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Bergen County Circuit Court

VIOLET MAY HUMMERS, by William S. Hummers, her next friend, and WILLIAM S. HUMMERS, and VIOLET HUMMERS, his wife, *Plaintiffs,* *vs.* PUBLIC SERVICE ELECTRIC and GAS Co., and WILLIAM ANKELEIN, *Defendants.*	*Action at Law.*

Hackensack, New Jersey, May 8, 1929.

Before Honorable Edwin C. Caffrey, Judge, and a jury.

Appearances: For the plaintiffs, George F. Losche, Esq.; John M. Ward, Esq., of counsel.

For the defendants, Henry H. Fryling, Esq.; Joseph Coult, Esq., of counsel.

Hart and Vanderwart, Esqs.; Martin Cummins, Esq., of counsel.

(A jury was empanelled, accepted and sworn.)

Mr. Ward: I understand the ownership of the truck in question—what do you call that, Judge, a truck?

Mr. Coult: It was a light truck.

Mr. Ward: I understand the ownership of the truck is admitted?

Mr. Coult: The ownership, yes.

Mr. Ward: Yes.

(Mr. Ward opens the case to the jury on behalf of the plaintiffs.)

(Mr. Coult opens the case to the jury on behalf of the defendant Public Service Electric and Gas Company.)

Mr. Cummins opens the case to the jury on behalf of the defendant William Ankelein.)

Mr. Ward: I offer in evidence a picture taken upon Walnut avenue looking in the direction of West Shore avenue, that would be looking in a westerly direction.

Mr. Coult: Well, when was it taken?

Mr. Ward: Taken about two months ago, as I understand it. Is that right, Mr. Losche, two months ago?

Mr. Losche: About that.

Mr. Coult: Well now, in connection with these photographs, your Honor, I want to say, for your Honor's information and for that of the jury, too, if they are going to go in, that there appear to be no leaves on the trees.

Mr. Ward: Well, with reference to the leaves—

Mr. Coult: If that will be borne in mind, I do not care when they were taken, as far as the physical situation is concerned, I have no doubt that represents the condition.

The Court: With that explanation.

Mr. Ward: Yes, sir; as to the condition of the leaves on October 5th, also.

Mr. Cummins: And foliage, also.

The Court: You say that represents Walnut street?

Mr. Ward: Walnut street; yes sir; or Walnut avenue.

The Court: At the joinder of the streets?

Mr. Ward: Yes, sir.

The Court: Walnut street runs?

Mr. Ward: East going west. West Shore avenue runs north and south.

The Court: All right.

(Photograph marked Exhibit P. 1 in evidence.)

Mr. Ward: I will explain this to the jury, with your Honor's permission and Judge Coult's permission.

The Court: Yes.

Mr. Ward: Looking down Walnut avenue towards the west, or towards West Shore avenue; the direction in which the little girl was going was into the picture on West Shore avenue, the direction in which the truck was coming being from the right of this picture, going to the left.

A second picture, being a picture taken of West Shore avenue, or of Walnut avenue, looking in the opposite direction, the picture being taken from across West Shore avenue, or upon the westerly side of West Shore avenue, looking east across West Shore Avenue and into and along Walnut avenue.

(Photograph marked Exhibit P. 2 in evidence.)

Mr. Ward: The little girl coming down in this direction and the truck coming in this direction (indicating).

The third picture being a picture of West Shore avenue looking south past the junction of Walnut avenue.

(Photograph marked Exhibit P. 3 in evidence.)

Mr. Ward (to the jury): The picture looking towards the south in which direction the

truck was going, Walnut avenue being on the left of the picture, and coming down into West Shore avenue.

The fourth being a picture of the corner, the northeast corner of Walnut avenue and West Shore avenue, being taken on West Shore avenue looking in a generally southeasterly direction across the corner of West Shore avenue and Walnut avenue, where Walnut avenue joins West Shore.

(Photograph marked Exhibit P. 4 in evidence.)

Mr. Ward (to the jury): The truck going in this direction, the little girl coming down here (indicating).

Mr. Ward: Mrs. Hummers?

VIOLET HUMMERS, called as a witness on behalf of the plaintiffs, and being duly sworn according to law, testified as follows:

Direct examination by Mr. Ward.

Q Mrs. Hummers, you are the mother of Violet May? A I am.

Q And one of the plaintiffs in this suit? A I am.

Q Where do you live? A At 32 Beechwood avenue, Bogota.

Q With whom? A With my mother-in-law, my mother-in-law.

Q Does your family live there? A Yes.

Q Your husband? A Yes.

Q And Violet lives with you? A Yes.

Q Whereabouts were you living on the fifth of October, 1927? A 15 Walnut avenue.

Q I want you, if you will please, to talk so all these ladies and gentlemen will have no difficulty in hearing you. A At 15 Walnut avenue.

Q In Bogota, or Bogota, which is it? A Bogota.

Q Bogota. You call it Bogota, do you not? A We do.

Q Bogota, New Jersey? A That is right.

Q How far was that, from West End avenue, or West Shore avenue, 15 Walnut avenue? A There was about five houses on that side, and about two vacant lots, it was on the south side, it was on the south side of the street.

Q West Shore avenue runs in a generally northerly and southerly direction, does it not? A It does.

Q And is right adjacent or next to the West Shore railroad? A Yes.

Q That is east of the West Shore Railroad? A Yes. The freight tracks are right there against it.

Q And Walnut avenue runs from the east into West Shore avenue, is that correct? A That is right.

Q And these pictures—I am referring now to P. 1, 2, 3 and 4—quite correctly show the situation as it existed upon the fifth of October, 1927, aside from the foliage? A Yes. Otherwise, it is just the same.

Q Was the pavement the same, smooth? A Yes.

Q On each street? A Yes.

Q How was the foliage at that time? A Well, it was almost all gone.

Q At that time, if you were to come down Walnut avenue, approaching West Shore avenue, or going westerly, what was the nearest building

on the northerly or right side of Walnut avenue, the nearest building to West Shore avenue? A This here one (indicating); I do not know. I do not know the name of the people. This here was—

Q And you are now indicating on P. 3 the house to the left of the picture, is that correct? A Yes.

Q Do you know what distance that was from West Shore avenue? A At least 200 feet, possibly more.

Q And that was on the fifth of October, 1927. What was the view that one would have coming down Walnut avenue toward the West Shore avenue to the right, or to the north? A Well, you would see easily up to Elmwood avenue.

Q And Elmwood avenue is where? A It is two blocks above Walnut avenue. First comes Beechwood and then Elmwood.

Q What were the distances between those two blocks? A About 200 feet, possibly a little more.

Q 200 feet, each block, you mean? A Yes, because the lots are—

Q And the first street north of Walnut avenue running parallel with Walnut avenue, or in the same direction, what street was that? A That is Beechwood.

Q And then Elmwood avenue after that, north? A Was after that.

Q And coming down West Shore avenue going south in the general direction— A Yes.

Q —of south, rather, when one was at Elmwood avenue on the fifth of October, 1927, what view would one have up Walnut avenue? A Why, you could see up to this house. The house

would be the only thing would obstruct the view.

Q And how was the—or how were the bushes and trees? A Well, they did have some leaves on, but not many. They were almost all gone at that time.

Q And could you see through them or not? A Yes. You could see through them, easily see through them.

Q What kind of a day was the fifth of October, 1927? A It was a beautiful, warm day.

Q When did you last see Violet before the accident? A I saw her about a half-hour before.

Q Where? A She came to the house and I asked her to take a box upstairs to the attic, and I asked her what she was doing, and she said she was going—

Mr. Coult: I object.

Q Not what was said, if you please. A Well, she was going to read, and that is the last I saw of her.

Q Was she the owner of a scooter? A Yes, she was.

Q Did she have the scooter, her scooter, out on that day, do you know? A Yes, she did. She got boxes for me.

Q Pardon? A She got boxes for me with this scooter.

Q And after having seen her at the time you have told us, what was the next that you knew about the accident? A When Mrs. Irving came in and told me that Violet had been hit.

Q What did you do? A Why, I didn't—Immediately after, I called up my brother and

asked him to come and take me tc her, and then Dr. Dickson—

Q Did you go to where Violet was? A Yes. Dr. Dickson called up and said he would send someone for me.

Q And then you went to where she was? A Well, he sent someone for me, and I went.

Q I neglected to ask you, Mrs. Hummers, how wide is West Shore avenue, approximately, at the place where Walnut avenue joins it? A 50 feet.

Q Where did you find Violet after the accident? A Dr. Dickson's; she was up at Dr. Dickson's office.

Q What was her condition? A She looked like she was dead to me.

Q Mrs. Hummers, what was Violet's health and her general condition— A It was good.

Q —before the accident? A It was good.

Q What have you to say about whether or not she was a normal, natural child. A She was absolutely normal, a healthy child.

Q Was she active or not? A Yes, she was just as active as all girls of her age.

Q Did she play around? A Yes.

Q As children usually play? A Yes.

Q Was there any difference in her so far as you could observe in her actions from the actions of a natural, normal child before the accident? A Before the accident she was absolutely normal, there was nothing wrong with her.

Q Where did she attend school? A At Hawthorne School, Bogota.

Q Did she attend regularly? A Yes.

Q In what grade was she? A She was in the seventh grade.

Q From the doctor's office, do you know where she was taken? A Dr. Dickson and myself took her up to the hospital.

Q What hospital? A Hackensack Hospital.

Q Who attended her? A Dr. Dickson.

Q Now, what did you observe about her general condition?

I withdraw that, if your Honor please. Did you see her undressed? A She had her dress on.

Q Well, after that, at any time, did you see her undressed? A I saw her lying up on the operating table when we took her up there.

Q Was that at the hospital? A That was at the hospital.

Q And she was undressed at that time? A She was.

Q What was her condition as observed by you at that time? A I noticed her stomach was terribly swollen and bruised.

Q And anything else? A Why, she did not seem to know anything clearly, and she was screaming, and her leg was—Dr. Dickson had it bandaged up, but it was all—the bandage he had around it was covered with blood.

Q Which leg? A The left.

Q Who attended her? A Dr. Dickson.

Q Anyone else? A There was another doctor helped him with her up at the hospital, but I do not know, I do not remember; he did introduce me to him at the time, but I did not pay any attention.

Q I do not suppose you know of your own personal knowledge what was done to her, you were not present, were you? A I know they sewed up her knee, and they were giving her

New Jersey State Library

ether, and she had just gone to sleep, and then they said I had better go.

Q You say you took her to the hospital. What was her condition during the time that she was going to the hospital? A On the way, she was crying terribly, and she was saying Dr. Dickson was looking for all the bumps, and she screamed all the way over.

Q How long was she in the hospital? A Four and one-half weeks.

Q And what was her condition as you observed it during that time? A Well, at first she could not speak at all, and then she got a terrible fever after the third day, and she was sick all the time, and then, sometimes she would act all right. Other times, she would—

Q Did she or not appear to be suffering any pain? A She suffered terrible pain.

Q Do you know what treatment was given her at the hospital? A Why, they X-rayed her first, and then they put her in a cast after three weeks, she was out of the hospital three weeks before they could put her in a cast. She was there a week and a half after the cast was on, and then she came home.

Q Do you know anything about her general condition and what was done, if anything, to improve her general condition? A Why, she would get choking spells, and she would turn all black, and her eyes would almost pop out of her head. They would give her some sort of injection, I do not know what it was.

Q Was there anything else that you recall done for her there? A She did take some kind of medicine, but I do not know what it was all about.

Q Do you recall anything about a blood transfusion? A Yes, sir. I gave her the blood the first night she was up there.

Q That was the first night? A That was the first night she was there.

Q That is, there was a blood transfusion in which you contributed your blood? A Yes.

Q And before you gave this transfusion of blood to her, before you gave her your blood, what was her condition? A It was terrible. When I passed her—they took me to the operating room first and took the blood, and then took me out, and I passed her in the hall, and then when I passed her she looked as though she was a corpse.

Q While she was in the hospital, I presume she improved? A Yes, she did improve.

Q And at the end of four and one-half weeks, you took her home? A Yes.

Q During the time she was being treated, you said, first, about three weeks after the accident they put on the cast? A Yes. They could not put a cast on because she had—

Q After that, do you know whether or not that cast was removed and any other casts were put on? A Yes, there was. That cast was taken off and then she was without a cast for a number of weeks, and then she got no motion in her leg at all, and we had to take her back to the hospital, and she was X-rayed again. And then she had to go back into another cast. That was on all but one day, all but ten weeks.

Q How long was the first cast on? A Four.

Q A second cast, ten weeks? A Yes.

Q What was the nature of that cast? A The first cast was from her waist down to her foot on the left leg, and down to her knee on the right

leg, and she was cast with her legs that way. And the second cast, she had a body cast around her waist and her left leg, which goes directly out from her hip, right straight out.

Q After you took her home, where did you keep her? A I keep her down in the bedroom on the first floor.

Q In bed? A Yes, in bed.

Q And for how long a period of time did you keep her in bed? A Why, she was in bed for eight months.

Q Eight months? All of that time under your care? A Yes.

Q And under the care of physicians? A Yes.

Q What was her condition during this time, period of time, during the eight months? A Why, at times, she was terrible, when it was almost impossible to keep her down, but she would throw things around and tear things, and do anything that she should not be doing.

Q Did she or not seem to be suffering any pain during that time? A Yes, she suffered terrible pain.

Q Did you ever see any symptoms aside from the bruises, and aside from the gash about which you have told us? Did you ever see any symptoms of her illness or her injuries? A Yes, her mind.

Q Pardon me? A Her mind.

Q Well, any other signs? A Well, her—she had terrible pains and still has them in her stomach.

Q And fever, I presume, too? A Well, I do not know. I never take her temperature, so I could not say that.

Q Did you ever see any evidences of an injured kidney? A Well, sometimes she complains of burning sensations.

Q Whereabouts was the pain, so far as you could see, from which she suffered? A The pain seems to be down in the lower part of her body.

Q Anywheres else? A In her back and hips.

Q Did you ever see any blood aside from the day at the hospital? A Yes, I did.

Q Tell us about that, please. A After that, she could not urinate herself, so that they took it, and there was always blood in that, and one day she vomited, and she vomited blood. That was about four or five days later.

Q Pardon me? A That was about four or five days later when she was vomiting blood.

Q When was it that you first saw traces of blood in the urine? A Well, the first day that I helped the nurse relieve her bladder, I saw it.

Q After this four weeks and a half in the hospital, and eight months at home, how was she then, Mrs. Hummers? A She walked on crutches.

Q For how long a time did she walk on crutches? A I guess it was sometime in August when she first took her first steps without.

Q The following August after the accident? A Yes.

Q How long was she out of school? A Well, she missed the whole term, all but the three weeks up until—from the time school started until the fifth of October, she had been to school and then she did not go back until the following September.

Q What is her condition now, as you observe it? A It is not—she is not the same as she was before.

Q Now, will you please tell these ladies and gentlemen in what respect she is not the same. A Her disposition is entirely different.

Q How? A Why, she is nervous and high strung, and she is very irritable.

Q And what about her activities? A Why, she cannot play as she used to, it is impossible because she is stiff, and she cannot bend or twist as she did.

Q Any difference in her physical appearance or condition, as you can see? A Yes, her leg is shorter, her leg is two and a quarter inches shorter.

Q Aside from that, any difference, any other difference in her physical condition? A Well, her hip, from the left hip, it is gradually dwindling down, it is much smaller and unless she wears loose clothes, why you can see it.

Q What about her studies, is there any difference in her studies? A No, I do not think there is much difference in her studies, but she seems to have to work very hard with them.

Q And you said something about her mind a short time ago, a few moments ago; just explain to the Court and jury about that. A At times you just wonder about her, that is all, you just wonder if she is all right.

Q How does she show a change?

Mr. Coult: I object to that.

The Court: Sustained.

Mr. Ward: I will withdraw the question.

Q Have you noticed any—or, has there been any change that you have noticed in that respect, comparing her condition as you observed it be-

fore the accident, and as you have observed it now? A She is not at all the same.

Q Has there been a change, or not? A Yes, there has. She was different.

Q Now, tell us what that change is, as you have observed it. A Why, she is no longer the carefree child she was.

Q Anything else? A Why, her pain all the time certainly does affect her mind, it is bound to.

Q Anything else that you observe? You say that she is irritable? A She is very irritable.

Q And what about her playing with children now? A Why, she cannot play with children as she did. She cannot jump rope and she cannot play hop-scotch, and all those things that the other children do.

Q Since the accident, have you noticed any difference in her spine? A She has a curvature of the spine.

Q Did she have that before? A No, she did not.

Q Is that pronounced, or not? A Quite some.

Q Bringing it right down to the present time, Mrs. Hummers, can you just describe briefly what her condition is now? Do you understand what I mean by that? A I think I do.

Q I mean her physical and mental condition. A Why, she has a curvature of the spine, her left hip is smaller than her right hip, and her leg is two and a quarter inches short, her left knee has a terrible scar on it pretty near three inches in length, and her whole condition as far as her—I do not know just how to express it.

Q Does she act any differently or not? A Yes, she does.

Q How? A She was agreeable, and she is anything but agreeable now. She is very disagreeable, at times, especially.

Q Does she, or not, ever appear strange? A At times, I have thought so.

Q Is she still under the care of physicians or not? A She is, and she always will have to be.

Q How often does she go to physicians now? A Well, there is no regular intervals.

Q Do you know what the hospital bill was? A It was not—the first bill—the first bill was a little under a thousand dollars.

Q And may I ask you now, does she require any attention from you? A From me?

Q Yes. A Yes, I have to be with her continually, or almost continually.

Q You drop your voice sometimes, it is sometimes somewhat hard for us to hear. A I say, she needs me all the time.

Q Do you give her any personal attention now? A Well, I do everything I can for her. I stay with her to quiet her and keep her quiet in that way.

Q Was this necessary before the accident? A No.

Q Did you ever give her this personal attention— A No.

Q —that you give her now? A No, I didn't have to.

Q You said that the hospital bill was somewhat under a thousand dollars? A The first bill.

Q And then, after that, was there any further hospital bills? A Yes, there was. We took her back to get the second cast put on.

Q Now, this hospital bill of less than a thousand, do you know how much less than a thousand dollars? A I do not remember.

Q What did that include? A That included the blood transfusion.

Mr. Coult: Now, if the Court please—

The Court: Have you anything to corroborate that, Mr. Ward?

Mr. Ward: I think so, sir. I thought it would be just as well not to bother to bring in all this from the hospital here, inasmuch as we presented this evidence, and the defendant, of course, could investigate to see if it were correct.

Mr. Coult: I do not think that is a burden we ought to take up.

The Court: You ought to be relieved of the necessity of seeing the reasonableness and the necessity of the charges.

Q Was this hospital bill paid? A Almost all of it, not all.

Q Do you know how much was paid? A No, I do not know exactly, almost all, I believe.

Q At the hospital, aside from the doctors, did she receive any other care or attention? A Why, we had Dr. Rauschenbach from Paterson to put her in the second cast, and she had Dr. Korn when she was there the first time.

Q Well, did she receive any other attention, aside from the X-rays and the doctors? A Well, she had private nurses.

Q Pardon? A She had to have two private nurses.

Q Two nurses? A A day nurse and a night nurse.

Q Are these some of the bills? A Yes. That is—

Q Now, this first—

Mr. Coult: Don't you think it would be a good thing to get all your expenses together?

Q These four bills, were they paid? A Yes, those were paid.

Q And the two that I hold in my hand now, are not paid? A Are not paid.

Mr. Ward: And these four bills I offer in evidence.

Mr. Coult: Mr. Ward, may I suggest this, for the purpose of not encumbering the record, why don't you read the amounts?

Mr. Ward: I thought if I offered them then the jury would have them.

Mr. Coult: Well, they are not competent, of course.

Mr. Ward: No, I thought instead of encumbering the record—

Mr. Coult: I am perfectly willing, in order to save time and trouble and expense and everything else, for counsel to read those amounts into the record, the amount of the bills; but your Honor sees the obvious difficulty in putting all these into the record.

Mr. Ward: Of course, the jury would then have the amounts and have them in mind, I mean, if the bills were to go in—

Mr. Coult: You would have no difficulty with that.

Mr. Ward: I realize the Judge's objection is well taken, sir, of course.

The Court: You may read, on consent, the amounts.

Mr. Ward: You do not want them to go in, then, Judge?

Mr. Coult: I would rather not.

The Court: No, I will exclude them because they are not evidential, anyhow.

Mr. Ward: "To bill rendered—Hackensack, N. J., August the 14"—

Mr. Coult: Please do not read the bill. Just read the amounts, Mr. Ward.

Mr. Ward: Well, these bills that I hold in my hands are—have you any objection to these—The Hackensack Hospital Association, these four bills, rendered to Mr. William S. Hummers?

The Witness: Right.

Q And the first item on the—

Mr. Coult: Now, I object.

The Court: No. If you do not take the offer of the defendant's counsel, I will have to rule on it and then you won't have any of them, because you have to establish the necessity and a reasonableness, and if you do not want to take the offer of the defense, I will have to rule—

Mr. Ward: Do I understand the offer that I am to read these items?

The Court: No. Just the amounts.

Mr. Ward: No. He said the items.

Mr. Coult: No. The amount of the bill.

The Court: The amount of the bill.

Mr. Ward: $198.50, $140.00. You see these are not duplications?

Mr. Coult: Oh, I trust you on that.

Mr. Ward: Another for $140.00 and $234.50. One for $116.50 and one for $71.00. Here are two.

Mr. Coult: The same way with these.

Q Do you recall refreshing your recollection from this, what Dr. Knapp's bill was? A It was $75.00.

Q Please keep your voice up. A $75.00.

Q And Dr. Rauschenbach? A Was $115.00.

Q Were there others besides these or not? A Yes. There is Dr. Dickson.

Q I beg pardon? A Dr. Dickson, and Dr. Korn.

Q Do you recall any other expense to which you were put? A Drugs.

Q Have you any recollection of how much that bill was, how much expense you were put to in that respect? A Around $100.00, if I remember correctly.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q Mrs. Hummers, did you say you lived on Walnut avenue? A At the time of the accident I lived on Walnut avenue.

Q That is what I meant. Now, does this picture, P. 2, show your house or not? A I believe it does.

Q Can you point it out to me? A This one right here (indicating).

Q Now, when you say "this one," you are indicating the sixth house— A The sixth house.

Q On the right-hand side, up the hill? A Yes, going up.

Mr. Ward: Would your Honor permit Dr. Korn and Dr. Knapp, who are here, to be put on at this time?

Mr. Coult: I have no objection.

The Court: Yes.

Mr. Ward: Will you step aside, please?

The Witness: Surely.

(Witness excused.)

Mr. Ward: Dr. Korn?

DAVID KORN, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Ward.

Q Doctor, you are a practicing physician of this State? A Yes, sir.

Q And you have been for how long? A Twenty-one years, going on twenty-two.

Q And you have practiced where? A In Ridgefield Park.

Q You are a graduate of what— A Bellevue.

Q —Institution? A Bellevue Medical School.

Q Have you specialized in any particular branch of medical science? A Surgery.

Q Are you connected with any hospital? A Hackensack Hospital.

Q In what capacity? A Gynecologist.

Q Do you know Violet May Hummers? A I have seen her at the hospital.

Q When did you first see her after the fifth of October, 1927? A I could not give you the date. I only saw her upon two occasions

at the request of Dr. Dickson, one time when she had a— It was a question of probably an injury to the internal organs of the abdomen, and he asked me to see her with him to decide whether an operation would be required or not.

Q And, did you see her? A I did, but I couldn't tell you the date.

Q In what condition did you find her to be. A Well, she had very severe pain and rigidity and tension of the abdomen, and, of course, the diagnosis—I mean, an absolute diagnosis was not possible at the time when I saw her, and we decided to keep her under observation for a while and watch her condition.

Q Do you know whether or not the operation was performed? A I beg pardon?

Q Do you know whether or not the operation was performed upon her? A It was not.

Q And what does your examination consist, doctor? A Well, I saw mostly the abdomen at that time because, as far as her other injuries, there was no question about those, and Dr. Dickson was taking care of them. Then I saw her—

Q From your examination, doctor, did you form any conclusions from what she was suffering? A Well, I believe at that time she had hematuria, which means blood in the urine, and the main question came up whether she did not have a ruptured kidney; but, as I say, we decided to wait, and that thing cleared up and subsided gradually, so that, of course, nothing was done in an operative interference. And then—

Q What symptoms, if any, were there of a ruptured kidney? A Well, the blood in the urine, and then pain around the kidney region,

as well as pain and rigidity all over the abdomen.

Q And did you see her at all after that? A Then I saw her upon the second occasion when she developed signs of inflammation of the skin over the kidney region, and those were the only two occassions upon which I saw her.

Q And what were they? A I say, the time I could not give you the date.

Q I thought you said there were two things. A No. Upon two occasions.

Q Two occasions? A Yes.

Q Aside from the inflammation of which you speak, in what condition did you find her to be? A Well, I was only asked—I really did not go into details. He only asked me to see her again in regard to the inflammatory condition of the back, and whether they would give an incision or not, which to my recommendation, we just gave her some treatment, and that subsided in a certain length of time again without any operative interference.

Q On that second occasion when you made this examination, did you form any opinion as to what her condition was? A Well, I was only asked to see her with regard to that lumbar region, the inflammation of the back.

Q With reference to that particular region, did you form any opinion? A Well, she had an inflammation of the skin, of course.

Q Inflammation of the kidney?

Mr. Coult: No. The skin.

A Not the kidney, the skin, the lumbar region. I will say the lumbar region.

Q Keep your voice up, doctor. A I say she had signs of inflammation of the lumbar region.

Q And what, if anything, did that indicate? A Well, as far as it went it only meant she had an infection of, apparently, the skin covering the lumbar region, it is almost like an erysipelas of that region.

Q Did you make any laboratory analysis of any specimens? A I saw the urinary report with regard to elimination of blood in the urine.

Q Did those examinations indicate anything? A Well, they suggested—

Mr. Coult: Well, now—

A (Continuing)—they suggested— May I answer?

Mr. Coult: This is objectionable. He is testifying from a report made—

The Court: I sustain the objection.

Mr. Coult: —from a urinalysis of another doctor.

The Court: Yes, he said he saw the report only.

Mr. Ward: I beg your pardon.

The Court: You asked him had he made any tests. He said no.

Mr. Ward: I thought it was from the tests.

Q What was your bill, doctor? A $20, I think.

Mr. Ward: Cross examine.

David Korn, for Plaintiffs, cross.

Cross examination by Mr. Coult.

Q Doctor, you did not make a urinalysis yourself? A I did not.

Q And you did not see any sample of the urine? A No.

Q And you said something about a ruptured kidney, that, in your opinion, there might be a ruptured kidney? A Yes, sir.

Q And that was based upon the report of some other doctor, that there was blood in the urine, is that right? A Plus my examination.

Q But did you depend upon the doctor's report in coming to your conclusion? A Yes, I did.

Mr. Coult: I move to strike it out.

Mr. Ward: I would like to examine him.

The Court: What is the purpose?

Mr. Ward: For the purpose of showing it is relevant and proper, or competent, rather.

Mr. Coult: I am moving to strike out the doctor's opinion that there might have been a ruptured kidney.

Mr. Ward: I ask to re-examine him.

The Court: It is discretionary, and I will not permit it, but I will reserve on your motion, and then permit further examination.

By Mr. Ward.

Q Doctor—

Mr. Coult: I am not quite through with the doctor.

By Mr. Coult.

Q And then, at another time, doctor, you saw her and she had an inflammation of the skin, is that right? A Covering the kidney region, yes.

Q On the back, which you said was in the nature of erysipelas? A Yes.

Q And, in your opinion, did that have a traumatic origin? A No. It apparently was a secondary infection, because that only developed several days later after she had been in the hospital, probably two weeks later.

Q What do you think caused it? A Oh, I think it had an indirect connection with the injury.

Q In what way? A The way it would devitalize the part, whereby the organism just stayed there and caused the infection.

Q Did you do anything in the way of treating this skin eruption? A She was just treated with astringent application.

Q Is that the only way she was treated for that? A That is all.

Mr. Coult: That is all.

By Mr. Ward.

Q Doctor, irrespective of the reports given, or made by some other physician, did you, from your own examination, and depending upon what you saw from your own examination, form any opinion as to the condition of this child? A Yes, sir.

Mr. Coult: I object to that, if the Court please, on the ground the doctor already

testified he did rely on the report in making his diagnonsis.

Mr. Ward: Well, that is true, that might be.

The Court: Well, Mr. Ward, I will do this: I will strike out his previous testimony. Now, if you can, by questioning him, get before the jury his knowledge which he derived from his own examination, rather than from hearsay, I will permit that evidence to stand.

By Mr. Ward.

Q I believe you stated you made an examination of her? A I did, sir, yes.

Q And what was the extent of the examination that you yourself made? A Why, of her abdomen and lumbar region and the region of the kidneys.

Q Now, depending upon that examination alone and what you yourself observed so far as she was concerned, and not upon what was told you or what you learned from any other source, did you form any opinion as— A Yes.

Q —to the condition of this girl? A Suspicion of an injured kidney.

Mr. Coult: I will move to strike that out.

The Court: Strike it out.

Q Did you form any opinion as to the probable condition in which she was at that time? A Well, I say, the opinion was that—

Q No. Please just wait so as to give this gentleman an opportunity to object.

Mr. Coult: You do not have to take care of me.

Mr. Ward: I want to take care of the doctor.

The Witness: Will you repeat the question, please?

Q Did you, or not, form any opinion— A I did.

Q —as to the probable condition— A I did.

Q —her probable condition? Now what was that opinion?

Mr. Coult: I object to that. The opinion as to her probable condition, that is not competent.

The Court: I sustain the objection.

Mr. Ward: Your Honor will permit an exception.

Q Basing what you were going to say to us if permitted upon the examination that you made personally, and upon no other factors, nothing that was said to you, can you tell us what she, in all probability, was suffering from at the time you examined her? A Well, the best I can say, the only thing that would arise in one's mind, first, would be a suggestion that there may be possibly a ruptured kidney.

Mr. Coult: I move to strike that out.

The Court: That answer is not responsive.

Mr. Coult: And it is, of course, vicious because it deals with possibilities.

David Korn, for Plaintiffs, re-direct.

Q What was her probable condition, not the possible condition?

Mr. Coult: I object to that.

The Court: No.

By the Court.

Q Now, you tell us, doctor, give us your opinion— A Well, your Honor—

Q —as to her condition. A —I say, in a condition of that kind, no one could say definitely that there is an injury without further aid.

Q Then, you have no opinion— A Well, partly, but not complete.

Q —as far as you can go? A Yes, I would say we may deal here with a ruptured kidney, then we can go and have laboratory examinations which would further aid us in our conclusions; otherwise we cannot come to a definite conclusion without laboratory aid.

Q Then, you haven't any definite opinion on it? A Not without laboratory aid. I might say, your Honor, that with the history of blood in the urine—

Q No.

Mr. Ward: I will ask that.

The Court: No. That is not in the case, yet.

By Mr. Ward.

Q Did you receive a history of the case? A Yes.

Q And, I think, you said you saw—or, did you or not see any traces of blood in the urine? A No. I was told by Dr. Dickson.

Q No, not what you were told. A No. I have not seen—

Q I want to keep that out. A No, I have not seen that.

Q Well, from the history of the case—

Mr. Coult: Now—well, all right. Go ahead and form your question, then I will object.

Q From the history of the case and from your examination, the examination that you made, what have you to say—

Mr. Coult: Objected to.

Q —as to her probable condition?

The Court: Sustained.

Mr. Coult: Objected to.

The Court: Objection sustained.

Mr. Ward: Your Honor will permit an exception.

I understand the reports are present, and I would like to show them to the doctor and ask him if these were the reports that were shown to him.

Mr. Coult: Well, having in view what counsel said this paper is, I am going to object to having it shown to the witness.

Mr. Ward: I do not think counsel can object to it being shown to the witness.

The Court: Oh, yes. In other words, the witness is not privileged to refresh his recollection from data—

Mr. Ward: That is not my object, sir, and counsel is somewhat precipitant in making his objection.

Q I show you this and ask you if that is the paper that was shown to you.

Mr. Coult: Well, now—

The Court: Now, I cannot see much distinction, Mr. Ward.

Mr. Ward: I meant to recall this man. I am going to prove it, if possible, later on. Now, I want to know if this is the paper he saw, if it is a proper report, and if it is proven to be a proper report, why, that, of course, is a different matter. If this gentleman saw a certain report and that was a proper and correct report of an analysis, he had a right to form his opinion from that, as well, and I have a right to identify that report, sir.

The Court: I will rule on these questions as they are presented.

Mr. Ward: Yes, sir.

Q You say that there were certain reports shown to you? A No. I was only told by Dr. Dickson.

Q Oh! A I did not see any report.

Q You were only told? A Yes.

Mr. Ward: Cross examine.

Mr. Coult: No questions.

Mr. Cummins: No questions.

Mr. Ward: That is all, doctor.

(Witness excused)

Mr. Ward: Dr. Knapp?

RICHARD KNAPP, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Ward.

Q Doctor you are a practicing physician of this State? A Yes.

Q And have been for how long? A About twenty years.

Q You are a graduate of what institution? A Columbia University.

Q And have you, or not specialized in any particular branch of medical science? A I have specialized in X-ray work and fracture work.

Q Do you know Violet May Hummers? A I do.

Q Do you recall seeing her at any time after this accident took place? A Yes, sir.

Q When? A I saw her the first time on October the seventh when I was asked to take an X-ray.

Q Whereabouts did you see her? A At the Hackensack Hospital.

Q Did you make any examination of her? A Yes.

Q And did you take any X-ray pictures? A Yes.

Q Have you those pictures present? A Yes.

Q Will you produce them, please? A (X-ray films produced.)

Q These are the pictures, are they? A Yes, sir.

Q Taken upon that day? A Yes sir.

Mr. Ward: I offer them in evidence.

Q Were they taken in order, doctor, do you recall? A The pelvis—yes, I can tell you the order they were taken at the same examination.

Q It makes no particular difference, I mean, the order in which they are presented? A No.

(Seven X-ray films marked Exhibit P. 5, P. 6, P. 7, P. 8, P. 9, P. 10 and P. 11 in evidence.)

Q Will you take the first of those that comes to your hand, or the first in order, and set it up, please, and tell us of what that is? A This radiograph shows evidence of multiple fractures.

Q First, pardon me, doctor. May I ask you of what that picture is? A This is a radiographic—a radiograph of the pelvis and both hip joints.

Q Taken from the front? A Taken from the front. That is, the patient is lying on the back and the tube is above the patient and the film under the patient.

Q So that is as it would appear if one were gazing upon the child from the front? A Yes.

Q What does that picture disclose? A It discloses evidence of multiple fractures of both pubic bones, and also—

Q And the pubic bones being here where you have indicated? And where are the fractures? A Here (indicating) and there (indicating).

Q That is, two fractures then, of the—what is it, what bone? A Pubic bone.

Q The pubic bone on the right? A The pubic bone on the right,

Q Yes. And what about the pubic bone on the left? A Yes, sir.

Q One fracture of the pubic bone on the left? A Yes, sir.

Q And what else? A An oblique fracture in the upper extremity of the left femur or thigh bone, through the neck.

Q Anything else? A I believe not.

Q Then how many fractures does that picture disclose? A Four.

Q Have you any other pictures there, doctor? That first picture is Exhibit P. 11? A This is a similar view. These are stereoscopic films.

Q Of what? A Stereoscopic films.

Q What do you mean by that? A These two films when looked at through a stereoscopic apparatus, show the actual position of the fragments.

Q So that is a picture of the same fracture? A Yes, sir.

Q And that is Exhibit P. 6? A This is a—

Q What is that, doctor? A This is a radiograph of the lumbar region.

Q What number is that, please? A One-four-three-one.

Q No. I beg your pardon. I meant on here, Exhibit P. 10. Now, of what is that a picture? A That is a picture of the lumbar vertebrae, a part of the pelvis.

Q And what does that picture disclose? A That discloses some of the fractures previously described, but no evidence of fracture or dislocation of the lumbar spine.

Q Does it disclose any injury to the spine? A No.

Q And the next picture, that is P. 9? A This is a radiograph of the right knee joint.

Q And what does it disclose? A An anteroposterior picture, discloses no evidence of fracture or dislocation.

Q The number on that, doctor? I mean the stenographer's number,— A Yes, sir.

Q —Exhibit P. 5? A This radiograph shows a lateral view of the right knee joint, no evidence of fracture or dislocation.

Q And that was P. what? A Seven.

Q Yes, indeed, P. 7. A This shows a lateral view of the left knee joint. No evidence of fracture or dislocation. This is P. 8.

Q P. 8. A Is an anteroposterior view of the left knee joint. It shows no evidence of fracture or dislocation.

Q Now, thereafter, upon any other date, did you take any pictures? A Yes, sir.

Q What date? Of course, I mean pictures of Violet May Hummers. A October twenty-fourth.

Q And have you those pictures there? A Yes.

Q How many? A Two, two pictures.

Mr. Ward: I offer them in evidence.

(Two X-ray films marked Exhibit P. 12, P. 13 in evidence.)

Q Will you put them up, please, and describe what they are and what they disclosed? P.— what is that? A P. 12.

Q P. 12. And what is that? A This is a radiograph of the lumbar vertebrae and the pelvis and both hip joints.

Q And what does that disclose? A It shows the fractures of the pelvis previously described, and also a fracture of the upper extremity of the right femur or thigh bone through the neck.

Q Right or left? A The right.

Q Look at that again, doctor, so that you may be sure. A Could I see the first film, please.

Q Surely. (Handing X-ray film to the witness.) A That is the left femur.

Q The left. And the other, what number is that, please, P.—I think it is P. 13? A I believe those were the only ones taken on that date, the twenty-fourth. These are of another date.

Q Oh, I see. So, P. 12 was the only one taken on the twenty-fourth, is that correct? Were there two? You say two, and I have them marked P. 12 and 13? A Yes. Here is the other one.

Q Was that of the twenty-fourth? A Yes.

Q Will you put them up, please? And that discloses the same thing? A It shows the same thing.

Q Now, thereafter, did you ever make any other examination, roentgenologist examination? A Yes.

Q When was that? A On the twenty-seventh.

Q How many plates were taken at that time? A Two.

Mr. Ward: I will offer these in evidence.

(Two X-ray films marked Exhibit P. 14 and P. 15.)

Q And P. 14, what does that disclose? A This is a radiograph of the lower two lumbar vertebrae, pelvis, and both hip joints.

Q What does it show? A It shows the multiple fractures of the pelvis previously described, and also the fracture of the upper extremity of the left femur or thigh bone through neck.

Q P. 14, what does that disclose? A 14 shows the same fractures.

Q After that, were there any others taken? A Yes, sir.

Q When were these taken? A These were taken on December the twelfth, or excuse me, December the seventh.

Q December—how many were there? A There were four.

Mr. Ward: I offer these.

(Four X-ray films marked Exhibit P. 16, P. 17, P. 18, P. 19.)

Q The date is on these different pictures, is it not? A Yes, sir.

Q Or, the dates, rather, are on them? A Yes, sir.

Q Are all of these pictures about the same? A They are.

Q Will you just take one of them, then, and tell us what that discloses? A This radiograph shows the fracture, the multiple fracture of both pubic bones, with bony union and the oblique fracture of upper extremity of left femur or thigh bone through the necks with partial absorption of the neck.

Q Do these pictures show the progress or development— A Yes.

Q —of the fracture or the treatment given it, and so forth, or its condition? A The previous pictures were taken after the cast had been applied.

Q I see. A And these pictures were taken after the first cast had been removed.

Q And after that, were there any taken? A Yes, sir.

Q On what date? A On January 16th.

Q How many were taken at that time? A I have three, three.

Mr. Ward: I offer them in evidence.

(Three X-ray films marked Exhibit P. 20, P. 21, and P. 22.)

Q Just take one of them, doctor, and tell us what they disclose. Now, referring to Exhibit P. 19, is that— A P. 20.

Q 20. A This is a radiograph showing the first four lumbar vertebrae, pelvis, and both hip joints.

Q And what does it disclose? A It shows the fractures of the pubic bones previously described with bony union. It also shows the fracture of the upper extremity of the right femur or thigh bone through neck with more absorption of the neck than in the previous examination, and no bony union.

Q No bony union? A Yes.

Q What does that indicate, doctor, as of the the 16th of January, 1928? A That indicates that—what is so often the case in fractures of this nature through the neck of the femur, that absorption, that the blood supply in the region affected is anatomically poor, and that absorption of the bone has taken place, and that the bony—and that the union—that there is non-union, or delayed union.

Q What do you mean by that? A By delayed union I mean that union may still take place in the remaining fragments.

Q But there was not union at that time? A But there was not union at that time.

Q Now, after that, I believe there were some taken, and these were not the last? A Yes, sir.

Mr. Ward: I offer them in evidence.

(Two X-ray films marked Exhibit P. 23 and P. 24.)

A Juror: When were they taken?

Mr. Ward: Covering a period from October 7th, the last were taken January the 19th.

Mr. Coult: The 19th.

Mr. Ward: First October 7th, 1927; the next series, October the 24th, 1927; the next, October the 27th, 1927; the next, December the 7th, 1927; the next, January the 16th, 1928, and these last, to which we are referring now, January the 19th, 1928.

Q Are they all about the same, I mean, showing the same condition? A Yes.

Q Now what condition do these last plates show? A This shows a radiograph of the pelvis and both hip joints after the application of the second plaster spica cast. It shows the fracture of both pubic bones with bony union, and it shows the oblique fracture of the upper extremity of left femur as previously described with absorption of the neck.

Q And what does that indicate? A That—This is taken three days after the previous examination—

Q Yes? A —and it indicates that there is non-union.

Q Now, doctor, this callus, what is that, about which you speak with reference to the

pubic bones? A The callus is new bone formation.

Q Isn't there anything indicated by the ramuses of the right pubic bone? A Yes.

Q And what does that picture show? A It shows a fracture of the ascending and descending rami of the pubic bones.

Q Is that ramus or rimus? A Ramus is singular.

Q What is a distal fragment, doctor? A The distal fragment is the fragment farthest away from the body.

Q Is there any distal fragment shown in that picture? I am now referring to the left femur. A Yes, there is a distal fragment.

Q Can you indicate that to the jury? A (The witness indicates on X-ray film.)

Q And was there anything about that disclosed by this X-ray? A The distal fragment in this radiograph is displaced upward.

Q Was there any abnormality there with reference to this leg, the left leg? A There is a shortening of that leg.

Q And how much of a shortening was there, doctor, at that time? A Measured from the X-ray at this time, January 19th, it amounts to about two and one-half centimeters, or one inch.

Q Did you see the child after that? A No, sir.

Q And that ended your— A Yes, sir.

Q —experience with the case? Did you render any reports— A Yes.

Q —of these X-rays, and what the X-rays disclose? And are these your reports? A Yes, sir.

Mr. Ward: I offer them in evidence.

Mr. Coult: Well, of course, I object to them. Counsel knows they are not competent.

Mr. Ward: If counsel objects, I won't press it.

Q Did you render a bill? A Yes.

Q Is that your entire bill? A Yes.

Q Refreshing your recollection from that, how much was your bill? A Seventy-five dollars.

Q Thank you.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q Your X-ray bill is in the hospital bill, isn't it? A I did not understand that question.

Q I say, your bill for X-rays is included in the hospital bill, isn't it? A No, sir. This bill is not, for X-ray services.

Q I see. You say that you found by radiograph four fractures altogether, is that right? A Five altogether.

Q Oh, five altogether; four in the pelvis? A Yes, sir.

Q And one in the neck of the humerus in the left leg? A Yes, sir.

Q How many fractures were there of the ascending and descending rami of the pubis? A There was—I would have to refresh my memory.

Q Suppose you take one of these. Which one do you want? Can you tell by— A Any one, two or three, I would like.

Q (Handing X-ray films to the witness.) A Could I have the earlier ones?

Q (Handing X-ray films to the witness.) A There is a fracture of both rami of the left pubic bone and a fracture of the descending ramus of the right pubic bone and a fracture of the body, and at its junction with the ascending ramus of the right pubic bone.

Q Those were all simple fractures? A Yes.

Q And not comminuted? A Yes, one of them was comminuted.

Q Which one was that? A The two of them were comminuted. The fracture of the body of the right pubic bone and the fracture of the descending ramus of the left pubic bone.

Q In other words, there was a fragment in each one of those cases? A Yes, sir; or more. That is, one line of fracture.

Q Was there a loose fragment in either one? A There was a loose fragment in one.

Q Which one was that? A That is in the fracture in the descending ramus of the left pubic bone.

Q Now, those bones appear to be in good position on that plate, do they not? A Yes, they do.

Q And in normal position for healing? A Yes.

Q And they got a normal exudation of callus? A Yes.

Q And healed in normal fashion? A Yes.

Q And callus is the material that is thrown out in the process of repair by nature which serves the place of a splint, isn't it? A Well, it is the beginning of new bone formation.

Q Or viscous, and then it hardens later into bone, isn't that right? A Yes, sir.

Q That is a natural process, that is what happens in all fractures of bones if they heal? A Yes.

Q If you do not get callus, you do not get any healing, do you? That is, you do not get a union? A Right.

Q And, so far as these fractures in the rami of the pelvis are concerned, they all healed normally? A Yes.

Q Now, you said that at the time of the last radiograph of the neck of the left femur, there was no bony union? A No bony union.

Q And you do not know whether or not, since that time, bony union has taken place? A No.

Q How long does it take for fractures to heal in the pelvis? A About six weeks.

Q That is normal, isn't it? A Yes.

Mr. Coult: That is all.

Re-direct examination by Mr. Ward.

Q What do you mean by no bony union, doctor? A I meant that the fragments are not joined by bone—

Q And— A —or united by bone.

Q —as in the pubic bone— Yes, when you say that it healed in a natural normal fashion, rather, of course, you are taking into consideration all of the circumstances of the case; that is correct, is it not? A I am referring to the radiological or X-ray appearance—

Q Yes. A —of those fractures.

Q From the nature of these fractures, can you tell us whether or not they were painful? A I know from—from the examination of the patient that they were painful, but I do not know from the X-ray examination.

Q I see. You mentioned another fracture. Those X-rays disclosed four fractures.

Mr. Ward: And I omitted this, if your Honor please, and I would like your Honor's permission to go into it.

Q Where was the other fracture? A You have to name the fractures.

Q Well, there were four disclosed by these X-rays, were there not? A There are five disclosed by these X-rays.

Q Oh, five disclosed by these X-rays? A Including the—

Q I see. A Including the femur fracture.

Q Now, will you please name them? A A comminuted fracture of the body of the right pubic bone at its junction with the ascending ramus, a fracture of the descending ramus of the right pubic bone, a fracture of the ascending ramus of the left pubic bone, and a fracture of the descending ramus of the left pubic bone, also an oblique fracture of the upper extremity of the left femur through the neck.

Q And of those five fractures, I think you stated a certain number were simple. How many? A Three were simple.

Q And two comminuted? A Two comminuted.

Q Will you explain to the jury, please, what comminuted means? What the difference is, first, if I might ask you? A Comminuted is—

Q What is a simple fracture? A A simple fracture is one which does not communicate with the external air.

Q Now, what is a comminuted fracture? A A comminuted fracture is a fracture which has more than one line of fracture, it is a shattered fracture.

Mr. Ward: Cross examine.

Richard Knapp, for Plaintiffs, re-cross.

Re-cross examination by Mr. Coult.

Q These are all simple fractures, aren't they? A These are all simple fractures.

Q Only two of them are comminuted, simple fractures? A Two of them are comminuted simple fractures.

Q Let me ask you something while I think of it. Every fracture has a distal fragment, hasn't it? A Yes.

Q In other words, there are two fragments, and the one that is furthest away from the body you call the distal fragment? A Yes.

Q All right.

Mr. Coult: That is all.

By Mr. Ward.

Q These, of course, are technical terms that you are using, such as simple and comminuted? A Yes.

Q Or medical terms? A Yes.

Mr. Ward: That is all.

By Mr. Coult.

Q A simple fracture is one that does not communicate with the air? A One in which there is no wound of the soft parts.

Q Compound fracture is where there is a wound? A A wound.

Q And a compound fracture may be comminuted or not, and a simple fracture may be comminuted or not, that is right? A Yes.

Q A simple fracture or a compound fracture, or either one of them, is comminuted when there is a fragment? A Yes, sir.

Mr. Coult: That is all.

(Witness excused.)

PAUL EMIL ROSHENBACH, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q You are a practicing physician of this State, doctor? A Yes, sir.

Q And you have been for how long? A Twenty-three years.

Q Practicing where? A Paterson, New Jersey.

Q A graduate of what institution? A University of Virginia.

Q And connected with any hospital? A Yes, sir.

Q What hospital? A General Hospital, Paterson, and Hackensack Hospital.

Q In what capacity? A As orthopedic surgeon.

Q An orthopedic surgeon means what? A Treatment of fractures.

Q Have you specialized in treatment of fractures? A Yes, sir.

Q Did you come in contact with Violet May? A Yes, sir.

Q Do you recall the case? A Yes, sir.

Q When did you first see her? A The last January.

Q Whereabouts?

The Court: Doctor, did you mean 1929 or 1928?

The Witness: 1928.

Mr. Ward: The 28th of January.

The Court: In January, 1928. He said last January, and I want to know when.

Q January, 1928? A 1928.

Q Where did you see her? A At her home.

Q In what condition did you find her? A I found her with a fractured femur, lying in bed, unable to walk.

Q And what else, doctor, tell us. Or, I will withdraw that. Did you receive a history of the case, doctor? A Yes, sir.

Q And did you make an examination of her? A Yes, sir.

Q From the history of the case, did you learn that she had sustained this fracture on the fifth of October, 1927? A Yes, sir.

Q Now, what condition was she in aside from the fractured femur, aside from the fact that you found that, when you examined her in January, 1928? A Well, she has a very nervous condition, in fact, it was very hard to make an examination because she was suffering so much with pain and her pelvis. Of course, we had to go very carefully and, finally, I did make my examination, and I found that, as far as the femur is concerned, that is the only thing I was interested in. It was—there was non-union, and that means there was no—there was no formation of bone and tissue between.

Q Now, ordinarily, doctor, within what time is there formation of union of a bone in a fracture? A Well, it starts anywhere after two weeks.

Q Two weeks after. And how long does it take for that union to become complete? A That

all depends upon the condition of the patient, and the condition the blood is in, and also whether there is any disease or not.

Q And does it or not depend upon the condition of the fracture? A Sometimes.

Q Ordinarily, if conditions had been good in this case, within what time would there have been a bony union? A Well, you should have a result within the course of six weeks.

Q And that was not so when you examined it, the girl? A No.

Q Now, what did you do, doctor, for her? A I—she was taken to the hospital and she was given ether, put under an anaesthetic, and I reduced the alignment as well as I could.

Q What do you mean by that, reducing the alignment? A Well, a fracture, when a bone is broken, it usually goes out of alignment, that is, you have a straight line, and by reducing, you mean putting back into place, putting back into as straight a line as possible. So I did that, and then applied a plaster Paris spica.

Q Did you see her immediately after that? A I did.

Q How often? A Well, first, about once a week.

Q And then? A And then about every month or two.

Q For how long a time? A Well, over one year.

Q And what condition was she in the last time you saw her? A Fairly good condition.

Q What about the fracture of the femur, what had been the result? A United.

Q In your estimation? A The femur had united, and there was about two inches shortening.

Q About two-inch shortening? A Yes, sir.

Q When was it you last saw her? A About a week ago.

Q How much was your bill? A Well, I rendered a bill at that time, but since then there has been several visits, so it will be larger than it was. I believe you have it there.

Q This is in full to August 16, 1928. And since then you have seen her, have you? A Yes.

Q How much is it at this time? A I have not figured it up. This came so suddenly I had not had time.

Q But at that time it was $115? A Yes.

Q Was that or not a reasonable charge for your services? A Very reasonable.

Q Can you figure up what your charge will be for the remainder of your treatment after August 16, 1928? A I can when I get home, but not here.

Q Not here? A No, sir.

Q I see.

By the Court.

Q Doctor, what are the probabilities? Are you still treating her? A No. Dr.—Dr. Dickson is treating her.

Q You are not treating her now? A No.

By Mr. Ward.

Q Now, the last time you saw her, doctor, there was a two-inch shortening? A Yes, sir.

Q And you merely treated the fractured femur, is that it? A That is all.

Q Were you or not treating her for her general condition? A No.

Q This two-inch shortening, what would be the result of that so far as her activity— I will withdraw that. This two-inch shortening, what have you to say as to whether or not that is a permanent condition? A It is.

Q What effect, if any, will that have upon the girl in the future? A Well, a very, very poor effect.

Q In what respect? A She has a permanent limp and her general disposition, and so on, is going to have an effect in the future when she gets to be a young lady, she might not find a husband.

Q That may be a blessing, doctor, instead of a misfortune.

Mr. Ward: If your Honor please, I would like at this time to have the jury see this girl and see these wounds, and scars. It occurred to me it was not an opportune time now.

The Court: Well, if you want to, I will adjourn, and the court room will be cleared except those who are interested.

Mr. Ward: Yes, sir.

Q In order to—would it be necessary for you to see this child? A No.

Q In order to amplify your statements now? A No.

Mr. Ward: That is all, doctor. Cross examine.

Cross examination by Mr. Coult.

Q Doctor, so far as bone surgery or bone treatment is concerned, this girl has gotten all

of the treatment that she will require, hasn't she? A For the present time. She may require some more treatment.

Q Well, as far as you can see, she won't? A I said she may.

Q But, I am asking you now about probabilities. It is probable, now? A That she may.

Q Probable that she may. Is that what you say? A Yes.

Q What are the probabilities? Is it probable that she will or she won't? A Probable that she will.

Q On what account? A Well, on account of the degeneration of the muscular tissue surrounding the fracture, she might have to have treatments.

Q I confined my question solely to the treatment of the bone. A Of the bone.

Q She won't need any more treatments? A No.

Q In other words, all of these fractures now, so far as you know, are healed? A Yes, sir.

Q And the shortening of her leg is compensated for considerably by a tilting of the pelvis, isn't it? A Usually.

Q Well, is that so in her case? A Yes.

Q That is,— A That causes a curvature of the spine, which will be permanent.

Q I understand that, but I am asking you whether it is not true— A It is.

Q —that the shortening is compensated for by the tilting of the pelvis? A Yes, sir.

Q That is nature's way of taking up the difference? A Yes, it is a fact—

Q That reduces the limp, though, doesn't it? A It makes it still shorter.

Q Does it reduce the limp? In other words, you get less limp with a tilted pelvis than if you had a pelvis that is not tilted and tried to walk with a two-inch shorter leg, that is true? A Yes, sir.

Mr. Coult: That is all.

Re-direct examination by Mr. Ward.

Q Doctor, this curvature of the spine would be caused by what? A By the tilting of the pelvis. She has a curvature of the spine.

Q I beg your pardon? A She has a curvature of the spine.

Q You observed that? A Yes, sir.

Q And that, in your opinion, would be permanent? A Yes, sir.

Q Counsel asked you about her—whether or not she would require treatment in the future, in your opinion, and you say that, in your opinion, she would? A She should.

Q Due to what, doctor? A The atrophy of the muscles. They should be treated, they should be—have massage, electricity, and things of that sort, in order to strengthen them.

Q And by atrophy of the muscles, you mean what? A Well, the muscle decreases in size.

Q Due to what? A It degenerates due to inactivity.

Q Is that or not a natural consequence? A Yes.

Q And something that naturally follows after an injury such as this? A After every fracture.

Mr. Ward: That is all, doctor.

Paul Emil Roshenbach, for Plaintiffs, re-direct.

By Mr. Cummins.

Q Just one question, doctor. You say that if a person is healthy, the bone will knit quicker, is that right? A Surely.

Q And in this case, the bone did not knit very quickly, did it? A Well,—

Q Yes, or no? A The bone did not knit very quickly.

Mr. Cummins: That is all.

By Mr. Ward.

Q You saw her in January? A Yes, sir.

Q Do you know whether that was due to the general condition and the injuries that she had sustained? A Why, I cannot say whether that was due to sickness, or what it was due to.

Mr. Ward: That is all, doctor.

The Witness: I cannot say that.

Mr. Ward: That is all, doctor.

The Witness: That is none of my business.

(Witness excused.)

The Court: Mr. Ward, do you want the jury to view this girl now?

Mr. Ward: If you please, sir.

(Conference between counsel and Court.)

The Court: We will adjourn until 2:00 P. M.

(Recess.)

After recess, two o'clock P. M.

Mr. Ward: Dr. Dickson?

JOHN DUANE DICKSON, sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Ward.

Q Doctor, you are a practicing physician of the State of New Jersey? A Yes, sir.

Q And you have been for how long? A Seven years, over seven years.

Q Practicing where? A In Bogota, New Jersey.

Q Have you specialized? A Not exactly. I do general work.

Q You are a graduate of what institution, doctor? A Western Reserve University, Cleveland.

Q Did you know Violet May Hummers before the accident? A Yes.

Q Did you treat her for the injuries she sustained as a result of the accident? A Yes.

Q When did you first see her? A The day of the injury, October the fifth, I think it was.

Q Whereabouts? A In my office. They first brought her to the office.

Q Did you make any examination of her? A Well, a slight examination. I saw it was a hospital case, at least, more for hospital care, as I could see right then, so I sent her on to the hospital.

Q When you examined her in your office, what did you find as to her condition? A Well, the most evident thing was quite an extensive laceration on the knee about that long (indicat-

ing). Of course, I saw the child was in shock and hysteria, and generally knocked out.

Q Did you accompany her to the hospital, or not? A I do not think so.

Q How long after her arrival in the hospital was it you saw her again? A Not very long. I went right on. They went and I went, too, just —I imagine possibly a few minutes.

Q When you saw her at your office was she, or not, in your opinion, suffering pain? A Yes, I would say she was in a good deal of pain.

Q When you saw her at the hospital, did you ascertain her condition? A Yes, certainly.

Q What was it? A Of course, I could not make the complete diagnosis until I had gotten X-ray plates.

Q What did you find with reference to the objective symptoms? A This laceration of the knee, bruises about the body, on the hips, around the groin, and some body bruises, I have forgotten; but there were scratches and contusions about the body.

Q And these bruises about the hip, which hip? A Well, both hips were bruised.

Q Were there bruises at any other part of her body that impressed you? A Well, I do not remember about that now.

Q Well, what was her condition, aside from these bruises? A Very marked hysteria and practical shock.

Q What about the laceration on her leg? A Well, that was quite an extensive, deep laceration down to the bone.

Q Whereabouts on her leg was it? A Just on the edge of what you call the kneecap.

Q When you say a deep laceration, how deep was it? A Well, extending down to the bone.

Of course, the skin was laid open there, it looked like it might have been a quarter of an inch wide, ground into the dirt.

Q How long? A Oh, a foot—or, two and a half inches long.

Q Were there any other symptoms that you noticed at that time indicating her condition? A Well, there was a relaxation of the sphincter, what we call the sphincter. I think she had an incompetent bowel movement, and she did not pass any water.

Q You treated her then, doctor, did you not? A Yes.

Q What was the course of treatment that was pursued by you? A General care for the injuries, the fractures taken care of, her general condition.

Q When did you make—or, when did you ascertain that she was suffering from fractures? A Well, the complete diagnosis on the fractures was not made for about three days on account of the extreme weakened condition of the child.

Q Then, after that, what course was pursued? A Well, the general semi-supportive care. Of course, the question of fractures then was secondary. The question was saving the child's life rather than taking care of any broken bones.

Q And why? A It developed that night that the first time I had what you call a catheterization by one of the nurses there was clear water, and then, some time in the night, the nurse reported the next catheterization was blood.

Mr. Coult: I move to strike that out.

The Court: Strike it out.

Q What you saw, doctor? A Well, I go by this case what the nurses report to me, Judge.

The Court: Well, unfortunately, you cannot testify—

The Witness: Well, I saw the blood the next day. I did not see it that night. I did see it that night, too. I saw it that night, because, we considered the question very seriously of a ruptured bladder, and that was—it happened at five o'clock, and that was along about eight or eight-thirty, up to that time, we considered that the right—the one kidney was ruptured, which I considered to be the right, and by that time the blood had come down to the kidney and into the bladder and water drawn off, and I remember we considered very seriously the question of an operation on account of a ruptured bladder.

Q What treatment was given, doctor? A The main thing then was a blood transfusion, the blood taken from the mother, and injected into the child.

Q When was that done? A Oh, about nine o'clock. You see, of course, we had no time to stop and figure on the time of it.

Q Did the condition grow better after that? I mean, her general condition, after the blood transfusion? A Yes, she seemed to get stronger, yes, more and more, in the course of an hour or two, she picked up.

Q Now, was there anything else that you observed about her at that time that you can tell to us now? A Well, at that time, why, the case had, as the result—the tremor came on, she be-

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came very much distended, the fever went up, the temperature went up, pain in the—the abdominal pain grew very much more severe. Inasmuch as I felt fully satisfied there wasn't any rupture of the bladder, of course, we did not consider any more question of operation.

Q Yes. You continued to treat her then at the hospital with others, did you not, for how long? A For about—well, as I remember on November 6th, she went home.

Q And during that time, did she suffer any pain or not, in your opinion? A Yes, she had a good deal of pain; she could not sleep; she was very nervous, and a good deal of pain.

Q What was the general course of treatment that was pursued by you during that time? A Well,—

Q A cast applied, was there not? A Not then, no. As I said, we had to wait until the question of the shock went down.

Q A short time after, doctor? A I think it was about two weeks.

Q Yes? A Then we could put on the cast.

Q And that cast was kept on while she was in the hospital? A Yes, and after she went home from the hospital.

Q And the fracture was reduced? A Well, yes. Reduced means put in line.

Q It was reduced, and the cast was applied? A Yes.

Q Her general condition was treated, and it grew better for those four weeks and a half, whatever it was, that is correct, isn't it? A Her general condition grew better. The fever went down at the end of about two weeks, but the mental condition was a very grave—

Q What condition? A Mental condition.

Q Mental condition? A Yes.

Q After she was taken to her home, you continued to treat her, didn't you? A Yes.

Q And, in fact, she is under your care at this time, is she not? A Yes, I guess so, yes.

Q What treatment did you give her at her home, doctor? A What you would know as general care, just treat the extremity as that would arise. If she complained of too much pain, you would consider what to do, whether I would give her sedatives, something to ease the pain, or else a cast, as those things come up.

Q And she was in bed about eight months, is that correct, approximately? A Eight months. I do not remember just about how long she was in bed. I referred to the records before I came up, but some questions, I cannot get everything in my mind, you know. But she was in bed quite a long time, practically confined to bed, and sometimes we put her over on a davenport for—well, way along in the spring before you can say she could get up at all.

Q During the time that she was in the hospital, do you know whether or not there were any records kept of her condition? A Yes.

Q Of her case? A Certainly, absolutely.

Q Are these the records? A Yes. All the records are there.

Q Were they, or not, kept under your supervision? A My own records are kept, and then a nurse's records are kept.

Q The nurse's record, was that kept under your supervision or not? A No. They are kept for my information.

Q Well, while they were kept, did you ever examine them? A Oh, yes, certainly.

Q Do you know them to be correct? A Yes, as near as I could tell.

Mr. Ward: I offer these in evidence.

Mr. Cummins: I object on the ground they are not properly proven.

The Court: Objection sustained.

The Witness: Now, Judge, I do not quite get his point there.

Mr. Ward: One moment, doctor.

The Court: You are not concerned with my ruling at all, you are to answer questions, never mind whether you get the point or not. You just answer questions and I will take care of whether they are right or not. Do not make any comments on the Court's ruling, he is responsible for that, not you.

The Witness: Certainly, sir.

Q What part of these records were kept by you? A What you call the radiograph notes.

Q And where are they? A Well, there is the first note when she was first brought in, you see? Then we are going over here, beginning there, and the next morning.

Q Well, can those be taken out? Is that in your handwriting? A Yes.

Q Yes? A And then, from here to here, you see, each day a note is made on the patient's condition.

Q I see. A Now—

Q Wait a moment, doctor. Just answer the questions. A All right.

Mr. Ward: I will pass that up for the moment, with your Honor's permission.

Q After she was taken to her home, during the period of time that she was at her home in bed, you continued to treat her, didn't you? A Yes. Yes, I called quite frequently.

Q What was her condition during that period of time? From what was she suffering? A Well, as I said, there was pain, there was mental disturbance, fever, incapacity.

Q Do you know whether or not she had any fractures? A What?

Q Do you know whether or not she had any fractures? A Why, of course, the fractures were still there. It had not healed.

Q What were the fractures? A The fracture of the upper part of the neck of the femur, and the pelvic fractures. Of course, I did not suppose they had healed in that length of time, completely healed, anyway.

Q What about the kidney? What was the development of that? A Well, I considered that had about cleared up, so far as any concern, source of concern from that source had about cleared up.

Q I mean for how long a period of time did she suffer from that condition of the kidney? A Oh, that cleared up, and I considered that as removed from any source of danger in about three days, about four days after the injury.

Q And after that, it grew steadily better? A Yes.

Q Until the present time, it has cleared up? A Yes.

Mr. Coult: Now, just a minute.

The Witness: All right.

Mr. Coult: I do not object to leading, ordinarily, but I object to that question.

The Court: I did not hear the question.

Mr. Ward: I thought I was helping. At least, if your Honor can hear the question—

Mr. Coult: The result of that question is to continue this kidney condition up to the present.

Mr. Ward: Oh, no, I beg your pardon.

The Court: Read the question.

(Question read.)

The Court: I think the doctor's testimony was that the kidney condition had cleared up a short time after his first examination.

Mr. Ward: I might state to your Honor and to Judge Coult and to the jurors that there is no claim that this kidney is in any way affected now, and that is what I wanted to bring out. As a matter of fact it cleared up in a few days, it grew better, there were indications of its being better a few days after, and it rapidly cleared up. That is what I wanted to bring out. I meant to do that.

Mr. Coult: Well, the question was framed so it would appear, if it were answered yes, it continued to the present time.

Mr. Ward: No. That is not our contention, by any means.

Q Within what time had it cleared up, doctor? A It was free from blood at the end of the third day. I feel safe in saying that.

Q And from that time on? A I gave it no concern at all, only a casual examination.

Q And, as far as this child is concerned now, it is apparently all right? A Yes.

Q At the present time? A Yes.

Q And has been since that time? A Yes.

Q Was there any other cast put on her, doctor? A Yes, I had put a second cast on her.

Q When? A Well, I put that on January 28th, January 27th.

Q 1928 and when? A 28th.

Q 28th? A Yes.

Q And these X-rays that we have in evidence, were they taken— A Yes, taken at the Hackensack Hospital.

Q —under your supervision? A Yes.

Q And used by you? A Ordered by me, yes.

Q From the time the girl got out of bed, what has been the progress of her trouble, or been her progress? A The progress of her condition?

Q Yes. A She—it has been slow. In fact, she has, of course, the limp and that is there as a permanent condition.

Q And during the period of time—the exact time you do not remember--that she was in bed at home, what was her condition with reference to pain and suffering? A Pain? She had quite frequent attacks of pain, one where the cast would come in contact with her back and with her leg and with her thigh, you know, and she had a good deal of pain.

Q The second cast remained on for how long? A Nine weeks.

Q And then, at the expiration of that time, it was taken off, was it? A Yes.

Q And what did you discover then about the fracture? A Why, that the union was firm.

Q And how is the union now so far as the pubic bones are concerned of the pelvis? A I consider it firm.

Q And the union of the femur, that is firm, is it? A Yes. Yes, I—

Q What shortening, if any, is there? A There is two inches of shortening of that leg.

Q Is that a permanent condition or not? A That is permanent, yes.

Q And, as a result of that shortening, will there be any—will that have any effect upon her? A Yes.

Q What effect? A Well, there is a limp. You see, the child limps. It don't make any difference how much you pad the other foot up, the limp is still there. There is a limitation in motion of that leg. She cannot move it as she can the other leg. As a natural consequence, it is somewhat what we call atrophy of the muscles around the thigh and around the hips, due to the inactivity of the leg, and it is weak and she has pains in it, and damp spells of weather, she suffers pain from it.

Q With reference to this— A If you do not mind, if you will pardon me. Of course, there is a tilting of the pelvis, the left side is down, and the right side up. The spine is crooked. There is a curvature of the spine. Well, you know how that affects anyone, especially a girl. She will be a woman. That will affect her.

Q And the shortening of the leg, I think you stated was permanent? A Yes.

Q The curvature of the spine? A Permanent.

Q Is that, or not, permanent? A Yes.

Q In your opinion? A That is permanent.

Q And the limp? A That is permanent.

Q Is that permanent? A Yes.

Q What about the laceration on the leg? A That grew better, that got better. The scar is still there, though.

Q The limitation of motion in this leg, doctor, can you give us any idea to what degree there is that limitation? A Well, of course, anyone can move their thigh around a certain—certain circle.

Q Can you stand up and demonstrate? A Yes.

Q To the jury? A Now, you are standing on both feet. A normal person can move their left leg out a certain distance. You understand that, of course. Now, she can move hers out what I consider from a straight line an angle of about thirty-five degrees. She cannot flex it on her body this way (indicating) as you can yours, and neither can she flex it back. You see, the motion of the leg is limited. Do I make myself clear?

Q This condition in which she is now, with reference to these things that you have mentioned that are permanent, are they—or is this condition such as to cause her any pain now? A Well, of course, the pain now is as you would find in any old fracture. It gives pain at times. Everybody complains of it that has had a fracture; at least, not everybody, but a good many people where there is no question of any liability at all, they complain of pain at the site of the fracture or in the joint nearby.

Q Will she in your opinion require any medical care or attention in the future? A Oh, I think the girl ought to be treated, yes, certainly.

Q For what? A Well, for continued use of that leg, she ought to be kept under treatment.

Q These injuries that she suffered, do they have any other effect upon her and upon the leg, with reference to her nervousness, for instance? A Yes. That is a nervous shock which takes anyone, especially a child ten or eleven or twelve years old a long time to recover from. And now, even now, anyone in that condition certainly cannot be considered as normal and as strong and as well poised as they would be if they did not have it.

Q Comparing the condition in which you knew her to be before this accident with her condition at the present time, what have you to say as to the difference, if any? A Oh, yes, she is in a much more nervous state than she was before, of course.

Q What have you to say as to her mental condition now? A Well,—

Mr. Cummins: I object on the ground he has not qualified as a mental expert.

The Court: Any physician can testify to that.

The Witness: I beg your pardon?

The Court: You can testify to that.

A Yes. By mental condition, you mean the question of her emotional condition, do you not?

Q Yes, what you have observed. A Oh, she is emotional, what we call emotionally—more emotionally unstable than a child ordinarily would be. She gives out quicker and she gets not exactly hysterical, but I can see the difference in the girl.

Q Is that condition permanent or not, in your opinion? A Well, that is hard to say. I do not know. You know, of course, anyone—it depends

on how she can adjust herself to her surroundings.

Q These injuries, have they had any other effect upon her, or will they have in the future? A Well, of course, fractures of the pelvic girdle affect a girl much more than a man.

Q Tell us about that. A She will some time or other face the question of motherhood. I would consider that she would face a problem there.

Q In what respect? A In respect of a difference in the formation of the pelvic girdle. You see, there is four fractures there.

Q Now, is there a different condition now in that pelvic girdle from a normal condition? A Well,—

Mr. Coult: Now, if the Court please, I think we have gone far enough to see where we are tending, and I call your Honor's attention to the complaint in this case. There is no allegation here as to impairment of function. I suppose this is leading toward difficult in childbirth, or something of that kind. It says normal use of her body and its members. That does not apprise us of any claim that there is to be a likelihood of sterility. I suppose that is what counsel is leading to.

Mr. Ward: Yes.

Mr. Coult: Nor are we apprised of anything in the answers to the interrogatories.

Mr. Ward: If your Honor please, first, the complaint says that the plaintiff sustained internal injuries, the extent—the exact nature and extent of which are not yet known to the plaintiff, which caused her and

still cause her pain and deprive her of the normal use of her body and its members, and hamper her normal bodily movements, and she is informed and verily believes will permanently cause her pain and deprive her or hamper her of the normal use of her body and its members.

Now, aside from that, of course, they have had physical examinations, several of them. They have not been restricted in any way in permitting other doctors to examine this girl at any time.

Mr. Coult: Before your Honor rules on this matter, may I submit the answers to interrogatories here? They are not in evidence.

The Court: What I am interested in is, are there particulars asked as to this general allegation?

Mr. Coult: Well, there seems to have been interrogatories propounded in the nature of bills of particulars.

The Court: Well, with respect to that, the plaintiff sustained contusions and lacerations, and so forth, the exact nature and extent of which are yet unknown to the plaintiff. Normal use of the body and members and hamper the normal body movement.

Mr. Coult: Well, your Honor, the fifth interrogatory in this case: "Are you entirely cured of the injuries for which you are seeking to recover damages in this suit? If your answer to this question is 'no,' then state fully and particularly in what respects you still suffer from such injuries."

Then it says, "give the nature and extent of all injuries claimed to have been sustained by the plaintiff's daughter, as a result of the accident. State what visible marks of injury are evident upon the body of the plaintiff's daughter as a result of the accident. Give the nature, extent and location of all permanent injuries claimed to have been received by the plaintiff's daughter as a result of such alleged accident."

I do not have to say to your Honor there is no such claim made there. We have never been apprised of any such element of damage as this.

Mr. Ward: Well, that—

The Court: What is the question now before the Court?

(Question read as follows:)

"Q Now is there a different condition now in that pelvis girdle from a normal condition?"

The Court: I will allow that question for this reason: there is a general allegation in the complaint which could have been particularized by a demand for particulars. While it is true, perhaps, those interrogatories were propounded in the nature of a bill of particulars, yet I have to treat those on a basis of evidence, whereas, I will have to look upon what should be a bill of particulars in the light of explaining the pleadings, and the interrogatories, of course, may be offered to contradict; but I think the general allegation is enough to warrant that question.

Mr. Coult: Will you Honor allow me just one moment's time? I think these interrogatories by stipulation were treated as bills of particulars.

Am I correct in that, sir?

Mr. Losche: No. There was a stipulation that some of the questions should have been asked—

Mr. Coult: I think that stipulation provides that they should be treated as bills of particulars. Will your Honor give me just one moment to see if that is so? You say that is not so?

Mr. Losche: No. The stipulation, if anything, was that some of the questions asked in the infant's case were improper, and the attorney for the defendant conceded that they should be asked, that was the only stipulation.

Mr. Coult: This is rather late notice of a claim of this kind. It seems to me, your Honor, that should have been specially pleaded.

The Court: No issue was joined on that allegation.

Mr. Coult: I cannot object to that question, but I will when the time comes.

The Court: Yes.

Mr. Ward: Will you repeat the question, please?

(Question read.)

A Yes, I would consider so. What we call the pelvic outlet would naturally be limited from the amount of callus formation and healing of those fractures. That is one thing. The pelvis is

tilted to the left, and—well, that makes a difference in anyone, as I said, especially in a woman. The amount of trauma or bruising at the time of the accident will naturally leave this result, she cannot help it.

Now, there was a paralysis of the bowel at the time of the accident. There was no bowel movement after the first, you may say, shock for some three or four days, and we had to use very stringent means to produce one. So, you cannot have those conditions and those effects, rather, or causes, without having some remaining effects on the surrounding tissue. It cannot possibly be done. To produce enough bruise to break a hip, you see, and rupture a kidney, why, of course, it is going to affect the urinary organs and the female genital organs.

Q Doctor, basing your opinion upon the history of the case and what you yourself found to be this girl's condition, what have you to say as to whether or not these things would have any effect upon her in the future with reference to bearing children?

Mr. Coult: Now, I object to that, if the Court please, on the ground it is not pleaded, and surprise.

The Court: Read the question. (Question read.)

A Well, I would say—

Mr. Ward: One moment.

The Court: I will sustain the objection.

Q Doctor, taking into consideration the history of the case, and taking into consideration

the conditions that you found from which she was suffering, the injuries that she sustained, what, in your opinion, is the probable effect upon her, and will be the probable effect in the future, with reference to her bearing children?

Mr. Coult: I object to that.

The Court: I will have to sustain the objection. Mr. Ward, you are framing this in the nature of a hypothesis,—

Mr. Ward: Yes.

The Court: —and there is not enough included in the question.

Mr. Ward: Well, of course, that I understand is purely within your Honor's discretion.

Q Doctor,—

Mr. Ward: Your Honor will permit an exception?

Q Doctor, if a child of twelve years of age were injured by reason of coming in contact with an automobile truck and sustained injuries upon the fifth day of October, 1927, and thereafter were removed to a hospital where it was discovered that she had bruises and contusions about the left hip and in the vicinity of her hip and, I think, abdomen—am I correct in that?—and abdomen, that it was ascertained that she had a fracture of the right pubic bone, a comminuted fracture of the descending ramus of the right pubic bone, an oblique fracture of the ascending ramus of the left pubic bone, a comminuted fracture of the descending ramus of the left pubic bone near the—or the left pubic bone,

rather, an irregular or an oblique fracture of the extremity of the left femur, with some displacement, and if those fractures of the pubic bones threw out callus, united in the ordinary time, if, however, the femur bone, or in the following January, were discovered not to have become united, and if the child had had one cast which was kept on for four weeks, and thereafter a second cast was put on which was kept on for between nine and ten weeks, that thereafter it was ascertained that the femur had become united and there was union, good strong union, and if, however, there were a shortening of the left leg of approximately two inches, and a curvature of the spine, what would these things—or, what effect would these conditions have, in your opinion, probably, upon this girl when she became a woman with reference to her bearing children?

Mr. Coult: Objected to on the ground it is not in the pleadings. We have not been apprised of this element of damage.

The Court: I will allow the question.

Mr. Coult: Exception.

The Court: You may answer that.

A It would impair that function, see?

Q To what extent? A It would impair—it would lessen the diameter or the width of the pelvic girdle. Now, those fractures, in healing, those comminuted fractures, they take up, when a fracture of that kind healed, it takes up a good deal more space, which is a physical limitation, if nothing more, than it did before.

Mr. Coult: I do not want to repeat my objection to every one of these questions.

Probably I had better. If your Honor feels I should, I will.

The Court: Well, one is as good as a dozen.

Q And those physical limitations would probably have what effect on her in the future when she became a woman in giving birth to a child?

Mr. Coult: Objected to on the ground it is not pleaded.

A As I said before, it would certainly impair it very much to the extent that I would seriously consider the impossibility of a normal birth.

Q Doctor, now what is this little girl's condition, mental and physical? A Well, physical, I would say very much below what it would have been if she had not had this accident.

Q What is your bill, doctor? A I think the fee—at the time, the fee came, first, to $225, if I am not mistaken, of course, there has been something in connection with this since then.

Q $225? A What?

Q $225? A That is of the time, yes.

Q Is that a reasonable charge? A That is —yes, that is very reasonable.

(The plaintiff, Violet May Hummers, comes forward.)

Mr. Ward: With your Honor's permission, I would like the doctor to indicate—

The Court: Just point out.

Q Is there any difference in that child's hips, doctor? A Yes, there is.

Q Can you show that the way she is now? A Well now, this left hip, that hip there is very much smaller than this one, very much thinner, what we call atrophied, and so is this left leg, see?

Q Is there a scar there now on the leg? A Not up here (indicating).

Q No, but anywhere? A A scar down here (indicating), can you see that?

Q Is that the result of this—of these injuries? A That is the result of the laceration of the knee, and of the accident.

By the Court.

Q Doctor, just a minute. Can you indicate on the outline of the back the curvature? A That throws the backbone—of course, I will exagerate it a little bit,—but it throws it to the left. The backbone ought to be straight up and down in a normal individual, the backbone is straight in a perpendicular line. It ought to be straight up and down, but this is curving to the left, now, see?

By Mr. Ward.

Q Is that more pronounced with the shoe off, doctor? A Yes.

Mr. Ward: Will your Honor permit her shoe to be taken off?

The Court: What is the purpose?

Mr. Ward: Whatever you deem necessary, sir.

The Court: No.

Mr. Ward: All right.

Q At the time that you are showing these things to the jury, now, she at that time has her shoe on? A Yes.

Q With an extension, an extended sole? A Yes, sir.

The Court: Oh, the shoe has an extention now?

Mr. Ward: Yes, sir.

Q Will you show his Honor that, please?

The Court: Then both shoes would have to be removed?

Mr. Ward: Yes, sir.

The Court: I will permit that, remove both shoes.

Mr. Ward: (To Violet May Hummers) Take off both of your shoes, little girl.

(Both shoes removed.)

Mr. Ward: (To Violet May Hummers.) Now, put your heel down. Now, walk, put your heel on the floor, now put your hands down. Now, will you walk back that way, and walk out this way, please, just out that way? Now, walk back again. Put your hands down.

(Violet May Hummers does as heretofore directed.)

Q Doctor, I think I interrupted you when you were stating something about your bill. You said up to a certain time, it was $225? A Yes.

Q And what time was that? A The date I have forgotten, several months ago.

Q What is your bill to date? We will put it that way. If you know? A I think 275 would be a reasonable bill.

Q $275.

Mr. Ward: That is all. Cross examine.

Cross examination by Mr. Coult.

Q Doctor, you say that this impairment of the ability to bear children is due in part to the change in the pelvic girdle, is that true? A I would consider it so.

Q And would it be due in part to the tipping of the pelvis? A Yes, that would be it's effect.

Q And your opinion as to the inability to bear children would be in part predicated upon the tipping of the pelvis? A Do you mean that would be a factor?

Q Is that one of the factors in your basing your opinion— A Yes.

Q —you gave Mr. Ward, is that true? A I think so, yes, that is what I would say.

Mr. Coult: I move to strike out the opinion on the ground that the tilting of the pelvis was not included in the hypothetical question.

Mr. Ward: I think it was.

Mr. Coult: No.

Mr. Ward: I said a two-inch shortening of the left leg.

The Court: Well, the exact wording was not used, but I will give you an opportunity to add that to it because, I take it, all the elements of the injury were included without the use of the term itself.

Mr. Ward: Is it necessary for me to repeat the question, sir?

The Court: I think not. Just add it to it.

By Mr. Ward.

Q The question that I asked you, doctor, in which I related the factors with reference to the date of the accident and what had occurred with reference to the child since then, I wish to include in that question the factor that, as a result of the shortening of the left leg to the extent indicated in the question, there is a tilting of the pelvis; and what is your answer to that? A As to its effect on child bearing?

Q Yes. A I think it would impair it.

Q Is your answer the same as it was before, or not? A I think so.

Q Yes. Thank you, sir.

By Mr. Coult.

Q Doctor, in what manner would the tilting of the pelvis, taken alone, not in connection with any other factors, tend to impair the function of childbirth? A Well, of course, to the extent that the baby—as the center of the baby goes through the certain planes, and one plane, anterior or posterior curve is enough, but where you are making, in addition to a posterior or anterior, a lateral curve, sometimes might render it impossible.

Q You think that the fact that a woman's pelvis was tilted would in itself, standing alone, make childbirth more difficult? A Yes.

Q All right. And that is because of the change in plane of the opening into the pelvis, is that it? A Yes. And the whole—

Q Now, you said that these fractures would change the pelvic girdle on account of the presence of the callus and the comminuted fractures? A Yes.

Q You have seen the X-rays, of course, haven't you? A Yes.

Q And has there been a normal healing of these fractures in the pelvis? A Yes, as bones considered—as you consider normal healing, yes.

Q And the callus is being absorbed, isn't it? A Well, callus is never completely absorbed.

Q Is it being absorbed? A I should not say, because I have not seen the X-rays lately.

Q Then, you do not know whether it has been or not, do you? A Well, I do not consider that callus is completely absorbed.

Q You simply take that for granted? A I do not take it for granted, no, I do not. I do not think there is any difference between this child and a normal individual.

Q That is just what we are coming to. Do you think any woman who has a fracture of the ascending and descending ramus of the pubis would have difficulty in childbirth? A Not any woman. If the fracture is of a sufficient extent, that would affect it.

Q And then there is a question of the extent of the fractures, is there? A Yes, of course, that would have its effect, certainly.

Q What is the last X-ray that you looked at, what date? A Well, January the twenty-seventh, I think it was.

Q And at that time, the callus was present in considerable quantity, wasn't it? A Well, I let the X-ray man pass on it.

Q Then you are basing your opinion upon what the X-ray man told you about it, are you? A No, I am not.

Q Well, what do you mean, you let the X-ray man take care of that? A Well, as a doctor, we take it that when a bone is fractured, and the

greater the extent of the fracture and the trauma to the bone, of course, the more callus it takes to complete the healing,—

Q Yes. A —see? And you asked me for my opinion. Of course, I cannot measure it. You asked me solely for my opinion.

Q I know. But your opinion, is your opinion based upon what the X-ray man told you in this case? A No, no.

Q And you are basing your opinion, then, now on the X-rays that you saw in January, 1928? A Not entirely.

Q Well, I know. But you have not seen any other X-rays, have you? A No. As I said just now, in a comminuted fracture, when it heals, it leaves a certain amount of callus.

Q You do not know how much callus has been left in this case, do you? A No, I cannot measure it.

Q Then, you do not know anything about it, do you? A Yes, I think I do.

Q Well, how? You have not seen any X-rays, have you, since January twenty-eight? You cannot discover the amount of callus by palpation on the pubis, can you? A Well,—

Q Can you? A I would not limit—I would not exclude it by the fact that I could not, no.

Q I am not asking you to exclude it, but I say, can you find out how much callus there is by a clinical examination? A Well, I have not tried.

Q All right. Then, you do not know by that method, do you? A No.

Q And you have not seen any X-rays since January twenty-eight, have you? A No.

Q So you do not know by that method, do you? A No.

Q Now, by what method do you know how much callus there is there, or the extent of the fracture, or the nature of the recovery? A Just what would take place in any normal bone.

Q So, you are just finding your opinion entirely upon what you think has taken place normally in this case, is that it? A In any fracture, yes, where there has been a comminuted fracture.

Q So, you would say that in any case where a woman had a comminuted fracture of the pelvis, it is going to interfere with childbirth? A Yes, I would, especially as extensive as one was where all the four bones were fractured.

Q I see. And you make that a general statement then, do you? A Yes, I would.

Q Relating to all cases? A Well, I am not here discussing the rest of the feminine world, I do not know, I would not say.

Q Now, you said that there had been atrophy on one hip? A Yes.

Q And that atrophy is due to non-use, isn't it? A Yes.

Q Due to the immobilization of the limb? A Yes, yes.

Q And that is a natural consequence of immobilization, isn't it? A Yes.

Q In other words, if you do not use a limb— A Certainly.

Q —you do not get the exercise, and the muscles become— A Yes.

Q —smaller? A Yes.

Q And, in course of time, that is going to come back, isn't it? A Which, the—

Q With exercise? Yes? A Yes, certainly.

Q So that that is not a permanent condition, is it? A Well, I would consider the use of the

limb, this particular limb, would never come back to normal.

Q I did not ask you about the use of the limb coming back to normal. I asked you whether or not the effects of this atrophy is not going to disappear in course of time? A Not this one, I do not think it will.

Q Why not? A Because there is a certain amount of limitation of the motion of the bone,—

Q Do you mean to say— A —of the leg, of the skeleton.

Q Do you mean to say that the limitation of motion in this leg is so going to interfere with the exercise this girl gets that her muscles won't come back to their normal condition? A Not to the normal condition, if you consider it as equal to the right leg, it will not.

Q How far will it be short of the size of the right leg after she has come back as far as she is going to? A Oh, I could not say as to that.

Q Well, will you say it will be within a quarter of an inch in diameter? A Well, that is hard to say.

Q Well, you would not say positively that it would be any more than that, would you? A I believe it will.

Q You do? A Yes.

Q And what is there—it is no unusual thing at all, is it, for a limb, arms, and legs that have been immobilized and put in casts to be smaller than the fellow, isn't that true? A That is true.

Q In fact, that happens in every case where you put any limb in a cast, doesn't it? A Yes.

Q Now, you do not want to undertake to say when anybody has had a fracture and had a limb

put in a cast that that person permanently is going to have one limb smaller than the other?

Mr. Ward: I object to the form of the question, "You do not want to undertake to say."

Mr. Coult: I will withdraw that.

Q Do you want to say, or no, that any person who has had a fractured limb and has had that limb in a cast and has suffered an atrophy, for that reason is going to have one limb smaller than its fellow? A It frequently results in that.

Q As a permanent affair? A Well, when you see it years afterwards—

Q And you do not say that that is true of all fractures, do you? A Well, I do not think necessarily so, no.

Q Isn't it a very common practice now to put fractured limbs in casts? A That is the common—yes, of course.

Q And every time you do it, you get atrophy, don't you? A Certainly.

Q And, as a physician, do you say that that practice frequently results in leaving a permanent— A No.

Q —difference in size— A No.

Q —between the limbs? A No, I do not.

Q Well, the only reason why this hip and leg in this girl's case is atrophied is because it has been in a cast, isn't that so? A No.

Q What other reason for it? A Because she cannot use the leg as much as she could, she is not as strong on that leg as she was before the accident, and she is naturally saving it. She

naturally refrains from exercising it as much as she would.

Q Then, we come back to a question that I think I asked you before. Do you mean to say that the impairment of the use in the leg is of such a degree as to have any effect in recovering from the atrophy that exists there? A An impairment in the use of the leg?

Q Yes. A Yes, certainly.

Q All right.

Mr. Coult: That is all.

Mr. Ward: That is all, doctor.

The Court: That is all.

(Witness excused.)

VIOLET HUMMERS, recalled as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Ward.

Q Mrs. Hummers, do you recall when the last cast was taken off your child's leg? A Yes, I do.

Q Is there any difference in the size of that leg now from the size—from its size at that time? A Yes, there is considerable, much smaller now than when it was first taken off, because both hips were in the cast, you know.

Q Much smaller now? A Yes, sir.

Q Thank you.

The Court: Are you through with your direct?

Mr. Ward: Yes, sir.

Violet Hummers, recalled, cross.

Mr. Coult: I was cross examining, your Honor.

By Mr. Coult.

Q Now, I think at the time of my cross examination, Mrs. Hummers, I was pointing out to you your house? A Yes, you were.

Q On the street, you said it was the sixth house on the right-hand side? A I believe it was the sixth.

Q And there seems to be in that hill a little rise or bump? A There is.

Q Do you notice it? A Yes, there is.

Q And there is, below you,—that is down hill from your house, isn't it? A Just a little ways below.

Q And the grade of the hill is steeper from that bump down to West Shore avenue than it is above? A Oh, no. The steepest part of the hill is above my house.

Q I see. Well, there is a little pitch there, isn't there? A Yes, a little pitch, but the steep part of the hill is here (indicating).

Q I see. I am speaking from the photograph. It looks so here. A Yes.

Q Now, how long had your daughter had the scooter? A How long had she had the scooter?

Q Yes. A About two years, about two years, I could not say definitely.

Q Had she ridden on Walnut avenue with it? A Yes, she had.

Q Down the hill? A Yes.

Q And you were aware of that, were you? A I was.

Q And you knew that the street ran—dead-ended into West Shore avenue? A I did.

Violet Hummers, recalled, cross.

Q Did you ever caution her against riding down that hill? A I told her to be careful, because she could easily steer around that corner.

Q Because she could easily steer around the corner? A Yes, she could make the turn very easily.

Q And you had seen her go down that hill yourself before, have you? A I have. Not this day.

Q But on other days? A Yes.

Q And on those other days she was able to make that corner all right? A She always did.

Q And so, for that reason, you merely cautioned her to be careful? A Well, I always told them to be careful; every mother does.

Q But you never told her not to ride on that hill? A I never told her not to ride on her scooter, no.

Q Did you ever tell her anything about where she should start on that hill? A I told her she should never start on the top of the hill, and she never did start on the top of the hill.

Q I see. So that, always, she started about where? A The place of starting was about here (indicating).

Q About in front of your house? A No, down from my house.

Q I see. About where that rise for the hill is there? A Just about where this rise is, just a little above this first house.

Q Now, you did not see this accident happen, of course? A No, I did not.

Q And, of your own knowledge, you do not know where on that occasion your daughter did start on the hill, do you? A I know where she told me she started.

Violet Hummers, recalled, cross.

Q You do not know where she did start, of your own knowledge? A No.

Q Now, you say that at the time this accident happened, almost all of the leaves were off the trees? A Most all of them were off.

Q And do you mean by that that the leaves had fallen in the course of nature in the fall? A Yes, they were falling.

Q You do not mean that just at that particular locality there was some reason why the trees—the leaves were shedding? A No.

Q That is, it was general? A Yes, it was.

Q And you have not made any mistake about that? A I have not.

Q Did you notice it at the time? A Yes, I did.

Q Why, on the 5th of October the leaves had not begun to change yet, had they? A They did, they started to fall in September. I always figure them as falling in September.

Q And had you had frost before the 5th of October? A I do not remember if we did or not; we might have, but I do not know.

Q Well, you never knew the leaves to fall before frost, did you, that is— A Well, they fall in September.

Q Now, I want you to look at a photograph that I am showing you, and ask you if you recognize that as the lower end of Walnut avenue where it meets— A I do.

Q —West Shore avenue? A I do.

Q Do you see the trees and the bushes on the right-hand side of that picture as you look at it? A Yes, I do.

Q They have got leaves on them, haven't they? A Yes, they have; but I do not know when that picture was taken.

Q I know it. But I am going to ask you this: Is that the way that the leaves and the trees looked at the time this accident happened? A No, it don't. You could easily look through them, because I looked through them myself.

Q Now, if I were to tell you that this photograph was taken five days after the accident— A I would hardly believe it.

Q All right. But if you were told to assume that that was so, would you say you were mistaken about the leaves being off the trees? A No. I could not be mistaken about the trees, because I was going back and forth, going over to my mother-in-law's house, and I could see my mother-in-law's house through there.

Mr. Ward: See what?

Q At the time the accident happened—

Mr. Ward: See what?

The Witness: Going through there, I could see my mother-in-law's house through the trees.

Q And at the time that the accident happened, that corner did not look the way it does in this picture, did it? A Not to my knowledge, it did not. It was less leaves.

Q Well, you see that there are lots of leaves on those trees? A Yes. And you could look through them.

Q And look at this. A Of course, that is a small photograph.

Q I know. But look at this picture, even if it is a small photograph. You would say, wouldn't you, that at the time this photograph

was taken the leaves had not begun to fall yet, wouldn't you? A Just let me hold it, and stop shaking it, I might be able to see it.

Q All right. Excuse me. A The leaves on the little trees have dropped.

Q I say, would you say—then, you would say, looking at that photograph, that the leaves had begun to fall? A Yes, I would.

Q Then, the condition that you see in this photograph was the condition that was present at the time when this accident happened, wasn't it? A I could not see through that tree on that photograph. Probably, if you had a bigger one, I could see through it.

Q I will get you another one in a minute.

Mr. Coult: May I mark this for identification?

The Court: Mark it for identification.

(Photograph marked Exhibit D. 1 for identification.)

Q I show you another photograph, and I ask you whether that is a good photograph of the condition at the corner of West Shore avenue and Walnut street, viewing it from West Shore avenue? A Probably it would be if it was a good picture, but it is not.

Q Well, making allowance for the fact that the picture is not very good. A Well, this corner of the picture where I am supposed to identify is no good; it is dark; how can I tell?

Q You cannot tell, then, can you? A I cannot see because the picture itself is no good.

Q You see some trees here on the left-hand side? A I do. Why, don't you see, even your sky is black?

Violet Hummers, recalled, cross.

Q I see. A How can I tell just about the trees?

Q Can't you tell whether there are any leaves on those trees? A No. It all looks black to me, also the sky.

Q Can you tell whether there are any leaves on the trees? A No. I could not. It just looks like a black mass.

Q So this does not help you any at all? A No. It does not help. You can see quite a ways up there.

Mr. Coult: May I have this marked for identification, please?

(Photograph marked Exhibit D. 2 for identification.)

Q I want to show you another photograph and ask you if that is a correct photographic representation of the hill down Walnut avenue as it was at the time of this accident? A Yes, but do you allow me to tell you there was something the matter with your camera. How can I identify a good picture when there is something absolutely wrong with your camera that took—anybody that knows anything about pictures knows that the camera was no good.

Q Is that a correct photographic representation of Walnut avenue as it was? A Up on top of the hill?

Q Yes. Taking down Walnut avenue. A Way up on top of the hill, that must have been taken.

Q But, considering what it shows, is it a proper picture? Is it a good photographic representation or not? A It is a photograph of Walnut avenue, but not a good one.

Violet Hummers, recalled, cross.

Q All right. It is a photograph. Now, that photograph is good enough for you to see the trees down there, isn't it? A Yes, I can see the trees.

Q Now, do you see any leaves on them? A Yes.

Q Lots of leaves, aren't there? A Quite a few.

Q Now, if you assume that that photograph was taken five days after this accident, won't that serve to change your mind as to whether or not the leaves had fallen at the time the accident took place? A No, it would not, because I know I went through there before the accident happened that morning, and there was leaves on the ground.

Q So, the irresistible conclusion— A And I did not pull them off.

Q So, the irresistible conclusion that you are led to is that this photograph was not taken at the time when the accident happened? A I was not there to see it taken, so I do not know.

Q But, I mean, you see leaves there on that photograph? A I see leaves on that photograph.

Q All right. If that is a photograph of this place, it must have been a photograph taken at some other time—

Mr. Ward: I object to that—

Q —isn't that right?

Mr. Ward: —as argumentative.

The Court: Sustained.

Violet Hummers, recalled, cross.

Mr. Coult: I will have it marked for identification.

(Photograph marked Exhibit D. 3 for identification.)

Mr. Coult: That is all.

Mr. Ward: That is all, Mrs. Hummers.

By Mr. Cummins.

Q Just a moment, Mrs. Hummers. You say that this last picture was taken from way up on top of the hill? A It must have been.

Q Is that right? A Yes, up on top of the hill.

Q Is that a very steep hill, Walnut avenue? A The first part of the hill is, up on the top part of the hill.

Q How about the last grade? A That is not so steep, nowheres near as steep.

Q How long a hill is it? A Why, I do not know just how long a hill it is.

Q Do you live partly up on that hill? A I live about half way.

Q And how far away from West Shore avenue do you live? How far east of West Shore avenue do you live? A Well, I do not know just how many feet.

Q Would you say three hundred feet? A Well, I won't say anything about the feet, because I do not know.

Q Well, how close is the nearest house to Walnut avenue, going east, or to West Shore avenue, going east? A Do you mean on the left-hand side going down?

Q On the north side. A On the north side, it is at least two hundred feet, possibly more.

Violet Hummers, recalled, cross.

Q And how far east of that house do you live? A Do you mean, did I live?

Q Did you live at the time of the accident. A I think there was about four houses down.

Q And are they all on fifty foot lots? A No.

Q How large are the lots? A Some are larger, some are smaller.

Q What would they average? A I do not know. I think around forty feet on that side of the street.

Q So, then, you have lived approximately four hundred feet east— A Possibly.

Q —of West Shore avenue? A Possibly. I do not know for sure.

Q And where was it customary for your daughter to start going down the hill on this scooter? A Below Irving's house, that was the house next to mine.

Q That is the one that is two hundred feet? A No. The houses on our side of the street were on bigger pieces of property than houses on the other side.

Q Was the place where she started from east of this bump? A It was right about here (indicating) where they started.

Q And that is about—you say the first house is about two hundred feet? A About that.

Q And that takes in that first knoll? A Yes.

Q And isn't that a fairly steep knoll? A No, it is not. The steep part of the hill is there from right in front of our house up.

Q And you say that— A Above our house.

Q How often did you see your daughter go down that hill on that scooter? A I never tried to keep count of that.

Q Did you ever see her? A Yes, I did.

Q Many times? A Why, I do not know whether she was on many or a lot.

Q What kind of a scooter was it? A What do you mean by many?

Q Well, a dozen times, would you say, you saw her go down there daily? A Daily, no.

Q A few times a week? A Why, I never kept a record of just exactly what she did. I did not have to.

Q But you saw her go down quite frequently, didn't you? A Yes, I did. I seen her on the scooter before that day.

Q What kind of a scooter was this? A A regulation scooter, I suppose it is.

Q An iron scooter? A The frame work was iron and the part you stand on was wood, and the part you steer with, the handle that you turn the wheel to steer was of wood.

Q Did it have any brakes on it? A No scooters have brakes.

Q This one did not have brakes on it? A No.

Q Did you ever walk through West Shore avenue? A Yes, I did.

Q Do you know whether that was a busy thoroughfare? A No, it is not so very busy.

Q Cars used it quite frequently, didn't they? A They use it more so now than they did, and I would not say that it is a busy street.

Q It is a cement road? A Yes.

Q Did you ever see your daughter turn— A Yes.

Q —on that corner— A Yes.

Q —as she came down the hill? A She was capable of handling her scooter.

Q She was quite capable of handling it? A Yes, she was.

Violet Hummers, recalled, re-direct.

Q Did she take the scooter to school with her? A No.

Q Did you ever see her make the turn? A Yes, I did.

Q When she made the turn, which way did she usually go, north or south? A She went up toward Beechwood avenue, always.

Q Up, meaning north? A Beechwood avenue.

Q And when she made that turn, did she go out to the center of the road to make it? A She did not; she made it close to the sidewalk.

Q She made a very close turn? A Yes, she did.

Q And, coming down that hill, do you know whether she came very fast, as a general rule? A No, she did not, because she put her foot on the back wheel so that she could not go very fast.

Q She could not go very, very fast? A No.

Q That day, in particular, you had sent her to Reeve's to get boxes on the scooter? A No, I did not. I sent her to my mother-in-law's to get boxes.

Q That is where she was headed for, or was she playing? A No, she was not. She had got the boxes and brought them home to me and she had gotten some books and was going out to read when I saw her.

Mr. Cummins: That is all.

Re-direct examination by Mr. Ward.

Q Will you just describe that scooter? A Why, there was two wheels, front and back, they were solid wheels.

Violet Hummers, recalled, re-direct.

Q About how large were those wheels in diameter? A About that size (indicating), I guess, or small wheels.

Q About nine inches?

Mr. Coult: I did not see it.

Mr. Ward: Five inches, counsel says you think about five inches; five inches, we will agree to that.

Mr. Coult: Pardon me. I do not know what it is all about.

Mr. Ward: The diameter of the wheels of the scooter.

Mr. Coult: I will say it is anything that you say.

Mr. Ward: Your associate says five inches, so I will agree with him and you agree with me.

Q Then, there is a platform, is there not? A Yes.

Q A board between the two wheels? A Yes.

Q And about how high off the ground is that board? A Not very high.

Q Can you indicate about how high? A About half the depth of the wheel, I could say.

Q Two or three inches. And that board is about how long? A It is about that long (indicating).

Q A couple of feet. And then there is something, a post, that comes up from the front? A Yes; that is what they steer with.

Q And the children steer with that, don't they? A Yes.

Q Will you just tell the Court and jury how she used her foot, how your daughter used

her foot on the back wheel as a brake? A Why, she put her heel up against the wheel and that would check the speed.

Q And how fast could she go under those circumstances? A She could not go very fast, just fast enough to keep the scooter from falling over.

Q Well, can you give us any idea how fast that was? A Why, it would be about a fast walk, probably.

Q As fast as what? A As fast as a fast walk.

Q On these different occasions before when you saw your daughter come down that hill and turn, will you just describe to the Court and jury how she came down the hill and how she turned into West Shore avenue? A Why, they go on down to the bottom.

Q And did what? A Well, she would go down, and she would look up and down the street, and then she would make her turn around, she would always be quite close to the sidewalk.

Q And how far out from the curb would she turn when she turned? A She always turned very close. Of course, there was no two times, I suppose, that it was exactly the same.

Q Did she ever go out as far as the middle of the street when she turned?

Mr. Cummins: I object.

A No.

The Court: I sustain the objection.

Mr. Ward: Of course, that was asked upon cross examination with reference to

these turns, sir. Counsel asked that, especially, whether or not she had ever seen her daughter turn.

The Court: I know; but we are going into collateral matters now. What we are interested in is what happened on this day.

Mr. Ward: Of course, the door was opened.

The Court: But you could have objected.

Mr. Ward: I did not wish to object. I did not wish to open the door.

The Court: I will sustain the objection.

Mr. Ward: Your Honor will permit an exception.

Q Now, you were asked by Judge Coult about cautioning your daughter. Will you tell us how you cautioned your daughter about going down that hill? A Why, I told her to be careful and to watch for automobiles before she turned into the road, she was always to be careful, and I told her always from the time she was a tot that she must never cross the street, when she crossed, before she looked up and down a street, any street.

Q And when you saw her going down the hill on these different occasions that you were asked about on your cross examination, did she, or not, so far as you saw, follow your instruction? A Yes, she did.

Mr. Ward: That is all.

Violet Hummers, recalled, re-cross.

Re-cross examination by Mr. Coult.

Q Where is the scooter? The scooter?

Q Yes. A Is at present at Ridgefield Park.

Q What? A The scooter is in the cellar of Ridgefield Park, of the house in Ridgefield Park.

Q And you are going home tonight? A Not to that house, no.

Mr. Ward: Do you want it?

Mr. Coult: Yes, I think it would be a good thing to bring it here tomorrow.

Q Can you bring it here tomorrow? A Sure, I can bring it.

Q And you say your daughter used to keep her heel on the hind wheel? A She did.

Q And that kept the scooter from going too fast? A Absolutely.

Q And did you ever see her heel come off the hind wheel? Did you? A No, I did not.

Q You never did. Always held it on? A Yes, she would take it off.

Q Take it off, and then? A After she was down there, if she kept her foot on the— her heel on that, she would have fell off, the scooter and all would fall off.

Q Why? A Because it would not be going. How could it be going if she was stopping the wheel?

Q I see. So that she would put her heel on the hind wheel and reduce the speed of the scooter, and then take her heel— A When she was a little grade there, she did that.

Q Didn't she— A This grade right here, this first grade.

Q She did not use her heel when she was going around the corner? A Well, I wasn't right alongside of her on another scooter and watched her when she put it on and took it off.

Mr. Coult: That is all.

By Mr. Cummins.

Q In going down that hill, it was necessary for her to put her foot on that rear wheel, was it? A It would not be necessary, no, only that she was cautious.

Mr. Cummins: That is all.

Mr. Ward: That is all.

(Witness excused.)

WILLIAM S. HUMMERS, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q You are the father of Violet May— A Yes, sir.

Q —Hummers, and one of the plaintiffs in this suit? A Yes, sir.

Q Mr. William S. Hummers? A That is correct.

Q Do you remember the date when this accident took place? A I do, sir.

Q The 5th of October, 1927? A I remember the evening of it, yes, sir.

Q I mean, you remember the occurrence? A Yes, sir.

Q For how long a period of time before that had you been living on Walnut avenue? A Over a year. I could not say exactly how long.

Q Were you familiar with that neighborhood? A Very much so.

Q Exhibit P. 1, does that, or not, disclose Walnut avenue and it approach to West Shore avenue as it looked on the 5th of October, 1927?

Mr. Coult: Just a moment. Except the foliage. You promised me that, you know, when you put those in.

Mr. Ward: I said, subject to whatever proof you might have about the foliage, of course. There is no question that this picture was not taken at that time. There is no picture—there is no question but what this picture was taken about two months—

Mr. Coult: It was very clearly understood and stipulated between the counsel and myself in open Court that those pictures were to be admitted without proof on the understanding that they represented the situation as it was there, except the foliage.

Mr. Ward: Certainly, sir. And I say, two months ago these pictures were taken; but surely Judge Coult does not expect me to be restricted to the proof that the foliage was different at that time.

Mr. Coult: No. I am objecting—

The Court: I think we said that we would admit them to show the place in the pictures, or, rather, the foliage, and so forth, as represented, ought not to be taken as to be true from these pictures; now, that is a matter of proof insofar as the offer is

concerned; it did not relate to the trees or the foliage.

Mr. Ward: If that was Judge Coult's understanding, of course, I would not traverse upon it.

Mr. Coult: The Court was stating what the Court's understanding was of it.

The Court: That was my understanding.

Mr. Ward: Well, the thing is this: Of course, I do not suppose it makes any great difference, but I think I have the right to ask him to describe the foliage as it was on October 5th, and then compare it with the situation as disclosed in this picture.

Mr. Coult: There won't be any objection if you try to do that, not from me. But I do object to counsel handing that picture to the witness and asking him whether or not that was a representation of the condition as it was then when he has already stipulated that he would not urge that.

Mr. Ward: I would like my stipulation read, then I think there can be no question about it.

(Previous stipulation upon introduction of photographs read.)

Mr. Ward: Now, with that in mind, do you feel that you do not want these pictures used?

Mr. Coult: Oh, no; I am not talking at all about not using the pictures. I am objecting to a question asked of this witness which was this, as I recall it, as nearly as I can repeat it: Does or does not the situation shown in this picture represent the condition that was present on the day of

the accident? After Mr. Ward has stipulated that with me, that it did not.

The Court: The difficulty about it, those pictures are in.

Mr. Ward: All right, sir.

The Court: We are not concerned with the admissibility of the pictures. We cannot very well ask a witness to testify to something which, by virtue of a stipulation, is admittedly not shown on the pictures. That is your difficulty.

Mr. Ward: All right, sir.

Q What was the condition of the foliage at that time, Mr. Hummers? A The leaves had begun to fall, possibly, two weeks before that. They generally do about the 15th of September.

Q I am now referring to the foliage on the shrubbery and trees on the northeast corner of Walnut and West Shore avenues. A There was very few leaves left on the trees, in fact, those leaves fell early; they are white basswood.

Q With the conditions as they were on the 5th of October, 1927, coming down Walnut avenue going westerly, upon Walnut avenue, at what place upon Walnut avenue could you first get a view of West Shore avenue to the north? A Why, you would have a view of West Shore avenue to the north at any time, coming down Walnut, because there is an empty corner there.

Q Well, for how great a distance was that corner empty? A That corner is empty for —it must be exactly 140 feet, 140 feet. There is a 100-foot lot leading in along Walnut avenue

that faces on West Shore, and a 40-foot lot on the west side of the street, 140 feet.

Q And in the next line to the vacant space is what? A Is the back end of my house lot, another 40-foot lot.

Q What is the first building on Walnut avenue on the northerly side? A It is a house, a one-family house.

Q Whose house? A I really do not know who owns it.

Q How far from Walnut avenue, east of Walnut avenue, was that house? A Over 200 feet. I would not want to say exactly.

Q When you come down to that house from that—when you pass the house, from that distance down, or from that place down, what was there, if anything, to obstruct your view? A Nothing. Nothing except the trees there, and they are very small, and very small bushes. These trees were very small trees. These are merely shrubbery, that is all it amounts to.

Q And on the 5th of October, 1927, with the conditions as they were at that time, keeping in mind the foliage on the trees and bushes upon the northerly side of Walnut avenue, how far could you see up West Shore avenue towards north? A You could see at least two blocks up.

Q And what was the first block? A The first block is Beechwood, and the next block is Elmwood.

Q Are you also familiar with the situation coming down West Shore avenue coming south towards Walnut avenue? A Yes. I have driven down it many a time.

Q Coming down West Shore avenue, going south towards Walnut avenue, for how far up do you have an unobstructed view of Walnut

avenue? A You could see at least two houses on the south side of the street without any difficulty, coming down from where the street first begins to widen, and that is three blocks up.

Q Three blocks up? A Yes, sir.

Q When you were three blocks up on West Shore avenue going south, how much of Walnut avenue can you see? A I was referring to Walnut avenue, and you could see at least two houses up on the south side.

Q Which would be the side upon which you live? A Yes, sir.

By the Court.

Q Do I understand, riding in a southerly direction on West Shore avenue, when you were two blocks away from Walnut, you could see into Walnut street? A Certainly. There is nothing there to stop you, Judge. By that I mean you could see across the lots into Walnut street; you could not see around the corner; you could see across the lots into Walnut avenue.

Q And that would be Beechwood or Munn? A Not Munn. It is Elmwood. It has been changed. It used to be Munn. It has been changed to Elmwood.

Q What is the street north of Munn? A The street north of Walnut is Beechwood, and the street north of Beechwood is Elmwood.

Q When you are at a point at Elmwood, you could see into Walnut, you say? A Yes, sir.

Q That is, looking across? A Across the lots, correct, sir.

Q How far would you say you could see up Walnut street? A You can see two houses on the south side of the street. The first house is possibly 200 feet from the corner, and on

the sixty-foot plots, I believe that would make it close to three hundred fifty feet, roughly speaking.

By Mr. Ward.

Q I show you P. 1. Does that disclose the corner of Walnut avenue and West Shore avenue? A Yes, sir.

Q The northeast corner? A Yes, sir.

Q P. 3. Does that show West Shore avenue looking up towards Walnut avenue? A That shows West Shore avenue looking south to Walnut avenue, looking down.

Q And does that show the view across the lots? A It does. It is taken well from the right-hand side of the street.

Q The second house to which you refer, is that the second house? A That is correct, sir.

Q Which you could see looking across lots? The pavement on both streets, was it not? A Very good concrete.

Q How wide was West Shore avenue? A I believe it is a fifty-five foot street, I am almost sure, divided into three sections.

Q A concrete roadway? A Concrete from curb to curb.

Q How many sections of concrete were there running along there? A Three sections of concrete, practically even.

Q And divided by what? A I said about fifty-five; that would give you about seventeen feet each.

Q About seventeen feet each? A That is about right.

Q What was there between each section? A Just what do you mean?

Q Well, what divided them, if anything? A Oh, there is the general division, there is in all concrete streets, a little strip of tar about an eighth of an inch wide.

Q And are those the marks that we see on the pictures, P. 3 and P. 4? A That is right. Those are the divisions in the general concrete streets.

Q And those divisions were there at the time? A (No response.)

Q When did you first learn about this accident? A I was coming along Palisade avenue, turning into Walnut avenue, when I first saw a Public Service truck, and my wife was on it, and that was when I first learned of the accident.

Q How long after the accident was that, about? A It must have been an hour.

Q Did you make any examination of the situation at the corner of Walnut avenue and West Shore avenue? A Not immediately. Of course, my first thought was the child.

Q But, thereafter, did you? A Yes.

Q When? A That evening late, as much as we could.

Q What did you find there? A We found skid marks on West Shore avenue.

Mr. Coult: I object to that.

The Court: It is not responsive, and then, you ought to fix a time.

Mr. Ward: He said about an hour.

The Witness: About dusk.

Mr. Coult: That evening after he went home and came back in the evening and found skid marks on the street.

The Court: It is a little bit remote.

Mr. Ward: I intend to connect it up. They were the only skid marks there. If these skid marks were observed by others immediately after the accident, they were the only skid marks there.

The Court: Well, if you can show that the marks were made by this truck, by evidence from which we may infer that as a probability, all right.

Mr. Ward: Yes, sir. That is what I intend to do, sir.

Q They were the only skid marks there?

Mr. Coult: That question is objected to.

The Court: I think, from the likelihood of it being remote, unless it is connected up, I will exclude it at this time.

Q When did you first see your child after the accident? A At Doctor Dickson's office.

Q Did you ever have any conversation with the defendant, Mr. Ankelein? A I met him possibly a week later. I do not remember, a week or a few days later. Quite a good deal of excitement, as you may realize. Maybe three days or a week later. And he expressed great sorrow for what had happened. That is all the conversation.

Q And that was all the conversation? A That is all. I realized his situation and he realized mine, and that is all the conversation.

Q Do you recall the conversation *in toto*, or all the conversation? A I believe Mr. Ankelein came to me and said, "I am awfully sorry." He introduced himself to me.

Mr. Coult: Just a minute. I object to this on behalf of the defendant Public Service and Gas & Electric Company.

The Court: This statement is not intended as part of the *res gestae,* is it?

Mr. Ward: No, sir.

The Court: So, whatever statement is made which is not within the scope of the authority of the agent, if he were an agent, is not binding on the defendant company.

Mr. Coult: And I want to ask your Honor to take care of that in the charge.

The Court: Yes.

Mr. Ward: Well, inasmuch as Mr. Hummers is going back on the stand, I won't press that at this time either, then. I will put him back on the stand.

Q Where did you first see your child after this accident, Mr. Hummers? I think I asked you that question. A At Doctor Dickson's office. My wife and I went there immediately.

Q And that was before the child was taken to the hospital? A Yes, yes. Doctor Dickson did not recollect this morning, but he took the child with my wife in the same car to the hospital, and I followed up in my car.

Q I see. A We helped the child in the car.

Q You visited your child during the period of time it was in the hospital? A Certainly.

Q Did it suffer any pain, in your opinion? A You bet she did, plenty.

Mr. Ward: I do not wish to take up the time of your Honor and the jury in going

all over these facts again. I do not think there is much dispute about them, is there, Judge Coult and Mr. Cummins, about what happened afterwards, the operations, and all that? I do not wish to bore the jury by going into all of that again. Is there any dispute about that?

Mr. Coult: Well, of course, I do not want to be put in a position of admitting anything, but I do not suppose we are going to seriously dispute these injuries that were disclosed on these X-ray plates were present and that this girl suffered pain; I do not doubt it a bit, as far as I am concerned.

The Court: You cannot very well contradict it.

Mr. Coult: I not only could not, but I would not.

Mr. Ward: That is true as to you, also?

Mr. Cummins: That is true as to me, also.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q Now, Mr. Hummers, I want to show you some photographs which I think you have already seen, or you have seen some of them. A Not before I came here.

Q And I call your attention to P. 4. Now, that is a good, clear photograph, isn't it, in your opinion? A Yes. I think it is a very good photograph.

Q And that shows the physical situation at the foot—at the junction of Walnut avenue and

West Shore avenue? A Yes; but it don't show at the junction; it shows it quite a ways from the junction, a block away, which is taken at Beechwood.

Q It shows the junction in the picture? A Yes, in the distance, correct.

Q Now, that photograph is taken from somewhere on the west side of South Shore avenue, isn't it? A You mean to say West Shore avenue?

Q From West Shore avenue. And that gives you a view across the corner lot on the northeast corner into Walnut avenue? A Certainly.

Q And that is the view that you were describing to his Honor when you said you could see across the vacant lot, isn't it? A That is correct, that—and, of course, you would not be from that angle; you can see five lots from up there, but not two.

Q I understand, I see them. And you see those houses through the trees that are on the corner lot, don't you? A Very true; yes, sir; the sidewalk and street.

Q Look at it on this photograph. You see them right through the trees, don't you? A Certainly. You see above the trees as well as through the trees, note that.

Mr. Ward: Mr. Hummers, I cannot hear you.

Q But, looking at the street itself, I mean, on Walnut avenue, you look at that through the trees on the corner lot? A Yes, you can see Walnut avenue through the trees.

Q And, of course, when this photograph was taken, there were not any leaves on those trees at all, were there? A No, evidently no.

Q Yes. A There is no leaves on the trees in the picture.

Q Now, when those trees are in foliage and the leaves are on there, can you, from the same position that you have here, see Walnut avenue through them? A You can see at certain intervals through it, certainly; in June or August, when the trees are in full foliage, you can see at certain intervals; there is only a few trees.

Q And isn't there foliage that grows in that lot in summer time, shrubbery and weeds? A Very little. There is a lot of paths through there, and people use it continuously, so the grass does not grow there on that corner of that lot in the summer.

Q Let me ask you again, in the summer time, in the summer before this accident happened, didn't the grass grow, and the weeds, a couple of feet tall on that corner lot? A I do not know why you insist it is a couple of feet tall.

Q I am asking you, how high did they grow? A They grow about a foot, as the grass usually does.

Q Then, you would say, in the summer, there were grass and weeds about a foot high? A Yes.

Q In that corner lot? A Absolutely.

Q And on the— A In the summer.

Q On the 5th day of October, were the weeds and the grass still there? A They were there, but they had summer usage, kids romping through them, dogs romping through them, naturally, they would shrink themselves, and curl over, see?

Q By the 5th of October, the natural herbiage you would find on the vacant lot you are looking at now would have shrunk somewhat on account of use? A That is correct.

Q How many of the leaves do you think that ordinarily grew on these trees on the corner were off on the 5th day of October? A I could not count them. I do not know. Possibly a third or a half of them.

Q There must have been a lot of those leaves on the ground by that time? A Surely, there would be a lot, proportionately with the number of trees.

Q And had you had frost on the 5th of October? A I do not remember. I do not live on a farm. I do not remember.

Q Now, Mr. Hummers, you do not want to say, do you—

Mr. Ward: Well now—

Q Mr. Hummers, do you want to say under oath that the leaves were off of the trees, generally, on the 5th of October? A I do.

Mr. Ward: I object to the form, sir, of that question, "do you want to say under oath?" Of course, all this is under oath.

The Court: I sustain the objection.

Mr. Coult: Exception.

Q Do you wish to testify that on the 5th of October there were one-third of the leaves off of the trees? A At least one-third of the leaves.

Q Now, do you think that that condition prevailed generally in that locality? A I be-

lieve it prevailed generally throughout northern New Jersey, absolutely. I am not just picking out one street.

Q Now, as a matter of fact, isn't it true that the leaves had not even begun to turn by the 5th of October? A No, it is not.

Q Do you know kind of trees these are in this lot? A I do not know what they are. They are basswood or dogwood, or something like that. Just weeds. They are not trees. They are weeds. If we cut them down, they continue to grow up again.

Q Now, I show you this photograph, P. 2, and I direct your attention to what appears to be some kind of vegetable growth in that corner. Do you call that a weed or a tree? A I call that a shrub of some sort. It is really not a tree. No child could climb up that tree.

Q You do not call any vegetation a tree unless a child could climb it? A I would not limit it to that, absolutely not; but it is not a man-sized tree, absolutely.

Q What do you call these other affairs all over these lots here? A Little bits of stinkweeds would cover it, probably.

Mr. Coult: That is all.

Mr. Ward: That is all.

By Mr. Cummins.

Q Just one question, please. Mr. Hummers, what kind of trees are those in the corner? A I am not a botanist; I do not know.

Q Isn't it a fact that during the Indian Summer the leaves are turning red and all colors? A I have heard so; that is correct.

Q And fall off. And isn't Indian Summer after October 5th? A Not aways, no. Indian Summer varies considerably.

Q But isn't it the latter part of October and early November that the leaves start turning red? A Not necessarily, no. Indian Summer—

Q How about this particular year? A I do not remember that particular year.

Q Oh, you do not remember.

Mr. Cummins: That is all.

By Mr. Ward.

Q Do you know anything about the frosts that year? A If I had an almanac, I might be able to assist you.

Q You have not hay fever, have you? You do not keep track of the frosts.

Mr. Ward: That is all, Mr. Hummers.

The Witness: Very well, sir.

The Court: We will adjourn until tomorrow morning.

RECESS.

Hackensack, New Jersey,
May 9, 1929.

TRIAL RESUMED.

SECOND DAY.

The Court: We will proceed with this case.

Mr. Ward: Mrs. Cummins?

OLGA CUMMINS, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q Where do you reside, Mrs. Cummins? A At 25 Beechwood avenue.

Q Were you living there on the 5th of October, 1927? A Yes, sir.

Q And that is how many blocks from Walnut avenue? A Just one block from Walnut avenue.

Q And about how far from West Shore avenue? A A half block.

Q On which side of—you said Beechwood, I believe? A Yes.

Q On which side of Beechwood avenue do you live? A On the left-hand side going up from West Shore avenue.

Q That would be the northerly side, wouldn't it? A Yes.

Q Do you remember the 5th of October, 1927? A I do.

Q What was the first that you knew of any accident? A Well, I was in the kitchen preparing supper, and I heard the noise and the squealing of the brakes, so I went through to the

porch, the front of the house, and I opened the door, and I looked out, and I could not see anything, and I happened to look at the far side of Walnut avenue, a truck was stopped, and I saw two young men running from each side of the truck, back; and then, just that they picked up a child in the middle of the street.

Q The screech of the brakes that you heard, can you indicate the character of that? A No, I could not, only that the noise was terrible.

Q When you went out to the front of your house on the porch, I believe you said— A Yes.

Q —in which direction were you facing then? A Well, I was facing toward Walnut avenue.

Q And can you, or not, or, did you, or not, have a plain and unobstructed view of the corner of Walnut avenue and West Shore avenue? A Oh, I can see very plain, summer or winter.

Q And that, I believe you said, was a block away? A Yes.

Q At an angle? A Well, it would be about a block, not quite a block and a quarter, or at an angle.

Q The truck, whereabouts was that? A Well, that was on the far side of Walnut avenue; that would be going south, I believe.

Q Was it past Walnut avenue, or not? A Yes, it was. The tail end of the truck was on Walnut avenue.

Q And the child to whom these men ran back, where was that child? A Well, it was a little turned to the right of Walnut avenue.

Q I do not quite understand what you mean by that. A Well, Walnut avenue is about a block from where I am, and they had to cross

the street to run back to Beechwood avenue where I live to get the child. It was coming toward Beechwood avenue where the child was laying, but it was nearer to Walnut avenue.

Q Than it was to Beechwood? A Than it was to Beechwood.

Q Can you give us any idea how far past Walnut avenue in your direction, which would be north, the child was? A No. I could not exactly, because, I tell you why: when I saw them pick up the child, I did not see them hit the child, but when the two men went to pick up the child, I thought it was my little girl, and I fainted.

Q Do you know where the child was in the roadway? A Well, it was more to the sidewalk, which would be to the left; there is no sidewalk on the opposite side.

Mr. Ward: Cross examine.

By the Court.

Q Mrs. Cummins, you say the left; which way was this truck going, north or south? A It was going south, toward the tunnel.

Q Going south? A Yes.

Q And you saw the truck stop, you say? A I did not see the truck stop. I come to the door while it was stopped.

Q And at that time, you say that it had crossed Walnut street so that the tail of the truck was at the south side of Walnut street? A Yes. Not coming toward my home, Beechwood avenue; I am on the north side.

Q Yes. But you say the truck had cleared— A It had cleared Walnut avenue.

Q —Walnut avenue? A Yes.

Q And then, where was the child when it was picked up, between Beechwood and Walnut? A Oh, Walnut avenue, it was not—it was nearer to Walnut avenue than it was to Beechwood avenue.

Q And on what side of the street, the side toward the sidewalk, or the railroad? A The sidewalk.

Q The sidewalk? A Yes.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q Walnut avenue does not cross West Shore avenue, does it? A Walnut avenue does not cross, no, it does not. It cannot cross.

Q So that it dead-ends there? A Yes.

Q It comes in from the east, and there are no cross-walks there, are there? A No, there isn't any.

Q On West Shore avenue? A It is a dead-end street; West Shore avenue. The railroad tracks are below.

Q And West Shore avenue is paved with concrete? A Yes.

Q And there are no sidewalks? A There is sidewalks on the left-hand side going south.

Q I meant to say cross-walks; there are no cross-walks in the line of Walnut avenue across West Shore avenue? A No.

Q And your observation that you made was between the time that you got out and saw the car, saw these men pick up the girl, and the time that you fainted? A Yes.

Q And you did not make any further investigation after you came to? A How could I? I couldn't.

Q You did not. Now, when you say that the truck had crossed Walnut avenue, you are estimating the distance by extending the line of Walnut avenue across West Shore avenue? A Well, you see, my house is the first house on the left-hand side on Beechwood avenue, and I can look clean through.

Q You can see down there? A Yes.

Q But, I say, in telling the Court and the jury where this truck was, you saw it across Walnut avenue? A Yes.

Q You are estimating its position by your idea of the extension of the lines of Walnut avenue across West Shore avenue, aren't you? A Yes. It is across, as I say. Here is Walnut avenue, and this is the nearest side to Beechwood avenue. Well, the truck was not stopped there. It had crossed Walnut avenue.

Q But you are making that statement that it had crossed Walnut avenue— A Yes.

Q —by estimating where the line, the south side of Walnut avenue, would cross West Shore avenue provided it continued, isn't that true? In other words, there is nothing on West Shore avenue to indicate where Walnut street is on the right hand side, is there? A What do you mean?

Q Well, I mean there is no street on that side, there is no sidewalk or no curb lines, or anything, to show where Walnut avenue would be on the right hand side of West Shore avenue if it had crossed it, is there? A I do not quite get you.

(Conference between the Court and counsel off the record.)

Q See if I can make myself clear, madam. On the left hand side of West Shore avenue going south, these various streets come in, Beechwood avenue, Walnut avenue, and so on, down the street? A Yes.

Q Is that right? A Yes.

Q Now, on the right hand side of West Shore avenue, there is an unbroken curb line right straight down the street, isn't there? A An unbroken curb line.

Q Those streets do not cross, nor do they show curb lines where they would cross? A No, they do not. You cannot cross there.

Q You have got a straight curb line on the right hand side of West Shore avenue all the way down, haven't you? A Yes, on the left hand side, is that what you mean, on West Shore avenue?

Q I mean on West Shore avenue— A Well, West Shore avenue—

Q —going south? A —continues all the way from Fort Lee road right to Ridgefield Park, Mount Vernon street; on the left hand side, sidewalks all the way through, that is about all I know, and the railroad track continues down to Fairview avenue, with the tunnel, and then that goes up a little further on, continues.

Q What I am asking you is this: on the right hand side of West Shore avenue, looking down in the direction in which you were looking— A Yes.

Q —you have an unbroken curb line all the way with nothing to indicate where Walnut street or Beechwood avenue or any other one of these streets would go if it crossed, isn't that true? A (No response.)

Q Well, I show you P. 2. A Well now, this is Walnut avenue, and here is where—this is where the truck stopped, on this side of the street (indicating).

Q All right. But what I am getting at is this— A And here is where I live, over there (indicating).

Q I understand.

Mr. Ward: May I have indicated for the record—

A This is where the truck stopped (indicating) and I saw the tail end of the truck.

Q You are indicating now a point on West Shore avenue opposite the south sidewalk line? A Yes.

Q Curb line? A Yes.

Q Is that right? A Yes.

Q All right. Now, what I am asking you is this: There is nothing on this right hand side of the street— A Nothing at all.

Q —or the east side of the street, to show where the extension of the sidewalk lines of Walnut street would come, is there? You can see, madam, here is an unbroken curb line across the face of this street, isn't there? A Yes.

Q All right. Now then, when you sit on your porch on Beechwood avenue and looked south down West Shore avenue and located this truck, as you say, across Walnut street, you were guided by your estimate of the points on that curb line that would be opposite the two corners of Walnut street, weren't you? A Well, I do not know. All I can say, I could see the child so plain, or the man so plain, as though they were right on the corner of my block; there

was nothing to obstruct the view that I could not see. I could even see when they ran back and picked the child up.

Q Yes. A But I could not tell you definitely how near to the left the child was laying unless I was right there, but I did not get any further. But I did see—I would never see the child there if it was not that the two gentlemen ran out from each side of the truck.

Q Now, the truck at that time was up near the curb on the right hand side of West Shore avenue? A Not the right hand side; he was near the left hand side when he stopped.

Q You mean to say that he stopped on the left hand side of West Shore avenue? A Well, he was nearer to the left hand side. He wasn't near the right hand side of West Shore avenue, because the right hand side would be nearer to the railroad tracks, and he was nearer to the sidewalk.

Q All right.

Mr. Coult: That is all.

Mr. Cummins: That is all.

(Witness excused.)

Mr. Ward: Eugene Travers?

EUGENE TRAVERS, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q How old are you, Eugene? A Ten.

Q Whereabouts do you live? A Bogota, New Jersey.

Q On what street? A Walnut.

Q Walnut avenue? A Yes.

Q Were you living there in September? A Yes, sir.

Q At the time Violet May Hummers was hurt? A Yes, sir; I was.

Q Do you remember the time when she was hurt? A Yes.

Q What kind of a day was it? Do you understand what I mean by that? If you do not understand, you just tell me, if you please.

The Court: How was the weather? Was it raining or was it clear?

The Witness: It was clear, very clear.

Q Whereabouts were you when this accident happened? A I was across the tracks with Billy Hummer.

Q With whom? A Billy Hummer.

Q How close were you to Walnut avenue? A About—

Q Were you a block away, two blocks, three blocks, or less than that? A About two blocks away.

Q Two blocks away. In which direction were you? Do you know what I mean by that? A West. West and north. Between north and west.

Q Now, you know where Fort Lee— A Yes.

Q —road is? A Yes.

Q And you know— A I was pointing—

Q And you know where Ridgefield Park is? A Yes, I do.

Q Now, were you nearer to West Shore road, or nearer to Ridgefield Park? A West Shore?

Q I beg your pardon. I should say Fort Lee road. A Nearly Fort Lee road.

Q Now, you say you were about two blocks away? A Yes sir; I was.

Q Do you know what street is near where you were? A Elmwood, Elmwood.

Q Elmwood? A Yes, sir.

Q What were you doing there, Eugene? A I had been over to the brook with Billy Hummer.

Mr. Ward: (To the jury) Can you ladies and gentlemen hear?

Q Now, talk a little bit louder. A I was over to the brook with Billy Hummer.

Q What was the first that you knew about what happened, the accident? A Well, I was down on the bank, and I heard a grinding of brakes, and then I heard somebody yelling. Then I told Billy that somebody was hit. So I ran up to the top of the hill, and then I saw this car, and it stopped over on the other side, across Walnut.

Mr. Ward: I could not get that, sir. Might I have it repeated by the stenographer?

(Answer read.)

Q Did you see Violet May? A I did not see her, but I saw—I saw the car, with the two men run out on each side.

Q Now, where was this car that you saw? A It was over on the left hand side, the left hand side.

Q Was it nearer on the side nearer the railroad tracks, or across from the railroad tracks? A Nearer to the left.

Q What side would that be, right, do you mean, or left, going which way? A Going east, going east.

By the Court.

Q Now, just a minute. Was this truck nearer to the railroad, or nearer to the sidewalk? A Nearer to the sidewalk.

By Mr. Ward.

Q You say to the sidewalk? A Yes, sir.

Q Was the truck standing still or moving— A Yes, sir.

Q —when you saw it? A It was standing still.

Q And, with reference to, or, when you think of Walnut avenue, where was it? A Well, it was in back of the truck, behind the truck.

Q Walnut avenue was in back of the truck? A Yes, sir.

Q Now, did you see Violet May after that? A No, I could not see her, because there was a freight car there.

Q I see. What did these men do? A Well, I saw them get out, one man on the other side, and the other man that ran back, and then I didn't see them because there was a freight car in the way.

Q I see. What did you do then, Eugene? A Then, Billy and I ran across the tracks, and then we saw Violet May try to get up.

Q Where did you go? A Then Billy picked the scooter up, picked the scooter up, and then—

Q Where was the scooter? A It was laying on the left hand side, near the left.

Q And did you see Violet May at any time? A Yes, I saw her when the men picked her up.

Q Whereabouts was she? A They had her in the car.

Q Oh, they had her in the car? A Yes, sir.

Q Did you see her at any time on the ground, or had she already been picked up when you saw her? A She was already picked up.

Q Did you see any marks there, Eugene? A Yes, sir; I did.

Q Where were those marks? A They were over on the left hand side, the skid marks, black skid marks.

Q Can you tell us anything more about those marks, what kind of marks were they? A Well, they were black, like where the man had left off his brakes.

Q What? A Left his brakes off, leave them off, and put them on again, you know. They were black.

Q Left them off and put them on again? A Yes.

Q Where did those marks start? A They started up near Beechwood, nearer Beechwood.

Q Where did they end? A They ended down near Walnut avenue.

Q Were there any other cars there excepting— A No.

Q —these marks about which you have told us? A There was just those black skid marks.

Q And how many were there? A Just one great big long one—

Q Well, was there just— A —where they left off, the brakes left off.

The Court: Never mind that. Never mind what caused it. Just tell us what you saw there.

The Witness: Well, I saw these black skid marks.

Q Can you tell us any more about what kind of marks they were? A They were black. They were very black, the skid marks were.

Q What did you do then after you saw— A Well, then—

Q —Violet May in the car? A Then we picked the scooter up, and we went on up to the house.

Q What is that? A We picked the scooter up, and we went on up to the house.

Q And Violet May was taken away, I believe? A Yes, sir; she was.

Q Did you see any other children in the street? A Yes, I saw quite a lot of other boys, and they were playing ball, but they were all up where the accident had happened.

Q Playing ball? A Yes, sir; they were.

Q You knew Violet before the accident, didn't you? A Yes, sir; I did.

Q Have you seen her since? A Yes.

Q And did you ever play with her before? A No, I didn't. I only played with Billy.

Q What? A I only played with Billy.

Q Billy is her brother, isn't he? A Yes.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q You say you were down by the railroad track? A Yes, I was.

Mr. Ward: Pardon me, Judge. Something I omitted, with his Honor's permission.

Eugene Travers, for Plaintiffs, cross.

By Mr. Ward.

Q Do you know how long those skid marks were there? A About two weeks.

Q And were there any other skid marks there during that time? A No, there wasn't.

Q Thank you.

By Mr. Coult.

Q You say you were down by the railroad track? A Yes, sir; yes.

Q And how far is the railroad track from West Shore avenue? A About two blocks, two blocks.

Q You do not mean that the track is two blocks away from West Shore avenue, do you? A Well, that length, that long.

Mr. Coult: What was that answer?

(Answer read.)

Q No. I mean how far is it, son, from West Shore avenue to the railroad track?

Mr. Ward: Now, I object to that question. West Shore avenue—

Mr. Coult: I will withdraw it, and put it this way.

Q How far apart are the railroad tracks and West Shore avenue at the place where you were playing? Can you tell us, about?

By the Court.

Q Just a minute. Do you know where the railroad tracks are? A Yes, I do.

Q Do you know where West Shore avenue is? A Yes, sir.

Q If you were on the tracks, how far would you have to walk to get on the street? A Well, I would have to run across four tracks down a bank.

Q Down a bank? A Yes, there is a bank there.

Q Then, when you would walk down the bank, you would be on West Shore avenue? A Yes.

By Mr. Coult.

Q And where was this freight car, on the tracks? A Yes, sir; it was on the track.

Q And that freight car was placed on the track so that you could not see where Violet May was lying on the street— A Yes.

Q —is that right? A Yes.

Q So, you were on the other side of the tracks away from the street, weren't you? A Yes, sir.

Q How far on the other side of the tracks were you? Can you point out something here in the court room to show? A (No response.)

Q Can't you give us any idea how far you were on the other side of the track away from the avenue? A How far?

Q How far were you on the other side of the track away from the avenue? A I was about from here up to the lights up there (indicating).

Q These lights in the back of the court room? A Yes.

Mr. Coult: And that is about how far, Mr. Ward?

The Court: I will give you that. (Chart produced.)

Mr. Coult: About 30 feet. It says 31.2.

Q And when you saw the truck, which side of the freight car did you look, to the right of it or to the left? A I looked to the right.

Q To the right? A Yes, sir.

Q And how far was the freight car away from you? A That was over on the tracks.

Q And how far was it away from you? A (No response.)

Q Can you point out anything here? A What?

Q Can you point out anything in the court room to show us how far away it was? A It was about from the other side of the back seat up to the lights from the tracks.

Mr. Coult: What was that answer?

(Answer read.)

Q What do you mean? Do you mean from the back of these seats here (indicating)? A No. From the tracks.

Q To what lights? A To about from here to those lights, where I was.

Q Oh, I see. It was about that far from the tracks? A Yes, sir.

Q Is that right? A Yes, sir.

Q Then, the freight car was about twice as far as from here to the lights away from you, is that what you mean? A Yes.

Q You were about that far away from the track, and the freight car was about that much further down, is that right? A (No response.)

Q Then, what were you doing just before you heard something? A Well, we were sailing boats in the brook.

Q And you heard a noise? A Yes, sir. I did.

Q When you heard the noise, you looked? A Yes.

Q And when you looked, you saw this truck? A Yes, sir.

Q Did you see the men run back from the truck? A Yes, I saw two men run back.

Q Then what did you do? A Then we ran over there.

Q Well, by the time you got there, was Violet May in the car? A They had her right on the running board there, on the step.

Q And you say this was about two blocks—you were about two blocks away from Walnut street— A Yes, sir.

Q —at the time? Have you talked to anybody about this case? A No.

Q Not to anybody at all? A (No response.)

Q Haven't you told anyone about what you knew? A No.

Q You have not talked to Mr. Ward? A Oh, sure.

Q Did you? I see. Is he the only one? Is he the only one you talked to about the case? A Mr. Losche.

Q What? A Mr. Losche.

Mr. Coult: What was that answer?

(Answer read.)

Q That is the gentleman with Mr. Ward? A Yes.

Q You talked to them both together at the same time? A Yes.

Q Just once? A Yes.

Q And to nobody else? A No.

Q And have you talked—when was it that you talked to them? When did you talk to them? A Yesterday.

Q Yesterday? A Yes, sir.

Q Where? A In the office.

Q In whose office? A Mr. Iosche's office.

Q And did you tell them that this truck was on the left hand side of the street? A Yes, I did.

Q How did you come to mention that? A Because it was—I saw it on the left hand side.

Q What? A Because I saw it on the left hand side.

Q And had you ever told anybody else that? A (The witness shakes his head in the negative.)

Q Not anyone? A (The witness shakes his head in the negative.)

Q At the time of this accident, did you see any other automobiles on the street? A Yes, I did. I saw a Ford, a little "coop."

Q Which way was that going? A That was going north.

Q Did it stop at Walnut street? A Yes, it did.

Q Where did the Ford stop? A Right on the corner of Walnut.

Q And how near was it to the truck? A Oh, it was just a little ways from the truck.

Q Were they side by side? A No, they were not. The truck was like over there, and the car was over here (indicating).

Q One was on one side of the street, and the other was on the other side, wasn't it? A No. The Public Service car was on this side, and the—what do you call it? the other car was more to right on the curb, near the curb.

Q The Ford was on the—do you know the points of the compass there? You said something about the east side of the street. When

the Ford came up, it stopped on the east side of the street, didn't it? A Yes, it did.

Q And how near was the Ford to the truck? A That was about from here to that chair right there (indicating).

Q From where you are sitting to the chair? A Yes.

Mr. Coult: That is all.

Cross examination by Mr. Cummins.

Q Will you look at this picture, Eugene? A Yes, sir.

Q Were you east or west of these tracks? A I was west.

Q And two blocks south, is that right? A No, north.

Q Two blocks north, and west of the tracks? A Yes.

Q Now, how were the railroad tracks there, are they level with the ground or are they raised? A They are raised.

Q How high are they raised? Can you tell me? Are they that high (indicating)? A Well, they had a bank about that high (indicating).

Q About that high (indicating)? A Yes.

Q And they run along West Shore avenue? A Yes, yes.

Q What is that? A Yes. No. The railroad tracks ran north.

Q The railroad tracks ran north? A Yes.

Q And were on the west side— A Yes.

Q —of West Shore avenue, is that right? A Yes.

Q And the tracks were that high (indicating)? A Yes.

Q And you were two blocks north? A Yes.

Q And over on the west side of those tracks? A Yes.

Q And you heard a noise? A Yes.

Q And some screaming? A Yes.

Q And you looked? A Yes. I ran up to the top of the hill and looked.

Q Oh, you ran up to the top and looked? A Yes.

Q You looked southeast? A Yes.

Q And you saw— A I saw this truck.

Q —a truck? How close to the east side of—the east sidewalk was that truck you saw? A The truck was about to that chair (indicating).

Q To that chair? A Yes. And then the Ford was along the side.

Mr. Ward: May I have that on the record, about to that chair, about ten feet?

Q Which chair? A The chair where that young man sits.

Mr. Ward: About ten feet?

Mr. Cummins: I should say so.

Q And was this Ford in between that truck and the sidewalk? A The Ford was right near the curb, stopped right near the curb, and then the truck was just a little ways in front of it.

Q And was it between the truck and the sidewalk? A Yes.

Q And how far—what distance was there between the westerly side of the Ford and the easterly side of the truck? A I do not understand.

Q What distance was there between the further side of the Ford going north and the

nearest side of the truck? A They were both near to each other.

Q Now, the Public Service—the truck— A Yes.

Q —did you see that turn around? A No, I did not see it turn around.

Q It was still there when you got there? A Yes.

Q Do you know which way it turned? A No, I do not.

Q You did not see it move at all? A We took it up—the scooter up to the top of the hill.

Q When you came back, was the truck still there? A No, it was gone.

Q It was gone? A Yes.

Q You did not see it go? A No, I did not see it go.

Q Now, with reference to the west side of the track, where is the brook? A The brook is down the bank.

Q Way over on the bank? A Yes.

Q Running along there? A Yes.

Q And you and Billy Hummers were down there? A Yes.

Q Sailing boats? A Yes.

Mr. Cummins: That is all.

Mr. Ward: That is all, Eugene.

(Witness excused.)

Mr. Ward: Robert Delmar?

CARL ROBERT DELMAR, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q Is your first name Charles or Robert? A My first name is Carl, Carl.

Q Carl? A Yes, sir.

Q Where do you live, Carl? A 39 Beechwood avenue.

Q And where were you living on the 5th of October, 1927? A 39 Beechwood avenue.

Q How old are you? A 15.

Q Do you go to school? A No, sir.

Q Are you working? A Yes, sir.

Q And when did you stop going to school? A About a week and a half ago.

Q In what grade were you when you stopped? A Seventh.

Q Where are you working now? A New York.

Q At what? A At Cassidy's, Architectural building.

Q At what are you working? A Cassidy's, Architectural building.

Q Do you remember when this accident happened, Robert? A Yes, sir.

Q Or, Carl? A Yes, sir.

Q Whereabouts were you? A I was between Elmwood and Beechwood, playing baseball.

Q Between Elmwood and Beechwood on what? A On West Shore avenue.

Q What kind of a day was it? A A warm day.

Q What were you doing there? A Playing baseball.

Q With whom? A With some other boys.

Q Who were the other boys? A I cannot remember all of them, but I know one was Vernon Chelson.

Q You remember his name? A Yes, sir.

Q Where were you playing ball? A Between Elmwood and Beechwood, on West Shore avenue.

The Court: On the street?

The Witness: Yes, sir.

Q Were there any other boys beside the group—

Mr. Ward: I will withdraw that, if your Honor please.

Q How many were in your group that were playing ball on West Shore avenue? A Oh, about four or five. We did not have a big team.

Q Were there any other boys playing beside those that were playing on your small team? Any other children playing in the street there? A Not where we were. They were down on Oakwood avenue. There were some down there.

Q Whereabouts? A By Oakwood avenue.

Q And where is Oakwood avenue? A The next block south of Walnut.

Q One block from Walnut? A Yes, sir.

Q Did you see Violet May there? A When do you mean?

Q At any time while you were there? A Well, when the accident occurred.

Q What was the first that you saw of Violet May? A Do you mean the very first?

Q Yes. A When she was hit.

Q Did you see her hit? A Yes.

Q And whereabouts was she when she was hit? Can you tell us? A About the first section east of West Shore.

Q I show you this picture, Exhibit P. 2, and ask you if you can indicate—are you familiar with that picture? A Yes, sir.

Q You have seen it before, haven't you? A Yes, sir.

Q You have talked to me before? A Yes, sir.

Q And to Judge Losche, have you not? A Yes, sir.

Q And will you show us on the picture, please, if you can, about where Violet was when she was hit? A Just about—about there (indicating).

Q Will you put a mark there?

The Court: What mark are you using?

Mr. Ward: Would you suggest an "X," sir?

The Court: Well, there are so many X's, I suppose it had better be an "R".

The Witness: (Marks on photograph.) Just about there.

Q Thank you. That is on Exhibit P. 2. What hit her? A The front left hand bumper or fender.

Q Of what? A Of the truck.

Q Where did the truck—or, what happened to the truck after it struck her? A Well, it went on a little bit south of Walnut avenue to the curb, around the curb.

Q When it stopped, did you see it stop? A Yes, sir.

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Q The truck, whereabouts did it stop? A Well, just about on the left hand, or the sidewalk, side of Walnut avenue.

Q How near to the curb, if you can tell us? A I could not tell you how near.

Q That you cannot tell us? A No.

Q What become of Violet May when she was struck? A I do not understand you.

Q Well, you saw Violet May struck? A Yes.

Q Now, what happened to her? When the truck struck her, what happened? A Well, she fell down.

Q And after the truck stopped, did you see what happened then? A After it stopped?

Q Yes. A Two men jumped out of it.

Q And where did they go? A And they ran back, one man, the driver, I think it was, he looked out, and the other man jumped out and ran back, and the driver backed up and picked her up; or, not the driver, the other fellow picked her up.

Q You were playing north of where this accident happened, weren't you? A Yes, sir.

Q In the street. Did you see this truck before the accident? A Yes, sir.

Q Where did you first see it? A Well, when—I do not know if it came down a side street or where, but I know it passed us.

Q And how was it going when it passed you? A Fast.

Q Did it slacken its speed at all up to the time it struck her, if you know?

Mr. Ward: Or, perhaps, I will withdraw that, if your Honor please.

Q Can you tell us just about the speed of that truck from the time it passed you and what happened up to the time it struck Violet? A Well, I do not know just how fast it went, I could not—I do not know the speed limit it went.

Q Well, can you tell us what happened after it passed you? A Well, after it passed me, it sort of swerved around, you know, and skid.

Q Did you hear any noise? A Yes, the brakes.

Q What? Did you hear any horn blown, or anything of that kind? A It did not blow any horn, not that I heard of.

Q And you heard the noise of brakes? A Yes, sir.

Q What kind of a noise was that? A A squeaking noise.

Q Were there any skid marks there after the accident? A Yes.

Q Where were those skid marks? A They were—not the middle, halfway to the left-hand side.

Q And where did they go? A They went into the curb, the sidewalk.

Q And towards which side? A The east.

Q When you say that they were not in the middle, where were they with reference to the middle? A More to the left.

Q To the left? A More to the left.

Q How long were those skid marks? A I should judge about—

Q If you can tell us. A Oh, about fifty, forty or fifty feet.

Q Did you see what was done with Violet May? A Well, all that I saw, that they picked her up and they turned to the right, and turned towards the railroad, around.

Q And went away? A And went away.

By the Court.

Q Carl, in what part of the street were you playing ball? A Do you mean, where was I?

Q Yes. Where were you? A I was on the —I was left field. That is nearer to the—

Q That would be nearer to the railroad track? A To the railroad.

Q And you were left field. I thought there were only five playing; first base, second base, third base— A We didn't have any second baseman.

Q Did you have a center fielder? A No. We just had a pitcher, the catcher, the first base and a field, and a fielder, a little further.

Q You had a pitcher and a catcher? A Yes, two.

Q You had a first baseman? A Yes.

Q And nobody playing third base? A Well, he wasn't exactly playing third base. He was just around there, you know.

Q Short stop? A Yes, it was sort of a short stop.

Q You were playing left field? A Yes.

Q Therefore, you were closer to the tracks than you were to the sidewalk? A Yes.

Q And when this truck came down, did it ride on the right side or the left side of the street? A The center.

Q The center. Did you pay any attention to the truck as it passed you? A Yes, sir; I had to jump out of the way.

Q You jumped out of the way? A Yes, sir.

Q You were in the center of the street? A No, not exactly the center.

Q Then you were facing toward the north? A North.

Q Did you pay any more attention to the truck after it passed you? A Yes, sir; I watched it a while.

Q All right.

Cross examination by Mr. Coult.

Q Now, you were playing left field? A Yes, sir.

Q And you were over on the side near the railroad track? A Yes, sir.

Q So the batter was south of you, wasn't he? A No. The batter was north. I was facing north.

Q You were not playing right field then, were you? A No.

Q You say you were on the side of the street toward the railroad track? A Yes.

Q Oh.

The Court: You mean the field, from the batter's point of view?

The Witness: The batter is facing south.

Q The batter was facing south? A Yes, and I was facing north.

Q And you were on the west side of the field? A Yes, sir.

Q That is right field, not left field, isn't it?

The Court: That is his point of view. He wasn't viewing it from the batter's side.

A I was batting from where I was.

Q What? A I was taking it from where I was. I was right of the batter, and left field.

Q Do I understand you to say you were playing left field? A Left field.

Q And you were on the side of the road toward the railroad tracks? A Towards the railroad. That is right—

Q And the batter was north of you? A Yes.

Q All right. Maybe they have changed the game since I played it. Now, you saw this truck, I suppose, before it passed you? A What do you say?

Q Did you see this truck coming south? A Yes, sir.

Q And how close were you to the railroad track? A Well, I should say about—about two feet east of the first line, you know.

Q That is, you mean the first dividing line between these strips of concrete? A Yes. On the west side. I was about two feet east of that.

Q Two feet east of the— A Of the west line.

Q Of the west line? A Yes, sir.

Q And you got out of the way to let the truck— A Yes, sir.

Q —go by? A Yes, sir.

Q How far did you have to move? A I moved about two or three feet west of that line.

Q So that when the truck passed you, it was on its right hand side of the road, wasn't it? A No. It was about the center.

Q Well, I understood you to say that there are three strips of concrete there? A Yes.

Q And you were a foot or two east of the westerly line? A Line.

Q Between the two strips, is that right? A That is towards the railroad.

Q Towards the railroad? A Yes.

Q And that you have to move over toward the railroad in order to get out of the way of this truck? A Well, if I had stood there, it would have been about that far away from me (indicating).

Q Well, didn't you have to move? A Well, I didn't want to get hit.

Q Well, if you had stood still, would you have been hit? A Well, I do not know.

Q You said on your direct examination that you jumped out of the way of the truck. Did you? A No.

Mr. Ward: That was by answer to his Honor's question, not direct.

Q Did you? A Well, yes.

Q Now, did the truck continue on in the same part of the street that it was in when it passed you as it went down the street? A No. I think he tried to avoid the accident, and went over to the left.

Q Well, until the accident, until the time of the accident, did that truck keep going straight ahead all the way down the street? A Yes, sir.

Q It did not pull either right or left? A No.

Q So it went right in that same part of the roadway? A Yes.

Q Where you were playing what you say was left field? A Yes.

Q It kept on going right on down to Walnut street and it did not change its course one way or the other until this accident happened, is that right? A I do not understand what you mean.

Q I say, it kept right on going straight until the accident happened, is that right? A Well, yes, pretty near.

Q I suppose you have talked this case over— A Yes, sir.

Q —with these attorneys. And did you ever talk it over with anybody else at all? A No.

Q Nobody but just these two gentlemen? A Well, I do not know what the other man's name is, Senator something.

Q These two gentlemen here sitting at the table here? A Yes. And there was another man.

Q When did you talk to him? A I think it was two or three days ago up in Mr. Losche's office.

Q And had you ever talked to anybody before that? A No, sir.

Q So it was only up to two or three days ago that you talked to anybody at all about this accident? A Well, nobody, outside of these two men here.

Q That is what I meant. And you saw these pictures there at that time? A Yes.

Q And did you point out the place where this accident happened, on these pictures, at that time? A Yes, sir.

Q And had anything been said to you about this truck being on the left-hand side of the road before you had this conversation with them? A Do you mean has anybody told me it was there?

Q Yes. A No.

Mr. Coult: That is all.

Cross examination by Mr. Cummins.

Q You say you were playing ball two blocks north, is that right? A Two blocks, well, it was about a block and a half. You see, Walnut,

then Beechwood, and halfway between Beechwood and Elmwood.

Q And you were on the west side of the street? A Yes.

Q And you were facing north? A Facing north.

Q And after this truck passed, did you resume the game? A Did we stop it?

Q You stopped to allow the truck to go by, is that right? A Stopped the game, yes, sir.

Q And then you started playing again, didn't you? A No, we did not.

Q So the game ended then? A The game ended.

Q When did it end before the truck passed? A Well, we had to get out of the way for the truck to pass, and then we watched it.

Q Why did you watch it? A What? Well, we usually watch a truck when it goes fast.

Mr. Ward: When it goes what?

The Witness: Fast.

Q Isn't this side of the street just for unloading freight cars? A Yes, sir.

Q And wasn't there a freight car right at that particular point with a truck backed into it? A Well, I do not just know that.

Q You do not know? A No.

Q You cannot remember that? A I cannot remember.

Q Do you remember whether there were any other freight cars along the line? A Yes, there was.

Q There was quite a few, weren't there? A I don't know if there was a few, but there was one. There was one about a little—a bit south of Walnut avenue.

Q Who was at the bat? A I do not know; I do not remember.

Q Who was catching? A I do not know.

Q Who was playing first base? A I do not remember who else was there.

Q Or who was playing third base; but you do remember you were playing left field? A Yes.

Q And you do or you do not remember whether the game continued after the truck passed? A It did not. It stopped right there.

Q What did you all do when it passed you? A We all watched it.

Q All turned around and watched it, is that right? A Well, we couldn't all turn around; some of them were already around.

Q But all those that were facing north turned around? A Yes, sir.

Q And you do not know who they were? A Well, I just remember Vernon Chelson.

Q He is the only one you remember? A That is the only one I remember.

Q And you saw the truck continue on? A Yes, sir.

Q About in a line with yourself, is that right? A Well, yes, just about.

Mr. Cummins: That is all.

By the Court.

Q Just a minute. You say that was on the section nearest to the railroad track? A That I was, yes, sir.

Q And then there was another section in the center, and another section to the other side of the street? A There wasn't—yes, there was; yes, sir.

Q Three sections on this street? A Yes, sir.
Q All right.

Re-direct examination by Mr. Ward.

Q Carl, on which section were you when that truck passed?

Mr. Coult: I object to that, if the Court please. That has been gone over very thoroughly.

The Court: We have been over that, and I think he has testified he was on the—

Mr. Ward: That was on the center section.

Mr. Coult: Two feet to the east of the first line between the sections.

Mr. Ward: I thought he just made a different reply to your Honor. I did not know. I did not quite catch his answer.

Q I show you another picture, Exhibit P. 3, and ask you if you can point out on that, or indicate on that picture, about where Violet May was struck?

Mr. Coult: Objected to as not being re-direct examination.

Mr. Ward: Well, I ask your Honor to—it may not be re-direct.

The Court: It might add to the confusion. I think he has indicated.

Mr. Ward: He has indicated on a cross section. Now, this, as your Honor can see, is a length section.

The Court: What is that, West Shore avenue?

Mr. Ward: Yes, sir.

The Court: And the other picture was West Shore avenue?

Mr. Ward: It is of Walnut avenue coming into West Shore avenue.

The Court: I will allow him to mark that.

A Put whereabouts she was hit?

Q Yes. A (The witness marks on photograph.) Somewheres around there.

Mr. Ward: That is all, Carl.

(Witness excused.)

Mr. Ward: Patricia Irving?

PATRICIA ELIZABETH IRVING, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q How old are you, Patricia? A I am twelve.

Q Do you attend school? A Yes, sir.

Q Whereabouts? A The Saint Joseph's Catholic School.

Q And can you talk so that we will hear without and difficulty here? A Yes, sir.

Q It is somewhat hard to hear in this room. In what grade are you? A I am in the sixth grade.

Q Whereabouts do you live? A 42 Walnut avenue.

Q Were you living there on the 5th of October, 1927? A Yes, sir.

Q Did you know Violet May? A Yes, sir.

Q How long had you known her? A Well, I knew her for about—I guess, for about a year.

Q Did you ever play with her? A Yes, sir.

Q Do you remember when she was hurt? A Yes, sir.

Q Were you playing with her on that day? A Yes, I was.

Q Where were you playing? A Well, we—we were playing up at in front of my house, at first.

Q And your house where? A It is the fifth house, on that south side of Walnut avenue.

Q The fifth house where? A On the south side of Walnut avenue.

Q You have seen this picture, haven't you? A Yes, sir.

Q Do you know or recognize that picture as a picture of Walnut street? A Yes, sir.

Q Or, Walnut avenue, rather. Can you show us, please, where your house was? A Right there (indicating).

Q This house right here (indicating)? A Yes, sir.

Q Is that right where I put the dot? A Right here (indicating).

Q Yes. Where I put the dot there? A Yes.

Q And that is on Exhibit P. 2. What time was it, Patricia, when you were playing? A Do you mean the month?

Q No. I mean the time of day. A Well, it was in the afternoon.

Q Can you tell us about when? A Well, I guess about five o'clock.

Q What kind of a day was it? A Well, it was a bright, clear, warm day.

Q What were you doing there, you and Violet May? A Well, we were reading, at first.

Q Pardon me? A We were reading.

Q Then, after that, what were you doing? A We got our scooters out.

Q What did you do with the scooters? A Well, we rode them down the hill.

Q Do you remember when this accident happened? A Yes, sir.

Q Just before the accident happened, were you riding on your scooters? A Well, we had been getting boxes for Mrs. Hummers.

Q I am sorry, Patricia, but I do not know whether these ladies and gentlemen of the jury can hear you or not; I cannot. I wish you would speak just a little bit louder. We all want to hear you. A We were getting boxes for Mrs. Hummers.

Q Yes. A And then, after a while, we decided we would play with our scooters.

Q Go on, just tell us. A And we started about the—about Mrs. Bartram's house, that is the third house up, and I stopped to tie my shoe and Violet May started on, and she gained—well, about four or five yards on me, and we looked, we looked to the right.

Mr. Coult: Now, I object.

The Court: No. Not "we."

Q What you did, not what we did; what you did. A Well, I started down right after her, because it only took a minute or two for me to tie—a second or two for me to tie my shoe, and then I looked right, and I could see through the trees, and the road was clear; and then, as I got down a little bit further, because Mrs.

Webb's house, that is the first house, obstructs the view to the south, and I looked down to the south—to the south side of Walnut, and I did not see any car coming that way; and when we got down to about the corner, I looked right again, and I saw Violet May hit; but she had turned the corner.

Q Hit by what? A She was hit by a truck.

Q When she was going down, she was on the scooter? A Yes, sir.

Q And about how many yards ahead of you, or how far ahead of you? A Well, I think she was about four or five yards ahead of me.

Q Can you show us by anything in this court room? A Well,—

Q To indicate about how far she was ahead of you, to show us about how far she was ahead of you? A Well, from about where I am sitting to about that chair over there (indicating).

Q Which chair? A That chair you were sitting in.

Q Where I was sitting in a moment ago? A Yes, sir.

Q About four or five yards?

Mr. Ward: It is about four or five yards, we agree, sir.

Q When she was going down on that scooter ahead of you, did you see her do anything? A No. She had her foot on the back wheel to use as a brake, so that didn't—so she couldn't go very fast that way.

Q And how fast did she go down there, if you can tell us? I suppose that is hard for you, but have you any idea how she was going down there? A No, I do not think I have.

Q Well, was she going fast, slow, or how? A Well, she wasn't going very fast.

Q Did you see her do anything else when she was going down there? A Well, when she got about to the corner, she turned—she steered around the corner, and then the next instant I know that she was hit by the truck.

Q What part of the truck hit her? A Well, the front left fender.

Q I show you Exhibit P. 3. You have seen this picture before? A Yes, sir.

Q Can you tell us about where she was when she was hit? A Well, I think she was just a little bit to the left of that line over this way near the sidewalk.

Q A little bit to the left of what mark? A This—this line right here (indicating.)

Mr. Ward: May I have that line marked, sir?

The Court: Yes. You say a little bit to the left. Do you mean toward the curb or toward the center?

The Witness: Well, toward the curb.

Mr. Ward: She said towards the sidewalk before, sir.

Q Well, you see where the ink "R" is on Exhibit P. 3? A Yes, sir.

Q Can you tell us—now, point out again whereabouts that was? A Well, I think just about there, around there, somewhere, around that line (indicating).

Q On the line, and you are indicating the first line from the curb, or the easterly side? A Yes, sir.

Q Of West Shore avenue; the line upon which the "R" is,— A Yes, sir.

Q —are you not? And how far around the corner had she gotten, if you can tell us? A Well, I could not tell you exactly.

Q Can you give us any idea? If you cannot, little girl, I do not want you to try. But, if you can, tell us. A Well, I do not think I could.

Q All right. After this truck struck her, what happened? A Well, I ran, I started running down toward Beechwood.

Q Why? A Why, I think I was frightened.

Q And then what did you do? A Well, I heard someone calling me, and I looked back and, I am not sure, but I think I turned—I jumped up on the sidewalk and pulled my scooter after me, and then I ran down toward Walnut avenue, and by that time, they had—I think they had put her in the car.

Q Did you see where the truck was after the accident at any time? A Well, when I saw it, I think it was fully across Walnut avenue on the other side.

Q And did you notice any marks there of any kind? A Well, I did not notice any, but I—

Q All right. If you did not notice them yourself, I do not want you to tell us what was told to you. You never noticed any marks there? A No, I do not think I did.

Q Did you see what the truck did after that, after you saw it past Walnut avenue? A No, I do not think so.

Q What became of Violet May, do you know? A Well, she was put into the truck.

Q And do you know where the truck was when she was put into it? A No, I do not think so.

Q You played with Violet May quite often, didn't you? A Yes, sir.

Q Before the accident? A Yes, sir.

Q And did you play with her afterwards? A Yes, I did.

Q Do you notice any difference in her, Patricia? A Yes, I do.

Q Will you tell us what you have noticed about her that is different? A Well, she does not seem as active as she did before the accident.

Q And how, in what way, doesn't she act the same? A Well, before we used to play more active games, and now we just have to play more quiet games.

Q And have you noticed anything else about her? Has she changed any or not? A Yes, she limps.

Q Have you noticed any other changes in the way she acts? A Well, I think she is much thinner.

Q Pardon me? A I think she is much thinner than she was before.

Q She does not live near you now, does she? A What do you say?

Q They have moved away, have they? A No. She lives with her grandmother.

Q Pardon me? A She lives with her grandmother.

Q And is that near where you live now? A Yes. It is just the next block over.

Q I see.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q Patricia, coming back to the time that you stopped to lace your shoe, and Virginia May got on her scooter, tell us just what happened? A Well, I stopped to tie my shoe.

Q Go on. A And she started down, and she gained about—well, it only took a second or two for me to tie my shoe, and she started down a while, and she gained, well, about four or five yards. And then, when I started down, I looked to the right, and I could see through the trees, and the road was clear; and then, when I got down further, past the first house on the south side of Walnut avenue, or the right side, I looked left toward the south, and I couldn't see any car there, and I got down to about the corner, and I looked down toward the north of—of West Shore, and I saw Violet May hit.

Q Now, how far were you behind her when she was hit? A Well, I think four or five yards.

Q And what did you do then? A After the accident?

Q No. When she was hit? A Well, I know I got very excited, and I started to run toward Beechwood.

Q No. I mean, which way did you turn? Where did you go? A Well, I turned north, the same as she did.

Q And you did not hit the truck, did you? A No, I did not.

Q How close to the west curb did you go when you turned north? A Well,—

Q I beg your pardon. I want to re-frame that. How close to the east curb did you go when you turned north? A I did not go near the east curb. The east curb—I was over near the east curb.

Q How close were you to it? A Well, I could not tell you that.

Q Can't you give us any idea? A Well, I always turned very close there.

Q I know. But on this time, how far away were you from the curb? A Well, a foot or two.

Q And how far away was Virginia May over to your right? A What do you mean?

The Court: To the right?

Q Your left, I mean to say. Pardon me. A Well, she—I guess she was only a little ways over.

Q Is that what you guess? A Yes, I think so.

Q How far? Well, how far over to your left side? A Well, I could not—I do not know.

Q Why can't you tell us that? A Well, I do not remember.

Q Well, now you have given us other distances; you know how far she was ahead of you, and so on. Can't you remember that distance? A No, I do not think I could.

Q How far was the truck away from you when you passed it? A What do you mean?

Mr. Ward: Pardon. Passed it?

Q You and the truck passed each other, didn't you? A Well, I do not remember.

Q Well, here was Virginia May, four or five yards ahead of you, and you say that she and the front left end of this truck came together, that is right, isn't it?

Mr. Ward: I object to that.

Q What?

Mr. Ward: The left front mudguard, she said.

Q Well, the left front mudguard of the truck came into collision with the scooter, that is right, isn't it?

Mr. Ward: I object to that. She said struck Violet May.

The Court: What difference does it make?

Mr. Ward: Yes, because, I think it is a difference, whether it came into collision with the scooter or struck this girl.

Mr. Coult: Well, I have a right to ask her whether that is not a fact, or not, anyhow.

Mr. Ward: But you say she said that; she did not say that.

The Court: I will allow the question.

Q That is a fact, isn't it, that Violet May was struck, if you want to put it that way, by the front left mudguard of this truck? A Yes, sir.

Q And that, at that time, you were about the distance, from that chair from where you are sitting down to this chair, behind her, that is right, isn't it? A Yes, sir.

Q And you had been continuing at that distance behind her all the way down this hill? A Well, about that distance.

Q Yes. So that you were about as far as from you to that chair from this truck when the collision occurred, weren't you? A Well, she was in front of me.

Q Yes. Now, you and the truck passed each other, didn't you? A Well, if I was going down toward Beechwood, I think it would.

Q No. But I am asking you, not to reason it out; but can't you remember that that truck went by you? A No, I cannot.

Q You cannot remember that at all? A No, sir.

Q You do not know how near it was to you? A No, sir.

Q You cannot give us any idea of it? A No, sir.

Q And you made a right turn north into West Shore Road? A Yes, sir.

Q West Shore avenue? A Yes, sir.

Q Now, you and Virginia May had taken your scooters at about the same time to go out in the street, hadn't you? A Yes, sir.

Q So the start that she got on you was at the time you started to lace your shoe, is that right? A I tied my shoe.

Q What? A While I was tying my shoe.

Q Tying your shoe? A Yes, sir.

Q And from the time—what happened after you tied your shoe? A Well, she started down.

Q Yes. A And then I started down after her.

Q Yes. A I looked north, and I couldn't—the road was clear. And then, after I got down a little bit further, I looked south, and that side of the road was clear, and when I got down to the corner, I looked north, and I saw Violet May hit by the truck.

Q Have you ever told that story that you just gave me about how this accident happened to anybody else before you went on the witness

stand? A Yes, I have talked—told it to Mr. Ward, Mr. McGinnis and Mr. Losche.

Q And how many times over have you told it? A Well, I was to Mr. Losche's office three or four times.

Q I know. But how many times did you go over this same story that you have just given us about tying your shoe and Virginia May going four or five yards ahead of you, then you looking to the right through the trees, and then coming down to the first house and looking to the left, and then going down and looking to the right, and Virginia May was struck by the truck? How many times have you gone over that? A What do you mean by that?

Q Just that; how many times did you go over that story?

The Court: How many times did you talk or tell that story to anyone else?

The Witness: Well, I told it the times I was to see the lawyers.

Q How many times? A Well, I was there three or four times.

Q And each time did you just tell the story once, or did you go over it a number of times? A Well, each one was supposed to tell their own story.

Q Well, how many times did you tell your story? A Well, I do not know.

Q A good many times? A Well, I am not sure.

Q You cannot remember now? A No, sir.

Mr. Coult: That is all.

Cross examination by Mr. Cummins.

Q Did anyone tell you how far that chair was from you? A Well, I should figure it was four or five yards.

Q No one told you that, did they? A Yes.

Q Who? A Well, they did not exactly tell me; but Mr. Ward said it was four or five yards.

Mr. Cummins: That is all.

Re-direct examination by Mr. Ward.

Q When was it I told you that? A About a few minutes ago.

Q Right here in court, wasn't it? A Yes, sir.

Q Now, Patricia, you remember these talks that you had— A Yes, sir.

Q —with Judge Losche and myself? A Yes, sir.

Q Do you remember what we told you about telling the truth? A Yes, sir.

Q What did we tell you about that?

Mr. Coult: Objected to.

A Well, do you mean—

Mr. Ward: I think we are entitled to the entire conversation, now.

Mr. Coult: Oh, no. How many times she told that to the jury.

Mr. Ward: I think we are entitled to what was said, your Honor.

The Court: The entire conversation, if you were going to testify.

Mr. Ward: No. But this child has been asked—I do not wish to rest under the imputation, or I do not think Judge Losche does, that there was one thing told to this child.

The Court: She is just asked how many times she told her story.

Q Were you ever asked to tell anything but the truth in this case? A No, sir.

Q Were you told to tell the truth? A Yes, sir.

Q Was there ever any suggestion made to you as to what you were to say? A No, sir.

Mr. Coult: I object, if the Court please.

The Court: I sustain the objection.

Mr. Ward: That is all.

By the Court.

Q Just a minute. Did you see a Ford truck? A Well, it wasn't a truck; it was a car.

Q Did you see a Ford car? A Well, I think I just have a slight remembrance of seeing it.

Q Where was that when you saw it? A Well, it was coming—when I got down to the corner, it was coming south, along—going north along West Shore avenue.

Q Going north? A Yes, sir.

Q What side of the street was it on? A Well, I do not remember.

Q Was it on its right side or the center of the street? A Well, I am not sure about that.

Q Did you see the truck that struck Violet May? A Yes, sir.

Q Before it struck her? A No, I do not remember of seeing it before it struck her.

Q How far could you have seen north on West Shore Road? A Well, from where we started,—

Q No. From the time before you made the turn into West Shore Road? A Well, I should think we could see three or four blocks.

Q Three or four blocks. Did you see this truck at all? If you looked three or four blocks, could you have seen it? A Yes.

Q Did you look? A Well, we looked, but we didn't see anything.

Q And you could have seen three or four blocks? A Yes, sir.

Q How soon after you had looked three or four blocks did this collision occur? A Well, I looked left and then, when I looked right, I had to wait a few seconds, because I looked right to make sure that no—I looked south to make sure that no car was coming, and then I looked north and I saw Violet May hit by the car.

Q Well, had you looked north at all before you looked south? A Yes, sir; when we first started out.

Q When you first started? A Yes, sir.

Q Had you looked again? A I looked left, and then I looked right again.

Q How many times did you look north? A Well, I looked twice.

Q The first time when you started? A Yes, sir.

Q And where were you the second time that you looked north? A Well, I was at the corner.

Q Was that the time you saw the collision? A Yes, sir.

Q Now, in riding down Walnut street, taking the point where you started from, how far north could you see? A Well, I could see about as

far as Elmwood, and that is the next block after Beechwood.

Q That is two blocks up? A Yes, sir.

Q When you looked south, did you see the Ford? A No.

Q When did you see the Ford? A Well, I saw it when I got down to the corner.

Q Where was it when you saw it with reference to Oakwood avenue? A Well, it was about halfway between Oakwood and Walnut.

Q What side of the street was it riding on? A Well, I am not sure what side it was.

Q You are not sure of that? A No, sir.

Q Can you tell us what side of the street the Public Service truck was riding on? A Yes, sir; it was more to the left than it was to the right.

Q Then, had it continued, would it strike the Ford car? A Well, I do not know, because I do not know what side the Ford car was on.

The Court: That is all.

By Mr. Ward.

Q You say that when you were coming down, you looked to the left? A Yes, sir.

Q Did you see any car then? A Well, do you mean that I looked north?

Q When you looked south the first time as you were coming down? A No, I did not see any car then.

Q And then, when you got down to the corner, you say you looked right, and you saw the accident at that time? A Yes, sir.

Q Now, how long after that was it that you saw the Ford car? A Well, then, when I—I started in running down toward Beechwood, I

turned around again to look, and I saw this Ford car stop.

Q And it was then that you saw the Ford car for the first? A Yes, sir.

Q The third house to which you referred when you say that you started from the third house, is this the third house here (indicating)? A Yes, sir.

Q That was from where you started, wasn't it? A Yes, sir.

Q And the house that you referred to as—whose house did you say this was? A Webb's.

Q As the last house when you looked to the left, is that that house? A That was the house.

Q After you had passed that.

Mr. Ward: I think she answered this in reply to your Honor's question about looking to the right, how far she could see.

That is all, Patricia.

(Witness excused.)

Mr. Ward: Vernon Chelson?

JOHN VERNON CHELSON, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q Where do you live, John? A On Elmwood avenue.

Q That is Bogota? A Bogota.

Q And were you living there in October, 1927? A Yes, sir.

Q Do you remember this accident? A Yes, sir.

Q Where were you when it happened? A I was over on a freight car, behind the freight car.

Q With whom were you playing? A There were two other boys.

Q What time was it when the accident happened? A Around five o'clock.

Q What was the first thing that you knew about it? A When I heard the brakes, I heard the brakes squeak, and I looked; I happened to be on the other side of the freight car, and I looked under the freight car, and I saw Violet May laying in the road.

Q I show you Exhibit P. 2 and ask you if you can show me about where she was in the road? A About here, about there (indicating).

Q Now, will you mark that? A (The witness markes on photograph.)

Q You have marked an "X" there? A Yes, sir.

Q And that was the place where you think she was— A Yes, sir.

Q —from where you saw her? A Yes, sir.

Q You have seen these pictures before? A Yes.

Q And you have talked to us before? A Yes, sir.

Q And you told Judge Losche and myself where you thought it was, before, didn't you? A Yes.

Q And did you see any truck when you looked across? A I saw the truck; it was past Walnut avenue.

Q And whereabouts past Walnut avenue? A There is some lots there, and there is some trees

a few feet away from the corner, and it was about by those trees.

Q I show you Exhibit P. 4, and ask you if you recognize that as the corner here? Here is Walnut avenue, this is West Shore (indicating). A He stopped right by that tree there (indicating).

Q Can you make a mark there? A (The witness marks on photograph.) By that first division there.

Q Did you notice any marks of any kind on the roadway? A Yes, there was marks where the car—when he put on the brakes, why, the black marks were there.

Q And from where were they to where? A They were from—a little before the beginning of Walnut avenue, past Walnut avenue.

Q The noise that you heard, what kind of a noise was that, the first thing that you heard? A That was squeaks.

Q And these marks that you saw about which you have just spoken, were they the only marks, or not? A That was the only mark that an automobile—that the automobile made.

Q How long did they remain there? A About two weeks or so.

Q After you saw Violet May lying where you have said, and saw the truck where you have said, what happened then? A Well, two men came out of the car and picked her up.

Q And what then? A And they took her in the car and they turned around and went—took her away.

Q Were there any boys or any people or children playing in the street? A Yes.

Q Whereabouts? A They were playing between Elmwood and Beechwood; they were play-

ing ball. And there was some down by Oakwood avenue, playing ball.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q What were you doing? A I was playing behind a freight car.

Q On the tracks? A Not on the tracks.

Q On the other side of the tracks? A No. There is a place where they keep the freight cars while they are unloading the things they have in them, and there is some gravel there. It was behind the tracks, though.

Q Then you were between the switch and the tracks, is that right? A Yes.

Q Were you between the switch and the main tracks? A No. I was down further. The switch is up by Linwood avenue.

Q What was this freight car, on the tracks? A Yes.

Q You were on the west side of it? A Yes.

Q Were you on the tracks, too, on the other tracks? A No. I was just below the bank.

Q You were down between the bank and the brook? A No, on this side, the east side.

Q All right. And where did you look to see what happened? A Under the freight car.

Q Was the freight car between you and the accident? A Yes, sir.

Q Well, how did you look under the freight car, from one end to the other, or across? A Across.

Q And, looking under the freight car, you saw this truck standing where you have put the mark on the picture? A Yes, sir.

Q And you saw Virginia May where you put the other mark on the picture? A Yes, sir.

Q Could you see both of those things looking under the freight car? A Well, yes, sir. Then I came out and I ran across, and I—and I—I was going to get on my bicycle and ride down. Then some man came and he asked me if he could lend my bicycle and run down there, and he gave me his lunch box.

Q Did you go down where the accident was? A Yes, sir.

Q Did you see the truck turn around to go back? A No, I did not.

Q You did not see the men turn the truck around? A No, sir.

Q Did you see a Ford car come the other way? A Yes, sir.

Q Where did that stop? A That stopped at Oakwood avenue.

Q Where is that? A That is a block just before Walnut, going north.

Q That is, it is a block south of Walnut? A That is—yes, a block south of Walnut.

Q You saw a Ford car stop down there, did you? A Yes. There was one Ford car stopped down there.

Q Well, didn't the Ford car stop— A Yes.

Q —right after this accident, right at the corner of Walnut and West Shore avenue? A The Ford did not stop there at Walnut.

Q What did stop there? A The truck, the truck.

Q I know. But wasn't there a Ford car going north that stopped there right after this accident happened? A I do not know. There

was a Ford car that stopped at Oakwood, I know.

Q A block south? A Yes.

Q And the man got out of the Ford and walked up a block to see what happened? A No.

Q What? A The Ford turned up the hill. It stopped at the corner there, but I did not see the man get out.

Q How did you come to notice that? A Well, I saw—some kids said maybe that fellow is coming up, and I looked down there; but he turned up the hill.

Q Some kids said maybe that fellow is coming up? A Yes.

Q And then you looked down and saw him over a block south? A Yes.

Q And that turned and went up the hill? A It turned—it did not go up the hill, it stopped at the corner.

Q Did anybody get out? A No. I did not see anybody get out.

Q Now, at the time that that Ford came up there and the boy said maybe he was coming up, what was going on up at the corner of Walnut and West Shore? A Well, they picked Violet May up, and they had her up by the time the car was around.

Q Weren't you interested in that? A Sure.

Q Well, what was it that made you note that a Ford car had stopped, coming north, a block away to the south, anything at all? A No. I was just there when the fellow said that.

Q When the fellow said, "He is coming up," is that right? A Yes.

Q Well, it is no unusual thing to see cars come both ways on that street, is it? A No. He thought he might come up and see the accident, he might be able to tell us what was the matter with her.

Q What is that answer? A He thought—

Q No. Wait a minute.

Mr. Coult: I want to have it read, please.

(Answer read.)

The Witness: How the accident happened.

Q Who might? A The man in the Ford car.

Q A block away? A Yes, sir.

Q To the south? A Yes, sir.

Q And did you think that? A Yes, sir.

Q Is that the reason you were interested in it? A Yes.

Q You thought he might drive up a block and tell you how the accident happened? A Not tell me; but tell some of the people around there.

Q Well, didn't you know how it happened? A Well, I didn't see her get hit, but I saw the marks there.

Q You saw more than a man in the Ford car a block away from the south could see, couldn't you? A Well, he could see more than I could see. He could see her get hit.

Q You remember, then, that there was no Ford car that drove up there just about the time this accident happened and stopped? A No, sir.

Q At the corner of Walnut avenue? A No, sir.

Mr. Coult: That is all.

Mr. Ward: That is all.

Mr. Cummins: Just a moment, please.

By Mr. Coult.

Q Oh, I want to ask you just another question. You were up in the balcony here with the other boys when your name was called as a witness, weren't you? A Yes, sir.

Q And you know the other children that have testified here, don't you? A Yes, sir.

Q And you know the Hummers? A Yes, sir.

Q And you have talked this case over; you have told your story to the attorneys— A Yes, sir.

Q —have you? How long ago? A Oh, I don't remember how long ago. It was—it was —I went down Tuesday, but I didn't tell the story. It was about two or three weeks ago.

Q And you told your story then, did you? A Yes, sir.

Q Did you tell about this truck being on the left hand side of the road? A Yes, sir.

Q And the marks being on the left-hand side of the road? A Yes, sir.

Q Did you tell that? A Yes, sir.

Q Did you ever tell anybody else before that anything about it? A No, sir.

Mr. Coult: That is all.

Cross examination by Mr. Cummins.

Q Do you know Mr.—do you know Carl Delmar? A Yes, sir.

Q Did you see him testify here a few minutes ago? A Yes, sir.

Q Did you hear his testimony? A Yes, sir.

Q Is your name Vernon Chelson? A Yes, sir.

Q Did you hear him say that Vernon Chelson was playing ball with him?

Mr. Ward: I object to the question.

The Court: Sustained.

Mr. Cummins: I beg pardon?

The Court: I sustain the objection.

Q Were you playing ball with Mr. Delmar? A No. I know I was playing on the back of the freight car, around the freight car.

Q And you were not playing ball? A I do not know.

Q Now, you said a moment ago that as you came up you saw them put her in the car and turn it around, is that right? A I did not see them turn it around, but I know they turned around.

Q How do you know they turned it around? A Because I saw when he passed me, when I was going down there.

Q And you were coming south all that time toward the scene of the accident? A Yes, sir.

Q But you did not see the car turn around? A No.

Q But you know it turned around because it passed you? A Yes.

Q Afterward? A Yes.

Q Is that right? A Yes, sir.

Q Were you playing ball that day? A I played in the morning; yes, sir.

Q In the morning? A Yes, sir.

Q But you did not play that evening? A No, sir.

Q When did you first notice this Ford coming from the south? A Well, I heard him blow his horn down further and then I looked down there.

Q You looked down and you saw a Ford? A Yes.

Q You were close enough at that time to see that it was a Ford, is that right? A Well, I won't say, but I know the sound of a Ford horn.

Q Oh, I see; you know the sound of a Ford horn? A Yes.

Q And how far away was this Ford at the time? A I would say a block or a block and a half.

Q And you knew it was a Ford by the sound of the horn, is that right? A Yes.

Q Now, where were you when the accident happened? A I was on—a little before Beechwood avenue in back of the freight car.

Q A little before Beechwood avenue? A Yes.

Q Is Beechwood avenue north or south of Walnut? A North.

Q And how many freight cars were there? A I do not remember.

Q What kind of a freight car was it? Was it a coal truck, or was it an ordinary freight car? A An ordinary freight car.

Q What first attracted your attention? A The squeaking of the brakes.

Q Anything else? A No, sir.

Q That is all you heard, was the squeaking of brakes? A Yes, sir.

Q You are sure of that? A Yes, sir.

Q And then what did you do? A Then I looked under, and I looked under—stooped down

to look under the freight car, and I saw Violet May laying in the road.

Q How far away were you at the time? A I cannot say.

Q You cannot say? A I cannot, no.

Q And did you know it was Violet May? A Yes, because I saw her coasting down the hill there, before.

Q You saw her coasting down when? A Before the accident happened.

Q How long before the accident happened did you see her coasting down hill? A About five or ten minutes.

Q About ten minutes before? A Yes.

Q And how many times did you see her coast down before the accident? A I do not know. I saw her once or twice, I think.

Q Once or twice? A Yes.

Q Coasting down? A Yes.

Q What did she do, turn around and go up and coast down again? A She would turn the corner, and then she went up and coasted down again.

Q How many times did you see her do that? A I do not know.

Q You saw her at least twice, did you say? A At least twice or more; I am not sure.

Q Twice or more? A Yes, sir.

Q And you do not know how many freight cars were there? A No, sir.

Mr. Cummins: That is all.

Mr. Ward: That is all, John.

(Witness excused.)

Mr. Ward: Cortland Bartlum?

GEORGE CORTLAND BARTLUM, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q George, do you go to school? A Yes.

Q Where do you attend school? A The front of it is on Fisher avenue.

Q In Bogota? A Yes.

Q Did you live in Bogota in October, 1927, when Violet May was hurt? A Yes.

Q And did you know Violet May? A Yes, sir.

Q Do you remember the accident? A Yes.

Q Whereabouts were you? A I was in between Beechwood—I was in between Beechwood road—avenue.

Q Between what? A Beechwood avenue.

Q I see. And what were you doing? A I was going to the store.

Q Crossing over? A Yes.

Q Crossing over what? A The street.

Q The street? A Yes.

Q Beechwood avenue? A Yes.

Q Were you with anybody? A Yes.

Q With whom? A My brother, and another girl.

Q Who was the girl? A Adelaide.

Q How were you crossing that street, Cortland, do you remember? A Yes; backwards.

Q Walking backwards, were you? A (No response.)

Q And when you were crossing that street, do you remember anything happening? Did anything happen? A Well, Adelaide said, "Look." And I looked and saw the car coming.

Q What car did you see coming? A It was a truck.

Q And whereabouts was it? A Between an alley and West End avenue.

Q Well, where was it coming, along what street? A West Shore.

Q And which way was it coming? A It was coming towards south.

Q Towards the south? A Yes.

Q Did it pass you? A It hadn't passed me yet, no; it didn't pass me yet, though.

Q It didn't pass you yet, though? A No.

Q Well, did it pass you sometime? A Yes.

Q And how was it going? A Fast.

Q Where were you when it passed you? A I was between Beechwood, then.

The Court: Between Beechwood and what street, or were you crossing over Beechwood?

The Witness: I crossed over, and between Beechwood and Elmwood, it is.

Q Now, after you saw the truck, did you, or not, continue to walk backwards? A Well, after I saw the truck, I still walked backwards, only when—

Q When you were walking backwards, you were looking towards Walnut avenue, I mean, in the direction of Walnut avenue? A Yes.

Q Did you see Violet May? A Yes.

Q Where was she? A At Mrs. Webb's house, I do not know how many feet away.

Q I want to show you this picture, Cortland, George Cortland. A Yes, right here (indicating), I saw her right in the street in front of the house.

Q You saw her in the street in front of the house? A Yes.

Q And that is the house that you are indicating there? A Yes.

Q In the street, up in front of the house? A Yes.

The Court: That is on Walnut?

The Witness: Yes.

Q Now, at that time, you were down at Beechwood, weren't you? A Yes.

Q And could you see her there across the lots? A Yes.

Q After that, did you see the truck? A After?

Q After seeing Violet? A No, not right after.

Q Well, sometime after? A Yes.

Q And did it pass you? A Yes.

Q And went on down, didn't it? A Yes.

Q Well, after you saw Violet in front of Mrs. Webb's, will you just tell us, if you will, please, George, in your own way, what happened, what you saw? A I kept walking backwards a little ways, and then Adelaide said, "Look," and I looked, and then I turned around, and Adelaide told me to look out, because I would fall on the curb, and I turned around and I got up the curb, and then, after a while, why, the truck went past me.

Q Yes. Go on. Just tell us in your own way what you saw? A And then I kept watching the truck, and it hit Violet May, and then I watched it for a few seconds, and then I went on.

Q Where was Violet May when the truck hit her? A On the left side of West Shore.

Q You have seen these pictures, haven't you? A Yes, sir.

Q Can you show us, please, about where she was when she was hit? Just look at that one, showing you P. 2. A About here (indicating).

Q Now, will you just mark a mark there where you think she was hit, where she was when she was hit? A Right about here (witness marks on photograph).

The Court: What mark is that?

Q You are making a long mark.

Mr. Ward: May I put a "C" there, sir, underneath it?

The Court: Yes.

Mr. Ward: (Handing photograph to the jury.) I have put the "C" there myself; the long mark was made by the witness.

Q I show you, now, P. 3, or this picture. Can you show us on that about where she was when she was struck? A Why, see this—about where that "R" is.

Q About where the "R" is? A Yes, right there.

Q Do you know what part of the truck hit her? A The front left fender.

Q Where did the truck go? Do you know where the truck went after it hit her? A Yes.

Q Can you tell us? A It turned around and went down towards the north again.

Q Well, before—

Mr. Cummins: I ask to have that last answer, please.

(Answer read.)

Q Before it turned around, did you see where it went after it hit her? A It went past Walnut, and then it stopped.

Q Well, when it stopped, was it near anything, or did you see anything where it was? Did you see where it was? A It was past Walnut, and two men went out of the—one man stayed in the truck, and looked back, and then he backed up, and then he got out.

Q After it passed Walnut and stopped, do you know whether it was near any particular thing or not? A No.

Q After the truck backed up, did you see what it did then? A Well, after he picked Violet May up, why, then they turned around and went back.

Q What did you do then? A I was so scared, I walked frontwards.

Q Pardon? A I was so scared, I walked frontwards.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q You were walking backwards on what street? A Beechwood. I was walking backwards all along from Oakwood to Beechwood in the middle of Beechwood.

Q Were you on Beechwood avenue? A When the truck hit Violet May?

Mr. Coult: What is the answer?

(Answer read.)

Q Well, at any time? A What do you mean?

Q That you have been telling us about, were you on Beechwood avenue? A Yes.

Q What part of Beechwood avenue were you on? A Well, I was on—from the middle of Beechwood on to—into the middle of Chestnut avenue; no, not Chestnut; I forgot the name of the avenue. Yes, Beechwood; I was in the middle of Beechwood, onto the middle of—

Q You know where Walnut avenue is? A Yes.

Q And you know where the Hummers house is? A Yes. When they were living there, you mean?

Q Yes. A Yes.

Q You know where it was then? A Yes.

Q And you saw this little girl right out in front of that house? A Not in front of their house.

Q What? A Not in front of their house.

Q Well, in front of one of those houses there? A Yes.

Q And you pointed out the house on the picture, didn't you? A Yes.

Q Which house was it? A This one here (indicating).

Q And you were on a street a block north of that, weren't you? A Yes.

Q And Beechwood avenue runs the same way as Walnut? A Up and down.

Q Yes. A Yes.

Q And how far were you up the hill? A I wasn't up the hill.

Q Well, were you down near the corner? A I was on West Shore avenue.

George Cortland Bartlum, for Plaintiffs, cross.

Q That is what I was trying to get. Then, you were down on West Shore avenue? A Yes.

Q And you were walking backwards, which way, across Beechwood? A No. Across Beechwood, yes. I say I was walking backwards when she was about on that house, where that house is.

By the Court.

Q Where did you start from on West Shore avenue? What avenue did you come down onto West Shore avenue? A From Oakwood.

Q Oakwood. Did you live on Oakwood? A No. I live on Walnut.

Q Did you walk down Oakwood? A What did you say?

Q You walked down Oakwood? A Yes.

Q And turned to your right, is that right? A Yes.

Q And then you passed Walnut street? A Passed Walnut, yes.

Q And then you got up to Beech street? A Yes.

By Mr. Coult.

Q And were you crossing Beechwood avenue when you saw this little girl out in front of that house on Walnut street? A Yes.

Q And was it at that time that this truck passed you? A No.

Q Well, where were you when the truck passed? A Not quite in the middle of West Shore, not quite between Beechwood and Elmwood.

Q Well then, you had gotten across Beechwood avenue, still walking backwards? A Yes.

Q And you had gone about half the block

between Beechwood and Elmwood, is that right? A Yes.

Q So, you were a block and a half from Walnut street? A Not exactly the half.

Q Well, just about a block and a half? A Yes.

Q And when this truck passed you— A Yes.

Q —did you see the little girl then? A When it passed me?

Q Yes. A No.

Q You do not know where she was? A No.

Q And you say there were two other children with you? A Yes.

Q Were they walking backward, too? A Yes.

Q All three of you walking backward? A Yes.

Q And you continued to walk backwards right across the streets? A Well, I looked up and down first, and then I—

Q And then walked backwards. Did you see the truck strike this little girl on the scooter? A Yes.

Q You had been watching it all the time? A What did you say?

Q Had you been watching it all the time while it was going down the street? A The truck?

Q Yes. A No.

Q Did you see it hit the scooter? A Yes.

Q Were you watching it then? A Yes. You see, I watched after it had passed me, not all the time before it had passed me, though.

Q And it was going fast? A Yes.

Q Did you see a Ford car coming the other way? A No.

Q Did you ever see any Ford car at all? A Yes.

Q At that time, where was it? A Oh, not at that time, no.

Q Not at that time? A No.

Q You say you noticed where the truck stopped? A What did you say?

Q Did you? A What did you say?

Q Did you tell Mr. Ward that you noticed where the truck stopped? A Yes.

Q And you say that was on the left side, more to the left than to the right? A Well, he didn't stop there.

Q What? A He stopped up by the tree, up by—about half of the block from Walnut to Oakwood.

Q Then you think it went a half a block beyond Walnut street, did it? A Well, not exactly half, pretty near a half.

Q Well, how much? What? A Pretty near half.

Q So that you put a mark on the picture where the little girl was hit, didn't you? A Yes.

Mr. Ward: Wait a moment. I object to that, if your Honor please. Oh, I beg your pardon.

Mr. Coult: You object to it?

Mr. Ward: I withdraw my objection.

Q And you say that the truck went from that point to Walnut avenue, across Walnut avenue, and then about a half a block beyond that, is that right? A Yes.

Q Now, on which side of the street was it at that time? A The left.

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Q And had it been on the left side of the street all the way down the street? A No. It had sort of curved over.

Q Well, when did it start to curve over? A When it was skidding.

Q What? A When it was skidding, when it had the brakes on.

Q So it did not start to go to the left side of the street until after the brakes went on, is that it? A It was on the left side quite a long time, when he put the brakes on, he sort of swung to the right side.

Q Did it skid all the way from the place where it hit the scooter to the place where it stopped? A Yes; but then it let off the brakes, and put them on again.

Q Did you see him do that? A Yes.

Q You saw that, did you? A Yes.

Q Then, did you go down to see what had happened? A No.

Q You went the other way? A Yes. I kept on going to the store.

Q Yes. And yet you could tell us that he put the brakes on, took them off, and put them on again? A Yes.

Q Where did he put them on? A He put them on just about that much space between us (indicating), and then he put them on again.

Q That much. You are pointing now a space of about a foot and a half, when he was that near to the scooter? A Not so far. He let off the brakes, I guess, to stop from falling over; and then he put them on again.

Q He first put them on? A Yes.

Q Where was he when he did that? A Near Beechwood; yes, it was about Beechwood.

Q About Beechwood avenue? A Yes.

Q That is up where you were, up near where you were? A Well, a little past Beechwood, about a foot past Beechwood; that is all.

Q He put the brakes on there? A Yes.

Q And then when did he take them off? A Just then he had hit Violet May.

Q Then he put them on again? A Yes.

Q And then did he take them off again? A Well, he had stopped a little ways, and then he backed up.

Q He backed up? A Yes.

Q Where did he back up? A Up to where Violet May was, and then he brought her in the car.

Q The truck backed up to Violet May? A Yes.

Q Well then, how long did it stand still? A Not very long.

Q Just stopped for a second, and then backed up, is that right? A Well, as soon as it had stopped, why, just it backed up.

Q Did you see this? A Yes.

Q Why, didn't the truck turn around and come back? A No.

By the Court.

Q How old are you, George? A I am nine.

Q When this accident happened, it will be two years ago next October? A What do you say?

Q I say, this accident happened in October, 1927? A Yes.

Q And when were you nine? A January 9th.

Q January 9th? A Yes.

Cross examination by Mr. Cummins.

Q How many blocks did you walk backward, George? A About one and a half.

Q About how many? A One and a half.

Q Where did you first start to walk backward? A Oh, from Oakwood.

Q From Oakwood? A Yes.

Q And you went from Oakwood to Walnut, backward? A Yes. I looked back once in a while to see where I was going.

Q You mean you looked forward once in a while, is that right? A Yes.

Q And then you went to—from Walnut to Beechwood, backward? A Yes.

Q And then you continued on from Beechwood until halfway between Beechwood and Elmwood, backwards? A Yes.

Q And then all three of you were walking backward? A Yes.

Q Do you always walk that way? A Well, not all the time. We looked—when crossing the street, we looked where we were going, and then we turned around.

Q And where had you started out from that day, on Oakwood; did you come down Oakwood? A Backwards?

Q Yes. A No.

Q You came down Oakwood, frontwards? A Yes.

Q Is that right? A Yes.

Q And when did you first notice the truck? A Well, when that little girl said "look!" When I was between—

Q Well, how far—where were you at the time when she said "look!"? A Where was I?

Q Yes. A Between Beechwood Road.

Q Between Beechwood and Elmwood? A No. Between the road, in the middle of the road.

Q And she said "Look!"? A Yes.

Q And what did you do? A I looked.

Q And which way did you look? A Frontwards, and saw the truck.

Q You turned around and looked north, is that right? A Yes.

Q And how far away was the truck at that time? A Between the alley and Elmwood.

Q And halfway between? A No, not Elmwood; West End avenue.

Q West End and Elmwood, halfway between? A Yes. No. Between that alley and West End, I mean.

Q And then did you turn around and continue walking backward? A Yes. Well, not all the time, because I had to see where I was going when I went up the bump.

Q You went where? A I had to turn around to see where I was going when I was going up to the curb.

Q And then when did the truck pass you? Where were you when the truck passed you? A About half—not quite halfway in between Beechwood and Elmwood.

Q And how far is that alley street—you say alley and West End? A Yes.

Q How far from Elmwood is Alley street? A Alley is not the name of it, but there is an alley.

Q I see. And that is where the truck was when you were crossing Beechwood, is that right? A Yes.

Q And that is one block, that alley is about one block north of Elmwood? A It is about three and a half.

Q About two and a half blocks north of Elmwood? A Three.

Q So that the truck came about— A I said three and a half.

Q About three and a half. So that, by the time you walked halfway between Beechwood and Elmwood, the truck had come down two blocks while you were walking that distance, backward; is that right? A Yes.

Q Is that right? A Yes.

Q And then, where were you when Violet May was struck? How far, further? A Well, I was further than half.

Q Further than half? A Yes. Just about half, though.

Q Did you notice a Ford? A No.

Q You were facing that way all the time? A Yes.

Q And where were you when you first noticed Violet May? A The first time I seen her?

Q Yes. A She was at Webb's house.

Q She was at Webb's house? A Yes. That was the first house.

Q Is that east of West Shore? A Yes.

Q And on Walnut? A Yes.

Q And you were how far away? A Between Beechwood Road.

Q I see. And you looked across and you saw Violet May? A Yes.

Q And did you watch her coming down the hill? A Watch her?

Q Yes. A Yes.

Q You saw her coming down? A Well, not all the time.

Q Well,— A Not all the time.

Q —once in a while you looked? A Yes, down that way.

Q How often did you look? A Well, I looked sometimes, and then I would turn and look at something else.

Q How long would you look, for how long a time? A Oh, I do not know.

Q About how long? A Five seconds.

Q Five seconds. And then how long would you look away? A Oh, I do not know.

Q How long? A I do not know exactly, it is so long ago.

Q Well, how many times did you look? A Oh, about twice.

Q You looked about twice? A Yes.

Q Five seconds each time? A I do not know whether it was five each time.

Q And did you see Violet May come into West End or go into West Shore Road? A Yes.

Q Was she going fast at the time? A No. Well, she—she wasn't going very fast; she was going—

Q You do not know whether she was going fast or slow, do you?

By the Court.

Q Where was the truck then? A Then?

Q Yes. A It was just about passing me.

Q Just about past you? A Yes.

Q And was Violet May in the West Shore Road then? A I do not know. I am not so sure.

Q Not so sure? A No, sir.

By Mr. Cummins.

Q Well, do you remember Violet May coming into West Shore Road? A Yes.

Q And you were looking back toward that scene, weren't you? A Where she was, yes.

Q Yes. And the truck was between you and Violet May, wasn't it? A Well, a little while after.

Q And was it nearer to Violet May at that time than it was to you? A No. It was nearer to me.

Q It was nearer to you? A Yes.

Q And Violet May was in the road? A Yes.

Q How far out in the road was she? A What do you say?

Q How far out in the road was she? A Well, there is that three sections.

Q Yes. Which section was she in? A She was in the first one.

Q Near the end of it? A Yes, near it.

Q Near the first line? A Yes.

Q Is that right? A Yes.

Q Would you say she was on the first line? A No.

Q But just about there? A Yes.

Q You said very close to it? A What do you say?

Q How close did you say to the first line?

Mr. Cummins: I will withdraw that question.

The Court: Is that all?

A About two feet.

The Court: The time for adjournment has come.

(Recess.)

After recess, 2:00 o'clock P. M.

The Court: Were you through with the boy?

Mr. Cummins: Yes, your Honor.

Mr. Ward: A few questions I wish to ask him, sir.

The Court: All right.

GEORGE CORTLAND BARTLUM, recalled, testified further as follows:

Re-direct examination by Mr. Ward.

Q George, you said your brother was with you. How old is your brother? A He is five.

Q Five. And you said there was a little girl with you? A Yes.

Q Where is she now? A She is home.

Q Do you know whether or not there is anything the matter with her?

Mr. Cummins: I object to that, your Honor please.

A She is absent.

Mr. Cummins: I think it is wholly irrelevant and immaterial. I object, your Honor please.

Q You mentioned a tree where you saw the truck after the accident. Would you tell us on this picture, P. 4, if you see it? A Right here (indicating).

Q Right there (indicating)? A Yes.

Q That is correct? A Yes. Right under that "F."

Q Right over the "F." That was where the truck was after it stopped? A Yes.

Mr. Ward: That is all.

(Witness excused.)

Mr. Ward: William Apitius?

WILLIAM APITIUS, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q Where do you live? A 21 Maplewood avenue.

Q Bogota? A Yes.

Q Were you living there in October, 1927? A Yes.

Q Do you remember this accident? A Yes.

Q Whereabouts were you when it happened? A Well, I was up near Oakwood avenue, playing with some boys.

Q Will you talk so all of us can hear, please? Whereabouts were you? A Up near Oakwood avenue, playing with some boys.

Q Now, Oakwood avenue is the next street to Chestnut, or to Walnut avenue, is it not? A Yes, south.

Q And it is the next street further down towards Ridgefield Park, or south, is that correct? A Yes.

Q What were you doing there? A I was playing football with three other boys.

Q Who were the other boys? A Arthur Steinmetz and William Johnson and George Upinger.

Q Where were you playing? A Near Oakwood avenue.

Q I know; but whereabouts, in what street, if in a street? A West Shore.

Q West Shore? A Yes.

Q And how close was that to Walnut avenue? A About a block away.

Q How long had you been playing there? A Oh, for quite a while, since after school.

Q Do you see this picture,— A Yes, sir.

Q —P. 3? Can you tell us about where Oakwood avenue was on that picture, if you can see it? A Right back in here; right back here (indicating).

Mr. Coult: Will your Honor ask this witness to speak up, please?

The Court: Yes.

Mr. Coult: It is very hard to hear. The sound seems to go up in the air here.

The Witness: Right in back of that car, there (indicating).

Q What was the first that you knew about an accident? A Well, I heard a screeching of brakes, and then I looked up.

Q What did you see? A I saw Violet May Hummers just about—

Q I cannot hear you.

The Court: A little louder.

A I saw Violet May Hummers just about turning the corner, and I saw the truck coming.

Mr. Ward: Will you repeat that?

(Answer read.)

Q What next did you see? Just tell us in your own way, if you please, what you saw and what happened? A Well, then she collided with the truck, and she struck the mudguard, the front mudguard.

Q What mudguard? A Well, on the left side.

Q And whereabouts was the truck at that time? A Well, it was over to the left side.

Q Do you know how the truck was going? A Yes; it was going fairly fast.

Q What happened after the accident, after— A Well, the truck stopped past Walnut avenue, and a man jumped out and picked her up.

Q And what did you do? A Why, I went down there, and stayed around there.

Q Did you see what took place after that, after the truck stopped? A Well, he turned around, and then he drove to the doctor's office, I guess.

Mr. Coult: What was that?

The Court: "He turned around and drove to the doctor's office."

Q Did you see any marks there? A Yes, sir; there was skid marks.

Q Where were they? A Well, they began from the center of the road, and then swerved out towards the left.

Q How long were they? Have you any idea? A No.

Q Were those, or not, the only skid marks there? A No, there was no others.

Q No others there? A No.

Q Do you know how long they were there after the accident? A I guess about two weeks they were there.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q Did you see the truck turn around? A Yes.

Q Which way did it turn? A Well, he turned right.

Q It turned to the right to go around? A Yes.

Q Now, you signed a statement in this case, didn't you, William? A What?

Q You signed a statement in this case? A Yes.

Q I show you what purports to be a statement of Master William Apitius, and I call your attention to the signature on the first page, and I ask you if that is your signature? Did you sign that? A Yes.

Q I show you the second page of the same statement, and I ask you if you signed that? A Yes, sir.

Q Now, look at the words above that, "I read this two-page statement and think it is true." Did you write that? A Yes.

Q You wrote that in your own handwriting? A Yes, sir.

Q And had you read the statement? A Read it before, you mean?

Q Before you signed it. You do not have to look at it to tell me that? A Yes, I think I did.

Q You did read it. Was it true? A Yes, it was true, as far as I could see.

Q Now, let me show you something in this statement: "I saw Violet May Hummers coming west out of Walnut avenue in the center of

the street on the scooter, she was coming quite fast, when I saw a Public Service truck skidding on the black line just to the left of the west curb of West Shore avenue." Is that the truth? A Yes.

Q Well, the black line just to the left of the west curb of West Shore avenue was on that truck's right hand side of the street, wasn't it? A The left line?

Q Just to the left of the west curb of West Shore avenue. You know where the west curb is, don't you? A Yes.

Q Well, is that where the truck was? A No. I think it was more over to the center.

Q Well, it says—you see, it says here that it was skidding on the black line just to the west of the west curb of the West Shore avenue. You know where that black line is, don't you? A Yes.

Q And that is on the truck's right-hand side of the street, isn't it? A Yes.

Q Well now, if that wasn't true, why did you sign it? A (No response.)

Q Do you remember when this statement was taken? A It was a few days after the accident.

Q And at that time your memory was fresh as to what happened, wasn't it? A Yes.

Q Better then than it is now, wasn't it? A Yes, sir.

Q Well now, having had this statement shown to you, and realizing that your memory was better then than it is now, wouldn't you say that it was the truth that the truck was on the right-hand side of the road? A (No response.)

Q Which do you want us to believe, the statement that you signed, or what you say now? A Both.

Q We cannot believe both if they are contrary, can we? A (No response.)

Q Now, I want you to look at something else: "It appeared as though the front left wheel went over her stomach, after which the truck swung to its right toward the railroad so that the rear left wheel cleared her body. The truck finally came to a dead stop or standstill about twenty feet south of Walnut street close to the curb on the west side of West Shore avenue." Is that true? A No, I do not think so.

Q Well, why did you sign it? A I mustn't have read it very good.

Q Well, that is perfectly clear to you now, isn't it? A Yes, sir.

Q You can read that writing now, can't you? A Yes, sir.

Q You say yes to that? A Yes, sir.

Q And you have read it with me as I have read it to you, haven't you? A Yes.

Mr. Ward: What was that expression, Judge Coult, over her belly?

Mr. Coult: What?

Mr. Ward: Over her belly or stomach?

Mr. Coult: Over her stomach, is what he says.

May I have this marked for identification?

(Statement of two sheets marked Exhibit D. 4a and b for identification.)

Q After the accident, did Violet lie on her back with her head facing toward the railroad? A I do not remember that.

Q Was she about in the middle of the road between the two black lines? A No, I do not think so.

Q Well, look at your statement again. "Violet lay on her back with her head facing toward the railroad. She lay about in the middle of the road between the two black lines." Is that wrong, too? A I think she was more towards the left line.

Q Can you give us any other explanation of how you came to sign this paper with these three errors in it? A Why, I didn't know much about it then.

Q Well, you knew what had happened then, didn't you, because this was right after the accident? You knew that, didn't you? A Yes.

Q And you read this paper before you signed it, didn't you? A Yes.

Q And you knew what was in it, didn't you? A Well, not all of it.

Q Well, why not, son? A (No response.)

Q Any reason why you did not know what was in it? A Well, I might have forgot something.

Mr. Ward: What was that? I did not hear that.

Mr. Coult: "I might have forgotten something."

Q Do you mean you have forgotten something between the time you signed this statement and the time you are testifying now, or do you mean you might have forgotten something between the time of the accident and the time you signed the statement? A Yes, sir.

Q Which one? A Well, I might have put something wrong, too.

Q Can't you give us any reason why you might have put something wrong? A I may have misjudged the accident.

Mr. Ward: What was that?

Mr. Coult: "I may have misjudged the accident."

Q Do you mean that you misjudged it when you made this statement, or that you are misjudging it now when you are testifying? A When I made the statement.

Q Well, why is it that you should get it wrong when you made the statement and get it right now? Has something happened between the time you made this statement and the time you testified to help your memory? A Yes.

Q You got together with these other boys and talked this thing over, haven't you? A Yes.

Q And since you have talked it over with the boys, you have got a different idea of how this accident happened from what you had when you made this statement,— A Yes, sir.

Q —haven't you? A In some things.

Q And one of those things is that this truck was on the left-hand side of the street, isn't it? A Well, it was left of the center.

Q Well, I say, you have changed your mind about that since you made this statement, haven't you? A Yes.

Q Well now, what made you change your mind? Was it talking to somebody else that did it? Was that what changed your mind? A No.

Q Well, what did change your mind? A Well, when all the others said, I thought mine was wrong.

Q That is it. When all of the other witnesses who were talking this over said that it was on the left side, you decided you must be wrong, and changed your mind, is that it? A Yes, sir.

Mr. Coult: That is all.

Mr. Ward: One moment.

Mr. Cummins: That is all.

Re-direct examination by Mr. Ward.

Q Did you write that statement, or did someone else write it? A Someone else wrote it.

Q Do you know who it was? A No.

Q Are those your exact words in that statement, or someone else's words? A Well, I told them something, and then—I said something, and he wrote it down.

Q I want you to talk so all these—

The Court: What was the answer? "I told him something, and then he would write it down"?

The Witness: Well, then he would say—he would say something, and then I would—

The Court: Speak a little louder,—

The Witness: —remember it.

The Court: —so the jurors will hear you.

The Witness: He would say something, and then I would, like, remember it.

Q He would say something, and then you might remember it? A Yes, sir.

Q And he did the writing, didn't he? A Yes.

Q Do you know how to write? A Yes.

Q You could have written what you knew, couldn't you? A Yes.

Q He did not ask you to do that, did he? A No.

Mr. Ward: That is all.

(Witness excused.)

Mr. Ward: Mrs. Apitius?

FAITH APITIUS, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q Whereabouts do you live? A 21 Maplewood avenue, Bogota.

The Court: I did not get your last name.

The Witness: A-p-i-t-i-u-s, Apitius.

Q Were you living there in October, 1927? A Yes.

Q Do you remember the time when this accident happened? A Yes.

Q What was the first that you knew about it? A The first thing I knew was the screeching of the brakes.

Q And whereabouts were you at that time? A I was between Linwood and Elmwood.

Q Glenwood? A Linwood and Elmwood.

Q Linwood? A Linwood.

Q And Elmwood. How many blocks was that from Walnut? A From where?

Q From Walnut avenue? A I think, three blocks.

Q There is Beechwood, is there not? A Beechwood.

Q And Elmwood? A Elmwood; and then Linwood.

Q Then Linwood? A Yes.

Q What did you do? A I stopped.

Q Had you seen the truck before this? A Yes.

Q Whereabouts? A It passed me further down, north.

Q How was that truck going? A It was going very fast.

Q After you heard the screech of the brakes and you stopped, what did you do then? A I stopped, and looked away, because I—

Q Looked away, where? A I knew what was going to happen.

Q Pardon me? A I just looked away, I didn't watch the truck.

Q Well, after that, did you make any observation of where the truck was, or anything of that kind? A I couldn't tell. It was too far away.

Q I see. And then you went on? A No. I waited there for a few minutes.

Q You what? A I waited for a few minutes.

Q Did you see anything about where the accident was, or where it had happened? A I couldn't tell just where it was.

Q I see.

Mr. Ward: Cross examine.

Mr. Coult: No questions.

Mr. Cummins: No questions.

The Court: That is all.

(Witness excused.)

Mr. Ward: Violet May?

VIOLET MAY HUMMERS, one of the plaintiffs, sworn as a witness on her own behalf, testifies as follows:

Direct examination by Mr. Ward.

Q How old are you, Violet? A 13.

Q Do you go to school now? A Yes.

Q Whereabouts do you go to school? A Hawthorne.

Q Whereabouts? A Hawthorne in Bogota.

Q In Bogota? A Yes.

Q Do you go quite regularly now, do you? Do you go about every day? A Yes.

The Court: Speak up; speak up loudly.

Q What grade are you in, Violet? A The seventh.

Q How long have you been going to school? A Three years.

Q And with whom do you live over there, Violet? A With Mama and Daddy.

Q You know, I want all these ladies—

The Court: Can't you speak louder? Just shout, if you want to.

A With Mama and Daddy.

Q I see. And how long have you been living with her? A Since I was born.

Q How long?

The Court: Since she has been born.

Q Violet, do you remember when this accident happened? A Yes.

Q It was on the 5th of October, 1927, wasn't it? And about what time of day was it? A 5 o'clock.

Q Do you remember where you were before it happened? A Reading.

Q And then what did you do after that? A Well, we thought we would go find my brother, because he had some boxes that we wanted to go on the sidewalk on the boxes, and so we went down the hill.

Q Now, just tell his Honor and these ladies and gentlemen, Violet, just what you did, what happened? A When I came home from school, Mama said that I should go over and get some boxes, because she was housecleaning the attic, and I did with Paddy, and we went over about—we took the scooters over with us, and we sat on the scooters going down on the sidewalk, and we pushed them up; we did that two times, and then we got books and we read. Then Paddy wanted to play hide and go seek, and I didn't; so we went down the hill.

The Court: Just take your time, now.

Mr. Ward: Shall we wait, sir, and I will put on another witness?

(Witness excused.)

Mr. Ward: Mrs. Irving?

LILLIAN E. IRVING, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Ward.

Q Whereabouts do you live, Mrs. Irving? A About a third of the way up the hill, a little over two hundred feet up the hill.

Q On what street? A On Walnut avenue.

Q Do you know where Mrs. Webb lives? A Yes.

Q And how many houses above Mrs. Webb do you live? A Just four.

Q On the same side of the street, isn't it? A Yes, yes.

Q I show you P. 2 I ask you if— A This is my house right here (indicating).

Q This is her house on the corner? A Yes. It is not on the corner.

Q The first house on the right-hand side, rather? A Yes.

Q And your house is how many up? A One, two, three, four.

Q Four houses.

Mr. Coult: My hearing is fairly acute, but it is very hard for me to hear witnesses on this side. I suppose it is the acoustics of this room; but will you not ask the witness to speak louder?

The Court: Speak up, please.

The Witness: Yes.

Q What was the first that you knew about the accident, Mrs. Irving? A Well, just the screeching of the brakes, it must have drawn my attention, to look out my window.

Q Where were you at the time? A I was in the dining room, and you could just see down the hill.

Q What did you do then? A Why, as I looked out, I saw a child lying in the street, and, of course, I—

Q Pardon me. Did you come out of your house? A Well, as I heard these here brakes squeak, I could just look right out of my dining room straight down the hill, and I had seen the youngsters go down on their scooter, so I looked right out the window and I saw Violet May lying down on the road, and I went right out of the house to go down the hill to help her.

Q Do I understand you to say you saw Violet May? A Yes. I could see her from my window, lying in the road. I didn't know, I wasn't sure it was Violet May, I wasn't sure whether it was Paddy or Violet May.

Q Paddy is your daughter, isn't she? A Yes.

Q I show you Exhibit P. 1. Can you recognize the situation from that? A I am quite sure it was around here (indicating). It would have to be for me to see from my window, just around the corner, it must have been.

Q Will you mark on Exhibit P. 1 where you saw this child lying? A Well, as nearly as I can.

Q As nearly as you can show? A From the window, I cannot judge positively, but it seemed to me it must have been right around here (indicating).

The Court: What mark is that?

Q You have made a— A Right there (indicating). I don't know what I made.

Q This is the only mark on Exhibit P. 1 (indicating). And that was looking from your window? A Yes.

Q That you saw her? A And then I came right out of the house and went down the hill.

Q When you got down the hill, what happened?

Mr. Ward: I beg your pardon. I will withdraw that.

Q When you looked down, could you see any truck? A Not from the window; I didn't see any truck at the time.

Q Did you, thereafter, see any truck? A When I got down there, it seems to me it was past Walnut avenue.

Q The truck? A Yes.

Q And on which side of the street was the truck? A Well, I cannot be sure of that.

Q I see. A I was too—

Q What happened then, Mrs. Irving? A Well, I looked back to speak to my other youngster, that he did not follow me down, and that way she must have been—they must have backed up and picked her up, because I didn't see who had picked her up, only saw her as she was in the truck, and she put her arms out to me to take her, and I told her to be quiet, she would be all right, just if the boys would take her to the hospital, I would bring her mother right over to her. And then my attention was drawn by some car, had drawn to the curb of Walnut avenue, a small Ford, and he got out and he asked me if I was the mother.

Q Not what was said, if you please. Well, he got out and talked to you, did he? A Yes.

And he told me that it was a Public Service truck that hit her.

Mr. Coult: No, no. I object to that.

The Court: Strike it out.

Mr. Coult: I move to strike that out.

The Court: It is out.

Mr. Coult: It does not make much difference.

Q And then what did you do? A Then I—I went back up the hill.

Q Did you see any skid marks there? A I saw black marks, but in my confusion, and I heard voices talking about it, that I cannot—

Q Not what was said. You heard something about— A I saw black marks, but I don't know just where they were or how long they were.

Q You knew Violet May before this, didn't you? A Yes.

Q How often had you seen her, on the average, before this? A Not very often. She was a very quiet child.

Q What have you to say as to whether or not before this accident she was a normal, natural, child? A Well, she did just about the same things as my youngster did.

Q And have you noticed any change in her? A Yes, considerable.

Q What is the change, please? A Well, I I don't think her disposition is just the same.

Q Anything else? A Well, of course, she is lame and cannot play with the children now. My little girl tries to console her.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q You were in your home? A In my dining room.

Q In your dining room? A Yes.

Q At the time the accident happened? A Yes.

Q And you heard the screech of the brakes, and you looked down the street? A Yes.

Q And you saw this little girl, or some little girl, lying in the street? A Yes.

Q And how far is your house from the corner? A About 220 feet, I should say, We have sixty-foot lots there, for three houses, my house—well, now, out of my dining room window, that would be only ten feet more of that lot, and sixty feet alongside of us is seventy, and forty on these three houses, and it seems to me that is about eighty there.

Q Now, let us see? A It seems like two lots there.

Q There is eighty and forty, is one hundred and twenty, and forty is one hundred and sixty, and sixty is two hundred and twenty? A Yes.

Q And ten is two hundred and thirty? A Yes.

Q Well, your front door is more than ten feet up there, isn't it? A This is my house here, and here are my dining room windows (indicating).

Q Now, I have got to go further, still. A Sixty feet; yes.

Q There is eighty, right? A Yes.

Q That is forty? A I am not sure whether those small houses have forty feet; I do not think they have.

Q What would you say? A Well, they must have thirty, but I don't know whether they have forty. They are very tiny lots.

Q Well, let us call them thirty. Eighty and thirty is one hundred and ten,—and thirty is one hundred and ten; and then this one is sixty? A No; this is forty.

Q This is eighty, those two, eighty; that is two hundred and forty. Then how far is it from there up to your front door? A To my window?

Q No. To your front door? A She has—

Q To your front door? A About fifteen or twenty-five feet.

Q Now, there is two hundred and sixty-five feet. In order to get out of the house, you went by the front door? A Right out the front way. It is a bungalow, right out of my dining room into the vestibule and the front porch.

Q So you went from your dining room? A Yes.

Q Out into the front porch? A Yes.

Q And then you went— A It seems to me I must have run down there.

Q Yes. You ran two hundred and sixty feet down to the corner? A Yes.

Q And then you had to cross Walnut avenue? A No. I didn't cross Walnut avenue at all. I stayed on this side all the way down.

Q You must have crossed over something to get over to where the girl was? A I didn't cross over at all. I stayed on this side.

Q Didn't you go over to the girl at all? A By the time I got down there—as I say, I looked out several times to talk to my little boy, that he mustn't follow me down.

Q Yes. A And by the time I got down there, the truck must have backed out, or whatever it was, I don't know; but, anyway, she had been picked up.

Q Yes. A While I had turned around, this must have happened, because I didn't see her, when I got down there, lying in the road.

Q Which way was the truck facing then? A Going back.

Q Facing north, wasn't it? A Yes, facing north. It ran back to—

Q Then it didn't back up, did it? A Not that I know of. I didn't see that.

Q It was facing north and up at the place where the child had been lying by the time you got down there? A It was facing north, yes. The child was already in the seat.

(Witness excused).

VIOLET MAY HUMMERS, recalled, testified further as follows:

Direct examination by Mr. Ward.

The Court: Now, just take your time, Violet.

Q Do you think you can tell us now what happened? Will you do that, please?

The Court: Just take your time; do not get nervous.

A After school, Mother said to go over and get boxes, and we did; we went over twice, and

we went to look for Billy, and we pushed our scooters down to Bartlum's; we didn't stop at Mrs. Irving's, because we pushed them down. She had been speaking to us a few minutes before; we stood and talked, and then pushed them down to Bartlum's, and then Paddy had to tie her shoe or something, I don't remember, and I—

The Court: She said Paddy tied her shoe or something, "I don't remember."

A (Continuing) And then I pushed up a little more to the curb in the gutter, and I went down about six feet past Gregory's, and I looked through the trees and I saw some of the boys playing, and they were just—I don't know what they were playing. And I didn't see no car. And I went down further about Webb's, maybe past Webb's, and looked to the left, I mean to the right, first, and I didn't see anything at that time, and looked to the left and I saw a car, I don't know what kind of a car it was, it was way down that way by the tunnel. And then I went down to about just before the corner, and I looked and I saw a car, I don't know where it was, on what part of the street, but it was down by the freight place where they dump the freight.

By the Court.

Q Now, just a minute, Violet. You were coming down Walnut street, and the first time you looked, where was the car then, up at Elmwood or Beechwood or where? A I didn't see any car.

Q The first time you looked; but when you did see the car, where was it? A It was by

the freight station, I think it is the middle of the block after Elmwood, Linwood.

Q Linwood. That was the first time you saw it? A It is more to the end. And it looked to me as though he was on his right side, I don't know if it was or not, I can't remember, I only saw that car.

Q And then you looked again, you said, and you saw it again, and where was it when you saw it the second time? A I only saw it once.

Q You only saw it once? A And then I made the turn, and something black, and then I felt a bump and then another and then another one, and then a black cloud, and I got up and stood up, and I saw Paddy, and I—(the witness cries)—and then a man with a red sweater came and picked me up; and I wanted to get out of the way because I saw a dog run over the Sunday before.

Mr. Coult: Your Honor, why can't we defer this examination of this girl until tomorrow? She is all broken up.

The Court: I think so.

Mr. Coult: I certainly do not want to cross examine her.

Mr. Ward: The only thing I would say is this: I suppose this is a strain to her, I wouldn't want to prolong it; I wouldn't want this child to look forward to this again tomorrow. I think I do not wish to prolong it, and I will ask but one or two questions more and let Judge Coult cross examine.

Mr. Coult: That puts me in a very curious position, because I do not want to have the girl suffer by anticipation, but I certainly

do not want to cross examine her when she feels as badly as she does now.

Mr. Ward: If your Honor please, I think Judge Coult should cross examine her this afternoon. I do not want this child to look forward to this tomorrow.

The Court: (To the witness.) Do you feel nervous?

The Witness: I will answer him.

The Court: Do you think you will be all right? Suppose you do this: Suppose you go outside, walk around a bit and then come in. Do you want to do that? Suppose you go up and talk to Paddy for a while, go outside and talk with her and then came back again, and just forget you are coming back.

Mr. Ward: May she go out for just a moment?

The Court: Yes. Let her and her companion go outside.

We will take a recess until five minutes after three.

(After a short recess.)

Mr. Coult: Your Honor, I will waive cross examination so far as I am concerned; I won't cross examine this girl in the condition she is in.

Mr. Ward: In view of the judge's generous attitude, I do not wish to ask her anything more.

That is all, sir.

The Court: All right.

(Witness excused.)

Mr. Ward: Mr. Cunningham?

WILLIAM J. CUNNINGHAM, called as a witness on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. Ward.

Q Where do you live, Mr. Cunningham? A At the present time, in Jersey City.

Q And what is your business? A Automobile salesman.

Q What was your business in October, 1927? Automobile salesman.

Q Do you recall the 5th of October, 1927? A Yes, sir.

Q Did you witness this accident? A Yes, sir.

Q Whereabouts were you just before the accident took place? A I was traveling south on West Shore avenue going to Ridgefield Park to my home at the time.

Q What were you in, if anything? A I was driving a brand new Hudson sedan.

Q Were you working for the Hudson people at that time? A Yes, sir.

Q A brand new Hudson, was it? A Yes, sir.

Q And at what rate of speed were you going?

Mr. Ward: Oh, I will withdraw that, for the moment.

Q Did this truck pass you? A Yes, sir; the truck passed me at— .

Q Whereabouts were you when the truck passed you? A At Linwood avenue, about where the frieght station is, where the road starts to widen, and—

Q After the truck passed you, did you observe it at all? A Yes, sir. I observed the truck pass

me, because I knew that the children used that street for a playground, and I travel it about four times a day, and I looked at my speedometer when he passed, and I was doing 25 miles an hour, I should judge.

Q And how fast was he going? A Well, I judge around forty.

Q Are you familiar with automobiles? A Yes, sir.

Q Do you know whether Dodge automobiles have any governors? A I do not believe they have. A larger truck has a governor, but I believe that was a three-quarter-ton truck.

Q So far as you were able to judge, was there any governor on that car, keeping it down?

Mr. Coult: I object to that.

Mr. Ward: This man is a very busy man and I did not want to bring him in rebuttal. Perhaps some of this may properly be rebuttal.

Q You say he was going faster than you, however? A Yes, sir; he passed me.

Q And after he had passed you, did you observe the accident? A Yes, sir.

Q Do you know where Walnut avenue is? A Yes, sir.

Q What did you see? Just tell the Court and the ladies and gentlemen of the jury what you saw? A Well, his truck passed me, and I looked at my speedometer to recognize the speed, and I heard the squeal of his brakes; at that time, he was about two blocks ahead of me. I believe I was around a block past Linwood, and I saw the little girl and the scooter and the fender all together.

The Court: What was that?

The Witness: After he passed me—he passed me and gone about two blocks, and I had traveled about a block, and I saw the little girl come out of the side street, and I saw the fender, the left front fender of his car and the little girl hit, and it looked all together, the scooter, the little girl and the fender of the car, and he passed her after he struck her.

Q What part of the car hit the little girl? A The left front fender.

Q What part of the fender? A The front part.

Q Where was the little girl when she was struck? A She was on the "bike," on this scooter, when she was struck.

Q And whereabouts? A Well, there is three black lines, I believe there was three lines of cement.

Q Three sections? A Three sections. She was on about fifteen feet from the east curb, or about on that black line, on the first black line.

Q That would be the first black line, or the closest black line to the easterly side? A To the side away from the railroad track, yes.

Q Or, towards the curb side? A Yes, sir.

Q What did the truck do then? A Why,—

Mr. Ward: I withdraw that, if your Honor please.

Q How long before the accident was it when you heard the screech of these brakes, about? A Oh, a matter of seconds.

Q And you heard the screech before the accident? A Before the accident; yes, sir.

Q Then where did the truck go after it struck the little girl? A Why, the truck backed up, and I pulled—

Q No. I mean, first, where did it go after striking her? How far did it go? A Why, across Walnut avenue, I should say, about fifteen feet past Walnut avenue.

Q And then what? A And then it stopped. And one of the men, not the driver, but the other gentleman on the truck, got out and ran back to the girl, and the driver backed up, and I pulled up to the curb alongside of the railroad track, that is, the far side. I didn't get out of the car. I seen them put her in the truck, and when she was taken care of, I went on ahead. I didn't know who the little girl was, or anything about it. And I seen she was taken care of, I went on.

Q Have you any idea how far that little girl was in front of the truck when the brakes of that truck were first applied? A Well, that I couldn't say.

Q Can you give us any idea?

Mr. Coult: I object to that.

The Court: Sustained.

Q Now, have you formed any opinion upon it?

Mr. Coult: I object to that.

The Court: Sustained.

Mr. Ward: Exception, sir.

Q You saw the truck when the brakes were applied? A Yes, sir.

Q Did you see the little girl at that time? A Yes, sir.

Q How far in front of the truck was the little girl at that time?

Mr. Coult: I object to that. The witness has answered that. He said he did not know.

The Court: Well, I will allow it again, if he said he did not know.

Mr. Ward: Well, if he does not know, of course, it is all right; but I would like to have a complete opportunity to find out whether he knows or not.

A I couldn't say exactly.

Q You couldn't say exactly. Can you form an estimate?

Mr. Coult: Well, I object to that, if the Court please.

A I should say four—

The Court: Well, I do not want you to conjecture unless you know.

The Witness: Well, I am not positive of the distance. I was too far away to be exact.

The Court: Then, do you want to say?

The Witness: No. I would rather not say.

Q All right. Did you see any skid marks there? A Yes, sir.

Q Where were they? A Well, that I am not positive of. I know they were the skid marks of that truck. I know they were the skid marks there, but I didn't pay any attention, because I didn't stay there and look them over.

Q Was there any horn sounded? A No, sir.

Q By the truck? A No, sir. The truck didn't sound any horn when he passed my car, and he didn't sound it from then on until I heard the screech of his brakes.

Q Were there any children playing in the street? A Yes, sir; plenty of them.

Q Where? A Why, there were some about a block or so from where the little girl was hit, and there was some further down, and some on the railroad tracks; in fact, there always is.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q You had a brand new Hudson car? A Yes, sir.

Q And how much mileage had you run on it? A The car was the first time it had been on the road, I believe, not more than twenty-five or fifty miles.

Q So, you were naturally driving it very carefully, weren't you? A Yes, sir.

Q It is not a good thing to drive a new car rapidly, is it? A No, sir.

Q You know, as a mechanic, that there is nothing that will shorten the life of an engine more than to run a new car fast, that is true, isn't it? A Yes, sir.

Q And where had you come from? A I had come from Hackensack.

Q And up to the time that this accident happened, I suppose a number of cars had passed you going in the same direction, hadn't they? A I don't know if they passed me on West Shore avenue, but I know they had passed me

coming over from Hackensack, plenty of them; yes, sir.

Q The general course of traffic through Hackensack is more rapid than you were driving, wasn't it? A Yes, sir.

Q That is because you had the new car, and you were driving it slowly; that is so, isn't it? A Yes, sir.

Q When you went down West Shore avenue, did you continue at the same rate of speed that you had gone through Hackensack? A Why, no. I was going faster going down West Shore avenue for the simple reason it was a steady line of traffic over the causeway, and you could hardly move at all.

Q Well now, if you were going faster on West Shore avenue than you did in Hackensack and traffic was slower in Hackensack than it was on West Shore avenue, why did all these automobiles pass you in Hackensack? A Well, they didn't pass on the causeway, they passed about from the court house before you hit Brewster's.

Q Well, were you going on West Shore avenue at the same rate of speed that you had maintained there? A No. I was going faster on West Shore avenue than I was going there.

Q Why didn't you go fast enough to keep up with traffic? A I didn't want to pass any cars and duck in and out with a brand new automobile; I didn't have any obstruction.

Q Well, I mean, from the court house, out? A I didn't pass other cars.

Q Why didn't you keep up with the traffic there? A I didn't pass any other cars. I kept up with the traffic, but other cars passed me.

Q And you saw lots of them? A Yes.

Q Was that because you were driving a new car and did not want to pass other cars? A I didn't want to pass other cars and scratch it.

Q You did not have to duck in and out and maintain your place? A I did not; I maintained it.

Q I thought you said a line of cars passed you? A They did.

Q Was that because you were driving the car slowly on account of it being a new car? A No. I was following a line of traffic, but I wasn't taking any chances in pulling out of the line.

Q You say when this car passed you on West Shore avenue you looked at your speedometer? A Yes, sir.

Q Had you been looking at your speedometer every time a car passed you? A Not every time, no, sir; but I kept a general watch on it to see I didn't go too fast.

Q How was your speedometer running when the other cars passed you? A About eighteen, fifteen, one time twenty.

Q Now, you take the car that passed you last before this one; where did that happen? A Why, on the causeway before this side of River Road.

Q You looked at your speedometer then? A Yes, sir.

Q How fast were you going? A Eighteen.

Q What? A Eighteen.

Q Now, you take the car that passed you next before that; where did that happen? A That I cannot tell you.

Q Well, why is it that you remember the car that passed you when you were going eighteen miles an hour when you do not remember the other one? A Because he turned in front of

me, it turned down River Road, and I wanted to go straight ahead, and I had to stop.

Q And that caused you to look at your speedometer, did it? A Yes.

Q And you saw you were going eighteen miles an hour? A Yes, sir.

Q Can you remember what your speedometer read when any other car passed you on that day? A Not just exactly when a car passed me, no.

Q Why not? A That is the only two particular instances that I remember.

Q You only had particular interest in two cars, is that right? A Yes, sir.

Q Didn't you know about how fast you were going without looking at your speedometer? A No, sir.

Q How long had you been driving a car? A Twelve years.

Q And when this car passed you on West Shore avenue, you did not at that time expect that there was going to be an accident, did you? A No, sir; I did not.

Q Your purpose in looking at your speedometer was to see how fast your car was going, wasn't it? A Exactly; yes, sir.

Q What was there about the car passing you that caused you to inquire how fast your car was going? A Which car?

Q Well, when the truck passed you? A When the truck passed me?

Q Yes. A Because I noticed the rate of speed he was going, and I—and I know that the children play in that street, and I thought it was funny he was using such speed down that road when the children use it for a playground.

Q You knew, when you looked at him, he was going fast, didn't you? A Yes, sir.

Q Why did you have to check that by looking at your speedometer to see how fast you were going? A Because I wanted to see how fast I was going.

Q I see. Now, this car, this truck passed you how far north of the accident, how many blocks? A When he first passed me?

Q Yes. A I should say about four or five blocks.

Q Did it pass you twice? A No. Once.

Q About four or five blocks north of the accident? A Yes, sir.

Q About how far were you from the scene of the accident when it happened? A I guess about three blocks.

Q And the blocks are about the same size along there? A The same except the last one.

Q While you went one block, he went four; is that right? A Well, I wouldn't say four; he went about two. I think it was about two blocks ahead of me.

Q You say you were four blocks away when he passed you, is that right? A I was at Linwood avenue when he passed me.

Q I am only taking your word. You said it was four blocks away; is that right? A Well, I can tell you if I can count the blocks. I do not remember. I haven't been in that territory in two years, close to it.

Q Well, you remember the avenue, don't you? A Yes, sir.

Q But you do not remember how many blocks the avenue is away? A I do not remember how many Linwood is from Walnut, no, sir.

Q Well, the first one is Walnut, and the second one is Beechwood, and the third one is

Elmwood, and the fourth is Linwood; was it four blocks from the accident? A Yes, four blocks.

Mr. Ward: Now, that shows it is three. Counsel is counting Walnut and saying that is a block.

Q All right. Three blocks, then? A Three blocks.

Q Three blocks. And how far were you from the accident when it happened? A Two.

Q All right. Then he made three blocks while you made one block, is that right? A Yes, sir.

Q So, if you were going twenty-five miles an hour, he was going seventy-five, right?

Mr. Ward: I object to that.

The Court: No.

Mr. Ward: No, that is not so.

The Court: No evidence as to the distance between the blocks.

Mr. Coult: He said the blocks were equal. I asked him that.

Q The blocks were all about equal size there, you said, didn't you? A I believe they are, yes.

Q All right. Well, assuming that the blocks were equal, as you believe, and that he went the three blocks while you went one, you were going twenty-five miles an hour, isn't it a fact that he was going seventy-five? A I said I was about two blocks, I believe, I was two blocks—he was two blocks in front of me when the accident occurred.

Q Well, is that your best judgment? A Yes, sir.

Q Where were you when the accident happened, at what street? A When the accident happened I believe I was at the block past—a little past the block past Elmwood—past Linwood avenue, between Elmwood and the next block.

Q I see. A Between Elmwood and Beechwood, I believe it is.

Q Now, about how long are those blocks? A That I cannot tell you.

Q About two hundred feet? A I imagine about two hundred feet.

Q Did you continue to go along at 25 miles an hour? A That I cannot tell you.

Q You cannot remember whether you did or not? A I didn't look at the speedometer any more. I was watching the accident.

Q Well, I know; but can't you tell from your recollection of the incident and from your experience as a driver whether or not you picked up speed, or whether or not you continued at the same speed? A I don't remember now, no, sir.

Q You haven't any recollection about it at all? A I know I didn't go any faster, but whether I slowed down or whether I maintained twenty-five miles an hour, I don't know.

Q Do you mean to say that you saw an accident of this kind, a little girl coming out of a street and hit by a truck and knocked out in the street, and you didn't hurry up any to get there? A I pulled to the curb and stopped after the accident.

Q You pulled to the curb when you got to Walnut avenue, didn't you? A Yes, sir.

Q What rate of speed did you travel between the time that you saw the accident and the time

that you got there? A Well, do you realize what little time it takes in an automobile to cover two hundred feet, so I was only about—

Q That is just exactly what I was getting at. How long do you think it took you to get down there? A It was a matter of seconds.

Q How many seconds? A That I cannot say.

Q Now, when you got there, what was the situation? A When I got there, the truck was backing up toward the little girl.

Q Didn't you say on your direct examination that the truck had backed up to where the little girl was when you got there? A Yes, sir.

Q Is that true? A Yes, sir.

Q So that, no matter how long it took you to run that block and a half or two blocks, whichever it was, the truck had had time, at least, to come back to where the girl was, that is a fact, isn't it? A I don't—will you repeat that?

Q The truck got there before you did? A Yes, sir.

Q Now, you stopped, did you? A Yes, sir.

Q You did not get out? A No, sir.

Q And you went right on? A I didn't go right on; no, sir, until I seen that she was put in the truck, and being taken care of; then I went on.

Q You went on, but you did not get out of your car? A No, sir.

Q Where did you go to ? A I went to my home.

Q Do you know either Mr. or Mrs. Hummers? A I know Mr. Hummers, yes, sir.

Q How long have you known him? A About five years.

Q Did you know that she lived in the vicinity of this accident? A I did.

Q Did you know that the little girl that was hit was her daughter? A No, sir.

Q Had you known the little girl before the accident? A I think I have seen her once.

Q You did not have enough curiosity about whose child this was to get out of your car and find out? A No, sir; not when I seen it was taken care of. I didn't know whose child it was at the time; in fact, I didn't see her face.

Q You knew the Hummers lived on that street, didn't you? A Yes, sir.

Q And, so far as you knew, at the time you went on, it might have been the Hummers child? A Well, that didn't enter my mind at that moment.

Q What? A That didn't enter my mind at that moment.

Q It did not enter your mind at all? A No, sir; that it was anyone's child that I knew .

Q Did it enter your mind that you might be of some assistance to the child? A It did; that is why I stopped, but, when I seen she was taken care of, I knew I wasn't of any assistance.

Q Now, when did you first find out it was the Hummers child? A Well, I believe the following day or the following evening.

Q And how did you get that information? A From Mr. Hummers.

Q What? A Through Mr. Hummers. When he mentioned his child was hurt, I realized that was the child I saw.

Q Through Mr. Hummers, did you say? A Yes, sir.

Q Where did you see him? A In Bogota.

Q What? A In Bogota.

Q When? A The day after the accident.

Q Well, you knew Mr. Hummers too, did you? A Yes, sir.

Q How long had you known him? A I told you five years.

Q Well, you said Mrs. Hummers? A No. I beg your pardon. I said Mr. Hummers.

Q Ever been connected in business with him? A No, sir; not directly.

Q Well, indirectly? A Yes, sir.

Q In what way? A Well, we had business transactions together.

Q Of what nature? A Real estate.

Q Both in the same business? A No. I was in a different line of business.

Q When you got down to the corner where the accident occurred, did you see any car coming from the other direction? A I didn't notice; no, sir.

Q When you got there, was somebody already putting the child into the truck, when you got there at the corner? A Why, yes; when I got there, they were at the little girl, I don't know whether they already had her in the truck, or were putting her in the truck.

Q Now, tell me this: Which way was the truck headed, north or south? A The truck was headed south.

Mr. Coult: That is all.

By the Court.

Q Did you see the little girl on Walnut street before she turned into West Shore avenue? A No, sir; I did not.

Q You did not see her? A The first I saw her, she was on West Shore avenue.

Q All right.

Cross examination by Mr. Cummins.

Q Just a moment, please. So that, if Mr. Hummers had not told you that it was his child, you would not have known, even to this day, from any inquiry of your own, whose child it was, would you? A No, sir.

Q You were not that much interested, were you? A No, sir.

Q Did you take the number of the truck? A No, sir.

Q Did you go over and find out who the driver was? A No, sir; I didn't get out of the car.

Q You didn't get out of the car at all? A No, sir.

Q But you were interested enough, two blocks up further, to check up on his mileage? A I didn't check on his mileage. I checked on my own.

Q With the idea of finding out how fast the other fellow was going? A No, sir. With the idea of finding out how fast I was riding a new car.

Q Now, at the time of the accident, you say the child was about fifteen feet west of the westerly curb, or curb on West Shore Road, is that right? A I believe that is the east curb.

Mr. Ward: I object to that. It is the easterly curb. Well, he has corrected it.

A (Continuing) About at the black line, the first black line of those three strips of cement. I don't know exactly how many feet, I should judge it is about fifteen feet.

Q And the child was lying on the black line, the first black line west of the curb? A West of the east curb,

Q That is right? A Yes, sir.

Q And how far south, or rather, north of Walnut street? A Why, I should judge around fifteen to twenty feet.

Q Fifteen or twenty feet? A A short distance from the corner.

Q From the curb, if extended, or the sidewalk, if extended? A From the curb.

Q From the curb. Now, did you see the truck back up? A Why, I imagine I did. I am not sure whether I was looking at it back up, or I was watching where I was going, but I know it passed the child, and when I pulled up alongside of the curb, why, the truck was back to the child, so it evidently backed up. I know it didn't turn around, it backed up.

Q Did the truck back up all the way to where the child was? A I don't think, not quite as far as the child was, no. I believe the truck backed up from a little past the south corner of Walnut avenue, to about the corner—to about the other corner, it backed about across the curb, and they may have carrier her the other distance, which wasn't very far.

Q And they picked the child up and took the child over to the truck? A Yes, sir.

Q Do you know who was driving? A No, I don't know.

Q Would you recognize the driver? A No, sir.

Q How many other men were in the truck? A There were one other man besides the driver.

Q Do you know who the other man was? A No, sir.

Q Do you know what color he was? A No, sir. I know he was white.

Q You are sure of that? A Well,—

Q Was he taller than the driver?

Mr. Ward: Wait a minute. You are asking whether he was sure of that. I object to that unless he is given an opportunity to answer.

The Court: A question unanswered?

A What was the question?

Mr. Cummins: Just repeat the question, please.

(Question read.)

A Was he white? Yes.

Q Was he taller than the driver or shorter? A That I cannot say. The driver—he was out of the truck, and the driver was in the truck at all times when I remember seeing them together.

Q You did not see the driver get out of the truck at all? A I didn't see the driver get out of the truck at all.

Q Would you say the driver didn't get out of the truck? A I wouldn't say he didn't; no, sir.

Q But you didn't see him? A I didn't see him get out.

Q And you were looking south, in that direction? A Well, I had passed the truck before, where I come to a standstill, I was past the truck.

Q You had passed the truck? A Yes, sir.

Q How soon after the accident did you pass the truck? A Oh, a matter of seconds.

Q Did you take the number of the truck? A No, sir.

Q As far as you know, you were the only one that saw the accident, weren't you? A No, sir.

There were several other people there, several people around the truck.

Q At the time? A When they picked up the little girl, several children and some grown-ups.

Q Were around the truck? A Yes, sir; on the left side of the truck, around the curbing.

Q On the east or west side of the truck? A On the east side of the truck, the left-hand side.

Q On which side of the truck did you pass? A I passed the west side, the right side.

Q And with reference to the truck, where did you come to a stop? A I should judge about fifteen feet past it, alongside of the curb.

Q Fifteen feet further south? A Than the truck.

Q And alongside of the curb, is that right? A Yes, sir.

Q And then, did you get out of your car? A No, sir.

Q You just stood there, sat in the car? A I sat there and looked back and seen the girl was taken care of, and went on.

Q Did you see how badly hurt the girl was? A No, sir.

Q Did you inquire? A No, sir.

Q Did you find out whether she was dead or alive?

Q How soon, in minutes and seconds, how soon after the truck and the girl came into collision, did you reach that point? A Why, that I couldn't say; it was a very short space of time.

Q And, at the time the collision took place, you were two blocks, approximately, north? A North of the truck?

Q Of the scene of the accident? A Of the scene of the accident; yes, sir.

Q Did you see anybody running toward it? A No, I cannot say I did.

Q No one was running toward it? A I didn't see them.

Q When did the people come? A Why, after the squeak, the squeaking of the brakes, why, the children then started to run down there.

Q Were you there before the children? A Why, the children were ahead of me.

Q The children were ahead of you? A Yes.

Q How many adults did you see there? A That I couldn't say.

Q How many children did you see there? A I couldn't tell you that. There were quite a few.

Q They were all on the east side of the truck, you say? A Well, there might have been one or two on the other side; but it looked as though the majority of the children were on the east side of the truck.

Q Where was the child in the truck? A In the driver's seat.

Q Who was holding her? A That I cannot say. I was looking back for my car.

Q Was she occupying the whole of the driver's seat? A What is that?

Q Was she occupying the whole of the driver's seat, or was the driver and the helper both on the seat with her? A That I don't remember.

Q Was she lying down or sitting up? A I know the driver was on the truck.

Q Was she lying down or sitting? A That I cannot tell you.

William J. Cunningham, for Plaintiffs, cross.

Q Was she standing up? A I cannot tell you that.

Q But you are sure that she was in the truck when you got there? A I saw them put her in the truck; yes, sir.

Q Where was she when you got there? A In the truck.

Mr. Cummins: That is all.

Mr. Ward: That is all, Mr. Cunningham.

By the Court.

Q Just a minute. When this truck passed you up at Linwood avenue, what side of the road were you riding on? A Why, I was quite over toward the right.

Q Close to the right? A Well, not—pretty close, I imagine about ten or twelve feet from the curb.

Q How close to you did the truck ride? A Why, maybe three to four feet.

Q Would you say that was on the right side, too? A I would say he was riding about the center of the road.

Q The center? A I wouldn't say he was on the left-hand side of the road. When he passed me, he might have been a little bit, to pass me.

Mr. Ward: That is all, Mr. Cunningham.

(Witness excused.)

Mr. Ward: Mr. Hummers?

WILLIAM S. HUMMERS, recalled as a witness on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. Ward.

Q Mr. Hummers, after this accident, on the day of the accident, did you make any observation with reference to skid marks? A I did, that evening.

Q What did you see? Just describe to the Court and jury? A I went down to the scene of the accident, naturally, that evening, I knew nothing about it until afterwards, and I went down to view what the situation was, and how it could possibly have happened, and the only thing left for me to see beyond a bunch of youngsters hanging around and talking about it was the skid marks that was there.

Q Where did you see those skid marks? A They began about forty feet north of Walnut avenue, north of the curb line, and they ran down to a point possibly to the middle of the street, I would say, the skid marks.

Q The middle of what street? A Middle of Walnut avenue.

Q You mean Walnut avenue, if projected across West Shore? A That is correct.

Q It would be about the middle of Walnut avenue. What then? A I simply paced them off to get a measurement of how far the car skidded, to get an approximate speed of what the car must be going.

Mr. Coult: I object to that.

Q Did you pace those marks off? A I paced them off to the extent of walking them off.

Wm. S. Hummers, recalled, for Plaintiffs, direct.

Q What did you ascertain by that? A They were about ten of my paces, about thirty feet.

By the Court.

Q You said they began forty feet north of Walnut? A Yes, sir. The total skid marks were about forty feet, though, about thirty to forty feet; the skid marks were not one unbroken streak, they seemed to have varied a trifle; they began, of course, and then they stopped, and began again and stopped; evidently, he was taking off his brakes and putting them on.

Mr. Coult: I move that be stricken out.

The Court: Strike it out.

By Mr. Ward.

Q Now, they began, you say, thirty or forty feet north of Walnut avenue? A They began about forty feet north of the intersection of Walnut avenue.

Q I see. A That would make it about ten or fifteen feet.

Q And they continued to where, on and off, as you have described? A They continued, on and off, brokenly, until about the middle of the intersection of Walnut avenue.

Q Were there any beyond that? A Not beyond that point; no, sir.

Q And, with reference to the particular sections of cement, where were these skid marks? A They evidently began about—

Q Not what they evidently— A They began ten feet, eight to ten feet east, or, rather, west of that one dividing line of the cement, and they curved easterly in, brokenly, of course, but they

curved in towards the west side—the east side of Walnut avenue.

Q And how close to the east side of Walnut avenue did they come at the nearest point? A They come within two feet, possibly, of that line.

Q Within two feet of that line? A Yes, sir.

Q And they were broken, as you say? A They were broken, evidently, intermittent.

Q And two feet of what line do you mean? A I mean of the easterly line. There is three lines, two lines there, of the easterly line.

Q And you mean the line, then, nearest the easterly curb, is that correct? A Nearest the sidewalk is correct.

Q Yes. A The sidewalk is only on the easterly side.

Q Did you have a conversation with Mr. Ankelein? A I did, sir.

Q When? A To put it exactly, I could not; it must have been three days after the accident. The accident was a Wednesday.

Q Whereabouts? A In front of Somer's cigar store in Bogota.

Q What time of day? A I believe it was a Sunday morning. I am not quite sure as to the time of the day. I believe—

Q What was said?

Mr. Coult: That is objected to by me on the ground it is not binding on my client, and I would like to ask your Honor to take care of that in your charge.

Q What was said? A Why, Mr. Ankelein introduced himself to me. I had never met the man before, but he evidently knew me. I had been a business man in Bogota, and he evidently

knew me, and I was talking to somebody at the time about the accident.

Q What did he say? A He came to me and introduced himself to me. He said, "I am Ankelein. Are you Mr. Hummers?" I says yes. And. of course, he was very much wrought up and distressed.

The Court: No.

Mr. Cummins: I object.

The Court: Just tell us. Can't you tell us what he said?

The Witness: He said, "I am awfully sorry, Mr. Hummers," he says, "You know, I must be awfully sorry," and I told him, yes, I thought he was very sorry. And he says, "I just don't know how it possibly could have happened." He says, "I must have lost my head, or something; I cannot imagine how it could have happened."

Q And that was all that was said? A His bus came along about that time, and he took his bus; I don't know whether he was going to Ridgefield Park or New York. I know he was waiting for a bus. The bus came along and he took his bus.

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q Now, these skid marks that you mentioned were two in number, I suppose? A Yes.

Q Do you mean they were parallel to each other? A Yes.

Q There were two of them? A Certainly.

Q And about five feet apart, I suppose? A I couldn't say. Possibly the width of the car. Naturally, they would be the width of the car tread.

Q Well, possibly about five feet apart? A Yes, six feet; five or six feet.

Q Well, do you believe it was? You were looking at them; I wasn't? A I am not sure. I did not measure them, Judge, because, you know, the average marks would be parallel, the wheels would be parallel, and the skid marks would have to be parallel.

Q I know they were parallel; but I am trying to find out how far apart they were? A Do you mean each individual skid mark?

Q From one to the other? A Or the tracks and the skid marks, what do you mean?

Q You say there were two skid marks that were parallel; how far were they apart? A Why, about five or six feet. I didn't measure them.

Q Use your better judgment? A It is pretty hard to tell. Between five or six feet, exactly, I should say.

Q You are familiar with the Dodge car, aren't you? A No. I have never driven a Dodge car.

Q You know that the track on the Dodge car is about the same as the ordinary tread? A It would seem so.

Q You say these were five or six feet apart, and you could see where they went along this concrete surface? A That is correct.

Q For a distance, as you say, of about how many paces? A About forty feet from the intersection.

Q How many of your steps? You told us that once? A From the curb line, ten of my

steps; but they were broken considerably from that point on.

Q Well, you recall being asked if you paced the length of those skid marks, don't you? A Yes, I paced them ten paces from the intersection.

Q Ten paces? A Not from the intersection, from the end, the cub line, the extension of the curb line, the skid marks.

Q What I want to get at, did you pace them from the point where they began on the street to where they ended? A I paced them from the curb line at the west point at the intersection; after the curb line to the intersection, about ten or fifteen feet, they weren't apparent, they were hardly visible. He had evidently released his brakes, and you could hardly see them.

Q Well, did you pace the distance from where the skid marks first appeared on the road to where they last appeared on the road? A I did not, I paced them from the point where they were the blackest to the point where they practically simmered out to nothing.

Q And that was ten— A Ten of my paces.

Q Ten paces? A Yes, sir.

Q And how far north of the north curb line of Walnut avenue did those skid marks begin? A North of the curb line?

Q Yes. A About thirty feet.

Q Is that where you started to pace them? A No, sir. I paced them from the blackest point, from the north point, out.

Q Why didn't you pace the whole length, everything you could see? A Because, naturally, I looked at the blackest point, where it was, first, and I paced them on down; they were

hardly visible from that point on. The man had evidently released his brakes.

Q Well, did you pace—can you give us any idea of the length of the skid marks where you could see them? A Yes, sir; thirty feet, approximately.

Q How long were they? A Thirty feet.

Q That, you could see on the— A That is correct.

Q —concrete? A They were black for at least twenty—

Q And the rest of it was where you say it was invisible? A It wasn't invisible. It was hardly visible, as if the car had just come to a stop.

Q All right. Now, you say that those skid marks were ten feet west of the easterly tar line? A I don't think I said ten feet.

Mr. Ward: I object to that.

Q What? A I didn't say ten feet.

Q Where they began. Isn't that what you said? A I didn't say ten feet. I said eight to ten feet.

Q They were eight to ten feet west of the easterly tar line? A That is correct.

Q To the intersection? A That is correct.

Q Is that right? A That is correct.

Q By that, you mean the nearest skid mark to the easterly side? A Yes.

Q So that the nearest skid mark was eight to ten feet west of the easterly tar line, and the other skid mark would be thirteen to fifteen feet west of it? A Yes, sir.

Q Is that right? A That is right, on that basis.

Q Now, those sections of cement are seventeen feet wide, aren't they? A I don't know; I never measured them.

Q There are three sections of cement? A There are three sections of cement; that is right.

Q And it is approximately fifty feet wide? A And they are approximately seventeen feet wide, if they are even.

Q Well, aren't they even? A I don't know. I never measured them to make sure they are even. I don't believe they are even, though.

Mr. Coult: May I ask at this time whether your Honor would permit the jury to look at the locus of this accident?

The Court: Have you any objections, Mr. Ward.

Mr. Ward: My associate thinks it would be a good thing. I have no objection if the jury would not mind doing it.

The Court: What arrangements can we make?

Mr. Coult: Why,—

Mr. Ward: Well, each pay half the expense, of course.

Mr. Coult: That is satisfactory. I am going to say we can get you buses or a bus.

The Court: How far is it?

Mr. Ward: It is only about a mile and a half.

Mr. Coult: Just across the river.

A Juror: That is a good idea. I think it is a good idea.

The Court: Do you want to go tonight?

A Juror: I think we have enough cars to get over there. I can take five with me.

You possibly have cars here or something we could travel in.

Mr. Coult: I do not suppose the attorneys ought to go.

Mr. Ward: No. I do not think we ought to bother the jury, either.

Mr. Coult: I think your Honor should send an officer with them.

The Court: What I am thinking about, of course, probably the jurors have made some plans for tonight, and I do not know, they live in different parts of the county.

Mr. Coult: It would not take ten minutes to go over and just look, I would like to have your Honor instruct the jury just to look at these two streets and the hill.

The Court: I suppose they generally know about it.

Mr. Coult: I do not think the jury should use the cars of either counsel, I do not think it would be—

The Court: The first thing we want to decide, do you want to go tonight?

A Juror: It depends on the women folks, I suppose. Would it be necessary to come back?

The Court: No, not tonight.

Another Juror: Well, then, let us go.

Mr. Ward: I suppose your Honor can adjourn now?

The Court: Yes, I will do that. And if you want conveyances, we will have to arrange for them; if not, you can arrange it yourselves.

Mr. Ward: I am perfectly willing, if the sheriff will arrange to get the proper conveyances, comfortable conveyances, to pay half of the cost, and let the Public Service pay the other half.

Mr. Coult: I think the best idea is to get some taxicabs, or whatever is necessary.

The Court: We will have some officer accompany them. All right, then; we will let you find your way. Go over there this evening. We will adjourn now.

Mr. Coult: I think I am through with the cross examination of this witness.

The Court: And I might say to you that when you get over there, you may look at it and talk about the points; but do not discuss the case until it is closed, and do not permit anybody to discuss the case with you, nor permit anybody to discuss the case in your presence, and if anybody attempts to, report that to the Court. I will designate an officer.

(The Jury retired in charge of an officer to view the scene of accident.)

(Recess.)

Hackensack, New Jersey,
May 10, 1929.

THIRD DAY.

(Trial resumed.)

The Court: All right. We will proceed with this case.

Mr. Ward: Mrs. Hummers?

VIOLET HUMMERS, recalled as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. Ward.

Q Mrs. Hummers, I think I started to ask you about the skid marks, but due to the fact that you had not seen them until after the accident, I waited until there was other evidence. Now, when did you see these skid marks, after? A Well, it was less than two weeks after.

Q Two weeks? A It was a little less than two weeks when I first came home after I had left my brother's house to come home to my own home again.

Q Were they the only skid marks there? A They were the only ones that I saw.

Q I show you Exhibit P. 2 and ask you if you can indicate in a general way where those skid marks were?

Mr. Ward: I will withraw that, with his Honor's permission.

Q First, how many skid marks were there? A There were two; one from each wheel.

Q And what was the character of them? A Just what do you mean, Mr. Ward?

Q What did they look like? A Like two black marks, two long black marks.

Q And can you indicate on that picture where they were? A Yes, I think I can. The furthest one away from the sidewalk was well past the middle, toward the sidewalk.

Q That would be towards the easterly side? A Yes.

Q Past the middle of what? A Of the road.

Q And you are indicating that it began at a place about— A About there, but just—(indicating).

Q Where the picture—there is a picture, a mark "X" on the picture, is that correct? A Yes.

Q They began at that point? A Yes.

Q Now, where did they go from there, or extend from there? A Well, they came down this way—(indicating), and they started to—immediately, almost, they started to curve in toward the sidewalk, and—

Q That would be towards the east? A Yes, towards the east, and a point about here (indicating), the one wheel was across the line, the tar line,—

Q Now,— A —about there (indicating).

By the Court.

Q You refer to the tar line. Are you referring to the— A The most easterly tar line.

Q —most easterly section? A Yes; closest to the sidewalk.

By Mr. Ward.

Q Now, will you put a mark there, please, where the one skid mark crossed the tar line? A

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(The witness marks on photograph.) You see, this is the tar line right here (indicating).

Q Yes. You have got a "V," which is the initial of your first name? A Yes.

Q How far beyond that, if at all, did those continue beyond that line? A They continued to almost the middle of the intersection of Walnut avenue.

Q And that was all that you know about the skid marks? A That was all about the skid marks.

Q Now something I neglected to ask you, you called to my attention after you got off the stand, with his Honor's permission, I would like to ask it. Is there anything else about Violet May that has come to your attention with reference to her condition? A Yes, there is; but I would like to take her in the other room before I testify.

Q What is that? A I would like her to go out of the room before I testify.

Mr. Ward: May I ask that?

(The plaintiff Violet May Hummers leaves the room.)

Q Will you just tell his Honor and the ladies and gentlemen of the jury what it was? A Could I start at the beginning?

Q Just about this one incident. A Well, when the children—one of the little girls passed a remark about her.

Q No. Not what was said. A Well, that led up to her hysteria.

Q But you cannot tell what was said. Just tell what she did. A Well, she attempted suicide.

Q How? A By taking iodine.

Q Has that occurred more than once, or not? A She has threatened time and time again, and I cannot even leave her alone for fear that she will do it.

Mr. Ward: Cross examine.

Pardon me, Judge. I think you wanted the scooter, and I have it here.

By Mr. Ward.

Q Is this the scooter? A Yes, that is the scooter.

Q Upon which she was at the time? A Yes, that is it.

Mr. Ward: I offer this in evidence.

By the Court.

Q Has that been repaired? A No, it has never been touched from the time that accident happened, outside of removed it from Walnut avenue.

Q Is that the condition it was found after the accident? A Yes.

Q I mean, had it been repaired? A No, it has not been repaired since the accident.

By Mr. Ward.

Q Do you know whether this scooter was in that condition before? A No, it was not; it was bent at the time of the accident.

Q And I am indicating the neck leading down from the steering post— A Yes.

Q —to the platform. A Yes, that was bent at the time she was hit.

Violet Hummers, recalled, for Plaintiffs, cross.

Q The neck on the right-hand side of the scooter? A Yes.

The Court: I did not hear that question.

Mr. Ward: The neck, sir.

The Court: She said that was bent?

Mr. Ward: Yes, sir.

The Witness: At the time of the accident, not before.

Mr. Ward: I offer this in evidence.

(Scooter designated Exhibit P. 25 in evidence.)

Mr. Ward: Cross examine.

Cross examination by Mr. Coult.

Q The incident that you have just related on the stand was something that you forgot to testify to the other day? A Well, I couldn't testify to those things in the presence of Violet May.

Q And was that the reason you did not tell about it? A I couldn't in front of her; no, I didn't.

Q And did you know when you came here today that you were going to testify to that? A No, I didn't. I wouldn't have testified to it if she couldn't have left the room, because it would have a terrible effect on her.

Q Why was it necessary, when Mr. Ward asked you if you had anything else to tell about it, that— A I have lots of other things I could tell if I were permitted.

Q Why was it that you then suggested she be taken out of the room? A I didn't know that she could be, and I didn't know this morning she could be, and I wouldn't have testified, re-

gardless of what would have happened, if the child could not have been taken out of the room.

Q When did you find out she could be taken out of the room? A I didn't know. I just asked his Honor now if she could be taken out of the room.

Q And it did not occur to you to make that same suggestion when you were on the stand before? A No; it did not occur to me.

Q Now, you remember when the interrogatories in this case were sworn to, do you recall that? A Yes, I think I do.

Q Were you present when your daughter swore to these interrogatories? A Yes, I believe I was.

Q And did you go over—I withdraw that for the moment. Who else was there? A I do not remember distinctly. You see that this last year and a half has been an awfully hard one on me.

Q Well, was there a lawyer present? A Of course, there would have to be, anything legal, there certainly would have to be a lawyer.

Q Now, you are arguing with me. Was there a lawyer there? A I think there was.

Q And the items of damage, and so on, were gone over, weren't they, between you? A I suppose there was.

Q And was the question of this incident that you have referred to brought up at that time? A If Violet May was there, it wasn't.

Q That was because she was present, is that the reason? A I don't talk about those things in her presence, no.

Q Did you tell your lawyer about it before today? A Yes, I did.

Q When, first? When did you first tell him? A I believe right after it happened.

Q And just when was that? A About two or three weeks ago, the closest attempt of suicide she had made.

Q And the reason why you did not tell us about this when you were on the stand before was because Violet May was in the room? A Absolutely.

Q And you did not know that she could be taken out of the room? A I didn't know it today.

Q You did not know it until you got on the stand? A I did not. I did not know that she could be taken out.

Q Well, what did you think Mr. Ward was inquiring about when he asked you if you had anything further to say about Violet May's condition? A If you will remember, I asked Mr. Ward if I could start at the beginning and tell him things. There is lots of things I could tell you if I were permitted.

Q But, I mean, when Mr. Ward asked you if there was some other thing that you could tell about Violet May's condition? A I didn't know what particular incident he was referring to, but that was the closest attempt of suicide she had made.

Q And you did not think, then, that that matter was going to be inquired into at all while you were on the stand? A No, I didn't know it was going to be.

Q And your suggestion that the little girl be taken out of the court room was original with you? A Absolutely.

Q And you never had thought of suggesting that before? A No, I did not.

Q Well now, Madam, didn't it occur to you that when you were on the stand before you might have told that to the Court and jury? A If I had, I would have said it right then at that time.

Q And didn't you tell your attorneys about it? A About taking her out of the room?

Q No. A No.

Q No. About the fact that you had omitted to tell about this incident? A I did tell him that I had not spoken about the suicide.

Q Did you tell him why? A I do not believe I did.

Q Well, didn't you tell him, just as you had told the Court and the jury here, that the reason why you did not mention it was because the little girl was in the room? Is that a fact? A I don't quite get your question.

Q Did you tell your attorney that the reason why you did not tell about this thing was because the little girl was in the room? A No. I did not. I said because I—

Q All right. A I was very nervous, too, at the time.

Q But that is the only reason you did not tell it, is that it? A The only reason I didn't tell him what?

Q The only reason you did not tell about this thing when you were on the stand before was because the little girl was in the room? A Yes, that was the reason.

Q Well, you told your lawyer about the fact that you had not told this thing, didn't you? A Well, I had spoke to Mr. Losche about it before.

Q No. Had you— A At the time, I told you before, at the time, right after it happened, I

had told Mr. Losche that she had made the attempt.

Q Did you tell him that you could not testify to it if the little girl was here? A No, I did not.

Q But, anyhow, after having testified and having omitted this thing because the little girl was in the court room, you told your attorneys about it, didn't you? A Now, just what do you mean?

Q Well, I am trying to make it plain enough. You said once that between the time you were on the stand before and the time you went back here today, you told your attorneys that the reason why you had not testified to this incident was because the little girl was in the court room? A Yes.

Q You did. Now, who suggested bringing her in here this morning? A Who suggested it? Why, I brought her along. Why not? Because I couldn't leave her.

Q I see. And did you know then that you were going to go on the witness stand and tell about this incident? A No, I did not.

Q And you did not tell your attorneys anything about it this morning? A I did not.

Q And, in spite of the fact that you had told your attorneys that you had omitted to tell about this incident, you did not have the slightest idea that that was what Mr. Ward was expecting you to tell when he asked that question? A Judge Coult, I told you before there was a lot of incidents that I could tell you about. I did not know that he meant this particular one, or a dozen or more that I could tell you.

Violet Hummers, recalled, for Plaintiffs, re-direct.

By the Court.

Q This morning, did you talk to your attorney as to what you wanted to tell the jury which you had omitted to tell? A The only thing I asked the attorney, if I could tell my story from the beginning and in my own words.

Q When did you ask that? A I asked him this morning if I could get—if I would be permitted to tell the story in my own words from the beginning. I didn't ask any special thing to tell. I asked to be allowed to tell my own story.

Q In the course of the conversation, did you mention the attempted suicide? A I did not.

Q Had you told them before that? A I told them before this.

Mr. Coult: I think that is all.

Re-direct examination by Mr. Ward.

Q Now, Mrs. Hummers, when you got on the stand before, you were the first witness, were you not? A I was.

Q Were you nervous? A I was extremely nervous.

Q After the adjournment of court on the first day, did you have any conversation with your lawyers? A After that day?

Q Yes. A Yes, I did.

Q Immediately after the hour of adjournment? A Yes.

Q And, did you, or not, tell me, at that time, about— A Yes, I did.

Q —this thing? And did I, or not, tell you, at that time, that it was important? A You told me it was important.

Q Yes. Before that, immediately after the incident, I believe you stated you told it to Judge Losche? A I did.

Q Now, this morning, when I was about to enter the court room, you were in this little lobby here? A I was.

Q And what did you say to me? A I said—

Mr. Coult: I object to that.

The Court: I will sustain the objection. The question is too general.

Q Did you have any conversation with me about this case at that time? A I did.

Q And, at that time, what did you say to me about this case?

Mr. Coult: Objected to.

The Court: Sustained.

Mr. Ward: Your Honor please, counsel has asked whether there were any suggestions made.

The Court: Oh, you can ask her whether you made any suggestions.

Q At that time, did you, or not, ask me if you could tell your own story in your own way? A I did.

Q And did I, or not, say that you could not, despite the fact that you had been nervous, and despite the fact that you said you had omitted many things?

Mr. Coult: I object to that.

Mr. Ward: I am trying to confine it to just this one thing.

The Court: Yes.

Violet Hummers, recalled, for Plaintiffs, re-cross.

Q And, at that time, did I not mention to you that I would only call you back with reference to her condition, aside from the skid marks? A You did tell me that at that time.

Q About that one thing? A You said it was too late for me to go back.

Q Excepting about the one thing? A Yes.

Q To which you had called my attention? A Yes.

Mr. Ward: That is all.

Mr. Coult: Now, I omitted a question on my other cross.

Re-cross examination by Mr. Coult.

Q Now, at the time you examined the skid marks, was your husband with you? A Yes, he was.

Q And you and he made the examination at the same time? A Yes; but it wasn't the first time that he had seen the skid marks.

Q But he was with you at the time? A Yes.

Q And were you here when he testified? A Why, I was sitting there with Violet May.

Mr. Coult: That is all.

Mr. Ward: That is all, Mrs. Hummers.

I believe the ownership of the truck is admitted. As I said to the Court in the beginning, the hour is admitted, and the fact that Mr. Ankelein was a driver of the truck at the time of the accident, and in the employ of the Public Service. Those facts are admitted; is that correct?

Mr. Coult: What is that?

The Court: Well, the proof of ownership raises the presumption, anyway.

Mr. Coult: I will admit the ownership of the truck, but not that the—it was being operated by an agent.

Mr. Ward: No. But he was in the employ during the day time at that particular time?

Mr. Coult: Yes.

Mr. Ward: We rest, sir.

Mr. Coult: What do you mean by daytime, after quitting hours?

Mr. Ward: Yes. What is that?

Mr. Coult: After the quitting hour, anyway, in the day time, I suppose this happened in the daytime.

Mr. Ward: Yes. I believe it is admitted that he was driving the truck at the time, Mr. Cummins? He was driving the truck at the time?

Mr. Cummins: Yes.

Mr. Ward: Mr. Ankelein.

Mr. Coult: If the Court please, what motion I have to make at this time I will reserve until the conclusion of the whole case, if I may.

THE DEFENDANT'S CASE.

Mr. Cummins: Mr. Ankelein?

WILLIAM ANKELEIN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. Cummins.

Q Where do you reside, Mr. Ankelein? A 79 East Main street, Bogota.

Q Do you recall the date of October 5, 1927? A I do.

Q Will you tell the Court and jury what occurred on that day? A Well, I left the shop of John Quirk to take John home. He was one of the men which were employed in the company. It was a general rule to take them home. So I proceeded to cross Fort Lee Road to West Shore avenue. I turned south on West Shore avenue in the general direction of Ridgefield Park. When I approached Walnut avenue, the scooter just hurtled out of that street, out of that corner there, and crashed into the side of my front mudguard.

Q How fast were you going at the time? A About twenty miles an hour.

Q Do you remember whether or not the truck you were driving had a governor on? A It did.

Q And do you know to what speed that truck was governed? A The truck could never make more than twenty-two.

Q How was it going at that time?

Mr. Ward: I ask that that be stricken out.

The Court: Strike it out.

Q Do you know at what speed the car was governed? A Yes, sir; twenty-two miles an hour.

Q And how fast were you going at the time? A Well, between eighteen and twenty.

Q And what side of the road were you on? A I was on the right side of the road; that is, there is three tar marks in the road, there is three sections of concrete, and I was straddling the tar mark furthest to the west, in other words, there is a railroad siding there; they have a strip of concrete about sixteen or seventeen feet, and between the railroad and that tar line it is about, as I said, about sixteen feet, and I was just straddling that first tar line.

By the Court.

Q Were you partly in the center? A Well, you might say the center of my truck was just straddling that one tar line over to the right.

Q That would be the westerly side? A The westerly side of the road, that is, going south, sir.

By Mr. Cummins.

Q And was that your right-hand side of the road? A That was my right-hand side, yes.

Q And does Walnut street cross there? No; it does not; it is a dead-end street there.

Q Are there any cross streets along West Shore avenue? A Why, no, there isn't.

Q There are none cross over the westerly side? A No, not until you get down to the tunnel, that is down around Cypress avenue there.

Q That is several blocks further south? A Oh, yes.

Q Now, as you approached Walnut avenue, was your vision clear? A Very clear, that is, south.

Q It was clear, south? A Yes, there was no traffice or anything there.

Q And what was the first you saw of this scooter? A Well, I tell you, the scooter came out of that corner so fast that—well, I cannot just explain it; that scooter just came shooting around the corner, when I first did see it, it came around that corner at such a tremendous speed that the only thing I could do was put on my brakes and turn my wheel to the right.

Q And did you put your brakes on and turn your wheeel to the right? A Yes, sir; I did.

Q And what happened? A Well, before my car really came to a stop, as I said, I turned to the right; this girl came sort of over on an angle; she had turned the corner not exactly all the way around, but she sort of came out on an angle, and she seemed to freeze to the wheel there, she didn't turn right or left, but she kept on coming, and my front wheel hit the curb; but before that happened, she had crashed into the truck.

Q Did the wheel at any time go over her? A No, not at all, because this here rod that comes up in the front of the scooter—

Mr. Ward: I object to that as argumentative, "because."

The Court: Just answer the question.

Q Did the wheel at any time run over her? A No, sir; it did not.

Q What did you do after that? A Just when?

Q After the accident? A After the accident?

Q Yes. A I—well, when the truck did come to a stop,—I might bring out a point there, that when my wheel hit the—

Mr. Ward: I object to that, sir. He was asked what he did.

Mr. Cummins: I withdraw the question.

Q After you put your brakes on, what happened? A Well, the car stopped.

Q Did you hit the curb? A Yes, sir; I hit the curb.

Q And what did you do after that? A Well, I jumped out of the truck and ran toward the girl. Before I got there, John Quirk had picked the girl up.

Q Who is John Quirk? A He was the man I was taking home.

Q And where did you put the girl? A Well, John brought the girl over to the car, and I ran over to ask a man in another car that had come on the scene whether he would take the girl over to the hospital or to a doctor's, that my car was—

Q Never mind what was said. A I see.

Q Now, where did you stop? Where did your car come to a stop, on the right or left-hand side of West Shore avenue? A On the right-hand side of West Shore, right on the railroad siding, on the curb.

Q It came to a stop on the right-hand side? A On the right-hand side of the street.

Q Did you see Mrs. Hummers after the accident? A I did.

Q When did you first see Mr. Hummers? A I saw Mr. Hummers after I came back from the doctor's office. I had brought Violet—

Q That same night? A That same night, about fifteen minutes after the accident happened, because I went over to the doctor's office, and Violet was calling for her mother. So I told Doctor Dickson I would run over and try to locate her mother, and when I did get there, I picked up Mrs. Hummers, and she sat in the cab of my car, and just as we got to Palisade avenue, Mr. Hummer came along; that is the first time I met Mr. Hummers.

Q Was that night? A That night, yes. And then he took Mrs. Hummers in his car; I suppose they went to the doctor's office.

Q Did you see a Mr. Cunningham on the stand? A Yes, sir.

Q When did you first see him? A Yesterday.

Q Was he or was he not at the scene of the accident? A No, sir.

Q Was there a Hudson sedan at the scene of the accident? A No, sir; there was just two cars there; there was my truck and this Ford "coop" which was on the east side of the road.

Q And was Mr. Cunningham in the Ford "coop"? A No, sir; he was not.

Q You heard Mr. Hummers testify that he first met you the following Sunday? A I did.

Q Was that— A No.

Q —the first time you saw him? A No. He didn't say Sunday, I don't believe. I met him a few nights after two or three nights after.

Q But had you met him previous to that time? A Yes. I met him the night I was picking up his wife. I was going to take her over to the doctor's office, when he came along.

Q You heard Mr. Hummers say that you said to him, "I am sorry for what happened, I guess I must have lost my head.". Did you make that statement to him? A I did not.

Q Did you make any statement to him? A No, sir; I did not.

Q Did you notice the scene of the accident after, did you pass the scene of the accident? A After?

Q Yes. A Yes. I did, when I came back to pick Mrs. Hummers up.

Q And you have heard her testify that there were skid marks for approximately thirty feet south? A I did.

Q Or, rather north? A I did.

Q Were there? A There was a skid mark there, yes, sir.

Q For how long a space? A Oh, I should imagine from six to eight feet.

Q And it was also testified that the skid marks went toward the east curb. A Well, they didn't, they were practically straight, in fact, almost crossing that tar line, if I remember rightly.

Q Crossing— A Crossing to the west.

Q Crossing to the west? A The first tar line, yes.

Q I see. A Because I said I turned my car to the right, and the chances are that is the way the skid marks looked, inclined toward that curb.

Q Will you state what your conversation with Mr. Hummers was? A Yes, sir. I was standing on—in front of Somer's cigar store, I was on my way down to Seventy-first Armory, and he was talking with some man there, and he turned and looked at me, and I looked at him. His face looked familiar, but I didn't know who he was.

And he walked over and he says, "How do you do?" I says, "How do you do?" He says, "My name is Hummers." I says, "Oh, yes, you are Violet's father." He says, "Yes." I says, "How is Violet?" He says, "Well, she is in pretty bad shape, the mother had to give her blood." And I said, "Gee, that is too bad, I feel very sorry." That is all I said to him. My bus came along and I went over to the armory.

Q Was there an officer at the scene of the accident? A Not at the scene. I picked the officer up as I went over to the doctor's office.

Q How soon after did you pick him up? Oh, about five minutes.

Q And who was the officer? A Officer Carlson of Bogota.

Q And did you take him back to the scene of the accident? A No, I don't remember whether I took him, because I went up to the police station. I don't know whether I went to the police station before I picked Mrs. Hummers up or after. I think it was after I picked Mrs. Hummers up I went over to the police station.

Mr. Cummins: That is all.

Cross examination by Mr. Coult.

Q Where are you employed, Mr. Ankelein? A I am employed with the Public Service Gas Distribution Department.

Q And how long have you been employed by them? A About 7 years.

Q Were you in the same position at the time this accident occurred, or some other, with the company? A In the same position.

Mr. Ward: Pardon my interruption. I believe it is my opportunity to cross examine now in the order it which the parties to the suit are.

Mr. Coult: Well,—

Mr. Ward: The parties to the suit, the plaintiffs, then the Public Service, then Mr. Ankelein, and in the order, it is my opportunity.

Mr. Coult: It seems to me it is the other way. If you want to cross examine first, all right.

Cross examination by Mr. Ward.

Q Mr. Ankelein, you were in the employ of the Public Service at that time, weren't you? A I was.

Q And I think you stated in answer to counsel's question that you were employed in what capacity? A As a gas fitter.

Q And in the service, in your service with the company, you had this use of this truck, didn't you? A Yes, sir; I did.

Q Where was that truck kept? A The truck was kept at my home, that is, in a neighbor's garage that is next door to my house.

Q In a neighbor's garage? A Yes.

Q The Public Service paid for the garage? A No, sir. I paid for that.

Q You paid for that? A Yes, sir.

Q For the garage? A Yes.

Q And you kept the truck there, however, with the permission and or at least with the consent under the instruction of the Public Service? A Not under the instruction.

Q Well, with their consent? A No. There is a little story to that, Mr. Ward.

Q Yes. I want you to answer my questions, and tell your story to your lawyer. A I see.

Q How long had the truck been kept there? A Well, since—

Q At this garage? A Since June first, I guess, 1927.

Q A new truck at that time, was it? A Bran new.

Q And it had been used by you since June? A It was used by me since May. I got the truck new in May sometime, during May, the early part of May.

Q I see. And used by you in the company's business? A Yes.

Q And for the company? A Yes.

Q And kept in this garage for how long? A Well, up to the day of the accident.

Q From the time it was purchased? A Yes, sir.

Q Or from the time you got it new? A From the time that I got it, yes.

Q And the company knew about that, of course? A Well, the mechanic knew about it.

Q Yes. And your boss knew about it, didn't he? A Not that I know of; he may have.

Q Don't you know that he knew about it? A I cannot say he did, because I very seldom come in contact with that boss.

Q You did not take that truck belonging to the Public Service and use it without their permission unbeknown to them, did you? A I took it home with the mechanic's permission.

Q You did not take it unbeknown to that company, did you? A Well, now, you are bring-

ing in a big company there. I only had the mechanic's permission.

Q Well, you came in contact with those who were in control of your particular division, didn't you? A During the day, yes.

Q And you were using that truck under the instructions that came to you as part of your work, weren't you? A Absolutely, as part of my work.

Q Yes. And this was part of your service, to take the truck and house it properly, wasn't it, and see that it was housed properly, that is correct, isn't it? A Yes. I was supposed to take care of the truck.

Q And, so far as this truck is concerned, that was the proper place to keep the truck, wasn't it? A In the garage.

Q Yes.

Mr. Coult: I object to that. This witness's opinion as to what is a proper place to keep a truck is not binding on my client.

The Court: It all depends on what you mean by a proper place.

Mr. Ward: I think it is a proper question, under all of the circumstances, under the circumstances of his employment.

The Court: I think we might assume that a proper place to keep a truck would be in the garage.

Mr. Ward: Yes. So far as his employment is concerned, of course, I mean; in other words, an improper place to keep that truck would have been if he had taken it without the permission of the company.

Mr. Coult: I was going to say the only purpose of this examination, of course, is

to inquire into the relationship between this witness and my client, and, therefore, if that question is not competent so far as my client is concerned, it is not competent at all and, certainly, we would not be bound by this witness's statement of what, in his opinion, is a proper place to keep our truck.

The Court: That is true.

Mr. Ward: I do not, of course, agree with that.

The Court: Suppose you find out who this man is he refers to as the mechanic; find out who he is and what he is.

Mr. Ward: Yes, sir.

Q This John, Mr. Ankelein, what was his last name? A Who?

Q This John?

Mr. Ward: Oh, I beg your pardon, sir. I thought you meant the—

The Court: No. He said the mechanic knew it.

Mr. Ward: The mechanic.

Q Who was the mechanic? A Bill McElroy.

Q Where was he? A He was the—in charge of the Bergen County Garage, that is, the Gas Distribution Department.

Q In charge of the Bergen County Garage? A Garages.

Q Of the Public Service Gas? A Distribution.

Q Electric and Gas Company? A No. Gas Distribution.

Q I beg your pardon? A Gas Distribution Department.

Q Gas Distribution Department? A Yes.

Q Of the Public Service Electric and Gas Company? A Yes.

Q That is correct? A Right.

Q And you say he was the man who knew about this? A Yes, he—he knew about it.

Q What were you going to add? A No, sir.

Q And this was a new car, wasn't it? A Bran new.

Q And that is the reason it was taken over to this garage in Bogota?

Mr. Cummins: I object, if your Honor please, as the reason; a mere statement of fact, than a question. That is the reason it was taken over to the garage.

Mr. Ward: It is a statement of fact; that is the very reason it is asked.

The Court: He may answer yes, or no.

Q That is true, isn't it, Mr. Ankelein? A Yes, sir.

Q Because the company did not want a new car—

Mr. Coult: I object to that.

Mr. Ward: Will you permit me to finish of course?

Mr. Coult: You have gone far enough to show it is vicious.

Mr. Ward: I insist it is my right to complete the question.

The Court: Finish the question.

Q The company, by its representatives, did not want that car kept in that garage that you have mentioned, because it was a new car?

Mr. Coult: I object to that on the ground it is—

The Court: I sustain the objection.

Mr. Ward: Your Honor will permit an exception.

Q Well, it was at the suggestion—I withdraw that, Mr. Ankelein. It was with the understanding between you and this gentleman—what was the name you mentioned? A McElroy.

Q McElroy, that it would be better to keep the car at some other place than the regular garage, that that car was taken over by you to Bogota and kept there in that garage, that is correct, isn't it? A Yes, sir; that was my suggestion to him.

Q Because it was a new car? A Rather; yes, sir.

Q And that suggestion, as you say you made, was made to Mr. McElroy? A McElroy, right.

Q And consented to by him? A Yes.

Q Or acquiesced in by him? A Yes.

Q Now, I think you said that it was the custom or general rule, I think that is the expression you used, the general rule to take John home? A Well, not only John, anybody that lived in the neighborhood of where we were going.

Q That was the general rule of the company? A Oh, no; not of the company, I would not say that it is—just good fellowship down there, that is all.

Q But that was a general rule, wasn't it, when you were working, all the time you were working there? A Oh, yes; they are always taken home.

Q And were your hours regular or more or less uncertain? A Regular hours.

Q Well, were you ever called out on emergencies? A No, I cannot say I was.

Q Was the helper? A No.

By the Court.

Q Mr. Ankelein,— A Yes, sir.

Q —when you would report to a job for installation of meters, would you go to the company office, or sometimes would you go directly to the place from your home? A No. We report in the shop every morning at seven-thirty; we get a day's work; we go out and we get through with what we have. Now, if we get through with the work before five-twelve at night, why, we go and see the dispatcher, and see if there is anything else to do up to five o'clock.

Q Was it necessary to report to the company every night, or may you go home after finishing a job? A We have to report every night, sir.

Q Irrespective of what time you finish? A Yes, sir; we have to report.

By Mr. Ward.

Q Well, if a job be incomplete or uncompleted, you would call up then and find out whether it was urgent enough to finish that night; if it was, they would give you permission to finish it? A Naturally, that would take you through to five-fifteen or five-twelve.

Q Suppose the job was uncompleted? A Yes.

Q You would go directly to the job the next morning, wouldn't you? A No, sir. You would go in the shop first and get additional work for the day.

Q Wouldn't you, when you had completed your job, report back to the shop then? A No, sir. By that time, you would have—

Q Pardon me. Just answer the questions, Mr. Ankelein. A Do you mean if I reported to the shop in the morning and then went back on the uncompleted job, would I go back to the shop again?

Q Yes. A No, sir.

Q You would go right on about the other jobs? A Go right on about the other jobs that I got that morning.

Q Supposing you got a number of jobs? A Yes, sir.

Q And one took longer than you expected it, or it took the whole day? A Yes.

Q Until quitting time? A Yes.

Q Or to five, five-twelve, did you say? A Yes, sir.

Q Five-twelve. And you had these other jobs to do, when you went back, or, at least, when you completed the job the next day, would you go to the next job then? A Why, no. In a case—

Q Would you, or not? A Why, now, that would have to be answered in a different way.

Q You cannot answer it yes or no, whether you would or not? A No. You would have to explain that question, because—

Q I see. A There is something comes in there. If I went on a job—I will answer that

this way: If I went on a job, and I sized it up to be a slower job, I would immediately call up the shop and ask them whether I should continue on with this job, or whether they would send a man over who was walking, that is, a man without a car, and he would go, possibly, and do that job. If he told me to finish that job, he would send some man over who didn't have so much work to do, or who could do this work with his other work, and take the other tickets, and he would do those other tickets.

Q There were instances, however, were there not, where you went from one job to another without reporting back to the office? A That is true.

Q And there were instances where if you found a job lasted longer than a day and you went back the next day and completed that job, you would go to another job without reporting back to the office? A Oh, yes, because I would tell him in the morning that this job might take an hour to finish, and he would give me tickets to do for the rest of the day.

Q And on this night that this accident happened, you were going from the garage, or the place where you reported back— A Yes, sir.

Q —at night, to the garage where this car was kept? A Yes, sir.

Q And on your way, you took home John, the helper? A That is right.

Q And that was the general rule? A Yes, it was.

Q For the person who had charge of the car to take the helper to his home? A Well, we did it, yes.

Q Well, that was a general rule, wasn't it? A Yes, among the men, it was.

Q Yes. That is what you said, wasn't it? A Certainly.

Q And this helper, of course, was employed by the Public Service Electric & Gas Company? A He was.

Q And a man who worked with you? A Well, he didn't work with me that day.

Q Well, generally? A No, he didn't.

Q As your helper? A No, sir.

Q Helper of what? A Well, he was helping some other driver.

Q Some other driver? A Yes, during the day.

Q Wasn't he your helper? A No, sir.

Q Who was your helper? A I didn't have any that day.

Q Who was generally your helper? A Well, it depended on what kind of jobs we had whether we get a helper or not.

Q Who was generally your helper when you had one? A Well, no particular helper at all. Any helper that was around the shop that wasn't working with anybody.

Q I see. Whereabouts is 79 East Main Street, Bogota? A That is at the corner of Palisade Avenue and East Main Street there, where the trolley runs.

Q Palisade Avenue and East Main Street? A East Main.

Q Is Palisade Avenue Fort Lee Road, is that the same? A No. It crosses Fort Lee Road.

Q When you got to West Shore Road on that day in question,— A Yes.

Q —you went to—

Mr. Ward: I will withdraw that.

Q Whereabouts its this garage to where you reported generally? Was it a garage at which you reported generally? A No, to the office down in Hudson Street.

Q The office? A Yes.

Q And that is on Hudson Street, Hackensack? A Right.

Q Did you leave that office that night? A I did.

Q At what time? A Oh, about twenty after five, I guess, somewheres around that.

Q And you came down to this road that leads before the court house? A Yes, I went around the court house down the causeway.

Q And along the Fort Lee Road to West Shore Avenue? A Right.

Q And I believe West Shore Avenue at that time was a one-way street, wasn't it? A No, sir; it was not.

Q I beg your pardon. I mean it was not a one-way street? A No, sir.

Q It was open? A Yes, sir.

Q And you turned in to the right at West Shore Avenue, that is correct, isn't it? A I did.

Q Now, you were familiar with that neighborhood, were you not? A Well, a little bit.

Q Taking John home frequently before? A I had taken him home a couple of times.

Q And you saw children playing there on that street that day? A I saw children playing some blocks up from Walnut Avenue.

Q Do you mean beyond? A That is north of Walnut Avenue.

Q How many blocks? A Well, I imagine around Elmwood or Linwood, somewhere up there.

Q Well, Elmwood is two blocks, isn't it? A Well, yes.

Q Two blocks? A Yes.

Q And the children were playing in the street? A Yes, they were playing ball, playing something, and running back and forth.

Q Didn't you observe what they were playing? A No, I did not.

Q Did you observe how many there were? A No, I did not.

Q Did you observe their positions? A They were in the street. I know, one time, I had to slow down a bit.

Q Just answer my question. Did you observe their positions in the street? A No, I did not. They were just scooting back and forth, playing as children will.

Q They were scooting back and forth. And did you notice any others at any other part of the street excepting by Elmwood Avenue? A No, I did not.

Q Did you notice any down a little ways beyond Walnut Avenue? A No, sir. I stopped at Walnut.

Q Well, you were looking, weren't you? A No, I cannot say I saw anything.

Q Were you looking ahead? A Absolutely.

Q And you could see the next street? A Oh, yes.

Q Beyond Walnut Avenue, did you see any children in the road there, playing? A I couldn't tell you whether I could or not, because I had—

Q Well, did you, that you can recall? A No, I did not.

Q You knew that that street was commonly used as a playground, or a playing place for children, didn't you? A No, sir; I did not.

Q You had never observed that before? A No, sir.

Q You had never observed children playing in the street there before? A No, sir.

Q And how often had you gone down that way? A Well, I tell you, Fort Lee Road was paved about two or three years ago, and I had been using it possibly fifty or a hundred times a year.

Q This was a nice day? A Oh, a dandy day.

Q There was nothing to obstruct your view? A No. It was clear right ahead of me.

Q From right down from West End Avenue, right down past Linwood Avenue, Elmwood Avenue, Beechnut Avenue, Walnut Avenue and Oakwood Avenue, a plain and unobstructed view? A Yes, unobstructed; nothing in the way.

Q Did you pass any cars on West Shore Avenue? A No, sir.

Q None at all? A No, sir.

Q That you observed? A I did not pass any.

Q Were you paying particular attention to that? A No, sir.

Q Are you sure you did not pass any other car? A I am sure.

Q Did you pass any other car at any place along West Shore Avenue? A No, sir.

Q Any car parked any place along West Shore Avenue? A Not that I noticed.

Q Why, the station is right there, isn't it? A Yes, sir.

Q Weren't there cars parked at the station? A Yes, there was, there.

Q Did you observe them? A Well, I didn't make a point to look at them. Usually they are always there.

Q Can you tell us now whether there were any parked there or not? A Well, I imagine there is always cars parked there.

Q You imagine. Well, have you any recollection about it? A No. I cannot say I noticed that they were there; but they usually are.

Q All right. So that if there were cars parked there, you passed them without observing them, didn't you? A I wouldn't say I observed them. I just didn't pay any attention to them.

Q Without paying any attention to them, or having them make any impression upon your mind? A None whatsoever, because it is a common occurrence that you see them parked there.

Q Do you know whether or not you passed any cars going over until you got to West Shore Avenue? A Until I got there?

Q Yes. A Oh, yes.

Q Have you any distinct recollection about them? A Oh, yes; because you have got to see cars there crossing the West Shore Railroad, there is cars generally parked on both sides of the street.

Q One moment; you have said yes. A Yes.

Q Have you any distinct recollection of any car that you passed at any place along Fort Lee Road? A Now, just what do you mean by any distinct recollection of any car?

Q Well, do you remember passing any car as you were going along Fort Lee Road? A I couldn't pick out any particular car, but I remember—

Q Just generally? A —that there was cars parked on each side, because on one side there is a garage, and on the other side a vegetable

store, and they generally park on both sides of that street; it is very narrow.

Q But you do not remember any particular instance about passing any cars? A Oh, no.

Q And your mind was no more acute going along West Shore Avenue before this accident than it was going along this other street, was it? A No, it wasn't. It was just the same.

Q So you were paying no more attention to any car which you might have passed on West Shore Avenue than you were at any other place, were you? A Oh, yes, I was.

Q You were? Why? A Well, if I passed a car, I would blow my horn to pass him and pass him on the left, wouldn't I?

Q But you do not remember any particular car on Fort Lee Road, do you? A No; because they were parked.

Q No. Do not give your reasons. Please answer my questions. You do not remember any car that you passed on Fort Lee Road, do you? A No, I do not.

Q And you do not remember passing any car on West Shore Avenue, do you? A I didn't pass any movable—

Q You do not remember it, do you? A I didn't pass any movable cars.

Q You are sure of that? A I am positive of it.

Q And yet you are not sure about Fort Lee Road, are you? A I am sure that I didn't pass any on Fort Lee Road either that were moving.

Q Going in either direction? A Right.

Q From the court house over, you didn't pass any car moving? A No, sir.

Q That is so, is it? Is that right? A I didn't pass any car, no, that is, that was in motion.

Q In motion? A Right.

Q Did you travel from this court house over to West Shore Avenue— A Yes.

Q —without passing any cars going in either direction that were in motion? A Oh, no; not either direction; going my direction.

Q I said in either direction. A I meant in my direction.

Mr. Coult: I object to that.

A (Continuing) Of course, there may be cars—

Q One moment.

Mr. Coult: I object to that because counsel did not say that, and I have been listening with particular care. He said passing cars, not meeting them.

Mr. Ward: May I refer to the record? If I did, I wish to apologize.

The Court: Re-frame the question.

Mr. Ward: I would like to have the record if your Honor will permit.

(Previous record on this point read.)

The Court: Suppose you re-frame the question.

Q Going along Fort Lee Road, do you remember passing any car going in either direction? A Do you mean north and south and east and west?

By the Court.

Q Just listen. Did any car pass you going in the opposite direction, or did you pass a car

going in the same direction that you were? A No. I didn't pass any car going in my direction, but the chances are there are cars that passed in the opposite—going the opposite way that I didn't notice.

Q So they made no particular impression on your mind? A No; because I was watching ahead of me.

Q And it was necessary for you to be much more careful on Fort Lee Road than it was for you on West Shore Avenue, wasn't it? A Well, not more careful, but a little more cautious on account of cars being parked.

Q And, in spite of that, you have no recollection of any car that passed you coming in the opposite direction? A No.

Q On Fort Lee Road? A The chances are there were cars passed me, but I didn't notice them.

Q And you distinctly remember you did not pass any car on West Shore Avenue? A No, I did not.

Q And you distinctly remember that. Why is your recollection any better about that? A Well, because if I would pass a car, I would remember it.

Q That is the only reason? A Oh, sure.

Q And you do not remember whether there were cars parked along there, the West Shore Avenue, at any point? A Beyond the railroad?

Q From Fort Lee Road, down. A Well, as I told you before, there are usually cars parked.

Q Do you remember any? A Well, I don't recollect whether I looked there and saw the car; as a rule, they are there.

Q Your recollection is not keen or distinct about that either, is it? Is it, Mr. Ankelein? A What is that?

Q Your recollection is not keen or distinct about that? A Well, I know, as a rule—

Q Is it keen or distinct, Mr. Ankelein? Will you please answer my question? A That there were cars, or there weren't any there?

Q Yes. A Well, I don't recollect seeing any.

Q All right. And there was no reason for you to be particularly impressed with passing any car on West Shore Avenue before you had this accident, was there? A Just say that again, please.

(Question read.)

A Well, as a rule, I don't pass cars.

Q I see. Never? A Well, not unless a car is very slow.

Q And, in your experience, of course, as a driver, you have passed cars, haven't you? A Oh, I have passed them, yes.

Q What kind of a governor had you on that car? A I don't know the name of it. It is some sort of a mechanical device that cuts down the speed.

Q You are not familiar with governors? A No, sir; I am not.

Q You know that they are often inaccurate? A No.

Q You do not know that? A No, sir.

Q Would you say that they are true, from your experience? A Well,—

Q Would you, or not, Mr. Ankelein? Tell me. A As far as accuracy is concerned, I do not know.

Q I see. You say this was a governor that governs your car, or this particular car, at twenty-two miles an hour? A Absolutely.

Q How do you know that? A Well, because when you are going at your full rate of speed,

that is, with the throttle all the way open, she wouldn't permit the car to travel more than twenty-two miles an hour.

Q So you tried that with the throttle completely open, haven't you? A Naturally.

Q What? A Certainly.

Q Tried to force the car as fast as you could, haven't you? A Well, you couldn't go any faster.

Q Have you, or not? A Certainly.

Q Yes. Yet, on this occasion, you were going about eighteen miles? A I was.

Q Did you keep your eye on the speedometer? A No.

Q Did you look at it at all? A No. Just by experience, I figure I was going that fast.

Q Did you pass any children before you came to the scene of this accident? A Yes. In fact I slowed down for them.

Q You did? A Absolutely.

Q And did any child jump out of the way of your car? A Not that I noticed. I blew my horn.

Q Did any child move to the side quickly, that you noticed? A No. I don't think they did so abruptly. I blew my horn about fifty or a hundred feet away and slowed down.

Q You do not think they did? A Yes, sir.

Q You do not know, but you do not think that they did? A I do not think they did?

Q No. Then, when you got down towards Walnut avenue, you were going about eighteen or twenty miles an hour? A That is all.

Q And this little girl, Violet May, came out of Walnut avenue, at a tremendous speed? A She hurtled out.

Q Hurtled out? A Absolutely.

Q Just as though she were jumping a hurdle, is that it? A Well, she came out "dog-gone" fast, I am telling you.

Q Yes. At a tremendous speed? A Right.

Q You know what the word "tremendous" means, don't you? A As fast as that vehicle could go.

Q Yes. Tremendous speed is a very fast rate of speed in your mind, isn't it? A One of those things, it is.

Q Well, is it, or not? A Certainly, it is.

Q How fast was she going, do you think? A I couldn't tell you how fast she was going, but she was—

Q Well, give us some idea. A Well, she just shot out, and before my car even stopped, she (clapping hands) smacked it. Now, how fast was she going?

Q When did you first see her? A Well, I tell you, Mr. Ward, it happened so quick, she just about came out of the corner when I saw her.

Q Yes. A She was just coming around. I could see across the sidewalk, there is a curb there, I could see beyond that curb, that is all.

Q So you saw her beyond the curb? A No, I cannot say I saw her beyond the curb.

Q You just said so. A Not beyond that curb. She was coming out more toward the center of the street, and shooting over toward—

Q Where was she when you first saw her? That is a simple question, isn't it? A Coming right out of that street on an angle.

Q Whereabouts? A Right at the corner.

Q On which street was she then? A Walnut avenue.

Q Had she gotten out to West Shore avenue yet? A Yes.

Q How far out in West Shore avenue? A Well, right where—if you extended the curb line, she would have been right at the—about at the curb.

Q If you extended the easterly curb line, or the one curb line that there is there? A Do you mean the northerly curb line?

Q I mean the easterly curb line of West Shore avenue. A Yes.

Q Across Walnut street? A Yes.

Q Or Walnut avenue. Had she passed that line yet when you first saw her? A Just about.

Q Just about? A Right.

Q And was she about on that line? A Just about.

Q How long a time elapsed from the time you saw her until the contact? A A matter of seconds.

Q Seconds? A Absolutely.

Q Count off a second; clap your hands and show me what you mean by a second. A Well, I couldn't exactly do that.

Q You know what a second is? A Yes.

Q Give me some indication of what you think a second is. A Why, a snap of the finger could be a second.

Q (Clapping hands) Do you mean like that? A Almost, yes.

Q Well, how many seconds, according to you, was it from the time you saw her until the contact between her and your car? A Gosh, I don't know, it happened so quick, Mr. Ward.

Q Do you mean it happened so quick that it was almost instantaneous? A Almost. And I tell you there wasn't—

Q In a wave of the hand, as I am waving my hand? A Almost.

Q Just about like that. Now, I am clapping my hands very quickly, am I not? A Very quickly.

Q And from the time you saw her until at the position you have stated, until the contact, it was about that time, was it? A Mr. Ward, that is holding me down to pretty fine points, in a case like that. Now, I cannot say—

Q One moment. A —like that.

Q If you cannot say, tell us; if you can say, tell us. A It was very quick. That is all I know, because this girl came shooting out of that street just as fast as—

Q Hurtling out? A Absolutely.

Q At a tremendous speed? A And I didn't have any chance to figure seconds, or anything. I tried to avoid her.

Q That is what I want to know now, when you saw her from the time you saw her first, up to the time of the contact, how long a time it was. A Well, I tell you, I had just about turned my wheels to the right and put on my brakes when the contact—when she (clapping hands) hit.

Q Well, again I ask you now, have you any idea of the time? Was it about— A I couldn't give you no time. Remember, now, there was excitement there those few minutes.

Q Yes. And you cannot give us any idea of how fast that girl was going? A Mr. Ward—

Mr. Coult: I object to that.

Q Was she going as fast—

Mr. Coult: Just a minute. The witness has been trying to give you some idea of it, the best he knows how.

Q Can you give us any idea at the rate of speed at which that girl was going? A No, sir; Mr. Ward.

Q Was she going as fast as your car? A Faster.

Q You are sure of that? A Yes, sir; I am sure of that.

Q So this little girl on that scooter was going more than eighteen miles an hour, eighteen or twenty miles an hour, was she? A She must have been.

Q You do not wish to change that, now? A No, sir; I do not.

Q How far were you away from her when you first saw her? A Well, about eight feet.

Q About eight feet from the point of contact? A About eight feet, yes.

Q Yes. And you went straight ahead, and she came around at an angle? A No, sir; I didn't go straight ahead. I turned my car to the right.

Q Oh, to the right, which brought you further over to the right? A Brought me over toward the railroad track.

Q Yes. And you went eight feet? A Yes.

Q And your car was astraddle of the westerly tar line? A That is right.

Q About how far east of the westerly tar line? A Oh, about three or four feet, I guess. That is, the tar line was just in the center of my truck, you know; I was astraddle of that.

Q Your truck was about five feet wide, wasn't it? A About five and a half feet or six feet.

Q Take it six feet. If you were astraddle, the left side of your truck would have been three feet over that line, wouldn't it? A I figure that; yes, sir.

Q And this little girl, according to you, now, had to travel across that first section at an angle, which was about sixteen or seventeen feet? A That is right.

Q And all of the sixteen or seventeen feet of the second section with the exception of three feet that your car was over, that is correct? A That is true.

Q So that little girl, then, had to travel about sixteen or seventeen feet across the first section and about thirteen feet of the second section, or a distance of thirty feet, to come in contact with your car, according to you; that is right, isn't it? A Well now, you are holding me down to feet; I cannot say that.

Q Isn't that what you have said? A She came across these two tar lines, I will admit that.

Q All right. And you going at the rate of eighteen or twenty miles an hour—wait one moment—eight feet— A Yes.

Q —she traveled, then, at the rate of three and a half times as fast as you, according to you, that is right, isn't it? A Certainly, she was, because I was going—

Q And she was— A When she collided, I was almost stopped.

Q One moment, now. So, then, according to you, she must—

Mr. Coult: One minute. There was an answer by the witness that never got on the record.

(Answer read.)

Q Why, didn't you say it happened so quickly that you just had time to apply your brakes? A I did.

Q We will come to that question of your stopping, in a moment. So, according to you, then, she traveled three and a half times at the rate of speed at which you traveled, didn't she? A Sure, she did.

Q And you going eighteen or twenty miles an hour, she must have been going at the rate of about fifty miles an hour? A No, sir; she wasn't, because we had slowed up and almost stopped. When she came across the street, she was froze to that scooter. That is a common expression for that, holding tight to that scooter, when she crashed into my mudguard.

Q And you were not frightened, were you, a bit? A I was nervous, certainly, I was nervous.

Q You say you stopped within eight feet? A I did; that is, I put on my brakes.

Q Did you stop within eight feet or not? A I slowed down in eight feet.

Q Did you stop within eight feet? A No, I didn't stop in eight feet.

Q How long did it take you to stop? A Well, I slowed down to almost nothing.

Q I haven't asked you about your slowing down.

Mr. Ward: I would like this witness to answer my questions directly without arguing.

The Court: Answer the question. Do not argue.

Mr. Coult: I would suggest counsel give him a chance.

William Ankelein, for Defendants, cross.

Q How far did you go from the time you first saw this little girl up to the time you stopped? A Well, my cab was about even with the sidewalk of Walnut avenue, that is, the southerly sidewalk of West Shore—of Walnut avenue.

By the Court.

Q Just a minute. What kind of brakes, two-wheel, or four-wheel? A Two-wheel brakes, sir.

Q Mechanical or hydraulic? A No. Mechanical, that is, the foot and the hand brake.

By Mr. Ward.

Q You stopped so that your cab was about even with the southerly sidewalk coming down Walnut avenue? A Right.

Q And against the curb? A Absolutely.

Q And the place where you came in contact with this little girl was before you got into Walnut avenue, wasn't it? A Absolutely.

Q So your car ran a distance of entirely across Walnut avenue and a little bit beyond— A Yes.

Q —didn't it? A Yes, sir.

Q From the time you came in contact with this girl until you stopped? A That is true. I could explain that better.

Q I haven't asked you anything about what you can explain. A I see.

Q And you ran from your position of astraddle of this tar line up against the curb? A I did.

Q And you say you had applied your brakes eight feet back before you saw her? A I did.

Q Do you know the distance that the front of your car was beyond the southerly curb line of Walnut avenue? A The front of my car?

Q Yes.

The Court: At what time, Mr. Ward?

Mr. Ward: I beg pardon?

The Court: At what time?

Q When you stopped. A Well, I don't know how much in front of it, but I know when I got out of my cab to go back to the child, I could look up the street.

Q Do you want to say five or six feet? A I don't want to be held down to feet.

Q Can't you tell us, about? A No, I cannot, not honestly.

Q Do you think five or six feet, it may have been? A It may be.

Q Do you know what Walnut avenue is, the distance across it? A It is about twenty feet, I guess.

Q Twenty feet? A Yes.

Q There are two sections of concrete there, aren't there? A Yes. Ten feet sections, aren't they?

Q Only ten-foot sections? A I think so. I think the assessment map shows ten feet, that is a twenty-foot roadway.

Q And where you struck this little girl— A Yes.

Q —how far around into West Shore avenue was that? A How far—wait—a minute.

Q Do you understand the question? A No, sir.

Q If you do not understand any of my questions, tell me. A I do not understand, sir.

Q Well, you struck her before you came to the northerly curb of West Shore avenue, what would be the projection—you understand what I mean by the "projection"? A Yes, I understand.

Q The projected curb line? A Well, I tell you, you might say I struck her just about on the sidewalk line if the sidewalk was extended out.

Q Yes. I show you Exhibit P. 2. About there (indicating), Mr. Ankelein? A No. Have you a pencil? Here is a pencil, I have one now. If you extend this—

Q I want you to talk so the jury can hear you. A If you extend this sidewalk line straight across here (indicating)—

Q Yes? A —now, I turned my car here (indicating).

Q You say you saw her—that is all right. A Is that all right?

Q Yes. Put a mark there. You saw her about where you put a dot? A About the dot, see, or a little beyond that. I should say I seen her about—I struck her about here somewheres (indicating), around there I struck her or she struck me, she came on an angle.

Q No. Wait a moment.

Mr. Cummins: Let the witness put the mark on.

Mr. Ward: I am in control of this witness just now. State to the Court.

Q This dot here, is that the dot right there (indicating)? A Yes, that is the dot, when I saw her.

Q That is where you saw here? A Yes.

Q And this is where— A And this—

Q I beg your pardon. A I am trying to explain this. I turned my car there (indicating), you know.

Q No. Where you struck her, now. A Yes, right about in here (indicating). Remember, I told you I put on the brakes, and I turned to the right.

Q All right. Now, see if this is correct. A Now, that is the—

Q That is where you were when you saw her? A Yes.

Q Shall I put "A" there? A You can.

Q This is where you struck her (indicating)? A Yes, about that.

Q A. 2; is that all right? A Right.

Mr. Ward: (To the jury) The first "A" where the car was when he saw her.

Mr. Coult: Your Honor, counsel has a habit of addressing the jury, taking the exhibits over there, and talking to the jury, which most of us do not do.

Q Will you come down here? A Surely.

Q The first "A" is where you have indicated that your car was when you first saw the girl? A That is right.

Q And the second "A" is where your car was when you struck her? A That is right.

Q Go back on the stand. A (The witness resumes the stand.)

Q So, then, Mr. Ankelein, you went a distance from the position "A", the first "A"— A That is right.

Q —all the way across Walnut avenue, so the front of your car was past this curb line

on Walnut avenue before you stopped your car? A May I just—

Q Did you, or not? A I did, yes. But may I just explain why?

Q One moment, now, please.

The Court: No.

A I cannot—

The Court: Wait until your counsel takes you. You just answer questions that are put to you.

Q And there were skid marks there, weren't there? A There was one skid mark.

Q And the moment you saw her, you knew you were going to strike her, didn't you? A Well, that is hard to say.

Q Well, you applied your brakes immediately, didn't you? A Oh, yes, as a precaution, of course, and I turned to the right to avoid her.

Q You applied your brakes? That is all I asked you about. A That is right.

Q And you were anxious to stop as soon as you could, weren't you? A Absolutely.

Q And don't you know that, going at the rate of twenty miles an hour, you can stop your car within eighteen feet, applying your brakes, two-wheel brakes? Don't you know that? A Certainly. Who said I didn't?

Q Why, you went all the way down to Walnut avenue and across it, didn't you? A That is true, I admit that I did.

Q Isn't is true that you never saw this girl until you struck her? A No, sir; it is not.

Q And isn't that the reason you did not stop your car? A No, sir; it is not.

Q Until you had crossed over Walnut avenue? A No, sir; it is not. The truth is that she came—

Q One moment. And you never saw this little girl until she was on this line here, did you? A No, sir; I did not. That is the first time I saw her.

Q One moment. And yet she came down this hill, and she could have been seen before she got to that position if you had looked, couldn't she? A No, sir; she could not.

Q You could not see her when she crossed in front of or passed what would have been the sidewalk, the easterly sidewalk, on West Shore avenue? A Hardly, not sitting in my cab.

Q You could not have seen her for some distance as she came down that hill across those lots? A No, sir; you could not.

Q There is a vacant lot there, isn't there? A True.

Q There was at that time? A There is yet.

Q Wasn't there? Yes. And even the foliage is back—

Mr. Ward: Will your Honor pardon me just a moment, sir?

Q Even whatever foliage there was in back from that sidewalk, and I am now referring to the easterly sidewalk along the easterly side of West Shore avenue, at least fifteen feet, isn't it? A Just say that again.

Q The foliage— A Yes.

Q —whatever there is, even there, now— A Yes.

Q —is back at least fifteen feet from the easterly sidewalk, isn't it?

Mr. Coult: I object to that.

A I do not know.

Mr. Coult: Just a moment.

A (Continuing) I wasn't over there.

Mr. Coult: If that relates to conditions as they are now, of course, it is not competent.

The Court: Suppose you fix the time.

Mr. Coult: This is spring, and the accident happened in October.

Q Have you been over there lately? A Oh, about two weeks ago; yes, sir.

Q Is the condition so far as the foliage and the trees is concerned about the same now as it was then at the time of this accident? A Two weeks ago, no; I was over there about two or two and a half weeks ago.

Q Yes. Do you see these trees here (indicating)? A Yes.

Q Will you step down here, please? Do you see those trees there? A Yes.

Q They are back even with this second little tree, aren't they, the second little tree, which is the second from West Shore avenue? Wait a moment. The second from West Shore avenue along the curb of the northerly side of Walnut avenue, there is one little tree which is right behind that building? A Yes, sir.

Q And the second little tree, just about there (indicating). These lines, or these trees, the first tree which is on the corner is back as far as that, isn't it? A I want to look, first. No, it is not.

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Q Now, is it, or not? A No, sir; it is not.

Q It is not? A At the time—

Q One moment, now. Come back on the stand. A (The witness resumes the stand.)

Q At that time, there was a curb? A Yes.

Q On the easterly side of West Shore avenue, wasn't there? A Yes.

Q And then, along the sidewalk, there was a strip of cement which makes the walking surface of the sidewalk? A Yes.

Q And that strip of cement is how wide? A I do not know.

Q About? A Oh, maybe three or four feet.

Q And a space between the strip of cement and the curb is of sod, isn't it? A Yes.

Q And how wide is that? A That is about the same width the sidewalk is.

Q Three or four feet? A Yes.

Q Then, from the strip of cement back to where this foliage is, or where these trees are, is about how far, or was about how far? A Well, I wouldn't know. About two feet, I will say.

Q Two feet? A Why, do you mean to the curb?

Q Will you come down here again, Mr. Ankelein? A Sure.

Q And just answer my question. A It sort of means exercise (leaving stand).

Q Now, will you get so these ladies and gentlemen can all see? From that strip of cement walk back to these trees is how far? A Oh, that is only five or six feet.

Q That is only five or six feet. Is that your estimate of distance? And that strip of cement to which I am referring now is the sidewalk on the easterly side of West Shore avenue, and the trees, all the trees that appear in the fore-

ground of the picture to the east of West Shore avenue. Well, now— A Naturally, there is—

Q One moment. There is no question being asked you now. Well, even according to you, though, there was five or six foot of open space— A Yes, sir.

Q —before you came to the sidewalk? A Yes, sir.

Q About three or four feet of sidewalk? A Yes.

Q That would be three and six, giving you the benefit one way, and taking it the other, or three and five, we will put it that way, eight feet, and about three feet beyond that, would be eleven feet out to the line of this curb, wouldn't it? A It would.

Q And that child must have come along through that space, must she not, or, at least, along the roadway? A Oh, she must have come out of Walnut avenue, yes.

Q And yet you never saw her when she was coming down that hill until she got— A No, sir; I did not.

Q —up to this curb line? Because you were not looking; that was the reason, wasn't it? A No, sir; it was not. I was looking.

Q If you had been looking, you would have seen her, wouldn't you?

Mr. Coult: I object to that.

A I did see her.

Mr. Coult: I want to object to that question on the ground it is argumentative.

The Court: I sustain the objection.

Q You never did see her until she got to the curb line that you have indicated, that is true, isn't it? A That is true.

Q And she would have been in plain view if you had been looking back a distance, according to your own calculation, of eleven or twelve feet, wouldn't she?

Mr. Coult? I object to that on the ground that is argumentative.

The Court: Sustained.

Mr. Ward: Your Honor will permit an exception.

Q Would there have been anything to prevent you, if you had looked, from seeing her as she crossed across this space that I have indicated before she came to this curb line? A Yes, some of the trees that are knocked down in that picture.

Q Yes. There were other trees there? A Yes, sir; there is a tree that is knocked down in the picture, and you can see it.

Q Knocked down in the picture? A Yes, sir; bring it over and I will show it to you.

Q Where? A Right there (indicating). That was a little piece of shrubbery standing up there.

Q I see. Right here (indicating)? A Yes, sir.

Q Can I put a pencil mark there? A Sure, you can.

Q I better put an ink mark; it will be more distinct. A All right.

Mr. Coult: If the Court please, I might say we have photographs here taken on the

10th of October and in November of the same year, which, of course,—

The Court: Well?

Mr. Coult: I was wondering whether we are not wasting time.

Q Come down here, please. A Surely.

Q The tree that you say was obstructing your view is this little twig where I put the "X"?

Mr. Cummins: I object to that.

Q That little limb?

The Court: Mr. Ward, the witness said the tree was knocked down, so we cannot characterize it as a tree.

Mr. Ward: All right.

Q The tree that you have indicated on the picture is the tree where the "X" is? That is the tree that is lying on the ground there, that we see extended along the ground that the "X" is on? And you say that that tree was out further than the rest? A I did not say that.

Q Oh, you did not? A No. But I—

Q Didn't you just say a moment ago that that was out further than the rest of the foliage? Did you not? A I did not say. I said that helped to obstruct.

Q Didn't you say that that was out beyond the rest of the foliage? A I did not. I said—you said could I see over that corner?

Q Was it out beyond the rest of the foliage? A No, sir; it was not. It was just in the line of those trees there.

Q Well, that did not obstruct your vision, then, back of the line of foliage, did it? A Well,

its leaves helped, with the other leaves, you know.

Q Yes. But, even according to you, Mr. Ankelein, back from the easterly curb of West Shore Avenue, there was an open space of three feet of sod between the corner and the sidewalk? A That is true.

Q Three or four feet of sidewalk? A Yes.

Q Making six or seven or eight. And I think you said five or six feet clear space beyond that? A True.

Q Making anywheres from ten to fourteen feet that you had a clear vision. Now, I am asking you— A That is in a direct line.

Q Yes. What do you mean by a direct line? A Well, that isn't looking from West Shore Avenue, going south, at an angle, into West Shore Avenue. What I am trying to bring out, you couldn't see there on account of that foliage. What I could see was just about that corner.

Q Well, you can see back as far as I have just indicated, can't you? A How far back did you indicate, the curb?

Q I have indicated from the curb to the sidewalk, or the cement walk, that was three or four feet, you say three or four feet across this cement sidewalk; five or six feet beyond that, before you came to the foliage, you say five or six feet. Now, that was a clear view, wasn't it, or a clear, unobstructed space, wasn't it, according to you, is that right? A Are you taking the side—

Q Was it, or not? A Wait a minute. Get that question clear. I am not going to answer anything I do not understand.

The Court: He did not understand it. The answer is he did not understand the question.

Q You know where the curb is? A I know where the curb is.

Q And you said you know there was sod next to the curb? A That is West Shore Avenue you are talking about now?

Q Yes. Just where I showed you on the picture. A Yes.

Q And between the easterly curb along West Shore Avenue and the flagging, it was sod, you said that was three or four feet? A Yes.

Q And next to that it is a sidewalk, three or four feet, you said? A Yes.

Q And then, beyond that, there is an open space where there is no foliage, you said, five or six feet, is that right? A To the foliage, yes.

Q Yes. And there was nothing there to obstruct your vision, was there, according to your own statement? A Well, I tell you,—

Q Was there, or not, Mr. Ankelein? A Yes, there was.

Q What? A The foliage.

Q Up to the foliage? A No. Beyond the foliage, nothing.

Q All right. So that from that distance out beyond the foliage towards the street you had a clear and unobstructed view of the street down which this child was coming, didn't you? A No, sir; you would only have a—

Q From that distance, out towards West Shore Avenue? A Do you mean from the—from that—

Q From the line of foliage. A Right, yes, that is all.

Q And that you have estimated to be anywheres from eleven to fourteen or fifteen feet? A Yes, about that.

Q And yet, although you had this clear vision, —did I understand you to say you were watching? A I was looking.

Q —you never saw this child until she was along the line of the curb? A That is the first time I saw her.

Q That is true, isn't it? A Yes.

Q You say you saw skid marks there? A Yes, when I went back.

Q And how far were the skid marks beyond the place where your car was when you first saw the child? In other words,—see if I make this plain, I want to be fair and make this plain to you. A Yes.

Q Now, when you saw the child, you applied your brakes? A I did.

Q Can you give us any idea of how far your car traveled from the place where you were when you first saw the child until your brakes took hold and the skid marks began? A Well, the skid marks began almost immediately when I put on my brakes.

Q I know; but can you give us any idea how far that was? A No.

Q Do you understand what I mean, now? A I know. Back from the place where I hit her.

Q No, no. You have mentioned skid marks, I think? A Yes.

Q Where were those skid marks? A Well, I tell you, they were—

Q You mentioned before where they were? A Yes.

Q Will you tell us again, please? A The skid marks were to the right of that tar line, that is, one skid mark to the right of that tar line, and sort of inclined toward the curb of the railroad side.

Q The railroad side? A Yes.

Q And did the skid marks pass that tar line, either one of them? A Well, I cannot tell.

Q I mean, the one on the left? A I cannot remember.

Q And how far did those skid marks run, do you recall, from the place where you first saw the car—where your car was when you first saw the child? A Do you mean how long were the skid marks in length?

Q No. You say there must have been an appreciable space between the time when you got a glimpse of this child and your brakes applied and the skid marks began? A Well, I imagine eight feet, seven or eight feet.

Q About eight feet? A About eight feet, eight or ten feet.

Q So you traveled this eight feet about which you have told us from the place where you were when you first saw the child until you came in contact with the child before your brakes took ahold, didn't you? That is so, isn't it? A I would not say that.

Q Why, your brakes did not take ahold until the skid marks were on, did they? A No.

Q. No.

Mr. Ward: That is all, Mr. Ankelein.

Cross examination by Mr. Coult.

Q You were employed by the Public Service Electric and Gas Company?

Mr. Ward: Will you pardon me? Counsel has suggested something else, Sir, my associate.

William Ankelein, for Defendants, cross.

By Mr. Ward.

Q You say this child came in contact with the left side of your car? A Yes, sir; it did.

Q The mud guard? A Yes, sir.

Q And you were pulling to the right, you say, at the time? A Pulling to the right.

Q The child was never under your wheel? A No, sir; never.

Q Never under the front wheel? A No, sir; never.

Q And she simply hurtled into the side of your car? A True.

Q And then fell back? A At an angle, and fell backwards.

Q Fell backwards? A Yes, that is, not backwards, but thrown, really.

Q She was on this scooter? A Yes.

Q And she was at an angle? A She was at an angle, coming out of the curb.

Q Now, wait one moment. Just answer my questions. About at that angle? A Well now, are you trying to figure a curb, are you?

Q No. Just figure this is the curb. A Figure this is the curb. That will be better.

Q And she came out— A Wait a minute. I will do this.

Q You will do it under my questions. Come out here, please. A Well, I cannot describe a curb there for you.

Q Well, assume that this is the corner? A Yes.

Q Now, will you show me at about what angle? This, we will assume, is Walnut Avenue. A This is Walnut Avenue.

Q And this was West Shore Avenue? A Take them for the other side of the street.

Q That is not a skid mark there, simply a mark in the curb. A Now, take that as a center of the road, and I saw her just as she was about crossing.

Q Tell me where she was when she hit you? A Well, she was up at this sort of an angle, coming right for me, and she hit my mudguard, and it threw this scooter.

Q One moment. She was at that angle? A Yes, sir.

Q Was she? A Yes, sir.

Q When she hit you? A Yes, sir.

By the Court.

Q What direction was she facing, south? A She was facing more northwest.

By Mr. Ward.

Q That would be toward your car? A That would be toward my car, yes, sir.

Q And your car, you say, the front, she hit the front mudguard? A Yes.

Q Coming right out like that? A Yes.

Q Is that right? A Yes. She seemed to crash right into it, this way.

Q Right into it that way? A Yes. There is the mudguard about twelve inches in back of this, starting at the mudguard.

Q Yes. And the mudguard and the wheel seemed to come in contact with the wheel right under the mudguard? A No, it did not.

Q Just with the mudguard? A The mudguard; yes, sir.

Q I see. And then she was thrown back, and you pulled to the right? A As I was pulling to the right, my car was at an angle.

Q At a side angle? A And she hit, and it sort of threw her back.

Q Threw her back? A Yes, sir.

Mr. Ward: That is all.

By Mr. Coult.

Q You were at this time employed by the Public Service Gas and Electric Company? A I was.

Q And you reported for work every morning at the plant, did you not? A Yes, sir.

Q At what time did you go to work? A Seven-thirty.

Q And did you invariably report to the plant after you got through work? A Yes, sir.

Q What time did you quit, ordinarily? A Five-twelve, five-fifteen; somewheres around there.

Q And this machine which was owned by the Public Service Electric and Gas Company was not being kept at the company's garage? A No, sir; it was not.

Q Had it ever been kept there? A For a few weeks.

Q When was that? A That was the first two weeks; the car came up from Irvington, the new car.

Q And you say they got the car about when? A Oh, the beginning of May, sometime.

Q And was that your car, then? A Yes, sir; my car.

Q It was assigned to you? A Assigned to me.

Q And you used it? A I used it.

Q During the first two weeks, you kept it in the company's garage? A No, I did not. The company did not have room for it in the garage.

Q Where did you keep it? A I kept it in back of the plant, in back of the garage, in the open.

Q What was the occasion of your first taking it home? A Somebody seemed to have used it and bunged up one of the mudguards a little bit.

Q Who suggested that you take it home? A I asked if I could take it home.

Q Whom did you ask? A I asked Mr. McElroy.

Q And he was the mechanic there? A Yes, sir.

Q Ordinarily, cars did not go home with the men, did they? A Well, some cars did.

Q Which were those? A Why, the different men took cars home.

Q Now, on this occasion, you took somebody home with you? A Yes, sir.

Q Have you ever done that before? A Oh, yes, I have.

Q Did you ever take anybody beside this man? A Yes, I did.

Q And, in order to take these people home, did you go out of your way? A Well, sometimes; that is, it wasn't very far.

Q Whom else have you taken home beside the man who was with you on this occasion? A Oh, Seis. He lives up around my way; a few other men.

Q Did anybody connected with the company ever request you to take the employes home? A No, sir.

Q Was anything said about whether you should do it or not? A No, sir.

Q And on this occasion, did you go out of your way to take this man home? A Just a bit, yes.

Q Where do you live? A I live on East Main Street.

Q Where? A That is on Palisade Avenue and East Main Street.

Q In what? In Bogota? A In Bogota, yes.

Q And where did this employe who accompanied you live? A He lived in Ridgefield Park, down on Second Street, Ridgefield Park.

Q Now, in order to go to your home, what was your direct route? A Well,—my direct route home?

Q Yes. A Well, over Fort Lee Road and north on Palisade Avenue through East Main Street.

Q And what was the route that you took in taking this man home? A Well, my route was generally down West Shore Avenue and to Second Street, then, directly after I left him off, I came up directly north on Second Street, which is Palisade avenue in Bogota.

Q And where were you intending to go at the time of the accident? A To John Quirk's home, to take him home.

Q And, from there, where were you going? A Home.

Q How far was it from his home to yours? A About a mile. A little over a mile, maybe.

Q In which direction? A South.

Q As you approached Walnut Avenue from the north at the time this accident occurred, could you look into Walnut Avenue? A No, sir; you could not; that is, not from the driver's seat, you could not.

Q I show you a photograph and I ask you if that is a correct photographic representation of the view that one had of Walnut Avenue approaching it from the north at the time when this accident occurred? A Yes, sir; that is a good picture of it.

Mr. Coult: I ask to have it marked for identification.

(Photograph marked Exhibit D. 5 for Identification.)

Q Can you tell about the point where that—

The Court: What is the number of that?

Q I show you D. 5 for identification, and ask you how many sections of concrete that has north of the corner, shown in that picture? A How many sections north?

Q Yes. A Do you mean going up?

Q Yes. A One, two lines north.

Q So this is taken from the second—the head of the second section? A Yes.

Mr. Coult: Do you want to look at it now?

Mr. Ward: If you are going to use it, go right ahead with it.

Mr. Coult: No.

Q And at the time that the accident occurred, were the leaves on the trees? A Yes, sir.

Q And were the grasses growing— A Yes, sir.

Q —in the vacant lots? A There were high weeds.

Q Were there high weeds on this vacant lot? A Yes, sir; there were.

Q At the corner? A Practically, to the apex.

Q Now, you say you saw this little girl first as she crossed the curb line? A Yes, sir.

Q On the east side of West Shore Avenue, coming out of Walnut Avenue? A Yes. Well, that is a little away from the east side, you know, away from the curb.

Q Yes. But I mean she was crossing, she was coming out of Walnut Avenue, and just about to cross, or crossing? A Yes, just about crossing.

Q The east curb line of West Shore Avenue? A That is right.

Q And, at that time, you say she was going rapidly? A Very rapidly.

Q You were then, you said, about seven or eight feet north of the point where the collision occurred? A That is approximate.

Q Is that correct? A Yes.

Q And when you saw this little girl coming out at this point that you designated on the curb line, you applied your brakes? A I did.

Q When you put your brakes on, you also turned your car to the right? A I did.

Q And you went about eight feet before she struck your front left mudguard? A That is right.

Q And she came across from the point where you first saw her at an angle— A Yes.

Q —across the street? Did she change her rate of speed any? A No, sir; she kept coming.

Q And how was she on this scooter, standing, kneeling, sitting, or how? A Very rigid and wild-eyed.

Q Well, was she standing on it? A Yes, sir.

Q At that time, were you on the right or left hand side of the street? A The right hand side, Sir.

Q And before you started to turn your wheels to the right, how far was the right hand side of the truck from your right hand curb line? A Well, I should imagine about six feet, six to eight feet.

Q And from the time that you saw her up to the time the collision occurred, did you keep your brakes on? A Yes, sir.

Q Now, did you release your brakes after that? A Why, my foot slipped off the foot brake when my front wheel touched the curb; whether it was excitement to get out of the car, or what, I do not know.

Q Yes. A But my foot got off the foot brake and I just rolled slowly, you know; the car just rolled down to where it stopped, see?

Q Now, how far was that? A Well, that was where the cab—well, I could look up Walnut Avenue when I got out of my cab.

Q Were you getting out at that time? A Yes, sir; when I got out, I could see up Walnut Avenue.

Q I mean, at the time you say your car was still rolling, were you getting out of the car, or were you in it? A I was attempting to, yes, sir; in my nervousness, I was; I wanted to get back to her as quick as I could.

Q What kind of a drive is this, right or left, the car? A Left drive.

Q And the man who was with you was sitting in the seat with you? A On the right; yes, sir.

Q To your right? A Yes, sir.

Q Did he get out of the car? A Yes, sir.

Q Did he get out before it came to a stop or after? A Yes. He got out before it came to a stop.

Q Then where did you go? A Do you mean after—back to the child.

Q Yes. Now, at that time, there was a Ford car coming in the opposite direction, wasn't there? A Yes, sir.

Q Where did that car stop? A He stopped at the southern—the southerly curb line of Walnut Avenue.

Q On which side of the street? A On the right—the right side of the street, going north.

Q And did this man get out of his car, the man in the Ford? A No. I do not think he did.

Q You say that you recall no Hudson car in that locality? A No, sir. There was just two cars there. That was mine and this Ford.

Q Were there more than two cars there at any time before the little girl went away? A No, sir; I do not think so.

Q You say that in coming south on West Shore Avenue, you cannot remember whether you passed parked cars or not? A Well, no, I cannot say offhand whether there were or not; but, as a rule, as you turn into West Shore Avenue there, there is a depot right there, and Hallberg and Everett salesmen keep their cars parked there.

Q I understand that. But you say you did not notice this day whether there were cars there or not? A No, sir; I did not.

Q And there was nothing to especially attract your attention as to whether there were any parked cars along the street more than there were at any other time? A No, sir; just the usual number of cars.

Q And I do not suppose you want to undertake to say how many cars you passed that were

parked on the street this morning? A No, I did not count them.

Q And at the time when you saw that little girl come out of the street, was your attention attracted to her? A Very much so.

Q And did it continue to be on her? A Yes, sir.

Mr. Coult: I think that is all.

Mr. Cummins: That is all.

The Witness: All right.

(Witness excused.)

JOHN A. QUIRK, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Cummins.

Q Where do you reside, Mr. Quirk? A 17 Second Street, Ridgefied Park.

Q Ridgefield Park. Where are you employed? A Public Service Gas Company.

Q And where were you employed on the 5th day of October, 1927? A Public Service Gas Company.

Q Do you recall the date of October 5th, 1927? A Yes, sir.

Q Who took you home that night? A Ankelein.

Q Who started to take you home that night? A Ankelein.

Q And did you see an accident occur that night? A Yes, sir.

Q Will you just tell the Court and jury what occurred? A Well, we were riding south on West Shore avenue, and as we came about to the—well, about five foot north of the curb line, this girl come around the corner very fast, down the hill, that is, and turned on an angle to the corner very fast, and run into the front left mudguard of the truck.

Q She ran into the front, left. Did Ankelein make any attempt to avoid her? A Yes.

Q What did he do? A Why, he jammed his brakes on and tried to swing to the right.

Q And did he swing to the right? A Yes.

Q How fast was Ankelein going as he approached Walnut avenue? A Around twenty miles an hour.

Q Do you know whether or not that truck has a governor on? A That I cannot say.

Q And what was the child riding on that came in contact with the Dodge? A A scooter.

Q And did she come toward the truck, or the truck go toward her? A She came towards the truck, on an angle towards the truck.

Q At a fast or slow rate of speed? A Well, at a fast rate of speed.

Q And did you see a Hudson sedan at the scene of the accident? A No, I didn't see none; that is, I don't remember seeing any.

Q Did you ever see Mr. Cunningham before, the man who testified here? A No, sir.

Q Was yesterday the first time you saw him? A Yesterday, yes.

Q Now, after the accident, what did Mr. Ankelein do? A Why, after the accident, I jumped out of the car and I run up and picked the child up, I run her back to the car, and I

don't know whether he backed up a little bit or not; I don't remember that.

Q And where did you take the child? A To Doctor Dickson's office.

Q Where was the child in your truck? A On my lap.

Q And you were holding the child? A Yes.

Q Did you see Mr. Hummers that night? A Yes, sir.

Q Was Mr. Ankelein with you at the time you saw Mr. Hummers? A Yes, sir.

Q Did you see an officer there that night? A Yes. We picked the officer up on Fort Lee road.

Q And where did you take him? A To Doctor Dickson's office.

Q And did you take him back afterward? A I don't remember whether we took him back or not.

Mr. Cummins: Cross examine.

Cross examination by Mr. Ward.

Q You still work for the Public Service, Mr. Quirk? A Yes, sir.

By the Court.

Mr. Ward, I want to ask a question.

Q Did you pick the child up? A Yes, sir.

Q Where was she lying with reference to the easterly curb line on West Shore avenue? A To the easterly curb line?

Q That is the one on the railroad side, the other side. A She was lying about—I believe,

it was about three foot. I won't say three foot. About two foot, on the west—on the east of the last tar mark, that last section.

Q Lying two feet east? A Yes.

Q Of the third— A Or west. Towards the railroad.

Q Towards the railroad? A Yes.

Q She was beyond the center? A Yes, sir.

Q Lying two feet on that section which has been referred to as the westerly section? A Yes, sir.

Q Or the third section? A The third section, towards the railroad.

By Mr. Ward.

Q Did he say two feet within that, sir?

By the Court.

Q Two feet within it, or two feet east of it? A Well, I would say just about two feet east of it.

Q East of it? A Yes.

Q Where was the scooter? A That I cannot remember, the scooter, because I just picked the child up.

By Mr. Ward.

Q You were on your way home with Mr. Ankelein? A Yes, sir.

Q As was your custom? A Well, no; it wasn't no custom.

Q Well, that was the usual thing, wasn't it? A No.

Q Taken you home, before, at times, hadn't he? A Yes, sir; maybe once or twice before that.

Q And whose helper were you? A Well, on that day, I don't know just—George Sisa, I was working with that day, George Sisa.

Q Had you ever been a helper for Mr. Ankelein? A I do not know about before that.

Q I mean, before that? A No, I cannot say that.

Q You do not know? A I cannot remember, no.

Q Were you talking as you were going along? A Well, I do not know whether we were talking at that particular time or not.

Q You do not remember that? A No.

Q Do you remember whether or not you had been talking at all, going over there, up to the place of the accident? A Do you mean from the time we left the Public Service Shop? Oh, yes, sure; we must have been talking about something.

Q You must have been? A Sure, because we were sitting there all the time.

Q And you haven't any recollection either one way or the other about whether you were talking as you went along West Shore avenue? A No, sir.

Q Is that correct? A Yes, sir.

Q Were you familiar with the neighborhood? A Well, no; not familiar with it.

Q You passed along there before, hadn't you? A Oh, yes, sure.

Q In this truck? A Yes.

Q This is a light Dodge truck, isn't it? A Yes.

Q An ordinary Dodge car, the regular car with a truck body? A Yes.

Q That is correct? A Yes.

Q And when you came along there, you were not paying any particular attention, were you, Mr. Quirk? A Attention to what?

Q I beg pardon? A Paying attention to what?

Q You were not paying any particular attention to anything, for that matter, were you? A No, no, I wasn't.

Q The first thing you knew was when the child and the car came in contact, wasn't that it? A No.

Q That was not the first thing? A No.

Q Well, you say the car was going about—about how fast? A Well, somewhere around twenty miles an hour.

Q Around twenty miles an hour. And do you recognize this picture as a picture of the scene? A (Referring) It looks like it.

Q Do you recognize that as Walnut avenue? A I cannot say I recognize it. Pretty near all the streets are the same.

Q Do you remember this vacant lot here, vacant lot here, and the houses there, and you remember these sections of the—I am showing you P. 3, that is simply for identification—do you remember these particular sections of the roadway? A Yes.

Q And where did you say that child was struck? A Right here (indicating).

Q Right there. Mark it, will you please? A (The witness marks on photograph) Right about here, (indicating) Sir.

Q Right about where you have put an "X" on P. 3? A Yes.

Q Now, may I put your initial, "Q", underneath that? A Yes, sir.

Q Or right beside of it, "Q", is that right? A Yes, sir.

Q Now, did you see the child before she was struck? A Yes, sir.

Q Did you see her coming down Walnut avenue? A No, I did not see her coming down Walnut avenue. I see her coming out of Walnut avenue.

Q Well, she had to pass in front of the sidewalk there, what would have been the crosswalk, didn't she? A Yes, sir.

Q You could have seen her there, couldn't you, if you had looked? A If I looked, I guess.

Q And you could have seen her coming down that hill if you had looked? A Well, I do not know whether you could or not.

Q Well, you at least could have seen her when she crossed? A In that picture, you could, yes.

Q Well, of course, there is no shrubbery or trees on the sidewalk on the easterly side of West Shore avenue? A No.

Q And that space there was such as to give a plain and unobstructed view, wasn't it? A Well, you mean this space here?

Q Yes. I mean opposite the sidewalk, of the projection, crossing over. A Right in there?

Q Yes. A Do you mean outside the sidewalk line?

Q Yes. A No. I don't think there was anything there, only the weeds and grass, or something.

Q Then she would have been in plain view for the distance back to wherever the foliage was?

Mr. Coult: I object to that, if the Court please. That is simply arguing with the witness about—

Mr. Ward: I will withdraw the question.

Q Would there have been anything to obstruct your view of a child coming down Walnut avenue back to the line of where the foliage was? A I don't just know—foliage is all through this lot, isn't it?

Q Yes. The foliage is up here, was it not?

The Court: You say it would be, or was there an obstruction?

Mr. Ward: Would there have been. I will reframe the question.

Q There is where the foliage is, is that correct?

Mr. Coult: I object to that.

A There is foliage all through there.

Mr. Ward: Why do you object?

Mr. Coult: Because you are using a picture in which you admitted—you said there wasn't any foliage, and which you said you would not use for that purpose.

Mr. Ward: I am indicating a place on the picture and asking him if that is the place on the picture where the foliage would have been.

Q Well, what was there?

The Court: We are interested in the fact—

Mr. Ward: Yes.

The Court: —that existed at that time.

Mr. Ward: Yes, sir.

Mr. Coult: I thought counsel pointed to the map and said there was no foliage there. I may be mistaken about that. I do not think—I mean the picture. There is no foliage on that picture, is there?

The Witness: No, there is not.

Q Do you see where this line is, trees and brushes? A Yes, a tree there.

Q Now, back to there, back to that point, there was no foliage or nothing to obstruct the view, was there?

Mr. Coult: Now, do you mean on the picture or on the land?

Q Was there not, is there on the picture, was there?

Mr. Coult: I know; but, you see, your Honor, he points to the picture and then asks the question as though it applies to the land.

The Court: Haven't we a picture with the foliage?

Mr. Coult: I have one, two or three of them. Suppose you use this one.

Mr. Ward: I would be very glad to use it if it had been taken by a photographer who had shown the outlines differently as it could have been taken, very glad to, Judge Coult.

Mr. Coult: Here is one.

Mr. Ward: Taken by an impartial photographer?

The Court: Well, we have not come to that yet.

Mr. Ward: No, sir.

The Court: So I will strike that from the record.

Q Well, so far as your recollection is concerned, how far back from the easterly curb line, or the easterly sidewalk line—I will put it that way—of West Shore avenue was the foliage? A I do not know.

Mr. Coult: Objected to on the ground it is not cross examination. I do not think this witness has been interrogated at all.

Mr. Ward: He was asked where he first saw the child and told about that.

The Court: I will allow that.

Q If you know, or you recollect? A I do not know. I do not know where the foliage was. I didn't pay no attention to the foliage.

Q Do you remember on your direct examination saying that she came out of Walnut avenue, she came down the hill on Walnut avenue, very fast? A I said she come out of Walnut avenue.

Q Do you remember saying that she came down the hill on Walnut avenue very fast? A No, sir.

Q Did you see her coming down Walnut avenue? A No.

Q Well, if you said that on your direct examination, was that a mistake, then? A I don't remember saying she came down the hill.

The Court: My recollection is he said he did not see her coming down, but he saw her coming out.

Mr. Ward: Our recollection, sir, was he saw her coming down the hill very fast.

The Court: This man?

Mr. Ward: Yes, sir.

The Court: I do not know about that.

Mr. Ward: It is the recollection of both my associate and myself.

The Court: Well, if he said it, he said it.

Q Well then, you did not see her? A I didn't see her.

Q Until she came out from Walnut avenue? A No, sir.

Q Now, what I want to know is, if you had been looking, whether or not the view beyond the curb line coming out from Walnut avenue into West Shore avenue, whether that was open and unobstructed? A That I do not know, I cannot say.

Q Well, according to you, Mr. Quirk, that child came out of Walnut avenue? A Yes.

Q Traveled a distance completely across the first section and across the second section, and was struck? A She did not cross this here section.

Q Well, to the place where you—no, I say, across the second section, not the tar line? A Yes, sir.

Q Do you understand? A I understand.

Q That is correct, is it? A Yes.

Q And do you know what that distance is? A No, I have no idea what it is.

Q Would you approximate that distance at thirty feet? A Well, I do not know. I have no idea what it is.

Q At the time they came in contact, this car was moving, wasn't it? A Yes.

Q And it continued to move after the contact, didn't it? A Yes.

Q It continued to go how far after the contact? A Well, I am not sure about that. I would figure about—I do not know for sure how far he went after the contact because I jumped out of the car.

Q During all of the time that the child came out from Walnut avenue across, as you say, across West Shore avenue, it was in plain view, wasn't it? A Yes.

Q And it came this distance across those two sections, then it came in contact with the car? A Yes.

Q And during all that time while that child was crossing there in plain view, the car continued on, didn't it? A The car was going when she turned into it, yes.

Q Yes.

Mr. Ward: That is all.

Cross examination by Mr. Coult.

Q Now, you were not driving this car? A No, sir.

Q And you were not making particular observations as to street corners, were you, any more than— A No, sir.

Q —an ordinary passenger would? And when you first saw this little girl on the scooter, she

was out of Walnut avenue, wasn't she? A Yes, sir.

Q And how far had she gotten out of Walnut avenue when you first noticed her? A Why, she was pretty well over that first black line when I first noticed her, that is, she was coming down that way.

Q And she was coming on a slanting direction? A Yes.

Q Towards you? A Kept going towards the west curb, swinging north.

Q And what was the first thing that attracted your attention? Was it the jamming on of the brakes? A Yes.

Q So that, when Mr. Ankelein put on the brakes and swung his wheel, you looked up?

Mr. Ward: Now, your Honor please, I object to this line of questioning as leading. I know that is is cross examination, but, at the same time, it seems to me—

Mr. Coult: Oh, well, I won't lead.

Mr. Ward: —that where the counsel—

Mr. Coult: I won't lead.

Q You have already said, I believe, that you were aware that he put on the brakes and swung the car? A Yes, sir.

Q How far did the car go after that, about? A Well, I think it was about seven—well, maybe seven to ten feet.

Q Now, where did the car finally come to rest? A Over by the west curb.

Q Did you get out? A Yes, sir.

Q Did you go back? A Yes, sir.

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Q What did you find? A Well, I found the child lying on the street, and I picked her up and carried her down to the car.

Q Did you indicate the place on this map, on this photograph, where you found the child? A Well, where I figured it was, yes.

Q Now, I think there is a mark on here with a "Q"? A Yes.

Q Is that where you located that— A No, that ain't where I said the child is; I said that is about where she got hit.

Q I see. About where did you pick her up? A Down here somewhere (indicating); I am not positive.

Q And you picked her up how close to that point you marked with a "Q"? A Well, it was right around there somewheres. I don't know just the distance.

Q Now, in putting this "Q" on the map here, on the picture, you have had in mind the distance across the street, have you not? A The distance between curb to curb?

Q Yes. A No. I have not. I have no idea what the distance is.

Q I mean, did you put this mark with reference to the curb, or with reference to the tar marks? A In reference to the tar marks.

Q In putting it on the tar mark, have you attempted to put it in—

Mr. Ward: I will agree to that, because I do not think he attempted to locate the road, so far as Walnut avenue is concerned.

Q You did not attempt to locate that so far as the corner of Walnut avenue is concerned? A Oh, no.

Mr. Ward: I think that is correct. I am perfectly willing to admit that.

Mr. Coult: That is all.

Mr. Cummins: That is all.

(Witness excused.)

Mr. Ward: I beg your pardon. Is "Q"— I want to ask you something on re-cross.

JOHN A. QUIRK, recalled for further cross examination, testified as follows:

By Mr. Ward.

Q In answer to Judge Coult's questions just now, you said that you first saw the child near the tar line. What tar line did you mean? A Near the car line?

The Court: Tar.

The Witness: Oh, tar line?

Q Tar line. A I meant the tar line on the west side of the road, West Shore avenue.

Q And is that the tar line? A When I first seen the child, you mean?

Q Yes. A Well, no, I wouldn't say. I thought you meant when I picked her up.

Q You said in answer to Judge Coult's question that when you first saw the child, it was near the tar line. Now, what tar line did you mean? A On the east side.

Q You meant the easterly tar line? A Yes.

Q Now, had it crossed that tar line, or not, when you first saw it? A Had it crossed it?

Q Yes. A We didn't cross that tar line at all.

Q No. Had the child crossed that tar line, or not, when you first saw it? A I don't know whether she did or not. I don't know whether she did or not. It was around there some place.

Q Around that tar line? A Yes.

Q Now, are you sure about that? A Yes.

Q Well, then, you did not see her come out of Walnut avenue as you testified you did, did you? A I said just as she come out of Walnut avenue.

Q You testified, as I understood you, first, that you saw her coming down the hill, fast? A No. I didn't say I seen her coming down the hill.

Q And you testified next you saw her coming out of Walnut avenue? A Out of Walnut avenue, yes.

Mr. Cummins: I object to the form of the question.

The Court: That has been answered.

Q You testified you saw her coming out of Walnut avenue? A Yes.

Q And now you testify you did not see her until you got—until she was about on that tar line? A I meant across the street, on West Shore avenue.

Q Which is the truth as to where you first saw her?

Mr. Coult: I object to that as not fair.

The Court: The man might misunderstand your question.

Mr. Coult: Exception.

John A. Quirk, for Defendants, Further cross.

Q As I understood you, you testified on your direct examination that you saw this child coming down the hill, is that true or not? A No, I don't think this was coming down the hill.

The Court: That is not it. Did you so testify?

The Witness: No, I don't believe I did testify to that.

Q Now, you testified on cross examination that you saw her coming out of Walnut avenue, is that so or not? A Yes, coming out of Walnut avenue.

Q Well, you testified on cross examination by Judge Coult that you first saw her when she was on that tar line, or near that tar line; now, which is so?

Mr. Coult: I do not see anything inconsistent in that, if the Court please.

Mr. Ward: That is for the jury to say. (Argument).

Mr. Ward: I will withdraw my question, Sir.

Mr. Coult: All right.

Q Where did you first see this little girl? A Well, I will say about—about ten foot to the west curb, out of Walnut avenue.

By the Court.

Q You do not mean that? Do you mean the west curb? A From the east curb, from Walnut avenue side.

Q Ten feet from the curb? A By that, you mean coming down Walnut avenue?

Q The space from the curb, what would be the sidewalk, the space— A From the sidewalk?

Q —between the foliage and beyond the foliage? A The sidewalk line, I mean the curb line.

Q Which do you mean? A The curb line.

Q You have got that clear in your mind, what you mean by the curb line? A The curb line on West Shore avenue.

Q You saw her ten feet— A About that.

Q —in on West Shore avenue? A No, I don't mean on Walnut.

Mr. Coult: Your Honor, may I say a word?

Mr. Word: Now, one moment.

The Court: No.

Q Did you see her on Walnut avenue at all? A No.

Q You did not see her at all on Walnut avenue? A Not on Walnut avenue.

Q When you saw her first— A She was on West Shore avenue.

Q On West Shore avenue? A Yes. Walnut avenue, facing it, she was right in the center, coming around the turn.

Q And making the curve going in what direction? A The curve was going north.

Q Going in the opposite direction from which you were coming? A She was going the opposite direction from the way we were going.

Q Yes. In other words, going north, and you were traveling south? A Yes.

John A. Quirk, for Defendants, Further cross.

By Mr. Ward.

Q As I understand it, then, that was about ten feet out from the easterly curb line? A Yes.

Q In other words, she had come ten feet out into West Shore avenue; is that correct? A Yes.

Q And she was facing north at that time? She was on an angle, towards north, yes.

Q On the scooter? A Yes.

Q And practically facing north, the direction from which you were coming? A Yes.

Q Is that right? A Right. She wasn't practically facing north; she was on an angle towards the north.

Q Yes. But didn't you say a moment ago that she was facing north? A Well, the wheel was turning north, yes.

Mr. Ward: That is all.

By Mr. Coult.

Q This was an intersection of Walnut avenue and West Shore avenue? A Yes, sir.

Q And when you say coming out of West Shore avenue, you mean coming out of the line —pardon me. When you say coming out of Walnut avenue, you mean that she was coming out of the line of Walnut avenue into West Shore avenue? A West Shore avenue; yes, sir.

Mr. Ward: I object to that.

Q At a point—

Mr. Ward: I object to that.

Mr. Coult: It is perfectly obvious.

The Court: Now, he said he saw her when she was on West Shore avenue ten feet from the curb.

Mr. Ward: Yes, sir. Now, Judge Coult comes back and says, "You saw her coming out of Walnut avenue?"

Mr. Coult: Well, that is exactly what he means.

Mr. Ward: You are telling what he means, now.

Mr. Coult: I know. But it is so obvious what she did, anybody could see it.

Q You are referring to the intersection of West Shore avenue— A Yes.

Q —and Walnut avenue? A And Walnut avenue, yes.

Q And when you used the expression, coming out of Walnut avenue, do you have reference to the fact that the child crossed from the intersection of Walnut avenue into West Shore avenue? A Yes, sir.

Mr. Ward: I object to that, sir.

The Court: I will allow it.

The Witness: Yes, sir.

Q Is that what you meant? A Yes, sir.

Mr. Coult: That is all.

Mr. Ward: That is not his explanation, now; it is the Judge's.

The Court: He said yes. I assume he would not say yes if he did not think so.

Mr. Coult: That is all.

Mr. Cummins: That is all.

Carl Carlson, for Defendants, direct.

By Mr. Ward.

Q Well, do you mean, when you say that, that the child when you first saw it was a distance of about ten feet from the easterly curb out into West Shore avenue facing generally north? A Yes, sir.

Mr. Ward: That is all.

Mr. Coult: That is all.

The Witness: From the east curb of West Shore avenue, ten foot out.

The Court: All right. We will take a recess until two o'clock.

(Recess.)

After Recess 2:00 o'clock P. M.

The Court: Are you through with that last witness?

Mr. Cummins: Yes.

CARL CARLSON, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Cummins.

Q What is your full name, officer? A Carl Carlson.

Q And with what police department are you identified? A Bogota.

Q Bogota police? A Right.

Q Do you recall the date of October 5th, 1927? A I do.

Q Were you on the Bogota police force at that time? A I was.

Q Do you know Mr. Ankelein? Have you met him? A I did.

Q And did you see Mr. Quirk here this morning? A What is that?

Q Mr. Quirk, did you see Mr. Quirk here this morning? A Yes, sir.

Q Do you recall seeing these gentlemen on the date of October 5th, 1927? A I do.

Q Where did you see them? A Fort Lee road and West Shore avenue.

Q What happened at that time? Did they pick you up? A Yes. I was doing traffic duty at that point, and a Dodge truck belonging to the Public Service Gas Company come through West Shore avenue, headed north, and the driver of the truck called me over to it. I walked over to the truck, and they told me they wanted to get to a doctor's right away.

Mr. Ward: One moment, please. I object, of course, to the hearsay.

The Court: Yes.

Q Well, what did you do? A I walked over to the truck.

Q And did you go with the truck? A I did.

Q Where to? A Doctor Dickson's office on Larch avenue.

Q Who was in the truck? A Mr. Quirk, Mr. Ankelein and Violet May Hummers.

Q Where was Violet May Hummers in the truck? A Mr. Quirk was holding Violet May in his arms.

Q And after you went to Doctor Dickson's office, did you go any place else, after you left Doctor Dickson's office? A Yes.

Q Where? A To Violet May's mother's house.

Q And did you see Violet May's mother there? A I did.

Q Did you see Mr. Hummers there? A No.

Q Where did you take Mrs. Hummers? A We started to take her to Doctor Dickson's office.

Q And after you came back, did you come back to the scene of the accident after that? A After that.

Q Are you acquainted with the intersection, Walnut avenue and West Shore avenue? A Yes, sir.

Q Did you see any skid marks there on October 5th, 1927? A I did.

Q Where did you see them? A They were on West Shore avenue on the west side about five foot east of the west curb of West Shore avenue.

Q And which way did they go? A They were—the southern end of the skid mark was slightly closer to the west curb than the northern end of the skid marks.

Q And on which side of West Shore avenue were these skid marks, the right or left? A On the west side, it would be the right if you were going south, or the left coming north.

Q And how long did they extend, for what distance? A I would judge ten feet from the beginning of the skid mark to the end of the skid mark.

Q And are you acquainted with the scene around there at Walnut avenue? A Yes, sir.

Carl Carlson, for Defendants, cross.

Q And these other streets? Did you ever warn any of the children against using scooters down these hills?

Mr. Ward: I object to that.

The Court: Sustained.

Mr. Cummins: That is all.

Cross examination by Mr. Ward.

Q Your name is Carlson, isn't it? A Right.

Q When did you come back, or, first, come to the scene of the accident? A On the way to notify Mrs. Hummers of the accident.

Q And that was the only time? A Yes, sir.

Q From where had you come? A From Doctor Dickson's office.

Q You knew the child's condition was serious? A Yes, sir.

Q And you left Doctor Dickson's office for the purpose of getting the child's mother? A Yes, sir.

Q And on your way to the home of the child's mother, you passed the scene of the accident? A Yes, sir.

Q You did not stop; you went right on to her home? A We stopped for a short space of time.

Q Wasn't your purpose to get her to take her to the child who was, you thought, seriously ill? A Yes, sir.

Q Or seriously injured? A Yes, sir.

Q And you were anxious to get there as quickly as possible, were you not? A Yes, sir.

Q That was the whole mission upon which you were at that time, that is so, isn't it? A Yes, sir.

Q In going from Doctor Dickson's to the home of Mrs. Hummers, did you necessarily pass by where the accident had occurred? A Yes, sir.

Q So there was no particular object in your going that particular way excepting to go to the child's home, or the home of her mother, that is so, isn't it? And yet you say you stopped? A Yes, sir; right.

Q At the scene of this accident? A Yes, sir.

Q How long were you there, altogether? A Only a minute or two.

Q What do you mean by a minute or two, Officer Carlson? A Just—if I may explain, I probably could tell you just what I mean. As we come down West Shore avenue we—

Q Well, pardon me. I do not want any statements, and I would prefer, with his Honor's permission, to ask the questions.

The Court: Well, I think you wanted to know what he meant.

Mr. Ward: Yes. I will withdraw that question.

Q How long altogether were you at the scene of this accident? A I would say about two minutes.

Q Pardon? A About two minutes.

Q About? A About two minutes.

Q About two minutes? A Yes, sir.

Q Were you still anxious to get the mother of Violet May? A I was.

Q And still you say you observed these skid marks? A Absolutely.

Q No one called your attention to them? A Yes, sir.

Q Did you observe them closely? A Yes, sir.

Q Were they important? A In what respect?

Q To you? A Yes, sir.

Q Why didn't you report them? A It is not necessary for me to report skid marks.

Q You considered these skid marks of importance? A To myself; yes, sir.

Q To your report? A No, sir.

Q Not to your report? A No, sir.

Q You know that you never made a report about these skid marks or never mentioned them in your reports? A No, sir; I did not.

Q That is so, isn't it? A Positively.

Q And yet you say now that you observed them carefully? A Absolutely.

Q You never went back there? A No, sir.

Q You never took any measurements? A No, sir.

Q You had lots of time afterwards to go back there, didn't you? A My own time, yes.

Q Yes. And lots of police time, for that matter, to go back there, is that so? A No, sir; not for that purpose.

Q You believed it was essential for your making a correct report to find out about those skid marks, didn't you? A No, sir.

Q Didn't you think it was necessary, in order to make a correct report, to have accurate measurements? A That is not required of us.

Q Didn't you think, in your own mind, that that was necessary? A Absolutely not.

Q How far do you live from the place of this accident? A At that time, I lived—oh, about three-quarter of a mile from the accident.

Q And the scene or the place where you were on duty was how far from this accident? A About, I would say, a little less than a half a mile.

Q That is down at the corner of West Shore avenue and Fort Lee road? A Right.

Q That is where the station is, isn't it? A Just above the station.

Q I beg your pardon? A Just north of the station.

Q Yes. To whom did you first mention these skid marks? A No one.

Q No one at all? A No, sir.

Q Never to a soul? A No, sir.

Q You did not know what you were going to testify when you went on the stand? A I knew from the run of things what I would be asked, yes.

Q But you never consulted with anybody about it? A No, sir.

Q Or talked about it? A No, sir.

Q And you did not tell anybody what you knew? A No, sir.

Q You are sure of that? A Positive.

Q Have you talked to any of these gentlemen sitting at the table? A Not regarding it, no.

Q I beg pardon? A No, sir.

Q At all? A Yes, I have.

Q When? A Just a little while ago.

Q Where? A In the other room.

Q In this little room right here? A Yes, sir.

Q Is that correct? A Absolutely.

Q And you did not talk about the accident? A Indirectly, yes.

Q Directly or indirectly, did you talk about the accident? A Yes.

Q Did you tell them what you knew? A Yes.

Q Then, when you said a moment ago you had never told a soul what you knew, that was not so, was it? A No.

Q Why did you say that? A Well, your question was not exactly clear.

Q Why didn't you tell me it was not clear? A Because you cannot explain on the stand just the way to describe a situation.

Q Well, it is clear to you now? A Yes, sir.

Q Had you talked to anybody about this accident? A Yes.

Q Had you told them what you knew? A Some of it.

Q Some of it? A Yes, sir.

Q Did you talk about the skid marks? A Yes, sir.

Q When you answered a moment ago you had never mentioned that to anyone, that was not correct either, was it? A Well, I answered that question before.

Q Well, I am asking you about the skid marks. Now, you said, as I understood you, you had never told or never mentioned those skid marks to anybody; is that correct or not? A I corrected that statement.

Q I beg your pardon? A I corrected that statement.

Q Do you wish to correct it now? A I say I did correct it.

Q So you have talked about these skid marks? A Yes.

Q To whom? A To one of the attorneys on the opposing side.

Q No one else? A No, sir.

Q Anybody else from the Public Service? A No, sir.

Mr. Coult: I object to that, anybody else from the Public Service.

The Court: To anybody.

Mr. Cummins: Has he talked to anyone. I am not from the Public Service, your Honor, and the question is, did he talk to anybody else from the Public Service.

Q Well, is this the gentleman to whom you talked? A Yes, sir.

Q In the little ante-room there? A Yes, sir.

Q About the accident? A Regarding it, yes.

Q About the skid marks? A I mentioned it to him, yes.

Q You mentioned those, the skid marks, to him? A Yes, sir.

Q Have you ever mentioned those skid marks to anyone else before? A No, sir.

Q You are sure of that now? A Yes, sir.

Q Did you ever give a statement to the Public Service or anyone representing them? A Not that I know of.

Q Didn't you sign a statement about this accident? A No, sir.

Q Are you sure about that, or not? A As far as I can recollect, I didn't sign a statement regarding this accident.

Q Is your recollection poor? A I do not think it is.

Q Do you know Mr. Meyers? A No, sir.

Q You do not know Mr. Meyers? Do you know this gentleman sitting at the end of the table? A Yes, sir.

Q Have you seen him before? A Yes, sir.

Q A representative of the Public Service, you know him to be? A Yes, sir.

Q You have talked to him about this case, haven't you? A I had nothing to do with the case, with the particulars.

Q Have you talked to him about the case? A No.

Q When did you see him before you got on the stand? A I saw him many times before.

Q And when did you talk to him? A I spoke to him only out in the lobby, in the hall, before I come in.

Q Outside? A Yes, sir.

Q Of this court room? A Yes, sir.

Q And you spoke to him about the accident, didn't you? A No, sir.

Q Didn't you mention the case? A No, sir.

Q Who served you with a subpoena? A The Public Service man.

Q Who? A Mr. Hansen, I believe his name is, another claim agent, another adjuster, or claim agent. I don't know what he is.

Q A representative of the Public Service? A Yes, sir.

Q Did you talk to him about the case? A No, sir.

Q So you did not tell him what you knew about the case? A No, sir.

Q He did not ask you? A No, sir.

Q No one has asked you what you knew about this case until you came here today, eh? A No, sir.

Q Well, when you came here today, were you asked what you knew about the case? A No, sir.

Q Not in the little ante-room? A I wasn't asked what I knew about the case in the ante-room.

Q Were you asked to tell anything about the case in the little ante-room? A That question is not plain.

Q Did you tell anything about the case in the little ante-room? A Yes, yes.

Q Is that why you went in there? A Yes, sir.

Q And when was that? A Just before the noon recess.

Q Did you mention the skid marks then? A Yes, sir.

Q Was that the first you had ever mentioned the skid marks from the time you saw them? A Yes, sir.

Q Now, at the expense of repetition, I want to ask you, are you sure that from the time this accident happened up to this morning when you went into that little ante-room that you never made mention to anybody about these skid marks? A It is possible that I did, but I—

Q To whom? A I do not know. I do not recollect; but I say it is possible that I did.

Q You have no recollection of that now, however? A No, sir.

Q You did not talk to Ankelein about the skid marks? A No, sir.

Q You did not talk to Mr. Quirk about the skid marks? A Mr. who?

Q Mr. Quirk, is it? A No, sir.

Q So, when you went down there, nothing was said to you about the skid marks? A No, sir.

Mr. Ward: That is all.

Cross examination by Mr. Coult.

Q What time of day was it when you got down to the place where this accident happened? A Shortly after five o'clock.

Q And is it a part of your duties as a police officer to investigate accidents? A If my—if I am sent down on them, yes.

Q You were not sent on this one, were you? A I was called on it indirectly, yes.

Q And when you noticed these skid marks, where did you go? What did you do when you got down to this corner? A Why, on the way from the doctor's to Mrs. Hummers' house, we passed that spot, and Mr. Ankelein said, "There is the skid marks."

Q All right. Did you go over and look at them? A Yes, sir.

Q And did you find them as you described them here? A Yes, sir.

Q Absolutely. When were you subpoenaed in this case? A The night before—it was the night before the first day of the trial.

Q Were you here Monday? A Yes, sir.

Q Were you here yesterday? A Yes, sir.

Q And has anybody talked to you about this case up till today? A No, sir.

Q Did you ever talk to me about it? A No, sir.

Q Did you ever talk to anybody beside Mr Cunningham since this case—pardon me—Mr. Cummins, since this case is in progress? A I don't know which Mr. Cummins is.

Q. This gentleman (indicating). A Yes, no one else but him.

Mr. Coult: That is all.

Frederick M. Fleck, for Defendants, direct.

By Mr. Ward.

Q. Didn't you know who Mr. Cummins was when you talked to him? A I didn't know what his name was, no, sir.

Q Did you know who he was? A I knew he was a—one of the client on the side of Ankelein and the Public Service; I knew he was representing Mr. Ankelein.

By Mr. Cummins.

Q But you did not know my name, did you? A I did not know your name, no.

Mr. Cummins: That is all.

Mr. Ward: That is all.

Mr. Cummins: That is the defendant Ankelein's case.

Mr. Coult: Is Mr. Fleck here?

A Voice: Yes, sir.

Mr. Coult: Take the stand.

FREDERICK M. FLECK, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Mr. Fleck? A Maywood.

Q And you are an investigator employed by the Public Service? A I am.

Q With what office are you connected? A Hackensack.

Q And were you connected with the investigation of the present case? A I was.

Q Did you make any investigations at or near the scene of this accident? A I did.

Q I show you a photograph which is marked D. 1 for Identification, and ask you if you took that photograph? A I did.

Q When? A October 10th, 1927.

Q And that was 5 days after the accident occurred? A It is.

Q What did you take that picture with? A A Kodak, my own camera.

Mr. Coult: Now, I offer it.

Q I will ask you this: Where did you take it from? A That is facing west on Walnut Avenue, looking toward West Shore Avenue, Bogota.

Q And about how far from the corner? A I should say approximately about a hundred and fifty to two hundred feet east of West Shore Avenue.

Mr. Ward: No objection.

The Court: What is the writing on the back?

Mr. Coult: That is a memorandum number.

The Witness: A memorandum of the case number and the day of the accident and when the picture was taken.

Mr. Coult: It says, "Looking from Walnut Avenue to West Shore Avenue."

No objection?

Mr. Ward: No, indeed.

Q I show you a negative, a photographic negative, and ask you if that is the negative from which this picture was taken? A It is.

Mr. Coult: I will offer in evidence D. 1 for Identification and a negative of the same picture.

(Photograph marked Exhibit D. 1, and negative marked Exhibit D. 6 in evidence.)

Q I show you another photograph, and ask you if you took that? A I did.

Q When did you take that? A The same day, October 10th, 1927.

Q Where was that photograph taken? A That is facing looking south on West Shore Avenue, Bogota, toward Walnut Avenue.

Q Where is that taken with relation to that corner? A That is about up at the next block.

Q Can you count the strips of concrete between— A Do you mean the sections?

Q —the corner? The sections, yes. A Between the black lines, I cannot tell from this here picture, no.

Q I see.

Mr. Coult: I will offer this in evidence.

(Photograph marked Exhibit D. 7 in evidence.)

Mr. Ward: The same thing on the back, Judge, isn't it?

Mr. Coult: Yes. There is nothing on the back of these to cause you any alarm, I think, Mr. Ward.

Q I will ask you if that is the negative from which that—that you took that day, and from which this last picture was printed? A It is.

Mr. Coult: I offer them in evidence. I might explain I am doing this, your Honor, because we had enlargements made from these photographs; I am going to prove those later.

(Marked Exhibit D. 8 in evidence.)

Q I show you another photograph which is marked—

Mr. Ward: May I show this to the jury?

Mr. Coult: I will show it to them.

Q —which is marked D. 3 for Identification, and ask you if you took that photograph? A I did.

Q And when was that taken? A The same day, October 10th, 1927.

Q And what does that show? A That is further up on top of the hill there where the grade starts to go down toward West Shore Avenue. That is looking west on Walnut Avenue toward West Shore.

Q And I will show you a photographic negative and ask you if that is the negative from which this last picture was printed? A It is.

Mr. Coult: I will offer the picture. That is looking down the hill.

(Photograph marked Exhibit D. 3 in evidence.)

Mr. Coult: And the negative.

(Negative designated Exhibit D. 9 in evidence.)

Mr. Ward: That is number 1, I think they saw that.

Mr. Coult: Is that number 1?

A Juror: That is D. 1; that is right.

Q I show you another photograph marked D. 3 for Identification, and ask you if you if you took that photograph? A I did.

Q From what point did you take that? A I took that from the railroad tracks, looking southeast toward Walnut Avenue.

Q And how far north of Walnut Avenue was that taken? A Approximately two hundred and fifty feet.

Mr. Coult: And I will offer that in evidence.

(Photograph marked Exhibit D. 2 in evidence.)

Q I show you a negative from which the last picture was printed, and ask you if that is the negative that you took? A It is.

Mr. Coult: I ask to have that marked for identification, or in evidence.

(Negative marked Exhibit D. 10 in evidence.)

Mr. Coult: Cross-examine.

Cross examination by Mr. Ward.

Q You are not a professional photographer? A No, sir; I am not.

Q Your claim department has its regular photographers? A Yes.

Q The photographers who are sent out to take pictures of scenes of accidents? A Yes.

Q And, so far as you know, that was not done in this case? A It was.

Q It was? A I believe it was.

Q A regular photographer sent out? A I am not positive about that.

Q Well, where are the pictures that he took, do you know?

Mr. Coult: Here they are. Taken in November. He is coming next.

Q This photographer did not go out before you? A No, sir.

Q So far as you know? A No, sir.

Q And you went down there on a bright sunshiny day, did you? A Yes, sir.

Q About what time? A Sometime in the morning between ten and eleven.

Q And you took these pictures? A I did.

Q Did you request the presence of a regular photographer with you at that time? A I did not.

Q Yet you had in mind taking pictures of this place, didn't you, and went down there? A I was asked to by my superior.

Q Oh, you were asked to. So that that was arranged, the taking of pictures, by your superior, so far as you know? A It wasn't arranged. He just requested me to go down with my camera and take a picture of the scene of the accident.

Q Arranged with you? A Yes.

Q And you followed out the instruction? A Yes, I did.

Q Was there a regular photographer with you at the time? A No, sir; I was alone.

Q Now, these pictures that you took, Exhibit D. 1, were those clouds actually dark with the sun shining upon them, the clouds that are in the upper left hand corner? A This here (indicating), do you mean?

Q Yes. No. Not the light spot; the dark sports. A These here clouds, that is the way it was, I didn't touch it up.

Q They were actually dark at that time, do you know? A That's just the way it was.

Q The sun was in the east at that time, wasn't it? A It was.

Q And bright and sunshiny? A It was.

Q So those clouds have the appearance of being dark with the sun shining on them at that time? A That is the way it was; I didn't put it there.

Q That is the way it appears in the photograph? A As it appears in the photograph.

Q And was Exhibit D. 2 taken at the same time? A They were all taken at the same time.

Q The light was just as strong? A It was.

Q Have you any idea why those buildings and that foliage appears so dark in Exhibit D. 2? A I cannot say, no.

Q You notice it appears very much darker? A It does.

Q In Exhibit D. 1 you can see through the foliage, can't you? A Somewhat, yes.

Q From this point where I am indicating?

Mr. Coult: I object. The photograph speaks for itself.

Mr. Ward: I think I have a right to test the witness.

The Court: What was the question?

Mr. Coult: Showing him the photograph and asking him whether or not on the photograph you can see through the trees.

Mr. Ward: That is with reference to the conditions under which he took them.

The Court: That would be all right to let him describe the conditions other than what was set forth in the photograph.

Mr. Ward: That was my purpose.

The Court: Suppose you get that in first.

Mr. Coult: Then do not refer to the photographs, Mr. Ward, if you are talking about conditions on the land, because the photographs speak for themselves.

The Court: I said I would allow the question as to his observation.

Mr. Coult: Yes. But Mr. Ward is asking him with reference to the photographs.

The Court: Not yet. I have excluded that question.

Mr. Coult: Well, you have to watch counsel to see that he is doing it.

Mr. Ward: How am I doing it, when there is a question pending now?

The Court: You may ask him as to his own observations before we can go into the photograph.

Mr. Ward: That was my intention.

Q Now, could you, as a matter of fact, see through the foliage at the time that picture was taken? A I could not say.

Q You do not know? A I only went there to take the picture.

Q One moment. You do not know? A No, sir.

Q Didn't you try to see? A Partly.

Q And you cannot explain why there is a difference in the appearance of the buildings and the foliage between D. 1 and D. 2? A It may be due to the fact that the sun was shining

this way, and I had the shadow of the lens, so I didn't get the sun in the lens.

Q So there may be a shadow there? A That I do not know; I am not an official photographer.

Q The foliage was dropping, and had been dropping at that time, hadn't it? A It was in the fall, yes.

Q Do you know where Mrs. Cummins lives? A Mrs. Cummins?

Q Yes. A I may know if I look at my papers.

Q Were you here when Mrs. Cummins was on the stand? A When was that?

Q Yesterday, I think. A I have seen several people on here, but I wasn't here the day before.

Q Day before yesterday you were not here? A I wasn't here the day before.

Q Were you here yesterday? A In the afternoon, yes.

Q And not in the morning when the first witness went on the stand in the morning? A I wasn't here in the morning early, no.

Q You did not hear the first witness on the stand? A No, I did not.

Q Do you know where Mrs. Cummins lives on Beechnut Avenue? A I could tell from looking at my records.

Mr. Ward: That is all.

Re-direct examination by Mr. Coult.

Q Just a minute. You are not an expert photographer, are you? A No, sir.

Q And you were sent up and instructed to take photographs? A Yes, sir.

Q And you took them? A I did.

Q And came back? A I did.

Mr. Coult: That is all.

(Witness excused.)

Mr. Coult: Mr. Powelson?

CHARLES R. POWELSON, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Mr. Powelson? A West Caldwell, New Jersey.

Q What is your business? A Photographer.

Q And you do work for the—you are employed by the Public Service— A Yes, sir.

Q —Companies, are you not? A Yes, sir.

Mr. Coult: Maybe I can hasten this by using all four of these together if nobody objects to it.

Q I show you photographic films marked D. 6, D. 9,—D. 6, D. 8, D. 9 and D. 10, and ask you if you recognize them? A (Referring) Yes, sir.

Q When did you first see those? A The night before last.

Q And did you take certain enlargements from those films? A Yes, sir.

Q Now, when did you do that? A Night before last.

Q Where? A The Public Service Terminal, Room 2230, Newark.

Q I show you D. 6, film D. 6, and ask you if the picture which I now hand you is an enlargement taken from that film? A Yes, sir.

Q Just how do you take those pictures, Mr. Powelson? A The film is put in the projection machine, and the light projects through the film, through a lens and into the paper.

Q Is that how you did it? A Yes, sir.

Q Are those pictures touched up in any way? A No.

Q Did you touch up the films in any way? A No, sir.

Mr. Coult: I will offer this photograph.

Mr. Ward: I object, your Honor please.

The Court: On what ground?

Mr. Ward: Upon the ground that the original photograph is in evidence, and this, at best, is secondary; it is a copy of the original.

The Court: No. The Court of Appeals has ruled, in murder cases,—

Mr. Ward: Yes. I was thinking of that—

The Court: No. I specifically recall a murder case that I tried in Essex where the identical thing was done, and it was assigned as error, and the Court held it was proper.

Mr. Ward: Under those circumstances I will withdraw my objection.

Mr. Coult: The original is the film, of course.

(Photograph marked Exhibit D. 10 in evidence.)

Q Now, I show you the Exhibit D. 1 and the enlargement D. 10, and ask you if you recognize whether those are the same or not? A Yes, sir; they are.

Q Except for the size? A Yes, sir.

Q I show you another photograph and ask you if you recognize that; do you? A Yes, sir.

Q I show you the negative D. 9, and ask you if that is an enlargement from that negative? A Yes, sir.

Q Did you make that enlargement? A Yes, sir.

Q In the same manner? A Yes, sir.

Q Did you touch up the plate? A No, sir.

Q Or the picture? A No, sir.

Mr. Coult: Now, I will offer that photograph in evidence.

Mr. Ward: No objection.

(Photograph marked Exhibit D. 11 in evidence.)

Q Now, I show you another photograph and ask you if you recognize that? A Yes, sir.

Q And is that an enlargement of the film D. 10? A Yes, sir.

Q And did you do that? A Yes, sir.

Q And in the same manner— A Yes, sir.

Q —as you have described?

Mr. Coult: I will offer that.

(Photograph marked Exhibit D. 12 in evidence.)

Q I show you another photograph and ask you if you recognize that? A Yes, sir.

Q Did you make it? A I made the enlargement.

Q Yes. From the film D. 8? A Yes, sir.

Q I call your attention to the fact that this has already been marked D. 5 for Identification. A Yes, sir.

Q And you used the same process in making that picture, did you? A Yes, sir.

Mr. Coult: I offer that in evidence.

Mr. Ward: That is a copy, is it, an enlargement?

Mr. Coult: That is an enlargement.

(Photograph marked Exhibit D. 5 in evidence.)

Q Now, Mr. Powelson, I call your attention to D. 7, which is the small picture, showing the same thing as D. 5, and call your attention to the fact that it is obscure in some detail and dark in one corner, and ask you why that is? A Taken against the light.

Q And I notice that in your enlargement there is more detail in scenery, how do you account for that? A An enlargement will usually make it that way, because the light goes through slower than it does in the contact print; the person who printed this printed it on a very contrasty piece of paper, making it more black and white.

Q Now, Mr. Powelson, did you yourself take some photographs— A Yes, sir.

Q —in connection with this case? A Yes, sir.

Q And when did you do that? A On November the 10th, 1927.

Q Now, at the time you took your photographs, had the leaves begun to go off the trees? A Yes, sir.

New Jersey State Library

Q I show you a photograph and ask you if you took that? A I did.

Q And that was on the tenth of November? A Yes, sir.

Q 1927. And what does that show? A It is looking northwest from a point on Walnut Avenue showing West Shore Avenue sixty-five feet distance.

Mr. Coult: I will offer this photograph in evidence.

(Photograph marked Exhibit D. 13 in evidence.)

Q I show you another photograph and ask you if you took that? A Yes, sir.

Q At the same time? A Yes, sir.

Q What does that show? A Looking west on Walnut Avenue showing West Shore Avenue, two hundred foot distance.

Mr. Coult: I offer that in evidence.

(Photograph marked Exhibit D. 14 in evidence.)

Q I show you another photograph and ask you if you recognize that? A Yes, sir.

Q What does that show? A That is looking north from a point on Walnut Avenue thirty feet east of West Shore avenue.

Mr. Coult: I will offer that in evidence.

Q That was taken at the same time? A Yes, sir.

(Photograph marked Exhibit D. 15 in evidence.)

Mr. Coult: Cross-examine.

Cross examination by Mr. Cummins.

Q Mr. Powelson, when were these last group of photographs taken? A November 10th, 1927.

Mr. Cummins: That is all.

Cross examination by Mr. Ward.

Q And, Mr. Powelson, in making enlargements, in fact, any printing, depends largely upon the extent of the exposure as to the shadows or shades in the picture; that is correct, is it not? A Yes, sir.

Q In other words, if you take an ordinary film and print from it, if you print for a long time, of course, the detail is— I will withdraw that. When you start to print, the impression gradually is reproduced upon the—what do you call it? A The sensitized emulsion.

Q Pardon me? A The sensitized emulsion.

Q Well, the sensitized substance, which is the photograph or the picture, rather, that is correct, is it not? A Yes, sir.

Q And there comes a point, of course, when it is most clear and distinct, considering the condition of the film; that is correct, isn't it? A Yes, sir.

Q Of course, the film may be good or bad, and that affects the result of the printing, doesn't it? A Yes, sir.

Q And then, if you overprint, it gives the effect of greater shadows, does it not? A Yes, sir.

Q Upon the print? A Yes, sir; it makes it darker.

Q Or the substance you mentioned a moment ago. And that is equally true, of course, of enlargements? You take your film and project the light through it upon the print, and it depends upon how long that light is projected through as to the exact result that is reproduced or produced, rather, upon the print; that is true, isn't it? A Yes, sir.

Q And that is true of all the pictures? A Yes, sir.

Q A lot of distortion, I don't mean intentional distortion, but a lot of distortion in photography, isn't there? A No, I wouldn't say so.

Q Well, the reproduction or the print is flat, isn't it? A Yes, sir.

Q And isn't there distortion because of that? A No, sir.

Q What I mean is this, Mr. Powelson: As you get further away, or, at least, the object is further away from the camera, it becomes smaller, of course? A Yes, sir.

Q Then a thing will appear smaller by reason of the fact that it is taken at an angle? A A perspective.

Q Yes, a perspective. That has a lot to do, of course, with the picture, hasn't it? A Yes, sir.

Q And you frequently have seen pictures taken of people where they have a foot extended where the foot appears as big as the body? A Yes.

Q That is true in photography, isn't it? A Yes, sir; just as it is with the eye.

Mr. Ward: That is all, Mr. Powelson.

Re-direct examination by Mr. Coult.

Q In photography does the lens take what the eye sees? A Yes, sir.

Q So that if I were standing to you with my hands out this way, to your eye my hands would cover a large part of my body, I suppose? A Yes, sir.

Q And that is what the photograph shows? A Yes, sir.

Mr. Coult: That is all.

Re-cross examination by Mr. Ward.

Q But not as the eye sees it? A Yes, sir, just as the eye sees it. I do not mean to say color, in that respect; but so far as perspective, so far as perspective is concerned, it will show it exactly as the eye sees it.

Q Now, Mr. Powelson, as a matter of fact, looking at you as you sit in the stand, you do not appear to be flat against that wall, the lightness, and all that, it stands out about your body; that is not true? A You see it with two eyes when you see it that way, you get a stereoscopic effect. If you close one eye, though, you will get it just as the camera sees it.

Mr. Ward: That is all.

(Witness excused.)

JOSEPH HASSMILLER, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Mr. Hassmiller? A Irvington.

Q New Jersey? A Yes, sir.

Q What is your business? A Foreman of the automobile department.

Q Of the automobile department of what? A The Public Service.

Q And how long have you been employed in that capacity? A About fourteen years.

Q And where do you work? A Irvington, 21st street and Clinton avenue.

Q What is there there? A A garage.

Q Public Service Garage? A Yes, sir.

Q Do you have anything to do with the automobiles of the company? A Yes, sir; I supervise the work.

Q Do you know an automobile known as G-498 of the Public Service Gas & Electric Company? A Yes, sir.

Mr. Coult: Now, Mr. Ward, I suppose, if I observed the strict order of proof, I would prove this was G-498, first; but do you want me to do that?

Mr. Ward: No. I am perfectly willing to rely upon your statement.

Mr. Coult: It is the same car.

Q What kind of a car is that? A It is a Dodge three-quarter ton, screen truck.

Q And in July, 1927, did you do any work on that Dodge? A Yes, sir; we overhauled the car.

Q I show you a paper and ask you what it is? A We call that a job order.

Q And was that a job order on this G-498? A Yes, sir.

Q Did that come to your hands? A Yes, sir.

Q Have you made any memorandum on it? A Yes, sir; I OK'd the work on the car.

Q Now, was there anything that you did in connection with a governor? A Yes, sir.

Q What did you do? A Why, I set the governor, the speed of the governor.

Q And was that in connection with this order that you have here? A Yes, sir.

Q Do you know when you did that? A Yes, sir; that was on July the 23rd.

Q And did you make a notation of it? A Yes, sir.

Q And is this the notation on this slip? A Yes, sir.

Q What kind of a governor was that? A That is called a K-P governor.

Mr. Ward: What kind?

The Witness: K-P.

Q K-P. And had there been any governor on the car before you put it on? A No, sir.

Q Did you set the speed of it? A Yes, sir.

Q How did you do that? A Well, take it out on the road and test it.

Q And how did you test it? A Well, with the speedometer that is on the car.

Q And did you do that in this case? A Yes, sir.

Q And what did the test show? A Twenty-two miles an hour.

Q Now, was that governor set so you could make more than twenty-two miles an hour? A No, sir.

Q On that car? Could you describe—I would like to have you do it, if you can without too much technical detail, how that governor controls the speed? A Well, it is controlled by a spring. There is an adjustment on the spring.

Q What does that spring work on? A Well, there is a screw in the back of it.

Q Well, I mean, how does that hold the—how does that check the speed of the car? A That is worked by the suction of the motor.

Q Now, did that governor have any seal on it? A Yes, sir.

Q How did you seal it? A Why, we have a wire, and there is a place where the adjustment is, there is a hole, and you put the wire through the hole, and the seal onto the wire, and we have a special pair of pliers we squeeze them together.

Q Is that something like a freight car seal, is that the idea of it? A Well, it is smaller; it is about as big as a ten-cent piece.

Q And what is the object of sealing the governor? A Well, so that the—

Mr. Ward: I object to that, sir.

Q What is the purpose of the seal?

The Court: I will allow it.

A So the driver cannot change the setting of it.

Q And did you ever see that car again from that time to this? A Well, I might have saw it, I don't just remember.

Mr. Ward: What was that?

Mr. Coult: He says he might have seen it, but does not remember.

Q Attached to this slip that I showed you are some pink slips; what are they? A Time sheets.

Q What do they show? A Well, the men that worked on the different cars and what they done.

Q And immediately under this order blank that I showed you first, there is a pink slip here; do you recognize that? A Yes, sir.

A And is that a time sheet? A Yes, sir.

Q Whose time sheet? A August Sand.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q This governor was set in July? A Yes, sir.

Q 1927? A Yes, sir.

Q That was after the car had been owned by the Public Service for how long? A Well, I don't know when they bought the car.

Q I see. The adjustment of this governor is by a screw on what? A There is a spring.

Q On the springs? A No. A screw—a spring goes in the tube, and there is a screw directly in back of that, and then you adjust that screw until you get the speed that you want.

Q So it depends upon the adjustment of the screw? A Yes, sir.

Q Is that correct? A And you have to take it off to adjust it.

Q But it does depend upon the adjustment of the screw? A Of the screw. And there is a pin goes through the screw so it cannot move.

Q Well, it can be moved, of course, if you move the—or, the pin is taken out? A You have to take the governor off the car.

Q Well, you can take the pin out, can't you? A No, sir; not unless you take the carburetor or the governor off.

Q Is this adjustment on the carburetor? A On the governor. The governor goes on the—

Q What is the governor on? A It is up against the motor block, and the carburetor is directly in back of that.

Q Well, is this governor on the carburetor? A Yes, sir.

Q It affects the carburetor, is that it? A Yes, sir.

Q It affects the flow of gas, is that it? A No, no.

Q What does it affect? A I don't know what you mean.

By the Court.

Q How does it work? How does it operate to check the speed? A There is a valve inside of the governor, and the suction of the motor closes this valve, and checks the supply of gas going into the motor.

By Mr. Ward.

Q That is what I mean. It works—I beg your pardon. I said carburetor. I should have

said the gas. It works upon the flow or supply of gas, doesn't it? A Yes, sir.

Q Now, as a matter of fact, isn't there a difference in gas? A Oh, I suppose so.

Q And that you know to be especially true? A Well, does it make any difference in the speed, though?

Q Wouldn't it? A No, sir.

Q Well, this affects the quantity of gas, this governor, doesn't it? A No.

Q The quantity or flow of gas? A No. if you set that governor for twenty miles an hour, you can open that carburetor wide and it won't go any faster.

Q I know. But—I beg your pardon for interrupting you—as a matter of fact, doesn't this governor work upon the gas, the supply of gas? A The volume of gas, you mean?

Q What? A The amount of gas?

Q Yes. A Yes, sure.

Q And, of course, if the governor were not there, or were adjusted so as to give a greater flow of gas, there would be greater speed, wouldn't there? A Yes, sir; that is right.

Q And isn't it true that gas makes a great deal of difference? A Oh, possibly a little, probably a mile or so, that is all.

Q The same amount or quantity of gas, depending upon the quality of gas, of course, affects the speed? A A little bit, very little.

Q I see. I understand you to say that this governor was sealed? A Yes, sir.

Q And you found that necessary? A Oh, we always do that.

Q And that was a practice you used? A Yes, sir.

Q So far as you were concerned, you found necessary? A Every car will pass inspection.

Q These governors were tampered with, in other words, at times? A No. I never saw any.

Q Well then, there was no necessity for the seal, was there? A Absolutely.

Q So far as you know? A That is the orders we get to seal them, and that is what we did; so—

Q Well, do you know the reason why that order was passed? A That is the orders I get, to make sure every governor is sealed when it leaves the shop.

Q I believe you said on your direct examination that the purpose of the seal was so that no change might be made? A Well, yes, sure. That is probably what it is put there for.

Q If a person wanted to change that governor, it could be done, couldn't it? A Yes, sure; if he knew how to do it.

Q By breaking the seal? A Breaking the seal.

Q And then, if he could put the seal back on, he could fix that up as it was before? A Well, he couldn't because he hasn't got the special pliers that we use.

Q Where are those special pliers kept? A Right down in our shop.

Q Yes. In your shop? A Yes.

Q And lots of people have access to that shop, haven't they? A No, sir.

Q What? A It is locked up in my desk.

Q Always. A Always; yes, sir.

Q There are lots of people who have access to that desk? A No, sir.

Q Nobody? A Nobody but me.

Q At all? A Yes, sir, I have the keys.

Q Now then, so far as you know, that governor has not been inspected since you adjusted it? A Well, I haven't anything to do with that. I set it.

Q You know, as a matter of fact, these governors get out of order, don't you? A Yes; and if they do, the truck will run slower.

Q And some of them will run faster, don't they? A Not this type. If the spring gets weaker, it will run slower.

Q Always slower, never faster? A I am talking about this particular type.

Q Yes. This particular type. Never faster? A No, sir; impossible.

Q But slower? A Slower.

Q Well, there is a change, then? A Yes, sir.

Q What brings that about? A Well, the spring gets weak in there, the car runs slower, or if it breaks you can only go about five mile an hour then.

Q And suppose the screw were to change, the position of the screw? A It is impossible.

Q Why, now, Mr.— A Hassmiller.

Q If that screw were to break, or the—what did you say went through it? A Cotter pin.

Q —cotter pin were to break or slip out— A It couldn't.

Q If it were, let us assume that it could. A Well, I never saw one.

Q Well, I do not care about that. If it did slip out, and the screw changed its adjustment, that would affect it, wouldn't it? A Well, you cannot run at all then, because—

Q Why, doesn't a turn of the screw— A Yes, but there would be nothing there to hold the spring.

Q One minute. Doesn't a turn of the screw—
A What do you mean?

Q That affects the adjustment? A Absolutely.

Q If you turn it one way it makes the adjustment such that the car runs faster? A Yes, sir.

Q If you turn it the other way, it affects it so that the car runs slower? A That is right.

Q Or more slowly? A Yes, sir.

Q And if the cotter pin were to slip out and the screw turn either one way or the other, that would affect it, wouldn't it? A Yes, sir; you cannot run at all.

Q Couldn't it run if the screw was shifted around? A No, sir. You are talking about if it came out.

Q If the cotter pin came out, the screw could be changed, or could change, couldn't it? A I hardly think so.

Q Wouldn't vibration do it, or vibration alone? A Not the way this is made.

Q You do not think so. But would it be possible? A I do not think so, I am telling you.

Q Couldn't you turn that screw with your fingers? A No. You need a screw driver for that.

Q A screw driver to change the screw? A Yes, sir.

Q What is the purpose of putting the cotter pin in? A I do not know. That is the way they are made.

Q Isn't the purpose of the cotter pin to keep the screw from turning? A Absolutely.

Q So there is a necessity for the cotter pin, isn't there? A Well, I never saw one that did turn yet.

Q Well, it is there for that purpose? A Absolutely.

Q Don't you know if that cotter pin were out that screw could change? A Yes.

Q And that would affect the speed, wouldn't it? A It would go slower, yes.

Q Depending upon the way the screw turned? A No, it couldn't turn that way; it would have to come out.

Q Doesn't it turn before it comes out, when you take it out? A It turns so hard, you couldn't turn it.

Q If you turn it with a screw driver, doesn't it turn before it comes out? A What do you mean?

Q Why, the very adjustment depends—the adjustment of the governor depends upon the extent to which this screw is turned, doesn't it? A Yes, sir.

Q If the governor is adjusted and you want to take that screw out, you have to turn it considerably before you get it out, don't you? A Yes, sir.

Q That seal could be impressed with another pair of pliers, couldn't it? A Well, I suppose so, if you wanted to, sure.

Q You know nothing about whether or not this seal was intact? A Sir?

Q You know nothing about whether or not this seal was intact? A No, I do not know.

Q After— A I could not say that.

Q —you made the adjustment?

Mr. Ward: That is all.

Re-direct examination by Mr. Coult.

Q Did you use the same seal more than once? A No.

Q There has to be another seal? A Yes, because you squeeze it together.

Q Now, the cotter pin, as I understand, that goes through this screw, prevents it from turning? A Yes, sir.

Q This cotter pin is one of those split pins that you shove through a hole and then spread at the end? A Spread at the end.

Q Counsel was asking if the cotter pin came out whether the screw would turn; if so, would it loosen or tighten? A It would loosen.

Q And what happens to your speed when the screw loosens? A It is slower, the car goes slower.

Q And what do you have to do to the screw in order to make the car go faster? A You have to tighten it up.

Q And in your experience have you ever known screws to get tighter by vibration or use? A No. The cotter pin is always there. It is impossible to get out.

Q Well, throwing the cotter pin aside, out of the question, I am asking you whether, in your experience, you ever knew of screws by reason of vibration or use to get tighter or to come loose? A No, sir.

Mr. Coult: That is all.

Re-cross examination by Mr. Ward.

Q In your experience, have you ever known a cotter pin to come out? A Yes; but—

Q One moment. How much experience have you had with these governors? How many have you ever put on? A Oh, I do not know; I cannot recall.

Q How many? A A couple of hundred.

Q A couple of hundred? A Yes, sir.

Q All in this shop where you have worked now? A Yes, sir.

Q The seal is an ordinary piece of lead, isn't it? A Yes, sir! a round piece of lead.

Q A round, ordinary piece of round lead, with a wire stuck through it? A There is two holes in it.

Q Two holes in it? A Yes, sir.

Q And wires running through the holes? A That is right.

Q And then you take your pliers and make an impression upon them, don't you? A Yes, sir.

Q What kind of an impression? A A "P-S" mark under it.

Q Just ordinary "P-S?" A Yes. In raised letters.

Q So that they are raised on the surface of the lead disk? A Yes, sir.

Mr. Ward: That is all.

(Witness excused.)

WILLIAM O. McELROY, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Mr. McElroy? A At the present time, Englewood.

Q What is your business? A I am an automobile mechanic.

Q By whom are you employed? A Public Service Electric and Gas Company.

Q Where? A At Englewood, at present.

Q And are you familiar with the Public Service Electric and Gas Ford or Dodge truck G-498? A I am.

Q What kind of a truck was that? A That was a three-quarter ton, Dodge, screen body.

Q And do you remember when it was purchased, about? A Not the exact date; but along in May, 1927.

Q And did you have anything to do with that car? A I did.

Q What did you have to do with it? A Well, it came directly under my supervision in this particular county.

Q And what do you have to do with cars that are under your supervision in this particular county? A Why, I make weekly inspections, and do necessary—what we call here as minor repairs.

Q And did you inspect car G-498? A I did.

Q How frequently? A Once every week.

Q Where? A At the garage at Hudson street, Hackensack.

Q And do you recall whether that car had a governor on it or not? A Positively.

Q Was it any part of your duties to see whether that governor remained sealed? A Oh, yes.

Q This accident happened on the 5th day of October, 1927, on a Wednesday. Now, can you tell what would be the last previous day of inspection on that truck? A Prior to the accident?

Q Yes. A Why, the Thursday prior; directly after noon, to be exact.

Q Did you make an examination of it on that day? A I did.

Q Did you make any examination of it after the accident? A The day after.

Q What was the condition of the car on the Thursday before the accident happened? A Why, I would say good.

Q Did you look at the governor? A I did.

Q Did you test the car? A Not as to speed, prior to the accident, no; I just tested the governor seal, I examined the governor seal.

Q And how was the governor at that time? A It was intact, the seal was there.

Q Now, on the day after the accident, did you make an examination of the car? A I did.

Q And what was the condition of the governor at that time? A The governor was still sealed, and I took the car out on the road that day.

Q Did you make a test with it? A I did.

Q What did your test show? A My test showed a little bit less than twenty-two miles per hour, that is, with the wide open accelerator and the spark control.

Q Where did you test it? A I tested it on Hudson street, going south towards Little Ferry.

Q What kind of a street is that? A It is a paved street that has a concrete, macadam or asphalt covering.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q You were in charge of these cars, Mr. McElroy? A In charge of the mechanical part of the cars.

Q Whereabouts? A In Hudson street, Hackensack.

Q Is that the garage that was referred to by Mr. Ankelein? A That is the one.

Q And who had charge of the cars? A Just what do you mean, Mr. Ward?

Q In charge of the garage, I mean? A Well, the superintendent is directly in charge of everything, including the cars.

Q And who is he? A Mr. Minard, E. D. Minard.

Q Was he there all the time? A Why, he is on the road a lot.

Q Well, who was the man in charge of that particular garage? A Oh, I was.

Q I see. You are the gentleman who was referred to by Mr. Ankelein? A I was.

Q Of the garage. And you knew about this car, of course, there being no room in the garage for it? A That is not so.

Q That is not so? He was mistaken about that. Well, aside from the inspection of these cars, you had a general supervision over them, didn't you? A Yes.

Q And you say that you regularly made examinations— A Yes.

Q —of the cars? A Once a week.

Q How many? A What was that?

Q How many? A At the time of that accident, I think there was eighteen.

Q About eighteen cars? A About eighteen cars that I examined once a week.

Q On the same day? A Oh, no. We did so many together in a day.

Q So many on Thursday, perhaps, and so many on Friday? A That is it.

Q Is that it? A That is it.

Q And the Thursday before, you examined this car? A Yes. I examined that car.

Q And I think you said that you looked at the seal? A Oh, yes, sir.

Q Did you pay any particular attention to the seal? A Why, yes; I would take ahold of it and see—examine it to see that it was not tampered with.

Q You found that necessary to examine these seals? A Well, as a general principle, I always done it.

Q Yes. As a good, general principle? A To protect myself.

Q Yes. And to protect the cars from being used at an excessive rate of speed? A Well, naturally.

Q You found that a good principle? A Always.

Q Yes. You knew where Mr. Ankelein lived, didn't you? A About, not exactly.

Q You knew he went home in the car? A Oh, yes. I did not know he went home with the car, no; but I know the bus route that he would take.

Q Yes. You knew that car was not at that garage nights? Your supervision was— A No, I did not.

Q What? You did not? You were examining these cars and had charge of these cars, and you did not know whether that car was there nights or not? A Why—

Q Mr. McElroy? A Just lower your voice, Mr. Ward, and I will answer you.

Q Did you, or not, know that? A The car was out of the garage?

Q Yes; nights? A No, I did not.

Q You had charge of this garage; these cars were under your supervision; that is true, isn't it? A Positively, yes.

Q And you did not know whether this car was out or not? A No, sir; I did not.

Q For months? A That car was not out for months, Mr. Ward.

Q It was not out of that garage for months, nights? A At times, it was on duty.

Q Nights, you knew it was not there at that garage, didn't you? A I knew it if the car happened to be out on duty, occasionally I would know it, not always.

Q Didn't you inspect to see whether cars were there or not? A No, I did not.

Q Why not? A Because I was not working twelve—twenty-four hours a day. I was working eight hours a day.

Q When did you quit? A Five o'clock; sometimes a little before.

Q And with the charge of these cars entrusted to you, you did not know whether they were out consistently and continually or not? A No, I wasn't—

Q Or any one of them? A No, I wasn't concerned in that.

Q But you were concerned about the cars to the extent of examining them, weren't you? A Mechanical condition of the cars—

Q Yes. A —I told you, Mr. Ward.

Q You always examined the seals? A Yes, always.

Q What kind of seals were they? A Why, we had more than one type seal, but on that—you are talking about the seal, did you say, or the governor itself?

Q Were there more than one type of seal? A No. There was more than one type of governor.

Q Were there more than one type of seal that you had? A No, only one type of seal.

Q Did I understand you to say a moment ago that you had more than one type of seal? A No. No, I meant governor. I misunderstood your question.

Q You thought that I said governor when I said seal? A Yes, that is it.

Q I had just been asking you about examining the seal, hadn't I? A Yes.

Q Didn't you know that I meant seal, the same seal that you said you examined, the same thing, when you answered as you did? A I would have answered it differently had I known it.

Q Now, did you have more than one kind of seal? A No, positively not, only one.

Q And that was a common, ordinary— A Lead seal.

Q — lead disk, wasn't it? A Yes.

Q With two wires stuck through it? A That is it.

Q And the seal that you simply pressed with a pair of pliers, wouldn't you? A I wouldn't say it was a pliers; it was a sealing tool.

Q Yes. Like a pliers? A Yes; on that principle.

Q Which left the impress of two letters upon the seal, "P-S?" A That is right.

Q Is that correct? A That is correct.

Q And that was your whole system about that, wasn't it? A Yes, sir.

Mr. Ward: That is all.

Re-direct examination by Mr. Coult.

Q Did you have authority to give permission to people to take the cars out? A No, sir.

Q Who had charge of the cars? A The superintendent.

Q Your duty is confined to the— A Mechanical condition.

Q —mechanical condition? A Alone.

Q Did you make any report of where the cars were at night, or who had them, or what became of them? A Why, no, because—I can answer the reason, if necessary.

Mr. Coult: That is all.

Re-cross examination by Mr. Ward.

Q Well, you were in charge of that garage, weren't you? A I told you in the very beginning—

Q Were you, or not, in charge of that garage? A As far as the mechanical part of the cars was concerned.

Q Aside from the mechanical part of those cars, weren't you the one man who was there in charge of that garage under a superintendent? A Yes.

Q And in charge of the cars, weren't you? A Yes.

Mr. Ward: That is all.

The Court: Just what do you mean by that, in charge under a superintendent?

Mr. Ward: Yes. Well I presume there was a general superintendent who, perhaps, had charge of many garages.

The Witness: No, on the contrary, only one garage.

Mr. Ward: Just one moment.

The Witness: I beg your pardon.

The Court: What I am interested in, you said in charge of that garage under a superintendent. Now, do you mean a superintendent of that garage?

Mr. Ward: I will inquire, sir.

By Mr. Ward.

Q There was a general superintendent, wasn't there? A In—there is a general superintendent in each district.

Q Yes. And that superintendent has multifarious duties, hasn't he? A Yes.

Q And included amongst those duties is the supervision over this garage, that is true? A That is correct, yes.

Q But the man in charge of the garage was you, wasn't it? A Yes.

Q Yes.

Mr. Ward: That is all.

By Mr. Coult.

Q Who had charge of the custody of the cars? A Mr. E. D. Minard, superintendent.

Q And of what is he superintendent? A He is superintendent of the distribution—the Hack-

ensack district of distribution, gas department only.

Mr. Coult: That is all.

Mr. Ward: That is all.

(Witness excused.)

Mr. Coult: Mr. John Brady?

JOHN ANTHONY BRADY, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Mr. Brady? A East Orange.

Q What is your business? A Automobile inspector for the Public Service Gas and Electric Company.

Q And did you ever make an inspection of car G-498 of the Public Service Gas and Electric Company? A Yes, sir.

Q How frequently did you inspect it? A Well, we are supposed to make it monthly, but we usually make it five or six weeks.

Q And what cars did you inspect every five or six weeks, Mr. Brady? A Why, all the cars in the Bergen division and the Central division for the Public Service Gas and Electric Company.

Q And you make a record of your inspections? A Yes, sir.

Q I show you what appears to be an inspector's report dated July the 6th, 1927. Is that your report? A Yes. That is a copy of my report.

Q A carbon copy? A Yes, sir.

Q And looking at that for the purpose of refreshing your recollection, can you say when you inspected auto G-498 in July? A The 10th of July.

Q The 10th of July, in what year? A 1927.

Q I do not suppose you can recall the details of every inspection you make, can you? A No, I cannot. I have over three hundred cars.

Q Can you tell by looking at this for the purpose of refreshing your recollection what condition you found that car in?

Mr. Ward: May I inquire, sir, how the report was made?

Mr. Coult: Well, I think this is a carbon copy. If you want me to send for the original and bring it here, tomorrow, I will do it; I mean, Monday.

Mr. Ward: No; if he made it; I do not know.

The Witness: You want to know what I do in inspecting a car?

Mr. Coult: He was got his name signed on it.

By Mr. Ward.

Q Do you make these reports? That is a copy of it, this is? A Yes, sir.

Q You make those out yourself? A I make an identical copy with the exception the girl makes a carbon copy to be sent to the district superintendent and also to our main office.

Q What I mean is this, Mr. Brady: Did you typewrite— A No, I don't; I write that from longhand.

Q There is an original from that carbon copy, of course, is there not? A Yes.

Q And that is typewritten by whom? A By a girl in the automobile maintenance department.

Q You have no recollection of it, of course, excepting from what you see on the report? A From the copy; yes, sir.

Q That is correct. And from what does she make her copy A From my report.

Q From your report? A From my report.

Mr. Ward: I do not think this is proper, sir.

By Mr. Coult.

Q Let me ask you, Mr. Brady, where is your original report? A My original report is turned in to the office.

Q Can you get it?

The Court: I believe we will save time. I will ask a question.

By the Court.

Q With reference to the report that you made out in your own handwriting, after it was typewritten, did you compare it with the original that you had submitted to the girl? A No, sir.

Q Do you know whether that is a correct copy of your original statement or not? A Yes. It is a correct copy, because I always left a report with Mr. McElroy as to the work that was to be done when I left the division.

Mr. Coult: Well, if you want this man to bring in his reports, I think I would rather have them here myself.

Mr. Ward: I do not want to make you any trouble.

Mr. Coult: Well, I do not want any question about the authenticity of anything that I bring into court. I want to have it right. These originals ought to be here.

The Witness: I doubt very much if you can find them. After a certain length of time, they destroy the originals.

Mr. Coult: Do you want me to go on with this?

Mr. Ward: I do not know. He only recollects that this is a carbon copy, the original made by a stenographer from something given by him. Go ahead. Go on.

Mr. Coult: Yes.

By Mr. Coult.

Q Now, let us see, who dictates these reports to the stenographer?

Mr. Ward: I will waive all that.

Mr. Coult: I want to find out for my own information.

A There is no dictation. We make a report on a sheet, on our own sheet, and turn it in at night to a chief inspector who, in turn, leaves it on the girl's desk, and she recopies it in carbon; but the only reference I have is my own book which I keep as a reference.

Q Have you got a book showing your— A No, only the date on which it was inspected, that is all.

Q By looking at your book can you find the date on which you inspected this car? A Yes, sir.

Q When was it? A 498 was inspected on 6/10.

Q Then, when was it next inspected? A It was in the shop on 7—you see, I make my dates, that is 6/10, 498—

Q Yes. A —on 6/10. On the next inspection, it was in August, around the 21st, it was in the shop, that small "s" is for "shop." And the next inspection was 9/16.

Mr. Ward: 6/10, where is the 6?

The Witness: At the top.

Mr. Ward: That is a "6?"

The Witness: Yes, sir.

Mr. Ward: And those are the months?

The Witness: Yes, sir.

Mr. Ward: I see. All right.

The Witness: The next inspection was the 16th of October.

Q You have got your original records there that you made in your own handwriting in your book, have you? A No. That is only the date of the inspection. I never kept any records.

Q All right. That is a record of the date of the inspection? A That is it.

Q And you can look in your own book and see on what date you inspected it? A Yes, sir.

Q Have you got it now? A 10th of July.

Q 10th of July. And when next? A The 16th of October.

Q Now, using these for the purpose of refreshing your recollection, I understand—

The Court: It is not July, is it? It is June, isn't it, Judge?

The Witness: June. In July, it was in the shop.

Q I want to direct your attention to the inspection in September, using this for the purpose of—

Mr. Ward: I object to that on the ground it does not state there was any inspection.

Q Let me see your dates.

The Court: October the 16th.

Mr. Ward: October the 16th.

Mr. Coult: Well, all right; somebody got this mixed up in good shape.

The Witness: No. It wasn't mixed up. That is 6/10. That is the date of my former inspection. 9/16 is the next time I inspected it. It had not been inspected for three months.

Q All right. What is 9/16? A 9/16 is October 16.

Q No. It is not. It is September 16.

Mr. Ward: That does not agree with his record kept by him personally.

A I was figuring July as being the 7th or the 6th month, and October being the 9th month.

Q Well, you did see it on 9/16, 1927, did you? A Yes.

Q And that is September? A Yes.

Q Now, referring to your report of 9/16, 1927— A Yes, sir.

Q —can you say in what condition you found that car then? A In OK condition, that car was OK.

Q And can you tell by looking at your report whether or not it had a governor on at that time? A Yes. We make a record of whether the car has a governor or not.

Q Now, what inspection—

Mr. Ward: Make a record of whether a car has a governor or not?

The Witness: Yes, sir.

Q This notation on here, "Car has—P S car has governor"— A Yes, sir.

Q What does "P S " stand for? A Some cars formerly ran without "P S" being on the side of the cars. In order to keep a record of these cars, a car with "Public Service" on was also put on our reports. If the car had a governor, we also made a notation of that.

Q Now, which of the cars that you inspected had governors, generally? A Mostly large trucks or cars that carried heavy material.

Q And which cars did not have governors? A Why, we might call them passengers cars, cars that we used for, say, meter inspectors, division agents, district superintendents, light cars.

Q Yes. And did you examine the governor on this truck? A We are responsible for the governor. That is, the last time we look at a car, if we don't report the governor as being OK, it is chalked against us if the car comes in the shop without it being OK.

Mr. Coult: Cross examine.
Mr. Ward: No questions.
The Court: That is all.
The Witness: All right, sir.
(Witness excused.)

ELLSWORTH E. CONOVER, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, doctor? A Hasbrouck Heights.

Q You are a practicing physician and surgeon of the State of New Jersey? A Yes, sir.

Q And have been such for how many years? A Over 25.

Q Where did you receive your medical education? A University of Vermont, final.

Q I cannot hear that answer. A University of Vermont.

Q All right, sir. And when did you graduate from the university? A 1885.

Q And what has been your practice since that time? A General.

Q Have you any hospital connections? A Not directly; indirectly.

Q Did you make an examination of the plaintiff in this case? A I did.

Q When did you make your examination, sir? A October the 12th, 1927.

Q Where? A Hackensack Hospital.

Q Of what did your examination consist, doctor? A I beg your pardon.

Q Of what did your examination consist? A Well, I was going over the—viewing the patient, going over the X-ray reports, and so forth.

Q Can you remember what X-rays you had before you at that time? A Those were the plates of the pelvis, right and left, the body in general, and femur.

Mr. Coult: Your Honor, in order to attain brevity in this, if we can, which I think is to be desired, I am willing to state for the purpose of this record that we concede that this girl had four fractures of the pelvis and one of the neck of the humerus or neck of the femur, and that she has a two and one-quarter inch shortening of the leg, and that that condition is permanent, and confine my inquiry, so far as my doctors are concerned, largely to the effects of this injury to childbirth.

The Court: The effect of the present injury as to that?

Mr. Coult: Yes. And that will save my going all over this case again, through these X-rays and everything of that kind, and I want to set it frankly and fully before the Court because I do not want my adversary to comment upon the fact that I did not examine the doctor on certain features of this case, which I will do if he insists on it.

Mr. Ward: Well, from your statement, I understand that you do not deny, of course, the four fractures?

Mr. Coult: No.

Mr. Ward: A fracture of the femur?

The Court: I take it the purpose of calling the physician is to offer evidence with respect to the opinion of Doctor Dickson, and the defendant is not questioning at all the five fractures and the shortening, is that it, Judge Coult?

Mr. Coult: Yes, sir. And I am not because I do not want any inference drawn because I do not go into other branches of the case, that is all.

The Court: As I take it, the only purpose of calling Doctor Conover is to offer testimony with relation to Doctor Dickson's opinion as to the probable effects these injuries would have on child birth.

Mr. Ward: Of course, that is the only thing upon which I want to cross examine.

Mr. Coult: Will you be good enough, Mr. Ward, to show me the first and the last of these photographs? I want those of January, January 28th.

Q Doctor, I show you an X-ray which has been marked P. 6 in this cause and which was taken on the 7th of October, 1927, and ask you whether you had that before you at the time you made your examination? A That resembles it; I would say yes.

Q What is that answer? A Yes.

Q And that X-ray discloses, does it not doctor, certain fractures? A It does, yes.

Q There are, in all, four fractures of the ascending and descending rami of the pubis, aren't there? A Yes.

Q Now, you are accustomed to the interpretation of X-ray plates, are you, doctor? A To a certain extent, yes.

Q And are you able to see those fractures in the X-ray that is exhibited to you? A Yes, sir.

Q What are the position of the various fragments there? I do not mean to describe exactly where the fragments are, but is the position good, bad or poor? A The position —they are in a good position.

Q Now, doctor, look at—just take that down a moment—I hand you P. 21, which is marked January 16, 1928; that appears to be an X-ray photograph of the pelvis. I will withdraw that question. I will show you P. 21 which is an X-ray photograph of the pelvis of the plaintiff in this case, and call your attention to the fact that this was taken in January, 1928, and ask you whether or not you can tell from that X-ray whether the fractures that were disclosed in the first X-ray have united? A Some have, and some of them not.

Q Are the fragments in good position?

Mr. Ward: Some of them have not, did did he say?

Mr. Coult: Some have and some have not.

Q Are the fragments in good position? A They are.

Q Are there any evidences of callus in that picture? A Yes.

Q And where is the callus formation? A The interior of the pelvis, in the pelvic girdle rim.

Q Now, doctor, look at this X-ray, P. 20, which is another radiograph taken January 16, 1928, of the plaintiff. Can you see the fractures on that photograph?

Mr. Ward: What number is that?

Mr. Coult: That is 20.

Mr. Ward: P. 20. The other is 21?

Mr. Coult: Yes.

A Yes. You can see the fractures.

Q Are those fragments, or are those fractures united or not? A There is a callus formation.

Q When you said in the other photograph that some of the fractures were united and some were not, point out some fracture that has not united in that P. 21. A Well, you have got a poor union here (indicating).

Mr. Ward: Where?

The Witness: Here, you see that (indicating)?

Mr. Ward: Just make a mark there, doctor, where you are pointing. There is no—you mean, it is not united there?

The Witness: Well, now, you have got a thin callus through there where she comes down.

Mr. Ward: A thin callus there?

The Witness: Yes.

Q Now, I direct your attention to the neck of the humerus, or the femur. Has that united? A It does not look like a good union.

Q All right, sir. So that you can point out one place in the pelvic girdle where there is a thin callus and a lack of union in the neck of the femur, is that correct? A Yes, sir.

Q Are the other fractures in the pelvis united? A Yes.

Q All right. Now, doctor, what is callus? A Callus is nature's repair, soft bone formation to repair the parts.

Q And where does it come from? A From the bone proper. It is thrown out on the fragment, on the raw ends.

Q And when it is first thrown out, what is the consistency of it? A Practically liquid.

Q And from liquid, it becomes what? A A jelly like mass, and finally becomes ossified.

Q Well, then, it becomes bone? A Bone.

Q And is that the natural process? A Yes.

Q Now, what do you call the change of the callus to bone? A Ossification.

Q And you also term it absorption? A Yes, sir.

Q And is the absorption of callus a natural process? A It is.

Q Can you have a healing of any fractured bone without callus? A You cannot.

Q And what becomes of the callus eventually? A That portion of it which is between the distal ends or the broken ends remains as part of the original bone. The other formation is gradually absorbed.

Q And where does the bone on the distal fragment form? A I beg your pardon.

Q Where does the bone—you say that some of it becomes bone on the distal fragment? A Yes.

Q Where does that bone form? A It forms in between your broken portions.

Q So that you have an exudation of this fluid over the bone and that becomes jelly like and then it becomes hard and the callus is absorbed on the one part of the fracture and

becomes bone at the point of the break? A Yes, sir.

Q On the other fragments, is that right? A That is right.

Q Now, how long does it take in cases of normal recovery for the callus in a fracture to become absorbed? A To become absorbed?

Q Yes. A Well, there is no regulation time for that. Some of them are prolonged for a length of time.

Q Well, what would you say would be a short time in which to absorb callus in a normal recovery? A Well, in the—it usually takes months.

Q And what would you say would be a long time for the absorption of the callus? Give us the maximum length of time. A Well, that will continue to absorb, according to the cause, for a year and a half.

Q What was that answer? A A year and a half or two.

Q You examined this young lady, the plaintiff in this case? A Yes.

Q Would you expect callus formation to be present at the seat of her fractures in the pelvis by the time she becomes able to bear children?

Mr. Ward: I object to that question.

The Court: I did not hear the question.

(Question read.)

Mr. Ward: I understand this gentleman is qualifying as an expert, and that question surely is not in proper form.

The Court: I do not think there is enough assumed in the question.

Mr. Coult: All right.

Q Doctor, you made an examination of the plaintiff in this case, did you not?

Mr. Ward: In the interest of saving time, I will withdraw my objection.

Mr. Coult: I can put it in, if you want me to.

The Court: No. He has withdrawn his objection. Proceed and ask the question.

Q Now, doctor, from your experience and your handling of this case, what have you to say as to whether or not this girl will have callus formation at the site of the fracture in the pelvis when she becomes of age to bear children?

Mr. Ward: I do not think that is quite right, because he did not handle this case. You said, "In your handling of this case," as I understand it.

Mr. Coult: No, I did not.

The Court: We know it is only his opinion, and you have waived the usual hypothesis.

Mr. Ward: Yes, I waived that.

A I question whether there will be any of the callus left at that time, from the age of her.

Q In cases of fracture of the neck of the femur and a consequent shortening of the limb, is there a compensation of the shortening by tilting of the pelvis, particularly in young folks? A Not to any marked extent.

Q Is the pelvis of this girl tilted? A I beg your pardon?

Q What? A I beg your pardon.

Q Is the pelvis of this girl tilted? A Well, I have only seen this patient that one time, and that was following that, but your X-ray shows that it is tilted.

Q Can you tell by examination of that X-ray whether or not that is a tilting of the pelvis, if there is a tilt in it today here, as it is? A Yes.

Q Is there a tilt there? A Yes.

Q How much is it? A Oh, well, that is pretty hard to say unless you came right down to your particular measurement of the thing.

Q Well, you have it before you, and you are able to observe a tilting of the pelvis in that photograph, are you not? A The pelvis is tilted, and it looks to be about a half inch.

Q All right. Now, in your opinion, would the tilting of the pelvis to the extent that you observe there in that radiograph have any effect upon the ability of this girl to bear children? A The tilting, no.

Q Would it have any effect upon the ease or, on the other hand, the discomfort which she might be subjected to in bearing children? A No.

Q Would the presence of the fractures of the pelvis in the condition that they are disclosed at this time in that radiograph have any effect upon the ability of this girl to bear children? A I beg your pardon?

Mr. Coult: Well, I will withdraw it.

Q Would the fact that this girl has suffered the fractures of the ascending and descending rami of the pubis which you have seen in these X-rays and which you have examined have

any effect upon her ability to bear children? A No.

Q Would it make the bearing of children any more dangerous or uncomfortable than it would be if the fractures were non-existent? A No.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q You have been practicing how long, doctor? You have been practicing how long? A Over twenty-five years, since 1885.

Q You saw this girl where? A Hackensack Hospital.

Q Once? A Once.

Q How long after she was injured? A I think it was a week.

Q Do you know who was the physician in charge of the case? A Doctor Dickson.

Q Pardon me? A Doctor Dickson.

Q You went there without him, didn't you? A I beg your pardon?

Q You went and examined this girl without Doctor Dickson, didn't you? That is so? A I did not.

Q Was Doctor Dickson present when you examined this girl? A He was.

Q Who was present when you examined her? A The doctor and the nurse.

Q What? A The doctor and the nurse.

Q What doctor? A Doctor Dickson.

Q Now, you are sure of that doctor? A Doctor Dickson and the nurse was there.

Q Don't you remember that you went there without ever consulting Doctor Dickson, and

that he was not there when you examined this girl; isn't that the truth? A It is not.

Q That is not so. Have you a distinct recollection of this occurrence? A Quite so.

Q Of going to the hospital? And who was present? Who was the nurse? A I do not know.

Q When was it? A October the 12th, at eleven o'clock in the morning.

Q When had you communicated with Doctor Dickson about going there? A Well, I am not prepared to answer that question, whether it was that morning or the following—the preceding day.

Q Where did you meet Doctor Dickson? A At the hospital.

Q Did you get there first or did he get there first? A I do not know.

Q Where did you first see Doctor Dickson? A In the room with the nurse, with the patient and the nurse.

Q Was he there when you got there, or did you get there first? A I do not recall.

Q How long did your examination take? A Oh, I do not know; maybe twenty minutes or a half an hour.

Q And that was the only examination you made? A It was.

Q You referred to Exhibit P. 21 just now on the stand? A Yes.

Q And you made a pencil mark on Exhibit P. 21 at that place there, did you not? A I did.

Q And you indicated that as a place where the bone, the fracture, had not united, that is correct, isn't it? A Either that, or it is filled in there with this soft callus.

Q Well, that, in your opinion, was a place where the fracture had either not united or was filled in with soft callus, is that right? A Right.

Q Now, don't you know there wasn't a fracture there at all? Don't you know that is so? Look at that picture, doctor. Now, never mind the others; put that down, and look at that picture. A Well—

Q And you say that you are capable of reading X-rays? A To a certain extent.

Q To a certain extent? A I am not—

Q And you read that X-ray as disclosing a fracture up in here where you put your lead pencil mark, didn't you? A Yes, sir.

Q Don't you know the only fractures were down in the pelvis and over the femur here?

Mr. Coult: What was that last question?

(Question read.)

Q Can you answer that? Can you answer that? A Yes.

Q Well, answer it, please, doctor. A There is a separation there.

Q And that indicated a fracture to you? Did it, or not, please? A I will say yes.

Q And from your examination of this girl and from these X-rays that you had at that time—I beg your pardon. Did you have this X-ray at that time in your hand? A Where?

Q At the hospital? A No.

Q You did not? A No.

Q From your examination you concluded she had a fracture up there where that lead—where you put that lead pencil mark, is that so? A Yes.

Q I beg your pardon? A Yes.

Q Don't you know that she never had a fracture up there? A A separation there.

Q What? A There is a separation there.

Q Well, did you think from your examination that you found a fracture up there when you examined her? A I did not make a digital examination.

Q No. You did not make a very careful examination, did you? A No. I could not in her condition.

Q Now, did you know that the fractures were down in the pelvic bone here? A That is right.

Q And down in the femur? A Yes, sir.

Q Did you know those were the only fractures, four fractures in the pelvic bone, and one of the femur, five in all? A Five.

Q Do you know now that there was no fracture up here where you indicated with the pencil mark? Do you know that now, doctor? A All right.

Q I beg your pardon? A Yes.

Q You know that now? A All right.

Q Well, do you think that you are competent to express an opinion about this case?

Mr. Coult: I object to that.

The Court: Sustained.

Q Do you feel that you are competent to express an opinion about this girl's condition?

Mr. Coult: Objected to.

Mr. Ward: That goes to his competency.

The Court: I will let the jury decide that.

Q You know that you have testified here as an expert witness, don't you? A No.

Q Oh, you haven't? A No.

Q You do not intend to testify as an expert witness? A I told you I was not an expert.

Q You did not intend to testify as an expert? A No.

Q Or give your opinion as an expert? A No.

Mr. Ward: Then I ask that his evidence be stricken out with reference to this—

The Court: Except insofar as he could testify with respect to his own examination.

Mr. Ward: Yes, sir. But not with reference to the future condition of the girl. That is what I want stricken out.

The Court: No. This examination is based upon his physical examination. I will have to let it stand for what it is worth; but if it were in the form of an hypothesis, and the hypotheses were excluded by reason of your consent, then, of course, I would have to strike it out.

Mr. Coult: Did your Honor strike out a portion of his testimony?

The Court: He is not testifying as an expert. In other words, I do not want the witness to be in a false position.

Mr. Coult: Well, I want to take an exception to whatever—

Mr. Ward: I do not ask it be stricken out.

The Court: You may. All right. There is nothing before the Court, no ruling, and

the application is withdrawn. Anything more, Mr. Ward?

Mr. Ward: No, sir. That is all, doctor.

Re-direct examination by Mr. Coult.

Q Just a minute, doctor. Where is the pelvis there?

Mr. Ward: If he knows.

Mr. Coult: Well, he can tell where he thinks it is, whether he knows or not.

A (The witness indicates on X-ray film.)

Q You are pointing now to the bone which encircles this cavity here (indicating)? A Yes, sir.

Q And that is the pelvis, isn't it? A It is.

Q And when Mr. Ward says, "Why, these breaks are in the pelvis, they are not up here," he is pointing at the pelvis, isn't he?

Mr. Ward: I object to the question as leading. The picture speaks for itself.

The Court: We will adjourn until Monday morning.

(Recess.)

FOURTH DAY.

Hackensack, New Jersey, May 13, 1929.

Trial resumed.

The Court: All right. You may proceed.

Mr. Coult: Dr. Washington?

WALTER S. WASHINGTON, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Dr. Washington? A Newark.

Q You are a practicing physician and surgeon of the State of New Jersey, are you not? A I am.

Q And, if it does not embarrass you, how many years have you been practicing? A This is my fifty-fourth.

Q And of what school were you a graduate? A Trinity, Toronto.

Q Did you have any hospital experience after graduation? A Yes. In the Toronto General Hospital for a time, and since coming to Newark I have been in the Saint Michael's Hospital, and I am now on the consulting staff of Saint James' Hospital.

Q And have you specialized in your profession? A Yes.

Q In what line? A Neurology and psychiatry, also in diseases of the throat and nose for a number of years.

Q Have you held any official position in the County of Essex? A I have.

Q What was that? A I was county physician from '94 to 1902, and have been connected with the courts, the criminal courts, ever since that time.

Q In what capacity? A As an expert witness, and—

Q Do you do work for the Public Service Corporation? A Yes.

Q At times? A Yes.

Q You represent some insurance companies, I believe? A Oh, yes.

Q Had experience in traumatic injury? A Yes.

Q How many cases do you see on the average a month? A A month?

Q Yes. A Oh, I could not say. I do not see as many as I used to some years ago. I—sometimes fifteen, sometimes twenty, sometimes less.

Q Did you make an examination of the little girl who is the plaintiff in this case? A Why, a small examination.

Q Where did you see her? A In the room off the court here.

Q And of what did your examination consist? A To determine how much tilting of the pelvis she had, and what was the difference in the length of the legs.

Q And what have you to say as to the extent of the tilt in the pelvis? A Very little now.

Q And why is that so, doctor? A It is because she has a lift on the bottom of her left shoe, which takes up the lift.

Q How much lift is there on the shoe, about? A I should think about two inches, a little more.

Q What is it, doctor, in cases of shortening of a limb, that causes the pelvis to tilt? A

Well, if nothing is done for it, it is the difference in the limb. The—in walking, the shortened limb drops down and the other limb raises that side of the pelvis so that the other side drops down.

Q And the lift on the shoe compensates for that? A Oh, yes.

Q Doctor, it has been testified here that the tilting of the pelvis in the case of this plaintiff would have some effect upon her ability to bear children. What is your opinion in that regard, so far as the tilting of the pelvis is concerned? A Well, it does not make any difference as far as the tilting of the pelvis is concerned, if the breaks or fractures, of things of that character, have been all healed, and the callus has been taken up.

Q Why is it, doctor, that the tilt of the pelvis will not make any difference, in your opinion? A Well, there are what they call the inlet and the outlet of the pelvis; the inlet is the upper part, and has a bone on the back, as a support, but in front has nothing but the abdomen with the muscles and so on; but in the outlet there is bone all around.

Q And would the position of the pelvis in the body have any effect upon the ability to bear children? A No.

Q That is, would it make any difference— A No.

Q —whether the pelvis was tilted or was not? A No.

Q As I understand it, so long as the orifice is there and it is intact— A Yes.

Q —the ability to bear children would be— A Yes.

Q —normal? A It would be just the same, it would not make any difference.

Mr. Coult: We have a shadow box here?

(X-ray illuminator placed before the witness.)

Q Doctor, this little girl was injured on the 5th day of October, 1927. I show you now a radiograph marked P. 6 which was taken on the 7th day of October, 1927. A The day after, you say?

Q That is five days after the injury. A Yes.

Q And I ask you if you see any pathology on that plate? A Yes.

Q Where is it? A There is a fracture of the—there is a fracture of the horizontal ramus of the pubis on the right side, and a fracture of the one that runs down, the same on the other side, almost opposite, and a fracture of the neck of the left femur.

Q Have you ever seen that X-ray before, doctor? A No.

Q And what is the position of the fragments in those? A Good.

Q In the fractures in the ascending and descending rami of the pubis? A Good. There is no displacement whatever, except, I should say—in the pelvis, you said?

Q In the pelvis, I said. I am not speaking now of the neck of the femur at all. A All right.

Q Now, I show you Exhibit P. 21, a radiograph taken of this plaintiff on January the 16th, 1928. I think that is turned the opposite way from the reading on the top. It looks as though it has been marked on the wrong side.

It says "right" up there; I suppose I have got that turned over, haven't I? A Well, no. This is the left here, you see?

Q I see. A This is the left, this is right.

Q Doctor, what does that radiograph show? A It shows the union of all of the fractures with no evidence of callus, or, at least, very little. It also shows a slight curvature of the spine in the dorsal region to the left.

Q Doctor, what is callus? A That is the material that is thrown out after an injury to a bone which is later organized into bone.

Q And is that a natural process? A Yes.

Q Can you get union of a broken bone without callus? A No.

Q What becomes of the callus, doctor? A It is absorbed; that is, the temporary callus is absorbed, and the permanent callus remains.

Q And what is the form of the permanent callus which remains? A Bony.

Q Doctor, from your examination of this girl, and from your examination of these two X-rays, can you, with that material, express an opinion as to whether or not there would be any difficulty in childbirth in the case of this young lady after she matures, from any injury that is present? A I do not think so.

Mr. Ward: One moment.

Q And disclosed by these pictures?

Mr. Ward: That question calls for yes or no, sir.

Q I am asking you if you can express an opinion? A Yes.

Q What is your opinion, doctor?

Mr. Ward: I object to the question.

The Court: What is the question before me?

Mr. Coult: I say, what is his opinion?

The Court: I did not hear that part. Do you object to that?

Mr. Ward: I object to the question as not proper in form.

The Court: It recites all the material facts to that point. I will allow it.

Mr. Ward: Your Honor will permit an exception?

A And what is the question?

(Question read.)

A My opinion is that, so far as can be determined in this picture, the inlet and the outlet of the pelvis is the same as normal, and that there would be no trouble with the birth of a child, if the young lady developed as they normally do.

Q Doctor, having in mind the fact that this accident occurred on the 5th of October previous to the taking of this picture, and this picture was taken on January the 16th, 1928, what have you to say as to whether or not there has been a normal recovery? A I think there has been.

Q And what have you to say as to the presence of callus on that picture which is now before you? A Well, there is nothing abnormal about it. It has been mostly absorbed, so far as can be seen.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q When you say nothing abnormal about the callus, doctor, you mean considering the fact that there are fractures there? A Yes.

Q Or have been fractures there? A Yes.

Q In other words, that is not a natural, normal condition, is it? A What?

Q The condition of callus, aside from the fractures. A Yes. But some—

Q Now, please answer my question. A It is not a normal—

Q That is not a normal, natural condition of the bone, is it? A Well, part of it is, at least.

Q I beg your pardon? A Part of it is, at least.

Q Part of it? A Yes.

Q But I am speaking of the bone as you see it there with the fractures having taken place and with the callus as it is now. A No, not entirely.

Mr. Coult: I object to that question because the callus as it is now is not, certainly, before the doctor.

The Court: He is now speaking as he sees it in the picture.

Mr. Coult: As it was in January, 1928.

The Court: Well, as that picture reveals.

Mr. Ward: Yes, sir.

Q I think you answered that, doctor, did you not? Did you answer that, doctor? A I think it is on the record.

(Previous question and answer read.)

Q When you say that there is a normal condition there, of course, you are speaking relatively, aren't you? A Yes.

Q You mean, considering the character of the injuries, the fractures, and all that, so far as might be expected, in your opinion, there is a nomal condition— A Yes.

Q —of recovery? A Yes.

Q If a man would have his leg amputated and were to get along well afterwards, that would be a normal condition relatively, wouldn't it? A No, that never would be normal.

Q What? A That never would be normal.

Q Well, if he got well, as well as might be expected by you medical gentlemen, it would be considered a normal condition by you, wouldn't it, taking into consideration the amputation of the leg? A Why, no, he could have one leg less than the other.

Q Yes. A He would not have two legs.

Q And this girl has a fractured bone— A Yes.

Q —more than another? A Yes.

Q That is the condition there, isn't it? A Yes.

Q And a two-inch shortening of the femur, that is the condition there; that is not a normal condition, is it? A No, never.

Q Of course, all of this, Doctor, is your opinion,— A Yes.

Q —isn't it? A Yes.

Q And in your experience in testifying for the Public Service, you have frequently expressed opinions that have been diametrically opposed or opposite to opinions of other eminent surgeons, that is correct, isn't it?

Mr. Coult: I object to that.

The Court: I sustain the objection.

Mr. Ward: Your Honor will permit an exception.

Q You spoke of your experience in testifying in Court. You have testified frequently for the Public Service, haven't you? A Oh, yes, a good many times.

Q That was a very large part of your work for years, that is true? A Quite considerable.

Q Yes. And it still is? A Yes.

Q That is correct? A Yes, a good deal.

Q And in these particular—and in these cases, in which you have testified for the Public Service, you have expressed opinions as an expert? A Oh, yes.

Q And there have been numerous instances, have there not,—

Mr. Coult: Do not answer this. Go ahead.

Q Wait for the objection. There have been numerous instances, have there not, where you have expressed opinions where eminently qualified gentlemen have also testified, I mean gentlemen of the medical profession?

Mr. Coult: I object to that as not being material.

The Court: I will sustain the objection.

Mr. Ward: Your Honor will permit an exception.

Q Well, as a matter of fact, in expressing your opinion, you know, do you not, that opinions may differ in cases such as this?

Mr. Coult: Objected to on the ground that is not a material matter.

Mr. Ward: That is material when this gentleman has qualified as an expert.

The Court: No. You are asking him to characterize opinions of other opinions. We are not concerned with that.

Mr. Ward: That is what his evidence is.

The Court: I know; but the jury has heard this man and heard the other man. Now, they are going to decide as to the value of both opinions.

Mr. Ward: Yes, sir; that is just it.

The Court: His opinion as to someone else's opinion or his own is immaterial.

Mr. Ward: I desire to show—

Mr. Coult: He is not produced as an expert on opinions.

Mr. Ward: I desire to show—

The Court: I understand what you desire, Mr. Ward. I have ruled and you have the benefit of an exception.

Mr. Ward: I was replying to your Honor's statement.

Q In what cases have you testified, Doctor, upon questions of fractured pelvis, or pelvi, I think it is, isn't it? A Well, I could not tell you the names now.

Q Don't you remember any case? A I could not give you the names, but most of them have been settled. I think the cases I have seen, there are very few cases—

Q Do you recall testifying in any case where there was a fracture of the femur which resulted

in a tilting of the—of what is it, Doctor? A Of the pelvis.

Q Of the pelvis? A I do not, at this moment.

Q You do not recall any case of that kind? A I do not now, no.

Q Have you testified in any such case? A Yes.

Q Do you remember when? A No, I do not. I could not tell you.

Q Or where? A No, I do not.

Q How long is it since you personally have come in contact with any fracture of the femur? A Oh, within a year or two.

Q In what? A They are not very common.

Q Pardon? A They are not at all common, you know.

Q They are not common? A Oh, no.

Q Did you testify in that case with which you came in contact? A No. That was settled. That was a case in Newark.

Q Pardon? A That was a case in Newark.

Q And that was a case in which you did not testify? A No. I did not have to testify.

Q Do you recall any case with which you have come in contact involving a fracture of the pelvis, personal contact? A Oh, yes.

Q What case? A Oh, I cannot tell you the case. I do not remember the case.

Q You do not remember a case of that kind? A I forget them; there are so few, compared to the others.

Q What? A They are so few compared to the others. There are only about eight per cent of fractured pelvis that are present.

Q I see. A They are very unusual.

Q I presume it is very rare, too, to find more than one fracture of the pelvis, isn't it? A No.

You may find two. You may find—you are more apt to find two.

Q How many fractures do you find there, Doctor, of the pelvis? A Four.

Q It is very rare to have three fractures of the pelvis, isn't it? A Yes, and it is rarer to have four.

Q And more serious where it is four? A I do not know as it is more serious. It depends on the character of the fracture.

Q According to you, the ratio of seriousness does not go up with the ratio of fractures, is that it? A No, not at all.

Q A person might have two dozen fractures of the pelvis and it would be no more severe than if she had one? A That would not be right.

Q Well, I am asking you, Doctor, if that is correct? A Well, that would be if you ever found one who had two dozen, but you never did.

Q Have you ever seen a case where a person had four fractures of the pelvis before? A I do not remember that I did, a live person.

Q Have you ever seen a case where a person had three fractures of the pelvis? A I think I have.

Q Where? A I could not tell you.

Q When? A Within two or three years.

Q Within two or three years? A Yes.

Q You do not recall the case,— A No, I do not.

Q —however? A No.

Q You do not recall the name of the person? A No, I do not know the name.

Q I think you have stated that was a small examination that you made this morning? A Yes, it was.

Q Consisting of— A Just—

Q —or, at least, lasting how long? A Oh, not more than ten minutes.

Q And that was the first examination and the only examination you ever made of this child? A Yes.

Q And you say there was very little tilt there now? A No, not very much.

Q Tilt of the pelvis? A No. It is taken up by the lift on the shoe.

Q Yes. And that lift of the shoe is what? What do you mean by a lift of the shoe? A I mean something on the bottom of her shoe.

Q And also something inside of the shoe? A Yes.

Q Is it not? A Well, it is made to fit the ankle and the foot.

Q The additional sole on the bottom, and you know there is something inside of that shoe, as well? A Yes.

Q I think you were informed of that this morning? A Yes; that is right.

Q And that is what you mean, that takes up the tilt? A Yes. Prevents a complete tilt.

Q And if it were not for that, there would be a considerable tilt, wouldn't there? A Oh, yes, considerable, very much.

Q And, as it is, you find some tilt there? A Very little.

Q But some? A Well, yes, possibly. I do not know that.

Q Do you, or not, find some? A I do, but I do not know that—

Q All right. A It may be normal.

Q The first time you have ever seen these X-rays, I think you stated, was on the stand? A That is so.

Q Do you find any fracture up here, (indicating) Doctor? A No. Here (indicating).

Q But none up here where that pencil mark is? A No sir. And over here, and over here (indicating).

Q Over here (indicating)? A Yes, sir; and here, too (indicating).

Q Now, which? A This one (indicating).

Q Right there. Will you make a mark there, please? A (The witness marks on film.)

Q And the other here (indicating)? A Well, what do you mean by there?

Q Well, where you just indicated a moment ago, there? A I did not indicate that.

Q You did not indicate that, and say there and there? A No. I said here (indicating).

Q Well now, show me where the other one is? A Well, which other one?

Q On that side? A (The witness indicates on film.)

Q Didn't you indicate there a moment ago (indicating)? A No, I did not.

Q And isn't it because you only recollect that there are only two on that side that you say you did not indicate there? A No; it is not.

Q Now, show me where they were on the other side. A Here is one, and here is one (indicating).

By the Court.

Q Doctor, by reason of this callus formation, does it take up any more space than if the bone were normal? A No, after it is absorbed.

Q Well, is it smooth, or— A Oh, yes, oh, yes, it becomes so; no difference that way.

By Mr. Ward.

Q Well, there is some callus there, isn't there, in that last picture, the one taken last January? A Let me see it.

Q In the pelvis? A I do not see any callus that shows.

Q Why, didn't you state that there was very little callus there? A Very, very little.

Q Well, there is some, isn't there? A Well, it does not show.

Q Is there, or not, some? A Some, very little.

Q Yes. A Not enough to make any difference.

Q Well then, there is some space taken up, isn't there? Yes, or no? A You—

Q Is there, or not? A I cannot tell you that.

Q You cannot tell? A No, I cannot tell by an X-ray.

Q You cannot tell by an X-ray? A No.

Q I see. A Now, then—

Q But you do see some little callus there, don't you? A Yes.

Q So you are not basing your opinion, then, upon any X-ray? A What?

Q Or upon this X-ray, your opinion that there is no difference or no space taken up? A What do you mean by space taken up?

Q I beg your pardon. You recall the question, do you not, his Honor asked you? A Well, then, that is—

Q Whether the callus would take up any—

The Court: Space.

Q —space? A Well, I have assumed that that—

The Court: I am referring now to Doctor Dickson's testimony where I think he used that language.

Mr. Ward: Yes, sir.

The Witness: I am assuming, your Honor, that you meant—

Q Well, now,—pardon?

The Court: All right.

The Witness: Do you mean on the inside?

The Court: Yes.

The Witness: That is the ring.

The Court: In other words, taking the area that has been affected, let us say, than there would be if there were no callus?

The Witness: You can only determine that by a pelvic examination and measurements.

By Mr. Ward.

Q Have you made a pelvic examination? A No, sir.

Q Have you made measurements? A No. How could I?

Q Then the only thing by which you could determine that factor you have not done, have you? A No; or no one else, as I understand.

Q I believe you did state in your diect examination that you did find evidence or permanent callus, or, I beg your pardon, no. I think you expressed your opinion about permanent callus as one—as callus that remains, that is correct? A Yes.

Q Is it not? A Certainly.

Q In differentiating between the other kind of callus? A Yes. There are two, temporary and permanent.

Q Now, what is the name of that particular part of the pelvis where you find the fracture or fractures? A The pubic portion.

Q Yes. Any other name? What is the pubic—

Mr. Ward: I will withdraw that, sir.

Q What is the pubic portion? A This part here (indicating), on each side, it joins over here with the ilium.

Q Run your finger over that that is shown in the picture as the pubic portion? A This portion here (indicating); this is what they call the horizontal, generally, this part here; and this part here and here are the parts downwards.

Q Now, is there any other name for them? A Rami.

Q Is there any other name for them?

The Court: Rami, he said.

A Rami.

Q Rami? A Yes. They are all called rami.

Q And whereabouts do you find those fractures, doctor, upon the right side, which would be the left side of that picture? A Where do I find them?

Q Yes. A One is here (indicating).

Q On the right side, doctor. A Oh, on the right side?

Q Yes. A One is there, almost right opposite.

Q Where is that? A That is at the outer end of the horizontal rami of the pubis.

Q That is not in the ramus at all, is it? A Yes, it is.

Q It is in the ramus? A Yes.

Q I thought you said it was on the outside of it? A I said at the outer end of it.

Q Is it in the ramus at all? A Yes, in the ramus.

Q What portion of the ramus? A The horizontal.

Q That is, you say, on the horizontal part? A Yes.

Q Of the ramus? A Yes.

Q Now, where is the other fracture? A Where? Where do you mean?

Q On that side. A On that side; here (indicating).

Q And what is that, or upon what is that? A That is the lower rami.

Q What do you call it? A I call it a rami.

Q Anything else? A No.

Q And that is all? A Yes.

Q Now, isn't one of those rami the ascending rami? A Sometimes called that, but I—

Q Sometimes called that? A Sometimes.

Q That is the ascending rami, there? A This here would be the ascending rami, horizontal; this one here, this would be the descending rami, coming down here (indicating).

Q Where is the ascending rami? A Here (indicating), from the center, way over.

Q Well, is there any fracture in that ascending rami? A That is what I have told you two or three times..

Q Well, just tell me over again. A You hear well, don't you?

Q Yes. You understand well? A Very well, indeed.

The Court: Now, just a minute. That is enough of that.

The Witness: That is called the horizontal or the ascending, see?

Q Is there any fracture in that? A There is, there (indicating).

Q That is what you designated as the end of it, isn't it? A Towards the end of it.

Q Now, is there any in the descending rami? A Yes, here (indicating), on the same side, here.

Q And what do you call this part of the rami? A Well, that is simply part of the—of the rami. This is the descending portion over here, and it meets with the ascending portion of the ischium which is not involved at all.

Q Now, on the other rami, where are the fractures? A Just about the same in each case; there (indicating), the ascending; and here (indicating), the descending.

Q The descending. Which is the descending? A This one here (indicating).

Q Do you mean this one right here (indicating)? A Yes, right there.

Q Will you mark that, please? A I have, I think I tried to. Oh, yes, I have marked it there. That shows the callus there.

Q The shoe upon this girl when you examined her is the shoe she has on now, isn't it? A I think so.

Q Or wasn't it? A Why, so far as I know, unless she has changed it since.

Mr. Ward: (To Violet May Hummers) Take that shoe off. (Shoe removed.)

Q That is the same shoe, is it not (handing shoe to the witness)? A Yes, I suppose so.

Q Don't you know, doctor? A Why, I don't know any difference. How could I tell what she has done since then?

Mr. Ward: Any objection to passing that before the jury?

The Court: The jury saw it.

Mr. Ward: There is something inside, sir; that is the factor of it.

The Court: The jury saw the girl with her shoes off.

Mr. Ward: All right, sir.

Q Now, doctor, all of your opinion with reference to the future condition of this girl and it being possible for her to bear children is based upon her normal development, isn't it, that is so? A Oh, yes. Of course, if she had any abnormal development, that would be different.

Q That is so, is it not, doctor? A Yes, sir.

Mr. Ward: That is all.

Re-direct examination by Mr. Coult.

Q Doctor, you spoke about measuring the aperture in the pelvis. How is that done? A It is done by a—what they call a pelvimeter, which is measured with one part on the outside and the part that passes up into the vagina, the rectum, and the same this way, and running the exact measurements between the various points. That can be done absolutely and exactly.

Q Does that require some sort of mechanism? A Oh, yes, and some skill in using it.

Q And would the results from that be exact? A Oh, absolutely exact.

Q Doctor,— A The only way you can get them exact.

Q —you say there is some evidence of callus remaining in this picture taken in January, 1928? A Yes, yes.

Q Now, will that callus continue, in your opinion, or continue to absorb as the child gets older? A Yes, it does.

Q And how long, in your opinion, would it take callus to absorb completely? A Well, they vary so very, very much, I could not tell you.

Q Well, can you give us a minimum and a maximum? A Oh, three or four years.

Q Would you expect it to be all gone in three or four years? A Oh, yes; all gone.

Q And if there is no callus remaining in the end of three or four years, and considering the apposition of these bones and the union that you see there, would her condition be normal?

Mr. Ward: I object to that.

Mr. Coult: On the ground it is leading? If it is, I will withdraw it.

Mr. Ward: No. I do not object on the ground it is leading.

Mr. Coult: Well, I think it is a good question, if the Court please.

Mr. Ward: It is improper, and my objection is, it is not properly framed, sir, for the purpose of the record.

The Court: I will allow it.

Mr. Ward: Your Honor will permit an exception.

A Yes.

The Court: I take it everything is for the purpose of the record.

Mr. Ward: No, but I understand I have got to make known the objection, the nature of my objection, in fairness to your Honor. That is all.

The Court: All right.

Mr. Ward: That was all that was said for, I assure you, I wanted to explain why I had stated that.

The Witness: Yes, I have answered it, yes.

Mr. Coult: Your Honor, I overlooked a matter on my direct that I would like to go into if I may.

Mr. Ward: Sure.

Mr. Coult: With relation to the atrophy of the left hip.

Q Doctor, what were your purposes in examining; you say you made a brief examination; what were you interested in? A In the amount of tilting of the pelvis, and the difference in the lengths of the two legs, and the evidence of any curvature of the spine.

Q Now, what did you have to do in order to find out that the pelvis was tilted? A I simply had to feel them and see them.

Q And where did you feel? A Right over the anterior superior process of each one.

Q How long did it take to do that? A A second.

Q And how did you find out the extent of the shortening? A By measuring with a steel tape measure.

Q How long did it take you to do that? A Not over a minute.

Q And, by the way, how much shortening did you find? A About two inches.

Q And, Doctor, did you notice in the course of your examination whether there was any atrophy in the left hip? A No, I did not. I did not examine her hip.

Q Doctor, it has been testified here that this girl has an atrophy in the muscles of the left hip. It is also in evidence that at the time of this injury to the femur she was confined in a plaster case. Would you say there was any relationship between the confinement in the cast and the atrophy which is present? A Yes. There is always atrophy of the soft parts after a long confinement in a cast, or anything else, from non-use.

Q And what is the result from such atrophy caused by a confinement in a cast? A Atrophy.

Q Yes. A From non-use.

Q I say, what is the result? Does it get better or stay that way? A Oh, no. It invariably gets better as soon as they are able to use it.

Q Why does a limb atrophy from non-use? A Because exercise of the limb keeps it in a normal condition, and the same as the other limb; if that is taken away, then the quietude of the leg, of nourishment in particular, and use that you get from walking, and so on, makes it smaller.

Q Now, there is just one thing, doctor, I want to be sure about. You have referred to a bone in this X-ray as the horizontal ramus. A Yes.

Q Of the pubis on the right side. A Yes.

Q Is that the same bone which is referred to generally as the ascending ramus? A Yes.

Q And there are two ascending rami in the pubis? A Yes.

Q Is that right? A One on each side.

Q And two descending rami? A Two descending.

Mr. Coult: That is all.

Re-cross examination by Mr. Ward.

Q With reference to this atrophy, the limitation of motion have anything to do with that? A Yes, some.

Q Where there is limitation of motion, then there would be atrophy, wouldn't there? A No, I would not say that.

Q Well, it has something to do with it, you just said, doctor, did you not? A Well—

Q Did you, or not? Did I understand you correctly? A I did not say so. I said that the non-use—

Q Doctor,— A I said the non-use—

Q Doctor, I want you to answer my questions. A Well, then, what is the question?

Q Has limitation of motion anything to do with atrophy? A It depends on the amount of limitation.

Q Yes. Well, then, limitation of motion has something to do with atrophy, hasn't it? A It may. Depending upon the extent of the limitation of motion.

Q Do you know anything about the limitation of motion in this leg? A I see that she uses it.

Q Do you know anything about the limitation of motion in it? A No, I do not.

Q All right.

Mr. Ward: That is all.

The Court: That is all.

Mr. Coult: That is all.

(Witness excused.)

Mr. Coult: Doctor Ruch?

VALENTINE RUCH, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Doctor, where do you live? A In Englewood.

Q You are a practicing physician and surgeon of the State of New Jersey? A Yes, sir.

Q And where do you practice? A At Englewood, New Jersey, and throughout Bergen County.

Q Of Bergen? A Bergen County.

Q And from what school were you graduated? A Cornell University, Medical College, of New York.

Mr. Ward: No doubt about the doctor's qualifications in my mind.

Mr. Coult: I won't waste time.

Q Have you any hospital connections? A Yes, sir.

Q What are they? A I have been on the surgical associate staff of the Englewood Hospital for a number of years, Holy Name Hospital

for twelve years. I have been, until very recently, a part of the management of our County Hospital at Bergen Pines.

Q Have you had any experience with traumatic injuries? A Yes, sir.

Q To what extent, doctor? A Why, I have devoted most of my life to surgical conditions as a practitioner.

Q Did you make an examination of the plaintiff in this case? A Yes, sir.

Q More than one? A Two.

Q When was the first one? A In June, the 22nd of June, 1928.

Q Where? A At Ridgefield Park, at her home.

Q And of what did your examination consist? A It consisted of complete physical examination and measurements.

Q What did you find, Doctor? A Well, at —I saw the patient in her home in the presence of her family physician and her mother, and I asked her to leave the couch she was sitting on and walk across the room, and she used the crutch to help herself, and I noticed that she had a shortening in her left leg. At that time, she was not wearing an orthopedic shoe. She was able to walk about with a limp. I then asked the physician to enumerate her injuries, which he did. And I found that at that date almost all had recovered except that this apparent shortening was giving her the limp, and she complained of some pain in that hip. And I then asked her to remove her clothing and lie in a prone position in her bed. I then made measurements of her left leg and compared them with her right leg. And I examined her pelvic bones externally and made a thorough examina-

tion of her spinal column. I then examined her reflexes, the eye reflexes, the knee reflexes, and made a general physical summary of her condition as I found it at that time.

Q And what did you find she was suffering from at that time? A Her chief complaint was some pain in her hip. Outside of that, I couldn't —any other symptom was subjective, except the apparent shortening in her left leg.

Q What have you to say as to the limitation of motion in the left hip joint? A I brought her—I flexed her thigh upon her abdomen, I found it normal. I flexed the leg upon her thigh, and found it normal. I rotated her thigh in her hip joint and fount a slight limitation. And I adducted and found the adduction was normal. I abducted her thigh, and found a slight diminution in abduction.

Q Then the only limitation, as I understand, that there was present then was in limitation and abduction of the thigh? A Yes, sir.

Q And to what extent was there limitation in the rotation and abduction? A Well, it was very slight. I got a decided abduction, and then just a little retardation toward the end of complete abduction. I would say it was slight, and the same in rotation.

Q Did you find any atrophy in the left hip? A Yes, sir.

Q To what did you attribute that? A Well, I attributed the atrophy due to disuse. I went over her reflexes and found there was no tonic disturbance in the muscles of that side of the body, and it was due to disuse.

Q What do you mean by tonic disturbance? A I mean loss of structural tone, and by the

pressure on her nerve and the loss of nerve stimuli to the muscles of the limb in question.

Q And what is your opinion as to recovery from the atrophy in the hip?

Mr. Ward: I object to the question, the form.

Mr. Coult: I will withdraw it.

Q Did you form an opinion, doctor, as to whether or not there would be any improvement as to the atrophy in the left hip? A I took it for granted there would be.

Q Why? A Because my experience shows that atrophy due to disuse can be reclaimed by constant use.

Q Would you expect that result in this case? A Yes, sir.

Q When did you see the young lady next? A I saw her on the 28th of—I think it was July. No. I saw her this year, about January the 28th. I saw her January 28th, 1929.

Q Where did you see her on that day? A I saw her in Bogota, at her home in Bogota.

Q And who was present? A The mother and Doctor Dickson, and a representative—I would like to correct my previous statement. There was also present in Ridgefield Park a representative of the firm of Lewis—a lawyer, at this examination, I just forget his name.

Q What sort of an examination did you make in January of this year? A Very similar to the one I made in January, 28.

Q What did you find? A I was amazed at the improvement the child had made in the interval, and I said yesterday to the mother—I said she is to be congratulated.

Mr. Ward: One moment.

The Court: Just tell us what you found.

Q What did you find? A I found that the child was going about without the aid of cane or crutch, that she walked with very slight limp now, that she was able to go upstairs unassisted, and that she had made a very marked improvement, and to me she developed wonderfully in the interval, and was normal except for the slight limp, which was very slight, in her left leg, in spite of the fact that the cumbersome orthopedic shoe might have been a contributing factor to the limp.

Q Was she wearing an orthopedic shoe then? A Yes, sir.

Q Have you seen the shoe that has been passed around? A Yes, sir.

Q Was that the same kind of shoe? A Yes, sir.

Q Now, doctor, at that time was there any limitation of motion in the hip joint? A In the hip joint?

Q Yes. A Yes. There was still a slight diminution in rotation and external—and abduction.

Q Between the dates of the examinations had there been any improvement in that limitation of motion? A Yes. In fact, no pain was elicited at the last examination.

Q Doctor, had there been any improvement in the atrophy in the left leg? A Yes, sir.

Q To what extent? A Both the thigh and the calf had increased in circumference. I measured them. Now, I beg your pardon. I did not measure in that case. They were im-

proved. There was more tone. They were not so flabby. I palpated both the thigh and the—

Q I do not know that this has been gone into, doctor. What is atrophy? A Well, atrophy means a loss in strength and tone and composition of the tissue in question. It does not break down, it is simply weakened, and it loses muscle tone and becomes less.

Q Do you always have that in cases where a limb is confined in a cast for any length of time? A Yes. You have atrophy where—the moment that immobilization is begun, atrophy begins, break or no break.

Q In other words, if you have a limb that is held without motion,— A Yes, sir.

Q —you get a deterioration of the muscles? A Yes, sir.

Q And what is your opinion, doctor, as to recovery, so far as this atrophy is concerned? A Should have that complete.

Q How long do you think it will take? A Several years.

Q Well, can you give us an idea of how many years? A Possibly two years, under proper use. The left leg will probably never be the size of the right, and that is normal. The left leg is always a little smaller than the right on every natural, normal human being.

Mr. Coult: Would you mind, Mr. Ward, if the young lady stepped out here?

(Violet May Hummers stands before the witness.)

Q Now, looking at the leg, as far as you can see it, now, is the atrophy apparent? A (To Violet May Hummers.) Just put your heels to-

gether. To me the left leg is about as normal in appearance and general contour and line as the right. I cannot see any difference by inspection.

Q All right. I think you stated, doctor, that the right leg is normally somewhat larger than the left? A Yes, sir.

Q Now, in these examinations, doctor, did you have the assistance of any X-rays at all? A No, sir; I never saw any X-ray.

Q You have not seen any up to this time? A No, sir.

Q I do not want you to look at that one first. We will get the other one first. A All right.

Q Oh, yes. This is P. 6, doctor. This is an X-ray taken a few days after the accident. Does that disclose any pathology to you? A Do you mean any pathology of the pelvis?

Q Any fractures to be seen there? A Yes, sir.

Q Where are they? A There is one (indicating).

Q Now, you are pointing to the neck of the left femur, are you not? A I am pointing to the neck of the left femur.

Q Yes. Where are the others? A It is pretty well marked up.

Q Well, do you find them, doctor? A Yes. There is one in the pubis here at the junction of it with the—with the ischium, or near it there. It is rather difficult to read an X-ray under these conditions. You ought to have a double superimposed picture.

Q How many fractures do you find there, doctor? A Well, these two points here, while they appear to be a separation of the bone, are normal separations of the bone, that is, this is

the ilium of the left—this is the ilium of the right, that unites with the ischium and the pubis, and you have an apparent separation at these two points which, inasmuch as in a human being, is not complete until the twenty-fifth year, these are probably normal separations.

Q I see. Well, do you find fractures there? A I couldn't—I wouldn't go on record as to that. They are symmetrical, they are opposite each other, they are just where the ilium unites with the ischium and the pubis, and while this shows a deformity and an impaction of the fracture, this simply may be, in my judgment, to be classified as separations that are normal.

Q You would not call them fractures as such? Then, what do you call them? A Well, there is a separation at the normal articular surface of the two bones, the three bones there.

Q Do you find any other evidences of fracture on that plate? A Yes. On the left side. This is the horizontal and—yes, there is a fracture, too, apparently, at the normal separation between the—and I think that could be classified too as a normal point. May I make a remark that is—that seems, apparently irrelevant? In the first place, the entire pelvis is one bone.

Mr. Ward: Pardon me, Doctor.

The Court: No.

The Witness: All right. I could not say that that is a fracture.

Q Well, what is it? What does it show? A Well, as a matter of fact, it is a separation.

Q And where is the point of separation? A Well, the point of separation is betwen the symphysis pubis and the ischium, two portions of

what is commonly called the innominate bone, which normally is made up of three bones; that is to say, they are not articular, or are they movable on each other. If I was to put this human pelvis in a pot of hot water, it would separate itself into seven pieces, and yet it is all one solid rim.

Q Well, now,— A And these points that show on this plate are the normal places which will ossify sometime in her life between now and her twenty-fifth year.

Q And is that true in the lower part of the picture that you also indicated there? A Yes, sir. This is—this is probably more likely a fracture to me, I will admit that that is a fracture.

Q Now, doctor, on that plate, is there any evidence of callus? A I would say no.

Q Now,— A Remember, callus is very pervious to the X-ray; it don't give much of a shadow, and it is pretty difficult to see. You could say yes if you see it, but it is better to say no when you don't. It may be present, of course.

Q Now, I show you, doctor, an X-ray. Just put that up there, will you? A All right.

Q Which was taken in January, the 16th, 1928. Are the bones of the pelvis in that picture in normal position? A In the pelvis as in relation to each other?

Q Yes. A Yes, they are.

Q Is there a tilting of the pelvis there? A Yes, sir.

Q Well, you are speaking now of the bones of the pelvis? A In their normal relation to each other. They are normal, but the pelvis is tilted, and tilted to the left.

Q Is there any evidence of callus on that picture, doctor? A No. In spite of the fact that this is a wonderful break of the left—there is no evidence of callus on this picture.

Q Doctor, how long, in your opinion, does it take callus to absorb in fractures of the pelvis? A Fractures of the pelvis?

Q Yes. I mean, give us a minimum and a maximum time. A Well, it depends upon the nature of the break.

Q Well,— A A simple fracture will throw up less callus than a comminuted fracture, and a compound fracture will throw up more than either of the two mentioned.

Q Well, do you know that this is not a compound fracture? A They are simple fractures, but there are four of them in the pelvis.

Q And the bones are in good position? Can you form an opinion as to how long it will take the callus to absorb under the circumstances?

Mr. Ward: Yes, or no, to that please.

A Yes.

Q How long?

Mr. Ward: I object to the question.

The Court: I do not know whether we have enough before us on which—

Mr. Coult: He says so. I asked him if he could form an opinion, and he said yes. As I understand the rule in stating a hypothetical question, give the witness the data that you believe has been proved in the case, and ask the witness if he can form an opinion; then he is entitled to give it.

(Question read.)

The Court: There is testimony as to the nature of the fracture.

Mr. Ward: Yes, sir.

The Court: They were simple fractures?

Mr. Coult: Your Honor, I am only giving him added information now.

The Court: No; but I am thinking of the testimony in relation to the nature of the fractures.

Mr. Coult: They are all simple fractures.

Mr. Ward: Oh, no.

Mr. Coult: Well, they are.

Mr. Ward: Well, I say they are not.

The Court: That is the difficulty.

Mr. Coult: They are all simple fractures, your Honor.

Mr. Ward: I say they are not, sir.

Mr. Coult: They are not compound; there is no evidence at all of a compound fracture.

Mr. Ward: Comminuted.

Mr. Coult: Well, comminuted is a simple fracture.

The Court: I think Doctor Knapp testified that they were simple fractures.

Mr. Coult: One comminuted, but all simple.

Mr. Ward: There is a difference between a comminuted fracture and a simple fracture.

Mr. Coult: Not at all. A compound fracture may be comminuted, and a simple fracture.

Mr. Ward: Compound is where the bone is exposed to the air, that is the only difference. The difference between a comminuted

fracture and a simple fracture is where there are fragments.

Mr. Coult: Does your Honor recall that testimony clearly?

The Court: (To stenographer.) Mr. Robinson, will you turn to Doctor Knapp's testimony? In my recollection, he said they were all simple fractures.

Mr. Coult: Well, I will withdraw the question; maybe we will get along faster.

Q Doctor, having in mind the condition that you found as a result of the examination of this child, and having in mind the information that you had from an examination of these X-rays while you are testifying here, can you form an opinion as to the length of time that it would be necessary to completely absorb callus in this case?

Mr. Ward: Yes, or no, to that, sir, please.

A Yes.

Q What is your opinion?

Mr. Ward: I object to that.

The Court: What is the ground?

Mr. Ward: On the ground that it is not proper with reference to the hypothesis.

The Court: Well, your hypothesis is limited, so, therefore, he can answer as to that. I will allow the question.

Mr. Ward: Your Honor will permit an exception.

Q What is your opinion, Doctor? A Less than six months.

Q Do you mean from this present date? A No. I am talking—

Mr. Ward: Now, I—pardon me. Go ahead.

Q Do you mean less than six months—

Mr. Ward: I do not think the counsel—it is pernicious, what he means.

The Court: Are you talking of now or talking as of the time of the X-rays.

Mr. Ward: He started to say something, sir.

Mr. Coult: He started to say something.

Mr. Ward: And he started to say something.

The Court: No. The answer was that he could give an opinion, and then he said—

Mr. Coult: Six months.

The Court: He said six months.

Mr. Ward: And he said something after that.

The Court: We are not interested in that. Six months from when?

The Witness: What else did I say?

Q Do not answer this until Mr. Ward has a chance to object to it. When you said six months, were you referring to six months from the present time, or six months from the date of the injury? A You told me not to answer it.

Q All right. Now, answer it. A I meant from the date of the injury.

Q Doctor, would the tilting of the pelvis in a woman have any effect upon the ability to bear children? A No.

Q Why not? A Well, the position of the pelvis, en masse, bears no relation to delivery. For example, when I practiced in the obstetrical hospital twenty-five years ago I delivered all my patients on their side, and had I not, I could not have received a certificate. I now deliver them on their back, so it is immaterial what your position might be, and this pelvis, the bones, in my judgment, are in normal relation with each other. Tilting has no influence whatever upon delivery.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q You deliver cases and patients on the back, on their back? A Yes, sir.

Q You believe that the better method? A No. It is—

Q Do you, or not, Doctor? That answers the question. A No.

Q You do not? A No.

Q Yet you have changed as you have grown older and more experienced in your practice, you have changed? A I have.

Q That is true, isn't it? And there has been no reason for it, according to you? A Yes.

Q There has been a reason? A Yes, sir; not to me, but there is a reason. The hospital in which I delivered demand that.

Q You have answered. A I said yes.

Q Now, I think you said that you saw Violet May twice? A Yes, sir.

Q Both times in the company of Doctor Dickson? A Yes, sir.

Q Your examinations were made, the last one, prior to last July? A I said July, I believe, January 28, 1929, and in July, 22nd, 1928.

Q Your last examination was made in January? A Yes, sir.

Q This last January, was it? A Yes, sir.

Q And your first in July? A Yes, sir.

Q You recall having talked to Mrs. Hummers at the time you made this last examination? A Yes, sir; yes, sir.

Q And did you find at that time any limitation of motion with the child, in the child's leg? A As I testified before, yes.

Q Was it great or not? A Not great.

Q And only in one respect? A In two respects.

Q What respects? A In rotation and abduction. To tell you the truth, you cannot lie about it.

Q Pardon me? A I say I remember what I said before.

Q You have a pretty good recollection? A Yes, sir.

Q In two respects, then, you find limitation? A Limitation; yes, sir.

Q Yes. And in what other respects might there have been limitation? A There might been limitation in extension and flexion of the thigh on the abdomen—

Q Is that all? A —and abduction.

Q Three other respects? A Yes, sir.

Q Do you recall saying to Mrs. Hummers at the time of your first examination, "Poor kid, she is limited in every way"? A I never said anything like that.

Q Nothing of the kind? A Never.

Q You never expressed any sympathy for the child? A No, sir.

Q At that time, did you tell Mrs. Hummers that the child's condition was very serious? A No, sir.

Q Did you have any conversation with her? A With the mother?

Q Yes. A Yes, sir; I did.

Q Did you express any opinion as to the case? A Yes, sir.

Q To the mother? A Yes, sir.

Q But nothing of that kind? A No, sir.

Q Now, at the time of the first examination, you found her suffering from pain, you say, in her hip? A Yes, sir.

Q And that all other symptoms were subjective; is that correct? That was your expression? A No. She might have had—

Q Don't you recollect saying that? A Saying what?

Q That all other symptoms were subjective. A And I said, if there was any.

Q If there were any? A Yes.

Q Now, is pain an objective symptom? A No.

Q Well then, you were wrong when you said that, weren't you? A No.

Q Do you remember saying that you found pain, and that all other symptoms were subjective? A I said when I abducted and rotated the limb, I—

Q Do you remember saying that? A Yes, I do.

Q Did you mean then that pain was an objective symptom? A How could I?

Q I don't know how you could. A No. I didn't say it, either.

Q Do you remember saying that you found pain— A I—

Q —and it was an objective symptom? Did you say that, or don't you remember saying that? A I did not say it.

Q You did not say that? A No. I did not say it.

Q Did you say that all the other symptoms were subjective? A If there were any.

Q So you qualify it by saying, if there were any? A I intended to, if I hadn't, and I think I did.

Q But you do not remember? A Yes, I do.

Q Oh, you do remember? A Yes.

Q You remember that you qualified that, do you? It your memory poor on that? A No. I remember I qualified it.

Q Did you describe this limitation of motion to Mrs. Hummers at all, this slight limitation? A No.

Q You did not discuss that with her? A Why, sure I didn't, no.

Q Now, did I understand you to say that all atrophy could be reclaimed? A When you refer to this leg, yes; not all.

Q You made the general statement, did you not, that all atrophy can be reclaimed, on your direct examination, in describing what atrophy was? A But I referred to this case in particular.

Q Didn't you, when you were asked what atrophy was,— A Yes.

Q —didn't you say, when you were asked about atrophy, didn't you state that all atrophy could be reclaimed? A I referred to this case when I did.

Q Didn't you state it generally, that all atrophy could be reclaimed?

Mr. Coult: If the Court please, if counsel wants to go back, the record is here.

A Why—

The Court: The doctor described atrophy with relation to permanent injuries, the effect on the nerves and the muscles, and then he referred to this case as saying that use would bring it about.

Mr. Ward: Yes. But he also stated, describing atrophy in general, that all atrophy can be reclaimed.

The Court: No. I do not think he testified to that.

Mr. Ward: And the expression he used was reclaimed.

The Court: I do not know whether we can take a single sentence, unless we take the entire phrase.

Mr. Coult: Your Honor, counsel has what I think is a very bad habit of asking whether the witness has not testified to a certain thing. Now, we are wasting a great deal of time on that. If counsel wants to look into the record, the record is here.

Mr. Ward: This gentleman has testified to an excellent recollection.

Mr. Coult: The best record is the record.

The Court: But there is no justification of taking the time. If there is any doubt, we will refer to the record, because we are using a great deal of time on this case.

Mr. Ward: However, counsel in his direct examination of this man consumed a very great time.

The Court: No; but I am not limiting you to matters. If you are not satisfied with the answer and the record will bear out your contention, we will go to the record without persistently calling his attention to it. If you want to look at the record, all right.

Mr. Ward: Well, I do not want to take up the time.

The Court: Then we cannot go on with this persistent single question any more.

Q Well, can all atrophy be reclaimed? A Partly, yes.

Q Reclaimed completely? A Not all atrophy.

Q So that all atrophy cannot be reclaimed, is that correct? A Yes. That is correct.

Q But, in your opinion, the atrophy in this girl's case can be completely reclaimed? A Absolutely, yes.

Q Has it been reclaimed? A To a very marked extent.

Q Has it been completely reclaimed? A Wait until I get through answering. So much so, that—

Q One moment.

The Court: Just listen to the question.

Mr. Coult: He said, to what extent? Give the witness a chance to make a complete description.

The Court: What is the question that is unanswered?

(Question read.)

The Court: He can answer that yes, or no.

A Please ask the question again, Mr. Ward.

(Question read.)

A No.

Q Can you tell us to what extent it has not been reclaimed? A Yes.

Q To what extent? A Give me a tape and I will measure her here and tell you the difference.

Q Can you tell us from your examinations? A I haven't seen her just recently.

Q Can you tell us to what extent it was reclaimed when you last examined her? A Yes.

Q To what extent? A Marked improvement.

Q Was there any marked degree of atrophy in her limb at that time? A I would not call it a marked degree of atrophy, just simply an atrophy due to disuse.

Q From what you have seen now, is there any marked degree of atrophy present in this child's case? A Not as far as I can see.

Q You think one limb is the same as the other, as you expressed yourself a moment ago? A Yes, quite close; there is a slight difference.

Q Yes. But almost unobservable, so far as you are concerned? A Yes, sir.

Q Does that include the entire limb? A No.

Q Well, what did you mean when you said, so far as you could observe, the left limb was in the same—was about the same size as the right? A Well, I meant just as far as I could see, and as far as you could see, and if you would like to know the difference, I would be glad to measure them for you.

Q Do you know how far, I say? A I held her dress up above her knees; I guess that is as far as you saw.

Q Yes. Now, do you know whether there is any atrophy of the leg above the knee? A No, I do not.

Q At this time? A I do not.

Q Was there at the last time you made the examination? A Yes.

Q To a marked degree, or not? A No, not.

Q So you think that from that time to the present it has grown better? A Yes.

Q And it was not marked at the time you made your examination in January? A No.

Q In making your examination here in court, or your observation here in court, did you make any observation of that? A Of what?

Q Of the limb, the left limb, above the knee? A No.

Q Did you mention all the things that you found with reference to this child? A When?

Q Upon your direct examination.

Mr. Coult: Objected to.

The Court: Sustained.

Mr. Ward: Your Honor will permit an exception.

Q Do you recall any other trouble that you found in this child that you did not mention on your direct examination? A Say that again, please.

Mr. Coult: Now, if the Court please, that calls for the witness's conclusion; that is hardly a fair question. It could not possibly be cross examination. It is directed to some-

thing that he omitted to mention on his direct. I object to it.

The Court: Sustained.

Mr. Ward: Your Honor will permit an exception.

Q Do you know whether or not you told us everything that you found to be the trouble with the girl at the time of your examination? A Yes, I did.

Q Did you mention curvature of the spine, that you recall? A Here?

Q You did? A Here? Do you mean here?

Q Here. A No. I told you her spine was normal, just a few minutes ago. You remember it.

Q So, then, you did not find any curvature of the spine? A There is no curvature of the spine.

Q Well, do you mean—I assume that you mean from that that you did not find any, is that correct? A No. I say that there isn't any now.

Q Well, you did not find any?

The Court: Are you speaking of this girl's case? You say there won't be any complication later? When you say there is no curvature, do you say there is no curvature in the instant patient?

The Witness: Judge, I meant, with this orthopedic shoe, the pelvis will tilt, and then there is an apparent curvature of the spine.

The Court: Didn't you just say there is no such thing as a curvature, or you found no such curvature in this case?

The Witness: No.

The Court: Which is it?

The Witness: There is no curvature in this case.

Q And did I understand you to say on your direct examination that the orthopedic shoe that she was wearing at the time of your last examination probably contributed to her limp? A Yes.

Q Made the limp worse? A No, no; but what little limp she did have.

Q She would not have had a limp without the orthopedic shoe? A Oh, Mr. Ward, no.

Q Do you mean that? A No, no; you know that I don't believe that. No. There is the answer.

Q No. Then she would have a considerable limp without that orthopedic shoe, wouldn't she? A Absolutely, yes.

Q And that orthopedic shoe helps, doesn't it? A Yes.

Q How many fractures did you find that this child was suffering from? A One.

Q Where? A Right there (indicating).

Q And basing your opinion, or the opinions that you have expressed, you have based your opinions upon that, or you have taken into consideration one fracture, that is correct, isn't it? A No.

Q Any others? A You told me she had four fractures.

Q Well, did you take those into consideration? A Why, I ought to. You said she had four.

Q Did you take them into consideration? A Yes, yes.

Q Did I tell you she had four? When? A Just a little while ago. You said—you mentioned four.

Q When? A This morning, about eleven-twenty-five, I guess.

Q Before you got on the stand? A No.

Q Since I have been cross examining you? A You mentioned it several times before I got on the stand. You told—

Q Did I tell you this morning at any time before now that she had four fractures? A No; but you did tell the previous witness.

Q You said I told you, didn't you, a moment ago? A You referred to four here to me, too, since I have been on the stand.

Q At eleven-forty-five, you said I mentioned it to you, is that true or not? A I said some time this morning.

Q Didn't you mention eleven-forty-five?

Mr. Cummins: I object. The record itself speaks.

The Court: He referred to time?

Mr. Ward: Yes, sir. Eleven-forty-five, sir, he said.

(Question and answer read as follows):

"Q When? A This morning, about eleven-twenty-five, I guess."

Mr. Ward: I beg your pardon, sir. I thought he said forty-five.

Q Eleven-twenty-five. Did you mean that?

The Court: Let us get down to this.

A I made a guess at it, I told you I guessed.

The Court: Are you referring to something Mr. Ward asked you or told you di-

rectly, or something you overheard, when you said that?

The Witness: Both, Judge.

Q Both? A Yes.

Q What I asked you, then, at eleven-twenty-five, and what you heard before that? A Yes.

Q Now, are you basing the opinion that you gave upon your direct examination upon the—or, upon taking into consideration four fractures of the pelvis or just one? A Four.

Q So then, you are not taking into consideration what you yourself have discovered? A No.

Q And when you were asked that question about the knowledge you have gained, and so forth, you referred to something that you had heard, is that correct? A Yes, in another place than here.

Q Is that so, or not? A In another place than here, and here also, yes.

Q I see. A Yes.

Q And you would not have been able to formulate your opinion and express it otherwise, would you? A Probably not.

Q And you are sure of that now, aren't you? A Quite.

Q Yes.

Mr. Ward: I ask that his evidence be stricken out, sir, with reference to those—in answering those questions based upon—at least, expressing an opinion as to the result in this case.

Mr. Coult: I think counsel is bound to pick out the opinion that he wants stricken out.

Mr. Ward: Well, I am not infallible. I cannot remember the record, of course, sir, completely, but your Honor will recall those questions to which I objected, and giving his opinion in reply to them.

The Court: Of course, the Court is not infallible, either. In the absence of being very specific, I will be unable to comply with your request.

Mr. Ward: Well, I ask that this witness's evidence be stricken out.

The Court: I will strike out any evidence, and tell the jury to disregard any testimony, on any opinions he has given not based on either from his own knowledge or an hypothesis framed, as a result of an hypothesis framed, put to him in the form of a question.

Mr. Ward: That would include the evidence given with reference to this child's future condition?

Mr. Coult: Not necessarily.

Mr. Ward: Yes, sir; positively. He has based his opinion upon what he has heard outside, and he could not form his opinion or give it, otherwise.

The Court: Did that relate to your entire expert evidence, doctor?

The Witness: Judge, I examined this child in the presence of another physician on two occasions, and they referred to the fracture of the pelvis. This morning is my first—the first opportunity I have seen the—to see an X-ray, and I have not had sufficient time to study it through, and I do not think it is—

The Court: First, what is your opinion, from your examination, plus the history of the case? That is, put it this way: Did you, in making diagnosis, take the history of the case into consideration?

The Witness: Yes, sir.

The Court: At the time of your first examination?

The Witness: Yes, sir.

The Court: Now, since that examination, you have looked at these X-ray plates, then, this morning?

The Witness: Just now. This is the only time I have seen them, Judge, just now.

The Court: Well, are you able to form an opinion as to the condition of the girl by looking at those X-ray plates as of the time when they were taken? In other words, can you read those plates?

The Witness: The relations, with reference to this plate, except for the hip, seem normal.

The Court: That is your reading of it?

The Witness: Yes. I say it is normal. The relation of every bone on that plate is normal to me.

The Court: Normal?

The Witness: Yes, sir.

The Court: Then I take it the child should proceed as any other normal child should proceed?

The Witness: Except for the leg.

The Court: Except for the leg.

The Witness: Yes, sir.

The Court: What fact do you find? Do you find a tilted pelvis there?

The Witness: I do. Judge, if I could explain that one point to you in my way of thinking, without being harassed by counsel, perhaps I can get this.

Mr. Ward: By which counsel, I would like to know?

The Witness: Well, either one.

The Court: All right. Explain what your understanding of the tilt is in this case.

The Witness: Normally, a pelvis is horizontal if both legs are normal in length. And this would be the position of the pelvis, and the pelvis is made up of seven bones all united to each other as if one bone. And it is propped up by a right and left leg, and it is held in an erect posture in this position. If one leg is shortened, the pelvis, as such, in its entirety, will tilt; but the relation of the bones in that pelvis remain exactly as they did when it was horizontal. Whether you stand with your tilted pelvis this way with one foot off the ground, it does not mean that the relation of the bones in the pelvis are out of normal relation, nor does it if you stand in this position, nor whether you lie down, sit down or stand on your head, the relation of the respective bones in the pelvis remain the same. And by the tilting then, however, Judge, is simply because the support has diminished on the side toward which the whole pelvis, as such, tilts. With the tilting, there is a compensatory curvature of the spine to make up for the little difference. The spine, being a

flexible support for the body, will tilt, so that you might stand erect if the pelvis is tilted to the right or to the left.

The Court: Well now, doctor—

The Witness: That is—

The Court: —did you find any curvature in this case?

The Witness: No. Only when her shoe is off, Judge.

The Court: Then you find the curvature there?

The Witness: With the orthopedic shoe off, there is a functional—it simply tilts over with the pelvis to hold you in an erect posture. We call it compensatory curvature. It can be straightened right out. If you lay right down straight and put her in a straight line, her spine is as straight as mine is, and mine is perfectly straight. If I put an orthopedic shoe on the wrong foot and try to strike the ground with the good foot, I have a compensatory curvature, which is not in this picture. There is no disease in this picture, and the spine is absolutely normal. This picture is only of the time it was taken; it shows this left hip was up in the air.

The Court: You have not seen the girl since that picture, have you?

The Witness: Only here.

The Court: And that is the only examination you made?

The Witness: Twice, in June and January.

The Court: Then you cannot tell anything about the atrophy with relation to now, only as of those dates?

The Witness: Except that which I see below the knee.

The Court: Do you find any diseased tissue there? Did you find any?

The Witness: At any time, no, Judge.

Mr. Ward: I renew my motion, sir.

The Court: I will strike out the previous testimony, I think. I am inclined to strike out any testimony the witness has given which is not based upon either the proper hypothesis or his own observation; but the difficulty is I cannot pick it out.

Mr. Coult: Nor can anybody else.

Mr. Ward: I think the jury might be able to.

Mr. Coult: Of course, this is all for the jury, under instruction by the Court.

The Court: All I can say, in the absence of giving it to me, line for line, is that the jury will only take such evidence as the doctor has given which is based either upon his own knowledge of the case, or upon the assumed facts in the case in the form of an hypothesis, but matters which he has learned of extraneous to this issue such as an ordinary conversation in the court room or the testimony of another witness, unless they were so incorporated in the question to him, the jury will disregard it. That is the best I can do under the circumstances.

Mr. Ward: I specifically refer to those opinions expressed by the doctor, or in answer to the hypothetical questions pro-

pounded by the counsel for the defendant, with reference to her condition in the future.

The Court: Well, he can testify as to that upon an assumed set of facts which covers the nature of the question.

Mr. Ward: My objection being that it now appears that he did not take into consideration the elements that properly should be.

The Court: Now, Judge, I will strike that out, and ask you to reframe the question, so there will be no misunderstanding.

Mr. Coult: Exception.

The Court: I will give you an opportunity now to get before this jury the doctor's opinion as to the future of this girl.

Mr. Coult: I guess I can do it.

The Court: All right.

Mr. Coult: Mr. Ward was still cross examining.

The Court: Well, he can continue after that because he will probably want to cross examine on that, also.

Mr. Ward: In the interest of saving time, I will withdraw my objection. The jury has all of the factors.

The Court: All right.

Mr. Ward: I will withdraw it. And that is all, doctor.

Re-direct examination by Mr. Coult.

Q Now, doctor, I think I will ask you an hypothetical question anyway. Assume that this young lady was injured on the 5th day of October, 1927, by coming in contact with an auto-

mobile truck when she was riding on a scooter, and that she suffered four fractures of the pelvis, simple fractures of the each, ascending and descending, ramus of the pubis, of both the right and left side, and that on— A Here is two fractures right through here (indicating).

The Court: One minute.

Mr. Ward: I wish your Honor would instruct this doctor—

The Court: Just listen. Judge Coult is framing a question. What you find there is immaterial.

Q On October the 7th, 1927, the Exhibit P. 6, which you have seen— A Let me see that.

Q —was taken— A That is right.

Q —and on October—on January the 16th, 1928, the Exhibit P. 21 was taken, which you have before you— A This is the date of this one?

Q October the 7th. And having regard for the information that you obtained by your examination of this girl, confining that, however, to what you yourself saw without regard to anything that anybody told you, either then or at any other time, can you, from the material I have given you in this hypothetical question, give us an opinion as to the prognosis in this case? A Yes. With added information just obtained there myself to the extent—

Q Now, never mind that. Can you give an opinion on what I have given you there in that question? A I can now, yes.

Q All right. Well, what is your prognosis?

Mr. Ward: I object to the question.

The Court: On what ground?

Mr. Ward: On the ground it does not contain the proper elements.

Mr. Coult: If counsel will point out something in the question that was not proved—

Mr. Ward: I do not think it necessary for me to frame counsel's question.

The Court: Of course, an hypothetical question does not necessarily have to embrace every bit of evidence in the cause. I take it we have before us the result of the doctor's own examination, plus the assumed facts as testified to by both your own physician and the defendant's physicians. Now, he has asked him whether or not he can on all of this evidence give a prognonsis as to this case, and he says he can, and I will allow it.

Mr. Ward: Your Honor will permit an exception.

Q What is the prognosis, doctor? A Very good.

Q And having in mind the same facts that I gave you in the last question, can you form an opinion as to whether or not this girl would have difficulty in bearing children?

Mr. Ward: I object to that question.

The Court: I do not know whether that—wearing shoes?

Mr. Coult: Bearing children.

The Court: Oh! I thought you said wearing shoes.

Mr. Coult: Bearing children, I said.

The Court: If the doctor can answer it.

Mr. Coult: I am only asking now if he can form an opinion.

Mr. Ward: I, of course, do not object to his answering yes, or no, to that.

Q Can you form an opinion, doctor? A Yes.

Q What is your opinion?

Mr. Ward: I object to that.

The Court: Now, just a minute. I do not know whether the doctor is forming that as a result of looking at this X-ray or simply taking his own observation of the child, plus the assumed facts in the hypothesis. He picked up the X-ray.

Mr. Coult: I had the X-ray before him, I included in the hypothetical question; I said "This X-ray which you had before you," and "This other X-ray which you had before you," all that is in the hypothetical question.

The Court: I will allow that.

Mr. Coult: It is based upon this, the two X-rays, his examination, and the four fractures.

The Court: I will allow the question.

Mr. Ward: Your Honor will permit an exception.

Q What is your opinion, doctor? A She ought not to have any difficulty.

Mr. Coult: Cross examine.

Re-cross examination by Mr. Ward.

Q Is your opinion just formed, doctor? Have you just formed your opinion? A Yes.

Q Upon something that you discovered just now? I beg your pardon. A No.

Q Based upon something? A No.

Q Didn't you state that it was in part based upon the X-rays and something you had just discovered in them? A If I could make my testimony—

Q Did you, or not? A —retroactive, I would call your attention—

Q Doctor—

The Court: Just answer the question.

A Ask the question again, now.

(Question read.)

A Didn't I state? No, not on that basis.

Q You did not, when Judge Coult was asking you the question, that hypothetical question that you answered, just now turn to the X-ray and say "something I found here just now in here"—

A It was, partly.

Q —or words to that effect? A Yes. But that had—

Q You did, didn't you? A Yes.

Q Then you were basing your opinion upon something you had just found there, weren't you? A Partially, yes.

Q And yet you came to the same question that you came to before, apparently, didn't you? That is right? That is true, isn't it? A In relation to what? I do not just get that.

Q In reference to this child's future and the prognosis in this case. A I say the prognosis is good.

Q Yes. Now, did you form that opinion basing it upon something that you have just found in the picture? A In relation to what?

Q To the prognosis in this case. A In respect to what? To walking, or—

The Court: Just a minute. What did you mean when you said the prognosis was good? What did you mean by that?

The Witness: I was asked if the—as to the future of this girl, what was the prognosis, in my judgment, as to the future, and referring then to her ability to have children, I said good, the prognonsis was good, and there is no reason, in my judgment, with the information I have at hand, that she should have anything but a normal time.

Q Now, did you base your opinion— A When I referred to this picture—I am talking to the Judge, now, for a minute.

The Court: Just a minute. Just answer the question.

The Witness: I know; but I haven't—all right, Judge, I beg your pardon.

Q Did you base your opinion upon something that you just found in those pictures? A No.

Q Didn't you say that you did in reply to Judge Coult's question? A Partially, yes.

Q Well, wasn't that so? A Partially on these pictures, yes.

Q Partially, then? A Yes.

Q Was that an important factor, what you discovered in those pictures? A Don't forget, I examined this—

Q Was it an important factor, doctor? A Yes, it was important.

Q And it aided you in forming your opinion? A Yes.

Q You are nodding your head, yes? A Yes.

Q And without that factor, you would not have formed your opinion, would you, without that important factor? A Yes, I would have given an opinion, yes.

Q You would have? A Yes.

Mr. Ward: That is all.

The Witness: I would have given some opinion, yes.

Mr. Ward: Now, there is no—some opinion?

The Witness: Yes. That is what you asked me.

Mr. Ward: No matter what kind, but some?

The Witness: Yes.

Mr. Ward: That is all.

By Mr. Coult.

Q Doctor, you said something about there being no curvature in this case. To what did you refer when you spoke of curvature of the spine, in that connection? A This picture shows it.

Q I think you said that the— A This picture I point to now is not the one.

Q Doctor, listen to my question. A Yes.

Q You said in this case there was no curvature of the spine, did you not? A I say that now, yes.

Q What do you refer to when you speak of curvature of the spine? A The curve which—with the tilting at the left side.

Q What prevents the curvature of the spine at present? A When—the orthopedic shoe.

Q Is it a fact that the spine curves when the shoe is off and is straight when the shoe is on? A Yes.

Mr. Coult: That is all.

By Mr. Ward.

Q Well, when the child is lying, of course, there is no weight on that, or there is no movement, there is nothing to bring that spine down or curve it, is there? A It would be perfectly straight when she lies down.

Q Wasn't that picture taken when the child was lying down, in your opinion? A I can tilt the pelvis—

Q I have not asked you that. A I do not know.

Q You do not know whether that picture was taken when the child was lying down? A No.

Q That distinctly shows a curvature of the spine, doesn't it? A Yes.

Q Well, then, if the child was lying down at that time, you are wrong, aren't you? A No.

Q All right.

Mr. Ward: That is all.

Mr. Coult: That is all, doctor.

(Witness excused.)

Mr. Ward: If your Honor please, in view of this physician's testimony, I would like to have the child's hips shown to the jury. I mean, with reference to the atrophy.

The Court: No.

Mr. Coult: Mr. Cunningham?

WILLIAM J. CUNNINGHAM, recalled as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. Coult.

Q Mr. Cunningham, you testified that you were driving a Hudson car on this occasion? A Yes, sir.

Q Whose car was that? A Brown Garage.

Q Located where? A Hackensack, State street.

Q You say it was owned by Brown's Garage in Hackensack? A Yes, sir.

Q Did you get it there that morning? A What is that?

Q Did you get it there that morning? A I don't know whether I got it there that morning or not.

Q Well, when did you get it? A I took it away from there when I went home to dinner.

Q And where were you going with it? A Home, to my home.

Q And where is your home? A At that time, it was 64 8th street, Ridgefield Park.

Q By whom were you employed at the time this accident happened? A Mr. Brown.

Q By Brown's Garage, Hackensack? A Yes, sir.

Q Were you using the car yourself? A I used it to go home to dinner; yes, sir.

Q Had you ever had it out before? A That I could not say, that particular car; I may and I may not; I do not know.

Q Did you ever have it out again? A That I could not say.

Mr. Coult: That is all.

Mr. Ward: No questions.

By Mr. Coult.

Q Just one other question. A Yes, sir.

Q Who gave you permission to take the car out?

Mr. Ward: I object to that as irrelevant. Well, I will withdraw it.

The Court: I cannot see the materiality of it.

Q Who gave you permission to take the car out? A I do not know.

Mr. Ward: I do not think that is relevant, sir.

The Court: What is the materiality of it?

Mr. Coult: Well, this witness was produced by the plaintiff. I suppose I ought to ask leave for further cross examination.

Mr. Ward: Well, the plaintiff's case is closed, sir.

Mr. Coult: I think that is enough. That is all.

Mr. Ward: That is all.

(Witness excused.)

DAVID J. BINGHAM, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, sir? A Paterson, New Jersey.

Q What is your business? A Salesman for the New Jersey Tobacco Company.

Q How long have you been in their employ? A The past ten years.

Q Did you see the accident which is the basis of this suit? A Yes, sir; I did.

Q Where were you at the time? A At the time of the accident, about one-half block away, south.

Q And what were you doing? A Riding in a northerly direction.

Q In what? A A Ford "coop."

Q And whose Ford coupe was that? A What was that?

Q Whose Ford coupe? A Belonging to the New Jersey Tobacco Company.

Q How rapidly were you traveling? A Oh, an average of about twenty or twenty-five miles an hour.

Q Did you see the truck that was involved in this accident before the accident occurred? A Yes, sir; I noticed the truck about a block away from the scene of the accident while I was approaching.

Q And was there any other traffic on the street between you and the truck? A Not that I noticed.

Q And what side of the street was the truck on? A The truck was on the right hand side, I should judge, about twelve feet from the curb.

Q Now, when you say the right hand side, do you mean the truck's right hand side or your right hand side? A The truck's right hand side.

Q And to get it more explicit, do you mean towards the railroad or towards the paved side of the street? A Why, he was towards the railroad, coming south.

Q Just about where did this accident occur? A Well, I should judge it was about between five and ten feet on the north side of Walnut avenue.

Q Did you see the little girl before the accident happened? A Well, when I was coming along about three-quarters away from the accident, I noticed the little girl come out of Walnut avenue on the scooter, and she made a wide turn, that is when I first noticed her, and then I noticed the truck coming along.

Q Did you see her before she came out of Walnut avenue? A Well, about twenty feet before she come out of Walnut avenue, I did.

Q And how was she traveling? A At a fair rate of speed for a scooter.

Q You say she made a wide turn? A Yes, sir.

Q What do you mean by that? A Well, she come down Walnut avenue and made a wide turn on the wrong side of the street, and then she was coming into the right side of the street.

Q And when you say the wrong side of the street, you mean— A The left hand side, she made a wide turn.

Q And do you mean by that the left hand side in the way you were looking? A Yes, sir.

Q And as she came out of Walnut street and made this wide turn, what did the truck do? A Why, the truck kept right on going until the child—as it was turning around to the right side, all of a sudden, I don't know whether she lost control of the scooter or got frightened on the nearness of the truck; but suddenly she made a left hand turn into the front of the truck, and the driver swerved towards the curb.

Q And where was the truck with relation to Walnut street when the child struck the left side? A When the truck hit the child, I should judge it was about ten feet on the north side of Walnut avenue.

Q Where did the truck go after that? A The truck crossed Walnut avenue and stopped on the south side.

Q And where was it when it stopped? A Well, it was on the right hand side of the street. Do you mean how many feet from the curb?

Q Yes. A I could not tell you because I was facing it looking at it that way, it was close to the curb, but I do not know how far.

Q What part of the street, now, with relation to the width of the street, was the little girl on when the accident occurred, that is, when these two vehicles came together? A Well, I should judge she was about five feet to the west of the center of the street.

Q Did you see any skid marks on the cement? A I did not notice. There must have been some there, but I did not notice.

Q You did not look at them? A No, sir.

Q Now, what happened after the truck stopped? A After the truck stopped, the driver —I got out, and the driver of the truck come over to me, and he asked me to take the little girl—

Q No. A No?

Q Well, he had a conversation with you? A Yes, sir.

Q Then what did he do? A Then he went back to his truck and the helper walked back, picked up the child and brought it in the truck, and they turned around and went north on West Shore avenue towards the hospital.

Q And in turning around, how did they turn? A They just turned right around.

Q Well, would that be to the truck's left, or to the truck's right in making the turn? A To the truck's left, turned right around, it is a wide street.

Q What part of the truck and what part of the scooter came together? A Why, the part of the scooter I do not know, but it was the front fender of the truck that hit either the scooter or the little girl, I don't know which.

Q And what part of the front fender? A The left front.

Q And did you notice the little girl, how she was standing? A How she was standing?

Q Yes. A On the scooter, do you mean?

Q Yes. A No, I could not say. I was about a half a block away. I do not know whether she was standing with both feet forward or one back.

Q Did you see any other automobile around at the time of the accident? A None outside of the Public Service.

Q Was there any Hudson car there? A Not that I noticed.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q Mr. Bingham, you are employed by the New Jersey Tobacco Company? A I am.

Q Do you remember what time it was this accident happened? A I should judge it was right before five, or five.

Q You were on your way home to Paterson? A No. I had one more stop to make.

Q Whereabouts? A On Fort Lee road.

Q And you were familiar with this locality, were you? A Fairly familiar.

Q You have been over there before? A Yes, sir.

Q Did you notice any children playing in the street? A Yes, sir; I did.

Q They were up by Oakwood avenue, were they not? A There was some by Oakwood, and there was some beyond Walnut.

Q You know where Oakwood is; Oakwood is one block south of Walnut? A Yes, sir.

Q And you noticed the children playing there, did you? A Yes, sir.

Q In the street? A There was a couple.

Q And then down beyond Walnut avenue, did you notice children playing there in the street? A Yes. There was some boys playing ball.

Q And that was one block north? A North; yes, sir.

Q Now, you say that you could see this little girl about twenty feet up from West Shore avenue? A Yes, sir.

Q That would be toward the east, wouldn't it? A Yes, sir.

Q As she was coming down? A Yes, sir.

Q And she seemed to be going an ordinary rate on the scooter, as scooters go? A Yes, as scooters go.

Q I do not suppose you have had very much experience with scooters? A No, sir.

Q This scooter going about as fast as a person would walk fast? A No. I would say she was going as fast as a boy would trot.

Q As fast as a boy would trot? A Yes.

Q Mr. Bingham, can you give us any idea in miles about how fast that was? A About five mile an hour.

Q About five miles an hour. And she came right down towards West Shore avenue? A Yes, sir.

Q And then turned north, didn't she? A Yes, sir.

Q And you say you saw her turn north? A Yes, sir.

Q And when was it you first observed the truck? Was it after you had observed her? A No. I had observed the truck about a block away from the scene of the accident.

Q How far? A About a block.

Q That would be down by Beechwood avenue, that is one block north, isn't it? A No. I mean one block south.

The Court: That is your position?

The Witness: Yes. Well, I was coming along; when I was about a block south of the accident, I noticed the Public Service truck coming.

Q Where was the truck then? A The truck was along—along, I should judge, about twelve or thirteen feet to the east of the curb on this side.

Q How many blocks up from Walnut avenue? A About—up from Walnut?

Q Yes. A About a block or a block and a half, I should judge.

Q About a block or a block and a half? A Yes.

Q And then you continued on, didn't you? A Yes, sir.

Q And when you got about halfway down between Oakwood avenue and Walnut avenue, this accident happened, is that correct? A Yes, sir.

Q And it happened, I think you said, about five or ten feet around the corner north from Walnut avenue? A I should judge about five.

Q Now, do you know what the distance is across West Shore avenue at that place? A Not exactly, but I think it is around fifty or sixty feet, somewheres in that neighborhood.

Q There are three sections there, are there not? A Yes, sir.

Q And would you think a fair estimate of the width of those sections is about seventeen or eighteen feet, each section? A No. They are more than that.

Q More than that? A I would say the two sections on both ends are about twenty, and the middle section around thirty. The—

Q I see. A —middle section is bigger than the other two.

Q A very wide street, isn't it? A Yes, sir.

Q And a plain, unobstructed view coming down from the north for a number of blocks in the direction of Walnut avenue? A Yes, sir.

Q And beyond Walnut avenue for a number of blocks? A Yes, sir.

Q And this truck was, you say, about twelve feet from the easterly side? A Yes, sir.

Q I beg your pardon. I am wrong and you are wrong. That would be the westerly side, wouldn't it? A Yes, sir.

Q The westerly side? A Yes, sir.

Q Now, you say the little girl had turned to the north, and then seemed to hesitate, or something, and turned to the left? A Yes.

Q Which would be, first, she came around and turned to the right? A Yes.

Q And was facing up north? A Yes.

Q And then seemed to falter, or something of the kind? A Yes.

Q And turned to the left, is that correct? A Yes, as if she had lost her nerve or lost control of the scooter.

Q And the truck, after it hit the little girl, went across Walnut avenue? A Yes, sir.

Q All the way across, didn't it? A Yes, sir; it did.

Q Some little distance beyond Walnut avenue, in feet, wasn't it? A Well, maybe two or three feet.

Q Now, do you mean two or three feet beyond the curb line or beyond the sidewalk? A Well, beyond the sidewalk.

Q Beyond the sidewalk. That would be, if the sidewalk on the southerly side of Walnut avenue were projected across West Shore avenue, —it would have been beyond that? A About two or three feet beyond that; yes, sir.

Mr. Ward: That is all.

(Witness excused.)

Mr. Coult: Mr. Olson?

OLAF OLSON, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Mr. Olson? A 74 Beechwood avenue, Bogota.

Q What is your business? A Carpenter.

Q Do you recall this accident? A I do.

Q Where were you at the time. A Approximately a block and a half from the scene of the accident.

Q South or north? A North.

Q Where were you going? A Home.

Q And to do that, did you go south or north? A I was going south to Beechwood avenue, one block.

Q So you were facing the place where this accident occurred? A I was.

Q Did you see this truck before the accident happened? A I did.

Q Where was it when you noticed it? A Just opposite myself, as I was crossing Walnut avenue, on the right hand side of the street.

Q And at what rate of speed was it traveling? A At a moderate rate of speed.

Q Did you see the little girl? A I did, as I went a little further down.

Q How much further down were you? A About a half a block.

Q How near were you to Walnut street, then, Walnut avenue? A Well, a block and a half.

Q I mean, at the time you saw the little girl. A About a block and a half.

Q About a block and a half. Where did this little girl come from? A Out of Walnut avenue.

Q And at the time you saw her, how was she traveling? A I cannot give you any idea of the speed, but I could see, even before the accident happened, that it was going to happen.

Mr. Ward: I ask that that be stricken out.

The Court: Strike it out.

Mr. Coult: I will consent to that.

Q Can you give us some idea of how rapidly the child was traveling on the scooter? A I cannot.

Q Would you say it was fast, slow or medium? A It appeared to me to be quite fast.

Q Now, where did that little girl go? A Out into West Shore avenue.

Q And where in West Shore avenue? A From where I was, it appeared that she went straight out.

Q And how far did she go across? A That I cannot say.

Q Did you see the truck at the time of the collision? A I did.

Q What part of the roadway was the truck on? A Well, it was well over on its right hand side.

Q And how near, can you give us some estimate of how near it was riding to the curb? A As far as I remember, it was straddling the line on the west side of the road.

Q Now, at the time of the collision, what did the truck do? A I do not know.

Q Do you know where it went to? A No, I do not.

Q Did you look at the truck after the collision? A Yes.

Q Where was it then? A Well, it was on the right hand side of West Shore avenue.

Q And where, with relation to Walnut avenue? A Well, if the south sidewalk of Walnut avenue continued across, it would be, in my estimation, just about parallel with it.

Q That is, if it went across Walnut avenue to the south sidewalk, is that right? A (Witness nods head in the affirmative.)

Q They do not get your nod. You will have to say something. A Yes, sir.

Q And can you say how near it was to the right hand curb when it came to a standstill? A I do not know.

Q Where was the little girl? A I do not know that either.

Q What did you see after the accident occurred? What happened? A Well, I immediately ran across the street to where one of these little boys that had testified was that had a bicycle there, and I jumped on the wheel and ran down with the intentions of helping the girl if I possibly could and, in that way, I didn't see where she landed.

Q I see. What was the situation when you got down there? A The man that was on the truck had already picked the girl up, and I believe Mr. Ankelein was in the truck backing it up.

Q Now, did you see any Hudson car? A I did not.

Q Around that place? Did you see any other automobiles beside the—I will withdraw that for the moment. Did you see a Ford car going north? A I did not see it going north, but I saw it stopped on West Shore avenue.

Q Did you see any other automobiles at the scene of that accident when you got there beside the truck and the Ford? A Not that I remember.

Q Was there any other car that came south afterwards? A That I do not know.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q How far up were you, Mr. Olson, when the accident happened? A Approximately a block and a half north.

Q And that would be north, that would be between Beechwood and Elmwood, wouldn't it? A Yes, sir.

Q You live on Beechwood? A Yes, sir.

Q And you were walking down towards Beechwood on the easterly side of West Shore avenue? A Yes, sir.

Q And do you remember when the truck passed you? A Yes, sir.

Q Where were you then, about the same place? A No. I was just about to cross Walnut avenue, just crossing Walnut avenue on West Shore, as it runs into West Shore avenue.

Q You just said Walnut, did you? A Pardon me. I meant Elmwood.

The Court: I think in his direct testimony he said Walnut, too.

The Witness: I wish to correct that.

The Court: You meant Elmwood?

The Witness: I meant Elmwood avenue.

The Court: I see.

Q Did you see the boys playing in the street there? A Yes, sir; I did.

Q They were playing around Beechwood, weren't they? A If I am not mistaken, they were playing between Beechwood and Elmwood avenue.

Q Between those two blocks? A Yes, sir.

Q Or two streets, rather? A Yes, sir.

Q And you saw the little girl come out— A I did.

Q —of Walnut avenue? A I did.

Q Could you see her coming down the hill there when she was coming down the hill, or don't you remember? A Not coming down the hill; the first I saw as she crossed between the sidewalks of West Shore.

Q You saw her as she was crossing between the sidewalk? A Yes, sir.

Q That is along the sidewalk in front of you, that is correct? A Yes, sir.

Q How far down was the truck then, at that time, if you have any idea, if you haven't, do not— A Only in relationship as to where the girl was.

Q Pardon me? A Only in relationship as to where the girl was.

Q Well, had the truck passed at that time, had it passed Beechwood? A It must have.

Q Well, I do not want you to reason what it must have done, but just what you actually saw. A Yes, it had passed Beechwood avenue.

Q Do you understand my—I beg pardon? A It had passed Beechwood avenue when I saw the girl.

Q Could you see the truck, then, plainly? A Yes, sir.

Q About how far past Beechwood avenue had it gotten, if you can give us any idea? A Oh, it was quite near to Walnut avenue.

Q I do not suppose you know definitely, do you? A Not in feet; no, sir.

Q And that, according to you, Mr. Olson, that child came into your view and crossed the sidewalk and crossed West Shore avenue, the first section and the second section? A I would not say crossed the first and second section, no.

Q Well, what do you think? A As far as I can remember, it was approximately halfway out on the second section.

Q So, possibly halfway out, is that it? A Yes, sir.

Q And it came across that distance, across the sidewalk and the first section and out into the second section halfway across that before it was hit? A Yes, sir.

Q And all that time it was in your plain view, wasn't it? A Yes, sir.

Q And there was nothing to prevent anyone who was in that truck from seeing it, so far as you know, was there?

Mr. Coult: I object to that.

A Well, I do not know.

Mr. Coult: I will withdraw it.

Q Was there? A I do not know just what the view was from the truck.

Q Well, there was no—there was no obstructions there, nothing to interfere with the view, were there, or was there? A Not from where I was. I was looking directly ahead.

Q You know the situation there, don't you? A Yes, sir.

Q And you know that, going down West Shore avenue in that direction, there would have been nothing so far as you know to have obstructed the view of that child coming out? A Not on the sidewalk line, no.

Q And not on the street, either, would there? A No, sir.

Q That is so, isn't it? A Yes, sir.

Q Along the curb line—I am showing you Exhibit P. 4—along the curb line between Walnut avenue and Beechwood, there are no trees, I mean along the curb line? A I do not believe there are.

Q And that is true between Beechwood and Elmwood, there are no trees? A No; there are no trees.

Mr. Ward: That is all.

(Witness excused.)

Mr. Coult: Arthur Steinmetz?

ARTHUR MARTIN STEINMETZ, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, Arthur? A In Bogota.

Q Where in Bogota? A 50 Oakwood avenue.

Q And how old are you? A What is that?

Q How old are you? A Thirteen.

Q Do you go to school? A Yes, sir.

Q What class are you in? A First year in high school.

Q And did you see this accident? A Yes, sir.

Q Where were you? A Between Oakwood and Maplewood.

Q That is north or south of Walnut? A South.

Q How far south? A A little over a block; yes, sir.

Q And what were you doing there, Arthur? A Playing football.

Q What was the first you knew about the accident? A I heard a squealing of brakes.

Q Then what did you do? A Then I looked toward the accident.

Q Had you been looking the other way? A No, sir; I was looking that way.

Q What? A No, sir; I was looking that way.

Q You say you looked toward the accident? A Yes, sir.

Q And what did you see? A I saw Violet May Hummers come around the corner and I saw the truck hit her.

Q What is that?

The Court: Raise your voice.

A I saw Violet May Hummers come around the corner and the truck hit her.

Q Now, where was the truck when this collision occurred, Arthur? A A little to the right of the center of the road, or just about straddling the western tar line.

Q And what did the truck do? A It put on its brakes and the driver must have turned to-

ward the right because the skid marks were on a slight angle toward the railroad.

Q Did you see where the truck stopped? A No, sir.

Q What did you do when you saw that happen? A I ran toward the accident.

Q And what did you find when you got there? A They had already taken the girl away, the truck had turned around and taken her.

Q Did you see them get the girl? A Yes, sir.

Q Did that happen while you were running up there? A Yes, sir.

Q Who got her? A The man that was with the driver.

Q Now, when you got up there, how many automobiles were there? A Two.

Q Which were they? A The Ford "coop" and the car that ran over the child.

Q Was there anything else up there? A No, sir.

Q No other cars at all? A No, sir.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q There was a Ford "coop" and the car that ran over the child? A Yes, sir.

Q There, when you came up? A Yes, sir.

Q What child? A Violet May Hummers.

Q And you say the car ran over her? A I would not say that it ran over her.

Q But you just did say it, didn't you, Arthur? A I meant to say it hit her.

Q I beg pardon? A I meant to say it hit her.

Q It hit her? A Yes, sir.

Q Well, is that expression, the car that ran over the child—was that your own expression? A Yes, sir.

Q That you saw the Ford car, and the car that ran over the child? A Yes, sir.

Q Those are your own words? A Yes, sir.

Q And you do not know exactly where that car was that ran over the child after it hit her? A No, sir.

Q Or, I beg your pardon. I mean after it hit her, you do not know where it was? A No, sir.

Q You were playing football, were you— A Yes, sir.

Q —Arthur? And you were not paying any attention to vehicles— A No, sir.

Q —or automobiles on the street? A No, sir.

Q You were to the south upon West Shore avenue, weren't you? A Yes, sir.

Q And the first thing that attracted your attention was when you heard the screech of the brakes? A Yes, sir.

Q And then did you look up? A Yes, sir.

Q And you saw the truck? A Yes, sir.

Q And that was after you heard the screech of the brakes, wasn't it? A Yes, sir.

Q Now, after that, did you see Violet May? A Yes, sir.

Q And it was after that that she came out, wasn't it, out of Walnut avenue? A No. When I first looked up, she was already out of the corner.

Q Oh, she was already out then? A Yes.

Q I understood you to say on your direct examination that you saw Violet May come

around the corner? A Yes, sir; she was just coming around the corner.

Q Did you see her as she came out from Walnut avenue, or not? A No, sir.

Q So you did not see her until after she was out? A Yes, sir; just a little way from the corner.

Q And turning up north? A No, sir; she didn't really turn; she went on a diagonal line, slightly to the north and west.

Q You saw her come around the corner, didn't you? A Yes.

Q Did she come around the corner? Now, what do you mean by that? I will withdraw that. That is not quite fair. I asked you two questions.

The Court: Well, he did testify as to what he **meant.**

Mr. Ward: There were two questions in one, there, sir; that is why I withdraw it.

Q Did she actually come around the corner? A Yes. She turned slightly north.

Q And then you saw the truck hit her? A Yes, sir.

Mr. Ward: I think that is all.

Re-direct examination by Mr. Coult.

Q Arthur, how far was she from the truck when you first saw her? A Well, the truck was straddling the western tar line, and she was quite near the eastern tar line, a little east of it.

Q How many feet away from the truck would you say? A I should say about seventeen or eighteen feet.

Q Now, how was she traveling as to speed? A Well, I could not say.

Q Did you look at the skid marks after the accident? A Yes, sir.

Q Where were they? A Well, they were on—to the western side of the road, and on a slight angle toward the railroad.

Q How far did they go? A I should judge around fifteen feet.

Mr. Coult: That is all.

Re-cross examination by Mr. Ward.

Q Did I understand you to say on a slight angle towards the railroad? A Yes, sir.

Q They went about fifteen feet? A Yes, sir.

Q The car went all the way across Walnut avenue, didn't it? A Not all the way across.

Q Don't you know that? A No, sir.

Mr. Coult: He said, not all the way across.

Mr. Ward: It is rather hard to hear in this room.

Q Not all the way across? A No, sir.

Q Was it in the center of Walnut avenue? A The back part was just about the center of Walnut avenue.

Q So that, although you did not see it stop— A No, sir.

Q —nevertheless, you know that it was not all the way out of Walnut avenue; the back part of it was in what would be the extension of Walnut avenue, the roadway, across West Shore avenue? Is that clear to you? A Yes, sir.

Q What I mean by that? A Yes, sir.

Q Now, are you sure of that? A Yes, sir.

Q And from the time it stopped up to the time you got up there, it had not moved? A Yes, it had moved.

Q Oh, it did move? When did it move? A By the time I was up there, it had already started back to Doctor Dickson's office with the child.

Q It had backed up, had it? A Yes, I think it had.

Q It had backed up? A Yes, sir.

Q When did it back up? A Well, right after the man had got back with the child, he got in the car, and the back backed up.

Q And that was before you got up there? A Yes, sir.

Q Where were you when that happened? A About half way between Walnut avenue and Oakwood avenue.

Q So you did not get halfway up there before the car had gotten out of the position in which it was when it stopped? A Just about half way.

Q That is right, isn't it? A Yes, sir.

Mr. Ward: I guess that is all.

(Witness excused.)

Mr. Coult: William Johnson?

CHARLES WILLIAM JOHNSON, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, William? A Bogota, on Oakwood avenue.

Q Do you go to school? A Yes, sir.

Q What school do you go to? A Bogota High.

Q What class are you in? A Freshman.

Q Did you see this accident? A No, sir.

Q Were you there after it happened? A Yes, sir.

Q What was the first you knew about it? A Well, I was facing south, and when I heard the screech of the brakes, why, I turned around.

Q Just where were you? A I was between Oakwood and Maplewood.

Q And that is south of Walnut avenue? A Yes, sir.

Q You were on West Shore avenue, I suppose? A Yes, sir.

Q What did you do when you heard the screech of the brakes? A Well, I turned around and I saw the car. I saw the—I saw the little girl lying in the road and the car stopped, and I immediately ran up there.

Q And where did the car—where did the truck stop? A Well, it was a little past Walnut avenue.

Mr. Ward: A little what?

Mr. Coult: A little past Walnut avenue.

Q On which side of West Shore avenue? A The right side, to his right.

Q The right? A Yes, sir.

Q And where did Violet May lie in the street? A Well, I couldn't tell you. Near the center of the road.

Q And did you look at the skid marks afterwards? A Yes, sir.

Q Where were they? A To the driver's right, near the railroad.

Q How long were they? A I should judge about fifteen feet.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q Do you mean to the right of where the driver was— A Yes, sir.

Q —William? Do you mean to the right of where the truck was, or, just what do you mean by to the right of where the driver was? A Well, they were where the driver was, where he was driving, on the right side of the road, to his right.

Q Well, were they to the right of where he was driving, or where he was driving? A Where he was driving.

Q Where he was driving? A Yes, sir.

Q Is that what you mean? A Yes, sir.

Q You were down by Oakwood avenue? A Yes, sir.

Q And the first thing that you heard was the— A Screech.

Q —screeching of the brakes? A Yes, sir.

Q And you looked around immediately, didn't you? A Yes, sir.

Q When you looked around immediately, the accident had already happened? A Yes.

Q You are sure about that? A Yes.

Mr. Ward: That is all.

(Witness excused.)

Mr. Coult: George Uppington?

GEORGE PAUL UPPINGTON, called as a witness on behalf of the defendants, being first duly sworn, testifies as follows:

Direct examination by Mr. Coult.

Q Where do you live, George? A Gray street, Bogota.

Q And do you go to school? A Yes.

Q Are you in the high school, too? A No. I am in the public school No. 2, eight grade.

Q How old are you? A Fourteen.

Q George, where were you when this accident happened? A Between Oakwood and Maplewood avenue.

Q What were you doing down there? A Playing football.

Q These other boys who were just on the stand, were they with you? A Yes.

Q What was the first you knew about the accident? A I heard the screeching of the brakes.

Q Then what did you do? A I turned around.

Q What did you see? A Well, the accident had already happened.

Q Yes. A The truck had stopped and Violet May was lying on the side, on the ground.

Q Where was Violet May, in what part of the road? A She was towards the center of the road, just back of the truck.

Q And where was the truck? A The truck had stopped just a little bit beyond Walnut avenue.

Q On what part of the road? A On the right—on the driver's right, nearer the railroad tracks.

Q Near the railroad tracks? A Yes.

Q How much space between that truck and the curb after it stopped? A Well, I do not believe I know.

Q Did you look at the skid marks? A Yes.

Q Where were they? A They were on the back of the truck on the right hand side near the railroad tracks.

Q About how long were they? A About fifteen feet.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q Fifteen feet long? A About.

Q You know what fifteen feet is, don't you,— A I believe I do.

Q —George? Fifteen feet is about from here to you, do you think? A Well, could I just give you a different example? About from the corner of that there railing there to—

Q Do you mean this corner (indicating)? A Yes.

Q From that to you. And that was the length of those skid marks, is that so, about? A That is about that.

Q You observed them and you looked at them closely? A Yes.

Q You looked at them pretty closely? A Yes.

Q And the truck had passed Walnut avenue? A Yes; not much, though.

Q Do you know where the sidewalk would be if it came right down across as a crosswalk across West Shore avenue? A Yes.

Q And the truck was past that spot where the sidewalk and the crosswalk would have been, wasn't it? A Yes.

Q Now, did I understand you to say that you saw the skid marks right up to the place where the truck was stopping, or had stopped, rather? A (No response.)

Q I think you said, to use your expression, up to the back of the truck? A No. I said the skid marks after the car had stopped were to the back of the truck.

Q Went to the back of the truck? Or, one moment.

The Court: Read the answer.

(Answer read.)

Q Were to the back of the truck on the road, up to the truck? A No. They—

Q How far from the truck were they? A I do not know. I could not give you a definite answer.

Q Well, where were they, George, if you saw them? A Well, they ended about—you see, the truck was here, the skid marks were back here about ten feet from the back of the truck, something like that.

Q Well, that would be out in Walnut avenue if Walnut avenue crossed West Shore? A No. It would be on the Walnut avenue side.

Q That would have been where Walnut avenue would have crossed West Shore? A Yes, to the right.

Q If it extended across, is that right? A Yes.

Q How far back north did those skid marks go, up to what point, do you know? A I do not know. I did not look at it.

Q You do not know that? A No.

Q And you were two blocks down? You were between Oakwood and Maplewood; that would be a block and a half down from Walnut, is that right? A About a block.

Q Well, Oakwood is the next street south of Walnut, isn't it? A Yes, sir.

Q And Maplewood is the next street beyond that, isn't it? A A block and a half, that is right.

Q You were a block and a half down, and the first thing you heard was a screech of the brakes? A Yes.

Q And then you looked up, is that right? A My back was fronting it, and I turned around.

Q And as you turned around, of course, you looked and you saw that the truck had stopped at that time? A Yes. The truck had already stopped.

Q And was Violet May back of the truck? A Well, a little to the right of the back wheels, more near the center of the road.

Q I see. But how far back of the truck, about? A Probably about ten feet, something like that.

Q Ten feet. Is that all? A Well, I do not know. I really do not know how far back, I did not look that close, before I got to the scene; when I ran down towards it, the truck had already gone.

Q The truck was already gone before you traveled back this block and a half? A When

I walked—ran towards the accident after it had already happened, whatever you call it, the driver's assistant had picked up Violet May and left for the hospital.

Q Well, do you know where Violet May was when you looked back there? A I do not understand your question.

The Court: Just listen, now, and get the question.

Q After you heard the screech of the brake, you turned around and you looked? A Yes, sir.

Q Is that right? A Yes.

Q And you testified on direct examination that you saw Violet May back of the truck, do you remember that? A Yes.

Q Now, how far back of the truck was she, if you know? A I do not know the exact number of feet.

Q You do not know where she was, do you, George? A Yes. She was—well, there is three blocks of cement the width of the road.

Q Do you know where she was when you looked back there? Do you, or not? A I do not understand the question.

Q Well, when you looked back, do you know where—or, did you see Violet May? A Yes, she was lying on the ground.

Q Yes. In the roadway, is that right? A Yes.

Q Now, do you know where that was? A Yes. Just before—about—a little before the corner of Walnut avenue.

Q A little before you would come into Walnut avenue, is that what you mean, or past the

corner? A Suppose the Walnut avenue runs here, the truck was stopped here, and she was just before Walnut avenue.

The Court: She was to the north of Walnut avenue?

The Witness: Yes.

Q Now, if Walnut avenue ran right across West Shore avenue, would she have been in Walnut avenue or not? A No. She would have been just north of it.

Q A little bit north of it, is that right? A Yes.

Q So that was more than ten feet back of the truck, wasn't it? A Yes.

Q Considerably more than ten feet back of the truck, wasn't it? A Yes.

Q Now, have you told this story before? A No.

Q Never? A No.

Q Did you sign any statement? A Well, I signed a statement.

Q Well, you told it—you mean that you signed a statement without telling your story? A Yes. I told it before.

Q Oh, you did tell it before, then? A Yes.

Q Now, you are sure of that? A Yes.

Q What made you say that you had not told it before? A I did not recollect.

Q You did not recollect signing a statement? A I remember now, all right.

Q You remember now? A Yes.

Q And you signed it for someone from the Public Service? A Yes.

Q And you have read that statement since? A No.

Q You have never read it since? A No.

Q Has it been read to you? A No.

Q You have never seen it since? A No.

Q You have talked about this case, now, to anybody else? A No. I just spoke to Judge Coult this morning.

Q Well, aside from Judge Coult, have you talked to anybody else about the case? A No.

Q When were you served? Were you served with a subpoena? A Yes.

Q When? A This morning.

Q Was that the first? A Yes.

Q Did you talk to the man who served you with the subpoena? A He just asked me a couple of questions, that is all.

Q Pardon me? A He just asked me a question or two, that is all.

Q He asked you a question— A Just one or two.

Q —about this accident? A Yes.

Q And you told him, then, didn't you? Please answer. A Yes. I didn't tell him the whole story. He just asked me where the truck was, and a few questions like that.

Q Well now, who before that? To whom, before that, have you told the story? A Just the man that asked for the statement from the Public Service, and I signed the statement.

Q Do you remember how long ago that was? A Two years ago.

Q Two years ago? A In 1927.

Q Now, haven't you ever seen that statement since you signed it? Just think. A I do not remember of ever seeing it.

Q Wasn't it read to you this morning? A No.

Q Was anything read to you this morning? A No.

Q Where did you have this conversation this morning? A In the room back there.

Q And nothing was read to you at all? A Nothing.

Mr. Ward: That is all.

Re-direct examination by Mr. Coult.

Q Just a minute. You talked to me this morning, didn't you? A Yes.

Q I did not have any papers or show you any papers, did I? A No.

Q How many questions did I ask you? A Only about one or two, about one, something like that.

Q How many? A Maybe one or two.

Q Not over three, were there? A No.

Mr. Coult: That is all.

The Court: All right. We will take an adjournment until 2:05 P. M.

(Recess.)

John A. Quirk, recalled, direct.

AFTER RECESS.

2:05 o'clock P. M.

WILLIAM ANKELEIN, re-called as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. Coult.

Q Mr. Ankelein, a girl by the name of Patricia Irving has testified here that she was four or five yards behind the plaintiff in this case on her scooter coming out of Walnut avenue. Did you see her? A I did not, sir.

Q Did you see any other little girl with a scooter around there? A No, I did not.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q You did not see her at all? A No, sir.

Mr. Ward: That is all.

(Witness excused.)

JOHN A. QUIRK, recalled as a witness on behalf of the defendants, testified as follows:

Direct examination by Mr. Coult.

Q At the time of this accident, Mr. Quirk, did you see any other little girl on a scooter? A No, sir.

John A. Quirk, recalled, cross.

Q Was there any other little girl with a scooter there? A No.

Mr. Coult: Cross examine.

Cross examination by Mr. Ward.

Q Do you mean that there was no other girl there, or you did not see any other girl? A I did not see any other girl there.

Q Well, are you sure there was no other girl there? A I did not see any other girl.

Q You do not know, is that it? A I did not see any.

Mr. Ward: That is all.

Mr. Coult: No questions. That is all. We rest.

Mr. Ward: We rest.

The Court: Any rebuttal?

Mr. Cummins: No rebuttal.

Mr. Coult: Oh, I beg your pardon, sir, I forgot something, if I may put it in now? I want to put in the interrogatories in this case.

The Court: Yes.

Mr. Coult: I am concerned with only one of these, so I will offer the first interrogatory and the answer.

The Court: All right.

Mr. Coult: I will offer in evidence the first interrogatory and the answer to it, verified, the 30th day of August, 1928, by the plaintiff, Violet May Hummers.

First: How did the alleged accident happen?

Interrogatory.

Answer: The automobile of the defendant driven by its employe, William Ankelein, was proceeding at a very high rate of speed southerly along West Shore avenue in the Borough of Bogota, County of Bergen, and State of New Jersey, and struck the plaintiff, Violet May, who was lawfully upon the highway at the jointure of Walnut avenue and said West Shore avenue.

Mr. Ward: With reference to that interrogatory, sir, I would like to call the jury's attention to the fact that it was signed, or, at least, sworn to by William S. Hummers, as next friend of the infant, Violet May Hummers, on the date set forth.

Mr. Cummins sums up for the defendant, William Ankelein.

Mr. Coult sums up for the defendant Public Service.

Mr. Ward sums up for the plaintiffs.

The Court then charged the jury as follows:

80 FEB.T.1931

NEW JERSEY COURT OF ERRORS AND APPEALS

Filed after the Oral Argument by leave of Court.

VIOLET MAY HUMMERS, by WILLIAM S. HUMMERS, her next friend, and VIOLET HUMMERS, his wife, Plaintiffs-Appellants, vs. PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Defendant-Appellee, and WILLIAM ANKELEIN, Defendant-Appellee.	80 (9051) ACTION AT LAW SUPPLEMENTAL MEMORANDUM FOR THE COURT

DEFENDANT-APPELLEE, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, IN FILING THE UNCERTIFIED TRANSCRIPT OF TESTIMONY IS BEING AFFORDED AN UNUSUAL ADVANTAGE

The defendant-appellee, Public Service Electric and Gas Company, appealed from the judgment of the Bergen County Circuit Court in favor of the plaintiffs-appellants, against it. In appealing to the Supreme Court, it prepared the state of the case which included only the strict record plus the charge of the Court. Absolutely no testimony was included in the state of the case in that Court. The Supreme Court reversed the judgment of the Circuit Court.

The plaintiffs-appellants then appealed to this Court and necessarily included in the state of the case only the same record which was before the Supreme Court plus the opinion of the Supreme Court and the grounds for the appeal. It would seem that since the defendant-appellee, Public Service Electric and Gas Company, was responsible for the

of the case in this Court (b

state of the case in the Supreme Court and also for the state of the case in this Court (because of its failure to object in accordance with the provisions of Section 19-a of the Rules of this Court), it should not now be permitted to inject into the record that which it twice chose to omit, especially since the record is not in anyway certified.

This Court has stated that it would not consider evidence which was not properly in the record.

CAPITAL BUILDING AND LOAN ASSOCIATION OF NEWARK v. PESCE, et al., 147 Atl. Rep. 394. (not officially reported).

In this situation the plaintiffs-appellants should be afforded the advantages which accrue to them because of the defendant-appellee's, Public Service Electric and Gas Company's, choice.

McGEARY v. HYDE, 3 N. J. Misc. Rep. 115, (at p. 116).

PYRAMID PETROLEUM PRODUCTS CO. v. ABRAHAM, 6 N. J. Misc. Rep. 811, (at p. 813).

PLAINTIFFS-APPELLANTS COMPLY WITH THE ORDER OF THIS COURT

However, the Court has requested counsel for plaintiffs-appellants to point out wherein in the said uncertified transcript of testimony there is evidence concerning the brakes on the automobile which ran over the infant plaintiff-appellant. Accordingly, the citations from said transcript of testimony follow:

Page 107-lines 29 and 30.

Page 116-lines 39 and 40.

Page 117-lines 12, 13 and 14.

Page 117-line 37, to Page 118-line 7. (This is referred to so the Court (may note how far beyond the child (the truck actually travelled before (stopping.

Page 127-lines 10 to 40, inclusive.

Page 127-lines 10 to 40, inclusive.

Page 128-lines 1 to 3, inclusive.

Page 129-lines 5 to 10, inclusive.

Page 141-lines 9 to 35, inclusive.

Page 167-lines 13 to 15, inclusive.

Page 168-lines 14 to 29, inclusive.

Page 172-lines 28 and 29.

Page 173-lines 27 and 28.

Page 175-lines 33 to 37, inclusive.

Page 186-lines 7 to 19, inclusive, and lines 25 to 40, inclusive.

Page 187-lines 1 to 14, inclusive.

Page 195-lines 28 and 29.

Page 196-lines 28 to 40, inclusive.

Page 198-lines 5 to 8, inclusive, and lines 18 to 22, inclusive.

Page 203-lines 27 and 28.

Page 204-lines 10 to 14, inclusive.

Page 207-lines 38 to 40, inclusive.

Page 208-lines 11 and 12.

Page 210-lines 16 to 22, inclusive.

Page 211-lines 11 and 12.

Page 218-lines 35 and 36.

Page 219-lines 36 to 40, inclusive.

Page 220-lines 8 to 10, inclusive.

Page 221-lines 34 to 40, inclusive.

Page 222-lines 5 to 8, inclusive.

Page 236-lines 10 to 13, inclusive.

Page 238-lines 10 to 12, inclusive, lines 20 to 26, inclusive, and lines 31 to 40, inclusive.

Page 239-Entire page.

Page 240-lines 6 to 18, inclusive.

Page 248-lines 19 to 30, inclusive.

Page 293-lines 12 to 16, inclusive, and lines 27 to 40, inclusive.

Page 297-lines 17 and 18.

Page 306-lines 10 to 40, inclusive.

Page 306-lines 10 to 40, inclusive.

Page 307-lines 1 to 30, inclusive.

Page 378-lines 20 to 30, inclusive.

Page 379-lines 4 and 5.

Page 382-lines 35 to 38, inclusive.

Page 384-lines 6 to 8, inclusive and lines 30 to 32, inclusive.

(These citations are given for the purpose of showing that the defendant-appellee, Public Service Electric and Gas Company, offered testimony as to the inspection of the automobile in question.

Due to the shortness of time and to the desire to avoid prolixity, the actual quotations of testimony have not been set forth.

THE VERDICT OF THE JURY SHOULD BE SUSTAINED BECAUSE THERE IS SUFFICIENT EVIDENCE TO SUPPORT IT.

In

DOOLITTLE v. WILLET, 57 N. J. L. 398, (at p. 399),

Van Syckel, J., speaking for the Court of Errors and Appeals said:

> "This court will not review the finding of facts; if there is any view of the evidence which will sustain such finding the judgment will not be reversed."

There was, however, evidence from which the jury could have inferred that the brakes on the car in question were defective in that they only affected one wheel, as was evidenced by the fact that there were skid marks from but one wheel. In the testimony of Eugene Travers,

Page 306-lines 10 to 40, inclusive.

Page 307-lines 1 to 30, inclusive.

Page 378-lines 20 to 30, inclusive.

Page 379-lines 4 and 5.

Page 382-lines 35 to 38, inclusive.

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Page 127, line 32,

in speaking of skid marks it is said:

"Q And how many were there? A Just one great big long one-",

and, in the testimony of the defendant, William Ankelein, defendant-appellee's, Public Service Electric and Gas Company's, driver, at

Page 297, lines 17 and 18:

"Q And there were skid marks there, weren't there? A There was one skid mark."

The further evidence from which the jury could have concluded that the brakes were defective was that the brakes gripped intermittently.

Page 127, lines 10 to 40, inclusive, and

Page 186, lines 26 to 31, inclusive.

The jury could have also inferred from the evidence before it that the car swerved to the left because of the fact that the brakes gripped only on one wheel.

Page 141, line 10.

Page 196, lines 30 to 32, inclusive.

The jury also could have found from the testimony of William O. McElroy called by the defendant-appellee, Public Service Electric and Gas Company,

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and from the testimony of John Anthony Brady, also called by the defendant-appellee, Public Service Electric and Gas Company,

Page 392, lines 7 to 10, inclusive,

that the defendant-appellee, Public Service Electric and Gas Company knew that the brakes were defective.

In addition, it appears from the pleadings that the defendant-appellee, Public Service Electric and Gas Company, denied

Page 9, lines 16 to 18, inclusive, State of Case,

the allegation concerning defective brakes set forth in paragraph 8 of the complaint

Page 5, lines 5 to 10, inclusive, State of Case.

This denial is tantamount to saying that "we had inspected the brakes on this car and found them to be not defective", thereby presenting to the court and jury the issue as to whether or not the defendant-appellee, Public Service Electric and Gas Company, knew the brakes to be defective. The jury's verdict was the answer.

In this connection it is important to consider that the defendant-appellee, Public Service Electric and Gas Company, found no fault with this allegation of the complaint, requested no bill of particulars, took no exception to the charge of the court with respect thereto, and allowed the issue to go to the jury.

Even if there was a variance between the negli-

gence alleged and the negligence proved, this Court should

gence alleged and the negligence proved, this Court should not now resolve that matter in favor of the defendant-appellee, Public Service Electric and Gas Company, because if the variance were brought to the attention of the trial judge it might have been cured by an amendment.

In

NEUTZE v. ATLANTIC CITY RAILROAD CO., 71 N. J. L. 407 (at p. 408),

Justice Swayze said:

> "It is now argued that there was such a variance between the negligence alleged in the declaration and the negligence proved that the nonsuit should have been granted.
>
> There can be no question that such a variance exists, and if the question had been presented to the trial court an amendment would have been necessary. The question was not, however, presented to the trial court, as will appear from the grounds of the motion as stated by counsel and quoted verbatim above. We ought not, therefore, to review its action. The well-established rule as to bills of exception has been held applicable to a review upon a rule to show cause. Jackson, Administrator, v. Consolidated Traction Co., 30 Vroom 25. And this case has been cited with approval in the Court of Errors and Appeals, in Wallace v. Leber, 36 Id. 195, 198."

Nor will this Court consider any alleged defects in the charge of the Court to which no exceptions in this respect were taken.

AMERICAN PHOTO-PLAYER COMPANY, v. HARRIET AMUSEMENT COMPANY, 3 N. J. Misc. Rep. 558 (at p. 560).

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BONIEWSKY v. POLISH HOME OF LODI, supra,

wherein the Chancellor speaking for this Court said at p. 337:

> "In the late case of State v. Merra, post, p. 361, we recently called upon the judge of the Oyer and Terminer of Essex to certify as to whether or not the verdict rendered by the jury was accurately stated in the state of the case and the printed record submitted to us, and, if not, then what, in fact, that verdict was. And the judge sent us a certificate, accordingly, showing that an inaccurate verdict had been returned and printed, and certifying what the verdict really was.
>
> The cases above cited are criminal ones, but the same rule of course exists in civil causes."

and at p. 338:

> "From the above, it may be deduced that the rule is, that an appellate court, to sustain a judgment, may regard a verdict expressed in untechnical language as truly finding the fact or facts in issue, or may mold a verdict itself, and affirm accordingly; but, where a verdict is to be changed to meet the facts which were introduced by amendment before the trial court, in order to support a judgment which will differ from one which might be entered on the issue sent down in the Circuit record, and which judgment must now be entered upon an amended postea, the appellate court has power to require the judge who tried the case to mold the verdict and return it with such amended postea, so that such proper judgment may be entered."

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BONIEWSKY v. POLISH HOME OF LODI, 103 N. J. L. 323, (at p.p. 336-339)

In any event, if substantial justice is to be done the parties, no advantage should be given one party over the other.

When the jury returned the verdict in this case, the foreman handed to the Clerk a piece of paper upon which was written,

"Verdict for Father & Mother 3,000.
" " Violet May. 10,000.
Verdict against Public Service

No verdict against driver
",

as appears by the annexed copy of the affidavit of Lester S. Mathis, Clerk of the Bergen County Circuit Court.

An effort was made by certiorari to bring this paper to the attention of the Supreme Court but because of certain technicalities, this effort failed. It is submitted that justice requires that plaintiffs-appellants be given the benefit of this Court's consideration of the jury's actual verdict so that real substantial justice may be done the parties.

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verdict returned by the jury, it is submitted that the

verdict returned by the jury, it is submitted that the rule set forth in

DUNBADEN v. CASTLES ICE CREAM CO., 103 N. J. L. 427, (at p. 429 and p. 430),

wherein the Court of Errors and Appeals said:

> "Some courts have held that the failure of a jury to return a verdict against the servant affords no ground to set aside a judgment rendered against the master because the verdict which ignores the servant should not be deemed or construed as a finding of absence of negligence on the part of the servant, but should be regarded as no finding as to the servant. Upon the rendition of such a verdict the case stands as to the servant as if it had never been tried, and the master has whatever right he ever had against his servant. It will be observed that the verdict rendered in the present case is silent as to Grundman. We think that such a verdict should be regarded as no finding against him.",

should apply, and the verdict against the defendant-appellee, Public Service Electric and Gas Company, should be sustained on this further ground.

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

Respectfully submitted,

GEORGE F. LOSCHE

Attorney of Plaintiffs-Appellants.

NEW JERSEY COURT OF ERRORS AND APPEALS

80

VIOLET MAY HUMMERS, by WILLIAM S. HUMMERS, her next friend, and VIOLET HUMMERS, his wife, Plaintiffs-Appellants, vs. PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Defendant-Appellee, and WILLIAM ANKELEIN, Defendant-Appellee.	(9051) ACTION AT LAW AFFIDAVIT

STATE OF NEW JERSEY)
SS.:
COUNTY OF BERGEN)

LESTER S. MATHIS, of full age being duly sworn according to law deposes and says:

1. I am the Clerk of the Bergen County Circuit Court and acted as such at the time of the trial of the above entitled cause before Hon. Edwin C. Caffrey, Judge of the Bergen County Circuit Court.

2. I am now Deputy County Clerk of Bergen County.

3. I was present when the jury returned its verdict in the above entitled cause and received the same. When the jury returned its verdict, the foreman handed me a slip of paper of which the following is a true photographic

NEW JERSEY COURT OF ERRORS AND
APPEALS

VIOLET MAY HUMMINGS, by WILLIAM)
S. HUMMINGS, her next friend, and)
VIOLET HUMMINGS, his wife,)
)
Plaintiffs-Appellants,)
)
vs.)
)
PUBLIC SERVICE ELECTRIC AND GAS) ACTION AT LAW
COMPANY,)
) APPELLATE
Defendant-Appellee,)
) DIVISION
and)
)
WILLIAM AMBLEIN,)
)
Defendant-Appellee.)
)

STATE OF NEW JERSEY)
) ss.:
COUNTY OF BERGEN)

I am the Clerk of the Bergen County Circuit Court and as such I have custody of the records of the proceedings in the above entitled cause before Hon. Edwin C. Gaffney, Judge of the Bergen County Circuit Court.

I am now Deputy County Clerk of Bergen County.

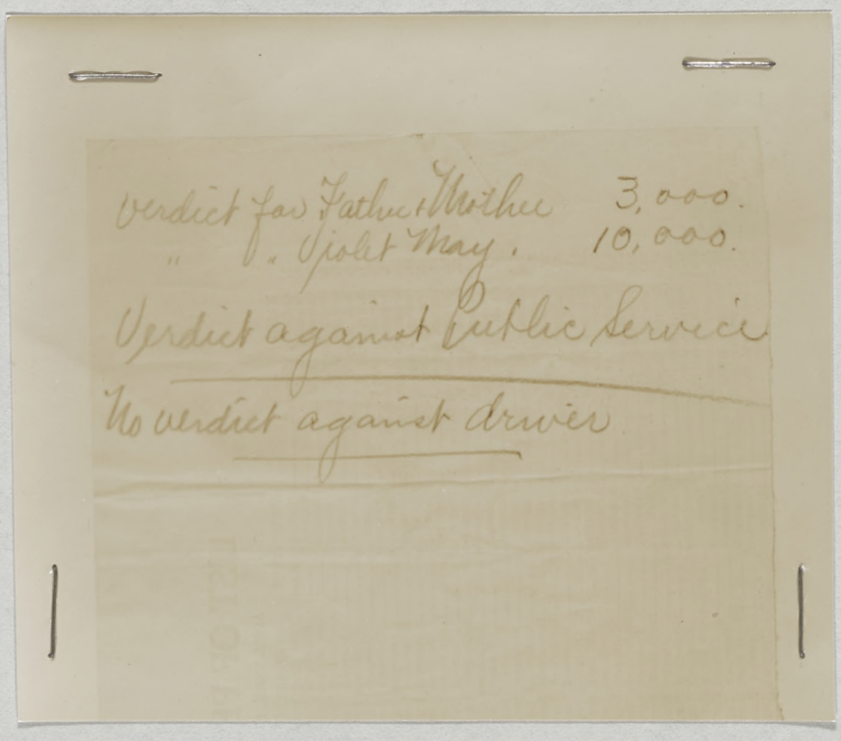
I was present when the jury returned its verdict in the above entitled cause and recorded the same. The jury returned its verdict, the foreman having read the same from a slip of paper to which I affixed the seal of said Court and delivered it to the Deputy Sheriff in charge of the jury.

Sworn to and subscribed before me this 8th day of May, 1961.

Deputy County Clerk

Copy:

copy:


Verdict for Father, Mother 3,000.
" V. Violet May. 10,000.
Verdict against Public Service
No verdict against driver.

This paper was then filed with the filed papers in the above entitled cause in the Office of the Clerk of the County of Bergen and is still there and is now part of the records.

Sworn and Subscribed to)
before me this 21st day)
of February, 1931.)

Lester S. Mathis

)

Louis A. Mounier, Jr.
~~Attorney-at-Law of New~~
Jersey

(The original of this affidavit is filed with the Clerk of this Court.)

copy:

This paper was then filed with the filed papers in the above entitled cause in the Office of the Clerk of the County of Bergen and is still there and is now part of the records.

Sworn and Subscribed to)
before me this 21st day)
of February, 1931.)

Louis A. Mounier, Jr.
Attorney-at-Law of New Jersey

Lester S. Mathis

(The original of this affidavit is filed with the Clerk of this Court.)

80
(9051)

NEW JERSEY COURT OF ERRORS AND APPEALS

VIOLET MAY HUMMERS, &c., et als.

Plaintiffs-Appellants,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, et al.,

Defendants-Appellees.

ACTION AT LAW
SUPPLEMENTAL MEMORANDUM FOR THE COURT

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80 FEB.T.1931

Filed after the Oral Argument by leave of Court.

GEORGE F. LOSCHE
COUNSELLOR AT LAW
BANK OF BOGOTA BUILDING
BOGOTA, N. J.

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Notice of Appeal

NOTICE OF APPEAL

Filed May 31, 1929

BERGEN COUNTY CIRCUIT COURT

Violet May Hummers, by William S. Hummers, her next friend, and William S. Hummers, and Violet Hummers, his wife, Plaintiffs-Appellees, vs. Public Service Electric and Gas Company, Defendant-Appellant, and William Ankelein, Defendant.	Action at Law.

To George F. Losche, attorney of plaintiffs-appellees.

Sir:

Take notice that the defendant Public Service Electric and Gas Company appeals to the New Jersey Supreme Court from the whole of the judgment entered in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company in the above-entitled cause.

Dated, May 25th, 1929.

Yours truly,

HENRY H. FRYLING,

Attorney for Defendant-Appellant

Public Service Electric and Gas Company.

Endorsed: "Service of a copy of the within notice of appeal is hereby acknowledged this 27th day of May, 1929."

GEORGE F. LOSCHE,
Attorney of Plaintiff-Appellee.

SUMMONS

The defendant was duly summoned.

COMPLAINT

Filed June 21, 1928.

BERGEN COUNTY CIRCUIT COURT

Violet May Hummers, by William S. Hummers, her next friend, and William S. Hummers, and Violet Hummers, his wife,
Plaintiffs,
vs.
Public Service Electric and Gas Company,
and
William Ankelein, 34 E. Main Street, Bogota, N. J.,
Defendants.

The plaintiffs who reside in the Village of Ridgefield Park, County of Bergen and State of New Jersey, complain and allege:

FIRST COUNT

1. That at all the times hereinafter mentioned in paragraph 5 hereof, the defendant, Public Service Electric and Gas Company was the owner of a certain automobile bearing New Jersey Registration No. X 16612.

2. That at all the times hereinafter mentioned in paragraph 5, the said automobile was being operated by the defendant, William Ankelein.

3. That all the times hereinafter mentioned in paragraph 5, the defendant, William Ankelein, was an employee of the defendant, Public Service Electric and Gas Company, and engaged in and about the business of the defendant, Public Service Electric and Gas Company.

4. That at all the times hereinafter mentioned in paragraph 5 the defendant, by its employee, the defendant, William Ankelein, was in operation and control of said automobile.

5. That on or about the 5th day of October, 1927, the said automobile came into contact with the person of the plaintiff, Violet May Hummers, at or near the jointure of Walnut avenue and West Shore avenue, both public highways in the said Borough of Bogota.

6. At the time referred to in paragraph 5 hereof, while the plaintiff, Violet May Hummers was lawfully upon the said West Shore avenue, the defendant, William Ankelein, with reckless disregard for the rights and safety of the said plaintiff, Violet May Hummers, so carelessly, recklessly and negligently operated said automobile, that the said defendants thereby caused and permitted said automobile to strike with great force and knock down the said plaintiff, Violet May Hummers, to her great pain, injury and damage.

7. It was the duty of the defendants to operate said automobile at the aforesaid time and place in a careful, prudent manner with said car under control and to yield the right of way to pedes-

trians and persons lawfully on said West Shore avenue, and this duty they owed to the said plaintiff, Violet May Hummers, at the said time and place.

8. The defendants did at the time and place aforesaid operate the said automobile at a reckless and unlawful rate of speed, without warning, without proper brakes, carelessly and recklessly, without regard to the rights of the plaintiff, Violet May Hummers, on said public highway.

9. As result of the defendant's negligence, recklessness and carelessness aforesaid, the plaintiff, Violet May Hummers was knocked unconscious by the automobile owned and operated by the defendants as aforesaid, and the plaintiff, Violet May Hummers, suffered grave bodily injury, to wit: The plaintiff sustained contusions and lacerations of her body and limbs, fractures of the bones of her hips, pelvis and limbs and internal injuries, the exact nature and extent of which are as yet unknown to the plaintiff, all of which caused her, and still cause her pain and deprived her of the normal uses of her body and its members, and hampered her normal bodily movements, and as plaintiff Violet May Hummers is informed and verily believes, will permanently cause her pain and deprive her or hamper her of the normal uses of her body and its members.

10. As a result of the said negligent acts of the defendant as aforesaid, plaintiff, Violet May Hummers, suffered great pain and shock to her nervous system and great mental anguish.

11. By reason of the injuries caused as aforesaid, by the negligence, recklessness and carelessness of the defendants as aforesaid, the plaintiff

Violet May Hummers was confined to her bed for a long period of time and was totally disabled from following her usual activity for a long period of time and is still unable to follow her usual activity.

12. By reason of all of which, as aforesaid, plaintiff Violet May Hummers has been damaged by the defendants in the sum of fifty thousand ($50,000) dollars.

SECOND COUNT

1. Paragraphs 1 to 11 inclusive of the first count are made a part of this count without repeating the same.

2. Plaintiff, William S. Hummers, is the father of Violet May Hummers, the infant plaintiff, and the said Violet May Hummers resides with the said William S. Hummers and is a member of the said William S. Hummers' household.

3. Plaintiff, Violet Hummers, is the mother of Violet May Hummers, the infant plaintiff, and the said Violet May Hummers resides with the said Violet Hummers as a member of the household of the said William S. Hummers.

4. By reason of the injury caused as aforesaid to plaintiff, Violet May Hummers, by the negligence, recklessness and carelessness of the defendants, the plaintiff, William S. Hummers, has necessarily paid, or become liable to pay, large sums of money of medical and surgical attention, aids, devices and medicines and other necessary expenditures so occasioned, and has had to purchase new clothing for the plaintiff, Violet May Hummers, to replace the articles of wearing apparel which were damaged as a result of the negligence of the defendants as aforesaid.

5. By reason of the injuries caused as aforesaid, by the negligence, recklessness and carelessness of the defendants aforesaid, the plaintiff, William S. Hummers and Violet Hummers, have been deprived of the services of the said Violet May Hummers and will be permanently deprived of the normal services of Violet May Hummers.

6. As a result of the said negligent acts of the defendants as aforesaid, the plaintiff, William S. Hummers, suffered great pain and shock to her nervous system and great mental anguish.

7. As a result of the said negligent acts of the defendants as aforesaid, the plaintiff, Violet Hummers, suffered great pain and shock to her nervous system and great mental anguish.

8. By reason of all of which as aforesaid, plaintiff Violet Hummers and William S. Hummers, have been damaged by the defendants in the sum of twenty thousand ($20,000) dollars.

Wherefore, Violet May Hummers, by her next friend, William S. Hummers, demands damages in the first count: In the sum of fifty thousand ($50,000) dollars, and the plaintiff, William S. Hummers and Violet Hummers, demand damages in the second count: In the sum of twenty thousand ($20,000) dollars; together with all costs and disbursements.

WILLIAM S. HUMMERS,
Individually and as next friend of
Violet May Hummers.

GEORGE F. LOSCHE,
Attorney for Plaintiffs.

New Jersey State Library

ANSWER OF WILLIAM ANKELEIN

Filed June 8, 1929.

Defendant, William Ankelein, residing in the Borough of Bogota, County of Bergen and State of New Jersey, answering the complaint, says:

1. He admits the allegations contained in paragraphs one, two, three and four of the first count.

2. He denies the allegations contained in paragraphs five, six, seven, eight, nine, ten, eleven and twelve of the first count.

3. Defendant hereby repeats his answers to paragraphs one to eleven of the first count as his answers to paragraph one of the second count.

4. Defendant has no knoweldge or information sufficient to form a belief as to the allegations contained in paragraphs two and three of the second count, and therefore denies the same.

5. Defendant denies the allegations contained in paragraphs four, five, six, seven and eight of the second count.

FIRST SEPARATE DEFENSE.

Plaintiff was guilty of contributory negligence.

HART & VANDERWART,
Attorneys of Defendant.

(Endorsed) "Copy received as of time June 29, 1928.

GEORGE F. LOSCHE,
Attorney of Plaintiffs."

ANSWER OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY

Filed June 29, 1928.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, County of Essex and State of New Jersey, answering the plaintiff's complaint filed herein, says:

FIRST COUNT

1. It has no knowledge of the truth of the allegations contained in paragraphs one, two and five sufficient to form a belief, and it therefore denies the same.

2. It denies the allegations contained in paragraphs three, four, six, seven, eight, nine, ten, eleven and twelve.

SECOND COUNT

1. In answer to paragraph one of this count, it repeats its anwers to paragraphs one to eleven inclusive of the first count and makes them part hereof.

2. It has no knowledge of the truth of the allegations contained in paragraphs two and three sufficient to form a belief, and it therefore leaves the plaintiffs to their proof.

3. It denies the allegations contained in paragraphs four, five, six, seven and eight.

FIRST OBJECTION TO SECOND COUNT

It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiffs herein, and it reserves the right to

move to strike out the same at the trial of this suit.

SECOND OBJECTION TO SECOND COUNT

It avers that the complaint contains a joinder of causes of action, and it reserves the right to move to strike out the same at the trial of this suit.

FIRST DEFENSE TO FIRST AND SECOND COUNTS

It avers that the negligence of the infant plaintiff Violet May Hummers contributed to the happening of the said alleged accident in that she negligently and carelessly exposed herself to the risk of such an accident and neglected to take precautions to guard and protect herself against such an accident; moreover, at the time and place mentioned in the complaint, she was conducting herself in a careless, reckless and negligent manner and was not exercising care or taking proper precautions, and that she carelessly, recklessly and negligently placed herself in a position of danger at the time and place mentioned in the complaint while the automobile was in such position as to endanger her safety.

HENRY H. FRYLING,
Attorney of Defendant.
Public Service Electric and Gas Company.

REPLY TO ANSWER OF DEFENDANT WILLIAM ANKELEIN

Filed August 31, 1928.

Plaintiff denies every allegation in the answer of the defendant, William Ankelein.

GEORGE F. LOSCHE,
Attorney for Plaintiffs.

(Endorsed) "Service of the within reply is hereby acknowledged this 30th day of August, 1928, as of being in time.

HART & VANDERWART,
Attorney of Defendant,
William Ankelein."

REPLY TO ANSWER OF DEFENDANT PUBLIC SERVICE ELECTRIC AND GAS COMPANY

Filed September 11, 1928.

Plaintiff denies every allegation in the answer of the defendant, Public Service Electric and Gas Company.

GEORGE F. LOSCHE,
Attorney for Plaintiffs.

(Endorsed) "Service of the within reply is hereby acknowledged this 30th day of August, 1928, as of being in time.

HENRY H. FRYLING,
Attorney of Defendant
Public Service Electric and Gas Company."

VERDICT OF JURY

BERGEN COUNTY CIRCUIT COURT

Violet May Hummers, by William S. Hummers, her next friend, and William S. Hummers, and Violet Hummers, his wife, Plaintiffs, vs. Public Service Electric and Gas Company, Defendant.	Action at Law.

The above case having been heard before Honorable Edwin C. Caffrey, Judge of the Circuit Court, and on May 13, 1929, the jury rendered a verdict in favor of the plaintiff Violet May Hummers in the sum of ten thousand dollars ($10,000) and in favor of the plaintiff William S. Hummers in the sum of three thousand dollars ($3,000) against the defendant, Public Service Electric and Gas Company and in favor of William Ankelein, defendant, no cause for action.

RULE FOR JUDGMENT

Violet May Hummers, by William S. Hummers, her next friend, and William S. Hummers, and Violet Hummers, his wife, Plaintiffs, vs. Public Service Electric and Gas Company and William Ankelein, Defendants.	Action at Law	10

The above cause having been tried before Honorable Edwin C. Caffrey, Judge of the Circuit Court, and a jury in the presence of the respective attorneys of May 8, 9, 10, 13 and 14 and 20 the jury returned a verdict in favor of the plaintiff and against the Public Service Electric & Gas Company, defendant, in the sum of ten thousand dollars ($10,000) in favor of Violet May Hummers and in the sum of three thousand dollars ($3,000) in favor of William S. Hummers and Violet Hummers.

Rule entered May 15, 1929.

On motion of 30

GEORGE F. LOSCHE,
Attorney for Plaintiff.

JUDGMENT

BERGEN COUNTY CIRCUIT COURT

Violet May Hummers, by William S. Hummers, her next friend, and William S. Hummers, and Violet Hummers, his wife, Plaintiffs, vs. Public Service Electric and Gas Company, Defendant.	Action at Law On Verdict.

George F. Losche, attorney for plaintiffs.

Amount of damages in favor of Violet May Hummers ten thousand dollars ($10,000). Amount of damages in favor of William S. Hummers and Violet Hummers three thousand dollars ($3,000). And costs one hundred eight dollars fifty-eight cents ($108.58).

Damages in favor of Violet May Hummers	$10,000.00
Damages in favor of William S. and Violet Hummers	3,000.00
Costs	108.58
	$13,108.58

Judgment signed and entered May 15, 1929, at 9 A. M.

CERTIFICATE OF CLERK

United States of America,
State of New Jersey, } ss.
County of Bergen.

I, James W. Mercer, Clerk of the County of Bergen aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas holden therein, the same being courts of record with a seal,

Do Hereby Certify, that the foregoing are true copies of the original papers filed in the case and rule for judgment and copy of the record of judgment as the same remains on file and of record in my office at Hackensack.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said courts and county at Hackensack, this 17th day of June, 1929.

JAMES W. MERCER,
County Clerk.

(seal) Deputy County Clerk.

CHARGE TO JURY

Caffrey, J.: Ladies and gentlemen of the jury, we have come to the close of a case which has taken a number of days to try and, recounting some of the witnesses who have been called in rebuttal, or after the main case, you have listened to some thirty-eight people testifying. In addition to that you have had photographs and an opportunity to view the scene. Able counsel have presented the respective sides of this case, both in their conduct of the trial and in the summation and, therefore, I am relieved of a lengthy discussion, if discussion at all, as to the evidence which has gone before.

At the outset, I am going to emphasize to you that under your oaths you are the triers of fact. You are to take the rule of law as laid down by the Court, but with respect to the facts you are the judges, and that carries with it a right of consideration of the evidence with a view to determining its credibility, its value, and, in coming to the consideration of that, you have a right to consider the interest that a witness has in this case; you have a right to determine if you can from the evidence whether there is any bias or prejudice and, of course, in arriving at the value of a witness' testimony, you may properly consider his attitude and demeanor as you have observed them.

This suit is based upon an accident that occurred on the 5th of October, I believe, 1927, on West Shore avenue, Bogota. There seems to be no dispute that the car operated by the defendant Ankelein and owned by the defendant Public

Service Gas & Electric Company was proceeding in a southerly direction on West Shore avenue, and the plaintiff Violet May was going west on Walnut street on her scooter. There is considerable evidence with respect to exactly where this accident happened and how it happened. There is much testimony with respect to skid marks and the exact place of contact and the position of the automobile while it was riding on West Shore avenue; also, as to whether or not proper observations were made and, if they were made, whether the girl could have seen the truck or the driver of the truck could have seen the girl. There has been some discussion as to the condition of the trees and leaves and weeds, which all have some bearing on this case, because it relates to the place in question.

Of course, in determining whether or not an act of negligence has been committed, it is a necessity that you consider all of the circumstances, because when we come to consider whether an act is one of negligence, we cannot with a single word define it, nor can we define it in any words precisely, because what is a negligent act today might be a very careful one tomorrow. So, of necessity, we look to the circumstances that existed at that time. Therefore, in determining whether or not an act of negligence has been committed, you ask yourselves whether or not, under the circumstances, the person who has been charged with the negligent act acted as a reasonably prudent person would have acted under the circumstances then existing.

As I said before, there has been a conflict of testimony. You have heard several witnesses

who had placed this automobile riding on the wrong side of the road. You have had other witnesses who placed it riding on that part of the road which it belonged. You have heard some testimony with respect to the speed; I think one man testified the car was going forty miles an hour. Then, on the other hand, you have had evidence offered by the defendants who testified that by the nature of a mechanical device this car was incapable of making more than twenty-two miles an hour. You also have evidence with respect to the position of the skid marks. Some witnesses have placed the marks, to use their language, at the left side of the road or the east side; others have placed them on the west, turning to the curb. There seems, however, to be a general agreement that the brakes were applied. As to whether they were applied in time, whether the brakes were defective, of course, those factors are considerations for you.

Now, there are three plaintiffs in this case and two defendants. Violet May Hummers is suing by her next friend, her mother and father are suing by reason of the fact of parentage to recover expenses incurred in their efforts to cure the infant plaintiff, and, of course, Violet May is suing or, rather, suit instituted on her behalf for compensatory damages to make her whole in so far as money will do. She is suing for the personal injury, the pain and suffering incident to that, and the permanent injury which has come as a result of this accident. William Ankelein is made a party defendant because he was the operator of the truck. The Public Service Electric & Gas Company is made defendant because it was the owner of the truck, and it is

the contention of the plaintiffs that by reason of the relationship of master and servant the Public Service should respond in damages for the wrongful acts of the driver.

Now, of course, under the law, irrespective of any relationship between the man who is driving an automobile and anyone else, if he were guilty of such negligence as we could say was the proximate cause of the plaintiffs' injuries, that person would be liable; and then, on the other hand, if we determine from all of the evidence that this man was engaged at the time of the accident as a servant of the Public Service Gas & Electric Company, and that he was engaged in the scope of his duty, then, if you find that he was guilty of negligence and such negligence was the proximate cause of the injury, of course, his master is responsible for his acts. There is a phase of the case relating to contributory negligence about which I will speak later. Now, whether or not Mr. Ankelein was engaged in his master's business is a question of fact as well as a question of law. Of course, it is your duty to decide from all of the evidence in the case whether or not the defendant Ankelein was engaged in the work of his master, the Public Service. Our Court of Errors and Appeals, the court of last resort, has said:

> "Acts are authorized under the meaning of the law, where the master commands the particular act in question, or the act is such as may be reasonably done and is, in fact, done in order to carry out the master's general instructions, or to accomplish a com-

manded act. A general command may be inferred from conduct or usage."

We have another proposition with relation to that, if an agent be empowered to do something and there be a deviation, our Court of Appeals, speaking of that phase, has said this:

"It is to be observed that it is not the circumstance of a deviation made from the direct route that determines the question of liability of a master for the tortious act of his servant, but, rather, whether the acts of deviation in themselves were so disconnected from the master's service as to exonerate him from liability."

So, taking all of the evidence with respect to what Mr. Ankelein was doing, it is for you to determine whether at the time of the happening of this accident he was so engaged as to render or not render the Public Service Gas Company liable.

Now, under the law, a mere happening of an accident raises no presumption of negligence; on the other hand, we rather presume against negligence. Therefore, the burden of proving negligence rests upon the one who asserts it. And when we consider the case in the light of all of the testimony, you must decide from all of the evidence whether or not the defendants or defendant, or either of them, has been guilty of negligence. As I said before, you must look to the circumstances in the given case, and also view the course of conduct of the parties with respect to the circumstances of the given case.

Now, this infant plaintiff has been severely injured. There seems to be no serious dispute that

as a result of this accident she suffered fractures in the pelvis, and I think there is another fracture of the femur. In addition to that, there is evidence as to her condition of shock; there is a tilting of the hip; of the pelvis; there is a curvature of the spine, and there is a lameness due to a two or two and a half inch shortening, to be exact, I cannot recall. The witnesses who testified on her behalf, the medical doctors, you will recall, gave their understanding of the case both from their treatment and in the form of hypothesis or assumed facts, and they have given you their opinion as to the future of this child.

You have heard the testimony of the physicians called on behalf of the defendant. You have heard Dr. Washington and Dr. Ruch, I think, this morning, and you heard Dr. Conover. Now, that is defendants' medical evidence in the cause, and if there be a disagreement with respect to the medical testimony, of course, that, too, coming back to our first premise, is for you to decide as to which of the evidence you will believe, which you will accept, and which, in your judgment, will determine the nature and the seriousness and the character of the injuries sustained by this girl.

Now, this accident happened on the public highway. Of course, the little girl had a right to be there, and so did the driver of this automobile. Under the traffic act, "every driver of a vehicle when entering or crossing any public road, street, highway or turnpike shall grant the right of way at all times to any vehicle approaching from his right." Now, the evidence in this case indicates that the driver of this automobile was approaching so that he was on this girl's right. I might

say with respect to that reference to the traffic law, a violation of the traffic law itself is not conclusive of negligence on the part of the one who violated it, if there be a violation, but it is a circumstance which you may consider.

Now, in considering the facts in this case, if you conclude that there is no liability on the part of the defendants or either of them, then, of course, your labors are over, your verdict ought to be in favor of the defendants. In other words, if you conclude that there has been no negligence on the part of the defendants which shall be looked upon as the proximate cause of this girl's injury, then your verdict ought to be in favor of the defendants, and that verdict will end your consideration of the case. But, on the other hand, if you conclude that the defendants are guilty of negligence, then the next consideration is the course of conduct of the girl herself. In other words, what was her course of conduct with respect to the happening of this accident? What did she do? I believe at the time of the accident this girl was some ten years of age.

Mr. Coult: Twelve.

Mr. Ward: Twelve, sir.

The Court: Twelve at the time of the accident?

Mr. Ward: Yes, sir.

The Court: I again refer to the Court of Appeals discussing the question of contributory negligence on the part of a child: "That the degree of care required of a child old enough to be capable of negligence is such as is usually exercised by persons of similar age, judgment and experience, and that, in order to determine whether a child old enough to be capable of negligence has

been guilty of contributory negligence, it is necessary to take into consideration the age of the child and its experience and capacity to understand and avoid dangers to which it is exposed in the actual circumstances and situation under investigation." That, of course, is a question for you to decide, being a fact element in the case.

Now, if you conclude that the defendants were guilty of negligence and then, in addition to that, you conclude that the girl herself was guilty of contributory negligence, despite the negligence of the defendants, if you find the girl was guilty of contributory negligence, then, of course, no recovery can be had for the plaintiffs. Elaborating on the question of contributory negligence, our upper court said: "To disentitle a plaintiff to recover, it must not only appear that he was negligent, but his negligence proximately contributed to the negligence of the defendant that caused his injury." So, therefore, in considering contributory negligence, we ought to consider the negligence of the defendants. Now if, after considering all of the evidence in this case, you conclude there was no negligence at all on the part of the defendants, and that the accident came about as the result of the conduct of the young girl herself, of course, in that event, there would be no recovery; but, on the other hand, if you conclude that the plaintiffs have made out a case in the sense that they have established liability through negligence on the part of the defendants or either of them, and you conclude from the evidence that she was not guilty of contributory negligence in the language that I have defined it, then your next question is that of

damages. Damages, as I said before, are to be given to this girl on the basis of what injuries she has sustained. Our court has said, recovery for damages in a case such as this are the natural and proximate effects, the natural effects are those which might reasonably be foreseen, those which occur in an ordinary state of things, and the proximate effects are those between which and the tort there intervenes no culpable and efficient agency. As I said before, in some detail, I enumerated the physical injury that this girl sustained. There is one matter which I will direct your attention to, because I cannot see that there is any evidence in this case that connects it with the claim, keeping in mind, as I said before, we are concerned with natural results based upon an antecedent cause. Now, there has been some testimony by the mother as to the attempt on the part of the child at self-destruction. Frankly, I can see no evidence in this case, on the basis of cause and effect, that what this youngster tried to do at that time had anything to do with the antecedent cause, namely, the accident. So, therefore, if you have to consider the question of damages, I am going to ask you to exclude that phase of it from your deliberations.

Now, as I said before, this case is one essentially of fact. Your oaths have cast upon you a duty to determine the facts as you understand them. Money is not to be given to a plaintiff because of sympathy and, on the other hand, money is not to be withheld for any reason. If you feel that the plaintiff is entitled to recover, your judgment should be based upon all of the evidence in such sum as you believe the evidence warrants

you in setting the figure. On the other hand, if you conclude that the plaintiff has failed to sustain the burden imposed upon her, or upon them, then, of course, your verdict will be in favor of the defendants.

This case has taken considerable time to try and extended over your term of service. It is important to the defendants, and it is important to this young girl. There will have to be more than one verdict. As I said, there are two defendants and three plaintiffs. In rendering your verdict, keep the parties in mind. The parents are to be paid on the basis of money expended, and if we have any evidence before us as to probable expenses in the future, of course, that is to be taken into consideration. The girl's damages are as the result of her physical injury, speaking as of that time, the suffering endured, and the permanency involved.

Take this case and, despite the lateness of the hour, I am going to ask you to give it your very earnest consideration and arrive at a verdict according to your understanding of the evidence.

(Officer sworn and jury retired at 4:40 o'clock P. M.)

Mr. Coult: I want an exception to that portion of the Court's charge in which the Court, after discussing the question of negligence on the part of the defendant, said to the jury that if an act of negligence was proved which was the proximate cause of the injury, they should then proceed to the question of damages, on the ground that in that portion of the charge, the Court charged out contributory negligence.

And I want an exception to that portion of the Court's charge in which the Court said that the jury could conclude—no, that if the jury did conclude that the accident was all the fault of the plaintiff, there could be no recovery, and that if the jury found it was the combined fault of the defendant and the plaintiff, there could be no recovery; that if the jury found neither of the foregoing, and that the accident was the sole fault of the defendant, there should be a recovery, on the ground that the charge excluded injuries which might be the proximate result of a pure accident, for which neither party was responsible.

I want to ask an exception to that portion of the Court's charge in which the Court said, after discussing the duty on the plaintiff to sustain the charge of negligence by the greater weight of the evidence, that if, on the other hand, the plaintiffs have failed to sustain the burden on them, there should be a verdict for the defendant, since that excluded a defendants' verdict in the event that the defendant had sustained the burden of proving contributory negligence.

GROUNDS OF APPEAL

Filed June 25, 1929
NEW JERSEY SUPREME COURT

Violet May Hummers, by William S. Hummers, her next friend, and William S. Hummers, and Violet Hummers, his wife, Plaintiffs-Appellees, vs. Public Service Electric and Gas Company, Defendant-Appellant.	Action at Law. On Appeal from Bergen County Circuit Court. Grounds of Appeal.

To George F. Losche, Esq., attorney of plaintiffs-appellees.

Sir:

Take Notice that the following are the grounds of appeal which the defendant-appellant Public Service Electric and Gas Company will urge why the judgments heretofore rendered against it in the above-entitled cause should not be reversed, set aside and for nothing hidden:

1. The Bergen County Circuit Court erred in giving judgment for the plaintiffs and against the defendant Public Service Electric and Gas Company.

2. Because the verdicts in favor of the defendant William Ankelein against the plaintiffs established that he, the said William Ankelein, was not guilty of negligence,

and, as he, the said William Ankelein was the servant of the Public Service Electric and Gas Company the judgments ought, by the law of the land, to have been in favor of the Public Service Electric and Gas Company.

3. Because the verdicts in favor of the defendant William Ankelein established that he was not guilty of negligence, and that the plaintiffs and each of them were guilty of contributory negligence, and the judgments in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company are erroneous and illegal.

4. Because the verdicts in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company are contrary to law.

Dated, June 18, 1929.

Your truly,

HENRY H. FRYLING,

Attorney of Defendant-Appellant

Public Service Electric and Gas Company.

Endorsed: "Service of a copy of the within grounds of appeal is hereby acknowledged this 21st day of June, 1929.

GEORGE LOSCHE,

Attorney of Plaintiffs-Appellees."

Notice of Appeal from Supreme Court and Grounds

NOTICE OF APPEAL FROM SUPREME COURT AND GROUNDS

No. 34, January Term, 1930

NEW JERSEY SUPREME COURT

Violet May Hummers, by William S. Hummers, her next friend, and Violet Hummers, his wife, Plaintiffs-Appellants, vs. Public Service Electric and Gas Company, Defendant-Appellee, and William Ankelein, Defendant.	Action at Law. On Appeal from Judgment of Supreme Court Reversing Judgment of Bergen County Circuit Court.

To Henry H. Fryling, Attorney of Defendant-Appellee, Public Service Electric and Gas Company, or, To Whom It May Concern:

Please Take Notice that the plaintiffs in the above entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause in the Supreme Court on the 4th day of September, 1930, on the following ground, to wit:

(1) Because the Supreme Court erred in giving judgment to the defendant, Public Service

Electric and Gas Company, instead of to the plaintiffs, in that

(a) The judgment of the Bergen County Circuit Court against the defendant, Public Service Electric and Gas Company was legal.

(b) Even if the verdict had exonerated the defendant, William Ankelein, the judgment of the Bergen County Circuit Court would still be valid.

Respectfully yours,
GEORGE F. LOSCHE,
Attorney of Plaintiffs-Appellants.

RULE OF REVERSAL AND REMITTITUR

NEW JERSEY SUPREME COURT

Violet May Hummers, by William S. Hummers her next friend and William S. Hummers and Violet Hummers, his wife, Plaintiffs-Appellees, vs. Public Service Electric and Gas Company, Defendant-Appellant, and William Ankelein, Defendant.	Action at Law. On Appeal from the Bergen County Circuit Court.

The court having heard the arguments of counsel, and having inspected the judgment and proceedings removed by the appeal in this cause, and having duly considered the grounds of appeal,—

It Is, on this 4th day of September, Nineteen hundred thirty, Ordered that the said judgment of the Bergen County Circuit Court be in all things reversed, set aside and for nothing holden, and that the said cause be remitted to the Bergen County Circuit Court to be proceeded in according to law.

Entered September 4th, 1930.

On motion of
HENRY H. FRYLING,
Attorney of Defendant-Appellant.

A true copy,
FRED L. BLOODGOOD,
Clerk.

Supreme Court Opinion

NEW JERSEY SUPREME COURT

No. 34, January Term, 1930

Violet May Hummers, et al. vs. Public Service Electric and Gas Co., et al.	Appeal from Bergen Circuit Court.

Argued before Gummere, Chief Justice, and Justice Campbell.

For the appellant Public Service Electric and Gas Company, Henry H. Fryling.

For the respondents, George F. Losche.

PER CURIAM

This is an appeal by the Public Service Corporation from a judgment entered against it and in favor of the plaintiffs. The suit was brought to recover compensation for personal injuries received by Violet May Hummers, an infant, who while riding on a scooter bicycle was struck and severely injured by an automobile truck owned by the corporation and driven by its employee, the defendant Ankelein, and also for the expenses and losses incurred by her father as the result of the injuries to his child. The case of the plaintiffs was based upon the contention that the accident occurred through the negligent driving of Ankelein, and that the Public Service Corporation, as his master, was responsible for his negligence. The jury returned a verdict in favor of the infant plaintiff for $10,000, and in favor of her father for $3000, against the defendant Public Service Electric and Gas Company, and in favor of the defendant Ankelein, finding no cause of action as against him. The Court charged the jury as the

law of the case that the Public Service Corporation was made a defendant because it was the owner of the truck, and that the contention of the plaintiffs was that by reason of the relationship of master and servant the Public Service Corporation should respond in damages for the wrongful acts of the driver. The Court then proceeded as follows: "If you determine from all the evidence that this man Ankelein was engaged at the time of the accident as a servant of the Public Service Corporation, and that he was engaged in the scope of his duty, then if you find that he was guilty of negligence and such negligence was the proximate cause of the injury, of course his master is responsible for his acts. It is your duty to decide from all the evidence in the case whether or not the defendant Ankelein was engaged in the work of his master, the Public Service Co., in such a way as to render the Public Service Co. liable for his negligent act."

The verdict returned by the jury against the Public Service Co., is clearly contrary to the law of the case as stated by the Court in its charge to the jury; that is, that the company was only responsible in case Ankelein while engaged in its service negligently caused the accident which is the basis of the present suit. A verdict in favor of the driver was, by necessary implication, a declaration by the jury that he was not guilty of any negligence which was the producing cause of the accident. The verdict of the jury imposing liability upon the corporation, although there was no negligence on the part of the driver, being illegal, the judgment entered on that verdict is also illegal. **Musto v. Mitchell,** 146 Atl. 212.

The principal ground of appeal being that the verdict of the jury and the judgment entered thereon were contrary to law, and that contention being well founded for the reason stated, the judgment under review will be reversed.

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FEB.1.1931

Filed after the Oral Argument by leave of Court.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

VIOLET MAY HUMMERS, by William S. Hummers, her next friend, and VIOLET HUMMERS, his wife, *Appellants,* *vs.* PUBLIC SERVICE ELECTRIC AND GAS COMPANY and WILLIAM ANKELEIN, *Appellees.*	*Action at Law.* *No. 80, February Term, 1931.*

SUPPLEMENTAL REPLYING MEMORANDUM FOR APPELLEES.

The above-entitled case was orally argued on February 13, 1931, at the bar of this Court. The judgment of the Supreme Court reversing that of the Bergen County Circuit Court placed the reversal upon the ground that the verdict was inconsistent and illegal, in that upon allegations of joint negligence of Public Service Electric and Gas Company and its servant, William Ankelein, it found in favor of the plaintiffs against the corporate defendant, and in favor of the individual defendant, who was driving the truck involved in the accident for the corporate defendant.

In the brief served by appellants in this Court, the judgment of the Supreme Court reversing that of the Circuit Court was attacked upon the ground that the charge of the Court and the allegations of the pleading and the evidence in the case would have permitted a finding against the corporate defendant and in favor of the individual defendant, upon the ground of defective brakes.

The testimony had not been included in the State of Case before the Supreme Court, nor was it included in the original State of Case before this Court. At the oral argument, appellees' counsel, having served appellants several days before the bringing on of the oral argument with printed transcripts of the testimony, and having furnished like printed transcripts thereof to this Court, and having notified appellants that they were requested to point out *any* testimony in the printed transcript supporting the claim of the negligence of the company because of defective brakes, moved this Court to permit an amendment of the State of Case by including therein said printed transcript of the testimony.

Appellants' counsel, after discussion, consented thereto, and in response to a question from the Court, stated that he did not challenge the correctness or authenticity of the transcript. This Court thereupon permitted said transcript to be received as part of the State of Case in this Court, and upon motion of appellants' counsel therefor allowed him ten days from said 13th day of February, 1931, within which to furnish in typewriting his designation of the places in the transcript which supported his statement in his brief and oral argument that the testimony showed a defective condition of the brakes, and further declared that he was to circulate this typewritten brief among the members of the Court, and also serve a copy thereof upon counsel for appellees, and that counsel for appellees would be allowed five days from and after such service thereof to reply thereto.

Enclosed in a letter dated February 21, 1931, but the post-mark upon the envelope of which shows it to have been post-marked in Hackensack at 6 P. M. on February 23, the typewritten

brief of appellants reached appellees' counsel on the morning of February 24, 1931. Appellees' counsel was astonished to find that instead of its being confined to pointing out the places in the transcript which appellants' counsel thought referred to the matter of defective brakes, it attempted to re-argue the matter of the propriety of considering the transcript of the testimony to be admitted into the case, notwithstanding the consent of appellants' counsel thereto given in open court. It also contained a considerable amount of matter in the way of an attack upon the verdict as it is conclusively established to have been rendered by the record returned by the trial court into the Supreme Court, and which is contained without objection or exception in the State of Case in this Court.

The same matter which is there attempted to be argued was the subject-matter of a writ of certiorari sued out of the Supreme Court when the main case was pending therein and as yet unargued. The certiorari proceedings were duly listed on the calendar of the Supreme Court for argument, and on the same being called for argument in the Supreme Court, counsel for appellants openly abandoned said certiorari proceedings, and thereafter the main case was heard in the Supreme Court, resulting in the judgment now before this Court on appeal.

This statement of the facts with respect to that situation is sufficient without further argument to demonstrate the impossibility of interfering at this time in this Court with that phase of the case.

* * * * * * * *

In their brief, appellants have attempted to point out wherein in the transcript of testimony there is evidence which they conceive concerned the brakes on the automobile with which the infant appellant collided.

Before dealing with the matter of this testimony, it is desired to state parenthetically that the only portion of the complaint which appellants contend would warrant a verdict against the corporate defendant and one which at the same time exonerated the individual defendant is the eighth paragraph thereof, which is found on page five of the State of Case. This paragraph reads in full as follows: "8. The defendants did at the time and place aforesaid operate the said automobile at a reckless and unlawful rate of speed, without warning, without proper brakes, carelessly and recklessly, without regard to the rights of the plaintiff Violet May Hummers on said public highway."

A reading of the above paragraph of the complaint demonstrates that there is no charge that the defendant Public Service Electric and Gas Company either knowingly or negligently furnished an automobile with defective brakes to Ankelein. There is no charge that anything was negligently attributed to the defendant company disconnected from the negligence of the individual defendant. The charge is that *defendants operated* the automobile "without proper brakes, carelessly and recklessly." Now, inasmuch as defendant company only *operated* the car by and through its servant Ankelein, and the charge is that both defendants operated the car without proper brakes, carelessly and recklessly, it follows that a verdict finding the defendant company guilty of negligence in that regard can only be predicated on the negligence of Ankelein, and if

he be held non-negligent, this would likewise establish the non-negligence of the defendant company.

Inasmuch as the operation of the car was solely the conduct of the servant, the case is governed by *Vaniewsky* v. *Demarest Brothers Company*, 8 N. J. Adv. Rep. 13; 148 Atl. 17, which case was affirmed by this Court at this term in a *per curiam* opinion not yet reported.

It will therefore be perfectly manifest that there is not the slightest shred of pleading in this case upon which a verdict exonerating the individual appellee and convicting the corporate appellee could be rested, and consequently this Court might well affirm the judgment of the Supreme Court without the necessity of looking into the testimony at all.

It was deemed, however, that inasmuch as appellants had asserted in their brief that there was evidence which would have supported such a separated verdict if the pleadings would have warranted it, this Court should be permitted to have the opportunity of looking into the evidence and seeing how hollow and baseless such statement is.

It will be observed on looking into this evidence that the whole theory upon which the case was tried was that the negligent *operation* of the automobile caused the accident. So far as the pleadings are concerned, the one and only allegation as to improper brakes is that the defendants operated the automobile without proper brakes. There is not the slightest reference to a *separate* charge of negligence against the defendants in having knowingly or negligently furnished a car with defective brakes, but simply that they operated the car so. Of course, the only way the

defendant company could operate the car with defective brakes was through the individual defendant, and the car might have been furnished to him in perfect condition and have been operated by him with defective brakes without the slightest knowledge thereof or opportunity therefor on the part of defendant company, and without the slightest negligence on its part. It is trite law that the pleading will be taken most strongly against the pleader.

As to the trial of the case, the one and only theory was the negligent operation of the driver. Plaintiffs did not by a single word of testimony challenge the condition of the brakes, and a reading of the entire book of testimony will demonstrate that such challenge was never even faintly suggested. Defendant was not called upon to and did not expressly mention the condition of the brakes. All the evidence as to skid-marks was introduced to show the position of the car on the road at the time of the happening of the accident and thereafter, and the character of its operation by Ankelein. The break in the skid-marks was expressly stated to show that the driver had applied and then released the brakes, and this was explained by his testimony that when the car hit the curb, his foot slipped off the brake. This testimony will be found on page 315 of the State of Case, where, commencing at line 12, the following occurs:

> "Q Now, did you release your brakes after that? A Why, my foot slipped off the foot brake when my front wheel touched the curb; whether it was excitement to get out of the car, or what, I do not know.
>
> Q Yes. A But my foot got off the foot brake and I just rolled slowly, you know; the car just rolled down to where it stopped, see?"

Whatever evidence there was in the case as to the brakes was fully demonstrative of the fact that they worked. The driver's companion said his attention was called to the happening when the driver jammed the brakes on. The mechanic witnesses for the defendant called to show the condition of the governor, swore that the whole car, which, of course, included the brakes, had been examined immediately before and immediately after the accident and was in good condition. No witness for plaintiffs stated that anything whatever was the matter with the brakes. Any verdict for the plaintiffs, therefore, on the theory of defective brakes would be against the theory upon which the case was tried, outside the pleadings, without evidence to support it, and based on fantastic conjecture only. Furthermore, the evidence shows the car was new in May or June of the year in which the accident happened; the time of the happening of the accident having been in October. (See State of Case, p. 269.)

Furthermore, the evidence is absolutely conclusive that if the brakes had been in perfectly sound condition, the accident would have happened in precisely the same way in which it did happen, since the evidence of the driver and the only other witness to the accident is conclusive to the effect that the girl rushed so rapidly at the car that from the time of her heaving in sight to the time of the happening of the accident about as much time elapsed as one witness called a second, and as would be consumed by a wave of the arm.

It is perfectly obvious, therefore, that the condition of the brakes not only was not the proximate cause of the accident, but that they bore no causal relation whatever to the accident; and whether the brakes were in good condition or not

is an irrelevant inquiry, since the happening of the accident was in no way caused by, attributable to, or avoidable by the good or bad condition of the brakes under the circumstances.

* * * * * * * *

In the brief of appellants in this Court, counsel gives citations of evidence concerning the brakes by pages and lines only, and states that "due to the shortness of time and to the desire to avoid prolixity, the actual quotations of testimony have not been set forth." It would seem that ten days would have been ample time in which to get ready a typewritten brief for the use of the Court, and to have set forth the relevant parts of the testimony therein: an inspection of the citations will show that it would not have tended to undue prolixity to have set them forth in the brief in full, and would certainly have added greatly to saving the time of the judges in their consideration of the case.

I think the true reason for not setting them forth is that if they were all collected and placed in sequence before the Court, their utter insufficiency would have been too clearly demonstrated.

The testimony on pages 107, 116, 117, 118, 125, 141, 167, 168, 172, 173, 175, 186, 195, 203, 204, 207, 208, 210, 211, 218, 219, 220, 221, 222, 236, 248, 263, 269, 293, 297, 306, 307, which are the only references appellant cites, with the exception of pages 127, 128, 129, 238, 239 and 240, which exceptions I shall quote in full hereinafter, consists of citations which all bear upon the question of whether or not there were skid-marks there, and the screeching or squeaking of the brakes, and the location of the truck after the accident.

The fact established, if any can be considered as established by this evidence, as to the existence of the skid-marks on the street, which was undisputed, and the screeching or squeaking of the brakes, is that the brakes did act and hold—not that they did not. If the driver released them after applying them, the fault, if any there was, was in their operation, not in their condition.

Even if there was a possibility of holding that the accident might with equal probability have been due either to negligent operation or improper brakes, appellants would fail in their action, since the burden was cast upon them by the law to show which of the two was the cause. That this is the law is clearly established by this Court in the case of *Hummer* v. *Lehigh Valley R. R.*, 75 N. J. L. 704.

Argument that there was only one skid-mark, and that consequently the brakes only held on one wheel and thereby caused the auto truck to swerve around, is the most illuminating contention in appellants' brief. It shows counsel's consciousness of the utter weakness of his cause, and the sheer necessity to grasp at straws. It is supported neither by the facts nor the law. The plaintiffs themselves in their testimony conclusively established that there were the marks of two wheels, and what was the distance between the two marks. It is established in the testimony of the very witnesses avouched as showing that there was only one skid-mark that they meant the skid-marks of only one car. It is further established by all the evidence in the case that if the car turned, it turned away from and not toward the oncoming child, and consequently the fact of the car's swerving around was rather preventive than causative of the accident.

The exception to the general observation with respect to the application of the evidence found in the citations of appellants' counsel will now be set forth by quoting the testimony in full. The first is that of Eugene Travers, commencing on page 127, and proceeding as follows:

"Q Did you see any marks there, Eugene? A Yes, sir; I did.

Q Where were those marks? A They were over on the left-hand side, the skid-marks, black skid-marks.

Q Can you tell us anything more about those marks, what kind of marks they were? A Well, they were black, like where the man had left off his brakes.

Q What? A Left his brakes off, leave them off, and put them on again, you know. They were black.

Q Left them off and put them on again? A Yes.

Q Where did those marks start? A They started up near Beechwood, nearer Beechwood.

Q Where did they end? A They ended down near Walnut avenue.

Q Were there any other cars there excepting— A No.

Q —these marks about which you have told us? A There was just those black skid-marks.

Q And how many were there? A Just one great big long one—

Q Well, was there just— A —where they left off, the brakes left off.

The Court: Never mind that. Never mind what caused it. Just tell us what you saw there.

The Witness: Well, I saw these black skid-*marks*.

Q Can you tell us any more about what kind of marks they were? A They were black. They were very black, the skid-marks were."

And again on page 129, the same witness was interrogated and answers as follows:

> "Q Do you know how long those skid-marks were there? A About two weeks.
> Q And were there any other skid-marks there during that time? A No, there wasn't."

This testimony has been quoted in full because it is avouched by appellants in their brief as being "evidence from which the jury might have inferred that the brakes on the car in question were defective in that they only affected one wheel, as was evidenced by the fact that there were skid-marks from but one wheel." Counsel quotes Travers as saying, page 127, line 32, "Q And how many were there? A Just one great big long one."

All that it is necessary to do is to set out, as I have just done, the context of the lines quoted by appellants in their brief, to show that there was the skid-mark of only one wheel, to manifest the utter hollowness of such contention, since both examining counsel and the witness throughout the entire testimony both speak of skid-marks, and never use the singular, except in the quotation in appellants' brief; and after having stated that there was just one great big long one, Travers stated, on page 128, as quoted above, "They were black. They were very black, the skid-marks were." It is clearly manifest that the witness was intending to say that no other car had made skid-marks at this place, but that there existed there only the skid-marks of the car in question, and his statement that the marks there were black, very black, "the skid-marks were," clearly indicates the force with which the brakes must have been applied and must have held.

Appellants further use this testimony of Travers as a basis for the suggestion that the jury might have concluded therefrom that the brakes were defective and that the brakes gripped intermittently, and that the car swerved to one side because of the fact that the brakes caught on only one side.

A reading of the context of the testimony of Ankelein clearly shows that when he answered to the question, "And there were skid-marks there, weren't there?" that "there was one skid-mark," he clearly meant to say that having looked at the marks on the street there was only the skid-marks of one car at that place. This will be made manifest by referring to page 266 and other pages of his testimony, in which he clearly sets out that there were skid-*marks* on the road.

I think it was in one of the opinions of the Supreme Court of the United States, where in giving the reason for the rule that positive testimony, other conditions being equal, was to be preferred to negative testimony, the Court used language of this purport: that while it is quite possible that a person may forget that something has happened, it is quite impossible for him to remember a thing that never occurred. I use this language of the Supreme Court of the United States as a prelude to the quotation of the testimony of Mr. Hummers, the plaintiff, himself, found on pages 238, 239 and 240, of the Transcript of Testimony (and as his wife also says, on pages 248, 249, 250 and 259, which pages I shall not quote in full, as she merely testifies to the effect that she accompanied her husband and actually sought for and found the skid-marks on the road):

"Q Mr. Hummers, after this accident, on the day of the accident, did you make any observation with reference to skid-marks? A I did, that evening.

Q What did you see? Just describe to the Court and jury? A I went down to the scene of the accident, naturally, that evening, I knew nothing about it until afterwards, and I went down to view what the situation was, and how it could possibly have happened, and the only thing left for me to see beyond a bunch of youngsters hanging around and talking about it was the skid-marks that was there.

Q Where did you see those skid-marks? A They began about forty feet north of Walnut avenue, north of the curb line, and they ran down to a point possibly to the middle of the street, I would say, the skid-marks.

Q The middle of what street? A Middle of Walnut avenue.

Q You mean Walnut avenue, if projected across West Shore? A That is correct.

Q It would be about the middle of Walnut avenue. What then? A I simply paced them off to get a measurement of how far the car skidded, to get an approximate speed of what the car must be going.

Mr. Coult: I object to that.

Q Did you pace those marks off? A I paced them off to the extent of walking them off.

Q What did you ascertain by that? A They were about ten of my paces, about thirty feet.

By the Court.

Q You said they began forty feet north of Walnut? A Yes, sir. The total skid-marks were about forty feet, though, about thirty to forty feet; the skid-marks were not one unbroken streak, they seemed to have varied a trifle; they began, of course, and then they stopped, and began again and stopped; evidently, he was taking off his brakes and putting them on.

Mr. Coult: I move that be stricken out.

The Court: Strike it out.

By Mr. Ward.

Q Now, they began, you say, thirty or forty feet north of Walnut avenue? A They began about forty feet north of the intersection of Walnut avenue.

Q I see. A That would make it about ten or fifteen feet.

Q And they continued to where, on and off, as you have described? A They continued, on and off, brokenly, until about the middle of the intersection of Walnut avenue.

Q Were there any beyond that? A Not beyond that point; no, sir.

Q And, with reference to the particular sections of cement, where were these skidmarks? A They evidently began about—

Q Not what they evidently— A They began ten feet, eight to ten feet east, or, rather, west of that one dividing line of the cement, and they curved easterly in, brokenly, of course, but they curved in towards the west side—the east side of Walnut avenue.

Q And how close to the east side of Walnut avenue did they come at the nearest point? A They come within two feet, possibly, of that line.

Q Within two feet of that line? A Yes, sir.

Q And they were broken, as you say? A They were broken, evidently, intermittent."

* * * * * * * *

Only one other matter has to be noted before concluding this already lengthy brief, and that is the argument in appellants' brief that it may be inferred from the testimony of the mechanics employed by and who testified on behalf of Public Service Electric and Gas Company that the company knew that these brakes were defective—and at this point it might also be well to mention that something is said in appellants' brief to the effect that the condition of the brakes was an issue in

the case, because the witnesses for the company had testified with respect to them.

Taking up the latter of these suggestions first, the only testimony which these witnesses gave with respect to their examination of the car, and indeed the only reason for their being called as witnesses, as appears by the testimony, was that as to the condition of the *governor* on the car. No specific question was asked them with respect to the brakes or any other portion of the car except the governor, and no cross examination of them was indulged in with respect to any other portion of the car.

They did, however, state that they examined the car just before the accident and just after it, and that the car was in good condition. By what process of reasoning it can be deduced from testimony of men who examined the car and swore that it was in good condition, that the brakes were not in good condition, I am at a loss to know. And, further, by what process of reasoning it can be deduced that the company knew the brakes of the car were in bad condition, when those who examined it found it in good condition, and must so have reported to the company, is likewise an enigma to me.

The whole result of the testimony of these witnesses, with not the slightest evidence from those of the appellants or any other witnesses in the case that the brakes were not in proper condition, is to render it impossible for any jury to find either that the brakes were not proper or that the accident happened because of their improper condition.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

WILLIAM H. SPEER,
Attorney for and of Counsel
with the Appellees.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

VIOLET MAY HUMMERS, by William S. Hummers, her next friend, and VIOLET HUMMERS, his wife, *Plaintiffs-Appellants,* *vs.* PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Defendant-Appellee,* *and* WILLIAM ANKELEIN, *Defendant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Defendant-Appellee.

Statement of Facts.

This is an appeal by the plaintiffs' from a judgment of the Supreme Court reversing judgments in favor of the plaintiffs recovered against the Public Service Electric and Gas Company in the Bergen County Circuit Court.

The suit was brought to recover compensation for personal injuries received by Violet May Hummers, an infant, who, while riding on a scooter bicycle was struck and injured by an automobile truck owned by the defendant corporation and driven by its employee, the defendant, Ankelein, and also for the expenses and losses incurred by her father and mother as the result of the injuries to their child. The case of the

plaintiffs' was based upon the contention that the accident occurred through the negligent driving of Ankelein and that the defendant corporation, as his master, was responsible for his negligence. The jury returned a verdict in favor of the infant plaintiff for $10,000.00; and in favor of her father for $3,000.00; against Public Service Electric and Gas Company and in favor of the defendant Ankelein, finding no cause of action as against him. A copy of the verdict is included in the printed State of Case on page twelve.

On the appeal from the Bergen Circuit Court to the Supreme Court the Public Service Electric and Gas Company, defendant-appellee in this court, raised four grounds of appeal which were argued under two headings and which will be argued in their respective order hereafter.

COMMENT.

We have examined carefully the brief served upon us by the attorneys for the appellants as it recites in several places matters which are untrue and have no bearing upon this court on this appeal. We desire at this time to call the court's attention to page two of the appellants' brief. Lines five to eleven state:

> "The jury brought in a verdict of 'No verdict' as to the defendant, William Ankelein, which was moulded by the Court into a verdict of no cause for action, and in favor of the plaintiffs and against the defendant, Public Service Electric and Gas Company, for $10,000 for the infant, and $3,000, for her father."

The foregoing paragraph is untrue and the verdict of the jury has been set out by the appellant in its printed State of Case in this court and

appears on page twelve thereof. An examination discloses that the verdict of the jury was in the sum of $10,000 in favor of the plaintiff, Violet May Hummers and in the sum of $3,000 in favor of the plaintiff, William S. Hummers, against the defendant, Public Service Electric and Gas Company, and in favor of William Ankelein, defendant, no cause for action. There likewise appears in other parts of the brief statements which are incorrect and particularly the argument raised by the appellants under point two found on page fourteen of their brief. Reference is there made to certain certiorari proceedings. While this court is not concerned with what may have happened in the certiorari proceedings in the Supreme Court, because of the reference to them made by the appellants in their brief we desire to state the following as facts, which can be verified upon an examination of the records of the Supreme Court.

After the verdicts were rendered in the Bergen County Circuit Court, the Public Service Electric and Gas Company, one of the defendants in that action, filed an appeal to the New Jersey Supreme Court. The plaintiffs-appellants in this cause applied to Mr. Justice Parker who granted a writ of certiorari directed to the Bergen County Circuit Court commanding that the true record of said judgment in said cause, of the Bergen County Circuit Court of the 13th day of May, 1929, with all things touching or concerning the same, particularly with respect to the said William Ankelein, be sent under the hand and seal of said court to the Justices of our Supreme Court of Judicature of the State of New Jersey on the 1st day of October, 1929.

For some unknown reason this writ was served upon the Bergen County Clerk. Mr. Doremus,

Deputy County Clerk of Bergen County, a gentleman who is about eighty years of age and who has since been retired because of physical disability, received the original writ. He certified to certain papers, the contents of which we had no definite information relative thereto, but a copy of a paper which was entitled, verdict of the jury, was sent to us by the attorneys for the plaintiffs, who were the prosecutors in the certiorari proceedings. The contents of the papers received by us were untrue and did not recite the verdict of the jury in this cause. The defendant-appellee herein, applied to Mr. Justice Parker for an order allowing the taking of depositions under the writ of certiorari on the grounds that the Bergen County Clerk had not certified to the correct contents of the judgment record and the verdict of the jury as appeared of record in the minutes of the Bergen County Circuit Court. Mr. Justice Parker called our attention to the fact that the writ was directed to the Bergen County Circuit Court and that the return should have been made by Edwin C. Caffrey, Judge of the Bergen County Circuit Court. The writ of ceriorari was called to Judge Caffrey's attention and he thereupon made his return to the Supreme Court. An examination of that return discloses that the verdict of the jury as appears on page twelve of the printed State of Case herein was the verdict of the jury as appears upon the records of the Bergen County Circuit Court and as certified to by Judge Caffrey in his return to the Supreme Court in accordance with the mandate of the writ. Upon the argument of the certiorari proceedings before the Supreme Court, the printed State of Case of the plaintiffs contained copies of the papers certified to by the Bergen County Clerk. It was called to the attention of the attorneys for the

plaintiffs that Judge Caffrey had made his return as commanded by the writ of certiorari and an examination of the files of the Clerk of the Supreme Court verified this fact. The return of Judge Caffrey was produced in court and the plaintiffs abandoned the certiorari proceedings.

It is therefore, improper, in the first instance, for the appellants in this case to make any reference to the certiorari proceedings as they are no part of the record or the printed State of Case on this appeal, and in the second instance, the statements contained in the brief of the appellants herein as to the certiorari proceedings are untrue as an examination of the records of the Supreme Court will disclose.

The grounds of appeal of the appellants are as follows (pp. 29 and 30, printed State of Case):

> "(1) Because the Supreme Court erred in giving judgment to the defendant, Public Service Electric and Gas Company, instead of to the plaintiffs, in that
>
> (a) The judgment of the Bergen County Circuit Court against the defendant, Public Service Electric and Gas Company was legal.
>
> (b) Even if the verdict had exonerated the defendant, William Ankelein, the judgment of the Bergen County Circuit Court would still be valid."

In the Supreme Court the grounds of appeal raised by the defendant, Public Service Electric and Gas Company were four in number and argued under two headings.

In the Supreme Court, grounds numbers one, two and three were as follows:

> "1. The Bergen County Circuit Court erred in giving judgment for the plaintiffs and against the defendant Public Service Electric and Gas Company.

2. Because the verdicts in favor of the defendant William Ankelein against the plaintiffs established that he, the said William Ankelein, was not guilty of negligence, and, as he, the said William Ankelein was the servant of the Public Service Electric and Gas Company the judgments ought, by the law of the land, to have been in favor of the Public Service Electric and Gas Company.

3. Because the verdicts in favor of the defendant William Ankelein established that he was not guilty of negligence, and that the plaintiffs and each of them were guilty of contributory negligence, and the judgments in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company are erroneous and illegal."

Those grounds of appeal raised the question of the legality of the judgment in law against the Public Service Electric and Gas Company in the face of the judgment exonerated its servant or agent, the driver of its automobile, William Ankelein, and were identical in form as those raised in this court in the case of *Goekel, et al.* v. *Erie R. Co.,* 100 N. J. Law 279, 126 Atl. 446, and the question presented was whether or not the verdicts were justified strictly on the record.

Ground number four on the appeal to the Supreme Court was as follows:

"4. Because the verdicts in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company are contrary to law."

The case was argued in the Supreme Court before Chief Justice Gummere and Mr. Justice Campbell and in a *per curiam* opinion that court stated that the principal ground of appeal being that the verdict of the jury and the judgment thereon were contrary to law and that contention

being well founded for the reason stated, the judgment under review will be reversed.

In its opinion the Supreme Court said (p. 32, State of Case):

> "The Court charged the jury as the law of the case that the Public Service Corporation was made a defendant because it was the owner of the truck, and that the contention of the plaintiffs was that by reason of the relationship of master and servant the Public Service Corporation should respond in damages for the wrongful acts of the driver. The Court then proceeded as follows: 'If you determine from all the evidence that this man Ankelein was engaged at the time of the accident as a servant of the Public Service Corporation, and that he was engaged in the scope of his duty, then if you find that he was guilty of negligence and such negligence was the proximate cause of the injury, of course his master is responsible for his acts. It is your duty to decide from all the evidence in the case whether or not the defendant Ankelein was engaged in the work of his master, the Public Service Co., in such a way as to render the Public Service Co. liable for his negligent act.'
>
> The verdict returned by the jury against the Public Service Co., is clearly contrary to the law of the case as stated by the Court in its charge to the jury; that is, that the company was only responsible in case Ankelein while engaged in its service negligently caused the accident which is the basis of the present suit. A verdict in favor of the driver was, by necessary implication, a declaration by the jury that he was not guilty of any negligence which was the producing cause of the accident. The verdict of the jury imposing liability upon the corporation, although there was no negligence on the part of the driver, being illegal, the judgment entered on that verdict is also illegal. *Musto* v. *Mitchell,* 146 Atl. 212."

It is apparent from an examination of the opinion that the Supreme Court did not pass upon the grounds of appeal raised under point one, which were whether or not the verdicts were justified strictly on the record.

The errors assigned being so closely related and dealing with the same proposition will therefore be argued by us together.

POINT 1.

The judgment of the Supreme Court reversing the judgments entered on the verdicts rendered in the Bergen County Circuit Court should be affirmed because:

> "(a) The Bergen County Circuit Court erred in giving judgment for the plaintiffs and against the defendant Public Service Electric and Gas Company.
>
> (b) Because the verdicts in favor of the defendant William Ankelein against the plaintiffs established that he, the said William Ankelein, was not guilty of negligence, and, as he, the said William Ankelein was the servant of the Public Service Electric and Gas Company the judgments ought, by the law of the land, to have been in favor of the Public Service Electric and Gas Company.
>
> (c) Because the verdicts in favor of the defendant William Ankelein established that he was not guilty of negligence, and that the plaintiffs and each of them were guilty of contributory negligence, and the judgments in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company were erroneous and illegal.
>
> (d) Because the verdicts in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company were contrary to law."

It therefore becomes necessary to examine the complaint filed in the cause to ascertain the allegations of negligence charged against each of the defendants.

Paragraph one of the first count of the complaint alleges that the defendant Public Service Electric and Gas Company was the owner of a certain automobile (p. 3).

Paragraph two alleges that the automobile was being operated by the defendant, William Ankelein.

Paragraph three alleges that the defendant, William Ankelein, at the time of the accident was an employee of the defendant Public Service Electric and Gas Company and engaged in and about the business of that defendant.

Paragraph four alleges that at the time of the accident the defendant, by its employee, the defendant, William Ankelein, was in operation and control of said automobile.

Paragraph five alleges that said automobile came in contact with the person of the infant plaintiff (p. 4, State of Case).

Paragraphs six, seven and eight of the complaint are set out in detail as follows:

> (p. 4) "6. At the time referred to in paragraph 5 hereof, while the plaintiff, Violet May Hummers was lawfully upon the said West Shore avenue, *the defendant, William Ankelein,* with reckless disregard for the rights and safety of the said plaintiff, Violet May Hummers, so carelessly, recklessly and negligently operated said automobile, that the said defendants thereby caused and permitted said automobile to strike with great force and knock down the said plaintiff, Violet May Hummers, to her great pain, injury and damage. (Italics ours.)

7. It was the duty of the *defendants* to operate said automobile at the aforesaid time and place in a careful, prudent manner with said car under control and to yield the right of way to pedestrians (p. 5) and persons lawfully on said West Shore avenue, and this duty they owed to the said plaintiff, Violet May Hummers, at the said time and place.

8. The *defendants* did at the time and place aforesaid operate the said automobile at a reckless and unlawful rate of speed, without warning, without proper brakes, carelessly and recklessly, without regard to the rights of the plaintiff, Violet May Hummers, on said public highway." (Italics ours.)

An examination of these last three paragraphs discloses that none of the allegations therein charged are directed solely against this defendant-appellee. Paragraph six alleges that the *defendant, Ankelein,* with reckless disregard for the rights and safety of the said infant plaintiff, so carelessly, recklessly and negligently operated said automobile, that the said defendants thereby caused and permitted the said automobile to strike the said infant plaintiff. Paragraph seven alleges that it was the duty of the *defendants* to operate the said automobile in a careful, prudent manner with said car under control and to yield the right of way to pedestrians and persons lawfully on said street, and this duty they owed to the said plaintiff. Likewise paragraph eight is directed to the *defendants* jointly, and alleges that the *defendants* did operate the automobile at a reckless and unlawful rate of speed, without warning, without proper brakes, carelessly and recklessly, without regard to the rights of the said infant plaintiff.

It was urged that there was a distinction between the case at bar and the case of *Goekel* v. *Erie R. Co.*, *supra*, for the reason that in the Goekel case the duty of care and performance on the part of each was not identically the same, and the allegations of negligence charged against the railroad company being separate and distinct from those charged against the engineer in charge of its locomotive and train, the verdicts in that case exonerating the engineer and holding the railroad company responsible, were sustained on appeal. In the *Goekel* decision, in discussing the case there presented, Mr. Chancellor Walker intimated that where two are sued as joint tortfeasors and the doctrine *respondeat superior* applies, and the duty of care is identical in the case of each defendant, as, for instance, where the servant is driving the motor car of his master in the latter's business and carelessly and negligently collides with a third person, causing damage, the master, being responsible for the servant's act, is liable as well as the servant.

That reasoning was likewise referred to in the case of *Dunbaden* v. *Castles Ice Cream Co.*, (E. & A. 1927), 103 N. J. Law 427; 135 Atl. Rep. 886, where the jury failed to return a verdict against a servant in a suit against both the master and servant based upon the doctrine of *respondeat superior*, but returned no verdict against the servant. While in that case the court held that upon the rendition of such a verdict the case stands as to the defendant's servant as if it had never been tried, it discusses a line of reasoning raised by the attorneys for the master relative to a verdict which holds the master liable on the doctrine of *respondeat superior*, and acquits the servant. The point raised was that such verdict is equivalent to a finding that no cause of action

exists against the master and will not support a judgment against the master. The following excerpt is taken from the reported case.

> "Some of the leading cases are Pangburn *v.* Buick Motor Co., 211 N. Y. 228, 105 N. E. 423; Doremus *v.* Root, 23 Wash. 710, 63 P. 572, 54 L. R. A. 649; D. B. Loveman Co. *v.* Bayless, 128 Tenn. 307, 160 S. W. 841, Ann. Cas. 1915 C, 187; Fimple *v.* Southern Pacific Co., 38 Cal. App. 727, 177 P. 871; Williams *v.* Hines, Director General, 80 Fla. 690, 86 So. 695; Southern Railway Co. *v.* Harbin, 135 Ga. 122, 68 S. E. 1103, 30 L. R. A. (N. S.) 404, 21 Ann. Cas. 1011. In the case last cited the verdict was set aside and a new trial granted."

This rule of law has met the approval of the majority of the courts of the various states of our country in which the point has been raised.

A recent case covering the point involved herein was that of *Southern Railway Company* v. *Davenport*, 148 S. E. Rep. 171, decided May 15, 1929 by the Georgia Court of Appeals. The suit was a joint action against the railway company and its engineer for the negligent infliction of personal injuries upon the plaintiff. The petition properly construed most strictly against the plaintiff shows that the injuries sued for were caused by the negligence of the engineer. Furthermore, upon the trial of the case there was no evidence authorizing a finding that any other employee or agent of the railway company was guilty of any negligence that contributed to the plaintiff's injuries. Verdicts having been recovered against the railway company alone, and the jury having exonerated the engineer, and it being apparent that the accident happened solely in consequence of the engineer's negligence, the court held that a verdict finding the engineer not liable, but finding in favor of the plaintiff and

against the railway company, was unauthorized, and should be set aside, citing *Southern Railway Co.* v. *Harbin*, 135 Ga. App. 122; 68 S. E. 1103; *Salmon* v. *Southern R. Co.*, 137 Ga. 636, 73 S. E. 1062.

In the case of *Walker* v. *St. Louis-San Francisco Railway Co.*, 108 So. 388, (Supp. Ala. 1926) plaintiff's intestate sued the defendant company and the engineer in charge of the engine which caused the injuries resulting in the death of the decedent. The first count of the complaint was struck out by the court. Count 2 was for the subsequent negligence of the engineer after discovery of the peril of the intestate. The third count charged that the defendants wantonly and wrongfully caused said engine to run upon or against, or strike, plaintiff's intestate. The fourth count charged each defendant with being a joint tort feasor and causing the injury and death through a servant or agent "of defendants acting within a line and scope of his authority as such servant or agent of defendants wantonly and wrongfully * * * allowing said locomotive engine to run upon or against, or strike plaintiff's intestate." The plaintiff recovered a judgment in the court below, the jury having found a general verdict against the railway company, sued jointly with the engineer, and exonerated the engineer. The trial court granted ~~plaintiff~~ defendant railway company's motion for a new trial, and the ~~defendant~~ plaintiff appealed. The appellate court affirmed the judgment of the trial court granting a new trial. In its opinion the court stated (p. 388):

> "It is settled law by the decisions of a majority of the states as well as the United States Supreme Court that, when the master is sued jointly with his servant for the misfesance or malfeasance of said servant, and is liable for the conduct of said servant under

> the doctrine of respondeat superior, a verdict in favor of such servant entitles the master to have the verdict against him set aside."

In the case of *Williams* v. *Hines*, Director General of Railroads, *et al.*, 86 So. 695, (Supreme Fla. 1920), the appellate court affirmed the action of the trial court in granting the motion of the defendant Hines, as Director General of Railroads, for the entry of a judgment in favor of that defendant notwithstanding the verdict in favor of the plaintiff. The Director General of Railroads, and the engineer in charge of the train, had been sued jointly by the plaintiff who had been a passenger on one of the trains in charge of the Director General, and he received certain injuries. At the trial the jury rendered a verdict against the defendant Hines and in favor of the plaintiff Henry Williams, and also in favor of the engineer, the defendant Drew Williams. The court in passing upon the question involved says (p. 698):

> "Where the jury, however, have all the evidence before them and there is no conflict whatever as to the acts of the engineer, it would, in the words of the judge already quoted in a similar case, be 'monstrous' to say that the engineer was blameless, but his master, who was only liable because of his acts, by virtue of a mere presumption, was negligent. * * * In this case the jury, with the evidence of his acts before them, has, by its verdict, exonerated the defendant employee of all negligence. The recovery of the plaintiff being based solely on the acts of the employee, we feel that under our laws of pleading the action of the trial judge was not erroneous, and that the judgment of the court of record should be affirmed."

In *Zaney* v. *Rieman*, 151 N. E. 625 (Appellate Court of Indiana 1926), the original complaint alleged that plaintiff was employed by the de-

fendant as a carpenter to assist in building a certain house, and while engaged in that work he was injured by the reason of the negligence of the defendant in furnishing and providing an unsafe scaffold. An amended complaint was filed, the only difference being that that complaint made one, William Hickman, a defendant, and alleged that the original defendant, by and through Hickman, failed to provide a safe scaffold, and that the scaffold so furnished broke and that appellee was injured as a result thereof. The theory of the amended complaint was that Hickman was the agent and servant of the appellant, the original defendant, and that Hickman was negligent in erecting the scaffold, and that the appellant, the original defendant, was liable because of Hickman's negligence. The jury returned a verdict in favor of Hickman thus finding that he was not negligent, and returned a verdict against the appellant. The court having rendered a judgment on this verdict, the original defendant, this appellant appealed. The appellate court, in reversing the judgment, says:

> "Appellee's complaint and cause of action being based on the alleged negligence of a servant and the jury having returned a verdict in favor of the servant, it follows that there can be no recovery against appellant. For the effect of a verdict and judgment in favor of Hickman see Childress *v.* Lake Erie, etc. R. Co., 105 N. E. 467, 182 Ind. 251; Indiana, etc., Torpedo Co. *v.* Lippincott Glass Co., 75 N. E. 649; 165 Ind. 361; City of Anderson *v.* Fleming, 67 N. E. 443; 160 Ind. 597, 66 L. R. A. 119; Lake Erie, etc. R. Co. *v.* Reed, 103 N. E. 127, 57 Ind. App. 65."

In *Hobbs* v. *Ill. Central R. Co., et al.,* 152 N. W. 40 (Sup. Iowa 1915), the plaintiff, a passenger on a train of the defendant railroad company had been ejected therefrom by two special policemen

employed by the railroad company. Plaintiff brought an action against the railroad company and the two policemen. The jury returned a verdict in favor of the policemen and against the carrier. The court, in reversing the judgment against the railroad company, says (p. 41):

> "Counsel for the company contend that the exoneration of its co-defendants necessarily leaves it all of the responsibility, and that there was error in assessing against it any damages whatever. It seems impossible to avoid this conclusion. The responsibility of the company was necessarily dependent upon the culpability of its co-defendants, who were important actors. And yet, in the same action by the same plaintiff for the same reasons, they were adjudged not culpable, and the company adjudged culpable, though it was without fault, save as responsible for the acts of its co-defendants, * * * where the real actor (who is none the less liable personally because acting for another) is not guilty, it necessarily follows that the party for whom he acted cannot be."

In *Begin, et al.* v. *Liederbach Bus Co., et al.*, 208 N. W. 546 (Minn. Sup. 1926) the plaintiff, a passenger on an omnibus of the defendant Liederbach, sustained injuries when the bus was in collision with a street car of the defendant Indianapolis Street Railway Co. One Bergeron, the chauffeur of the bus, was also named as co-defendant, and his negligence being the only want of care charged against the bus company. The jury returned a verdict in favor of the plaintiff and assessed the damages in the sum of $8,500. Liederbach Bus Company $4,250; Minneapolis Street Railway Company $4,250. The court, in dealing with the question as to the effect of this verdict as to the defendant Bergeron, says (p. 547):

> "It is hard to escape the logic of the proposition that if, on a single issue, the jury

> finds for the plaintiff and against two of three defendants, the other defendant is exonerated and the verdict is in his favor, even though he is not named therein."

As a result of this decision in dealing with the effect of the verdict for Bergeron as against the Bus Company, the latter being liable under the rule of *respondeat superior,* or not liable at all, the court held that in such a case a verdict for the servant and against the master while such a finding stands, is nothing short of an arbitrary seizure of its property for the private benefit of plaintiff. And where the only possible fault is that of the employee, the necessary effect of a verdict exonerating him, is that neither defendant is liable. The jury is one breath both condemned and exonerated both the Bus Company and Bergeron. This was, of course, fatal to the verdict. The result was that the judgments appealed from were reversed and a new trial ordered as to the defendant Bus Company and Bergeron.

In *Lowney* v. *Butte Elec. Railway Company, et al.*, 204 Pac. 485 (Montana Supreme Court 1921) Helen Lowney, a minor, by her guardian *ad litem*, sued the railway company and the conductor of its car alleging that the conductor put his arm around Helen to lift her from the car to the pavement where he carelessly let her drop; the back of her head striking the iron rim of the car step causing severe injuries. The jury rendered a verdict in favor of the defendant Hoar, the conductor, and against the railway company. The court stated in its opinion (p. 486):

> "As one of the vital issues in the case was whether or not defendant Hoar was guilty of negligence, it follows that the verdict against the railway company could have been based reasonably only upon the finding that Hoar

> was negligent, while, on the contrary, a verdict in favor of Hoar could be based reasonably only upon the finding that he was not negligent. * * * In this case the court is equally unable to determine which verdict, based upon findings inconsistent with those that support the other verdict, was right. Unquestionably, one was wrong, but as we are unable to go behind the verdicts, and reach the minds of the jurors, we cannot determine which was wrong; but we do know that it is logically impossible in this case for the defendant company to be liable in damages to plaintiff while defendant Hoar is not." The verdict of the jury is therefore set aside and the case returned to the District Court for re-trial.

In *Wade* v. *Campbell, et als.,* 243 S. W. 248 (Kansas City Court of App. Missouri 1922) a hotel manager employed a private detective to hunt for keys that were missing, but did not authorize him to arrest anyone. In the search plaintiff, a maid, was arrested at the suggestion of a police officer acting without the manager's knowledge. Suit was instituted against the hotel company and its manager. The jury returned a verdict in favor of the manager and found for the plaintiff against the hotel company. The court held that the liability of the hotel company can only rest on the doctrine of *respondeat superior,* and, under the evidence, liability could arise, if sued, solely through Campbell, the manager, who hired the private detective, and authorized him to hunt for the keys. Consequently, when the jury exonerated the servant Campbell it *ipso facto* exonerated the master, the hotel company. Judgment against the hotel company was reversed.

In *Peer* v. *Babcock,* New York Court of Appeals 1920, 129 N. E. 224, the plaintiff received

injuries by reason of being run into by a team of horses driven by the defendant Pizzo, who was a driver under the control and management of defendants Babcock and May. While the appellate court, upon reviewing the testimony, arrived at the conclusion that the evidence was as a matter of law insufficient to establish as between Babcock and May and Pizzo the relation of master and servant, in discussing the verdict of the jury in favor of plaintiff against Babcock and May and in favor of defendant Pizzo, thus exonerating plaintiff and defendant Pizzo of negligence, and holding Babcock and company guilty of negligence, states as follows (p. 226):

> "The effect of the verdict under the law of the case as charged by the trial justice, would be to relieve not only Pizzo, but Babcock and Co., from liability." Citing Pangburn *v.* Buick Motor Co., 211 New York 228, 105 N. E. 423.

In *Michely* v. *Mississippi Valley Structural Steel Company*, (St. Louis Court of Appeals 1927) 299 S. W. 830, the plaintiff, an employee of the defendant corporation, instituted suit against the defendant corporation and its foreman in charge of the moving and assembling of a large steel column, for the injuries received as a result of the lowering of one of the steel columns by a crane operator, upon signal alleged to have been given by the defendant foreman. At the close of the plaintiff's case the trial court instructed the jury that plaintiff was not entitled to recover and that they should bring in a verdict for the defendant foreman. The jury returned a directed verdict in favor of the defendant foreman but against the defendant steel company in the sum of $5,000. The court in reversing the verdict said (p. 832):

> "This will not do, for, if the servant causing the injury is free from liability therefor,

> liability cannot attach to the master, for his liability, if any, must be predicated upon the negligent act of his employee. This rule of law is so well established that the reasons therefor no longer need be reiterated."

In *Emmons* v. *Southern Pacific Co.,* (Sup. 1920) 191 Pacific 333, plaintiff sued the defendant railroad company and its motorman Woodson for injuries received by her resulting from a collision of one of the defendant railroad company's trains operated by the defendant motorman Woodson and an automobile which she was driving. The jury returned a verdict in favor of the plaintiff and against the defendant railroad company alone, and judgment was entered against the railroad company alone. The court held that inasmuch as the defendant railroad's liability must be predicated on the motorman's negligence under the allegations of the complaint, no verdict having been rendered by the jury against the motorman, the verdict against his employer, the defendant railroad company being based on the negligent acts of the motorman, must be reversed.

In *Sparks* v. *Atlantic Coast Line R. Co.,* (South Carolina Supreme Ct. 1916), 88 S. E. 739, plaintiff's intestate sued the defendant railway company and the conductor of its train alleging that the conductor wilfully pitched off of the car of a rapidly moving train, plaintiff's intestate, a negro boy, as a result of which the boy was killed. The jury found a verdict against the corporation master, which verdict was sustained by the Circuit Court. In discussing the relationship of the conductor and the defendant company, the court says (p. 740):

> "The conductor was two persons in one; he stood for the general manager and for himself, too. The *act* he did, and the *intent* he had when he pitched out the trespasser

> were the two facts to be established against the conductor and against the general manager. These facts were traceable to the general manager *only through* the conductor. If the conductor had no evil intent, there was no other chance for the general manager to have it. If the conductor did not do the physical act of ejection, there was no chance for the general manager to do it. The verdict is that the conductor had no evil intent, and that the conductor did not pitch the trespasser out. If that be so, neither did the general manager do it. The general manager in the case stated is the corporation." The action of the Circuit Court in affirming the verdict of the lower court was reversed.

In *Spigner, et al.* v. *Seaboard Airline Railway, et als.,* (So. Carolina Sup. 1919), 98 S. E. 330, the plaintiff sued the defendant railway company and its employees, and a Pullman Company for being left at a station knowing that she was seeking and intending to board the train of the defendant railway company. At the close of the testimony a verdict was directed in favor of the defendant Pullman Company, and consented to by the plaintiff's attorneys. The jury returned a verdict for $20,000 for actual damages, and $5,000 pecuniary damages against the defendant railway company, and $1,250 for punitive damages each against the defendant Brooks, the station agent, and Rhodes, the train conductor. In discussing the verdict the court says (p. 332):

> "Where a servant is united with the master in an action for damages for tort, and the allegations and proof shows that the tort complained of was the tort of this servant alone, then a verdict against the master alone cannot stand, because, if this servant did not commit the tort complained of, then there was no tort, and a verdict against the master alone cannot stand."

In *Johnson* v. *Atlantic Coast Line Railroad Co., et als.,* (Sup. So. Carol. 1927) 140 S. E. 443, the court, in discussing the question presented in this brief, stated (p. 445):

> "That, when the master and the servant are sued together for the same act of negligence or wilful tort, and the master's liability rests solely upon the servant's conduct, a verdict against the master alone is illogical and cannot stand. This seems to us to be a reasonable and proper rule, for it is an inconsistent declaration on the part of the court to say that, while the servant is without blame in his conduct, yet, because of that same conduct, the master is to be held blamable."

In *Union Painless Dentists, et al.* v. *Guerra,* (Texas 1927) 234 S. W. 688, Court of Civil Appeals, where an employee of the defendant dentist, in pulling a tooth, negligently poisoned plaintiff, it was held that the jury could not find against the dentist and in favor of his employee in an action by the plaintiff for damages as a result of such negligent poisoning.

In *Doremus* v. *Root, et al.,* (Wash. Supreme Ct. 1901) 63 Pac. 572, plaintiff was employed by the defendant company as a fireman and sued the defendant railway company and the conductor of its freight train, Root, for injuries alleged to have been caused by the negligence of Root while acting as a conductor on one of the appellant's freight trains. The jury returned a verdict against the defendant Root. After the verdict was read, but before the jury was discharged, the attorney for defendant Root inquired of the court what construction the court would place upon the verdict with respect to that defendant, and the court ruled that the verdict was and should be considered as a verdict in favor of the defendant Root. On appeal taken by the defend-

ant railway company, the appellate court held that it was error on the part of the trial judge to enter judgment against the railroad since, if the conductor was not negligent, the railroad could not be liable and the judgment in favor of the conductor operated as an estoppel in favor of the railroad.

In *Fimple* v. *Southern Pacific Co., et als.*, (Cal. District Ct. of App.) 177 Pac. 871, cited by Mr. Justice Katzenbach in the case of *Dunbaden* v. *Castles Ice Cream Co., et al., supra,* the plaintiff's intestate met his death as a result of being struck by an engine in charge of the defendant McNight, the engineer employed by the defendant railroad company, which engine struck an automobile operated by plaintiff's intestate. The jury returned a verdict in favor of the defendant McNight, and against the railroad company. In discussing the principle herein involved the court said (p. 871):

> "It cannot be doubted that it is the law, that unless the appellant participated in the negligence which it is charged produced the injuries and consequent death of the deceased, or that it committed some different and distinct act of negligence, separate from and independent of that of its engineer and co-defendant McNight, which, concurring with that of McNight, proximately produce the injuries whereby the deceased lost his life, the appellant (railroad) cannot be held liable for the death of Fimple, since its co-defendant and agent, was acquitted by the jury of all blame or culpability for said injuries and death. In other words, if the damage was negligently produced by the defendant McNight, the locomotive engineer, while he was engaged in discharging his duties as a servant or agent of the appellant, and the negligence of said defendant so producing the damage was not personally participated in or aided by some negligent act

> of the appellant wholly independent of and dissociated from the act of the engineer, then a verdict acquitting the latter of culpable negligence is necessarily a verdict likewise acquitting the appellant, for the very obvious reason that, where injury is solely the result of the negligence of the servant while performing his duties as such, the principal's liability for such injury can follow only from the relationship existing between the master and servant as such."

It is apparent upon referring to the complaint herein that the liability of the defendant-appellee was only by operation of law under the doctrine of *respondeat superior*, and that inasmuch as there are no allegations of negligence charged against that defendant other than as the master of the employee defendant, the findings of the jury acquitting the servant Ankelein of negligence exonerates the master, this defendant-appellee.

In the case of *Lanning et ux.* v. *Trenton & Mercer County Traction Corporation*, 103 N. J. L. 23, 130 Atl. 444, affirmed 104 N. J. Law 175, suit was brought by Mrs. Lanning to recover compensation for injuries received while a passenger in a car of the defendant company, and by her husband for the expenses incurred in the treatment of her injuries, and also for compensation for the loss of her services and society as a wife. The jury returned a judgment in favor of Mrs. Lanning against the defendant company in the sum of $2,500, and also returned a verdict of no cause of action as to the claim of the husband, although the rendition of the medical services was not disputed, nor was the propriety of the charges made for such services challenged. The court held that these two verdicts are absolutely irreconcilable and demonstrate the unfitness of the jury to determine the respective rights and

obligations of the parties to this litigation; for if the traction company was responsible for the injuries received by the wife it follows, as matter of course, that the husband was entitled to recover from the company such moneys as he had expended in the treatment of the injuries received by his wife, and also a reasonable compensation for the loss of her services and society. The defendant's rule to show cause was made absolute.

In *Sullivan* v. *Bradley Beach Bathing Co.,* (Supreme Court 1927), (not officially reported) 139 Atl. Rep. 398, the infant plaintiff, Gladys Sullivan, brought suit to recover compensation for injuries received by her through a fall in the bath house of the defendant company, and also by her father to recover damages incurred by him by reason of her injuries. The trial resulted in a verdict in favor of the father for $1,050, and against the daughter, and in favor of the defendant company as to her claim. The defendant sought to have the verdict set aside inasmuch as it awarded damages to the father, and the plaintiffs sought to have it set aside so far as it denied compensation to the daughter. The court held that in view of the fact that both the plaintiffs and defendant concurred in the view that the verdict as a whole is erroneous, and because it is manifestly self contradictory the rules to show cause will each of them be made absolute.

In the case of *Ryan, et al.* v. *Jones, et al.* (not officially reported) 139 Atl. Rep. 430, which was a suit brought by a four year old boy and his father to recover compensation for injuries received by the boy through being run down by an automobile of the defendant, and for the losses by the father by reason of those injuries, the trial resulting in a verdict in favor of the father for $500, but the

jury made no finding either in favor of or against the child. The court held:

> "This action on the part of the jury plainly indicates that its members entirely failed to appreciate the duty that they were called upon to perform. If they considered that the defendants were solely responsible for the injuries received by the boy, their obligation was to award compensation to him for those injuries. On the other hand, if they found the contrary to be the fact, then their award to the father was without legal warrant."

In *Henderson et al.* v. *Abbotts Alderney Dairies, Inc.*, 7 Miscel. Rep. 455; 146 Atl. Rep. 47 (not yet officially reported), a truck of the defendant company collided with an automobile belonging to Mr. Henderson and operated by his wife, in which Mrs. Stancil, another plaintiff, was riding. Suit was instituted to recover compensation for the personal injuries received by Mrs. Henderson and Mrs. Stancil. Mr. Stancil sued for the loss of services and companionship of his wife, and for medical expenses incurred by him in the treatment of her injuries. Mr. Henderson claimed like compensation, and also compensation for the damage to his car. The jury returned verdicts in favor of Mr. and Mrs. Henderson and Mrs. Stancil, and a verdict of no cause of action as to Mr. Stancil. The court stated that the findings of the jury in favor of Mrs. Stancil, and against her husband, was in direct disregard of the charge of the court, which was that if they found the driver of the defendant's truck solely responsible for the accident they should return verdicts in favor of each of the four plaintiffs, and the only ground upon which the verdict against Mr. Stancil can be justified under the charge is that the jury found that the defendant's driver was not guilty of negligence causing

the accident, and if that finding was justified then the finding in favor of the other plaintiffs cannot be sustained. The court cited with approval the case of *Lanning* v. *Trenton & Mercer County Traction Co., supra,* which in its opinion was applicable to the Henderson case. The defendant's rule to show cause was therefore made absolute.

In *Morton, Admx. ad pros.* v. *Hardman-Wilkie Construction Co. and Hugh M. Wilkie,* 7 Misc. Rep. 917, (not yet officially reported) the defendant company was the owner of an automobile truck operated by and in control of its servant, Wilkie, who delivered some material in the rear of a fire house on Kearney avenue, running the truck upon the rear of the lot and turning it around so that it faced Maple street. There being a grade sloping towards Maple street, the rear wheels were blocked, the emergency brake applied and the motor stopped. This was disputed, however. The truck was unloaded, and about fifteen minutes later was seen to be in motion, proceeding towards Maple street, with the defendant, Wilkie, running after it. The truck continued on, running over Peter Morton, injuring him so that he died of such injuries.

The trial resulted in verdicts in favor of the plaintiff against the owner of the truck, the defendant, Hardman-Wilkie Construction Company; and in favor of the driver and servant of the owner, the defendant Wilkie.

Plaintiff was granted a rule to show cause. Three reasons were assigned why the verdict in favor of Wilkie should be set aside.

The court held that the only reason requiring its consideration was that the verdicts are clearly inconsistent, and that is so. The verdicts against the owner are not sustainable except upon the

theory of *respondeat superior*. It was claimed that the proofs show that the brakes on the truck were not in proper condition and this was the cause of the happening. A careful examination of the proofs did not disclose any such situation.

The rule to show cause was therefore made absolute.

One of the most recent cases bearing upon the subject in question is that of *Vaniewsky* v. *Demarest Bros. Co., et al.*, 8 N. J. Adv. Rep., p. 13, 148 Atl. Rep. 17, (not yet officially reported) which was decided by our Supreme Court, on December 19, 1929. In that case plaintiff, the owner of a building, sued the corporation defendant, which was the owner of a truck being operated by its servant, the individual defendant John Dotson, which ran into and damaged the building. The allegations of negligence were that:

> "Said defendant, John Dotson and said defendant Demarest Bros. Co. by its agent and servant John Dotson did carelessly and negligently drive said truck at a high, dangerous and excessive rate of speed without having proper control thereof, without having the same in proper repair and without giving heed or attention to the manner of its driving and without using proper precautions with respect to property lawfully located on said highway."

The plaintiff's proofs simply established that the truck ran over the sidewalk and into the building and that at the time it was being driven by the defendant Dotson.

At the conclusion of plaintiff's proofs motions for non-suit were made on behalf of both defendants and were refused. Defendant Dotson testified that he was president of the defendant

company and that he was driving the truck at the time of the accident and that he lost consciousness, in consequence of which he did not know what thereafter occurred. This comprised the whole of the testimony as to negligence.

At the conclusion of the entire case a motion for the direction of a verdict in favor of both defendants was made on the grounds that there was no proof of negligence and no proof of any negligent acts which were the proximate cause of the accident; as to the defendant Dotson that there was no proof of the allegations set forth in the complaint; and as to both defendants that the proofs showed that the accident was unavoidable. The court granted the motion as to Dotson, denied it as to Demarest Bros. Co. and thereupon awarded a judgment in favor of the plaintiff against that company, for the amount of plaintiff's damages.

Mr. Justice Lloyd speaking for the Supreme Court said:

> "* * * It will be observed that the whole negligence, if any, alleged or proved in the case was in the operation of the truck by Dotson as the agent of the Demarest Bros. Company. It is therefore entirely apparent that no liability could exist as to the company unless by and through the negligence of Dotson.
>
> The case was heard by the judge sitting without a jury, and we therefore have the anomalous situation of the judge sitting as a jury finding as a fact that no negligence existed in the case and yet rendering a verdict for the plaintiff against one of the defendants. With what show of logic or reason such a result could have been reached we are unable to discover.
>
> From the rulings of the judge directing a verdict for the defendant Dotson, the plain-

tiff does not appeal. The Demarest Bros. Company appeals from the judgment rendered against it.

The question here involved was discussed by Justice Katzenbach in the case of Dunbaden *v.* Castle's Ice Cream Co., 103 N. J. Law, 427, 135 A. 886, though in that case the precise point did not arise. That action was against master and servant with a verdict against the master only, but with no finding by the jury as to the servant. It was therefore said that the case as against the servant remained yet undetermined. To like effect was Feury *v.* Reid Ice Cream Co., 126 A. 462, N. J. Misc. R. 1008.

"These cases, however, are far from controlling here. What different juries may do in different cases, or possibly in the same case on different trials, is by no means analogous to the case where, as here, the action is one against both defendants in which a single complaint is filed alleging the negligence of the driver as a basis of liability against both driver and master and a verdict is rendered at one and the same time exonerating the servant and holding the master. In the case of New Orleans & Northeastern Railroad Co. *v.* Jopes, 142 U. S. 18, 12 S. Ct. 109, 111, 35 L. Ed. 919, it was said by that high tribunal that:

> 'It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity.'

In practice the great weight of authority is as stated in 39 C. J. 1347, that,

> 'where a master and servant are sued jointly in an action based solely on tortious conduct of the servant, and the servant is acquitted, there can be no verdict against the master. A verdict against the master and acquitting the servant is equivalent to a finding that no cause of action exists and will not support a judgment against the

> master; and such a verdict should be set aside or judgment for the master entered notwithstanding the verdict,'

citing a long line of cases, beginning with the case above noted, and continuing with like rulings in numerous states.

The liability of the servant is primarily due to his wrongful act; that of the master is derivative and predicated wholly upon such primary liability. Courts are for the administration of justice; it is their duty to administer the law as to effectuate justice within the bounds of adjudicated rules. By implication the judge in the present case found that there was no negligence; none in the servant because it acquitted him of all responsibility, and by implication, therefore, none in the master because such negligence could only exist if the servant had been guilty. It would be a travesty on justice if courts were powerless to set aside a result so illogical and unjust.

If it be suggested that the plaintiff should not suffer because of the wrongful action of the judge, the answer is that he could have himself appealed from the finding in favor of Dotson. A finding which deprives him of the benefit of the liability of the servant, on which alone the liability of the master could be predicated, and a similar finding that such master was nevertheless liable, could certainly be brought before this court for review upon the same logical principles that we are now invoking on the legal phases of the case as they are here presented. If he neglects to avail himself of the means to protect his rights, he cannot complain of the final result which deprives him of all remedy.

The judgment is set aside and judgment rendered for the defendant Demarest Bros. Company.''

It is noted in the instant case that the appellants have not taken any appeal from the verdict and judgment entered in the Bergen County Cir-

cuit Court in favor of the defendant William Ankelein, who was the driver of the truck of the Public Service Electric and Gas Company, and on the same reasoning as stated by Mr. Justice Lloyd, the judgment of the Supreme Court which deprives the appellants "of the benefit of the liability of the servant, on which alone the liability of the master could be predicated, and a similar finding that such master was nevertheless liable, could certainly be brought before this Court for review upon the same logical principles that we are now invoking on the legal phases of the case as they are here presented." If the appellants, the plaintiffs in the original action, neglect to avail themselves of the means to protect their rights they cannot complain of the final result which deprives them of all remedy.

On pages ten, eleven, twelve and thirteen of the appellants' brief criticism is directed to the State of Case filed with the Supreme Court. It is claimed that on the appeal to the Supreme Court the Public Service Electric and Gas Company failed to include the testimony taken at the trial and improperly included only the charge of the trial court. It is elementary that if there are any objections to the printed State of Case they must be made within five days of the date of service. (Rule 71 Pr. Act 1912.) Rule 111 of the Supreme Court, 1929 Edition. In this Court Rule 19a, three copies of the State of Case shall be furnished to each adverse party at least twenty days before the time noticed for argument and unless the adverse party gives notice within ten days after service of his objections thereto it shall be deemed complete.

Under Rule 141 of the Supreme Court the statement of the case shall include the Notice of Appeal, the record of the case and so much of the

evidence taken and documents filed in the cause as shall be necessary to present the questions raised upon the appeal. (Rule 81, Pr. Act, 1912.) In this Court Rule 19, the appellant shall provide a State of Case which shall contain, in appeals, the pleadings, proofs and orders or decrees in chancery with the petition of appeal and answer thereto, or, in error, the record and bills of exceptions, with the assignments of errors and joinder in errors, the reasons given in the Court below for the decree, order, or judgment complained of, and any other documents proper to be considered in this Court. By agreement of the parties an abridgment of the foregoing may be printed in lieu thereof.

The appellants have failed to print the testimony taken at the trial but have printed the charge of the trial court to the jury. (See pages 16 to 26 inclusive, printed State of Case.)

Appellants cite, amongst other cases, *Petrie* v. *Rosenvinge*, 94 N. J. Law, 521, in which Mr. Justice Kalisch speaking for this court recites that the only matter for review as disclosed by the grounds of appeal was the charge of the trial judge in the Circuit Court. The printed case contained the charge of the court, but not the evidence upon which the charge was based. Justice Kalisch says in the opinion (p. 521):

> "We must, therefore, assume that the charge gives a true version of the facts in the case, as established by the evidence. For the appellant it is said that sufficient of the facts in the case to raise the grounds of appeal relied on for a reversal of the judgment under review are found in the charge of the court."

We respectfully claim that the appellants in this case cannot criticise any failure on our part to include the testimony of the witnesses in the

appeal to the Supreme Court and then, when it likewise fails to print the evidence and include in its State of Case on their appeal to this court criticise such action. It is likewise noticed that throughout the brief of the appellants' they have quoted from the charge of the trial court and their argument for a reversal is based upon excerpts from that charge. The appellants are estopped by their own record.

Appellants on pages four and five refer to the charge by the trial court and base their argument upon excerpts from that charge.

Point Two raised by defendant-appellee in the Supreme Court was:

> "4. Because the verdicts in favor of the plaintiffs and against the defendant Public Service Electric and Gas Company are contrary to law."

An examination of the charge of the court shows that the court clearly instructed the jury with respect to the duty of the jury in arriving at their verdict and the rules of law to be applied by them in deciding the case.

Excerpts from the charge are as follows:

> (p. 19, l. 5.) "Now, of course, under the law, irrespective of any relationship between the man who is driving an automobile and anyone else, if he were guilty of such negligence as we could say was the proximate cause of the plaintiffs' injuries, that person would be liable; and then, on the other hand, if we determine from all of the evidence that this man was engaged at the time of the accident as a servant of the Public Service Gas & Electric Company, and that he was engaged in the scope of his duty, then, if you find that he was guilty of negligence and such negligence was the approximate

cause of the injury, of course, his master is responsible for his acts * * * (p. 22, l. 6). Now, in considering the facts in this case, if you conclude that there is no liability on the part of the defendants or either of them, then, of course, your labors are over, your verdict ought to be in favor of the defendants. In other words, if you conclude that there has been no negligence on the part of the defendants which shall be looked upon as the proximate cause of this girl's injury, then your verdict ought to be in favor of the defendants, and that verdict will end your consideration of the case. But on the other hand, if you conclude that the defendants are guilty of negligence, then the next consideration is the course of conduct of the girl herself. In other words, what was her course of conduct with respect to the happening of this accident? What did she do? I believe at the time of the accident this girl was some ten years of age * * *

(p. 23, l. 8.) Now, if you conclude that the defendants were guilty of negligence and then, in addition to that, you conclude that the girl herself was guilty of contributory negligence, despite the negligence of the defendants, if you find the girl was guilty of contributory negligence, then, of course no recovery can be had for the plaintiffs. Elaborating on the question of contributory negligence, our upper court said: 'To disentitle a plaintiff to recover, it must not only appear that he was negligent, but his negligence proximately contributed to the negligence of the defendant that caused his injury.' So, therefore, in considering contributory negligence, we ought to consider the negligence of the defendants. Now, if, after considering all of the evidence in this case, you conclude there was no negligence at all on the part of the defendants, and that the accident came about as the result of the conduct of the young girl herself, of course, in that event, there would be no recovery; but, on the other

> hand, if you conclude that the plaintiffs have made out a case in the sense that they have established liability through negligence on the part of the defendants or either of them, and you conclude from the evidence that she was not guilty of contributory negligence in the language that I have defined it, then your next question is that of damages. * * * (p. 25.) On the other hand, if you conclude that the plaintiff has failed to sustain the burden imposed upon her, or upon them, then, of course, your verdict will be in favor of the defendants."

It is apparent that the verdicts so rendered by the jury were in direct opposition to the charge of the court. The complaint alleging the relationship of master and servant between the defendant-appellee, the owner of the automobile, and Ankelein, and the liability of the defendant-appellee to the plaintiffs, being only under the doctrine of *respondeat superior,* it was the duty of the jury in rendering its verdicts either to bring in verdicts of no cause of action in favor of both defendant and defendant-appellee and against the plaintiffs; or, verdicts in favor of the plaintiffs against both the defendant Ankelein and this defendant-appellee.

In the latter part of its charge the court specifically stated: "—if you conclude that the plaintiff has failed to sustain the burden imposed upon her, or upon them, then, of course, your verdict will be in favor of the defendants." And again (p. 22, l. 6) "—if you conclude that there is no liability on the part of the defendants or either of them, then, of course, your labors are over, your verdict ought to be in favor of the defendants. In other words, if you conclude that there has been no negligence on the part of the defendants which shall be looked upon as the proximate cause of this girl's injury, then your verdict

ought to be in favor of the defendants, and that verdict will end your consideration of the case." And again (p. 23, l. 8) "—if you conclude that the defendants were guilty of negligence and then, in addition to that, you conclude that the girl herself was guilty of contributory negligence, despite the negligence of the defendants, if you find the girl was guilty of contributory negligence, then, of course, no recovery can be had for the plaintiffs."

In *Rubel* v. *Weiss, et al.* (not officially reported), 7 Miscel. 447, 146 Atl. Rep. 42, an automobile being driven by the defendant Bluestein collided with an automobile of the plaintiff injuring her and damaging her car. The plaintiff claimed that the collision was the result of the carelessness of the defendant Bluestein in driving the defendant Weiss' car, and brought suit against her, and also against the defendant Weiss, whose agent she was, to recover compensation from them for the injuries received by her and the damage done to her car. The trial resulted in a verdict of $2,500 in favor of the plaintiff and against the defendant Weiss only. The case was presented on a rule to show cause and the first ground upon which the court was asked to make this rule absolute was that the verdict so rendered was in direct opposition to the charge of the court. The trial court judge charged the jury that if they should find Weiss liable because of his ownership of the car, and the agency of Mrs. Bluestein, "the verdict in that case will be against both Mrs. Bluestein and Mr. Weiss, because, even though Mrs. Bluestein might be the agent of Mr. Weiss, if she was negligent, she is personally responsible for her own wrongful act, as well as her principal, for whom she is the agent."

This court in the Rubel case held:

> "Ordinarily the failure of a jury to find a verdict either for or against one or more of the defendants in an action is no ground for setting aside such verdict as to the defendant against whom it is rendered. *But this principle does not apply where the court expressly charges the jury that their verdict must be against both or neither of the defendants and the jury deliberately disregards that instruction.*" (Italics ours.)

An examination of the charge of the court and the resulting verdicts of no cause of action in favor of the servant Ankelein, the driver of the car, and against the defendant-appellee, clearly shows that the jury disregarded the charge of the court in arriving at their verdicts. The verdicts being inconsistent with one another, the finding of the jury acquitting Ankelein, the servant, of negligence, exonerates the master.

In the case of *Musto, et al.* v. *Mitchell, et al.*, (not as yet officially reported) 7 Adv. Rep. 787, 146 Atl. 212, decided by this court and cited in the Supreme Court opinion, suit had been instituted for injuries sustained to the infant plaintiff by his father as next friend, and by the father individually, for incidental damages for loss of services and moneys expended in the curing of the son for the injuries sustained, against the defendants, City of Asbury Park and Edward T. Mitchell, and the negligence charged against the City was that a broken milk bottle had been left negligently protruding and covered with sand on the bathing beach, which injured the knee of the infant plaintiff. The negligence charged against the defendant Mitchell was the same, and also that he was liable as the lessee of the bathing beaches of the City of Asbury Park. The trial resulted in a verdict in favor of the defendant,

the City of Asbury Park, and a verdict in favor of the plaintiffs, Henry Musto, Jr. by Henry Musto, Sr. his next friend, and Henry Musto, Sr. and against the defendant Mitchell, on which a judgment in like form was entered. This judgment was reversed on appeal, the court holding that the judgment entered was illegal and could not stand; that the illegality was apparent upon the face of the record; that there should have been verdicts on each separate claim or count of the complaint, and the judgment should have indicated the amount to be raised upon each.

We respectfully submit that the judgment of the Supreme Court reversing the judgments of the Bergen County Circuit Court should be affirmed.

Respectfully submitted,

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Attorney for and of Counsel
with Defendant-Appellee.

WILLIAM H. SPEER,
CARL T. FREGGENS,
Of Counsel.

New Jersey Court of Errors and Appeals

Violet May Hummers, by William S. Hummers, her next friend, and Violet Hummers, his wife, Plaintiffs-Appellants, vs. Public Service Electric and Gas Company, and William Ankelein, Defendants-Appellees.	Action at Law. On Appeal From Supreme Court.

Brief on Behalf of Plaintiffs-Appellants

STATEMENT OF FACTS

This is an appeal by the plaintiffs from a judgment of the Supreme Court, by which a verdict in favor of the plaintiffs at the Bergen Circuit against the Public Service Electric and Gas Company was reversed. The infant plaintiff, Violet May Hummers, while riding a scooter bicycle was struck, and severely injured by a truck of the defendant, Public Service Electric and Gas Company, driven by its servant, the defendant, William Ankelein. Two causes of negligence were alleged in the complaint and proven before the jury and submitted to the jury by the trial court, viz., (1) that the truck was equipped with defective brakes, so that its driver was unable to stop it in time to prevent the accident, which produced the injuries to the plaintiff, Violet May Hummers, and (2)

that the driver, William Ankelein, was negligent, and, therefore that the Public Service Electric and Gas Company, was responsible under the doctrine of respondeat superior.

The jury brought in a verdict of "No verdict" as to the defendant, William Ankelein, which was moulded by the Court into a verdict of no cause for action, and in favor of the plaintiffs and against the defendant, Public Service Electric and Gas Company, for $10,000 for the infant, and $3,000, for her father.

The Supreme Court reversed this judgment but did it under the erroneous impression that the only theory upon which the case was submitted to the jury was as to the negligence of the defendant, William Ankelein. The Court then took the view that inasmuch as the master, the Public Service Electric and Gas Company, could only be responsible under the doctrine of respondeat superior, that if William Ankelein were not negligent, then the Public Service Electric and Gas Company could not be found guilty.

We say that this view is erroneous, because, as just stated, two issues and not one issue were submitted to the jury. Because of this erroneous judgment of the Supreme Court, an appeal has been taken to this Court by the plaintiffs.

POINT I.

EVEN IF THE VERDICT HAD EXONERATED THE DEFENDANT, ANKELEIN, THE JUDGMENT WOULD STILL BE VALID.

The Supreme Court took a different view than the contention expressed in this point, and based their opinion upon the assumption that the sole question before the trial court was whether or not, Ankelein, the driver, was guilty of negligence, and that only because of this factor, could the Public Service be found guilty. In other words, that there was but a single issue before the trial court. This was not so. There were before the trial court, two issues, one respecting the negligent driving of Ankelein, and the other, the fact that the vehicle was operated with defective brakes. If there were, in fact, these two issues, then the judgment of the Supreme Court, reversing the lower court, was erroneous.

A reading of the pleadings and the charge of the Court, must make it manifest that there were two issues before the Court. We shall, however, direct the Court's attention to the contention that there was the issue of defective brakes before the Court, and if this were so, then the judgment of the trial Court should have been sustained under the principle enunciated in the case of Goekel v. Erie, 100 N.J.L., p. 279.

The complaint charged in paragraph eight:

> "The defendants did at the time and place aforesaid operate the said automo-

bile at a reckless and unlawful rate of speed, without warning, **without proper brakes, carelessly and recklessly, without regard to the rights of the plaintiff,** Violet May Hummers, on said public highway."
(P. 5, l. 5-10.)

In paragraph eleven, the charge is generally, the the injury was occasioned by the negligence of the **defendants.** Note the plural form.

Evidence was submitted in support of this contention, with respect to the defective brakes, and the court sent the case to the jury for its consideration on this point, as well as on the negligent driving of Ankelein. Said the Court:

"There is much testimony with respect to skid marks, etc."
(P. 17, l. 7.)

The court also made reference again to the skid marks on P. 18, l. 14. This was in connection with previous remarks as to an alleged mechanical device on the car, that made it incapable of going more than twenty-two miles an hour (P. 18, l. 8-11). Following this, the Court then said:

"There seems, however, to be a general agreement that the brakes were applied. As to whether they were applied in time, **whether the brakes were defective, of course, those factors are considerations for you."**

(P. 18, l. 18-22.)

It will thus be seen, from this language, that the question of defective brakes of defendants' sues left for the consideration of the jury. That this was an issue correctly before the jury, is further to be evidenced by the fact that no exception was taken to the Court's charge, or was any other form of objection made to the submitting of the issue of defective brakes to the jury.

Although the Court distinctly submitted to the jury as a fact upon which it could base a finding, the question of defective brakes of defendants automobile, no exception was taken to the charge, nor was the statement of the Court in anywise challenged. This being so, the defendant cannot now be heard to complain. As was said by our Supreme Court in Silberstein v. Hendrickson, 1 Misc. P. 263:

> "The Court submitted the case to the jury under instructions which are not here challenged, and the jury found for the defendant."

This was in answer to certain contentions on the part of the appellant who alleged that the trial Court had committed error, which error had not in fact been challenged at the trial.

The duties of the two defendants were different. The negligent operation of the automobile by the defendant, Ankelein, would be attributable to the defendant, Public Service Electric and Gas Company, under the doctrine of respondeat superior. But whether or not the defendant, Ankelein, was provided by the defendant, Public Service Elec-

tric and Gas Company, with a properly equipped automobile to operate, which was a duty which the corporate defendant owed irrespective of the duty of the defendant, Ankelein, was another question. Its failure in this respect would render it liable to plaintiffs, irrespective of any negligence of the defendant, Ankelein, provided, of course, the defective vehicle was the cause of the injury.

It is perfectly possible that the jury, while exonerating Ankelein, might have determined that the corporate defendant was negligent in not providing an automobile equipped with proper brakes.

On this issue, the case of Goekel v. Erie, supra, fully supports plaintiff's contention, that there was a valid judgment before the Supreme Court. Said the Chancellor, speaking for the Court of Errors and Appeals at p. 283 of the case:

> "The declaration set out a good cause of action against each defendant, as hereafter particularly set forth, and there can be no doubt that in such a situation one defendant may be held alone if the proof justify it. Matthews case (at P. 37.) And it must be assumed that the proof did justify it, for, on appeal, we are not concerned with the evidence. To support the verdicts it is only necessary to find that they were justified strictly on the record, and such is the case."

Continuing at the foot of page 283, the Chancellor stated:

> "It may be that where two are sued as joint tort-feasors, and the doctrine respond-

eat superior applies, and the duty of care is identical in the case of each defendant, as, for instance, where the servant is driving the motor car of his master in the latter's business and carelessly and negligently collides with a third person, causing damage, the master being responsible for the servant's act, is liable, as well as the servant; but where the master has some duty of care imposed upon him, which is not cast upon the servant, and the accident happened by the neglect of the master to perform his duty, disassociated from neglect of the servant to perform any duty resting upon him, a verdict in favor of the servant and against the master, would be valid, and a judgment entered thereon would be good in law. To illustrate: The master might send a servant on an errand with a motor car of which the mechanism was known to the former to be defective but not so known to the servant, and an accident happens by reason of such defect, without any default of the servant. In such a case the servant should be exonerated, and the master held."

The opinion then proceeds to analyze the complaint and states at page 286:

"Therefore, it appears that the judgment for the plaintiffs against the railroad company and in favor of Weyant against the plaintiffs, was and is legally supportable."

This principle was again recognized in the Supreme Court, in the case of Vaniewsky v. Demarest Bros., 148 Atl., p. 17 (not yet officially reported). There the defendant driver of the truck had been exonerated, and his master held. The verdict was set aside, but it will be noted in that case that the

> "allegations of complaint and **proof** showed that any negligence of the corporation **was entirely and solely that of the individual defendant,** and the court granted a nonsuit as to such individual defendant, judgment for plaintiff against the corporation could not stand." (Syl. 1).

Justice Lloyd, speaking for the Court, several times in his opinion, referred to the fact that the question of liability of the master grew solely out of the negligence of the defendant driver. In part, he said:

> "It will be observed that the **whole negligence,** if any, alleged or proved in the case was in the operation of the truck by Dotson as the agent of the Demarest Bros. Company. **It is therefore entirely apparent that no liability could exist as to the company unless by and through the negligence of Dotson, (the driver).** (P. 17, second column.)

Justice Kalisch, who dissented from this opinion, also recognized the principle enunciated in the Goekel case, but apparently argued that the abnormal movements of the truck might have been

evidence which would justify the inference of a defective vehicle.

These two cases as to the form of the verdict, are precisely the same as the case at bar, namely that the driver defendant in each case was exonerated and the master defendant held, but the Supreme Court in its consideration of the case at bar, assumes, without justification, that the case at bar fell within the Vaniewsky case, and not within the Goekel case. Therein is it error.

For the reasons we have indicated above, and which we reiterate, namely the pleadings and the charge of the court, all show that the issue submitted to the jury brings this case within the Goekel case.

There was no evidence sent up from the court below, but this cannot be called to its aid by the defendant, Public Service Company. The appeal was an appeal from a judgment on its face value. If there were, as we contend, two issues: first, of negligence of the driver, under which the defendant, Public Service Company, would be held under the doctrine of respondeat superior, and second, the issue of defective brakes, under which the driver might have been exonerated, and the master held, this court must assume, in the absence of evidence to the contrary, that there was evidence before the court to support a valid verdict and judgment.

The general rule is thus stated in 4 Corpus Juris, P. 55, "Appeal and Error:"

> "It being the duty of the appellant to see that the evidence is in the record, the appellate court will not reverse a judgment because the record fails to show that any evidence was given."

Supporting this are a number of cases cited, amongst which is that of Barcklow v. Hutchinson, 32 N. J. L., p. 195, where the court held:

> "The judgment of the Court of Common Pleas, in a case of appeal, which did not state that any evidence was heard, held to be prima facie good." (Syl. 2.)

Said the court in its opinion, at p. 198:

> "Another reason relied on for reversal was, that the original judgment entered in the Court of Common Pleas was so defective as to be erroneous and void. In my opinion, this judgment was. prima facie, sufficient. No law requires the Court of Common Pleas to record the names of the witnesses, or to show on their record that their judgment was supported by evidence. **The presumption is, that everything was rightly done, unless the contrary appears.** 7 Halst. 367."

This Court, in the case of Laure v. Singer, 100 N. J. L., p. 99, dealt with a situation where the appellant attempted to argue a certain question of law based on evidence heard before the Court below. The state of case did not contain all of the evidence. The court, speaking through Chancellor Walker, criticized this and said at p. 105:

> "Now, conceding defendant's view that the fact that plaintiff was not entitled to sue on the contract sub judice, was brought out on plaintiff's cross-examination. nothing appears on that examination except that the contract was made, and that in Germany. Further cross-examination may have disclosed facts constituting waiver by defendant. And, for that matter, the examination of other witnesses for the plaintiff may have disclosed it. **We cannot infer in favor of an appellant who does not return all of the pertinent testimony with the record on appeal, that waiver was not disclosed in the testimony which has been omitted."**

In Petrie v. Rosenvinge, 94 N. J. L., p. 521, a case decided in this Court, Justice Kalisch said:

> "The only matter brought here for review, as disclosed by the grounds of appeal, is the charge of the trial judge in the Circuit Court. The printed case contains the charge of the court but not the evidence upon which the charge was based. We must, therefore, assume that the charge gives a true version of the facts of the case, as established by the evidence."

This case, we submit, is absolutely conclusive as to the justice of plaintiff's contention in the appeal to the Supreme Court. All the defendant Public Service Company returned, was the pleadings, the rule for judgment and the charge of the

Court. In other words, a state of case substantially the same as in the last cited authority.

Another case, supporting counsel's contention is that of Union Garage Co. v. Wilner, reported in 98 N. J. L., 441, a case decided in this Court. Said Chancellor Walker, after pointing out two of the grounds of appeal, which were, that the jury's verdict and judgment were contrary to law of the case, and that the verdict and judgment were not within the issues submitted to the jury (last para; p. 442):

> "The judge's charge is returned with the record on this appeal, but without the testimony which was adduced upon the trial. Both sides claim advantage from the charge. The appellant submits that the verdict was responsive neither to the issue submitted to the jury by the pleadings nor the issue submitted to the jury in the charge of the court. The respondents urge that the judge in his charge told the jury to take all the evidence in the case and pass upon it; also that the return, or non-return, of the car was one of the issues submitted to the jury. As already remarked, the testimony has not been returned. Nor is the charge properly before us. These are not returned on appeal at common law, and matters which do not, and legally cannot, appear on the face of the record of the judgment, and not brought before the court by bill of exceptions or other legal process, are unavailing. Lewis v. Lewis, 66 N. J. L., 251."

In the case of Dordoni v. Hughes, 83 N. J. L., p. 355, the Court held:

> "Facts found by the District Court will be presumed to rest on competent proof when nothing appears to the contrary." (Syl. 1.)

Said Justice Trenchard at p. 356:

> "In the first place, it may be answered that a fact found by the District Court is presumed to rest on competent proof when nothing appears to the contrary. Home Coupon Exchange Co. v. Goldfarb, 49 Vroom 146. And since all the evidence is not returned to this court, but only abstracts from it, it is for that reason impossible for us to say that the finding was not properly reached from the facts proven."

In 4 Corpus Juris, p. 63, "Appeal and Error" is the following:

> "A party alleging error as a ground for reversing a judgment of a lower court must show the errors complained of clearly and affirmatively by the record, for error will not be presumed."

See also Green v.Higgins,7 N.J.Misc., 1012 (P.1014) where the Supreme Court said:

> "The evidence taken at the hearing on the rule,and upon which the order wasbased,is not laid before us in detail. In such situation we assume that the evidence justified the finding,and that being so we think the order was justified."

POINT II.

THE JUDGMENT AGAINST THE DEFENDANT, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, WAS LEGAL.

The verdict as returned by the Court reads as follows:

> "And the jury returned a verdict in favor of the plaintiff and against the Public Service Electric and Gas Company defendant in the sum of Ten thousand dollars in favor of Violet May Hummers and in the sum of Three thousand dollars in favor of the plaintiffs, William S. Hummers and Violet Hummers. No verdict against William Ankelein."
>
> ~~(State of case on Certiorari, P. 4.)~~

Rule for judgment thereon was entered as follows:

> "It is ordered on May 15th, 1929, that judgment final be entered in favor of the plaintiff, Violet May Hummers in the sum of $10,000, and in favor of the Plaintiffs, William S. Hummers and Violet Hummers, in the sum of $3,000, against the Public Service Electric and Gas Company."
>
> ~~(State of Case on Certiorari, P. 4.)~~

Appellant's brief, therefore, argues against the validity of a judgment based upon a verdict which the jury, in fact did not find. It follows, as of course, that appellant's argument deals with a situation which is somewhat different from that which is presented by the true record.

In Dunbaden v. Castles Ice Cream Co., 105 N. J. L., p. 427, the jury returned a verdict as follows:

> "We find for the plaintiff and against the defendant Castles Ice Cream Company, a corporation, and assess the damages of the plaintiff, Walter S. Dunbaden, in the sum of $500, and so say they all."

It was argued that this finding was repugnant, contradictory and irreconcilable, in that the jury found against the defendant master and exonerated the defendant servant. The Court of Errors and Appeals by Mr. Justice Katzenbach, states on page 429:

> "It is argued that a verdict which holds the master liable on the doctrine of respondeat superior and acquits the servant is equivalent to a finding that no cause of action exists against the master and will not support a judgment against the master. A judgment based on such a verdict, it is insisted, should be set aside or judgment entered for the master notwithstanding the verdict."

After citing certain authorities from other jurisdictions which support this view the learned Justice proceeded:

> "In other jurisdictions it has been held that in an action against master and servant jointly, based solely upon the doctrine of respondeat superior, the master may be held liable although the servant is exonerated. The reason assigned for this rule is that the plaintiff is entitled to the verdict

given him by the jury and for the failure of the plaintiff in obtaining a verdict against another equally responsible, the jury may have a grievance but the defendant adjudged responsible has none. The leading cases supporting this are: Buskirk v. Caudill (KT) 203 S. W. Rep. 864; Well v. Hagen (KT) 179 Id. 835; Chesapeake, &c., Railway Co. v. Dawson (KY) 167 Id. 125; Illinois Central Railway Co. v. Murphy (KY) 97 Id. 729; Van Gundy v. Packard Motor Car Co. (KAN). 219 Pac. Rep. 503."

"Some courts have held that the failure of a jury to return a verdict against the servant affords no ground to set aside a judgment rendered against the master because the verdict which ignores the servant should not be deemed or construed as a finding of absence of negligence on the part of the servant, but should be regarded as not finding as to the servant. 'Upon the rendition of such a verdict the case stands as to the servant as if it had never been tried, and the master has whatever right he ever had against his servant. It will be observed that the verdict rendered in the present case is silent as to Grundman. We think that such a verdict should be regarded as no finding against him. This view has support in decisions in this state. In Bon v. Eastern Motor Co., 94 N. J. L. 34, a judgment against the master alone was affirmed.

"In Dumphy v. Thompson, 3 N. J. Misc. R. 1086, there was a verdict in favor of the defendant against two of four plaintiffs, and a verdict in favor of two of the plaintiffs." The Court said:

"We cannot perceive on what legal principle the defendant can avail herself of the failure of the jury to find a verdict in favor of the infant (plaintiff), and for that reason be entitled to have the verdict in favor of the plaintiffs set aside."

"The decisions in this state which tend to support the view of the law on this subject herein expressed are supported by decisions in other jurisdictions. Some of the cases thus holding are: Benson v. Southern Pacific Co. (Cal.) 171 Pac. Rep. 948; Whitesell v. Joplin, &c. Railway Co. (Kan.) 222 Id. 133; Melzner v. Raven Copper Co. (Mont.), 132 Id. 552; Dalby v. Shannon and Florence (Va.) 124 S. E. Rep. 186."

Reference to Bon v. Eastern Motor Co., supra, disclosed that a judgment therein was in favor of the Eastern Motor Co., with apparently no finding of any kind against the negligent driver, Edward Folwell, who was also a defendant.

The appellant argues that the Dunbaden case is not good law (Appellant's brief P. 6) and criticizes it through the medium of citations from other states.

The answer is that the Dunbaden case was decided by the unanimous Court of Errors and Ap-

peals. Nearly every case in appellant's brief is one in which the verdict generally was against the defendant master and the defendant servant was found not guilty of negligence. This, of course, is not the situation presented by the true record in this case.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the Supreme Court should be reversed, and that the judgment of the Bergen County Circuit Court should be affirmed.

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