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WRIT OF ERROR.

NEW JERSEY, ss.

To Dallas Flannagan, Esquire,
Judge of the Court of Oyer and Term-
(L. s.) iner of the County of Essex; Because
in the record and proceedings, and also 10
in giving of judgment upon a certain
indictment against George Villano, late of the
City of Newark, County of Essex and State of
New Jersey, for manslaughter.

Pro ut the said indictment and the several
counts therein, whereof, before you, he hath been
indicted, and is thereof convicted by a certain
jury of the county, taken between the State of
New Jersey and the said George Villano as it is
said, manifest error hath intervened to the great 20
damage of the said George Villano, as from his
complaint we have received information, we being
willing, in this behalf, to correct the error in due
manner, if any there shall be, and that speedy
justice be done to him, the said George Villano,
command you that if judgment be thereon given
then that you distinctly and openly send, under
your seal, the record and proceedings aforesaid,
with all things touching the same to our Justices
of our Supreme Court of the State of New Jersey,
on the 7th day of January, 1928, and this writ, 30
that the record and proceedings aforesaid being
inspected, we may further cause to be done there-
upon for correcting that error what of right and
according to the law ought to be done.

WITNESS, WILLIAM S. GUMMERE, Esquire, our
Chief Justice, at Trenton, aforesaid, the 20th day

Return to Writ.

of December, Nineteen Hundred and Twenty-seven.

EDWARD J. KELLEHER,
Clerk.

10 J. VICTOR D'ALOIA,
Attorney.

RETURN TO WRIT.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

20 I, DALLAS FLANNAGAN, Judge of the Court of Quarter Sessions, in and for Essex County, New Jersey, Do HEREBY CERTIFY and return to the Supreme Court of Judicature of the State of New Jersey the Indictment, Judgment and Proceedings together with the entire record of the proceedings had at the trial and all things touching and concerning the same as by the written writ to me directed, I am commanded,

IN WITNESS WHEREOF, I have hereunto set my hand and the affixed seal of said Court at Newark, N. J., this 20th day of January A. D. 1928.

30 DALLAS FLANNAGAN,
Judge of the Quarter Sessions Court
(L. S.) Essex County New Jersey.

Presented in open court the 21st day of Dec., 1927. Signature of Judge affixed January 5, 1928.

DALLAS FLANNAGAN,
Judge.

Return to Writ.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

BE IT REMEMBERED, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the first Tuesday in April, A. D. Nineteen Hundred and Twenty-seven, by the Hon. William S. Gummere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of Harry Friend, Walter J. Garrigal, Alexander Clark, William H. Martin, William J. Hodgkinson, Adrian R. Kristeller, Albin A. Lucius, Charles F. Conrad, Joseph E. Amorose, Asa Duckworth, Max Oppenheimer, Vito Verniero, Bernard Degnan, James A. Whalen, Henry Merritt, Matthias Stratton, C. Joseph Peabody, Morris Metsky, Edward S. Crain, George W. Fischer, Edward J. Quinn, Fred Dreitler and George L. Lang, good and lawful men of the said County of Essex, duly summoned and then and there sworn and charged to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and form following, to wit:

ESSEX COUNTY, TO WIT: The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that George Villano on the thirtieth day of June, in the year of our Lord one thousand nine hundred and twenty-seven, at the City of Newark in the County of Essex aforesaid did feloniously kill and slay Samuel McKeon, contrary to the form of the statute in such case made and provided, and

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against the peace of this State, the government and dignity of the same.

JOSEPH L. SMITH,
Prosecutor of the Pleas.

- 10 On the seventeenth day of September, A. D. Nineteen hundred and twenty-seven, on which day the said Indictment was presented by the Grand Jury, aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said Indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for said County of Essex, and then and there the said Indictment was duly delivered and duly filed by the clerk
- 20 of said court and an entry of such order and delivery and filing was then and there made in the minutes of said court at the same time pursuant to the statute in such case made and provided.

- And afterwards, that is to say on the twenty-ninth day of September, A. D. Nineteen hundred and twenty-seven, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable Dallas Flannagan, presiding Judge of the Court of Common Pleas,
- 30 George Villano, in the custody of Conrad Deuchler, Sheriff of the County of Essex aforesaid, and the said George Villano, being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is not guilty thereof, and therefore for good and evil he puts himself upon the Country,
- 40 &c., and Joseph L. Smith, Prosecutor of the Pleas

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of said State for said County of Essex in this behalf doth the like.

Therefore, let a jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex, on the twenty-ninth day of October, A. D. Nineteen hundred and twenty-seven, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said George Villano to recognize upon their oath whether the said George Villano is guilty of the premises in the said indictment specified or not guilty because the said Joseph L. Smith, Esquire, prosecutor, &c., as the said George Villano puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

And afterwards, that is to say, the fifth day of December, A. D. Nineteen hundred and twenty-seven, to which day the trial of aforesaid indictment was postponed, at the same Court of Quarter Sessions, holden before the Honorable Dallas Flannagan, Judge of the Court of Common Pleas, comes the said Joseph L. Smith, who prosecutes as aforesaid, and the said George Villano, and the jury of whom mention is before made, and by Conrad Deuchler, Sheriff of the County of Essex, for this purpose empanelled and returned, after special panel was waived, to wit, after the following challenged, by the State five, the defendant five and by consent one, Pat-

Return to Writ.

rick McComb, Max D. Hammerschlag, Theodore
 P. Gilliam, Fred Jeremias, Adolph Trattler,
 Herbert E. R. Seibert, Walter Clark, Philip
 Eichler, Jacob Greenberg, George H. Hall, John
 T. Smith, Daniel Haberlandt, being called were
 sworn upon that jury who to speak the truth of
 10 and concerning the premises and thereupon the
 trial of said issue and commenced and continued
 until the sixth day of December A. D. Nineteen
 hundred and twenty-seven when the jury returned
 into court in charge of the officer sworn to attend
 them, and then and there in the presence of the
 prosecutor, defendant and Court do say upon
 their oath, "We find the defendant, George Vil-
 lano, guilty in manner and form as is charged
 in the indictment, with a recommendation of
 20 Mercy."

Whereupon all and singular, the premises being
 seen and by the Court (Hon. Dallas Flannagan),
 now here fully understood, it is on this nine-
 teenth day of December, A. D. Nineteen hundred
 and twenty-seven, ORDERED and ADJUDGED that the
 defendant be imprisoned in the New Jersey Re-
 formatory upon this conviction, and the defendant
 be in mercy, etc.

30 Judgment signed December 19, 1927.

DALLAS FLANNAGAN,
 Judge.

John J. Bracken, direct.

ESSEX COUNTY COURT OF GENERAL
QUARTER SESSIONS.

Monday, December 5, 1927.

THE STATE OF NEW JERSEY,

vs.

GEORGE VILLANO,

On Indictment No. 214, Sep. T., 1927, for Man-slaughter.

10

Before Hon. Dallas Flannagan, Judge, and a jury.

For the State appears Joseph E. Conlon, Second Assistant Prosecutor of the Pleas.

For the Defendant appears J. Victor D'Aloia.

20

(A jury is called and sworn.)

RECESS.

AFTER RECESS.

Mr. D'Aloia: May it please the Court, my client went down to the Elks' Club to procure some witnesses. He will be here in a few minutes and until he comes I will waive his presence.

30

Mr. Conlon opens for the State.

JOHN J. BRACKEN, sworn in behalf of the State.

Direct examination by Mr. Conlon.

Q You are a surveyor in the City of Newark?

A Yes.

40

John J. Bracken, cross.

Q And did you, at the request of the prosecutor's office, make a map of Vincent street between Horatio street and Ferry street? A Yes.

Q Is that the map on the wall? A Yes.

Q Will you explain it? A Why, it shows the
10 block on Vincent street running south from Horatio street, different buildings on it, garage and frame dwellings. The lines are the curb lines, and the distance between the curb lines is 29.4 by 29 feet 5 inches.

Q Is that shown on the map? A Yes. 1 inch on the map equals 10 feet on the ground. There is a light pole there (indicating) and hydrant shown, and the street manhole in the center of the street. Those houses are the resi-
20 dences along the street.

Q You mean the yellow marks indicate residences? A Yes.

Q And the house numbers as taken from the houses? A Yes.

Q Vincent street is where in the City of Newark. A It is down in the lower end of the City of Newark.

Q Is it in a built-up part of Newark? A Yes.

Q The numbers in black are the buildings
30 —what are they? A They are the house numbers.

Cross examination by Mr. D'Aloia.

Q How long is the block? A I will have to scale that for you.

Q Do not take so long. A It will only take a minute.

Q What is the distance between the manhole
40 and the southwesterly corner of Ferry street and Vincent street? A 310 feet.

John J. Bracken, re-direct.

Q To the manhole? A To the manhole.

Mr. Conlon: Will you so mark it?

Q And how long is the entire block? Now, measure it from the manhole to Horatio street.

A Well, I have the block broken.

10

Q All right. Measure it along the curb. A 359 feet; that is, to the curb line.

Q To Horatio street? A Yes.

Q Well, do you mean to tell us that it is 59 feet from the manhole to Horatio street and 300 to Ferry? A 359, and this way you have 55 plus another 120.

Q What is the distance from the southwest corner of Ferry street to this manhole? You say that is 300 feet? A Yes. This is not a scale. Is is broken here (indicating).

20

Q No. I want this distance (indicating) A That is 300 feet.

Q And I want the distance from here to the next corner. A That is 359 feet.

Q Then in all it is 659 feet long? A Yes.

Q What is that? A That is from the curb line of Horatio street to the north line of this residence.

30

Re-direct examination by Mr. Conlon.

Q This break in the curb line shows the place which is not scaled? A Yes. The reason I did that, the board would not be long enough to put the map on.

Q In other words, it shows where it is not scaled? A Yes.

Q Did you mark the distance from the manhole to Horatio street? A No, sir.

40

Vernon McKeon, direct.

Q Will you do that? A That is taken to the curb line.

Mr. D'Aloia: All right.

10 VERNON McKEON, sworn in behalf of the State.

Direct examination by Mr. Conlon.

Q Where do you live? A 17 Vincent street.

Q Newark? A Yes.

Q How long have you lived there? A About ten years.

20 Q Do you remember the evening of June 30, this year? A I do.

Q And at that time you had a son named Samuel? A Yes.

Q How old was he? A He was three and a half years old then.

Q Where were you about 7 o'clock or 7:30? A Sitting in the front room, reading the paper.

Q And you lived at number 17? A Yes.

30 Q That is this house here, indicating number 17 on the map. A Yes.

Q You were sitting in the front room reading the paper? A Yes.

40 Q What happened? A I had the paper down reading it when I heard the people hollering and yelling out on the street, and I jumped up and looked out of the window and there was a crowd in the street at that time, and I seen the little overalls sticking out and Mr. Smith had the baby in his arms, and I ran down the street and got into the truck and made them take me to St. James' Hospital.

Vernon McKeon, cross.

Q And the baby was whom? A My baby, Samuel McKeon.

Q What happened at St. James' Hospital?
A They put him on a stretcher and gave him an examination and then undressed him and took him in the ward, and an officer come down and took statements from Villano.

10

Q When did you see the baby next? A After that?

Q Yes. A After they took Villano out I went down to let the lady know the condition of the baby, and she went up to the hospital and stayed there until eleven or half-past eleven, and the doctors did not want her around any more, saying, if they wanted her, they would send her word, and at half-past twelve, an officer came down and said the baby was dead.

20

Q When did you see the boy again? A The following afternoon, when the body was brought home.

Cross examination by Mr. D'Aloia.

Q You heard some people yelling and you went out and saw that the baby was in Mr. Smith's arms? A Yes.

Q Where was Mr. Smith? A Almost right outside his own door. He lives at 19.

30

Q On the sidewalk? A Not on the sidewalk, on the street.

Q That is all you know about it? A Yes.

40

Robert J. Citrino, direct—cross.

ROBERT J. CITRINO, sworn in behalf of the State.

Direct examination by Mr. Conlon.

10 Q You were attached to St. James' Hospital in June, last? A I was.

Q And what was your position down there? A Intern.

Q Do you remember seeing Mr. McKeon down there? A I do.

Q Just tell us what happened. A Why, the night of June 30, at about 7:10 a child was brought in and, as far as I recall now, there was Mr. McKeon and the police officer and a man whose Ford ran the child over.

20 Q And what happened to the child, doctor? A On physical examination diagnosis of a fracture of the skull at the base was made, a fractured right femur, the patient was in shock and he had contusions and abrasions of the face.

Q What happened? A He was admitted to the hospital.

Q Then what happened? A And after we did all we could to save the child's life, he was pronounced dead at 11:55 the same night.

30 *Cross examination* by Mr. D'Aloia.

Q Outside of the injury to the skull, where were the other injuries? A The right femur. He was in shock and he had abrasions and contusions of the face.

Q That would be the bone of the right leg? A Right. Right thigh.

Q And where was this fracture located? A At the base.

40 Q Was it toward the left or right? A I cannot tell.

Carmine D. Berardinelli, direct.

CARMINE D. BERARDINELLI, sworn in behalf of the State.

Direct examination by Mr. Conlon.

Q You are a practicing physician in this County? A Yes.

10

Q You hold what official position? A Assistant medical examiner with Dr. Martland.

Q You are assistant to Dr. Martland? A Yes.

Q Did you perform an autopsy on a young boy named Samuel McKeon? A I did.

Q When? A On July 1, 1927, at 11:30 A. M.

Q Where did you perform it? A Down to William Mullin's Morgue on Lafayette street.

Q What did you find as a result of your autopsy? Did you make notes of your autopsy?

20

A Yes, I did.

Q Have you the notes with you? A Yes, I have.

Q Do you remember the result of your autopsy without the notes? A Yes.

Q All right. Then you may testify without them. A I found a laceration of the liver and laceration of the spleen, with severe bleeding of the abdominal cavity. Beside there was a fracture of the right femur—a simple fracture of the right femur.

30

Q Where is the right femur? A Here (indicating).

Q In the upper leg? A Yes, upper leg.

Q What else did you find? A I found in the lungs nothing. I found numerous bruises or contusions all over the body, arms, shoulder and legs; quite numerous abrasions. I did not open the head, because I found enough cause of death in the abdomen.

40

Joseph Comiskey, direct.

Q From your autopsy, were you able to form an opinion as to the cause of death? A The cause of death was a rupture of the liver and spleen.

Cross examination by Mr. D'Aloia.

10

Q And that caused an internal hemorrhage?
A Yes.

JOSEPH COMISKEY, sworn in behalf of the State.

Direct examination by Mr. Conlon.

20

Mr. Conlon: The situation with this witness is peculiar, and on account of an affection of the throat, it is practically impossible to make himself heard.

Mr. D'Aloia: Suppose one of us stands close to him.

Mr. Conlon: Suppose we have the stenographer repeat it.

30

Q Where do you live? A 18 Vincent street.
Q How long have you lived there? A
Pretty near two years.

The Court: If it is agreeable to all parties let Mr. Doyle repeat the answers.

Mr. Conlon: Yes, sir.

Mr. D'Aloia: Yes, sir.

40

Q Did you know Mr. McKeon? A Yes.
Q Did you know his little boy Samuel? A
Yes.

Joseph Comiskey, direct.

Q Do you remember the evening of June 30th, this year? A Yes.

Q Where were you about 7 o'clock in the evening? A On the front stoop.

Q Was it light or dark at that time? A Light.

10

Q Was it clear or wet? A Clear.

Q How was the pavement of the street, Vincent street, as to dryness or wetness? A Dry.

Q You were sitting on your front stoop? A Yes.

Q Who else was there? A I do not remember now. I think Mrs. Volk was there.

Q Did you see Samuel McKeon that evening? A That was the boy?

Q Yes. A Yes.

Q Where was he when you first saw him? A Outside by my house, down in the street—on the sidewalk.

20

Q Where did he go then? A After he got up, he started to go across the street home.

Q Did he run or walk across the street? A He walk. He started to walk.

Q How far did he get? A Well, pretty near half the street; on the middle, about.

Q What happened then? A Well, this driver come down with a little truck. He run very fast. I got up and put up my hand and said stop. I don't know whether he saw that or not. He run to the middle of the street.

30

Q Then what happened? A Well, he run on the boy, the front wheel and the back wheel. He never stopped it, either, and somebody stopped him about the third house. That is all I see.

Q Do you know who was driving the truck? A Mr. Villano's boy.

40

Joseph Comiskey, cross.

Q Do you see him in court? A Yes.

Q Will you point him out? A There he is (pointing).

10 Mr. Conlon: It is admitted, for the purpose of the record, that the witness is indicating the defendant?

Mr. D'Aloia: Yes.

Q How fast was the truck going? A Well, I could not tell you about how fast. I cannot tell. Very fast.

Q Did you hear any horn blown? A No.

Q Do you know whether or not there was a horn blown? A No, sir; no horn blown. I never heard it.

20 *Cross examination* by Mr. D'Aloia.

Q Now, you said you got up and you ran out in the street, too? A Yes. I sit down on the stoop and the boy over on the sidewalk in front of my house.

The Court: No. Wait a minute.

30 Q The boy was playing on the sidewalk in front of your house? A Yes.

Q And was he sitting down on the sidewalk? A Yes.

Q He was sitting down? A Sitting down having some little stones playing.

Q How near was he to the curb? A (Witness indicates.)

Mr. D'Aloia: Indicating about two feet, Mr. Conlon?

40 Mr. Conlon: Yes.

Joseph Comiskey, cross.

Q Now, right in front of your house there was an automobile parked? A No.

Q Where was the automobile? A About the third house from my house, on the right side.

Q Now, as you looked out of your house, you say up here on your right side there was an automobile parked? A Yes. 10

Q Is that right? A Yes.

Q And it was up against the same curb as your sidewalk or not? A No.

Q Was it up against the curb on the same side of the street that your house is on? A I cannot remember that. I know there was one automobile.

Q Now, where was that? A On Vincent street. 20

Q Was it near your house? A No, sir.

Q How far away from your house? A About three houses ahead.

Q What do you mean by three houses, three houses nearer Ferry street? A No. Three houses nearer to Horatio street.

Q Why, you just told us that the automobile, as you stand on your stoop was to your right; is that true? A I lived from Ferry street on the left-hand side. 30

Q I know you live coming in from Ferry street on the left-hand side. A Yes.

Q And that is this side, isn't that so? A Yes.

Q The downtown side? A Yes. I lived on this side.

Q Now, you said that when you stood up in front of your house the automobile was to your right, is that right? A The automobile was on my right. That is right. 40

Joseph Comiskey, cross.

Q Well, that is nearer to Ferry street than your house? A I don't know. About—maybe 200 feet; maybe more; I can't tell.

The Court: Well, was the automobile between your house and Ferry street or between your house and Horatio street?
10

The Witness: Between my house and Horatio street.

Q Well, then, it was to your left, not to your right as you stand on your stoop? A The automobile that was standing on the street, that is the automobile you refer to?

Q Is that right? A Yes.

Q Now, you saw the little boy get up? A
20 No, not that fellow that was killed.

Q Well, you told us that you saw the little fellow that got killed get up and go out in the street. A Yes. I saw that.

Q And when he got up from the sidewalk to go out in the street you were on the stoop, that is right? A Yes.

Q And you ran out in the street after him? A After that boy started to walk easy home I turned my face at Ferry street. This driver
30 was coming very fast. I get up from my stoop, put up my hand, and he never stopped. Maybe he did not see me.

Q But you went out in the street? A No, on the curb.

Q Well, you came down after the boy? A Yes, on the street.

Q And you came down to the boy on the street because you saw the boy leave the sidewalk and walk out in front of this automobile, didn't you?
40 A I no see him. The first time the automobile.

Joseph Comiskey, re-direct.

Q Let us go back to the point where the boy was playing on the sidewalk in front of your house? A Yes.

Q You saw the boy get up and step in the street? A Yes.

Q At that time you were on your stoop? A After the boy got up from the sidewalk and was about that much on the road— 10

Q Yes, you got up. A I turned my face toward Ferry street.

Q And you saw an automobile coming? A Yes.

Q Then you came down off the stoop to go after the boy, didn't you? A Yes.

Q You were afraid the boy was going to walk out in front of that automobile? A Yes.

Q And before you could get to the boy, the boy walked out to the middle of the street? A Yes. 20

Q And the automobile hit him? A Yes.

Q And you were excited, weren't you? A Yes. He had plenty of time.

Mr. D'Aloia: I move to strike that out as a conclusion.

The Court: Strike it out.

Q Now, you were excited, weren't you? A I don't understand that. 30

Q Well, you were afraid the boy was going to walk out, and you were afraid the automobile was going to hit him? A Yes.

Q And you say you did not hear any horn? A No, sir; maybe, but I didn't hear.

Re-direct examination by Mr. Conlon.

Q Will you look at this map? A Yes. 40

Joseph Comiskey, re-cross.

Q This is Vincent street here. Do you understand that? A Yes.

Q This is number 18. That is where you lived? A Yes.

10 Q Here is Ferry street. This is Horatio street. Now, which way did the automobile come that ran over the boy? A It come out Ferry street and pointed south.

Q Where was the automobile that was parked on Vincent street? A Before he hit the boy?

Q Yes. The automobile that was parked there? A About that much.

Q Was that automobile against the curb or in the street? A Against the curb.

20 Q Was there any automobile between your house and Ferry street along this curb? A No, not one.

Re-cross examination by Mr. D'Aloia.

Q Well, do you remember telling the prosecutor that the automobile was to your right?

30 Mr. Conlon: I object to that, because he was talking about a different automobile. He was talking about the automobile that ran into the boy.

Q Do you remember saying that the automobile which was parked was to your right? A No. There was only one automobile.

Q Well, do you remember saying the one that was parked was parked to your right as you came out on your stoop? A Yes, I remember.

Q Well, is that true, was it parked to your right? A I cannot tell that.

40

Julia Voelker, direct.

Re-direct examination by Mr. Conlon.

Q Do you know what is meant when you talk about an automobile being parked? A I don't know.

Q How many automobiles were along the curb of Vincent street on your side of the street? 10

A One automobile on that street. That is all. No passing this way or that way.

Q And there was one automobile standing on Vincent street against the curb? A Yes.

Q Was that on your side of the street or the other side? A I think it was on the other side.

Q Well, do you know whether or not there was any automobile between your house and Ferry street on the same side of the street? A No. 20

JULIA VOELKER, sworn in behalf of the State.

Direct examination by Mr. Conlon.

Q Where do you live? A 22 Vincent street.

Q How long have you lived there? A Almost three years.

Q Do you know Mr. McKeon, who was on the stand a little while ago? A Yes, I do. 30

Q How long have you known him? A Well, I have known him for about two or three years.

Q Did you know his little boy Sammy? A I ought to.

Q Well, did you? A Yes.

Q Do you remember the evening of June 30th, this year? A I do.

Q Where were you about 7 o'clock that evening? A Sitting in my front window. 40

Julia Voelker, direct.

Q Your house is number 22 Vincent street?
A 22.

Q 22 Vincent street is where I am indicating on the map? A Yes.

Q And who was with you, if anybody, when you were in your front window? A No one. I
10 just had my baby on my lap.

Q Was it light then? A Yes.

Q What was the weather? A Well, clear, as far as I remember.

Q Was the pavement dry or wet? A Dry.

Q Did you see Samuel McKeon? A I did.

Q Where was he when you first saw him? A Why, I saw him crossing the street. He came out from between 18 and 20 Vincent street, and he started walking across the street and got out
20 in the middle of the street when the truck came along and hit him and knocked him down and ran over him.

Q Well, can you tell how fast the truck was coming? A Well, I am no judge of speed, but he was coming very fast.

Q After the truck struck the boy, what happened to the truck? A Well, he did not stop until he got down to about 25 Vincent street. That would be about in front of the electric light there, or a little beyond.
30

Q Now, as Sam was crossing the street, was he walking or running? A Walking. He was singing.

Q And where was he with reference to the curb or middle of the street when he was struck? A About the middle of the street.

Q Now, do you understand this map on the wall? This is Vincent street and this is Ferry street and these are the houses? A Yes.

Q And that is your house? A Yes.
40

Julia Voelker, cross.

Q Now, will you just take this pointer and show us on the map where you were? A Well, it is a bay window and I was sitting at this window over here, right here (indicating).

Q Where was Sam when you first saw him?
A Crossing here (indicating).

Q Sam lived where? A Right here (indicating). 10

Q What number? A 17.

Q And where was Sam when he was struck by the automobile? A About in the middle of the street.

Q Will you just show us? A About here (indicating).

Q Where was the automobile when you first saw it? A Where was the truck when I first saw it? 20

Q Yes. A When I first saw it, it was right about there by the electric light pole there.

Q And the truck stopped where? A Right here, between these two houses here, 25-27 (indicating).

Q Were there any cars parked on your side of Vincent street? A Yes.

Q Where? A Right here, between 20 and 22, in front of my stoop.

Q Were there any other cars parked on that side of Vincent street? A No, sir. 30

Q Was there any other car parked on the east side of your street between Horatio street and Ferry street? A No, sir.

Cross examination by Mr. D'Aloia.

Q You say the car was parked in front of your house? A Yes, sir.

Q What kind of a car was it? A You mean what make? 40

Julia Voelker, cross.

Q No, what style? A Why, a Hudson, a sedan.

Q And were you living on the first floor? A I lived in the whole house.

Q Were you sitting in the first floor? A Yes.

10 Q Didn't that automobile which was parked in front of your house, as you looked toward Ferry street, block your view? A Not at all.

Q Well, you pointed out it was right in front of your house? A Yes.

Q Only a little toward Ferry street? A Right here (indicating).

Q And you were sitting here? A Yes.

Q And didn't any part of that car block your view as you looked up? A No, not at all.

20 Q You say you had your baby there? A I did.

Q Were you paying attention to the baby? A No, I was not. I was nursing my baby and I was looking up the street.

Q Did you see Sam play on the sidewalk? A I didn't see him play on the sidewalk. I saw him go out on the curbstone.

Q Going across the street toward his house? A Yes.

30 Q And as he was turned toward you? A No. He was sitting on the side of the street I am and he was facing the way I am facing you. He was going from the east side to the west.

Q You told the prosecutor the boy was going across the street and he was singing? A Yes.

Q And you could see his mouth? A Well, from the side I could see his mouth.

Q Couldn't you see the full face? A No.

40 Q And you saw him walk out? A With his head down, very slowly.

Julia Voelker, re-direct.

Q Did you hear an automobile horn? A No, I didn't.

Q You do not remember one? A Well, if I heard one, I would remember it. I did not hear it.

Q Were your windows open? A They were.

Q Did you scream? A Did I scream? 10

Q Yes. A I guess I did.

Q Well, did you scream after the boy was hit by the automobile? A Well, I do not just remember that.

Q You did not see this automobile coming from Ferry street until it hit the boy? A I did. I saw it when it was at Sturgeon's house, the house before McKeon's.

Q Well, did you scream? A Not then, not until after the boy was hit. 20

Q You do not know anything about speed? A Well, that is, if you ask me how many miles it was going, I could not tell you, but I know he was going very fast.

Q Didn't you see him put on the brake? A No, I didn't.

Q Couldn't you see on that kind of car whether he was trying to put on the brake? A Well, I didn't pay any attention to that. I do not know whether he did. 30

Q Are you a good friend of Mr. McKeon? A I never was intimate with him, no.

Re-direct examination by Mr. Conlon.

Q Did the speed of the automobile change from the time that you first saw it until the time it hit the boy? A No, not until it stopped.

Mr. D'Aloia: I object to that. 40

John Smith, direct.

Q Did the speed of the automobile change from the time you first saw it until it hit the boy? A No.

10 JOHN SMITH, sworn in behalf of the State.

Direct examination by Mr. Conlon.

Q Where do you live? A 19 Vincent street.

Q What is your business? A Chauffeur.

Q For whom do you drive? A Passaic Transportation Company.

Q How long have you been a chauffeur? A About nine years; a little over that.

20 Q Do you know Mr. McKeon? A Yes, just know him to see him and bid him the time of day

Q How long did you live at 19 Vincent street? A About ten months.

Q Mr. McKeon lives at 17 Vincent street? A Yes.

Q Do you remember the 30th of June, this year? A Yes.

30 Q Where were you about 7 o'clock that evening? A I was just coming down the street, coming home from work.

Q What time did you get home? A Just about five minutes to seven.

Q It was light then, of course? A It was light.

Q What was the weather? A Clear.

Q Was the pavement on Vincent street wet or dry? A Dry.

Q Did you see this Samuel McKeon that evening? A Yes.

40 Q You knew him, did you? A Yes, sir.

John Smith, direct.

Q Where did you see him? A I was talking to him at the stoop as I was going in the house.

Q Did you then go in the house? A I went in the house.

Q Did you see him again? A I seen him again just outside of the window.

Q Where were you? A Sitting in the window, reading the paper. 10

Q In the window of 19 Vincent street? A Yes.

Q Where did you see Sam then? A He was playing right outside of the door.

Q And you saw him later on? A Yes. He was playing around there.

Q Where did you see him last? A Last I seen him in the middle of the street.

Q You did not see him start to cross the street? A No. 20

Q Do you know which way he started to cross? A No.

Q You do not know what side he was going or to what side? A No.

Q Just exactly where was he? A He was just between 19 and 21 Vincent street.

Q In the middle of the street? A In the middle of the street.

Q Tell us what happened? A Well, I was sitting in the window reading the paper and this truck made quite a noise coming down the street, and as I looked up I heard someone holler out in the street and I turned and looked out the window, and no more than I looked out of the window, the truck hit the boy and went right on over him and it went down the street about 100 or 150 yards before he stopped, and by the time I got outside in the street, his truck was coming to a standstill then. 30

John Smith, direct.

Q What would you say was the speed of the truck? A Between twenty and twenty-five miles an hour.

Q What if anything made you look up? A The noise of the truck coming down the street.

10 Q Did you hear any horn blown? A No, sir.

Q Are you able to say whether there was or was not a horn blown? A There was no horn blown.

Q Now, were there any cars parked on Vincent street on your side of the street? A No.

Q Were there any cars parked on the opposite side? A Yes, between 22 and 24.

Q Were there any cars parked between that car and Ferry street on either side? A No, sir.

Q You understand this map? A Yes.

20 Q You understand that these are the house numbers here? A Yes.

Q Now, will you just point to the map and show where you were sitting. A I was sitting right here at this window here (indicating); there were three windows; the center window.

Q And Mr. McKeon's house was there? A Right next door.

30 Q Now, where was Sam when you saw him? A Just right about in between these two buildings here, in the center of the street. (Indicating.)

Q In the center of the street between 19 and 21 Vincent street? A Yes.

Q Where was the car that was parked on the opposite side of the street? A Right here in the center, between twenty-two and twenty-four.

Q You mean in front of the stoop? A Yes.

Q Where did this truck stop after striking the boy? A It stopped down the street here (indicating).

40 Q How far? A It was about four houses.

John Smith, direct.

Q You lived in the same building where Mr. McKeon lived? A Yes, a double house.

Q You saw Sam when you came on foot? A Yes.

Q And the boy was about here (indicating)? A Yes.

Q And you spoke to him? A Yes. 10

Q And you went in the house through the rear? A Through the front.

Q And when you got there and sat down and read the paper you saw the boy cross the street?

A I didn't see the boy cross the street.

Q He was playing over here (indicating)? A Yes.

Q Do you know how he got over here (indicating)? A I don't know? I was not watching him. 20

Q Which way was he going across? A He was just standing in the middle of the street, and when I looked out the car was on top of him.

Q You did not see him go from your side of the street and go across the street and sit down on the street and start playing, A No.

Q You looked up when you heard a scream?

Mr. D'Aloia: I object to that. That is not the testimony. I submit the question misleads this witness. It misquotes the evidence. 30

The Court: Well, the witness never said that he heard a scream and you say to him you heard a scream. That misleads the witness. It is not proper to misquote the evidence.

Mr. Conlon: I am not misquoting it.

Q Now, isn't it a fact that you looked up when you heard the scream? A I did not hear the 40

John Smith, direct.

scream. I heard the noise of the truck coming down the street. I heard the scream after the boy got hit.

Q Well, you told me when I asked you which way the boy was crossing, that you saw the truck on top of the boy when he was in the middle of the street. A I didn't tell you he was walking
10 across the street when I seen him. I saw him standing there.

Q How far away was the truck? A About five feet.

Q Is that the time you say you first saw the truck? A Yes. I seen him coming down the street. The noise of it made me look up.

Q Where was it when you first saw it? A Coming around the corner from Ferry street.

Q And you kept it in sight? A Yes, sir, I
20 kept it in sight. I was glancing up at him.

Q Were you looking at your paper and looking at the truck? A I was looking at the paper before I heard the noise.

Q Did you keep the truck in sight from when you first saw it until it hit the boy? A Yes, I did.

Q Do you mean to tell me the truck was five feet from the boy? A Well, I seen it when it
30 was five feet away from him.

Q When did you hear the scream? A After the boy was knocked down.

Q Now, isn't it a fact that your attention was attracted by the scream? A My attention was attracted by the noise of the truck coming down the block.

Q What kind of pavement is it? A Smooth pavement.

Q Have you ever talked this case over with
40 Mr. McKeon? A No, I didn't.

George Villano, direct.

Q You say the truck stopped about three or four houses below? A Yes.

Q And you say it went 150 yards? A I said between 50 and 100.

Q You did not say 150 yards? A No.

Q Did you go out and pick the boy up? A Yes. 10

Q And you brought him in toward the house? A I brought him toward the house.

Q And the truck came back? A No, sir; the truck did not come back.

Q Well, the truck took the boy to the hospital? A They walked down with the boy to the truck.

Q You walked down? A I didn't. His father did.

Q Did you walk to where the truck was? A No, I didn't go near the truck. 20

Re-direct examination by Mr. Conlon.

Q How far was the truck from the boy when you first saw the boy in the middle of the street?

A It was close on top of him then, and the boy was bewildered and he didn't know which way to go, back or forward.

STATE RESTS.

30

Mr. D'Aloia opens for the defendant.

GEORGE VILLANO, defendant, sworn in his own behalf.

Direct examination by Mr. D'Aloia.

Q How old are you? A Nineteen. 40

George Villano, direct.

Q For whom were you working on the 30th of June, 1927? A For the Henry Steers Corporation.

Q What kind of a concern is that? A Contracting engineers.

Q And what was your particular employment?
10 A I was trucking for them.

Q Whose truck were you using? A My father's.

Q Now, do you remember this night? A Yes.

Q Do you remember turning in from Ferry street to Vincent street? A Yes.

Q Who was on the truck with you? A Nick Giffello and Mr. Joseph Policastro.

Q Tell the Court and jury as you came into
20 Vincent street what happened. A Well, I was coming down and I saw a car parked on the other side, on the left-hand side of the street.

Q Then what happened? A Well, as I was nearing the car the child come running from the sidewalk and struck my front right wheel, so I stopped short to avoid the accident, and the accident was unavoidable.

Q How fast were you going at the time? A Eight miles an hour.

Q And how much of your car passed over
30 the boy? A The front wheel.

Q Did the rear wheel pass over him? A No, sir.

Q Who picked him up from under the front wheel? A I could not tell you. I jumped out quick. His father had him in his arms already and I took him to St. James' Hospital.

Q Did your car go any five houses or three
40 houses after striking that boy? A No, sir; it did not go more than two feet; maybe three.

George Villano, cross.

Q Did your rear wheel pass over the boy? A
No, sir.

Q Did the father go with you to St. James' Hospital? A Yes.

Q And you left the boy there? A Yes.

Q And you left all the information as to who you were? A Yes. 10

Cross examination by Mr. Conlon.

Q As a matter of fact, there was a policeman with you at St. James' Hospital? A Yes.

Q And he took the information from you? A And so did the doctor.

Q And you came around into Vincent street—how fast were you going? A Eight miles an hour. I had to stop there for a trolley car and I was just starting off when I got into the block. 20

Q You mean the trolley was on Ferry street? A Yes. He let a passenger off and I was just starting off again.

Q I mean how fast were you going when you were going along Vincent street? A Eight miles an hour, because I only had fifty feet more to go to my house.

Q At any time you were traveling on Vincent street, did you go any faster than eight miles an hour? A No. 30

Q You are sure about that? A Yes.

Q Did this boy who you hit come from your right or your left? A He come from my left.

Q And did he come from behind a parked car? A He come from behind a parked car.

Q And the parked car was where? A Well, it was right at 24 or 22, if I remember right.

Q Well, you lived there. A I live at 34. 40

George Villano, cross.

Q You know all the numbers of those houses?

A Yes.

Q Now, where was this parked car? A In front of 22.

Q And this boy came from behind it? A Behind it.

10 Q That car was parked on the east side of Vincent street? A On the west side.

Q On the west side? A Yes.

Q You mean the right side as you came down? A On my left side.

Q Well, that is the east side, isn't it? A The west side, I think.

Q You were going south on Vincent street? A I was going south. It was on this side (indicating).

20 Q Well, it was your left side? A Yes.

Q How far behind the car was he? A The boy?

Q Yes. A I don't know that. I just seen him come running out in front of me all of a sudden. I do not think he knew where he was going.

Q No, just a moment. Was he running? A Yes.

Q Running very fast? A Yes.

30 Q And you say that your right front wheel struck him? A Yes.

Q Where was he when you first saw him? A I saw him on the sidewalk, when I turned the corner.

Q You saw him on the sidewalk when you turned the corner? A Yes, and then I did not see him until he come running out in front of me.

40 Q Where was he when you first saw him as you come up Vincent street? A He was playing on the street.

George Villano, cross.

Q No, I mean when you first saw him in the street? A Well, he just was running right into me then.

Q Where were you traveling with reference to the curb? A Well, I was about five feet—four feet from the curb.

Q Which curb? A From the right-hand curb. 10

Q And where was he when you first saw him? A He was on the east side of the street.

Q And he came from back of this parked car? A Yes.

Q How far was he out from the parked car when you first saw him? A Well, about three feet—well, a little more than that; he was right under my front wheel.

Q How far was he from the parked car when you first saw him? A When I turned the corner? 20

Q No. When you came he ran out from behind this parked car? A Yes.

Q Well, when did you first notice him? A When he was right in front of me. I saw him run from behind the car, too.

Q Well, that is what I want to know? A Right from behind the car.

Q Did you see him while he was in the act of running from behind this parked car? A He was running out, I do not know what you mean by that. 30

Q Well, I want to know what you saw. A Well, I saw him come running from behind the car. He come running right under my front right wheel.

Q And did you see him all the time he ran from behind the car until he ran under your wheel? A Well, I noticed him when I turned the corner. 40

George Villano, cross.

Q No. I mean when he got out from behind the parked car, did you see him continuously until your wheel ran over him? A Yes.

Q Then you were going eight miles an hour? A Yes.

10 Q How far were you from the parked car? A Well, I wasn't very far from it. I was just on the verge of passing it.

Q Well, when you saw this boy running across the street, why didn't you stop? A I did stop.

Q Within about what space? A Within about three feet.

Q You stopped within three feet? A Yes.

20 Q In other words, you were bringing your car to a stop when you hit him? A I brought my car to a stop before I hit him.

Q The car was moving when you hit him? A It was moving.

Q But it was moving over a space of this three feet? A Yes.

Q And you say your car did not go over two feet after you hit him? A No, sir.

Q Now, just follow me. You came around this corner of Ferry street (indicating)? A Yes.

30 Q And you were traveling eight miles an hour? A Yes.

Q Five feet from this west curb, your right curb? A Yes.

Q Were there any cars parked along this side of the street? A No.

Q Were there any cars parked between Ferry street and this— A Yes. There was one in front of 22.

40 Q I mean beside that. A That was the only one.

George Villano, cross.

Q So you had a clear view of this street from Ferry street up to 22? A Yes.

Q And you were five feet from this curb (indicating)? A Yes.

Q Going eight miles an hour? A Yes.

Q And you had seen this boy on the curb, on the sidewalk, as you turned the corner? A Yes. 10

Q This car was parked in front of the stoop at 22 Vincent street? A Yes.

Q Headed north, toward Ferry street? A Yes.

Q And against the curb? A Yes.

Q And you say that the boy came from behind the car? A Yes.

Q In other words, he came from between 22 and 24? A Yes, about that. 20

Q Behind this car? A Yes.

Q You are sure he did not cross here between 18 and 20? A No.

Q You are sure about that? A Yes.

Q Now, how far was he out in the street when you first saw him? A Well, he come running out when I first saw him and I stopped and he ran right into me.

Q How far out in the street was he from this curb when you first saw him? A How far was he from the curb? 30

Q Yes. A Well, he was not on the curb. He come running out from behind the car.

Q How far was he from the east curb of Vincent street when you first saw him? A Well, as I turned the corner I did not see him no more.

Q You misunderstand that question? You know what the east curb of this street is? A I do. 40

George Villano, cross.

Q Do you know how far means; don't you? A I don't know what you mean by that. You mean how far the child was standing from the curb?

Q When you saw him first, how far was he from the curb? A He was running out from behind the car when I first saw him. He ran
10 from behind the car.

Q And when you first saw him, how far was he from the curb? A I don't know what you mean.

Q How far was he from the middle of the street when you first saw him? A Well, he was just as far as my truck was. That is where I struck him, on the right-hand side.

Q What do you mean? A He come running from behind the car and I saw the child running
20 from behind the car and stopped my truck and he kept running right into me and he ran into my front wheel.

The Court: No. Answer the question. He asked you how far was the boy from the curb when you first saw him.

The Witness: Well, I could not judge how far he was.

30 The Court: Then he asked you how far he was from the center of the street.

The Witness: He was a little over the middle.

The Court: A little over the middle when you first saw him?

The Witness: Yes.

Q You mean on the right side of the middle as you came down the street? A On the right
40 side.

George Villano, cross.

Q And when you first saw him he had already crossed the middle of the street? A No. He come running from behind the car.

Q I am trying to locate the spot where you first saw this boy. I am not asking what he did or what you did. I want to know the spot, as near as you can fix it, where he was when you first saw him? A When he come running from behind the car.

10

The Court: Just give him the pointer. Can you take that pointer and put that on the spot where the boy was when you first saw him?

The Witness: Here is the car here and I am going right about here (indicating) and he come running right in behind the car.

20

The Court: No. I want you to answer the question. I am asking you to put that pointer at the point where you first saw that boy.

The Witness: Right at the gutter.

The Court: Put it at the spot where you first saw the boy.

The Witness: Where I first saw him was in front of 22.

30

The Court: Well, put your pointer there. Now, is that the place you first saw the boy on the curb?

The Witness: Yes, sir.

Q That was when you came around the corner? A Yes.

Q Now, put your pointer on the spot where the boy was in that street when you first saw him, as nearly as you can place him. These

40

George Villano, cross.

are the houses along Vincent street, 28, 26, 24 and this is a double house, and so on down. Here is the manhole in about the middle of the street. Now, I want you to point to the spot where the boy was when you first saw him. A I first saw him when I turned the corner.

10 Q No, after you turned the corner. A Well, after I turned the corner I saw him coming from behind the car.

Q Well, where was he? A In the street.

Q That is whereabouts? I want you to point out. A Right about there (indicating).

Mr. D'Aloia: Pointing at a spot just the other side of the manhole.

20 Q Now, will you make a mark there with this pencil?

Mr. Conlon: Shall I mark that with a "D" indicating where the defendant first saw the boy?

Mr. D'Aloia: Yes.

Q Now, where was he when your automobile hit him? A Well, that is the same spot.

30 Q In other words, you hit him at the same spot you first saw him? A No, I didn't see him there.

Q I ask you to indicate on the map the spot where the boy was when you first saw him? A He was on the gutter.

Q Now, is that the spot? A That is the spot where I hit him.

Q Now, show us the spot where you first saw him? A He was running. I could not make no spot.

40 Q Well, where was he when you first saw him?

George Villano, cross.

Mr. D'Aloia: He has answered that.

The Court: Well, I cannot understand him. Will you kindly sit down and let the witness answer the question?

Q Now, as I understand it, you have indicated there with that pencil mark the spot where you hit the boy? A That is the spot where I hit him. 10

Q Now, will you indicate the spot where you first saw the boy after he ran from behind the automobile, the exact spot, as nearly as you can locate it? A I don't quite get you now, either. I could not make out no spot. The child was running.

Q You must have seen him first at some time? A I seen him come running from behind the car. 20

Q All right. You see the curbs of the street? A Yes.

Q Can you not locate, with reference to those curbs, where he was when you first saw him running? A From behind the car.

Q All right. Can you locate that spot in the street? The car—this car was faced toward Ferry street? A It was.

Q And the boy ran from behind the car? A Yes. 30

Q You are sure about that? A Yes.

Q He did not run from in front of the car? A He run from behind it.

Q Was there anybody in that car? A Not that I remember; I don't think so.

Q Well, do you know whether there was? A No.

Q Did you look? A No.

Q Well, you don't know whether there was anybody? A There was nobody in the car. 40

Nicholas Cifelli, direct.

Q But you didn't look? A I did look.

Q When did you look at it? A Why, the car was empty as I was coming down.

Q You did look at it as you were coming down? A Yes.

Q And there was nobody in it? A No, sir.

10 Q What kind of a car was it? A I think it was a Hudson sedan, or a Moon; I think it was a Hudson.

Q And you are sure there was nobody in it? A Yes.

Q And you are sure the boy ran from behind that car and not in front of it? A From behind it.

20 NICHOLAS CIFELLI, sworn in behalf of the defendant.

Direct examination by Mr. D'Aloia.

Q Do you remember the 30th of June, 1927? A Yes.

Q And where were you working on that day? A Well, I was working in the day and then I was coming home.

30 Q Where were you working? A With Henry Steers.

Q Do you know Villano? A Yes.

Q Do you know his Ford truck? A Yes.

Q Were you on his truck that night when it came from Ferry street to Vincent street? A Yes.

Q What happened after the truck came into Vincent street from Ferry street? A After it got in from Ferry street we turned down Vincent street. As we went about 150 feet from the

40

Nicholas Cifelli, direct.

corner of Ferry street we were going down and then I saw a little boy almost up to the front wheel.

Q A little boy came from where? A It seems it was from the left.

Q Well, where was the little boy with reference to the sidewalk; what part of the street was he on? A Well, he was apast the middle of the street on this side (illustrating). 10

Q On what side? A On the right side.

Q Was the boy running or walking? A It seems he was running, because I just turned my eye and I caught him. He was very close to the car.

Q And where were you sitting? A In the middle. 20

Q On the front seat? A Yes.

Q Looking straight ahead? A No, I was not looking then straight ahead. Just when I turned my eye around I saw him.

Q And when you saw the boy, what was he doing? A I saw him and he was running not more than four or five feet away.

Q Which way was he going when you saw him running? A To the right.

Q To the right from the left? A Yes. 30

Q Is that where you saw him run? A Yes.

Q And how far did the car go after the boy was hit? A Well, as soon as I see that I raised my both hands up to my eyes. I was too frightened to stand it.

Q What did Villano do; did he bring the car to a stop?

Mr. Conlon: I object.

The Court: The last part is leading. 40

Nicholas Cifelli, cross.

Q What did Villano do? A When I placed my hand up at the same time I heard the car come to a stop.

Q Did you get off? A Not me. When I come back to myself I do not remember whether Villano was still in the truck, but Policastro was
10 not in there.

Q Now, do you know what part of the automobile or truck went over the boy? A No, I didn't see.

Q How far did the truck go after the boy was struck, do you know? A Well, I cannot give you any description, but I do not think he went any more than seven or eight feet, from what I seen.

Q How fast was the truck going as you were going along from Ferry street, along Vincent street? A I cannot tell; about eight or nine miles an hour; about that much.
20

Q You got a subpoena from the State? A Yes. I have to make—

Q You were subpoenaed by the State—

Mr. Conlon: I object.

The Court: Sustained.

30 *Cross examination by Mr. Conlon.*

Q You were sitting in the front seat? A Yes.

Q Of the truck? A Of the truck.

Q And were you in the middle or the outside?

A On the middle.

Q Policastro was on your right? A He was on my right, on the outside.

Q Where was this boy when you first saw him? A He was not more than four or five feet from the front wheel.

40

Nicholas Cifelli, cross.

Q From the front of the truck? A Yes.

Q That is when you first saw him? A Yes. I do not know where I was looking then and I come around with my eye.

Q You only saw him a very short time before he was hit? A Sure. Right away I made my view go away, because it was not far from the wheel. I hardly seen him at all. 10

Q Did you see which direction he was going in, whether he was going to your right or to your left? A It seems he was going to the right.

Q No. I asked you which direction he was going. A He was going to the right.

Q You are sure about that? A Yes.

Q And how far did you see him travel? A How far did I see the boy go? What do you mean, going across? 20

Q Yes. How many steps did you see him take? A Well, I don't think it was one, because that was short.

Q You mean the time was short between when you saw him and when you hit him? A Yes. He was close to the wheel.

Q So you did not see him take a step? A No.

Q How do you know what direction he was going? A He was facing the other way. 30

Q That is the only reason? A Well, that is the only way.

Q You are sure he did not take a step? A No.

Q You are sure about that? A I am sure.

Q How did you come to testify a little while ago that he was running? A What do you mean?

Q You said he was running. A No, he was facing the right side. 40

Nicholas Cifelli, cross.

Q You said a few minutes ago, in answer to Mr. D'Aloia, that you saw this boy running? A Running?

Q Didn't you say that? A He was move—not running; he was standing still.

10 Q But you didn't see him running? A No.

Q You are sure you did not see him running? A Not running. He was facing the right side.

Q Answer my question. Are you sure you didn't see him running? A He was not running. How it appeared to me—

Q No. I do not want to know how it appeared to you. Now, after you took this boy to the hospital the police questioned you in this case?

A That was the next morning.

20 Q Down at headquarters? A Yes, down at headquarters. They brought me from the bed.

Q You made a statement to detectives Ash and Thomas; do you remember that? A Yes, I remember.

Q And you told them just what happened. A I told them what happened and I remember I was wrong, because I was excited.

Q Well, this was the next morning? A Yes.

30 Q The next morning you told the police officers what happened? A Yes. They come over to my house.

Q They took you down to Headquarters and you told them what happened and they wrote it down? A Yes.

Q And you signed it? A Yes. I did sign it.

Q Now, I understand what you told them was wrong. A No. I had the thing all wrong.

40 Q What was wrong? A When they questioned me, I stand up and told them the boy was coming from the right side.

Joseph Policastro, direct.

Q You mean when they questioned you first, you told them he was coming from the west side of the street to the east side? A Yes, and then I realized I was going down this way and I was coming like that (illustrating).

Q Yes, but you first told them he was crossing the other way? A Yes. 10

Q And then you afterwards realized that was wrong? A Yes.

Q And still you are sure you did not see the boy take a single step? A He was moving.

Q Did you see him take any steps? A I cannot tell that.

Q And you are sure he was not running? A He was not running.

Q Did you see any automobiles parked there? 20
A On the left side there was one.

JOSEPH POLICASTRO, sworn in behalf of the defendant through interpreter.

Direct examination (through interpreter) by Mr. D'Aloia.

Q Where were you working on the 30th of June, 1927? A Near Port Newark. 30

Q Did you come home on the truck that was driven by Villano on the evening of that day around seven o'clock? A Yes.

Q And do you remember when the truck turned from Ferry street into Vincent street, going toward Horatio street? A Yes.

Q Now, please tell the Court and jury what happened after you got into Vincent street, as you saw it? A The child was playing on the 40

Joseph PolICASTRO, direct.

sidewalk. We were going on slowly. He jumped in front of the wheel.

Q Well, what does that mean? Did you see him leave the sidewalk? A Sure. He was not on the sidewalk. He was about so far from the curb. (Indicating).

10 Q Well, what was he doing when you saw him? A I saw the boy run and he fell. His head went under the wheel.

Q Now, how fast was the truck going at that time? A It could not go any slower.

Q You mean it was going slow? A Sure; easy.

Q Did you see the boy hit the truck? A Sure.

20 Q How far did the truck go after the boy was struck? A About three feet; that is all.

Q Did you get off the truck? A Yes.

Q Did you see where the boy was on the ground with reference to the wheel? A About two and a half feet from the wheel that went over him.

Q Now, which wheel went over him, the front or rear wheel? A The front.

30 Q So, the front wheel was two and a half feet past the body? A That is all.

Q And did you pick the body up; did you pick the boy up? A A girl picked him up.

Q Now, at the time you saw the boy two feet and a half back of the front wheel, was the truck moving or standing still? A It was standing still.

Q Do you know where Villano lived on that street? A Yes.

40 Q What number? A I think it is 46.

Joseph Policastro, cross.

Cross examination by Mr. Conlon.

Q You were sitting on the right side of the truck, were you? A Yes.

Q You saw this boy on the curb? A On the sidewalk, yes.

Q Was there any automobile parked on the curb of Vincent street between you and the boy when you saw the boy on the sidewalk? A Yes. It was about from here back there (indicating); back of the railing. 10

Q What was there? A An automobile.

Q Where was the boy with reference to that automobile? A On the sidewalk.

Q And was he between—was the boy between this parked automobile and you, or was he the other side of the parked automobile? A He was between me and the automobile here (indicating). 20

Q So, you saw the boy when he left the curb, did you? A Yes, I saw him.

Q And your view of the boy leaving the curb was not interrupted by the automobile that was against the curb, was it? A No. He only went three or four paces and then went suddenly under the automobile.

Q You could see the boy all the time from the time he left the curb until the time he was hit by Villano's automobile? A Yes; I saw him. 30

Q Did he fall down before he was hit? A He went to sleep himself under the wheel and the wheel just went over him this way ((illustrating)).

Q Well, did he fall down in the street before the automobile touched him or after? A When he fell down the wheel then went over him like this (illustrating.)

Q Well, did he fall down before the automobile hit him or after? A He fell afterward. 40

Joseph PolICASTRO, re-direct.

Q So that the automobile knocked him down; is that it? A He went as if somebody had thrown him under; he went this way and went under the wheel (illustrating).

10 Q And it was the right side, the side you were sitting on? The right side of the automobile that ran over him; is that right? A The right side.

Q And you were able to see the boy from the time he left the curb until he crossed the street and was right up to your automobile; is that right? A Yes, I saw him.

Q And how far was your right wheel of your automobile from the right curb of Vincent street? A Four or five feet, I think.

20 *Re-direct examination by Mr. D'Aloia.*

Q Well, now, when you said it seemed as if the boy went down to go to sleep under the automobile, what did you mean by that? A No. I think he was afraid.

Mr. Conlon: I ask that that be stricken out.

30 The Court: Strike out the last part.

Q You mean to tell us the boy went toward the automobile with his head down?

Mr. Conlon: I object to that on two grounds. It is leading and it has already been covered.

40 Q Well, will you please describe to us the condition of the boy as he came toward the automobile?

Joseph Policastro, re-cross.

Mr. Conlon: I object to that as having been already testified to.

The Court: I will allow that.

A The wheel went over here (illustrating).

Q Well, before the wheel went over there, how did the boy come toward the car when you saw him? A He was running. 10

Q At full speed? A At full speed.

Mr. Conlon: I object to that.

Mr. D'Aloia: Well, he left it out; the interpreter did. What was the answer?

The Interpreter: He was running at full speed.

Q Well, did you notice whether his head was up or down? A As he was on the ground? 20

Q No, as he was coming running at full speed, was his head up or down? A The head went between the two wheels.

Q I know, but before it went there, did you see it? A I think the boy got scared and when he got to the wheel he went this way (illustrating) and fell down. 30

Re-cross examination by Mr. Conlon.

Q Was the boy running from the time he left the curb? A Sure. How would it go over him?

Q You just answer the question, will you, and tell me whether the boy was running from the time he left the curb? A Yes.

Q Was he running at the time he was hit by the automobile, or was he standing still? A We were going easy. 40

Nicholas Rufalo, direct.

Q Was the boy running at the time he was hit by the automobile, or had he come to a stop?

A I didn't get off in a hurry. A girl picked him up between the two wheels.

10 Adjourned until tomorrow, Tuesday, December 6, 1927, at 10:00 o'clock A. M.

SECOND DAY.

Tuesday, December 6, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

20 NICHOLAS RUFALO, sworn in behalf of the defendant.

Direct examination by Mr. D'Aloia.

Q Where do you live? A 83 Sunset avenue.

Q And before you lived at 83 Sunset avenue, where did you live? A 385 North 6th street.

Q Before that where did you live? A 57 Monroe street.

30 Q That is down below the railroad? A Yes.

Q Do you know this defendant? A I do.

Q Do you know his family? A Yes.

Q Do you know the neighborhood in which he lives? A Yes.

Q How long have you known him? A Well, I have known him since he come from the old country.

40 Q Do you know his reputation in that neighborhood for telling the truth and being a law-abiding citizen?

Nicholas Ruffalo, cross.

Mr. Conlon: I object.

The Court: I think that is admissible. I will allow it.

Q Now, do you know his reputation in that neighborhood for telling the truth and being a law-abiding citizen? A Yes. 10

Q What is it, good or bad? A (Not answered.)

Cross examination by Mr. Conlon.

Q How long have you lived on Sunset avenue? A Six months.

Q How long did you live on North 6th street? A About a year.

Q It is a year and a half ago since you lived on Monroe street? A Yes. 20

Q When you lived on Monroe street, where did Villano live? A Vincent street.

Q How far from Monroe street is Vincent street? A About a mile.

Q Where did you get your information as to his reputation? A Well, we visited one another.

Q You visited him? A Yes.

Q And he visited you? A Yes.

Q Who did you talk to about him; did you ever hear anybody talk about him? A No, sir; I know it myself. 30

Q In other words, you are testifying now as to what you think about him? A Yes.

Q You never heard anybody else talk about him, did you? A I did not.

Q You are sure that you never talked to anybody about Villano? A Everybody I talked to knew it was always in his favor.

Q Well, who did you talk to about him? A Well, we come from one town. 40

Walter Horrer, direct.

Q You mean in Italy? A Yes, and we visited frequently every day.

Q You are a very good friend of his? A Yes.

10 Q And you are telling us now what you think about him? A Yes—not what I think about him, but what I know about him.

Q How do you know it? A Because I visited him every day.

Mr. Conlon: I object to the witness' qualifications.

The Court: Did you ever hear any evil about him; did you ever hear anything about his truth or law-abiding qualities?

The Witness: No.

20

The Court: I will allow it.

DEFENDANT RESTS.

WALTER HORRER, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Conlon.

30

Q Where do you live? A 100 Niagara street.

Q What is your business? A Why, I am a foreman, Celluloid Company.

Q Do you remember the 30th of June, this year? A I do.

Q Where were you about seven o'clock in the evening of that day? A Why, I was seated at the wheel of my car in the front of 20 Vincent street.

40

Walter Horrer, direct.

Q What kind of a car did you have at that time? A A Hudson sedan.

Q Who was with you? A Mrs. Cahill was sitting in the back and we were waiting for her son Joe to come out of the house.

Q And there was just you and Mrs. Cahill in the car? A That is right. 10

Q You did not see this accident, did you?

Mr. D'Aloia: I object to that as not proper rebuttal.

The Court: Well, let him answer whether he saw it.

Mr. Conlon: I just want to know whether you saw it.

A Well, I didn't see it from the beginning, but I seen it from the time that the wheel went over the boy's body. 20

Q Your car was in front of 20 and 22 Vincent street; that is a double house? A Yes.

Q And just what part of the house was it in front of? A Why, between the two doors; that is, the doors are together; the door to 20 is the same as 22.

Q Where were you with reference to the stoop of the house? A Right at the steps. I was parked on the right-hand side of the curb and right opposite the stairs of 20 and 22 Vincent street. 30

Q And where with reference to the position you were did this accident happen?

Mr. D'Aloia: I object. He did not see it.

The Court: Well, he did not see the accident. He saw the boy from the time he went over him. 40

Walter Horrer, direct.

Mr. Conlon: Yes, sir.

The Court: Well, he can state where the boy was with reference to the time the wheel went over him.

A Why, I was seated at the wheel of my car.

10 Q No. Where with reference to your car was the boy when you saw the wheel of the automobile go over him? A You mean the truck?

Q Where was the boy? A Why, the boy was in the front of me on my left; that is, on my left as I looked I seen the wheel go over the boy's body. That was in front of me.

20 Q How far in front of you? A Well, I am not a very good judge of feet. I think it happened about fifteen feet in front of me.

The Court: How far away from where you are sitting in the room here?

The Witness: Why, I judge about that corner where that man is sitting.

The Court: You mean the man with the gray hair?

The Witness: Yes; sitting down.

30 Q And your car was facing which direction?
A Ferry street.

Q On the east side of Vincent street? A On the right-hand side of the street.

Q Was there any other car parked in front of you, between you and Ferry street? A No.

The Court: How is this rebuttal?

40 Mr. Conlon: The defense brought out the fact that this child had run out from the sidewalk in back of the automobile parked in

Walter Horrer, cross—re-direct.

front of 22, and this was the man sitting in that automobile.

The Court: All this witness says is his was the only car parked there.

Mr. Conlon: And that the child was ahead in front of it.

10

Cross examination by Mr. D'Aloia.

Q Could you see where the child came from before you saw it hit? A No, sir.

Q Do you know whether or not it came from in back of your car? A I am positive it did not.

Q I know, but you did not see where it came from? A No.

Q You did not see the child until the child was struck by the automobile? A That is right.

20

Q From where you are sitting in your car to where that man is? A That is right.

Q Now, do you know whether the little fellow came from in back of your car and run? A No.

Q Did you see the little fellow leave the sidewalk and go into the street? A No.

Q At the time the automobile struck the—when the boy was struck by the automobile, did you notice the position of the boy's head, was it down or up? A Well, he was laying down.

30

The Court: Well, he was on the ground when you saw him?

The Witness: Yes. The wheel was going over the body.

Re-direct examination by Mr. Conlon.

Q What happened to the truck, where did that go? A The truck that hit the boy?

40

Joseph Cahill, direct.

Q Yes. A Why, he was down a couple of feet from my car, because he had to back up to put the boy in the car to take him to the hospital.

Q Where did he stop with reference to your car, do you know? A Well, it was in back of my car.

10 Q Was it a couple of feet? A Well, I don't know.

Q You did not look back to see how far back? A No, I didn't, but I know the father of the boy had him in his arms and I told the fellow to take him in the truck and take him to the hospital, and I know the man had to back up to take the boy to the hospital.

Re-cross examination by Mr. D'Aloia.

20 Q Which the boy did? A Yes, with the father.

JOSEPH CAHILL, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Conlon.

Q Where do you live? A 20 Vincent street.

30 Q Do you remember the 30th of June, this year? A Yes.

Q Where were you about seven o'clock that evening? A In the house, just in the hallway coming out on the stoop to get in the car.

Q Did you see this accident? A No, I did not see it.

Q What did you see? A I saw the father taking the boy to the truck to take him to the hospital.

40 Q Where was the boy when you first saw him?

Joseph Cahill, direct.

Mr. D'Aloia: I object to that. That is not proper rebuttal.

The Court: Well, it shows the position of the truck. Is that what you are trying to show?

Mr. Conlon: Yes, sir, with reference to this parked car. 10

A In his father's arms.

Q Were there any cars parked on the east side of Ferry street? A Not that I seen.

Q On Vincent street? A No, I didn't see a car on that side outside of the one I was to get in.

Q What car was that? A A Hudson.

Q Where was that? A In front of the door.

Q Where was the father with the child with reference to that car when you saw him? A 20
Why, he was just carrying him; he was between 19 and 21 Vincent street. He was carrying him to the truck, and the boy was backing the truck up.

Q This is 19 (indicating on map)? A Yes.

Q And this is 21, is that right (indicating)?

A Yes.

Q And the truck was here (indicating)?

Mr. D'Aloia: The car was there. 30

Q The Hudson car was there? A Yes.

Q Now, just point out where you first saw the father with the boy? A Right about here (indicating); he had just left from the other side. The truck backed here like this (indicating).

Cross examination waived.

Mary Cahill, direct.

MARY CAHILL, sworn in behalf of the State
in rebuttal.

Direct examination by Mr. Conlon.

- Q Where do you live? A 20 Vincent street.
 10 Q Do you remember the 30th of June, this
year? A Yes.
 Q Where were you about seven o'clock? A
I was sitting in the back seat of the car.
 Q Whose car? A Mr. Horrer's car.
 Q Where was that car? A At the door, 20
Vincent street, between the two doors.
 Q Did you see the accident that happened
there? A No.
 Q Did you see the boy? A Yes. I saw the
 20 little fellow lying on the street. The screams
drew my attention to the little fellow.
 Q And where was the boy on the street when
you first saw him?

Mr. D'Aloia: I submit this does not
establish the position of the truck at all.

The Court: Are you going to show the
same thing by this witness about the truck?

- Mr. Conlon: I am going to show when
 30 the boy was struck he was in the front of
the Hudson car, which was on the right side
of Vincent street.

The Court: Go ahead.

- Q Where was the boy when you first saw
him? A Lying on the street.
 Q And where in reference to the Hudson car
in which you were sitting? A Well, in front of
it, toward 19.
 Q And where in reference to the middle of
 40 the street? A Well, towards the left side.

John Smith, direct.

Q You mean your side or the other side? A No, the other side.

Cross examination by Mr. D'Aloia.

Q You do not know where the boy came from when he got into the street? A I did not see him, no. 10

Q You were sitting in this automobile looking straight ahead? A No, I was not.

Q But you were facing front? A Yes, but I was looking toward the side door.

Q You do not know whether the boy came out from behind your car and ran toward Ferry street? A No.

Q Or ran toward his house? A No.

Q The first you saw of this thing was you heard a scream and you looked and saw a boy to your left on the ground? A Yes. I saw the little boy on the ground. 20

Mr. D'Aloia: Will Mr. Conlon admit that the defendant and his family lived at 34 Vincent street?

Mr. Conlon: Yes, I will admit that.

JOHN SMITH, recalled in behalf of the State in rebuttal. 30

Direct examination by Mr. Conlon.

Q Where did you say you lived? A 19 Vincent street.

Q How long did you live there? A About ten months.

Q Do you know the defendant in this case, Villano? A I know him to see. 40

John Smith, direct.

Q And do you know any of the people in the neighborhood down there? A Two or three I have known to see in and out the street.

Q Do you know Villano's reputation as a careful automobile driver?

10 Mr. D'Aloia: I object to that, because I did not ask him that question.

The Court: But you asked his general reputation for being law-abiding.

Mr. D'Aloia: Yes, sir. Now, if he will ask that same question in that way, I have no objection to it.

The Court: Is not driving properly involved in law-abiding?

20 Mr. D'Aloia: No, sir. I might be a good driver and you may not deem it proper. This specific question I object to because I do not think it comes within the perview of what I think—

The Court: Well, can you not show his general reputation as a careful driver? Is that what you propose to show?

Mr. Conlon: Yes, sir, or the reverse.

30 The Court: Well, I think if you can show under present circumstances his reputation for driving in such a manner as would constitute a breaking of the law, I think his general reputation for being careful would not be admissible. It may be quite a narrow distinction.

Mr. Conlon: Well, I do not know how to frame a question to bring that out. Of course, any reckless driving is unlawful.

40 The Court: If you can show that and show that he has a reputation for being a

John Smith, direct.

reckless driver, I think I will allow you to show it.

Mr. Conlon: Well, may I ask the question and have the evidence stricken out if it is not proper?

The Court: Yes.

10

Q Do you know his reputation? A Well, he has been—

The Court: Just yes or no.

The Witness: Yes.

Q And is his reputation as a careful driver good or bad? A No, sir.

Q What do you mean by "No, sir?" A Bad.

20

Mr. D'Aloia: I object to that. The same objection.

The Court: I will strike out the part that says it is bad.

Mr. D'Aloia: The trouble is your Honor gives the prosecutor a certain amount of latitude and I do not know when to get up.

The Court: I will strike out both answers. I think you can show his reputation for recklessness in driving.

30

Q Answer the question yes or not. Do you know his reputation for recklessness in driving an automobile?

The Court: Or the reverse.

A Yes.

40

John Smith, cross.

Q And is his reputation in that respect good or bad?

Mr. D'Aloia: I object.

The Court: I will allow that.

10 Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

A He goes through there in a reckless manner all the time.

The Court: Strike it out.

20

Q No. Is his reputation in that respect good or bad? A It is bad that way.

Cross examination by Mr. D'Aloia.

Q You are passing upon this of your own observation? A You would pass upon it, too, if you seen it.

Q But that is your observation? A Yes.

30 Q Nothing else? A No.

Q You are a chauffeur? A Yes.

Q You would drive a car differently? A Yes.

Q Is that what you are basing your opinion on? A Yes.

Q Is that all? A Yes.

Mr. D'Aloia: I move to strike out the testimony.

40

John Smith, re-direct—re-cross.

Re-direct examination by Mr. Conlon.

Q Did you ever hear anybody talk about him?

A Other people in that street have been talking about him the way he comes in and out that street.

Q And is it partly on that you are basing your opinion? 10

Mr. D'Aloia: I object.

The Court: I will strike out the particular act.

Q You say you have heard people on the street talk about him? A Yes.

Q What was the subject of their conversation? 20

Mr. D'Aloia: I object.

The Court: Well, the general subject was his manner of driving. Was the subject of the conversation his manner of driving?

The Witness: Yes, sir.

Mr. Conlon: I submit the witness is qualified.

The Court: He is. I think he is not only qualified, but he has answered the question. 30

Re-cross examination by Mr. D'Aloia.

Q Did you ever hear of his having an accident? A No, sir.

Joseph Comiskey, direct.

JOSEPH COMISKEY, recalled in behalf of the State in rebuttal.

Direct examination by Mr. Conlon.

Q What number Vincent street do you live?

10 A 18.

Q How long have you lived there? A About two years, pretty near.

Q Do you know Villano, the defendant in this case? A I know him.

Q How long have you known him? A I know him as a little kid.

Q Do you know his reputation in the community in which he lives for his recklessness in driving an automobile?

20

Mr. D'Aloia: I object to the question as absolutely improper. He is not competent to judge.

The Court: Well, I will assume he understands the meaning of the word, but I would suggest you ask for his reputation for recklessness or the reverse.

Mr. D'Aloia: May I have an objection to your Honor's modification of that question?

30

The Court: Yes.

Q Do you know Villano's reputation for recklessness or carelessness in driving an automobile?

A Yes, I know.

Q Do you know what I mean by reputation?

A What does that mean? I do not understand.

Q Do you know what other people think about him? A I tell you his father and mother is nice people, that boy.

40

Joseph Comiskey, direct.

Q Did you ever hear any other people down in that neighborhood talk about him? A Yes, I heard that.

Q About the way in which he drives an automobile?

Mr. D'Aloia: I object to that question. 10

The Court: This answer calls for yes or no.

Mr. Conlon: That is all.

The Court: I will allow him to answer yes or no.

Mr. D'Aloia: I object to the question. He did not hear anybody talk about a certain subject.

The Court: I will allow that. 20

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q Did you ever hear any people talk about the way in which he drives a car? Now, answer me yes or no. 30

Mr. D'Aloia: The same objection.

A Yes.

Q Do you know what the people in that neighborhood think about the way in which he drives an automobile.

Mr. D'Aloia: I object to that. The same objection. 40

Joseph Comiskey, direct.

The Court: I will allow that. Yes or no.

A Yes.

10 The Court: Well, that is what he means by reputation, what the people in the neighborhood think about the way in which he drives. Do you understand what reputation is?

20 Mr. D'Aloia: The people in the neighborhood—their opinion of the way in which a man drives a car may be competent and may not be in accordance with their experience with driving an automobile. That is not truthfulness or law-abiding. I do not think it is proper you should take from this witness what people think. I do not think those housewives down in Vincent street are competent to judge whether a man drives an automobile properly.

30 The Court: It is general reputation in the neighborhood, and that is all this question asks for, what people think, if he knows. He does not seem to understand what reputation is. Now, I have instructed him and I have told him now that reputation means what the people generally in the neighborhood think of the man. Do you understand that? Now listen to me. Reputation means what the people in the neighborhood think of a man—what they think of him—the people in the neighborhood. Now, if it is reputation for goodness, it is what people think of him for being a good man. If it is reputation for honesty, it is what people think in the neighborhood as to his honesty. If it is his reputation as to recklessness in

40

Joseph Comiskey, cross.

driving, it is what the people in the neighborhood think about him. Now, he is asking about this man's general reputation in the neighborhood for reckless driving, or careful driving, and he wants to know it, and now we want to know whether you know that reputation. Do you know that reputation? 10

The Witness: Yes, sir.

Mr. D'Aloia: I object.

The Witness: I know.

Q And is his reputation for careful or reckless driving good or bad? A Bad.

Mr. D'Aloia: The same objection to that last question.

The Court: You may have it. 20

Cross examination by Mr. D'Aloia.

Q Did you ever hear of an accident he had?

A Before?

Q Yes. A No.

TESTIMONY CLOSED.

Mr. D'Aloia sums up for the defendant. 30

Mr. Conlon sums up for the State.

*Charge to Jury.***CHARGE.**

The Court thereupon charged the jury as follows:

FLANNAGAN, *J.*

10 Gentlemen of the Jury. The Court is the judge of the law. The jury are the sole and exclusive judges of the facts. The defendant is presumed to be innocent and unless crime charged and each of its elements is proved against him beyond a reasonable doubt he is entitled to an acquittal. The burden of so proving him guilty rests upon the State and never shifts. The defendant comes before you under an indictment which has been found by the Grand Jury of our County. That indictment you may take with you
20 into the jury room and read it there.

The elements of this crime, as charged in this indictment, are as follows: (1) A plain legal duty from the defendant to the deceased; (2) Neglect or violation of that duty to an extent amounting to gross negligence, in other words, negligence evincing a reckless indifference to or disregard of human life; (3) That the injuries received by the deceased were the result of this gross negligence and were the regular, natural and likely consequences thereof; (4) That the
30 deceased came to his death by reason of such injuries.

Gross negligence means in cases like the present negligence of a degree evincing a reckless indifference to or disregard of human life. When it results in death it becomes criminal negligence or criminal carelessness.

Involuntary manslaughter means unintentional killing. No malice is necessary and no intention to kill is involved. In involuntary manslaughter
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Charge to Jury.

gross negligence supplies the place of criminal intent.

This defendant was under a duty to this little child. The defendant in driving the motor vehicle was under a duty to the deceased to exercise such care and skill and have the car under such reasonable control as a reasonable and ordinarily prudent person would under the conditions existing at the time the deceased was injured. 10

In addition, the defendant was under a duty to observe the provisions of the motor vehicle act governing speed and governing driving in the streets of the city. The mere neglect on the part of the deceased—on the part of the defendant, I meant to say, to use the care which I have charged you he was under an obligation to the deceased to use and the mere neglect to observe any of the provisions of the motor vehicle or traffic acts would not of themselves necessarily show gross negligence or be sufficient to form the basis of a conviction for manslaughter. They are mere circumstances to be considered along with all the other facts and circumstances of the case. Upon all of the duties of the defendant, the defendant's neglect must under all the facts and circumstances go to such an extent as to constitute gross negligence evincing a reckless indifference to or disregard of human life. 20 30

The jury should not be confused in a case of this kind by the rule of contributory negligence which prevails in civil courts. The doctrine of contributory negligence does not apply upon a trial for manslaughter and the contributory negligence of the person killed is not a defense to a criminal charge of homicide. Though, of course, all of the evidence must be taken into consideration in determining whether or not the defendant 40

Charge to Jury.

has been proved guilty beyond a reasonable doubt.

10 If a man drives an automobile along the highway in such a manner as to evince a reckless indifference to or disregard of human life, he takes his chances. He takes the risk of drunken people, children, careless people being at the time in the act of crossing the street, and if thereby he kills one of them he is not excused because they are drunk, children, or careless, or in anywise guilty of contributory negligence.

20 The State claims that this defendant was driving his car with gross negligence. The State produces witnesses who testified to the manner in which he was driving the car. On the other hand, the defendant says he was not driving the car with any negligence at all. He says he was driving the car about eight miles an hour, as I recall the testimony. The defendant says that as he was driving the car around eight miles an hour a little child came out from behind an automobile, that the little child ran toward and into his car, or under it, or fell under it, or got under it in some manner, that he stopped his car in about a space of a few feet—two feet, as I recall. The State, on the other hand, says 30 that the child did not run out from behind the car; that the defendant ran over the child and proceeded a distance of some—I do not recall the exact distance, but a considerable distance before the car was stopped, and that the car was then backed up and the little child taken and carried to the hospital.

40 It is for you to say upon all the testimony, not only such as has been referred to by the Court, but upon all the evidence whether or not the State has made out its case, whether or not

Charge to Jury.

the State has sustained the burden cast upon it to prove the defendant guilty of the crime charged and each of its elements beyond a reasonable doubt. In reaching your verdict you must, of course, consider not only such testimony as the Court has briefly referred to, but all of the evidence, and you must not take the recollection of the Court as to what the evidence is or is not, but you must be guided by your own recollection wherever it fails to coincide with that of the Court.

10

Ordinarily a man's reputation cannot be brought into issue—cannot be brought in issue, I should say. It is only when a man produces witnesses to testify to his character that the State is permitted to do likewise.

In this case the defendant has produced witnesses in regard to his character or reputation, in regard to his reputation for truth and with regard to his reputation as a law-abiding citizen.

20

Reputation as a law-abiding citizen covers a broad field, and upon that issue being opened the State produces witnesses for the purpose of endeavoring to show that the defendant's reputation for driving was not such as is in keeping with a law-abiding repute but was reckless in character.

30

You have heard the testimony of witnesses produced by the respective sides on the subject of reputation and it is always the right of a person charged with crime to have all the relevant testimony considered, including that relating to his good character or reputation, and, if on such consideration there exists in the minds of the jury a reasonable doubt of his guilt, even though that doubt be engendered merely by his previous good repute, he is entitled to an acquittal. But if from the entire evidence, includ-

40

Exception to Charge.

ing that relating to good character or reputation, the jury believe the defendant guilty beyond a reasonable doubt, he should be convicted, and the evidence of good character or reputation should not alter the verdict.

10 So it is for you to take this case and reach your conclusion upon all of the evidence and the entire charge of the Court.

Mr. Conlon: If the Court please, by consent we have indicated on the map where the Hudson car was parked.

The Court: You both agree on the same thing?

Mr. D'Aloia: Yes, sir.

20 The Court: And let me remind you that the map has never been offered in evidence.

Mr. D'Aloia: I consent it go in now.

(Map offered in evidence and marked Exhibit S. 1.)

(The jury retires.)

Defendant's counsel prays a general exception to the charge of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

30 DALLAS FLANNAGAN,
Judge.

(The jury returns into court.)

Supplemental Charge to Jury.

FLANNAGAN, J.

Gentlemen, I have two communications from you. One of them reads: "Your Honor, will you define the difference between (1) murder; (2) voluntary manslaughter; (3) involuntary manslaughter. Signed, Foreman B. McComb."

This is not an indictment for murder. Murder does not enter into this case at all. There is no charge of murder. The charge is manslaughter. Perhaps you have in your mind manslaughter other than this particular kind of manslaughter, manslaughter such as you have heard of, perhaps, more frequently than this crime, or quite as frequently.

An example of voluntary manslaughter would be this: A man comes home unexpectedly in the dead of night. He goes to his wife's room and finds another man in bed with her. In a sudden transport of passion and heat of blood he picks up a revolver and kills him. He intends to kill him. He kills him voluntarily. That would be voluntary manslaughter.

That is quite different from the case before you.

There is another inquiry which I have from you and it says this: "Your Honor. Some of our jury are of the opinion that you have charged us that we can bring in, or that there is such a thing as involuntary manslaughter." Signed by your foreman.

There is such a thing as involuntary manslaughter and I undoubtedly charged you to that effect.

The elements of this crime, as I said to you before, were quite different from that illustration of voluntary manslaughter that I gave you.

Supplemental Charge to Jury.

These were the elements of the crime: (1) A plain legal duty from the defendant to the deceased, and I charged you he was under a certain duty as to how he should have his car under control, and so forth. You will remember. Then (2) neglect or violation of that duty amounting
10 to gross negligence; in other words, negligence evincing a reckless indifference to or disregard of human life. (3) That the injuries received by the deceased were the result of this gross negligence and were the regular, natural and likely consequences thereof. (4) That the deceased came to his death by reason of such injuries.

The element which perhaps has been bothering you is the second and that is the neglect
20 or violation of that duty to an extent amounting to gross negligence, in other words, negligence evincing a reckless indifference to or disregard of human life.

Then I said to you something further in the charge to this effect: involuntary manslaughter means unintentional killing. No malice is necessary and no intention to kill is involved. In involuntary manslaughter gross negligence supplies the place of criminal intent.

30 Now, you ask me this. You say some of our jury are of the opinion that you have charged us that we can bring in or that there is such a thing as involuntary manslaughter.

If you have come to the conclusion that this defendant is guilty of involuntary manslaughter under this charge as I have defined the elements of it, then the proper verdict is simply a verdict of guilty. The charge is manslaughter, you do not have to specify involuntary. The charge is

Exceptions to Charge.

manslaughter, and if you come to the conclusion under the charge of the Court, under the elements of the crime as I have defined them to you, that the defendant has been proven guilty beyond a reasonable doubt of involuntary manslaughter, then the proper verdict is a verdict of guilty as charged, that is charged in the indictment. 10

I hope that I have made it clear and if you find out when you get back to your room I have failed to do so, then I will be very glad to make another explanation.

A Juror: Your Honor—

The Court: No. If the jury puts down in writing what they want to ask me then I can answer it more clearly, because you realize everything the judge says is subject to review by the higher courts. 20

Defendant's counsel prays a general exception to the supplemental charge to the jury.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Defendant's counsel prays a specific exception as to the defining of the crime. 30

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Defendant's counsel prays a specific exception as to whatever the Court said in regard to involuntary manslaughter.

Exceptions to Charge.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

10 Defendant's counsel prays a specific exception as to whatever the Court said in regard to gross negligence.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

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30

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*Certificate of Stenographer.*ESSEX COUNTY COURT OF GENERAL
QUARTER SESSIONS.

STATE OF NEW JERSEY,

vs.

GEORGE VILLANO.

On Indict-
*ment No.**214, Sep. T.,**1927, for**Man-**slaughter.*

10

I, HAROLD T. COOK, an official stenographer of the Essex County Court of General Quarter Sessions, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the above-mentioned case, which trial was held before the Honorable Dallas Flannagan, Presiding Judge of the Essex County General Quarter Sessions Court in and for the County of Essex, and a jury, on Monday, December 5, and Tuesday, December 6, 1927, at Newark, New Jersey.

20

HAROLD T. COOK.

Dated:

January 5, 1928.

30

40

*Certificate of Judge.*ESSEX COUNTY COURT OF GENERAL
QUARTER SESSIONS.

10 STATE OF NEW JERSEY,
vs.
20 GEORGE VILLANO,

*On Indict-
ment No.
214, Sep. T.,
1927, for
Man-
slaughter.*

I, DALLAS FLANNAGAN, Presiding Judge of the
Essex County Court of General Quarter Sessions
and the judge who presided over the aforesaid
cause, certify that the above-printed book con-
tains the entire record of the proceedings had
upon the trial of the said cause, and that the same
is returned by the plaintiff-in-error therein with
the writ of error bringing up the bill of excep-
tions signed and sealed in this cause.

DALLAS FLANNAGAN,
Judge.

Dated:
January 6, 1928.

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ASSIGNMENTS OF ERROR.

NEW JERSEY SUPREME COURT.

<p style="margin: 0;">THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i></p> <p style="margin: 0; text-align: center;"><i>vs.</i></p> <p style="margin: 0;">GEORGE VILLANO, <i>Plaintiff-in-Error.</i></p>	}	<p><i>In Error.</i></p> <p><i>Assign-</i></p> <p><i>ments of</i></p> <p><i>Error.</i></p>	<p>10</p>
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Afterwards, to wit, on the return day of the writ of error, before the Justices of the Supreme Court of Judicature, comes the said George Villano by J. Victor D'Aloia, his counsel, and says that in the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error, in this, to wit:—

1. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said George Villano, erroneously permitted the witness, John Smith, to be asked and answer the following questions:

“Q Answer the question yes or no. Do you know his reputation for recklessness in driving an automobile?”

The Court: Or the reverse.

“A Yes.

“Q And is his reputation in that respect good or bad?” (Pp. 63-64.)

2. That the said Court before whom, &c., at and upon the trial of the said issue so joined be-

Assignments of Error.

tween the State of New Jersey and the said George Villano, erroneously permitted the witness, John Smith, to be asked and answer the following questions:

- 10 “Q You say you have heard people on the street talk about him? A Yes.
 Q What was the subject of their conversation?” (P. 65.)

3. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said George Villano, erroneously asked the witness, John Smith, this question:

- 20 “Q The Court: Well, the general subject was his manner of driving. Was the subject of the conversation his manner of driving?” (P. 65.)

4. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said George Villano, erroneously permitted the witness, Joseph Cominsky, to be asked and answer the following questions:—

- 30 “Q Do you know Villano’s reputation for recklessness or carelessness in driving an automobile?”
 “Q Did you ever hear any other people down in that neighborhood talk about him?”
 “Q About the way in which he drives an automobile?”
 “Q Did you ever hear any people talk about the way in which he drives a car?”
 “Q Do you know what the people in that neighborhood think about the way in which he drives an automobile?”

Assignments of Error.

“Q And is his reputation for careful or reckless driving good or bad?” (Pp. 66, 67, 69.)

5. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said George Villano, erroneously charged the jury as follows: 10

“Ordinarily a man’s reputation cannot be brought into issue—cannot be brought in issue, I should say. It is only when a man produces witnesses to testify to his character that the State is permitted to do likewise.

In this case the defendant has produced witnesses in regard to his character or reputation, in regard to his reputation for truth and with regard to his reputation as a law-abiding citizen. 20

Reputation as a law-abiding citizen covers a broad field, and upon that issue being opened the State produces witnesses for the purpose of endeavoring to show that the defendant’s reputation for driving was not such as is in keeping with a law-abiding repute but was reckless in character.”

There are divers other errors in the record and proceedings aforesaid and in the giving of judgment and passing of sentence aforesaid, by reason of which the said judgment and sentence should be reversed and set aside. 30

WHEREFORE, the said George Villano prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all which he has lost by occasion thereof.

J. VICTOR D’ALOIA, 40
Of Counsel for Plaintiff-in-Error.

REASONS FOR REVERSAL.

NEW JERSEY SUPREME COURT.

10	THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	}	<i>In Error.</i>
	<i>vs.</i>		<i>Reasons</i>
	GEORGE VILLANO, <i>Plaintiff-in-Error.</i>		<i>for Reversal.</i>

20 And now comes the said George Villano by J. Victor D'Aloia, his counsel, and says that in the record and proceedings aforesaid and also in the matters recited and contained in the said writ of exceptions and also in giving the verdict and judgment aforesaid, there is manifest error, and the said George Villano says that said judgment should be reversed and assigns the following reasons or causes:

1. Because the Trial Court permitted the witness John Smith to be asked and answer the following questions:

30 "Q Answer the question yes or no. Do you know his reputation for recklessness in driving an automobile?"

The Court: Or the reverse.

A Yes.

Q And is his reputation in that respect good or bad?"

2. Because the Trial Court permitted the witness John Smith to be asked and answer the following questions:

40 "Q You say you have heard people on the street talk about him? A Yes.

Reasons for Reversal.

Q What was the subject of their conversation?"

3. Because the Trial Court permitted the witness John Smith to be asked and answer the following question:

"The Court: Well, the general subject was his manner of driving. Was the subject of the conversation his manner of driving?" 10

4. Because the Trial Court permitted the witness, Joseph Cominsky, to be asked and answer the following questions:

"Q Do you know Villano's reputation for recklessness or carelessness in driving an automobile?"

"Q Did you ever hear any other people down in that neighborhood talk about him?" 20

"Q About the way in which he drives an automobile?"

"Q Did you ever hear any people talk about the way in which he drives a car?"

"Q Do you know what the people in that neighborhood think about the way in which he drives an automobile?"

"Q And is his reputation for careful or reckless driving good or bad?"

5. Because the Trial Court improperly charged the jury as follows: 30

"Ordinarily a man's reputation cannot be brought into issue—cannot be brought in issue, I should say. It is only when a man produces witnesses to testify to his character that the State is permitted to do likewise.

In this case the defendant has produced witnesses, in regard to his character or reputation, in regard to his reputation for truth 40

Reasons for Reversal.

and with regard to his reputation as a law-abiding citizen.

10 Reputation as a law-abiding citizen covers a broad field, and upon that issue being opened the State produces witnesses for the purpose of endeavoring to show that the defendant's reputation for driving was not such as is in keeping with a law-abiding
repute but was reckless in character."

6. Because the verdict is contrary to law and against the weight of the evidence.

20 WHEREFORE, because the aforesaid reasons or some of them constitute error prejudicial to the said George Villano, the plaintiff-in-error, and he prays that the said judgment and sentence be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

J. VICTOR D'ALOIA,
Of Counsel for Plaintiff-in-Error.

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NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> <i>vs.</i> GEORGE VILLANO, <i>Plaintiff-in-Error.</i>	}	<i>On Writ of Error.</i> <i>Rule of Affirmance and Remittitur.</i>	 10
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This cause having been submitted at the January Term, nineteen hundred and twenty-eight of this Court, by Joseph L. Smith, Esquire, Attorney for the defendant-in-error, and J. Victor D'Aloia, Esquire, Attorney for the plaintiff-in-error, and the Court having considered the same and finding no error in the record and proceedings in the Essex County Court of Quarter Sessions;

It is thereupon ordered and adjudged that the judgment of the Essex County Court of Quarter Sessions, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the Essex County Court of Quarter Sessions to be proceeded with in accordance with this judgment and the practice of said Court.

Entered July 11th, 1928,

On Motion of

JOSEPH L. SMITH,
 Prosecutor of the Pleas,
 Attorney of Defendant-in-Error. 40

Opinion

NEW JERSEY SUPREME COURT.
No. 86 January Term 1928.

Submitted January Term 1928. Decided
June, 1928.

10 For Plaintiff-in-Error: J. Victor D'Aloia.

For Defendant-in-Error: Joseph L. Smith.

Before Gummere, Chief Justice, and Justices
Black and Lloyd.

PER CURIAM:

20 Plaintiff in error was convicted of man-
slaughter in the Essex Court of Oyer and Ter-
miner, and appeals from the judgment entered
thereon assigning two grounds for reversal.

The first of these is that the court erred in
receiving in evidence the testimony of one John
Smith, a character witness offered by the state;
and the second that the verdict of the jury was
against the weight of evidence.

30 As to the first point the matter is presented
in this wise: The defendant called a witness
Rufalo as a character witness. He was asked
if he knew the reputation of the defendant for
telling the truth and being a lawabiding citizen.
He answered "Yes." He was then asked
whether it was good or bad, to which question
there was no answer. The witness was then
cross-examined and in the course of this cross-
40 examination the witness said that everybody he
talked to knew it was always in the defendant's

Opinion

favor. Finally the court asked, "Did you ever hear anybody say anything about his truth or lawabiding qualities?" to which the witness answered "No." That this examination was adopted by defendant's counsel is evidenced by the fact that the court having at the conclusion of the testimony said it would allow the question previously asked by defendant's counsel, the question itself was not pressed; counsel evidently being satisfied with the answers already given. 10

When the witness Smith was called he was asked the question, "Do you know his (defendant's) reputation for recklessness in driving an automobile?" 20

The Court: "Or the reverse."

A "Yes."

To this there was objection and the objection overruled. Then the question was modified by the prosecutor:

Q "Is his reputation in that respect good or bad?"

A "It is bad that way." 30

It is contended in the first place that the defendant had not by its proofs brought the defendant's reputation in issue and that the state was not entitled to rebut it; and also that the testimony was incompetent in that it is only the general reputation that can be proven.

We think both grounds of appeal are without merit. Defendant was on trial for manslaughter in having killed a child through reck- 40

Opinion

less driving of an automobile. The only pertinent character evidence would obviously be his reputation for reckless driving, and this we think was an issue attempted to be set up by the defendant in calling the witness Rufulo and
10 with whose testimony he was doubtless contented when elicited by the prosecutor and the court. This testimony, according to its obvious import, tended to leave in the minds of the jury a conviction that the defendant was not only truthful, but that he was a lawabiding citizen, as this was the question asked by defendant's counsel and to which the witness undoubtedly referred when he said "Everybody I talk to
20 knew it was always in his favor." When, therefore, the state in rebuttal introduced the witness Smith and elicited from him his reputation for reckless driving, it was substantially an inquiry directly in line with the testimony adduced in the defendant's favor but tending to contradict it.

The traffic act makes reckless driving unlawful, and it necessarily follows that being unlawful, one who violates it is not a lawabiding citizen, and the state under the circumstances was entitled to show the defendant's reputation in this regard.
30

We, therefore, conclude that the testimony adduced by the defendant opened the door to the proof offered by the state in rebuttal, and that the inquiries addressed to this witness were
40 not unduly narrowed and restricted. In this

Opinion

view we are sustained by the authorities. In Witmore on Evidence, we find (2d Ed., p. 278) "The elementary law is that the inquiry into character is always adapted to the charge," and at page 277: "The prosecution's rebutting repute may be of the specific trait even though defendant's evidence was of general character." 10
 To this same effect are Frank vs. State, 80 S.E., 1016 (Ga.) and Commonwealth vs. Maddocks, 93 N.E., 253. (Mass.) In both cases the defendant had set up a general reputation for good character and the prosecution in rebuttal was permitted to prove the bad reputation in the particular phase of conduct involved in the charge. Any other view we think would be injurious to the defendant himself. Unless character inquiry is restricted to the class of conduct involved in the criminal charge, grave injustice would result through the introduction of a damaged reputation in respects alien thereto. It is unnecessary to cite illustrations to demonstrate this truth. 20

As to the second point raised on the appeal, our examination of the proofs satisfies us that the verdict was not against the weight of the evidence and that the judgment should not, therefore, be disturbed. 30

Judgment affirmed.

Copy of Return

NEW JERSEY SUPREME COURT.

10	THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> <i>vs.</i> GEORGE VILLANO, <i>Plaintiff-in-Error.</i>	} <i>Copy of Return</i>
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COPY OF RETURN.

20 The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule of this Writ annexed, as within we are commanded.

A true copy,

30 FRED L. BLOODGOOD,
 Clerk.

WM. J. GUMMERE,
 Chief Justice.

40

Writ of Error

NEW JERSEY, ss.

THE STATE OF NEW JERSEY to Chief Justice and other Justices of our Supreme Court of
 (L. S.) Judicature. 10

GREETING.

FORASMUCH as in the record and proceedings, and also in the giving of judgment, in a certain plaint, and which was in our said Supreme Court of Judicature, before you, between the State of New Jersey, Defendant-in-Error and George Villano, Plaintiff-in-Error, manifest error hath intervened to the great damage of the said Plaintiff-in-Error, George Villano, as it is said: We being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the party aforesaid in this behalf; DO COMMAND YOU, that if judgment be thereupon given and confirmed, then you distinctly and openly said, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the 18th day of October, next, together with this writ, that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon, for 40

Writ of Error

correcting that error, what of right and according to the law and custom of the State of New Jersey, ought to be done.

10 WITNESS, our Chancellor and President of our said Court of Errors and Appeals, at Trenton, aforesaid, the 28th day of September, A. D. One Thousand, Nine Hundred and Twenty-eight.

JOSEPH F. S. FITZPATRICK,
Clerk.

20 J. VICTOR D'ALOIA,
Attorney.

30

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*Assignments of Error*NEW JERSEY COURT OF ERRORS
AND APPEALS.

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	} <i>In Error.</i>	} <i>Assignments</i>	} 10
<i>vs.</i>			
GEORGE VILLANO, <i>Plaintiff-in-Error.</i>			

AFTERWARDS, to wit on the 1st day of October, 1928, before our said Court of Errors and Appeals in the last resort in all causes comes the said George Villano by Harold Simandl, his attorney, and says that in the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error in this, to wit:

20

1 Because the Supreme Court rendered a judgment in favor of the State of New Jersey, defendant-in-error, instead of George Villano, the plaintiff-in-error.

2 Because the Supreme Court erred in rendering a judgment affirming said judgment instead of reversing the same.

30

WHEREFORE, the said George Villano prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

J. VICTOR D'ALOIA,
Of Counsel for Plaintiff-in-Error.

40

NEW JERSEY COURT OF ERRORS
AND APPEALS

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STATE OF NEW JERSEY
In Error
The People of the State of New Jersey
vs
JAMES WILSON
Defendant

ATTEST: I, the Clerk of the Court, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in the records of the Court of Errors and Appeals of the State of New Jersey, in and to which said records and proceedings the said James Wilson was duly admitted as a party, and that the same were read and approved by the Court on the 14th day of June, 1884.

Witness my hand and the seal of the Court at Trenton, New Jersey, this 14th day of June, 1884.

CLERK OF THE COURT

OF THE COURT OF ERRORS AND APPEALS

NEW JERSEY COURT OF ERRORS
AND APPEALS

THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	}	On Writ of Error
v.		
GEORGE VILLANO <i>Plaintiff-in-Error.</i>		

Brief of
Defendant-in-Error

STATEMENT

George Villano, the accused, plaintiff-in-error herein, was convicted of manslaughter in the Essex County Court of Oyer and Terminer, Honorable Dallas Flannagan presiding, and on December 19, 1927, was sentenced to the New Jersey Reformatory. From this judgment he sued out a writ of error to the New Jersey Supreme Court, which court affirmed the judgment. He thereupon obtained a writ to review the judgment of the Supreme Court. ~~On Aug. 15, 1928, defendant was released on parole from Reformatory.~~

THE FACTS

On June 30, 1927, at about 7 P. M., the defendant, driving a truck on Vincent Street, Newark, struck and ran over Samuel McKeon, a child of 3½ years, causing him injuries from which he died the same day.

The defense was that the accident was unavoidable; that the boy ran from behind a parked car into the path of the defendant's truck.

The State showed that defendant was driving very fast; that both front and left wheels of his truck ran over the boy, and that he went about 50-100 yards after striking the boy, before he stopped. (Case p. 15, L. 25; p. 22, L. 31.) The defendant was proceeding on Vincent Street from

Ferry toward Horatio Street. The only car parked in the street was between the boy and Horatio Street and not between him and Ferry Street. (Case p. 18, L. 8; p. 20, L. 18; p. 22, L. 17; p. 23, L. 28.) Therefore the deceased crossed the street in full view of the defendant and defendant did not come from behind a parked automobile.

Defendant's witness, Cifelli, testified that just before the accident the deceased was not running. (Case p. 47, L. 18.)

Defendant's witness, Policastro, testified that deceased did not come from behind a parked automobile as claimed by this defendant. (Case p. 49, L. 18.)

The Supreme Court, affirming the judgment of the lower court, gave its opinion PER CURIAM, as follows:

“ NEW JERSEY SUPREME COURT.

No. 86 January Term 1928.

Submitted January Term, 1928.

Decided June, 1928.

For Plaintiff-in-Error: J. Victor D'Aloia.

For Defendant-in-Error: Joseph L. Smith.

Before Gummere, Chief Justice, and Justices Black and Lloyd.

PER CURIUM:

Plaintiff-in-error was convicted of manslaughter in the Essex Court of Oyer and Terminer, and appeals from the judgment entered thereon assigning two grounds for reversal.

The first of these is that the court erred in receiving in evidence the testimony of one John Smith, a character witness offered by the state; and the second that the verdict of the jury was against the weight of evidence.

As to the first point the matter is presented in this wise: The defendant called a witness Rufalo as a character witness. He was asked if he knew the reputation of the defendant for telling the truth and being a lawabiding citizen. He answered 'Yes'. He was then asked whether it was good or bad, to which question there was no answer. The witness was then cross-examined and in the course of this cross-examination the witness said that everybody he talked to knew it was always in the defendant's favor. Finally the court asked, 'Did you ever hear anybody say anything about his truth or lawabiding qualities?' to which the witness answered 'No'. That this examination was adopted by defendant's counsel is evidenced by the facts that the court having at the conclusion of the testimony said it would allow the question previously asked by defendant's counsel, the question itself was not pressed; counsel evidently being satisfied with the answers already given.

When the witness Smith was called he was asked the question, 'Do you know his (defendant's) reputation for recklessness in driving an automobile?'

The Court: 'Or the reverse.'

A. 'Yes.'

To this there was objection and the objection overruled. Then the question was modified by the prosecutor:

Q 'Is his reputation in that respect good or bad?'

A 'It is bad that way.'

It is contended in the first place that the defendant had not by its proofs brought the defendant's reputation in issue and that the state was not entitled to rebut it; and also that the testimony was incompetent in that it is only the general reputation that can be proven.

We think both grounds of appeal are without merit. Defendant was on trial for manslaughter in having killed a child through reckless driving of an automobile. The only pertinent character evidence would obviously be his reputation for reckless driving, and this we think was an issue attempted to be set up by the defendant in calling the witness Rufulo and with whose testimony he was doubtless contended when elicited by the prosecutor and the court. This testimony, according to its obvious import, tended to leave in the minds of the jury a conviction that the defendant was not only truthful, but that he was a law-abiding citizen, as this was the question asked by defendant's counsel and to which the witness undoubtedly referred when he said 'Everybody I talk to knew it was always in his favor.' When, therefore, the state in rebuttal introduced the witness Smith and elicited from him his reputation for reckless driving, it was substantially an inquiry directly in line with the testimony adduced in the defendant's favor but tending to contradict it.

The traffic act makes reckless driving unlawful, and it necessarily follows that being unlawful, one who violates it is not a law-abiding citizen, and the state under the circumstances was entitled to show the defendant's reputation in this regard.

We, therefore, conclude that the testimony adduced by the defendant opened the door to the proof offered by the state in rebuttal, and that the inquiries addressed to this witness were not unduly narrowed and restricted.

In this view we are sustained by the authorities. In Wigmore on Evidence, we find (2d Ed., p. 278) 'The elementary law is that the inquiry into character is always adapted to the charge,' and at page 277: 'The prosecution's rebutting repute may be of the specific trait even though de-

fendant's evidence was of general character.' To this same effect are *Frank vs. State*, 80 S. E., 1016 (Ga.) and *Commonwealth vs. Maddocks*, 93 N. E., 253. (Mass.) In both cases the defendant had set up a general reputation for good character and the prosecution in rebuttal was permitted to prove the bad reputation in the particular phase of conduct involved in the charge. Any other view we think would be injurious to the defendant himself. Unless character inquiry is restricted to the class of conduct involved in the criminal charge, grave injustice would result through the introduction of a damaged reputation in respects alien thereto. It is unnecessary to cite illustrations to demonstrate this truth.

As to the second point raised on the appeal, our examination of the proofs satisfies us that the verdict was not against the weight of the evidence and that the judgment should not, therefore, be disturbed.

Judgment affirmed."

ARGUMENT

POINT I.

Plaintiff-in-Error's sole contention is, that the State's evidence of defendant's reputation for being a reckless driver was not proper rebuttal to defendant's evidence of general reputation for being a law-abiding citizen.

Plaintiff-in-Error states as a universal rule of law that the prosecution cannot give evidence of bad character of the accused unless accused has first adduced evidence of good character of the trait involved in the charge; and plaintiff-in-error cites the case of *State vs. Bulloch*, 65 N. J. L., 557, as an authority for the rule. The rule, as stated, is incomplete and is not at all supported by the case cited by plaintiff-in-error.

The case of *State v. Pollock*, supra, cited by plaintiff-in-error, merely stands for the rule that particular acts and specific facts are not admissible to rebut the character evidence of the accused. In that case the State put in evidence the fact that the accused had pulled a razor 18 years prior to the charge on trial. The case is not at all in point, and the rule enunciated therein has no bearing on the case at bar, as, in our case, the State at no time attempted to bring out any specific instances of recklessness.

The rule stated by the plaintiff-in-error would be correct if taken in conjunction with the simple rule that the inquiry into character must be adapted to the charge.

What could be the intent and purpose of the defendant's evidence of his reputation for being a law-abiding citizen, unless it were adapted to the trait in issue?

Reputation evidence has a probative value. Its purpose and its probative value is to create the impression in the minds of the jury, that the accused, judging from his character as evidenced by his reputation, is not likely to have formed the criminal intent necessary to commit the crime for which he is tried. Thus, character evidence becomes substantive evidence, and not merely reflecting on the truthfulness of the accused's testimony. But in the case at bar no malice or actual criminal intent was involved. Therefore the only purpose defendant could have had in introducing evidence of reputation for being a law-abiding citizen was to create the inference, and to induce the jury to believe, that the accused, being a man of good character and a law-abiding citizen, would not likely have driven his car with recklessness, or with gross negligence, without regard to consequences and to the rights of others,

or in such a manner as to be guilty of criminal negligence.

Defendant's general character as a law-abiding citizen becomes very relevant, and therefore subject to rebuttal, when adapted to the trait involved in the charge.

"The elementary rule is, that the inquiry into character is always adapted to the charge." 1 *Wigmore on Evidence, 2nd Ed., p. 278, Par. 59.*

Where accused's general reputation as a law-abiding citizen is brought forth by the defendant, that must be accepted as having reference to the trait in issue, otherwise the introduction of reputation evidence becomes meaningless. Accepting the accused's evidence of reputation as having reference to the trait in issue, the prosecution's evidence of the accused's reputation concerning that trait becomes admissible.

"The prosecution's rebutting repute may be of the specific trait, even though defendant's evidence was of general character". 1 *Wigmore Evidence, 2nd Ed. No. 59, P. 277.*

The case of Frank v. State, 80 S. E. 1016 (Ga. App.) is directly in point. In this case defendant was accused of the murder of a thirteen year old girl. The evidence showed that the crime was committed in an attempt to carnally abuse the child. Defendant had witnesses who testified as to defendant's *general good character.*

The prosecution was permitted in reply, to introduce evidence of his bad reputation in regard to lasciviousness. Defendant excepted on ground that it was not proper rebuttal.

The Court, in a very well considered opinion, on page 1030, says:

“In a case of this kind the probative value of the defendant’s evidence as to good character involved his character with respect to lasciviousness. If he be permitted to introduce evidence of good character as a substantive fact, where the trait of lasciviousness is involved, and the State should not be permitted in reply to introduce evidence of his bad character in regard to lasciviousness, it would in effect allow him to introduce evidence of a substantive fact and deny the state the privilege to rebut it.”

In Comm. vs. Maddocks, (Mass.) 93, N. E. 253, (Supreme Judicial Court of Mass.) defendant put his *general reputation* in issue. The prosecution rebutted by showing that his reputation as to being a law-abiding person in relation to the liquor law was bad. The admission of such rebutting evidence was sustained by the appellate court.

In that case the court said:

“We cannot say that after the defendant had put his general reputation in issue, the commonwealth might not show in reply that his reputation as to being a law-abiding person in relation to the liquor law was bad, although we intimate no opinion as to the particular question which was excepted to. The introduction of such evidence would of course call for great care on the part of the judge to see that the jury should not use it as evidence of guilt, but should treat it merely as meeting and nullifying, (so far as it might have any effect,) the evidence of defendant’s good reputation. But it was not incompetent. It was so held in *State v. Knapp*, 45 N. H., 148 157; *Balkum v. State*, 115 Ala., 117, 22 South, 532, 67 Am. St. Rep. 19 and *State v. Thornhill*, 174 Mo., 364, 74 S. W. 832. See discussion in 1 *Wigmore on Evidence*, Par. 59, et seq. *The testimony excluded in Commonwealth v. Nagle*, 157 Mass., 555,

32 N. E. 861, was as to defendant's habits and course of action, not as to his reputation itself."

(Italics are ours.)

The defense in the case at bar attempted to create the presumption that defendant was not likely to have committed the crime in question, judging from his reputation as to being a law-abiding citizen. The State properly refuted that by showing that law-abiding as he might have been in other respects, he did not bear that reputation as applied to driving. The State did not attempt to show any specific instances of recklessness.

Recklessness means an indifference whether wrong is done or not; indifference and a disregard to rights of others, heedlessness of consequences. 34 Cyc. 534. Also Bouviers Dictionary.

It is argued by plaintiff-in-error that a person may be careless, reckless, imprudent or unwise, and yet be a law-abiding citizen. The argument is not at all in point because it does not relate to the evidence in issue, that of a reputation for reckless *driving*. It is true that a person may be careless, reckless, imprudent or unwise in many activities of life, not endangering or menacing the lives of others, and still be a law-abiding citizen. A person who has the reputation of being a reckless driver in a thickly populated section may be a very law-abiding citizen as relates to gambling, fighting and a hundred other traits, but he certainly cannot claim the reputation of being law-abiding in respect to his legal duties to consider and regard the safety and rights of others while driving a car.

That was the trait in issue and that was the trait refuted by the State; the State's testimony was legal and the case of *State v. Cook*, 24 N. J. L., 851, has no application to the case.

POINT II.

ASSIGNMENT AND REASON 4.

Plaintiff-in-error, under this assignment, attacks the testimony of the witness, Comisky, on the ground that said witness was not an intelligent person. The Court at length explained to the witness what is meant by "reputation", and there is nothing to show that witness did not understand the meaning of "Reputation" after such explanation. (Case p. 68, L. 31.) If the defense was in doubt as to whether witness understood the meaning of the word "Reputation", he could have cross-examined witness, which he did not.

The jury heard the witness, and they were capable of judging his intelligence and giving his testimony the weight it deserved.

Plaintiff-in-error attempts to give a dual meaning to the following:

"Q And is his reputation for careful or reckless driving good or bad?"

"A Bad."

Plaintiff-in-error does not explain how this is capable of dual interpretation. We take the question and answer to mean that defendant had the bad, unfavorable reputation of being a reckless driver. No objection was made to the question or answer on the grounds of ambiguity.

The State confined itself to defendant's reputation, and there is nothing in the entire case to indicate any attempt on the part of the State to introduce evidence of the commission of previous

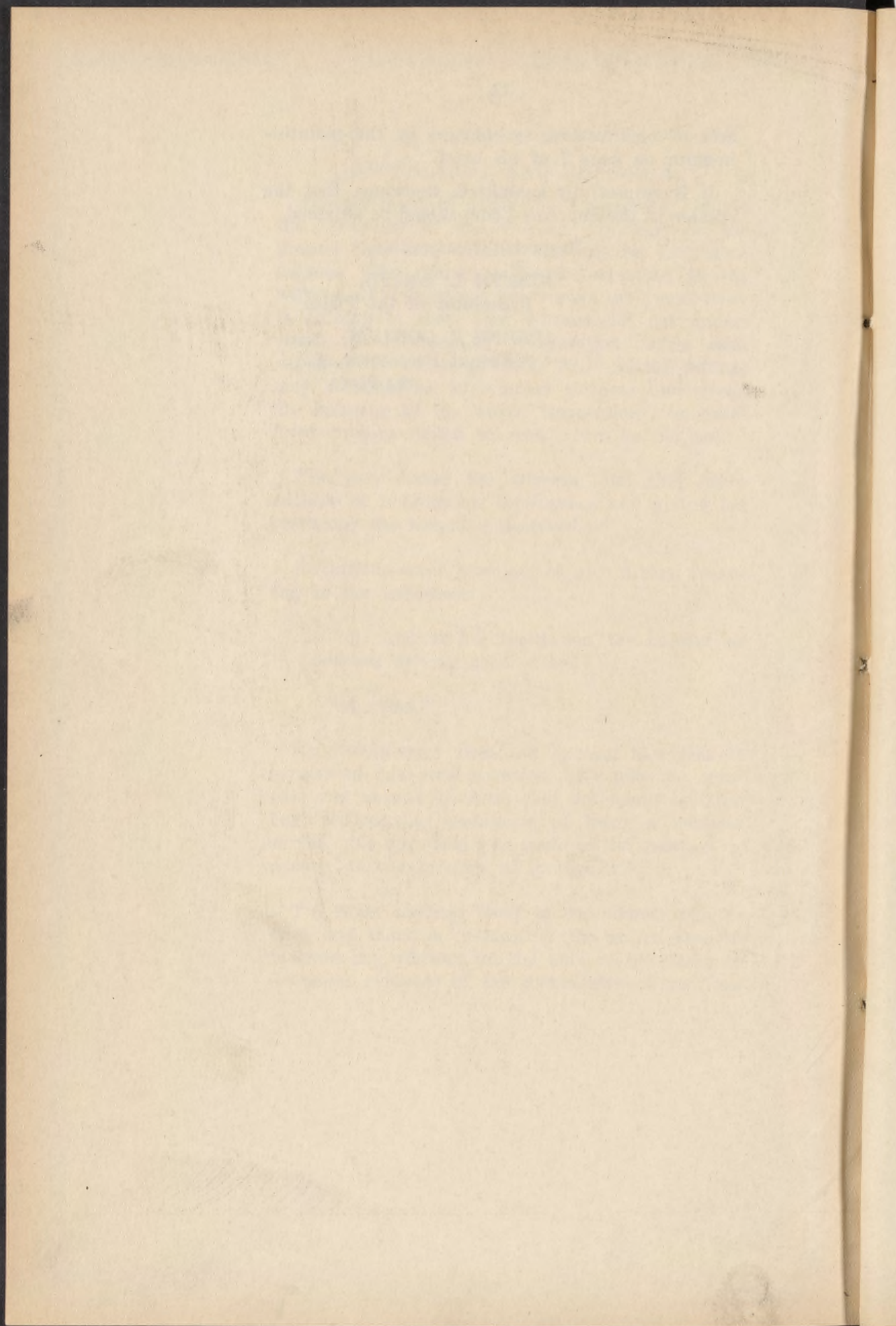
acts of recklessness, as charged by the plaintiff-in-error on page 7 of his brief.

It is respectfully submitted, therefore, that the opinion of the Supreme Court should be affirmed.

Respectfully submitted,

JOSEPH L. SMITH,
Prosecutor of the Pleas.

JOSEPH E. CONLON,
Assistant Prosecutor of
the Pleas.



NEW JERSEY COURT OF ERRORS
AND APPEALS

STATE OF NEW JERSEY,

Defendnat-in-Error,

vs.

GEORGE VILLANO,

Plaintiff-in-Error.

On Writ of Error

BRIEF FOR
PLAINTIFF-
IN-ERROR.

STATEMENT UNDER THE RULES

George Villano, plaintiff-in-error, was convicted of manslaughter in the Essex County Court of Oyer and Terminer, Honorable Dallas Flannagan presiding, and on December 19th, 1927 was sentenced to imprisonment in the New Jersey Reformatory. From this judgment he sued out a writ of error to the New Jersey Supreme Court which affirmed the judgment. He thereupon obtained a writ to review the judgment of the Supreme Court.

THE FACTS

The alleged crime, arose out of an automobile accident which took place on Vincent Street, in the City of Newark, at about 7:00 P. M., on the evening of June 30, 1927. The defendant, a youth, nineteen years of age, while driving a truck on Vincent Street was alleged to have struck and run down Samuel McKeon, a child 3 1/2 years of age, causing him injuries, from which he died. The defense was that the collision was unavoidable; that the child had run suddenly from behind a parked auto, directly in the path of a truck of defendant, who, although he had his machine

under control and was driving in a careful manner, had not sufficient time or space in which to avoid striking the child. The jury returned a verdict of "guilty with a recommendation of mercy."

Point One

THE SOLE QUESTION TO BE DECIDED BY THIS APPEAL IS WHETHER OR NOT THE TESTIMONY OFFERED BY THE STATE ATTEMPTING TO PROVE THE BAD REPUTATION OF THE PLAINTIFF-IN-ERROR FOR RECKLESSNESS IN DRIVING HIS AUTOMOBILE WAS COMPETENT.

Evidence of bad reputation can never be introduced by the prosecution to show guilt. It can only be introduced to rebut or nullify the effect which the evidence of good reputation of the accused may have had upon the jury. It is the universal rule that the prosecution cannot give evidence of bad character of the accused unless accused has first adduced evidence of good character of the *trait involved in the charge*. Prudence was the trait involved in the crime charged against plaintiff-in-error. State v. Bullock, 65 N. J. L. 557. Therefore, unless the evidence which he introduced in his own behalf proved or involved his good character with respect to prudence, the State ought not be permitted in reply, to offer evidence tending to show his bad character for prudence; but should be confined strictly to rebuttal of the evidence offered by the defendant. A trait in mankind does not mean his disposition. A man may be careless, reckless, imprudent or unwise, and yet be a law-abiding citizen. In other words, a man may be a law-abiding citizen and yet have a bad reputation for prudence and carefullness. Every act of carelessness or recklessness is not necessarily a violation of the law, nor is every

act of reckless driving of an automobile a violation of the Motor Vehicle Act. Recklessness in driving is a comparative term, having to do not only with the surroundings of the individual who is driving, but also the state of mind of the person who is watching the driving and who gains the idea under some circumstances that certain acts may be reckless when others might not have such an opinion.

In the case of Commonwealth vs. Nagle, 32 Northeastern 861, the Court says:

“A man of good character is unlikely to be guilty of crime involving moral turpitude and reputation is the index of character. This rule has little or no application to penal acts which have no moral quality but are merely *mala prohibita*. That one is of good reputation, he is an honest peaceable citizen, has little tendency to show that he has not violated a statute or ordinance forbidding him to catch trout out of season or to drive certain vehicles faster than a walk * * * * *”

The opinion of the Supreme Court proceeds upon the theory that the recklessness in driving, of which the defendant was alleged to have a bad reputation must have been a violation of the Motor Vehicle Act. However, let us assume it was not a violation of the Motor Vehicle Act. Would it then necessarily show that the defendant was not a law abiding citizen? The opinion of the Supreme Court cites two cases which it says supports its view. In the case of Commonwealth vs. Maddocks, 93 N. E. 253, cited by the Supreme Court, the Commonwealth offered proof in reply to the defendant's proof of general good reputation, that his reputation as to being a law-abiding citizen in relation to the liquor law was bad. There

the defendant was charged with violating the liquor law and he put in evidence his reputation for being a law-abiding citizen, which of course included an observance of the liquor law. The Commonwealth rebutted specifically that evidence. As to the particular question the Court expressed no opinion but continued by saying:

“The introduction of such evidence would of course call for great care on the part of the judge to see that the jury should not use it as evidence of guilt, but should treat it merely as meeting and nullifying (so far as it might have any effect) the evidence of the defendant’s good reputation.”

And in the case of *Frank v. State*, 80 South-eastern 1016, the proof was that the defendant had generally a good character and the Court held: “. . . *that such evidence involved his character with respect to lasciviousness.*”

The prosecution however, cannot *prove by hearsay that the defendant was likely to commit the particular act of which he was accused, because he had been in the habit of committing previous acts of recklessness.* Inasmuch as the defendant had never put his reputation as to the prudence in issue the State could not rebut it. I am conceding that it was improper for the Court to admit in behalf of the defendant evidence of his good reputation as a law-abiding citizen, but that did not justify the introduction of illegal testimony by the State. *State v. Cook*, 24 N. J. L., 851.

“There is no better settled rule of law, than that the introduction of irrelevant or immaterial testimony by one party, *can never justify the introduction of illegal testimony by the other.*” (Italics mine.)

The State should have been confined to proving

that his reputation for being a law-abiding citizen was bad and not single out a trait never placed in issue. The defendant was thus deprived of an opportunity to meet that issue and was in effect convicted in great measure by evidence which was hearsay, and tended only to show he had been in the habit of committing previous acts of recklessness.

Point Two

ASSIGNMENT AND REASON 4.

The witness, Joseph Comiskey was called by the State in rebuttal. The testimony appears on pp. 66-69 of the case.

In addition to what has been previously urged herein with respect to the testimony of the witness, Smith, the Court is specifically directed to further error presented in the admission of the testimony of this witness.

Upon being asked if he knew the defendant's reputation for recklessness or carelessness in driving an automobile, he replied that he did; thereupon he was asked:

Q Do you know what I mean by reputation?

A What does that mean? I do not understand.

Q Do you know what other people *think about him*? A I tell you his father and mother is nice people, that boy.

After this illuminating evidence of the lack of qualification and comprehension of the witness, the Court proceeded to permit the witness to be further questioned on the subject and be asked:

Q Did you ever hear any other people

down in that neighborhood *talk about him?*

A Yes, I heard that.

Q About the way in which he drives an automobile?

Objection and argument.

The Court: I will allow that.

Exception.

The question was repeated and the witness answered "Yes."

Then followed the question:

Q Do you know what the people in that neighborhood think about the way in which he drives an automobile?

Objection.

The Court: I will allow that.

A Yes.

Thereupon this witness after further argument, was asked this question over objection.

Q And is his reputation for careful or reckless driving good or bad? A Bad.

Mr. D'Aloia: The same objection to that last question.

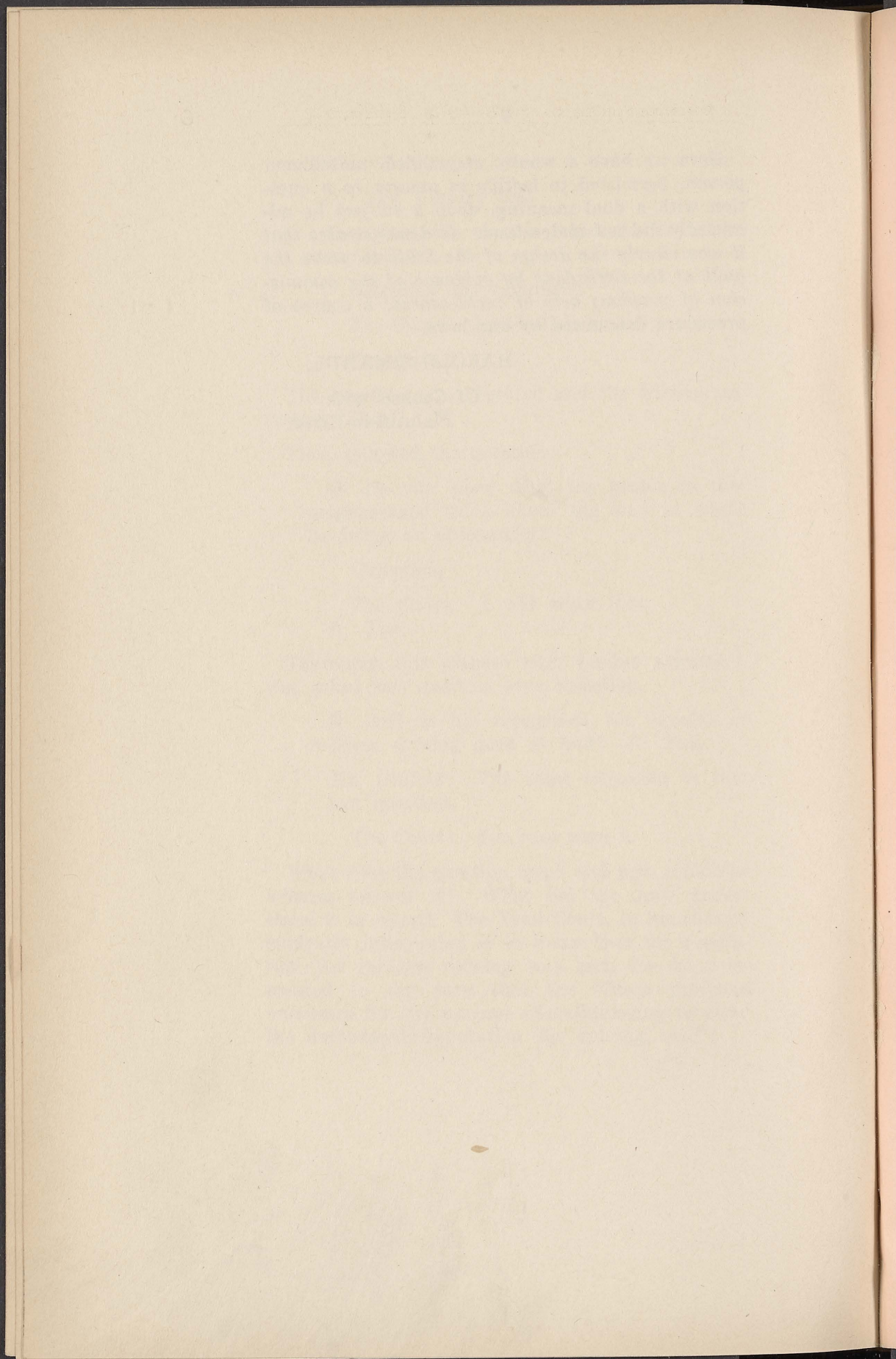
The Court: You may have it.

What does the question mean and how could the witness answer it? What did the jury understand it to mean? The Trial Court, in his charge, evidently interpreted it to mean that his reputation for reckless driving was bad, for he commented to the jury that the "State produces *witnesses* for the purpose of endeavoring to show the defendant's reputation for driving, etc."

Here we have a wholly unqualified, unitelligent person, permitted to testify in answer to a question with a dual meaning, upon a subject he admittedly did not understand. *It demonstrates that it was clearly the design of the State to prove the guilt of the defendant by evidence of the commission of previous acts of recklessness; a course of procedure denounced by our laws.*

HAROLD SIMANDL,

Of Counsel with
Plaintiff-in-Error.



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