2

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New Jersey Supreme Court

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

JOHN COSGROVE, JR.,
Plaintiff-in-Error.

On Error.

BRIEF OF JOHN O. BIGELOW FOR THE STATE.

The defendant was convicted in the Essex Quarter Sessions of an atrocious assault and battery upon Lillian Dowling and has sued out this writ of error.

I.

The Quarter Sessions properly directed a verdict for the State on the trial of the plea of autrefois acquit.

The opinion of the Quarter Sessions dealing with this plea appears at page 19 of the state of the case and is worthy the attention of this Court.

Before the trial of this case the defendant was tried and acquitted of manslaughter for the death of Mary Mullaney.

The facts connecting the two cases were as follows: The defendant, on May 15, 1923, was driving an automobile along Bloomfield avenue, Newark. Mrs. Mullaney and Lillian Dowling were crossing the street hand in hand. The au-

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tomobile struck them both. Mrs. Mullaney died and Lillian recovered from the injuries received.

Counsel for the defendant contends, in support of the plea of *autrefois acquit,* "The criminal act of the defendant alleged in each case was his unlawful driving of the automobile, for the result of his driving did not determine his guilt or innocence." The State emphatically controverts this, and asserts that the negligent or even wilful driving of an automobile in a dangerous manner is not criminal of itself.

On the manslaughter trial, the issues were briefly these: Was defendant operating his automobile in a grossly negligent manner? Did he, by reason of such operation, strike Mary Mullaney? Was the blow received by her the proximate cause of her death?

In order to convict of manslaughter, it would have been necessary for the jury to answer all these questions in the affirmative. Furthermore, on this indictment for manslaughter, they could not have found the defendant guilty of assault and battery on Mrs. Mullaney, since assault and battery is not necessarily an ingredient of manslaughter.

State v. *Thomas,* 65 N. J. L. 598.

The jury answered one of the three questions above stated in the negative, but their verdict of "not guilty" does not disclose which question was so answered.

On the trial for atrocious assault and battery upon Lillian Dowling, the following were the issues: Did the defendant wilfully drive his automobile in a manner dangerous to pedestrians? Did he, by such wilful driving, strike Lillian Dowling? Did he thereby wound her?

The jury, by its verdict of guilty, answered all these questions in the affirmative.

A.

The defendant cannot succeed on his plea of autrefois acquit unless the crime charged in the second indictment or an integral part thereof is one of which he might legally have been convicted on the first trial.

> 4 *Blackstone* 335. "First, the plea of *autrefois acquit,* or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense. And hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any Court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime. * * * It is to be observed that the pleas of *autrefois acquit* and *autrefois convict,* or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime."
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> 1 *Chitty C. L.* 452. "In order, however, to entitle the defendant to this plea it is necessary that the crime charged be precisely the same and that the former indictment, as well as the acquittal, was sufficient. As to the first of these requisites, the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution for the other * * * (p. 456). But if the former charge were such a one as

the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded."

9 *Halsbury's Laws of England* 356. "The defendant can only succeed on such a plea if the charge to which he pleads is one in respect of which he could have been legally convicted on the prior occasion or is one in respect of which by statute previous proceedings for the same cause are a bar to subsequent proceedings."

Reg. v. *Barron* (1914), 2 K. B. 570. Lord *Reading.* "The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offense. If therefore he has been acquitted, *i. e.,* found to be not guilty of the offense by a court competent to try him, such acquittal is a bar to a second indictment for the same offense. This rule applies not only to the offense actually charged in the first indictment, but to any offense of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaugher. * * * The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offense which is the same offense as 'gross indecency' (charged in the second indictment), *i. e.,* whether the acquittal on the charge of sodomy (on the first trial) necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offense. The graver charge of sodomy involves gross indecency and something else, and, as was de-

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The defendant was convicted in the Essex Quarter Sessions of an atrocious assault and battery upon Lillian Dowling. This conviction has been sustained by the Supreme Court.

I.

THE QUARTER SESSIONS PROPERLY DIRECTED A VERDICT FOR THE STATE ON THE TRIAL OF THE PLEA OF AUTREFOIS ACQUIT.

The opinion of the Supreme Court is printed at page of the State of the Case.

The opinion of the Quarter Sessions, dealing with this plea, appears at page 19 of the State of the Case. This opinion is also worthy the attention of this court.

Before the trial of this case, the defendant was tried and acquitted on an indictment charging that he did feloniously kill and slay Mary Mullaney.

The facts connecting the two cases were as follows: The defendant, on May 15, 1923, was driving an automobile along Bloomfield Avenue, Newark. Mrs. Mullaney and Lillian Dowling were crossing the street, hand in hand. The automobile struck them both. Mrs. Mullaney died and Lillian recovered from the injuries received.

By their verdict of "Not Guilty" in the manslaughter case, the jury found that the death of Mrs. Mullaney was not the proximate result of being struck by the automobile.

Or else they found that defendant was not driving the automobile in a grossly negligent manner.

Or else that he was not the person driving the automobile which struck Mrs. Mullaney.

Any one of these findings would have necessitated an acquittal. The verdict of "Not Guilty" does not disclose the ground on which it was based, or which one of the three findings above suggested the jury actually reached.

On the trial for atrocious assault and battery, the jury by their verdict of "Guilty," found that the defendant was driving the automobile which struck Lillian Dowling; that he was driving it wilfully in a manner dangerous to pedestrians and that she was wounded by the blow received.

It will be observed that there is no necessary inconsistency between the two verdicts.

A.

A CONSIDERATION OF THE GENERAL PRINCIPLES OF AUTREFOIS ACQUIT AND AUTREFOIS CONVICT.

It is abhorrent, not only to our law but to every system of jurisprudence and every feeling of justice, that a man should be punished for a crime and then again punished a second time for the same crime. This is the basis of the plea of autrefois convict, - that no man shall be punished twice for the same offense.

It is also repugnant to our law that a man should be tried and acquitted and thereafter be tried again for the same offense, and so on, until perhaps a jury be found to convict him. If the victim of such a system were in fact guilty, no injustice would be done him by such a series of trials. The sound objection to the procedure is that it would be likely to result in the conviction of an innocent person and this is the foundation on which rests the plea of autrefois acquit.

The application of these principles in simple cases is easy: If one is convicted or acquitted of an assault, he cannot again be tried for the same assault.

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The next step relates to compound crimes. If A be convicted of murder committed in the course of arson, he cannot thereafter be tried for the arson, because the conviction for murder includes a conviction of the lesser offense. Conversly, if he be convicted of arson, he cannot afterward be tried for a murder committed in the perpetration of such lesser felony, for the arson is an integral part of the murder.

If A be acquitted on a common law indictment of the murder, he cannot afterward be tried for the arson, because the jury might, on the former trial, have convicted him of the arson and acquitted as to the residue of the charge, and hence the general verdict of "Not Guilty" was an acquittal of the arson.

But the situation is somewhat different when the form of the indictment for the greater offense does not permit a verdict of guilty of the less offense. For instance, if A be tried for murder on our statutory form of indictment, charging merely that he did wilfully, feloniously and of his malice aforethought, kill and murder the deceased, and the State endeavor to prove that the murder was committed in the course of arson and A be acquitted, can he thereafter be tried for the arson? It is obvious that the reason which would govern if the murder indictment had been in common law form, does not apply, for the jury could not have convicted him of the arson, and hence their verdict of "Not Guilty" does not show that they acquitted him of arson.

It may be that the defense on the murder trial was an alibi, or perhaps that the deceased died of pneumonia and not as a result of injuries received in the fire, or perhaps both defenses were interposed.

Will the court, in considering the plea of autrefois convict, search the minds of the jurors on the first case and try to see wherein lay their reasonable doubt? Will the court say "We have examined the evidence on the murder trial and find that the jury acquitted the defendant because they doubted whether the death was the proximate result of the act of the defendant, and hence, the acquittal of murder is not a bar to the arson charge," or "We find that the jury acquitted because the evidence that the defendant set the fire was insufficient, and hence, the plea of autrefois acquit is good?"

There is no authority for such an inquiry on a plea of autrefois acquit. In the absence of such an inquiry, it might be the rule that the second trial would be barred if the verdict of acquittal could possibly have been based on the innocence of the defendant of the less offense. But such a rule would not be in the interest of justice; it would merely give to the defendant the advantage of the mistake made by the prosecutor in using the statutory murder indictment.

The correct rule, I contend, is that the acquittal on the trial of the statutory indictment for murder does not bar the subsequent trial for arson because the record in a murder case does not necessarily involve acquittal of arson. <u>It will be observed that none of these doubts or questions apply when the first trial resulted in a conviction.</u>

Similar doubts arise when two offenses have each certain elements in common and certain independant elements.

For instance, A is convicted of rape. The girl is under the age of 16 years. It certainly cannot be the law that he may be tried again for the same act on an indictment for carnal abuse. But if he be acquitted of rape, perhaps the jury doubted whether the act was against the will of the girl, can he then be tried for carnal abuse?

Lastly come the cases where the "one volition" results in injury to several people. A steals at the one time the property of B and C, or wounds by one discharge of a shot gun, X and Y. He cannot, I take it, be twice convicted of larceny or assault; but if he be acquitted of stealing B's property because it appears that B had given him the property, or if he is found not guilty of assault on X, because the evidence shows that X was not really one of the men shot, - shall A go untried for the crime he actually committed against C or Y?

In all these supposititious cases, the correct rule, I submit, is that the acquittal on the one charge does not bar the trial of the other, although a conviction on the one would be a defense to the indictment on the other.

This distinction between former conviction and former acquittal

is not noted in the elemental authorities such as Blackstone and Chitty, but it is supported by the cases.

At common law, indictments were so detailed that usually every part of the criminal transaction was set out in the same indictment and hence the jury could pick and choose as to which part of the offense they would convict. It was, however, the rule that on an indictment for a felony the jury could not convict of a misdemeanor part of the felony. Hence it followed that an acquittal of the felony was not a bar to the later trial for the misdemeanor, although a conviction of the felony was such a bar.

The first Constitution of New Jersey declared "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Our present Constitution provides "No person shall, after acquittal, be tried for the same offense."

It may well be that the framers of our Constitution recognized a distinction between former acquittal and former conviction, and confidant that no court would twice present a person for the same offense, were unwilling to attempt to define the exact limits of a plea of former conviction, and therefore omitted all reference to it from the Constitution.

State v. Rosa, 72 N. J. L. 462, 62 Atl. 695. Upheld the action of the Oyer in sustaining a demurrer to a plea of autrefois acquit. The court expressly refrained from considering "the question whether an acquittal upon an indictment charging the felonious homicide of A is a bar to a conviction upon an indictment charging the felonious homicide of B, when it is shown that the death of each was produced by the same act of the person indicted." This case is not an authority in support of the contention of the plaintiff-in-error.

Headnote. Opinion of Supreme Court. The opinion of Mr. Justice Parker deals with the question of autrefois acquit from a somewhat different angle. This opinion is clear and convincing and needs no argument from me to support it.

Counsel for defendant urges State v. Scaduto, 74 N. J. L. 289, 66 Atl. 908, is not in harmony with this opinion or with the decision in State v. Thomas, 65 N. J. L. 598, 48 Atl. 1007.

The Thomas case holds that manslaughter does not necessarily involve assault and battery, and hence that an indictment for manslaughter in statutory form will not support a conviction for assault and battery. The Scaduto case dealt with voluntary manslaughter committed in the heat of passion, and noted that assault and battery was an element of that class of manslaughter. There is no discrepancy between these cases.

cided in *Reg.* v. *Di Salvi* (10 Cox C. C. 481), an acquittal of the whole of an offense does not involve an acquittal of every part of it. There has therefore been no verdict that the appellant was not guilty of gross indecency, and the appellant has never been in peril before of being convicted of gross indecency."

Reg. v. *Gilmore,* 15 Cox C. C. 85. Baron *Huddleston.* "An accused person who relies upon a previous acquittal must make out satisfactorily that he has been acquitted of the identical charge before, or that he could upon the trial of the first indictment have been lawfully convicted of the offense which was charged in the second indictment."

Gavieres v. *U. S.,* 220 U. S. 338, 31 S. C. 421. *Day, J.,* quoting from *Morey* v. *Com.,* 108 Mass. 433, "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

If the question before the Court be tested by the rule stated above, namely, that the charge to which the defendant pleads or some part thereof must be one of which he could have been convicted on the first trial, the action of the Quarter Sessions in directing a verdict for the State must be approved. Certainly, on the trial for the slaying of Mrs. Mullaney, defendant could not have been convicted, whatever the evidence, of any offense against Lillian Dowling.

B.

The Cooper, Rosa and Mowser cases.

State v. *Cooper,* 13 N. J. L. 361, and *State* v. *Mowser,* 92 N. J. L. 474, 106 Atl. 416, each considered a plea of former *conviction* and in each of them the crime for which a conviction had been obtained—arson or robbery—was an integral part of the murder charged in the second indictment.

State v. *Rosa,* 72 N. J. L. 462, 62 Atl. 595, upheld the action of the Trial Court in sustaining a demurrer to a plea of *autrefois acquit.* This case is not an authority in support of the contention of the plaintiff-in-error.

Mr. Justice Drake, in the *Cooper* case, relied on the fact that the arson was a necessary ingredient of the murder and that by being put on trial first for arson and then for the murder, Cooper was tried twice for the very same indictable offense. Indeed, if Cooper had been tried first for the murder the jury could legally have convicted him of the arson and acquitted as to the residue of the charge. The basis of the *Mowser* decision is the same, namely, that the robbery for which Mowser was first tried was an essential element of the murder.

Counsel for the defendant quotes Mr. Justice Kalisch's opinion in the *Mowser* case that one test is "whether or not the offenses grew out of the same transaction or were the product of a single criminal act." By this language, however, the learned Justice intended the situation where one indictable offense grows out of and includes another, as murder and robbery.

> "The principle to be extracted from well-considered cases is that by the term 'same

> offense' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment."

I call attention to the last clause, "which may subject an offender to indictment and punishment."

> "When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater."

This language from the Mowser case does not tend to support the plea in the case at bar. The manslaughter charge for killing Mrs. Mullaney and the assault and battery charge both grew out of the reckless driving of the defendant; but that reckless driving was not subject to indictment and punishment. Defendant has not been acquitted of reckless driving, for reckless driving is not a crime for which he was or could be tried.

C.

A distinction between the rules applicable to autrefois acquit and those applicable to autrefois convict should be noted.

Of course, generally speaking, when a former conviction would be a bar to a subsequent prosecution a former acquittal instead of a conviction would likewise be a bar. But there are exceptions to this rule founded in sound reason and noted by the authorities.

In re Nielsen, 131 U. S. 176, Bradley, *J.*

"In order that an acquittal may be a bar to

> a subsequent indictment for the lesser crime it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also, and would be a bar.

Com. v. *Hudson,* 14 Gray (Mass.) 11. The same rule is expounded and based on the theory that the lesser crime is merged in the greater only in case of a conviction of the latter.

> *Simco* v. *State,* 9 Texas C. A. 338. "There is a marked difference in modern practice between the rules which govern the two pleas of *autrefois acquit* and *autrefois convict,* notwithstanding the immense amount of *dictum* and loose expression to the contrary found in the books. *Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by, the same proof. These two elements must combine, and are both *sine qua non* to the sufficiency of the plea. *Autrefois convict* only requires that the transaction, or the facts constituting it, be the same. To illustrate: If a party be indicted separately for the theft of three horses, the property of A, B and C, taken at the same time, or in one transaction, and he be tried on the first for the theft of A's horse, and the State fails from misnomer, or the defendant by proving A's consent should be acquitted, would the plea of that acquittal operate a bar to the conviction on the other trials because the transaction was one and the same? By no means. Why? Simply because the proof necessary to a conviction in the latter cases

would not convict in the former. *Albert Pickens* v. *The State, ante,* p. 270; 1 *Whart. Cr. Law* (6th ed.), Sect. 557, and authorities cited.

"But suppose the party was convicted of the theft of any one of the horses, would a plea of former conviction be a bar to conviction on the other two indictments? Clearly so. And why? Because the transaction—the taking of the three horses at the same time—would constitute but one offense in law (*Wilson* v. *The State,* 45 Texas 76); and the plea would be good upon the strength of and by virtue of another rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once. *Quitzow* v. *The State,* 1 Texas Ct. App. 47. Here is where the doctrine of carving would come in and support the plea. 1 *Whart. Cr. Law* (6th ed.) Sect. 565, and authorities cited in note."

Wright v. *State,* 17 Texas C. A. 152. Same rule.

In *Reg.* v. *King* (1897), 1 K. B. 214, the defendant was convicted twice for two different offenses which were parts of the same transaction and which consisted of substantially the same acts. The Court of Criminal Appeals reversed the second conviction. Lord Reading, in *Rex* v. *Barron* (1914), 2 K. B. 570, commenting on this decision, noted that the two offenses were not the same, but approved of the decision on the ground that the Trial Court should have directed a verdict for the defendant on the second trial "as a matter of fairness" and in "the exercise of a proper judicial discretion."

These cases suggest a sound distinction which may, perhaps, be stated as follows: The defendant can prevail on a plea of *autrefois acquit* only

if the charge to which he pleads, or some part thereof, is one of which he might have been legally convicted on the first trial. But on a plea of *autrefois convict,* the plaintiff can succeed if the acts constituting the two offenses are substantially the same.

In most of the cases cited in the brief for defendant in which his plea has been sustained it will be noted that the first trial resulted in a conviction, and the decision sustaining the plea to the second indictment may be supported under the distinction above noted. Such are the following cases:

State v. *Damon,* 2 Tyler (Vt.) 387;
State v. *Benham,* 7 Conn. 414;
Sadberry v. *State,* (Tex.) 46 S. W. 639;
Clem v. *State,* 42 Indiana 420;
Carson v. *People,* (Col.) 36 Pacific 551;
Hurst v. *State,* (Ala.) 6 So. 120.

D.

Defendant's argument is based on an unsound view of res judicata rather than on autrefois acquit.

The argument, on careful analysis, is not that the defendant had already been acquitted of the same offense, but rather that one issue of the second indictment had been decided adversely to the State on the former trial and that the State was concluded as to that issue by the record in the former proceeding and hence could not prevail at the second trial. Defendant's counsel, in effect, contends that the first acquittal was an adjudication that the defendant was not operating his automobile in a grossly negligent manner; that the adjudication of this fact was binding on the State at the second trial and

hence that there should have been an acquittal on the second trial.

This line of reasoning overlooks the possibility that the jury may have acquitted Cosgrove of manslaughter, although they found that he was driving in a grossly careless manner, because they were not convinced that he struck Mrs. Mullaney or because they doubted whether the blow was the proximate cause of her death.

It is true that the evidence on that trial that the automobile struck Mrs. Mullaney and that she died as a result of the blow was clear and uncontradicted, but this lack of contradiction did not remove these issues from the consideration of the jury.

Schmidt v. *Marconi, etc. Co.*, 86 N. J. L. 183;

State v. *Pittman*, N. J. L. , 119 Atl. 438.

This argument also overlooks one difference in the issues in the two cases, namely, the question in the manslaughter case was whether defendant drove in a grossly negligent manner; in the assault and battery case, whether he wilfully drove it in a dangerous manner.

State v. *Schutte*, 87 N. J. L. 15, 88 *Id.* 396.

If we assume that the ordinary rules of *res judicata* are applicable to criminal cases, still the record in the manslaughter case would not estop the State from proving in the assault and battery case the manner in which the defendant was driving. The manner of driving in the manslaughter case was merely incidental to the general issue and can only be inferred by argument from the judgment.

Bernard v. *Hoboken*, 27 N. J. L. 412. Headnote. "The first judgment is conclu-

sive upon the facts only so far as that case is concerned. It does not prevent the same facts being controverted in a second case founded upon a distinct cause of action."

Sbarbero v. *Miller,* 65 Atl. 472, Garrison, *V.-C.* "A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered."

State v. *Robinson,* 16 N. J. L. 507. Headnote. "On the trial of an indictment for uttering a forged note, it is competent evidence in order to show a scienter, to prove that the prisoner uttered another forged note on the same bank, on the same day, although he had been acquitted on a trial for that offense."

State v. *Dragone,* (E. & A.) 122 Atl. 878. Defendant had been tried and acquitted under the Van Ness Act for the sale of intoxicating liquor. He was later indicted for keeping a disorderly house. On the trial of that indictment, the State, in order to show one element of the alleged disorder, introduced evidence of the very sale for which the defendant had been acquitted. Defendant offered the record in the liquor case to disprove the sale. The Trial Judge overruled the offer on the ground that it was the province of the jury to determine whether liquor was sold, and that they could not take the judgment or conclusion of someone else on that point. The Court of Errors, in affirming the conviction, held that the exclusion of this evidence was proper because, among other reasons, the offense of selling liquor and the offense of keeping a disorderly house were not the same.

E.

Defendant's Authorities.

One case cited is not in any library to which I have access:

Com. v. *Veeley,* 63 Pa. Sup. 489.

Two cases are not at all in point:

Burgess v. *Sugg,* (Ala.) 2 St. & P. 341;
Com. v. *Chicester,* 1 Va. Cas. 312.

One case resulted in a reversal because the Trial Court struck out the plea, instead of trying it:

Cook v. *State* (Tex.) 63 S. W. 872.

In the following cases the plea of *autrefois acquit* or *convict* was held properly overruled, and hence the decisions cannot aid the plaintiff-in-error:

Com. v. *Andrews,* 2 Mass. 409;
Lillie v. *State,* (Tex.) 187 S. W. 482;
Gunter v. *State,* (Ala.) 20 So. 632;
McCoy v. *State,* 46 Ark. 141;
Bell v. *State,* (Ark.) 180 S. W. 186;
People v. *Ochotski,* (Mich.) 73 N. W. 889;
Morris v. *Ter.,* (Okla.) 99 Pac. 760; 101 Pac. 111;
Augustine v. *State,* (Tex.) 52 S. W. 77;
Keaton v. *State,* (Tex.) 57 S. W. 1125;
State v. *Evans,* (W. Va.) 10 S. E. 792.

Cases distinguishable because they dealt with former conviction and not former acquittal have been mentioned under Point C above.

The only decisions which support the contention of defendant are based on the view of *res judicata* above mentioned, and are contrary, I

believe, to the law of New Jersey. These cases are:

State v. *Spanell,* (Tex.) 205 S. W. 357;
Moss v. *State,* (Ala.) 75 So. 179;
Burnam v. *State,* (Ga.) 58 S. E. 683;
Jones v. *State,* (Miss.) 6 So. 231.

F.

If the foregoing argument is sound, there was no issue of fact for the jury on the plea of *autrefois acquit,* and the Court properly directed a verdict for the State.

II.

Alleged Errors in the Exclusion of Evidence.

Reason for Reversal No. 7.

The defendant's witness, Peter Fagin, was a police officer of Glen Ridge. The evening of the accident, and apparently shortly thereafter, he was with Lieutenant Higgins some two miles from the scene of the accident. An automobile came up and stopped, and the driver, Krauth, told Higgins about the accident. Then Krauth drove away.

"Q Were you ordered to do anything then?"

Objection sustained (Case, p. 182, l. 35 to 184, l. 25).

The overruling of this question is specified as cause for reversal.

After some argument on the objection, the Court asked counsel for defendant:

"You want this witness to testify as to what orders were given by the police that night?

Mr. Simandl: What he did subsequent to this conversation as the result of this conversation with Krauth. That's what I want to know." (Case, p. 184, ll. 13 to 19.)

Thereupon, counsel was permitted to ask without objection:

"Q Did you do anything as a result of this conversation with Krauth? A I walked to the center of the street and watched around for automobiles with dented headlights and broken mudguards, under the spotlight there." (Case, p. 184, l. 26.)

Defendant's counsel was allowed to bring out the facts which he wished brought out and has no cause for complaint.

Assignment of Error No. 8.

Defendant's witness, Edward W. Townsend, testified to the good character of the defendant. On cross examination he admitted that he knew defendant had pleaded guilty to some offense (Case, p. 244, l. 13). On re-direct examination, Mr. Townsend testified that he knew the details "regarding the alleged plea of guilty."

"Q And you had investigated that yourself, personally, had you?"

Objection sustained (Case, p. 246, l. 15).

If this question be regarded as a preliminary one, leading to testimony that the defendant was, in fact, not guilty of the offense to which he had pleaded, it was clearly incompetent. The Court was trying only the instant case, and not some old indictment to which the defendant had pleaded guilty.

Standing by itself, the question was immaterial. It made no difference to the defendant's reputation whether or not Mr. Townsend had investigated personally the details of the plea of guilty.

III.

Charge to the Jury.

Assignment of Error No. 10.

This assignment alleges that the Court erred in its charge as to inferences which may be drawn from the flight of one accused of crime. The brief for defendant admits, however, that there is no error in this part of the charge, and therefore this assignment needs no consideration.

Assignment of Error No. 13.

Error is alleged in the following passage from the charge:

> "Now, an automobile, like a gun, is a dangerous instrumentality under some circumstances. If a gun is fired in a remote forest, or an automobile run at a high rate of speed in an unsettled country, that is one thing; but if a gun is fired at random, or an automobile run at a high rate of speed in the streets of a city, that is quite another thing. All the facts and circumstances must be considered." (Case, p. 297, ll. 27 to 34.)

This is certainly an accurate statement of fact; a fair comment on the possible dangers lying in the use of an automobile.

Assignment of Error No. 14.

Counsel objects to the words in the charge, "You are at liberty, if you see fit, to draw the inferences I have indicated," on the ground that these words permitted the jury to disregard the evidence and to act on their mere whim. This contention cannot be sustained. The words quoted were predicated upon the jury finding "that the defendant was, at the time and place

charged, wilfully, knowingly and intentionally running his automobile at a rate of speed, and in such manner, which, under all the facts, circumstances and conditions existing in the case, was, to him, consciously and obviously dangerous to pedestrians or others lawfully using the highway, and he hit and maimed or wounded the little girl with his automobile while so doing." (Case, p. 298, l. 18.)

Assignment of Error No. 15.

Counsel for defendant lifts from the charge this sentence:

> "The question in that particular, which is contested, is whether or not the defendant was there present, and whether or not he is the man who struck by an automobile the little girl." (Case, p. 298, l. 39.)

Defendant contends that the Court thereby restricted the case to this one issue. Obviously, however, this is not so. Attention is called to the first words in the sentence: "The question *in that particular.*" The Court was considering, when using these words, the alibi of the defendant, the question whether this was a case of mistaken identity. The other issues in the case were elsewhere in the charge fully and correctly developed.

Assignment of Error No. 17.

Exception is taken to this part of the charge: "Gentlemen, the case is an important one. It involves an accusation against an officer of the law." (Case, p. 305, l. 11.)

This assignment requires no argument on the part of the State.

IV.

Alleged Failure to Answer Jury's Inquiry.

Assignment of Error No. 19.

After retiring, the jury returned to the court room, having sent a question to the Judge, "Is actual intent to atrociously assault necessary, or is it implied by recklessness in driving, by breaking of speed laws and fleeing from the spot?" (Case, p. 308, l. 25.)

The Court answered this question to the effect that intent might be implied from the circumstances of the case, "an intention to injure need not be specifically directed to the particular individual that was injured, and may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional." (Case, p. 308, l. 37.)

I contend that the question of the jury was fully and correctly answered. I know of no rule, however, which required the Court to answer a question of the jury, especially when the answer has already been given in the charge. The Court in the case at bar had already clearly pointed out that guilt could not rest on negligence alone, but that there must be malice and an intention to inflict injury. (Case, p. 297, l. 1.)

Assignment of Error No. 20.

In answer to the jury's inquiry, whether intent might be implied "by recklessness in driving, by breaking of speed laws and fleeing from the spot," the Court replied that intent might be implied "from those things, but you must take into consideration, of course, all of the testimony in the case."

Counsel contends that this instruction permitted the jury to infer an intent to injure from any one of the three elements mentioned, as, for instance, breaking of speed laws. This interpretation is not supported by the language of the question. The jury used the conjunction *and;* they did not use a disjunctive.

State v. *Kelly,* 124 Atl. 516.

V.

Refusal to Charge as Requested.

Assignments of Error Nos. 21 and 25.

These requests dealt with the necessity of an intention to do injury as distinct from mere negligence. The Court fully and correctly charged this subject. (Case, p. 297, l. 1, to p. 298, l. 30.)

Assignment of Error No. 22.

The request was as follows:

> "It is for you, gentlemen of the jury, to decide among other things whether or not Krauss, Dever and Shaw were able to follow this car and keep it in sight in view of the testimony that the night was foggy, and several witnesses have testified that a person could not see an object any great distance away from where they were standing." (Case, p. 313, ll. 13 to 21.)

It will be observed that this request does not embody any rule of law. It merely asks the Court to comment on the evidence. The Court is not required to pick out of the case any particular bit of evidence which the defendant designates, and comment on it to the jury.

State v. *Samaha,* 93 N. J. L. 482.

The Court did charge, in general, that the jury were the judges of the facts, the credibility of witnesses, etc. (Case, p. 289, l. 22.)

Assignment of Error No. 24.

The defendant requested the Court to charge as follows:

> "Even if you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lillian Dowling, and that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery, it is only one factor in the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as amounted to an intentional and malicious and atrocious act of assault and battery, in this connection, you may consider whether the driver knew he struck anyone, and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile." (Case, p 316, ll. 21 to 38.)

The Court charged as requested, the first half of this request, but modified the last half by substituting a reference to all the facts and circumstances of the case. (Case, p. 291, l. 37, to p. 292, l. 11.)

Counsel contends that the clause in the request, "you may consider whether the driver knew he struck anyone," was of importance in connection with inferences which the jury might draw from the alleged flight of the defendant. The Court, however, charged on this subject in a manner even more favorable to the defendant than was requested. The charge permitted an inference of a consciousness of guilt to be drawn

only in case the defendant took refuge in flight "fearing an accusation of the crime would be made against him, for the purpose of evading that accusation." (Case, p. 294, ll. 1 to 29.)

The whole charge is a most full, fair and correct exposition of the law of the case.

The judgment of the Quarter Sessions should be affirmed.

J. O. BIGELOW,
Prosecutor of the Pleas.

Index.

	Page
Greeting	1A
Return	2A
On Writ of Error Remittitur	3A
Assignments of Error	4A
Writ of Error	1
Presentation of Writ	3
Return	3
Indictment	4
Record of Delivery of Indictment for Trial	6
Plea	6
Plea *Autrefois Acquit*	8
Answer to Plea	10
Trial on Plea	11
Motion to Set Aside Verdict	11
Judgment Record	12
Motion in Arrest of Judgment	13
Judgment and Sentence	13
Trial of Plea	14
Opinion	19
Exhibit D1: Indictment	24
Exhibit D2: Indictment in This Case	4
Exhibit D3: Sur Indictment	28
Exhibit D4: Stipulation	33
Case	35
Motions	151, 285
Stipulation as to Character Witnesses	282
Stenographer's Certificate	288
Charge	289
Defendant's Requests to Charge	311
Motion in Arrest	319
Certificate of Court Stenographer	320
Certificate of Judge	321
Assignments of Error	322
Reasons for Reversal	332

TESTIMONY

Page

STATE'S WITNESSES:

Day, John L.:
Direct 42
Dever, Daniel:
Direct 67
Cross 75
Re-direct 89
Re-cross 89
Dietrich, Charles A.:
Direct 135
Cross 138
Re-direct 139
Dowling, Lillian:
Direct 50
Cross 53
Re-direct 54
Gannon, John J.:
Direct 143
Cross 145
Gaudiosi, Michael:
Direct 106
Cross 110
Gaussi, Dr. Charles P.:
Direct 46
Cross 49
Gotisar, Theodore:
Direct 54
Cross 65
Re-direct 66
Re-cross 66
Krauth, William:
Direct 90
Cross 98
Re-direct 105
Re-cross 105

Page

Pecola, Jeremiah J.:
Direct 145
Cross 147
Odoms, Daniel:
Direct 131
Cross 134
O'Mara, Francis:
Direct 148
Recalled:
Direct 282
Cross 283
Schwartz, Edward H.:
Direct 43
Cross 45
Seerey, John A.:
Direct 140
Cross 142
Shaw, Frank J.:
Direct 112
Cross 120
Re-direct 128
Re-cross 129
Walters, Richard:
Direct 149
Cross 150
Re-direct 150

DEFENDANT'S WITNESSES:

Anderson, Frank:
Direct 206
Cross 208
Re-direct 214
Barney, August W.:
Direct 257

Page

Cosgrove, M. (read:)
Direct 236
Cross 237
Re-direct 238
Cosgrove, John, Jr.:
Direct 265
Cross 270
Re-direct 281
Fagin, Peter:
Direct 179
Cross 184
Gallagher, Henry:
Direct 231
Cross 231
Gordon, Albert:
Direct 246
Cross 247
Re-direct 254
Re-cross 254
Re-direct 255
Re-cross 256
Gossler, Mrs. Margaret:
Direct 239
Cross 240
Higgins, William P.:
Direct 191
Cross 196
Re-direct 199
Re-cross 199
Kronen, George:
Direct 232
Cross 233
Re-direct 235
Re-cross 235
Prager, Jacob:
Direct 258
Cross 259

Page

Priestman, John H.:
Direct 168
Cross 175
Re-direct 178
Re-cross 178
Sephtein, Mrs. Mary:
Direct 152
Cross 153
Cross 158
Re-direct 158
Re-cross 161
Townsend, Edward W.:
Direct 243
Cross 244
Re-direct 246
Webb, John A.:
Direct 219
Cross 221
Re-direct 224
Re-cross 225
Winarsky, Herman:
Direct 215

NEW JERSEY COURT OF ERRORS AND APPEALS

NEW JERSEY—*ss*:

THE STATE OF NEW JERSEY TO OUR SUPREME COURT

GREETING:

Because in the record and proceedings and also in giving of judgment in a certain plaint which was in our Supreme Court before you, between State of New Jersey, prosecutor and defendant in error, and John Cosgrove, Jr., defendant, and plaintiff in error, in error to the Essex County Quarter Sessions Court, manifest error hath intervened to the great damage of the said defendant as by its complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the party aforesaid, do command you that if judgment be thereupon given, then you distinctly and openly send, under your seal, the record and proceedings and plaint aforesaid with all things touching and concerning the same, and our Court of Errors and Appeals in the last resort in all causes, at Trenton on the 30th day of March, 1926, together with this writ and the record and proceedings aforesaid being inspected, we may cause to be done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS our chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the 10th day of March, 1926.

Thomas F. Martin,
Clerk.

Harold Simandl,
Attorney.

Return

Filed March 11th, 1926

Return.

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 to this writ annexed, as within we are commanded.

Wm. S. GUMMERE,
C. J.

On Writ of Error Remittitur

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY, *Defendant in Error,* *vs.* JOHN COSGROVE, JR., *Plaintiff in Error.*	ON WRIT OF ERROR REMITTITUR.

This cause having been argued at the March Term, nineteen hundred and twenty-five, of this Court by John O. Bigelow, Esquire, Attorney for the defendant in error, and Harold Simandl, Esquire, Attorney for the Plaitiff 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 February 27th, 1926.

On motion of

J. O. Bigelow,
Prosecutor of the Pleas.

A true copy

Edward F. Kelleher,
Clerk

Filed March 10, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

THE STATE OF NEW JERSEY, *Defendant in Error,* *vs.* JOHN COSGROVE, JR., *Plaintiff in Error.*	On Writ of Error to New Jersey Supreme Court. ASSIGNMENTS OF ERROR

Afterwards, to wit, on the return day of the said writ of error before the Court of Errors and Appeals, at Trenton, comes the said John Cosgrove, Jr. by Harold Simandl his attorney, and says, that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. Because the judgment of the Supreme Court in said cause was in favor of the State of New Jersey, whereas it should have been entered in favor of John Cosgrove, Jr.

2. Because the Supreme Court affirmed the conviction of the said John Cosgrove, Jr. whereas it should have reversed the same.

And the said plaintiff in error, John Cosgrove, Jr. prays that the judgment aforesaid be reversed and that the conviction of the said John Cosgrove, Jr. be in all things reversed, and that the record and proceedings be remitted to the Supreme Court to be proceeded with according to law and the rules and practice of said Courts.

Harold Simandl,
Attorney for Plaintiff in Error.

Writ of Error.

New Jersey, ss:

The State of New Jersey to our Essex County Court of Quarter Sessions and Dallas Flannagan, Judge of our Essex County Court of Quarter Sessions.

Because in the record and process and also in giving of judgment upon a certain indictment against John Cosgrove, Jr., late of the City of Montclair, in the said County of Essex:

"That John Cosgrove, Jr., on the 15th day of May, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Newark, in the County of Essex aforesaid did make an assault upon Lillian Dowling, in the peace of God and State, and then and there did beat, wound and ill-treat the said Lillian, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

That the said John Cosgrove, Jr., on the 15th day of May, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Newark, in the County of Essex aforesaid, did commit an atrocious assault and battery upon her the said Lillian and did then and there commit an atrocious assault and battery in and upon her the said Lillian by then and there maiming, wounding the said Lillian, in and upon the head, face, limbs, body of her, said Lillian, by then and there striking her in and upon the head, face, limbs and body of her, said Lillian with an automobile, contrary to the form of the statute in such case made and provided, and against

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

Pro ut the said indictment and the several counts therein, whereof, before you, he, the said John Cosgrove, Jr., hath been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said John Cosgrove, Jr., as it is said, manifest error hath intervened to the great damage of the said John Cosgrove, Jr., as from his complaint we have received information we being willing in his behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said John Cosgrove, Jr., 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, to be held at Trenton, on the 12th day of April next, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

Witness: William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this 24th day of March, A. D., One thousand nine hundred and twenty-four.

EDW. J. KELLEHER,
Clerk.

Harold Simandl,
Attorney.

Presentation of Writ.

Presented in open court this 24th day of Mar., 1924.

DALLAS FLANNAGAN,
Judge.

Return.

State of New Jersey,
County of Essex, ss:

I, Dallas F. Flannagan, Judge of the Court of Quarter Sessions, Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey the indictment, Judgment Record and Proceedings together with the entire record of the proceedings had at the trials and all things touching and concerning the same as by the within Writ to me directed I am commanded.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at Newark, N. J., this 6th day of June, A. D., 1924.

DALLAS FLANNAGAN,
Judge of the Court of Quarter Sessions,
Essex Co., N. J.

Seal
Essex County
New Jersey.

Indictment.

State of New Jersey,
County of Essex, ss:

Be it remembered, that at a Court of Oyer & Terminer, holden at Newark, in and for the County of Essex on the first Tuesday in April, A. D., Nineteen hundred and twenty-three, by the Honorable 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 W. Albert Banister, John A. Linnett, John A. Elliott, Stephen P. Flarity, Frank S. Dodd, Theodore C. Brandeis, Fred G. Stickel, Sr., Samuel E. Sofman, Walter C. Jacobs, Harold L. Jacobus, Stanley J. Lathrop, Peter S. Johnson, Peter Loehnberg, Louis Leonardis, Allerton D. Hitch, Eugene Caveneget, Herman Harris, Thomas Linnett, Jr., George E. McCollum, Robert O'Gorman, John A. Hilser, Nathaniel Elin, and Ernest N. Bush, good and lawful men of the said County of Essex, duly commissioned and then and there duly 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 Inquest for the State of New Jersey, and for the body of the County of Essex, upon their oath present, That John Cosgrove, Junior, late of the City of Newark, in the said County of Essex on the fifteenth day of May, in the year of our Lord, one thousand nine hundred and twenty-three with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this Court, in and upon one Lillian Dowling in the peace of God and of this State then and there

being, an assault did make, and her the same Lillian then and there did beat, wound and illtreat, and other wrongs to said Lillian then and there did, to the great damages of the said Lillian contrary to the form of the Statute in such case made and provided against the peace of this State, the government and dignity of the same. And the Grand Inquest upon their oath aforesaid, do further Present, that the said John Cosgrove, Junior, on the fifteenth day of May in the year of our Lord one thousand nine hundred and twenty-three, at the City aforesaid, in the County of Essex aforesaid, and within the jurisdiction of this Court, in and upon one Lillian Dowling in the peace of God and of this State then and there being an atrocious assault did make, and her the said Lillian then and there did beat, wound and illtreat and did then and there commit an atrocious assault and battery, in and upon her, the said Lillian, by then and there maiming and wounding her, the said Lillian, in and upon the head, face, limbs and body of her, the said Lillian, by then and there striking her, the said Lillian in and upon the head, face, limbs and body of her, the said Lillian, with an automobile to the great damage of the said Lillian contrary to the form of the Statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

J. O. BIGELOW,
Prosecutor of the Pleas.

Record of Delivery of Indictment for Trial.

On the twelfth day of June, A. D., Nineteen hundred and twenty-three 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 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.

Plea.

And afterwards, that is to say on the fourteenth day of June, A. D., nineteen hundred and twenty-three, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Hon. Dallas Flannagan, Judge of the Court of Common Pleas, John Cosgrove, Jr., in the custody of Harry B. O'Connell, Sheriff of the County of Essex aforesaid, and the said John Cosgrove, Jr., 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, &c., and John O. Bigelow, Prosecutor of the

Pleas 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 twentieth day of June, A. D., nineteen hundred and twenty-three, 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 John Cosgrove, Jr., to recognize upon their oath whether the said John Cosgrove, Jr., is Guilty of the premises in the said indictment, specified, or Not Guilty, because the said John O. Bigelow, Esquire, Prosecutor, &c., as the said John Cosgrove, Jr., puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

Plea *Autrefois Acquit.*

And afterwards, that is to say on the twenty-eight day of January, A. D., Nineteen hundred and twenty-four, the following plea was filed by defendant's counsel, viz:

ESSEX COUNTY COURT OF QUARTER SESSIONS.

STATE OF NEW JERSEY vs. JOHN COSGROVE, Jr.	On Indictment. Atrocious Assault & Battery Plea.

And now the said John Cosgrove, Jr., having heard the said indictment read, says that the State of New Jersey ought not further to prosecute the said indictment against him because he says that at the April Term of 1923 of the Court of Oyer and Terminer of the County of Essex, holden at Newark, in said County, &c., he was indicted by the Grand Jury of said County for the crime set forth in the indictment to which this plea is interposed, and that he did at said April Term of said Court then and there plead that he was not guilty of the offense therein charged against him, and thereupon he put himself upon the County and the said State of New Jersey, did the like, and thereupon at Newark, at a Court of Oyer and Terminer held at Newark aforesaid on the 26th day of November, A. D., 1923, by the Honorable Dallas Flannagan, Judge of the Court as aforesaid, a jury was duly impanelled to try the said issue and on the 28th day of November, A. D., 1923, the verdict of said jury was that the said defendant

was not guilty of the offense therein charged against him as by the record thereof more fully and at large appears and that the said offense for which he now stands indicted and to which indictment this plea is interposed is the same offense mentioned in the said former indictment upon which he was acquitted and not other and the defendant avers that he has been lawfully acquitted of the same offense charged in the indictment to which this plea is interposed. And this he is ready to verify wherefore he prays a jury be impaneled to try the issue and prays judgment and that by the Court he may be dismissed and discharged from the said premises in the present indictment specified.

JOHN COSGROVE, JR.

and at the same Court and on the same day the following Answer to said plea was filed by John O. Bigelow, Prosecutor of the Pleas, viz,

Answer to Plea.

ESSEX COUNTY COURT OF QUARTER SESSIONS.

STATE OF NEW JERSEY v. JOHN COSGROVE, Jr.	On Indictment Answer to Plea.

The State of New Jersey, answering the plea filed by the defendant in the above entitled cause, admits that the defendant was indicted in the April Term of 1923 as alleged in the plea, but denies that it was for the same offense set forth in the indictment to which this plea is entered, and says that the former indictment was one for manslaughter, that the indictment in this case is not for the offense mentioned in the former indictment and that the State is not barred from proceeding under this indictment.

J. O. BIGELOW
Prosecutor of the Pleas
WILLIAM WACHENFELD
Assistant Prosecutor of the Pleas

after the plea for Not Guilty was withdrawn by defendant's counsel for the purpose of trying defendant, John Cosgrove, Jr., on plea of *autrefois acquit.*

Trial on Plea.

And afterwards, that is to say, the twenty-eighth day of January, A. D. Nineteen hundred and twenty four to which day the trial of aforesaid plea was postponed at the same Court of Quarter Sessions, holden before the Hon. Dallas Flannagan, Judge of the Court of Common Pleas, comes the said John O. Bigelow, who prosecutes as aforesaid and the said John Cosgrove, Jr., and the jury of whom mention is before made and by Harry B. O'Connell, Sheriff of the County of Essex, for this purpose empanelled and returned to wit: Frederick Ullrich, Harvey A. Grinsted, Charles Whitely, Walter A. Morton, Charles B. Stewart, Harry K. Dodd, Arthur Nathan, John H. Fairweather, George H. Faller, Otto J. Heubner, John W. Allen and William Clark, being called were sworn upon that jury who to speak the truth of and concerning the premises and matters contained in said Plea of *autrefois acquit,* filed by defendant and thereupon the trial of said issue was commenced when the jury by direction of the Court without retiring in the presence of the Prosecutor, defendant and Court do say upon their oath, "We find in favor of the State on this Plea of *autrefois acquit,*" and so they say all.

Motion to Set Aside Verdict.

And further, that is to say on the tenth day of March, A. D. nineteen hundred and twenty-four defendant's counsel Harold Simandl moved to set aside the verdict rendered on plea of *autrefois acquit* and the Court after hearing the motion of counsel and opposition of Prosecutor to this motion reserved his decision and now, that is on the tenth day of March A. D. Nineteen Hundred and twenty-four an Opinion of this Court was filed, denying the motion to set aside the verdict on the Plea of *autrefois acquit.*

Judgment Record.

And further, that is to say on the eleventh day of March A. D. Nineteen hundred and twenty-four, at the same Court of Quarter Sessions, holden at Newark, in and for the County of Essex, Defendant's Plea of Not Guilty was re-entered and the trial of the aforesaid indictment was moved.

And afterwards, that is to say the thirteenth day of March, A. D. Nineteen hundred and twenty-four to which day the trial 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 John O. Bigelow, who prosecutes as aforesaid, and the said John Cosgrove, Jr., and the jury of whom mention is before made, and by Harry B. O'Connell, Sheriff of the County of Essex, for this purpose empaneled and returned to wit: after the following challenges by the State 3, by the Defendant 6, John M. Teague, Vincent Wyckoff, Albert E. Mitchell, John F. Dempsey, Arthur D. James, Charles Lieb, George L. Shannon, Joseph A. Dodd, George Layer, Edward F. McLaughlin, Joseph Davis and William J. Whiteside being called were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued 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 say, we find the defendant Guilty in the manner and form as is set forth in the indictment and recommend him to the leniency of the court, and so they say all. Jury polled each juror answered for himself: "Guilty in the manner and form as is set forth in the indictment with recommendation of leniency."

Motion in Arrest of Judgment.

And further, that is to say on the twenty-fourth day of March, A. D. Nineteen hundred and twenty-four Motion in arrest of Judgment was made by Harold Simandl, Attorney for Defendant John Cosgrove, Jr., which motion was denied by the Court.

Judgment and Sentence.

Whereupon all and singular, the premises being seen and by the Court now here fully understood on this twenty-fourth day of March, A. D. Nineteen hundred and twenty-four the Court (Hon. Dallas Flannagan) do order and adjudge that defendant be imprisoned in the Penitentiary of this county for a term of eight months at hard labor upon this conviction; that he pay the costs of this prosecution and that he stand committed until said costs be paid which said costs are taxed by the Clerk at the sum of Two hundred and sixty-four dollars and thirty-seven cents and the defendant be in Mercy, etc.

Judgment signed March 24, 1924.

DALLAS FLANNAGAN,
Judge.

Trial of Plea.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

Monday, January 28, 1924.

STATE OF NEW JERSEY v. JOHN COSGROVE, Jr.	On Indictment No. 89, Dec. T., 1923, for atrocious assault and battery.

Before: Hon. Dallas Flannagan, Judge.

For the State appears William A. Wachenfeld, Second Assistant Prosecutor of the Pleas of Essex County.

For the defendant appears Harold Simandl.

Mr. Simandl: At this time, before State against Cosgrove is called for trial, may I apply to your Honor for leave to withdraw the plea of not guilty on the ground that I am about to file a plea of *autrefois acquit?*

The Court: You may withdraw that.

Mr. Simandl: I now present to your Honor the plea of *autrefois acquit* in this matter and ask that a jury be empaneled to try this issue.

The Court: Have you seen this?

Mr. Wachenfeld: I have not, except this morning, but if counsel will consent to it I will dictate upon the record an answer to that plea and during the course of the day have a transcript written and give it to the Court.

The State of New Jersey, answering the plea filed

by the defendant in the above-entitled cause, admits that the defendant was indicted in the April Term of 1923, as alleged in the plea, but denies that it was for the same offense set forth in the indictment to which the plea is entered, and says that the former indictment was one for manslaughter, that the indictment in this case is not for the same offense mentioned in the former indictment and that the State is not barred from proceeding under this indictment.

Mr. Simandl: I would be very glad to consent to that. I, of course, join issue.

The Court: All right. Then we will empanel the jury and go right ahead.

A jury is called and sworn.

Mr. Simandl opens for defendant.

THOMAS McCLELLAND, sworn.

Direct-examination by Mr. Simandl:

Q. You are the Clerk of the Court of Quarter Sessions? A. Yes.

Q. Have you with you the record in the case of John Cosgrove, Jr.? A. I have.

Q. Was there an indictment returned against John Cosgrove, Jr., in the April Term, 1923? A. Yes.

Q. Have you that indictment with you? A. I have.

Paper offered in evidence and marked Exhibit D1.

Q. Have you the record showing what plea was entered on that indictment? A. I have.

Q. Will you state for the record what plea was entered? A. A plea of not guilty.

Q. And was the matter brought for trial and moved for trial? A. It was.

Q. Before what court? A. Before the Court of Quarter Sessions, Part III, before Judge Flannagan.

Q. And was the matter tried according to the record? A. It was.

Q. And what was the verdict rendered? A. A verdict of not guilty rendered.

Q. Is there another indictment pending against John Cosgrove? A. Yes.

The Court: Under what date is that verdict of not guilty?

The Witness: November 28, 1923.

Q. When was the jury empaneled?

Mr. Wachenfeld: That is John Cosgrove, Jr.?

The Witness: That is right; that is the record.

Q. When was the jury empaneled? A. November 26.

Q. And a verdict was rendered on what date? A. November 28.

Q. Now, I show you a paper and ask you what this is? A. That is an indictment charging John Cosgrove, Jr., with atrocious assault and battery.

The Court: What is the number of that?

The Witness: No. 89, this term.

The Court: What is the number of the indictment for manslaughter?

The Witness: 41, September Term.

Paper marked Exhibit D2.

Mr. Simandl: I now offer the record in evidence.

Paper marked Exhibit D3.

Mr. Simandl: Now, I offer a transcript of the record in the case of State vs. John Cos-

grove, Jr., on the indictment for manslaughter, the indictment marked D1. Of course, there is a charge to supplement the record as it is now.

Record marked D4.

The Court: The charge will be inserted after.

Mr. Simandl: Yes.

Cross-examination waived.

JOHN COSGROVE, JR., sworn.

Direct-examination by Mr. Simandl:

Q. Are you the same person mentioned in the indictment for manslaughter in the evidence marked D1 and the person named in the indictment for atrocious assault and battery to which this plea is interposed? A. Yes.

Cross-examination waived.

LILLIAN DOWLING, sworn.

Direct-examination by Mr. Simandl:

Mr. Simandl: You will admit that this is the Lillian Dowling mentioned in the indictment for atrocious assault and battery?

Mr. Wachenfeld: I do.

Q. Were you and Mrs. Mulaney hit by the same automobile—the time that you were hit were you hit by the same automobile, both your aunt and you hit by the same automobile and knocked down? Do you

understand me? You were hit by something? A. Yes.

Q. Something knocked Auntie Mulaney down? A. Yes.

Q. Was that the same thing that hit you? A. Yes.

Q. And was the same time, were you both together? A. Yes.

Q. And it was the same day, it was May 15, was it? A. I don't know.

Q. Well, it was the same day when Mrs. Mulaney was hurt? A. Yes.

Q. And it was by the same automobile? A. Yes.

Q. In the same place? A. Yes.

Cross-examination waived.

Mr. Simandl: You will admit the person I refer to by Mrs. Mulaney is the person named in the other indictment?

Mr. Wachenfeld: Yes.

Mr. Simandl: That is our evidence in this case. It is now my purpose to sum up to the jury, or move for the direction of a verdict on the facts, and, of course, if there are any questions of law in your Honor's mind with respect to the question of law, why, I am perfectly acquiescent that the jury render its verdict on the facts and your Honor take care of the law, if your Honor desires some time to consider it.

The Court: Gentlemen of the jury, to the best of my information the question of law which is involved in this issue has already been passed upon by a Judge of this court (Judge Stickel). It has been passed upon in favor of the State. Therefore, I direct you now to bring in a verdict in favor of the State in

the issue now joined before the Court, and I will entertain a motion to set the verdict aside by the defendant's attorney, but I will do that as soon as the verdict is rendered, and then I will decide that motion at a later period.

Mr. Simandl: I merely want to enter on the record an exception to your Honor's directing a verdict for the State, on the ground that the plea is a good one and that we have proven that it is the same offense.

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

DALLAS FLANNACAN. Judge.

Opinion.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS.

STATE OF NEW JERSEY v. JOHN COSGROVE, Jr.	On Indictment No. 89, Dec. T., 1923, for Atrocious Assault and Battery.

Harold Simandl for the motion.
William A. Wachenfeld for the State.

FLANNAGAN, J.:

The defendant interposed herein a plea of *autrefois acquit* and, issue having been joined, the same

was heard before a jury, and upon the close of the evidence the Court directed a verdict for the State.

The defendant now moves to set aside the verdict and for a new trial.

The question involved has already been passed upon by this Court in the case of State v. Cooper, the question having arisen before Judge Stickel, and his determination in that case is dispositive of the question. In that case Judge Stickel wrote as follows: "On the night of September 25, 1920, the defendant, Wilfred C. Cooper, driving his auto east on Clinton Avenue, Newark, New Jersey, at or near Clinton Place, ran into Mr. and Mrs. Harry L. Meyer, killing Harry L. Meyer and injuring the wife, Florence Meyer.

He was indicted for manslaughter in causing the death of Harry L. Meyer and also indicted for atrocious assault and battery on the wife, Florence Meyer.

He was tried on the manslaughter charge and acquitted.

Thereupon he asked leave to withdraw his plea of not guilty to the atrocious assault and battery charge so as to file a plea of *autrefois acquit,* and such permission was granted and plea filed.

To this plea the State has filed a demurrer.

The plea alleges and the demurrer in legal effect admits that the person named in each indictment is Wilfred C. Cooper, this defendant, that Harry L. and Florence Meyer were struck at the same time and place by the said Cooper's automobile and that the assault on Florence was committed by the same identical act of said Cooper as caused the death of Harry L. Meyer.

The plea was evidently drawn with State v. Rosa, 43 Vroom 462, and the unanswered query therein

contained, in mind, and if sound is a statement that where a single act produces results giving rise to the finding of two indictments for separate crimes involving two different people, that an acquittal or conviction under one of the indictments is a bar to prosecution on the other, even though one crime is not an integral part of the other, not such a lesser crime as defendant might be found guilty of on a trial of the other indictment, even though the evidence in support of the second indictment would not convict the defendant of the offense charged in the first indictment, and despite the fact that the two offenses could not be joined and tried in one indictment.

I do not conceive this to be the law of our state. The state constitution says, 'No person shall, after acquittal, be tried for the same offense,' Article 10, and the inquiry naturally is directed to what constitutes one offense. Many are the cases in which such an inquiry has been made and answered, and the well reasoned cases it seems to me established that identity of offense does not exist when:

1. It appears by the plea that the offenses charged in both cases are not the same in law and in fact, and when the offenses charged in the two indictments are perfectly distinct in point of law, however, they may be connected in fact. Commonwealth v. Roby, 12 Pick. 469, opinion by Chief Justice Shaw; Boswell v. The State, 30 Fla. Rep. 869-875; Bishop on Criminal Law, Vol. 1, Sec. 1051; People v. Majors (Cal.), 3 Pac. 597, 4 Black. Com. 336; 1 Russ. on Crimes, 836, 829. See also exhaustive note to the case of The King v. Vandercomb and Abbott, Vol. 1; Bennett's Leading Cases in Criminal Law.

2. The facts necessary to convict in the second pros-

ecution would not necessarily have convicted or justified a conviction in the first, though the offenses were both committed at the same time and by the same act. State v. Elder, 65 Ind. 282; 1 Chitty Criminal Law 453; State v. Hattabough, 66 Ind. 223; Burns and Cary v. The People; Vol. 1; Parker's Criminal Reports, 182, or stated in the words of Greenleaf in his book on Evidence, 'If the defendant, upon the first indictment, could not have been convicted of the offense described in the second, then an acquittal or conviction upon the former is no bar to the latter.' 3 Greenl. Ev., Sec. 36; Freeland v. People, 16 Ill. 380, 382; Speers v. People, 220 Ill. 72.

3. The lesser offense is not included in or an integral part of the greater offense. State v. Standifer, 5 Port (Ala.) 523; State v. Cooper, 1 J. S. Green 361; State v. Mowser, 7 Gummere 474. And a former conviction or acquittal of a minor offense is a bar to a prosecution for the same act charged as a higher crime, whenever the defendant on trial of the latter, might be legally convicted of the former, had there been no other prosecution.

Applying these tests it is clear that there is no identity in law between a charge of involuntary manslaughter and atrocious assault and battery affecting different persons, that the offenses charged in the two indictments in question are perfectly distinct in point of law, especially as in the manslaughter charge the element of intent is immaterial, while in the atrocious assault and battery charge it is an essential element of the crime (State v. Shutte, 87 N. J. L. 15; A. & E., 88 N. J. L. 396), that the defendant could not have been convicted of slaying Harry L. Meyer, by proof that he had struck and injured Florence Meyer even

though the killing and the injury took place at the same time and as the result of the same act; and the charge of atrocious assault and battery on Florence Meyer is neither an integral part of the manslaughter charge for the killing of her husband, nor could the defendant have been found guilty under the manslaughter indictment of atrocious assault and battery upon Florence Meyer. No one of the foregoing tests is necessarily dispositive in each and every case as is indicated in State v. Mowser, *supra*, and thus each of the three tests have been applied with like result.

State v. Cooper and State v. Mowser, *supra*, cited by the defendant, are in entire harmony with the conclusion which I have reached, for in these cases the arson in the one case and the robbery in the other was an integral part of the murder, the foundation of the statutory murder, and the defendant under a charge of murder in these cases could perhaps have been found guilty of the lesser and integral offense.

The other cited cases are opposed to the weight of well reasoned opinion, and State v. Clem., 42 Ind. 420, though not expressly overruled, has been rendered valueless as an authority by the two later cases in Indiana, of State v. Elder, 65 Ind. 282, and State v. Hattabough, 66 Ind. 223, while State v. Damon, 2 Tyler, Vermont 387, if applicable at all to the present situation where the crimes are distinct and not similar as in that case, is against the weight of authority as the decision is interpreted by counsel for the defendant, and in harmony with such weight, if interpreted, as does Chief Justice Morrison in People v. Majors, *supra*. See also the note on *autrefois acquit* in Bennett's Leading Cases in Criminal Law, page 528, at page 534, top.

In treating a similar situation the Court, in State

Exhibit D1

v. Standifer, *supra,* well said: 'As in the case presented by the demurrer to the plea now under consideration, one person may be killed and another assaulted in the same affray. If the indictment included both offenses, it must be pronounced bad, yet it could not be tolerated that the offender, because acquitted of killing, must necessarily be discharged of the assault.'

The offenses being entirely distinct, having no appearance of identity, it being absolutely impossible to include them in the same indictment, the one crime not being a lesser offense of the other or an integral part thereof, and the evidence in support of the second indictment being of necessity insufficient to warrant a conviction under the first indictment, the demurrer is sustained and the defendant directed to plead over to the indictment of atrocious assault and battery."

The motion is, therefore, denied.

Dated, March 10, 1924.

DALLAS FLANNAGAN,
Judge.

Exhibit D1.

INDICTMENT

State of New Jersey,
County of Essex, to wit:

Be it Remembered, That at a Court of Oyer and Terminer and General Jail Delivery holden at Newark, in and for the said County of Essex, on the First

Exhibit D1

Tuesday in April, in the year of our Lord, nineteen hundred and twenty-three by the Honorable William S. Gummere, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Fred G. Stickel, Jr., Edwin C. Caffrey and Dallas Flannagan, Esquires, Judges of the Inferior Court of Common Pleas, in and for the said County of Essex, by the oath of

1 W Albert Banister
2 John A Linnett
3 John A. Elliott
4 Stephen P Flarity
5 Frank S Dodd
6 Theodore C Brandeis
7 Fred G Stickel Sr
8 Samuel E Sofman
9 Walter C Jacobs
10 Harold L Jacobus
11 Stanley J Lathrop
12 Peter S Johnson
13 Peter Loehnberg
14 Louis Leonardis
15 Allerton D Hitch
16 Eugene Caveneget
17 Hermon Harris
18 Thomas Linnett Jr
19 George E McCollum
20 Robert O'Gorman
21 John A. Hilser
22 Nathaniel Elin
23 Ernest N Bush

good and lawful men of the said County of Essex, duly summoned, and then and there duly 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 OYER AND TERMINER

April Term A. D. 1923

Essex County, to wit: The Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, upon their oath PRESENT, That John Cosgrove, Junior, late of the City of Newark,

Exhibit D1

in the County of Essex aforesaid, on the fifteenth day of May in the year of our Lord one thousand nine and twenty-three, with force and arms at the City aforesaid, in the County aforesaid and within the jurisdiction of this Court, one Mary Mullaney, in the peace of God and of this State then and there being, feloniously did kill and slay; contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

J. O. BIGELOW,
Prosecutor of the Pleas.

CAPTION
of the
Term, April 1923

Filed, May 5 1923

JOHN H. SCOTT
Clerk.

Exhibit D1

(Cover)

413
Sept 1923

ESSEX OYER AND TERMINER
April Term A. D. 1923

THE STATE
vs.
JOHN COSGROVE, Junior

INDICTMENT
For
Manslaughter Part 3

J. O. BIGELOW
Prosecutor of the Pleas.

A TRUE BILL

W ALBERT BANISTER
Foreman.

Plea, N G
Trial Day, June 20
Bail in $2000
By Benjamin Farber

663 Bloomfield Ave
Montclair

96 Cherry St.
Rahway

Exhibit D2.

See indictment in this case.

Exhibit D3.

ESSEX QUARTER SESSIONS COURT.

THE STATE vs. JOHN COSGROVE, Jr.	Sur Indictment for Mansl.

Abstract of Criminal Record.

Indictment presented June 12, 1923.
Defendant pleaded Not Guilty June 14, 1923.
Trial dates Sept. 24, Oct. 15-23, Nov. 26, 27, 28, 1923.
Nov. 28, 1923 Verdict Not Guilty.

QUARTER SESSIONS

Monday Nov. 26, 1923.

The Court met.

Present: Hon. Fred G. Stickel, Jr.,
Hon. Edwin C. Caffrey and
Hon. Dallas Flannagan, Presiding.

THE STATE 41 v. JOHN COSGROVE, Jr.	Sur Indictment for Manslaughter.

The Court (Judge Flannagan) on motion of the Second Assistant Prosecutor, order on the trial of this

Exhibit D3

indictment and that the Sheriff return a panel from the Special Panel served upon this defendant according to law, thereupon the defendant, by his counsel, waived the calling of said Special Panel and the drawing of a jury therefrom and consented to be tried by a jury drawn in the usual way, whereupon the following named persons were returned and sworn as jurors.

The State challenged three jurors.

The defendant challenged eleven jurors.

1. Oscar W. Wiley
2. George W. Haffert
3. Theodore Breuning
4. Lloyd P. Roberts
5. John A. Pfarr
6. Edgar W. Wells
7. George W. Kirchner
8. Chester A. Johnson
9. Charles Lavery
10. Sidney E. Pape
11. Joseph A. Carter
12. Harry W. Brady, Jr.

QUARTER SESSIONS

Monday, Nov. 26, 1923.

State v. Cosgrove, cont.

For State Wm. A. Wachenfeld, Esq.
For Defendant Harold Simandl, Esq.

Evidence

Lieut. Edward H. Schwartz
Ex—Map
John L. Day
Ex—2 pictures
Arthur Mullaney
Lillian Dowling
Dr. Chas. P. G. Masi
Dr. Wm. D. Miningham
Daniel Dever

At this stage of the proceedings the Court order a continuance until Nov. 27th at 10 A. M.

Exhibit D3

QUARTER SESSIONS

Tuesday, Nov. 27, 1924.

	THE STATE		Sur Indictment for Man-slaughter.
10	44	v.	
	JOHN COSGROVE, Jr.		

The jury being called all appeared and the trial progressed.
Evidence cont.

The State	For Deft.
Danny Dever R. C.	William Sephton
Michael Gaubiosi	Ex—2 Pictures
Theodore Gotisar	Max Sephton
William H. Krauth	Off. Peter Fagan
Charles H. Dietrich	Lieut. Wm. P. Higgins
Daniel Adams	Off. Frank Anderson
Sergt. John Seery	John A. Webb
Off. John L. Day R. C.	
Sergt. John Seery R. C.	
Off. John L. Day R. C.	
Off. Charles Nobbe	
Off. John L. Day R. C.	
Ex—2 Pictures	
Lieut. Richard Walters	
John Jas. Gannon	
Jeremiah Piccolo	
Frank J. Schall	
Det. Charles Woodkoski.	

At this stage of the proceedings the Court order a continuance until Nov. 28 at 10 A. M.

Exhibit D3

QUARTER SESSIONS

Nov. 28, 1923.

	THE STATE	Sur Indictment for Man-slaughter.
41	v.	
	JOHN COSGROVE, Jr.	

The jury being called all appeared and the trial progressed.

Evidence cont.

For State	For Deft.
Sergt. John A. Seery RC	Herman Winarsky
J. Victor D'Aloia	Edward W. Townsend
Daniel Adams RC	Israel Sussman
	George Cronen
	Henry Gallagher
	Anna Cosgrove
	Lt. Richard Walters RC
	Margaret Gossler
	John H. Priestman
	Jacob Prager
	Dr. Morris Cohen
	William M. Cole
	James Mooney
	Thomas F. Roche
	John Cosgrove, Jr.

The evidence being closed and the Court having charged the jury, the jury retired to consider of their verdict, an officer being sworn to attend them, when

Exhibit D3

having returned into court they say they have agreed upon their verdict and by their foreman say, we find the defendant Not Guilty, and so they say all.

Sentence postponed.

ESSEX COUNTY CLERK'S OFFICE

State of New Jersey,
County of Essex, ss:

I, John H. Scott, Clerk of the County of Essex in the State of New Jersey.

Do Hereby Certify That the foregoing is a true and correct copy of the abstract of the criminal record and also a true and correct copy of the rules entered upon the trial in the case of the State vs. John Cosgrove, Jr., Sur Indictment for Manslaughter, and the same is taken from and compared with the original records on file in this office and as the same now remains on the files of said office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said County at Newark, N. J., this 16th day of January A. D., 1925.

(Seal.)

JOHN H. SCOTT,
Clerk.

Exhibit D4.

Stipulation.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, Defendant-in-Error, vs. JOHN COSGROVE, Jr., Plaintiff-in-Error.	On Error, Stipulation.

It is stipulated between the State and the plaintiff-in-error (hereinafter called the defendant) that the transcript of the testimony marked Exhibit D4 offered on the trial of the issue joined on the plea of *autrefois acquit* in the above-entitled cause, need not be printed in the state of the case, and that in lieu thereof, this stipulation may be printed.

And it is further stipulated that it was proved by Exhibit D4 on the trial of said issue, that one John Cosgrove, Jr., named in the indictment, Exhibit D1, was alleged to have been driving an automobile along Bloomfield Avenue, in the City of Newark, New Jersey, on the 15th day of May, 1923. That the death of Mary Mullaney alleged by said Exhibit D1, to have been feloniously slain, was caused by her being struck by said automobile alleged to have been driven by said John Cosgrove, Jr., while she was on Bloomfield Avenue, in the City of Newark, New Jersey. That the atrocious assault and battery alleged to have been committed on Lillian Dowling, for which the defendant has been convicted in the above-entitled cause, was committed by means of said automobile

Exhibit D4

alleged to have been driven by John Cosgrove, Jr., on Bloomfield Avenue, in the City of Newark, New Jersey, and that said Lillian Dowling and Mary Mullaney were standing on Bloomfield Avenue, Newark, N. J., holding each other's hands at or about the time they were struck by said automobile alleged to have been driven by John Cosgrove, Jr., on said Bloomfield Avenue, in said City, and that said Lillian Dowling and Mary Mullaney were struck by the same automobile either simultaneously or one immediately before the other by said automobile alleged to have been driven by John Cosgrove, Jr.

JOHN O. BIGELOW,
Prosecutor of the Pleas.
HAROLD SIMANDL,
Attorney for Defendant.

Case.

ESSEX COUNTY COURT OF QUARTER SESSIONS.

STATE OF NEW JERSEY **vs.** JOHN COSGROVE, Jr.	B89 Atrocious Assault and Battery.

Newark, N. J., March 11, 1924.

Before: Honorable Dallas Flannagan, Justice, and a jury.

Appearances:

William A. Wachenfeld, Esq., Assistant Prosecutor of the Pleas, for the State.

Harold Simandl, Esq., for the defendant.

A plea of *autrefois acquit* is made by the defendant as follows:

Mr. Simandl: Before the jury is empannelled, your Honor, I desire not only to record my exceptions already taken to your Honor's actions in finding for the State in the plea at bar, but I have further grounds, and they are as follows:

First, if your Honor please, the law of this state requires that the matter in issue be decided by a jury and not by your Honor. The case of State against Ackerman in this state, and the case of State against de Rosa in this state are my authorities for that ruling. In both of those cases, if your Honor please, as well as in Bishop's Criminal Law, which cites those two cases for its authority, it is held that a plea of

autrefois acquit, where the plea is proper on its face, as this one was, this being a statutory plea, raises an issue of fact, as well as record, which can only be decided by a jury. For your Honor to determine the plea as a matter of law, the prosecutor had a right to file a demurrer, and in that demurrer he could have raised the issue of law without admitting the fact.

In this case, a replication was filed, which raised an issue. For that reason, if your Honor please, the defendant is deprived of his constitutional guaranty, that is, a right to a decision and trial by a jury of this plea.

The Court: Do these cases hold that the case must go to the jury? That is to say, assuming the evidence in its most favorable light for the defendant. If, as a matter of law, he would not be entitled to a verdict, is it then for the Court to decide the issue?

Mr. Simandl: Your Honor, under the cases as I interpret them, and under the constitutional limitations, as I understand them, your Honor must leave the matter to the jury under a proper instruction, and if the jury decides under your Honor's charge in favor of the defendant, then, if your Honor feels that the judgment was without law, your Honor may vacate that judgment and make the defendant plead over.

Mr. Wachenfeld: If I may interrupt, I don't know what these cases that counsel cited hold; but I do know that this motion comes after a time, after your Honor has taken the action which is complained of. In other words, the direction of the Court on that verdict was made sometime ago when the jury was empannelled, and at that time counsel did not suggest anything about the law being contrary to what your

Honor held. He didn't take any exceptions or make any objections to your Honor's action at that time. That jury is not now before the Court and the Court is not now passing on that question. I say even if those objections—and I don't know what those cases hold—are meritorious, they come absolutely too late.

Mr. Simandl: The defendant hasn't pleaded. The defendant hasn't pleaded over as yet. Therefore, it does not come too late. There has been no plea of "not guilty" entered, and, if your Honor please, this is a perfectly proper application at this time.

(At the request of the Court, Mr. Simandl cited and read from the cases above quoted.)

Mr. Simandl: There has been no demurrer filed in this case. There was a replication filed which raises an issue for the jury and for the jury alone. In one of these cases—the de Rosa case—the defendant failed to state that this was the same act, and for that reason the Court of Errors never decided the very proposition we are trying to solve today; that is, the question of whether or not an act against one is barred by an act against the other, although it is the same transaction. It was presented in that case, but they never decided it because of a defect in the plea.

The Court: Do you claim that in no case is the Court entitled to direct a verdict of guilty where there is a plea of not guilty?

Mr. Simandl: A plea of guilty?

The Court: Yes.

Mr. Simandl: No, sir. I say your Honor has no right to direct a verdict of guilty even in the case where all the witnesses for the State testify to a certain act and the defendant merely says "not guilty." Your Honor has no right to direct a verdict because

that proposition was very well decided in the case of State against Laddo.

The Court: But you recall that where there is a plea of not guilty the burden is upon the State to establish beyond a reasonable doubt the guilt of the accused; but in a plea of *autrefois acquit* the burden is on the defendant to establish his plea by a preponderance of the evidence.

Mr. Simandl: True, but he is always the defendant.

The Court: True, but the rule of reasonable doubt does not apply in a plea of *autrefois acquit*. The burden is on the defendant to establish his plea by a preponderance of the evidence.

Mr. Simandl: But there was no evidence, and if the evidence was in your Honor's opinion insufficient—

The Court: In other words, the whole question is this. It seems to me that it resolves itself into this: Was there any question for the jury at all, the burden being upon the defendant to establish his case by a preponderance of proof, and if he did not establish his case at all, was there any question for the jury?

Mr. Simandl: But, if your Honor please, there was a question for the jury. The question for the jury is the issue which is immediately raised by the plea and the replication. That is, is it the same offense? Witnesses were sworn for the defendant. None were sworn for the State. The record was introduced by the defendant.

The Court: Why did you leave this question till right now?

Mr. Simandl: Because, I am frank to admit, your Honor, I didn't know the law on the subject. I thought the proceeding was perfectly proper until I sat down yesterday in the law library, and I was there

from half-past nine in the morning until five in the afternoon, and I went all through it, and apparently all the criminal writers use those cases which I have cited to your Honor as their authority, and they come to the conclusion that there are two manners in which you can try this issue. One is on the question of law raised on the demurrer, where no facts at all enter into the situation; and the other on the question of whether or not it is the same offense; whether or not the facts show it is the same offense, and while the burden may be upon the defendant, the other principles of evidence, the constitutional guaranty and all those other things that enter into the trial of a criminal case. and not a civil case, are always cloaked about the defendant.

The Court: You made a motion for a new trial. That motion was denied yesterday.

Mr. Simandl: I said that I would make a motion for a new trial by memorandum, but I abandoned that motion. I intended, if your Honor please, to cite some authorities to your Honor. I cited some to you that morning, and I couldn't find any additional authorities until late yesterday afternoon.

The Court: I waited for you yesterday, and not having any further authorities, I denied the motion.

Mr. Simandl: I hope your Honor didn't misinterpret me. I said I thought I ought to send you a memorandum.

The Court: You made a motion for a new trial in open court.

Mr. Simandl: I never intended to make a motion for a new trial. The only thing I said, if your Honor please, is that I think we have proved this is the same offense, and we take exception to your Honor directing a verdict.

The Court: No. I said I would direct a verdict, and entertain an application for a new trial. A motion was made for a new trial. You argued the question somewhat, and I asked you for further authorities, and you said you would send me some.

Mr. Simandl: I didn't sort of understand that. You said you were going to do this. I didn't intend to make a motion for a new trial. I certainly had no idea I was going to. I knew I was supposed to supply your Honor with a memorandum. I found one case yesterday in Georgia, the only case I could find in addition to those I had already cited to you, that bore upon the proposition. I think the last thing I said in the proceeding was, "I take an exception on the ground that we have proven the same offense"— or some words to that effect.

The Court: I haven't got the stenographer's minutes here, but that was what I understood and said.

Mr. Simandl: I didn't intend to make a motion for a new trial. I said I was trying to convince your Honor that your Honor was wrong in the law, and I couldn't find any more cases. In making this motion I make it, of course, without waiving any rights I may have on appeal. I don't intend to waive any rights.

(The Court examines cases cited.)

The Court: I don't think the Laddo case applies. That is the Supreme Court case. The point in that case was that the testimony of the witnesses was one of credibility for the Judge. Now, there was no issue here of credibility because it was a matter of record.

Mr. Simandl: And fact. I put the girl on the stand. I put the defendant on the stand. There was other testimony. There was a volume of testimony introduced in evidence.

The Court: Precisely; but admitting all of that to be true, the plea was not sustained. That is the proposition here. Admitting the testimony to be true, admitting the testimony of the defendant to be true, the plea was not sustained. Nobody disputed the testimony. The winesses on the stand were in your behalf, and the testimony was admitted as far as the prosecutor was concerned, isn't that so?

Mr. Wachenfeld: Yes.

The Court: And that being the case, there was no question of credibility and no question of law which could be raised on demurrer.

Mr. Wachenfeld: If I had demurred to the plea it would have meant I admitted the truth of the plea, and the plea states specifically that this was the same offense.

The Court: What is your motion now?

Mr. Simandl: My motion is that the defendant go without day and not be held to plead.

The Court: Your motion is denied.

Mr. Simandl: I pray an exception.

The Court: You may have an exception.

Mr. Simandl: And I also desire to have it appear again on the record that my motion is not an intention to waive any rights I have on appeal.

The Court: Whatever your intent may be, the fact of the motion being made and denied will stand for what it is. The defendant will be brought to the bar and plead.

Mr. Simandl: The defendant pleads not guilty.

The Court: The trial will proceed.

(At this point a jury was duly empanelled, accepted and sworn.)

(The prosecutor opened to the jury.)

JOHN L. DAY, called as a witness for the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Mr. Day, you are connected with the Newark Police Department? A. I am.

Q. And have been for some time? A. Yes.

Mr. Wachenfeld: Will counsel admit his qualifications?

Mr. Simandl: Certainly.

Q. I show you, Mr. Day, what appears to be a photograph of a certain portion of Bloomfield Avenue, and ask you what portion of Bloomfield Avenue that photograph indicates? A. That is a portion of Bloomfield Avenue at the intersection of South and 9th Street.

Q. Will you indicate on the map where you were standing when that photograph was taken and in which direction you were facing? A. This was taken just about here (indicating on map) looking toward Bloomfield.

Q. Looking toward Bloomfield or toward Newark? A. Looking toward Bloomfield.

Q. Isn't that (indicating) the wall of the city playground? A. Yes.

Q. Then, your camera wasn't standing this way, because if you were, it wouldn't have this wall here. Where were you standing when taking this picture? A. About here (indicating).

Q. That is, looking toward Bloomfield? A. Looking toward Bloomfield.

Q. And the wall, or that which appears the wall or fence, is the sidewall of this city playground, isn't that correct? A. That's right.

Q. Now, here is another picture. In which direction were you facing when you took that? A. I was right about here (indicating on map) looking across this way, taking 9th Street in and a portion of Bloomfield Avenue.

Q. And do you know when these pictures were taken? A. Yes.

Q. When? A. On the 17th day of May, 1923.

Q. You took them yourself, did you? A. Yes.

Q. And they actually show the situation at the time you took the pictures? A. Exactly.

The map was marked Exhibit S1, and the two photographs were marked Exhibit S2 and Exhibit S3 respectively.

Mr. Wachenfeld: That's all.

Mr. Simandl: No cross-examination.

EDWARD H. SCHWARTZ, called as a witness for the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

(Mr. Simandl admits Mr. Schwartz's qualifications.)

Q. Mr. Schwartz, you have been making maps and diagrams for some thirty years, have you not? A. Yes, sir.

Q. Did you make this map that is now on the blackboard? A. Yes.

Q. Is that map drawn to scale? A. Yes, sir.

Q. What is the scale, please? A. One inch equals twenty feet.

Q. And it shows the intersection of what highway? A. Bloomfield Avenue between North 8th Street and North 10th Street.

Q. And what is the width of Bloomfield Avenue from curb to curb? A. Fifty-four feet.

Q. And the width of Bloomfield Avenue there is practically uniform, isn't it? A. Yes, very little difference.

Mr. Simandl: After measuring it according to your scale, I get thirty-nine feet.

Q. Will you look at that again, Mr. Schwartz? A. Thirty-nine feet; yes, sir.

Q. Well, that is without the sidewalk? A. Yes.

Q. From curb to curb? A. From curb to curb.

Q. What is the distance between the easterly curb line of Bloomfield Avenue to the nearest trolley rail? A. Twelve feet.

Q. And the distance between the trolley rails? A. The trolley tracks are five feet two and four feet two between the tracks.

Q. They are indicated on the map—there are little round spots on the map, both green and blue. What do they represent? A. The irregular green circles are trees. The round circles are telegraph poles, this mark here (indicating) showing a street lamp. The darker, smaller circles represent trolley poles.

Q. And does the map also indicate any of the buildings that are in that particular section? A. Only one, sir. That (indicating) is a brick building on the easterly side of the street between North 8th and North 9th Street.

Q. And what is this little square here filled in with orange? A. Just a little shanty.

Q. What does this (indicating) show? A. That shows a billboard or signboard.

Q. And what is this (indicating) down here? A. Also a signboard.

Q. And on the right-hand side going towards Newark, is that the playground? A. That's right.

Q. What is this little mark here with two orange circles on either end of it? A. Telegraph poles and street lamp.

Q. What are the other small circles filled in with orange color? A. Those are all telegraph poles with yellow or orange, and the greens are trees and the darker, smaller circles are the trolley wire.

Q. Will you tell us approximately the distance of this block running from North 8th to North 9th Street? A. 257 feet.

CROSS-EXAMINATION by Mr. Simandl:

Q. Mr. Schwartz, the distance from the southeast corner of North 9th Street to the corner of the street which is cut off by the playground is what? A. From this point or here or directly from the street line (indicating on map)?

Q. Directly from the sidewalk? A. 58 feet.

Mr. Simandl: That's all.

Mr. Wachenfeld: I offer the map in evidence.

Mr. Simandl: No objection.

Map marked S1 was now received in evidence and marked Exhibit S1.

State's Witness, Charles P. Guassi, Direct

DR. CHARLES P. GUASSI, called as a witness for the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Doctor, you are a practicing physician here in the City of Newark? A. Yes, sir.

Q. And how long have you been practicing medicine? A. About twenty-two years.

Q. How much of that time has been in Newark? A. About nine years.

Q. And where is your office, please? A. 474 North 12th Street.

Q. In addition to naming that as your office, have you a hospital there? A. Yes, sir; the same number, 474 North 12th Street.

Q. Do you conduct the hospital? A. Yes, sir.

Q. Did you, Doctor, on the night of May 15th treat a patient by the name of Lillian Dowling? A. Yes, sir.

Q. Is this the little girl that you treated that night (indicating girl in court room)? A. Yes, sir.

Q. Where did you treat her? A. In the hospital.

Q. Your hospital in 12th Street? A. Yes, sir.

Q. What time of night was it that she got there? A. About 8 or 8:30.

Q. About 8:30? A. Yes, sir.

Q. Was there anyone with the little girl at that time? Do you know who brought her to the hospital? A. The aunt.

Q. Was her aunt with her at that time? A. The aunt died.

Mr. Simandl: I object to that, and move that it be stricken out. It is not responsive, in the first place, and absolutely prejudicial.

The Court: If the prosecutor makes no objection I will strike it out.

Q. Did her aunt come with her at that time, or did someone else come with her?

Mr. Simandl: I object. It is immaterial who came with her, if your Honor please.

The Court: It might be very material, if the question of time arises.

Mr. Wachenfeld: I don't want to put anything in this case that doesn't belong in it.

The Court: The doctor doesn't understand you.

Q. What I am trying to find out, Doctor, is whether this little girl walked into your hospital alone, or whether they carried her in, or who was with her and how she got there. A. Somebody brought her in there. I don't remember the name.

Q. And this aunt that you speak of, was she taken to the hospital at that time?

Mr. Simandl: I object. That is wholly immaterial.

The Court: Strike it out.

Q. Did you treat the little girl? A. Yes, sir.

Q. What did her injuries consist of, Doctor? A. Lacerated contusions of the left leg, arm and back in the lumbar region.

Q. What else, Doctor? A. That's all.

Q. Now, these bruises or contusions, as you call them, on the leg, how many were there? A. On the left leg one.

Q. Now, were they big or small, or can't you give us a more definite idea how badly the girl was hurt? A. Not very big.

Q. That doesn't mean anything to us, Doctor. How big were they, about? Won't you indicate to give us an idea? A. About two inches square.

Q. Now, was there one bruise or contusion two inches square, or were there more than one? A. In the leg one. In the arm is one, and in the back, lumbar region, about four inches square.

Q. And the lumbar region is where? A. The lumbar region is the back, the kidney.

Q. Did you treat this girl for her injuries? A. Yes, sir.

Q. How long did you continue to treat her? A. She was in the hospital from May 15th, 1923, and she left the hospital May 20th, 1923—five days.

Q. Did you treat her during those five days? A. Yes, sir.

Q. Will you tell us what you did for these injuries that this little girl had?

Mr. Simandl: I object. It is immaterial. The doctor can testify as to the injuries, but I don't think the treatment and all the other things are material.

The Court: I don't think it is material.

Q. Did you treat her during those five days? A. Five days; yes, sir.

Q. And after five days she left the hospital? A. I discharged her, yes.

Q. What was the physical condition of the little girl the night that you saw her when she was brought to the hospital other than the condition of contusions and bruises that you have already told us about? A. Shock.

Q. Was she in a bad or slight state of shock, or what? A. She remained under shock about a couple of hours.

State's Witness, Charles P. Guassi, Cross

Q. And there were no other injuries excepting what you told us? A. That's all.

CROSS-EXAMINATION by Mr. Simandl:

Q. You say she got there at 8:30 to your hospital? A. Yes, sir.

Mr. Simandl: That's all.

By the Court:

Q. Let me understand it. In these injuries was the skin broken at any place? A. Yes, sir.

Q. Where was the skin broken? A. In the back.

The Court: That's all.

By Mr. Simandl:

Q. That could be produced by a fall, couldn't it? A. It could be produced by a fall, too, sure.

By Mr. Wachenfeld:

Q. Doctor, could all these injuries be produced by one fall, simply by the child falling down herself? A. No. It is impossible from the one fall.

Q. These bruises and contusions and these wounds as you saw them, in your opinion, were they caused by this girl merely falling down? A. No, sir.

Q. What were they caused by? A. It was—she must have been on the ground, rolled on the ground for four or five feet.

By Mr. Simandl:

Q. This breaking of the skin in the back, Doctor, that was merely what you termed a "laceration"? A. A laceration, yes.

Mr. Simandl: That's all.

LILLIAN DOWLING, a witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

By the Court:

Q. Do you go to school? A. Yes.

Q. Where do you go to school? A. Newark.

Q. How long have you been going to school? A. A long time.

Q. And what do you study in school? A. Spelling.

Q. Can you spell a little? A. Yes, sir.

Q. And read, too? A. Yes, sir.

Q. Do you say your prayers at night? A. Yes, sir.

Q. And you believe in God? A. Yes, sir.

Q. Do you think God punishes people if they tell stories? A. Yes, sir.

By Mr. Wachenfeld:

Q. Do you remember your Aunt Mary? A. Yes, sir.

Q. Were you with your Aunt Mary on the night of May 15th of last year, Lillian? A. Yes, sir.

Q. And where were you with your Aunt Mary? A. To my mother's house.

Q. And where did she live? A. Ninth Street.

Q. Do you know where Bloomfield Avenue is and Ninth Street? A. Yes, sir.

Q. Where were you going with your Aunt Mary that night? A. I was going home to her house.

Q. Where did she live at that time? A. 329 Park Avenue.

Q. So when you got to Bloomfield Avenue, would you go toward Montclair, or would you go toward

Newark to go home to your Aunt Mary's house? A. We were going down towards Newark.

Q. And do you know what time of night it was when you got to the corner of 9th Street and Bloomfield Avenue, about what time it was? A. 25 minutes to 9.

Q. When you got to Bloomfield Avenue and North 9th Street, did you cross over Bloomfield Avenue? A. Just before we crossed over my aunt looked up and down both sides of the street.

Q. Did you see her look up and down, Lillian? A. Yes.

Q. And then did you start to cross over? A. Yes, sir.

Q. When you started to cross over, did you see any cars on Bloomfield Avenue coming towards you at all? A. My aunt looked up and down and she didn't see any but when she stepped off the curb we saw a light far away.

Mr. Simandl: I object to the latter part of the answer, and move that it be stricken out.

The Court: Strike out what the aunt saw.

Q. Was it raining that night, Lillian? A. No, sir.

Q. Was it a little bit foggy, or was it clear that night? A. It was foggy.

Q. When you started to cross Bloomfield Avenue, did you go all the way across Bloomfield Avenue? A. No, sir.

Q. What happened, Lillian? A. I was hit by an automobile.

Q. Was your Aunt Mary with you at the time you were hit by the automobile? A. Yes, sir.

Q. Did she have hold of your hand, or did you have hold of her hand? A. She had hold of mine.

Q. Was she on your left-hand side, Lillian, or at your right-hand side? In other words, as you were coming across Bloomfield Avenue, was your Aunt Mary this side of you (indicating), or was she on the other side of you? A. On this side of me (indicating).

Q. That would be your left-hand side, is that right? A. Yes, sir.

Q. And now, how far across Bloomfield Avenue did you go before this automobile struck you? A. To the first car track.

Q. Before the automobile struck you, did you hear it blow a horn of any kind, Lillian? A. No, sir.

Q. Did you see it at all before it struck you? A. No, sir.

Q. And when it struck you, where did you go to? Did you fall down on the street, or did it throw you some distance, or what happened, do you remember? A. No, sir; I don't remember.

Q. And after this accident happened, when you were hit by an automobile, where did you next find yourself? Were you still on the street? A. No, sir. I was in the hospital.

Q. How long did you stay in the hospital, Lillian? A. Five days.

Q. Were you hurt in this accident? A. I don't know.

Q. Were you hurt? Did you have any injuries? Were you hurt in the accident? A. Yes, sir.

Q. Where were you hurt? A. My little finger.

Q. Is it all right now? A. No, sir.

Q. What is the matter with it? A. It is still crooked.

Q. And did you have any other hurts on you? A. Yes, sir.

Q. Was your leg hurt at all? A. Yes, sir.

Q. What was the matter with your leg? A. It hurt, but I don't know what was the matter with it.

Q. Did you have any other hurts? A. Yes, sir.

Q. Where were the other hurts? A. Arm.

Q. Any more? A. Back of the neck and my head.

Q. Did you see your Aunt Mary after that, Lillian? A. No, sir.

Q. You didn't see her after the accident happened?

Mr. Simandl: I object, if your Honor please. How is that material?

The Court: Objection sustained.

By the Court:

Q. Let me see your finger. (Shown.) Oh, I see. Was that straight before the accident? A. Yes, sir.

CROSS-EXAMINATION by Mr. Simandl:

Q. Lillian, it was very foggy that night, wasn't it? A. Yes, sir.

Q. You couldn't see very far, could you? A. No, sir.

Q. When you started to cross across the street, did you see any lights? A. Yes, sir.

Q. And did you stop on your way across the street any? A. I don't know. I don't remember.

Q. You don't remember whether your aunt stopped or whether you stopped? A. Oh, I remember we got to the first car track.

Q. You couldn't see very far at all, could you, in the fog? A. No, sir.

Q. Did you see more than one light? A. Two.

Q. Were they close together or wide apart? A. They weren't very wide apart.

Q. Is that the only lights you could see? A. Yes, sir.

Mr. Simandl: That's all.

RE-DIRECT EXAMINATION by Mr. Wachenfeld:

Q. Lillian, do you know where the city playground is up there on Bloomfield Avenue? A. Yes, sir.

Q. Were you walking towards the city playground? A. Yes, sir.

Q. You couldn't tell—did you see this car before it struck you, Lillian? A. I don't know what you mean.

Q. Did you see it before it struck you? A. All I saw was the lights on it.

Q. Was it near to you then or far away? A. I don't know.

Mr. Wachenfeld: All right.

THEODORE GOTISAR, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Mr. Gotisar, where do you live? A. 132 Washington Street.

Q. In Newark? A. Yes, sir.

Q. Were you living there in the month of May of last year? A. Yes, sir.

Q. Were you up on Bloomfield Avenue anywhere near the intersection of North 9th Street on the night of May 15th? A. Yes.

Q. Were you walking or were you driving? A. I was driving.

Q. And in which direction were you going on Bloomfield Avenue? Were you going toward Newark or toward Montclair? A. I was coming towards Newark.

Q. About what time of night was it, do you know? A. Quarter to nine; something like that.

Q. Did you have a watch or a clock, or is that just what you figure? A. That is just what I figure.

Q. And as you got toward the intersection of North Ninth Street, did you see an accident happen there? A. Yes. I saw an accident.

Q. What kind of a night was this, as to the weather conditions. Was it clear or raining, or what was the condition? A. Very bad night; very foggy.

Q. How fast were you driving at that time? A. Well, I was going very slow. I remember I even had my windshield open because I couldn't see. The fog would get on the glass.

Q. And you couldn't see through it, is that it? A. That's it.

Q. So you had the windshield open? A. Yes, and I was going very slow, about fifteen miles an hour, between twelve and fifteen miles.

Q. When you got towards North 9th Street, did you see an accident happen? A. Yes, sir.

Q. Did you see a woman and a little girl trying to cross Bloomfield Avenue at that intersection? A. I just happened to see them.

Q. In which direction were they walking, and where were they at the time you saw them? A. They was standing in the middle of the street right between the four car tracks.

Q. Look at this diagram, please. This (indicat-

ing) is Bloomfield Avenue. This is going toward Newark, and that is the direction you were going? A. Yes.

Q. When you say they were standing in the middle of the street between the car tracks, do you mean in the middle of the two car tracks? A. There is four. They were standing right between the west bound and the east bound tracks, right there (indicating on map).

Q. And could you tell by looking at that whether the lady, the woman was nearer to you or whether the girl was nearer to you? A. They were standing side by side, facing the south, I think.

Q. Were they going toward the city playground? A. Yes, that's where they were going.

Q. Now, that is where they were at the time you noticed them? A. Yes.

Q. What happened after that? Did they walk across Bloomfield Avenue, or did something else happen? A. These things happen so quick. I saw the woman standing there and the child and several cars were coming up from Newark, and all of a sudden one of the cars struck the woman and the child. I could hear a dull noise.

Q. Did you see the car actually strike? A. No.

Q. What makes you say, then, that it did? A. It was the noise that I heard.

Mr. Simandl: I object and I ask that the answer be stricken out as a conclusion.

The Court: Yes, strike it out, all except that he heard a noise.

Q. You heard a noise? A. Yes.

Q. What kind of a noise? A. A dull noise.

Q. And after you heard the noise, what did you

see then? A. Well, I saw first that the child was right in front of my car, about fifteen feet or twenty feet in front of my car.

Q. Was she standing there or— A. Laying on the ground.

Q. How did she get there? Did you see how she got there? Did she walk or was she thrown over? A. She must have been thrown over, I suppose.

Q. How near to the right-hand side—

Mr. Simandl (interrupting): I object to what this witness supposes, unless he actually saw what happened. I ask that it be stricken out.

The Court: Strike it out.

Q. How near to the right-hand curb were you driving at that time? A. I was very close to the right-hand curb.

Q. And you say then that the little girl was at that time about fifteen feet in front of your car, is that right? A. Yes.

Q. How near to the curb was the body of the little girl? A. About within six feet of the curb.

Q. What became of the woman? A. I looked over in the middle of the road where I saw the woman, and the woman was laying on the car tracks.

Q. On which car tracks? A. She was laying on the—

Q. The one going toward Montclair? A. No, towards Newark; the one that goes to Newark.

Q. At the time you saw this little girl's body, as you say, about fifteen feet in front of you, and six feet from the curb, was she lying there? A. Yes.

Q. Was she conscious or unconscious? A. She was crying.

Q. Did you stop your car at that time? A. Yes.

Q. Did you get out? A. Yes.

Q. Now, then, at the time you heard this dull noise, you say you saw a couple of cars coming up from Newark, is that right? A. Yes.

Q. How many of these cars went past you, one or more than one? A. I can't tell you that.

Q. Did you see a car go past you? A. No, I didn't see anything outside I saw the woman there and I saw cars in the distance coming towards Montclair.

Q. Now, did one car come out of the other cars and pass them? A. I couldn't tell you that.

Q. How many cars went past your automobile? A. I don't know anything about that. It was a bad night and I had to watch my way, and it only took a second from the time I saw that lady and the child until I saw the child in front of me. I was looking straight ahead.

Q. Didn't a car go by you, past your car, going toward Montclair? A. Well, I don't know what I should answer you.

Q. You should answer truthfully just exactly what you saw? A. I didn't observe that. I just saw that child and I stopped the car. What happened on the other side of the road I couldn't see at the same time.

Q. Didn't you tell us before at a trial of this case that you saw a car go by? A. Yes, maybe I did.

Q. Is that the truth, or isn't it? A. I assume that a car went by.

Mr. Simandl: I object, and move that it be stricken out.

The Court: Strike it out.

Q. You can't assume anything. You've got to tell us just exactly what you saw. Didn't you see a car go past you going toward Montclair? A. Yes, I saw the car coming by.

Q. Did you see it go past you? A. Of course it must have went past.

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

The Court: Yes, strike it out.

By the Court:

Q. You didn't see it any more? A. I don't know where the car went. I looked straight ahead.

Q. Did that car stop or did it go toward Montclair? A. It kept on going, I suppose.

Q. Strike that out. Don't suppose anything. Tell us exactly what you saw. Did you see a car going toward Montclair? A. Before I saw—

By Mr. Wachenfeld:

Q. Either before or afterwards. Tell us everything you saw? A. I saw it going to Montclair, two or three of them.

Q. Did it stop? A. No.

Q. How many cars went past you, one or two or three? A. Three of them.

Q. Three of them went past you? A. I saw three of them coming up.

Q. How many went past you is my question? A. You want me to tell you what I saw?

Q. Absolutely? A. I didn't see any go past me.

Q. Did you say at the last trial that you saw one car go by? A. I don't remember that.

Q. Do you remember this question: "After the

lady fell on the car track, after the child was then ten or fifteen feet ahead of your car, did you see a car go by? A. Yes, I saw a car go by." Did you answer that way? A. I don't remember that. Maybe I did.

Q. Did you answer this question?

Mr. Simandl: Is the prosecutor attempting to impeach his own witness?

The Court: I don't know. He hasn't said what he is doing.

Mr. Wachenfeld: I am surprised, and I am going to say that this witness at the former trial made statements which are inconsistent with his testimony that he is now offering, and I am not reading his testimony at the previous trial for the purpose of impeaching his testimony, but for the purpose of neutralizing it.

Mr. Simandl: Very well said. I have no objection to your doing that.

Q. Did you answer that question that way—"Yes, I saw a car go by"? A. I don't remember that.

Q. Don't you remember what you testified to before? A. No.

Q. Do you remember this question: "Was it going fast or slow?" A. It was going fast. The car I saw coming up was going fast.

Q. The car you saw coming up was going fast, was it? A. Yes.

Q. And did it go past you or did it stop, this car that was going fast? A. Yes, it went past me.

Q. Now, did these other cars that you saw coming up, did they stop or did they go past you? A. I don't know that.

Q. When you stopped, how many cars did you see

coming up from Newark at that time? A. It was three cars I saw coming up.

Q. Now, one car went past you when you got out of your car after this accident happened, you say? A. Yes.

Q. At that time how many cars did you see standing there? A. I didn't look over there right away.

Q. Didn't look over where? A. I picked up the child and put it in the car, and afterwards I looked over to turn around, and there were other cars standing there.

Q. There were several cars there, you mean? A. I don't know if those cars were the ones I saw coming up or whether they were other cars.

Q. How many cars were standing there? A. About three of them.

Q. Didn't you answer that question differently at the last trial of this case? Didn't you say there were two? A. Well, maybe two.

Q. Listen to this. Didn't you answer this way at the last trial: "You were in your car when one car passed you going about thirty miles an hour, weren't you? A. Yes. Q. Is that the only car that passed you then that you know of? A. I can't tell you that. When I got out of my car there were two other cars stopped on the other side." Is that right? A. Yes.

Q. Were there two or six or eight or ten? How many were there? A. They kept stopping right along, you see. Everybody that came up stopped.

Q. I appreciate that, but I am asking you now, immediately after the accident happened when you got out of your car, how many other cars were there there? A. There wasn't any cars there.

Q. How many cars had passed you? A. While I stopped?

Q. Not while you stopped; when the accident happened? A. You are trying to get something out of me that I didn't see.

Q. I am not trying to get anything out of you. All I want to know is everything that you saw up there. Didn't you say a car passed you and it was going fast? A. Yes.

Q. Did you see that car or do you assume that? A. No. The car went past.

Q. And it was going fast or slow? A. It was going fast.

Q. About how fast would you say it was going?

Mr. Simandl: I object. The witness is not qualified to answer that. He has said several times that he hadn't noticed any car.

Mr. Wachenfeld: If your Honor please, first counsel says he isn't qualified on speed, and then he says he never noticed the car.

Mr. Simandl: The opinion must be based on facts, and the man must also have knowledge.

Q. You were driving a car that night? A. Yes.

Q. How long have you been driving a car? A. Five years.

Q. Do you know what rate of speed a car is going, approximately, when you look at it? A. Yes.

Q. How fast was this car going?

Mr. Simandl: I object on the ground that there has been no proof to show what car this was. The witness said continually it must have passed him. He doesn't know whether it was this car that struck or not. It is only going to confuse the jury. There is no proof that he knows that any car struck this woman.

He says there were three cars coming up the avenue, and I submit, if your Honor please, there is no proof that the car in question was the car that this man saw.

The Court: It wouldn't make any difference whether there were proof that the car in question was the car driven by the defendant. The prosecutor can show that, and he can connect it up afterwards. The witness has testified that a car did go past him and went past fast. Now, the prosecutor asks, "How fast" did that car go? I will allow that question.

Mr. Simandl: I pray an exception.

Q. How fast did it go? A. About twenty-five or thirty.

Q. Did you hear that car sound any horn or blow any horn at that time? A. No.

Q. When you say twenty-five or thirty, you mean twenty-five or thirty miles an hour? A. Yes.

Q. What makes you say twenty-five? A. Well, I wouldn't dare to make such an accurate statement by a mile.

Q. You made an accurate statement at the last trial of this case when you said it was going thirty miles an hour, didn't you? A. Probably I said thirty.

Q. What is the truth in this thing? We want to know your best opinion as to how fast this car was going? Was it going thirty miles an hour, twenty-five or thirty-five? A. I use my best judgment when I say between twenty-five or thirty miles an hour.

Q. Didn't you say at the last trial it was going about thirty miles an hour?

Mr. Simandl: I object, if your Honor please.

The Court: I assume the prosecutor takes the same position he did before.

Mr. Wachenfeld: I make the same announcement.

Q. Didn't you say last time it was going about thirty miles an hour? A. I don't remember anything what I said the last time.

Q. Listen to this question?

Mr. Simandl: Just a minute. I'd like the prosecutor to state when and in what court and in what proceeding this witness testified that is being alluded to.

Mr. Wachenfeld: Do you want me to do that?

Mr. Simandl: Yes.

Mr. Wachenfeld: I am referring to the testimony in the case of the state against John Cosgrove, Jr., on the charge of manslaughter for the killing of a woman arising out of an accident that occurred May 15th, 1923, at Bloomfield Avenue at the corner of North 9th Street, and the woman's name who was killed was Mary Mulraney.

Mr. Simandl: Now, we have it on the record.

Q. Didn't you say on the trial of that case, didn't you make this answer, that the car was going thirty miles an hour—didn't you? A. I don't remember that.

Q. You don't remember? A. No.

Q. If you said at the last trial that this car was going thirty miles an hour, why do you say now it was going only twenty-five? A. I am saying the same thing now; between twenty-five and thirty is my best judgment.

Q. You didn't say anything about twenty-five on the trial of the other case that I mentioned? You said it was going about thirty miles.

Mr. Simandl: I object, if your Honor please. All this is argumentative and stating a conclusion on the part of the prosecutor.

The Court: I think it does, too.

Q. Did you on the last trial state it was going about twenty-five miles an hour? A. No.

Mr. Simandl: I object, if your Honor please. This is not the proper form to neutralize the testimony of this witness.

The Court: Strike it all out.

Mr. Wachenfeld: I consent.

Q. Was this car going in your opinion nearer thirty or was it going nearer twenty-five miles an hour? A. I don't know what to answer to that.

The Court: He wants to get your opinion on the subject. Do you think he was going nearer thirty or nearer twenty-five?

The Witness: I dare not make—I dare not judge that. I would simply be making a guess to answer that question.

Q. Give us your guess, then? A. All right; nearer to thirty I am pretty sure.

Mr. Wachenfeld: That's all.

CROSS-EXAMINATION by Mr. Simandl:

Q. Mr. Gotisar, you also testified at the trial of John Cosgrove, Jr., in this court room on November 26th, 1923, as follows, didn't you (p. 76): "Q. They

all passed you, didn't they (meaning by 'they' the cars)? A. Of course they must have passed me, but I told you before that I didn't pay any attention to the cars. I had to stop my car to take care of the child. I didn't look at the left-hand side of the road any more." You said that, didn't you? A. Yes.

Mr. Simandl: That's all.

RE-DIRECT EXAMINATION by Mr. Wachenfeld:

Q. This car that you are speaking of that you saw that you think was going about or nearly thirty miles an hour, did that pass the other two cars? A. Yes. It was alongside of another car coming up.

Q. Did it stay alongside of it or did it pass it? A. It was passing it.

Q. Did it pass it? A. The same argument. It happened so quick I can't remember. I can't tell you all these things.

Q. Don't you know whether this car that was going, as you say, thirty miles an hour, whether it passed the other two? A. Yes, it passed it.

Q. It did pass it? A. Yes.

Q. You are not assuming that, are you? A. No, sir.

Mr. Wachenfeld: That's all.

RE-CROSS EXAMINATION by Mr. Simandl:

Q. That is merely, when you say it was going between twenty-five and thirty miles an hour, that is merely your estimate of the speed of the car, isn't it? A. Yes, sir.

Q. And you didn't see that car excepting that it was coming towards you, is that right? A. That's right.

Q. And your attention was more or less focused on the child, wasn't it? A. That's right.

Q. You didn't have much of an opportunity to see this other car, did you? A. Yes, that is right.

Q. You just got a glance at it and you saw this child and you centered your mind on the child? A. Yes.

Q. Is that right? A. Yes.

Mr. Simandl: That's all.

DANIEL DEVER, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Mr. Dever, were you up there on Bloomfield Avenue near either North 8th or North 9th Street on the night of May 15th, when this accident happened? A. Yes, sir.

Q. Where were you at that time? A. In the restaurant on Bloomfield Avenue.

Q. What is the name of that restaurant? A. Philby Restaurant.

Q. Were you in the restaurant or were you near the restaurant? A. I was sitting in the car in front of the restaurant.

Q. Whose car was that? A. Buck Krauth's.

Q. How long before this happened had you known Krauth? A. For about six or seven years.

Q. Before the accident happened? A. Yes, sir.

Q. And had you been in some other place that night with Buck Krauth before the accident happened or did you just meet him? A. I met him that night and we went down to the Studebaker people to look at my car.

Q. You went down with him? A. Yes.

Q. Did you drive down to the Studebaker Company in his car? A. Yes.

Q. Then you came back from the Studebaker Company? A. Yes.

Q. And then you stopped at this restaurant on Bloomfield Avenue? A. Yes.

Q. Did you get out of the car and go into the restaurant or did you stay in the car? A. Kept staying in the car talking.

Q. Now, look at this diagram. Will you tell us about where this restaurant is on Bloomfield Avenue? That (indicating) is North 8th Street there. This is North 9th Street. I take it that the restaurant is on that side opposite the city playground? A. Yes.

Q. Is it nearer 8th or 9th Street? A. It is nearer to 8th Street. Eighth Street comes in on an angle.

Q. Here is a building marked a "brick building." The restaurant is in that brick building? A. Yes, sir.

Q. How long had you been sitting outside before the accident happened? A. I guess fifteen or twenty minutes.

Q. Was Krauth there during that time? A. Yes, sir.

Q. Was there anybody else in that car besides you and Krauth? A. No, sir.

Q. Now, did you see an accident happen there? A. Yes, sir.

Q. Where did the accident happen? A. By 9th Street.

Q. Did the accident involve several pedestrians and an automobile? A. I didn't get that.

Q. Who was involved in the accident?

The Court: What did you see?

The Witness: I seen this car coming up at the rate of thirty to thirty-five an hour, maybe more, forty, and I heard this crash on the left-hand side of the avenue. Then I sees this girl flying through the air and she went underneath the electric pole and rolled over. He went to the right. It looked like he hit the curb and went up Bloomfield Avenue. He never stopped. He didn't look back to see what happened. This car just kept on going.

Q. When you say "this car," do you mean the car that hit this woman and the girl? Was it a woman and a girl? A. A woman and a girl.

Q. Where was the woman and the girl on Bloomfield Avenue? In which direction were they going? A. I couldn't see that. I didn't know anything until I heard the crash. They came out of 9th Street.

Q. When you say "this car" you are referring to the car that struck this woman and the girl? A. After we had caught them and found out—

Q. Just a minute. We haven't got to that yet. You say it was going about thirty-five to forty miles an hour? A. Yes.

Q. Before it struck this woman and this child, did you hear it blow a horn or give a signal of any kind? A. No.

Q. Before it struck them did it decrease its speed or turn to the right or to the left before it struck them? A. No.

Q. Where was the woman and the little girl at the time they were struck by the automobile? A. It looked to me about—not on the trolley track, but in the spaces in between.

Q. In between the two trolley tracks, one going to Newark and the other away from Newark? A. Yes.

Q. What became of the little girl after the automobile struck her? A. She flew through the air on the side of the city field underneath the electric pole.

Q. Over on this side of Bloomfield Avenue (indicating on map)? A. Yes.

Q. Near the electric light? A. Electric light, yes.

Q. This diagram has an electric light indicated here where I have the pointer? A. Right underneath that.

Q. How near to the curb would you say the little girl was thrown? A. She looked like she was right up against the curb.

Q. What became of the woman that was with her? A. I didn't see her. She was knocked flat away from where I was. Then we gave chase way up there after the car.

Q. You say "we gave chase." How soon after this accident did you start to give chase? A. I guess it was a couple of seconds.

Q. When you went right after it were you and Krauth still alone? A. No, sir.

Q. Was anybody else with you? A. A fellow we called "Young Shaw"—he jumped on the running board.

Q. Had you known Shaw before this accident? A. Yes.

Q. For how long? A. A year or two years.

Q. And where was Shaw at the time that the accident occurred? A. Walking on Bloomfield Avenue.

Q. Did he get on the Buick running board that Krauth was driving? A. He stood on the running board.

Q. Then what did you do after he stood on the running board? A. Shaw caught us when we were just moving, and we kept on going and followed his car.

Q. You were already moving when Shaw jumped on? A. Yes.

Q. Where did Krauth drive his car? A. Right up straight Bloomfield Avenue after this other car.

Q. Did you see this other car that struck this child? Did you see that car on Bloomfield Avenue that you were giving chase to? A. Yes.

Q. Did you follow it? A. Yes.

Q. Did you finally catch up to it? A. We caught it in Glen Ridge.

Q. Whereabouts in Glen Ridge? A. Right this side of Ridgewood Avenue where the people get on the trolley car.

Q. Is there a safety isle there? A. Yes.

Q. How many feet would you say the safety isle was this side of Ridgewood Avenue—almost a block or half a block or a quarter of a block? A. Only a few steps. Fifteen feet, maybe; something like that; maybe more than that.

Q. About fifteen feet from Ridgewood Avenue? A. That's the end of the safety isle.

Q. As I understand it, the safety isle is right at the intersection of Ridgewood Avenue and Bloomfield? A. No, up further, up Ridgewood Avenue.

Q. Right at the intersection of Bloomfield? A. Right there.

Q. Is that the safety isle you refer to? A. Near Ridgewood Avenue.

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Q. When you got up there did this car that you had been following stop or what? A. We hollered to him and he stopped.

Q. Who hollered? A. The whole three of us.

Q. Did he stop then? A. Yes, sir.

Q. Where did Krauth's car drive? A. He let me drive the car.

Q. After the car stopped, did you drive near the car you were following? A. Around Ridgewood Avenue.

Q. Before he drove around Ridgewood Avenue did he stop? A. He stopped.

Q. Did he stop near this car that you had been chasing? A. Yes.

Q. Did you see who was driving this car? A. I didn't see him till he hollered my name? Then I knew who it was.

Q. At the time he stopped in Glen Ridge did you see him? A. Yes.

Q. Who was it? A. Johnny Cosgrove.

Q. How long had you known Johnny Cosgrove before this thing happened? A. Pretty near all my life. I went to school with him.

Q. And did you speak first at the time that you stopped this car that Cosgrove was driving or did Cosgrove speak first? A. He spoke first.

Q. What did he say? A. He said, "You know me, Dever. Lay off me."

Q. Did he say anything else? A. Then I said, "You hit a woman and child down Newark. You had better make good."

Q. What did he say to that? A. He said, "I have to be on the job at Montclair at 9 o'clock. When I get there I'll report it."

Q. When he gets there at 9 o'clock he'll report it? A. Yes.

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Q. Was Krauth there at that time or had his car driven away? A. Krauth's car drove away.

Q. Did you report that to the police? A. No, sir.

Q. Did you report to the police that this man Cosgrove was the man driving the car that you saw caused this accident? A. Not until Sergeant Seery saw me.

Q. Sergeant Seery saw you that night? A. Yes, sir.

Q. He is a detective in the Newark Police Department? A. Yes.

Q. But before Seery came up to see you, did you tell the authorities yourself that this man Cosgrove was driving this car? A. I didn't tell nobody.

Q. Did you go to any of the precincts or to Police Headquarters and report the fact that Cosgrove was driving this car? A. No, sir.

Q. You didn't tell anybody that it was Cosgrove until Seery saw you that night, is that a fact? A. I told him, yes.

Q. Now, at the time you stopped this car in Glen Ridge, or caught up with it, Krauth was with you, wasn't he? A. Yes, sir.

Q. Was Shaw still with you? A. He was standing with me up there.

Q. What kind of a car was Cosgrove driving that night? A. A Cleveland.

Q. From the time you started to chase this car at Bloomfield Avenue, did you ever lose sight of it? A. No, sir.

Q. Was it always within your view? A. Yes, sir.

Q. Are you sure or is there some doubt in your mind as to whether or not the car that you caught in Glen Ridge was the car that was involved in this accident?

Mr. Simandl: I object to the form of that question on the ground that it calls for a conclusion. The question is, "Are you sure?"

Mr. Wachenfeld: I will withdraw it.

Q. This car that you say you followed from the scene of the accident on North 9th Street to Glen Ridge—is that the same car that was in the accident that struck this little girl, this child, and that woman? A. It was the same car because it was ripped in the back and that's how we told it was the same car.

Q. Did you ever lose sight of it from the time you started to give chase to it? A. No, sir.

Mr. Wachenfeld: I ask to have this picture marked for identification.

Photograph marked Exhibit S4 for identification.

Q. Look at this picture marked S4 for identification and tell me whether or not that appears to be a picture of the Cleveland car taken from the rear? A. Yes, sir.

Q. Does it show the condition of the top there? A. The flap is ripped here, back and forth.

The Court: It flapped back and forth?

The Witness: Yes.

Q. In addition to this flap that you say flapped back and forth in back of this car, could you see its tail light while you were chasing it? A. I didn't notice any tail light.

Q. I show you this picture again and ask you whether it looks like the car that you saw Cosgrove in that night when you stopped him up in Glen Ridge? A. That's the car.

Q. And was the condition of that car then as it appears on this photograph with that flap loose in the back? A. Yes.

Mr. Wachenfeld: I ask to have this picture marked Exhibit S5 for identification.

Photograph marked Exhibit S5 for identification.

Q. I show you another picture which is marked Exhibit S5 for identification, which apparently is another picture of the same car, and I ask you if that looks like the car that Cosgrove was driving that night? A. Yes, sir.

Q. I call your attention on this picture to the condition as it appears in the picture of the left front mudguard, the left front light, the left front mirror reflector just on the top of the left front mudguard, and I ask you if that condition was the same at the time you saw Cosgrove's car in Glen Ridge after you stopped it. Was it the same as appears on this picture? A. Yes, sir.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. Dever, where are you working? A. I ain't working at all now.

Q. Where do you live? A. 21 Woolsey Street.

Q. What's that? A. Essex county jail.

Q. That's the county jail? A. Yes, sir.

Q. On the 15th day of May where were you working?

Mr. Wachenfeld: What year?

Q. 1923? A. I don't believe I was working at that time.

Q. What time did you eat supper that night, Dever? A. I don't eat supper at no particular time. I got no particular time.

Q. I asked you what time you ate supper that night? A. About five o'clock.

Q. Where? A. At my home.

Q. And then what did you do, sir? A. I come out to Bloomfield Avenue to meet Buck Krauth come down from Pleasantdale.

Q. What time did you meet him? A. It was after six o'clock.

Q. Can you tell me how much after six? A. A quarter or twenty minutes after that; somewhere around that.

Q. It was 6:15 in your opinion when you met Mr. Krauth? A. 6:20.

Q. What did you two gentlemen do then? A. We went down to the Studebaker place in Newark.

Q. Whereabouts in Newark? A. Across the way from Central Avenue, opposite Central Avenue. I don't know the number.

Q. And how long were you down there? A. We wasn't there very long.

Q. About how long? A. Well, we left there 7 o'clock.

Q. You left there about 7 o'clock? A. Yes.

Q. Then where did you go? A. Come up Bloomfield Avenue to Philby Avenue.

Q. Come up Bloomfield Avenue to Philby Avenue? A. Yes, sir.

Q. That's the restaurant you were sitting in front of, isn't it? A. Yes, sir.

Q. How long did it take you to drive over from Central Avenue to Philby, do you know? A. I don't know.

Q. Were you driving? A. Driving along slow.

Q. Did it take you about fifteen minutes? A. It took longer than that. I guess about twenty minutes or twenty-five.

Q. Twenty minutes? A. Twenty or twenty-five.

Q. And you were sitting in front of this restaurant, sir? A. Yes, sir.

Q. For about twenty minutes? A. Fifteen minutes I should say.

Q. Fifteen or twenty minutes when this accident happened? A. Yes, sir.

Q. And there couldn't be any mistake about that, could there?

Mr. Wachenfeld: If your Honor please, I thought counsel objected to making these things certain. I asked this witness a question whether he was sure, and counsel objected.

Mr. Simandl: This is cross-examination.

Q. You are sure you were sitting in front of this place about twenty minutes? A. Fifteen minutes. Fifteen to twenty minutes.

Q. Now, what were you doing there—talking? A. Talking.

Q. What side of the car were you seated in? A. I was on the right-hand side.

Q. That is closest to the curb? A. Yes, sir.

Q. And what kind of hood—no, it isn't a hood. What kind of a curtain or roof is there on this car you were sitting in? A. There is a top on it.

Q. And this top was up, wasn't it, that night? A. Yes, sir.

Q. You first saw an automobile pass you or were attracted by the crash first, which? A. I saw an automobile pass me first.

Q. Did you say your attention was attracted by a loud thump? A. No, sir.

Q. You didn't say that on your direct-examination? A. I said the man passed me with this car and I heard the crash and I seen him pass before the crash come.

Q. But the thing that attracted your attention—

10 A. (Interrupting.) Was the man coming up speeding.

Q. While you were sitting there talking to Krauth, is that right? A. Yes, sir.

Q. What were you talking about, do you remember? A. Different things. Talking about the car I had down there, to see what he could do with this fellow, if he could make him buy it.

Q. You had plenty of time on your hands? A.

20 I wasn't going anywhere.

Q. And do you watch every car that goes past up Bloomfield Avenue rapidly? A. I guess I do. I can't help it.

Q. Even while you were sitting on the inside of an automobile discussing the sale of a car with a friend of yours? A. Yes, sir.

Q. You say that? A. Yes.

Q. And your attention was not drawn to this thing

30 by the crash at all, was it? A. No, sir.

Q. Is there anything else you want to say? A. What do you mean?

Q. I thought you wanted to say something else. Your attention was not drawn to this thing by the crash, was it? A. No, sir, by the speeding automobile.

Q. Have you finished your answer?

The Court: No, I don't think he has.

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Q. Tell us all that attracted your attention? A.

I was sitting in the car and that car came up Bloomfield Avenue speeding and I says to Buck Krauth, "Buck, look at that guy riding," and no more the words were out of my mouth and this crash came. It was a very misty night, and right after this crash came this girl was thrown right underneath the electric pole.

Q. It was a very foggy night that night, wasn't it? A. I thought it was misty.

Q. Well, now, how misty? A. I could see all right.

Q. How far could you see? A. About a block and a half, two blocks.

Q. And you were right close by this accident, weren't you? A. I don't know what the distance is. From 9th Street to Philby's might be a stone's throw.

Q. Is it a hundred feet? A. It's a hundred feet all right.

Q. Were there any other cars that passed you? A. No, sir.

Q. No other cars passed you at that time? A. No, sir.

Q. Did you see the people in the street before the crash? A. No, sir.

Q. You didn't? A. No, sir.

Q. Why did you tell the prosecutor you saw the woman and the child in the middle of the car tracks? A. I seen them after they got struck. I didn't see the woman. I seen the child come flying through the air.

Q. Didn't you tell the prosecutor, this Court and the jury that the child was in between the two car tracks with the woman? A. No, sir.

Q. That those two people were standing in between the two car tracks? Didn't you tell him that? A. No, sir.

Q. You didn't tell him that? A. I don't think I told him they were standing there.

Q. So you didn't see any people there at all. You simply heard a crash and then you saw the child go flying through the air? A. Yes.

Q. All right. Now, did you look at this car at all as it went by you? A. I didn't notice it very well.

Q. You didn't notice it at all? A. I noticed the car going by.

Q. Did you take it for a Ford? A. No.

Q. You didn't? A. No, sir.

Q. Do you remember testifying in the police court on May 18th, 1923? A. Yes, sir.

Q. That was only a few days after this occurrence, wasn't it? A. I don't know how long it was after.

Q. May 18th is three days after May 15th, isn't it? A. Yes.

Q. So that is a short time after the occurrence? A. Yes.

Q. And the facts were then fresh in your mind, weren't they? A. I suppose they were.

Q. Do you remember saying this in answer to a question that was put to you there in front of Judge Murray, "Did you catch the car that you found was going fast past you and you said somebody was stepping on it and the child was being seen going across the left side of the street? A. I took it for a Ford, but it was the one I stopped." Do you remember that? A. I didn't say nothing like that.

Q. Do you remember testifying at the police court at the same time, on May 18th, to the following: Do your remember this question: "Did you stop the car? A. Yes. Q. What happened at Glen Ridge? Was there any conversation? A. Yes, sir. Q. What was

the conversation you had? A. He said, 'Dan, you know me.'" Do you remember that? A. He didn't say, "Dan." He said, "Dever, lay off me."

Q. But do you remember testifying at the police court that the only conversation was that he said, "Dan, you know me"? A. No, sir.

Q. You don't remember that? A. No.

Q. Do you remember this question and answer: "Q. What was said to him, the defendant? A. Didn't say a word to him." Do you remember that? A. No, sir. I didn't say nothing like that.

Q. Do you remember this question: "Did anyone tell him he hit a woman? A. The kid told him. Q. What did the kid tell him? A. He told him he hit a woman down in Newark." Do you remember that question and answer? A. No, sir. I never said anything like that.

Q. Do you remember my asking you this question: "Q. You looked and you saw this car shoot by? A. Yes. Q. And you thought it was a Ford? A. I thought it was a Ford." Do you remember that? A. No, sir.

Q. And do you remember again this question: "Q. Yes, that's what I am asking you? A. I did think it was a Ford." Do you remember that? A. I didn't say nothing like that.

Q. How soon after you saw the little girl flying through the air was the machine started that you were sitting in? A. It only took us a second to start the machine. Stepped on the starter and we was off.

Q. Where was Shaw? A. Coming down Philby.

Q. How far from Philby was he? A. I don't know how far he was, but he was right on the car as soon as we were pulling out.

Q. When you saw Shaw where was he? A. On the running board.

Q. That is the first you saw of Shaw? A. I heard him hollering just as we were starting, but I didn't know who he was.

Q. And then you started after him? A. Yes, sir.

Q. Were there any cars ahead of you? A. Not what I seen. Only the one we were chasing.

Q. You mean to say you could see that car for a block or a block and a half or two blocks ahead of you? A. Block and a half. We were gaining on it all the time.

Q. How far behind that car were you when you started? A. About a block he was head of us. He was pretty near at 11th Street across the way from Max's saloon on Bloomfield Avenue when we started.

Q. He was then two and a half blocks ahead of you, wasn't he? A. One block. They are small blocks—from 9th to 10th. You wouldn't call that very big.

Q. And also from 10th to 11th? A. Yes, but they're short blocks.

Q. You continued up towards Bloomfield Center, is that right? A. Yes.

Q. And you were going how rapidly? A. We were going fast.

Q. How fast? A. Sixty miles an hour down Bloomfield Avenue.

Q. Did you pass any traffic? A. Right straight on to Bloomfield Avenue.

Q. Did you pass any traffic? A. We wasn't watching for no traffic.

Q. Didn't you pass any trolley cars? A. I didn't notice.

Q. You didn't notice any trolley cars? A. No. I was only watching the fellow we were chasing.

Q. Did you notice any cars ahead of you? A. No, sir. We was only paying attention to the one ahead of us.

Q. What was the condition of the traffic when you hit Bloomfield Center? A. Clear all the way through.

Q. Do you mean to say you went through Bloomfield Center going sixty miles an hour? A. Pretty near that.

Q. There is a traffic officer standing at that point, isn't there? A. Wasn't there that night.

Q. There wasn't? A. No, sir; I don't believe so.

Q. Do you remember testifying in the case of State against Cosgrove in this court on Monday, November 26th, 1923? A. Yes, sir.

Q. Do you remember this question and answer: "How fast did your car travel? A. We were hitting forty to forty-five all the time." Do you remember that? A. When we got to the hill.

Q. One minute. Do you remember that? A. Yes, sir, I remember that.

Q. You didn't say anything about sixty miles an hour then, did you? A. I said something about sixty miles an hour after we hit Berkley School and going down to Bloomfield Centre.

Q. I ask you if you said anything at that time— at Bloomfield Centre you say there was no traffic officer? A. No.

Q. Was the traffic sign turned against you? A. Didn't have any sign.

Q. Did you get out of the car at Glen Ridge? A. Yes, sir.

Q. Did Cosgrove get out of the car at Glen Ridge? A. No, sir.

Q. He stayed in the car? A. Yes.

Q. Where did his car stop? A. Right this side

of the stand where you get on the trolley car, on your right-hand side.

Q. Is that below Ridgewood Avenue, that is, nearer to Newark on Bloomfield Avenue or is it above Ridgewood Avenue towards Montclair? A. Below Ridgewood; this side of the safety isle.

Q. How far this side? A. Ten or fifteen feet.

Q. How far from the corner of Ridgewood Avenue? A. Couldn't tell you exactly.

Q. About how far? A. I don't take no measurements and couldn't tell you.

Q. You were there? A. Yes, sir.

Q. You know where that point is? A. Yes, sir.

Q. You've lived up that way for a good many years, haven't you? A. Yes, sir.

Q. Tell us about how far from Ridgewood Avenue that car was stationed? A. That car was stationed I guess about—I couldn't give you an exact measurement.

Q. I don't want exact; approximately? A. Well, say, twenty steps; that is, walking, good steps, from where I was to Ridgewood Avenue, twenty-five steps.

Q. Did you see a police officer there? A. No, sir.

Q. Did you speak to a police officer? A. No, sir.

Q. Did you see a police officer immediately afterwards? A. No, sir.

Q. Didn't you go to a police officer immediately afterwards? A. Me and Shaw sit there in the car.

Q. Did you see any police officer shortly afterwards? A. No, sir.

Q. Did you go near a police officer shortly afterwards? A. No, sir.

Q. How did you get back to Newark? A. Come back in Buck Krauth's car.

Q. Where did you get Buck Krauth's car? A. On Ridgewood Avenue.

Q. Do you remember testifying again in the police court, and being asked the following questions and making the following answers: "Q. And he continued on his way (referring to Cosgrove)? A. Cosgrove continued on his way. Q. And you went over and you and Buck went over to the Glen Ridge police? A. Buck went over to the Glen Ridge police, and the Glen Ridge policeman said, 'I can't leave my post,' and Buck said, 'There he goes,' and he went to Montclair"? A. That ain't got nothing to do with me. That's Buck.

Q. I am asking you whether you heard that conversation between the policeman in Glen Ridge and Buck Krauth? A. No, sir.

Q. Did you testify to that conversation? A. No, sir.

Q. Did you speak to anybody in Glen Ridge at all? A. No, sir.

Q. Did you see anybody in Glen Ridge other than Cosgrove at all? A. No, sir; only Shaw and Buck Krauth, the fellows I come up with.

Q. Didn't you see the police officers there after you got in the car? A. No, sir.

Q. You didn't see them? A. No, sir.

Q. When you got into Buck Krauth's car you didn't see any police officers there? A. No, sir.

Q. You are sure of that? A. Yes, sir.

The Court: Does that testimony (indicating testimony of previous trial) say that he had the conversation with the police officer or Krauth had the conversation?

Mr. Simandl: That Krauth had the conversation.

The Court: With the officers?

Mr. Simandl: Yes.

Q. Did you take the number of this car? A. Shaw did.

Q. You were out of the car, were you? A. Yes, sir, we got out of the car we come up in.

Q. Yes? A. Yes, sir.

Q. And so was Shaw? A. Yes, sir.

Q. Shaw was hanging on the mudguard or on the fender while you were going at the rate of sixty miles an hour? A. On the running board.

Q. And at no time did you pass any traffic at all while going towards Glen Ridge? A. I wasn't watching the traffic. I was watching the car.

Q. I am asking you whether you were watching it. Was there traffic there?

Mr. Wachenfeld: I object to the question because the witness has not said anything of the kind and counsel is trying to confuse him and mix him up by harping on something that the witness has not testified to. He said in answer to a former question in reference to the traffic that he didn't pay any attention to it. He was watching this one particular car, and then counsel inserts the question again by saying did he see any other cars pass by. I say that is unfair.

Q. Did you see any traffic?

Mr. Wachenfeld: I object on the ground that it is certainly repetition. He has asked the witness that same question, and the witness has answered that he didn't know, that he was not paying attention to traffic.

The Court: I am going to let him answer it.

Q. At no time did you pass any traffic at all going towards Glen Ridge, did you? A. I wasn't watching traffic. I was watching the fellow we was chasing.

Q. And the only thing that guided you in this thrilling chase was this thing that was flapping in the back, is that right? A. Yes, sir.

Mr. Wachenfeld: I object to the form of that question. Nobody said anything about this chase being thrilling.

Mr. Simandl: All right. I withdraw the "thrilling."

Q. The only thing you saw in this chase was the flapping on the back of the car?

Mr. Wachenfeld: I object to the question on the ground that counsel insists upon putting into his questions mere statements and then he winds up by saying, "Is that right?"—things which aren't in the evidence. The witness hasn't said them. I submit he should ask him what else was there if there was anything else that he saw there.

Mr. Simandl: I think I am cross-examining properly.

The Court: Proceed.

Q. The only thing you saw in this chase was the flapping on the back of the car, was it? A. Yes, sir.

Q. Did you understand that question?

The Court: He wants to know if you saw anything else.

The Witness: He was zigzagging in and out, going from the car track to the middle of the road and back.

Q. What was he zigzagging in and around for? A. I don't know.

Q. You don't know? A. I don't know. There was nothing in front of him to bother him.

Q. And you say the zigzagging attracted your attention? A. No, sir, the flap was the first thing. He would shoot across in the tracks and then slide out.

Q. Did you meet any traffic at all in Bloomfield Center? A. No, sir.

Q. You didn't? A. No, sir.

Q. None at all all the way up to Glen Ridge? A. No, sir.

Q. Is that so? A. Yes, sir.

Q. That is your testimony? A. Yes, sir.

Q. Now, Dever, have you ever been convicted of crime? A. No, sir; not what I know of.

Q. Not that you know of? A. Yes; once in Montclair I had a little trouble.

Q. In Montclair? A. Yes, sir.

Mr. Wachenfeld: Now, if your Honor please—

Mr. Simandl (interrupting): I will be fair to this witness.

Mr. Wachenfeld: That will be a change.

Mr. Simandl: I am always fair, Mr. Prosecutor.

Q. After you left Glen Ridge, where did you go? A. Come back to Philby, to the restaurant.

Q. Then where did you go? A. We sit there chewing the rag and then Shaw and Krauth went down to Bloomfield Avenue.

Q. Where did you go? A. I took a walk home. Then I came back and I met Sergeant Seery.

The Court: In other words, after you left Glen Ridge, you went home, and then after that you went back to this lunch wagon and at the lunch wagon you saw the sergeant?

The Witness: No, sir. I come down with Buck. Krauth took the three of us down, turned around in front of Philby. We walked into there and had a cup of coffee. Then Shaw walked on down Bloomfield Avenue, Buck went on home, and I took a walk over to the house and then I came back and then Sergeant Seery was in Philby.

Mr. Simandl: That's all.

The Court: How long do you think it was from the time you left Glen Ridge before the sergeant came in to Philby's place.

The Witness: I couldn't tell you that—just how long it would take me to walk over to my house. I didn't stay there but a few minutes and then I came right back.

RE-DIRECT EXAMINATION by Mr. Wachenfeld:

Q. Right after this car struck the woman and this child, did he continue out on the car tracks or did he swerve either to the left or right? A. He swerved to the right, hit the curb and straightened up. If the curb wasn't there he would have been over in the lots.

RE-CROSS EXAMINATION by Mr. Simandl:

Q. As a result of this trouble you say you had in Montclair, you lost your job with the Studebaker people, isn't that so? A. Yes, sir.

WILLIAM KRAUTH, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Mr. Krauth, do you know a man by the name of Daniel Dever, the man who just testified? A. Yes, sir.

Q. Did you know him prior to the 15th day of May of last year? A. Yes, sir.

Q. How long prior to that date had you known him? A. Five or six years, I guess.

Q. And were you with him on that day in question, May 15th? A. Yes, sir.

Q. Where had you been? A. Why, him and I had gone to the Studebaker Company to look at a car and then we went back there.

Q. In Newark—the Studebaker Company in Newark? A. Yes.

Q. And then, you say, you went back up there? A. Yes.

Q. What do you mean by up there? A. I parked my car in front of this restaurant in Philby Avenue.

Q. About what time was it when you got back up there in front of Philby's restaurant? A. About 8 o'clock I should judge.

Q. And after you parked the car did you stay in the car or did you go into the restaurant? A. I stayed in my car talking.

Q. Was there anyone there beside you and Dever? A. That's all.

Q. Did you see an accident happen there that night? A. Yes, sir.

Q. Where did it happen? A. It just happened between fifty and seventy feet in front of me.

Q. Where did you see this woman and child before they were struck? A. No, I didn't.

Q. You didn't see them before they were struck? A. No, sir.

Q. Did you see them at the time they were struck? A. As I heard a crash I seen the little girl flying through the air.

Q. Towards which side of the street did she fly? A. Toward my left.

Q. Did you see the car that was involved in the accident? A. Yes, sir, just momentarily.

Q. How long have you been driving or had you been driving a car before this happened? A. I have owned several cars.

Q. No, I mean driving? A. I have been driving five or six years.

Q. Will you tell us whether this car was going fast or slow? I mean the car that was involved in this accident? A. In my estimation it was going between thirty-five and forty miles an hour.

Q. And before the accident happened did it give a signal, or blow a horn, or give warning of any kind that you heard? A. No, I didn't.

Q. You say you saw this girl's body flying through the air? A. Yes, sir.

Q. Where did the body land finally? A. As I looked at it, it seemed to be two or three feet from the curb.

Q. Near the right-hand curb going toward Newark? A. Yes, coming down it would be right.

Q. Did you see the woman that was struck? A. I just seen the woman lying there after I started my car and went by with her head toward the curb.

Q. What did this car do that struck the woman and child? Did it continue straight ahead—I with-

draw that question for the time being. At the time that the automobile came in contact with the woman and child, was it on this right-hand side of Bloomfield Avenue or between the trolley tracks or where? A. It seemed to be astraddle the east and west bound rails.

Q. After it struck them did it stay in the rails or did it turn to the right or left? A. It turned to the right immediately.

Q. And did it continue to go on? A. Yes, sir.

Q. Or did he stop? What did it do? A. It continued on.

Q. What did you do? A. Why, I started my car immediately off to give chase to it.

Q. What time, Mr. Krauth, would you say it was about when this thing happened? A. Between twenty minutes after eight and 8:40. Exactly when I don't know, but it's in that neighborhood.

Q. Would you say it was nearer 8:40 or 8:20? A. No, I can't say. I didn't look at my watch.

Q. What did you do after you saw this thing happen? A. I gave chase to this car.

Q. When you gave chase to it, was there anyone in your car besides Dever? A. Yes. Some young fellow jumped on the running board.

Q. Stand up, Shaw (addressing man in court room). Is that the young man you spoke of? A. Yes, sir. That's him.

Q. Had you known this young man whose name I believe is Shaw before this accident? A. I never seen him before, no, sir.

Q. Where did he come from? A. Just as my car left the curb he jumped on the running board.

Q. Did he say anything? A. No, I don't remember whether he said anything or not.

Q. Did your car start at the time that he got on the running board? A. Yes.

Q. Did you see whether this young man Shaw was alone or whether someone else was with him prior to his getting on the car? A. No.

Q. You say he got on the running board? A. Yes.

Q. Then what did you do? A. I continued on up Bloomfield Avenue after this car.

Q. Did you finally catch that car? A. Yes, sir.

Q. Where did you catch it? A. Glen Ridge.

Q. Whereabouts in Glen Ridge? A. Why, I come up even with it just a little bit—there is a ball field up there and a safety isle—

Q. (Interrupting.) There is a school up there, too, isn't there? A. Yes, and right about the extreme lower end of the school is where I came alongside of him and then I got in front of him.

Q. He pulled to one side, didn't he? A. Yes.

Q. Up at the curb? A. Yes.

Q. How near to where he stopped was the safety isle which is at the intersection of Bloomfield Avenue and which you've just mentioned? A. Just about a foot below the lower end of the safety isle.

Q. At the time he stopped did you drive your car alongside of him? A. Yes.

Q. Did you see who was driving this car that you caught? A. Johnny Cosgrove.

Q. Had you known Cosgrove before this? A. Many times. I have lived in Montclair, myself.

Q. Did you know him to speak to or did you just know who he was? A. I knew who he was.

Q. At the time you stopped did Dever or Shaw say anything to Cosgrove, or did Cosgrove say anything to Dever or to Shaw? A. Why, as we caught

up to him Dever hollered out, "Why," he says, "it's Johnny Cosgrove, the cop from Montclair."

Q. Dever hollered that? A. Yes. By that time the car had slowed down and they both jumped out. So I drove up in front of him and I just stood there for a minute or so and I saw Dever talking to him and the other fellow.

Q. Did you hear Cosgrove say anything to Dever? A. No. I didn't hear no conversation.

Q. Did you hear Dever say anything to Cosgrove? A. No.

Q. You heard nothing between them at all? A. I didn't hear no conversation.

Q. Did you get out of your car at all? A. No. I was just on the safety isle and of course I didn't want to stay there in case any other cars come up, so I started up and went over to Ridgewood Avenue and I was going to notify the officer.

Q. Did you notify an officer? A. Yes. Just as I turned around one came along and I started telling him about it.

Q. What did you tell the officer? A. I told him that a car just struck a woman and a child down near the city line there and that the fellow was standing out there now on Bloomfield Avenue.

Q. Was he standing there at that time? A. He was there when I left him. How he swung around and left I don't know.

Q. When you got through telling this officer about the fact that this car had struck a woman and a child and was standing there, did you see then whether or not the car was still there while you were speaking to the officer? A. No. I didn't look that way.

Q. What did the officer do? Did he go away? A. He seemed to hesitate a while and he said something

about he couldn't leave his post. He was looking around down Ridgewood Avenue, so I started my car rolling and he got on the running board, and almost at the same time another car pulled up alongside of us, a Dodge, and he says to me, "Here's the chief or lieutenant. Tell him all about it."

Q. Did you speak to the lieutenant or to the chief as he was called? A. I was going to get out of my car and tell him about it when this officer started to tell this other man in the car about it, and one of them said, "That must have been the fellow that just passed us with one light," and so immediately afterwards he says, "Let's go up that way and see if we can find him." And the other fellow says to him, "Who the hell is going to go around in a night like this? Do you want to get us knocked over?" So when I seen they don't show any interest I started my car and I went back to Bloomfield Avenue and Dever and the other fellow jumped on and I took them back.

Q. After you spoke to the first officer and the man who was called "chief," at that time was the Cosgrove car still standing there or not? A. I didn't see it.

Q. When you finally met Shaw and Dever was the car still standing there? A. Then it was gone.

Q. Did you tell either the chief patrolman or the chief or the lieutenant or any of the members of the police department up there that this car was being driven by Cosgrove? A. No. I don't remember that.

Q. Did you give them Cosgrove's name at all? A. I don't remember ever saying that. I may have. I don't recall that.

Q. Where did you go after that? A. I brought these two fellows down to this restaurant again.

Q. Both Shaw and Dever? A. Yes.

Q. They both went back to the same restaurant with you? A. Yes, sir.

By the Court:

Q. The policemen's car, did that come down Bloomfield Avenue or did it come along Ridgewood Avenue? A. From that conversation they must have come down Bloomfield Avenue.

Q. But you really didn't see it? A. No, only when they pulled up to my right.

At this point a recess was taken to 2 P. M. when court reconvened with the same appearances.

By Mr. Wachenfeld:

Q. After this accident happened, about how long did it take you to get your car started in order to pursue the other car? A. Probably half a minute or so. I started immediately.

Q. And about what rate of speed did you drive at, if you noticed, or approximately how fast did you go following this other car until you got to Glen Ridge? A. Well, at times I guess I was going as fast as fifty-five, sometimes less.

Q. And did you notice the traffic conditions there, as to whether or not you passed any other cars until you got up to the other car? A. Yes. There was other traffic on the street, here and there.

Q. Is the car that you finally halted in Glen Ridge in which Cosgrove was in, was that the same car that hit this woman and this girl? A. Positively.

Q. Are you sure it was the same car? A. Yes, sir.

Q. Did you ever lose sight of it from the time you started to follow it? A. No, sir.

Q. About how far would you say the car got in front of you, the greatest distance? A. Not more than one block in front of me.

Q. Now, you say that when you got up there, you didn't hear any conversation between Cosgrove and either of the other two boys, Dever and Shaw? A. No, sir.

Q. And you say that you told the police officer that an accident had happened? A. Yes, sir.

Q. Did you tell that police officer or any of the other police officers that you saw up there at Glen Ridge that the man who was driving that car was Cosgrove? A. No, sir, I didn't tell him.

Q. Why didn't you tell the police officers that it was Cosgrove? A. Well, mainly, I guess, because I knew he was a friend of Danny Dever, and I knew the man also.

Q. Did you know he was a policeman? A. Yes, sir.

Q. At the time this happened was it light or was it dark? A. Why, it was dark.

Q. And was it a fair night? What were the weather conditions? A. It had been raining and was clearing up. It was misty.

Q. Was it raining at that time? A. No; not that I remember.

Q. You say it was misty? A. Yes.

Q. Were the pavements wet or were the pavements dry? A. Wet, very wet.

Q. The car that you stopped up at Glen Ridge, did it have any more than one occupant in it? A. No, sir.

Q. Did you see the man who was in the car at that time? A. Yes, sir.

Q. Was it Cosgrove? A. Yes, sir.

Q. Do you see Cosgrove here now? A. Yes, sir.

Q. Is that Mr. Cosgrove (indicating defendant)? A. That's the man.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. Whereabouts on Bloomfield Avenue did Cosgrove's car stop? A. Did it stop, did you say?

The Court: Where did it stop? What point?

The Witness: Just about the lower end of the safety isle in Glen Ridge.

Q. Was that near the corner of Ridgewood Avenue and Bloomfield Avenue? A. Yes. The safety isle is right there.

Q. The safety isle is just a little bit below the corner, isn't it? A. Probably it is. I've never noticed it that close. It's right there at the intersection.

Q. Right at the intersection? A. Yes.

Q. The officer that you saw first was right over on the railroad bridge, wasn't he? A. Yes, sir.

Q. That's not very far from that intersection, is it? A. No.

Q. Now, when you got up there, you saw that it was Cosgrove, didn't you? A. Yes, sir.

Q. And notwithstanding the fact that you knew Cosgrove and saw him there you went to get a policeman? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. That was the thought that was in your mind when you turned your car around, is that right? A. Yes, sir.

Q. And you did get a policeman, didn't you? A. Yes, sir. He come walking from the sidewalk to my car.

Q. Now, exactly what did that policeman say to you and what did you say to him? A. I told him that I just followed a car up and that it had struck a woman and a child and I says, "The man is out at the corner just now, right now."

Q. You said that to him? A. Yes, sir.

Q. What did he say to you, sir, if anything? A. He said something about he couldn't leave his post. The exact words I just don't recollect, but it was something to that effect.

Q. But he did leave his post, didn't he? A. I don't know what territory his post is.

Q. He got in your machine, didn't he? A. He just stood on the running board for about ten or fifteen feet as I was rolling along.

Q. And then another car came up? A. Yes, sir.

Q. And in that was another police officer? A. Yes, sir.

Q. Is that correct? A. Yes. I found out since there are two officers.

Q. You identified him the last time he was in court here at the trial? A. They were in plain clothes, then.

Q. At the former trial? A. Yes, sir.

Q. That was Lieutenant Higgins? A. Yes, sir.

Q. And you saw two other men there you say? A. I saw the two men in the car.

Q. And you saw a man by the name of Webb? A. No. I only saw the two men and the patrolman in uniform.

Q. Did you see Maillard? A. No.

Q. You spoke to those men, didn't you? A. I started to tell them about it and then the officer interrupted me and he went on to tell them what I had said to him.

Q. And then the officer detailed the first officer to

go to the middle of the street, is that right? A. I didn't hear that.

Q. Did he go to the middle of the street? A. No. When I left him, I left him right there.

Q. Did Dever come up there while you were talking to the police officer? A. Dever was walking to my car as I started up, and as I got up to them they both jumped in.

Q. They came up to where the police officer was, didn't they? A. Not exactly to where he was.

Q. They didn't? A. No.

Q. Why didn't you say to the police officer "Cosgrove is in that car"? A. Why, I just explained that a moment ago. I know Cosgrove and I figured he was a friend of Dever's and I wanted to let the police handle the affair.

Q. Had you ever seen Cosgrove with Dever at any time? A. With Dever.

Q. Yes. A. No.

Q. You thought it was necessary to notify the police, didn't you? A. Yes, sir.

Q. You thought that the accident was such that you had to follow the driver of that car, didn't you? A. Yes, sir.

Q. And after you found out it was Cosgrove you immediately turned around to get a policeman? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And you say the only reason you didn't tell him it was Cosgrove was because you figured Dever knew him? A. Yes, I certainly did.

Q. Is that right? A. Yes, sir.

Q. Up until this time when you figured that Dever knew Cosgrove and therefore you didn't tell the police

officer, you hadn't spoken to Dever, had you? Dever was away from the party, is that right? Do you understand me? A. No, I don't get you.

Q. After you turned your car around and met the police officer— A. Yes, sir.

Q. —whom you went after, and then met the other police officer during that time, you didn't speak to Dever, did you? A. No. They were away from me.

Q. Now, as a matter of fact, didn't you say to Officer Fagan, the first police officer you met there, the following: "That automobile took the clothes off a child down in the city line and is coming through," and that you lost him? A. I told him—

Q. (Interrupting.) Did you say that to that police officer? A. Not in those words, no.

Q. Not in those words. Did you tell the police office, Officer Higgins whom you subsequently saw, Lieutenant Higgins, the following: "The automobile just struck a young girl down at the city line and tore the clothes off her and it's coming this way"? A. I told him that the accident—how it happened.

Q. Did you tell him that? A. I told him that the girl was struck with such force—

Q. (Interrupting.) I ask you whether you told him that, yes or no? A. I didn't tell him all that you say, no.

Q. Did you—did he ask you for the number and make of the car? A. They spoke to me about the number of the car and I told him I didn't stop to get the number.

Q. Did he ask you the make of the car? A. No, sir.

Q. Didn't you, after he enquired as to the number and make of the car, tell him that you had lost the car? A. No, sir.

Q. You didn't tell him that? A. No, sir.

Q. Now, was Dever with any other party but you while you sat there in front of the restaurant? A. No. Dever and I were the only two there.

Q. Did Crosgrove get out of his car when you stopped him at Glen Ridge? A. When I seen him, he was sitting in the car leaning over his arm.

Q. Did he get out of the car? A. I didn't see him standing outside of the car. When I passed him, the car had come—

Q. (Interrupting.) Do you remember testifying in the case of State against Cosgrove, tried in this court on November 26th, 1923, as follows (page 97): "The man you say you saw up there in the car got out of the car, did he? A. Yes, sir. He got out of the car." Do you remember that? A. No, I don't remember saying that.

Q. Is it or is it not a fact that he did get out of the car? A. When I seen the man he appeared to me to be stepping out of the car. Actually on the ground I didn't see him.

Q. Did the car that you were chasing continue in a straight line up Bloomfield Avenue? A. No. It swerved.

Q. Did it pass any other traffic? A. Why, I guess I must have. I passed traffic.

Q. Did you pass any trolley cars? A. Why, I can remember passing one trolley car about Liberty Street and Bloomfield.

Q. Did it stop for the trolley cars that were stopped there from which passengers were alighting?

The Court: He didn't say they were.

Mr. Simandl: He said he passed a trolley car.

The Court: He didn't say passengers were alighting.

Q. Did the car stop for any trolley cars that had stopped from which passengers were alighting? A. You mean was the trolley car stopped that I passed?

Q. No. I am asking you whether the car which you were following. A. No, sir. The car I was following was all the time in motion, going.

Q. Do you remember this question (page 96)? "Did the car continue in a straight line? A. No. It ran around other cars. It caught up with trolley cars and it would naturally have to wait if passengers were alighting to start off again" and so on. Do you remember that? A. It went around other cars the same as I did. I just said we drove around cars.

Q. Were you ever convicted of crime? A. Yes, sir.

Q. Are you working now?

Mr. Wachenfeld: That is objected to, if your Honor please, as immaterial.

The Court: It is immaterial, I think.

Mr. Simandl: The jury would be interested to know, I think.

The Court: If you want to show what you are apparently trying to show, why don't you go at it by direction?

Q. Where are you living now?

Mr. Wachenfeld: I object to that as immaterial.

The Court: I don't see where he is living has anything to do with this issue.

Mr. Simandl: It may have a great deal to do with it. I might want to determine whether

he has moved, whether he is living at the same place.

The Court: Is that what you want to determine?

Mr. Simandl: That's one of the things.

The Court: You had better go to the one.

Q. Are you in jail now?

Mr. Wachenfeld: Objected to as immaterial. I withdraw the objection.

Q. Are you in jail now?

Mr. Wachenfeld: Not just now.

Q. Is your residence at the present time in jail? A. Why, just a minute. When I was on the stand before I believe that you were entitled to ask me if I was convicted of a crime which covered everything, and I answered you.

Mr. Simandl: I ask your Honor to direct the witness to answer the question which I asked.

The Court: You may prove the fact that he has been convicted of crime, if he was, the sentence that he received, and if that sentence covers the present time, it is inferrable he is in jail at the present time.

Q. Are you serving sentence at the present time? A. Yes, sir.

Q. Where? A. Cauldwell Institution.

Mr. Simandl: That's all.

State's Witness, William Krauth, Re-cross

RE-DIRECT EXAMINATION by Mr. Wachenfeld:

Q. Look at this picture marked Exhibit S5, picture of a Cleveland car. What make of car was it that Cosgrove was driving that night? A. I don't know the make of the car, but this resembles it a lot.

Q. Does this picture resemble the car you saw Cosgrove in? A. Yes, sir.

Q. I call your attention particularly to the left front fender, the left front light and the reflector or mirror which is on top of the left-front fender, and I ask you if at the time you saw Cosgrove's car in Montclair or Glen Ridge, if the photograph represents the condition of the car at that time. A. The front fender is a good deal in the same condition that that car was in. I didn't notice the mirror. The car had a nickel-plated radiator on it.

Mr. Wachenfeld: Take the witness.

RE-CROSS EXAMINATION by Mr. Simandl:

Q. Was traffic turned against you at Bloomfield Centre when you arrived there? A. There was no traffic against me. I went right through.

Q. How fast did you go through Bloomfield Centre that night? A. Probably forty miles an hour.

Q. Were there any other cars that passed you while you were sitting down there in front of the lunch room? A. Before this accident?

Q. Yes. A. Yes.

Mr. Simandl: That's all.

MICHAEL GAUDIOSI, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Where were you living in the month of May last year? A. 195 Bleecker Street.

Q. Is that in Newark? A. Newark.

Q. And do you know a man by the name of Shaw? A. I do.

Q. Stand up, Shaw (addressing man in courtroom). Is that boy whom you mean? A. Yes.

Q. Were you with him on the night of May 15th, anywhere on Bloomfield Avenue? A. Yes, sir.

Q. Whereabouts on Bloomfield Avenue? A. Up to Belmont Avenue and we came down from Belmont Avenue straight down Bloomfield Avenue.

Q. Were you anywhere near the intersection of North 9th Street and Bloomfield Avenue? A. Yes, sir.

Q. Did you see an accident happen there? A. Yes, sir.

Q. What time was it as near as you can fix it? A. Quarter to nine.

Q. You say you were walking down Bloomfield Avenue. A. Yes, sir.

Q. That would be towards Newark, wouldn't it? A. Yes.

Q. Were you walking on Bloomfield Avenue on the side of the street that the city playground is on, or were you walking on the other side? A. The other side.

Q. The same side where Philby's restaurant is? A. Yes, sir.

Q. And did you see this woman and this child be-

fore they were struck by this automobile? A. Yes, sir.

Q. In which direction were they walking and where were they when you first saw them? A. They were crossing Bloomfield Avenue towards the city field on the 9th Street.

Q. Which side of North 9th Street were they on, this side or that (indicating on map)? A. The same side that the spaghetti house was at.

Q. And going towards the city playground, is that right? A. Yes, sir.

Q. How far across Bloomfield Avenue did they get before anything happened? A. The centre of the track where the car goes up towards Montclair.

Q. Then what happened? Tell us in your own words what happened. A. I was going down with Frank and a car come up fast, pretty fast, and it drew our attention, so I—

Q. (Interrupting.) What drew your attention? A. The speed of the car.

Q. How fast was the car going?

Mr. Simandl: I object to that unless he is qualified.

Q. Do you drive a car yourself? A. No, sir.

Q. Do you ride in a car very frequently? A. Yes, sir.

Q. Very often? A. Not very often.

Q. Do you know how fast a car goes when you see it? A. I couldn't just judge exactly on the dot. I can just tell about ten, fifteen, twenty, thirty miles an hour. I have rode that fast.

Q. Was this car going as fast as that or faster?

Mr. Simandl: I object, if your Honor please. That certainly is not sufficient to qualify the witness to judge speed.

Q. This car, would you say, was going fast or would you say it was going slow? A. Fast. That's what drew my attention to it, the speed of it.

Q. And where was it when you first saw it? A. Right about 8th Street, about five feet coming up.

Q. How near the right-hand curb or trolley tracks?
10 A. It was in the track.

Q. And you say this woman and this girl were also in the trolley track when they were struck? A. Yes, sir.

Q. Did the car, from the time you saw it until it struck the woman and the child, did it go slower? A. No, sir.

Q. Did it blow a horn or give a signal of any kind? A. No, sir.

20 Q. What became of the woman after she was struck by the car? A. She was thrown on the centre of the next track, and the child was thrown over further.

Q. How far was the child thrown? A. On the other side of the tracks altogether.

Q. How near the curb did the body land? A. About six feet.

Q. And after the automobile struck these two pedestrians, did it stop? A. No, sir.

30 Q. What did it do, if anything? A. It kept right on going. After it hit the lady it went about five feet and it kind of threw him on the side a little. That was when he was going up after he hit her. It threw him towards the curb and then he went on the track again.

Q. Did you see another car standing there near Philby's restaurant that night? A. Yes, sir.

Q. Had you known this man Krauth before this
40 accident? A. No, but I knew Dever.

Q. Before the accident? A. Yes, sir.

Q. Where was this other car standing? A. The car that Dever was in?

Q. Yes. A. In front of the spaghetti house.

Q. Now, what did that car do after that? A. After the car struck the lady and the child, I says to Frank Shaw, I says, "Go get him."

Mr. Simandl: I object to what he said to anybody else.

The Court: Strike that out.

Q. Never mind what you said to Shaw. You said something to Shaw— A. Yes.

Q. —and after you said something to Shaw, what did you do or what did Shaw do? A. He jumped on the running board.

Q. Of this car that Dever was in? A. Yes.

Q. Where did that car go? A. Straight up the avenue after it.

Q. Now, did you see Dever again that night? A. No, I didn't see Dever.

Q. Did you see Shaw again that night? A. No, sir.

Q. At the time this happened was it light or was it dark? A. Dark. It was a foggy night.

Q. You say it was a foggy night? A. Yes.

Q. What was the condition of the street pavement, as to it being wet or dry? A. Wet.

Q. Did you see any other cars go past there at the time this accident happened? A. No, sir.

Q. Only this one car? A. Just the one car.

Q. Could you at that time tell what kind of a car it was? A. I can't judge the make of a car.

Q. Can you tell us whether it was an open or a closed car? A. It was one of those open cars.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. You were walking down Bloomfield Avenue towards Newark, is that right? A. Yes, sir.

Q. And you were below 9th Street, is that right? A. Below 9th Street, yes, sir.

Q. You were walking down on this side (indicating on map) of the street? A. Yes.

Q. And your back was turned to 9th Street? A. To 9th Street.

Q. How far down towards 8th Street had you gotten? A. I was past the spaghetti house about two feet on the edge of the spaghetti house.

Q. And you were looking down the avenue? A. Down Bloomfield Avenue.

Q. And then you say your attention was directed to a car? A. Yes, sir.

Q. Was there one or more cars? A. One.

Q. Didn't you see any others? A. Only the one that was standing in front of the spaghetti house.

Q. That's the only one? A. Yes.

Q. You saw the car come up? A. Yes.

Q. What did you do? A. I watched the car. The rate of the speed attracted my attention, and then I watched the car and when I turned around there was a lady and a child crossing the street.

Q. Where were they when you saw them? A. The lady and the child?

Q. Yes. A. In the centre of the first track.

Q. In the centre of—would you say somewhere around in between the first and second rail? A. In between the first and second rail.

Q. And the automobile was where? Whereabouts was the automobile on Bloomfield Avenue? A. What automobile do you mean?

Q. The one that you saw? A. The one that hit the child was in the tracks, too.

Q. Which track? A. The same track as the lady and the child was in.

Q. Did the—I withdraw that. It was a foggy night, wasn't it? A. Yes, sir.

Q. You couldn't see very far, could you? A. No, sir.

Q. Now, where did you see the woman and the child? Was she on the left-hand side of 9th Street passing the park, or the right-hand side? A. What do you mean?

Q. This (indicating on map) I would call the right-hand side as you pass the playground, and this (indicating) the left. A. She was on the left-hand side, the same side as the spaghetti house.

Q. Do you remember testifying in this case before this court once before? A. Yes, sir.

Q. Do you remember my asking you on what side of 9th Street she was? A. Yes, I remember.

Q. Do you remember that? A. Yes, sir.

Q. Do you remember saying "They were on the right-hand side of 9th Street, walking out towards the city field"? Do you remember pointing to the right-hand side of 9th Street? A. I pointed to where I just told you. I don't know whether you call that the right or the left side.

Q. Didn't you point to the right-hand side of 9th Street on that map? A. I pointed to where you just asked me the question before.

Q. It was too foggy for you to tell the kind of a car, wasn't it? A. It wasn't too foggy. I don't know enough about the makes of cars.

Q. Do you remember being asked this question at that time: "You couldn't tell what kind of a car it

was? A. No, sir. Q. It was too foggy for that? A. Yes." Do you remember that? A. No, sir.

Q. You don't remember that? A. No, sir.

Q. Do you remember whether there were any lights on this car coming up? A. Judging from the rear—

Q. (Interrupting.) I am asking you whether you know. A. I am answering your question.

Q. Do you know? A. No. I didn't notice the lights.

Mr. Simandl: That's all.

FRANK J. SHAW, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Shaw, where do you live now? A. 125 North 16th Street, East Orange.

Q. Were you living there at the same address in the month of May of last year? A. Yes, sir, I was.

Q. And you know this man Michael who just testified? A. Yes, sir.

Q. Were you with him on the night of May 15th up on Bloomfield Avenue? A. Yes, sir.

Q. Where were you coming from? A. Belmont Avenue.

Q. About what time of night was it you were at the intersection or near the intersection of North 9th Street and Bloomfield Avenue? A. About twenty minutes to nine, quarter to nine.

Q. What business are you in, Mr. Shaw? A. I was at that time in the plumbing supply business.

Q. And are you in the same line of business now? A. No, sir.

Q. What business are you in now? A. Salesman.

Q. Did you see an accident happen there that night? A. Yes, sir.

Q. Did you see this woman and this child, this little girl, who were struck by an automobile? A. Yes, sir.

Q. Where were they when you first saw them? A. About the centre of the street, the middle of the street.

Q. Were they going towards the city playground or away from it? A. Toward the city playground.

Q. When you say in the centre of the street, would that be near where the trolley tracks are? A. Between the two trolley tracks.

Q. Did you see the automobile that struck them? A. Yes, sir.

Q. Where was that car when you first saw it? A. The car was approaching us, coming down.

Q. That would be going toward Montclair? A. Yes, sir.

Q. How fast was that car going?

Mr. Simandl: I object.

The Court: Sustained.

Q. Do you own or drive a car, Shaw? A. Yes, sir.

Q. Do you drive a car yourself? A. Yes, sir.

Q. How long have you had a car? A. Four or five years.

Q. And do you still—

Mr. Simandl (interrupting): Go ahead and ask your question.

Q. How fast was this car going? A. Anywhere from forty to forty-five miles an hour I should judge.

Q. You think it was going between forty and forty-five miles an hour? A. Yes, sir.

Q. What was the condition of the pavement at that time? A. Very damp weather. The rails were wet. The sidewalks were damp.

Q. You say you saw this car when it was about 8th Street, is that right? A. Yes, sir.

Q. And did you see it strike the woman and the child? A. Yes, sir.

Q. Before it struck the woman and the child, did it give a signal by blowing a horn or any other kind of a signal or warning? A. I didn't hear any.

Q. And before it struck the woman and the child did it decrease its speed any? Did it slow up any, or did it turn to the right or to the left? A. No, sir.

Q. Did it do anything that you could see in attempting to avoid this accident? A. No, sir, I couldn't see any.

Q. Where did the body of the woman, where was the body of the woman flung to after the impact with the machine? A. Her body was along about the third rail.

Q. That is the woman's body? A. Yes, sir.

Q. Did you see where the child was flung to? A. The little girl was thrown across the street under a light.

Q. How near to the right-hand curb of Bloomfield Avenue would you say that her body landed? A. I should judge about five feet, five or six feet.

Q. What did the car do after the collision of these two pedestrians? Did it stop or go to either the right or the left? A. It kept right on going. It made one zag to the right and then went back to the rails again.

Q. At the time you saw all this happen where were you standing or walking or whatever you were doing? A. I was in front of Philby's at the time it happened.

Q. Was this man Mike with you? A. Yes, sir.

Q. Did you know a man by the name of Dever, Danny Dever, before this thing happened? A. Yes, sir.

Q. How long? A. About a year and a half or so.

Q. Had you known this man Krauth? A. No, sir. I never seen him before.

Q. Did you know him before the accident at all? A. No, sir.

Q. Did you see another car standing on Bloomfield Avenue anywhere near that so-called spaghetti house? A. Yes, sir.

Q. Who was in that car? A. Danny Dever and this other man whom I picks out later to be Mr. Krauth.

Q. And what did you do, if anything, after you saw this woman and this child struck? A. I jumped on this other car, the roadster, and I was on the mudguard and we went right after him.

Q. Who was driving that car, Dever or Krauth? A. Krauth was driving the car.

Q. How long a time did it take before this roadster as you call it, which I understand was a Buick, before it got started and pursued the other car involved in the accident? A. When I boarded the chasing car, it was moving then.

Q. How soon after you saw the woman and the child struck was it when you got aboard the car? A. Immediately as soon as I seen it.

Q. Did that car while it was chasing the other car, did that car go fast or slow? A. Fast.

Q. About how fast? A. Very fast. I should judge about fifty miles an hour or so, perhaps more.

Q. And did you keep in view or did you continue to see the car that struck the woman and the child? A. Yes, sir.

Q. Did you finally catch up to that car? A. Yes, sir.

Q. Where was it that you caught up to the car? A. At the Ridgewood road. There is a high school right nearby.

Q. That would be in Glen Ridge, is that right? A. Yes, sir.

Q. When you caught up to the car, did the car that you were chasing, did it stop or how did it come to a halt? A. It didn't stop. One of the—I don't know who it was—but he hollered, the man who was driving. Well, he didn't seem to make any attempt to stop, so the man driving, the roadster, made him pull to the gutter by cutting him off.

Q. And when he pulled to the gutter, did you see who was in that car? A. I seen the man, yes, sir.

Q. Had you known Cosgrove before this accident? A. No, sir.

Q. Did you see him or know him at all before that happened? A. I never seen him.

Q. Do you see the man here now whom you saw in that car that you stopped? A. Yes, sir; right here (indicating defendant).

Mr. Wachenfeld: Do you admit that is the defendant?

Mr. Simandl: Sure.

Q. And did you say anything to him, or did he say anything to you? A. I told him he had hit someone on Bloomfield Avenue and 9th Street.

Q. You told him he had hit someone on Bloomfield Avenue and 9th Street? A. Yes, sir.

Q. Just tell us exactly what you said to him and what he said to you at that time. A. I told him to come back, and as soon as those words left my mouth Danny Dever jumped out of the other automobile, and I heard him say, "You know me, Danny. Lay off me. I'm late."

Q. Who said that? A. Cosgrove.

Q. Is that what he said as near as you can remember? A. As near as I can remember.

Q. Did he use any profanity at that time? A. Yes, sir.

Q. Tell us exactly what he said, then. A. "Jesus Christ, you know me, Danny. Lay off me."

Q. Did Danny Dever say anything to him when Cosgrove said that? A. No, sir. I didn't hear anything else.

Q. Did you hear anything more said either between Cosgrove and Dever or anyone else there? A. No, sir.

Q. Did Cosgrove at that time say anything about reporting it himself? A. I wouldn't just say. I don't know whether I heard it or not. I don't remember.

Q. What is the furthest that this car, that this car that you were chasing got in front of you? A. I should judge about a block.

Q. You are sure that the car you finally caught up to and stopped in Glen Ridge is the same car that struck this woman and the child? A. Cosgrove, sure.

Q. Did he ever get out of your view at all? A. No, sir.

Q. After this conversation occurred, when Cosgrove said to Dever, "Jesus Christ, Danny, lay off me. You know me," did you stay there for any length of time?

A. The only thing I stayed for to identify the front of the car where it had struck something and to identify the mirror and the mudguard, dash-pan, and from there I went to the rear and I tried as best I could to take the license number of the car.

Q. What happened while you were taking the license number of the car? A. The car sort of drove away.

Q. What do you mean "sort of drove away"? A. It started off slow and then went on its away.

Q. Did you get the full license number? A. No, sir. At first—

Q. (Interrupting.) Do you remember what the license number was as you got it? A. No, sir.

Q. Do you remember the first two or three numbers? A. 1, 4, 5, I believe.

Q. Was that the first three numbers? A. Yes, sir.

Q. Do you remember the second three numbers or anything more about the number? A. No, sir.

Q. So the car drove away at that time, did it? A. Yes, sir.

Q. At the time that the car drove away was Krauth and his Buick roadster there? A. No, sir.

Q. Where had he gone to? A. I didn't take notice where he had gone, but I knew he wasn't there.

Q. Then, what did you and Dever do after this man Cosgrove in his car drove away? A. We went across the street, that would be on the opposite corner, and Mr. Krauth was there. His car was rolling down and he was ready to take us back to Newark.

Q. And did you go back to Newark with Krauth? A. Yes, sir.

Q. Did you see two police officers or one or three police officers at that time? A. I seen—no, I haven't seen any police officers there.

Q. Did you see Krauth talking to any men? A. I

seen him talking to a man but I don't know who he was.

Q. Now, you say you noticed the condition of the car at that time? A. Yes.

Q. I show you this picture marked S5, and I ask you to look at that and tell us whether or not that looks like the condition of the car as you saw it that night. A. Yes, sir.

Q. I ask you to look particularly at the left-front fender, the left front light and the reflector or mirror that is on top of the left front fender, and I ask you if that picture shows the condition of the car as you saw it that night? A. Yes, sir.

Q. Was the left front light bent as is shown by that picture? A. Yes, sir.

Q. Did you notice the rear of the car? A. The rear of the car had a slight rip in the back.

Q. I show you another picture which is marked at the present time S4, which is a picture of the rear of the car, and I ask you if that represents the condition of the rear of the car that you stopped in Glen Ridge. A. Yes, sir.

Q. And that rip that you just spoke of, is that the rip which is shown on the rear of that picture? A. Yes, sir.

Q. Now, then, while you were in Glen Ridge, did you report this accident to anyone? Did you tell any police officers there that this accident had occurred and that a man by the name of Cosgrove was involved in it? A. Not in Glen Ridge.

Q. After you came down with Krauth where did you go? A. We went back in Krauth's car.

Q. Did Dever go back the same time you did? A. Yes, sir.

Q. Did you and Dever go together after that or did

you part company? A. He said he was going down the street, towards 6th Street, I believe.

Q. So you left Dever there, did you? A. Yes.

Q. Where did you go? A. To the 5th Precinct.

Q. In Newark? A. Yes.

Q. You mean the station house? A. Yes, sir.

Q. And did you make a report there of this accident? A. Yes, sir.

Q. And did you tell them who the man was who was involved in it? A. Yes, sir.

Q. Did you tell them his name? A. Yes, sir.

Q. What name did you give? A. I gave him the name of Danny Dever who knew him by Charles Cosgrove.

Q. You gave him the name of what? A. Danny Dever told me his name.

Q. Danny Dever told you his name? A. Yes, sir.

Q. And Danny Dever told you it was Charles Cosgrove? A. Yes, sir.

Q. Is that the information you gave to the police there? A. Yes, sir.

Q. Did you go to Montclair again that night? A. No, sir.

Q. With the police officers? A. No, sir.

Mr. Wachenfeld: Take the the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. Shaw, how fast do you say that car was going? A. Forty to forty-five miles an hour.

Q. Do you remember testifying in this court once before? A. I believe so, yes.

Q. And do you remember the prosecutor asking you this question: "You say the speed of the car attracted

your attention first? A. Yes." Then the prosecutor asked you this question: "What was that speed? A. I am not a very good judge of speed, but I would say thirty or thirty-five miles an hour, between the two." Do you remember that? A. I don't remember, no.

Q. Or don't you want to remember? A. I don't remember.

Q. All right. Do you remember testifying in the police court on May 18th, in an examination before Judge Murray? A. Yes.

Q. Do you remember being asked a question there by Prosecutor D'Aloia: "How fast was the car going up Bloomfield Avenue? A. I should judge thirty miles an hour." Do you remember that? A. I remember the rate of speed and I remember I said something about the speed of the car up Bloomfield Avenue.

Q. Do you remember testifying there? A. Yes.

Q. Do you remember testifying "thirty or more"? A. I don't remember saying thirty miles an hour or more.

Q. No one has asked you to change your testimony, have they? A. No, sir.

Q. Have you spoken to anyone about this case since November? A. Never; no, sir.

Q. Nobody at all? A. No, sir.

Q. You were walking down Bloomfield Avenue, you say? A. Yes, sir.

Q. In the direction of Newark? A. Yes, sir.

Q. And you were attracted by this car? A. Yes, sir.

Q. How many cars attracted you, one or two? A. Just the one that I seen.

Q. Is that the only car you saw? A. That's the only one I seen coming up at a high rate of speed.

Q. Was there another car coming up at the same time? A. I don't know. I didn't see any.

Q. You didn't see any? A. No, sir.

Q. Would you say there was or there wasn't? A. There wasn't.

Q. That was the only car you saw then. A. Yes, sir.

Q. Did that car appear to have a nickel-plated radiator? A. It did that night. I don't know what it's got now.

Q. Didn't you say the radiator was nickel-plated in your former testimony? A. Yes, sir.

Q. You got out of your car and walked around the car that you were chasing or that you thought you were chasing, didn't you? A. Yes, sir.

Q. And you were able to observe all these things that you see on these photographs, weren't you? A. Yes, sir.

Q. Then you walked to the back to take the license number? A. Yes.

Q. How close to that car were you when you started to take the license number? A. About two feet in back of it.

Q. The car was standing still when you started to take the number, wasn't it? A. Yes, sir.

Q. And yet you were unable to get the correct license number? A. No, sir.

Q. You took a license number down, didn't you? A. Yes, sir, I took it, but I didn't know whether it was correct.

Q. And you put it in your note book? A. Yes, sir.

Q. And you turned it into the 5th Precinct? A. Yes, sir.

Q. And then you found out it was not the license of Cosgrove's car, didn't you? A. When I found it out—

Q. (Interrupting.) Just answer my question. Then you found out the car was not Cosgrove's car, that that was not the license number of Cosgrove's car, didn't you?

Mr. Simandl: I object, if your Honor please, on the ground he is making a statement which is not in evidence at all. As a matter of fact, the witness has not testified to anything of the kind.

Mr. Simandl: This is cross-examination, your Honor.

The Court: You can ask him if he found it out, but you have assumed it. He hasn't said he did.

The Witness: To the best of my knowledge I am denying nothing that I said in former statements.

The Court: Nobody has asked you that.

Q. Did you find out at the 5th Precinct, or subsequently, that the license number that you had given the police was not the license of Cosgrove's car? Did you find that out? You can answer that yes or no.

The Court: He can answer it in his own way.

A. Did I find it out in the police station, you mean?

Q. Yes. A. No.

Q. Did you find it out afterwards? A. Yes.

Q. From whom? A. At the time?

Q. From whom? From what person? A. One of the detectives.

Q. One of the detectives told you that? A. Upon the stand, I heard it.

Q. Did you hear Dever when he came near the

car of Cosgrove in Glen Ridge say, "It's Johnny Cosgrove"? A. Approaching, yes.

Q. Why did you give the police the name of Charley Cosgrove? A. That's what he told me later. That's what I took it to be, Charley Cosgrove.

Q. It was a foggy night, wasn't it? A. Kind of misty.

Q. It was a foggy night, wasn't it? A. Not so very foggy. No, I should call it misty.

Q. Was it foggy or clear? A. A little, yes, sir.

Q. As you went up Bloomfield Avenue did you pass any traffic? A. Did we pass any traffic going up Bloomfield Avenue?

Q. Yes. A. At Bloomfield Centre, I believe we must have passed some traffic.

Q. At Bloomfield Centre, the traffic was against you, wasn't it? A. The traffic was against us not to slow down to a dead stop.

Q. Didn't you say in your former testimony before this Court, "Did you go through Bloomfield Centre going at the rate of fifty miles an hour while you were standing on the running board? A. We had to slow down at Bloomfield Centre. The traffic was against us." Do you remember testifying to that?

Mr. Wachenfeld: Just a minute.

The Court: He said the traffic was against him and he had to slow down, but he didn't say he had to come to a stop.

Q. There was a stop signal on against you there, wasn't there? A. What do you mean by a stop signal?

Q. There was a stop signal on the traffic policeman's stanchion which made traffic coming from your direction stop, wasn't there? A. I don't remember the

stanchion, what signal was on it, but I know we had to slow up a bit at Bloomfield Centre. That's what I'm sure of.

Q. Do you remember being asked this question: "How long was traffic against you on Bloomfield Avenue? A. As soon as he took off the stop signal and gave us the start signal we went." Do you remember that? Did you testify to that before? A. Yes, sir, I believe I did, but I don't remember the stanchions being there.

Q. Was there an officer there? A. I believe there was an officer there, someone directing traffic, but the stanchion I don't know about.

Q. Did you say anything to the officer? A. No, sir.

Q. Did you speak to him? A. No, sir.

Q. Did you tell him to stop that car or get on your car? A. No, sir.

Q. And give chase to the other car? A. No, sir.

Q. Bloomfield Avenue at that point curves, doesn't it? A. Yes, sir.

Q. And you lost sight of your car there, didn't you, the car ahead of you, didn't you? A. I might have lost sight of the rear of the car, that's all. I could see the top.

Q. The traffic signal wasn't against him, was it? A. That I couldn't say.

Q. You say you didn't see any police officers at Glen Ridge, is that right? A. I seen one man in plain clothes which later I found out to be a police officer. That's all I seen.

Q. And you saw no man in uniform? A. No, sir.

Q. Do you remember this testimony that you gave at the former trial: "And did you stand there speaking to the police officers of Glen Ridge? A. Yes,

sir. Q. Could you recognize the officers that you spoke to? A. No, sir, I couldn't." Do you remember that?

Mr. Wachenfeld: That's just exactly what he testifies to here now.

Mr. Simandl: He says he was speaking to a man in plain clothes.

Mr. Wachenfeld: Yes.

Mr. Simandl: He has mentioned only one man.

The Witness: I wasn't speaking to the man in plain clothes. I said I seen the man in plain clothes. I had nothing to say to any officers in Glen Ridge. I didn't hear any conversation.

Q. Did you testify on November 26th, in this case in answer to the following question: "Q. And did you stand there speaking to the police officer in Glen Ridge?" and did you give the answer, "Yes, sir"? Did you so testify? A. I seen the officer and I said yes, I seen him and that was all.

Q. You didn't speak to him? A. I didn't have anything to say.

Q. Did you so testify at the former trial? A. I believe so, yes.

Q. Did you give the officers there a license number? A. No, sir.

Q. Did you give them Johnny Cosgrove's name? A. No, sir.

Q. Didn't you run back to Krauth and tell him that Cosgrove had disappeared? A. I told him he went off. That's what I said.

Q. Were the officers present when you said that? A. No.

Q. Where were you when you said that to Krauth? A. On our way back to Newark.

Q. That's what you first told to Krauth at that time? A. Yes, sir.

Q. Did you tell him it was a Cleveland car? A. I told Krauth it was a Cleveland car.

Q. With a nickel-plated radiator? A. Yes.

The Court: When was that—before you overtook the car or afterwards?

The Witness: That was afterwards.

Q. Do you remember—what time did you see this car? A. About twenty to a quarter to nine.

Q. Has anyone refreshed your memory as to the time? A. No, sir.

Q. Do you remember testifying in the police court shortly after this accident? A. I believe so.

Q. It was very close after the accident, wasn't it, and the facts were fresh in your mind, weren't they? A. What do you mean?

Q. Weren't the facts fresh in your mind three days after the accident? A. After all the talking and everything I heard, I guess they were, yes.

Q. And you are giving some of that talk now, aren't you? A. I am trying to give the best of my knowledge the statements I made before and what has happened.

Q. Do you remember being asked this question: "What time was this? A. I should judge it was about eight fifteen. I don't know the positive time because I jumped on the car and raced after him." Do you remember that? A. No, sir, I do not.

Q. Did you so testify? A. I don't remember.

Q. Do you remember, then, this: "Q. This was eight fifteen? A. Or after. I wouldn't say posi-

tively it was eight fifteen. It may have been after eight fifteen." Do you remember that? A. No, sir.

Q. What makes you say so positive now that it was eight forty or eight forty-five? A. That was just a guess. I'm not positive. I didn't say for sure.

Q. Oh, now, you're not sure? A. No. I didn't say I was sure.

Q. It might have been eight fifteen, is that right? A. It might have been twenty minutes to nine or a quarter to nine as I said.

Q. Are you sure that the condition as shown on that picture that has been shown to you is exactly the same as you saw on that car? A. Quite sure.

Q. Absolutely sure? A. Quite.

Q. And you were just as sure the last time you testified, weren't you? A. Yes, sir.

Q. No changes? A. Just the same as last.

Q. Do you remember being asked this question: "Look at this picture and tell me whether the condition as is shown in that picture is as you observed it on the other car that night? A. The mudguard was bent somewhat similar to that, but the light was not quite bent back as far as that is." Do you remember that? A. Yes, I remember that.

Q. It isn't entirely similar, then, is it? A. Which is on the picture it is similar, yes.

Q. In your former testimony, you stated the light was not bent quite as far, didn't you? A. Yes.

Mr. Simandl: That's all.

RE-DIRECT EXAMINATION by Mr. Wachenfeld:

Q. Mr. Shaw, I show you this picture again, which is the front view of that car. Is that the same car

that you saw that night that Cosgrove was in? A. Yes, sir.

Q. You said you thought there was a nickel-plated radiator on it. Did you look at the radiator, or did you notice it particularly? A. No, sir. That was just from a distance that I looked at it.

Q. There isn't any nickel-plated radiator on that picture, is there? A. No, sir.

Q. But you are sure that's the picture of the car you saw Cosgrove was in that night? A. Yes, sir.

Mr. Wachenfeld: That's all.

RE-CROSS EXAMINATION by Mr. Simandl:

Q. When you testified May 18th, 1923, you hadn't seen the picture, had you, of this car? You hadn't seen the photograph of it, had you? A. No, sir.

Q. Do you remember being asked this question: "You also saw a rip in the curtain and a piece of glass out? A. No glass out at all. This was a full glass." Do you remember that? A. I said full glass.

Q. Do you remember this question: "Where was the rip? A. At the bottom." Do you remember that? A. Near the bottom.

Q. I ask you whether you so testified?

The Court: He said he testified near the bottom.

Q. Do you remember this question, then: "At the bottom where? A. On the body." Do you remember that? A. No, sir, I do not.

Mr. Simandl: That's all.

By the Court:

Q. Let's come right to the time when you went be-

hind the car, as you say, to take this license number. A. Yes, sir.

Q. Did you have any paper in your hand or pencil or anything of that sort? A. No, not at the present time.

Q. I mean at that particular minute you had no pencil? A. No.

Q. Any paper? A. No.

Q. Now, did you undertake to put that number down on any piece of paper at that time? A. After that?

Q. After the car had gone away? A. Yes, sir.

Q. Was it right on the spot that you put it down? A. Yes, sir.

Q. Then it was you tried to put down the number of this car from your memory? A. Yes.

Q. And that was the number you put down, the one from your memory, which you tried to put down after the car went away from the corner of Bloomfield Avenue and Glen Ridge Avenue, is that it? A. Yes, sir.

By Mr. Simandl:

Q. Didn't you pull your note book out of your pocket when you stood there taking the license number? A. No. I went around the back first.

Q. After you pulled your note book out? A. Yes.

Q. And while the car was pulling away you were writing, weren't you? A. Yes, sir.

Mr. Simandl: That's all.

DANIEL ODOMS, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Where do you live? A. 18 1/2 Linder Avenue, Montclair.

Q. In May of last year where were you employed? A. Sussman's garage in Montclair.

Q. Where is that located in Montclair? A. Just above Valley Road on Bloomfield Avenue.

Q. What was your connection with the garage? Were you day man or night man? A. Night man.

Q. Were you working at night during the month of May? A. Yes, sir.

Q. Do you know the defendant in this case, John Cosgrove? A. Yes, sir.

Q. Did he keep his car up there in that garage? A. At that time, yes, sir.

Q. Were you working there on the night of May 15th? A. Yes, sir.

Q. Were you there when Cosgrove came in with his car that night? A. I was there, yes.

Q. About what time did he come in with his car? A. I didn't see Cosgrove when he came in with the car. I didn't see Cosgrove come in with the car at all that night, but as near as I can get it, about a quarter of nine.

Q. When you saw the car? A. When I saw the car, but I didn't see Cosgrove come in with the car.

Q. Did you see who brought the car in? A. No, sir.

Q. Did you notice the condition of the car that night? A. Yes, sir, I noticed it.

Q. Did you do any work on that car that night? A. I started to.

Q. What work did you start to do? A. I started to take the fenders off.

Q. And about what time of night was it when you started to take the fenders off? A. In the neighborhood of nine; whether a little before or a little after I don't know.

Q. Who told you to take the fenders off this car? A. A young man by the name of Dietrich.

Q. Is he connected with the garage? A. He had a lot of cars at that time.

Q. He was in the taxicab business? A. Yes, sir.

Q. You say you started to do some work on this car, take off the mudguards? A. Yes, sir.

Q. Well, why didn't you do the work? A. I was stopped.

Q. Who stopped you? A. Detective.

Q. Look at this picture, Exhibit S5, a picture of Cosgrove's car. Is that a picture of Cosgrove's car? A. That's the car.

Q. Is that his car? A. That's the car.

Q. Now, look at the condition as shown by that picture, with particular reference to the left front mudguard, the left front light and the reflector on top of the mudguard, and will you tell us whether or not the condition of the car when you saw it that night at about nine o'clock, whether it was in the condition as illustrated in that picture or whether it was different? A. It was in this condition when I started to work on it.

Q. When you started to work on it? A. Yes.

Q. What was the matter with the left front light? A. The left light was bent back over.

Q. Was it bent the way it is shown by that picture? A. Yes.

Q. What about the reflector or the mirror which

is on top of the fender? A. That's bent the way it's shown on this picture.

Q. What about the fender itself? Was that bent or dented? A. Yes. That's the way it's shown on this picture.

Q. Had you seen this Cosgrove car before—cross that out. The night before—cross that out. On the night of May 15th is when you saw the car come in in that condition? A. Yes, sir.

Q. When had you seen that car prior to that date? A. The same morning. The same day.

Q. Where did you see it on the same morning? A. In the garage before I left, went off duty.

Q. When you left for your house? A. Yes, sir.

Q. After doing the night's work? A. Yes, sir.

Q. On the morning that you saw it of May 15th, was the light bent as shown by that picture? A. No, sir.

Q. Was the reflector crushed down or bent as shown by that picture? A. No, sir.

Q. Was the mudguard bent or dented as shown by that picture? A. There is a dent in the mudguard but I don't see it on the picture.

Q. There was a dent in the mudguard? A. There is a dent in the mudguard, but it isn't shown on this picture.

Q. Where was the dent on the mudguard? Doesn't the picture show a dent there? A. At least I don't see it, but there is a dent there. I don't see it on the picture.

Q. Isn't that a dent on that picture there (indicating)? A. Yes. That's a dent on that picture.

Q. Was it bent on that morning, the way it is shown on this picture? A. No. It wasn't bent, no, sir.

Q. Was the light bent that morning as is shown by that picture? A. No, sir.

Q. Was that reflector crushed back or bent as shown by that picture? A. No, sir.

Q. You say you didn't do this work because someone stopped you? A. Yes, sir.

Q. Who stopped you? A. The detective.

Q. That night? A. The night.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. It was ten o'clock, wasn't it, Odoms, when the detective came in? A. I am sure I don't know whether it was ten or not. No, I don't think it was ten. I can't say a time sure. It wasn't ten. I don't think so.

Q. Do you remember testifying in this case once before? A. Yes, sir.

Q. Do you remember being asked that exact question: "Can you give us about the hour? I don't expect the exact hour. Was it ten, eleven, twelve, one or two?" And your answer was: "Somewhere around ten, I guess. I was busy that night, but I know it wasn't after ten." Do you remember that? A. I remember that it wasn't after ten.

Q. That car was out in the street the night before, wasn't it? A. It was out in the street, yes, sir.

Q. Wasn't it out in the street all night there? A. What do you mean—by the garage?

Q. Wasn't it standing out in front of the garage, across the street from the garage all night the night before? A. I don't know.

Q. Wasn't it locked and weren't you unable to take

it in? A. One of the nights the car was standing out there. I was unable to get in. Whether it was the night before that or that night I don't know, but it was out one night before that.

Q. You got off duty when? A. In the morning?

Q. Yes. A. Eight o'clock.

Q. Was Dietrich your boss? A. No, sir.

Q. Did you ever receive any orders from Dietrich before to do work? A. If there is someone leaving some work. Yes, sir, I received orders from him.

Q. While you worked there? A. Yes. I was busy that time.

Q. Weren't you sitting in the office with Mr. Sussman that night? A. Yes, sir.

Q. The boss? A. The boss.

Mr. Simandl: That's all.

CHARLES A. DIETRICH, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Mr. Dietrich, where do you live? A. 358 Carrol Street, Orange.

Q. Where were you living in the month of May of last year? A. The same place.

Q. What was your business in the month of May? A. Taxicab business.

Q. Where was that, Orange or Montclair? A. Montclair.

Q. Do you know where Sussman's garage is in Montclair? A. Yes, sir.

Q. Is it on Bloomfield Avenue? A. Yes.

Q. Were you in any way connected with the garage in the month of May of last year? A. Storing cars there. My cars were there.

Q. Do you know the defendant John Cosgrove? A. I do.

Q. How long prior to May 15th of last year had you known him? A. Not very long.

Q. Was it a matter of weeks or months or years or what? A. About a year.

Q. And did he keep his car in that same garage? A. Yes, sir.

Q. Did you see him there on the night of May 15th? A. Yes, sir.

Q. Were you there when he brought his car in that night? If he did bring it in? A. Yes, sir.

Q. About what time of night was it? A. Five minutes to nine.

Q. When he brought it in, did he say anything to you about the car in reference to having it repaire or any work on it? A. Yes, sir.

Q. What did he tell you? A. He wanted me to take the fenders off and the running board.

Q. The fenders and the running board? A. Yes, sir.

Q. Did you do the work? A. No, sir.

Q. Did you tell someone else to do it?

Mr. Simandl: I object to what he told someone else.

Mr. Wachenfeld: All right. It is already in anyhow.

Q. Did you notice the condition of the car that night as it came in? A. Yes, sir.

Q. Was there anything unusual about the condition

of the left front lamp? A. It was bent back so that the light shines up toward the ceiling.

Q. And was there anything about the condition of the reflector or mirror on the fender that you noticed? A. That was bent back, and there was no glass in the mirror.

Q. It was bent down and no glass in the mirror? A. Yes, sir.

Q. What about the mudguard, the left front mudguard? Was that bent or damaged in any way? A. That was dented in, too.

Q. I show you this picture which has been marked Exhibit S5, and ask you if that represents the condition of the Cosgrove car as you saw it on the night in question, May 15th, at Sussman's garage in Montclair at about five minutes to nine? A. It does represent it but it looks as if the light had been pulled forward a little further.

Q. You think then that the actual condition of the light as you saw it— A. (Interrupting.) Was bent back more.

Q. Than the picture shows? A. Yes, sir.

Q. How about the condition of the left front fender? Was that as the picture shows or different from the picture? A. That's the same condition.

Q. And how about the reflector on top of the mudguard? Does the picture show it to be in the condition as it was when it came in that night? A. Yes, sir.

Q. Had you at any time prior to May 15th, or during the course of that same day seen Cosgrove's car in the garage? A. Yes, sir.

Q. Will you tell us when it was you saw it before this night? Did you see it the same day, or the day prior, or a week prior, or what? A. I couldn't

say exactly. It might have been—I seen it Friday in fact.

Q. At any time prior to the night of May 15th when you saw this car come into the garage driven in by Cosgrove at about five minutes to nine, was the condition of the car at any time that you saw it prior to that occasion as indicated in this picture? A. No, sir.

Q. At any time prior to that time was that lamp twisted or the reflector bent or crushed down that way? A. No, sir.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. Dietrich, how do you fix the time as being five to nine? A. I am in the taxicab business and I got a telephone call a quarter to nine to be up 80 South Mountain Avenue, nine o'clock. So I went to look at the city hall clock in Montclair, and just as I was looking at the clock, Mr. Cosgrove pulled into the garage and it was five minutes to nine.

Q. Now, what time did you pull out to go on this call at nine o'clock? A. Nine o'clock; a couple of minutes, about two minutes to nine.

Q. Two minutes to nine. A. Yes, sir.

Q. Do you remember testifying in this case once before, do you? A. Yes, sir.

Q. Do you remember being asked with reference to this taxicab call? A. I do.

Q. Do you remember being asked this question: "How long did you stay there? A. Stayed until nine o'clock." Do you remember that? A. I do.

Q. Do you remember the next question: "You

stayed until nine o'clock? A. A few minutes, two minutes past nine by that clock in the city hall." Do you remember that? A. No, I don't.

Q. You were supposed to be in South Mountain Avenue at nine o'clock, isn't that so? A. I was supposed to be there.

Q. Yes, and you were supposed to leave the garage at what time to be there at nine o'clock? A. I wasn't supposed to leave at any certain time. We wasn't supposed—

Q. (Interrupting.) Do you remember being asked this question at the former trial: "Were you supposed to be at South Mountain Avenue at nine o'clock? A. I was supposed to leave the garage at nine o'clock." Do you remember that? A. No, sir.

Q. You don't remember that? A. No, sir.

Q. And if you testified to that fact at the former trial you weren't telling the truth, is that so? A. I don't remember testifying to that fact.

Mr. Wachenfeld: I object. Just a minute.
Mr. Simandl: That's all.

RE-DIRECT EXAMINATION by Mr. Wachenfeld:

Q. Do you get your calls for your business while you are at that same garage, Sussman's garage? A. Yes, sir.

Mr. Wachenfeld: That's all.

State's Witness, John A. Seerey, Direct

SERGEANT JOHN A. SEEREY, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Sergeant, you are connected with the Newark Police Department? A. Yes, sir.

Q. And have been for some time? A. Yes, sir.

Q. On the night of May 15th, did you go to Montclair on this Cosgrove case? A. I did.

Q. About what time of night did you go up there? A. About ten o'clock.

Q. Where did you go? A. Montclair Police Headquarters.

Q. Did you see Cosgrove there? A. Not at that time. Later on I did.

Q. Did you see him later? A. Yes, sir.

Q. About what time did you see him? A. About eleven-thirty.

Q. Did you go to Sussman's garage in Montclair that night? A. Yes, sir.

Q. Did you find a car there that was owned by Cosgrove? A. Yes, sir.

Q. Where was it—in the garage? A. In the garage.

Q. Did you note the condition of the car at that time? A. I did.

Q. I show you this photograph marked S5 and ask you if the condition of the car at the time you saw it that night—what time did you say it was about when you were in the garage? A. About ten o'clock, the first time.

Q. The condition of the car as you saw it at ten o'clock was in the same condition as illustrated or shown on that picture? A. It was.

Q. Look particularly, please, at the left front fender, and tell me whether or not that picture illustrates the true condition of the car as you saw it that night? A. It does.

Q. Look at the left front headlight and tell me whether or not the picture illustrates the condition of the headlight as you saw it? A. It does.

Q. How about the mirror, the reflecting mirror which is on top of the mudguard? A. That was in the same condition.

Q. Did you notice that reflector and can you tell us whether the condition of that reflector as you saw it, whether it was bent back or forced back, or what the situation was in reference to that? A. It appeared to be forced back.

Q. You did see Cosgrove after that? A. Yes, sir, I did.

Q. How did you know this was Cosgrove's car? A. From information I received from—

Mr. Simandl (interrupting): I object to that, if your Honor please.

Mr. Wachenfeld: All right, all right.

Q. After you got hold of Cosgrove, did Cosgrove say anything about whether this was his car? A. He said it was his car.

Q. And where did you go with Cosgrove? A. Newark Police Headquarters.

Q. Did Cosgrove come down to Newark in this car with you? A. Yes, sir.

Q. Where did you take the car after you got to Newark? A. Police garage.

Q. Is this (indicating) a picture of Cosgrove's car? A. Yes, sir.

Q. I show you another picture which is the rear of the same car apparently, from the picture, and I ask you if you noticed the condition of the rear of Cosgrove's car that night? A. I did.

Q. Will you look at that, what appears on that picture a loose slip on the back just under the mirror on the back of the car, and will you state whether or not the condition of that Cosgrove car as you saw it that night coincides with that picture? A. The same condition.

Q. Were you there, Mr. Seerey, when these pictures were taken? A. No, sir.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. You didn't tell the colored man not to do any work, did you? A. Yes, sir, I did.

Q. Do you remember testifying in this case once before? A. Certainly.

Q. Do you remember this question: "Did you tell him not to do any work on this car? A. No, sir, I did not. I asked him was he doing any work on it and he told me no he was not." Do you remember that, Sergeant? A. He did tell me that and I told him not to do any.

Q. But do you remember this question and answer: "Did you tell him not to do any work on this car? A. No, sir, I did not." Don't you remember testifying that way? A. I don't remember answering that way.

Q. I see. Cosgrove rode that car down for you, didn't he? A. He did.

Mr. Simandl: That's all.

Counsel for defendant admits in evidence pictures which have been marked for identification S4 and S5; S4 being a rear view of the Cosgrove car taken on the 17th day of May, and S5 being a front or side view of the same car taken on the same day.

JOHN JOSEPH GANNON, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Where do you live? A. 14 Maple Avenue, Montclair.

Q. What business are you in? A. Plumber's helper.

Q. Were you living at the same address in the month of May of last year? A. No, sir.

Q. What address were you living at then? A. 26 Misha Street.

Q. Do you know where Sussman's garage in Montclair on Bloomfield Avenue is? A. Yes, sir.

Q. Whereabouts is it? A. Between Valley Road and Orange Road.

Q. Were you anywhere near that garage on the night of May 15th? A. Yes, sir.

Q. Where were you? A. Right across the street.

Q. Prior to May 15th did you know the defendant in this case, John Cosgrove? Did you know him personally or just know who he was? A. I knew him as soon as he got on the police force.

Q. You knew who he was? A. Yes, sir, since he's been on the police force.

Q. You knew he was a policeman up there in Montclair? A. Yes, sir.

Q. You didn't know him personally, did you? A. No, sir.

Q. Did you see him drive into Sussman's garage on the night of May 15th? A. No, sir.

Q. Did you see that car in there that night? A. Yes, sir.

Q. About what time of night was it? A. About twenty minutes to nine.

Q. Was there any way by which you can fix that time, or how? A. I just guess at it.

Q. You don't know whether Cosgrove was driving that car or somebody else? A. I don't know who was driving the car.

Q. Did you look to see who was driving it? A. No, sir.

Q. What attracted your attention to the car? That's an ordinary event a car going into the garage, isn't it? A. The left light was shining in my eyes.

Q. Is that what attracted your attention to it? A. Yes, sir.

Q. Did you notice anything else about the car? A. No, sir.

Q. Look at the picture, S5, please, and tell me whether or not the condition of that one light, which is the left front light, is the same as at the time that you saw it? A. That's the same light.

Q. Is that the same position that the light was in? A. Yes, sir.

Q. Now, how do you fix the time of twenty minutes to nine? A. I just judge the time.

Q. Might it have been earlier or later? A. I don't know. I couldn't judge.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. Why are you so sure it was the left headlight—because you looked at the picture? A. No, sir. I was standing on the opposite side of the street.

Q. You remember testifying in this case once before, don't you? A. Yes, sir.

Q. Do you remember this question: "Which headlight, the left or the right headlight? A. That's what I don't know." Do you remember that? A. No, sir.

Mr. Simandl: That's all.

JEREMIAH JOSEPH PECOLA, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Where do you live? A. 78 Pine Street.

Q. Were you living—that's in Montclair, isn't it? A. Yes, sir.

Q. Were you living in Montclair at the same address in the month of May of last year? A. Yes, sir.

Q. Prior to the 15th day of May, did you know the defendant, John Cosgrove? A. Yes, sir.

Q. Did you know him personally? A. No, sir.

Q. Do you know who he was? A. I knew he was a cop.

Q. Do you know where Sussman's garage is on Bloomfield Avenue? A. Yes, sir.

Q. Were you anywhere near that garage on the night of May 15th? A. Across the street.

Q. Were you alone or with someone? A. With two other fellows.

Q. Who were the two other fellows? A. O'Mara and Gannon.

Q. Gannon is the boy who just testified before you? A. Yes, sir.

Q. Did you see Cosgrove drive a car into the garage that night? A. I didn't see Cosgrove, but I saw Cosgrove's car go into the garage.

Q. Could you tell who was driving it? A. No, sir.

Q. What time was it that the car went into the garage? A. Around nine o'clock.

Q. What was it that attracted your attention to that car? A. The left light.

Q. What was the matter with the left light? A. It shone right in our faces as he passed by.

Q. Over across the street? A. The car came up on the right-hand side and we were standing on the right-hand side, and the light was shining in our face as it was coming up.

Q. Did you see whether the light was bent or not? A. It must have been bent if it shone in our face.

Mr. Simandl: I object to the answer, if your Honor please, on the ground that it is a conclusion.

The Court: Strike it out.

Q. Did you see the light itself? A. Yes.

Q. Did you see the condition of the lamp? A. No, sir, I did not.

Q. Where were the rays of the light, in which direction? A. The rays of the light?

Q. Were they shining in front of the car or towards the sidewalk or where? A. Where we were standing.

Mr. Wachenfeld: Take the witness.

CROSS-EXAMINATION by Mr. Simandl:

Q. Pecola, this was a very foggy night, wasn't it? A. It was misty.

Q. Was it foggy is my question? A. Not that I know of.

Q. Do you remember being asked by me that very question on your former examination in this trial: "Was it a foggy night? A. Yes, sir." Do you remember that? A. No, sir.

Q. You know Cosgrove, don't you, pretty well? A. From being on the police force, I do.

Q. He locked you up, didn't he? A. He gave me a ticket for speeding.

Q. Yes, and as a result of which you were fined? A. Yes, sir.

Mr. Simandl: That's all. Just a minute.

Q. Did you answer this question at the last trial: "Very foggy? A. Quite misty it was, yes." Did you answer it that way? A. Quite misty, yes.

State's Witness, Francis O'Mara, Direct

FRANCIS O'MARA, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Mr. O'Mara, where do you live? A. 44 Elm Street.

Q. Were you with these two other boys, Gannon and Pecola on this night in question? A. Yes, sir.

Q. Where were you? A. Corner Bloomfield Avenue and Valley Road.

Q. Did you know Cosgrove before this day? A. Yes, sir.

Q. Did you know him personally? A. Not personally, no, sir.

Q. You knew who he was, is that it? A. Yes, sir.

Q. Do you know his car? A. Yes, sir.

Q. Did you see his car go into Sussman's garage on this night in question? A. No, sir.

Q. You didn't see it go in? A. No, sir.

Q. Did anyone call your attention to a car going in there that night? A. Yes, Gannon did, but I didn't see it go in.

Q. He called it to your attention that it went in? A. Yes, sir.

Mr. Wachenfeld: That's all.

Mr. Simandl: No questions.

State's Witness, Richard Walters, Direct

LIEUTENANT RICHARD WALTERS, witness called in behalf of the State, being first duly sworn, testified as follows:

Direct-examination by Mr. Wachenfeld:

Q. Lieutenant, you are connected with the Montclair Police Department? A. Yes, sir.

Q. And have been for some number of years? A. Twenty-five years.

Q. Were you at the police station on the night of May 15? A. Yes, sir.

Q. Did you have charge of the squad of men that were put out that night? A. Yes, sir.

Q. Did you call the roll? A. Yes, sir.

Q. Was Cosgrove a member of that force that night? A. Yes, sir.

Q. What time are the policemen supposed to be there? A. They go out at nine o'clock.

Q. Was Cosgrove there at nine o'clock? A. No, sir.

Q. How long after nine o'clock was it before Cosgrove got in? A. About four or five seconds.

Q. You are supposed to go out at nine o'clock? A. Yes, sir.

Q. When Cosgrove came in, was he in uniform? A. Yes, sir.

Q. How long does it usually take to call the roll up there, Lieutenant?

Mr. Simandl: I object to that, if your Honor please, on the ground it is immaterial how long it takes, usually, to call the roll.

Q. How long did it take that night? A. It only takes three or four seconds to call the roll.

Q. Of how many men? A. About eight or nine; ten sometimes.

Q. You mean it takes only three or four seconds to call the roll of the squad? A. Positively.

By the Court:

Q. The prosecutor asked you what time the men were supposed to be there and you answered they were supposed to go out at nine o'clock. A. They have no special time to be there. They go out at nine o'clock.

CROSS-EXAMINATION by Mr. Simandl:

Q. Cosgrove came in walking, didn't he? A. Yes, sir.

Q. He appeared calm, did he? A. Perfectly normal.

Q. He reported, did he? A. Yes, sir.

Q. Got his nightstick? A. Yes, sir.

Q. And went out on post? A. Yes, sir.

Q. Went out with the sergeant? A. The sergeant was just going out as he was going out.

Q. Some of the men had not left yet? A. The men had just gone out and the sergeant was going out after them.

Q. And he was fully dressed in uniform? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Wachenfeld:

Q. Cosgrove didn't hurry in at all that night? A. I didn't pay any attention to him at all any more that he came in a few seconds late.

Q. Did you notice whether he came in in a hurry or not? A. If he was in a hurry I didn't notice any.

Mr. Wachenfeld: State rests.

Mr. Simandl: Now, if your Honor please, before I open to the jury I desire to move for a direction of a verdict, first, on the ground, if your Honor please, that the State has not proven beyond a reasonable doubt all of the facts and allegations contained in the indictment which are necessary to be proven by the State. Second, on the ground that this defendant, according to the record, should not have been brought before this court for trial.

The Court: Motion denied.

Mr. Simandl: And third, on the ground there is no proof of an atrocious assault and battery, and no maiming proved.

The Court: Denied.

Mr. Simandl: I pray an exception.

The Court: Certainly.

(Mr. Simandl opened to the jury.)

At this point court adjourned to 10 o'clock tomorrow (Wednesday, March 12, 1924), morning, the jury being duly warned by the Court as to the discussion of the case.

Second Day.

Wednesday, March 12, 1924.

Met pursuant to adjournment.

Counsel as before stated present.

MRS. MARY SEPHTEIN, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Are you married? A. Yes, sir.

Q. Where do you live? A. 212 Johnson Avenue.

Q. In May, 1923, where did you live? A. 1699 Boulevard Street.

Q. What city, please? A. Jersey City.

Q. Do you know the defendant, John Cosgrove? A. I do.

Q. On May 15th did you see him at any time during that day? A. I did.

Q. During what part of that day? A. Why, he came to visit us about 2:30 or twenty minutes to three in the afternoon.

Q. What is your husband's business? A. He's a fireman on the Pennsylvania Railroad.

Q. How long did he stay at your home on that day? A. Why, he was there from the time he arrived until about 7:10 or 7:15.

Q. And did he leave you and your husband then? A. Yes, sir.

Q. Have you ever been out in Cosgrove's car? A. Once or twice.

Q. With your husband and himself? A. Yes.

Q. And how long before May 15th, do you recall,

were you out in that car? A. About a week or eight days.

Mr. Simandl: You have no objection to my offering these photographs in evidence?

Mr. Wachenfeld: None at all.

Mr. Simandl: I offer these in evidence.

Received and marked Exhibits D1 and D2 respectively.

Mr. Wachenfeld: These pictures were taken after the car was in custody in front of police headquarters and some time after the pictures which the State has offered in evidence.

Mr. Simandl: Yes.

Q. I show you Exhibit D1 and ask you whether or not this picture shows the condition of that car as you saw it about a week or eight days prior to May 15th. A. I know there was a dent in that mudguard.

Q. There was a dent in the mudguard? A. Yes, on the right-hand side of the photograph.

Q. And you saw it on that day? A. I did.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. How long had you known Mr. Cosgrove before May 15th? A. About seven years.

Q. Did he call very frequently to visit you and your husband at your home on the Boulevard in Jersey City? A. Quite often.

Q. What do you mean by "quite often"? How frequently was that? A. Sometimes once, sometimes twice a week.

Q. Would it be as many as two or three times a week? A. Frequently.

Q. Your husband is employed by whom, you say? A. By the Pennsylvania Railroad.

Q. And in what capacity is he employed? A. As a fireman.

Q. Does he work at night or day, or does it vary? A. At the present time he works in Philadelphia. He is home every third day.

Q. At this time in May was he working at night or day? A. At night.

Q. Always at night, or did he sometimes work in the day? A. Always at night.

Q. And Cosgrove came to pay you a visit as often as two or three times a week, is that it? A. Yes.

Q. And when he came to pay you a visit he usually drove his car over there? A. Usually.

Q. So for a number of weeks or a period of several weeks prior to the 15th day of May you saw this car two or three times a week, did you? A. No, I wouldn't see the car. I live up two flights and he usually parked it around on the side.

Q. You went out riding in his car on several occasions, didn't you? A. Once or twice.

Q. How long before May 15th was that? A. About a week or eight days.

Q. Did you go out on two occasions a week or eight days before that? A. No. The other time was either the latter part of March or first part of April. I am not positive.

Q. How long prior to the 15th of May was it that Cosgrove called at your home? A. How long?

Q. Yes. A. He had been calling on us for seven years.

Q. I mean how many days elapsed between his visit at the time prior to the 15th and the 15th day of May? A. It was about a week or eight days.

Q. Then the gentleman called regularly on you those two or three times a week? A. It wasn't a force of habit. He just simply dropped in, sometimes twice a week and sometimes he would skip a week.

Q. He didn't call on you quite regularly two or three times a week, did he? A. No.

Q. And a week or eight days prior to the 15th you were out driving in that car, were you? A. Yes.

Q. When did you notice the condition of this car, before you started to drive or after you started? A. Before.

Q. And did you notice it while you were sitting in the car? A. No. I was sitting in the back.

Q. When did you notice it? A. As I was getting into the car.

Q. You did sit in that car that day, didn't you? A. Yes.

Q. Do you remember this testimony which you gave at the last trial: "I show you Exhibit D1 and ask you whether or not this picture represents the condition of the car that you saw a week previous to May 15th? A. Yes. I know the mudguard was bent. That's the only thing I noticed." Did you answer it that way? A. Yes, sir.

Q. "The Court: On what side were you sitting in the car? The Witness: I didn't sit in it. I was walking toward the car." A. When I noticed the dent in the mudguard I was walking towards it.

Q. But you did sit in it and take a ride, didn't you? A. Yes.

Q. Did you notice anything else about the car other than the fact it had a dent in the mudguard? A. No, sir.

Q. Nothing at all? A. No.

Q. Which mudguard was it? A. As I approached the car it was on my left-hand side. It is on the right-hand side of the photograph.

Q. On which side of the car would that be? A. If you were sitting in the car, that would be on your left-hand side. As I was approaching the car it was on my left-hand side.

Q. Look at that mudguard and tell me whether or not your recollection of this car a week prior to May 15th was as it appears there? A. Yes, it was.

Q. Was it as bad as that? A. From what I see it was.

Q. Did it have that crack in the mudguard? A. I didn't notice it that closely.

Q. At that time, a week prior to May 15th, did you notice the condition of that light? A. No. I just walked past it and glanced at it.

Q. Just a minute. Listen to my question. Did you notice the condition of that light? A. No.

Q. Did you notice the condition of that reflector which is forced down over the radiator or over the fender? A. No, sir.

Q. You didn't notice either one of these two things. All you noticed was a dent in the mudguard. A. That's all.

Q. And you didn't notice this crack which is shown in the picture of the mudguard? A. That's all.

Mr. Wachenfeld: That's all.

By the Court:

Q. Now, Mrs. Sephtein, I am going to call your attention to this photograph marked D1, and as I understand you to say you noticed a dent on this left mudguard, is that right? A. Yes, sir.

Q. Now, can you point exactly what you call a dent? A. This place here (indicating on D1). That's bent.

Q. This gap here is what you call a dent? A. Yes, sir.

Q. Now, did you notice anything wrong with the left front light, that is, the headlight? A. No, sir.

Q. And did you notice anything wrong with the reflector? A. No, sir.

Q. Did you notice anything wrong about this car except what you call a dent in this fender? A. No, sir.

Q. How close did you pass to the car? A. Right alongside of it.

Q. How many feet do you mean by that? Just indicate in the room. As close as the stenographer there (indicating about three feet)? A. Even closer than that.

Q. And did you go in the car then? A. Yes, sir.

Q. And ride in it? A. Yes, sir.

Q. How far did you drive? A. Just up the Boulevard.

Q. And then you got out? A. No. We went back to the house and then got out.

Q. And when you got out did you notice anything wrong with the headlight? A. No, sir.

Q. Was anything wrong with the reflector? A. No, sir.

Q. Was anything else wrong except the condition that you referred to? A. I did not.

The Court: That's all.

Defendant's Witness, Mary Sephtein, Re-direct

CROSS-EXAMINATION by Mr. Wachenfeld (continued):

Q. Mrs. Sephtein, you say, as I understand you, he left there at 7:15? A. He did.

Q. How do you know it was 7:15? A. We have a clock setting on the kitchen cabinet and we glanced at it.

Q. Did you look at the clock? A. Yes.

Q. Is that how you know it was 7:15? A. That's how I know.

Q. Did you always make a note of paying particular attention as to the time Mr. Cosgrove left your place? A. No, but that night he also pulled out his watch and he said, "It's after 7."

Q. Mr. Cosgrove also pulled out his watch in addition, did he? A. He did.

Q. And you don't know anything to be unusual to cause you to look at the clock and Mr. Cosgrove to look at his watch at the same time? A. No.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. When you say you didn't notice the condition of the reflector and the lamp you don't mean to say that they couldn't have been in the condition that they are shown to be on that photograph, D1, do you?

Mr. Wachenfeld: Just a minute before you answer that question. I object to it on the ground that it is leading.

The Court: Sustained.

Mr. Simandl: I pray an exception to that. I am asking the witness to explain. This is re-direct, and the Court has assumed to ask questions in the nature of cross-examination.

The Court: You have your exception.

Q. When you say, Mrs. Sephtein, that you didn't notice this condition of the reflector and the mirror, do you mean to say that you don't remember that they were in that condition or that they were not in that condition?

Mr. Wachenfeld: I object to that. I have no objection to counsel asking this witness what she meant, but he must not put the words in her mouth, whether she meant this or that.

The Court: Objection sustained.

Mr. Simandl: I pray an exception, if your Honor pleases.

The Court: You may have it.

Q. What did you mean in answer to the Court's question when you said, "I didn't notice the reflector and the lamp"—the condition of the reflector and the lamp?

The Court: She said she didn't notice anything wrong with the lamp and the reflector, and as far as the Court can see, that is as plain as it can be made.

Mr. Simandl: If your Honor please, if the witness has any explanation of that, I think she has the right to make it at this time.

The Court: She has not indicated that her testimony is not clear or that she doesn't understand what she is saying.

Mr. Simandl: I have the right, as counsel for the defendant, to find out whether she does or does not.

The Court: No, you are not finding out anything. You are asking whether she means something that you are putting into your ques-

tion. She has not indicated that she has meant anything of the kind. She has made a perfectly clear statement which is not capable of any misunderstanding.

Mr. Simandl: But, if your Honor please, I know the witness has testified in a somewhat different tone at a prior trial, and for that reason, if your Honor please, I am more or less surprised by her answer, and I assume, therefore, that she has an explanation to make. I have a copy of her testimony before me and of course I have read it and I know what the witness has testified to once before.

By the Court:

Q. Do you want to make any explanation about your testimony? A. As I passed the car—

Q. (Interrupting.) No. Just answer me yes or no. Do you want to make an explanation or is your testimony clear and do you understand what you said? A. I don't want it to be understood that those things could not have been like they are in the picture. I just gave it a casual glance and I noticed the mudguard, but I didn't stand there examining the car.

Q. Yes; but I asked you at the time if you noticed anything wrong about the lamp and you said you did not. Do you want to change that? A. No, I didn't notice that.

Q. I asked you if you noticed anything wrong with the reflector and you said no. Do you want to change that? A. No. I didn't notice anything wrong but the mudguard.

RE-CROSS EXAMINATION by Mr. Wachenfeld:

Q. You looked at this car pretty closely, didn't you? You were right near it, weren't you? A. Yes, I was near it.

Q. You were interested enough in this automobile to notice the condition of the dent in the front mudguard, weren't you? A. I won't say I was interested.

Q. What caused you to see it? A. Just passing by and I happened to notice the dent.

Q. What caused you to look or glance at the automobile? A. That I couldn't say.

Q. You just happened to look at it, is that it? A. Just happened to glance at it.

Q. And the thing that attracted your attention was that you remembered for several weeks afterward there was a dent in the front mudguard, is that right? A. It wasn't several weeks after. It was only a matter of a week.

Q. All right. So that you, with no reason to look at this car, just observing it casually, noticed a dent in the front mudguard and you retained that recollection of your having seen a dent in the front mudguard for fully a week, didn't you? A. Yes.

Q. There was no reason why you should be that much interested in this car, was there? A. Well, there was no reason, but I did notice it and I remembered it.

Q. As you looked at that car, you didn't notice that lamp bent that way, did you? A. I didn't notice.

Q. Did you look at it? A. I wasn't standing there and looking at it.

Q. You went right past in front of it, didn't you? A. Right past the side.

Q. You passed this portion of the picture (indicating), didn't you? A. Yes.

Q. You mean to tell me that you could have looked at that automobile a week prior to May 15th and noticed a condition of the mudguard without noticing that the reflector on the top of the mudguard was crushed down and that the lamp was bent as shown at the angle in that picture? A. With a casual glance I would say you could without seeing the rest.

Q. You think, then, if you were to look at an automobile on which the light is bent as that is bent, with the reflector crushed or smashed over the fender as that is—

Mr. Simandl (interrupting): I object. That is merely a conclusion on your part.

Q. So that you think, Mrs. Sephtein, that looking at a car casually, being right alongside of it, with the light turned at an angle as indicated by this picture, with a reflector forced down on the fender as indicated by this picture, that you would notice a dent in the mudguard, but would not notice the unusual condition of the lamp or the reflector, is that right? A. I didn't notice it.

Q. You didn't notice it? A. No.

Q. You saw the dent. A. I saw the mudguard bent.

Q. Will you tell me frankly whether it is possible for you or for anyone else to stand on the side or front of this car and look at that mudguard without seeing that reflector and that light? A. I would say it is.

Q. How do you cover up the light and the reflector? A. I didn't cover it up. I was just passing by.

Q. And when you did see them, you didn't see anything wrong with them, did you? A. I don't remember looking at them.

Q. Is it possible for you to stand in front of that mudguard without seeing that reflector? A. I wasn't standing in front of it.

By the Court:

Q. How big was this dent that you noticed? A. Personally, I didn't even notice that closely so that I could tell you the size.

Q. You were very definite it was a dent. When you first gave your testimony you said it was a dent. Now, tell us how big this dent was that you remember seeing? A. I know one side of the mudguard was dented in.

Q. And can't your mind tell you how large a dent this was? A. No, I couldn't tell you just how large it was.

Q. You just remember it was a dent. A. I walked by and happened to glance at it.

Q. Would you say that the dent was larger than what I am showing you now, just a little bit bigger than a silver dollar? A. It would have to be larger than that or you wouldn't notice it.

Q. You would think it was bigger than this page here? A. Absolutely.

Q. Would you think as much as six inches long? A. It would have to be larger than that.

Q. Larger than a foot long, the dent that you speak of? A. I couldn't tell you exactly. I couldn't judge exactly the exact size.

By Mr. Wachenfeld:

Q. Can't you indicate by using your hands or some

object in the room how big this dent was? A. I know one side of the mudguard was bent in.

Q. Can't you answer my question and indicate approximately the size of this dent? A. I can't. I don't know how large a mudguard is.

Q. Do you know how large that dent was? A. No.

Q. And you don't know what attracted your attention to the dent? A. Nothing, but as I passed the car I happened to glance down and noticed the dent.

Q. And nothing caused you to recall it particularly, was there? A. Not until after it was recalled to my memory.

Q. How long after was it recalled to your memory? A. About two days.

Q. Who called it to your attention? A. Mr. Cosgrove.

Q. Didn't you speak to him about it first? A. I spoke to my husband first.

Q. Who recalled it to your attention is my question? A. When he said it was owing to the dent of the car that he was accused of this accident, why, then I remembered I had seen it.

Q. Did he speak of it first—Mr. Cosgrove I mean? A. Yes.

Q. Don't you remember testifying at this trial that you mentioned it first to him before he said a word to you? A. I mentioned it to my husband.

Q. Didn't you testify at the first trial that you mentioned it to him before he said a word to you? A. I don't remember that I did.

Q. "Who spoke to you about the fact that this car was bent? A. I was the first one to mention it. Q. To whom? A. To Mr. Cosgrove." Did you testify to that? A. I probably said that.

Q. What is the actual situation? That's what we are trying to find out. You are not guessing at this thing are you? A. No.

Q. Did you speak to Mr. Cosgrove first or did he, as you just testified today, recall it to your attention? A. He said that was the reason they accused him of the accident.

Q. Did you speak to him first about it? A. Not until he said that, and then I told him I remembered seeing the dent in the car.

Q. Won't you answer my question? Who spoke first about this dent? A. I suppose Mr. Cosgrove must have mentioned it first.

Q. Don't you remember how this thing happened? Don't you remember who spoke about it first? A. Why, he said—

Q. (Interrupting.) Do you remember who spoke about it first? A. I can't recall that.

Q. Did you testify at the last trial that you spoke first, that you mentioned it first before anybody else spoke about it? A. What I meant by that—

Q. (Interrupting.) Did you testify to that? Did you? A. Can't I tell my meaning?

Q. No. Did you so testify? A. Probably I did.

Q. Why did you testify to that if it wasn't so? A. I was the first one to speak about it, that I remembered seeing the dent in the car.

Q. Didn't you just tell me that Mr. Cosgrove first told you about it, and then you told him you remember seeing this dent? A. He didn't ask me did I see the dent.

Q. Didn't you just testify that Mr. Cosgrove first spoke to you about this and then you told him you remember seeing the dent in the car? A. Yes. He mentioned the fact that the car was in that condition, and

that was the reason he was accused of the accident.

Q. Then I am asking you—at the last trial you said you were the first one to speak of it before anyone else mentioned it to you. A. What I meant I was the one that remembered I had seen the dent in the car.

Q. Why didn't you say that at the last trial instead of answering the question, "I was the first one to mention it"? A. You misunderstood my meaning.

Q. Who misunderstood your meaning? A. I am telling you now what I meant.

Q. Who do you mean misconstrued your meaning? Do you mean I misconstrued your meaning? A. You must have.

Q. Didn't you give the answer as you have already testified, "I was the one who mentioned it"? A. That I had seen the dent in the car.

Q. Didn't you give the answer as I have read it to you? A. I don't remember.

Q. I thought you just said a minute ago that you did give that answer.

Mr. Simandl: She said that she probably did.

Q. I thought you said probably. A. Probably I did, but you misconstrued the meaning.

Q. I haven't misconstrued anything. I am telling you that was the answer that you gave, "I was the first one to mention it." Did you give that answer? A. I was the first one to mention that I had seen the dent.

Q. How do you construe that answer, "I was the first one to mention it"? A. You probably would think I mentioned seeing the dent.

Q. How would you construe it? What do you mean by saying, "I was the first one to mention it"?

A. I mean when Mr. Cosgrove said that the reason for his being accused of the accident was the condition of the car I said, "I remember the dent in the mudguard a week ago."

Q. Why didn't you say at the last trial that Mr. Cosgrove spoke first and then you mentioned that you recall seeing the dent?

Mr. Simandl: I object, if your Honor please. She says very distinctly that she was the first one who mentioned that she remembered seeing the dent in the car. She was the first one to say that. What's the use of quibbling about words?

Mr. Wachenfeld: I am quibbling about the truth—not words.

By the Court:

Q. As I understand you now, you say you were the first one to mention the fact that you observed this dent, is that right? A. I was the first one to mention that I had observed the dent.

Q. And you say you mentioned that to Mr. Cosgrove. A. Yes.

Q. And how long was that after you observed the dent on this automobile that you testified to before? A. A week.

Q. In other words, about a week after you observed this dent when you passed by the car at the time you testified to, you mentioned it to Mr. Cosgrove, and that was the first time that that dent was mentioned at all? A. That was the first time.

Q. Then, as I understand you, when you got in the car that day, or you took a ride, you didn't call attention to the fact or mention the fact that you had seen this dent in the mudguard? A. I did not.

Q. And you didn't mention it at all until a week after? A. Until a week after.

By Mr. Wachenfeld:

Q. What did you mean when you said someone recalled it to you? A. Mr. Cosgrove came that day and told us about the accident.

Q. What did you mean when you said someone recalled it to your recollection that you had seen a dent in this car? A. No one recalled it to my memory. No one knew I had noticed it.

Q. Did you use the word "recall" in your testimony a few minutes ago? A. I mean—

Q. (Interrupting.) Did you or didn't you? A. I probably did.

Q. What did you mean when you said someone probably recalled it to your mind? A. Mr. Cosgrove mentioned the fact that they accused him of the accident on account of the condition of his car, and that brought back to my mind that I had seen the dent in the car.

Q. And that recalled it? A. Yes.

Q. Did that recall the condition of the lamp or the reflector, or didn't it? A. I didn't notice that.

Mr. Wachenfeld: That's all.

JOHN HENRY PRIESTMAN, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Mr. Priestman, what is your business? A. Automobile dealer.

Q. And what company are you with? A. The Buchgen Motor Company.

Q. What car do they handle? A. Cleveland.

Q. Were you connected with that company in May, 1923? A. Yes.

Q. Do you know Cosgrove, the defendant here? A. Yes, sir.

Q. Did you see him prior to May 15th, 1923? A. Yes.

Q. How long prior to May 15th, 1923, did you meet him? A. I met him at police headquarters at Montclair in April. I couldn't tell you the date.

Q. Did you see him in your place of business after you met him in April, 1923? A. Just a few days after I met him in Montclair he came down.

Q. And whom did he come down there with? A. His father. He introduced his father to me.

Q. And did you have a conversation with him? A. Yes, sir.

Q. What was that conversation? What did that conversation have reference to?

Mr. Wachenfeld: Just a minute. I object to it upon the ground it is immaterial and not binding upon the State and incompetent.

Mr. Simandl: The testimony of this witness is to show the ordering of certain parts at that time by the defendant and his subsequent countermand of that order.

The Court: Go ahead.

Mr. Simandl: I will connect it up.

Q. What was the conversation with reference to? A. They were in the stock room buying some fenders. We didn't have them in stock, and I just don't recall

all the conversation between the two gentlemen, but it was with regard to purchasing new fenders and fixing up the present car he had at that time.

Q. Did you deliver the fender to him? A. No. We didn't have them in stock. They were ordered from our distributors in New York.

Q. Did you subsequently hear from Mr. Cosgrove? A. Yes. He cancelled the order.

Mr. Wachenfeld: Just answer yes or no.

By the Court:

Q. Did you subsequently hear from him? A. Yes.

By Mr. Simandl:

Q. When? A. I imagine it was about the latter part of April, before the first of May.

Q. What did you hear from him then with reference to your prior conversation?

Mr. Wachenfeld: I object to that on the ground it is incompetent.

The Court: I will allow it.

Q. What did he say? A. He called me on the telephone personally and cancelled the order for the fenders.

Q. Are you familiar with Cleveland cars, Mr. Priestman? A. I ought to be, yes.

Q. How familiar are you with Cleveland cars? A. I drove the first one that left the Cleveland factory in 1919 east.

Q. And have you been dealing in Cleveland automobiles since? A. Yes, sir.

Q. Is there a tire rod that comes between the two headlights on the Cleveland car? A. Yes.

Q. What is that rod used for? A. It is supposed to sustain and make the fenders rigid. It is also used for the license bracket which is usually attached to it.

Q. Well, now, on the early models, what have you to say with reference to that tire rod?

Mr. Wachenfeld: That's objected to. Let's confine ourselves to this model.

Q. This was a 1921 model? A. 1919, 1920 and 1921 were all the same fender, head lamp and tire rod construction.

Q. What can you say as to the tire rod during those years? Did they give satisfaction? A. Without the tire rod—

Mr. Wachenfeld: I object to that. It is wholly immaterial. We are not trying the Cleveland Automobile Company.

The Court: I think the prosecutor is correct.

Q. In the event that the tire rod is not in its place or is missing, what is the effect upon the headlights and fenders? A. Well, the bolt which holds the tire rod goes through the lamp bracket attaching it to the fender. The lamp bracket is slided about three-quarters of an inch at that point, and if the rod were broken away the bolt which holds the lamp bracket would not support it.

Q. How does that leave the lamps, as to whether or not they are or they are not controlled? A. They are uncontrolled due to the rod being out of there. We had an awful lot of experience with that particular model.

Q. Now, I show you photograph D1, and I will ask

you to look at it. Examine it carefully. (Witness examines carefully.) Have you examined carefully? A. Yes, sir.

Q. Look at this photograph and the condition of the fender shown on the right-hand side of the automobile as you glance at the photograph. Would you say that the dent in that fender was caused by—what would you say the dent in that fender was caused by?

Mr. Wachenfeld: I object to the question on the ground he is not qualified yet.

The Court: Is he an expert on dents?

Mr. Simandl: He is an expert on automobiles, if your Honor please, and an expert on collisions, I imagine.

Q. Have you seen a number of cars that have been in collisions? A. Yes, sir.

Q. About how many have you seen, sir, during your employment? A. I imagine that we destroy and do away with about a dozen fenders a month at our place of business due to wreckage.

Q. And do you know—have you been able to determine from your experience the cause of these dents?

Mr. Wachenfeld: I object—if he has been able to determine the cause. What do you mean—of the twelve mudguards that he throws away every month?

Mr. Simandl: Yes.

Mr. Wachenfeld: That is objected to, if your Honor please.

The Court: You mean—

Mr. Simandl: I withdraw that.

Q. Have you ever seen cars in collisions, after they have been in collision with people? A. No, I have not.

Q. Have you seen cars that have been in collision with sharp objects, such as trucks, other automobiles, etc.? A. Yes, sir.

Q. Have you seen the effect upon an automobile after it has been in a collision with a truck or other automobile as far as the fenders of the automobile are concerned? A. Yes, sir.

Q. I ask you to look at this fender (indicating photograph), and I ask you whether or not this fender appears to have been in collision with a person or with another automobile or some other sharp object?

Mr. Wachenfeld: That is objected to on the ground that the witness is not qualified on the ground he is not in a position to judge according to standards. According to his own testimony he has some knowledge of the condition of the car after a collision with another object, but absolutely no knowledge of the condition of the car when it strikes a pedestrain, and therefore he must work by comparison.

The Court: He says he has no experience with collisions with persons.

Mr. Simandl: But, if your Honor please, if his ability to determine from collisions with sharp objects sufficiently gives him knowledge to determine whether or not this was caused by a collision with a sharp object, then, if your Honor please, he qualifies. The weight of his testimony is one for the jury. They can totally disregard it if they so desire.

The Court: If you confine your question to sharp objects I will allow it.

Q. Would you say that this car had collided with some sharp object?

Mr. Wachenfeld: Objected to upon the ground it is leading, and upon the further ground that the witness is not competent.

The Court: I will allow it.

A. Why, the skirt of the fender, which runs down to the frame of the car, is ripped away from the fender, torn away. As to the dent in the face of the fender, it is simply bent in.

The Court: You distinguish between the dent in the face of the fender and the rip that you referred to of the skirt of the fender, is that right? The dent being in the part as you approach in front, and the skirt is that part which runs down and attaches to the car.

The Witness: Apparently.

The Court: I ask you if you were distinguishing between the two.

The Witness: Yes, I was.

Q. Will you explain to the Court what part of the fender you mean by the rip? A. The skirt is ripped right back from the front of the fender, away back to the lamp.

Q. Show the jury what you mean? A. I mean the skirt of the fender. You can see it on this fender (indicating on photograph). On the opposite side it is attached to the fender. That is done by a small piece of metal running through the fender skirt after they are both wrapped around together. On this side it has been forced back, torn right from the fender all the way back to the headlamp and buckling up back there.

Defendant's Witness, John Henry Priestman, Cross

Q. What have you to say with reference to the lamp?

Mr. Wachenfeld: If your Honor please, I don't know what this is going to lead to.

The Court: We don't care to hear anything he may have to say about the lamp.

Mr. Simandl: I will withdraw the question.

Q. I show you this lamp and ask you whether or not the bracket on this lamp is or is not bent.

Mr. Wachenfeld: You mean a picture of the lamp.

Mr. Simandl: Yes, a picture of the lamp.

A. No, it is not.

Q. Is it or is it not as it naturally is supposed to be, the bracket? A. As far as I can see.

Mr. Simandl: That's all.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. The lamp as shown by that picture is as it is supposed to be? A. He didn't ask me that.

Q. Is the lamp as it is supposed to be? A. The lamp bracket.

Q. (Interrupting.) Is the lamp as it is supposed to be? A. No, it is not.

Q. It is forced back, isn't it? A. Yes, sir.

Q. And only force would bring it in the position it is in, wouldn't it? Did it take force to get the lamp back there on some part of the car or the lamp or the bracket? A. Yes.

Q. It did take force? A. Yes.

Q. You say these lights—I believe you used the word "uncontrollable." What do you mean by that? A. I mean she would shimmy and dance in front of the car.

Q. You mean a little play in the lamp without the weight there? A. Yes.

Q. And if there is a little play there, is that what you would term "uncontrollable"? A. Yes.

Q. Now, this tire rod being out of there. These lamps are fastened on to the fenders with a piece of steel around them or wrought iron or some such substance as that, isn't that so? A. The tire rod goes across from that hole in that bracket to the hole in this lamp bracket (indicating on photograph).

Q. But the tire rod is merely there for the purpose of making or keeping it on more firm, isn't it? A. It's part of the attachment between the head lamp and the fender.

Q. But the tire rod is not the thing that keeps these things attached to the fender, is it? A. No.

Q. There is a connection between the lamp and the fender, isn't there? A. Yes.

Q. And that is a piece of iron, is it? A. Malleable iron.

Q. And that's shown on this picture? A. That's this "L-shaped" bracket here (indicating).

Q. You say that the condition of this fender was caused by coming into contact with some sharp object?

Mr. Simandl: What part of the fender?

Mr. Wachenfeld: Any part that he wants to specify. I don't care.

A. The sharp angle of that dent in there would show that.

Q. You would say it would have to come in contact with a truck or wagon or some other object like that? A. Something fairly sharp.

Q. You have never seen a fender after it has come in contact going at a considerable rate of speed with a pedestrian, with a woman or a child or a man? A. No.

Q. Then you don't know whether under those circumstances if a fender on a Cleveland automobile, even going at a considerable rate of speed, comes in contact with a human body in the roadway—whether or not that same condition could have existed? A. No. I couldn't testify as to that.

Q. You don't know that? A. No.

Q. So that you have no standard of comparison within your own knowledge between a fender that ran into a truck or another automobile— A. (Interrupting.) Yes.

Q. Just wait a minute. Let me finish my question. You don't know of your own knowledge whether or not a car striking a pedestrian in the roadway going at considerable speed would not have the same effect as shown in this photograph? A. I wouldn't say it would. I wouldn't imagine it would.

Q. I am not asking for your imagination. You have never had any experience along that line? A. No.

Q. And as far as you know the same condition could be caused by the fender coming in contact with a human body, is that right? A. Yes.

Mr. Wachenfeld: That's all.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. Mr. Priestman, the prosecutor asked you on his cross-examination whether force to some part of that automobile caused that lamp as shown on photograph D1 to be in this condition? A. Yes.

Q. Would you say it was the force on the lamp or force on the fender? A. On the fender.

Q. Is it your opinion that a sharp instrument caused this rip as you call it? A. Yes, sir.

Mr. Simandl: That's all.

RE-CROSS EXAMINATION by Mr. Wachenfeld:

Q. Did you answer this question the last time in the way which I am reading: "Could the lamp turn under the conditions which you have suggested as indicated by this picture unless some force were used on it? A. No." Did you answer it that way? A. I couldn't recall that.

Q. Do you want to look at it? A. I may have answered it that way.

Q. You were telling the truth then, weren't you? A. Yes, sir.

Q. Your opinion was then that you would have to have force used on it? A. I didn't understand the question.

Q. What was there you didn't understand about the question? A. I didn't understand the "it" that you put in there.

Q. What did you think the question was? A. The lamp was forced back. It is forced back with the fender.

Q. But force was used on some part of the car? A. Yes, sir, on the fender.

Q. In order to get that lamp in the condition it is in there, and whether it's a truck or a human body you don't know? A. Yes, sir.

Mr. Wachenfeld: That's all.

PETER FAGIN, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. What's your business, Fagin? A. Police officer.

Q. Connected with what department? A. Borough of Glen Ridge.

Q. Do you remember Tuesday, May 15th, 1923? A. I do.

Q. When did you go on duty that day? A. 7 P. M.

Q. And where were you assigned to duty? A. Ridgewood Avenue and Bloomfield Avenue.

Q. What were your hours? A. From 7 P. M. to 4 A. M.

Q. Did you see any person there that night after you got on duty and speak to him? A. Yes. I was speaking to a man who was driving an automobile.

Q. What time was that about? A. It wasn't yet nine o'clock.

Q. Whom did you see? A. I don't know. They call him Dever, a tall fellow.

Q. Dever or Krauth? A. A big, tall fellow.

Q. Was he the man you identified in court at the last trial? A. Yes.

Mr. Simandl: Will you admit he identified Krauth?

Q. Was it the man who was driving the automobile? A. Yes, sir.

Mr. Wachenfeld: A Buick roadster?

The Witness: I don't know what kind of a car it was.

Mr. Wachenfeld: Well, the man who was driving the automobile was Krauth.

Q. He is a big, tall fellow, you say? A. Yes.

Q. And where did you see him that night? A. I was standing on the centre of the bridge. The D., L. & W. station is there.

Q. How far is that from the corner of Ridgewood Avenue and Bloomfield Avenue? A. That's about I should say one hundred and fifty feet.

Q. On Ridgewood Avenue? A. Yes.

Q. Is your view from where you are standing obstructed in any way so that you couldn't see the corner of Bloomfield Avenue and Ridgewood Avenue? A. Not there. I was standing on the sidewalk and it's a high sidewalk all the way down.

Q. So you could see that? A. Yes.

Q. And how far down Bloomfield Avenue in an easterly direction could you see, or is it southerly?

Mr. Wachenfeld: Southerly.

A. That was a very foggy night. You couldn't see far.

Q. When you—did you speak to this man? A. Yes.

Q. Did he say to you—I'll withdraw that. Did you say to him that you couldn't leave your beat? A. No.

Q. Did he say to you—

Mr. Wachenfeld: Is that the tall man you refer to?

The Witness: That's him (indicating man in court room).

Mr. Wachenfeld: That's Krauth.

Q. Did he say to you that an automobile took the clothes off a child down at the city line and he is coming through and he lost him? A. Well, he told me that—

Q. (Interrupting.) Did he tell you that? A. Yes, he told me that.

Q. Did he tell you that the automobile was out there? A. No.

Q. Did he tell you that Cosgrove had been the driver of an automobile that he had followed? A. No.

Q. Did he give you the license number of that automobile while you were standing there? A. No.

Q. Did he give you a description of it? A. No.

Q. Where did you subsequently go with him? A. I rode from the centre of the bridge to the corner of Ridgewood and Bloomfield Avenues.

Q. Whom did you see there, if anyone? A. Lieutenant Higgins.

Q. Is Lieutenant Higgins in Court? A. Yes.

Q. Lieutenant (addressing man in court room), please stand up. Is that the man you saw? A. Yes.

Q. Did Krauth speak to Lieutenant Higgins? A. He did.

Q. Did he tell Higgins the kind of a car that struck

this woman, this girl he spoke of? A. He didn't give any description of the car. Lieutenant Higgins asked him and he said he didn't know the make of the car. He didn't know the description.

Q. Did he say that Cosgrove was in the car? A. No.

Q. Did he give a license number of the car? A. He didn't know the license number.

Q. Did he tell Lieutenant Higgins that an automobile took the clothes off a child down at the city line, that he was coming through and he lost him? A. Yes; he said that.

Q. Did he tell Higgins that the car was right out there? A. No.

Q. Did Higgins tell him that he would not go out and break his neck and chase a car on a night like that? A. No.

Q. Did anybody else then come up to the party? A. There was two other fellows with this man that drove the car.

Q. Did they come up to the car while you were standing there talking? A. Just as he was about to pull away they got in.

Q. Did they say anything to you? A. They never spoke. The only man who spoke was the man driving the car.

Q. And then they drove away? A. They drove away down Bloomfield Avenue.

Q. Were you ordered to do anything then?

Mr. Wachenfeld: I object to what he was ordered to.

The Court: By whom?

Mr. Simandl: By Lieutenant Higgins, as the result of this conversation.

The Court: Objection sustained.

Mr. Simandl: It is very material to us, the frame of mind that Lieutenant Higgins and this witness were in after they had the conversation with Krauth, in order that the jury may deduct as to what these men thought of what they said. This entire incident has been testified to on the part of the State, and now when I give my explanation of Krauth's conduct in Glen Ridge, and this man's conduct there, the Court says I have no right to show our side of the story.

The Court: I didn't say that, and you know I didn't. Your remark is entirely uncalled for and entirely disrespectful.

Mr. Simandl: I didn't intend to be. I apologize to your Honor, if your Honor believes I was.

The Court: The question is as to this particular proposition that you have gone into. You have followed the entire incident through, and you are now asking one question and one single question only, as to what orders were given by the police. That's all. That is the only thing that is in question. Anything else as to what happened that night has not been gone into and your opportunity to present your story has not been limited otherwise. The only question now is whether orders given by the police that night in the absence of the defendant, so far as I have been able to see, are relevant to this issue. That is the question before the Court, and the only question. Now confine yourself to that.

Mr. Simandl: I am bound by the answer if I ask the question, and no matter what right the defendant can have, he can waive it.

The Court: He is your witness. You are not cross-examining him. Why are you bound by his testimony?

Mr. Simandl: Because he is my witness.

The Court: It is not binding. It can be denied. You can produce other witnesses to prove otherwise and testify otherwise. Now, let's see. Let's come down to this particular case and not go into discussions of law. You want this witness to testify as to what orders were given by the police that night?

Mr. Simandl: What he did subsequent to this conversation as the result of this conversation with Krauth. That's what I want to know.

Mr. Wachenfeld: I object to the question on the ground that it is immaterial and not binding on the State—what instructions he received from Lieutenant Higgins.

The Court: Sustained.

Q. Did you do anything as a result of this conversation with Krauth? A. I walked to the centre of the street and watched around for automobiles with dented headlights and broken mudguards under the spot light there.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. You say this was about 9 o'clock? A. No. It wasn't yet 9 o'clock.

Q. What do you mean by that? A. About ten minutes to nine, I should figure.

Q. You were standing over there on the D., L. & W. bridge, is that it? A. The great, big bridge, yes.

Q. Then about a hundred and fifty feet from the nearest corner, is that right? A. From the centre of that bridge to the corner is about a hundred and fifty feet. It might be a hundred and seventy-five. It might be more.

Q. That spot light on Bloomfield Avenue is located at this intersection of Ridgewood Avenue and runs down Bloomfield Avenue for a number of feet, doesn't it? A. Yes.

Q. Almost fifty feet? A. From the corner?

Q. Yes. A. About fifty feet, I should say.

Q. So while you were standing there you didn't notice what kind of an automobile it was that drove up to you? A. Yes; it was a Buick.

Q. I thought you didn't know the make of it? A. It was a Buick.

Q. Didn't I ask you if it was the man who was driving a Buick and you said you didn't know what kind of a car it was? Didn't you tell me that? A. I don't remember. This is a Buick car.

Q. Listen to my question. A few minutes ago, before Krauth was in the room, you said it was a tall man by the name of Dever. Then Mr. Simandl and I had a conversation, and I asked you if it was the man who was driving the Buick roadster and runabout, and you said you didn't know what kind of a car it was. A. Not if I remember.

Q. Don't you remember what you testified to two or three minutes ago? A. I know it was a runabout car.

Q. Do you remember whether you told me that a little while ago you didn't know what kind of a car it was? A. I don't remember; honest, I don't.

Q. You say this man drove up to you? A. Yes.

Q. Were you on the left or right-hand side of

Ridgewood Avenue? A. Right-hand side as you go towards Bloomfield Avenue.

Q. He pulled up a hundred and fifty feet from you, that car? A. No.

Q. Did he drive up very fast? A. Not very fast.

Q. Going rather slow, wasn't he? A. Yes.

Q. He leisurely told you that an accident happened down at the city line, did he? A. He pulled around to where I was standing and told me to jump in.

Q. Did he tell you to jump in first, or did he tell you about the accident first? A. "Jump in," was the first word.

Q. Did you jump in? A. I jumped in.

Q. And he didn't tell you about the accident? A. He told me about the accident at the same time.

Q. Well, now, which is it? What did he tell you first? A. The first word he said was, "Jump in."

Q. And did you jump in? A. Yes.

Q. You were in the car when you heard about the accident? A. I was in the car.

Q. Sure about that? A. I was in the car. He opened the door and told me to jump in and that an automobile took the clothes off a child down at the city line.

Q. So that everything he told you about this accident happening at the city line was told you while you were in the automobile, is that right? A. Yes.

Q. Were you seated in the automobile? A. Seated upon the inside, yes.

Q. You didn't stand on the running board, did you? A. No.

Q. You were seated in the automobile? A. Yes.

Q. How far did you drive in that car? A. About a hundred and fifty feet.

Q. And that's when he told you about what happened? A. Yes.

Q. Just exactly what did he say to you? A. He told me to "Jump in, an automobile took the clothes off a child down at the city line. While he was going through I lost him."

Q. He said he lost him, did he? A. Yes.

Q. Did you ask him for a description of the car? A. No.

Q. Did you ask him what kind of a car it was? A. No.

Q. Did you ask him if he knew who was driving it? A. No.

Q. Did you ask him anything about it, where they lost the car? A. Not until I went down to the corner.

Q. Did you ask him anything about where they lost the car? A. No. I didn't ask him where he lost the car.

Q. And here you were, a police officer on duty in Glen Ridge, and a man reports to you, as I understand your story, that a woman and child were struck by an automobile with such force as to tear some of the clothes off her— A. (Interrupting.) I didn't have time to ask.

Q. And you didn't ask him for a description of the car, you didn't ask him if he knew what make car it was, and according to your story, he told you he lost it, and you never even asked him if he lost it. A. No. We asked him on the car—

Q. (Interrupting.) Did you ask him those questions? A. No.

Q. You didn't ask him any of those questions? A. No. It wasn't my business to ask him. The lieutenant was there.

Q. The lieutenant wasn't there when he first spoke to you, was he? A. He didn't have time to.

Q. Was the lieutenant there when Krauth was

speaking to you? A. He was about a hundred and fifty feet away from us.

Q. He wasn't there, though, was he? A. Not on the spot, no.

Q. Was he standing there a hundred and fifty feet away from you, or was he in a car? A. He was in the car.

Q. How long had that car that Lieutenant Higgins was in, a hundred and fifty feet from where you were standing, been standing there? A. About ten minutes previous to that.

Q. It was standing there for ten minutes? A. Yes.

Q. The car that Higgins was in? A. It just drove down ahead of the other car.

Q. For fully ten minutes before Krauth spoke to you, is that right? A. Yes. The two pulled down at the same time.

Q. Now, listen to my question. The police car that Higgins was in was standing on Ridgewood or Bloomfield Avenue? A. Corner of Ridgewood and Bloomfield Avenue.

Q. For ten minutes before Krauth spoke to you, is that right? A. About that.

Q. And then you and Krauth drove down to where this car was that had Higgins and Officer Anderson in it, is that right? A. Yes.

Q. Who spoke to Krauth when he got down there? A. Lieutenant Higgins.

Q. Did you hear everything that was said? A. Pretty near.

Q. What did you hear said then? A. I heard Lieutenant Higgins ask him if he got the number of the car.

Q. Who asked him that? A. Lieutenant Higgins.

Q. What else did he ask him? A. If he knew the description of the car.

Q. What else did he ask him? A. I don't remember anything else.

Q. You didn't hear anybody ask Krauth where he lost this car? A. No.

Q. You didn't hear Lieutenant Higgins or anybody ask Krauth that question, did you? A. No.

Q. And so that while you were there, and while Officer Anderson and Lieutenant Higgins were there, you didn't hear anybody ask this man Krauth where he lost this car? A. No. He told—

Q. (Interrupting.) Did you hear anybody ask him that question? A. No.

Q. Now, have you told us everything that was said there either by Krauth to you or by Krauth to Lieutenant Higgins or Officer Anderson? A. As far as I know.

Q. Just take your time and think if you have told us everything that was said by Krauth to any of you police officers that night. (Pause.) Have you told us everything? A. As far as I know.

Q. Why did you go out on the street and look for a car with one light and with a bent mudguard? Where did you get that information? A. I was working under orders of my superior.

Q. Where did you get the information from? A. I didn't get the information.

Q. Didn't you say you went out on the street to look for a car with one broken light and a broken mudguard? A. Lieutenant Higgins told me to go out and look.

Q. You were right there when Krauth told to Lieutenant Higgins—you've told us everything that was said there, haven't you? A. I didn't hear everything that was said.

Q. Didn't you tell me a little while ago that you heard everything that was said? A. As far as I know, I could hear, but there might have been something I didn't hear.

Q. How long did this conversation last? A. Three minutes.

Q. And during any of that conversation, or rather during all of that conversation, you were right there in that group with Lieutenant Higgins and Officer Anderson? A. There was a group of fellows standing around, too.

Q. But you were in that group, weren't you? A. Yes.

Q. You heard everything that was said? A. There might be something I didn't hear.

Q. There might be, but was there? A. I wouldn't swear to it.

Q. Weren't you interested in knowing the identity of this car that caused this accident? A. I was in the crowd.

Q. Weren't you interested? A. Sure.

Q. Weren't you there when Krauth told somebody she had a bent light or a broken light?

Mr. Simandl: I object to that, if your Honor please. It isn't even in the testimony.

Mr. Wachenfeld: I know it isn't.

Mr. Simandl: Then, why does the prosecutor state that as a fact?

Q. Did you get any information from anybody outside of Krauth and Lieutenant Higgins about this car? A. Any information?

Q. Yes, at that time? A. No.

Q. And Higgins is the man who told you to watch out for a car with a broken mudguard and a broken light? A. Yes.

Q. And you heard nothing said about that at that time? A. No.

Q. Do you know Cosgrove? A. Yes; I know Cosgrove.

Q. How long have you known Cosgrove? A. Oh, about, I should figure, just about the time of the accident.

Q. What do you mean by that? How long before the accident did you become acquainted with Cosgrove? A. I know him seeing him come up and down the avenue.

Q. You knew he was a policeman, didn't you? A. Yes.

Q. How long before the accident had you known him? A. Six or eight months. I seen him pass by, going up and down the avenue.

Mr. Wachenfeld: That's all.

LIEUTENANT WILLIAM P. HIGGINS, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Mr. Higgins, what is your business? A. Lieutenant in the Police Department of Glen Ridge.

Q. Were you such in May, 1923? A. I was.

Q. Do you remember Tuesday, May 15th, 1923? A. I do.

Q. Were you on duty that night? A. I went on duty at eight o'clock.

Q. And your tour of duty brought you to what hour? A. 4 A. M. in the morning.

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Q. Were you in headquarters that night? A. I was.

Q. What time did you leave there? A. 8:45.

Q. Who was with you, if anyone? A. Officer Anderson was with me.

Q. Where did you go after you left headquarters? A. To the garage adjoining police headquarters and backed the car out. I was driving, and we went south to the gasoline station which adjoins the police station, on the south side, and we put ten gallons of gasoline in the tank. We then proceeded south to Bloomfield Avenue, turned left on Bloomfield, went east to Ridgewood, on Ridgewood turned right, went south, saw no police officer on the corner. I knew Fagin was supposed to be there and Fagin was not on the corner. I wondered what the trouble was, so I thought I would look for him. When I saw him he was on the sidewalk on the east side of the Lackawanna Railroad Bridge.

Q. With reference to the traffic lights on Bloomfield Avenue at Ridgewood Avenue, where was your car standing when you first looked up the street? A. You mean after I stopped the car?

Q. Yes. A. To the traffic lights—what do you mean?

Q. The safety isle lights? A. I was facing north. I was parked on the southeast corner.

Q. How far from the safety isle is that? A. I imagine from the lower safety isle about, I judge about forty feet.

Q. Was there any car parked there? A. None.

Q. When you stood there? A. Not while I was there.

Q. What kind of a night was this? A. Very foggy.

Q. Could you see for a great distance? A. At

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that point that is the brightest lighted section of Glen Ridge, and you could possibly see two hundred feet.

Q. But generally, as you went through the streets, what was the condition? A. About fifty or sixty feet. I had to drive with the top windshield open.

Q. You mean you couldn't see without the windshield being open?

Mr. Wachenfield: I object to counsel leading the witness.

The Court: When you drove up you say you saw Fagin standing on the sidewalk?

The Witness: On the east sidewalk in the centre of the Lackawanna Bridge.

Q. Could you or couldn't you see as you drove through the various streets with your windshield down? A. I—

Mr. Wachenfeld: (Interrupting.) Just a minute. I object to that because some streets are darker than others. We ought to confine ourselves to Bloomfield Avenue where this thing happened.

The Court: Where are you referring to, what place?

Mr. Simandl: As he drove generally. I was merely trying to find out what the actual conditions of the weather were.

The Court: There may be a great difference in the condition of fog at one point and another, and I think you should specify what condition you are talking about.

Q. It was very foggy, you say? A. Yes.

Q. And at the brightest point in Glen Ridge you

could only see two hundred feet, is that right? A. That's right.

Q. And that is with your windshield down.

Mr. Wachenfeld: There are those leading questions again. Mr. Simandl knows better than that.

The Court: Go on.

Q. What did you do then when you saw Officer Fagin? A. When I saw Officer Fagin I turned around and proceeded north on Ridgewood and as I was driving toward Bloomfield Avenue, Officer Anderson, who was sitting in the rear seat, told me that Officer Fagin had just got in an automobile and was turning toward the police car and he thought that possibly he wanted us, so I pulled in on the curb on the southeast corner and parked within about ten feet of Bloomfield Avenue.

Q. And did the other car approach your car? A. About less than a minute he pulled up right alongside of our car.

Q. Now, did you see anyone in the car that pulled up alongside of your car? A. Officer Fagin and the driver got out of it.

Q. Who was the driver? Can you point him out in court? A. That's the man, rubbing his face (indicating man in court room).

Q. Stand up (addressing man in court room). A. That's the man.

The Court: You know his name, don't you?

The Witness: Krauth.

The Court: You knew his name before he ever got on the stand, didn't you?

The Witness: Yes.

The Court: Why didn't you call him by his name?

Mr. Simandl: For the purpose of the record and for the purpose of the jury I had him point him out.

The Witness: Krauth or Krauss, I don't remember which.

Q. When Krauth spoke to you did Krauth say to you an automobile had just struck a young girl down at the city line and tore the clothes off her and he was coming this way? A. He did.

Q. Did he say anything about recognizing the automobile? A. I asked him the number of the car and the make of the car and he said he didn't know either. He lost it.

Q. What did you do then? A. Officer Fagin who was standing alongside of me, I directed him to go to the centre of the road.

Mr. Wachenfeld: I object.

Mr. Simandl: All right. I withdraw it.

Q. Did he tell you that Cosgrove was the driver of the car? A. No.

Q. Did you tell him that you wouldn't chase any car that night and break your neck, or words to that effect? A. I did not.

Q. Did he say that the car was right out there and point or do anything or say anything else? A. No. He said the car lost him.

Q. If the car were at the lower end of the safety isle at the intersection of Ridgewood Avenue and Bloomfield Avenue on the north side of Bloomfield Avenue, would you have seen the automobile there from where you stood? A. I would, certainly.

Mr. Wachenfeld: If he looked.

Q. If he had called it to your attention would you have been able to see it? A. Yes.

Q. How far away was that from where you were standing? A. That would be about sixty-five or seventy feet looking across.

Q. Was there anything in front of you so that it would obstruct your view? A. Nothing.

Mr. Simandl: That's all.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. So you weren't parked up there at the corner of Ridgewood Avenue and Bloomfield Avenue for ten minutes before Officer Fagin was talking to this man Krauth, were you? You weren't parked up there for ten minutes, were you? A. No, I was not.

Q. You weren't parked within fifty feet of where Officer Fagin was standing at that time for ten minutes, were you? A. About one hundred and fifty feet I judge from where I was parked and I saw Fagin.

Q. Had you been parked there for ten minutes before Officer Anderson called your attention to the fact that he saw a man go up to Fagin? A. Not more than a minute.

Q. You just pulled up there when it all happened, didn't you? A. Just pulled up to the curb.

Q. As a matter of fact you were going to continue on until Anderson called your attention to the fact that Fagin was speaking to a car, isn't that right? A. That's right.

Q. You weren't parked there for ten minutes, were you? A. Not over a minute.

Q. And you wouldn't have stopped there at all if Officer Anderson had not called your attention to the

fact of a man in an automobile going up to Fagin, would you?

Mr. Simandl: I object.

Mr. Wachenfeld: All right. I'll change it.

Q. What caused you to stop up there? A. Anderson telling me that Fagin pointed toward the car.

Q. And if Anderson hadn't given you the information about Fagin and the car, you wouldn't have stopped there, would you? A. I—

Mr. Simandl: (Interrupting.) Just a minute. I object to that question.

The Court: Sustained.

Q. Now, you waited there, when you found out that a car had approached Officer Fagin, didn't you; after Anderson told you that you pulled in, didn't you? A. I pulled in and parked.

Q. And then Fagin came down in the car? A. He did.

Q. Was he seated inside or standing on the running board? A. He pushed the door open and got out. Whether he was standing or in the inside of the car I don't know.

Q. You don't know whether he was standing on the running board or inside the car? A. He was inside.

The Court: You say he pushed the door open and got out?

The Witness: He did.

Q. When he pulled up there did Fagin say anything to you first or did Krauth speak to you first? A. Krauth.

Q. And did Krauth say to you that a car had struck a woman and a child down at the city line and that

he had lost the car? A. No. He said that an automobile had just struck a young girl below the city line cutting the clothes off her and was coming this way.

Q. Is that what he said? A. Yes.

Q. Sure about that? A. Positive.

Q. Did he say anything else at that time? A. Not until I asked him questions.

Q. What question did you ask him? A. If he got the number of the automobile.

Q. What did he tell you? A. No.

Q. What else did you ask him? A. If he knew the make of the machine.

Q. What did he tell you? A. No. He lost it.

Q. What else was said by anybody? A. That's all the conversation I had with Krauth.

Q. That's all the conversation you had with Krauth? A. That's all.

Q. He didn't give you any other information? A. None whatever.

Q. Did you ask him where he lost this car? A. No reason why I should ask him.

Q. I didn't ask you that. Did you ask him where he lost the car? A. No.

Q. Is there anythng else that Krauth told you that night? A. Nothing else.

Q. Did you have any other conversation with Shaw or Dever? A. No. They didn't come near me.

Q. They said nothing to you at all? A. Nothing at all.

Q. Where did you get the information about a broken mudguard or a broken headlamp?

Mr. Simandl: I object to that, if your Honor please. That question assumes that there

was some information like that given him. There is no evidence to that effect.

Mr. Wachenfeld: Oh, yes, there is. All right, I'll change it.

Q. Did anybody that night—did Krauth tell you that night about, anything about a broken headlight or a broken lamp? A. He did not.

Q. Did you tell Officer Fagin to look for a car? A. No, not one with a broken headlight or a broken mudguard.

Q. Did you tell him that? A. No.

Mr. Wachenfeld: That's all.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. What did you tell him, Lieutenant? A. I told Officer Fagin to go under one of the spotlights which throws its rays in the centre of the street, and I told Fagin to go out there and if he saw any car coming through with damaged mudguards or headlights to bring him in for investigation.

Mr. Simandl: That's all.

By the Court:

Q. Are you sure that you were not told that night that the car had gone on up towards Montclair instead of that it was coming up from Newark? A. Positively.

RE-CROSS EXAMINATION by Mr. Wachenfeld:

Q. Do you remember this question? "On the night of May 15 you say that Krauth told you about some

car that was about to come up? A. He didn't say that. Q. What did he say? A. He said an automobile had just struck a child back at the city line and tore the clothes off her and that's what he said." Is that right? A. Yes.

Q. That a child had been struck by the city line? A. And was coming this way.

Q. You didn't say that in this answer. A. It must have been overlooked.

Q. By whom, the stenographer? A. Possibly.

Q. Now, you say that you could see about two hundred feet on this night, is that true? A. At that corner I could.

Q. Looking in which direction? A. Any direction.

Q. What could you see two hundred feet away? A. An approaching automobile. A person walking.

Q. So you could see a person walking two hundred feet away? A. At that intersection.

Q. Couldn't you see an automobile with headlights more than two hundred feet? A. You could.

Q. How far away could you see an automobile? A. If the automobile headlights were lit?

Q. Yes. A. Possibly three hundred feet.

Mr. Wachenfeld: That's all.

By Mr. Simandl:

Q. You say there is a spot light there? A. Yes, lights on all corners besides the safety isle lights and a number of arc lights on the Lackawanna Bridge.

Q. You did say that in other parts of Glen Ridge you were unable to see for sixty feet, didn't you?

Mr. Wachenfeld: I object on the ground it is leading, and even if it wasn't the question would not be competent.

Mr. Simandl: I am trying to get a comparison, if there were any dark spots or any light spots in different sections.

The Court: Go ahead. Reframe the question.

Mr. Simandl: I will withdraw the question.

Q. Did you ride around other parts of Glen Ridge? A. I did.

Q. And in those parts of Glen Ridge what was the condition of the fog?

Mr. Wachenfeld: Objected to on the same ground.

The Court: I think remote places in Glen Ridge would not be of any importance.

Q. In other parts of Bloomfield Avenue did you ride? A. Yes, I did.

Q. How far could you see in those parts? A. Towards Newark we have another spot light on Hillside Avenue. That is well lighted there. The upper part toward Montclair is very dark.

Q. The upper part of Montclair? A. You could only see from fifty to sixty feet.

Q. Now, I call your attention to your testimony at page 177. By the Prosecutor: "You did say"—this was at the last trial of this case—"What words were they?"—with respect to the conversation with Krauth. "You did say the automobile had just struck a young girl down at the city line and tore the clothes off her and it was coming this way?" You remember so testifying? A. Yes.

By Mr. Wachenfeld:

Q. Where is that spot you could only see fifty feet on that night? A. On the west end toward Montclair.

Q. Whereabouts? What do you mean by the west end? A. From Harmon Street to the Montclair line.

Q. How far below Ridgewood Avenue did you go on Bloomfield Avenue? A. To the Bloomfield line.

Q. What was the condition down there? Is that worse or better than the west end section of the city?

A. Better.

Q. How far could you see down there? A. About a hundred feet.

Q. What could you see a hundred feet? A. Could see an automobile in the street.

Q. Could you see a pedestrian at one hundred feet? A. There were no pedestrians on the street.

Q. No pedestrians on the street at nine o'clock? A. On the sidewalks, not on the street.

Q. Could you see them on the sidewalks? A. Yes.

Q. How far away would you be? A. When we passed them we would glance at them—as we went by and see them.

Q. How long do you think this room is, from that wall to this one? A. About fifty-five feet.

Q. Is there any spot below Ridgewood Avenue toward the City of Newark where you couldn't see an automobile more than fifty feet that night? A. Any what?

Q. Any spot on Bloomfield Avenue below Ridgewood Avenue going toward Newark where you couldn't see a car more than fifty feet away?

Mr. Simandl: In what city?

Mr. Wachenfeld: Either city. I don't care. In his own or Newark.

Mr. Simandl: If he wasn't down there—

Mr. Wachenfeld: (Interrupting.) He said he was down as far as Bloomfield Avenue Centre.

A. You could see an automobile that distance.

Q. With headlights on? A. Yes.

Q. You couldn't see it any greater distance than that? A. You didn't ask me that.

Q. Could you? A. Yes, you could.

Q. Could you see a pedestrian that many feet away? A. You could.

Q. How far away could you see automobile headlights? A. A hundred and fifty feet.

Q. Three time this distance? A. Yes.

Q. More or less than that would you say? A. About a hundred and fifty feet.

Q. How long did this conversation all told that you had with Krauth that night take? A. Why, I wouldn't judge over two minutes.

Q. All of it? You hadn't been at that intersection before Krauth got there? You about arrived there at the same time he did, didn't you? A. I must have arrived there ahead of him because he told me—

Q. (Interrupting.) But it was practically the same time? A. Just a minute or so.

Q. You don't know whether before you got there at that intersection down at Bloomfield Avenue, whether one car had stopped or parked there or whether a dozen cars had stopped and parked there, do you? A. Not before I got there, no.

By Mr. Simandl:

Q. You came down Bloomfield Avenue? A. Yes, east.

Q. And you proceeded down Bloomfield Avenue for what distance? A. On Ridgewood Avenue.

Q. How far did you travel on Bloomfield Avenue? A. One block.

Mr. Simandl: That's all.

By the Court:

Q. Now, as I understand you, the substance of what you were told was that night that an accident had occurred in Newark, clothes had been torn off this child by a collision, and that the men who were telling you this had preceded or were preceding the car that caused the accident, and you were to look out for the car when it would come up later? A. I don't know how you would say it, but the information he gave me was that an automobile had struck a young girl below the city line, tore the clothes off her, and was coming this way.

Q. And he wanted you to look out for it? A. I figured there was a possible chance he might turn into a side street.

Q. But you understood that those men who were telling you that had gotten ahead of the automobile that caused the accident? A. I don't know.

Q. Wasn't that the substance of the information that he conveyed to you? A. It seemed to me because he said it's coming this way.

Q. Are you sure he said he was coming this way? A. I am positive he said he's coming on this way.

Q. When you got in your mind that this man was coming this way and they had lost him, as you say, did you ask him how they lost him? A. No, he didn't tell me.

Q. I asked you did you ask him? A. No.

Q. Did you ask him where he last saw him? A. No, I did not.

Q. Did you ask him how he happened to lose him? A. No, sir.

Q. Did you ask him if he ran ahead of the man, whether he turned off at some place, or anything else? A. No. He gave me the impression—

Q. (Interrupting.) No. I am asking you what you asked him, not what impression you got. A. No, I didn't ask him. I only asked him for the number and description of the car.

Q. And you knew—he told you before you asked for the number that he had said he had lost him? A. Yes.

The Court: All right.

By Mr. Simandl:

Q. Did you understand the Court's last question that you knew before he told you the number of the car, before you asked him for the number of the car that he had lost him—did you understand that?

Mr. Wachenfeld: I don't think it is the province of counsel to do that. If the witness doesn't understand something, the witness can tell us so.

The Court: Now, then, of course the jury are the judges of these matters and not the Court.

By the Court:

Q. Do you want to change anything or explain anything about your testimony? A. Yes.

Q. Go right ahead. A. I asked the man if he knew the number of the car and he told me no. I then asked him if he knew the make of the car and he said, "No. He lost us."

Mr. Wachenfeld: We have covered all that.

Q. That's all you have to say? A. That's all.

Q. You go from Newark to Glen Ridge frequently, do you not? A. I do.

Q. And Ridgewood Avenue is much higher than Bloomfield Avenue, is it not? A. It is.

Q. And higher than Newark? A. Yes, sir.

Q. Now, are the conditions of fog at Ridgewood Avenue and Glen Ridge the same as the conditions of fog had been on or at Bloomfield Centre and Newark?

Mr. Simandl: I object to your Honor's question on the ground—

The Court: (Interrupting.) Very well, the question will not be answered.

FRANK ANDERSON, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. What is your business? A. Police officer.

Q. Connected with what department? A. Glen Ridge.

Q. Were you connected with the Glen Ridge Police Department on or about May 15th? A. I was.

Q. What time did you report for duty that night? A. Eight o'clock.

Q. What was your tour of duty that night? A. From eight to four.

Q. When did you leave headquarters that night? A. About a quarter to nine in the police car.

Q. Where did you go? With whom were you? A. With Lieutenant Higgins.

Q. Where did you go? A. We went down Ridgewood Avenue and Officer Fagin was not at the corner,

so Lieutenant Higgins pulled over Ridgewood Avenue looking for him. We went about a hundred and fifty feet and Fagin was standing on the sidewalk and we turned around and started towards the corner, and as we did another car pulled up and I saw Fagin talking to him a minute and I seen him pointing to the police car like that (indicating with outstretched hand) so I says to the Lieutenant, "I think Fagin wants us," so he pulled to the curb and stopped, and this other car came up alongside of us and Officer Fagin and Krauth got out of it, and Krauth told the Lieutenant that a child was struck down at the street line and the clothes torn off her and it came up this way but he lost it on the way up. So Lieutenant Higgins says, "What was the number of the car?" He says, "I don't know. We didn't get it." So Lieutenant Higgins asks him, "What kind of a car was it?" He said he didn't know the make of the car.

Q. Did he mention Cosgrove's name at any time during that conversation? A. He did not.

Q. What kind of a night was this? A. Real foggy that night.

Q. Anderson, before you went down to the corner, did you do anything with the car? A. We got out at the police garage and put gas in it.

Q. About what time were you at the corner of Ridgewood Avenue and Bloomfield Avenue? A. I should judge about ten minutes to nine or eight minutes to nine. It only took four or five minutes to go from headquarters down to Ridgewood Avenue.

Q. Did you notice any car parked at the safety isle? A. I did not.

Q. Did you look in that direction? A. Yes. I was looking all over.

Q. Did Krauth in his conversation mention to any-

one present that a car was out there or that the car was out there? A. He did not, no.

Q. If a car were parked at the corner of Ridgewood Avenue or near the safety isle on Ridgewood Avenue and Bloomfield Avenue, would you have been able to see it? A. Certainly.

Q. Did Fagin do anything then? A. Why, Lieutenant Higgins told him to go out in the middle of the road and watch for any damaged cars coming through, if any mudguard were damaged or headlights or anything like that, and if there was to bring him up to headquarters.

Q. Was there anything said by Krauth about a damaged mudguard or a damaged light to you? A. No, not a thing.

Mr. Simandl: That's all.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. You say you could have seen this car. That includes the presumption on your part that you looked to see if there was one there or not, doesn't it? A. If I looked, yes.

Q. But you wouldn't see if you didn't look, would you? A. You generally look around.

Q. Did you look that night and at that spot, that's the question? A. I wouldn't say I looked that night, but if a car had been parked—

Q. (Interrupting.) Just a minute. I am asking you if it is not a fact that in answering to the question by Mr. Simandl you included in it an assumption that you looked for the car?

Mr. Simandl: I object. That is asking the witness for a pure conclusion.

The Court: He says he didn't look.

Q. You weren't parked there at the intersection of Ridgewood Avenue and Bloomfield Avenue for ten minutes, were you? A. No, we wasn't.

Q. And it was within a few seconds or a minute after you stopped there that you saw this automobile drive up to Officer Fagin, and then the car came back to where you were. A. Yes. This other car followed us right down to the corner.

Q. All right. When that car got down who spoke first? A. Krauth got out of the car. I didn't do any talking at all.

Q. Who did the talking? A. Lieutenant Higgins.

Q. And did Lieutenant Higgins ask him for the number of the car? A. Yes. He said, "What was the number?"

Q. What did he say? A. "I didn't get the number."

Q. What did Krauth say about the car coming up after the accident happened? A. He said, "We lost it on the way up."

Q. Did Lieutenant Higgins ask him where he lost it? A. No, he did not.

Q. Did he make any inquiry as to where this car had been lost? A. I didn't hear him.

Q. Or as to how it had been lost, if it had gone off into a side street or passed him or how? A. He didn't say.

Q. Did you hear Lieutenant Higgins make any inquiry about that? A. No. I said no.

Q. How long did you talk to Krauth all told? A. I didn't talk to Krauth at all.

Q. How long did the conversation take place between Krauth and Higgins? A. Three or four minutes probably.

Q. At the end of that three or four minutes you

didn't see any car parked down on Bloomfield Avenue, did you? A. I didn't see any car parked there at all.

Q. You didn't look for one until after Krauth spoke to you about it, did you? A. I didn't look for any at all.

Q. Did you see these other two boys, Dever and Shaw? A. I did not.

Q. Did you see them at all that night? A. No. If they were there I didn't see them.

Q. And if you didn't see them you didn't have any conversation with them? A. I did not.

Q. This was a foggy night, wasn't it? A. Yes.

Q. How far could you see? A. Around two hundred to two hundred and fifty feet. It is well lit up there.

Q. By standing out in the light or looking in the dark? A. The whole corner is pretty well lit up. You would be standing in the light wherever you stood.

Q. That corner isn't two hundred feet square, is it? A. You could see two hundred feet pretty near each way.

Q. You would be standing where the light is most intense at the corner? A. Yes, near the safety isle.

Q. And you would be looking into a section that was darker than the section in which you were standing, wouldn't you? A. I don't get you.

Q. You say you can see two hundred feet from the centre? A. Yes.

Q. And it was very well lighted? A. Yes.

Q. The corner was lighted better than the section of the road that was two hundred feet away from the corner, or from the centre, wasn't it? A. Yes.

Q. So you were standing in the light looking in

the dark, weren't you? A. I was and I wasn't. It depends which way you was looking. If towards Bloomfield, there is another spotlight. If towards Montclair it is dark.

Q. How far away from Ridgewood Avenue is the other spotlight? A. There is another spotlight on Hillside Avenue.

Q. How far away is Hillside from Ridgewood? A. About seven or eight hundred feet away.

Q. And you could see seven or eight hundred feet from Bloomfield Avenue down towards the other spotlight? A. No. I said you could see better towards the spotlight.

Q. How far? A. Half way down the block.

Q. In other words, you couldn't see a distance of four hundred or five hundred feet if you were standing in the dark and putting an automobile or pedestrian under the spotlight? A. I didn't say I was standing in the dark.

Q. Assume you put a person or an automobile, if you like, at the intersection of Ridgewood Avenue and Bloomfield Avenue, and you are standing down on Bloomfield Avenue looking toward Newark; how far could you see that object?

Mr. Simandl: I object. There is no testimony that he ever did. He was asked his estimate of what could be seen from where he stood, and he has told it. Now the prosecutor is asking him to estimate or assume another position which is not in the evidence, and I say certainly he cannot give an opinion based on something that never happened unless there is testimony that it did.

Mr. Wachenfeld: If the witness said he

looked from the light into the dark we ought to know you can't see very far and I have got to take his answer.

Mr. Simandl: He said he was standing on a portion of the highway where there was a great deal of light in both directions, the best lighted part in the city, and including the lighted part and including the dark part there was two hundred feet he could see in every direction.

The Court: I think you (addressing Mr. Wachenfeld) you had better confine yourself.

Mr. Wachenfeld: I withdraw it.

Q. Could you see that spotlight from Ridgewood Avenue? A. You could if you stand in the road.

Q. Did you stand in the road? A. No.

Q. If you stand in the middle of the road, you say, you could see seven or eight hundred feet way up on Hillside Avenue where the other spotlight is?

Mr. Simandl: I object, if your Honor please.

The Court: Sustained.

Mr. Wachenfeld: This witness said you could see it if you were in the middle of the road.

Q. Didn't you say a minute ago that if you were in the middle of the road you could see this far, seven or eight hundred feet away? A. Yes, certainly.

Q. Do you know that to be a fact? A. It all depends on the night.

Q. Did you know that to be a fact on that night? A. Not that night. I wasn't in the middle of the road that night.

Q. When you say you could only see three hundred

feet what conditions do you include in that answer? A. It was foggy that night.

Q. Where could you see three hundred feet? A. It all depends where you were standing.

Q. Where were you standing when you came to that conclusion? A. I was sitting in the car.

Q. When you came to the conclusion you could only see three hundred feet? A. I was sitting in the back of the car.

Q. Looking in which direction? A. Not looking in any particular direction.

Q. How do you know you could see only three hundred feet? A. Looking in any direction you could see that.

Q. Which direction were you looking in when you came to the conclusion you could only see three hundred feet? A. I don't understand your question.

Q. What is there about the question you don't understand? A. You say you come to the conclusion.

Q. That's what I want to know. How you came to that conclusion. A. I was sitting in the car looking out one side and probably looking out another. You don't pick out one particular direction to look at.

Q. This car was where it was light, wasn't it? A. Yes, it was.

Q. And you were looking toward the dark, weren't you? A. All directions. What do you mean?

Q. Which way did you look from the corner of Ridgewood Avenue and Bloomfield Avenue so you would get more light than was had at that particular corner? A. If you looked down towards Bloomfield you could get more light.

Q. Where on Bloomfield would there be more light than on that particular corner? A. Below Ridgewood Avenue.

Q. How far below Ridgewood Avenue? A. The whole distance there because one spotlight is shining this way and the other one up that way and the rays come together.

Q. Where is the other spotlight? A. One on Bloomfield and Ridgewood Avenue and the other at Bloomfield and Hillside Avenue.

Q. I thought you said you couldn't see the spotlight on Hillside from where you were seated in the car? A. You couldn't.

Q. Did you go out in the roadway and look? A. No.

Q. How do you arrive at that conclusion, then? A. Because I know.

Q. How do you know? A. I've stood in the centre on traffic duty.

Q. On foggy nights? A. Lots of nights.

Q. You could see that spotlight on Hillside Avenue from Ridgewood Avenue? A. Certainly.

Q. And you could see an automobile when it was under that spotlight? A. Yes.

Q. And that was seven or eight hundred feet away? A. Yes.

Mr. Wachenfeld: That's all.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. Did you drive around other parts of Bloomfield Avenue? A. I think we did, yes.

Q. Were you able to see? A. As I said before, up towards Montclair it was very dark. Down towards Bloomfield it is lighter and you could see more.

Q. And as you drove along did you have your windshield down or open? A. The windshield was open.

Q. Was it necessary to have the windshield open?

Mr. Wachenfeld: I object.

Q. Could you see through the windshield?

Mr. Wachenfeld: I object. It is immaterial.

The Court: He says he had the windshield open. Let that stand.

Mr. Simandl: That's all.

HERMAN WINARSKY, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Mr. Winarsky, what is your business? A. Free lance court stenographer.

Q. And as such have you taken down proceedings in the courts of this state? A. I have.

Q. In what courts have you taken down proceedings? A. The Chancery Courts, the District Courts, the Police Courts, the Workmen's Compensation Court.

Q. Have you acted for any vice-chancellors of this state? A. I have.

Q. And have you taken proceedings in other courts? A. I have.

Q. And how long have you been engaged as a court stenographer? A. About five and a half years.

Q. Did you take down an examination held on May 18th, 1923, in the Second Precinct Criminal Court before his Honor, John F. Murray? A. Yes, sir.

Q. At that time was there a witness by the name of Daniel Dever? A. There was, sir.

Q. At that time was Daniel Dever asked the following question and did he give the following answer: "Did you catch the car that you found was going past you fast and made you say somebody was stepping on it and the child was being seen going across the left side of the street?" and the answer was, "I took it for a Ford, but it was the one that"—

The Court (interrupting): Were you there officially?

The Witness: Well—

Q. (Interrupting.) You were there employed by me to be there? A. Yes.

Q. And you are employed by other lawyers to take proceedings in the Police Court? A. I am.

Q. There is no official stenographer in the Police Court, is there? A. No, sir.

Q. And anyone can employ you to take down proceedings in any court wherein there is no official stenographer? A. Yes, sir, that's right.

Q. Now, was Daniel Dever asked the following questions and did he make the following answers at the examination before referred to: "Q. What was said to him, the defendant? A. He didn't say a word to him. Q. Didn't anyone tell him he hit a woman? A. The kid told him." A. He was asked those questions and he gave those answers.

The Court: Are you testifying from recollection or are you testifying from notes?

The Witness: From my notes.

Q. In other words, you say you have notes which say that that is true? A. Yes.

Q. Have you any recollection of the subject? A. No, I have no recollection.

Q. And those notes are accurate that I have been reading and that you are verifying? A. They are, sir.

Q. And you accurately transcribed those notes? A. I did, sir.

Q. Was Daniel Dever asked the following question, and did he make the following answer on the examination referred to: "Q. How fast was the car going at the time? You saw this car going"—

Mr. Wachenfeld (interrupting): Just a minute. I object to that on the ground that the witness Dever admitted that on his cross-examination, and there is no necessity for any rebuttal of that testimony.

Mr. Simandl: I have no recollection of that at all, if your Honor please. In fact I believe that Mr. Dever very strongly denied he ever said that.

The Court: Of course the only testimony this witness would give is as to the statements which Dever denied.

Mr. Simandl: I asked him that question and his reply—this is my impression—was that he did not remember saying anything like that.

The Court: We haven't got time to go over the record so I will allow it.

Q. Did he answer "thirty miles an hour"? A. He did, sir.

Q. And did he at the same examination, or was he asked the following questions and did he make the following answers: "Q. You thought it was a Ford? A. I thought it was a Ford. I thought it was a Ford. Q. Yes, that's what I am asking you. A. I did think it was a Ford." A. The previous answer was, he

said, "I thought it was a Ford. I thought it was a Ford? Q. That's what I am asking you. A. I did think it was a Ford."

Q. Did he so testify? A. He did, sir.

Q. Now, I ask you, did the witness by the name of Frank J. Shaw testify on that examination? A. He did, sir.

Q. Was he asked the following question and did he make the following answer: "Q. How fast was the car going up Bloomfield Avenue?"

Mr. Wachenfeld: I object on the ground that there is no necessity for any rebuttal testimony on the ground that Shaw said he thought he did testify that way in the Police Court.

Mr. Simandl: He testified that he said the car was going forty to forty-five miles an hour.

The Court: Didn't you read him that while he was on the stand?

Mr. Simandl: Yes, your Honor, and he denied it or he said this: "I don't remember saying that," or "I don't think I said it"—words to that effect. There is no admission here at all of this testimony.

The Court: All right. Proceed.

Q. What answer did he make to that question? A. "I should judge thirty miles an hour and more."

Q. Was he asked the following questions and what answers did he make to those questions: "Where was the rip?" What answer did he make to that question? A. The question was "Where was the rip? A. At the bottom."

Q. What was the next question? A. "Q. At the bottom where? A. On the body."

Q. All right. Was there a question asked him in the same examination and what answer did he make? "Q. What time was this?" A. That question was asked, and the answer was "I should judge it was about eight-fifteen or after. I don't know the positive time because I jumped on a car and raced after this man."

Mr. Simandl: That's all.

Mr. Wachenfeld: No cross-examination.

JOHN A. WEBB, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Mr. Webb, where do you live? A. 11 Harmon Street, Glen Ridge.

Q. Do you remember the night of May 15th, 1923? A. I do.

Q. Whom were you with on that night, if anybody? A. I was with a friend of mine, Mr. James Millard.

Q. Where were you on your way to? A. To the movies.

Q. Where did you stop in, if any place? A. I stopped on the southeast corner of Ridgewood Avenue.

Q. Did you see any persons there? A. I seen Mr. Krauth.

Q. Did you see any other persons? A. I seen Daniel Dever and some gentleman he was with.

Q. When you got there where were they? A. Mr. Krauth was conversing with Lieutenant Higgins.

Q. Where was Dever and the other man? A. He

was conversing with Daniel Dever and his friend was coming across Bloomfield Avenue.

Q. Did you see any car parked on Bloomfield Avenue? A. I did not.

Q. Did you see the police car there? A. I did.

Q. Did you see a Buick roadster there? A. I did.

Q. Who was in that car? A. Why, I don't think anybody was in it. Mr. Krauth was on the outside of it.

Q. Was there a conversation out there with Krauth? A. There was.

Q. Did Krauth say that a car—

The Court (interrupting): Don't lead your witness.

Mr. Simandl: But, if your Honor please, this is something that I laid a foundation for.

The Court: You mean contradiction?

Mr. Simandl: Yes.

The Court: Go ahead.

Q. Did Krauth say a car had struck a child at the city line in Newark and that it had torn the clothes off the child? A. He did.

Q. And that he was coming through and that he lost him? A. He did.

Q. What kind of a night was this? A. Very foggy evening.

Q. Did he mention the name of Cosgrove in connection with this conversation? A. He did not.

The Court: He didn't say he mentioned Cosgrove to the police. I think he distinctly said he did not.

Mr. Simandl: I have asked a direct question and he has answered it.

The Court: What is the use of it? There is no dispute on that subject.

Q. Did he mention the make of the car? A. He did not.

Q. Did he give the license number of the car? A. He didn't know the license number.

Q. Did he say the car was out there? A. He did not.

Q. Did Lieutenant Higgins say to him that he wouldn't chase any car on that night, that he didn't want to break his neck? A. He never made no assertion like that.

Mr. Simandl: That's all.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. Do you know Lieutenant Higgins? A. I do.

Q. How long have you known him? A. Practically all my life.

Q. Do you know Officer Anderson? A. Yes, sir.

Q. And Officer Fagin? A. I do.

Q. Before this thing happened you didn't know Krauth, did you? A. I did not, no, sir.

Q. You didn't know this man Shaw, did you? A. No.

Q. Don't you know the name of the other man who was up there that night? A. I do not. I know now.

Q. But you didn't know it at that time? A. No, sir.

Q. You know now it was Shaw, don't you? A. If it was the man with Dever, yes.

Q. You were here every day at the last trial, weren't you? A. Yes.

Q. And you were up in the police court, too, weren't you? A. I might recall his name.

Q. If you can't recall this man's name after having heard it so frequently, how is it you can go back to May and recall so distinctly the conversation that occurred that night? A. I don't know the name of the man who was with Dever.

Q. Didn't you hear Shaw testify at this last trial? A. I don't think I did.

Q. Weren't you here all during the last trial? A. I was.

Q. Were you here yesterday? A. No, sir.

Q. And during the last trial didn't you find out the name of this man who was with Dever at that time? A. I did know. I don't know his name.

Q. Weren't you here when he testified? A. I might have been. I might not. I wasn't here the first day.

Q. The first day of what? A. The last trial.

Q. Weren't you here when Shaw testified? A. I don't know the man. I might know him to see him.

Q. You don't know his name now when I mention it to you? A. If he was the man with Dever I would recognize him.

Q. And that is the first time you say you heard that the name of the man who was with Dever was Shaw when I mentioned it? A. Positively.

Q. How soon after this incident was it when someone spoke to you about what you heard that night? A. About two or three days after.

Q. Who first spoke to you about it? A. I think it was Mr. Simandl's secretary.

Q. Do you know who that is? A. Do I know him?

Q. Yes. A. No, I don't see him.

Q. Is it Mr. Simandl's brother who is the last man at that counsellors' table (indicating)? A. No. I think the gentleman wore eyeglasses.

Q. He spoke to you about this three days after the thing happened? A. Yes.

Q. Between that time and the time you had the conversation with the man with the eyeglasses you didn't speak to anybody about it? A. No, sir.

Q. There was no particular reason for paying attention to every word spoken that night, was there? A. No, sir.

Q. But you can remember every word that was and was not said? A. Part of it.

Q. Don't you remember distinctly what was said that night? A. While I was there I do.

Q. Wasn't there more or less excitement at the time? A. There was.

Q. You say that Krauth told them this accident happened near the city line? A. I did.

Q. Did you hear Krauth tell them the car was out there? A. I did not.

Q. What did you hear Krauth tell about the car? A. I heard him say the car was on his way up here and they lost him.

Q. Did you hear anybody ask him where they had lost it? A. I did not.

Q. Didn't you think it was rather strange, you being there hearing a man make a report of an accident of this kind and not a single solitary soul ask him where the man lost it?

Mr. Simandl: I think that is absurd and objectionable, and the prosecutor knows it.

Mr. Wachenfeld: I withdraw it.

Q. You didn't hear anybody make any inquiry that night where the car was lost? A. No, sir.

Q. Did you hear anybody tell any of the police officers about the fact it had a damaged mudguard and damaged lamp? A. No, sir.

Q. Did you hear Higgins give any instructions to Fagin? A. To go out in the middle of the road and watch for cars coming up.

Q. What kind of cars? A. Any car that looked damaged.

Q. Didn't he say, "Fagin, go out in the middle of the road and look for a car with a right damaged mudguard and damaged headlight"? A. That's what I said.

Q. No, you said to look for any cars that were damaged. Now, which did he say? A. He told him to go out and look for any car with a damaged mudguard or damaged headlights on.

Mr. Wachenfeld: That's all.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. Did anybody there say anything about any car having on a damaged headlight?

Mr. Wachenfeld: I object to that.

The Court: He just told you that.

Q. Did Krauth tell anyone there that the headlight or the fenders of the car were damaged?

Mr. Wachenfeld: That is objected to on the ground it is leading.

The Court: It is leading, but he can answer the question.

A. He did not.

Mr. Simandl: That's all.

Defendant's Witness, John A. Webb, Re-cross

RE-CROSS EXAMINATION by Mr. Wachenfeld:

Q. So, you don't know where Lieutenant Higgins got this information on which he based his order to Officer Fagin about looking for a car with damaged headlights and a damaged fender.

Mr. Simandl: I object to that, if your Honor please. There is no testimony of any information, and I think a police officer would tell any man to do that.

The Court: The question, I think, is entirely proper.

Mr. Simandl: May I ask your Honor to have the question read?

Mr. Wachenfeld: I withdraw it.

Mr. Simandl: May I state to your Honor that he spoke of his information with respect to Lieutenant Higgins, and that is what the question said.

Mr. Wachenfeld: I've withdrawn the question. That's all.

By the Court:

Q. Now, where were you standing when this conversation was heard? A. I was standing on the southeast corner of Ridgewood Avenue.

Q. And Bloomfield Avenue? A. Yes, sir.

Q. The southeast corner, that is the corner next to the school? A. No, that is the opposite corner.

Q. The opposite corner? A. Yes; that is, towards the railroad station.

Q. Were you on the upper side of the avenue towards Montclair, I mean of Ridgewood Avenue, or the lower side? A. Lower side.

Q. Now, then, right across the street is this isle that was spoken of here with a spot light? A. Yes.

Q. If any car had been standing there, you could have seen it, couldn't you? A. I could, yes, sir.

Q. Exactly. When the officers discussed this matter, when Krauth talked about it and they talked about it, when Krauth referred—I withdraw that. When Krauth referred to having lost the car, did he say anything to anybody that it was a car that was expected to come up the avenue, or that the car had been lost because he had gone up further the avenue towards Montclair? A. He did not. All he said was he lost the car.

Q. He said nothing to indicate it was a car that had yet to come towards Newark or whether it was a car that had passed on and gone to Montclair? A. No.

By Mr. Simandl:

Q. Did you look across the street in the direction of the spot light? A. I went over there. I didn't look at that time, but I went over after on my way to the movies.

Q. Where did you—did you see Dever? A. I recognized Daniel Dever coming across the street with some other chap there.

Q. From where he was coming was there an automobile? A. There was not, no.

Mr. Simandl: That's all.

By Mr. Wachenfeld:

Q. Where was he coming from? A. He was coming right from the car tracks, the middle of the car tracks.

Q. You didn't see him until he got in the middle

of the car tracks? A. In the direction of the police car.

Q. You didn't see him until he was in the middle of the car tracks, that's my question. A. Practically on the other side of the street, but I only recognized him when he was in the middle of the car tracks.

Q. What side of the street was he coming from? A. He was coming from the northeast corner.

Q. Listen to this question which was asked you at the last trial: "Did you see any other persons there? A. I did. Q. Who? A. The man who was on the witness stand by the name of Krauth and two tall young chaps, one Daniel Dever. Q. Where were they? A. When I got there they were coming across the street. Q. From what side? From where? A. From some place, I don't know." Did you answer that that way? A. I did.

Q. Is that true? A. That's in the middle of the street.

Q. Is that true? A. Yes.

Q. So you don't know where they were coming from? A. I couldn't say, no.

Q. And you didn't see Dever and this man who was with him coming across any part of Bloomfield Avenue until after this two or three or four-minute conversation that took place between Krauth and the police officers? A. I seen him walking towards the police car.

Q. After or before the conversation that Krauth had with Lieutenant Higgins? A. During the conversation.

Q. What part of the conversation, the middle? A. I can't say the middle. The conversation had just started.

Q. So that Dever and Shaw got there while that

conversation was still going on? A. Yes, sir, that is positively.

Q. And then Lieutenant Higgins turned to Dever and Shaw and asked them all about this accident, didn't he?

Mr. Simandl: I object.

The Court: Sustained.

Q. Did Lieutenant Higgins say anything to Shaw and Dever? A. He did not. He was talking to Krauth.

Q. Did he say anything to either one of those men? A. Not as I know of.

Q. Did you know at that time that these two men had been in the car? A. I didn't see them in the car.

Q. Did you know they had been in the car that chased the other car? A. No.

Q. When did you first find that out?

Mr. Simandl: I object. That is not an issue of fact to be tried out here.

Mr. Wachenfeld: What is the issue of fact?

Mr. Simandl: As to whether they chased the other car.

The Court: I think the question is a proper one.

Mr. Wachenfeld: I'll withdraw it as long as there is an objection.

Q. When did you first find out that these two men, Dever and the other man, when did you know they were interested in any way in this incident? A. Why, after I found out I read it in the paper the next morning.

Q. So that you didn't know until the next morning

that these two men, one being Dever, had anything to do with this case at all, did you? A. I don't get your question.

Q. I'll repeat it for you. You didn't know, then, according to the statement you just made, until the next morning that these two men, one being Dever, had anything to do with this accident at all, did you? A. I knew that that night.

Q. Did you know it at the time that that conversation was going on? A. I didn't know whether they were with Mr. Krauth or not.

Q. Did you know at that time when Krauth was talking to Lieutenant Higgins and those two men came there, did you know at that time that Dever and Shaw had anything to do with this thing? A. No.

Q. You didn't find that out that night? A. No.

Q. But you saw these two men right there, didn't you? A. I did.

Q. They were right near you? A. They were.

Q. Did anyone ask them any questions? A. Not as I can recall.

Q. Did you see this Buick car go away? A. That I couldn't say.

Q. Why not? A. Go away from there?

Q. Yes. A. No, I didn't.

Q. How long did you stay there? A. Well, from five to ten minutes while the excitement was going on.

Q. This conversation lasted as long as five or ten minutes? A. No, not quite five minutes.

Q. What was going on for the five minutes that you stayed there? A. I was waiting for a trolley to go to the movies.

Q. And while you were still there the conversation had entirely closed, had it? A. As far as the accident is concerned, yes.

Q. Did Krauth continue to stay there? A. That I couldn't say. I didn't look around.

Q. Don't you know whether you went away from that scene before Krauth did or whether you went after Krauth? A. I don't know. I couldn't say.

Q. Why not? A. I wouldn't want to say unless I was sure.

Q. Did you see where these two other boys went to? A. I did not.

Q. Did you see the police car there? A. I did.

Q. Where was that parked? A. That was parked in the southeast corner of Ridgewood Avenue.

Q. Did you know Dever before this night? A. I did.

Q. Did you know him on this night? A. I did.

Q. Listen to this question by Mr. Simandl on page 189: "Direct-examination by Mr. Simandl: Q. Did you know Dever? A. No, sir. Q. You didn't recognize him that night? A. I did not." Is that true? A. I didn't make no such statement at the last trial.

Q. You didn't testify to that? A. That I didn't know Dever?

Q. Yes. A. No.

Q. You didn't testify as I have just read to you? A. I did not, no.

Q. You didn't testify "Q. You didn't recognize him that night? A. I did not." You didn't testify to that? A. I didn't make any such statement.

Q. Sure of that? A. Positive.

Mr. Wachenfeld: That's all.

Defendant's Witness, Henry Gallagher, Cross

HENRY GALLAGHER, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. You were formerly chief of police of Montclair? A. Yes.

Q. And you are now retired? A. Yes, sir.

Q. Do you know John Cosgrove, Jr., the defendant? A. I do.

Q. How long have you known him, Chief? A. All his life.

Q. Do you know, Chief, what his general reputation is in the community in which he resides? A. Yes.

Q. For honesty, prudence and carefulness? A. Yes.

Q. What is that reputation? A. Good.

Mr. Simandl: That's all.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. You were chief of the Police Department when Mr. Cosgrove, the defendant in this case, was appointed to the department? A. Yes.

Q. And you appointed him yourself, did you not? A. Yes, sir.

Mr. Wachenfeld: That's all.

GEORGE KRONEN, witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Mr. Kronen, what is your business? A. Automobile mechanic.

Q. Were you such on May 15th, 1923? A. Yes, sir.

Q. And where did you work prior to May 15th, 1923? A. I worked with the Service Garage, 654 Bloomfield Avenue, Montclair.

Q. On that day did you know John Cosgrove, Jr.? A. Yes, sir.

Q. Did you know him for some time prior to that time? A. Yes, sir.

Q. Did you know the car that he owned? A. Yes, sir.

Q. What was the general condition of that car? A. Bad condition.

Q. That was prior to May 15th, 1923? A. Yes, sir.

Q. Did you ever do any work on that car? A. Yes, sir.

Q. What was the condition of the fenders of the car prior to May 15th? A. Bad condition. All the fenders were in bad condition, front and back, both.

Q. I show you this photograph, D1, and ask you to look at it, please, and after you have looked at it, will you tell us whether or not the front fenders on that car as shown on that photograph were in the same condition as they are shown there prior to May 15th, 1923? A. They wasn't in the same condition there in the picture, but they was bent.

Q. And what have you to say as to whether or not

they were bent more or less than there shown in the picture? A. The picture appears to me to be bent more than they were when I seen the car last.

Q. Very much more? A. Well, they're bent more, that's all. I couldn't say how much more.

Q. Will you show the jury where? A. It seems to be bent more right in this here corner.

Q. Was that tear there? A. It started to tear from the front here a considerable distance back, but not as far as the picture shows.

Q. Now, as to the lights. Was there anything that you knew between the two lights? A. A rod running across between the two lights.

Q. Did you ever have occasion to repair that rod? A. I put one new rod on.

Q. And was that rod there before the 15th of May for any length of time? A. The rod was broken after I replaced it.

Q. Without that rod what was the condition of the lights? A. The lights were loose after the rod was broken.

Mr. Simandl: That's all.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. When prior to the night of May 15th did you notice the condition of this car? A. I believe it was—I seen the car before I went to work in the morning.

Q. You mean on the same day, the 15th? A. Yes, sir.

Q. After looking at this picture, as I understand your testimony, you say that this mudguard was not dented or damaged as badly as it appears in that picture? A. Yes, sir.

Q. Will you look at the headlight. Was it at the time you saw in the condition shown in the picture, or wasn't it? A. The headlight was bent.

Q. As much as indicated in the picture? A. Not as much as indicated in the picture.

Q. Was it bent exactly near the centre? A. Very near that but not as far as that.

Q. How was it bent when you saw it? A. Just tipped to the one side. If the light was lit it would throw the light on one side.

Q. What about the reflector on that mudguard? A. It was loose from the fender.

Q. Was it crushed down or lying down on the fender the way it is there? A. The reflector was up and upright, but it was loose.

Q. At the time you saw it that day? A. Yes, sir.

Q. It wasn't as shown by this picture at all, then? A. No, sir.

Q. Now, you say he needed mudguards all the way around. A. Yes, sir.

Q. You say these front lights without that rod between them would be loose? A. Yes, sir.

Q. There would be a little play in them, is that what you mean? A. Yes, sir.

Q. But you don't mean that they would swing or turn by themselves unless some force was applied to them, do you? A. I couldn't say how far they would turn themselves.

Q. Look at the way they are fixed there, attached to the mudguards, by a bit of malleable iron, aren't they? A. The bracket is riveted to the fenders.

Q. And that holds it in place? A. Yes, sir.

Q. And it can't swing or turn unless some force is used? A. No, sir.

Mr. Wachenfeld: That's all.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. Were there screws missing from the reflector? A. The screws were in the reflector but loose. The nuts were loose and it could rock back and forth.

Mr. Simandl: That's all.

RE-CROSS EXAMINATION by Mr. Wachenfeld:

Q. But the reflector at the time you saw it that day was standing upright on the fender, wasn't it? A. Yes, sir.

Q. It was not as appears now on this picture, was it? A. No, sir.

Mr. Wachenfeld: That's all.

It is stipulated and agreed that the testimony of Mrs. Cosgrove, the mother of the defendant, given on the former trial, shall go in in this trial as if she were in court and given it in this trial.

Adjourned to 2 o'clock.

Before Flannagan, J., and a jury.
Met pursuant to adjournment.

Newark, March 12, 1924, 2 o'clock.

Appearances:

William Wachenfeld, Esq., Assistant Prosecutor, for plaintiff;
Harold Simandl, Esq., for defendant.

Mr. Simandl: In accordance with the stipulation made between the prosecutor and myself whereby the testimony of M. COSGROVE given at the trial in this court of State against Cosgrove in November, 1923, is to be admitted into evidence, I will read the answers, or let Mr. Wachenfeld read the answers, either one, into the record before the jury at this time.

Mr. Wachenfeld: Suppose you read them your questions and I will read Mrs. Cosgrove's answers.

Mr. Simandl: All right. "Direct-examination by Mr. Simandl"—

The Court: Gentlemen, you understand this is the testimony of a witness and this testimony is being read by counsel with the same effect as if the witness were here in the chair. The witness is unable to be present on account of sickness, and so counsel have stipulated to read this testimony with the same effect as if the witness were here present in court, to testify.

The reading of said testimony by the two counsel then proceeded as follows (page 240):

"Direct-examination by Mr. Simandl:

"Q. Mrs. Cosgrove, you are the mother of John Cosgrove, the defendant? A. Yes, sir.

"Q. And in May, 1923, where did you live? A. 663 Bloomfield Avenue, Montclair.

"Q. 663? A. 663, yes, sir.

"Q. Did John live with you there? A. Yes, sir.

"Q. Do you remember the evening of May 15th, 1923? A. Yes, sir.

"Q. Do you remember what time John got home that evening? A. 8:30.

"Q. What did he do when he got in? A. He sat down to his supper.

"Q. What? A. He sat down to his supper.

"Q. Then what did he do, if anything? A. Oh, he went up to his room and dressed.

"Q. Then what time did he leave the house, about? A. I called him about five minutes of 9 and I told him it was time to go to work.

"Q. And how did he appear to you? Did he appear calm and quiet, normal? A. Oh, yes, just as calm as on any other evening.

"Q. Did he go to duty in his uniform? A. In full uniform, yes, sir.

"Q. He had been out that afternoon, had he? A. Yes, sir."

Mr. Simandl: That's all.

"CROSS-EXAMINATION by Mr. Wachenfeld:

"Q. Did your son frequently came in and eat his dinner as late as 8:30? A. Yes, sir.

"Q. Quite frequently? A. 8 and 8:30.

"Q. He was always in between 8 and 8:30? A. Yes.

"Q. You say there wasn't anything unusual in his appearance that evening? A. Not that I noticed.

"Q. And there wasn't any particular— A. No, because I was waiting with supper for him.

"Q. Because you were waiting with supper for him? A. Yes.

"Q. Is that the only time that you had to wait for him with his supper? A. No. Generally every evening. We always eat supper first and he was the last one for the supper.

"Q. But was there anything particular that directed your attention to his coming that night? A. Yes.

"Q. What was that? A. 8:30 he came in.

"Q. Well, what was there— A. I expected him any minute.

"Q. But you just said it wasn't unusual for him to come late for supper? A. Well, he came home late every night.

"Q. Of course you can't tell us about every night, whether it was quarter past eight or half-past eight that he came? A. No.

"Q. And there wasn't anything unusual about his coming home that night at that hour? A. No.

"Q. It was nothing out of the ordinary, was it? A. No, sir.

"Q. Did you hear about what happened with your son that night?"

Mr. Wachenfeld: Well, that doesn't seem to be answered, Mr. Simandl. Then the Court says, "Go ahead."

"Q. You knew that your son was arrested that night? A. Yes—that night."

Mr. Simandl: That's all.

"RE-DIRECT EXAMINATION by Mr. Simandl:

"Q. You didn't know that at the time he came home, did you? A. No. Twelve o'clock.

"Q. But when he came home that night there wasn't anything unusual about his coming home, as to whether it was 8:15 or 8:30? A. Yes, sir.

"Q. What called your attention to it just then? A. Because he was late for supper.

"Q. Who called your attention to the clock? A. Myself. Looked at it.

"Q. Why didn't you tell us— A. Did you ask me that?

"Q. Certainly. I asked you if there was—don't you remember that? A. I misunderstood you then, that's all."

MRS. MARGARET GOSSLER, a witness called on behalf of defendant, having been duly sworn testified as follows:

Direct-examination by Mr. Simandl:

Q. You are related to the defendant John Cosgrove? A. Yes.

Q. You are his sister? A. Yes.

Q. On May 15, 1923, did you see John Cosgrove? You remember? A. Yes.

Q. Where were you at that time? A. In my mother's house.

Q. What time did you see John Cosgrove that evening? A. At 8:30 when he came in.

Q. What did he do? A. After he came in he ate his supper and went to his room to get dressed.

Q. Did he put on his uniform? A. Yes.

Q. Do you know about what time he left the house? A. Five minutes of nine.

Q. Do you know what happened to him that night, later in the night? A. Not until the next morning.

Q. You heard that he had been arrested? A. Yes.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. You are married and living with your husband, are you not? A. Yes.

Q. And you live in the same house that your mother lives in; is that true? A. The same building, across the hall.

Q. What is that, an apartment house? A. Yes.

Q. And you were in your mother's apartment that night when John came home? A. Yes.

Q. Does John live with his mother? A. Yes.

Q. And does John's wife and family live with his mother? A. Yes.

Q. All of them? A. Yes.

Q. Were they living at that time? A. Yes, they had been there for quite some time.

Q. Was Mrs. Cosgrove, your brother's wife, there when he came in? A. I don't think that evening she was.

Q. Where was she, do you know? A. No, I couldn't just say.

Q. Do you know where she was? A. I couldn't just say.

Q. Do you know what time she got home that night? A. Well, after nine it was. I don't know just how much after.

Q. Were you still in your mother's apartment when she got home? A. Yes.

Q. Still there? A. Yes.

Q. You say that was after nine? A. It was after nine.

Q. After John left? A. Yes.

Q. About how long after? A. Maybe about half an hour.

Q. Were any of the children there at that time? A. In bed.

Q. In the apartment, in your mother's apartment? A. Yes.

Q. All of them in bed? A. Yes.

Q. And does your mother generally get John's supper or dinner or his meals, or does his wife usually get them? A. Well, both do.

Q. They both do? A. Yes.

Q. Isn't it a fact that his mother got his dinner or supper, whatever you call it, the meal at night, every night when he came home? A. Well, everybody had supper earlier and his was kept for him.

Q. Everybody had supper earlier? A. Yes.

Q. Weren't you waiting for John, in order to eat? A. No, I don't eat there.

Q. Did your mother eat with John? A. No.

Q. Did your mother eat with John that night? A. No.

Q. Did John's wife eat with him that night? A. No, she wasn't there.

Q. Or any of the children? A. No.

Q. You say it was what time when he came there? A. Half-past eight.

Q. What makes you know this time particularly? A. Because my mother mentioned the time.

Q. What did your mother say? A. She said, "You will have to hurry now, it's half-past eight."

Q. Did you know by any other reason or any other fact that it was half-past eight, other than the fact that your mother mentioned it? A. She mentioned it. I noticed the clock.

Q. You looked at the clock? A. Yes.

Q. Why did you look at the clock after your mother told you what time it was? A. Only seemed natural. It was right in front of me. I couldn't help but notice it.

Q. Was that after she told you what time it was? So that after she told you what time it was, you looked at the clock to see what time, if it was correct? Is that right? A. No, naturally I looked at it.

Q. Is that the reason you remembered it was 8:30? A. Yes.

Q. This is not an estimate of yours? You know it was 8:30 because of the fact that it was 8:30? A. Yes.

Q. John left at five minutes to nine? A. Yes.

Q. Did you look at the clock again to see what time it was? A. Yes, I think I did. My mother said it was five minutes to nine and I looked.

Q. This is the second time your mother mentioned the time and for the second time instead of simply taking her word you looked at the clock again to see whether she was correct in stating the time? A. Yes.

Q. And you looked at the clock again and it was five minutes to nine? A. Yes.

Q. That was when John went out? A. Yes.

Q. When John went out he was in his uniform? A. Yes.

Q. He wasn't still putting on as he left the house? A. No.

Q. Are you there pretty nearly every night? A. Yes. Mostly every night.

Q. You were there on a great many other occasions when John came home around 8 or half-past 8 or quarter of 9? A. Yes.

Q. On those other occasions did you also notice immediately by the clock what time it was exactly when he got there, and what time it was exactly when he left? A. Yes, she always noticed the time.

Q. Not she. I am asking you yourself. A. Yes, myself.

Q. Every time that John came home, whether it was 8 o'clock or half-past 7 or whether it was 8:30 or quarter to 9, you always looked at the clock to see what time John got home, is that right? A. Mostly always.

Q. What was the particular reason for your being so exact as to every night that John got home? Any reason for it? A. No, I don't think so.

EDWARD W. TOWNSEND, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Where do you live? A. My residence is in Montclair.

Q. How long have you lived there? A. Twenty-five years.

Q. Have you held any public office during that time? A. I have represented part of this county in Congress for four years and been postmaster of Montclair eight years.

Q. Do you know the defendant John Cosgrove? A. I do.

Q. How long have you known him? A. I guess all of that time. As a little boy, anyway, I remember him.

Q. Do you know his reputation for prudence and carefulness, honesty? His general reputation within the community wherein he resides? A. Yes.

Q. What is his reputation? A. Excellent.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. You gather this reputation by talking to others, do you not, Congressman? A. Oh, yes, yes.

Q. In other words, you have heard this man Cosgrove spoken of by quite a number of people in Montclair, haven't you? A. Yes.

Q. And in hearing this man Cosgrove spoken of, have you heard it while other people were speaking of him, that he has been convicted of crime? A. He pleaded guilty to some offense.

Q. Won't you answer my question? Do you understand it? A. Yes. I will have to ask if it is the same thing legally as you asked the question, to be convicted.

The Court: No, he didn't ask you that. He asked you what you heard.

Mr. Wachenfeld: Repeat the question, please.

The Witness: I can answer the question. I don't recall hearing anybody speak of his conviction.

Q. You don't recall anyone speaking of his conviction? A. No, it wouldn't be spoken of that way.

Q. So that as far as you know, these people whom you have heard speak about Cosgrove didn't know that he was convicted of crime? A. No, that isn't a fair inference.

Q. It is not a fair inference? A. No.

Q. You never heard any of these people from whom you derived your knowledge to say that his reputation is good, speak of the fact that Cosgrove had been convicted of a crime, as I understand it? A. Not in the language you use, no.

Q. Did you hear it in any language? A. Yes.

Q. What have you heard? A. What?

Q. What have you heard said about Cosgrove, and his being convicted of crime? A. They would speak of his trouble, they would speak of his arrest, they would speak of his conviction for some offense. I think it was a street fight or something of that kind.

Q. What else have you heard? A. That would cover, generally.

Q. Have you heard anything else about that? A. About what?

Q. Along that line. The information about Cosgrove and his past, as to being convicted of crime or being in trouble? A. Well, I am trying to give you an impression of the way people would speak of the trouble he had.

Q. That's what I am trying to get at. So that these people that you did hear speak about John Cosgrove knew that he was convicted of crime; or, if you will have it otherwise, knew that he had pleaded to a crime for which he had been indicted? A. Yes.

Q. So that they did know that? A. Yes.

Q. So that, disregarding that fact, did he still bear a good reputation in Montclair? A. Yes.

Q. Did you know him at the time that he was convicted? A. Yes.

Q. Was his reputation in Montclair at that time good? A. Yes, yes.

Q. Never been anything else but good? A. Have never heard anyone speak of him otherwise.

Q. Disregarding the fact that he was convicted of crime, or as you say pleaded these pleas to a crime that he had committed? A. Disregarding that.

Q. Disregarding that, his reputation was still good? A. I think so.

Q. Nobody seemed to hold any grievance against the fact that he had been convicted of crime? A. I never heard anyone.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. You yourself knew of the details regarding the alleged plea of guilty to these facts? A. Yes, I knew of the details.

Q. And you had investigated that yourself personally, had you?

Mr. Wachenfeld: I object to that.

Objection sustained.

Mr. Simandl: Exception on the ground that this matter has been brought out by cross-examination and I have a right now to inquire into the circumstances surrounding the alleged occurrence.

ALBERT GORDON, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. In May, 1923, where were you employed? A. At the Service Garage, Montclair.

Q. In what capacity? A. Manager.

Q. Is that the garage where Mr. Cosgrove stored his car? A. Yes.

Q. Did you see his car there? A. Used to see it every morning.

Q. What were your duties out there? A. Used to

manage the place and keep a watch on the cars. All cars used to come in damaged or so, I used to take care of, I shouldn't be the blame of it.

Q. Did you see Cosgrove's car prior to May 15? A. No, not May 15.

Q. I mean before May 15. A. Before, yes.

Q. Did you see it the day before May 15th? A. The day before in the morning, I saw it. When I came in at work I looked all cars over.

Q. I show you photograph D1 and ask you whether that photograph fairly represents the condition of that car at the time that you saw it on May 14? A. Yes, it was. The front left mudguard was bent in. That had been for about a month.

Q. What can you say with respect to the lamp? A. The lamp had been that way always, turned; the back of it was turned out and toward the radiator, the head—to the right.

Q. What was the condition of the mirror? A. The mirror was bent.

Q. Was it bent as much as that? A. I can't tell on the picture the way it is.

Q. It was bent? A. It was bent.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. What do you mean, you can't tell on the picture? A. Well, I can't tell how far away it is from the mudguard.

Q. Look at the picture. A. It is bent. It was bent. Maybe it's a little more bent now and I can't tell.

Q. Never mind the "maybe." Just look at that picture and answer the question Mr. Simandl asked you as to whether or not the reflector, as we

have been calling it, or the mirror on the mudguard was bent as much the day before the 15th—which would be the 14th—of May as it is shown on that picture? A. It was bent as much; I don't know.

Q. Why don't you know? A. I can't tell on the picture.

Q. What is the matter with the picture? Doesn't the picture show how much it is bent? A. I know it was bent over. I never noticed how far away.

Q. Doesn't the picture show how much it was bent? A. Yes; the picture shows.

Q. Did you see it before the 15th? A. Yes.

Q. Was it bent as much as it is shown on that picture? A. No; it wasn't bent as much as it is shown on that picture.

Q. How much was it bent? A. How much? I didn't measure it.

Q. Can't you give us some idea? A. Must have been two or three, two inches away from the mudguard.

Q. Two inches away? A. Two or three inches.

Q. Which part of it was two inches away from the mudguard? A. Bent up. In the space between.

Q. The space between what part of the mirror and the mudguard was two inches? A. The facing of it.

Q. Did you hear this McGannon testify, or Gannon—Cronin; did you hear Cronin testify? A. Yes.

Q. Did you hear Cronin testify that that was all correct at noontime of May 15th, and that reflector was standing upright on that mudguard? A. He couldn't see it.

Q. What? A. He couldn't see the car there.

Q. How do you know? A. Because his place was upstairs. When he used to come to work he used to come upstairs in the shop.

Q. Were you there at noontime May 15th? A. I was there in the morning. No.

Q. Were you there at noontime? A. Yes.

Q. Why did you say you were not? A. I come in the morning and stay there.

Q. How long did you stay there? A. Until lunch time.

Q. What time is that? A. 12 o'clock.

Q. Did you go to lunch then? A. Yes.

Q. What time did Cronin go to lunch? A. Twelve.

Q. Go to lunch with you? A. No, not with me.

Q. Were you there when he left the garage? A. No; I left before.

Q. Didn't you hear Cronin testify that he saw this car at noontime on May 15? A. I didn't hear him.

Q. Did you hear him? A. I didn't hear him.

Q. Were you here this morning? A. Yes.

Q. Here yesterday? A. No.

Q. Did you hear Cronin testify? A. Yes.

Q. Is he still employed up there at that garage? A. No.

Q. Was he employed up there? At that time? A. Yes.

Q. Did you hear him testify that he saw this car at noontime on May 15th and that reflector was standing upright? A. I didn't hear him testify the 15th.

Q. Didn't hear him testify that? A. Not the 15th.

Q. Did you hear him testify that—did you hear him testify this morning that he saw the car before or prior to the 15th of May and that when he saw it last, that reflector was standing upright on that mudguard? A. Yes, I heard, but the day I didn't hear.

Q. You heard him testify, did you? A. I heard him testify.

Q. You say that reflector was bent? A. Yes.

Q. How much was it bent? A. About three inches away from the mudguard.

Q. Which part of it? A. The bottom of it.

Q. The bottom is fastened right to the mudguard? A. Well, this (indicating) is the bottom where the reflector is. That is the bottom by me.

Q. You consider the top of it the bottom, is that it? A. This is the stamp of it.

Q. That was bent that way for how long? A. About three weeks.

Q. How long was the mudguard bent? A. The same thing.

Q. Only three weeks? A. About three or four weeks. I can't exactly remember.

Q. Sure about that? A. Yes.

Q. How long has the light been that way? A. The same way. When the car came in one morning I noticed everything was bent.

Q. You noticed everything? A. Yes.

Q. You didn't testify at the last trial, did you? A. I wasn't here.

Q. You didn't testify at the last trial, did you? A. I was not here.

Q. Did you testify at the last trial? A. What last trial?

Q. The last trial of John Cosgrove. A. I wasn't here.

Q. Did you testify? A. No.

Q. Why don't you say so? Who was Sussman up there? Does he own that garage? A. Yes.

Q. Are you in partnership with him? A. No, I was working there.

Q. You were working there? A. Yes.

Q. It isn't a fact, is it, that that mudguard was

bent for a period of seven or eight months before that accident happened? A. Seven or eight months? No.

Q. Before May 15, 1923? A. No, no.

Q. You are sure about that? A. Yes.

Q. It was only bent two or three weeks before; is that right? A. Yes.

Q. Positive about that? A. Positive about that.

Q. Mr. Sussman, was he in or about that garage during the month of May and for six or seven months before that time? A. Yes, he was there.

Q. He was there pretty nearly every day? A. Pretty nearly.

Q. He noticed the condition of this car, of those cars in that garage? A. He was an experienced man. He doesn't know about cars. He used to stay in the office.

Q. He never looked at every car, did he? A. Why should he?

Q. You never saw him? A. Sometimes used to go out and just take a glance at it. But his business wasn't to look at every car.

Q. Did you ever see him take a glance at Cosgrove's car? A. I never did.

Q. Were you employed there during the daytime or at night? A. I was employed from seven o'clock or eight, to ten at night.

Q. Were you there frequently at ten o'clock? A. Yes.

Q. At night? A. Yes. Sometimes until ten.

Q. How frequently until ten? A. Well, if Sussman used to come in the place and let me off, I used to go home.

Q. Where were you in November of last year? A. In the garage.

Q. In the garage in Montclair? A. November last? Was it 1923?

Q. That's last year, isn't it? A. Well, in the garage.

Q. Where were you living in November of last year? A. Cauldwell.

Q. Were you there all during the month of November? A. Yes.

Q. So that, on the 26th day of November of last year you were working in this garage up there at Sussman's and you were living in Cauldwell? A. Yes.

Q. And you never appeared here to testify for Cosgrove on the trial that took place on that and the several succeeding days, did you? A. No.

Q. That you said you were away? A. I was at the ward in the hospital. Was sick.

Q. Where were you on November 26?

Mr. Simandl: What was this? Last year?
Mr. Wachenfeld: 1923.

A. How many months is that?

Q. Don't ask me. Count them up. I can't tell you.

A. Well, I—

Q. Where were you in November, 1923? A. I don't remember.

Q. I thought you told me a little while ago that in November— A. I was in a garage, yes. I don't remember how many months it was.

Q. In November you were in a garage, were you? A. I had been a few months in the hospital.

Q. What months were you in the hospital? A. I don't remember. About three months, I was in the hospital two months. That's five months ago.

Q. Take your time and think. Tell us what months

you were in the hospital? A. I got cards (producing).

Q. Go ahead, look. A. I went out January 9 from the hospital. I had been there two months.

Q. What day do—what day did you go to the hospital? A. I don't remember.

Q. Don't remember? A. No.

Q. How long were you there? A. Two months.

Q. How many weeks? A. That's eight weeks.

Q. You are sure you were there eight weeks? A. Yes.

Q. And you don't remember what day you went there? A. I don't remember. I got the papers home.

Q. Were you there in the hospital practically all during the month of November? A. I don't know if it was November or a different month.

Q. What's the matter with your recollection? You remember the condition of this car as you saw it before May 15? A. Yes, when I had been in the garage. The garage been sold about six months ago.

Q. What hospital did you go to? A. Presbyterian.

Q. In Newark? A. No. In New York.

Q. You don't know whether it was the last of November or the first of November or the first of December? A. I don't. I got sick that way I can't remember.

Q. Did your sickness affect your memory? A. It did.

Q. Pretty good on the recollection of the condition of this car in last May? A. During the time.

Q. Didn't you tell me a little while ago that during the month of March or the month of November you were up there at this garage and you lived in Cauldwell? A. Yes.

Q. Is that true? A. Yes.

Q. Were you subpoenaed last time to come here to testify? A. No.

Q. Did Cosgrove speak to you about coming here to testify? A. No.

Q. You saw Cosgrove in the garage after May 15? A. Yes.

Q. And you saw him quite frequently from May 15 of last year up to the month of November? A. Yes.

Q. Talked to him quite frequently? A. Yes.

Q. And all of that time he never asked you to come here and testify? A. No.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. Did you have a memorandum that fixed the time when you came out of the hospital? A. I don't know if it says on the card.

Q. What card have you there? A. That's a hospital card (examines the card). No, it doesn't say here. I can't remember exactly the month or the day. This card is given a month later, to come for a visit. That is just the month before.

RE-CROSS EXAMINATION by Mr. Wachenfeld:

Q. This card says this, doesn't it: "Name, Al Gordon." That's you, isn't it? A. Well, they are named, that's all.

Q. It has got a number on it and it says: "Please come to the main entrance, 41 East 70th Street at 9 A. M. on Wednesday, January 9, 1924," doesn't it? A. Yes, sure, that's after coming out of the hospital this card was given to come to the hospital, visit the hospital a month later, and this is again for the last month.

Q. When did you come back to the hospital again after January 7? A. I went back the 9th.

Q. Ninth of January? A. January.

Q. Sure about that? A. It says on the card there.

Q. When did you go back? A. I went back the day the card calls.

Q. What day does the card call for? A. I can't remember now.

Q. Didn't you say the 9th of January? A. It says there, the 9th of January.

Q. It says March 12, doesn't it? A. Yes, but here (indicating on card) this is a different one. This is two months later they told me to come back.

Q. Have you any record from the hospital showing when you first went to hospital? A. Not right with me.

Q. Got them home? A. Sure.

Q. Showing the exact day you went there? A. Yes.

Q. And the exact date you came out? A. Yes.

RE-RE-DIRECT EXAMINATION by Mr. Simandl:

Q. After you were discharged from the hospital they told you to report for treatment, didn't they?

Mr. Wachenfeld: I object to that as leading.

Objection sustained.

Q. After you were discharged from the hospital, were you told to do anything by the hospital people? A. I was told to come back a month later, and they gave me a card on the front to come back there, says January 9th. That's one month. And I was there

January 9th and then they wrote in on the book to come back in two months later. Here it is (producing card). And then here was the first, January 9th, to come back, that was just a month. On Wednesday I came out from the hospital, this is a month.

RE-RE-CROSS EXAMINATION by Mr. Wachenfeld:

Q. During the time you were there at this garage, did you see this car go out frequently at night? A. Not nights.

Q. Did you ever see it going out at nights at all? A. Sometimes.

Q. How often do you mean by "sometimes"? A. I didn't count. Sometimes in a week it stayed in, and sometimes it went out twice a week.

Q. Did it go out twice in the week after it was dark? A. No. Sometimes.

Q. Did you ever see it go out after it was dark? A. Yes.

Q. And when it went out of the garage, did it have its headlight burning? A. Yes.

Q. And was that headlight in that condition as shown by that picture at night? A. Yes.

Q. Sure about that? A. Yes.

Q. And you are equally sure that the only dents that got in this mudguard occurred about three weeks before May 15? A. Yes.

Q. Up to that time there wasn't anything the matter with that front until three weeks before the 15th of May? A. Three or four weeks.

Q. It isn't a fact that the mudguard was dented first, and that some time after that the lamp was dented or bumped, and some time after that the reflector was

bent? A. The same time. I have noticed the same time.

Q. You noticed them all the same time? A. Yes.

Q. Three or four weeks before the 15th? A. Yes.

AUGUSTUS W. BARNEY, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. What is your business? A. Garage.

Q. Where? A. 139 North Seventh Street.

Q. Do you know John Cosgrove? A. I do.

Q. How long have you known him? A. 1917.

Q. Do you know his reputation for honesty, prudence, carefulness, in the neighborhood wherein he resides?

Mr. Wachenfeld: You may answer that yes or no.

Mr. Simandl: Yes.

A. Where he resides?

Q. Yes. A. Well, he lives in Montclair and my place is in Newark.

Q. You didn't testify in the former case, did you? A. No.

Q. You are his former employer, is that it? A. Yes.

Q. You have never lived in Montclair? A. I have never lived in Montclair.

Mr. Simandl: I won't be able to qualify him.

Defendant's Witness, Jacob Prager, Direct

JACOB PRAGER, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct-examination by Mr. Simandl:

Q. Do you know John Cosgrove? A. I do.

Q. Did you know him prior to May 15th? A. I did.

Q. Did you see him on May 15? A. I did.

Q. How long before that day had you seen him? A. Previous summer.

Q. Where did you see him? A. At Asbury Park.

Q. Did you see him on May 15, 1923? A. I did.

Q. Where? A. In Montclair.

Q. Where did you see him? A. He was pulling in the garage at Bloomfield Avenue.

Q. What were you doing there? A. I just got through fixing a shoe that was blown out.

Q. Do you remember what time it was you saw him? A. Yes, it was two or three minutes of 8:30.

Q. Did you speak to him? A. Just "Hello." I hollered "Hello" to him.

Q. What did he do? A. He hollered "Hello" back.

Q. What was he in at that time? A. In an automobile.

Q. In which direction was he driving? A. He was pulling in in the garage.

Q. Then you went around to your business? A. Yes.

Defendant's Witness, Jacob Prager, Cross

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. What business are you in? A. Wholesale produce.

Q. You have an office? A. No.

Q. How do you conduct your business? Where? A. Well, I go from farm to farm. I buy up on farms and sell it that way.

Q. You buy it at the farms, do you? A. Yes.

Q. What farms do you usually go to, what locality? A. South Jersey, 'most anywhere.

Q. Where do you sell them? A. Stores.

Q. What stores? A. I have no particular customers. I sell any stores that I step into.

Q. Whereabouts? A. Plainfield, around Hackensack.

Q. Ever do it around Newark or in the Oranges? A. Yes.

Q. Ever do it in Montclair? A. No, never sell anything in Montclair.

Q. Never do it? A. No.

Q. Ever do it in Boonton? A. Yes.

Q. You buy it or sell it in Boonton? A. Sell it.

Q. Have you the name of a customer in Boonton to whom you have sold some farm products? A. No.

Q. Don't know the name of a customer in Boonton where you do business? A. No, I do cash business.

Q. Can you give us the street address of any customer in Boonton? A. I don't know.

Q. Don't you know the streets in Boonton? A. No.

Q. How about the Oranges, have you the name of a customer? A. I used to retail in the Oranges about four years ago.

Q. Do you know the name of any person or firm or company that you sold farm products to within the last four years in the Oranges? A. I haven't been selling in the Oranges in the last four years.

Q. But you have been in Boonton in the last four years? A. Yes.

Q. But you can't tell us the name of a customer? A. Yes.

Q. Where do you usually sell the stuff you sell in Boonton? A. At farms or at the wholesale market in Newark.

Q. So, you buy it in the markets and sell it in the country? A. Yes. Boonton is not in the country.

Q. Don't you call it in the country? A. Yes.

Q. You go to Newark, buy farm produce and take it away up to Boonton to sell it? A. Yes.

Q. And you can't give us the name of a customer in Boonton? A. No.

Q. How long have you known Cosgrove? A. Few years.

Q. Where did you meet him? A. In Asbury Park, New Jersey.

Q. How long before May 15, 1923, was it that you saw him? A. The previous summer.

Q. That would be in August, 1922, wouldn't it? A. That was the last time I saw him.

Q. In the month of August? A. In the month of August.

Q. Where did you see him then? A. At Asbury Park.

Q. Did you know him very closely? Intimately? A. Pretty closely.

Q. So, you hadn't seen him for almost a year when you saw him on the night of May 15th? A. If it's that long, yes.

Q. Where do you come from? Where had you come from? A. I was up at Newton.

Q. What were you doing up at Newton? A. I was visiting friends.

Q. Sure it was Newton? A. Yes.

Q. What time was it you came down Bloomfield Avenue? A. I couldn't exactly tell, just to the minute, but I know I have got a flat shoe going down that steep hill in Montclair, and I stop in front of a garage and repaired my shoe.

Q. You saw Cosgrove that night? A. Yes.

Q. What time? A. Two or three minutes of 8:30.

Q. What makes you say it was two or three minutes of 8:30? A. I had an appointment that night in Newark at 8:30 and I was kind of in a hurry.

Q. You had a blowout? A. Yes, and I pulled out my watch to see what time it was.

Q. Did you look at your watch after you pulled it out? A. Yes.

Q. What time did your watch say it was? A. I couldn't say within a minute. It was two or three minutes of 8:30.

Q. Did you pull out your watch before or after you spoke to Cosgrove? A. After.

Q. So that, after you saw Cosgrove and said "Hello" to him you pulled out your watch and found it was within a few minutes of 8:30? A. Yes.

Q. And you hadn't seen this close, intimate friend of yours since the summer, since August, 1922, almost a whole year had elapsed? A. I didn't say he was an intimate friend of mine. Friend of mine.

Q. You know him closely? A. Well, yes, to a certain extent.

Q. You hadn't seen him for almost a year, when you happened to run into him on Bloomfield Avenue on the night of May 15? A. Yes.

Q. All you did then was to say hello? A. That's it.

Q. You didn't hold any conversation with him? A. No.

Q. Why not? A. I didn't have anything of importance to say to him; and the second thing, I was in a hurry.

Q. The last trial you said the reason was you were in a hurry. A. I was in a hurry, yes.

Q. He didn't know you were in a hurry? A. No.

Q. You didn't tell him? A. No.

Q. So that after you spoke to him he didn't come over and speak to you, did he? A. No.

Q. He drove right into the garage? A. Yes.

Q. When did you see him next? A. I met him about a week afterward at Market Street, Newark.

Q. Meet him by appointment? A. No.

Q. Met him accidentally? A. Yes.

Q. Meaning where? A. In front of Childs' restaurant on Market Street.

Q. Where were you living at that time? A. 184 Bishop Avenue.

Q. So that for a whole year practically, almost, from August, 1922, to May 15, 1923, you hadn't seen Cosgrove? A. No.

Q. And you happened to see him on this night and you happened to look up, to look at your watch to see the proper time that he went into the garage? A. No, not just because he went into the garage. Of my own accord.

Q. And then you accidentally, a week after that, not having seen him for almost a year with the exception of this one occasion, you ran into him in Newark in front of a restaurant? A. Yes.

Q. What time of night was it? A. In the afternoon.

Q. What restaurant was it? A. It was in—not the restaurant. In front of the restaurant.

Q. Which restaurant? A. Childs' restaurant on Market Street, Newark.

Q. You had a conversation with him there at that time? A. Yes.

Q. At that time did you know that he was accused of driving this car that was involved in this accident? A. I didn't know he was the one accused. I asked him who the John Cosgrove was in Montclair that killed this woman, and that's how that started the conversation.

Q. So that he never spoke to you about the fact that he was accused of driving this car, until after you asked him? A. Yes.

Q. You asked him first? A. I asked him who the John Cosgrove was.

Q. He wasn't looking around for you or trying to get hold of you, as far as you know? A. No.

Q. He didn't say to you at that time, "You are the man I am looking for, because I am accused of an accident and you saw me in a garage at 8:30 in Bloomfield"? A. Not exactly that way.

Q. You spoke to him first? A. Yes.

Q. You knew, prior to meeting him accidentally in front of this restaurant a week after May 15th, that John Cosgrove was involved in an accident or accused of driving a car? A. I didn't know that was that John Cosgrove.

Q. You knew a John Cosgrove was? A. I knew of a John. I have always called him "Jack."

Q. You read it in the papers? A. Yes.

Q. Did you get the information from the papers of what he was accused of? A. Yes.

Q. Did you know, at the time you spoke to him,

what he was accused of? A. I didn't know it was him. I didn't know he was a policeman.

Q. You knew his name was John Cosgrove? A. I knew his name was "Jack Cosgrove."

Q. You knew "Jack" was a nickname for "John"? A. Oh, yes.

Q. You knew he lived in Montclair? A. Yes.

Q. So that you knew that a John Cosgrove from Montclair was accused of driving this car, accused of these injuries to these people? A. A John Cosgrove.

Q. And you never took the trouble to find out from your friend whether he was the John Cosgrove or not? A. It slipped my mind.

Q. So that when you met him he didn't speak to you about it first that he wanted you to testify, or anything of that sort? You first had to broach the subject to him? A. Yes.

Q. What did you ask him? A. I asked him who the "John Cosgrove" was that killed this woman that night; and I remembered that I was in that way that night.

Q. How did you know that he killed a woman? A. I read that in the papers.

Q. Did he at that time tell you that he was the man that was accused of it? A. Something come to my mind and I didn't think it was him that done it.

Q. Did he tell you at that time that he was the John Cosgrove that was accused of it? A. Oh, yes, when I met him.

Q. Who first mentioned the fact that you had seen him that night going into the garage about 8:30 and you had looked at your watch? A. Cosgrove didn't say anything.

Q. Didn't ask you if you recalled seeing him? A. Oh, yes.

Q. I thought you said he didn't say anything? A. What is that?

Q. I thought you said he didn't say anything. A. I was the one that recalled that night that I saw him; and he didn't ask me—he recalled seeing me.

Q. He recalled seeing you? A. Yes.

Q. Did you mention it first, or he? A. I mentioned it first.

Q. You are sure you looked at your watch on this occasion? A. Yes.

Q. Then you went to Newark to keep this appointment? A. Yes.

Q. And ran into him accidentally in Newark a week after that? A. A week later, yes.

JOHN COSGROVE, JR., the defendant, called as a witness in his own behalf, having been duly sworn testified as follows:

Direct-examination by Mr. Simandl:

Q. How old are you? A. Thirty years old.

Q. Are you married or single? A. Married.

Q. Have you any children? A. Yes.

Q. How many? A. Three living.

Q. How old are they? A. About one-and-a-half, five and eight.

Q. Do you remember May 15, 1923? A. Yes.

Q. Are you a police officer at the present time? A. Yes.

Q. Connected with what department? A. Montclair Police Department.

Q. Were you a regular policeman or were you just

what they call a "chance man," prior to May 15, 1923? A. I was a chance man.

Q. When were you appointed a regular policeman? A. May 15, 1923.

Q. On that day did you leave your home to go anywhere? A. Yes.

Q. What time did you leave home? A. About two o'clock.

Q. Where did you go? A. To Jersey City.

Q. Where to in the city? A. To a friend of mine by the name of William Sephton. 1699 Boulevard.

Q. Were they home when you reached there? A. Yes.

Q. What did you do there? A. I went in and sat down and had a bite to eat with Mr. Sephton and then we played cards.

Q. Did three of you play cards? A. Yes.

Q. How long did you remain there? A. Until about 7:15 that evening.

Q. How did you get there? A. Drove over in a Cleveland car that I owned.

Q. Do you own it now? A. No.

Q. Did I understand you to say you left the Sephtons at what hour? A. About 7:15.

Q. What was the condition of the weather at that time? A. Very foggy.

Q. Did you have your windshield open or closed? A. Closed.

Q. Why was it closed? A. Both glasses were broken in the windshield, that is the upper and the lower, and if I opened them they would be apt to fall out.

Q. Were they broken or were they cracked? A. Cracked.

Q. Where did you go after you left the home of the Sephtons? A. I went back to Montclair.

Q. What was your route? A. I drove up the Boulevard, through Communipaw Avenue into Newark, through a number of streets in Newark to Broad. Up Broad to Belleville (?) Avenue. Up Belleville Avenue to Bloomfield Avenue, and up Bloomfield Avenue to the garage at 654 Bloomfield Avenue.

Q. What time did you get home that night, in your house? A. At 8:30.

Q. Did you see anyone before you pulled in that garage at Montclair? A. Yes.

Q. Whom did you see? A. I saw a man named Prager.

Q. Is that the man who preceded you on the stand? A. Yes.

Q. What did you do then when you saw him? A. Spoke to him. Said "Hello." And he spoke to me.

Q. Did you drive slowly or rapidly, as you went from Jersey City to Newark? A. Slowly.

Q. Why? A. It was so foggy that you couldn't see any distance ahead of you.

Q. When you got home, what did you do? A. I ate my supper. Went to my room and changed my clothes, put on my uniform consisting of shoes, trousers, overcoat and hat.

Q. Then what did you do? A. Went to work.

Q. How did you go to work? A. Walked down Bloomfield Avenue, over across Valley Road into the police station.

Q. Did you report in? A. Yes.

Q. To whom? A. To Lieutenant Lawrence.

Q. What time did you get in there? A. About nine o'clock.

Q. How did you know it was nine? A. As I entered the first door I heard the fire gong ring in the police station.

Q. And that signified to you what hour? A. Nine o'clock.

Q. Did you drive your car up Bloomfield Avenue at Ninth Street at a speed of thirty or forty or forty-five miles an hour and strike and run into Lillian Dowling? A. No.

Q. Did you drive up there at a speed ranging from thirty-five to forty miles an hour along Bloomfield Avenue at that point? A. No.

Q. Were you stopped by anyone in Glen Ridge and did you there say to anyone, "Leave off me, Danny, I'm late; I'm reported to be in at headquarters"? A. No.

Q. Did you meet Deever at Glen Ridge, or Grout or Shaw at Ridgewood Road and Bloomfield Avenue, Glen Ridge? A. No.

Q. Did you see Deever that afternoon? A. Yes.

Q. Where? A. I saw him near Roseville Avenue on Bloomfield Avenue, shortly after two o'clock in the afternoon as I was going to Jersey City.

Q. Did he see you? A. Yes, he spoke to me.

Q. What did he say? A. Just said, "Hello."

Q. Did you stop? A. No.

Mr. Wachenfeld: You say you saw Deever where?

The Witness: At Roseville Avenue and Bloomfield Avenue, about quarter after two in the afternoon, when I was going to Jersey City.

Q. Did you strike any person on Bloomfield Avenue between the hours of 8 and 9 that night, and not stop your car, and run away? A. No.

Q. I show you Photograph D1 and ask you what it represents to you? A. That's a picture of the car that I owned at that time.

Q. Look at the photograph and I call your atten-

tion to the fender which appears to be broken on the photograph, right-hand side of the photograph as you look at it, and ask you whether or not that fender was in that condition when you went to the Sephtons in Jersey City that afternoon? A. Yes.

Q. How long prior to that time had it been in that condition? A. About a month.

Q. Had you ever made arrangements to have it fixed? A. Yes.

Q. With whom had you made these arrangements?

Mr. Wachenfeld: Objected to.

The Court: I believe you had a witness on the stand that testified. Go ahead.

A. I made arrangements with Sussman that owned the garage where I stored the car, and also with Mr. Priestman.

Mr. Wachenfeld: I object to what the witness said to a man by the name of Sussman. Objection sustained.

Q. Did you speak to Mr. Priestman, the man who was on the stand today? A. Yes.

Q. What did you do with Mr. Priestman? What business dealing did you have to do with Mr. Priestman? A. I went there and ordered a set of fenders the latter part of April. A few days later I countermanded the order.

Q. Has there ever been a tie rod on the car prior to May 15? A. Yes, there have been two different ones.

Q. Was there a tie rod on the car when you went out that afternoon? A. No.

Q. How did the car get in the condition which is disclosed by this photograph? Can you tell us? A.

Yes. About the 15th of April or the middle of April I left it out one night in front where I live on Bloomfield Avenue. There are milk trucks that unload there in the morning, and it must have backed into it.

Mr. Wachenfeld: I object to this witness's conclusion and ask that it be stricken from the record.

Mr. Simandl: All right.

Objection sustained and motion granted.

Q. When you came down the following morning, did you see the condition of the car? A. Yes.

Q. What was the condition of the car then? A. Just as it is in this picture.

CROSS-EXAMINATION by Mr. Wachenfeld:

Q. Sussman is the owner of the garage up there where you kept your car? A. He was.

Q. He testified for you at the last trial, didn't he?

Mr. Simandl: I object to this as immaterial.

Objection sustained.

Q. Sussman was in and about that garage around May 15 of last year? A. Yes.

Q. He was the owner of it, wasn't he? A. I believe so.

Q. You believe so? You know that to be a fact, don't you? A. I have no way of saying that he was the owner.

Q. Didn't you hear him testify at the last trial?

Mr. Simandl: I object to that.

The Court: I don't think that it is material.

Objection sustained.

Q. You started to say you had a conversation with Sussman about your car, didn't you? A. No.

Q. Didn't have a conversation with Sussman about your car? A. I said that I had made arrangements with both Sussman and, I was going to say, Priestman, when you interrupted me.

Q. Did you have a conversation with Sussman when you made these arrangements? A. Yes.

Q. Why did you say you didn't? A. You said I just said that. I didn't.

Q. Did you have a conversation with Sussman about this car? A. Yes.

Q. Was that conversation about repairing it? A. Yes.

Q. Did you have that conversation in the garage? A. In the office of the garage.

Q. Was the car in the garage at that time? A. I believe so.

Q. And Sussman was in that garage practically every day of the week, wasn't he? A. Well, I couldn't say whether he was or not.

Q. You stored your car there for a period of some six or seven months prior to this time? A. Yes.

Q. With whom did you make your arrangements for storing? A. Sussman.

Q. Whom did you pay your rent to? A. Either Sussman or Gordon.

Q. Did you pay it by check? A. Yes.

Q. Did you make the check payable to Gordon? A. No. Made it payable to cash.

Q. You knew Sussman was the owner of that garage? A. He was the man who appeared to be in charge. I don't know whether he owned the garage or not.

Q. And, as near as you could see, he was in and

about that garage a great deal, saw your car a great many times, didn't he? A. I believe he did.

Q. Did you drive this car at night? A. Well, never late at night.

Q. But what I mean by "night" is, after it was dark? A. At times, yes.

Q. And you drove it at times within a month from prior to May 15, you drove this car at night, didn't you? A. At different times up to 8, 8:30.

Q. While it was still dark? A. Yes.

Q. This car had done quite a number of miles? A. It had, yes.

Q. Friends of yours drove this car around considerably? A. Much more than I did.

Q. Did they drive it at night as well as in the daytime? A. I don't think late at night.

Q. What do you call not late at night? How late would you say your friends drove it? A. Well, during the day and in the evening up to six o'clock, seven o'clock.

Q. How many friends of yours drove it during the daytime? A. Five or six.

Q. You say that you were over to Jersey City at Mrs. Sephton's? A. Yes.

Q. And you left there about what time? A. 7:15.

Q. How did you know it was 7:15? A. I looked at my watch.

Q. Did anybody else while you were there look at a clock? A. I don't know whether they looked at a clock or not.

Q. Who was there at the time besides Mrs. Sephton and Mr. Sephton? A. That's all.

Q. You left at 7:15 and you looked at your watch? A. Yes.

Q. Then you drove over from Jersey City to Newark? A. Yes.

Q. You went up Bloomfield Avenue? A. Yes.

Q. What time would you say it was, about, that you passed Bloomfield Center that night? A. About quarter after eight.

Q. What time did you get home? A. In the house at 8:30.

Q. And did you eat before you put on your uniform? A. Yes.

Q. When you got in the house, who was there? A. My sister and my mother.

Q. Where was your wife? A. Was out.

Q. Does she live there? A. Yes.

Q. Were your children there? A. Yes.

Q. Any of them up at that time? A. Never up at that time.

Q. And you left the house at what time? A. About five minutes to nine.

Q. How long does it take you to walk from your house to Montclair police headquarters where you report for duty? A. About three and a half or four minutes.

Q. It's just around the corner, isn't it? A. It isn't just around the corner.

Q. How far is it? A. I live in the middle of the block and I go to the corner and then turn left.

Q. How many feet would you say it was from police headquarters? A. About seven or eight hundred.

Q. Sure it's as far as that? What number of the street did you live on? A. 663 Bloomfield Avenue.

Q. How many feet from Bloomfield would you say that was? A. It's on Bloomfield Avenue.

Q. How far away from police headquarters is it in blocks? Half a block, or a full block? A. Half block each way.

Q. What do you mean, each way? A. Half a block from the police station to Bloomfield, and half a block from Valley Road to my house.

Q. Is the police station half a block from Valley Road? A. It's about in the center of the block, between Portland Place and Bloomfield Avenue.

Q. So you say it would take you three or three and a half or four minutes to walk seven or eight hundred feet? A. I live on the top floor of the apartment.

Q. Would you say it took four minutes all told from police headquarters? A. Yes.

Q. You left at five minutes to nine? A. My mother called to me at five minutes to nine.

Q. Did you look at your watch? A. No. It was in my pocket.

Q. When you got to police headquarters you were late? A. I was not late.

Q. Weren't the rest of the officers leaving? A. They were just starting to leave the desk.

Q. Aren't you supposed to be there when roll call is called by the lieutenant in charge? A. You are supposed to be there at nine o'clock. If he calls the roll earlier than nine, you are not considered late.

Q. Do you know whether he called the roll earlier than nine that night? A. Yes, because I walked into the first door as the nine o'clock bell rang.

Q. The rest of the officers were coming out at that time? A. Just starting to leave the desk, yes.

Q. You didn't hurry? A. No.

Q. Took your time to eat at home? A. Yes.

Q. When you came out of your house, did you walk slowly, leisurely from your place to headquarters? A. Yes.

Q. Sure about that? A. Yes.

Q. Didn't walk fast or run? A. No, I thought I had plenty of time.

Q. So you walked real slow? A. Not real slow. Ordinary.

Q. You didn't hurry? A. No.

Q. Because you didn't think there was any reason for it? A. No.

Q. After you came out of the house you were not arranging part of your uniform? A. No.

Q. You walked into this station house at a normal and leisurely gait? A. Yes.

Q. You say it was about quarter after eight when you passed Bloomfield Center? A. About that.

Q. You went to school with Dever? A. I went to the same school, but he went for a small while.

Q. How about Grout? A. Never saw Grout in my life until he testified against me, at the previous trial.

Q. How about Shaw? A. Never saw him until he was in the police court in Newark.

Q. So that the only one of those three men you knew was Dever? A. Yes.

Q. Dever didn't speak to you that night? A. No.

Q. Shaw didn't speak to you that night? A. No.

Q. Grout didn't speak to you that night? A. No.

Q. You didn't see any of these three men in Montclair or Glen Ridge? A. No.

Q. You didn't stop your car there, did you? A. No.

Q. Sure about that? A. Absolutely.

Q. When you drove over from Jersey City you were alone? A. Yes.

Q. It was a foggy night? A. Yes.

Q. Was it dark at 8:15? A. Yes.

Q. Did you have your headlights on? A. Yes.

Q. So you, a member of the police department,

drove home on a foggy night all the way from Jersey City with that lamp in that condition as shown there? A. Yes. I did.

Q. Did your light hit the roadway when you had your headlights on? A. No.

Q. Where did it go to? A. Off to the side.

Q. The light you displayed? A. Yes.

Q. You had been driving that car around in that condition for about a month? A. Yes.

Q. Up to eight? A. Yes.

Q. That was after it was dark? A. Yes.

Q. You had driven that car and there—you had driven that car on former occasions? A. The light wasn't always lighted.

Q. It was lighted when it was dark? A. Not that light, no.

Q. Was that light burning that night? A. Yes, I believe it was.

Q. So you had this light fixed? A. No, I didn't have it fixed. One time it would light, and another time it wouldn't. The lamp was continually shaking.

Q. On this night from Jersey City over, it was burning? A. Yes.

Q. It didn't go out that night? A. It flickered a few times.

Q. But it always burned? A. Yes, it burned.

Q. On other occasions, after this lamp was bent backward as indicated by this picture, it didn't light? A. Not always. Sometimes it would light and sometimes it would not.

Q. You never had it fixed? A. No.

Q. So you, a police officer, with that mudguard in that condition and with that light at that angle, and sometimes not even lighting, drove around with that

car in that condition for a period of a month? A. Yes.

Q. Look at this reflector; was that in that condition for a month prior to this accident? A. Not over as far as that.

Q. You don't know how it got over all that way, do you? A. Yes.

Q. How did it get over that way? A. Those lamp —those little studs that hold it in an upright position loosened out of it.

Q. When? A. Previous to May 15.

Q. How long previous to May 15? A. A week or two.

Q. So that this reflector was not damaged in that condition as shown by the picture, for a month prior to this accident, was it? A. That reflector is not damaged now.

Q. You don't think it's damaged? A. No.

Q. Look at the picture (indicating); you don't think it's damaged? A. No.

Q. Sure about that? A. I am absolutely sure.

Q. Let me understand; had the reflector been in the position shown in the picture there, for a week? A. Yes, more than a week.

Q. How much more than a week would you say? A. Well, I wouldn't set any definite time. One, two weeks. Those screws or bolts kept loosening up.

Q. The front of this fender was dented, wasn't it? A. Yes.

Q. Was any other part of it dented? A. The whole four fenders were dented.

Q. Any other part of the left front of the mudguards dented, other than the front part of it? A. Yes.

Q. What part of it was dented? A. All along the side.

Q. Where do you mean? Near the running board? A. Yes.

Q. How about the rear mudguard; was that dented? A. Yes, all four mudguards were dented.

Q. Just tell me exactly where the other dents other than the front or left front mudguard, appear on the left front mudguard, if there were any. Were there any dents excepting the front of it? A. Yes.

Q. Where were they? A. Along the side of the fender.

Q. Under the side of the front fender? A. Yes.

Q. Where? Near the running board? A. Near the running board.

Q. How near to the running board? A. Here (indicating on picture).

Q. You mean down here, near this side (indicating)? A. Yes, this is the other fender, too.

Q. That is the right fender? A. Yes.

Q. Point out on this where these other dents on the left fender were, which existed prior to May 15. A. In that part that protects the wheel.

Q. In what part? Point to it. A. The point that runs from the fender.

Q. Point to the spot on the photograph that you have before you now, where there were any dents on the left front mudguard. A. I can't see it on there. I can't point to what's not on there.

Q. Can't you point to the same relative position? A. Down inside.

Q. You can't see it on the photograph, can you? A. Not this photograph, no.

Q. Which one would it be on this mudguard? Won't you indicate? A. This is the top of the mud-

guard. On this top of the mudguard (indicating) a piece goes down to the top of the car. On the inside. The dents is in that.

Q. On—not on the upper part of this mudguard, but on the sheet that fastens into the top? A. Yes.

Q. On this left front mudguard prior to May 15, were there any other dents down here near to the running board, other than what is on what you call the inside? A. I don't remember.

Q. Why not? A. Because I don't.

Q. You drove this car quite frequently, didn't you? A. Yes.

Q. Were there any other dents on that mudguard that you remember? A. There were dents but I don't remember where they were.

Q. Can't tell us now where they were? A. Not offhand, no.

Q. When you look at this picture which shows the dents (that is, D5), I suppose you can tell us that there is a big dent in that left mudguard, right where the reflector fastens back on the mudguard? A. Yes, that was caused by when this was bent in.

Q. So that was a month prior to that? A. Yes.

Q. But you couldn't tell me that when you were looking at the other picture? A. You were talking about the side of the fender.

Q. I was talking about the whole fender and I asked you to point out every place where there was a dent showing, didn't I? A. Yes. You were talking other than that dent.

Q. You didn't tell me then, when you were referring to the other picture, which doesn't show the dent, that there was a dent right where that reflector fastens down? A. That (indicating) is not a dent. The dent is here (indicating).

Q. That isn't a dent? A. No.

Q. Sure about that? A. Yes, absolutely sure. That's a shadow from the reflector.

Q. You are sure that is not a dent? A. Yes.

Q. Why did you tell me that dent happened when the dents in the front happened, a minute ago? A. There is a dent in front where the reflector is attached to the fender.

Q. Didn't you say that dent happened at the same time when the reflector was broken? A. No, I didn't say that. Not the dent you are referring to.

Q. So you now say that the photograph doesn't show a dent there? A. No, it does not.

Q. Was it foggy this night? A. What night?

Q. This night that you drove home from Jersey City on the Boulevard? A. May 15th, yes.

Q. Quite foggy, wasn't it? A. Yes.

Q. You have been convicted of a crime, haven't you? A. I pleaded guilty to assault and battery.

Q. "Atrocious assault and battery," wasn't it? A. I don't know what the charge was. It was a street fight.

Q. Didn't you plead guilty to "atrocious assault and battery"? A. I don't know.

Q. You are a policeman and you know what the difference between assault and battery, and atrocious assault and battery is, don't you?

Mr. Simandl: I object to that. Frequently the courts and lawyers differ on that proposition.

The Court: He asks him if he knew.

Q. (Continued.) You know whether or not you were convicted of atrocious assault and battery, or whether you were convicted of simple assault and bat-

tery? A. I don't know what the charge was. I know what I did.

Q. And you know you pleaded guilty? A. I pleaded guilty to it.

Q. But you don't know whether you pleaded guilty to an indictment for atrocious assault and battery, or to an indictment for assault and battery? A. No, I don't know.

Q. Were you interested enough to find out? A. I was interested enough, but I never found out.

Q. Didn't you tell me on the last trial on page 291, didn't you say this, that you were convicted of an atrocious assault and battery (reading): "That you were convicted of atrocious assault and battery? A. Yes, sir"? Didn't you say that? A. I don't believe it was atrocious assault and battery.

Q. Didn't you say this on page 289: "Q. You were convicted of atrocious assault and battery? A. I believe that is what the charge was"? Didn't you say that? A. Well, that answer implies that there is some doubt in my mind.

Q. Didn't you say that "I believe that is what the charge was"? A. Yes.

Q. Now, do you say that it was atrocious assault and battery, or that you don't know? A. I don't know which it was.

Q. You don't know which it was? A. No.

RE-DIRECT EXAMINATION by Mr. Simandl:

Q. It was a street fight, you said; is that right?

Mr. Wachenfeld: I object to that.

Objection sustained.

The Court: Did you fix the date when you said you had the talk with Sussman?

The Witness: No, I did not.

Mr. Simandl: Outside of three character witnesses who have not arrived, I rest. If the prosecutor is willing to let me read into the record: Morris Cohen, police sergeant, Montclair; James Mooney, real estate man, Montclair, and Thomas F. Roach, real estate man at Montclair.

The prosecutor stipulates that if the three men above named were present they would testify to defendant's good character, and that this stipulation is to have the same effect as if they were present and so testified: General reputation for honesty, prudence and carefulness.

DEFENDANT RESTS.

FRANCIS O'MARA, recalled on behalf of plaintiff, further testified as follows:

By Mr. Wachenfeld:

Q. Did I ask you before, if you knew Mr. Cosgrove, the defendant, before May 15? A. Yes.

Q. How long before that had you known him? A. All my life.

Q. Do you know where Cosgrove lives? A. Yes.

Q. On that night of May 15 did you see Cosgrove come out of his house? A. Yes.

Q. What time of night was it? A. It was about nine o'clock.

Q. What did you see him do? A. He was hurrying toward police headquarters.

Q. Was he doing anything with his clothing? A. He was buttoning his overcoat.

CROSS-EXAMINATION by Mr. Simandl:

Q. You are the gentleman who was standing out there? A. Yes.

Q. With the other two men? Is that right? A. Yes.

Q. And you noticed this very particularly, did you? A. Yes.

Q. Where were you just prior to nine o'clock, can you tell us? A. In the candy store in the corner.

Q. How long were you in the candy store? A. About three minutes.

Q. Where were you before that? A. Standing on the corner.

Q. Whom did you see pass by there during that time? Do you remember, while you were standing on the corner? Other than Cosgrove? A. Several men.

Q. Who? Mention one. A. Friends of mine.

Q. Who? Mention one. A. A fellow by the name of Fixler.

Q. What was he doing? A. He was going up to the restaurant to eat.

Q. Is that the only one you can remember? A. Another fellow by the name of Deering.

Q. They are all good friends of yours? A. Yes.

Q. And you are sure you saw them there? A. I saw them.

Q. They spoke to you? A. Certainly.

Q. What did they say? Do you remember?

Mr. Wachenfeld: What difference does it make?

The Court: We can't hear all the conversation. I think that's going too far.

Q. When did you see the car go in? A. I didn't see the car go in.

Q. When did someone tell you the car went in? A. Just a few minutes before I went in the candy store.

Q. Then you were in there three minutes before you came out? A. That was nine o'clock.

Q. How do you know that? A. I know what time the fire bell rings.

Q. You knew it by the fire bell? A. Yes.

Q. How soon after you heard the fire bell did you see Cosgrove? A. Just about that time.

Q. Where was he? A. Going from his house toward the police headquarters.

Q. At the time the fire bell rang? A. Yes.

Q. Where was he when you heard the fire bell ring? A. Crossing the street by Valley Road and Bloomfield Avenue from his house.

Q. You are sure of that? A. Yes.

Q. What drew your attention to him buttoning his coat? A. Well, I saw him every night.

Q. Does he always button his coat? A. Well, he is always in a hurry.

Q. He is always in a hurry and you are sure of it? A. Positive.

Q. Nothing unusual to see Cosgrove running along the street buttoning his coat? A. I always say "Hello" to him when he passes.

Q. You are always there at night to see him when he passes? A. Yes.

Q. You have seen him button his coat on previous occasions? A. Yes.

Q. Did you testify on the last trial? A. Yes.

Q. Were you subpoenaed? A. Yes.

Q. But they didn't call you, did they? A. No.

STATE RESTS.

Mr. Simandl: In view of the length of the testimony and pretty nearly thirty-eight witnesses sworn, I would like to ask some time to go into it before I sum up this case; and my requests to charge ought to be here momentarily. Your Honor will appreciate that this case took a whole lot longer to try than last time.

Mr. Wachenfeld: I don't mind indulging to a certain extent, but we have extended every courtesy. We have extended and stipulated. And we have half an hour now.

The Court: I think it will be as fair to one side as to the other to sum up immediately. We have at least half an hour. So we will have both sides sum up.

Recess from 3:35 to 3:50 P. M.

Mr. Simandl: I move to direct a verdict on the ground that the State has not proved beyond a reasonable doubt all the elements of the crime as necessarily alleged in the indictment; and secondly on the ground that the defendant should not have been brought to trial, for the reason stated in my original motion.

Motion denied. Exception.

Mr. Simandl summed up.

In the course of Mr. Simandl's remarks, terminating with the words "because of the arrest there," the following occurred:

Mr. Wachenfeld: I object. There is no proof in this case and we respectfully submit that counsel is taking advantage of it, that he was ever convicted in

Montclair. He was asked on the witness stand if he was ever convicted of a crime, and he said he was not. He then said, "I was in a little trouble at Montclair." Counsel did not at that time ask him what the trouble was. There isn't one word of testimony in this case that Dever was ever arrested in Montclair.

Mr. Simandl: He was asked the question, "Were you ever convicted of crime?" He said, "I had a little trouble in Montclair." I said, "All right. As the result of that trouble, did you lose your job?" He said, "Yes."

The Court: Didn't he say he was handed a ticket for speeding?

Mr. Simandl: No, that was a witness by the name of Bigelow (?).

Mr. Wachenfeld: I still insist that there is no testimony that Dever was arrested in Montclair, and that he hasn't a right to say that to the jury.

The Court: What the testimony is or is not, gentlemen, is for your judgment and your recollection; and it is your duty to be guided by your own recollection on that subject, and not by what counsel may say and not by what the Court may say. As far as the recollection of the Court goes, there is no testimony that this man was arrested. But that does not bind you, and if that does not coincide with your recollection you are to disregard it and follow your own recollection. And the same thing follows with reference to the recollection of counsel. If the recollection of counsel differs from your own recollection you are to disregard it and follow your own recollection, because you are the judges of the facts, and the responsibility of judging the facts and the right to judge the facts is with you.

Mr. Simandl then concluded his summing up.

Mr. Wachenfeld summed up.

During Mr. Wachenfeld's remarks the following occurred:

Mr. Simandl: I don't like to interrupt, but there is no evidence in this case and we are not trying Mr. Cosgrove for killing a woman.

The Court: Yes, there is no evidence in this case about anybody being killed, gentlemen, and you will disregard anything that is said on that subject.

Mr. Wachenfeld: I don't want to argue that; but there is evidence, if I may say so. Witness—

The Court: Well, never mind whether it is or not.

Mr. Wachenfeld: And then another thing. While we were referring to the testimony, it was at the instance of Mr. Simandl that we stipulated that this testimony which had been given was in the trial of the case of the State against John Cosgrove for manslaughter. I didn't put that in.

The Court: Well, never mind whether there is evidence in the case or not, of anybody being killed. That question is irrelevant to this issue and it is not to be regarded. In other words, it is not to be regarded that because somebody may or may not have been killed this man is guilty or not guilty. That fact has no bearing upon the issue here. We are trying an indictment which will be handed to you when you go into the jury room, and it's upon that indictment, gentlemen, that this man is being tried, and no other.

Mr. Simandl: Again I am sorry that there was no evidence that Mr. Otis started or attempted to fix those mudguards.

The Court: That is matter that is in the hands of the jury, and I have already instructed them as to the statements of counsel. They are the judges of the facts.

After counsel had summed up:

The Court: It is now 5:12 o'clock. We will adjourn to 10:15 tomorrow. In the meantime, gentlemen, you will please not discuss this case, nor permit anyone to discuss it with you or to mention it to you or to talk to you in any way upon the subject of this case, between now and tomorrow when you will kindly return at 10:15 sharp. Thank you, gentlemen.

Adjourned to March 13, 1924, at 10:15 o'clock.

Stenographer's Certificate.

STATE

vs.

JOHN COSGROVE, Jr.

I, Alan G. Kennish, one of the stenographers 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 at the trial of the case of the State of New Jersey vs. John Cosgrove, Jr., on indictment number 89, for atrocious assault and battery, which said trial was held before the Honorable Dallas Flannagan, presiding Judge of the Essex County Court of General Quarter Sessions, and a jury, on Tuesday, March 11th, Wednesday, March 12th, and Thursday March 13th, 1924, at Newark, N. J.

ALAN G. KENNISH.

Charge.

Tuesday, March 11, 1924.

The Court charges the jury as follows:

FLANNAGAN, J.:

Gentlemen of the jury: There are four instructions which are paramount ones, and my entire charge is to be understood as controlled by and subordinate to them.

First: The Court is the judge of the law, and as such it is its function to pass upon all questions of law arising in the trial, and to inform the jury of the law governing the case; and it is the duty of the jury to follow the law as it may be stated by the Court.

Second: The Court has no power to decide or to instruct the jury how to decide any question of fact. The jury are the sole and final judges of the facts, the weight of the testimony and other evidence, the credibility of witnesses, inferences to be drawn from the evidence, and of inferences, issues and questions of fact whatever, including the ultimate conclusion of guilty or not guilty to be reached on all the evidence in the case. As judges of the facts it is their function, responsibility and duty to recollect what the evidence is, and all of the evidence, the occurrences during the trial, the appearance and conduct of the witnesses, whether evidence is or is not in the case, and whether it is disputed or undisputed, and the jury must not be guided by the recollection of the Judge or of counsel, but must be controlled by their own recollection alone in all such matters. If the Court should at any time make any statement of his recollection, or should even go further and make definite

affirmations, no matter how positive, in regard to any of such matters, it is the duty of the jury to disregard such expressions of the Court except where the same coincide with their own recollection.

Third: The Court has the right to comment on the evidence, but in his references thereto does not undertake to say what the evidence is or is not, but only his recollection of it; and the jury must consider, in deciding the case, not only the evidence referred to by the Court, but all the evidence. The Court has also the right, if it sees fit, to express its opinion on the evidence, pointing out what portions of the evidence, situations or circumstances seem to it in its opinion salient, controlling or persuasive, and indicating any inferences or conclusions of fact which it would or may draw from the whole or parts of the evidence; but the jury are not bound thereby and may disregard any and all of such expressions if they see fit.

Fourth: The defendant is presumed to be innocent and he must be proved beyond a reasonable doubt guilty of the crime charged, and of each and all of its elements. The burden of so proving the defendant guilty rests upon the State throughout the whole case and never shifts. This rule is an ultimate one surviving all others, it is an independent and final protection to the defendant, and notwithstanding all other presumptions and burdens, if any arise in the case, it remains upon the State until and after all the evidence is in, when the jury must consider upon all the evidence in the case whether or not this burden has been sustained. If the jury are then satisfied upon all the evidence that the defendant is proved guilty beyond a reasonable doubt, the verdict must be

guilty; if not so satisfied, the verdict must be not guilty. Reasonable doubt is not a mere possible doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

I have received, gentlemen, some requests to charge in behalf of the defendant. One reads this way:

"The witnesses, Dever and Krauss, have admitted that they have been convicted of crime and you are entitled to take this fact into consideration when passing upon the credibility of either of these witnesses' testimony."

I so charge you, gentlemen, and the same thing applies to the defendant, Cosgrove, himself, who admits that he was convicted of crime.

Another request, gentlemen, which I have modified is as follows:

"The mere fact that the defendant has been indicted by the Grand Jury raises no presumption against the defendant and overcomes none in his favor. It is a mere step in the cause and the indictment is of no evidential value."

I so charge you, gentlemen, that request as modified.

Another request, gentlemen, which I have modified, and as modified reads as follows:

"If you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lillian Dowling, and that the automobile which

struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery. It is only one factor in the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as to justify a verdict of guilty under all the facts and circumstances of the case and under the entire charge of the Court."

I so charge you, gentlemen, that request as modified.

Another request in behalf of the defendant reads as follows:

"Testimony has been offered by several witnesses as to the speed of the automobile alleged to have injured Lillian Dowling. These are mere opinions on the part of the witnesses offering them, and you may inquire into the facts and circumstances upon which the witnesses based their opinions; such as their opportunity to observe the car, their ability to judge speed, the weather conditions, the type of car and its condition and their truthfulness in giving their opinion or testifying to the facts offered to support it, before giving any weight to the opinion offered."

I so charge you, gentlemen.

Where a party is surprised by the testimony of its witness it may introduce prior inconsistent statements, written or verbal, not to impeach the witness or his whole testimony, but only to neutralize that part of the testimony inconsistent with the prior statements; namely, to wipe the slate clean as to that part of the testimony. The prior statements are not evidence, but can, when proven to have been made, only neutralize the present inconsistent statements, and nothing more.

Charge

The defendant interposes in this case a defense known as an alibi; that is to say, a defense arising upon proof that the prisoner was elsewhere at the time that the crime was committed, and consequently incapable of being the guilty person. The presence of the accused at the time and place of an alleged criminal act is not presumed or assumed. In every case where the presence of the accused at the commission of the crime is essential to his conviction—and it is in this case—the State must establish that fact beyond a reasonable doubt.

Testimony tending to break the force of the State's *prima facie* case by testimony that the defendant was alibi is not the offer of an affirmative issue advanced by the defense; it is merely showing a state of facts inconsistent with an essential element of the indictment. The jury may, notwithstanding such testimony, believe that the defendant was present as charged, or they may believe that he was absent, in which event he is said to have proved his alibi.

A third result may be that the defendant's testimony may create such a degree of uncertainty as to his whereabouts that the jury are not satisfied beyond reasonable doubt of his guilt of the crime for which he was indicted.

If the alibi fail, that is to say, the defense of alibi is overcome by the State or is disbelieved and therefore disregarded by the jury, it does not by any means follow that the defendant is guilty. The State is still under the burden of establishing the guilt of the accused by evidence which shall satisfy you beyond a reasonable doubt that he is guilty. If reasonable doubt of guilt is raised even by inconclusive evidence of the alibi, the defendant is entitled to the benefit of it by an acquittal.

Now, gentlemen, there has been testimony in this case tending to indicate that this defendant fled. That is, it is alleged by the State and its witnesses say that he was there at this time, and that after this little girl was struck he continued on his way at a rapid rate of speed. In other words, the State contends that he fled. Now, if you believe from the testimony beyond a reasonable doubt that the defendant, fearing an accusation of the crime would be made against him, for the purpose of evading that accusation, took refuge in flight, then you may consider that flight in connection with all the other testimony and evidence in the case, because the flight of the defendant after the commission of the deed is a circumstance tending to prove a consciousness of guilt. It is well recognized that the flight of one accused of a crime, or his escape from custody, or his attempt to take his own life, may be given in evidence upon the trial of an indictment for the crime charged. Such evidence is deemed if and when unexplained to raise some inference of guilt akin to the inference deemed to arise upon the fabrication of false evidence or the suppression of true evidence.

Now, gentlemen, evidence has been brought before you and introduced of the good reputation of the defendant. It is the right of a person charged with crime to have all the relevant testimony, including that relating to his good character or reputation, considered by the jury in every case, and if on such consideration there exists 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, including that related 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.

Now, if you believe, gentlemen, that any witness in this case wilfully or knowingly or intentionally testified falsely to any material fact in this case, you may give such weight to his or her testimony on other points as you may think it entitled to, or you may disregard it altogether. False in one thing, false in all things—is not a mandatory rule of evidence, but is rather a permissible inference that the jury may or may not draw when convinced that an attempt has been made to mislead them in some material respect. You are at liberty, gentlemen, to sift the evidence of such a witness and to take out the false from the true in your opinion. You are at liberty to believe a part of the evidence, what part you may believe to be true, and reject and disbelieve that part that you may believe to be false, if any.

Now, gentlemen, this case has occupied you for some time, and you have heard all of the testimony, and, of course it is your duty to consider all of the testimony and to consider the testimony of all of the witnesses. One of the important issues in this case is as to whether or not the defendant was present at the time this little girl was struck. That, gentlemen, is an important issue, and I will discuss that more fully with you later in my charge, or will refer to it again.

Now, this defendant comes before you gentlemen under an indictment which has been found by the grand inquest of this county, and this indictment contains two counts, the first of which is for assault and battery, and the second for atrocious assault and bat-

tery. Any wilful, unlawful touching of another's person is an assault and battery. An atrocious assault and battery is an assault and battery by maiming or wounding another. The word atrocious is used in the legal sense. It does not necessarily involve an atrocity. Atrocious assault and battery merely means an assault and battery by maiming or wounding another. The extent of the maiming or wounding does not control.

Now, I will read you gentlemen an extract from the laws of our State:

"The following rates of speed may be maintained, but shall not be exceeded, upon any public street, public road, or public turnpike, public park, or parkway, or public driveway, or public highway, in this state, by anyone driving a motor vehicle. A speed of one mile in four minutes at the junction or intersection of a prominent crossroad where such a street, road or highway passes through the open country, the term 'open country' meaning where houses are on an average more than one hundred feet apart."

"A speed of one mile in five minutes where such street or highway passes through the built up portion of a city, town, township, borough or village, where the houses are on an average less than one hundred feet apart."

"Nothing in this act contained shall permit any person to drive a motor vehicle recklessly or at any speed greater than is reasonable, having regard to the traffic and use of the highways, or so as to endanger life or limb, or to injure the property of any person."

I have read you this law, gentlemen, because if it was violated it is one of the circumstances for you to consider in reaching your verdict.

The State does not claim that it is entitled, and it is not entitled to a verdict if the defendant was guilty of negligence only. In order to justify a verdict of guilty, there must be malice and an intention to inflict injury. Malice may be implied from the doing of an unlawful thing from which injury is reasonably to be apprehended, and an intention to injure need not be specifically directed to the particular individual that was injured, but may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional. The prisoner may be taken to have intended the natural consequences of that which he did. For example, gentlemen, if a man wilfully and intentionally fires a gun into a crowd of pedestrians lawfully in the street, and unexpectedly hits the person he loves best in the world not suspecting his or her presence in the crowd, malice could be implied and intent inferred. One who does such things cannot escape on the ground that he did not intend to injure the particular person struck.

Now, an automobile, like a gun, is a dangerous instrumentality under some circumstances. If a gun is fired in a remote forest, or an automobile run at a high rate of speed in an unsettled country, that is one thing; but if a gun is fired at random, or an automobile run at a high rate of speed in the streets of a city, that is quite another thing. All the facts and circumstances must be considered.

By way of further illustration, gentlemen, I will read you another case. The defendant was in the gallery of a theatre, which was reached by a staircase lighted by gas light, at the bottom of which was a pair of folding doors. At the end of the performance

the defendant ran quickly down the stairs turning out as he went the gas lights on the middle and lower landing and closing with a bar the doors of exit. As a consequence of which there was a jam on the staircase in which several persons were injured. In commenting upon that state of facts, the Court said:

"The person must be taken to have intended the natural consequences of that which he did. He acted unlawfully and maliciously, not that he had any personal malice against the particular individual injured, but in the sense of doing an act calculated to injure, and by which others were in fact injured."

So in the case at bar, gentlemen, if you find that the defendant was at the time and place charged wilfully, knowingly, and intentionally running his automobile at a rate of speed and in such manner which, under all the facts, circumstances and conditions existing in the case, was to him consciously and obviously dangerous to pedestrians or others lawfully using the highway, and he hit and maimed or wounded the little girl with his automobile while so doing, then you are at liberty, if you see fit, to draw the inference I have indicated, and to find him guilty of atrocious assault and battery.

Now, I will return, gentlemen, to what I spoke of a moment ago, namely: I said it was an important issue in this case as to whether or not it was the defendant in his car who struck this little girl. As I understand the attitude of the defendant through his counsel, it is not disputed that this little girl was struck and injured that night by an automobile. The question, in that particular, which is contested is whether or not the defendant was there present, and whether

or not he is the man who struck by an automobile the little girl.

Now, the State has produced a number of witnesses. Two of those witnesses to whom I will first refer are Krauss and Dever. As I recall it, both of those witnesses had been previously convicted of crime, and, as I have said to you, their testimony may be affected by that fact. In other words, you may take into consideration the fact that they were convicted of crime in weighing their testimony and passing upon their credibility; and the same thing applies to the defendant, who says and admits that he was convicted of crime.

The next witness called by the State, was one, Gadiosi, the one-legged boy. He says he was there, and he saw Shaw get on the running board of this car. He saw the car move off, as I recollect it, and Shaw got on the running board.

Now, Shaw is the young man who testified here. You probably will recall him. He was the light-haired young man. I will say that he made a favorable impression upon the Court. It is always the right, and sometimes the duty of the Court to indicate its view in respect of the facts, but they have no binding force upon the jury, and the jury are at liberty to disregard them entirely. And I say, with that reservation, giving the jury the benefit of such experience as the Court has had, that Shaw impressed the Court favorably. Now, Shaw says that it was fifteen to twenty minutes to nine when this accident occurred. He says that he jumped on to this running board. His view was not obstructed by a wind shield. He was standing on the running board. He said that they pursued this car which had passed; that they fol-

lowed it as far as Ridgewood Avenue, near Ridge-Wood Avenue, in Glen Ridge, and that there they overtook it. He noticed this flap on the rear of the car, which, he says, was there, and which he says is shown in the picture. He says he is certain that that was the car; that he never lost sight of it, as I recall. He says that when they overtook the car Cosgrove was the man in the car. He says that he heard Dever speak to Cosgrove, and heard him say: "Jesus Christ, you know me, Danny. Lay off me." He says he noticed the mudguard and the mirror, and they were bent. He says that he went to the rear of the car to take the license number, but before he got the license number the car drove away; that he tried to write down the license number from his memory, and apparently he got it wrong. He says that he went back to Newark, and that he went to the Fifth Precinct, and reported the matter; that he gave there the name of "Charles Cosgrove" because that was the name he understood from Dever as the name of the man.

It was not Krauss or Dever who went to the precinct and reported this matter, but it was Shaw who did so. As far as the evidence shows Shaw had no acquaintance with this defendant; he had no motive as far as I recall in the evidence to be antagonistic to him.

We then have the witness Daniel Odoms, who was a colored man. That colored man was the night man in this garage. He says he was not there when the car came in but he saw the car later, and he was told by Dietrich to take the fenders off the car. He says he started to do so about nine o'clock, not as late as ten o'clock, and that he was stopped by a detective.

He cannot give the exact time. He says the car was as shown in one of these pictures when he started to work on it, and he says further that he had seen the car the morning of the same day and the light was not bent, the reflector was not bent, the mudguard had a dent in it, but was not bent. He says the car was outside on a night unlocked, but he cannot say what night that was.

The State calls Dietrich, Charles A. Dietrich, who says he is in the taxi business. He says he was there in this garage when the car came in, and he was told by Cosgrove to take the fenders and the running board off. He says the lamp was bent back so that the light shone up to the ceiling, and the mirror and the mudguard were bent the same as in the picture, except that the light looked to be pulled forward a little. He said he had a call about that time to go up to South Mountain Avenue, and that he looked at the clock on the building there, and that it was two minutes to nine o'clock.

The State then called a man named Gannon. He was a plumber's helper. He says that he knew Cosgrove as a policeman. He says he saw the car go into the garage. He guesses it was about 8:40; that his attention was directed to it by the left light shining in his eye. He was standing on the sidewalk.

We then have a witness Pecola. He was with Gannon and O'Mara. He saw Cosgrove's car go into the garage. He says the left light shone in his face, and he was attracted by the light. He says that Cosgrove once gave him a ticket for speeding, and that he was fined.

We have a witness, O'Mara, who had some trouble with his back. He said he was with Gannon, and

that this time his attention was not called to the car until after it went into the garage.

Now, the defendant calls Mrs. Setphin. She says that on the night when this accident occurred the defendant was at her place. She gives a time as to when he left there which coincides with his contention. She says that she saw this car about a week as I recall it, or some considerable period of time, before this accident occurred, and she said that she noticed a dent in the mudguard. She pointed out the dent in the mudguard from the picture which you gentlemen will recall. She said she got into the car, came by it, took a ride to some place, came back home again. But, she says, she did not mention this dent in the mudguard to anybody until a week later.

The defense calls a man named Pressman. He says that he received an order from Cosgrove for fenders. Another witness, perhaps Cosgrove himself, I think it was, testified that all his fenders were in bad shape, and that he needed new ones.

The defense calls Policeman Fagin. He says he was standing about one hundred and fifty feet from the corner of Bloomfield Avenue, near the Lackawanna station, near Ridgewood Avenue; that he was told that a car had taken the clothes off a child, and had been lost; that this was about ten minutes to nine; and he says he was told that the car was coming through, that is, was to pass instead of having passed.

The defense calls Lieutenant Higgins, Lieutenant of Police. He says that he was there at this time; that he came up in the police car; that he saw Fagin standing over on the street, and that his attention was called to Fagin by one of the other officers. Fagin got into the car of this witness Krauss, and

rode for some distance. He says that he was told that the car was to pass, the car which had injured somebody.

We have also Policeman Anderson, who was with Lieutenant Higgins and the other policemen, and those three policemen corroborate each other in a measure at least.

We also have a young man called Webb called by the defendant. He says that Krauss said nothing to show—in his hearing—whether the car lost was one which was to come up from Newark, or was one which had already gone on towards Montclair. The testimony of some of these witnesses, I don't remember which, was to the effect that this car had gone on; that it had stopped; that while Shaw was trying to take the number of the car, the car drove away and went on up towards Montclair and disappeared in that way.

The defense calls the witness Conley, who says all the fenders were in bad condition. He saw the car on the morning of May 15th, that is the very morning of this accident. He says that the fenders and the lamp were bent, but were bent more in the picture. The reflector was upright at that time, and that there were screws loose in the reflector.

The defendant calls his sisters, and his mother's testimony is read with the same effect as if she were here present by stipulation.

The defense calls a man named Albert Gordon. He says he saw the car on May 14th, that is, the day before the accident, and that the condition was the same as in the picture, and that it had been that way for a month or less. He says the car went out after dark; that the lights were lit; and they were in the same condition as shown in the picture.

We have another witness for the defendant, Jacob Praeger, who says he sells farm products. He says he saw Cosgrove as he went into this garage that night; that it was at eight-thirty; that he had not seen Cosgrove for some time. Cosgrove he had met down at the seashore some time previous; that Cosgrove said hello to him, and he said hello to Cosgrove. Nothing more was said. He did not renew their acquaintance any further. He says, however, that he met Cosgrove by accident later in front of Childs' restaurant, and he asked Cosgrove whether he was the man who was concerned in this accident in Montclair. This occurred after Cosgrove had been arrested and charged with this crime.

Now, we have Cosgrove himself. He says he got home that night at 8:30; that he had his supper; dressed himself in his uniform; went to the police station, and reported there at nine o'clock fully dressed without hurrying. He says this car had been in this condition for about a month; that he had his lights on coming home; that he had ordered new fenders around the latter part of April, but he countermanded the order. Now, gentlemen, without referring any further to the testimony, you will take into consideration not only the testimony to which I have referred, but all of the testimony. It is for you to weigh this evidence. It is for you to come to a conclusion. It is for you to say whether or not it is true that this boy Shaw, and these other people, did follow this man up and overtake him; whether that is a fabrication out of whole cloth or not, because they testified definitely that it was Cosgrove. It is for you to say whether you believe that or not, and whether the testimony of those witnesses justify a

verdict under the charge of the Court and all the charge of the Court. It is for you to say what credence, weight, you will give to the defense, to the contention of the defense that this car was in this condition for a period of time, and was driven around in the condition that was testified to, and in such condition as far as the pictures reflect.

Gentlemen, the case is an important one. It involves an accusation against an officer of the law. The responsibility of deciding it is upon you as judges of the facts, and I now place the case, gentlemen, in your hands for such a verdict as you may think just upon all the testimony and upon the entire charge of the Court.

You will recall that I have told you that this indictment contains two counts. You have a right to bring in a verdict of guilty on the first count, which charges assault and battery. You have a right to bring in a verdict of guilty on the second count, which charges atrocious assault and battery, atrocious assault and battery being such assault and battery as the Court has defined to you. The words "atrocious assault and battery" have the meaning in this indictment which the law gives them. Or you are at liberty to find this defendant not guilty. If you are satisfied that the defendant has been proven guilty in the manner and as called for by the charge of the Court, it is your duty to find him guilty; and if not so proven guilty, it is your duty to find him not guilty.

The case, gentlemen, is with you.

The jury retires.

The Court: As to the requests to charge of the defendant, the Court declines to charge the requests

except as already charged, and gives the defendant an exception separately as to each request to charge.

Mr. Simandl: May I also take an exception to your Honor's charging my requests not in the form I presented them to the Court?

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

DALLAS FLANNACAN. Judge.

Mr. Simandl: May I also take an exception to your Honor's charge, wherein your Honor said—quite properly—that evidence of good character could raise a reasonable doubt, and then your Honor said, after the reasonable doubt had been arrived at, evidence of good character should not alter the verdict. It is my contention that that is inconsistent.

The Court: I don't believe that that is what I said.

Mr. Simandl: If your Honor did say that I want an exception.

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

DALLAS FLANNACAN. Judge.

Mr. Simandl: I also desire to take exception to your Honor's charge on flight. It is my contention there is no evidence of flight within the meaning of that word at law.

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

DALLAS FLANNACAN. Judge.

Mr. Simandl: I also desire to take exception to your Honor's illustration of the firing of a gunshot

into a crowded street as an apt illustration of atrocious assault and battery under circumstances such as these. I say, if your Honor please, that the firing of a gunshot or the possession of a gun under circumstances as your Honor stated them, is an unlawful thing in itself; but the driving of an automobile is not unlawful, and the driving of an automobile at thirty miles an hour upon this highway is not unlawful. Your Honor may say that the State law respecting firearms is that the gun should be concealed. I think there are cases that hold if a man has a gun in his hand walking up the street fully loaded, he is just as guilty of concealed weapons as if he had it in his pocket, and I know of a man who was convicted on that testimony.

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

DALLAS FLANNACAN. Judge.

Mr. Simandl: I also take an exception to your Honor's charge wherein your Honor said that Shaw made a very favorable impression upon the Court.

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

DALLAS FLANNACAN. Judge.

Mr. Simandl: I also take exception to that part of your Honor's charge where your Honor definitely stated as a fact that Shaw went to the Fifth Precinct. I don't think I ever admitted that to be a fact.

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

Judge.

DALLAS FLANNACAN.

Mr. Simandl: I also take a general exception to your Honor's charge.

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

DALLAS FLANNACAN. Judge.

Mr. Wachenfeld: The Court charged the jury that the two witnesses, Dever and Krauth, had both been convicted of a crime. I don't recall Dever admitting or any proof or testimony that he was convicted of crime.

The Court: I am sorry, but I think I will let it stand. I apologize to Mr. Dever if he hasn't.

(After some time the jury returns, by order of the Court.)

The Court: Gentlemen, I have a communication from you which says:

"Is actual intent to atrociously assault necessary, or is it implied by recklessness in driving, by breaking of speed laws and fleeing from the spot."

It may be implied, gentlemen, from those things, but you must take into consideration, of course, all of the testimony in the case. In order, perhaps, that I may make it clearer, I will read to you what I said to you before in my charge, and that is:

"Malice may be implied from the doing of an unlawful thing from which injury is reasonably to be apprehended, and an intention to injure need not be specifically directed to the particular individual that was injured and may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was

intentional. The prisoner may be taken to have intended the natural consequences of that which he did."

I hope, gentlemen, that that makes the first inquiry clear.

Now, there is a second inquiry, that reads this way:

"Is it necessary to convict on both counts of the indictment, or can the defendant be found guilty on the first or second or both?"

The defendant may be found guilty on the first; he may be found guilty on the second; or you may render a general verdict of guilty. Of course, he may be acquitted altogether, but he may be convicted on the first count in the indictment, or on the second count in the indictment, the first being a count for assault and battery, and the second count in the indictment being for atrocious assault and battery.

Now, I am going to give you a definition, or a further statement of the elements constituting the crime respectively of assault and battery and atrocious assault and battery. First, let us take up assault.

"An assault is an attempt or offer wilfully without his consent and without lawful right, to beat or obstruct, or molest physically the person or body of another without actually touching him," as if one lifts up his cane or his fist in a threatening manner.

"Battery is the beating or least touching of another person without his consent, wilfully and without lawful right."

That is battery. Now, when the battery goes to the extent of constituting wounding, then it becomes atro-

cious assault and battery. It is not necessary that it shall be an atrocity, but wounding is all that is required. It is not atrocious in the sense that it is sometimes used, but it is used in the legal sense—when the battery goes to the extent of wounding, then it becomes atrocious assault and battery. In other words, an atrocious assault and battery means an assault and battery by maiming or wounding another.

Now, gentlemen, I hope that I have answered your questions satisfactorily, and if so, will you kindly retire to your room and resume your consideration of the case.

(The jury again retires.)

Mr. Simandl: Your Honor has not answered that question, the very question that the jury asked, which was whether or not intent is a necessary ingredient, and your Honor didn't answer that. It seems to me that that is error.

The Court: If you wish an exception—

Mr. Simandl: Yes.

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

DALLAS FLANNACAN. Judge.

Mr. Simandl: And I desire an exception to the rest of your Honor's charge.

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

DALLAS FLANNACAN. Judge.

Defendant's Requests to Charge.

1. It is the right of a person charged with crime to have all the relevant testimony including that relating to his good character or reputation considered by a jury trying his case, and if on such consideration by you gentlemen of the jury, there exists reasonable doubt of his guilt, even though that reasonable doubt be engendered merely by his previous good reputation, he is entitled to an acquittal.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS F[illegible]NNACAN, Judge.

2. It is the law that the defendant, John Cosgrove, Jr., is assumed innocent and that assumption of innocence continues until overcome by the State establishing his guilt beyond a reasonable doubt.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN, Judge.

3. If there is a reasonable doubt in your minds as to whether or not this defendant drove the car which struck Lillian Dowling, it is your duty and under your oaths you must acquit the defendant.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

4. The witnesses, Dever and Krauss have admitted that they have been convicted of a crime and you are entitled to take this fact into consideration when passing upon the credibility of either of these witnesses' testimony.

(Charged.)

5. Mere negligence on the part of the defendant would not be sufficient to convict him of the crime of atrocious assault and battery. His conduct must be such as would evince in your minds beyond a reasonable doubt a wilful and malicious intent to strike Lillian Dowling with his automobile.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

6. The mere fact that the defendant has been indicted by the Grand Jury raises no presumption against the defendant. It is a mere step in the cause and the defendant is presumed innocent until that presumption is overcome by the establishment of his guilt by proof beyond a reasonable doubt.

Charged as Follows: The mere fact that the defendant has been indicted by the Grand Jury raises no presumption against the defendant and overcomes

none in his favor. It is a mere step in the cause and the indictment is of no evidential value.

(Denied as to the remainder.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

7. It is for you, gentlemen of the jury, to decide among other things whether or not Krauss, Dever and Shaw were able to follow this car and keep it in sight in view of the testimony that the night was foggy and several witnesses have testified that a person could not see an object any great distance away from where they were standing.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

8. It is the law that where the presence of the defendant at the place of the alleged crime is essential link in the State's chain of proof, such presence like any other essential fact must be established beyond a reasonable doubt.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

Judge.

DALLAS FLANNACAN.

9. If the testimony of the defendant's alibi creates in your minds such a degree of uncertainty as to whether or not Cosgrove was or was not the person driving the car which struck the complaining witness, that you are not satisfied beyond a reasonable doubt of his guilt of the crime in question, you must acquit him under the law.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

10. If after considering the testimony there is a reasonable doubt in your minds as to whether or not Cosgrove did or did not drive the car which struck the complaining witness you must acquit him.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

11. You have a right to regard the contradictions which appear in Dever's testimony and in Krauss' testimony and in the testimony of Shaw, and if you conclude that they have given you false testimony as to one point, you may disregard their entire testimony as not believable.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

12. It is your duty to search out the evidence in this case, bearing in mind that the defendant is entitled to the benefit of the reasonable doubt throughout the entire case, and that the duty is upon the State to prove a guilt beyond a reasonable doubt, and if the State fails to convince you by evidence beyond a reasonable doubt of the defendant's guilt, you must acquit him under the law and as your duty.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

13. It is your duty to review all the evidence in this case, and if in the review of any witness's testimony, you conclude that the witness has not told you the truth on one point in his testimony, you have a right to disregard his entire testimony from your consideration.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

14. If you find from the evidence in the case that the houses on Bloomfield Avenue, at the point where it is alleged Lillian Dowling was injured by the automobile, were more than one hundred feet apart and that it was not a built up portion of the city, the driver of the automobile under the law was permitted to drive at a speed not more than thirty miles an hour, using due regard for the safety of persons using the highway.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN.

Judge.

15. Even if you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lilliam Dowling, and that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery, it is only one factor in the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as amounted to an intentional and malicious and atrocious act of assault and battery, in this connection, you may consider whether the driver knew he struck anyone and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile.

Charged as Follows: Even if you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lillian Dowling, and

that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery, it is only one factor in the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as to justify a verdict of guilty under all the facts and circumstances of the case and under the entire charge of the Court.

(Denied as to the remainder.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN, Judge.

16. Even if you were to find from the testimony beyond a reasonable doubt, that Cosgrove drove the car which struck Lillian Dowling, this finding in itself would not be sufficient to find him guilty of the crime of atrocious assault and battery, you would also have to find beyond a reasonable doubt that the defendant wilfully, intentionally and maliciously struck Lillian Dowling.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

17. Before you can find the defendant guilty of atrocious assault and battery, you must find from the evidence beyond a reasonable doubt, a specific intent to injure Lillian Dowling, or any other person using the highways at that time.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

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

DALLAS FLANNACAN. Judge.

18. Testimony has been offered by several witnesses as to the speed of the automobile alleged to have injured Lillian Dowling, these are mere opinions on the part of the witnesses offering them, and you may inquire into the facts and circumstances upon which the witnesses based their opinions, such as, their opportunity to observe the car, their ability to judge speed, the weather conditions, the type of car and its condition and their truthfulness in giving their opinion or testifying to the facts offered to support it, before giving any weight to the opinion offered.

(Charged.)

Motion in Arrest.

ESSEX COUNTY COURT OF GENERAL QUARTER SESSIONS,

Monday, March 24, 1924.

STATE OF NEW JERSEY

v.

JOHN COSGROVE.

Before Hon. Dallas Flannagan, Judge.

For the defendant appears Harold Simandl.

Mr. Simandl: I move for an arrest of judgment on the ground:

First: That your Honor is sentencing this defendant on the same offense and same act for which he has already been acquitted by a jury of his peers.

Second: On the ground that your Honor should have sustained the plea involved, there being sufficient evidence before the Court and jury upon which they could have found it was the same offense for which this defendant had been acquitted.

Third: Your Honor lacked jurisdiction in taking from the jury the issue of whether or not it was or was not the same evidence and deprived this defendant of his right to have this matter passed upon by a jury.

On these grounds I submit the judgment should be arrested.

The Court: Motion denied.

Mr. Simandl 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.

Certificate of Court Stenographer.

STATE OF NEW JERSEY

vs.

ADAM DRESCH.

State of New Jersey,
County of Essex, ss:

I, Harold T. Cook, the official stenographer of the Essex County Court of General Quarter Sessions, Part I, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of the State of New Jersey vs. Adam Dresch, assault and battery, which trial was held before the Hon. Fred G. Stickel, Jr., presiding Judge of the Essex County General Quarter Sessions Court in and for the county of Essex, and a jury, on Tuesday, March 14th, 1922, and Wednesday, March 15th, 1922, at Newark, New Jersey.

Dated June 20, 1922.

HAROLD T. COOK.

Certificate of Judge.

STATE OF NEW JERSEY

vs.

ADAM DRESCH.

State of New Jersey,
County of Essex, ss:

I, Dallas Flannagan, 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 contains 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 exceptions signed and sealed in this cause.

Dated

DALLAS FLANNAGAN.

Presiding Judge of the Essex County Court
of General Quarter Sessions.

Assignments of Error.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, Defendant-in-Error, vs. JOHN COSGROVE, Jr., Plaintiff-in-Error.	In Error.

New Jersey, ss:

Afterwards, that is to say, on the 25th day of June, 1924, before our said Supreme Court of the State of New Jersey, comes the said John Cosgrove, Jr., 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:

1. That the said Court before whom, &c., at and upon the trial of an issue joined between the State of New Jersey and the said John Cosgrove, Jr., upon a proper plea of *autrefois acquit,* erroneously directed the jury to return a verdict in favor of the State, at and upon the trial of said plea of *autrefois acquit,* filed by the defendant in this cause, although the defendant did prove before the Court and a jury impaneled to try the issue that he had been lawfully acquitted at a trial upon a former indictment, of the same identical act and offence charged in the indictment to which this said plea was interposed.

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

State of New Jersey and the said John Cosgrove, Jr., erroneously denied a motion to direct a verdict in favor of the defendant, on the ground that the defendant should not have been directed to plead and stand trial upon the indictment in this cause, he having filed a proper plea of *autrefois acquit* and proved that he had already been lawfully acquitted of the same identical act and offence charged against him in the indictment for which he was being tried.

3. That the said Court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and the said John Cosgrove, Jr., erred in refusing to grant the motion in arrest of judgment made by the defendant.

4. That the said Court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and the said John Cosgrove, Jr., denied a motion made by the defendant, that the defendant go without day and not be held to plead, for the reason that his plea of *autrefois acquit* was good in law and that he had submitted proof before the Court and the jury trying the issue raised on said plea, that he had already been lawfully acquitted at the trial of a former indictment of the same identical act and offence charged in the indictment to which said plea was interposed.

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 John Cosgrove, Jr., erroneously ordered the defendant to plead to the indictment upon which he stands convicted, although he had filed a legal plea of *autrefois acquit* and had proven before a jury impaneled to try said plea, that

he had already been lawfully acquitted at the trial of a former indictment of the same identical act and offence, as the indictment upon which he was ordered to plead and was tried and convicted.

6. 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 John Cosgrove, Jr., erroneously tried the defendant for the same offense after he had been lawfully acquitted thereof.

7. 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 John Cosgrove, Jr., refused to permit the witness, Peter Fagan, on behalf of the defendant, to answer the following question:

"Question: And then they drove away? Ans. They drove away down Bloomfield Avenue.

"Q. Were you ordered to do anything then?

"Mr. Wachenfeld: I object to what he was ordered to do.

"The Court: By whom?

"Mr. Simandl: By Lieutenant Higgins, as the result of this conversation.

"The Court: Objection sustained.

"(Argument.)

"Exception."

8. 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 John Cosgrove, Jr., refused to permit the witness, Edward W. Townsend on behalf of the defendant to answer on re-direct examination, the following question:

"Q. You yourself knew of the details regarding the

alleged plea of guilty to these facts? A. Yes, I knew of the details.

"Q. And you had investigated that yourself personally, had you?

"Mr. Wachenfeld: I object to that.

"Objection sustained. Exception noted."

9. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"Now, gentlemen, there has been testimony in this case tending to indicate that this defendant fled. That is, it is alleged by the State and its witnesses say that he was there at this time, and that after this little girl was struck he continued on his way at a rapid rate of speed. In other words, the State contends that he fled."

10. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"Now, if you believe from the testimony beyond a reasonable doubt that the defendant, fearing an accusation of the crime would be made against him, for the purpose of evading that accusation, took refuge in flight, then you may consider that flight in connection with all the other testimony and evidence in the case, because the flight of the defendant after the commission of the deed is a circumstance tending to prove a consciousness of guilt. It is well recognized that the flight of one accused of a crime, or his escape from custody, or his attempt to take his own life, may be

given in evidence upon the trial of an indictment for the crime charged. Such evidence is deemed if and when unexplained to raise some inference of guilt akin to the inference deemed to arise upon the fabrication of false evidence or the suppression of true evidence."

11. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"Malice may be implied from the doing of an unlawful thing from which injury is reasonably to be apprehended, and an intention to injure need not be specifically directed to the particular individual that was injured, but may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional."

12. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"For example, gentlemen, if a man wilfully and intentionally fires a gun into a crowd of pedestrians lawfully in the street, and unexpectedly hits the person he loves best in the world not suspecting his or her presence in the crowd, malice could be implied and intent inferred. One who does such things cannot escape on the ground that he did not intend to injure the particular person struck."

13. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"Now, an automobile, like a gun, is a dangerous instrumentality under some circumstances. If a gun is fired in a remote forest, or an automobile run at a high rate of speed in an unsettled country, that is one thing; but if a gun is fired at random, or an automobile run at a high rate of speed in the streets of a city, that is quite another thing."

14. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"So in the case at bar, gentlemen, if you find that the defendant was at the time and place charged wilfully, knowingly and intentionally running his automobile at a rate of speed and in such manner which, under all the facts, circumstances and conditions existing in the case, was to him consciously and obviously dangerous to pedestrians or others lawfully using the highway, and he hit and maimed or wounded the little girl with his automobile while so doing, then you are at liberty, if you see fit, to draw the inferences I have indicated, and to find him guilty of atrocious assault and battery."

15. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"The question in that particular which is contested is whether or not the defendant was there present, and whether or not he is the man who struck by an automobile the little girl."

16. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"Now, Shaw is the young man who testified here. You probably will recall him. He was the light haired young man. I will say that he made a favorable impression upon the Court."

17. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"Gentlemen, the case is an important one. It involves an accusation against an officer of the law."

18. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"It was not Kraus or Dever who went to the Precinct and reported this matter, but it was Shaw who did so. As far as the evidence shows Shaw had no acquaintance with this defendant; he had no motive as far as I recall in the evidence to be antagonistic to him."

19. 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 John Cosgrove, Jr., failed to accurately answer the following question put to him by the jury, after said jury had retired:

"Q. Is actual intent to atrocious assault necessary or is it implied by recklessness in driving, by breaking of speed laws and fleeing from the spot?"

20. 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 John Cosgrove, Jr., erroneously charged the jury as follows:

"It may be implied, gentlemen, from those things, but you must take into consideration, of course, all of the testimony in the case."

21. 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 John Cosgrove, Jr., erroneously refused to charge the jury the following request to charge of the defendant:

"Mere negligence on the part of the defendant would not be sufficient to convict him of the crime of atrocious assault and battery. His conduct must be such as would evince in your minds beyond a reasonable doubt a wilful and malicious intent to strike Lillian Dowling with his automobile."

22. 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 John Cosgrove, Jr., erroneously refused to charge the jury the following request to charge of the defendant:

"It is for you, gentlemen of the jury, to decide among other things whether or not Kraus, Dever and Shaw were able to follow this car and keep it in sight in view of the testimony that the night was foggy and several witnesses have testified that a person could not see an object any great distance away from where they were standing."

23. 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 John Cosgrove, Jr., erroneously refused to charge the jury the following request to charge of the defendant:

"If you find from the evidence in the case that the houses on Bloomfield Avenue, at the point where it is alleged Lillian Dowling was injured by the automobile, were more than one hundred feet apart and that it was not a built up portion of the City, the driver of the automobile under the law was permitted to drive at a speed not more than thirty miles an hour, using due regard for the safety of persons using the highway."

24. 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 John Cosgrove, Jr., erroneously refused to charge the jury the following request to charge of the defendant:

"Even if you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lillian Dowling, and that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery, it is only one factor in the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as amounted to an intentional and malicious and atrocious act of assault and battery, in this connection, you may consider whether the driver knew he struck anyone and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile."

25. 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 John Cosgrove, Jr., erroneously refused to charge the jury the following request to charge of the defendant:

"Before you can find the defendant guilty of atrocious assault and battery, you must find from the evidence beyond a reasonable doubt, a specific intent to injure Lillian Dowling, or any other person using the highways at that time."

26. 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 John Cosgrove, Jr., upon a proper plea of *autrefois acquit,* erroneously directed the jury to return a verdict in favor of the State.

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.

Wherefore, the said John Cosgrove, Jr., 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.

HAROLD SIMANDL,
Of Counsel with Plaintiff-in-Error.

Reasons for Reversal.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, Defendant-in-Error, vs. JOHN COSGROVE, Jr., Plaintiff-in-Error.	In Error.

And now comes the said John Cosgrove, Jr., by Harold Simandl, of counsel with plaintiff-in-error, and says that in the record and proceedings aforesaid, and also in the matter 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 John Cosgrove, Jr., says that said judgment should be reversed and assigns the following reasons or causes:

1. Because the Trial Court directed the jury to return a verdict in favor of the State at and upon the trial of said plea of *autrefois acquit*, filed by the defendant in this cause, although the defendant did prove before the Court and a jury impaneled to try the issue, that he had been lawfully acquitted at a trial upon a former indictment, of the same identical act and offense charged in the indictment to which this said plea was interposed.

2. Because the Trial Court denied a motion to direct a verdict in favor of the defendant, on the ground that the defendant should not have been directed to plead and stand trial upon the indictment in this cause, he having filed a proper plea of *autrefois acquit* and

proved that he had already been lawfully acquitted of the same identical act and offense charged against him in the indictment for which he was being tried.

3. Because the Trial Court erred in refusing to grant the motion in arrest of judgment made by the defendant.

4. Because the Trial Court denied a motion made by the defendant that the defendant go without day and not be held to plead, for the reason that his plea of *autrefois acquit* was good in law and that he had submitted proof before the Court and the jury trying the issue raised on said plea, that he had already been lawfully acquitted at the trial of a former indictment of the same identical act and offense charged in the indictment to which said plea was interposed.

5. Because the Trial Court ordered the defendant to plead to the indictment upon which he stands convicted, although he had filed a legal plea of *autrefois acquit* and had proven before a jury impaneled to try said plea, that he had already been lawfully acquitted at the trial of a former indictment of the same identical act and offense, as the indictment upon which he was ordered to plead and was tried and convicted.

6. Because the Trial Court tried the defendant for the same offense after he had been lawfully acquitted thereof.

7. Because the Trial Court refused to permit the witness, Peter Fagan, on behalf of the defendant, to answer the following question:

"Q. And then they drove away? A. They drove away down Bloomfield Avenue.

"Q. Were you ordered to do anything then?

"Mr. Wachenfeld: I object to what he was ordered to do.

"The Court: By whom?

"Mr. Simandl: By Lieutenant Higgins, as the result of this conversation.

"The Court: Objection sustained.

"(Argument.)

"Exception."

8. Because the Trial Court refused to permit the witness, Edward W. Townsend, on behalf of the defendant to answer on re-direct examination, the following question:

"Q. You yourself knew of the details regarding the alleged plea of guilty to these facts? A. Yes, I knew of the details.

"Q. And you had investigated that yourself personally, had you?

"Mr. Wachenfeld: I object to that.

"Objection sustained. Exception noted."

9. Because the Trial Court charged the jury as follows:

"Now, gentlemen, there has been testimony in this case tending to indicate that this defendant fled. That is, it is alleged by the State and its witnesses say that he was there at this time, and that after this little girl was struck he continued on his way at a rapid rate of speed. In other words, the State contends that he fled."

10. Because the Trial Court charged the jury as follows:

"Now, if you believe from the testimony beyond

a reasonable doubt that the defendant, fearing an accusation of the crime would be made against him, for the purpose of evading that accusation, took refuge in flight, then you may consider that flight in connection with all the other testimony and evidence in the case, because the flight of the defendant after the commission of the deed is a circumstance tending to prove a consciousness of guilt. It is well recognized that the flight of one accused of a crime, or his escape from custody, or his attempt to take his own life, may be given in evidence upon the trial of an indictment for the crime alleged. Such evidence is deemed if and when unexplained to raise some inference of guilt akin to the inference deemed to arise upon the fabrication of false evidence or the suppression of true evidence."

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"Malice may be implied from the doing of an unlawful thing from which injury is reasonably to be apprehended, and an intention to injure need not be specifically directed to the particular individual that was injured, but may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional."

12. Because the Trial Court charged the jury as follows:

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and intent inferred. One who does such things cannot escape on the ground that he did not intend to injure the particular person struck."

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19. Because the Trial Court failed to accurately answer the following question put to him by the jury, after said jury had retired:

"Q. Is actual intent to atrocious assault necessary or is it implied by recklessness in driving, by breaking of speed laws and fleeing from the spot?"

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"It may be implied, gentlemen, from those things, but you must take into consideration, of course, all of the testimony in the case."

21. Because the Trial Court refused to charge the

jury the following request to charge of the defendant:

"Mere negligence on the part of the defendant would not be sufficient to convict him of the crime of atrocious assault and battery. His conduct must be such as would evince in your minds beyond a reasonable doubt a wilful and malicious intent to strike Lillian Dowling with his automobile."

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"Even if you are satisfied beyond a reasonable doubt from the evidence, that an automobile struck and injured Lillian Dowling, and that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery, it is only one factor in the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as amounted to an intentional and malicious and atrocious act of assault and battery, in this connection, you may consider whether the driver knew he struck anyone and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile."

25. Because the Trial Court refused to charge the jury the following request to charge of the defendant:

"Before you can find the defendant guilty of atrocious assault and battery, you must find from the evidence beyond a reasonable doubt, a specific intent to injure Lillian Dowling, or any other person using the highways at that time."

26. Because the Trial Court upon a proper plea of *autrefois acquit*, erroneously directed the jury to return a verdict in favor of the State.

Wherefore, because the aforesaid reasons or some of them constitute error prejudicial to the said plaintiff-in-error, he, the said John Cosgrove, Jr., 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.

HAROLD SIMANDL,
Of Counsel With Plaintiff-in-Error.

by leave of Court.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

JOHN COSGROVE, JR.,
Plaintiff-in-Error.

On Error.

BRIEF OF JOHN O. BIGELOW FOR THE STATE.

The defendant was convicted in the Essex Quarter Sessions of an atrocious assault and battery upon Lillian Dowling. This conviction has been sustained by the Supreme Court.

I.

The Quarter Sessions properly directed a verdict for the State on the trial of the plea of autrefois acquit.

The opinion of the Supreme Court is printed as a supplement to the State of the Case.

The opinion of the Quarter Sessions, dealing with this plea, appears at page 19 of the State of the Case. This opinion is also worthy the attention of this Court.

Before the trial of this case, the defendant was tried and acquitted on an indictment charging that he did feloniously kill and slay *Mary Mullaney*. It is this acquittal which is pleaded.

The facts connecting the two cases were as follows: The defendant, on May 15, 1923, was driving an automobile along Bloomfield avenue, Newark. Mrs. Mullaney and Lillian Dowling were

crossing the street, hand in hand. The automobile struck them both. Mrs. Mullaney died and Lillian recovered from the injuries received.

By their verdict of "Not Guilty" in the manslaughter case, the jury found that the death of Mrs. Mullaney was not the proximate result of being struck by the automobile.

Or else they found that defendant was not driving the automobile in a grossly negligent manner.

Or else that he was not the person driving the automobile which struck Mrs. Mullaney.

Any one of these findings would have necessitated an acquittal. The verdict of "Not Guilty" does not disclose the ground on which it was based, or which one of the three findings above suggested the jury actually reached.

On the trial for atrocious assault and battery, the jury by their verdict of "Guilty," found that the defendant was driving the automobile which struck Lillian Dowling; that he was driving it wilfully in a manner dangerous to pedestrians and that she was wounded by the blow received.

It will be observed that there is no necessary inconsistency between the two verdicts.

A.

The defendant cannot succeed on his plea of autrefois acquit unless the crime charged in the second indictment or an integral part thereof is one of which he might legally have been convicted on the first trial.

> 4 *Blackstone* 335. "First, the plea of *autrefois acquit,* or a former acquittal, is grounded on this universal maxim of the

common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense. And hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any Court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime. * * * It is to be observed that the pleas of *autrefois acquit* and *autrefois convict,* or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime."

1 *Chitty C. L.* 452. "In order, however, to entitle the defendant to this plea it is necessary that the crime charged be precisely the same and that the former indictment, as well as the acquittal, was sufficient. As to the first of these requisites, the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution for the other * * * (p. 456). But if the former charge were such a one as the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded."

9 *Halsbury's Laws of England* 356. "The defendant can only succeed on such a plea if the charge to which he pleads is one in respect of which he could have been legally convicted on the prior occasion or is one in respect of which by statute, previous proceedings for the same cause are a bar to subsequent proceedings."

Rex. v. *Barron* (1914), 2 K. B. 570. Lord *Reading.* "The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to

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be twice in peril of being convicted of the same offense. If therefore he has been acquitted, *i. e.,* found to be not guilty of the offense by a court competent to try him, such acquittal is a bar to a second indictment for the same offense. This rule applies not only to the offense actually charged in the first indictment, but to any offense of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter. * * * The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offense which is the same offense as 'gross indecency' (charged in the second indictment), *i. e.,* whether the acquittal on the charge of sodomy (on the first trial) necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offense. The graver charge of sodomy involves gross indecency and something else, and, as was decided in *Reg.* v. *Di Salvi* (10 Cox C. C. 481), an acquittal of the whole of an offense does not involve an acquittal of every part of it. There has therefore been no verdict that the appellant was not guilty of gross indecency, and the appellant has never been in peril before of being convicted of gross indecency."

Reg. v. *Gilmore,* 15 Cox C. C. 85. Baron *Huddleston.* "An accused person who relies upon a previous acquittal must make out satisfactorily that he has been acquitted of the identical charge before, or that he could upon the trial of the first indictment have been lawfully convicted of the offense which was charged in the second indictment."

> *Morey* v. *Com.*, 108 Mass. 433, "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

If the question before the Court be tested by the rule stated above, namely, that the charge to which the defendant pleads or some part thereof must be one of which he could have been convicted on the first trial, the action of the Quarter Sessions in directing a verdict for the State must be approved. Certainly, on the trial for the slaying of Mrs. Mullaney, defendant could not have been convicted, whatever the evidence, of any offense against Lillian Dowling.

B.

A distinction between the rules applicable to autrefois acquit and those applicable to autrefois convict should be noted.

Of course, generally speaking, when a former conviction would be a bar to a subsequent prosecution a former acquittal instead of a conviction would likewise be a bar. But there are exceptions to this rule founded in sound reason and noted by the authorities.

It is abhorrent, not only to our law but to every system of jurisprudence and every feeling of justice, that a man should be punished for a crime and then again punished a second time for the same crime. This is the basis of the plea of *autrefois convict*—that no man shall be punished twice for the same offense.

It is also repugnant to our law that a man should be tried and acquitted and thereafter be tried again for the same offense, and so on, until perhaps a jury be found to convict him. If the victim of such a system were in fact guilty, no injustice would be done him by such a series of trials. The sound objection to the procedure is that it would be likely to result in the conviction of the innocent and this is the foundation on which rests the plea of *autrefois acquit.*

The application of these principles in simple cases is easy: If one is convicted or acquitted of an assault, he cannot again be tried for the same assault.

The next step relates to compound crimes. If A be convicted of murder committed in the course of arson, he cannot thereafter be tried for the arson, because the conviction for murder includes a conviction of the lesser offense. Conversely, if he be convicted of arson, he cannot afterward be tried for a murder committed in the perpetration of such lesser felony, for the arson is an integral part of the murder.

If A be acquitted on a *common law indictment* of the murder, he cannot afterward be tried for the arson, because the jury might, on the former trial, have convicted him of the arson and acquitted as to the residue of the charge, and hence the general verdict of "Not Guilty" is an acquittal of the arson.

But the situation is somewhat different when the form of the indictment for the greater offense does not permit a verdict of guilty of the less offense. For instance, if A be tried for murder on our statutory form of indictment, charging merely that he did wilfully, feloniously and of his malice aforethought, kill and murder

the deceased, and the State endeavor to prove that the murder was committed in the course of arson, and A be acquitted, can he thereafter be tried for the arson? It is obvious that the reason which would govern if the murder indictment were in common law form, does not apply, for the jury could not have convicted him of the arson, and hence their verdict of "Not Guilty" does not show that they acquitted him of that offense.

It may be that the defense on the murder trial was an alibi, or, perhaps, that the deceased died of pneumonia and not as a result of injuries received in the fire, or, perhaps, both defenses were interposed.

Will the Court, on the plea of *autrefois acquit*, search the minds of the jurors on the first case and try to see wherein lay their reasonable doubt? Will the Court say, "We have examined the evidence on the murder trial and find that the jury acquitted the defendant because they doubted whether the death was the proximate result of the act of the defendant, and hence, the acquittal of murder is not a bar to the arson charge," or, "We find that the jury acquitted because the evidence that the defendant set the fire was insufficient, and hence, the plea of *autrefois acquit* is good?"

There is no authority for such an inquiry on a plea of *autrefois acquit*. In the absence of such an inquiry, it might be the rule that the second trial would be barred if the verdict of acquittal could possibly have been based on the innocence of the defendant of the less offense. But such a rule would not be in the interest of justice; it would merely give to the defendant the advantage of the mistake made by the prosecutor in using the statutory murder indictment.

The correct rule, I contend, is that the acquittal on the trial of the statutory indictment for murder does not bar the subsequent trial for arson because the record in a murder case does not NECESSARILY involve acquittal of arson. *It will be observed that none of these doubts or questions apply when the first trial results in a conviction.*

Similar doubts arise when two offenses have each certain elements in common and certain independent elements.

For instance, A is convicted of rape. The girl is under the age of 16 years. It certainly cannot be the law that he may be tried again for the same act on an indictment for carnal abuse. But if he be acquitted of rape, perhaps because the jury doubted whether the act was against the will of the girl, can he then be tried for carnal abuse?

Lastly come the cases where the "one volition" results in injury to several people. A steals at the one time the property of B and C, or wounds by one discharge of a shot gun, X and Y. He cannot, I take it, be twice convicted of larceny or assault; but if he be acquitted of stealing B's property because it appears that B had given him the property, or if he is found not guilty of assault on X, because the evidence shows that X was not really one of the men shot, shall A go untried for the crime he actually committed against C or Y?

In all these supposititious cases, the correct rule, I submit, is that the acquittal on the one charge does not bar the trial of the other, although a conviction one the one would be a defense to the indictment on the other.

This distinction between former conviction and former acquittal is not noted in the elemental authorities such as Blackstone and Chitty, but it is supported by the cases.

> *In re Nielsen,* 131 U. S. 176, Bradley, *J.*
>
> "In order than an acquittal may be a bar to a subsequent indictment for the lesser crime it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also, and would be a bar."

Com. v. *Hudson,* 14 Gray (Mass.) 11. The same rule is expounded and based on the theory that the lesser crime is merged in the greater only in case of a conviction of the latter.

> *Simco* v. *State,* 9 Texas C. A. 338. "There is a marked difference in modern practice between the rules which govern the two pleas of *autrefois acquit* and *autrefois convict,* notwithstanding the immense amount of *dictum* and loose expression to the contrary found in the books. *Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by, the same proof. These two elements must combine, and are both *sine qua non* to the sufficiency of the plea. *Autrefois convict* only requires that the transaction, or the facts constituting it be the same. To illustrate: If a party be indicted separately for the theft of three horses, the property of A, B and C, taken at the same time, or in one transaction, and he be tried on the first for the theft of A's horse, and the State fails from misnomer, or the defendant by proving A's consent

should be acquitted, would the plea of that acquittal operate a bar to the conviction on the other trials because the transaction was one and the same? By no means. Why? Simply because the proof necessary to a conviction in the latter cases would not convict in the former. *Albert Pickens* v. *The State, ante,* p. 270; 1 *Whart. Cr. Law* (6th ed.), Sect. 557, and authorities cited.

"But suppose the party was convicted of the theft of any one of the horses, would a plea of former conviction be a bar to conviction on the other two indictments? Clearly so. And why? Because the transaction—the taking of the three horses at the same time—would constitute but one offense in law (*Wilson* v. *The State,* 45 Texas 76); and the plea would be good upon the strength of and by virtue of another rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once. *Quitzow* v. *The State,* 1 Texas Ct. App. 47. Here is where the doctrine of carving would come in and support the plea. 1 *Whart. Cr. Law* (6th ed.), Sect. 565, and authorities cited in note."

Wright v. *State,* 17 Texas C. A. 152. Same rule.

In *Reg.* v. *King* (1897) 1 Q. B. 214, the defendant was convicted twice for two different offenses which were parts of the same transaction and which consisted of substantially the same acts. The Court of Criminal Appeals reversed the second conviction. Lord Reading, in *Rex* v. *Barron* (1914), 2 K. B. 570, commenting on this decision, noted that the two offenses were not the same, but approved of the decision on the ground that the Trial Court should have directed a verdict for the defendant on the second trial "as a matter of fairness" and in "the exercise of a proper judicial discretion."

At common law, indictments were so detailed that usually every part of the criminal transaction was set out in the one indictment and hence the jury could pick and choose as to which part of the offense they would convict. It was, however, the rule that on an indictment for a felony the jury could not convict of a misdemeanor, part of the felony; so it followed that an acquittal of the felony was not a bar to a later trial for the misdemeanor, although a conviction of the felony was such a bar.

C.

Defendant's argument is based on an unsound view or res judicata rather than on autrefois acquit.

The argument, on careful analysis, is not that the defendant had already been acquitted of the same offense, but rather that one issue of the second indictment had been decided adversely to the State on the former trial and that the State was concluded as to that issue by the record in the former proceeding and hence could not prevail at the second trial. Defendant's counsel, in effect, contends that the first acquittal was an adjudication "that the defendant was not the person who had driven the automobile in question"; that the adjudication of this fact was binding on the State at the second trial and hence that there should have been an acquittal on the second trial.

This line of reasoning overlooks the possibility that the jury may have acquitted Cosgrove of manslaughter, although they found that he was the driver and was driving in a grossly careless manner, because they were not convinced that he struck Mrs. Mullaney or because they

doubted whether the blow was the proximate cause of her death.

It is true that the evidence on that trial that the automobile struck Mrs. Mullaney and that she died as a result of the blow was clear and uncontradicted, but this lack of contradiction did not remove these issues from the consideration of the jury.

Schmidt v. *Marconi, etc., Co.,* 86 N. J. L. 183;

State v. *Pitman,* 119 Atl. 438.

If we assume that the ordinary rules of *res judicata* are applicable to criminal cases, still the record in the manslaughter case would not estop the State from proving in the assault and battery case the fact that the defendant was driving the car. Whether defendant was driving or not was merely incidental to the general issue and could only be inferred by argument from the judgment.

Bernard v. *Hoboken,* 27 N. J. L. 412. Headnote. "The first judgment is conclusive upon the facts only so far as that case is concerned. It does not prevent the same facts being controverted in a second case founded upon a distinct cause of action."

Sbarbero v. *Miller,* 65 Atl. 472, Garrison, *V.-C.* "A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered."

State v. *Robinson,* 16 N. J. L. 507. Headnote. "On the trial of an indictment for uttering a forged note, it is competent evidence in order to show a scienter, to prove that the prisoner uttered another forged note of the same bank, on the same day, although he had been acquitted on a trial for that offense."

State v. *Dragone* (E. & A.), 122 Atl. 878. Defendant had been tried and acquitted under the Van Ness Act for the sale of intoxicating liquor. He was later indicted for keeping a disorderly house. On the trial of that indictment, the State, in order to show one element of the alleged disorder, introduced evidence of the very sale for which the defendant had been acquitted. Defendant offered the record in the liquor case to disprove the sale. The Trial Judge overruled the offer on the ground that it was the province of the jury to determine whether liquor was sold, and that they could not take the judgment or conclusion of someone else on that point. The Court of Errors, in affirming the conviction, held that the exclusion of this evidence was proper because, among other reasons, the offense of selling liquor and the offense of keeping a disorderly house were not the same.

D.

The Cooper, Rosa and Mowser cases.

State v. *Cooper,* 13 N. J. L. 361, and *State* v. *Mowser,* 92 N. J. L. 474, 106 Atl. 416, each considered a plea of former *conviction* and in each of them the crime for which a conviction had been obtained—arson or robbery—was an integral part of the murder charged in the second indictment.

Mr. Justice Drake, in the *Cooper* case, relied on the fact that the arson was a necessary ingredient of the murder and that by being put on trial first for arson and then for the murder, Cooper was tried twice for the very same indictable offense. Indeed, if Cooper had been tried first for the murder the jury could legally have convicted him of the arson and acquitted as to the residue of the charge. The basis of the

Mowser decision is the same, namely, that the robbery for which Mowser was first tried was an essential and integral element of the murder.

Counsel for the defendant quotes from Mr. Justice Kalisch's opinion in the *Mowser* case that one test is "whether or not the offenses grew out of the same transaction or were the product of a single criminal act." By this language, however, the learned Justice intended the situation where one indictable offense grows out of and includes another, as murder and robbery.

> "The principle to be extracted from well-considered cases is that by the term 'same offense' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment."

I call attention to the last clause, "which may subject an offender to indictment and punishment."

> "When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater."

This language from the Mowser case does not tend to support the plea in the present case. The manslaughter charge for killing Mrs. Mullaney and the assault and battery charge both grew out of the reckless driving of the defendant; but that reckless driving was not subject to indictment and punishment. Defendant has not been acquitted of reckless driving, for reckless driving is not a crime for which he was or could be tried. The assault on Lillian Dowling was not an integral part of the offense of slaying Mrs. Mullaney.

State v. *Rosa,* 72 N. J. L. 462, 62 Atl. 695, upheld the action of the Oyer in sustaining a demurrer to a plea of *autrefois acquit.* The Court expressly refrained from considering "the question whether an acquittal upon an indictment charging the felonious homicide of A is a bar to a conviction upon an indictment charging the felonious homicide of B, when it is shown that the death of each was produced by the same act of the person indicted." This case is not an authority in support of the contention of the plaintiff-in-error.

E.

Defendant's Authorities.

One case resulted in a reversal because the Trial Court struck out the plea, instead of trying it:

Cook v. *State,* (Tex.) 63 S. W. 872.

In the following cases the plea of *autrefois acquit* or *convict* was held properly overruled, and hence the decisions cannot aid the plaintiff-in-error:

Lillie v. *State,* (Tex.) 187 S. W. 482;
Gunter v. *State,* (Ala.) 20 So. 632;
McCoy v. *State,* 46 Ark. 141;
Bell v. *State,* (Ark.) 180 S. W. 186;
People v. *Ochotski,* (Mich.) 73 N. W. 889;
Morris v. *Ter.,* (Okla.) 99 Pac. 760; 101 Pac. 111;
Augustine v. *State,* (Tex.) 52 S. W. 77;
Keaton v. *State,* (Tex.) 57 S. W. 1125;
State v. *Evans,* (W. Va.) 10 S. E. 792.

Cases distinguishable because they dealt with former conviction and not former acquittal are the following:

State v. *Damon,* 2 Tyler (Vt.) 387;

Sadberry v. *State,* (Tex.) 46 S. W. 639;
Clem v. *State,* 42 Indiana 420;
Carson v. *People,* (Col.) 36 Pacific 551;
Hurst v. *State,* (Ala.) 6 So. 120.

The only decisions which support the contention of defendant are based on the view of *res judicata* above mentioned, and are contrary, I believe, to the law of New Jersey. These cases are:

Spannell v. *State,* (Tex.) 203 S. W. 357;
Moss v. *State,* (Ala.) 75 So. 179;
Burnam v. *State,* (Ga.) 58 S. E. 683;
Jones v. *State,* (Miss.) 6 So. 231;
Com. ex rel. Veley v. *Orealey,* 63 Pa. Sup. 489.

G.

Opinion of Supreme Court.

The opinion of Mr. Justice Parker deals with the question of *autrefois acquit* from a somewhat different angle. This opinion is clear and convincing and needs no argument from me to support it.

Counsel for defendant urges *State* v. *Scaduto,* 74 N. J. L. 289, 65 Atl. 908, is not in harmony with this opinion or with the decision in *State* v. *Thomas,* 65 N. J. L. 598, 48 Atl. 1007.

The Thomas case holds that manslaughter does not necessarily involve assault and battery, and hence that an indictment for manslaughter in statutory form will not support a conviction for assault and battery. The Scaduto case dealt with voluntary manslaughter committed in the heat of passion, and noted that assault and battery was an element of that class of manslaughter. There is no conflict between these cases.

H.

If the foregoing argument is sound, there was no issue of fact for the jury on the plea of *autrefois acquit,* and the Court properly directed a verdict for the State.

II.

Alleged Error in the Exclusion of Evidence.

Assignment of Error No. 8.

Defendant's witness, Edward W. Townsend, testified to the good character of the defendant. On cross examination he admitted that he knew defendant had pleaded guilty to some offense (Case, p. 244, l. 13). On re-direct examination, Mr. Townsend testified that he knew the details "regarding the alleged plea of guilty."

> "Q And you had investigated that yourself, personally, had you?"
> Objection sustained (Case, p. 246, l. 15).

If this question be regarded as a preliminary one, leading to testimony that the defendant was, in fact, not guilty of the offense to which he had pleaded, it was clearly incompetent. The Court was trying only the instant case, and not some old indictment to which the defendant had pleaded guilty.

Standing by itself, the question was immaterial. It made no difference to the defendant's *reputation* whether or not Mr. Townsend had investigated personally the details of the plea of guilty.

III.

Charge to the Jury.

Assignment of Error No. 10.

This assignment alleges that the Court erred in its charge as to inferences which may be drawn from the flight of one accused of crime. The brief for defendant admits, however, that there is no error in this part of the charge, and therefore this assignment needs no consideration.

IV.

Alleged Failure to Answer Jury's Inquiry.

Assignment of Error No. 19.

After retiring, the jury returned to the court room, having sent a question to the Judge, "Is actual intent to atrociously assault necessary, or is it implied by recklessness in driving, by breaking of speed laws and fleeing from the spot?" (Case, p. 308, l. 25.)

The Court answered this question to the effect that intent might be implied from the circumstances of the case, "an intention to injure need not be specifically directed to the particular individual that was injured, and may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional." (Case, p. 308, l. 37.)

I contend that the question of the jury was fully and correctly answered. I know of no rule, however, which required the Court to answer a question of the jury, especially when the answer has already been given in the charge. The Court in the case at bar had already clearly pointed out that guilt could not rest on negligence alone,

but that there must be malice and an intention to inflict injury. (Case, p. 297, l. 1.)

Assignment of Error No. 20.

In answer to the jury's inquiry, whether intent might be implied "by recklessness in driving, by breaking of speed laws and fleeing from the spot," the Court replied that intent might be implied "from those things, but you must take into consideration, of course, all of the testimony in the case."

Counsel contends that this instruction permitted the jury to infer an intent to injure from any one of the three elements mentioned, as, for instance, breaking of speed laws. This interpretation is not supported by the language of the question. The jury used the conjunction *and;* they did not use a disjunctive.

State v. *Kelly,* 124 Atl. 516.

V.

Refusal to Charge as Requested.

Assignments of Error Nos. 21 and 25.

These requests dealt with the necessity of an intention to do injury as distinct from mere negligence. The Court fully and correctly charged this subject. (Case, p. 297, l. 1, to p. 298, l. 30.)

Assignment of Error No. 24.

The defendant requested the Court to charge as follows:

> "Even if you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lillian Dowling, and that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery, it is only one factor in

> the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as amounted to an intentional and malicious and atrocious act of assault and battery, in this connection, you may consider whether the driver knew he struck anyone, and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile." (Case, p. 316, ll. 21 to 38.)

The Court charged as requested, the first half of this request, but modified the last half by substituting a reference to all the facts and circumstances of the case. (Case, p. 291, l. 37, to p. 292, l. 11.)

Counsel contends that the clause in the request, "you may consider whether the driver knew he struck anyone," was of importance in connection with inferences which the jury might draw from the alleged flight of the defendant. The Court, however, charged on this subject in a manner even more favorable to the defendant than was requested. The charge permitted an inference of a consciousness of guilt to be drawn only in case the defendant took refuge in flight "fearing an accusation of the crime would be made against him, for the purpose of evading that accusation." (Case, p. 294, ll. 1 to 29.)

The whole charge is a most full, fair and correct exposition of the law of the case.

The judgment of the Supreme Court should be affirmed.

J. O. BIGELOW,
Prosecutor of the Pleas.

26 OCT.T.1926

by leave of Court.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* JOHN COSGROVE, JR., *Plaintiff-in-Error.*	*On Error.*

BRIEF OF JOHN O. BIGELOW FOR THE STATE.

The defendant was convicted in the Essex Quarter Sessions of an atrocious assault and battery upon Lillian Dowling. This conviction has been sustained by the Supreme Court.

I.

The Quarter Sessions properly directed a verdict for the State on the trial of the plea of autrefois acquit.

The opinion of the Supreme Court is printed as a supplement to the State of the Case.

The opinion of the Quarter Sessions, dealing with this plea, appears at page 19 of the State of the Case. This opinion is also worthy the attention of this Court.

Before the trial of this case, the defendant was tried and acquitted on an indictment charging that he did feloniously kill and slay *Mary Mullaney*. It is this acquittal which is pleaded.

The facts connecting the two cases were as follows: The defendant, on May 15, 1923, was driving an automobile along Bloomfield avenue, Newark. Mrs. Mullaney and Lillian Dowling were

crossing the street, hand in hand. The automobile struck them both. Mrs. Mullaney died and Lillian recovered from the injuries received.

By their verdict of "Not Guilty" in the manslaughter case, the jury found that the death of Mrs. Mullaney was not the proximate result of being struck by the automobile.

Or else they found that defendant was not driving the automobile in a grossly negligent manner.

Or else that he was not the person driving the automobile which struck Mrs. Mullaney.

Any one of these findings would have necessitated an acquittal. The verdict of "Not Guilty" does not disclose the ground on which it was based, or which one of the three findings above suggested the jury actually reached.

On the trial for atrocious assault and battery, the jury by their verdict of "Guilty," found that the defendant was driving the automobile which struck Lillian Dowling; that he was driving it wilfully in a manner dangerous to pedestrians and that she was wounded by the blow received.

It will be observed that there is no necessary inconsistency between the two verdicts.

A.

The defendant cannot succeed on his plea of autrefois acquit unless the crime charged in the second indictment or an integral part thereof is one of which he might legally have been convicted on the first trial.

> 4 *Blackstone* 335. "First, the plea of *autrefois acquit,* or a former acquittal, is grounded on this universal maxim of the

common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense. And hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any Court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent accusation for the same crime. * * * It is to be observed that the pleas of *autrefois acquit* and *autrefois convict*, or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime."

1 *Chitty C. L.* 452. "In order, however, to entitle the defendant to this plea it is necessary that the crime charged be precisely the same and that the former indictment, as well as the acquittal, was sufficient. As to the first of these requisites, the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution for the other * * * (p. 456). But if the former charge were such a one as the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded."

9 *Halsbury's Laws of England* 356. "The defendant can only succeed on such a plea if the charge to which he pleads is one in respect of which he could have been legally convicted on the prior occasion or is one in respect of which by statute, previous proceedings for the same cause are a bar to subsequent proceedings."

Rex. v. *Barron* (1914), 2 K. B. 570. Lord *Reading.* "The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to

be twice in peril of being convicted of the same offense. If therefore he has been acquitted, *i. e.*, found to be not guilty of the offense by a court competent to try him, such acquittal is a bar to a second indictment for the same offense. This rule applies not only to the offense actually charged in the first indictment, but to any offense of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter. * * * The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offense which is the same offense as 'gross indecency' (charged in the second indictment), *i. e.*, whether the acquittal on the charge of sodomy (on the first trial) necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offense. The graver charge of sodomy involves gross indecency and something else, and, as was decided in *Reg.* v. *Di Salvi* (10 Cox C. C. 481), an acquittal of the whole of an offense does not involve an acquittal of every part of it. There has therefore been no verdict that the appellant was not guilty of gross indecency, and the appellant has never been in peril before of being convicted of gross indecency."

Reg. v. *Gilmore,* 15 Cox C. C. 85. Baron *Huddleston.* "An accused person who relies upon a previous acquittal must make out satisfactorily that he has been acquitted of the identical charge before, or that he could upon the trial of the first indictment have been lawfully convicted of the offense which was charged in the second indictment."

> *Morey* v. *Com.*, 108 Mass. 433, "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

If the question before the Court be tested by the rule stated above, namely, that the charge to which the defendant pleads or some part thereof must be one of which he could have been convicted on the first trial, the action of the Quarter Sessions in directing a verdict for the State must be approved. Certainly, on the trial for the slaying of Mrs. Mullaney, defendant could not have been convicted, whatever the evidence, of any offense against Lillian Dowling.

B.

A distinction between the rules applicable to autrefois acquit and those applicable to autrefois convict should be noted.

Of course, generally speaking, when a former conviction would be a bar to a subsequent prosecution a former acquittal instead of a conviction would likewise be a bar. But there are exceptions to this rule founded in sound reason and noted by the authorities.

It is abhorrent, not only to our law but to every system of jurisprudence and every feeling of justice, that a man should be punished for a crime and then again punished a second time for the same crime. This is the basis of the plea of *autrefois convict*—that no man shall be punished twice for the same offense.

It is also repugnant to our law that a man should be tried and acquitted and thereafter be tried again for the same offense, and so on, until perhaps a jury be found to convict him. If the victim of such a system were in fact guilty, no injustice would be done him by such a series of trials. The sound objection to the procedure is that it would be likely to result in the conviction of the innocent and this is the foundation on which rests the plea of *autrefois acquit.*

The application of these principles in simple cases is easy: If one is convicted or acquitted of an assault, he cannot again be tried for the same assault.

The next step relates to compound crimes. If A be convicted of murder committed in the course of arson, he cannot thereafter be tried for the arson, because the conviction for murder includes a conviction of the lesser offense. Conversely, if he be convicted of arson, he cannot afterward be tried for a murder committed in the perpetration of such lesser felony, for the arson is an integral part of the murder.

If A be acquitted on a *common law indictment* of the murder, he cannot afterward be tried for the arson, because the jury might, on the former trial, have convicted him of the arson and acquitted as to the residue of the charge, and hence the general verdict of "Not Guilty" is an acquittal of the arson.

But the situation is somewhat different when the form of the indictment for the greater offense does not permit a verdict of guilty of the less offense. For instance, if A be tried for murder on our statutory form of indictment, charging merely that he did wilfully, feloniously and of his malice aforethought, kill and murder

the deceased, and the State endeavor to prove that the murder was committed in the course of arson, and A be acquitted, can he thereafter be tried for the arson? It is obvious that the reason which would govern if the murder indictment were in common law form, does not apply, for the jury could not have convicted him of the arson, and hence their verdict of "Not Guilty" does not show that they acquitted him of that offense.

It may be that the defense on the murder trial was an alibi, or, perhaps, that the deceased died of pneumonia and not as a result of injuries received in the fire, or, perhaps, both defenses were interposed.

Will the Court, on the plea of *autrefois acquit,* search the minds of the jurors on the first case and try to see wherein lay their reasonable doubt? Will the Court say, "We have examined the evidence on the murder trial and find that the jury acquitted the defendant because they doubted whether the death was the proximate result of the act of the defendant, and hence, the acquittal of murder is not a bar to the arson charge," or, "We find that the jury acquitted because the evidence that the defendant set the fire was insufficient, and hence, the plea of *autrefois acquit* is good?"

There is no authority for such an inquiry on a plea of *autrefois acquit.* In the absence of such an inquiry, it might be the rule that the second trial would be barred if the verdict of acquittal could possibly have been based on the innocence of the defendant of the less offense. But such a rule would not be in the interest of justice; it would merely give to the defendant the advantage of the mistake made by the prosecutor in using the statutory murder indictment.

The correct rule, I contend, is that the acquittal on the trial of the statutory indictment for murder does not bar the subsequent trial for arson because the record in a murder case does not NECESSARILY involve acquittal of arson. *It will be observed that none of these doubts or questions apply when the first trial results in a conviction.*

Similar doubts arise when two offenses have each certain elements in common and certain independent elements.

For instance, A is convicted of rape. The girl is under the age of 16 years. It certainly cannot be the law that he may be tried again for the same act on an indictment for carnal abuse. But if he be acquitted of rape, perhaps because the jury doubted whether the act was against the will of the girl, can he then be tried for carnal abuse?

Lastly come the cases where the "one volition" results in injury to several people. A steals at the one time the property of B and C, or wounds by one discharge of a shot gun, X and Y. He cannot, I take it, be twice convicted of larceny or assault; but if he be acquitted of stealing B's property because it appears that B had given him the property, or if he is found not guilty of assault on X, because the evidence shows that X was not really one of the men shot, shall A go untried for the crime he actually committed against C or Y?

In all these supposititious cases, the correct rule, I submit, is that the acquittal on the one charge does not bar the trial of the other, although a conviction one the one would be a defense to the indictment on the other.

This distinction between former conviction and former acquittal is not noted in the elemental authorities such as Blackstone and Chitty, but it is supported by the cases.

> *In re Nielsen,* 131 U. S. 176, Bradley, *J.*
>
> "In order than an acquittal may be a bar to a subsequent indictment for the lesser crime it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also, and would be a bar."

Com. v. *Hudson,* 14 Gray (Mass.) 11. The same rule is expounded and based on the theory that the lesser crime is merged in the greater only in case of a conviction of the latter.

> *Simco* v. *State,* 9 Texas C. A. 338. "There is a marked difference in modern practice between the rules which govern the two pleas of *autrefois acquit* and *autrefois convict,* notwithstanding the immense amount of *dictum* and loose expression to the contrary found in the books. *Autrefois acquit* is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by, the same proof. These two elements must combine, and are both *sine qua non* to the sufficiency of the plea. *Autrefois convict* only requires that the transaction, or the facts constituting it be the same. To illustrate: If a party be indicted separately for the theft of three horses, the property of A, B and C, taken at the same time, or in one transaction, and he be tried on the first for the theft of A's horse, and the State fails from misnomer, or the defendant by proving A's consent

should be acquitted, would the plea of that acquittal operate a bar to the conviction on the other trials because the transaction was one and the same? By no means. Why? Simply because the proof necessary to a conviction in the latter cases would not convict in the former. *Albert Pickens* v. *The State, ante,* p. 270; 1 *Whart. Cr. Law* (6th ed.), Sect. 557, and authorities cited.

"But suppose the party was convicted of the theft of any one of the horses, would a plea of former conviction be a bar to conviction on the other two indictments? Clearly so. And why? Because the transaction—the taking of the three horses at the same time—would constitute but one offense in law (*Wilson* v. *The State,* 45 Texas 76); and the plea would be good upon the strength of and by virtue of another rule, well settled in criminal practice, which allows the prosecutor to carve as large an offense out of a single transaction as he can, yet he must cut only once. *Quitzow* v. *The State,* 1 Texas Ct. App. 47. Here is where the doctrine of carving would come in and support the plea. 1 *Whart. Cr. Law* (6th ed.), Sect. 565, and authorities cited in note."

Wright v. *State,* 17 Texas C. A. 152. Same rule.

In *Reg.* v. *King* (1897) 1 Q. B. 214, the defendant was convicted twice for two different offenses which were parts of the same transaction and which consisted of substantially the same acts. The Court of Criminal Appeals reversed the second conviction. Lord Reading, in *Rex* v. *Barron* (1914), 2 K. B. 570, commenting on this decision, noted that the two offenses were not the same, but approved of the decision on the ground that the Trial Court should have directed a verdict for the defendant on the second trial "as a matter of fairness" and in "the exercise of a proper judicial discretion."

At common law, indictments were so detailed that usually every part of the criminal transaction was set out in the one indictment and hence the jury could pick and choose as to which part of the offense they would convict. It was, however, the rule that on an indictment for a felony the jury could not convict of a misdemeanor, part of the felony; so it followed that an acquittal of the felony was not a bar to a later trial for the misdemeanor, although a conviction of the felony was such a bar.

C.

Defendant's argument is based on an unsound view or res judicata rather than on autrefois acquit.

The argument, on careful analysis, is not that the defendant had already been acquitted of the same offense, but rather that one issue of the second indictment had been decided adversely to the State on the former trial and that the State was concluded as to that issue by the record in the former proceeding and hence could not prevail at the second trial. Defendant's counsel, in effect, contends that the first acquittal was an adjudication "that the defendant was not the person who had driven the automobile in question"; that the adjudication of this fact was binding on the State at the second trial and hence that there should have been an acquittal on the second trial.

This line of reasoning overlooks the possibility that the jury may have acquitted Cosgrove of manslaughter, although they found that he was the driver and was driving in a grossly careless manner, because they were not convinced that he struck Mrs. Mullaney or because they

doubted whether the blow was the proximate cause of her death.

It is true that the evidence on that trial that the automobile struck Mrs. Mullaney and that she died as a result of the blow was clear and uncontradicted, but this lack of contradiction did not remove these issues from the consideration of the jury.

Schmidt v. *Marconi, etc., Co.,* 86 N. J. L. 183;

State v. *Pitman,* 119 Atl. 438.

If we assume that the ordinary rules of *res judicata* are applicable to criminal cases, still the record in the manslaughter case would not estop the State from proving in the assault and battery case the fact that the defendant was driving the car. Whether defendant was driving or not was merely incidental to the general issue and could only be inferred by argument from the judgment.

Bernard v. *Hoboken,* 27 N. J. L. 412. Headnote. "The first judgment is conclusive upon the facts only so far as that case is concerned. It does not prevent the same facts being controverted in a second case founded upon a distinct cause of action."

Sbarbero v. *Miller,* 65 Atl. 472, Garrison, *V.-C.* "A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered."

State v. *Robinson,* 16 N. J. L. 507. Headnote. "On the trial of an indictment for uttering a forged note, it is competent evidence in order to show a scienter, to prove that the prisoner uttered another forged note of the same bank, on the same day, although he had been acquitted on a trial for that offense."

State v. *Dragone* (E. & A.), 122 Atl. 878. Defendant had been tried and acquitted under the Van Ness Act for the sale of intoxicating liquor. He was later indicted for keeping a disorderly house. On the trial of that indictment, the State, in order to show one element of the alleged disorder, introduced evidence of the very sale for which the defendant had been acquitted. Defendant offered the record in the liquor case to disprove the sale. The Trial Judge overruled the offer on the ground that it was the province of the jury to determine whether liquor was sold, and that they could not take the judgment or conclusion of someone else on that point. The Court of Errors, in affirming the conviction, held that the exclusion of this evidence was proper because, among other reasons, the offense of selling liquor and the offense of keeping a disorderly house were not the same.

D.

The Cooper, Rosa and Mowser cases.

State v. *Cooper,* 13 N. J. L. 361, and *State* v. *Mowser,* 92 N. J. L. 474, 106 Atl. 416, each considered a plea of former *conviction* and in each of them the crime for which a conviction had been obtained—arson or robbery—was an integral part of the murder charged in the second indictment.

Mr. Justice Drake, in the *Cooper* case, relied on the fact that the arson was a necessary ingredient of the murder and that by being put on trial first for arson and then for the murder, Cooper was tried twice for the very same indictable offense. Indeed, if Cooper had been tried first for the murder the jury could legally have convicted him of the arson and acquitted as to the residue of the charge. The basis of the

Mowser decision is the same, namely, that the robbery for which Mowser was first tried was an essential and integral element of the murder.

Counsel for the defendant quotes from Mr. Justice Kalisch's opinion in the *Mowser* case that one test is "whether or not the offenses grew out of the same transaction or were the product of a single criminal act." By this language, however, the learned Justice intended the situation where one indictable offense grows out of and includes another, as murder and robbery.

> "The principle to be extracted from well-considered cases is that by the term 'same offense' is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment."

I call attention to the last clause, "which may subject an offender to indictment and punishment."

> "When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater."

This language from the Mowser case does not tend to support the plea in the present case. The manslaughter charge for killing Mrs. Mullaney and the assault and battery charge both grew out of the reckless driving of the defendant; but that reckless driving was not subject to indictment and punishment. Defendant has not been acquitted of reckless driving, for reckless driving is not a crime for which he was or could be tried. The assault on Lillian Dowling was not an integral part of the offense of slaying Mrs. Mullaney.

State v. *Rosa,* 72 N. J. L. 462, 62 Atl. 695, upheld the action of the Oyer in sustaining a demurrer to a plea of *autrefois acquit.* The Court expressly refrained from considering "the question whether an acquittal upon an indictment charging the felonious homicide of A is a bar to a conviction upon an indictment charging the felonious homicide of B, when it is shown that the death of each was produced by the same act of the person indicted." This case is not an authority in support of the contention of the plaintiff-in-error.

E.

Defendant's Authorities.

One case resulted in a reversal because the Trial Court struck out the plea, instead of trying it:

Cook v. *State,* (Tex.) 63 S. W. 872.

In the following cases the plea of *autrefois acquit* or *convict* was held properly overruled, and hence the decisions cannot aid the plaintiff-in-error:

Lillie v. *State,* (Tex.) 187 S. W. 482;
Gunter v. *State,* (Ala.) 20 So. 632;
McCoy v. *State,* 46 Ark. 141;
Bell v. *State,* (Ark.) 180 S. W. 186;
People v. *Ochotski,* (Mich.) 73 N. W. 889;
Morris v. *Ter.,* (Okla.) 99 Pac. 760; 101 Pac. 111;
Augustine v. *State,* (Tex.) 52 S. W. 77;
Keaton v. *State,* (Tex.) 57 S. W. 1125;
State v. *Evans,* (W. Va.) 10 S. E. 792.

Cases distinguishable because they dealt with former conviction and not former acquittal are the following:

State v. *Damon,* 2 Tyler (Vt.) 387;

Sadberry v. *State,* (Tex.) 46 S. W. 639;
Clem v. *State,* 42 Indiana 420;
Carson v. *People,* (Col.) 36 Pacific 551;
Hurst v. *State,* (Ala.) 6 So. 120.

The only decisions which support the contention of defendant are based on the view of *res judicata* above mentioned, and are contrary, I believe, to the law of New Jersey. These cases are:

Spannell v. *State,* (Tex.) 203 S. W. 357;
Moss v. *State,* (Ala.) 75 So. 179;
Burnam v. *State,* (Ga.) 58 S. E. 683;
Jones v. *State,* (Miss.) 6 So. 231;
Com. ex rel. Veley v. *Orealey,* 63 Pa. Sup. 489.

G.

Opinion of Supreme Court.

The opinion of Mr. Justice Parker deals with the question of *autrefois acquit* from a somewhat different angle. This opinion is clear and convincing and needs no argument from me to support it.

Counsel for defendant urges *State* v. *Scaduto,* 74 N. J. L. 289, 65 Atl. 908, is not in harmony with this opinion or with the decision in *State* v. *Thomas,* 65 N. J. L. 598, 48 Atl. 1007.

The Thomas case holds that manslaughter does not necessarily involve assault and battery, and hence that an indictment for manslaughter in statutory form will not support a conviction for assault and battery. The Scaduto case dealt with voluntary manslaughter committed in the heat of passion, and noted that assault and battery was an element of that class of manslaughter. There is no conflict between these cases.

H.

If the foregoing argument is sound, there was no issue of fact for the jury on the plea of *autrefois acquit,* and the Court properly directed a verdict for the State.

II.

Alleged Error in the Exclusion of Evidence.

Assignment of Error No. 8.

Defendant's witness, Edward W. Townsend, testified to the good character of the defendant. On cross examination he admitted that he knew defendant had pleaded guilty to some offense (Case, p. 244, l. 13). On re-direct examination, Mr. Townsend testified that he knew the details "regarding the alleged plea of guilty."

> "Q And you had investigated that yourself, personally, had you?"
>
> Objection sustained (Case, p. 246, l. 15).

If this question be regarded as a preliminary one, leading to testimony that the defendant was, in fact, not guilty of the offense to which he had pleaded, it was clearly incompetent. The Court was trying only the instant case, and not some old indictment to which the defendant had pleaded guilty.

Standing by itself, the question was immaterial. It made no difference to the defendant's *reputation* whether or not Mr. Townsend had investigated personally the details of the plea of guilty.

III.

Charge to the Jury.

Assignment of Error No. 10.

This assignment alleges that the Court erred in its charge as to inferences which may be drawn from the flight of one accused of crime. The brief for defendant admits, however, that there is no error in this part of the charge, and therefore this assignment needs no consideration.

IV.

Alleged Failure to Answer Jury's Inquiry.

Assignment of Error No. 19.

After retiring, the jury returned to the court room, having sent a question to the Judge, "Is actual intent to atrociously assault necessary, or is it implied by recklessness in driving, by breaking of speed laws and fleeing from the spot?" (Case, p. 308, l. 25.)

The Court answered this question to the effect that intent might be implied from the circumstances of the case, "an intention to injure need not be specifically directed to the particular individual that was injured, and may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional." (Case, p. 308, l. 37.)

I contend that the question of the jury was fully and correctly answered. I know of no rule, however, which required the Court to answer a question of the jury, especially when the answer has already been given in the charge. The Court in the case at bar had already clearly pointed out that guilt could not rest on negligence alone,

but that there must be malice and an intention to inflict injury. (Case, p. 297, l. 1.)

Assignment of Error No. 20.

In answer to the jury's inquiry, whether intent might be implied "by recklessness in driving, by breaking of speed laws and fleeing from the spot," the Court replied that intent might be implied "from those things, but you must take into consideration, of course, all of the testimony in the case."

Counsel contends that this instruction permitted the jury to infer an intent to injure from any one of the three elements mentioned, as, for instance, breaking of speed laws. This interpretation is not supported by the language of the question. The jury used the conjunction *and;* they did not use a disjunctive.

State v. *Kelly,* 124 Atl. 516.

V.

Refusal to Charge as Requested.

Assignments of Error Nos. 21 and 25.

These requests dealt with the necessity of an intention to do injury as distinct from mere negligence. The Court fully and correctly charged this subject. (Case, p. 297, l. 1, to p. 298, l. 30.)

Assignment of Error No. 24.

The defendant requested the Court to charge as follows:

> "Even if you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lillian Dowling, and that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery, it is only one factor in

> the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as amounted to an intentional and malicious and atrocious act of assault and battery, in this connection, you may consider whether the driver knew he struck anyone, and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile.'' (Case, p. 316, ll. 21 to 38.)

The Court charged as requested, the first half of this request, but modified the last half by substituting a reference to all the facts and circumstances of the case. (Case, p. 291, l. 37, to p. 292, l. 11.)

Counsel contends that the clause in the request, ''you may consider whether the driver knew he struck anyone,'' was of importance in connection with inferences which the jury might draw from the alleged flight of the defendant. The Court, however, charged on this subject in a manner even more favorable to the defendant than was requested. The charge permitted an inference of a consciousness of guilt to be drawn only in case the defendant took refuge in flight ''fearing an accusation of the crime would be made against him, for the purpose of evading that accusation.'' (Case, p. 294, ll. 1 to 29.)

The whole charge is a most full, fair and correct exposition of the law of the case.

The judgment of the Supreme Court should be affirmed.

J. O. BIGELOW,
Prosecutor of the Pleas.

New Jersey Supreme Court

STATE OF NEW JERSEY
VS.
JOHN COSGROVE

Opinion.

An acquittal on an indictment for manslaughter committed on L. will not bar an indictment for atrocious assault and battery on M., though the killing and the assault were features of the same occurrence.

On a traverse of a plea of *autrefois acquit,* and trial of that issue by a jury, it is not error to direct a verdict against the plea, when the conceded facts in evidence fail to support it.

Error to Court of Quarter Sessions, Essex County.

John Cosgrove, Jr., was convicted of atrocious assault and battery, and he brings error.

Affirmed.

Argued March Term, 1925, before Parker and Katzenbach, *JJ.*

Harold Simandl, of Newark, for plaintiff in error.

John O. Bigelow, Prosecutor of the Pleas, of Newark, for the State.

PARKER, *J.* The plaintiff in error, defendant below, was convicted on indictment charging him with atrocious assault and battery, and brings this writ

of error to review that conviction. The principal attack on the judgment below is based on a plea of *autrefois acquit,* which was traversed by the State and tried with a jury, the judge directing the jury to find a verdict against the plea.

1. The plea was based on these general facts: The defendant, driving a motor car, ran down one Mary Mullaney, inflicting injuries from which she died; and in the same collision ran down one Lillian Dowling, who was severely injured, but recovered. Defendant was indicted for manslaughter arising out of the killing of Mary, and, by a separate indictment, was charged with atrocious assault upon Lillian. The indictment for manslaughter was tried first, and the defendant was acquitted, and it was this acquittal that was invoked under the plea of *autrefois acquit* in the assault and battery case now at bar.

Counsel for the plaintiff in error urges with vigor and at great length the claim that—

> "Inasmuch as both indictments grew out of the same occurrence, and inasmuch as manslaughter is a higher grade of crime than assault and battery, and the defendant was convicted on an indictment for manslaughter though the victim was different, the acquittal of manslaughter bars the further prosecution of the indictment for atrocious assault."

Among the cases cited are *State* v. *Mowser,* 106 A. 416, 92 N. J. Law 374, 4 A. L. R. 695, and *State* v. *Cooper,* 13 N. J. Law 361. We consider, however that the present point is not well taken, and for the reason which we deem fundamental, that, in order to support a plea of *autrefois acquit,* it must appear that, under the other indictment, the

defendant could have been convicted of the same character of crime as that now charged; and it has been definitely held in this State that there cannot be a conviction of assault and battery under an indictment for manslaughter, for the reason that manslaughter does not necessarily involve assault and battery. *State* v. *Thomas,* 48 A. 1007, 65 N. J. Law 598. This doctrine was reiterated very recently in the case of *State* v. *Lehigh Valley R. Co.,* 103 A. 685, 90 N. J. Law 372, citing the Thomas case, and holding that a general indictment for manslaughter will lie against a corporation aggregate. We consider, therefore, that, as manslaughter does not necessarily involve assault and battery, an acquittal of that crime does not bar prosecution for assault and battery, especially when charged as committed on another person.

2. A cognate question of procedure is involved, viz., whether, on trying this plea, the judge properly directed the jury to find against the plea. The facts were not in dispute. And, if the law be as we think it is, and have stated above, it is obvious that no verdict in favor of the plea on those facts could possibly be supported. In *State* v. *Cooper,* 115 A. 386, 96 N. J. Law 376, 377, Justice Bergen, speaking for this court, said that the State may take issue on the facts stated and put the defendant to proofs of the averments contained in the plea, and, on the trial of that issue, the court may charge the jury that the plea is not sustained by the proofs when that is the fact. There is no substantial difference between instructing the jury that the plea is not sustained by the proofs and instructing them to find against it; the difference is one of language merely. Hence, if the facts claimed by the defendant under the plea were incapable of supporting it, the verdict against the plea was properly directed.

The other matters argued before us relate to rulings on evidence, portions of the charge, and refusal of requests to charge. Many of them we deem to be frivolous and none of them we think is well founded; but they have been considered in detail. The first one argued is Specification 7, under Section 136 of the Criminal Procedure Act. The defendant called one Fagin, a Glen Ridge police officer, mainly to contradict the plaintiff's witness, Krauth, who testified that he saw the accident from the sidewalk and immediately started his own car to give chase, finally overtaking the defendant's car at Glen Ridge, and then recognized Johnny Cosgrove, police officer from Montclair; that another witness, named Dever, was with him, and a man named Shaw had jumped on the runboard. When the witness recognized Cosgrove and succeeded in stopping him, he called a policeman, who called Lieutenant Higgins, and report was then made of the occurrence, but that the police seemed little interested in the matter, and, while it was under discussion, Cosgrove and his car disappeared.

For the defense, Fagin was called and said he was the policeman in question, and identified Krauth; that he rode with him until they found Higgins. The conversation between Krauth and Higgins was shown from Fagin's standpoint, and finally he said that Krauth and the two others drove away. Then he was asked several questions, one of which was excluded, and is the ground of Specification 7.

> Q. And then they drove away? A. They drove away down Bloomfield avenue.
>
> Q. Were you ordered to do anything then?
>
> (Objected to.)

The Court: By whom?

Mr. Simandl: By Lieutenant Higgins, as the result of this conversation.

The objection was sustained, and properly so. It could not contradict Krauth, because he had gone away, nor could it contradict Dever or Shaw. Defendant apparently had gone away, so that he was not present. The question was plainly incompetent.

Assignment No. 8: The witness Townsend was called as a character witness and gave the usual testimony. On cross examination he was asked whether he had ever heard that the defendant had been convicted of crime, and admitted he had heard talk about his being in some trouble of that kind, but, notwithstanding that fact, he still bore a good reputation in Montclair. On re-direct:

Q. You yourself knew of the details regarding the alleged plea of guilty to these facts?

A. Yes. I knew of the details.

Q. And you had investigated that yourself personally, had you?

(Objected to and excluded.)

The exclusion was proper. The question was Cosgrove's good reputation, not what the witness personally knew about the details of his conviction.

Assignment No. 10: This covers nearly half of a page of the court's charge, which bore upon the inferences that the jury were entitled to draw from

the fact, if they so found, that the defendant ran away for the purpose of evading prosecution. Counsel says in the brief:

> "It is not contended that the rule is not properly expressed in this charge. It is, however, contended that it was the duty of the court to lay before the jury any explanations or qualifications arising from the evidence which in any way tended to show the alleged flight consistent with innocence or a lack of consciousness."

It is not claimed that any request was preferred in that regard; and in such case the rule is well settled that error cannot be predicated on a mere omission to comment on the evidence favorably to the defendant.

Assignment No. 13 challenges the following portion of the charge:

> "Now, an automobile, like a gun, is a dangerous instrumentality under some circumstances."

The claim is that this permitted the jury to draw the inference that an automobile and a gun were dangerous instrumentalities under the same circumstances. The error of this claim we think is obvious.

Assignment No. 14: The court charged:

> "So in the case at bar, gentlemen, if you find that the defendant was at the time and place, charged wilfully, knowingly, and intentionally running his automobile at a rate of speed and in such manner which, under all the facts, cir-

> cumstances and conditions existing in the case was to him consciously and obviously dangerous to pedestrians or others lawfully using the highway, and he hit and maimed or wounded the little girl with his automobile while so doing, then you are at liberty, if you see fit, to draw the inferences I have indicated, and to find him guilty of atrocious assault and battery."

Counsel says:

> "This permitted the jury, irrespective of the evidence and merely if they desired, or if they saw fit, to draw certain inference and convict."

This objection we deem to be frivolous; it is perfectly plain that the inferences the jury were authorized to draw were necessarily based upon the evidence in the cause. The charge was based upon *State* v. *Schutte*, 93 A. 112, 87 N. J. Law 15, 88 N. J. Law 396, 96 A. 659.

Assignment No. 15: The court charged:

> "As I understand the attitude of the defendant through his counsel, it is not disputed that this little girl was struck and injured that night by an automobile. The question in that particular which is contested is whether or not the defendant was there present, and whether or not he is the man who struck by an automobile the little girl."

The claim here is that the jury were permitted to convict on a finding of these facts alone, without reference to the other elements of assault and battery, namely, the wilful running down of the

little girl. But it will be noted that the court was careful to use the words, "In that particular," and this fact we deem to be a complete answer to the argument now made.

Assignment No. 17: In the course of the charge the court said:

> "Gentlemen, the case is an important one. It involves an accusation against an officer of the law."

As to this, the argument is:

> "That the effect of the instruction is to demand a higher and greater consideration of the case by the jury, than the ordinary case where atrocious assault and battery is charged. The defendant was entitled to have his case considered by the jury in the same light as any similar case of atrocious assault and battery. The jury received an erroneous conception of this issue from the charge complained of, which is not warranted in the law and which prejudiced the defendant in his defense on the merits."

As to this we need only say that the charge was undoubtedly correct in fact, and the comment that it was an important case is entirely justified. If it was harmful to either party, it was harmful to the State rather than to the defendant.

Assignments Nos. 19 and 20: The jury came back after being sent out, and propounded the following question:

> "Is actual intent to atrociously assault necessary, or is it implied by recklessness in driving,

by breaking of speed laws and fleeing from the spot?"

to which the judge replied:

"It may be implied, gentlemen, from those things, but you must take into consideration, of course, all of the testimony in the case. In order, perhaps, that I may make it clearer, I will read to you what I said to you before in my charge, and that is: (The Court then read an extract from the charge as already delivered.)"

It is now claimed, first, that the intent might be implied from any one of the matters mentioned in this question, but it is quite clear that this was not the effect of the instruction; second, that the judge failed to answer the inquiry adequately. We think the question was fairly answered, and certainly there was nothing misleading to the jury in the answer as given.

Assignments Nos. 21 and 25: No. 21, the Court was requested to charge:

"Mere negligence on the part of the defendant would not be sufficient to convict him of the crime of atrocious assault and battery. His conduct must be such as would evince in your minds beyond a reasonable doubt a willing and malicious intent to strike Lillian Dowling with his automobile."

And request No. 25:

"Before you can find the defendant guilty of atrocious assault and battery, you must find from the evidence, beyond a reasonable doubt,

> a specific intent to injure Lillian Dowling or any other person using the highways at that time."

The Court refused to charge these requests, and did charge as has been quoted above under Assignment No. 14. It is, of course, true that in the case of *Rose* v. *Squires* (N. J. Sup.), 128 A. 890, now pending in the Court of Errors and Appeals, this Court decided in a civil case that, as to a license, there must be a wilful intent to injure. But, as pointed out in the Schutte case, *supra*, the civil action of negligence throws no light upon the distinction made by the criminal law between a wilful and a negligent act. In a criminal case, it was held:

> "We are dealing with a wilful act, done under circumstances that rendered likely the infliction of such an injury as that which actually resulted from it." 93 A. 112, 114, 87 N. J. Law 15, 18.

So far as the requests were proper, they were fully covered by the charge as delivered.

Assignments Nos. 22 and 24: No. 22, the Court refused to charge as requested, that:

> "It is for you, gentlemen of the jury, to decide, among other things, whether or not Kraus, Dever and Shaw were able to follow this car and keep it in sight, in view of the testimony that the night was foggy, and several witnesses have testified that a person could not see an object any great distance away from where they were standing."

And No. 24, the Court was requested and refused to charge as follows:

"Even if you are satisfied beyond a reasonable doubt from the evidence that an automobile struck and injured Lillian Dowling, and that the automobile which struck her did not stop after the accident, this fact alone is not sufficient to charge the driver of the car with the crime of atrocious assault and battery; it is only one factor in the evidence upon which you are to determine whether or not the conduct of the driver of the automobile was such as amounted to an intentional and malicious and atrocious act of assault and battery. In this connection, you may consider whether the driver knew he struck any one, and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile."

The Court did not err in refusing to charge the requests contained in Assignment No. 22, because it was mere comment on evidence, and it is well settled that the Court is not required to comment on the evidence at the request of counsel.

Request No. 24 is faulty because it necessarily involves the proposition that to support a conviction of assault and battery the act of assault must be intentional and malicious, which is just the question that has been discussed above. Moreover, the only argument urged to support the claim that it was error to refuse these requests is that both of them involves some allusion to the foggy condition of the night, and that nowhere in the charge did the Court mention where in the charge did the Court mention this foggy condition. Comment on the facts, as we have just intimated, is discretionary with the Court.

This covers all the points urged for the plaintiff in error. Our examination of the case satisfied us that no harmful error was committed at the trial, and the judgment is accordingly affirmed.

New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, Defendant-in-Error, vs. JOHN COSGROVE, Plaintiff-in-Error.	Sur Indictment Atrocious Assault and Battery. In Error to Supreme Court

BRIEF OF PLAINTIFF-IN-ERROR

Statement

On the 15th day of May, 1923, between 8:30 and 9:00 o'clock P. M. Mary Mullaney and Lillian Dowling were crossing hand in hand, Bloomfield avenue, Newark, N. J., proceeding in a southerly direction from the north side of Bloomfield avenue, at or near the intersection of said Bloomfield avenue with North Ninth street. At this point on the southerly side of Bloomfield avenue for approximately one block below Ninth street and two blocks above Ninth street, extends a long wall parallel with Bloomfield avenue, which is the wall of the City Playfield. The night was very foggy and as these two pedestrians crossed the street, an automobile came along Bloomfield avenue in a westerly direction and struck both of them, while they were standing in the trolley tracks on Bloomfield avenue. Mary Mullaney died as the result of the injuries she received at this time and Lillian Dowling was injured. Defendant was alleged to have been the driver of the machine on the night in question and was subsequently indicted for manslaughter for the death of Mary Mullaney and for atrocious assault and battery for the injuries of Lillian Dowling. Pleas of not guilty were

entered by the defendant and the manslaughter indictment was tried and resulted in an acquittal. Defendant thereupon obtained leave to withdraw his plea of not guilty to the atrocious assault and battery indictment and filed a plea of autrefois acquit. The State filed a replication or answer to this plea and joined issue.

A jury was impanelled and the defendant proved before the jury that the person named as defendant in each indictment was the same person (the defendant) ; that Lillian Dowling and Mary Mullaney were struck at the same time and place by the same blow of an automobile alleged to be driven by the defendant; that as the result Mary Mullaney died and Lillian Dowling was injured and that the assault and battery on Lillian Dowling was committeed by the same act or alleged act of John Cosgrove, Jr., as caused the death of Mary Mullaney. The defendant further proved that he had been tried before a jury in the Essex County Court of Oyer and Terminer and acquitted of the indictment charging manslaughter, "that on the 15th day of May, 1923, he did feloniously kill and slay Mary Mullaney.

Notwithstanding the proof of the former acquittal by record and the identity of person and act or offense by parol evidence, and the failure of the prosecutor to offer any evidence tending to show the lack of identity of offense, the trial Court without motion by the State directed a verdict for the State and against the defendant upon the plea. No formal judgment of respondeat ouster was entered. The defendant was ordered to plead, and upon his plea of not guilty the trial proceeded. He interposed a defense of alibi and a denial of the charge, and was convicted by the jury, which recommended mercy. The defendant was thereupon sentenced to serve eight months in the County Penitentiary and there-

upon appealed to the New Jersey Supreme Court. The New Jersey Supreme Court affirmed the judgment of the Court below and thereupon the defendant sued out a writ in this Court.

The various assignments and reasons pertaining to the plea of autrefois acquit will be argued under one point in the brief. (Assignments and Reasons. 1, 2, 3, 4, 5 and 6 and 26 in Court below.)

Point I

A.

Where it is shown that the same act of A resulted in the death and injury of B and C, an acquittal of A upon an indictment charging the felonious killing of B is a bar to A conviction of A upon an indictment charging an assault and batter on C.

Article 1, Section 10 of the Constitution of the State provides:

> "No person shall, after acquittal, be tried for the *same offense.*"

In cases such as the one under consideration, the true test to be applied in determining whether the defendant has already been tried for the *same offense* is laid down in the case of State v. Rosa, 72 New Jersey Law 462:

> "Although it sets out that Galante was shot at the same time and place that Donofrio was, and that they were shot by the same person, it fails to allege or show that *it was the same act* which produced both homicides, and this is universally held to be the *essential feature,* in a plea of this nature; *for it is the character of the*

act, not the results which flow from it, which determines the question of the guilt or innocence of the person who does so." (Italics are mine.)

The Rosa case followed the case of State vs. Cooper 13, N. J. L. 361 at 371, wherein the Court said:

"*Upon this principle are founded the plea of autrefois acquit, and autrefois convict. The writers on the subject concur in stating that these pleas 'must be upon a prosecution for the same identical act and crime.'* (3 Bl. Com. 366 Ch. C. Law, 1st vol. Pp. 452, 462) But says Chitty, p. 455, *'It is not in all cases necessary that the two charges should be precisely same in point of degree for it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other.'*" (Italics are mine.)

In the case of State v. Mowser, 92 N. J. L. 474, this court followed the rule above laid down.

In *State* v. *Rosa, supra,* this court, in considering and construing the decision in the COOPER case, declared the legal rule to be that where the crimes arose out of the same transaction, *it is the character of the act, not the results which flow from it,* which determines the question of the guilt or innocence of the person who does it." (Italics are mine.)

And again in the same case:

"The unsoundness of this reasoning lies in assuming that the offenses must have legal identity in all cases, and in ignoring a most essential factor, that is, whether or not offenses

* * * were the product of a *single criminal act.*"

The proof on the plea justifies the conclusion that the death and injury were the product of a *single criminal act.*

> The evidence before the jury disclosed that the defendant at the same time and place, while in *one frame of mind by one single blow* of the same instrument, killed Mary Mullaney and wounded Lillian Dowling. The fact that Mary Mullaney died and Lillian Dowling survived did not change the character of the act. Nor did the fact that two persons were struck in anywise change *the character of the act or lessen or increase the defendant's guilt or innocence.*

By the process of logical reasoning and the application of common law rules of pleading the conclusion is further supported.

If both Lillian Dowling and Mary Mullaney who were struck by the *single blow* had died, a single indictment could have been found charging the defendant (either with manslaughter or second degree murder) for having caused their death, or if Mary Mullaney had survived, a single indictment could have been laid charging the defendant with the unlawful and wilful striking of the blow which wounded and maimed them both. This on the theory that it was the *single criminal act* of the defendant which resulted in either their death or their injuries.

1. Bishop's New Criminal Law, page 636, paragraph 1061:

> "One blow wounding two—Killing two—*Where the same one blow wounds or kills two*

> *men, it is competent for the pleador to charge it as inflicted on the two; in other words, the prosecuting power may, if it pleases, treat it* as *one offense.*" (Italics are mine.)

Some confusion is occasioned by reason of the inconsistent manner in which the State has charged the offense.

The State in the first indictment elected to proceed upon the theory that the blow which killed Mary Mullaney was delivered as the result of gross negligence. In the second indictmtnt they charge that the *identical blow* was delivered intentionally.

It is obvious however, that the blow was delivered *either* willfully or as the result of gross neglect.

As is pointed out in the case of State vs. Richardson, Iowa Supreme Court 162 Northwestern, page 28:

> "Of course, the counter argument is that no negligence, no matter how reckless, can supply specific intent to injure a named person. In effect, that the situation is within a statement which we find in Brown vs. Com. 86 Va. 466, 10 S. E. 745, that '*Malice and passion* are *inconsistent,* and an act which proceeds from one cannot also proceed from the other."

And in like effect in the dissenting opinion of Rose vs. Squires, 133 Atlantic at page 491:

> "There is, however a marked difference between mere negligence, gross negligence and a wilful act. A wilful, wrongful act is not necessarily a negligent one."

> "Nor is gross negligence *equivalent to a wilful or wanton wrongful act. Gross negligence is simply a degree of negligence.* Whether the negligence is gross or ordinary depends upon the degree of care required and the circumstances surrounding the doing of the act."

The State cannot by changing the name of the accusation, change the character of the offense, and thus after acquittal try the defendant for the same offense.

To support this contention, I refer the Court to Holt vs. State, 38 Ga. 189, wherein the Court said:

> *"If the defendants have been legally acquitted for the same criminal acts in the first indictment as are now charged against them in the second indictment though a different name is given to the offense in the second* indictment, it is extremely difficult to perceive upon what principle they can be twice tried for the same criminal acts; *although technically, it may not be for the same offense in name.* Can the State put a party upon trial the second time for the same criminal act, after he has been acquitted, by changing the name of the accusation? If it can, then his constitutional protection does not amount to much. The effort here is to evade the provision of the Constitution by changing the name of the offense. The record shows that the defendants have been indicted the second time for the same identical criminal acts for which they have been acquitted; but the reply is, that you are not indicted for the same criminal offense; therefore,, the former indictment and acquittal is no bar * * * The question to be answered is, Has the defendant been arraigned and put upon his trial upon a sufficient legal accusation,

for the same criminal acts with which he is charged the second time? If he has, then he has been put in jeopardy, within the true intent and meaning of the Constitution, and cannot be tried the second time for the same criminal acts under the same or a different named offense."

To simplify matters, let it be assumed there was but one person struck, Mary Mullaney, for whose death the defendant has already been acquitted. The contention of the State and the Supreme Court is that the conviction or acquittal of the defendant under the manslaughter indictment is no bar to the trial of the defendant under another indictment charging assault and battery upon that same person *by the same act.* If the contention is sound it is immaterial whether two or twenty persons were killed or injured *as the result of the act, the same legal conclusion must follow.*

Hence it must naturally follow if this contention is sound, that the State may yet indict and try the defendant for murder in the second degree or assault and battery upon Mary Mullaney, although he has already been acquitted of that criminal act.

Can this be done by merely changing the technical verbiage of the indictment?

Can this be done by first alleging her death to be the result of a grossly negligent act of the defendant and after his acquittal charge him with having wilfully caused her death by the identical criminal act?

To answer these inquiries in the affirmative, the Court must arrive at a construction which would destroy the very foundation upon which the constistutional provision rests, and render it valueless.

There is another aspect of this case which seems to have been entirely overlooked in the courts below. The trial of the defendant in each case proceeded purely upon the issue of fact regardless of the legal questions involved-the defense was that of *alibi*. The jury in the trial of the first indictment had to find either that the defendant was the driver of the automobile which ran down these two people or they had to find that he was not the person. Beyond any peradventure of doubt, the State had made out a case involving all of the other elements of the offense alleged in the indictment. **The jury was convinced that the defendant was not the person who had driven the automobile in question. They saw fit to acquit the defendant.** The jury in the second case not only found that the necessary elements of the crime were proved to their satisfaction, but **found that the defendant was the driver of the automobile in question.**

This is not a case of hair-splitting technicalities; of niceties of legal verbage; of juggling of technical phrases. It simmers down to one concrete and simple question. Can the State, after one fair trial by a jury of twelve men, gamble with the most fundamental right man has reserved to him, and protected for him; that of life, liberty and the pursuit of happiness and bring him before another jury who might find contrary to the other?

Our Constitution and our Courts have answered that inquiry in the negative. State vs. Cooper, supra..

> " * * * It is not in all cases necessary that the two charges should be precisely same in point of degree for *it is sufficient, if an acquittal of the one would show that the defendant could not have been guilty of the other.*" (Italics are mine.)

THE SUPREME COURT OPINION

At this point I deem it advisable to discuss the opinion of the Supreme Court, which seemingly does not follow the rule so succintly laid down in the Rosa case. It overlooks entirely the proposition that one *single act* was responsible for both results, and that the difference in offense, in this instance, is purely in the technical and inconsistent manner, in which the offenses are charged and not *in the criminal act itself.*

The decision is extracted from the combination of two distinct propositions neither of which are applicable to the question under consideration, Viz:

> "It must appear that under the other indictment the defendant could have been convicted of the same character of crime as that now charged."

And the other:

> "There cannot be a conviction of assault and battery under an indictment for manslaughter, for the reason that manslaughter does not necessarily involve assault and battery." State v. Thomas 65 N. J. Law 598.

The rule laid down in the first proposition seems to be *inferentially rejected* as a test to be applied to cases such as is under consideration, by this Court in the case of State v. Mowser, supra:

> "The Supreme Court proceeded upon the theory that the true test to be applied in a case of a plea of second jeopardy is that where the facts required to convict on the second indictment would necessarily have convicted on

> the first, a conviction on the first will bar the prosecution on the second. And since the evidence to convict under the indictment for robbery would not have been sufficient to convict of murder, therefore the legal identity of the offenses fails.
>
> "The *unsoundness* of this reasoning lies in assuming that the offenses must have legal identity in all cases, and in ignoring a most essential factor, that is, whether or not the offenses * * * were the product of a single criminal act."

By applying this test to the facts presented in the case of State vs. Cooper, supra, its unsoundness becomes readily apparent.

In that case under the first indictment, the defendant was convicted of burning the dwelling house of another, which was pleaded as a bar to a subsequent indictment charging a deliberate, wilful and intentional murder.

Would it appear under the arson indictment that the defendant could be convicted of homicide?

If this be the true test, why is there not even the slightest suggestion of it in the Rosa and Cooper cases?

The answer is obvious. The rule has no applicability to the particular question at bar. To accept this test, the Court would be compelled to discard a rule which has prevailed from almost the very beginning of our jurisprudence and subsisted down to this very day.

The rule propounded by the Supreme Court entirely overlooks the fact that both results were the products of a *single criminal act;* and that the difference in offense is not *in the act itself,* but in the *inconsistent* and *technical* manner in which it is charged. A rule which disregards this fundamental observation is erroneous. And why is this not true?

Had the State been consistent and charged the defendant with the *murder* of Mary Mullaney, instead of manslaughter under the reasoning of the Supreme Court an acquittal under that indictment would be a bar to the present indictment for assault and battery. Notwithstanding, the jury by its verdict of acquittal has declared that the defendant *did not commit* an act of homicide in degree as grave as second degree murder, this verdict, according to the Supreme Court is not available to the defendant as a bar to further prosecution upon the *same criminal act.*

The result of the *criminal act,* did not aggravate the degree of the crime. Hence, if the acquittal of second degree murder would bar the second prosecution for the same criminal act, it is difficult to perceive why the acquittal of manslaughter would not have like effect.

By combining the above stated rule with what it conceives to be the decision in the case of State vs. Thomas 65 N. J. L. 598, the Supreme Court arrives at the conclusion:

> "That as manslaughter does not necessarily involve assault and battery, an acquittal of that crime does not bar prosecution for assault and battery, especially when charged as committed on another person."

The case cited is not authority for the proposition laid down by the Supreme Court.

> The question raised in the Thomas case, was not that of double jeopardy, but whether the defendant's Constitutional right "to be informed of the nature and cause of the accusation" had been violated by a conviction of assault and battery under the indictment as laid.

See State v. Thomas, supra:

> "As was said in the case just cited, (state v. Johnson, 30 N. J. Law 185) where the Supreme Court laid down a rule which was thought best to promote the public good and at the same time deprive parties of no substantial right: 'The interests of public justice require that, when an offense clearly and distinctly charged in the indictment is made out by the evidence, the defendant should not be acquitted. * * * When the offense is charged and proved, there can be no surprise upon the defendant! 'A party indicted for a crime may be convicted of any offense of a lower grade, provided such offense is included within the description in the indictment! **These expressions are in harmony with our constitutional bill of right that in all criminal prosecutions the accused shall have the right to be informed of the nature and cause of the accusation, a provision similar to that which the Supreme Court of Massachusetts declared to be only 'an affirmation of the ancient rule of the common law that no one shall be held to answer to an indictment or information unless the crime with which it is intended to charge him is set forth with precision and fullness.'** Com, v. Blood, 4 Gray, 31."

In arriving at its decision in the case of State v. Thomas, supra, upon the question of whether Sec. 8 and 9 of Art. 1 of the Constitution had been violated, the Court made certain general references to the law regarding assault and battery and manslaughter. There was no question of former jeopardy involved, and hence it is contended that the expressions of the Court regarding manslaughter and assault and battery, were never intended to have, nor do they have any particular force in laying down a rule to be applied to cases involving those two offenses, *where the question of former jeopardy arises.*

And this is made clearer by the expressions of Justice Garretson, in the later case of State v. Scaduto, 74 N. J. L. 289.

> **"If, on the trial, the defendant had made out a defense which entirely excused him of the crime of manslaughter, and so entitled him to an acquittal of that charge, and necessarily acquitted him of that assault and battery which is involved in the manslaughter he could not be convicted of the assault and battery mentioned in the fortieth section, else he would be thus subjected to a penalty for an offense for which he had been acquitted."** (Bold face mine.)

Thus, in the case sub-judice, if the results were the product of *one single criminal act,* the one *must be involved in the other,* and under the rule above laid down the acquittal under the manslaughter indictment would be a bar to the prosecution under the indictment charging assault and battery.

In any event, the case of State v. Scaduto, supra is in *direct conflict* with the opinion of the Supreme Court in this case. It recognizes in effect the rule laid down in the Rosa and Mowser cases, —* * *

that is, whether or not the offense —* * *— * * * were the product of a single criminal act," and should therefore receive great consideration by this Court.

The error of the Supreme Court in failing to take into consideration the fact that both indictments arose out of *one criminal act,* now becomes convincingly apparent.

I deem a further discussion of the opinion of the Supreme Court unnecessary, as I am aware it is the *judgment* of the Supreme Court I am seeking to reverse, and not its opinion, and in passing, I feel justified in concluding that the *judgment* of the Supreme Court cannot under the law be sustained by adopting the views expressed in this opinion.

VIEWS OF TEXT WRITERS

While I am satisfied that the decisions of our own State have settled the rule to be applied, in considering cases giving rise to the question at bar, it is interesting to observe, how the subject is treated by the learned text-writers, in their valuable treatises. Chitty in his valuable work on Criminal Law, in a foot-note found in Volume 1, Chitty Cr. L., page 455, states:

> "Where an assault and battery has been made upon two, and both were wounded by the same stroke, and the offender has been legally convicted before a Court of competent jurisdiction for the breach of the peace in the assault and battery upon the one, an indictment cannot afterwards be maintained against him for the assault and battery upon the other."

Citing State vs. Damon, 2 Tyler 387; State vs. Benham, 7 Connecticut 414; Commonwealth vs. Anrews, 2 Mass. 409; Vergus vs. Sugg, 2 Stewart Port 341; Com. vs. Chicester, 1 Virg. Cases 312:

Bishop's New Criminal Law, Vol. 1 (one) par. 636, page 1061.

> "*Obviously there is a difference between one volition and one transaction and on* a view of our combined authorities, there is little room for denial that in one transaction a man may commit distinct offenses of assault or homicide upon different persons and be punished for each. *But if one by a single volition* should discharge into a congregation of people a fire-arm loaded with peas for shot and each of fifty different persons should be hit by a pea, it would be startling to affirm that he could be punished

> for assault and battery fifty times and once for disturbing the meeting. Certainly it would violate the spirit, if not the letter, or our 'twice in jeopardy' guaranty; and every provision for the case of persons accused of crime is, it is settled beyond dispute, to be interpreted liberally as extending to cases within its spirit whether within the letter or not." (Italics are mine.)

2 Van Fleet's former adjudications par 622:

> "If several persons are injured in person or property by the same act, it is held in Conn. Georgia, Illinois, Indiana, Iowa, Missouri, New York, Texas, Vermont, and England, that there is but one offense, but the contrary is ruled in Arkansas California, Kentucky, New York, South Carolina, and Virginia; while in Massachusetts, it is decided that the State may elect to prosecute for one or several offenses."

8 Ruling Case Law, page 144, paragraph 128 is as follows:

> "Stated in another form, if there was one act one intent and one volition, and the defendant has been tried on a charge based on such act, intent and volition, no subsequent charge can be based thereon, though the crimes involved in the two proceedings are entirely different."

16 Corpus Juris, page 283, paragraph 485 states the rule to be:

> "Although crimes are not usually identical if committed against different persons, yet by the weight of authority where the same act or stroke results in the death of two persons an

> acquittal or a conviction of the murder of one bars a subsequent prosecution for the killing of the other, because the killing is but one crime and cannot be divided. This rule also has been applied where the same blow produces a separate assault and battery on two different persons." (Cases cited in note.)

The decisions of our sister states are not entirely in accord upon this subject. *The contrary view* is best stated in the case of State vs. Rose, 89 Ohio 383-106 N. E. page 50, where the Court says:

> "The words 'same offense' mean same offense not the same transaction, not the same acts, not the same circumstances or same situation. There is but one offense that is the same offense as 'rape' and that is 'rape'. We have no trouble with the plain purpose and manifest meaning of these words of the Constitution He who runs may not only read but clearly understand.
>
> We contend that there is nothing here for this Court to construe. Where there is no doubt, no ambiguity, no uncertainty as to the meaning of the language employed by the right nor authority for the court to assume to interpret that which needs no interpretation and to construe that which needs no construction."

However our courts have long recognized that the words "same offense" have a *different* and more *technical meaning.*

AUTHORITIES FROM SISTER STATES

The following authorities from other jurisdictions are in point; the courts having had occasion to consider and decide the question at bar. Their expressions on the subject are in entire accord with the doctrine laid down by this Court in the Rose and Mowser cases. I believe, therefore, the Court will find them useful, and of assistance, in considering the case sub-judice.

State v. *Spanell,* (Texas Criminal Reports), 203:

> Southwestern 357, where Spanell, his wife and one butler were in an automobile together at night. Defendant testified that Butler assaulted him and that several shots were fired by him at Butler with no intent to injure Mrs. Spanell. Butler and Mrs. Spanell were killed. He was indicted in separate indictments for each homicide and was tried and acquitted for the murder of his wife and filed in this issue a plea fo autrefois acquit based upon the proposition that the two homicides resulted from a single act and volition and constituted one offense.

The Court said:

> "Where two persons are killed or injured in one transaction, the fact that more than one shot was fired does not, as a matter of law, render it insusceptible of proof that they were both killed by one act. A series of shots may constitute one act, in a legal sense, where they are fired with one volition. In cases where two persons have been killed or wounded by a series of shots, and under the general issue of not guilty it is urged as a defense that one of the

homicides or injuries resulted from shots aimed at one striking another, the issue of singleness of the act and intent, bringing the double result, has not been made to depend on the number of shots fired."

In the case of *Clem* vs. *The State*, 42 Ind. 420, at 429, the Court said:

"It is urged that the plea should show by proper allegation that the person in this indictment alleged to have been killed is the same person who was alleged to have been killed in the indictment in the former prosecution. In other words, that in order to make it good, the plea should have alleged that Jacob Young, mentioned in the indictment in this case, is the same person as Nancy Jane Young, the person alleged to have been killed in the indictment on which the defendant was previously acquitted. But evidently this cannot be so, else when two persons are killed by the same act and when the crime would therefore be one and indivisible, and when the State had chosen to indict the defendant and try him for the killing of one of them, there could be no plea of former acquittal when he was indicted for the death of the other produced by the same act. If it be true, as we suppose it is, that the killing of two or more persons by the same act constitutes but one crime, then it follows that the State cannot indict the guilty party for killing one of the persons and after a conviction or acquittal indict him for the killing of the other; for the State cannot divide that which constitutes, but one crime and make the different parts of it bases of separate prosecutions. But when the State has prosecuted the accused for one part of the crime, she cannot again prosecute him

for the other or remaining part of it. Hence, if the killing of Jacob and Nancy Jane Young resulted from the same act, and therefore one crime, and the State has prosecuted the accused for the murder of Nancy Jane Young, one part of the crime, it cannot again prosecute her for the murder of Jacob Young, the other part of the crime. The gist of the plea, therefore, in this case is, that the felonious act with which the defendant is charged in the indictment resulted in the death of both Jacob and Nancy Jane Young and that the State, having prosecuted the defendant for part of the crime, should not prosecute for the other part. *Where, by the discharge of a fire-arm, or a stroke of the instrument, an injury is inflicted, upon two or more persons, or their death is produced, there is but one crime committeed.*" (Italics are mine.)

Sadberry v. *The State,* 39 Texas Criminal Reports; 466-46 Southwestern, 639.

Where it appeared that the defendant because of indignities heaped upon him during the day by some fisherman, approached their tent at night with a loaded shot-gun while they were seated around the camp fire, and fired one shot at them, wounding four of them, it was held that the defendant's conviction of assault with intent to murder, committeed by shooting one of them, was a bar to a prosecution for the same offense in relation of another of them.

Lillie v. *State,* 79 Tex. Crim. Rep. 615; 187 Southwestern, 482.

It would appear from the reports of this case, that the Court was of the opinion that if two persons were killed or injured by the same shot, a conviction

of the murder or assault of one of them would be a bar to a prosecution for the murder or assault of the other.

State v. *Damon*, 2 Tyler (Vt.) 387:

> "It appears that the defendant wounded two persons in the same affray, at the same instant of time, and with the same stroke. On a regular complaint made, he has been convicted before a court of competent jurisdiction, for assaulting, beating and wounding Frederick Miller, of those persons. He stands here indicted for assaulting, beating and wounding Charles Doty, the other of those persons; and the defendant pleads in bar the former conviction, which he alleges to have been in the same offense. The only question is, whether the defendant has been legally convicted of the offense charged in the indictment? Of this there can be no doubt; for it is apparent on the record, that the assault and battery charged in the indictment, and that of which he was convicted by Mr. Justice Randell were at the same place and in the same affray and the wounds made by the instrument and by the same stroke. This is not a question between either of the persons injured by the assault and battery, and their assailant, redress has been or may be obtained by them by private actions; but it is a question between the government and its subject, and the Court are clearly of opinion, that the indictment cannot be sustained. The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows he has been legally convicted by a Court of competent jurisdiction. He cannot there-

fore be again held to answer in this Court for the same offense."

Commonwealth v. *Veeley,* 1916, 63 Pa. Super. Ct. 489, the Court said:

> "There is identity of person, causal act, evidence, and time in regard to the cases in which the defendant was acquitted; and the one which he is again called to answer. * * * When the record shows that, as here, the alleged facts are identical in each case, and on the whole record, the trial judge would be obliged to direct a verdict of acquittal, the defendant should not be again subjected to the expenses of another trial for the same cause, when the result is made certain by our decisions."

In *Gunter* v. *State,* 111 Ala. 23; 20 Southern, 632, the Court said:

> "It is the settled rule of this Court that a defendant cannot be lawfully punished for two distinct felonies growing out of the same identical act and where one is a necessary ingredient of the other; that a series of charges cannot be based upon the same offense, and subdivided into two or more indictable crimes. * * * So, it has been held that, where the same act of unalwful shooting resulted in the death of two persons, an acquittal or conviction on the trial of one would be a good defense on a second trial for the alleged murder of the other, for the reason that the killing constituted but one crime, which could not be subdivided and made the basis of two prosecutions. * * * And again, where one blow produces two separate assaults and batteries on two dif-

> ferent persons, a conviction of one may be pleaded in bar to an indictment for the other, for the reason that the defendant cannot be punished for two distinct assaults growing out of the same identical act."

In the case of *McCoy* v. *State*, 46 Ark. 141, the Court, although they held the plea of former acquittal bad, said that the two persons were not wounded and killed by the same shot, and that the indictments were not founded upon the same physical act.

In *Bell* v. *The State*, 120 Ark. 530; 180 Southwestern, 186, the former conviction was held no bar, because the killings were not the result of one shot.

In *People* v. *Ochotski*, 115 Mich. 601; 73 Northwestern, 889, the Court said:

> "That while two offenses grew out of the same affray, no claim was made that the two persons were injured by the same blows; that it was the same transaction but not the same volition; that there is a difference between one volition and one transaction."

In *Morris* v. *Territory* (1909), 1 Okla. Criminal Report, 617; 99 Pacific, 750; 101 Pacific, 111, the Court denied the contention that a former acquittal was a bar, stating that it was not the same shot that killed both parties.

In *Augustine* v. *The State*, 41 Texas Criminal Report, 59; 52 Southwestern, 77, the Court said:

> "That the contention that a former acquittal was a bar might be urged with some force if

> the killing of both parties was done by one and the same act; that is, if the proof showed that but one shot was fired and it caused the double death, then it might be a good plea in bar."

The Court said in *Keaton* v. *State* (1900), 41 Tex. Crim. Rep. 621; 57 S. W. 1125:

> "That the true criterion in pleas of this character is, if the act for which defendant is being prosecuted is the same violence of or act relied upon in the case wherein he was previously convicted, or if the two offenses constituted but one continuous transaction, in which appellant was the actor, this prosecution could not stand; but if the acts were distinct and separate transactions, and the prosecution is maintained to conviction against defendant in one, this fact cannot be pleaded in bar of a subsequent prosecution for a different offense by sheer force of the fact that the last offense occurred at one and the same time."

And in *State* v. *Evans* (1890), 33 W. Va. 417; 10 Southeastern, 792, holding a plea of former acquittal demurrable, the Court said:

> "A case can be conceived where such a plea might be held good. For example, the engineer of a railway train might be charged with negligently and feloniously causing the death of one passenger in a wreck, and, being tried and found by the jury entirely blameless for the accident, such acquittal might, perhaps, constitute a perfect defense to a subsequent indictment for killing another passenger, who was on the same train. But this case presents no such question. The killing was the result of a separate act in each case, committed under de-

grees of provocation not necessarily identical, accompanied by apprehensions not necessarily the same. In fine, every element to constitute two separate offenses appears on the face of the plea to exist in this case, and therefore the demurrer was properly sustained."

Cook v. *State,* 63 S. W. 872:

"But where there is one act, one intent, one volition, as is evidenced by the testimony of the appellant in this case, then appellant cannot be convicted upon an act, intent and volition for which he has been previously acquitted."

Hurst v. *The State,* 6 S. 120; 86 Ala. 604:

"Is each result a separate and distinct crime, liable to be indicted as such, or is it a mere consequence of a single unlawful act, done with criminal intent? An analagous inquiry would be: If one should cast a stone into a crowd and wound a dozen men at one blow, is he liable to one or a dozen indictments? If he burns a hundred houses by one act of arson, knowing the probable consequences of his unlawful act, would he be guilty of a hundred crimes? Or should he blow up a hotel with dynamite, murdering a thousand guests, would he be separately triable for the perpetration of a thousand homicides? The authorities are in direct conflict on this subject and we shall make no effort to reconcile them. It is our judgment that none of the legitimate purposes of punishing crime require the adoption of the policy of multiplying prosecutions in cases of this nature."

In *Moss* v. *State* (1917), Ala. App. 75 So. 179, accused fired four shots in rapid succession at one

person, killing him, and in so doing unintentionally killed an innocent bystander. The Court stated that it may be conceded and it is the law—that where a man kills two men in quick succession with a formed design as to each man, there are two offenses, but where the killing is pursuant to, and is a continuation of, the assault, and done under the impulses of the same design, it is but one act. It therefore follows that if accused, without any design or intention, killed an innocent bystander, while engaged in defending his own life or limb, under such circumstance as would justify him in so doing, and a court of competent jurisdiction had so held, and acquitted him upon the charge, he cannot again be put in jeopardy for the same offense.

In *Carson* v. *People* (1894), 4 Colo. App 463; 36 Pac. 551, the Court said:

> "If they had found the act which produced her death to be unlawful, or to have been committed in the prosecution of felonious intent, they would have been compelled to find the defendant guilty of murder; but to agree upon a verdict of involuntary manslaughter, they necessarily found that although the act which resulted in the death of * * * (the wife) was committed in an unlawful manner, yet the act itself was lawful. The defendant in his plea alleged in substance, that the assault charged in this information, and the affray which cost * * * (the wife's) life, were one and the same transaction. The demurrer admitted this to be true, and, so accepting it, the only question which was tried, or which could possibly have been tried, in the first case, was the character of the assault charged in this, and the verdict of involuntary manslaughter

was, as to the alleged felonious assault upon * * * (the husband) a verdict of acquittal."

The Court further said:

"It could not be shown without proof of the assault. For the purpose of ascertaining whether the defendant was guilty or innocent of the crime of murder, the only subject to be investigated was the act charged in this information; and the jury, by their verdict of involuntary manslaughter, declared that in committing the act the defendant was guilty of no violation of law. He has therefore been tried upon this identical charge and adjudged not guilty; and, when another prosecution was instituted against him for the same alleged assault, he was entitled to the benefit of his former acquittal. The Court erred in sustaining the demurrer, and the judgment will be reversed."

Where defendant pleaded former acquittal of the murder of one person as bar to prosecution for assault with intent to murder another, the Court in *Burnam* v. *State* (1907), 2 Ga. App. 395; 58 S. E. 683, said:

"The same transaction test adopted in this state may make a trial for the murder of one person a bar to a prosecution for assault with intent to murder a different person. For instance, if the defendant shot A, intending to kill him and by reason of bad marksmanship, struck and killed B, whom he did not intend to kill, the transactions the assualt with intent to murder A and the actual murder of B are legally the same. As intimated by this Court in the case

> of *Fewes v. State* (1907), 1 Ga., App. 122, 58 S. E. 64 (plea of former conviction), if by separate shots the defendant wounded two persons, the transaction would be single if the shooting was done in repelling a joint assault of these two persons. The intent of the defendant determines the matter."

Where, during a fight at night, accused struck two persons, one of them by mistake, thinking he was the other with whom accused had the quarrel, it was stated in *Jones* v. *State* (1889), 66 Miss. 380, 14 Am. St. Rep. 570, 6 So. 231, that a former acquittal of assault and battery with intent to kill the person purposely struck was a bar to a prosecution for assault and battery or simple assault upon the person unintentionally struck.

Ben v. *The State,* 22 Ala 9;

> "The offense consists in the attempt to destroy life, by administering to a white person any deadly poison; and that by this effort he compasses the lives of three instead of one, or that he places the poison in such a situation as to cause them to take it with the intent thereby of depriving them of life and does not hand it to either himself, does not change the nature of the offense, except in so far as they may be considered circumstances of aggravation; nor do they in anywise affect the penalty."

In the case of *Ruffin* v. *State,* 108 S. E. pg. 29, is the following:

> "Where A shoots at B with the intent to kill B and does kill B and, while so shooting at B accidently shoots and kills C., and is tried for the

homicide of B and acquitted, such acquittal is a bar to a prosecution of A for the killing of C. *Burnam* v. *State*, 2 Ga. App. 395, 58 So. Eastern, 683 and citations."

ENGLISH CASES.

The solution of the problem rests solely in judicial interpretation and true application of the *constitutional* provision, hence the following observations of Mr. Bishop, upon the weight to be afforded the decisions of the Courts of England on this subject is very interesting:

Bishop on Criminal Law, Sec. 982:

> "Some of our judges appear to have assumed without much consideration, that this provision merely affirms the common law; to which, therefore, they have looked to ascertain its interpretation and true application. But, in England, the maxim is a mere deduction, made by some judge or text-writer, from the adjudications, which must govern if found in conflict with it. With us, the constitutional provision is supreme and it must be the controlling power, though the result should be to overturn decisions. In England, the maxim is, in the language of Cockburn, C. J. 'Not one of those principles that lie at the foundation of our law, —such as the maxim that judges shall decide questions of law, and juries questions of fact, or that the verdict of the jury, in order to be binding, must be unanimous:' but it is 'a matter of practice which has fluctuated at various times, and which even at the present day may perhaps not be considered as finally settled.' Not thus is the constitutional provision regarded in the United States, where it is fundamental in our criminal jurisprudence. Nor is it within the rule, that words of established legal meaning take, in a new law the significa-

tion they bore in the old. And the reason is, that this maxim was never a law in England, or a thing which the English law interpreted; being itself a mere interpretation of a judicial practice not entirely uniform."

SUMMARY.

The rule laid down in the Rosa and Mowser cases, as applied to pleas of the nature under discussion, is that the *same criminal act* must produce both results. The Court in the Rosa case declares it *the universal rule* and that it is the universal rule, is fully supported by the expressions found in the text books and the decisions of the Courts of other jurisdictions. The qualifying principle upon which Supreme Court decision rests, has not received the judicial sanction of this Court, or the courts of other jurisdictions, where pleas of like nature to the one under discussion, have been considered and hence like a multitude of other rules and tests, applicable possibly to a different state of facts, has no applicability to the precise question at bar. It cannot be denied that the *unlawful blow*, by the *same instrument* delivered at one *time, in the same frame of mind and by the same act* of the defendant was the *proximate* cause of the injury to Lillian Dowling and death of Mary Mullaney, and without it no indictment would lie in either instance. The illustration given by Bishop supra, and the example given by the Court in *State* v. *Evans*, supra, of an engineer of a railway train, both bear strong analogy in principle to the plea under discussion and strikingly disclose the logic of the position taken by the plaintiff-in-error.

I again refer this Court to Bishop's New Criminal Law, Volume 1, paragraph 636, page 1061, wherein that Learned Author says:

> "Certainly it would violate the spirit if not the letter of our 'twice in jeopardy' guaranty; and every provision for the ease of persons accused of crime, it is settled beyond dispute, to

be interpreted liberally as extending to cases within its spirit whether within the letter or not."

It is therefore urged by the great weight of authority, it is established that where the same act or stroke results in the death or injury of two persons, an acquittal upon the prosecution of one bars a subsequent prosecution for the injury or death of the other.

The Trial Court Erred In Directing a Verdict for the State.

Our criminal procedure act (C. S. page 1835, par. 45) provides that in a plea of autrefois acquit it shall be sufficient to state that the defendant had been lawfully acquitted of the offense charged in the indictment. The plea filed in this case is in writing and in conformity with the statute.

If the State desired to raise the question of the sufficiency of the plea, it should have done so by demurrer.

State v. *Rosa,* 72 N. J. Law, 462:

> "Ordinarily a plea of former acquittal raises an issue for the jury; but, where upon its face it is insufficient in substance, it may be so adjudged on demurrer."

No question of the sufficiency of the plea having been raised by the State, the trial should have proceeded according to the established practice.

The State filed a replication which raised the issue of identity of offense.

State v. *Cooper,* 115 Atl. 386:

> "The proper practice in such a case is for the State to take issue on the facts stated, and thus put the defendant to proof of the averments it contains, and, as was done in State v. Mowser, 91 N. J. Law 395, 103 Atl. 805, on the trial of that issue the Court may charge the jury that the plea is not sustained by the proofs when that is a fact."

State v. *Ackerman*, 64 N. J. Law 99:

> "But in the statutory pleas the record need not be, and is not, set out; there can be no *prout patet per recordum*, and in criminal cases no such thing as a trial by the record; and, as the trial in all cases must be by the contrary, a general traverse of the pleas is the proper replication by the State, whenever it intended to contest the former acquittal or conviction."

State v. *Ackerman, supra:*

> "It has been necessarily held that the plea of *autrefois acquit* is of mixed nature, and consists partly of record and partly matter of fact. The matter of record is the former indictment and acquittal. The matter of fact is the identity of the offense and of the person formerly indicted. 4 B. Comm. 335. Under the plea here presented with the statutory averments, the issue became one for a jury to determine, under proper instructions by the Court as to the law."

State v. *Ackerman, supra:*

> "The trial of the issue presented by the plea of *autrefois acquit* is, like the issue upon plea of not guilty, triable by a jury only under like procedure, except that the burden of the proof of the issue lies upon the defendant to establish the averments of the plea to the satisfaction of the jury by a preponderance of proof."

Ackerman, supra:

> "The defendant must establish the existence

of the record, and, orally or otherwise, the averment of identity of the offense and person."

State v. *Ackerman, supra:*

"In the trial of the issue, what becomes a matter of law for the Court, and what a matter of fact for the jury, to determine, must be regulated by the general principles relating to the admission of evidence, the effect of documents and records, and as to instruction as to the law to be applied by the jury to reach a conclusion."

Mr. Bishop in his New Criminal Procedure, Book 2, page 633, paragraph 816, states as follows, the procedure to be adopted at a jury trial on such a plea:

1. Jury Trial.

"This is a mixed plea, ordinarily embracing both law and fact, therefore requiring a trial by jury. And still it may admit a demurrer, which is passed upon by the Court alone.

2. The *Burden of Proof* to establish this plea being matters affirmatively alleged by the defendant is on him.

3. The former record is produced and for what is probable thereby, it is conclusive, nor can the matter thereof be established otherwise, than by itself. There must be no variance between it and the plea.

4. The identity of the parties and of the offense, the defendant taking, as just said, the burden of proof, is shown by parol. It is so

even though the two indictments are alike. A common method is to produce the testimony of persons who were present at the previous trial as to what was there investigated; and if it appears to be within the present indictment a *prima facie* case is made, to be overcome only by proof from the other side of the diversity of the two offenses. Such witnesses need not be those of the former trial, the calling of whom is not indispensable, even though they are within reach of process. If sentence was rendered against the party, proof that it was inflicted on the present defendant shows his identity."

Hale, Pleas of the Crown, page 241:

"Now, as to the plea of *autrefois acquit*, it consists of two matter."

1. Matters of record, namely, the former indictment and acquittal, and before what justices, and in what manner, viz: by verdict or otherwise; and 2, matter of fact, viz: that the prisoner is the same person that was acquitted, that the fact the fact is the same of which he was acquitted, and whereof he is indicted.

In case of *Hite* v. *The State*, 9 Yergr., page 357:

"But the modern practice, which we recognize as more consistent with the general nature of our institutions, is to submit the question of identity to a jury immediately impaneled for that purpose."

State v. *Thornton*, 37 Mo. 360:

"As the indictment here charges the offense

> to have been committed on several and distinct occasions and the record of the recorder's court could not show conclusively the identical offense for which she was convicted, *oral testimony was perfectly competent to show they were one and the same.*" (Italics mine.)

In this case, the defendant offered the former indictment as well as the trial record thereunder (see Exhibit D-2), showing a valid and lawful acquittal by a jury impaneled to try said issue. The defendant orally proved that he was the same person mentioned in each of said indictments and the transcript of the trial upon the indictment for manslaughter was received in evidence without objection and without the necessity of swearing the stenographer who had taken the notes at the previous trial. From this record it was proven that Mary Mullaney and Lillian Dowling were struck while they were standing hand-in-hand on Bloomfield avenue by the same automobile alleged to have been driven by the defendant, at the same time and place *by the same act of driving, and by the same blow.* The testimony of Lillian Dowling offered in this case further corroborates this record. *The issue thereupon to be decided by the jury was whether or not the injury sustained by Lillian Dowling was the result of the same act or volition of the defendant, John Cosgrove, Jr., which caused the death of Mary Mullaney.*

In Van Fleet on Former Adjudications, paragraph 661, the author says:

> "But when the former record showing those facts is introduced, the Court cannot, as a question of law, rule the two offenses are identical; that must be left to the jury."

This point is carefully discussed in *Spannell* v. *State, supra.*

And so it is contended that the defendant, having *made a prima facie case, the Court was without jurisdiction* in deciding this issue as a matter of law.

State v. *Anderson,* 27 Mo. 267:

> "To sustain the plea in this case, it was incumbent on the defendant not only to produce the record of the former conviction, but to show by testimony that he had been previously tried for identically the same offense as the one for which he was then prosecuted, and it was not sufficient to show that the evidence offered on the last trial would have supported the first indictment, because it would have been sustained by proof of any act of selling within twelve months before the finding thereof. Whether, therefore, the offenses charged in both indictments were the same was a question of fact; and although the Court on the evidence would have been authorized to have found the issue on the plea for the defendant, the conclusion from the proof ought not to have been announced as a declaration of law."

State v. *Ainsworth,* 11 Vermont 91:

> "When a man is shown guilty of an offense, he may defend himself by the plea of *autrefois convict,* as was attempted in this case. To sustain this defense, the respondent must show that he has been legally convicted of the same offense for which he is now prosecuted. To this end, he must produce the record of conviction and must then produce substantive tes-

timony to show the jury that it was identically the same offense as the one for which he is now prosecuted." (Followed in State v. Pianfetti, 79 Vermont 236.)

Cook v. *State*, 63 S. W. 872:

> "But if the plea presents a question of fact, then it is a question for the jury and not for the courts."

If the jury found that the injury to Lillian Dowling and the death of Mary Mullaney were caused *by one and the same act and volition of this defendant* under the law, the plea would be a bar to further prosecution.

The State offered no proof and made no motion for a verdict in its favor.

The Court, *of its own motion*, although a *prima facie* case had been established by the defendant, refused to permit the jury to decide the facts in issue.

State v. *Karpowitz*, 120 Atl. 40:

> "This Court said, in Schmidt v. Marconi Wireless Telegraph Co., 86 N. J. Law 183, 'That the uncontradicted testimony of a man whose character for truth and integrity is universally known, should nevertheless be submitted to the jury.' "

The *criminal act* of the defendant in each case was the unlawful blow delivered under the same identical circumstances. The fact that two persons were struck by this single blow did not change its character or lessen or increase the defendant's

guilt or innocence. It was one crime in the eyes of the law.

State v. *Schutte*, 87 N. J. L. 15:

> "The running of a car at a high rate of speed is an act in which the will of the driver concurs, and hence is clearly a willful act as distinguished from merely negligent conduct, when considered with respect to the state of mind of the offender, which is what the criminal law considers." (Italics mine.)

Quoting from *Commonwealth* v. *Veeley*, 63 Pa. Super. Ct. 489, *supra:*

> "There is identify of person, casual act, evidence and time in regard to the cases in which the defendant was acquitted; and the one which he is again called to answer. * * * When the record shows that, as here the alleged facts are identical in each case, and on the whole record the trial judge would be obliged to direct a verdict of acquittal, the defendant should not be again subjected to the expenses of another trial for the same cause."

I have already fully discussed in the previous point the law applicable to this plea, and hence a further discussion thereon is deemed unnecessary.

Bishop's New Cr. Pro., Vol. 2, page 633:

> "The identity of the parties and of the offense, the defendant taking as just said the burden of proof, is shown by parol. It is so even though the two indictments are alike. A common method is to produce the testimony of persons who were present at the previous trial

> as to what was the investigation and if it appears to be within the present indictment a *prima facie* case is made to be overcome only by proof from the other side of the diversity of the two offenses."

The Trial Court erred, therefore, in directing the jury to render its verdict in favor of the State after a *prima facie* case had been made by the defendant.

POINT II

Assignment of Error 8. Reason for Reversal 8 in Court Below.

The testimony with respect to this assignment is found on page 24€ of the State of the Case.

The witness was testifying in behalf of the defendant as to his general reputation for prudence and carefulness. On cross examination the witness was asked whether or not he had ever heard that the defendant had been convicted of crime, to which he replied that he had so heard. He was then asked this question, found on page 345:

> "Q. Disregarding the fact that he was convicted of crime, or as you say pleaded these pleas to a crime that he had committed? A. Disregarding that.
>
> Q. Disregarding that, his reputation was still good? A. I think so.
>
> Q. Nobody seemed to hold any grievance against the fact that he had been convicted of crime? A. I never heard anyone."

As the subject of conviction of crime was first introduced on cross examination, it was competent for the defendant on re-direct examination in rebuttal to neutralize, modify or explain any adverse inference to be drawn from the evidence, so elicited on cross examination. It was further competent and material to explain the motive which prompted his expression. Did his reply have foundation in fact? Was it prompted by good or bad, false or true motive?

These inquiries naturally arise in the minds of the jury and their answer should, in order to be effective, fall from the lips of the witness.

Pullen v. *Pullen,* 12 Atl. Rep. 138.

Abbot's Trial Brief (3rd Ed.), Sec. 47, page 462.

POINT III

Assignment of Error 10. Reason for Reversal 10 in Court Below.

It is not contended that the rule of law with respect to "flight" is not properly expressed in this charge by the trial court. It is, however, contended that it was the duty of the trial court to lay before the jury any explanations or qualifications arising from the evidence which in any way tended to show the alleged flight consistent with innocence or a lack of consciousness. *The attention of the Court was directed to such explanation by the defendant's request to charge No. 15, which the trial court did not charge as requested.*

> "In this connection, you may consider whether the driver knew he struck anyone, and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile."

Mr. Wharton, in his work on Criminal Evidence, Vol. 2, 10th Edition, at page 1479, in speaking of the duty of the trial court with respect to a charge, as is here under consideration, delivers himself of the following:

> "However, the Court should always carefully instruct upon this class of evidence and take into consideration any fact that explains or qualifiies or limits such circumstances or shows them in any way to be consistent with innocence."

It is contended, therefore, that the failure of the trial court to lay before the jury the explanatory or qualifying circumstances as requested by the defendant was error which was harmful to the defendant in the maintenance of his defense on the merits.

POINT IV

Assignment 24. Reason 24 in Court Below.
The Court charged part of this request, but refused to charge the following:

> "In this connection, you may consider whether the driver knew he struck anyone, and whether or not the foggy condition of the weather prevented him from seeing the person alleged to have been struck by the automobile."

The Court subsequently charged the jury on "flight," and it is a well-known principle of law that any explanation of the alleged "flight" of the accused should be placed before the jury for its consideration to overcome the inference which arises at law from such circumstances. There was abundant proof of the foggy condition of the weather and there was evidence to the effect that a person could not see the road while driving with the windshield down, because of the condition of the weather (see State of Case, p. 55, l 20, *et seq.*).

There was no evidence that the machine which struck Lillian Dowling had its windshield open.

Mr. Wharton, in his work on Criminal Evidence, Vol. 2, 10th Edition, at page 1479, in speaking of the duty of the trial court with respect to a charge as is here under consideration, delivers himself of the following:

> "However, the Court should always carefully instruct upon this class of evidence and take into consideration any fact that explains or qualifiies or limits such circumstances or shows them in any way to be consistent with innocence."

It is contended that the trial court erred in refusing to place before the jury the explanation advanced by the defendant, as to his alleged flight, and that the defendant suffered by reason thereof harm, and was prejudiced in his defense on the merits.

POINT V

Assignments 21-25. Reasons for Reversals 21-25 in the Court Below.

These assignments will be argued together. The requests to charge deal with the necessity of an intention to injure Lillian Dowling or any other person using the highway, as one of the elements constituting the crime of atrocious assault and battery.

After the jurors retired to agree upon their verdict they addressed a communication to the trial court wherein they asked whether or not such an intention to injure was a necessary element. It is clear that the jury were in a state of doubt as to the proposition requested by the defendant and not charged. That an intention to injure is one of the necessary elements of the crime of assault and battery needs no other citation of authority than Blackstone's definition of that crime:

> "An assault is an attempt or offer to beat another, without touching him, as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, and misses him." (3 Black. 120.)

> "A battery is the unlawful beating of another; that is, the least touching of another's person, wilfully or in anger."

It is contended that notwithstanding the rule "that sane persons are presumed to intend what will naturally result from what they knowingly do," and the rule that an intent to injure may be inferred from circumstances which legitimately permit such finding, the ultimate finding of the jury must be that the force constituting the battery was

intentionally applied by the person charged with the offense upon the person injured.

The case of *State* v. *Schutte,* 88 N. J. Law 396, holds no more than if a man should intentionally drive his car into a crowd of people, so that it was improbable *they would all get out of the way,* and thus would possibly drive over or against one of them, the inference that he intended to strike somebody with his car could be reasonably drawn from the fact of his intentionally driving it into the crowd in that manner. In effect, it does no more than establish that the "specific intent to injure" may be proven by circumstantial evidence, and by legitimate inference from evidence.

It reaffirms the proposition contained in Blackstone's definition:

> "Counsel for the plaintiff-in-error correctly contends that both the wilful wrongdoing that constitutes malice in the law and also an intention to inflict injury are of the essence of a criminal assault." *State* v. *Schutte, supra.*)

In order that the jury could find the existence of a specific intent to injure by inference, they had to naturally rest their conclusions upon what was relevant to that ultimate conclusion. How could the jury arrive at the true ultimate conclusion by inference without being instructed with regard to it.

It is respectfully submitted that it was error for the Court to refuse to charge as requested.

POINT VI

Assignment of Error 19. Reason for Reversal 19 in Court Below.

It is contended that the learned trial judge did not answer the inquiry addressed to him by the jury and, by failing to do so, the jury was misled to the prejudice of the defendant.

The inquiry was whether or not actual intent to atrocious assault is necessary. To this inquiry the Court made no answer.

It cannot be disputed that actual intent to injure is necessary in a criminal case of assault and battery. (*State* v. *Schutte,* 87 N. J. Law, p. 15.)

> "Counsel for the plaintiff-in-error correctly contends that both the wilful wrongdoing that constitutes malice in the law and also an intention to inflict injury are of the essence of a criminal assault."

It is contended that the Court should have informed the jury that "an intent to injure" was a necessary constituent of the crime charged in the indictment, and then charge them that it could be inferred by law. That was the ultimate question they were to decide. The defendant had requested the Court to charge the jury upon the necessity of an intent to injure in the crime of assault and battery, as is evidenced by requests to charge Nos. 5, 16 and 17, which the Court refused to charge. See argument under Point V.

The Court was bound to clearly expound the law in reply to the inquiry of the jury so as to leave no doubt.

This the trial court failed to do, and the defendant suffered thereby prejudice in his defense upon the merits.

POINT VII

Assignment of Error 20. Reason for Reversal 20 in Court Below.

The question evoking the reply of the trial court to which exception is taken is as follows:

> "Is actual intent to atrocious assault necessary or is it implied by recklessness in driving by breaking of speed laws and fleeing from the spot?"

The answer of the trial court is:

> "It may be implied, gentlemen, from those things, but you must take into consideration, of course, all of the testimony in the case."

By this reply it is contended that the jury was permitted to imply an intention to atrociously assault from either one of the following three propositions: Mere recklessness in driving, breaking of the speed laws and fleeing from the spot.

It is contended that recklessness in driving may be a mere act of negligence, and under the case of *State* v. *Schutte*, 87 N. J. Law, page 15, that did not sustain a conviction for assault and battery. Breaking of the speed laws did not of itself constitute sufficient from which an intention to injure could be implied. As was pointed out in the case of *State* v. *Schutte* in the Court of Errors and Appeals, reported in 88 N. J. Law 386:

> "The fact that the automobile was exceeding the speed limit prescribed by the Motor Vehicle Act is not the controlling factor, but is only a circumstance to be considered in deciding whether or not the defendant was running his automobile at a rate of speed which under the existing conditions was obviously dangerous to pedestrians or others using the highway."

A mere failure to stop in violation of the Motor Vehicle Act did not of itself tend to prove an intent to injure, and if the defendant were merely negligent and had not committed a crime, even though he did not stop his machine and fled, there could be no consciousness of guilt of any crime. While the Court continued and did charge correctly with respect to implying the malice and inference of intent to injure where two contradictory statements of the law are included in a charge, and the jury is permitted to accept either one, the mere fact that the Court did correctly state the law does not cure the error, as it is impossible to say which of the two statements the jury accepted. *State* v. *Clayton,* 83 N. J. Law 673, 85 Atl. Rep. 173.

For the divers reasons herein argued it is respectfully submitted the judgment should be reversed.

Respectfully submitted,

HAROLD SIMANDL,

Counsel for Plaintiff-in-Error.