INDEX

SUMMONS.

THE STATE OF NEW JERSEY TO F. MARION DUCKWORTH:

You are summoned to answer the annexed complaint of Phillip J. Lilly, administrator *ad prosequendum* of Irene M. Lilly, deceased, in an action at law in the Warren County Circuit Court. And take notice that unless you file your answer to the said complaint with the Clerk of the Warren County Circuit Court, at Belvidere, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

(Seal)

Witness, RULIF V. LAWRENCE, ESQUIRE, Judge of the Warren County Circuit Court, at Belvidere, this third day of December, nineteen hundred and twenty-six.

RAMSEY REESE,
Clerk.

WILLIAM C. GEBHART & SON,
Attorneys.

COMPLAINT.

WARREN COUNTY CIRCUIT COURT.

PHILLIP J. LILLY, Administrator *Ad Prosequendum* of IRENE M. LILLY, deceased,
Plaintiff,
v.
F. MARION DUCKWORTH,
Defendant.

Action at Law.
Complaint.

The plaintiff, Phillip J. Lilly, administrator *ad prosequendum* of Irene M. Lilly, deceased, who resides in the Town of Phillipsburg, in the County of Warren and State of New Jersey, says:

1. On the 9th day of December, 1925, the said Irene M. Lilly, deceased, was walking or about to walk across a certain street or public highway in the said Town of Phillipsburg, known as South Main Street, at a point where the said street is intersected by another public street or highway in the said town called Mill Street, in an easterly direction, and was then and there proceeding in a careful and prudent manner.

2. The defendant was then and there the owner of a Buick coupe automobile.

3. The defendant was then and there driving the said automobile on the said street or public highway, known as South Main Street, and was then and there approaching the intersection of the said street with the said Mill Street, in a southerly direction.

4. The defendant, by his servants or agents, was then and there driving his said automobile on the said South Main Street in a southerly direction, and approaching said intersection.

5. The defendant, his servants and agents, then and there carelessly, negligently, wilfully, maliciously and unlawfully drove and operated his said automobile, and then and there carelessly, negligently, wilfully, maliciously and unlawfully drove and operated his said automobile at a dangerous and excessive rate of speed, and too near this right-hand gutter or curb of the said street, and without keeping any lookout for the said Irene M. Lilly, deceased, and without giving the said deceased any warning of his approach and without having good and sufficient and proper headlights on his said automobile, and with the brakes on the said automobile and other parts of his said automobile in a dangerous, defective and unlawful condition, of which he had had notice for a long time prior to the said date, so that as a result of all the aforesaid carelessness, negligence, wilfulness, maliciousness and unlawfulness of the defendant, his servants and agents, the defendant's automobile then and there struck the said deceased and threw her to the ground with great force and violence so that she was so greatly wounded, bruised and injured thereby, that she died as a result thereof

on the 19th day of December, 1925, leaving her surviving her father, the said Phillip J. Lilly, her mother, Bertha S. Lilly, her sister, Helen A. Lilly, and her brother, James J. Lilly.

6. Plaintiff herewith brings into court his letters of administration *ad prosequendum* on the said Irene M. Lilly, deceased, granted to him by the Surrogates of the said County of Warren, on the ninth day of September, 1926.

Plaintiff demands $10,000 damages.

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff.

ANSWER.

WARREN COUNTY CIRCUIT COURT.

PHILLIP J. LILLY, Administrator *Ad Prosequendum* of IRENE M. LILLY, deceased, *Plaintiff*, v. F. MARION DUCKWORTH, *Defendant.*	Action at Law. Answer.

The defendant, residing in the Town of Phillipsburg, in the County of Warren and State of New Jersey, answering the complaint of the plaintiff, says that:

1. The defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1, and leaves the plaintiff to his proof thereof.

2. The defendant admits that he was the owner of a Buick coupe automobile on December 9, 1925, but denies that said automobile was at or near the corner of South Main and Mill Streets in said Town of Phillipsburg at the time mentioned in the first paragraph of the complaint.

3. Paragraphs 3, 4 and 5 are denied.

4. The defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 6, and leaves the plaintiff to his proof thereof.

Defendant denies that the plaintiff is entitled to damages from him in the sum mentioned in the complaint, or in any sum.

EDWARD L. KATZENBACH,
Attorney for Defendant.

INTERROGATORIES.

WARREN COUNTY CIRCUIT COURT.

PHILLIP J. LILLY, Administrator *Ad Prosequendum* of IRENE M. LILLY, deceased, *Plaintiff*, v. F. MARION DUCKWORTH, *Defendant.*	Action at Law. Interrogatories.

To Edward L. Katzenbach, Esquire, Attorney for Defendant,

Sir:

You will please take notice that the defendant is required to answer the following interrogatories within the time required by law.

FIRST INTERROGATORY.

Please state whether or not the defendant was the owner of a Buick coupe automobile bearing New Jersey 1925 automobile license No. 223037 at the time and place of the accident upon which this action is based.

SECOND INTERROGATORY.

Please state whether or not the defendant was the owner of a Buick coupe automobile bearing New Jersey 1925 automobile license No. 223037 during the entire month of December, 1925, and, if not, who was the owner of the said automobile.

Yours respectfully,
WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff.

ANSWERS TO INTERROGATORIES.

WARREN COUNTY CIRCUIT COURT.

PHILLIP J. LILLY, Administrator *Ad Prosequendum* of IRENE M. LILLY, deceased, *Plaintiff*, v. F. MARION DUCKWORTH, *Defendant.*	Action at Law. Answers to Interrogatories.

To William C. Gebhardt & Son, Esquires, Attorneys for the Plaintiff:

Sirs:

The defendant makes the following answers to the interrogatories served by the plaintiff:

ANSWER TO FIRST INTERROGATORY.

The defendant was the owner of a Buick coupe automobile bearing New Jersey 1925 automobile license No. 223037 at the time mentioned in the complaint, but said automobile of the defendant was not at or near the place of the accident mentioned in the complaint when said accident happened.

ANSWER TO SECOND INTERROGATORY.

The defendant was the owner of a Buick coupe automobile bearing New Jersey 1925 automobile license No. 223037 during the entire month of December, 1925.

Yours respectfully,
EDWARD L. KATZENBACH,
Attorney for Defendant.

———

STATE OF NEW JERSEY, }
COUNTY OF WARREN, } *ss.*

F. MARION DUCKWORTH, of full age, being duly sworn according to law, on his oath deposes and says that he is the defendant in the foregoing action, and that the foregoing answers to interrogatories are true.

F. MARION DUCKWORTH.

Sworn and subscribed before me this 13th day of January, 1927.

J. E. DWYER.

(Seal)

[ENDORSED]

Service of the within Answers to Interrogatories is hereby acknowledged this 18th day of January, 1927.
William C. Gebhardt & Son,
Attorneys for Plaintiff.

TESTIMONY.

WARREN COUNTY CIRCUIT COURT.

April Term, 1927.

PHILLIP J. LILLY, Administrator *Ad Prosequendum* of IRENE M. LILLY, deceased,
Plaintiff,
v.
F. MARION DUCKWORTH,
Defendant.
} Action at Law.

(Transcript of shorthand notes of testimony, etc., taken in the above-entitled cause on the trial thereof before HON. RULIF V. LAWRENCE, Circuit Court Judge, and a jury, at the Court House, Belvidere, Warren County, New Jersey, on Thursday and Friday, May 12th and 13th, respectively, A. D. 1927.)

APPEARANCES:

MR. GEBHARDT and MR. W. READING GEBHARDT (GEBHARDT & SON), for the plaintiff.

MR. GEORGE GILDEA (EDWARD L. KATZENBACH), for the defendant.

(Jury called and sworn.)

(Mr. W. Reading Gebhardt opened for the plaintiff.)

(Mr. Gildea opened for the defendant.)

PHILLIP J. LILLY, sworn.

Direct examination.

By Mr. Gebhardt:

Q. You are the plaintiff in this case?
A. Yes.
Q. You are the father of Irene M. Lilly?
A. Yes, sir.
Q. What date did she die, Mr. Lilly?
A. December 19th.

By the Court:

Q. 1925?
A. 1925.

By Mr. Gebhardt:

Q. She was then how old?
A. 7 years 7 months 5 days.
Q. At that time, previous to the time she met with this accident, will you please tell me whether or not she was a girl in good health?
A. She was.
Q. Did she go to school?

A. Yes, sir.
Q. How did she get along with school work?
A. Good.
Q. What was her general character and disposition?
A. Her general disposition was a nice little girl all round. Never had anything to say to anybody. Never done nothing to nobody.
Q. A girl of good character. On December 9, 1925, did she meet with an accident?
A. Yes.
Q. What was the first you knew of this accident occurring?
A. I was up at the garage and I come down. When I come down Mr. Wargo had her in his machine. Mr. McDermott got in the machine and I got in, too, and went to the hospital.
Q. What hospital was she taken?
A. Warren.
Q. What condition was she in when she arrived there?
A. They took her in and laid her on the operating table, and about five minutes Dr. Wolfe came in and said it was a compound fracture of the skull. There was a hole in her head about as big as a quarter right along up over the ear.
Q. Was she conscious or unconscious?
A. She never spoke a word from the time we took her in until she died outside that she would sit up in bed and put her arms out, and holler.
Q. Did she recognize you?
A. No, she didn't know anybody.
Q. Did she stay in the hospital then?
A. She stayed in the hospital then.
Q. What day did she die?
A. On the 19th, Saturday morning, 2 o'clock.

Q. Did she die as a result of these injuries?
A. She died from the injuries she had.
Q. Are you familiar with the intersection of South Main Street with Mill Street where the accident is alleged to have occurred?
A. Yes.
Q. Have you at my request made any measurements of the street and so forth there?
A. Yes, I did make measurements, made measurements when the car stood there, Wargo's car, the distance from the running board.
Q. Will you give us the width of South Main Street at this intersection?
A. 37 feet 7 inches.
Q. Did you also measure the width of Mill Street at the intersection?
A. You mean this way (indicating)?
Q. The width of Mill Street?
A. No, sir, I didn't measure the width of Mill Street.
Q. Did you measure the distance at my suggestion from what is known as Purchell's Corner down to Mill Street?
A Yes, sir.
Q. How far is that?
A. The distance from Purchell's Corner down to where she was hit, where she lay, is somewheres around 200 feet. I don't know just for sure, but it's close to that.
Q. How many children do you have, Mr. Lilly?
A. Two, now.
Q. What are their names?
A. Helen and James.
Q. How old is Helen?
A. Helen, 14 years old.
Q. How old is James?

A. James will be 12.

Q. At any time after this accident, could you tell me whether or not your daughter, Helen, pointed out any particular automobile to you?

A. Yes, sir, three days after it happened.

Q. What automobile was it she pointed out?

By Mr. Gildea: Objected to as irrelevant and immaterial.

By the Court: Objection sustained.

By Mr. Gebhardt: I can call the witness after.

Q. In the vicinity, Mr. Lilly, of where Mill Street intersects South Main Street, will you please tell me whether, on the average, the houses are less than 100 feet apart, on South Main Street?

A. The houses at the intersection are all, on the side going to Alpha, all close together; but on the opposite side going up South Main Street there's

---

Q. In the vicinity of this intersection, are the houses there on South Main Street less than 100 feet apart on the average?

A. Yes.

Q. What kind of pavement is there on South Main Street?

A. Flagstones, from Mill Street up to, from Mill Street out.

Q. What kind of paving in the street?

A. Brick.

Q. Just brick?

A. Yes.

Q. What kind of paving, or material is it that you found at the point where Mill Street comes out on to South Main Street?

A. Brick.

Q. Am I correct in my idea the South Main Street is the main street running through Phillipsburg from Easton to Alpha?

A. Yes.

Q. Does Mill Street intersect South Main Street as you go towards Alpha, from the left or the right?

A. From the right.

Cross-examination.

By Mr. Gildea:

By Mr. Gildea: No questions.

By Mr. Gebhardt: I might say that, of course, I reserve the right to recall this witness for other testimony that will become relevant at that time.

Helen Lilly, sworn for the plaintiff.

Direct examination.

By Mr. Gebhardt:

Q. How old are you, Helen?

A. I was 13 in April.

Q. Are you the daughter of Mr. Lilly, who was just on the witness stand?

A. Yes.

Q. Was it your sister, Irene M. Lilly, who was killed in this accident?

A. Yes.

Q. Will you please tell me whether or not you were along with her the day this accident happened?

A. Yes, sir.

Q. On what street did it happen?

A. South Main Street.

Q. In Phillipsburg?

A. Yes, sir.

Q. Was your sister along with you, or was she apart from you, separate from you?

A. She was with me.

Q. Who else was along with you?

A. Wilbur Yerane.

Q. Where were you going that day, the three of you?

A. We always carry papers, and my father was at the garage. He always takes us around with the papers, and we were going up to the garage.

Q. Where did you live, left- or right-hand side of the road towards Alpha?

A. Right-hand side.

Q. Where did you live so far as this intersection of Mill Street and South Main Street is concerned?

A. We lived right on the corner, where Mill Street comes out on South Main Street.

Q. Where did this accident happen with reference to Mill Street and South Main Street, the intersection of the two?

A. Right where Mill Street joins South Main Street.

Q. In order to get to this garage, did you have to go up the street, or down the street, or across the street?

A. Across the street.

Q. As you look towards Alpha, did you go from the left to the right, or from the right to the left?

A. From the right to the left.

Q. You were all going across the street at the time this accident happened, is that right?

A. No, sir.

Q. You were not? Were you about to? Did you expect to?

A. We expected to.

Q. Just tell me what happened to your sister?

A. There was a machine standing there by the ——

Q. By that you mean an automobile?

A. Yes, standing by the pole ——

Q. Was that on the left-hand side or right-hand side as you look towards Alpha?

A. Right-hand side.

Q. Was it in the gutter, or close to the gutter, or in the middle of the road, or where?

A. There was no gutter there, no pavement either, just bricks.

Q. You say no pavement, do you mean no walk, or what?

A. No walk.

Q. No sidewalk?

A. No, sir.

Q. Where was this car, then, with reference to where the gutter would have been, if there had been a gutter there, on the right-hand side of the road?

A. About that far out past the gutter. (Indicating about one and a half feet.)

Q. Was that distance to the left of it, or to the right of it, or ahead of it, or where?

A. To the left of it.

Q. The left-hand side as you looked towards Alpha, or how?

A. Towards Alpha, yes, sir.

Q. Were there any other cars on the street at the time of this accident, when it happened, outside

of this car that was parked there, and the car that struck your sister?

A. You mean any others parked there?

Q. Were there any other cars around this point, parked there?

A. No, sir.

Q. What did your sister do then?

A. We were standing in back of that machine, and she looked up towards the left, and ——

Q. Towards the left would be towards Easton or Alpha?

A. Towards Easton. And the machine was coming down there past Purcell's Corner.

Q. What machine?

A. Duckworth's machine, the machine that hit her.

Q. Coming down past Purcell's Corner?

A. Yes. Then she looked towards the right, and when she looked towards the right the machine hit her.

Q. Where was she standing with reference to the parked car, back of it, in front of it, alongside of it, or where?

A. In back of it.

Q. On the left-hand side, or right-hand side, or where?

A. The left-hand side looking towards Alpha.

Q. When she looked to the right, how did she look to the right, look through the machine, or around it, or what?

A. She stuck her head out.

Q. When you first saw the machine that struck her, was it going fast or slow?

A. Fast.

Q. Up to the time that the machine struck your sister, did the machine blow any horn?

A. No, sir.

By the Court: I wish you would establish just where she was standing, Mr. Gebhardt, at the time of the impact, where she was standing, or how near to the side of it. Just where she stood.

By Mr. Gebhardt:

Q. You have told us that the car was parked on the right-hand side of South Main Street, looking towards Alpha, and that it was a little ways out from where the gutter would have been. We want you to tell us where your sister stood with reference to that car?

By Mr. Gildea: Was that car between Mill Street and Easton, or between Easton and Alpha? Was it on the Alpha side or the Easton side of Mill Street?

By Mr. Gebhardt:

Q. Was this machine that was parked there, was that standing right at the Mill Street intersection, or beyond it towards Alpha, or beyond it towards Easton?

A. Beyond it towards Alpha.

Q. Where was your sister with reference to that car? She was standing near what part of the car?

A. The back.

Q. And can you tell us whether it was the middle of the back, or near the left mudguard, or the right mudguard, or where?

A. Near the left mudguard.

Q. And the front mudguard or the rear mudguard?

A. The rear mudguard.

Q. How far, can you give us any idea of how

far your sister was from the edge of South Main Street, the right-hand side of South Main Street as you go towards Alpha?

A. Towards the curb do you mean?

Q. How far from where the curb would have been, if there had been one there. Can you show me in this room about how far?

A. About half a foot.

Q. Let's see. Suppose we get at that this way. Please tell me how close she stood to this left-hand rear mudguard of this car that was parked there?

A. She was standing close to it.

Q. When she looked down towards the right, did she look beyond this car, or was she still behind it?

A. She was behind the car, just her head.

Q. Her body was behind the automobile?

A. Yes, except her head.

By Mr. Gebhardt: Is that clear now? Was that what your Honor meant?

By the Court: I think so, yes.

By the Court:

Q. Did this automobile which struck your sister also strike the parked car?

A. No, sir.

Q. Didn't hit it at all?

A. No, sir.

Q. Do you know what part of the automobile struck her?

A. No, sir.

Q. Was she standing in the street, in South Main Street, at the time she was hit? Was she standing in the street herself?

A. No, sir.

Q. She must have been in line with the parked automobile, the rear of that parked machine, isn't that right?

A. She was in the rear, yes, and when she looked towards the right she stuck her head out.

Q. How soon after she stuck her head out was she struck?

A. As soon as she looked towards the right.

By Mr. Gebhardt:

Q. The machine struck her?

A. Yes.

Q. From what direction did the machine come as to the right or left as she stood there? From what side did it come as it struck her?

A. From the left-hand side.

Q. Her left-hand side?

A. From her left-hand side, yes, sir.

Q. And the car which struck her was going towards Alpha or Easton?

A. Alpha.

Q. Up to the time, then, that the car struck your sister, did it blow any horn, or not?

A. No, sir.

By the Court:

Q. Your sister was knocked down, was she?

A. Yes.

Q. Where did she fall?

A. She fell right alongside the mudguard.

Q. Of the parked car?

A. Of the parked car.

Q. The rear of that car?

A. No, sir, not quite to the rear.

By Mr. Gebhardt:

Q. Did this car that struck her stop when they hit her, or not?

A. There's a little store around the corner there, and he just slowed down a little bit. One man looked out of the side and one out of the back, and then they started out again.

By the Court:

Q. And went on?

A. Yes, sir.

By Mr. Gebhardt:

Q. They didn't stop at all?

A. No, sir.

Q. As they looked back towards your sister, was there anything to prevent their seeing your sister in the road, anything between them and your sister?

A. No, sir.

Q. Going back to just before the accident happened, as your sister stood there near the left-hand mudguard of this parked car, was there any car, or anything else, between her and this car that was coming down, and finally hit her?

A. No, sir.

Q. At the time that the accident happened, when she was struck, were there any other cars passing up and down South Main Street outside of this one car that struck her?

A. No, sir.

Q. Can you tell me whether or not when the car struck her, it was going fast or slow?

A. Fast.

Q. When, if at any time, after this accident, did you see this same car that hit her, again?

A. I saw it in front of Duckworth's.

Q. Were you asked by anybody, or did you at any time point out the car that struck your sister?

By Mr. Gildea: Objected to as irrelevant, incompetent and immaterial.

By the Court: She may say whether the car that she saw was the car that struck her sister.

By Mr. Gebhardt: She said that.

By the Court:

Q. How did you recognize the car afterwards?

A. Just before the car struck my sister I happened to notice it had something taped at the side of the window.

Q. Which window?

A. I don't know which window it was, because when it was near to me I could see right through the window, and I could see that tape on it.

By Mr. Gebhardt:

Q. What shape was it?

A. Shaped like a Christmas tree.

Q. Triangular shape?

A. Yes, sir.

Q. You say you saw through the car and saw that on the opposite window?

A. Yes, just as it was going to pass I could see.

Q. Did you see that car again after the accident?

A. Yes, sir.

Q. Where?
A. In front of Duckworth's store?
Q. Did it have tape on the window?
A. Yes, sir.
Q. The same appearance as the car you saw in the accident?
A. Yes, sir.
Q. How soon after the accident was it that you saw the car in front of Duckworth's?
A. I think it was the next day that Mr. Stalen, the cop, came down in his motorcycle, and took me to try and find it.
Q. Wilbur was with you at the time?
A. Yes. He took us up around the block and he said we were to pick out the machine.

By Mr. Gildea: I object to that.

By the Court:

Q. As a result of what was said, you looked for the car?
A. Yes.
Q. You saw this car in front of Duckworth's drug store?
A. Not in front of the drug store, across the street from the drug store.
Q. The car that had the same tape on it as you had seen the night before, put on in the same way as the one in the accident?
A. Yes.

By Mr. Gebhardt:

Q. Will you please tell me whether the car you then saw when you were with Mr. Stalen in front

of this drug store of Mr. Duckworth's, was or was not the same car that hit your sister?
A. It was the car.
Q. It was, you say?
A. Yes.
Q. Will you please tell me whether that was an open or closed car, the car that hit your sister?
A. A closed car.
Q. Can you tell me how many windows on each side it had?
A. Four windows, two on each side.
Q. Can you tell me what color it was?
A. Dark blue.
Q. Can you tell me what make of car it was, or don't you know?
A. I don't know.
Q Will you please state whether or not at any time after the accident you pointed out to your father the same car that hit your sister?
A. Yes, sir.
Q. You did?
A. Yes.
Q. At the time your sister was struck, will you please tell me whether or not she was standing still or moving?
A. Standing still.
Q. Will you please tell me about what time of day it was the accident happened?
A. Half-past five.
Q. Was it then dark or light?
A. Just about dusk.
Q. Did this car which hit your sister have any lights on or not?
A. No, sir.

Cross-examination.

By Mr. Gildea:

Q. Were the street lights lighted at the time?
A. I didn't take notice whether they were or not.
Q. Is there a light at the corner of Main Street and Mill Street?
A. No, sir.
Q. No light there?
A. No, sir.
Q. Was there a street light anywhere near there?
A. Yes, sir, one at Purcell Street and one at the corner below at Myers' garage.
Q. How far is that away from the Mill Street intersection with Main Street?
A. I don't know.

By the Court:

Q. You don't know?
A. No, sir.

By Mr. Gildea:

Q. Was it as far away as this court room is long, or further?
A. About as far away as this court room.
Q. What from, the street?
A. Purcell Street is a little further away, but the light down at Myers' garage is about that far away.
Q. You said this accident happened about half-past five?
A. Yes, sir.
Q. It was dark at half-past five on December 9, 1925?

A. It was about dusk.
Q. What do you mean by dusk?
A. Just getting dark.
Q. Stll daylight, or dark?
A. Just about getting dark, starting to get dark.
Q. Did any of the automobiles there have lights on them?
A. There were no automobiles around there.
Q. How about the automobile parked there. Did that have a light on?
A. No, sir.
Q. Didn't you see any other automobile about that time?
A. No, sir.
Q. Shortly before that?
A. No, sir. We were just in the house before that. We just came out of the house.
Q. You lived then at the corner of Mill Street and Main Street, is that right?
A. Yes, sir.
Q. The corner towards Alpha?
A. Yes, sir.
Q. This car was parked right in front of your house, wasn't it?
A. Yes.
Q. Whose car was it, do you know?
A. Mr. Wargo's.
Q. You say there was no light on that car at 5.30 P. M., on December 9, 1925?
A. No, sir.
Q. Are you sure it was as late as that?
A. Yes, sir.
Q. You are sure it was not earlier than 5.30?
A. No, sir, I don't think it was.
Q. What time did you leave your home, do you know?

A. I don't know.

Q. Your sister at that time was seven years old, wasn't she?

A. Yes, sir.

Q. Was she the first one that went out in the street?

A. We were all together.

Q. Where were you at the time she was struck?

A. Right with her there.

Q. You weren't struck then, were you?

A. No.

Q. Were you in back of her, or where?

A. In back of her.

Q. You were in back of the parked car?

A. Yes.

Q. Where was the boy who was with you?

A. He was right with us, too.

Q. Was he in back of you, or ahead of you or alongside of you?

A. Alongside of me.

Q. Was he between you and the parked automobile or were you between him and the parked automobile?

A. I was between him.

Q. You were between the boy and the parked automobile?

A. Yes, sir.

Q. He would be between you and the approaching car, on your left, would he not?

A. Yes, sir.

Q. How far away was this automobile that struck your sister when you first saw it?

A. It was at Purcell's Corner when I saw it first.

Q. How far do you say that was from Mill Street?

A. I said it was further away than the length of this court room.

Q. Was it twice as far as the length of this court room, if you can tell that. If you can't, just say so.

A. I can't tell.

Q. After you saw this automobile, where were you when you first saw it?

A. We were in back of this machine that was parked there.

Q. You were standing there?

A. Yes.

Q. You were standing there when you saw it, and you had not moved until the time your sister was struck?

A. No, sir.

Q. You saw it approaching all the time?

A. Yes, sir.

Q. Didn't you know your sister was in front of it?

A. She was not out far enough and I didn't think he would hit her.

Q. She was hit?

A. Yes.

Q. You stood there and let the automobile hit your sister?

A. I didn't think she was out far enough to be hit.

Q. She was hit, wasn't she?

A. Yes.

Q. You stood there and saw this automobile come all the way up the street from Purcell's Corner. Were you looking at it all the time?

A. No, sir. I saw it at Purcell's Corner, and then I looked across the street again, and I saw it was pretty near up to us.

Q. How close was it the second time?

A. About half as far away as the length of this court room.

Q. Where was your sister then?

A. She was standing right in front of me, and then she looked up the street and then she looked down again.

Q. Did she look in the direction in which this car was coming?

A. Yes, sir.

Q. She looked at the automobile before she was struck?

A. Yes, sir.

Q. Are you sure she was not walking at the time she was struck?

A. No, sir, standing still.

Q. How far from the automobile was she, the parked automobile?

A. She was standing right in back of it. She just stuck her head out to look towards the right.

By the Court:

Q. How near to the parked automobile was she standing?

A. She was right close to the back.

Q. Can you tell us about how close in feet for example? Have you any idea of feet?

A. Yes.

Q. How long is a foot?

A. (No response.)

Q. Having that in mind as a measurement, how near to the automobile was she standing? How near to the rear of the parked car?

A. She was right against it.

By Mr. Gildea:

Q. Can you tell us how far she was from the center of South Main Street?

A. I could not say.

Q. You haven't that in mind, have you?

A. No, sir.

Q. I think you said that you saw some tape or some paper or something on the window of this automobile. Which window was it?

A. I don't know which window it was.

Q. You don't know whether it was the right or left or front or back?

A. I don't know.

Q. You don't know which window it was on?

A. No, sir.

By the Court:

Q. The next day you saw a car with tape on the window?

A. Yes.

By Mr. Gildea: That's objected to, as leading, your Honor.

By the Court: Objection overruled. She has already testified. You may have an exception.

By the Court:

Q. Which window was it on?

A. It was on the left window when we saw it.

Q. When you saw it the next day?

A. Yes.

Q. That was the car you were speaking about a moment ago here, when you testified that the next day you saw the car?

A. Yes.

Q. With tape on the window?

A. Yes.
Q. The tape on that car was on the left window?
A. Yes, sir.

By Mr. Gildea:

Q. You don't know which window of the car which struck your sister had tape on, do you?
A. No.
Q. You don't know whether it was the right or left or front or back?
A. I don't know.
Q. You don't know?
A. No, sir.
Q. As a matter of fact you only saw the automobile at the glance, didn't you? You didn't stand there looking at the automobile? There was nothing about it to attract your attention?
A. Only the tape on the window.
Q. Did you stand and look at the tape?
A. No, sir.
Q. How many times did you look at the automobile before it struck your sister?
A. Twice.
Q. Once when it was down at Purcell's Corner, and another time when it was half the length of this court room from your sister?
A. Yes, sir.

By the Court:

Q. How old was your sister at the time of the accident, do you know?
A. 7.

By Mr. Gildea:

Q. Did you notice anything else unusual about the automobile that struck your sister? Anything else that would enable you to identify it?
A. It was a coupe, and it was dark blue, and had that tape on the window, that's all.
Q. Did you notice anything else on any of the windows?
A. No, sir.
Q. You say there were four windows in the car, two on each side. These windows on each side, two on each side, one was in the door. Did you notice anything on the back windows, I mean the rear side windows?
A. The back window?
Q. On the two side windows, which are near to the back, not the windows in the doors, the windows in the body of the car, did you notice anything about those windows?
A. No.
Q. Did you see those windows at the time?
A. Yes, sir.
Q. You saw them as the car passed?
A. Yes.
Q. Wasn't there anything on those windows?
A. No, sir.
Q. You didn't see anything on there at all?
A. No.
Q. Did you say that the car had lights on which struck your sister?
A. No, sir.
Q. You were looking at it?
A. I was looking up the street.
Q. In which direction?
A. Towards Easton.

By the Court:

Q. That was the direction from which this car was coming?
A. Yes, sir.

By Mr. Gildea:

Q. You didn't see the car strike your sister, did you?
A. No, sir.
Q. When was it you saw the tape or paper on the window? Was it the first time you looked at the car, or the second?
A. Second time.
Q. You didn't see anything there the first time?
A. It was too far away to see then.

By Mr. Gildea: That's all.

By Mr. Gebhardt:

Q. The car that was parked there, was that looking towards Alpha or towards Easton?
A. Alpha.
Q. Headed towards Alpha?
A. Yes.
Q. Why were you waiting there?
A. We were waiting for the machine to go by and then go across.

By the Court:

Q. Which machine?
A. The machine that was coming down.
Q. The one that struck your sister?

A. Yes.
Q. You were waiting for the machine to go by?
A. Yes, sir.

By Mr. Gebhardt:

Q. That was the only machine on the street at the time?
A. Yes.
Q. Other than the one that was parked?
A. Yes.
Q. The car that was parked, was it wholly on South Main Street or partly on Mill Street?
A. There was a pole right there, and the pole was in pretty far, and the machine was a little ways back over the gutter.
Q. On South Main Street?
A. Yes, sir.
Q. Facing towards Alpha?
A. Yes.
Q. As you sit there, which side of that parked car were you and your sister and the boy standing?
A. We were standing in the back.
Q. In back of the parked car?
A. Yes, sir.
Q. Sure of that, are you?
A. Yes, sir.

By Mr. Gildea:

Q. Was your sister waiting for the car to pass, too?
A. Yes, sir.
Q. How do you know that?
A. Because she must have saw the machine coming. She would not go across when she saw the

machine coming towards us. She was waiting for the machine to pass.

Q. Do you know that she saw the machine coming?

A. I don't know, but I am pretty sure she saw it.

Q. Did she look in the direction of the machine so that she could have seen it?

A. Yes.

Q. How far away was the machine that struck her when she looked in the direction in which the machine was then?

A. The machine was just by Purcell's Corner when she looked at it.

Q. When the machine was at Purcell's Corner you saw your sister looking at it?

A. Yes, sir.

WILBUR YERANE, sworn for the plaintiff.

Direct examination.

By Mr. Gebhardt:

By the Court:

Q. How old are you?
A. I will be 14.

By Mr. Gebhardt:

Q. Where do you live?
A. 803 South Main.
Q. In Phillipsburg?
A. Yes, sir.

Q. Is that anywhere near where this accident happened?

A. Yes.

Q. How near?

A. Around five houses down the left-hand side.

Q. Towards Easton or Alpha?

A. Alpha.

Q. Were you the Yerane boy who was with the little girls at the time this accident happened?

A. Yes.

Q. About what time of day was it the accident happened?

A. Around half-past five.

Q. How did you happen to be with them? Where were you going?

A. I was going over to get the paper.

Q. Going over to do what?

A. Get the paper.

Q. Where did you come from and where were you going, what street?

A. I came from the right-hand side of the street and was going over to ——

By the Court:

Q. Where did you come from and where did you go?

A. I came from the Lilly's house, and was going to cross the street.

By Mr. Gebhardt:

Q. As you look towards Alpha, were you going from the right to the left or the left to the right side of the street?

A. From right to left.

Q. Did the accident happen anywhere near the intersection of Mill Street and South Main Street?
A. Yes.
Q. Where did it happen with reference to that intersection?
A. It happened where Mill Street comes out on Main Street, right at the intersection.

By the Court:

Q. What grade are you in at school?
A. Seventh grade.

By Mr. Gebhardt:

Q. Mill Street comes out like this into Main Street. Right here at the corner of Mill Street is where the machine stood?
A. The parked car.
Q. How near to the parked car were you when the accident happened?
A. I was by the spare tire.
Q. Where was the little girl, Irene?
A. She was by the mudguard.
Q. Where was her sister?
A. Her sister was alongside of me.
Q. The girl who you say was by the mudguard, was that the left or the right mudguard as you looked towards Alpha?
A. Left mudguard, rear end.
Q. Left mudguard, rear end?
A. Yes, sir.
Q. Did you see the car coming that afterwards hit her?
A. Yes.
Q. Where did you see that?

A. I saw that by Purcell's store.
Q. Up at Purcell's store?
A. Yes.
Q. At the time you saw it, was it going fast or slow?
A. It was going pretty fast.
Q. Then what happened? What did the Lilly girl say, or do?
A. She looked up and then she looked down, and when she was looking down the machine hit her.
Q. When you say looking up would that be to the left or to the right?
A. Left.
Q. Would that be towards Easton or Alpha?
A. Towards Easton.
Q. At the time she was hit by the machine was she walking or standing still?
A. Standing still.
Q. Which direction was she looking when she was hit?
A. Looking towards Alpha.
Q. Was she standing straight up or leaning over, or what?
A. Her head was low, looking down.
Q. Leaning over do you mean?
A. Yes.

By the Court: Was that the side of the head that was punctured, Mr. Gebhardt?

By Mr. Gebhardt: No, I think not.

By the Court: I was wondering which side of the head was punctured?

By Mr. Gebhardt: The right side.

By the Court: She was hit on the left side of the head. Was that where the puncture was?

By Mr. Gebhardt: On the left side of the head.

By Mr. Gebhardt:

Q. Up to the time that the girl was hit, please tell me whether the automobile blew any horn?
A. No, sir.
Q. The automobile that struck the girl was what kind of a car, open or closed?
A. A closed car.
Q. How many windows did it have on each side?
A. Two on each side.
Q. What color was it?
A. Darkish blue.
Q. What make was it, do you know?
A. I could not tell.
Q. Was there anything unusual you noticed about the car?
A. The front window on the left was taped. It was taped like a Christmas tree.

By the Court:

Q. Which window?
A. The left window of the left door.

By Mr. Gebhardt:

Q. It looked like a Christmas tree did you say?
A. Yes.
Q. After the automobile hit the girl did it stop or go right on?
A. No, sir, kept going.

Q. Kept going?
A. Yes.
Q. Did you see the people in the car do anything after it hit?
A. Somebody looked out of the back window.
Q. Somebody looked out of the back window?
A. Yes.
Q. Where was the girl lying?
A. Part way under the running board of the machine that was parked there.
Q. Part way under that. Where was the rest of her body?
A. The rest of the body was out on the street.
Q. Out on the street. At the time the girl was hit, were there any other cars parked around this intersection?
A. No, sir.
Q. At the time she was hit were there any other cars going up or down South Main Street or Mill Street except the car that hit her?
A. No.
Q. Did you at any time after the accident see this same car?
A. Yes.
Q. Where did you see it?
A. Up in front of Duckworth's drug store.
Q. How long after the accident was that?
A. Next day.
Q. Who were you with at the time?
A. Mr. Stalen.
Q. The cop?
A. Yes, sir.
Q. Who else was along?
A. Helen Lilly.
Q. What did you do on that occasion, that day?

By Mr. Gildea: Objected to as irrelevant and immaterial.

By the Court: He may answer.

By Mr. Gildea: I ask for an exception.

A. He asked us to point out the machine and we did it.

By Mr. Gildea: I move that be stricken out as not responsive.

By the Court: Strike it out.

By the Court:

Q. You saw a car there?
A. Yes.
Q. Where was it standing?
A. In front of Duckworth's drug store.
Q. Which side of the street?
A. Right hand, towards Alpha.
Q. Same side as the drug store?
A. Yes.
Q. What kind of a car did you see there?
A. A closed car, and the window was taped.
Q. Which window was taped?
A. Left door, the window in the door.
Q. What kind of tape was it?
A. I could not tell you what kind of tape.
Q. How was it taped?
A. Taped up like a Christmas tree.
Q. Did it resemble the same tape that you had seen on the car that struck the girl?
A. Yes, sir.

Q. The same window, the same side?
A. Yes, sir.
Q. The same form of tape?
A. Yes, sir.

By Mr. Gebhardt:

Q. What color was the car you saw standing there?
A. Dark blue.

Cross-examination.

By Mr. Gildea:

Q. What kind of a licence did the car that you saw standing on Main Street near Mr. Duckworth's drug store the day after the accident have, New Jersey or Pennsylvania license?
A. New Jersey.
Q. What kind of license did the car that struck the girl have, do you know?
A. I could not tell.
Q. You don't know whether it was a Pennsylvania or New Jersey license, do you?
A. No, sir.
Q. How many times did you see this automobile before the accident?
A. I saw it twice after the accident.
Q. Before the accident. Right just before the accident, immediately before the accident, how many times did you look at the automobile that struck the girl?
A. I only saw it once.
Q. When was it you saw it?
A. In front of the drug store.

By the Court:

Q. At the time of the accident, when did you see the car first that struck the little girl?
A. Purcell's store.
Q. That was the first time?
A. Yes.
Q. Did you see it after that?
A. Not that same day.

By Mr. Gildea:

Q. Did you see it between the time you saw it at Purcell's store and the time that it struck the little girl?
A. No, sir.
Q. Are you sure about that? You saw it down by Purcell's store and then you looked away, didn't you?
A. Yes.
Q. You didn't see it again until it struck the little girl?
A. That's the last I saw of it until it slowed down by the store.
Q. What was the last you saw of it, at Purcell's store or when it struck the little girl?
A. When it struck the little girl.
Q. You saw it first at Purcell's store, then you saw it again when it struck the little girl?
A. Yes. I didn't see when it struck the little girl.
Q. Did you see it strike the little girl?
A. No, sir.
Q. You didn't see the accident, did you?
A. No, sir.
Q. You didn't see the impact and you didn't see the car after it was at Purcell's store?
A. I saw it after it struck the girl.

Q. When did you notice this tape?
A. When it slowed down.
Q. After it struck the girl?
A. Yes.
Q. You didn't see it before then?
A. No, sir.
Q. You didn't notice the tape until after the automobile slowed down after it struck the little girl. Where were you then?
A. I was out by the running board then.
Q. By which running board?
A. The running board of the machine that stood there.
Q. The running board near the center of the road or the other side?
A. Near the center of the road.
Q. Near where the little girl was?
A. Yes.
Q. And the automobile that struck the little girl was then ahead of you?
A. Yes.
Q. You could only see the back of the automobile, couldn't you?
A. No, I could see the other side.
Q. How could you see the other side?
A. Right through the back window.
Q. Through the back window?
A. Yes, sir.
Q. Weren't there people in the automobile?
A. Yes.
Q. Could you see through the people?
A. Yes, sir.
Q. How many people were in there?
A. I could not tell you how many there were sitting in there.
Q. Have you talked to anybody about this accident before you came to court to testify?

A. Yes, sir.
Q. To whom did you talk?
A. To my mother.
Q. Anybody else?
A. My uncle.
Q. Who's your uncle?
A. Mr. Duckworth.
Q. Which Mr. Duckworth?
A. Cleveland Duckworth.
Q. Is he a relation of the defendant?
A. No, sir.
Q. No relation to Mr. Duckworth who is the defendant here?
A. No.
Q. Did you talk to anybody else?
A. Mr. Lilly.
Q. Anybody else?
A. No, sir.
Q. That's all. How many times did you talk to Mr. Lilly?
A. About twice.
Q. Only twice. Did you ever talk to the little girl about it?
A. I talked to Helen.
Q. You talked to Helen about it?
A. Yes.
Q. Whom did you tell before you came today what you were going to say when you got here?
A. I didn't tell anybody.
Q. Never told anybody. Who asked you to come here today?
A. Mr. Lilly.

By Mr. Gildea: That is all.

By Mr. Gebhardt:

Q. As you go down South Main Street, at Mill Street, towards Alpha, does the road go straight, or curve to the right or to the left?
A. It curves round to the right.

By Mr. Gebhardt: That's all.

By Mr. Gildea:

Q. How far from Mill Street does it start to curve?
A. I could not say how far. A good distance, anyway.
Q. How far away was this automobile when it slowed down? How far away from Mill Street?
A. Pretty near a block when it started to slow down.
Q. Mill Street and then there's an alley down further. It was up by that alley?
A. Yes.
Q. How far away was that?
A. I could not tell.

By the Court:

Q. The length of this court room?
A. Something like the length of this court room.

By Mr. Gildea:

Q. That's where you saw the automobile when it slowed down?
A. Yes, sir.

WILLIAM F. LILLY, sworn for the plaintiff.

Direct examination.

By Mr. Gebhardt:

Q. Are you the brother of Phillip Lilly, the plaintiff in this case?
A. Yes, sir.
Q. Did you see this accident happen?
A. No, sir.
Q. Where were you at the time?
A. I was on Main Street, I believe.
Q. South Main Street, Phillipsburg?
A. Yes, sir.
Q. What part of Main Street with regard to where this accident happened? On which side of the intersection of Mill Street and South Main Street, Alpha or Easton side?
A. On the Easton side.
Q. On the Easton side?
A. Yes.
Q. Where were you around about 5.30 that evening?
A. I was at Jefferson and Main Streets. Across from Jefferson and Main.
Q. How far is that from Mill and South Main Streets?
A. That's about five blocks. Maybe a little more.

By the Court:

Q. Five blocks towards Easton?
A. No, towards Alpha.

By Mr. Gebhardt:

Q. Prior to the time of this accident happening, were you familiar with Mr. Duckworth's car
A. Yes, sir.
Q. How were you familiar with it?
A. I have seen Mr. Duckworth driving it.
Q. How many times have you seen him driving it before the accident?
A. Some days three or four times, most every day, some days I would not see him.
Q. Do you recall having seen him driving it a short time before the accident?
A. Yes.
Q. Will you describe to me the nature of this car he drove, make, and color and so forth?
A. Buick coupe, blue body, dark trim around the windows.
Q. How many windows in it on each side?
A. Two windows on each side.
Q. Please tell me whether or not you saw this car the day this accident happened?
A. Yes.
Q. And when did you see it?
A. I seen it around a few minutes of 5.30 when I crossed the street in front of it at Main and Jefferson Street.
Q. Was that beyond the intersection of Mill Street and South Main Street towards Easton, or where?
A. Towards Easton.
Q. Did you notice anything unusual about the car at that time?
A. No, only that it was his car. I knew the car by the window. He had tape on it.
Q. Tape on one of the windows?
A. Yes, on the left side, when I crossed over to the left side of the street towards Alpha.

A. I could not say.

Q. You could not say that the lights were not lit?

A. No.

Q. You don't know whether they were or not?

A. Yes.

Q. You testified remembering having passed two sedans, and another car, on December 9, 1925, as you were crossing the street, and you can't tell whether the lights were lighted or not. Is that right?

A. Yes, sir.

Q. You don't mean to tell us you can tell one Buick coupe from another if they are both of the same model?

A. I know his car by the tape on it.

Q. Aside from the tape you could not tell whose car it was?

A. From the side I was on it was on the left.

Q. Except for the fact that this car had tape on the window you would not have known whose car it was?

A. Yes.

Q. You would have known without it?

A. I would not have known it without it, but I know the markings of his car, the windows, and such as that.

Q. What about the windows?

A. The windows, the type of them.

Q. What do you mean?

A. The back ones are oval, and the ones in the doors are square.

Q. The windows in the back were oval, alongside the seat?

A. Yes.

Q. It's very likely the Buick people may have made some other automobiles like that?

A. Yes.

Q. You could not have told Mr. Duckworth's automobile from any other automobile of the same model except for the tape?

A. I remember seeing the tape there. That's how I knew it was his automobile.

Q. Did you pass from the south side of Main Street to the north side of Main Street?

A. Main Street runs east and west, and I passed over to the east side, and he was——

Q. Main Street runs east and west and you passed from north to south?

A. Yes.

Q. He was going from west to east?

A. He was going towards Alpha, and I was going towards Alpha.

Q. You were crossing the street?

A. I crossed the street from right to left.

Q. You were crossing Main Street?

A. Yes.

Q. Did you pass ahead of this automobile, or did the automobile pass ahead of you?

A. I passed ahead of the automobile. I was going up the street when it passed.

Q. How far away was it when you passed?

A. I judge it was maybe a hundred feet up the street from the corner.

Q. When you walked across?

A. Yes.

Q. Where were these two sedan automobiles you talked about?

A. They passed before I went across.

Q. You don't know whether the lights were lighted on any of these cars?

A. No.

Q. Were you standing still when the two sedans passed?

A. On the corner.
Q. You didn't notice the lights?
A. No, sir.
Q. After you passed in front of this automobile which you say had tape on the window you got to the opposite side of the street, didn't you?
A. Yes.
Q. Then in which direction did you walk?
A. Towards Alpha, the same as the machine was going.
Q. Did you look at the machine again as it passed you?
A. Yes, sir, when I crossed over, then's when I looked out at the machine.
Q. How far away from you was the machine?
A. The machine was directly out in the street from me when I looked.
Q. How many feet, roughly?
A. About, I judge about 25 feet or 20 feet something like that, over on the other side of the street.
Q. You had seen Mr. Duckworth many times before this accident happened?
A. Yes.
Q. Knew him very well at sight, didn't you?
A. Yes.
Q. You say it was not dark at the time, just dusk?
A. Yes.
Q. You didn't see Mr. Duckworth driving the automobile, did you?
A. I didn't take notice who was driving, but I seen there was a man in it. I could see it when the machine got down the street. You could see two men sitting in there through the back glass.
Q. Isn't it true that the only thing you know about this situation is that at this time you mention, about 5.30, you saw an automobile going in an

easterly direction, with some tape on the window. That's all you know about it?
A. I seen a machine with tape on.

By Mr. Gildea: That's all.

By Mr. Gebhardt:

Q. How soon after the accident happened did you hear about it?
A. 7 o'clock.
Q. Can you give me any particular reason why on this particular occasion seeing Mr. Duckworth's car, this particular day, impressed itself upon your memory?
A. I was going to Hogan's barber shop. I used to be a barber and was going down to help that young fellow out. I worked for Mr. Schmitt, the undertaker, and 7 o'clock Mr. Schmitt called me out to go to Allentown Hospital to get a young lady who was dead up there in the hospital.
Q. Have you seen this car since the accident?
A. After the accident?
Q. Yes?
A. Yes.
Q. Please tell me whether the same tape was on it then, or not?
A. Yes, sir, the same tape was on it.

PHILLIP LILLY, recalled.

By Mr. Gebhardt:

Q. After this accident happened, did you go at any time with your daughter to look over any automobiles connected with this accident?

A. Yes, sir.

Q. What did your daughter do on that occasion?

A. She took me along the third day after it happened and up in front of Doc Spillane's office she said "there's the car."

By Mr. Gildea: I move that answer be stricken out.

By the Court: That is not admissible, what she said.

By Mr. Gebhardt: Did she point out a car to you?

By Mr. Gildea: That's objected to on the same grounds.

By the Court: Yes, the best evidence is by the girl herself. You can support, or corroborate, or add ——

By Mr. Gebhardt:

Q. Your daughter testified that on the third day after the accident she pointed out the car to you that struck your other daughter. Will you please tell me whether or not you saw that car?

A. Yes, I did.

Q. Will you please tell me what license plates that car bore, New Jersey or Pennsylvania?

A. New Jersey.

Q. What was the number?

A. 223037.

Q. Was that a 1925 license or not?

A. 1925.

Q. Where was this automobile standing at this time?

A. In front of Doc Spillane's. Doc Drake used to be there, Doc Spillane then.

Q. Where was that in regard to Mr. Duckworth's drug store?

A. About half a block away, almost.

Q. Did you have a conversation with Mr. Duckworth any time after this accident with reference to the accident?

A. Yes, sir.

Q. When did that conversation take place?

A. At his home on December 28th, the Monday following we buried her on Tuesday, the following Monday night, December 28th, I went up to Mr. Duckworth's house.

Q. How did you come to go up there?

A. Through my daughter talking about the machine. I went up to talk to him about it to find out, satisfy myself whether it was his machine or not that hit her.

Q. Did anybody go with you on that occasion?

A. Yes, I had a young fellow by the name of Mr. Sandt along.

Q. Where did you see Mr. Duckworth?

A. At his home on Washington Street.

Q. Just tell us what took place?

A. I went up to Mr. Duckworth's home and knocked at the door and a girl came to the door.

Q. What do you mean, a girl?

A. I don't know. I think it was his daughter, I won't say for sure, a girl I judge about 14 years old. I asked her if her father was in.

By Mr. Gildea: I object to what was said.

By the Court:

Q. Not the conversation with the daughter. Did you see the father?
A. Yes.
Q. You had a talk with him?

By Mr. Gebhardt:

Q. Did he come to the door?
A. Yes.
Q. What was said?
A. I asked him if he knew who I was, and he said no, and I said I am the father of the little girl that was killed over on Main Street by your machine, and right away I seen he got all worked up.

By Mr. Gildea: I move that be stricken out as a conclusion.

By the Court: That would be an observation, not a conclusion.

By Mr. Gebhardt:

Q. What did he do?
A. He turned round and said go out and sit in my machine, and I will be out, and we will talk matters over in my machine, and he shut the door and went back in.
Q. You started to say he got all worked up, but counsel objected to that. Will you please tell us what his appearance was, what his characteristics were when you made that statement to him that you were the father of this child?
A. Just looked as though he was dumbstruck. He

didn't know what to say. Stood there like he didn't know what to say, and he was shaking.

By the Court:

Q. You say he was shaking?
A. Yes, he was shaking there. He had his hand on the door knob there, and he said to me you go out.

By Mr. Gebhardt:

Q. What motion did he make?
A. Here's the way he stood.
Q. Trembling?
A. Yes.
Q. Shaking?
A. Yes.
Q. What expression, if any, was on his face?
A. He just looked like a man not worth ten cents. He didn't know what to say.

By the Court: That would not describe it.

By Mr. Gebhardt:

Q. What was the appearance of his face, red or white?
A. Red.
Q. What else have you to say about him, was he cool and collected, or what?

By Mr. Gildea: That calls for a conclusion.

By the Court: I think it does.

Witness: He said go out in my machine, I will be right out in a few minutes.

Q. You didn't go in the house?

A. He said he would not let us in because his wife was awful nervous and awful broken up, and he would not let us in.

Q. What did you then do when he told you to go out in the car?

A. We turned round and went out and stood on the corner. When he came out of the house he went right across the street and said to get in his machine. We walked round the other side of the car and got in the back seat.

Q. All of you got in the car?

A. The three of us got in the machine. He sat there running his hand around the steering wheel. He said he didn't know how they could get his machine mixed up with it. Then he asked how they identified the machine. I told him my daughter for one seen the adhesive tape on the left side window. Then he dropped his head.

By the Court:

Q. Was the adhesive on the car you were then sitting in?

A. I could not say. The window was down.

Q. What kind of car?

A. Buick coupe.

By Mr. Gebhardt:

Q. After he dropped his head, what happened?

A. For a few minutes he didn't say much. Then he put his head up again, and he said I am going

to tell you my machine was not away from the front of my drug store from 11.30 in the morning until 11.30 at night. He said there was not a clerk on the job, not even Mrs. Lott. There was not one working that day but myself, and then he said there's only one key to the machine. That was right here in my pocket, and I know nobody else could move the machine. I didn't say anything. I stayed there and left him go a little. "My daughter might have had the machine done that way. "He said that, then he stopped a few minutes, and he said, no, she was not home from college. Then he said, "Well, I don't care, my car is insured big," he said, "I don't care."

By Mr. Gildea: I object to that, that's been——

By the Court: The jury will pay no attention whatever to the last answer of the witness. It appears to have been brought out merely incidentally, involving a conversation. It is, therefore, regarded by the Court as not within the ruling which counsel has in mind, and in the exercise of sound discretion the Court will content itself by saying that the jury will pay no attention whatever to the question of insurance. Ignore it entirely.

By Mr. Gildea: Did counsel tell you to say that?

By Mr. Gebhardt:

Q. Go on, what else, if anything, did he say?

A. He sat there, and he didn't say anything for a while. He kept looking at me.

Q. What else happened?

A. Then he turned round the machine and went on out Washington Street.

A. Hitting around 35, if not more.
Q. Had you ever seen that car before?
A. I could not swear I seen that car before, no.
Q. Had you seen a car that looked like it?
A. I seen one with some stuff in the window.
Q. Where had you seen that car before?
A. In front of Mr. Duckworth's drug store.
Q. Marion Duckworth's drug store?
A. Yes.
Q. What kind of car was it, open or closed?
A. A closed car I seen. I could not tell you what kind of car it was.
Q. What color was it?
A. A dark color car.
Q. After you saw this car, where did you go next?
A. I was on my way home. I went home from work, got my supper and got cleaned up.
Q. When you arrived at the scene of the accident was the little girl there yet?
A. No. They took her up to the hospital by that time.

Cross-examination.

By Mr. Gildea:

Q. How do you know you got there five minutes after the accident if you don't know?
A. I said about five minutes.
Q. Well, how do you know you got there about five minutes after the accident?
A. I could walk to work in ten minutes from where I live.
Q. When you got there the little girl had been taken to the hospital?

A. Yes.
Q. You didn't see the accident?
A. I didn't see the accident.
Q. Did you get there before the accident?
A. No, after.
Q. How did you know you got there five minutes after the accident?
A. I don't know it was exactly five minutes
Q. You don't know how long it was?
A. I know it was not over ten minutes before because I can walk from the shop to my home in ten minutes.
Q. How do you know the accident didn't happen before you left the shop?
A. I didn't know there was an accident at that time.

By Mr. Gildea: Alright, that's all.

By Mr. Gebhardt: I desire to offer interrogatories relevant to this suit:
1. Please state whether or not defendant was the owner of a Buick coupe automobile bearing New Jersey 1925 automobile license number 223037 during the entire month of December, 1925, and if not, who was the owner of the said automobile.
A. The defendant was the owner of a Buick coupe automobile bearing New Jersey 1925 automobile license No. 223037 during the entire month of December, 1925.
Sworn to in the usual way by F. Marion Duckworth.

WILLIAM H. STEHLIN, sworn for plaintiff.

Direct examination.

By Mr. Gebhardt:

Q. In the month of December, 1925, what was your employment?
A. Policeman.
Q. Policeman employed by what municipality?
A. Phillipsburg.
Q. Are you still in the employ of the Phillipsburg Police Department?
A. No, sir.
Q. You were at that time?
A. Yes.
Q. Did you make any investigation of this accident to the little girl?
A. None.
Q. What did you do with reference to it? Did you make any effort to locate the car in question?
A. No. That was up to the chief to send me after these youngsters. That was all I could do.
Q. You had orders from the chief to do what?
A. Go down after these children and bring them up.
Q. Bring them up where?
A. South Main.
Q. For what purpose?
A. Locating the car.
Q. Did you do that?
A. Yes, sir.
Q. How soon was that after the accident?
A. I could not tell whether it was the next day after or the second day.

By Mr. Gildea:

Q. Told you to do what, go get the children or locate the car? What do you mean? Did you do that, or what do you mean?
A. To get these children there.

By the Court: To locate the car that killed this child.

By the Court:

Q. First you went and got the children. Where did you go with the children?
A. Up South Main Street towards Easton.
Q. From South Main Street where did you go?
A. Back down.
Q. All the time you were talking or listening to the children. You are not permitted to say what was said by you to them, or what they said to you. Where did you go from South Main Street?
A. I was only on South Main Street. I went up South Main Street and then I went back down again.

By Mr. Gebhardt:

Q. Where did you start out with these children?
A. At Purcell's.
Q. That's the first street near Mill Street where this accident happened?
A. Yes.
Q. You took them up South Main Street how far?
A. To River Street.
Q. About what distance would you assume that to be? How many blocks?

A. 8 or 9.
Q. What did the children do on that journey?
A. Pointed out this car with the tape on.

By Mr. Gildea: I move that be stricken out.

By the Court: I will allow him to say that they indicated a car. He may describe the car, the car they pointed out.

By Mr. Gildea: May I have an exception?

By the Court: You may have it.

By the Court: No conversation will be permitted as to what he said or they said.

By the Court:

Q. What was it?
A. A Buick coupe with a New Jersey license.
Q. Did you get the number?
A. No, sir, not then.
Q. Did you get it later?
A. The same coupe?
Q. Yes?
A. Yes.
Q. What was the number?
A. I don't know.
Q. You haven't it with you. You turned it in for the blotter?
A. They took it down there, yes.
Q. Describe the car?
A. Buick coupe, I could not just tell the color, dark colored car, broken window fixed up with adhesive tape or paper.

Q. Which window was it?
A. On the left window.
Q. In what shape was the tape, what form?
A. Strips about 12 or 15 inches at the bottom running into nothing at the top.
Q. Triangular shape?
A. Yes.
Q. What else?
A. That's about all I took notice of the car.

By Mr. Gebhardt:

Q. Have you made an effort at my request to locate your police docket, in which you made a report of this affair?
A. No, sir.
Q. You have not done that?
A. I didn't get no record of it.
Q. Did you try to locate it in the records?
A. In City Hall in Phillipsburg?
Q. Yes?
A. No, sir.
Q. Do you know whether or not an effort was made to locate that docket?
A. Not that I know of.
Q. In driving these children up and down South Main Street did you drive by any other cars?
A. Yes, lots of them.
Q. Was there any other car they pointed out except this one?
A. No, sir.

Cross-examination.

By Mr. Gildea:

Q. Did you see any other car with broken window fixed up either by tape or paper?
A. I didn't see any.
Q. That's the only one you saw?
A. Yes.

By Mr. Gildea: That's all.

By Mr. Gebhardt:

Q. Can you tell me, Mr. Stehlen, whether it was 1925 license 223037?
A. I would not swear to that, because I didn't keep any record of that much. It's up to anybody to find it on the docket at Phillipsburg.

By Mr. Gildea:

Q. On what day did you go with these children to look at this car?
A. What day?
Q. Yes?
A. I could not tell you the day. It was a day or two after the accident.
Q. What did you do, go up and look at all of the cars?
A. The chief sent me out on Main Street to locate a car that had a broken window and they picked it out of all of them.
Q. You knew the kind of car to look for?
A. With broken glass.
Q. To look for a car with a broken window?

A. Yes, that's the orders I got from City Hall.
Q. You went along Main Street looking for that car?
A. Yes.
Q. You looked only for that car with the window broken?
A. The kids were supposed to point the car out to me. I was not supposed to tell the kids anything, and I didn't. They picked the car out.
Q. Why did you start at that street way back there at the place of the accident? Why did you start there to look?
A. The youngsters lived there. I went there to get them.
Q. You were not making an inspection of all cars there to see which one had broken windows?
A. No, I didn't. The chief sent down after these youngsters and I went and got them.
Q. They told you where to go?
A. The chief told me to go.
Q. Directed you where to find the car?
A. Yes.

By Mr. Gildea: That's all.

Owen George Sandt, Junior, sworn for plaintiff.

Direct examination.

By Mr. Gebhardt:

Q. Are you the Mr. Sandt who went along with Mr. Lilly, at his request, when this interview took place with Mr. Duckworth, the defendant?

A. Yes, sir.

Q. How did you come to go along with him on that occasion?

A. I got home from work about 7 o'clock. He come to the house and asked me to go along with him and I said I would. We went up there.

Q. Did you go to Mr. Duckworth's house?

A. Yes.

Q. What happened when you got there?

A. Mr. Lilly rapped on the door, and Mr. Duckworth's daughter, or who she was, a little girl came, and we asked her if Mr. Duckworth was in, and she said yes. She called him, and he came out and stood there. Mr. Lilly asked, "Do you know who I am?" He said, no. He said, "I am the father of the little girl your machine hit up in South Main Street," and when Mr. Lilly told him that he got red in the face, and kind of nervous. He said, "Go outside and I will come out. I don't want you to come in the house. My wife's nervous and all upset." We walked out to the curb and stood out there, and he come out and called us over to the machine. We went over and sat in the machine. He asked why we picked out his car. Mr. Lilly said, "Your car was identified by the tape on the window" He said, "My car's not the only car taped up." Mr. Lilly said, "That's the only car I even seen taped up like that, shaped like a Christmas tree." We sat in there and he was running his hands round the shifting lever and the steering wheel, all nervous, all worked up like, looked to me like ——

By Mr. Gildea: That's objected to, as a conclusion.

By the Court: Strike out the conclusion, that latter part.

By Mr. Gebhardt:

Q. Tell what he did.

A. I was sitting in front, with Mr. Lilly alongside of me. We could not see the tape on the window. He must have had the window down.

By the Court:

Q. Was the window open? Was it down?

A. It was down.

Witness: We sat in the car and he told us, "My car was not away from the drug sore," he said, "from 11:30 A. M. until 11:30 at night. I was the only one there, I could not leave," and he says, maybe his daughter had the car, he says there, and he says afterwards, he turned round, she was not home, she was to college; and he said to us, maybe the garage man went and got it; he takes it every so often for oil and grease and to look it over. He went up to the garage and he found out the car was not there that day. He said, after he sat there a while, all nervous and fussing around, he said, "Well, did anyone see this car?" We said, yes, a fellow who knows this car. He said, he must have been going pretty fast then. My car is fully insured, I don't care, he said.

By Mr. Gildea: I move for a mistrial. Having heard what your Honor said before ——

By the Court: I will make some observations now as to the latter part of this conversation involving a remark of Mr. Duckworth's. It is admissible only with regard to some suggestion of an

admission against interest, if you think it has any relation at all to it; but as to the insurance, the jury will pay no attention at all, because of a ruling of our appellate courts to the effect that if the case is in any way prejudiced by reason of the defendant being insured, with the result that the jury may not accord the defendant the same right that otherwise there might have been if there was no insurance, the result would be that you would bring an artificial element into the case, which prevents its being tried on its merits, and that is a fatal error. Our appellate courts have said, and theoretically held, that the Court can declare a mistrial. That is the situation, and it rests within the discretion of the trial Court, and I am now warning the jury to eliminate from their minds entirely the question of whether there was any insurance by Mr. Duckworth or not. It happens to have been brought out incidentally, merely in the conversation of these two witnesses.

Cross-examination.

By Mr. Gildea:

Q. I understood you to say that Mr. Lilly said to Mr. Duckworth, I am the father of the little girl your machine hit. Is that right?

A. Yes.

Q. In other words, Mr. Lilly accused Mr. Duckworth of having killed his daughter, didn't he?

A. That's what I heard. I don't know. I am just telling you what he said up there at the house.

Q. That's exactly what he said?

A. That's what he said. What I told you.

Q. How long have you known Mr. Lilly?

A. I have known him the last eight years.

Q. Where do you live?

A. Purcell Street, Phillipsburg.

Q. How did he happen to ask you to go with him that night?

A. He's my wife's uncle, and he asked me to go along with him.

Q. Mr. Lilly is your wife's uncle?

A. Yes.

Q. Mr. Duckworth did say, didn't he, in your presence that evening, that his car had been standing in front of his store from early in the day to late at night, locked?

A. Yes.

Q. You heard him say that?

A. Yes.

Q. He said he had the only key in his pocket?

A. Yes.

Q. He said the reason he didn't want to go into the house was that his wife was nervous and he didn't want her to know anything about it?

A. That's what I took it for.

By the Court:

Q. He said that, didn't he?

A. That's what he said.

(Mid-day recess.)

JULIUS VARGO, sworn for plaintiff.

Direct examination.

By the Court:

Q. What is your nationality?
A. Hungarian.

By Mr. Gebhardt:

Q. If you do not understand the questions, say so, and I will ask them over again. Did you see anything of this accident that happened that day?
A. No, sir.
Q. You did not, but you got there pretty soon afterwards?
A. Yes, sir.
Q. How soon afterwards, do you know?
A. When I come out of the store, a fellow had the child in his arms.
Q. Did you see the car that hit the child at all?
A. No, sir.
Q. Did you take the girl to the hospital?
A. Yes, sir.
Q. Is that all you know about it then?
A. Yes, sir.

Cross-examination.

By Mr. Gildea: No questions.

ALBERT M. READING, sworn for plaintiff.

Direct examination.

By Mr. Gebhardt:

Q. Are you employed in my office?
A. Yes.
Q. In what capacity?
A. Clerk.
Q. Pursuant to my instructions, did you go to the City Hall down in Phillipsburg and endeavor to locate the police docket containing the report of this accident?
A. Yes, sir.
Q. How many times did you go there for that purpose?
A. I would say four or five times.
Q. Were you able to locate it or not?
A. No, sir.
Q. Did you make your best efforts to locate it?
A. Yes.

By Mr. Gebhardt: That's all.

Cross-examination.

By Mr. Gildea:

Q. Did you find any record there concerning this accident?
A. No record at all.
Q. No record whatsoever?
A. I was not able to locate the blotter for that month.

Q. The volume?

By the Court: The police blotter.

By Mr. Gildea:

Q. When did you go there?
A. It was last fall some time I went there the first time. I can't say the day, and then I stopped in several times since then.
Q. Didn't they have any report there other than the blotter with regard to this accident?
A. They were unable to locate the blotter. I asked them several times.
Q. Did they have any other report or any record aside from the blotter?
A. There was no record at the Police Department at all.
Q. Anything aside from the blotter?
A. Nothing at all.
Q. Did you ever see the record there?
A. I wanted to see the record for the month of December.
Q. 1925?
A. Yes. They were unable to show me any record or police blotter for the month of December, 1925.
Q. At any previous time had you seen the record there?
A. I saw other records, but not of this accident.
Q. I mean at any previous time did you see there any records concerning this accident?
A. No, sir.

By the Court:

Q. I understand you found no reference whatever to this accident?
A. No.
Q. No record at all?
A. No.
Q. At any time you have never seen any records there concerning this accident?
A. No.

Re-direct.

By Mr. Gebhardt:

Q. Were you at any time able to locate the police records for the month of December, 1925?
A. No time at all.

Re-cross.

By Mr. Gildea:

Q. Anybody assist you in making the search?
A. Yes.
Q. Who?
A. Fisher, the Commissioner of Police.
Q. Was he the man who had charge of the blotter?
A. He was not commissioner at that time, in 1925, he's now commissioner.
Q. And he's the man who has charge of the blotter at this time?
A. He was unable to locate the blotter for 1925, the month of December.

By Mr. Gebhardt: Plaintiff rests.

JAMES A. McDEVITT, sworn for defendant.

Direct examination.

By Mr. Gildea:

Q. Where do you live?
A. 835 South Main Street.
Q. Phillipsburg?
A. Phillipsburg.
Q. Do you recall the accident that happened some time about 5:30 on December 9, 1925, at or near the corner of Main Street and Mill Street in Phillipsburg?
A. Yes, sir.
Q. Where were you going? Where were you at that time?
A. I was going home from work.
Q. Were you walking?
A. Yes.
Q. In which street were you walking?
A. South Main Street.
Q. In which direction?
A. Towards Alpha.
Q. That would be generally in an easterly direction?
A. Yes.
Q. On which side of the street were you walking, north side or south side?
A. I was on the opposite side to what the accident was.
Q. You were on the left-hand side going towards Alpha?
A. Left-hand side towards Alpha.
Q. Did you see the automobile strike this little girl?

A. No.
Q. What did you hear or see?
A. I saw this car coming down Main Street at a high rate of speed.
Q. In which direction?
A. Going towards Alpha. I looked at the car, and saw it was a roadster. It had side curtains on it, and then I heard like a machine going over a hard hill. I kept on walking, and then I heard a little girl holler, look at it. I looked across the street and saw this form lying in the street. I walked over. I saw a little girl lying under Mr. Vargo's car, and I got down and got her out from under the car. I didn't see any other automobiles going up and down, and there was a crowd standing all around there, all around Mr. Vargo's car.
Q. Did you see the license tags on the roadster you saw go by there?
A. They were Pennsylvania tags on the left rear mudguard.
Q. Any other automobile pass east just before that?
A. No.
Q. Was there any other cars passing east just after that?
A. No.
Q. About how many steps did you take between the time this roadster passed you and you heard the little girl make some exclamation?
A. I walked from about here to the jury.
Q. You immediately went across the street?
A. Yes.
Q. You saw no other automobiles pass east or west?

By Mr. Gebhardt: Very leading.

By Mr. Gildea:

Q. You know Mr. Lilly?
A. Yes, sir.

Cross-examination.

By Mr. Gebhardt:

Q. You didn't see the accident?
A. No, sir.
Q. How long a time after the accident occurred did you know that it had occurred?
A. I didn't know it had occurred until I heard the little girl holler, the one that was here this morning.
Q. You didn't know anything had happened until then?
A. No.
Q. You didn't know that a Pennsylvania car hit the child?
A. I didn't know what car hit it. This car had a Pennsylvania license.
Q. You don't swear that a Pennsylvania car did hit the child?
A. No, sir.
Q. You don't know anything about it?
A. No, sir.
Q. You stated it had a Pennsylvania license?
A. On the left rear mudguard.
Q. Did you come that way yesterday?
A. What do you mean?
Q. The same way you were going that night?
A. Did I come the same way yesterday?
Q. Yes, yesterday?
A. Yes.

Q. You did?
A. Yes.
Q. Did you see any cars in that neighborhood yesterday, going up that way?
A. Yes, I did.
Q. Tell us what license plates they had on?
A I didn't take notice of them.
Q. Why did you happen to notice this one?
A. Because it was going so fast.
Q. You didn't know anything had occurred that night?
A. No.
Q. How did you come to notice this particular car with the Pennsylvania license on?
A. Because I took notice it was going so fast.
Q. Was that the reason?
A. Yes.
Q. That was the only car you saw going fast on that street?
A. Yes.
Q. Exactly. You say now that you remember it had Pennsylvania license on?
A. Pennsylvania license tags.
Q. What color was it?
A. I could not tell you the color now, but I did know at the time.
Q. Why can't you tell?
A. I forget, it has been so long.
Q. It was called to your attention at the time, wasn't it? You knew shortly after that you were going to be called upon to testify, didn't you?
A. Yes.
Q. You didn't keep in mind the color of the license?
A. No, I didn't.
Q. How far away from where the accident oc-

curred was this Pennsylvania car at the time you saw that it had a Pennsylvania license?

A. When it went right by me.

Q. How?

A. When it went by me, and I was about from here to where that table there.

Q. It passed alongside of you?

A. On the South side of the street.

Q. On the right-hand side towards Alpha. You ask us to believe this car, about which you knew nothing, and which you have never seen before, you remember that particular car without anything calling your attention to it ——

By Mr. Gildea: That's not fair.

By Mr. Gebhardt (continuing): And it had a Pennsylvania license?

By Mr. Gildea: I don't think that's fair, because the witness what called his attention to it was the speed it was going.

By Mr. Gebhardt:

Q. Is that correct?

A. The reason why I thought it was that car, I didn't see no other car going that way.

Q. That's a very busy street, isn't it?

A. Yes.

Q. South Main Street?

A. Yes.

Q. The main street of the town of Phillipsburg, a place of about 25,000 inhabitants?

A. I don't know how many inhabitants.

Q. About that, isn't it, quite a large town?

A. Yes.

Q. Thousands of cars on the streets every day. When were you first asked by anybody about this particular car having passed there at that time?

A. Two days afterwards. I think I gave Mr. Hauser a statement.

Q. Who is he?

A. He was commissioner at Phillipsburg at that time.

Q. Do you know how he came to ask you?

A. I talked about it, I guess.

Q. Do you know how he came to ask you about what the license plate on that car was?

A. I don't understand what you mean.

By the Court:

Q. What did he ask you? What did Hauser ask you?

A. Asked me where I was coming from, what I was doing there, where I was going. I told him I was going home from work.

Q. Did he ask you what you saw?

A. He asked me what I saw and I said I saw this car.

Q. You picked up this child?

A. I picked up the child.

By Mr. Gebhardt:

Q. You swear positively there was no other car in that neighborhood at the time of this accident?

A. Not since that one went by me until I picked the child up.

Q. You swear that positively?

A. Yes.

Q. That's a busy street?
A. Yes.
Q. South Main Street in Phillipsburg?
A. Yes.
Q. No other car went by during that whole period of time?
A. I should say that was only about half a minute.
Q. You got the girl from under the car, didn't you?
A. Yes.
Q. Any other car go by after that?
A. I stood there waiting for one to come either way so I could stop them.
Q. Did you stop them?
A. No.
Q. How long were you there?
A. I should say about a minute and a half or two minutes.
Q. Before you got this man to come and take the child over?
A. Yes.
Q. Do you know what a minute and a half to two minutes is? Ever held a watch to see how long that was?
A. I never done that, no.
Q. Whom did you finally get to take the child to the hospital?
A. Mr. Vargo.
Q. Do you know the number of the license?
A. No, I didn't get the number.
Q. Was it an open car or closed?
A. Roadster with side curtains.
Q. Roadster. What do you mean by roadster?
A. A two-passenger car.
Q. Two passengers. Did you notice all that?
A. I noticed it was a roadster with side curtains on.

Q. You noticed all that?
A. Yes.
Q. Did you say the car that passed you was a Buick car, too?
A. I imagine it was a Buick, I don't know what make of car, but it was a roadster.
Q. It was a roadster?
A. Yes.
Q. You did tell my son, did you not, it was a Buick?
A. I told him I thought it was a Buick.
Q. Were you in the office of Prosecutor Smith of this county subsequently to the night of the accident?
A. Yes, sir.
Q. And you made a statement as to what you knew about this accident.
A. Yes.
Q. It was in his hands, was it?
A. Yes, I think he has it.
Q. Didn't you state in that conversation with him that you didn't know whether it was an open car?
A. No, sir.
Q. Or whether it was a closed car?
A. No, sir. I didn't state any such thing.
Q. Or whether it was a New Jersey license or a Pennsylvania license?
A. A Pennsylvania license was what I saw.
Q. Did you say you didn't know in that conversation whether it was a Pennsylvania license or a New Jersey license?
A. No, sir.
Q. Sure about that?
A. I am sure I told him it was Pennsylvania.
Q. It was going at a high rate of speed?
A. Yes.

Q. Do you know what a high rate of speed is in an automobile with regard to the number of miles it may be going?

A. I would say 35 to 40 miles an hour was a high rate of speed.

Q. It was 5:30 in the evening?

A. Between 5:15 and 5:30.

Q. You do say that South Main Street is the busiest street in the City of Phillipsburg, or town of Phillipsburg?

A. Yes, for passing automobiles.

Q. As far as you know, you don't know whether this car, or some other car, hit this child?

A. No, sir.

Q. All you know is that you saw shortly before you learned that the child had been hit by hearing these youngsters say something about it, that a car of that character had passed along there?

A. Yes, this roadster went down by there at an awful rate of speed.

Q. All you know is that the roadster, running at a high rate of speed, passed there some little time before you knew the child had been hurt?

A. Yes.

By the Court:

Q. How long before was it this car passed at a high rate of speed before you heard the child's voice?

A. The car passed me, and I walked maybe from here to that table, down South Main Street. Then I heard this girl holler, she says, oh, look at it.

Q. You looked over and saw the child?

A. I saw the child lying under the machine.

Q. You went over and picked her up?

A. I picked her up.

By Mr. Gebhardt:

Q. How long before that the child was hit, you don't know?

A. I don't know that, no.

Re-direct.

By Mr. Gildea:

Q. Did any other automobile pass east of west in Main Street between the time this roadster which you described passed, and the time that you heard the little girl say, oh, look at it?

A. No.

Q. Did any pass either east or west just prior to that?

A. I was not paying any attention to that.

Q. Did any automobile pass east between the time that you picked the child up and Mr. Vargo came and took her to the hospital?

A. No, if they did I would have stopped them, no matter where they were going.

Q. You came here in response to a subpoena?

A. Yes.

Q. You never talked to Mr. Duckworth about this case?

A. No, sir.

Q. You were questioned right after the accident by Mr. Hauser when he was making his investigation for the Police Department of Phillipsburg?

A. Yes.

Q. And Mr. Smith?

A. Yes.

Q. Mr. Smith, the Prosecutor?
A. Yes.
Q. You told them the same story you have told here?
A. Yes.

By Mr. Gildea: That's all.

Re-cross.

By Mr. Gebhardt:

Q. You do say before you saw this car pass with the Pennsylvania license, you don't know whether immediately before that there had passed any other car there?
A. I didn't take any attention. I would not have paid any attention to this if it had not been going so fast.

F. Marion Duckworth, defendant, sworn.

Direct examination.

By Mr. Gildea:

Q. You are the defendant in this suit?
A. I am.
Q. Where do you live, Mr. Duckworth?
A. 40 Washington Street.
Q. Phillipsburg, New Jersey?
A. Yes.
Q. You have a drug store in Phillipsburg, haven't you?

A. Yes.
Q. How long have you lived in Phillipsburg?
A. I have lived in Phillipsburg about 55 years.
Q. How long have you been in business there?
A. I have been in the store about 40 years, as a boy, from clerk to proprietor.
Q. You did in 1925 own a Buick coupe automobile?
A. Yes.
Q. Bearing the license number which has been mentioned here in the interrogatories today?
A. Yes.
Q. On the 9th of December, 1925, was there anything the matter with the glass in the left-hand door of your car?
A. Yes.
Q. What was the matter with it?
A. The glass was broken.
Q. How had it been fixed? Did you have it fixed in any way?
A. It was bound with brown tape paper about an inch wide, brown, pasted together until I could get a new one.
Q. How many strips of paper were on there?
A. Probably 12 or 15. I would not say just how many did run up the glass.
Q. All running in the same direction or across each other? How did they run?
A. A few ran down the glass but most of them ran across the glass.

By the Court:

Q. Did they assume any form at all? You heard these children refer to it as a Christmas tree formation?

A. The glass was cracked up to a point and some way across.

By Mr. Gildea:

Q. Where was that automobile, if you know, on December 9, 1925, between 5 and 6 o'clock in the afternoon?

A. It was parked in front of the store on the opposite side of the street, in front of the barber's shop, Holden's barber shop.

Q. On Main Street?

A. Yes.

Q. In Phillipsburg?

A. Yes.

Q. What time did you leave it there that day?

A. Between 12 and 12:30 at noon.

Q. Was it there all the afternoon?

A. It was there all afternoon until after eleven at night.

Q. Constantly during that time?

A. Yes.

Q. Was it locked?

A. Yes.

Q. Where was the key?

A. I had the key in my pocket.

Q. How many keys do you have to your automobile?

A. I have only one that locks the dashboard, and on that key ring I had the key to the register drawer, and the key to the alcohol cupboard and the key to the garage. That's why I know I had the keys because I used these keys several times during the day in the store.

Q. Were you in your store constantly from the

time you left the automobile across the street until you got in it at night?

A. Yes.

By Mr. Gebhardt: Very leading.

By Mr. Gildea:

Q. How many clerks did you have in your store at that time?

A. I had a porter, two men, and a lady, besides myself.

Q. What day of the week was December 9, 1925?

A. That was Wednesday.

Q. Did any of your clerks have that afternoon off?

A. My head clerk is off all day Wednesday. My prescription man is off Wednesday afternoon and evening.

Q. Would that have anything to do with your remaining there the whole time you were there on this day?

A. Mrs. Lott, my clerk, leaves the store at 5 o'clock. This evening we were quite busy and she didn't get away until 5 or 10 after 5. She comes back at 6 o'clock.

Q. Did she come back at 6 o'clock that day?

A. About 6 o'clock.

Q. When you work your store that way, how do you get your supper?

A. I had my supper brought down to me for several weeks on account of being short-handed on Wednesdays only.

Q. Who brought it down?

A. My wife.

Q. Did she bring it down that day?

A. Yes, sir.

Q. Did you hear of the accident to the Lilly child any time about the 9th of December?

A. No, I read it in the paper. That's the first I knew of it.

Q. When, that day, or the next day?

A. Next day.

Q. Did you hear or was there anything that caused you to think that anybody believed it was your car that struck the girl?

A. First I heard of it was perhaps a week or a little later afterwards. Then my clerk told me there was a report that it had been my car that had struck the child. He rather ridiculed the idea from the fact that he knew I could not have been away from the store at the time.

Q. Because he was not there?

A. Yes.

Q. Did you receive a call from Mr. Lilly at your home any time after the accident to his daughter?

A. Yes.

Q. It has been said by Mr. Lilly that when he spoke to you about the subject you became agitated and nervous. Did you become nervous when Mr. Lilly spoke to you about it?

A. No. My daughter answered the knock. I went to the door. He told me, asked me if I knew who was it. He said, "I am Mr. Lilly." I said, "Alright, as soon as I am through my supper, I will step out." I said, "Step in the car, I will be out," and I finished my supper and went out.

Q. What were the names of the clerks who were working in your store at the time, if you recall?

A. Howard Applegate was my head clerk.

Q. Is he still with you?

A. No.

Q. He does not work for you any more?

A. No.

Q. Is he here today?

A. Yes.

Q. Who else?

A. Frank Hoyt was the next man.

Q. They were both off this afternoon?

A. Yes.

Q. Were you, or was your automobile, at or near the intersection of Mill Street and South Main Street, in Phillipsburg, at or about, or any time between 5 and 6 o'clock, on December 9, 1925?

A. No.

Q. You say no?

A. No.

Cross-examination.

By Mr. Gebhardt:

Q. You say that car was parked in front of your store, or near your store, from 12 to 12:30 until what time?

A. It was until after 11 at night, right across the street.

Q. In the meantime you had not been in the car?

A. No, sir.

Q. You didn't go down to the Second National Bank with it that afternoon?

A. No.

Q. Did you go to the Second National Bank any time that day with that car?

A. No.

Q. You say that nobody could possibly have used that car but yourself?

A. I don't see how they could if the car was locked.

Q. Do you say that nobody else could have used it?

A. I don't see how they could. It was opposite the store. I would surely have seen it if it had been moved away.

Q. I am asking because you had the key, the only key that there was to that car, in your pocket. How did that car get down there that day?

A. I drove it down myself.

Q. Was this car around to the Second National Bank any time that day?

A. I don't say that I could remember. I go up to the Second National Bank when I go to the store in the morning.

Q. Was it around there standing still for any time during that day?

A. Not that I remember.

Q. If it were, would you remember it?

A. Hardly, unless there was some occasion. That's my bank, that's where I do my banking, but I have no recollection of going to the Second National Bank on the Wednesday morning.

Q. Do you say you were not there?

A. I have no recollection of being there.

Q. Do you say you were not there?

A. No, I don't say I was not there.

Q. Could your wife take that car out?

A. My wife doesn't drive.

Q. What?

A. She doesn't drive.

Q. Could any member of your family?

A. My daughter drives.

Q. Do you know she didn't drive that car that afternoon?

A. I do.

Q. How do you know it?

A. She was out of town. She was in Poughkeepsie.

Q. In college at the girls' college?

A. Yes.

Q. Any of your employees drive it beside yourself?

A. No.

Q. Do you remember where you were, where this car was, one week later than the 9th December, 1925?

A. One week later?

Q. Yes, you don't, do you? Or any other?

A. One week later. I think it was up in the country. I went deer hunting that fall. I think deer season opens on the 15th. If I remember right, I drove the car up there.

Q. A week after that do you remember where it was?

A. The week after that it was in Phillipsburg.

Q. What part of Phillipsburg was it in that day?

A. In the neighborhood of the store.

Q. Do you know where it was two weeks after the accident, whether it was on Mill Street and South Main Street any time in the evening, around 5:30? You have no recollection of it at all, have you?

A. No, it was not in that section. The last time the car was in that section was on Thanksgiving Day, or around Thanksgiving Day. My daughter was home on two or three days' vacation.

Q. That same year?

A. Yes.

Q. You ask us to believe that very Thanksgiving Day, which was the latter part of November, this car had not been in the neighborhood of South Main Street and Mill Street at any time on any of those

days between the 9th of December and Thanksgiving Day, or don't you recall anything about it?

A. I have no recollection of the car having been there.

Q. That's what I thought, Mr. Duckworth, but it may have been there lots of times since?

A. The car was down there during the summer vacation, quite often, yes, my daughter has some friends there that she visits.

Q. You could not tell where the car was a week or two weeks or three weeks or more weeks after the accident, on the same day of the week, could you?

A. That would be a very hard thing for any driver to remember.

Q. That's just what I am trying to bring out. The first inkling or intimation that you had that anybody thought your car had any connection with this accident at all was a week after it occurred, isn't that so?

A. I didn't hear of it that soon, I don't think.

Q. Was it later than that?

A. It was between, I think, one and two weeks, Mr. Applegate spoke to me, told me about it.

Q. That was the first you heard of it?

A. No, I read it in the paper.

Q. You didn't hear you were blamed for it until between one and two weeks after?

A. Yes, about that.

Q. Go back to the 8th, where was that car the day before the accident?

A. The car was no doubt parked near the store.

Q. I don't want any doubts.

By the Court:

Q. Give your best recollection.

A. I usually park my car in front of the store when there's a space.

By Mr. Gebhardt:

Q. You don't know what you used it for, or where it was on the 8th. The truth is you don't know?

A. It's impossible for me to tell. No living person could do that.

Q. You don't know where the car was on the 10th?

A. No.

Q. Yet you do remember on the 9th, just where it was all day long, although your connection with it in any way, with this accident, didn't become known to you until a week to two weeks after the accident occurred?

A. I remember where I parked that day on account of it being Wednesday. When I work Wednesday afternoons and Wednesday evenings I don't go home to meals, I always stop at the store.

Q. You remember every Wednesday thereafter, where the car had been all day?

A. Not every Wednesday, but this one I can recall.

Q. You didn't know anything about your being accused of being responsible until ten days after the accident?

A. I can remember that very well.

Q. You can?

A. Yes.

By the Court:

Q. How was it fixed in your memory?
A. The car being parked over there?
Q. Yes, from 11 to 11:30 at night?
A. That's the time I come into the store 12:30.
Q. What is it fixes it in your memory as to the 9th December, 1925?
A. Fixes it in my mind that the car was parked over there. One thing was my porter usually turns the lights on at that time. We were forced to have the traffic light on, he turned the traffic lights on that Wednesday immediately after 5 o'clock. It got dark early that Wednesday, it was such a cloudy day.
Q. What else, anything, fixes it in your mind?
A. No, but the man across the street, the barber, has an automobile that he sometimes parks in front of my store. I kiddingly told him, "You are interfering with my business. I wish you would park this automobile where there is no business house." This Wednesday I parked my car over there, and he told my clerk that I was objecting to his parking his car in front of my store, but that I was putting my car over there. That's how I remember placing my car over there.

By Mr. Gebhardt:

Q. Those are the only two things that enable you to fix in your mind as to this particular Wednesday?
A. Yes.
Q. Any other days in December, or November, or October, or on January or February, you can tell where the car was, or where you were, or anything about it?

A. I think I know where I was, but I could not say exactly where my car was parked.
Q. Not for any of those periods of time?
A. A man in business has a good many things on his mind, and he can't charge his memory with those things.
Q. You could not tell?
A. This one thing reminds me.
Q. That is all there is to it?
A. Yes.
Q. At that time you knew nothing about this accident at all, didn't know until ten days after?
A. No.

By the Court:

Q. Did you give anyone your consent to use that car about 5 or 6 on the afternoon of December 9, 1925?
A. No.
Q. Did you, yourself, drive that car down South Main Street on the day of this accident?
A. No.
Q. At the time of this accident?
A. No. I have never allowed anyone to drive that car outside of my family. My daughter, that's the only person who ever drove my car outside of the garage man. When I first heard this thing, I thought perhaps the garage man, he gets the car every 500 miles, its practically a new car, to be looked over, and to change the oil, he had had the car, but when I went down that way I asked them and they looked it up and said, no, your car was not here at that time. They are the only people who would drive the car outside of the family.
Q. Outside of yourself and your daughter?

A. Yes.
Q. Was she in Poughkeepsie that day?
A. Yes.

By Mr. Gebhardt:

Q. After you heard your name mentioned in connection with this accident, you went to the garage to find out whether they had taken your car on that afternoon to drain out the oil, is that right?
A. Yes.
Q. You told us just a few minutes ago you knew that nobody could have taken it because the key was in your pocket, and there was no other key to it?
A. They could not have had it that afternoon.
Q. If that is so, why didn't you know that without going down to the garage to inquire about it?
A. You would do it naturally.

By the Court:

Q. Why did you have any doubt at all?
A. I had no doubts.
Q. Why did you inquire at the garage?
A. I thought such a thing might possibly have been ——
Q. How could it occur if you had the key in your pocket?
A. I am sure it could not have occurred.
Q. Yet you didn't know whether it had occurred or not until you went down to the garage and found out?
A. Not for that alone. I did it to satisfy myself.

By Mr. Gebhardt:

Q. At previous times when the oil was taken care of how did they get possession of it?
A. I usually drove it up to the garage.
Q. Didn't any of the men come down and get it?
A. I used to take it down, and they would bring it down when it was finished.
Q. You knew it had not been done that afternoon, didn't you?
A. Yes.
Q. Exactly. Still you went down to the garage to find out whether it had been done there or not?
A. As a matter of form.
Q. When the key was in your pocket?
A. Yes.
Q. You knew they could not get it without getting the key?
A. Sure.

Re-direct.

By Mr. Gildea:

Q. Didn't you go down to the garage for the purpose of reassuring yourself and corroborating your own recollection?
A. Yes.

By Mr. Gebhardt: I object to that as leading.

By the Court: Yes, very leading.

Witness: I wanted to make sure.

By the Court:

Q. When did you go to the garage to verify the fact that your car had not been out that afternoon?
A. I don't remember the date.
Q. How long after this accident?
A. It was probably two or three weeks.
Q. Two or three weeks?
A. Yes.

By the Court: Now you have the facts you want as to the time when he went.

By Mr. Gildea:

Q. When it was called to your attention that somebody had an idea that it was your car that was involved in this unfortunate accident, did you, or did you not, at that time, when was, as I understand it, about two weeks after the accident, cause your mind to go back to the 9th day of December, and determine, in your mind, where you had been and where the car had been at that time?

By Mr. Gebhardt: Objected to as still leading.

By the Court: It is leading. It has that tendency.

By Mr. Gildea:

Q. When did you first, Mr. Duckworth, in your mind, undertake to recollect where your car was on the 9th of December, 1925, between five and six o'clock in the afternoon?
A. The following day Mr. Hogan came over, and

I think he talked to Mr. Applegate about this parking business, and he says, he's hollering about my parking my car in front of his store, and now he's parking his car in front of my shop.

Q. After that, did you at any other date after that, run over in your mind where your car was on the 9th of December, 1925, and if so, what caused you to do it?

A. When I first heard of this thing, of course, I referred back to where my car was parked, and knew that, through the argument I had had, just where it was that afternoon and that evening.

Q. Is it true that all Wednesday afternoon, when your daughter is not in Phillipsburg, and you are engaged in working in your store, is it true your automobile is, ordinarily, in one of two places, either across the street, or somewhere near your store, or at the garage being oiled?

By Mr. Gebhardt: Objected to. The question is not what is ordinarily done.

By the Court: That's not proper, relying on proof of custom to prove a specific situation. Each one case depends on its own particular circumstances.

By Mr. Gildea: No further questions.

Re-cross.

By Mr. Gebhardt:

Q. Did I understand you to say, Mr. Duckworth, that the day after the accident you had a talk with somebody with respect to the parking of cars around your place and a barber shop, is that the next day after the accident?

A. This talk was several days before. I told this gentleman I didn't like him parking his car in front of my store.

Q. Yes. I understood you to say you referred to that matter because of this accident?

A. No.

Q. I am asking you?

A. I know what I said, too.

Q. I am asking you whether you did say that. That's my recollection, the connection between this parking business and this accident?

By the Court: No, he said not.

By Mr. Gebhardt:

Q. You said something about the day after this accident, the day after the accident you heard of it through the newspaper. What connection did that have with this parking business between you and the barber?

A. No connection with the argument we had about parking, but it called to my mind where my car was during that afternoon.

Q. This accident did?

A. When I heard of this accident, this called to my mind where my car was parked, after he spoke of my car being in front of his shop.

Q. You, having no connection with this accident, how did the accident cause you to recollect that it was the day of this accident this parking trouble occurred, if you had nothing to do with it?

A. The accident didn't recall this to me.

Q. What occasion did?

A. The gentleman speaking to me about it.

Q. About parking in front of his place? What had the accident to do with it?

A. That had nothing to do with it.

Q. You heard of the accident the next day?

A. I read it in the paper. I didn't hear I was connected with it the next day.

Q. We are talking about the next day. You said that this parking of car business caused you to refer back to where your car was parked that day?

A. Yes.

Q. You say this accident caused that?

A. No.

By Mr. Gebhardt: I am willing to submit it to the stenographer. He has it all down.

By the Court: Of course, the stenographer can't read all his testimony, and in the last analysis the recollection of the jury must prevail.

CATHERINE LOTT, sworn for defendant.

Direct examination.

By Mr. Gildea:

Q. You live in Phillipsburg?

A. Yes, sir.

Q. Are you employed in Mr. Duckworth's drug store?

A. Yes.

Q. Were you employed there in the month of December, 1925?

A. Yes.

Q. Do you recall what day of the week December ninth was?

A. A Wednesday.

Q. When did you learn that Mr. Lilly's daughter had been injured?

A. I read it in the paper.

Q. When?

A. I suppose the same day it happened. I usually read the newspaper when I go home from the store.

Q. If it happened between 5 and 6 in the evening, would there be any Phillipsburg paper that would print it?

A. Not that night.

Q. Were you working on that day?

A. Yes, sir.

Q. Who else worked in the store that afternoon from 12 o'clock on?

A. Nobody but Mr. Duckworth and myself and Mr. Gishel, the porter.

Q. What kind of work did Mr. Gishel do?

A. Just cleaned and swept and different things like that.

Q. No other clerk around but you and Mr. Duckworth that afternoon?

A. No, sir.

Q. Who would put up prescriptions, then, during that time?

A. Mr. Duckworth.

Q. Can you put up prescriptions?

A. No, sir.

Q. Was he there on the afternoon of that day?

A. Yes, sir.

Q. On the 9th of December, 1925?

A. He was there that day.

Q. What time did you go out to supper?

A. 10 minutes after 5 as near as I can tell.

Q. Was he there when you left?

A. Yes, sir.

Q. What time did you get back?

A. Six o'clock.

Q. Was he there when you came back?

A. Yes, sir.

Q. He was there the balance of the evening?

A. Yes, until I left at 9 o'clock.

Q. You left at 9 o'clock?

A. Yes, sir.

Q. Did you hear any report shortly after this accident that some mention was made of Mr. Duckworth's car in connection with it?

A. I never heard anything about it, about his being connected with it, until Mr. Applegate asked me whether I was in Wednesday, and what time I went to supper, and I told him I went 10 minutes after five to supper.

Q. How long was that after the accident?

A. It was at least a week and a half or two weeks. I would not say just how long, but it was over a week. He spoke to me about the accident and asked me about going home to my supper, what time I went, and everything.

Q. Did he tell you Mr. Duckworth's car had been mentioned?

A. I asked him why he asked me so many questions. I said you always know I go at that time for supper. Then he spoke to me about Mr. Duckworth's car, wondered if it had been out, and that's why he asked me. I said it had not been out to my knowledge while I was in the drug store Wednesday afternoon.

Cross-examination.

By Mr. Gebhardt:

Q. You left at 5 or 10 minutes after 5 for your supper, did you?

A. Yes.
Q. You got back at 6?
A. Yes.
Q. Where Mr. Duckworth was you don't know?
A. No, sir. He was in the store as far as I know.
Q. You left him in the store?

By Mr. Gildea: Objected to, that's the very thing ——

By Mr. Gebhardt: She says, he was in the store as far as I know.

Witness: When I left, when I left he was in the store. He was in the store and he was there when I returned.

By Mr. Gebhardt:

Q. Where he was between 5.10 and 6.00 o'clock you don't know?
A. No, sir.
Q. Whether he went out and hit this child you don't know?
A. No.
Q. Don't know anything about it?
A. No.

———

SALLY DUCKWORTH, sworn for defendant.

Direct examination.

By Mr. Gildea:

Q. You are the wife of Mr. Duckworth, who is the defendant in this suit, aren't you?

A. Yes.
Q. During the month of December, 1925, do you recall at any time taking your husband's supper down to the store to him between 5 and 6 o'clock?
A. I do.
Q. You did it every day of the week?
A. No.
Q. What days would you do it?
A. Wednesday.
Q. Why Wednesday?
A. Because Mr. Duckworth was alone in the store, he would be the only prescription clerk there.
Q. Do you recall whether or not you did it every Wednesday in December?
A. Yes, it was customary for me to take lunch down every Wednesday.
Q. What time would you get there?
A. I would get there any time from 10 minutes past 5, I would leave home about 10 minutes past 5 to half-past five.
Q. What time would you get there?
A. About half-past 5.
Q. What would you do after you got there, would you stay, or go right home?
A. Sometimes I would stay in the store a little while, sometimes I would leave and go across the street to my mother's.
Q. Do you have any recollection of having gone to the store on the 9th of December, 1925?
A. Yes, I have.
Q. Do you know about what time you went there that afternoon?
A. Yes.
Q. When was it?
A. You mean what time? The same time?
Q. What time was it that day?

A. From 10 minutes past 5 to half-past 5.
Q. You mean you left home at that time?
A. I got there about half-past five.
Q. Was your husband there when you got there?
A. Always he was there.
Q. Was he there that afternoon?
A. Yes.
Q. Did you sometime after this accident, Mrs. Duckworth, learn that it was thought by some people that it was Mr. Duckworth that struck this child?
A. I surely did.
Q. How long after the accident?
A. Two to three weeks. It may be four weeks before I heard it, but I read in the paper when the child was hit, and that the child had died from the injury, but I didn't know Mr. Duckworth was connected with it.
Q. Until some time after?
A. Until some time afterwards.
Q. When you did learn that Mr. Duckworth's name had been connected with it by some people, what did you do with regard to your recollection of the evening of December 9, 1925?
A. I just reflected back, and I knew that on that afternoon I had taken Mr. Duckworth's lunch down to him.

Cross-examination.

By Mr. Gebhardt:

Q. When you first heard of his being connected with it, two, three or four weeks after the accident, you thought back, you said?
A. I certainly did.
Q. Why was it necessary for you to think back?

A. Wouldn't you think back?
Q. I am not the witness.
A. I thought back.
Q. Why was that necessary?
A. Why should it not be necessary for me to think back to see that he was in the store?
Q. You say that you went down there practically every Wednesday afternoon?
A. I certainly did.
Q. Why did you have to think back to see whether on that Wednesday you were there?
A. I just thought back, that's all.
Q. Why did you have to think back?
A. What else was I to do?
Q. Did you have to think back?
A. I didn't have to, but I did just the same.
Q. Are you willing to tell us why you thought back?
A. Well, I don't know why I thought back, but I did.
Q. You were very much upset over the thing?
A. Not one bit.
Q. Not one bit?
A. Not one bit.
Q. When you heard of this accident?
A. I was just a little bit interested.
Q. Interested?
A. Yes.
Q. Knowing of the child's death?
A. I felt very sorry about the accident, and I would not want you to think I didn't, because I did.
Q. You said you were a little bit interested?
A. I was interested because my husband was connected with it.
Q. Just a little interested when your husband was connected with the death of this child?

A. Because his name was connected with it.
Q. Just a little interested, yes. The fact is that you took the supper down on Wednesdays to your husband sometimes, and sometimes you did not. Isn't that true?
A. Well, I don't take it down every day.
Q. Every Wednesday?
A. Wednesdays, yes.

By the Court:

Q. You always take it down yourself?
A. When he had but one clerk to relieve him.
Q. Did it ever happen that it was not necessary to take it down on Wednesdays?
A. I took it down every Wednesday when it was necessary.

By Mr. Gebhardt:

Q. That's just what I asked, sometimes you took it down on Wednesdays and sometimes you didn't take it down on Wednesdays. Isn't that correct?
A. What would be the use of my taking it down if I didn't have to?

By the Court:

Q. Don't argue. Some Wednesdays you did, and some you didn't?
A. I took it down every Wednesday when he was alone in the store.
Q. Was he alone every Wednesday?
A. When Mrs. Lott went out he was. He was when she went out to her supper.

By Mr. Gebhardt:

Q. When she didn't go out, he was not alone, and then he could come home for his supper, couldn't he?
A. How could he leave the store and come home?
Q. When Mrs. Lott was there?
A. Mrs. Lott is no prescription clerk.

By the Court:

Q. During the month of December, 1925, was it necessary for you to go down every Wednesday afternoon with his supper or dinner?
A. Yes.
Q. During the month of December, the entire month?
A. Yes.
Q. Sure of that?
A. I went down three, I am sure.

By Mr. Gebhardt:

Q. Three Wednesdays. Which Wednesday did you not go?
A. I don't know. I know I went down the Wednesday that this accident happened.
Q. How do you fix it in your mind that you went down three instead of four in December?
A. I said I went three or four Wednesdays in December.
Q. Did you sometimes go down there before 5 o'clock on Wednesday?
A. Not often, no, I did not.
Q. Sometimes you did?
A. No.

Q. You didn't ever go down before 5 o'clock and sit talking with your husband?

A. No.

Q. How long did you stay afterwards, just a few minutes, or would you stay a considerable time sometimes?

A. I don't think I spent the evening there.

Q. On this day you didn't know your husband was connected with this thing in any way, did you?

A. No.

Q. You didn't know that until weeks afterwards?

A. No.

Q. And then you did think back?

A. Yes.

Q. You had to pass over several different Wednesdays before you reached the 9th of December, didn't you?

A. Well, I just had to think back two weeks, I guess.

Q. You said four weeks, two, three or four weeks.

A. I said three at least.

Q. You said two, three or four weeks after the accident you first heard of it. What about the other Wednesdays between the 9th and two, three or four weeks afterwards? Can you tell us what time you got there those Wednesdays, or whether you did take it down those Wednesdays, or not?

A. I suppose I got there about half-past 5.

Q. The other Wednesdays?

A. Yes.

Q. Sure about that?

A. That was the time I generally got there.

Q. Is that the reason you are swearing it was 5.30, because that's when you generally got there?

A. That's the time I got there.

Q. When?

A. 5.30.

Q. On what day?

A. Wednesday.

Q. Which Wednesday?

A. The Wednesday of the 9th and two or three other Wednesdays.

Q. Thereafter?

A. Yes.

Q. When your daughter came home for the Christmas holidays, did she take his dinner down to him?

A. No, she didn't.

Q. You took it all the time?

A. I did.

Q. How did you go down there?

A. I walked down.

Q. How far away is it?

By the Court:

Q. How many blocks?

A. I don't know. I should think it was about 12 blocks.

By Mr. Gebhardt:

Q. You didn't go down in the car sometimes?

A. No, I walked down.

Q. Always?

A. Always.

Q. You don't know whether your husband's car was out that Wednesday afternoon, the 9th of December, between 5 o'clock and 6, do you?

A. No, I do not.

Q. Do you know anything about where it was?

A. No.

By Mr. Gebhardt: That's all.

JACOB H. GISHEL, sworn for defendant.

Direct examination.

By Mr. Gildea:

Q. Where were you employed in December, 1925?
A. Mr. Duckworth's.
Q. Mr. Duckworth's store on Main Street, Phillipsburg?
A. Yes, sir.
Q. You were the porter, weren't you?
A. Yes.
Q. You worked that day?
A. Yes, sir, from 8 in the morning until 6 at night.
Q. You worked until 6?
A. Yes.
Q. You were there between 5 and 6?
A. Yes, sir, continuous.
Q. You saw Mr. Duckworth there?
A. Yes.
Q. All the time?
A. All the time.
Q. Was there anybody else there beside Mr. Duckworth and yourself from the time Mrs. Lott went out at, she said, 10 after 5, until she got back at 6 o'clock?
A. Sometimes Mrs. Duckworth was there.
Q. We are talking about December 9, 1925. You mean Mrs. Duckworth was there that day?
A. Yes.
Q. Part of the time?
A. Yes.
Q. Was there any other person there who could fill prescriptions except Mr. Duckworth between 5 and 6?

A. No, sir.
Q. In fact, was there anyone there who could fill prescriptions after noon on that day?
A. No, sir.
Q. Do you happen to know where Mr. Duckworth's car was any time during that day?
A. Yes, sir.
Q. You saw it there?
A. Yes.
Q. When?
A. I saw it there all the afternoon.
Q. Do you know whether or not it was there between 5 and 6?
A. Yes.
Q. You saw it there between 5 and 6?
A. Yes.
Q. Did you read the newspaper, or find out in any way about the injury to the daughter of Mr. Lilly?
A. I did not, because I don't read no papers.
Q. When did you find out that she had been injured, do you remember?
A. When Mr. Applegate came in the store one day and spoke something. That's all I know. I have not never paid no attention to it.
Q. How long after this time?
A. A few weeks I should judge.

By Mr. Gebhardt:

Q. A few weeks?
A. A few weeks, yes, or so.

By Mr. Gildea:

Q. What did Mr. Applegate say?

By the Court: If you heard him.

By Mr. Gebhardt: I think I object to that.

By Mr. Gildea: I will withdraw it.

Q. As a result of what Mr. Applegate said to you, did you, in your mind, have any thoughts with regard to the 9th day of December, 1925?

By Mr. Gebhardt: I object to what he thought.

By the Court:

Q. How do you know it was the 9th day of December of which you have been speaking?

A. It was on Wednesday.

Q. How do you fix the time as Wednesday, December 9th, as against Wednesday, December 16th, for example, or Wednesday, December 2nd?

A. He's always in the drug store on Wednesday. Mr. Duckworth puts up prescriptions. After he puts them up I may take them out, or take money and make change, and wait on trade, which I can do, and which I have to do yet. I act as clerk then, too.

Q. How do you know you did that December 9, 1925?

A. I know I did because I was working that day.

By Mr. Gildea:

Q. Did what Mr. Applegate said sometime after the 9th, have anything to do with fixing in your mind what occurred on the 9th?

By Mr. Gebhardt: I object to that.

By the Court: It has a tendency to be leading, but I think I will allow it.

A. No, it didn't.

Cross-examination.

By Mr. Gebhardt:

Q. You say you don't read the papers?

A. I don't read no papers.

Q. Do you mean to tell us, Mr. Gishel, that you know that Mr. Duckworth's car was parked across the street opposite the store, the drug store, all day on Wednesday, December 9th?

A. All that afternoon, from about 11 o'clock, somewhere around there. It was there until 11 or 11.30 at night, because I know he never leaves the store early that night.

Q. Is that why you have no doubt of it? You know what his custom was. Is that why you have no doubt about it? Do you mean to tell this Court and jury that you know that that car was parked there from 11 o'clock in the forenoon until 11 o'clock that night? Do you mean to tell us that?

A. I want to say that from 11 o'clock to between 11 and 12 o'clock, it was always there.

Q. I didn't ask that. On December 9th, do you know that it was parked there anywhere, from 11 to 12 so as to cover the entire time until 11 o'clock that night?

A. How do I know? Because he told me. I leave there at 6 o'clock.

Q. That's what I thought. I didn't think you knew anything about it from 6 to 11.

A. I know nothing about that, only what he told me.

Q. How many prescriptions did you deliver that afternoon?
A. We didn't deliver any.
Q. Why not?
A. We put them up.
Q. I am asking you how many you delivered?
A. I didn't deliver any. I didn't take none out.
Q. You didn't take any out?
A. No.
Q. What were you doing that afternoon, standing in the window watching the car across there?
A. I can always find work if I want to work. I don't always look for work.
Q. You don't always look for work?
A. I don't always look for work.
Q. Do you mean to tell us you stood in the window and watched this car parked across the street all the afternoon?
A. No.
Q. You were doing that part of the time, weren't you?
A. Sir?
Q. You only saw the car there occasionally?
A. Whenever I looked across there it was there.
Q. How many times did you see it?
A. I can't recall that.
Q. Once?
A. More than once.
Q. One hundred times?
A. Not one hundred times, no.
Q. Five times?
A. Yes, every bit of five times.
Q. That would mean you looked at it once every hour, is that right?
A. Yes, sometimes two and three times in an hour.
Q. That day, that particular day?

A. Not that particular day.
Q. That's what we are talking about, that particular afternoon. You don't know how many times you looked at it that afternoon?
A. No.
Q. No recollection of it?
A. No, I could not say that.
Q. Therefore, as to whether it was there that afternoon you are only guessing, aren't you?
A. I know positive it was there, because no one else could run the car but him.
Q. Is that the only way you knew it?
A. Sure.
Q. That's the only way you know it?
A. I saw it there.
Q. You said you can't recall how many times you saw it there that afternoon?
A. No.
Q. Between 5 and 6, what were you doing?
A. I know positively.

By the Court:

Q. What were you doing between 5 and 6?
A. What was I doing?
Q. Yes.
A. Cleaning up, getting ready to go home.

By Mr. Gebhardt:

Q. Thinking about your supper?
A. You bet I was.
Q. You were looking across the street at the car, then you cleaned up and got ready to go home?
A. I often looked across.
Q. Were you looking between 5 and 6 that afternoon, looking across the street at this car?

A. Every once in a while I looked at it.
Q. Yes. How do you remember that?
A. Because I remember.
Q. Did you do it last Wednesday?
A. I did it most every Wednesday.
Q. Most every Wednesday?
A. I do it most every Wednesday.
Q. Wednesday, the 2nd December, do you remember what you did then?
A. I was cleaning up getting ready to go home.
Q. You don't remember anything about the 2nd of December?
A. Yes.
Q. Do you remember what you did that day?
A. His car stood out there.
Q. The 2nd. How about the month before that, did it stand there?
A. When he was not out of town, it stood there.
Q. Every Wednesday?
A. Every Wednesday if he was not out of town.
Q. All the time?
A. All the time.
Q. Every afternoon?
A. Every afternoon.
Q. You saw it there?
A. I saw it there.
Q. When did you first hear about this accident? When this Mr. Applegate came in? How long was that?
A. A week, or two weeks afterwards.
Q. Ten days to two weeks.
A. Yes, I paid no attention to it.
Q. That's the first you heard of it?
A. Yes, I paid no attention to it.
Q. When did you hear Mr. Duckworth was in any way talked about in connection with it?

A. I didn't hear anything until Mr. Applegate mentioned it.
Q. Did he mention anything about Mr. Duckworth being accused of being the one who did it?
A. Who, Mr. Applegate?
Q. Yes. Did he say anything that day about that when he came in the store, that Mr. Duckworth's name was connected with it?
A. I don't know what he said. I was working.
Q. Did you hear what he said?
A. I didn't pay no attention to what he was talking about.
Q. That was the first time it was called to your attention, was it? When did you first hear Mr. Duckworth's name connected with it?
A. Not until Mr. Applegate spoke about it.
Q. You just said you didn't hear what he said that afternoon?
A. I didn't stand listening to any conversation.
Q. He was not talking to you?
A. No.
Q. You didn't hear what he said?
A. No.
Q. When did you first hear of it then?
A. When Mr. Applegate came and said it. I was working around back ——

By the Court:

Q. Who told you afterwards that Mr. Applegate was talking about? How do you know what Mr. Applegate came in the store for? Did you learn what he came in the store for?
A. No, I didn't learn what he came in the store for until he spoke.
Q. You didn't know anything about the killing of this child until Mr. Applegate came in?

A. I didn't.

Q. How did you learn, then, that the child had been run over?

A. What he said.

Q. Did you hear him say it?

A. He said they was putting it on Mr. Duckworth, that's all I know.

Q. You heard Applegate say that, did you?

A. Yes.

Q. They were putting it on Mr. Duckworth?

A. Yes.

Q. That's the first time you learned of it?

A. Yes.

Q. That's all you know about it?

A. That's all I know about it.

Re-direct.

By Mr. Gildea:

Q. When you say cleaning up, you mean cleaning up the store?

A. Sweeping up, and finishing up for the day's work, sweeping up and getting ready to go home.

———.

HOWARD APPLEGATE, sworn for the defendant.

Direct examination.

By Mr. Gildea:

Q. Did you live in Phillipsburg in December, 1925?

A. Yes, sir.

Q. Where did you work then?

A. F. Marion Duckworth's drug store.

Q. Are you a druggist?

A. I am a registered assistant pharmacist.

Q. You were at that time a registered assistant druggist?

A. Yes.

Q. You worked for Mr. Duckworth, did you, during the month of December, 1925?

A. Yes.

Q. Do you recall hearing about the accident to the little Lilly girl?

A. Yes, I recall it.

Q. Do you recall whether you heard about it on the 9th of December or sometime thereafter?

A. I remember I heard of it the morning after the accident. A newspaper reporter came in the store and was talking about it.

Q. Do you know what day of the week the 9th of December was, 1925?

A. I know it was Wednesday.

Q. Did you work that day?

A. No, I never work on Wednesday. I very seldom work on Wednesday.

Q. Wednesday was your day off?

A. Yes, my regular day off, unless I wanted to change.

Q. Were you working that day?

A. I was not working that day.

Q. You didn't work at all that day?

A. I never worked on Wednesday.

By the Court:

Q. You very seldom work on Wednesday. What do you mean by that?

A. If I want to change my day off, or something turns up, I might change it.

Q. Did you do that during the month of December, 1925?

A. I did not.

By Mr. Gildea:

Q. Do you know whether Mr. Hoyt worked on Wednesday, the 9th December, 1925, or not, of your own knowledge?

A. I had best answer that my own way. His day off was Wednesday as well as mine. He was off afternoons and evenings, as a regular occurrence.

By the Court:

Q. Who remained to put up prescriptions?

A. Mr. Duckworth.

Q. Himself?

A. Yes.

By Mr. Gildea:

Q. Was there anyone else who could put up prescriptions except you and Mr. Hoyt and Mr. Duckworth?

A. No, sir.

Cross-examination.

By Mr. Gebhardt:

Q. You were interviewed by a reporter of what paper the next day after the accident?

A. I was not interviewed, sir. A reporter came

in next morning and made a statement. He was talking about it.

Q. What did he say about it?

A. Too bad about that little Lilly girl getting hit by one of those hit-and-run drivers. It's a sad case.

Q. Was that all that he said?

A. I think it was.

Q. Did he mention Mr. Duckworth's name?

A. Oh, no.

Q. When did you first hear Mr. Duckworth's name connected with it?

A. I heard that while he was deer hunting.

Q. Do you remember when it was?

A. That was shortly after. I don't know how many days. Shortly after.

Q. Was it ten days?

A. It may have been. I won't say.

Q. You are not at all certain about it?

A. I am not quite certain. I think it was a week or ten days, a very short time.

Q. Then you heard his name connected with it?

A. I heard they were trying to accuse F. Marion Duckworth.

Q. Where Mr. Duckworth was on Wednesday afternoon, December 9th, you don't know?

A. I don't know.

Q. Where Mr. Hoyt was you don't know?

A. I don't know.

By Mr. Gebhardt: That's all.

ALOYSIUS J. DWYER, sworn for defendant.

Direct examination.

By Mr. Gildea:

Q. Where did you live in December, 1925?
A. 84 Fayette Street, Phillipsburg.
Q. Were you acquainted with Mr. Duckworth at that time?
A. I have been acquainted with him as long as I can remember.

By the Court:

Q. How old are you?
A. 30.

By Mr. Gildea:

Q. How long have you lived in Phillipsburg?
A. Outside of the war, about five years, I have lived there all my life.
Q. Did you see Mr. Duckworth anywhere on the 9th day of December, 1925?
A. Yes, I was there in his store about from two to half-past to about ten minutes of six.
Q. What were you doing there at that time?
A. Nothing in particular.
Q. Just putting in your time? You were not working at the time?
A. No, sir.

By the Court:

Q. Are you a prescription clerk?
A. No, sir.

By Mr. Gildea:

Q. Did you ever work for Mr. Duckworth?
A. No, sir.
Q. You said you left at ten minutes of six?
A. About ten minutes of six.

By the Court:

Q. How do you recall that that day?
A. Because I recalled after Mr. Applegate was telling about Mr. Duckworth being connected with the case, and he said, "Don't you remember, it was the day I was off," and I recalled it, about him being off.
Q. You associated that date with the killing of the child?
A. Yes.
Q. That's the way you recalled?
A. Yes.
Q. You and Applegate were talking, and you, at that time, went back in your mind, and you found you were there in the drug store between half-past two and ten minutes of six?
A. Yes.
Q. Because that was the day of the accident?
A. Yes.
Q. That's the reason?
A. Yes.

By Mr. Gildea:

Q. Where was Mr. Duckworth between half-past two and when you left?
A. In the store all the time.
Q. Where did you go when you left the store?
A. Home to eat supper.

Q. Was Mr. Duckworth in the store when you left and went home?
A. Yes.

By the Court:

Q. Did you know Mr. Duckworth's car?
A. Yes, sir.
Q. Did you see it on that occasion?
A. Yes, I saw it there whenever I came down until I left.
Q. Where was it?
A. Across the street in front of the barber shop.
Q. What sort of a front has the drug store?
A. It's a full glass front.
Q. All the way across?
A. It's a full glass front.
Q. Where's the entrance?
A. Between the windows.
Q. Between the show-windows?
A. Yes.
Q. Right in the center?
A. Yes.
Q. Was Mr. Duckworth's car there when you left?
A. Yes.

Cross-examination.

By Mr. Gebhardt:

Q. What's your business?
A. I am under the doctor's care. I don't do anything.
Q. How long have you been there?
A. Since last August.
Q. Were you under the doctor's care in December, 1925?

A. No, sir.
Q. Working then?
A. No, sir.
Q. Why not?

By Mr. Gildea: I think that's irrelevant.

By Mr. Gebhardt:

Q. Were you sick then?
A. I might have been. I don't recall whether I was sick, or not. It was not a spell of anything.
Q. Do you know whether on the 9th of December you were sick, or not?
A. No.
Q. You haven't much recollection of the day, have you?
A. I don't recall whether I was sick that particular day, but I didn't have any spell of sickness, if that is what you mean.
Q. Do you remember whether you were sick or not on that day?
A. I just told you I didn't.
Q. Why don't you?
A. Ask the good Lord about that. I don't remember.
Q. You had this accident in mind. Who talked to you first about this?
A. Mr. Applegate.
Q. How long after the accident?
A. Probably a week.
Q. Probably a week. It wasn't later than that?
A. It may have been.
Q. A week or ten days?
A. Something like that.
Q. Two weeks?

A. I could not say particularly when it was.

Q. Are you a very close personal friend of Mr. Duckworth's?

A. No closer to him than anyone else.

Q. Do you go in there to call in the afternoon and stay until 6 at night?

A. 10 minutes of 6.

Q. Do you do that often?

A. Frequently.

Q. How often?

A. I don't know, whenever I have nothing else to do.

Q. You have got nothing to do all the time?

A. Sometimes.

Q. You are not working, you said, now, and you were not working at that time either, were you?

A. No, sir.

Q. Any other stores around Phillipsburg where you can stay from 2 o'clock to 6 o'clock? Any other stores like that around Phillipsburg?

A. Some places.

Q. You heard of this accident how soon after it occurred?

A. The next day in the paper was the only time I heard of it.

Q. What paper?

A. Express.

Q. Easton Express?

A. I think it was the Express.

Q. That had a long account of it?

A. I don't recall.

Q. It was a week or ten days after you heard that Mr. Duckworth's name was being connected with it?

A. I amagine it was.

Q. About that time Applegate spoke to you?

A. About that time, yes.

Q. He said to you, "Don't you remember that I was off that afternoon?" He said that, did he?

A. Yes, something on that order. I don't say they were his very words.

Q. He said, "Don't you remember, I was off that afternoon?"

A. Yes.

Q. You didn't remember until he suggested that to you?

A. I didn't remember that particular day, no.

Q. Did you remember until he suggested to you that afternoon he was off? I asked if you didn't remember?

A. I don't get the point, you mean ——

By the Court:

Q. He asked whether Mr. Applegate suggested to you that he was off that afternoon?

A. Yes.

By Mr. Gebhardt:

Q. You didn't remember until he suggested it to you?

A. I did remember that particular day, but I didn't remember what December 9th was.

Q. You had discussed about it?

A. Yes.

Q. With Applegate?

A. Yes.

Q. He was trying to make you remember that it was on the 9th he was off?

A. Yes, but he didn't have to try very hard.

Q. You didn't remember until he suggested it to you?

A. Didn't remember the day, do you mean?
Q. Yes.
A. I didn't remember the day, no.
Q. How many times have you been in that store since in the afternoon and stayed 3, 4 or 5 hours?
A. I could not say.
Q. How many times before that?
A. I could not say that.
Q. All the recollection you have about this particular December 9th had to be suggested to you before you could remember?
A. Yes, the day had to, yes.
Q. What part of the store were you in?
A. The front part.
Q. Where was Mr. Duckworth?
A. Waiting on trade.
Q. Waiting on trade. How far away from you?
A. According to where he was.
Q. That's what I am asking you?
A. He was not standing still. He was waiting on trade.
Q. Did you have your eye on him all the afternoon?
A. No, sir.
Q. What part of the time did you have your eye on him?
A. I didn't have my eye on him any time.

By the Court:

Q. Could he have gone out of the store without you seeing?
A. He could not have gone out the front way. I suppose he could have gone out the back.

By Mr. Gebhardt:

Q. He could have gone out the back way without your seeing him?
A. Yes.
Q. He could have been gone a half hour without your knowing it?
A. Yes.
Q. And even an hour without you knowing it?
A. I suppose.
By Mr. Gebhardt: That's all.

Re-direct.

By Mr. Gildea:

Q. Is your recollection of what transpired, as far as you know, and where you were on the afternoon of December 9, 1925, is it clear in your mind now, you are sure you are telling us the truth about the matter?

By Mr. Gebhardt: That's very leading.

By the Court: Of course, we have the right to assume that the witness is telling the truth until the contrary appears. You can reframe the question.

By Mr. Gildea:

Q. Is, or is it not, your recollection, as you have given it, of what transpired on December 9, 1925, as you have testified today, clear or not?
A. To the best of my knowledge.
Q. You think you are telling us the truth about it, don't you?
A. Yes.

HARRY D. HOLDEN, sworn for defendant.

Direct examination.

By Mr. Gildea:

Q. You live in Phillipsburg?
A. Yes.
Q. How long have you lived there?
A. 7 years, may be 8.
Q. Were you living there in the month of December, 1925?
A. Yes.
Q. Your business is that of a barber?
A. Yes.
Q. You have a shop on Main Street?
A. Yes.
Q. Anywhere near Mr. Duckworth's drug store?
A. Right straight across the street.
Q. Do you know Mr. Duckworth's automobile? Have you seen it?
A. Yes.
Q. Seen him driving it?
A. Yes.
Q. I am referring to the automobile he was driving in December, 1925?
A. Yes.
Q. Did he ever leave that automobile in front of your store?
A. Yes.
Q. Do you konw where that automobile was during any part of December 9, 1925, and if so, during what part of the day do you know where it was?
A. As far as I know, round 12 o'clock, I go to dinner, of course, his car was not there. When I

come back, quarter of one, the car was parked in front of my shop. He just accused me about parking my car in front of his store the Monday before, and I told him, I didn't tell him, I said to myself, I swore a little bit, he don't consider my place a business place.

By Mr. Gebhardt: Conversation, of course.

By the Court: Have you fixed the time?

Q. Can you fix the time when that occurred?
A. What occurred?
Q. What you have just been telling us about?
A. That occurred there, I was to dinner, of course, but I came back a quarter of one.
Q. Have you any recollection of this accident, Mr. Holden?
A. I don't know, but I heard about it.
Q. How soon after the accident did you hear?
A. A barber, you know, he gets news very quickly. People come into my shop. I guess a quarter after or half-past seven that evening.
Q. With regard to that accident, when did you have this trouble with Mr. Duckworth about parking his car?
A. The Monday before.

By Mr. Gildea:

Q. How long was Mr. Duckworth's car in front of your barber shop on the 9th of December, 1925, the day of the accident?
A. I looked at it all the afternoon.
Q. What time did you leave the shop?
A. I didn't leave the shop until anywheres from 8 to half-past in the evening.

Q. Was it there between 5 and 6?
A. Positive.
Q. Was it there until 8?
A. Yes.
Q. Until you left?
A. Yes.
Q. When, if at all, after this accident, did you hear that Mr. Duckworth's name had been mentioned in connection with it?
A. I heard it about, it had not been two weeks before, I heard a fellow state in my shop, he asked me if I heard he was accused about hitting that girl. I said no. He said Mr. Duckworth, and he didn't say Mr. Duckworth. He said it when he was looking at the car. I looked out to see, and the only car I saw was Mr. Duckworth's. Him and I had an argument, and that was all there was to it.
Q. You and he had an argument?
A. Yes.
Q. That was the Monday before ——

By the Court: He said someone came in and asked him if he knew he had been accused of running into this child.

By Mr. Gildea:

Q. Did you know then at the time you were having this argument with your customer, did you know then that Mr. Duckworth's car had been in front of your barber shop at the time of the accident?
A. Yes, sir.
Q. That's why you had the argument?
A. Yes.

Cross-examination.

By Mr. Gebhardt:

Q. Is it your custom to look out of the window all the time you are cutting people's hair?
A. No, sir.
Q. This particular afternoon you looked out of the window all afternoon?
A. Yes.
Q. Weren't you working?
A. No, sir.
Q. What were you doing?
A. Sitting there waiting for business.
Q. You didn't have a customer all the afternoon?
A. No, sir.
Q. On Wednesday afternoon?
A. No, sir.
Q. You know Mrs. Lott, Mr. Duckworth's clerk?
A. Yes. sir.
Q. You married her daughter, didn't you?
A. No, sir.
Q. Or some relation of her's?
A. No.
Q. No relation at all?
A. No.

By Mr. Gebhardt: We must have been misinformed.

Q. This was Wednesday, December 9th. How long was Mr. Duckworth's car parked there December 8th?
A. I can't tell you that, that was the day afterwards?
Q. The day afterwards?

A. The day before.

Q. Take the 7th. Do you know where it was parked on the 7th?

A. On the 7th it was parked right behind my car.

Q. In front of your car, in front of your store?

A. Right across the street, in front of his store.

Q. How do you come to remember December 7, 1925, his car was parked behind yours in front of your barber shop?

A. That was the evening we had the argument about my machine being in front of his store.

Q. Take the 6th. Do you remember where it was on the 6th?

A. The 6th was a Sunday.

Q. You didn't have any argument on the 9th, did you?

A. Nobody on the 9th but myself.

Q. How about the 10th?

A. The 10th I don't remember.

Q. You don't remember?

A. No, I didn't have no argument. I didn't have nobody to argue with. I said those things to myself.

Q. You do remember what occurred on the 9th of December, 1925, and you ask us to believe it?

A. I don't ask you to believe it. I am just telling you.

Q. You don't remember anything about the 10th of December, 1925?

A. 10th December, no.

Q. Because there's nothing to call it specially to your attention, so you would recall that particular day, is there?

A. No.

Q. You don't know whether the car was parked there, or not?

A. Not on the 10th.

Q. You don't remember anything about it, do you?

A. No.

Q. It was about two weeks after this accident when you first heard Mr. Duckworth's name connected with the accident, was it?

A. Yes.

Q. On the 9th you had no argument with Mr. Duckworth?

A. No, sir.

Q. What time did you go to supper that night?

A. I don't go to supper.

Q. Do you go without supper, or eat it in the shop?

A. I go without supper until I close up.

Q. Every day?

A. Every evening.

Q. Every evening?

A. Yes.

Q. Is there anything whatsoever that causes you to remember the 9th December any more that you would any other day?

A. The only thing I remember is a fellow came in about a quarter of 8 and asked me if I heard about the Lilly girl, and I said I didn't hear, and he told me about it. I was still sitting in the rocking chair there, and I was still looking out the window.

Q. What time did you get back to the shop that day?

A. 1.15.

Q. Where is the shop?

A. 399 South Main Street.

Q. That's a pretty active part of the business section of the city, isn't it?

A. Yes.

Q. People who shave a couple times a week usually get it done on Wednesday and Saturday?

A. Yes.

By the Court:

Q. Do you have daily customers?
A. Yes, but they come in the morning.

By Mr. Gebhardt:

Q. Wednesday is your busy day, isn't it?
A. Wednesday night.
Q. Wednesday and Saturday are busy days?
A. Wednesday morning and Wednesday evening.
Q. Did you have anycustomers after 6 o'clock?
A. That's my busiest hour, after 6.
Q. Did you have any on the 9th December after 6?
A. I positively did.
Q. How many?
A. I didn't count them.
Q. You do tell us that from 1.15 to 6 you had none at all?
A. I didn't have many up to about four o'clock. From then on I had one or two.
Q. Do you tell us that Mr. Duckworth could not have taken his car out at any time between 5 and 6 that night without your knowing it?
A. No, sir.

By the Court:

Q. Do you mean, yes, sir, or no?
A. He could have, yes, but I know he didn't.

By Mr. Gebhardt:

Q. He could have without your knowing it?
A. Yes.

Q. Is that correct?
A. Yes, but he can't open that door without I know.
Q. On top of that you say you know he didn't, is that correct?
A. Yes, I know he didn't.
Q. You want both of the answers to stand? He could have done it without your knowledge, but yet you know he didn't. Do you want both answers to stand, or don't you, yes or no?
A. It's immaterial to me.
Q. Do you want neither one of them to stand?
A. Yes.

By Mr. Gebhardt: Alright, that suits us very well, that's all, if you don't want either of them to stand.

Re-direct.

By Mr. Gildea:

Q. Did Mr. Duckworth take his car from the front of your shop between 5 and 6 on the 9th December, 1925?

By Mr. Gebhardt: Objected to. He has just said he doesn't know. It could have been taken without his knowledge.

By the Court: I will allow him to answer it.

By Mr. Gebhardt: I ask for an exception.

A. He did not.

By the Court:

Q. Are you in a position to know he didn't?
A. Yes.
Q. How?
A. Because I saw his wife going across there with his lunch.
Q. That was the afternoon of this accident?
A. That afternoon.
Q. At the time when she went across the street with the lunch, where was the car?
A. Right in front of my shop.
Q. You saw it?
A. Yes, sir.

Re-cross.

Q. What time did she get there with the lunch?
A. Between a quarter and half-past 5.
Q. That's the last you saw of the car when she brought the lunch?
A. No, when I locked my door at half-past 8 or quarter past 8 the car was there yet.
Q. You said a moment ago he could have taken the car between 5 and 6 without your knowing it?
A. I did say that, yes.

By the Court: The testimony will stand as recorded and the jury will pass upon the weight and credence to be given it.

REBUTTAL.

Daniel J. Lilly, sworn for defendant.

By Mr. Gebhardt:

Q. Were you present at a conference in the office of Prosecutor Smith, of Phillipsburg, at which Mr. McDevitt, who has testified in this case, was present and was interrogated by Mr. Smith?
A. I was.
Q. Will you please tell me whether or not in that case Mr. McDevitt stated to the Prosecutor he did not know whether this car that struck the child was an open car or a closed car.

By Mr. Gildea: I object to this testimony which is said to be for the purpose of impeaching the witness, upon the ground that the foundation was not properly laid.

By the Court: It was properly laid, because he asked the witness whether he had not said in Prosecutor Smith's office that he did not know whether it was an open car or a closed car.

By Mr. Gildea: You must say, didn't you say so and so, quoting it, and that was not done.

By the Court:

Q. It may go in, and you may have an exception.
A. I can't answer the question as it is asked there.

By Mr. Gebhardt: The question is whether or not on that occasion Mr. McDevitt said to the prosecutor in your presence that he did not know whether or not it was an open or closed car that struck this girl.

By Mr. Gildea: The same objection.

By the Court: Overruled, and you have the same exception.

A. He said he was not sure.

By Mr. Gebhardt:

Q. On the same occasion, at the same place, please tell me whether or not Mr. McDevitt stated to the Prosecutor that he did not know, or was not sure, whether or not the license plates of this car that struck the girl were New Jersey plates or Pennsylvania plates?

By Mr. Gildea: The same objection.

By the Court: Objection overruled and exception allowed.

A. He said that.

Cross-examination.

By Mr. Gildea:

Mr. Gildea: No questions.

Walter E. Liefert, sworn for plaintiff.

By Mr. Gebhardt:

Q. You know Mr. Lilly, Mr. Liefert?
A. Yes.
Q. Any relation in any way?
A. No.
Q. Do you recall seeing him shortly after this accident happened, in the hospital?
A. Yes.
Q. On that occasion, I don't want you to give the conversation, but state whether or not you had any conversation with Mr. Lilly about the accident?

By Mr. Gildea: Objected to, as irrelevant, immaterial and incompetent.

By the Court: Which Mr. Lilly, the plaintiff here?

By Mr. Gebhardt: The purpose is, of course, to lay the foundation for the further testimony of this witness, which will make it appear perfectly competent. I am trying to fix the time, how the witness recalls the time of the accident.

By Mr. Gildea: It is not proper rebuttal.

By Mr. Gebhardt: And the purpose of the testimony, I may say that so as to apprise the Court of what the purpose of it is, the purpose of it is to have this witness testify as to whether he saw this car earlier in the day, to rebut the defendant's testimony to the effect that this car was not away from

stances, either under the theory of failure to prove negligence, under the greater weight of the evidence, or of circumstances connecting the defendant with the accident. While I cannot anticipate what a jury may do, they must be the judges of the facts, which clearly present the question at issue in the case. The motion will be denied, and you may have an exception.

Friday, May 13, 1927:

(Mr. Gebhardt summed up for the plaintiff.)

(Mr. Gebhardt summed up for the plaintiff.)

CHARGE.

LAWRENCE, J.

Ladies and gentlemen of the jury: I desire to make one or two preliminary observations to you regarding consideration of this case, when you come to deliberate upon it, the first of which is that you will recall during the progress of the trial, at least in two instances, there was a repetition of a conversation alleged to have taken place between the plaintiff, Mr. Lilly, and the defendant, Mr. Duckworth, at the latter's home, or, subsequently, in his automobile; in which Lilly alleges that Mr. Duckworth referred to a certain amount of indifference, because of his carrying insurance on his automobile. That testimony was allowed to stand only because, in the opinion of the Court, it was entitled to go in with the other testimony in the case, for the purpose of allowing the jury to assess it in the sense of its being an admission of responsibility in connection with the question with which we are here concerned. Ordinarily, as I had occasion to say to you at the time, our appellate courts have held, and thereby charged the trial Judge with the duty of declaring a mistrial on any reference at all to insurance, for the reason that allowing it to creep in in ordinary circumstances would be calculated to prejudice the minds of the jury, and alienate them, as it were, against true consideration of the real facts of the case, with which, necessarily, you are concerned, and which, under your oaths, you must solely consider; so that it makes no difference whether Mr. Duckworth carried insurance or not. You, in no circumstances, can hold a man liable

unless you are satisfied under the rules of law that the Court will give you, and the evidence, and of the facts, as you find them, that he should be justly and honestly on the merits of the case so held liable; because if he is not so, then that is the end of the case. You should approach this courageously, without the slightest regard for sentimentality, in arriving at a just and honest verdict in this case. No matter what verdict may be returned, it cannot bring back to this father, or this family, this child who has been killed; and, therefore, we are concerned, not emotionally, not sentimentally, but as a matter of justice, in solving the problem in accordance with the evidence, and the rules of law that will be submitted.

It appears in the case that on the 9th of December, 1925, one of the children of Mr. Lilly, was about to cross a highway in Phillipsburg. That it was struck in such a manner as to justify a charge of negligence on the part of some person driving an automobile at an excessive rate of speed, such conduct, it is claimed, being an act of negligence on the part of such person. I may say that, under ordinary circumstances, this suit would not have been permitted, but for our statute, which is that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

The law provides that every action, proceeding, or claim brought, instituted or made under and by virtue of the remedy given by the act, the section of which I have just read to you, shall be brought, instituted, or made in the name of an administrator *ad prosequendum*—which means nothing more or less than an administrator specially appointed for the purpose of prosecuting the suit—of the decedent, whose death gives rise to the claim under the act, to which the section of the act I have just read, is a supplement. Again, it provides that the amount recovered in every such action shall be for the exclusive benefit of the next of kin—and I shall read it now as it is applicable to this case—to the next of kin of such deceased person, and shall be distributed to such next of kin in proportion provided by law, and the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injuries resulting from such death, to the next of kin; to which I may add that the father in his own right here claims that he is entitled to recover under the law for the loss of service of his child, to which he had a reasonable right of expectancy from the time the child became of sufficient age to render service until it reached its majority, or, as we say, emancipated, allowed to go out and make its own way, with no thought on the part of the parents of controlling its earnings; or, in the event that the father, and I may say mother, became later on, even after the child was of age, subject to the receipt of support and maintenance by reason of any impoverished condition in which they may at any time in the future find themselves. Therefore, this action is brought by reason of the law permitting it as I have indicated, and, therefore, as it states, it is based upon the proposition that this child, if it

had not been killed, would have been permitted to have recovered damages for the injuries suffered by it, in the event of their not having proved fatal. The result is that it becomes now an ordinary case for your investigation, as to whether or not two things have been proven to your satisfaction. The first, whether the driver of the offending car was negligent within the definition of the law. That's the first question for you to take up and consider, because if you find no negligence within the definition of the law, that would be the end of the case; and we are accustomed to say that negligence in the law is failure to observe for the protection of the interest of another person, that degree of care, precaution and vigilance which circumstances justly demand, whereby such other person suffers injury, and since it may appear in this case—whether or not it does I am unable to say, meaning thereby just what view you will take of it—I say whereas it may appear in the case that some person other than the owner of the car was driving it at the time, I will give you another definition of negligence, which is that it is either the omission to do something, which a reasonable person, guided by circumstances which ordinarily regulate the conduct of human affairs, would do; or the doing of something which a prudent and reasonable person would not do; but when negligence arises out of an act of commission or omission of one for whose conduct another is responsible, it must be with regard to some duty which the responsible person owed to the party injured.

It appears in the case that the child, with her sister and a boy of the neighborhood, was passing from one side of the street on which the two girls lived, to the opposite side; that it was necessary for them,

before crossing, to walk around the end of a car parked on the side of the street from which they were about to go into the highway. I take it that you may infer, as a question of fact, that the parked car was of ordinary width, and that a person driving an automobile and approaching the spot where the children then were could have seen both them and the parked car. There is no question involved in this case of contributory negligence, nor could there well be in view of the defense, and, therefore, I shall say nothing about the element of contributory negligence, which sometimes arises in cases of this character, for the very obvious reason that the defendant here denies all knowledge of this accident, insists that he was not driving a car on South Main Street at the time this child was struck, and in addition thereto, that his own car was not at that point at the time of this accident; so, therefore, the case in that regard is a very simple one. Obviously, if he should come in and say it was not only not my car, I was not driving the car which struck this child, but the child was guilty of contributory negligence, then you might readily say that the defense was inconsistent; so that the defendant comes here and plainly and emphatically denies that his car had anything to do with the accident, or that he personally had anything to do with it. I shall presently refer to other phases of the case which the Court deems it important for the jury to consider. The result is that your inquiry will be first, whether the car that struck this child was driven in such a negligent manner as to cause its death. Then you take up the second question, if you find that the child's death was due to negligence, within the definition, then you will consider the second question, was it the defendant's car that caused it? There you

have testimony wholly of a circumstantial charactor, and that phase of the case becomes peculiarly one for the jury to determine. The children was survived, at least one of them, and may be both, say that they saw a car at a point some 200 feet away, coming very rapidly; that is, they stood behind the parked car, that the child who was killed looked to the right and to the left, and almost at that instant the child was struck and knocked down, and that the car which struck her was going very fast. To visualize and reproduce the scene of the accident does not seem to be very difficult. It may be that if you attempt to re-picture this situation you will find that at the moment the little child leaned out, a car driven by someone came so close to the parked car as to strike the child in the head and cause a fracture, from which she died, because the evidence appears to be that the child was struck on the left side of the head, and that there the fracture was. This happened in a street where it may be said that certain traffic rules apply, such as the right of a pedestrian at that particular spot to cross under what is ordinarily called a right of way, and the duty being cast upon a person driving a motor vehicle on the highway to observe such right, and exercise the due and reasonable care that the immediate circumstances demanded. Therefore, it may be said, these children had the right of way, which every person driving an automobile should have observed. I may further add that a further provision of our Motor Vehicle Act limits the speed of motor vehicles on the highway in that location to twelve miles per hour; but I may say that I should add that our appellate courts have said this about the driving rule, that a violation thereof of itself is not necessarily evidence of negligence. The old

common law rule of negligence still applies, notwithstanding the provisions of our statute, and while violation of the rule is a circumstance for the jury to consider, unless it proved to have borne a casual relation between the accident and the negligence alleged, then it cannot be said that a mere violation of itself is exidence of negligence. In other words, the burden still rests on the plaintiff to prove, under the greater weight of the evidence, that the defendant charged was negligent within the definition of the law given you; so that there is something more necessary than to merely prove a person was not observing a traffic rule at the moment, and let it go at that. There must be shown that there was a direct relation between the violation of the traffic act and the act of negligence of which complaint is made. In other words, negligence it not alone caused by violation of the traffic rule. In these circumstances, you have a right to consider the conduct of the driver of the motor vehicle, whoever he may have been. I think it's fair to say that these children, under the evidence, apparently were standing where they had a right to be, and a person driving an automobile and coming towards them on the highway, was bound to exercise the care of a reasonable person, and have the car in such control as to prevent it from colliding with them, or striking them, and if you find that there was a failure to observe such due and reasonable care, you may say that the driver of the car that struck this child was negligent.

In the second place, you must ascertain whether it was the defendant who was driving the car at the time it was charged, or any of his employees, or a member of his family. If, after examining all of the testimony in the case, you are unable to say

whether or not it was the defendant, one of his employees, or a member of his family, driving the car that struck this child, or, indeed, his car, then I charge you you must find a verdict for the defendant—no cause of action. In other words, in cases of this character, which there is a sharp contradiction in the testimony, and the jury are bound to ascertain whether the plaintiff has satisfied it under the greater weight of the evidence of the negligence alleged, that you found the evidence equally balanced, so you are unable to say what is the fact, then, of course, you would be obliged to return a verdict of no cause of action, because you could then say that the plaintiff had not carried the burden of satisfying you, under the greater weight of the evidence, of the truth of the allegations in the complaint. I may say to you, however, that there is no evidence in this case that the defendant himself was driving his automobile as alleged, but it is purely a circumstantial matter. The only evidence in the case is that the children recognized a car with a broken window, which had been taped in the manner indicated. There is no evidence as to who was driving that car at the time, and, of course, you must arrive at the inference of guilt or innocence of this defendant of the negligence charged, upon such circumstances as would indubitably lead a reasonable mind to the conclusion that it was his car, in the first place, and in the second place, that he was driving it, or some employe, or member of his family. Otherwise, you could not hold this defendant. The mere happening of this accident, ladies and gentlemen, is not sufficient to hold this defendant guilty of negligence. The burden is on the plaintiff of showing by credible, legal evidence his guilt. Assume that this car of the defendant had gone to the garage

for the purpose of being greased, or oiled, and that some employee in the garage had taken the car and driven it through South Main Street, causing the accident with which we are here concerned, and that that was done without the knowledge or permission of the defendant, he would not be responsible in the circumstances, because that's the law. There's no evidence of that, but I am merely suggesting that to you in comment. You may accept it or not as you see fit. If you arrive at the conclusion it was Duckworth's car that struck this child, you still would have to have competent evidence in the case that it was either Duckworth, or some employee of his, with his knowledge, or some member of his family, who was driving the car at the time in the negligent manner complained of, and for that reason I have just offered the suggestion to you that if it was someone from the garage, unknown to him, who was driving the car at the time, Mr. Duckworth would not be liable. You are to observe the questions that are vital to the case in arriving at the solution of the preliminary questions. First, whether negligence has been shown, and whether the defendant has been shown to be responsible for it. If you should find either no negligence was shown, or if any, defendant was not responsible for it, then, as I say, that would be the end of the case, and your duty would be to return a verdict of no cause of action. If on the other hand you find under all the evidence in the case that it was the defendant's car that struck this child, that the driver, whoever he may have been, was negligent within the definition of the law, that Mr. Duckworth, the defendant, was responsible for the driving of this car, either by himself, or through one of his employees, or a member of his family, then you should pass to the ques-

tion of damages, but not until then; and you are to observe that the law lays down the rule that the amount to be recovered in such action shall be for the exclusive benefit of the next of kin; also, in this particular case, the father for the alleged loss of service which he might in the future suffer by reason of the death of his daughter. That rule in the law, however, has been interpreted to mean that so far as his right of recovery is concerned, it must be in behalf of those who had a reasonable expectancy of pecuniary advantage to have been derived by them had the child continued to live. Our courts say that in such a suit, the plaintiff is entitled to recover a capital fund (so to speak,) which shall represent the present value of the pecuniary loss which will fall upon the next of kin on account of the premature taking off of the interstate, namely, this child. That fund is to be ascertained by taking into account all the possibilities. The child might have died by the course of nature shortly after the accident. She may, had she lived, suffered financial reverses. (I am giving you this just as the courts have laid it down. Obviously some of it cannot apply to the child, who was of the tender age of seven years. However, I am giving it to you as a whole.) The father in this case, or next of kin, may have died before the child. Indeed, the child, in the due course of advancing years may have married. She might have left home through what we call emancipation, earned her own living, with no thought on the part of the parents of taking control of the wages she earned. You are to consider all of the probabilities in that respect, coupled with the fact that the father and mother, in the course of advancing years, might have become dependent upon this child as it grew up, and was able to earn and

therefore support, in a compulsory sense under the law, her parents. So that all the reasonable probabilities you must take into consideration. It does appear that this child was apparently normal, in good health, and had a reasonable expectancy of living, shall we say, the Biblical period of three score years and ten, qualified, of course, by the not unreasonable expectancy of leaving this home, and the other probabilities that I have just given you. You will have that all in mind. That makes it very difficult for the jury to know what that really means, and yet I am giving the rule to you as our appellate courts have laid it down. In one of our cases it is stated that it is almost impossible to take all of these considerations under advisement, and then to say, now, this sum represents what should be returned as an award under the law. Nevertheless, it's the function of the jury to pass upon the question of damages, and they must accept the rule of law given. In addition to that, I may say the next of kin may have died. There might have been no question of dependency, or reasonable expectation of pecuniary advantage between the next of kin and this child; but the courts say this, that nothing is to be added for sympathy, or wounded feelings, or anything else, which cannot be measured by money and satified by a pecuniary recompense. For that reason I said to you at the beginning, that you are to ignore the emotional side of this case. It's very easy to reason the loss of this child's life, which, in the circumstances, undoubtedly was inexcusable on the part of some person driving an automobile at that time. There's no question about that, but here we are dealing with a cold proposition of law, the ascertaining of liability on the part of the person accused here, and if you are to render a verdict in

accordance with the law and under your oaths, you must observe the rules given you, and eliminate all question of emotion, sentimentality, and deal with it just as the law expects you to.

In addition to the sum which would be returned under the rule given you, to which I shall refer as the capital fund rule, the father in this case would be entitled to recover a sum which will reimburse him for the loss of service of this child during its minority, and indeed, after it reached its majority, had it lived; in the event of he and his wife becoming dependent in the manner hereinbefore indicated, because it is the law that children are obliged to provide for and support their parents in the event of their becoming necessitous. That is the law, so that you have a right to consider what loss this father has suffered by reason of the death of his child, by reason of his being deprived of the reasonable expectancy of pecuniary advantage in the manner indicated. I think I have said enough to you about the law in this matter, ladies and gentlemen, to enable you to arrive at a just verdict in this case in accordance therewith. You will bear in mind your first inquiry will be, was this child killed by an automobile due to the negligence of some person driving it, and in the second place, was that person this defendant, one of his employees, or a member of his family? As you resolve this question, either for or against him, then you would take up, and only then, the question of damages, because if you decide those questions in favor of the defendant, that's the end of the case. If you decide them against him, then you would pass to the question of damages, and solve the problems presented to you in accordance with the law given you.

I am requested by counsel for the plaintiff to charge you that if you find it was the defendant's car that caused the accident, then there is raised a presumption of fact, which may be rebutted, that such automobile was at the time in possession of the defendant, if not in person there, his servant or agent, and that such servant or agent was acting with the knowledge and consent of his employer. I think I charged you that already. If not, I so charge you, but you will understand that in so charging, I am expressing no opinion one way or the other about the liability in this case.

By Mr. Gildea: I take exception to what your Honor said to the jury about permitting the testimony regarding the defendant's statement that he was insured to go to the jury, on the ground that it might be taken as an admission of liability.

I take exception to your Honor's leaving to the jury whether or not this car was driven by an employee of the defendant, or a member of his family, on the ground that there is no evidence that any such person was driving the car from which the jury could infer that.

I also take exception to your Honor's charge to the jury that in addition to the damages suffered by the next of kin as mentioned in the statute, the father would be entitled to recover an additional sum for loss of the child's services during minority, and until after minority.

By Mr. Gebhardt: I take exception to that part of your Honor's charge in which it was said, if I understood it correctly, in referring to proof of negligence, it must appear by the great weight of the evidence, my point being that it should have

been, by the greater weight of the evidence, that is if I understood your Honor correctly.

Also to your Honor's reference to the possibility that someone from the garage may have taken the car out in town, my point being that there is no evidence offered to that effect in this case.

Also to that part of your Honor's charge in which your Honor said that there would have to be competent evidence in the case that either Duckworth, or his employee, with his knowledge or consent, or a member of his family, was driving the car, my point being that we are also entitled, in that case, to have the benefit of presumption of the fact, which your Honor later on charges.

By the Court: As the result of certain suggestions made by counsel, I desire to say to you that insofar as the recovery of damages is concerned, you will understand that what I intended to say is that the father is entitled in his own right to no greater sum which, under the ruling, he would reasonably expect to be of pecuniary advantage had the child continued to live, and on that basis he has no greater right to recover than the next of kin in that respect. In other words, the same rule applies to both.

Wherever I used in the charge "great weight of the evidence," if I did, you will understand that the plaintiff carries the burden of proving the allegation of negligence by the greater weight of the evidence, and if any of you have it in mind that I used the words "great weight of the evidence" in any aspect of my charge, whatever it may have been, you will understand that I intended it must be by the greater weight of the evidence. That's the answer to that exception.

By Mr. Gebhardt: I also ask exception to your Honor's refusal to charge my requests.

PLAINTIFF'S REQUESTS TO CHARGE.

1. It was the duty of the driver of the car to use reasonable care in the operation of the automobile, both as to the speed of the automobile and in keeping a lookout for other people on the same street, that is, such care as a reasonably prudent person would exercise under these circumstances, and failure so to do would be negligence on the part of the driver of the car.

2. It was the duty of the driver of the car to give to the deceased girl such warning of the approach of the automobile, if any, as a reasonably prudent person would have done under the same circumstances, and a failure so to do would be negligence on the part of the driver of the car.

3. The statutes of this State contain the following provisions:

Every motor vehicle must be equipped with a horn or signallnig device, and the operator of the same shall give reasonable warning of his approach whenever necessary to insure the safety of other users of the highway, and before passing any vehicle he may overtake, or pedestrian using any part of the highway other than the sidewalk, also at curves and intersecting highways where the view of approaching vehicles is obscured; but the horn, bell, or other signalling devices shall not be sounded unnecessarily.

In places where the houses are on the average less than one hundred feet apart, pedestrians shall have the right-of-way over vehicles at any street crossing. Cum. Sup. 2 Comp. Stat., page 3065, 1916, P. L., page 49.

The following rates of speed may be maintained, but shall not be exceeded, upon any public street, public road or 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 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. P. L. 1921, page 668.

If you find there was a failure on the part of the driver of the car to obey any of these statutes, such violation is a circumstance to be considered in deciding whether or not the driver of the car exercised reasonable care. Chiapparine v. P. S. Ry. Co., 91 N. J. L, page 581 at page 584; also Brockstedy v. Meltzer, 111 At. 812 (N. J. E. and A.).

4. Our Traffic Act (Pamph. L. 1916, page 49, para. 12) provides in effect, that in places where the houses are on the average less than one hundred feet apart, pedestrians shall have the right-of-way over vehicles at any street crossing, in the absence of any municipal regulation relating to such crossing. Thereunder, when a pedestrian and an automobile, moving in different directions, approach such a crossing at the same time or in such manner that if both continue their respective courses there is danger of collision, then the pedestrian, having been accorded the preference by the statute, is entitled to first use the crossing, and it is the duty of the

driver of the automobile to stop or to so reduce speed as to give such pedestrian a reasonable opportunity to pass in safety, and to that end to have such automobile under such control as to enable him to do so. Venghis v. Nathanson, 3 Adv. Rep. 183.

5. The deceased girl in this case had an equal right with the driver of the car on the street where the accident occurred, and had a right to the use of the street equal to that of the driver of the car.

6. You cannot find that the deceased girl in this case, who was a girl only about seven years of age, was guilty of contributory negligence, unless you are satisfied by a preponderance of the evidence of two things, namely (1) That the deceased girl had reached the age of discretion, that is, that she was of sufficient age and discretion to be capable of caring for her own safety; and also (2) that the plaintiff failed to use that degree of care and caution as would ordinarily be used by a girl of similar age, judgment and experience.

Justice Trenchard speaking for the Court of Errors and Appeals of our State in the case of David v. W. J. & S. R. R. Co., 84 N. J. L. p. 685, at p. 687 said: The degree of care required of such a child is such as is usually exercised by persons of similar age, judgment and experience. Traction Company v. Scott, *supra.* The reason for the rule is this: The conduct of a child should not be measured by the standard of care applied to an adult, because the immaturity of youth ordinarily embraces not only imperfect knowledge of natural facts and laws and of the proper relation between cause and effect, but when possessed of these elements necessary to the exercise of reasonable care, it still

lacks the discretion, thoughtfulness and judgment presumed to be an attribute of the ordniary prudent adult, and which may be said to come only with experience. Thoughtfulness, impulsiveness and indifference to all but patent and imminent dangers are natural traits of childhood, and must be taken into account when we come to classify the conduct of the child. Mann v. Missouri, etc., Ry. Co., 123 Mo. App. 436.

7. If you come to the question of damages, the plaintiff in this case is entitled to recover a capital fund which shall represent the present value of all the pecuniary loss which will fall upon the father and the mother and the brother and the sister of the deceased by the premature taking off of this deceased girl. Hackey v. Del. and Atl. Tel. Co., 69 N. J. L. 335 at p. 337. You may include as a part of this capital fund such damages as would compensate the father for the reasonable expectation of pecuniary benefit from the deceased during the period of his minority, when she owed her services to her father whenever he demanded it, and thereafter, when she was of age, for the prospective deprivation of such contributions as she might thereafter make to the support of the father or the mother, or both of them, either voluntarily or under the compulsion of the law in case either or both became in need. Graham v. Cons. Tract. Co., 64 N. J. L. 10 at p. 15. Morhart v. North Jersey St. Ry. Co., 64 N. J. L. 236 at p. 237. You may also include as a part of this capital fund such damages as would compensate the brother and sister of the deceased for the deprivation of a reasonable expectation of a pecuniary advantage or benefit which would have resulted by the continuance of the life of the deceased. Paulmier v. Erie R. R. Co., 34 N. J. L. 141, at p. 158. Rowe v. N. Y. and N. J. Tel. Co., 66 N. J. L. 19; Rafferty v. Erie R. R. Co., 66 N. J. L. 444 at p. 450. Maher v. Magnus Co., Inc., 1 Misc. Rep. p. 469. 1 Misc. Rep. 549.

8. The father of this deceased girl was legally entitled to all her wages at any time he might demand them until she became twenty-one years of age.

DEFENDANT'S REQUEST TO CHARGE.

I have had occasion in this case to instruct you to disregard certain references to insurance. I now call your attention to the absence of any testimony as to conditions, or limitations, of the policy of insurance, if there were any, which might relieve the insurance company from liability. There may have been provision as to the time within which the insured was to notify the company of an accident, a failure to comply with which would relieve it from responsibility. The present action is against F. Marion Duckworth, and if a verdict in favor of the plaintiff is returned by you, it must be against him, and him only, and should an execution be obtained to collect such a judgment, the levy must be made upon the defendant's property. If the defendant paid a judgment returned by you against him, he might sue the insurance company, if he is insured, but his right to recovery from the company would depend upon the conditions of his policy, assuming again that he had one, and the company could offer in defense testimony as to any failure to perform his obligations toward it.

NOTICE OF APPEAL.

WARREN COUNTY CIRCUIT COURT.

PHILLIP J. LILLY, Administrator *ad prosequendum* of IRENE M. LILLY, deceased, *Plaintiff*, v. F. MARION DUCKWORTH, *Defendant.*	Action at Law. Notice of Appeal.

To William C. Gebhardt & Son, Esquires, Attorneys for Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause in favor of the plaintiff.

EDWARD L. KATZENBACH,
Attorney for Defendant.

Dated, May 19, 1927.

[ENDORSED]

Service of the within Notice of Appeal is hereby acknowledged this 20th day of May, 1927.

William C. Gebhardt & Son,
Attorneys for Plaintiff.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PHILLIP J. LILLY, Administrator *ad prosequendum* of IRENE M. LILLY, deceased, *Plaintiff-Respondent*, v. F. MARION DUCKWORTH, *Defendant-Appellant.*	On Appeal. Grounds of Appeal.

The defendant-appellant, F. Marion Duckworth, assigns the following grounds of appeal from the judgment of the Warren County Circuit Court in favor of the plaintiff in the above case:

1. The trial Court erred in denying the defendant's motion for the direction of a verdict in his favor.

2. The trial Court erred in charging the jury as follows:

> "I desire to make one or two preliminary observations to you regarding consideration of this case, when you come to deliberate upon it, the first of which is that you will recall during the progress of the trial, at least in two in-

is raised a presumption of fact, which may be rebutted, that such automobile was at the time in possession of the defendant, if not in person there, his servant or agent, and that such servant or agent was acting with the knowledge and consent of his employer. I think I charged you that already. If not, I so charge you, but you will understand that in so charging, I am expressing no opinion one way or the other about the liability in this case."

Dated, August 1, 1927.

EDWARD L. KATZENBACH,
Attorney for Defendant-Appellant.

[ENDORSED]

Service of the within Grounds of Appeal as within time is hereby acknowledged this 8th day of August, 1927.

William C. Gebhardt & Son,
Attorneys for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

PHILLIP J. LILLY, Administrator ad prosequendum of Irene M. Lilly, deceased,
Plaintiff-Respondent,

vs.

F. MARION DUCKWORTH,
Defendant-Appellant.

} ON APPEAL.

BRIEF FOR APPELLANT

This action was brought in the Warren County Circuit Court by Phillip J. Lilly, as administrator ad prosequendum of his daughter, Irene M. Lilly, to recover damages for her death. Irene M. Lilly, who was about seven years and seven months of age on December 9, 1925, was killed on that day on South Main Street, in Phillipsburg, New Jersey. The driver of the automobile which struck the child did not stop. The plaintiff contended that this automobile belonged to F. Marion Duckworth, the defendant, who for fifty-five years had been a resident of Phillipsburg, and who had for many years been the owner of the largest drug store there. The defendant denied that it was his automobile that killed the child, and the issue thus raised was submitted to the jury who gave a verdict in favor of the plaintiff for $3,000.00. From the judgment entered upon this verdict the defendant has appealed.

QUESTIONS INVOLVED

The three grounds of appeal may be briefly stated as follows:

1. The trial Court should have directed a verdict for the defendant.

2. The trial Judge in his charge treated as an admission of responsibility a certain statement alleged to have been made by the defendant concerning insurance upon his automobile.

3. The trial Court erred in charging the jury that the defendant was liable if some member of his family or some employee of his was driving his car and negligently caused the death of plaintiff's intestate.

STATEMENT OF FACTS

In his attempt to show that it was the defendant's automobile which struck his daughter, the plaintiff testified himself and produced as witnesses another daughter, Helen Lilly, thirteen years of age, who saw the automobile involved in the accident; a boy, Wilbur Yerane, fourteen years of age, who was with the Lilly children at the time of the accident; William F. Lilly, a brother of the plaintiff who claimed to have been on Main Street about five blocks from the accident at the time it occurred; Thomas Edward Spencer, who saw a car near the scene of the accident with a taped window (the defendant's car had pieces of paper tape on a cracked window to hold the pieces of glass together); William H. Stehlin, a member of the Phillipsburg Police Department, who was with Helen Lilly and Wilbur Yerane when they pointed out the defendant's car as the one which figured in the accident; Owen George Sandt, Jr., who went with

the plaintiff to interview the defendant; Julius Vargo, who merely picked the child up and did not see the accident nor the car which struck her; Albert M. Reading, an employee of the plaintiff's counsel, who testified about searching for police records.

Helen Lilly testified that at the time of the accident she and her deceased sister, Irene M. Lilly, and a boy named Wilbur Yerane were going to a garage to see her father, as the children were carrying papers and her father always took them around with the papers. She lived on the right hand side of South Main Street looking from Phillipsburg in the direction of Alpha, or eastwardly, and at the intersection of South Main Street with Mill Street. The accident happened near the intersection as they were crossing Main Street from south to north (p. 16). There was an automobile standing on the south side of the road and the children were standing back of this machine to the west of it. They saw an automobile coming east rapidly (pp. 17, 18). Irene was standing near the left rear mud guard of the parked automobile (p. 19) and stuck her head out beyond the automobile as she looked down the road toward the east (pp. 20, 21). The car that struck her did not stop (p. 22). The witness noticed that the car that struck her sister had "something taped at the side of the window." She did not notice which window. It was shaped like a Christmas tree (p. 23). She said that she saw the same car again after the accident in front of "Duckworth's Drug Store." She saw it there the next day when she and Wilbur Yerane were taken around the block by a police officer to try and find the car (p. 24). The car she saw in front of Duckworth's

was the car that struck her sister. She described the car as a closed car, having four windows, two on each side, dark blue in color. She did not know the make. She pointed out the car to her father after the accident. The accident happened at about half past five in the afternoon (December 9, 1925). There were no lights on the car which struck her sister (p. 25), and on cross examination she said she did not know whether the street lights were lighted or not at the time of the accident. There was no light on the corner where the accident happened (p. 26). It was dusk at the time, just getting dark. The automobile parked on the south side of the road had no light on it. This car was parked right in front of her house. She was sure that it was as late as 5:30 (p. 27). When her sister was struck the witness was standing behind her and between the parked car and the boy who was with them. The boy was between her and the approaching automobile which she first saw some little distance up the street (p. 28). She did not think her sister was far enough out in the road to be struck. She first saw the automobile at Purcell's Corner, and then again when it was pretty near to the children (p. 29). Her sister looked in the direction of the approaching automobile before she was struck (p. 30). She said again she did not know which window had tape or paper on it. She did not know whether it was the right or left or front or back. The car which she identified the next day had tape on the left front window (p. 31). She saw the automobile twice before the accident, once down at Purcell's Corner and at another time when it was about the length of the court room from her sister (p. 32). She did not see the car strike her

sister, and she did not see the tape on the glass until the second time she looked at the car (p. 34). Her sister was waiting for the machine to pass (p. 35).

Wilbur Yerane testified that he lived on Main Street near the place where the accident occurred. The accident occurred around half past five in the afternoon. He was going to get a paper. He came out of the Lillys' house and was going across the street (p. 37). The accident happened at the corner of Mill and Main Streets. He was standing by the spare tire in back of the parked automobile, Irene Lilly was standing at the left rear mud guard, and her sister was beside him. He saw the approaching car before the accident (p. 38). He saw it down at Purcell's Corner. It was coming pretty fast. Irene Lilly was standing still when she was struck, looking towards Alpha, or eastwardly (p. 39). The automobile which struck the girl was a closed car, having two windows on each side, and dark blue in color, but the witness did not know the make. He said the front window on the left was taped to look like a Christmas tree. The automobile did not stop after it struck the girl (p. 40). He saw somebody look out of the back window of the automobile, but it did not stop. There were no other cars going up and down Main Street at the time. The next day after the accident he said he saw the same automobile in front of Duckworth's Drug Store. He was then with Mr. Stehlin, the police officer, and Helen Lilly (p. 41). He described the car which he saw in front of Duckworth's Drug Store (p. 42). On cross examination he said that the car which he saw standing in front of Duckworth's Drug Store had a New Jersey license, but he did not know what kind of license

the car that struck the girl had. He saw the automobile that struck the child once before the accident (p. 43). It was then at Purcell's store. He did not see it after that until it had struck the girl. He didn't see it strike the Lilly girl. He did not see the accident (p. 44). After it passed the place of the accident it slowed down. It was then that he noticed the tape. He didn't notice the tape until after the automobile had slowed down after striking the girl. He looked through the back window of the automobile and saw the tape on the front left hand window. He could see through the people in the car (p. 45). He talked to Mr. Lilly about the accident twice after it had occurred (p. 46). The automobile was nearly a block from Mill Street when it started to slow down (p. 47).

William F. Lilly, a brother of the plaintiff, testified that he believed he was on Main Street at the time the accident occurred, between Mill Street and Easton. He was at Jefferson and Main Streets at about 5:30, that is about five blocks from the place of the accident, toward Easton (p. 48). He was familiar with the defendant's automobile and had seen him driving it three or four times every day. He said that he crossed in front of this automobile at Main and Jefferson Streets a few minutes before 5:30 on the day of the accident. He said he knew the car by the tape on the window (p. 49). This tape was on the left front window and resembled a pyramid. The tape was not white. It was straw color. He did not see who was driving the car but it was a man and there was another man sitting in the car. He didn't know who they were. Since the accident he had seen Mr. Duckworth in the car at different times, passing up Main Street, and he

had seen it standing in front of the drug store (p. 50). On cross examination he said that it was around 5:30 in the afternoon when he saw the car, that it was not light, it was not dark, just dusk. He gave the day as the 9th of December, 1925. He did not know whether the headlights on the automobile were lighted when he saw it. He does not know whether lights were lighted on other automobiles that he saw at that time (p. 51). The only way that the witness could distinguish the automobile as that of the defendant was from the tape which he saw on the window. The witness passed from the north side of Main Street to the south side in front of the automobile which he described. It was one hundred feet up the street when he crossed the street (p. 53). He looked at the machine after he crossed the street when it was directly out in the street from him. (He was then to the right of the automobile.) He had seen Mr. Duckworth many times before the accident and knew him well by sight. He did not notice who was driving the automobile. There were two men in it (p. 54). He heard of the accident at 7:00 o'clock on the day it happened (p. 55).

The plaintiff testified that he took the license number of an automobile pointed out to him by his daughter. It was 1925 New Jersey license 223037. The automobile was standing one-half block from Mr. Duckworth's drug store. The plaintiff called upon Mr. Duckworth on December 28, 1925, in company with his friend Mr. Sandt (p. 57). He testified concerning a conversation with the defendant in which he said the defendant "got all worked up" when the plaintiff accused him of owning the machine which killed his daughter (p. 58). The

defendant asked him why his car was identified as the car involved and the plaintiff told him it was because his daughter had seen adhesive tape on the left side window (p. 60). The defendant then told the plaintiff that his machine was not away from the front of his drug store from 11:30 in the morning until 11:30 at night on the day of the accident. That there was no one working that day but himself, and that there was only one key to the machine which was in the defendant's pocket. At first he thought his daughter might have had the machine and then he remembered that she was not home from college. The plaintiff then said that the defendant said, "Well, I don't care, my car is insured big, I don't care" (p. 61). He said that the defendant also said he had thought the garage man might have taken his car to change the oil but that he had been up there and found that the car was not there on that day. The defendant then drove the plaintiff and his friend down as far as S———— Street and let them out. He did not converse with the defendant after that (p. 62).

Thomas Edward Spencer testified that he reached the scene of the accident above five minutes after it occurred (p. 62). He was approaching the place of the accident from the east and saw an "unusual" car pass. He was attracted by the speed of the car and something on the window on the left hand side which looked like broken glass taped together. It looked something like a Christmas tree (p. 63). The car was traveling about 35 miles an hour. He could not swear that he had ever seen the car before although he had seen a car with something on the window in front of Mr. Duckworth's drug store. The car he saw on the night of the accident was a closed car and was of a dark color (p. 64).

The plaintiff offered in evidence the defendant's interrogatories showing that during the month of December, 1925, the defendant owned a Buick automobile bearing New Jersey automobile license No. 223037.

William H. Stehlin, called by the plaintiff, testified that in December, 1925, he was a policeman employed by the Town of Phillipsburg. He took Helen Lilly and Wilbur Yerane up Main Street to try and find the automobile in question (p. 67). They started near the scene of the accident and went up Main Street toward Easton and then back down Main Street (p. 67). On the journey the children pointed out "this car with the tape on it." It was a Buick coupe with a New Jersey license. He got the number later but does not know what it was. It was a broken window fixed up with adhesive tape or paper. It was the left front window. The strips were about twelve or fifteen inches at the bottom running into nothing at the top, and in a triangular shape. The police records had been lost and could not be found (p. 69). The officer had been sent by his chief out on Main Street to locate a car that had a broken window in it (p. 70).

Owen George Sandt, Jr., sworn for the plaintiff, testified that he went with Mr. Lilly at his request to interview the defendant. He testified that Mr. Lilly said to Mr. Duckworth, "Do you know who I am," and when the defendant said "No," Lilly said "I am the father of the little girl your machine hit up on South Main Street." He testified that then the defendant became nervous and told them to go outside and wait. The defendant asked why

his machine was picked out and Lilly said, "Your car is identified by the tape on the window." The defendant then said, "My car is not the only car taped up." Lilly then said "That is the only car I have ever seen taped up like that, shaped like a Christmas tree" (p. 72). The witness said the defendant, after saying he was the only one in the drug store and could not leave, and that his daughter was at college, and that he had been to the garage to see if his car had been there on that day, then said, "My car is fully insured, I don't care." This witness had known the plaintiff for eight years, Lilly being his wife's uncle.

Julius Vargo, testified for the plaintiff, but only to the effect that he had picked up the injured child and taken her to the hospital. He did not see the accident nor the car which was involved (p. 76).

Albert M. Reading, an employee of the plaintiff's counsel, testified that he had made several unsuccessful efforts to locate the Phillipsburg police records of the accident (p. 78).

The defendant in addition to his own testimony offered the testimony of several other witnesses as to his whereabouts and that of his car at the time of the accident.

James A. McDevitt testified for the defendant that he was walking along Main Street near the place of the accident and while he did not see the automobile strike the girl he did see an automobile pass just before he heard a little girl "holler," and he immediately went across the street and saw the girl lying under the parked automobile. The car that passed was a roadster and bore Pennsylvania license tags (p. 81). No other cars passed in that direction after the car mentioned by the witness

until he picked up the child (p. 85). The automobile was going at a high rate of speed (p. 87). The witness thinks 35 or 40 miles an hour is a high rate of speed (p. 88).

The defendant himself testified that he lived in Phillipsburg for about fifty-five years and for forty years had been in the drug business, from clerk to proprietor. That on December 9, 1925, he owned a Buick coupe automobile and that the glass in the left hand front door was broken and had been bound with brown paper tape until he could get the window fixed (p. 91). On December 9, 1925, between 5:00 and 6:00 in the afternoon his car was parked in front of his store but on the opposite side of the street and in front of Holden's Barber Shop on Main Street in Phillipsburg. He left it there between 12:00 and 12:30 on the day in question and it was there until after 11:00 at night. It was locked and the key was in his pocket. The key was on the ring upon which he kept keys which he used in his store several times a day. He was in the store from the time he left his automobile across the street until he got it that night (p. 92). In his store he employed a porter, two men clerks and a lady clerk. December 9, 1925, was Wednesday. His head clerk was off all that day, and his prescription man was off all afternoon and evening. The lady clerk, Mrs. Lott, leaves the store at 5:00 o'clock until 6:00, although she did not leave that evening until five or ten minutes after 5:00 and she was back at 6:00 o'clock. His supper was brought down to him by his wife (p. 93). He read of the accident to the Lilly girl in the newspaper the day after it happened. About a week after the accident he was told of a report that it was his car that struck

the child. He received a call from Mr. Lilly but was not nervous when Mr. Lilly spoke to him about the matter (p. 94). He did not see how anybody could have his car because it was locked (p. 95). His wife does not drive, although his daughter does drive, but his daughter was then at college in Poughkeepsie (p. 96). None of his employees drive the car. His car had not been in the section where the accident occurred since around Thanksgiving Day when his daughter was home for a vacation and used the car to visit some friends in that neighborhood (pp. 97, 98). The only person who ever drove his car aside from himself was his daughter, except that the garage man where he gets his car oiled sometimes drove it up to him from the garage (p. 101). His daughter was in Poughkeepsie on the day of the accident. He went to the garage to verify his recollection that the car had not been there on the day of the accident (p. 102). When his car is oiled he usually takes it to the garage and one of the men from the garage returns it to him when it is finished (p. 103). When the defendant first heard his name mentioned in connection with the accident he thought back to determine where his car had been at the time of the accident (p. 105).

Catherine Lott, sworn for the defendant, testified that she was employed by the defendant and was employed by him in the month of December, 1925 (p. 107). She said the only persons working in the store in the afternoon on December 9, 1925, were the defendant, the witness and Mr. Gishel, the porter who cleaned up and swept the store. No other clerk was working that afternoon. The defendant was the only one in the store that afternoon who could put up prescriptions. The defendant

was in the store that afternoon and was there when the witness left at ten minutes after 5:00 (p. 108). He was still in the store when she got back at 6:00 o'clock and was still there when she left at 9:00 o'clock in the evening. A week and a half or two weeks after the accident Mr. Applegate, one of the clerks, asked her if she was there on the day of the accident and told her that Mr. Duckworth's car had been mentioned in connection with the accident (p. 109).

The defendant's wife testified that she recalled during the month of December, 1925, taking her husband's supper down to him on Wednesdays because he was the only one there who could do prescription work, and he could not leave. She would leave home between ten minutes after five and half past five and would get to the store somewhere around half past five. She took her husband's supper to him on December 9, 1925 (p. 111). She got to the store about 5:30 and her husband was then there. Two or three or four weeks after the accident she heard her husband's name mentioned in connection with it, and she then reflected back and knew that on that afternoon she had taken her husband's supper to him (p. 112).

Jacob H. Gishel, the defendant's porter, testified that he was so employed by the defendant at the time of the accident; that he worked in the store that day from 8:00 in the morning until 6:00 at night and was there continuously from 5:00 to 6:00. Mr. Duckworth was also there during that time. The only persons working in the store were Mr. Duckworth, Mrs. Lott and the witness (p. 118). The defendant's automobile was there all afternoon and the witness saw it between 5:00 and 6:00. He

did not read of the accident in the newspapers as he does not read newspapers, and he did not know of the accident until Mr. Applegate mentioned it to him (p. 119). He saw the automobile across the street every time he looked out of the window and he looked at least five times (p. 122).

Howard Applegate testified for the defendant that during the month of December, 1925, he worked for the defendant and that he heard of the accident the day after it occurred. He did not work on the day of the accident because it was Wednesday. He very seldom worked on Wednesday. It was his day off (p. 127). Mr. Hoyt, the other clerk, also had Wednesday afternoons and evenings off, and the defendant remained to put up prescriptions. The witness, Mr. Hoyt and Mr. Duckworth were the only ones who could put up prescriptions (p. 128). The witness heard that someone was trying to accuse the defendant of being responsible for the accident about ten days after it occurred (p. 129).

Aloysius J. Dwyer, sworn for the defendant, testified that he had known the defendant for a long time, and that he was in the defendant's store from about half past two to about ten minutes of six on the day of the accident (p. 130). He recalls the day of the accident because Mr. Applegate later spoke to him about Mr. Duckworth being connected with the case. Mr. Duckworth was in the store all the time the witness was there (p. 131). He saw Mr. Duckworth's car across the street in front of the barber shop when the witness left the store. The witness was not working at the time and at the time of the trial he was not working, but was under the care of a physician (p. 132). It was about

a week after the accident when Mr. Applegate spoke to him about Mr. Duckworth's name being mentioned in connection with it (p. 133). The witness frequently stops in the drug store to visit (p. 134).

Harry D. Holden, sworn for the defendant, testified that he lived in Phillipsburg for seven or eight years and conducted a barber shop on Main Street across the street from the defendant's drug store (p. 138). The defendant's automobile was parked in front of his barber shop when the witness came back from lunch at a quarter of one on December 9, 1925. The defendant had spoken to him about parking his (the witness's) car in front of the drug store and when the witness saw the defendant's car in front of his barber shop he said "I said to myself, I swore a little bit, he don't consider my place a business place." The car was there all afternoon (p. 139). The witness was positive that it was there between 5:00 and 6:00 and until he left his shop at 8:00 o'clock. He had an argument with someone who mentioned Mr. Duckworth's name in connection with the accident because he knew Mr. Duckworth's car was in front of his shop when the accident occurred (p. 140). He heard of the accident to the Lilly girl on the day it occurred (p. 143). He knows that Mr. Duckworth did not move the car while he (the witness) was in his shop on the day in question (p. 144). He reiterated that Mr. Duckworth, the defendant, did not take his car from in front of the barber shop between 5:00 and 6:00 on December 9, 1925 (p. 145). He remembered seeing the defendant's wife take the defendant's supper to him that afternoon between a quarter after and half past five.

When he left his shop at 8:00 o'clock the car was still there (p. 146).

In rebuttal the plaintiff called Daniel J. Lilly, another brother of the plaintiff, who said that he had heard the witness McDevitt say to the prosecutor of Warren County that he did not know, or was not sure, whether or not the license plates on the car that struck the girl were New Jersey plates or Pennsylvania plates.

Walter E. Liefert was called by the plaintiff and testified that he saw a blue Buick coupe with a taped window on the left hand side near the Second National Bank of Phillipsburg about noon on the day in question.

At the conclusion of the testimony the defendant moved for the direction of a verdict in his favor upon the ground that it was not shown that it was his automobile that struck the plaintiff's intestate. This motion was overruled and an exception allowed (pp. 151, 152).

ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT.

The plaintiff failed to present any evidence connecting the defendant's automobile with the killing of the plaintiff's intestate. The only persons called as witnesses who were at the place of the accident when it occurred were the two children, Helen Lilly and Wilbur Yerane. They did not actually see the accident, but they saw an automobile pass at the time of the accident. They did not nor did anyone else get the license number of this automobile. Helen Lilly said that she saw the au-

tomobile twice, once when it was a block away and then again when it was close to the place of the accident. She saw something pasted on a window of the automobile in the shape of a Christmas tree, but she could not say which window it was. This tape or whatever it was was the only thing unusual about the car that she noticed. The Yerane boy did not notice anything unusual about the car until it had passed the place of the accident when he said that he could see, through the back window of the car and two people in it, something taped on the left front window in the shape of a Christmas tree. All of this is said to have been at 5:30 in the afternoon on December 9, 1925, with no street light at the place of the accident and no lights on the automobile that passed. The only way that the Yerane boy identified the defendant's automobile was by means of what he described as the Christmas tree pasted on the window.

It is common knowledge that in the early part of December the sun sets at about 4:30 and that complete darkness has fallen before 5:30.

We realize of course that there is no use in discussing upon this appeal the very many matters which affected the weight of the testimony offered by the plaintiff, because if there was any evidence that it was the defendant's automobile that struck the child a question for the jury was presented. Briefly stated, the matter now under discussion may be summed up in the question, Was the fact that there was testimony that the automobile involved in the accident had a left front window temporarily repaired with paper tape in the manner in which the window of the defendant's automobile was repaired sufficient evidence to raise a jury question

as to whether or not the defendant's automobile was the one involved in the accident?

It is respectfully submitted that while it might be unusual to find in the same locality many automobiles having windows repaired with paper tape, it is by no means impossible that another automobile with a window so repaired passed along Main Street that night. It is entirely probable, assuming the truth of the testimony, that some other automobile with a window repaired with tape caused this accident. Unless a jury would be entitled to find that no other automobile with a window repaired in the manner in which the defendant's window was repaired could have passed over this road about the time of this accident, there was no testimony which required the submission of this case to the jury.

When it appears in a case where the identity of an automobile is involved, that nobody saw the defendent or anyone connected with him in the automobile, which according to the testimony offered by the plaintiff passed in the darkness or semi-darkness without lights, and at a place where there was no street light, without anyone taking the number of the automobile, and without there being any testimony as to its appearance except that some strips of paper or some other substance were pasted upon the left front window, and that strips of paper were pasted upon the left front window of the defendant's automobile, we respectfully submit that there is no evidence justifying the submission to the jury of the question of whether or not it was the defendant's automobile which struck and killed the child and then continued on its journey.

Another reason why the Court should have directed a verdict in favor of the defendant is that, assuming that there was evidence from which the jury could hold that it was the defendant's car which caused the accident, there was no evidence that the defendant himself or anyone for whose conduct he would be responsible was driving the car. If someone unlocked the defendant's automobile and drove it without his knowledge or consent to the place of the accident surely the defendant would not be responsible. The testimony of the defendant was that he had the key in his pocket. This, of course, did not preclude the idea that some other person might have picked the lock or had a master key which would make it possible for them to use the defendant's automobile. The uncontradicted testimony of all those who knew about the defendant's whereabouts was that he was not at the scene of the accident. Further than that the evidence was that the only persons who ever drove the defendant's automobile aside from himself were his daughter who was then, according to the uncontradicted testimony, away at college, and the garage man who oiled and greased his car, and who of course would be an independent contractor. Upon this state of facts it appeared beyond controversy that if anyone did cause the accident with the defendant's automobile it was someone for whose conduct the defendant was not responsible.

This Court has frequently held that the presumption arising from the ownership of an automobile that the owner or his servant or agent is using it at a given time may be rebutted, and if it is rebutted by uncontradicted and uncontroverted testimony the Court should direct a verdict for the defendant.

Doran v. Thomsen, 76 N. J. L. 754.

Missell v. Hayes, 86 N. J. L. 348.

Tischler v. Steinholtz, 99 N. J. L. 149.

This Court has also held that in an action for personal injury the plaintiff in order to recover damages must show more than the possible responsibility of the defendant for the injury. In the absence of direct evidence he must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and exclude the idea that it was due to a cause with which the defendant was unconnected.

Suburban Electric Company v. Nugent, 58 N. J. L. 658.

In the case just cited the question was not as to the ownership of the alleged instrument of death but as to the cause of death by that instrument. We can see no reason, however, why the rule does not apply with equal force to a case of the kind now before the Court.

It is respectfully submitted that there was presented at the trial of this case no evidence justifying the submission to the jury of the question of the defendant's liability, and that the Court therefore erred in not directing a verdict for the defendant.

2. THE TRIAL COURT ERRED IN CHARGING THE JURY THAT TESTIMONY THAT THE DEFENDANT MADE CERTAIN STATEMENTS WITH REFERENCE TO INSURANCE WAS ADMITTED "FOR THE PURPOSE OF ALLOWING THE JURY TO ASSESS IT IN THE SENSE OF ITS BEING AN ADMISSION OF RE-

SPONSIBILITY IN CONNECTION WITH THE QUESTION WITH WHICH WE ARE HERE CONCERNED."

The testimony to which the Court referred in this part of the charge was that of the plaintiff and the witness Sandt. The plaintiff testified that some time after the accident he called upon the defendant and talked with him. He said that the defendant became very nervous when the plaintiff said to him "I am the father of the little girl that was killed over on Main Street by your machine" (p. 58). After further discussing the defendant's actions on this occasion the plaintiff testified as follows with reference to what the defendant said: "For a few minutes he didn't say much. Then he put his head up again, and he said, 'I am going to tell you, my machine was not away from the front of my drug store from 11:30 in the morning until 11:30 at night.' He said, 'There was not a clerk on the job, not even Mrs. Lott. There was not one working that day but myself,' and then he said, 'There's only one key to the machine. That was right here in my pocket, and I know nobody else could move the machine.' I didn't say anything. I stayed there and left him go a little 'My daughter might have had the machine down that way.' He said that, then he stopped a few minutes, and he said, 'No, she was not home from college.' Then he said, 'Well, I don't care, my car is insured big,' he said, 'I don't care'" (p. 61).

Sandt, who was with the plaintiff when he visited he defendant, said, that the defendant got red and nervous when the plaintiff accused him of being the owner of the machine that had killed the plaintiff's daughter (p. 72). This witness testified as

follows as to what the defendant said: "We sat in the car and he told us, 'My car was not away from the drug store,' he said, 'from 11:30 A. M. to 11:30 at night. I was the only one there, I could not leave,' and he says, 'Maybe his daughter had the car,' he says; afterwards, he turned round, 'She was not home, she was to college;' and he said to us, 'Maybe the garage man went and got it; he takes it every so often for oil and grease and to look it over.' He went up to the garage and he found out the car was not there that day. He said, after he sat there awhile, all nervous and fussing around, he said, 'Well, did anyone see this car?' We said, a fellow who knows his car. He said, 'He must have been going pretty fast,' then, 'My car is fully insured, I don't care'" (p. 73).

Referring to the statements of these two witnesses that the defendant had said he did not "care" as he was insured, notwithstanding the fact that the testimony of one of them on this point had already been ruled out (p. 61), the trial Judge said (p. 153):

> "Ladies and gentlemen of the jury: I desire to make one or two preliminary observations to you regarding consideration of this case, when you come to deliberate upon it, the first of which is that you will recall during the progress of the trial, at least in two instances, there was a repetition of a conversation alleged to have taken place between the plaintiff, Mr. Lilly, and the defendant, Mr. Duckworth, at the latter's home, or, subsequently, in his automobile; in which Lilly alleges that Mr. Duckworth referred to a certain amount of indifference, because of his carrying insurance on his automobile. That testimony was allowed to stand only because, in the opinion of the Court, it was entitled to go in with the other testimony in the case, *for the purpose of allowing the jury to assess it in the sense of its being an admission of responsibility in connection with the question with which we are here concerned.*"

The Court then told the jury that the fact that the defendant was insured was immaterial (p. 153).

The Court assumed that the testimony as to the defendant's statement that he was insured had two meanings, or could be taken in two senses. In one sense it showed that the defendant was insured. In the other sense it was, according to the Court, an admission of responsibility. The jury was plainly told that this testimony, in the sense that it showed that the defendant was insured, was to be disregarded, but "in the sense of its being an admission of responsibility in connection with the question with which we are here concerned" it was to be dealt with and assessed.

Whether the Court's instruction in this regard is construed (1) as a direction that what the defendant is alleged to have said amounted to an admission of responsibility, or (2) as a direction that the jury could so treat it if they found it had that effect, the instruction was erroneous.

The defendant's alleged statement that he did "not care" because he was insured came at the conclusion of a somewhat detailed denial of responsibility in which he voluntarily stated that he had been in his store at the time of the accident and that his car was parked and locked. Undoubtedly he said he was insured to lend support to what he had already said and to show that fear of a damage suit was not leading him to conceal the truth.

Construed most broadly the defendant's alleged statement could not mean more than that he did not care whether the plaintiff sued him and got a judgment against him or not, because he was insured. But indifference as to the outcome of a suit is not an admission of liability. Since the statement at-

tributed to the defendant could not under any circumstances (and certainly not when part of a conversation in which responsibility was flatly denied) be construed to be an admission of liability, it did not furnish any evidence of such an admission. The Court, therefore, erred in its charge in this respect and the judgment should be reversed.

3. THE TRIAL COURT ERRED IN CHARGING THE JURY THAT THE DEFENDANT WAS LIABLE IF HIS AUTOMOBILE CAUSED THE ACCIDENT AND WAS DRIVEN BY SOME SERVANT OF HIS OR SOME MEMBER OF HIS FAMILY.

The Court several times in its charge stated that in deciding upon the defendant's liability they must determine whether or not the defendant or an employee of the defendant or a member of the defendant's family was driving the automobile which caused the accident (pp. 159, 160, 161, 164). The following is typical of what the jury was told on this subject:

> "You will bear in mind your first inquiry will be, was this child killed by an automobile due to the negligence of some person driving it, and in the second place, was that person this defendant, one of his employees, or a member of his family? As you resolve this question, either for or against him, then you would take up, and only then, the question of damages, because if you decide those questions in favor of the defendant, that's the end of the case. If you decide them against him, then you would pass to the question of damages, and solve the problems presented to you in accordance with the law given you." (p. 164).

Exception was taken to the Court's charge in this particular (p. 165).

The testimony of the defendant was that at the time of the accident out of which this case arises, his automobile was parked and locked and the key

was in his pocket. He further testified that his wife did not drive an automobile and his daughter, who sometimes drove, was at the time of the accident in Poughkeepsie, attending college. None of his employees ever drove his automobile (pp. 96, 97).

Under the Court's charge the jury could have found that the defendant was not driving his automobile, but some servant of his or some member of his family was driving it. To find this the jury would have been obliged to find that the defendant was either mistaken or was not telling the truth when he said that his automobile was locked and he had the key in his pocket. If the defendant's automobile was being driven by an employee or a member of the defendant's family, the defendant would not be liable, of course, if the car had been taken without his permission, or if it had been loaned to the person driving it for his or her own purposes. Nevertheless the jury was simply told that the defendant was liable if his car was driven by his employee or a member of his family, and that driver was negligent.

This is certainly not the law. The presumption arising from ownership of an automobile involved in an accident, as we understand it, merely goes so far as to make out a prima facie case against the owner and does not amount to absolute proof of responsibility for the driver's negligence.

The defendant, in effect, denied that he had authorized anyone to use his car on the day of the accident. He said his car was parked near his store and locked. In view of such testimony on the part of the defendant, if the jury held that his car was not parked and locked, as he said, but was driven

by an employee or member of his family, it was possible for them to find that it was driven without the defendant's knowledge or consent. His testimony certainly amounted to a denial of his having authorized the use of his car at the time of the accident.

The Court erred in taking from the jury the question of the defendant's responsibility for the negligence of the driver of his car, if the jury held, as it could have held under the charge, that the defendant himself was not driving it.

Furthermore, we think it was erroneous for the Court to permit the jury to find that an employee of the defendant or a member of his family was driving his car at the time of this accident. In the light of the defendant's uncontradicted testimony that his daughter, the only member of his family who ever drove his car, was away at college (a statement easily disproved if untrue), and that none of his employees ever drove his car (another statement readily susceptible of verification) the jury should have been required to find either that the defendant's car was not involved in the accident or that it was driven by him, if the case was to be submitted to a jury at all.

It is respectfully submitted that for one or more of the reasons argued above the judgment entered in this case should be reversed.

EDWARD L. KATZENBACH,
Attorney for and of Counsel with Defendant-Appellant.

NEW JERSEY
Court of Errors and Appeals

PHILLIP J. LILLY, Administrator ad prosequendum of IRENE M. LILLY, deceased,
Plaintiff-Respondent,

vs.

F. MARION DUCKWORTH,
Defendant-Appellant.

Action At Law.

On Appeal From the Warren County Circuit Court.

Brief of Plaintiff-Respondent

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff-Respondent.

W. Reading Gebhardt,
Of Counsel.

NEW JERSEY
Court of Errors and Appeals

PHILLIP J. LILLY, Administrator ad prosequendum of IRENE M. LILLY, deceased,
Plaintiff-Respondent,

vs.

F. MARION DUCKWORTH,
Defendant-Appellant.

Action At Law.

On Appeal From the Warren County Circuit Court.

Brief of Plaintiff-Respondent

STATEMENT OF FACTS.

This is an appeal from the judgment of the Warren County Circuit Court entered on a verdict in the sum of $3,000, against the defendant, and in favor of the plaintiff, for damages for the death of his minor child, Irene M. Lilly, as a result of being struck by the defendant's automobile.

The accident occurred on December 9, 1925, at Phillipsburg, Warren County, on one of the principal streets of Phillipsburg, known as South Main Street, which leads through the heart of Phillipsburg, to Easton and Alpha, and other points. The accident took place at the point where another street, called

Mill Street, joins South Main Street on the south side.

The plaintiff's daughter, Irene M. Lilly, was a young child, seven years of age, at the time of her death. At the time of the accident, she, in company with her sister, Helen Lilly, and a boy, Wilbur Yerane, intended to cross from the south to the north side of South Main Street, at Mill Street. There was a car parked on the south side of South Main Street, just east of the junction of Mill Street and South Main Street, and this car was in or near the gutter of South Main Street. The three children started across behind this car, and they walked behind this car, or on the westerly side of it, and stopped. Irene, the girl who was killed, was ahead, and as she stood there she looked to the left, and at that time the defendant's car was up at Purcell's corner, about two hundred feet way, in a westerly direction, or in the direction of Easton and it was going east and going fast. There was nothing in between the oncoming car and the girl as she stood there to interfere with the driver of the car seeing her.

The girl then continued to stand still where she was, and after she had finished looking to the left, which would be in a westerly directly, she then turned her head and looked to the right, which would be easterly, to see if anything was coming from that direction, and in order to ascertain this, she extended her head out beyond the rear of the standing automobile, and as she was standing there, looking to the right, the defendant's car, which was going fast struck her from the left and knocked her into the street. There were no other cars going in either direction on South Main Street or Mill Street at the time of the accident (p. 41, ll. 18-22.)

The car that struck her slowed up somewhat, after she had been hit, and both of the two men in the car looked back and apparently saw the child lying in the

street, for there was nothing to prevent their seeing her, and then they went on without stopping. Up to the time that the girl was struck, there was no horn sounded by the defendant's automobile, and it had no lights on it, although it was dusk. The girl was seriously injured and was picked up by some one else and was taken to the hospital and died there on December 19, 1925, as a result of these injuries.

The car that struck the girl was a blue coupe, and had a broken window in the left hand door, the pieces of which were held together by adhesive tape of some kind, placed on the window, in a triangular shape, so as to form the shape of a Christmas tree. The car was identified the next day by the girl's sister, Helen Lilly, and by the boy who was along, Wilbur Yerane, both of whom witnessed the accident, and there was other testimony produced by the plaintiff to the effect that this car was seen in the vicinity of the accident going in this direction, both before and after the accident, which strongly corroborated the story of the boy and girl. The car that was so identified by Helen Lilly and Wilbur Yerane, was admitted to be the defendant's car by the answer to an interrogatory. Moreover, the defendant made certain damaging admissions in an interview had with him by the plaintiff after the accident.

The sole defense in the case was that it was not the defendant's car that caused the accident.

POINT No. 1.

THE COURT WAS CORRECT IN DENYING THE MOTION FOR THE DIRECTION OF A VERDICT.

The first point urged by the defendant in his brief is that the court erroneously denied the defendant's motion for a non-suit, and counsel for defendant in

his brief, sets forth two reasons as to why this was error, in his opinion. The first reason is, that there was no evidence to go to the jury that it was the defendant's car which caused the accident; and second, that there was no evidence that the "defendant himself or anyone for whose conduct he would be responsible, was driving the car." We propose to take up the first reason under the title of "A," and the second one under that of "B."

A.

As we have already intimated, that was abundance of evidence to go to the jury on the first point that it was the defendant's car that was involved in this accident.

We shall first deal with the testimony of the plaintiff's witnesses on this point. The witness, Helen Lilly testified that the car that hit her sister was a dark blue closed car, a coupe, with two windows in each side (page 25, ll. 7-13 and page 33, ll. 5-6); that one of the windows of the car was taped in a trianglar shape so that it looked like a Christmas tree, (page 23, ll. 17-31.)

She also said that the next morning after the accident, a police officer of Phillipsburg by the name of Stehlin, came and got her and Wilbur Yerane and instructed them to pick out the car, if they saw it, that caused the accident. **Accordingly, she identified a car that was standing in the street opposite defendant's drug store as the very car that had struck her sister the evening before,** and she says that when she then saw it that it was the left hand front window that was taped, (page 31, ll. 28-31.) We set forth her testimony on this important point for the purpose of showing how strong and unequivocal it was to the effect that **it was that very car that struck her sister.** (page 23, l. 34 to page 25, l. 6.)

"Q. Did you see that car again after the accident?

A. Yes, sir.

Q. Where?

A. In front of Duckworth's store?

Q. Did it have tape on the window?

A. Yes, sir.

Q. The same appearance as the car you saw in the accident?

A. Yes, sir.

Q. How soon after the accident was it that you saw the car in front of Duckworth's?

A. I think it was the next day that Mr. Stehlin, the cop, came down in his motorcycle, and took me to try and find it.

Q. Wilbur was with you at the time?

A. Yes, He took us up around the block and he said we were to pick out the machine.

By Mr. Gildea: I object to that.

By the Court:

Q. As a result of what was said, you looked for the car?

A. Yes.

Q. You saw this car in front of Duckworth's drug store?

A. Not in front of the drug store, across the street from the drug store.

Q. The car that had the same tape on it as you had seen the night before, put on in the same way as the one in the accident?

A. Yes.

By Mr. Gebhardt:

Q. Will you please tell me whether the car you then saw when you were with Mr. Stehlin in front of this drug store of Mr. Duckworth's, was or was not the same car that hit your sister?

A. It was the car.

Q. It was, you say?
A. Yes."

She pointed out this same car to her father later (page 25, ll. 17-22) and he took down the number, which was 223037, New Jersey, 1925, (page 56, ll. 23-36). The defendant admitted in answer to the second interrogatory served upon him that this car belonged to him (p. 65, ll. 20-32).

Wilbur Yerane, the next witness produced by the plaintiff stated that the car that hit the girl was a closed car with two windows on each side and "darkish" blue in color; that the window of the left front door was taped like a Christmas tree, (page 40, ll. 11-32). He also testified **that he saw the same car** the next day in front of Duckworth's drug store when the police officer took him up there. We quote from his testimony at page 41, l. 22 to page 43 l. 10.

"Q. Did you at any time after the accident see this same car?
Q. Where did you see it?
A. Up in front of Duckworth's drug store.
Q. How long after the accident was that?
A. Next day.
Q. Who were you with at the time?
A. Mr. Stehlin.
Q. The cop?
A. Yes, sir.
Q. Who else was along?
A. Helen Lilly.
Q. What did you do on that occasion, that day?
By Mr. Gildea: Objected to as irrelevant and immaterial.
By the Court: He may answer.
By Mr. Gildea: I ask for an exception.
A. He asked us to point out the machine and we did it.

By Mr. Gildea: I move that be stricken out as not responsive.
By the Court: Strike it out.
By the Court:
Q. You saw a car there?
A. Yes.
Q. Where was it standing?
A. In front of Duckworth's drug store.
Q. Which side of the street?
A. Right hand, towards Alpha.
Q. Same side as the drug store?
A. Yes.
Q. What kind of a car did you see there?
A. A closed car, and the window was taped.
Q. Which window was taped?
A. Left door, the window in the door.
Q. What kind of tape was it?
A. I could not tell you what kind of tape.
Q. How was it taped?
A. Taped up like a Christmas tree.
Q. Did it resemble the same tape that you had seen on the car that struck the girl?
A. Yes, sir.
Q. The same window, the same side?
A. Yes, sir.
Q. The same form of tape?
A. Yes, sir.
By Mr. Gebhardt:
Q. What color was the car you saw standing there?
A. Dark blue."

William Lilly, a brother of the plaintiff, testified that he was familiar with the Duckworth car and saw it on the very day of the accident within a few minutes of 5:30 P. M. on South Main Street, Phillipsburg, about five blocks away from the scene of the accident in a westerly direction, and going toward

the scene of the accident. We quote from his testimony, (page 49, l. 2, to page 50, l. 35.)

Q. Prior to the time of this accident happening, were you familiar with Mr. Duckworth's car.

A. Yes, sir.

Q. How were you familiar with it?

A. I have seen Mr. Duckworth driving it.

Q. How many times have you seen him driving it before the accident?

A. Some days three or four times, most every day, some days I would not see him.

Q. Do you recall having seen him driving it a short time before the accident?

A. Yes.

Q. Will you describe to me the nature of this car he drove, make, and color and so forth?

A. Buick coupe, blue body, dark trim around the windows.

Q. How many windows in it on each side?

A. Two windows on each side.

Q. Please tell me whether or not you saw this car the day this accident happened.

A. Yes.

Q. And when did you see it?

A. I seen it around a few minutes of 5:30 when I crossed the street in front of it at Main and Jefferson Street.

Q. Was that beyond the intersection of Mill Street and South Main Street towards Easton, or where?

A. Towards Easton.

Q. Did you notice anything unusual about the car at that time?

A. No, only that it was his car. I knew the car by the window. He had tape on it.

Q. Which side was that tape on?

A. Left side.

Q. On which window?

A. On the window of the door on the left side.

Q. What was the general shape that this tape took?

A. On the order of a pyramid, came up to a point.

Q. What color was the tape?

A. It was not really a white. It didn't look white, a sort of straw color.

Q. What direction was the car going?

A. Towards Alpha.

By the Court:

Q. Did you see who was driving it?

A. No, sir, I could not see who was driving it, but it was a man driving it.

Q. A man driving it. How many people were in it?

A. There was another man sitting in the car.

Q. You noticed there were two persons?

A. Yes, I didn't take notice to look to see who was driving any more than I merely looked at the car as I crossed over the street there.

By Mr. Gebhardt:

Q. Did you see this car any time after the accident?

A. Yes.

Q. Where did you see it then?

A. I seen Mr. Duckworth in it different times passing up Main Street, and I have seen it standing in front of his store, and across the street.

Phillip Lilly testified that on the third day after the accident, his daughter again pointed out the same car and he took therefrom the license number, as we have already stated, (page 56, ll. 23-36).

Thomas E. Spencer said that he worked at a plant toward Alpha, or east of the accident, and that he

quit work a few minutes before 5:30, and walked in a westerly direction toward the scene of the accident, apparently on South Main Street, but before he got to the point of the accident a car passed him, and his attention was attracted to the car because of the speed it was travelling, and by the fact that the window of the left hand front door was taped in the shape of a Christmas tree; that the car was going around thirty-five miles an hour, if not more, and was a closed car of dark color. He had seen the same car before this standing in front of the defendant's drug store. Whe he arrived at the scene of the accident, the girl had been taken to the hospital, (page 62, l. 20, to page 64, l. 23.)

William H. Stehlin, who was the Phillipsburg police officer, stated that he had orders from the Chief of Police to go down and get the two children, Helen Lilly and Wilbur Yerane, for the purpose of endeavoring to locate the car that struck the girl. He took them up South Main Street from their home, a distance of eight or nine blocks, and they pointed out the car that was involved in the accident, which, as we have already stated, was Duckworth's car. He said this car was a Buick coupe, dark color, with the left window taped in a triangular shape. He took down the number but had turned it in to the police headquarters, and could not give it. He was no longer on the police force.

It is extremely important to note that this was an official investigation conducted by the authorities of Phillipsburg, undoubtedly because of the wantonness involved in the accident evidenced by the failure of the automobile to stop, and that the police officer did not tell the children anything except that they should point out the car which struck the girl. He said that in driving up and down South Main Street with the children, he passed lots of cars (in all probability

scores of them), and that this was the only car they pointed out, and that they picked out this car without any suggestion of any kind from him. Certainly a more positive identification of the car would hardly be required in a homicide case, let alone a civil case. Mr. Stehlin's testimony appears on pages 66 to 71.

Albert M. Reading, a clerk in the office of counsel for the plaintiff, testified that he endeavored to locate the police blotter containing the report of this accident at the City Hall at Phillipsburg, but the authorities at the City Hall had been unable to do so, (page 77, ll. 2-21).

In addition to these witnesses as to the identification of the car itself, the plaintiff produced evidence of an interview between the plaintiff and defendant shortly after the girl's death, in which both by his actions and words, the defendant clearly showed indications of guilt.

The plaintiff testified with respect to this interview, (page 58, l. 10 to page 62, l. 14) and said that after he had informed Duckworth that he was the "father of the little girl that was killed over on Main Street by your machine," Duckworth got "all worked up," (page 58, ll. 13-16), and was shaking and trembling and was red in the face, (page 59, ll. 2-32).

He then suggested to the plaintiff and the man, Owen G. Sandt, who was with Lilly, that they go out in his machine, that he would be out in a few minutes, (page 60, ll. 1-2). What occurred in the rest of the interview is graphically described by Lilly in the following testimony, (page 60, ll. 3-23).

"Q. You didn't go in the house?

A. He said he would not let us in because his wife was awful nervous and awful broken up, and he would not let us in.

Q. What did you then do when he told you to go out in the car?

A. We turned round and went out and stood on the corner. When he came out of the house he went right across the street and said to get in his machine. We walked around the other side of the car and got in the back seat.

Q. All of you got in the car?

A. The three of us got in the machine. He sat there running his hand around the steering wheel. He said he didn't know how they could get his machine mixed up with it. Then he asked how they identified the machine. **I told him my daughter for one seen the adhesive tape on the left side window. Then he dropped his head."**

Again at page 60, l. 31 to page 61, l. 14.

"Q. After he dropped his head, what happened?

A. For a few minutes he didn't say much. Then he put his head up again, and he said 'I am going to tell you my machine was not away from the front of my drug store from 11:30 in the morning until 11:30 at night.' **He said there was not a clerk on the job, not even Mrs. Lott.** 'There was no one working that day but myself,' and then he said, 'there's only one key to the machine. That was right here in my pocket, **and I know nobody else could move the machine.'** I didn't say anything. I stayed there and left him go a little. **'My daughter might have had the machine down that way.' He said that, then he stopped a few minutes, and he said, 'No, she was not home from college.'** Then he said, **'Well, I don't care, my car is insured big,' he said, 'I don't care.' "**

Again at page 61, l. 31 to page 62, l. 11.

"Q. Go on, what else, if anything, did he say?

A. He sat there, and he didn't say anything for a while. He kept looking at me.

Q. What else happened?

A. Then he turned the machine and went on out Washington Street.

Q. You got out of the machine?

A. No, we stayed right in the machine. **He turned round to go out Washington Street and he said maybe the garage man came down and took his car to change the oil in it.**

Q. Whose car?

A. Duckworth's. He said I was up there and found out from the records that my car was not up there. He took us down as far as S—— Street. There he left us out. He went up South Main and we went down South Main."

It is highly important to note that Duckworth did not deny having this conversation and did not deny his statements therein as Lilly testified to them. Futhermore, he swore that Mrs. Lott was in the store that afternoon and evening except between about 5 P. M. and 6 P. M. (p. 93, ll. 20-29) **and she corroborated this** (p. 107-9), **thus contradicting himself.**

The plaintiff's testimony on this point was corroborated by that of Owen G. Sandt, who accompanied him. We quote from his testimony at page 72, ll. 10-35.

"Q. What happened when you got there?

A. Mr. Lilly rapped on the door, and Mr. Duckworth's daughter, or who she was, a little girl came, and we asked her if Mr. Duckworth was in, and she said yes. She called him, and he came out and stood there. Mr. Lilly asked, 'Do you know who I am?' He said, 'No.' He said, 'I am the father of the little girl your machine hit up in South Main Street,' **and when Mr. Lilly told him that, he got red in the face, and kind of**

nervous. He said, 'Go outside and I will come out. I don't want you to come in the house. My wife's nervous and all upset.' We walked out to the curb and stood out there, and he come out and called us over to the machine. We went over and sat in the machine. He asked why we picked out his car. Mr. Lilly said, 'Your car was identified by the tape on the window.' He said, 'My car's not the only car taped up.' Mr. Lilly said, 'That's the only car I ever seen taped up like that, shaped like a Christmas tree.' **We sat in there and he was running his hands round the shifting lever and the steering wheel, all nervous, all worked up like, looked to me like—**

By Mr. Gildea: That's objected to, as a conclusion.

By the Court: Strike out the conclusion, that latter part."

Again at page 73, ll. 12-29.

"Witness: We sat in the car and he told us, 'My car was not away from the drug store,' he said, from 11:30 A. M. until 11:30 at night. I was the only one there, I could not leave,' and he says, maybe his daughter had the car, he says there, and he says afterwards, he turned round, she was not home, she was to college; and he said to us, maybe the garage man went and got it; he takes it every so often for oil and grease and to look it over. He went up to the garage and he found out the car was not there that day. He said, after he sat there a while, all nervous and fussing around, he said, 'Well, did anyone see this car?' We said, 'Yes, a fellow who knows this car.' He said, 'He must have been going pretty fast then. My car is fully insured. I don't care,' he said.

It will thus be observed that the plaintiff produced

two witnesses who saw the accident, and who, the very next day, identified the Duckworth car as the one which struck the girl, and also the policeman who corroborated the facts of the identification; one witness who saw the Duckworth car and identified it as that very car five blocks away from the scene of the accident at about the time of the accident, and going in the direction of the accident; and another witness who saw a car of the same description which he had frequently seen in front of Duckworth's store fleeing from the scene of the accident, at high speed, shortly after it occurred; and finally two witnesses who had an interview with Duckworth, which afforded strong ground for the conclusion that it was Duckworth's car that was responsible for the accident. Such was the strength of the plaintiff's car, and we submit that it amounts to the most positive and convincing evidence that the Duckworth car was the one which struck this girl.

The rule is so well settled that it does not seem necessary to restate it, that on an appeal where there is any evidence to go to the jury to support the plaintiff's case, the case must be submitted to the jury, and the action of the trial judge will not be reversed on appeal. This is not a Rule to Show Cause, so, of course, the weight of the evidence cannot be considered, although we submit that even on a Rule the verdict should not be set aside.

This rule was laid down in very terse fashion in the case of Traction Co. vs. Scott, 58 N. J. L. 682, at page 682, as follows at page 686.

> "Whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and that, in order to withdraw such a case from the jury, the facts should not only be undisputed, but the inferences, in re-

spect of the defendant's failure of duty, which arise from these facts, should be indisputable."

The rule is stated somewhat more in detail in the case of Newark Passenger Railway Co. vs. Block, 55 N. J. L. 605, at page 607.

"When, in such cases, the trial judge is requested to nonsuit, or to direct a verdict, his duty is, as was well expressed by Lord Chancellor Cairnes, in Metropolitan Railway Co. v. Jackson, L. R., 3 App. Cas. 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to a jury; but if from facts established negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence ought to be inferred.

In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury.

It follows that if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judge must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury."

See also:

Ferguson vs. C. R. R. Co. 71 N. J. L. 647.

Smith vs. Erie R. R. Co. 67 N. J. L. 637.

Adams vs. Camden, etc. R. R. Co. 69 N. J. L. 424.

A recent case that is practically on all fours with the case at bar and clearly dispositive of it, is that of

Benson vs. Brady, 5 Misc. 13. One of the main questions in dispute there was as to whether it was the defendant's car that was involved in the accident. The defendant admitted in his answer that he w the owner of the car bearing license number 275710. He did not take the stand in his own defense, evidently believing that the plaintiff's evidence was not strong enough to go to the jury, but both the trial judge and the Supreme Court disagreed with him on this point. The testimony of the plaintiff's witnesses is well summed up from the following excerpt, at page 15.

"Christy, a witness for the plaintiff, testified that he caught sight of the first three numbers of the car that hit the plaintiff and that these numbers were 275. Kondrup, a trooper, called at the defendant's residence the day following the accident and asked him if he had been out the night before with his car, and he replied that he had not taken his car out. Thereupon, the witness requested the defendant if he would permit him, the witness, to look at his, the defendant's, car, and having received his assent, they both went out to look at the car and upon viewing it the defendant said, 'I will say somebody has been out with the car,' but that he did not know who it could have been. The witness further testified that the car looked as if it had been run several miles on a flat tire; that upon calling defendant's attention to a break on the right rear mudguard, the defendant at first said that it was an old mark and finally admitted it was a fresh mark. There was also the circumstance that the fresh mark was on that side of the defendant's car where it would naturally be as a result of the impact with the plaintiff's car in passing it."

The Supreme Court held that the trial judge properly denied both the motion for a nonsuit and the mo-

tion for the direction of a verdict, because the foregoing facts were sufficient to go to the jury on the identity of the car.

Upon a mere glance at this Benson case, it becomes at once apparent that the testimony in the case at bar was many times stronger, for in the case at bar there were two witnesses who saw the accident, and who positively identified the defendant's car as being responsible, beside the other two who saw it in that vicinity at that time, and in addition the damaging admissions of the defendant himself. Certainly if the Benson case was a jury question, the instant case was infinitely more so.

Counsel for defendant in his brief assume that the burden rests upon the defendant to show that there was no other automobile of this same description that might possibly have passed the point of this accident at this time, but such is not the law, as is clearly indicated by the decisions referred to above, and counsel fails to cite any authority in support of his unusual contention on this point. **Moreover, counsel overlooks the fact that the Duckworth car was positively identified by these three witnesses as the car in question, which affords ample evidence to go to the jury, beyond any possibility of question.**

It is respectfully submitted that there was an abundance of evidence to go to the jury on the question of the identity of the car.

B.

The second reason urged by the defendant for the direction of a verdict, was that there was no evidence to go to the jury that the defendant or any one for whose conduct he would be responsible, was driving the car at the time of the accident. This point is likewise without merit.

In this first place, so far as this aspect of the case

is concerned, counsel asked for the direction of a verdict on the ground "that there is no proof that the defendant was driving the automobile that struck this child," (page 150, ll. 34-5). It will be observed that he did not include the other reason that he now seeks to argue, that there was no evidence that "anyone for whose conduct the defendant would be responsible was driving the car." (Quotation from defendant's brief). Consequently, he is now limited to the reason that he advanced to the trial court for a direction on this point. See Neff v. Hannan 85 N. J. L. 381. Moreover, we desire to point out that this reason for the direction of a verdict in any event, is not broad enough to warrant the court in directing a verdict because of the fact that even if there was no evidence that the defendant was operating the car, in order for the court to take this case from the jury, the reason would have to be advanced that there was likewise no evidence produced that his servant or agent was operating the car.

In the second place, the rule of law has been definitely settled in this state by a long line of cases, that where there is proof that the defendant's car was involved in the accident, then the presumption arises that the car was at that time being operated either by the defendant or by his servant or agent, acting within the scope of his employment.

This rule is clearly laid down by this court in the case of Tischler vs. Steinholtz, 99 N. J. L. 149, at page 152.

> **"The evidence showed that the car was owned by the defendant Morris Steinholtz. Such proof of defendant's ownership of an automobile driven on a public highway raises a presumption of fact that such automobile was in the possession of the defendant, if not personally, then through**

his servant, the driver, and that such driver was acting within the scope of his employment."

See also:

Missell vs. Hayes, 86 N. J. L. 348.

Dennery vs. Great A. & P. Tea Co., 82 N. J. L. 517.

The case at bar is a somewhat unusual case, for the sole defense in the case was that the defendant's car was not the one responsible for the accident, but that on the contrary, the defendant's car was parked in front of his store from 12 or 12:30 noon, on the day of the accident, to 11 P. M. that evening, and that there was only one key for the car which was in defendant's pocket, and he was in his store continuously between the same hours.

This was not one of the cases, therefore, of which there are many in the books, where the defendant admitted that the car responsible for the accident was his car, but averred that it was being operated by some one who was not his authorized servant or agent, and where the defendant introduced evidence showing the circumstances under which the person was driving the car to prove that he was not doing so as his servant or agent. **On the contrary, Duckworth's whole defense and his only defense, was that it was not his car.**

This being so, the sole question for the jury to consider with reference to the connection of the defendant's car with the accident, was as to whether or not it was, in fact, his car that struck the girl. If not, that ended the case. On the other hand, if the jury came to the conclusion that it was the defendant's car, then that would wipe out his entire defense that his car was in front of his store from noon until 11:00 P. M., that the only key was in his pocket, and that he was at the drug store continuously during that period on that day. And this would leave the established fact

that it was the defendant's car that caused the accident.

Thereupon, under the decisions above referred to, the presumption would arise that the car was either operated by the defendant himself, or by his servant or agent, acting within the scope of his employment, and the jury having refused to give credence to the defendant's story, this presumption would stand unrebutted, for there was no testimony produced by the defendant as to who the person operating the car was and that such person was not his servant or agent, and the jury would have the right to assume, therefore, that the defendant or his authorized servant or agent, was driving the car at the time of the accident.

The case of Doran vs. Thomsen, 76 N. J. L. 754, cited by cousel under this point, has no application to this situation, for there the car was admittedly the defendant's car, but the proof was that this daughter was driving the car on her own pleasure and not in any way on behalf of the defendant. But in the case at bar, there was no proof by the defendant as to who was driving the car—he simply denied that it was his car.

While it is true, as counsel states, that where the defendant's ownership of the car causing the accident is established, the presumption that then arises as to the car being operated by the defendant or his authorized servant or agent, may be rebutted by showing that the person who was driving the car was not, in fact, the servant or agent of the defendant, or not acting as such at the time, **there was no such evidence in the instant case, however, Duckworth's sole defense being that his car did not cause the accident.**

In the two other cases cited by counsel in this connection, of Missell vs. Hayes, 86 N. J. L., 348, and Tischler vs. Steinholtz, 99 N. J. L. 149, judgments

for the plaintiff were affirmed, and they afford no support for the defendant's contention.

The other case cited by counsel in his brief is that of Suburban Electric Co. vs. Nugent, 58 N. J. L., 658, and is so far from being an authority for the defendant's position in this case, that we shall make use of it in our behalf. In that case there was no eye witness to the accident at all; the evidence was purely circumstantial and yet this court held that the evidence plainly established the responsibility of the defendant for the accident. We quote from the opinion of the court at page 660.

> "No one was present when the decedent came to his death, and therefore there was no direct evidence to show how it was caused; but it appeared from the plaintiff's proofs that there was fastened upon the pole at the foot of which decedent's body was found, a reel, around which was wound a wire rope used for the purpose of raising and lowering one of the defendant's arc lamps; that the reel was about on a level with the top of a man's head, and that the wire rope around it was practically uninsulated and was heavily charged with electricity. It also appeared that the post-mortem examination of the decedent showed all his organs to have been in a normal condition; that his death was not caused by disease of any kind; that there was upon his left hand, and running all the way across it, a freshly-made burn, about one-sixth of an inch in width, and that the blood was in an abnormal state, its condition being such as is found in the bodies of persons who have died from electric shock.
>
> These facts, unexplained, not only make it reasonable to suppose that the decedent came to his death through having touched with his hand the uninsulated wire upon the reel which was fastened to the defendant's electric light pole and thereby received a fatal shock, but exclude any other inference. For such a death the defendant was plainly responsible."

A case that is absolutely on all fours with the case at bar is the very recent case of Crowell vs. Padolsky, 98 N. J. L. 552. We set forth the opinion of the court which includes the facts, and which we submit, is entirely dispositive of the instant case, page 552.

> "The plaintiff Mrs. Crowell was injured on Avon Avenue, Newark, by being backed into by a jitney automobile behind which she was passing while it was standing still at the curb. She and another witness took notice of, and testified to, its New Jersey license number and also to its municipal license number, which were the numbers of defendant's auto-bus, thus justifying a finding of ownership in the defendant and thereby establishing a presumption of fact that at the time of the accident the bus was being operated on the public street by the defendant, its owner, or by his servant acting within the scope of the employment. Edgeworth v. Wood, 58 N. J. L. 463; Mehan vs. Walker, 97 N. J. L. 304, citing Dennery v. Great Atlantic and Pacific Tea Co., 82 N. J. L. 517; Missell v. Hayes, 86 Id. 348.
>
> For the purpose of overcoming this presumption the defendant undertook to show by the testimony of himself and his chauffeur, first, that neither he nor his chauffeur was in fact driving the bus on the public streets at any time during the afternoon when the accident happened, and second, that he had not authorized anyone else to take the bus out that afternoon. It is now contended that this proof brought the case within the principle of Doran v. Thompsen, 76 N. J.

L. 754, and that the court should have directed a verdict for the defendant on the theory, established by that case, that where the proof overcoming the presumption is uncontradicted the question becomes one for the court and not for the jury.

The difficulty with this contention is that the defendant's proof went too far, for not only did he and his chauffeur and one or two other witnesses in his behalf testify that the bus was not being driven on the afternoon in question by the defendant nor by any servant of his acting within the scope of his employment, but all of them also testified that the bus was not out of defendant's private yard during the entire afternoon. This testimony was clearly in contradiction of the testimony of the plaintiff and of a disinterested witness who testified in her behalf that the bus was in fact on the street at the place of the accident when the accident occurred, and it was also contradicted to some extent by the records of the city, which showed that the defendant had made a return to the city as required by the licensing ordinance for taxation purposes that this particular bus had carried one hundred and sixty-four passengers on the day in question. The credibility of defendant and his witnesses was also weakened by their testimony that this particular bus was also in defendant's yard all of the day following the accident, which was Sunday, and carried no passengers on that day, whereas the record turned in by defendant showed that the bus had in fact carried two hundred and eighty-eight passengers on that Sunday. Clearly, under these circumstances, the truth of the testimony offered to rebut the presumption was for the jury, and, consequently, the

entire question became one for the jury to solve, and the learned trial judge was right in refusing to direct a verdict for the defendant.

The judgment is affirmed."

Another recent case in which the evidence was not nearly so strong as in the case at bar, but which this court held was properly submitted to the jury, is that of Montecalvo vs. Wahl, 97 N. J. L. 554.

The plaintiff was walking along a concrete highway and while one automobile was passing another, going in the same direction, she was hit by one of the two cars and injured. She brought suit against the owner of the car that was overtaking the other. The only eye witness of the accident stated that it was the overtaking automobile that hit the plaintiff, and that it then stopped and two men got out; that he said to the one who had been driving the car, "What are you going to do now?" and the man replied, "I don't know what I'm going to do." He furthermore said that the man was very nervous and took off his coat and cap and said, "Oh, Jesus, what am I going to do now," and also said, "I feel it, I hit somebody, I thought I hit a pole or post, something like, then I turned my eyes back and then I see the girl in the ditch." This eye witness was unable to recognize this man in court, but he went to the doctor's office with the plaintiff and with this man.

Another witness, McClinskey, testified that he came up to the scene of the accident and saw there three men and the injured girl, and that he identified the eye witness as one of the men and the defendant as another, and one of them was holding the girl in his arms. He asked the defendant who hit her, and the latter replied that he did not know whether he hit her or whether the other fellow hit her, and that he further said "there was two cars, one trying to pass the other at the time." The girl was taken to the

doctor's office in the defendant's car. Another man, Yefchinsky, testified that he asked the man who was standing holding the girl in his arms, who hit her, and the man replied "I don't know if I hit her or the other fellow that passed." He also identified the defendant as the man who placed the girl in the automobile and took her to the doctor's office.

The defendant testified that there were two cars ahead of him and that the one directly in front of him was "zigzagging the road, driving pretty nasty." He also said that when he got to the point of the accident he heard some one scream, stopped his car, and got out and found the plaintiff lying a little off the road. Presently a young fellow came along and the two of them placed the plaintiff in his car and he took her to the nearest doctor.

It was contended by the defendant on the motion for the direction of a verdict that there was no evidence connecting the defendant in any way with the accident, or that the automobile which injured the plaintiff was in the possession, control or operation of the defendant. The Court of Errors and Appeals held that the motion for the direction of a verdict was properly denied in the following language, (page 558).

> "We are of the opinion that there was sufficient evidence connecting the defendant with the collision in this case and to show that the automobile which injured the plaintiff was in the possession, control or operation of the defendant, to make it a jury question and that the motion to nonsuit was properly refused.
>
> Where fair-minded men might honestly differ as to the conclusions to be drawn from the facts whether controverted or uncontroverted, the question at issue should go to the jury. Mc-

Carthy v. Metropolitan Life Insurance Co., 75 N. J. L. 887.

We are also of the opinion that there was sufficient evidence to identify or connect the defendant with the accident to make it a jury question, and that it was for the jury to decide whether the weight of testimony shows that defendant was not connected with the accident, and that the motion to direct a verdict was properly refused.

Identity of person is a question for the jury, 38 Cyc. 1525.

It is well settled that the credibility of witnesses is in all cases a question for the jury, and a verdict will not be directed for the defendant if the evidence is conflicting and leaves the mind in a state of some doubt. Kearns v. Waldron, 76 N. J. L. 370."

See also:

Venghis vs. Nathanson, 101 N. J. L. 110,
Spelde vs. Galtieri, 3 Adv. Rep. 1704,
Tenney vs. Verdon, 3 Misc. 1001.

It is respectfully submitted therefore that there was no error in the denial of the motion for the direction of a verdict.

POINT No. 2.

THE COURT COMMITTED NO ERROR IN HIS CHARGE TO THE JURY WITH REFERENCE TO THE ADMISSION BY THE DEFENDANT WITH RESPECT TO HIS RESPONSIBILITY FOR THE ACCIDENT.

The next point raised by counsel in his brief is that the court committed error in charging the jury as follows: (page 153, l. 3 to page 154, l. 16). The part

that is particularly complained of is set forth in bold type.

"Ladies and gentlemen of the jury: I desire to make one or two preliminary observations to you regarding consideration of this case, when you come to deliberate upon it, the first of which is that you will recall during the progress of the trial, at least in two instances, there was a repetition of a conversation alleged to have taken place between the plaintiff, Mr. Lilly, and the defendant, Mr. Duckworth, at the latter's home, or, subsequently, in his automobile; in which Lilly alleges that Mr. Duckworth, referred to a certain amount of indifference, because of his carrying insurance on his automobile. **That testimony was allowed to stand only because, in the opinion of the Court, it was entitled to go in with the other testimony in the case, for the purpose of allowing the jury to assess it in the sense of its being an admission of responsibility in connection with the question with which we are here concerned.** Ordinarily, as I had occasion to say to you at the time, our appellate courts have held, and thereby charged the trial Judge with the duty of declaring a mistrial on any reference at all to insurance, for the reason that allowing it to creep in in ordinary circumstances would be calculated to prejudice the minds of the jury, and alienate them, as it were, against true consideration of the real facts of the case, with which, necessarily, you are concerned, and which, under your oaths, you must solely consider; so that it makes no difference whether Mr. Duckworth carried insurance or not. You, in no circumstances, can hold a man liable unless you are satisfied under the rules of law that the Court will give you, and the evidence, and of the

facts, as you find them, that he should be justly and honestly on the merits of the case so held liable; because if he is not so, then that is the end of the case. You should approach this courageously, without the slightest regard for sentimentality, in arriving at a just and honest verdict in this case. No matter what verdict may be returned, it cannot bring back to this father, or this family, this child who has been killed; and, therefore, we are concerned, not emotionally, not sentimentally, but as a matter of justice, in solving the problem in accordance with the evidence, and the rules of law that will be submitted."

Counsel takes the position that the court, in effect, told the jury that this was an admission of liability on the part of the defendant, but a careful reading of the Judge's charge will make it at once apparent that such is not the case. On the contrary, what the court did was to take great pains to instruct the jury that they must disregard entirely the element of insurance so far as this statement was concerned, and that they could only consider it from the standpoint of whether or not it was an admission of liability, and if so, to what extent. The language was perfectly clear:

"That testimony was allowed to stand only because, in the opinion of the Court, it was entitled to go in with the other testimony in the case, for the purpose of allowing the jury to **assess** it in the sense of its being an admission of responsibility in connection with the question with which we are here concerned."

The jury was allowed to consider it and **"assess"** it, that is, to value or weigh it from that standpoint, the same as they would weigh all the other facts in the case. Counsel does not contend in his brief that the statement of the defendant was inadmissible and,

of course, the only ground on which it was admissible was by way of an admission of liability, and therefore, the Judge certainly committed no error in charging the jury that they consider it and weigh it from that standpoint. Certainly that could not possibly have been harmful to the defendant.

The admission of the defendant referred to was as follows: (page 61, ll. 12-14).

> "Well, I don't care, my car is insured big, I don't care."

That such testimony is admissible and proper for the jury to consider was held in effect by this court in the case of Bashaw v. Eichenberger, 100 N. J. L. 153. In that case the trial court was asked to grant a mistrial on the ground that the statement of a witness was improper. The witness was called by the plaintiff and testified with reference to a conversation with one of the defendants. The trial court refused to grant a mistrial. The testimony complained of was as follows, p. 155:

> "He asked me how many children my daughter (Mrs. Bashaw) had and I told him, and how old they were. 'Well,' he said, 'tell Mrs. Bashaw not to worry,' that he was fully insured and that he intended to do what was right, and he knew how she must feel about it."

This court held, however, that the action of the trial judge was not erroneous, in the following language, p. 155:

> "The testimony of the witness Emma Roth appears to have been, in a measure, volunteered. There is nothing to show that counsel was deliberately attempting to extract from the witness irrelevant testimony for the purpose of prejudicing the defendant."

It is respectfully submitted that the trial court committed no error in his charge on this point.

POINT No. 3.

THERE WAS NO ERROR IN THE CHARGE OF THE COURT AS TO THE LIABILITY OF THE DEFENDANT.

The final point urged by counsel in their brief is based upon the following exception to the court's charge, (p. 165 ll. 19-24).

> "I take exception to your Honor's leaving to the jury whether or not this car was driven by an employee of the defendant, or a member of his family, **on the ground that there is no evidence that any such person was driving the car from which the jury could infer that."**

It will thus be observed that the sole ground for this exception stated by counsel at the trial is that there was no evidence from which the jury could infer that the defendant's car was driven by any employee or member of his family. But as we have already pointed out, if the jury was satisfied that it was the defendant's car that caused the accident, the presumption arose from that fact that the car was at the time, operated by the defendant or his authorized servant or agent and that presumption being unrebutted, there was evidence in the shape of this presumption to go to the jury on this point.

Counsel in his brief criticises the charge of the court on this point in various respects. As a matter of fact, however, criticism should now be properly limited to the reason given when he took his exception to the Judge's charge and he cannot now argue some other reason, for the rule is, that the trial court is entitled to be apprised of the grounds for an exception to the charge and if he refuses to modify his charge for the reasons stated by counsel, he should not be

reversed for some other reason advanced by counsel for the first time in an appellate court.

The rule is well settled that the whole charge of the court must be taken into consideration. See State vs. Giberson 99 N. J. L. 85. We submit that the trial judge charged the jury fully and carefully on this point as will appear in the following excerpts from the charge (page 159, l. 32 to 162, l. 2).

> "In the second place, you must ascertain whether it was the defendant who was driving the car at the time it was charged, or any of his employees, or a member of his family. If, after examining all of the testimony in the case, you are unable to say whether or not it was the defendant, one of his employees, or a member of his family, driving the car that struck this child, or, indeed, his car, then I charge you you must find a verdict for the defendant—no cause of action. In other words, in cases of this character, which there is a sharp contradiction in the testimony, and the jury are bound to ascertain whether the plaintiff has satisfied it under the greater weight of the evidence of the negligence alleged, that you found the evidence equally balanced, so you are unable to say what is the fact, then, of course, you would be obliged to return a verdict of no cause of action, because you could then say that the plaintiff had not carried the burden of satisfying you, under the greater weight of the evidence, of the truth of the allegations in the complaint. I may say to you, however, that there is no evidence in this case that the defendant himself was driving his automobile as alleged, but it is purely a circumstantial matter. The only evidence in the case is that the children recognized a car with a broken window, which had been taped in the manner indicated.

> There is no evidence as to who was driving that car at the time, and, of course, you must arrive at the inference of guilt or innocense of this defendant of the negligence charged, upon such circumstances as would indubitably lead a reasonable mind to the conclusion that it was his car, in the first place, and in the second place, that he was driving it, or some employe, or member of his family. Otherwise, you could not hold this defendant. The mere happening of this accident, ladies and gentlemen, is not sufficient to hold this defendant guilty of negligence. The burden is on the plaintiff of showing by credible, legal evidence his guilt. Assume that this car of the defendant had gone to the garage for the purpose of being greased, or oiled, and that some employee in the garage had taken the car and driven it through South Main Street, causing the accident with which we are here concerned, and that that was done without the knowledge or permission of the defendant, he would not be responsible in the circumstances, because that's the law. There's no evidence of that, but I am merely suggesting that to you in comment. You may accept it or not as you see fit. If you arrive at the conclusion it was Duckworth's car that struck this child, you still would have to have competent evidence in the case that it was either Duckworth, or some employee of his, with his knowledge, or some member of his family, who was driving the car at the time in the negligent manner complained of, and for that reason I have just offered the suggestion to you that if it was some one from the garage, unknown to him, who was driving the car at the time, Mr. Duckworth would not be liable. You are to observe the questions that are vital to the

case in arriving at the solution of the preliminary questions. First, whether negligence has been shown, and whether the defendant has been shown to be responsible for it. If you should find either no negligence was shown, or if any, defendant was not responsible for it, then, as I say, that would be the end of the case, and your duty would be to return a verdict of no cause of action. If on the other hand you find under all the evidence in the case that it was the defendant's car that struck this child, that the driver, whoever he may have been, was negligent within the definition of the law, that Mr. Duckworth, the defendant, was responsible for the driving of this car, either by himself, or through one of his employees, or a member of his family, then you should pass to the question of damages, but not until then."

Also at page 165, ll. 2-12.

"I am requested by counsel for the plaintiff to charge you that if you find it was the defendant's car that caused the accident, then there is raised a presumption of fact, which may be rebutted, that such automobile was at the time in possession of the defendant, if not in person there, his servant, or agent, and that such servant or agent was acting with the knowledge and consent of his employer. I think I charged you that already. If not, I so charge you, but you will understand that in so charging, I am expressing no opinion one way or the other about the liability in this case."

As a matter of fact in the main part of his charge, the trial judge does not even charge as favorably to the plaintiff as he was entitled to, because he did not give the rule of law with respect to the presumption that arose from the ownership of the car.

Moreover, he went farther than was necessary in dealing with the question of agency, for after all, as we have already pointed out, when the jury arrived at the conclusion that it was in fact the defendant's car, then the presumption was raised and there was no evidence to rebut the presumption, for the defendant and his witnesses were already discredited. The jury was then entitled to rely on the presumption of law and there being no defense set up that the car was driven by some one else, who was not the authorized servant or agent of the defendant, there was no necessity for any detailed charge on the question of agency, for that was not involved in the case. The jury had the right to presume that either the defendant or his duly authorized servant or agent was operating the car and it made no difference whether it was the defendant or his servant or agent, for that was not involved as a defense in the case. The charge was, therefore, more favorable to the defendant than he was entitled to.

Moreover counsel for defendant submitted to the trial judge no request to charge on this point; whereas it is well settled that if counsel desires a more detailed or comprehensive charge on some specific point, he must submit a request to charge on this point and he fails to do so, he cannot be heard to complain.

See:

Folly vs. Van Tuyl, 9 N. J. L., 153.
Hetfield vs. Dow, 27 N. J. L., 440.
Meade vs. State, 53 N. J. L., 601.
Illinois Central R. R. Co. vs. Skaggs, 240 U. S. 66.

The rule with respect to criticism of the trial judge's charge is admirably stated by this court in the case of Kargman v. Carlo, 85 N. J. L. 632, at page 638, as follows:

"If counsel notices a slip in judicial language

he should call the judge's attention to it. It is solely upon the assumption that this has been done that the right of review rests; appellate courts uniformly refusing to give to an unsuccessful litigant the benefit of a trial error that he himself could have had corrected at the trial for the mere asking. Benz v. Central Railroad of New Jersey, supra.

With respect to other instructions, said to be erroneous in law and as to assumptions of matters of fact, and to which objections were made at the trial, it is sufficient to say that we have examined them in the light of the entire charge, and find no error in them, when properly tested. **So long as the law is stated correctly and intelligently, the ultimate test of the soundness of instructions is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole."**

It is respectfully submitted that the court committed no error in this part of the charge.

POINT No. 4.

THE JUDGMENT SHOULD BE AFFIRMED.

In conclusion we desire to say that we are thoroughly convinced that an examination of the whole case will prove that the defendant had a fair trial, and that there was no error committed by the trial court, or if the trial court did fall into error, it was not such as to affect the substantial rights of the defendant.

We quote from the opinion of the Court of Errors

and Appeals in the case of Berkowitz vs. Lyons, 98 N. J. L. 198, at page 204, as follows:

> "It may be finally stated that our examination of the record concerning the alleged errors of procedure, in the light of the requirement of section 27 of the Practice Act of 1912, which requires an affirmance of the judgment, 'unless upon an examination of the whole case it shall appear that the error injuriously affected the substantial rights of the party,' has resulted in the conclusion, that no such error is discoverable, and, therefore, the judgment must be affirmed."

And in the case of Vliet v. Simanton, 63 N. J. L. 458, it was held that "a judgment will not be reversed for the admission of evidence which could not have affected the verdict."

See also State v. Simon, 71 N. J. L. 142.

Again in the case of Enstice v. Courtright, 61 N. J. L. 653, it was held "that a judgment will not be reversed for an erroneous instruction if appellant was not prejudiced thereby."

And in the case of State v. Hummer, 73 N. J. L. 328, it was held that "an incorrect statement of a legal proposition in the charge of the court to the jury affords no ground for reversal in a criminal case when it is manifest that the error could not have prejudiced the defendant in maintaining his defence upon the merits."

See also Kargman vs. Carlo, 85 N. J. L. 632, at p. 638.

CONCLUSION.

It is respectfully submitted that for the above reasons the judgment of the Warren County Circuit Court should be affirmed.

Respectfully submitted,
WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff-Respondent.

W. Reading Gebhardt,
Of Counsel.