

162-1 845

Record No. 1385

W. G. BAPTIST

v.

GRANT FAULKNER'S ADMINISTRATOR.

FROM THE CIRCUIT COURT OF THE COUNTY OF MECKLENBURG

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES. Clerk.

162 Va 1

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

W. G. BAPTIST

versus

GRANT FAULKNER'S ADMINISTRATOR.

PETITION FOR WRIT OF ERROR AND *SUPERSEDEAS*.

*To the Honorable Chief Justice and Associate Justices of the
Supreme Court of Appeals of Virginia:*

Your petitioner, W. G. Baptist, respectfully represents that he is aggrieved by a final judgment of the Circuit County for Mecklenburg County entered on the 29th day of October, 1932, in an action therein depending by notice of motion for judgment in which R. R. Slate, Administrator of the estate of Grant Faulkner, deceased, was plaintiff and petitioner was defendant; the judgment in the case being upon a verdict rendered in favor of the plaintiff against the defendant for \$3,000.00 and cost.

A transcript of the record in said action is herewith presented as a part of this petition.

STATEMENT OF THE CASE.

For convenience, the plaintiff in error will be referred to as the defendant and the defendant in error as the plaintiff in accordance with their respective positions in the trial court.

R. R. Slate, Administrator of Grant Faulkner, deceased, proceeded against W. G. Baptist by notice of motion for judgment in the sum of \$10,000.00 claimed as damages for the death of the intestate, Faulkner, caused by an automobile accident which occurred on June 6, 1931. The notice of motion

for judgment alleged that the automobile involved in the collision was supplied by the defendant for the use, pleasure and convenience of his family and was being used for said purpose at the time of the collision with his knowledge and consent and was being operated at the time by the defendant's daughter as his agent and for his purposes, obviously basing the plaintiff's case upon what is known as "The Family Purpose Doctrine". This notice was served on April 1, 1932, and returnable on April 18, 1932. On April 18, 1932, the defendant filed his demurrer to said notice of motion upon the ground that it did not allege that the automobile was operated or controlled by the defendant nor was it being operated for the benefit and upon the business of defendant by any servant or agent of said defendant and that it did not allege any facts showing the liability of the defendant for the injuries sustained by plaintiff's intestate. The demurrer was overruled and the defendant excepted. Thereupon, the defendant filed his several pleas of not guilty and contributory negligence of plaintiff's intestate and an affidavit denying that the automobile in question was operated or controlled by him or for him at the time of the collision. Upon motion of the plaintiff, the defendant was allowed until May 15, 1932, to file his grounds of defense to said action. By order entered on May 14, 1932, this time was extended to the 25th of the same month. On June 27th following, counsel for the defendant moved the court for leave to file an affidavit denying that the defendant was the owner of the automobile in question and an additional or supplemental ground of defense based thereon, but the court overruled the motion and the defendant excepted. The first trial of the case was commenced on June 29, 1932, at which the jury were unable to agree upon a verdict. During the progress of the second trial in the following August, a witness for the plaintiff gave certain testimony from which it might be inferred that defendant's automobile was covered by insurance and the court declared a mistrial. The last trial was had in October, 1932, at which time the jury rendered the verdict complained of. Before each trial, the defendant renewed his motion to file the affidavit denying ownership of the automobile and the additional and supplemental ground of defense, but this motion was overruled each time and the defendant excepted.

The verdict of the jury was, "We, the jury, find for the plaintiff in the amount of \$3,000.00". After this verdict was returned, the court stated to the jury that they must direct to whom this money should go. The jury then stated that after paying debts they wanted the intestate's mother and father to receive the amount. The court thereupon entered

up judgment providing that the amount of the recovery should be divided between the mother and father of the intestate. (R., 342.)

The defendant thereupon moved the Court to set aside the verdict upon the following grounds:

1. On account of the change of the verdict by the court.
2. For error of the court in refusing to permit the defendant to file the affidavit denying the ownership of the automobile and to file additional, amended and/or supplemental ground of defense.
3. Because the verdict is contrary to the law and evidence and without evidence to support it.
4. For error of the Court in admitting improper evidence on behalf of the plaintiff.
5. For error of the court in rejecting proper evidence offered by the defendant.
6. For error in granting improper instructions tendered by the plaintiff.
7. For error of the court in refusing proper instructions tendered by the defendant.
8. For error of the court in making improper amendments or changes in instructions tendered by the defendant.

THE FACTS OF THE CASE.

Early during the evening of June 6, 1931, Mrs. W. G. Baptist, her daughter, Miss Marjorie Baptist, Miss Mary Baptist, Mrs. Irby Turnbull, Miss Elizabeth Turnbull and J. H. Baptist started from Boydton to attend a dance at Buffalo Springs, a summer resort in Mecklenburg County about eighteen miles from Boydton. On this trip, Miss Marjorie Baptist was driving the automobile, a Ford A-Model Sedan which had been given to Mrs. Baptist as a Christmas present in 1929 by her brother, B. O. Cone of Richmond, but the automobile had been registered in the name of her husband, the defendant in this case. Miss Mary Baptist occupied the seat by the driver and J. H. Baptist was also on the front seat of the automobile. Mrs. Turnbull occupied the right rear seat with Mrs.

Baptist seated on the extreme left and Miss Turnbull between these two ladies. It was testified that Miss Baptist drove at a moderate rate of speed and upon reaching a point near the village of Finchley, which is approximately six miles west of Boydton, the automobile which, for convenience, will be called the Baptist car, was involved in a collision with a Ford Touring car owned and operated by a young colored man named Grant Faulkner, at that time proceeding eastwardly in the direction of Boydton. With Faulkner on the front seat of his car were a colored girl named Rosa Edmunds, who sat beside the driver and a negro man named Ed Wade, who was seated on the extreme right of the front seat. The time of the collision is fixed at approximately nine o'clock, it being in evidence that the dance was to commence at about ten o'clock, and it was dark at the time of the accident. The collision occurred on a stretch of road which is practically level and straight, although the road descended eastwardly for some distance west of the point of the collision and there is a curve and slight grade a few hundred yards east of this point. The surface of the road had been treated with tar and gravel. After the collision the Baptist car came to a stop on its left or south of the highway some thirty or thirty-five yards west of the scene of the collision. The left front wheel of this car had been broken down and the rim and wire spokes entirely torn from the hub, leaving the hub and brake drum on the ground. From the place where the Baptist car came to a stop to the point fixed by the plaintiff's witnesses as the scene of the accident there was a clearly discernible scar or mark extending along the tarred surface of the road. The hub or brake drum of the Baptist car rested in the western end of this mark and the eastern end of the mark was designated by the plaintiff's witnesses as the point of the impact between the automobiles. The exact location of the eastern end of this mark is a matter of controversy between the witnesses for the litigants, three of those for the plaintiff testifying that it was to the south or left of the center of the highway with relation to the Baptist car and it was apparent that the location of this mark was a pivotal point in the case. The three witnesses for the plaintiff, whose testimony will be more fully discussed later, testified that they made no measurements of the mark nor of the roadway, but witnesses for the defendant of the highest intelligence and reliability, including the Deputy Motor Vehicle Commissioner, whose duties include the investigation of automobile collisions on this highway, testified that actual measurements placed the eastern extremity of the mark well to the north or the right side of the center line of the highway. The front head lights

on the Baptist car, including the glass lens and the front bumper and radiator, were uninjured. The left front fender was bent at a point about opposite the hub cap, but the front end of the fender was not scarred. The left running board and rear fender were torn off.

A few minutes after the collision and while the occupants of the Baptist car were descending from their automobile, a third car proceeding in the direction of Clarksville or Buffalo Springs, driven at a high rate of speed, collided with the Faulkner automobile. This third car did not stop and the identity of the driver has never been discovered. It is not clear from the testimony what damage was caused the Faulkner car by the third automobile, but after the accident, when the Faulkner car was examined, its front bumper and left head light were injured; the left front fender was bent back; there was a deep dent in the left front door and evidence of a severe downward blow on the top of that door. The left rear fender was damaged as well as the running board and the windshield and top were broken.

Faulkner received injuries from which he died shortly after reaching a hospital in South Boston.

ASSIGNMENTS OF ERROR.

The assignments of error upon which your petitioner relies are as follows:

1. The court erred in the admission of improper evidence offered in behalf of the plaintiff.
2. The court erred in rejecting proper evidence offered by the defendant.
3. The court erred in refusing to permit the defendant to file an affidavit denying the ownership of the automobile and the amended and supplemental ground of defense based thereon.
4. The court erred in granting certain instructions on motion of the plaintiff and in refusing certain instructions tendered by the defendant.
5. The court erred in not granting the motion of the defendant to set aside the verdict because it was contrary to the law and evidence and without evidence to support it.

THE FIRST ASSIGNMENT OF ERROR.

The evidence to which objection is made will be discussed under several separate headings:

(a) *The Court erred in admitting testimony of admissions of the driver of the automobile.*

The plaintiff's witness, Ed Wade who was riding in the Faulkner car at the time of the accident, after stating that the plaintiff's car was turned over at the point of the collision and that the defendant's car went some fifty or sixty yards before it was stopped, testified as follows:

"Q. Well, what did you all do with Grant Faulkner after you found out that he was hurt?

A. Took him and carried him out on the right side of the road and laid him on a cushion, me and Charles Carter.

Q. What became of the people in the Baptist car?

A. They came back up there.

Q. They came back up there to where Grant Faulkner was lying and where you all were?

A. Yes, sir.

Q. Well, what did they say or do.

A. They came back up there and asked if anybody was hurt, and I said yes, Grant was hurt, and she said that she was not as far out of the road as she thought, that the light blinded her." (R., 118.) and again, after objection was made to the foregoing testimony, this testimony was admitted over the objection of the defendant. (R., 120.)

"Mr. Settle: I withdraw that question, and will ask another:—Did Miss Marjorie Baptist (the driver of defendant's car) make any statement that night, after the accident, as to how it occurred?

A. Yes, sir, she said that she was not as far out of the road as she thought that she was, and the light blinded her."

The objection to this testimony was that it was hearsay evidence and could only be introduced in evidence by calling to the stand the driver of the automobile; that no agency had been shown between the driver of the automobile and the defendant; and even conceding that the driver was the defendant's agent for the purpose of driving the automobile, this would not make her statements narrating a past event binding upon the defendant. This rule of law appears to be well settled.

It is stated in Blashfield's Cyclopedia of Automobile Law, p. 1670 (1926-31 Perm. Supp.):

"The owner must be held liable if at all because of the negligence of the driver of the car, and that negligence must be established as against the owner by the usual and ordinary rules which govern in asserting liability of a master for the negligence of his servant. In such case, therefore, the admissions of the driver are not admissible to bind the owner as proof of the negligence of the owner."

One of the most frequently cited cases upon this subject is *Luby vs. The Hudson R. R. Co.*, 17 N. Y. 131, which was an action for running a horse car over plaintiff in the street. A policeman was permitted to prove, over defendant's objection, that after the accident he arrested the driver, and that as he was getting off the car, and out of the crowd, which had surrounded it, he asked him why he did not stop the car, to which the driver replied, "The brake was out of order". The court held:

"The declarations of an agent or servant do not, in general, bind the principal. When his acts will bind, his statements and admissions respecting the subject matter of these acts will also bind the principal, if made at the same time, and so they constitute a part of the *res gestae*. To be admissible they must be in the nature of original, and not of hearsay evidence. They must constitute the fact to be proved, and not be mere admissions of some other fact. They must not only be made during the continuance of its agency, but in regard to a transaction pending at the very time. The declaration was no part of the driver's act for which the defendant was sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete and the driver, when he made the statement, was only endeavoring to account for what he had done."

The foregoing rule has been approved by this court and consistently followed. In *Va. & Tenn. R. R. Co. vs. Sayer*, 26 Gratt (67 Va.) 328, this Court, in passing upon the admissibility of statements made by a brakeman forty miles from and prior to the accident that the train brakes were bad and of the section master made shortly after the wreck and while on his way to it, that he had been expecting an accident at this point, stated:

"The parties' own admission, wherever made, may be given

in evidence against him; but the admission or declaration of his agent, binds him only when it is made during the continuance of his agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act and part of the *res gestae* that it is admissible at all. It is to be observed that the rule admitting the declaration of the agent is founded upon the legal identity of the agent and the principle, and the declaration of the agent to be admissible, must be a part of the *res gestae*."

And after citing with approval the foregoing case of *Luby vs. Hudson River R. R. Co.*, said:

"I think, therefore, upon principle and authority, that the declarations of the brakeman and section master made at the time, and under the circumstances when made, were not a part of the *res gestae*, but mere hearsay, and ought to have been excluded. There was no reason why the brakeman and section master should not have been examined as witnesses, and their declarations not being made at such time and under such circumstances as make them a part of the *res gestae* were mere hearsay."

"It is argued, however, that the evidence, if excluded, would not have changed the verdict of the jury, as the case was clearly made out without it. It is impossible for this court to estimate the effect which this evidence had on the minds of the jury, and it would be going beyond our legitimate function to enter upon any such vain speculation."

"The court erred in admitting the evidence, and it is our province, without speculating how the evidence might have affected the minds of the jury, simply to declare it inadmissible, and for this error of the court to reverse the judgment * * *."

Among the cases in Virginia upon this subject and holding to the same effect are: *Jammison vs. Chesapeake and Ohio Ry. Co.*, 92 Va. 327, 23 S. E. 758; *Blue Ridge Light & Power Co. vs. Price*, 108 Va. 652, 62 S. E. 938; *Deitz vs. Whyte*, 131 Va. 19, 109 S. E. 212.

In *Jammison vs. Chesapeake & Ohio R. Co.*, *supra*, a witness stated that he did not know where the conductor of the train was at the time of the accident, but he saw him immediately after the accident. He was asked if he was then told by the conductor where he was at the time of the accident.

An objection was sustained to this question, and this court stated:

"It seems from every point of view that the ruling of the court was correct. It was not admissible as an admission, because Capt. Berkeley (the conductor) was not the agent of the defendant in error in the sense that he could bind it by his admission. It was not a part of the *res gestae*, because not sufficiently connected with it in point of time and circumstances, and its exclusion is in no event reversible error, because the declarations sought to be offered in evidence are not given, so that the court may be enabled to judge of their relevancy and value."

In *Blue Ridge Light Co. vs. Price*, 108 Va. 652, 62 S. E. 938, one of the material questions was whether the car was standing still or moving when the plaintiff attempted to get on it. The witness, who was some twenty-feet from the point where the plaintiff was injured, had testified that the car was not moving when the plaintiff put her foot on the step, but before she could get on, the car pulled out and she fell. He stated that afterwards "the motorman made a remark that he had no right to stop on the railroad track, and I remarked to him, 'What did you stop for, then'?" The court held that this evidence was inadmissible, stating:

"The general rule is, that railway companies are not responsible for the declarations or admissions of any of their servants beyond the immediate sphere of their agency, and during the transaction of the business in which they are employed. It has been held that the declarations of the conductor or engineer of a railroad train, as to the manner in which an accident occurred, made after its occurrence, are not admissible."

In *Deitz vs. Whyte*, 131 Va. 19, 109 S. E. 212, 214, this rule was again laid down by Judge Burks as follows:

"It is well settled that the declaration of an agent, made before the agency began or after its termination, cannot be given in evidence against his principal. The agent is a competent witness and may be put on the stand and allowed to testify as any other witness, but his declarations are not admissible."

It was argued in the trial court that even if these statements would not be admissible when made by an agent, still

the rule known as the family purpose doctrine is not based purely upon agency and is so broad in its scope as to make the statements admissible in this case. We cannot see how it can be claimed that these statements were a verbal part of the acts claimed as negligence; they were not so closely related to any act, nor are there the other necessary circumstances shown to qualify them as spontaneous declarations; therefore, we know of no other rule of law under which they could be admitted as an exception to the hearsay rule other than admissions against interest and to bind the principal, agency must be shown.

In the recent work of Madden on Persons and Domestic Relations, p. 399, it is aptly stated:

“If the parent authorizes the child to act as his servant or agent in any matter, he will be liable for any torts committed by the child in the scope of his employment. This liability does not depend upon the relationship of the parties as parent and child, but upon their relationship as principal and agent, and is governed by rules governing other cases of agency.”

The theory of the family purpose doctrine being that the head of the family obtains, owns and controls an automobile for the convenience of the household and recreation and enjoyment of his family, it would seem that the only grounds on which liability could be placed upon the head of the family would be agency, which is according to the decision in the case of *Trice vs. Bridgewater* (Tex. Civ. App.), 51 S. W. (2nd) 797, stating:

“The father is held liable for injuries inflicted by a minor son, a constituent member of his family, while operating the family car, on the theory that while so operating the same, though wholly for his own pleasure, such son is in legal effect a sort of special agent of his father. Giving such doctrine of agency full force and effect, the declarations of such son, to be admissible against the father or to constitute a basis for charging him with liability, must be made within the scope of the son's authority in the operation of such car and contemporaries with some action in connection therewith when such declarations or admissions are not so made but constitute in effect merely a narrative of past events, they are mere hearsay and not admissible against the father nor sufficient standing alone to charge him with liability.”

It is therefore respectfully submitted that the Court committed prejudicial error in the admission of evidence of statements made by the driver of the defendant's automobile after the accident in question had been completed.

(b) *The Court erred in permitting witnesses to state their opinion as to how the collision occurred.*

The plaintiff was permitted to qualify two witnesses as experts. One, J. A. Cole, was qualified as such upon the statement that he had been automobile mechanic for the last twenty years and had been so engaged regularly for the last fifteen years. The other, F. W. Carpenter, Jr., was qualified upon the statement that he had been an automobile mechanic for fifteen years and had had right much experience with wrecked automobiles and that during the last five years he had gotten up and repaired around 175 or 200 wrecked cars. These witnesses testified in part as follows:

J. A. Cole: R., 37—"Q. Please state whether or not in your opinion, the Grant Faulkner car was turning over on its side—on its right-hand side?

R., 38, L. 3—"A. Yes, sir, the top and windshield were turned over to the left-hand side and it was bound to have been turned over on the right side." And

R., 42—"Q. State whether or not, from the evidence of the blow sustained by the Grant Faulkner car on its left-hand side about where the driver sits, it was struck with sufficient force, in your opinion, to have turned over?"

"A. Yes, sir."

F. W. Carpenter: R., 99—"Q. Will you tell the jury whether the bumper of that car has been struck or received any blow in that accident or at any time?

"A. The bumper shows a minor scratch on it. It does not seem to have a big blow but a minor scratch." And

R., 99—"Q. Mr. Carpenter, it is in your testimony here that the car involved in the accident with this car that is out here had the left front wheel torn off, the front axle bent, he front fender torn down, and the front left headlight bent; with these two injuries before you, would you say that the other car ran into this one, or this car ran into the other one?"

"A. I would say the other car ran into this." And

R., 100—"Q. I will ask you if, in your opinion, the driver of this car, which the jury has just seen, could have, with the injuries that you saw on that car, while proceeding along the

highway, suddenly have swerved his car to the left and sustained the injuries which you saw there?"

R., 101—"A. If he had done that, he would have cut more in front. The main blow is more in the center." And

R., 101—"Q. Mr. Carpenter, from what angle on the highway would another car receiving the injury I just described to you a moment ago, have to be driving towards this car of Grant Faulkner's in order for Grant Faulkner's car to sustain the damage that it has in the side there?"

"A. He would have to be running about a thirty-five degree angle to come in the way that this car is damaged."

The necessary qualifications of an expert witness required in this jurisdiction is laid down in *Bird vs. Commonwealth*, 21 Gratt. (62 Va.) 800, as follows:

"All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required."

And the appearance, size, construction and the materials used in the construction and the operation of the modern automobile, especially a Ford, is so generally and commonly well known, with all respects that it may have bearing upon the case, none of such facts would necessitate the inquiry of an expert automobile mechanic, nor did the witnesses attempt to testify as to these details. The whole of their testimony is with tension of steel and the physics of motion. Under the facts of this case, it is our contention that the matters testified to were not a proper subject for expert inquiry, because he facts and conditions were too numerous for any expert to analyze and base his conclusion upon. But if such an expert could be obtained, our idea of such a person would be an expert on dynamics or a physicochemist and not an automobile mechanic. However, it is our contention that no one should be allowed to make an independent investigation of an automobile collision and substitute his opinion for that of the jury as to who was guilty of negligence and especially in this case, where all of the evidence shows that the automobile upon which the opinions were based had been in another collision, loaded and moved several times and a considerable time had elapsed before the inspections were made.

The following expressions are contained in the case of *Virginia Ry. Co. vs. Bell*, 118 Va. 492, 87 S. E. 570:

"The witness, Dr. E. C. Ambler, was permitted, over the objection of the defendant company, to say that, in his opin-

ion, considering the size, travel and adjustment of the door, the rate of speed of the train, and its alleged sudden stop, and assuming that one side of the plaintiff's neck was against the door jamb, the blow which the plaintiff might thus receive from the door coming shut on his neck would be sufficient to fracture the transverse process of the third cervical vertebra. To appreciate the possible consequence of this testimony, it must be borne in mind that one of the main issues before the jury was whether the plaintiff could have received, under the circumstances and in the manner claimed by him, a blow sufficient to cause the fracture mentioned in Doctor Ambler's answer. Much of the evidence centered around this question. Proof was introduced to show the size of the door, how it was hung, and how far it could travel or slide; also as to the speed of the train and how suddenly it was or could have been stopped or checked by the application of air to the brakes; and as to the force of the blow necessary to break the transverse process of the plaintiff's third cervical vertebrae.

The question under consideration was improper as a hypothetical question, because it assumed that the plaintiff's neck was against the door jamb when there was no proof of that fact. Moreover, it was not a sudden stop, but only a more or less sudden reduction of speed of the train, which is claimed to have caused the injury, and the question was inaccurate and misleading in this respect. It was further improper because the only matter of expert knowledge upon which the witness could properly express an opinion was as to the force necessary to cause the fracture, which is very different from the question as to how violent would be the blow from a door of given size and weight upon the application of air brakes on a train running at a given rate of speed. As a physician, Doctor Ambler, could properly express an opinion in answer to the former but not the latter question, unless he was an expert on dynamics as well as on anatomy and surgery. He testified that he had no personal experience or knowledge whatever in regard to such doors, and his evidence on the point, taken as a whole, shows clearly that he was not competent to express any expert opinion on the subject. It was for the jury to determine, under the facts proved, whether the fracture could have been caused in that way; and this being one of the pivotal points in this case, it was error, and for all that we can say, prejudicial error, to permit this purely conjectural nonexpert expression of opinion to go to the jury."

The facts and expressions in that case aptly apply to the facts of this case. Here the automobile mechanics did not

know the position or relative speeds of the cars at the time of the collision and even though they had known these facts, they still would not have had sufficient information to make their testimony as experts admissible as held in the case of *Griggs vs. Brown*, 126 Va. 556, 102 S. E. 212, which was a dispute over an interlock. There was a survey but all landmarks had been destroyed. A surveyor testified that from his measurements and examinations and conclusion from the evidence in the case that the land in question was included in the plaintiff's boundaries. The court stated that this was the only evidence upon which the jury could have based their verdict, and although it was admitted without objection, such conclusion was not evidence and the judgment was reversed. This was also the conclusion in the recent case of *Johnston vs. Peair* (Cal. App.) 3 P. (2nd) 617:

"It is appellant's contention that expert testimony was admissible to prove that these cars could not, if struck in the manner and under the circumstances testified to by plaintiff's witnesses, have moved or come to rest in the manner also testified to. Such a contention is well answered in the case of *Fishman vs. Silva* (Cal. App.) 2 P (2nd) 473, 474, in which the court said: 'It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the single reason that in partisan representation there is an ever present temptation to forget essential facts which do not fit in. For instance, where it is argued that where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule of law, in the abstract, will be found of little value when we have the additional factors of each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of the impact.' "

In that case it was attempted to qualify an automobile mechanic as an expert witness, who by way of qualification testified that he had had many years experience in repairing automobiles; that he had examined and analyzed the wrecks of cars on the ground where the wrecks had occurred and

that he had examined, studied and analyzed the effects of collisions quite generally, but the court refused to permit him to testify as an expert.

It is respectfully submitted that on reason and principle it would be an invasion of the province of the jury to let anyone make an examination of either the scene of the accident or the automobiles involved in it and from the investigation give their opinion as to who was negligent, and especially so in this case where from all of the testimony the plaintiff's car was struck by another car after the collision complained of and perhaps turned over before the inspection was made. And that the admission of this evidence was prejudicial error.

Further, the court refused to permit defense counsel to ask upon cross-examination a hypothetical question based upon the injuries sustained by defendant's car, which car the witness, Carpenter, had never examined.

(c) The court erred in permitting the jury to view the wrecked automobile.

Over fifteen months after the wreck, and without evidence to show that the automobile of plaintiff's intestate was in the same condition that it was immediately after the wreck, the court, over the defendant's objection, permitted the jury to view the plaintiff's intestate's automobile as real evidence (R., 97). The view was had before the completion of the plaintiff's testimony. After all of the testimony was completed and it was conclusively shown that the automobile was not in the same condition that it was immediately after the accident, the defendant moved to exclude all of the evidence based upon the condition of the automobile, which motion the court overruled and the defendant excepted. (R., 326.)

It will be seen from the following evidence that the automobile was not in the same condition as it was immediately after it collided with the defendant's car; the extent of the injuries it later received were controverted; such injuries appear to have been severe, and there is no satisfactory statement given of such later injuries from which the jury could decide which were received by the collision with the defendant's automobile and those received later.

Charles Carter, a witness for plaintiff on direct examination (R., 56), stated:

"A. I and Ed Wade went to carry him (Grant Faulkner) out in the field and lied him down; we got a seat and put under his head, and then we went and pulled the car down. (He had stated that Grant Faulkner's automobile was then

lying on the right ditch, with the top lying over on the bank out of the ditch (R., 55), and by the motor being heavier than the back, it slid down and then the other car came on and struck the fender that was torn off the car down in the road.

Q. That was after you had turned the car back?

A. Yes, sir." And

"Q. Charlie, you say the car was off the highway and the top of it lying up on the bank?

A. Yes, sir.

Q. And the body of the car was in the ditch?

A. Yes, sir." And on cross-examination (R., 74).

"A. The last car that passed there hit that fender that was torn off lying down on the ground.

Q. Which fender?

A. The left hand fender that was torn off.

Q. The front or rear fender?

A. The front fender. It hit that lying on the ground."

Following this testimony, the plaintiff called Ed Wade (R., 117), who, on direct examination, gave the following account of the second impact:

"Q. Well, when the Baptist car hit Grant Faulkner's car, did it immediately turn Grant Faulkner's car over and throw you all out or did Grant Faulkner's car run some distance down the road?

A. No, sir, it never run nowhere; when it struck it, it turned it over.

A. It turned it over on the right side?

A. Yes, sir." And later (R., 121).

"Q. Did any other car come by and hit any portion of the Grant Faulkner car after the Baptist car had turned it over on the right hand side?

A. Yes, sir, a car passed there and struck the fender." And

"Q. Did the second car do any damage to Grant Faulkner's car other than strike the fender?

A. No, sir."

On cross-examination (R., 131), he stated as follows:

"Q. Had Grant's car been moved when the second car had hit it?

A. No, sir." And later (R., 133).

"Q. Had the Faulkner car been moved at all when the second car hit it?

A. No, sir.

Q. It had not been moved at all?

A. No, sir.

Q. Now, Ed, do you know Charles Carter?

A. I just know him when I see him.

Q. He testified here today that when he got there the car had been pushed down or pulled down, or something; anyway, it had been moved, and that the second car came along and hit it after it had been moved; is he mistaken about that?

A. Yes, sir. The car had not been moved.

Q. How is that?

A. The car hadn't never been moved when the second car came along.

Q. It had not been moved?

A. No, sir.

Q. So Charlie Carter is mistaken about that?

A. Yes, sir.

Q. What part of the Faulkner car was hit, Ed? (R., 134.)

A. Do you mean the first time?

Q. No, the second time?

A. It just hit the fender." He then stated that at this time he was ten or twelve yards south of the road in the field and

"Q. Had you examined the Faulkner car before the second car came along?

A. No, sir, not particularly.

Q. Then, how do you know it didn't do any damage.

A. I don't think it done any damage. All the damage was done by the first car.

Q. How are you so sure about that? You said it hit the fender; did it pass on the other side of Grant's car from you, or on the same side of Grant's car that you were on?

A. Passed on the other side.

Q. How do you know it hit the fender?

A. I didn't see nothing there for it to hit but a fender. It was hanging off.

Q. You say you had not examined the Faulkner car at all?

A. No, sir.

Q. You don't know what it hit do you?

A. I think it hit the fender.

Q. Are you pretty sure of that, too?

A. Yes, sir.

Q. Which fender did it hit?

A. The left fender.

Q. Front or back?

A. The back. That is where it was torn off.

Q. Charles Carter testified it hit the left front fender; which is right?

A. That is the only fender that was scarred on the left.

Q. You don't mean to say that the left front fender is not bent?

A. The whole fender on the left side.

Q. Which did it hit—the left front or the left rear?

A. I don't know whether the front or the hind one, but I think the hind one."

It is seen that these two witnesses by whom the plaintiff attempted to show the injuries received by the second impact present entirely different versions, and from their statements it is apparent that they were not in a position to see the second collision and that they knew little about it. The defendant's witness, Hiawatha Towles' testimony is much more credible and presents still another view of the second collision.

Direct examination (R., 225).

"A. Yes, sir. I went where Faulkner was lying out in the field, and pretty soon, in four or five minutes, another car came and hit the Faulkner car.

Q. Where was the Faulkner car when the other car came by?

A. In the road.

Q. Where was it in the road?

A. I guess on the Baptist side.

Q. What did the other car do to the Faulkner car? Did it change its position any?

A. Yes, sir, it pulled it a foot or two, after he hit it, he scrambled around there and he got out from it. I couldn't say whether it was the bumper or fender, but he got out and stepped down to it.

Q. The Faulkner car was in the road near the center when the third car came by?

A. Yes, sir."

All of the other testimony upon this subject tended only to confuse the extent of the injuries received by the Faulkner automobile after the collision with defendant's automobile. The second collision was of sufficient force to be heard a quarter of a mile off (R., 241), and at the time it was brought to trial the automobile was "torn all to pieces". (R., 295.)

The plaintiff strongly contended that the scars and dents on the left front door of the Faulkner automobile showed that it was run into by the Baptist car. However, this fact is se-

riously questioned by the plaintiff's own witness, J. A. Cole (R., 49), as follows:

"Q. Now, Mr. Cole, the injury to the side door of the Faulkner car would indicate that it was struck a blow straight down like that (illustrating), wouldn't it?

A. In the top of the door?

Q. Yes?

A. It seemed like it got that when it turned over.

Q. The top of the left-hand door is bent down by a blow from above, isn't it?

A. Yes, sir.

Q. You say it seems it got that when it turned over?

A. It seemed so.

Q. Haven't you testified it seemed in your opinion, it turned back on the right side?

A. Yes, sir, but it kept on over when it turned clear over. It turned bottom side upwards, and when it struck the other way, it seemed like it caught the lick straight down from the top of the door."

In addition to the fact that the Faulkner car was in a second collision, it was hauled from the scene of the accident seven miles to the town of Boynton, then made two trips of thirty-five miles each way between Boynton and South Boston, requiring four loadings and traveling a distance of one hundred and forty miles in the interval between the collision and the view by the jury, and exposed to the elements for months (R., 18) in the meantime.

The general rules governing the admissibility of such evidence is stated in 22 C. J. 769 as follows:

"Any article made important by the evidence or by the nature of the investigation may be produced for inspection, or where the circumstances are such that it cannot be or should not be brought to court, it may be inspected at the place where it is to be found. Inspection evidence of this character may range over any line of human activity, as building or mechanical trades, the medical or surgical profession, or nautical affairs. A frequent application of the rule is found in the production of the tools or implements with which a certain act was or is claimed to have been done, or the clothing which was worn by a person at the time of an occurrence in controversy. In order that articles may be so introduced they must be satisfactorily identified, *and it must also be shown to the satisfaction of the Court that no such sub-*

stantial change in the articles exhibited as to render the evidence misleading has taken place." (Italics supplied.)

And in 10 R. C. L. 992, it is stated:

"As a preliminary to the introduction of any object in evidence, it must appear, however, that it has not sustained or undergone any change by reason of lapse of time or otherwise, since the time in issue."

And it is respectfully submitted that the admission of this evidence is prejudicial error. A view of the automobile was had for the sole purpose of permitting the jury to reconstruct the collision from the injuries shown on it. This would be difficult under any circumstances, and aside from the fact of a second collision, we believe impossible in this case. The plaintiff's theory was that the automobile was struck in its left front door by the front of the defendant's car, but by his own witnesses, J. A. Cole (R., 49), and F. W. Carpenter, Jr. (R., 104), it is shown that this door received a severe injury in some other manner (perhaps by the automobile being turned over). In addition to this, the numerous loadings and unloadings of the car and the long trips upon which it was hauled, as well as the length of time elapsing between the accident and the view, would indicate material changes in the condition of the car. The evidence was that the car was a complete wreck. How it received its injuries was not satisfactorily explained and almost every statement regarding how it received them was controverted. Even the experts did not agree. We realize that the admissibility of such evidence is largely within the discretion of the trial court, but this discretion must be held within bounds, and when the evidence clearly shows that it was not admissible due to material changes since the collision; the trial court's error should be corrected.

An automobile is an intricate piece of machinery, strong in parts necessary for high speeds and comfortable riding, but not built to sustain the forces of a collision. If these two automobiles were each traveling at a speed of 35 miles an hour, as stated, the speed of the collision was sufficient to hurl an object through air, and without an accurate knowledge of their structure, component parts, relative speeds, angles at which they struck, whether or not the motors were pulling, and the specific pull of each and many other details not ascertainable in this case, it is impossible to reconstruct the collision from a view of them. To introduce one of them in evidence invites the jury to the realm of speculation on per-

haps a minor injury that could be easily explained were it called to the attention of the litigants, but was not seen among the hundreds of possible details. We have been unable to find a decision of this court dealing with exactly this point, but in view of our decisions, this question should be governed by the same rules as those governing a view of the scene by the jury.

In *Noell vs. Commonwealth*, 135 Va. 600, 115 S. E. 679, it is stated:

“Whether we regard the proceeding as the taking of evidence or merely as an explanation and illumination of the testimony given or to be given in court, no one can doubt that it is expected and intended to have a material bearing upon the conclusions reached by the jury. Indeed, it is perfectly well settled by our own decisions that a view ought never to be granted unless the court is satisfied that it will be of material aid to the jury in passing upon the evidence. Nor can we agree with Prof. Wigmore, and other authorities holding that the view, so far as the question of the presence of the accused is concerned, is like a consideration of the evidence by the jury after they have retired to their room. Nothing can be lawfully considered there unless it has been regularly brought to the attention of the jury in court during the course of the trial and in the presence of the accused.”

The right to a view is not an absolute right of a litigant, but rests in the sound discretion of the trial court, subject to review under proper circumstances and as said in *Lorillard Co. vs. Clay*, 127 Va. 734, 104 S. E. 384:

“We have reviewed most of our recent decisions on the subject of views by the jury, and while there is some variation in the language used in the different cases, we are content to rest our conclusion on the statement that the propriety of ordering a view lies largely in the discretion of the trial court, which should only grant it when it is reasonably certain that it will be of substantial aid to the jury in reaching a correct verdict, and that its decision refusing a view will not be reversed unless the record shows that it did appear to the trial court that such view was necessary to a just decision, and that the statutory provision for expenses in a civil case were complied with. Code No. 6013.”

If this court will reverse a decision refusing a view when the record shows that it was necessary to a just decision, it should equally reverse a decision when the record shows that

a view of an object would be misleading and confusing and that the object was not in the same condition it was at the time in controversy, which is in accordance with the following expression in *Chesapeake and Ohio Ry. Co. vs. Nickel*, 157 Va. 382, 161 S. E. 248, 252:

“Another very important reason why the view was not necessary was that the evidence conclusively showed that at the time of the trial the crossing was in first class condition. This is shown by the plaintiff’s own witnesses. Where the condition of the premises have been changed the jury would receive no benefit from a view.”

It is therefore respectfully submitted that the court committed prejudicial error in allowing the jury to view the automobile of the Plaintiff’s intestate.

(d) *The court erred in permitting B. L. Smithson to testify in regard to statements made by the witness, Charlie Carter.*

Charlie Carter, a witness for the plaintiff, testified that at the time of the collision, he was in the old road paralleling the highway, about half way between Liberty Church and Finchley (R., 65); that from where he was standing in the dirt road, he could see the scene of the accident (R., 75); that he was on the “second rise from Finchley” (R., 315). From an inspection of the record, it will be seen that while this man claimed to know a great deal about the collision, his testimony contained glaring discrepancies and he was contradicted in material particulars. It was he who testified that the *left front* fender of the Faulkner car was struck by the third automobile (R., 74), which was contradicted by Ed Wade, the occupant of the Faulkner car, who testified that the third automobile struck the *left rear* or back fender (R., 135). Wade also testified that when the third car passed, the Faulkner car had not been moved (R., 133), but Carter testified that the Faulkner car had been moved at that time (R., 78). These two colored men were the principal witnesses for the plaintiff.

J. A. Creedle, a merchant at Finchley, testified that an automobile on the highway could not be seen from the point where Charlie Carter claimed to have been standing (R., 237 and 245). The plaintiff thereupon recalled Carter and upon being recalled, he testified that he was *out of the road* (R., 314), out on the soil ground (R., 317), although, as before pointed out, he had previously testified that he was in the

road. With Carter discredited by his own testimony and that of Mr. Creedle, the court permitted B. L. Smithson, a deputy sheriff of the county, to testify that in company with counsel for the plaintiff, he and Carter had been to the scene of the accident; that Carter pointed out to him the place where he claimed to have been standing at the time of the collision and from that point the place *where Carter said the wreck occurred* was in plain view (R., 321). It will be noticed, however, that Mr. Smithson was unable to fix the location of this point where Carter told him the wreck occurred by any landmark while testifying before the jury and there is nothing in the record to show that the place pointed out by Carter is where the collision actually occurred.

The witness, Carter, had been discredited; he had changed his testimony in regard to where he was standing and in other particulars he had been contradicted by the plaintiff's witness, Wade, who was an occupant of the Faulkner automobile, and Mr. Smithson was permitted to testify that from a point *shown him by Carter* as the place where he was standing, he could see another point which Carter designated as the scene of the collision. He was unable to even describe the point of collision shown him sufficiently for the jury to identify it. The testimony of this deputy sheriff was obviously offered for the purpose of bolstering up the testimony of Carter, but it does not even have the merit of being evidence as to Carter's reputation for truthfulness. It was simply and purely hearsay evidence, and not only that, it was given while the witness, Carter, was present to testify himself and, in fact, after he had testified.

It is respectfully submitted that the testimony of this witness was inadmissible and prejudicial to the defendant. We regard as applicable the ruling laid down by the court in *Virginia & Tenn. R. R. Co. vs. Sayer, supra*:

"The Court erred in admitting the evidence, and it is our province, without speculating how the evidence might have affected the minds of the jury, simply to declare it inadmissible, and for this error of the court to reverse the judgment * * *."

THE SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR.

As before indicated, the plaintiff apparently based his case upon what is known as the "Family Purpose Doctrine". Prior to each trial of the case, counsel for the defendant offered to file an affidavit denying that the defendant owned

the automobile, but the court refused the motion of counsel and the defendant excepted. The testimony of the defendant to the effect that the automobile belonged to his wife was rejected by the court, and at the conclusion of the evidence the court granted Instruction No. 2 on motion of the plaintiff, which is as follows:

“The Court instructs the jury that the law of this State is that where a father maintains an automobile for the comfort, use and convenience of the members of his family, as well as for the use of himself and his business and for his pleasure, and such automobile is driven by members of his family with his knowledge and expressed or implied permission, the father becomes liable for any injuries caused by the negligent operation of such automobile by such members of his family.”

The defendant excepted to the giving of the foregoing instruction and offered Instruction No. F which told the jury that before the plaintiff could recover, he must prove that the operator of the automobile was the agent of the defendant and that she was driving the automobile on his business in the scope of her employment. But the court refused to grant Instruction No. F, and the defendant excepted.

In view of the fact that these three assignments of error involve the “Family Purpose Doctrine”, they will be considered together.

There was no evidence showing that the operator of the automobile was defendant's agent.

W. G. Baptist, called as an adverse witness by plaintiff (R., 7), testified as follows:

“Q. You are Mr. W. G. Baptist, the defendant in this suit?
A. Yes.

Q. It is a fact that the car involved in the accident in which Grant Faulkner lost his life was registered in your name?

A. Yes.

Q. The licenses were also obtained by you in your name?

A. Yes.

Q. And had been for several years?

A. Yes.

Q. Now, Mr. Baptist, it is further a fact that you maintained this car for the use and benefit of your family, at their will and desire?

A. Yes.” And (R., 8):

"Q. You used this car yourself, when you wanted it, and any member of the family, your wife and daughter and particularly Miss Marjorie Baptist used it whenever they wanted it if you did not have use for it yourself?

A. Yes, sir."

This evidence was admitted over the defendant's objection and later the court refused to admit the following testimony of the defendant (R., 302):

"Q. Please state how you acquired title to this automobile?

A. Well, I think I stated before that the car was really a present to my wife.

Q. From whom?

A. From her brother.

Q. Who was he?

A. B. O. Cone in Richmond. The car was given to her, I think in 1929, Christmas, 1929, but, of course, we all used the car, used it as a family car, and I hardly ever used the car myself. I have never used the car without asking my wife or my daughter. I didn't know when they wanted to use it, and I didn't want to keep them from using it if they wanted it.

Q. The car was registered in your name?

A. Yes, sir.

Q. But it was given to your wife by her brother?

A. By her brother.

Q. She claimed it as her automobile?

A. Well, I don't know. She always used it.

Q. I believe you stated you hardly ever used the automobile yourself without asking her?

A. No, because I had another car and used that.

Q. So then, this automobile was used almost exclusively by Mrs. Baptist and the other members of the family?

A. Yes, sir, more so than by anybody else. I didn't use it very often and I didn't come down here today in it; I had to get somebody else to bring me.

Q. Mr. Baptist, are you able to explain why this automobile was registered in your name?

A. Well, I don't know that I am. I had a car, an old car and it was not any use to me, and Mr. Cone phoned me, or I knew that they were going to give this car to my wife, and I had no use for the old car, and I said that they had as well let it go in for what it was worth, and I don't know what they would get for the old car or what they were al-

lowed for the old car. I didn't know about the trade being made until he told me.

"Q. Who attended to the registration of the car and the license?

A. I got Mr. Park to do it.

Q. Was Mr. Park the dealer from whom it was bought?

A. Yes, sir.

Q. And he looked after it?

A. Yes, sir.

Q. Did you ever tell your wife in whose name the car was?

A. It was sent up there with a card on it from her brother. Mr. Park drove it up there one morning before she got up, and when she got up it was sitting in the yard with a card on it.

Q. Do you know whether Mrs. Baptist ever knew that this automobile was registered in your name?

A. Certainly, she knew it was registered in my name.

Q. You think that she did?

A. I don't know that she did. I don't remember her ever asking."

It is seen from the testimony that the automobile in question was owned solely by Mrs. Baptist and while it is true that the defendant assented to a question that he maintained this car for the use and benefit of his family at their will and desire, there is no evidence to show of what this maintenance consisted or in what capacity he acted. It may be that acting as agent for the donor, Mr. Cone, he saw that the automobile was kept in proper repair and Mr. Cone paid the bills, or his statement could consistently have meant that when his wife and daughter were not using the automobile, he saw to its housing, repair and filled it with gas and oil for his wife and she paid the bills. One thing is shown, and that is that the wife not only owned the automobile, but exercised complete dominion over it. The defendant owned another automobile and never used the one in question without the special consent of his wife or daughter, and that seldom.

These facts present the questions whether or not the so-called "Family Purpose Doctrine" is the law in Virginia; if so, is the ownership of the automobile necessary to invoke this doctrine; and even if not, do the facts of this case come within such doctrine?

Family Purpose Doctrine.

The theory of the so-called family purpose doctrine is stated in Blashfield's *Cyclopedia of Automobile Law*, page 1464, to be as follows:

“The rule supported by the weight of authority, is that, where one provides an automobile for the purpose of furnishing members of his family outdoor recreation, and for general family purposes, the use of the car for such purpose by a member of the family is within the scope of the owner's business, analogously to the furnishing of food and clothing to the family or ministering to their health, and that a child or other member of the family, other than the owner, who drives the car while containing other members of the family, for their convenience and pleasure, with the general consent of the owner, may be regarded in so doing as so carrying out the purpose of the owner, and for which the car is maintained, as to render the owner liable for the negligent driving of the child or member of the family on the principle of agency.”

The facts of the Virginia cases upon this subject are as follows:

In *Cohen vs. Meador*, 119 Va. 429, 89 S. E. 876:

“As to the liability of J. Cohen, the material facts, and consequently the controlling principles, are wholly different. He was the owner of the car, but was not present and did not know that his son, E. H. Cohen, was making the trip which resulted in the accident.

The testimony of the younger Cohen, which in this respect is not contradicted, is that the Cohen family had just returned from Big Stone Gap; that he had driven them in the car; that on his return he left his ‘father and mother and family’ at the store (meaning his father's store); that, with his two small brothers, he had started to put the car up when he met two friends whom he invited to go with him for a ride; that they accepted and he was taking them towards West Norton when he struck the horse; that he supposed his father thought he had taken the car to put it up; and that his father did not know that he had the car out at that time. It further appears that E. H. Cohen, up to the time of the accident, had done practically all of the driving of the car for his father and the family.

In this state of the evidence we do not think the judgment against J. Cohen can be upheld."

It is seen that in this case then were the required elements of ownership, general family usage and implied consent.

In *Blair vs. Broadwater*, 121 Va. 301, 93 S. E. 632, L. R. A. 1918A 1011. The facts are these:

"The evidence showed that Broadwater bought and kept the car for use and pleasure of himself and family. He was a deputy sheriff, and also used the car sometimes about the discharge of his official duties. The daughter was a careful and experienced driver, and on the day of the accident she sought and obtained permission from her father to use the car that afternoon for the pleasure and entertainment of herself and her cousin."

This opinion also states that the daughter operating the car was nineteen years of age, and liability upon the father was denied.

In *Litz vs. Harman*, 151 Va. 363, 144 S. E. 477, the facts were:

"The uncontradicted evidence is that the defendant owned the automobile which he kept for family purposes; that they drove it out frequently; that they used it for pleasure, as well as business. One witness said that he had never seen the defendant driving it; that he spent a great deal of his time away from home; that some of the defendant's children drove it, and that the defendant did not keep a hired chauffeur. The testimony of the son of the defendant, who was driving the car at the time, is thus summarized on this point in the petition for the writ of error: 'That he was driving the car at the time of the accident and had been in the habit of driving the car; that some people who were at a camp near Tazewell wanted some groceries brought down there, and asked his mother to bring them, and it was at her request that he took his mother and sister, and got the groceries, and drove down to the camp to deliver them, and on their return the accident happened; that the car was bought and maintained by his father, partly for such errands; that at the time he was testifying he was 22 years old, and at the time of the accident he lacked a few days of being 21; that he had been down to camp near Tazewell to take some food to some girls there; that a boy by the name of Gillespie

called up his mother, and said that the people at the camp wanted some food, and that his mother stated they would take it down; that his mother got the food at one of the stores; that his father did not know that he was driving the car on that occasion; and that he was not on any errand or mission of any kind or business for his father."

It also appears that another of the defendant's daughters was at the camp to which the groceries had been so carried by her mother, and the opinion of the Court is delivered as follows:

"The discussion might be prolonged and citations multiplied, but we shall content ourselves with saying that we agree with the Judge of the trial court in holding that, under the facts in this case, the 'family purpose doctrine' applies. The automobile was being used at the time by three members of the family of the defendant (wife, son and daughter), for the purpose for which it had been bought, under the implied authority of the defendant, so as to make his son, the driver of the machine, for the time being, his servant and agent. The doctrine of respondent superior applies here under the conceded facts."

The facts in *Green vs. Smith*, 153 Va. 675, 151 S. E. 282, were:

"James Smith was, at the time of the injury a young man 17 years of age, about 6 feet 3 inches tall, and weighed approximately 175 pounds; and for 4 or 5 years had been attending the Danville Military Institute. This school had opened for the session 1927-28 during the week prior to Monday, September 19, 1927, on which day Earl Green was injured; and Sam P. Smith had entered his son therein again as a five day boarder. That is, he boarded and roomed at the school from 6 P. M. on Monday until 4 P. M. on Saturday and spent the week-end and his Monday holiday with his father. Monday is the regular weekly holiday at this school. James Smith spent Sunday night at his father's home in pursuance of his arrangement as a five day boarder; and on Monday morning used his father's automobile to carry some of his clothes to a pressing club to be cleaned and pressed and to take some of his clothes to Danville Military Institute to be laundered, as his laundry was done at the school. About 10 A. M., while he was driving his father's automobile, and was on his way from the pressing club to

the school, he ran over and seriously injured Earl Green in front of his parents' home.

"The other facts and inferences which might be properly drawn therefrom appear from the evidence of James Smith and his father quoted below:

James Smith on direct examination testified:

Q. Did you tell your father what you wanted with the car?

A. Yes, sir.

Q. Did he give you permission to take it?

A. Yes, sir.

On cross examination, James Smith testified:

Q. Where did you get the key from when you borrowed your father's automobile?

A. My father was at the pump house where he is employed and I got the key from him at the pump house.

Q. Did your father keep the key?

A. Yes, sir.

Q. As I understand, you tell Judge Aiken that you borrowed the car so you could take some clothes that you wanted to get pressed to the pressing club and to take a package to school?

A. Yes, sir.

Q. When did you expect to get back home?

A. I expected to stay over at the school a while and I was going back before 12 o'clock that day.

Sam Smith on direct examination testified:

Q. Have you been sending your boy to the Danville Military Institute several years?

A. Yes, sir, ever since Col. Kemper has been there.

Q. What is your plan about his going to school, does he go out there as a sort of boarder?

A. Yes, I board him out there from Monday night to Saturday evening.

Q. He has a room out there?

A. Yes, he has a room out there.

Q. Keeps his clothes and personal effects out there so as to make himself at home for the greater part of the week?

A. Yes, sir.

Q. Every summer, I suppose he brings his things home?

A. Yes.

Q. Takes them back at the beginning of the session?

A. Yes, sir.

Q. Do you require him to go to school?

A. I hope so.

Q. On the 19th of last September was it according to your orders that he took your car and took his things out to school?

A. Yes, sir.

Q. Taking such things along as he would need for his use out there as a boarder?

A. Yes, sir.

On cross examination Sam P. Smith testified:

Q. Judge Aiken asked you whether or not it was according to your orders. I wish you would tell the court and jury how he came to get the car that day?

A. He wanted to go over and carry some clothes to Robert and some other things over there to the school—you know they do the washing over there, and his clothes were washed there, and he wanted to go over there to have them pressed and washed.

Q. How did he happen to get the car?

A. I gave him the key.

Q. Did he ask you to give your permission so that he could use the car to go over there for that purpose?

A. Yes.

Q. And when you tell Judge Aiken it was according to your orders you mean that you consented to his using the car and loaned it to him?

A. Yes.

Q. What time did you tell him to come back?

A. He would be back at 12 o'clock—dinner time.

On re-direct examination, Sam P. Smith testified:

Q. When I said your orders I did not mean you ordered him to do anything like an officer in the army orders soldiers. What I meant to ask you was whether or not you required your son to go to school out there?

A. Well, I tell you, he got to be a mighty big boy and I didn't think Miss Rosa Brimmer could handle him like she ought to.

Q. So you required him to go out there. As your son and as his father, you required him to go to school?

A. Yes, sir.

Q. And you required him to board out there?

A. Well, my wife died and it was better for him to be out there, and Col. advised me that it was better, he would be in study hall every night and that it was best for him.

Q. So you required him to board out there?

A. Yes.

Q. And incidentally you required him to take such things along as he needed?

A. Yes.

Q. And he was doing this at the time that he unfortunately hit this boy?

A. Yes.

Q. All that was according to your general wishes for his education?

A. Yes, sir."

In discussing this evidence, although not deciding the case directly upon the point, this court said:

"The cases holding for and against the father's liability for the negligence of his minor son while driving his automobile with his permission, express or implied, uniformly hold that the father, in the absence of negligence on his part, is liable only where the son is acting as the agent or servant of the father and within the scope of his authority or employment; but they are in irreconcilable conflict as to the circumstances under which it is held that the son is acting as the agent or servant of the father and within the scope of his authority or employment. The authorities are not reconcilable, and no good purpose can be served by a review of them here." And

"The advent of the automobile has no magic power to change and rewrite the common law with reference to the liability of a father for the negligent use of an instrumentality which he permits his minor son to use; and if experience has demonstrated that the use of automobiles require that the owner of the automobile be held liable for the negligence of his minor son, or other persons, using his automobile with his permission in cases in which he would not be liable were the son or other person, using some other instrumentality owned by him, the change should come, we think, by the act of the Legislature and not by judicial pronouncement, as has been done in New York. See Section 59 C. 54 Laws of New York, 1929."

From the closest examination we have been able to make of the facts of these cases and the expressions of the court therein contained, we are able to reach but the one conclusion that this court first repudiated the so-called "Family Purpose Doctrine"; then accepted it; and has now overruled it, as has been done in other jurisdictions. The elements of this doctrine are a family; the ownership and maintenance of an automobile by a member thereof, perhaps the head of the family; and the use of the automobile by some member of the family, other than the owner, with the owner's consent either expressed or implied, for some family business or pleasure of a member thereof. All of these requirements are present in each of the Virginia cases. In the most recent case, cited last above, the father was certainly the head of a family; the son was actually residing at his home and would continue to do so until at least six o'clock that evening; he was using the automobile with the express consent of his father, who owned and maintained the same; and the son was using the automobile for both family purposes, delivering clothes to be cleaned and pressed and others to be washed, and his own pleasure and convenience to stay around school until his dinner time. And it is seen that the court disregarded the family purpose doctrine theory entirely and searched the record only for facts tending to prove agency as has heretofore been so long recognized. We heartily agree with the statement that if any such liability is proper, it should be imposed only by the Legislature; otherwise, we shall have various interpretations and confusions for years to come. Our Legislature has imposed an *in rem* liability upon the machine by Sec. 2146 Code of Va., and in comparison it would seem that the family purpose doctrine would more appropriately be adopted in the same way.

It is respectfully submitted that no agency was shown between the driver of the automobile and the defendant; therefore, the judgment should be reversed and this case dismissed.

Defendant's Ownership of Automobile.

If this court should go back to the ruling of *Litz vs. Harman*, 151 Va. 363, 144 S. E. 477, still this judgment should be reversed upon the ground that the ownership of the automobile in question was not in the defendant, and such ownership is a required element of the family purpose doctrine. It is seen that all the cases upon the subject recognize ownership as one of the necessary elements of the family purpose

doctrine. The court refused to permit the defendant to file an affidavit denying ownership as provided by Section 6126 Code of Virginia. The plaintiff's objections to the filing of this affidavit were that it was in nature of a plea in abatement and could not be filed with the grounds of defense after demurrer; that it was inconsistent with other pleas; that if plaintiff's claim were defeated for this reason, the time had elapsed in which he could sue the person responsible; that registration of the automobile in his name was conclusive proof that the defendant was the owner thereof; and that it would be prejudicial to plaintiff to permit the filing of the affidavit when offered. The statute and the reason for it gives a complete answer to the first contention; ownership is a matter of proof and questioned by a plea in bar, not in abatement, and to be proved as any other fact or defense. The statute was passed to give the plaintiff notice in advance whether or not this defense would be offered in order that the plaintiff could have his testimony accordingly. We are unable to point out inconsistency in the pleas; but be it so, since the abolition of special demurrers, it is seriously doubted whether the objection of duplicity even in a declaration can be raised, but if this can be done in such case, it may be cured by separate counts in the declarations. Burks' Pleading and Practice, p. 906. These grounds of defense being separately pleaded, it is proper. The fact that the time had passed in which the plaintiff could sue the real owner has no bearing upon this case. A plaintiff is given the right to bring his action within twelve months and if he chooses to wait until the last day, this should not bar a litigant of his defense. The fact that the filing of the affidavit may have been to the plaintiff's prejudice is equally true to the defendant's right. Here the named defendant is not the one in real interest, in fact, this defense may operate to the detriment of his wife and it may not have been to his interest to disclose the real ownership of the automobile. It is submitted that under the circumstances the court should have permitted the affidavit to be filed.

We are unable to find from either our statutes or decisions that the registration certificate is conclusive proof of ownership in the operation of the family purpose doctrine or otherwise. However, a similar case is *Cewe vs. Shuminski* (Minn.), 233 N. W. 805, in which a husband purchased an automobile, and had it registered in his wife's name and she signed a chattel mortgage to secure the unpaid portion of the purchase price. On the night of the accident the husband

had not been home and was leaving a roadhouse with others in the car. He ran into a train and was killed. This was a suit by the occupant of the car. The family of the deceased consisted only of his wife, who was not present at the time of the accident, and it was attempted to hold the wife liable upon the family purpose doctrine. The court said:

"The sole circumstance furnishing for plaintiff's position a factual basis which comes anywhere near being arguable is that the machine was registered in defendant's name rather than her husband's; and that she signed a chattel mortgage securing the unpaid portion of the purchase price. Why the husband put the title in her name and caused the car to be so registered does not appear. The transaction was his in real substance. It was not at all that of his wife, save for the mere form of the title documents. The husband alone procured, furnished and maintained the car for whatever use anybody made of it. The wife had no active participation in the transaction at any point. Her passive holding of title was not enough to charge her with liability for her husband's lethal negligence.

Putting aside the circumstance that defendant was not the head of her family—it remains that she had nothing to do with providing the automobile or maintaining it for family use. There is no evidence that she possessed or claimed any right of use or control independent of her husband. The family automobile rule is an application of one of agency, respondent superior. It has been extended to unusual limits. 6 Minn. Law. Rev. 79. But none of the cases furnish any justification for further extending it so as to impose liability upon a wife upon the sole ground that legal title of the car was placed in her by her husband. Our own cases are collected in Dunnell's Minn. Digest (2nd Ed.) #58346. The authorities elsewhere are collected and reviewed in the annotation of *Watson vs. Burley*, 64 A. L. R. 83."

For these reasons it is respectfully submitted that the court should have permitted the defendant to file the affidavit denying ownership of the automobile.

Does This Case Come Within the Family Purpose Doctrine?

While this question is closely related to the assignment of error based upon the insufficiency of the evidence, in view of the fact that the present status of the Family Purpose Doctrine has just been considered, it is deemed proper to

follow that discussion with the views of the defendant upon the sufficiency of the evidence showing his liability under the facts of this case even should the court adopt this rule of law.

Even should the action of the trial court be sustained, the facts of this case do not sustain the family purpose doctrine. In the absence of such an affidavit, there was an affidavit filed denying that the defendant operated or controlled the automobile at the time of the injury. The negligence upon which the plaintiff bases his action is that defendant's car was being operated to its left of the center line of the highway as prohibited by Sec. 2145-(4) Code of Virginia. This act is prohibited to any person driving a vehicle. The owner of such vehicle is not mentioned. Therefore, to fix liability upon the defendant, agency must be shown under the established rules of agency or upon the so-called family purpose doctrine, which latter the plaintiff attempted to do. The notice of motion refers to the automobile in question as "your automobile" and makes this statement, "at the time of said collision your said automobile was a car supplied by you for the use, pleasure and convenience of your said family", but nowhere makes the specific allegation that the defendant was the owner thereof. If these allegations are sufficient to allege that the defendant was the owner, then the court erred in not permitting the defendant to file the affidavit denying such ownership. If this is not a sufficient allegation to put ownership in issue, then the affidavit was not required and the evidence in the record is that the defendant was not the owner. The plaintiff himself did not rely upon it, as it will be seen from the foregoing testimony when he called the defendant as an adverse witness to do so. He proved that the automobile was registered in defendant's name and the bald statement that he maintained it for the use and benefit of his family.

But if the ownership is conceded; the testimony fails to show that the defendant bore the burden of the financial maintenance and upkeep of the automobile; or that it was so used with his consent, expressed or implied; nor does it show that he had a right to consent for such a use. The evidence offered by the defendant shows that he not only had no control over the use of the automobile, but could and did use it only with the express permission of his wife. If anyone is responsible under the family purpose doctrine, the evidence in the record may make out such a case against the wife of the defendant, but not against him. Anyone to be held responsible for a negligent act, must have had some

control over the act or it must have been done at his instance or request. Therefore, this automobile being in the possession of the defendant's wife and under her exclusive control, and not being so placed by the defendant; the only ground upon which liability could be placed on him in this case would be through relationship. So far as we know, this has never been done, under the family purpose doctrine or otherwise.

It is, therefore, respectfully submitted that the court erred in not admitting the testimony of the defendant as to ownership of the automobile and refusing to set aside the verdict of the jury upon the ground that there was no agency shown between the operator of the automobile and the defendant.

THE FIFTH ASSIGNMENT OF ERROR.

The verdict is contrary to the law and the evidence and without evidence to support it.

In considering this assignment of error, we are not unmindful of the fact that the position of the defendant is somewhat similar to that of a demurrant to the evidence and shall not emphasize the many conflicts in the evidence, but shall confine the discussion principally to a consideration of the proof offered by the plaintiff and the physical facts shown. However, we invite the attention of the court to the overwhelming weight of the evidence showing that the operator of the defendant's car was free of negligence. The number and personnel of witnesses by whom this is shown and the clear and convincing testimony of the occupants of the Baptist car indicates by a great preponderance of the evidence that the accident was caused by the negligence of the plaintiff's intestate. Miss Marjorie Baptist, the operator of the Baptist car, and Mrs. W. G. Baptist, Mrs. Irby Turnbull, Miss Mary Baptist, Miss Elizabeth Turnbull and J. H. Baptist, occupants of the Baptist car, as well as Hiawatha Towles, the only eye-witness to the collision not involved therein, all testified clearly and convincingly to the effect that the Baptist car was on its right of the center line of the highway. Mrs. Turnbull does not drive an automobile herself but all the other occupants of the car testified that they have had a great deal of experience in driving; that they were noticing the road at the time; that Miss Baptist drove further to her right of the highway before the collision and remained there; and that the Faulkner car left its side of the highway and ran into the Baptist car. Mrs. Baptist, the

mother of Miss Marjorie, testified that she was sitting immediately behind the driver and in answer to a question on cross examination (R., 179) said, "I drive and am always on the alert when I am riding," in explaining her testimony.

The plaintiff's sole claim of negligence is that the Baptist car was being operated to its left of the center line of the highway at the time of the collision. The proof offered to show this is that its left front wheel was crushed and the flange upon the hub fell to the surface of the road making a scar which could be plainly tracked from the point of the collision to the place where the car was brought to a stop, and that this mark, at the point of the collision, started to its left of the center line. No witness for the plaintiff measured the road or the distance of this mark from the edge. Three testified for him upon this subject and estimated the marks from six inches to three feet to the left of the Baptist car's center line. No two of them agreed as to the distance. By actual measurement, as shown by witnesses for the defendant, who carefully examined the scene of the collision, the marks in question were well to the north or right of the defendant's center line of the highway. It is true that the plaintiff's witness, Ed Wade, who was a passenger in the automobile of plaintiff's intestate at the time of the collision, stated that the car in which he was riding was well to its right of the road and that its right wheels were off the hard surfaced portion, still he is the one who places the point of the impact where the scar marks of the defendant's car started. Both these statements cannot be true. If, as this witness testified, the right wheels of the Faulkner car were off the surface of the road which was eighteen feet wide, the left of the car could not have been three feet from the center. Therefore, it being shown by actual measurements that this mark was to the defendant's right of the center line, the plaintiff is bound by this testimony and the mere statement of the witness that the automobile of plaintiff's intestate was to its right must be discarded, and it being proved beyond doubt that the defendant's car was to its right of the center line at the time of the accident, the verdict of the jury should be set aside and judgment entered for the defendant.

The testimony upon this subject is as follows:

Ed Wade, witness for plaintiff—direct examination (R., 115).

"A. We were coming on down the road, driving on the

right hand side of the road, and we seed the car when it come over the grade and he (Grant Faulkner) turned out of the road there. The car come on and struck and turned the car (Grant Faulkner's) over on the right hand side of the road," and later (R., 116).

"Q. Was Grant Faulkner on his right hand side of the road then?

A. Yes, sir.

Q. Was he on his extreme right, or just to the right of the center?

A. Way over on the right.

Q. Was he on the hard surface?

A. He had two wheels on the hard surface and two wheels off.

Q. How fast was he driving at that time?

A. He was driving about thirty or thirty-five miles an hour.

Q. How fast was the other car coming that you say you ran into his car?

A. He was running about fifty or sixty miles an hour." And again (R., 125):

"Q. (Mr. Settle) Could you tell, when the Baptist car ran into the Faulkner car, what damage was done to the Baptist car?

A. The front wheel was broken, and the fender gone or turned up on the end." And on the same page:

"Q. When that front wheel (left front wheel of the defendant's car) broke off, did it make any mark in the road there?

A. Yes, sir." And (R., 126):

"Q. Was that mark on Grant Faulkner's right side of the roadway or on Mr. Baptist's right side of the roadway?

A. Yes, sir, it was on Grant's side of the road.

Q. How far was that mark to the left of the center of the road?

A. It was over on the right—on Grant's side of the road.

Q. How far was it over on Grant's right side?

A. It was way over on the right.

Q. You say way over?

A. Yes, sir.

Q. Well, when you say way over, can you tell us about how far you mean that in feet? How far from the center of the road was that mark?

A. I don't know exactly how far it was from the center of the road.

Q. How far was the Baptist car when you first saw it?

A. I seed it when it came down the hill. We could see it half a mile, I reckon.

Q. How far were you away from it when you saw that it would probably run into Grant Faulkner's car?

A. About ten or twelve feet."

On cross examination, he made the following statements (R., 138):

"Q. You have also testified that this mark (made by the flange on the left front wheel of the Baptist car) in the road was way to the right. Now, about how far was that to the right?

A. About three feet, I reckon." And following (R., 139):

"Q. Are you pretty sure of that?

A. Yes, sir.

Q. Did you measure that?

A. No, sir, I didn't measure it.

Q. You just estimated it with your eye?

A. Yes, sir.

Q. When?

A. When we were up there.

Q. That night?

A. Yes, sir.

Q. Well, now, Ed, you say about three feet. Emmett Gregory said it was six inches from the center. Could Emmett be right about that by any possible chance?

A. (No answer.)" And following (R., 141):

"Q. So, then, you would say you are mistaken on actual measurement, wouldn't you?

A. (No answer.)

Q. I say, if these measurements were made and show that the scar was on the other side of the center of the road, you would say you were mistaken in your estimate, wouldn't you?

A. Yes, sir.

Q. Now, Ed, you said that Grant was on the right hand side of the road; you were not watching the road especially, were you?

A. No, sir, not particularly." And later (R., 142):

"Q. What was it that made you think that your car was on the right hand side of the road?

A. He pulled off up the road, and I know that he was on the right because he had gotten on the right hand side coming this way.

Q. Had you been on the left hand side before that?

A. No, sir.

Q. What was it that made you specially notice you all were on the right hand side of the road?

A. I was just looking.

Q. As a matter of fact, I believe you had just lighted a cigarette, hadn't you?

A. No, sir, I lit the cigarette way up the road.

Q. How far up the road?

A. We were coming up on a rise.

Q. In sight of the Baptist car?

A. Yes, sir, we could see the car.

Q. How did you light the cigarette?

A. With a match.

Q. Do you remember whether you had thrown the match away when the accident happened?

A. Yes, sir.

Q. You had thrown it away?

A. Yes, sir.

Q. You were puffing on the cigarette then?

A. Yes, sir.

Q. What makes you remember so particularly you had thrown the match away?

A. I know I had thrown the match away and was smoking the cigarette.

Q. But you say you were not watching the road?

A. No, sir, not particularly."

Due to the fact that this witness had a very few moments before lighting a cigarette and was in the act of puffing, getting it started, it is not likely that he saw what immediately preceded the collision, and, in, fact, he admitted that he was not noticing particularly. The only definite evidence he gives is that the Faulkner car was off the hard surface after it had turned over and that the scar marks of the left front wheel of the defendant's automobile started at the point of the impact. Whether or not the Faulkner car was off the hard surface after it turned over is strongly controverted by the witnesses and the physical fact that it was struck by another automobile soon after the collision. However, this fact would have slim bearing as to whether or not it was to its right of

the center line when struck. The chief point of this testimony is that the defendant's left front wheel scarred the road at the point of the collision, and the plaintiff builds his case around that fact as will be seen by the following evidence.

Emmett Gregory, witness for plaintiff (R., 24), testified:

"Q. Tell the jury where the cars hit.

A. Well, from where I see the car hit at, the place was knocked in the road, and I didn't see nothing else that could have knocked it unless when she tore down the wheel, for the brake drum to drop down and hit the road, and that was in the right center of the road coming to Boydton.

Q. That would have been to the left of the center of the road in the direction that the other car (the Baptist car) was going at the time of the accident?

A. Yes, sir.

Q. About how far was that to the left of the center of the road where you saw this place, apparently a brake drum plowing up the center of the road, going towards Clarksville?

A. I don't know, sir, exactly, maybe six inches or more.

Q. Six inches or more?

A. Yes, sir." And on cross examination (R., 31):

"Q. You say the scar mark of the Baptist brake drum started six inches to the left of the center of the highway; you did not make any measurements of that, did you?

A. No, sir, no more than to look at it."

Charlie Carter, witness for plaintiff, direct examination (R., 57):

"Q. When you say the brake drum (in reference to scars on the road) whose car do you refer to?

A. Mr. Baptist's car I know it is, because where the brake drum hit the ground it was more on his side from my knowledge than his.

Q. On whose side?

A. On Grant Faulkner's side.

Q. You say it was to the left side?

A. Yes, sir.

Q. On Grant Faulkner's side?

A. Yes, sir.

Q. In your own imagination—

Mr. Sterling Hutcheson: (interposing) "Don't let us have imagination."

By Mr. Hodges:

"Q. You didn't measure that spot?

A. No, sir.

Q. About how far was the brake drum scar to the left of Miss Baptist's side of the center of the highway?

A. Something like two feet I should think—at least I know it was."

The foregoing testimony, although vague and indefinite as to the position of the scars made by the defendant's car with reference to the center line of the highway, definitely places them at the point of the collision. No reference is made of any swerve of the marks to the north, indicating that the car was thrown back to its right of the road, as argued by counsel in the trial court, but on the contrary, the plaintiff's witnesses place the inception of the mark at the scene of the impact, and as will be more clearly shown by the defendant's testimony, this mark went down the road for some distance and then bore to the south.

The whole case resting upon the position of these marks with reference to the center line of the highway; the defendant offered the only positive proof of such position as follows:

E. L. Baptist, witness for defendant, direct examination (R., 263):

"Q. From where this car (the defendant's car) was lying, could you track it back to the scene of the accident, or could you track it back up the road?

Mr. Settle: We object to that for the reason he asked from where the car was lying could he track it; how could he track it?

The Court: He is trying to find out. The objection is overruled.

Mr. Settle: We save the point.

A. It was the easiest thing anybody ever tried to do. The hub on a Ford car has a very sharp flange on it, and when the wheel was knocked off, I suppose it was twelve or fourteen inches in diameter and that took the place of the wheel, and the hub took the place of the rim, and when it dropped down on the asphalt road, or whatever road it is (I don't

know the proper name) that is where it dropped and made the indentation, and that mark was just as distinct as you are over there, to the place the hub was resting, and the hub was sitting in one end of it, and there were the indications of a wreck back up thirty to thirty-five yards back up to where I was told the wreck took place and there was every indication of the wreck having taken place, and to the place where that hub was sitting was a line as definite as my hand."

By Mr. John Hutcheson:

"Q. So the hub was sitting in the end of the that line?

A. Of my brother's car?

Q. Yes.

A. The left front hub.

Q. And you tracked that back that night to where it started in the road?

A. That night, and went back the next morning and went over it again.

Q. Have you ever made any measurements in that road at that point?

A. I did. The hub dropped down from the north side of the road just about six feet and six inches from the north side of the road. That was the inside wheel of my brother's car. It was nearer the center of the road than the other wheel was."

W. P. Bishop, witness for defendant, direct examination (R., 160):

"A. There were bruise marks on the road, evidently caused by a wreck, several small marks you might say, and small wires leading off in the opposite direction from Boynton. There were also some grease spots and some glass in the road also. The marks that led off there as if something scraping the road, led, as I say, in the direction of Clarksville and eventually turned off to the left, and that mark was practically say a foot or two to the right of the road—the right center.

Q. To the right of the center going to Clarksville (the direction in which defendant's car was traveling)?

A. Yes, sir, and led off eventually down further fifteen or twenty yards to the left.

Q. Where did these marks or scars you refer to start with relation to the center line of the highway going towards Clarksville?

A. They were possibly a couple of feet, to the right of the

imaginary center line of the road." And further (R., 161):

"Q. Mr. Bishop, did you make any measurements of the road and these marks you refer to?

A. These particular streaks there that I just mentioned were approximately six to six and half feet from the right hand edge of the hard surface.

Q. What is the grade width of the road?

A. I think it is an eighteen foot road.

Q. Did you measure these distances yourself?

A. Yes, sir."

There were many other witnesses for the defendant who stated that the scar marks were to the defendant's right of the center line of the roadway, as well as the occupants of the defendant's car who stated that they were to their right of the center of the road at the time of the collision, but they did not make actual measurements as made by the foregoing two (R., 224, 276, 281, 298).

Regardless of the testimony or theory of the plaintiff's case, the positive testimony as to where the collision took place is shown by the measurements to have been upon the defendant's right of the center line.

Conceding all the other facts attempted to be proved in this case and disregarding all of the other errors pointed out, it is respectfully submitted that the plaintiff claiming that the left front wheel of the defendant's car made a scar mark at the point of the impact, when this mark is shown, by actual measurements, to be to the defendant's right of the center line of the highway, it necessarily puts defendant's car to its right of the highway at the time of the collision. Therefore, the plaintiff's intestate was to the left of the highway and he was guilty of negligence and the verdict of the jury should be set aside as contrary to the law and the evidence and without evidence to support it. As aptly stated by this court in the recent and similar case of *White vs. Richmond Greyhound Line, Inc.*, Va. , 163 S. E. 78:

"It is said that all of these matters are for the jury, and that our court has frequently so held. All of this is true, but in all cases of this character, there was something for the jury to decide, some issue made by the evidence. It is our duty to support a verdict when possible, while it, in turn, must be supported by the evidence. Any other rule would make of it a fetish and put away that responsibility which must always rest upon the court."

In that case, there was testimony to the effect that the right rear wheel of the bus slipped off the pavement and that the front end was then thrown to the left of the road causing the injury and that the bus came to a stop with both right wheels off the pavement. This court stated that due to the fact that the rear wheel which was off the pavement did not scrape against the edge of the pavement (the shoulders of the road were wet and soft), it is shown that the front end of the bus did not swerve to the left of the road, and due to the fact that this physical evidence conflicted with the testimony accepted by the jury, sustained the trial court's action in setting aside the verdict of the jury. The instant case is much stronger for the defendant than that case. There it was possible for the accident to have happened as related by the plaintiff, but not probable. In this case, if actual measurements are accepted over guesses, it is shown by the scar marks in the road at the point of the collision that the defendant's car was upon its right of the roadway and therefore, the plaintiff's car was then to its left, so the negligence of the plaintiff's intestate caused the injury.

In view of the foregoing reasons, it is respectfully submitted that the judgment of the trial court based upon the verdict of the jury should be set aside and final judgment for the plaintiff in error, the defendant in the lower court, entered by this court.

CONCLUSION.

It was prejudicial error on the part of the trial court to admit the hearsay evidence respecting admissions made by the driver of the defendant's automobile as to how the accident happened against the interest of the defendant. Such driver was not an agent of the defendant to settle the controversy or to investigate the scene or make any contract in behalf of the defendant. She was not a party to the proceeding, but was available as a witness for the plaintiff had he desired to call her to the stand.

It was prejudicial error to permit witnesses to be qualified as experts upon testimony that they were automobile mechanics in small country garages and after examining one of the automobiles involved in the collision from evidence thus obtained to give the jury their opinion as to who was liable for negligence. This is especially true when it is shown that such automobile, at the time it was examined, was not in the same condition as immediately after the collision and that proof of the evidence of the injuries sustained in the col-

lision is vague and controverted. Under these circumstances, it was also prejudicial error to permit the jury to view such automobile. It was prejudicial error to permit B. L. Smithson to testify in regard to statements made to him by the witness, Charles Carter.

The so-called Family Purpose Doctrine is not the law in Virginia, but should the court adopt such rule of law, the defendant in this case neither owning, maintaining nor having any control over the automobile in question, such rule in its broadest scope would not fix liability upon him under the particular facts of this case.

The negligence alleged by the plaintiff is that the automobile of the defendant was to its left of the center line of the highway at the time of the collision and he centers proof of this around the statement that the hub of the left front wheel of defendant's automobile marked the point of the collision. His proof that this mark was to the defendant's left of the center line of the highway is the testimony of three witnesses. One of such witnesses testified that the mark was six inches to the left; another said two feet and the third places this distance at three feet. All these witnesses testified that they made no measurements but their statements were based merely upon an estimate made at night. The defendant proved by E. L. Baptist and by W. P. Bishop, a motor vehicle inspector, who actually measured the distances, that the mark in question was to the defendant's right of the center line of the highway.

For the foregoing and other errors apparent in the record and to be stated at Bar, petitioner prays that a writ of error and *supersedeas* be granted him and that the judgment of the trial court be reviewed and reversed.

Counsel for petitioner desire to present orally reasons why a writ of error and *supersedeas* should be allowed and state that copies of this petition were mailed to Messrs. McKinney & Settle at South Boston, Va., and Mr. Y. M. Hodges, at South Hill, Va., the opposing counsel, on the 27th day of January, 1933. Counsel for petitioner also desire the right to rely upon this petition as their brief or a part thereof provided such writ of error is allowed.

Respectfully submitted,

W. G. BAPTIST, Petitioner.
By Counsel.

STERLING HUTCHESON,
JOHN Y. HUTCHESON,
Counsel for Petitioner.

Supreme Court of Appeals of Virginia.

We, the undersigned attorneys at law, practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion the judgment complained of in the foregoing petition should be reviewed and reversed by the said Supreme Court of Appeals of Virginia.

Given under our hands this the 27th day of January, 1933.

STERLING HUTCHESON,
JOHN Y. HUTCHESON.

Writ of error and *supersedeas* awarded. Bond, \$4,000.00.
March 13, 1933.

In the Circuit Court of Mecklenburg County,
Virginia.

R. R. Slate, Administrator of Grant Faulkner, deceased,
vs.
W. G. Baptist.

The following is a true copy of the record in the case of R. R. Slate, Administrator upon the estate of Grant Faulkner, Deceased, vs. W. G. Baptist tried in the Circuit Court of Mecklenburg County, Virginia, at its October Term, 1932.

NOTICE OF MOTION FILED APRIL 1ST, 1932.

Take notice that I shall, on Monday, the 18th day of April, 1932, at 10:00 o'clock A. M., or as soon thereafter as I may be heard, move the Circuit Court of Mecklenburg County, Virginia, for judgment against you for the sum of Ten Thousand Dollars (\$10,000), which amount is due by you to the undersigned Administrator of Grant Faulkner, deceased, by reason and on account of the following facts:

On Saturday, June 6, 1931, at about 9:00 o'clock P. M., Grant Faulkner was driving an automobile on the state highway between Clarksville, Va., and Boydton, Va., in Mecklenburg County, and was proceeding in the direction of Boydton, and had reached a point about seven and a half miles from Boydton and about four miles from Clarksville, and was driving his said automobile on his right hand side of the said highway and proceeding along the said highway in a prudent and lawful manner, when the said automobile was met by your automobile which was proceeding in the opposite direction towards Clarksville, and was at the time of

collision being driven by your daughter, Majorie
page 2 } Baptist; and at the time of the collision hereinafter
described, your said automobile was occupied by
your said daughter, your wife and friends of your family.

At the time of said collision your said automobile was a car supplied by you for the use, pleasure and convenience of your said family, and was being used for said purposes with your knowledge and consent, and was being operated at the time by your daughter as your agent for your said purposes. When your said automobile approached the automobile driven by said Grant Faulkner, the driver of your said automobile negligently turned and directed your said car to the left, causing the same to collide with the car driven by said Grant Faulkner, turning the same over on its right hand side, throwing the said Faulkner and other occupants of his said automobile out, and crushed the said Grant Faulkner on the left side of his body, causing injuries from which he died about 11:00 o'clock on the same night of the said collision, and shortly after reaching the hospital at South-Boston, to which he was taken.

The undersigned charges that at the time of the said collision the driver of your said car was driving the same at a high rate of speed in excess of the speed permitted by law, and in an unlawful and negligent manner, and by reason of said negligent and reckless driving and excessive speed, and the negligent turning of your said automobile to the left and the driving of the same to the left of the center of the said highway in violation of law, you negligently caused the said collision and the death of the said Grant Faulkner.

The undersigned charges that at the time of the injuries complained of it was the duty of the driver of your said car, driving the same for you as aforesaid, to drive the same on the right half of the said highway and to keep the same under proper control and drive the same at a prudent and lawful rate of speed, and so operate the same as not to injure the
page 3 } said decedent and particularly in meeting other vehicles to guide the same to the right of the center of the said highway; but nevertheless, notwithstanding your said duty, you negligently disregarded the same, and drove and caused your said automobile to be driven at a reckless, negligent, excessive and unlawful rate of speed, and in meeting the said automobile of the said Grant Faulkner drove your said car to the left of the center of the said highway, and with great force and violence drove it against the automobile of the said Grant Faulkner, negligently causing the same

to be overturned crushing the said Grant Faulkner and causing injuries from which he about two hours thereafter died.

Wherefore and by reason of the foregoing facts and acts of negligence and breaches of duty on your part, judgment will be asked for the amount, and at the time and place hereinbefore set forth.

The undersigned states that he is the duly qualified Administrator of the estate of the said Grant Faulkner, deceased

R. R. SLATE,
Administrator of Grant Faulkner, Deceased.
By Counsel.

McKINNEY & SETTLE,
Attorneys for Plaintiff.

Executed in the County of Mecklenburg by delivering a true copy of the within Notice to W. G. Baptist. This the 1st day of April, 1932.

W. R. BEALES,
Sheriff Mecklenburg County, Va.

page 4 } AFFIDAVIT, FILED APRIL 18TH, 1932.

This day W. G. Baptist personally appeared before me, H. F. Hutcheson, Clerk of the Circuit Court of Mecklenburg County, Virginia, and being first duly sworn, made oath that he is the defendant in the above styled case now depending in the Circuit Court for said County; and that at the time of the collision between the automobile of the defendant and the automobile of the plaintiff's intestate on the 6th day of June, 1931, referred to in the notice of motion for judgment in this case, he, the said W. G. Baptist, did not operate nor control his said automobile nor was the said automobile being operated at the time by any agent of the defendant, nor was the said automobile being operated for any purpose of the defendant as alleged in said notice of motion for judgment.

W. G. BAPTIST,

Subscribed and sworn to before me this the 18 day of April, 1932.

H. F. HUTCHESON, Clerk.

page 5 } DEMURRER, FILED APRIL 18TH, 1932.

The said defendant says that the notice of motion for judgment in this action is not sufficient in law and states the grounds of demurrer relied on to be as follows:

1. The notice of motion for judgment does not allege that the automobile which collided *with* the automobile of the plaintiff's intestate was operated or controlled by the defendant or that it was being operated for the benefit and upon the business of the defendant by any servant or agent of the defendant.

2. That the notice of motion for judgment does not allege any facts showing the liability of the defendant for the injuries sustained by the plaintiff's intestate.

HUTCHESON & HUTCHESON, p. d.

page 7 } PLEA OF CONTRIBUTORY NEGLIGENCE,
FILED APRIL 18, 1932.

The defendant, by his attorneys, comes and says that he *is* not guilty of any negligence in manner ad form as the plaintiff hath complained and state that he intends to rely upon the contributory negligence of the plaintiff's intestate as a defense to the action and that the acts of negligence of the plaintiff's intestate are as follows:

That the plaintiff's intestate, Grant Faulkner, immediately before and at the time of the collision referred to in the notice of motion for judgment, was driving to his left of the center of the highway and negligently failed to pass the automobile of the defendant to its right as required by the statute; that the automobile of the plaintiff's intestate was being operated at a high, dangerous and excessive rate of speed exceeding that which would have been careful and prudent and greater than would have been reasonable and proper having due regard to the traffic, surface and width of the highway and all other conditions then existing; that the brakes on the automobile of the plaintiff's intestate were not maintained in good working order and said automobile was not equipped with brakes adequate to control the movements of and to stop said automobile; that the plaintiff's intestate did not keep a proper lookout to avoid the collision; that the plaintiff's intestate took no precaution to avoid

the accident after the time of discovering or the time when he should have discovered the danger of the defendant's automobile.

HUTCHESON & HUTCHESON, p. d.

page 8 } PLEA OF NOT GUILTY.

The said defendant, by his attorneys, comes and says that he is not guilty of the premises in this action laid to his charge in manner and form as the plaintiff hath complained And of this the said defendant put himself upon the country.

HUTCHESON & HUTCHESON, p. d.

page 9 } GROUNDS OF DEFENSE, FILED MAY 16,
1932.

The said defendant, by his attorneys, states the following grounds of defense to this action:

1. That the defendant and/or the driver of the defendant's automobile was not guilty of any negligence.

2. That the sole proximate cause of the collision was the negligence of the plaintiff's intestate.

3. That the plaintiff's intestate was guilty of contributory negligence which precludes the right of the plaintiff to recover in this action; and the defendant intends to rely upon his plea of contributory negligence filed in this action.

4. That the automobile of the defendant, at the time of the collision, was being operated in a careful, prudent and lawful manner upon the righthand side of the highway and at a reasonable and proper rate of speed and under proper control.

5. That the automobile of the plaintiff's intestate, at the time of the collision, was being driven to its left of the center of the highway.

6. That the automobile of the plaintiff's intestate, at the time of the collision, was being operated and driven at a high, dangerous and excessive rate of speed, greater than

was reasonable and proper under the circumstances then existing.

7. That the plaintiff's intestate failed to keep a proper lookout for the defendant's automobile.

8. That the plaintiff's intestate, after discovering the peril of the defendant's automobile or after the time when he should have discovered such peril, took no precaution to avoid the accident.

9. That the collision was the result of an unavoidable accident.

page 10 } 10. That the defendant did not operate or control his automobile at the time of the collision nor was it being operated or controlled for the benefit and/or upon the business of the defendant by any servant or agent of the defendant.

HUTCHESON & HUTCHESON, p. d.

page 11 } *AMMENDED* GROUNDS OF DEFENSE,
FILED JUNE 27, 1932.

The said defendant states as an *amendment* and supplement to his grounds of defense heretofore filed the following:

That the said defendant did not own, operate nor control the said automobile at the time of the accident.

HUTCHESON & HUTCHESON, p. d.

page 12 } AFFIDAVIT, FILED JUNE 27, 1932.

This day came Sterling Hutcheson, attorney for the defendant, and being first duly sworn, made oath that according to his information and belief the automobile described in the notice of motion for judgment in this case as belonging to the defendant was, at the time of the collision complained of, the property of Mrs. W. G. Baptist, the wife of the defendant; that the said automobile was purchased by a brother of the said Mrs. Baptist and presented to her; that affiant is informed that in negotiating the purchase of said automobile, an automobile then owned by the said W. G. Baptist was transferred to the dealer from whom the first mentioned

automobile was purchased as a part of the purchase price but that the automobile so purchased was to be owned by the said Mrs. W. G. Baptist although the said automobile was registered in the name of W. G. Baptist and the license for the operation thereof issued to him. Therefore, the said affiant says that the said W. G. Baptist did not own the automobile involved in said collision; and that information of this fact was discovered by counsel subsequent to filing of other pleadings herein.

STERLING HUTCHESON.

Subscribed and sworn to before me this 27th day of June, 1932.

L. B. SMITH, J. P.

page 13 }

Boydton, Va., June 26, 1931.

Mr. W. G. Baptist,
Boydton, Virginia,

In Account With

PARK MOTOR COMPANY
R. H. Park, Proprietor.

Goodyear
Tires and Tubes.

Texaco and National
Gas and Oils.

Lincoln Ford Fordson
Cars-Trucks-Tractors.

To 1 Front Axle	6.00
To 2 Locking Pins	20
To 1 Perch	1.00
To 1 Front Brake housing	1.65
To 1 Shock Absorber seat	04
To 1 Wheel	5.00
To 2 Hub caps	30
To 1 Wheel strip	25
To 1 Stearing arm	1.00
To 1 front hub	4.50
To 1 Stearing Sector	1.50
To 1 front fender	6.75
To 1 Running board	2.50
To 1 Shield	2.50
To 1 Rear fender	4.00

To 1 Brake rod	25
To 2 Dust shield bolts	10
To 1 fly wheel housing	4.00
To 1 Clutch plate	2.25
To 4 Running board bolts	40
page 14 } To 1 Starter spring	50
To 1 battery	7.50
To 4 Hood clip bolts and nuts	10
To 1 Battery clamp	15
To 2 Nuts	05
To 1 grease cup	10
To 2 headlight bulbs	80
To Washing car	1.00
To Labor	26.75

Total \$81.14

page 15 } The following orders are all the orders entered
in this case:

ORDER ENTERED APRIL 18, 1932.

This day came the defendant, by his attorney, and filed his demurrer to the notice of motion for judgment in this case and stated the grounds of demurrer relied on to be as follows:

1. The notice of motion for judgment does not allege, that the automobile which collided with the automobile of the plaintiff's intestate was operated or controlled by the defendant or that it was being operated for the benefit and upon the business of the defendant by any servant or agent of the defendant.

2. That the notice of motion for judgment does not allege any facts showing the liability of the defendant for the injuries sustained by the plaintiff's intestate, and the plaintiff also came by his attorneys and the Court having heard argument of counsel, overruled the said demurrer to which action of the Court the defendant, by counsel, duly excepted. Thereupon the defendant filed his plea of not guilty, his plea of contributory negligence of the plaintiff's intestate and his affidavit denying that the said defendant operated or controlled his said automobile at the time of the collision as set out in the notice of motion for judgment nor that the said automobile was being operated by any agent of the defendant

nor for any purpose of the defendant as alleged in the notice of motion for judgment.

Thereupon, the plaintiff's moved the Court to require the defendant to file his grounds of defense, which motion the Court sustained and directed the said defendant to
page 16 } file his grounds of defense in writing by the 15th day of May, 1932.

page 17 } ORDER ENTERED MAY 14, 1932.

This day came the defendant by counsel and moved the Court to extend the time for the filing of his grounds of defense.

Whereupon, the Court being of opinion that sufficient cause therefor has been shown doth grant the said defendant until the 25th day of May, 1932, as time to file said grounds of defense.

page 18 } ORDER ENTERED JUNE 29TH, 1932.

This day came the parties by counsel and joined issue. Then came a jury of nine persons selected and summoned according to law, who after first being duly sworn and having heard a part of the evidence were instructed by the Court to speak to no one nor permit any one of them to speak to them concerning this case until they return into Court tomorrow morning at 10 o'clock and this case is continued until tomorrow morning at 10 o'clock.

page 19 } ORDER ENTERED JUNE 30, 1932.

This day came again the parties by counsel and the jury sworn and adjourned in this case on yesterday returned into Court in pursuance of their judgment and upon being polled it was ascertained that all were present. Upon hearing the conclusion of the evidence having received their instructions and having hear the argument of counsel, the jury having heard the argument of counsel, the jury having expressed a desire to view the scene of the accident, they were given in charge of the Sheriff to whom an oath was given that he would not permit the jury to speak to any one nor permit any one to speak to them until they returned into Court. And after some time the jury returned into Court and retired to their room to consult of their verdict and after some time

returned into Court and stated that they had not agreed upon a verdict: Thereupon they were instructed by the Court to speak to no one concerning this case until they return into Court tomorrow morning at 10 o'clock and this case is continued until tomorrow morning at 10 o'clock at which time the jury is to consider further of their verdict.

page 20 } ORDER ENTERED JULY 1, 1932.

This day came again the parties, by counsel, and the jury adjourned on yesterday returned into Court in pursuance of their adjournment and upon being polled it was ascertained that all were present. Thereupon the jury retired to their room to consult further of their verdict and after some time returned into Court and stated that they could not agree upon a verdict thereupon L. Davis, one of the jurors was withdrawn and a mistrial was declared.

page 21 } ORDER ENTERED OCTOBER 27, 1932.

This day came the parties by counsel, and joined issue, then came a jury of nine persons selected and summoned according to law two of whom were stricken from the *pannel* one by the plaintiff and one by the defendant. The remaining seven constituted the jury as follows: C. C. Creedle, W. S. Gordan, A. L. Brewer, L. Rosser Wells, C. L. Russell, P. N. Winn, and J. M. Evans, who were duly sworn and having heard a part of the evidence were instructed by the Court to speak to no one nor permit any one to speak to them concerning this case until they return into Court tomorrow morning at 10 o'clock, and this case is continued until tomorrow morning at 10 o'clock.

page 22 } ORDER ENTERED OCTOBER 28, 1932.

This day came again the parties, by counsel, and the jury empanelled in this case on yesterday and adjourned appeared in Court in pursuance of their adjournment, and upon hearing the evidence and jury retired to view the scene of the accident, and after some time returned into Court, and were instructed by the Court to speak to no one nor permit any one to speak to them concerning this case until they return into Court tomorrow morning at 10 o'clock and this case is continued until tomorrow morning at 10 o'clock.

page 23 } ORDER ENTERED OCTOBER 29, 1932.

This day came the parties, by counsel, and issue joined; and came a jury of nine persons selected and summoned according to law, two of whom were stricken from the panel, *on* by the plaintiff, and one by the defendant, there remaining seven which constituted the jury as follows: C. C. Creedle, W. S. Gordan, A. L. Brewer, L. Rosser Wells, C. L. Russell, P. N. Winn, and J. M. Evans, who after first being duly sworn and having heard the evidence and received their instructions from the Court, and having heard argument of counsel, retired to their room to consider of their verdict, and after sometime returned into Court and rendered the following verdict: "We, the jury, find for the Plaintiff and fix his damages at \$3,000.00. This Amount to be divided equally between Daniel Faulkner, Sr., and Sarah Faulkner, the mother and father of Grant Faulkner, deceased."

Thereupon, it is considered by the Court that R. R. Slate, Admr. of Grant Faulkner, dec'd do recover of W. G. Baptist the sum of \$3,000.00, with interest thereon from October 29, 1932, until paid, and his cost in this behalf expended.

Thereupon, the defendant, by counsel, moved the Court to set aside the verdict of the jury on the grounds stated in the record as taken by the stenographer, which grounds are hereby made a part hereof which motion the Court overruled, and to which the defendant, by counsel, excepted. But on motion of the defendant, the judgment of the Court, was ordered to be suspended for a period of ninety days upon execution by the defendant within ten days, before the Clerk of this Court, a bond in the penalty of \$1,000.00, conditioned according to law and with security thereon to be approved by said Clerk.

I, H. F. Hutcheson, Clerk of the Circuit Court of Mecklenburg County, Virginia, do hereby certify that the foregoing is a true copy of the record in the case of R. R. Slate, Administrator of Grant Faulkner, deceased, vs. W. G. Baptist, and that notice in obedience to section 6339 of the Code of Virginia was duly given.

Given under my hand this the 21st day of December, 1932.

H. F. HUTCHESON, Clerk.

page 1 } In the Circuit Court of Mecklenburg County,
Virginia.

Grant Faulkner's Administrator

vs.

W. G. Baptist.

RECORD.

THIRD TRIAL.

Stenographic report of testimony and other incidents of the trial of the case of Grant Faulkner's Administrator, vs. W. G. Baptist, tried before Hon. N. S. Turnbull, Jr., and Jury, in the Circuit Court of Mecklenburg County, Virginia, beginning October 27, 1932, and ending October 29, 1932.

Present: Messrs. McKinney & Settle (Mr. Settle) and Y. M. Hodges for the plaintiff. Messrs. Hutcheson & Hutcheson for the defendant.

Phlegar & Tilghman,
Shorthand Reporters,
Norfolk, Virginia.

page 2 } Note: The jurors were examined on their *voir dire*.

Mr. Sterling Hutcheson: If Your Honor please, before the jury is impaneled, the defendant moves the court to permit him to file an affidavit denying ownership of the automobile and the amended and supplemental grounds of defense, in accordance with the motion made on June 27th and renewed at the August term, on August 24th.

The Court: The court overrules the motion.

Mr. Sterling Hutcheson: The defendant excepts on the grounds previously assigned verbally when the motion was made, and also at the August term. I do not think it necessary to renew the grounds now.

The Court: No; that is all that is necessary.

Note: The shorthand reporter was not present on June 27, 1932, when the motion referred to was made and the affidavit filed, the first trial having begun on June 29, 1932. However, the following is copy of order entered June 27, 1932, copy of the affidavit and copy of the amended grounds of defense therein referred to.

“Virginia:

In the Circuit Court of Mecklenburg County.

R. R. Slate, Admr. of Grant Faulkner, Deceased.

vs.

W. G. Baptist.

ORDER.

June 27, 1932.

“This day came the defendant, by counsel, and moved the court to permit him to file a Supplemental Ground of Defense

Based on affidavit of Sterling Hutcheson, Atty. for page 3 } Dfd. in addition to the Grounds of Defense originally ordered at the April term, 1932, to be filed by May 15, 1932, which time was later extended to May 25, 1932; which Grounds of Defense and the General Issue and a Special Plea of Contributory Negligence were filed pursuant to said order, and after the defendant had filed at the April term, 1932, a Demurrer to said Notice of Motion for Judgment, which was overruled. And the defendant now moves the court to permit him to supplement his said Grounds of Defense by adding thereto the following additional ground:

“ “That the said defendant did not own, operate nor control the said automobile at the time of the accident;”

which Ground of Defense is supported by the affidavit of Sterling Hutcheson, attorney for the defendant; of which said motion to file said additional Ground of Defense and affidavit notice was given by counsel for the defendant to counsel for the plaintiff on June 25, 1932, this case having been set for trial on June 29th.

“Whereupon, the plaintiff, by counsel, moved the court to reject the said Supplemental Ground of Defense and affidavit on the following grounds and for the following reasons:

“(1) Such Supplemental Ground of Defense and affidavit in support thereof constitute in effect a Plea in Abatement, which should not be received after the filing by defendant of his Grounds of Defense to this action, and the filing of pleas in bar as well as a Demurrer.

“(2) Such Supplemental Ground of Defense is inconsistent

with the original Grounds of Defense heretofore
page 4 } filed, as well as pleas in bar and Special Plea of
Contributory Negligence, in that in the original
Grounds of Defense heretofore filed and the said several
pleas, the defendant's ownership of the automobile in question is admitted, whereas in said Supplemental Ground of Defense defendant undertakes to deny his ownership thereof.

"(3) The substantial rights of the plaintiff would be seriously affected or denied by admitting such Supplemental Ground of Defense after the time had elapsed within which any other party as the owner of said car, if any, could be proceeded against for the negligent acts alleged in the Notice of Motion.

"(4) The defendant by registering the automobile in question and obtaining license therefor in his own name is not legally entitled now to deny his ownership for the purpose of escaping responsibility in this action.

"(5) The rights of the plaintiff would be prejudiced by permitting such Supplemental Ground of Defense and affidavit filed therewith to be set up at this time, and the granting of such motion would not be in furtherance of justice, but on the contrary would be in denial thereof.

"Whereupon, the court after hearing argument of counsel, is of opinion that the motion to file said Supplemental Ground of Defense, with the affidavit in support thereof, should not be granted, and doth overrule the said motion, and reject the said Supplemental Ground of Defense and the affidavit in support thereof; to which action of the court the defendant, by counsel, excepted."

On the back of this paper is the following: "Order, June 27, 1932. Enter, N. S. T. Jr., Judge. 6/27/32."

page 5 }

AFFIDAVIT.

"Grant Faulkner's Administrator

vs.

W. G. Baptist.

"State of Virginia,

County of Mecklenburg, to-wit:

"This day came Sterling Hutcheson, Attorney for the de-

fendant, and being first duly sworn, made oath that according to his information and belief the automobile described in the notice of motion for judgment in this case as belonging to the defendant was, at the time of the collision complained of, the property of Mrs. W. G. Baptist, the wife of the defendant; that the said automobile was purchased by a brother of the said Mrs. Baptist and presented to her; that affiant is informed that in negotiating the purchase of said automobile, an automobile then owned by the said W. G. Baptist was transferred to the dealer from whom the first mentioned automobile was purchased as a part of the purchase price, but that the automobile so purchased was to be owned by the said Mrs. W. G. Baptist although the said automobile was registered in the name of W. G. Baptist and the license for the operation thereof issued to him. Therefore, the said affiant says that the said W. G. Baptist did not own the automobile involved in said collision; and that information of this fact was discovered by counsel subsequent to filing of other pleading herein.

“STERLING HUTCHESON.

page 6 } “Subscribed and sworn to before me this the
27th day of June, 1932.” L. B. Smith, J. P.”

(On the back of this paper, the following occurs: “Offered and Refused. N. S. T. Jr. Judge. 6/27/32.”)

“Virginia:

In the Circuit Court for Mecklenburg County.

Grant Faulkner's Administrator

vs.

W. G. Baptist.

AMENDED AND SUPPLEMENTAL GROUNDS OF
DEFENSE.

“The said defendant states as an amendment and supplement to his grounds of defense heretofore filed the following:

“That the said defendant did not own, operate nor control the said automobile at the time of the accident.”

HUTCHESON & HUTCHESON, p. d.”

(On the back of this appears the following:

"Offered and Refused. N. S. T. Jr., Judge. 6/27/32.")

Note: The jury was selected and sworn. The witnesses who were present were excluded from the court room.

Opening statements were made by Mr. Hodges on behalf of the plaintiff, and by Mr. Sterling Hutcheson, on behalf of the defendant.

page 7 } Mr. Hodges: If your Honor please, we call Mr. Baptist as an adverse witness, first, Mr. W. G. Baptist.

The Court: Mr. Baptist is called as an adverse witness, subject to the rules of cross examination.

W. G. BAPTIST,

called as an adverse witness, being duly sworn, testified as follows:

Examined by Mr. Hodges:

Q. You are Mr. W. G. Baptist, the defendant in this suit?

A. Yes.

Q. It is a fact that the car involved in the accident in which Grant Faulkner lost his life was registered in your name?

A. Yes.

Q. The licenses were also obtained by you in your name?

A. Yes.

Q. And had been for several years?

A. Yes.

Q. Now, Mr. Baptist, it is further a fact that you maintained this car for the use and benefit of your family, at their will and desire?

A. Yes.

Mr. Sterling Hutcheson: If your Honor please, we would like to object to this line of testimony under the pleadings and our contention as to the law applicable with respect to the family purpose doctrine.

page 8 } The Court: The objection is overruled.

Mr. Sterling: We except.

The Court: You had argued that before.

Mr. Sterling Hutcheson: Yes, sir, we had argued that before, and, in order to expedite the matter we would like to be understood as objecting to all this line of testimony.

The Court: No; this is a new record, and you might forget it. Put it all in.

By Mr. Hodges:

Q. You kept this car for the use of Miss Marjorie Baptist, when she so desired to drive the same for herself, and other members of your family, did you not?

A. Yes.

Mr. Sterling Hutcheson: The same objection.

The Court: I did not catch the point, but make it at the end of the testimony. I thought you meant different witnesses.

Mr. Sterling Hutcheson: No, sir.

By the Court:

Q. You used this car yourself, when you wanted it, and any member of the family, your wife and daughter and particularly Miss Marjorie Baptist, used it whenever they wanted it if you did not have use for it yourself?

A. Yes, sir.

page 9 } The Court: Now, put in the objection.

Mr. Hodges: Hold on a minute.

By Mr. Hodges:

Q. Please state what make and type car this was?

A. It was a Ford car.

By the Court:

Q. "A" model, wasn't it?

A. Yes, sir.

Q. What kind of car was it—sedan or otherwise?

A. A Ford.

Q. What kind was it—a coach or sedan

A. It was a five-passenger car; a sedan, I reckon you call it.

Q. Did it have four doors or two?

A. Four doors.

Mr. Hodges: That is all.

The Court: Now, state your objection, Mr. Hutcheson.

Mr. Sterling Hutcheson: The defendant objects to the foregoing questions and answers undertaking to establish the fact that this automobile was used for general family purposes, or to show any agency existed between Mr. Baptist

and his daughter, Miss Marjorie Baptist, upon the ground that it is contrary to the law applicable to this case and under the pleadings of the case.

The Court: The objection is overruled for the reasons stated.

Mr. Sterling Hutcheson: We except for the re-
page 10 } sons stated.

Mr. Hodges: I would like to ask Mr. Baptist one other question:

Q. (Mr. Hodges) Mr. Baptist, at the time of this accident, when your car was being operated by Miss Marjorie, were there other members of your family in the car?

A. Yes, sir.

Q. Who were they, if you please?

Mr. Sterling Hutcheson: That is bound to be hearsay; he was not present.

The Court: He says that he knows.

Witness: I reckon that they were in there; they left home in there.

By Mr. Hodges:

Q. Who left home in there?

A. My wife and daughter and my brother, and I reckon that they were in there.

Mr. Sterling Hutcheson: We make the same objection to the form and to the questions and answers heretofore stated.

The Court: The same ruling.

Mr. Sterling Hutcheson: We note an exception.

The Court: The same exception.

page 11 } CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Mr. Baptist, I understood Mr. Hodges to ask you if you kept this automobile for the special use of your daughter, Miss Marjorie, more than the other members of your family?

A. No, I did not. I did not keep it for her specially, but kept it for family use.

Q. Then, as I understand, she had no more right to use the automobile than any other member of your family?

A. No, she did not.

Mr. Sterling Hutcheson: That is all for the present.

Witness: I want to say this: I say I knew that they left home together: I was not at home when they left, but I suppose that they did leave.

DR. G. NORFLEET CARTER,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Hodges:

Q. You are a practicing physician at Boydton, are you not, Dr. Carter?

A. Yes, sir.

The Court: It is not necessary to qualify him. Everybody knows that he is qualified. Put into the record that he is qualified as a physician.

page 12 } Mr. Sterling Hutcheson: We admit that.

By Mr. Hodges:

Q. Were you called on the night of June 6th, 1931, near Finchely, to see a man named Grant Faulkner?

A. Yes sir.

Q. About what time did this accident happen or did you arrive at the scene, Dr. Carter?

A. I don't know exactly what time it was, but I think it was somewhere a little after nine o'clock, but I am not sure of the time.

Q. On a Saturday night, was it not?

A. Yes, sir.

Q. What did you find when you arrived there in relation to the condition of Grant Faulkner?

A. I found him in a very serious condition.

Q. Was he injured?

A. Yes, sir.

Q. Where was his injuries, Doctor?

A. In his chest; he had some broken ribs.

Q. Which side, do you recall?

A. He was injured in both sides. His principal injury that I saw at first was on his left side in the second, third and fourth ribs, I think; they were fractured.

Q. When you say fractured, does that imply that they were dislocated?

A. Yes. Not only were they dislocated, but
page 13 } pressed in some.

Q. Probably punctured his lung?

A. Yes, spitting blood.

Q. What did you do with Grant Faulkner?

A. He was suffering a great deal, and I gave him hypodermic of morphine to ease his pain somewhat; I waited some time, maybe fifteen or twenty minutes for him to get somewhat easier, and put him in a car and carried him to South Boston to the hospital.

Q. What developed in his condition at South Boston, at the hospital?

A. He died in a few minutes after arrival at the hospital.

Q. When you say a few minutes, how long do you think it was?

A. He appeared to be dying before we got to South Boston, and he died about ten minutes after we got there.

Q. What time was it?

A. I don't recall what time, but sometime after eleven o'clock, I think.

By the Court:

Q. Was his death the direct result of the injuries received?

A. Yes, sir.

Mr. Hodges: The witness is with you.

Mr. John Hutcheson: No questions.

page 14 }

R. R. SLATE,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Settle:

Q. You are Mr. R. R. Slate, and a member of the partnership of Slate Seed Company, at South Boston?

A. Yes, sir.

Q. Are you also the administrator of Grant Faulkner, deceased?

A. Yes, sir.

Q. When and where did you qualify as administrator of his estate?

A. I qualified at Halifax on March 25 of this year.

By the Court:

Q. The 25th?

A. Yes, sir.

Q. 1932?

A. Yes, sir.

By Mr. Settle:

Q. How long had you known Grant Faulkner at the time of his death, on the night of June 6th, 1931?

A. I had known him all his life; he was born on our farm just a few hundred yards from my old home place.

Q. Had his father and mother also lived on your father's farm practically all their lives?

A. His father was born on our farm and lived there all his life except one year.

page 15 } Q. I believe your father is located at Hico, in
Halifax County, about five miles from South Boston?

A. About seven miles from South Boston.

Q. Was Grant Faulkner, at the time of his death, working as a farm hand on your farm, or was he a share cropper?

A. He was working with his father as one of our tenants as a share cropper.

Q. How old a man was he?

A. I think Grant was about twenty-four.

Q. What was Grant Faulkner's physical condition at the time of his death?

A. He was in good normal physical condition, I think. I had never known him to have any serious illness.

Q. He was a well, able-bodied man?

A. An able-bodied boy.

Q. What kind of automobile did he own at the time of his death?

A. He had an "A" model Ford, touring.

Q. In what condition was that car?

A. It was in very fair condition.

Q. What would you say that the car was reasonably worth at the time of his death?

A. At the time of the accident a second-hand Ford was selling right well. I would consider his car worth at that time around \$200.

Q. You say the car was in good condition?

page 16 } A. Yes, sir, in good running condition.

Q. Was he an experienced driver?

A. Yes, sir. Grant was a very good mechanic and had had right much experience with automobiles.

Q. Please state the names of Grant Faulkner's mother and father and his brothers and sisters who are now living, who survive him and are now living?

A. His father is Daniel Faulkner; his mother Sarah Faulkner; brothers and sisters are Archer Faulkner, Oscar Faulkner, Daniel Faulkner, Jr., Fannie Stokes, Emma Wilkerson,

Mary Murray, Grace Murphy, Lacy Woody, Andrew Faulkner and Jesse Faulkner.

By the Court:

Q. You had better state the ages of those?

A. Well, I could come within the neighborhood of it.

Q. Come within the neighborhood of it?

Mr. Settle: Would this cover it—whether all were of age at the time?

The Court: Yes.

By Mr. Settle:

Q. State whether all of his brothers and sisters were over twenty-one years of age at the time of his death?

A. Yes, sir. Grant was one of twins, I think, which was the youngest in the family; he had a twin—I think he had a twin sister; I know that he had a sister about his page 17 } age.

By the Court:

Q. None of them is physically or mentally incapacitated?

A. No, sir.

By Mr. Settle:

Q. Have any repairs been made to Grant Faulkner's car since the accident, on the night of June 6, 1931, when he was killed?

A. Not to my knowledge.

Q. What is his car worth today?

A. Nothing.

Q. Where has Grant Faulkner's car been since the last term of this court?

A. Sitting over here in the Sheriff's yard.

Q. It was brought here at the last trial of this case?

A. Yes, sir.

Q. Where had his car remained from the time that it was removed from Boydton here on Sunday following the accident to his home in Halifax County?

A. Where had it remained as long as it was up there?

Q. Yes.

A. We carried it from down here that Sunday and stored it under the shed at his father's home.

Q. Do you mean Mr. J. A. Cole, the automobile mechanic?

A. Yes, sir. He carried it up there and stored it under the shed.

Q. And it remained here after it was brought page 18 } here for the first trial?

A. Yes, sir.

Q. And you say no repairs were made to it?

A. No, sir.

By the Court:

Q. And it is in the same condition now that it was immediately after the accident?

A. Yes, sir.

Mr. Settle: That is all.

CROSS EXAMINATION.

By Mr. John Hutcheson:

Q. Mr. Slate, I understand from the testimony that the Grant Faulkner car was moved from the scene of the accident, some seven miles from Boydton, to Boydton, and then to South Boston, and then back here when the case was tried the first time, and then back to South Boston and then back here, and it is here now; is that correct?

A. I think so.

Q. You are not very familiar with automobiles, are you, Mr. Slate?

A. I am not a mechanic.

Q. I think there was some confusion last time about the model of this car; I believe you said it was a "T" model, and then you found out it was an "A" model?

A. Yes, sir.

page 19 } Q. Are you sure now it was an "A" model?

A. I think so.

Q. You do not work on automobiles?

A. No, sir.

Q. You can't state the value of any second-hand car?

A. No, sir.

Q. You do not sell cars?

A. I don't sell cars. I buy them occasionally and have a second-hand to trade in occasionally.

Q. So you place it on a trade-in value?

A. No; I base it on what cars in that condition were selling at at that time.

Q. Did you ever buy any second-hand cars?

A. Yes, sir.

Q. Did you buy any about that time?

A. I couldn't swear to the date.

Q. Within a year of that time?

A. I did about that time; we have a good many men on the farm, and we generally buy their cars for them.

Q. How was this disabled car hauled from South Boston here and back? Was it towed?

A. The front end, I think, was raised up and put on the rear end of a lumber truck, with the body removed and just the chassis, and it was dragged on behind the lumber truck.

Q. That is the way it was hauled each way?

A. I think so—each time I saw it.

page 20 } RE-DIRECT EXAMINATION.

By Mr. Settle:

Q. When the car was taken from Boynton back to South Boston on the day following the accident, was it taken on the truck?

The Court: He has already described how it was taken. Stand aside.

By Mr. Hodges:

Q. Mr. Slate, the rear tires on that *car* are inflated now, are they not?

A. They were the last time I saw it.

Q. When you say it was dragged, you mean it was rolled?

W. R. BEALES,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Hodges:

Q. Sheriff, it has been suggested that the car driven by Grant Faulkner, at the time of his death, has been at your home since the last term of court; is that correct?

A. Yes, sir.

Q. I believe it was put there with your permission, to keep from bringing it back from his home?

A. Yes, sir; it is up there in the yard.

page 21 } Q. Is that car in the condition now as it was when it was put there in your yard?

A. The same. It has been stored; it has been kept there not in the shed.

By the Court:

Q. The same except what the weather has done for it?

A. Yes, sir.

Supreme Court of Appeals of Virginia.

EMMETT GREGORY (Colored),
a witness on behalf of the plaintiff, being duly sworn, testified
as follows:

Examined by Mr. Hodges:

Q. You are Emmett Gregory?

A. Yes, sir.

Q. Where do you live?

A. I live at Finchley.

Q. How old are you?

A. I was twenty-two years old the 8th of October.

Q. Where do you work?

A. I ain't working nowhere for the last three or four weeks;
I ain't had nothing to do.

Q. The depression got you?

A. Yes, sir.

Q. Where were you working in June, 1931, at the time that
they had an automobile accident very near Finchley?

A. I was working on the farm.

page 22 } Q. This is an action involving an automobile
wreck between the car driven by Miss Marjorie
Baptist and one driven by Grant Faulkner, who was killed
in the accident on the night of June 6, 1931; did you happen
at the scene of this accident?

A. I was not there when it happened, but I was there
promptly afterwards.

Q. How soon after the accident were you there?

A. Well, I reckon it was about ten or fifteen minutes after
it happened.

Q. Where were you when the accident happened, if you
know?

A. I had started to Clarksville and heard the licks, and
turned around and came back.

Q. Are you related to Grant Faulkner in any way, or were
you?

A. No, sir; I never knowed him and never seen him before
that night.

Q. Do you know any of the Faulknors?

A. No, sir.

Q. Did you know anybody that was in the Faulkner car?

A. No, sir, I didn't know anybody who was in there.

Q. What time was it when you got back to the scene of
the accident and you heard the collision?

A. Did you say what time of night was it?

Q. Yes.

page 23 } A. I reckon about nine or half past nine o'clock.
 Q. When you got there who did you see there?
 A. Well, Mr. Carroll and Charlie Carter and Hiawatha.

Q. Mr. Carroll who?

A. Mr. Cal Creedle.

Q. Where was Grant Faulkner, who was injured, when you got there?

A. They had laid him out on the bank when I got there.

Q. On which side?

A. On the righthand side coming to town.

By the Court:

Q. Coming which way?

A. This way.

By Mr. Hodges:

Q. To Boynton, do you mean?

A. Yes, sir.

Q. Where was Grant Faulkner's car when you arrived?

A. They had pulled it down. Mr. Cal said, when I got there, "You boys help me shove the car across the road", and I helped them.

Q. Cal Creedle said that?

A. Yes, sir.

Q. Where was it lying before you shoved it down and pulled it across the road?

A. I didn't see it no more than they pulled it down and laid this fellow out on the ground.

Q. Where was it when it was pulled down? On page 24 } which side of the road was it?

A. On the righthand side coming to town—coming to Boynton.

Q. Had the car been moved when you got there—when you immediately walked up?

A. No, sir, no more than they had pulled it down.

Q. Did you see them when they pulled it down?

A. No, sir, I didn't see them when they pulled it down.

Q. The car was sitting on its wheels when you arrived?

A. Yes, sir, sitting on the wheels when I arrived.

Q. Did you look at the highway or around the car?

A. Yes, sir, I looked in the road where they hit it at.

Q. Tell the jury where the cars hit?

A. Well, from where I see the car hit at, the place was knocked in the road, and I didn't see nothing else that could have knocked it unless when she tore down the wheel, for

the brake drum to drop down and hit the road, and that was in the right center of the road coming to Boydton.

A. Yes, sir.

Q. That would have been to the left of the center of the road in the direction that the other car was going at the time of the accident?

A. Yes, sir.

Q. About how far was that to the left of the center of the road where you saw this place, apparently a brake drum plowing up the center of the road, going towards Clarksville?

A. I don't know, sir, exactly; maybe six inches or more.

Q. Six inches or more?

A. Yes, sir.

page 25 } Q. Did you see anything to indicate to you whether Grant Faulkner's car had been turned over on the side, or not?

A. Did you say did I see anything to show whether it had been turned over on the side?

Mr. Sterling Hutcheson: If your Honor please, we think he should ask what he saw.

The Court: I don't know.

Mr. Sterling Hutcheson: He is asking for opinion evidence.

The Court: Ask what he saw then. The objection is sustained.

By Mr. Hodges:

Q. What did you see there? You state Grant Faulkner's car was on the right side of the road; what did you see just about the place where Grant Faulkner's car was?

A. Some tools out of it, a glove and some pieces I took it to be from the floor, laying there where they said it turned, but I wasn't there when it turned, but it was laying in the gutter of the road on the outer edge on the righthand side coming to town.

Q. Was there any glass around there?

A. Yes, sir, some glass was there, too.

Q. Where was that?

A. Some down in the gutter of the road, I think, and maybe some up on the bank, but I ain't right sure now it
page 26 } has been so long.

Q. Do you mean the rubber mat?

A. From the floor of the car was laying out there in the gutter, too.

Q. Do you mean the drain or ditch to the side of the road, when you say the gutter?

- A. Yes, sir, the drain to the side of the road.
- Q. Was any of it further out than that, or did you see?
- A. I didn't see whether any was further out, or not.
- Q. How wide is that shoulder, would you say, from the gutter, where you saw the stuff lying down, to the edge of the hard surface on the righthand side coming this way?
- A. About six feet.
- Q. A six-foot shoulder?
- A. Yes, sir, I think it was.
- Q. And you tell the jury that this stuff was lying in the gutter. Was there any bank on the right side of the road?
- A. A little bank, but not so awful much.
- Q. How much? As much as that (illustrating)?
- A. Yes, sir, I reckon as much as that or maybe more.
- Q. Say in inches about how high the bank was?
- A. About fifteen inches, I reckon.
- Q. And when you describe this stuff that you saw lying in the ditch, on the righthand side of the road, you mean Grant Faulkner's righthand side coming towards Boydton?
- A. Yes, sir.
- page 27 } Q. Emmett, how wide is the road at the point
where this car was turned over?
- A. Do you mean the asphalt part?
- Q. Yes.
- A. I reckon about eighteen feet.
- Q. And you tell the jury the shoulder on Grant Faulkner's righthand side was six feet?
- A. Yes, sir, I reckon about six feet.
- Q. And the stuff from his car was lying in the righthand ditch?
- A. Yes, sir.
- Q. Have you seen any part of that car there at the point, since the accident?
- A. I think a piece of matting, I was telling you about is lying out there some place now.
- Q. Is it still there on the righthand side of the highway—the piece of matting?
- A. The last time I paid any attention to it, it was.
- Q. How far, if you know, was the Faulkner car moved from the point where you said the road was scarred by the brake durm of the other car?
- A. Did you say how far was it moved?
- Q. Yes, how far was it from that point where you saw this scar?
- A. When I got there, they had turned it down, and there

were only two wheels of it on the asphalt. The two
page 28 } righthand wheels were off on the dirt, and the two
lefthand wheels were on the edge of the road.

Q. And how far was that from the spot that you saw where the road was torn up and the hole knocked out?

A. It was a good little ways. I don't know exactly how far. I didn't pay close attention to how far it was.

Q. All right. Did you know who was driving the other car, the Baptist car, involved in the accident?

A. Did you say did I know who was driving it?

Q. Yes.

A. No, sir, I didn't know who was driving it. I didn't know any of them any more than I heard them say it was Mr. Baptist. I didn't know him from anybody else if I would meet him in the road.

Q. Now, Emmett, when you arrived there, can you tell the jury where the Baptist car was?

A. Well, Mr. Baptist's car had gone off the road and went off on the righthand side coming to Boydton, had crossed the gutter of the road and gone out on the right of way I should say.

Q. So that had crossed over the left of the road and was on the side of the road and on the same side that Grant Faulkner's car was lying?

A. Yes, sir, on the same side.

Q. How far was that down the road beyond Grant Faulkner's car?

page 29 } A. How far had it gone down the road?

Q. Yes.

A. I reckon around about fifty or fifty-five steps or yards or whatever you might call it down there, and to the left.

Q. Did you track the Baptist car down the road, or did you notice the tracks at all?

A. No, sir, I didn't pay much attention to it, but you could see it that time where the brake drum dragged all the way down.

Q. I will ask you this: You have testified you saw a place in the road about six inches to the left of the center of the road (of Grant Faulkner's car) where the brake drum hit the ground; did the track from the brake drum go on from that same car?

A. Yes, sir, to the same.

Q. Did you examine the Baptist car, or look at it?

A. No, sir, only to look at the front wheel broke down. I think some one tried to turn on the headlights, but they didn't burn.

Q. Were the headlights crushed in, or do you know?

A. No, sir, I didn't pay much attention to the headlights.

Q. How about the fender?

A. When Mr. Glasscock come, we helped to shove the wheel down.

Q. Was the wheel gone?

page 30 } A. The wheel was clear off the brake-drum.

Q. Do you know where the wheel was?

A. No, sir, I don't know now, at this time; I didn't pay much attention to the wheel. We got the wheel that night, but where they got it from I don't know.

Q. You tell the jury the car had gone down the road fifty-five yards with the brake-drum cutting a mark on it?

A. Yes, sir. It went off on the righthand side coming to Boydton.

Q. Did anybody try to crank the Baptist car?

A. No, sir, not while I was there that night.

Q. There has been some suggestion or statement made here that some other car passed along and hit the Grant Faulkner car after it was in collision with Miss Baptist's car; do you know whether that is correct, or not?

A. No, sir, I don't know anything about that.

Q. Did you see any other car pass there?

A. Well, when I got there, there was a lot of cars passed, but didn't none of them hit it at the time I got there. I don't know anything about the other car.

CROSS EXAMINATION.

By Mr. John Hutcheson:

Q. Emmett, did you make any measurements on the road there at that time?

A. No more than to look at it.

page 31 } Q. You don't know whether the road is eighteen feet wide, or not; you just think it is eighteen feet wide, and it looks eighteen feet wide?

A. No, sir, I didn't measure it; I just put it about eighteen feet wide.

Q. You say the shoulder there is six feet wide; you didn't measure that?

A. No, sir.

Q. The ditch there is how many inches deep?

A. I say the bank is about fifteen inches, I reckon.

Q. You didn't make any measurements of it?

A. No, sir.

Q. You say the scar mark of the Baptist brake-drum started

six inches to the left of the center of the highway; you did not make any measurement of that, did you?

A. No, sir, no more than to look at it.

Q. Now, Emmett, the Faulkner car was moved to the north of the highway, wasn't it?

A. It was moved over on the righthand side going back to Clarksville.

Q. That is north, isn't it?

A. Yes, sir.

Q. There was a bank on that side at that time which has since been cut down?

A. On which side?

Q. On the north—on the righthand going to page 32 } Clarksville?

A. I don't think there has been since they put the highway through there any more than what is there now.

Q. The road has been worked since then; it shows the road has been scraped since that time?

A. Yes, sir.

Q. They run one of these big scrapers over it once in a while?

A. Yes, sir.

Q. You don't mean to say the mat is there at the same place as in the wreck?

A. I don't say in the same place, but still on the righthand side of the road.

Q. It may be fifty yards one way or fifty yards the other way from the wreck?

A. It may be now. I haven't paid attention to it in a good while. The last time I was there I didn't see it in the place of the wreck, but it was still on the righthand side of the road.

J. A. COLE,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Settle:

Q. You are Mr. J. A. Cole, and you reside in Halifax County?

A. Yes, sir.

Q. How long have you resided in Halifax County, page 33 } Mr. Cole?

A. All my life.

Q. How old are you?

A. Forty-three.

Q. Are you an automobile mechanic by vocation?

A. Yes, sir.

Q. How long have you been an automobile machanic?

A. The last twenty years, but I have been working on them regularly the last fifteen years.

Q. Did you ever work for Ames-Barnett Motor Company and the Crowell Motor Company, in South Boston?

A. Yes, sir.

Q. I believe you were one of the first automobile mechanics to come to South Boston?

A. Yes, sir.

Q. Please state whether or not you come to the garage here at Boydton on Sunday, June 7, 1931, to get Grant Faulkner's car and take it back to South Boston?

A. Yes, sir.

Q. To his home in Halifax County?

A. Yes, sir.

Q. That was the day following the collision in which Grant was killed?

A. Yes, sir.

Q. Did you take the car back to Grant Faulkner's home in Halifax County

A. Yes, sir.

page 34 }

Q. How did you take the car back?

A. Put it on the truck, the front part of it, and pulled it.

Q. When you brought that car to the first trial of this case, how did you bring it?

A. I brought it like I carried it away.

Q. You brought it down on a truck?

A. Yes, sir.

Q. And at the last term of court you left the car at the Sheriff's house so you would not have to bring it back?

A. Yes, sir.

Q. Where is that car now?

A. It is out there on the street.

Q. You brought it down from the Sheriff's home this morning and put it out on the street?

A. Yes, sir.

Q. When you got to the garage here at Boydton on Sunday, June 7, 1931, to get the car, in what condition did you find Grant Faulkner's car?

A. The front wheel was torn down—the lefthand front wheel torn down, the fender torn off, the runningboard and the rear fender torn off; the top and windshield torn off.

Q. You say the left front wheel was torn off?

A. Yes, sir.

Q. What was the condition of the left front axle?

A. It was bent.

page 35 } Q. Was the tire on the lefthand front wheel of
the car still on it, or had it been torn off?

A. It had been torn off.

Q. What about the other tires on the car?

A. The other tires were on the car.

Q. The tire on the righthand front wheel and the tires on
the hind wheels were still on the car?

A. Yes, sir.

Q. Do you happen to know in what condition Grant Faulk-
ner's car was at the time of the accident?

A. The car was in an all right condition, as I worked on
it on Friday and this happened on Saturday night, and I
drove it up to Cluster Springs to a school, myself.

Q. Were the brakes in good condition?

A. Yes, sir.

By the Court:

Q. Were the lights in good condition?

A. Yes, sir.

By Mr. Settle:

Q. What would you say Grant Faulkner's car was reason-
ably worth at that time?

A. I would say \$150.

Q. What kind of car was it?

A. Ford.

Q. A Ford touring car?

A. Yes, sir.

page 36 } By the Court:

Q. What model?

A. '28.

Q. "A"?

A. Yes, sir.

By Mr. Settle:

Q. What was his car worth following the accident?

A. I don't think the car would be worth over \$35 or \$40.

Q. Would you be willing, yourself, to give \$35 or \$40 for
it in its present condition?

A. If I had any use for it, I would.

Q. Please state whether or not, when you saw that car on
Sunday following the accident, it showed any evidence of hav-

ing received a blow on the lefthand side of the car, along about where the driver sits?

A. The side was bent up.

Q. From the way in which that car is bent up, state whether or not the blow the car received was a severe or a slight blow?

A. It seemed to be severe from the way it was torn up.

Q. When you came down past the scene of the accident on the morning following the accident, state whether or not you could see at the scene of the accident any evidences of a recent collision?

A. Well, after the car was moved from there I didn't take so much time, but when I got there I saw some windshield glass and parts of the car scattered in the road page 37 } and pieces.

Q. Where was that—on the righthand or lefthand side of the road coming towards Boydton?

A. Kind of strewed all over the road.

Q. Did you see any on the righthand side of the road, on the extreme righthand side of the roadway, coming towards Boydton?

A. There was glass and stuff there.

Q. Did you see anything of a part of a floor covering to the car?

A. No, I didn't notice that.

Q. Please state whether or not, in your opinion, the Grant Faulkner car was turning over on its side—on its righthand side?

Mr. Sterling Hutcheson: If your Honor please, he is asking for his opinion. I think that he should ask him to describe the automobile. It is a personal opinion. He was not there.

The Court: I thought he asked if it was turned over on the righthand side.

Mr. Settle: The car was brought in.

Mr. Sterling Hutcheson: He asked whether or not the car had been turned over.

The Court: He is qualified as an expert?

Mr. Settle: Yes, sir.

The Court: The objection is overruled.

Mr. Sterling Hutcheson: Exception.

page 38 } By Mr. Settle:

Q. Go ahead and answer the question?

A. Yes, sir, the top and windshield were turned over to

the lefthand side and it was bound to have been turned over on the right side?

Q. When you came to the garage to get Grant Faulkner's car, did you see the Baptist car which was in collision?

A. Yes, sir, I saw the car that they said was the Baptist car.

Q. What damage had been done to that car, if any?

A. The front wheel and axle—the front wheel was torn off.

By the Court:

Q. Which wheel?

A. The lefthand front wheel was torn off, and the axle was bent, and the lefthand front fender was torn and the light was bent.

Q. Which light?

A. On the lefthand side.

By Mr. Settle:

Q. The lefthand headlight?

A. Yes, sir. That is all I saw.

Q. Was the radiator on that car damaged?

A. I don't think so.

Q. And you say that the lefthand front headlight was broken?

A. Bent up, yes, sir.

Q. Had the glass been broken?

page 39 } A. I think so.

Q. And the lefthand front fender was bent?

A. Yes, sir.

Q. You have testified that you have been an automobile mechanic for the past twenty years?

A. Yes, sir.

Q. From the condition in which you found Grant Faulkner's car on the day following the accident, I will ask you to state whether or not in your opinion Grant Faulkner's car was run into by the Baptist car, or the Baptist or Grant Faulkner's car ran into the Baptist car?

Mr. Sterling Hutcheson: We object to that, if your Honor please.

The Court: I sustain that objection. State both cars.

Mr. Settle: I thought I did.

Mr. Sterling Hutcheson: No he did not.

Note: The question was read as asked.

Mr. Settle: I beg your pardon, but I will state it.

Mr. Sterling Hutcheson: Let me make this motion first: We make a motion to exclude Mr. Cole's testimony as to the condition of the Baptist car because it is not connected up. He saw the car in the garage, and unless it is connected up that it was in the same condition in the garage as at the time of the accident, it is not competent.

The Court: Where did you see the Baptist car?
page 40 } Witness: In the garage.

Mr. Settle: Certainly it will be connected up by other witnesses.

The Court: I will let it go in now with this proviso, that if you do not connect it up I will strike it.

Mr. John Hutcheson: He should not be permitted, at this time, to base any opinion evidence on that.

The Court: I will let him give opinion evidence, not on the condition of Grant Faulkner's car but on both cars.

Note: The last question asked by Mr. Settle was read.

The Court: The objection to that question is sustained.

By Mr. Settle:

Q. When you saw the Grant Faulkner car and the Baptist car, at the garage in Boydton on Sunday, June 7, 1931, the day following the accident, were both cars at the same garage?

A. Yes, sir.

Q. Do you know the name of that garage?

A. I do not. It is this big garage right across there; Park Motor Company, I think.

By the Court:

Q. The Ford garage?

A. Yes, sir, the big garage. Yes, sir, it is where they have the new Fords. That is the Park garage.

By Mr. Settle:

Q. From the condition in which you found both
page 41 } of those cars when you saw them there that day,
please state whether or not in your opinion the Baptist car ran into Grant Faulkner's car or Grant Faulkner's car ran into the Baptist car?

A. I couldn't say.

Mr. John Hutcheson: We renew the motion and object to

this on the ground that the Baptist car has not been connected up, and neither car has been connected up as they were immediately after the accident. There is testimony given that the Grant Faulkner car was struck by a third car, and this witness has not connected it up with the physical facts directly after the accident. Furthermore, we object on the ground that he is not an expert on automobile accidents. That is a matter of physic. He may be a garage expert, but he does not know the physics of motion, and I do not think he is competent to testify.

The Court: This objection will be overruled for the time being, with the proviso that the condition of the Baptist car is later connected up, the previous witness having already testified as to the condition of the Faulkner car.

Mr. John Hutcheson: We except.

Mr. Sterling Hutcheson: No witness has connected up the Baptist car as being the same.

The Court: I will put the proviso on both cars.

Mr. John Hutcheson: We except to the ruling.

The Court: Of course. You understand that. Go page 42 } ahead and answer the question.

A. I couldn't say. I wouldn't say and I couldn't say.

Mr. Settle: I guess that is highly satisfactory.

By Mr. Settle:

Q. Had the Baptist car sustained any injury on the left hand side of it?

The Court: He stated what injuries the Baptist car had, a while ago.

A. No, not alongside of the body.

Mr. Settle: He said the fender.

The Court: I thought he said the body.

By Mr. Settle:

Q. State whether or not, from the evidence of the blow sustained by the Grant Faulkner car on its left hand side about where the driver sits, it was struck with sufficient force, in your opinion, to have turned it over?

A. Yes, sir.

Mr. Sterling Hutcheson: We make the same objection that we made before.

The Court: The objection is overruled.

Mr. Sterling Hutcheson: We except.

By Mr. Settle:

Q. From the time when you took the Grant Faulkner car from Boydton, on June 7, 1931, back to his home in Halifax, had any repairs been made to that car?

page 43 } A. No, sir.

Q. Have you seen the car this morning?

A. Yes, sir.

Q. Have any repairs been made to it up to this time?

A. No, sir.

Q. And it is now in the same condition as it was on the day following the accident?

A. Yes, sir.

At 1:00 o'clock the court took a recess until 2:00 o'clock for lunch.

page 44 } AFTERNOON SESSION.

Boydton, Virginia, October 27, 1932.

The court met at the expiration of the recess.

Present: Same parties as heretofore noted.

J. A. COLE,

a witness on behalf of the plaintiff, took the stand for further direct examination, and testified as follows:

Examined by Mr. Settle:

Q. What time of day was it on Sunday, June 7th, 1931, when you first saw the Grant Faulkner car and the Baptist car in the Park garage?

A. I don't know exactly. I come on down here the first thing Sunday morning, and I couldn't tell you what time it was.

Q. Was it before or after twelve o'clock?

A. It was before twelve o'clock.

Q. Could you say whether it was before or after eleven o'clock?

A. No, I wouldn't say positively because I don't know. It is a right smart ways, and I didn't get up soon the morning I come down here.

Q. What time did you leave here taking the Grant Faulkner car back home?

page 45 } A. I couldn't tell you because I didn't pay any attention to that part, and I don't know.

Q. Did you leave before noon or during the afternoon?

A. I reckon it was around twelve o'clock when I left.

Q. How long did you stay here in Boydton?

A. I reckon I stayed here an hour and a half or something like that.

Q. So that would make the hour of your arrival up here, when you saw these cars in the garage, about 10:30?

A. Something like that.

CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Mr. Cole, you have testified, I believe, that the left front wheel of the Baptist car was torn off and the left headlight to the Baptist car was bent?

A. Yes, sir.

Q. And that the left front fender was torn off?

A. Yes, sir.

Q. Is that all the injury to the Baptist car?

A. The headlight, and the front axle was bent, and that is all I saw.

Q. Please tell the jury how badly bent was the headlight?

A. It just had a small lick; it struck the light and bent the light and it wasn't anything bad whatever.

Q. It bent the light?

A. Yes, sir.

page 46 } Q. It would make a new light necessary?

A. I don't know whether they straightened it up or just the place that held the light. I wouldn't say positively.

Q. Didn't you testify in this case before that that left headlight was bent so badly it would be necessary to put another on?

A. I didn't say to put on another, but it was bent.

Q. Didn't you say it was bent so badly it was necessary to put on another?

A. I don't know.

Q. You don't know whether you did, or not?

A. No, sir.

Q. What do you think about it? Do you think it was bent so badly it was necessary to put on another?

A. It depends on what people think, whether they want the car fixed or not.

Q. But it was bent?

A. Yes, sir.

Q. Was it bent to such extent that it could not be made as good as new

A. I think it could be straightened out, everything but the rim which held the glass.

Q. Would you have to put on another rim?

A. I would think so.

Q. So then the headlight, the left front fender, the left front wheel and axle were everything that were injured?

A. All that I saw to amount to anything.

page 47 } Q. You looked at the car, didn't you?

A. Yes, sir.

Q. How about the rear fender?

A. I don't think the rear fender got a lick on it.

Q. Speak louder?

A. I don't think it got bent.

Q. If it had been bent, you would have seen it?

A. I think so.

Q. Do you tell the jury the rear left fender was not bent?

A. If it was, it was so slight I didn't notice it.

Q. How about the left runningboard?

A. I don't think it was torn.

Q. Do you tell the jury it was not torn?

A. I don't think so.

Q. Not injured?

A. No, sir.

Q. Mr. Cole, the left front fender of the Faulkner automobile is pretty badly broken up, isn't it?

A. Yes, sir.

Q. Isn't that fender struck immediately from the front or almost immediately from the front?

A. I will tell you the best way it looked like it was caused to me: It looked like the two wheels might have hung like that, because it pulled each wheel back, and it seemed to me like that they must have hooked one wheel into the

page 48 } other.

Q. Doesn't it look like the front end of the fender on the Faulkner car was hit?

A. It was bent back.

Q. It was bent back?

A. Yes, sir.

Q. You testified that the front axle to the Faulkner car was bent, too, didn't you?

A. Yes, sir.

Q. Now, Mr. Cole, you have had that car down here twice before?

A. Yes, sir.

Q. In other words, it has been loaded and unloaded on trucks how many times since the accident?

A. Three times.

Q. Loaded and unloaded three times?

A. Yes, sir.

Q. That makes six operations of loading and unloading?

A. Yes, sir.

By the Court:

Q. Has it been loaded each time just as it is loaded now?

By Mr. Sterling Hutcheson:

Q. Mr. Cole, when it was down here before, was it loaded and fastened on there just as it is now, with the chain around the axle?

page 49 } A. Every time but the first time I had a bed on the truck, flat, and it is in the same condition it was before. I took the flat off the last time and put it on this time so I would not have to raise it so high, but it is loaded just like it was each time.

Q. The front axle was bent back, wasn't it?

A. Yes, sir.

Q. Bent back?

A. Yes, sir.

Q. Hasn't that axle been straightened out since then?

A. No, sir.

Q. Isn't it tied to the car? Hasn't it been tied on to the car?

A. In the middle part of the axle, a chain on each side went to the truck. It has not been tied to either side, but in the middle of the axle.

Q. Do you say the axle has not been changed at all?

A. It has not been changed at all, and it is just like it was the day I carried it away from here.

Q. Well, wasn't that axle the first time right back against the frame of the car?

A. No, sir.

Q. It never was?

A. No, sir.

Q. Now, Mr. Cole, the injury to the side door of the Faulkner car would indicate that it was struck a blow
page 50 } straight down like that (illustrating), wouldn't it?

A. In the top of the door

Q. Yes.

A. It seemed like it got that when it turned over.

Q. The top of the left hand door is bent down by a blow from above, wasn't it?

A. Yes, sir.

Q. You say it seems it got that when it turned over?

A. It seemed so.

Q. Haven't you testified it seemed, in your opinion, it turned back on the right side?

A. Yes, sir, but it kept on over when it turned clean over. It turned bottom side upwards, and when it struck the other way it seemed like it caught the lick straight down from the top of the door.

Q. That is the left door?

A. That is the left door.

Q. That is what caused the dent or bent place in the door, isn't it,—that blow you are talking about?

A. Yes, sir, it is bent down from the top.

Q. Right from the top?

A. Yes, sir.

Q. That blow from the top bent or dent in the side, too, didn't it?

A. I don't know about the side, but it is bent and sprung down.

page 51 } Q. Like that (illustrating)?

A. Yes, sir.

Q. And caved in?

A. Yes, sir.

Q. Then, Mr. Cole, you could not tell the jury that that blow on the door was caused by being struck by another automobile, or not?

A. No, sir, not on that door. I couldn't say on that door.

Q. You don't undertake to say that the automobile turned clear over, do you?

A. It seemed to be. It seemed to be turned bottom side up, because it mashed the windshield.

Q. Your theory is that the car turned clear over like this (illustrating)?

A. Yes, sir.

Q. And straightened up again?

A. I don't know who straightened it up, but that is the appearance.

Q. You think, after it stopped turning over, the wheels were up in the air?

A. It looked so.

Q. The wheels up in the air?

A. It could have kept on, but it turned with the top part down.

Q. The fenders on the right hand side of the Faulkner car are not hurt, are they?

page 52 } A. No, sir.

Q. You don't mean to say that the right wheel was off the car when you got it there, do you?

A. It was when I carried it away. It was took off over yonder.

Q. You don't mean the right wheel was off in the wreck, do you?

A. No, sir.

Q. That was taken off since the wreck?

A. It was took off over there before I carried it away.

RE-DIRECT EXAMINATION.

By Mr. Settle:

Q. Who took it off?

A. I reckon some of Faulkner's crowd took it off, I imagine.

Q. You don't know?

A. No, I won't say.

Q. All you know is that it was taken off, and it was off when you saw it?

A. It was took off over there.

page 53 }

W. G. BAPTIST,

the defendant, recalled by the plaintiff as an adverse witness:

Mr. John Hutcheson: We think there should be some limitation on the adverse witness.

The Court: I am not going to waste time like I did just now, but I will see what he says first.

By Mr. Hodges:

Q. I want to clear this point up relative to your car being in the wreck: Your car was in that wreck with—

The Court: (Interposing) He stated that this morning.

Mr. Hodges: I wanted to be doubly sure.

By Mr. Hodges:

Q. Your car was brought to the Park Garage, was it not?

A. Yes.

Q. And it remained there from Saturday night until Monday morning?

A. Yes.

Q. Was there any work done on that car during Sunday?

A. Not that I know of.

Q. No repairs were made to your car at all until after Sunday?

A. None I know of.

The Court: I think that is within the rule.

page 54 } CHARLES CARTER (colored),
a witness on behalf of the plaintiff, being duly
sworn, testified as follows:

Examined by Mr. Hodges:

Q. Your name is Charles Carter?

A. Yes, sir.

Q. Where do you live?

A. Finchley.

Q. How old are you, Charles?

A. Twenty-five.

Q. Do you drive an automobile?

A. Not now; I used to.

Q. Have you driven right much?

A. Yes, sir.

Q. Where have you lived all your life—what county?

A. At Mr. Wright's.

Q. No; what county do you live in?

A. Mecklenburg all my life.

Q. Did you go to the scene of the accident Saturday night,
June 6th, 1931, between one Grant Faulkner's car and a car
of Mr. W. G. Baptist?

A. Yes, sir.

Q. Did you see the accident?

A. No, sir, I was not there when it struck but I saw the car.

Q. Which car?

A. I saw Mr. Baptist's car, the only car that passed before
they had an accident.

page 55 } Q. Where were you?

A. Between the little church and Finchley.

Q. Did you immediately go to the scene of the accident?

A. Yes, sir, I went right away after I heard it, and got
there in less than five minutes after the accident.

Q. Who was there when you arrived?

A. There was only one colored man, and that was Hiawa-
tha Towles.

Q. Where was Grant Faulkner when you arrived there?

A. Lying beside the car in the right hand ditch. The car
was turned up in the right hand ditch coming towards Boyd-
ton.

Q. On whose right hand ditch?

A. On his right hand ditch coming towards Boydton.

Q. When you say his, do you mean Grant Faulkner?

A. Yes, sir.

Q. Was it off the hard surface of the highway?

A. Yes, sir.

Q. Was the entire body of the car off?

A. Yes, sir.

Q. And lying up on the right ditch?

A. Yes, sir, the top of the car was lying over on the bank out of the ditch.

Q. Where did you say Grant was?

A. Lying on the side of it.

Q. Was he out of the car?

A. Yes, sir, and I helped to take him up and
page 56 } carry him to the field.

Q. Had some one taken him out, or was he where he had fallen?

A. Right where he had fallen, I guess.

Q. What did you do?

A. I and Ed Wade went to carry him out in the field and lied him down; we got a seat and put under his head, and then we went and pulled the car down, and by the motor being heavier than the back, it slid down, and then the other car came on and struck the fender that was torn off the car down in the road.

Q. That was after you had turned the car back?

A. Yes, sir.

Q. Where was Grant Faulkner at that time?

A. Grant Faulkner was out in the field where we had carried him.

Q. He had been hit and injured before this car came along?

A. Yes, sir.

Q. Charlie, you say the car was off the highway and the top of it lying up on the bank?

A. Yes, sir.

Q. And the body of the car was in the ditch?

A. Yes, sir.

Q. How wide is that shoulder?

A. I don't know; I haven't measured it to tell the truth.

Q. Guess, Charlie? Give me an estimate?

page 57 } A. It was about two feet—about three feet, I guess.

Q. You are just guessing?

A. Yes, sir.

Q. Do you know how wide the highway is?

A. No, sir.

Q. You don't know how wide it is?

A. No, sir.

Q. Was Mr. Cal Creedle there when you got there?

A. No, sir.

Q. He came after you got there?

A. Yes, sir, he came after I did.

Q. Charlie, you got there before the car was moved, and it

was still turned up, and the man was lying where you say he fell out of the car?

A. Yes, sir.

Q. Can you tell the jury whether or not you examined the road, or saw the road, with a view to saying where the collision took place?

A. From what I could see with my own eyes and my own knowledge, from where the brake-drum hit the ground, this car was just about, I would say, about six feet from where the brake-drum hit the ground, the man on the right hand ditch and the car turned up on the fender.

Q. When you say the brake-drum, whose car do you refer to?

A. Mr. Baptist's car I know it is, because where the brake-drum hit the ground it was more on his side from page 58 } my knowledge than his.

Q. On whose side?

A. On Grant Faulkner's.

Q. You say it was to the left side?

A. Yes, sir.

Q. On Grant Faulkner's side?

A. Yes, sir.

Q. In your own imagination—

Mr. Sterling Hutcheson: (Interposing) Don't let us have imagination.

By Mr. Hodges:

Q. You didn't measure that spot?

A. No, sir.

Q. About how far was the brake-drum scar to the left of Miss Baptist's side of the center of the highway?

A. Something like two feet I should think—at least I know it was.

Q. How do you know Miss Baptist's car made that brake-drum scar where it hit the ground two feet from the center?

A. I saw where the wheel went down it marked and in plain view where it went down, and the scratch of the brake-drum on.

Q. Did it follow down to her car?

A. Yes, sir.

Q. I am going to ask you how far her car went from the point where the wheel went down and the brake-drum hit the ground to where it stopped? page 59 }

A. About sixty feet.

Q. Sixty feet?

A. Sixty yards I should have said.

Q. Sixty yards you should have said?

A. Yes, sir.

Q. Did it stop just at a pine bush lying on the bank of the road?

A. The front swung across the ditch.

Q. Did the car stop of its own motion, or what stopped it?

A. The bank stopped it.

Q. On which side of the road did Miss Baptist's car come to a stop?

A. On Grant Faulkner's side, on the right hand side.

Q. It went across the road?

A. After the collision it went across the road on Grant Faulkner's side, and swung across the bank.

Q. And do I understand you to say that her car stopped on the left hand side of the road?

A. Yes, sir.

Q. Facing towards Clarksville, in the direction in which she was going?

A. Yes, sir.

Q. And that the bank stopped it?

A. The bank stopped the car.

Q. Was it off the right of way of the highway
page 60 } at the time it stopped?

A. Yes, sir.

Q. After this accident happened, was Grant Faulkner's car later moved?

A. Yes, sir.

Q. Where was it moved?

A. Moved over on the right side going towards Clarksville, on the bank.

A. Mr. Creedle was there and said "Boys, I guess you had better move the car; somebody else will come", and we moved it on the right hand side going towards Clarksville, against the bank.

Q. Was there any bank on Grant Faulkner's right hand side coming towards Boydton?

A. Yes, sir, I reckon about that high (indicating).

Q. You hold your hand up?

A. About that high (indicating).

Q. How many inches would you say?

A. About fourteen.

Q. If I understand you, the top of this car was up on the bank fourteen inches?

A. Yes, sir.

Q. And the car was lying up on the side?

A. The body of the car was in the ditch.

Q. Do you know whether the body of the car was
page 61 } touching the ground, or not?

A. Yes, sir, I think it was. I am pretty sure it was.

Q. Now, did you look to see, or did you notice, where Grant Faulkner's car was struck?

A. Yes, sir.

Q. Where?

A. In the left hand door where the driver sits.

Q. You referred a moment ago to a scar where the brake-drum of Miss Baptist's car hit the ground; how far was that from where Grant Faulkner's car was lying turned over on its right side on the ditch, when you arrived there?

A. Just about—I didn't measure, but I was going to say, from my own knowledge, I guess it was about six feet from where Grant Faulkner's car was lying.

Q. In other words, Grant Faulkner's car was lying on the right side of the road here, and six feet further you found a scar mark in the road?

A. Yes, sir, where the brake-drum hit in the road.

Q. And you followed that mark up to where Miss Baptist's car was?

Q. I will ask you, did you look to see whether Grant Faulkner's car skidded or was knocked anywhere before it was turned over on the ground?

A. No, sir, there was no skid at all.

Q. In other words, it pulled over on the ground?
page 62 }

A. Yes, sir; there was no skid or skidding at all.

Q. You made reference awhile ago to the fact you had seen one of these cars before the collision?

A. Yes, sir, I saw Miss Baptist's car coming over the hill by Mr. Jeffress' store.

Q. How far is that from the point of accident?

A. About four hundred yards.

Q. Did you know it was Miss Baptist's car?

A. That was the car that passed before this collision.

Q. You didn't know it was Miss Baptist's car at that time?

A. No, sir, but it was the one that passed before the collision.

Q. Can you tell the jury at what rate of speed, in your opinion, that car was being driven when it passed you four hundred yards before the accident?

Mr. Sterling Hutcheson: I think that is too remote from the accident.

The Court: Objection overruled.

Mr. Sterling Hutcheson: We except.

By Mr. Hodges:

Q. Answer the question.

A. From my own opinion and my knowledge from what I have drove, it was running right around about sixty miles an hour, and I don't think there is anything wrong about it, but from my experience and what I have drove, I think sixty miles an hour.

page 63 } Q. She passed you, and, if I understand you, immediately after she passed (and that was the only car that passed), then you heard this collision?

A. Then I heard the collision.

Q. Are you related in any way—

A. (Interposing) No, sir.

The Court: One minute.

By Mr. Hodges:

Q. Are you related in any way to Grant Faulkner or any of his family?

A. No, sir.

Q. Or Ed Wade?

A. No, sir.

Q. Or Rosa Edmonds?

A. No, sir.

Q. And you live there at Finchley?

A. Yes, sir.

Q. And have lived there all your life?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. You testified in this case before, didn't you?

A. Yes, sir.

Q. You didn't tell us anything about those scars in the road at that time, did you?

page 64 } A. They didn't ask me.

Q. You didn't tell us anything about seeing this automobile going sixty miles an hour, did you?

A. No, sir. They didn't ask me.

Q. You had told these gentlemen about it?

A. He asked me if I saw it, and I said I did.

Q. You had told them all about it before the other trial that you testified in?

A. About what?

Q. About the scars in the road and the rate of speed?

A. No, sir.

Q. You had not told them about it?

A. No, sir.

Q. I see. Didn't you tell them all you knew about it at that time?

A. They told me what I did know and I told them. I saw the car was it was coming down the road, but they didn't ask me did I see the car.

Q. They asked you this time?

A. Yes, sir, they asked me did I see it.

Q. You didn't tell them anything but what they asked you?

A. No, sir, that I know of.

Q. How is that?

A. I told them what I knew that they asked me.

Q. Where were you when you heard this collision?

A. Betwixt the Liberty Church and Finchley.

page 65 } Q. Where is Liberty Church.

A. Just a little the other side of Finchley.

Q. Which way?

A. Towards Clarksville on the old highway.

Q. On the old road?

A. Yes, sir, the old highway.

Q. That is west of Finchley then?

A. Yes, sir.

Q. Are you talking about the colored church?

A. Yes, sir.

Q. That is the other side of Finchley?

A. Yes, sir.

Q. Were you in the old road?

A. Yes, sir.

Q. About half way between Finchley and the church?

A. Yes, sir.

Q. Now, Charles, how could you see this automobile?

A. It was in plain view and you could see all the way. It is in plain view and no woods or nothing to keep from seeing.

Q. How far were you away from it?

A. When I saw it?

Q. Yes.

A. I don't know, but something like three hundred yards when I first saw it, and I hadn't walked, I know, as far as from here out to the street before they had the collision.

Q. And you saw it three hundred yards off the page 66 } first time, and you were not on the same road the automobile was on?

A. I was meeting the automobile but I was on the old highway.

Q. Three hundred yards away, and you were not on the same road the car was on?

A. No, sir.

Q. On a side road?

A. Yes, sir, but coming the same way.

Q. You were coming to Finchley?

A. Yes, sir.

Q. And this was at night?

A. Yes, sir.

Q. Where did you see it when you say it was going sixty miles an hour?

A. Coming down by Mr. Jeffress' store on the hill.

Q. On the curve?

A. Yes, sir.

Q. You tell the jury the car was going sixty miles an hour around the curve?

A. From my own experience and what I have drove it was going sixty miles an hour around the curve.

Q. What kind of car have you driven?

A. I have drove a Chevrolet and I have drove a new Ford and I have drove a model "T".

Q. Have you ever gone more than sixty miles an hour?

A. Yes, sir, I have drove seventy miles an hour.

page 67 } Q. A Ford?

A. No, sir; a Chevrolet.

Q. Well, now, what time of night was this?

A. Right around eight o'clock, I should think.

Q. Dark?

A. Yes, sir.

Q. Was it dark good?

A. Yes, sir.

Q. Lights were on?

A. Lights were on the car.

Q. When you went, from where you were on the old road to the scene of the accident, how did you go? Did you travel around the road or through the field?

A. No, sir, out across the field.

Q. Wasn't there a patch of woods between you and where the accident happened?

A. Yes, sir, but it was not between me. If I had gone back there would have been, but there was none.

Q. There was a patch of woods between you and where the accident happened, wasn't there?

A. Yes, sir.

Q. When you got up there—you testified about what you found; Hiawatha Towles was there, wasn't he?

A. Yes, sir.

Q. Are you able to say whether the automobile had been moved, or not?

A. No, sir, it was not moved before I got there.
 page 68 } Q. How do you know?

A. From where it was, if they had moved it, it looks like they would have set it up.

Q. Was it lying on the side or top?

A. On the fender, on the right hand ditch. It was turned up in the ditch on the right hand fender.

Q. On the right hand fender?

A. Yes, sir.

Q. You remember the persimmon tree on the right hand side of the road going to Clarksville, do you not?

A. Yes, sir.

Q. On which side of the persimmon tree was it?

A. On the upper side.

Q. Going toward Clarksville?

A. Yes, sir.

Q. On the upper side?

A. Yes, sir.

Q. That is west of the persimmon tree?

A. I think it is.

Q. How far beyond the persimmon tree was the car?

A. I would not be able to say; I didn't measure it.

Q. You have been able to tell us about the other distances mighty glibly; now, about how far was it?

A. Maybe thirty yards, maybe, or something like that—something like thirty yards.

Q. Charles, is that road in about the same con-
 page 69 } dition that it has been in all along on the south side?

A. There has been a lot of patching since then.

Q. Is the shoulder of the road, the ditch, and all that, about the same?

A. I should say it is. There has not been much water since then to do much washing.

Q. Don't you know that there is no bank on that side of the road?

A. Something like that (illustrating).

Q. How much?

A. About like that (illustrating).

The Court: About fourteen inches.

By Mr. Sterling Hutcheson:

Q. You say the top was against the bank?

A. The top was laying up on the bank.

Q. Was the car lying on the side?

A. On the fender up in the right hand ditch.

Q. Where were the left wheels of the car—up in the air?

A. The car was turned up, and the wheels like that (illustrating); one wheel was up. There wasn't but one on that side.

Q. Now, Charlie, you remember that the bank on the north side of the road has been cut down since the wreck, don't you?

A. I don't know that it is.

page 70 } Q. You don't know whether it is, or not?

A. I don't know whether it is, or not.

Q. Has any bank been cut on the south side since the wreck?

A. I couldn't say that, either. I don't think it has.

Q. You don't think it has?

A. I don't think it has.

Q. You testified about this scar you saw there: You say that was about two feet from the center?

A. Yes, sir.

Q. On the left of the center going towards Clarksville?

A. Yes, sir.

Q. And you followed it up the road where?

A. Followed it up to where the car turned off.

Q. Who followed it with you?

A. There was more than a dozen, I reckon, just looking at it, but I couldn't name them all.

Q. Did you have a flashlight?

A. No, sir.

Q. How did you follow it?

A. They had a lantern light, and the next day I was there and saw it.

Q. Was the same mark there the next day you saw?

A. Yes, sir.

Q. The same mark?

A. Yes, sir.

Q. The next morning?

page 71 } A. Yes, sir.

Q. Did you measure it?

A. No, sir.

Q. Did you measure the road?

A. Do you mean the width across?

Q. Yes.

A. No, sir.

Q. Did you measure how far that mark was from the center line of the road?

A. No, sir, no more than with my eyes looking at it.

Q. You did not measure it?

A. No, sir; I didn't have no rule on it.

Q. So you judge from your eye, and you estimate that that

mark was two feet to Miss Baptist's left of the center of the road?

A. Yes, sir.

Q. You didn't measure it?

A. No, sir, I didn't measure it.

Q. You know Emmett Gregory, don't you?

A. Yes, sir.

Q. He was up there that night, wasn't he?

A. Yes, sir.

Q. He just testified it was six inches from the center?

A. It was more than six inches. I looked and I know it was more than six inches.

Q. But you never made any measurement of any kind?

A. No, sir.

page 72 } Q. Charlie, there is a bank on the north or right hand side of the road going to Clarksville now, isn't there?

A. How is that?

Q. Isn't there a bank on the right hand side of the road going to Clarksville?

A. Of course there is.

Q. It is a higher bank than on the left hand side, isn't it?

A. I never measured them, but right deep banks on both sides betwixt that and Clarksville.

Q. Why did you all move this automobile to the north side of the road instead of moving it further on the south side?

A. Because he said to push it there, and I never had any least idea why he wanted to push it to one side rather than the other. I was there and he said to push it there.

Q. And he said to push it across the road?

A. He said to push it on the bank and we pushed it on the bank. He didn't say no particular side to push it on.

Q. As a matter of fact, didn't you all push it to the nearest side?

A. No, sir, I shouldn't think it would be to the nearest side because from where it was getting it was no nearer to push it to his side than across.

Q. Then why didn't you push it on that side?

A. I don't know. Nobody mentioned to push it on that side.

Q. And the left front wheel was torn off too, wasn't it?

A. Yes, sir.

page 73 } Q. Mr. Creedle didn't tell you which side to push it to?

A. He had no particular side.

Q. Who pushed the car there—you and who else?

A. Myself and Emmett Gregory and several others, and it has slipped my memory who it was.

Q. Now, Charlie, you have testified here that the automobile hit the left front door—that the Baptist car hit the Faulkner car's left front door. That is not the only damage done to the Faulkner car, is it?

A. No, sir.

Q. How can you say it hit the left front door?

A. Because that was hit, and that was the only lick that was hit before I got there, and after I got there there wasn't another lick until we turned it down and the fender was hit.

Q. Wasn't the left front wheel off when you got there?

A. Yes, sir.

Q. Wasn't the left front fender torn off when you got there?

A. Sure, that was torn off when I got there.

Q. How can you say it hit the door rather than it hit the fender?

A. I just had it in my mind if it hit the fender it was obliged to hit the door.

Q. Now, Charlie, didn't you hear a second collision that night?

page 74 } A. I was standing there looking at it.

Q. Tell us about that?

A. The last car that passed there hit that fender that was torn off lying down on the ground.

Q. Which fender?

A. The left hand fender that was torn off.

Q. The front or rear fender?

A. The front fender. It hit that lying on the ground.

Q. Was the front fender torn off and lying on the ground?

A. It was hanging to the other, but it was stripped from the motor back, and the runningboard down there, that was torn off, and that was lying out in the road like, and the second car ran over that, and that was the only lick done to the car more than the first, because I was standing there looking at it.

Q. You were standing there looking at it?

A. Yes, sir.

Q. What became of that automobile.

A. It kept going.

Q. Who was there when the second car hit the Faulkner car?

A. Right many people were there.

Q. Were you there?

A. Sure I was there.

Q. Had the people from the Baptist car gotten there?

A. Sure they had come down there.

Q. And they were there, too?

page 75 } A. Yes, sir.

Q. All of you were standing there looking at that?

A. Yes, sir.

Q. When you went there, you testified that there was a patch of woods between where you were standing on the old road and where the accident happened; when you went there, did you go through or around the woods?

A. If I had went back the old road to where I turned off, there would have been woods.

Q. What I am getting at is this: The place where the accident happened was not in your sight when it happened?

A. No, sir.

Q. It was not in your sight all the way when you were going up there to it, was it?

A. Yes, sir; yes, sir.

Q. When and how?

A. After I turned back and went to it there was an opening all the way, and I could see it.

Q. That was after you got across to the new road?

A. I could see clean across.

Q. You couldn't see where the accident happened from where you were standing?

A. Yes, sir, in day time; it being dark, I could see from the lights of the car. If it had been broad daylight, like it is now, I could have seen the cars.

Q. Charlie, do you remember a little branch or
page 76 } drain which comes from the railroad on the old
road?

A. Yes, sir, mighty well.

Q. On which side of that were you when the accident happened?

A. On the upper side next to clarksville.

Q. Did you cross that drain and circle around, or go across?

A. I turned and went right across to the cars where they had the accident.

Q. Wasn't the accident beyond that patch of woods from where you were standing?

A. Just on the upper end of the patch of woods.

Q. Then you could not see through the patch of woods to where the accident was?

A. You could see through them, and you can see through them yet.

Q. Well, now, Charlie, after you got there, had any other automobiles gotten there?

A. No, sir.

Q. Had any other cars gotten there when this automobile you are telling about that hit the fender came up?

A. It might have been. It might have by so many people standing around, but I am sure another car was there by that time. I am there there was another car there, and by a lot of people standing around and everybody being excited I am almost absolutely sure that it was there, and I am not absolutely sure it was not.

page 77 } Q. You do not undertake to say that the car that hit the fender was the first car that passed after the accident?

A. Yes, sir, I know that that was the first car that passed after the accident that passed.

Q. Had Mr. Creedle gotten there when that car passed?

A. Mr. Cal?

Q. Yes.

A. I don't know for certain whether he had, or not.

Q. You don't know?

A. No, sir. I don't think he had. I don't think he had.

Q. Was the doctor there?

A. Before the other car passed?

Q. Yes.

A. No, sir.

Q. Hiawatha Towles was there?

A. Yes, sir, he was there.

Q. And you say the ladies from the Baptist car had come down there?

A. Yes, sir, they had come down there, yes, sir.

Q. Where were they—in the field, or near the road?

A. How is that?

Q. Where were they—up in the field, or in the road?

A. I couldn't say that, but I think out in the field because I remember one of them asked was he seriously hurt, and I think he was out in the field.

Q. And your measurement you are talking about page 78 } of that scar, that is guess work at night?

A. Yes, sir. I didn't measure it; I didn't have a ruler.

Q. You say the Faulkner car was lying on the right fender?

A. Yes, sir, turned up in the ditch on the right hand fender?

Q. It has been testified that the fenders on the right hand side of the Faulkner car were not bent?

A. Were not bent?

Q. Yes.

A. I don't suppose that they are, but the car was turned

up on the right hand fender on the right hand ditch, and the top was lying up on the bank.

Q. When this other car came along which you are telling about and hit the left hand fender, was the fender on the hard surface portion of the road?

A. Sir?

Q. When this other automobile came along and hit the fender, was the fender on the hard surface portion of the road?

A. Do you mean half way in the road?

Q. No. I mean was it on the hard surface?

A. Yes, sir, laying back.

Q. You had moved the car then?

A. Had pulled the car down the road, but we hadn't taken the fender up and put it in the car, but it pulled the car down on three wheels. We had not gone around and taken the fender and put it in the car. The fender was lying kind of out from the car.

page 79 } Q. Was there any part of the automobile on the hard surface?

A. No more than the fender, and the edge of the car was not on the hard surface.

Q. Now, Charlie, you know that that was the left front fender that was lying out in the road, don't you?

A. Yes, sir, I know that.

RE-DIRECT EXAMINATION.

By Mr. Hodges:

Q. Charlie, you have been quizzed at length about your ability to see that accident; it is a fact that the old road and the new road run along parallel to each other?

A. Yes, sir.

Q. With just a field between where you were and this other road?

A. Yes, sir.

Q. How close to you did the Baptist car pass just before the accident, would you say?

A. Well, now, I couldn't exactly say how close. Do you mean how close did it pass along against me?

Q. How close was one road to the other?

The Court: How close was the car to you?

A. Something like from here over to Mr. Bing's hardware.

By Mr. Hodges:

Q. Something like one hundred yards?
page 80 } A. Yes, sir, a piece of ground that they sawed
off between the two roads.

RE-CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Didn't you tell me just now you were three hundred yards from the car when you saw it?

A. When I saw it the first time coming over the hill by Mr. Jeffress.

Q. I asked you how far that car was from you when, according to your testimony, it was going sixty miles an hour, and you told me three hundred yards?

Mr. Hodges: I submit that the witness said when it came into his sight.

By Mr. Sterling Hutcheson:

Q. Now, you tell Mr. Hodges one hundred yards, now, which is right?

A. I meant across the field.

By the Court:

Q. How far was the car from you when you first saw it?

A. About three hundred yards, coming by Mr. Jeffress' store.

Q. Is that the time you say it was running sixty miles an hour?

A. Yes, sir.

By Mr. Sterling Hutcheson:

Q. Do you say also it was running sixty miles an hour when it came by you?
page 81 } A. It had not cut down any.

Q. Why didn't you tell me just now it was one hundred yards from you when it was going sixty miles an hour instead of three hundred?

A. You asked when I first saw the car.

Q. Let me ask you one other question: You heard the Baptist car, didn't you?

A. I heard it and saw it, too.

Q. Did you see the other automobile coming from towards Clarksville?

A. I saw the reflection of the light in the air by it being dark and by my looking back.

Q. By your looking back?

A. Yes, sir.

Q. Did you see the reflection of the light in the air by your looking back when you first saw the Baptist car?

A. At that time it is natural I could see both of them, and I had been standing talking, understand, before I saw the Baptist car. I was standing talking before I saw it.

Q. Then you saw the reflection from the lights of the other car?

A. Yes, sir.

Q. How long before you saw the Baptist car did you see the reflection of the lights from the other car?

A. It was not more than five or ten minutes, I should think.

Q. Five or ten minutes?

A. Yes, sir, if that long.

page 82 } Q. You first saw the reflection of the lights coming from Clarksville, five or ten minutes, and then later you saw the lights of the Baptist car sixty miles an hour?

A. How is that?

Q. You first saw the reflection of the light of the car coming from towards Clarksville?

A. Yes, sir.

Q. Then five or ten minutes later you saw the Baptist car?

A. It was not that long.

Q. How long was it?

A. I saw the reflection of the lights coming from Clarksville flashing, by being dark, and it was not over five or ten minutes before I saw the car coming over the hill.

Q. That is the Baptist car?

A. I guess it is the Baptist car. That is the one that passed.

Q. Five or ten minutes later?

A. Yes, sir.

Q. How long was it before you heard the wreck?

A. It was not so long after this car come in sight. It was not over two minutes, I should say, and it was not that long after this car come around the hill.

Q. Did you hear the engine from the Faulkner car?

A. No, sir, I didn't pay any attention.

page 83 } Q. Did you see the car itself, or the lights themselves, or just the reflection from the lights?

A. The reflection.

Q. Only the reflection?

A. Yes, sir, by that car being behind the woods from me.

Q. Then you never did see the lights from the Faulkner car?

A. That was bound to be the reflection.

Q. But you never did see the lights from the Faulkner car?

A. No more than the reflection, but I took that to be the light.

Q. What I mean is this: Did you ever see the headlights from the Faulkner automobile?

A. Of course I saw them after this happened, but I didn't come close enough to it to see the headlights before it happened.

Q. Why?

A. Because I didn't know nothing about the headlights.

Q. Didn't you say the woods were between you?

A. Yes, sir, but I could see the lights over the top of the woods by my looking back.

Q. But the woods were between you and the Faulkner car?

A. Yes, sir.

Q. Didn't you tell me just now the woods were not between you and these automobiles when they hit?

A. They were not when they hit.

Q. When did you see the headlights from the Faulkner car?

A. Let me explain it to you like I saw it.

page 84 } Q. I wish you would?

A. You remember if you are out on the road at night traveling, you can look back, and if you are standing still you can see the lights of a car flashing a long ways, and by my looking back I could see the car flashing coming down the road, and then it was not long before Mr. Baptist's car come over the hill, and it was not over two minutes, if it was that long, before they had an accident.

Q. Here is what I am trying to get at, Charlie—

A. (Interposing.) I will tell you: By my not stopping and standing still, that threw me behind the woods when they had the collision; if I had stood still when I first saw the reflection of this light, I would have been behind the woods.

By the Jury:

Q. I would like to ask how close was it where they hit to the old road where it crosses the good road?

A. How far was it? Do you mean the upper side where the old road comes?

Q. How far was it this side on that road?

A. Do you mean coming from Mr. Chandler's?

Q. Yes.

A. I don't know, to tell you the truth, but it was nearer to this corner of the woods than that. It was a little nearer this corner of the woods.

By Mr. Sterling Hutcheson:

Q. You have just testified, I think, that it was page 85 } about thirty yards west of that persimmon tree on the righthand side of the road, didn't you?

A. I said that, yes, sir.

Q. That is the only persimmon tree along there, isn't it—that is the only big persimmon tree on that side of the road?

A. On that same side?

Q. Yes.

A. I think it is.

Q. I just want you—

A. (Interposing.) I am going to tell you the truth as near as I can. I will not be absolutely sure because there is a lot of trees.

Q. I just want to fix the place. Do you remember a sort of orange colored mail box at the corner near that cemetery?

A. Yes, sir.

Q. There is a persimmon tree on the same side of the road, this side of the mail box?

A. Yes, sir.

Q. Is that the persimmon tree you are talking about?

A. That is the one I am talking about.

By Mr. Hodges:

Q. You said something about a lantern being there; do you know where the lantern came from?

A. Yes, sir.

Q. Who brought it there?

A. Mr. Cal brought it there.

page 86 } Q. Mr. Cal Creedle?

A. Yes, sir.

Q. Do you know whether he was there before he brought it?

A. He came and didn't stop, and he said that he was going to the house and get a lantern to see what they were doing.

G. C. CREEDLE,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Hodges:

Q. You are Mr. G. C. Ordeedle?

A. Yes, sir.

Q. And you are employed by the State Highway Department, in the Maintenance Department?

A. Yes, sir.

Q. Did you go to the scene of the accident or collision on the night of June 6, 1931, between a car operated by Grant Faulkner and one operated by Miss Marjorie Baptist, near Finchley?

A. Yes, sir.

Q. What time did you arrive at the scene of the accident?

A. I really don't know, but somewhere around 7:30 or 8:00 o'clock. It was after dark.

Q. Could it have been as late as 9:00?

A. It possibly could.

page 87 } Q. Some of the witnesses put it that late. How many times did you go there?

A. I went there twice.

Q. What did you do the first time you went there?

A. I went back to my house after a lantern, nearly half a mile; there was not any light there, and everything was done and there was right much agitation, and a man was hurt, and they didn't have any light except a match.

Q. Where was Grant Faulkner's car at the time you arrived there?

A. On the road, on the side of the road.

Q. Whereabouts on the side of the road?

A. Where the accident occurred.

Q. Was it on the right or left side of the road?

A. It was on the left from here.

Q. On Grant Faulkner's right coming towards Boydton?

A. Yes, sir.

Q. When you arrived there, did you make any examination at all before you went and got the light?

A. No.

Q. Can you say whether the car was on its wheels or sitting up in the air?

A. I could not.

Q. Where was Grant Faulkner when you arrived there?

A. He was laying out on the side of the road. They had got him from the road a little ways, I suppose five or six steps from the road; there was a little ravine there, and
page 88 } they were all around him. When I got back I could see—I don't know that they moved him, but when I got back with the light. I don't know that I even saw him the first time.

Q. Mr. Creedle, when you got back with the light, had the car been turned on its wheels?

A. I really don't know whether it had been, or not. I didn't pay any attention to the car at all until they got the

man up and sent him to the hospital. That was the first time I took any notice of it.

Q. You say the car was on the right side of the road?

A. Yes, sir.

Q. Was any part of it on the hard surface?

A. Yes, sir, a part of it. It was sitting up sideways a little bit, like that (illustrating). I picked up some of the tools that were lying on the grass, some pieces of iron and things that looked like they had slid out, and they were on the shoulder of the road, and they had slid out the door. The car was leaning a little that way.

Q. On its right side?

A. On its right side.

Q. Those pieces of tools and things which you picked up on the shoulder, how far were they from the ditch?

A. I suppose somewhere around two feet from the surface treatment.

Q. From the surface treatment?

page 89 } A. Yes, sir.

Q. Did you order this car pushed back across the lefthand side of the road?

A. I just asked the crowd to help me get it off the road after everybody was gone. There was some obstruction, and I asked the crowd. I didn't order anything. I thought it was my duty to keep things off and I didn't know whether they were going to get it up. I asked the crowd standing around to help me get it across the road.

Q. Charlie Carter has testified that when the car was turned back on its wheels the front part of the car was nearer towards the center of the road than the rear; is that correct?

A. When I started to get it *it* up, it was laying at a little angle from the surface, and the rear end was a little further from the surface than the front.

Q. Is there any ditch on the righthand side of the highway?

A. There is a small drain.

Q. And it is a fact you would have to push it to get up on the hard surface?

A. I had to get out on the ditch to get out on the right side, and it was clear there.

Q. You could go up on the ditch—

A. (Interposing.) To get it up on the road.

Q. Do you know anything about any other car striking this car?

page 90 } A. No, sir.

Q. Did you examine the highway in regard to any scars or marks in the highway as to where the accident took place?

A. No, sir.

Q. You were not there?

A. No. I was trying to protect the traveling public.

Q. Where was Mr. Baptist's car when you arrived there?

A. The first time I saw it, I suppose fifty or sixty feet down the road. They pointed it out at another angle, headed further off.

By the Court:

Q. Feet or yards?

A. Feet, I suppose, fifty or sixty feet, and it might have been more.

By Mr. Hodges:

Q. It might have been more?

A. Yes, sir.

Q. Did you make any estimate of the distance?

A. No, but just as I can remember it, it was fifty or sixty feet.

Q. And it had stopped, as I understand, on the lefthand side?

A. Yes, sir, headed to the left, going the other way.

Q. Can you say whether or not there was a wheel missing off Mr. Baptist's car

A. Yes, sir. I don't know that it was missing;
page 91 } there was one missing, but I don't know whether
it was a spare or a wheel off the car, but they were
looking for it.

Q. Where was that wheel found?

A. About fifty or sixty feet on the lefthand side going from here. It rolled down towards the field and rolled into a little ravine.

Q. And there was a wheel missing off the Baptist car?

A. Yes, sir. They were inquiring for one and trying to fix it, and thought maybe that they could bring his car in, and they commenced to look for the tire, and, of course, I took part and I found it.

Q. And it was fifty or sixty feet on the left side?

A. Fifty or sixty feet from the road.

Q. Was the Baptist car brought away from there before you left?

A. I don't remember which one was brought away first. One of them was brought before I came away, and Mr. Glasscock was left to take care of them both. He had sent his car on, or truck, with one of them, and he said that he would stay there until the truck got back after the other, but they were

both off the road at the time and no obstruction to the road. I don't know which one he brought first.

CROSS EXAMINATION.

By Mr. John Hutcheson:

Q. Mr. Creedle, do you know where that perpage 92 } simmon tree is to the north of the road near the wreck?

A. No, I don't remember any persimmon tree there. It might be there, but I never paid any special notice to it.

Q. It was testified it was thirty feet west of that persimmon tree?

A. I don't remember. I know it was close to the cemetery there.

Q. Leaving from Finchley, you go around a curve and down a hill, and then you come up a little rise, and then the road starts down, sloping gradually again, before you come up the hill to the old road?

A. Yes.

Q. Will you tell the jury exactly where this accident took place? Was it after the second little hill where you go down and come up?

A. As you go down from Finchley, down a little grade there and bottom, and up another grade, and it was over that grade that the accident happened.

Q. Can you tell how far it was over that grade?

A. I would say 150 yards over the grade.

Q. To the north of the highway there was a bank there at that time, wasn't there?

A. Sir?

Q. To the north of the highway, wasn't there an embankment there which was later cut down?

A. Yes, sir, it has been sloped some; there was page 93 } a bank, and then a place in there that wasn't any bank, and then another little place. As it goes off from the bank, there is a little dip.

Q. That has been graded down since the accident?

A. Yes, sir.

Q. To the south of the road, was there any bank?

A. There was no bank, but a drain there like a ditch.

Q. It was testified here by Charles Carter and Emmett Gregory—one says a fourteen inch bank and the other a two foot bank?

A. I suppose the ditch is twelve or fourteen inches deep. It is six feet from the hard surface treatment back to the back

of the ditch, and I suppose that ditch is washed out some twelve or fourteen inches.

Q. There was no bank?

A. No bank.

Q. It was even with the road?

A. There was no bank more than the ditch bank. I suppose the ditch is washed out twelve or fourteen inches. The bank hasn't been sloped since the wreck.

Q. The bank to the north?

A. It has not been sloped since the wreck.

Q. Charles Carter testified that you asked him and a number of others to move the car out of the road, and that they moved it out of the road?

A. They might have helped. I didn't ask any-
page 94 } body particularly, I didn't specify anybody, but
asked the crowd standing around to give a hand to
get it out.

Q. They said you didn't say which side to move it to?

A. I said "Will you all help me move it over yonder"?

Q. So you did tell them which side?

A. I remember that they helped, but I don't remember which helped.

Q. Are you sure that you told anybody which side of the road to move the car to?

A. I asked them to move it to that side.

Q. You said to move it to that side—the north side?

A. Yes, to put it on the other side.

Q. You are positive of that?

A. Yes, sir.

Q. You told them to move it to the north side of the road?

A. Yes, sir, I asked if they would help me move it to the north side.

Q. Mr. Creedle, can you say whether or not the left front fender was on the Faulkner car at the time you moved it across the road?

A. No, I cannot to save my life.

Q. I understood you to say the front wheels of the Faulkner car were on the hard surface when you got there, or when you first noticed it?

A. The left wheel coming this way was on the hard surface.

Q. Do you mean the left wheel or the front
page 95 } wheels?

A. The front wheels.

Q. Both wheels were on the hard surface?

A. Both front wheels were on the hard surface.

Q. That is when you first noticed it?

A. When I first noticed it. The rear wheels were just about the edge of it, or a little bit off it. When the body tilted like that (illustrating) the tools and things would slide out on the grass and not on the hard surface.

Q. When you moved the car across the road to the north, it was headed more towards Clarksville than it was towards Boydton?

A. No; it was headed more towards Boydton.

Q. That was after you finished moving it?

A. No; I turned it and brought it clean across the road.

Q. I am talking about after you had moved the car and left it standing on the north side of the road, was it headed towards Clarksville or Boydton?

A. Towards Clarksville.

Q. It was headed towards Clarksville then?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Hodges:

Q. How wide is the hard surface there?

A. Eighteen feet.

Q. How wide are the shoulders on each side?
page 96 } A. They are supposed to have them six feet, but possibly some of that was washed away, and I don't reckon it was over four and a half to five feet.

RE-CROSS EXAMINATION.

By Mr. John Hutcheson:

Q. You have never measured it?

A. No.

Q. This type of road very often runs short and very often runs over?

A. A few inches.

Q. It is a tar treated road?

A. Yes, where it is treated.

Q. Not concrete?

A. No.

Q. Not laid out by any form?

A. No, except the distributor has a nine foot pipe that the booms are on that spreads the tar, and it runs two strips, and sometimes maybe it will lap over two or three inches and sometimes spread thinly back.

Q. And sometimes it might be a foot or two feet wider?

A. No, not unless it is patched. When it is put down they don't vary. I have never put down any that varied.

page 97 } Mr. Settle: We desire to move the court to permit the jury to view the Grant Faulkner car.

The Court: Where is it?

Mr. Settle: It is now in front of the court house.

The Court: Is there any objection?

Mr. Sterling Hutcheson: No, sir.

The Court: All right.

Mr. John Hutcheson: We wish to make this objection: The evidence is that this car has been struck twice; if it was struck twice, we don't see where it has any evidential value to be viewed by the jury.

The Court: The evidence is that only the fender was struck after it was detached from the car,—that is so far.

Mr. John Hutcheson: So far, but here is our point: If at this time they were going to rest and not put on other witnesses to show that the car was struck, not a detached fender, then we think the jury should not take it in. If they are going to put on more evidence to contradict it—

The Court: They certainly would not be fools enough to do that. Do you think so?

Mr. John Hutcheson: I don't know. It was testified here that it is not now as it was after the wreck. If the fender is on there, and the witness says that it hit the fender, that is bound to be wrong.

The Court: I will let them view the car.

page 98 } Mr. Sterling Hutcheson: We save the point. Outside of the wreck, we do not intend to object.

The Court: Gentlemen of the jury, you are under the charge of the sheriff.

Note: A view of the wreck was had, and the jury returned to the courtroom.

F. W. CARPENTER, JR.,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Hodges:

Q. Mr. Carpenter, where do you live?

A. South Hill.

Q. What is your business?

A. Run the Carpenter Motor Company.

Q. Are you an automobile mechanic?

A. Yes, sir.

Q. How long have you been an automobile mechanic?

A. Fifteen years.

Q. During that fifteen years, what experience have you had dealing with wrecked automobiles?

A. I have had right much experience with wrecked automobiles.

Q. How many wrecked cars have you gotten up and repaired in the last five years?

A. I would say around 175 or 200.

Q. Have you made a close inspection of a car sitting here, just viewed by the jury?

page 99 } A. Yes, sir.

Q. When did you do that?

A. Today.

Q. Have you examined carefully the bumper on that car, on the front left side?

A. Yes, sir.

Q. Will you tell the jury whether the bumper of that car has been struck or received any blow in that accident or at any time?

Mr. John Hutcheson: We object to that question. The jury has seen it and has just as good idea as Mr. Carpenter.

The Court: I think Mr. Carpenter has qualified as an expert.

Mr. John Hutcheson: We except.

A. The bumper shows a minor scratch on it. It does not seem to have a big blow but a minor scratch.

By Mr. Hodges:

Q. Has the bumper received, from the amount of scratch you saw on it, the force of the injury to the side of the car, which you now see?

A. No.

Q. Mr. Carpenter, it is in testimony here that the car involved in the accident with this car that is out here had the left front wheel torn off, the front axle bent, the front fender torn down and the front left headlight bent; with
page 100 } those two injuries before you, would you say that the other car ran into this one, or this car ran into the other one?

Mr. John Hutcheson: We make the same objection.

A. I would say the other car ran into this.

By Mr. Hodges:

Q. I will ask you, as a mechanic, would it be possible for the driver of this car, with the type of injuries you have seen, to have suddenly swerved to the left as he proceeded along the highway and to have received the injuries which you saw out here?

Mr. John Hutcheson: Objection.

The Court: I think that question is going too far. Strike that question out.

By Mr. Hodges:

Q. I will ask you if, in your opinion, the driver of this car, which the jury has just seen, could have, with the injuries that you saw on that car, while proceeding along the highway, suddenly have swerved his car to the left and sustained the injuries which you saw there?

Mr. John Hutcheson: Objection.

The Court: Objection overruled.

Nr. John Hutcheson: Exception.

A. Do you mean if he would be going along straight down the road and pulled out suddenly to the left?

page 101 } By Mr. Hodges:

Q. Yes.

A. If he had done that, he would have cut more in front. The main blow is more in the center.

Q. In your opinion, did this car receive a severe blow or a slight blow?

A. It had a hard blow right at the center of the frame.

Q. I will ask you if the frame on this car is bent, and, if so, where?

A. Bent at the center right at the front door—right at the back of the front door.

Q. Do you tell the jury it is your opinion that the blunt of the blow on this car was where—where was the hard part of the blow received by this car?

A. Right in the center of the body.

Q. Opposite where the driver sits?

A. Yes, sir.

Q. Mr. Carpenter, from what angle on the highway would another car receiving the injury I just described to you a

moment ago have to be driving towards this car of Grant Faulkner's in order for Grant Faulkner's car to sustain the damage that it has in the side there?

Mr. John Hutcheson: We object to all this line of testimony.

The Court: Make it at the close.

page 102 } A. He would have to be running about a thirty-five degree angle to come in the way that this car is damaged.

By Mr. Hodges:

Q. Mr. Carpenter, did you say you operate the Carpenter Motor Company?

A. Yes, sir.

Q. You are not actually selling automobiles at the present time, are you?

A. Repairing only. We repair.

Q. Isn't it a fact that your main or principal business for the past five years has been getting up wrecks and repairing wrecked automobiles?

A. Yes, sir.

Mr. John Hutcheson: We object to all the testimony given by this witness on the ground that he is not qualified as an expert in the happening of wrecks or the injuries sustained by the cars after the wrecks. He is purely a mechanic, and, as such, he is not competent to testify to the injuries or the physical facts after the wreck as to how the wreck occurred. He has not testified that he has ever seen a wreck; that all that he has seen is after the injury has taken place, and all his testimony is merely his opinion. The jury has seen the car, and the jury's opinion is as good as his, and it is purely in the discretion of the jury.

The Court: The objection is overruled; save the exception for the reasons stated.

page 103 } CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Mr. Carpenter, you have testified here, as I understand your testimony, that it necessarily be a fact that the other automobile ran into this one. What part of the other automobile will you say was bound to have struck this one?

A. Well, I would say the left front wheel and fender and bumper.

Q. Do you think that a fender, we will say, would cause as severe blow as this car has had?

A. It would on the door, but the bumper and the front end of the chassis would bend the frame, or even the axle or wheel, jammed up together.

Q. Well, assuming that you are correct, and that necessarily the Baptist automobile ran into this car, wouldn't it follow necessarily that the front part of the Baptist car would be hurt?

A. Yes, sir, I would think that he would have a fender torn up, and probably a wheel.

Q. What else?

A. Well, maybe the front end of the bumper. I don't say it would be broken off, or anything like that, but bruised up.

Q. The headlight?

A. It would not be necessary to carry the headlight off unless he carried the fender clean off.

page 104 } Q. Well, wouldn't it be necessary that the front part of the fender on the Baptist car would have been crumpled in?

A. No. It depends altogether on where it hit it. It is liable to roll up on it. When the lick struck the axle, the front of the wheel could have done that.

Q. How do you mean?

A. I have seen them ride up on it.

Q. Ride up on it like that?

A. Yes, sir.

Q. Now, I will ask you this: What part of the car made that blow on top of the door like that?

A. Well, now, I don't know; I couldn't tell you that.

Q. Please state, for the purposes of the record, whether or not it is a fact that a very severe blow was received by the top of that left front door?

A. It looks like it has had a right good lick on top of it.

Q. Isn't the most severe blow received the one which appears to be a downward blow on top of the door?

A. Your hardest lick is on that chassis.

Q. Isn't that a very severe blow on top of the door?

A. Yes, sir.

Q. Please tell what part of the Baptist car inflicted that blow, in your opinion?

A. I don't know. I couldn't tell you because that car might have turned over and caught something.

Q. Mr. Carpenter, you are the expert who has page 105 } qualified here and you know all about wrecks; you have gotten up 175 wrecks in the last few years. Please tell, and I ask you again, what part of the Baptist car could have inflicted that blow?

A. I couldn't tell you that because I don't know. It is not dented in, and it don't show any scratches like iron would do that. I don't know what probably hit that. The man kind of bending over like that (illustrating) might have pressed it. I have seen them tear them up right badly.

Q. Does it show, Mr. Carpenter, the effect of having been struck by any part of the front end of an automobile?

A. What do you mean?

Q. The blow on top of the door?

A. It don't show any scratches like iron or anything like that has hit on top.

Q. I ask you does it show—I will put it this way: What part of the front of the Baptist car could have made that downward blow on the left front door, assuming the Faulkner car was standing on its wheels at the time?

A. Well, I don't think any part of that car could have done that.

Q. You don't think any part of the Baptist car could have done that?

A. No, sir.

Q. Then, have you ever seen a blow just like that on a car?

A. No, sir, not exactly like that.

Q. So then you have never seen a wreck just page 106 } like this one appears to be?

A. Not exactly, because none of them happen exactly alike.

Q. Now, do you tell this jury that the blow which bent the front axle and pulled off that left front wheel was not a severe blow?

A. Could I tell them that it was not?

Q. Yes.

A. I would tell them that I thought it was. You did not mention the bumper. That is what I said—I said the bumper would make a severe blow.

Q. It is one of these spring bumpers, and it sort of flexes and bends?

A. They don't bend that model of the Ford so easily.

Q. Has the bumper on this car been bent?

A. On the other side it has.

Q. Hasn't it been bent on the left side also?

A. It don't show it.

Q. You said that the blow which bent the front axle and tore off the left wheel was not as severe as the blow which struck the side of the Ford car?

A. No, sir.

Q. What is your answer?

A. It was not as severe as it was that hit the side. You will notice that when a Ford gets a severe lick in front, it always bursts the transmission housing.

Q. It was sufficiently severe to have bent the page 107 } axle, wasn't it?

A. Yes, sir.

Q. That is a pretty good blow, isn't it?

A. Yes, sir.

Q. Well, now, assuming that immediately after the collision the most severe blow to the Baptist car was about opposite and behind the hubcap of the left front wheel, how would you tell this jury the accident happened?

A. I don't understand what you said.

Q. Assuming that the evidence will show that the most severe blow on the Baptist car was about opposite the hubcap of the left front wheel, and from there on back, how would you say the accident happened?

A. Do you mean it tore off the runningboard and then shattered a back fender?

Mr. Hodges: We object to that.

The Court: It is a hypothetical question. The objection is overruled.

Mr. Settle: We except.

A. I would say that that car probably kept moving and tore that part off.

By Mr. Sterling Hutcheson:

Q. How is that?

A. You asked how was it the whole back side got tore off.

Q. I asked you this, how would you say the accident happened if the evidence showed that the Baptist car page 108 } was struck about opposite the hubcap on the left front wheel, and that that was the first blow on the Baptist car, and the runningboard and rear fender were torn off?

A. Well, he was bound to tear that off when he ran into that side.

Q. Amplifying my question, the front part of the left front fender was not injured; how would you explain the accident then?

A. The front part was not injured?

Q. Yes.

Mr. Settle: Is that a hypothetical question, your Honor?

The Court: I think so.

Mr. Settle: He is making a statement.

The Court: He is amplifying his question.

A. The only thing I can tell you about that, you say the left part of the front fender was not damaged; the only thing I can say is when it hit, it rose up. The fender raised up above where it was supposed to hit it.

By Mr. Sterling Hutcheson:

Q. Then do you not admit hat in view of the fact that the front part of the left front fender of the Faulkner car is injured, that it might have run into the Baptist car?

A. I don't think so from the looks of this one. I haven't seen the other car.

Q. I ask you as an expert, and you qualified page 109 } yourself as an expert here—here are two automobiles: You have seen the one down here; now, assuming that the evidence shows that the front part of the Baptist car—neither the headlight nor the fender is injured—only the front tire punctured—

The Court: (Interposing.) Have you any evidence to show that the front headlight was not injured?

Mr. Sterling Hutcheson: I am asking a hypothetical question.

The Court: When you have the facts, you had better put them in.

Mr. Sterling Hutcheson: We haven't introduced our evidence, and there is a conflict.

The Court: All right; you can call him back when you introduce your evidence.

Mr. Sterling Hutcheson: I will withdraw the headlight part, then.

Mr. Settle: That is the very point I had in mind.

The Court: You can call the witness back when you have introduced it.

Mr. Sterling Hutcheson: If you will keep him here so we can recall him for further cross examination, it would be better.

The Court: All right.

page 110 } RE-DIRECT EXAMINATION.

By Mr. Hodges:

Q. Did I understand you to say that the blow on the body of that car could have been received by the person sitting in the car?

A. Yes, sir.

Mr. Sterling Hutcheson: We want to save our point on the court's ruling about recalling Mr. Carpenter afterwards. We take the position that we ought to be permitted to ask hypothetical questions whether the testimony of the defendant has been introduced or not.

The Court: I think a hypothetical question should be based on some evidence. You can save the point.

Mr. Sterling Hutcheson: Yes, sir, we want to save the point.

ED WADE (Colored),

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Settle:

Q. Your name is Ed Wade?

A. Yes, sir.

Q. Do you reside in Halifax County on Mr. W. C. Slate's farm, owned by Mr. W. C. Slate and his sons?

A. Yes, sir.

page 111 } Q. And that is the same farm that Grant Faulkner lived on up to the time of his death?

A. Yes, sir.

Q. Were you with Grant Faulkner on the night of June 6th, 1931, when he had a collision with some one about nine o'clock that night?

A. Yes, sir.

Q. Who else was in the car besides you and Grant Faulkner?

A. Rosa Edmonds.

Q. Rosa Edmonds?

A. Yes, sir.

Q. Where is she now?

A. I don't know, sir.

Q. She testified at the first trial in this case?

A. Yes, sir.

Mr. Sterling Hutcheson: Will you Honor let me inter-

rupt? Mr. Settle said something about sending that automobile back to Halifax: In view of the fact that we have not completed our cross examination of Mr. Carpenter, we suggest that it might be desirable to have it here tomorrow.

The Court: The jury has seen it, and I will not let the jury look at it any more. I will not let the jury keep going and looking at a car every time a witness testifies.

Mr. Sterling Hutcheson: We might want to look page 112 } at it.

The Court: I will let you go right now. I will give you half an hour to go and look at it.

Mr. Sterling Hutcheson: No, sir. We want it tomorrow.

The Court: The record will show that the jury has seen the car, and that counsel has asked if you had any other questions you want to ask, and you said you had none.

Mr. Sterling Hutcheson: And we state that the evidence in regard to the automobile, and especially with respect to the expert testimony, is not all in.

The Court: So far as I know; in fact, I think I am straining a point on an expert's testimony for you. I will let it go as it is. Save the point.

Mr. Sterling Hutcheson: We save the point.

The Court: Save the point for what it is worth.

By the Court:

Q. Is Rosa Edmonds in the State of Virginia now?

A. I don't know where she is.

By Mr. Settle:

Q. After the first trial of this case, did you hear Rosa Edmonds say anything—

The Court: Don't go into that. Gentlemen of the jury, retire to your room.

Note: The jury retired from the court room.

The Court: Isn't it a fact that you have tried to find this woman, and she is not in the State of Virginia?

Mr. Settle: She is not in the State of Virginia. page 113 } At the first trial of this case she stated to Andrew Faulkner, I believe it is, a brother of Grant Faulkner, that she didn't know whether she would be present or be able to get down to the trial of it, or not, and she was thinking of going to New York. Your Honor will recall when the case came for trial sometime ago she was not here, and

we sent to Roanoke and found that she had gone to New York. The first time we got her from Roanoke and kept her at Halifax four or five days.

The Court: You have made ever effort to get her?

Mr. Settle: Yes, sir. He tells us that he sent to Roanoke where she resided at the time of the first trial; at the second trial, she had gone from Roanoke to New York.

Mr. Sterling Hutcheson: We do not want to be in the position of consenting to the reading of the testimony.

The Court: If you do not consent, it doesn't make any difference. You can object to putting it in.

Mr. Sterling Hutcheson: I realize that your Honor will overrule the objection.

The Court: No, I would not accept a bill of exceptions to such objection.

Mr. Sterling Hutcheson: If we state an objection and exception in the record for what it is worth—

The Court: (Interposing) I will pass on it then, but my idea is that a record is not a record until the page 114 } court signs it. I can't say that it is a proper record until I sign it, mandamus or no mandamus. Go ahead and call the jury back.

Mr. Sterling Hutcheson: We do not like to delay the court, but we do not want to agree.

The Court: All right.

Note: The jury returned to the courtroom.

By Mr. Settle:

Q. Where did you and Grant Faulkner and Rosa Edmunds leave from, and where were you going to on the night that the collision was had between Grant Faulkner's and Mr. W. G. Baptist's car?

A. Going to La Crosse. We left Riverdale.

Q. Turn around towards the jury. When you say Riverdale, do you mean a village in Halifax County near South Boston?

A. Yes, sir.

Q. What time did you all leave Riverdale?

A. About half past six o'clock or seven.

Q. You say that you were going down to La Crosse in Mecklenburg County?

A. Yes, sir.

Q. What were you going down there for?

A. Going down there for my wife.

Q. Did you get Grant Faulkner to take his car and drive you down there to get your wife and bring her back home?

A. Yes, sir.

page 115 } Q. Was she visiting there at her father's home?

A. Yes, sir.

Q. How did you happen to get Grant Faulkner to take this trip for you?

A. We were all living there and all working there together, and I asked him would he take me down there, and he said yes.

Q. Were you to pay him anything for the trouble, or was he doing it as an act of kindness?

A. He was doing it as a kindness.

Q. You were all living on the same farm?

A. Yes, sir.

Q. And you say you left the village of Riverdale, in Halifax County, about 6:30 o'clock or 7:00 that evening?

A. Yes, sir.

Q. What time did the collision occur?

A. About half past nine.

Q. Well, go ahead and state to the court and jury, in your own way, just how the accident occurred—who was responsible for it, and all the facts in connection with it?

A. We were coming on down the road, driving on the right-hand side of the road, and we seed the car when it come over the grade, and he turned out of the road there. The car come on and struck, and turned the car over on the righthand side of the road.

Q. Struck and turned whose car over?

A. Grant's.

page 116 } Q. Was Grant Faulkner on his righthand side of the road then?

A. Yes, sir.

Q. Was he on his extreme right, or just to the right of the center?

A. Way over on the right.

Q. Was he on the hard surface?

A. He had two wheels on the hard surface and two wheels off.

Q. How fast was he driving at that time?

A. He was driving about thirty or thirty-five miles an hour.

Q. How fast was the other car coming that you say ran into his car?

A. He was running about fifty or sixty miles an hour.

Q. And that was the car of Mr. W. G. Baptist?

A. Yes, sir.

Q. When the other car ran into Grant Faulkner's car, what happened?

A. I didn't understand what you say.

Q. I say, when the Baptist car ran into Grant Faulkner's car, what happened?

A. It turned it over and threw us out.

The Court: Turned over and did what?

Mr. Settle: "Threw us out."

Q. (Mr. Settle) It turned Grant Faulkner's car over, and threw you and him and Rosa Edmonds out?

A. Yes, sir.

page 117 } Q. Where did you land with respect to the road-way there?

A. Over on the right, in the edge of the field.

By the Court:

Q. Were you all sitting on the front seat?

A. Yes, sir.

By Mr. Settle:

Q. Who was driving the car?

A. Grant.

Q. Where were you sitting?

A. On the outside.

Q. And Rosa Edmonds was in the middle?

A. Yes, sir.

Q. Well, when the Baptist car hit Grant Faulkner's car, did it immediately turn Grant Faulkner's car over and throw you all out, or did Grant Faulkner's car run some distance down the road?

A. No, sir, it never run nowhere. When it struck it, it turned it over.

Q. It turned it over on the right side?

A. Yes, sir.

Q. What became of the Baptist car? Did it stop, or what happened?

A. It ran down the road about fifty or sixty yards and stopped on the south side of the road.

Q. Was that on the lefthand side of the road facing towards Clarksville?

page 118 } A. Yes, sir.

Q. Was that the direction in which the Baptist car was going when the collision occurred?

A. Yes, sir.

Q. And you say, after striking Grant Faulkner's car and turning it over on his righthand side of the road, the Bap-

tist car ran on down the road fifty or sixty yards and stopped on its lefthand side

A. Yes, sir.

Q. Do you recall whether or not it stopped there against a bank or near a pine bush?

A. Yes, sir, it stopped pretty close to a pine bush laying up there.

Q. Was there a bank there that it ran up against?

A. Yes, sir, a little small bank.

Q. Well, was anybody hurt in that collision?

A. Yes, sir.

Q. Who was hurt?

A. Grant Faulkner?

Q. Where was he hurt?

A. In his chest and left side.

Q. You and Rosa Edmonds were not injured?

A. Sir?

Q. You and Rosa Edmonds were not hurt?

A. No, sir.

Q. Well, what did you all do with Grant Faulk-
page 119 } ner after you found out that he was hurt?

A. Took him and carried him out on the right side of the road and laid him on a cushion, me and Charles Carter.

Q. What became of the people in the Baptist car?

A. They come back up there.

Q. They came back up there to where Grant Faulkner was lying and where you all were?

A. Yes, sir.

Q. Well, what did they say or do?

A. They come back up there and asked if anybody was hurt, and I said yes, Grant was hurt, and she said that she was not as far out of the road as she thought, that the light blinded her.

Mr. John Hutcheson: We object to that as to what was said?

The Court: What who said?

Mr. Settle: Miss Marjorie Baptist, the driver of the car. That is what he is undertaking to say, as to what she said as to how the accident occurred.

Mr. John Hutcheson: We object to any statement that anybody made there. They can put them on the stand.

The Court: Objection overruled.

Mr. John Hutcheson: We except.

Mr. Sterling Hutcheson: I would like to amplify the ob-

jection: I assume that this man will testify to some admission—

page 120 } The Court: (Interposing.) I will not pass on that objection now. Gentlemen of the jury, retire to your room.

Note: The jury retired from the courtroom.

The Court: Repeat the question, and let him answer it.

Mr. Settle: I withdraw that question, and will ask another:

Q. Did Miss Majorie Baptist make any statement that night, after the accident, as to how it occurred?

A. Yes, sir; she said that she was not as far out of the road as she thought that she was, and the light blinded her.

Mr. Sterling Hutcheson: We object to that.

The Court: Is there anything else you want to prove along that line?

Mr. Settle: No, sir, I don't think so.

Mr. Sterling Hutcheson: We object to the introduction of this evidence and testimony upon the ground that it is a violation of the hearsay rule,—it is hearsay evidence. No agency has been shown between Mr. Baptist and Miss Marjorie Baptist, the driver of the car. Mr. Baptist was not the operator of the car; Miss Marjorie Baptist is not a party to this proceeding, and no statements or admissions made by her are admissible as evidence against Mr. Baptist.

The Court: Overruled.

Mr. Sterling Hutcheson: We except.

page 121 } The Court: Objection overruled. Bring the jury back.

Mr. Sterling Hutcheson: Even if she were an agent, or agency had been shown, even then it clearly would not be admissible.

Note: The jury returned to the court room, and the last question and answer were read to the jury.

By Mr. Settle:

Q. She was the young lady that was driving the Baptist car that ran into Grant Faulkner's car?

A. Yes, sir.

Q. Who helped you carry—

The Court: (Interposing.) He stated that.

By Mr. Settle:

Q. Did you see Emmett Gregory and Mr. Cal Creedle there that night?

A. Yes, sir.

Q. Did any other car come by and hit any portion of the Grant Faulkner car after the Baptist car had turned it over on the righthand side?

A. Yes, sir, a car passed there and struck the fender.

Q. Struck the fender?

A. Yes, sir.

Q. Had Grant Faulkner been injured and taken out in the field at the time the second car came along?

A. Yes, sir.

Q. Did the second car do any damage to Grant page 122 } Faulkner's car other than strike the fender?

A. No, sir.

Q. Who was the driver of the second car, or what became of it?

A. It never did stop. I don't know who was driving it.

Q. It never did stop?

A. No, sir.

Q. Where were these occupants of the Baptist car standing, if you remember, when the second car came along and struck the fender of the Grant Faulkner car?

A. Down the road about fifty or sixty yards, right over where they moved it.

Q. They had not come up to see about Grant Faulkner at the time the second car came?

A. Yes, sir, they had gotten out of the car and come back up there.

Q. Are we to understand that some of the occupants from the Baptist car had come up to see about Grant Faulkner being injured before the second car came along and struck the fender of Grant Faulkner's car?

A. Yes, sir.

Q. Had the occupants of the Baptist car left Grant Faulkner when the second car came along, and had gone back to their car?

A. Yes, sir.

Q. How fast was the Baptist car running at the page 123 } time it collided with Grant Faulkner's car?

A. It was running about fifty or sixty miles an hour.

Q. And on which side of the road was it at the time it collided with Grant Faulkner's car?

A. It was in the middle of the road.

Q. In the middle of the road?

A. Yes, sir.

Q. And you say Grant Faulkner was over on his extreme righthand side?

A. Yes, sir.

Q. How did they happen to run into Grant Faulkner?

A. She says that she was not as far out of the road as she thought that she was, and that the lights blinded her.

Mr. Sterling Hutcheson: We make our same objection.

The Court: Same ruling.

Mr. Sterling Hutcheson: And the same exception.

By Mr. Settles:

Q. Now, after the accident, was Grant Faulkner's car moved from the extreme right side of the road, or ditch in which it was lying, over to the other side of the road and headed back towards east Clarksville?

A. Yes, sir.

Q. Who moved that car over there?

A. Me and Charles Carter and Mr. Creedle.

Q. Who told you to move it over there?

A. Mr. Creedle.

Q. Do you know where Grant Faulkner's car,
page 124 } has been since Mr. J. A. Cole brought it back from
Boydton on Sunday, the day after the accident?

A. It has not been nowhere but at home.

Q. There have been no repairs made to it?

A. No, sir.

Q. In what kind of condition was Grant Faulkner's car?

A. It was in good shape.

Q. How fast did you all run coming down from Riverdale?

A. We didn't run very fast; we took our time; we were not in no hurry.

Q. And you say you left Riverdale, you think, at 6:30 or 7:00 o'clock?

A. Yes, sir.

Q. And the accident happened about 9:00 or 9:30?

A. Yes, sir.

Q. Did you have any watch with you, or are you just guessing?

A. Just guessing. I didn't have a watch.

Q. Was the sun down when you left Riverdale?

A. No, sir.

Q. Do you happen to know how far it is from Riverdale to where this accident occurred?

A. No, sir, I don't.

Q. What damage was done to Grant Faulkner's car?

The Court: You have been over that.

Mr. Settle: Question withdrawn.

page 125 } Q. (Mr. Settle) Could you tell, when the Baptist car ran into the Grant Faulkner car, what damage was done to the Baptist car?

A. The front wheel was broken, and the fender gone or turned up on the end.

Q. Were either of the headlights broken?

A. No, sir, not that I know of.

Q. You did not make any special examination of the car?

A. No, sir.

Q. When that front wheel broke off, did it make any mark in the road there?

A. Yes, sir.

Q. Was that mark in the road, made by that front wheel of the Baptist car breaking off, over on Grant Faulkner's side of the road or over on the Baptist side of the road.

Mr. Sterling Hutcheson: If your Honor please, my objection is this: He is practically cross examining his own witness. This man hasn't even said the mark was made by the Baptist car. He has been leading ever since he started.

Mr. Settle: I will ask whether any mark was made.

The Court: Question is withdrawn.

Mr. Sterling Hutcheson: We wish he would not lead.

By Mr. Settle:

Q. You have testified that the front wheel of the Baptist car was torn off in the collision?

A. Yes, sir.

page 126 } Q. Was it the right or left front wheel?

A. The left front wheel.

Q. State whether or not, as the result of the breaking off of that wheel, any mark was made in the road by that car?

A. Yes, sir.

Mr. Sterling Hutcheson: We do not think that question is proper.

The Court: I do. Save the point.

Mr. Sterling Hutcheson: We save the point.

By Mr. Settle:

Q. Was that mark on Grant Faulkner's right side of the roadway or on Mr. Baptist's right side of the roadway?

Mr. Sterling Hutcheson: If your Honor please, we think he ought to ask where the mark was.

The Court: I think that is proper. You can save the point.

Mr. Sterling Hutcheson: Yes, sir.

By Mr. Settle:

Q. Answer the question?

A. Yes, sir, it was on Grant's side of the road.

Q. How far was that mark to the left of the center of the road?

A. It was over on the right—on Grant's side of the road.

Q. How far was it over on Grant's right side?

A. It was way over on the right.

Q. You say way over?

page 127 } A. Yes, sir.

Q. Well, when you say way over, can you tell us about how far you mean that in feet? How far from the center of the road was that mark?

A. I don't know exactly how far it was from the center of the road.

Q. How far was the Baptist car away when you first saw it?

A. I seed it when it come down the hill. We could see it half a mile, I reckon.

Q. How far were you away from it when you saw that it would probably run into Grant Faulkner's car?

A. About ten or twelve feet.

Q. Well, did Grant Faulkner turn either to the right or to the left when he saw that this other car was about to run into him?

A. He turned to the right.

Q. He turned to the right?

A. Yes, sir.

Q. How far to the right did he go?

A. He went way over to the right. He had two wheels off the concrete and two on the concrete.

Q. Where was Grant Faulkner's car hit by the Baptist car?

A. In the left door.

Q. The left door?

A. Yes, sir.

Q. Is that where the driver sits?

page 128 } A. Yes, sir.

Q. Well, was it a severe or a slight blow?

A. It was a hard blow.

Q. Hard enough, you say; to turn you over into the ditch?

A. Yes, sir.

Q. How were the lights on Grant Faulkner's car? In what condition were they?

A. He had good lights.

Q. How were the brakes?

A. He had good brakes.

Q. Were you or Grant Faulkner blinded by the lights of the Baptist car?

A. No, sir.

Mr. Sterling Hutcheson: He can't say that Grant Faulkner was blinded by the Baptist car. We ask that the answer be stricken out as to Grant Faulkner being blinded.

Mr. Settle: He is not here to testify.

The Court: Strike it out.

Mr. Settle: It will remain as to him.

By Mr. Settle:

Q. Was there anything about the lights on the Baptist car to cause them to blind you?

A. No, sir.

Q. Did you hear Grant Faulkner say anything about being blinded by those lights?

A. No, sir.

page 129 } Q. After Grant Faulkner's car turned over, was it lying off the hard surface, on the shoulder, or in the ditch, or partly on the shoulder and partly on the hard surface?

A. Partly in the ditch and partly up on the shoulder.

Q. Was there any glass broken outside?

A. Yes, sir.

Q. The windshield?

A. Yes, sir.

Q. Was there any other part of the car thrown out—of Grant Faulkner's car?

A. Yes, sir, some of the pieces of the top, and wrenches.

Q. Do you mean the floor?

A. Yes, sir, pieces from the top and the floor mat, and some wrenches, were thrown out in the road.

Q. Did you ever live in Mecklenburg County?

A. Yes, sir.

Q. Where?

A. Herbert & Kidd.

Q. What kind of business were they in?

A. Running a beef market.

Q. How long did you live with them?

A. Five years.

Q. Since you left them you have been living with Mr. Slate in Halifax?

A. Yes, sir.

Q. Who did you marry at La Crosse?

page 130 } A. Penny Meredith's daughter.

Q. He still lives there?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Ed, where were you sitting in the automobile?

A. In the front.

Q. You were sitting on the righthand side, I suppose?

A. Yes, sir.

Q. Grant Faulkner was driving?

A. Yes, sir.

Q. Who else was on the front seat?

A. Rosa Edmonds.

Q. Where was she sitting?

A. In the middle.

Q. Next to Grant?

A. Yes, sir.

Q. And you on the outside.

A. Yes, sir.

Q. Now, Ed, you state you saw this car coming in the distance as you came over the hill; is that right?

A. How?

Q. I think you said you saw the Baptist car when you came down the hill; is that right—when you first started down the hill?

A. I said I seed it when it came over the hill.

page 131 } Q. When it came over the hill?

A. Yes, sir.

Q. Now, after this accident, you said that these people from the Baptist car had come up there to see about you all and were there when the second car hit; is that right?

A. Yes, sir.

Q. Had Grant's car been moved when the second car hit it?

A. No, sir.

Q. Now, Ed, in June, Mr. Settle asked you this: "Do you know whether or not, after Grant Faulkner's car had been

moved from the righthand to the lefthand side of the road by Charles Carter and you or somebody, another car coming from the direction of Boydton struck the Grant Faulkner car?" Your answer was "It struck a piece of the fender". Then you were also asked this: "So there was nothing to the south of the road, and this car you pushed to the north of the road, and the car ran past there and struck the fender"? Your answer was "Yes, sir". Which is right? Was the Faulkner car on the south of the road or north of the road when the second car hit it?

A. On the south side of the road.

Q. On your right coming to Boydton?

A. Yes, sir.

Q. Now, are you sure of that?

A. Yes, sir.

Q. You do not deny having made this state-
page 132 } ment here the other time, do you?

A. If I made it, it was wrong. If I said it, I didn't mean to say that.

Q. How is that?

A. I didn't mean to say that. That is wrong if it is on there.

Q. So your testimony now is that the car was hit while it was on the south side of the road; is that it?

A. Yes, sir.

Q. Hit by the third car?

A. Yes, sir.

Q. Where were the people from the Baptist car when the third car came along and hit Grant's car?

A. They were down in the field where Grant was laying on the cushion.

Q. I thought you told Mr. Settle just now that they had been there and gone back up the road to their car?

A. No, sir.

Q. So your testimony is that they were down there when that other car came along and hit the Faulkner car; is that right?

A. Yes, sir.

Q. Now, Ed, are you absolutely sure of that?

A. Yes, sir.

Q. You are just as sure about that as anything else you have testified about, are you?

A. Yes, sir.

page 133 } Q. Had the Faulkner car been moved at all
when the second car hit it?

A. No, sir.

Q. It had not been moved at all?

A. No, sir.

Q. But these ladies had come down there?

A. Yes, sir, they had come down there.

Q. Are you sure about that, too?

A. Yes, sir.

Q. Now, Ed, do you know Charles Carter?

A. I just know him when I see him.

Q. He testified here today that when he got there the car had been pushed down, or pulled down, or something; anyway, it had been moved, and that the second car came along and hit it after it had been moved; is he mistaken about that?

A. Yes, sir. The car had not been moved.

Q. How is that?

A. The car hadn't never been moved when the second car came along.

Q. It had not been moved?

A. No, sir.

Q. So Charlie Carter is mistaken about that?

A. Yes, sir.

Q. You are sure about that?

A. Yes, sir.

Q. What part of the Faulkner car was hit, Ed?

page 134 } A. Do you mean the first time?

Q. No, the second time?

A. It just hit the fender.

Q. It hit the fender?

A. Yes, sir.

Q. Just the fender?

A. Yes, sir.

Q. Where were you?

A. In the field.

Q. How far from it?

A. We were not so far—just across the road.

Q. About how far?

A. About ten or twelve yards from the road, I reckon.

Q. How do you know it hit the fender?

A. It didn't do no damage.

Q. Had you examined the Faulkner car before the second car came along?

A. No, sir, not particularly.

Q. Then, how do you know it didn't do any damage?

A. I don't think it done any damage. All the damage done was done by the first car.

Q. How are you so sure about that? You said it hit the

fender; did it pass on the other side of Grant's car from you, or on the same side of Grant's car that you were on?

A. Passed on the other side.

Q. How do you know it hit the fender?

page 135 } A. I don't see nothing there for it to hit but a fender. It was hanging off.

Q. You say you had not examined the Fulkner car at all?

A. No, sir.

Q. You don't know what it hit, do you?

A. I think it hit the fender.

Q. Are you pretty sure of that, too?

A. Yes, sir.

Q. Which fender did it hit?

A. The left fender.

Q. Front or back?

A. The back. That is where it was torn off.

Q. Charles Carter testified it hit the left front fender; which is right?

A. That is the only fender that was scarred, on the left.

Q. You don't mean to say that the left front fender is not bent?

A. The whole fender on the left side.

Q. Which did it hit—the left front or the left rear?

A. I don't know whether the front or the hind one, but I think the hind one.

Q. Charles Carter has said it was the left front; which one do you think it right about that?

Mr. Settle: We object to that. He testified that he thinks it was the left hind fender, and Carter said that it was the front.

page 136 } The Court: Read the question.

Mr. Settle: You are asking which is right, he or Carter.

The Court: Read the question.

Note: The question was read as follows: "Charles Carter has said it was the left front; which one of you is right about that?"

The Court: I think that is proper on cross examination. Go ahead. Save the point, of course.

By Mr. Sterling Hutcheson:

Q. Where was Charles Carter when the second car hit?

A. Down in the field.

Q. Was he there with you?

A. Yes, sir, down in the field.

Q. So when the other automobile came up and hit the Faulkner car, the Faulkner car was between you and the other car, and also between Charles Carter and the other car; is that right?

A. Yes, sir.

Q. How could you say it hit the fender?

A. That is what I think it did.

Q. Have you any reason to think that?

A. I don't see how it could hit anything else.

Q. How about in the body?

A. That had been hit before the second car came along.

Q. You just said you had not examined it.

A. It had hit and been damaged.

page 137 } Q. You think that?

A. No, sir, I don't think that.

Q. Had you been around to look at it?

A. It had been hit and turned over before the second car come.

Q. Now, how far were you from this automobile when you first thought you were going to have a wreck?

A. About ten or twelve yards.

Q. About ten or twelve yards?

A. Yes, sir.

Q. How far were the automobiles apart when Grant turned off to his right, according to your statement?

A. A pretty good ways up the road, but I don't know exactly how far it was.

Q. About how far?

A. About ten or fifteen feet, I reckon.

Q. A pretty good ways up the road?

A. Yes, sir, when he turned off.

Q. Ten or twelve feet?

A. Yes, sir.

Q. Now, I ask you this: Didn't you testify before that he turned off ten or twelve yards?

A. I don't recollect if I did.

Q. Do you think feet is right now?

A. Yes, sir, I reckon so.

Q. Do you reckon it is feet and not yards?

page 138 } A. Yards.

Q. You take yards?

A. Yes, sir.

Q. Instead of feet?

A. Yes, sir.

Q. All right. Ten or twelve yards, then. Didn't you have it ten or twelve feet at one place the other time and ten or twelve yards at another?

A. I don't think I did.

Q. I ask you if you were not asked on cross examination how far back up the road he was when he pulled off, and you said that he turned off about ten or twelve feet before he got to the car? Then at another place, didn't you say. "Where did you first notice that he pulled off the concrete?" Your answer was "Up the road I reckon ten or twelve yards." Now, which is right?

A. (No answer.)

Q. Now, Ed, you have testified that Grant was way over on his right, but you don't know how far; could you give us an estimate about the number of feet that he was to his right?

A. No, sir, because I don't know exactly how wide the road is.

Q. You have also testified that this mark in the road was way to the right; now, about how far was that to the right?

A. About three feet, I reckon.

Q. About three feet to the right?
page 139 } A. Yes, sir.

Q. Are you pretty sure of that?

A. Yes, sir.

Q. Did you measure that?

A. No, sir, I didn't measure it.

Q. You just estimated it with your eye?

A. Yes, sir.

Q. When?

A. When we were up there.

Q. That night?

A. Yes, sir.

Q. Well, now, Ed, you say about three feet. Emmett Gregory said it was six inches from the center. Could Emmett be right about that by any possible chance?

A. (No answer.)

Q. I just want to get your idea. You say you just estimated it, and Emmett says that he didn't measure it, but he estimated it was six inches from the center. Do you know whether you are talking about the same scar?

A. I don't know whether it is the same scar, or not.

Q. You don't know whether you looked at the same scar?

A. No, sir.

Q. How many scars did you see in the road?

A. I didn't see but the one that night.

Q. Emmett said that he saw his that night. You don't know whether it was the same scar?
page 140 } A. No, sir.

Q. Charles Carter—you know Charles, you say?

A. Yes, sir.

Q. Now, Charles said that he saw a scar up there, too; did you all look at it together?

A. No, sir.

Q. He said it was something like two feet from the center; could he be right about it?

A. I don't know, sir.

Q. Well, now, tell me this: Could Emmett Gregory, in his statement that it was six inches from the center line, have been looking at the same scar you were looking at?

A. Yes, sir, I reckon that he could.

Q. He could have been?

A. Yes, sir.

Q. But you still think that it was as much as three feet from the center?

A. Yes, sir.

Q. But you don't know whether you looked at the same scar that Charles looked at nor the same scar that Emmett looked at, do you?

A. No, sir.

Q. You don't know?

A. No, sir.

Q. Well, now, Ed, suppose the testimony should show that this road was measured with a tape line, or
page 141 } stepped either, and that the scar was really on the other side of the center line of the road, that is on the right side going to Clarksville, you could not say that that is not right, could you?

A. Do how?

Q. You say that Emmett might have looked at the same scar you did; Emmett says it was six inches from the center line, and you say three feet, but neither of you measured it; now, I ask you if that road was measured and the actual measurement shows that that scar was on the lefthand side of the center coming to Boydton, you would not say that that was right?

A. No, sir.

Q. You just estimated it that night?

A. Yes, sir.

Q. In the dark?

A. Yes, sir.

Q. Did you have a lantern?

A. No, sir.

Q. So then you would say you are mistaken on actual measurement, wouldn't you?

A. (No answer.)

Q. I say, if these measurements were made and show that the scar was on the other side of the center of the road, you would say you were mistaken in your estimate, wouldn't you?

A. Yes, sir.

Q. Now, Ed, you said that Grant was on the righthand side of the road; you were not watching the road es-
page 142 } pecially, were you?

A. No, sir, not particularly.

Q. You were not driving?

A. No, sir.

Q. You were not noticing the road particularly at all?

A. No, sir, not particularly. I was looking ahead, but I wasn't watching particularly.

Q. What was it that made you think that your car was on the righthand side of the road?

A. He pulled off up the road, and I know that he was on the right because he had gotten on the righthand side coming this way.

Q. Had you been on the lefthand side before that?

A. No, sir.

Q. You say you didn't expect to have an accident until you were in ten or twelve feet of the accident, did you?

A. No, sir.

Q. What was it that made you specially notice you all were on the righthand side of the road?

A. I was just looking.

Q. As a matter of fact, I believe you had just lighted a cigarette, hadn't you?

A. No, sir. I lit the cigarette way up the road.

Q. How far up the road?

A. We were coming up on a rise.

Q. In sight of the Baptist car?

page 143 } A. Yes, sir, we could see the car.

Q. How did you light the cigarette?

A. With a match.

Q. Do you remember whether you had thrown the match away when this accident happened?

A. Yes, sir.

Q. You had thrown it away?

A. Yes, sir.

Q. You were puffing on the cigarette then?

A. Yes, sir.

Q. What makes you remember so particularly you had thrown the match away?

A. I know I had thrown the match away and was smoking the cigarette.

Q. But you say you were not watching the road?

A. No, sir, not particularly.

Q. Were you watching the Baptist automobile?

A. No, sir, I was not watching it particularly.

Q. You didn't know that you would have an accident, either, did you?

A. No, sir; I wasn't thinking about having no accident.

Q. So then what you are really going on largely is what you thought about the accident after it happened as to where you all were on the side of the road, isn't it?

A. We were on the right.

Q. I know you stick to that, but are not you page 144 } basing your opinion on what you thought about it afterwards?

A. (No answer.)

Q. Isn't that a fact?

A. (No answer.)

Q. Well, you don't care to answer that, then.

A. I didn't understand what you said.

Q. I say, when you say that your car was on the righthand side of the road, you are saying that because of what you thought after the wreck was over more than anything else; isn't that a fact?

A. Yes, sir, it was on the righthand side.

Q. Tell me this now: Who was there when Miss Marjorie Baptist made these statements you are talking about?

A. When she came back up there where we were at?

Q. Yes, what you said just now?

A. She was the first one that got there, and then Charlie Carter and Mr. Creedle.

Q. Miss Baptist was the first to get there?

A. Yes, sir.

Q. By herself?

A. She and the ladies with her in the car.

Q. How many came together?

A. Three ladies and one man.

Q. They all came up together, didn't they?

A. Yes, sir.

Q. Were there three ladies?

page 145 } A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. That was all that was in the Baptist car?

A. There was a man; there were three ladies and one man.

Q. Three ladies and one man?

A. Yes, sir.

Q. You are certain of that?

A. Yes, sir.

Q. Who was there and heard her make this statement that the lights blinded her and that she didn't know that she was that far in the road?

A. Me and Rosa Edmonds were there when she came back up there.

Q. Well, who else?

A. I don't think Charlie Carter and Mr. Creedle had got there then.

Q. Did anybody else hear her say this?

A. No, sir, not that I know of.

Q. How about the people in the car with her?

A. They heard it, I reckon.

Q. All were right there together?

A. Yes, sir, all come up there together.

Q. How about Hiawatha Towles, was he there?

A. If he was, I didn't see him.

Q. Do you know him?

page 146 } A. No, sir.

Q. Did you see him that night?

A. No, sir.

Q. You say you don't know him?

A. No, sir.

Q. Who was the first man to get there after the wreck?

A. Charles Carter was the first man to come there that I know of, he and Mr. Creedle.

Q. Were they the first to get there?

A. Charles Carter was the first man to get there, and then Mr. Creedle come.

Q. Charles was the first person to get there?

A. Yes, sir.

Q. Why didn't he hear the statement? I believe you say you don't know whether he had gotten there?

A. No, sir.

Q. You don't know whether he had gotten there when these ladies got there?

A. No, sir.

Q. Are you sure that he got there before another colored man did?

A. Yes, sir.

page 147 } RE-DIRECT EXAMINATION.

By Mr. Hodges:

Q. At the time that this other car struck you and so much has been said about, that struck Grant's car, it was not incapacitated or anything from going, but continued on?

A. Yes, sir.

Mr. Settle: If your Honor please, Mr. Cole wants to know if he can leave.

The Court: Yes, so far as the court is concerned. Do you want him back tomorrow?

Mr. Sterling Hutcheson: Yes, we may want to cross examine him further.

The Court: You should have cross examined him while on the stand. If you want him, I will send for him at your expense.

Mr. Sterling Hutcheson: I don't know that we will want him at all.

The Court: If you do, you can send for him. He lives in Halifax.

Mr. Sterling Hutcheson: If you Honor please, I don't see why your Honor should rule that it is necessarily at our expense.

The Court: Because you have had the witness on the stand and you had crossed examined him I think thirty-five or forty minutes. You certainly can't cross examine him on anything that you have not cross-examined him on already.

Mr. Sterling Hutcheson: My idea of it was that he was summoned and is supposed to be here.

The Court: I will excuse him now, and if we want him we will send for him.

ANDREW FAULKNER (colored),
a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Settle:

Q. Are you a brother of Grant Faulkner?

A. Yes, sir.

Q. Where is Rosa Edmonds, who testified in the first trial of this case?

A. They say that she is in New York—in Brooklyn, New York.

Q. At the time that she first testified in the case, she was residing at Roanoke?

A. Yes, sir.

Q. Did you go to Roanoke to bring her to Halifax some days before the trial so she would be available here?

A. Yes, sir, we sent after her the first time.

Q. After the first trial, state whether or not she said anything to you about being present at the next trial, or going to New York?

A. Yes, sir; she was aiming to be here, but she page 149 } said the trial was so long coming off that she left. That is what the lady told me where she stays at in Roanoke.

By the Court:

Q. Where did she go?

A. To Brooklyn, New York. We went over there, and after we had written to her and couldn't hear from her, we went there.

Q. When did you go there?

A. Week before last.

By Mr. Settle:

Q. And, to the best of your knowledge and belief, she is outside of the State of Virginia and in New York?

A. Yes, sir.

(No Cross Examination.)

The Plaintiff Rests.

The Court: Are you going to offer that woman's evidence?

Mr. Settle: If there is any objection by the gentlemen on the other side to the evidence of Rosa Edmonds, we will not insist upon it. We will be glad if they will allow it to go in.

The Court: You will have to offer it before they can object to it.

Mr. Settle: Yes. I want to know if they would page 150 } consent.

The Court: Offer it, and if they object, then if you make that statement I will sustain the objection.

Mr. Settle: They, of course, have the completed record.

The Court: They can read their record. You have Mr. Phlegar's testimony. You can offer Mr. Phlegar's testimony, and they will let you use it, of course.

Mr. Settle: What time does your Honor expect to adjourn?

The Court: About 5:30.

Mr. Settle: Do you object to that?

The Court: Offer it, and I will pass on it.

Mr. Settle: If they will not consent to it going in.

The Court: You offer the evidence. I will use Mr. Phlegar's say-so. You have it in court, have you?

Mr. Sterling Hutcheson: Yes, sir.

Mr. Settle: We will consider it further and bring it to the attention of the court the first thing tomorrow morning.

The Court: No, sir. I will consider the case closed.

Mr. Settle: If they will not consent to it right now before we offer it—

The Court: (Interposing) You have to offer it.

Mr. Settle: I mean that they can tell us in advance.

The Court: The evidence for the plaintiff is closed. Call your evidence, Mr. Hutcheson.

Mr. Sterling Hutcheson: If your Honor please, we desire to make a motion before proceeding.

page 151 } The Court: Gentlemen of the jury, retire to your room.

Note: The jury retired from the court room.

The Court: In regard to the testimony of the witness Rosa Edmonds, the court now asks counsel for the plaintiff if they are going to tender this evidence; counsel for the plaintiff say that they cannot tender the evidence unless counsel for the defendant consents thereto and that therefore, they close their evidence in chief. Go ahead.

What is the motion?

MOTION TO STRIKE EVIDENCE.

Mr. Sterling Hutcheson: If your Honor please, we move the court to strike out the evidence offered by the plaintiff upon the ground that it does not show actionable negligence on the part of the defendant.

The Court: Any other ground?

Mr. Sterling Hutcheson: We think that that ground will go back to the contention which we have heretofore made with respect to filing the affidavit and additional grounds of defense, and so forth.

The Court: Do you think it would also go back to the family doctrine?

Mr. Sterling Hutcheson: That is what I had in mind.

The Court: Do you wish to argue it?

Mr. Sterling Hutcheson: No, sir.

The Court: The motion is overruled. Call the jury back.

page 152 } Note: The jury returned to the court room.

W. P. BISHOP,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. Mr. Bishop, you live at Chase City, don't you?

A. Yes, sir.

Q. You are Deputy Motor Vehicle Commissioner?

A. Yes, sir.

Q. Is the road from Boydton to Clarksville in your territory?

A. Yes, sir.

Q. Did you investigate, in your official capacity, an accident which occurred shortly west of Finchley on the 6th of June, 1931?

A. Yes, sir.

Q. Between the automobile of Mr. Baptist and a colored man named Faulkner?

A. Yes, sir.

Q. How long have you been Motor Vehicle Commissioner?

A. About two years and a half—a little longer than that; about eight or nine months.

Q. About two years and eight or nine months?

A. Yes, sir.

Q. Are you employed full time?

A. Yes, sir.

page 153 } Q. In other words, do you devote your entire time to that work?

A. Yes, sir.

Q. Is it a part of your duty to investigate accidents or collisions between automobiles?

A. Yes, sir.

Q. I believe it is also a part of your duty to institute proceedings against persons who are in fault—

Mr. Settle: (Interposing) We object.

The Court: Sustained.

Mr. Sterling Hutcheson: We except. We want to show his duties and the view with which he investigates accidents.

The Court: Possibly we had better get it into the record.

Mr. Sterling Hutcheson: I think we can put it into the record.

The Court: I want it in the record. The jury will retire.

Note: The jury retired from the court room.

Mr. Sterling Hutcheson: Answer the question.

A. Only from a criminal part we do; where we find it is extreme fault on the part of one party we summon them to court, or possibly if we can't get at the facts in the case we summon both for reckless driving, or whichever page 154 } the case may be.

Q. What was your record after investigating this accident as to who was at fault?

A. I didn't see any criminal charges there that could be brought of reckless driving against the Baptist girl, and of course the other fellow was dead or passing out rapidly and the matter rested as it was.

Q. What report did you make?

A. I made a report to the office that possibly it was reckless driving on Faulkner's part, having more road than was really due him.

The Court: I sustain the objection to all these questions as not proper.

Mr. Sterling Hutcheson: We except.

Mr. John Hutcheson: How about the expert testimony?

The Court: If you can qualify him as an expert, you can ask it. I am sustaining the question as to the criminal report and his duty to report criminally and what he did report to the Vehicle Commissioner. If you can prove that he is an expert and saw it, you can ask what questions you please.

Mr. John Hutcheson: It seems to me that we have qualified him.

The Court: You have limited your question to reporting in criminal cases. Qualify him if you can do it. I ruled it out on criminal liability.

Mr. Sterling Hutcheson: Does your Honor also page 155 } rule out his report to the Department?

The Court: Yes.

Mr. Sterling Hutcheson: We except.

The Court: I am not ruling out that he is an expert. Bring the jury back. I think that he is an expert.

Note: The jury returned to the court room.

By Mr. Sterling Hutcheson:

Q. Please state to the jury the extent of your territory, that is the territory patrolled by you as Deputy Motor Vehicle Commissioner—what roads do you have under your supervision?

A. Well, at that time, I was carrying principally the territory between Chase City and Boydton and Clarksville, and also back up from Clarksville into Charlotte as far as Keyesville and back there to Lunenburg and Keyesville and back to Chase City.

By the Court:

Q. How much mileage, roughly?

A. Possibly 125 or 130 around that loop. Now I am making a trip as far as Lynchburg.

By Mr. Sterling Hutcheson:

Q. What was your rank in the service at that time?

A. At that time I was Motor Vehicle Inspector, or State Police.

Q. What is your rank now?

A. At the present time possibly sergeant.

page 156 } Q. You are sergeant?

A. Yes, sir.

Q. You occupy the position of sergeant?

A. Yes, sir.

Q. And it is your duty, as I understand, in part to investigate all accidents or collisions involving motor vehicles within the territory which you have named?

A. Yes, sir,—pardon me, I didn't quite get the last?

Q. Within the territory you have named—in your territory?

A. Yes, sir.

The Court: Ask how many wrecks he has investigated.

By Mr. Sterling Hutcheson:

Q. About how many wrecks, if you can state, have you investigated during your service with the Department?

A. That would be almost a guess. Sometimes there is an average of three or four or five a month, and then I have been as long as a month without a wreck. That is about as far as I can tell.

By the Court:

Q. Do you think you have investigated, in your career, as many as 250?

A. Your Honor, I doubt it.

Q. Do you think 150?

A. Yes, sir, I reckon so.

The Court: All right.

page 157 } By Mr. Sterling Hutcheson:

Q. Are you able to state some approximate figure, as nearly as you can get at it?

A. Possibly 100 to 125.

Q. 100 to 125?

A. Yes, sir.

Q. Now, Mr. Bishop—

The Court: (Interposing) Wait a minute.

Q. (By the Court) By "Investigating wrecks" do you mean examining the scene of the accident, and so forth?

A. No, sir, because sometimes they are taken away and several days old before we get hold of them. Very often we are summoned to the scene before the cars are moved. Each case, as a rule, is always different from the other.

By Mr. Sterling Hutcheson:

Q. You also interview witnesses, do you not, in making these investigations?

A. Yes, sir.

Q. You state, I believe, you interview witnesses in these investigations?

A. Yes, sir, we do to get the facts as far as we can of the accident and how it occurred, and so forth.

Q. And examine the vehicles?

A. Yes, sir.

Q. And the scene in some cases?

A. Yes, sir.

Q. Usually?

page 158 } A. Yes, sir.

Mr. Sterling Hutcheson: We submit that that qualifies him as an expert.

The Court: The court don't agree with you. I sustain the objection made by the plaintiff to his testifying as an expert on wrecks. He is not qualified.

Mr. Sterling Hutcheson: We except to your Honor's ruling.

By Mr. Sterling Hutcheson:

Q. When did you go to the scene of the accident between these two automobiles?

A. The following day.

Q. Were any physical facts or marks, or anything of the kind, pointed out to you, and, if so, by whom?

Mr. Hodges: If your Honor please, we object to that. It is purely hearsay.

The Court: He can state what he saw in the road.

Mr. Sterling Hutcheson: We had this question up before, I think, and furthermore this witness Mr. Cole—

The Court: (Interposing) I think he can testify to what he saw. Go ahead.

Mr. Sterling Hutcheson: What he saw and who they were pointed out to him by, and we connect it up by showing that these people saw it immediately after the accident.

Mr. Hodges: I am not objecting to things page 159 } pointed out to him.

The Court: Mr. Cole testified to that.

Mr. Hodges: He testified to what he saw in the road.

The Court: This man testified to what he saw in the road. What did you see in the road when you got there?

Witness: There were some scars in the road as to possibly a wreck that had happened there—bruised places and so forth.

The Court: All right, state where the scars and bruised places were?

Mr. Hodges: We further object to that because that was bound to have been pointed out to him, and that would be hearsay.

The Court: Didn't Mr. Cole testify to the same things?

Mr. Hodges: He has not gone that far. He discovered some stuff in the road a few hours after.

The Court: When did Mr. Cole get there?

Mr. Hodges: I think the next day.

The Court: When did you get there?

Witness: I think after lunch.

The Court: I will let this testimony in. Go ahead and save the point.

Mr. Settle: We understand that your Honor is confining this witness' testimony to what he saw.

The Court: I will let him testify to what he saw himself. Go ahead.

page 160 } A. There were bruise marks on the road, evidently caused by a wreck, several small marks you might say, and small wires leading off in the opposite direction from Boynton. There were also some grease spots and some glass on the road also. The marks that led off there as if something scraping the road led, as I say, in the direction of Clarksville and eventually turned off to the left, and that mark was practically say a foot or two to the right of the road—the right center.

By Mr. Sterling Hutcheson:

Q. To the right of the center going to Clarksville?

A. Yes, sir, and led off eventually down further fifteen or twenty yards to the left.

Q. But the marks started to the righthand of the center line going towards Clarksville?

A. Yes, sir.

Mr. Settle: We object to that as leading.

The Court: I will sustain that. All of you have been leading too much.

Mr. Sterling Hutcheson: I withdraw the question.

The Court: All right, the question is withdrawn.

Mr. Sterling Hutcheson: I will ask this question to get it properly in the record:

Q. (Mr. Sterling Hutcheson) Where did these marks or scars you refer to start with relation to the center line of the highway going towards Clarksville?

page 161 } The Court: I think that is proper.

A. They were possibly a couple of feet to the right of the imaginary center line of the road.

By the Court:

Q. Going towards where?

A. Towards Clarksville.

By Mr. Sterling Hutcheson:

Q. Mr. Bishop, did you make any measurements of the road and these marks you refer to?

A. These particular streaks there that I just mentioned were approximately six to six and a half feet from the right-hand edge of the hard surface.

Q. What is the grade width of the road?

A. I think it is an eighteen foot road.

Q. Did you measure these distances yourself?

A. Yes, sir.

Q. And this mark about which you have testified, I believe you said something about some spokes, spoke marks of a wheel; what did you say?

A. Apparently where spokes were dragged in the road from a wheel.

Q. That is these marks?

A. Yes, sir.

Q. And they were how far from the righthand edge of the hard surface?

A. They were around six or six and a half feet.

Q. From the extreme righthand edge of the page 162 } surface?

A. Yes, sir.

Q. And that would put them how far to the right of the center line?

A. I would say possibly two feet and some inches.

Mr. Hodges: If your Honor please, just for the purpose of the record, because of the evidence developed by Mr. Bishop, we move the court to exclude all of Mr. Bishop's evidence as based on hearsay, as we view it now, and he knows nothing of the wreck of his own knowledge, as he was not present, and anything that he saw and has described, from his own statement, was pointed out by somebody else.

The Court: The motion is overruled. Go ahead.

Mr. Sterling Hutcheson: Before going further, if you will permit me to ask one more question?

The Court: Yes.

By Mr. Sterling Hutcheson:

Q. Have you a copy of your report to the Department?

A. No, sir, I haven't now. I returned it after last court.

Q. Do you recall the substance of it?

A. Only—

Q. (Interposing) Don't tell what it is.

A. No, sir, I can't remember.

Mr. Sterling Hutcheson: We think we went into this long ago, and we want your Honor to rule on it definitely.

The Court: It is apparent that the report of page 163 } Mr. Bishop can be gotten, but it is ruled out of the record.

Mr. Sterling Hutcheson: As a matter of fact, we have a copy, I believe.

The Court: I rule that you cannot introduce it. You can hand a copy of it to the stenographer and get it into the record.

Mr. Sterling Hutcheson: We except.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Mr. Bishop, I notice you say that this mark that you saw in the road, of course you don't know who made that mark, do you?

A. No.

Q. All the cars were cleared up and gone at that time?

A. Yes, sir.

Q. And you didn't get there until late the next afternoon, after the accident happened?

A. Yes. I was late; as well as I remember, it was after lunch.

Q. Did I understand you to say you went there Sunday or Monday?

A. I don't know what day. It was the day after the wreck.

Q. Didn't you testify heretofore you went there Monday afternoon after the wreck on Saturday night?

A. I don't think so.

page 164 } Q. You don't work on Sunday?

A. Yes, we do. We work on Sunday.

The Court: Let us clear it up. What did he say?

Mr. Sterding Hutcheson: He said the day after.

By Mr. Hodges:

Q. Mr. Bishop, did you see any indication of mats or anything like that to show where any car had been turned over?

A. Yes, sir, there was some broken glass and I think possibly some odd and end pieces of tools there.

Q. Where were they?

A. They were on the righthand facing Boydton—on the lefthand from here.

Q. Over in the ditch?

A. No, sir; a part of them on the shoulder and some of them on the hard surface.

Q. Do you recall seeing a part of a rubber floor covering there that came from a Ford automobile?

A. No, sir.

Q. You don't recall seeing that?

A. No, sir.

Q. Mr. Bishop, when you see a mark where a wheel has gone down, that doesn't indicate in anywise that the wreck took place where the mark is, does it?

Mr. Sterling Hutcheson: Are you qualifying him as an expert?

Mr. Hodges: All right.

page 165 } The Court: The question is withdrawn?

Mr. Hodges: Yes, sir.

Q. (Mr. Hodges) It is a fact that that mark you saw took a turn first to the right and then a circle on the left hand side of the highway; isn't that the general course of that mark?

A. No, sir. It is my memory that it kept a very straight—down the road pretty straight, and then began to turn.

Q. Back to the left?

A. Yes, sir, facing that direction.

Q. How far do you think it went straight, Mr. Bishop,—that mark?

A. Possibly eight—around eight or nine yards.

Q. About twenty-eight or thirty feet. Then how far did it go after it started turning to the left?

A. Possibly six or seven yards.

Q. Did that mark in the road appear to have been made where a wheel had gone off and gone down?

A. As I recollect, they were spoke marks.

Q. As I understand, you want the jury to understand from your evidence, by the left wheel suddenly going down that the car continued straight for a distance of nine yards?

A. No. The marks continued that distance. I don't know which wheel it was that was down.

Q. And you don't know whose wheel made it, do you?

A. No.

page 166 } Q. And you don't know how they were made?

A. No, sir.

A Juror: I would ask if the left hand wheel comes off, would it naturally turn to the left, regardless of the driver?

The Court: I don't think that he is qualified to answer that. I think you are as much of an expert as he is on that.

At 5:32 the court adjourned until 9:45 tomorrow morning, October 28, 1932.

page 167 }

MORNING SESSION.

Boydton, Virginia, October 28, 1932.

The court met pursuant to adjournment of yesterday.

Present: The same parties as heretofore noted.

MRS. MARY C. BAPTIST,
a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. You are Mrs. W. G. Baptist, are you not?

A. Yes, sir.

Q. You live in Boydton, do you not, Mrs. Baptist?

A. I do.

Q. You are the mother of Miss Marjorie Baptist, too, are you not?

A. Yes.

Q. Mrs. Baptist, it is in evidence here that on the night of the 6th of June, 1931, you and some others were going from Boydton to Buffalo Springs in your automobile, or the automobile of your husband, registered in the name of your husband, and had a collision with an automobile operated by a man named Faulkner, just west of Finchley; do you recall the circumstances?

A. Yes.

page 168 } Q. Please tell the jury when you first saw the approaching automobile that night?

A. I saw the car that came up over a hill.

Q. Turn around a little so these gentlemen can hear you better. You saw a car coming over a hill?

A. A slight hill, when the lights first came in sight.

Q. About how far do you suppose that was from you, Mrs. Baptist?

A. I haven't any idea as to the distance, but it was a right good ways off.

Q. A right good ways off?

A. Yes.

Q. Mrs. Baptist, was the road straight at this point?

A. Fairly straight, yes—pretty straight.

Q. Who was driving your car?

A. My daughter Marjorie.

Q. How long has she been driving automobiles?

A. About three years at that time, I imagine, or four,—three or four years.

Q. Do you drive an automobile yourself?

A. I do.

Q. How long have you driven automobiles yourself?

A. Eighteen years.

Q. Where were you sitting in the automobile?

A. I was sitting on the rear seat behind Marjorie, my daughter.

page 169 } Q. Then you were on the left rear seat?

A. Yes, behind the driver.

Q. Who was on the rear seat with you?

A. Elizabeth Turnbull and Mrs. Turnbull.

Q. Who was on the front seat with Marjorie?

A. Mary Baptist and John Baptist.

Q. When you saw this automobile approaching, please tell the jury what happened?

A. Well, as the car got nearer to us, just before time to pass the car, it looked as though the lights did this way (illustrating),—just a little wavering,—and I thought nothing of it at all, and we didn't know anything else until the car had crashed into the side where my daughter was sitting.

Q. What had Marjorie done in the meantime?

A. Well, when we saw the car approaching, I was aware of the fact that she pulled out slightly on her side of the road and slowed down a little.

Q. How fast would you say that your automobile was approaching at that time?

A. Well, we had been driving about forty miles an hour when she saw the car coming; she slowed down slightly.

Q. About how fast would you put the speed at the time of the collision?

A. I should think around thirty-five miles.

Q. Is this your car which she was driving? I
page 170 } mean is it the car which you drive yourself?

A. Do you mean the car which Marjorie was driving, is that the one I drive?

Q. Yes.

A. It is.

Q. That is the car you drive yourself?

A. Yes.

Q. How long had you been driving that automobile, Mrs. Baptist?

A. This was done a year ago; I had had the car—it will be four years this Christmas. That is the only way I can definitely say. We got it Christmas four years ago.

Q. Christmas 1929?

A. Yes.

Q. You had been driving this car about eighteen months then, at that time?

A. Yes.

Q. About how long before the collision was it that Marjorie pulled to the right? You say you felt the car pull to the right?

A. I don't understand your question.

Q. You testified before reaching the car you felt it pull to the right, I believe, didn't you?

A. I was perfectly aware of her pulling out on the side of the road and slowing down as the car came nearer to us. You see it was quite a distance when we first saw the lights.

Q. Are you able to state whether she remained page 171 } on the right hand side of the road until after the collision, or not?

A. She did.

Q. After the collision, what happened to your car?

A. After the collision what happened to my car?

Q. Yes.

A. Well, the front left wheel was pulled off.

Q. I mean not with respect to the damage to your car right now, but where did your car go and what did it do?

A. Rolled slightly, and we had the sensation of feeling we were turning over, and it gradually went around and around until it came to a stop.

Q. On which side of the road?

A. Do you mean when it came to a stop?

Q. Yes.

A. On the opposite side from which we were driving on.

Q. After the car came to a stop, what did you do?

A. After the car came to a stop?

Q. What did the people in your car do?

A. We got out as quickly as we could. John Baptist and Mrs. Turnbull and Elizabeth got out first, and I was next, and just about the time I stepped out of the car a third car came up the road at a terrific speed, and the next thing we knew there was a terrible crash, and all of us screamed because we thought we were going to be killed, and it evidently hit the car. Of course we didn't know where the page 172 } other car was because we hadn't had time to get up.

Q. When you say "evidently hit the other car", do you mean the Faulkner car?

A. Yes, and then it swerved over to the side where we were, and, straightening, went on towards Clarksville as fast as it could, and never stopped at all.

Q. It didn't stop?

A. It never stopped at all.

Q. Was that before you and the other people in your car had gotten down the road where the accident happened?

A. Oh, no; all of us hadn't gotten out of our car. Marjorie Baptist, the driver, was still at the wheel, and Mary Baptist was still in there with her, and I was the fourth one to get out, and I had just gotten out of the car when this car came.

Q. So then all the people in your car had not gotten out of the car when this car came by?

A. Hadn't gotten out.

Q. What did you all do then?

A. Well, as soon as we could get ourselves together—because Mrs. Turnbull had lost a shoe and we thought that she had been hit by this other car,—as soon as we got ourselves together, we went up to see who had hit us and if any one was hurt, and we didn't know even who had run into us, and we heard these people talking out there *besides* the road, so we walked over there and found this colored man page 173 } on the ground and a colored woman and a man with him, and we talked to him. He was conscious.

Q. You say you all talked to him; what was said? What sort of conversation was had with him?

A. We asked him if he was hurt, and how he was hurt, and he tried to tell us, and Mrs. Turnbull asked him "What happened to you all? Did you lose control of the car?" or something to that effect, and he says "I just couldn't hold it".

Q. "Just couldn't hold it?"

A. "Just couldn't hold it."

Q. How fast would you estimate the speed of the Faulkner car immediately before the collision?

A. I don't think that they were driving very fast; probably about the speed we were going. They certainly were not speeding.

Q. Are you able to state where the Faulkner car was at that time, or do you know?

A. Do you mean in the road when we got up there?

Q. Yes.

A. I don't know. We heard these people talking, and we went there first to see who was hurt and who was there, and so forth, or if any one was hurt, for that matter, because we didn't know, and when I saw the car it had been pushed over to one side of the road, because I remember John Baptist saying after this—

Mr. Hodges: If your Honor please, we object.

Mr. Sterling Hutcheson: Don't tell what John page 174 } said.

Q. (Mr. Sterling Hutcheson) When you saw it, it had been pushed to one side of the road?

A. It had.

Q. Now, Mrs. Baptist, are you certain that the third automobile to which you have referred passed there before anybody from your car had gone down to the scene of the accident?

A. I am positive of that.

Q. When you went down there where these people were, was your daughter Miss Marjorie with you?

A. I can't say just how many or who went there first, but we were all back and forth.

Q. A man named Wade testified yesterday that Miss Marjorie stated, in the presence of all of you, that she was not as far to her side of the road as she thought, and that the light blinded her?

Mr. Hodges: I think there is a misunderstanding on Mr. Hutcheson's part, or mine, as to that.

Mr. Sterling Hutcheson: I asked if these people from the Baptist car were there, and he said that they were all there.

The Court: At the time the second car hit?

Mr. Sterling Hutcheson: No; at the time he said Marjorie made the statement.

Note: Turn back, Mr. Phlegar, and read it.

page 175 } Note: The following testimony was then read from the testimony of Ed Wade.

Q. "Tell me this, now: Who was there when Miss Marjorie Baptist made these statements you are talking about?

A. "When she came back up there where we were at?

Q. "Yes, what you said just now?

A. "She was the first one that got there, and then Charlie Carter and Mr. Creedle.

Q. "Miss Baptist was the first to get there?

A. "Yes, sir.

Q. "My herself?

A. "She and the ladies with her in the car.

Q. "How many came together?

A. "Three ladies and one man.

Q. "They all came up together, didn't they?

A. "Yes, sir.

Q. "Were there three ladies?"

A. "Yes, sir."

Q. "You are sure of that?"

A. "Yes, sir."

Q. "That was all that was in the Baptist car?"

A. "There was a man. There were three ladies and one man."

Q. "Three ladies and one man?"

A. "Yes, sir."

Q. "You are sure of that, are you?"

A. "Yes, sir."

Q. "Who was there and heard her make this
page 176 } statement that the lights blinded her and that she
 } didn't know that she was that far in the road?"

A. "Me and Rosa Edmonds were there when she came back up there."

Q. "Well, who else?"

A. "I don't think Charlie Carter and Mr. Creedle had got there then."

Q. "Did anybody else hear her say this?"

A. "No, sir, not that I know of."

Q. "How about the people in the car with her?"

A. "They heard it, I reckon."

Q. "All were right there together?"

A. "Yes, sir, all come up there together."

Mr. Hodges: My objection was based on the fact that he said in there that he didn't know whether they heard it, or not. He has not said that they were present and heard it.

The Court: He has said it if that evidence means anything. Objection overruled.

By Mr. Sterling Hutcheson:

Q. It has been testified by a colored man, Ed Wade, that immediately after the accident, when Miss Marjorie and the other people in your automobile came down to where Grant Faulkner was, Miss Marjorie said she was not as far out of the road as she thought, and that the lights blinded her; did she make any such statement in your hearing?

A. I never heard Marjorie make such a statement as that.

Q. Were all of you together (that is, all the
page 177 } people in your car) when you went down to where
 } this man was hurt?

A. I don't remember whether we were all together, or not. I know some of us went down there, and Mrs. Turnbull and I were talking to him. In fact, she was trying to examine

him to see how he was hurt. I cannot say we were all there at one time.

Q. I mean when you all first went down there, did you all go together?

A. I don't think so.

Q. Were you among the first to get there?

A. I was.

Q. You were among the first to get there?

A. I was.

Q. And you didn't hear Marjorie make any such statement?

A. I did not.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Mrs. Baptist, I believe that this is the first time you have testified in this case?

A. It is.

Q. It is true, Mrs. Baptist, that under those circumstances there, with the man badly injured, that everybody was rather nervous and excited around the crowd, is it not?

A. I didn't see any demonstration of it. Naturally we felt nervous about this collision.

page 178 } Q. It is also true that Miss Marjorie could have made such a statement as has been testified here without you having heard it, isn't it, Mrs. Baptist?

A. Oh, she couldn't have made such a statement when it was not true.

Q. But she may have made a statement without you having heard it?

A. Oh, yes, she may have made a statement without my having heard it.

Q. If I understand you, you were riding on the rear seat, just in the rear of Miss Marjorie who was driving the car?

A. Yes.

Q. And Mrs. Turnbull and Miss Elizabeth were on the seat with you?

A. Yes.

Q. Were you all engaged in conversation at that time?

A. We had been talking all along. I cannot say we were talking at that instant. We probably were; I just don't recall it, but we had been talking.

Q. And you do not recall whether you were talking just at the time or immediately prior to the collision, or not?

A. I just don't remember whether we were talking at that second, or not. We probably were.

Q. There was nothing about the operation of your car at

that time to indicate that you were in trouble until just immediately prior to the accident, was there?

page 179 } A. There was nothing at all wrong with my car.

Q. And you estimate that the speed was approximately forty miles an hour just immediately prior to the collision?

A. I think that was about the speed we were going.

Q. Of course, Mrs. Baptist, there was nothing about the operation of the car to draw your attention to the speed; that is merely an estimate on your part, is it not?

A. I drive and I am always on the alert when I am riding.

Q. But you and Mrs. Turnbull and Miss Elizabeth being engaged in conversation as you were going along, nothing had happened to attract your attention to the speed that the car was being operated until immediately before the accident?

A. I don't understand what you mean.

Q. I mean everything, you say, was going in a normal condition, and you had no reason to observe the speed?

A. Not any at all other than just driving. When you drive you always watch, and I think it makes no difference who is driving.

Q. You were not particularly watching the highway and watching Miss Marjorie's operation of the car as you went along?

A. I had no occasion to watch Marjorie driving because if she had been driving along or not doing as she should, I would have called her down, but I saw the road and was watching the road when the car came, because that was not the first car we had passed.

page 180 } Q. There was nothing about the appearance of this car to indicate it was being operated improperly until just immediately prior to the accident

A. Not at all only it looked his lights were doing funny just before he got to us.

Q. I understand—flickering?

A. Not flickering, but waving this way (illustrating).

Q. And that was immediately before the collision that you observed it?

A. Just a few seconds before. I do not mean just at the time he crashed into us, because I couldn't have seen it. In other words, I didn't know that we were not passing the car all right until he crashed into us.

Q. Until this car was up to you, he was probably on his side of the highway?

A. I don't know *know*, but it appeared to be.

Q. It appeared to be on his side of the highway until he was almost meeting you?

A. He appeared to be.

Q. Then, as I understand your view of what happened, as the cars were approaching one another he swerved to the right?

A. In the side where my daughter was sitting—kind of turned in and hit the fender and the wheel.

Q. Of course, after you observed that his swerving to the left, from your view of what happened, was too late for Miss Marjorie to have gotten over further to her right?
page 181 }

A. We didn't know it was going to happen until it practically happened.

Q. In other words, just as this car was approaching—

A. (Interposing) It was not a head-on collision.

Q. After the cars became separated, your car continued for quite some distance, I believe, did it not?

A. It rolled apparently. We had the sensation of turning over—thought we were turning over all the time, pulling to one side.

Q. One wheel went down, and that made that part of the car lower than the other?

A. Yes, sir.

Q. When you went back to where Grant Faulkner was, was it apparent to you that he was very badly injured?

A. We couldn't tell. He was groaning, and he was conscious.

Q. He was groaning?

A. Yes, making a noise, and we asked where he was hurt.

Q. Didn't he say to you that he was going to die?

A. Oh, no, I never heard him say anything about that.

Q. Isn't it a fact that he was calling for his mother there?

A. I didn't hear any call for his mother at all, but you understand I wasn't there all the time, because as soon as I found that he was injured we watched the road for another car, and one of the girls and I went out and stopped this car, and it was some boys and girls in the car from Union Level.

They didn't tell us their names, but said that they
page 182 } were from Union Level, and they asked what happened and if they could be of any assistance, and I asked them to come back and get my husband and the doctor.

Q. There is no doubt of the fact that the car in which Miss Marjorie was driving and riding was in collision with the car in which Grant Faulkner was riding, is there, Mrs. Baptist?

A. Well, they ran into us.

Q. Those two cars collided; there is no dispute of that, is there?

A. I don't understand what you mean. We were on our side of the road, and he crashed into the car we were in.

Q. I am not asking about the responsibility. What I mean is, is it true that these two cars hit each other?

A. Yes, there was a collision.

Q. Regardless of what part any third car might have taken in any collision, your two cars struck each other. If I understand you, when you first saw the Faulkner car after the collision it had been moved around the other side of the highway?

A. It had, because I didn't go to the car first.

Q. So, of course, you don't know or have any idea where it came to a stop immediately after the collision?

A. I do not.

Q. When you got back to where Grant Faulkner was, I understood you to say that he was out in the field—page 183 } had been moved there?

A. They were all three out there when we walked up the road to see who had run into us and if any one was hurt.

Q. Did he, at that time, have a cushion from the car under his head?

A. No, he did not because the girls put the cushion under his head.

Q. Do you know Charles Carter,—a colored boy named Charles Carter?

A. No.

Q. You don't know him when you see him, I suppose?

A. I never heard of him.

Q. Mrs. Baptist, only one further question: Is Miss Marjorie approximately the same height as you are?

A. There is very little difference.

Q. About the same?

A. It might be about the same. She is not quite as tall as I am.

MISS MARJORIE BAPTIST,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. Miss Marjorie, you were driving the automobile at the time of the collision that occurred between your car and an automobile driven by a boy named Grant Faulkner, near Finchley, weren't you?

A. Yes, sir.

Q. Where were you going?

A. Going to Buffalo Springs to a dance.

Q. Who was with you?

A. Mary Baptist and Mrs. John Baptist and our mother, and Elizabeth Turnbull and Mrs. Turnbull.

Q. You were driving the car, I believe?

A. Yes, sir.

Q. Where did the accident happen?

A. Just beyond Finchley.

Q. When did you first see the other automobile?

A. After I turned the curve right there at Finchley I saw the lights of his car coming over the other hill.

Q. About how fast were you driving?

A. I was going about forty at the time I saw his car.

Q. About how fast were you going when the collision occurred?

A. When I saw his car I naturally slowed down to between thirty and thirty-five.

Q. Which side of the road were you on?

A. I was on my right hand side of the road.

Q. Why are you so sure you were on the right hand side of the road?

A. Because when I saw his car I pulled over to my side, and as he got nearer I pulled over further be-
page 185 } cause it didn't look like he was getting out as
much as he should.

Q. Did you remain on your side of the road?

A. Yes, sir.

Q. Until the collision?

A. Yes.

Q. Now, when did you first realize that there would be an accident?

A. I thought we were going to pass him all right until it looked like his lights just flashed on us and his car kind of swerved towards us.

Q. Where did he hit your car, about?

A. The front left hand wheel was pulled off; the headlights were not broken, and it hit the side.

Q. In the side?

A. Yes, sir.

Q. After the collision what happened to your car?

A. It rolled over in the road, and the front left wheel was off, and it was hard to try to keep it on my side. I pulled over, and we crossed over on the left hand side of the road and stopped facing the south.

Q. It went across the road after the wheel came off?

A. Yes.

Q. After your car came to a stop, what did you all do?

A. Mrs. Turnbull and Elizabeth and Uncle John had gotten out—

Q. (Interposing) Speak a little louder?
page 186 } A. Mr. John Baptist had gotten out, and Mrs.

Turnbull and Elizabeth, and a third car came from the same direction that we had come from and hit this other car that was in the road, and it was going, I imagine, about sixty or sixty-five, mighty fast, and it came towards our car, and Mrs. Turnbull tried to jump out of the way and jumped over in the ditch, and I hadn't gotten out and neither had Mary.

Q. So, when the third car passed, only Mrs. Turnbull and Elizabeth and Mr. John Baptist had gotten out of your car?

A. Yes.

Q. You testified that the third car struck this other car, the Faulkner car, in the road?

A. Yes, sir.

Q. Did it appear to be a severe impact?

A. It made a lot of noise—terrible loud. I can't say how much damage it did, because I don't know.

Q. Of course you don't know about that?

A. No.

Q. Do you know just where the Grant Faulkner automobile was standing at the time it was hit by the second car or by the third car?

A. No.

Q. You had not gotten down there?

A. No, we had not gone down there when the other car came.

Q. Clear it up a little bit; had anybody from your automobile gone down to the scene of the accident when
page 187 } this third car passed?

A. No. All of us in our car had not gotten out.

Q. And no one from your car had gone down these?

A. No.

Q. Now, after all of you got out of your car, what did you do then?

A. We walked down to see if anybody was hurt in the other car.

Q. And what did you find there?

A. His car, or their car, was on my side of the road facing the other way. It was more in the middle of the road; it was more on my side than it was on his side, and I don't exactly remember where he was when he went up there.

Q. Had he been taken from the car when you got there, or was he in the car when you got there?

A. He was not in the car.

Q. Was he lying on the ground?

A. I imagine so, but I don't remember seeing him right then. When I saw him, he was on my left hand side of the road.

Q. He was?

A. Yes, sir.

Q. And when you saw his car, it had already been hit by the third car?

A. Yes, sir.

Q. Did you go there where this injured man was with your mother add the other people in your car?
page 188 } A. All of us went down, but I don't know who I was with.

Q. All of you went down?

A. Yes, sir.

Q. Did you go down together?

A. I don't remember how we went, but I know we all went down there.

Q. It has been testified here by a colored man named Wade that you stated, while down there where Faulkner was, that you were not as far out of the road as you thought, and that the lights blinded you; did you make any such statement?

A. No, I did not.

Q. Did you make any such statement at any time?

A. No, I never did make any such statement to any one.

Q. As a matter of fact, please tell the jury whether or not that is true?

A. That is not true. I did not make any such statement.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Miss Marjorie, you don't know where Grant Faulkner's car came to a stop after it was in collision with your car, do you?

A. I don't know exactly. I didn't roll very far after the collision.

Q. Before you got out of your car and came back to where he was, could you tell whether or not his car had
page 189 } turned over, from the headlights or anything about Grant Faulkner's car?

A. I didn't examine his car.

Q. I understand that, but could you tell from your car, where you were, whether this other car that was in collision with you had turned over in the road?

A. I don't know.

Q. Could you tell whether it had stopped there by the road, after the collision, or not?

A. From where I was in my car?

Q. Yes, after you came to a stop?

A. I don't know exactly what you mean.

Q. In other words, Miss Marjorie, when your car came to a stop, did you know that the other car that had struck you, as you say, was down there by the road?

A. I imagine I did know it. I don't see how it could have gone any further as it was affected by the wreck?

Q. You say you have been driving for sometime?

A. Yes.

Q. What is the fastest speed that you have ever driven a car?

Mr. Sterling Hutcheson: If your Honor please, I don't see how that is pertinent. It is cross examination, I realize.

The Court: What is the objection?

Mr. Sterling Hutcheson: I don't see how it can have any bearing in this case. I think the cross examination should be limited to the facts in the case.

The Court: That would be an isolated instance, whether you can show an instance of fast driving, and the objection will be sustained.

By Mr. Hodges:

Q. Miss Marjorie, had any car passed you from the time you left Boynton until you arrived at the point where the accident took place?

A. I don't remember.

Q. You don't recall seeing any other car?

A. I don't recall.

Q. At the time of this accident, or immediately prior thereto, nothing had happened to attract your attention to the speed of your car, or to cause you to look at the speedometer, I don't suppose, had there?

A. Yes, I had looked at my speedometer.

Q. About where?

A. I don't know exactly where, but I know that I wanted to drive, and they told me not to go fast, and I told them I wouldn't, and I remember looking to see, and I know I wasn't over forty-or-forty-five.

Q. Now, when you first saw the lights of this other car, how far was he from you?

A. He was on the opposite hill right after I turned the curve. I have no idea of the distance.

Q. Something like half a mile?

page 191 } A. I imagine it was.

Q. You said that you slowed down as they were approaching each other; how far were you from him at that time, when you slowed down, do you think?

A. After he had come on top of this hill—he was on the opposite hill, and he went down, and on this other hill, and when I saw his lights I slowed down.

Q. He had been down through a little bottom?

A. Yes.

Q. Do I understand his lights went out of your sight after he came over the hill before you all met?

A. I don't know whether it was out of sight, or not. It was not very much of a hill, but it is a little sloping.

Q. At that time you had not observed him, or had you observed anything about his driving, to indicate that he was not driving properly?

A. As I said before, it looked like we were going to pass all right until his lights flashed on us and kind of swerved in.

Q. How far was he away when his lights flashed on you?

A. I said it looked like we were going to pass all right, and all of a sudden it looked like his lights flashed on us and he hit us.

Q. How far was he away when his lights flashed on you, Miss Marjorie, is what I am getting at?

A. Just as we were passing him.

page 192 } Q. So it is a fact that if he cut as you were passing him, or just in the act of passing him, from your version and what you saw he cut to the left in towards you?

A. Yes.

Q. And of course that naturally threw his lights in your face?

A. Yes.

Q. And that is what you meant by when the lights flashed on you?

A. Yes, when his car swerved in.

Q. So, if I understand, and I want to get this clear in my mind, you were going on your right side properly, and he was going on his right side properly until they were meeting each other, and then he turned and swerved to the left and ran into the side of your car?

A. He was bound not to have been very far off his side of the road to have turned in and hit us on our side of the car.

Q. He necessarily would not have to be very far on his side to make a left turn and hit you?

A. The cars were close before he swerved in. He was about in the center of the road.

Q. And they were very close together when he swerved?

A. Yes, sir.

Q. Now, Miss Marjorie, were you applying your brakes at that time?

A. Not then.

page 193 } Q. Did you ever apply your brakes?

A. When I slowed down I did.

Q. Do I understand you had released them at the time the collision took place?

A. I don't exactly remember. I know I did not put them on all of a sudden.

Q. After your car was struck, what course did it take down the road immediately after the collision?

A. Well, it naturally pulled to the left because the front wheel was off, and I tried to keep it on our side of the road, but I couldn't do it, and it crossed over, and then went on his side of the road facing south, after we had gone a good little ways.

Q. Could you tell, by the operation and the feeling in the car, when that left hand wheel went down?

A. The spokes, you could feel it kind of give; the wheel was pulled off, and the spokes were still on. They were bent, and they made the track in the road as they were bent down, and it pulled as if it was turning over. It was pulling to the left.

Q. Were you applying your brakes at that time?

A. I don't remember. I was trying to keep it on my side of the road the best I could.

Q. As a matter of fact, Miss Marjorie, at a former trial you said you did not put your brakes on very hard at that time, but you may have later?

page 194 } A. I put them on gradually.

Q. Do you know about how far you went after this collision before you came to a stop?

A. No, I do not. I testified before I didn't know the distance.

Q. Could you approximate the distance, Miss Marjorie?

A. I don't remember exactly.

Q. Miss Marjorie, how old were you at the time that this collision took place?

A. I was seventeen—wait: I think I was seventeen. Yes, I was seventeen.

Q. How long had you been driving a car at the time of this collision?

A. About four years or over.

Q. Four years or over?

A. Yes.

Q. When you came back to where Grant Faulkner was injured, of course you were very nervous?

A. Yes, sir.

Q. And, Miss Marjorie, isn't it possible that you did things there you do not now recall?

A. I was not as nervous as that. I told what I did—I mean the statements I made.

Q. Now, when you went back, though, Miss Marjorie, were you there where the man was injured ahead of your mother and the rest of them who were in the car with you?

A. I just told Mr. Sterling Hutcheson I don't
page 195 } know where we went or who got there first, but
we all went to the other car.

Q. When you got there the man had been moved out in the field from the car?

A. Yes.

Q. At that time did he have a cushion under his head?

A. Somebody got a cushion. I think it was Mr. John Baptist, but I am not sure, to put it under him to make him as comfortable as possible.

Q. At that time did you observe where his car was?

A. Somebody moved the car so any others had happened to be coming down the road wouldn't hit it, but I can't say who it was.

Q. Do you know Mr. Calvin Creedle?

A. I know one Mr. Creedle.

Q. The same gentleman who works on the road?

A. I know the one who used to speak at school.

MISS ELIZABETH TURNBULL,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. You are Miss Elizabeth Turnbull, are you not?

A. Yes, sir.

Q. You live in Boydton?

page 196 } A. Yes, sir.

Q. You are at school now, I believe?

A. Yes.

Q. Miss Elizabeth, it has been testified here that on the 6th of June, last year, you and your mother and some other people from Boydton started to Buffalo Springs and had a collision with an automobile driven by a man named Faulkner, near Finchley; do you recall the night?

A. Yes.

Q. Please tell the jury who was in the automobile with you?

A. Marjorie Baptist was driving; Mary Baptist was sitting near to her on the front seat, and Mr. John Baptist was sitting on Mary's right, and in the back seat of the car was Mrs. Baptist, my mother and myself.

Q. Turn around so the jury can hear you a little better. Where were you sitting on the back seat—that is, on the side or middle?

A. I was sitting in the middle.

Q. And your mother was on which side?

A. I think on the left.

Q. You do not recall?

A. I do not recall.

Q. But you were in the middle yourself?

A. Yes, I was in the middle.

Q. Do you drive a car yourself?

A. Yes.

page 197 } Q. How long have you been driving one?

A. About four years.

Q. Do you drive right much, as a matter of fact?

A. I did before I went to school.

Q. Now, when did you first see the automobile driven by Faulkner, involved in this collision?

A. When it approached over the hill.

Q. About how far was that from you all?

A. I should say about 150 yards.

Q. You don't know?

A. I am not a good judge of distances.

Q. Have you ever measured it?

A. No.

Q. Now, after you saw this automobile approaching, please tell the jury just what occurred?

A. Well, when I saw this car approaching it was not going any faster than we were, and we were going at a rate of speed I should say between thirty-five and forty miles an hour, and they didn't see us, and the car was kind of swerving, and then it turned as though to pass on the right as it should and it seemed that it was going off the road, and he turned back to the left, turned sharply, and hit our car just beyond the bumper. It didn't hit the front of the car at all, and he sliced in *and he sliced in* and hit our fender and runningboard.

Q. You say when you first saw the car Miss
page 198 } Marjorie was driving about thirty-five or forty;
about how fast would you say you were driving
at the time of the collision?

A. At the time of the collision, she slowed down immediately when she saw the car, and she was not, I don't think,

going more than twenty or twenty-five miles an hour when she saw that there might be a collision.

Q. Which side of the road was she on?

A. She was on the extreme right hand side.

Q. Are you certain of that?

A. Yes, because the right hand wheels of our car were off the hard surface.

Q. Why do you state that they were off the hard surface?

A. A fact would show after the accident had occurred where the wheel of our car had been knocked there was an indentation in the road, and this was on the far right hand side.

Mr. Hodges: We object to that. She is stating the position of the car as a passenger and substantiating that by the marks she saw in the road.

The Court: I think the evidence is proper. Objection overruled. You can save the point.

By Mr. Sterling Hutcheson:

Q. You were telling us about an indentation in the road which you saw afterwards; that fixed your car on which side of the road?

A. The far right hand side.

Q. The right hand side going to Clarksville?

page 199 } A. Yes, sir.

Q. When did you first realize that an accident would probably occur?

A. When Faulkner's car swerved to the right, and then we saw that he was going off the road, and he turned back immediately to his left.

Q. After the collision, what happened to your automobile?

A. Well, as I said, it was sliced in, and our automobile turned across the road and landed in a ditch on the other side, and of course there was quite a bit of excitement. My mother and I had gotten out of the car, and Mr. Baptist and Mrs. Baptist were just getting out, and we came around on the left hand side of the car facing towards Boydton, and just about that time another car was coming at a terrific rate of speed, and there was an awful crash, and this third car hit and swerved in and almost caught Mother and me between the Baptist car and the car that was coming, and it righted itself and went on down the road towards Clarksville, never stopping.

Q. It never stopped?

A. No, sir.

Q. You testified that it struck something down the road—struck this other car down the road, I believe?

A. Yes, sir.

Q. Was the impact from the sound a slight impact, or not?

A. Do you mean the hitting of the third car?

page 200 } Q. Yes.

A. It appeared much louder than the crash of our two cars.

Q. That was before the people from your automobile had all gotten out, was it?

A. Yes, sir.

Q. Had any one from your automobile been to the scene of the accident when this third car came along?

A. No; we had not had time.

Q. A colored man named Charlie Carter and another one named Wade testified yesterday that this third car came along after you all had arrived at the scene of the accident, as I recall their testimony; are you certain that the third car came before you all had gotten to the scene of the accident?

A. I am positive. There was no one there when the accident occurred, and when we got out they were not in sight.

Q. And the third car came along before you had really gotten out of the car?

A. Before we had really gotten out of the car.

Q. After you had gotten out of the car and the third car had passed on, what did you all do then?

A. The first thing, the car came, and came so near hitting Mrs. Turnbull, and then Marjorie got out of the car, and when we were sure none of us were hurt we went immediately to the scene of the accident where the other car was sitting in the middle of the road, after the third car hit it, and we heard

page 201 } talking over in the cornfield, and these people that were in the other car were over there, and this boy was hollering and moaning, and we went right straight to him to see if anybody in that car was hurt, and he was injured, and we went and found this man lying down on the road and the other two people with him did not seem to be paying much attention to him, and there was a colored girl and colored man in the car with him, and they said that they were not hurt, and he was lying down on the ground, and of course we tried to find out if he was hurt, and then we asked what had happened, and he said that he didn't know, Lady, that he couldn't hold it.

Q. Who asked him that question?

A. My mother.

Q. Your mother?

A. Yes, sir.

Q. And his reply was what?

A. "I don't know, Lady; I just couldn't hold it."

Q. Was that before the doctor had arrived?

A. Yes, sir.

Q. Where was the Faulkner automobile when you first saw it after the collision? What part of the road was it standing in?

A. Well, I first saw the car before the third car hit it. Of course, naturally I turned immediately to look to see, and it was sitting almost in the middle of the road with the engine facing this way. Then the third car hit it and
page 202 } knocked it completely around.

Q. Where was it when you got down there after you all had gotten out of your car?

A. It was turned around almost facing Clarksville.

Q. Almost facing Clarksville?

A. Yes, sir.

Q. When you went down where these people were, were all of you together—all the people in your car together?

A. When we went down to see if the man was hurt?

Q. Yes.

A. Yes, sir, I think we were.

Q. Was Marjorie Baptist along?

A. Yes.

Q. A man named Wade testified yesterday, a colored man, that Miss Marjorie Baptist stated, in his presence and in the presence of the other people in her automobile, that she was not as far to the side of the road as she thought, and that the lights blinded her; did she make any such statement in your presence?

A. I don't recall any such statement as that.

Q. You did not hear any such statement?

A. No, sir.

page 203 }

CROSS EXAMINATION.

By Mr. Hodges:

Q. Miss Elizabeth, at the time you went back and first saw this man, he was in a rather bad condition, was he not?

A. It was pretty hard to tell. He was not hurt on the outside at all.

Q. But it is a fact that he was groaning very much—continuously?

A. Yes, sir.

Q. Moaning, too, wasn't he?

A. Yes.

Q. Wasn't he saying that he was going to die?

A. Yes, he was hollering and saying that he was going to die.

Q. Wasn't he calling for his mother there about that time?

A. I never heard him call his mother.

Q. You never heard him call his mother?

A. No, sir.

Q. And he said "I don't know, Lady; I couldn't hold it"?

A. Yes, sir.

Q. You don't know what he had reference to—whether it was after the car was in collision and he couldn't hold it from turning over?

A. I have a good idea.

Q. But you couldn't say other than your idea?

A. No.

page 204 } Q. Now, Miss Elizabeth, if I understood you,
the third car came along and knocked Grant
Faulkner's car clean around, if I understood the words you
used?

A. That is right, yes.

Q. How much would you think, from what you saw, it knocked the car—how far?

A. What do you mean—distance in feet?

Q. Yes, distance in feet?

A. I wouldn't say at all. I don't know.

Q. Did it swing it around, or just knocked it back?

A. The car was sitting this way, and when the third car came it naturally tried to pass on its side of the road, and there wasn't room, and it hit the rear end of Grant Faulkner's car and swerved it around.

Q. The other car didn't stop at all?

A. No, it didn't stop.

Q. It didn't check its speed?

A. It didn't check its speed.

Q. But hit with sufficient force to knock this car around in the road, and didn't check up?

A. When it hit the car its speed was naturally checked, but as soon as it righted itself he stepped on it again.

Q. At the time of this accident I believe you said Grant Faulkner was not going faster than your car was, in your opinion?

A. No.

page 205 } Q. And just immediately as he approached you,
or the car in which you were riding, you saw him
pull well over to the right side of his highway,
and then cut back towards your car?

A. Yes, but he was not going at a steady drive. He was

kind of trying to right himself, it seemed, when he approached over the hill, and then he saw this car was coming, and he tried to pass by going away on the righthand side of the road, and he thought that he was going over, and he cut to the left.

Q. So, after he got over, he thought that he was going out of the road and cut back to you?

A. Yes.

Q. In what respect was he trying to right himself if he was driving at a speed that your car was going? What do you mean by *tring* to right himself—getting himself right in the road?

A. Yes. He was swerving.

Q. Just as an illustration, if you please, let us take this: Say that this is the car in which you were riding, the Baptist car; and this the Faulkner car?

A. Let us put them this way.

Q. All right, put them in your own position.

A. We were coming this way, and Grant Faulkner this way (illustrating).

Q. Let us put the pad the way the road was?

A. You had it right like it was.

page 206 } Q. I mean in the same direction that the road runs.

The Jury: I think she had it right.

The Court: Here is Clarksville.

Witness: Here is Boydton and here is Clarksville, and we were coming this way, and Grant Faulkner's car approached from here; he was driving in the road going something like this, and when he saw this car coming he turned this way and thought he was going off the road, and so he immediately pulled his car to the left and hit our car like this (illustrating).

Q. He hit your car door on that angle?

A. Yes. It didn't hit the bumper, or lights, but ran into the fender and hit our wheel and wrenched it off.

Q. This fender was torn—this front fender?

A. Yes.

Q. So, necessarily, Miss Elizabeth, if that which you just demonstrated be true, necessarily the front part of Grant Faulkner's car, the front wheel and front axle and front fender on the lefthand side, were the parts which came in contact with your car?

A. Yes.

Q. And necessarily that would be the only part of Grant

Faulkner's car which would be severely damaged if that is the way the accident happened?

A. Yes. His car was, I thought, sitting in that position, and the third car came and hit him at that angle, page 207 } knocking him around like that (illustrating).

Q. I see. Miss Elizabeth, was the right wheel on your car struck?

A. The right wheel?

Q. Yes.

A. No. The left front wheel was struck.

Q. The left front fender?

A. Yes, and the runningboard.

Q. How about the left light, headlight?

A. I don't know about that.

MISS MARY BAPTIST,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. Miss Mary, you are what kin to Mr. W. C. Baptist?

A. He is my second cousin.

Q. You live in Boynton, do you not?

A. Yes.

Q. I believe you were in the automobile with Miss Marjorie Baptist and others on the night of June 6, 1931, when there was a collision between that automobile and an automobile operated by a man named Faulkner, near Finchley, were you not?

A. Yes, sir.

Q. Where were you sitting?

page 208 } A. On the front seat next to Marjorie.

Q. Marjorie was driving?

A. Yes.

Q. When did you first see the car that collided with you?

A. I saw the lights as they came over the hill just beyond.

Q. Just beyond where?

A. Where the accident occurred.

Q. About how fast was Miss Marjorie driving at that time?

A. I would imagine around forty.

Q. About how fast was she driving at the time of the collision?

A. I don't know exactly. I think she slowed down a little when she saw the car coming.

Q. What side of the road was she driving on?

A. On her right side.

Q. On her right side?

A. Yes, sir.

Q. Do you drive an automobile yourself?

A. Yes, sir.

Q. How long have you been driving an automobile?

A. I think about two years. I am not positive.

Q. You have testified that you saw the lights coming towards you on this other automobile; please tell the jury then what happened? Turn around a little so that they can hear you?

A. After I saw the lights coming?

page 209 } Q. Yes.

A. We were talking, and I saw the car as it turned over the hill in front of us, and I had no idea that we were going to have an accident, and the first thing I knew the car was right on us, and the lights seemed to flicker and it came towards us at an angle, and our left wheel was broken off and naturally the car dropped in the road, and it went on down the road and swerved to the lefthand side.

Q. That is your car?

A. Yes, sir, our car. As quick as we could, we started to getting out of the car, and before all of us had gotten out, Marjorie and myself had not gotten out, we heard the third car coming, and we heard the collision back up the road, and it came and swerved over to where our car had stopped, and almost hit us, and we thought it had hit Mrs. Turnbull, and Marjorie and I got out as quick as we could, just as soon as we got ourselves together, and went up to where we heard these people talking, and found this negro out on the side of the road.

Q. You testified that the third car came by and struck the Faulkner car; judging from the sound of that collision, was it a severe impact or a slight one?

A. It was very severe.

Q. Did it make a loud noise?

A. Yes, sir.

Q. I believe you testified that that was before
page 210 } all the people had gotten out of your car, was it?

A. Yes, sir.

Q. Had anybody from your automobile been to the scene of the accident when this third car came along?

A. No.

Q. That is the only other car which hit the Faulkner car, was it not?

A. The only other car?

Q. Yes.

A. Yes.

Q. No fourth car came along and struck it, did it?

A. No.

Q. Are you certain of that?

A. Yes.

Q. Now, when you went to the scene of the accident (that is, when you went to where the Faulkner car was), where was that car standing?

A. I didn't examine it. I didn't notice it specially because it was dark, but it was my opinion that it was knocked over on the north side of the road—our righthand side going towards Clarksville.

Q. But you didn't go to examine it?

A. No, I didn't go right to the car.

Q. You went to where this man was hurt, you say?

A. Yes.

Q. When you went down there, did all of you
page 211 } go together?

A. I don't remember.

Q. Did Marjorie go at the same time you went?

A. Yes.

Q. Now, it was testified yesterday by a man named Wade, a colored man who was a passenger in the Faulkner car, that Marjorie stated, in his presence and in the presence of a colored girl named Rosa Edmonds and of the people who were in your automobile, that she was not as far to her side of the road as she thought, and that the lights blinded her; please tell the jury whether Marjorie made any such statement as that?

A. She did not in my presence.

Q. She did not in your presence?

A. No.

Q. Did you ever hear her make any such statement?

A. No.

Q. And you were present down there where she was?

A. Yes.

Q. Do you remember seeing this man and woman down there with Faulkner?

A. Yes.

Q. You saw them down there that night?

A. Yes.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Miss Mary, after your car was in collision
page 212 } with this other car, and you all had come to a stop
down the highway there, how long did you stay

down there before you came back to where Faulkner was?

A. Well, I don't know. It was about three minutes—a very short time, just as soon as we could get out of the car and saw none of us were hurt.

Q. You would say about three minutes?

A. Yes, sir.

Q. When you got back, how many people did you find back there where Faulkner was?

A. When I went up to where Faulkner was?

Q. Yes, if you recall?

A. I think there was a colored woman and two colored men.

Q. Two colored men?

A. Standing up there.

Q. Could there have been more?

A. Yes, I suppose so.

Q. When you first became conscious of the position of the Faulkner car, it was on the other side of the road, or the north side?

A. Yes, sir.

Q. It is in testimony here that the car was moved by Mr. Cal Creedle and others, after the collision, to that side of the road; you don't know anything about whether they moved it, or whether they didn't, do you?

A. No, sir.

page 213 } Q. You just saw it over there when you were first conscious of the position it occupied?

A. Yes.

Q. This colored man was in rather bad condition when you first went back there, wasn't he?

A. Yes.

Q. The fact is that he was moaning and groaning almost continuously until he was carried away?

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Miss Mary, I didn't ask you this: Did you hear this man Faulkner make any statement in regard to how the accident happened?

A. Mrs. Turnbull asked him—I don't remember just the exact question that she asked him, but his reply was "I just couldn't hold it" or "couldn't help it", or something to that effect. I don't remember the exact words.

Q. You did hear Mrs. Turnbull talk to him about the accident?

A. Yes.

RE-CROSS EXAMINATION.

By Mr. Hodges:

Q. Would you say "I couldn't hold it" or "couldn't help it"?

A. I don't remember exactly which statement page 214 } he made, but something like that.

Q. Something like that. He could have "I couldn't help it"?

A. Yes, he could have.

By Mr. Sterling Hutcheson:

Q. All you know is you heard a conversation between them in regard to how it happened?

A. Yes, sir.

MRS. IRBY TURNBULL,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. Mrs. Turnbull, it has been testified here that you were in the Baptist car on the night of June 6th last year when there was a collision near Finchley with an automobile operated by a man named Faulkner; do you recall the circumstance?

A. Yes.

Q. Where were you sitting Mrs. Turnbull?

A. In the right rear.

Q. The right rear, and who was sitting next to you?

A. Elizabeth in the middle, and Mrs. Baptist on the left.

Q. Mrs. Turnbull, do you drive an automobile yourself?

A. No, I do not.

Q. Are you able to estimate the speed that the Baptist car was going at the time when you first saw the approaching automobile?

page 215 } A. I would say around thirty-five or forty.

Q. Are you able to place the position of the Baptist car in the road—that is, which side of the road it was on?

A. It was on the right.

Q. Well, now, when did you first see the approaching automobile?

A. I will tell you, really I just remember seeing a light; I was not paying any special attention, and didn't notice anything about how close it was, or anything else. I just remember having seen a light come over the hill.

Q. Please tell the jury just what happened after that?

A. After the wreck?

Q. No; after you saw the light coming?

A. There was not anything to tell. That was the time the car ran into us, and I can tell what happened afterwards; is that what you want?

Q. One moment before then. You saw the light approaching, and when did you first realize that there would be a collision or probably be a collision?

A. I didn't realize that there was going to be any collision at all, because I didn't pay that much attention. I don't drive, and I didn't pay that much attention, but I remember the crash, and we all screamed, and wondered what damage was done.

Q. The first you noticed was when it happened?

A. Yes.

page 216 } Q. After the collision, then what happened?

A. After the collision, we went over on the left-hand side of the road; Marjorie guided us very nicely to the lefthand side, and we got out just as quickly as possible, and I was the first to get out, and I told them to hurry and get out. My idea was it might catch on fire (I didn't know the damage), and Elizabeth jumped out as quick as she could, and Mr. John Baptist was out, and I think Mrs. Baptist got out by the time we were around, and Marjorie and Mary were still in the car, and we started around to the other side of the road, and before we got to the other side of the road this third car came over the hill, and I screamed because I saw it coming.

Q. From which direction did it come?

A. From towards Boydton, going towards Clarksville, and I screamed because I knew it was dangerous, because on the car the lights were out, and they couldn't see anything, and we heard this automobile crash, and the car headed towards us, and in my presence of mind I gave Elizabeth a shove and sent her outside of the road, and I knew if it hit us it would kill everybody. I shoved Elizabeth out, and jumped myself. I felt the force of the car, and it came like that, and it turned back. I don't think it hit me, but I felt the wind from it.

Q. You felt the wind from it?

A. Yes, sir.

page 217 } Q. Had you gotten out of the road when the third car came by?

A. No, I was still coming around the car, right near the fender.

Q. And you felt the wind from the car?

A. Yes, and I lost my shoe. I don't know whether the car hit us, or whether I lost my shoe, but knocked the heel off my shoe.

Q. Then that was before Marjorie and Mary had even gotten out of the Baptist car?

A. They hadn't gotten out, and I knew if it hit us it would get us between the cars and kill everybody, because it was coming at such a terrific rate of speed, and they were then in the car.

Q. Did any other *other* automobile strike the Faulkner car that night?

A. That was the one.

Q. I mean any other car except that?

A. No, no other car.

Q. Now, a man named Carter and one named Wade, colored men, testified here yesterday, as I recall their testimony, that at the time the Faulkner car was struck by the third car, you ladies and Mr. Baptist had left the Baptist car and gone to the scene of the accident; please state whether or not they are correct?

A. What do you mean—before the third car page 218 } came?

Q. Yes.

A. No, as we hardly had time to get out of the car. As I say, we had hardly gotten out of the car before this third car came on and hit the Faulkner car.

Q. You are quite sure that nobody from the Baptist car had been to the scene of the accident when that car came?

A. We couldn't possibly have gotten there.

Q. After the third car passed, what did you all do then?

A. As soon as we could possibly get ourselves straight, we went right on up there where the car was, and they were moving the colored boy from their car out towards the field, and we went out to where the colored boy was stretched out, and he insisted that he was dying, and I said no, I didn't reckon he was, and asked how bad he was hurt, and opened his shirt and looked at the place myself. We got some one to strike matches just as soon as the men came. In a few minutes some people came from Finchley and Mr. Creedle and others, and

I asked what was the trouble that he couldn't hold the car, and he said "I don't know, Lady. I just couldn't hold it".

Q. "Just couldn't hold it?"

A. "Just couldn't hold it."

Q. I believe it has been testified that you all asked Mr. Wells to come to Boydton for a doctor?

A. Asked somebody, but I don't know who.

Q. I don't know whether his name is in there, page 219 } or not. Do you recall how many people were there when you reached the place where Faulkner was?

A. I really couldn't say except there was a colored man who said that he was walking, I think, on the righthand side of the road just ahead of us.

Q. He was already there?

A. He got there just about the time we got there.

Q. Who else was there?

A. I don't know. I don't recall everybody else except Mr. Creedle and somebody else came in a few minutes.

Q. I mean with Faulkner; was there anybody with him?

A. There were two others. There were three in the car.

Q. What were they, men or women?

A. One woman and one man.

Q. So, when you got there, Faulkner and the two people who said that they were in the car with him were there, and the third man walking got there about the same time?

A. Yes.

Q. Do you know whether that is a boy named Hiawatha Towles, or not, do you know him?

A. I think it was. It seems to me I recall seeing him here the last time, but I didn't pay a great deal of attention to that. I guess that is who it was. It was just a colored man.

Q. Mrs. Turnbull, it has been testified by this man Wade, who was a passenger in the Faulkner car, that Marjorie Baptist made the statement, in his presence and in page 220 } in the presence of the other occupants of the Baptist automobile, that she was not as far to her side of the road as she thought, and that the lights blinded her; did she make any such statement in your presence?

A. No, I am quite sure that she did not. If she did, I didn't hear her, and I think she was certainly on her side of the road.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Mrs. Turnbull, the only thing you can be certain of is that you did not hear such statement from Miss Marjorie?

A. No; I did not.

Q. When your car came to a stop, was it off the highway, Mrs. Turnbull?

A. Not entirely. I would say the left front wheel was; I don't think the rear wheel was quite off.

Q. Prior to the collision, you and Miss Elizabeth and Mrs. Baptist and others were engaged in conversation, were you not?

A. Yes, sir.

Q. Do you recall whether you were engaged in conversation at the time the scream you refer to went up?

A. No, I don't recall. I can't remember whether we were.

Q. Ladies usually talk?

A. Yes.

page 221 } Q. At the time of the collision, nothing had happened to fixing your mind the position that you occupation in the road, or that the car occupied in the road, or the Faulkner car, either?

A. No.

Q. So, when you say you were on the righthand side of the road, you say that, of course, based on your intuition, or—

A. (Interposing.) When the crash came, I know we were on the righthand side.

Q. Mrs. Turnbull, after your car had come to a standstill, how long were you down there before you came back to where the injured man was?

A. Just as soon as we could get out of the car and get up there.

Q. Had the man been moved from the car to the field when you got there?

A. Do you mean when we got up there where he was?

Q. Yes.

A. He was being taken out.

Q. It is in testimony here by a colored man, who says that he was present and helped to move the man from the car to the field, that he held him by the head and shoulders until some one could get a cushion; did some one hold his head and shoulders?

A. Yes. I know we were trying to make him comfortable, is all I know.

page 222 } Q. At the time he made the statement in response to the question from you, he was in a very bad condition, wasn't he?

A. Well, much more so than I realized. I didn't think he was seriously injured.

Q. But he was insisting that he was going to die?

A. Yes.

Q. Isn't it a fact that he was moaning and groaning at that time?

A. Yes.

Q. Isn't it a fact that he called for his mother about that time?

A. I never heard him.

Q. You never heard that?

A. No.

Q. One of the ladies preceding you on the witness stand testified that he said "I couldn't hold it", or "I couldn't help it", one or the other.

A. He told me, when I asked him, I said "What is the trouble? It looked you didn't have your car under control", and he said "I don't know, Lady; I just couldn't hold it".

Q. What was the reason you said "You didn't have it under control"?

A. From what the others had said, because I didn't know enough about it.

Q. Did you see the Faulkner car at all prior to the instant of the collision?

page 223 } A. Yes; I just saw the lights, as I stated.

Q. Was there anything unusual about its lights—just approaching as an ordinary car would?

A. Not so far as I was concerned.

Q. Of course, Mrs. Turnbull, there was nothing about the approach of his car and the lights from his car to indicate to you that there would be a collision at all?

A. No, not as far as I was concerned.

Q. Did you see Sheriff Beales, of this county, out there that night?

A. I don't recall. Probably I did. There was such a crowd there afterwards I don't remember.

Q. You would not say about that?

A. No, I would not say.

HIAWATHA TOWLES (Colored),

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. John Hutcheson:

Q. Hiawatha, do you remember the wreck on the night of the 6th of June, between Mr. Baptist's car and the car owned by Grant Faulkner, near Finchley?

A. Yes, sir.

Q. Were you present that night?

A. Yes, sir.

Q. Where were you standing?

page 224 } A. I guess I was as far as from here half way
down the stairs when it happened.

Q. That is where the cars ran together?

A. Yes, sir.

Q. Were you on the righthand side going towards Boydton
or Clarksville?

A. Towards Clarksville.

Q. Did you see the cars run together?

A. Yes, sir.

Q. Tell the jury what happened when they ran together?

A. I was coming from Finchley going home, and the two cars were coming; the Faulkner car was coming over the hill and the other car was behind it. I could see the lights, and he was over the rise of the hill, and I didn't know how far he would get, and I said "Dog, these cars are going to meet about the time that they get opposite me", and I got out of the way, and by that time the Faulkner car had passed. I looked back, and I said "Dog, these cars are going to hit", and by that time they hit. I heard a tire or tube burst, I couldn't say which, and by that time the Baptist car came on down the road, and there was a whole lot of sparks, I guess from the lefthand front wheel dragging the hard surface and making a lot of sparks, and I ran up on the bank further, and it ran on until it left the road.

Q. Did you go back and see the marks of the lefthand wheel
where it hit the road?

page 225 } A. Yes, sir, I went back afterwards.

Q. Which side of the road was that mark on?

A. It was on Mr. Baptist's side, I guess about two feet from the center of the road.

Q. On Mr. Baptist's righthand side of the center line?

A. Yes, sir.

Q. What happened then?

A. Well, I went on back down there and asked Mr. Baptist was anybody hurt, and he said didn't think so. I didn't know who he was in the beginning.

Q. Did you see any other car coming by?

A. Yes, sir. I went where Faulkner was lying out in the field, and pretty soon, in four or five minutes, another car came and hit the Faulkner car.

Q. Where was the Faulkner car when the other car came by?

A. In the road.

Q. Where was it in the road?

A. I guess on the Baptist side.

Q. What did the other car do to the Faulkner car? Did it change its position any?

A. Yes, sir, it pulled it a foot or two. After he hit it, he scrambled around there and he got out from it. I couldn't say whether it was the bumper or fender, but he got out and stepped down on it.

Q. The Faulkner car was in the road, near the center, when the third car came by?

A. Yes, sir.

page 226 } Q. It has been testified that the Faulkner car was off the hard surface when the third came by?

A. No, sir.

Q. You know it was in the center of the road when it was struck by the third car?

A. Yes, sir.

Q. Were you present when they took Grant Faulkner down in the field?

A. I was at Mr. Baptist's car when they were carrying him across.

Q. It has been testified by Charles Carter that he helped carry Grant Faulkner out in the field?

A. No, sir; it was this woman and this other boy, I don't know his name.

Q. Was Charles there at that time?

A. No, sir.

Q. He had not come up?

A. No, sir. I was the only one there with these people in the car.

Q. The two people in the car, Rosa Edmonds and Ed Wade, were the only other people there, and they carried him down in the field?

A. Yes, sir.

Q. Charles Carter is mistaken when he says that he helped carry him there?

A. Absolutely.

page 227 } Q. Charles Carter said that when this collision took place he was about half way between Liberty Church and Finchley, on the old road; do you know where Liberty Church is?

A. Yes, sir.

Q. You walked with me over that road this morning, did you not?

A. Yes, sir.

Q. Charles Carter says that he saw the collision, that he was about three hundred yards from the curve right after you

pass Mr. Jeffress' store, at Finchely; in walking over that road this morning, was it possible, at any point, for Charles Carter to have seen the collision?

A. Not unless he was in an airplane. He couldn't have seen it by walking.

Q. Therefore, if he was where he says that he was, he did not see the collision, did he?

A. No, sir.

Q. You say you were just west of the point of collision?

A. West.

Q. To fix in the minds of the jury how far you were west, did the Baptist car pass the point where you were standing?

A. Did it pass the point where I was standing?

Q. Did it pass by you?

A. Yes, sir.

Q. About how far from the point of collision, where the Baptist car stopped, were you standing?
page 228 }

A. Say that again?

Q. You were between the point of collision and where the Baptist car stopped?

A. Yes, sir.

Q. It has been testified here it is from thirty yards to, I believe, as high as sixty yards; would you say you were half way between those two points?

A. Yes, sir, I was half way.

Q. About half way between those two points?

A. Yes, sir.

Q. I understood you to say that the Baptist car was on its right of the center line at the time of the collision; is that correct?

A. Yes, sir.

Q. How about the speed of the cars?

A. Of the Faulkner car?

Q. Both of them?

A. I couldn't tell the speed of the Baptist car because that was behind me. I could make explanation of this other car.

Q. About how fast was the Faulkner car going?

A. He was making about forty or forty-five.

Q. This second collision, the third car hitting the Faulkner car, was that a loud lick?

A. Yes, sir, pretty loud.

Q. It has been testified here by Charles Carter
page 229 } and Ed Wade that the second car only struck a fender which was lying in the road?

A. No, sir; that car hit somewhere near the fender, or the bumper, I couldn't say which.

Q. It hit the body of the car, did it?

A. Yes, sir.

Q. And knocked the fender?

A. No, sir, and pulled it about a foot or two.

Mr. Hodges: If your Honor please, he is leading the witness.

The Court: Yes, go ahead.

Mr. John Hutcheson: The witness is with you.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Hiawatha, where were you at the time the third car came along?

A. Standing right up there where this Faulkner boy was.

Q. Out there where the Faulkner boy was?

A. Yes, sir.

Q. There were others there besides yourself, were there not?

A. Sir?

Q. There were others there besides yourself, were there not?

A. Only this girl and this boy. I don't know who they were, but the ladies were coming on up.

Q. They had not got there?

A. No, sir.

page 230 } Q. But Grant Faulkner, at that time, was out in the field and had been moved out from the car?

A. Sure.

Q. How long had he been moved?

A. I couldn't say exactly, but it was not long because it was not but three or four minutes between the licks.

Q. Grant Faulkner had been injured and moved out in the field before the third car came along?

A. Yes, sir.

Q. And you testified that it hit a fender or a bumper?

A. I say it either hit the bumper or fender.

Q. It either hit the bumper or the fender?

A. Yes, sir.

Q. You were down in the field when this happened; couldn't it have hit a fender which was torn loose from the car and lying on the ground?

A. No, sir, not the way the car moved.

Q. Was it dark there that night?

A. It was dark but it was light.

Q. It was dark but it was light?

A. The lights from the car.

Q. How far did the car move?

A. A foot and maybe two feet.

Q. It was way over on Mr. Baptist's side of the road?

A. It was a foot and maybe two feet.

Q. Over on Mr. Baptist's side?

page 231 } A. Yes, sir.

Q. Did you see Mr. Calvin Creedle there that night?

A. Yes, sir.

Q. If he says that that car was on the right side of the road, on the shoulder with the rear wheels and the front on the road, he is mistaken?

A. Yes, sir.

Q. Did you see him there?

A. Yes, sir.

Q. Did you see Sheriff Beales there?

A. Yes, sir, later.

Q. You later saw Sheriff Beales there?

A. Yes, sir.

Q. If Mr. Creedle says when he got there the car was over on the righthand shoulder of the road, then he is mistaken?

A. Yes, sir, according to the way I saw it.

Q. You say now Grant Faulkner's car—you don't say where the car was in the road, but you say that these marks were two feet to Mr. Baptist's right of the center of the road?

A. I say when the accident happened, this fellow was either a foot or two feet on Mr. Baptist's side.

Q. Did you testify at the former trial as follows: "Are you able to tell the jury on which side of the center line of the road Mr. Baptist's car was on?" and you said "A little to his side"?

A. I said a foot or a foot and a half or two
page 232 }

Q. "A little to his side;" did you say that?

A. No, sir.

Q. At the time of this collision you were walking along the road going towards Clarksville, and the collision happened behind you, didn't it?

A. Yes, sir.

Q. Nothing had attracted your attention to look back to see both of these cars, had there?

A. Sir?

Q. Had anything attracted your attention to make you look back to see these cars?

A. Sure there was.

Q. You walked up on the bank, I understood you to say?

A. No, sir; I was on the shoulder of the road. I said I didn't know whether these cars might meet exactly when they got right against me, and I said I would walk out a little further, and after the first car passed me I walked out and looked back, and then they were about that far apart (indicating).

Q. Did you see the collision?

A. Yes, sir.

Q. How far did Miss Baptist's car go after the collision?

A. I guess about thirty some odd feet.

Q. Thirty some odd feet?

A. Yes, sir.

Q. If Mr. Bishop, the State Highway Police Officer, says it ran eight or nine yards before it turned its course, then he is wrong?

A. I don't know whether he is wrong. I haven't anything to do with that. I have made explanation where it went.

Q. You are satisfied that he is mistaken?

A. I say it went some thirty odd feet.

By the Court:

Q. Before it stopped?

A. Yes, sir.

By Mr. Hodges:

Q. Did you step it?

A. Yes, sir, I have stepped it.

Q. When—since then?

A. Yes, sir.

Q. This morning?

A. No, sir.

Q. You were up there this morning with Mr. John Hutcheson?

A. Sure I was up there.

Q. Did you see the Baptist car—did you examine the Baptist car at all, or look at it, to see whether it was hurt?

A. No, sir.

Q. When this third car that you are talking about came alone, did I understand you to say that it hit it and turned it around and knocked it towards Clarksville?

A. You understood me to say that it hit somewhere near the fender or bumper, and I say that he pulled it
page 234 } a foot or two feet.

Q. In which direction?

A. Towards Clarksville.

Q. Straight back up the road?

A. A foot or two feet towards Clarksville right straight like that (illustrating).

Q. Did he pull the whole car, or just swing one end?

A. Pulled the whole car.

Q. And you were down in the field in the dark and saw that?

A. Yes, sir.

Q. Isn't it a fact that he was thirty or forty feet down in that field, on this cushion, at the time the third car came along?

A. No, he was not that far.

Q. How far?

A. He was not thirty or forty feet.

Q. Well, how far?

A. I couldn't say.

Q. About how many steps was it from the highway?

A. How many steps?

Q. About how many?

The Court: Guess at it.

Witness: It might have been fifteen or twenty. It was not thirty-five or forty.

By Mr. Hodges:

Q. Fifteen or twenty steps?

page 235 } A. Yes, sir, and it might have been twenty-five, but it was on thirty-five or forty.

Q. Fifteen or twenty steps, he was lying down there with a cushion under his head, and he was saying that he was afraid that he was going to die?

A. I didn't hear him say that.

Q. He had the cushion under his head?

A. I wouldn't say positively whether he had the cushion or a rock, or something, under his head at the time. He never did bring the cushion directly he carried the man there; he brought it there later, but I couldn't say he had the cushion or a rock.

Q. Did you bring it?

A. No, sir.

Q. Who brought it?

A. The woman.

By the Court:

Q. The colored woman in the car?

A. Yes, sir.

By the Court: Rosa Edmonds.

By Mr. Hodges:

Q. This third automobile that hit this car you are talking about, tangled up in it and got untangled and went ahead?

A. I don't say tangled, but it hit the fender or bumper.

Q. Did you say on direct examination—

A. (Interposing.) I say it hit somewhere near page 236 } the fender or bumper.

Q. Did it stop?

A. It stopped and backed up and scrambled.

Q. That is what you said, "Scrambled"?

A. I didn't say tangled up.

Q. Scrambled is what you said?

A. Until he got from under it, and then stepped on it.

Q. Are you positive about that, that it stopped?

A. Yes, sir.

Q. Just as positive as anything else you told?

A. Yes, sir.

Q. If the other witnesses say that it did not stop, they are mistaken?

A. Absolutely.

J. A. CREEDLE,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. John Hutcheson:

Q. Mr. Creedle, I came to your store this morning and requested you to walk with me up the road from Finchley to Liberty Church, did I not?

A. Yes, sir.

Q. You walked with me up there?

A. Yes, sir.

Q. I told you at the time that it had been testified page 237 } by Charles Carter that he was standing some three hundred yards from the intersection of the old road and the new road right at Mr. Jeffress' store and that he saw the collision of these two cars; you remember the night of the collision, do you not?

A. Yes, sir.

Q. In walking up that road, and from your knowledge of the surroundings and the facts there and obstructions, could he possibly have seen the point of this collision?

A. From where we were I tested it and waited for some other cars to come along and the precipice, this little hill, and I couldn't see a car at all. I would estimate the distance from the new road over to the old road as possibly one hundred or a hundred and fifty yards, and it is a very thick undergrowth of very thick pines. That was my observation.

Q. You couldn't see them this morning when you made the test?

A. No, sir.

Q. Approximately where Charles Carter says that he was, approximately one hundred yards or two hundred yards, could you?

A. No, sir, I couldn't see any car coming down the road.

Q. This collision occurred on the 6th of June, 1931. You lived in a few hundred yards of this place at that page 238 } time, did you not?

A. Yes, about quarter of a mile.

Q. Has anything been changed since the 6th of June, 1931, until now, in the physical facts there?

A. Nothing that I know of. I would say that the undergrowth there would possibly be thicker in June than it is now between the two roads.

Q. Therefore, if anything, you could see more clearly now than you could on the 6th of June, 1931?

A. I think so.

Q. You remember the night of the accident, do you not?

A. Yes, sir.

Q. Did you hear any collision that night?

A. Yes, sir, I heard a noise.

Q. Will you tell the jury how you happened to hear that noise and what kind of noise it was?

A. I was in the store waiting on the trade and my wife called me; she was up on the porch. I have a porch which runs the entire east and south of the house; she was sitting on the south porch, and she heard the noise and told me that there had been a collision—

Mr. Hodges: (Interposing) We object.

The Court: You can't tell what she said.

Mr. John Hutcheson: He should say that she called his attention.

The Court: He can say his wife called his attention.

Mr. John Hutcheson: This is what immediately page 239 } followed hearing the noise.

The Court: Gentlemen of the jury, go to your room.

Note: The jury retired from the court room.

The Court: Let us see what the answer is.

Witness: My wife called me and said that she believed that there was an accident up the road, that she heard people hollering. I went back to the back of the store and when I got back there I heard something that sounded like a collision, and I heard, it looked like, I could hear people hollering up there, and I heard this collision. This collision was the first I heard. It sounded like two cars struck or sideswiped or something, I couldn't say which, and I heard, it looked like, the hollering increased, or noise and I went out there and got in my car and drove up there. I was sure somebody was hurt, from the noise. I went up to render whatever assistance I might.

Mr. John Hutcheson: You testified you lived about quarter of a mile from there?

Witness: I estimated something like that in a straight line. It might be six hundred yards, or five hundred yards, but somewhere around that.

Mr. John Hutcheson: Was that collision you heard a loud noise?

Witness: Well, it was not so loud; just like two cars might have sideswiped, or a collision, or tin rattling.

page 240 } Mr. John Hutcheson: But it didn't sound like an automobile running over a fender in the road, did it?

M. Hodges: We object to that.

The Court: Let us see what he says.

Mr. John Hutcheson: It was testified that the second collision was an automobile running over a fender in the road.

Witness: I don't know that I could answer that intelligently because I don't know whether I ever heard it. It was a noise like two cars running together.

Mr. John Hutcheson: A noise or an impact?

Witness: Yes, sir, or an impact. I couldn't say exactly what it was, but when the impact occurred I heard the voices kind of raise like they were hollering.

The Court: Now, what is the objection?

Mr. Hodges: Let me ask a question. As I understand it, you did not hear the first collision, and your wife called your attention to it?

Witness: That is right.

Mr. Hodges: I object to that as not being admissible to prove that there were two collisions or impacts. It is purely hearsay.

The Court: I think what the wife said is purely hearsay.

Mr. John Hutcheson: The fact that his wife called his attention to a collision, that proves that this was
page 241 } the second impact that he heard, and we are not
attempting to ask him anything about the first
collision, but if he heard the second collision, and if it was
an impact—

The Court: (Interposing.) Why doesn't it come under the hearsay rule?

Mr. John Hutcheson: Without the physical fact of her calling his attention to it, it means nothing. His attention was called to a collision that occurred.

The Court: The *res gestae* is the act itself.

Mr. John Hutcheson: It is the act itself. That is the reason that he heard it; his attention had been called, and he heard the scream, and in walking to the back door he heard the second lick.

The Court: I will let him testify as follows: That he went out and heard some noise, and then heard another follow.

Mr. John Hutcheson: We insist that that testimony will mean nothing to the jury.

The Court: Why didn't you have his wife summoned here? Objection sustained.

Mr. John Hutcheson: We except.

The Court: Bring the jury back.

Note: The jury returned to the court room.

The Court: Gentlemen of the jury, Mr. Creedle testified that about this time that he went out of the store—that he
page 242 } had been in the store which is quarter of a mile
from the place,—and that he heard some people
talking as if there had been a wreck, and screaming, and then he heard another collision between the cars.

Mr. Hodges: He heard another noise.

The Court: Another noise, as if cars were going together, sideswiping each other. Go ahead from that point.

By Mr. John Hutcheson:

Q. Mr. Creedle, how did that noise sound—as an impact?

Mr. Hodges: If your Honor please, might I suggest this to the court? He heard a noise—not another noise, but a noise.

The Court: He said another noise. He said he heard the scream before that.

By Mr. John Hutcheson:

Q. Describe to the jury, as well as you can, what noise you heard?

A. I just heard some voices, very loud, just like I reckon any of you gentlemen can picture, where there was some screaming, and about that time I heard another impact. I couldn't say whether it sounded like a sideswipe or a head-on collision. I couldn't describe the difference between them and the noise of two cars coming in contact. I was satisfied in my mind that another car had come in contact—

Mr. Hodges: (Interposing.) If your Honor please, I object.
page 243 } The Court: Tell what you know and saw, but not what you thought.

By Mr. John Hutcheson:

Q. This impact you heard was loud enough for you to hear distinctly quarter of a mile off?

A. Yes, sir.

Q. What did you do then?

A. I went down and got in my automobile and got my flashlight and went up to the scene.

Q. What did you find when you got there? Did you find anything had happened?

A. I found that one car was turned out in the field right astride of a ditch, a small ditch.

Q. What I was getting at, you heard the noise; did you find anything to explain this noise to you?

A. I saw a wreck there of two cars.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Mr. Creedle, isn't it a fact that there is an open broomstraw field between the old highway and the new highway at the point of collision?

A. A broomstraw field?

Q. Yes.

A. It is just above it; it is above the church.

Q. Above the church?

page 244 } A. Yes.

Q. Isn't it a broomstraw field just on the north side the highway between two pieces of pine right where this accident happened?

A. There is a broomstraw field there, yes, sir.

Q. And the broomstraw field runs all the way back to the old highway, doesn't it?

A. I don't think it runs all the way back to the old highway. It may up higher at the cemetery, but right directly opposite the wreck it runs, I should say, about half back.

Q. About half way back to the old highway?

A. Yes, sir.

Q. And what about the other half?

A. Just undergrowth and pines.

Q. Small scrub undergrowth?

A. Yes, sir.

Q. How much have those pines grown in the last year and a half?

A. I don't know.

Q. They grow right much, don't they?

A. They are pretty good size pines and average about six inches across the stump.

Q. Isn't it a fact you can see an automobile better under those pines at night, with the lights blinding and permeating the air, than you can see a car in the daytime?

A. If you go up high enough; if you go up the page 245 } old road until you get opposite the wreck, then you are up above the church, somewhere there—if you go above the church, then you can possibly see across.

Q. You don't know where this man Charlie Carter was when the accident happened?

A. No, sir, I don't know where he was.

Q. And it is possible for him to see this road and see the cars on the road?

A. If you go up above the church. That is considerably up.

RE-DIRECT EXAMINATION.

By Mr. John Hutcheson:

Q. If you come down between the church and Finchley, you cannot see a car?

A. You cannot see it if you get below the church.

Q. So, again, if Charles Carter says that he was about half way between the church and Finchley, he couldn't see the point of the wreck?

A. You couldn't see it now, and I am judging that from seeing the physical conditions there now.

Q. It is a fact that there are high pines all the way between the roads?

A. Very thick pines.

Q. And along the road, is there any ditch or obstruction or undergrowth or hedge along the road?

The Court: Didn't you go over that in the direct?

Mr. John Hutcheson: This is along the road.

page 246 } (Mr. John Hutcheson) Along the road is there
any undergrowth or hedge?

A. Between the church and Finchley?

Q. Yes.

A. It is very thick pines.

Q. I believe you said there was undergrowth in the pines?

A. I was speaking about above the church, but after you pass the church coming towards Finchley then it is very thick.

RE-CROSS EXAMINATION.

By Mr. Hodges:

Q. You said you couldn't see this, this morning when you was there, but you don't know what you could see on June 6, 1931, do you?

A. Under the same size growth, yes, sir. I didn't test it on that day. You can't do it now.

Q. You don't know what he could see then in his particular position, do you?

A. No.

J. H. BAPTIST,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. Mr. Baptist, you are a brother of Mr. W. G. Baptist, are you not?

page 247 } A. Yes, sir.

Q. It has been testified that you were in an automobile on the night of the collision between that car and a car of Grant Faulkner, near Finchley; that is correct, isn't it?

A. Yes.

Q. Where were you sitting, Mr. Baptist?

A. I was sitting on the front seat on the right hand side.

Q. Who was driving?

A. My niece, Marjorie Baptist.

Q. Mr. Baptist, please tell the jury the circumstances in connection with that collision, as nearly as you can recall them at this time?

A. Well, it was on, I think, Saturday night, June 6th. My brother's wife called me at my oldest brother's house, just a little ways off, on the telephone and asked if I would go to Buffalo with them that night, and I told her I would.

The Court: Don't go into that.

By Mr. Sterling Hutcheson:

Q. State you were proceeding up the road. I will ask you this question, to get a start: About where did the accident occur?

A. About quarter of a mile west of Finchley.

Q. You testified that Marjorie was driving the car?

A. Yes.

Q. When did you first see the approaching automobile?

A. Well, we say it some distance off. The road page 248 } is very straight there for nearly three-quarters of a mile, I suppose. I saw it coming some distance off.

Q. Mr. Baptist, how fast was Marjorie driving when you saw the automobile approaching?

A. I didn't look, or wasn't looking, at the speedometer at the time.

Q. Do you drive an automobile yourself?

A. Yes.

Q. How long have you driven one?

A. Fifteen years.

Q. How fast would you estimate her speed, when you saw the automobile coming?

A. I think somewhere around thirty-five miles an hour.

Q. When you saw the automobile coming, please tell the jury what happened then?

A. I noticed that they had the lights all right, and as they approached, when I first observed the car, it seemed to be on their side of the road, when it was some distance off, but when they got up I suppose within thirty or forty yards it seemed to me that the driver of the car swerved in a little bit. I do not know for what reason. Perhaps he might have been blinded, but I don't know, but he seemed to have swerved in a little to our side of the road. He struck my brother's car at the tip of the fender on the left side; it struck the wheel, the hub of the wheel on my brother's car, and the wheel was crushed and went down; it went down on the page 249 } hard pavement, and the little hub on there made a dent where it wen down, and the Baptist car ran about thirty or thirty-five yards. It ran about thirty

yards, I reckon, on the hard surface, and swerved all at once to the left and crossed the road and came to a standstill after the front wheels had gone into a little ditch out in the field. I suppose the ditch was some seven or eight inches deep.

Q. You stated when the Faulkner car was about thirty or forty yards away from you, he swerved; what did he do after he swerved? Which way did he swerve?

A. He swerved the car to the left—that is, to his left.

Q. And then what happened?

A. His car, the car struck us on the tip—

Q. (Interposing) I mean after he swerved, what happened then?

A. Well, they went into us about the time he swerved. It struck the tip of our fender on the left side and gradually went in. It was not a head-on collision, but kind of sideways. The car struck at a point like that (illustrating) and gradually went in like that and plowed all the way to where the runningboard is joined on to the fender.

Q. Which side of the road was the Baptist car on at the time of the collision?

A. Well, of course not driving a car, you don't pay attention all the time to where the driver is running the car, if you are just in the car, but it seemed, at the time, page 250 } to me that we were still on the right side of the road, and the physical facts indicated that after the car came down in the road because there was the track.

Q. What physical facts?

A. The print of the hub, and it ran on the hub, and you could trace it for thirty yards, I think, before it swerved to the left, and went out into the field.

Q. Did you trace the track of the Baptist car by the dent in the road?

A. Did I do what?

Q. Did you trace the Baptist car by the indentation in the road?

A. Yes.

Q. Where did the indentation start with respect to the center line of the highway?

A. Well, it started, I suppose, three feet or more from the center of the road to the north.

Q. To the north?

A. Yes, sir.

Q. That is north of the highway from here to Clarksville, your right if you are going to Clarkeville?

A. Yes, it would be to the right.

Q. Therefore, it was about three feet to the right?

A. I would say that. I didn't measure the distance.

Q. Mr. Baptist, after your automobile stopped, what did you do?

page 251 } A. I was the first one that got out of our car.

I knew no one was hurt in our car unless it was my niece, or Marjorie Baptist, because she was under the wheel. I immediately went around to the side where she was, and she stayed in the car a few seconds, and about that time the third car came down the road and struck the Grant Faulkner car, struck the car that was wrecked—that is the Grant Faulkner car. I heard the noise. I had my back turned to the east ward at that time, and when it struck this car it made quite a noise, and when I looked around to see what it was, in order to get by the Grant Faulkner car he swerved in to the left side of the road, and when he passed our car he came very near striking the rear end of that.

Q. Where was the Grant Faulkner car when the third car struck it?

A. Well, it was right at the point where it was left after the wreck.

Q. I mean was it out of the road or in the road?

A. Well, it was in the road about, I would say, four—probably four or maybe five feet—four feet, anyway, from the furthest edge of the hard surface to the north.

Q. To the north?

A. Yes.

Q. Could you tell from where you were standing whether the third car moved the Grant Faulkner car, or not?

A. No, I couldn't tell that.

page 252 } Q. You couldn't tell about that?

A. No.

By the Court:

Q. Could you tell, from where you stood, what part of the Grant Faulkner car was hit by the third car?

A. No, I could not. It sounded more like it struck some part of the fender. The noise indicated that.

By Mr. Sterling Hutcheson:

Q. Was it a loud noise?

A. Yes, it was right loud.

Q. Mr. Baptist, it has been testified by a man named Carter, I believe, and maybe some other, that the third car passed after the occupants of the Baptist car returned to the scene of the collision; is that a fact?

A. Let me get that again?

Q. A man named Carter testified that the third automobile passed after you all had gotten out of the Baptist car and had come down to where the accident happened; is that a fact?

A. We had all gotten out except Mary Baptist and Marjorie Baptist.

Q. But had you gotten down to the scene of the accident?

A. No, I had not, because I had not had time.

Q. Had any of the occupants of the Baptist car gotten to the scene of the accident?

A. No, they had not gotten there because they didn't have time to get there.

page 253 } Q. It has also been testified by the same man that the third car merely struck a fender from the Faulkner car, which had been torn away, and was lying in the road; if you are able to, please state to the jury whether the noise which you heard could have been caused by striking a loose fender lying in the road?

A. Well, there was not any fender lying in the road.

Q. There was not any fender lying in the road?

A. No.

Q. Did you examine the marks in the road, about which you have testified, that night?

A. Yes.

Q. Did you examine them subsequently?

A. Yes, Sunday morning.

Q. Do you know whether any measurements were made with respect to those marks on the following day?

A. Yes, some measurements were made. I did not make them myself, I don't believe. I probably stepped it off, but I think my brother made some measurements of them accurately.

Q. Did you point any marks out to anybody?

A. Yes; I think he and I followed the marks together.

Q. You and your brother?

A. Yes.

Q. Was Mr. W. G. Baptist there when those marks were pointed out by you?

A. He was there soon after the collision occurred; whether he was there with us at the time, or not, I just do not recall.

Q. Mr. Baptist, it has been testified to by a man named Wade, who was in the Faulkner car at the time of the collision, that, after the collision, you and, he said, three ladies who were in the Baptist car, came down to where Grant Faulkner was, and that Marjorie made the statement, in the presence Wade, a colored girl named Rosa Edmonds, and

you, and the ladies who were with you in the Baptist car, that she was not as far out of the road as she thought, and that the lights blinded her; did she make any such statement in your presence?

A. No, she did not.

Q. She did not?

A. No.

Q. Did you hear Grant Faulkner make any statement to Mrs. Turnbull about the accident?

A. No, I don't believe I did. I went up there immediately after I found that nobody in our car was hurt, but I left there and went over to where the Grant Faulkner car was. My idea was to get it out of the road in order to avoid, perhaps, a collision with some other car, because it was dangerous in the road.

Q. Where was the Grant Faulkner car when you got up there?

A. Well, it was, as I told you, about three or three and a half feet from the center of the road to the north.
page 255 }

Q. That is when you got there?

A. Yes.

Q. Do you know whether Mr. Creedle had got there at that time, the road man?

A. Yes, Mr. Creedle, I think, got there—one of them got there, I think, about the first person to get there after it happened. Of course there were a whole lot of people there in thirty or forty minutes, and I don't know who was there. We moved the car—I helped move the Grant Faulkner car. We moved it out of the road and moved it to the north—moved it on the north side of the road.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Mr. Baptist, did I understand that after your car and the Faulkner car were in collision, and before it was hit by a third car, that it was three and a half feet over to the north of the center of the road?

A. I think that is about the point it was.

Q. Where was it when the third car hit it?

A. At that point. It had not been moved.

Q. After the third car struck it where was it?

A. Well, now, I don't—I wasn't up there; I was down thirty five yards from it when the third car struck it.

Q. So you didn't see the car until after the third car hit it, except from a distance of thirty-five yards, at night?

A. No; the other car came up in less than a page 256 } minute after the collision with the Faulkner car occurred. The third car came down the road, I suppose, in less than a minute.

Q. It is in testimony here, Mr. Baptist, that there was some screaming up there; who was doing the screaming?

A. Well, there was not very much excitement until the third car came down the road. After that, Mrs. Turnbull screamed because this car came very near striking her.

Q. There is testimony that there was some screaming prior to a lick which took place between what appeared to be two cars; was there any screaming prior to that?

A. I didn't hear any screaming until after the third car had passed.

Q. Now, you said Mr. Calvin Creedle was there about the time, or the first person after you got back up to where—

A. (Interposing) That is my impression, that one of them was there.

Q. Mr. Baptist, Mr. Cal Creedle testified that he moved the car from the right shoulder of the road, sitting up on the right shoulder of the road coming from Clarksville to Boydton, across the highway to the north side of the road, after this accident, and that he knows nothing about a third car; is he mistaken, from what you know about it?

A. Yes.

Q. Did you know Charles Carter?

A. No, I don't know him.

Q. And you say your car ran thirty yards down page 257 } the highway with this mark in the hard surface before it turned to the left?

A. It ran approximately thirty yards. It turned north. Of course the resistance was on the left after the wheel went down. It swerved to the left all at once, and ran over into the field, and the rear end was about clear, just about clear of the road.

Q. How far in all did it go after the wheel hit the ground?

A. How far did it go?

Q. Yes, in all?

A. I say it went around thirty yards. The total distance was about thirty yards.

Q. I thought you said thirty yards before it made the left hand turn?

A. No; the total distance was about thirty or thirty-five yards. That is the total distance.

Q. This third car that is spoken of, involved in this collision, did that car stop at all as it went through there?

A. No, it did not. It was going at a very rapid speed.

Q. It did not stop and it did not back up?

A. No, it did not stop at all.

Q. Isn't it a fact, Mr. Baptist, that the left runningboard and left rear fender were hanging loose from the Grant Faulkner car?

A. Do you mean after the collision?

Q. Yes.

page 258 } A. I don't know whether they were hanging loose, or not. I looked at the car, and looked at it down here, but I don't recall. I don't think it was.

Q. You don't recall, but it would show?

A. I don't think the fender was hanging loose on it. I don't recall positively.

Q. Isn't it a fact the runningboard and the left rear fender were torn loose from the car (I don't mean clear loose, but swinging loose) and is laid back on the car in the old wreck?

A. I don't think so.

Q. You didn't pay any attention to the position of the Faulkner car until after the third car had hit it, because you had not been back?

A. No I did not go up there until the third car had hit.

Q. And whatever measurements were made the next morning were made from points pointed out by you to the parties who made the measurements?

A. I think the marks were pointed out that night and the next morning.

Q. Then you went back next morning and pointed out the marks to the people who made the measurements?

A. Yes.

Q. Who went with you the next morning to make the measurements?

page 259 } A. The next morning—I think I went with my brother, and I don't know who else went with me.

I don't recall that. I pointed out the marks to him and I pointed them out that night.

Q. Was it necessary for you to point out the marks there to him in order for him to see them, or anything of that kind?

A. It might not have been necessary, but I pointed them out.

Q. I believe that your party was on its way to Buffalo Springs at the time of the injury, to a dance?

A. Yes.

Q. Now, Mr. Baptist, the hour has not been fixed that the accident happened, by any people in your car; do you know what time it took place?

A. Do you mean the collision?

Q. Yes.

A. We left here, I would say, about something like a few minutes of nine; I would say about five minutes of nine, or maybe nine o'clock, or somewhere like that.

E. L. BAPTIST,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. John Hutcheson:

Q. Mr. Baptist, you are Mr. E. L. Baptist?

A. Yes, sir.

page 260 } Q. A brother of Mr. W. G. Baptist?

A. Yes.

Q. Do you remember the night that Mr. W. G. Baptist's car was in a collision near Finchley?

A. Yes.

Q. Did you go up there that night?

A. I did.

Q. Please tell the jury what you found there?

A. I went up there that night—I am guessing at it,—possibly forty minutes after the collision; I reckon it was that I got *I got* up there, and I found my brother's car on the left hand side of the road, practically out of the road, and the other car going west on the right hand side of the road. There was some colored man lying over on the left hand side of the road, or south side of the road, who I was told had been injured in the wreck.

Q. Were you told that he was Grant Faulkner—

A. I learned then or afterwards that they called him by that name. I don't remember when I learned that. I suppose I learned it that night—I am sure I did.

Q. When you got there Grant Faulkner was there, and his car was on the north side of the road?

A. On the north side of the road and headed not directly towards Clarksville but rather in a northwesterly direction. My brother's car was on the other side of the road and headed almost directly south. After looking after the man
page 261 } that was injured, my brother and I took charge of that and got him off to the hospital. I examined, the best I could, the cars and the marks I could find on the road for the cause of the accident. I had nothing else to do. My brother was in charge of it, and I wanted to see it. I found that those cars, the indications, the best I could tell,—

Mr. Hodges: I don't believe that is admissible.

The Court: You can tell what you saw in the road.

Witness: I was going to tell about the marks in the road and on the car.

The Court: You can tell that.

Witness: My brother's left fender and the left fender on the other car had been in collision—that is, I suppose that they had. I was told that they had.

Mr. Settle: We object.

The Court: You can't say what you were told.

Witness: My brother's fender had come in contact about six inches from the front of the fender, had been struck from the front of the fender about six inches, by an object moving at an angle to that car at which I would take, from what I saw—there was every indication of it. The front wheel was knocked off my brother's car and knocked off the other car.

Mr. Settle: We want to object.

The Court: I do not think it is proper testimony, but he can say what he saw.

Mr. John Hutcheson: He said that he saw this, page 262 } that he saw his brother's fender, and the lick going in at an angle to it.

The Court: He can say that. He can't say it indicated so.

Mr. John Hutcheson: I would like for him to repeat it.

The Court: All right.

Mr. John Hutcheson: Strike it out.

The Court: Strike out all his testimony so far.

Mr. Sterling Hutcheson: You do not mean all of his testimony, do you?

The Court: All that this gentleman testified to so far as to what he saw down there, and so forth, is stricken from the record.

Mr. John Hutcheson: With reference to the injuries to the car?

The Court: No; start all over.

Mr. John Hutcheson: If your Honor please, in his testimony we established that Grant Faulkner was there and that Grant Faulkner's car was to the north of the road.

The Court: That is left in, but what he saw as to the marks and all that.

By Mr. John Hutcheson:

Q. What injuries did you find to your brother's car?

A. His left fender had been knocked off—

Q. (Interposing) Knocked off?

A. No, it was not knocked off, but it had been
page 263 } badly damaged and left, and then the running-
board was damaged. The front wheel was knocked
off, and the radius rod, I think, was bent. That was all of
the damage that I noticed that night.

Q. Describe the damage to the fender?

A. Well, the damage on the fender was caused by a lick
which struck it some six inches from the front of the fender
and went back to and ruptured the whole fender and bent it
up on the side of the car.

Q. That was the left front fender?

A. That was the left fender.

Q. How about the headlight—was that damaged in any
way?

A. I don't think that they were. I did not examine the
headlights to notice that. I noticed the other damage, and
I suppose if the headlight had been damaged I would have
seen it.

Q. How about the runningboard?

A. The fender had pulled the runningboard and bent it up
some. I don't think it was shattered, or anything of that kind,
and, in fact, I am sure it was not.

Q. From where this car was lying, could you track it back
to the scene of the accident, or could you track it back up the
road?

Mr. Settle: We object to that for the reason he asked from
where the car was lying could he track it; how could he track
it?

The Court: He is trying to find out. The ob-
page 264 } jection is overruled.

Mr. Settle: We save the point.

A. It was the easiest thing anybody ever tried to do. The
hub on a Ford car has a very sharp flange on it, and when
the wheel was knocked off I suppose it was twelve or four-
teen inches in diameter, and that took the place of the wheel,
and the hub took the place of the rim, and when it dropped
down on the asphalt road, or whatever road it is (I don't
know the proper name), that is where it dropped and made
the indentation, and that mark was just as distinct as you
are over there, to the place the hub was resting; and the hub
was sitting in one end of it, and there were the indications
of a wreck back up thirty to thirty-five yards back up to where

I was told the wreck took place, and there was every indication of the wreck having taken place, and to the place where that hub was sitting was a line as definite as my hand.

By Mr. John Hutcheson:

Q. So the hub was sitting in the end of the *that* line?

A. Of my brother's car?

Q. Yes.

A. The left front hub.

Q. And you tracked that back that night to where it started in the road?

A. That night, and went back the next morning and went over it again.

page 265 } Q. Have you ever made any measurements in that road at that point?

A. I did. The hub dropped down from the north side of the road just about six feet and six inches from the north side of the road. That was the inside wheel of my brother's car. It was nearer the center of the road than the other wheel was.

Mr. Settle: We renew the objection. He could not possibly say that this mark was made by his brother's car except from what somebody told him.

The Court: Objection overruled. Save the point.

By Mr. John Hutcheson:

Q. You say the mark started about six feet six inches from the north side of the road?

A. The north side of the road. I didn't have a rule, but I stepped it off. I step across time after time and I step right accurately. It was not over seven feet, and it was over six feet, and I say six feet six inches where it dropped at the point of collision.

Q. How wide was the road at that point?

A. I stepped that road and I stepped the whole distance; I am under the impression that it was built for a twenty foot road, but I stepped it off, and where I stepped it the road and the asphalt are on a level, and you can't separate them without moving off a little dirt; I stepped it twenty-one feet, and I think it was a twenty foot road, but that is
page 266 } what I stepped, twenty-one feet.

Q. From the mark and the measurements you made, and in view of the road, was that mark to the north of the center line of the highway?

A. It was north by a good deal of the center of the high-

way. I am sure the road up there must be twenty feet, and, anyway, it was six and a half feet from the north of the center of the road. I think it was a twenty foot road and it was built for that.

Q. It is testified it was built for an eighteen foot road?

A. It is wider than that.

Q. Whether that was eighteen feet or twenty feet, which side of the center line was it on—the north or south?

A. It was on the north side of the center line by a great deal.

Q. Even if it was an eighteen foot road?

A. Yes, and if it had been a sixteen foot road it would have been on the north side.

Q. Did you go there with Mr. W. P. Bishop?

A. No. I believe some one told me Mr. Bishop was there, but I didn't go there with him. I might have been there with him. but I don't know.

CROSS EXAMINATION.

By Mr. Settle:

Q. Did you see, Mr. Baptist, on the extreme right hand side of the roadway facing towards Boydton, on page 267 } that same night, a lot of cotton and glass and a part of floor covering from an automobile, that had come from the Grant Faulkner car?

A. I saw some glass; the glass was scattered all over the road—practically all over. I think you could have found some on either side of the road. I don't remember seeing all the articles you say. The car had been rolled out of the road when I got there and some things put back. There were some nuts and bolts and glass scattered practically all over.

Q. At the previous trial of this case didn't you testify that on that night, when you went there, you saw some rags and rubber covering, and so forth, on the right side of the road, and that a piece of the same was there a day or so prior to the trial?

A. A piece from that car?

Q. A piece of that same stuff, that covering?

A. There was a lot—

Q. (Interposing) I say, didn't you testify to that before?

A. I wouldn't say I designated it in detail like you did. I say there were nuts and bolts and some possible parts of an old cushion, or something of that kind, lying out in the road, but the stuff was scattered all over the road. I believe there

was a piece of the old rubber lying on the right hand side of the road.

Q. And it was lying there a day or so before the previous trial—

page 268 } The Court: (Interposing) The first trial.

By Mr. Settle:

Q. The first trial?

A. Yes, sir, I think I saw it there after that. That was off the road then. The last time I saw it it was lying off. Some of that stuff, I suppose—I didn't see the things taken there, but some of the rubbish had been carried there to put the man on; he was lying on the cushion, and possibly the cushion dropped out. I don't know anything about that except he was lying on the cushion from that car.

Q. Yes, off in the field. But the articles that we are talking about that came from the car were on the right side of the road?

A. They were scattered all over the roadway.

Q. You say you got to the scene of the accident in thirty or forty minutes after?

A. I guess it was about forty minutes. I would think that from the time the crew left here and the time that they should have been here, I guess it was thirty or forty minutes.

Q. And you will not state positively, will you, Mr. Baptist, that the left front headlight of your brother's car was not bent and the glass in it broken?

A. I would not state positively. I think if the headlight had been broken I would have noticed it. I noticed the other things. I tried to find out what damage was done, and I looked around specially that night and wanted to
page 269 } find out how the accident occurred, and I did everything I could to find out.

Q. That front headlight may or may not have been bent and the glass in it broken?

A. If that headlight was broken it was broken from the impact and not the contact of that other car.

Q. I am not asking you how or why.

The Court: Answer it "Yes" or "No".

By Mr. Settle:

Q. I ask you again if you can state positively, or will do so, that the left front headlight of your brother's car was not bent or the glass in it broken?

A. I cannot state positively that it was not, but I told you what I was there for, and I can only answer again that I think I would have seen it if it had been.

Q. The roadway, at the point where the accident occurred, is almost straight for three quarters of a mile or more, isn't it?

A. Yes, it is almost straight for about three quarters of a mile.

Q. And on each side of the hard surface roadway there is a shoulder at the point of accident of five or six feet; isn't that true?

A. A shoulder—do you mean—

Q. (Interposing) A dirt shoulder?

A. Yes. I don't know exactly how wide, but I page 270 } reckon about five or six feet.

Q. And after the collision, from the mark which you assume was made by your brother's car when the wheel came off and it came down in the road, it ran down the road some considerable distance, and finally stopped on its left hand side there against the bank off the highway, didn't it?

A. Yes, the hub of that broken wheel stopped in a ditch I suppose twelve or fifteen inches deep.

Q. And you were interested in going to the scene of the accident because it was your brother's car?

A. Yes, sure I was.

RE-DIRECT EXAMINATION.

By Mr. John Hutcheson:

Q. Did Dr. A. B. Snellings and J. E. Bing go with you to the scene of the accident?

A. They were there, but they didn't go there with me. I don't think that they went with me; I think my wife and I went there.

Q. Did you show them these marks in the road?

A. Yes, I did.

Q. And those were the marks that were made by your brother's car?

A. Yes. There were other marks on the road, too, made by the other car.

Q. State to the jury about the other marks?

A. There were marks where the other hub page 271 } dropped down, like it was where my brother's hub dropped down; both of those cars made a definite indentation when they struck the tar and gravel road, and

the front wheel of that car was damaged almost identically in the same respect as my brother's. They were both knocked off. That fender was bent on the end, and this way (illustrating), at a slant—the least little bit slant, and on the end, and is now, I reckon. Then that car, after it dropped down,—for instance, my brother's car dropped down west or westerly—

Q. (Interposing) Use this tablet for illustration.

A. If this were the road, my brother's hub—if this had been the road, he was possibly in this proportion; his car was occupying about that proportion of the road. You could see where the hub dropped right here, and the car will pull around, as you probably have had the experience with a flat tire on the front wheel, and you know the wheel is inclined to go that way. The hub pulled the driver, I suppose, or, anyway, that is the way it went, and at a point thirty-two feet from where it dropped down it went out of the road to the south. There was an identical mark made by the other hub, I think—

Mr. Settle: (Interposing) We object to an expression of opinion.

The Court: Objection sustained.

Witness: This mark here was caused by the hub on the other car, but it disappeared and I didn't see it
page 272 } any more until I got ten or twelve feet from that
point, it went back and struck the road again.
The car turned over in the road, and that is what did it.

By Mr. John Hutcheson:

Q. The second mark you testified about coming east, where was that with respect to the center line?

A. About six and a half feet or the least little bit further in than my brother's. They were about in line.

Q. Was that to the north of the center line or to the south of the center line?

A. Considerably to the north,—not more than seven feet to the north of the center line of that road.

The Court: Gentlemen of the Jury: What the witness has stated as to what he thinks is stricken from the record, and you will pay no attention to that.

RE-CROSS EXAMINATION.

By Mr. Hodges:

Q. Mr. Baptist, the evidence is, and a view of the car of

Faulkner shows, that it is struck opposite the left front door and the frame bent in right there—indicating on a model)—the frame bent in under the left front door; can you explain to the jury how Faulkner's car could have gone into your brother's car and gotten the impact opposite the left front door and bent that frame?

A. I will show you what I think and what I feel.
page 273 } pretty sure about: I think Faulkner's car struck my brother's car like that (illustrating).

Q. Explain to the jury how he got this blow in the side, the heavy part of the blow in the side, sufficient to bend the frame under the door?

A. I know that car came in contact with this car, but how far it went in I don't know. The resistance of this car was against the side of this car, and if that frame was bent that way, it must have been like that.

Q. Bent by going against your brother's car. Wouldn't that necessarily tear this car up if it was with sufficient force to bend the frame?

A. The car is there, and if you will go there you will see the point there is bent. My brother's car was not touched on the point of the fender but about six inches behind. If my brother's car had gone at an angle, it would be bent like the piece of his.

Q. The left front fender of your brother's car was torn off?

A. It was torn off, but it was not demolished. It was back behind that.

Q. That might be there. If the Faulkner car shows the blunt of the lick on the left side sufficient to bend the frame, then wouldn't your brother's car have to hit it in that forty-five degree angle in order to bend it, assuming the front of the Faulkner car is not torn up?

A. The front of his car is torn up, and the front
page 274 } of the fender—the whole of his front left fender is ruptured. The front of his car struck there and it bent up the fender on the point, but the other car was not bent on the point.

Q. Your brother's car, you testified, had a broken radius rod?

A. Bent.

Q. Assuming the Faulkner car has no bent radius rod or broken radius rod, and assuming the frame was bent on the side, wouldn't you tell the jury that it looked like your brother's car hit Faulkner's car on the side?

A. No, because they were in collision, and it might have

bent my brother's rod or the other. If you will let me tell you what I think about it, I will be glad to do so.

Mr. John Hutcheson: I think Mr. Hodges is asking what he thinks.

The Court: I think that is proper cross examination. Stand aside.

At 1:05 a recess is taken for lunch until 2:10.

page 275 }

AFTERNOON SESSION.

Boynton, Virginia, October 28, 1932.

The court met at the expiration of the recess.

Present: The same parties as heretofore noted.

The Court: Note that the call is waived.

J. E. BING,

a witness for the defendant, being duly sworn, testified as follows:

Examined by Mr. John Hutcheson:

Q. Mr. Bing, do you know about this automobile accident that happened near Finchley between Mr. Baptist's car and a car driven by a colored man named Faulkner? Do you when it happened?

Q. Have you been to the scene of the accident?

A. Yes, I went up there the night that it happened and went back up there the next day.

Q. Tell the jury what marks you saw in the road at this point?

A. I went up there pretty soon after it happened, I don't know how long after it happened, with Mr. Turnbull. This car of Mr. Baptist was sitting out in the field on the left hand side of the road going towards Clarksville, off the road, with the wheel knocked off, and it looked like, and, as
page 276 } a matter of fact, it was that this car was—the wheel was knocked off of it in the road I would say thirty to *thirty to* thirty-six inches o the north side of the center of the road towards Clarksville, and went down he road and made a mark about sixty feet, and turned off to the left and went off on the left hand side of the road.

Q. Did you see these marks again later on the next day, Sunday?

A. Yes, sir.

Q. They were the same marks?

A. Yes, sir.

Q. How much north of the center line would you say?

A. I would say about thirty to thirty-six inches. I just looked at them, and didn't measure.

Q. Can you say positively that they were on the north half of that road?

A. Yes, sir.

Q. There is no doubt about that?

A. No, sir.

Q. And those marks started at the point of collision, and could you trace them right down to where the Baptist car was sitting that night?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Hodges:

Q. You were there with Mr. Turnbull, who was the father of Miss Elizabeth Turnbull, and his wife, Mrs. Irby Turnbull, who were in the car?

A. Yes.

Q. That was his interest in taking you down there, I suppose?

A. Yes.

Q. Mr. Bing, did you testify at the former trial of this case?

A. Yes.

Q. Did you make any reference in that former testimony as to the marks on the road at that time and the measurements of your opinion of where the marks were?

A. Yes.

Q. You made no measurement; it is just your opinion?

A. No, I made no measurement.

RE-DIRECT EXAMINATION.

By Mr. John Hutcheson:

Q. What is your residence and occupation?

A. Boydton; hardware merchant.

By Mr. Hodges:

Q. Mr. Baptist also lives in Boydton?

A. Yes.

page 278 } By Mr. John Hutcheson:

Q. Was Mr. A. B. Snellings with you at the time you went there Sunday?

A. Yes, he was with me on Sunday. We went to Buffalo to play golf.

Q. Did he see the same tracks that you saw?

Mr. Hodges: We object. How in the world can this man testify that he saw the same tracks?

The Court: Can you testify to the fact that we are both looking at that stove?

Mr. Hodges: He can't say the same tracks.

The Court: But we can both see the same object.

Mr. Hodges: The question I am raising is that he can't say he saw the same thing.

The Court: He can testify that the man saw the same thing and had the opportunity to see the same.

Mr. Hodges: Yes, had the opportunity.

By Mr. John Hutcheson:

Q. Did you see Mr. A. B. Snellings examine these tracks on Sunday afternoon while you were there?

A. We were all there looking at them. I suppose that he was examining them. We were all there looking at them together.

Q. He was there?

A. Yes, he was there looking.

page 279 } By Mr. Hodges:

Q. Who else was there?

A. I think Spott Finch and Mr. Turnbull and Mr. Snellings and myself; we were going to Buffalo to play golf.

DR. A. B. SNELLINGS,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. John Hutcheson:

Q. Doctor, I believe you are a druggist in the town of Boynton?

A. Yes.

Q. Did you go to the scene of an accident which happened between the Baptist car and Grant Faulkner's car sometime the first of June, 1931?

A. I saw the place in the road the following Sunday afternoon where the accident occurred.

Q. Who did you go there with?

A. With Mr. Turnbull and Mr. Bing. We didn't go there to look at the accident, but were on our way to Buffalo to play golf.

Q. Did any one show you the marks in the road made by the Baptist car?

A. Yes, sir.

Q. Tell the jury—

The Court: (Interposing) Let him state what page 280 } marks he saw.

By Mr. John Hutcheson:

Q. State to the jury what marks you saw?

A. There was one very long abrasion on the right, starting on the right hand side going towards Clarksville, I would say some six or seven feet beyond the center of the road and running down the road some considerable distance and going over to the left hand side or south side of the road going to Clarksville.

Q. Is that the mark which was pointed out to you to be the track of the Baptist car?

Mr. Hodges: We object.

The Court: I doubt whether that is testimony. He can say what he saw.

Mr. John Hutcheson: I withdraw the question.

Q. (Mr. John Hutcheson) I understand you say that that mark started at its eastern section (that is towards *towards* Boydton) north of the center line of the road?

A. On the right hand side going to Clarksville,—the north side of the road, yes.

CROSS EXAMINATION.

By Mr. Hodges:

Q. Mr. Snellings, the road is an eighteen foot road, isn't it?

A. I don't know, sir. I didn't measure any of those marks, but just looked at them.

page 281 } Q. Did you get out of the car?

A. Yes, sir.

Q. Did the others get out?

A. Yes, sir.

Q. You saw the marks made by another car first on the south side of the road?

A. This mark was a continuation; it started on the right hand side of the center of the road going towards Clarkville, and went down some distance, fifteen or twenty yards or twenty-five yards, and was gradually going in to the left hand side of the road until it stopped on the left hand side.

Q. You didn't see any other marks except that one?

A. I don't recall.

Q. Did you see any packing or cotton, nuts or glass on the right hand side of the road?

A. The only thing I remember, if I am not mistaken, was a piece of rubber mat that goes in the footboard of an automobile.

Q. Where was that?

A. On the left hand side of the road.

Q. Going to Clarksville?

A. Yes, sir.

Q. On the left side?

A. As well as I remember between the hard surface and the ditch, a piece about that big (illustrating).

Q. Did you see any imprint of a car on the page 282 } shoulder of the road or on the bank?

A. I didn't go on that side of the road. I didn't get off the right hand side of the road.

Q. In other words, all of you were interested in the Baptist car? All of you in the crowd were friends of the Baptist family?

A. Yes, sir.

Q. Did you testify formerly at the trial?

A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. John Hutcheson:

Q. You saw all these scars that were on that road, didn't you?

Mr. Settle: We object to that as leading.

The Court: Let us see how he answers it.

By Mr. John Hutcheson:

Q. Were you in position to have seen all the scars on the road at the point?

A. Yes, sir.

R. H. PARK,

a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. John Hutcheson:

Q. Mr. Park, you are the proprietor of the Park Garage in the town of Boydton, are you not?
page 283 } A. Yes.

Q. The Grant Faulkner car and the W. G. Baptist car, which were in a wreck sometime the first of June, 1931, were both brought to your garage, that night, were they not?

A. Yes.

Q. You repaired the Baptist car, did you not?

A. Yes.

Q. I hand you what is purported to be a copy of your bill for services rendered for repairs made on the Baptist car; is that a copy of your bill?

Mr. Hodges: We object to the use of that bill at all unless it is put in evidence.

The Court: Do you mean to say that he can't use it as a memorandum?

Mr. Settle: We think the memorandum ought to go into the record.

Mr. John Hutcheson: It is to refresh his memory. We have no objection to introducing it in evidence.

The Court: You can introduce it in evidence if you want, but he can certainly use any memorandum to refresh his memory. The objection is overruled.

Mr. Sterling Hutcheson: We will introduce it in evidence.

The Court: Introduce it in evidence, and that saves all these questions. Mark this filed, Mr. Phlegar.

Note: This paper is filed as Exhibit No. 1, and is as follows:

page 284 } "Boydton, Va., June 26, 1931.

"Mr. W. G. Baptist,

Boydton, Virginia,

IN ACCOUNT WITH

PARK MOTOR COMPANY.

"To 1 Front Axle	6.00
" 2 Locking Pins	20
" 1 Perch	1.00

" 1 Front Brake housing	1.65
" 1 Shock Absorber seat	04
" 1 Wheel	5.00
" 2 Hub caps	30
" 1 Wheel strip	25
" 1 Steering arm	1.00
" 1 front hub	4.50
" 1 Stearing Sector	1.50
" 1 front fender	6.75
" 1 Running board	2.50
" 1 Shield	2.50
" 1 Rear fender	4.00
" 1 Brake rod	25
" 2 Dust shield bolts	10
" 1 fly wheel housing	4.00
" 1 Clutch plate	2.25
" 4 Running board bolts	40
" 1 Starter spring	50
" 1 battery	7.50
" 4 Hood clip bolts and nuts	10
" 1 Battery clamp	15
" 2 Nuts	05
" 1 grease cup	10
" 2 headlight bulbs	80
" Washing car	1.00
To Labor on Car	26.75
Total	81.14''

By Mr. John Hutcheson:

Q. Using that bill as a memorandum to refresh your recollection, will you state to the jury whether or not the front headlights on the Baptist car were injured?

page 285 } A. No, sir; the head lamps were not injured other than the bulbs were burned out in the headlights.

Q. Will you state to the jury why the bulbs were burned out?

A. In the lick it broke the battery loose and it caused the motor to run probably a minute, and that burned the bulbs in the headlights out.

Q. Will you state to the jury the damage done to the Baptist car, refreshing your memory by that memorandum and from your memory of viewing the car?

A. The Baptist car, the left front fender, left front wheel

and hub, front axle, rear left fender, shield, runningboard, steering sector, were the largest items.

Q. Was the left rear fender injured?

A. Yes, sir.

Q. Runningboard?

A. Yes, sir.

Q. Can you state to the jury where the left front fender of the Baptist car was struck?

A. The left front fender of the Baptist car was struck about twelve inches from the front end of the fender, right over the front hub, right over the center of the wheel.

Q. The lick coming from the front of the car first struck it approximately opposite the hub of the wheel?

A. I would say on the side, and then went on down the side of the automobile.

page 286 } By the Court:

Q. Sideswiped?

A. Sideswiped it.

By Mr. John Hutcheson:

Q. Was the front of the Baptist fender injured?

A. The front fender of the Baptist car was torn all to pieces, but did not show any lick on the front end; the front end of the fender is curved, and it looks it hit it about twelve inches from the front of the fender.

Q. Therefore, the front end of the fender was not struck?

A. No, sir; it was struck on the side.

Q. Can you state whether or not the bumper to the Baptist car was injured?

A. No, sir, it was not.

Q. The car had a bumper on it, did it not?

A. Yes, sir.

Q. Was the headlight to the Baptist car injured outside of the bulb?

A. Nothing but the bulb. Of course when the fender was bent, that threw the headlight out of focus. It was thrown off, but it was not broken, and we used it on the car.

Q. Was the glass broken out of the headlight?

A. No, sir.

Q. Was the radiator broken in any way?

A. No, sir.

Mr. Settle: Your Honor, this is leading.

The Court: I think, myself, that it was lead-
page 287 } ing.

By Mr. John Hutcheson:

Q. Mr. Park, how long have you been in the automobile business?

A. Fourteen years.

Q. You have driven cars that fourteen years, I suppose?

A. Yes.

Q. Have you ever been in automobile wrecks?

A. Yes, sir.

Q. Have you made any practicing of repairing wrecked cars and getting up wrecked cars

A. Yes, sir.

By the Court:

Q. Going to the scene of the wreck, yourself personally?

A. I have been to several, yes, sir.

By Mr. John Hutcheson:

Q. You did see the Grant Faulkner car, did you not?

A. Yes, sir, I saw the Grant Faulkner car after it was pulled into my garage.

Q. You have also been to the scene of the wreck?

A. I have been up there, but I didn't go to the scene of the wreck.

Q. From viewing the Grant Faulkner car and from viewing the Baptist car, could you state whether or not one car ran into the other one?

page 288 } Mr. Hodges: I don't think that he is qualified as an expert.

The Court: On wrecking cars, I agree with you. The objection is sustained.

Mr. John Hutcheson: I call your attention that Mr. Carpenter was in the automobile business—

The Court: (Interposing.) Mr. Carpenter said that he visited the scenes of 175 wrecks, and this man stated that he had not seen but seven. If you can show that he visited fifty wrecks and helped move the wrecks, or superintended them, I will let him testify. You can save the point and put it into the record what he will say.

Mr. John Hutcheson: Did you say how many you have to?

Witness: No, sir.

The Court: Have you been to that many?

Witness: Fifty?

The Court: Yes.

Witness: I don't know.

The Court: I mean superintending the active moving of the wreck.

Witness: I would say in fourteen years that I have been to forty or fifty wrecks.

The Court: And superintended the moving of them?

Witness: Yes, sir.

The Court: And examined the cars where they were hit, then and there?

page 288 } Witness: Generally getting up and repairing them.

The Court: I think he is qualified.

Mr. John Hutcheson: We take this view, that there is no such thing as an expert on automobile wrecks, and in view of the fact that we objected to Carpenter's testimony we withdraw this line of questions.

The Court: All that Mr. Park states as to wrecks is stricken from the record.

By Mr. John Hutcheson:

Q. You saw the Grant Faulkner car?

A. Yes, sir.

Q. Was the front of that fender bent or dented in, in any way?

A. Yes, sir.

Q. That is which fender?

A. Both fenders were—both front fenders were bent on Grant Faulkner's car.

Q. Bent in the front?

A. Yes, sir.

Q. Was the bumper bent?

A. Well, the bumper, it looks to me, was pulled out on the right side and bent back some on the left side.

Q. Do you remember whether or not the automobile tires on the left front wheel of the Grant Faulkner car was punctured?

A. I couldn't say.

page 289 } Q. Do you remember whether or not the left tire on the Baptist car was injured?

A. No, sir.

Q. You don't remember?

A. I don't remember.

Q. You made a complete repair job of the Baptist car?

A. Not complete; we are not equipped to do some body work, and I estimated what that work would be.

Q. Have you on your bill a tire or tube, or a charge for patching the tire on the Baptist car?

A. No, sir.

Q. If the tire on the Baptist car had been injured, would it have been on that bill?

Mr. Hodges: If your Honor please, we object to that testimony. The bill that he is introducing here is a memorandum, and because it does not carry a tire it has nothing in the world to do with what happened out in the country at a wreck that he never went to and knows nothing about.

The Court: Sustained.

By Mr. John Hutcheson:

Q. Did any one do any repairing or work on the car except what was done at your garage?

A. At this wreck?

Q. At this wreck?

A. I don't know whether anything was done
page 290 } to the car before it was brought into my garage,
or not.

Q. It was brought into your garage that night?

A. Yes, sir.

Q. And you do not have on your bill any charge for repairing a tire, tube, or for a new tire?

The Court: I sustained that.

By Mr. John Hutcheson:

Q. What was the body injury?

A. Two dents on the left side of the body on the door; one, I think, is just below the door, probably a little back—a small dent.

Q. You say you made an estimate of the cost—

The Court: (Interposing.) I do not think I will let you go into that. You can ask what was the matter with it, but not what it cost.

By Mr. John Hutcheson:

Q. What was the shape of that injury? Was it a sharp indentation?

Mr. Settle: We object to it as leading.

By Mr. John Hutcheson:

Q. What was the extent of the injury to the body? Was it severe or light?

A. It was a light injury.

page 291 } CROSS EXAMINATION.

By Mr. Hodges:

Q. Mr. Parks, will you let me have that memorandum just a minute? What is a fly wheel housing on a Ford automobile?

A. A fly wheel housing on a Ford automobile is a piece of casting or malleable iron around the fly wheel.

Q. You are quite often called upon to put these in Fords, are you not?

A. Yes, sir.

Q. Whenever you break a fly wheel housing, isn't that an indication that the car is struck from the front and the radius rod broke?

A. No. It can be hit anywhere in the front wheel, or anywhere that holds the radius rod.

Q. It can be hit anywhere in the front wheel or anywhere that holds the radius rod, and that breaks the housing?

A. Yes.

Q. Doesn't take a very severe blow to break the fly wheel housing on a Ford automobile?

A. Well, it don't take such a hard blow.

Q. I will ask you this: Your testimony is that the lick went in twelve inches from the front of the fender, right over the top of that wheel on an angle; would that be sufficient to break the fly wheel housing?

A. It hit this wheel here and hub; it hit right over the top of the wheel, and carried it back, the wheel, a
page 292 } piece.

Q. And you tell the jury that that is where, in your opinion, it hit, and yet, at the same time, the fly wheel housing under here was broken by the radius rod pushing it back?

A. The radius rod is fastened here and here (illustrating); a lick on this wheel right there will break the fly wheel housing.

Q. All right, sir. Mr. Park, if Grant Faulkner's car had hit this car on that angle, sufficient to break the housing in the Baptist car, wouldn't it also have broken the housing in the Grant Faulkner car?

A. Yes.

Q. Was the frame in the Baptist car broken?

A. No, sir.

Q. It is apparent and from evidence here, and we will use this (model) as the Grant Faulkner car coming east towards Boydton, and this is the Baptist car going west towards

Clarksville; that the blunt of the lick on the Grant Faulkner car is on the frame just below the left front door, where the frame is sprung in. I will ask you if those cars were meeting each other in the road, the Grant Faulkner car had run into the front of the Baptist car, it could have gotten the blunt of that blow on the lefthand side opposite the front door?

A. What was your question?

Q. Here is the Baptist car, and we will take this page 293 } as the Grant Faulkner car (illustrating); if the Grant Faulkner car had run into the Baptist car on the angle you just described, please tell the jury how the blunt of the blow to the Faulkner could have been on the left side opposite the door sufficient to bend the frame?

A. I think a lick right in here like that would bend this car back in here the same as that.

Q. Suppose this wheel and axle are not bent back there, what would you say?

A. This wheel and axle would be bent and the lick would be more on the end, which would cause the frame to bend.

Q. Suppose it shows a place where the blunt of the blow has been there, then tell the jury how you would get it?

Mr. John Hutcheson: You remember yesterday in Mr. Carpenter's cross examination—

The Court: (Interposing) I think the view of the car would permit these questions.

Mr. John Hutcheson: Mr. Carpenter testified that the blow on the side of the door was caused by a downward lick.

The Court: The jury has seen the car. The car itself is in evidence, and I think the questions are proper.

By Mr. Hodges:

Q. Mr. Park, it is a fact that the Ford frame is square behind that to re-enforce pieces in the middle?

A. Square?

page 294 } Q. It is a four-piece frame—envelope shape?

A. The frame is here (illustrating) and crosses over there, and the motor is fastened along about there (illustrating), and there is another across there.

Q. How many cross members?

A. Three.

Q. When you bend this side of the frame, you necessarily have to bend this side, too?

A. Not necessarily, but it can be done. Here is a cross member here (marking on paper); you can bend the frame between the cross members.

Q. It takes a very severe blow to bend a frame, don't it?

A. Right much of a blow.

Q. Mr. Park, you run the garage yourself across the street?

A. Yes.

Q. You were in Boydton or around here during the former trial of this case, were you not?

The Court: Tell him when the case was tried.

Mr. Hodges: I don't remember.

A. I was here the last time when they started to try it.

By Mr. Hodges:

Q. Were you here when they tried it about July, 1932?

A. I don't know whether I was, or not.

Q. This is the first time you have testified or have been in the case?

A. Yes.

page 295 } RE-DIRECT EXAMINATION.

By Mr. John Hutcheson:

Q. Mr. Park, Mr. Hodges asked you if it was possible for the Baptist car to hit the Faulkner car and the Baptist car fly wheel housing to break and the Faulkner fly wheel housing not to break; what was your answer?

A. Was it possible for one fly wheel housing to break and not the other?

Q. He said if the Baptist fly wheel housing was broken, doesn't it necessarily follow that the Faulkner fly wheel housing would have broken?

A. In a lick of that kind I think the fly wheel housing on both cars would break.

Q. Did you examine the Faulkner car before it was taken away from you with respect to the dent in the lefthand door and the frame of the car?

A. I saw that the door was bent down and a lick on the side, and the car was torn all to pieces.

Q. Mr. Hodges made the statement that that was a lick in the side that bent the frame; couldn't it be just as possible for that to be caused by turning over in the road?

A. I would say a lick in the frame—that the frame was bent from the lick and not from turning over.

Q. You couldn't tell from which way the lick was received?

A. The lick on the Faulkner car?

Q. Yes.

page 296 } A. It looks to me as if the Faulkner car was hit on the left front fender, more on the end, than the Baptist car.

Q. Isn't it possible if it was hit on the end that that lick would have sprung the frame opposite the door?

A. Sprung the frame at the door?

Q. Opposite the door?

A. It would have sprung the frame a little to the front of the front door—about the end of the front door.

Q. What I am getting at, isn't it possible for the lick on the front of the Faulkner car to have sprung the frame of the Faulkner car where it was?

A. Yes.

RE-CROSS EXAMINATION.

By Mr. Hodges:

Q. Mr. Park, when did you repair the Baptist car?

A. Sometime about June.

Q. Was this bill made at the time you repaired it?

A. That is a copy of the bill.

Q. June 26, 1931; is that the time you repaired it?

A. Probably we repaired the car a few days before that time.

Q. Mr. Park, do I understand you to tell the jury that if the Faulkner car has a dent in just under the front door on the side, indicating that it was caved, that it could have been caused by hitting the frame?

A. If it was hit on the front end of the frame.

Q. But that would not give a view of the lick page 297 } in the side?

A. I don't say a lick on the front would give a view of the lick on the side, but it would bend the iron in.

Q. It would buckle?

A. Yes, sir.

W. G. BAPTIST,

the defendant, being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. Mr. Baptist, you were not present when this accident occurred?

A. No, I was not.

Q. Where were you?

A. I was at home or down town.

Q. When did you go to the scene of the accident?

A. As soon as I received a message that some one brought to me—I didn't see them, but they told me at the drug store my wife sent for me to come up near Finchley, that they had had a wreck.

Q. Was that that night?

A. It was that night.

Q. Did you make an examination of the scene of the accident and of your automobile that night?

A. I did.

Q. Did you make any examination later?

A. After it was brought here to the garage.

Q. I mean an examination of the scene

page 298 } A. Yes, I went back Sunday, too.

Q. Who was with you Sunday, or who examined it when you were there Sunday?

A. Mr. Bishop and Mr. Marvin Bales were with me. I don't know whether they went up Sunday or not.

Q. Mr. Bishop testified that he made some measurements; were you present when those measurements were made?

A. Yes, sir.

Q. Who else measured it or stepped it?

A. My brother.

Q. Mr. E. L. Baptist?

A. Yes, sir.

Q. Were you present at that time?

A. Yes.

Q. Were the measurements made by these gentlemen, Mr. E. L. Baptist and Mr. Bishop, made with respect to the marks which you saw immediately after the accident?

A. Yes, sir.

Q. Please tell the jury what you saw in the road after the accident, if anything?

A. The first thing I did when I went there—of course I went there to see if my people were all right, and I knew that they were because I had a message saying that they were not hurt. Then I went down and looked at the car on the south side of the road, and then went back to where they said the accident occurred. They had some lights there, page 299 } flashlights, and you could see where the cars went together and the wheels went down in the road and they made a dent in the road. Then we also noticed, and, in fact, as I said, my brother measured it, that my car was about seven feet, or, that is, it was at least three feet to the north of the center of the highway.

Q. North of the center of the highway?

A. Yes, sir.

Q. Which side of your car was three feet to the north?

A. The left.

Q. The left side of your car was three feet to the north of the center?

A. Yes, sir.

Q. How could you tell that?

A. From where the cars went together and it made the dent in the road, you could track to where my car went as plain as my hand.

Q. You could trace the marks from where the dent started to where your car was?

A. Yes.

By the Court:

Q. To where your car was then?

A. Yes, sir.

By Mr. Sterling Hutcheson:

Q. Your car was there then?

A. Yes, sir.

Q. And had not been moved?

page 300 } A. It had not been moved.

Q. And you traced it with a flashlight?

A. With a flashlight, and lantern, too, I believe.

Q. Mr. Baptist, was any work or repairs made on your automobile after the accident before it was brought to the garage of Park Motor Company, at Boynton?

A. There was not.

Q. When it was brought to the Park Motor Company, was it in the same condition that it was immediately after the collision?

A. Yes.

Q. Please tell the jury just what damage your automobile received in this collision?

A. The lefthand wheel was torn down, or broken in, and the lefthand fender was torn to pieces, and I think the back fender was. The axle was bent—

Q. (Interposing) Which side?

A. The left side.

Q. The fender on the left side?

A. The left side.

Q. Was there anything else injured about your car?

A. I don't think there was. I think the axle was bent. I think that was all I could see.

Q. Did you examine it pretty closely?

A. Well, I did in a way. I just looked at it. I didn't get down and look under it. I just looked at it.

page 301 } Q. What part of the left front fender was struck?

A. About twelve or fourteen inches from the front end of the left fender.

Q. How far would that put it from the hub of the left front wheel?

A. Nearly over the hub.

Q. Was the front part of your left front fender injured in any way?

A. The left front fender?

Q. The front end?

A. No, it was not.

Q. Were your headlights injured?

A. No, I don't think that they were. I am pretty sure that they were not.

Mr. Sterling Hutcheson: Now, if your Honor please, we desire to ask Mr. Baptist some questions with respect to the ownership of this automobile, and I think that they should not be asked in the presence of the jury, in view of your Honor's ruling.

The Court: All right; retire to your room, gentlemen.

Note: The jury retired from the courtroom.

Mr. Sterling Hutcheson: We are not suggesting that the jury leave.

The Court: No, but they will probably object to the testimony and I will sustain it if it was as before.

Mr. Sterling Hutcheson: You testified yesterday, as well as I recall, that this automobile is registered in your name and that the license was issued in your name.

Witness: Yes.

Mr. Sterling Hutcheson: Was that the case in June, 1931?

Witness: Yes, sir.

Mr. Sterling Hutcheson: Please state how you acquired title to this automobile?

Witness: Well, I think I stated before that the car was really a present to my wife.

Mr. Sterling Hutcheson: From whom?

Witness: From her brother.

Mr. Sterling Hutcheson: Who was he?

Witness: B. O. Come, in Richmond. The car was given to her, I think, in 1929, Christmas, 1929, but of course we all used the car, used it as a family car, and I hardly ever used the car myself. I have never used the car without asking my wife or my daughter. I didn't know when they wanted to use it, and I didn't want to keep them from using it if they wanted it.

Mr. Sterling Hutcheson: The car was registered in your name?

Witness: Yes, sir.

Mr. Sterling Hutcheson: But it was given to your wife by her brother?

page 303 } Witness: By her brother.

Mr. Sterling Hutcheson: She claimed it as her automobile?

Witness: Well, I don't know. She always used it.

Mr. Sterling Hutcheson: I believe you stated you hardly ever used the automobile yourself without asking her?

Witness: No, because I had another car and used that.

Mr. Sterling Hutcheson: So then this automobile was used almost exclusively by Mrs. Baptist and the other members of the family?

Witness: Yes, sir, more so than by anybody else. I didn't use it very often and I didn't come down there today in it; I had to get somebody else to bring me.

Mr. Sterling Hutcheson: Mr. Baptist, are you able to explain why this automobile was registered in your name?

Witness: Well, I don't know that I am. I had a car, an old car, and it was not any use to me, and Mr. Come phoned me, or I knew that they were going to give this car to my wife, and I had no use for the old car, and I said that they had as well let it go in for what it was worth, and I didn't know what they would get for the old car or what they were allowed for the old car. I didn't know about the trade being made until he told me.

page 304 } Mr. Sterling Hutcheson: Who attended to the registration of the car and the license?

Witness: I got Mr. Park to do it.

Mr. Sterling Hutcheson: Was Mr. Park the dealer from whom it was bought?

Witness: Yes, sir.

Mr. Sterling Hutcheson: And he looked after it?

Witness: Yes, sir.

Mr. Sterling Hutcheson: Did you ever tell your wife in whose name the car was?

Witness: It was sent up there with a card on it from her

brother. Mr. Park drove it up there one morning before she got up, and when she got up it was sitting in the yard with a card on it.

Mr. Sterling Hutcheson: Do you know whether Mrs. Baptist ever knew that this automobile was registered in your name?

Witness: Certainly she knew it was registered in my name.

Mr. Sterling Hutcheson: You think that she did?

Witness: I don't know that she did. I don't remember her ever asking.

The Court: Do you object to that line of testimony?

Mr. Hodges: Yes, sir.

The Court: State the objection.

Mr. Sterling Hutcheson: There is one other page 305 } matter I overlooked. On this night in question, was Miss Marjorie Baptist, or any other occupant of this automobile, on any business of yours?

Witness: No, sir.

The Court: State your objection.

Mr. Hodges: May we ask him a few questions before we do?

The Court: Yes.

Mr. Sterling Hutcheson: It seems to me that they ought to state their objection if they object to this line of questions, without cross examining.

The Court: Possibly you had better do that. If I rule it out, I don't see why you should cross examine him. State your objection.

Mr. Hodges: We object on the ground that the car had been bought and registered in Mr. W. G. Baptist's name in 1929, and again in 1930, and again January 1, 1931, and he was required to make an affidavit of ownership to secure title therefor, and he was held out to the public under that registration, and he is estopped to deny this, and he furnished a part of the purchase price for the car.

The Court: State your objection to the agency question.

Mr. Hodges: We further object to it on the ground that under the family purpose doctrine of Virginia you do not have to prove specific agency at the instant of the page 306 } accident, but the evidence of the defendant himself, and as shown in the record, is that the car was maintained by the defendant for the use of himself and

his family and members thereof at their will and pleasure, and that he could not at this place deny the agency; and, further, if it please the court, for the reason that no denial of ownership of the car was asserted by the defendant until after more than one year from the instant of the injury herein complained of, and the statute of limitations had run on the cause or action, and after which time anybody else that might have been made a party could have been made a party to it.

The Court: Objection sustained, and take an exception.

Mr. Sterling Hutcheson: Exception.

The Court: For what reason? You had better get your record straight.

Mr. Sterling Hutcheson: Our grounds of exception are that the family purpose doctrine is not the law of this state, and that the actual agency must be shown, and it must be shown that the agent was acting within the scope of her employment at the time of collision; that the certificate of registration is not conclusive evidence of ownership of the automobile; that the defendant, prior to the trial of this case and within proper time, offered to file an affidavit denying such ownership, which the court denied him to do, and that the pleading page 307 } ings contained an affidavit filed by the defendant denying that the operator of the automobile was his agent or acting within the scope of employment or of agency for him at the time of the collision; and for other reasons apparent in the record, pleadings and evidence in this case.

The Court: Are there any other questions you want to ask this gentleman before the jury comes back?

Mr. Hodges: Yes, sir.

Mr. Sterling Hutcheson: In view of the fact that you have excluded the evidence, I do not see any object in cross examining him.

The Court: Do you object to it?

Mr. Sterling Hutcheson: If they make him his witness.

The Court: I do not think it proper to examine the witness on what I ruled out. It may be error.

Mr. Sterling Hutcheson: If you think it error, we will withdraw it.

The Court: No; I think it would be error if I allowed it in.

Note: The jury returned to the courtroom.

CROSS EXAMINATION.

By Mr. Settle:

Q. Mr. Baptist, the car which your daughter was driving at

the time of the collision with Grant Faulkner was
page 308 } purchased from Park Motor Company, or from
Mr. Park, who just testified in this case?

A. Yes.

Q. And that was in 1929?

A. I think it was in 1929.

Q. Mr. Baptist, didn't you testify in the first trial of this case that the steering gear of your car and the axle, the front axle, was bent, and the left front wheel was broken off, and that you would not be positive that the headlights were not broken?

A. I did. That is right.

Q. Mr. Baptist, when you testified previously, or in the previous trial of this case, you did not testify about the marks up there in the road which you now testify were made by the cars when the wheels were broken off, did you?

A. I should have. Maybe I wasn't asked that question.

Q. Isn't it a fact that you did not testify to it?

A. I don't remember.

RE-DIRECT EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Mr. Baptist, he asked you about that headlight: You were asked if the left headlight was injured. Do you recall just what you said?

A. I said I was sure that it was not, but I would not say positively it was not. I was not sure that the headlight was, but in answering his question I couldn't say that
page 309 } said that it was not injured, but I am pretty positive it was not.

By the Court:

Q. That is your answer now?

A. Yes, sir.

By Mr. Sterling Hutcheson:

Q. Mr. Baptist, when you had the automobile repaired by Mr. Park, what were your instructions to him with respect to the amount of repairs that he was to do? In other words, was he to do what was necessary to repair the car:

A. I told him to do what was necessary to repair the car.

Q. You paid for the repairs and settled by that bill, didn't you?

A. Yes.

Mr. Sterling Hutcheson: The defendant rests at this time, and we indicated yesterday that we thought it would be well for the jury to view the scene of the accident.

The Court: Don't put this in the record. Do you know the place up there very well.

A Juror: I believe not.

The Court: I will let the jury go up there with the sheriff, and we can work on the instructions while they are there.

Mr. Hodges: We would like to introduce one page 310 } more witness in rebuttal.

The Court: Finish your evidence, and then I will send them with the sheriff. I will not let any of you go. You rest your evidence with that exception. The motion for a view is granted.

MISS SALLIE STEBBINS,

a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Examined by Mr. Settle:

Q. Did you report the evidence in this case at the first trial thereof for the plaintiff?

A. Yes, sir.

Q. Have you your original stenographic notes with you?

A. Yes, sir.

Q. Please refer to your notes of the evidence of Hiawatha Towls, and state whether or not this question was asked him at the first trial of this case: "Are you able to tell the jury which side of the center line of the road Mr. Baptist's car was on?"

A. Yes, sir, I have it right here.

Q. Read his answer?

A. "A little bit on his side."

Mr. Sterling Hutcheson: Where was it—on cross examination?

page 311 } Mr. Settle: Direct examination.

Witness: Direct examination, a little after the beginning.

By Mr. Settle:

Q. Now, please state if this question was asked him: "After the collision, what did you see next?"

A. Yes, sir.

Q. What was his answer?

Mr. Sterling Hutcheson: If your Honor please, before

proceeding further, the defendant would like to state this, that if this is an effort to impeach Hiawatha Towles, no ground was laid for it.

The Court: I disagree with you; the foundation was laid.

Mr. Sterling Hutcheson: Your Honor overrules the objection?

The Court: Yes.

Mr. Sterling Hutcheson: Exception.

By Mr. Settle:

Q. Read it?

A. "Another car came along and hit the Faulkner car."

Q. Continue to read?

A. "Did it stop?" "No, sir, it ran into it and hit the bumper or fender, and he got out of there and ran and page 312 } stepped down on it."

By Mr. Sterling Hutcheson:

Q. Will you read that over?

A. "Another car came along and hit the Faulkner car." "Did it stop?" "No, sir, it ran into the car and hit the bumper or fender, and he got out of there and ran and stepped down on it." "What kind of car?" "I don't know." "Do you know who it was?" "No, sir."

By Mr. Settle:

Q. That is the part I wanted right there. Please state if this question was asked him: "Miss Baptist's car, after the collision, where did it go?"

A. Yes, sir, I have that.

Q. Read his answer and continue?

A. "It came towards me and then made a curve to the right."

Q. Continue to read.

A. "How far did it go?" "About thirty yards, maybe more and maybe less." "To the lefthand side?" "Yes, sir."

The Court: Any questions, gentlemen?

Mr. Sterling Hutcheson: Yes, sir.

CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Miss Stebbins, how many cases have you reported?

A. This is the only case I have ever reported. I have reported all three trials, though.

page 313 } Q. All three trials?
A. Yes, sir.
Q. That was the first trial?

A. Yes.

Q. The June trial?

A. Yes, but I have had a year's experience in legal stenographic work.

Q. This trial in June was the first you had taken, was it not?

A. Yes, sir.

Q. You said you have had a year's experience in legal stenographic work; where was that you had that experience?

A. In Mr. Settle's office, in South Boston.

The Court: Put it McKinney & Settle.

Witness: McKinney & Settle, in South Boston.

By Mr. Sterling Hutcheson:

Q. What do you term legal stenographic work?

A. General work in a law office, writing bills and taking depositions; I have taken depositions at times, but just general office routine.

Mr. Sterling Hutcheson: That is all.

page 314 } CHARLES CARTER (Colored),
a witness on behalf of the plaintiff, recalled, testified in rebuttal as follows:

Mr. Hodges: If your Honor please, I move the court that Charlie Carter be required to stand at the place where he stood that night when he saw the accident.

The Court: It is not proper.

Mr. Hodges: It is to let him stand where he was to let them see.

The Court: It is improper, and the motion is overruled.

By Mr. Hodges:

Q. Charlie, have you today been to the point with me where you stood on the night that you saw the accident between these cars?

A. Yes, sir.

Q. Who went with you and me?

A. Mr. Hodges and that man standing over yonder.

Q. Mr. Smithson?

A. Yes, sir.

Q. The Deputy Sheriff?

A. Yes, sir.

Q. Where is that spot?

A. Right on the old highway just a few steps off, right on the bank.

Q. In that field?

A. In the field where the soil was taken off.

page 315 } Q. Just this side of the piece of woods opposite where the accident happened?

A. Yes, sir.

Q. The two highways are parallel?

A. Yes, sir.

Q. Did you point out to Mr. Bernard Smithson the point where you stood and saw the accident?

A. Yes, sir.

Q. Can you see the accident from the spot where you stood?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. John Hutcheson:

Q. Yesterday you testified that when you saw this Baptist car coming, and when you heard the collision, that you were half way between Liberty Church and Finchely; is that a fact?

A. Yes, sir.

Q. And that you were in the old road?

A. Yes, sir.

Q. And that you were on the top of the second little rise from Finchely?

A. Yes, sir, the second rise is exactly right.

Q. You go down from Mr. Jeffress' store, and then you go up a hill?

A. That is right.

Q. And then you go down a little bit more and come up another hill?

page 316 } A. It goes down the hill from Mr. Jeffress' store and takes the next little rise, and on that little rise was where I was in the edge of the field where the soil was taken off.

Q. You were standing in the road on that rise?

A. In the edge of the field where the soil was taken off.

Q. And you said from that point you saw these two cars run together, the Grant Faulkner car and the Baptist car?

A. I didn't say I saw the cars run together. I say you

could see there from where I was standing, and if I had been paying attention the way the car was going, I could have seen it, but I told you I wasn't paying that much attention, but I saw the reflection of the light.

Q. Didn't you say yesterday you saw the two cars run together?

A. No, sir.

Q. Do you deny you said yesterday you saw them run together?

A. I didn't say I saw them run together.

Q. Didn't you say you saw the Baptist car just as the two cars run together?

A. No, sir, I didn't say that.

RE-DIRECT EXAMINATION.

By Mr. Hodges:

Q. In order that the jury may understand page 317 } (some of these gentlemen know where you were),
it is near where the two roads come together,
where the soil was taken out?

A. Yes, sir.

Q. You were out on that soil ground?

A. Yes, sir.

Q. And you could see straight down the road?

A. Yes, sir, straight down the road.

RE-CROSS EXAMINATION.

By Mr. John Hutcheson:

Q. I do not believe that this testimony makes any difference as he did not see the cars. I do not understand the intent of it, but I want to place him exactly. The old road and the new road curve right at Mr. Jeffress' store?

A. Yes, sir.

Q. A considerable little distance, a still older road which used to go to Finchley runs into the old road that you were in; isn't that a fact, and there is a path coming out from Mr. Creedle's store right to this old road you were walking in; isn't that a fact?

A. Sure, there is a road comes from the gate to the old highway.

Q. You were on top of the hill nearer to the church than this road was that comes out from Finchley?

A. Nearer to the church?

Q. You were nearer back to the church than that road?

A. Right on top of that little rise.

page 318 } Q. There is a branch there?

A. There is a branch in the bottom and this old road comes across there and into the old highway. I was in the road that comes out from Finchley, and standing on top of the rise where the soil was taken off.

Q. You were in the old road?

A. No, sir, not exactly.

Q. Didn't you say yesterday you were coming down the old road from Liberty Church?

A. I said I was coming down the old road.

Q. Now, you say you were out of the road?

A. Now, it is natural a person would step out of the road to relieve themselves.

Q. Where were you?

A. Coming down by the old highway, coming from Liberty Church, and I stepped out of the edge of the road and right where this old road and the good road they are pretty near level on that rise.

Q. You said you were three hundred yards from that curve; when the Baptist car came around the curve, you were about three hundred yards?

A. I said when I first saw the car it was about three hundred yards from me.

Q. Where did you first see it?

A. Coming around the curve at Mr. Jeffress'.

Q. Had it gotten into the curve when you first
page 319 } saw it?

The Court: I think you have gone half dozen times into the same thing.

Mr. John Hutcheson: This man has not yet said where he was.

The Court: I think he has.

Mr. John Hutcheson: We except to the ruling of the court.

BERNARD SMITHSON,

a witness on behalf of the plaintiff, being duly sworn, testified in rebuttal as follows:

Examined by Mr. Hodges:

Q. You are an officer of the court here?

A. Yes, sir.

Q. Did you go with Charlie Carter and myself out to the scene of the accident at the noon hour?

A. Yes, sir.

Q. Did Charlie Carter point out to you and stand at the point where he says that he was standing the night the accident occurred between these two cars?

Mr. Sterling Hutcheson: The only thing Mr. Smithson can testify to is what Charlie Carter said as to where he was. Charlie Carter has testified, and they heard him testify as to his location at the time of the accident, and the jury is going to have a view of the scene of the accident. We page 320 } do not know where Charlie Carter placed himself when he went up with Mr. Hodges and Mr. Smithson, and we submit the proper way for them to determine where Charlie Carter was is what he said on the witness stand.

The Court: Yes, but I think they can ask if they could see the car from that distance.

Mr. Sterling Hutcheson: This man said that he was on the second rise.

The Court: Suppose the jury believes that he was in Chase City when some one says that he was in Clarksville?

Mr. Sterling Hutcheson: Why can't the jury determine that from Charles Carter's testimony?

The Court: They can determine it from Charles Carter, but I will let Smithson say whether he could see the car.

Mr. Sterling Hutcheson: We except.

The Court: Not from that place, but where the man said that he was.

By Mr. Hodges:

Q. You heard Charlie Carter testify in court as to where he was when the accident took place?

A. Just a minute ago.

Q. Can you tell the jury from the spot you heard him testify to on the witness stand that you could see the scene of the accident?

Mr. John Hutcheson: We object.

The Court: The objection is overruled. Exception.

page 321 } A. From where Charlie Carter said the wreck happened and where he said that he was standing at the road was in plain view.

By Mr. Hodges:

Q. From where he said it was?

A. From where he said he was standing and where the wreck occurred.

Mr. John Hutcheson: We move to exclude that. None of those points is connected up. Mr. Smithson is testifying what he testified on the stand. The jury is the sole judge of whether he said that he was there. If Mr. Smithson can say that he went to that point and looked to another point it is evidence, but in this case he is basing his opinion on where Charlie Carter said that he was, and to me it is not clear where Charlie Carter said that he was, and to me it is not clear where Charlie Carter was.

The Court: That is for the jury to pass on. I am letting this man's testimony in saying that he could stand at a certain point and see to another point. The objection is overruled. Save the point.

CROSS EXAMINATION.

By Mr. Sterling Hutcheson:

Q. Did you see a persimmon tree on the righthand side of the highway up there?

A. Yes, sir.

Q. Where did Charlie Carter put this accident page 322 } with relation to that persimmon tree?

A. Mr. Hutcheson, I noticed the persimmon tree, but I didn't—I suppose you mean whether it was above or below it?

Q. Yes.

A. I didn't notice that. This is the first time I ever noticed the place in any way.

Q. Then you are not able to say whether he told you it was west of the persimmon tree or not?

A. I can go and show you about the spot where he said it was, but as to pointing out the persimmon tree, whether above or below it, I couldn't, no, sir.

Mr. Sterling Hutcheson: We still feel, your Honor, that the place where Charlie Carter said the wreck happened has not been sufficiently established.

The Court: Save the point. I have ruled on it three times.

Mr. Sterling Hutcheson: Yes, sir, but I don't want to lose it.

The Court: Is there any other evidence?

Mr. Sterling Hutcheson: Yes, your Honor.

If your Honor please, we have here the stenographic record of the trial at the June term, made by Messrs. Phlegar & Tilghman, Shorthand Reporters, Norfolk. Miss Stebbins has testified heretofore to certain testimony of page 323 } Hiawatha Towles, as disclosed by her notes. We not care to introduce this record in evidence, but we do do move that we be permitted to prove the record by Mr. Phlegar, who is here, and read to the jury the stenographic report of Messrs. Phlegar & Tilghman covering that portion of the record as testified to by Miss Stebbins. I will say this, that there is no material difference, but still there is a difference, showing that Mr. Phlegar got more of the testimony than Miss Stebbins did. I say its not material, but it is material.

The Court: If Mr. Phlegar will testify that he took this record and that this copy which you have is a correct, true and accurate statement of his notes, it will be allowed.

D. S. PHLEGAR,
being duly sworn, testified as follows:

Examined by Mr. Sterling Hutcheson:

Q. Mr. Phlegar, is this a copy of the record of the testimony taken in this case on June 29, 1932, by you or by your firm?

A. It was taken by me, yes, sir.

By the Court:

Q. Is that a correct and true transcript of your notes as taken at that time, Mr. Phlegar?

A. It is.

The Court: Go ahead.

Mr. Stering Hutcheson: Judge, I never have done this before, and I don't know exactly what we are page 324 } supposed to do in getting it in. I would be glad for Miss Stebbins or Mr. Settle to have her notes covering this to check it up.

The Court: I think you can read the testimony. I never saw it done before.

Mr. Sterling Hutcheson: I have marked it in pencil there.

The Court: Just read the section.

Mr. Sterling Hutcheson: At line 1, on page 120, this question was asked Hiawatha Cowles. I want to call the court's attention that his name is spelled T-o-w-l-e-s.

“Q. Now, Hiawatha, are you able to tell the jury which side of the center line of that hard surface Mr. Baptist’s car was on when the collision took place?

A. I guess a little bit on the righthand side.

Q. On the righthand side?

A. Yes, sir.”

Then on line 17—(there was some other testimony intervened):

“Q. After the collision what did you see next? I mean after the Baptist car had gone and stopped?

A. Another car came along and hit the Faulkner boy’s car.

Q. Which way was that car coming from?

A. From this way towards Clarksville.

Q. Did that car stop?

A. I don’t know whether he hit the bumper or fender, but he scrambled around enough to get away, and he
page 325 } stepped down on it.

Q. What sort of car was he driving?

A. I couldn’t tell you.

Q. Do you know who was driving?

A. No, sir.”

Mr. Settle: She had the same thing, but I didn’t read it.

Mr. Sterling Hutcheson: On page 122, line 23:

“Q. Mr. Baptist’s car, after the collision, which way did it go—towards you?

A. Yes, sir, straight towards me and made a curve.”

Then on page 123, which I think is the last one, line 11:

“Q. How far do you think it went after it struck the Faulkner car?

A. I don’t know, sir, but thirty yards and maybe more.

Q. How much?

A. Thirty some odd yards.

Q. And went to the left side of the road?

A. Yes, sir.”

Mr. Settle: I asked that because he testified today thirty feet.

The Court: I noticed that, to

Mr. Sterling Hutcheson: As I said, this testimony here amplifies the testimony.

By the Court:

Q. That is correct as to what he testified the last time, is it, Mr. Phlegar?
page 326 } A. Yes, sir.

The Court: Swear the Sheriff to take charge of the jury and bring them back. Gentlemen of the jury, you will retire with the Sheriff and go to this place. You are in charge of the Sheriff, and you will not talk to any one, but may talk among yourselves. Be back in a reasonable time.

MOTION TO STRIKE EVIDENCE:

Mr. John Hutcheson: The defendant, by counsel, moves the court to strike from the record all the evidence with respect to the condition of the Grant Faulkner automobile, upon the ground that it appears from all the evidence that this automobile was in another severe collision after being in collision with the Baptist automobile; and, further, that it appears that this automobile was moved from the scene of the collision, seven miles to the town of Boydton, and from thence to Hico, and again loaded and brought to the town of Boydton, some thirty-five miles, and again to Hico and again to Boydton, and then loaded and hauled several hundred yards to the yard of W. R. Beales, Sheriff, and there exposed to the elements for some two months, and
page 327 } the jury should be instructed that any evidence introduced or conclusions reached by a view of the automobile should not be considered by them.

The Court: The motion is overruled.

Mr. John Hutcheson: The defendant excepts for the reasons stated.

INSTRUCTIONS AND EXCEPTIONS THERETO:

Plaintiff's Instruction No. 1 (Granted):

"The court instructs the jury that the law of this state is that where one (who is free from negligence on his part contributing to and being the proximate cause of the injuries complained of) sustains injuries resulting in his death as the result of the negligence of another, then the estate of the person so injured and dying is entitled to recover

of the person inflicting said injuries and causing said death a sum not in excess of \$10,000. And if the jury shall believe from the evidence that Grant Faulkner came to his death as a result of the negligent operation of the defendant's automobile, as alleged in the notice of motion, then they should find for the plaintiff in a sum not in excess of \$10,000, the amount claimed in the notice of motion." (Granted, N. S. T. JR., Judge, 10/28/32.)

page 328 } *Plaintiff's Instruction No. 2 (Granted)* -

13 20 2-17 19 4 - 2 = 170 - 55 -
 "The court instructs the jury that the law of this state is that where a father maintains an automobile for the comfort, use and convenience of the members of his family, as well as for the use of himself in his business and for his pleasure, and such automobile is driven by members of his family with his knowledge and express or implied permission, the father becomes liable for any injuries caused by the negligent operation of such automobile by such members of his family." (Granted, N. S. T., JR., Judge, 10/28/32.)

Mr. Sterling Hutcheson: The defendant excepts to the giving of Instruction No. 2 for the plaintiff upon the ground that it does not correctly state the law; that the family purpose doctrine is not the law in Virginia; that no agency between the operator of the automobile and the defendant has been shown, nor has it been shown that the automobile was being operated on any business of the defendant or by the consent of the defendant at the time; and upon the further ground that the evidence is to the effect that the automobile is not used by the defendant in his business or pleasure, but, on the contrary, it is shown that the automobile was not so used by the defendant.

Plaintiff's Instruction No. 3 (Granted):

13 proximate cause 7
 "The court instructs the jury that the 'proximate cause' of an injury is that cause which naturally leads to
 page 329 } and may have been expected to be directly instrumental in producing the injury. It is that act which directly produced or concurred in producing the injury. It is that cause which is the natural and probable consequence, and the cause without which the injury would not have resulted. There may be more than one proximate cause." (Granted, N. S. T., JR., Judge, 10/28/32.)

Mr. Sterling Hutcheson: The defendant excepts to the giving of Instruction No. 3 upon the ground that it is ambiguous and it is error for the court to undertake to attempt to define proximate cause.

Plaintiff's Instruction No. 4 (Granted):

"The court instructs the jury that if they find for the plaintiff they may award such damages as to them from the evidence may seem fair and just not exceeding \$10,000, the amount claimed in the notice of motion, and they may direct in what proportion the damages shall be distributed among Daniel and Sarah Faulkner, the mother and father of the deceased, and the following named brothers and sisters of the said Grant Faulkner: Archie Faulkner, Oscar Faulkner, Daniel Faulkner, Jr., Fannie Stokes, Emma Wilkerson, Mary Maury, Grace Murphy, Lacy Woody, Andrew Faulkner, Jesse Faulkner.

"The court further tells the jury that as the above named parents and brothers and sisters of Grant Faulkner are all members of the same class, the jury have absolute discretion to determine and say who of the above named persons shall receive the whole or any part of such damages. That is to say, the jury may award the whole of such damages to the parents of the deceased, or the whole thereof to the brothers and sisters of Grant Faulkner, or divide such damages among the father and mother and brothers and sisters in such proportions or in such manner as the jury may deem proper." (Granted, N. S. T., JR., Judge, 10/28/32.)

Plaintiff's Instruction No. 5 (Granted):

"The court instructs the jury that in the case now on trial W. G. Baptist denies liability on the ground that Grant Faulkner was guilty of contributory negligence resulting in the injuries complained of in this suit. In such a case the court instructs the jury that Grant Faulkner is presumed to have exercised due and proper care in the operation of his automobile at the time he received the injuries resulting in his death, and the burden rests upon the defendant, Baptist, to prove by a preponderance of the evidence that Grant Faulkner was guilty of contributory negligence on said occasion which contributed to his injuries and death, and that such contributory negligence was a proximate or contribut-

ing cause of the injuries received by him resulting in his death, unless the jury shall believe that such contributory negligence appears from the plaintiff's own evidence. And the court further tells the jury that if they shall believe from the evidence that the defendant's negligence is established by a preponderance of the evidence, and even though Grant Faulkner was guilty of contributory negligence, yet unless this contributory negligence was a proximate or contributing cause of the injury, they should find for the plaintiff." (Granted, N. S. T., JR., Judge, 10/28/32.)

Mr. Sterling Hutcheson: The defendant excepts to the giving of Instruction No. 5 for the plaintiff upon the ground that it ignores any defense except that of contributory negligence; that it tells the jury that contributory negligence proven must be the proximate cause of the injury when, as a matter of fact, such negligence of the plaintiff's intestate would merely have to be such as contributed to the injury to bar a recovery. Any negligence on the part of plaintiff's intestate contributing to the injury would bar a recovery, and the jury should be so told, but under the instruction as given it would appear that the jury could weigh one negligence against the other, but there can be no such thing as concurring negligence in a case of this kind, although under the instruction as prepared it would appear that this is ignored; on the further ground, that the instruction should tell the jury that such evidence of contributory negligence may be shown partly by the plaintiff's evidence and partly by the defendant's.

page 332 } *Plaintiff's Instruction No. 5½ (Refused):*

13 *Crane v. H. G.*
 "The court instructs the jury that in the case now on trial, the defendant, Baptist, denies liability on the ground that the plaintiff's intestate, Grant Faulkner, was guilty of negligence contributing to his death. In such a case the court instructs the jury that the burden rests upon the defendant, Baptist, to prove by a preponderance of the evidence that Grant Faulkner was guilty of negligence which contributed to his death, and if the jury shall believe that the defendant's negligence is proved by a preponderance of the evidence and that the contributory negligence charged against Faulkner has not been proved by a preponderance of the evidence, then the jury should find for the plaintiff, R. R. Slate, Ad-

ministrator of Grant Faulkner." (Refused, N. S. T. JR., Judge, 10/28/32.)

Mr. Hodges: Counsel for the plaintiff excepts to the action of the court in refusing Instruction No. 5½, as offered by the plaintiff, on the ground that Instruction 5½ correctly propounds the law in the case, and peculiarly fits the facts as proven.

Plaintiff's Instruction No. 6 (Granted):

"The court instructs the jury that in arriving at their verdict in this case, it is the jury's right and duty to consider the verbal testimony given by the witnesses on the witness stand and all facts proven in the case and the circumstances surrounding the collision complained of on the night of June 6, 1931, and the condition of Grant Faulkner's car at the time the same was shown to the jury, provided they shall believe from the evidence that said Faulkner's car was in the same condition when they saw it as it was immediately after the collision, as well as any other exhibit admitted in evidence."

"The court further tells the jury that they alone are the triers of the facts in this case, and that they have a right to determine what weight shall be given to the testimony of the witnesses in the case, and that they have a right to believe any one witness to the exclusion of any number of witnesses testifying to the contrary." (Granted, N. S. T., JR., Judge, 10/28/32.)

Mr. Sterling Hutcheson: The defendant excepts to the giving of Instruction No. 6 for the plaintiff upon the ground that all the evidence in the case is to the effect that the Faulkner automobile is not now in the same condition that it was immediately after the accident; that the testimony of the witnesses for both plaintiff and the defendant show that the automobile was involved in a second collision before it had been examined, and almost immediately after the accident the testimony of the plaintiff is to the effect that the automobile had been loaded and unloaded from a truck as many as six times since the collision and carried back and forth from Hico, in Halifax County, twice, making four trips, and has been exposed to the weather since August, and the court should instruct the jury as a matter of law that they cannot consider the present con-

dition of the automobile of the plaintiff's intestate in arriving at a verdict.

Defendant's Instruction A (Granted as amended):

B preponderance of ev.
 "The court instructs the jury that the basis of an action of this kind is negligence, which negligence cannot be presumed from the mere fact that the plaintiff's intestate was injured in a collision with the automobile of the defendant. Before the plaintiff can recover in this case, he must prove by a preponderance of the evidence, not only that Miss Baptist, the operator of the defendant's automobile, was negligent, but that she was negligent as charged in the notice of motion and that the negligence charged was the proximate cause of the death of the plaintiff's intestate. If, after hearing all the evidence, you believe it just as probable that the accident happened in some other manner and from some other cause as from that charged in the notice of motion, your verdict should be for the defendant." (Granted, N. S. T., JR., Judge, 10/28/32.)

Note: The last seven words of Instruction A, as presented, read "your verdict must be for the defendant" instead of "your verdict *should* be for the defendant."

page 335 } Mr. Sterling Hutcheson: The defendant excepts to the action of the court in changing Instructions A, B, C, D and E tendered by him by the substitution of the word *should* for the word *must* in the last line of each instruction mentioned, upon the ground that the instructions as tendered correctly state the law applicable, that the jury should be told positively and emphatically that if they find the facts are as set out in those instructions, their verdict *must* be for the defendant.

Defendant's Instruction B (Granted as amended):

B proximate cause
 "The court instructs the jury that the plaintiff is not entitled to recover in this action unless the defendant was guilty of the negligence charged in the notice of motion for judgment, and that that negligence was the proximate cause of the accident, and unless they believe from the evidence that the particular negligence charged in the notice of motion for judgment was the proximate cause of the accident, they should find for the defendant." (Granted, N. S. T., JR., Judge, 10/28/32.)

Note: The last six words in this instruction, as presented, read "they *must* find for the defendant" instead of "they *should* find for the defendant". Counsel for the defendant excepted to this change on the grounds stated in the exception to Instruction A.

page 336 } Mr. Settle: Counsel for the plaintiff except to the action of the court in granting Instruction B, offered by the defendant, on the ground that the same is covered by Instruction A, granted for the defendant, and that Instruction B is repetition of the law stated in Instruction A and unduly emphasizes the burden of proof resting upon the plaintiff.

Defendant's Instruction C (Granted as amended):

Concurring N.Y.
 "The court instructs the jury that if they believe that the plaintiff's intestate, Faulkner, was negligent and that his negligence was a contributing cause of the injuries, they cannot find a verdict for the plaintiff but must find a verdict for the defendant. If the jury believe that the operators of both automobiles were negligent and that the damage to the plaintiff's intestate, Faulkner, resulted from such combined negligence and that such negligence continued to the moment of the collision, then they cannot weigh the negligence of the one against that of the other, for the negligence of the plaintiff's intestate, if any, bars a recovery under such circumstances, and the jury should find for the defendant". (Granted, N. S. T., JR., Judge, 10/28/32.)

Note: The last eight words of this instruction, as presented, read, "and the jury *must* find for the defendant" instead of "and the jury *should* find for the defendant" to which modification or change counsel for the defendant excepted on the grounds stated in exception to Instruction A.

Mr. Settle: Plaintiff excepts to the action of the court in granting Instruction C, offered by the defendant, on the ground that the same does not correctly state the law applicable to the case on trial and ignores entirely the question of the contributory negligence of the plaintiff, if any, having been a remote cause and not the proximate cause of the injury complained of.

Defendant's Instruction D (Granted as amended):

B equal weight
 "The court instructs the jury that the burden of proof is on the plaintiff to make out his case by a preponderance of evidence and that if they find the evidence evenly balanced, their verdict must be for the defendant. In other words, the plaintiff's claim to recover in this action must be established by evidence which, in the opinion of the jury, outweighs the evidence produced by the defendant to resist the plaintiff's claim. If, therefore, in the opinion of the jury, the weight of evidence on each side is exactly equal, the plaintiff should fail in his recovery". (Granted, N. S. T., JR., Judge, 10/28/32.)

Note: The last seven words of this instruction, as presented, read "the plaintiff *must* fail in his recovery" instead of "the plaintiff *should* fail in his recovery", to which the defendant excepted on the grounds stated in exception to Instruction A.

page 338 } Mr. Settle: The plaintiff excepts to the granting of Instruction D, offered by the defendant, on the ground that the same does not correctly state the law applicable to the case on trial, and unduly emphasizes the burden of proof resting upon the plaintiff necessary to entitle him to a recovery in this case.

Defendant's Instruction E (Granted as amended):

B N. S. T., JR.
 "The court instructs the jury that if they believe from the evidence that the Baptist car, at the time of the collision, was being operated on its right of the center line of the highway and at a proper rate of speed and under proper control, then they should find for the defendant". (Granted, N. S. T., JR., Judge, 10/28/32.)

Note: The last seven words of this instruction as offered read "then they *must* find for the defendant" instead of "then they *should* find for the defendant", to which counsel for the defendant excepted on the grounds stated in exception to Instruction A.

Mr. Settle: Plaintiff excepts to the action of the court in granting Instruction E offered by the defendant on the ground that the same entirely ignores the doctrine of the last clear chance, and insists that the instruction, if given, should be so amended as to embrace the doctrine of the last
 page 339 } clear chance, and that the jury should be instructed with regard to the law thereto.

The Court: There is no evidence in the record by the plaintiff or the defendant upon which the last clear chance doctrine could be invoked.

Defendant's Instructions F (Refused):

B - 1 - agency
 "The court instructs the jury that before the plaintiff can recover against the defendant, the plaintiff has to prove by a preponderance of the evidence that at the time of the accident the driver of the automobile, Miss Marjorie Baptist, was acting as the agent of the defendant, W. G. Baptist, and that she was driving the automobile on his business in the scope of her employment." (Refused, N. S. T. JR., Judge, 10/28/32.)

Mr. Sterling Hutcheson: The defendant excepts to the action of the court in refusing to grant Instruction No. F offered by him upon the ground that under the evidence, the pleading and the law applicable, the plaintiff is not entitled to recover unless it is shown that the operator of the defendant's automobile was acting as the agent of the defendant and driving his car in his business and within the scope of her employment at the time of the collision, and that there is no evidence to prove these facts in the record; furthermore, the family purpose doctrine is not the law page 340 } of this state, and the instruction as tendered correctly states the law; and, upon the further ground, that the court should have permitted the defendant to introduce his testimony before the jury with respect to the ownership of the automobile and the circumstances with respect to agency under which it was being operated at the time of the collision.

Defendant's Instruction G (withdrawn).

Defendant's Instruction H (Granted):

B - 2 -
 "The court instructs the jury that negligence on the part of the operator of the Baptist car cannot be presumed in this case but that it must be shown by the plaintiff by a preponderance of the evidence. Otherwise, the plaintiff cannot recover." (Granted, N. S. T., JR., Judge 10/28/32.)

Mr. Hodges: Plaintiff, by counsel, excepts to the action of the court in granting Instruction H, as asked for by the defendant, on the ground that Instruction H is fully cov-

ered by Instruction D granted for the plaintiff and unduly emphasizes the burden on the plaintiff.

Defendant's Instruction I (Refused):

“The court instructs the jury that if they believe from the evidence that Grant Faulkner and Miss Marjorie Baptist were both guilty of negligence, and that the page 341 } negligence of both caused the death of Grant Faulkner, then your verdict must be for the defendant, even though you may believe from the evidence that the degree of negligence of Miss Baptist was greater than that of the Grant Faulkner.” (Refused, N. S. T., JR., Judge, 10/28/32.)

Mr. Sterling Hutcheson: We wish to except to the action of the court in refusing Instruction I offered by the defendant upon the ground that the instruction correctly states the law and is not covered by other instructions given; that the instruction as offered covers the comparative negligence of the operators of the two automobiles involved in the collision, and the jury should be instructed upon that point.

The court therupon adjourned until tomorrow morning, October 29, 1932 at 10:00 o'clock.

MORNING SESSION,

page 342 } Boydton, Virginia, October 29, 1932.

The court met pursuant to adjournment of yesterday.

Present: Same parties as heretofore noted.

Note: The court read the instructions to the jury.

The case was then argued to the jury by Mr. Hodges, on behalf of the plaintiff; by Mr. John Hutcheson and Mr. Sterling Hutcheson on behalf of the defendant, and by Mr. Settle on behalf of the plaintiff.

The jury retired at 12:28 to consider its verdict, and returned to the court room at 1:13 with the following:

“We, the jury, find for the plaintiff in the amount of \$3,000.”

The Court: Take your seats, gentlemen; that verdict is not correct. Gentlemen, under the law in Virginia you must state how this money is to go and to whom. You were instructed along that line. Did you consider that?

The Jury: Yes, sir, we understood that we could do it, or not.

The Court: The instruction I gave you told you that you must divide this money among his people or give it to one or two.

The Jury: After paying the debts, we wanted page 343 } the mother and father to have it.

The Court: You wanted it to go to the mother and father and not to the brothers and sisters?

The Jury: To his mother and father.

The Court: Gentlemen, listen to it: "We, the jury, find for the plaintiff, and assess his damages at \$3,000, this amount to be divided equally between Daniel Faulkner, Sr., and Sarah Faulkner, the father and mother of the deceased, Grant Faulkner." Is that your verdict, gentlemen?

The Jury: Yes, sir.

The Court: Come here and sign it.

Note: The foreman signed the verdict.

The Court: "We, the jury, find for the plaintiff, and assess his damages at \$3,000, this amount to be divided equally between Daniel Faulkner, Sr., and Sarah Faulkner, the father and mother of Grant Faulkner, deceased."

Is there any motion you want to make before the jury is discharged?

Mr. Sterling Hutcheson: We wish that the jury retire to their room, as we desire to make a motion not in the presence of the jury at this time.

The Court: Gentlemen, retire to your room.

Note: The jury retired from the court room.

Mr. Sterling Hutcheson: If your Honor please, we move that we be permitted to ask the jurors whether or not they knew that the question of insurance was involved page 344 } in this case, or knew that the defendant was insured.

The Court: Overruled.

Mr. Sterling Hutcheson: We except.

The Court: You might have asked that in the *voir dire*.

Mr. Sterling Hutcheson: We couldn't ask it on the *voir dire*.

The Court: You can't ask is now.

Are there any other motions you wish to make?

Mr. Sterling Hutcheson: If your Honor please, we also move that the court declare a mistrial upon the ground that the verdict of the jury has been materially changed since the jury reported.

The Court: I will not do that. I will poll them on the verdict.

Mr. Sterling Hutcheson: We would like to note an exception and save the point, and state our position. We take the position that it cannot be cured by polling the jury. The verdict was really suggested inferentially.

The Court: The verdict of the jury was for \$3,000, and they simply overlooked the fact of how it should go.

Mr. Sterling Hutcheson: The court stated that they could either specify, or not, where the money was to go, and one of the jurors said, in reply to your Honor's question, that they wanted it to go to pay his debts and the balance to the parents.

The Court: If he is free of debt.

page 345 } Mr. Sterling Hutcheson: Which shows that that was in the jury's mind when they asked the question.

The Court: Overruled. Bring the jury back.

Note: The jury returned to the court room.

The Court: Poll the jury, Mr. Clerk.

Mr. Sterling Hutcheson: Of course this is being done under protest from us.

The Court: Of course. Poll the jury.

The Clerk: Mr. Creedle, was that your verdict rendered here for \$3,000?

Juror: Yes, sir.

The Court: The \$3,000 to be divided equally between the mother and father, Sarah Faulkner and Daniel Faulkner, Sr.?

Juror: Yes, sir.

The Clerk: Mr. Gordon, was that your verdict?

Juror: Yes, sir.

The Clerk: Mr. Brewer, was that your verdict?

Juror: Yes, sir.

The Clerk: Mr. Wells, was that your verdict?

Juror: Yes, sir.

The Clerk: Mr. Russell, was that your verdict?

Juror: Yes, sir.

The Clerk: Mr. Winn, was that your verdict?

Juror: Yes, sir.

The Clerk: Mr. Evans, was that your verdict?

Juror: Yes, sir.

The Court: Gentlemen of the jury, you are discharge 346 } charged from the further consideration of the case, and also discharged until the first day of November, which is Tuesday, at 10:00 o'clock.

Mr. Sterling Hutcheson: If your Honor please, we move that the verdict of the jury be set aside upon the following grounds:

(1) On account of the change of the verdict as mentioned in our motion in the absence of the jury, the defendant contending that the verdict was materially changed;

(2) For error of the court in refusing to permit the defendant to file the affidavit denying the ownership of the automobile and to file additional amended and/or supplemental grounds of defense;

(3) Because the verdict is contrary to the law and the evidence and without evidence to support it;

(4) For error of the court in admitting improper evidence on behalf of the plaintiff;

(5) For error of the court in rejecting proper evidence offered by the defendant;

(6) For error in granting improper instructions tendered by the plaintiff;

(7) For error of the court in refusing proper instructions tendered by the defendant;

(8) For error of the court in making improper amendments of changes in instructions tendered by the defendant.

page 347 } We would like to be heard on it.

The Court: Gentlemen, you have argued this case so often before me, and this is the second or third time it has been tried—

Mr. Sterling Hutcheson: (Interposing) Let me add this ground:

(9) For the refusal of the court to permit the defendant to propound to the jury the question mentioned in the absence of the jury, while they were in their room.

The Court: I will not add that. Put it this way: For refusal of the court in permitting the defendant to ask the jury, after they had rendered their verdict, whether they knew that the defendant was insured.

Mr. Sterling Hutcheson: I would suggest that the record show just what I stated and all your Honor stated.

The Court: No.

Mr. Sterling Hutcheson: I don't think that was unlike it.

The Court: Read it back.

Mr. Sterling Hutcheson: It is not necessary to do that.

The Court: Is there any other objection?

Mr. Sterling Hutcheson: No.

The Court: I don't want to cut you off from arguing it, but this case has been tried two or three times and my mind is pretty definitely made up. I do not think there are any errors in the conduct of the case. I do not think it would be permissible for you to poll the jury about any-
page 348 } thing, after the verdict is brought in, and especially about the insurance. I think the instructions are correct unless in giving the instructions as to the family purpose doctrine and in refusing yours. That question does not seem to have been definitely passed on. If there was a family purpose doctrine, Mr. Baptist's testimony has made it so. The motion will be overruled.

Mr. Sterling Hutcheson: Will you Honor let me add this—upon the further ground that the verdict is excessive and no actionable negligence upon the operator of the defendant's car was shown.

The Court: Nor do I think it excessive. I overrule your motions.

Mr. Sterling Hutcheson: I would be glad for your Honor to see the record.

The Court: I have heard the testimony two or three times. My judgment is that there is a conflict of testimony, and the jury has the right to find the verdict. The fact that the court might have found a different verdict, if it had been on there, does not make any difference. How much time do you want?

Mr. Sterling Hutcheson: As long as we can get.
The Court: Ninety days.

page 349 } I, N. S. Turnbull, Jr., Judge of the Circuit Court of Mecklenburg County, Virginia, who presided over the foregoing trial of R. R. Slate, Administrator of Grant Faulkner, deceased, plaintiff, against W. G. Baptist, defendant, do certify that the foregoing is a true and correct copy and report of the evidence, and all of the evidence, the testimony, all of the instructions granted by the court, refused by the court and amended by the court, and other incidents of the said trial of the said cause, with the exceptions and objections of the respective parties as therein set forth.

And I do further certify that the attorneys for the plaintiff had reasonable notice, in writing, given by the defendant, of the time and place when the foregoing report of the testimony, instructions, exceptions and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication.

Given under my hand this 19th day of Dec., 1932, within 60 days after the entry of the final order in said cause.

N. S. TURNBULL, JR.,
Judge of the Circuit Court of
Mecklenburg County.

page 350 } I, H. F. Hutcheson, Clerk of the Circuit Court of Mecklenburg County, Virginia, do certify that the foregoing report of the testimony, instructions, exceptions and other incidents of the trial of the cause of R. R. Slate, Administrator of Grant Faulkner, deceased, plaintiff, against W. G. Baptist, defendant, was lodged and filed with me as Clerk of the said Court on the 19th day of Dec., 1932.

H. F. HUTCHESON,
Clerk of the Circuit Court of
Mecklenburg County.

Clerk's fee for transcript, \$13.50.

A Copy—Teste:

H. STEWART JONES, C C.

INDEX

	<i>Page</i>
Petition.....	1
Record.....	48
Notice of Motion.....	48
Affidavit of W. G. Baptist.....	50
Demurrer.....	55-51
Plea of Contributory Negligence.....	51
Plea of Not Guilty.....	52
Grounds of Defense.....	62-53-52
Affidavit of Sterling Hutcheson.....	61-53
Account of Park Motor Company.....	226-54
Verdict.....	262-58
Judgment.....	58
Evidence.....	59
W. G. Baptist.....	242-241-235-90-65-63
Dr. G. Norfleet Carter.....	66
R. R. Slate.....	71-70-67
W. R. Beales.....	71
Emmett Gregory (Colored).....	77-72
J. A. Cole.....	90-86-78
Charles Carter (Colored).....	247-246-245-106-105-96-91
G. C. Creedle.....	115-113-109
F. W. Carpenter, Jr.....	124-119-116
Ed Wade (Colored).....	146-136-124
Andrew Faulkner (Colored).....	146
Motion to Strike Evidence.....	253-148
W. P. Bishop.....	156-149
Mrs. Mary C. Baptist.....	164-158
Miss Marjorie Baptist.....	170-167
Miss Elizabeth Turnbull.....	178-174
Miss Mary Baptist.....	185-184-183-181

	<i>Page</i>
Mrs. Irby Turnbull.....	188-185
Hiawatha Towles (Colored).....	194-190
J. A. Creedle.....	204-203-202-198
J. H. Baptist.....	209-204
E. L. Baptist.....	219-218-216-212
J. E. Bing.....	222-221
Dr. A. B. Snellings.....	225-224-223
R. H. Park.....	235-234-232-225
Miss Sallie Stebbins.....	244-243
Bernard Smithson.....	250-248
D. S. Phlegar.....	251
Instructions.....	253
Certificate.....	267