

178-261 1675-
Record No. 2398

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIAM E. GARRISON

v.

SALLIE BURNS, AN INFANT, ETC.

FROM THE CORPORATION COURT OF THE CITY OF NEWPORT NEWS

RULE 14.

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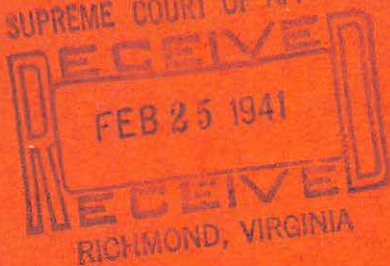
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INDEX TO PETITION.

(Record No. 2398)

	Page
Parties and Court Proceedings	2*
Assignments of Error	4*
Propositions of Law Involved	5*
Foreword to Statement of Facts	7*
Scene of the Accident	9*
Statement of Facts	11*
Resume of the Testimony	16*
Argument	38*
Assignments of Error 1 and 2	38*
Summary Clements' Negligence	39*
What Was Garrison's Negligence	40*
What Garrison Had Right to Expect	41*
What Plaintiff Proved When Rested	43*
Assignments of Error 3, 4 and 5	45*
Instructions	45*
Case of <i>Otey v. Blessing</i>	48*
Clements' Failure to Give Signal	52*
Assignments of Error 6 and 7	56*
Addenda	56*
Conclusion	59*
Certificate	61*

Table of Citations

Code Section 2154 (108)	38*
<i>Otey v. Blessing</i> , 170 Va. 542	48*
<i>Norfolk Southern R. Co. v. White</i> , 117 Va. 342	49*
<i>V. E. & P. Co. v. Ford</i> , 166 Va. 619	50*
<i>Lavenstein v. Maile</i> , 146 Va. 789	50*
<i>Real Estate, etc., Co. v. Gwyn</i> , 113 Va. 337	50*
Code Section 2154 (122)	52*
<i>Morris v. Dame</i> , 161 Va. 545	52*
<i>Walker v. Croson</i> , 168 Va. 410	52*
<i>Wright v. Viar</i> , 152 Va. 510	52*
<i>N. & W. R. Co. v. Strickler</i> , 118 Va. 153	54*
<i>V. & S. W. R. Co. v. Skinner</i> , 119 Va. 843	54*
<i>Drumwright v. Walker</i> , 167 Va. 307	54*
2 Blashfield, Sec. 1025	55*
2 Blashfield, Sec. 1028	55*

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 2398

WILLIAM E. GARRISON, Plaintiff in Error,

versus

SALLIE BURNS, AN INFANT, WHO SUES BY HER
FATHER AND NEXT FRIEND, P. B. BURNS,
Defendant in Error.

PETITION FOR WRIT OF ERROR.

*To the Honorable Justices of the Supreme Court of Appeals
of Virginia:*

Your petitioner, William E. Garrison, would respectfully represent unto this Honorable Court that he is aggrieved by a final judgment entered by the Corporation Court of the City of Newport News, Virginia, on the 5th day of July, 1940, in which Miss Sallie Burns recovered a judgment against your petitioner, W. E. Garrison, and one Nat Clements, jointly, in the sum of Five Thousand Dollars (\$5,000.00), with interest thereon from the 5th day of July, 1940, with costs. Your petitioner presents herewith a transcript of the record
2* *and proceedings had in the Corporation Court of the City of Newport News.

PARTIES AND COURT PROCEEDINGS.

The plaintiff is a young lady, sixteen years of age, and the co-defendant, Nat Clements, is a young man twenty-one years

of age, formerly residing in Isle of Wight County, and now residing in the City of Newport News. The other defendant, your petitioner, W. E. Garrison, is a man sixty-two years of age, a farmer residing in Isle of Wight County, Virginia. Mr. Garrison was driving his car, a 1937 Chevrolet Sedan, in which his wife was riding, and Nat Clements was driving his car, a 1937 Ford Tudor Sedan, in which Miss Sallie Burns was riding in the front seat, and a young couple, Miss Dinkie Brickle and Mr. Worth Dunning, were riding in the rear seat.

The action for personal injury to Miss Sallie Burns arose out of a collision between the two automobiles, in which collision the wife of Mr. Garrison was also seriously injured, on the afternoon of Sunday, December 10th, 1939, at about 5:30 o'clock P. M. at the intersection of U. S. Highway #460, an arterial highway between Suffolk and Petersburg, and 3* a secondary road known *as Lake Prince Road, in Nansemond County, Virginia. The usual allegations of negligence against both Mr. Garrison and Mr. Clements, host driver of the plaintiff, were made in the notice of motion.

There was no notice of contributory negligence filed by either party and issue was joined, a jury impaneled, with the result that a verdict was found in favor of the plaintiff against both defendants for the sum of \$5,000.00. Your petitioner, as well as Clements, the co-defendant, moved to set aside the verdict and enter judgment, notwithstanding the verdict, or that the verdict be set aside and a new trial awarded. The court refused both motions and on the 5th day of July, 1940, entered judgment against both defendants in the sum of \$5,000.00, to which judgment a writ of error is now sought by your petitioner, William E. Garrison.

On the 31st day of July, 1940, your petitioner, William E. Garrison, indicating his intention to appeal from the said judgment, secured an order suspending the same, and gave bond in the amount of \$6,000.00, conditioned according to law (Rec., p. 8-A). Counsel for defendant, Clements, secured no such 4* suspending order. *As appears from the Judge's certificate (T., p. 248) your petitioner, William E. Garrison, gave notice of the presentment for certification of a true and correct copy and report of the evidence, motions, objections and exceptions, and other incidents of the trial, to be made a part of the record, which was signed on the 30th day of August, 1940. Counsel for Clements, while present at the signing of the record, gave no notice of appeal or presentment of the record for the purpose of applying for a writ of error. It is the contention of your petitioner that the defendant, Clements, is not now and cannot become a party to these proceedings and because of the expiration of the time

allowed by law cannot appear in any manner before this Court, if, indeed, it is his intention so to do. If the defendant, Clements, does attempt to appear for any purpose it is the intention of your petitioner to object.

ASSIGNMENTS OF ERROR.

The Court erred in the following particulars:

1. The Court erred in refusing to strike the evidence of the plaintiff, on motion of the defendant, Garrison, *as
5* not being sufficient to go to the jury at the conclusion of the plaintiff's evidence.
2. The Court erred in not sustaining the defendant Garrison's motion made at the conclusion of all of the evidence, to strike the evidence of the plaintiff.
3. The Court erred in giving any instructions at all for the plaintiff.
4. The Court erred in giving instructions numbers P. 7 and P. 8 for the plaintiff.
5. The Court erred in giving instructions numbers 7, 8, 13, 15 and 16 for the defendant, Clements.
6. The Court erred in refusing to set aside the verdict of the jury in favor of the plaintiff and to enter judgment in favor of the defendant, Garrison.
7. The Court erred in refusing to set aside the verdict of the jury in favor of the plaintiff and to award the defendant, Garrison, a new trial.

PROPOSITIONS OF LAW INVOLVED IN THE CASE.

From the assignments of error and the resume of the evidence which follows, it can readily be perceived that there are four propositions of law involved *in this case as
6* contended for by your petitioner, namely:

ONE: The evidence fails to show the breach of any duty owing by the defendant, Garrison, to the plaintiff, i. e., no primary negligence has been proven on the part of the defendant, Garrison.

TWO: The testimony adduced by the plaintiff was so insufficient, uncertain, inadequate and contradictory that no proper verdict against the defendant, Garrison, could be based thereon.

THREE: The Court should have sustained the motions of the defendant, Garrison, to strike the evidence of the plaintiff and of the defendant, Clements, as being wholly insuf-

ficient to go to the jury, and refusing that, should have rejected any instructions permitting a finding against the defendant, Garrison, because:

(a) There was no credible evidence showing any primary negligence on the defendant, Garrison.

(b) The great preponderance of the evidence showed that the sole cause of the collision was the gross negligence of the defendant, Clements.

FOUR: The verdict being contrary to the law and the evidence, the court should have set aside the same as it affected the defendant, Garrison.

7* *FOREWORD TO STATEMENT OF FACTS.

While your petitioner recognizes the fact that the verdict of a jury settles conflicts of evidence, which in this case would be in favor of the plaintiff, yet it is the purpose of your petitioner to show to the Court that the verdict of the jury settled only one thing, and that is the gross and almost suicidal negligence of the driver of the plaintiff's car, the defendant, Nat Clements. It is the purpose of your petitioner to show to the Court that insofar as the defendant, Garrison, is concerned, the plaintiff's own evidence, in great part, is in hopeless conflict, incredible, insufficient, unworthy of belief and such that no proper verdict could be founded thereon against your petitioner. For the most part, your petitioner will review and discuss the evidence from the viewpoint of the plaintiff, except where it is necessary to demonstrate from the physical facts brought out at times by defendant's testimony that the plaintiff's evidence is partly wholly insufficient, incredible, contradictory and unworthy of belief. Stated

plainly, your petitioner will and does contend that the
8* verdict against the defendant, Clements, *is eminently fair and just, but that the jury, without warrant of evidence, utterly failed to follow the instructions of the court, failed to segregate the evidence as it should be applied to the two defendants, and, finding that the plaintiff was entitled to a verdict, took the easy way out and found against *both* defendants, rather than against the defendant, Clements, *alone*. The lower court erred in failing to correct this error.

9* *SCENE OF THE ACCIDENT.

This accident occurred on Route #460, a heavily traveled and most direct route from Suffolk to Petersburg. It was

at a place in Nansemond County, known as Providence Church, about $3\frac{1}{2}$ or 4 miles west of Suffolk, at the intersection of the said Route #460, with a dirt country road, known locally as Lake Prince Road. The time of the accident was around 5:30 on Sunday afternoon, December 10th, 1939. At that time of the day, in December, it was getting dusk and while the Clements car had on its parking lights, they were not necessary and served no purpose other than to make the position of the car on the highway more easily discernible to other drivers. State Officer Burgess testified that he did not arrive at the scene of the accident until "25 minutes after 6:00" and he had just turned on his parking lights about two miles west of where the accident occurred and that "there was plenty of light, in other words for ordinary travel" (T., p. 194).

Route #460 runs northwestwardly and southeastwardly but for the purposes of this petition, we will call it east and west. At the point of the accident Route #460 is straight and level for a distance of 2,070 feet,—1,570 feet to the east to the beginning of a curve and 500 feet to the west to the beginning of a curve. The highway is improved for a width of 42 feet,—consisting of 20 feet of bituminous pavement and 11 feet of concrete *pavement on both sides thereof. On the north side of the highway there is a dirt shoulder some four or five feet in width, and on the south side of the road there is another dirt county road leading to Conan's Beach and a surface gravel entrance to Hines Service Station. At the entrance to Lake Prince Road on the edge of the shoulder is a concrete head wall for a pipe culvert. Lake Prince Road, as stated, is a graded soil surface road about 25 feet in width, which widens as it enters Route 460 to about double that width. At the intersection, on the east side of Lake Prince Road there was a State Highway stop sign about 30 feet from the north edge of the concrete of Route 460. On the westerly side of Lake Prince Road in the angle made by that road and Route 460 there is located Powell's Service Station, and on the easterly side of the road there was a cultivated field, across which there was a view unobstructed of a quarter of a mile or more. Exhibit 6 is a map prepared by Mr. J. C. Causey, Jr., Civil Engineer, which shows the general layout of the scene of the accident. This map was prepared five days after the collision. The map also shows "Point A" at the intersection of the highway and the County Road, which is to the north of the center line of Route 460. Beginning at "Point A" there was a gouge in the bituminous pavement extending across the center line and diagonally to the west a distance of about 45 feet to

“Point B”. (It will appear later that this “Point A”
11* is the point of impact, which is on Garrison’s right *half
of the highway and which shows that Clements was attempting to make an illegal turn into Route 460.)

STATEMENT OF FACTS.

Counsel for your petitioner believe that with this foreword to the statement of facts and description of the scene of the accident that the statement of facts proper might be divided into (a) a concise and brief statement of facts and (b) a resume of the plaintiff’s evidence. For the purposes of clarity, contrast and emphasis, a somewhat less brief resume will have to be made of the defendant’s evidence. Where the physical facts are not in dispute we will also refer to them.

On the afternoon of December 10th, 1939, just before dusk, Nat Clements was driving his automobile southwardly along the county road, known as Lake Prince road, with the intention of turning to the east, when he reached the main State highway #460, which, as stated, runs east and west. To accomplish this Clements was to make a left turn into Route 460. When he came in close proximity to Route 460

he passed the State highway stop sign, which *was about
12* 30 feet from the main highway, and stopped his car momentarily,—but stopped it, according to Clements and witness Dunning, but did not stop according to Mr. and Mrs. Garrison. As will be seen, it is immaterial which version is accepted because if he *did* stop he failed to remain stopped when the Garrison car was then in dangerous proximity. At that time another automobile was traveling well to its right on the south side of Route 460 on its way east to Suffolk. This car did not interfere with the operation of the Clements car as it was, of course, going in the same direction. Clements said he moved in the road right after the other car going to Suffolk passed the intersection. The gouged out portion of the bituminous pavement near the middle of the highway, shown as Point “A” on the map, made by Mr. J. C. Causey, Jr., Civil Engineer (Garrison’s Exhibit 6), is to the north of the middle point of the highway, that is, on Garrison’s right half of the road. The gouged line extends diagonally to Point “B” just to the south side of the center line of the highway. A collision occurred at Point “A” between the Clements car and the car of your petitioner, W. E. Garrison, who was proceeding west on Route 460 on his own right half of the highway. Miss Burns, the plaintiff,

13* riding with Mr. Clements *in the front seat, was injured and Mrs. Garrison, Mr. Garrison’s wife, was also in-

jured. Both cars were considerably damaged. The photographs, which were introduced as Exhibits, show the extent of the damage to the two cars and the points of impact thereon.

When Clements stopped, or slowed down near Route 460, he saw the approach of the Garrison car, which he testified, reiterated and insisted was 1,050 feet down Route 460 to his left, traveling on his right half of the highway. He said it did not have any headlights or parking lights burning, but he had no difficulty in seeing the car (T., p. 25). When Clements "got almost to the center of the asphalt" (T., p. 15) with his car in low gear, "I seen him coming and I pulled out and pulled over and he got almost to me and cut to the left and hit me full in the front" (T., pp. 14 and 15). He had "got on the highway nearest to the curbing" and had practically made his turn to the left when there was "a sort of head-on collision". (The photographs of both cars show just the contrary.) Mr. Clements would not state the speed of the Garrison car to travel this 1,050 feet. He later estimated it at 55 miles per hour as a "pure guess" (T., p. 30).

14* *Clements stated he stopped ten feet from the center of the road and his car traveled about ten feet plus less than half the distance of the width of the road, which would be 20 feet more, a total distance of 30 feet, when the impact occurred. He "wouldn't be going over 10 or 12 miles an hour" (T., p. 28) in traveling this 30 feet, and later testified (T., p. 33) that he was going five or six miles an hour, taking him "4 or 5 seconds" (T., p. 32) to traverse the 31 feet. He saw Mr. Garrison's car "the entire time" (T., p. 33) and he, Clements, could have stopped his car "almost instantly" (T., p. 34).

With Clements' car in a stopped position, according to him, and in low gear coming out of this dirt road onto the main highway, with the Garrison car in full view, and being able to stop his car "almost instantly", Clements was asked (T., p. 34) "When you went onto that concrete, or were about to go onto it, and saw Mr. Garrison's car bearing down on you, why didn't you stop?" His answer was: "I was almost—he was too far—I was almost in the intersection of the road. I wasn't expecting him to cut to the left." He was again asked (T., p. 34) "Where was he (Garrison) when you started on the concrete, I ask you again?" Answer: "350 yards."

15* *As Mr. Garrison was driving home on this main highway and as he drew near to the intersection of the Lake Prince Road, with which he was thoroughly familiar, he saw the Clements car coming toward Route 460 on the Lake

Prince Road. He was traveling on his right half of the highway, as he says, around 40 or 45 miles an hour. He was some distance away when he first saw the Clements car down the Lake Prince Road, but he did not pay any particular attention to it at that distance as it was not "interfering at all with your (my) traveling on the highway" (T., p. 59). As the Clements car got to the stop sign (about 30 feet from Route 460) Garrison particularly noticed it and stated (T., p. 61) "I thought he was going to stop".

"Q. You say you felt sure he was going to stop?"

"A. Yes, sir."

"Q. Was he going slow enough to stop, if he had applied his brakes?"

"A. Yes, sure he was."

When Garrison realized that Clements was going to attempt to come onto the highway, regardless of his (Garrison's) approach, Garrison was then 50 or 75 feet away running 40 to 45 miles an hour, according to his own *estimate, instead of the absurd and unbelievable distance of 1,050 feet as testified by Clements. He then turned sharply to the left "and tried to avoid the accident" and was struck by the Clements car on his right front wheel. He testified that Clements had *not* straightened his car out on the highway, but that he was "at the angle of turning". The photographs bear out this statement. *There was no signal given by the arm or otherwise of Clements' intention to enter or turn left on the main highway.*

The foregoing is a brief description of the accident. Indeed, it does not call for a great deal of elaboration, as it is the familiar type of intersection collision, where one car attempts to cross the path of another, turning left into the direction from which the other car was travelling when it was too late for him to negotiate the crossing. A resume, or so much thereof as is necessary, of the testimony of the witnesses follows.

RESUME OF THE TESTIMONY.

To prove her case, the plaintiff put on both Mr. Clements and Mr. Garrison as adverse witnesses, then her father and sister, who knew nothing about the accident, and then testified, herself. It will be seen that the plaintiff knew little or nothing about the accident. *The plaintiff then rested without even offering the couple on the back seat, Mr. Dunning and Miss Brickie, who were eyewitnesses. It was

at this point that your petitioner made his first motion to strike the evidence.

It was only when the defendant, Clements, put on his evidence that Mr. Dunning and Miss Brickle testified. Their testimony will be considered later.

The plaintiff introduced Dr. J. R. Ellison, who testified as to the plaintiff's injuries. He was cross examined by counsel for Mr. Clements, but not by counsel for Mr. Garrison.

The defendant, Nat Clements, was then called as an adverse witness by plaintiff's attorney. He testified he lived in Isle of Wight County, but worked in Newport News, was the driver of the car in which the plaintiff was injured about 5:30 or 6:00 o'clock Sunday afternoon, December 10th. Coming out of Lake Prince Road he had to make a left turn into Route 460 to reach his father's filling station in the direction of Suffolk. He saw the car operated by Mr. Garrison and when he arrived at the intersection he was about 350 yards, "that is about 1,050 feet" (T., p. 13) to his left. The Garrison car was on its right side of the highway, had no lights burning, but plainly visible. He had on *parking lights. 18* He did not know whether it was after sundown, but it was kind of cloudy. In answer to the question as to how the collision happened, he said (T., p. 14):

"Well, I got up to this road, I stopped at this road and put my car in *low gear*. I seen him coming and I pulled out and pulled over, and he got almost to me and cut to the left and hit me full in the front."

He stated he stopped and that Garrison was then about 350 yards from him when he "started to make a left turn"; that he saw the Garrison car "all the way back from the road you came out of to where Mr. Garrison's car was coming down the road"; that he had gotten almost to the center of the highway nearest to the curbing and had practically made his turn; that Mr. Garrison cut to his left; that "he struck the right hand say a little more than the left", but that it was kind of a head-on collision. Asked if Mr. Garrison could have passed to the rear of his car, Mr. Clements said: "I think so. He could pass on the right, I think." (The physical facts show that this is not correct.) He could not estimate the speed of the Garrison car, but that it took "just a few seconds" for him to travel this 1,050 feet; 19* *that there was another car going towards Suffolk and he waited for that car to pass. He was knocked unconscious and did not know the position of the cars after the accident. The front part of the motor was jammed up and

knocked back; (the photographs show that the blow was to the side) the traffic was heavy, going both ways, but there was no car between his car and the Garrison car.

20* *On cross examination, Mr. Clements identified the photographs and would not then say that there had been a head-on collision (T., p. 19), and admitted that the principal damage to the Garrison car was on its right front. He reiterated that 5:30. was the approximate time of the collision. He then gave the distance of the gas station on his right as he entered the road as being about 100 feet from the highway and the stop sign 20 or 25 feet. He could see to his left about a quarter of a mile and that he saw the Garrison car 350 yards away. He stopped 10 feet from the edge of the highway, permitted the car going to Suffolk to pass and then went right onto the road, making his left turn. He reached about the center of the asphalt, but "it might have been a little, a very little" before he reached the center of the road. He traveled only about 31 feet while Mr. Garrison's car traveled 1,050 feet; that he was in low gear, traveling not
21* over 10 or 12 miles an hour. He *could not estimate Mr. Garrison's speed and said:

"Q. You could not estimate Mr. Garrison's speed, you say?"

"A. No."

"Q. Is that because you don't know, or do you have a hesitancy in estimating it?"

"A. Yes, sir."

"Q. Which is it, that you don't know?"

"A. I hesitate. I cannot estimate. I don't believe you could sit at the side of the road and see a car and estimate how fast it was going. I couldn't estimate."

He did estimate the angle that the Lake Prince Road made with the main highway as being 110 degrees.

Afterwards, at page 30 of the transcript, he had no hesitancy in estimating that Garrison "was going the speed limit" and that he "always thought that". In the next breath he said:

"A. No, I can't say how fast he was going."

"Q. You really cannot do that?"

"A. No."

And that when he said 55 it was approximately a pure guess. He stated he thought he had plenty of time to
22* get across *the road. Asked what he did to avoid the accident, he answered (T., p. 31): "A. I didn't do noth-

ing. There was nothing I could do." He further said that it took him "four or five seconds, I imagine", at 10 to 12 miles an hour to travel the 31 feet from where he stopped to the point of impact. He reiterated at page 33 of the transcript twice that the Garrison car was at least 350 yards away when he started across and he was looking at him all the time. After a colloquy between counsel, in his presence (T., p. 33) he stated he was not going over five or six miles an hour. He testified he could stop his car almost instantly, suddenly, within two or three feet. Asked why he did not stop, he stated (T., p. 34): "A. I was almost—he was too far—I was almost in the intersection of the road. I wasn't expecting him to cut to the left." He was again asked where the Garrison car was when he actually went onto the concrete. His answer was 350 yards.

Mr. W. E. Garrison, your petitioner, was next called by the plaintiff as a witness, also adverse. He testified he was a native of Isle of Wight County, a farmer 62 years of age.

With his wife beside him, he was driving his car to his 23* home on the 11 foot strip of *concrete on the right side of the highway. When he was possibly 200 or 300 yards back from the intersection he saw the Clements automobile; that he kept his eyes on the road and didn't pay any particular attention to the Clements car at that time. The Clements car had not then gotten to the service station on Lake Prince Road near the intersection. When Garrison was 50 or 75 feet from the intersection Clements drove out onto the highway from the side road. He changed his speed at that time to 15 or 20 miles an hour, "something like that." He didn't stop at the stop sign or at all before he entered the main highway. In his own words, he said (T., p. 52):

"Q. What did he (Clements) do when he came into the main highway?"

"A. He came right into the highway, right in front of me, it looked like I was right at him. He came on out, turning right towards me."

"Q. What sort of a turn did he make?"

"A. He just turned right on towards me, turned to the left."

"Q. Did he go over beyond the center of the street?"

"A. No, sir."

"Q. He shot right in front of you?"

"A. He made a short turn. That is the reason I tried to dodge him, to avoid the accident."

24* *He further testified that as he proceeded down the road he did not look at the Clements car all the time and was not paying particular attention to him when he was 200 or 300 yards away, but stated (T., p. 54):

“When I got up closer he was driving slow and I thought he was going to stop.” * * *

“Q. And he did not stop?”

“A. No, sir.”

“Q. You are positive of that?”

“A. Sure.”

He then testified that the right-hand corner, the front, of his car was damaged, tearing off the wheel and mashed and bent the axles back, as well as his engine. As to whether or not there was a head-on collision, he said it was not and testified (T., p. 56):

“Q. When your car and his car came together hadn't he made a complete turn and wasn't his car facing towards Suffolk?”

“A. No, sir, he hadn't made a complete turn. He was turning towards me, but he hadn't gotten off the highway.”

“Q. What do you mean he hadn't gotten off the highway?”

“A. I mean he didn't get off the concrete.”

25* *It will be recalled that the first portion of Route 460 that Clements reached was the 11 foot strip of concrete that had been added to the bituminous pavement when the road was widened. It was this concrete that Mr. Garrison was talking about. He further stated (T., p. 56):

“Q. In other words, he started to turn left while he was still on the concrete?”

“A. Yes, sir.”

“Q. It was a very short turn, of course?”

“A. A very short turn.”

On the question as to Mr. Clements' actions as he approached the road, Mr. Garrison was asked as follows (T., p. 61):

“Q. Now, when you were attracted to the car of Mr. Clements in the neighborhood of the stop sign, how fast or slow was it traveling?”

“A. Mr. Clements' car?”

"Q. Yes."

"A. He was most likely traveling 15 or 20 miles an hour."

"Q. Did you get the impression that he was going to stop?"

"A. Sure, I thought he was going to stop."

"Q. Did you think he was going to stop?"

"A. Yes."

26* "Q. You say you felt sure that he was going to stop?"

"A. Yes, sir."

"Q. Was he going slow enough to stop if he had applied his brakes?"

"A. Yes, sure he was."

He further stated that 15 or 20 miles an hour was about the speed when Clements was opposite the service station and that even after he had gotten by the stop sign and did not stop he still thought he was going to stop as he had an opportunity to do so, but he did not stop. Garrison was 50 or 75 feet away when he realized that Clements was not going to stop, when he was about right up to the highway. It was then that he turned to his left to avoid the accident, but it was too close to apply his brakes.

On the question as to whether any signal was given by Mr. Clements of his intention to turn or to go onto the highway, Mr. Garrison testified as follows (T., p. 65):

"Q. Did Mr. Clements give an arm signal showing his intention of turning on that highway?"

"A. I didn't see it."

"Q. Would you have seen it if he had given it?"

"A. I certainly could."

27* "Q. Your eyesight is good without glasses?"

"A. Yes, sir."

"Q. And you didn't see him give an arm signal?"

"A. No, sir."

"Q. Did he do anything to indicate that he was coming on the highway in your immediate vicinity?"

"A. Not anything but drive right on it."

In answers to cross examination by Mr. Bivins, pages 66, 67 and 68 of the transcript, he reiterated that Clements did not stop before entering the highway. He was asked how far he traveled before he commenced to turn to the left and he stated "he (Clements) was just coming on the highway, making the turn on the highway". He further stated (T.,

p. 70): "Yes, sir, I turned to the left to keep from busting right into him. He was right in front of me". And "he was just coming on the concrete."

On the question as to which car struck the other, Mr. Garrison was asked (T., p. 72):

"Q. Tell us how you reach the conclusion that he ran into you?"

"A. He ran into me because I am on the left trying to miss the car to keep from having an accident. He is right in my part of the road."

"Q. Well, if you had stayed on your part of the highway you wouldn't have had any accident."

28* "A. Wouldn't I?"

"Q. No, sir."

"A. I would have busted into him."

And, further (T., p. 73):

"Q. What is the truth about that? In other words, if you had stayed on that shoulder or that concrete apron, you wouldn't have had this accident?"

"A. I wouldn't?"

"Q. Or you would have?"

"A. I would have, sure."

"Q. Even if you had stayed on the concrete apron, that 11-foot apron that you were traveling on, if you had stayed on that you tell this jury you would have struck him?"

"A. Sure I would."

"Q. And you would have—that is all I wish to ask you."

"A. Yes, I sure would."

Questioned by Mr. Ford, Mr. Garrison said (T., p. 74):

"Q. What part of his car would you have struck had you stayed on the concrete portion?"

"A. Right in the side of him."

29* *Note: The above excerpts are important because it may be contended that Mr. Garrison could have passed to the rear of the Clements car. The physical facts show that it was impossible because his car had not straightened up and he was athwart the road, directly in the path of the oncoming Garrison car. Even after Garrison turned sharply to his left, in an effort to avoid the accident, it will be recalled that the gouged out portion of the road, the

physical indication of the point of impact, was still not yet to the center line and on Garrison's right side.

Mr. P. B. Burns, father of the plaintiff, then testified about her age, the doctors' and hospital bills. He knew nothing about the accident.

Mrs. Jeanette Akers, sister of the plaintiff, also testified briefly about her sister's condition after she left the hospital.

Miss Sallie Burns, the plaintiff, was the last witness in her own behalf. She was 16 years old, going to High School. At the time of the accident she was in the front seat with Mr. Clements and the other couple were in the back seat.

They had been to Mr. Clements' home on Lake Prince 30* Road and were headed toward Suffolk around *5:30

P. M. She did not see Mr. Garrison's automobile as it approached the highway (T., p. 84) and does not know how the accident occurred. She then testified as to the length of time she was in the hospital having her broken leg treated. She was not cross-examined by counsel for Mr. Garrison, but was cross-examined by counsel for Mr. Clements. She did not know whether or not Mr. Clements came to a stop before he entered Route 460. She testified (T., p. 89):

"Q. In other words, you don't attempt to say whether he came to a stop or whether he didn't come to a stop?"

"A. I know he slowed down, but whether he did stop or not, I don't know."

She did not know the speed of Mr. Clements' car as he drove to the highway, except to say that it was average speed, "I guess". She did not know what gear he was in, whether low, intermediate or high. She did not know how far across the intersection Mr. Clements traveled before being struck. Although she was temporarily unconscious, she came to shortly afterwards, even while she was in the service station on the side of the road.

The above is substantially all the testimony for the plaintiff.

It was at this point, after the plaintiff had rested, that your petitioner moved to strike the evidence and the attention of the Court is invited to *the motion to strike and the reasons assigned, which appear in full in the transcript, pages 91-97. This motion will be discussed later.

The defendant, Clements, then introduced his evidence. Dr. Foy Vann was called and testified concerning defendant's injuries.

Mr. S. W. Dunning, the young man who was riding in the back seat of Mr. Clements' car with Miss Brickle, was next called. Concerning the accident, he testified that Mr. Clements stopped his automobile just long enough to permit the car going to Suffolk to pass, and "when that car was gone he started across the highway." He had seen Mr. Garrison's automobile, and he was then 300 to 350 yards away. That was at the time that the car to Suffolk was going through the intersection and Clements was then "pulling on out as that car passed." Asked if he made a left turn around the middle point of the highway, Dunning said, "He went partly straight out about 30 degrees, I imagine coming across", and also "He hadn't all the way turned, but only about 30 degrees" (T., p. 105).

The Court asked, "You mean he was at an angle of about 30 degrees?" Answer: "From straight, the way he was turning."

32* *He stated that Mr. Garrison made a sharp turn to the left inside the road in an effort to avoid the collision; that Garrison was on his right-hand side of the highway.

Asked about the space on the concrete portion of the highway in the rear of Clements' car, Dunning said (T., p. 108): "I don't know. I couldn't answer that. We were—I would call it moving all the time, and I wouldn't answer whether it could have went by or not", and again, "I say I don't know whether he had room enough or not." And again at page 109 of the transcript the witness said:

"Nobody hardly could tell whether they could pass or not. We were moving all the time off of that strip."

He did not know what gear Mr. Clements was in. Mr. Dunning thought that Mr. Clements was driving 10 or 15 miles per hour as he approached the intersection and stopped within 5 or 10 feet of the northern edge of the highway. He was asked on cross examination how far away the Garrison car was when Clements started out on that strip of concrete—the northern strip, and his answer was, "I would say he
33* covered half the distance, between 300 *and 350 yards, and immediately thereafter stated, "It was 75 or 80 yards, something like that, maybe a little over" (T., p. 113).

And then stated that at that time they were about the middle of the northern strip of concrete. He was then asked this question:

"Q. How far was the Garrison car from you when it made this abrupt left turn?"

"A. So close I thought it was going to hit the rear of the car."

Asked exactly where in the highway the accident happened, he stated, "On Mr. Garrison's right side" (T., p. 115). And that the left front of the Clements car collided with the right front of the Garrison car. (Clements had said it was head-on.) He placed the time at about 5:30 in the afternoon, and that "one automobile" was using its headlights.

The witness did not know how fast Mr. Garrison was traveling (T., p. 124). He reiterated that the impact occurred on Garrison's right-hand side.

Miss Hilda Brickle, the young lady in the back seat, testified that she was seated on the left-hand side of the back seat, that the Clements car stopped before entering Route 460, a car passed on its way to Suffolk, *³⁴ "and then it just happened." She did not see the Garrison car until after the collision, and, therefore, knew nothing further about the accident except that they followed right in behind the car going to Suffolk, and had not gotten very far into the road when the collision happened (T., p. 138).

Mr. Joseph Weber, 18 years of age, lived near the scene of the accident, and was in the Shell gasoline station just across the road. He did not see the accident, but went out immediately after the collision. He described the location of the two cars after the accident. The Garrison car crossed the road, that is on the cement apron on the left side. The Clements car was "on the far" pointing towards Suffolk, and in low gear; that the distance between the gouged place in the road and the front of the Clements car was about 15 feet in the direction of Windsor, and that the two cars were only a short distance from each other, about two feet.

This completed the testimony for the defendant, Clements, after which Counsel for Mr. Garrison again moved the Court to strike the evidence as being wholly insufficient to go to the jury. This motion appears in full at page 151, to
³⁵ which the attention of the Court *is invited, but the Court overruled the motion, after which the defendant,

Garrison, introduced his witnesses. In this petition it is necessary only to briefly refer to the same.

Mr. J. C. Causey, Jr., Civil Engineer, introduced and explained the drawing, which is Exhibit 6. The distances and dimensions already used were taken principally from Mr. Causey's testimony, because they were accurate.

Mr. Walter Ely, who operated the service station at the intersection, testified that he was in the station at the time of the accident. He saw the Clements car as it approached the highway, and as it passed his line of vision through a window (T., p. 164). He said he saw the car go by and the next thing was the crash. He did not know whether the car stopped after it passed his line of vision (T., pp. 168-169). He identified the gouged place in the highway, but did not know which part of which car made it.

Mrs. Garrison then testified that she was riding in the front seat with her husband; that she saw the Clements car 36* driving toward Route 460 at a moderate *rate of speed and that he did not stop. She did not know how many feet away her husband was when he turned his car suddenly to the left to avoid the accident; that she was injured in the accident and did not recall any of the details for a long time; that she was in the hospital 58 days; that her husband was traveling at 40 to 45 miles per hour on the right side of the highway; that it was not dark and that Mr. Garrison had on his dim lights; that Mr. Garrison was driving his usual speed and that she was humming at the time of the accident. She did not know whether Mr. Garrison slowed up his car before the impact; that she did not know how far down the road she was when she saw the Clements car. She did not know the speed of the Clements car, except that she thought it was 15 or 20 miles per hour. She reiterated that the Clements car did not stop before it entered the intersection and that "if it had stopped, it wouldn't have happened, anybody knows that."

Police Officer H. W. Burgess, who had been patrolling Route 460, came to the scene of the accident after it had happened, but did not arrive there until about twenty-five minutes after "six". He doubtless meant twenty-five minutes after five. It was not dark enough for lights and he had only turned his parking lights on about two miles 37* *before he got to the scene of the accident; that there was plenty of light for ordinary travel (T., p. 194).

He described the position of the two cars when he arrived (T., pp. 194-195); and that he carried Mr. and Mrs. Garrison to the hospital. He described the dugout portion of the highway (T., p. 196), and "looking west, this mark was to the right of the center of the wood", and then swerved to the left. That he pointed out the various points to Mr. Causey, the engineer who made the survey, and was also present when the photographs were made.

38*

*ARGUMENT.

Perhaps counsel for petitioner should apologize to the court for the extent to which the evidence in this case has been narrated here. Counsel feel so keenly, however, that this whole record shows so plainly that the defendant, Garrison, has been the unfortunate victim of being joined in an action with the guilty party and was carried down with him by the jury, that a full resume of the evidence was justified. We, therefore, ask the indulgence of the court.

Assignments of error 1 and 2 will be considered together.

Regardless of what the court or counsel may believe as to the actual fact, because of the verdict of the jury, we can accept as a fact for the purpose of argument the statement of the defendant, Clements, and the witness Dunning, that Clements slowly drove up to Route 460 and gradually came to a full stop some five to ten feet to the edge of the concrete, stayed in a stopped position just long enough for a car to pass to Suffolk and immediately attempted to move in behind it when the collision occurred, before he reached the center of the road. Regardless of whether the jury believed Clements stopped, the result is the same because admittedly he failed to wait until traffic within 500 feet had gone by before attempting to cross. At this point we invite the attention of the court to Act of 1938, p. 146, Virginia Code 2154 (108), reading as follows:

"(b) Any person who shall

* * * * *

"(8) Fail to bring his vehicle to a stop immediately before entering a highway from a side road when there is traffic approaching upon such highway within five hundred feet of such point of entrance, shall be guilty of reckless driving."

39* *The defendant, Clements, by his reckless conduct and violation of the motor vehicles laws of Virginia regulating traffic was the sole cause of the collision, which caused the injury to his guest in the following particulars:

1. He violated Section 2154 (108), above quoted, by stopping only momentarily, if at all, and failing to permit Garrison to pass when he was within 500 feet of the Clements car.

2. He violated the law by failing to keep a proper lookout for approaching traffic.

3. He violated the law by failing to yield the right of way to Mr. Garrison.

4. He violated the law by attempting to make a left turn across the line of travel of the Garrison car, without giving a signal of his intention so to do.

5. He violated the law by attempting to make a left turn without passing to the right of the center of the intersection.

6. He was guilty of gross negligence in failing to apprehend the approach of the Garrison car in dangerous proximity to the intersection.

7. He was guilty of gross negligence in leaving a stopped position of safety in the face of impending danger.

If any two or more of the above acts of law violations and reckless driving are present, then under the decisions of this court, undoubtedly, Clements was guilty of gross negligence. It is doubtful if it will be contended by anybody that most, if not all, of these acts of negligence on the part of Clements were *not present. It is our duty, then, to show that nothing that was done or omitted to be done by Garrison efficiently contributed to the collision.

WHAT WAS GARRISON'S NEGLIGENCE?

1. *There was no excessive speed.* No person testified that Garrison was running at an excessive speed. The nearest approach to it was Clements, himself, who stated that he was going the speed limit, after having previously testified he did not know what speed he was traveling and then admitted that his estimate was a pure guess. Miss Burns did not know, Miss Brickle did not know and Mr. Dunning did not know, and they all three claimed to be looking at the Garrison car. So there is no evidence of excessive speed, physical or otherwise.

2. *Mr. Garrison was keeping a lookout.* He and his wife both saw the approach of the Clements car and Garrison's action in cutting his car to the left in order to avoid the impact shows that he saw that Clements suddenly attempted to cut across at the last moment. So there is no failure of a lookout.

3. *He was traveling on his right half of the highway.* No witness claimed to the contrary.

4. *He acted in emergency to avoid the collision.* It was not of his own making and cut his car sharply to the left, away from the direction of the force of the blow, thereby saving a direct blow on the body of Clements car, with possible 41* fatalities. *Under the familiar rules of law, even if this action on the part of Garrison was wrong, which it was not, it could not be held to be negligence if he was compelled to act in emergency and instinctively in an effort to avert a catastrophe. This will be discussed in more detail later.

WHAT DID GARRISON HAVE A RIGHT TO EXPECT OF CLEMENTS?

In appraising Garrison's actions to determine whether or not he was guilty of any breach of duty, it is necessary, first, to consider what he had a right to expect of Clements. In the first place, he knew that he occupied a much travelled arterial four-lane highway, which position gave him favor in the eyes of the law and in common ordinary sense over a person driving into such highway from a dirt, county, secondary, little used road. He had a right to expect that Clements would recognize such favored position or right of way. He had a right to expect that Clements would observe the stop sign placed just 30 feet from this busy highway. He had a right to expect that Clements would stop his automobile at a safe distance from the highway, in accordance with the mandate of this stop sign and permit traffic in dangerous proximity to pass before attempting to enter. He had a right to expect that notwithstanding the stop sign that Clements would obey Section 2154 (108) and stop his car and remain stopped, if there was approaching traffic within 500 feet. He had a right to expect that Clements would not 42* enter the *highway immediately in front of him and attempt to "beat him" across.

If these things are true, *what then was Garrison's negligence, in the light of what he had the right to believe and ex-*

pect? It was the contention of counsel for Clements in the court below that Clements had the right of way because he arrived at the intersection first. The lower court promptly overruled that contention. He also contended that as long as Clements stopped, even momentarily, regardless of whether traffic was within 500 feet or more, that he had complied with Section 2154 (108). The court below also overruled him on that. Counsel for Clements also argued that Garrison should have anticipated that Clements would attempt to cross the road. There is no such law anywhere, when Clements was on an inferior road, barred by a stop sign and prevented from entering by a State Statute. *You do not anticipate anything contrary to the actions of the other party nor a violation of the law.* Citations of law are later in this petition. The physical facts show that if a right turn could have been made, the Clements car would have been split wide open. The physical facts also show that the Garrison car was too close then to have made such a maneuver, less than a hundred feet.

What is the evidence for the plaintiff to sustain the contention that Garrison could have done *anything* to save Clements from his folly? Clements, it must be remembered, stated, reiterated and insisted that when he went up 43* onto the concrete Garrison was *then "350 yards, 1,050 feet" away. He never receded from that position. Of course, it is an absurdity on its face, and this court cannot accept it. Both Clements and Dunning, the only two witnesses for the plaintiff, testified, and our own common sense tells us, that it only took a matter of two, three or four seconds at the most for Clements to travel 31 feet from his stopped (?) position to the point of impact. Simple arithmetic will demonstrate that Garrison could not travel 1,050 feet in two, three or four seconds.

When the plaintiff had rested and the motion to strike had been made, the plaintiff had proved, first by Clements, that the cars were 1,050 feet away when Clements attempted to cross, and then by Garrison that he was less than 100 feet away. The jury could only hazard, guess or conjecture from *that evidence where* the Garrison car was. The same thing is true as to speed at the close of the plaintiff's evidence and that is true both as to his own speed and Garrison's speed. The plaintiff produced Clements to show Garrison's speed, which he admittedly did not know, and he then guessed at his own speed, first ten or twelve miles an hour, and then five or six miles an hour. As to signals, no witness in the entire case ever testified that Clements by any signal indicated his in-

tention to cross Garrison's path and turn left. As to the manner of impact, the plaintiff produced Clements, who said it was a head-on collision, when the actual photographs show to the contrary. When Dunning came on, under Clements' testimony, he flatly contradicted his own driver, and, of course, corroborated the photographs.

Now, then, under this uncertain evidence, *what could a jury find were the facts from the plaintiff's evidence?* They had to reject Clements' testimony, except as to stopping only momentarily, almost entirely because it was contradictory to the physical facts. Her other witness was Garrison, who absolutely absolved himself from negligence in the clearest manner and in accordance with the physical facts. If you reject Clements' statement of 1,050 feet, you must accept Garrison's statement that he was less than 100 feet from Clements when he cut across his path. If we go on to Clements' testimony and take Dunning's evidence, the jury had to choose between his first statement of where Garrison was, of 300 to 350 yards, and his second statement of 75 to 80 yards when Clements attempted to cross. Accepting 75 to 80 yards and Garrison's speed of 40 to 45 miles an hour, simple arithmetic shows that Garrison was only three to four seconds away when Clements attempted to cross his path. Common experience teaches us that under the very best conditions there is mighty little, if anything, a driver can do to avoid a collision under circumstances such as these when he only has a few seconds to act. No matter how much control he may have over his own car, obviously, there is nothing he can do about the other man's driving.

It is only upon an erroneous hypothesis that there could be any remote claim of Garrison's negligence. You would have to disregard the proven physical facts of distance, speed and method of impact between the two cars. You would have to ignore the superior right of Garrison on the arterial highway. You would have to refuse to recognize the unquestioned law of Garrison's right to expect Clements to stop and afford him free passage across the intersection. You would have to refuse to compel Clements to obey the mandate of the stop sign and Section 2154 (108) requiring him to let traffic within 500 feet pass. You would have to assume that Garrison could anticipate that which Clements' actions belied. You would have to assume that Garrison knew, or should have known, that Clements would do the unforeseeable and would commit a breach of the law. And, finally, you would have to assume that all this occurred and that, notwithstanding, Garrison was only a few seconds

in time from the intersection, that he, in some miraculous manner could avert the collision which Clements had precipitated.

INSTRUCTIONS.

The third and fourth assignments of error have to do with the granting of instructions for the plaintiff, and the fifth assignment of error has to do with the granting of any instructions permitting a finding in favor of the defendant, Clements. They will be considered together. The foregoing discussion concerning the motion to strike the evidence of the plaintiff, both at the close of the plaintiff's testimony and also at the close of the defendant, Clements' testimony, is 46* applicable *pro tanto* to these three assignments *of error.

As has been stated in this petition and brief, we feel that the evidence was wholly insufficient to go to the jury at the close of the plaintiff's case. The evidence for the defendant, Clements, added absolutely nothing to aid the plaintiff, except to further contradict the contradictory evidence already adduced by the plaintiff. The witness, Dunning, was the only witness introduced by Clements who knew anything about the accident, and as has been pointed out, he contradicted Clements on the position in the road where he stopped, the distance Garrison's car was away from the intersection, the method of the turn he attempted to make into the highway, and the speed of the Garrison car. *His evidence added absolutely nothing to show any breach of duty on the part of Garrison.* There was not a syllable of evidence in the testimony adduced by Garrison that would show any liability on his part.

Inasmuch as counsel have given a resume of the testimony of all the witnesses, no good purpose can here be served by again analyzing the testimony to substantiate the statements made above. If we are correct in our contentions that there was no credible evidence to go to the jury, then the Court should not have granted any instructions permitting a finding in favor of the plaintiff against the defendant, Garrison.

Likewise, inasmuch as the physical facts and Clements' own admission, as well as the testimony of his friend, Dunning, show that Clements was guilty of gross reckless- 47* ness and the *violation of several statutes, already cited, we think the Court erred in granting any instruction that permitted a finding in favor of the defendant, Clements. The objections to all of these instructions and exceptions are

fully set out in the record (T., pp. 202-242), and reference is made to the argument and reasons assigned therein. The Court erred particularly in granting Clements' Instruction 15 (T., p. 216) wherein the jury was permitted to find that the sole proximate cause of the accident was the alleged negligence of Garrison. Under all the evidence, it was impossible to negative Clements' gross negligence, and, therefore, the instruction should not have been granted. The same thing is true of Instruction 16 (T., p. 217), which permitted the jury to find that the action of Garrison might have been the sole proximate cause of the collision. Clements' Instruction 13 (T., p. 214), is especially objectionable under the evidence and erroneous for the very obvious reason that there is no possibility of last clear chance in this case, and that instruction permitted the jury to find that Garrison could, by the exercise of reasonable care, have avoided the accident by slowing up or turning to his right, but there was no evidence in the case indicating that there was ever any opportunity for Garrison to do anything but what he did, and that is to abruptly turn his car to his left away from danger in order to avert the accident.

Plaintiff's Instruction 7 (T., p. 207) has the same vice, in addition to the fact that it permitted the jury to find that Clements was free from any negligence. To the same effect, is Instruction 8 (T., p. 208), which permitted a finding 48* against Garrison *alone and permitted the jury to find that Clements was free from gross negligence.

Instruction L (T., p. 240) offered by the defendant, Garrison, was refused as tendered, but the court gave the last paragraph (T., p. 223). We think the first paragraph explained the second and should have been granted as a whole.

THE CASE OF OTEY V. BLESSING.

Just a little over two years ago, this Court had occasion to decide the case of *Otey v. Blessing*, 170 Va. 542. That case was almost, if not exactly, on all fours with this case, except that the plaintiff's decedent in that case was the guest in the Blessing car being driven on the arterial road known as Lee Highway. She occupied the position that Mrs. Garrison occupied in this case. She recovered a verdict in the lower court which was sustained by this Court. At the time of that accident, however, Sec. 2154 (108), Acts 1938, p. 145, was not in effect, so that the law today is even more unfavorable to Clements than it was to Otey, who was in exactly the same situation as Clements in this case, that is, entering a main

arterial highway from a secondary road. However, the Court through Justice Holt, on page 548, stated the rationale of the statute as it was subsequently enacted and as it exists today, as follows:

"It is natural to assume that one on a main highway, rapidly approaching a crossing, would take it for granted that another on a secondary road likewise approaching it, but who had stopped, did so with the intention of giving arterial traffic the right of way. *One who is required to stop has not the right of way. That right, assuming that it had theretofore existed, is then suspended and remains suspended until he can proceed with safety.*" (Italics ours.)

Just prior to this statement, Justice Holt in commenting on the conduct of Otey, might well have been discussing the conduct of Clements in this case. He said:

"There can be no doubt about Otey's negligence. The stop sign standing at the crossing and the mandate of the statute (Code, Section 2154 (132) give to the high road the right of way. Yet after having stopped and when this fast approaching car was but eighteen or twenty steps away and in plain view, he attempted to pass in front of it in a car sixteen feet long. *It was almost a suicidal movement. To stop and not to look is inexcusable and inexplorable.*" (Italics ours.)

In that case, as in this, it was claimed that Blessing made a wrong movement in turning to his left while acting in an emergency. The Court quoted the familiar quotation from *Norfolk So. Railroad v. White*, 117 Va. 342, concerning the inability of the minds, nerves and muscles of men to coordinate so that there could be instantaneous action to meet an emergency. And the Court said concerning Blessing's effort to avoid the result of Otey's heedlessness, at page 548:

"Wherein was Blessing negligent? He passed from the right to the center of the road when Otey stopped. *Between that movement and the accident there is no causal connection.*" (Italics ours.)

Justice Holt further said:

"We may concede for the sake of argument that Blessing

failed to act with the best of judgment. When Otey started to cross the highway in front of him, he cut to the left in the hope that he might in that manner safely pass in front of the Packard car. When he found that this could not be done, he *undertook to turn back and to pass it to the right. He failed. *The emergency which confronted him was due to Otey's heedlessness, and for it he was in no wise responsible.*" (Italics ours.)

The facts in the Otey case are so similar, and the reasoning of the Court so unanswerable, that it is hardly necessary to quote further authority.

Our Court has many times passed upon the doctrine of error *in extremis*. Even if it were conceded that Garrison had committed an error in turning to his left to avoid the accident, it cannot be invoked when one is forced to recognize human frailties. *Va. E. & P. Co. v. Ford*, 166 Va. 619; *Lavenstein v. Maile*, 146 Va. 789; *Real Est., etc., Co. v. Gwyn*, 113 Va. 337.

This case is not similar to that of *Johnson v. Harrison*, 168 Va. 104, where the Court held, and very properly so, that a driver having the right of way cannot drive blindly into an intersection totally oblivious of all other conditions. In the Johnson case, the car from the intersecting road was approaching the main highway at a dangerous rate of speed, which was about 50 miles per hour, which was not seen by the driver of the other car. The Court held that the plaintiff was guilty of concurring negligence in not seeing the other car, notwithstanding his right of way afforded by the law.

Such is not the case here. Quite the contrary, Clements was approaching at a slow rate of speed, was slowing down as if to *stop, so slowly that he could have stopped instantly, according to his own statement. If he is to be believed, he actually stopped momentarily. In either case, this was a clear "go" signal if one were needed, for Garrison to proceed.

52* *CLEMENTS' FAILURE TO GIVE SIGNAL.

As heretofore stated, Clements did not give an arm signal of his intention to turn left into Route 460.

"Sec. 2154 (122): Signals on starting, stopping or turning—(a) Every driver who intends to start, stop or turn, or partly turn from a direct line shall first see that such movement can be made in safety and whenever the opera-

tion of any other vehicle may be affected by such movement, shall give a signal as required in this Section, plainly visible to the driver of such other vehicle of his intention to make such movement.”

The signal, of course, is the extension of the left arm in a horizontal position straight from and level from the shoulder. *The failure to give this signal had a very marked effect in this case.* Certainly, the driver of an automobile approaching like Mr. Garrison, was entitled to the benefit of such signal.

Morris v. Dame, 161 Va. 545;
Walker v. Croson, 168 Va. 410;
Wright v. Viar, 152 Va. 510.

53* *Conceivably, an arm signal by Clements could have avoided the collision. Undoubtedly, from the fact of the collision itself, Garrison was close enough to have seen the signal. If the signal had been given as Clements approached the crossing when he was in plain view of Garrison, or if it had been given when Clements was in a stopped position, if he was stopped, that is when the car going to Suffolk passed by, Garrison could have plainly seen it. He would have then been put on warning that Clements did not intend to accord to Garrison the right of way which the law afforded him. Garrison could have then, before going any closer, either turned to the middle or left of the highway, or, indeed, applied his brakes and stopped before reaching the intersection. No person on the highway was more entitled to this signal than Garrison, because of the movement across his line of travel and a turn to the left, that was intended to be made by Clements.

OTHER CITATIONS OF AUTHORITY.

For the proposition asserted that this court or any other court does not have to accept as true that which is contrary to physical facts or human experience, *we cite the following cases:

Norfolk & Western Railroad v. Strickler, 118 Va. 153, where the court said:

“This court has repeatedly declared that courts are not required to believe that which is contrary to human experi-

ence and the laws of nature, or which they judicially know to be incredible. Though the case be heard as upon a demurrer to the evidence, the court will not stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, when the physical facts demonstrate such evidence to be untrue and the verdict to be unjust and unsupported in law and in fact."

See also *Va. & S. W. R. R. v. Skinner*, 119 Va. 843, and *Drumwright v. Walker*, 167 Va. 307, where Justice Spratley, commenting upon the failure to see in a rear view mirror a straight road for 261 feet, said:

"Neither courts nor juries are required to believe that which they know from ordinary experience is otherwise."

If a further citation of authority than the Virginia cases already cited is considered necessary on the obligation of Clements to stop and yield the right of way to Garrison on the main highway and the fact that Garrison had a right to expect him so to do, we cite the able discussion in *Blashfield*, last edition, volume 2, section 1025, and the cases there collected. The author says:

55* *"While the precise scope of the acts relevant to the observance of the duty of care cannot, of course, be categorically stated, there is a fairly common concurrence in substance on the main content of the duty, to-wit, that the priority of right of one driver imposes a corresponding duty on the driver having the inferior right of way to exercise a degree of care commensurate with the superior right of the other *to observe the car of the other, its speed, position and operation, and to wait until it has passed before attempting to cross the intersection.*" (Italics ours.)

In the notes to the text are cited numerous typical cases from many states of the Union and in the 1940 cumulative annotation many more cases are cited substantiating the text, including *Otey v. Blessing*, 170 Va. 542, herein already referred to.

Section 1028 of *Blashfield* discussing the assumptions permissible to one having the right of way on a main highway is as follows:

"Notwithstanding the rule stated, in the preceding section, as to the absence of any assumption that other drivers

will give way, *a motorist having the right of way*, in addition to the general assumptions permissible to a motorist, *may properly anticipate* that others will respect that right, as a branch of his right, to rely on other drivers' observance of traffic rules and regulations; *he approaches the crossing, expecting, and entitled to expect; that such others will recognize his right, and his* conduct is to be judged in view of that circumstance." Citing many cases. (Italics ours.)

56* *ASSIGNMENTS OF ERROR 6 AND 7.

These assignments of error are to the refusal of the court to set aside the verdict and enter judgment in favor of the defendant, Garrison, or, failing that, to order a new trial. In view of the discussion under the other assignments of error, we do not deem it necessary to elaborate, except to say that the Court, after the verdict, should have corrected its error in not striking the evidence and in granting any instructions permitting a finding against the defendant, Garrison.

ADDENDA.

Since completing the preparation of this petition and brief, but before it had been finally transcribed, counsel for petitioner received copy of petition for writ of error on behalf of the other defendant, Nat Clements. As stated in this petition, counsel object to the consideration of the petition of the co-defendant Clements on the grounds previously set forth herein.

However, in the event this Court does consider the petition of the defendant Clements, your petitioner feels impelled to comment on the same in several *particulars:

1. Counsel for defendant Clements state that the transcript of the record has not been available to them, inasmuch as it has been in possession of counsel for Garrison. Of course, the original at all times has been in the Clerk's Office and readily accessible.

2. Counsel for Clements asks for a writ of error only in the event the same is granted to Garrison. A reading of the prayer will at once disclose that they do not seriously anticipate a writ in their behalf, but are content with the judgment of the lower court if Garrison is compelled to bear the burden with them.

3. While counsel for Clements do not rely on their petition as their brief, they do attempt to briefly set out the facts.

It is a scant narration of the facts and only from the most favorable point of view of the defendant Clements. A comparison of the detailed statement of facts and resume of the evidence contained in this brief will immediately disclose the accuracy of this statement.

4. While we have dealt with the subject to some extent in this petition and will do so more fully orally, if necessary, we feel called upon to comment on the contention of counsel for Clements concerning the granting *of Instruction 58* "L" for Garrison:

(a) Instruction "L" as granted was correct as applied to the facts in this case. The physical evidence shows that Clements attempted to enter the intersection not only when the Garrison car was within 500 feet, *but when it was dangerously close*. If there is any force in the contention that "reckless driving" means gross negligence, then we reply that that act *was gross negligence*. If the statute requiring a vehicle entering a main highway to stop when traffic is within 500 feet means anything, it means to stop and remain stopped, if necessary, to permit traffic within that distance to go by in safety. The lower Court merely stated the true meaning of the statute *as applied to this case*. It is no answer to state a hypothetical case, as did counsel, of a horse-drawn wagon 400 feet away. Such did not happen to be the case here.

(b) The case of *Morris v. Dame*, 161 Va. 545, cited by counsel, is not applicable, for in this case the act of entering under these circumstances, unquestionably was gross negligence. The Court in another instruction defined elaborately the term "gross negligence" which in this case would be synonymous with reckless driving.

(c) The case of *Gale v. Wilber*, 163 Va. 211, cited by counsel, is not applicable for the very reason *that even if 59* the instruction in that case were objectionable, *as applied to the facts in that case*, the Court there was dealing with an instruction that asked for a finding for the plaintiff. In this case Instruction "L" *does not ask for a finding for the plaintiff, it does not ask for a finding against Clements*,—it merely tells the jury that if Clements was guilty of reckless driving and it "was the sole proximate cause of the collision, then you are instructed that *you cannot find a verdict against the defendant Garrison*".

The two instructions are entirely different. Even if there were any force in the contention of counsel for Clements it would be inapplicable here *where this instruction does not ask for a finding*.

CONCLUSION.

For the foregoing reasons and other reasons which may be assigned at bar, your petitioner prays that a writ of error and *supersedeas* be awarded him and that upon a hearing the judgment of the Corporation Court of the City of Newport News be reviewed and reversed and final judgment entered in favor of your petitioner, or, if not, that a new trial be awarded to your petitioner.

60* *A copy of this petition was delivered to Mr. H. L.

Nachman, Newport News, Virginia, of counsel of record for the plaintiff, on the 2 day of November, 1940, and although counsel for your petitioner does not consider it obligatory on his part to deliver a copy of this petition to counsel for the defendant Clements, nevertheless, as a matter of professional courtesy, he delivered a copy of the same to Mr. A. L. Bivins, Newport News, Virginia, of counsel of record for the defendant, Clements, on the 2 day of November, 1940.

An oral presentation is requested, and if a writ of error is allowed, this petition will be relied on as an opening brief.

WILLIAM E. GARRISON.

By CHARLES E. FORD, Counsel.
Newport News, Virginia.

A. E. S. STEPHENS,

Smithfield, Virginia.

LETT, MURRAY & FORD,

Newport News, Virginia,
Counsel.

61* *I, Charles E. Ford, Attorney, practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the decision and judgment of the Corporation Court of the City of Newport News in the foregoing case should be reversed by the Supreme Court of Appeals of Virginia.

Given under my hand this 2 day of November, 1940.

CHARLES E. FORD,

Attorney at Law.

Newport News, Virginia.

Received Nov. 2, 1940.

C. V. S.

November 27, 1940. Writ of error and *supersedeas* awarded by the Court. Bond \$6,000.

M. B. W.

RECORD

VIRGINIA:

PLEAS before the Corposation Court of the City of Newport News, at the courthouse thereof, on Friday, the Fifth day of July, in the year, One Thousand Nine Hundred and Forty.

BE IT REMEMBERED, That heretofore, to-wit: On the 10th day of June, 1940, came Sallie Burns, an infant who sues by P. D. Burns, her father and next friend, by counsel, and docketed in said Court a certain notice of motion for judgment for money against Nat Clements and William Garrison, which said notice of motion is in the words and figures following, to-wit:

Virginia:

In the Corporation Court of the City of Newport News.

Sallie Burns, an infant, who sues by P. D. Burns, her father and next friend, Plaintiff,

v.

Nat Clements and William Garrison. Defendants.

To Nat Clements,
231 44th Street,
Newport News, Virginia,

and

William Garrison,
Windsor, Virginia:—

NOTICE is hereby given you, and each of you, that on the 10th day of June, 1940, at ten o'clock A. M., or so soon thereafter as the undersigned can be heard, the undersigned, an infant, who sues by P. D. Burns, her father and next friend, will make a motion before the Corporation Court of the City of Newport News, Virginia, at the courthouse thereof, in said City, for a judgment against you, and each of you, for the sum of Twenty Thousand (\$20,000.00) Dollars, for damages for personal injuries she sustained by reason of the gross negligence of you, the said

Nat Clements, and the negligence of you, the said William Garrison; for this, to-wit:

That heretofore, to-wit, on the 10th day of December, 1939, the undersigned was riding as a passenger in an automobile operated by you, the said Nat Clements, which was proceeding in a westerly direction along a certain road which runs into the main highway #52 on the outskirts of the City of Suffolk, Virginia, between the said City of Suffolk and Windsor, Virginia; that on the day, month and year aforesaid, you, the said William Garrison, were operating an automobile along said highway #52 in a northerly direction on the outskirts of the said City of Suffolk, Virginia, between the said City of Suffolk and Windsor, Virginia; that it thereupon became the duty of you, and each of you, while operating your respective automobiles, as aforesaid, to operate the same in a careful and prudent manner and at a reasonable and proper rate of speed; to keep your respective automobiles under proper control; to keep a proper lookout for vehicles using said road; and it was also the duty of you, the said Nat Clements, while operating your said automobile, as aforesaid, to give timely warning of your approach to said highway #52, and to stop your said automobile before entering said highway, and it was also the duty of you, and each of

page 3-a } you, when you saw, or by the exercise of ordinary care could have seen, the automobile operated by the other in time to stop your respective automobiles so as to prevent a collision and avoid injuring the undersigned, as hereinafter mentioned, to so stop the same. Yet, not regarding your aforementioned duties in that behalf, you, the said Nat Clements, grossly negligently failed to operate your said automobile in a careful and prudent manner and at a reasonable and proper rate of speed, but operated the same at a high, rapid and excessive rate of speed; you grossly negligently failed to keep your said automobile under proper control; you grossly negligently failed to keep a proper lookout for vehicles using said road; you grossly negligently failed to give timely warning of your approach to said highway #52; you grossly negligently failed to stop your said automobile before entering said highway, and when you saw, or by the exercise of ordinary care could have seen, the automobile operated by the said William Garrison in time to stop your said automobile so as to prevent a collision and avoid injuring the undersigned, as hereinafter mentioned, you grossly negligently failed to so stop the same. And you, the said William Garrison, not regarding your aforementioned duties, carelessly and negligently failed to operate your said

automobile in a careful and prudent manner and at a reasonable rate of speed; you carelessly and negligently failed to keep your said automobile under proper control; you carelessly and negligently failed to keep a proper lookout for vehicles using said road, and when you saw, or by
 page 4-a } the exercise of ordinary care could have seen, the automobile operated by the said Nat Clements in time to stop your said automobile so as to prevent a collision and avoid injuring the undersigned, as hereinafter mentioned, you carelessly and negligently failed to so stop the same. And as a direct and proximate result of the gross negligence of you, the said Nat Clements, and the carelessness and negligence of you, the said William Garrison, the automobiles operated by you respectively collided with great force and violence. And as a direct and proximate result thereof, the undersigned sustained a broken leg and divers painful, severe, serious and permanent injuries in and about other parts of her body, and as a direct and proximate result thereof, the undersigned became and was sick, sore, lame, disabled, disordered and disfigured, and so remained for a long space of time, to-wit, from thence hitherto, during which time she suffered great physical pain and mental anguish, and for a long time in the future, and for the rest of her natural life, the undersigned will continue to be sick, sore, lame, disabled, disordered and disfigured, and to suffer great physical pain and mental anguish, to the total damage to the undersigned of Twenty Thousand (\$20,000.00) Dollars.

WHEREFORE, The undersigned will pray for a judgment against you, and each of you, for the sum of Twenty Thousand (\$20,000.00) Dollars, at the time and place first above set out.

SALLIE BURNS,
 an infant, who sues by P. D. Burns, her
 father and next friend,
 By HERMAN A. SACKS, Counsel.

HERMAN A. SACKS,
 p. q.

page 5-a } And at another day, to-wit: At a Corporation Court held for the City of Newport News, on Tuesday, the 2nd day of July, in the year 1940.

This day came the parties, by their attorneys, and the defendants, by their attorneys, say that they are not guilty of

the trespasses laid to their charge in the manner and form as the plaintiff against them has complained, and of this they put themselves upon the country, and the plaintiff likewise, and issue is joined; thereupon came a jury of seven persons, to-wit: C. E. Minnigerode, M. M. Hutton, W. C. Gay, G. W. Fowler, Malcolm Nexsen, J. W. Eubank, A. W. Goolsby, who being elected, tried and sworn the truth to speak upon the issue joined, after having heard the evidence of the plaintiff, the defendant, Garrison, by his attorney, moved the Court to strike out the evidence of the plaintiff on the ground that it does not show that the defendant, Garrison, contributed to the accident involved herein, which said motion being fully argued, the Court doth overrule the same, to which action of the Court in overruling his said motion, the defendant, Garrison, by his attorney, excepted. Thereupon the defendant, Clements, by his attorney, moved the Court to strike out the evidence of the plaintiff as to him on the ground that the evidence does not show gross negligence on the part of the defendant, Clements, which said motion being

page 6-a } fully argued, the Court doth overrule the same, to which action of the Court in overruling the said motion, the defendant, Clements, by his attorney, excepted. And after the evidence had been further heard, the defendant, Garrison, renewed his motion to strike out the evidence of the plaintiff as to him, on the ground heretofore stated and for the additional reason that there had been no additional evidence heard, except that which was in favor of the defendant, Garrison, which said motion being fully argued, the Court doth overrule the same, to which action of the Court in overruling his said motion, the defendant, Garrison, by his attorney, excepted; and the evidence being completed, the jury was adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: At a Corporation Court held for the City of Newport News, on Wednesday, the 3rd day of July, in the year 1940.

This day came again the parties, by their attorneys, and the jury appeared in Court in accordance with its adjournment herein on yesterday, and the Court having heard arguments on instructions, were adjourned until July 5th, 1940, at ten o'clock A. M.

And now at this day, to-wit,—being the day and year first herein above written,—At a Corporation Court held for the City of Newport News, on Friday, the 5th day of July, in the year 1940.

This day came again the parties, by their attorneys, and the jury appeared in Court in accordance with their adjournment herein on the 3rd day of July, 1940, and the arguments of counsel being fully heard, the jury retired to page 7-a } its room to consider of its verdict and after some time, returned into Court, having found the following verdict, to-wit: "We, the jury, find for the plaintiff against the defendants, Nat Clements and William Garrison, and fix her damages in the sum of Five thousand Dollars (\$5,000.00) (signed) Malcolm Nexsen, Foreman." Thereupon the defendant, Garrison, by his attorney, moved the Court to set aside the verdict of the jury and to enter up judgment for the defendant, Garrison; and the defendant, Garrison, by his attorney, also moved the Court to set aside the verdict of the jury as to him and to grant him a new trial herein on the grounds that the same is contrary to the law and the evidence and for misdirection of the jury by the Court in granting instructions for the plaintiff and for the defendant, Clements, over objection of counsel for the defendant, Garrison, and for the failure to grant instructions for the defendant, Garrison, that were offered and should have been granted, and for the further reason that the Court erred in failing to strike the evidence of the plaintiff on the motion of the defendant, Garrison, when the motion to strike was first made, and for error of the Court in failing to strike evidence of the plaintiff as against the defendant, Garrison, when the motion was made the second time, and for the further reason that the verdict against Garrison is without sufficient evidence and without any legal evidence to support it, and that all of the evidence shows that the defendant, Clements, was solely responsible for the accident involved herein, and that the verdict of the jury should be against the defendant, Clements, solely. Thereupon the defendant, page 8-a } Clements, by his attorney, moved the Court to set aside the verdict of the jury as to the defendant, Clements, on the ground that the same is contrary to the law and the evidence, and that there is no law to support it, and moved the Court to render final judgment in favor of Nat Clements; and the defendant, Nat Clements, by his attorney, also moved the Court to set aside the verdict of the jury and grant him a new trial on the ground that the verdict is contrary to the law and the evidence, and that there is no evidence to support it, and because of misdirection of the jury by the Court in reference to instructions, and for the further reason that the verdict is excessive, which said motions of both defendants being fully argued, the Court doth overrule the same, to which action of the Court in over-

ruling the said motions, both defendants, by their attorneys, excepted. Therefore, it is considered by the Court that the plaintiff recover against the defendants, Nat Clements and William Garrison, the sum of five thousand dollars (\$5,000.00), with interest thereon to be computed after the rate of six per centum per annum from the 5th day of July, 1940, till payment, and her costs by her about her suit in this behalf expended. And the said defendants in mercy, etc.

And at another day, to-wit: At a Corporation Court held for the City of Newport News on Wednesday, the 31st day of July, in the year 1940.

Now comes the defendant, William Garrison, by counsel, and the said defendant intimating his intention to apply to the Supreme Court of Appeals for a writ of error page 9-a } and *supersedeas* to the judgment entered herein on the 5th day of July, 1940, it is Ordered that the said judgment be suspended as to the defendant, William Garrison, for a period of ninety (90) days from this date on condition that the defendant, William Garrison, or someone for him, shall, within five (5) days from the date hereof, enter into a suspending bond before the Clerk of this Court in the penalty of \$6,000.00, with surety approved by the said Clerk, the said bond to be conditioned according to law.

It is further Ordered that should the defendant, William Garrison, or someone for him, elect to give a bond containing all the conditions prescribed in Section 6351 of the Code, he may do so provided the bond shall be in the penalty of Six Thousand Dollars (\$6,000.00), with surety approved by the said Clerk, the said bond to be conditioned in accordance with the said Section 6351, and in that event the said judgment shall be suspended for a period of ninety (90) days from this date.

page 1 } Virginia:

In the Corporation Court of the City of Newport News.

Sallie Burns, an infant, who sues by her father and next friend, P. B. Burns

v.

Nat Clements, and William Garrison.

RECORD.

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the re-

spective parties, the action of the Court in respect thereto, all the instructions granted, amended and refused, and the objections and exceptions thereto, and all other incidents of the trial of the case of Sallie Burns, an infant, who sues by her father and next friend, P. B. Burns v. Nat Clements and William Garrison, tried in the Corporation Court of the City of Newport News, Virginia, on the 2nd, 3rd and 5th of July, 1940, before the Honorable Herbert G. Smith, and Jury.

Present: Mr. Herman A. Sacks, and Mr. Harry L. Nachman, representing the Plaintiff. Mr. John S. Rixey, and Mr. A. L. Bivins, representing Defendant Clements. Mr. A. E. S. Stephens, and Mr. Charles E. Ford, representing Defendant Garrison.

page 2 } Index.

page 3 } Virginia:

In the Corporation Court of the City of Newport News.

Sallie Burns, an infant, who sues by her father and next friend, P. B. Burns

v.

Nat Clements, and William Garrison.

TESTIMONY.

Before: Hon. Herbert G. Smith, J., and Jury.

Newport News, Virginia, July 2, 1940.

Present: Mr. Herman A. Sacks, and Mr. Harry L. Nachman, for Plaintiff. Mr. John S. Rixey, and Mr. A. L. Bivins, for Defendant Clements. Mr. A. E. S. Stephens, and Mr. Charles E. Ford, for Defendant Garrison.

The court certifies that the following evidence on behalf of the plaintiff and the defendants, respectively, as hereinafter denoted, is all the evidence that was introduced on the trial of this action, and the following stenographic report contains all the evidence, together with all the motions, objections and exceptions on the part of the parties, the action of the court in respect thereto, all the instructions granted, amended and refused, and the objections and exceptions thereto, and all other incidents of the trial of this action.

Dr. J. R. Ellison.

Be it remembered that on the trial of this case, after the jury had been sworn and opening statements of counsel for all parties had been made to the jury, the plaintiff, to maintain the issue on her part, introduced the following evidence:

page 4 } PLAINTIFF'S EVIDENCE.

DR. J. R. ELLISON,
sworn on behalf of the plaintiff, testified as follows:

By Mr. Sacks:

Q. Your name is Dr. J. R. Ellison?

A. Yes.

Q. And you practice medicine in Suffolk?

A. Yes, sir.

Q. How long have you been practicing medicine?

A. Twelve years.

Q. In the City of Suffolk all that time?

A. Yes, sir.

Q. Of what school are you a graduate, doctor?

A. The Medical College of Virginia.

Q. Dr. Ellison, do you know this young lady, Miss Sallie Burns?

A. Yes, sir.

Q. Did you have occasion to treat her for any injuries she sustained last December?

A. I did.

Q. Now, will you please turn to the jury and tell them, describe the nature of her injuries?

A. Miss Burns was injured in an automobile accident on the 10th of December. She was brought to the hospital suffering from a fracture of her left thigh about mid-
page 5 } way, she had a fracture of her left thigh about mid-
way, and bruises and abrasions of her head and

body.

Q. What sort of a fracture was it?

A. It was a transverse fracture, a clean break.

Q. She was taken to the hospital?

A. She was admitted to the hospital on the 10th.

Q. The same day she was hurt?

A. Yes.

Q. How long did she remain in the hospital?

A. 105 days.

Q. That is a little over four months?

A. Yes.

Dr. J. R. Ellison.

Q. Three months?

A. Yes.

Q. What was the occasion for her staying in the hospital that long?

A. For treatment to the broken leg.

Q. While she was in the hospital was she able to get about any?

A. Oh, no, she was in bed up until the last week or so.

Q. And did you resort to the usual treatment of having her leg stretched?

A. In suspension, yes, sir, traction.

Q. By means of a pulley?

A. That is right.

page 6 } Q. After she left the hospital was she able to walk without the assistance of crutches or a cane?

A. She was on crutches up until some two or three weeks ago.

Q. Now, what was the final result of this injury? Is she well now or is she still disabled?

A. Well, she has about a half-inch shortening of the broken leg and some interior bowing of the thigh.

Q. Will that be permanent?

A. That will probably be permanent.

Q. Would you say that was a painful injury she sustained?

A. Yes, she suffered right much pain at first.

Q. And will she or not suffer pain in the future?

A. Well, I think most everybody who has had a broken bone complains of it from time to time, from aching.

Q. You say that you had her leg suspended in the hospital; how long did that treatment continue?

A. About two and a half months, I should say.

Q. For two and a half months she was flat on her back with her leg suspended?

A. Yes.

Q. And after that what sort of treatment was given her?

A. After that we started massage and heat treatments.

CROSS EXAMINATION.

By Mr. Bivins:

page 7 } Q. That, of course, will not prevent her from walking?

A. Oh, no, she will be able to get around all right.

Q. This young lady is sixteen years of age, I understand?

A. Yes, sir.

Dr. J. R. Ellison.

Q. It was asserted by Mr. Sacks that that is her age?

A. Yes, sir.

Q. That is true from your knowledge of her case history?

A. Yes, sir.

Q. Is there a probability that she will grow, or has she had all of her growth, or what is your opinion as to that?

A. It is possible that that leg will lengthen some. It is probable that that leg will lengthen some as she grows older, but there will always be some shortening.

Q. At the present time you say the shortening amounts to how much?

A. About a half-inch.

Q. About a half-inch?

A. Yes.

Q. If she does continue to grow, of course, that shortening will be lessened?

A. It probably will some.

Q. Did you make mention of the fact that she has had some bowing of the thigh?

A. She has some slight interior bowing.

Q. That will become less in time, is that correct?
page 8 } A. Yes.

Q. You did make that statement, I understand, doctor?

A. I made that statement.

Q. And that condition will become less?

A. That will probably become less, too.

Mr. Stephens: No questions.

RE-DIRECT EXAMINATION.

By Mr. Sacks:

Q. If this young lady grows some more, her well leg will grow some, too, will it not?

A. Oh, yes.

Q. And if her well leg grows in the same proportion as the damaged leg, she would still have the same shortening, wouldn't she?

A. If it grows in the same proportion, yes.

Q. And isn't it possible the well leg may grow and the injured leg may not grow as rapidly?

A. Yes, that is possible.

Q. And if that condition exists she will have much more shortening than she has now, will she not?

Dr. J. R. Ellison.

A. Yes, that is right.

Q. And that is possible, you say?

A. That is possible.

Q. Now, this bowing of the thigh, you say that that may straighten a little more?

page 9 } A. That comes from a healing process and will gradually straighten out.

Q. You don't know how long that will take, do you?

A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Bivins:

Q. Your statement about the growth of her legs, and so on, that is merely problematical?

A. Yes.

Q. At this time, she has a shortening there of a half-inch?

A. Yes.

Q. Certainly it will not become any greater; if anything occurs it will become less?

A. More chance.

Q. Isn't that true?

A. There is more chance.

Q. The use of the limb itself will, of course, lessen that shortening, isn't that a fact?

A. That is probably true.

Q. Exercise will produce that character of results, isn't that so?

A. While needing exercise, it is a fact that a short leg will usually compensate for its shortness.

Q. The compensation resulting from a condition
page 10 } of that sort, in other words, the shortage will be adjusted in her walking, so that it will not be noticeable unless you observe closely?

A. That is right.

Q. Unless a person has some—

A. There will be some limp while it is short like that.

Q. But you have to notice carefully to observe it. I mean after a course of time?

A. Well, after a course of time, yes.

Q. After a course of a few months, that is true, isn't it? After a few additional months you would have to look closely in order to observe any limp in the walking of this young woman?

A. I think that is probably true.

Nat Clements.

RE-DIRECT EXAMINATION.

By Mr. Sacks:

Q. Doctor, will her injured leg be as good as it was before this injury?

A. Excepting for the shortness, yes.

By A Juror:

Q. Does the hospital record show what time she was admitted to the hospital?

A. Somewhere around 5 o'clock in the afternoon. I didn't see her right at that time. I saw her later on. She was treated by the house man when she first came in.

page 11 } Q. How far was it to the scene of this accident, do you know that?

A. Some four miles, I should say.

By Mr. Sacks:

Q. You don't know the exact time; you are only guessing at it?

A. Some time late in the afternoon.

Mr. Sacks: I would like to call Mr. Clements as an adverse witness.

NAT CLEMENTS,

sworn as an adverse witness, testified as follows:

By Mr. Sacks:

Q. Your name is Nat Clements?

A. Yes, sir.

Q. And, Mr. Clements, I believe you live in Isle
page 12 } of Wight County, is it, or Newport News?

A. Isle of Wight is my home. I work over here.

Q. You know this young lady, do you not?

A. Yes.

Q. She was riding as a passenger with you in your automobile on December 10th?

A. Yes.

Q. About what time of the evening did this collision between your car and Mr. Garrison's car occur?

A. It was around 5:30 or 6 o'clock.

Q. What makes you think it was that late?

A. Well, it was getting pretty dusky, dark.

Q. You put it at around 5:30 or 6 o'clock?

Nat Clements.

A. Yes, sir.

Q. Where did you come from?

A. My home.

Q. Is that in Nansemond County?

A. Yes.

Q. How far is that from Suffolk?

A. About 3½ or 4 miles.

Q. Going towards Petersburg?

A. Yes.

Q. When you left your home where were you intending to go?

A. Back up to my father's service station.

page 13 } Q. Is that towards Suffolk?

A. Yes.

Q. Coming down this road that you were on, before you enter the main highway, what is the name of that road?

A. Lake Prince Road.

Q. Is that a second class road?

A. Yes, sir.

Q. And in order to get where you were intending to go, to your father's station, do you have to make a left- or a right-hand turn?

A. Left.

Q. This young lady was riding on the front seat with you?

A. Yes, sir.

Q. And there was another couple in the back?

A. Yes.

Q. Did you see this car operated by Mr. Garrison?

A. Yes.

Q. Where was that car when you arrived at the intersection?

A. About 350 yards up the road.

Q. Left of you?

A. Left of me, yes.

Q. About 350 yards?

A. Yes.

Q. That is about 1,050 feet?

page 14 } A. Yes.

Q. Did you see the car?

A. Yes.

Q. What side of the road was it on?

A. On the right.

Q. Coming towards you?

A. Yes.

Q. Did it have any headlights burning?

Nat Clements.

A. No, sir.

Q. You are sure of that?

A. Yes.

Q. Did you have your headlights burning?

A. No, sir, I had parking lights.

Q. You had your parking lights burning?

A. Yes.

Q. But you had front lights burning?

A. Yes.

Q. Was it after sundown?

A. I don't know. It was kind of cloudy, I think a few clouds.

Q. At 5:30 o'clock in December it would be kind of dark?

A. Yes.

Q. How do you say this collision happened?

A. Well, I got up to this road, I stopped at this road and put my car in low gear. I seen him coming, and
page 15 } I pulled out and pulled over, and he got almost to me and cut to the left and hit me full in the front.

Q. You say you stopped?

A. Yes.

Q. And when you stopped he was how far away from you?

A. He looked like about 350 yards.

Q. Then you started to make a left turn?

A. Yes.

Q. As you were turning was this car coming?

A. You mean the Garrison car?

Q. Yes.

A. Yes, I saw it.

Q. Was there anything to prevent Mr. Garrison from seeing your car turning to the left?

A. Not as I know of.

Q. You say you had your parking lights burning?

A. Yes.

Q. And you could see all the way back from the road that you came out of to where Mr. Garrison's car was coming down the road?

A. Yes.

Q. About 350 yards?

A. Yes.

Q. How far had you gotten into the main highway?

A. I got almost to the center of the asphalt.

page 16 } Q. That is a right wide highway, isn't it?

A. Yes.

Nat Clements.

Q. And you had made your left-hand turn then?

A. Yes, I got on the highway nearest to the curbing.

Q. You had practically made your turn?

A. Yes.

Q. And you say Mr. Garrison came over to his left?

A. To his left, yes, sir.

Q. What part of your car was struck?

A. The front. He struck the right-hand say a little more than the left.

Q. Was it a sort of a head-on collision?

A. Yes.

Q. A head-on collision?

A. Yes, kind of.

Q. Was there any room between the extreme left of the highway—I am talking about the side Mr. Garrison was on—and the rear of your car for Mr. Garrison to have passed without turning to the left?

A. I think so. He could pass on the right, I think.

Q. You mean he could pass on your right?

A. Yes.

Q. There was room enough?

A. I think so.

Q. Now, do you know about how fast Mr. Gar-
page 17 } rison was going?

A. I couldn't say.

Q. You couldn't estimate the speed?

A. No, sir.

Q. How long did it take him to travel this 1,050 feet?

A. Not long.

Q. Well, about how long?

A. Just a few seconds.

Q. Was there another car in that vicinity at that time?

A. When I came up to the highway one car went from Windsor to Suffolk, and I waited for him to pass.

Q. Did that car have any lights on?

A. Yes, sir.

Q. This car you were just talking about, which was coming in the opposite direction from—

A. From Mr. Garrison.

Q. And he had lights on?

A. Yes.

Q. You say you waited for that car to pass?

A. Yes, sir.

Q. This young lady was hurt?

A. Yes.

Nat Clements.

Q. And she was taken to the hospital?

A. Yes, sir.

Q. Now, after the accident how were the cars located there, what was their position?

page 18 } A. I was unconscious, I don't know. When I knew anything they had drove the cars off the road.

Q. It knocked you out?

A. Yes.

Q. And was your car damaged much?

A. Yes, sir.

Q. What part of your car was damaged and to what extent?

A. The front part of it.

Q. Was the motor damaged?

A. Yes, I think so, it was jammed up.

Q. It was jammed up?

A. Yes.

Q. Was it knocked back?

A. Yes.

Q. How was the traffic on the road that time of night?

A. All Sunday traffic is pretty heavy.

Q. This was on Sunday?

A. Yes, sir.

Q. You say traffic was heavy?

A. Yes, pretty heavy.

Q. Going both ways?

A. Yes.

Q. But there was nothing between your car and Mr. Garrison's car?

A. No, sir.

page 19 } CROSS EXAMINATION.

By Mr. Ford:

Q. Mr. Clements, what was the license number of your car last year?

A. 234-452.

Q. Is this what was left of your car after the accident? (Showing witness photograph marked for identification Garrison Exhibit No. 1.)

A. Yes, sir.

Q. Do you recognize it as being your car?

A. Yes.

Q. You identify that?

Nat Clements.

A. Yes, sir.

Q. Now, looking at that picture you wouldn't say this was a head-on collision, would you?

A. Well, it is in the front anyhow. I don't know what you would call it.

Q. The left front?

A. Yes.

Q. Isn't that true?

A. Yes, my left fender. My right fender is caught, too.

Q. Do you remember what part of the Garrison car was injured?

A. No, sir, I don't.

Q. Did you see it afterwards?

page 20 } A. No, sir.

Q. Would you know it if you saw it?

A. Yes, sir, I guess I would know the car. I have seen it.

Q. You have seen the car?

A. Yes, sir.

Q. Would you recognize this as being Mr. Garrison's car, Mr. Clements? (Showing witness photograph marked for identification Garrison Exhibit No. 2.)

A. Yes.

Q. Well, now, Mr. Clements, would you say that the principal damage to the Garrison car was on his right front?

A. Yes, sir.

Q. Looking at that?

A. Yes.

Q. And the principal damage on your car was where?

A. Right in the center. You see the bumper is practically broken in two right in the center.

Q. You think it is in the center?

A. Yes.

Mr. Rixey: You mean the center in front?

The Witness: Yes.

By Mr. Ford:

Q. Why is it that you have some hesitancy about the time of evening it was? You say about 5:30 or 6 o'clock.
page 21 } Can't you fix the time any closer than that?

A. Well, because I didn't have a watch.

Q. I think it becomes important, because it is beginning to get dusk at that time of year?

A. Yes.

Q. And a half hour might make a great deal of difference.

Nat Clements.

You are not able to fix the time any closer than 5:30 or 6 o'clock?

A. I would say 5:30.

Q. Officer Burgess came up very shortly, did he not?

A. Yes.

Q. Were you conscious then?

A. Yes.

Q. But he did come up within a few minutes?

A. Yes.

Q. Well, now, where had you been? You say you had been to your home?

A. Where had I been before I got there?

Q. Yes.

A. I had been to the station.

Q. Doing what?

A. Nothing. My dad had a new car and I drove it out, it had 43 miles on it. I drove my dad's car, a new Chevrolet, up to this station just trying it out, and drove back home and got in my own, and that happened.

Q. Where did Miss Burns get in the car?

page 22 } A. At the station.

Q. How long had you all been together that evening?

A. We just ran up with each other.

Q. Who was in the rear of the car?

A. Miss Brickle and Mr. Dunning.

Q. How long did you stay down there at your home?

A. Just long enough to change cars.

Q. Then you drove back from your lane onto the Lake Prince Road, that is this dirt road, with the idea of going up to the Route 460, and then back to your father's station, is that right?

A. That is right.

Q. Well, now, how far away from the highway 460 is that gas station on the right as you approach the highway, the rear end of that, how far away from the road is that, would you say?

A. The Shell gas station there?

Q. That is right.

A. From the front of that road or—

Q. From the front of the road to the Shell station, to the nearest side, how many feet is it?

A. About 100 feet, I imagine.

Q. About 100 feet?

Nat Clements.

- A. Yes.
- page 23 } Q. How far is that stop sign from the side of the road?
- A. They have changed it now.
- Q. I mean at that time?
- A. At that time, from the edge of the road I would say about 25 feet, 20 or 25 feet.
- Q. You think 20 or 25 feet?
- A. Yes.
- Q. They have moved it over a little bit farther out of the way?
- A. Yes.
- Q. And at the time of this accident it was right by the telegraph pole, was it not?
- A. Yes.
- Q. Don't you think probably 30 feet would be a better estimate of distance?
- A. I couldn't say, I don't know the distance.
- Q. This is the stop sign as it existed at the time of the accident, is that right, Mr. Clements?
- A. That is right.

Mr. Ford: I think I ought to introduce these in evidence, Your Honor.

The Court: All right.

Mr. Ford: I will do so now. I will mark them Garrison's Exhibits Nos. 1, 2 and 3; I think there is no objection, and also this will be Garrison Exhibit No. 4. These ex-
 page 24 } hibits I now introduce out of order with the permission of these gentlemen, but we are all talking about them and you ought to see them. This is the stop sign right here by the side of that telegraph pole as it was at the time of the accident, (indicating). This little photograph, Mr. Clements, that I have designated Garrison Exhibit No. 5, and which I now introduce in evidence, shows the stop sign there standing in the middle of the highway, doesn't it?

The Witness: Yes.

By Mr. Ford:

Q. Do you recognize that?

A. Yes.

Q. This is a photograph taken from about the middle of the highway in the direction of the stop sign, showing the

Nat Clements.

distance between the road and the stop sign, which is much nearer than the other photograph, Mr. Clements, and you think that is about 20 or 25 feet?

A. Yes.

Q. Mr. Clements, this main road is perfectly level on a stretch at this point, is it not?

A. Yes.

Q. And looking to your left as you enter on the Lake Prince Road towards Suffolk you can see down there about page 25 } a quarter of a mile, can't you?

A. Yes.

Q. And you had no difficulty in seeing this car 350 yards away?

A. No, sir.

Q. Whether or not it had lights, that did not interfere with your vision of it?

A. No, sir.

Q. You say you stopped your car when you were about 10 feet from the edge of the highway?

A. Yes, sir.

Q. And you permitted a car going towards Suffolk to go by?

A. Yes, sir.

Q. Going towards Suffolk, is that right?

A. Yes, from Windsor.

Q. In other words, you permitted a car to go by in the same direction you were going?

A. That is right.

Q. You say Windsor. He could have been coming from Windsor or Petersburg?

A. Yes.

Q. It could have been Windsor or Petersburg?

A. That is right.

Q. Of course, with a 42-foot road, the width of the road, there was no reason in letting a car go on to Suffolk in so far as your driving was concerned, was there? page 26 }

A. No.

Q. With a road that wide you could actually let a car go on by you in the same direction without even stopping, couldn't you?

A. No, I did.

Q. There was no difficulty in doing that, was there?

A. No, sir.

Nat Clements.

Q. Because of the width of that road?

A. Yes.

Q. But you say you did stop?

A. Yes.

Q. Now, when you stopped at that 10 feet distance you then saw the Garrison car, as you say, 350 yards away?

A. Yes, sir.

Q. Of course, it didn't take long for you to stay in a stopping position to let this car go to Suffolk did it?

A. No.

Q. And then you went onto the road making your left turn?

A. That is right.

Q. Is that right?

A. Yes, sir.

Q. Did you get to the middle point of the highway before the impact?

A. About the center of the asphalt.

page 27 } Q. About the center of the asphalt, which would be about the center of the entire road, wouldn't it?

A. Yes.

Q. The asphalt is in the middle of that highway?

A. Yes.

Q. And it had concrete, 11-foot concrete aprons, I call them?

A. Yes.

Q. On both sides?

A. Yes.

Q. So when you got to the center of the asphalt you were in the center of the road approximately?

A. Approximately.

Q. As a matter of fact, wasn't it a little bit to your side?

A. It might have been a little, a very little.

Q. But for all practical purposes we will call it the center of the road?

A. Yes.

Q. So that you had traversed a distance of half of the 42 feet and the 10 feet from the time that you first became in a stopped position until the impact, isn't that right?

A. That is right.

Q. You went about 31 feet on a slight curve, that is right, isn't it?

page 28 } A. Yes.

Q. And the other car, Mr. Garrison's car, at the same time went 1,050 feet, is that right?

Nat Clements.

A. That is right.

Q. While you were going at a normal rate of speed, weren't you, 10 or 15 miles an hour?

A. I was in low gear.

Q. And you wouldn't be going over 10 or 12 miles an hour, would you?

A. No.

Q. And Mr. Garrison's car then, of course, would have to be going about 100 miles an hour or more, wouldn't he?

A. I don't know.

Q. But that is your recollection as to what occurred?

A. Yes.

Mr. Ford: What kind of a car was it?

Mr. Sacks: A Mercury.

By Mr. Ford:

Q. Well, anyhow, Mr. Clements, if he was 350 yards away he couldn't interfere with you driving 31 feet on that highway and driving out to go on your way to Suffolk, could he?

A. Well, he did.

Q. That is what happened?

A. Yes.

page 29 } Q. You couldn't estimate Mr. Garrison's speed, you say?

A. No.

Q. Is that because you don't know, or do you have a hesitancy in estimating it?

A. Yes, sir.

Q. Which is it, that you don't know?

A. I hesitate. I cannot estimate. I don't believe you could sit at the side of the road and see a car and estimate how fast it is going. I couldn't estimate.

Q. How long have you been driving a car?

A. Ever since I was 16. I am 21 now.

Q. And you couldn't sit on the side of the road and come pretty near telling within five or ten miles an hour how fast a car is going?

A. Not where the car is coming towards me.

Q. But look at the angle—you know the angle?

A. I see.

Q. It is about an angle of 110 degrees to that road, isn't it?

Nat Clements.

A. Yes.

Q. This little sketch I made, is that very far off? This is the Suffolk Road, this is the Lake Prince Road. Isn't that about the angle?

A. That is about right.

Q. Do you mean to tell us that if a car is going
page 30 } towards Suffolk coming towards you, you cannot
tell within five or ten miles an hour the speed of
that automobile?

A. I think he was going the speed limit.

Q. You think he was going 45?

A. 55 is the speed limit.

Q. You think he was going 55?

A. Yes.

Q. What makes you think that?

A. Well, I just judged it.

Q. Well, when did you decide that?

A. When did I decide what?

Q. That he was going the speed limit?

A. I said I thought he was going the speed limit.

Q. When did you decide to think that, just a moment ago?

A. No.

Q. Because you know, Mr. Clements, you haven't given us the benefit of your judgment up to now. Have you just decided about that, that he was going 55?

A. No, I always thought that.

Q. You just didn't like to tell Mr. Sacks, but you have no hesitancy in telling me, is that it?

A. No, I can't say how fast he was going.

Q. You really cannot do that?

A. No.

Q. And so when you say 55 it is a pure guess?
page 31 } A. Yes, approximate.

Q. When you went onto the highway and he was coming 55 miles an hour, didn't you know that you couldn't get across it before he got to the intersection?

A. I thought I had plenty enough room, it would be safe to cross.

Q. You thought what?

A. I thought I had plenty of time to get safely across the road.

Q. You were at a right angle?

A. Yes.

Q. And he was on his right side?

Nat Clements.

A. Yes.

Q. And coming at that speed?

A. Yes.

Q. And you thought you had time enough?

A. Yes.

Q. You didn't get to the middle of the road quite?

A. About.

Q. He turned to his left to avoid hitting you?

A. Yes.

Q. What did you do?

A. I didn't do nothing. There was nothing I could do.

Q. Now, how many seconds did it take you to get to the middle point of that road from your stopped position going 10 to 12 miles an hour?

A. I don't know.

Q. Could you estimate it?

A. How many seconds it would take me to get from—

Q. From where you had stopped to the point of the impact, 31 feet?

A. Four or five seconds, I imagine.

Q. You think it was four or five seconds? Rather, wouldn't you think it was more likely two seconds? Do you know how many feet you would be traveling at 10 miles an hour?

A. No.

Q. I mean a second?

A. No.

Q. In the neighborhood of 15 roughly, 14 or 15 feet, and you went 31 feet. Wouldn't you say that it would have taken you about two seconds rather than four or five seconds?

A. No.

Q. You wouldn't?

A. No.

Q. Well, that is a matter of mathematics. Now, at that point, if it did take you in the neighborhood of two seconds, or you went at least 31 feet when you started on that road, tell the jury where Mr. Garrison's car was, how close to you?

A. When I started on the road?

page 33 } Q. Yes.

A. It looked to me like about 350 yards away when I stopped and put the car in low gear and seen his car, it looked to be 350 yards away.

Q. Did you see Mr. Garrison's car the entire time?

A. Yes.

Nat Clements.

Q. When you started, when you left the side of that highway in a place of safety and started up on that highway from where you were driving, how close was he to that intersection?

A. I just told you.

Q. 350 yards?

A. When I started in low gear, when I was on the side of the road, he was coming all the time.

Q. And you were looking at him all the time, too?

A. Yes.

Q. At 10 to 12 miles an hour, how quickly—

Mr. Rixey: He never said he was going ten to twelve.

Mr. Ford: If you make your objection to the Court maybe we can get somewhere.

Mr. Rixey: I object to that question.

By Mr. Ford:

Q. I ask you now were you going about ten or twelve miles an hour?

A. I was in low gear, I wasn't going over five page 34 } or six miles an hour.

Q. All right, take it at five or six miles an hour, how close was Mr. Garrison to the intersection when you started on that concrete?

A. I said 350 yards.

Q. You still say that, Mr. Clements?

A. Yes.

Q. You said he was 350 yards away when you were 10 feet from the highway in a stopped position, and when you were going on the concrete you still say he was 350 yards away?

A. I say when I stopped at the side of the road to put my car in low gear I seen Mr. Garrison's car, it looked to me like 350 yards away.

Q. How quickly can you stop your car going at five or six miles an hour?

A. Almost instantly.

Q. Certainly within two or three feet, isn't that true?

A. Yes.

Q. When you went onto that concrete or were about to go onto it and saw Mr. Garrison's car bearing down on you, why didn't you stop?

A. I was almost—he was too far—I was almost in the intersection of the road. I wasn't expecting him to cut to the left.

Nat Clements.

Q. Where was he when you started on the concrete, I ask you again?

A. 350 yards.

Q. Then didn't he move any at all?

A. He was running 55 miles an hour.

Q. From the time you saw him until the time you went on the concrete?

A. Sure, he was moving.

Q. Of course, he was. If you don't know, say so. You have that opportunity, Mr. Clements.

A. I know.

Q. You have that right, I mean. Were you alert, were you watching what was going on?

A. Yes, sir.

Q. You were not talking to Miss Burns?

A. No.

Q. Or anybody in the back of your car?

A. No.

Q. Was your attention distracted at all?

A. No.

Q. So that you had complete command of all your faculties?

A. Yes, sir.

By Mr. Rixey:

Q. You live in Newport News, do you?

A. Yes.

Q. And you work where?

page 36 { A. At the Shipyard.

Q. Where does your father live?

A. He lives in Nansemond County.

Q. Where is that in reference to where this accident occurred?

A. That is about—right on the corner, but it is off—it is the only house on that corner. It is about an eighth of a mile, I believe, from the corner.

Q. About an eighth of a mile from the place where this accident occurred, down what is called—you have described as the Lake Prince Road is where the lane from your father's house enters into the Lake Prince Road, is that right?

A. Yes, that is right.

Q. Then you follow that Lake Prince Road down to about an eighth of a mile to where this accident occurred, is that right?

A. Yes, that is right.

Nat Clements.

Q. Now, I understand you to say that you first were riding in your father's car?

A. Yes.

Q. And you had been to your father's service station?

A. Yes.

Q. And where is that in reference to—

A. That is towards Suffolk from where the accident occurred.

page 37 } Q. About how far from where the accident occurred is your father's service station?

A. About three-quarters of a mile.

Q. And it is on your side of the road looking towards Suffolk?

A. It is on the right-hand side of the road going towards Suffolk.

Q. And I understand you had been down there with your father's car?

A. Yes.

Q. And there you had picked up Miss Burns, I believe you said?

A. Yes.

Q. At the service station?

A. Yes.

Q. Who else did you pick up there?

A. Mr. Dunning and Miss Brickle.

Q. Mr. Dunning and Miss Brickle?

A. Yes.

Q. And you took the three of them driving back to your father's house?

A. Yes.

Q. And there you got in your car?

A. Yes.

Q. And started out again?

page 38 } A. Yes.

Q. Is that right?

A. Yes.

Q. When you left your father's home and came on down your father's lane into the Lake Prince Road—

A. Yes.

Q. You turned in which direction then?

A. Left.

Q. You turned into the Lake Prince Road?

A. Yes.

Q. And came up to Route 460, is that right?

Nat Clements.

A. Yes.

Q. Now, I am going to ask you is there anything in that intersection to your left as you approach Route 460 to prevent you from seeing any vehicle coming from Suffolk?

A. No, sir.

Q. Is there anything in the intersection to interfere with the vision of anyone coming from Suffolk on seeing a car coming out of the Lake Prince Road?

A. No, sir.

Q. It is a perfectly clear and open intersection?

A. Yes.

Q. So that both parties have a clear view of the other?

A. Yes.

Q. That is correct?

page 39 } A. That is right.

Q. I believe you said that you stopped before entering Route 460?

A. Yes.

Q. You came to a complete stop?

A. Yes.

Q. About how far were you from the hard surface of Route 460 when you came to a complete stop?

A. About 10 feet.

Q. I believe you said you let a car go by going towards Suffolk?

A. Yes.

Q. And while you were standing there you saw this Garrison car coming from Suffolk?

A. Yes.

Q. Is that right?

A. Yes.

Q. And you place that car how far from the intersection?

A. About 350 yards.

Q. And then you started up, did you?

A. Yes.

Q. What gear did you start up in?

A. Low gear.

Q. Are you sure of that?

A. Yes.

page 40 } Q. Do you know what gear your car was in after the accident was over?

A. There is witnesses here we will call say it was jammed in low gear and the wheels was broke.

Q. In low gear?

A. Yes.

Nat. Clements.

Q. What is your best judgment as to the speed you were making as you came out of that intersection?

A. About five or six miles an hour, I would say.

Q. I understood you to say the point where the accident occurred was in the center of Route 460 or thereabouts?

A. Yes.

Q. Then you were on the asphalt part?

A. Yes.

Q. And I want you to describe that Route 460 to these gentlemen of the jury, some of whom may not know it?

A. It has two, as he says, aprons of concrete on each side, and in the center they have a wide strip of asphalt, in the center.

Q. That is the well-traveled part of the road?

A. Yes.

Q. Then they put a concrete strip on either side?

A. Yes.

Q. I understood you to say you had gotten over in that center double lane?

page 41 } A. Yes.

Q. And about straightened up when the accident occurred?

A. Yes.

Q. Now, suppose, Mr. Garrison instead of going to his left over into that center lane had kept straight on his right-hand concrete lane, would there have been any accident?

A. I think it wouldn't have been.

Q. There wouldn't have been an accident?

A. No, sir.

Mr. Ford: I move to strike. It is a matter of opinion and the conclusion of Mr. Clements. That is an opinion which he cannot state, whether or not there was room enough for him to have gone by.

By Mr. Rixey:

Q. State whether or not there was sufficient room for Mr. Garrison to have gone by you if he had stayed on his right-hand concrete lane?

A. I think he could have passed by.

Q. Now, what happened to you as a result of the accident?

A. Cut and split my head open a little.

Q. Were you rendered unconscious?

A. Yes.

Nat Clements.

Q. When did you regain consciousness?

A. I guess it was twenty or twenty-five minutes afterwards.

page 42 } Q. Do you know whether you were knocked out of the car or not?

A. No, I don't know. They say I was. They saw me when I went out.

Q. You don't know that?

A. No, I don't know.

Q. So you don't know the positions of the two cars after the accident occurred?

A. No, sir.

Q. You said there were no lights on the Garrison car?

A. No, sir.

Q. You spoke of *your* having your parking lights on. What do you mean by that?

A. The parking lights, like you park in the city when you leave them on.

Q. Do you mean dim lights?

A. No, sir, regular parking lights, not the dim lights.

Q. You didn't have your dim lights on, or Garrison either?

A. No, sir, just simply parking lights.

Q. What sort of an automobile were you driving?

A. A '37 Ford.

Q. And I believe you say you saw the Garrison car?

A. Yes, sir, I saw it.

Q. And he didn't have any lights on?

A. No, sir.

page 43 } Q. Was there any reason why Garrison should not have seen you?

A. I don't think so, unless it was dusk, on account of it being late.

Q. You saw Garrison?

A. Yes, I saw him.

By Mr. Ford:

Q. Had you been to your father's service station or Powell's service station?

A. My father's.

Q. You hadn't been to Powell's service Station?

A. No, sir.

Q. Which is that, towards Petersburg or Suffolk?

A. Towards Petersburg.

Q. You hadn't been down there in the afternoon?

Nat Clements.

A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. Sacks:

Q. Mr. Clements, I believe you said that when you had made your turn, your car facing in the direction towards Suffolk, that you were then in the center of the asphalt road?

A. Approximately in the center.

Q. That would have put you a little on the left of the road in the direction that you were going?

A. Yes.

page 44 } Q. Then you didn't make a complete right turn?

A. Right turn?

Q. I mean a complete turn around the center of the street in going to your left?

A. I just turned to my left and was going over.

Q. If you had made a complete turn as required by law, you would have been about on the same side as your father's service station was? You didn't drive straight across the road and turn back and come back still farther? I have drawn a little rough sketch here. Suppose you come down and let the jury see this. This is the highway, that is going towards Suffolk—

A. Yes.

Q. This is the concrete and that is concrete?

A. Yes, sir.

Q. This is asphalt?

A. Yes, sir.

Q. There is room enough for two cars to use the center?

A. Yes.

Q. When you made your left-hand turn like this—

Mr. Bivins: Let him make it.

Mr. Sacks: He is an adverse witness and I would like to cross-examine him.

Mr. Bivins: Of course, you would, but at the same time let him indicate it.

page 45 } By Mr. Sacks:

Q. You say you actually turned in the center of this asphalt?

A. Yes.

Q. That would be right along here, wouldn't it?

Nat Clements.

A. Yes.

Q. Then you were more on the left than you were on the right?

A. It might have been a foot.

Q. If you had made a complete turn required by law you would have to be around this side more, wouldn't you?

Mr. Bivins: When he speaks of the turn required by law, what is the requirement?

Mr. Sacks: The requirement is that you make a left-hand turn—

Mr. Bivins: Let the Court state the requirement.

The Court: Let him state how he made it.

By Mr. Sacks:

Q. Just draw your diagram how you made your turn?

A. I stopped here (indicating).

Mr. Nachman: I would like for the stenographer to get this in the record.

A. (Continuing) I left my home and came to this highway stop here (indicating), waited for a car to pass from Windsor that was going to Suffolk; I stopped here (indicating). I saw this car, so I pulled out. This car came in front of me like that (indicating).

Mr. Bivins: It is concrete between these two lines?

The Witness: Yes.

By a Juror:

Q. Was the car on the concrete when you first saw it?

A. Yes, sir.

By Mr. Ford:

Q. That is the Garrison car?

A. Yes.

Mr. Bivins: One of the jurors wanted to know the width of the road. Mr. Stephens says it is 45 feet.

By a Juror:

Q. Has that been established by some official measurement?

Nat Clements.

Mr. Ford: Yes, we have had that done by an engineer.

By Mr. Sacks:

Q. When you arrived at the intersection of the main highway you looked to your left and saw this Garrison car, it was at an angle, wasn't it?

A. Slightly.

Q. Couldn't you tell whether the car was going fast or get an idea of about how fast it was going?

A. I said approximately I thought he was going 55. It could have been more.

Q. Or less?

page 47 } A. Yes.

Q. He did travel 1,050 yards while you went across about 31 feet?

A. Approximately.

Mr. Ford: You mean 1,050 feet, don't you?

Mr. Sacks: Yes, 1,050 feet.

The Court: One of the jurors wants to know where Mr. Garrison's car was when you first saw it in reference to the concrete. Was it on the right-hand side of the concrete?

The Witness: Yes, it was on the right-hand side of the concrete going towards Windsor.

The Court: When did he turn to his left?

The Witness: When he got right at me.

Mr. Ford: One of the jurors has asked about the specific measurements. We have a drawing here and a couple of blue-prints.

Mr. Bivins: Who prepared that?

Mr. Ford: Mr. Causey, who was here but wouldn't go on until the proper time. I would be glad for you to have the benefit of it.

Mr. Sacks: I have no objection. You can put it in evidence now.

Mr. Ford: We have no right to put it in yet. You may use it.

page 48 } Mr. Sacks: He is an engineer of the City of Suffolk?

Mr. Ford: Yes. If there is anything which you think ought to be eliminated, we would be glad to eliminate it, but this is accurate.

The Court: It would be helpful to get it in now.

Mr. Ford: I think so. We will introduce the map prepared by Mr. J. C. Causey, the city engineer of Suffolk.

W. E. Garrison.

The Court: Is there any objection?

Mr. Sacks: No, sir.

Mr. Ford: I will introduce it in evidence.

(Map above introduced in evidence was marked for identification Garrison Exhibit No. 6.)

W. E. GARRISON,
sworn as an adverse witness, testified as follows:

By Mr. Sacks:

Q. What is your full name, sir?

A. W. E. Garrison.

Q. Where do you live?

A. I live in Isle of Wight.

page 49 } Q. Were you driving an automobile on the 10th
of December which collided with a car operated

by Mr. Nat Clements?

A. Yes, sir.

Q. You were proceeding towards Petersburg?

A. Yes.

Q. And were you driving on the right side of the road?

A. Yes, sir.

Q. Were you driving on the concrete?

A. Yes, sir.

Q. This collision occurred at the intersection of Lake
Prince Road and the main highway?

A. Yes.

Q. When did you first see the Clements automobile?

A. I saw it—well, I don't know just what distance up
the road. I saw it a right good little ways before I got
there.

Q. Have you an idea as to about how far away you were
from the intersection when you first saw him?

A. When I first saw him?

Q. Yes.

A. Well, no, sir.

Q. I mean approximately?

A. Well, I reckon probably it might have been two or
three hundred yards probably when I first saw him.

Q. You were two or three hundred yards away
page 50 } when you first saw him?

A. Of course, I kept my eyes on the road. I saw

W. E. Garrison.

the car coming out. I didn't pay any attention to him until I got up close.

Q. When you first saw him you say you were about two or three hundred yards away; where was he?

A. He was coming down the road, he hadn't got quite to the service station.

Q. You saw him first down the Lake Prince Road?

A. Yes, sir.

Q. Now, did you see him when he came out of the Lake Prince Road into the main highway?

A. Into the main highway?

Q. Yes.

A. Yes.

Q. How far away from him were you then?

A. I reckon I was 50 or 75 feet when he drove out onto the highway.

Q. About 50 or 75 feet?

A. Yes.

Q. Did you see him all the time as he was coming down the Lake Prince Road up until the time of this accident?

A. No, sir, I never saw him all the time he was coming from there.

Q. Was there anything that blocked your view?
page 51 } A. No, if I turned my head, but I looked straight
down the road. Of course, I could see anybody
coming along there.

Q. When you say you didn't see him all the time coming down on the Lake Prince Road, if you had looked in front of you you could have seen him all the time?

A. I reckon I could probably a certain distance, just what I could see driving straight down.

Q. Did he stop at all?

A. No, sir.

Q. When you saw him again you said you were about 50 or 75 feet away from that intersection?

Mr. Ford: No, he did not say that.

The Witness: No, I didn't say that.

By Mr. Sacks:

Q. When he came out of the intersection how far were you away, when he first came in on the main highway?

A. When he drove out on the main highway how far was I away?

W. E. Garrison.

Q. Yes.

A. About 50 or 75 feet.

Q. Now, how did he come out of that side road?

A. Sir?

Q. How did he come out?

A. What do you mean, the speed?

page 52 } Q. The speed, yes.

A. He was driving around 15 or 20 miles an hour, I reckon, something like that. I judge it to be that. Of course, I couldn't tell.

Q. If he had stopped at that stop sign there would you have seen it?

A. Would I have seen him?

Q. Yes.

A. Sure I would have seen him.

Q. What did he do when he came into the main highway?

A. What did he do?

Q. Yes.

A. He came right into the highway, right in front of me, it looked like I was right at him. He came on out, turning right towards me.

Q. What sort of a turn did he make?

A. What sort of a turn did he make?

Q. Yes.

A. He just turned right on towards me, turned to the left.

Q. Did he go over beyond the center of the street?

A. No, sir.

Q. He shot right in front of you?

A. He made a short turn. That is the reason I tried to dodge him, to avoid the accident.

page 53 } Q. He made a short turn?

A. Yes.

Q. Then you turned to the left?

A. Yes.

Q. Did you have any lights on your car?

A. I had my dimmers burning.

Q. Why did you have your dimmers burning?

A. I always after sundown have them on. After sunset when I am on the highway I turn on my dimmers.

Q. In other words, the law requires you to have lights on at that time?

A. Yes.

Q. And you put your lights on?

W. E. Garrison.

A. Yes.

Q. Did Mr. Clements have lights on his car?

A. I couldn't tell whether he had or not, it was all so quick.

Q. Let me ask you this. You said when you first saw him coming down the Lake Prince Road you were about two or three hundred yards?

A. I said approximately.

Q. Approximately?

A. Yes, sir.

Q. And you were coming closer to him all the time?

A. I wasn't paying any attention to him in that
page 54 } distance, but when I got up closer he was driving
slow and I thought he was going to stop.

Q. Why couldn't you have seen him before he came out there about 50 or 75 feet away? The space was all open, wasn't it?

A. What?

Q. There is an open space.

Mr. Ford: He has not said that he didn't see him at any time. He said that he didn't pay any attention to him.

By Mr. Sacks:

Q. Did you see him all the time you were driving towards him?

A. Not all the time.

Q. What prevented you from seeing him at any time?

A. Because I didn't turn my head to see him. When I am going down the road a certain distance I can see anybody driving.

Q. And you say he made a short turn right in front of you?

A. Yes.

Q. And he did not stop?

A. No, sir.

Q. You are positive of that?

A. Sure.

page 55 } Q. Was there anything between your car and
Mr. Clements' car?

A. Not anything that I saw but the road.

Q. Only the road?

A. Yes.

Q. It is an open road?

W. E. Garrison.

A. Yes.

Q. Were there any cars coming in the opposite direction?

A. Oh, yes, cars on the other side of the road was coming.

Q. They had lights on, too, didn't they?

A. I don't remember about them having lights on. I wasn't paying any attention to them. I know there was a lot of traffic on that road, and I always pay attention when I am driving on that road.

Q. What part of your car was struck?

A. What part?

Q. Yes.

A. The right-hand corner, the front.

Q. The right-hand front?

A. Yes.

Q. Was it damaged much?

A. Yes, I think so.

Q. Well, how was it damaged?

A. Well, it tore the wheel all off and mashed
page 56 } and bent the axles all back.

Q. Did it push the engine back?

A. Yes, sir.

Q. It was a sort of a head-on collision, wasn't it?

A. No, sir. Well, the—he struck me right on the corner.

Q. Hadn't Mr. Garrison made a complete left turn when the two cars came together?

A. Mr. Clements?

Q. Mr. Clements.

A. When I turned out?

Q. When your car and his car came together hadn't he made a complete turn and wasn't his car facing towards Suffolk?

A. No, sir, he hadn't made a complete turn. He was turning towards me, but he hadn't gotten off the highway.

Q. What do you mean he hadn't gotten off the highway?

A. I mean he didn't get off the concrete.

Q. In other words, he started to turn left while he was still on the concrete?

A. Yes, sir.

Q. It was a very short turn, of course?

A. A very short turn.

Q. Was there anything to have prevented Mr. Clements from seeing you when you were about 50 or 75 feet from him then?

W. E. Garrison.

page 57 } A. Sure he could have seen me if he had been looking.

Q. The space was open between you and him?

A. Yes.

CROSS EXAMINATION.

By Mr. Ford:

Q. How old are you?

A. Sir?

Q. How old a man are you?

A. Sixty-two.

Q. You have lived in Isle of Wight a number of years?

A. I was bred and born there.

Q. You were born there?

A. Yes, sir.

Q. You are a farmer?

A. Yes, sir.

Q. Is your wife living?

A. Yes, sir.

Q. She was hurt in this accident, wasn't she?

A. Yes.

Q. How long was she in the hospital?

Mr. Sacks: I think that is irrelevant and immaterial. She is not sued.

The Court: I do not think that is material.

Mr. Ford: Well, you brought out that your man had a crack in his head, and I want to show what happened to us. We got hurt, too.

The Court: I think he can show she was injured, but as far as going into the extent of her injuries is concerned, I do not think it is material.

By Mr. Ford:

Q. Your wife was hurt?

A. Yes.

Q. And you were hurt?

A. I think so.

Q. How fast were you traveling about this time immediately prior to the impact?

A. I couldn't say exactly, but I imagine around 40 or 45 miles.

Q. Whereabout on the highway were you traveling?

W. E. Garrison.

A. I was on the concrete portion of the highway.

Q. That would be on the right-hand side?

A. Sure.

Q. And that would be the north strip of the concrete?

A. Yes, sir.

Q. You were traveling fairly close to the right-hand side, were you?

A. Yes, sir.

Q. In the asphalt portion of the concrete apron?

A. Yes, sir.

Q. Now, as you looked to the right when you
page 59 } say you were about two or three hundred yards
away, is that anywhere near an accurate estimate,
or isn't it?

A. By turning my head I could see up the road. I didn't pay any attention to the car.

Q. You were some distance away when you first noticed Mr. Clements' car, which you say might have been two or three hundred yards?

A. Yes, when I first saw it.

Q. And at that time he was down the Lake Prince Road some distance?

A. Yes.

Q. Do you know how far?

A. No, sir, I do not.

Q. But was he interfering at all with your traveling on the highway?

A. No, sir.

Q. Was he a sufficient distance away yet for him to see what you were doing?

A. Sure.

Q. You were familiar with this whole area?

A. Yes, sir.

Q. You had passed by there many, many times, had you not?

A. Yes, sir.

Q. You knew that stop sign was there?

A. Yes.

Q. You knew this was a dirt road?
page 60 } A. Yes.

Q. Did you know Mr. Clements?

A. No, sir, I never met him before the accident, not until two or three weeks afterwards.

Q. Do you know how far about the stop sign was from the concrete edge of the road, how many feet?

W. E. Garrison:

A. The sign?

Q. The stop sign, that is right?

A. No, sir, I don't know the distance.

Q. Well, about; can you estimate it?

A. Yes, I reckon probably—

Mr. Bivins: Of course; you mean did he know prior to this accident?

Mr. Ford: Yes:

By Mr. Ford:

Q. Do you know where the stop sign was on this Lake Prince Road?

A. Yes:

Q. Would you estimate the distance it was from the edge of the concrete?

A. What, the stop sign?

Q. Yes.

A. I couldn't really say. I don't know the distance. It is away enough for a man to see it and to stop.

page 61 } Q. Would you say it was 30 or 35 feet?

A. Something like that, probably.

Q. As far as from you to me?

A. Yes.

Q. Would you say it was as far as from where you sit to the back of the courtroom?

A. What, the sign?

Q. Yes, from the edge of the road?

A. No.

Q. Now, when you were attracted to the car of Mr. Clements in the neighborhood of the stop sign, how fast or slow was it traveling?

A. Mr. Clements' car?

Q. Yes.

A. He was most likely traveling 15 or 20 miles an hour.

Q. Did you get the impression that he was going to stop?

A. Sure, I thought he was going to stop.

Q. Did you think he was going to stop?

A. Yes.

Q. You say you felt sure that he was going to stop?

A. Yes, sir.

Q. Was he going slow enough to stop if he had applied his brakes?

A. Yes, sure he was.

W. E. Garrison.

Mr. Rixey: I have been very patient with your page 62 } leading of your client. I ask you not to lead him any more.

Mr. Ford: This witness is an adverse witness and is subject to cross examination.

Mr. Sacks: He is adverse to me.

Mr. Rixey: It is his own client. I do not see how he would be an adverse witness.

Mr. Ford: He was put on the stand and examined as an adverse witness, considering he was put on the stand and cross examined as an adverse witness, the same as you cross examined Mr. Clements. I have the record for that.

The Court: Try not to lead him anyway.

Mr. Ford: The witness is subject to cross examination.

The Court: He may cross examine.

Mr. Rixey: Note an exception. May it be understood that my objection goes to all these leading questions without my renewing my objection each time?

The Court: You have recorded one already. He may not be asked leading questions. Of course, he was put on as an adverse witness. However, he is one of the defendants, and defendant's counsel represents him and is now examining him.

Mr. Rixey: He is not adverse to his own interests.

The Court: I mean so far as he is adverse. I page 63 } have asked counsel not to ask leading questions, but simply let him ask the questions as he would ask any other witness.

By Mr. Ford:

Q. Mr. Garrison, when you say that you thought Mr. Clements was going to stop, how fast was he going then?

A. Mr. Clements?

Q. Yes.

A. Well, I judge at that time 15 to 20 miles an hour.

Q. How close was he to the road at that time?

A. About even with the service station.

Q. About the service station?

A. Yes.

Q. Now, after he got by the stop sign and didn't stop, did you still think he was going to stop?

A. Sure, I did.

Q. Did he have an opportunity to stop?

A. Yes, sir.

Q. At the speed he was going?

W. E. Garrison.

A. Yes.

Q. Did he ever stop?

A. No, sir.

Q. I believe you stated that you were 50 or 75 feet away about when that occurred?

A. Yes.

page 64 } Q. In other words, when you found out he was not going to stop, or realized that he was not going to stop, how close was he to the highway then?

A. He was on the highway.

Q. On the highway?

A. Right up on it.

Q. What did you do?

A. I turned right to the left and tried to avoid the accident.

Q. Did you have time to apply your brakes?

A. Sir?

Q. Did you have time to apply your brakes?

A. Well, I didn't. I felt like I was too close.

Q. You turned to your left?

A. I turned to my left.

Q. And that would carry you away from him?

A. That would carry me away from him.

Q. Is that right?

A. Yes.

Q. And where did the impact occur with reference to the side of the highway and the middle point, where did the impact occur?

A. Where did he strike me?

Q. That is right.

A. Right in the—I turned out right on the left
page 65 } on my part of the line, I couldn't afford to go any further, I was afraid of an accident, and he struck me right as he came off the highway.

Q. Then he had not gotten straightened out on the highway at all?

A. No, sir.

Q. He was at an angle?

A. He was at the angle of turning, *what* I was turning.

Q. Your car I believe you stated was struck on the right front portion?

A. Yes.

Q. Did the wheel go down?

A. It was down when I saw it. I didn't know anything about it after that.

W. E. Garrison.

Q. And on what part of his car was the blow?

A. Sir?

Q. What part of his car?

A. I never seen it.

Q. You haven't seen it since?

A. After he struck me I was knocked senseless and didn't know anything until they took me out of my car.

Q. Did Mr. Clements give an arm signal showing his intention of turning on that highway?

A. I didn't see it.

Q. Would you have seen it if he had given it?

page 66 } A. I certainly could.

Q. Your eyesight is good without glasses?

A. Yes, sir.

Q. And you didn't see him give an arm signal?

A. No, sir.

Q. Did he do anything to indicate that he was coming on the highway in your immediate vicinity?

A. Not anything but drive right on it.

Q. Until he did do so?

A. No, sir.

By Mr. Bivins:

Q. What makes you so positive this boy did not stop?

A. Didn't stop?

Q. Yes.

A. Because I could see him.

Q. You could have seen him?

A. Yes.

Q. If he had stopped you could have seen him?

A. If he had stopped I could have seen him.

Q. You tell this jury positively now, in spite of what he says to the jury—

A. Yes.

Q. —that he did not stop?

A. I am telling the jury he surely did not stop.

Q. He surely did not stop?

page 67 } A. No, sir.

Q. Then you didn't see him stop?

A. I could have seen him if he had stopped.

Q. He could have stopped without you having seen him, isn't that true?

A. Sir?

Q. He could have stopped without you having seen him?

A. I don't think so.

Q. Well, he could have?

W. E. Garrison.

A. Without my seeing him?

Q. Yes.

A. Unless I shut my eyes.

Q. Maybe you shut your eyes?

A. I don't think I did.

Q. As a matter of fact, he could have stopped and you not have seen him, isn't that true?

A. I would be crazy if I shut my eyes coming up the highway like that.

Q. I am not saying that you shut your eyes. I am asking you, he could have stopped without you seeing him?

A. You say he could have stopped without me seeing him?

Q. Yes, without you having observed that he stopped there?

A. He couldn't have stopped there without me seeing him, as close to the road as that.

Q. He couldn't have done that?

page 68 } A. No.

Q. That would have been an impossibility?

A. Yes, sir.

Q. Where do you live in Isle of Wight?

A. About five miles from Isle of Wight, seven miles from the courthouse.

Q. About how frequently do you travel this particular highway?

A. 460?

Q. Yes.

A. As much as two or three times a week sometimes, sometimes oftener.

Q. On what day of the week did this accident occur?

A. The accident was on Sunday, December 10th.

Q. Were you traveling towards your home at the time?

A. No, sir, Suffolk.

Q. Sir?

A. I had been to Suffolk visiting and was going home.

Q. You were with your wife?

A. Yes.

Q. You say that when you were within 50 or 75 feet of the intersection this young man suddenly drove his automobile onto the highway?

A. Suddenly drove onto the highway.

Q. When he was a distance of from 50 to 75 feet
page 69 } away and entered the highway, that is, you were
that distance away from him, and he entered upon
the highway?

W. E. Garrison.

A. Yes.

Q. Did you immediately turn to the left, immediately upon his entering into the highway or not?

A. No, sir, not until I saw he was not getting off the highway, he couldn't get out of my way. I was coming direct to him.

Q. How far had he traveled on the highway when you commenced to turn to the left?

A. He was on the concrete.

Q. How far did he travel before you commenced to turn your automobile to the left?

A. He was just coming on the highway, making the turn on the highway.

Q. He was coming on the highway making a turn to the left when you commenced to turn your automobile to the left?

A. I turned my automobile in my part of the lane and tried to avoid the accident.

Q. Will you explain to this jury how you were going to avoid a crash with this man who was making a left turn, as you say, on the highway, he is turning to the left on the highway and traveling across the concrete, and you are on the concrete traveling in the direction opposite, and yet you tell this jury in order to avoid a crash you turned to
page 70 } the left?

A. Yes, sir, I turned to the left to keep from busting right into him. He was right in front of me.

Q. How far onto the concrete had this man traveled when you commenced to make your turn to the left?

A. How far on the concrete?

Q. Yes.

A. He was just coming on the concrete.

Q. How far did he travel on the concrete?

A. How far did he travel on the concrete?

Q. Yes.

A. I couldn't tell you.

Q. Can't you give us an idea? You have given us—

A. I don't imagine he traveled any more than he would trying to get across.

Q. How far did he travel?

A. I couldn't tell you that.

Q. Well, four feet?

A. It might have been four, maybe it might have been more than that. I would tell you if I could do it.

Q. So after he had traveled that distance on the concrete you made the turn?

W. E. Garrison.

A. I didn't say he traveled that distance.

Q. What distance did he travel?

A. I couldn't tell you that. I told you he was on
page 71 } the concrete, and I saw that I had to bust right into
him if I didn't do something, so I pulled to my left.

Q. So you did something and you busted right into him?

A. He bumped into me, sure.

Q. How far had he traveled on that concrete, if you can
tell us from where you sit to that gentleman there, or from
here to that post, or how far had he traveled?

A. I can't tell you.

Q. You can't tell us?

A. No, sir.

Q. All you can do—

A. He was on the concrete and was coming right towards
me.

Q. And was making a left turn, and you turned to the left
to avert a crash, is that your statement?

A. I couldn't help what hit him if I stayed there, because
he was right in the road.

Q. This is a picture of your car, isn't it (indicating)?

A. Yes, sir.

Q. It is in evidence. This is a picture of Mr. Clements' au-
tomobile?

A. Well, I haven't seen the Clements car.

Q. Well, as a matter of fact, you crashed head-on, isn't that
true?

A. How is that?

page 72 } Q. You crashed into him head-on?

A. No, sir, I didn't crash into him head-on. He
crashed into me.

Q. How did you crash into him? How do you describe that,
if it isn't head-on?

A. You don't mean that I crashed into him with that car
struck like that, do you?

Q. I am asking you. You answer my question. You didn't
crash into him?

A. No, sir.

Q. Did he run into you?

A. I thought he did.

Q. That is your version, that he ran into you?

A. Yes.

Q. This is the Clements automobile, and this is the Gar-
rison automobile. So your view of this matter is that this
man ran into you?

W. E. Garrison.

A. Yes, sir.

Q. How do you reach that conclusion?

A. How do I reach that conclusion?

Q. How do you reach that conclusion that he ran into you? Tell us, will you please? Just tell us how you reached that conclusion, if you will?

A. How is that?

Q. Tell us how you reach the conclusion that he page 73 } ran into you?

A. He ran into me because I am on the left trying to miss the car to keep from having an accident. He is right in my part of the road.

Q. Well, if you had stayed on your part of the highway you wouldn't have had any accident.

A. Wouldn't I?

Q. No, sir.

A. I would have busted into him.

Q. The fact is, and everybody that has testified to yet admits it, that if you had stayed on your side of the highway you couldn't have had an accident, because the city engineer of Suffolk, who prepared this print at the request of Mr. Stephens, one of your own counsel, says that the accident occurred just about the center of this highway, a 42-foot highway, so if you had stayed on your side of the highway you couldn't have had the accident, isn't that true?

A. No, sir.

Q. What is the truth about that? In other words, if you had stayed on that shoulder or that concrete apron, you wouldn't have had this accident?

A. I wouldn't?

Q. Or you would have?

A. I would have, sure.

Q. Even if you had stayed on the concrete apron, page 74 } that 11-foot apron that you were traveling on, if you had stayed on that you tell this jury you would have struck him?

A. Sure I would.

Q. And you would have—that is all I wish to ask you

A. Yes, I sure would.

By Mr. Sacks:

Q. Mr. Garrison, how was the traffic on that road that day or at that time?

A. The traffic was thick, always is thick there, especially Sunday evening.

W. E. Garrison.

By Mr. Ford:

Q. What part of his car would you have struck had you stayed on the concrete portion?

A. Right in the side of him.

By Mr. Bivins:

Q. How long is the car that this man was driving, do you know?

A. What?

Q. How long was the car, the Clements car?

A. I don't have any idea.

Q. In answer to Mr. Ford's question you said you would have struck him right in the side?

A. Yes.

Q. Is that right?

A. Yes.

page 75 } Q. If you had stayed on your side of the highway?

A. Yes.

Q. This man had traveled all the way out here a distance of 22 feet, or more than that, approximately 22 feet. In other words, the right side of his automobile was beyond the center point of the highway, and the center point of the highway would be 21 feet, and the automobile that this man was traveling in or driving, about half of it or approximately half had gone beyond the center point of the highway. In other words, that would make it approximately 23 to 24 feet.

A. He might have been in the center of the highway when he struck me.

Q. Well, the length of his automobile is how many feet, 16 or 17 feet?

A. No, sir, I don't know.

Q. And yet you sit here and tell the jury you would have run into him?

A. I tell the jury I would have struck him right in the side.

Q. Which part of the side?

A. Which side?

Q. The front part?

A. The outside, I reckon.

Q. Just tell us which part of the outside would
page 76 } you have struck?

A. It would have been the left side of his car.

Q. Which portion would you have struck, the front, center or the rear?

P. B. Burns.

A. I wouldn't tell you to save my life exactly what part I would have hit.

Q. So he hit you and you didn't hit him?

A. No, sir.

By Mr. Sacks:

Q. Do you recall how the cars were situated after the accident, or were you knocked out then?

A. Did I see the car?

Q. After the accident?

A. After the accident?

Q. Yes.

A. No, sir, I didn't know enough.

page 77 }

P. B. BURNS,

sworn on behalf of the plaintiff, testified as follows:

By Mr. Sacks:

Q. Mr. Burns, you are the father of this young lady, Sallie Burns?

A. Yes, sir.

Q. How old is she?

A. About sixteen.

Q. Where do you live?

A. Rescue.

Q. That is in Isle of Wight County?

A. Yes.

Q. What is your business?

A. Well, carpenter, boatsman mostly.

Q. A what?

A. A boatsman.

Q. A boatsman?

A. Yes.

Q. How old a man are you?

A. Me?

Q. Yes.

A. Sixty-eight.

Q. Was your daughter still working at the time she was hurt?

A. No, sir.

page 78 }

Q. She was going to school?

A. Going to school.

Q. You yourself know nothing at all about the accident?

A. No, sir, I don't know nothing about the accident.

P. B. Burns.

Q. She was at the hospital, the evidence shows, three and a half months, 105 days?

A. Yes, about that.

Q. After she came out of the hospital did she come to your home?

A. Yes.

Q. Was she able to walk without the aid of crutches?

A. No, sir, not for some time.

Q. Not for some time?

A. Yes.

Q. Was she in pain at that time while she was at home as a result of this accident?

A. Well, she would put the best foot forward. She wouldn't say nothing about it much.

Q. What doctor attended her?

A. Dr. Ellison.

Q. Have you gotten the bills from the hospital and the doctor?

Mr. Rixey: That is objected to.

A. I got a bill, yes, sir.

Mr. Rixey: I imagine that the father is going to page 79 } bring another suit for the hospital and doctor bills.

Mr. Sacks: If you object, I won't ask him.

Mr. Rixey: If you want, so far as we are concerned, if you want to introduce the hospital bills and doctors' bills in this case it would be understood that the result of this case will bar suit by the father, all right, but I am informed by Mr. Sacks that he intends to bring another suit for the hospital and doctor's bills when this case is all over.

Mr. Sacks: I think we can complete it now. We can bring in everything at this time, Mr. Rixey.

The Court: All right, with that understanding.

Mr. Rixey: And that is satisfactory with Mr. Burns, is it?

Mr. Sacks: Yes.

Mr. Rixey: All right.

By Mr. Sacks:

Q. Now, Mr. Burns, what do these bills amount to?

A. What?

Q. How much is the doctor's bill and the hospital's bill that

Mrs. Jeanette Akers.

you incurred and are responsible for as a result of your daughter's injury?

A. I don't understand you.

Q. You say you got a bill from the hospital, did you not?

A. Yes, \$1,030.00.

page 80 } Q. One thousand and how much?

A. Thirty.

Q. \$1,030.00?

A. Yes.

Q. Is that just for the hospital or the hospital and doctor?

A. The hospital and doctor, I guess.

Q. Then all your medical expenses incurred up to date amount to \$1,030.00?

A. Yes, sir.

Q. You haven't paid any part of that?

A. No, sir, none at all.

(No cross examination.)

MRS. JEANETTE AKERS,

sworn on behalf of the plaintiff, testified as follows:

By Mr. Sacks:

Q. Your name is Mrs. Akers?

A. Yes.

Q. And you live in Norfolk?

page 81 } A. Yes.

Q. You are Mrs. Burns' sister?

A. Yes, sir.

Q. I mean Miss Burns?

A. Yes.

Q. You don't know anything at all about the accident that your sister was in on December 10th of last year?

A. No, sir.

Q. You were not there?

A. No.

Q. Did you see her at the hospital?

A. Yes, I did.

Q. Did you visit her often?

A. No, I went to see her about three times while she was there.

Q. After she came out of the hospital was she able to walk aided by anything?

A. She could walk with crutches.

Sallie Burns.

Q. And for how long, until how recently did she use crutches?

A. About a couple of weeks ago.

(No cross examination.)

page 82 } SALLIE BURNS,
the plaintiff, being duly sworn, testified as follows:

By Mr. Sacks:

Q. Your name is Sallie Burns?

A. That is right.

Q. And how old are you, Miss Burns?

A. Sixteen.

Q. Did you do any work prior to the time you were hurt?

A. No.

Q. Were you going to school?

A. That is right.

Q. What grade were you in?

A. I was going to Smithfield High School.

Q. What school did you go to?

A. Smithfield.

Q. You were involved in an accident on December 10th of last year?

A. Right.

Q. And that was at the intersection of the Lake Prince Road with the main highway that runs from Suffolk to Petersburg, is that correct?

A. Yes.

Q. You were riding with Mr. Clements?

A. Yes.

Q. How many people were in that car besides you
page 83 } and Mr. Clements?

A. There was another couple with us.

Q. You were seated in the front seat with Mr. Clements?

A. Right.

Q. You were on his right?

A. Yes, sir.

Q. Where had you been just before you got to the intersection of the main highway and Lake Prince Road?

A. We had been to his home.

Q. And where were you going from there?

A. We were headed towards Suffolk, going back to the service station.

Q. In order to get back to Suffolk what direction was it

Sallie Burns.

necessary for Mr. Clements to have turned on the highway?

A. To the left.

Q. Do you recall about what time of the day it was?

A. I imagine it was about 5:30.

Q. Do you recall what time you got to the hospital?

A. No, I do not.

Q. About how much time elapsed from the time you were hurt until the time you were taken to the hospital?

A. About a half hour, I imagine.

Q. Now, was it dusk or dark, or how?

A. Yes, it was getting dark.

Q. Did you see the automobile which collided with Mr. Clements' automobile before the accident occurred?

A. No, I did not.

Q. You were, of course, seated with Mr. Clements in the automobile coming towards Suffolk?

A. Yes, that is right.

Q. Do you know how the accident occurred?

A. No, I do not.

Q. What happened?

A. What happened?

Q. Do you know when the two cars came together?

A. No, I don't. I remember a crash, and that is all I remember, because I was knocked out.

Q. You remember a crash?

A. Yes.

Q. And you don't know what collided?

A. No, sir.

Q. You say you were knocked out?

A. Yes.

Q. Unconscious?

A. Yes.

Q. Did you come to before you were taken to the hospital?

A. Yes, sir.

Q. Where did you find yourself after the accident?

A. They took me into the service station right there.

Mr. Bivins: Were you unconscious at that time?
page 85 } Mr. Sacks: She regained consciousness in the service station.

By Mr. Sacks:

Q. And from the service station where were you taken?

A. Taken to the Lakeview Hospital, in Suffolk.

Sallie Burns.

Q. How long did you remain there?

A. Well, about three and a half months.

Q. Now, what injuries did you sustain?

A. Well, a broken leg and some bruises.

Q. Have the bruises healed?

A. Yes, most of them.

Q. Where were your bruises?

A. Well, I had some under my—my neck and my arms and my back was bruised.

Q. Now, you were treated for your broken leg in the hospital?

A. Yes, sir.

Q. How long were you in bed or in a wheel chair altogether?

A. You mean—

Q. In the hospital, how long were you flat on your back?

A. About two and a half months, I imagine.

Q. And during that time how was your leg being treated?

A. Well, they had this weight attached to it.

Q. And you had your leg up in the air?

A. Yes.

page 86 } Q. For all that time?

A. Yes.

Q. Was that painful or comfortable?

A. It was rather painful.

Q. And then after the two and a half months what did they do to you then?

A. Well, you mean after I got in a chair?

Q. Yes.

A. They let me sit in a chair for a while.

Q. Yes?

A. Well, they massaged it and put it in this heating apparatus.

Q. Did they put you on crutches while you were in the hospital?

A. Well, about two days before I left they did.

Q. So that practically for three and a half months you were either bed-ridden or permitted to sit up in a chair?

A. Yes.

Q. After you left the hospital how long did you have to use your crutches?

A. Well, I left the 24th of March, and I just put them up about two weeks ago.

Q. Are you well now completely?

A. Well, no. My leg is shorter, you know, but it still pains me, of course, in damp weather especially.

Sallie Burns.

page 87 } Q. Are you able to walk as much as you could before this accident?

A. No, sir.

Q. Can you bear your weight down on that injured leg?

A. Not all of it.

Q. You say you still have pains?

A. Yes.

Q. Dr. Ellison was your doctor?

A. Yes, sir.

Q. And I believe at the request of the defendants they had Dr. Van examine you in Norfolk about a week or so ago, two weeks ago?

A. Yes, sir.

Q. At the request of the defendant, Clements?

Mr. Rixey: And also at the request of the defendant, Garrison?

Mr. Sacks: I don't know about that.

By Mr. Sacks:

Q. Now, you say that you don't walk as much as you did before?

A. No, sir.

Q. What difficulty, if any, do you have in walking?

A. Well, I limp, you know, when I get tired quickly, and in fact, I still have pain when I walk a right good distance.

page 88 } CROSS EXAMINATION.

By Mr. Bivins:

Q. Miss Burns, you recall, of course, what occurred just prior to the accident; in other words, you were riding with Mr. Clements and this other couple?

A. Yes.

Q. It is a fact, isn't it, that you and the other young people and Mr. Clements all drove from his father's service station in a new automobile to his father's home, and there you left the new automobile and entered Mr. Clements' automobile, and then started back towards Suffolk?

A. Yes.

Q. And this accident occurred?

A. Yes.

Q. And, of course, you did drive out of his father's lane onto this—what is the name of that road?

Sallie Burns.

Mr. Ford: Lake Prince Road.

By Mr. Bivins:

Q. Onto this Lake Prince Road, that is a fact, isn't it?

A. Yes.

Q. And you drove on Lake Prince Road up to the point where it intersects with Route 460; that is true, isn't it?

A. Yes.

Q. Now, before Mr. Clements drove onto the highway did he come to a stop or not?

page 89 } A. I can't remember.

Q. You can't remember?

A. I don't remember.

Q. In other words, you don't attempt to say whether he came to a stop or whether he didn't come to a stop?

A. I know he slowed down, but whether he did stop or not, I don't know.

Q. You wouldn't undertake to say?

A. No.

Q. You didn't see the automobile that was approaching from the left at all?

A. No, sir, I didn't.

Q. Mr. Clements, of course, sat between you and the automobile coming from the left?

A. Yes, sir.

Q. That is, you were to the right of Mr. Clements and the automobile was coming from his direction?

A. Yes.

Q. Now, do you have any recollection as to the approximate speed Mr. Clements drove onto the highway, that is, how fast his automobile was traveling?

A. I don't know about that.

Q. What is that?

A. I don't know.

Q. Well, was it moving rapidly, or was it moving slowly, or can you tell us?

page 90 } A. Well, about the average speed, I guess, he started out.

Q. Do you know whether he was in low gear, or whether he was in intermediate gear, or whether he was in high gear?

A. I don't know.

Q. You don't know as to that?

A. No.

Q. As I understand your testimony, you didn't see Mr. Garrison's automobile at all?

Sallie Burns.

A. No, sir.

Q. Do you have any recollection as to how far across the intersection Mr. Clements traveled before being struck?

A. I have no idea.

Q. You have no idea?

A. No.

Q. How long were you rendered unconscious?

A. Well, I don't know exactly, but I know when I came to I was in the service station.

Q. At the service station located near the intersection of the two roads?

A. That is right.

page 91 } Mr. Sacks: We rest.

Plaintiff rests.

Recess until 2 o'clock P. M.

AFTERNOON SESSION.

Mr. Ford: We desire to make a motion. Probably it had better not be made in the presence of the jury.

(The jury retired from the courtroom.)

Mr. Ford: If Your Honor please, on behalf of the defendant, Garrison, we move to strike the evidence of the plaintiff, and all of it, for the reason that there has been no showing of negligence against our client, Mr. Garrison, that proximately caused or contributed to this accident.

Now, there is no dispute about a great part of this evidence, and the part that is disputed is so unbelievable that I can return, I think, to the first statement I made, and correct it and say that there is practically no dispute.

Now, in the first place, Your Honor will recall that this is a perfectly straight, level and excessively wide
page 92 } highway in a wide, open country, and if Your Honor will think for just a moment it is comparable to the intersection of Huntington Avenue extended at 69th Street. The main highway is just as straight as Route 60, and the intersecting road, which you will recall is called Lake Prince Road, enters the main traveled highway at a most favorable angle to both parties, as a matter of fact, more so than the Huntington Avenue extension intersection

enters that highway, and they are in every sense comparable, and the lay of the land is comparable. So that there is never an excuse, as I see it, for an accident at that intersection any more than there was an excuse for an accident at this intersection. This young man came down the highway which is shown by the map to be 25 to 35 feet in width, and although it was a dirt road, a good country road, the evidence shows that there wasn't any mud, the weather was clear, it wasn't dark, some cars had lights on and others didn't, but in any event Mr. Clements stated very fairly and candidly that the lights did not help or hinder him. He saw Mr. Garrison a thousand feet away, so whether you believe he did or did not have lights, that is not the cause of the accident, because unquestionably he saw him, and he saw him all page 93 } the way, so that isn't any evidence of negligence.

We come to the question of location on the highway. Everybody agrees that Garrison was on the concrete portion, that apron or 11-foot strip where he had a right to be and where he should have been, so that allegation of negligence, if there is any allegation to that effect, is certainly out.

We come to the question of speed. In the first place, the question of speed does not enter into the cause of this accident, but even if it did enter into it, nobody has said that there has been a negligent operation so far as speed is concerned. The most Mr. Clements has said is that, he probably was going the speed limit, and then he admitted that his idea of the speed limit was purely a guess, that he had no idea, and only made up his mind on the witness stand as to the amount of speed, but he was fair and candid in saying after all it was a guess, so there is no evidence on the part of our client so far as speed is concerned.

Now, on a motion to strike we accept the version of the plaintiff, although it is contradicted. The plaintiff had produced evidence that the Clements car did stop, and it has produced evidence that the Clements car did not page 94 } stop. Isn't that right? They have not preponderated in either direction. If left to a jury to determine from the statement that they did not stop, or the statement that they did stop, I say accept either statement as being true and there isn't any negligence on the part of our client. Why do I say that? Accept for the time being the statement that he did not stop when our client was 1,050 feet away, this accident would never have happened if that were true. It may have violated the law, but it would not have entered into this accident, because we would never have gotten to the intersection unless we were traveling between

two and three hundred miles an hour, which obviously is an absurdity on its face. Accept for the time being the statement that he did stop, and what do you have? You have the Otey case, don't you, you have the case of *Otey v. Blessing* in every essential. If this witness stopped, or even slowed down as my client says he did, as if to stop, and went forward in the face of the oncoming car, accepting his statement at 55, or ours at 40 to 45, his act was the sole cause of this collision. Why? Because if he had proceeded on the left coming 45 or 55 miles an hour there would never have been any accident, so the speed doesn't enter into the consideration or the liability of Mr. Garrison.

page 95 } Now, then, if he didn't stop, what happens? Obviously we cannot accept the statement of Mr. Clements. It is obviously so incorrect that it is incapable of any consideration. We know that this car was not any 350 yards, 1,050 feet, down the highway when he started up to go that 10 feet and 21 more feet. We know that is not true. We know that it could not be true. What happened? If he was going five or six miles an hour as he says, it took him $3\frac{1}{2}$ to 4 seconds to negotiate that 31 feet, and our car was 150 to 200 feet down the road when he left the 10-foot safety zone he was in before he entered on the highway. Isn't that true? It is bound to have been. But accepting the statement of Mr. Garrison, which is more worthy of belief and consideration, he left the place of safety at a speed of anywhere from 10 to 15 or 20 miles an hour and tried to negotiate that turn, committing an act of suicide, practically, when Mr. Garrison was anywhere from 50 to 75 feet from him, and it took him a second or a second and a half to traverse that distance.

Now, then, where is there any evidence of negligence? Oh, they say that the accident happened in the middle of the road.

Where would you expect it to happen? Wouldn't
page 96 } you expect a man's natural instinct either from the observation of somebody else or from his own observation would be to turn away from danger? That is what he did. He turned to the left, he turned away from the force that was directed at him. What else would you expect in an emergency or *anything* other time? That is consistent, if Your Honor please, with that type of negligence with which Your Honor is familiar, the doctrine of last chance and action in emergency, and there is no person here who would dare say this man did not act in an emergency not of his own making, and even turning the wrong way would not be evidence of negligence. He did turn away from danger, from the force of Clements car. If he had not done that, it would

have ripped his car wide open, or probably have hit it on the other portion of the left outside. So when you boil it down there hasn't been any evidence of negligence but the reckless, rank act of almost suicide on the part of Mr. Clements, in which our car was not involved.

Now, we stand or fall, if Your Honor please, on our own testimony, which in this case is very conflicting. I do not think anybody will deny it does not behoove me to uphold the other defendant. We are not going to sit idly by and participate in it naturally, but I do not think anybody at counsel's table or in the courtroom is going to page 97 } think for a moment that the case against Mr. Clements is not a proper one for a jury on the question of gross negligence. If you do not have a *prima facie* case there now, then I do not recognize it—the failure to keep a lookout, the failure to observe a stop signal, the attempt to negotiate this crossing in the face of an oncoming car, and no hand signal, and I think he didn't look in his rear view mirror, or some one other thing he didn't do. But under the recent decisions in Virginia today I don't think any of us would entertain the hope even that this case will not go to a jury in so far as young Clements is concerned. That doesn't mean that we are to be submitted to the ordeal of a jury simply because one of the defendants has to. They cannot put their finger on us or produce any evidence as against our client. If that is so, then Your Honor ought to strike the evidence.

(Mr. Sacks argues for the plaintiff.)

The Court: We are not going to strike the evidence at this time.

Mr. Ford: I except.

Mr. Rixey: I would like to make a formal motion to strike the evidence as far as the defendant, Clements, is concerned on the ground that the evidence does not show page 98 } any negligence on the part of Mr. Clements.

The Court: I will overrule your motion.

Mr. Rixey: Note an exception.

Mr. Nachman: As I understand it, all of these pictures have been introduced in evidence. We want it understood that they are all in evidence.

The Court: Yes.

Be it remembered that on the trial of this case and after the plaintiff, to maintain the issue on her part, had introduced the foregoing evidence and had rested, and the defendant,

Dr. Foy Vann.

Garrison, had moved to strike the evidence of the plaintiff, which motion was overruled, and the defendant, Clements, had moved to strike the evidence of the plaintiff, which motion was overruled, the defendant, Clements, introduced the following evidence:

(The jury returned to the courtroom.)

DEFENDANT CLEMENTS' EVIDENCE.

DR. FOY VANN,

sworn on behalf of Defendant Clements, testified as follows:

By Mr. Rixey:

Q. Your name is Dr. Foy Vann?

A. Yes.

Q. You are a physician practicing in Norfolk, are you not?

A. Yes.

page 99 } Q. What is your specialty?

A. Orthopedic surgery.

Q. Did you examine Miss Sallie Burns, the plaintiff in this case?

A. Yes, sir.

Q. And that was on what day?

A. June 18th, of this year.

Q. Will you please state what injuries you found as a result of the accident that she had in December?

A. This injury, according to my information, was on December 10th, last year. The injury was a fracture to the left femur, or left thigh bone. The fracture as we describe was a simple fracture, meaning that the bone did not penetrate the skin. She gave me the history of the progress of the case. This examination was made in my office at Norfolk. The fracture had been about the middle of the shaft of the thigh bone, or somewhere about half-way between the knee and the hip. She had union; the bone had united. There was according to my measurement about a half of an inch shortening between that and the opposite side. I say about a half-inch, because it is a little difficult to be accurate in measuring the length of a thigh, like you can the length of a piece of timber. The best I could tell, it was about a half-inch shortening. Now, she showed certain other

page 100 } evidences of a fracture, of results of having had a fracture and having been in splints, and hav-

S. W. Dunning.

ing been some little time unable to use the limb, and that consisted, first, in some stiffness of the hip joint. For example, the hip joint could be turned up and straightened out all right. The rolling of the hip joint, the rotation, she showed some stiffness in that. She showed some flabbiness and atrophy of the muscles of the thigh and muscles of the calf. She showed some stiffness of the knee on that side. The knee would straighten fully, but the bending at that time was about two-thirds. The foot and ankle showed no stiffness. Concluding on what I found, the atrophy and flabbiness of the muscles of her thigh and leg ordinarily through the usual course of activity will limber up. The bending of the knees and stiffness of the hip likewise will do the same thing. I might add that she was walking on crutches then, she had not been told by her physician that she could abandon them. The atrophy and the joint stiffness I found, I think one may safely say that routine activity will take care of it and it will no longer bother her. That leaves only the one-half inch of shortening, and I can say about the height of her family, assuming that she is going to be about the same stature of her family, she told me that they were all short, as she is, and she is sixteen years old.

Q. What can you say about that?

page 101 } A. It is a very frequent observation, in fact, the usual observation, with that amount of shortening in a limb which has been broken, after the individual has gotten on it and begins to run around on it, they catch up in that shortening. That is in the growing. Now, if she is going to grow some, I think you can anticipate that some of that shortening will disappear. That I don't know. She is sixteen years old. While she is short, she comes of a family that are short in stature, and I think I would be safer in guessing that that half-inch shortening will remain.

Mr. Rixey: All right, I thank you, doctor.

Mr. Ford: No questions.

Mr. Sacks: No questions.

S. W. DUNNING,

sworn on behalf of Defendant Clements, testified as follows:

By Mr. Bivins:

Q. State your name, please, sir?

A. S. W. Dunning.

S. W. Dunning.

Q. Where do you live, Mr. Dunning?

A. 218 Nansemond Avenue, Suffolk.

page 102 } Q. On the evening of the afternoon of the day
this accident occurred, were you with Mr. Clements and Miss Burns?

A. I was.

Q. Were you in the automobile which was being driven by Mr. Clements?

A. I was.

Q. Who else was in that automobile?

A. Miss Burns and Mr. Clements, and Miss Brickle.

Q. Now, tell us in your language how or when you first entered the automobile?

A. I entered that automobile at Mr. Clements' home.

Q. Well, you had been in another automobile prior to that time with Mr. Clements, had you?

A. Yes.

Q. Tell us about that?

A. I got out of my automobile into Mr. Clements' Chevrolet.

Q. That was a new automobile?

A. Yes.

Q. You and Mr. Clements and the young lady, that is Miss Burns and this other young lady, rode in the new Chevrolet?

A. We did.

Q. Out where?

A. To Mr. Clements' house.

Q. When you got to Mr. Clements' house what
page 103 } did you do then?

A. Nat's car wasn't there.

Q. Nat, you mean Mr. Clements?

A. Yes.

Q. So then you left his father's automobile and got into Mr. Clements' automobile, is that right?

A. Not at that time. We looked for his automobile, we went to his uncle's in—I don't know where it was, I didn't know the people to start with—and we couldn't find it, so we came back to his home. When we arrived at his home his car was there. We got out of the Chevrolet and got into the Ford and started for the station. When we came out to this house Mr. Clements stopped and waited for a car coming from Windsor, with lights on, to go by.

Q. That car coming from Windsor was traveling towards Suffolk, is that right?

S. W. Dunning.

A. Towards Suffolk.

Q. So you say Mr. Clements stopped his automobile and permitted that car to pass on?

A. That is right.

Q. Now, did he wait there for any considerable time, or what did he do?

A. No, when that car was gone he started across the highway.

Q. Had you seen the automobile which was being driven by Mr. Garrison up to that time, had you seen it up to that time?

A. I had seen it.

Q. Where was the Garrison automobile when you first saw it?

A. I say, the best I could judge, I estimated 300 to 350 yards.

Q. Where was the automobile that was traveling towards Suffolk? That automobile was traveling in a direction opposite from that which the Garrison car was traveling, is that right?

A. Yes.

Q. Where was the automobile traveling towards Suffolk when you first saw the Garrison automobile, the Garrison automobile being about 300 to 350 yards away?

A. When the car from Windsor come by me I just naturally looked at the other car then.

Q. About how far away was the Garrison automobile when the car going towards Suffolk passed in front of you?

A. What do you mean?

Q. In other words, a car passed traveling towards Suffolk, passed in front of you?

A. Yes.

Q. As soon as it passed where was the Garrison automobile at that time?

A. About the same place, 300 to 350 yards.

page 105 } Q. You think it was 300 to 350 yards away?

A. Yes.

Q. Well, what did Mr. Clements do then?

A. He was pulling on out as that car passed.

Q. Well, did he get onto the highway?

A. Yes, he got up on the highway and finally crossed the concrete in the middle lane.

Q. He was in the middle lane when you say he finally crossed the concrete?

S. W. Dunning.

A. I don't mean the middle lane. It is a 4-lane drive. He was on the side of the middle lane.

Q. How did he make that turn? He was going to make a left turn?

A. Yes.

Q. How did he make that? Did he cut short or did he go out and then turn left?

A. He went partly straight out, about 30 degrees, I imagine, coming across.

Q. Then what did he do after he made that maneuver?

A. That is when the car hit.

Q. Had he made the turn before he was struck or not?

A. No, he hadn't all the way turned.

Q. How much had he turned, can you give us any idea?

A. I say about 30 degrees. I couldn't say that for sure—about that, I imagine.

page 106 } By the Court:

Q. You mean he was at an angle of about 30 degrees?

A. From straight, the way he was turning.

By Mr. Bivins:

Q. Did he run into this other gentleman, Mr. Garrison, or did Mr. Garrison run into him?

A. Mr. Garrison hit him.

Q. You are sure of that, are you?

A. Yes.

Q. Mr. Garrison ran into Mr. Clements?

A. Yes.

Q. After you got on the highway did you continue to observe the automobile which was being driven by Mr. Garrison?

A. I watched it all the time.

Q. You did?

A. Yes.

Q. What did Mr. Garrison do?

A. I don't know what he did. He cut in to the left.

Q. You say you were watching him?

A. Yes, sir.

Q. If you were watching him, can't you tell me?

A. I watched the car; I couldn't watch him.

Q. What did you watch?

A. I watched the car. He made a sharp curve to the left inside the road.

S. W. Dunning.

page 107 } Q. He made a sharp turn to the left, Mr. Garrison did?

A. Yes, sir.

Q. Was he traveling on the right-hand side of the highway up to the time he made this left-hand turn?

A. I didn't get that.

Q. Was Mr. Garrison traveling on the right-hand side of the highway, that is on his right-hand side of the highway, until he made this turn to the left? Is that where he was traveling?

A. Yes.

Q. Well, of course, when he turned to the left he left the concrete apron, is that right?

A. Yes.

Q. Did Mr. Garrison leave the concrete entirely or did a portion of his automobile remain on the concrete?

A. I think his whole car was off the concrete in the center lane when he hit.

Q. When he struck?

A. I couldn't tell you exactly.

Q. I am speaking of Mr. Garrison now?

A. Yes, I say his car was in the inside off the concrete.

Q. When the collision occurred?

A. When he hit, when the cars hit.

Q. At the time this boy Clements drove onto that highway and made a left turn, you say that he had reached
page 108 } —where was he now when he was struck, whereabouts with relation to the center of the highway was he?

A. From the center of the highway, he was on the right-hand side. I don't know whether it was all off the concrete or not, the whole car.

Q. He was in that position?

A. Yes.

Q. When Clements was in that position that you have indicated, was there sufficient space on the concrete portion of the highway, that is the portion Mr. Garrison had been traveling on, was there sufficient space on that concrete portion of the highway to have permitted Mr. Garrison to continue on the concrete past Clements' automobile, if he hadn't made the left turn?

A. I don't know. I couldn't answer that. We were—I would call it moving all the time, and I wouldn't answer whether it could have went by or not.

S. W. Dunning.

Q. You don't know?

A. I say I don't know whether he had room enough or not.

Q. If Mr. Garrison hadn't made the left turn and had stayed on his right-hand side of the highway, could he have passed the automobile that Mr. Clements was driving?

Mr. Ford: He has already stated that he don't know whether he could or not, very plainly.

The Court: He stated that he didn't know page 109 } whether he could or not.

The Witness: Nobody hardly could tell whether they could pass or not. We were moving all the time off of that strip.

By Mr. Bivins:

Q. Now, you were watching the Garrison automobile as it approached you, watching the automobile which was being driven by Mr. Garrison, you watched it as it approached the Clements automobile, as it came towards it?

A. Yes.

Q. As it moved on and came close you were watching it, weren't you?

A. Yes.

Q. As you watched it did you notice whether Mr. Garrison reduced the speed of his automobile or not?

A. I couldn't say. It didn't look like it.

Q. You say it didn't look like he did?

A. I couldn't say that it did or did not.

Q. You don't have any opinion as to that, or any recollection as to what occurred in respect to the reduction of speed?

A. It was getting too close.

Q. How is that?

A. It was getting too close. I don't remember much about it.

page 110 } Q. Did you receive any injury as a result of this collision?

A. No, nothing but a little skin cut. It didn't amount to anything.

Q. That didn't amount to anything?

A. No.

Q. Mr. Clements was rendered unconscious as a result of the collision?

A. I don't know. He was out of the car when it stopped.

S. W. Dunning.

Q. Do you know whether or not he had his car in low gear, intermediate gear, or high gear?

A. I don't know.

Q. You don't know as to that?

A. No. I don't know whether he started off in high, second or low. I was in the back seat of the car.

CROSS EXAMINATION.

By Mr. Stephens:

Q. You were riding on the back seat, Mr. Dunning?

A. Yes.

Q. In Nat Clements' car?

A. Yes.

Q. Who was on the back seat with you?

A. Miss Brickle.

Q. Miss Brickle?

A. Hilda Brickle.

page 111 } Q. She lives in Suffolk?

A. Yes.

Q. You went down to Clements' home and transferred from his father's car to his old car, and you were going back, going towards Suffolk, to his father's service station, is that correct?

A. Yes, going to the service station.

Q. And that service station is in the direction of Suffolk, Providence Church Crossroad or Lake Prince Road?

A. Yes.

Q. At what speed, Mr. Dunning, did Nat Clements approach that intersection?

A. At what speed?

Q. Yes.

A. You mean from the house?

Q. What I am talking about, when you drove up towards the intersection do you have any idea at what speed his car was traveling?

A. I say 10 or 15 miles an hour.

Q. You say 10 to 15 miles an hour?

A. Coming up to the crossing, you mean?

Q. Yes.

A. That is right, something like that.

Q. And as you approached that intersection there was a car coming from the direction of Windsor, in other words, coming from the west going east towards Suffolk?

page 112 }

S. W. Dunning.

A. Yes.

Q. And you came to a stop?

A. Right.

Q. When you came to that stop how far was the Clements car from the northern outside edge of the northern strip of concrete?

A. I should say five or ten feet. I couldn't say exactly. I don't know. Something around that.

Q. As the eastbound car moved past, you all moved in on the hard surface right behind it, is that right?

A. The Windsor bound car?

Q. The car bound east towards Suffolk?

A. It moved out.

Q. So as it moved out you all drove on the highway behind it in a diagonal position?

A. Yes.

Q. You say it was about a 30-degree angle?

A. Oh, I don't know, something like.

Q. And that angle was pointing east towards Suffolk, is that correct?

A. That is right.

Q. And as you went out this 30-degree angle attempting to make this left turn to get over on your right-hand side of the road, where was the Garrison car just as you page 113 } started to make that turn, or Mr. Clements started to make it?

A. You mean how far was Mr. Garrison's car from his car at that time?

Q. Yes, where was he at that time with reference to where you were?

A. Oh, I don't know. I couldn't say. It would be hard for me to say. It was getting close.

Q. What do you mean when you say it was getting close? I understood you to say a moment ago when you stopped to let this eastbound car go by and as you started on to the hard surface road this car of Mr. Garrison was between 300 and 350 yards away from you?

A. Yes.

Q. As you got out on this strip of concrete headed at this 30-degree angle, or started out on that strip of concrete, the northern strip, we want to know how far the Garrison car was from you at that time?

A. Well, he was—I would say he covered half the distance between 300 and 350 yards.

S. W. Dunning.

Q. He was still then a minimum of 150 yards away from you?

A. I don't know, I couldn't say about that.

Q. Well, now, just about how far?

A. I say around 75 or 80 yards, something like that, maybe a little over.

page 114 } Q. At that time you were completely up on that northern strip of concrete, is that correct?

A. About the middle of it, I reckon.

Q. As you moved from that point over to a point on the northern side of the center of the road is where the collision occurred, is that correct?

A. Yes.

Q. How far was the Garrison car from you when it made this abrupt left turn?

A. So close I thought it was going to hit the rear of the car.

Q. You thought it was going to hit the rear of the car?

A. Yes.

Q. And he made a left turn in order to avoid hitting the rear of the car, is that correct?

A. I don't know whether he did that or not.

Q. Until he made that left turn you were of the opinion that he would hit the rear of that car?

A. It looked like it to me.

Q. I think you said you were watching the Garrison car all the time?

A. Yes.

Q. Where was the Garrison car when you first saw it?

A. About 300 to 350 yards.

Q. And you first saw it then when you stopped—

page 115 } A. That is my judgment about the distance. I might be wrong about the distance. I haven't measured it or nothing like that.

Q. I understand that, but the first time you saw it was when you stopped for this eastbound car?

A. Beg pardon?

Q. The first time you saw it was when you stopped for this eastbound car, the car going towards Suffolk?

A. Yes.

Q. Was that the first time you had noticed it?

A. Yes.

Q. No further stop was made, Mr. Clements went right onto that hard surface road in front of this car?

S. W. Dunning.

A. Yes, sir.

Q. Do you know where these cars were, Mr. Dunning, with reference to the center of the highway at the time this collision or accident occurred?

A. When they went together?

Q. Yes, that is right.

A. Oh, I couldn't say that.

Q. Didn't you testify a moment ago that it happened on Mr. Garrison's right side of the macadam? I understood you to so testify?

A. That is where the accident happened.

Q. So it happened on Mr. Garrison's right side?

page 116 } Mr. Rixey: No, he said the other side.

Mr. Stephens: Let us let him say what he did say.

By Mr. Stephens:

Q. I asked you if you didn't say on direct examination that the accident happened, or the collision occurred, on Mr. Garrison's right side of the macadam?

A. Yes.

Q. Did I understand you to say, Mr. Dunning, that this was a head-on collision?

A. No.

Q. Will you tell the jury just exactly how those cars came together, if you know?

A. If I had something to show that, maybe I could show it.

Q. We will pass that for the time being. Here is a picture of the cars. I don't know whether you have seen this or not.

The Court: Here are a couple.

Mr. Stephens: Let us put them on the map so the jury can see them. Now, Mr. Dunning?

The Witness: This is going towards Windsor. This is Suffolk over here (indicating).

By Mr. Stephens:

Q. Clements was coming up there and Mr. Garrison was going down there. This is Windsor, here (indicating)?

page 117 } A. Do you want me to put a cross where they come together there?

Q. Yes. The gray car is ahead on the side of

S. W. Dunning.

the road that Mr. Garrison was traveling on going towards Windsor. The green car is at the point of intersection of the Lake Prince Road with the State Highway Route 460. The green car is the one that was operated by Nat Clements. Now, show to the jury, if you will, just the way you recall that accident occurred?

A. That don't look right to me. The road doesn't look right to me. It looks more like the road is straight. You say you want me to put the automobiles where they come together?

Q. That is right.

A. That is the inside lane.

Q. And here is the center of the intersection.

A. That is the center of the intersection. The front looked like to me they hit like that (indicating) when the cars went together.

Q. In other words, according to your recollection, Mr. Dunning, the left front of the Clements car collided with the right front of the Garrison car?

A. Yes.

Q. You give us from recollection now whether the main force of the blow of the Garrison car was on its front or on the right front wheel, or in that vicinity, can you? page 118 }

A. I don't exactly get you there.

Q. (Repeated by stenographer) You give us from recollection now whether the main force of the blow of the Garrison car was on its front or on the right front wheel, or in that vicinity, can you?

A. It is right in the front wheel.

Q. You say right into the front wheel. Do you mean the right front wheel or the left front wheel, speaking of the Garrison car?

A. On the right. I am speaking of this car here.

Mr. Sacks: Clements?

The Witness: On the left front wheel, and this looks like it hit the front end. Mr. Garrison's car hit the front end, hit the right—I mean the left front wheel of Clements' car.

By Mr. Stephens:

Q. Could you say from looking at that picture that that is a correct statement of how it happened? The Clements car, if I understood your answer, was at a 30-degree angle?

A. About that.

S. W. Dunning.

Q. And Mr. Garrison made an abrupt turn to his left?

A. Yes, he came out—of course, this road is wider, but he came out like that (indicating).

Q. Now, had the Clements car straightened up in the direction of Suffolk, headed in the direction of Suffolk, before this collision occurred?

A. (Not answered).

By Mr. Sacks:

Q. Mr. Dunning, what time of the day or evening did this accident occur?

A. About 5:30. I don't know exactly what time.

Q. About that time?

A. Yes.

Q. Was it getting dark?

A. Just dark.

Q. Were automobiles using their headlights then?

A. One was using it.

Q. Which one was that?

A. The one coming from Windsor.

Q. You saw headlights?

A. I saw one headlight.

Q. Did Mr. Garrison's car have its headlights on?

A. He did not.

Q. Are you sure of that?

A. Yes.

Q. If it had you would have seen it?

A. I certainly would.

Q. Now, you said that when Mr. Clements' car got into the intersection and stopped to let that car coming from Windsor go by—

page 120 } Mr. Stephens: He didn't go into the intersection before letting that car go by. That car was permitted to pass before he entered the intersection, as I understand the witness.

The Witness: What do you call the intersection, the side of the road or—

Mr. Sacks: The intersection is where the Lake Prince Road hits the main highway.

The Witness: You mean on the concrete?

Mr. Sacks: On the concrete, yes, at the edge of the concrete.

S. W. Dunning.

The Witness: Ask the question over.

By Mr. Sacks:

Q. Let me ask you this way. Had the front part of Mr. Clements' car gotten into the main road, any part of the main road, the main highway, when he stopped for this car coming from Windsor?

A. He hadn't touched the concrete when he stopped.

Q. He hadn't touched the concrete?

A. No.

Q. Is there any part of the road that isn't concrete on the right of that concrete there?

A. How do you mean?

Q. There are two concrete sides?

A. Yes.

page 121 } Q. And then in the middle it is asphalt?

A. Yes.

Q. Is there anything on the other side of the concrete road, any dirt?

A. Yes.

Q. Dirt?

A. Yes.

Q. So he could have gotten into the intersection before he hit the concrete, couldn't he? Let me get this plat.

By the Court:

Q. Are there any dirt shoulders on the road?

A. Yes.

Q. How wide are they?

A. I imagine two cars can get by there before the cars hit the fence.

By Mr. Sacks:

Q. Now, this is the highway. This is the road that you folks came down on, that is the Lake Prince Road. Now, this is concrete, that is asphalt, and that is asphalt, and that is concrete. Now, what I want to know is this. Is there a dirt road, any dirt shoulders on this side of the concrete?

A. Yes.

Q. There is?

A. The road from here to here, this road here, that is all dirt, and from here up to Mr. Ely's filling station I imagine there is room for two cars to be in there.

page 122 }

Q. Are there any dirt shoulders along the side?

S. W. Dunning.

A. About three feet.

Q. About three feet?

A. I imagine.

Q. So Clements' car could have gotten into the intersection before it touched the concrete?

A. How do you mean?

Q. Could have gotten out the end of this road to that patch of main highway?

A. Over here, yes, (indicating).

Q. Over there?

A. Yes.

Q. What I want to know is this, when Mr. Clements came out and stopped his car to let the Windsor car go by, where was he?

A. Right around on here somewhere (indicating).

Q. Right along there?

A. Right along there somewhere.

Q. How many feet from the concrete?

A. From five to ten feet from the edge of the concrete, back on the road.

Q. But was any part of the car sticking out in the main road, the main highway?

A. No.

page 123 } Q. It wasn't?

A. No.

Mr. Stephens: In other words, the front end was back here five or ten feet from the main highway when it stopped?

The Witness: Yes.

By Mr. Sacks:

Q. You said when Clements started to pass and make his turn, at that time the Garrison car was about 75 or 80 yards from that point, is that correct?

A. How is that?

Q. You first said when you saw the Garrison car, that is the car that was going towards Suffolk, down about 300 yards away?

A. 300 or 350 yards away.

Q. All right, when you first saw it. At that time Mr. Clements had not stopped and he had not endeavored to make a turn?

A. He was stopped.

Q. Then when he started off to go towards Suffolk you say that the Garrison car was about 75 or 80 yards away?

S. W. Dunning.

A. 75 or 80, somewhere along there. I couldn't tell exactly.

Q. How far would you say the Garrison car was from Mr. Clements' car when Mr. Garrison started towards his left?

A. I wouldn't say. I don't believe—

page 124 } Q. You did say that Mr. Garrison before striking the Clements car turned to his left, didn't he?

A. Yes.

Q. Well, how far was he away from that point when he first started to his left?

A. I didn't say.

Q. You don't?

A. I didn't say. I don't know exactly.

Q. About how far do you think he was?

A. About how far do I think he was?

Q. Yes, when he started to turn to his left?

A. I don't know. It was getting kind of close.

Q. Have you any idea?

A. Well, I might—no, I wouldn't say. I would rather not say.

Q. Well, say something, give us an idea of what you think?

A. I don't know how far, to tell you the truth.

Q. Was it as much as 20 yards away?

A. I don't know.

Q. 25 yards away?

A. I won't say because I don't know.

Q. Could you tell about how fast Mr. Garrison was traveling?

page 125 } A. No.

Q. You couldn't tell that?

A. I couldn't tell.

Q. What side of the car were you sitting on, the right or the left?

A. The right side of our car.

Q. You were right behind this—

A. Miss Burns.

Q. You saw that car all the time from the time it was 300 yards away until the time it struck the—

A. I was practically looking right at it all the time.

Q. And you couldn't tell whether it was going fast or slow or what?

A. I don't know the speed he was coming.

Q. But it looked like it was coming fast?

S. W. Dunning.

A. It was coming fast.

Q. What do you call fast?

A. What I call fast?

Q. Yes.

A. Well, the speed limit is 55 miles an hour on the highway, is that what you want?

Q. Was he going as fast as that?

A. I don't know.

Q. You don't know?

A. No.

page 126 } Q. What makes you think he was going fast?

A. It was traveling.

Q. He was traveling?

A. Did I say he was going fast?

Q. I think you said he was going fast. Wasn't he?

A. He was moving, I say.

Q. Certainly he was moving.

A. But I don't know how fast he was moving.

Mr. Bivins: Judge, I wish to make this comment, that it is not exactly a fair portrayal of what the situation is in relation to these two cars, because the width of either one of these little automobiles is practically one-half the width of this road as drawn on this print.

Mr. Sacks: Why don't you let him demonstrate on the table without that plat?

Mr. Bivins: That is confusing. The jury will get an entirely different idea.

Mr. Ford: I am sorry we didn't draw the automobile maps according to scale.

Mr. Bivins: I am not asking you to draw it to scale, but it doesn't just exactly depict the situation, because if he puts this car out here he doesn't show that he is out of the intersection.

The Court: You may cross-examine him.

page 127 } Mr. Bivins: I just want to show to Your Honor that it isn't fair.

By Mr. Bivins:

Q. As I understand your statement to this jury, it was not your intention to leave with them the thought that the greater portion of this Clements automobile was yet in the side road?

A. Not to leave it in the side road.

S. W. Dunning.

Q. Was the Clements automobile altogether on the highway when the crash occurred?

A. Yes.

Q. It got on the highway?

A. Yes.

Q. Was it altogether past the right concrete apron of that highway at the time the crash occurred?

Mr. Stephens: That is objected to as leading.

Mr. Bivins: I am asking if it was.

Mr. Stephens: That is what I am objecting to.

The Court: Ask him where it was rather than where it was with reference to some particular place. Let him place it for us and then you can examine him all you want to.

Mr. Rixey: He certainly has a right to ask him where it was in reference to a particular object.

The Court: That is right, but he didn't ask page 128 } him that. Go ahead.

By Mr. Bivins:

Q. (Repeated by stenographer) Was it altogether past the right concrete apron of that highway at the time the crash occurred? That is Clements' automobile.

A. It was off the concrete. I don't know if it was all the way off or not. I couldn't say whether the rear was off or not.

Q. How far into the asphalt portion of the highway had the front of the Clements automobile traveled when it was struck?

A. It was over on the right-hand side of the middle lane. I don't know how far it was in there.

Q. When you say the right-hand side of the middle lane, which right-hand side do you refer to, Clements' right-hand side?

A. Garrison's right-hand side.

Q. Garrison's right-hand side?

A. Yes.

Q. Then it was on the right-hand side of the middle lane?

A. The left-hand side wasn't used at all until after it was practically stopped.

Q. Now, it is in evidence that the concrete apron on Mr. Garrison's right-hand side, that was the side he was using, was 11 feet wide or is 11 feet wide, and, of course, page 129 } that is the width of the apron on the other side of the road. Now, there is a concrete apron on

S. W. Dunning.

either side of the highway, and there is this 20-foot strip of asphalted surface in the center, is that right or not?

A. Yes. I don't know how wide the asphalt is.

Q. You don't know the width of it?

A. No.

Q. How far into the asphalted portion of this highway had the Clements automobile traveled when it was struck by the Garrison automobile?

A. I don't know how far it was. It was a good ways over on that.

Q. It was a good ways over?

A. Yes. I don't think all the car was off the concrete. I don't know that.

Q. You don't know that?

A. It was on the macadamized portion when it was hit.

Q. So far as you know it was on the macadamized portion?

A. I know it was on the macadamized portion when they hit, the front of the car was.

Q. But whether any portion of it was overhanging on the concrete portion you cannot say?

Mr. Ford: He said he thought a portion of it was on the concrete.

A. I don't know. It might have been on it, but
page 130 } I still don't know.

By Mr. Bivins:

Q. How far into the asphalt portion do you think it had traveled, five feet, ten feet?

A. Eight or ten feet, something like that. I imagine that is how far it went, something like that. I don't know exactly.

Q. You don't know exactly?

A. No.

Q. And while in that position it was struck?

A. Yes.

Q. Now, you answered questions put to you by Judge Smith to the effect that two cars could have gotten by on the shoulder of this highway just at the point where it joins this side road, is that right?

A. Yes, sir.

Q. And is that also true in relation to the road, or the side of the road in front of the filling station?

S. W. Dunning.

A. In front of the filling station?

Q. Yes, how about on this side before you get to the filling station?

A. There is room enough—here is the filling station.

Q. How wide is this shoulder?

A. I will say three feet, something like that, this shoulder up to this road. That is the whole road there.

page 131 } Q. That is next to the concreted portion?

A. Yes.

Q. Then this would be the shoulder and that is the concrete? Here is the concrete in here (indicating).

A. Yes.

Q. You think that is about three feet wide?

A. Something like that.

Q. Is there any ditch in there, or can you tell us that?

A. I don't know. There is drainage there. I don't know whether it is a ditch or not.

Q. You don't have any idea as to the depth of that?

A. No, sir.

Q. This is a level surface there, isn't it?

A. Yes.

Q. There isn't any ditch or drainage in here by the service station side?

A. No.

Q. This accident happened directly—in a direct line from the center line of this highway if it were extended, isn't that true?

A. Yes, about there, I think.

Q. Then Mr. Garrison had three feet to the right of the concrete apron before he entered the side road, and then, of course, all of that side road was dirt?

A. Yes.

page 132 } Q. He had that width and then at least two cars could have traveled abreast on the portion in front of the service station?

A. Yes.

By Mr. Sacks:

Q. Mr. Dunning, step down here one second. I think we can clarify this. Now, let this be the main highway (indicating)?

A. The whole table?

Q. Yes. This is Mr. Garrison's car going down the main highway?

A. Yes.

S. W. Dunning.

Q. Now, right here is the concrete, and you say there is a dirt shoulder this side of the concrete, is that correct?

A. Yes.

Q. Then next to the concrete is an asphalt road which the evidence shows is about 20 feet?

A. I don't know the width it is.

Q. Then there is concrete on the other side?

A. Yes.

Q. Now, take this as Mr. Garrison's car coming out of the side road.

A. This is Garrison's car?

Q. I mean Mr. Clements' car. Now, just show how these two cars came together?

page 133 } A. Is this the intersection coming in here?

Q. Yes, this is Mr. Clements' car and this is Mr. Garrison's car back here.

A. Where is the intersection of that road going to be?

Q. Right here (indicating).

A. That is going to be the road where he stopped to come up here?

Q. Yes.

A. The car coming over here—

Q. Yes, that is right.

A. This is going to be the road coming straight across here?

Q. That is Lake Prince Road.

A. This x will be the Lake Prince Road?

Q. Yes.

A. You want the cars where they hit?

Q. Yes, that is right. That is Mr. Garrison's car.

A. That would be the right-hand side of the road, the concrete apron they call it. I imagine something like that.

Q. Then Mr. Clements had gone off the concrete completely, is that it?

A. No, I didn't say that.

Q. Was any part of his car on the concrete?

A. I don't know.

Mr. Stephens: The witness has testified several times that he did not know.

By Mr. Stephens:

Q. You testified, I think, on the north side of this highway between the north strip of concrete on which Mr. Gar-

Hilda Brickle.

ri son was traveling and the ditch there is a shoulder about three feet wide?

A. Something like that to the best of my knowledge.

Q. At the point of intersection with this Lake Prince Road you said there was—four times?

A. Yes.

Q. At the northeast corner don't those ditches from these two roads converge, don't they meet there?

A. In that corner?

Q. That is right.

A. On the northeast side?

Q. Yes.

A. I think there is.

Q. Isn't there also a culvert there with a concrete head wall?

A. I don't know what you mean.

Q. You wouldn't say whether that is true or not?

A. No, sir, I couldn't say.

Q. Do you have any idea how deep that ditch is?

A. I do not.

Q. As you approach that intersection from page 135 } Lake Prince or from Suffolk?

A. No, sir, I never noticed. If I did, I don't recall it now.

HILDA BRICKLE,

sworn on behalf of the Defendant Clements, testified as follows:

By Mr. Rixey:

Q. Where do you live?

A. Suffolk.

Q. You were riding in this automobile at the time of this accident, were you not, with Mr. Clements?

A. Yes.

Q. Where were you sitting in the car?

A. I was sitting on the left-hand seat in the back.

Q. You were sitting in the left-hand seat in the back?

A. Yes.

Q. You were sitting on the seat beside Mr. Dunning, is that correct?

A. Yes.

Q. All right, now, do you remember going to the home of

Hilda Brickle.

Mr. Clements' father and getting out of one car
page 136 } and getting into another?

A. Yes, sir.

Q. Then you left the Clements home and came on in to the Lake Prince Road, is that right?

A. Yes, sir.

Q. And then you came on and approached the main highway, Route 460; do you remember that?

A. Yes, sir.

Q. Now, tell the jury, please, what you know about this accident?

A. Well, all I know is we just stopped.

Q. What is that?

A. We stopped.

Q. You stopped?

A. Yes, in the road.

Q. Where did you stop?

A. Well, I—I don't know. We just stopped before we went on the highway.

Q. You stopped before you went on the highway?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. You came to a complete stop?

A. Yes.

Q. And after you stopped what did you do,
page 137 } what did the car do in which you were riding?

A. Well, we stopped and waited for one car to pass, and then it just happened.

Q. Did you see the Garrison car that you were in collision with?

A. No, sir.

Q. You didn't see it?

A. No, sir.

Q. Did you see it at all after the collision?

A. No, sir.

Q. Can you say how far the Clements car, that is the car that you were riding in, had gotten across the Route 460, that is the main highway, before the accident occurred?

A. No, I couldn't.

Q. You don't know?

A. I don't know.

Q. Do you know how fast Mr. Clements was traveling at the time he was struck?

Hilda Brickle.

A. No, I don't know that.

Q. You are positive that Mr. Clements stopped before entering the road?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Sacks:

Q. He stopped to let the car go by coming from Petersburg?

A. Yes, going one way. I don't know just page 138 } which way it was going.

Q. It was going toward Suffolk from Petersburg?

A. Yes, sir.

Q. That is the car he stopped to let go by?

A. Yes, sir.

Q. And immediately after that car went by you went onto the road?

A. Yes, sir.

Q. That was going in the same direction that you all were going?

A. Yes.

Q. And you followed in right behind that car, or attempted to?

A. Yes, sir.

Q. You hadn't gotten very far on the road before the collision occurred, had you?

A. No, I don't believe so.

Q. Were you hurt?

A. No, sir.

Q. You don't know where you were when you stopped on the road?

A. No, sir.

Q. You didn't know as a matter of fact that you were on the road?

page 139 } A. No, sir.

Q. You didn't know Mr. Garrison's car was in the land of the living, did you?

A. No, sir.

Q. Not until it struck you?

A. No, sir.

Q. Do you know about the angle in which the two cars came together?

A. No, sir, I don't.

Q. Or where they were afterwards?

A. No.

JOSEPH WEBER,

sworn on behalf of Defendant Clements, testified as follows:

By Mr. Rixey:

Q. Your name is Joseph Weber?

A. Joseph Weber.

Q. Where do you live?

A. About a half a mile from where the accident happened.

Q. How old are you?

A. Eighteen.

page 140 } Q. Where were you at the time this accident occurred?

A. In that Shell station across the road from where it happened.

Q. Whose station is that?

A. Mr. W. C. Ely.

Q. You were in the station then. Point here to it on this map. Here is the dirt road coming in here, and that is the main boulevard—Suffolk is in this direction, and this is the Ely station. As I understand, you were in that station?

A. That is right.

Q. You didn't see the accident?

A. No, sir.

Q. Did you hear it?

A. Yes, sir.

Q. And did you go out there directly after you heard it?

A. Yes, sir.

Q. All right, sir. Tell us what you saw when you got out there, please?

A. Well, I saw very little—just the way the cars was, in the shape they was. I just saw the cars was shaped when I got there, and I took one of the boys—

Q. Where was the Clements boy when you got there?

A. Underneath the automobile.

Q. Which automobile was he underneath?

page 141 } A. His car.

Q. Was he unconscious?

A. Yes, sir.

Q. Tell the jury where the two cars were standing?

A. They was standing on the opposite portion of the road in which either one of them should have been. In other words, when they hit they both skidded across on the left-hand side of the road from the way the Garrison car was going.

Q. Maybe you can place it on this map. Here is the main boulevard, and this is the side road, and this straight line here, that is the outside lane marking the boulevard, as I un-

Joseph Weber.

derstand it, from the edges of the—outside edges of the concrete. Now, show us where the two cars were?

A. This is the Suffolk direction here?

Q. Suffolk is this way (indicating).

A. The Garrison car was just about here, and the—

Q. The Garrison car was on the cement, was it?

A. Yes, sir, on the left-hand side.

Q. On the cement on its left-hand side pointing in which direction?

A. Just crosswise of the road, the front next to the Ely station.

Q. Pointing to Ely's station?

A. Yes.

page 142 } Q. And the rear pointing in the opposite direction?

A. Yes.

Q. So it was standing at the intersection, was it?

A. Yes.

Q. Where was the other car?

A. Pointing in the direction towards Suffolk.

Q. Was it on the tar or the concrete?

A. On the tar.

Q. Pointing in which direction?

A. Pointing towards Suffolk.

Q. Heading towards Suffolk?

A. Yes.

Q. As I understand you to say, the Clements car was on the tar?

A. Yes.

Q. On the side of the roadway from the Ely station?

A. Yes, next to the church.

Q. And you say Mr. Clements was underneath his car?

A. Yes.

Q. Unconscious?

A. Yes.

Q. Now, did you examine Mr. Clements' car?

A. Yes, sir, after it was all over.

Q. Can you tell the jury what gear it was in?

page 143 } A. It was jammed in low gear so I couldn't get it out.

Q. It was jammed in low gear?

A. Yes.

Q. Did you try to get it out?

A. Yes, I tried to get it out before they moved it.

Joseph Weber.

CROSS EXAMINATION.

By Mr. Stephens:

Q. Mr. Weber, you live right around in this neighborhood?

A. Yes, sir.

Q. And did you notice a cut place in the macadam on the right-hand side of the road going towards Windsor?

A. Yes, sir.

Q. Did you notice a line cut into the macadam leading from that point up towards Windsor that ended a little to the left of the center, going in the same direction, in other words, towards Windsor?

A. I never noticed it.

Q. You never saw that line running up there like that?

A. I probably saw it.

Q. What I want to know and what I am trying to get at is where the front of the Garrison car was with reference to the termination of that line?

A. It skidded around across the cement on this side. The front was over here (indicating).

Q. Maybe I haven't made myself clear. Was the front of the Garrison car on the macadam and the rear of page 144 } it on the concrete, or was it all on the concrete?

A. All on the concrete.

Q. That concrete is one 11-foot strip?

A. Well, it was on there. You understand I didn't say it was crossways. It was on an angle.

Q. And the Clements car was headed towards Suffolk and that was on the macadam, as I understand it?

A. That is right.

Q. You never saw the accident at all?

A. No, sir.

Q. You don't know anything at all about how it happened?

A. No, sir.

Q. Was Mr. Walter Ely in the service station that night?

A. Yes, sir.

Q. In the meantime, the Garrison car caught on fire, didn't it?

A. The Garrison car was burning when we went out there.

Q. And somebody put it out?

A. Mr. Ely put it out.

Q. Where was Mr. Garrison, did you see him?

A. I didn't see him at all after they got him out of the car.

Q. Where was Mrs. Garrison, did you see her?

Joseph Weber.

A. The same way.

Q. Had they taken them both out of their car?
page 145 } A. Yes, sir.

By Mr. Rixey:

Q. To make sure I understand you, you found the Garrison car on the concrete on the south side, that is away from Ely's service station?

A. Yes, sir.

Q. On an angle, pointing in which direction, pointing towards Ely's, the back towards the road where the—across the road on the other side pointing towards Ely's on what we have been calling the Lake Prince Road?

A. No, sir, not the Lake Prince Road, it is the opposite right across the highway.

Q. You mean the other side of the Lake Prince Road?

A. Yes.

Q. It wouldn't be headed towards Ely's service station and at the same time be headed in the opposite direction, would it?

A. Yes.

Q. Do you mean to say the front of the car was pointing towards Ely's and the rear of it towards this road?

A. Yes, sir.

Q. I understand you to say that the Garrison car was standing at an angle on the hard surface?

A. On the side opposite there.

Q. Ely's service station?

page 146 } A. Yes.

Q. Standing at an angle, the front of it pointing towards Ely's station and the rear of it away from Ely's station?

A. Yes.

Q. Now, we will get you to tell us in your own words. The other car, that is the Clements car—

A. The Clements car was crossing this middle part here, the asphalt, or whatever you call it, pointing back this way (indicating).

Q. Pointing a little bit east of north, is that it?

A. In other words, back across the pavement.

Q. How was it in reference to being on the portion of the asphalt away from the Ely service station, or the portion towards Ely's service station?

A. The side was towards Ely's service station.

Q. The side of it?

Joseph Weber.

A. Yes.

Q. Was most of it in which lane?

A. The two lanes in the middle, most of it was on the lane next to this cement pavement over here (indicating).

Q. Next to the Garrison car?

A. Yes. In other words, they were two feet apart.

Q. So that most of the Clements car then was in the right-hand portion of the concrete if you face towards Suffolk?

A. Yes.

page 147 } Q. And headed, you say, a little bit towards Suffolk, is that right?

A. Yes.

By Mr. Sacks:

Q. You testified when you first came out after you heard this impact, that both cars were on the wrong side of the road?

A. Yes.

Q. You meant by that that Mr. Garrison was on the wrong side of the road, and Mr. Clements was on the wrong side of the road?

A. That is right.

Q. Now, at that time was Mr. Clements' car facing towards Suffolk?

A. No, sir.

Q. Had it made any turn at all?

A. They were both turned around opposite the way, I guess, either one of them was going.

Q. This may help you. This is the direction of Windsor and this is Suffolk. Mr. Ely's station is right here somewhere, and that is the Lake Prince Road?

A. Yes.

Q. This is concrete; this is macadam.

A. Yes.

Q. There is also a dirt shoulder on this road
page 148 } of three or four feet?

A. Yes.

Q. When you came out you testified that the Garrison car was away over here on his left?

A. Yes.

Q. The front facing towards your station, Ely's station?

A. Yes.

Q. And that Mr. Clements' car was on this side of the concrete, which would be the right side going towards Suffolk?

A. Yes.

Joseph Weber.

Q. How was his car facing then?

A. His car was facing—

Q. Was it facing—the front part facing Suffolk?

A. The front of his car was facing the church, and the back—

Q. What side is the church on? Where is the church?

A. The church is over here.

Q. Is the church towards Suffolk?

A. Towards Windsor.

Q. Towards Windsor?

A. Yes, from the station, just a little bit.

Q. You mean that the Clements car looked as though it had made a right turn instead of left?

A. When they hit they slid over there.

page 149 } RE-DIRECT EXAMINATION.

By Mr. Rixey:

Q. You say they slid over there. How far did they slide?

A. I haven't got an idea.

Q. Did you see the place on the boulevard where the two cars came together?

A. Yes, I seen the hole in that place where they struck the ground at first.

Q. Where was that hole?

A. It was in the—it was four or five feet from the cement on the right-hand side where they struck.

Q. It was in the tar there, was it?

A. Yes.

Q. And how far from that point where the two cars came together did you find the two cars after it was all over? In other words, what I want to know is how far backward was the Clements car knocked?

Mr. Stephens: That is objected to as leading, and as asking for a conclusion. This is Mr. Rixey's witness, and there isn't any evidence that the Clements car was knocked any place, I understand, Mr. Rixey.

The Court: Answer that first question. He asked if you could tell how far these cars were from this mark in the road-bed?

The Witness: I don't know exactly. It was
page 150 } clean across the road from about where they were
hit.

Joseph Weber.

By Mr. Rixey:

Q. What is your best judgment as to the distance, the distance between this gouged place in the road and the front of the Clements car?

A. Well, I will say fifteen feet.

Q. And that was in the direction of Windsor, wasn't it?

A. Yes, sir.

By the Court:

Q. The other car was about how far away? How far away was the other?

A. The other one was just the length of the car. They were just in a short distance of each other.

Q. How far were they apart from each other?

A. I would say about two feet.

Mr. Rixey: We rest, if Your Honor please.

(Defendant Clements rests.)

Mr. Ford: We want to make a motion, if Your Honor please.

The Court: The jury may retire.

page 151 } (The jury retired from the courtroom.)

Mr. Ford: We at this time renew our motion to strike for the reasons I have already stated, and for the additional reason there has not been one bit of evidence since that time except in our favor. Mr. Dunning and Miss Brickle—of course, Miss Brickle didn't remember very much—both said they stopped for the Petersburg car and went right onto this highway when our car was bound to have been there, despite anything anybody says. It certainly was there. You talk about it being 350 yards away. That is perfectly absurd. The car was right there bearing down in that intersection, or the accident wouldn't have happened. Where is there any negligence on our part? It certainly has not been adduced by the other defendant's testimony. If anything, it has emphasized very clearly our whole theory of the case. The accident clearly happened on our right, on the right side of the highway. Mr. Dunning admitted that very fairly. In fact, he has admitted very fairly everything that he has known or stated, I should say, and he fully exempts our client from

J. C. Causey, Jr.

any negligence, and we ask Your Honor under the authorities presented to strike the evidence.

(Argument.)

page 152 } The Court: I will take your theory on the instructions. I think there is enough evidence here if they believe the man was driving in that car, and he stopped, and this man was that far away, whether it is far-fetched or not, if they believe that, it is a question for them to decide.

Mr. Ford: We except to the ruling of the Court for the reasons I stated on the first motion and the second motion.

The Court: Yes, an exception may be noted for defendant.

(The jury returned to the courtroom.)

Be it remembered that on the trial of this case, and after the defendant, Clements, had introduced the foregoing evidence, and the defendant, Garrison, had again moved to strike the evidence, which motion was overruled, the defendant, Garrison, to maintain the issue on his part, introduced the following evidence:

DEFENDANT GARRISON'S EVIDENCE.

J. C. CAUSEY, JR.,

sworn on behalf of Defendant Garrison, testified as follows:

By Mr. Stephens:

Q. State your name?

A. J. C. Causey, Jr.

Q. You live in Suffolk?

A. I do.

Q. What is your business or occupation?

page 153 } A. I didn't hear that question.

Q. What is your business or occupation?

A. Civil engineer.

Q. Did you make a survey of the scene of the accident between the automobile driven by one Nat Clements and another driven by Mr. W. E. Garrison that occurred December 10th, in Nansemond County?

A. I did.

Q. Do you have here a drawing of that survey?

A. Yes, sir.

Q. Do you recall the date you made the survey?

J. C. Causey, Jr.

A. I think the date is on the plat.

Mr. Stephens: It was made December 15th, for the purpose of the record.

By Mr. Stephens:

Q. Who was present at the time this survey was made?

A. State Officer Burgess and myself, and you, and the assistant that I had.

Q. Will you step over here now? This is a blueprint of the plat that you made?

A. Yes, sir.

Q. Does that correctly show the conditions that existed on December 15th, 1939?

A. It does.

Q. Will you tell the jury what this building page 154 } there is?

A. That was a filling station or store. My understanding is they live in the back of it.

Q. That is really the service station of Mr. Walter Ely?

A. That is right.

Q. This road here is the Lake Prince Road?

A. That is right.

Q. This is State Highway 460?

A. Yes.

Q. Windsor is west?

A. Yes.

Q. And Suffolk is east?

A. That is correct.

Q. Is this map drawn to scale?

A. Yes.

Q. This point here, a circle in this center lane, will you tell the jury what that indicates?

A. Well, now, this small point here is the intersection of the center line of these roads, and this circle here designates the beginning of the line in the pavement and runs from Point "A" to Point "B". That was actually a scar in the road.

Q. This point here, the round mark, is the center of the intersection of this Lake Prince Road and Highway 460?

A. That is correct.

Q. This mark to its right, or northeast of it, page 155 } indicates by a circle with a cross in it where the place in the highway ran up to this point designated by "B"?

A. That is correct.

J. C. Causey, Jr.

Q. Will you tell the jury how far it was from Point "A" to Point "B"?

A. I can tell you directly—in a straight line it is farther than the actual line—approximately 38 feet from Point "A" to Point "B".

Q. From Point "A" to Point "B" is 38 feet?

A. Yes.

Q. Tell the jury about how far it is from Point "A" to Point "B" as you have indicated on this plan?

A. I would say approximately 45 feet.

Q. 45 feet?

A. Or 46.

Q. Now, will you tell the jury what this mark is on the west side of the Lake Prince Road indicated by the circle?

A. That is a telephone pole or power pole.

Q. Will you tell the jury what this mark is, the line immediately north or northeast of that pole?

A. That is the State Highway stop sign to handle traffic coming from Lake Prince, coming out on the highway.

Q. This highway sign indicated here is so set or situated as to handle or control traffic coming out of the Lake Prince Road into State Highway 460, is that correct?

page 156 } A. It is.

Q. Is it the usual sign indicated by the State Highway—

Mr. Sacks: We will admit that.

By Mr. Stephens:

Q. Will you tell the jury how far it is from the location of this sign to the north side of the concrete?

A. That is approximately 30 feet. It would be longer coming down the center of the road in measuring from the sign to the nearest point.

Q. Mr. Causey, here on this side of the plat is marked "Window #1". Is that window to the north or to the south of this sign?

A. It would be approximately northwest of the sign, or more north.

Q. I mean in a general direction. *I* lies between the line pointing north on the Lake Prince Road?

A. Yes.

Q. Now, the shoulder, Mr. Causey, on the north side of this highway leading up to this intersection with the Lake Prince

J. C. Causey, Jr.

Road, at the northeast corner, what is the width approximately of that shoulder?

A. From the edge of the concrete to the shoulder is approximately 6 feet.

Q. Now, will you tell the jury whether or not there is any ditch there?

page 157 } A. There is no ditch there with the exception of right at this designated spot, right at the intersection of the road where the culvert runs under it.

Q. At the intersection of Route 460?

A. And the road to Lake Prince.

Q. On the northeast corner?

A. There is a small ditch there. The ditch comes down the Lake Prince Road coming south, and comes into a culvert and goes under the highway.

Q. And goes over on the south side of the highway?

A. Yes, but there is no ditch along the north side of the highway.

Q. This mark here, does that mark the head wall of the culvert?

A. Yes, sir, that is to Suffolk.

Q. Will you tell us now just how long that head wall is, how high it is from the general level of the highway?

A. It is approximately 6 feet long 14 inches wide, I think. I am sure of the 6-foot part, but the 14 inches is my recollection of it.

Q. Does it protrude above the general level of the ground now?

A. Very slightly.

Q. Now, will you tell the jury how far it is from the center of this intersection to the curve, the first curve on page 158 } this highway going towards Suffolk?

A. It is marked on the map plus or minus, which is approximately 1,570 feet.

Q. Will you tell the jury how far it is from the same center of the intersection going towards Windsor before there is a curve in the highway?

A. It is approximately 500 feet.

Q. Now, will you explain to the jury—do you know where Mr. Clements' home is, his father's home?

A. Yes.

Q. Will you say approximately with reference to this map?

A. I know it is up the Lake Prince Road.

Q. Did you put on this map how far it is from the intersection to the lane leading to his home?

J. C. Causey, Jr.

A. No, sir.

Q. You did not?

A. No.

Q. Anybody coming up this road within 500 feet of this intersection, what is there along there to obscure their vision?

A. The northeast corner of the road, there is a cultivated field. At the time I was there there was a crop on it.

Q. You were there within five days of the accident?

A. Yes.

page 159 } CROSS EXAMINATION.

By Mr. Rixey:

Q. Now, as I understand, this circle that you have put in there with a cross mark in front of it is the place where you found the gouged-out place?

A. Yes.

Q. That is the beginning of the gouged-out place?

A. Yes.

Q. And you could find where some automobile had scraped the surface of the road from there to what you call "Point B"?

A. That is correct.

Q. Now, if that was made in front of our—in front of the Clements car, then you would say that the Clements car was pushed by the force of the impact back for a distance, you say, of 45 to 46 feet, that is correct, isn't it?

Mr. Stephens: That is objected to as calling for a conclusion. He wasn't there, and it is speculative.

The Court: It speaks for itself. Is there any evidence that it was the Clements car? I rule that it is not evidence.

By Mr. Rixey:

Q. That gouged-out place or those marks here that you say show some scraping on the road, starts in the direction of Suffolk and runs in the direction of Windsor, doesn't it, the general direction?

page 160 } A. I am not in a position to say which way they run. There is no evidence that they were made there either going north or south.

Q. And that gouged-out place that you spoke of, those gouged marks, stopped at Point "B", you say?

A. Yes.

Q. And Point "B" is in the asphalt portion of the road,

J. C. Causey, Jr.

in the lane, rather, from the Ely service station; that is correct, isn't it?

A. Yes, sir, it is south of the center line of the asphalt pavement.

Q. Now, I understood you to say that on the north side of the road there is a space of 6 feet of shoulder from there over to the place that you call the shoulder?

A. That is approximately correct, yes.

Q. And that space an automobile can run over there easily, can it?

A. Yes.

Q. It is perfectly smooth in there?

A. Yes.

Q. And if you come down here you run into the mouth of the Lake Prince Road, and that is all smooth, isn't it?

A. Yes.

Q. And then when you leave the road and get here along in front of Ely's service station that is all level, page 161 } too?

A. That is level up to this dotted line shown here on the northwest corner of the station.

Q. Could you tell from what you saw out there the point of impact?

A. No, sir, I made no attempt whatsoever to find out anything about the accident. I simply went out and showed what I found on the ground.

Q. As to whether or not this "Point A" then is the point of impact, you are not able to say?

A. I am not able to say.

Q. That is the only place that you found, as I understand, that has a gouged place starting at "Point A" and ending at "Point B"? They are the only marks that you saw there that could have been made by this accident?

A. They were the only clearly defined marks. There may have been a few other rough spots on the road we didn't attempt to locate. These points were shown me by Officer Burgess.

By Mr. Nachman:

Q. Can you give us the width of the right shoulder on the other side? When you say there was 6 feet on one side, was it the same distance on the other?

Mr. Stephens: Where do you mean, up in front of the service station?

Walter Ely.

Mr. Nachman: On the opposite side, in front page 162 } of the Hines Service Station.

A. In front of the Hines service station there is no shoulder. It is graded out over to the filling station.

By Mr. Nachman:

Q. You have here a road shown on this side?

A. Yes.

Q. What is the width of that?

A. Approximately 7 feet.

Q. So in addition to the 20 feet of asphalt and the 22 feet of concrete highway there is a road shown on one side of 6 feet and a road shown on the other side of 7 feet, is that correct?

A. That is correct.

WALTER ELY,

sworn on behalf of Defendant Garrison, testified as follows:

By Mr. Stephens:

Q. You are Mr. Walter Ely?

A. Yes.

Q. Mr. Ely, where do you live?

A. Providence.

page 163 } Q. That is in Nansemond County?

A. Yes.

Q. Where do you live with reference to the scene of the accident that occurred December 10th, last year, between Mr. Clements' car and Mr. Garrison's car?

A. Where I was living at?

Q. Yes.

A. At Providence.

Q. You operate the service station there?

A. Yes.

Q. And that service station lies on the northwest corner of the intersection of the Providence or Lake Prince Road and the State Highway 460?

A. That is right.

Q. Now, did you see the accident, Mr. Ely?

A. No, sir.

Q. You might come here to the jury. Did you hear the accident?

A. What?

Q. Did you hear the impact?

Walter Ely.

A. Yes, I heard the noise.

Q. Just immediately before the impact occurred, this is the Lake Prince Road, this is the highway to Suffolk, this is Windsor, just immediately before the impact occurred did you see any car coming up the Lake Prince Road
page 164 } going in the direction of Route 460?

A. Just by the window, like that.

Q. You did see it then?

A. Yes.

Q. This is your place of business here?

A. Yes.

Q. Now, at the time that you saw this car come up this road, will you please tell the jury where you were standing and how you saw it?

A. I was sitting on the counter on this side of the room, over there.

Q. You were sitting on a counter in a position so you could see through this window?

A. The window over here, facing that road.

Q. As you looked through that window you saw this car pass?

A. Yes, I saw this car come by the window, that is all.

Q. What did you next see?

A. It wasn't but a little while before the crash come, a lot of noise.

Q. What do you mean by a little while?

A. It wasn't any time.

Q. You saw this car flash by and the next thing you heard was the crash?

A. Yes.

page 165 } Q. And that is all you know about it?

A. Yes.

Q. How many cars went by?

A. I didn't see but that one just that time.

CROSS EXAMINATION.

By Mr. Rixey:

Q. Where were you sitting? Were you sitting in your home, your dwelling, or in your service station?

A. In the store.

Q. About how far away from the window were you?

A. From the window?

Q. Yes.

A. Just across the room, that is all. I wasn't quite across

Walter Ely.

the room. The window is on one side of the store, and then the counter comes off and cuts off here about four feet.

Q. As you were sitting where you could look out of your window, how far from the boulevard, that is Route 460, would your vision strike that Lake Prince Road? Do you understand my question?

A. I judge it to be about as far as from here to the front door from where I was sitting.

Q. From where you are to the front door?

A. Yes.

Q. How far do you call that?

page 166 } A. Oh, I don't know—about 50 feet.

Q. About 50 feet?

A. No, it ain't quite 50 feet, I don't think.

Q. You understand what I am getting at?

A. Yes, you are talking about the road coming in from Lake Prince to where my station is at?

Q. No, sir, I asked you as you sat where you did on your counter, I understand you to say?

A. Yes.

Q. And looked out of your window, I want to know how far your line of vision as it would strike Lake Prince Road, how far that point would be from Route 460?

A. Oh, how far that would be?

Q. Yes.

A. Let's see. I sat back there about—it would be, I reckon, about 30 or 40 feet from 460 Highway, sitting back.

Q. Let me see if you understand me. Which one of these windows did you look out of?

A. That one right there.

Q. As you looked out that window your line of vision would go in a straight line, wouldn't it?

A. Yes.

Q. I want to know where your line of vision as you looked out there on a straight line, where it strikes this Lake Prince Road, how far from that point where your line

page 167 } of vision would strike the Lake Prince Road, how far that would be from Route 460? Do you understand what I mean?

A. It would be about the distance from there across the room.

Q. How far do you call that, from that wall to that wall?

A. About that distance. I reckon about 35 feet, something like that.

Walter Ely.

By A Juror:

Q. Would that stop sign be between your line of vision where it hit that road?

A. Yes.

Q. The stop sign would be between there?

A. Yes, the stop sign would be between where that window sets out and 460.

By Mr. Rixey:

Q. In other words, your line of vision then would be to the north of the stop sign, wouldn't it?

Mr. Bivins: Back of it?

By Mr. Rixey:

Q. The stop sign would be between your line of vision and the highway, wouldn't it?

A. Yes.

Q. It has been testified here that the stop sign is 30 feet from the highway, so your line of vision must have struck that Lake Prince Road more than 30 feet from page 168 } the highway, didn't it?

A. It couldn't have been much more than 35 or 40 feet, something like that.

Q. Well, according to the engineer it is 30 feet from the stop sign measuring on a straight line to Route 460, and you say your line of vision, and so the map shows, would be to the north of the stop sign; in other words, the stop sign was between you and the highway. If it is 30 feet from the stop sign to the highway, your line of vision must have struck that road more than 30 feet from it, wouldn't it?

A. Well, I reckon it wouldn't have been more than 30 or 30 feet.

Q. In other words, there was plenty of room in there for a car to stop, wasn't there?

A. Yes, there was plenty of room for a car to stop.

Q. And you, of course, don't know whether the car stopped or not?

A. No, I couldn't say whether the car stopped or whether it didn't.

By Mr. Sacks:

Q. One question. The car that you say passed by your window which was proceeding towards the main highway did not stop at all?

A. It didn't stop?

J. C. Causey, Jr.

Mr. Stephens: He testified he didn't know page 169 } whether it stopped or not.

A. I don't know whether it stopped or not.

By Mr. Sacks:

Q. So far as you saw it didn't stop?

A. As far as I could see it didn't stop.

Q. How long after you saw that car pass by your window did you hear the noise of the impact?

A. He had time to stop if he wanted to stop. Now, whether he stopped or not, I don't know. I didn't see.

J. C. CAUSEY, JR., recalled.

CROSS EXAMINATION.

By Mr. Bivins:

Q. Using your map once again, it has been testified to that Mr. Ely was seated on a counter in such a position that he was permitted to look through this window out onto this highway, this side road—what is it, Lake Prince?

A. Lake Prince.

Q. Will you state to the jury the distance that this building is located, that is, this line here, to the road, the line on the side of the building nearest the highway, the page 170 } distance that is from the center of the Lake Prince Highway?

Mr. Stephens: I object to the question on the ground that counsel stated that Mr. Ely testified he was sitting on the counter. My recollection of the evidence is that he was leaning up against the counter.

Mr. Bivins: I am asking about the distance from the side of the building to the center of the Lake Highway.

The Witness: Which one do you want?

Mr. Bivins: The window here.

The Witness: The distance on the one designated as No. 1 to the center line of the highway leading to Lake Prince, making a right angle to the road, is approximately 50 feet.

Mr. Stephens: That is the center line?

The Witness: That is to the center line of the road.

Mr. Stephens: A man's vision isn't confined to the center line.

Mr. Nachman: Have you introduced this map in evidence?

Walter Ely.

Mr. Ford: Yes, it has been formally introduced.

The Witness: The width of the window facing the station from the State Highway is approximately 18 feet.

page 171 } By Mr. Bivins:

Q. What is the length of it?

A. The longest possible way?

Q. Yes.

A. It would be approximately 40 feet.

Q. Now, will you state the distance from the far corner here to the edge of the highway?

A. From the northeast corner of the building to the edge of the concrete highway going south towards Windsor, on the north side of the highway at the north edge of the concrete is approximately 76 feet.

WALTER ELY, recalled.

CROSS EXAMINATION.

By Mr. Sacks:

Q. After you heard this impact and came out to see what happened, did you observe the two cars that were in this collision?

A. Yes, sir.

Q. Can you state how they were situated, what position they were in? If you come down here I think you
page 172 } can demonstrate it better. Now, let this be the main highway, and this is the Lake Prince Road. Do you know which was the Clements car and which was the Garrison car, did you know them?

A. Yes.

Q. Just show—let this be the Garrison car and this is the Clements car—just show the position they were in?

Mr. Rixey: Wouldn't it be better for him to have something to show the sides of the road?

Mr. Sacks: Except the cars may be out of proportion.

Mr. Rixey: These two are the asphalt, and these are the concrete. Here is Mr. Ely's station right in there.

Mr. Sacks: Use the car that you want to use as Garrison's car first.

The Witness: This is Garrison's car. This is Clements' car.

Mr. Sacks: That is right.

Walter Ely.

The Witness: In other words, I didn't see this.

Mr. Rixey: You can't demonstrate it if you didn't see it.

The Witness: Of course, I have to show you where they come together.

Mr. Sacks: Show where you found them.

Mr. Ford: He can tell what he saw afterwards.
page 173 } The Witness: I found them like that (indicating). When I got to it, Mr. Weber got Mr. Clements out. Mr. Garrison's car was on fire, and I got a fire extinguisher and put the fire out. Both of the cars had been afire and would have burned up in less time than nothing if I hadn't done that.

By Mr. Bivins:

Q. You used your own fire extinguisher?

A. Yes, I put the fire out. Mrs. Garrison, they got her out, and Miss Burns was carried up in my front room—it is nothing but a bedroom and sitting room—they put her in there and laid her on the day bed. I carried Mrs. Garrison across the road in my arms and laid her on the counter in the store. Then they brought Mr. Garrison in and set him in a chair over on the other side, he was bloody and she was bloody, and all like that.

By Mr. Sacks:

Q. According to your testimony here the Garrison car was on the left concrete portion of the road facing towards Windsor?

A. That was when it stopped.

Q. And Mr. Clements' car was on the left asphalt part facing Windsor?

A. Yes.

Q. He was on the left-hand side of the road?

A. Yes.

page 174 } Q. Did you see any marks there?

A. Enough fellows come up there to take photographs and all—

Q. According to the marks, the cars were in that position when they came together?

Mr. Bivins: I object to that. He can only say where the marks were, but he can't tell the position they were when they came together.

The Witness: The mark was on the road there. Of course,

Walter Ely.

it isn't there now. Those marks, the front portion or wheel, dragged from over here to where it stopped.

By Mr. Rixey:

Q. As I understood you to say, and I would like to introduce this in evidence, you say where the gouged place started was at the point that I mark "A" there?

A. Yes.

Q. And you could follow that down to where the front spring on the Clements car was sticking down in the road?

A. Yes, the spring or bumper, I don't know which it was.

Q. And these marks stayed there for some time, didn't they?

A. They stayed there for three months or more.

Q. Were you there when the engineer, Mr. Causey, measured the marks?

A. Yes.

Q. Were those the marks he measured?

A. Yes.

Q. You showed them to him, did you?

A. Yes, I am the one that showed them to him.

Q. You say those marks were made by the front spring of Mr.—

A. I don't know whether it was the front spring or the axle.

Q. Some part of the front part of Mr. Clements' car?

Mr. Ford: I object to that. He didn't say that. He didn't see the accident.

The Court: I don't think he said which car it was.

The Witness: That was the one that the wheel was broke on that side.

Mr. Rixey: That was Clements' car. That is what he said.

Mr. Ford: I am objecting to it.

By the Court:

Q. You couldn't say which car made it?

A. No.

The Court: He can say the mark was there, if he wants to, when he got there, the mark from the Garrison or the Clements car.

Walter Ely.

page 176 } By Mr. Rixey:

Q. I understand you say the place the broken thing on the Clements car was at the end of where the gouged place was stopped, didn't you?

A. The front wheel or the axle was bent up there that caused that mark in the concrete, where they dug that hole.

Q. Take a look at this picture and see if you can find what thing made the mark there?

Mr. Ford: I object to it.

The Court: He doesn't know what car made the mark.

The Witness: I don't know which car made the mark.

The Court: Just tell what you saw.

By Mr. Rixey:

Q. I understood you to say that you saw—

Mr. Rixey: This is the other defendant's witness, not ours, and I think we have a right to cross-examine him.

By Mr. Rixey:

Q. (Continuing) I understood you to say, Mr. Ely, that you saw this gouged place where it started and where it stopped?

A. Yes.

Q. And I understood you to say that it stopped where a broken spring was sticking down, didn't you?

A. There was something broken about this car, page 177 } the wheel or something, that caused that car to stop.

Q. Look and see if you don't see a broken spring sticking down in that car?

A. That is what I say.

Q. What caused it?

A. I don't know what caused that mark to go across there, but there was something caused that mark to be in the road.

Q. Is that the end of the broken spring where it stopped?

A. That is what it looks like here. That is the spring that is broke down there, or whatever it was.

Mr. Ford: He has already answered that he cannot say—

Mr. Rixey: He said he saw the broken—

The Court: If he saw the mark on the concrete, he can say he saw the mark on the concrete. He can't say where

Walter Ely.

the mark stopped or what made the mark on the concrete. He can't say that, because he doesn't know. He said he doesn't know.

Mr. Rixey: I think he does so know. He says he followed it from the place where it started to the place where it stopped, and the place where it stopped was where that spring was sticking in the road.

The Court: I think he has testified to that. I have admitted that part of it.

Mr. Rixey: All right, sir.

page 178 } Mr. Stephens: You admit then that he can trace the course of it?

The Court: He can trace the course of it.

Mr. Bivins: And that is where the gouged surface ends.

The Court: That is right.

Mr. Bivins: The gouging ends there.

By Mr. Stephens:

Q. Did you examine that Garrison car?

A. No, sir.

Q. Do you know whether or not anything was hanging down from that?

A. I don't know, I couldn't tell you.

Q. Look at that picture and tell the jury what if anything you see that is hanging down?

A. That is what I say, one of the cars—like I said a while ago, it started over there, and when I got out there to see these cars, these cars was setting out there in the road like that, we had to push them off the road. For three months or more that gouge stayed there until it started to get warm. They put some sand or something over it.

Q. There was something hanging down from the Garrison car, and that was broken down, is that right?

A. Yes.

Q. Where this gouged place starts or ends, did
page 179 } it commence on the left-hand side of the road going towards Windsor?

A. Did what?

Q. Did this gouged place in the highway commence on the right- or the left-hand side of the road going towards Windsor?

A. It commenced on the right-hand side just off the concrete on the asphalt, right along there. That is where it started, on the right-hand side.

Mrs. W. E. Garrison.

By Mr. Rixey:

Q. As I understand, you didn't trace any mark up to the Garrison car, but you did trace the mark up to the Clements car, that is correct, isn't it?

A. There was one of the cars, I don't know which of the cars it was, it is a hard thing to say that, it happened at night and everybody is in a rush around there, the car come out and got struck, and I followed that up there.

Q. You *folled* that up to the Clements car?

A. That car was sitting up there at that angle, like that (indicating).

By Mr. Nachman:

Q. What time did this accident occur?

A. Just before dark.

Q. About what time would you say?

A. About 4:30, something like that, 5 o'clock.

Q. One of the witnesses placed the time at page 180 } about 5:30; is that about right?

A. I don't know. I was just sitting in the store, I hadn't noticed any time. I noticed it wasn't but a few minutes until the cars turned on their lights coming down the road. We had to use flashlights out there to let people by and had to get flares off the truck and set them in the road to keep people from running into the car.

MRS. W. E. GARRISON,
sworn on behalf of Defendant Garrison, testified as follows:

By Mr. Stephens:

Q. You are Mrs. W. E. Garrison?

A. Yes.

Q. You were riding with Mr. W. E. Garrison on the day this accident occurred, when you collided with the car of Mr. Nat Clements?

A. Yes.

Q. It was a 2-seated car Mr. Garrison owned, wasn't it?

A. Yes.

Q. Will you tell the jury in your own words briefly what you recall about that accident?

page 181 } A. We were on the way home from Suffolk.

Q. You were going from Suffolk towards Windsor?

A. Yes. We were approaching this place, and I saw the

Mrs. W. E. Garrison.

car coming that Mr. Clements was driving, at a moderate rate of speed. I thought he was going to stop, but he proceeded out into the road and ran into us.

Q. Now, you said you saw this car approach at a moderate rate of speed. Do you mean coming up the Lake Prince Road?

A. Yes, sir.

Q. And instead of stopping, it drove out on the hard surface road?

A. Highway, yes.

Q. When that car driven by Mr. Clements drove out on that hard surface, could you tell this jury approximately how far Mr. Garrison's car was from him?

A. From the—

Q. How close was Mr. Garrison's car to that intersection when the Clements car came out on that hard surface road?

A. I really don't know, Mr. Stephens.

Q. How many feet? Could you give us any idea of the distance?

A. I don't know.

Q. Well, now, when that Clements car came out on that concrete road, what if anything did Mr. Garrison do?

A. He turned his car to avoid the blunt of the accident.

Q. Speak a little louder.

page 182 } A. He turned his car to avoid the blunt of the accident.

Q. In what direction did he turn it?

A. That way (indicating).

Q. You are pointing towards Windsor?

A. Yes.

Q. Did Mr. Garrison turn his car to the right or the left, which way did he turn it?

A. He turned it to the left.

Q. And about that time you had a collision with Mr. Clements, did you?

A. Yes, sir.

Mr. Bivins: Of course, that is very leading, but if you don't object we won't object.

By Mr. Stephens:

Q. Were you hurt in the accident?

A. I certainly was.

Q. Do you recall anything that happened after the accident?

Mrs. W. E. Garrison.

A. Not for a long time.

Q. Where did you go, Mrs. Garrison, from the scene of the accident?

A. From the accident?

Q. Where did you go from the scene of the accident?

A. I was taken in Mr. Ely's service station, page 183 } and then Mr. Burgess came along, the road cop, and took me in his car to the hospital.

Q. That is to the Lakeview Hospital, over to Suffolk?

A. Yes, sir.

Q. You stayed there how long, Mrs. Garrison?

A. I stayed there 58 days, two months less two days, I believe. I went down the 10th of December and left the 6th of February.

Q. Do you have any idea of the rate of speed at which Mr. Garrison approached that intersection?

A. Around 40 or 45 miles.

Q. How do you know that?

A. Because that is his usual speed, and when he goes over that I just touch him.

Q. As he approached the scene of the accident on which side of the road was he driving?

A. He was driving on his right, the side he should proceed on.

Q. Was it dark?

A. No, sir, it wasn't dark.

Q. Was there anything to obscure your vision any reasonable distance?

A. No, sir.

Q. Did he have any lights on his car, Mrs. Garrison?

A. He had the dimmers on.

page 184 } Q. That is the small light inside of the big headlight?

A. Yes, sir.

Q. Do you know whether anybody else had any lights on?

A. No, sir, I don't know. I don't remember about that. I wasn't paying any attention.

Q. Was there or was there not any occasion for any headlights?

A. I don't think so.

Q. It was perfectly clear?

A. Yes.

Mrs. W. E. Garrison.

CROSS EXAMINATION.

By Mr. Rixey:

Q. Now, Mrs. Garrison, was there anyone in the car with you and your husband?

A. No, sir.

Q. And you were traveling along the highway, and what were you talking about, you and your husband?

A. Well, I don't hardly recall. We had been to visit some friends, and we might have been—it seems to me like I was kind of humming, singing a little bit.

Q. You say you were traveling along about 40 to 45 miles an hour?

A. Yes.

Q. And that is the usual speed Mr. Garrison generally travels?

page 185 } A. Yes, sir.

Q. On the other hand, if he goes over 45 you touch him?

A. Yes.

Q. Does he always respond to the touch?

A. Yes, sir.

Q. And if he doesn't, what happens to him?

A. He slows down.

Q. I say if he doesn't slow down, what happens?

A. He generally slows down, because he knows what I mean. He knows I don't care to travel fast.

Q. He didn't slow down on this particular occasion, however, until he struck the other car, did he?

A. He was just driving that speed. There wasn't any reason to slow down.

Q. You didn't touch him after you saw the other car come into the boulevard, did you?

A. I didn't have to touch him at all at that particular time, but that is the way I do if he drives over that, but this time he was just driving along. I wasn't even thinking of touching him, because he wasn't driving over his usual speed.

Q. What I mean is that he didn't slow up from the time that you saw this other car to the time that he struck it, did he?

A. I don't remember.

page 186 } Q. You don't remember?

A. No.

Q. You wouldn't be able to say?

Mrs. W. E. Garrison.

A. No.

Q. He just kept on his same speed until he ran into the Clements car?

A. I don't know about that.

Q. At any rate, you are not able to say that he did slow up any?

A. I don't remember about his slowing up, because he wasn't driving so very fast.

Q. Now, how far away from the intersection where the accident occurred were you when you first saw the Clements car?

A. I couldn't tell you.

Q. Were you a thousand feet away?

A. I couldn't tell you.

Q. Were you a hundred feet away?

A. I just don't know.

Q. Were you twenty-five feet away?

A. I don't know anything about the distance.

Q. You don't know whether you were twenty-five feet away or a thousand feet away?

A. Well, I am sure I wasn't a thousand.

Q. Are you sure you were as much as twenty-five feet?

page 187 } Mr. Ford: There ought to be some limit when the witness has testified categorically that she doesn't know in answer to the persistent questions of counsel, and I object to any further questioning along this line.

The Court: If she can give us any idea—

By the Court:

Q. Can you point out any distance that you think you were away from the intersection when you first saw the Clements car? Have you any idea at all about how far you were away?

A. I couldn't tell you how far, because I don't know.

The Court: If she doesn't know, she doesn't know, that's all.

By Mr. Rixey:

Q. Did you ever see that Clements car?

A. Yes, sir.

Q. Did you see it at any time before the impact?

A. Yes, I saw it coming up the road.

Mrs. W. E. Garrison.

Q. Well, how many seconds, if you cannot give us the time in space, can you give us the time in seconds that you saw it before the impact?

A. No, sir.

Q. Was it as much as one second before the impact?

A. I can't tell you anything about the time. I don't know.

Q. You can't tell us then either in time or distance, you can't give us any idea of the space either in time or distance, that you saw the Clements car before the impact?

A. No, sir.

Q. All you know is that you saw it and the impact occurred?

A. I certainly did.

Q. That is all you know?

A. I certainly know that.

Q. Now, you say that your husband just before the accident turned to his left?

A. I didn't say he turned to his left before the accident, although he may have just as he saw the car coming into him.

Q. I understood that you did say that your husband turned his car to the left shortly before the impact?

A. Yes.

Q. Am I wrong about that?

A. No, I think you are right.

Q. I am right?

A. Yes.

Q. Now, I would like to know your best judgment as to the distance that your husband was from the point of the impact when he started to turn left?

A. I don't know a thing about the distance, because I never have been to the road over there, nobody has shown me anything about it, and I don't know anything about it, and being hurt like I was I couldn't remember that, I am sure.

Q. He turned left about the same time the two cars came together, did he?

A. I think he turned left to avoid the blunt of the car.

Q. You cannot give us any space, any time or distance, either there?

A. No.

Q. And are you able to state the speed of the Clements car?

Mrs. W. E. Garrison.

A. Well, from the looks after we saw it coming, it looked like it might be traveling 15 or 20 miles an hour.

Q. So there is one thing you can judge the speed of the Clements car?

A. Yes, from the looks of it. It wasn't coming flying.

Q. You can't tell us how long before the accident occurred that you saw the Clements car either in time or distance, but you can—

Mr. Ford: She has already answered that three times. I think there is a limit to it, and I ask Your Honor to impose the limit.

The Court: Let us see what he wants to ask her.

By Mr. Rixey:

Q. I understand that you cannot give us any idea of the space either in time or distance intervening between the time that you first saw the Clements car and the time of the accident, but that you can give us your opinion as to page 190 } the speed of the Clements car; is that correct?

Mr. Ford: Don't answer that until the Court directs it to be answered. I object to the question. It is perfectly obvious it isn't anything in the world but argument. Counsel knows that the witness has stated three different times in answer to his question that she cannot, and the purpose is so obvious that Your Honor ought to restrain him.

Mr. Rixey: This witness is on cross examination and I have a right to cross-examine her in my own way.

Mr. Ford: Not *ad libitum*. There is a length to which counsel can go with any witness, and I ask Your Honor to impose that restraint now. It is perfectly obvious this witness is testifying under difficulties, counsel is arguing with the witness, and we ask Your Honor not to permit it.

The Court: I think she has already answered the question. Obviously, all she can tell you is what she has testified to, and the fact that she cannot tell you about some things and can tell you about others is simply a matter for you to argue.

Mr. Rixey: I would like Your Honor to rule one way or the other, and I ask an exception if Your Honor rules contrary.

The Court: I will rule that you can cross-page 191 } examine her as to anything you want to, but you

Mrs. W. E. Garrison.

cannot ask her argumentative questions. You cannot argue with the witness. I am perfectly willing for you to ask her any questions you want to ask her. She has answered that she does not know and cannot give you any idea of distance. She answered that apparently Clements was coming at 15 miles an hour. You can make anything of that you want to. You can ask her again. You can ask her any question you want to ask her, but you cannot argue with her.

Mr. Rixey: I think I am entitled to some liberties here. This witness has told us she cannot give us any distance, either in space or time.

The Court: That is right.

Mr. Rixey: If I am arguing, I ask Your Honor to call me and I will state my question over again.

By Mr. Rixey:

Q. I understand that you cannot give us any idea of the length of time that you saw the Clements car?

Mr. Ford: She has answered that four times now.

The Court: I will let her answer that.

Mr. Ford: I except.

A. I don't know what the distance was, because I saw the car and I could tell the car was coming at not a rapid rate of speed, put to remember the distance I don't, page 192 } because nobody had told me the distance. I don't know.

By Mr. Rixey:

Q. Well, if you don't know how long you saw the car, how can you say the speed at which the car was traveling?

A. Well, I just imagine that it was coming around that.

Q. It is a pure guess on your part, isn't it?

A. It wasn't coming so fast, and when you are not driving a car very fast, it isn't—

Q. The Clements car might have stopped for all you know, didn't he?

A. No, sir, it didn't stop. If it had stopped it never would have run into us.

Q. If it had stopped it wouldn't have run into you?

A. No.

Q. Is that the reason you say it didn't stop?

Officer H. W. Burgess.

A. I said if it had stopped we wouldn't have run into it.

Q. If it had stopped then you say the accident wouldn't have occurred?

A. If it had stopped it wouldn't have happened, anybody knows that.

page 193 } OFFICER H. W. BURGESS,
sworn on behalf of Defendant Garrison, testified
as follows:

By Mr. Stephens:

Q. You are Officer H. W. Burgess?

A. Yes, sir.

Q. You are connected with the state police force?

A. Yes, sir.

Q. And you are stationed where?

A. In Norfolk.

Q. Did you investigate an accident that occurred at Providence Church Crossroad in Nansemond County on Sunday, December 10, 1939?

A. Yes, sir.

Q. Will you tell the jury what time you got there, Mr. Burgess?

A. I was patrolling 460, this road is 460, in the direction of Norfolk, on that Sunday evening, and we arrived at the scene of the accident about twenty-five minutes after six. I got there right after it had happened.

Q. Did you have the lights on your car lighted as you drove up there?

A. I had turned the parking lights on my automobile about two miles west of where this accident happened.

Q. Was it dark enough to obscure your vision?

A. No, sir.

page 194 } Q. There was plenty of light, in other words,
for ordinary travel?

A. Yes.

Q. Will you tell the jury what you found when you got there?

A. When I arrived on the scene of the accident I found these two cars on the hard surface part of the road. Mr. Garrison's car with its rear—the rear of Mr. Garrison's car was across west of the south lane or the eastbound lane. Nat Clements' car was in the center part of the road headed west. Both of the fronts of the automobiles were together

Officer H. W. Burgess.

in that manner (indicating), right together. Mr. Garrison's car had been hit on the left and right front, and Nat Clements' car had been hit in the center of the left front, doing both very much damage.

Q. Now, I understood you to say the cars were setting there after the accident with their fronts locked?

A. Not locked—they were very close together.

Q. Would you say how close they were?

A. They were—I guess they were about a foot apart. They were very close together.

Q. The Clements car was headed west or towards Windsor?

A. Yes, sir.

Q. And the Garrison car was across the southern strip of concrete headed towards the Ely service station?
page 195 }

A. Yes.

Q. Was there any part of the Garrison car on the tar or macadam?

A. Yes, the front part was.

Q. It was partly on the tar and partly on the concrete?

A. Yes.

Q. You found the cars in those positions, and what did you find with reference to the people who were riding in those cars?

A. I found this young lady here had a broken leg.

Q. Miss Burns?

A. Yes. I went in the service station and found Mrs. Garrison had her left arm broken and a number of bruises. She complained of a back injury. Mr. Garrison, I believe, had a head injury, and he was able to sit up, and I carried Mrs. Garrison in the back seat of my car and Mr. Garrison in the front seat of my car, and left Miss Burns there for an ambulance to carry her to the hospital, because she had a broken leg.

Q. You didn't want to move her in a passenger automobile with her leg in the condition that it apparently was?

A. No, sir, and I carried Mr. and Mrs. Garrison to the hospital, with the aid of another man, I forget his name right now.

Q. You took them over to Lakeview Hospital?

page 196 }

A. Yes.

Q. Did you examine that road that night or at any time shortly thereafter with reference to any marks or

Officer H. W. Burgess.

any indications on the highway with reference to where the accident occurred?

A. Yes, I looked at the marks that night, and I also looked at the marks the next day, and two or three days later.

Q. What mark, if any, did you find on that highway, Mr. Burgess?

A. I found there at the scene of the accident a mark that was dug out of the center portion of the road, the tar and gravel part.

Q. Where was that dug-out place with reference to its beginning or with reference to the right-hand side of the center of the road? Was it on the right-hand side or left-hand side going towards Windsor?

A. Looking west, this mark was to the right of the center of the road.

Q. Looking west, do you mean going towards Petersburg or Windsor?

A. Yes, sir.

Q. Will you tell the jury where it was with reference to the center of the intersection of the Lake Prince Road with the U. S. Highway 460?

A. The break was slightly east of the center of page 197 } the intersection.

Q. Inside the center instead of being around on the outside?

A. Yes.

Q. This mark you saw was on the right-hand side of the highway in the macadam going towards Windsor, it started at that point and then what did it do, Mr. Burgess?

A. It went to the left in a swerving manner and then stopped at the point where I found the automobiles.

Q. How far would you say that was, if you know?

A. When I measured it that break was 36 feet.

Q. When you measured it that mark was 36 feet long?

A. Yes.

Q. When you got a distance of 36 feet, do you mean a straight line between the two points, or following the contour of the road, a runabout line?

A. I don't know if it went that way or went straight. I have an idea the automobiles went 36 feet after the impact.

Q. Were you there when that drawing was made?

A. Yes, sir, I was there when these measurements were taken here.

Officer H. W. Burgess.

Q. Who pointed those various points out to Mr. Causey, who made the survey?

A. I did myself.

Q. Were you present when this picture was page 198 } taken, Mr. Burgess?

A. Yes, sir.

Q. That is the one where he stands in the road. Will you tell the jury at what point you were standing at the time that picture was taken?

A. When this picture was taken I was standing on the cut place in the road that is supposed to have been the point of impact.

Q. This way is towards Windsor or Petersburg, and this way is Suffolk?

A. Yes.

Q. In other words, the background shows the road going to Windsor and the foreground shows it going into Suffolk?

A. Yes.

Q. Were you present when that picture was taken?

A. Yes.

Q. Will you tell the jury what that picture shows? Where was it taken from?

A. This was taken at the scene of the accident on the Lake Prince Road.

Q. On the Lake Prince Road?

A. Yes.

Q. What does that picture show?

A. It shows the stop sign just before entering 460 off the Lake Prince Road.

page 199 } Q. Do you recall when these pictures were taken?

A. December 15th, if I am not mistaken.

Q. Just a few days after the accident?

A. Yes.

CROSS EXAMINATION.

By Mr. Bivins:

Q. I have another picture here. Mr. Burgess, can you identify the scene that picture depicts (referring to Defendant's Exhibit No. 5)?

A. Yes.

Q. Tell the jury what that picture shows?

A. This picture represents the scene of the accident taken

from the Lake Prince Road, looking south, showing the stop sign and this electric light pole.

Q. Mr. Burgess, as a matter of fact, it is the same as Garrison Exhibit No. 4, except it is on a larger scale and shows the service station across on the south side of the highway, doesn't it?

A. Yes.

page 200 } (Defendant Garrison rests.)

Testimony closed.

Adjourned until Wednesday, July 3, 1940, at 10 o'clock A. M.

page 201 } Virginia:

In the Corporation Court of the City of Newport News.

Sallie Burns, an infant, who sues by her father and next friend, P. B. Burns

v.

Nat Clements, and William Garrison

TESTIMONY.

Before: Hon. Herbert G. Smith, J., and Jury.

Newport News, Virginia, July 3, 1940.

Present: Mr. Herman A. Sacks, and Mr. Harry L. Nachman, for Plaintiff.

Mr. John S. Rixey, and Mr. A. L. Bivins, for Defendant Clements.

Mr. A. E. S. Stephens, and Mr. Charles E. Ford, for Defendant Garrison.

page 202 } (The jury was called and retired to the jury room.)

INSTRUCTIONS.

Mr. Ford: We object to any instructions either offered by the plaintiff or by the defendant, Clements, that permit a finding against the defendant, Garrison, and that objection is made specifically to each instruction offered by the plain-

tiff and each instruction offered by the defendant, Clements, that permits a finding against the defendant, Garrison, for the reason from our view of the case there is no evidence that the negligence if any, of the defendant, Garrison, was the proximate cause of the accident. We hope Your Honor understands that objection runs through all the instructions, notwithstanding any objections we may interpose to any instruction.

Plaintiff's Instruction 1-a (Granted):

“The Court instructs the jury that ‘gross negligence’ does not necessarily mean intentional or wilful negligence, nor recklessness. ‘Gross negligence’ is that negligence which amounts to something more than a mere failure to skillfully operate an automobile under the circumstances then existing, measured by what an ordinarily prudent
page 203 } person would have done under the same circumstances. Gross negligence may be acts, or omissions of an aggravated character falling short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. The three degrees of civil negligence are slight negligence, ordinary negligence, and gross negligence. The element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence.”

Plaintiff's Amended Instruction 1 (Granted):

“The Court instructs the jury that if you believe, from the evidence, that the plaintiff was injured as a proximate result of the sole negligence, if any, of the defendant, William Garrison, then you shall find for the plaintiff against the defendant, William Garrison, only. And if you believe, from the evidence, that the plaintiff was injured as a proximate result of the sole gross negligence, if any, of the defendant, Nat Clements, then you shall find for the plaintiff against the defendant, Nat Clements, only.

And if you believe, from the evidence, that the plaintiff was injured as a proximate result of the joint negligence if any, of the defendant, William Garrison, and the gross negligence, if any, of the defendant, Nat Clements, then you shall find for the plaintiff against both defendants.”

Plaintiff's Instruction 2 (Granted):

“The Court instructs the jury that it was the page 204 } duty of the defendant, Garrison, while operating his automobile along the main highway, to keep his said automobile under proper control, to keep a proper lookout, and to drive as close to his right of the road as practicable; and if you believe from the evidence, that the defendant negligently failed in the performance of any of the aforementioned duties, and the accident was proximately caused or efficiently contributed to the plaintiff's injuries, then you shall find for the plaintiff against the said defendant, Garrison.”

Mr. Ford: We object to the granting of instruction P-2 for the reason that while the instruction might be a proper one in the abstract, there is no evidence that the defendant, Garrison, at any time did not have his automobile under proper control. There is not the slightest evidence that he did not keep a proper lookout. Nobody has said that he did not drive as close to the right of the road as practicable. Therefore, while these statements may be correct in the abstract, they are not applicable in this case, and we object for that reason.

Mr. Rixey: I might say as to the negligence of Mr. Garrison, when his instructions are being presented I expect to move the Court to refuse them, because I think under the testimony of Mr. Garrison he convicts himself of negligence.

page 205 } The Court: Suppose we let him make his objection. I take it you have no objection to P-2, have you?

Mr. Rixey: No.

Mr. Nachman: I think it would be in order to let Mr. Rixey make his objection.

The Court: I think we might save some time. I might say that the Court thinks it is purely a question for the jury to say whether there is any negligence. I am going to grant No. 2.

Mr. Ford: We except to the ruling of the Court.

Plaintiff's Instruction 3 (Granted):

“The court instructs the jury that if you believe from the evidence that there was a stop sign standing on the road on which the defendant, Nat Clements, was riding, at or

near the intersection of said road with the main highway, then it was the duty of the said Nat Clements to immediately stop his automobile before he entered the main highway. It was also the duty of the said Nat Clements to indicate by proper signal his purpose to make a left turn, if the operation of any other vehicle was affected by such movement, to keep a lookout for traffic on the main highway, and to use due care to see that such left turn could be made in safety, and in making such turn to pass beyond the center of the intersection and as closely as practicable to the right of the center of such intersection before turning to the left.

And if you further believe from the evidence page 206 } that the said Nat Clements failed to perform the aforementioned duties, and that such failure constituted gross negligence as heretofore defined, and that said gross negligence was the proximate cause of the accident, then you shall find for the plaintiff against the said Nat Clements, even though you may believe from the evidence that the defendant, William Garrison, was free from negligence."

Mr. Rixey: I will state my objections to the stenographer after we get through here.

Plaintiff's Instruction 4 (Granted):

"The Court instructs the jury that if you believe from the evidence that the defendant, Nat Clements, seeing the approach of the Garrison car in close proximity, made an improper turn into the main highway in front of the fast approaching automobile operated by the said William Garrison, and that if you believe such act on the part of the said Nat Clements constituted gross negligence, and that said gross negligence was the proximate cause of the injury, then you shall find for the plaintiff against the defendant, Clements."

Mr. Ford: We object, because the law is that it was his duty to stop at the intersection whether or not he saw him, and we except to the granting of the instruction.

(Plaintiff's Instructions 5 and 6 withdrawn.)

page 207 } *Plaintiff's Instruction 7 (Granted):*

"The Court instructs the jury that if you believe from the evidence, that the defendant, William Garrison, saw, or

by the exercise of ordinary care could have seen, Nat Clements' automobile on the main highway in time to have stopped and avoided colliding with it, then it was the duty of the said William Garrison to stop. And if you believe, from the evidence, that the said William Garrison negligently failed to stop his automobile, and as a proximate result thereof collided with the said Nat Clements' automobile and the plaintiff was injured, then you shall find for the plaintiff against the defendant, William Garrison, even though you believe, from the evidence, that the defendant, Nat Clements, was free from any negligence."

Mr. Ford: We object to P-7 for the reason that there is not the slightest evidence that he had any opportunity to stop in order to avoid this accident. In consequence it does not carry with it the obligation of Garrison to stop, and I except to the granting of the instruction. Furthermore, defendant, Garrison, had a right to expect defendant, Clements, to stop and remain stopped in a place of safety until Garrison had passed the intersection. The instruction leaves out entirely the question of Clements' negligence and submits to the jury the fact that Clements might page 208 } not be *negligence* at all, when as a matter of fact his own evidence, in addition to that of the plaintiff and the defendant, Garrison, shows that Clements was guilty of the grossest negligence. We except to the ruling of the Court in granting the instruction.

Plaintiff's Instruction 8 (Granted):

"The Court instructs the jury that even though you may believe, from the evidence, that the defendant, Nat Clements, was not guilty of gross negligence; yet, if you further believe, from the evidence, that the defendant, William Garrison, was guilty of any negligence which proximately contributed to the plaintiff's injuries, then you shall find for the plaintiff against the defendant, William Garrison, only."

Mr. Ford: That is objected to as being repetition. We object to the amendment as well, and for the reasons stated in objection to plaintiff's Instruction 7.

Plaintiff's Instruction 9 (Granted):

"The Court instructs the jury that if you find for the plaintiff, then in assessing her damages, you may take into

consideration her physical pain and mental suffering, if any, the nature and extent of her injuries, and the duration and permanency thereof, and the necessary medical expenses incurred in the treatment of her aforesaid injuries."

page 209 } Mr. Rixey: I would like to observe on the record that by consent of all parties the item of medical expenses is being included in this case, so that any—

Mr. Sacks: The instruction says that. There will be no claim by Mr. Burns hereafter.

The Court: Let it be shown on the record.

Plaintiff's Instruction 10 (Granted):

"The Court instructs the jury that the plaintiff was a passenger in Clements' car, and the negligence, if any, of Clements cannot be imputed to her, and if you believe from the evidence that the accident was proximately caused by the gross negligence of Clements and the ordinary negligence of Garrison, then both defendants are liable."

Defendant Clements' Instruction 1 (Granted):

"The Court instructs the jury that while the measure of liability as against the defendant, Garrison, is ordinary negligence, such is not the measure of liability as against the defendant, Clements. Since the plaintiff was a guest in the automobile of the defendant, Clements, the plaintiff is not entitled to recover against Clements, upon the mere showing of ordinary or slight negligence, or that the defendant, Clements, merely violated some traffic rule or law, or that he failed to operate his car as a reasonably prudent person would have operated it. The defendant, Clements, is presumed to be free from negligence of any kind and to have operated his car with due care. And the burden of proof is upon the plaintiff to prove, by the preponderance of the evidence, not only that the defendant, Clements, was guilty of negligence, but also that such negligence was gross negligence. And in order to constitute gross or culpable negligence it is necessary that the plaintiff prove to the jury that the defendant, Clements, was guilty of such absence of care for the safety of the plaintiff as exhibits indifference to consequences, or amounts to wanton or culpable misconduct in the palpable violation of a legal duty respecting the rights of others. If, after hearing all the evidence, you are uncertain whether Clements was

guilty of gross negligence, and it appears equally as probable that he was not guilty of gross negligence as that he was, you should find for the defendant, Clements."

Mr. Sacks: We object to the words "culpable negligence," and then towards the bottom of the page he says, "Clements was guilty of such absence of care for the safety of the plaintiff as exhibits indifference to consequences, or amounts to wanton or culpable misconduct in the palpable violation of a legal duty respecting the rights of others." The Court says gross negligence does not mean wilful or reckless.

Defendant Clements' Instruction 2 (Granted):

page 211 } "The Court instructs the jury that the burden of proving gross negligence is upon the plaintiff; and such gross negligence must be proven by the preponderance of evidence, which must show more than a probability of such gross negligence. A verdict against the defendant, Clements, cannot be found upon conjecture, speculation or sympathy; but there must be preponderating proof that the plaintiff's injury was directly and proximately caused by gross negligence on the part of the defendant, Clements, before the jury would be justified in finding a verdict against the defendant, Clements."

Defendant Clements' Instruction 3 (Granted):

"The Court instructs the jury that a mere failure to skillfully operate an automobile under all conditions, or mere failure to be alert and observing, or mere failure to act intelligently, may be a failure to do what an ordinarily prudent person would have done under the circumstances and thus amount to slight or ordinary negligence. But such lack of attention and diligence in itself or mere inadvertence, without more does not amount to gross negligence."

Mr. Sacks: If Your Honor please, that is objected to because it only tells the jury that the mere failure to exercise ordinary care is not gross negligence, that same
page 212 } instruction ought to tell the jury what gross negligence is.

Defendant Clements' Instruction 5 (Granted):

"The Court instructs the jury that while the mere violation of a State statute amounts to ordinary negligence, which is

the measure of liability as against the defendant, Garrison, yet the mere violation of a State statute does not of itself amount to gross negligence sufficient to hold liable the defendant, Clements, unless the preponderance of the evidence further shows that Clements was guilty of such absence of care as amounts to gross negligence or the wanton or wilful disregard of the safety of the person being so transported."

Mr. Sacks: That is bad, because it tells the jury a mere violation of the statute amounts to simple negligence.

Defendant Clements' Instruction 8 (Granted):

"The Court instructs the jury that the defendant, Clements, had the right to assume that the driver of the Garrison car would keep a proper lookout, would operate his car at a careful and prudent rate of speed, and would keep the same under reasonable control, and that Clements had the right to act accordingly until he saw, or by the exercise ordinary care should have seen, that the driver of the Garrison car was not observing those duties."

Mr. Ford: That is objected to and excepted to, page 213 } because it is contrary to the three sections of the Code, 1154 and sub-sections. The instruction is erroneous for the further reason that defendant, Clements, had no right to assume anything of the defendant, Garrison, inasmuch as he had failed to comply with the said statutes and the statute requiring him to stop, and because under all the circumstances the defendant, Garrison, had the right to proceed and the right to assume that Clements would observe it by stopping and remaining stopped. There is no evidence upon which to base an instruction that Garrison did not keep a proper lookout or that he did not operate his car at a careful and prudent speed or that it was under reasonable control. The words "act accordingly" are ambiguous, uncertain and improper in that from the same the jury could infer that the defendant, Clements, had a right to "act accordingly" and go on to the highway regardless of the dangerous proximity of the Garrison car. Exception to the Court granting instruction.

Defendant Clements' Instruction 12 (Granted):

"The Court instructs the jury that it was the duty of Mr. Garrison in driving his automobile to keep the same under proper control, and if you believe from the evidence that he

failed to do so he was negligent, and if such failure was the sole proximate cause of the accident, you should find for the defendant, Clements.”

Mr. Nachman: That instruction leaves off the question of whether or not Clements was negligent.

Mr. Ford: We object to the granting of this instruction because there is no evidence of lack of control; there is no evidence of negligence; there is no evidence that his action was the sole proximate cause of the accident. It negatives the negligence of Clements, which is proved beyond all question of doubt and no instruction should be submitted permitting a finding against Garrison, alone. That is objected to for the further reason that it is repetition of instructions already given, and I object to the amendment, and except to the granting of it.

Defendant Clements' Instruction 13 (Granted):

“The Court instructs the jury that it was the duty of Mr. Garrison not only to drive at a reasonable rate of speed under all the circumstances, but to keep a proper lookout; and if you believe from the evidence that Mr. Garrison saw, or by the exercise of ordinary care should have seen Mr. Clements entering the intersection, and thereafter Mr. Garrison, by the exercise of reasonable care, could have avoided the accident by either slowing up or turning to his right, and his failure to do either of those things was the sole proximate cause of the accident, you shall find for the defendant, Clements.”

Mr. Ford: We object to it, because there is no evidence that Mr. Garrison saw, or by the exercise of reasonable care could have seen, the entrance of the Clements car into the intersection in time to have avoided the accident. I think it ought to say something about finding facts. There is no evidence of any unreasonable speed or lack of lookout. There is no evidence upon which to base a finding against Garrison on last clear chance. There is no evidence that Garrison had any time or opportunity to do anything when he saw or should have seen Clements enter the intersection. The only credible evidence is that Garrison was 75 to 80 feet from Clements when Clements came onto the concrete; that he had only a second and a half or two seconds in which to do anything after Clements came out in front of the Garrison car. There is not the slightest evidence from any person that Garrison, even by the exercise of superhuman effort, could have turned

his car either to the right or left or to have applied his brakes and avoided the accident. The instruction is further erroneous because under no theory of the case should an instruction be submitted giving a jury the right to page 216 } find against Garrison, alone.

The Court: You can argue that.

Mr. Ford: We except to the granting of Instruction 13 for the reasons stated.

Defendant Clements' Instruction 15 (Granted):

"The Court instructs the jury that the law looks to the proximate cause, without which, notwithstanding all other causes, the accident would not have taken place, and holds liable the party whose negligence is the proximate or contributing cause of the accident. Therefore, even if you believe from the evidence that Mr. Clements was guilty of gross negligence, yet if you further believe from the evidence that Mr. Garrison negligently operated his car, and his negligence was the sole proximate cause of the accident, then Garrison is responsible for the accident and you shall find your verdict in favor of the defendant, Clements, even though you may believe from the evidence that the accident would not have occurred but for the remote gross negligence of Mr. Clements."

Mr. Sacks: That is objected to for the same reason.

Mr. Ford: That injects the question of unavoidable accident, and certainly there is no evidence of unavoidable accident in this case, and I except to the granting of the instruction. Furthermore, there is no evidence that there page 217 } was any negligence on the part of Garrison which was the sole proximate cause. No instruction should be given which would negative the negligence of Mr. Clements as the sole proximate cause. For these reasons I except to the granting of the instruction.

Defendant Clements' Instruction 16 (Granted):

"The Court instructs the jury that the statute law of the State of Virginia provides that irrespective of any speed limit, or maximum speeds, any person who drives a vehicle upon a highway recklessly, or at a speed, or in a manner so as to endanger, or be likely to endanger the life, limb or property of another, shall be guilty of negligence, and if you believe from the evidence that Mr. Garrison failed to comply with this statute, and that such failure was the sole proximate

mate cause of the accident, you should find for the defendant, Clements.”

Mr. Ford: We object to that instruction, because there is no evidence of exceeding the maximum speed limit, or to so operate his automobile in such a manner as to endanger the life or property of the plaintiff, or recklessness, and we except to the granting of the instruction.

We wish to make a further objection to Instruction 1-a, because it is misleading, and it is not a proper definition of the liability of the defendant, Clements, in view page 218 } of the gross negligence theory.

Defendant Garrison's Amended Instruction "B" (Granted):

“The Court instructs the jury that under the laws of this State, Nat Clements, the driver of the car in which the plaintiff was riding, as he approached Route 460, a main arterial highway, before entering the same with the intention of turning left thereon, was required:

1. To bring his car to a complete stop;
2. To give a left arm signal of his intention to turn left from Lake Prince Road onto Route 460, if it affected the operation of any other vehicle;
3. To yield the right-of-way to any automobiles traveling thereon in an easterly direction or westerly direction that may have been in dangerous proximity to the intersection of the two said highways; and,
4. To bring his automobile to a stop immediately before entering said highway when there was traffic approaching thereon within 500 feet of such point of entrance;
5. To keep his automobile under reasonable control;
6. To keep a proper lookout for approaching traffic;
7. In making a left turn to pass to the right of page 219 } the center point of the intersection, whether marked or not.

The Court further instructs you that the defendant, Garrison, had a right to expect that Clements would observe each and every provision of the law as above set forth.

You are further instructed that if you find from the evidence that the defendant, Clements, violated any of the above provisions of the law and that such violation was the sole proximate cause of the collision, causing the injuries to the plaintiff, then you are instructed that you cannot find a verdict against the defendant, Garrison.”

Mr. Rixey: This instruction is a duplicate of one you have already given for the plaintiff, various signals.

Mr. Ford: This is on our theory of the case, and we have to write them according to our theories of the case.

Defendant Garrison's Instruction "D" (Granted):

page 220 } "The Court instructs the jury that in addition to the requirements of the law imposed upon Nat Clements, you are instructed under the statute law of Virginia every driver who intends to stop, turn or partly turn from a direct line, shall first see that such movement can be made in safety in the exercise of ordinary care. And, further, whenever the operation of any other vehicle may be affected by such movement, he shall give a left arm signal if his intention is to turn left from a direct line.

If you find from the evidence, therefore, that the automobile driven by Mr. Garrison was in dangerous proximity to the intersection, where the Clements car was either stopped or driving slowly so that it could be stopped at almost within a few feet, by the exercise of ordinary care, and that the said Clements failed to give an arm signal of his intention to turn left into Route 460, as required by law, and negligently failed to first see that such movement could be made in safety, in the exercise of ordinary care, and that the conduct of Clements in this regard was the sole proximate cause of the collision, then you are instructed that you cannot find a verdict against the defendant, Garrison, whatever you may believe to be the liability, if any, of the defendant, Clements."

Defendant Garrison's Instruction "E" (Granted):

page 221 } "The Court instructs the jury that if you find from the evidence that the defendant, Garrison, was approaching the intersection, in the exercise of ordinary care, and in dangerous proximity to the said intersection and that the defendant, Clements, was driving his car at such a slow rate of speed and that he could have stopped the same within a few feet and that he saw, or in the exercise of ordinary care should have seen the approach of the Garrison automobile and had a last clear chance or opportunity to avoid the accident by stopping his automobile, or remaining in a stopped position, and that he negligently failed to do so, if you find that the negligence, if any, of Clements was the direct and sole proximate cause of the collision, then you are instructed that if you find for the plaintiff under the instructions of the Court, you cannot find your verdict against the

defendant, Garrison, but only against the defendant, Clements."

Mr. Nachman: We object to Defendant's Instruction "E", because we are entitled to a verdict against both of them.

Defendant Garrison's Amended Instruction "G" (Granted):

"The Court instructs the jury that if you find from the evidence that the defendant, Clements, approached Highway No. 460 and either slowed down his car as if to stop, or even if you believe from the evidence that he actually stopped
page 222 } immediately before reaching said Route 460 at such a time that the automobile of the defendant, Garrison, traveling west on the said Route 460, was in dangerous proximity to the said intersection, then you are instructed that it was the duty of the said defendant, Clements, either to remain stopped or to stop his car and permit the defendant, Garrison, to pass over the intersection unmolested.

If you find from the evidence, therefore, that the defendant, Clements, under such circumstances, negligently failed to stop or having stopped negligently failed to remain in a safe place and negligently attempted to enter the said highway to make a left turn when the automobile of the defendant, Garrison, was in dangerous proximity to the said intersection, and the conduct of the defendant, Clements, was the sole proximate cause of the collision, then you are instructed that it is your duty to find your verdict in favor of the defendant, Garrison."

Defendant Garrison's Instruction "K" (Granted):

"Even if you should believe from the evidence that Garrison was guilty of some negligence but that his negligence was remote, and not the proximate cause of the accident, and if you further find from the evidence that the defendant, Clements, was guilty of gross negligence or wanton and wilful disregard of the safety of the plaintiff and such gross negligence or wanton and wilful disregard to the
page 223 } safety of the plaintiff was the direct, proximate and sole cause of the collision and the plaintiff's injury then you cannot find a verdict against the defendant, Garrison, but only against the defendant, Clements."

Defendant Garrison's Amended Instruction "L" (Granted):

"If you find from the evidence that the Garrison car was

within 500 feet of the intersection when the Clements car drove up to Highway 460 and that Clements failed to stop, or, if stopped failed to remain stopped until the Garrison car had passed the intersection, then under the law of this State Clements was guilty of reckless driving. And if you further find from the evidence that such reckless driving was the sole proximate cause of the collision, then you are instructed that you cannot find a verdict against the defendant, Garrison.”

Defendant Garrison's Instruction "H" (Granted):

“The Court instructs the jury that if you find from the evidence that as the defendant, Garrison, approached the intersection, the defendant, Clements, suddenly and without warning, entered Route 460 with the intention of turning left across the path of the oncoming Garrison car, and that the said Garrison was presented with a sudden emergency, through no fault of his own, you are instructed that the law does not hold him to the same degree of care as under ordinary conditions, and even if you should believe
page 224 } from the evidence that the turning of his automobile to the left by Garrison was not the proper move, or such as would have been made under ordinary conditions, yet you cannot find from this alone that the defendant, Garrison, was guilty of negligence, if, under all the circumstances, his actions in so doing were not different to those of an ordinarily prudent person acting under the same or similar circumstances of emergency.”

Mr. Rixey: I submit Mr. Garrison is not entitled to a sudden emergency instruction, because he says himself he saw Mr. Clements was not going to stop.

Defendant Garrison's Instruction "J" (Granted):

“The Court instructs the jury that irrespective of what you may believe as to the negligence, if any, of the defendant, Clements, you are instructed that under the law you cannot find a verdict against the defendant, Garrison, unless it is shown by a preponderance of the evidence that there was negligence on the part of the defendant, Garrison, proximately causing or efficiently contributing to the collision.”

Defendant Garrison's Instruction "A" (Granted):

“The Court instructs the jury that before you can find a verdict against the defendant, Garrison, the burden is on the

plaintiff to prove, by the preponderance of the evidence, every essential allegation of her case against the defendant, Garrison. You are not permitted to conjecture, page 225 } hazard or guess as to the evidence, or any part thereof essential to her recovery. If you find from the evidence, therefore, that the plaintiff has failed to sustain this burden as to the defendant, Garrison, and has failed to preponderate as to him, then regardless of what you may consider to be the right of the plaintiff to recover against the defendant, Clements, you cannot find a verdict for the plaintiff against the defendant, Garrison."

Mr. Rixey: I renew my objection as stated, that Mr. Garrison's evidence shows conclusively, I think, there is no testimony that Clements was guilty of negligence.

Defendant Garrison's Instruction "C" (Granted):

"The Court instructs the jury that while the negligence, if any, of the defendant, Clements, cannot be imputed to the plaintiff, yet you are instructed that this does not alone entitle the plaintiff to recover against the defendant, Garrison, for the said defendant, Garrison, cannot be held liable if, under all the circumstances, you find that he was not guilty of any negligence proximately causing or efficiently contributing to the collision, and this is true regardless of what degree of negligence, if any, you may find against the defendant, Clements."

Mr. Rixey: The defendant, Clements, excepts to the action of the Court in granting Instruction P-1-a, page 226 } granted at the request of the plaintiff, on the following grounds:

It is submitted that recklessness is necessary in order to constitute gross negligence.

The language of this instruction, measured by what an ordinarily prudent person would have done under the same circumstances, is confusing. The jury might think that that applies to gross negligence. In other words, the gross negligence is measured by what an ordinarily prudent person would have done under the same circumstances.

The defendant, Clements, excepts to the action of the Court in granting Instruction P-3, granted at the request of the plaintiff, for the reason that the statute in regard to giving a signal for a left turn is not applicable. Furthermore, that the evidence shows that even if it is applicable, any failure

to have given a signal was not the proximate cause of the accident. Furthermore, there is no evidence in this case to the effect that Clements failed to give a signal. It is my recollection that the only evidence on this subject is the testimony of Mr. Garrison, to the effect that he did not see any signal given, and when asked whether or not he would have seen a signal if it had been given his answer was, "I may have", or words to that effect.

page 227 } This instruction is further objected to on the ground that in place of the word "due" before "care" should be used "slight" instead of "due". The measure of duty owed by Clements to the plaintiff was slight care.

This instruction is further objected to on the ground that the evidence shows that Clements did go beyond the center of the intersection in making his left turn, and furthermore that if there was a failure to go beyond the center of the intersection, that the evidence clearly shows that such did not proximately contribute to the accident.

The defendant, Clements, excepts to the action of the Court in granting Instruction P-4 on the grounds as stated in Instruction P-3, so far as applicable. This instruction is also covered by Instruction P-3 and is a duplicate of Instruction P-3 to the extent applicable.

The defendant, Clements, objects and excepts to the granting of any instructions for the defendant, Garrison, in this case, for the reason that the evidence conclusively shows that Garrison was guilty of negligence that proximately caused or contributed to the accident. Mr. Garrison is bound by his own testimony under the *principal* in *Massie v. Firmstone*. Mr.

page 228 } Garrison testified that when he was two or three hundred yards from the scene of the accident he saw the Clements car approaching on the side road about opposite the filling station, traveling at 15 to 20 miles an hour; that the Clements car did not slow up and did not stop, and came out onto the highway, and that he, Garrison, did not put on any brakes, but waited until the Clements car was in the intersection immediately in front of him turning to the left, and that he cut his car to the left immediately into the Clements car. We submit that Mr. Garrison's testimony shows conclusively that if he had put on his brakes and kept on his proper side of the road when he saw the Clements car was not stopping, but was entering the intersection, there would have been no accident.

The defendant, Clements, excepts to the action of the Court in granting each and every one of the instructions granted at the request of Garrison on the above mentioned grounds,

and in addition excepts to the action of the Court in granting the instructions granted at the request of Garrison on the following specific grounds as applied to each instruction:

The defendant, Clements, excepts to the action of the Court in granting Instruction "A", on the ground that the instruction "regardless of what you may consider to be the right of the plaintiff to recover against the defendant, page 229 } Clements", is misleading and is an invitation to the jury to find against Clements.

The defendant, Clements, excepts to the action of the Court in granting Instruction "B" on the following grounds:

That the statute law in reference to an arm signal of an intention to turn left is not applicable to this case; that the Court has no right to instruct the jury that the Garrison car had the right-of-way under the facts in this case. It may be that Mr. Clements was guilty of negligence in coming out into the intersection when he did, but even if he did so that did not necessarily give to Garrison the right-of-way. By the Items 1 and 4 in this instruction the Court tells the jury in each instance that it was the duty of Clements to stop. That would indicate to the jury that it was the duty of Mr. Clements to stop twice before entering the intersection, which we submit is not the law.

Furthermore, the item in reference to making a left turn to pass to the right of the center of the intersection, the same exception applies as stated in reference to Instruction P-3.

Furthermore, this instruction is excepted to on the following grounds:

page 230 } We submit that the paragraph reading as follows:

"The Court further instructs you that the defendant, Garrison, had a right to expect that Clements would observe each and every provision of the law as above set forth," is misleading and does not correctly state the full law on the subject. While Mr. Garrison may have had at one time a right to expect that Clements would observe the law, he did not have a right to expect that nor to rely thereon when by the exercise of reasonable care Mr. Garrison should have seen that Clements was not obeying the law. The instruction should be amended to embody the proposition that Garrison did not have any right to rely upon any such assumption after he saw, or by the exercise of reasonable care he should have seen, that Clements would not stop or was entering

the intersection. According to the testimony of Mr. Garrison himself, he said that Clements was traveling at 15 to 20 miles an hour and did not stop. It is submitted that under that testimony Garrison had no right to further rely upon Clements' stopping or doing anything else that was inconsistent with what Garrison saw.

The defendant, Clements, excepts to the action of the Court in granting Instruction "C", the exception applying to the last sentence of this instruction, which we sub-
page 231 } mit would convey to the jury an invitation to find against the defendant, Clements.

The defendant, Clements, excepts to the action of the Court in granting Instruction "D", granted at the request of the co-defendant, on the grounds heretofore stated in reference to the same applicable matter, and furthermore that this instruction places the burden of an insurer upon Mr. Clements to see that the movement could be made in safety, which we submit is not the law. All that was required of Mr. Clements so far as the rights of the plaintiff were concerned was that he should exercise slight care to see that the movement could be made in safety. This instruction is also covered by other instructions, and is a reiteration of the same propositions that have been previously propounded.

The defendant, Clements, excepts to the action of the Court in granting Instruction "E", on the ground that this instruction is also covered by other instructions and is a duplication and repetition, and furthermore on the ground that the defendant, Garrison, has no right to ask a jury to believe that the Clements car either stopped or was traveling at such a low rate of speed that it could have stopped within a few feet, because Garrison himself testified that the Clements car
was traveling at 15 to 20 miles an hour, and
page 232 } neither slowed down nor stopped.

The defendant, Clements, excepts to the action of the Court in granting Instruction "G", on the same grounds heretofore stated.

The defendant, Clements, excepts to the action of the Court in granting Instruction "H", which is a sudden emergency instruction, on the ground that Mr. Garrison is not entitled to the benefit of the sudden emergency principle, because under his own testimony he said that he saw the Clements car traveling at 15 to 20 miles an hour coming to the intersection, not slowing up, not stopping, and that he, Garrison, did nothing about the matter until the Clements car was in front of him turning to the left, and that then he, Garrison, without slowing up or applying the brakes, turned his car right into the Clements car.

The defendant, Clements, excepts to the action of the Court in granting Instruction "K", on the ground that the evidence we submit shows that the negligence of Mr. Garrison was either the sole proximate cause of the accident, or a proximate contributing cause of the accident, and that appears not only from the testimony in the case, but from the testimony of Mr. Garrison himself.

The defendant, Clements, excepts to the action page 233 } of the Court in refusing Instruction 1, offered by the defendant, Clements; and in amending the same. Attention is invited to the fact that in offering the instruction the word "reckless" was stricken out. It is submitted that the six lines that are stricken out in this instruction are the meat of the instruction and constitute the definition of gross negligence, and that we are entitled to have this instruction granted with the six lines in it.

The defendant, Clements, excepts to the action of the Court in refusing Instruction 4, which was requested by the defendant, Clements. It is submitted that this instruction correctly states the law and should have been given, while the Court stated that it was being refused because it was covered by Instruction 3, I think, to the contrary.

The defendant, Clements, excepts to the action of the Court in refusing Instruction 7. It is submitted that this instruction correctly states the law and should have been granted.

The defendant, Clements, excepts to the action of the Court in refusing Instruction 10, on the ground that this instruction correctly states the law. It is my understanding that the Court stated that in refusing this instruction page 234 } that it was covered by Instruction 8. We think that by a comparison of the two instructions it will be seen that that statement is not justified. The Court further stated that there was no evidence in this case of insufficient brakes.

The defendant, Clements, excepts to the action of the Court in refusing Instruction 14, on the ground that this instruction correctly states the law and should have been given, and is not covered by any other instruction. It is submitted that if Mr. Garrison saw, or by the exercise of reasonable care should have seen, the Clements car slowly entering the intersection, and thereafter by the exercise of reasonable care could have avoided the accident, then under those circumstances the negligence of Mr. Garrison would be the sole proximate cause of the accident, and Mr. Clements would not be liable.

The defendant, Clements, excepts to the action of the Court

in refusing Instruction 17, on the ground that this instruction correctly states the law and should have been given. Mr. Clements testified that when he entered the intersection the automobile of Mr. Garrison was 350 yards down the road, and that while Clements traveled around some 31 to 40 feet the Garrison car traveled a distance of 350 yards. It is, of course, admitted that Mr. Clements could not be perfectly accurate in his various estimates, but the jury knows how to give credit where credit is due, and under that testimony it is submitted that the jury has a right to draw the conclusion that Mr. Garrison was traveling faster than 55 miles an hour. Under the statute law of Virginia the maximum speed limit is 55 miles an hour, and if Mr. Garrison was traveling at more than 55 miles an hour then he was guilty of negligence as a matter of law.

Mr. Nachman: We object to Instruction 1 granted for the defendant, Clements, particularly the fact that plaintiff is not entitled to recover against Clements if the defendant, Clements, merely violated some traffic rule or law. It is possible that the jury might believe that the violation of some traffic rule or law was of such a nature and under such circumstances that it might not constitute gross negligence.

Mr. Sacks: We object to the granting of Instruction 3 for the defendant, Clements, on the ground that while it states what facts do not constitute gross negligence, it fails to tell the jury what facts do constitute gross negligence. This instruction merely presents a partial view and definition of gross negligence.

Mr. Nachman: Counsel for the plaintiff objects to all the instructions given for the defendant, Clements, for the same reasons and objections stated by Mr. Ford, of counsel for defendant, Garrison.

Counsel for the plaintiff objects to all instructions given on behalf of the defendant, Garrison, for the same reasons advanced by Mr. Rixey, counsel for the defendant, Clements.

Plaintiff's Instruction 5 (Withdrawn):

"The Court instructs the jury that it is the duty of a person driving an automobile, when turning to the left, to pass beyond the center of the intersection, and as closely as practicable to the right of the center of such intersection before turning such vehicle to the left."

Plaintiff's Instruction 6 (Withdrawn):

"The Court instructs the jury that if you believe, from

the evidence, that the defendant, Nat Clements, saw, or by the exercise of ordinary care could have seen, William Garrison's automobile on the main highway in time to have stopped and avoided colliding with it, then it was the duty of the said Nat Clements to stop. And if you believe, from the evidence, that the said Nat Clements negligently failed to stop his automobile, and as a proximate result thereof he collided with the said William Garrison's automobile and the plaintiff was injured, then you shall find for the plaintiff against the defendant, Nat Clements, even though you believe, from the evidence, that the defendant, William

page 237 } Garrison, was free from any negligence."

Defendant Clements' Instruction 10 (Refused):

"The Court instructs the jury that Mr. Clements had the right to assume that the Garrison car was properly equipped with brakes, that Garrison had exercised a proper lookout. had seen him and that Garrison would have reasonable use of his brakes if necessary; and Clements had a right to act upon such assumption until he saw, or by the exercise of ordinary care, should have seen that Garrison was not observing those duties."

Defendant Clements' Instruction 17 (Refused):

"The Court instructs the jury that no passenger automobile shall be driven at a speed in excess of 55 miles per hour, under any conditions, and if you believe from the evidence that Mr. Garrison was driving in excess of 55 miles per hour he was negligent as a matter of law; and if such action was the sole proximate cause of the accident, then you shall find for the defendant, Clements."

Defendant Clements' Instruction 14 (Refused):

"The Court instructs the jury that even though you may believe from the evidence that Mr. Clements was guilty of gross negligence, if you further believe the evidence that Mr. Garrison was, or by the exercise of reasonable care, should have seen Mr. Clements slowly entering the intersection, and thereafter, by the exercise of reasonable care,

page 238 } could have avoided the accident, you should find for the defendant, Clements."

Mr. Ford: We object to the granting of any instruction based on the last fair chance.

Mr. Sacks: We also object.

Defendant Clements' Instruction 4 (Refused):

"The Court instructs the jury that in this case the plaintiff assumed the risk so far as any claim against Clements is concerned of all accidents that may have happened by reason of mere forgetfulness, thoughtlessness, or other acts of simple negligence on the part of Clements. And since the plaintiff was a guest of the defendant, Clements, the plaintiff is not entitled to recover against Clements for the results of slight or ordinary negligence on the part of the defendant, Clements."

The Court: That instruction is refused because it is covered by No. 3.

Defendant Clements' Instruction 7 (Refused):

"The Court instructs the jury that if you believe from the evidence that the Clements car stopped before entering the intersection and thereafter entered the intersection ahead of the Garrison car, or even though you may believe from the evidence that the two vehicles entered the intersection at approximately the same time, then the Clements car being on the right had the right-of-way, and it was the
page 239 } duty of Mr. Garrison to slow up, stop or turn
aside to let the Clements car go by in safety. And if you believe from the evidence that Mr. Garrison failed in his duty in this regard he was negligent, and if such negligence was the sole proximate cause of the accident, you should find for the defendant, Clements."

Mr. Sacks: That is objected to. If both were negligent it would make no difference who had the right-of-way.

Defendant Garrison's Instruction "F" (Refused):

"The Court instructs the jury that if you find from the evidence that the defendant, Garrison, driving his automobile in a lawful manner on Highway No. 460, approached the intersection of the Lake Prince Road and at a time when he was in close proximity to the said intersection, the defendant, Clements, approached the said Highway 460 on the said Lake Prince Road, driving at a slow rate of speed; and if you further find from the evidence that the Garrison car was so close to the said intersection that a reasonable and pru-

dent driver, in the exercise of ordinary care, would have either stopped or if stopped remained stationary and permitted the Garrison car to proceed before entering the said intersection; and if you further find that the said Clements, under such circumstances, negligently failed to yield the right-of-way to the defendant, Garrison, and that page 240 } such failure was the sole proximate cause of the collision and amounted to gross negligence, then you are instructed that if you find your verdict for the plaintiff, it must be against the defendant, Clements, alone, and not against the defendant, Garrison."

The Court: That is refused because it is covered by Instruction "E".

Mr. Ford: We except to the refusal.

Defendant Garrison's Instruction "I" (Withdrawn):

"If you find from the evidence that the defendant, Clements, wrongfully entered the highway No. 460 when he should have stopped his car, or, if stopped, remained so, and have permitted the defendant, Garrison, to pass, under the law as set out in the other instructions of the Court, and if you further find from the evidence that Garrison veered his car to the left in an attempt to avoid being hit by the Clements car, then you are instructed that you cannot find the defendant, Garrison, guilty of negligence in attempting to extricate himself and his wife from their peril if he acted in emergency through no fault of his own and as any other reasonable man would act under similar circumstances."

Defendant Garrison's Instruction "L" as tendered (Refused):

"You are further instructed that the purpose of the law of Virginia requiring a vehicle to be stopped immediately before entering a highway from a side road when page 241 } there is traffic approaching thereon within five hundred (500) feet is to prevent such stopped car from entering or attempting to enter such highway until the approaching vehicle has passed or is otherwise out of danger. It is the duty of the driver of the stopped car to remain in a stopped position and accord the approaching automobile the right-of-way."

"If you find from the evidence that the Garrison car was within 500 feet of the intersection when the Clements' car

drove up to Highway 460 and that Clements failed to stop, or, if stopped, failed to remain stopped until the Garrison car had passed the intersection, then, under the law of this State, Clements was guilty of reckless driving. And if you further find from the evidence that such reckless driving was the sole proximate cause of the collision, then you are instructed that you cannot find a verdict against the defendant, Garrison."

But the Court refused to grant the said instruction "L" as tendered, indicating its willingness to grant the second paragraph of the said instruction. And the said defendant, Garrison, objected and excepted to the ruling of the Court as set out on page 243.

Adjourned until Friday, July 5, 1940, at 10 o'clock A. M.

page 242 } Virginia:

In the Corporation Court of the City of Newport News.

Sallie Burns, an infant, who sues by her father and next friend, P. B. Burns,

v.

Nat Clements and William Garrison.

TESTIMONY.

Before: Hon. Herbert G. Smith, J., and Jury.

Newport News, Virginia, July 5, 1940.

Present: Mr. Herman A. Sacks, and Mr. Harry L. Nachman, for Plaintiff. Mr. John S. Rixey, and Mr. A. L. Bivins, for Defendant Clements. Mr. A. E. S. Stephens, and Mr. Charles E. Ford, for Defendant Garrison.

page 243 } (The jury was called and retired to the jury room.)

Mr. Ford: We except to the ruling of the Court in refusing to grant Instruction "L", as tendered, and in striking out the first paragraph thereof on the ground that the instruction as a whole properly and correctly interprets Code Section 2154 (108) as amended; that if the statute did not require an approaching car from the side of the main highway to remain stopped when there was traffic within 500 feet, it did not mean anything; that the statute absolutely prohibits a car approaching from the side to enter the main high-

way when such car on the main highway is within 500 feet and the driver of such car on the main highway has the right to expect that the approaching car will remain stopped and not attempt to enter until the other car has passed the intersection.

Mr. Rixey: The defendant, Clements, excepts to the action of the Court in granting Instruction "L", granted at the request of defendant, Garrison, on the following grounds:

page 244 } In the first place, the defendant, Garrison, has no right to ask the jury to believe that the Clements car stopped, because he himself testified that the Clements car did not stop.

Second, this instruction is predicated upon a section of the Code No. 2154 (108) Paragraph 8, as amended in 1938. Under our construction of this law, if Clements stopped and let go by any traffic that was approaching the intersection within 500 feet of it before he stopped, then he has complied with the law, and thereafter it becomes a question under the common law as to whether or not he had a right to enter thereafter in the exercise of due care.

Third, this instruction tells the jury that under the circumstances therein set forth Clements was guilty of reckless driving. It is submitted that the term "reckless driving" has no application to a negligence case, and especially is it harmful in this case where recklessness constitutes gross negligence. The effect of this instruction is to tell the jury that if the Clements car either failed to stop or failed to remain stopped until the Garrison car went by, that Clements was guilty of gross negligence as a matter of law.

page 245 } (The jury returned to the courtroom.)

The Court: Gentlemen of the jury, these are the instructions of the Court. They are all to be read together, and you, of course, are the sole judges of the evidence. You should apply the evidence as you feel it should be. The evidence of the witnesses is given to you here, and the Court will instruct you as to the law in the case. The Court has not attempted to say to you which witnesses you are to believe or disbelieve, or to interpret the weight to be given the evidence of the witnesses. You are the sole judges of the weight of the evidence, and the evidence as you have heard it is what you pass on, and from the law and the evidence together you bring in a verdict. I will ask you to listen to the reading of these instructions as given to you by the Court.

(The instructions were read by the Court to the jury.)

The Court: In commenting on these instructions, as I have told you before, you are the sole judges of the evidence. You will note from the instructions that you have to pass on whether or not acts were the proximate cause or contributing cause of the accident. You are the sole judges of whether or not the evidence is sufficient to place either one or both or neither of the defendants' acts as the proximating or contributing cause of the accident. You pass upon that. You also pass upon whether or not the evidence is sufficient by a preponderance of the evidence. You also pass upon whether or not certain acts constitute gross negligence under the definition of gross negligence as the Court has defined it to you. You pass on that as a matter of fact and law as given to you by the Court, and from the facts you say whether or not in your opinion they amount to gross negligence.

Mr. Ford: I believe ordinary negligence as well.

The Court: I am strictly speaking of gross negligence now. The same thing is true of ordinary negligence. In one case ordinary negligence must be proven against Mr. Garrison, and in the other case it must prove gross negligence against Mr. Clements, because the plaintiff was a guest in the car of Mr. Clements, and, of course, under the page 247 } law gross negligence must be proved against him and ordinary negligence against Mr. Garrison. What would amount to gross negligence or what would amount to ordinary negligence is a question for you gentlemen, and so from the instructions of the Court you will pass upon the evidence.

The jury retired to consider its verdict and rendered the following: "We, the jury, find for the plaintiff against the defendants, Nat Clements and William Garrison, and fix her damages in the sum of Five Thousand dollars (\$5,000.00). Malcolm Nexsen, Foreman." Counsel for the defendants respectively thereupon made motions to set aside the verdict on the grounds following:

Mr. Ford: Will Your Honor entertain a motion? page 247-a }

The Court: Yes.

Mr. Ford: If Your Honor please, on behalf of the defendant Garrison we move the Court to set aside the verdict of the jury and enter a judgment that the jury should have rendered in favor of the defendant Garrison, and we also move to set aside the verdict of the jury and ask Your Honor to grant a new trial for the same reasons, and we

move to set aside the verdict of the jury against the defendant Garrison because it is contrary to the law and the evidence and a misdirection of the jury by the court in granting instructions for the plaintiff and defendant Clements over the objection of counsel for the defendant Garrison, and the failure of the Court to grant instructions for the defendant Garrison that were offered and should have been granted, and for the further reason that the Court erred in failing to strike the evidence of the plaintiff on motion of the defendant Garrison when first made, and error of the Court in failing to strike the evidence of the plaintiff as against the defendant Garrison when made the second time, and with the reservation that we would like to add anything to that which we have failed to include. We would like an opportunity of seriously arguing the motion made at any time Your Honor suggests.

Mr. Rixey: On behalf of the defendant Clements I would like to make a motion to set aside the verdict as to Mr. Clements on the ground that same is contrary to the law and the evidence, and there is no evidence to support it, and to render final judgment in favor of Mr. Clements. If Your Honor overrules that motion, then to set aside the verdict as to Mr. Clements and grant a new trial on the ground that the verdict is contrary to the law and the evidence, and there is no evidence to support it, and because of misdirection of the Court to the jury because of errors Your Honor made in reference to the instructions. I should also like to have an opportunity to argue the matter.

Mr. Ford: Will Your Honor add to the reasons assigned by me that the verdict against Garrison is without sufficient evidence and without any legal evidence to support it.

Mr. Rixey: I would also like to add to my grounds that the verdict is excessive.

Mr. Ford: I want to add that the evidence, and all the evidence, shows that the defendant Clements was solely responsible for the accident, and the verdict should be against the defendant Clements solely.

page 247-c } Mr. Sacks: The view I take it this. We have been here for three days, and the evidence was fully heard, and the jury had a right to find against both of these defendants. There was ample evidence by Mr. Garrison and Mr. Clements of gross negligence, and it is purely a jury question. We have argued the instructions very carefully, and I do not think we can show the Court any more law.

The Court: Both motions are overruled.

Mr. Ford: I ask for an exception as to the defendant Garrison for the reasons stated.

Mr. Rixey: I also ask for an exception for the defendant Clements.

page 248 } JUDGE'S CERTIFICATE.

I, Herbert G. Smith, Judge of the Corporation Court of the City of Newport News, Virginia, who presided over the foregoing trial of the case of Sallie Burns, an infant, who sues by her father and next friend, P. B. Burns *v.* Nat Clements and William Garrison, in said Court, at Newport News, Virginia, on July 2nd, 3rd and 5th, 1940, do certify that the foregoing is a true and correct copy and report of all the evidence, together with all the motions, objections, and exceptions on the part of the respective parties, the action of the Court in respect thereto, all the instructions offered, amended, granted, and refused by the Court, and the objections and exceptions thereto; and all other incidents of the said trial of the said cause, with the motions, objections, and exceptions of the respective parties as therein set forth and ordered to be made a part of the record in this case.

As to the original exhibits introduced in evidence, as shown by the foregoing report, to-wit: Plaintiff's Exhibits "A" and "B", Defendant Clements' Exhibit 1, and Defendant Garrison's Exhibits 1 to 7, inclusive, which have been initialed by me for the purpose of identification, it is agreed by the plaintiff and the defendants that they shall be transmitted to the Supreme Court of Appeals as a part
page 249 } of the record in this cause in lieu of certifying to the Court a copy of said exhibits.

I do further certify that the attorneys for the plaintiff and the defendant Clements had reasonable notice, in writing, given by counsel for the defendant Garrison of the time and place when the foregoing report of the testimony, exhibits, instructions, exceptions, and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication, and that the said report was presented to me on the 30 day of Aug., 1940, within less than sixty days after the entry of final judgment in said cause.

Given under my hand this 30 day of Aug., 1940.

HERBERT G. SMITH,
Judge of the Corporation Court of the
City of Newport News, Virginia.

I, F. B. Barham, Clerk of the Corporation Court of the City of Newport News, Virginia, do hereby certify that the foregoing is a true copy and report of the testimony, exhibits, instructions, exceptions, and other incidents of the trial in the case of Sallie Burns, an infant, who sues by page 250 } her father and next friend, P. B. Burns v. Nat Clements and William Garrison, and that the original thereof and said copy, duly authenticated by the Judge of said Court, were lodged and filed with me as Clerk of the said Court on the 31 day of August, 1940.

F. B. BARHAM,
Clerk of the Corporation Court of the
City of Newport News, Virginia.

I, F. B. Barham, Clerk of the Corporation Court of the City of Newport News, Virginia, do certify that the foregoing is a true transcript of the record in the case of Sallie Burns, an infant, who sues by her father and next friend, P. B. Burns v. Nat Clements and William Garrison, lately pending in said Court.

I further certify that the same was not made up and completed and delivered until the attorneys for the plaintiff and the defendant Clements received due notice thereof, and of the intention of the defendant Garrison to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment therein.

page 251 }

F. B. BARHAM,
Clerk of the Corporation Court of the
City of Newport News, Virginia.

Binding this Record
Fee for copy of record

50c
\$10.00

10.50

Teste:

F. B. BARHAM, Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

INDEX TO RECORD

	Page
Petition for Writ of Error	1
Record	33
✓ Notice of Motion for Judgment	33
Plea of Not Guilty	35
Verdict and Judgment, July 5, 1940,—Complained of	36
Stenographic Report of Testimony, &c.	38
Dr. J. R. Ellison	40
Nat Clements	44
W. E. Garrison	66
P. B. Burns	82
Mrs. Jeanette Akers	84
Sallie Burns	85
Motion to Strike Plaintiff's Evidence	90
Dr. Foy Vann	94
S. W. Dunning	95
Hilda Brickle	115
Joseph Weber	118
J. C. Causey, Jr.	125, 135
Walter Ely	131, 136
Mrs. W. E. Garrison	141
Officer H. W. Burgess	149
Instructions	153
Verdict and Motion to Set Aside	178
Judge's Certificate	180
Clerk's Certificates	181