

26-70 1020

# Record No. 1614

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**ROBERT JERRELL, Plaintiff in Error,**

v.

**NORFOLK AND PORTSMOUTH BELT LINE  
RAILROAD COMPANY, Defendant in Error**

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FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

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

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

M. B. WATTS, Clerk.

166 Va 70

IN THE  
**Supreme Court of Appeals of Virginia**  
AT RICHMOND.

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**Record No. 1614**

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ROBERT JERRELL, Plaintiff in Error,

*versus*

NORFOLK & PORTSMOUTH BELT LINE RAILROAD  
COMPANY, Defendant in Error.

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PETITION FOR WRIT OF ERROR.

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*To the Honorable Justices of said Court:*

Petitioner, Robert Jerrell, respectfully represents that he is aggrieved by a final judgment of the Circuit Court of the City of Portsmouth, rendered for the defendant on the 17th day of October, 1934, in an action by notice of motion for \$20,000 damages for personal injuries, in which he was plaintiff, and said Norfolk & Portsmouth Belt Line Railroad Company was defendant, a transcript of the record in which case is herewith filed, to which reference is made.

The sole error assigned is: That said Circuit Court erred by limiting the arguments of plaintiff's two attorneys on the trial of this case over their protest and exception, to an unreasonably short and insufficient time, to-wit, 30 to 34 minutes, for both his counsel.

The facts are: Plaintiff brought his action by notice of motion against defendant for \$20,000 damages for personal injury caused by defendant's train striking an automobile in which plaintiff was a guest. On the first trial when the evidence on behalf of plaintiff had been completed, said court

struck out the evidence, and there was a verdict and judgment for defendant, which were reversed by the Supreme Court of Appeals on the 14th day of June, 1934, to the record in which former appeal reference is made, pursuant to sections 6340 and 6345 of the Code of Virginia, without being again copied by the clerk.

The case being sent back for a jury trial, the jury trial now involved was had in said Circuit Court on the 17th day of October, 1934. On this trial plaintiff put on three witnesses on his behalf as to the facts of the accident, which facts were in great dispute, besides reading the evidence of his doctor from the former trial, the doctor having died, and having another doctor testify, which showed extremely serious injuries to plaintiff, bones broken in his leg, and his leg permanently shortened.

Defendant put on 10 witnesses and the written evidence of one other taken formerly, so that there was altogether before this jury the testimony of 16 witnesses, and great conflict. How the witnesses might be regarded as cumulative of each other, and how their evidence weighed was of much importance, and the testimony of the various witnesses should have been discussed, contrasted and thoroughly argued by plaintiff's counsel to give him a proper trial.

The case also involved serious injuries, so that the question of the various injuries, their permanent nature, plaintiff's pain and suffering and loss of earning capacity, ought to have been carefully and thoroughly discussed by his counsel before the jury.

Also, the case involved an accident at a grade crossing, where plaintiff claimed the train failed to sound its bell, as required by ordinance, so any contributory negligence would only mitigate damages, an instruction to which effect was gotten, and which instruction should have been fully discussed and explained to the jury by plaintiff's counsel.

Also, plaintiff was a guest in the automobile, so negligence on the part of the driver could not be imputed to the plaintiff, an instruction on which subject was granted, and should have been carefully explained to the jury by plaintiff's counsel.

Also, failure to have lights on the train was common law negligence, and contributory negligence of the plaintiff himself (but not of the driver) would bar him as to the lights, and an instruction was granted on that subject, which should have been well argued and made clear to the jury.

In all, three instructions were granted at request of plaintiff, and six at request of defendant, and the instructions

merited painstaking and very clear argument of plaintiff's counsel to a jury of laymen.

The evidence was in such conflict that it would support a verdict for either side, as expressly certified in the bill of exceptions of the trial now involved (R., p. 10), and as already held when this case was formerly in this court.

The evidence being sufficient to hold a verdict either way, plaintiff's counsel were called upon to use their very best efforts in their argument to the jury to show every reason and circumstance in the evidence supporting the plaintiff's view, and to do this properly would necessarily take time and thought, and would be destroyed by want of time and hurry.

### THE ARGUMENT.

The trial court could not strike out the evidence, as a reversal on that point had already occurred.

The trial court did a worse thing to the plaintiff, for the trial court *in effect struck out unheard a large part of the argument of plaintiff's counsel*, by refusing to allow plaintiff's counsel a reasonable time in which to argue his case; and ruling that only 30 minutes would be allowed to both plaintiff's counsel together to argue this very important case to the jury; and within which to treat of the evidence of the accident, the extent of the injuries, and the important and numerous matters of law in the instructions.

The manner in which the time was limited to 30 minutes to a side, over protest and exceptions of plaintiff's counsel, was also extremely belittling to the case, and gave it a poor standing with the jury, besides closing his counsel's mouths. For the court, having definitely ruled only 30 minutes to a side in the absence of the jury, and exception having been taken, when the jury returned into court and the instructions were read to them by him, apparently doubting the soundness of his decision that such a short period should be allowed for argument, APPEALED TO THE JURY to say, "How long they wanted to hear the lawyers argue this case". (R., p. 10.)

Of course, the jury thereby had the case belittled, were invited by the court to consider the case as light and not entitled to much of their time or consideration, and a juror most naturally answered, "Very little". (R., p. 10.)

This was an additional handicap to plaintiff's counsel, to be told the jury didn't want to listen long, and emphasizes the error of the court. Is the haste or carelessness of a jury to fix the time of argument of counsel in a court of justice?

We submit that to allow a party counsel, but to refuse the counsel a reasonable hearing, is a delusion; and deprives the litigant of a fair trial as definitely as if the court had refused to hear half of what a witness was testifying.

In an appellate court, with printed evidence and briefs for a learned court to read, a good deal of argument can be packed into 30 minutes.

But in a trial court with conflicting evidence, extent of injuries, and various instructions to be dealt with; and a fair opening to be made by one of plaintiff's counsel, and his other counsel to have to close the case and also answer a 30-minute argument of defendant's counsel; to allow only in the neighborhood of 30 minutes to both of plaintiff's counsel together is a denial of a real hearing.

In the instant case defendant's counsel stated that if plaintiff's counsel who opened the argument did not open fully, defendant's counsel would waive argument, and cut off any closing argument. Plaintiff's counsel who closed the case had only *thirteen minutes*. (R., p. 11.)

Thirteen minutes to close a \$20,000 damage suit for a client crippled for life; to deal with his injuries; to answer the argument of defendant's counsel; to contrast the numerous witnesses and their conflicting evidence; to discuss nine instructions containing interesting, and to laymen, unusual rules of law.

We submit that no lawyer can do justice to such a case in thirteen minutes, and to say that he can is incorrect and erroneous.

On the question of a reasonable time being allowed counsel for a fair trial, we shall quote only three authorities here, one from Rome, one from England, and one from Virginia:

The Roman advocate and judge, Pliny, the younger, wrote to Cornelius Tacitus, about the year one hundred, 9 Harvard Classics, 214:

"I have frequent debates with a certain acquaintance of mine, a man of skill and learning, who admires nothing so much in the eloquence of the bar as conciseness. I agree with him, that where the case will admit of this precision it may with propriety be adopted, but insist that, to leave out what is material to be mentioned, or only briefly and cursorily to touch upon those points which should be inculcated, impressed, and urged well home upon the minds of the audience, is a downright fraud upon one's client. In many cases, to deal with the subject at greater length adds strength and weight to our ideas, which frequently produce their impres-

sion upon the mind, as iron does upon solid bodies, rather by repeated strokes than a single blow."

\* \* \* \*

"It follows, then, that the nearer approach a speaker makes to the rules of just composition, the more perfect will he be in his art; always supposing, however, that he has his due share of time allowed him; for, if he be limited of that article, no blame can justly be fixed upon the advocate, though much certainly upon the judge. The sense of the laws, I am sure, is on my side, which are by no means sparing of the orator's time; it is not conciseness, but fullness, a complete representation of every material circumstance which they recommend. Now conciseness cannot effect this unless in the most insignificant cases. Let me add what experience, that unerring guide, has taught me; it has frequently been my province to act both as an advocate and a judge; and I have often also attended as an assessor. Upon those occasions, I have ever found the judgments of mankind are to be influenced by different modes of application, and that the slightest circumstances frequently produce the most important consequences. The dispositions and understandings of men vary to such an extent that they seldom agree in their opinions concerning any one point in debate before them; or if they do, it is generally from different motives."

"To delight and to persuade requires time and great command of language; and to leave a *sting* in the minds of the audience is an effect not to be expected from an orator who merely *pinks*, but from him, and him only, who *thrusts in*."

\* \* \*

"But, (it is replied) the harangue of a more moderate length is most generally admired. It is:—but only by indolent people; and to fix the standard by their laziness and false delicacy would be simply ridiculous. Were you to consult persons of this cast, they would tell you, not only that it is best to say little, but that it is best to say nothing at all."

And the same great Pliny wrote to Arrianus, 9 Harvard Classics, 291-2:

"The truth is, our advocates take more pleasure in finishing a cause than defending it; and our judges had rather rise from the bench than sit upon it; such is their indolence and such their indifference to the honour of eloquence and the interest of justice."

“ \* \* \* were our forefathers slow of apprehension and dull beyond measure? And are we clearer of speech quicker in our conceptions, or more scrupulous in our decisions” \* \* \* whenever I sit upon the bench” \* \* \* “I always give the advocates as much time as they require \* \* \* especially as the first and most sacred duty of a judge is patience, which constitutes an important part of justice.”

Sir Francis Bacon, Lord Chancellor of England in 1618, in his essay “Of Judicature” wrote; 3 Harvard Classics 138-9:

“Secondly, for the advocates and counsel that plead. Patience and gravity of hearing is an essential part of justice; \* \* \* It is no grace to a judge \* \* \* to show quickness of conceit in cutting off evidence or counsel too short \* \* \* let not the judge meet the case half way, nor give occasion for the party to say his counsel or proofs were not heard.”

In Virginia it was held that half an hour a side was too short and reversible error, in *Jones v. Com.*, 87 Va. 63, the court saying in an opinion by Judge Lewis:

“The next question arises upon the prisoner’s second bill of exceptions, which states that after the evidence had been closed the court announced that the argument before the jury would be limited to thirty minutes on a side, and restricted the counsel accordingly, to which ruling the prisoner excepted.

“We are of opinion that the exception is well taken. It appears from the record that the indictment was found upon the evidence of seventeen witnesses, whose names are written at the foot of the indictment, and it is fairly inferrible from the record that not less than that number of witnesses testified before the petit jury for the Commonwealth. How many were examined for the prisoner does not appear. The alleged offence was committed on the main street of the city, on Christmas eve in the night, and at a place at which a crowd had collected. The principal point before the jury was to the identity of the prisoner; that is as to whether the rock with which the injury was done was thrown by the prisoner or by another person, and upon this point the evidence was conflicting. It is obvious, therefore, that the ruling of the court in restricting the argument to thirty minutes, against the objection of the prisoner, was an undue abridgement of his rights, for which, if there were no other evidence in the case, the judgment would have to be reversed.

"It is the right of every party charged with crime to be fully heard by counsel on his whole case, although the court, undoubtedly, has a superintending control over the course of the argument to prevent the abuse of that or any other right. It is a power, however, to be exercised with discretion, and with reference to the particular circumstances of each case, subject to review by an appellate court. *Ward's case*, 3 Leigh. 743; Proffat, Jury Trial, Sec. 249.

"In *People v. Keenan*, 13 Cal. 581, which was a prosecution for a felony, and in which case fourteen witnesses were examined, the trial court restricted the argument to an hour and a half for each counsel, of which the prisoner had two, and this was held to be error. In *Dille v. State*, 34 Ohio St. 617, eleven witnesses were examined, and the evidence, which occupied half a day in its delivery, was circumstantial and conflicting. The accused was defended by two counsel, who were limited by the court to thirty minutes in the argument, and it was held that this was such an abuse of power as to prevent a fair trial. In *Hunt v. State*, 49 Ga. 255, which, like the present case, was an indictment for an assault with intent to kill, it was held that the trial court, in restricting the defendant's counsel to thirty minutes in his argument before the jury, over his protest that he could not do justice to his client's case in that time, 'committed a grave error', which was ground for a new trial."

In a civil case a man has a right to be fully heard by counsel, this right being even more ancient than the right to have counsel in a criminal case. Section 6255 of the Code of Virginia expressly allows a party to have "not more than two counsel argue in a civil case on the same side", unless the court gives leave for more than two to argue.

If anything else were needed to emphasize the error of the trial court, it is to be found in the *two so-called certificates of exceptions filed by defendant*, who did not except, and won the case below. As there can be no bill nor certificate of exceptions, without an exception, we submit that these two papers are really no part of the record, but if they should be they speak with definite force for plaintiff. For these two "certificates of exception", designed to bolster up the action of the court in cutting off argument, say in effect (R., p. 17), that in the *opinion* of the trial judge whose ruling is in controversy, the issues were narrow, and that each counsel for plaintiff made a superb argument, and was listened to by the judge, etc. (Plaintiff's counsel would be tempted to blush with pride at the high compliment of the judge; did they not know it was drawn by opposing counsel as an excuse for



closing their mouths.) It is also to be noted that these certificates do not show that plaintiff's counsel wasted any time, or wandered in their argument, but on the contrary that they were speaking to the point in a thorough and able manner.

Imagine speaking ably and completely in such a case *in thirteen minutes!*

The claim of such opinion is so obviously erroneous as to be suicidal.

Certificate No. 2, is, we submit, probably among the most remarkable papers this court has recently seen, the whole of it reading (R., p. 17):

“CERTIFICATE NO. B.

“The Court certifies that he listened attentively to the argument of *all three* counsel and that the argument of *both counsel for the plaintiff was able, exhaustive and complete and covered every phase of the case*

“*In the opinion of the Court, if further time had been allowed Mr. Martin he could have said no more than he had already said without repeating.*

“Given under my hand this the 9th day of November, 1934.

(Italics added.)

B. D. WHITE, Judge.”

The court does not say that Mr. Martin *actually repeated at all*. How can any one have a valuable opinion that in future there might have been repetition, when there had actually been no repetition and an “able” argument was being made.

But as to *Mr. Bangel*, the court does not even give an opinion that he would have repeated had he not been cut off. “*Expressio unius (Mr. Martin) exclusio alterius*” (Mr. Bangel).

It is also notable that this certificate does not state how good an argument for the defence Mr. Willcox made, *and how it merited a thorough reply*. When the court was expressing its opinion on the splendor of argument of counsel for plaintiff, fairness would seem to require an expression of opinion as to argument of counsel for defendant also.

We know, however, from plaintiff's bill of exceptions that Mr. Willcox by himself argued approximately thirty minutes.

We submit that the point in this case is important not only to the plaintiff at bar, but involves a fundamental requisite of a fair trial and the rights of counsel practicing in courts of justice, and there attempting to assert their clients' claims with diligence and vigor.

This petition is adopted as the opening brief, a copy hereof was mailed to counsel for defendant on the 22 day of November, 1934, and oral argument hereon is requested.

Petitioner prays that a writ of error may be awarded, said proceedings reviewed and the error corrected, the verdict and judgment set aside, a new trial granted, and such other relief granted as may be adapted to the nature of the case.

ROBERT JERRELL,

By ROBERT W. MOFFAT,  
A. A. BANGEL,  
JAS. G. MARTIN,  
Counsel.

November 22, 1934.

I, Jas. G. Martin, counsel practicing in the Supreme Court of Appeals of Virginia, certify that in my opinion sufficient matter of error appears in the proceedings and judgment shown by the record accompanying the above petition, to make it proper for the same to be reviewed by this court.

JAS. G. MARTIN.

Rec'd. Nov. 23, 1934.

M. B. WATTS, Clerk.

## RECORD

### VIRGINIA:

Pleas before the Circuit Court of the City of Portsmouth, at the Courthouse thereof, on the 9th day of November, 1934.

Robert Jerrell, Plaintiff,

v.

Norfolk & Portsmouth Belt Line Railroad Company, Defendant.

### UPON A MOTION TO RECOVER MONEY.

Be it remembered that heretofore to-wit: In the Clerk's Office of the Circuit Court of the City of Portsmouth, on the 7th day of July, 1934, the following copy of an order of the Supreme Court of Appeals, was received by the clerk

of this Court, which is in the words and figures following, to-wit:

Virginia:

In the Clerk's Office of the Supreme Court of Appeals in the City of Richmond, on the 21st day of June, 1934. The following copy of an order of this court, entered page 2 } at its place of session at Wytheville was this day received by the clerk here:

"Virginia:

"In the Supreme Court of Appeals held at the Courthouse in the Town of Wytheville, on Thursday, the 14th day of June, 1934.

Robert Jerrell, Plaintiff in error,

*against*

Norfolk & Portsmouth Belt Line Railroad Company, Defendant in error.

Upon a writ of error to a judgment rendered by the Circuit Court of the city of Portsmouth on the 23rd day of March, 1934.

This cause, which is pending in this court at its place of session at Richmond, having been fully heard but not determined at said place of session; this day came here the parties by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in the judgment complained of. It is therefore adjudged and ordered that the judgment aforesaid be reversed and annulled, the verdict of the jury set aside and this cause is remanded to the said circuit court for a new trial to be had page 3 } therein in accordance with the views expressed in the said written opinion of this court.

And it is further adjudged and ordered that the plaintiff in error recover of the defendant in error his costs by him expended about the prosecution of his writ of error aforesaid herein.

"Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond,

who will enter this order in the order book there and certify it to the said circuit court.

A Copy—Teste

J. M. KELLY, Clerk."

Teste:

M. D. WATTS, C. C.

Plaintiff in error's costs:

Writ tax		\$6.50
Printing	34.03	
Clerk	24.60	
Printing and Clerk		58.63
Clerk's initial fees		1.86
Transcript		
Attorney's fee		20.00
Clerk's small fees		2.59
Clerk at Wytheville		1.82
Total		<u>\$91.40</u>

Teste:

M. D. WATTS, C. C.

page 4 } And at another day, to-wit: At the Circuit Court  
of the City of Portsmouth, held on the 17th day of  
October, 1934.

At this day came the parties by their Attorneys and thereupon, by consent, came a jury of six, to-wit: T. L. West, W. G. Wilburn, L. E. Sykes, Reginald Hoggard, Wm. Boush and Edward B. Wood, who being duly sworn the truth to speak, upon the issue joined and having fully heard the evidence and argument of counsel, retired to their room, to consult of their verdict and after sometime returned into Court, having found the following verdict: "We the Jury find in favor of the Defendant. W. G. Wilburn, foreman, Oct. 17-34."; whereupon, the plaintiff, by counsel, moved the Court to set aside the verdict and grant him a new trial on the ground that the said verdict is contrary to the law and evidence, which motion being heard, the Court doth overrule the same, to which ruling of the Court, the plaintiff, by counsel, excepted; it is therefore considered by the Court that the

plaintiff take nothing by his bill but for his false clamor be in Mercy, &c., and that the defendant go thereof without day and recover against the plaintiff its costs by it about its defense in his behalf expended.

Virginia:

In the Clerk's Office of the Circuit Court of the City of Portsmouth on the 2nd day of November, 1934, the following notice was filed, which is in the words and figures following, to-wit:

page 5 } To Norfolk & Portsmouth Belt Line Railroad Company:

TAKE NOTICE, that I shall on the 9th day of November, 1934, at 10:30 o'clock a. m., present to the Judge of the Circuit Court of the City of Portsmouth, in his court room, my bill of exceptions in my case against you which was tried in said court October 17, 1934.

Further take notice that at noon on the same day, I shall apply to the Clerk of said court in his office for a transcript of the record in said case, in order to apply for a writ of error.

ROBERT JERRELL,

By JAS. G. MARTIN,  
Of Counsel.

Service of above accepted, Nov. 1, 1934.

T. H. WILCOX, p. d.

Virginia:

In the Clerk's Office of the Circuit Court of the City of Portsmouth, on the 9th day of November, 1934, the following notice was filed, which is in the words and figures following, to-wit:

page 6 } To Robert Jerrell,

TAKE NOTICE, that on November 9, 1934, at 10:30 o'clock a. m., I shall present to the Judge of the Circuit Court for the City of Portsmouth, at the courtroom thereof, two cer-

tificates in connection with the trial of your case against the Norfolk & Portsmouth Belt Line Railroad Company.

NORFOLK & PORTSMOUTH BELT LINE  
RAILROAD COMPANY

By T. H. WILCOX, Counsel.

Service of the above notice is accepted this the 9th day of November, 1934.

JAS. G. MARTIN,  
Of Counsel for Plft.

page 7 } And at another day, to-wit: At the Circuit Court  
of the City of Portsmouth, held on the 9th day of  
November, 1934.

This day came the parties by their attorneys, and the plaintiff presented his bill of exceptions "A1", and the defendant presented its certificates No. A and B, which were duly signed and made part of the record after it duly appeared in writing that each party had proper notice of the time and place of presenting the same.

Seen:

T. H. WILCOX, p. d.  
JAS. G. MARTIN.

page 8 } The plaintiff's bill of exceptions "A1", and the  
defendant's certificates No. A and B, referred to  
in the foregoing order are in the words and figures follow-  
ing, to-wit:

Virginia:

page 9 } In the Circuit Court of the City of Portsmouth.

Robert Jerrell

v.

Norfolk & Portsmouth Belt Line Railroad Company.

## BILL OF EXCEPTIONS NO. A1.

Be it remembered that upon the last trial of this case had on the 17th day of October, 1934, three eye-witnesses to the accident in question, including the plaintiff, testified on behalf of the plaintiff, and the evidence of Dr. J. C. Phillips, taken at a former trial, since which time he has died, was read on behalf of the plaintiff, and Dr. Bishop who examined plaintiff about two weeks before said last trial testified for plaintiff, and the ordinance of the City of Portsmouth, in force at the time of the accident, and hereinafter shown, was read in evidence, the taking of said evidence on behalf of plaintiff consuming from approximately 11:10 a. m. to approximately 12:40 p. m., when court adjourned till approximately 1:25 p. m. for lunch.

Commencing after lunch defendant put on its evidence, consisting of three police officers and six trainmen, and its superintendent, and the stenographic evidence taken at a former trial of a colored man who could not now be found, the taking of which testimony consumed from about 1:25 p. m. till about 3:10 p. m.

Then instructions were argued and three instructions granted at request of plaintiff, and 6 at request of page 10 } defendant, as hereinafter shown.

The evidence was conflicting, there being sufficient evidence to go to the jury to support a verdict for either side.

When the instructions had been decided upon, the jury being absent, the court asked counsel how much time they wished within which to argue the case. Mr. Bangel, of counsel for plaintiff, replied asking the court please not to put a time limit upon argument, and stating counsel would not waste time in argument. The court stated that a time limit would be fixed. Mr. Martin, of counsel for plaintiff, then asked that one hour be allowed each side for argument, but the court said this would not be allowed. Mr. Martin then asked the court to allow 45 minutes to each side, and stated that counsel would be hurried in their argument and could not properly present the case, that two counsel were to speak for plaintiff, and that the case was important and should be thoroughly discussed. Mr. Bangel stated he would open the argument and he wished to leave time for Mr. Martin to close the case, but he, Mr. Bangel would have to open fully, or Mr. Willcox might waive argument and cut off the closing argument. Mr. Willcox said that unless Mr. Bangel opened fully he would do so, and prevent a closing argument. The

court ruled that 30 minutes a side only would be allowed, to which ruling counsel for plaintiff duly excepted upon the grounds then and there stated that this was too short a time in which to properly argue the case, and that they would be hurried in their argument.

The jury then returned to their seats in the court room and the court read to them the instructions and then asked the jury how long they wanted to hear the lawyers argue this case; to which a juror answered: "Very little."

page 11 } And the judge then again stated, thirty minutes to a side for argument.

Mr. Bangel then rose to open the argument for the plaintiff, and requested the court to stop him after 15 minutes, so 15 minutes would be left for Mr. Martin. After 21 minutes the court told Mr. Bangel he had been speaking 21 minutes, and Mr. Bangel stopped.

Mr. Willcox then argued approximately 30 minutes for the defendant.

3/ Mr. Martin rose to speak in closing the case for the plaintiff, and the court said, you will have till "half past", which was ~~15~~ minutes. Mr. Martin spoke 13 minutes, at which time the court stopped him, and he sat down.

The jury then retired and the judge immediately left the room, and remained out of the room until the jury had "knocked" after considering their verdict about 15 minutes, and then the Judge returned to the bench and the jury came into the court with a verdict for the defendant.

And after the verdict was rendered the plaintiff, by counsel moved the court to set aside the verdict and grant a page 12 } new trial on the ground that his counsel had been unduly limited in arguing the case, and that he had not had his "day in court", but only a partial day, without his counsel being afforded a proper opportunity to present his case, which motion was then argued and overruled by the court, to which action of the court the plaintiff, by counsel, duly excepted on the grounds as already stated.

The following are all the instructions which were granted, the first three at request of plaintiff, and the others at request of defendant:

page 13 } 1P.

The Court instructs the jury that negligence of the driver of the automobile, if he was negligent, cannot be imputed to the plaintiff.



## 2P.

The Court instructs the jury that if they believe from the evidence that there was no light on the rear of the engine, and that this proximately helped cause the accident without contributory negligence on the part of the plaintiff himself, it is the duty of the jury to find for the plaintiff.

## 3P.

The Court instructs the jury that if they believe from the evidence that the engine bell was not ringing as the train approached the crossing, and this proximately caused or helped to cause the accident, it is the duty of the jury to find for the plaintiff, even if they should believe from the evidence that the plaintiff was himself also negligent

## D1

The Court instructs the jury that the mere fact that the accident complained of happened and the plaintiff was injured does not entitle the plaintiff to a verdict in this case. There is no presumption of negligence because of the accident, but on the other hand, the presumption is that the defendant was free from negligence and the burden is on the plaintiff to prove such negligence by a preponderance of the evidence.

The Court further instructs the jury that the plaintiff cannot recover in this case unless you believe from a preponderance of the evidence that the defendant was guilty of negligence as alleged in the notice of motion and that the accident was the result of such negligence. Even in that case, if you further believe from the evidence that the plaintiff was guilty of contributory negligence as defined in other instructions, the plaintiff cannot recover unless you further believe from a preponderance of the evidence that the defendant failed to ring the bell as required by the ordinances of the City of Portsmouth, and that such failure on its part proximately caused or contributed to the accident. The burden is on the plaintiff to prove failure to give such signal by a preponderance of the evidence.

D3.

The Court instructs the jury that trainmen have the right to presume that a person approaching a moving train which is within his view will stop before going upon the track, if there is nothing in his conduct as shown by the evidence to indicate that he is not in full possession of his faculties, or that he is not conscious of the approach of the train or that he intended to attempt to cross the track ahead of the train.

D4.

The Court instructs the jury that even if you believe from the evidence that the plaintiff has established by a preponderance of the evidence that the defendant did not ring its bell as required by law, and that such failure proximately caused or contributed to the accident and that the plaintiff is to recover because of this omission, yet if you further believe from the evidence that the plaintiff was guilty of contributory negligence as defined in other instructions, then you shall reduce the amount of damages established by the plaintiff in proportion to the negligence attributable to the plaintiff.

D6.

The Court instructs the jury that notwithstanding the fact that Satterfield was driving the automobile, the rule requiring a passenger to have his senses on the alert to discover and avoid danger from an approaching train is not relaxed in Jerrell's favor, but Jerrell was required by law to exercise reasonable care for his own safety, having reference to the surrounding circumstances and conditions at the time of the accident, and the care he was required to exercise must be proportionate to the known danger.

D7.

The Court instructs the jury that if they believe from the evidence that Jerrell by looking and listening with ordinary care could have discovered the approaching engine in time to have warned Satterfield to stop his automobile or change

the course thereof, and that he failed to do so, and such failure on his part proximately caused or contributed to the accident Jerrell was himself guilty of contributory negligence and that would bar his recovery unless you further believe from a preponderance of the evidence that the defendant failed to ring its bell and that such failure proximately caused or contributed to the accident. In that case contributory negligence would only mitigate the damages.

D11.

The Court instructs the jury that if they believe from the evidence that the sole proximate cause of the accident was the negligence if any of Satterfield or the negligence if any of Jerrell, or the joint negligence of both of them, the plaintiff is not entitled to recover.

page 15 } And plaintiff prays that this his bill of exceptions No. A1, may be signed and made a part of the record in this case, which is accordingly done, in due time this 9th day of November, 1934, after it duly appeared in writing that the defendant had been given due notice of the time and place of presenting the same.

B. D. WHITE, Judge.

page 16 } Virginia:

In the Circuit Court for the City of Portsmouth.

Robert Jerrell

v.

Norfolk & Portsmouth Belt Line Railroad Company.

#### DEFT'S. CERTIFICATE NO. A.

The Court certifies that in this case the plaintiff contended that the train of the defendant was moving over the street crossing at night without lights and with no bell ringing, and that the automobile in which he was riding approached the crossing at a reasonable speed; that he and the driver of the

automobile in which he was riding looked in both directions without seeing the train and listened for the bell without hearing it; and that the automobile proceeded along the highway and over the crossing and was struck on the crossing by the engine of the defendant. He further contended that there were obstructions on his right which prevented his having a full view of the track.

The defendant contended that its bell was ringing, its headlight was burning and that the noise of the train was itself a warning of its approach. It further contended that there were no practical obstructions to the plaintiff's view of the railroad track to his right. It further contended that its tender was on the crossing when the automobile in which the plaintiff was riding arrived at the crossing; that said automobile was going at a high rate of speed and that when its driver discovered that the crossing was blocked he turned to his left, leaving the highway entirely and tried  
page 17 } to cross the track at a point off the highway and in front of the engine.

The evidence of the various witnesses on each side except the testimony as to the injury dealt only with the above-mentioned features and the testimony of the several witnesses was cumulative.

Given under my hand this the 9th day of November, 1934.

B. D. WHITE, Judge.

#### DEFT'S. CERTIFICATE NO. B.

The Court certifies that he listened to the argument of all three counsel and that the argument of both counsel for the plaintiff was able, exhaustive and complete and covered every phase of the case.

In the opinion of the Court, if further time had been allowed Mr. Martin he could have said no more than he had already said without repeating.

Given under my hand this the 9th day of November, 1934.

B. D. WHITE, Judge.

page 18 } State of Virginia,  
          City of Portsmouth, to-wit:

I, Kenneth A. Bain, Jr., Clerk of the Circuit Court of the City of Portsmouth, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record in the foregoing cause; and I further certify that the notice required by Section 6339, Code of 1919, was duly given in accordance with said section.

Given under my hand this 21st day of November, 1934.

KENNETH A. BAIN, JR., Clerk.

By: D. V. MAJOR, D. C.

A Copy—Teste:

M. B. WATTS, C. C.

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