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190-76 No 15
Dr. Sp
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Record Number 3504

IN THE
Supreme Court of Appeals
of Virginia
AT RICHMOND

—o—
VIRGINIA TRANSIT COMPANY
a Virginia corporation,
PLAINTIFF IN ERROR

v.

JOSEPH B. OWENS, Administrator of the Estate of
RUTH H. OWENS, Deceased,
DEFENDANT IN ERROR

—o—
From the Circuit Court of the City of Richmond, Virginia

—o—
RULE 14

¶ 5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶ 6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

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190VA 76

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held **APR 1949**

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

M. B. WATTS, Clerk.

RULE 14—BRIEFS

1. *Form and contents of appellant's brief.* The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with reference to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

(d) Argument in support of the position of appellant.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

2. *Form and contents of appellee's brief.* The brief for the appellee shall contain:

(a) A subject index and table of citation with cases alphabetically arranged. Citation of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or simplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate reference to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

3. *Reply brief.* The reply brief (if any) of the appellant shall contain all the authorities relied on by him, not referred to in his petition or opening brief. In other respects it shall conform to the requirements for appellee's brief.

4. *Time of filing.* (a) **CIVIL CASES.** The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than thirty days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than fifteen days, and the reply brief of the appellant not later than one day, before the first day of the session at which the case is to be heard.

(b) **CRIMINAL CASES.** In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

(c) **STIPULATION OF COUNSEL AS TO FILING.** Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

5. *Number of copies to be filed and delivered to opposing counsel.* Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

6. *Size and Type.* Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

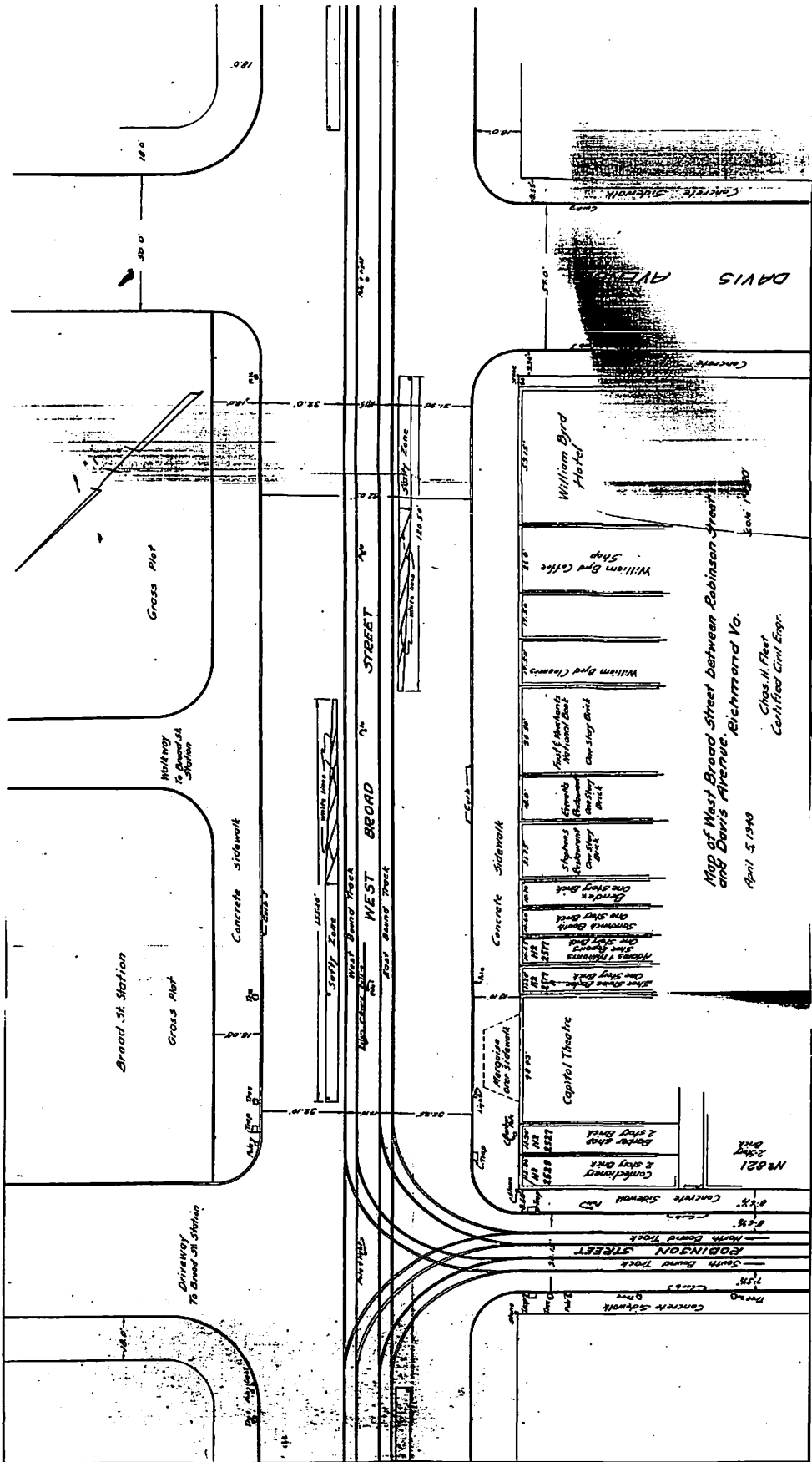
7. *Non-compliance, effect of.* The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief for the cause will not be heard. If one of the parties fails to file a proper brief he can not be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.

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SUPREME COURT OF APPEALS

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JOSEPH B. OWENS, Administrator of the Estate of
RUTH H. OWENS, Deceased,
DEFENDANT IN ERROR

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS

P E T I T I O N

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

PRELIMINARY STATEMENT

Virginia Transit Company respectfully represents that it is
aggrieved by a final judgment in the principal sum of Fifteen
Thousand Dollars (\$15,000.00) rendered against it in the

2* Circuit Court of the City of Richmond on *June 21, 1948, in an action where Joseph B. Owens, Administrator of Ruth H. Owens, deceased, sought recovery for the death of his wife Ruth H. Owens which occurred about 4:10 p. m. on July 19, 1946, when she was struck and instantly killed by an ~~east~~ bound street car of Virginia Transit Company when she attempted to cross from the north to the south side of Broad Street approximately midway between Robinson Street and Davis Avenue in the City of Richmond.

As appears from map submitted herewith marked *Exhibit with Petition for Writ of Error and Supersedeas*, Broad Street extends approximately east and west and on July 19, 1946, there was a double track street railway approximately in the center of the street, and the street was smooth paved from curb to curb, the northerly street railway track and also the portion of the street extending northwardly from that track to the curbing having been used on July 19, 1946, by west bound traffic, and the southerly track and that portion of the street extending southwardly to the curbing having been used on July 19, 1946, by east bound traffic.

Joseph B. Owens, Administrator of Ruth H. Owens, deceased, was plaintiff and Virginia Transit Company was defendant in the trial court, and for convenience they will be designated by the same terms in this Petition for Writ of Error and Supersedeas.

3* *Petitioner is advised that entry of judgment against petitioner as aforesaid constitutes reversible error to the prejudice of petitioner which warrants review and reversal of the judgment; and petitioner therefore prays for a Writ of Error and Supersedeas.

Stenographic transcript of the record, including all proceedings in the trial court is submitted herewith, together with certificate of plaintiff's qualification as Administrator marked *Plaintiff Ex. No. 1* which is the only exhibit which was offered in evidence.

Reference will be made to the transcript throughout this petition; all references to the record being designated by the letter "R" followed by appropriate page numbers.

THE ISSUES UNDER THE PLEADINGS

The notice of motion for judgment (R 2-4) alleges in detail that the defendant negligently ran down the plaintiff's decedent. The defendant filed a plea of the general issue (R 6-7).

THE PROCEEDINGS IN THE TRIAL COURT

Trial by jury was had on March 25-26, 1948, including a view by the jury on March 26, 1948.

After all the testimony for both parties had been introduced, the defendant moved to strike the testimony * (R 158) upon the ground that Coly Henley (colored), a witness for the plaintiff, had testified to a physical impossibility which was incredible, and consequently that no negligence had been proved against the defendant which would support a verdict for the plaintiff, and upon the further ground that the testimony had convicted plaintiff's decedent of negligence as a matter of law which bars any recovery by the plaintiff. The court overruled the motion and the defendant duly excepted.

The defendant insisted in the trial court and says now that plaintiff's decedent walked upon the west bound track between intersections when the west bound street car was so close upon her that it was impossible for the operator of the car to stop it before it struck her.

The defendant objected and excepted to the granting of any instructions for the plaintiff upon the ground that there is no evidence to support any instructions for the plaintiff. And the defendant objected and excepted specifically to the granting of last clear chance Instruction No. 4 for the plaintiff upon the ground that no issue of the last clear chance is warranted by the testimony in the case.

Under the instructions given, the jury returned a verdict of Fifteen Thousand Dollars (\$15,000.00) for the plaintiff.

5* *The defendant thereupon moved to set aside the verdict as contrary to the law and the evidence and without evidence to support it for the reasons already stated.

THE OPINION AND JUDGMENT OF THE TRIAL COURT

The motion was subsequently argued by counsel and was taken under advisement by the court, and on June 16, 1948, the

court announced its ruling in a letter to counsel as follows: (R 16):

"After having read the stenographer's transcript of the evidence and the memorandum on behalf of the defendant, submitted by counsel, and after having given due consideration to the able oral argument of counsel and the reasons given by counsel for the defendant why the motion to set aside the verdict should be sustained, I am of the opinion that the verdict of the jury should not be disturbed. Therefore, I am overruling the motion to set aside the verdict and will enter judgment for the plaintiff on Monday, June 21, 1948."

Pursuant to the foregoing letter, the court on the 21 day of June, 1948, rendered judgment on the verdict for the plaintiff; all subject to exception by the defendant.

ASSIGNMENTS OF ERROR

The defendant insisted in the trial court and says now:

- 6* * (1) That the testimony fails to convict the defendant of any negligence which will support a verdict for the plaintiff.
- (2) That the testimony convicts plaintiff's decedent of negligence as a matter of law which proximately caused and efficiently contributed to the death of plaintiff's decedent and bars any recovery by the plaintiff.
- (3) That the trial court committed reversible error to the prejudice of the defendant when the court granted last clear chance Instruction No. 4 for the plaintiff; and
- (4) That the trial court committed reversible error to the prejudice of the defendant when the court declined to set aside the verdict for the plaintiff and enter up final judgment for the defendant, or in lieu thereof grant the defendant a new trial upon all the issues in the case on account of misdirection of the jury by the court.

THE QUESTIONS FOR DECISION

The questions for decision are:

- (1) Does the testimony fail to convict the defendant of

negligence which will support a verdict for the plaintiff?

- (2) Does the testimony convict plaintiff's decedent of negligence as a matter of law which proximately caused and efficiently contributed to her death and bars any recovery by the plaintiff?
- (3) Did the trial court commit reversible error to the prejudice of the defendant when the court gave last clear chance Instruction No. 4 for the plaintiff?
- 7* (4) Did the trial court commit reversible error to the prejudice of the defendant *when the court refused to set aside the verdict of the jury and enter up final judgment for the defendant, or in lieu thereof grant the defendant a new trial upon all the issues in the case on account of misdirection of the jury by the court?

THE THEORY OF THE DEFENDANT

The defendant says all the foregoing questions must be answered in favor of the defendant.

THE FACTS WHEN VIEWED MOST FAVORABLY TO THE PLAINTIFF

- (1) The facts according to *Joseph B. Owens* (R 18-28, 48-54.)

Ruth H. Owens was the wife of Joseph B. Owens (R 18) and he did not see the occurrence when she was killed. According to Joseph B. Owens, Ruth H. Owens was 48 years of age at the time of her death (R 18) and for about two years prior to her death she had been a volunteer U.S.O. Canteen Worker at Broad Street Station (R 19-20, 26). At the time of her death she was on her way from Broad Street Station to catch an east bound street car to Thalhimers' store to purchase a birthday cake for her husband (R 22-23).

As appears from map marked *Exhibit with Petition for Writ of Error and Supersedeas*, there is a walkway from
8* *Broad Street Station on the north side of Broad Street; the walkway being equi-distant from Robinson Street and Davis Avenue.

According to Joseph B. Owens, the distance from the walkway at the north side of Broad Street to the safety zone on

the east side of Davis Avenue is about 250 feet (R 24) and the curbing on the north side of Broad Street is about 30 feet from the north rail of the west bound track; the distance between the two rails of the west bound track being a little over 4 feet; and large street cars extend "close to 2 feet" over the track (R 24).

According to Joseph B. Owens, his wife was in perfect health at the time of her death (R 25), and had lived in Richmond approximately 30 years (R 26). According to Joseph B. Owens, she was, therefore, thoroughly familiar with the locality where she was fatally injured. She was in full possession of all her faculties (R 27) and was an active woman for her age (R 27).

(2) Police Officer *Joseph Ryan* did not know the facts (R 29-34).

Joseph Ryan, a Police Officer from the Traffic Department of the City of Richmond was called to the stand by the plaintiff (R 29), but he did not know any relevant facts and his testimony is immaterial.

9* * (3) The facts according to *Coly Henley* (R 34- 44, 115-116).

Coly Henley a twenty-five year old Negro (R 40) testified for the plaintiff that he was seated about midway on the left side of the west bound street car which struck Mrs. Owens.

According to *Coly*, he saw Mrs. Owens leave the north curb of Broad Street (R 35) "right in front of the * * * walkway that leads to the Broad-Street Station", and the car which struck her was then standing approximately in the safety zone on the east side of Davis Avenue (R 35-36).

Coly testified he saw Mrs. Owens continue to walk across the street and that the street car started from a standstill when she was about midway between the north curb of Broad Street and the north rail of the west bound track (R 36), i.e. about 15 feet from the north rail of the west bound track.

According to *Coly*, he saw Mrs. Owens continuously as she walked across the street, and she walked upon the west bound track when the approaching west bound street car was about 65 feet away from her (R 36-37), and according to *Coly*, the operator of the car was then winding his change box and

looked to his left (R 37), and he did not sound his gong or apply his brakes before the impact occurred (R 37).

10* *According to Coly, "two kids" hollered and the operator stopped the car so suddenly that "he shook the street car and practically everyone on the street car was shook up" (R 38). According to Coly, the car did not go more than 10 or 12 feet after the brakes were applied, and the car stopped when Mrs. Owens' body, lying between the east bound and the west bound track, was "almost at the seat" where Coly was sitting (R 38). The weather was clear (R 38).

Coly testified under cross-examination that Mrs. Owens was walking normally in an ordinary manner when she stepped off the curb (R 41), and that she was "about half way between the curb and the first street car rail" (R 41) when the street car started forward from the east side of Davis Avenue (R 42).

Coly testified also under cross-examination that Mrs. Owens did not hesitate or slow down or stop, but kept walking straight across the street in a normal manner (R 41-42), and that she left the north curb of Broad Street "a little nearer to the east of the center of the walkway" to Broad Street Station (R 43).

And Coly testified finally under cross-examination that it was precisely 241 feet by his actual tape line measurement from the place where the car was standing when Mrs.

11* Owens left the curb to the point where she was struck *(R 43-44).

Coly did not testify regarding the speed of the car, but according to all the testimony in the case, the maximum speed of the car from the time it started from Davis Avenue to the point where Mrs. Owens was struck did not exceed 10 - 12 miles per hour.

Coly did not estimate the distance the car traveled before Mrs. Owens was struck. *He testified from actual tape line measurement*; and according to him the car started from a standstill and traveled 241 feet at a speed which had admittedly never exceeded 10 - 12 miles per hour and struck Mrs. Owens before she crossed a space of 15 feet plus the width of the street car, though she walked normally and did not hesitate or slow down or stop.

Obviously Coly testified to a physical impossibility which

is incredible; and his testimony is the testimony upon which the plaintiff must rely to recover. The testimony of Coly that the operator of the car negligently failed to maintain a proper lookout and give warning of his approach might be believed, but Coly did not show by credible testimony that there was any causal connection between the purported negligence of the operator of the car and the fatal injury of Mrs. Owens; and neither the testimony of Coly nor anyone else will support last clear chance Instruction No. 4 for the plaintiff. To 12* the contrary, all the *credible testimony in the case is to the effect that Mrs. Owens walked upon the west bound track when the west bound street car was so close upon her that it was impossible for the operator of the car to stop it before it struck her.

(4) The facts according to *L. D. Drinkwater* (R 45-48).

L. D. Drinkwater testified for the plaintiff that he was driving his automobile westwardly along Broad Street behind the street car, and that the only other moving west bound traffic was a Plymouth automobile in front of him. The Plymouth stopped beside the street car and Drinkwater stopped behind the Plymouth (R 47).

Drinkwater saw Mrs. Owens fall from the street car on the left side after she had been struck (R 45). He did not see her before she was struck and he did not hear any gong before she was struck (R 45). Drinkwater went to Mrs. Owens and she had some change in her hand (R 46). She was lying about midway of the car after it stopped (R 46).

Obviously the testimony of Drinkwater will not support a verdict for the plaintiff; and Joseph B. Owens, Joseph Ryan, Coly Henley and L. D. Drinkwater are the only witnesses who testified for the plaintiff and the only witnesses upon whom the plaintiff can rely for a recovery.

13*

*THE MATERIAL FACTS ARE UNCONTRADICTED

Since Coly Henley testified to a physical impossibility which is incredible, and since there is no other testimony for the plaintiff which will support a verdict for him, recourse must be had to the testimony for the defendant to determine whether the plaintiff can recover; and the testimony for the defendant convicts Mrs. Owens of negligence which was the proximate cause of her fatal injury, and consequently any negligence on

the part of the operator of the street car is immaterial and will not support a verdict for the plaintiff.

(1) The facts according to *John L. Corr* (R 54-86).

According to John L. Corr, the operator of the west bound street car, the street car never attained a speed exceeding 10 miles per hour after it left Davis Avenue (R 56), and he first saw Mrs. Owens about 6 or 8 feet from the west bound track when she hurried zig zag between a steady stream of traffic going west (R 72), looking westwardly (R 56), and the street car was then from 5 to 10 feet from her (R 57, 82).

According to Corr, the car was in good operating order and when he saw Mrs. Owens he sounded his gong (R 59) and threw the car into emergency and stopped within 14* *approximately 20 feet after the left front of the car just in front of him (R 82) had struck Mrs. Owens (R 59, 82).

Corr testified without contradiction that street cars did not stop for passengers opposite the walkway to Broad Street Station (R 59). Corr denied he was grinding his change carrier and testified he was looking straight ahead (R 60).

(2) The facts according to *H. J. Winston* (R 86-97).

H. J. Winston, a clerical employee at Broad Street Station testified for the defendant that Mrs. Owens told him when she left the station that she was going to Thalhimer's (R 87), and that the last time he saw her she was about 150 feet away from him (R 91) toward the east side of the walkway from Broad Street Station (R 80) stepping hurriedly into Broad Street (R 87-88) on an angle eastwardly (R 88), and that she glanced westwardly (R 88) as she stepped from the curbing (R 95).

According to Winston the street car had crossed Davis Avenue and was moving very slowly (R 90) when Mrs. Owens left the curb (R 89), and quite a few automobiles were passing by (R 89). Winston did not notice Mrs. Owens again until after she had been struck (R 89). He rushed to her then and she was lying beside the car about 6 or 8 feet from the front 15* (R 90), and the car was then 10 - 15 feet *east of the walkway from Broad Street Station.

(3) The facts according to *Mrs. Anna Bates* (R 97-104).

Mrs. Anna Bates testified for the defendant that she was

in the third seat from the front on the west bound car (R 98). Mrs. Bates did not see Mrs. Owens until "she was falling right directly from the window where I was sitting", after the attention of Mrs. Bates had been attracted by the sounding of the gong, the application of the brakes, and the thud of the impact (R 98-101); and the operator of the car then was looking forward in front of the car (R 103).

(4) The facts according to *James P. Wilson* (R 104-115).

James P. Wilson testified for the defendant that he was on the car in the third seat from the front on the right (R 105), and that the speed of the car from Davis Avenue to the point of impact did not exceed 10 miles per hour (R 106). Wilson first saw Mrs. Owens on the track "right in front of the car" (R 106) when the car was about 4 feet from her (R 107). The gong attracted Wilson's attention and in the time "it took her to walk across the track" he heard the thud of the impact (R 107), after he felt the thud of the brakes; and according 16* to Wilson, the *operator was looking straight ahead (R 112).

(5) The facts according to *George H. Bowles* (R 116-120).

George H. Bowles, a traffic officer of the City of Richmond, testified for the defendant that he was called to the scene and that blood stains in the street indicated that Mrs. Owens had been struck 103 feet west from the west property line of Davis Avenue (R 118).

(6) The facts according to *Douglas C. Johnson* (R 120-130).

Douglas C. Johnson testified for the defendant that he was in the fourth or fifth seat from the front on the left of the car (R 121); and that the speed of the car from Davis Avenue to the point of impact did not exceed 10 miles per hour (R 122).

Johnson did not see Mrs. Owens before she was struck (R 123). His attention was attracted by the sounding of the gong and the application of the brakes at the same time (R 123) followed by the thud of the impact, and then he saw Mrs. Owens as she was falling to the ground (R 123-124); and not more than 6 or 8 feet of the car ran past her (R 124). When Johnson's attention was first attracted, the operator was sounding the gong and doing all he could to stop the car, and after 17* the operator applied *the brakes (R 125) he "was facing just a little bit to his left" (R 124) in the direction in which Mrs. Owens thereafter immediately fell, i.e. the operator

was looking at Mrs. Owens as she was falling to the ground. The application of the brakes and the sounding of the gong occurred simultaneously (R 126).

(7) The facts according to *Clarence Harris* (R 130-138).

Clarence Harris (colored) testified for the defendant that he was seated about center on the right of the car (R 131). According to Harris, the speed of the car from Davis Avenue to the point of impact did not exceed 10 or 12 miles per hour (R 131). Harris saw Mrs. Owens when she was about 4 feet from the street car (R 131). "She had gotten to the track, but she hadn't started across. She stepped right across the track and by the time I got ready to yell, it looked like the conductor seen her the same time I did and he tried to come to a stop. He rang the bell and tried to stop and he couldn't (R 132).

Harris testified that Mrs. Owens was crossing at the walkway from Broad Street Station about the middle of the block (R 133). "She was trying to run across—just looked like she was trying to run to get across the track" (R 134). When 18* Harris first saw Mrs. Owens the car was *about a foot from the point where it struck her (R 134). "He applied the brakes and the brakes snatched us almost to the front (R 134) * * * I tried to yell, but it happened so quick I couldn't yell" (R 136). The street car was about 10 feet from Mrs. Owens when Harris first saw her (R 137).

(8) The facts according to *M. C. Lewis* (R 138-146.)

M. C. Lewis (colored) testified for the defendant that he was coming out of William Byrd Cleaners on the south side of Broad Street about opposite the east side of the walkway from Broad Street (R 138-139), (map marked *Exhibit with Petition for Writ of Error and Supersedeas*), when he saw Mrs. Owens in Broad Street walking fast toward the car line apparently from Broad Street Station and very close to the car track. She was walking in the direction of William Byrd Hotel and was looking in the opposite direction (R 145-146).

According to Lewis (R 139-140) he "saw her walk into the street-car"; and when he first saw her the west bound street car was from 8 to 12 feet away from her (R 140); and "she walked right into the car" (R 140).

According to Lewis, the operator of the car sounded the

19* gong (R 142) and "stopped so quick he is bound *to have applied his brakes" (R 143).

(9) The facts according to *W. K. Carper* (R 147-156.)

W. K. Carper testified for the defendant that he was driving his automobile westwardly along Broad Street following the street car (R 147) when he saw Mrs. Owens walk rapidly (R 148) in front of the street car which was running about 10 miles per hour (R 148). Carper did not see the actual impact because he was coming up beside the car at that moment and the car obstructed his view (R 149).

When Carper first saw Mrs. Owens she was about 15 feet from the track (R 149) and the street car was then from 25 - 35 feet from her (R 149); and according to Carper, Mrs. Owens never slacked up (R 149), and went upon the track when the car was only about 5 feet away from her (R 149-150). According to Carper, she was walking southeastwardly from the walkway to Broad Street Station toward the safety zone for east bound cars (R 150).

THE TESTIMONY IS ALTOGETHER CONCLUSIVE AGAINST THE PLAINTIFF

The testimony altogether is conclusive against any recovery by the plaintiff, and after all the testimony in the case had been introduced, the defendant as already stated moved to strike 20* the testimony for the reasons already *specified; and the court overruled the motion subject to exception by the defendant.

ARGUMENT

Coly Henly Testified to an Impossibility Which is Incredible

Coly Henley testified to a physical impossibility. It is impossible that the street car started from a standstill on the east side of Davis Avenue and traveled 241 feet by actual tape line measurement at a speed not exceeding 10 - 12 miles per hour and ran down Mrs. Owens before she could walk normally a distance of 15 feet to the track and across it in safety.

The testimony of Coly that such a thing occurred is incredible and must be disregarded.

For Coly's testimony to be true, the car must have started from a standstill and traveled 241 feet at a *maximum and uniform*

speed of 12 miles per hour which it could not have done before Mrs. Owens could walk normally a distance of 15 feet to the track, plus 4 feet across the rails, plus 4 feet representing 2 foot overhang of the car beyond each rail, or a distance of 23 feet, plus, say one additional foot for safety, or a total distance of 24 feet. If she walked 24 feet at 4 miles per hour the car must have traveled a uniform speed of 40 miles per hour to have run her down; and if she walked 24 feet at 2 miles per hour, 21* the car must have traveled a uniform speed of 20 miles per hour to have run her down. But the speed of the car never exceeded 12 miles per hour.

The Supreme Court of Appeals is not required to believe that which judges from human experience know is inherently incredible. *Day v. Commonwealth* (1948) 187 Va. 457; *Moody v. Howell* (1948) 18.. Va.; 49 S.E. (2nd) 233.

The court is not bound to accept as true what it knows to be untrue. *Drumwright v. Walker* (1937) 167 Va. 307; *Kent v. Miller* (1937) 167 Va. 422; *Meade v. Saunders* (1928) 151 Va. 636; *Johnson v. R. F. & P. R. R. Co.* (1933) 160 Va. 766; *Braswell v. Virginia Electric and Power Co.* (1934) 162 Va. 27; *Burch v. Grace Street Building Corp.* (1937) 168 Va. 329; *Virginia Electric and Power Co. v. Mercer* (1933) 161 Va. 666; *Virginia Electric and Power Co. v. Bennett* (1931) 156 Va. 910; *Saunders v. Temple* (1930) 154 Va. 714; *Equitable Insurance Co. v. Stieffens* (1930) 154 Va. 281; *Virginia Railway & Power Co. v. Bailey* (1918) 123 Va. 250.

Courts cannot accept as true statements which if made out of court no one would believe. *Norfolk and Western Railway Co. v. Eley* (1932) 157 Va. 568, 575.

"Here is applicable the oft repeated judicial expressions 'we are not bound to believe the unbelievable'".

Lynchburg Traction Co. v. Wright (1933) 161 Va. 251, 261.

22* "We are not required to believe that which the physical facts demonstrate to be untrue. *Chesapeake & Ohio Ry Co. v. Barlow*, 155 Va. 863, 156 S.E. 397."

Harris v. Howerton (1938) 169 Va. 647.

Last Clear Chance Instruction No. 4 Should Not Have Been Given
Over the objection and exception of the defendant, the

trial court erroneously granted last clear chance Instruction No. 4 for the plaintiff as follows (R 168-169):

"The Court instructs the jury that wherever you are instructed in this case that you may find for the defendant, or that the plaintiff may be barred from recovery, should it be proven that the plaintiff's decedent was guilty of contributory negligency, these instructions are subject to the following qualifications:

"That even though you may believe from the evidence that the plaintiff's decedent was guilty of contributory negligency, yet this will not prevent the plaintiff from recovering in this case. If you further believe from the evidence that the motorman in charge of defendant's car saw, or by the exercise of reasonable care should have seen, that the plaintiff's decedent was in a position of peril or about to go into danger and was oblivious thereof and that she was in danger of being struck by the streetcar should the car continue on and that the motorman thereafter could have sounded a warning, slowed down or stopped the car by the use of reasonable care in time to have prevented the car from striking the plaintiff's decedent, but failed to do so, then your verdict must be for the plaintiff."

23* *Without Coly Henley there is no testimony that the operator of the car had enough time and enough distance within which to stop the car before he struck Mrs. Owens if he had exercised ordinary care after he realized her peril, or in the exercise of ordinary care should have realized it.

Seeing a person in the apparent possession of all his faculties even with back turned to an approaching vehicle or with head bowed or turned away, approaching the track of the vehicle with no superseded circumstances or evidence of unconsciousness of peril, does not impose upon the operator of the vehicle the duty of pre-vision; and he has the right to assume that a normal person in the situation requiring the exercise of prudence will use his faculties in time to prevent his injury. That is the course of human experience. *Green v. Ruffin* (1924) 141 Va. 628; *Willard Stores v. Cornell* (1943) 181 Va. 143.

"In *Norfolk Southern R. Co. v. Smith*, 122 Va. 302, 94 S.E. 789, 790, Judge Prentis said: 'The doctrine of the last clear chance has nowhere been better stated than in

the syllabus to the case of *Roanoke Ry. & Elec. Co. v. Carroll*, 112 Va. 598, 72 S.E. 125, thus: "The underlying principle of the doctrine of the 'last clear chance', as declared by the decisions of this court, is that, notwithstanding the contributory negligence of the plaintiff, there is something in his condition or situation at the time of the injury to admonish the defendant that he is not able to protect himself. The doctrine is one of prior and subsequent negligence, or of remote and proximate cause, and *presupposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of defendant. Where the negligence of both continues down to the moment of accident and contributes to the injury, the case is one of concurring negligence, and there can be no recovery."

Virginia Electric and Power Company v. Vellines (1934) 162 Va. 671, 681.

"The doctrine of last clear chance 'implies thought, appreciation, mental direction, and the lapse of sufficient time to effectively act upon the impulse to save another from injury.' *Barnes v. Ashworth*, 154 Va. 218, 250, 153 S.E. 711, 720, See also, *Hutcheson, Adm'r v. Misenheimer*, 169 Va. 511, 517, 194 S.E. 665, 667.

"In *Washington, etc., Railway v. Thompson* 136 Va. 597, 603, 118 S.E. 76, 78, we said:

"It should and must be emphasized that a plaintiff is not entitled to recover under this doctrine upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant's agents had responded properly, promptly, instantaneously, he might have been saved. The burden is upon him to show affirmatively by a preponderance of the evidence which convinces the average mind that by the use of ordinary care, after his peril was discovered, there was in fact a clear chance to save him. It is insufficient to show that there was a mere possibility of so doing."

"See also, *Hendry v. Virginia Ry. & Power Co.*, 130 Va. 282, 284, 107 S.E. 715, 716; *Virginia Electric & Power Co. v. Vellines*, 162 Va. 671, 681, 175 S.E. 35, 39; *Frazier v. Stout*, 165 Va. 68, 74, 181 S.E. 377, 379.

"In the present case the evidence fails to show affirmatively that the operator of the bus, by the use of ordinary care, after Lesny's peril was discovered, had in fact a last clear chance to save him. At best, there was merely a possibility of his doing so."

Virginia Stage Lines v. Lesny (1940) 175 Va. 351, 356-357.

25* **Mrs. Owens Was Guilty of Negligence Which Bars Her Recovery*

A pedestrian who steps upon a street railway track immediately in front of an approaching car between crossings is negligent and cannot recover. *Virginia Railway & Power Co. v. Boltz* (1918) 122 Va. 649.

As was said in *Derring's Adm'r v. Virginia Railway & Power Co.* (1918) 122 Va. 517, Mrs. Owens was laboring under no physical disability and it was her duty to see that the car had slackened its speed or stopped before going on the track in such close proximity to it.

Where a pedestrian steps on a street car track immediately in front of a car even at an intersection and is immediately struck, the case is rare indeed where the pedestrian can recover. *Gordon v. Virginia Electric and Power Company* (1928) 150 Va. 442; *Virginia Railway & Power Co. v. Harris* (1918) 122 Va. 657.

One cannot with impunity undertake to pass in front of an approaching street car when it can be done in safety only by the narrowest of margins. *Hendricks v. Virginia Electric and Power Co.* (1934) 161 Va. 793.

A pedestrian knowing of the approach of a street car with nothing to obstruct his view, and in possession of his normal faculties can avoid injury in most cases by stopping and by 26* not taking the fatal step into obvious danger. *In most cases he can assure his safety by the exercise of the slightest care. *Hendricks v. Virginia Electric and Power Company* (1934) 161 Va. 793.

The principle applicable in the case at bar is the principle which was applied in *Meade v. Saunders* (1928) 151 Va. 636, where Mr. Justice McLemore said (pp. 641-643):

"If, as from this record is apparent, the plaintiff never

looked for, or saw, the defendant's car, after leaving the sidewalk until he was in collision with the rear end thereof, then his negligence was the proximate cause of his injury, and there can be no recovery. If it can be said that he was struck by the front of the car, which bore down upon him, we are confronted with a situation where a pedestrian who sees an automobile approaching, leaves the curb to cross the street in front of the approaching car. The car is all the while in full view if he but looks, and he knows it is coming. Assume that the defendant was negligent up to the instant of the accident, for failing to see and avoid injuring plaintiff, there was an equal opportunity for the plaintiff to have seen and avoided the collision, and he was therefore negligent in not doing so.

"As was said by Kelly, P., in *Stephen Putney Shoe Company v. Ormsby's Admr.*, 129 Va. 297, 105 S.E. 563:

" 'In other words, if he did look he was bound to see the truck, and was negligent as a matter of law in stepping in front of it and if he did not look, his negligence as a matter of law is none the less apparent.' *Virginia Railway and Power Company v. Boltz*, 122 Va. 649, 95 S.E. 467; *Hendry v. Virginia Railway and Power Company*, 130 Va. 282, 107 S.E. 715.

Virginia Transit Co. vs. Joseph B. Owens, Adm'r 15

"The facts presented by this record fail to make out a case for the consideration of a jury, and the learned presiding judge at the trial could very properly have refused to give any instruction for the plaintiff; by hypothe-
27* *tically stating the facts of the case is proved, instructed the jury that if they believe them, to find for the defendant, or at the instance of defendant might have stricken out the plaintiff's evidence *Davis v. Rogers*, 139 Va. 618, 124 S.E. 408.

* * * * *

"Here the car and the pedestrian are traveling at right angles, and their paths must cross only a few feet ahead. There is a clear view and the pedestrian has seen the car approaching. A collision under such circumstances can only arise as the result of the concurring or independent negligence of the plaintiff.

" 'If the continuing negligence of a plaintiff, up to the

time of the injury, concurs with the negligence of the defendant in causing the injury, the plaintiff cannot recover.' *Consumers' Brewing Company v. Doyles' Admr.*, 102 Va. 399, 46 S.E. 390, quoted with approval in *Green v. Ruffin, supra.*"

A street car track is itself a declaration of danger. *Ashby v. Virginia Railway & Power Co.* (1924) 138 Va. 310; *Green v. Ruffin* (1924) 141 Va. 628.

As was said by Mr. Chief Justice Campbell in *Virginia Electric and Power Company v. Ford* (1936) 166 Va. 619, 629:

"The doctrine of the last clear chance applies with equal force to plaintiff and defendant. Their rights and obligations are the same. *Virginia Electric & Power Co. v. Vellines, supra*; *Green v. Ruffin, supra*; *McNamara v. Rainey Luggage Corporation*, 139 Va. 197, 123 S.E. 515. Plainly it can not be successfully invoked by both parties to one accident.

"It is never intended that the doctrine of the last clear chance should wipe away or supersede the defense of 28* contributory negligence, *or of continuing and concurring negligence. *Frazier v. Stout, supra.* In this case and the case of *Driscoll v. Virginia Electric & Power Co.*, ante, p. 538, 181 S.E. 402, we have recently given to the matters here involved careful consideration."

So also in *Dick v. Virginia Electric and Power Company* (1932) 158 Va. 77, Mr. Justice Browning said (p. 86):

"* * * We are unable to reach any other conclusion than that the plaintiff's own lack of care for herself, in other words, her own negligence, continuing to the very time of the accident, contributed to her injury.

"Mr. Justice Epes said, speaking for the court, in the case of *Barnes v. Ashworth, supra*, and quoting from the case of *Virginia & S. W. Ry. Co. v. Skinner*, 119 Va. 843, 89 S. E. 887: 'No one can be allowed to shut his eyes to danger in the blind reliance upon the unaided care of another without assuming the consequences of the omission of such care.' "

As was said by Mr. Justice Eggleston in *Fedele v. National Liberty Insurance Company* (1945) 184 Va. 528, 534:

"In *McQuown v. Phaup*, 172 Va. 419, 426, 2 S.E. (2d) 330, 332, this is said: 'The trial judge may and should set aside a verdict which is contrary to the evidence or without evidence to support it. Code, section 6251. In so doing he must, to some extent at least, pass upon the weight of the evidence. *Cardwell v. Norfolk, etc., Ry Co.* 114 Va. 500, 77 S.E. 612, 614. But he does not sit as a jury. It is not his duty to pass upon the preponderance of evidence, and he should not set aside a verdict supported by testimony which there is no reason to discredit.'

" * * * * Where it can be seen from the evidence as 29* a whole that the verdict has *recorded a finding in plain deviation from right and justice, the court may, indeed should, set it aside.' *Meade v. Saunders*, 151 Va. 636, 640, 144 S.E. 711, 712. See also *McQuown v. Phaup*, *supra* (172 Va. at page 426, 2 S.E. (2d), at page 332), and cases there cited.

" 'We have no rule to tell us when there has been a plain deviation from right and justice. That, within fair limits, must be measured by the conscience of the court.' *McQuown v. Phaup*, *supra* (172 Va., at page 426, 2 S.E. (2d), at page 333).

CONCLUSION

Upon the record and under the authorities cited the defendant submits that the judgment of the trial court and the verdict of the jury must be set aside and final judgment rendered for the defendant, or in lieu thereof the defendant must be granted a new trial upon all the issues in the case since —

- (1) The testimony fails to convict the defendant of any negligence which will support a verdict for the plaintiff;
- (2) The testimony convicts plaintiff's decedent of negligence as a matter of law which proximately caused and efficiently contributed to the death of plaintiff's decedent and bars any recovery by the plaintiff;

- (3) The trial court committed reversible error to the prejudice of the defendant when the court granted last clear chance Instruction No. 4 for the plaintiff; and

- 30* (4) The trial court committed reversible error to the prejudice of defendant when the court declined to set aside the verdict of the jury and enter up final judgment for the defendant, or in lieu thereof grant the defendant a new trial upon all the issues in the case on account of misdirection of the jury by the court in the granting of last clear chance Instruction No. 4 for the plaintiff.

Counsel for defendant desire to state orally the reasons for reviewing the judgment of the trial court and hereby adopt this Petition for Writ of Error and Supersedeas as their opening brief in support of this Petition.

Copies of this Petition for Writ of Error and Supersedeas were mailed to Messrs. Leith S. Bremner and Thomas A. Williams, respectively, counsel for plaintiff on the 19th day of October, 1948.

Respectfully submitted,

VIRGINIA TRANSIT COMPANY

By T. JUSTIN MOORE

Electric Building
Richmond 12, Virginia

ARCHIBALD G. ROBERTSON

Electric Building
Richmond 12, Virginia

Counsel

Dated October 19th, 1948.

31* *We, T. JUSTIN MOORE and ARCHIBALD G. ROBERTSON, attorneys practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion there is sufficient matter of error in the record accompanying this Petition to

render it proper that the judgment complained of be reviewed and reversed.

T. JUSTIN MOORE

Electric Building
Richmond 12, Virginia

ARCHIBALD G. ROBERTSON

Electric Building
Richmond 12, Virginia

Received October 19, 1948.

M. B. WATTS, Clerk

Nov. 23, 1948—Writ of Error and Supersedeas awarded by the court. No additional bond required.

M. B. W.

RECORD

VIRGINIA:

In the Circuit Court of the City of Richmond.

Joseph B. Owens, Administrator
of the estate of Ruth H. Owens,
deceased,

vs

Virginia Transit Company,
a Virginia corporation,

I, WILBUR J. GRIGGS, Clerk of the Circuit Court of the City of Richmond, do hereby certify that the paper attached hereto, Marked Plaintiff's Exhibit No. 1, being certificate of Chas. R. Purdy, Clerk of Hustings Court of the City of Richmond, Part II, showing qualification of Joseph B. Owens as Administrator of the estate of Ruth H. Owens, deceased, and is certified to the Supreme Court of Appeals of Virginia under the provisions of Section 6357 of the Code of Virginia, as amended by Acts of Assembly of 1938, page 136; said exhibit being more fully described in the Descriptive Index of Original Exhibits filed with the Record in this case.

Given under my hand this 23rd day of August, 1948.

WILBUR J. GRIGGS, Clerk.

PLAINTIFF'S EXHIBIT NO. 1

VIRGINIA,

In the Clerk's Office of the Hustings Court of the City of Richmond, Part II:

I, CHAS. R. PURDY, Clerk of the said Court, do hereby certify that on the 22nd day of August, 1946, Joseph B. Owens qualified in my said Court as Administrator of the estate of Ruth H. Owens, deceased, and gave bond as such in the penalty of \$500.00, payable and conditioned according to law.

Given under my hand this 22nd day of August, 1946.

SEAL

CHAS. R. PURDY, Clerk,

By I. M. ROBB, D.C.

Joseph B. Owens, Administrator
of the Estate of Ruth H. Owens,

vs.

Virginia Transit Company,
a Virginia corporation,
Deceased,

VIRGINIA:

Pleas before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, held for the said City, at the Courtroom thereof, in the City Hall, on the 12th day of July, 1948.

Be It Remembered, that heretofore, to-wit: In the Clerk's Office of the Circuit Court of the City of Richmond, the 17th day of June, 1947: Came Joseph B. Owens, administrator of the Estate of Ruth H. Owens, Deceased, by counsel, and filed his Notice of Motion for Judgment against Virginia Transit Company, a Virginia corporation, which Notice of Motion for Judgment is in the words and figures following, to-wit:

page 2 } (Filed on June 17, 1947)

VIRGINIA:

In the Circuit Court of the City of Richmond.
Joseph B. Owens, Administrator
of the Estate of Ruth H. Owens,
Deceased,

Plaintiff

v.

Virginia Transit Company,
a Virginia corporation,

Defendant

NOTICE OF MOTION FOR JUDGMENT

TO: Virginia Transit Company, a Virginia corporation,
Richmond, Virginia —

TAKE NOTICE that on the 3rd day of July, 1947, at 10:00 o'clock, A. M., or as soon thereafter as Joseph B. Owens, Administrator of the Estate of Ruth H. Owens, deceased, hereinafter called the plaintiff, can be heard, plaintiff will move the Judge

of the Circuit Court of the City of Richmond for judgment against you, Virginia Transit Company, a Virginia corporation, hereinafter called the defendant, for the sum of FIFTEEN THOUSAND DOLLARS (\$15,000.00), due to the plaintiff by the defendant by reason of the following facts:

That on or about July 19, 1946, the defendant was a common carrier of passengers for hire and reward by means of streetcars run on stationary tracks, run by electricity in the City of Richmond, and it thereupon became and was the duty of the said defendant to operate its streetcars, by and through its servants, agents and employees with proper care and caution; to
page 3 } keep a proper lookout; to keep said cars under reasonable control; and to give timely notice and warning of approach of streetcars, and to operate the same at a proper rate of speed under the traffic and conditions then existing; and it was the further duty of said defendant to obey the city ordinances and traffic laws for such cases made and provided so as to avoid injury to persons and particularly plaintiff's decedent.

Yet the said defendant, not regarding its said duty or duties, carelessly, negligently, recklessly and wrongfully ran and operated one of its streetcars westwardly on Broad Street, between Davis Avenue and Robinson Street, on the day in question, without proper care and caution; without keeping a proper lookout, without having the same under reasonable control; without giving timely warning of the approach of said car; and did fail to obey the city ordinances and traffic laws for such cases made and provided; and did fail to operate said car so as to avoid hitting plaintiff's decedent; and did fail to run the same at a proper rate of speed under the traffic and conditions then existing so that while the plaintiff's decedent was crossing the street and tracks, the said car was, with great force and violence, run into and against her and she was mortally injured, from which injuries she died the same day.

That on the 22nd day of August, 1946, the undersigned, Joseph B. Owens, duly qualified before the Clerk of the Hustings Court of the City of Richmond, Virginia, as Administrator of the Estate of Ruth H. Owens, deceased, and is now acting as such.

WHEREFORE, the said Joseph B. Owens, Administrator of the Estate of Ruth H. Owens, deceased, will ask judgment

- at the hands of the Court against you in the sum of
page 4 } FIFTEEN THOUSAND DOLLARS (\$15,000.00).

JOSEPH B. OWENS, Administrator
of the Estate of Ruth H. Owens,
Deceased,

By: LEITH S. BREMNER

Counsel.

page 5 } VIRGINIA.

In the Clerk's Office of the Hustings Court of the City
of Richmond. Part II:

I, Chas. R. Purdy, Clerk of the said Court, do hereby certify
than on the 22nd day of August, 1946 Joseph B. Owens qualified
in my said Court as Administrator of the estate of Ruth H. Owens.
deceased, and gave bond as such in the penalty of \$500.00, pay-
able and contitioned according to law.

Given under my hand this 22nd day of August, 1946.

CHAS. R. PURDY, Clerk

By I. M. ROBB, D.C.

page 6 } And at another day, to-wit: at a Circuit Court of
the City of Richmond, held the 3rd day of July, 1947.

This day came the plaintiff and defendant, by counsel, and
on the motion of the plaintiff, by counsel, it is ordered that
this case be docketed. Then the defendant, by counsel, filed
herein its plea of "not guilty" and put itself upon the Country
and the plaintiff likewise.

page 7 } (Filed on July 3, 1947)

VIRGINIA:

In the Circuit Court of the City of Richmond

Joseph B. Owens, Administrator
of the Estate of Ruth S. Owens,
Deceased,

Plaintiff

v.

Virginia Transit Company, a
Virginia corporation,

Defendant

PLEA OF NOT GUILTY

The defendant Virginia Transit Company by its attorney comes and says that it is not guilty of the premises in this action laid to its charge in manner and form as the plaintiff hath alleged in the Notice of Motion for Judgment. And of this the said defendant puts itself upon the country.

ARCHIBALD G. ROBERTSON; p.d.

page 8 } And at another day, to-wit: at a Circuit Court of the City of Richmond, held the 25th day of March, 1948.

This day came again the plaintiff and defendant, by counsel, and thereupon nine jurors were chosen by lot, and the plaintiff, by counsel, and the defendant, by counsel, each struck off one, reducing the number to seven, who are as follows, to-wit: P. W. Brandt, J. M. Preston, H. A. Price, John E. Pugh, Jr., Ernest J. Barden, Jacob Bridge and F. J. Newcomb. And they were thereupon sworn well and truly to try the issue joined in this case and having fully heard the evidence, were adjourned until tomorrow morning at 10:15 o'clock A.M.

page 9 } And at another day, to-wit: at a Circuit Court of the City of Richmond, held the 26th day of March, 1948.

This day came again the plaintiff and defendant, by counsel, and the jury sworn in this case on yesterday appeared in Court in accordance with their adjournment and having heard the arguments of counsel, were sent out of Court to consult of a verdict, and after some time returned into Court with a verdict in the words and figures following, to-wit: "We, the jury, on the issue joined, find for the Plaintiff and assess damages at \$15,000.00, divided as follows: Father \$5,000.00, Son \$10,000.00.

Thereupon the defendant, by counsel, moved the Court to set aside the said verdict of the jury as contrary to the law and the evidence, and for other reasons set forth in writing and now made a part of the record, which motion the Court continued for argument to be heard thereon.

page 10 } (Filed on 3-26-48)

Owens vs. Va. Transit.

Mr. Robertson:

If Your Honor please, the defendant moves the court to

set aside the verdict as contrary to the law and the evidence and without evidence to support it, for errors committed by the Court in the admission and exclusion of testimony, for errors committed by the Court in the granting and refusing and modification of instructions and upon the further ground that there is no evidence in the case of negligence on the part of the defendant which would support a verdict for the plaintiff and for the further reason that the plaintiff's decedent was herself guilty of negligence as a matter of law which proximately caused or efficiently contributed to her death and bars any recovery by the plaintiff.

page 11 } And at another day, to-wit: at a Circuit Court of the City of Richmond, held the 21st day of June, 1948.

This day came again the plaintiff and defendant, by counsel, and the Court having heard argument upon the motion of the defendant to set aside the verdict of the jury rendered in this case, and now being advised of its judgment to be rendered herein doth overrule the said motion.

Therefore it is considered by the Court that the plaintiff recover against the defendant the sum of Fifteen Thousand Dollars, with interest thereon to be computed after the rate of six per centum per annum from the 26th day of March, 1948, until paid, and his costs by him about his suit in this behalf expended; to which action of the Court in overruling said motion and entering said judgment the defendant, by counsel, excepted.

It is further considered by the Court that the proceeds of said judgment, after the payment of costs and a reasonable attorney's fee, shall be paid by the Administrator as follows: One-third of said net proceeds to himself in his individual right, and two-thirds of said net proceeds to the duly qualified guardian of the infant son of the decedent.

Memorandum: Upon the trial of this case the defendant excepted to sundry opinions of the Court given against it, and on its motion leave is hereby given it to file bills of exceptions or certificates of exception herein at any time within sixty days from this date as prescribed by law.

page 12 } And on the further motion of the defendant, by counsel, the foregoing judgment is suspended for

a period of four months from this date, and until the appellate court has acted on a petition for a writ of error, presented to said court, or to one of the justices thereof, within four months from this date, and until this court shall thereafter authorize execution to issue upon said judgment, upon condition, however, that the defendant, or some one for it, shall, within ten days from this date, enter into bond in the Clerk's Office of this Court with surety to be approved by the said clerk in the penalty of Seventeen Thousand, Five Hundred Dollars, with all the conditions of a supersedeas bond as prescribed by Section 6351 of the Code of Virginia.

page 13 } And now at this day, to-wit: at a Circuit Court of the City of Richmond, held the 12th day of July, 1948.

This day came the plaintiff and defendant, by counsel, and thereupon the defendant tendered to the Court its Certificate of Exceptions, and on the request of the defendant the said Certificate of Exceptions is signed and made a part of the record in this case.

page 14 } (Filed on July 12, 1948.)

VIRGINIA:

In the Circuit Court of the City of Richmond

Joseph B. Owens, Administrator
of the Estate of Ruth H. Owens,
deceased,

Plaintiff

v.

Virginia Transit Company,

Defendant

CERTIFICATE OF EXCEPTIONS

I, Harold F. Snead, Judge of the Circuit Court of the City of Richmond, who presided over trial on March 25-26, 1948, in said Court of action entitled *Joseph B. Owens, Administrator of the Estate of Ruth H. Owens, Deceased, Plaintiff v. Virginia Transit Company, Defendant*, do certify that the foregoing Stenographer's Transcript, together with the one original exhibit specified in said Stenographer's Transcript, and the foregoing instructions which were given at said trial, is a true and correct transcript and report of all the evidence which was either offered or introduced at said trial; of all of the instructions

which were granted by the Court at said trial; of all the incidents of said trial; of all the motions, objections and exceptions of the respective parties at said trial, and of the action of the Court with respect thereto; and said Stenographer's Transcripts and original exhibit and instructions have been initialed by me for the purpose of identification.

I do further certify that the one original exhibit page 15 } which was introduced in evidence as shown by the foregoing Stenographer's Transcript and initialed by me for the purpose of identification is as follows:

Plaintiff's Exhibit No. 1, being certificate of qualification of Joseph B. Owens, Administrator of the Estate of Ruth H. Owens, Deceased.

Said one original exhibit may properly be transmitted to the Supreme Court of Appeals of Virginia as part of the record in this cause in lieu of certifying copy of said exhibit to said Court.

I do further certify that counsel for Joseph B. Owens, Administrator of the Estate of Ruth H. Owens, deceased, had reasonable notice in writing from counsel for Virginia Transit Company of the time and place when the aforesaid Stenographer's Transcript, exhibit and instructions would be tendered to the undersigned for signature and authentication, and that the said Stenographer's Transcript, exhibit and instructions were tendered to me on the 12th day of July, 1948, within less than sixty days after entry of final judgment in the aforesaid action; and the said Stenographer's Transcript of the evidence, together with the exhibit mentioned therein, said instructions, and copy of letter dated June 16, 1948, from Harold F. Snead, Judge, to counsel in the cause, are hereby made a part of the record in this proceeding.

Given under my hand this 12th day of July, 1948.

HAROLD F. SNEAD

Judge of the Circuit Court of the
City of Richmond

page 16 } (Filed on July 12, 1948.)

July 16, 1948

Messrs. Archibald Robertson,

Thomas A. Williams,
Leith S. Bremner,
Attorneys at Law,
Richmond, Virginia.

In Re: Joseph B. Owens, Administrator
of the estate of Ruth H. Owens,
deceased,

vs.

Virginia Transit Company,

Gentlemen:-

After having read the stenographer's transcript of the evidence and the memorandum on behalf of the defendant, submitted by counsel, and after having given due consideration to the able oral argument of counsel and the reasons given by counsel for the defendant why the motion to set aside the verdict should be sustained, I am of the opinion that the verdict of the jury should not be disturbed. Therefore, I am overruling the motion to set aside the verdict and will enter judgment for the plaintiff on Monday, June 21, 1948.

Very truly yours,

Judge.

s/s

page 17 } (Filed July 12, 1948.)

VIRGINIA:

In the Circuit Court of the City of Richmond
Joseph B. Owens, Administrator
of the Estate of Ruth H. Owens,

v.

Virginia Transit Company

Transcript of the testimony and other incidents in the trial of the above styled case before the Honorable Harold H. Snead, Judge of the Circuit Court of the City of Richmond, and a Jury on March 25-26, 1948.

Joseph B. Owens

Appearances:

Leith S. Bremner, Esq.,
Thomas A. Williams, Esq.,

Counsel for plaintiff

Archibald G. Robertson, Esq.,
Counsel for Defendant.

page 18 } Note:

The Jurors were examined on their voir dire, the Jury was selected and sworn, the witnesses were sworn and excluded from the courtroom, opening statements were made by counsel for both parties and the following testimony was introduced.

JOSEPH B. OWENS, the plaintiff, called on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

Q You are Mr. Joseph B. Owens, the administrator of the estate of Ruth H. Owens, your wife?

A Yes, sir.

Q Mr. Owens, did you qualify in August in the Hustings Court, Part II, as per this certificate as administrator of the estate of your wife?

A Yes.

Mr. Williams:

I offer that in evidence.

Note:

Filed and marked Plaintiff's Exhibit No. 1.

Q How old was Mrs. Owens?

A Ruth was 48 on June 24th before she was killed on July 19th.

Mr. Williams:

I offer in the expectancy from American Experience Mortality Table at 48 years is 22.36 years.

Joseph B. Owens

page 20 } Q What day was it your wife was killed?

A The 19th of July.

Q What year?

A 1946.

Q Do you know about what time of day it was?

Mr Robertson:

Wait one minute. Your Honor, unless Mr. Owens was an eye witness to the accident I object to his being questioned about the accident and if we are going to have any argument about it I suggest the Jury be excused so we can get it into the record and the Court rule on it.

Mr. Williams:

I will change the question.

Q When did you learn of the death of your wife?

A It was about just a few minutes after 4, sir.

Q Did you learn about how long before that it had been?

A I understood —

Mr. Robertson:

I object to that, Your Honor. That is hearsay.

Mr. William:

I withdraw the question.

Q Mr. Owens, what occupation or service had she been doing up there at Broad Street Station?

A Mrs. Owens was very much interested in the U. S. O. work, volunteer work, and she was also in the Canteen Work.

She had done both since the war started.

page 20 } Q Now do you know the purpose of her leaving the station and where she was going at that time?

Mr. Robertson:

I object to that, Your Honor. He cannot possibly know it except by hearsay. It is just a build-up from hearsay evidence.

The Court:

I sustain the objection unless you want to argue further on the matter.

Joseph B. Owens

Mr. Williams:

That is all right.

Q Did you know her itinerary?

A Yes, sir, I talked to her that afternoon over the phone, sir.

Mr. Williams:

I think that is the best evidence.

Mr. Robertson:

I ask that the Jury be excused and I may not object to it, but it is hearsay and a self-serving declaration.

The Court:

Do you insist on the question?

Mr. Williams:

Yes, sir, I think it is proper.

The Court:

Gentlemen, will you all stand outside a few minutes?

Note:

The Jury retired from the courtroom.

By Mr. Williams:

Q Now, Mr. Owens, did you learn from your wife where she was going at that time?

page 21 } A Yes, sir, I did.

Q At what time was it?

A That was sometime along about 2 o'clock of the day of the fatal accident that I talked to Ruth and Ruth said, "Joe, hurry home; we are going to have a light supper and I bought you a cake and you know we haven't had a chance to see Norris and Margaret since their trip to Florida and we will just have a light supper and have a Thalhimer's chocolate cake"—which I am very fond of.

Q Where was she going to get the cake?

A She was going by Thalhimer's to get that cake.

A She was going by Thalhimer's to get that cake, come

Joseph B. Owens

down from Broad Street Station and come down and pick the cake up and catch the car home. She said we would have this light supper and play bridge and have ice cream and that chocolate cake for the birthday party.

Q Whose birthday was it?

A Mine.

Mr. Robertson:

I object to that. It is perfectly obviously a build-up of hearsay evidence to win the sympathy of the Jury and whether they were going to eat ice cream and all that stuff has nothing more to do with the merits of this case than what I will have for supper tonight and I object to it because it is nothing but a build-up by hearsay and self-serving statements to win the sympathy of the Jury.

page 22 } Mr. Williams:

We are not asking for all the incidents; we are asking for the itinerary and I think that is proper.

Mr. Robertson:

I have stated to the Jury we are going to have evidence she said as she started out of the Station where she was going, but I am not going to agree to any such act as this for the sympathy of the Jury.

By Mr. Williams:

Q Now, Mr. Owens, under the Court's instruction I ask you just to relate where she was going —

A She was going to Thalhimers.

Q And what was the purpose of going there?

A To buy a chocolate cake.

Mr. Robertson:

I don't object to that.

Mr. Williams:

That is all we want.

Mr Robertson:

But, if Your Honor please, if they go into the other I am

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going to ask for a mistrial because the damage will be irreparably done then.

The Court:

I think your objection to the other part is well founded.

Mr. Williams:

We weren't offering that; just wanted to get the itinerary.

Just state the itinerary, Mr. Owens, when the Jury page 23 } comes back.

Note:

The Jury returned into the courtroom.

By Mr. Williams:

Q Mr. Owens, where was your wife going when she left the Broad Street Station?

A To Thalhimer's.

Q How was she going to Thalhimer's?

A By streetcar.

Q And would that be a westbound? —

Mr. Robertson:

I thought you were going to ask him why she was going to Thalhimer's.

Mr. Williams:

Yes.

Q Why was she going to Thalhimer's?

A To buy a chocolate cake.

Mr. Robertson:

Now, I want the record to show that, as I stated in the absence of the Jury, I have no objection to that testimony.

The Court:

All right.

By Mr. Williams:

Q And would that be an eastbound or westbound street car she would take?

Joseph B. Owens

A An eastbound, sir.

Q Do you know how far it is from the pedestrian cross walk entering Broad Street Station to the safety zone on the east side of Davis on the north side of the car tracks?
page 24 } A Will you ask me that again?

Q Do you know approximately how far it is from the cross walk, I mean the pedestrian entrance for people walking into Broad Street Station over to the safety zone on the east side of Davis?

A About 250 feet.

Q How far is it from the curbing on the northside of Broad to the first rail of the westbound tracks?

A About 30.

Q About 30 feet?

A Yes.

Q Do you know approximately how wide the westbound rails are?

A You mean the rail that the—

Q Between the two car tracks there.

A I reckon about a little over 4 feet.

Q Do you know how much those large cars extend over the track?

A Oh, I would say, close to 2 feet they extend over there.

Q Now, did your wife leave any children?

A She left one son.

Q What is his name?

A Junior—Joseph B. Owens, Jr.

page 25 } Q How old is the boy?

A The boy will be twenty in June, sir.

Q He is nineteen now then?

A Yes, sir.

Q What was the relationship between you and your wife; pleasant, unpleasant or what, and the boy?

A It was the three of us; we loved each other.

Q What was the condition of her health?

A Perfect, sir. Ruth never had a doctor over three or four times during her whole life, sir, outside of the time the boy was born, of course.

Joseph B. Owens

CROSS EXAMINATION

By Mr. Robertson:

Q Mr. Owens, you didn't see the accident?

A No, sir.

Q So of your own knowledge you know nothing about how it occurred?

A No, sir.

Q How old are you?

A I will be ~~fifty in~~ July, sir.

Q What is your occupation?

A I have been with Sydnor Howey for twenty-two years, coal, wood and building materials, sir; in my twenty-second year with them.

page 26 } Q Where were you and your wife living at the time of this accident?

A 4800 Riverside Drive.

Q How long had you lived in Richmond?

A All my life, sir; born in Richmond.

Q And she lived in Richmond all her life?

A No, sir.

Q How long had she lived in Richmond?

A We had been married going into twenty-three years. She would have been here about thirty years, sir.

Q How long have she been acting as hostess for the U. S. O. at Broad Street Station?

A She was one of the first invited to act as hostess and Ruth immediately accepted.

Q About how long had she —

A That was right after the war started.

Q Will you please answer how long?

A I would say about two years, sir.

Q And about how many days a week was she in service there?

A She had a regular day, that was Friday, and they called her often in the week.

Q But she was always there —

A Always there on Friday.

Q Over a period of how many years?

Joseph B. Owens

page 27 } A I should say about two years.

Q And sometimes oftener?

A Oftener, yes, sir.

Q Now you say she was in perfect health?

A Yes, sir.

Q Then she was in full possession of all her faculties?

A Yes, sir.

Q Her hearing was normal?

A Yes, sir.

Q Her eyesight was normal?

A Yes, sir.

Q Her method of walking was normal?

A Absolutely, sir.

Q And she was an active normal woman for her age?

A Yes, sir.

Q She was not employed anywhere?

A No, sir.

Q Does your son live at home?

A He is in college studying to be a minister.

Q Whereabouts?

A Morris Hale.

Q Where is that?

A Out of Asheville, North Carolina. He is here with me at the present time for the Easter holidays.

page 28 } REDIRECT EXAMINATION

By Mr. Williams:

Q Mr. Owens, could you state whether or not the safety zones as shown there between Robinson and Davis are today similar in design to those that were there when she was killed?

A I think the markers might be a little different there, sir.

Q What?

A When she was killed they extended down to where they joined one another.

Q You mean the one on the south side joined—came to a point —

A Yes, came to a point. The eastbound and the westbound came to a point like that, sir, (indicating). They overlapped just a little.

Joseph Ryan

Q They overlapped at what place with respect to the entrance to Broad Street Station?

A Just the other side of the pedestrian walk just enough to take them in. Ruth came down and walked across.

Q They took in the pedestrian crosswalk?

A Yes.

Witness stood aside.

page 29 } JOSEPH RYAN, a witness called on behalf of the
 plaintiff and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

Q You are Captain Joseph Ryan?

A Yes, sir.

Q Have you been attached to the Traffic Bureau of the City for many years?

A I was sixteen years in Traffic.

Q Are you acquainted with the situation up there at Broad Street Station as to where people going in and going from the station cross the street—Broad Street and enter the streetcar zone?

A Yes.

Q Would you state to the Jury what has been the practice for a number of years there?

A I will say this, when people are getting on the streetcars the streetcars stop in the middle of the block up there and they cross to go north in the depot and people from the trains cross in the middle of the block and catch the streetcar in the middle of the block. It has been the practice for a long time.

Q Would you say it has been in practice since July, 1946?

A It has been the practice —

page 30 } Mr. Robertson:

Now, if Your Honor please, I have an objection here and I ask that the Jury be excused, please.

Joseph Ryan

Note:

The Jury retired from the courtroom.

Mr. Robertson:

If Your Honor please, I object to any testimony as to what has been any practice there for a great many years. Now what we are entitled to have here—of course, the streetcar stops on July 19, 1946, were governed by ordinance and by regulation and not by any custom for many years or not by any law at any time except on July 19, 1946. Now I have no objection, of course, to the introduction of any proper ordinance or regulation or evidence regarding the streetcar stops or places to board or alight from cars at that locality on July 19, 1946. I do object to any other testimony regarding it upon the ground it is not material to this case because the question in this case is did this defendant obey the law or violate the law on July 19, 1946, shortly after 4 o'clock P. M.

Mr. Williams:

Now, if Your Honor please, the purpose of the testimony of showing pedestrians crossed in the middle of the block is for the purpose of negating the question of contributory negligence of the deceased and as notice to the Com-
page 31 } pany of the use of the streets there and to keep
the motorman on notice, and that is proper for that purpose. We are not trying to change by adoption of a custom the ordinance or anything of that kind.

The Court:

Mr. Robertson is not objecting to that question as on the day she was killed, as I understand.

Mr. Robertson:

Yess, as I understood—I may have misunderstood Capt. Ryan, but I understood Capt. Ryan to say on July 19, 1946, streetcars stopped there in front of the main entrance of Broad Street Station to let passengers on and off —

The Witness:

No, sir, I didn't say that.

Joseph Ryan

Mr. Robertson:

I knew that wasn't the law at that time. If I am in error, of course that is not involved, but if I am correct in this, then this whole thing is an effort to build up a sympathetic case here in the absence of testimony. Suppose this accident had happened between Fifth and Sixth Streets on Broad, do you think it would be relevant to let the evidence come in here that people did cross Broad Street between the intersections at Fifth and Sixth? What has that to do with the page 32 } merits of this case? You have a right to cross the street anywhere you want if you use ordinary care for your own safety. That is not an issue in the case, it has nothing to do with the case. The only thing having anything to do with this case is when this lady undertook to cross this track at this point on this particular time did this Company negligently strike her and was she guilty of contributory negligence. This other thing is not germane to the case. Of course, everybody knows they cross streets, every street in Richmond, and have got a right to cross them. How can that be relevant?

Mr. Williams:

I think the custom of crossing there into and from the Station is notice to the Company, makes them more vigilant and that is what it is for, that is the purpose of it. It is proper testimony in our opinion from that standpoint.

The Court:

I will allow the question.

Mr. Robertson:

The defendant objects and excepts to the ruling of the Court admitting this testimony for the reasons stated and to avoid interruption and delay will not interpose a separate objection and exception to each successive question and answer, but does not thereby waive any such objection or page 33 } exception, but specifically relies upon its objection and exception to this entire line of testimony from this and all other witnesses.

Coly Henley (col.)

Note:

The Jury returned into the courtroom.

By Mr. Williams:

Q Captain, the Broad Street Station is the Union Station for the Atlantic Coast Line, the R. F. & P. and other roads coming in from the north, isn't it?

A Yes, sir.

Q Is that walkway in and to the railroad station very frequently used by pedestrians?

A Well, Mr. Williams, I haven't been in traffic for six years and that is out of my district. I wouldn't like to testify to that exactly because not being in that district and not being in traffic for six years I don't know what they do up there now, to be frank.

Q I am not talking about today; I am talking about 1946.

A I was in the 1st District in the last six years and I wouldn't like to answer a question like that because it wouldn't be fair.

Q Isn't the William Byrd opposite the Broad Street Station?

A Well, yes, the Broad Street Station is at Davis Avenue and Broad.

page 34 } Q And almost opposite —

Mr. Robertson:

Don't lead him any more. It is not opposite.

A It is a little to the left.

Mr. Williams:

The Captain says he doesn't want to testify. I will withdraw the witness.

Mr. Robertson:

I have no questions.

Witness stood aside.

COLY HENLEY (col.), the witness called on behalf of the plaintiff and being first duly sworn, testified as follows:

Coly Henley (col.)

DIRECT EXAMINATION

By Mr. Williams:

Q Will you state your name to the jury?

A Coly Leroy Henley.

Q And where do you live?

A 4312 Fulton Street.

Q And where do you work?

A For the Railway Express Company agency at Broad Street Terminal.

Q How long have you been up there?

A I have been working up there the last time for about three years and a half straight, but of course, I been working for the Company about six years.

page 35 } Q Did you see the injury and accident in which Mrs. Owens was hit by a streetcar?

A Yes, sir.

Q Were you on the streetcar?

A Yes, sir.

Q Approximately where in the streetcar were you sitting?

A About half way or a little better than half way of the streetcar.

Q And on which side; the motorman's or the opposite?

A On the motorman's side, which is the lefthand side.

Q Did you see the lady leave the north curbing of Broad Street?

A Yes, sir.

Q Where was she located with reference to the entrance of Broad Street Station for the walking public?

A Right in the front of the path that goes—the walkway that leads to the Broad Street Station.

Q Where was the streetcar at the time she left the curbing?

A It was standing still at the corner just before you get to the front of the station.

Q Would that be Davis Avenue?

A Yes, sir, that is Davis Avenue.

page 36 } Q Would that be on the east or west side of Davis Avenue where the car was standing?

A That is on the east side.

Q Was the car standing in what is called the safety zone established there—at approximately the safety zone?

Coly Henley (col.)

A Standing approximately in the safety zone.

Q Now did you see her continue to walk across the street?

A Yes, sir.

Q Where was she when the streetcar started off?

A When the streetcar started off she was about half way between the first rail of the west bound track and the middle of the street; about the middle of the street is where she was when the car started off.

Q In the middle of what would be the westbound drive-way?

A Yes, sir.

Q Now did you see her when she entered the streetcar tracks when she went on the car tracks?

A When she entered the car tracks I still had my eyes on her. I could see her continuously walking across the street.

Q How far away was the streetcar when she went on the car tracks?

A It was about 65 feet away from her when she entered the first car tracks.

page 37 } Q What was the motorman doing at that time?

A The motorman was winding his change box. He had picked up a passenger at Davis Avenue and he was winding his change box continuously up the street as he started off. He looked to his left and was playing with his change box or winding it all the way up the street.

Q Did he ever look up before she was hit?

A I couldn't say exactly, but I don't believe that he did because I was looking right at him.

Mr. Robertson:

I object if he doesn't know. He either knows or doesn't know.

By Mr. Williams:

Q Can you state whether or not he sounded his gong for her?

A No, sir, he didn't.

Q Did he apply his brakes before he hit her?

A No, sir, he had hit her when he applied his brakes.

Q Now do you know what attracted his attention to her?

Coly Henley (col.)

Mr. Robertson:

I object to that, Your Honor. He can't know what was in his mind.

The Court:

Objection is made. Do you want to reply to the objection?

Mr. Williams:

No, I will withdraw that and change the question.
page 38 } Q Do you know whether or not anyone attracted his attention to her?

A No, sir. There was a hollering on the streetcar by two kids on there and I almost started to holler myself. You see—whether I hollered I don't know because I was somewhat excited over the accident myself and he stopped so suddenly that he shook the streetcar and practically everyone on the streetcar was shook up.

Q How far did he go after he applied his brakes?

A About 10 or 12 feet, not more than that.

Q Now where was her body with respect to where you were when the car came to a standstill?

A Her body was almost at the seat where I was sitting in the streetcar.

Q Could you state whereabouts her body landed in the street?

A Yes, sir, her body landed between the eastbound and the westbound rail with her head halfway across the first railing of the eastbound track and the blood was running out of her mouth and ears down that streetcar rail.

Q Was that one of the large cars?

A Yes, sir, it was one of the large cars.

Q What was the condition of the weather?

A It was fair and a pretty day, clear.

page 39 } CROSS EXAMINATION

By Mr. Robertson:

Q Who is the last person you have talked about this case to?

A Who is the last person?

Q Yes.

Coly Henley (col.)

A The last person I talked to about this case?

Q Yes.

A The last person I talked to was at my home with my wife and I have spoke of it several times with my uncle in South Richmond.

Q Who is the last lawyer you talked to about this case?

A Lawyer Williams.

Q This Lawyer Williams (indicating Mr. Thomas A. Williams)?

A Yes, sir.

Q When did you talk to him about it?

A I think it was about three days ago.

Q That was the first time you have ever talked about this case to anybody?

A Yes, sir.

Q How did you happen not to talk about it, going on a year and a half after it happened?

A Because of the fact that nobody seemed to have
page 40 } brought it up to me that seemed to be interested in
the case.

Q How old are you?

A Twenty-five.

Q What kind of work do you do up at the Broad Street Station?

A I am Railway Express separator.

Q What do you mean by that?

A That means that freight comes in to this City and it goes to other smaller cities—other smaller towns or villages and I route that the way it is supposed to go.

Q Now you saw this lady leave the north curb over in front of the station when the streetcar was standing still on the east side of Davis Avenue?

A She left the curb when the car was standing.

Q At the east side of Davis Avenue?

A It was right in front of the Broad Street Station —

Q I am talking about was the streetcar on the east side of Davis Avenue when she left the curb in the front of Broad Street Station

A That is the east side, I think; the righthand side.

Q And she left the curb there at the walkway where

Coly Henley (col.)

you enter at the main entrance in the middle of the Broad Street Station, didn't she?

A Yes, sir, she left the curb at that point.

Q And at that moment the car was standing still?

page 41 } A Yes, sir, ~~as she stepped off of the curb the car~~
~~was standing still.~~

Q And was she walking or running?

A She was walking normally.

Q In a normal—how?

A Normally, in an ordinary walk.

Q In an ordinary manner; she wasn't hurrying?

A No, sir.

Q She wasn't running?

A No, sir.

Q She was going in a normal manner?

A Yes, sir.

Q How far had she gotten away from the north curb when the streetcar started forward?

A About halfway across the street; that is about halfway between the curb and the first streetcar rail.

Q Did she ever stop?

A No, sir, she didn't.

Q Did she ever slow down?

A She didn't seem to slow down.

Q Did she ever change her direction?

A No, sir, she kept walking straight.

Q Was she walking straight across or catabias?

A She was walking straight across the street.

Q In a normal manner?

page 42 } A In a normal manner.

Q And when the streetcar started off she was half-way from the curb over to the first rail of the northbound track?

A When the streetcar started off from Davis Avenue she was halfway in the middle of the street.

Q Was she about the middleway of the sidewalk coming out there from the front of the Station? You know the walkway that comes down from the main entrance from the station to Broad Street?

A I don't quite get that question clear.

Q I say you recall that there is a walkway leading from

Coly Henley (col.)

the main entrance of Broad Street Station southwardly to Broad Street?

A It is a walkway leading from Broad Street Station to Broad Street.

Q From the main entrance of Broad Street Station?

A From the main entrance, yes, sir.

Q Was she about in the middle of that walkway?

A No, sir, she was about in the middle of that walkway at the curbstone.

Q That is what I am getting at. She was about the middle of the walkway coming out from Broad Street Station and she was at the north curb of Broad Street? Do you understand what I am asking?

A You are saying she was in the middle of the walk-
page 43 } way leading from Broad Street Station. Was that
your question?

Q Yes, and at the north curb of Broad Street. I am trying to get your testimony down correctly so there won't be any question about it. In other words, she had come down the walkway from the main entrance walking about in the middle of the walkway and had gotten to the north curbing of Broad Street. Is that correct?

A She had come down a little less than just the center of Broad Street Station.

Q She was a little more nearer —

A She was a little more nearer the east of the center, a little nearer to the east of the center of the walkway.

Q And she had reached the north curb?

A Yes, she had gotten to the curb?

Q And she stepped from the curb while the car was still standing still?

A Yes, she did. She stepped from the curb while the car was standing still.

Q Now from where the car was standing still up to the point that it struck her how many feet would you say it was.

A About 241 feet.

page 44 } REDIRECT EXAMINATION

By Mr. Williams:

Q How do you know that is 241 feet?

L. D. Drinkwater

A Because I measured it in the presenec of you and Mr. Owens.

Q Did you use a tape or stick or what?

A A tape measure.

Q I forgot to ask you about those safety zones over there for pedestrians who would walk to streetcars going westbound and eastbound. Do you know whether they meet?

A Yes, sir.

Q With respect to the Broad Street Depot entrance?

A Yes, sir.

Q Where do they meet?

A They meet in the middle of the block. The safety zone is a little better than halfway—the safety zone on the east side is better than—way over halfway of the entrance to Broad Street Station.

Q That is, for passengers going eastbound or taking east-bound streetcars?

A Yes, sir; that is for passengers taking the westbound streetcar; that is, the zone on that side, and the safety zone on the other side means the safety zone on the west side.

Q That would be for passengers going eastbound?

A Yes, sir.

page 45 } Witness Stood Aside.

L. D. DRINKWATER, a witness called on behalf of the plaintiff and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

Q Mr. Drinkwater, would you kindly state your initials to the Jury?

A L. D. Drinkwater.

Q And where do you live?

A Glen Allen.

Q Mr. Drinkwater, did you see the happening in which Mrs. Owens was killed by the streetcar on January 19, 1946?

A I saw her fall from the car on the lefthand side.

Q And where were you?

L. D. Drinkwater

A I was behind the streetcar coming up the street the same way the streetcar was going.

Q Did you ever see her before she was hit by the streetcar?

A No, sir.

Q Did the streetcar sound any bell or gong before you saw her body hurtle?

A No, sir, not to my knowledge.

Q Did you go over there to her?

page 46 } A Yes, sir.

Q Did she have anything in her hand?

A She had some change in her hand.

Q When you got there was she dead?

A No, she died in a few minutes after I got there.

Q Do you know how fast the streetcar was going?

A No, sir, I don't.

Q You didn't notice that?

A No, sir.

Q What did you do with the change that she had in her hand or did you take it?

A I didn't bother it, but I took up a quarter lying close to her purse and laid it on her purse.

Q Where was the body with reference to the streetcar when you got there?

A She was laying on her left side and her head was in the southern track and the blood was coming from her nose and draining down the track about middle way of the car that hit her.

Q She was lying about middle way of the car that hit her?

A Yes, sir.

Q Did you know Mrs. Owens before this?

A No, sir.

page 47 }

CROSS EXAMINATION

By Mr. Robertson:

Q What is your business?

A I am a mixer at the Philip Morris plant. I am the head mixer at the making department.

Q Were you driving your automobile westerly up the street behind the streetcar?

L. D. Drinkwater

A Yes, sir.

Q Do you recall what the condition of westbound traffic was? Was there other westbound moving traffic or do you know?

A The only thing I know it was a Plymouth automobile in front of me and I stopped behind the Plymouth when it stopped beside the streetcar.

Q You don't recall any other westbound traffic there at the time?

A No, sir.

REDIRECT EXAMINATION

By Mr. Williams:

Q Was there anything to obstruct the motorman between the Plymouth car and her body?

A I didn't see anything at all, sir.

Witness stood aside.

page 48 } Mr. Williams:

I want to read these ordinances.

Mr. Robertson:

I object. You can take them up in the instructions, but the Virginia practice does not permit the reading of law to the Jury. I object to it.

Mr. Williams:

If Your Honor please, I have alleged violation of ordinances. Ordinances are not recognized by the Court except as introduced as evidence.

Mr. Robertson:

I will agree that the appropriate ordinances may be introduced in the form of instructions. That is the way we always do it.

Mr. Williams:

That is all right. I just didn't want to overlook that.

Joseph B. Owens, re-called

The Court:

All right, you Gentlemen are in agreement on that.

Mr. Bremner:

If Your Honor please, that is the plaintiff's case.

Mr. Williams:

Before we rest I would like to recall Mr. Owens.

JOSEPH B. OWENS, being recalled on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Williams:

Q Would you tell the Court and the gentlemen of the jury how did you happen to get the name of Coly Henley?

A After this thing happened, of course, I was all page 49 } to pieces and Mrs. Duke —

Mr. Robertson:

I object to this, if Your Honor please. What he did about Mr. Henley and being all to pieces —

Mr. Williams:

Don't state that.

Mr. Robertson:

I object to this testimony along that line. It is perfectly obvious they got him and had a right to get him anyway they could.

The Court:

Are you insisting on the question?

Mr. Williams:

Not exactly that question. I would like to get in the fact.

Q How did you learn of the witness?

Mr. Robertson:

I object to that. He is bringing in a whole lot of stuff there

Joseph B. Owens, re-called

just to build up sympathy and they are going to argue it. I hate to keep interrupting every time and ask the jury to go out, but if he argues it in the presence of the jury you might as well let it in and I will have to sit here and take it. ✓

The Court:

Gentlemen, you will have to step outside again.

Note:

The jury retired from the courtroom.

Mr. Williams:

If Your Honor please, when Coly Henley was on the page 50 { stand Mr. Robertson asked him, "You hadn't talked to anybody for near two years" or something and I want him to relate the fact how it happened it was such a vast time between the period of the happening and the time he did talk to the witness:

Mr. Robertson:

Let the witness state what he did and I might not object to it. I don't want a jury speech here. I want the answer to the question and not a jury argument enlisting the sympathy of the jury which is what the gentleman is trying to do.

By Mr. Williams:

Q When did you learn of Henley's relation to this case?

A I learned that very soon after this thing happened, Mr. Williams; I would say a week or two. As I tried to say—is it all right to say how I learned it?—Mrs. Duke was connected with the cafeteria at Benedictine and Ruth and Mrs. Norris were good friends, exceptionally good friends, and Mrs. Norris being active in the Benedictine cafeteria, Mrs. Duke said to her—said to Mrs. Norris that Mr. Duke heard one of the porters say he saw this accident and so we went—he gave the name and Mr. Howey took it as Henry Porter. He should have taken it as Henley, the porter, but he took it as Henry page 51 { Porter. Mr. Howey went up to see him on 22nd Street and then he learned the name and the colored

Joseph B. Owens, re-called

man had moved and here about two or three weeks ago I looked on a stick file —

Mr. Williams:

Leave off the details.

The Witness:

I want somebody to tell me —

Mr. Williams:

Just leave off the embellishments; we are trying to confine you to the facts.

A (continued) I looked on this stick file and I came across Henry Porter and Mr. Howey said, "Well, Joe, I know where he lived" and I went up there and found his name was Henley and he was a porter and I went over in Fulton and found him.

Q And he was connected with the Railroad Express?

A Yes, sir.

By Mr. Robertson:

Q Have either you or your counsel promised to pay him anything for his testimony?

A No, sir.

Mr. Robertson:

I object to all that testimony because it has nothing to do with this case. He goes there and says Ruth and Mrs. Duke were such good friends and everything —

The Witness:

Pardon me —

Mr. Robertson:

I am talking to the Court now. It is just building up sympathy and I object to any such performance in page 52 } the trial of this case. I have no objection to his saying this, that he had reason to believe there was a colored man on that car that had seen the accident and he immediately tried to find out who he was and got in touch with him. He has a right to say that.

Joseph B. Owens, re-called

Mr. Williams:

We agree to stipulate like this, that he learned —

Mr. Robertson:

I won't stipulate anything.

Mr. Williams:

That he learned through an official of the Railway Express—
through the wife of an official of the Railway Express that one
of the porters there had seen it and he got the name mixed up.

Mr. Robertson:

Now, Your Honor sees what they are trying to do; they
are trying to make virtually Mr. Duke a witness in this case.
Duke doesn't know whether this colored man is telling the
truth or not. I have no objection to putting in the testimony
that they finally got him. I object to pulling an act at the
expense of this defendant in this case.

The Court:

Why not ask Mr. Owens here the question how he found
out Henley knew something about this case and he can answer
through a friend of the family? How would that be?

page 53 } Mr. Williams:

That is all right.

Mr. Robertson:

I want him to say he learned that there was this colored
man that said he had seen the accident and he had been trying
to locate him ever since and located him since then.

The Court:

I don't see any objection to that. Suppose you ask that
question.

By Mr. Williams:

Q Mr. Owens, how did you learn of Henley's relation to
the case?

A Through a friend of the family.

John L. Corr

Q And what was the delay between that period that you learned and the time you did find him?

A A mix-up in the name. We had it as Henry Porter instead of Henley, the porter.

Note:

The jury returned into the courtroom.

The Court:

Mr. Williams, will you read the question and answer?

Note:

The Reporter read the questions and answers as follows:

"Q Mr. Owens, how did you learn of Henley's relation to the case?

"A Through a friend of the family.

"Q And what was the delay between that period page 54 } that you learned and the time you did find him?

"A A mix-up in the name. We had it as Henry Porter instead of Henley, the porter."

Mr. Robertson:

I wish the record to show the defendant has no objection to that testimony.

Mr. Williams:

That is the plaintiff's case, if Your Honor please.

JOHN L. CORR, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Mr. Corr, your name is John L. Corr?

A Yes, sir.

Q Mr Corr, were you the motorman in charge of west-bound car number —

A 448.

Q — of 448 when Mrs. Owens was struck and fatally injured up in the vicinity of Broad Street Station?

A Yes, sir.

John L. Corr

Q About what time in the day did that accident happen, if you recall?

A It was a little after 4 in the afternoon.

page 55 } Q Do you remember what day of the month and week it was?

A July 7th, I believe it was.

Q I think it is agreed it was July 19th.

A The 19th.

Q That was the only accident you had involving Mrs. Owens?

A Yes, sir.

Q Which direction was your car proceeding?

A West.

Mr. Williams:

Don't lead him any more.

Mr. Robertson:

When I say which direction the car was going —

Mr. Williams:

I mean changing it from the 7th to the 19th.

Mr. Robertson:

You don't want to say it was the 7th, do you?

Mr. Williams:

I think he ought to testify what he knows.

Mr. Robertson:

It is claimed it was the 7th and not the 19th?

Mr. Williams:

I don't make any claim at all. The only thing I don't want you to lead your witness.

By Mr. Robertson:

page 56 } Q Mr. Corr, do you remember what was the last stop you made before this accident happened?

A I was going west on Broad and I got a bell at Davis

John L. Corr

Avenue and I let off and taken on passengers there. It was several cars going west ahead of me.

Q Do you mean streetcars or automobiles?

A Streetcars—and when I crossed Davis Avenue I cut my control off, cut my current off and was just rolling along and this lady came from between some automobiles in the middle of the block and right straight across in front of my car.

Q What do you think was the fastest speed of your car from the time you left Davis Avenue until you hit the lady?

A That is awfully hard, but not over 10 miles at the most.

Q Where was she the first time you saw her?

A The first time I caught a glimpse of the lady is when she come from the cars and ran right straight across in front of my streetcar. She was looking west on Broad.

Q How far away from the nearest rail of your track was she when you first saw her?

A How far was she from the rail of my track?

Q Yes, how far did she have to still come towards the track to get on the rail?

A That is hard to say I could say 6 or 8 foot,
page 57 } something like that.

Q How far was your car away from her at that time? How far was your car east of her at that time?

A I would say about from here to that gentleman right there (indicating).

Mr. Robertson:

Can we agree that is about 10 feet?

Mr. Williams:

Yes, I think we can say that is about 10 feet.

By Mr. Robertson:

Q Was she moving or standing still when you saw her?

A She was moving, just went straight across in front of my car.

Q In what way was she moving? Was she walking or running slow or fast or how?

A No, she seemed to be in a big hurry. I couldn't say she was running. I wouldn't like to put the speed she was

John L. Corr

going at because it looked like she was in a big hurry and it was impossible for me to stop the car.

Q When you first saw her what did you do?

A I threw my car into emergency, which we always do in those things when a case like that happens.

Q Was the car in good operating order?

A Yes, sir.

Q Which is the quickest way to stop it?

page 58 } A Throw it into emergency is the quickest way.

Q When you throw it into emergency what does that do?

A That locks all the brakes at one time on it.

Q Does that apply any sand?

A Yes, sir.

Q Did you succeed in stopping before you hit her or did you hit her?

A No, I was stopping when the car struck her.

Q What part of the car struck her?

A I am sitting here operating and this corner of the car struck her (indicating).

Q You mean the left corner?

A The lefthand corner, yes, sir.

Q And where did she fall?

A Around in between the tracks.

Q How far would you say your car ran from the time you first saw her until it stopped?

A When I first saw her—well, I would say I am not very good on estimating distances, but I should say about 20 feet in all from the time I seen her until the car stopped.

Q Was she at the crossing or between crossings?

A Between the crossings.

Q About how far west of Davis Avenue was she undertaking to cross the street?

A Let's see; right in front of Edwards' cafeteria.

page 59 } Q Would you say that was—how far through the block going from Davis towards Robinson.

A Let's see; around 50 feet, I imagine, from the corner up there.

Q What is the next stop for westbound cars after you leave Davis Avenue?

A Robinson Street.

John L. Corr

Q Is there or is there not a stop there in front of the walkway that comes out of the center of Broad Street Station?

A No, sir, there is no stop there.

Q Was this lady crossing straight or crossing catabias?

A She zigged-zagged through them automobiles. That is what happened.

Q Do you remember whether or not you sounded your gong?

A Yes, sir.

Q Do you remember how many passengers got on your car at Davis Avenue?

A No. That time of the day it is awfully hard to say.

Q Was anybody standing up there with you when you proceeded from Davis Avenue?

A Standing up to block my view?

page 60 } Q Yes.

A No, sir.

Q Do you remember whether or not you were grinding your change carrier?

A No, sir.

Q What were you doing?

A I was looking straight ahead watching the other cars in front of me.

Q Were you looking down or up or either direction?

A No, right direct.

Q Did you get off and go to the lady?

A Yes, sir.

Q Did you render what assistance you could?

A That is right. In fact, I held her head in my hand.

A Juror:

May I ask a question?

The Court:

Yes, but don't answer it until objection is made.

The Juror:

I just want to know how many were on the streetcar, whether full or partly full, how many people on the car?

John L. Corr

The Court:

There is no objection to that?

Mr. Robertson:

No.

The Witness:

Well, Mister, I can't really come out and say. I know I had a right good load on it. You see, it is a labor
page 61 } trip in the afternoon and you know what the street-cars going west are.

By Mr. Robertson:

Q Maybe this will clear it up. Were any people standing in the aisle or was everybody sitting down or do you know?

A Well, I couldn't say.

CROSS EXAMINATION

By Mr. Williams:

Q Now, Mr. Corr, how close was the nearest streetcar to you in front of you?

A How close was the nearest streetcar to me?

Q Yes.

A Well, I would say about a third of a block.

Q Now if a block is 300 feet, that would be 100 feet?

A No. You see, in other words, when you get up to Robinson Street it is a switch there and you have to hold your switch, drift into it.

Q You said there were several cars ahead of you. I just wanted to know the nearest one to you.

A I would say about my car length.

Q Then there was one car ahead you of one car length?

A Yes, sir.

page 62 } Q How far was the next car ahead of that?

A I couldn't tell you that.

Q How many streetcars were there in that block, would you say, between Davis and Robinson just at the time you were proceeding west?

A I couldn't say that because I don't know.

John L. Corr

Q You were asked a moment ago what you were looking at and you said you were just watching the cars, and you didn't say a car, but the cars ahead of you, meaning streetcars on your track.

A That applies to automobiles, too.

Q I want to know how many streetcars you were looking at.

A I couldn't see but the one in front of me, but it was plenty of automobiles going along up the side.

Q Then you were mistaken when you said you were looking at the cars; you weren't looking at but one streetcar?

A Don't automobiles come under the head of cars?

Q The Judge won't let me answer that question; I am not on the stand. Now, Mr. Corr, the only traffic you saw was the streetcars ahead of you; weren't they?

A No, that is not all the traffic I seen.

Q Were there any automobiles ahead of you?

A Just a line of them, just like always in a hurry going up the street.

page 63 } Q Just right straight up the street?

A Just a steady line of automobiles at that time of day.

Q Right there between you and Robinson Street?

A That is right.

Q You didn't see the lady leave the sidewalk, did you?

A No, sir.

Q You didn't see her walk across from the curbing until she got within 6 feet of you?

A I didn't.

Q The first time you saw her there she was 6 feet from your track?

A The first time I saw the lady she ducked right across in front of my streetcar.

Q She was going and ducking that way in front of your streetcar? Was she holding her head down?

A I didn't say she held her head down.

Q You said ducked. What do you mean by ducking?

A Well, maybe I don't know.

Q Well, tell the jury whether you do or not.

A She crossed in front of my car and the car struck her.

Q You said a moment ago she ducked in front of your

John L. Corr

car. What did you mean by that?

page 64 } A What I mean by ducking?

Q Yes.

A Maybe I don't know it as well as you do, but in other words, when she came across out here in this traffic she went right across my track like that, not even looking where she was going, and I rang my bell and she didn't respond to it at all and I threw it into emergency.

Q Now you said she was 6 feet at that point from your track, is that right?

A Mr. Williams, it has been so long I just can't remember.

Q You answered it for Mr. Robertson. You told him she was 6 feet from the track when you first saw her. Is that right or wrong?

A Well, I guess it is right.

Q I am sure His Honor won't want you to guess. Do you know that is right?

A I am trying to tell you as near truthful as I can.

Q Is it a guess or fact she was 6 feet from your rail when you first saw her?

A No, I wouldn't say that.

Q You wouldn't say it is a guess or fact?

A I couldn't say whether I would be telling the truth or something false.

Q If she was as far away from your track as you can't tell exactly, how close was the nearest automobile to
page 65 } your streetcar at the time you first saw her?

The Witness:

Is that a fair question?

Mr. Robertson:

Yes, you have to answer his questions.

A You see, it is a safety zone here for pedestrians, it is a safety zone going up here and that is split in between there and she come between the two safety zones to cross over to the south side. She come from the north side to cross over to the south side.

Q Now then how close was the nearest automobile that was proceeding westward to your streetcar?

John L. Corr

A Well, they was all in a line outside of the safety zone. It is a white line comes up there.

Q You mean there was no space between the cars at all and the nearest vehicle was the length of your hand from the streetcar?

A No, I didn't say that. Here —

Q Talk to the jury and show them because I want them to see what you are doing.

A Well, on Broad Street we have two rails, one east and one west, and when this lady was struck by my car she fell down in between the tracks this way and I could look right out my door like that and see her laying there and I hopped off the streetcar and took her head in my hand and held
page 66 } it and got aid for her, but to come down and measure the exact distance I don't believe anybody could do that.

Q Maybe you and I are not speaking of the same thing. I was talking about the righthand side of the streetcar and you got over on the lefthand side. How close—and I will ask you the third time—you said there were a line of cars there all up the street and I ask you how close to your streetcar was the nearest automobile at the time that you first saw this lady?

A Mr. Williams, I am telling you right now it ain't any way in the world I can answer your question because it was a stream of cars coming up there.

Q Look around the courtroom and point out some object how close or how far away from your streetcar was the nearest automobile you said was in that unbroken line going west?

A Well, I could go up there and see the traffic line up there and show you.

Q Mr. Corr, is that all you can answer to that question? Is that your best answer? Was it ten, fifteen, twenty or thirty?

Mr. Robertson:

I object to that. You asked the question and the witness answers it and it is for the jury to say what they think of his answer. You can't put the witness on any such spot as that.

The Court:

Objection sustained.

John L. Corr

page 67 } Mr. Williams:

I withdraw the question.

Q Mr. Corr, are you able to tell His Honor and the jury whether the nearest automobile to your streetcar going west in the way you were going was 10, 15, 20 or 30 or 50 or 100 or 200 feet?

A No, I couldn't say that; 4 or 5 feet at the most off on the right.

Q The nearest automobile to you was 4 or 5 feet away?

A Just beyond the white line going west.

Q Now how far ahead of that automobile was the next automobile going west?

A Well, they are just like this (indicating) going up and down in the afternoon.

Q I am not talking about this afternoon or yesterday; I am talking about that particular time.

A That particular day they were going just like that and about three abreast.

Q What time of day was it?

A A little after four o'clock in the evening.

Q Would you kindly tell His Honor and these gentlemen of the jury if the cars were tail to tail like that or tail to head—head to tail, if the cars were tied up head and tail like that how she ever got in between the two cars?

A I couldn't tell you.

page 68 } Mr. Robertson:

Wait a minute. I object to that. In the first place, he hasn't said they were in such a situation as that; in the second place, that is a question for the jury and not for this witness.

Mr. Williams:

I think the question is entirely proper.

Mr. Robertson:

The witness has not made any such statement and, in the second place, the witness does not have to explain how she —

John L. Corr

The Court:

The witness has said there was a line of cars proceeding west. I sustain the objection.

Mr. Bremner:

If Your Honor please, may I call your attention to this —

Mr. Robertson:

I know about Mr. Bremner's jury speeches and I ask Your Honor to exclude the jury again.

Note:

The jury retired from the courtroom.

Mr. Bremner:

All I was going to say, Your Honor, was that the records should show that when he said the cars were going west on Broad Street at least three abreast they were just like that and he put his hands together (indicating). That is what I want to call to Your Honor's attention.

page 69 } Mr. Robertson:

I don't object to that. The question Mr. Williams asked still is not justified. It is misquoting the witness unfairly and is trying to make him explain something he does not have to explain under the law.

Mr. Bremner:

I think it was proper for this reason, the witness not only by word of mouth but by putting his hands together said the cars were right together three abreast and Mr. Williams' question in effect, I don't remember the exact words, was how did she get between the two cars, meaning the rear of one and the front of the other, if that was the position. I think in view of the witness' own statement the question is highly proper and most material.

Mr. Robertson:

Mr. Williams put his hands out like that (indicating).

John L. Corr

Mr. Williams:

I will change the question to read this: Will you explain —

Mr. Robertson:

He doesn't have to explain it.

Mr. Williams:

I will change the question.

The Court:

Let us see what the question will be to see whether he objects to it while the jury is out.

By Mr. Williams:

page 70 } Q Mr. Corr, could you tell His Honor and the jury
if the cars were going west—automobiles three abreast
head to tail or tail to head, as it would be, one right immediately
behind, no separation, did you notice how she got between the
two cars?

Mr. Robertson:

Now, if Your Honor please, that is misquoting the witness. He hasn't said they were going there and she zigged-zagged to go between them, and it is trying to change the form but not the substance. He is trying to make the witness explain how she did it and he doesn't have to explain it under the law.

The Court:

I don't recall his using the words "head to tail".

Mr. Williams:

No, but he said tied up like that (indicating).

The Court:

I think you have a right to ask him what does he mean by like that.

By Mr. Williams:

Q Mr. Corr, what did you mean when you said to the jury that the automobiles were tied up like this (indicating) going west, kind of touching your thumb of one hand with the finger

John L. Corr

of the other so that there would be no separation between the things?

A Have you ever noticed that cluster in the afternoon?

How long does it take you to get across the street
page 71 } sometimes?

The Court:

That isn't responsive.

A (continuing) The only thing I can answer I didn't have no tape measure or rule to measure the distance.

By the Court:

Q Did you mean they were jammed together going up the street?

A Your Honor, you know how they do in the afternoon.

Mr. Williams:

No, we don't know.

The Court:

Unfortunately, he can't answer.

The Witness:

It is a hard question for anybody to answer the length of time it has been.

Mr. Williams:

I guess we had better have the jury back in.

Note:

The jury returned into the courtroom.

Mr. Robertson:

I wish the record to show the defendant has no objection to the question Your Honor has ruled is proper.

Mr. Williams:

You want the record to show when the jury gets here you make no objection. You are talking about stage playing; I think you are telling —

John L. Corr

Mr. Robertson:

I want both, but you are stage playing now.

The Court:

Go ahead, Gentlemen.

page 72 } By Mr. Williams:

Q Mr. Corr, will you tell His Honor and the jury what you meant a moment ago by saying that the automobiles going west were tied up tight like indicating with the finger of one hand on the thumb of the other extended.

A I didn't say they were tied up. I said it was a steady stream of traffic going west.

Q Didn't you say the nose of one was at the back of the other, right straight up the street?

A No, sir, I didn't say that.

Q What did you say?

A In other words, when you come out there in the afternoon and see them trying to pass each other just like a see-saw, so they couldn't have been back to back —

Q You said they were three abreast, didn't you?

A I still say they were three abreast.

Q Just at the time she went on across the street?

A I didn't say particularly at that time. All the way up Broad Street in the afternoon you see it.

Q You say you didn't see it particularly at the time she crossed. Do you mean there wasn't a steady stream of traffic up there at the time she crossed or it was?

A It was a steady stream of traffic going up there.

Q Then you mean now to say they were three abreast at the time she was crossing; is that right or not?

page 73 } A Is that a fair question?

Q Don't you think you have astute counsel? If I hadn't asked you a fair question, he would jump me on it.

The Court:

Answer the question the best you can.

The Witness:

I will try to do it, but it has been so long —

John L. Corr

Mr. Robertson:

You answer the question. It is a fair question and you should answer it. You have no right to ask other people questions. If you don't know, you have a right to say so; if you do know, say so and stick to it.

Mr. Williams:

Read him the question.

(Question read as follows:).

Q Then you mean now to say they were three abreast at the time she was crossing; is that right or not?

A I don't like to say yes and wouldn't like to say no.

Q Mr. Corr, Mr. Robertson asked you if you sounded your bell and your answer was yes. Where were you when you sounded your bell?

A Drifting along up Broad Street with no current on the car at all; just started on across the street, cut my control off.

Q You sounded your bell when you crossed Davis Avenue?

A I absolutely did.

page 74 } Q And that was what you meant when Mr. Robertson asked you if you sounded your bell; isn't that right?

A Yes, sir, I reckon so.

Q Now, then, when you got down there next to this lady you didn't sound it again, did you?

A I was steadily sounding it.

Q You didn't tell him a moment ago —

Mr. Robertson:

Yes, he did. You are misquoting him.

A I was steadily sounding it to keep people from walking in front of the car in the middle of the block.

Q You were steadily sounding your gong from Davis Avenue up to the point —

A Yes, sir.

Q How many times would you say you sounded your bell?

A I never counted it; I reckon a dozen or more.

Q You sounded your bell a dozen times between Davis

John L. Corr

Avenue and the time you hit her. You didn't sound it particularly for her, though?

A I sounded it to be safe and let anybody know the street-car was coming up there.

Q You did know that pedestrians crossed going to and from the Station taking streetcars at that point, isn't that right?

A Not supposed to do it.

page 75 } Q I am saying—not supposed, but I am talking about what you know.

Mr. Robertson:

I object to the question. The question is what this lady did at this time and what this operator did at the time.

Mr. Williams:

I think the question speaks for itself.

The Court:

I overrule the objection.

Mr. Robertson:

Exception for the reasons stated to this and all other questions along this entire line.

By Mr. Williams:

Q All right, Mr. Corr.

A They aren't supposed to cross in the middle of the block,

Mr. Williams.

Q That wasn't my question.

Mr. Williams:

Read the question again.

(Question read as follows:)

Q You did know that pedestrians crossed going to and from the Station taking streetcars at that point, isn't that right?

A No cars stop there.

By the Court:

Q What is that?

John L. Corr

page 76 } A No streetcars stop there in the middle of the block.

The Court:

That is not responsive to the question.

Mr. Robertson:

Yes, he used that in the question.

The Court:

He asked him whether or not he knew people walked across at that point.

Mr. Williams:

To go east.

Mr. Robertson:

And your question didn't ask about the car stop?

Mr. Williams:

No.

Q Now, I will ask you again. Is it not a fact—how long have you been driving on that route there on Broad Street going through that block?

A About four years.

Q In all your experience in those four years, hasn't it been a fact that people going to and from the railroad —

Mr. Robertson:

If Your Honor please, I can't sit here in duty to my client and not object to that.

Mr. Williams:

Wait a minute.

Mr. Robertson:

Don't interrupt me. He asked him if he didn't know in all the past four years —

John L. Corr

Mr. Williams:

I ask the witness be removed so he won't be coached
page 77 } by counsel.

The Court:

All right. Step out.

Note:

The witness retired from the courtroom.

Mr. Williams:

If I was going to make that speech you would ask the
jury to go out.

Mr. Robertson:

Yes, I have that same right.

Mr. Williams:

I want them to hear me. I have no objection.

Mr. Robertson:

I know, because you want to get all sorts of improper stuff
in. Now, if Your Honor please, the issue in this case is that
this particular time was this lady exercising ordinary care for
her own safety and the other issue is did this motorman neg-
ligently run her down; that is, at this one time. Now what has
happened there all during the preceding years has nothing on
earth to do with it. I object to it for that reason.

Mr. Williams:

The purpose of the question is to apprise this agent of the
company of the custom of people crossing there to make them
more vigilant and that is the purpose of the question and I
think it is entirely proper.

The Court:

I will allow the question.

Mr. Robertson:

The defendant excepts to this and all other questions upon

John L. Corr

this entire line of testimony for the reason stated.

page 78 } Note:

The witness returned into the courtroom.

By Mr. Williams:

Q Throughout your experience in four years have you or have you not observed that people going to and from the railroad station leave the station and cross the streetcar tracks at that point to enter the safety zone, say they are going east to take the safety zone that extends from that point to Davis Avenue where streetcars stop?

A Well, I reckon lots of people has crossed there but they are not supposed to do it.

Q But the Court doesn't let us make the correction and that has been practically throughout your experience?

A I have seen lots of people cross in the center of the block.

Q Could you state to His Honor and the jury whether you sounded—when you saw her whether you sounded your bell first or applied your brakes first?

A To answer it correctly, Mr. Williams, I was ringing the gong before I even saw the lady and just as soon as I got a glimpse of her I just dropped my car into emergency.

Q Then you didn't sound it afterwards?

A Yes, I had my foot steady on the gong.

Q Then you were doing both, applying the brakes —
page 79 } A I didn't have to apply my brakes; I just turned it aloose.

Q How could you sound your gong and release the brakes at the same time.

A Right easily.

Q Wasn't it necessary for you to keep your foot—to keep your car in gear to keep your foot on the pedal?

A Do you know the mechanical end of it?

The Court:

Don't ask Mr. Williams any questions.

A (continuing) You see, Mr. Williams, it is a little pedal down there that you put your foot on and that acts as an

John L. Corr

emergency down there. If I turn loose everything up here, that car will go right into emergency.

Q Don't you have to release the pedal with your foot?

A Just move your foot off.

Q Yes, but you can't have your foot on that pedal and let the car go into emergency too. The car won't go into emergency if you don't release the pedal and your hands, isn't that right?

A Oh, yes, I can put the emergency on by taking my foot off the pedal.

Q Before you applied your brakes or threw it into emergency, you had your foot—which foot on that pedal?
page 80 } A The one I always do, this one (indicating).

Q That is your right foot?

A Yes.

Q Which foot did you use your bell with?

A This one, the left one.

Q Do you sound it with your heel or toe?

A Heel.

Q You keep your right foot on the pedal and sound with your left foot?

A Yes, sir.

Q You said you were going 10 miles an hour?

A I said not over 10 miles an hour, if that fast.

Q At 10 miles an hour, within what distance can you stop your car?

A I never measured it, but when I stopped the lady was right back here between the tracks and I looked right off my seat and saw her down on the ground and I jumped down —

By the Court:

Q Can you give some estimate of approximately the number of feet it takes you to stop?

A No, I couldn't say, Your Honor.

By Mr. Williams:

Q Now how soon after you saw her did you apply your brakes?

page 81 } A How soon?

Q Yes.

John L. Corr

A When I got a glimpse I just turned the thing aloose like that.

Q How far had your car gone before the brakes took?

A She crossed the front of the car here and when my car stopped she was laying right here on the opposite side.

Q That is the front of the car up here (indicating)?

A Yes.

Q Then not more than half of your car went by her?

A Not half of it.

Q Not quite half?

A No, sir.

Q Then you stopped in less than twenty feet, didn't you?

A Well, I imagine I did. I think the policeman took a measurement of it.

Q How far were you from her when you first saw her—from the point at which she crossed the track when you first saw her?

A I can't answer that question because I never measured it.

Q You don't know how far. You could have been a car or two car lengths away or three?

page 82 } A No, I wasn't no car lengths away.

Q How many?

A She crossed right in front of me and I got a glimpse of her.

Q How far was your car from the point where she crossed the tracks when you first saw her?

A 6 foot, some thing like that; about 5 or 6 foot.

Q While you were going those 6 feet she went those 6 feet you saw her and then all the way across the tracks to be hit by the lefthand corner of your car, didn't she?

A She didn't have to cross that far.

Q She didn't do that? Isn't that what she did? You said she was hit by the lefthand corner of what would be the overhang of your streetcar, isn't that right?

A I don't know what you call it, but here is the streetcar right here and here is where I was sitting and it happened right here, right in front of me, not over on the far side.

Q Didn't you tell His Honor and the jury that the extreme lefthand corner of your streetcar hit that lady?

A No, sir, I didn't say the extreme corner.

John L. Corr

Q Didn't you say the lefthand corner struck her?

A That is right, left corner in front of me, just happened to be the lefthand side of the streetcar.

Q Does your streetcar have two corners on the left-
page 83 } hand side?

A No, it has a rounding thing on it.

Q One side is the end and one is the corner. Which is the end and which is the corner?

A Well, I reckon you call this the corner over here.

Q Yes.

A Well, this is the end over here.

Q You were talking about the corner when you said the lefthand corner, which is the extreme lefthand outside of the streetcar?

A No, sir, it wasn't the extreme.

Q Well, you say the outside; leave out the extreme.

A The front part of the car.

Q Now you said a moment ago you saw her zig-zagging. Just tell the jury how far you were away when she zigged and how far away when she zagged across the street. She had to take one movement for one which is zigging and another for zagging and you, of course, moving all the time. Tell us how far you were when you saw her take a zig.

A I won't answer that.

Q Well, how far were you away when she took a zag?

A What do you mean by a zig?

Q You said zig-zagging. Those are your words. I can't answer your question.

A Mr. Williams, when I saw the lady she darted
page 84 } across my car like this (indicating) and the car
struck her and when she fell she fell right down
beside my car.

Q Didn't you say you saw her zig-zagging through the cars? Didn't you tell the jury that?

A Did I say she zig-zagged through the cars?

Q I am afraid you did. That is what the jury heard and what I heard and Mr. Bremner wrote it right down here. What did you mean by that? Do you want to take it back?

A Mr. Williams, I couldn't see the lady from behind those automobiles to save my life.

John L. Corr

Q Why did you say it then? Do you deny telling this jury that she zig-zagged through the cars?

A I don't think that is a fair question.

Mr. Williams:

Well, I will ask the Court if that is a fair question.

The Court:

That is a fair question. If you can answer it, all right. If you can't, all right.

The Witness:

Well, Your Honor, I don't know how to answer it, to tell the truth, it has been so long. I can't refresh my mind.

By Mr. Williams:

Q Do you want to have Mr. Williams refresh your mind by reading what you said about it? Do you want to re-
page 85 } fresh your mind to see if you did say it from the Re-
porter's notes?

A Well, I guess I must have said it if he has it down there.

Q If you said it, why did you say it? In other words —

Mr. Robertson:

Let him answer.

A Mr. Williams, I don't think that is fair.

Q Now, Mr. Corr, I am not trying to embarrass you, I wouldn't do it for anything in the world, but you see —

A I might have made a broad remark about the lady zig-zagging through the cars, but I don't think that is fair.

Q You wish to take it back now, do you?

A Because if I sat up on that streetcar and watched people trying to get across that street I am not attending to my business.

Q You are not attending to it if you don't watch them.

A I am watching them.

Q As a matter of fact, you told the jury just in that second you wouldn't be attending to your duty if you watched everybody going up and down the street.

H. J. Winston

A Not to see her leave the curbstone —

Q Isn't that your duty?

Mr. Robertson:

Let him answer the question.

page 86. } A I am trying to answer you and explain to you the safety of it and how I try to operate my streetcar.

Q It is safe that the streetcar operator watch the streetcar and not the public?

A I don't think the public has too much to do to try to walk over top of the streetcar?

Q You think they want to walk over the top of a streetcar? Is that the way you look at it? That is enough.

Witness stood aside.

H. J. WINSTON, called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Mr. Winston, your name is H. J. Winston?

A Yes, sir.

Q Where do you work?

A At Broad Street Station.

Q What kind of work do you do there?

A Clerical work in the parcel checking room.

Q Do you remember shortly after four o'clock on the afternoon of July 19, 1946, when Mrs. Owens was fatally injured in the block in front of Broad Street Station on Broad Street?

A Yes, sir.

page 87 } Q Did you see Mrs. Owens shortly before the time she was struck?

A Just shortly before that.

Q Where were you and did you hear her make any remark at the time you last saw her before she left the Station?

A She spoke to two of us standing at the Travelers Aid just outside of my office.

Q Did she say where she was going?

H. J. Winston

A I understood her to say she was going to stop by Thalhimer's.

Q Then did you remain in the Station or did you come out of the Station before she was hurt, or if you know?

A I came on out shortly thereafter.

Q Now, did you see her again before she was struck?

A After leaving inside the Station?

Q Yes.

A Yes, sir.

Q Where was she the last time you saw her before she was struck?

A I would say the last time I saw her she was stepping into Broad Street.

Q Where was she with reference to the walkway which leads from the main entrance of Broad Street Station southwardly to Broad Street?

page 88 } A She was more over towards the east side of the walkway leaving the curbing.

Q Was she going straight across or crossing on an angle?

A I would say she was crossing on an angle.

Q Eastwardly or westwardly?

A Eastwardly.

Q What would you say her rate of speed was?

A Well, her rate of speed, I would say, was walking hurriedly, moving hurriedly.

Q Did you notice which way she was looking?

A I would say —

Mr. Williams:

Now, if your Honor please, I think that is a guess if he makes it, because if she is walking one way and he is up at the Broad Street Station, he can't see which way her eyes were looking.

Mr. Robertson:

He could tell which way her head was turned.

The Court:

If he knows.

H. J. Winston

By Mr. Robertson:

Q Was her head straight ahead or turned either way or do you know?

A I would say she was glancing westward.

Q Did you see the streetcar before she was struck?
page 89 } I mean did you notice it before she was struck?

A Yes, it was a streetcar leaving Davis Avenue going west.

Q When she left the curb do you know whether the streetcar was standing still or moving?

A When she left the curb, I would say the car was moving. ✓

Q How far had it gotten away from the stop at Davis Avenue when she left the curb, if you know?

A I would say just across Davis Avenue.

Q Then did you notice whether or not there was any westbound traffic in Broad Street—westbound automobile traffic?

A I would say it was quite a few automobiles passing by.

Q Did you see her when she got to the first rail of the westbound track?

A No, sir.

Q Did you notice her at all after she left the north curb of Broad Street before she was hit?

A From the time she left the curbing I didn't see her then until after she had been hit.

Q When is the first time you saw her after she had been hit?

A When she was lying on the other side of the car.
page 90 } Q Did you go to her?

A I rushed down from the Station hurriedly and ✓ went over there where she was.

Q Had the car run completely past her or was she along side of the car?

A She was along side of the car.

Q What portion of it?

A I would say from the front end of the car to possibly 6 or 8 feet back.

Q Where was the front end of the car then with reference to the walkway coming out of the main entrance of the Station? Had it gotten to it or east of it or west of it?

A The car was east of it.

H. J. Winston

Q How far east of it would you say?

A I would say 10 or 12 feet, possibly 15 feet.

Q Could you judge the speed of the streetcar when you saw it as it was moving away from Davis Avenue?

A No, sir, I wouldn't judge the speed, but it was moving very slowly.

CROSS EXAMINATION

By Mr. Williams:

Q Now, Mr. Winston, as I understood you, after she left and made that remark inside of the Station you walked to the front door, didn't you?

page 91 } A I walked on out to the front door following her approximately a few feet.

Q Where were you standing when she stepped from the curbing?

A Just as you walk under the concourse of the Station under the roof there.

Q Then you were up at the Broad Street Station nearly a block away from the point where she stepped from the curbing, is that right?

A I would say approximately 150 feet.

Q It is only 150 feet from the north curbing of Broad Street to —

A Where those columns are I would say 150 feet.

Q Now as I understood you to say the last time you saw her before she was hit she was just stepping down from the curbing, isn't that right?

A Yes, sir.

Q Now you didn't see her take any steps across the street?

A No, sir, I couldn't say I saw her take many steps across the street.

Q I said any; I didn't say many. You said the last time you saw her she stepped from the curbing.

Mr. Robertson:

Are you testifying or asking questions?

H. J. Winston

page 92 } Mr. Williams:

I am telling him I didn't say many steps; I said any steps.

Q Now, if you didn't see her take any steps, tell this jury how you can tell them that she was walking across the street diagonally?

A Because she was headed in that direction.

Q You can tell a party is walking diagonally by seeing him stepping from the curb?

A I would suppose so because —

Q We can't suppose. I object to that.

The Court:

Finish your answer.

Mr. Williams:

Just state the facts.

The Court:

State only what you know.

The Witness:

Could you excuse me just a minute to make a statement?

Mr. Williams:

You just answer questions and no argument. We don't want any argument. Lawyers have enough of that and the jury is tired of it.

Mr. Robertson:

Don't give him a lecture. Let the Court tell him what to do.

The Witness:

I just want to make an explanation.

The Court:

page 93 } An explanation of the question Mr. Williams has just asked you?

A That is what I was going to do.

H. J. Winston

The Court:

You can start answering it and counsel will stop you if it is improper.

A Well, when I got over there my face was across to the bank and I am seeing —

Mr. Williams:

I object to that.

The Court:

Objection sustained. That is argument.

By Mr. Williams:

Q Now as I understood you to say a moment ago, when you saw her stepping from the curbing that the streetcar was up at Davis Avenue standing still?

A No, sir, I didn't say that.

Q You didn't say that?

A No, sir, I don't think so.

Mr. Williams:

Mr. Williams, will you go back and read that?

Mr. Robertson:

Yes, I will ask Mr. Williams to read that.

Note:

The Reporter read as follows:

"Q When she left the curb do you know whether the streetcar was standing still or moving?

"A When she left the curbing I would say the car was moving."

page 94 } By Mr. Williams:

Q You were asked when you first saw that streetcar was that streetcar standing?

A When I first saw it?

Q Yes up at Davis Avenue.

A I didn't see it until it had left the point of Davis Avenue.

H. J. Winston

Q You said there was a streetcar up there at Davis and then you were asked the question was it standing at the time she stepped from the curbing or moving and you said it was moving at the time she stepped from the curbing. Did you see that streetcar standing up there at Davis?

A I hadn't seen any streetcar standing at Davis, no, sir.

Q Did you see any other streetcar between this streetcar and the walkway into your Station there for pedestrians?

A No, sir.

Q There was no streetcar ahead of that?

A Not that I know of. I didn't see any.

Q And that was the only streetcar in the block you saw?

A At the time.

Q Now you said you saw her glance westward. Did she glance westward before she stepped off or as she stepped off the sidewalk?

page 95 } A I would say as she stepped off the curbing.

Q Then she glanced westward. That would be towards Robinson Street, wouldn't it?

A Yes, sir.

Q And at the time she stepped off was there any automobile between the streetcar up at Davis Avenue and her?

A I couldn't answer that.

Q Isn't it a fact that there wasn't any automobile that affected her crossing from the time she left the curbing until you saw her lying dead there?

Mr. Robertson:

I object to that. That is asking the witness to make a conclusion when he said cars were passing constantly. That is for the Jury.

Mr. Williams:

You shouldn't tell the witness that.

The Court:

The witness is on cross examination.

Mr. Williams:

He didn't say constantly a minute ago. He said there weren't any.

H. J. Winston

Mr. Robertson:

Let him read it and you will see you are as wrong as when you said the car was standing still.

The Court:

The witness did testify, as I recall, that there was traffic.

Mr. Williams:

page 96 } Yes, he said there was traffic and I asked him if any automobile was between the streetcar and he and he didn't see any at that time. So it couldn't be as steady as that.

Q Now, Mr. Winston, you didn't hear any bell, did you?

A I didn't hear any bell?

Q Yes.

A No, sir, I can't say I heard any bell.

Q People cross there at that place intermittently all the time, don't they?

A Yes.

Mr. Robertson:

I object for the same reasons stated before.

Mr. Williams:

His answer was yes.

The Court:

Objection overruled.

Mr. Robertson:

I note my exception to that entire line of testimony.

By Mr. Williams:

Q How long have you been at that place?

A Broad Street Station?

Q Yes.

A I have been working there ever since it was opened.

Q And that has been the practice for the last several years?

A Yes, sir, it has been my practice all the time.

page 97 } Q As a matter of fact, you all go across to the bank

Mrs. Anna Bates

to cash your checks twice a month?

A I do.

Q And most every other man does it?

A Yes, sir.

REDIRECT EXAMINATION

By Mr. Robertson:

Q And never have been hit by a streetcar, either?

A No, sir.

Q Either westbound or eastbound?

Mr. Williams:

We will admit he wasn't hit.

Mr. Robertson:

Thank you. That is the most profound remark you have made today.

Witness stood aside.

MRS. ANNA BATES, a witness called on behalf of the defendant being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Your name is Mrs. Anna Bates?

A Yes, sir.

Q Were you a passenger on a westbound streetcar at the time Mrs. Owens was struck and fatally injured there
page 98 } in the vicinity of Broad Street Station?

A Yes, sir, I was.

Q Do you remember where you had gotten on the car?

A Up there at Harry Marks.

Q And where were you going?

A I was going home from work.

Q Do you remember whereabouts in the car you were?

A I was the third seat from the front on the lefthand side.

Mrs. Anna Bates

Q Do you remember what was the last stop the car made before this accident happened?

A It was at Addison Street.

Q Do you remember whether or not it stopped at Davis Avenue?

A Well, I think—I don't know the streets very well along there, but it was just at the corner down from where the accident was.

Q Did you see the lady before she was hit?

A No, sir.

Q When did you first notice her?

A When I seen her she was falling right directly from the window where I was sitting.

Q What first attracted your attention to it?

A The ringing of the bell and then I heard this thud and a jerk of the streetcar.

page 99 } Q Was there a considerable interval of time between these things or all right together.

A Just seemed like a few seconds.

Q When you felt the application of the brakes did that jostle you in your seat?

A Yes, sir, that is what attracted my attention.

Q And when the car stopped how far would you say she was back from the front end of the car?

A She was almost directly in front of where I was sitting when she fell and I was in the third seat from the front on the lefthand side.

CROSS EXAMINATION

By Mr. Williams:

Q Mrs. Bates, did you feel the thud before you felt the brakes applied?

A I heard it.

Q You heard the thud and then the brakes?

A And then the car jerked.

Q You heard the thud of the car against the lady's body and then the jerk of the brakes?

A Yes, sir.

Q And that was the first thing that attracted your attention?

Mrs. Anna Bates

A The ringing of the bell is what attracted my at-
page 100 } tention.

Q When did you hear the bell ring?

Q Well, I was looking out the window and that is what attracted my attention, the ringing of the bell. That was before the thud.

Q And how far away would you say when that bell was rung was it that this car was from the point where the accident occurred?

A Well, I don't know. I wouldn't like to say, but it wasn't very far.

Q Could you say how many seconds?

A No, it just seemed like it happened almost in a few seconds.

Q But you are sure you heard the thud of her body before the brakes were applied?

A Well, the jerk of the car —

Q Was afterwards?

Mr. Robertson:

Let her finish.

A The jerk of the car was just before the thud and then the thud.

Q You said a moment ago you heard the thud and then the jerk of the brakes.

A No, I said the jerk of the car and then the thud and the ringing of the bell was what attracted my attention.

Q You told me in answer to the first thing that you
page 101 } heard the thud and then the jerk of the brakes.

A I said the jerk of the brakes and then the thud.

Q You didn't want it to be that way?

A No, I want it to be as I said.

Mr. Williams:

Will you read back what she said?

Note:

The Reporter read as follows:

"Q Mrs. Bates, did you feel the thud before you felt the brakes applied?

Mrs. Anna Bates

"A I heard it.

"Q You heard the thud and then the brakes?

"A And then the car jerked.

"Q You heard the thud of the car against the lady's body and then the jerk of the brakes?

"Yes, sir."

Q Did you mean to say then that you felt the thud and then the brakes applied or do you mean to change that?

A I felt the jerk of the car and then this thud.

Q Then why did you answer that way, that you felt the thud first?

A You must have misunderstood me.

A Juror:

I would like to know whether the streetcar was fully occupied or just partly occupied.

The Court:

Is there any objection to that?

page 102 } Mr Williams:

None at all.

By the Court:

Q Was the streetcar fully occupied or not?

A It was quite a few people on there because it was during working hours, people coming from work, but there was no one standing.

REDIRECT EXAMINATION

By Mr. Robertson:

Q Did you notice what the motorman was doing when the bell attracted your attention? Which way was he looking, if you noticed?

A He was paying strict attention —

Mr. Williams:

I object to that, if Your Honor please. How could she say looking at the man's back or the back of his head and say he is paying particular attention to everything? That is a conclusion.

Mrs. Anna Bates

Mr. Robertson:

I think she could say as well as this darky that was back in the back or midway of the car way back behind her and the negro said he saw him grinding the fare box and turned away.

Mr. Williams:

He was asked what he was doing with the crank. That is what he saw him doing.

Mr. Robertson:

The jury remembers what he said.

page 103 } Mr. Williams:

Yes, he didn't say anything to help you.

The Court:

What is the question?

Mr. Williams:

I said: How could you look at the back of his head and tell what he was doing?

The Court:

I think that is all right.

A He was looking forward in front of the car.

RECROSS EXAMINATION

By Mr. Williams:

Q You were three seats behind him, weren't you?

A Yes.

Q And there is a flat seat—a straight seat, I mean, in between your three seats and the motorman, too, isn't it?

A There was another seat in front.

Q Didn't he have a curtain behind him?

A The curtain wasn't closed; the curtain was pushed open.

Q So he was in front —

A I could see him clearly from where I was sitting.

Q You could see what the front of his face was doing?

A No, not the front of his face.

Q Then you can't tell where his eyes were?

A He was sitting straight.

James P. Wilson

Q You couldn't tell where he was looking by looking at the back of his head?

page 104 }

A Certainly not by looking at the back of his head.

REDIRECT EXAMINATION

By Mr. Robertson:

Q It would be several seats back of you before you got back to the middle of the streetcar, wouldn't it?

A Yes.

Witness stood aside.

JAMES P. WILSON, a witness called on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Mr. Wilson, your name is James P. Wilson?

A That is right.

Q What is your business?

A Carpenter contractor.

Q For yourself or with someone?

A Yes, sir, for myself.

Q Were you a passenger on a westbound streetcar on the afternoon of July 19, 1946, when Mrs. Owens was struck and fatally injured up near Broad Street Station?

A Yes, sir, I was.

page 105 } Q Do you remember where you had gotten on the car?

A I got on at 6th and Broad, somewhere between 6th and 5th.

Q And where were you going?

A I was going out on Davis Avenue to paint a room.

Q Do you remember whereabouts in the car you were?

A The third seat from the front.

Q On which side?

A On the righthand side.

Q Do you remember how much of a load they had on that car? Was everybody seated?

James P. Wilson

A Not practically. Everybody was seated, but it wasn't crowded.

Q Was anybody up front around the motorman?

A Not a soul.

Q Do you remember what was the last stop the car made before the accident?

A Davis Avenue.

Q Then when it proceeded westward from Davis Avenue towards Robinson Street what would you say was the fastest speed it got up to?

A Well, in that short distance it couldn't get up a very fast speed.

Mr. Williams:

I object.

By Mr. Robertson:

page 106 } Q Could you estimate it in miles per hour?

A I judge about 10 miles an hour; could't be any faster than that.

Q Did you see Mrs. Owens before the car hit her?

A Yes, sir.

Q Where was she when you first saw her?

A I seen her head through the window.

Q Through which window?

A The righthand window. I seen her pass the second window and then she went on through and I heard the thump.

Q When you first saw her had she gotten on the track or was she —

A Yes, she was right in front of the car. I did not see her before.

Q How far was the car away from her at that moment?

A Well, at that moment it couldn't have been more than two or three feet to gain that distance —

Mr. Williams:

I object to that.

The Court:

Yes, just say what you know.

James P. Wilson

The Witness:

I wouldn't know. I wouldn't know by inches.

Mr. Williams:

Then he can't say it.

The Court:

Ask your question in another way

The Witness:

All I know she was hit. She passed that window and I heard the thump.

page 107 } By Mr. Robertson:

Q When you first saw her how many feet would you estimate the car was away from her?

A I imagine 4 feet.

Q Did you notice what the motorman was doing?

A When he hit her he dropped his head.

Q Do you know what he was doing before that?

A He was ringing his gong as hard as he could gong it. That is what attracted my attention, the gong.

Q Did you say that you heard the thud or felt it?

A I heard it.

Q Do you know whether the thud was before you felt the jerk of the brakes or afterwards or do you know?

A It was afterwards.

Q How much interval of time would you say passed between the time you first saw the lady until the time you felt or heard the thud?

A Well, that would be hard to judge exact; just the time it took her to walk across the track.

Q Did the jerk of the brakes affect you in any way?

A I never took notice of that.

Q Where was she lying when the car came to a stop?

A She was lying about fifth seat down, just about a third of the length of the car.

Q From the front?

page 108 } A Yes.

Q When you saw her was she moving or standing still?

James P. Wilson

A When?

Q When you first saw the lady.

A Oh, she was moving. She was coming across the track.

Q In what way was she moving?

A Well, I couldn't see. All I saw was her head go past the window.

Q You couldn't tell whether she was walking or running?

A No.

Q Could you tell which direction she was crossing?

A She was going south.

Q Could you tell whether she was crossing straight across or catabias?

A No, I couldn't tell that.

Q Do you know where she was crossing with reference to the walkway that comes out of the main Broad Street Station? Was she opposite that walkway or down east of it or west of it?

A I judge she was east of it. I don't think she got to the walk.

Q About how much?

Well, a 100 feet, I guess.

page 109 } CROSS EXAMINATION

By Mr. Williams:

Q Now, Mr. Wilson, you saw her head pass your right window and then you saw her head pass your left window?

A That is right.

Q That is from one side of the car to the other side of the car and then it was the extreme left corner of the streetcar that hit her, wasn't it?

A Yes.

Q And then you saw her sail through the air?

A I didn't see her sail through the air. I didn't see her until she was lying on the track.

Q Now then the first thing that attracted your attention to her was seeing her hit?

A No, sir, the first thing that attracted me was the motor-man striking his gong.

Q And when you first saw her how far away was the streetcar from her then?

A I imagine about 4 feet.

James P. Wilson

Q Now sitting back in the third seat there looking forward you tell this jury you can tell that a streetcar, looking over the front of that car and everything, is 4 feet from an object in front of it just like a lady the size of this lady; is that right?

A Well, I couldn't judge that distance. As I said page 110 } before, I couldn't judge 4 feet or 5 feet or —

Q Why did you state 4 feet? Who told you to tell 4 feet if it wasn't that?

Mr Robertson:

I object to that.

The Court:

Ask him why he said 4 feet.

By Mr. Williams:

Q Why did you say 4 feet?

A I will tell you just about how far he was from the —

Q Why did you say 4 feet if you couldn't tell it was 4, and she might have been 40 feet?

A She couldn't have been 40 feet and the lefthand corner of the car hit her. That is impossible.

Q But I am talking about the time she was on the right-hand side.

A With the car moving she couldn't be 40 feet away and that car hit her unless she was standing still.

Q Mr. Wilson, she had to go from one side of the tracks to the other, didn't she?

A Yes.

Q And didn't that take some time for a lady walking? She wasn't going as fast as the streetcar, was she?

A Sure, she takes steps.

Q She took some steps?

A Three to four steps.

Q While she is taking three or four steps that streetcar can go many feet, can't it?

page 111 } A Yes, it can go a certain distance, but not the rate the car was moving.

Q If she was going 2 miles an hour, which is a fast speed for a lady to walk, isn't it?

James P. Wilson

Mr. Robertson:

I object to that. Nobody has said she was going at that rate and he said he couldn't tell how fast she was going. He has a right to cross examine him and search him for the truth, but he has no right to put words in his mouth which the witness hasn't said.

The Court:

I sustain the objection

By Mr. Williams:

Q Do you know how fast she was walking?

A No, I couldn't judge that.

Q Was she just regularly walking?

A I don't know whether she was regularly walking or running; I just saw her head pass the window.

Q You just saw her head pass and don't know how far the streetcar was away?

Mr. Robertson:

I object to that. He said 4 or 5 feet and he is not quoting the witness fairly.

The Court:

The witness testified 4 or 5 feet

By Mr. Williams:

Q Do you know how far away the streetcar was from her when you first saw her head through the right
page 112 } window?

A You just asked me that question. How many times are you going to ask me? That is the third time.

Q But what is your answer?

A I judge 4 feet. You asked me three times the same question.

Q And you now say it is 4 feet.

A Yes.

James P. Wilson

REDIRECT EXAMINATION

By Mr. Robertson:

Q Did you notice what the motorman was doing?

A When is that?

Q I mean did you notice which way he was looking?

A He was looking straight ahead.

RECROSS EXAMINATION

By Mr. Williams:

Q Now you said you saw her head and the motorman was looking straight ahead. Did you see the motorman looking straight ahead before you saw her head or afterwards?

A He was looking straight ahead all the time because it was traffic so thick up there.

Q Were you watching him all the time?

A No, I wasn't watching him.

page 113 } Q How do you know what he was doing if you weren't watching him?

Mr. Robertson:

Let him finish answering the question.

By Mr. Williams:

Q Answer the question?

A I know he was looking straight ahead because he was ringing the gong. He wouldn't be ringing the gong and looking to the side. He was striking that gong as hard as he could to attract her attention.

Q You think he saw her?

A Sure, he did; no thinking about it.

Q Did you see the streetcar stop at Davis Avenue?

A Yes, it stopped there and let two soldiers off.

Q Did he take on any passengers?

A I didn't notice whether it took any on because I heard the soldiers ask the motorman to let them off at Davis Avenue.

Q Did you see her at that time when the car was standing still there?

A No. How could I see her? She wasn't anywhere near.

James P. Wilson

The Court:

Just answer whether you know.

A (Continued) No, I didn't see her.

Q You didn't see her anywhere?

page 114 } A No.

Q Was another streetcar in front of your streetcar?

A That I don't remember.

Q In that block?

A I don't remember that.

Q Did you see any automobile ahead of that streetcar?

A I didn't notice any of the traffic.

Q You didn't notice whether there was any traffic or not?

A No.

Q So you don't know anything about that. Where was your streetcar when you first heard the bell sounded by the motorman?

A It was between Davis Avenue and where he hit her.

Q Between those two points.

A Yes.

Q How far away from the point he hit her was it when you first heard the bell, you said, between those two points?

A I didn't see her when I first heard the bell

Q And you don't know how far the streetcar was?

A No, sir.

Q And at that time the brakes hadn't been applied, had they?

page 115 } A He was ringing his gong and putting on his brakes.

Q I didn't ask you that. I asked you if he had applied his brakes when he rang his bell the first time?

A Yes.

Q He had?

A Yes.

Q Now which did he do first? Apply his brakes first or ring his bell first?

A You are asking me something now.

Q You were there.

The Court:

Answer it if you can. If you don't know say so.

Coly Leroy Henley (Col.), re-called

George H. Bowles

A I don't know.

Witness stood aside.

Note:

At this point court recessed until 2:15 P. M. at which time the trial was resumed.

Mr Robertson:

I would like to recall Coly Henley for one question

COLY LEROY HENLEY, (Col.), being recalled for further examination, testified as follows:

By Mr. Robertson:

Q Whereabouts had you gotten on the car that struck this lady?

page 116 } A The 2100 or 2200 block west Broad Street; that is right across from the High Ice Cream store.

Q How far is that east of Davis Avenue?

A There is only one block. I don't know of the name of the block. I don't know the names of those streets down there that come across by the Motor Vehicles—which is now the Motor Vehicles Division, but I know the numbers that run along there.

Q Had you worked that day?

A Yes, sir I had.

Q What time do you get off from work?

A I am due off at 4—I was due off at 4 o'clock that day.

Witness stood aside.

GEORGE H. BOWLES, a witness called on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Your name is George H. Bowles?

George H. Bowles

A Yes, sir.

Q And you are connected with the Traffic Department of the City of Richmond?

A Yes, sir.

page 117 } Q Were you called to the scene of an accident when Mrs. Ruth H. Owens was fatally injured in the neighborhood of Broad Street Station on the afternoon of July 19, 1946?

A I was, sir.

Q When you went there did you find any indication of precisely where she had been injured?

A No, sir, we couldn't definitely establish the point of impact, just the approximate point.

Q Could you give the approximate point?

A Yes, sir, the approximate point of impact occurred 103 feet west of the crosswalk —

Mr. Williams:

I object to that. He can't tell the approximate point of impact. He got there after—the streetcar wasn't there. was it?

The Witness:

No, sir, it was up above.

Mr. Williams:

I don't think he can come and testify to an approximate point of impact.

Mr. Robertson:

Let's see what he found there.

Mr. Williams:

Certainly didn't any dirt drop from her where she was hit by the streetcar nor where she landed over on the other track.

The Court:

I will sustain the objection unless something else can be shown.

By Mr. Robertson:

Q When you got there was there any indication showing

George H. Bowles

where the point of impact had been? Were there
page 118 } any marks on the street or evidence in the street
 where the impact had happened?

A Yes, sir, we found blood stains on the street that extended from a point of 13 feet straight to the resting place of the body.

Q Where was the most western of those blood stains?

A 103 feet, the first blood stain we found from the crosswalk—west crosswalk.

Q Would that be 103 feet from the west property line of Davis Avenue?

A That is correct, sir.

Q And then it extended westwardly from that point? You said how many feet?

A The first blood stain was 103 feet west of the crosswalk line, which would be the property line—the imaginary crosswalk line or property line running from the northwest towards the southwest.

By the Court:

Q At which corner?

A The crosswalk line running from the northwest towards the southwest of Davis and Broad.

Q At Davis and Broad?

A Yes, sir.

By Mr. Robertson:

page 119 } Q And then those blood stains extended how far
 westwardly beyond that 103 feet?

A 13 feet.

CROSS EXAMINATION

By Mr. Williams:

Q Mr. Bowles, did you measure with a tape measure?

A Yes, sir.

Q And you did that from the property line on the west side of Davis Street?

A Yes, sir.

Q And that was 103 feet towards Robinson?

A Towards Robinson, yes, sir.

Douglas C. Johnson

Q Now you don't know how wide the sidewalk is on the west side of Davis, do you?

A No, sir, I do not.

Q And you don't know how wide Davis Avenue is?

A No, sir.

Q And you don't know how far it is from Davis Avenue to the point where the streetcar was standing in the safety zone?

A No, sir, I don't have that.

Q When you got there the body wasn't there, was it?

A Yes, sir.

Q The body was still there?

page 120 } A Yes, sir.

Q The body was still there?

A Yes, sir.

REDIRECT EXAMINATION

By Mr. Robertson:

Q Where was the body then?

A As I stated—you mean relative to what?

Q As to the blood stains or somewhere else.

By Mr. Williams:

Q Was the body of the lady there?

A Oh, no, sir; Mrs. Owens had been moved.

Q She had been moved when you got there?

A Yes, sir.

Witness stood aside.

DOUGLAS C. JOHNSON, a witness called on behalf of the defendant being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Mr. Johnson, your name is Douglas C. Johnson?

A That is right, sir.

Q What is your business?

A Presser, Friedman-Marks Clothing Company.

Douglas C. Johnson

Q Were you a passenger on a westbound streetcar on the afternoon of July 19, 1946, when Mrs. Ruth H. Owens was fatally injured in the vicinity of Broad Street Station?

A I was.

Q Do you remember where you had gotten on the car?

A I boarded the car at Harrison and Broad.

Q And where were you going?

A I was going to 17 South Stafford.

Q Was that your home?

A That is my home, sir.

Q Do you remember whereabouts in the car you were?

A I was sitting about the fourth or fifth seat on the left-hand side from the front.

Q Were all the passengers in the car sitting down at the time of the accident or were any of them standing up? In other words, was there a seated load or standing load?

A They were all seated.

Q You remember or not whether the car stopped at Davis Avenue before the accident?

A It did.

Q Do you remember whether people got on or off or both?

A I remember a couple of soldiers getting off, but I don't remember anybody boarding.

Q Now, as the car proceeded westwardly from Davis Avenue towards Robinson Street, what would you say was the fastest it ran?

page 122 } Mr. Williams:

Ask him if he knows first?

Mr. Robertson:

Of course, if he doesn't know he can't answer. I think the question is correct.

Mr. Williams:

I object to the question.

The Court:

Ask him whether he knows; if he knows anything about the speed of the car.

Douglas C. Johnson

By Mr. Robertson:

Q Do you drive an automobile?

A I do.

Q Do you ever walk?

A Yes, sir.

Q Do you drive your automobile?

A Yes, sir.

Q Have you got a permit to drive in the City of Richmond?

A I don't have one now. I don't drive now, not for a couple of years.

Q Have you had enough experience walking and riding and driving to have an opinion and if you have I will ask you to state your opinion how fast that streetcar ran at the fastest from the time it left Davis Avenue until the accident happened.

A In my opinion it didn't run a speed over ten miles an hour.

page 123 } Q Now did you see the lady before the car actually hit her?

A I did not.

Q What was the first that attracted your attention to the accident?

A What first attracted my attention was when the motor-man started to ringing the bell and the sudden appliance of brakes.

Q Which happened first, the ringing of the bell or the application of the brakes?

A The ringing of the bell.

Q How soon after the ringing of the bell was the application of the brakes?

A It was right away. He was ringing the bell and applying the brakes at the same time.

Q Did he apply the brakes smoothly or roughly?

A It was roughly in my estimation.

Q Then did you see or hear or feel the blow when the car hit the lady?

A I kind of heard a thud and then I saw this lady falling.

Q How much time would you say passed from the time your attention was first attracted by the ringing of the bell until you were conscious of that thud?

A Not over a couple of seconds.

Douglas C. Johnson

page 124 } Q And then when you saw the lady where was she?

A I saw her when she started falling after the thud—after I heard the thud; I just glanced out the window and saw the lady falling.

Q And where was she with reference to the front of the car?

A On the lefthand side of the front.

Q And how much of the car ran past her before the car came to a full stop?

A Well, not over 6 or 8 feet.

Q Did you notice what the operator was doing when you looked forward there?

A After the car stopped?

Q No, I mean when your attention was first attracted to the accident.

A The first I noticed him he was trying his best to stop the car and ringing the bell all at the same time.

Q Which way was he facing?

A He was facing just a little bit to his left, I would say one eye to the left.

Q Did you see him grinding his change box?

A No, sir.

Q Did you see him looking to the left to the extent he wouldn't be facing up the street?

A No, sir.

page 125 } CROSS EXAMINATION

By Mr. Williams:

Q Now where were you sitting, Mr. Johnson?

A I was sitting on the lefthand side about four seats—four or five seats from the front.

Q And you said you could see one eye to the left and one eye to the right of the motorman—you said something about one eye, that one eye was to the left. You are sure it was his left eye?

A I couldn't exactly see his eye, but I said it looked like he might have had one eye to his left glancing out the window.

Q And that was before the thud, wasn't it?

A Yes, sir.

Douglas C. Johnson

Q And he wasn't looking full forward before he hit this lady?

A Well, I would say he was looking—I can't say he was looking both ways, but it looked like he had seen her and just glanced to the left just before the thud.

Q Now when he was looking to the left he hadn't applied his brakes yet, had he?

A Yes, sir.

Q He had applied his brakes then? Now you were asked about the applying of the brakes and the ringing of the bell.

All of that was simultaneous, wasn't it?

page 126 } A Yes, sir.

Q Now did you see that motorman go down the block there from Davis Avenue gong-gong-gong-gong a dozen times before he became involved and applied his brakes and rang his bell for this lady?

A I don't remember that.

Q You don't remember him ever sounding the bell until this particular instant in which the simultaneous action of the bell and the brakes were operated?

A I don't remember any of that.

Q Did you see any streetcar ahead of your streetcar?

A I didn't pay particular notice of it.

Q Did you see any automobiles ahead of your streetcar?

A No, sir, I didn't take any particular notice.

Q Now if that lady had walked from the north curbing of Broad Street across to the tracks and across the tracks, there wasn't from your observation anything to keep the motorman from seeing her, was it?

A I wasn't looking to my right. I didn't see the lady until just as she was hit.

Q I am talking about if she had walked across there there wasn't any traffic to obstruct her getting across or the motorman from seeing her?

A I said I didn't notice on my right. I don't know
page 127 } whether it was any traffic coming or going.

Q You were seated on the lefthand side?

A Yes.

Q About how many passenger were on that streetcar?

A That is one thing I didn't notice, sir.

Q It wasn't crowded, was it?

Douglas C. Johnson

A No, sir.

Q At that moment the traffic hadn't started to be heavy on Broad Street yet, had it?

A Well, I imagine at that time of evening it is pretty heavy. It always it.

Q What time of day was it?

A I imagine it was sometime around four or five minutes after four.

Q The sun was shining, was it?

A That is right.

Q Your streetcar had stopped at Davis Avenue?

A Yes, sir.

Q Now this thud. Are you positive that the first thing you heard was the thud itself?

A No, sir.

Q You are not positive?

A I am positive on that.

Q You are positive on that?

A I am positive I heard the appliance of brakes and
page 128 } the bell ringing before I heard the thud.

Q But you think it was only a couple of seconds between that time?

A Yes, sir.

Q Now where was the streetcar with reference to the entrance of Broad Street Station when it stopped there—the pedestrian crossing in there.

A When it stopped it was a little past the east entrance.

Q In other words, it had gotten possibly past to the middle of the pedestrian crossing into the railroad station?

A About approximately to the middle of the entrance.

Q You saw her body?

A Yes, sir.

Q Where was she lying with reference to the eastbound tracks?

A Well, her head was on one track; she was lying with her head on one track.

Q That would be on the —

A The eastbound track.

Q The north rail of the eastbound track?

A Yes, sir.

Q Now you told the jury a moment ago that the motor-

Douglas C. Johnson

man was trying his best to stop his car. Just state what he did to stop it.

page 129 } A Well, I don't know how the brakes or things work on a streetcar, but I could see he was doing all in his power in the operation of it.

Q What was it he was doing?

A Well, he was raised up in his seat and one lever he worked quite a bit; I imagine he was working it.

Q He was working at the front and was raised up in his seat?

A Yes, sir.

Q And didn't take his hands and throw them away?

A No, sir.

REDIRECT EXAMINATION

By Mr. Robertson:

Q Mr. Johnson, Mr. Williams asked you about the ringing of the bell as the car passed through the block from Davis Avenue before he rang it right there at the moment of the impact and you testified that you didn't recall his ringing it. Do you mean he didn't ring it or you don't know one way or the other?

A I don't recall his ringing it from the start of where he stopped at until he did. Just that few seconds I recall him ringing the bell.

Q But prior to that time do you remember he didn't ring it or you didn't notice it?

page 130 } Mr. Williams:

He answered that. He said he didn't hear it.

Mr. Robertson:

He said he didn't recall it

The Court:

He said he didn't recall hearing the bell ring.

Witness stood aside.

Clarence Harris, (col.)

CLARENCE HARRIS, (col.) a witness called on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Your name is Clarence Harris?

A Yes, sir.

Q Where do you work?

A For Lew Perrin.

Q What kind of work do you do?

A Hodcarrier.

Q Were you a passenger on a westbound streetcar on the afternoon of July 19, 1946, —

A I was.

Q — when this lady was fatally hurt up there near the Broad Street Station?

A Yes, sir.

Q Where had you gotten on the car?

page 131 } A I got on on Church Hill.

Q And where were you going?

A I was going to A. Lynn Thomas'.

Q What were you going there for?

A After my payroll.

Q Whereabouts on the streetcar were you?

A On the center of the car.

Q On which side?

A On the righthand side.

Q Now do you remember where was the last stop that car made before it struck the lady?

A Yes, sir, it was just there next to Broad Street Station at Davis Lane.

Q Then as it went through the block going on west towards Robinson Street if you know anything about speed how fast would you say the car was going?

A I would say about ten or twelve miles an hour.

Q Did you see the lady before the car hit her?

A Yes, sir.

Q Where was she when you first saw her?

A She was about four blocks away from the streetcar.

Q Four blocks?

Clarence Harris, (col.)

A I mean four foot.

Q Was she on the track or had she gotten to the track or was she still coming towards the track?

page 132 } A She had gotten to the track, but she hadn't started across. She stepped right across the track and by the time I got ready to yell it looked like the conductor seen her the same time I did and he tried to come to a stop. He rang the bell and tried to stop and he couldn't.

Q When you first saw her had she gotten to the first rail of the track?

Mr. Williams:

He said she was on the tracks.

A She had gotten to the first rail of the track.

Mr. Williams:

On the track.

Mr. Robertson:

Let him testify.

Mr. Williams:

He said she was on the track.

Mr. Robertson:

You quit testifying.

Q Did the motorman ring the gong?

A Yes, sir.

Q What was the first thing that attracted you to the lady, the first thing that made you notice her?

A Well, my brother-in-law was working at Broad Street Station and I stop every time I go by there and look to find my brother-in-law to see if I can see him and I seen the lady.

Q Now did the motorman apply the brakes?

A Yes, sir.

Q Did he apply them before he hit her or after he hit her or do you know?

A Before he hit her. He was trying to come to a stop.

Q Did he apply them rough or nice and easy?

page 133 } A No, sir, it felt like it was snatching.

Clarence Harris, (col.)

Q Did he ring the bell before he applied the brakes or at the same time or afterwards?

A Well, it looked like the same time, trying to do both at the same time to me.

Q Where was the lady alongside of the car when the car stopped?

A Well, I would say about three windows down—just about three windows.

Q From the front?

A Yes, sir, from the front of the car.

CROSS EXAMINATION

By Mr. Williams:

Q Was she crossing about where the people walk into Broad Street Station, isn't that right?

A At the walkway, about the middle of the block.

Q Now you didn't see any traffic on the right—no automobiles or streetcars ahead of your car?

A No, sir, I didn't pay any mind.

Q Then if she had crossed from the curbing over to where you first saw her, there was nothing to obstruct the motorman from seeing her?

A Well, he seen her about the same time I did.

page 134 } Q You weren't running the car, though.

A No, sir, but I was watching.

Q You said the streetcar was 4 feet away when she got on the first track?

A I mean 4 feet from the corner where it hit her at. From one track to the other I guess is about 4 feet. That is what I am trying to say.

Q Oh, I see. What you mean is that she walked 4 feet on the track before the motorman hit her?

A She was trying to run across—just looked like she was trying to run to get across the track.

Q Do you know how far away the streetcar was from the point where it did hit her at the time you first saw her?

A I would say about a foot. He done the best he could to stop it is all I can say.

Q His Honor won't let you give your opinion. What did he do to stop the car?

Clarence Harris, (col.)

A He applied the brakes and the brakes snatched us almost to the front.

Q How did he put them on?

A I didn't look down at his foot to see how he put them on.

Q Did he use his hands?

A He used his hands and all, but I was watching—such excitement I was watching out.

page 135 } Q You weren't watching him? You don't really know what he did?

A Yes, sir, I do. When I was sitting on the car it nearly snatched me up to the front.

Q And that is the only thing you know that caused him to apply the brakes, that you felt the jerk of the brakes?

A The jerk and then he rang the bell and still the lady went across. He tried to come to a stop and couldn't stop that short.

Q What did he do?

A He was using the thing to stop it, using his hands.

Q Running it back and forth?

A I don't know how you stop a car, I couldn't tell you.

Q You are sure he didn't throw his hands off the brakes?

A No, sir, he didn't throw his hands off of them.

Q Had the streetcar stopped at Davis Avenue?

A Yes, sir.

Q Did anybody get on or off?

A He let off two soldiers and a sailor, if I am not mistaken, and a girl got off.

Q A girl got off, too?

A Yes, sir.

Q How many people did it pick up?

page 136 } A I don't know. I don't think it picked up nobody but I know he let off.

Q Now when the streetcar stopped you said about three windows—her body was three windows from the front of the car?

A That is right, just about three windows.

Q Did you yell?

A No, sir. It happened so quick—I tried to yell, but it happened so quick I couldn't yell.

Q You hadn't seen her at any time until you saw her on the tracks?

Clarence Harris, (col.)

A I saw her when she was getting ready to cross the tracks.

Q Now you could see her full body when you first saw her on the tracks?

A Yes, sir, I could see her full body.

Q Could you see her as far as the bottom of her dress?

A You could, but I was just watching her. I was that excited. I don't know whether I saw the bottom of her dress or not.

Q But you know you had a full view of her body before she was struck crossing the tracks?

A I could see her body.

Q And you were sitting back in the center of the street-car?

page 137 } A The center of the streetcar, that is right.

Q Now half of the streetcar was right straight in front of you, wasn't it?

A Half of the car, yes sir.

Q And to see her full body you had to see her far enough in front of the streetcar so that the streetcar wouldn't be obstructing your vision of her crossing the track, isn't that right?

A Yes.

REDIRECT EXAMINATION

By Mr. Robertson:

Q How far was the streetcar away from her when you first saw her?

A Well, the streetcar when I first saw her was just before the lady stepped across the track for the lefthand side to hit her.

Q Can you point out anything to show how far she was from it?

A I would say as far as from that yonder (indicating) she started and really tried to get across.

Mr. Robertson:

Can we agree that is 10 feet? You agreed to it this morning?

Mr. Williams:

Yes, if I agreed to it once I will agree to it this time. I

M. C. Lewis, (col.)

don't agree that is a fact. I just agree that is the
page 138 } distance he says.

Witness stood aside.

M. C. LEWIS, (col.) a witness called on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Your name is M. C. Lewis?

A Yes, sir.

Q What is your first name?

A Malachi.

Q That is a Biblical name?

A Yes, sir.

Q Where do you work?

A I work for the Richmond Hotel Corporation.

Q What kind of work do you do?

A Fireman.

Q Do you remember an accident up near Broad Street Station on the afternoon of July 19, 1946, when a lady was struck by a streetcar there and killed?

A Yes, I do.

Q Where were you when that accident happened?

A I was coming out of the William Byrd Cleaners.

Q And where is that located?

page 139 } A That is located on west Broad opposite Broad Street Station.

Q Where were you going?

A I was going west on Broad.

Q On which side of the street were you?

A I was on the left side going west.

Q What place were you going to?

A Stephen's restaurant.

Q Were you working up there at that time?

A Yes, sir.

Q Were you also working for the Richmond Hotel Corporation at that time?

A Yes, sir.

M. C. Lewis, (col.)

Q What was the first you knew about this accident?

A Well, what I first know about it when I stepped out of the William Byrd Cleaners I saw the lady walking towards the carline walking over to the William Byrd Hotel and I said to myself, "That lady is going to walk into the streetcar —"

Mr. Williams:

I object.

Mr. Robertson:

You can't tell that. Just tell what you saw, what you saw her do and what happened to her and what you did. You can't tell what went on inside your mind

A (continued) Well, all I saw was I saw her walk into the streetcar.

page 140 } Q Where was she crossing Broad Street from, if you know?

A Well, she seemed to be crossing—coming from Broad Street Station.

Q Was she coming straight across or coming catabias?

A Kind of catabias?

Q Was she going catabias eastwardly or westwardly?

A She seemed to be coming—looking east and going west to my idea, the way she was walking.

Q Was she walking slow or fast or how?

A She was fast walking.

Q How far away from the westbound streetcar track was she when you first saw her?

A The westbound streetcar track?

Q Yes.

A When I first saw her was it seemed to me very close to it.

Q And how far was the westbound streetcar away from her then?

A The westbound streetcar seemed to be 8, 10 or 12 feet away.

Q And then what happened?

A She walked right into the car.

Q And then after the car hit her where was she alongside the car when the car stopped?

page 141 } A When the car stopped she was laying stretched

M. C. Lewis, (col.)

out beside the rail with her head right at the rail.

Q How much of the westbound car had run past her?

A Not very far.

CROSS EXAMINATION

By Mr. Williams:

Q Did you see her when she left the curbing on the north side of Broad?

A No, sir, I didn't see when she stepped off the curb.

Q How far was she away from the cartracks when you first saw her?

A Very close to the tracks.

Q What part of the streetcar hit her?

A The front part of the side which she walked right into the side of it.

Q The right side?

A Well, she was coming from Broad Street Station.

Q She walked into the right side of the car?

A That is right, sir.

Q Do you know when that happened?

A In the afternoon.

Q Do you know what year?

page 142 } A 1946.

Q Do you know who the lady was?

A No, sir, I didn't.

Q You are not positive the lady whose case is under investigation here is the same incident that you have reference to, are you?

A That is what I understand.

Q You do understand that?

A Yes.

Q And you are positive it was the righthand side of the streetcar that hit her?

A Yes, sir.

Q Now tell me this: She never really got on the tracks then, did she?

A She walked into the streetcar, that is what I seen.

Q Did she walk in at the door or center or what part?

A At the front of the car. She walked right up in the front.

M. C. Lewis, (col.)

Q Did you see the motorman do anything to stop the car?

A Oh, yes, the motorman seemed to alarm the bell as loud as he could.

Q Did he apply his brakes at the same time?

A He stopped so quick he must have applied them at the same time —

page 143 } Q You don't know?

Mr. Robertson:

Let him finish.

A He stopped so quick he is bound to have applied his brakes.

Q Bound to have applied his brakes?

A Yes, sir, because he stopped very quick.

Q And that is the first time you heard the bell is when he applied his brakes at the same time?

A When I stepped out of the door the bell was making a noise.

Q How far did you walk before you saw the lady?

A I made about two steps.

Q You took two steps yourself?

A About two steps.

Q And you state he was then gonging his bell?

A That is right.

Q And then she hadn't yet reached the cartracks?

A Well, she got there in time to walk right into the street-car, that is all I can say.

Q I think you are a little ahead of me. I said at the time he alarmed or gonged his bell she hadn't yet gotten to the streetcar tracks, had she, or hadn't she?

A To my estimation what I seen —

Q You can't give your opinion. Just state what you saw.

A She was hasty.

page 144 } Q The question I asked is not responded to by that answer. I asked you if the time you heard the donging of the bell the lady was yet not on the cartracks?

A Mr. Williams, I heard the bell. When I stepped out of the door the bell was making a noise.

Q She wasn't on the cartracks then, was she?

A She walked into the streetcar.

M. C. Lewis, (col.)

Q I know; you have said that several times.

By the Court:

Q Was she on the streetcar track at the time you walked out of the door?

A Oh, no, she wasn't on the streetcar track at the time I walked out of the door.

By Mr. Williams:

Q How far was she from the car tracks when you walked out of the door?

A When I walked out of the door? Well, that was pretty hard for me to tell how far she was because she was walking very fast.

Q Was she half the distance between the curbing and the tracks or a quarter of that distance?

A She was a little nearer than that.

Q A little nearer than a quarter?

A Yes, sir, because she walked right in the front page 145 } because she was looking one way and walking the other way.

Q Which way was she looking?

A She seemed to be looking eastward and walking this way towards west.

Q She was walking west and looking east?

A She was walking southeast—southwest looking east; that is the way I seen it.

Q Southwest looking east. Can you tell this jury when you first saw the lady walking between the curbing and the car track when you first came out of the door whereabouts the streetcar was, whether it was at Davis Avenue, or half the distance or where in there?

A Well, to my idea, it was probably half the distance or probably wasn't; I couldn't exactly state.

Q Half the distance from Davis Avenue. He hadn't then applied his brakes?

A Well, he was ringing his bell and doing everything because when he stopped the car I saw everybody like get up off their seats.

W. K. CARPER

REDIRECT EXAMINATION

By Mr. Robertson:

Q As she walked across there was she walking substantially towards Robinson Street or towards Davis Avenue?

A She was coming across.

page 146 } Q I mean which way. Did she look like she was going toward Davis Avenue or toward Robinson Street?

A She was going towards—the way she was moving was towards Davis like on an angle.

Q And then you said when you first saw her you was very close to the track?

A Yes, sir.

Q Could you point out anything here to show how close to the track she was when you first saw her?

A Well, it is a lot of traffic moving at the same time and it is pretty hard for me to tell; a lot of traffic was moving west.

Q What kind of traffic?

A Automobiles and trucks and so forth.

RECROSS EXAMINATION

By Mr. Williams:

Q You didn't see any other streetcars, did you?

A Well, it was a streetcar going east.

Q It was one going east?

A Yes, sir.

Q He never did hit her body though?

A No, sir.

Witness stood aside.

page 147 } W. K. CARPER, a witness called on behalf of the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q Mr. Carper, where do you live?

W. K. CARPER

A I live at the present time 2627 Maplewood, Lakeside.

Q What is your business.

A Contractor.

Q With what firm?

A Van Doren, Carper & Perreyclear.

Q What is your connection with that firm?

A I am a part owner and in charge of all outside work.

Q What kind of contracting work does your firm do?

A Generally sewer and gas and water.

Q Do you remember an accident in the neighborhood of Broad Street Station on the afternoon of July 19, 1946, when a lady was struck and fatally injured by a westbound streetcar?

A Yes, sir.

Q Where were you when the accident happened?

A I was driving west on Broad Street.

Q Was the car that struck the lady in front of you or behind you?

A It was in front of me.

page 148 } Q Will you tell the jury what happened there so far as you saw it as you came along there?

A Well, as I was travelling west on Broad Street I think it was around four o'clock in the afternoon and the streetcar had passed the intersection. I don't know what that street is before you—it is the street that runs at a 90 degree angle off Broad at William Byrd. I was almost up with the streetcar at that point. I wasn't paying any particular attention to the streetcar. I was driving along about twenty, between twenty and twenty-five miles an hour and after the car had passed that intersection I noticed this lady; she walked out in the street. I noticed it particularly because she walked across in front of me and also the streetcar. The streetcar was headed west and I would judge the streetcar was making about ten miles an hour; it may have been going slightly faster, but I don't think so because I was gaining on it and I don't think I was making over twenty, and the lady seemed to be—well, as it appeared to me, the lady didn't—she wasn't taking into consideration —

Mr. Williams:

I object to the argument.

W. K. CARPER

The Court:

Just tell what you saw.

A (continuing) Well, she was just looking down at the ground and walking at a rather rapid pace and walked right on out and walked in front of the streetcar and the streetcar struck her—I didn't see the streetcar strike her because page 149 { she was out of my view. I hadn't passed the streetcar; I was coming up along side it at that time and I didn't stop. I kept going but I knew the streetcar was bound to hit her.

Mr. Williams:

I object to the opinion. You didn't see it.

The Court:

Objection sustained.

By Mr. Robertson:

Q How far away from the streetcar was the lady when you first noticed her?

A She was about halfway across the street.

Q And how far east of her was the streetcar at that time?

A Oh, the streetcar wasn't so many feet back; I would say twenty-five or thirty feet.

Q Did she ever slack up?

A She didn't slacken up.

Q Was any other automobile westbound along there besides yours?

A I didn't notice. I don't recall having seen any. There may have been but my attention was attracted to what I thought was going to happen.

Q How far would you say the streetcar was from the lady when she stepped on the track?

A The streetcar was very close to her; very, very close.

Q Could you point out anything in here —

page 150 { A The way I would judge, about 5 feet.

Q Where was she crossing with reference to the walkway that comes out from the main entrance to the Broad Street Station?

A She was walking in a southeasterly direction as if she

W. K. CARPER

was headed for that safety zone on the eastbound track, from what I would judge.

Q What I had reference to you remember there is a walkway that comes from the main entrance —

A Yes.

Q Was she crossing from that main entrance walkway?

A That is exactly right.

By Mr. Williams:

Q Now, Mr. Carper, did you see the streetcar stop at Davis Avenue?

A No, I can't say that I did.

Q Do you know that that streetcar that you had reference to had been standing at Davis Avenue?

A No, I don't know.

Q In other words, you can't tell when you were coming up Broad Street that that streetcar was standing at Davis for some time letting off or taking on passengers?

page 151 } A No, sir, I couldn't say it was or wasn't.

Q From your original testimony the way you related it it appeared at the time that you were following the streetcar up the street before it got to Davis.

A I don't want the jury to be under that impression.

Q You didn't follow that streetcar before it got to Davis Avenue, did you?

A No, I caught up with it along there. Whether it was standing still as I was approaching I don't know —

Q Did you notice —

Mr. Robertson:

Let him finish. You broke him off in the middle of his answer.

By Mr. Williams:

Q Did you finish?

A Yes, sir.

Q Mr. Carper, how far behind that streetcar were you?

A When?

Q When the streetcar was proceeding from Davis Avenue.

A Well, I can answer that in this way, sir. When I passed the streetcar I suppose it had hit somebody, I don't know.

W. K. CARPER

Q You don't know that it did?

A No, I don't know that it hit her, I didn't see it hit her, but the car had stopped when I passed and I passed just as it stopped.

page 152 } Q That isn't my question. How far behind that streetcar were you as the streetcar was proceeding from Davis Avenue?

A I would say I was approximately 50 to 60 feet behind the car at the intersection.

Q When the streetcar had left the intersection you were 50 or 60 feet behind it?

A Possibly that far. I don't recall exactly.

Q Now when you were 50 or 60 feet behind the streetcar you saw the lady in the middle of the street, didn't you?

A That is right, in that vicinity. She was between the sidewalk on one side and the track on the other. I wouldn't say she was definitely in the center.

Q But she was near about the center?

A Sir, that is hard for me to say and is hard for you to say too—any person. I was travelling along and the streetcar —

The Court:

Just answer the question the best way you can. Don't argue with counsel.

By Mr. Williams:

Q The Judge won't let me answer questions. You didn't hear any bells sounded, did you?

A No, sir, I didn't.

Q Now what brought to your mind that the streetcar was only going 10 miles per hour?

A Because of the speed I was proceeding and the rapidity with which I was gaining on the car.

page 153 } Q Well now, what kind of day was it? Was it rainy or dry?

A Sir, as I recall, it was a very nice day.

Q And there were no automobiles ahead of you?

A None that I recall. I won't say there was or was not.

Q Then there was nothing between the lady and the motor-man for the motorman not to have seen her?

A I suppose not.

W. K. CARPER

REDIRECT EXAMINATION

By Mr. Robertson:

Q Mr. Carper, when the lady stepped on the track how far would you say you were behind the streetcar then?

A I wasn't behind the streetcar then.

Q Where were you?

A I was beside the car.

Q And how far back from the front of the car were you at that moment?

A I was about halfway back.

RECROSS EXAMINATION

By Mr. Williams:

Q Well now then, from the time you saw that lady in the middle or between the curbing and the car tracks
page 154 } you had had sufficient time to make up those 50 to 60 feet which you were behind the streetcar and half of the distance of the streetcar? In other words, you went 100 feet —

Mr. Robertson:

If Your Honor please, there is nothing here to justify such a statement.

Mr. Williams:

He said 50 or 60 feet plus half of the streetcar.

Mr. Robertson:

What is the length of the streetcar?

The Court:

There is no evidence on that.

By Mr. Williams:

Q How long are those streetcars, would you say?

A Your idea is as good as mine. I expect it was around 60 feet, I imagine. It all depends on the size of the car. They are two different lengths of them, some big ones and little ones.

Q But that one looked to be about 60 feet to you?

W. K. CARPER

A I think it was one of the large cars. I wouldn't say to be positive.

Mr. Robertson:

I will tell you if you want to know.

Mr. Williams:

I don't know how much it is. I said it once and the Judge stopped me.

Mr Robertson:

It is 40 feet.

page 155 } Mr. Bremner:

I think we ought to put both attorneys on the stand to testify.

By A Juror:

Q Did you pass in front of or behind the lady at the time she reached the streetcar track?

A I passed behind her; that is, she had passed across my path because I had pulled over towards the curb as she came out in the street because I saw she wasn't stopping. Is that sufficient, sir?

By Mr. Williams:

Q You saw she wasn't stopping and you pulled over towards what would be the north curbing?

A Yes, sir.

Q In that direction. So then your car never at any time blocked the motorman's view of her?

A I couldn't block him, sir, because I wasn't in front of him.

Q Did you at any time before the lady was hit, if she was hit because you don't know she was—did you at any time pass the streetcar before the lady disappeared from your view?

A No, sir.

Q In other words, at no time were you ahead of the streetcar before she disappeared from your view.

A No, sir.

W. K. CARPER

Mr. Williams:

That answers the question I thought the juror was page 156 } under the wrong impression.

By Mr. Robertson:

Q Did you say there was one other automobile along there where you were?

A No, sir, I didn't. If there was one along there I don't recall it. It might have been a dozen, but I don't recall it. It has been so long I have forgotten.

By A Juror:

Q What kind of an automobile was yours?

A It was a dilapidated Mercury, sir. It was about worn out.

The Juror:

I didn't want to embarrass you.

The Witness:

But it is a rolling piece of equipment. It had run 169,000 when I traded it off.

Witness stood aside.

Mr Robertson:

That is our case, Your Honor. Since you refused a view before the testimony was heard, I suggest a view and leave the decision as far as I am concerned with the jury whether they want to go there or not.

The Court:

Gentlemen, would you all like to be taken to the scene of the accident or do you think you would rather not go?

A Juror:

I would like to go.

page 157 } The Court:

I might say, Gentlemen, you will not go and discuss this case up there with anyone, but just take a look; that is what a view is for.

Mr. Williams:

With the Court's permission if they want to ask a question they can ask it of the Court and the Court will then try to have answered anything in that manner and the jury satisfied. For instance, the record will be at their request if they want to verify anything.

A Juror:

May we have a streetcar stop at Davis Avenue on the eastern side and board that streetcar and take a view?

Mr. Robertson:

No, sir, not unless it is the same type of car. This car is 448. If there is a 400 type car there we would be glad to have you do it if you want to, but wouldn't want you to board a 1500 type car

Mr. Williams:

They have a lot of those 400 type. I am sure one will be there in due course.

Note:

The jury was taken to the scene of the accident in the presence of the Court and a view was taken and thereafter the jury was adjourned until tomorrow, March 26, 1948, at 10:15 A M. o'clock.

page 158 }

March 26, 1948.

The Court convened pursuant to adjournment.

Mr. Robertson:

The defendant moves the Court to strike from the record and exclude from the jury all the testimony in the case for the plaintiff upon the ground that there is no testimony in the case which would support a verdict for the plaintiff and upon the further ground that the uncontradicted testimony convicts the

plaintiff's decedent of negligence as a matter of law which bars any recovery by the plaintiff.

The Court:

Motion overruled.

Mr. Robertson:

The defendant excepts to the ruling of the Court for the reasons stated.

Note:

After the Court indicated to counsel the instructions it would give to the jury the following exceptions were taken:

Mr. Robertson:

The defendant objects and excepts to the granting of any instructions for the plaintiff upon the ground there is no evidence in the case to support any instructions for the plaintiff for the reason that no negligence on the part of the defendant has been shown to support a verdict for the plaintiff and the testimony in the case convicts the plaintiff of negligence as a matter of law which proximately caused or efficiently contributed to her injury and bars any recovery by the
page 159 } plaintiff.

The defendant specifically objects and excepts to the granting of Instruction No. 1 for the plaintiff upon the following grounds: (1) The first clause of the instruction is a statement that the operator of a streetcar has no right to assume that no person will go upon, near to or cross the tracks in front of a car. The evidence now having been introduced in favor of both the plaintiff and defendant, there is no presumption of any kind anywhere in the case. The case must now be determined on the evidence and not on any presumption. The statement in the instruction is in effect an argument against the operator of the car in that the sense of the statement is that the operator of the defendant's streetcar must assume that persons will come on the track. Such is not the law. The law in this case is whether or not the operator was guilty of negligence and whether or not the plaintiff's decedent was guilty of contributory negligence which bars a recovery, and the outcome of this case should be based on the evidence and not on presumptions or lack of presumptions; (2) Even if

the first statement of the instruction were correct on the basis of presumptions or lack of presumptions, it would still be fundamentally erroneous for the reason that it tells the jury that if they believe from the evidence that the operator of the westbound car did not use reasonable care to check his car at the time he saw or in the exercise of ordinary care should have seen plaintiff's decedent crossing in dangerous proximity to his car and consequently plaintiff's decedent was injured, then the verdict of the jury should be for the plaintiff. Such is not the law. In any view of the case the operator had a right to presume and assume in the absence of a showing to the contrary that the plaintiff's decedent would exercise her faculties and exercise ordinary care for her safety, as has been said by the Court of Appeals where a plaintiff steps on the track in front of a moving car between intersections the case is rare indeed where a recovery for the plaintiff can be had.

The defendant makes no specific objection to Instruction No. 2 for the plaintiff other than the general objection and exception urged against all the instructions for the plaintiff.

The defendant objects and excepts to the granting of Instruction No. 3 for the plaintiff upon the specific ground that the concluding phrase of the instruction which reads "the deceased must be presumed to have been without fault" is not the law and that entire phrase should be deleted for the reason that this case must now be determined upon the proof and not upon any presumption.

Mr. Williams:

The plaintiff objects to this specific objection on the part of the defendant and says that the Court granted No. 3 which had in it the following words on the second to the last line "as in the absence of such proof" and interlined in place of that clause the words "as otherwise" at the specific request of the defendant and the suggestion of the defendant's counsel to which he stated no specific objection except the general exception to all plaintiff's instructions and the authority for the instruction is *Core v. Wilhelm*, 124 Va. 150, at 157, and subsequent quotations in cases following.

Mr. Robertson:

Counsel for the plaintiff has misquoted and misconstrued and misstated what counsel for the defendant said. Counsel for

the defendant suggested that the language "as otherwise" be inserted to cure another objection to the instruction. As long as these instructions are still under argument counsel for defendant has the right to make any additional objections that occur to him as the discussion proceeds and counsel is now doing that and asks that the Court corroborate this statement of counsel as to why the words "as otherwise" were placed in the instruction.

The Court:

As I recall the suggestion, Mr. Robertson, it was made for the change in Instruction 3 by you and at that time the Court was of the opinion that you felt that with that change the instruction would be proper.

Mr. Robertson:

That it would be correct as to that and I have modified my thought to the extent you stated.

The defendant objects and excepts to the granting page 162 } of Instruction No. 4 for the plaintiff upon the ground

(1) that no issue of the last clear chance is proper to be submitted to the jury in this case under the evidence for the reason that the evidence of the witness Coly Henley is physically impossible and incredible; (2) The form of Instruction No. 4 is erroneous in that the first paragraph of the instruction turns the jury loose to search through all the other instructions and apply the doctrine of last clear chance against the defendant as a conjecture, surmise and speculation of the jury as they may be inclined to do; (3) In any view of the case, there is no evidence in the record to warrant the instruction by the Court that if the jury believe from the evidence that the operator of the defendant's car saw, or by the exercise of reasonable care should have seen, that the plaintiff's decedent was in a position of peril or about to go into danger and was oblivious thereof and that she was in danger of being struck by the streetcar it was incumbent upon the motorman to do anything which he failed to do or to leave undone which he did.

The defendant interposes no specific objection and exception to the damage instruction offered by the plaintiff other than the blanket objection of the defendant to all instructions offered by the plaintiff and given for the plaintiff.

Mr. Williams:

Plaintiff replies to the objections by the defendant raised to Instruction No. 1 and says this instruction is page 163 } peculiarly applicable as the motorman actually assumed by his conduct in keeping his eyes at his change carrier and not looking up that no one would cross in front of his car, and this duty of looking out for people attempting to cross upon the streetcar tracks was a continuing duty and that this instruction fits the case in a most acceptable manner.

In regard to the objection raised by the defendant to Instruction No. 4, known as the last clear chance instruction, his No. (1) that there is no issue of fact to predicate it as the evidence of Henley is physically impossible and incredible is answered by all the evidence in this case which supports Henley; and plaintiff replies to the objection raised by the defendant to Instruction No. 4 that it turns the jury a loose and requires them to search and apply the last clear chance doctrine by stating that this instruction is an evolution of the last clear chance doctrine in this State due to the fact that it was necessary to have finding instructions for the defendant in cases of last clear chance qualified by a concluding clause after the finding for the defendant "unless the jury believes from the evidence that after the plaintiff's peril was, or should have, by the exercise of ordinary care, been seen or discovered by the defendant, if the defendant then had a last clear chance to avoid injury and did not do it, then the verdict of the jury must page 164 } be for the plaintiff," and this Instruction No. 4 as at present drawn qualifies that finding instruction in a brief statement and is clear to the average mind and not confusing to the jury. Counsel for the plaintiff on yesterday in argument of this instruction offered to withdraw this class of instruction from the case provided each finding instruction for the defendant were qualified by a like clause applying the last clear chance doctrine and this tender still holds.

Plaintiff objects to Instruction B asked for by the defendant because it fails to embody in clause (e) the provision of the law which gives the only exception to pedestrians crossing otherwise than at intersections which is in these words: "(e) Except to board a streetcar or passenger bus or to enter a safety zone, in which event they shall cross the highway or street only at right angles." Now the evidence is undenied that the

plaintiff was crossing the street at the crosswalk from Broad Street Station where the safety zones begin for east and west-bound passenger traffic for streetcar passengers and she was on her way and at the point to enter the safety zone on the south side of the eastbound streetcar tracks provided for pedestrians anticipating being passengers on the streetcar. She had her change in her hand, she had disclosed where she was going to others as shown by the evidence and she is peculiarly covered in this clause of Section 2154 (122) (26) as to pedestrians, and plaintiff asks for the instruction to be amended there-
 page 165 } by and excepts to the ruling of the Court denying said amendment.

As to Instruction D plaintiff believes this is too brief and not full enough and is so worded as that it does not provide a finding for the defendant and would make it confusing to the jury in the application of the last clear chance instruction allowed by the Court and plaintiff believes that this instruction should close with the clause: "(e) Except that the doctrine of the last clear chance as set out in Instruction No. 4 must be applied herein."

The plaintiff objects to each and every finding on behalf of the defendant for the reason that there is no credible evidence in the record upon which a finding could be based for the defendant company. As is set out in Bassett v. Wood, a defendant's case is no greater than he makes it out himself and in this case the company speaks through its operator, its active agent, a fundamental thing in this case, and he convicts himself of the grossest kind of negligence in attempting to set up a figment of the imagination by which the plaintiff came from between cars which were not there, as shown by the defendant's own evidence, and she zigzagged across the street before she got to his car and which he later admitted was not true, that he didn't know what zigzagging was, that he could say she zigzagged, and he stopped his car by his own admission in 10 or
 page 166 } 12 feet and she walked, by all the evidence in this case, from the north curbing of Broad Street across the streetcar tracks and was hit by the extreme left front overhang of the car, showing she had been in view for the longest kind of time ever since he was standing up at Davis Avenue and he admits he didn't see her until too late and hit her, which is a confession of negligence, and there could

be no verdict favoring the defendant supported by the evidence.

Mr. Robertson:

If this case should go to the Court of Appeals, either for the plaintiff or for the defendant, counsel for the defendant wishes to call the attention of that Court to the manner in which counsel for the plaintiff is reading jury harangues into this record and encumbering the record and making it more expensive to write up the record, and asks the Court to take that matter into consideration in its decision of this case if it ever gets to that Court.

Note:

The Court gave the following instructions to the jury:

INSTRUCTION NO. 1

The Court instructs the jury that the operator of a street-car has no right to assume that no person will go upon, near to or cross the tracks in front of a car, and he must use reasonable care to attempt to check his speed as soon as page 167 } he sees, or ought to have seen, that a person is in dangerous proximity to his car; and if you believe from the evidence in this case that the motorman of the defendant's westbound car did not use reasonable care to check his car at the time he saw or ought, in the exercise of ordinary care to have seen plaintiff's decedent crossing in dangerous proximity to his car and by reason of his failure to check his said car, plaintiff's decedent was injured and killed while exercising ordinary care on her part, then you must find your verdict for the plaintiff.

INSTRUCTION 2.

The Court instructs the jury that Section 5 of an ordinance of the City of Richmond in effect at the time the plaintiff was injured, provided as follows in part:

"It shall be the duty of the motorman of the cars to give reasonable notice to drivers of vehicles and pedestrians of their approach, and also to afford all reasonable opportunity for them or either of them to avoid collision or accident."

And if you believe from the evidence in this case that the defendant violated the foregoing ordinance then such violation was negligence and if you further believe from the evidence that the defendant was so negligent and as a proximate result of such negligence the plaintiff's decedent was injured and killed, while exercising ordinary care on her part, then you must find your verdict for the plaintiff.

page 168 } INSTRUCTION NO. 3

The Court instructs the jury that if the defendant company relies upon contributory negligence on the part of the deceased to defeat a recovery by the plaintiff, that the burden is on the company to prove contributory negligence on the part of deceased, unless such negligence is disclosed by the evidence or may be fairly inferred from all the facts and circumstances in the case, as otherwise, the deceased must be presumed to have been without fault.

INSTRUCTION NO. 4.

The Court instructs the jury that wherever you are instructed in this case that you may find for the defendant, or that the plaintiff may be barred from recovery, should it be proven that the plaintiff's decedent was guilty of contributory negligence, these instructions are subject to the following qualifications:

That even though you may believe from the evidence that the plaintiff's decedent was guilty of contributory negligence, yet this will not prevent the plaintiff from recovering in this case. If you further believe from the evidence that the motorman in charge of defendant's car saw, or by the exercise of reasonable care should have seen, that the plaintiff's decedent was in a position of peril or about to go into danger
 page 169 } and was oblivious thereof and that she was in danger of being struck by the streetcar should the car continue on and that the motorman thereafter could have sounded a warning, slowed down or stopped the car by the use of reasonable care in time to have prevented the car from striking the plaintiff's decedent, but failed to do so, then your verdict must be for the plaintiff.

INSTRUCTION NO. 5

The Court instructs the jury that if they find for the plaintiff, then in assessing the damages to which they may believe he is entitled, they should estimate the same with reference to:

1. The probability of the life of the deceased, the jury have the right to determine with reference to recognized scientific tables relating to the expectation of human life.
2. Compensation for the loss of her care, attention and society to her widower and son.
3. Such sum as they may deem fair and just by way of solace and comfort to her widower and son for the sorrow, suffering and mental anguish occasioned to them by her death, but in no event to exceed the sum allowed by law

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INSTRUCTION NO. A

The Court instructs the jury that in considering whether or not the operator of the streetcar had a last clear chance to avoid injury to Ruth H. Owens, the plaintiff cannot recover by showing merely that perhaps if the operator of the streetcar had acted more promptly or instantaneously, injury to Ruth H. Owens might have been avoided. The burden is upon the plaintiff to show by a preponderance of evidence that after the operator of the streetcar actually realized the danger of injury to Ruth H. Owens, or in the exercise of ordinary care should have realized the danger of injury to her, there was in fact enough time and enough distance for the operator to avoid injury to her by the exercise of ordinary care. It is insufficient to show there was a mere possibility he might have done so.

INSTRUCTION NO. B.

The Court instructs the jury that when Ruth H. Owens was injured the traffic law provided as follows:

"s 2154 (126) Pedestrians. — (a) When crossing * * * streets within * * * cities, pedestrians * * * shall cross wherever possible, only at intersections * * * "

"(b) * * * "

"(c) * * * "

"(d) * * * "

"(e) Pedestrians shall cross * * * streets only at right angles * * * "

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If Ruth H. Owens violated either one of the foregoing provisions of the traffic law, then such violation of the traffic law was negligence on her part; and if you believe from the evidence that she was guilty of such negligence and that such negligence on her part either proximately caused or efficiently contributed to her injury, then the plaintiff cannot recover in this case.

INSTRUCTION NO. C.

The Court instructs the jury that the burden is upon the plaintiff to prove by a preponderance of the evidence that the operator of the streetcar was guilty of negligence and that his negligence was the sole proximate cause of injury to Ruth H. Owens; and if you believe from the evidence that Ruth H. Owens herself was guilty of negligence which efficiently contributed to her injury, then you must bring in your verdict for the defendant.

INSTRUCTION NO. D.

The Court instructs the jury that it was just as much the duty of Ruth H. Owens to look out for the streetcar and avoid injury to herself as it was the duty of the operator of the streetcar to look out for her and avoid injuring her.

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INSTRUCTION NO. E.

The Court instructs the jury if you believe from the evidence that the operator of the streetcar was guilty of negligence, and that Ruth H. Owens was also guilty of negligence which efficiently contributed to her own injury, then you must find your verdict for the defendant, even though you may believe from the evidence that the operator of the streetcar was more negligent than Ruth H. Owens, since the law does not apportion negligence nor consider degrees of negligence in this case, the plaintiff being barred from recovery in this case if Ruth H. Owens was guilty of negligence which either proximately caused or efficiently contributed to her own injury.

INSTRUCTION NO. F.

The Court instructs the jury that even though you may believe from the evidence that the operator of the streetcar failed to exercise ordinary care to avoid injury to Ruth H.

Owens after he saw, or by the exercise of ordinary care should have seen there was danger of injuring her, nevertheless you cannot find a verdict for the plaintiff if you also believe from the evidence that Ruth H. Owens negligently attempted to cross the westbound streetcar track on Broad Street in front of the approaching streetcar, after she knew or by the exercise of ordinary care should have known that the streetcar page 173 } could not stop in time to avoid injury to her.

INSTRUCTION NO. G.

The Court instructs the jury that it was the duty of Ruth H. Owens to exercise ordinary care for her own safety, and if you believe from the evidence that she failed to exercise ordinary care for her own safety, and that she thereby either proximately caused or efficiently contributed to her own injury, then you must find your verdict for the defendant.

INSTRUCTION NO. H.

The Court instructs the jury that the traffic law imposed upon the operator of the streetcar the duty to exercise ordinary care for the safety of persons lawfully using the streets of the City of Richmond; and if you believe from the evidence in this case that the operator of the streetcar was exercising ordinary care when Ruth H. Owens was injured, then the plaintiff cannot recover in this case.

INSTRUCTION NO. I.

The Court instructs the jury that you must consider this case solely upon the evidence before you and the page 174 } law laid down in the instructions of the Court; and you must not allow any sympathy you may feel influence your verdict. A verdict must not be based, in whole or in part, upon conjecture, on surmise, or sympathy, but must be based solely upon the evidence in the case and the instructions of the Court.

INSTRUCTION NO. 6.

The Court instructs the jury that in case your verdict should be for the plaintiff from the evidence and other instructions of the Court the statute provides that the jury may make the award to either the husband or son, or both of them in such an

amount or amounts as you may decide, but of course not to exceed the sum claimed in the notice of motion.

Note:

Counsel for both parties argued the case and the jury retired to the jury room to consider its verdict and thereafter returned to the court with the following verdict: "We, the jury, on the issue joined find for the plaintiff and assess damages at \$15,000 divided as follows: Father, \$5,000, son, \$10,000." The polling of the jury was waived and the jury was discharged from further consideration of the case.

Mr. Robertson:

If Your Honor please, the defendant moves the Court to set aside the verdict as contrary to the law and the evidence and without evidence to support it, for errors committed by the Court in the admission and exclusion of testimony, for errors committed by the Court in the granting and refusing and the modification of instructions and upon the further ground that there is no evidence in the case of negligence on the part of the defendant which would support a verdict for the plaintiff and for the further reason that the plaintiff's decedent was herself guilty of negligence as a matter of law which proximately caused or efficiently contributed to her death and bars any recovery by the plaintiff.

The Court:

The motion is postponed as far as the argument is concerned and we will set the date later.

I, WILBUR J. GRIGGS, Clerk of the Circuit Court of the City of Richmond, do hereby certify that the foregoing is a true transcript of the record in the action at law wherein Joseph B. Owens, Administrator of the estate of Ruth H. Owens, deceased, is plaintiff, and Virginia Transit Company is defendant, with the exception of the original exhibit which has been certified by the Court under the provisions of Section 6357 of the Code of Virginia, as amended by Acts of Assembly of 1938, page 136, and that the plaintiff had due notice of the intention of the defendant to apply for such transcript.

I further certify that the defendant, Virginia Transit Company, has executed a COMBINATION SUSPENDING AND SUPERSEDEAS BOND in accordance with the provisions of

Section 6351 of the Code of Virginia, as amended by Acts of Assembly of 1934, in the penalty of SEVENTEEN THOUSAND, FIVE HUNDRED DOLLARS (\$17,500.00).

Witness my hand this 23rd day of August, 1948.

WILBUR J. GRIGGS, Clerk.
by E. M. EDWARDS, D.C.

Fee for Record \$69.50

A copy: teste.

M. B. WATTS, Clerk.

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Plaintiff's Exhibit No. 1—Certificate of Qualification of Administrator for Ruth H. Owens, deceased.

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