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Record No. **1639**

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In the
Supreme Court of Appeals of Virginia
at Richmond

**VIRGINIA ELECTRIC AND POWER COM-
PANY, A CORPORATION,**

v.

ADAM R. LOWRY



FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

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

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

M. B. WATTS, Clerk.

166 Va 207

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1639

VIRGINIA ELECTRIC AND POWER COMPANY, A CORPORATION, Plaintiff-in-Error,

versus

ADAM R. LOWRY, Defendant-in-Error.

PETITION FOR WRIT OF ERROR AND *SUPERSEDEAS*

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

Petitioner, Virginia Electric and Power Company, respectfully represents that it is aggrieved by final judgment for the principal sum of One Thousand Dollars (\$1,000) entered against petitioner in the Law and Equity Court of the City of Richmond on the 29th day of August, 1934 (R., pp. 11-12), in an action *ex delicto* by notice of motion for judgment in a single count, wherein recovery is sought for personal injuries alleged to have been sustained by Adam R. Lowry July 11, 1932, when an electric street car upon which he was a passenger was derailed at the Halifax Avenue crossing of the Oak Grove line (R., p. 344) of Virginia Electric and Power Company on the Richmond-Petersburg Turnpike in the City of Richmond (R., pp. 1-3).

In said action Adam R. Lowry was plaintiff and this petitioner was the defendant (R., p. 1).

Two trials by jury were had; one by regular jury October 5th, 6th, 9th, 1933, which resulted in a hung jury (R., p. 8), and one by *special jury* May 24th, 25th, 28th, 29th, 1934, which

resulted in a verdict of \$1,000.00 for the plaintiff (R., pp. 9, 10).

Motion by petitioner to strike the testimony for the plaintiff at the second trial was overruled (R., p. 549), and the case was submitted to the jury at both trials upon the general issue (R., p. 4), and grounds of defense alleging *inter alia* that any injuries the plaintiff may have sustained were occasioned by an unavoidable accident (R., pp. 6-7). Motion to set aside the verdict returned at the second trial was thereafter overruled (R., p. 11), and on the 29th day of August, 1934, judgment was entered upon the verdict (R., pp. 11-12).

Petitioner is advised that during the progress of the trial and thereafter in entry of judgment upon the verdict, errors were committed to the prejudice of petitioner which warrant and call for a review and reversal of said judgment, and petitioner therefore prays for a writ of error and *superseedeas*.

Transcript of the record, including all proceedings at the second trial and subsequent thereto, together with all exhibits introduced at the second trial, is herewith submitted, to which transcript and exhibits reference is made throughout this petition; the plaintiff and the defendant in the trial court being for convenience designated by the same terms in this petition.

THE FACTS OF THE CASE.

About 11:30 o'clock in the morning of July 11, 1932 (R., pp. 31-114), the plaintiff boarded the defendant's south-bound (R., p. 32) electric railway safety car No. 1527 (R., pp. 114-15, 362-4) as a passenger at Cowardin Avenue (R., p. 32), his destination being Stop No. 3, about one mile southwardly (R., p. 132) at the end of defendant's Oak Grove line (R., pp. 133, 244, 344); both Cowardin Avenue and Stop No. 3 being within the City of Richmond (R., pp. 1-3, 550), and Stop No. 3 being about 300 feet south of Halifax Avenue (R., p. 224).

To open and close the doors upon car No. 1527 the operator of the car moves a control lever which automatically applies air pressure to the mechanism controlling the movement of the doors (R., p. 116). When the derailment occurred F. P. Upchurch was operating the car (R., p. 224). Thomas R. Owen (R., p. 118), an experienced operator upon the type of car involved, had just completed instructing F. P. Upchurch how to operate the doors upon the car (R., pp. 122-3, 222-3, 228); Upchurch himself having had some ten or fif-

teen years' experience in the operation of other types of cars (R., pp. 110, 127), so that the only instruction he required was instruction in the operation of the doors upon safety cars such as car No. 1527 (R., pp. 116, 126-7); operation of the different types of cars being otherwise practically the same (R., p. 115).

The plaintiff testified that car No. 1527 was roughly operated at a speed of approximately thirty-five miles per hour between Cowardin Avenue and Halifax Avenue (R., pp. 68-9). He also testified that the sound and motion of the car indicated that some unidentified part of the understructure of the car had broken down a considerable distance before the car reached Halifax Avenue (R., pp. 69, 70); and according to the plaintiff, just before the car reached Halifax Avenue there was a "*bim, bam, boom*" sound (R., p. 70) and the car left the rails.

The testimony of Lowry was contradicted by Upchurch (R., p. 117) and by Owen (R., pp. 223, 225), and by two passengers upon the car (R., pp. 238-247, 257-264); all of whom testified that the car was apparently in proper running order and that it was properly operated in a normal manner from Cowardin Avenue to Halifax Avenue, where the derailment suddenly and unexpectedly occurred, without fault of the operator, after the car had crossed Halifax Avenue (R., pp. 118-20, 128, 225, 239-40, 241, 246, 257-9).

According to the uncontradicted evidence the front axle broke on the left side of the car and no part of the car other than the axle was in anywise broken or damaged (R., pp. 530-3, Exhibit Childrey No. 1).

According to the uncontradicted testimony in the case car No. 1527, with all its mechanism and appliances, including the axle which broke, is the best obtainable standard equipment of approved design (R., pp. 290, 308, 324, 364-5); and according to the uncontradicted testimony, the axle was designed to withstand safely any possible application of the brakes (R., pp. 224-25). The axle which broke bore Virginia Electric and Power Company identification number 42 and weighed approximately 400 pounds (R., pp. 290, 291, 308). The wheel is pressed upon the axle and the axle revolves with the wheel (R., pp. 305, 314). The break, or *failure* as it is termed in the street railway industry, occurred inside the hub of the left front wheel (R., pp. 279, 286-7, 295).

An ordinance of the City of Richmond prescribed a reasonable rate of speed, but did not impose any speed limitation in miles per hour (R., p. 550), and the evidence is uncontradicted that the track is level and straight and in excellent condition for a considerable distance both North and

South of Halifax Avenue (Plaintiff's Photograph Exhibits Burkert Nos. 1, 3, 4, 6; Defendant's Photograph Exhibits Nos. 2 and 3; R., pp. 97-9, 108, 429, 436, 448).

The car actually came to a stop south of Halifax Avenue (R., pp. 71, 120, 128, 159, 225, 491). The trolley was reversed and the car was re-railed within the paved Halifax Avenue crossing (R., pp. 160, 165, 188); and after it had been re-railed, Thomas R. Owen returned the car under propulsion of its own motors northwardly to the car barn (R., p. 227). What had been the rear of the car going toward Halifax Avenue was the front of the car returning toward the barn, and what had been the left front wheel going toward Halifax Avenue was the right rear wheel returning toward the car barn (R., p. 224).

It appears without contradiction that the mechanical construction of the car was such that the car could not have been operated southwardly for more than a few feet with axle No. 42 broken, and that the car necessarily left the rails almost immediately after the break occurred (R., p. 317).

But according to the uncontradicted evidence, after the break occurred the car could have been operated northwardly, as was done, with axle No. 42 at the rear; and according to the uncontradicted evidence, the wheel where the axle broke was *canted* in such manner and was held in such position by the journal box and housing that the wheel left its mark in the paving at Halifax Avenue and at other street intersections when the car returned to the barn (R., pp. 131, 162-3, 179, 202). The track is not paved between intersections (Defendant's Photograph Exhibits 2, 37).

The plaintiff contends the marks in the paving were made by the car southbound, but the plaintiff testified he was confined to the hospital for two weeks and at his home for seven weeks immediately after his injury (R., pp. 34, 74). Obviously therefore he himself could not identify the marks.

According to one witness for the plaintiff the car ploughed up the ground north of the Halifax Avenue crossing and left marks upon the paving in Halifax Avenue before it was re-railed (R., p. 491). But the alleged marks were not identified by the witness; and according to witnesses for the defendant, marks specifically identified were made in the paving at the Halifax Avenue crossing by the appliance used to re-rail the car there, and by the right rear wheel of the car when the car left the scene of the accident northbound (R., 128); the mark made by the wheel being due to the fact that the wheel had *canted* (R., pp. 131, 159, 160-6, 179, 187-8, 192-7, 202-4, 210, 342-3).

INSPECTION AND TESTS WERE MADE AFTER THE
DERAILMENT.

The car was received at the barn and was inspected by F. L. Childrey, Shop Foreman for the Company (R., p. 278); and Childrey testified positively that the axle broke inside the hub of the wheel (R., pp. 279, 281) and that the car was otherwise undamaged (R., pp. 530-1).

Childrey removed axle No. 42 with the wheels upon it from car No. 1527 and substituted another axle with wheels; and thereupon car No. 1527 was returned to service (R., p. 279).

Axle No. 42 with wheels attached was thereupon forwarded by Childrey to the overhauling department at the Company's Reservoir Shops (R., p. 280), where the axle with wheels attached was received and inspected by W. J. Hicks, Master Mechanic for the Company (R., p. 286). Hicks testified positively that the axle broke inside the hub (R., pp. 286-7, 220).

The broken axle with the wheels attached was thereupon inspected by John T. Porter, Superintendent of Equipment for the Company (R., p. 289), and Porter also testified positively that the break occurred inside the hub (R., pp. 295, 319-20). Porter further testified that practically all breaks occur, as the break in axle No. 42 occurred, *inside the wheel* (R., pp. 223-4, 326-7, 331).

After Porter had inspected the axle the wheels were removed from the axle and were returned to service (R., p. 291).

The break was reported to J. R. Johnson & Company, Incorporated, Richmond, Virginia, where the axle had been purchased under Virginia Electric and Power Company purchase order No. 28839 (R., pp. 321-2), J. R. Johnson & Company, Incorporated, heat No. 5019 (R., p. 333); and thereupon both J. R. Johnson & Company, Incorporated, and Virginia Electric and Power Company, through inspections and through chemical analysis and tensile test undertook to ascertain the cause of the break (R., pp. 295-6).

For purpose of making chemical analysis and tensile test portions of the axle were desired which had been subjected to the same operating conditions to which the portion of the axle which broke had been subjected (R., p. 403). Accordingly, the axle was cut in two opposite the break and at a point about the same distance from the end of the axle opposite the break (R., p. 385). Portions of the axle were thereupon drilled from the inside of the axle which had been exposed where the end had been cut off the axle (R., pp. 391-9).

One such portion was subjected to a chemical analysis by W. L. Moody (R., pp. 402, 405-6), an independent and experienced graduate chemical engineer trained at North Caro-

lina State College, Stephens Institute and Cornell University (R., p. 405); and one portion of the axle was subjected to a tensile test by Morris Smith, a graduate of Lehigh University and an experienced mechanical engineer, employed by J. R. Johnson & Company, Incorporated (R., pp. 397, 411-15).

THE MATERIAL IN THE AXLE SURPASSED SPECIFICATION REQUIREMENTS.

Both the chemical analysis and the tensile test demonstrated that the quality of the material in the axle was better than specification requirements (R., pp. 383-5, 407-8; Exhibit Moody No. 1; R., pp. 414-15; Exhibit Smith No. 1; R., p. 417; Exhibit Smith No. 2); and no suggestion is made that either the chemical analysis or the tensile test was in anywise inaccurate or unreliable (R., p. 401).

Nor has the cause of the break been actually determined.

Both John T. Porter, Superintendent of Equipment for Virginia Electric and Power Company, and George E. Street, Jr., President of J. R. Johnson & Company, Incorporated, testified without contradiction that there was no obvious or latent defect in the axle (R., pp. 297, 384, 386); both these witnesses expressing the opinion that the break was occasioned by a progressive fracture of unknown origin and indeterminate duration which could not have been anticipated or foreseen or prevented (R., p. 386).

THERE IS NO EVIDENCE THE BREAK OCCURRED NORTH OF HALIFAX AVENUE OR OUTSIDE THE WHEEL.

Counsel for plaintiff contend, without evidence to support them, that the break occurred a considerable distance before the car reached Halifax Avenue. But, as already stated, the uncontradicted evidence is that the car could not have been run more than a few feet without leaving the track after the break occurred.

Through cross-examination of the defendant's witness Lee, and through the testimony of Thomas F. Martin, counsel for plaintiff attempted to show the break occurred outside the hub, but both Lee and Martin admitted they did not know where the break actually occurred; and Martin denied positively that he testified at the first trial, as counsel for plaintiff contend, that the break occurred outside the hub. Indeed, Martin testified unequivocally that counsel for plaintiff are mistaken in their contention that he ever testified the break

occurred outside the hub. And, as already stated, Childrey and Hicks and Porter all testified without contradiction that the break occurred inside the hub.

THE TESTIMONY OF THE WITNESS LEE DOES NOT
JUSTIFY A VERDICT FOR THE PLAINTIFF.

The witness, W. M. Lee, was put upon the stand at both trials by the defendant but his testimony at the first trial is not here involved. At the second trial Lee testified in part as follows:

CROSS EXAMINATION.

By Mr. Williams:

* * * *

P. 275:

"Q. *Where did the wheel break?*

"A. Right at the back side of the wheel close to the box.

"Q. Was it the wheel itself or was it the axle?

"A. Axle.

"Q. You could see the break in the axle?

"A. Yes, sir.

"Q. How far would you say from the hub of the wheel was the break?

"A. I don't know; I couldn't say exactly. It wasn't much space in between there and the box.

"Q. Would you say it was as much as an inch or two inches?

"A. Something like that I reckon; might have been a little different; I can't tell."

* * * *

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Pp. 276-277:

"Q. Did you see the broken part of the axle when you looked down or not?

"A. Mr. Williams: That has been answered by the witness categorically—'Yes, he saw it'.

"Mr. Robertson: I ask the witness the question."

"The Court: Let him answer."

"A. Yes, sir."

"By Mr. Robertson:

"Q. Did you see the ends of the broken axle when you looked under?

P. 277:

"A. *The wheel.*

"Q. Could you see the ends of the axle?

"A. A piece of the wheel was turned up like this (indicating). The wheel had got back under the car."

"Q. Did you make any measurement to see whether the break in the axle was inside the hub of the wheel or outside of it?

"A. No, sir, I did not."

"Q. Do you know whether it was or not?

"A. It was even with the wheel practically."

"Q. But you made no measurement?

"A. No, sir."

RE-CROSS EXAMINATION.

By Mr. Williams:

"Q. You stated a moment ago that it was about an inch, or maybe a little more, from the hub. You don't wish to change that, do you?

"A. No, sir. I meant from the motor box—motor casing."

DIRECT EXAMINATION.

By Mr. Robertson:

Pp. 358-359:

"Q. Could you see the axle?

"A. On this side. (Indicating.) Just could see it. I didn't pay no attention to it at all."

"Q. Was the axle broken inside the hub or outside of the hub?

"Mr. Williams: We object to that. He went over that. We object for the reason that the witness categorically an-

swered the question twice to my understanding and Mr. Robertson had never previously asked him that question on his examination and then asked him this question, 'Mr. Lee, wasn't that break inside the hub?' He said no, it was outside the hub.

"Mr. Robertson: If Your Honor has any doubt about it you can read the testimony he gave Friday.

"Mr. Williams: If that record is not right I want to prove it because I know what the record is. If the record is not right we will make the record right.

"Note: Testimony of the witness given when on the stand Friday was submitted to the Court.

"The Court: I am not going to have that any more. I will leave it just like it is for the jury to say under the testimony, and you except.

"Mr. Robertson: I want to state the reasons I except to the ruling of the Court: Upon the ground that the evidence of the witness is obviously confused and it is necessary under the defendant's theory of the case to clear that confusion. I have no further questions. The defendant is perfectly willing to open this witness's testimony for all purposes, but unless it is going to be opened up for all purposes we object to the plaintiff examining for any purpose.

"Mr. Williams: You mean that you can examine him and I can't examine him on what he testified to.

"The Court: The Court will decide that. Go ahead and ask questions."

THE TESTIMONY OF THE WITNESS MARTIN DOES NOT JUSTIFY A VERDICT FOR THE PLAINTIFF.

At the first trial Thomas F. Martin, a retired employee of Virginia Electric and Power Company almost seventy years of age (R., p. 497), was put upon the stand by the defendant and under cross examination testified in part as follows:

Pp. 498-499:

* * * * *

"Q. When you had the re-railer and put the car back on the track, did the car make any marks on the pavement on Halifax Avenue?

"A. Yes, sir.

"Q. Are those marks there today?

"A. Yes, sir. They will be there until it is repaved.

"Q. Did the axle drag down? Was it dragged on the pavement?

"A. The bottom field pole hit the ground in high places.

"Q. Did the axle hit the ground?

"A. No, sir.

"Q. What did you call that thing?

"A. Field pole.

"Q. What is that?

"A. That is the bottom half of the motor—a field in the bottom half and a field in the top.

"Q. Did that make any marks in Halifax Avenue?

"A. That didn't make any marks.

"Q. What did make the marks?

"A. Wheels made the marks."

* * * * *

"Q. Did you notice the break in the axle?

"A. No, I did not.

"Q. Didn't pay any attention to that?

Pp. 500-501:

"A. No, sir. That was under the car; I didn't pay any attention to that."

* * * * *

"Q. How far you would say the break in the axle was from the hub?

"A. I think it was about six or eight inches.

"Q. About six or eight inches?

"A. Yes, sir, it was a little longer on one side than the other."

At the second trial Martin was put upon the stand by the plaintiff and testified upon direct examination in part as follows:

P. 483:

* * * * *

"Q. I ask you if you did not testify to this. Mr. Martin,

that the break, or fracture, in the axle was six or eight inches from the wheel?

"A. No. You might read that, but my idea was it was six inches of the axle in the journal box.

"Q. Didn't you testify categorically to the question asked you that it broke up near the motor, six or eight inches from the wheel?

"A. Between the motor and the wheel. It broke right in the end of the hub of the wheel."

THE AXLE WHICH BROKE WAS THE BEST AVAILABLE TYPE OF AXLE.

It appears without contradiction that axle No. 42 was purchased by Virginia Electric and Power Company from J. R. Johnson & Company, Incorporated, Richmond, Virginia (R., pp. 321, 333), under standard specifications (R., pp. 375-6). The competency, efficiency and reliability of J. R. Johnson & Company, Incorporated, as a maker of street car axles is nowhere questioned, and the specifications under which axle No. 42 was manufactured are the most exacting prescribed in the street railway industry (R., pp. 350-4, 375-9, 380).

Indeed the plaintiff nowhere contends that the design; the material or the fabrication of axle No. 42 was defective.

It further appears from the record without contradiction that the ingot or "bloom" (R., pp. 347-8) from which axle No. 42 was fabricated was purchased by J. R. Johnson & Company, Incorporated, pursuant to standard specifications from Allen-Wood Iron & Steel Company of Pennsylvania (R., p. 348); the Allen-Wood Iron & Steel Company being a thoroughly responsible company of established reputation in the steel industry throughout the United States (R., p. 348).

The lot of ingots or blooms from which axle No. 42 was forged was subjected in the course of manufacture by the Allen-Wood Iron & Steel Company to the standard analyses and tests prescribed by the American Society of Steel Manufacturers (R., p. 375-7); and after the lot of ingots had satisfactorily met all such analyses and tests, and when the lot of ingots had been shipped to J. R. Johnson & Company, Incorporated, that company was furnished a record of such analyses and tests for comparison with the specifications which had been prescribed (R., p. 376), and for comparison also with the record of any additional analyses and tests which might be made by J. R. Johnson & Company, Incorporated (R., pp. 349-54).

When J. R. Johnson & Company, Incorporated, received the lot of ingots, it subjected the lot to additional standard

analyses and tests for the purpose of checking the accuracy of the analyses and tests already made by Allen-Wood Iron & Steel Company (R., pp. 376-81, 411). In every instance the material tested surpassed specification requirements (R., pp. 407-8).

And throughout the manufacture of the lot of axles containing axle No. 42 all inspections and tests prescribed by the most rigid requirements known to the industry were made; and in each instance every such requirement was fully met (R., pp. 350-4, 375-9, 380, 411, 414-15).

THE FAILURE OF AXLE NO. 42 COULD NOT HAVE
BEEN ANTICIPATED, FORESEEN OR
PREVENTED.

Upon cross examination of witnesses for the defendant, counsel for plaintiff undertook without success to show that the *assumed* progressive fracture which *supposedly* occasioned the failure should have been detected by inspection and that the derailment should thereby have been averted.

But according to the uncontradicted evidence, even if the break had occurred outside the hub, a progressive fracture could not have been discovered by any known practical means before the failure occurred.

No contention is made that an improper type of axle was used; nor is there any *evidence* that the method of inspection of the axle was improper.

Counsel for the plaintiff did undertake without success to demonstrate through cross examination of various witnesses for the defendant that the defendant negligently failed to inspect the axle efficiently, and that the defendant thereby failed to detect a progressive fracture and prevent the derailment.

But, as already demonstrated, the uncontradicted evidence is that the break occurred inside the hub; and the only *evidence* of a progressive fracture is the opinion expressed by Porter and by Street that the break resulted from a progressive fracture of unknown origin and indeterminate duration which according to Street started inside the axle (R., p. 382), and could not have been foreseen or anticipated or prevented.

According to the uncontradicted evidence, the shops of the defendant are thoroughly up-to-date and well equipped and the shop work and practice of the defendant conform to standard requirements (R., pp. 306-7, 311).

And according to the uncontradicted evidence, the method of inspection employed by the defendant is the best known

practical method of inspection developed to date in the street railway industry (R., pp. 301-6, 311, 366).

According to Childrey and Porter car No. 1527 is placed over a pit at the barn each night, and is given the most thorough inspection which can be given it consistent with operation of the car in service (R., pp. 281-3, 302).

According to Childrey and Porter, the car is taken to the company's shops whenever it completes 1,000 miles in operation, approximately every ten days, and is then given a thorough general inspection insofar as such inspection can be given without dismantling and rebuilding the car (R., pp. 283-4, 303).

And according to Childrey and Porter, whenever the car completes 75,000 miles in operation it is taken into the company's shops and is completely dismantled and is then overhauled and entirely rebuilt (R., pp. 284, 304).

When the car is so dismantled, overhauled and rebuilt the axle is removed from the car and the motor is removed from the axle (R., pp. 298, 304). But the gear and the wheels are not removed unless they require replacement or repair (R., p. 304).

From 60 to 150 tons pressure is required to remove the wheels (R., p. 305).

Whenever the wheels are removed the axle is thoroughly cleaned (R., p. 298) and is bathed in oil (R., p. 310). A coat of whiting is next applied, and the axle is then suspended in a sling and struck a number of blows with a sledge hammer (R., p. 298, 316).

The oil penetrates any surface cracks in the axle, and the hammer blows set up vibration which cause the oil to ooze out of any such crack and stain the whiting (R., pp. 298-90); and thereby a progressive fracture is detected, even though the fracture be so small that it is known as a hair-line fracture (R., pp. 299, 367-9, 382); and whenever such defect is discovered the axle is discarded (R., pp. 305-6, 338). If no defect appears the axle is used again (R., p. 306).

After the axle has been inspected by means of the *whiting test* the gear and the wheels successively are pressed upon the axle; a pressure of 60 tons being required to replace a wheel upon an axle (R., p. 335). The axle with the wheels attached is then placed beneath the car and the motor is seated upon the axle and engaged with the gear (R., p. 316).

It further appears from the uncontradicted testimony that it is considered bad practice to strip an axle for inspection more than once each 75,000 miles except when wheels or gears must be repaired or replaced; the reason being that the pressure and tool work required to remove and replace

the gears and wheels subject the axle to hazards which may produce more harm than any good to be derived from more frequent inspection (R., p. 305).

The normal life of an axle is from 500,000 to 750,000 miles (R., pp. 340-1, 387), but axle No. 42 had only been run some 190,420 miles before the break occurred (R., p. 309); and when the break occurred axle No. 42 had only been operated some 42,957 miles subsequent to its last inspection by means of the whiting test about one month before the break occurred (R., pp. 310-11, 338).

As appears from the uncontradicted testimony (R., p. 309), the whiting test affords the most efficient inspection yet devised in the street railway industry. And as appears also from the uncontradicted testimony, the whiting test cannot be made except when the axle has been stripped by removal from it of the motor, gear, wheels and journal boxes (R., pp. 301-2).

If the motor, the gear, the journal boxes and the wheels be in place upon the axle, a considerable portion of the axle is concealed from view; the whiting cannot be applied; the sledge hammer blows cannot be struck as required; and the necessary vibrations cannot be produced (R., pp. 301-2).

Axle No. 42 had been subjected to the routine daily inspection within twenty-four hours before the break occurred. It had also been subjected to the routine 1,000 miles inspection, and about one month before the break occurred it had been subjected to the 75,000 miles overhaul inspection, including the whiting test. No defect had been discovered, and according to highly trained technical experts no better methods of inspection are known (R., pp. 289-343, 362-374, 426-452).

THE RULING OF THE TRIAL COURT IS ERRONEOUS.

Before final judgment was entered below the trial court delivered an opinion in the form of a letter addressed to opposing counsel July 25, 1934, wherein the court set forth the grounds upon which the judgment below is based; the court directing that its opinion be made a part of the record in the case (R., p. 11). The opinion of the court has not been copied into the record but is as follows:

“LAW AND EQUITY COURT
OF THE
CITY OF RICHMOND

“Richmond, Va., July 25, 1934.

“Robert N. Pollard, Judge
Luther Libby, Clerk

“Messrs. Thos. A. Williams,
Leith S. Bremner,
Archibald G. Robertson
and V. P. Randolph, Jr.,
Richmond, Va.

“Gentlemen:

“I have concluded not to disturb the verdict of the jury in the case of *Lowry v. Virginia Electric and Power Company* but to enter judgment thereon.

“There have been two trials of the case. In the first trial the jury was unable to agree and in the second trial there was a verdict of \$1,000.00 for the plaintiff. Each trial consumed more than three days.

“The instant case is different in certain of its aspects from the case of *C. & O. Ry. Co. v. Baker*, 149 Va. 549 and 150 Va. 647. In that case the court was of opinion that the only reasonable hypothesis to be gathered from the evidence, as to the immediate cause of the accident, was that it arose from a defect in the rail not reasonably discoverable. It is true that the plaintiff in that case contended that the ties along which the rail was laid were rotten. As to this allegation of negligence the court said: ‘It may be such a situation might possibly exist, but there is no evidence of sufficient probative force upon which to base such a theory.’ In the instant case the court cannot say that the only reasonable hypothesis to be gathered from the evidence as to the immediate cause of the derailment of the car was the breaking of the axle. The evidence showed that the fracture of the axle was progressive and the jury may have concluded from the evidence that the derailment of the car was due to its negligent operation and that the final break in the axle occurred after the car left the track. There was sufficient conflict in the evidence as to each act of alleged negligence to justify the court in submitting such questions to the jury. *Norfolk Coca-Cola Bottling Works v. Krausse*, 173 S. E. 497.

“There is no denial that the plaintiff was injured as a result of the accident. Under the evidence relating to the

conduct of the plaintiff before and during the trial and from conclusions which the jury had the right to draw from observing the plaintiff in court, it was for the jury to say whether his injuries were temporary or, as the plaintiff claimed, still existed. If the jury took the view, which they had the right to do, and evidently did, that the injuries were temporary, then the amount allowed by them is not so inadequate as to justify the court, under well recognized legal principles, in setting the verdict aside.

"All that litigants have the right to ask or expect is that there should be one fair trial of their cases. In my opinion the ends of justice have been legally and substantially met by the trial already had.

Yours very truly,

ROBT. N. POLLARD."

DEFENDANT'S ASSIGNMENT OF ERROR.

The defendant contended in the trial court and submits now that no negligence on its part has been shown and that the plaintiff cannot recover.

ARGUMENT.

According to the uncontradicted testimony, as hereinbefore demonstrated, axle No. 42 was a standard axle of approved material and design; no causal connection has been established between the alleged negligent operation of car No. 1527 and the break; no latent defect has been shown and the actual cause of the break is undetermined; the break occurred inside the hub of the wheel; and the break could not have been anticipated, foreseen or prevented by any method of inspection known to the street railway industry.

The defendant submits, therefore, that the case at bar is controlled by the decisions in *Roanoke Railway & Electric Co. v. Sterrett* (1908), 108 Va. 533; *Farmer's Admx. v. C. & O. Railway Co.* (1926), 144 Va. 65; *C. & O. Railway Co. v. Baker* (1927; Reheard 1928), 149 Va. 549; *C. & O. Railway Co. v. Baker* (1928), 150 Va. 647; *C. & O. Railway Co. v. Butler* (Va., 1934), 177 S. E. 195; and that the case is not controlled by the decision in *Norfolk Coca-Cola Bottling Works, Inc., v. Krausse* (1934), 162 Va. 107, as was held by the court below.

Mr. Justice Holt delivered the opinion in the Krausse case and said, pp. 110, 111, 112, 114, 115, 118, 119, 120, 121:

P. 110:

"This action, by notice of motion, was brought by Mrs. G. Krausse against the defendant, Coca-Cola Bottling Works, Inc., and E. L. Bowen, a retail grocer, to recover damages for personal injuries suffered by the plaintiff as the result of swallowing glass contained in a bottle of Coca-Cola put on the market by the defendant, Coca-Cola Bottling Works, Inc., and partially drunk by plaintiff."

* * * * *

Pp. 111-112:

"There was a verdict for plaintiff against the company in the sum of \$2,000. The court overruled the motion of defendant to set aside the verdict, but being of opinion that the verdict was excessive, over the objection of plaintiff, reduced the amount of damages to the sum of \$750."

* * * * *

"Particles of glass are still in the bottle.

"On behalf of the defendant it was shown that the Norfolk Coca-Cola Bottling Works, Incorporated, operates a large bottling plant in the city of Norfolk. The bottled product, commonly known as Coca-Cola, is composed of Coca-Cola syrup and carbonated water. The Coca-Cola syrup is purchased by the bottling plant to which it is delivered in wooden barrels. It is doubly strained from the barrels into a closed glass-lined tank in the bottling plant. The water is filtered before it is carbonated. The empty bottles, after being inspected, are washed and sterilized by machinery. During the process of sterilization the bottles are washed with a spray of cold water and then they pass through three compartments containing solutions of hot caustic soda, then through a tank of fresh water, then are thoroughly scoured by two successive sprays of water. When the bottles emerge from the sterilizing and washing machine, they are again inspected over a strong light while empty. After leaving the washing machine and having been inspected, the bottles are conveyed by machinery to the bottling system where they are filled with syrup and carbonated water and capped by machinery. From the time the empty bottle enter the sterilizing machine until they emerge filled and capped, at the end of twenty-seven minutes, they are not touched by human hands.

"According to the undisputed testimony of A. F. Cathey,

the manager of the Norfolk plant, he has visited a number of other bottling plants, and the machinery and equipment used by the Norfolk Coca-Cola Bottling Works, Inc., 'is the best in existence', and he has never seen any other machine 'which is any nearer perfect than this one'".

* * * * *

Pp. 114-115-118-119:

"The plaintiff in her fifteen day motion for judgment charges that the 'defendant negligently failed to use due and proper care, and knew or could, by the exercise of reasonable care, have known that said drink sold this plaintiff contained chipped glass'. In other words, she bases her claim upon negligence and it was upon that theory that the case was tried, as plainly appears from all of the instructions. The jury by its verdict has said that the bottling company was negligent and to that finding we limit this inquiry.

"To make the issue sharper, it may be said that the bottle out of which plaintiff drank was not tampered with after it left the bottling company, certainly the evidence does not show it. The bits of glass which did the damage must have been in it at that time. This bottle is in evidence and is not fractured.

"In such circumstances some courts hold that the doctrine of *res ipsa loquitur* should be applied." (Citing authorities.)

"Others hold that it does apply." (Citing authorities.)

* * * * *

"We have held that it is an evidential presumption sometimes resorted to in the absence of evidence, but that it is not to be applied when evidence is at hand. *Riggsby v. Tritton*, 143 Va. 903, 129 S. E. 493, 45 A. L. R. 280; *C. & O. Ry. Co. v. Baker*, 149 Va. 549, 140 S. E. 648, 141 S. E. 753; (on rehearing *Id.*, 150 Va. 647, 143 S. E. 299. Here evidence is at hand and the doctrine does not apply. It is sometimes said that the mere presence of a foreign substance will not sustain a recovery."

* * * * *

" * * * The particular dereliction is not shown, nor was it necessary; the negligent act is demonstrated by showing glass in the bottom of the bottle."

* * * * *

"In *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382, 17 A. L. R. 649, it was held (syllabus): 'One injured by eating food prepared wholly under the control and management of a manufacturer putting up food products for human consumption makes out a *prima facie* case of negligence on the part of the manufacturer by showing the fact of injury, and the burden is then on the manufacturer to establish his freedom from negligence.'

"It has been suggested that there is distinction in principle between the application of the above doctrine to unwholesome food sold for consumption and the finding of a foreign substance in food sold for consumption and the finding of a foreign substance in food products. Such a distinction may possibly be drawn where the right of action is based upon implied warranty, but where the right of action is founded upon negligence, there can be no logical application of a different rule, whether the cause of injury be spoiled food or a foreign substance.

"In *Boyd v. Coca-Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80, 81, the court said: ' * * * When the manufacturer of this beverage undertook to place it on the market in sealed bottles, intending it to be purchased and taken into the human stomach, under such circumstances that neither the dealer nor the consumer had opportunity for knowledge of its contents, he likewise assumed the duty of exercising care to see that there was nothing unwholesome or injurious contained in said bottles. For a negligent breach of this duty, the manufacturer became liable to the person damaged thereby.'

"The *Boyd* case was quoted with approval in the *Van Camp Case*, *supra*, where the court further said:

" 'While it is true that no particular act of negligence is shown by plaintiff, in the very nature of the case that could not be done. It is also true that, according to the defendant's evidence, its plant and method of manufacture are good—probably as good as any; still, it does appear that the method was not always adhered to by defendant's employees. We think, from all the circumstances shown by the evidence, the jury could have properly inferred and found that the can of beans in question, and perhaps a batch, as one of the defendant's witnesses calls it, were defective. Take the two Coca-Cola cases before cited, where a decomposed mouse was found in a sealed bottle of the fluid; the defendant's evidence tended to show care on the part of the company in bottling the product. In one of the cases it was shown the bottles were inspected under an electric light; that they were finally inspected after being capped or corked; that the bottles were thoroughly

cleaned; that the fluid was strained into the bottle through a fine strainer, and so on. If all these precautions had been taken at the particular time when the bottle in question were filled and corked, it would seem improbable, if, indeed not impossible, that a mouse could get into the bottle. On the other hand, it would, of course, be impossible for a mouse to get into the bottle after it was corked up, and after it left the factory, and yet the mouse was in the bottle. Could the court say, as a matter of law, that the mouse did not get into the bottle during the process of manufacture? We think not. The jury, under all the circumstances, would have been justified in inferring and finding that some of the things usually done, in the bottler's method to prevent foreign substances getting into the bottle were not done. In other words, the circumstances were such that it would be for the jury to determine which was the more reasonable probability.' ”

* * * * *

“Foreign substances in food packages not tampered with are in themselves evidence of negligence. When that is shown, *prima facie* case has been made out, which, if not overborne by evidence for the defendant, is sufficient to sustain a verdict for the plaintiff. Evidence of a high degree of care may be sufficient, but such evidence is in conflict with a *prima facie* case, and should go to the jury. Its verdict must be sustained unless ‘plainly wrong’.”

So also in *Campbell Soup Co. v. Davis* (Va., 1934), 175 S. E. 743, where the plaintiff swallowed glass contained in a can of beans put upon the market by the defendant. Mr. Justice Holt delivered the opinion of the court and said, p. 745:

“ * * * On March 22, 1934, in *Norfolk Coca-Cola Bottling Works, Inc., v. Krausse, et al.*, 162 Va. , 173 S. E. 497, 502, we said:

“ ‘Foreign substances in food packages not tampered with are in themselves evidence of negligence. When that is shown, a *prima facie* case has been made out, which, if not overborne by evidence for the defendant, is sufficient to sustain a verdict for the plaintiff. Evidence of a high degree of care may be sufficient, but such evidence is in conflict with a *prima facie* case, and should go to the jury. Its verdict must be sustained unless ‘plainly wrong’.

“In this last-named case a number of authorities are cited

and considered. It is not necessary that they be re-examined. We adhere to the statement of substantive law there made.”

In the Krausse case and in the Davis case it is obvious that if the defendants had not left undone some of the things they ought to have done, and had not done some of the things they ought not to have done, the injuries to the plaintiffs would not have occurred. The fact that glass was found in the bottle and in the can demonstrated conclusively that the defendants in some manner failed to safeguard the consumer as they ordinarily did safeguard the consumers of their product.

But in the case at bar it nowhere appears that the defendant left undone any of the things it ought to have done, or did anything it ought not to have done; and no fact or circumstance appears whereby any negligence of the defendant is demonstrated. To the contrary, the defendant has shown conclusively that nothing it did or failed to do could possibly have prevented the derailment wherein the plaintiff was injured.

And in *Roanoke Railway & Electric Co. v. Sterrett* (1908), 108 Va. 533; *Farmer's Admx. v. C. & O. Railway Co.* (1926), 144 Va. 65; *C. & O. Railway Co. v. Baker* (1927; Reheard 1928), 149 Va. 549; *C. & O. Railway Co. v. Baker* (1928), 150 Va. 647; and *C. & O. Railway Co. v. Butler* (Va., 1934), 177 S. E. 195, where no negligence on the part of the defendants was shown, the court held that the plaintiffs could not recover.

In *Roanoke Railway & Electric Co. v. Sterrett* (1908), 108 Va. 533, a bridge, which had been properly inspected, collapsed and the plaintiff was injured. Judge Harrison delivered the opinion, denying a recovery, and said, pp. 537-8-9:

Pp. 537-538:

“Two experts were introduced by the plaintiff in error—one a bridge builder and the other a bridge engineer—both competent, with long experience in their line and familiar with the character and construction of the bridge in question. They show that the conditions described by the plaintiff's witnesses, if true, could not have caused the accident, and did not in any way contribute thereto. The undisputed testimony of these experts is that, if the stringers had slipped and fallen, it would not have caused the bridge to fall, for the reason that the stringers get their support, in part, from the bridge, while the latter gets no part of its support from the stringers.

“These experts explain the mechanism of the bridge, and

show, that while it is built in six sections of twelve and one-half feet each, yet these sections are all connected into one entire span which makes the whole bridge. The iron cords which unite these several sections and bind them into one span are what holds up the bridge, the stringers performing no function of that sort. If one of these cords breaks, the bridge falls. It is further shown that if one or more of the stringers had slipped from the beams and fallen into the creek, neither the bridge nor the car would have fallen from that cause.

"These experts inspected the bridge after it had fallen, and found no unsound or broken timbers therein, and found no faulty condition of anything about the bridge, except the defect in the loop of the bottom cord where there had been an imperfect weld. The broken cord was produced in court, and the unqualified testimony of these experienced bridge men is that the breaking of that cord was the sole cause of the accident; and that the defect in the cord was the imperfect weld, which could not have been detected by the utmost scrutiny.

"Where an accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the suffered as one of that class of injuries for which the law can afford no redress in the form of a pecuniary compensation.' *Hutchison on Carriers*, Vol. 2, Secs. 903-4 (3rd Ed.) The liability of a carrier of passengers as thus defined is now almost universally adopted.

"As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it; and if the accident complained of was inevitable, it is not a case of negligence. An accident is inevitable, if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent its injuring another. In such a case the essential element of a legal duty is wanting, and it cannot, therefore, be a case of negligence. *Shearman & Red. on Neg.*, Vol. 1, Secs. 15, 16.

"Applying these well settled principles to the established facts in the case before us, the conclusion cannot be escaped, that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against, and that no liability attaches to the plaintiff in error on account thereof."

In *Farmer's Admx. v. C. & O. Railway Co.* (1926), 144 Va. 65, Judge Martin P. Burks delivered the opinion of the court and said, pp. 87, 92:

Pp. 87, 92:

"Unless the injury complained of resulted from some defect, imperfection or other cause which would have been disclosed by proper inspection, the failure to inspect would not be actionable negligence."

* * * * *

"The failure of the defendant to inspect and keep in order the automatic valve is also assigned as negligence proximately contributing to the decedent's death. Non-inspection can only impose liability where inspection would have prevented the injury."

In *C. & O. Railway Co. v. Baker* (1927; Reheard 1928), 149 Va. 549, a passenger was injured in a derailment occasioned by a transverse fissure in a rail. Judge Christian delivered the unanimous opinion of the court and said, pp. 554-559:

P. 554:

"The law governing the trial of cases of this nature is well established in this State. The failure of the carrier to perform the duties imposed by law upon it is the basis of liability to the passenger for injury, and the burden of proof is on the injured passenger to establish the negligence of the carrier. This burden does not shift, but continues through the case. While negligence of the carrier is never presumed from the mere fact of injury, yet an injury may occur under such circumstances as will warrant an inference or presumption of negligence. However, it is well settled that where a passenger is injured in a derailment of a passenger coach, that the carrier by reason of its duty as such, and the fact that the train and track are under the exclusive control and management of the carrier, and the accident is such that in the ordinary course of things it does not occur if those who have the control or management use proper care, the liability of the carrier is to be determined upon the principle of negligence in accordance with the phrase or maxim, *res ipsa loquitur*; or, in other words, an injury under such circumstances is held to warrant the presumption of negligence, which puts the burden upon the defendant to *disprove the existence of*

negligence by evidence that as a matter of fact all proper and reasonable care had been employed. Norfolk-Southern Railroad Company v. Tomlinson, supra; Hines v. Beard, 130 Va. 286, 107 S. E. 717; Riggsby v. Tritton, 143 Va. 903, 129 S. E. 493, 45 A. L. R. 280.

“There were several exceptions taken by the defendant and presented here to the rulings of the trial court upon the admission and rejection of evidence, and the argument of counsel before the jury, but careful study of the evidence satisfies us that the objection by the defendant to the plaintiff’s instructions upon the ground that there is no evidence upon which they could be based, and the motion of the defendant to set aside the verdict of the jury and enter judgment for the defendant because there is no evidence to support the verdict, raise the same and sole question, for decision by us; in other words, when the presumption and all the facts and circumstances are considered, is there any evidence of negligence upon which a jury could find a verdict for the plaintiff?

“The plaintiff proved that he was a passenger of the defendant; the derailment of the coach; his injuries in consequence thereof, and the extent of his injuries. He also undertook to prove by a farmer and automobile mechanic that there were some rotten ties under the broken rail that contributed to the accident. The passenger made out a *prima facie* case, by the aid of the legal presumption, upon proof simply of the derailment and the consequent injury to him while a passenger.

Pp. 556-557:

“Upon the plaintiff making out a *prima facie* case the burden was upon the defendant to show that it had exercised that high degree of care required of it by law. It proved that the track at the point of the accident was ballasted with stone; that the rails were the best standard rails, that they had under them sound white oak ties, and that the track was regularly and properly inspected according to the best railroad practice. The officials and employees in charge of the maintenance of way visited the scene of the derailment soon after it occurred and every one of them, including the train crew, testified that the sole cause of the derailment was the breaking of the rail, and those who were conversant with transverse fissures testified that the sole cause for the breaking of the rail was the transverse fissures therein.

“Thereupon it became necessary for the defendant to prove (a) what a transverse fissure is, (b) how it occurs in a rail,

and (c) whether science has developed any means to prevent it. A transverse fissure is a term applied to a type of fracture which has its origin in the interior of the head of a rail and which progressively enlarges from a definite nucleus.

"Transverse fissure was first brought to the attention of the Interstate Commerce Commission in 1911. They have since appeared in large numbers and are chiefly prevalent on trunk lines.

"Railroad engineers and those engaged in the safe operation of railroads have established by experiment and observation that the cause of transverse fissure is in the manufacturing process, rather than in the subsequent service to which the rails are put.

"So far, notwithstanding the prevalence of this kind of fracture, there seems to be no promise, at present, of any remedy or means of discovering this latent defect. They occur in different parts of the length of the rail. Several incipient fissures are commonly present in each rail which fails from this type of fracture. They have been found in rails only one month old and also those which were thirty years old.

Pp. 557-558:

"The particular rail that caused the derailment had been down seven years, and had been inspected twice a day by the track walker, and at other times by other employees, with the result that no defect was discovered in the rail. This rail was purchased from the Bethlehem Steel Company that built it according to standard specifications of the American Railway Engineering Association. This rail was branded and every detail of manufacture shown, including its chemical composition, melt number and also the position of the ingot from which the rail was made. After the rail was manufactured and before it left the manufacturer it was subjected to chemical tests, and physical or mechanical tests. Thus it will be observed that every precaution suggested by experience and science had been taken to insure the safety of this particular rail.

"Counsel for the plaintiff in their oral and written argument before us have characterized this rail as an inferior rail, and claimed that rotten ties under this rail had contributed to the development of the incipient transverse fissure. This position presupposes two things, neither of which are proven. First, that the rail was inferior and that there were rotten ties under it; second, that the defendant knew of the incipient

fissure in the rail and should not have put any ties under it but the very best.

"The presumption of negligence arising from the derailment and injury of the passenger having been rebutted, and no other evidence of negligence produced, there was no evidence upon which the jury could base a verdict, therefore the verdict of the jury should have been set aside by the trial court and judgment entered for the defendant. This court will enter here such judgment as the trial court should have done." Reversed.

UPON A PETITION TO REHEAR.

Per Curiam:

"The doctrine of *res ipsa loquitur* has no application to this case, for that doctrine is one of presumption to be resorted to only in the absence of positive evidence. It is shown beyond peradventure that the accident was due to a defective rail, more specifically to a transverse fissure. This rail was made by a standard railmaker, and had been subjected to all the tests which are applied by those corporations engaged in that business. These tests revealed no defect, and there was nothing to put anyone on notice that any such latent trouble existed.

"Taking the case as upon a demurrer to evidence, it may be conceded that some of the supporting ties were not in first class condition, but no more was required of the railway than that they should appear to be in condition to carry the load and bear the stress of good rails used in an ordinary way. We are of opinion that in no aspect of the case was there anything to indicate that these ties were not sufficient for this purpose. The railway had a right to assume that the rail was a good one. If we start with this assumption, then the only burden placed upon it was to maintain a roadway sufficient to carry normal traffic upon good rails, and this burden is carried. When the case is all in, the burden rested upon the plaintiff to prove negligence—that is, to prove a state of facts which would indicate the existence of danger from defective ties or from some other source, and this burden has not been carried.

"The petition to rehear is denied."

On May 24, 1928, Mr. Justice Holt, speaking again for a unanimous court, delivered an addendum to note denying

rehearing in *C. & O. Railway Co. v. Baker* (1928), 150 Va. 647, and said, pp. 650, 651-2-3-4-5:

P. 650:

"Since the rehearing was denied on March 1, 1928, learned counsel for defendant in error have filed with the clerk an additional application. Upon denying the rehearing, the judgment of the court became final, and it has no jurisdiction either by statute or under the rules of court to set aside or correct that judgment in any matter of substance. However, the court will enlarge its reasons for denying the rehearing, to be taken as an addition to the brief note handed down on March 1, 1928, 149 Va. 558 (141 S. E. 753)."

* * * * *

Pp. 651-652:

"The law of the case is or should be familiar.

"In a case such as this, when evidence has been introduced very extensively by both sides, in an action by a passenger against a carrier, then in ascertaining what was the cause of derailment and whether it was caused by the negligence of the carrier, the principles of law to be applied to a consideration of the evidence are quite fully reviewed in the case of *Hines, Director General, etc., v. Beard*, 130 Va. 286, 107 S. E. 717. The court in that case very clearly states the true meaning of the oft repeated doctrine of *res ipsa loquitur* as applied in cases of a passenger against a carrier on a claim for personal injury founded upon an allegation of negligence. It is familiar doctrine, as the court states, that when the relation of passenger and carrier is shown and it appears that the train upon which the passenger was being carried was derailed and the passenger injured, a *prima facie* case is made, and there results a presumption of negligence which the carrier must meet by evidence; if there is no further evidence before the jury, a verdict in favor of the plaintiff may be justified by the presumption of negligence. But the court affirms in no uncertain terms the now generally approved doctrine that when the defendant endeavors to rebut the presumption of negligence and introduces evidence tending to free itself of the charge of negligence, then the general burden of proof resting upon the plaintiff to establish the negligence of the defendant still inheres in the case in all its stages.

“In conclusion of the discussion of this question, the court holds that the plaintiff, having based his right of recovery on the negligence of the defendant, must show it by a preponderance of the evidence, and at no stage of the case can he escape this responsibility; that when the plaintiff has proved that he was a passenger, the fact of derailment and the resulting injury, then the doctrine of *res ipsa loquitur*, upon which the presumption of negligence rests, may dispense with further proof on his part, until it is made to appear in some way, either by his evidence or that introduced by the defend-

Pp. 652-653:

ant, that it is at least doubtful if the derailment was the result of the defendant's negligence. ‘Unless—says the court—the evidence as a whole preponderates in favor of the plaintiff on the question of the defendant's negligence, the plaintiff cannot recover. A mere equipoise will not entitle the plaintiff to a verdict. If it is just as probable that the derailment is due to some other cause as to the negligence of the defendant, there can be no recovery by the plaintiff. This, we think, is the proper application of the maxim, *res ipsa loquitur*, to derailment cases, and the one sustained by the best considered cases.’ In *Riggsby v. Tritton*, 143 Va. 903, 129 S. E. 493, 45 A. L. R. 280, the court followed the principles thus enunciated, as also in *Tidewater Stevedore Co. v. Lindsay*, 136 Va. 88; 116 S. E. 377. For a discussion of the cases generally upon this subject, see *Hughes v. Atlantic City & Shore R. Co.*, 85 N. J. Law 212, 89 Atl. 769, L. R. A. 1916-A, page 927, and note, page 930.

“In two prior derailment cases, *N. & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721, and *Norfolk Southern R. R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89, the Court of Appeals had already held that it was error in the trial court to announce in an instruction that in order to rebut the presumption of negligence the burden was upon the defendant to establish by a preponderance of evidence that it was not guilty of negligence, and further held that it was error for the court to tell the jury that if the defendant had not shown the cause of the accident, then, without regard to what else had been shown, the presumption of negligence which arose from the proof of derailment entitled the plaintiff to recover. Touching the last mentioned point the court says, on page 163 of 116 Va. (81 S. E. 93): ‘In order to rebut the presumption of negligence arising from the derailment, the defendant, we do not think, was bound to account satisfactorily

for the cause of the accident. Sometimes accidents occur which are inexplicable, and to hold that a carrier of passengers must, under all circumstances, show what caused the accident itself would in such cases impose an impossibility upon the carrier, and render it practically an insurer of the safety of the passenger injured.'

Pp. 653-654:

"In holding that at the end of the entire evidence the presumption is lost to the plaintiff and he has the burden of proving negligence as in any other action founded on negligence, and that the carrier is not bound to account for the accident, the Virginia court may differ from the doctrine in other States.

"Viewing the evidence in the case here in the light of these established principles in derailment cases, which require the plaintiff to establish by a preponderance of all the evidence before the jury that the derailment was caused by the failure of the defendant in some respect to use the proper degree of care, we do not think the evidence in this case justifies a recovery, and, therefore, the verdict of the jury cannot be upheld. The only reasonable hypothesis to be gathered from the evidence, as to the immediate cause of the accident, is that it arose from a defect in the rail not reasonably discoverable.

"There was evidence on both sides as to the condition of the ties at and near the point of the accident, and there was no very material conflict, though there was some, in the evidence of this character. That some of the ties were split at the end, and there was some decay more or less in an occasional tie was doubtless true, and it was not unnatural. Wooden ties exposed to the weather are obliged to show some wear and deterioration even soon after they are put down. It is not shown that the defendant company failed to use in this respect that degree of care which is ordinarily exercised by a very prudent and careful company in the practical conduct of its business under the same or similar circumstances. It is strenuously argued for the plaintiff that the ties, along which the rail in question was laid, were so rotten that the rail was continuously exposed to a vertical bending movement and so became continually weakened until it broke. It may be such a situation might possibly exist, but there is no evidence of sufficient probative force upon which to base such a theory. It is urged that the plaintiff could not be ex-

pected to have proof showing the exact condition and location of the ties and whether the rail rested upon them in a manner to produce such a result. The court, however, cannot allow, even in a case of this character, the lack of ability to

Pp. 654-655:

obtain proof to be taken as of itself establishing the fact of negligence, and so disproving evidence to the contrary. Moreover, the rail did not merely break in a manner that could have been so caused. The evidence is that it broke in several places; in fact, that it suddenly flew into pieces, indicating some defect at various points in the rail. The object of the investigation on the trial was to ascertain whether the defendant was negligent in the omission to use the degree of care imposed upon it, and also whether such omission was the proximate cause of the derailment.

"As held in *C. & O. Ry. Co. v. Hibbs*, 142 Va. 96, 128 S. E. 538, 41 A. L. R. 1083, and *Va. R. & P. Co. v. McDermick*, 117 Va. 862, 86 S. E. 744, a common carrier is not an insurer of the safety of its passengers against all accidents, and is only liable where the injury complained of was proximately caused by its negligence. The entire evidence on both sides in this record produces an irresistible conclusion that the proximate cause of the sudden fractures of the rail in question at several points was a defect in its manufacture. The proof on the part of the defendant brought this defense well within the purview of the rulings in *Roanoke Ry. Co. v. Sterrett*, 108 Va. 553, 62 S. E. 385, 19 L. R. A. (N. S.) 316, 128 A. M. St. Rep. 971, applicable to such case.

"This case has been argued before the court very exhaustively, both orally and in writing, on the original hearing, and further for the plaintiff on the petition for rehearing. No purpose would be served by a repetition of the arguments. The members of the court have given the case, in all of its aspects, full attention and are of opinion that the evidence as a whole not merely preponderates for the defendant, but under established principles of law in this State is insufficient to authorize a judgment for the plaintiff.

"The judgment of the court must, therefore, be adhered to."

And in *C. & O. Railway Co. v. Butler* (Va., 1934), 177 S. E. 195, Mr. Justice Hudgins delivered the opinion of the court and said, p. 197:

"This particular type of safety bar was adopted by defendant in 1924, after adequate tests had been made and its superiority to those in use had been determined by experts qualified to pass on the subject. Each bar used was made by responsible manufacturers, according to the same specifications, and installed in the same manner. It, therefore, clearly appears that there was no negligence in adopting this type of equipment. See *Southern Railway Co. v. Chadwick*, 144 Va. 443, 132 S. E. 191."

* * * * *

"The third charge, upon which plaintiff relies to hold defendant liable for decedent's death, is that it failed to make proper inspection and repair of the equipment after the safety bars were installed. It was established that Butler and his men going from work late in the afternoon before the accident passed the same point, and at that time there was no obstruction in the tracks. It was agreed by counsel for the parties that, if the safety bar did fall from one of defendant's trains, it fell from one going east. The proof showed that all cars on eastbound trains, passing over this section of track within a period of 12 hours prior to the derailment were inspected in the usual way at Gladstone, about 35 miles west of the scene of the accident, and that this inspection disclosed no defect in any safety bar on the cars. This work was done by regular inspectors, each of whom had had from 10 to 30 years' experience. No evidence was adduced to show that the manner of inspection was different from that in use by other lines, or that the method was inadequate or improper, at least in so far as decedent was concerned."

CONCLUSION.

In view of the uncontradicted evidence in the case at bar and of the decisions hereinbefore cited, the defendant submits finally that no negligence on its part has been shown, and that the plaintiff cannot recover. The verdict and judgment in the trial court are, therefore, contrary to the law and the evidence, and without evidence to support them, and the judgment of the trial court should accordingly be reviewed and reversed.

Counsel for petitioner desire to state orally the reasons for reviewing the judgment complained of in this case and here-

by adopt this petition for writ of error as their brief in support of their argument; copy of this petition for writ of error and *supersedeas* having been delivered in person to Thomas A. Williams, one of counsel for defendant in error, on the 27th day of February, 1935, all as required by Rule II of the Supreme Court of Appeals of Virginia as amended November 6, 1929.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY,

By T. JUSTIN MOORE,
ARCHIBALD G. ROBERTSON,
Counsel.

Copy of the foregoing petition for writ of error and *supersedeas* received this 27th day of February, 1935.

THOMAS A. WILLIAMS and
L. C. O'CONNOR,
By L. C. O'CONNOR,
Counsel for Defendant in Error.

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,
ARCHIBALD G. ROBERTSON.

Received February 27, 1935.

M. B. WATTS, Clerk.

March 14, 1935. Writ of error and *supersedeas* awarded by the court. Bond, \$2,000.00.

M. B. W.

RECORD

VIRGINIA:

Pleas before the Honorable Robt. N. Pollard, Judge of the Law and Equity Court of the City of Richmond, held for the said City at the Courtroom thereof in the City Hall on the 22nd day of October, 1934.

Be it remembered that heretofore, to-wit: In the Clerk's Office of the Law and Equity Court of the City of Richmond on May 12th, 1933: Came Adam R. Lowry, by Counsel, and filed his Notice of Motion for Judgment against Virginia Electric and Power Company, a corporation, which Notice of Motion for Judgment is in the words and figures following, to-wit:

“Virginia:

In the Law and Equity Court of the City of Richmond.

Adam R. Lowry, Plaintiff,

v.

Virginia Electric and Power Company, a corporation, Defendant.

NOTICE OF MOTION FOR JUDGMENT.

To Virginia Electric and Power Company, a Corporation:

Take notice that Adam R. Lowry, hereinafter called the plaintiff, will on the 29th day of May, 1933, at 10 o'clock A. M., or as soon thereafter as he can be heard, move the Law and Equity Court of the City of Richmond for judgment against you, Virginia Electric and Power Company, hereinafter called the defendant, for the sum of Ten Thousand Dollars (\$10,000.00), due to the plaintiff by the defendant by reason of the following facts:

That on and before the 11th day of July, 1932, the page 2 } defendant was the owner and operator of an electric street car system in the City of Richmond and County of Chesterfield carrying passengers for hire and reward, and being such owner, operator and common carrier, it became and was the duty of the defendant to use the highest

degree of practicable care for the safety of its passengers in the operation of its said street cars; to employ competent operators to operate the said car; to operate the said car and cars at a reasonable and proper rate of speed; to equip, keep and maintain said cars, appliances and tracks and parts thereof in a good and proper operating condition; to use the highest degree of practicable care to discover defects in said car and cars and equipment and appliances, so as to avoid injury to others, and particularly the plaintiff, a passenger on one of your said street cars.

Yet you, the said defendant, disregarding your said duty and duties aforesaid, did carelessly, negligently, recklessly and wrongfully run and operate one of your said street cars without using the highest degree of practicable care in operating the same and did operate the same with a learner and incompetent operator, and did run and operate the said street car at an excessive and dangerous rate of speed, and did fail to equip and maintain said street car, appliances and track in a safe and proper operating condition, and did fail to exercise the highest degree of practicable care to discover defects in said car and its parts and appliances, and as a direct and proximate result thereof, on the 11th day of July, 1932, the plaintiff, a passenger on one of your said cars operated on and along the Petersburg Pike, about one block from the city limits of the City of Richmond, was seriously and grievously injured in and about his head, face, neck, shoulders, arms, hands, abdomen, back, stomach, hips, legs, feet and other parts of his body, both internally and externally, and he was thereby permanently injured and was caused to and did expend large sums of money endeavoring to be cured of his said injuries and was prevented thereby from following his usual affairs and occupation for a long space of time and suffered great bodily pain and mental anguish.

All to the damage of the plaintiff in the sum of Ten Thousand Dollars (\$10,000.00), and therefore he gives you this notice of motion for judgment.

ADAM R. LOWRY,
By Counsel.

THOMAS A. WILLIAMS,
L. C. O'CONNOR,
p. q.

page 4 } And at another day, to-wit: at a Law and Equity
Court of the City of Richmond, held the 29th day
of May, 1933.

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.

The defendant then filed herein a plea of "not guilty" and put itself upon the Country and the plaintiff likewise.

Virginia:

In the Law and Equity Court of the City of Richmond.

Adam R. Lowry, Plaintiff,

v.

Virginia Electric and Power Company, a corporation, Defendant.

PLEA OF NOT GUILTY.

The said defendant, Virginia Electric and Power 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 complained. And of this the said defendant puts itself upon the country.

ARCHIBALD G. ROBERTSON,
p. d.

page 5 } And at another day, to-wit: At a Law and Equity Court of the City of Richmond, held the 25th day of September, 1933.

This day came plaintiff by counsel and prayed the Court to require the defendant to file its grounds of defense herein. Whereupon, it is ordered that the defendant do file by Thursday, September 28th, its grounds of defense in this case.

And at another day, to-wit: At a Law and Equity Court of the City of Richmond, held the 29th day of September, 1933.

This day came the defendant, by counsel, and by leave of Court filed herein its amended grounds of defense to this action.

page 6 } Virginia:

In the Law and Equity Court of the City of Richmond.

Adam R. Lowry, Plaintiff,

v.

Virginia Electric and Power Company, a corporation, Defendant.

AMENDED GROUNDS OF DEFENSE.

The defendant, by its attorney, comes and says that it is not liable to the plaintiff in any amount whatsoever in the above-styled action and for its grounds of defense assigns the following, among other grounds:

1. The defendant was not guilty of negligence.
2. Even if the defendant was guilty of negligence (which is denied) such negligence was not the proximate cause of the injuries to the plaintiff.
3. The injuries to the plaintiff, complained of, were not the direct and proximate result of the defendant's negligence, even if there was any such negligence (which is denied).
4. No. 2 axle marked "5019" and also "J-42" (V. E. P. No.) in car No. 1527 broke while car No. 1527 was being lawfully operated southbound near Stop No. 3 on the Richmond-Petersburg Line of the defendant company. The break was due to an unavoidable accident which could not have been anticipated or prevented by the exercise of the highest degree of care.
5. The break down of the defendant's electric street car complained of in the notice of motion for judgment, was due to a cause which could not have been foreseen or anticipated by the exercise of the highest degree of care.
6. The defendant denies each and every allegation page 7 } of the notice of motion for judgment undertaking to charge negligence against the defendant in the particulars therein set out, or that such negligence, if it existed (which is denied) was the direct and proximate cause of the injuries to the plaintiff, complained of.
7. All the defenses that are legally provable under the general issue. The defendant reserves the right to amend and enlarge these grounds of defense at any time before the trial of this case.

VIRGINIA ELECTRIC AND POWER COMPANY.

By ARCHIBALD G. ROBERTSON,
Counsel.

page 8 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 5th day of October, 1933.

This day came again the plaintiff and defendant by counsel, and a jury to-wit: A. K. Townsend, L. H. Upson, H. O. Tiller, W. H. Shervin, Jr., C. H. Stout, Alfred T. Smith and Claiborne Watkins who were sworn well and truly to try

the issues joined in this case and having partly heard the evidence were adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 6th day of October, 1933.

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 fully heard the evidence were adjourned until Monday morning next at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 9th day of October, 1933.

This day came again the plaintiff and defendant, by counsel, and the jury sworn in this case appeared in Court in accordance with their adjournment on Friday last, and were again sent out of Court to consult further of a verdict and after some time returned into Court and not being able to agree of a verdict were altogether discharged from rendering their verdict herein and this case continued for further proceedings to be had herein.

page 9 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 24th day of May, 1934.

This day came again the plaintiff and defendant by counsel, and the special jury summoned for the trial of this case appeared in Court; sixteen were chosen by lot and thereupon the parties alternately struck off one of said jurors until the number was reduced to twelve, who are as follows, to-wit: Oscar J. Adams, S. B. Adkins, Carl Fleming, James Bolton, Ralph L. Dombrower, E. W. Farley, Cecil H. Long, Wm. E. Sullivan, Frank G. Christian, Robert K. Turner, F. Charle Behle and John H. Gary, who were sworn well and truly to try the issue joined in this case and having partly heard the evidence were adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 25th day of May, 1934.

This day came again the plaintiff and defendant, by counsel, and the special jury sworn in this case appeared in Court in accordance with their adjournment on yesterday and having further heard the evidence were adjourned until Monday morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 28th day of May, 1934.

This day came again the plaintiff and defendant by counsel, and the special jury sworn in this case appeared in Court in accordance with their adjournment on Friday page 10 } last and having further heard the evidence were adjourned until tomorrow morning at ten o'clock.

And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 29th day of May, 1934.

This day came again the plaintiff and defendant, by counsel, and the special jury sworn in this case appeared in Court in accordance with their adjournment on yesterday and having heard the evidence and 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 his damages at \$1,000."

Thereupon the plaintiff by counsel moved the Court to set aside the verdict as to the amount and remand the case for reassessment of damages by another jury, upon the ground that the verdict is not responsive to the evidence and because the uncontradicted in this case is that the plaintiff has suffered a loss of between twenty-six hundred and three thousand dollars in salary, plus medical expenses; and thereupon the defendant, by counsel, moved the Court to set aside the verdict of the jury rendered herein and to enter up final judgment for the defendant because the verdict is contrary to the law and the evidence and without evidence to support it, for errors committed by the Court in the granting and the refusal to grant certain instructions, upon all of the grounds heretofore assigned; both of which motions the Court continued for argument to be heard thereon.

page 11 } And at another day, to-wit: at a Law and Equity Court of the City of Richmond, held the 29th day of August, 1934.

This day came again the plaintiff and defendant, by counsel, and the motion of the plaintiff to set aside the verdict of the jury as to the amount and remand the case for reassessment of damages by another jury having been argued, the court for reasons stated in writing and now filed and made a part of the record doth overrule the said motion, to which action of the Court the plaintiff by counsel excepted.

And on the further motion of the plaintiff, by counsel, leave is hereby given him to file bills or certificates of ex-

ception herein at any time within sixty days from this date as prescribed by law.

And the motion of the defendant to set aside the verdict of the jury rendered herein and to enter up final judgment for the defendant having been fully argued, the court doth overrule the said motion for reasons stated in writing and filed and made a part of the record of this day, to which action of the Court the defendant by counsel excepted.

Therefore it is considered by the Court that the plaintiff recover against the defendant the sum of One thousand dollars, with interest thereon to be computed after the rate of six per centum per annum from the 29th day of May, 1934, until paid, and his costs by him about his suit in this behalf expended.

Memorandum: Upon the trial of this case the defendant, by counsel, excepted to sundry rulings and opinions of the Court given against it and on its motion leave is hereby given said defendant to file bills or certificates of exception herein at any time within sixty days from this date as page 12 } prescribed by law; and upon the further motion of the defendant, by counsel, it is ordered that this judgment be suspended for a period of ninety days from this date in order to enable the said defendant to apply for a writ of error and *supersedeas* upon condition that the said defendant or someone for it enter into bond before the clerk of this court in the penalty of Two thousand dollars with surety to be approved by said clerk and conditioned according to law, or at the option of the defendant the said judgment is to be suspended for a period of six months from this date and until the Appellate Court has acted upon a petition for a writ of error and *supersedeas* or until such petition has been presented to one of the Justices of the Supreme Court of Appeals of Virginia within six months from this date and until our said Law and Equity Court shall thereafter authorize execution to issue, upon condition that the defendant or someone for it enter into bond in the penalty of Two thousand dollars with surety to be approved by the Clerk of this Court within ten days from this date with the conditions of the *supersedeas* bond prescribed by Section 6351 of the Code of Virginia.

page 13 } And now at this day, to-wit: at a Law and Equity Court of the City of Richmond, held the 22nd day of October, 1934.

This day came again the plaintiff and defendant by counsel, and thereupon the defendant by leave of Court tendered

to the Court four certificates of exceptions which were received by the Court, and signed and ordered to be made a part of the record herein, which is accordingly done.

The plaintiff then tendered to the Court a certificate of exception an the same was received and signed and ordered to be made a part of the record, which was accordingly done.

page 14 } Virginia :

In the Law and Equity Court of the City of Richmond.

Adam R. Lowry, Plaintiff,

v.

Virginia Electric and Power Company, Defendant.

CERTIFICATES OF EXCEPTIONS.

CERTIFICATE NO. 1.

The following evidence on behalf of the plaintiff and of the defendant, respectively, as hereinafter denoted, is the evidence and all the evidence which was introduced at the trial of this action:

page 15 }

Richmond, Va., May 24th, 1934.

Court met at ten o'clock A. M.

The Court: Are you gentlemen ready?

Mr. Williams: At nine o'clock this morning my client's wife phoned me he was sick and would not be able to attend court and he had a doctor last night. I called the doctor and he confirmed the fact—Dr. Philip Jones. He is available at his office. I have no certificate from him, but it can be confirmed by calling his office.

The Court: Have you gentlemen anything to say?

Mr. Robertson: Yes, sir. If Your Honor please, we have prepared this case and we have twenty-five witnesses here. In addition to witnesses from Richmond, we have witnesses here from Baltimore, Philadelphia and Washington and Roanoke Rapids, N. C. We have been preparing for trial for this case. We talked to Mr. Williams about the case yesterday. My information is that this gentleman has a regular position. We worked until yesterday afternoon
page 16 } when he asked to get off. We are unwilling to accept his statement, that is, the witness' statement, or a hearsay statement that *that* he is unable to come

to court. We would ask that Dr. Jones be brought here for proper questioning; and, if necessary to read the testimony of anybody at the former trial, we are willing. We are willing to go to his house and take his deposition, willing for the jury to go to the house. We are willing to do anything the court thinks fair, but we do not want to continue the case.

The Court: Unless the rule of the court is complied with about a certificate, I will overrule the motion.

Mr. Williams: You mean I will have to get a certificate from the doctor?

The Court: Or get him here.

Mr. Williams: I understand O. D. Brinser is sick also.

Mr. Robertson: At the last trial Mr. Brinser, the employer of this man, testified as to what he made before and after the accident. We are willing to read his testimony into the record. If he says the same thing this time as the last, we will admit he would say it.

page 17 } The Court: All right. I will give you opportunity to get Dr. Jones here for examination.

Note: Mr. Williams phoned the residence of Dr. Jones.

Mr. Williams: If your Honor please, Dr. Jones has left home to go to his office. I expect a call from him any moment and will get in touch with him.

The Court: All right. Let me know when you hear from him.

Note: The court took a recess of a few minutes and resumed its session.

page 18 } DR. J. PHILIP JONES,
being first duly sworn, testified as follows:

The Court: Do you want to examine him, Mr. Williams?

Mr. Williams: Your Honor can examine him.

By the Court:

Q. Is Mr. Lowry a patient of yours?

A. Yes, sir.

Q. How long has he been a patient of yours?

A. Some two or three years.

Q. When was the last time you saw him professionally?

A. Last night.

Q. When did you see him before that time?

A. I saw him about a week ago in my office.

Q. What was his condition last night?

A. He seemed to be suffering with pain. The statement he made was he was weak and seemed to be in right bad shape.

Q. Did he have any temperature?

A. No, sir. His pulse was slow. He complained of considerable pain in the upper side of his right abdomen, seemed to be extremely tender.

Q. What treatment did you give him?

page 19 } A. Something to relieve his pain, some application to his side and told him to stay quiet.

Q. Have you seen him today?

A. No, sir.

Q. You don't know what his condition is today?

A. No, sir.

The Court: Gentlemen, I will let you examine him.

By Mr. Williams:

Q. Do you think he can come to court today?

Mr. Robertson: I object. The doctor doesn't know without examining him.

The Court: The fact that he had pain last night doesn't mean that he is not all right today.

Mr. Williams: His wife phoned me this morning he tried to get up several times this morning and couldn't do it.

Mr. Robertson: I will state that Mr. Purcell at the A. B. C. Board, which is the place where Mr. Lowry has been working over a week up until 11 or 12 o'clock midnight (under normal conditions his regular time for getting off would be 5 o'clock in the afternoon), says he worked there until 5 o'clock yesterday and nothing was the matter

page 20 } with him.

Mr. Williams: After that he had an attack.

The Court: I will let Dr. Jones examine him now. Where does he live?

Witness: On the Southside.

Mr. Robertson: I am not casting any aspersion on Dr. Jones, but would he like anybody with him to examine Mr. Lowry? If so, we would like the court to designate anybody acceptable to Dr. Jones.

Mr. Williams: I never heard of that request before.

Mr. Robertson: I am making it now. I am suggesting that he make an examination now.

The Court: I will ask the doctor to make an examination now and come back and report.

Note: Witness left to make an examination of the plaintiff, after which he returned to the court room.

By the Court:

Q. Have you been over to Mr. Lowry's residence?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. Will you state his condition this morning?
page 21 } A. I found Mr. Lowry lying in bed. He still complained of pain in his side. His pulse was low and slow; blood pressure normal; his temperature sub-normal. He said every time he tried to get up he got very dizzy. I waited in the room for him to try to put on his clothes, but he said he got so dizzy he couldn't stand up, had to get back in bed. His symptoms are more subjective than objective, and I had to be guided more by what he told me than from examination.

Q. From your examination of him what is your opinion of the result if he attended court today?

A. It is my opinion he is too ill to be out today anyhow. I couldn't tell what result it would have by his coming over.

Q. Do you think it would have a detrimental effect on his physical condition to come today?

A. I couldn't say that. I feel like (I am guided by what he tells me) he is unable to come—from the symptoms he tells me he has.

By Mr. Robertson:

Q. What was his pulse?

A. Fifty.

Q. What is the normal pulse for a person his age?

A. Seventy-five or eighty.

page 22 } Q. How long ago had you seen him before yesterday?

A. About a week.

Q. Do you know what his usual pulse rate is?

A. About 75.

Q. Usually about 75?

A. Yes, sir.

Q. Did he have any temperature?

A. No, sir. His temperature was sub-normal.

Q. You base your statement to the court about his coming here on what he told you?

A. Yes. That is my opinion.

Q. Do you think it would be detrimental to his health if either some one was sent or the jury went to his home and

had him give his testimony while he is at home lying down in bed?

Mr. Williams: I don't think that that could be done.

The Court: Let him answer.

A. I don't see where it would affect him at all.

By Mr. Robertson:

Q. You, of course, can't tell us whether or not his subjective symptoms will get better or worse by tomorrow?

A. No, sir. I have to be guided by the symptoms that he complains of.

page 23 } By Mr. Williams:

Q. How long have you been treating him for these injuries?

A. I have been treating him off and on since he was injured.

Q. Since July 11th, 1932?

A. Yes, sir.

Q. He had a ruptured liver, didn't he?

A. Yes, sir.

Q. He has never had a well day since, has he?

A. I couldn't say that. He complains of pain every time I see him.

By Mr. Robertson:

Q. Did you know that he was employed to handle liquor at the A. B. C. Board?

A. I heard you say it this morning.

Q. Do you know he worked there yesterday until five o'clock?

A. Yes, sir, I understood so.

Q. You see no reason why he should not give his testimony in this case at his home, do you?

A. I don't see where it would affect him at all to do it. He can talk all right, but he gets dizzy when he gets up.

Q. He seems all right while lying down?

A. He complained of pain constantly.

page 24 } Q. His mind is perfectly clear?

A. Yes, sir.

Q. He is perfectly rational in his conversation?

A. Yes, sir.

Q. Perfectly normal mentally?

A. Yes, sir.

Q. He is physically able to carry on a conversation without getting into a state of exhaustive collapse?

A. Certainly.

Q. Do you think, if he was put in an invalid chair and brought over here in an ambulance and testified in that way, it would hurt him?

A. I don't think it would.

Q. Would you object to being present when he was gotten ready to come in an invalid chair and taken in the chair to an ambulance and brought to court and being by him to render him any medical assistance he might need either in getting ready or on the way or while testifying?

A. Not a bit.

Q. You don't think that would hurt him?

A. No, sir.

page 25 } By the Court

Q. I understand this case will take about two days. Do you think two days would affect him physically?

A. I don't believe anything he does will affect him.

The Court: Have you gentlemen anything to say?

Mr. Robertson: When this case was tried before we brought these gentlemen here as experts at considerable expense. We have gotten ready in this case again at considerable expense; and there are a lot of gentlemen from Richmond who are going to testify in this case. They are gentlemen occupying very responsible positions with different companies where they are employed. They come here at considerable inconvenience to themselves and to the companies that they work for, disrupting their organization, and it would work great inconvenience upon them, to say nothing of the expense to have the case continued. We are very anxious to go ahead.

The Court: Have you anything to say, Mr. Williams?

Mr. Williams: Only this: Where a doctor says a witness is sick and cannot attend court, I never heard of
page 26 } bringing a man into court in a chair. As far as I am concerned, that does not affect my case at all; I wouldn't mind that; but at the same time I think it is unusual; I never heard of it before. It is not our fault that the witnesses had to come back here again and the expense that the defendant is put to. They don't need to go to that expense. They need not bring them if they don't want to. There were twenty-two. I don't think all are out of town. If they are expensive witnesses I haven't anything to do with that. Our man was a passenger on the street car. When the car runs off the track and injures him—

Mr. Robertson: I would like to take issue. It is very usual for a plaintiff to come into court in an invalid chair and be put on the stand and be given medicine and things.

Mr. Williams: I have tried cases 22 years and have never seen it in any of mine.

By the Court:

Q. Is his condition now such that it will probably be the same tomorrow or six months from now?
page 27 } A. I don't know. This man gets up and about sometimes. Some days he feels well and some days he does not. I couldn't tell you to save my life.

Mr. Robertson: I would like to put this in the alternative: We are either willing to read any testimony from anybody who testified in the other trial (all or any part), or we are willing for the jury and for counsel or whoever the plaintiff wishes to go and take this gentleman's testimony at his home, or, if you prefer, for him to come here under proper physical safeguard in a comfortable manner and attend court.

The Court: I will overrule the motion to continue.

Mr. Williams: I just take an exception to the ruling of the court for the reasons stated.

Witness stood aside.

page 28 } Mr. Williams: We will have to put Mr. Lowry's testimony on first.

Mr. Robertson: Do you want to read it?

Mr. Williams: Either that or have him brought here and then let the doctors come on after you begin your testimony.

Mr. Robertson: I would prefer you put your case on. We have our doctors right here.

Note: The jury selected were duly sworn.

Mr. Williams: I ask that all witnesses be excluded except the doctors.

Mr. Robertson: We have a lot of experts here. We ask that they be allowed to stay in the court room; also all of the same kind of witnesses on the other side.

Mr. Williams: They are not doctors, therefore do not testify to the injuries, and I ask that they be excluded, all except the doctors.

page 29 } The Court: The motion is granted. Of course, the defendant is entitled to one representative.

Mr. Robertson: I will ask Mr. Vaughan to stay in.

The Court: I think we had as well take a recess for lunch at this time.

Note: At 1:10 P. M. a recess was taken until 2 P. M.

page 30 } AFTERNOON SESSION.

Court resumed its session at 2 o'clock P. M.

Mr. Williams: I will prove Mr. Lowry's testimony in the beginning by Mr. Owen.

THOS. E. OWEN,
a witness on behalf of the plaintiff, being first duly sworn,
testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Are you Thos. E. Owen?

A. I am.

Q. You reported this case on one occasion before, including the testimony of Mr. Adam R. Lowry?

A. I did.

Q. Will you refer to your notes and state to the jury (using if you want to for the purposes of this record the record which you made up before of the testimony) what he stated at that trial?

A. I will.

Note: Witness here read the testimony of Adam R. Lowry, taken at the former trial of tis case, as follows:

page 31 } ADAM R. LOWRY,
the plaintiff, a witness in his own behalf, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. What is your name?

A. Adam R. Lowry.

Q. Where did you live in July, 1932?

A. #1500 Westmoreland Avenue.

Q. For whom were you working at that time?

A. Oscar Brinser.

Q. O. D. Brinser?

A. Yes, sir.

Q. What were you earning at that time, a month?

A. I made \$160.00 a month.

Q. What day was it that you were hurt, Mr. Lowry?

A. The 11th day of July, 1932.

Q. About what time of day?

A. About 11:30.

Q. Was that morning or night?

A. Morning—A. M.

Q. Where did you take the street car?

page 32 } A. At Cowardin Avenue and Hull Street.

Q. Cowardin Avenue and Hull?

A. Yes, sir.

Q. Which direction did the street car take?

A. Going towards my house, going south.

Q. On what street?

A. On the Petersburg Turnpike.

Q. Will you state where you were sitting in the car?

A. I was sitting about middle-way of the car, the third or fourth seat back.

Q. Which side of the car?

A. Right-hand side going down the Pike.

Q. Was that a street car of the defendant company, the Virginia Electric & Power Company?

A. Yes, sir, one of these little one-man cars.

Q. Have you got the number of it, or did you get the number then?

A. No, sir, I did not.

Q. Where was the street car derailed, about, Mr. Lowry?

A. It happened about Halifax Avenue, maybe some feet from Halifax.

Q. What happened to you?

page 33 } A. It was derailed and I was thrown from one seat to the other.

Q. What injuries did you suffer?

A. I got a severe blow in my right side just below my ribs, hurt my right knee and hurt up here on my head. (Indicating.)

Q. You say up here on your head. What portion of the head was it?

A. Seemed to be right along there. (Indicating.)

Q. That is the right or left side?

A. Right side.

Q. Just back of the right eye?

A. Yes, sir.

Q. What did you do after you picked yourself up, or did anyone pick you up?

A. No, sir. I crawled to the back seat of the car, and the motorman, Mr. Tom Owen, opened the back door in a few seconds and I got out of the back door.

Q. When you got out of the back door, now do you remember how the street car was resting with respect to the track?

A. I couldn't very well say. Sitting cross-ways of the track, but I don't know exactly how.

Q. You say it was sitting cross-ways?

A. Yes, sir, seemed to be.

page 34 } Q. Where did you go after you got off the street car?

A. I must have went home.

Q. Do you remember that?

A. I remember passing by Mr. Bartlett's store on the way home, in that direction. I remember Dr. Jones coming to my house.

Q. You don't remember much after passing Bartlett's store?

A. Very little.

Q. Your next recollection was Dr. Jones?

A. Yes, sir.

Q. Where did they take you?

A. Next thing I knew I was in Grace Hospital.

Q. How long did you stay in Grace Hospital?

A. About two weeks, I think.

Q. How long did you stay in bed?

A. Well, now, I was in bed about seven weeks after I came home from the hospital.

Q. How long were you disabled from your work?

A. Well, I tried to go back to work on November 14th. Dr. Jones told me I might try it. I tried it but I couldn't quite make the grade; I had to go back home again.

page 35 } Q. Have you tried it out any time since?

A. Yes, sir. Not to exaggerate, I think I tried it maybe forty times since, would go up there to go to work and had to go home.

Q. How do you feel now? Have you gotten well from those injuries?

A. No, sir, I have not.

Q. State some of the treatment that was given you and what they did for you, if anything?

Witness: In my home or at the hospital?

Mr. Williams: Both, in your home and in the hospital. What did they do for you?

A. Gave me some kind of an examination, I believe, the

first thing, or tried to, as near as I remember, and they shot something in my arm twice. Then, I don't know what they did. I don't know what they did.

Q. Did they take you to any places?

A. Yes, sir. They took me to a place around on Grace street—Dr. Hodges, I believe.

Q. For X-ray pictures?

A. Yes, sir.

page 36 } Q. While working for Mr. Brinser, did you have any other things that you did such as promoting games, baseball and things of that kind?

A. Yes, sir, I used to promote baseball on the Southside. I was very active in degree teams of some organizations.

Q. Have you been able since to carry on those affairs?

A. I have tried to on several occasions, but I had to give it up.

Q. Have you been as active in any way since, or even now, as you were prior to your injuries?

A. No, sir.

CROSS EXAMINATION.

By Mr. Robertson:

Q. How many passengers were on the street car when you were injured?

A. As near as I can recollect, it must have been about four or five; I wouldn't like to say exactly.

Q. At the time you were injured you were operating a pool room for Mr. O. D. Brinser, weren't you?

A. Billiard parlor.

Q. Where?

A. #1616 Hull street.

page 37 } Q. Where is that in reference to Stop #2 on the Petersburg Turnpike?

A. It is at 1616 Hull street, and Stop #2 is down on the Petersburg Turnpike. Do you want to know how far this was?

Q. About how far?

A. I would say in the neighborhood of about nine blocks—eight or nine blocks.

Q. Mr. Brinser was paying you \$25 a week to run a pool room, wasn't he?

A. Forty dollars a week.

Q. Thirty-five dollars for running the pool room and five dollars a week for watching out for the building, making a total of forty dollars a week?

A. Yes, sir.

Q. After you were injured they shut the pool room up?

A. No, sir, the pool room didn't shut up.

Q. Was it closed entirely during the nine weeks you were in bed?

A. Maybe two or three days, or two or three nights, something like that.

Q. Then, when you went back to try to resume page 38 { your work, you went back to work on a commission basis, didn't you?

A. The first week—I was not supposed to work on a commission basis when I first started back, but Mr. Brinser changed it right away.

Q. What percentage of commission did you get?

A. I got twenty-five per cent. That is what he allowed me.

Q. Did you keep any records or business account with Mr. Brinser, or just a cash transaction as you went along?

A. It was a cash transaction.

Q. No books?

A. I didn't keep any.

Q. Did he keep any?

A. I didn't.

Q. Do you know whether he kept any?

A. I couldn't tell you.

Q. Now, is that pool running now?

A. Yes, sir.

Q. Between July 11th, 1932, and down to this time, the pool room and billiard parlor business hasn't been very good, has it?

page 39 { A. Well, I don't think it has been so very good.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Did you pay your fare to the motorman?

A. Yes, sir.

Mr. Williams: That is the plaintiff's case with the exception of medical testimony.

Mr. Robertson: Our information is Dr. Herring is in the operating room, but, to keep from delaying, we will go ahead as far as we can.

page 40 } DR. J. PHILIP JONES,
a witness on behalf of the plaintiff, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Doctor, would you please state your name and your profession?

A. Dr. Philip Jones; Medical Doctor.

Q. Please state to the jury what school you are a graduate of?

A. Medical College of Virginia.

Q. Since graduating from the Medical College of Virginia have you been practicing your profession?

A. Yes, sir.

Q. How long have you been practicing?

A. Seven years.

Q. What year did you graduate?

A. 1926.

Q. Eight years, isn't it?

A. I was interne for a year.

Q. You were interne for a year following graduation?

A. Yes, sir.

Q. In what hospital were you interne?

page 41 } A. Medical College of Virginia hospital.

Q. That would be Memorial?

A. St. Philips and Dooley.

Q. Memorial and St. Philips?

A. Yes, sir, and Dooley.

Q. Were you called on to treat Mr. Adam Lowry in July, 1932, for injuries received on a street car on that day?

A. I was.

Q. State what time you saw him and what was his condition?

A. I saw him about the middle of the day on the 11th of July at his residence. At that time he was lying out there on a Chesterfield, said he had been hurt in a street car accident, gotten a lick right over his liver. He was in severe pain at that time, appeared to be physically shocked and was so sick I sent him to Grace Hospital.

Q. Did you go to the hospital with him?

A. I went over there right after he got there.

Q. Did you treat him at the hospital?

A. Yes, sir. I treated him the whole time he was there.

Q. What condition did you find him to have as you proceeded with his treatment?

A. I had Dr. Herring see him in consultation page 42 } with me. We didn't take X-ray pictures but decided he had a small fracture of the liver. Besides that he had a contusion of one eye and one leg. The injury to his abdomen over his liver seemed to give him more pain than anything else.

Q. Did he have any injury to his side and about his ribs?

A. The lick was right over his ribs.

Q. How long did you continue to treat him?

A. I have been seeing him intermittently ever since.

Q. How long did you keep him in the hospital?

A. I don't remember. I think he stayed there about a month or a little less.

Q. How long did he stay in bed after getting home?

A. Five or six weeks.

Q. What is his condition to-day, Doctor?

Witness: You mean particularly to-day?

Mr. Williams: I mean his general condition as the result of these injuries.

A. Well, his general condition is like I say. I see him intermittently. He goes about his work most of the time. Occasionally he complains of his side hurting him. I know of nothing you can put your hands on to show his hurt. You have to take his statement for it that it does.

page 43 } Q. Is an injury such as his of indefinite duration?

A. Yes, very.

Q. Can you state when he will be what will be termed a well, cured man of the injuries received in this accident?

A. No, I cannot.

Q. Can any one say, Doctor?

Mr. Robertson: We object to that.

A. I don't know whether he could at all unless he is operated on.

By Mr. Williams:

Q. Could he undergo an operation?

A. Yes, sir.

Q. What would be the expense of the operation?

A. Well, I couldn't say. Two or three hundred dollars.

Q. Would that be called a major or minor operation?

A. Major operation.

Q. Is a major operation more or less dangerous a thing to a person in his condition?

A. Well, I have seen people lots sicker than he is have an operation and live. It is not the best thing in the world to have at any time.

Q. Can you say whether or not the operation page 44 } would be a successful one?

A. No, I could not.

Q. If successful, could you say what would be his convalescent period following?

A. He would be in bed at least a month.

Q. Has he been able to follow his regular employment from the time he was injured up to the present time, Doctor?

A. I don't remember exactly how long he was disabled totally. I guess two or three months. Since then he has been able to do a little work I think, most of the time I think.

Q. Does he suffer from dizziness?

A. Yes, he has for some time.

CROSS EXAMINATION.

By Mr. Roberston:

Q. Doctor, from the time you first saw him after he was hurt, Mr. Lowry has improved down to the present time gradually, has he not?

A. I think so.

Q. And is still improving?

A. Yes, sir.

Q. And in order that you might assure yourself page 45 } of the correct course being followed in his case, I believe you had Dr. A. L. Herring in consultation in the case, didn't you?

A. Yes, sir.

Q. Doctor Herring as a surgeon examined him to see whether or not an operation was advisable—you and Dr. Herring together?

A. Yes, sir.

Q. As a matter of fact, neither of you have advised an operation, have you?

A. No. We put it up to him.

Q. I mean you have not advised it?

A. No, sir, only suggested it.

Q. You suggested that he should be operated on or should not?

A. We told him if he wanted to find how much injury exactly he had that was the only way we could tell.

Q. Did you tell him you thought he ought to be operated on?

A. No, sir, I did not.

Q. This accident happened on July 11th, 1932, which is about twenty-two months ago. During this time that you have treated him since, during which he has progressively improved, have his complaints been mostly subjective or objective?

A. Subjective.

Q. By subjective you mean that, if a patient tells page 46 { you he has aches and pains and dizziness, you accept his statement that he has it, but you can't see it?

A. Yes, sir.

Q. And an objective symptom is where there is something physically wrong that you can look at and see it is wrong?

A. That is right.

Q. There is not now anything about him that you can look at and see that it is wrong?

A. No.

Q. May dizziness come from high blood pressure?

A. Certainly.

Q. And kidney trouble?

A. Yes.

Q. Heart trouble?

A. Yes, sir.

Q. Do you know whether he has kidney trouble?

A. Yes, he evidently has. He had some albumen in his urine occasionally.

Q. What does that indicate?

A. Indicates kidney destruction or changes.

Q. Do you know whether he has abnormal blood page 47 { pressure?

A. His blood pressure has been low

Q. Do you know whether he has heart trouble?

A. No, sir, he has not.

Q. Did you know that he had gone to work for the A. B. C. Board about a week ago?

A. I heard you say it this morning.

Q. This morning was the first time you knew of that?

A. Yes, sir.

Q. Of course, you don't know of your own knowledge what sort of work he is doing there?

A. No, I do not.

Q. You say until you saw him yesterday it was about a week ago you saw him?

A. Approximately a week ago.

Q. Did he at that time ask your advice as to whether it would be all right for him to go to work with the A. B. C. Board?

A. He did not.

Q. Did he tell you he was going to work for them?

A. No, sir.

Q. When you saw him yesterday afternoon did page 48 } he tell you he was working with the A. B. C. Board?

A. No, sir. I thought he was working where he had been working before, at a pool parlor.

Q. Doctor, I want to get this into the record. The court sent you over to examine Mr. Lowry this morning?

A. Yes, sir.

Q. Did it not?

A. Yes, sir.

Q. When you went over there to examine him, will you state what you found his condition to be and what examination you made?

A. He was in bed when I got there, had his clothes off, said he tried to get up this morning and couldn't because every time he tried to get up he felt dizzy. I took his blood pressure and it was normal and took his temperature, which was sub-normal. His pulse was low; respiration was regular. I didn't make out anything else the matter with him except that he was tender over the place that he had gotten this lick in July. He said he had right much pain on that side, whether anybody touched it or not.

Q. Were the things that you found about him page 49 } this morning subjective signs or objective?

A. With the exception of the slow pulse they were subjective.

Q. In your opinion, would it have been dangerous for him to have come to court and testified in person in this case? Would it have injured his health?

A. No, sir.

Q. Do you think it would have caused him serious illness?

A. No, sir. I thought because he was complaining he was better off at home.

Q. But you think he could have come?

A. He could have been brought here, yes, sir.

Q. If he had been brought in an invalid chair in an automobile conveyance, do you think that would hurt him in any way?

A. I can't say.

Q. Do you think it would?

A. I don't think it would help him much.

Q. Do you think it would have injured his health?

A. No, sir.

Q. Do you think it would have been likely to have caused him serious illness?

A. No, sir. If he had felt as bad as he com-
page 50 } plained of his symptoms, it would have made him
mighty uncomfortable.

Q. In your opinion would it have caused him any danger
to his life if the jury would go to his home and hear his
testimony?

A. No, sir.

Q. Would it cause him any danger of serious illness?

A. I don't think so.

Q. Is his mind clear?

A. As far as I can tell it is.

Q. As clear as you ever knew it to be?

A. Yes, sir.

Q. His conversation is rational?

A. Yes, sir.

Q. He is mentally all right?

A. Yes, sir.

Q. The only way you could tell he was feeling so badly
was because he told you he felt too badly to go to court?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. You said in your examination that you found tender-
ness in his side. Is that largely an objective symp-
page 51 } tom? In other words, does a patient by pressure
convey to you actual tenderness or discomfort or
pain?

A. He says it hurts. That is the only way I can tell.

Q. Do you believe that was the condition that actually ex-
isted?

A. I couldn't do any more than take his word for it.

Q. You had no reason to believe otherwise, did you?

A. No, I did not.

Q. I don't know whether I asked you this question or not.
Can you state to the jury any definite time in the future that
you think he will recover from these injuries, if at all?

A. I cannot, no, sir.

The Court: I think you have been over that, Mr. Williams.

By Mr. Williams:

Q. I forgot to ask your bill for services.

A. I don't remember exactly but between \$200 and \$300.

By Mr. Robertson:

Q. You were summoned by both sides here to-day?

A. Yes, sir.

Witness stood aside.

Note: The testimony of Dr. H. Page Mauck, taken at the former trial, was here read to the jury as follows:

page 52 } DR. H. PAGE MAUCK,
a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. You are Dr. H. Page Mauck?

A. I am.

Q. Will you state your medical school?

A. Graduate of the Medical College, Richmond.

Q. How long have you been practicing?

A. A little over twenty years.

Q. Do you follow any particular branch of the profession?

A. I do.

Q. What is that?

A. Orthopedic surgery, or that branch of medicine and surgery dealing with diseases and injuries to bones and joints.

Q. Did you make an examination of Mr. Lowry recently?

A. Yes, sir, examined him October 2nd.

Q. Did you find any condition having the appearance of injury to his side?

A. Yes, sir. Mr. Lowry was complaining of his side just at the lower border of the ribs. Examination
page 53 } showed that one of the ribs at this point was more prominent than any of the other ribs on that side or the ribs on the opposite side. He was tender at this point. (Indicating.) Movement of the chest on breathing caused pain at this side. I felt that this man had an injury to the joint, just where the cartilage and the ribs join together, on the right side.

Q. Did you find any other condition which he complained of there?

A. No, there was no other condition—He had a cut on his forehead and cut on his chin, but those healed and he didn't complain of those at that time.

Q. Is there any deformity there noticed by you as a result—

Can you say whether the condition you found there is a permanent condition?

A. Well, I think the prominency of the ribs always will be permanent.

Q. Do you think he will always have discomfort from that side?

A. Usually they do not.

Q. Having existed for fifteen months nearly, would you say this will or will not be a permanent thing?

page 54 } A. It is impossible for me to say. Usually those things clear up in less time than fifteen months. I think the longer it goes with the symptoms the greater the probability it will be a permanent trouble.

Q. What is your bill?

A. Twenty-five dollars.

Witness stood aside.

page 55 } Mr. Robertson: In the notice of motion for judgment in this case a *res ipsa loquitur* case has been alleged, and, in addition to that, there have been many acts of negligence alleged that are not *res ipsa loquitur* elements; and, if the plaintiff expects to rely on anything other than a *res ipsa loquitur* case, I ask that he now proceed to put on testimony on features of his case other than *res ipsa loquitur* features, so he will have his case in chief in so we will not have to haggle over that when we get to rebuttal.

Mr. Williams: If Your Honor please, the notice of motion is drawn identically with other notices of motion in *res ipsa loquitur* cases. I have always known in this practice that when anything else is put in it is mere surplusage. The Supreme Court passed on that in the Beard case. I proceeded with my case in the matter stated. We tried it that way previously, and I see no reason at this time for us to take it out of the realm of a *res ipsa loquitur* case and try to prove negligence at this time until they put on their case. Suppose they

page 56 } don't do anything: We are entitled to a verdict at this time. That is the practice in the trial of a *res ipsa loquitur* case.

The Court: Mr. Robertson, if evidence is offered of a general nature you can object to it.

Mr. Robertson: That is what I propose to do. I didn't want to take him by surprise.

Mr. Williams: I don't understand I have to allege anything in a *res ipsa loquitur* case. I can pick out anything.

The Court: As to evidence on the nature of the operation

of the car, if Mr. Robertson objects to it, I will have to rule on it when it comes up.

Mr. Williams: That becomes my burden after he has proven his case. Then I come back and prove anything that was a fact that I know of.

The Court: All right, gentlemen. I will not rule on it at this time.

page 57 } DEFENDANT'S EVIDENCE.

Mr. Robertson: If Your Honor please, at this point we wish to introduce the balance of the testimony given by Mr. Adam R. Lowry at the former trial and wish to introduce it now as the testimony of an adverse witness.

Mr. Williams: I can't understand the procedure. I intend to put Mr. Lowry on after they have made their case, and the duty devolves upon them to proceed with their case. The next time that Mr. Lowry goes on the stand, with Your Honor's permission, it shall be with the jury and the court over there in Mr. Lowry's room, where they will hear it orally. As I stated before, for the purpose of expedition, rather than drag him over now in a chair and drag him back today, we thought we would not need him before to-morrow and we would ask the court and jury to go to his room and hear his testimony. I don't care for his testimony to be now introduced. I intend to introduce it at the proper time. I never saw such procedure in a *res ipsa loquitur* case.

Mr. Robertson: If Mr. Lowry were here, we
page 58 } would have a right to put him on the stand and
examine him along any lines that we choose. Since he is the party plaintiff and opposed to the party defendant, he is necessarily an adverse witness. Now his testimony has gone on in part and the greater part of it has been left out. Now, if Mr. Williams should elect to leave it out altogether, the jury would never have the benefit of his full testimony. I submit, if Mr. Lowry were here, we necessarily would have the right to call him to the stand and put him on as an adverse witness. We have the same right to put on his testimony he gave at the former trial in order that the jury at the outset might have it all instead of one small portion of it.

The Court: Do you object to it, Mr. Williams?

Mr. Williams: Yes, sir. He is now making him his own witness and is bound by what he says, and I do not wish the testimony of the plaintiff to proceed in that way. It is up to them now to defend this case.

Mr. Robertson: We are doing it through him page 59 } in part as an adverse witness.

The Court: I will let it be read.

Mr. Williams: We note an exception to the ruling of the court.

Mr. Bremner: I wish to add an additional objection. He certainly cannot read questions asked by Mr. Williams. He might read the cross examination. Certainly it is not proper for him to take the record and read questions propounded by Mr. Williams. It may be proper to permit him to read the cross examination at the last trial, but certainly, under no rule of evidence can he be permitted to read questions propounded by Mr. Williams. Mr. Williams certainly has a right to say what he shall introduce, but the attorney for the defendant has not a right to read that, for the reasons stated by Mr. Williams. Not disagreeing with Mr. Williams in any respect, it cannot apply to questions propounded by Mr. Williams.

The Court: Suppose Mr. Lowry were here to-day: Couldn't Mr. Robertson take the report of the evidence at the last trial and ask him, question by question, if he didn't testify to that? page 60 }

Mr. Bremner: If it were in the nature of a contradiction of what he already said, it would; but the only way to read his previous testimony would be in the nature of contradiction. Unless it is strictly in contradiction, it is not proper.

The Court: What have you to say about that, Mr. Robertson?

Mr. Robertson: This witness being the party plaintiff is necessarily an adverse witness, because they are plaintiff and defendant. It could not be more adverse. Mr. Bremner concedes that the cross examination is proper.

Mr. Bremner: No, I do not.

Mr. Robertson: What good is the cross examination if we don't know the direct examination that went ahead of it?

Now, if Your Honor please, under established practice, if Mr. Lowry were here, I could put him on the stand as an adverse witness at my peril and ask him anything at all under the rules of evidence, as I say, at my peril, and bring out to the jury whatever light I could bring out. Now, he has elected to testify at the former trial, and I examined him. Now, I have a right to do everything in his absence that I could do in his presence. Mr. Williams has already put us on notice that he is going to ask the court to send the jury to his room and let him testify in person. I am not going to object to that; but, if there is anything they don't like that comes out here by my reading this page 61 }

Williams has already put us on notice that he is going to ask the court to send the jury to his room and let him testify in person. I am not going to object to that; but, if there is anything they don't like that comes out here by my reading this

testimony, he has opportunity to do what he likes when he is examined and cross examined in person to-morrow. I put him on notice that, if he relied on anything other than *res ipsa loquitur*, I wanted him to do it then. He elected not to do it. Now, to rule me out on this and he elects not to come afterwards with it, we will not have it, and I have a right to put it in.

The Court: I will let you put it in. I think it is a matter of discretion with the court.

Mr. Williams: We except to the ruling of the court. Can I read my cross examination?

Mr. Robertson: I consent to your reading every-page 62 } thing that is in there.

Mr. Williams: I want to note for the record that my reading the cross examination of this testimony is without waiving my objection heretofore made.

Note: The testimony of Adam R. Lowry, taken in rebuttal at the former trial of this case, was here read to the jury as follows:

page 63 } ADAM R. LOWRY,
the plaintiff, being recalled in rebuttal, further testified as follows:

By Mr. Williams:

Q. As your car proceeded on down, before getting to the general collapse, will you tell the jury how that car was driven by Mr. Upchurch?

Mr. Robertson: We object to that entire line of testimony upon the ground that it is not rebuttal. It is an element of the case in chief, which he failed to prove in chief and is not permissible in rebuttal.

The Court: Do you want to be heard on that?

Mr. Robertson: Yes, sir.

Note: The jury were sent from the court room.

Mr. Robertson: If Your Honor please, under the doctrine in Bassett and Wood, and subsequent cases, the plaintiff can make no higher case than he made from his own testimony.

He goes on the witness stand and must prove his page 64 } case in chief and all the essential elements of recovery. Of course, this is a *res ipsa loquitur* case. This gentleman went upon the stand and saw fit to leave out any testimony except the facts of the accident and rested

his case in chief. Then, under the doctrine in *Baker v. C. & O. Railway*, 149 Va., and again in 150 Va., we proceeded to produce our testimony, and we think we have shown conclusively we are not guilty of any negligence. Thereupon, as to his case in chief, the presumption that was in his favor has fallen and he has no case in chief, and he can't now come in here, under the rule, for the purpose of rebutting us and prove his case in chief, which he did not do when it was his duty to do it. I wish to enlarge on my motion also to this extent, that, according to the evidence here, expert evidence, not controverted, the speed or method of operation of the car over that track could have had no causal connection with this accident; so I think his testimony is not
 page 65 } properly rebuttal and is merely an attempt to mend his hold and prove his case in chief. We think it is also irrelevant because there is no causal connection between the speed of the car, or method of operation, and this accident.

Mr. Williams: My friend admits that this is a *res ipsa loquitur* case. A *res ipsa loquitur* case is proven like this. The plaintiff states he was a passenger and paid his fare, there was a derailment and he was hurt, and he rests. The Baker case is a different case. The Baker case was an explanation of the cause, or how it happened. That was a transverse fissure. The Supreme Court said that, having explained the cause, or how it happened, they were exculpated and thereby exonerated. The Beard case is a case quite like here. The plaintiff proved he was a passenger, paid his fare and was injured. The defendant said "We can't find the defect". The Supreme Court says that it was one of those cases that, when it happened, in the absence of a satisfactory explanation, the defendant is presumed and
 page 66 } starts off to be negligent, and, if he comes in and attempts to give an explanation, the plaintiff is entitled to go to the jury on the presumed acts of negligence. That does not deter the plaintiff from coming in and rebutting the statement of the defendant that it carefully drove that car down there; that he drove it at fifteen miles an hour. That doesn't hinder the plaintiff from coming in and proving absolute negligence on the part of the defendant, which we propose to prove. We propose to prove this negligence and we are entitled to. A man comes in with some defense and the plaintiff replies. Mr. Robertson can find no law that would keep the court from following this procedure and no law which contends this is not the procedure.

Mr. Robertson: I think I am saving time by doing this because we are going to come to a similar question later on.

In the Baker case in 150 Va., I will read syllabus 8. (Reading.)

The Court: Objection overruled.

Mr. Robertson: Defendant excepts for the re-
page 67 } sons stated, and, without renewing its objection and
exception to each question and answer and, re-
serving every such right of objection and exception, defend-
ant wishes the record to show that this entire line of testi-
mony is objected to and excepted to.

Note: The jury returned to the court room.

Q. (Repeated) As your car proceeded on down, before get-
ting to the general collapse, will you tell the jury how that
car was driven by Mr. Upchurch?

Mr. Robertson: I don't want to quibble, but I don't want a
lot of stuff in the record that the evidence doesn't justify.
I object to the form of that question as to any "general col-
lapse".

The Court: Objection sustained.

By Mr. Williams:

Q. Will you state, Mr. Lowry, how Mr. Upchurch drove that
car down the street there before getting to Halifax street?

A. I got on the car going home to my lunch about
page 68 } 11 o'clock, or maybe 25 minutes after 11, I might
say. I had a package to take home. My wife
asked me to bring some things home for lunch. I went home
a little early. I got on this car. I put my package down
beside me in the seat like in this manner (Indicating), taking
my pencil out of my pocket. I had my eyeglasses on at the
time. They were not these; they were nose ones. I took my
pencil from my pocket and paper out of my other pocket and
was figuring on a baseball proposition to be worked out in
the billiard parlor. I was figuring. I first started off all
right. I got about a square perhaps away from where I first
started. The car commenced bouncing, going like that. (In-
dicating.) I could not very well get my figures down right.
I gazed over my glasses this way to see what the trouble was
with the motorman. After running a block or so, the same
thing occurred again, just commenced bouncing up like that,
bouncing up and down. Something was bumping. I couldn't
tell what it was. I gazed over top of my glasses again. I
could not see the motorman thorough my glasses, because they
were reading glasses; they were not these. I looked over

again. I remember looking over about three dif-
 page 69 } ferent times at the motorman. The car was in a
 motion just like a bouncing up and down, which
 it does right now as far as that goes.

Mr. Robertson: I object and ask that that be stricken out.

The Court: That will be stricken out.

Mr. Robertson: I ask the court to instruct the jury to disregard it.

The Court: Yes, sir.

By Mr. Williams:

Q. At what speed was the car going down there?

A. I would say the car was going somewhere around, to my judgment, thirty to thirty-five miles an hour.

Q. Who was at the wheel?

A. Mr. Upchurch.

Q. Now, about this bumping: Where did you hear this bumping and noise?

A. Every time it crossed a cross-over, or crossing, on the Pike this way (Indicating) it would be a bump. It seemed like one right after another, maybe two or three right in succession, one right after another.

Q. Did that continue on all down to where?

page 70 } A. Until it got down to Halifax Avenue, or street.

Q. Then what happened?

A. Then there came a "Bim, bam, boom", I might say, all at once.

Q. Were they in succession?

A. One right after the other.

Q. Was that the same kind of noise you heard coming down the road?

A. It was heavier than the noise I heard coming down.

Q. When it did that what happened to you; where did you go?

A. I had my legs crossed like this. (Indicating.) When that happened I was thrown out of the seat some kind of way, or up against the seat, from one seat of the car to the other; my glasses pulled off me; eyeglasses are still in the car; I haven't got them yet. I was knocked back down in the aisle. I remember. My memory is so faded I don't remember exactly what I did after I got to the back seat.

Q. How far from Halifax street was it that that street car was across the track?

A. Forty-five steps from Halifax street to where page 71 } the car crossed the track.

Q. Is there any mark in the rail there to show the point at which the street car was across the track?

A. Yes, sir.

Q. What kind of mark is it?

A. There is a mark on the rail, I will say, about an inch and a quarter or an inch and a half wide and about nearly—well, it is fully a quarter of an inch deep.

Q. That is in the rail itself?

A. That is in the rail itself.

Q. Is that a kind of fan shaped mark?

A. It spread out.

Q. In which direction?

A. It commences at the top very small and spreads wide down towards the bottom of the rail.

Q. I will ask you where is the extreme spread, in what direction—towards Richmond or Petersburg?

A. Toward Richmond.

Q. The extreme spread is?

A. The spread is on a degree of about 45 I will say. The largest part is towards Richmond and at a degree of 45.

Q. It began at nothing and goes to a spread you page 72 } would say of an inch and a quarter to two inches?

A. About one and a quarter inches. I wouldn't like to say exactly what it is at the bottom.

Q. I believe you said an inch and a quarter to an inch and a half?

A. Yes, sir, something like that.

Q. In walking towards Petersburg do you come to the small part of the mark, or the fan shape part, first?

A. Small part of the mark.

Q. Now, Mr. Lowry, are there any marks along the street as a result of the bumping and bouncing up to Halifax street?

A. Yes, sir. From Decatur street every cross street from Decatur down to Halifax you will find where the car was going like this. (Indicating.)

Mr. Robertson: If Your Honor please, we object to all this unless he can show that those marks were made by this car on the trip of this accident. It has been testified here as to how those marks were made in Halifax Avenue. I dare say you can go to every intersection in Richmond and find marks. I object unless he connects them up with this trip when this axle broke.

Mr. Williams: He has said there was a dragging page 73 } of the car and bumping of the car. I am asking him whether there are any marks indicating those marks made by the car.

The Court: Objection is sustained. You can ask him about marks made in the street.

Mr. Williams: I withdraw the question.

By Mr. Williams:

Q. Mr. Lowry, are there any marks at Decatur Street going as far as each intersection to Halifax street.

Mr. Robertson: I object unless he shows those marks were put there by this car on this trip when this axle broke.

Mr. Williams: I expect to show, if Your Honor please, that those marks—

Mr. Robertson: I object to arguing before the jury. I ask that the jury be excused if you are going to argue it.

The Court: I will let him ask if there are any marks in the street.

Mr. Robertson: We except for the reasons stated.

page 74 } A. Yes, sir, on Decatur street.

By the Court:

Q. When did you see those marks?

A. I saw those marks the first time, as near as I can come at it, Judge, it was somewhere around about two weeks after I came out of the hospital, the first time I saw those marks.

Mr. Robertson: We object because they are not sufficiently connected up and for the further reason that the witness is contradicting himself because he said he was two weeks in the hospital and seven weeks in bed after he came out of the hospital. I object for both of those reasons.

Mr. Williams: The objection is not well taken. I think we are entitled to prove the physical conditions there and prove where those marks were.

The Court: I will let you do it.

Mr. Robertson: Defendant excepts for the reasons stated. I wish to add one other objection. Defendant also, in addition to its other objection and exception, objects and excepts upon the ground that what happened at Decatur
page 75 } street has no connection with what happened at Halifax street, and the evidence is immaterial.

By Mr. Williams:

Q. Describe those marks at Decatur and the other streets and at Halifax street.

A. You will find on those streets, on each cross-over street from Decatur, counting Decatur in, down to Halifax street, a mark right along the edge of the rail. I don't know the distance exactly. I do know, too, because I had a record of it in my mind, but I haven't got it very clear, but from the rail about that far. (Indicating.)

Q. How far is that? The record can't show. You held your hand out like that. How far is that?

A. I really don't know exactly the distance. I wouldn't like to quote the exact distance; I don't know. In my mind I don't know. Well, I did measure it, but the record is not clear in my mind. I don't want to say it.

Q. Can you give us an approximate idea of the distance, Mr. Lowry?

A. In the neighborhood of seven inches.

Q. That distance is from the east rail? Is that right or not?

A. Yes, sir, that is from the east rail—the left page 76 } hand rail going south on the Petersburg Pike.

Q. Now, describe those marks at the different streets as you go towards Petersburg.

A. When the mark first enters on the cross-over street, you will find that it enters lightly, and, as it leaves each intersection, leaving the street, you will find that it has gone further down into the asphalt on each cross-over street, just as the bump goes.

Q. Was the noise of those bumps as you went down on that car the usual and ordinary noise that you get in riding a street car?

Mr. Robertson: We object.

The Court: Objection overruled.

Mr. Robertson: Exception.

A. The car was very unusual on this morning. I noticed there was something peculiar about the running of the car—

Mr. Robertson: Without renewing the objection and exception to each question and answer, but especially reserving the same, defendant wishes the record to show it objects and excepts to each and every question and answer along this entire line of testimony.

page 77 } A. (Continued) more so than other occasions
when I rode the car previous to this.

Q. How long have you been riding that particular line down there?

A. Well, for quite a while before this happened. I wouldn't like to say exactly.

Q. How many times a day?

A. In the neighborhood of—I would come up in the morning on the car and go down to lunch and come back after lunch and go down to supper and come back after supper and go down at night. In the neighborhood, I might say, of five or six times a day regularly, except Sundays.

Q. When you come to Halifax street do you find the marks referred to at other streets, or similar marks?

A. Marks at Halifax street, similar marks I spoke of coming all the way down. When you get to Halifax street, on the further side of Halifax street, just before you get there, about two steps, about six feet, something like that, you will find that the street is all torn up right at that one point. There are several marks right there at that one place where the street is all torn up.

Q. Now, Mr. Lowry, did you make any pictures page 78 } of those conditions down there?

A. I had pictures of it made.

Note: Pictures handed to counsel for defendant.

Mr. Robertson: Defendant objects to all pictures for every purpose and also for all reasons heretofore stated to this entire line of testimony, and asks the court to rule.

The Court: When were those pictures made?

Witness: I don't know when was the exact date.

Mr. Robertson: We further object upon the ground that it now develops those pictures were taken when?

Mr. Williams: April 2nd, 1933.

Mr. Robertson: Nine or ten months subsequent to the accident.

The Court: Objection sustained.

Mr. Williams: Here is one that shows a mark on the track

The Court: Do you object to that?

Mr. Robertson: Yes, sir. There is nothing to page 79 } connect that mark with this accident.

The Court (Examining photo.): Was this taken at the same time?

Mr. Williams: Yes.

The Court: Objection is sustained.

Mr. Williams: We note an exception.

By Mr. Williams:

Q. Mr. Lowry, did Mr. Owen call on you or come to see you on one occasion?

A. Yes, sir. Shortly after—

Mr. Robertson: I am not objecting to that provided he specifies the time and place and circumstance.

By Mr. Williams:

Q. Will you just give the time it was, the month and day and year?

A. Well, it was in July, after I came home from the hospital and was in bed. Mr. Owen, the motorman that was learning a greenhorn on the car—

Mr. Robertson: I object to that expression

The Court: Objection sustained.

page 80 } A. (Continued) Was learning a man to run the car. He came down to see me in July. The exact date I can't say.

Q. Was that the same month?

A. Same year and same month I was hurt.

Q. At your home he came to see you?

A. Yes, sir.

Q. Was there any one present at the time?

A. My wife and my boy; one of them was in the room at the time.

Q. Did Mr. Owen say how fast the car was going at the time, or what conversation did you have with him?

A. Mr. Owen talked to me a little while and told me he was sorry it happened, but he couldn't help it—something to that effect—and I said "Well"—He says "Do you know how it happened?" I said "No, I don't exactly know how it happened. I thought it ran into a cement post, but they tell me it didn't." He says, "No. We missed the post about eight or ten feet." He said the axle broke. My wife spoke up and said—

Mr. Robertson: I object to what his wife said.

The Court: Objection sustained.

Witness: Then he answered a question I asked him.

page 81 } By Mr. Williams:

Q. Did you say anything to him about the speed and did he say anything to you about the speed?

A. I didn't say anything to him, but he said something to me. He said, "Yes, he had her on nine".

Q. What did he say "Yes" to? You can state what you said to him.

Mr. Robertson: I want to know if he made that in reply to his wife. If he did, I object. If he made it in reply to a question of Mr. Lowry, I don't object.

Mr. Williams: If he made it in his presence—

Mr. Robertson: I withdraw objection. I continue my objection to what his wife said.

By Mr. Williams:

Q. What did you say to the motorman and what did he say?

A. He said "Yes, he had her on nine".

Q. That is the statement of Mr. Owen?

A. Yes, sir, Mr. Tom Owen.

Q. When he said "He had her on nine" whom was he referring to?

A. He was referring to Mr. Upchurch.

page 82 } Q. The gentleman who was a learner?

A. Yes, sir.

Q. And Mr. Owen was the teacher—

Mr. Robertson: Don't lead him any more, please.

By Mr. Williams:

Q. Now, Mr. Lowry, some time ago did you endeavor to see the axle that they claim was broken?

Mr. Robertson: I object, Your Honor.

The Court: What has that got to do with it?

Mr. Williams: I think we are entitled to know he attempted to see the axle and they wouldn't let him see it.

The Court: Objection sustained.

By Mr. Williams:

Q. At the time you went in an effort to view the axle, they promised to let you see it and refused?

The Court: I rule that has nothing to do with the case. That has nothing to do with the negligence of the company.

Mr. Williams: It has this—May I ask that the jury retire temporarily. I would like to discuss the question
page 83 } with Your Honor. But I withdraw it. That is all.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Do you know Mr. T. G. Vaughan, who testified here yesterday, who said he worked with the Claim Department of the Virginia Electric & Power Company? Do you know him by sight?

A. By sight, yes, sir.

Q. Didn't he come to see you around about the 21st of November, 1932, and ask you about this accident?

A. I haven't a record of it.

Q. Just answer my question.

A. Yes, sir.

Q. You told him how the accident happened, didn't you, to the best of your ability?

A. I told him certain portions of it.

Q. What portion did you not tell him?

A. That is what I am trying to tell on the stand here now. Part I didn't tell.

Q. The part you held out from him is the part you are trying to tell now?

A. Absolutely.

page 84 } Q. There was a statement filled out there as to how the accident happened, and you signed it, didn't you?

A. Yes, sir.

Q. You read it over before you signed it?

A. Yes, sir.

Q. You say that was not a complete statement?

A. Yes, sir.

Q. You mean it was or was not complete?

A. It was not complete.

Q. Was it true or false?

A. It was true.

Q. Was it the whole truth or partly the truth?

A. If it was true at all it would be the whole truth. I wouldn't tell a part of it and leave the balance off.

Q. Was it complete?

A. No, sir, was not complete.

Q. When you finished you asked Mr. Vaughan to give you a copy of that statement?

A. Yes, sir.

Q. He gave it to you?

A. Yes, sir.

Q. You read it over to see if it was correct?

A. Yes, sir.

page 85 } Q. It was correct, wasn't it?
A. As far as I know.

Q. Where is the statement?
A. You have it.

Q. Where is the copy you obtained?

A. I have it on file.

Q. Where?

A. Mr. Williams has got it.

Note: Counsel for defendant produces paper.

Mr. Williams: Do you offer the statement?

Mr. Robertson: I am trying to get the record straight in a legal way.

By Mr. Robertson:

Q. I will ask you to read that statement and see if that is the statement you signed at Mr. Vaughan's request and gave him? (Handing witness paper.)

A. I signed this statement. I would like to see my copy. Mr. Williams, will you read it and see how it compares with my copy? I don't remember exactly every word in the statement.

page 86 } Note: Mr. Williams hands copy of statement to witness.

A. (Continued) This latter part on there was added on afterwards, because my copy is supposed to be exactly the same as that copy, and that part was added on afterwards.

Q. But the other part is correct?

A. Yes, sir.

Q. I will ask you if Mr. Vaughan didn't ask you in that conversation what the speed of that car was and you told him you couldn't say?

A. Well, I didn't care to tell him at that time.

Q. I will ask you if you did not put in that signed statement that you couldn't say?

Mr. Williams: He was probably on a sick bed. I don't know.

Mr. Robertson: The report is dated the 21st of November. That was after he had been down there and also after he had been nine weeks in the hospital.

Mr. Williams: Under the statute these *ex parte* statements of witnesses are excluded. I invoke the rule so as to get along.

page 87 } Mr. Robertson: I haven't offered it yet.

The Court: Make your objection to the court.

Mr. Williams: He is doing something indirectly that he is not permitted.

The Court: Objection overruled.

Mr. Williams: Exception.

By Mr. Robertson:

Q. I will ask you, Mr. Lowry, if you did not tell Mr. Vaughan, when he asked you how fast the street car was going, that you couldn't say, and if you didn't make a signed statement to that effect?

Mr. Williams: Same objection.

The Court: Objection overruled.

A. I told Mr. Vaughan I couldn't say at that time.

By Mr. Robertson:

Q. Why did you tell him that?

A. For the simple reason I didn't have in my mind clearly exactly how fast the car was going.

Q. So you have developed that thought by thinking about it since you talked to Mr. Vaughan?

A. No, sir. I developed that thought this way: By riding in an automobile and noticing the speed of a car going down from time to time since that has happened.

page 88 } Mr. Robertson: We ask that that testimony regarding the speed of the car be stricken out as irrelevant, improper and immaterial.

The Court: I will let it in for what it is worth.

Mr. Robertson: Except for the reasons stated.

By Mr. Robertson:

Q. Now, Mr. Lowry, you stated a moment ago that the difference between the signed statement you gave Mr. Vaughan and the copy you kept yourself was something that Mr. Vaughan added after the statement left you, is that correct?

A. I say that the writing on that statement was different from the copy that he gave me, and that writing was put on after it was signed by me.

Q. I ask you if that writing doesn't say and the only thing it says is you asked him for a copy of your signed statement and he gave it to you?

A. Certainly, that is what the writing says.

Q. That is the only difference in it, isn't it?

A. That is all the difference I can see.

Q. What that writing says is true, isn't it?

A. Yes, that is true.

page 89 } Mr. Robertson: Now, we offer the writing in evidence.

Mr. Williams: I object.

The Court: I always understood the statute didn't apply to a party to the case. I have so ruled and rule now, and you except.

Mr. Williams: Yes, sir, I except.

Mr. Robertson: Defendant offers in evidence the signed statement of the plaintiff and asks that it be marked defendant's Exhibit #7. I have no other question.

DEFENDANT'S EXHIBIT #7.

WITNESS STATEMENT OF ACCIDENT.

Did you see the accident? Yes.

Where did it occur? One block north of stop #5.

What day and at what hour did it occur? 7-11-32 at about 11:25 A. M.

Where were you when it occurred? On car.

If on car or bus, what part? Left side 3 or 4 seats from front.

Was there any unusual motion in starting or stopping of car or Bus? Yes.

Did car or bus make one or two stops at the time of the accident? One.

Where was injured party when the accident occurred? On car.

Was there anything on floor, platform, or step to cause party to fall? If so, what?

Did you hear operator call to party to wait until car or bus stopped?

Was car or bus standing? No. If moving, about page 90 } how fast? Could not say.

About how fast was vehicle or auto moving?

Did driver of vehicle or auto signal that he was going to turn?

About how many feet did car or bus move after accident? I was taken to hospital and could not say.

About how close (how many feet) was car or bus to object when it first appeared in the way?

Did car or bus vehicle or auto, or did vehicle or auto strike car or bus?

Who was at fault and why? Va. Electric Co.

Was gong or horn sounded by operator? If so, to what extent?

Direction in which car or bus was going. North, East, South or West. South.

Direction in which vehicle, truck or person was going. North, East, South or West.

Are you acquainted with others who witnessed accident? If so, please give their names and addresses. No.

Please state fully all you saw and heard connected with accident. I was seated as stated with my legs crossed. I had been figuring on a piece of paper at times when car was not bouncing. As car was at above point it suddenly left rail & I was thrown out of my seat into aisle of car & against seats on other side then back in aisle. I then crawled back to the rear of car & took seat on right side. I thought at first my head was injured & bleeding but later discovered that my stomach was severely injured.

I have read this statement & it is correct.

Condition of street or track. Could not say. Weather. Clear.

Were vehicles lighted?

Do you think operator of car or bus could have prevented the accident? Will not answer.

What is your full name? Adam R. Lowry.

Date Nov. 21, 1932. Address 1500 Westmoreland.

(a) This car was being operated by a learner.

11-21-32.

A. R. L.

Mr. Lowry asked for a copy of this statement. I made another statement just like this one & gave it to him.

T. G. VAUGHAN.

11-21-32.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Did Mr. Vaughan tell you about how fast the man was running his car and how he was bumping up and down or anything of that kind?

Witness: Mr. Vaughan?

Q. (Continued) Yes, sir. In other words, did he tell you from their side? He talked to you about what you page 92 } knew about it?

A. He talked a good deal about that.

Q. He didn't tell you anything from his side of it?

A. No, sir.

Q. Did he tell you he had a learner on that car?

A. Yes, sir.

Q. He did tell you that?

A. Yes, sir. That is in here I think.

Q. What was your physical condition at the time you gave that statement?

A. Well, as the fellow says, I was under cover down there; I wasn't able to get out.

Q. Did you write that statement or he write it?

A. He wrote it.

Q. His handwriting?

A. Yes, sir.

Mr. Robertson: Now, in view of what has already happened, unless Mr. Williams objects to it, I offer in evidence here the accident report signed by Mr. Owen. I don't think it is admissible if you object to it. You have a right to keep it out. Do you object to it?

Mr. Williams: If I knew all that is in it, I might page 93 } not object.

Mr. Robertson: Do you object or not?

Mr. Williams: I object to something I don't know anything about.

The Court: You can't offer the paper until Mr. Williams has had opportunity to examine it.

By Mr. Robertson:

Q. These marks you talked about in the street, were any of them south of Halifax Avenue?

A. No, sir.

Mr. Robertson: I offer this accident report in evidence, subject to any objection that Mr. Williams chooses to make to it.

Mr. Williams: I object.

The Court: Objection sustained.

Mr. Robertson: Do I understand you do object, Mr. Williams?

Mr. Williams: I thought you heard my language.

Witness stood aside.

page 94 } Mr. Williams: I want to make the same objection as made before to the reading of the statement which was introduced in Mr. Lowry's testimony as Defendant's Exhibit #7.

Mr. Robertson: I will call Mr. H. E. Lowry.

Mr. Williams: If Your Honor please, I don't think I have ever known of any procedure like this and I object to it—with my witnesses at this time. I would like to hear their defense for an explanation of what they were doing that day. I think that that is the procedure that should be pursued in this case.

The Court: You are calling Mr. Lowry as a witness?

Mr. Williams: Yes, sir, he is.

The Court: He is making him his own witness. I can't tell Mr. Robertson what witness he must call.

Mr. Robertson: He is not here. We will call Mrs. Adam R. Lowry.

Mr. Williams: I think you will find her home with her husband. Counsel for the plaintiff states that Mrs. Lowry is at home with her husband, the plaintiff in this case, who is sick in bed.

Mr. Robertson: I ask that a summons be issued
page 95 } for Mr. H. E. Lowry, son of Mr. Adam R. Lowry,
and for Mrs. Adam R. Lowry.

Mr. Williams: Now, if Your Honor please, we wish to make an objection on the record on this; that we cannot see the materiality of the testimony of Mrs. Lowry; and I know if his son and wife are both brought from his bedside he will be alone in bed unable to take care of himself, without a soul in the house, and I don't think it is humane treatment; I don't think the court will stand for it.

Mr. Robertson: We will be delighted to send a trained nurse there while they are away.

The Court: Mr. Robertson has a right to summon whatever witness he wants. If for both of these witnesses to come at one time it will be any inconvenience to Mr. Lowry, I will see that one comes at a time. The officer serving the summons will tell them that they can come one at a time if there is any inconvenience to Mr. Lowry.

Mr. Robertson: Now, I ask that a summons be issued for Mr. H. E. Lowry and for Mrs. Adam R. Lowry. We will send an officer in an automobile for whichever one is most convenient to them to come back with him.

page 96 } The Court: Ask for a summons like you do any other witness, Mr. Robertson.

Mr. Williams: I move that the court require counsel to proceed in the proper way to get his witnesses—make the

proper requisition with the clerk for the witnesses he needs. I can see no motive or reason for the court stopping this trial to make this melo-dramatic appeal for witnesses in this way.

The Court: Call your next witness, Mr. Robertson.

Mr. Williams: I understood you allowed them to have one representative here. They have two—Mr. Mulford and Mr. Vaughan. The plaintiff is not here himself. I don't think they should be allowed more than one representative.

Mr. Robertson: You said I could keep one representative in here who was going to testify. I kept Mr. Vaughan. I have a right to keep anybody else in who is not going to testify.

Mr. Williams: I understood the court to say one representative. They now have two active men.

page 97 }

S. S. PLEASANTS,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Are you employed by the Virginia Electric & Power Company?

A. Yes, sir.

Q. In what capacity?

A. Assistant Engineer, Maintenance of Way.

Q. How long have you been working for the company?

A. About thirteen years.

Q. What are the duties of your position as Assistant Engineer?

A. Assistant in charge of the upkeep of track, bridges, etc., and paving.

Q. Are you familiar with the track from the intersection of Hull street and the Petersburg Pike down to and past the intersection of the Petersburg Pike and Halifax Avenue?

A. Yes, sir.

Q. When was that track built?

A. 1902 and rebuilt in 1929.

page 98 }

Q. What was done to that when rebuilt in 1929?

A. The rail was changed and heavy rail put in in new ballast brought up to the city grade.

Q. What weight rail was put in?

A. Hundred pound T-rail in the open grass plots and 122 pound girder rails at intersections.

Q. Why is the girder rail put at the intersections?

A. To hold the pavement.

Q. Is the condition of that track from the intersection of Hull street and the Petersburg Pike down past the intersection of the Petersburg Pike and Halifax Avenue the same today as it was on July 11th, 1932, or different?

A. Same condition.

Q. Has it been repaired or rebuilt or changed since July 11th, 1932?

A. No, sir.

Q. What is the normal life of a track after rebuilding in the way this track was rebuilt in 1929?

A. Twenty to twenty-five years.

Q. Was the condition of this track, over the part of it we are talking about, on July 11th, 1932, good, bad, indifferent or excellent?

A. Excellent condition.

page 99 } Q. Did you have any better piece of track in the city of Richmond?

Mr. Williams: We object to that. He stated the condition. I object to the comparison.

The Court: Objection sustained.

By Mr. Robertson:

Q. Do you know what part of the year 1929 this track was rebuilt?

A. In the fall of 1929, about October or November.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Pleasants, that rail down there from Hull street and Cowardin Avenue down to Halifax is T-rail in part and grooved rail in part, isn't it?

A. Yes, sir.

Q. You remember that specifically?

A. Yes, sir.

Q. The grooving is from a foot before getting to an intersection street and completely across the intersection of the street, isn't it?

A. Yes, sir.

page 100 } Q. Between those points most all the other parts of the street have just a T-rail, it doesn't have a groove?

A. In the grass plot a T-rail.

Q. As a car goes down there the flange of the wheel fits into the groove, doesn't it?

A. Yes, sir.

Q. When it leaves the groove to the T-rail it has no groove underneath it then?

A. No, sir.

Q. Doesn't that incline to sag somewhat when it leaves the groove?

A. No, sir.

Q. None at all?

A. None at all.

Q. You have never seen it do it? Have you watched it down there?

A. Certainly.

Q. You have noticed these small cars there?

A. Yes, sir.

Q. When they hit the groove you haven't watched that they would go up and when they hit the T, they would go down?

A. They do not.

Q. You have never seen them do that?

A. They don't do it.

page 101 } Q. Do you tell the jury as a matter of fact that the wheel flange is no deeper from the top of the rail on the T-rail than it is in the groove—it is no further from the top of the rail when it is on a T-rail than when it is in a grooved rail?

Mr. Robertson: I object to the question. I don't think it makes any sense. I don't know what he is talking about.

The Court: If the witness doesn't understand the question, he can say so.

Mr. Williams: You understood that, didn't you, Mr. Pleasants?

Witness: Yes, sir. I understand the question.

Mr. Williams: What do you say?

A. Because the ball of the rail in the two different sections of the rail are the same elevation.

By Mr. Williams:

Q. Do I understand your answer to my question to be that the flange (the extreme bottom from the flange of the wheel) is not any further below the top of a T-rail than it is below the top of a grooved rail?

A. No, sir, it is not.

page 102 } RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Pleasants, when you say a grooved rail, is that the

rail that has a piece alongside or over the paving to protect the paving?

A. Yes, sir. It is a place in the rail for the flange of the car wheel to go, in the groove, so as not to cut the pavement.

Q. Does the company put that in there under requirement of the city of Richmond, or otherwise?

A. Requirement of the City of Richmond.

Q. Suppose a street car is running south there along the Petersburg Pike and running down a rail where it has not got any groove on the side of it and it approaches an intersection where there is a groove, when it gets to the point where it runs off the rail which hasn't got a groove on to the part that is grooved, is there a sort of offset that makes the car bump?

A. No, sir.

Q. Does it run smoothly?

A. Yes, sir. Can't tell any difference.

Q. Is the groove smooth enough to run from one rail to the other without bumping?

A. Yes, sir.

page 103 } Q. As they run off a piece of rail that has not got a groove alongside of it, off the grass plot, onto the part of the rail that has got a groove in it in the paving portion of the street, does it make any different sort of sound or the same sound?

A. Makes a little difference in sound but there is no difference in the movement of the car.

Q. It is that sort of click you hear with a railroad train?

A. Yes, sir.

Q. What sort of noise is it?

Mr. Williams: Don't lead him.

The Court: The question is leading.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Williams, I will ask you this: Then, if the bouncing up and down of the car was not caused by leaving the T-rail to the groove, or the groove to the T, it must have been a defect in the car, must it not?

A. I don't know.

Q. What would cause it to bounce up and down if the track, you say, was in good condition?

page 104 } A. I don't know. I am not in the mechanical department. I don't know anything about street cars.

Q. How can you tell that your rails were in good shape if you are not a mechanic and not in the mechanical department?

A. I keep my rails up for cars to run on.

Q. You just know how to do that?

A. Yes, sir.

Q. How about, suppose you don't have any cars to run over it, you don't need tracks, do you?

A. There are no tracks when there are no cars to run.

Q. You tell the jury you don't know anything in the world about the operation of mechanical parts of a car?

A. No, sir, I do not.

Q. What is your particular occupation?

A. Maintenance of track and paving streets.

Q. Are you what they call a surveyor or engineer of that kind or a mechanical engineer?

A. I am not any kind. I am assistant engineer of maintenance of way. That comes under civil engineering, I expect.

Q. You are positive of your *previous* that the rails are so adjusted that they would not cause a car to go up and down as it ran 30 or 35 miles an hour?

A. They certainly are.

page 105 } Q. Then, if a car ran down there 30 or 35 miles an hour, as is in testimony in this case, and was bumping up and down and striking at each cross-over where it went over, there was something wrong in the matter of the operation of the car, wasn't it?

Mr. Robertson: I object. He says he doesn't know anything about it.

The Court: Objection sustained.

Mr. Williams: I wish to except to the ruling of the court. I am through.

Witness stood aside.

page 106 } E. P. ASBURY,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Are you employed by the City of Richmond?

A. In the Department of Public Works.

Q. What is your employment with the Department of Public Works?

A. Assistant Engineer of the Bureau of Streets.

Q. Do you know when the Petersburg Turnpike from the intersection of Hull street and the Turnpike down past Halifax Avenue on the Turnpike was reconditioned for northbound and southbound traffic and paved in its present condition?

A. For northbound traffic it was paved in 1927 and for southbound traffic was resurfaced in 1928.

Q. Just what part of the year 1928 was it that the last part was paved there?

A. I couldn't answer that. I don't know.

The Court: You said the first time it was repaved in 1928.

By Mr. Robertson?

Q. What did you say?

A. I said northbound was paved in '27 and
page 107 } southbound was resurfaced in 1928; but that is
not taking care of the intersections, if you want
to go into that. The intersections were paved in the winter
of 1929.

Q. Was that paving at the intersections done by the Virginia Electric & Power Company or by the city?

A. The paving was done by contractors working for the city.

Q. Did they give the grades there?

A. They gave the grades.

Q. Was the work done subject to inspection and approval by the city?

A. It was.

Q. And accepted by the city?

A. Yes, sir.

Q. Did the city accept it?

A. It did.

Mr. Williams: I ask what has the paving got to do with this case? I object to it as immaterial, irrelevant and inadmissible and as not bearing on the case.

Mr. Robertson: If Your Honor will recall the testimony in the other trial, I think you will recall—

The Court: If you say it is material to the
page 108 } case, go ahead.

Mr. Williams: I note an exception.

By Mr. Robertson:

Q. Then, after that paving at the intersections was done, either at that time or before that time or after that time,

do you recall whether or not the Virginia Electric & Power Company's tracks were rebuilt along there?

A. As I remember, the tracks were rebuilt after 1928.

Q. Were they rebuilt to conform to the city grades?

A. They were.

Q. Was the grade of the tracks subject to inspection and approval and acceptance by the city?

A. It was.

Q. Did the city inspect it and approve it and accept it?

A. It did.

Q. What is the approximate grade of that track along there at the Petersburg Pike and Halifax Avenue?

A. The top of the rail is approximately level with the top of the grass plot curbing.

Q. I mean, if a car was going southbound from Hull street towards Petersburg and gets along there about the intersection of Halifax Avenue, about what per cent page 109 } of grade is it going, or is it going on a level?

A. I couldn't tell you.

Q. You don't know?

A. No, sir.

Q. I may have said Hull street. I meant Halifax Avenue. Going down the Petersburg Pike, when you get to Halifax, do you know the grade there?

A. No, sir.

Q. Have you anything in your office that will show it?

A. I wouldn't be sure of it, no, sir.

Mr. Robertson: The witness is with you.

Mr. Williams: I have no questions.

Witness stood aside.

page 110 }

F. P. UPCHURCH,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Upchurch, are you employed as motorman by the Virginia Electric & Power Co.?

A. Yes, sir.

Q. How long have you been working for the company?

A. Thirty years or over.

Q. Did you ever run an Interurban car between Richmond and Petersburg prior to July 11th, 1932?

A. I have been running for 25 years down there.

Q. During that twenty-five years did you ever run as motor-man, or conductor all the time?

A. I was a two-end man, worked either end.

Q. Did you ever work as motorman in charge of a car?

A. Yes, sir.

Q. For how long a period of time?

A. I reckon 10 or 12 years.

Q. Prior to July 11th, 1932, did you run a one-man car or two-men car that you were operating between Richmond and Petersburg?

A. Two-men.

page 111 } Q. Was that a safety car, or one of the cars that is not known as safety car?

A. No, sir.

Q. What kind of door did it have on it to let passengers in and out?

A. We had a door in and out.

Q. The kind you were operating from Richmond to Petersburg before July 11th, 1932?

A. Practically the same thing; has a vestibule door in front.

Q. How would you open it?

A. With your hand; had a trap door—

Mr. Williams: I don't see the relevancy of the door. The man wasn't hit by the door. I don't think that has anything to do with it and I ask that this testimony be stricken out.

The Court: I don't know. I can only take Mr. Robertson's statement and tell him not to put in anything that is not relevant.

By Mr. Robertson:

Q. Explain how you opened that door of that car that was operated there prior to July 11th, 1932?

page 112 } A. We had a folding door at the platform and a trap door coming down to keep anybody from stepping on the step; had to raise the trap door, unhook the door and fold it back on the other side.

Q. Subsequent to July 11th, 1932, did they operate safety cars from Richmond to Petersburg on the Interurban line?

A. No, sir.

Q. Did we operate one-man or two-men cars subsequent to July 11th, 1932?

A. Two-men.

Q. Are they still operating two-men cars there?

A. No, sir.

Q. When did they change?

A. Some time the latter part of July; I don't remember the exact date.

Q. What year?

A. About two years ago.

Q. After July 11th, 1932, did they operate the same kind, the old vestibule door cars, or different cars?

Witness: After they changed cars, do you mean?

Q. When did they change them?

A. Some time the latter part of July; I don't re-
page 113 } member exactly though.

Q. What year?

A. About two years ago.

Q. What did they change from?

A. They changed from the old type doors like I explained to you to what they call safety cars.

Q. Are you running a safety car between Richmond and Petersburg now?

A. Yes, sir.

Q. Is it a single truck car or double truck?

A. Double.

Q. One-man or two-men?

A. One-man.

Q. Have you been operating that car ever since we changed to that type between Richmond and Petersburg?

A. Yes, sir.

Q. Does the type of car that you are operating now operate the same as the 1500 type car or different?

A. Practically the same, works on the same principle.

Q. Mr. Upchurch, about 11:25 o'clock in the morning—

Mr. Williams: Don't lead the witness.

page 114 } Q. (Continued) About twenty-five minutes past
11 o'clock on the morning of July 11th, 1932—

Mr. Williams: I object to that as being no such thing in the record.

The Court: I think it will be advisable to let him finish.

Q. (Continued) About twenty-five minutes past eleven on the 11th day of July, 1932, were or weren't you operating southbound car #1527, that jumped off the track near the intersection of Halifax Avenue and the Petersburg Pike?

A. I was.

Mr. Williams: That is all right. I withdraw objection, but the only thing is this: If Your Honor please, I want to caution counsel that he is bringing in testimony and giving this witness the benefit of a whole lot of testimony, and it is leading and enlightening to him and I don't think it should be done.

Mr. Robertson: Do you deny that the car jumped off the track?

The Court: Mr. Robertson, go on with the examination.

page 115 } By Mr. Robertson:

Q. Is that car #1527 a safety car?

A. Yes, sir.

Q. Single or double truck?

A. Single truck.

Q. Operated by one or two men?

A. One man.

Q. If you go to make a service stop on that car, do you make it in practically the same way as the car that you used to operate on the Richmond and Petersburg Interurban line before they changed over to the safety car, or is making the service stop practically the same?

A. Yes, sir.

Mr. Williams: Objected to as leading.

The Court: Objection overruled.

By Mr. Robertson:

Q. Is the operation of the two types of cars for a service stop practically the same or substantially different?

A. Practically the same.

Q. Now, do the doors on the two types of cars operate the same or differently?

Witness: You mean safety cars?

Mr. Robertson: Safety cars and the old type cars that you are operating.

page 116 } A. No, sir, they are different.

Q. Now, why were you operating this sound-bound car 1527 past Halifax Avenue the morning that this accident occurred?

A. They sent me down there to learn how to work the air and open the door.

Q. How did you open them?

A. With an air handle.

Q. Do you open and shut the door on car 1527 the same way

that you open and shut the door on the car that you are now operating between Richmond and Petersburg?

Mr. Williams: That is three times he asked the same question. I ask that it be stopped.

The Court: He said the operation of the car was practically the same, but I don't think he went into the matter of the door.

Q. (Continued) I say do you open and shut the door on car 1527 and on the type of car you are now operating over the Interurban between Richmond and Petersburg in practically the same way or a substantially different way?

A. In the same way—practically the same way.

Q. Now, Mr. Upchurch, do you remember what time you had started to work the morning of this accident?

A. About 10:30.

page 117 } Q. How did you happen to start to work so late?

A. Because I worked late before; I didn't get home until 3, didn't get up until 10.

Q. What time did you go to work in the morning ordinarily on your run?

A. At 2:30.

Q. Why were you out on this run at 11:30 in the morning?

A. They sent me down to break me in between runs so I wouldn't lose any time.

Q. And you started to work at what time?

A. About half past ten as well as I remember.

Q. How many trips had you made over this track there at Halifax Avenue before the accident occurred on the day of the accident?

A. About three.

Q. Was the car running properly that morning or improperly before the accident?

A. Was running properly.

Q. Did you have any trouble with it?

A. None at all.

page 118 } Q. Was there anybody on there with you to teach you or supervise how you would open and shut this door?

A. Yes, sir.

Q. Who was it?

A. Mr. Owen.

Q. Did you have any trouble starting and stopping the car smoothly?

A. No, sir, I did not.

Q. Now, when the accident happened, as you proceeded from Hull street to Halifax Avenue, up to the time you got to Halifax Avenue, was the car running in the usual, normal way or was there anything wrong with it?

A. Running in the usual, normal way. I didn't see anything and didn't hear anything out of the way at all.

Q. Was there anything bumping along down under the car?

A. No, sir; it was not.

Q. Was there anything broken along there before you got to Halifax Avenue?

A. No, sir.

Q. How fast do you think you were running?

A. About 15 or 20 miles.

page 119 } Mr. Williams: I wish to here note an objection that Mr. Robertson is putting on testimony now contradicting the testimony of Mr. Lowry. He put him on himself. He is setting up iron men and just knocking them down. I don't think he can do that. I think he is bound by the testimony of Mr. Lowry when he put it on. I think this witness' testimony is inadmissible as an attempt to contradict his own witness.

The Court: Objection overruled.

Mr. Williams: Exception.

By Mr. Robertson:

Q. How fast was your car running?

A. About twenty miles.

Q. What was the first you knew about the accident?

A. When it jumped the rail.

Q. Where was the front end of your car when it jumped the rail?

A. It was sitting on about a forty-five degree, I reckon—

Mr. Robertson: I am not talking about the degree—

Mr. Williams: Don't stop the witness.

The Court: The witness evidently misunderstood the question. Ask the question over again.
page 120 }

By Mr. Robertson:

Q. Where was the front end of the car when it jumped the rail?

Witness: You mean what street?

Mr. Robertson: Yes, sir.

A. Just south of Halifax street.

Q. Could you say about how far south of it?

A. About three car lengths I reckon.

Q. What happened to you?

A. Threw me off my balance and I turned everything loose.

Q. Then what happened to the car?

A. The car went into emergency and stopped.

Q. What position was the car in after it came to a stop?

A. It was sitting, I suppose, on a forty-five degree angle.

Q. Was it still in the grass plot or out in either the northbound or southbound driveway?

A. Wasn't in either one of the driveways. The front end might have been hanging over the northbound driveway probably two or three inches.

Q. Did it hit any of the poles there?

A. No, sir, it did not.

page 121 } Q. Do you know how many passengers you had on your car?

A. About four—three or four; I don't remember positively which.

Q. Did you stay there until the car was taken away?

A. No, sir.

Q. What did you do?

A. I had to go back home and get ready to go to work.

Q. Did you go to work that day?

A. Yes, sir.

Q. When this accident happened had you learned how to open and shut the doors on this type of car?

A. Yes, sir. Mr. Owen, when we left Cowardin Avenue, told me that was the last trip I had to make.

Mr. Williams: I object.

The Court: Objection sustained.

By Mr. Robertson:

Q. Did you go out on any more practice trips after that to learn to run them?

A. No, sir.

Q. Then, when they put in these double truck safety cars on the Interurban line between Richmond and Petersburg, did you go on and run them or not?

A. Yes, sir.

Q. Been running it ever since?

A. Yes, sir.

Q. Running it now?

A. Yes, sir.

Q. Did Mr. Owen O. K. you to operate either single truck or double truck one-man safety cars after this trip where the

accident happened without giving you any further instructions or not?

A. He O. K.'d me on the single truck car. I didn't make any on the double truck car.

Q. After you learned on a single car did you know how to do it on a double truck car?

A. Yes, sir.

Q. Been doing it ever since?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Williams:

Q. When did you first take the handle of the one-man safety car, so called, that you were operating that morning, the first time?

A. Somewhere about 10:30.

page 123 } Q. Ten-thirty that morning was the first time you had ever run it?

A. No, sir. You said that morning. I had worked three trips down there before that the day before.

Q. That morning the first trip was made at 10:30, and you had made three trips before the day before?

A. Yes, sir.

Q. Those were the first times that you had ever handled the one-man little safety cars?

A. Yes, sir.

Q. How many times did you stop and open the door between Cowardin Avenue and Hull street and the time that you got to Halifax on your trip at 11:30?

A. I really don't remember.

Q. Did you stop?

A. I don't remember.

Q. Between Cowardin Avenue and Hull where your car began—isn't that right?

A. Cowardin Avenue, yes, sir.

Q. Down to Halifax and the distance past Halifax that it stopped in a distance of twelve or thirteen cross-
page 124 } overs, or streets, isn't it?

A. I suppose about that; I haven't counted them.

Q. Isn't Decatur street succeeding Hull?

A. Yes, sir.

Q. Isn't Stockton next?

A. Hull, Decatur, Stockton, Maury, Albany—

Q. Not Everett?

A. Everett comes before Maury.

Q. Then what else?

A. Albany, Boston, Chicago, Dinwiddie, Edwards, Fairfax, Gordon and Halifax.

Q. Doesn't Lafayette come in there? It comes in between one of those streets, doesn't it?

A. It is below that.

Q. Lafayette is south of Halifax?

A. They run alphabetically from Maury street

Q. How about Everett, then Chicago?

A. I said from Maury south.

Q. You said they run alphabetically from Maury south?

A. Yes, sir.

Q. Everett comes before what?

A. That is north of Maury.

Q. Dinwiddie comes where?

page 125 } A. That is next to Edwards.

Q. Isn't that past Chicago?

A. Yes, sir.

Q. In between Chicago and Edwards?

A. Yes, sir.

Q. Where is Lafayette?

A. I don't know. There is a short street that comes from David M. Lea's to the north bound track.

Q. If Lafayette street isn't between the streets you have named it is the other side of that one, isn't it?

A. Yes, sir.

Q. How many points were you running your car on when you came to Halifax?

A. I was rolling when I came to Halifax.

Q. Where had you shut the current off?

A. Between Gordon and Halifax.

Q. Where did you apply your brakes for Halifax?

A. I don't remember that I applied any. I didn't want to stop there.

Q. Now, there is a down grade beginning where?

A. About Gordon Avenue.

page 126 } Q. That is how many blocks from Halifax?

A. The next block this side, north of it.

Q. Doesn't Fairfax come next to Halifax?

A. Yes, sir.

Q. Then Gordon is north of Fairfax?

A. Yes, sir.

Q. Then it is two blocks instead of one—Gordon and Halifax? Gordon and Fairfax and Halifax, isn't it?

A. Fairfax is north of Gordon.

Q. You say Fairfax is north of Gordon?

A. Yes, sir.

Q. Now, doesn't the hill begin just about Edwards street, about four blocks from Halifax?

A. I don't think so. It is level at Edwards.

Q. When you were running your car before turning it off you were going on nine, weren't you?

A. Yes, sir.

Q. You said that your only duty was to learn to operate the doors?

A. That is what I was sent down there for. I knew how to operate a car.

Q. You knew how to operate one of these little page 127 } bit of cars?

A. All with the exception of the doors. I had been running for 25 years.

Q. You knew how to handle the brakes?

A. Yes, sir.

Q. How long have you been running cars, Mr. Upchurch?

A. Thirty years or more.

Q. You have been running them that long?

A. Yes, sir.

Q. How long did you act as conductor?

A. About fifteen years.

Q. That makes 45 in all?

A. No, sir. You said running cars. I call that running cars, too, running conductor.

Q. A window washer out there wouldn't be running cars, would he?

A. No, sir. I wasn't a window washer.

Q. They wouldn't be runners?

A. No, sir. They are not car men.

Q. You didn't say the whole thirty years you were not operating. You were working as conductor?

A. Conductor and motorman

Q. How much of it were you conductor and how page 128 } motorman?

A. About fifteen years each.

Q. Now, just state where your car left the track.

A. I suppose it ran thirty or thirty-five feet after it jumped.

Q. I don't think you understood my question. State where it was that your car left the track? Where?

A. South of Halifax street.

Q. Whereabouts south of Halifax street?

A. About three or four car lengths, something like that I never measured it.

Q. When you are talking about cars are you talking about long distance Petersburg cars or small cars?

A. About small cars.

Q. It didn't leave the track until it was that distance? Did somebody say or did you say that you had a broken axle?

A. I didn't know it until I got off the car.

Q. Where did your axle break?

A. I couldn't tell you.

Q. How long are the small cars you have reference to?

A. About thirty feet.

Q. You say you didn't leave the track north of Halifax?

A. No, sir, I did not. If I had, I would have
page 129 } gone into a telegraph pole.

Q. I am not talking about "if". I ask you do you know that you did not leave the track north of Halifax?

A. I do know that

Q. You do know it?

A. Yes, sir.

Q. Tell the jury how you know it?

A. I know it because there were no marks there.

Q. Because there are no marks there?

A. There were no marks there.

Q. Don't you know that there are marks on Halifax street all the way across?

A. I know they are there now.

Q. Don't you know marks were not there before the wreck of this car?

A. There were none there before the wreck.

Q. Now, Mr. Upchurch, the only way that you can tell that the car did not leave the track north of Halifax, or in Halifax is that you disclaim that there were marks there?

A. I could have told by the bumping if it had been on the ground. Anybody can tell that.

Q. Did you feel a bumping going on all the way down?

A. No, sir.

page 130 } Q. Didn't feel any bouncing up and down?

A. I did not.

Q. If your car is in good condition it will not not bounce up and down, will it?

A. No, sir.

Q. If it is in good condition it will not wobble from side to side, will it?

A. Yes, sir. All of them will wobble some; depends on the variation of the rails.

Q. Will they wobble so as to go off the track at 20 or 30 miles an hour if they are in good condition?

A. No, sir.

Q. When you got back there and got off your car describe the under conditions that appeared to you of that car.

A. I don't understand the question.

Q. Did you when you got off there look at that car underneath?

A. Yes, sir.

Q. What did you see?

A. Broken axle.

Q. Where did you see the axle?

A. I could see the wheel turned over—axle was broken off. It was in this position. (Indicating.)

Q. Sitting in a little slanting position?

page 131 } A. Yes, sir.

Q. It was not flat on the ground?

A. No, sir.

Q. As a matter of fact, you didn't see the break in the axle, did you?

A. I never saw the axle.

Q. You couldn't see the axle at all?

A. No, sir.

Q. The axle was not dragging on the ground, was it?

A. I didn't see it.

Q. How could you tell that the axle was broken if you could not see the axle?

A. Tell by the position of the wheel.

Q. How did you know the axle was not bent?

A. The wheel was sitting too crank-sided for that.

Q. Didn't you notice that the ground was plowed up from the south side of Halifax street down to where your car was across the track?

A. No, sir, I did not.

Q. Do you mean to say it was not or you just didn't notice it?

A. I didn't notice it.

Q. You can't tell this jury where that axle
page 132 } broke—

A. No, sir, I cannot, not the exact spot. It broke somewhere near Halifax Avenue.

Q. How many trips altogether had you made with that type of car?

A. About six.

Q. The distance was less than a mile each trip, wasn't it, would you say, or was it about a mile?

A. Somewhere in the neighborhood of a mile down there and a mile back.

Q. When did your car go into emergency—before or after it left the track?

A. I really couldn't tell you, it all happened and was over so quick.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Upchurch, when the car left the track did it throw you off your balance?

A. Yes, sir.

Q. Did you hang onto the controllers or let them go?

The Court: He already testified to that.

page 133 } By Mr. Robertson:

Q. On those trips that you were making down there where did you turn back to come back north?

A. What we call No. 3.

Q. How far is that from Halifax Avenue?

A. About a block.

Q. South or north?

A. South

Q. Is there a switch there?

A. No, sir.

Q. You just turn around and come back?

A. Yes, sir.

Q. Is there a switch in that neighborhood?

A. No, sir, only at No. 5.

Q. Would you just change your controller and come back?

A. Yes, sir.

Q. After this accident was over did you ever go down to see Mr Lowry while he was at his home?

A. No, sir, I did not; never been in Mr. Lowry's house in my life, don't know where he lives.

Q. Have you ever discussed this case either with Mr. Lowry or his wife or his son?

A. I have not.

page 134 } Q. Have you ever told any one of those three that you were running this car on nine points when the accident happened?

A. No, sir, never been a word said about the accident between Mr. Lowry or his wife or his son.

Q. Have you ever been to their home?

A. No, sir, don't know where they live.

Q. Were you running it on nine when the accident happened or not?

A. I was rolling.

Witness stood aside.

page 135 } DR. A. L. HERRING,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. You are Dr. A. L. Herring?

A. Yes, sir.

Q. Where did you get your medical education?

A. Medical College of Virginia.

Q. When did you graduate?

A. 1910.

Q. Have you been practicing your profession since that time continuously?

A. Yes.

Q. Do you specialize in any branch of the medical profession?

A. Surgery altogether.

Q. Are you connected with Grace Hospital?

A. Yes.

Q. In what capacity?

A. President and part owner.

Q. Has Adam R. Lowry, the plaintiff in this case, ever consulted you professionally?

A. I saw him in consultation with Dr. Philip
page 136 } Jones, who had him in Grace Hospital.

Q. When was that?

A. May I refer to my record? (Referring to record.) July 11, 1932, he was admitted to the hospital and remained there until July 24th, approximately two weeks.

Q. Did you see him during the time he was at the hospital?

A. Yes, sir, I saw him repeatedly. He was admitted to the hospital with a history of having been hurt on a street car and complained of some injury to his head and a blow on the abdomen. Upon examination we could find nothing about his head; there was no injury to his head. He had a little bruise on the upper side of his abdomen, on the right side, close to the end of the ribs. That seemed to be the principal point of complaint at the time. After careful examination several days, concluded he had some injury to the abdominal wall, the muscles of the abdominal wall, as well as his liver, but the liver damage was never fully established for the reason no operation was ever done. He was later X-rayed by Dr. Hodges and he gave a negative report.

Q. When was the last time you saw him professionally, Doctor?

A. I have no record of the date. It was immediately before the case was tried here the first time. I don't re-
page 137 } member the date.

Q. At whose request did you see him then?

A. Dr. Philip Jones'.

Q. Had he improved, or still the same or gotten the worse?

A. Well, he was apparently well as far as we could demonstrate; that is, we could find nothing as to his injury some six months prior; there was nothing we could demonstrate.

Q. Did you recommend an operation so that you could expose his liver and look at it and see how it was, or think the best thing to do was to let him alone and let Nature cure itself?

A. I advised against an operation for the reason that we did not feel that sufficient damage had been done to justify a major operation and any damage that had been done apparently had been corrected and I didn't see where an operation could add anything to it other than gratify curiosity.

Q. Has he ever come to see you since the trial of his case on October 5th, 1933?

A. No, sir, I haven't seen him.

Q. You have never seen him since then?

A. No, sir. The last time I saw him was in this court room.

Q. Were you summoned by him to testify here
page 138 } to-day?

A. I really don't know. I have the summons. (Producing summons.) There is the summons. I don't know who had me summoned.

Q. This says for the defendant. Is this the only summons you have?

A. That is the only one I have.

Q. What is that other paper?

A. It is in another court I was in.

Mr. Robertson: I have no further questions.

CROSS EXAMINATION.

By Mr. Williams:

Q. The other court is on the same floor, isn't it?

A. Yes, sir.

Q. There was a rigidity of the abdomen, wasn't it, when he came into your hospital?

A. Yes, sir, he had rigidity, had apparently a wounded muscle.

Q. Why did you think it was a bruising of the liver and just think it was a muscle?

A. He appeared to have some liver damage.

Q. Rigidity of the abdomen would also result from injury to the liver, wouldn't it?

page 139 } A. It would not be definite indication of hemorrhage. It would be an indication of some type of irritation might be hemorrhage or infection or bile or a case of liver damage.

Q. You are not prepared to tell this jury that Mr. Lowry has been cured up of all his ailments as a result of this injury are you?

A. That was my impression the last time I saw him. I haven't seen him for six or eight months.

Q. Did you examine him for cartilagonius injury of the chest and ribs?

A. I never heard of any.

Q. You don't know anything about injury to his ribs?

A. No, sir.

Q. You didn't examine as to that at all?

A. No, sir. We had his chest and abdomen X-rayed.

Q. If Dr. Mauck testified he did have that condition, you would not say it was not so?

A. No, sir, but I didn't find it. I don't think it is true because I think I would have found it.

Q. You are at Grace Hospital. Dr. MacLean practices at your hospital, doesn't he?

A. Yes, sir.

Q. He is surgeon for the street car company?

page 140 } A. Yes, sir.

By Mr. Robertson:

Q. Did you hear Dr. Jones testify this morning?

A. No, sir, I did not.

By Mr. Williams:

Q. What kind of doctor is Dr. Jones, Dr. Herring, as to character and standing.

A. Good—excellent. He is a medical practitioner, does no surgery.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Doctor, if Dr. Jones testified that he was called to see Mr. Lowry yesterday evening and found him in bed, saying he felt badly, and he had no fever, his pulse was a little slow, blood pressure was about normal and perhaps a little low—

Mr. Williams: He didn't say normal. He said it was normal for him.

The Court: Let him finish the question.

Q. (Continued) He was complaining of pain over his right abdomen, and all his symptoms were subjective; page 141 } and Dr. Jones gave him something to ease his pain and told him to keep quiet, and then to-day at the request of the court Dr. Jones went back and examined him again and found practically the same condition, all symptoms subjective; Mr. Lowry stated he tried to get up and got dizzy and had to go back to bed. Do you think that that condition might or might not be caused by stage fright at the prospect of a jury trial of his case where he is suing for \$10,000?

Mr. Williams: I make objection that the statement is unfair to the plaintiff as well as to the witness.

The Court: Do you object to the question?

Mr. Williams: Yes, sir.

The Court: Objection sustained.

Mr. Robertson: May I ask what the ground of objection is?

The Court: Can you explain it?

Witness: I might make some kind of an explanation. It might not be very good.

Mr. Robertson: Just one minute. Doctor, under the situation such as I have stated what would you think was the matter with Mr. Lowry?

Mr. Williams: I object to it as being indefinite page 142 } and not containing the facts in the case and entirely leaving out the evidence in the case of Dr. Jones, because it was misstated by counsel anyway that Dr. Jones stated his pulse and temperature were normal, for he stated positively it was not so. Both were sub-normal, being 75 normal for him and 50 when the examination was made; and as not containing the symptoms stated by the client to the doctor and leaving out entirely sensitiveness at the point of pressure in the abdomen where pain was complained of.

Mr. Robertson: I accept all those modifications and ask that he embody all those in my question.

The Court: Objection sustained I don't think it is a proper question to ask the witness

Mr. Robertson: Well, I will not ask the doctor anything more.

Witness stood aside.

page 143 }

H. E. LOWRY,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. How old are you?

A. Twenty-eight.

Q. Are you a son of Mr. Adam R. Lowry, the plaintiff in this case?

A. Yes, sir.

Q. You reside at his home or maintain a separate home?

A. I live at his home.

Q. Live there now?

A. Yes, sir.

Q. Were you living here at the time of this accident on July 11th, 1932?

A. I wouldn't say I was living there for approximately a month.

Mr. Robertson: Now, if Your Honor please, I offer him as
an adverse witness—a member of Mr. Lowry's household and
immediate family.

page 144 } Mr. Williams: For what purpose do you offer him as a witness?

Mr. Robertson: For general information.

Mr. Williams: I object as being indefinite and inadmissible
and an attempt on the part of the defendant to delay this
case.

The Court: Proceed with the examination.

By Mr. Robertson:

Q. Mr. Lowry, did you ride on Virginia Electric & Power Company street car #1527 on the morning of July 11th, 1932, before your father was hurt?

A. I don't remember the number of the car. I rode on a car that morning from Stop #3 to Hull street.

Q. Proceeding from Stop #3 to Hull street northwardly?

A. Yes, sir.

Q. Who was running it?

A. Well, it was two men on the car, Mr. Owen, an older gentleman, and Mr. Upchurch.

Q. What time in the day was it when you rode on it?

A. I don't know exactly. It was around 9 or 9:30, some time in the early part of the morning.

Q. Did you have a nice trip?

page 145 } Mr. Bremner: What is that?

Mr. Robertson: I withdraw the question.

By Mr. Robertson:

Q. At the time you made that trip who was running the car?

A. Mr. Upchurch.

Q. How was he running it, smoothly or roughly?

A. I don't understand the question as to how he was running it.

Q. Was he running it with jerks and jolts and disturbing you in your seat or running it nice and smooth?

A. I never saw a car run with jerks and jolts—not a street car. I don't think it is possible.

Q. How did this one run?

Mr. Williams: I object to the tone of counsel to this witness. He has called him. He is a son of the defendant. I don't think he should jump on him in that manner. I object to it.

Mr. Robertson: When my manner is objectionable, you call me down.

Witness: I will be glad to answer the question if you will make it clear.

Mr. Robertson: If you don't like my manner, page 146 } call my attention and I will stop.

Witness: Yes, sir, I will.

By Mr. Robertson:

Q. Did that car make any stops as it went from Stop #3 to Hull street that morning?

A. Yes, sir, it made about three stops in between Stop #3 and Stop 2.

Q. What was the character of those stops?

A. Mr. Owen was telling Mr. Upchurch how to operate the car, how to bring it to a stop smoothly, without bringing it to a stop jerking it or seem to have the car stop all of a sudden.

Q. Would he jolt you in your seat when he stopped?

A. It jolted me out of the seat the third stop. I was sitting on the front seat.

Q. Where did it jolt you to?

A. To the bar.

Q. Did it hurt you?

A. No, sir, because I grabbed the bar with both hands.

Q. Did you say anything to them about it?

page 147 } A. No, sir. It wasn't up to me to say anything.
Q. Did that happen every time or just once?

A. It happened about three times before the

car came to stop #3—each time he stopped the car. The first time it threw me out of the seat; the second and third times it would have, but I was holding onto the bar.

Q. You were swinging on with both hands so it could not throw you out?

A. Yes, sir.

Q. Did he ever start it different from that and get better as he got more practice, or get worse, or stop the same?

A. It seemed to me on most stops he stayed about the same. He was a little better on one other stop the other side of #2 when he stopped for a passenger.

Q. Were you ever present when Mr. Upchurch or Mr. Owens came to your father's house and talked to him about this accident afterwards?

A. No, sir, I was not.

Q. You never have operated air brakes on street cars, have you?

A. Never operated a street car at all.

Q. Ever operate any other kind of air brake device?

A. Not professionally, no, sir.

page 148 } Q. In what way have you?

A. I don't understand you.

Q. Have you ever operated them in any other way? Have you ever run air brakes?

A. Yes, sir, I have operated air brakes on a railroad train. I wasn't supposed to but I was running an engine.

Q. How much operation did you do?

A. Enough to learn how to apply the brakes.

Mr. Robertson: That is all.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Lowry, just at this time, without waiving my previous objection, I will ask you if you are a graduate of Fork Union Academy?

A. Yes, sir—Fork Union Military Academy.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. You were not in the car when the accident happened?

A. No, sir.

page 149 } Q. You didn't get up there immediately afterward.

A. No, sir. I was up town.

Q. You don't know anything about the accident your father was in except what other people told you?

A. I didn't see the accident at all.

Witness stood aside.

page 150 } MRS. ADAM R. LOWRY,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mrs. Lowry, you are Mrs. Adam R. Lowry?

A. Yes, sir.

Q. Are you the wife of Mr. Adam R. Lowry, the plaintiff, in this case?

A. Yes, sir.

Mr. Robertson: I offer her as an adverse witness.

Mr. Williams: Same objection as immaterial and irrelevant and not bearing on the case.

By Mr. Robertson:

Q. Were you ever present when either Mr. Owen or Mr. Upchurch called to see your husband and discussed the accident he was in on July 11th, 1932?

A. I was present when Mr. Owen called.

Q. About when was that?

A. I could not recall the date but it was when Mr. Lowry was still confined to his bed.

Q. Were you present at the conversation?

page 151 } A. Yes, sir.

Q. Will you state what it was?

A. Mr. Owen said "Mr. Lowry, did you know what happened"? He says "No". He says "Well, an axle broke". Mr. Lowry said "Well, tell the truth, if any one asked me what happened, I would say it hit a cement post". He said "No; we missed it about ten feet". I said "Well, you must have been driving that car mighty fast". He says "Yes, it was coming down on nine".

Q. Mrs. Lowry, have you been at home to-day?

A. Yes, sir, all day.

Q. Has your husband been confined to bed all day?

A. Yes, sir. He is right now.

Q. Was he in bed when Mr. Vaughan, this gentleman here, came over there?

A. Yes, sir.

Q. Were you able to leave him alone or with some one when you came to court?

A. One of my boys was at home; left him with him, and my father is there.

Q. How old is the boy you left with him?

page 152 } A. Twenty-two.

Mr. Robertson: I have no further questions.

The Court: Any questions?

Mr. Williams: Not at this time.

Witness stood aside.

Note: At 5 P. M. court adjourned until tomorrow, May 25th, 1934, at 10 A. M.

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SECOND DAY.

May 25th, 1934.

Court met at 10 A. M. pursuant to adjournment.

T. G. VAUGHAN,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Vaughan, are you employed by the Virginia Electric & Power Company?

A. Yes, sir.

Q. In what capacity?

A. In the Claim Department.

Q. How long have you been working for the company?

A. Twenty-three years.

Q. Were you assigned to assist in the preparation of this case for trial when it came up October 5-9, 1933?

A. Yes, sir.

Q. Did you assist in preparing the case for this trial?

A. Yes, sir.

Q. Mr. Vaughan, did you take these two pictures, showing the locality at Halifax Avenue and the intersection of the Petersburg Pike?

page 154 }

A. Yes, sir.

Mr. Williams: Now, if Your Honor please, you remember you ruled out some pictures of mine a little bit better than this at the time. I object to this as not being full and complete and not very distinct. Probably if other pictures were made earlier, it would be much better. I just want to note my objection to the introduction.

The Court: All right, sir.

By Mr. Robertson:

Q. When did you take these pictures, Mr. Vaughan?

A. On September 26th, 1933.

Q. Are both of the two pictures the same or are they different?

A. They show different directions. They are of the same scene, but looking in different directions when taken.

Q. What locality do they show?

A. The square beginning at Halifax and south of Halifax.

Q. What different directions do they show?
page 155 } A. One shows looking south at Halifax street
near Stop #3 and the other shows the scene at
Halifax Avenue looking north.

Q. Who made these notations on the pictures here?

A. I did.

Q. That shows which picture was taken looking south and which looking north?

A. It does.

Mr. Robertson: These were the same pictures offered in evidence before and were admitted to show the character of the track at that point.

The Court: Is the track the same now it was then?

Mr. Robertson: Yes, sir, that is the testimony.

Mr. Williams: I will let him use mine.

Mr. Robertson: You show anything you want if the court rules you can.

The Court: Objection overruled.

Mr. Williams: We note an exception.

Mr. Robertson: I offer these two pictures and ask that they be marked Defendant's Exhibit Nos. 2 and 3, respectively.

Note: Pictures filed and marked Defendant's Exhibit Nos. 2 and 3, respectively.

page 156 } By Mr. Robertson:

Q. Mr. Vaughan, at my request, did you take that picture of car 1527, (Handing witness picture.)

A. Mr. Alexander took this picture.

Q. Is there any date indicated on the picture:

A. Yes, sir, September 22nd, 1922.

Mr. Robertson: Do you object to that?

Mr. Williams: No, sir, I have no objection to it.

Mr. Robertson: We offer this as Defendant's Exhibit No. 1.

Note: Picture filed and marked Defendant's Exhibit #1.

By Mr. Robertson:

Q. Mr. Vaughan, did you obtain this signed statement that has been offered in evidence here from Mr. Adam R. Lowry?

Mr. Williams: I wish to note an objection to that under the statute; that it is not proper evidence.

The Court: Objection overruled.

Mr. Williams: Exception.

A. Yes, sir.

page 157 } By Mr. Robertson:

Q. What was the date when you took that statement?

A. Nov. 21st, 1932.

Q. I failed to ask you how old you are?

A. Forty-three years old.

Q. How long have you been working for the Virginia Electric & Power Company?

A. Twenty-three years.

Q. Did you write anything on either side of that statement after the statement had been signed by Mr. Lowry?

Mr. Williams: We object, as self serving.

The Court: Objection overruled.

Mr. Williams: Exception.

A. Yes, sir. After the statement was signed, Mr. Lowry asked for a copy, identical copy of this statement, which I made, and he looked them both over to see if they were correct and said they were. Then I wrote on the back of this statement, "Mr. Lowry asked for a copy of this statement. I made another statement just like this one and gave it to him", and signed my name to it.

By Mr. Robertson:

Q. Where was Mr. Lowry when you obtained that statement from him?

A. At his home.

page 158 } Q. Did you get the statement from him the first time you went after it or did you go more than once?

Mr. Williams: I object as immaterial and irrelevant.

Mr. Robertson: To be perfectly frank, I am stating it now to show Mr. Vaughan went there twice, Mr. Lowry wasn't at home and then he went back a third time and finally got him at home, in view of the statement made here that he never had a well day since the accident.

Mr. Williams: I object to the statement of counsel as prejudicial, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Williams: Exception.

By Mr. Robertson:

Q. Did you get a statement the first time you went for it or go more than once?

A. No, sir. I made three trips before I got it.

Q. Where was Mr. Lowry the first two times you went?

A. He was not at home.

Q. Mr. Vaughan, did you go to the scene of this accident shortly after it occurred?

A. Yes, sir.

page 159 } Q. How long after it occurred did you get there?

A. I couldn't state that in minutes. I got there while the car was still off the track.

Q. When you got there what was the position of the car?

A. The car was headed in a southeasterly direction with the front of it practically even with the east curb of the grass plot between Halifax Avenue and the next street south.

Q. Where was the front of the street car in reference to the second concrete pole south of Halifax Avenue?

A. The front of the street car I would say was approximately ten or fifteen feet north of the second pole south of Halifax Avenue.

Q. Were you there when they put the car back on the track and took it away?

A. I was.

Q. When you got there while the car was still off the track, did you look at the pavement in the intersection there where Halifax Avenue crosses the car track?

A. I did.

Q. Did you examine the paving there to see if there were any marks in it that the car had made going over there?

A. When I got to the scene I started—

page 160 } Mr. Williams: I think that should be Yes or No, whether he knows.

Mr. Robertson: Answer Yes or No and then explain.

A. (Continued) I did.

Q. What examination did you make?

A. I looked to see if there were any marks to show at what point the car had left the rail.

Q. Were there any marks there?

A. There were not.

Q. Did you watch them when they re-railed the car?

A. I did.

Q. When they re-railed it did they move the car southwardly or northwardly when they took it away?

A. Northwardly.

Q. Did they move the car northwardly across Halifax Avenue?

A. Yes, sir.

Q. Did you watch them do it?

A. Yes, sir.

Q. As the car went across Halifax Avenue going north from the scene of the accident were there any marks in the paving there?

A. There were.

Q. Are those marks still there?

page 161 } A. Yes, sir.

Q. Did you get down and look at the marks and look at the car?

A. Yes, sir. I didn't get down and look at them but I was right there with them.

Q. Did you see what was the front left wheel of the car that had gone southwardly?

A. Yes, sir.

Q. Did you see that wheel as the car was taken away?

A. Back northwardly? Yes, sir.

Q. As they took the car away from the scene of the accident was that wheel at the front end of the car or back end of the car when the car went away north-bound?

A. It was at the back end of the car.

Q. Did you notice the position of that wheel that we are talking about?

A. Yes, sir.

Q. Just step here one minute. Suppose this fifty cent piece is the wheel, which would be the right rear wheel of the car

as they took it away north-bound. Can you indicate to the jury what the position of that wheel was?
 page 162 } A. Yes, sir. Using this as the rail of the car track—

Mr. Robertson: Use this pencil as the axle.

A. (Continued) Using the pencil as the rail, that would be the east rail of the car track. The wheel was at a position like this. (Indicating.)

Mr. Williams: Describe it for the record.

By Mr. Robertson:

Q. At about what degree would you call that, Mr. Vaughan?

A. I am not very good on degrees. In other words, the bottom of the wheel was approximately six or eight inches from the rail and on an angle. The top of it was at approximately this angle. (Indicating.)

Q. Those marks that you saw in the street there when they re-railed the car, were they running right up under the wheel that was tilted in the way you have described?

A. It did.

Mr. Williams: That previous question was putting words in the mouth of the witness.

The Court: Don't lead him.

Mr. Williams: I ask that it be stricken out and let him ask the question properly and see what he knows.

page 163 } By Mr. Robertson:

Q. All right, Mr. Vaughan, where were the marks nearest the east bound rail in reference to the wheel that you have described as being tilted?

A. Under the bottom of the wheel in question.

Q. How could you see them if they were under the bottom of the wheel in question?

A. I saw them as the wheel went on north, when the bottom of the wheel left the marks in question.

Q. Can you draw on this paper the way those marks were made as the car went away from there?

A. If this edge of the pad was the rail and the wheel was at this angle, it made a mark (of course, this is not on scale), made a perfectly straight mark, which I am not making, right along the rail there, except at the southern end of the crossing in question there was a double mark extending some feet (a few feet) from the extreme southern end of the cross-

ing back north of it. There was a double mark that was made by the car when it was re-railed.

By Mr. Williams:

Q. You saw that? Don't say what you don't know. You say you saw it?

A. Yes, sir.

Q. You didn't see it made?

page 164 } A. I am speaking from my knowledge of what I saw.

By Mr. Robertson:

Q. You did see that?

A. Yes, sir.

Q. As the wheel went away from there, did you see any trail or track left by the wheel?

Q. Just show how that was made.

A. That is what I attempted to show here.

Q. I am asking you to turn the wheel and show the way the mark was left?

A. The wheel went like that. (Indicating.) The bottom of the wheel made that mark, I said.

Q. The way you are showing it there was a mark in front of the wheel and the wheel ran down the mark. Is that what happened?

A. No, sir.

Mr. Williams: I object. Don't instruct the witness.

Witness: The explanation of that is that I first drew the mark—

Mr. Williams: My objection is to counsel instructing his witness on the stand. I wish to note an objection page 165 } to his instruction and to the question as being leading.

The Court: All right. Objection overruled.

Mr. Williams: Exception.

A. (Continued.) As the car went away with this wheel at an angle like this, the bottom of the wheel (which would be the bottom of this half dollar) was turning, the wheel was turning, and, as it was turning and crossing the avenue, it made a straight mark approximately six to eight inches from the rail. That would be to the west of the rail in question.

By Mr. Robertson:

Q. Did you notice any marks there around the west rail in the crossing there at Halifax Avenue?

A. Yes, sir, there were some marks there several feet in the south end of the crossing, which were made at the same time that the double mark that I spoke of was made on the east track.

Q. Are the marks that you saw there when they re-railed the car, that you say were made there when they re-railed the car still down there visible in the pavement?

A. They are.

page 166 } Q. Did you go up to any crossings north of Halifax Avenue and see whether there were any marks there that day?

A. I did not.

Q. Have you been down there to the scene of this accident in the last few days?

A. I have.

Q. When were you last there?

A. Day before yesterday. May I correct an error there? It was either two or three days ago; I wouldn't be positive.

Q. When you last went to the scene of that accident, did you go on north and examine crossings north of Halifax Avenue clear up to Hull street and see whether or not that mark about six or eight inches west of the east rail showed at other crossings on the way up to Hull street?

A. I did.

Q. Do those marks show or not?

A. They do.

Q. When you get to Hull street—

Mr. Williams: If Your Honor please, if this witness is attempting to say that those marks were made when he returned, when he didn't see them there that day,
page 167 } I ask that his answer be stricken out as being an impossible statement, something not known to his knowledge.

Mr. Robertson: I agree to that. I withdraw it.

The Court: All right. Strike it out and the jury will disregard it.

By Mr. Robertson:

Q. Mr. Vaughan, if you go northbound on the Petersburg Turnpike until you get to where it intersects Hull street, does the character of paving change at Hull street?

A. Yes, sir.

Mr. Williams: I object to this as not having shown any

knowledge of paving and its different characters, and not being in the proper department, just as Mr. Pleasants didn't know the character of a car. I don't see how a claim agent should know it, therefore I ask that the answer be stricken out.

The Court: Objection overruled.

Mr. Williams: Exception.

By Mr. Robertson

Q. Is the character of paving the same or is it different or is it different after you get to Hull street and get on Hull street?

page 168 } A. It is different.

Q. What is the character of paving on Hull street?

A. It is a type of cobblestone, what you would term as being cobblestone.

Q. What is it on the Petersburg Turnpike?

A. Asphalt.

Q. Mr. Vaughan, when summons was issued here yesterday for Mr. H. E. Lowry and for Mrs. Adam R. Lowry, did you go with the Sheriff to the home of Mr. Lowry?

A. I did.

Q. How did you go there?

A. Went south on the Petersburg Pike, first, down just below Mr. Lowry's home. He lives on Westmoreland Avenue, I think it is—

Q. I am not concerned with the route. Did you walk or ride or what?

A. I went in an automobile.

Q. Whose automobile was it?

A. Mr. E. H. Flippen's automobile.

Q. Who else was in the automobile when you went?

A. Mr. Flippen and the Sheriff.

A. Sheriff Mercer.

page 169 } Q. Who came back in the automobile?

A. The same three mentioned with Mrs. Lowry and H. E. Lowry.

Q. Did you go to the home of Mr. Lowry?

A. I did.

Q. Can you take this piece of paper and draw a sketch and show the way his home is situated there on the lot where it is built?

Mr. Williams: If Your Honor please, what has that got to do with it?

Mr. Robertson: I vouch the materiality of it.

Mr. Williams: I would like for it to be shown before you do it. You are vouching for a whole lot of things I don't think amount to anything.

By Mr. Robertson:

Q. Mr. Vaughan, when you got there did you and Mr. Flippen stay in the automobile or get out?

A. We stayed in the automobile.

Q. What did the Sheriff do?

A. The Sheriff got out and went to the front door of Mr. Lowry's home and rang the bell.

page 170 } Q. Is there a garage at the back of Mr. Lowry's house?

A. Yes, sir.

Q. Double or single garage?

A. Double.

Q. Was the door open or shut to the garage?

A. The door of one of the garages—There are separate doors. One of the garages or one of the doors was partly open.

Q. Do you know Mr. Adam R. Lowry by sight when you see him?

A. Yes, sir.

Q. Did you see him while the Sheriff was at the front door and while you and Mr. Flippen were sitting in the automobile?

A. I did.

Q. Where was he and what was he doing?

A. When I first saw Mr. Lowry he was passing through his back yard from towards his house, and he continued on to the garage door that I have just mentioned and went inside the garage door.

Q. Did he have his clothes on or was he undressed?

A. Had on his clothes.

Q. Was he walking limping or walking in a normal way?

A. He was walking in a normal way when he page 171 } went into the garage.

Q. Did you see him do anything while in the garage?

A. Yes, sir.

Q. What did you see him do?

A. I saw his head sticking around the edge of the door that was partly open, looking towards the direction our car was parked. He did that several times, drawing his

head back, and after a few minutes he came out of the garage.

Q. Where did he go when he came out of the garage?

A. He went towards the rear of his house. Before he actually got to the rear of his house my view was cut off.

Q. When he walked back from the garage to the house did he walk the same way as when going to the garage, or a different way?

A. No, sir, he walked differently.

Q. How did he walk?

A. He walked in a stooping position as if he was walking with pain.

Q. Can you illustrate the way he walked going to the garage and the way he walked coming back from the garage?

A. I will do the best I can. When he went to the garage he was walking this way. (Indicating.) When he came out of the garage, as near as I can say, he was walking page 172 } ing in this way, very slowly as if in pain.

Q. Did you see any one enter or leave the house, not mentioning Mr. Adam R. Lowry, while you were there?

A. Yes, sir.

Q. Who was that?

A. I saw a young man come out the front door and get in an automobile that was parked in front of the house. He was dressed in what appeared to be a baseball uniform, or baseball cap with a partial uniform.

Q. Were there any distinguishing marks that you remember?

A. "V-8."

Mr. Williams: What has that to do with it?

The Court: I don't know.

Mr. Williams: Doesn't Your Honor think we better find out?

The Court: The best way to find out is to let him go ahead. If it is not proper, I will strike it out.

Mr. Robertson: I will tell the relevancy of it.

The Court: Objection overruled.

Mr. Williams: Exception.

page 173 } Q. About how old was that young man you saw come out in a baseball suit?

A. That would be more a guess. In other words, I would say that the young man was—

The Court: Don't guess.

Mr. Robertson: I just want you to say whether he was middle age or old.

Mr. Williams: I object to counsel guessing with his witness and instructing him. He has done it before.

The Court: Don't guess.

Mr. Robertson: Say how old he looked to be if you can. If you can't, say so.

A. (Continued.) Around 17 or 18 years old.

Q. Was that the same young man (Mr. H. E. Lowry) that came here and testified, that you brought back in the automobile with you?

A. No, sir.

Q. Can you take this paper and draw a sketch and show the location of the house and the garage and the situation there where you saw the things you have stated?

Note: Witness draws sketch.

page 174 } Q. (Continued.) Illustrate by the sketch where you were and where the house was and where the garage was and what you saw Mr. Lowry do.

A. I arrived at Mr. Lowry's home, facing north, coming up opposite this driveway.

Q. Let me interrupt you. Does the street, upon which Mr. Lowry's house faces, run parallel with the Pike or at right angles to it?

A. Runs parallel.

Q. Is it east of the Petersburg Pike or west of it?

A. East.

Q. How far east of it?

A. One block to the best of my knowledge. We arrived there and stopped approximately in front of this driveway.

Q. Do you mean the driveway leading from the garage out to the street?

A. In front of the driveway leading from the garage out into the street. There was an automobile parked directly in front of Mr. Lowry's home, which was our reason for stopping just there. As soon as we stopped the Sheriff got out of the automobile and proceeded to the front door of the home, and just about the time he was at the
page 175 } front door I saw Mr. Lowry about here (indicating), and he continued up here and went in this garage. There is another garage here. This represents the

door to the garage. He went in this garage and was looking out from the door as described, the south door of this garage, looking in our direction. He finally came out of the garage and started on back to his home, and when he got along here somewhere my view was cut off from where he actually continued to go.

Mr. Robertson: I offer this sketch in evidence and *and* that it be marked Defendant's Exhibit #4.

Defendant's Exhibit 74



page 177 } CROSS EXAMINATION.

By Mr. Williams:

Q. You are claim adjuster, aren't you, or investigator?

A. Investigator.

Q. What time did this injury occur, Mr. Vaughan?

Witness: What injury do you have reference to?

Mr. Williams: The only one we are talking about.

Witness: The accident to Mr. Lowry?

Mr. Williams Yes, sir.

A. July, 1932.

Q. Do you remember the date?

page 178 } A. As well as I remember it was the 11th.

Q. About what time of day was it?

A. Around approximately 11:30 in the day.

Q. You testified once before in this case, did you not?

A. I did.

Q. Did you testify to anything about the way the wheel was hanging as it went back to Richmond?

A. I don't recall that the question was asked me or not. If it was asked me, I did.

Q. Don't you recall that you didn't testify anything about the position the wheel was in that you claim now that you saw going towards Hull street?

A. If I didn't, I wasn't asked the question.

Q. Don't you recall you never said anything about the wheel mark across Halifax in your previous examination?

A. If I didn't, I wasn't asked the question.

Q. What part of the wheel—I will ask you this: Did you actually see the wheel touch the paving?

A. I did.

Q. When and what part of the paving did it
page 179 } touch?

A. The bottom of the wheel touched the paving approximately six to eight inches west of the east rail of the car track.

Q. What part of the bottom of the rail—flange or other part?

A. Other part.

Q. You mean the flange didn't touch it but the inside of the wheel touched it?

A. That is right.

Q. The flange skipped the paving entirely?

A. It did as far as making any impression, because the wheel was at an angle. The flange of the wheel was up in the air.

Q. Who was running the car when it was making that impression?

A. Mr. Owen.

Q. How do you know that?

A. I saw him.

Q. Did you see him from the front end or back end?

A. I saw him on the car while it was being re-railed and saw him leave there with the car.

Q. Run in on its own power?

A. That is right.

Q. Down the roadway with the side of the wheel six inches from the rail?

page 180 } Mr. Robertson: He didn't say that. He said
six or eight inches.

Mr. Williams: I just used the smallest.

Mr. Robertson: I ask you to quote him correctly.

Mr. Williams: I object to counsel testifying. He has not been sworn.

The Court: Gentlemen, you have to make your objections to the court and not to each other.

By Mr. Williams:

Q. Now, Mr. Vaughan, how far from the rail?

A. Bottom of the wheel six or eight inches from the rail.

Q. How far was the top from the rail, the top of the wheel from the rail?

A. Just the dimension or diameter of the wheel. I don't know; I never measured it.

Q. You have seen lots of wheels, haven't you?

A. Yes, sir.

Q. Don't you know the size of wheels?

A. No, sir, I do not. I am not in the mechanical end.

Q. What was under that car, supporting the broken axle, if anything?

page 181 } A. The only support that I know of my own
knowledge that was supporting the axle was the
fact that it was into the opposite wheel, which was on the
rail.

Q. You mean the axle was inside both wheels?

A. The end that was not broken was intact into the hub of the wheel on the other side.

Q. It didn't need any support at that end, did it?

Witness: Which end?

Mr. Williams: The end you just spoke about that you said

was in the wheel. It didn't need any support if it was in the wheel, did it?

A. I didn't say it didn't need any support. I said the only support it had to my own knowledge was the fact that the end of the axle which was not broken was intact in the wheel on the west side of the car.

Q. It was the east side that was broken, wasn't it?

A. That is right.

Q. What was supporting the east side?

A. The hanging axle suspended from the wheel on the west side was the only thing of my own knowledge.

Q. There was nothing between it and the ground supporting the axle?

page 182 } A. Not of my own knowledge, no, sir.

Q. You haven't spoken about anything but of your own knowledge heretofore, have you?

A. Not a thing in the world.

Q. That car weighs 15,000 pounds, doesn't it?

A. I don't know, sir.

Q. Didn't you testify to it the last time?

A. I don't think I did.

Q. I hand you a statement and ask you if you didn't testify to that?

Mr. Robertson: I have the stenographic report and ask that he use that.

Mr. Williams: I will be glad to use that. (Examining stenographic report of last trial.) Look at page 85 of your testimony and refresh your mind and see if you didn't know it then. (Handing report to witness.)

Have you refreshed your mind?

Mr. Robertson: Wait a minute. He has a right to finish reading the thing.

Mr. Williams: I can ask him a question.

page 183 } Mr. Robertson: I don't think it is fair to him while he is reading something else.

Witness: The question that you refer to was by you as to the weight.

Mr. Williams: Will you answer the question?

Note: Question repeated to the witness.

A. I did not on the page referred to.

Q. Did you do it on the page following that?

A. You asked me to refer to that page and see if I didn't do it.

Q. Didn't you do it on page 86?

A. I will look and see.

Q. Didn't you already read that?

Mr. Robertson: If Your Honor please—

The Court: This continuous wrangle is not going to help a decision in the case by the jury. I hope you both will desist from following that kind of conduct.

Mr. Williams: I will be glad to do so.

A. I haven't read anything to the jury.

page 184 } By Mr. Williams:

Q. You didn't let me finish my question. I ask you didn't you read before the jury, right in the presence of the jury a moment ago on the top of page 86, just a minute ago?

A. I can say I fail to see anywhere that I said the car weighed 15,000 pounds. I will be glad if you will point it out to me.

Q. Weren't you asked the question? "That car is about twenty-eight feet long, isn't it?" Your answer was, "Approximately. I don't know the measurement."

A. That is right.

Q. "And weighs, say, 15,000 pounds, doesn't it?" Your answer was "I couldn't tell you". Then you were asked, "Something like that; isn't that about right?" Your answer was "It would be a mere guess; I don't know." And further:

"Q. Never heard of it before?

A. I have heard various weights before.

Q. You mean they weigh different?

A. No, sir. I have heard various weights of various cars testified to in court.

Q. You haven't heard the weight of this car testified to variously, have you?

page 185 } "A. No, sir, but I didn't want to confuse some of the weights that I had heard. I thought you were asking of my own knowledge."

A. That is right.

Q. You don't know of your own knowledge, after twenty-three years' of experience, the weight of one of these little one-man cars?

A. I do not.

Q. They have how many?

A. I couldn't tell you that.

Q. They have hundreds of them, don't they?

A. At least a hundred or more.

Q. You have investigated possibly 200 cases a month for years, haven't you?

A. No, sir, not that much.

Q. Or a year?

A. Possibly so.

Q. In that time you have never come across the weight of that car?

A. As stated to you in the testimony just read I heard various different weights of cars. I have never found it necessary to my investigation of any case to personally weigh *quire* knowledge of the weight of any page 186 } car.

Q. Now, did you notice any digging up in the dirt there from Halifax street to where the car was?

A. No, sir, not from Halifax street.

Q. You didn't pay any attention to that, did you?

A. I did.

Q. You say it was not dug up?

A. Not from Halifax street.

Q. There was no indentation in the dirt from the beginning of Halifax to where the car was?

A. No, sir.

Q. You state that positively?

A. Absolutely.

Q. Did you see the car pulled from off an angle on the track?

A. Yes, sir.

Q. How was it pulled?

A. It was pulled by the trouble wagon being hooked onto the north end of it, assisted by the power of the car in question.

Q. That was the only device they used until they used re-railers, wasn't it?

A. The only thing I saw, yes, sir.

Q. The trouble wagon had rubber tires, didn't it?

A. I think so.

page 187 } Q. It, therefore, could not make any indentation in the pavement itself?

A. No, sir.

Q. It pulled it back. Were all four wheels off the rail when you got there?

A. Yes, sir.

Q. All four wheels?

A. Yes, sir.

Q. The wheel on the right side—I mean that was on the left

front going south--what was its position when the car was over on nearly an angle to the track?

A. I didn't notice that.

Q. Didn't see that, did you?

A. No, sir.

Q. When was the first time you saw it? Where was it when you first saw it?

A. The first time I noticed the position of the wheel was when it was crossing Halifax Avenue, starting on its trip to the barn. The reason that registered in my mind, I noticed it was damaging the paving on the crossing, and I wondered if the city—

Mr. Williams: I object to his wondering things of that kind. I think it is self-serving.
page 188 } The Court: Objection overruled.
Mr. Williams: Exception.

A. (Continued.) I was wondering if the city would raise any contention about damaging the pavement. That is a fact which was putting in my mind as to the position of the wheel.

Mr. Williams: I ask that that argument be stricken out.
The Court: Also overruled.

Mr. Williams: Exception for the reasons stated.

By Mr. Williams:

Q. You never saw any mark made by the car until it got how far in Halifax that you say it first registered in your mind?

A. The first mark began at the beginning of Halifax street because they had not completed the re-railing of the car until the north end of the car was out into Halifax street.

Q. The front wheels never impressed the pavement going across Halifax street, did they—of the street car?

A. No, sir. The only mark that I saw was made by the east wheel, which going north at that time was at the rear of the car.

Q. How long after it was derailed was it that you saw this operation going on?

A. I couldn't answer that, Mr. Williams.
page 189 } Q. I mean approximately.

A. I can approximate it. I would say twenty to thirty minutes after I arrived at the scene.

Q. How arrived there how soon after it happened?

A. I couldn't tell you. The car was still off the track. That is all the explanation I can give of that.

Q. You can't approximate the time that you got over there?

A. No, sir.

Q. Now, do you know how far that second pole is from Halifax street?

A. To the best of my knowledge I would say 112 or 120 feet south of Halifax.

Q. A hundred and fifteen to 120 feet?

A. Yes, sir, south of Halifax street—the second pole.

Q. Did you notice any digging out at Halifax street?

A. Not at that time, no, sir.

Q. What time did you notice it?

A. The date that these pictures were taken.

Q. At that same point the street car was straddling the track, wasn't it?

A. Approximately, yes, sir.

Q. I would like for you to approximate the page 190 } time that you got over there. Do you know what time the accident happened?

A. Only from the accident report as to the identical time. I got over there I would say approximately ten minutes to twelve. That is not accurate.

Q. That is about twenty minutes after it happened? It happened about 11:30?

A. Yes, sir.

Q. Was Mr. Upchurch there when you got there?

A. No, sir, I didn't see Mr. Upchurch.

Q. Mr. Flippen is with you in your Claim Department, isn't he?

A. Yes, sir.

Q. Now, are those the only buildings back there that you saw? (Indicating on sketch.)

A. They are the only ones I have in my mind, with the exception that I might indicate on here: There was a small building detached from this building over here, which appeared to be a privy. I don't know whether it was.

Q. You don't know that it was?

A. No, sir.

Q. You don't know whether that house has an out-door toilet or in-door toilet?

A. No, sir.

page 191 } Q. Don't know anything about that?

A. No, sir.

Q. What time of day was it that you and Mr. Flippen and the Sheriff went over there?

A. Approximately 4:15 when we arrived there.

Q. Did you see him go in the toilet?

A. No, sir. I saw him go inside the garage as described.

Q. How was he dressed?

A. He had on trousers and his shirt.

Q. What kind of trousers?

A. Dark trousers.

Q. What kind of shirt?

A. I would call it a blue shirt.

Q. How old a man was the man you saw?

A. I would say Mr. Lowry is about around fifty years old.

Q. You mean the man you saw yesterday?

A. Yes, sir. I know Mr. Lowry.

Q. You know Mr. Lowry?

A. Yes, sir.

Q. How long did he remain out there where you saw him?

A. A few minutes.

Q. Then, went to his house, did he?

A. He was headed in that direction when he
page 192 } passed from out of my view.

Q. Did you see anybody else besides him around
the building except the boy that you have just mentioned?

A. There was an elderly man on the north front of the
house cutting grass.

Q. I will ask you this, if this question was not asked you
on page 79 of your previous testimony:

“Q. Did you see whether any marks were made from the
wheels of the car in Halifax street when they put it back on
the track?

A. I noticed there were some marks there I couldn't just
say what caused those marks but there were marks there
after the car went north, across Halifax street that were not
there previously

Q. Are those marks there now?

A. Yes, sir.”

How did you come to learn what made those marks since
you testified in the previous case.,

A. By seeing them.

Q. Why didn't you testify before that you saw them?

A. The question was in the previous testimony
page 193 } as to the re-railing of the car—marks made by
re-railing the car, not marks made by the car on
its northward journey.

Q. I ask this question again. See if that is what you un-
derstand:

“Q. Did you see whether any marks were made from the

wheels of the car in Halifax street when they put it back on the track?

Your answer was: "I noticed there were some marks there. I couldn't just say what caused those marks, but there were marks there after the car went north, across Halifax street that were not there previously."

Now, you tell the jury that you know what caused those marks?

A. No, sir, I do not.

Q. Why do you say now that you saw the wheels make those marks going back when you previously testified that you didn't know what made them?

A. Because I did see the marks made by the wheels when they were going back, and I testified before that those marks were made at the south end of the crossing by the re-railing of the car, but I didn't know what, if any, part of the car made them. I still testify to that.

page 194 } Q. I ask you to take that testimony and see if there is anything that say that they were made by the re-railing, or that you were asked anything about re-railing? (Handing witness his previous testimony.)

Mr. Robertson: Better read all the testimony. I think the witness should be told, Your Honor, that he has a right to read all of his testimony, if he wants to, in order to answer the question.

Mr. Williams: Counsel replies and states that it is not all of his testimony we are talking about, but just where I read before is now referred to and that is the point I want him confined to at this time. You can have his whole testimony later.

The Court: He is asked to explain certain testimony given at the former trial. For that purpose he can read his testimony given at the former trial if he wants to.

A. The question was "Did you see whether any marks were made from the car in Halifax street when they put it back on the track"? and the answer, "I noticed there were marks there. I couldn't say just what caused those marks, but there were marks there, after the car went north, across Halifax street that were not there previously".

By Mr. Williams:

Q. You say that is the same as your testimony that you are

testifying to-day, that you saw the wheels make the marks? You say there is no difference in that testimony?

A. Absolutely not.

Q. Why didn't you state you saw the wheels make those marks going north then as you say now.

A. Because I wasn't asked the question. This question asks: "Did you see whether any marks were made from the wheels of the car in Halifax street when they put it back on the track?" The answer is: "I noticed there were marks there. I couldn't say just what caused those marks, but there were marks there, after the car went north, across Halifax street, that were not there previously", referring to the marks that were caused by the car being re-railed on the southern edge of Halifax street, which I do not know to-day what caused them except in the re-railing of the car.

Q. Why did you tell the jury you didn't know what made the marks if you did know?

A. Because I wanted to be honest with the jury.
page 196 } Q. Then, you were honest when you said you didn't know what made them?

Mr. Robertson: I object to that. He has no right to use that sort of argument. I ask the court to instruct counsel he can't ask the witness if he is trying to be honest or dishonest.

The Court: I think the question was justified in view of the answer the witness made.

A. I am honest now in saying I don't know what part of the car made the marks referred to at the southern end of Halifax street crossing, which were made as the car was being re-railed.

By Mr. Williams:

Q. Now, Mr. Vaughan, was there anything in that question there which said that it referred only to the re-railing marks?

A. The question was when it was put back on the track, and I interpreted that as meaning re-railing.

Q. Did you stop there in your answer?

A. Certainly.

Q. Didn't your answer go on further and say,
page 197 } "But there were marks there after the car went north across Halifax street that were not there previously". Did you state in reference to those marks, "I couldn't say just what caused those marks"?

A. Absolutely—referring to the marks made at the south-end of the crossing.

Q. That is the only explanation you want to make of that?

A. Absolutely. That is all the explanation to make.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Vaughan, did you ascertain how many passengers were on this car when the accident happened?

A. Yes, sir.

Q. How many were on there?

A. Four.

Q. Do you know who they were?

A. Yes, sir.

Q. Who were they?

A. Mr. Lowry (the plaintiff in this case), Mrs. Nissen, Mr. Brown and a man by the name of D. D. Dudley.

Q. What has happened to Mr. Dudley?

page 198 } A. I am informed by Pine Camp authorities that he is dead.

Q. You mentioned the re-railer there. Are you talking about the truck that went down there or are you talking about something else?

A. When I referred to the re-railer it means a small metal contraption that they use in getting cars on the rail.

Q. Can you describe what it looks like or draw a sketch of it?

A. I think I can describe it by a mushroom in the street, like used on Broad street. It is shaped something similar to that but not exactly like it.

Mr. Robertson: Now I ask that we be permitted to read Mr. Vaughan's entire testimony at the former trial to the jury so that they can determine whether there is a variation in the testimony at that trial and this trial.

The Court: Is there any objection?

Mr. Williams: None except it takes a lot of time. Let him put it in and let's go and read it later. I don't want to exclude it.

The Court: I will let you read any part of the testimony relating to the matter referred to and give you page 199 } an opportunity to go over it and pick it out.

Mr. Robertson: If Your Honor please, here is the situation that is going to develop here. We might as well face it now. At the former trial there were three hundred and thirty-odd pages of testimony from all character of witnesses. Now, this is a specimen of what is going to occur here throughout the trial, I think. They take isolated

questions and answers and undertake to impeach the credibility of a witness by getting the idea across that he changes his testimony between the last trial and this trial. As I see it, the only way for the jury to determine whether any witness on any side is worthy of credit or whether he is switching his testimony is to read this testimony that has been challenged. I am as sorry to slow the case up as any one, but I don't know any other way to do it.

The Court: I say I will give you opportunity to page 200 } read to the jury any of the evidence given at the former trial which throws any light on the point on which he was cross examined by Mr. Williams. You can go over it and pick that out.

Mr. Robertson: I think I can do it right now. I have it marked.

Mr. Bremner: If Mr. Williams, who conducted the cross examination, was unfair and didn't read the whole question relating to a particular subject, then counsel on the opposing side has a right to call attention to that in the form of a question to the witness, "Didn't you say so and so"? and "Weren't you asked this"? I submit that under no rule of evidence is it proper for an attorney to pick out what he thinks is proper and read it to the jury.

Mr. Robertson: That is why I want to read it all.

Mr. Bremner: If he can point out anything that Mr. Williams didn't read properly, or misread the answer of the witness, or anything of that kind that leaves an page 201 } inference that was not justified, he has a right to ask a question, but it is not proper for an attorney to take the record and read to the jury such parts as he thinks he wants, and we have the right to take the record and read other parts.

The Court: Technically, Mr. Robertson can take that record of the former case and ask this witness if he was not asked this question and if he did not make this answer.

Mr. Williams: I don't object to that.

Mr. Robertson: I just want to get the line of procedure straightened out, the reason I suggested reading it all. I could have finished while talking.

The Court: Proceed and ask the witness the question, if he was not asked this question and did not make this answer—any part that you think applicable to the situation.

Mr. Williams: May I ask him one question I want to put in the record as to the description of the wheels so that anybody seeing the record will know the position of the wheel. I will ask you that.

page 202 } By Mr. Williams:

Q. Use your half dollar, Mr. Vaughan and that map here. Would you come over here. Describe to the jury its relative position to the east rail, which was the rail that it was nearest to as the car proceeded northward.

A. This red line we will use as the east rail, the car track running north and south. This wheel in question was just about at this angle. (Indicating.)

Q. Hold it there and let's get that angle. You have the bottom part of the wheel, you say, several inches from the east rail, which would be west of the rail?

A. Yes, sir.

Q. The top of the wheel at an angle pointing somewhat easterly, is that right, nearer the rail than the bottom?

A. That is right.

Q. Could you state the degree of angle that that would have there?

A. No, sir. I am afraid I would be incorrect in stating the angle because I am not familiar with angles as to degrees.

By Mr. Robertson:

Q. At the former trial you are reported to have been asked these questions and made these answers, at page 78:

page 203 } "Q. Did you go to the scene of this accident
when it occurred?

A. Yes, sir.

Q. Did you get there while the street car was still there?

A. Yes, sir.

Q. Did you look in Halifax street to see whether any marks were there caused by the car when it jumped the track?

A. I did.

Q. Were there any marks there?

A. No, sir."

Are those correct or incorrect?

A. They are correct.

Q. Were you asked these questions and did you make these answers:

"Q. Did you stay there until the trouble wagon came and they put the car back on the track?

A. Yes, sir.

Q. Did you watch them put it back on the track?

A. Yes, sir—not particularly, not in detail, but I watched the general performance.

Q. Did you see whether any marks were made
page 204 } from the wheels of the car in Halifax street when
they put it back on the track?

A. I noticed there were marks there. I couldn't say just what caused those marks, but there were marks there, after the car went north, across Halifax street that were not there previously."

Is that correct or incorrect?

A. That is correct.

Q. Then:

"Q. Are those marks still there?

A. Yes, sir."

Is that correct or incorrect?

A. That is correct.

Q. Then these questions by Mr. Williams:

"Q. That car is about 28 feet long, isn't it?

A. Approximately. I don't know the measurement.

Q. And weighs, say, fifteen thousand pounds, doesn't it?

A. I couldn't tell you."

Is that right or wrong?

A. That is right.

Q. And then:

page 205 } "Q. Something like that, isn't that about right?

A. It would be a mere guess. I don't know.

Q. Never heard of it before?

A. I have heard various"—

Mr. Williams: That whole thing was read in testimony.

Q. (Continued:)

"A. I have heard various weights before.

Q. You mean they weigh different?

A. No, sir. I have heard various weights of various cars testified to in court.

Q. You haven't heard the weight of this car testified to variously, have you?

A. No, sir, but I didn't want to confuse some of the weights that I had heard. I thought you were asking of my own knowledge.

Q. Is it your claim that all the marks shown on Halifax

street were made by the car coming back this way rather than going south?

A. The only way I could answer that question would be to say that before the car went back to Richmond page 206 } there were no marks on the street, and, therefore, they must have been made when going north.

Q. At what point was the car put on the track to go back?

A. Well, I would say approximately ten or fifteen feet south of Halifax street."

Are those answers right or wrong?

A. They are right.

Q. Mr. Vaughan, I hand you herewith the Richmond News-Leader, five o'clock edition, of Wednesday, May 8th, 1934, with a picture on the front page entitled—

Mr. Williams: I object. Wait a minute. I haven't the least idea what he is going to put in. Let me see the paper. Let me read it before you offer it. That is the usual way.

Mr. Robertson: I haven't offered it yet. Let me finish my question.

The Court: Wait a minute and let Mr. Williams see it.

Mr. Williams (Examining paper): This is the A. B. C. Board, but that is all right. I don't see anything wrong with that.

page 207 } Q. (Continued) I hand you a copy of the five o'clock edition of the Richmond News-Leader for Wednesday, May 9th, 1934, containing a picture. above which is written "First liquor shop may open here on Tuesday", and under which is written, "A. B. C. Board received 680 cases of liquors and wines to-day for storage in the Broad street warehouse. A. R. Lowry (left) and E. Lee Purcell are shown here checking over the shipment".

I will ask you to look at that picture and see whether you notice Mr. Lowry handling cases of liquor?

Mr. Williams: I object to the question, but I don't object to the paper and picture. The form of the question is wrong. He can't see from the picture what he is handling.

The Court: What do you object to?

Mr. Williams: I object to asking the witness if he sees Mr. Lowry handling liquor, because there isn't any there.

Mr. Robertson: I withdraw the question and ask if you recognize Mr. Lowry in that picture?

Witness: Yes, sir.

page 208 } By Mr. Robertson:

Q. As you look at the picture, is he on the right or left?

A. As we look at the picture he is on the left.

Q. What is he doing?

A. He has hold of a case or carton.

Mr. Robertson: I offer the picture in evidence. I have no other question.

Note: Picture filed as Defendant's Exhibit #6.

By Mr. Robertson:

Q. Is Mr. Adam R. Lowry in the court room now?

A. Yes, sir.

Q. Can you point him out?

A. The gentleman sitting back of Mr. Williams.

Q. In the checked suit with an ornament hanging out of his coat pocket?

A. Yes, sir.

Q. Is that the gentleman you saw walking from the house to the garage?

A. Yes, sir.

Q. Is that the gentleman you saw cutting grass
page 209 } or not?

A. No, sir, he is not the man cutting grass.

Q. Is that the gentleman that gave you a statement and signed it "Adam R. Lowry"?

A. Yes, sir.

By Mr. Williams:

Q. You said that the car was put on the track, re-railed, in Halifax street, just as it got to Halifax street, or not?

Witness: Are you speaking of this morning or the former trial?

Mr. Williams: I am speaking of this morning—if you didn't testify the car was re-railed at Halifax street?

A. Part of the car was in Halifax street.

Q. Was the car re-railed in Halifax street or part in it and part past it?

A. Part was in Halifax street and part was south of Halifax street.

Q. How much of it was south of Halifax street at the time it was re-railed?

A. Ten or fifteen, possibly fifteen or twenty, feet.

Q. That ten or fifteen or twenty feet would include the left hand front wheel, wouldn't it, going south?

A. I would say the left hand front wheel going south was just east of Halifax street, possibly right on the edge of it. I couldn't give it exactly.

Q. Do you mean to say that the front wheel is in the middle of the car?

A. No, sir.

Q. Don't you know as a matter of fact the front wheel is nearer the front than the middle?

A. Yes, sir—I wouldn't say it is nearer the front than the middle either. It is pretty close. It wouldn't vary a foot or two either way.

Q. Didn't you make this statement on page 86 of your previous testimony:

“Q. At what point was the car put on the track to go back?

A. Well, I would say approximately ten or fifteen feet south of Halifax street.”

A. That is right.

Q. Is that true or not?

A. That is true—referring to the south end of the street car.

Witness stood aside.

page 211 }

E. H. FLIPPEN,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Flippen, are you employed by the Virginia Electric & Power Company?

A. Yes, sir.

Q. How long have you been working with them?

A. Very nearly fourteen years.

Q. What is your position with the company?

A. Claim adjuster.

Q. Did you go in an automobile to the home of Mr. Adam R. Lowry yesterday afternoon with Sheriff Mercer and Mr. Vaughan when summons was served on Mrs. Lowry and Mr. H. E. Lowry?

A. Yes, sir.

Q. Will you state to the jury what you did with you automobile when you got there and what you saw?

A. When we first drove up I parked the automobile just south of Mr. Lowry's house. Two automobiles were there in front of his house when we arrived. I stopped just opposite the driveway on the east side of Mr. Lowry's house, right opposite the double garage in the back yard. I saw
 page 212 } Mr. Lowry go across the back yard into the garage, and he then watched us for about ten minutes, peeping around the door, and he came back out and went on back around behind the house,

Q. When he came from the house to go towards the garage was he walking in a normal way or with difficulty?

A. He was walking in a normal way. I called Mr. Vaughan's attention to it at the time.

Q. When he came back from the garage towards the house, was he walking in a normal way or with apparent difficulty?

A. He was walking kind of drawn like he had pain in his side or something.

Q. Did he go into a house that looked like a privy or go into the garage?

A. Looked like a garage. It has a double door. It is made out of wood with big wooden doors in front.

Q. Did you see a young man in baseball uniform there?

A. One came out and got in a Ford that was standing in front. He had on a baseball cap with V-8 on it.

Q. Do you know Mr. Lowry when you see him?

A. Yes, sir.

Q. Is he in court now?

A. Yes, sir.

Q. Where is he?

page 213 } A. Sitting over there. (Pointing.)

Q. Was it Mr. Lowry that you saw walk from the direction of the house into the garage or was it that man that was cutting grass in front?

A. No, sir. The man cutting grass was standing at the back end of the house. He was cutting it when we first drove up, but he walked around the house and was standing at the back of the house while the Sheriff was in there.

Q. What did the Sheriff do when you got there and stopped?

A. He got out, went across the grass plot and went to the front door. Mrs. Lowry came to the door.

CROSS EXAMINATION.

By Mr. Williams:

Q. Now, Mr. Flippen, you were asked whether you saw him go into these garage doors. You didn't answer that. Did you see him go in the garage door or not?

A. Yes, sir. I saw him before he got to the garage door.

Q. Did you see him go in the toilet?

A. No, sir, not unless there is one inside this big garage.

Q. You don't know what he was doing out there?

A. No, sir. There are some more houses to page 214 } the left, or to the north of that. The house was cut from my view.

Q. He didn't have a pick or shovel in his hand or anything like that?

A. No, sir—in his shirt and pants and no hat on.

Witness stood aside.

page 215 } W. W. LaPRADE,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Major LaPrade, what is your profession?

A. Civil engineer and surveyor.

Q. Graduate of what school?

A. Virginia Military Institute.

Q. How long have you been practicing your profession?

A. Twenty-seven years.

Q. At the request of the Virginia Electric & Power Company have you examined the crossings at the street intersections across the Virginia Electric & Power Company's tracks from Hull street to Halifax Avenue?

A. I have.

Q. When did you do it?

A. I did it day before yesterday.

Q. From what point to what point?

A. From Halifax, which is a little over five thousand feet south of Hull street, each street intersection, to Hull street, Halifax street being the twelfth street south of Hull on the Petersburg Turnpike.

Q. And the distance is slightly short of a mile page 216 } from Hull street to Halifax street?

A. That is correct.

Q. At those crossings did you notice any marks in the paving between the tracks?

A. The street surface of the Richmond & Petersburg Turnpike is sheet asphalt, and at each intersection of a street the same material is used in the intersections, and this is up right close to the rail, which is a girder rail at the intersection

and not a T-rail as between the intersections; and immediately west, or measuring eight inches to the west of the east rail, where the flange would be on the east rail, was an indentation in the sheet asphalt. At each intersection from Halifax street northward to Hull, at each of the twelve intersections, this bruise, or indentation, was apparently an inch to an inch and a half wide parallel to the rail. The variation from Halifax street as it went northward did not vary an inch in distance; the distance was regular and parallel. This indentation, however, seemed to have been made sometime ago, and at Decatur street at the intersection of it, it had disappeared in the middle of the street, but visible at the south edge and north edge of the intersection where the page 217 } surface had not been worn away.

Q. Was that a scored mark made by something dragging on the track, or made by something revolving?

A. There was no scoration of it. It was not scratched at all. It was a regular mark as you would judge from revolving.

Mr. Williams: I object to that.

The Court: I doubt whether that is a proper question.

Mr. Robertson: I think you are right, Your Honor.

The Court: I am glad somebody agrees with me.

By Mr. Robertson:

Q. Major LaPrade, what is the grade of the car track south-bound at Halifax Avenue and the Petersburg Pike? A car going south, is it going up hill, or down, or on a level? If there is a grade, what grade is it?

A. I didn't actually take these measurements myself, but from the records in the Department of Public Works, the grade which is given there is a little less than one per cent, going south; it is 94/100 of one per cent from Gordon Avenue to Halifax, Gordon Avenue being the first street north of Halifax.

page 218 }

CROSS EXAMINATION.

By Mr. Williams:

Q. Major, at Decatur street the mark, or indentation, is on the south side of the paved street, isn't it?

A. We ordinarily think of the Petersburg Turnpike as running north and south, and this indentation was on the west side of the east rail.

Q. But I am talking about the south side of Decatur street. It was not in the center of Decatur? Wasn't this indenta-

tion a slight indentation four or five feet long at the south side of Decatur?

A. This indentation, if there had been one along the center of Decatur street, was practically obliterated, but it was clearly in evidence both on the north and south sides of the intersection.

Q. You remember it was on the north?

A. Yes, sir, I remember that.

Q. But I am talking about the south side. Is the indentation visible there now certainly not more than four or five feet long, if not less than that?

A. I am reasonably sure it is only a short distance.

Q. At the extreme point where the paving meets the south curb of Decatur isn't it a very faint indentation as compared with the indentation as you go on down page 219 } southward to Halifax?

A. Yes, sir, it is a great deal less on Decatur street than on other streets.

Q. Isn't it also as you get to the next cross street and the next cross street a gradual deepening of that mark, a widening of the mark as you go south?

A. I would not say it was so much deeper than—When you get down to Dinwiddie street, which is one where traffic is very heavy, my recollection of it is that it was not so much evidence of it there as immediately north or immediately south of that.

Q. At points in all of the streets isn't it a fact that it is a kind of hop, skip and jump; in other words, it would be missed, the scoring is not at all at some points; whatever was doing the scoring missed;

Mr. Robertson: I object. He said it wasn't any scoring. The question is based on a false premise.

The Court: I think he can ask the question.

A. The groove as it appeared was not intermittent, at intermittent sections; it was apparently regular at the time it was made.

page 220 } By Mr. Williams:

Q. At each intersection where it was made, isn't it broken up, there being some spots that the indentation does not appear?

A. I didn't observe any such places, except in the middle of the street where traffic was heavy.

Q. When you leave the stand (I know that you wouldn't say anything but just what was right), won't you refresh your mind, go over there and see if there are what you call dashes,

for instance, the mark is broken in some places, and you can tell that by the visible surface, that the mark was skipped entirely? I will ask you to go there and refresh your mind and come back, and for the purpose of that I will release you so you can go back. Will you do that?

A. Yes, sir.

Mr. Robertson: Don't do it at our expense.

Mr. Williams: Do it at the request of the plaintiff.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Did Mr. Williams consult you within the last week or ten days as a possible witness for the plaintiff in this case?

A. No, he has never mentioned this case to me.
page 221 } He did tell me that he had a case pending that probably he would want to call me in on, but he did not mention this case or lead me to believe this was the case.

Q. Did he summon you in this case for the plaintiff?

A. No, sir. The defendant is the only one I got a summons from.

By Mr. Williams:

Q. Do you remember sometime ago you were on the stand in a case in which you were appearing as a witness for the plaintiff—

Mr. Robertson: If you are going to talk about any other case, I ask that the jury be excused. He is trying to get indirectly stuff he knows he has no right to get in.

Mr. Williams: I want to ask if Mr. Robertson didn't say "Major, you speculate for us at times, too"?

Mr. Robertson: I admit that. That is why I made objection.

Witness stood aside.

page 222 }

THOMAS R. OWEN,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Owen, are you employed as street car operator by the Virginia Electric & Power Company?

A. Yes, sir.

Q. How long have you been working for the company?

A. About 17 years.

Q. Do you run these single truck safety cars of the 1500 type?

A. Yes, sir.

Q. How long have you been running them?

A. About three and a half years.

Q. Were you on car 1527 when it jumped the track in the neighborhood of Halifax Avenue and the Petersburg Pike about half past eleven o'clock in the morning on July 11th, 1932?

A. Yes, sir.

Q. In which direction was the car going?

A. South.

Q. After the car left Hull street and proceeded south on the Petersburg Turnpike, during the distance
page 223 } from Hull street to Halifax Avenue, was the car operating properly or improperly?

A. Properly.

Q. As you went south along there was there any unusual noise in the operation of the car?

A. No, sir.

Q. Was there anything dragging underneath the car?

A. No, sir.

Q. Was the car bouncing other than the usual movements of running over that piece of track?

A. No, sir.

Q. Was there any unusual sway of the car?

A. No, sir.

Q. Until the car got to Halifax Avenue was the car running off the track or on the track?

A. On the track.

Q. Whereabouts in the car were you?

A. Standing in front.

Q. Was there anybody else there?

A. Operator.

Q. Who was that?

A. Mr. Upchurch.

Q. Were you operating the car or was he op-
page 224 } erating the car?

A. Mr. Upchurch was operating at the time.

Q. What were you doing?

A. I was learning him.

Q. You were teaching him how to run it?

A. I was showing him about the doors.

Q. How fast were you going when you got to Halifax Avenue?

A. About 20 miles an hour.

Q. Did that car run all the way through to Petersburg or turn back north before it got to Petersburg?

A. Turned back at #3.

Q. You mean at Stop #3?

A. Yes, sir.

Q. How far is Stop #3 south of Halifax Avenue?

A. About 300 feet I reckon.

Q. Were you going to turn back on this trip?

A. Yes, sir.

Q. How did you turn back? Do you have to stop and turn back or make a loop or what?

A. Had to stop and change ends and change trolleys.

Q. What do you mean by changing ends?

A. Have a controller on each end. You change from one end to the other.

Q. You change the trolley to come back?

page 225 } A. Yes, sir.

Q. Do you have to take any levers off the controls at one end and carry them and put them on at the other end?

A. Yes, sir.

Q. Is that what you mean by changing ends?

A. Yes, sir.

Q. In order to do that do you have to stop or keep on going?

A. Stop.

Q. If the accident hadn't happened and you had turned back at Stop #3 three hundred feet south of Halifax Avenue, would you have stopped at Stop #3?

A. Yes, sir.

Q. What was the first you knew about the accident?

A. First I knew we were on the ground jumping around.

Q. Did that happen north of Halifax Avenue or as you were crossing Halifax Avenue, or South of Halifax Avenue?

A. South of it.

Q. How far south?

A. About 40 or 45 feet.

Q. After that happened and the car began to bounce—

Mr. Williams: Wait a minute. He hasn't said anything about bouncing.

page 226 } By Mr. Robertson:

Q. When the car began jumping around what did it do?

A. Kind of turned at an angle and stopped.

Q. Did it stop in the grass plot between the driveways or go into either driveway?

A. Stopped in the grass plot.

Q. How far do you think it ran from the time it began to jump until it stopped?

A. I reckon four or five feet.

Q. Do you know that second concrete pole south of Halifax Avenue in the grass plot?

A. Yes, sir.

Q. Where did it stop in reference to that?

A. About ten feet north of that.

Q. Was it jumping the same way going across Halifax Avenue as it jumped when you first noticed something was wrong?

A. No, sir.

Q. Was it jumping as it came down from Hull street before you got to Halifax Avenue?

A. No, sir.

Q. How much time elapsed between the time you noticed the first jumping and the time that it was off the track?

A. Two seconds I reckon.

page 227 } Q. Was it close together or a considerable interval of time? Did all happen at once? Did it happen in sequence? Did it all happen there right in a space of time together or did considerable time elapse?

A. Happened all at one time together.

Q. What happened to you?

A. I stood up there.

Q. What happened to you? Did you fall down?

A. No, sir.

Q. What happened to Mr. Upchurch?

A. I don't know.

Q. You were watching yourself or him?

A. Watching myself.

Q. Who operated the car and took it away from there?

A. I did.

Q. Did you get it away under its own power?

A. Yes, sir.

Q. Were you there when they put it back on the track?

A. Yes, sir.

Q. Where did Mr. Upchurch go?

A. I don't know where he went.

Q. Now, do you remember what time Mr. Upchurch had started to work with you that morning?

A. No, sir, not exactly.

Q. Had you made any trips with him before this trip?

A. Yes, sir.

Q. How many?

A. Three or four I imagine.

Q. On those trips did he jolt his car when he would stop it?

A. No, sir.

Q. Did he stop it with any unusual jerks and jolts and bounces, or did he stop it with the ordinary course of operation?

A. Stopped in the usual course of operation.

Q. Did he at any time stop it in any way that you had to tell him not to stop it that way any more?

A. No, sir.

Q. Did you tell him not to stop it that way any more?

A. No, sir.

Q. Did you notice anybody in the car when he stopped it that had to grab onto something and swing with both hands to keep from falling in the floor?

A. No, sir.

Q. Did anybody have to do that?

page 229 } A. No, sir.

Mr. Williams: He couldn't see. I object.

The Court: He asked him if he saw that.

By Mr. Robertson:

Q. How long did it take to make the round trip?

A. Fifteen minutes.

Q. It was from what point to what point?

A. From Cowardin Avenue to #3 Stop.

Q. After this accident happened did you ever go down to Mr. Lowry's home and talk to him?

A. Yes, sir.

Q. When was that?

A. I don't remember very well.

Q. Was it after the accident?

A. Yes, sir.

Q. Why did you go on down there?

A. Went down to see him. I had known him several years.

Q. Did you discuss the accident with him?

A. I don't think so; I don't remember it.

Q. Did you have any conversation with him about how fast the car was—

Mr. Bremner: We object to leading.

The Court: Finish your question.

page 230 } Q. (Continued) Did you have any conversation with him about how many points the car was running on at the time it jumped the track?

A. No, sir.

Q. Did you tell him the car was running at nine points?

A. No, sir.

Q. Were you running at nine points?

A. No, sir.

Q. How fast were you running when the car crossed Halifax Avenue to your best recollection?

A. About twenty miles an hour.

Q. When you took the car away from there did you run it away under its own power or not?

The Court: You asked him that.

CROSS EXAMINATION.

By Mr. Williams:

Q. Where did you take the motor lever to start running it back?

Witness: You mean at what point?

Mr. Williams: Yes, sir.

A. At Halifax.

Q. Who pulled it back from the forty-five degree angle down there below Halifax?

A. Trouble wagon.

Q. Were you in the car at the time they did that?

A. Yes, sir.

Q. Did you get out of the car from that time to the time you got it back in the barn?

A. I don't remember whether I did or not.

Q. In other words, did you stick by and in the car from the time that they started to put it on the track until you got it back into the barn or did you get in and yet out?

A. I carried it to the barn.

Q. Then, you didn't get out of the car at all from that time until you went back to the barn, did you?

A. I told you I didn't know whether I got out of the car or not.

Q. You didn't have any reason to get out of the car, did you, from that time on?

A. No, sir.

Q. There was no other motorman on there with you from that time on over there?

A. No, sir.

Q. Where did your trouble wagon go as soon as
page 232 } you started off?

A. I don't know.

Q. It left you, didn't it?

A. Yes, sir.

Q. Went to attend to something else, or back to the barn, or something else?

A. Yes, sir, left me.

Q. Did it leave you before you crossed Halifax or after you crossed Halifax?

A. They got the car back on the track and I started away.

Q. Immediately they put it on the track you went on up the street?

A. Yes, sir.

Q. You ran it back on its own wheels, didn't you?

A. Ran it back on its own power.

Q. That is not exactly the question. You ran it back on its own four wheels, didn't you, not somebody else's wheels?

A. I don't know how you mean.

Q. Does it have eight wheels? Is it a double or single truck?

A. Single.

Q. Did it have more than four wheels?

A. No, sir.

page 233 } Q. It ran back on its own four wheels, didn't it?

A. No, sir.

Q. How did it run back?

A. It ran back on its own power.

Q. Did it run on three wheels?

A. Well, I guess so.

Q. Just explain to the jury how a car—How much does that car weigh?

A. I don't know, sir.

Q. Assuming for the purposes of this question, and we will prove it later by somebody that knows, that it weighs 16,000 pounds, can you explain to them how you ran that car back on its own power on three wheels? Look at the jury and not at anybody else. Look at the jury and explain that. That is a very simple question.

Witness: Read the question again, please.

Note: Question repeated to witness.

A. No. All I know is it was put back on the track and I carried it away on its power.

page 234 } Q. That is all the explanation that you can tell this jury as to how you got it back to the barn?

A. Yes, sir.

Q. Yet you tell them you went back on three wheels, or four?

A. Three.

Q. How far is the barn from the point that you started, from Halifax street?

A. I don't know exactly.

Q. Just give approximately in miles, one or ten miles, anywhere between that?

A. Say, one and a half.

Q. One and a half miles?

A. Yes, sir.

Q. Where is the barn located that you took it to?

A. Seventh and Perry streets.

Q. Then, if it is approximately a mile from Halifax to Hull—That is about the 1900 block, isn't it?

A. It is 1700 I think.

Q. And you carried it northwardly on Hull to Seventh street and then westward there blocks after that?

A. Yes, sir.

Q. What did you have there to take the place of that one wheel that you said was not operating?

page 235 } A. I don't know.

Q. Didn't you feel kind of shaky, wobbling around on three wheels?

A. Didn't wobble around.

Q. Was it running smooth?

A. Something was dragging under the car.

Q. Could you tell what was dragging?

A. No, sir.

Q. Why?

A. I didn't know.

Q. You didn't know it was dragging?

A. Didn't know what was dragging.

Q. Tell the jury the reaction one gets from a car which is operated on its own power with three wheels and something dragging that you don't know anything about?

Mr. Robertson: I object.

The Court: Objection sustained.

Mr. Williams: I would like to know that; but all right.

Q. The axle wasn't dragging, was it?

A. I don't know, sir.

The Court: He already stated that he didn't know what was dragging.

page 236 } By Mr. Williams:

Q. Now, where did you first get the jumping, the first jumping that you knew of that the car was doing it was where?

A. Forty or forty-five feet south of Halifax.

Q. Forty or forty-five feet south of Halifax?

A. Yes, sir.

Q. There was nothing unusual until just at that moment?

A. No, sir.

Q. Everything was working all right?

A. Yes, sir.

Q. And you said you were teaching Mr. Upchurch?

A. How to operate and handle the air.

Q. How many stops did you make from Hull street to Halifax?

A. I don't remember.

Q. Now, as you operate the air, can you operate the air when the car is moving and work the door, or do you have to stop it to work the door?

A. Stop it.

Q. In other words, a man who is learning how to operate an air door would learn very little if his car continued on running, wouldn't he; he would have to stop it to learn how to use it, wouldn't he?

A. Yes.

page 237 } RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. After this trip when the accident happened did you O. K. Mr. Upchurch to run one-man safety cars after that, or did you take him out and teach him some more?

A. O. K'd him then.

Q. When you came away from there on three wheels, did one wheel come clear off and leave it there lying on the ground or was it still fastened to the car and coming along with the car?

A. Still fastened to the car.

Q. Did it come along with the car or leave it there on the ground?

A. Came with the car.

By Mr. Williams:

Q. I forgot to ask you this: You can't tell the jury where your axle broke, can you?

A. No, sir.

Witness stood aside.

page 238 } W. L. BROWN,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. You are Mr. W. F. Brown?

A. W. L.

Q. Where do you live?

A. Roanoke Rapids.

Q. What is your business?

A. Engineer at the Halifax Paper Mill.

Q. Were you a passenger on the street car that jumped off the track about half past eleven on the morning of July 11th, 1932, at Halifax Avenue and the Petersburg Turnpike?

Mr. Williams: We don't know that it jumped off at Halifax. You can say approximately around there somewhere.

Mr. Robertson: Strike the question out.

Q. Were you riding on a street car that jumped off the track somewhere between Hull street and Halifax Avenue when the street car was going south on the morning that I have mentioned?

page 239 } A. Yes, sir.

Q. Were you living in Richmond at that time?

A. Yes, sir, living at #2 stop.

Q. Do you remember whereabouts in the street car you were?

A. As near as I can say I was near in front of Mr. Bartlett's place.

Q. Whereabouts in the street car were you?

A. About the fourth seat from the front on the right.

Q. When the car left Hull street going towards Halifax Avenue did you feel anything dragging under the car?

A. No, sir.

Q. Did you hear anything dragging?

A. No, sir.

Q. Did you feel any jolts of the car other than just the car running along?

A. No, sir.

Q. Feel any swaying of the car?

A. Didn't feel anything broke loose or wrecked.

Q. How fast do you think it was going when it got to Halifax Avenue

A. Not over 20 miles an hour.

Q. Where was the front end of the car when page 240 } the accident happened? Was it north of Halifax Avenue, in it or south of it?

A. I don't know exactly what street but it was over the last street before you get to Ingram Avenue.

Q. Had it crossed over the street?

A. Yes, sir.

Q. What was the first thing you knew anything was wrong?

A. The first thing I knew I heard something break loose just like that. (Indicating.)

Q. Was that a different sound or different movement from what you had noticed before that time or was it the same?

A. Sure it was. Hadn't anything else happened.

Mr. Williams: I ask that that be stricken out. How can he tell what had happened down there?

The Court: He was on the car.

Mr. Williams: That is a conclusion of the witness.

The Court: Objection overruled.

Mr. Williams: Exception.

By Mr. Robertson:

Q. Did all happen at once or some time elapse?

A. All happened in a minute's time, it seemed page 241 } to me.

Q. Did you feel anything go "Bim, Bam Bum" as it came along, or all happen at once?

A. No, sir.

Mr. Williams: It couldn't all be at once. He said it happened in a minute.

The Court: Objection overruled.

By Mr. Robertson:

Q. Did it knock you out of your seat?

A. No, sir, didn't knock me out of my seat, but made me stand up in the back of the seat this way (indicating) and I went back as far as the seat would go?

Q. Then, did you catch yourself?

A. Yes, sir.

Q. Did it hurt you?

A. No, sir.

Q. Did you see any other man in the car that was thrown out on the floor and fell back to the back end of the car?

A. No, sir.

Q. Did you see anybody thrown out on the floor?

A. No, sir.

Q. Hear anybody groan?

A. Nobody groan.

page 242 } Q. Do you know Mr. Lowry when you see him?

A. No, sir.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Brown, you were in the fourth seat, right-hand side?

A. Third or fourth; I don't know which seat exactly.

Q. You said your seat was turned around, you were out of it, and what happened?

A. Those are reversible seats. Threw me up against the back of the seat, and I went over as far as I could and stopped.

Q. Threw you against the back of the seat? I thought you said it threw you up on your feet?

A. Up on my feet, yes, sir.

Q. Did it or did it not throw you up on your feet?

A. The seats are like this. (Indicating.) The back goes back with it when you are coming back this way. The seats were thrown back in it. Going towards Petersburg they are with the backs towards you, and, when it left the track, that made me lean towards the front and catch hold of the back of that and go as far as I could go.

page 243 } Q. You don't know just the exact point it went off the track, do you?

A. No, I don't know exactly where it went off.

Q. You were kind of engaged in catching yourself there after things began to happen, weren't you?

A. Certainly.

Q. So, as far as you know, you can't tell how far that car went after the first thing began to develop that resulted in its being at a 45 degree angle across the track?

A. Yes. The car didn't go over fifteen feet before it turned.

Q. What do you mean by that; turned where?

A. Before it turned cross-ways on the track.

Q. How did you measure fifteen feet; how did you get that; how do you know it?

A. I judge it was about that much.

Q. Do you mean to tell this jury that from the time that you were thrown up the first action of the car and confused or knocked about, or standing on your feet—

Mr. Robertson: He has not said anything about being confused.

The Court: Both of you stop talking. Go ahead and finish your question.

Mr. Williams: Strike that out.

page 244 } By Mr. Williams:

Q. Do you mean to tell the jury that from the time that you first registered sensation from the unusual happening there, which resulted in your being thrown up against the seat in front of you, then up on your feet, the seat being turned around, and you having the result of the condition, whatever it was, whether perfect composure or confusion, or normality of mind—you know and tell this jury the car only went fifteen feet from that point to the time it crossed at right angles the track?

Mr. Robertson: The witness never said that. The question is argumentative.

The Court: Do you object to the question?

Mr. Robertson: Yes, sir.

The Court: Objection sustained.

Mr. Williams: I would like to make my objection to the ruling of the court. Counsel for plaintiff excepts to the ruling of the court in refusing to have the witness answer this question because the question, as counsel sees it, is based entirely upon the testimony and reasonable under
page 245 } the circumstances.

The Court: The court thinks no intelligent answer can be made to the question.

Mr. Williams: Counsel objects to the statement of the court in passing upon the question from the standpoint related by the court, that it is not intelligible, and will alter and reframe it so it will be intelligible.

Q. Mr. Brown, do you mean to tell the court that, from the time you got such knowledge of something unusual happening, which included your being thrown up against the front seat and on your feet, and the car stopping at a forty-five degree angle, you know it ran only fifteen feet between those two periods?

A. As near as I could judge it was not over 15 feet.

Q. How far from Bartlett's store did it leave the track, or do you know where it left the track?

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

Q. You testified in this case before, Mr. Brown?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Where had you gotten on that car?

A. Cowardin Avenue.

page 246 } Q. About how many blocks is that from where
it happened?

A. I couldn't tell you that.

Q. Could you indicate or approximate it in miles?

A. It is about one mile, I reckon.

Q. During the time that you were riding on the car to the time you got off, did the man that was operating the car make any unusually rough jerks in stopping or starting the car?

A. No, sir, ran it perfectly normal as far as I know. I rode it every day.

Q. Did he seem to be running it this time like other times that you rode on it?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Did the car stop between Cowardin Avenue and Halifax Avenue?

A. Yes, sir.

Q. How many times did it stop?

A. I couldn't tell you that.

Q. You don't know the number?

A. No, sir.

page 247 } Q. Mr. Brown, as you came down there what
were you doing in the car? In other words, were
you reading or writing or what?

A. I wasn't doing anything.

Q. Just looking out the window, were you?

A. I don't know as I was looking out of the window either.

Witness stood aside.

page 248 }

D. B. HEATH,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Where do you live?

A. Stop #4, Petersburg Pike.

Q. How far is that from where Mr. Adam R. Lowry lives?

A. I would say about four or five blocks.

Q. Do you know him?

A. Yes, sir.

Q. How long have you known him?

A. I have been knowing him all my life.

Q. Where were you working on the 11th day of July, 1932?

A. Harwood Avenue Service Station.

Q. Where is that in reference to Halifax Avenue and the Petersburg Pike?

A. It is one block the way the streets run, one block from Halifax.

Q. North or south?

A. South.

page 249 } Q. Do you remember the time a street car ran off the track in the neighborhood of Halifax Avenue on July 11th, 1932?

A. Yes, sir, I do.

Q. Where were you when it happened?

A. I was right there on Harwood Avenue, cutting across at Harwood and Petersburg Pike?

Q. Did you see the accident happen?

A. I heard a noise and naturally looked up, thinking it was an automobile wreck, and saw the street car coming.

Q. Was the noise that you heard an unusual noise?

A. It was kind of loud. It was rather loud, the reason I looked up.

Q. It was the noise that caused you to look up?

A. Yes, sir.

Q. When you looked, what did you see?

A. I saw the street car coming and in a second or two I saw it off the track.

Q. When you saw the street car coming after you looked up, was it north of Halifax Avenue, or crossing Halifax, or south of it, or could you tell?

A. I couldn't tell exactly where it was, but I know it was pretty close to Halifax Avenue.

Q. Did you go up there?

page 250 } A. I did—not right at the minute that it happened, but I went as soon as I could get there.

Q. Did you get up there before they got the car back on the track and took it away?

A. Well, I went up there before they got the car back on the track. I stayed about two minutes and came back.

Q. Did you go back before they put the car on the track?

A. Yes, sir.

Q. Did you notice any marks in the street at that time?

A. At the present time I wouldn't like to say I really did see any marks. I don't really know that I did, but I seen marks after the street car was moved, or before it was moved. I seen marks about four feet on Halifax street.

Q. You don't know whether they were put there before the car went across Halifax street or afterwards?

A. I know I saw them there.

Q. You don't know whether they were made by the car going south-bound or when they took it back north?

A. No, sir, I wouldn't say.

Q. I believe you have told both Mr. Williams and me what you know about this case—

Mr. Williams: I object.

Mr. Robertson: The question is leading. I withdraw it.

page 251 } By Mr. Robertson:

Q. Have you talked to Mr. Williams about this accident before today?

A. Yes, sir.

Q. Did you tell him the same thing you are telling now or something different?

A. Just as near as I can tell just what I tell you now.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Heath, as you saw that car up there and heard the noise, you saw it bouncing and wabbling, didn't you?

A. I wouldn't say I saw it bouncing and wabbling.

Q. You didn't tell Mr. Lowry and myself that you saw it bouncing and wabbling—

Mr. Robertson: I object to this line of questions upon the ground that it enables Mr. Williams, in effect, to testify in the case without going on the stand and being subject to cross examination and enables him to put his personal version of the matter before the jury.

The Court: He asked didn't he tell Mr. Lowry and himself.

page 252 } Mr. Robertson: I think my same objection is good.

The Court: Objection overruled.

Mr. Robertson: Defendant excepts for the reasons stated, and, without renewing objection and exception to each question and answer, defendant wishes the record to show that

it objects and excepts to each question and answer along this entire line of testimony and does not waive its exception by its failure to interpose objection and exception to each question and answer, but expressly reserves every such right under every such objection and exception.

By Mr. Williams:

Q. Didn't you tell Mr. Lowry and myself that you looked up and the car was at Halifax street bouncing and wabbling, and then went on down for a distance past Halifax street where it jumped the track, and then you thought it was going to turn over?

A. I don't think I said I thought it was going to turn over, but it looked to me it turned sideways on a 45 degree angle across the track.

page 253 } Q. When were you summoned by the street car company?

A. The 22nd day of May.

Q. Of this year?

A. 1934.

Q. When did their agent talk to you?

A. They didn't talk to me—I went over there to see a man myself. They didn't come to me.

By Mr. Robertson:

Q. You did what?

A. I went over to see the Virginia Electric & Power Company my own self and saw the man.

By Mr. Williams:

Q. They summoned you to come over there to the office; that is why you went to their office?

A. No, sir, they didn't summon me to their office. They summoned me to court.

Q. Then, you were mistaken when you said they summoned you to the office—

Mr. Robertson: Let him finish.

The Court: If you gentlemen realized how boring your conduct is, you wouldn't continue it.

Mr. Robertson: I would like to say in justice page 254 } to myself that I stated at the outset of the case that it would be very boring but would do everything in my power to expedite the case. I am conscientiously doing it, even at the expense of boring the court and jury. When I think the witness is being cut off in his answer, or when I think the rules of evidence are being violated, with

all deference, I must protect the witness and my client in the case, and I am doing that with all deference and to the best of my ability.

The Court: I think both of you are unconsciously not helping a decision of the case.

Mr. Williams: I wish to note an exception in the record to the remarks of the court. I hate to have to do that; I want to be entirely courteous. I would like to ask leave to note an objection for the record. While I am not trying to bore the court, I am afraid there will be a measure of prejudice, by the remark, to my client, which I prefer not to have.

The Court: Of course, you can make your exception. I do not see how anybody could be prejudiced by the remark of the court.

page 255 } By Mr. Williams:

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

A. I would say about seventy-five to a hundred feet—a hundred yards.

Q. Seventy-five to a hundred yards?

A. Yes, sir.

Q. Describe its actions to the jury as you saw it coming down there before it jumped the track.

A. Well, when I was standing—It all happened in just maybe a second. I didn't really have time to see exactly how it was running. I saw it coming down the track. I heard a fuss and looked up. Then I saw it sway sideways and turn across the track. That is as near as I can tell.

Q. Didn't you go up there and see marks at that time across Halifax street?

A. I wouldn't be positive that I saw them before the car was moved or afterwards. Just like I tell you, I wouldn't be positive about it, whether I saw it before or after the car was moved.

Q. Mr. Heath, didn't you tell us (Mr. Lowry and me) that you did see the marks across Halifax street before the car was moved?

page 256 } A. Not as I can remember.

Q. Do you deny that you said that?

A. I don't deny it, no, sir.

Q. What has happened that you change your mind and makes it so doubtful in your mind whether the marks were put there after the car was run back or before?

A. Nothing made me change my mind, because it has been so long ago. I tell it as near right as I know how.

Q. Which summons did you get to court first, for the plaintiff or for the defendant?

A. I couldn't tell you. I was at work at the time. They were both at the house when I got there. I never asked anybody what they were about. I never hardly read them over. I made arrangements to get off.

Q. Why is it that you went to their office voluntarily and not to our office?

A. Well, I just went over there just so, just to be going for my own idea. I didn't have any idea particularly but just to be going.

Witness stood aside.

page 257 } MRS. GEORGE NISSEN,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. You are Mrs. George Nissen?

A. Yes, sir.

Q. Where do you live?

A. 2313 Harwood Avenue.

Q. How far is that from Stop #3 on the Turnpike?

A. Not quite three blocks.

Q. Do you know Mr. Adam R. Lowry?

A. I know him when I see him.

Q. Were you living on July 11th, 1932, at the same place you are living now?

A. Yes, sir.

Q. Mrs. Nissen, were you on a street car as a passenger when the car jumped the track in the neighborhood of Halifax Avenue on July 11th, 1932?

A. Yes, sir.

Q. Whereabouts in the car were you?

A. In the first seat on the left.

page 258 } Q. Where had you gotten on the car?

A. At Hull street.

Q. As the car came from Hull street towards Halifax Avenue did the man that was running it make any unusual jerks in stopping or starting the car?

A. No, sir.

Q. Do you remember whether or not he made any stops between Hull street and Halifax Avenue?

A. I couldn't tell you that. I didn't pay attention to that.

Q. Did he seem to be having any difficulty in running the car?

A. I didn't notice that he was.

Q. As the car proceeded from Hull street to Halifax Avenue, did you hear anything dragging under the car?

A. No, sir, I did not.

Q. Did you feel anything dragging under the car?

A. No, sir.

Q. Did you notice any jumping or bouncing or swaying of the car?

A. No, sir, I did not.

Q. Are you in the habit of riding the cars on that line back and forth?

A. Ride three or four times a week.

page 259 } Q. Did you notice anything different in the way it ran on July 11th on that trip, when the accident happened, from other times that you rode it?

A. I did not.

Q. What was the first thing you knew that something was wrong?

A. I was on the floor, knocked off the seat.

Q. Did you feel any dragging or any bumps or booms before you were knocked out?

A. I did not.

Q. As the car came along, before it got to Halifax Avenue, or as it was crossing Halifax Avenue, did you hear any "Bim, bam, boom" noise?

A. No, sir.

Q. Could you tell whether any unusual happening occurred north of Halifax *north of Halifax* Avenue, or going across Halifax Avenue or south of it?

A. We had just crossed Halifax Avenue.

Q. How fast do you think the car was running?

A. Well, I am no judge of speed, but I didn't notice any unusual speed.

Q. Where were you going to get off?

page 260 } A. At Stop #3.

Q. Had you rung the bell to get off at Stop #3?

A. No, sir. I didn't ring the bell because that is the end of the line.

Q. You were going to get off when it stopped at the end of the line?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Williams:

Q. You were hurt?

A. My arm and knee were bruised—nothing serious.

Q. They settled your claim, didn't they?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. You testified when this case was tried last October, didn't you?

A. Yes, sir.

Q. Did Mr. Williams come to you the night before the case and talk to you—

Mr. Williams: We object.

The Court: What is the purpose?

page 261 } Mr. Robertson: To show Mr. Williams was familiar with what this witness knew and could have summoned her if he wanted to.

Q. (Continued) immediately before the trial last October?

The Court: Do you object to that?

Mr. Williams: Yes, sir. It has no relevancy.

The Court: Objection overruled.

Mr. Williams: Exception.

A. Yes, sir.

By Mr. Robertson:

Q. Did you tell him what you knew about the case?

Witness: Do you want me to tell what he asked me?

Mr. Robertson: Yes. Did you tell him what you knew about the case?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Mrs. Nissen, did the motorman apply his brakes at Halifax Avenue?

A. Well, it seemed to me that the car was getting ready to make a stop at Stop 3.

page 262 } Q. At Stop 3?

A. Yes, sir.

Q. Do you remember testifying before?

A. Yes, sir.

Q. Didn't you testify "It seemed to me, as it passed over Halifax, just over, it seemed to me he was applying brakes getting ready to stop"?

A. I said it seemed he was getting ready to stop at 3.

Q. Had he left Halifax when he got ready to apply his brakes?

A. Just crossed Halifax.

Q. Had finished crossing Halifax?

A. Had crossed Halifax.

Q. Didn't you say as it passed over Halifax street?

A. I don't know the exact words.

Q. Do you deny you said that?

A. I don't deny it, no, sir.

Q. Do you know who was running the car?

A. Mr. Upchurch, and Mr. Owen was standing by him.

Q. Where were you sitting?

A. On the first seat on the left.

Q. On the left?

A. Yes, sir.

page 263 } RE-RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. At the last trial you are reported to have been asked these questions and made these answers to Mr. Williams:

"Q. What else did they say?"

Mr. Bremner: We make the same objection as this morning. Unless the attention of the witness is directed to some question propounded by Mr. Williams—

Mr. Robertson: I have to read to get the test.

Q. (Continued) At the last trial you are reported to have been asked these questions and made these answers to Mr. Williams:

"Q. What else did they say?"

A. You asked me about the motion of the car, was it bobbing on the track. You asked if I remembered seeing Mr. Lowry. I told you I did.

Q. What else? Was there anything else that you said to us? Remember what you said about the car was coming to a stop, or getting ready to stop?

A. Yes, sir. It seemed to me as it passed over Halifax street it was getting ready to stop."

page 264 } Is that what you say today?

A. Yes, sir.

Witness stood aside.

Note: At 1 P. M. a recess was taken until 2 P. M.

page 265 } AFTERNOON SESSION.

Court resumed its session at 2 o'clock P. M.

J. HERBERT MERCER,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. You are Sheriff of the City of Richmond?

A. Yes, sir.

Q. Yesterday afternoon did you go in an automobile to the home of Mr. Adam R. Lowry with Mr. T. G. Vaughan and Mr. E. H. Flippen to serve summonses upon Mrs. Adam R. Lowry and H. E. Lowry?

A. Yes, sir.

Q. When you got down there to Mr. Lowry's home, what did Mr. Vaughan and Mr. Flippen do and what did you do?

A. Mr. Vaughan and Mr. Flippen stayed in the automobile. They were driving a Chrysler coupe with a rumble seat. Mr. Vaughan was sitting in the rumble seat and Mr. Flippen at the wheel. I went in and left those two gentlemen out in the car in front of the house—not quite in front of the house.

page 266 } Q. Did you go to the front door of the house?

A. Yes, sir.

Q. Did you see Mr. Adam R. Lowry at any time you were there?

A. No, sir.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Mercer, wasn't there an automobile in front of the house?

A. Yes, sir, two automobiles, an automobile and a sort of work wagon. I don't exactly know how to describe it. I think it was the Telephone Company's wagon or Passenger & Power Company's.

Q. But there were two automobiles?

A. Yes, sir.

Q. Do you remember about what time that was?

A. Yes, sir, around a little after 4 o'clock.

Q. It wasn't raining at the time?

A. No, sir.

Witness stood aside.

page 267 }

THOMAS R. OWEN,

a witness on behalf of the defendant, being recalled, further testified as follows:

By Mr. Robertson:

Q. Mr. Owen, are you still running the single truck safety cars over the line from Hull street down to Stop #3 and back?

A. Yes, sir.

Q. Have you been running them ever since the day of this accident?

A. Yes, sir.

Q. Has Mr. Adam R. Lowry ever ridden the car?

A. Yes, sir.

Q. Have you seen him come to catch the car?

A. Yes, sir.

Q. How has he come?

A. Well, he comes walking along as usual.

Q. Have you ever seen him run to catch the car?

A. Seen him run to catch a Hull street car at Cowardin Avenue and Hull.

Q. How was he running to catch—fast or slow or medium?

A. As fast as I can run.

Q. How many times have you seen him run?

A. I think I have seen him once.

page 268 } Q. Just once?

A. Yes, sir.

Q. How long ago was that?

A. About a month ago.

Q. How many times have you seen him walk up to catch your car?

A. I don't know, but several times.

Q. Ever seen him get off your car and walk away?

A. Yes, sir.

Q. How many times?

A. I couldn't tell.

Q. Do you know the dates of those different times or not?

A. No, sir.

Q. In either walking to your car or away from your car, did he have any difficulty in getting along?

A. No, sir.

Q. Did he limp?

A. No, sir.

Q. Was he stooping over?

A. No, sir.

Q. Was he holding his shoulders one high and one low?

A. I never noticed that.

page 269 } CROSS EXAMINATION.

By Mr. Williams:

Q. You have asked him how he felt on those days, too, haven't you?

A. I don't remember.

Q. Didn't you ask him on several occasions "How are you getting along, Mr. Lowry"?

A. I have seen him lots of times on the car.

Q. On those occasions you have asked him "How are you feeling today?" and "How are you getting along?"

A. I don't remember.

Q. Do you deny that you did?

A. No, sir.

Witness stood aside.

page 270 } W. M. LEE,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Lee, where do you live?

A. 3611 Hull street.

Q. Where do you work?

A. Times-Dispatch.

Q. What is your work there?

A. Night watchman—supposed to be—most anything that comes around.

Q. How long have you been working there?

A. Nearly 12 months.

Q. Do you remember the time that a street car jumped the track near Halifax Avenue on the Petersburg Pike?

A. Very well.

Q. Where were you when that happened?

A. Standing on the curb right across from the car, right opposite the car, facing towards David M. Lea's.

Q. Taking the south driveway where automobiles go to Petersburg, were you on the west side or east side of that driveway?

page 271 } A. West side.

Q. West side?

A. Yes, sir, standing on the curb.

Q. Which direction were you looking?

A. Towards David M. Lea's, up the Hopkins Road.

Q. Did you see the street car coming before it got to Halifax Avenue?

A. Yes, sir, I reckon about a square from there.

Q. Did you notice how it was running?

A. It was running normal speed.

Q. Was it jumping along the track?

A. No, sir.

Q. Was it swaying and lurching?

A. No, sir.

Q. Were you looking at it when it got to Halifax Avenue?

A. I just had taken my eyes off it when it got to the crossing at Halifax Avenue, and I looked back up towards David M. Lea's and then heard this crash and whirled around right quick to see what had happened and went on over there.

Q. At the time you looked and saw the car there when you heard the noise and whirled around, was the car north of Halifax Avenue, crossing it or south of it?

A. It was on the south side.

page 272 } Q. What was the car doing then when you looked at it?

A. It was running along. I suppose—

Mr. Robertson: You can't tell what you suppose.

A. (Continued.) About fifteen or twenty miles an hour—running along.

Q. I mean after you heard the noise and whirled around what was the car doing then?

A. Standing still at that time. Just as I turned around it was standing still.

Q. Was the car in the grass plot or partly out in either the northbound or southbound driveway?

A. Just the south end of the car, which would have been the south end towards #3 stop, was just across the curb of the northbound driveway.

Q. Did you ever work for the Virginia Electric & Power Company?

A. Yes, sir.

Q. How long ago?

A. 1922.

Q. That is when you left them?

A. I left them then.

Q. That was the time of the strike, wasn't it?

A. Yes, sir.

page 273 } CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Lee, the west part of the driveway—Were you on what is known as the sidewalk?

A. Yes, sir, I was right across on the west side.

Q. That would be the sidewalk west of the grass plot?

A. Supposed to be a sidewalk there but there is none there.

Q. But there is a curbing?

A. Yes, sir. I was standing on the curb.

Q. Whereabouts was your position in reference to Ingram Avenue? Do you know where that is?

A. No, sir.

Q. Do you know where Halifax is?

A. Yes, sir.

Q. There is a little short street in there, isn't it? It is next on the south of Halifax street, or Avenue. Do you know where it is now? Do you recall it?

A. I know where Bartlett's store is.

Q. Is that avenue south of Bartlett's or is Bartlett's right on the corner?

A. I thought it was a little below that, between the store and the corner.

Q. Where were you standing in reference to that corner?

A. In this direction. (Indicating.)

page 274 } Q. Diagonally from there?

A. From there.

Q. To the west side?

A. On the west side of the east siding.

Q. That would put your first seeing of the car when it was north of Halifax, or at Halifax?

A. The first thing that I saw of the car was just a little bit north of Halifax Avenue.

Q. Did you turn your attention then to something else?

A. I just looked towards David M. Lea's. My position was I only turned my head, not my body.

Q. The next thing was after the crash you looked and saw the car standing still?

A. The car standing still but had a little swaying.

Q. Like it would turn over?

A. Something like that, yes, sir.

Q. Did you go over to where the car was stopped?

A. Yes, sir.

Q. When it stopped how much of the car projected over the east curb of the grass plot?

A. I don't know just exactly how much, but
page 275 } there was a little of it sticking over the north side-walk.

Q. Could it be as much as four or five feet?

A. No, sir, because it wouldn't let the front wheel get over it.

Q. The front wheel hadn't gotten over?

A. No, sir. The wheel that broke went over the track.

Q. Where did the wheel break?

A. Right at the back side of the wheel close to the box.

Q. Was it the wheel itself or was it the axle?

A. Axle.

Q. You could see the break in the axle?

A. Yes, sir.

Q. How far would you say from the hub of the wheel was the break?

A. I don't know; I couldn't say exactly. It wasn't much space in between there and the box.

Q. Would you say it was as much as an inch or two inches?

A. Something like that I reckon; might have been a little different; I can't tell.

Q. Mr. Lee, I forgot to ask you: You have worked around mechanical things in some parts during your
page 276 } life?

A. Yes, sir, in machinery.

Q. About what part of your life have you spent in working in and about machinery and had knowledge of such things as that?

A. I would say something like ten years, in boilers and engines and rip saws and band saws and joiners.

Q. What are rip saws?

A. That is a circular saw on a table.

Q. You said something else.

A. Band saw. There is a saw that runs on two wheels, like a band on any other piece of machinery.

Q. All those things would have axles to them?

A. All had axles.

Q. Then you know something about axles?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Did you see the broken part of the axle when you looked down or not?

Mr. Williams: That has been answered by the witness categorically, 'Yes, he saw it'.

page 277 } Mr. Robertson: I ask the witness the question.
The Court: Let him answer.

A. Yes, sir.

By Mr. Robertson:

Q. Did you see the ends of the broken axle when you looked under?

A. The wheel.

Q. Could you see the ends of the axle?

A. A piece of the wheel was turned up like this. (Indicating.) The wheel had got back under the car.

Q. Did you make any measurement to see whether the break in the axle was inside the hub of the wheel or outside of it?

A. No, sir, I did not.

Q. Do you know whether it was or not?

A. It was even with the wheel practically.

Q. But you made no measurement?

A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. You stated a moment ago that it was about an inch, or maybe a little more, from the hub. You don't wish to change that, do you?

A. No, sir. I meant from the motor box—motor casing.

Witness stood aside.

page 278 }

F. L. CHILDREY,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Childrey, are you employed by the Virginia Electric & Power Company?

A. Yes, sir.

Q. How long have you been with the company?

A. Thirty-three years.

Q. What is your position with the company?

A. Shop foreman.

Q. On July 11th, 1932, were you foreman of shops on the Southside?

A. Yes, sir.

Q. Was car 1527 brought into the shops, of which you were foreman, after an accident in the neighborhood of Halifax Avenue and the Petersburg Pike on July 11th, 1932?

A. Yes, sir.

Q. Did you see the car when it came in?

A. Yes, sir.

Q. What was done with that car?

page 279 } A. Put a new set of wheels on it.

Q. What was done with the axle and wheel where the breakdown occurred? What did you do with the axle and wheel you took out of the car?

A. Sent it to the Reservoir shop.

Q. Did you hold the car when you put another axle and wheels in it or send the car out in service?

A. Put another set of wheels on.

Q. Keep it in the shop or send it out?

A. Sent it out.

Q. When you took the axle and wheels out from under it did you look at it to see what was wrong with it?

A. Yes, sir.

Q. Did you look at the axle?

A. Yes, sir.

Q. Did you look at the wheels?

A. Yes, sir.

Q. Did you look where the break occurred?

A. Yes, sir.

Q. Did the break in the axle occur inside the hub or outside the hub?

A. Inside.

page 280 } Q. Then, what was done with the axle and those wheels?

A. After I took them from under the car, sent them to the Reservoir shop.

Q. To which department?

A. To the overhauling department.

CROSS EXAMINATION.

By Mr. Williams:

Q. You didn't take them, yourself, did you?

A. No, sir.

Q. Now, Mr. Childrey, is your department the inspection department?

A. Yes, sir.

Q. In inspecting axle—In inspecting this axle, did you clean it off to inspect it?

A. No, sir.

Q. Now, when you don't clean an axle off, you can't discover a crack in it, can you, unless you put chalk on it?

A. Sometimes we do, yes, sir.

Q. I will take it in this way: If you didn't clean it off, you couldn't discover a crack in an axle, could you?

A. Sometimes we can, yes, sir.

Q. Sometimes you can?

page 281 } A. Yes, sir.

Q. But the most approved method of inspecting is by cleaning the axle and putting chalk on, isn't it?

A. I understand so, yes, sir.

By Mr. Robertson:

Q. How much inside the hub would you say that break occurred?

A. I didn't measure it, but I would say about an eighth of an inch, possibly three-sixteenths. I wouldn't say. I didn't measure it.

By Mr. Williams:

Q. You didn't measure it, did you?

A. No, sir.

Q. And what you are stating is just a mere hazard or guess?

A. Yes, sir.

Juror: The witness states he is shop superintendent. Will he be kind enough to tell me whether that car was inspected

before it went out in service or not and if the cars that run on that line are kept in that department?

Witness: Yes, sir. Inspection is covered by our department and we inspected them. We give a general inspection every thousand miles. We have a night man to
page 282 } go over them every night when they come in off the run, but we have a general inspection every thousand miles.

Juror: I want to know whether that car was inspected before it went out on that run on that day?

Witness: Yes, sir, by the night man.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. What sort of inspection would the night man give—

Mr. Williams: Well, now, would he know? May I ask him a question so I may not have to be interrupting with objection?

Were you there when the night man would be there?

Witness: He relieves me.

Mr. Williams: Then, I don't think he can pass on it.

The Court: I don't know what the question is going to be.

By Mr. Robertson:

Q. Mr. Childrey, under whose supervision are these inspections made?

A. Under mine.

Q. Who was responsible for them?

page 283 } A. The man that did the job. I was responsible to the company, yes, sir.

Q. What system, if any, of daily inspection did you have?

A. We always put these cars over the pit, and the night man has a light, about three feet apart, with an extension cord. He takes that light and goes over it and by the eye to see if there is any defect of any kind.

Q. When that inspection is made is the grease and dirt removed from the axle underneath the car?

A. No, sir.

Q. Why not?

A. That is done on the general overhaul. We couldn't do that; that would be impossible.

Q. When that car is over the pit there, what, if anything, is on the axle in addition to the wheels?

A. The motors, also journals.

Q. Well, now, what sort of inspection of that car is made each thousand miles?

A. Each thousand miles we have men assigned to different parts and they go over them, go over the entire car from pilot to the end, look at the under part to see if everything is properly lubricated and see if there is any trouble there.

Q. Do they take the car to pieces—disassemble it?

A. No, sir.

Q. Is that thousand mile inspection what you call the overhaul inspection or is that different?

A. That is a different inspection.

Q. What is the overhaul inspection?

A. That is every 75,000 miles. That goes to the main shops.

Q. Where?

A. At Reservoir barns.

Q. That is outside your department?

A. Yes, sir.

Q. On an average, how long does it take one of these cars of the 1500 type to run a thousand miles?

A. About every ten days.

Q. How long would it take to run 75,000 miles?

A. Well, around practically once a year. I wouldn't be exact on that.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Childrey, you have handled things like axles for a long, long time, haven't you?

page 285 } A. Well, I don't keep any record of axles.

Q. You have handled them?

A. Yes, sir, I have handled them, yes, sir. I have handled them a long time.

Q. About how long?

A. About thirty years.

Witness stood aside.

page 286 }

W. J. HICKS,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Hicks, are you employed by the Virginia Electric & Power Company?

A. Yes, sir.

Q. How long have you been working for the company?

A. About thirty years.

Q. What is your position with the company?

A. Master Mechanic.

Q. Did you see the axle that broke under car 1527 at Halifax Avenue and the Petersburg Pike on July 11th, 1932?

A. I saw it the day after the accident.

Q. How did you happen to see it?

A. It was brought into our shop.

Q. Did you look at it?

A. Yes, sir.

Q. Did you see where the break occurred?

A. Yes, sir.

Q. Did the break occur inside the hub of the wheel or outside?

page 287 } A. Inside.

Q. Did you measure to see how much inside?

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

Q. How much inside would you say it was?

A. Oh, a sixteenth or an eighth of an inch, possibly three-sixteenths.

Q. Who is your immediate superior?

A. Mr. J. C. Porter.

CROSS EXAMINATION.

By Mr. Williams:

Q. You don't know where that axle, as far as you are concerned, came from or where it went after that?

A. I know where it went after that.

Q. But you don't know where it came from?

A. Yes, sir, I knew by the records.

Q. How do you know it was a sixteenth, or an eighth, or three-sixteenths of an inch inside and wasn't an inch or two outside?

A. Well, I could very clearly remember that.

Q. That is the only way you know, is it?

A. Yes, sir.

page 288 } Q. You didn't record any paper memorandum at that time?

A. No, sir.

Q. You had a Mr. Campbell working for you at that time, didn't you—a motorman?

A. I don't recall.

Q. Do you remember Mr. Campbell?

A. No, sir.

Q. Don't remember him?

A. No, sir.

Witness stood aside.

page 289 } J. T. PORTER,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Porter, are you employed by the Virginia Electric & Power Company?

A. Yes, sir.

Q. What is your position with the company?

A. Superintendent of Equipment.

Q. How long have you been employed by this company?

A. About eight years.

Q. Did you go with the company when it was sold and passed to the Stone & Webster management?

A. Yes, sir.

Q. Where had you worked before that time?

A. Mostly with Texas properties of Stone & Webster—Houston.

Q. Before you came to Richmond how long did you work for the Stone & Webster organization?

A. Since 1902.

Q. What different positions have you held with that organization?

page 290 } A. Well, I worked in various departments, in shops, and had charge of equipment over various properties since 1908.

Q. What are some of the properties you worked with where you had charge of equipment?

A. El Paso and Fort Worth, Texas.

Q. Are you familiar with the single truck Birney safety car of the type similar to 1527?

A. Yes, sir.

Q. Familiar with car 1527?

A. Yes, sir.

Q. Is that up-to-date, standard equipment in general use in the United States or not?

A. Yes, sir, it is.

Q. Mr. Porter, did the axle that broke in car 1527 on July 11th, 1932, come under your observation after the accident?

A. Yes, sir.

Q. How do you know it was the axle that broke at that time that came under your observation?

A. The axle had a shop number on it, #42, which coincided with our records which we keep.

Q. What did you do with that axle when it came under your supervision?

page 291 } A. We pressed it out of the wheels, put the wheels on another axle and laid it aside.

Q. Are the wheels that came off that axle at that time in service now?

A. Yes, sir.

Q. Do you know where either one or both of them are?

A. I can easily find them. They are in a car here in town.

Q. Mr. Porter, is this axle over here the axle that broke under car 1527 on July 11th, 1932? (Pointing to axle in court.)

A. Yes, sir.

Mr. Robertson: Will you come over here and put the different pieces of that axle together?

Note: Witness puts pieces of axle together.

Q. Mr. Porter, is that axle an approved, up-to-date axle and good equipment?

A. Yes, sir.

Q. What does that axle weigh?

A. Approximately four hundred pounds.

Q. Mr. Porter, which end of the axle is where the break occurred?

page 292 } A. This one here. (Indicating.)

Q. How does it happen to be in two at the other end?

A. We put it in a lathe and cut it in two so as to analyze the metal.

Q. Starting at this end of the axle, where would the wheel on this end of the axle go?

A. It goes in this section of the axle right here. (Indicating.)

Q. Where does this extreme end part of the axle go?

A. That is the end on the journal box. A journal which supports the weight of the body works in here.

Q. Is the journal box the thing that the end of the axle fits in and revolves in?

A. That is a cast iron box that the end of the axle is supposed to go in to support the car body and carry the weight of the body and passengers.

Q. Is that the box you pull up with a hinge and has waste in it?

A. Yes, sir.

Q. What is this large piece of axle here?

A. It is the button.

Q. As you come in from the button and come to the next place where the size of the axle increases, what do you call that?

page 293 } A. That I don't know.

Q. Why is that increased size there?

A. Well, they have to have an offset in the dimensions in order to keep it from springing. If that was a straight piece of steel it would not stay in there.

Q. The purpose of that is to hold it in correct position?

A. Yes, sir.

Q. Working from the button on to the other end of the axle, tell me what is on that axle when it is under a car in operation?

A. There are two wheels on it. One wheel sits on the box in this location by measurement, and it goes out on this portion here, which is a fraction larger than this section here, and it is pressed onto this until you come down to this end and there is another wheel pressed on that end.

Q. Are those different offsets for the purpose of pulling different things on the axle in proper place?

A. Only this one. (Indicating.)

Q. Mr. Porter, how are wheels put on the axle?

A. They are bored to a certain dimension and put into a press with a good many tons pressure and pressed on to the axle.

Q. What do you mean by bored to a certain dimension? page 294 }

A. They put them in a machine that will bore out the metal to given dimensions, and make the distance necessary to press it into the wheel so it will be sufficiently strong to hold it in place.

Q. Like my hand would be the hole in the wheel, if you are

going to press it into the axle, is the part, or the hole, that the end of the axle is to come through, larger, or smaller, or the same size as the hole is further in?

A. It is practically the same size all the way through except at the point of entrance. Always make that a little bit larger and put a fillet on the end so the axle will enter under high pressure.

Q. What is a fillet?

A. Round offset, and that has a square cut.

Q. Why do they want a round offset instead of a square cut?

A. Because, if a square cut, it is a predominating weak spot and that is the way you have breaks.

Q. When you first inspected this axle after the accident were the wheels on it?

A. Yes, sir.

Q. Did you look at the wheel on the end of the axle that broke?

A. Yes, sir.

page 295 } Q. Did the break occur outside the hub of the wheel or inside the hub of the wheel?

A. Just inside the hub of the wheel.

Q. Mr. Porter, when that axle came in and you saw it, did it have those two holes in the short end of it here?

A. No, sir.

Q. You say this is the end that broke? (Indicating.)

A. Yes, sir.

Q. Which was the part of the axle that was inside the hub of the wheel, that broke inside the hub of the wheel?

A. From this point here (indicating) down to a given number of inches was inside the wheel.

Q. How did these two holes happen to be in the short end of the axle?

A. We sent that over to a place to have holes drilled out so they could get a piece of metal to make a test of it.

Q. Who took them to have that test made?

A. We did.

Q. Do you know who cut those pieces out of here where those holes are now?

A. J. R. Johnson Axle Company.

page 296 } Q. Were you present when they were cut out?

A. No, sir.

Q. Who made the test?

A. I don't know the name of the gentleman who made it.

Q. Now, Mr. Porter, why did the end of the axle opposite the end that broke happen to be cut in two like it is today?

A. So as to get a piece of material out of the opposite end from the break for the same kind of test.

Q. How did you happen to cut it in two at the point where you did rather than at some other point?

A. Well, I couldn't tell you. It was just a decision.

Q. Do you know why that decision was made to cut it at that place rather than in the middle, or up here, or somewhere else?

A. Well, only this: That part of the axle which we cut in two had been subject to some vibrations during the period of time it was in service.

Q. How did you cut it in two?

A. Put it in a lathe and took a tool and let it revolve until such time as it cut down deep enough just to allow a small piece to hold the two ends together until it was finally broken.

Q. After you cut it in two did you find these holes in it?

A. No, sir.

page 297 } Q. How did they get in?

A. They were drilled in at the same place and time the other was.

Q. What was the purpose of that?

A. To test the quality of the material—the steel.

Q. Look down here at the end of the axle that broke. Can you tell the jury what caused that break?

A. No, sir.

Q. What is this little thing like a teat that fits up there?

A. That is the last portion of the steel which gave way and finally is pulled apart, finally comes in two.

Q. Can you see any sort of defect in that axle?

A. No, sir.

Q. Can you see any defect in the other part of it here where it broke—the long end of the broken piece?

A. No, sir.

Q. What in your opinion causes the difference in appearance of the way this is around here, the way this other piece looks?

A. This portion here is rubbed, or worn. (Indicating.) The wheels were on the ends of the axle which fits into the journal box and it supports the weight of the
 page 298 } car, and, as this car was run into the shop, this portion, continuously rolling and turning, it rubbed against the wheel. The reason this part does not have the same kind of rub is because the wheel is separated, and this part was evidently dropped down, where this is inside and was protected and wasn't anything to hit it.

Q. What is this thing right here, that uneven place on the long end of the axle?

A. That is where this teat arrangement came out.

Q. Mr. Porter, are you familiar with the way axles are inspected by the Virginia Electric & Power Company?

A. Yes, sir.

Q. What is the system of inspection that the company uses?

A. When the axles are stripped of gear and wheels, as that axle shows, with nothing on it, they are washed off, cleaned and painted with a whiting and suspended in a sling and hammered on the end with a hammer and then examined to see if there is any oil or foreign matter of any kind which came out of a crack, showing on the surface of the whiting.

Q. What is the purpose of suspending the axle in a sling and hitting it?

A. That is to give vibration to the piece of page 299 } steel.

Q. What is the way in which grease shows up through the whiting?

A. Shows a dark streak where there is a crack.

Q. Is that the way cracks in axles are discovered?

A. That is the way the biggest portion are discovered.

Q. Suppose that car 1527 is put over the pit for inspection, are the axles washed off and whiting put on them to put them through an inspection to see whether or not there is any crack there?

Mr. Williams: I wish to note an objection to this. This witness has not shown that he is the one that attends to the inspection. On the contrary, the gentleman that just preceded him said he was in charge, and that was not done.

The Court: I understood Mr. Porter to say that he was familiar with the methods of making inspection.

Witness: Yes, sir.

The Court: Does that apply to all different classes of inspection?

Witness: Yes, sir.

The Court: Is that department under you?

Witness: Under me entirely.

The Court: Objection overruled.

page 300 } By Mr. Robertson:

Q. Are you the head man on equipment in the operating department?

A. Yes, sir.

Q. Is Mr. Hicks subordinate to you?

A. Yes, sir.

Q. Is Mr. Childrey subordinate to you?

A. Yes, sir.

Q. If car 1527 is put over the pit for inspection, do they get under there and clean the axle off, oil it and then paint it with whiting, then hit it with a sledge hammer to see if there are any cracks in it?

Mr. Williams: You are talking about an "if" case. Shouldn't we talk about what was done in this case?

The Court: I think he can explain the method of inspection.

Mr. Williams: Except this: When it comes to a specific case, I think he has to prove it was done in that specific case.

The Court: I overrule the objection.

Mr. Williams: Exception.

page 301 } By Mr. Robertson:

Q. If they put car 1527 over the pit to inspect it, do they clean off the grease and dirt and then oil it up and paint it with whiting and hit it with a sledge hammer to see whether they can find any cracks in it?

A. No, sir.

Q. Why not?

A. Because it is not practicable. For another reason: The wheels on the axle cover up a certain portion of it and it would be almost impossible to see unless a fracture was created and opened up big enough to be seen.

Q. Are you familiar with the system of inspection generally by street car companies of axles throughout the United States?

A. Yes, sir.

Q. Does the system of inspection of the Virginia Electric & Power Company accord to the best approved practice or is it less good or more good?

A. We follow the general method and approved practice that is used by practically every street car system in the United States.

Q. Do you know of any better system?

A. No, sir.

page 302 } Q. Well, now, when a car is inspected on the 1,000 mile inspection, what sort of inspection is given the axles?

A. Man gets under the car and looks at it with a light to see if there is anything visible that he could see, or which might show up.

Q. Why doesn't he wash off the grease and dirt and put oil on it and paint it with whiting and hit it with a sledge hammer and look at it?

A. We have found in our practice of inspection that the

portions of an axle which are most likely to give way are those which are covered. The other reason why is because the wheels and the gearing are onto this axle under the car and a hammer blow would not create any vibration sufficient to cause it to shake much, and it is too much load on it. It would be almost impracticable.

Q. When you say the parts most liable to break are covered, do you mean covered by grease or dirt or by the wheels and gears and motors on them?

A. Covered by the wheels and gears and bearings.

Q. Do you know of any company in the United States that, when a car is put over the pit for daily inspection, cleans off the grease and dirt and covers the axle with oil
page 303 } and then paints it with whiting and then hits it with a sledge hammer?

Mr. Williams: We object to the question as a real big question. What somebody else might do, some railroad in Washington or the State of Maine, has no bearing on this case in question. For that reason I object.

The Court: Objection sustained. I think it is not a question of what some other company does but what is good practice.

By Mr. Robertson:

Q. Do you know of any better way to inspect a street car over a pit without disassembling than the practice you follow?

A. No, sir.

Q. When a car is inspected on a 1,000 mile basis, do you know of any better method of inspection on the 1,000 mile basis than the method that you follow?

A. No, sir.

Q. Now, when a car is inspected on a 75,000 mile basis, what method of inspection do you follow?

A. Practically the same.

page 304 } Q. Do you know of any better method of inspection that is followed on the 75,000 mile basis?

Mr. Williams: I object to that. I think it has the same objection as the one previously mentioned.

The Court: Objection overruled.

Mr. Williams: Exception.

A. No, sir.

By Mr. Robertson:

Q. Now, Mr. Porter, when a car is brought into the over-

haul department to be overhauled, is that department subject to your supervision?

A. Yes, sir.

Q. What is done with a car when it is overhauled in the overhaul department?

A. Parts are taken off and repaired or replaced and put back in good order and put back in service.

Q. When you overhaul a car in that department and get down to the axle, do you take off the motors and gears and the parts on the axle?

A. We take out the motor but we don't take out the gears and wheels unless they are worn or need to come off.

Q. Why don't you do that?

page 305 } A. Because we don't think it is necessary to take them off if there is not anything the matter with them.

Q. Do you take the wheels off and look inside the hub at the piece of axle inside the hub to see whether it is good, bad or indifferent?

A. No, sir.

Q. Why not?

A. If we undertook to strip an axle every time we took it out at certain intervals and look at it, we would do it more harm than good, because the tonnage it takes to remove the wheels makes a stress on it.

Q. What is that pressure?

A. Wheels are put on with 60 tons pressure, or 100 or 150 tons.

Q. If you keep taking them off and putting them on, do you mean that is liable to do more harm than good?

A. We are satisfied it would.

Q. Suppose an axle comes in there and the wheel is worn out, or broken, or flat, *when* do you do then?

A. If it comes in and the wheels have to be removed, the gear and the wheels have to be removed, the axle is tested and examined carefully to see whether it is
page 306 } cracked or worn down below dimensions, and, if it is found to be good, it is put back in service.

Q. After you take those wheels and gears off, what sort of test do you give the axle?

A. Clean it and paint it with whiting, put it in a sling and hit it with a hammer and look for cracks, put it in a lathe and find out whether it is straight, or round. If it is found to be good, we use it again.

Q. Mr. Porter, have you visited various shops of street car companies in different parts of the United States?

A. Yes, sir.

Q. Are you familiar with the practice, or work, in machine shops of street car companies throughout the United States?

A. Good portion of them.

Q. Is your shop a well equipped, up-to-date shop or a dinky shop?

Mr. Williams: I object to the comparison.

Mr. Robertson: I withdraw that.

Q. Is your shop an up-to-date, well equipped shop, or is it a poorly equipped shop and not up-to-date in equipment?

A. Our shop is up-to-date and very well equipped.

Q. Do you know of any better practice followed anywhere else—

page 307 } Mr. Williams: I object.

By Mr. Robertson:

Q. Do you know of any better practice that can be followed in any street car shop than is followed in your shop?

The Court: What kind of practice?

Mr. Robertson: The practice of doing work in that shop in the overhaul department, overhauling street cars.

The Court: Objection overruled.

Mr. Williams: I note an exception.

By Mr. Robertson:

Q. Do you know of any better practice in overhauling street cars than the practice you follow in your shops?

A. No, sir.

Q. Mr. Porter, was a record kept of this axle to show the life story of the axle?

A. Yes, sir.

Note: Paper handed plaintiff's counsel by defendant's counsel.

Mr. Williams: Will you ask him what is the number of that axle? Does he know?

page 308 } By Mr. Robertson:

Q. Can you tell, or have you a way of telling, the number of that axle?

A. Number 42.

Q. Is that the number of the axle?

A. Yes, sir.

Mr. Robertson: Go there and point out the number on the axle.

Witness: Here it is. (Pointing to end of axle.)

Q. I hand you paper, which is already marked Defendant's Exhibit #4 (first trial), and ask you if that is the record of axle #42?

A. Yes, sir.

Q. I will ask you to step over here and explain to the jury what that record means.

Mr. Williams: Can't he explain from where he is?

Mr. Robertson: I don't think he can see the figures on it. It is very small.

The Court: I will let the witness do what he thinks is most convenient.

A. Beginning on this page is the car number, 1508. The axle was put in service 3/16/27 and removed 4/11/29. It was removed and the flanges were welded. It page 309 } was put back in car #1542, 4/24/29. It was taken out of that car on 5/19/31. Wheels were worn out. New wheels were pressed on it and put back in car 1527 on 6/18/31. Removed on 7/11/32 broken axle.

By a Juror:

Q. What was the last date it was removed there?

A. 7/11/32 is when they were pressed off.

By Mr. Robertson:

Q. What are these figures out here on the left-hand part of that report?

A. Those are the wheel numbers that were on that axle during its life.

Q. Is there anything on there to show the total number of miles that that axle had been used altogether?

A. Yes, sir, its mileage is here. Shows the mileage it was run from the time it was put in until it was taken out of various cars. The first time it was put in use it ran 62,561 miles. It was removed at that time and put back into #1542 and ran 84,902 miles. It went back into #1527 and then ran 42,957 miles until when it was broken.

Q. When the wheels were taken off that axle before the axle broke, when the wheels were taken off at the time shown in your report, would that axle be inspected by page 310 } being cleaned and oiled and whitened and put in a sling and tested?

A. Yes, sir.

Q. Would it be done each time the wheels were changed?

A. Each time the wheels were removed from the axle.

Q. When was the last time this axle had been subjected to that test before July 11th, 1932?

A. 5/19/31 and 6/18/31.

Q. That would be a period of approximately how much time?

A. Approximately one month.

Q. How far had the axle run from the time of the last testing in the way you have described until the break occurred?

A. 42,957 miles.

Q. It ran that distance in one month?

A. No, sir. It ran that between 6/18/31 and 7/11/32.

The Court: He evidently misunderstood the question about the time.

By Mr. Robertson:

Q. How much time was it between the last inspection of that axle, when the wheels were taken off and tested in a sling, and the time the break occurred?

A. The axle was removed 5/19/31 for worn wheels.

Q. Was it tested in a sling in that time?

page 311 } A. It was tested between that time and 6/18/31.

Practically a month's time elapsed between the time it was removed and went back into service.

Q. It was given the sling test during that thirty days?

A. Yes, sir.

Q. How much time elapsed from the time it was put back in service until the break occurred?

A. From 6/18/31 to 7/11/32.

Q. Slightly more than a year?

A. About thirteen months.

Q. During that period it ran what?

A. 42,957 miles.

Q. Mr. Porter, if the break in this case occurred inside of the hub of the wheel, is there any way that the part of the axle that was covered by the hub of the wheel could have been inspected without taking the wheel off?

A. No, sir.

Q. Mr. Porter, I hand you a blueprint and ask you what that is?

A. That is a blueprint of the dimensions of the axle which is used in the Birney cars and car No. 1527.

page 312 } Q. When you take that axle and are going to put the wheels on it, what is the procedure that is followed? If you are going to assemble the

equipment, or gears, of the axle on the axle, how do you go about it, and what is the sequence of the things that you do? Start out like you are going to begin at the beginning and go through until the axle had everything on it that was going on it to put it in service.

A. We put the gear on it. We put the gear in a wheel press. That is built up to enormous pressure. We suspend the gears in that, suspend the axle so it can be handled. This end of the axle is put in the hole, the hole being bored a little bit larger than this portion of the axle up to this point. Then that gear is pressed onto this section up to a given dimension. After that is pressed on, we suspend the wheel in the same fashion and press this axle in the wheel up to here, and then the axle is turned around in the sling, another wheel is put into the press and this end of the axle is pressed in that wheel on the other end, and it is set a certain distance apart. It is then set away to be used in another car.

Q. After you put the gear on it, why do you put the wheel on at that end at that time instead of putting the
page 313 } wheel on the other end and coming back to that?

A. The gear is hard to get on and we have to have the center piece on before we get the two end pieces on, therefore, we put the gear on first. Being this end of the axle is the end which is in the operation we are working on, it saves time by working on that end of the axle rather than keep turning it around and working on opposite ends.

Q. Now, Mr. Porter, when you put the gear on the axle, is it essential that the gear be placed at a precise position on the axle, or does standard practice admit of any variation in the precise place on the axle where the gear is put?

A. The gear goes on, you might say, to site. The tolerance allowed is very small. It has to be almost identical with the offset in the axle to make the bearing seat and axle seat come into play.

Q. What do you mean by the word, "tolerance"?

A. In pressing the gear on within two or three one-thousandths of an inch of its proper location.

Q. What is permissible tolerance?

A. Permissible variation in the distance from the motor bearing.

page 314 } Q. After the gearing is put on that axle and the wheel is put on the same end that the gearing is on, is there any tolerance permissible regarding the precise place on the axle where that wheel is put?

A. I don't know what they claim is permissible; but standard practice, and it is done when the first wheel is put on the axle, should be that, or approximately to that, as close

as you can press it with the high pressure, as close to its dimensions as you can. The location of that particular wheel within, I would say, an eighth of an inch of the proper location would not materially affect the operation of the axle, because the axle itself operates in loose bearings. Each journal box has approximately a quarter of an inch loose motion in the truck frame and would not materially affect the operation.

Q. When a car is in operation does the whole axle turn or the wheels turn on the axle?

A. The whole axle turns with the wheels.

Q. When you come to get the gauge between the wheels when both are put on the axle, how much tolerance is allowed in the gauge?

A. None; there is no tolerance; it is supposed page 315 } to be true to gauge. This wheel revolves around on the axle, and as the last wheel is pressed on the axle. The men have a gauge that drops over the flange, and it is watched until the flange of the opposite wheel comes up and drops in the gauge line. You come on up with a very slow speed until it is the exact gauge measurement.

Q. Did this axle break on the end where the gear was or on the opposite end?

A. On the end where the gear was.

Q. Did it make any difference whether or not the wheel on the end where the axle broke was precise or whether there was this tolerance in it that you have mentioned?

A. No, sir.

Q. Would the tolerance affect the situation or not?

A. No, sir.

Q. Now, then, you said you assembled the stuff on the axle by putting the gear on and then putting on the two wheels. What is the next thing you do when you are getting ready to use the axle after you do that? You put the gear and both wheels on. What is the next thing?

A. We have to take the wheels to a pit, or to page 316 } a place in the track where the rails have been removed, and put them on a horse or jack and push them back under the car into its location in the truck.

Q. Then, do the motors rest on that axle anywhere?

A. Yes, sir, the motor goes onto the center portion of the axle.

Q. Do those motors have to be in precise position, or is there some tolerance as to that?

A. They have to be in exact, precise position in accordance with the rotation of the gear.

Q. Where was that axle manufactured?

A. J. R. Johnson Axle Co., here in Richmond.

Q. Is that the company of which Mr. George Street, Jr., is President?

A. Yes, sir.

Q. Mr. Porter, did you bring these pieces of steel here at the last trial or some one else bring them?

A. Some one else brought them.

Q. What do you mean by a test of that axle for material?

A. Metallurgists set up an analysis of steel that has certain strength in it, and, when an axle is bought, it is ordered under this specification. We take a section out and have it tested to see whether they come up to the page 317 } required specification, which is set by some society of engineers or metallurgical men.

Q. Is that why those holes were bored in, to get material out?

A. Yes, sir.

Q. What do you mean by tensile test?

A. I couldn't tell you.

Q. Now, Mr. Porter, if that car was being operated on the Petersburg Turnpike in the neighborhood of Halifax Avenue and the axle broke that carried the left front wheel, south-bound—Suppose that this car 1527 was being operated south-bound on the Petersburg Pike at Halifax Avenue, and the axle that carried the front left wheel broke so that the wheel was tilted over on an angle, and then you turned the car around the way that you would operate it with the same end going front northward, could you run it into the barn on its own power?

A. No, sir.

Q. Why not?

A. Because you would have one loose wheel, or one wheel that would not play in its proper location.

Q. Now, Mr. Porter, does the blueprint which page 318 } I handed you a few minutes ago show the specifications of that axle for dimensions?

A. Yes, sir.

Q. Now, Mr. Porter, step over there where the jury can see it and point out to them the specifications for the dimensions of that axle on that blueprint.

A. According to this blueprint that axle is made—This end of the axle, at the end of it, right at the end, is about half an inch from the base across. This section is turned down small, six inches. The next section it has a reduced area, is 2 9/16 inches. There is a gear seat of 11 3/16 inches. The gear is finished a distance of 6 1/8 inches. That is another dimension. Then, it is shown from this edge of the

gear seat to the center section, to the absolute center of the axle, to be $12\text{-}11/16$, and from the center of the axle to the other offset would be $17\text{-}5/16$ more. Then, you have a section in here that is laid off that is just slightly larger. It does not give any dimension but it is a fraction larger, and a collar goes on that for a distance of one and a half inches.

Q. What sort of collar?

A. That is an adjustable collar which keeps lost page 319 } motion out of the bearings on the motor. Then we have another distance of the same dimension, $12\text{-}11/16$. Then we have a reduced area again of 2.9, and another reduced area of six inches and a button of $1/2$ an inch.

Q. Have you a rule in your pocket?

A. Yes, sir.

Q. Show me on there what $1/16$ of an inch is, will you, please, sir?

A. Any one of these given sections. (Indicating).

Q. Mr. Porter, have you had that rule tested in the Bureau of Weights & Measures of the City of Richmond to see whether or not it is accurate?

A. Yes, sir.

Q. When did you have it tested?

A. Day before yesterday.

Q. I understood you to say that, when you looked at this broken axle, when it came into your department, you saw that the break had occurred inside the hub?

A. Yes, sir.

Q. About how much inside the hub?

A. I would say anywhere from nothing to three thirty-seconds.

Q. Have you since measured the broken piece of that axle to see how those measurements are?

A. Yes, sir.

page 320 } Q. Can you do it again now?

A. Yes, sir.

Q. Will you make the measurement and show what your measurement discloses, please?

A. From 15 to $15\text{-}/32$ inches.

Q. Was the way that that wheel was put on that axle when the break involved in this case occurred the correct way or incorrect way of putting it on there?

A. Correct way.

Q. Was there any amount of tolerance there within the limits of the tolerance allowed by first class practice, or more, or less?

Witness: Either way?

Q. (Continued) I mean was there too much variation from good practice or not?

A. No, sir.

Mr. Robertson: We offer the blueprint in evidence and ask that it be marked Defendant's Exhibit Number 7.

Note: Blueprint filed and marked Defendant's Ex. #5.

page 321 } Q. Is that ruler of yours that you have been using, tested by the Bureau of Weights & Measures, equally precise, or more precise, or less precise than these wooden rulers that people put out for advertisement?

A. It is less liable for mistake in this ruler than the ordinary advertising ruler.

Q. Have you got with you any pictures of any axles that broke inside the hub?

A. Yes, sir.

Mr. Williams: I object to it as having no bearing on this case.

Mr. Robertson: I don't claim it is a picture of this case. I want to show what that character of break looks like.

Mr. Williams: I think it is confusing and misleading.

The Court: If you are going to offer the pictures in evidence, the objection is sustained.

Mr. Robertson: Well, I will not offer them, then.

The Court: You will save time not to.

By Mr. Robertson:

Q. Mr. Porter, have you got either the original or a copy of the purchase order under which that axle was bought by your company from the Johnson Manufacturing Company?

page 322 } A. I have a copy of it—not a copy of it—I just have the number which we purchased it under.

Q. What was that number?

A. The number is 28839.

Q. Do you know where the original purchase order is?

A. In the purchasing department at the main office.

Q. Do you have some breakages in all types of street car axles?

Mr. Williams: I object as having no bearing on this case.

Mr. Robertson: I am almost through. As a matter of fact, it is known in the street car business that these axles, when they do break, break inside—

Mr. Williams: I object. I don't think that that statement should be made.

Mr. Robertson: I think it is a proper statement.

The Court: Ask your question and I will rule on it when you ask it.

By Mr. Robertson:

Q. Do you have some breakages in all types of street car axles?

page 323 } The Court: Do all types of street car axles break? Is that the question?

Mr. Robertson: That is not the words, but that is the sense.

The Court: Are you going to follow that up with another question?

Mr. Robertson: Yes, sir.

The Court: What is the object of the question?

Mr. Robertson: To show that there are some breakages in all types of axles; that breakages usually occur where the axle is covered up.

The Court: I will let him answer that. I think he said he did.

Mr. Robertson: I don't remember.

The Court: Go ahead and ask the question.

Note: Question repeated to the witness.

A. Yes, sir.

Q. Where do those breakages usually occur if there is any point in the axle where they usually occur?

A. Practically every axle I have ever seen page 324 } broken was broken inside the wheel.

Q. Do you know what made this axle break?

A. No, sir.

Q. Do you know the length of car #1527?

A. About 28 feet.

Q. Do you know the weight of it?

A. Somewhere between 17,700 and 17,900 pounds.

Q. How many of those single truck Birney cars of the type 1527 does the Virginia Electric & Power Company operate, all told, where it runs street cars, if you know?

A. I don't know the exact number.

Q. Do you know the approximate number?

A. Somewhere between 300 and 600.

Q. How many do they run in Richmond?

A. A hundred and twenty-six, I think.

Q. Do you know any other towns where they are operated by companies other than the Virginia Electric & Power Company?

A. In Knoxville, Tennessee, they are in operation, in Dallas and Fort Worth, Texas.

Q. Mr. Porter, supposing that the operator of a car applied the brakes on a car to stop it roughly, would those brakes grip the axle and twist it and strain it in such a way as to be liable to break the axle?

A. No, sir.

page 325 } Q. Why?

A. Because the brake shoes are applied by pressure to the wheels. Of course, there is more strain on the axle when applied. The axle usually is designed to be strong enough to stand the pressure necessary to apply the brakes to stop the wheels.

CROSS EXAMINATION.

By Mr. Williams:

Q. I notice you answered him no, it would not put a strain on the axle and then you closed by saying of course the brakes would put more strain on an axle than if you didn't have any brakes. Do you run any car without brakes in the city?

A. I didn't want to leave the impression that I thought that the axle would bend and jump around under the street car in the way he asked the question, but I did want him left under the impression that the pressure is greater when the brake is applied.

Q. Now, Mr. Porter, do you remember the time before when you testified and you said there was 1/15 to 3/16 of an inch of that part of the axle which you measured a little while ago—

page 326 } Mr. Robertson: If you are going to question him on the former testimony, I want to use the record—

Mr. Williams: I asked for it but you didn't lend it to me.

Mr. Robertson: No. I didn't make up my mind. (Handing former testimony to Mr. Williams.)

By Mr. Williams:

Q. Mr. Porter, would you bring your rule around here a minute and explain to His Honor and the jury what it is that made this ring around this broken piece of axle for a distance variously proven by your rule there to be from 3/16 to 6/16 from the break?

A. When a wheel is bored the hole is bored straight through from side to side, leaving a square shoulder, therefore, on the end on that side of the wheel that the axle is going to enter first, there is always a small fillet so that the axle will enter the wheel without boring it out. This little mark is the mark where the tool strikes. I don't know what the dimension is, but less than one ten-thousandths. From the time they put the pressure of the wheel around this axle and the number of minutes it was on it, naturally left a mark at that portion which would fit tightest on the axle.

Q. Don't it, as a matter of fact, show that por-
page 327 } tion of the axle that was left outside of the hub
rather than what you are talking about?

A. No, sir.

Q. You say positively that this rim was not made by the fact that it was occupied by the hub seat from there to the other part of the axle?

A. I am positive that it is not.

Q. You said something about one ten-thousandths of an inch. Take that rule and show where you get one ten-thousandth of an inch?

A. I couldn't do it.

Q. Take your rule and show where it is $1/6$ outside of that ring.

A. The diameter of the bore is not the length of this axle. The diameter of the hole is the bore. This mark which you see I say is not over one ten-thousandth larger in diameter than this portion which you see on this side.

Q. It is imperceptible, isn't it?

A. Yes, sir.

Q. Even imperceptible to the naked eye?

A. No, sir; I can see it.

Q. You can see the mark and you can see it is not raised
above the part of the axle here?
page 328 } A. Yes, sir.

Q. The distance from this mark to the extreme outer part of the break is a distance of how much by your rule?

A. Apparently as much as a quarter of inch.

Q. Take your rule and measure it. What I mean by that is—Measure to the extreme furthest part of the axle which shows an abrasion or break.

A. I can't measure that because I can't get these two portions of the axle close enough together to measure it.

Q. Get it as close as you can and measure it for the purpose of the record. I will help you.

A. As well as I can figure, one guess would be as good as another.

Q. I asked you the distance by your rule from this mark, which I have described to the jury as a circular rim, or ring, around the axle, which appears to be a mark left there probably by the resting of some object for a time on the axle, to the outer extreme point of the break—the furthest point of the break.

A. That would all be on one piece of axle.

Q. Don't you see from the left hand piece of page 329 } axle, or the one that remains in the wheel, or the long piece of axle, that there is a grooved side on that that also constitutes a portion of the distance that the break covered?

A. I don't understand you.

Q. What I am asking you, Mr. Porter, is this: The piece of axle, which is the long piece, has a deepened groove. That was made by what?

A. From indications it was rubbed onto the wheel on this portion of the axle.

Q. Wouldn't it be caused by hitting against the inner piece of the break of the smaller piece of the axle?

A. There is the smaller piece of axle. (Indicating.) There is absolutely no mark that it rubbed there.

Q. Inside I am talking about.

A. Inside or any other place. That is absolutely a clear axle there is not a sign of a rub.

Q. This is not rubbed here? (Indicating.)

A. No, sir.

Q. Feel it and see how smooth it is.

A. That is clear.

Q. Is it smooth?

page 330 } A. Yes, sir. This is the end of the metal, and it has not been rubbed.

Q. Can you see this part by my finger is polished right there? There is no rust there?

A. No, sir.

Q. You don't see any?

A. No, sir.

Mr. Williams: I offer it to the court and jury as evidence of the fact that it is rust.

Witness: This (Indicating) is the last portion of this piece of axle that gave way. If this end of the protruding portion sticks out further than that portion which you say was rubbed, it does not show any sign of any impression. Then how can the lower portion be and the protruding portion not be.

Q. If the axle goes inside the hub, how did that rub against the hub, which is larger than the axle?

A. The wheel is on this portion of the axle. The center of this axle is approximately 13 or 14 inches above the rail. This portion of the axle, the longest piece of axle, has no support other than the wheel on this end of the page 331 } axle, and the pressure of the axle bearing at this location allowed this axle under the car to tilt from the wheel on the rail to the lower portion over where, therefore this portion rubbed against the wheel.

Q. If you made an inspection and that portion of the axle, the long part of it, the part that shows the smooth surface, or rounded surface, was dropped lower than the other part of the axle and was rubbing against the hub, why didn't you see it on inspection?

A. It didn't drop until after the axle broke and got off the rail.

Q. You mean all of this rub or rounding part on this part of the axle was done between the time that the car went off the track and it got back to the barn?

A. Yes, sir.

Q. You make that as your statement?

A. I am positive of that.

Q. Now, Mr. Porter, did I understand you to say that the car went into the barn on its power?

A. Yes, sir.

Q. And how many wheels?

A. Four.

page 332 } By a Juror:

Q. This extension (Indicating), does that protect a crystalization of the steel?

A. No, sir.

By Mr. Williams:

Q. What is the number besides 42 on that axle, which you say is number 42? What is there besides that?

A. There is the manufacturer's number which pertains to their order number and heat number.

Q. I ask you to look at this and tell me what this is on the end adjacent to the 42?

A. I don't know.

Q. Isn't that a '6?

A. Not to me.

Q. What would you say it is?

A. Mark.

Q. What kind of mark is it?

A. It looks like a misplaced mark by a die.

Q. It is formed in the nature of a 6, isn't it?

A. No, sir.

Q. You wouldn't say that is anything like a 6?

A. No, sir.

Q. notice on the other piece some marks.
page 333 } What is this 5019?

A. That is the manufacturer's heat number.

Q. What is the other number we have been referring to? You call it 42. The other place, the hieroglyphic next to the 4. It may be a 6 or some other mark.

A. I couldn't tell you.

Q. You don't know what that is for?

A. No, sir.

Q. But you use that as your registration or record in your office, the number that you have referred to?

A. Forty-two, yes, sir.

Q. Where is the list you have describing the life of career of the axle? (Examining paper.) It says, "Broken on Oakwood line". What does that mean? I am referring to Defendant's Exhibit #4.

A. I see a pencil mark there, "Oak Grove Line".

Q. What does that mean? Broken on Oak Grove line?

A. I don't know.

Q. Is the line out there on the Petersburg Pike called Oak Grove line?

A. I don't know.

Q. How long have you been in the street car business?

A. Since 1898.

page 334 } Q. You wouldn't know what that pencil mark was? Whose writing is that, do you know?

A. No, sir.

Q. Whose would it appear to be? You are supervisor of all mechanics out there.

A. I would presume it to be some of the clerks in my office.

Q. Now, this axle you say has been through a career of the use of three different sets of wheels; is that right?

A. No, sir—two.

Q. Two sets of wheels?

A. Yes, sir.

Q. Do you mean to say it came here with one set and you put it on another set or you put it on two sets yourself?

A. We bought the axle from one company and wheels from another and assembled the wheels on the axle ourselves.

Q. And in assembling the wheels on the axle you put it on by hydraulic pressure, didn't you?

A. Yes, sir.

Q. And the weight in putting those wheels on there was from 60 to 100 or 150 tons; is that right?

A. No, sir.

Q. Tell us what it was?

page 335 } A. The wheels are pressed on at approximately sixty tons pressure.

Q. What about 100 to 150.

A. That is the removal.

Q. When you came to take the wheels off this axle, you took two sets off or one set?

A. We took two sets off, including the one that was broken.

Q. I mean before the break you only took one set off?

A. Yes, sir.

Q. Now, that was what you might call a progressive fracture, wasn't it, Mr. Porter?

A. That is what we term it, yes, sir.

Q. In other words, it didn't arise in a night or day?

A. I don't think so.

Q. As a matter of fact, could you say it happened in less than a month, or two months, or six months?

A. I couldn't say.

Q. May have taken as much as six months?

A. It is possible.

Q. Now, didn't you say this? You were asked (and I asked you the same question a moment ago) on page 152 of the record of the previous trial, referring to the beveled parts of the axle, which is the long piece:

page 336 } "Q. You see the edges of these two pieces have been in that state so long that it has become beveled, hasn't it? This fracture appearing on the long piece on the outside has been in process of going to break for so long that it has almost become beveled by the friction of the other piece against it, isn't that right?

A. No, sir, it is not right.

Q. Say what it is. Is it beveled or not?

A. It is beveled.

Q. Do you know what beveled it?

A. Yes, sir. It wore working onto the wheel as it was coming to the shop from the scene of the accident."

Is that true?

A. Yes, sir.

Q. And further:

"Q. You mean coming from the scene of the accident or

where it wore out rubbing against this piece here that was attached to it?

A. If it wore against that, you would get the identical with that on this piece as on that piece.

Q. This piece, this small fracture, which you say was the last piece to break, doesn't show any kind of page 337 } rubbing or friction?"

Talking about the smoothness of the metal:

"Q. You tell the jury that that small piece is not as smooth as your hand inside, up and over the outside edge?

A. It might be smoother than my hand, but, nevertheless, there is no friction on this end."

Do you still stick to that statement?

A. Yes, sir.

Q. You were asked this question:

"Q. Will you tell the jury how wide that piece is? (Indicating.)

A. I would say approximately $7/8$ of an inch."

Do you remember what piece you were talking about?

A. My recollection of that is a small portion on the short end of the axle which shows a slight bulging.

Q. You were asked this question: "That break occurred within the 42,000 miles that it ran?"

A. Yes, sir.

Q. And that could be within the thirteen months, sometime within the thirteenth months; it could have been going on the whole 13 months, isn't that right?

A. It is possible.

page 338 } Q. When you pressed off the previous pair of wheels, which you say were defective, and put on the others—

Mr. Robertson: He said worn out or broken down or something.

By Mr. Williams:

Q. When they wear out, they are gone, aren't they?

A. Yes, sir.

Q. When you pressed off these worn out or broken down wheels, the first set, in inspecting the axle, all visible parts, you didn't clean it off and use chalk to find out whether there was any crack or break in it, did you?

A. When we pressed the first pair of wheels off this axle we cleaned this axle with coal oil, painted it with whiting and suspended it in a sling and hit the end with a hammer, and examined it carefully for any signs of fracture that might show through the whiting. There was nothing found to indicate that this axle was broken or cracked, and it was put back in service.

Q. You were asked on page 155:

“Q. During those 14 months did you ever inspect this axle?

A. Yes, sir. We looked at it, didn't inspect that particular portion.

page 339 } “Q. Looked at it with the dirt over it or with the dirt taken off?

A. No, sir, it was not wiped off. Looked at it as is.”

Witness: That is right.

Q. (Continued:)

“Q. It was not wiped off, the grime and grease and dirt and what not left on and you looked at it, and that was a good axle?

A. Yes, sir.”

You made that statement in answer to that question?

A. Yes, sir.

Q. Mr. Porter, if a car is going down grade at thirty or thirty-five miles an hour and there is an application of the brakes by a learner, and it has a defective axle, would that not be inclined to wring off the axle?

Mr. Robertson: I object to that. There is no evidence that the brakes were applied as Mr. Williams states in his question.

The Court: Read the question.

Note: The question was repeated by the stenographer.

page 340 } The Court: Is that a hypothetical question?

Mr. Williams: Yes, sir, from the evidence. Mrs. Nissen stated the brakes were applied as it passed over Halifax.

The Court: Where is the evidence that the axle was defective?

Mr. Williams: The fact that it had that break in there. It didn't happen over night. He said it could be from a month to thirteen months.

The Court: He can answer the question.

Mr. Robertson: Defendant excepts for the reasons stated.

A. In my opinion, the axle, or any other part that was approximately broken in two and had an unusual strain applied to it, would break at that particular time.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Porter, what is the normal life, in miles, of an axle of the type that we are talking about in this case?

Mr. Williams: I object to that as not being in rebuttal and as having been part of his direct case. He has the full record there.

The Court: Let him answer the question. Ob-
page 341 } jection overruled.

A. Anywhere from 500,000 to 750,000 miles. That mileage is the usual mileage when the bearing seats are usually worn to justify replacing the axle.

Q. Is that axle worn at the bearing seat or anywhere else to such an extent as it should be replaced?

A. No, sir.

Q. Do you know what the rated speed per mile is for car No. 1527?

A. On level ground the car is supposed to have free running speed of 27½ to 28 miles an hour.

Q. Is that the maximum?

A. Maximum free running speed per hour.

Q. Of course, if it ran down hill, it would run faster?

A. Yes, sir.

Q. Mr. Williams asked you whether or not the dirt was gotten off that axle at any time between the last time the wheels were taken off and the time of the break so that the axle could have been inspected. If the break had occurred inside the hub, would any dirt get over the axle inside the hub?

page 342 } A. No, sir.

Q. If you clean off the dirt outside the hub and look at the axle would that show anything inside the hub?

A. No, sir.

Q. Do you know enough about steel to look at that axle

and tell whether or not there has been any crystalization of the axle at any point?

A. No, sir.

Q. You mean you don't know?

A. No, sir.

Q. You mean you do know or don't know?

A. I don't know. I don't know what crystalization is.

Q. When an axle is in service, what is the nearest piece of mechanism on the axle to the wheel?

A. The gear.

Q. If, when that car was being brought back into the barn, the wheel where the break occurred was tilted over on an angle, would any part of that wheel be up against any part of the mechanism along the axle?

A. At the top portion of the wheel. If an axle is in the original position, unbroken, say like that (Indicating) and this got broken off, and had a wheel 26 or 27 inches in diameter, if that axle had a tendency to tilt like that, page 343 } then, being broken off, it wouldn't naturally hold up its portion of the load, and this wheel that had been sitting in this way (Indicating) would be sitting at an angle. The top part of this wheel stands on the journal box, and this part of the wheel could have rubbed on it on the inside.

Q. Would that have held the wheel in such a position that it would make a straight drag or a wabby drag?

A. It could be either.

Witness stood aside.

page 344 }

T. G. VAUGHAN,

a witness on behalf of the defendant, being recalled, further testified as follows:

By Mr. Robertson:

Q. Mr. Vaughan, what is the name of the street car line that runs down there from where they said this car started in this case down to Stop #3 on the Petersburg Pike and then comes back again?

A. Oak Grove line.

Witness stood aside.

page 345 }

GEORGE L. STREET, JR.,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Street, your name is George L. Street, Jr.?

A. Yes, sir.

Q. What is your business?

A. Car axle manufacturer.

Q. With what company?

A. J. R. Johnson & Co., Inc.

Q. How old are you?

A. Fifty-two and a half.

Q. What technical education have you had?

A. Lehigh University, five years course in mechanical and specializing in metallurgical engineering.

Q. Did you graduate at Lehigh?

A. Yes, sir.

Q. In what year?

A. 1906 as Mechanical Engineer.

Q. Mechanical engineering degree?

A. Yes, sir.

Q. Did you have any other schooling after
page 346 } that? I mean at a school?

A. No, sir.

Q. Then, when you got out of school in 1906, what did you do?

A. In the spring of 1906 I went with the York Safe & Lock Company. My job was supposed to have been estimator in the mill, but I immediately fit into testing and mill work.

Q. Where was that located?

A. York, Penn.

Q. How long did you work there?

A. About a year.

Q. Then, what did you do?

A. I went with the Auto Car Company, foreman of engine tests.

Q. Where?

A. Ardmore, Pa.

Q. What kind of work did you do with that company?

A. I was foreman on engine tests.

Q. How long did you stay there?

A. I stayed there until the end of 1907, and then I came down here with this company; J. R. Johnson & Co., Inc.

Q. In what capacity did you come to this company 347 } pany?

A. I came here at two dollars a day to see what I could do.

Q. What various positions have you occupied with J. R. Johnson & Company, Inc.?

A. Just about all.

Q. From bottom to top?

A. Yes, sir.

Q. Are you now at the top or bottom?

A. I am now President of the company.

Q. Mr. Street, did your company manufacture this axle that is involved in this case?

A. Yes, sir.

Q. How do you know you did?

A. It bears our identification marks.

Q. Will you show the jury what those marks are?

A. I don't know on which one, but it shows our serial shop number on one side or the other. Shows here. (Indicating.)

Q. Mr. Street, in your business what is a bloom?

A. A bloom is a forging that is made. The bloom itself is produced by a steel rolling mill from an ingot. An ingot is a large mass of steel, generally square, or octagonal in shape that is forged out of the molten steel, and the steel is allowed to

solidify in this mould until it reaches a temperature 348 } where it shrinks from the walls of the mould and then the ingot is pulled out of the mould and taking to a heating furnace and there the ingot is allowed to reach one temperature—every part reaches one temperature.

Q. Where do you buy your blooms?

A. We bought that bloom from Allen-Wood Iron & Steel Co. of Pennsylvania.

Q. Is that a recognized company for manufacturing blooms?

A. Yes, sir, one of the best in the country to-day.

Q. How is that bloom shipped from that company to your company?

A. The ingot is rolled in a rolling mill—

Q. How did you get it from that company to your company? Did it come in a box car or by truck or how?

A. It comes on a freight car—a long stick.

Q. About how long?

A. Thirty, thirty-five or thirty-eight feet long.

Q. Do you buy any blooms from companies other than the one you have named?

A. Yes, sir.

Q. Where else do you buy them?

A. Carnegie Steel Company, Bethlehem Steel
 page 349 } Co., Central Iron & Steel Co., Republic, Pitts-
 burgh Crucible—in the open market.

Mr. Williams: What is the relevancy of that? I object to it. It is just delaying.

The Court: Go ahead.

By Mr. Robertson:

Q. Now, Mr. Street, when this bloom in the length that you have stated comes in on a flat car to your factory, I am going to ask you to start at the beginning and tell us how you unload it, what do you do with it from the time you commence to unload it until it, becomes an axle?

A. Well, it is a long story. The sticks come in open top freight cars and they are unloaded with a magnet and crane. They are put down on the yard, and, as orders come in requiring certain weights of axles and certain sizes, we select a bloom of proper size and cut from it with an acetylene torch a billet or bloom of sufficient size and weight to forge one of these axles. That billet is cut with an actylene torch. It is nicked all the way around and allowed to cool, and
 page 350 } then drop a heavy ball on it, weighing something
 over three tons. That ball fractures the steel cold at the point where it is nicked. That gives a cold fracture. About a 6 x 6 bloom that would be, I judge, and a fracture about 5 3/4 inches square, possibly a little more than that. That is a cold fracture on each end of the steel used to make the axle. That fracture is examined with the eye or a magnifying glass, and, if there is any indication of unsoundness in it, naturally we would not receive it; but, if it is sound, we put it under a hammer, to be heated and forged, put it in the heating furnace and slowly heat it to a temperature around 2,100 or 2,200 degrees Farenheit. It is withdrawn and forged under a steam hammer. The steam hammer used for that size is six or seven or maybe eight thousand pounds. You can go back to the shop records and see what was used, but six thousand would be ample. It might have been seven or eight. That means actually that is the weight that falls on the billet or bloom. That is backed by steam pressure from the boiler, driving the hammer, 110 to 120 pounds to the square inch, with a 24 to 26 or 28 inch diameter piston, and that drives that weight on with the added pressure of the steam. It strikes a very heavy blow on the bloom, and the dies are shaped so that rounds up the
 page 351 } axle and it is forged until it gets to the proper
 size for a rough forging, from which it is machined. I might say that when we unload these

blooms they have already had chemical analysis from the steel manufacturer, which must come within our specification limits. As soon as we unload the steel we draw several samples of them for check analysis. This check analysis must agree with the steel mill analysis and must come within the specifications required by the customer for his forging.

Now, then, that forged bloom is made into a round axle. That axle is taken down and put into an oil fired furnace and there with others (a large lot of them) is heated slowly up to proper temperature, as shown by a pyrometer, which is nothing but a thermometer of high temperature. It is heated up to that temperature and held there for a time of about two hours per inch. A four inch diameter axle would be held eight hours, a six inch diameter twelve hours—two hours per inch, not less than that and more if anything; and that improves the quality of the forging. After it is taken out of the furnace and allowed to become cold, we take a core test out of a certain number of pieces and tests them, and the page 352 } physical properties must come within the customer's specifications. That makes a rough forging that has been tried and proved to be up to specifications. Then that rough forging is taken into the machine shop, the rough ends are cut off and a right heavy cut taken out. That cut is also subject to inspection and gives opportunity to see any superficial or surface cracks or anything like that. If there is, they are rejected. We turn it to within one-eighth of an inch of the customer's specifications. Then that is shipped in that condition in an open car. There is an eighth of an inch of metal on there for anything that happens in transit to injure them. That metal is taken off and you have the finished axle of proper dimensions.

Q. Did I cut you off before you completed stating how the bloom was made before it comes to your plant?

A. Yes, sir. It is not very long. The ingot, which has been taken out of the mould and put in the soaking pit and allowed to get to all one same temperature, is then raised in temperature to a rolling temperature, which would be about 2,400 degrees. In this case it was an $18\frac{1}{2} \times 18\frac{1}{2}$ inch ingot, say about 7,000 pounds. That is taken out of the soaking pit and properly heated and put in a bloom mill page 353 } rolled in a square long bloom, or billet. The terms are interchangeable.

Q. Then, after the bloom is in process of manufacture at your plant in the way you have described it, do these various heat treatments, to which the bloom is subjected, change the quality of the material in any way?

A. The ingot is cast as a very coarse steel cast. A big,

heavy, square steel cast like that is right coarse. With the heat treatment that the ingot undergoes every time it is put through the forge, everything tends to refine the grain, but the forging, of course, is the major element in refining it.

Q. By forging do you mean hitting with a hammer?

A. With these seven thousand pound, or six or eight thousand pound hammers.

Q. If you get some blooms from the concern, from which you buy them, that don't come up to your specifications and you reject them, does the money loss fall on you or on the person from whom you buy them?

A. No, sir.

Mr. Williams: We object.

The Court: Don't let's go into too many things.

page 354 } By Mr. Robertson:

Q. If you reject a bloom and return it, does the loss fall on you or the manufacturer?

Mr. Williams: I object.

The Court: Let him answer.

A. If we reject blooms we return them to the steel company and the invoice is cancelled.

By Mr. Robertson:

Q. After you get the bloom in your plant do you make any metallurgical tests to tell what the character of the material is?

A. Oh, yes, sir.

The Court: It will take some time on these tests, so I will take an adjournment right now. We will adjourn until Monday morning at 10 o'clock.

Note: At 4:50 P. M. court adjourned until Monday, May 28th, 1934, at 10 A. M.

THIRD DAY.

page 355 }

Monday, May 28th, 1934.

Court met at 10 o'clock A. M., pursuant to adjournment.

Mr. Robertson: I will call Mrs. Nissen.

Mr. Williams: Mr. Street was on the stand.

Mr. Robertson: This is another matter I want to go into at this point. I was getting ready to go into the tests. I want to go back and finish on this question I failed to ask the last time.

page 356 } MRS. GEORGE NISSEN,
a witness on behalf of the defendant, being recalled, further testified as follows:

By Mr. Robertson:

Q. Mrs. Nissen, when you testified Friday, you are reported to have been asked these questions by Mr. Williams and to have made these answers (I didn't hear you at the time):

"By Mr. Williams:

"Q. You were hurt?

A. My arm and knee were bruised—nothing serious.

Q. They settled your claim, didn't they?

A. Yes, sir."

Is that correct?

A. Yes, sir.

Q. How much did they pay you?

A. Ten dollars.

Q. How did they happen to pay you?

A. Mr. Flippen came out there the day after the accident—

Mr. Williams: Is that relevant?

The Court: I think it relevant to show the amount, but why they settled I think not.

Mr. Robertson: I have no further questions.

Witness stood aside.

page 357 } W. M. LEE,
a witness on behalf of the defendant, being recalled, further testified as follows:

By Mr. Robertson:

Q. Mr. Lee, when you went over to the street car after the accident and looked at it, can you tell the jury, illustrating with this half dollar, what position the front left wheel of the car was in? Now suppose this pencil is the left rail of the street car track, southbound. What was the position of that wheel in reference to the rail?

A. In that position. (Indicating.)

Q. Suppose this is the rail running this way, what would be the position of the wheel in reference to it?

A. The rail was running like that. (Indicating.) It would be something—The way the car left the rail, it would be going this way—going south, that would be the way that it would be. If this is the rail, it would be going south.

Q. If this was the rail going south, was the angle of the wheel—

Mr. Williams: Let him show.

The Court: Don't answer until I tell you.

page 358 } Q. (Continued.) If this was the rail of the track southbound, was the angle of the wheel in like that, or out like that? (Indicating.)

A. In.

Q. Illustrate the way it was.

A. This is supposed to be the rail coming down here and this is supposed to be the wheel on the rail. The axle broke and this wheel canted just like this, going from this rail in this direction across.

Q. Was the easternmost part of the axle in the journal box concealed by the journal box or outside where you could see it?

A. Could see it, just a little of it, as I said before.

Q. I am talking about now the end of it, the easternmost part of the axle.

A. Out of the journal box just a little, as I said before.

Q. Could you see the axle?

A. On this side. (Indicating.) Just could see it. I didn't pay no attention to it at all.

Q. Was the axle broken inside the hub or outside of the hub?

Mr. Williams: We object to that. He went over that.

page 359 } We object for the reason that the witness categorically answered the question twice to my understanding and Mr. Robertson had never previously asked him that question on his examination and then asked him this question, "Mr. Lee, wasn't that break inside the hub?" He said no, it was outside the hub.

Mr. Robertson: If Your Honor has any doubt about it you can read the testimony he gave Friday.

Mr. Williams: If that record is not right I want to prove it because I know what the record is. If the record is not right we will make the record right.

Note: Testimony of the witness given when on the stand Friday was submitted to the Court.

The Court: I am not going to have that any more. I will leave it just like it is for the jury to say under the testimony, and you except.

Mr. Robertson: I want to state the reason I except to the ruling of the Court: Upon the ground that the page 360 } evidence of the witness is obviously confused and it is necessary under the defendant's theory of the case to clear that confusion. I have no further questions. The defendant is perfectly willing to open this witness's testimony for all purposes, but unless it is going to be opened up for all purposes we object to the plaintiff examining for any purpose.

Mr. Williams: You mean that you can examine him and I can't examine him on what he testified to.

The Court: The Court will decide that. Go ahead and ask questions.

CROSS EXAMINATION.

By Mr. Williams:

Q. Now, Mr. Lee, would you come over here? As I understood you to say the wheel was inside the rail like that, as you held that quarter, is that right?

A. Yes, sir.

Q. Now what would you say that angle is from the rail? Would you kindly indicate?

page 361 } A. I suppose about a forty-five.

Q. The wheel was near a forty-five degree angle from the rail, inside the rail?

A. Yes, sir.

Q. And the angle a southwesterly angle? What would that be going south?

A. It would be east.

Q. Southeasterly?

A. In this direction, and went east—going east like this was. This is the car coming here. It went over—this wheel. The axle was broken in here and this wheel got over the rail by some means, I don't know how, but this other good wheel ran up to the rail and stopped.

Q. We are talking about the time when you testified in reply to Mr. Robertson's question a moment ago, in which you said that the wheel was at this angle of 45 from the rail. Was the wheel at that 45 degree angle southeasterly or southwesterly?

A. Bound to have been on the east.

Q. Southeasterly?

A. Yes, sir.

Witness stood aside.

page 362 }

J. T. PORTER,

a witness on behalf of the defendant, being recalled, further testified as follows:

By Mr. Robertson:

Q. Mr. Porter, I want to ask you a question I failed to ask when you testified before. You spoke of this car as being a Birney safety car. What was the name of the man who invented that car?

Mr. Williams: Objected to as being immaterial.

The Court: Objection overruled.

A. C. H. Birney.

By Mr. Robertson:

Q. Is he still living?

A. Yes, sir.

Q. Where is he living?

A. California.

Q. Why is that car called a safety car?

A. There is an automatic appliance devised and installed in this class of car, by which, in case of accident, or in case of failure of the operator, by sickness or dropping dead, the car will automatically stop itself.

page 363 } Q. In order to keep the current connected so that the car is receiving current to cause it to run, what is done by the operator of the car?

A. He has to hold his hand on the controller handle or his foot on the valve, which will keep the power from being cut off.

Q. If he removes his hand from the controller but keeps his foot on the valve, what will happen to the car?

A. Keeps on running.

Q. If he takes his foot off the valve but keeps his hand on the controller, what will happen?

A. Keeps running.

Q. If he is thrown off his balance so that his foot is off the valve and hand off the controller, what happens to the car?

A. Throws the power off and puts the brakes in emergency—air brakes.

Q. Do you know when that car was first put in operation?

A. 1922.

Q. When was that type of car first put in operation in the street car business?

A. 1914.

page 364 } Q. Is the operation of a single truck car the same as the operation of a double truck safety car, or different?

A. They are identically the same.

Q. Is there any more modern way to operate a safety car than the way this safety car was operated, the way car 1527 was operated on July 11th, 1932?

Mr. Williams: I object as being indefinite and not having any bearing on this case.

Mr. Robertson: I am talking about the mechanism. I will withdraw the question.

Q. Mr. Porter, was there any more modern mechanism for the operation of any kind of a street car than the mechanism by which safety car 1527 was operated on July 11th, 1932?

A. No, sir.

Q. Do you know who manufactured that Birney safety car No. 1527?

A. J. G. Brill Car Co.

Q. Where is that plant?

A. Philadelphia, Pa.

Q. How does the J. G. Brill Co. rank among manufacturers of street cars in this country?

A. The largest.

page 365 } Q. Mr. Porter, when you bought this axle that broke in #1527 from the Johnson Manufacturing Company, was it bought as a rough forging or as a completely finished machined forging?

Q. It was bought in what is termed or known as a rough turned axle.

Q. What does that mean?

A. That means that the axle is supplied to us in larger dimensions than that in which it would have to be finished to be used.

Q. How much larger?

A. Anywhere from 1/8 to 3/16 of an inch, possible 1/4.

Q. Where was it machined to the dimensions at which it was actually put into use?

A. At the car shops of the Virginia Electric & Power Company.

Q. Do you know any better type of axle to operate in this car #1527 than the axle that was operated in it and broke?

A. No, sir.

Q. Why were the wheels taken off the broken axle after the axle was brought into the overhaul department?

A. The wheels were good, had further life in them, and we put them back on another axle and put them page 366 } operation.

Q. Do you know of any better type of wheel for operation on the axle that broke in car 1527 than the type of wheel that was on that axle when it broke?

A. No, sir.

Q. You testified before as to the method of pressing the wheels on the axle and stated that you knew of no better practice for putting wheels on an axle. Now, how are those wheels taken off the axle?

A. They are put in the same press—

Mr. Williams: This is very interesting, but he has just gone over that whole thing; he has gone over it in his original testimony—putting it on by hydraulic pressure.

The Court: I don't see the necessity of going into that again.

By Mr. Robertson:

Q. Do you know of any better way in the street car business for taking wheels off of that axle that broke under car 1527 than the way that those wheels were taken off this axle after it broke and they were taken off and you overhauled the parts?

page 367 } Mr. Williams: Objected to as immaterial, because what was done with the wheels after the axle broke is of no interest to this case.

The Court: Answer the question.

By Mr. Robertson:

Q. Now, Mr. Porter, were you present when that piece was cut off the end of the axle that didn't break in order that the tests that were made could be made?

A. Yes, sir.

Q. Explain how that piece was cut off on the end of the axle opposite the end that broke?

The Court: Hasn't he testified to that?

Mr. Robertson: I don't think he did. I don't want to go over it again if he did. It has been so much in it my memory might be wrong.

The Court: I think so.

Mr. Robertson: I withdraw the question then.

Q. Mr. Porter, what is a hair line crack in an axle?

A. We term a crack that can be possibly seen by a magnifying glass or other methods to be a hair line crack, and our meaning is it is very hard to see, very small.

page 368 } Q. If you inspect an axle by cleaning it, by giving it a bath with oil and then painting it with whiting and then hitting it with a hammer, setting up vibration, making a crack appear if one is there, are those cracks that appear usually hair line cracks or other kinds of cracks?

Mr. Williams: I object as being too general in nature and indefinite and immaterial and irrelevant.

The Court: Objection overruled.

Mr. Williams: Exception.

A. I would say they are mighty small cracks.

CROSS EXAMINATION.

By Mr. Williams:

Q. This crack was called a progressive fracture, wasn't it?

A. Yes, sir.

Q. You never called it a hair line crack before, did you?

A. I don't remember.

Q. When did you learn it was a hair line crack—since the last trial or before?

Mr. Robertson: He has not stated it was a hair line crack. It is putting words in the mouth of the witness he has not said. I object for that reason.

page 369 } Mr. Williams: If what he is talking about has no relevancy to this case, I move that all of Mr. Robertson's testimony that he took from the witness, beginning with the hair line crack, be stricken out.

The Court: Answer the question.

Mr. Robertson: Defendant excepts for the reasons stated.

A. I did not state that this particular crack was that type of crack.

By Mr. Williams:

Q. Then what you have stated previously about hair line crack was not in reference to this particular crack, was it?

A. No, sir.

By Mr. Robertson:

Q. Mr. Porter, where there is a hair line crack, may there be a progressive fracture?

A. Yes, sir.

Q. May or may not the hair line crack be the first indication of a progressive fracture?

Mr. Williams: Objected to as being leading.

The Court: Objection overruled.

page 370 } Mr. Williams: Exception.

A. It would be.

By a Juror:

Q. You submitted last Friday an historical record of the axle. Is there contained in that record also a record of the condition of the first wheels on that axle?

A. Yes, sir.

By Mr. Williams:

Q. On that record it says, "Car 1508 put in 3/10/27". Is that the date that that axle was put in that car?

A. Yes, sir, that is the date the axle went in use.

Q. In that particular car, 1508?

A. Yes, sir.

Q. Now, it says following that, "Taken out 4/11/29". That means 1929?

A. Yes, sir.

Q. It was taken out?

A. The axle was removed from that car at that time.

Q. Was removed from those wheels?

A. No, sir, was removed from the car.

Q. Then "Car 1524, put in 4/24/29". What
page 371 } does that mean?

A. That is the date it went back into another car, from the time it was moved out of the other car.

Q. Then following that is "5/19/31, taken out". What is that?

A. That is the date that the wheels and axles were removed from car 1542.

Q. Doesn't mean the axle was taken out of those wheels?

A. No, sir.

Q. Following that is the memorandum, "Wheels worn out". What is that?

A. That is the wheels were pressed off the axle shortly after it was removed from 1542.

Q. Now, this: "Car #1527, 6/18/31, put in". What is that?

A. That is the date that the wheels with the axle—that new wheels were installed on that car.

Q. "Taken out 7/11/32." What does that mean?

A. That is the date the wheels were removed off the axle after it broke.

Q. How do you know that was not the date that the axle was taken off the car as all other dates, you say, are when it was taken out of the car?

page 372 } A. The date that elapsed between the time it shows it was removed—the date it went into service and the date it went back into service—

Q. From your testimony it appears only two pairs of wheels have been on that axle?

Q. Those numbers to the left known as wheel numbers and in which appears 1730 and 1731, what does that mean?

A. Each axle has two wheels, one on each end, and the wheel that goes on the opposite end of each axle has a different serial number.

Q. It says "148463 wheel number 1730, 1731, 1730, 1731, 4986, 4987". What does that mean?

A. The last two numbers are the last two wheels that were pressed on to the axle from the time the record shows the wheels were worn out.

Q. Two pairs of wheels of the same number—does that mean the same wheels were pressed off and on twice?

A. No, sir.

Q. What have you two sets of numbers on for?

A. It went back into various cars. This shows it went into three cars. It went back two times with one pair of wheels and another time with another pair of wheels, a
page 373 } new pair.

Q. What is that "J-264"?

A. I couldn't tell you. That is some of the office numbers.

Q. You don't know what that is?

A. No, sir.

By a Juror:

Q. I would like to ask one more question. You spoke of one pair of wheels being worn out. Is that simply wearing out the rim or what?

A. Wearing out the end of the flange.

Q. Any flat spots on that wheel?

A. We don't classify flat spots as worn out. It is usually ground until the life of the wheel is worn out.

Q. Is there anything on there about flat spots, on that record?

A. No, sir. It was only removed twice, one for bad flanges and the other time for being worn out.

By Mr. Williams:

Q. What is this here, the first pair of wheels on the first car—"Wheels welded".

A. It means the flange was welded and it was put back in place.

Q. When flanges are welded that means they have broken off or what?

page 374 } A. Worn sharp, are too thin for the gauge.

Q. And ground down to have a proper flange?

A. No, sir. We put them in a welding machine and build the flange up and then grind them back to proper shape.

Q. When a wheel is worn out what is the matter with it, where is it worn out?

A. It may be that the flange is worn too thin to be safe or the tread has no more miles left in it.

Q. You grind a flat down, don't you?

A. Yes, sir.

Q. That helps to wear out the tread, don't it?

A. Yes, sir.

By Mr. Robertson:

Q. If an axle comes in with a flat wheel on it, is that recorded as a flat wheel or in some other way?

A. It would be recorded as a flat, or ground.

Witness stood aside.

page 375 } GEORGE L. STREET, JR.,
a witness on behalf of the defendant, heretofore
upon the stand, resuming, further testified as follows:

EXAMINATION IN CHIEF (Continued).

By Mr. Robertson:

Q. Mr. Street, I don't think I asked you, do you know where the bloom was bought that this particular axle was made out of?

A. Allen-Wood Iron & Steel Co.

Q. I don't want you to repeat anything you have testified to, but I don't want to leave any gaps. Was the bloom that this axle was made out of bought subject to specification by you?

A. Yes, sir, bought on regular specification mostly used by power car companies in this country.

Q. Is that a standard specification for first class material to go into a street car axle?

A. Absolutely so—the most used one of several—it is the most used one.

Q. You testified how that bloom was manufactured by the concern from which you bought it. Did you testify regarding the tests for material and strength to which that bloom was put by the manufacturer before it was delivered to you?

A. In part, yes, sir. It was tested by ladle analysis of the manufacturer before shipment, and by us also. They test a great number of these ingots to be sure it is proper to be shipped. When we receive it we test it again. If it is defective, it is rejected.

Q. When that bloom is delivered to you are you furnished a record of the tests and analyses to which the bloom has been subjected by the manufacturer of the bloom?

A. Of the analyses, yes, sir. Their checks are reported.

Q. Does the manufacturer test every single bloom or just some of the blooms from the run from which the blooms are made?

A. Some of the blooms, in accordance with the regular specifications set up by the American Steel Manufacturers Association governing such tests. A representative lot of tests are taken.

Q. Is there any better way in the steel business for testing and analyzing blooms than the way that bloom, from which this axle was manufactured, was tested and analyzed before it was sent to you?

A. I don't know of any better way—this test by the American Society of Steel Manufacturers.

Q. You testified as to how a bloom is manufactured into a rough forging, from the time it reaches your plant as a bloom until it is completed into a rough forging. Now, I am going to ask you to tell the jury to what material tests any lot of blooms, such as that from which this axle was made, are subjected from the time you receive it until it is finished into a completed forging?

Mr. Williams: Didn't he go over that?

The Court: I don't know.

Mr. Robertson: I don't think he did. I think he stopped just before the test.

A. I remember testifying about the nicking and breaking test which is made as to these blooms, which gives a couple of fractures at each end of the bloom, but I didn't speak of the test for chemical analysis, which we make by taking drillings in a number of blooms as received from the manufacturer, and they are checked by outside chemists.

By Mr. Robertson:

Q. Did you say that was a test for material?

A. Test for chemical analysis.

page 378 } Q. Does that mean of the material?

A. Yes, sir.

Q. State to the jury what sort of test that is, how the test was made?

A. We drill into the ends of a number of pieces of bloom at random—three or four or five, depending on the size of the heat and the number there is in a heat. Those drillings are sent to the chemical laboratory. We have a report made on the analysis found, and they must conform both to specifications and to the mill analysis furnished by the bloom maker. In other words, when a heat varies widely in constituents, that heat would be subject to suspicion and we would have to go into it very thoroughly before using it. That is a rare case but does happen.

Q. Do you maintain your own laboratory and your own chemical expert for making those tests?

A. Not for chemical analyses. It is very much better and safer and more economical to have it done by outsiders who do that work regularly. They make a number of tests every day, whereas for a plant our size, it would be practically impossible to have a laboratory in working condition to make tests regularly.

page 379 } Q. What is meant by tensile test?

A. That is a pulling test, whereby a sample of steel is gripped and forcibly pulled apart.

Q. What is the purpose of that?

A. To reveal the strength and ductibility of the material and also soundness of the material.

Q. Can you tell by looking at these pieces of steel (Indicating) whether or not they have been subjected to a tensile test?

A. Yes, sir. Those are typical broken test bars.

Q. Will you use those to illustrate and explain to the jury in detail how the tensile test is made?

A. That is a test bar fitted together after it has been broken and measured for the various measurements. Before that was put in the testing machine it had threaded ends and was $2\frac{1}{4}$ inches long and $\frac{1}{2}$ inch in diameter; and a little prick mark is here, and then put in the testing machine, driven by electric motor. The bottom screw half and the top screw half are pulled apart. It pulls out like a shaving and breaks all of a sudden. While being pulled out you check the elastic point of the steel, which is the point it commences page 380 } to give way rapidly. Up to that time it hardly moves at all. When it reaches the point where it moves rapidly, that is reported as the yield point. You keep on running the test for three or four minutes later and this thing will break, and while that pulling is going on you see this little hour glass shape. The ductility of the material is shown by the amount of pulling apart before it breaks, in other words, how much the material stretches, also how much it necks down into this place. Good material necks down and stretches a lot. Other material gives way very suddenly. A layman could see half a dozen tests, representing various grades of material, and would have no difficulty in seeing what is or is not a good test.

Q. What is the purpose of those things on each end that you speak of as a thread?

A. They are screwed into holders on the testing machine, top holder and bottom holder. The machine exerts a pressure of a hundred thousand pounds.

Q. Does the distance that the steel will stretch before it breaks determine its strength?

A. That and the amount of reducing in diameter. It is shaped like an hour glass.

page 381 } Q. Is that the best known way to determine the quality of steel in an axle that you know of in the steel business?

A. That is the only way known to determine tensile strength and ductility and toughness.

Q. Does the Virginia Electric & Power Company buy all the axle forgings that you manufacture?

A. No, sir. We manufacture a great many more than you all use.

Q. Do you manufacture and sell street car axles to any other street car companies in this country?

A. I believe to practically all of them.

Q. Will you name some of them?

Mr. Williams: We object to that as being immaterial.

The Court: He said practically all. Is it necessary to name them?

Mr. Robertson: No, sir. I withdraw the question.

Q. Do you know what a progressive fracture in an axle is?

A. Yes, sir. Anybody connected with axles, in the manufacture or servicing of axles, very soon learns by observation what a progressive fracture is.

Q. What is a progressive fracture?

page 382 } A. A fracture that starts either from the interior, from an inside defect, or from the exterior, generally from a scratch or bruise or mark on the end of the key-way; generally speaking, something that you can see, either inside or out. It is very small to begin with and progresses at a more or less unknown rate to finally a point where the remaining metal is not sufficient to carry the load imposed on it.

Q. What is a hair line fracture?

A. Well, I don't believe that a hair line is considered a starting point to a fracture. A hair line is something that appears in roller bearing steel and things like that, just the slightest sort of a groove.

Q. Why call it a hair line?

A. Because it is so small. Hair is the best thing to describe it by.

Q. May the first indication of a progressive fracture be a hair line?

A. I would certainly think not. Every hair line I see runs this way—with the grain of the material. It is typical of it.

page 383 } Q. Did you familiarize yourself with the results of the tensile test and the material test that were made of the axle that broke and involved in this case?

A. Yes, sir, I did, Mr. Robertson.

Q. Have you looked at the axle?

A. Yes, sir, I have.

Q. Have you tried to find out what the condition of the steel in the axle was when it broke?

A. Why, I can show, I think, on the axle where the fracture had progressed to a certain point and then the rest of it broke suddenly.

Q. Will you show the jury that?

A. This teat on here corresponds with the teat on the other end. Do you all see that? That comes on to a very small piece of sound steel. This other part is a progressive fracture. This side does not show very well the character-

istic conditions of a progressive fracture because this has been bumped around in the hub. It broke back in the hub a little ways. When it broke and came out a little bit, this part rubbed around in the hub of the wheel. This shows better than this one (indicating), but this teat shows how far it went before it broke.

page 384 } Q. Do the tests that were made of this axle that broke for material and strength indicate whether it was a good, bad, or indifferent piece of steel?

A. The tests were not only good, but they were very, very much above the minimum requirements of the specification, and that is a very high grade specification.

Q. Is it a good, bad, or indifferent piece of steel?

A. Extremely good piece of steel, yet it broke.

Q. Does that teat that you handled there indicate a defect in the steel?

A. No, sir. The difference between one part of that fracture and another part shows very plainly it was a progressive break. A bad axle breaks in this way. (Indicating.)

By Mr. Williams:

Q. How?

A. Just flat apart, and shows crystallization structure.

By Mr. Robertson:

Q. Can you tell by looking at the two ends of the axle where it broke and also at the other end where pieces were cut off whether that is a good piece of steel or bad piece of steel?

Mr. Williams: We object. He has been over that.

The Court: I don't think so.

page 385 } A. We made tests from both ends of the axle. We took them as far apart as we could, and the tests were uniform with each other and both were very much above the required specifications.

Q. What do you mean by crystallization of a piece of steel?

A. That is really a misnomer.

Q. In what way?

A. Steel is a crystalline substance in itself, no matter what you do, and the bigger and coarser the crystals the lower the grade of the steel, the more brittle it is and the less tenacious. Tenacious steel is the fine parts; the other is coarser.

Q. Can you tell by looking at this piece of steel whether or not crystallization in it had taken place?

A. No, sir. Crystallization does not take place. I know it is a misnomer, but it is not a fact. A fracture that occurs

suddenly, no matter what grade of steel, would show crystals of some kind. A fracture that is progressive, or pulls slowly in a testing machine, does not show a crystalline surface. Right in the bottom of that hole is crystallized structure. It is in every piece of steel. You can see it. Everybody can see it.

page 386 } Q. Now, that break in that axle has shown what was inside the axle at the point where the break occurred, and cutting the other end of the axle off has shown what was inside where it was cut in two. Can you see any sort of a hidden defect in that axle, which those openings have made apparent and which the records of your company, or your technical education, or your practical experience enables you to recognize?

A. No, sir, there is not. That is an absolutely unquestionable failure, yet it is such a failure as occurs all the time. All axles give out by wear and the limits of use or by breaking.

Q. Is there or is there not either an obvious or a latent defect in that piece of steel anywhere?

A. No, sir, there is no indication whatever of any. It is one of those things you can't say why.

Q. Can you tell what made that axle break?

Mr. Williams: I object to that. I don't think he can answer that. He has not testified he knew conditions down there, how it was being operated and the speed it was being operated.

The Court: He may say he can't tell. The question was "Can you tell?" Answer Yes or No.

page 387 } A. No, sir.

Mr. Williams: We note the same objection for the reasons given.

By Mr. Robertson:

Q. How many miles will that axle normally run before it comes to the end of its life?

A. It is an extremely variable thing. We have had reports of our own axles running close onto a million miles. We have had plenty reports showing five hundred thousand. That is not something unusual. Two or three hundred thousand miles is, I believe, a low figure for the average life.

Q. When an axle of that type comes to the end of its life without breaking, what causes the end of its life?

A. Wear limit.

Q. What do you mean by that?

A. It wears at the journals and also at the motor bearing seat. The material is reduced by wear beyond the safety point.

Q. You mean at those different points it wears so small it is not safe to use it further?

A. Yes, sir. That is all settled by the American Transit Electrical Association.

page 388 } Q. Is that standard throughout the street car business?

A. It seems to be the official one used.

Q. Has that wheel worn down so small there where it broke, or anywhere else, that it had reached its life?

A. It shows practically no wear at all.

Q. Then, had it worn down enough to reach the end of its life?

A. No, sir.

Q. Was it in the full vigor of its age or getting feeble as far as you can tell by measurements?

A. I know that the axle was broken and we were called on to replace it. A record was kept by Mr. Hicks, I think. Since it involved finances, we had to look over those records. I think his report was it ran 40,000 miles. We replaced it on account of unsatisfactory life.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Street, you said it was reported to you that it had gone 40,000 miles?

A. As I remember.

Q. And you replaced the axle for unsatisfactory life?

A. Yes, sir.

page 389 } Q. At no cost to the company?

A. Well, I had to do the machining.

Q. Outside of the turning of it?

A. They sent the stuff over and delivered the broken axle to us when this matter came up, and we replaced the axle.

Q. Now, Mr. Street, do you remember as a boy you worked for your father over there, didn't you?

A. Yes, sir.

Q. Do you remember when you were getting this two dollars a day and Mr. Lowry was working at your father's plant?

A. Yes, sir.

Q. That was sometime ago, wasn't it?

A. Latter part of 1907 or 1908.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. When did he quit working there?

A. Still working there when there is work to do.

Q. You say Mr. Adam R. Lowry is still working there when there is work to do?

A. No, sir. I thought you said if I was.

Q. When did Mr. Adam R. Lowry quit working page 390 } at your plant?

A. I don't remember his ever working there, but he told me out in the hall that he had.

Q. Do you know what kind of work he did there?

A. I think he told me he used to turn or cut axles, I don't know which. I could get the record if he ever worked there.

Mr. Robertson: I will ask you, when you leave the stand, to get the record from your plant of whatever work Mr. Adam R. Lowry ever did there.

Witness: Could I ask from him about what date?

Mr. Williams: Yes, sir. You can talk to him.

Witness: That will help me in looking up the record.

Witness stood aside.

page 391 }

B. S. RAGLAND,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Ragland, what is your profession?

A. Mechanical engineer.

Q. Where did you get your technical education?

A. University of Virginia.

Q. Did you graduate?

A. Yes, sir.

Q. When?

A. 1924.

Q. With or without a degree?

A. With degree of Mechanical Engineer.

Q. Have you practiced your profession since then?

A. Yes, sir.

Q. Do you practice under your own name in Richmond or with any concern here?

A. With Wm. F. Lee, mechanical engineer.

Q. Mr. Bagland, were you present when the broken axle involved in this case had the end cut off of it
page 392 } opposite the break after the accident?

A. Yes, sir.

Q. At whose request?

Witness: You mean who took me out there?

Q. (Continued.) First, where was it done?

A. At the shops of the Virginia Electric & Power Co.

Q. Who took you out there?

A. Mr. George Street.

Q. When you got out there did you see the axle?

A. First I saw was the end of the axle and the center piece.

Q. State what you watched done while you were there.

A. They took the end of the axle that showed it had been broken off from the axle, took it to the center piece on the floor and matched it. There is a fracture mark in the end of the axle, and that was matched to the fracture mark on the end of the center part of the axle. Matching the marks showed the broken piece had come off the center part of the axle.

Q. Then, what was the next that was done?

A. Then the main portion of the axle was put
page 393 } in a lathe and on the end opposite to the end at which it had been broken a piece was cut off in the lathe.

Q. What sort of operation was it to cut that end opposite the break? State what was done and how long it took you for that?

A. They put the axle in the lathe, which revolves with the axle with a tool lying against the metal, which shaves the metal and gets deeper and deeper into the axle. When they had shaved enough metal from the axle so the diameter left was about an inch, then it was taken out of the machine and put on the floor and broken off.

Q. How did they break it off?

A. With a hammer.

Q. Tack hammer?

A. No, sir,—sledge hammer.

Q. Then, what was done with it?

A. The end opposite the end that was cut off and the end that had been broken off in some way were given to me and I took charge of them.

Q. Before you go further I am going to ask you to step

over here to the axle a minute. Can you show the jury the broken pieces of that axle which were matched page 394 } before the opposite end of it was cut off?

A. Yes, sir. This end here. (Indicating.) You see that small piece left there. It evidently broke after that. That is elliptical in shape. You can put it in this piece. If you will step around here you will see this end of the axle has the same elliptical piece as this piece here. This fits in this piece in that manner, which identifies this piece of steel as having come from this.

Q. Are the match marks that were put on there at that time still on there?

A. Yes, sir.

Q. Will you show them to the jury?

A. This 5019-F is stenciled on the broken end and right opposite it on the center part of the axle.

Q. When that was matched and those match marks put on it while you were at the Virginia Electric & Power Company's shops, were those holes already in it at that time?

A. No, sir.

Q. I am speaking now of the two holes in the short end of the axle that broke. Were those two holes bored in there at the shop while you were there?

A. No, sir.

Q. When the piece was cut off the opposite end page 395 } of the axle was that piece matched or not?

A. It didn't have to be matched. It was cut off. It has the match mark 5019 and 5019 on this end.

Q. That piece that was cut off, did you carry it away when you went?

Q. Did you carry that end of the axle with you? (Indicating.)

A. Yes, sir.

Q. When you got there were either of the wheels on the axle or had they been removed?

A. They were not on the axle.

Q. About when was it you went there? Do you know the approximate date?

A. The first part of October, first week in October.

Q. What year?

A. 1933.

Q. That little piece of steel that was introduced here at the last trial, do you know where that came from out of this axle?

A. Looks like it came off the end of the axle that was cut in the lathe at the shop.

Q. Can you indicate to the jury what part it page 396 } came off of?

A. When the axle was cut in the lathe, the mechanic who cut it made what is known as a wide cut; he ran the tool from here to here, so that, when the tool penetrated here, it left this portion between this end on here, and it was then taken out of the machine and broken and left this part, and this piece is where it broke.

Q. When you said they put the long part of the axle in the lathe and laid the tool against it and shaved the material away, did you mean it was the material which was originally covering up this little piece in there?

A. Yes, sir.

Q. Did you see that little piece sticking out when they finished cutting the shavings off?

A. The other piece was to it at that time. It had to be broken off. It was cut all the way down to this point and left this short piece between the two pieces.

Q. Is that the piece they broke off with the sledge hammer?

A. Yes, sir.

Q. Did that leave this short piece of axle?

A. Yes, sir.

Q. Was that hole in it or not?

A. No, sir.

Q. Did you carry both short pieces away with page 397 } you?

A. Yes, sir.

Q. Do you know what these marks are that show here in the end of the axle that you saw cut off? I am not now mentioning the two holes in the axle, but three dents in the axle?

A. I don't know what they are. They were probably put on with the hammer when broken off. I don't recall that.

Q. Now, take the short end of the axle that broke off. Were you present when those two holes were made in it?

A. Yes, sir.

Q. Where were they made?

A. J. R. Johnson & Co.

Q. About when?

A. The first week in October; I think it was October the 3rd.

Q. Who was present when they were made?

A. I was present.

Q. Any one else?

A. Not all the time. Mr. Smith part of the time.

Q. Were you and he together present there?

A. As far as I recall, except the man who made the holes.

Q. Do you mean Mr. Morris Smith?

A. Yes, sir.

page 398 } Q. Were you present when those two holes
were made in the short end of the axle that you
cut off?

A. Yes, sir.

Q. What was the purpose of making the two holes in the
short end of the axle that broke off?

A. We wanted to obtain from this end of the axle a piece
of steel from which to make a specimen to test the tensile
strength of the material.

Q. Why did you make one big and one little hole?

A. The little hole was made simply to obtain fine filings,
or shavings, or whatever you may call them, in order that
the chemist might make a chemical analysis of it.

Q. Did you state what the big hole was made for?

A. Yes, sir, I stated that.

Q. What were those two holes for in the short end of the
axle that you saw cut off?

A. For the same reason that they were made in this end of
the axle—to obtain a specimen to put in the testing machine
to find the tensile strength of the material; also to obtain
shavings for the chemist to make a chemical analysis.

Q. Why was one hole big and the other little?

page 399 } A. The reason this hole is the size that it is is
because the tool used in making this hole is hol-
low. In the end of that tool is a lot of teeth. It revolves
and leaves the center portion.

Q. Does it leave a little center portion which is cut out
somewhat like this little piece? (Indicating)

A. Yes, sir, leaves a core.

Q. You say you were present during the tensile test?

A. Yes, sir, I was present.

Q. It was made by whom?

A. By Mr. Morris Smith.

Q. Were you present when the material test was made
to determine the quality of the steel of which the axle was
made—the chemical analysis?

A. I was present part of the time, not all the time.

Q. Why not present all the time?

A. Because I had to come to court.

Q. Do you mean to-day, or at the trial last October?

A. Last October.

Q. Mr. Ragland, in whose possession were those two short
ends of the axle from the time you went up there and first

page 400 } saw them at the Virginia Electric & Power Company's shops until you came to court at the trial here last October?

A. In my possession.

Q. Are those the same two short pieces of that axle that you saw when you were out there in October?

A. Yes, sir.

Q. Is that the same long piece of axle you saw out there in October,

A. Yes, sir.

Q. How do you know?

A. Because they have the identification marks put on there in my presence and I know those marks.

Mr. Robertson: I suppose there is no objection to telling the witness and the jury that these things have been in court ever since the last trial and these other things have been in court ever since the last trial. (Indicating.)

Q. Mr. Ragland, these four pieces of steel all threaded on one end are the same four pieces of steel you brought here at the trial last October. I will ask you if you know where they came from?

Witness: You mean where they came from at the trial last October?

Mr. Robertson: Yes, sir.

page 401 } A. Came from specimens that were taken out of that axle.

Q. How did these threads get on the ends?

A. The piece of steel originally taken from the axle was round. Those were turned over to the mechanic who made what is known as a specimen piece, and he put those threads, or screws, on each end of these.

Q. Then, what was done with them?

A. They were taken to the testing machine and given to Mr. Morris Smith in my presence, and he put them in the testing machine and pulled them apart for the tensile strength test.

Q. As a graduate engineer, with the experience that you have, would you say that the way the specimens were taken from that axle for testing and the way those specimens were subjected to the tensile test is the best way to procure a specimen and take the test known in the steel industry, or not?

A. It is the customary way.

Q. Do you know of any better way?

A. No, sir, I know of no better way.

Q. Just explain to the jury how that tensile test was made?

A. The machine, in which this is tested, has two jaws that grip each end of the specimen—

Q. You mean the threaded ends?

page 402. } A. Yes, sir. One of those two jaws holds this end and one that end. They are fastened to a big plate. The big plate has very large screws in it. They are revolved by electric motor which pulls the plate apart, which in turn pulls these jaws. It keeps pulling until it breaks, and there is a scale to show what the force is. You read the scale at the time the rod pulls apart.

Q. You were present throughout the time that was done?

A. Yes, sir.

Q. Both of those specimens, or one?

A. Both of them.

Q. Did you see any comparison made of what that tensile test showed with any specification for that axle?

A. No, sir. I didn't see the specifications for this axle.

Q. Were you present when the material out of the two short ends of that axle was tested to show the character of the material in the axle?

A. Yes, sir.

Q. Who made those tests?

A. Mr. Moody, of Robb & Moody.

Q. And when did he make them?

A. The day after the tensile strength test was made; I think it was October 4th.

Q. 1933?

page 403 } A. Yes, sir.

Q. Why didn't you bore some holes and take some specimens and make some tests of the material from each end of the long piece of axle?

A. The end opposite the end that is broken was cut off approximately at the same place as the other end broke. Specimens were taken at those two ends because they were the part of the axle that we were interested in, because it was corresponding to the position of the break. There was no need to take it from the center portion.

Q. Have you any reason to believe, if you took any specimens and made tests of material at each end of the long piece of axle, it would show any different result than what tests of the axle that were made showed?

Mr. Williams: I object.

The Court: Objection sustained.

Mr. Robertson: I except on the ground that it is necessary to develop fully the defendant's theory of the case.

CROSS EXAMINATION.

By Mr. Williams:

Q. You never saw these pieces of axle when they came out of the car in which that broke, did you?

page 404 } A. No, sir. The first time I saw them was—

Q. Was in October, 1933?

A. Yes, sir.

Q. You don't know where they came from?

A. No, sir.

Witness stood aside.

page 405 } W. L. MOODY,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Moody, what is your profession?

A. Chemist.

Q. Where did you receive your technical education?

A. Graduated at North Carolina State; Stephens, Bachelor of Science degree, and post graduate work at Cornell.

Q. When did you finish your post graduate work at Cornell?

A. In 1916. Then went with the Madison Alkali Works, of Saltville, Va., as chemist; then with the Southern Railway as chemist; for the past twelve years a member of the firm of Robb & Moody, commercial chemists.

Q. Are you one of the partners in that firm?

A. Yes, sir.

Q. Who is the other?

A. J. Bernard Robb.

Q. Mr. Moody, did Mr. B. S. Ragland bring you some specimens of steel that were taken out of the broken axle involved in this case to get you to make analyses of those specimens to show the character of steel of which that

page 406 } axle was made?

A. He did.

Q. Did you make that analysis?

A. I did.

Q. Did you keep a record of your analysis?

A. Yes, sir.

Q. Have you got a copy of that?

A. I have a copy of the analysis that was made.

Mr. Robertson: I don't remember whether all this was an exhibit in the case or not, but, in any event, I ask that it now be put in, since Mr. Williams states it is an exhibit.

Mr. Williams: I asked for Mr. Adam Lowry's testimony.

Mr. Robertson: I have all this here and ask that it be made an exhibit in the case.

The Court: I don't know what you gentlemen are talking about.

Mr. Williams: I looked at the exhibits. Among the exhibits was Mr. Adam Lowry's testimony. As I understood it, that was to be an exhibit. I looked for it when they were reading it. That is why I asked about it.

The Court: We are examining Mr. Moody. page 407 } Go ahead, Mr. Robertson.

By Mr. Robertson:

Q. Mr. Moody, have you a copy of the record you made of the analysis of the material that came out of the axle involved in this case?

A. I have a copy of it here.

Q. Does that copy show the material that was in that axle?

A. It shows the chemical contents of the material.

Q. What was it?

A. The analysis shows it contained: Carbon, .054%; phosphorous, .025; sulphur, .025; manganese, .685.

Q. Does that analysis indicate the quality of material in that axle?

A. Yes, sir.

Q. Did you check the results of your analysis against the specification for material in that axle?

A. When the analysis was made, yes, sir.

Q. Now, where did you get the specification against which to check your analysis?

A. These analyses were checked against the American Society for Testing Materials' axle specifications, and also checked against copy of specification *unwe* which J. R. Johnson & Co. was working.

Q. Did your analysis show that this axle that page 408 } we are talking about was less good than this specification, or equally as good as this specification or better than this specification?

A. It shows better than this specification.

Mr. Robertson: We offer this report of analysis as an exhibit.

EXHIBIT MOODY #1.

ROBB & MOODY

Virginia Testing Laboratory

Chemists

5 and 7 North Sixth Street

Richmond, Va. Oct. 4, 1933.

Analysis No. 69577.

CERTIFICATE OF ANALYSIS

Of a sample of Steel Axle.

Marked F-23, also marked 5019—F.

This analysis represents average drillings from both ends of axle.

Received from J. R. Johnson & Co., Inc.

Total Carbon	.54 per cent.
Graphite Carbon per cent.
page 409 } Combined Carbon per cent.
Phosphorus	.025 per cent.
Sulphur	.025 per cent.
Manganese	.685 per cent.
Silicon per cent.

Very respectfully,

ROBB & MOODY,
W. L. M.

To J. R. Johnson & Co., Inc.
Richmond, Va.

CROSS EXAMINATION.

By Mr. Williams:

Q. Do you know Dr. Sheib, President of Froehling & Robertson?

A. Yes, sir.

Q. He is a very fine chemist, too?

A. He is considered so.

Witness stood aside.

page 410 }

MORRIS SMITH,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Smith, you are Mr. Morris Smith?

A. Yes, sir, that is right.

Q. Mr. Smith, what is your profession?

A. Mechanical engineer.

Q. Where did you get your technical education?

A. Lehigh University, Bethlehem, Pa.

Q. Did you graduate?

A. Yes, sir.

Q. With what degree?

A. Mechanical Engineer.

Q. When?

A. 1925.

Q. Then, did you take any post graduate work or go immediately into practical work?

A. Went immediately, didn't take any post graduate work.

Q. Where have you worked since you graduated at Lehigh in 1925?

A. J. R. Johnson & Co., Richmond, Va.

page 411 }

Q. What is your position with that company?

A. Assistant general manager.

Q. In that position do you make tensile tests of axles to determine the strength of the axles?

A. Yes, sir.

Q. Did you make any tensile test of an axle of the Virginia Electric & Power Company which broke and is involved in this case?

A. It may not have been on that one axle. It was a lot representing that axle.

Q. Are you speaking now of a test made before the axle broke or after?

A. Just before the axle was broken—in the process of manufacturing.

Q. Was the lot of material, from which this axle that broke in this case was made, subjected to the customary tests made of material that is manufactured into axles in your plant?

A. Yes, sir.

Q. Then, after this axle broke, were you furnished with specimens of it by Mr. Ragland to make the tensile tests with those specimens?

A. Yes, sir.

Q. Do you remember when those specimens
page 412 } were exhibited here in court at the trial last October?

A. Yes, sir.

Q. Those are the same specimens that were exhibited here last October. (Indicating.) I will ask you if they are the specimens of which you made the tensile tests?

A. Yes, sir, they are.

Q. How do you know?

A. By markings on the end.

Q. Who put those identification markings on them?

A. Our mill did it under Mr. Ragland's supervision.

Q. Were you present when those tests were made?

A. Yes, sir.

Q. Did you make them?

A. Yes, sir.

Q. Will you state what kind of tests you made and what you did making the tests? Make the whole explanation.

A. The axle was taken and from that broken end the test pieces were taken, pieces knocked out and turned up into the shape of these test pieces. These are just samples that I brought from the mill (Indicating) and have no dealings at all with these, but represent the way the test was taken.

This is the piece that was bored from the end
page 413 } of that axle. That piece fits in that hole. It is then knocked out and broken off and it comes in that shape. From that a test piece of this is turned out. In other words, this piece is put in a machine and machined. The only reason for the threads is for the purpose of holding it in the testing machine. This is known as the standard A. S. T. N. test tube, which has as the diameter .0505 inches, which is exactly $\frac{2}{10}$ of a square inch. Also on this test piece we put two gauge marks, which you can see, two inches apart, one here and one here. This piece is then put in the testing machine, which is nothing more than a beam with a movable head on it which pulls this test piece apart. One point is moved and that is registered on a scale to tell the thou-

sands of pounds it will take to break this apart. As it is tested you take various readings for tensile strength, the tensile strength being the full load at which the piece broke. When you have a broken test piece, you have it about something like this. (Indicating.) You measure its diameter before the piece broke, and the ratio between that and the original diameter of the piece before is the reduction area, stated in percentage. Also these marks show where it has been elongated. We measure that, and the ratio between these two in percentage gives the elongation of the piece.

Q. Were those specimens that were brought to you by Mr. Ragland subjected to the tests that you have described?

A. Yes, sir.

Q. Did you make a record of what that test showed?

A. Yes, sir.

Q. Is that a copy of the record of the tensile test you made of material that came out of the axle involved in this case? (Indicating.)

A. No, sir. This test was not that axle.

Q. What is that test?

A. That is a test representing the manufacturer's lot of axles made when that axle was manufactured.

Q. You mean that is a record of the tensile test, to which the lot of material, from which that axle was made, was subjected?

A. That is right.

Q. Does the test show that the material, in the lot of material from which that axle was manufactured, was less good than the standard specification, or equally as good as the standard specification or better than the standard specification?

A. It was better than the standard specification.

Q. What is the standard of this specification?

A. The standard specification, to which that axle was made in the factory, is A. E. R. A. specification E-6-23, and the general requirements of the specifications are 80,000 pounds per square inch for tensile strength, elasticity as much as 50% of tensile strength, elongation in two inches must be 20% and reduction in area must be 32%.

Q. Does it show that the lot of material, from which this axle was made, conformed to specification, or was less good, or more good than the specification?

A. This is considerably better than the specification.

Mr. Robertson: I offer that in evidence and ask that it be marked Defendant's Ex. Smith #1.

A. Just before the axle was broken—in the process of manufacturing.

Q. Was the lot of material, from which this axle that broke in this case was made, subjected to the customary tests made of material that is manufactured into axles in your plant?

A. Yes, sir.

Q. Then, after this axle broke, were you furnished with specimens of it by Mr. Ragland to make the tensile tests with those specimens?

A. Yes, sir.

Q. Do you remember when those specimens
page 412 } were exhibited here in court at the trial last October?

A. Yes, sir.

Q. Those are the same specimens that were exhibited here last October. (Indicating.) I will ask you if they are the specimens of which you made the tensile tests?

A. Yes, sir, they are.

Q. How do you know?

A. By markings on the end.

Q. Who put those identification markings on them?

A. Our mill did it under Mr. Ragland's supervision.

Q. Were you present when those tests were made?

A. Yes, sir.

Q. Did you make them?

A. Yes, sir.

Q. Will you state what kind of tests you made and what you did making the tests? Make the whole explanation.

A. The axle was taken and from that broken end the test pieces were taken, pieces knocked out and turned up into the shape of these test pieces. These are just samples that I brought from the mill (Indicating) and have no dealings at all with these, but represent the way the test was taken.

This is the piece that was bored from the end
page 413 } of that axle. That piece fits in that hole. It is then knocked out and broken off and it comes in that shape. From that a test piece of this is turned out. In other words, this piece is put in a machine and machined. The only reason for the threads is for the purpose of holding it in the testing machine. This is known as the standard A. S. T. N. test tube, which has as the diameter .0505 inches, which is exactly 2/10 of a square inch. Also on this test piece we put two gauge marks, which you can see, two inches apart, one here and one here. This piece is then put in the testing machine, which is nothing more than a beam with a movable head on it which pulls this test piece apart. One point is moved and that is registered on a scale to tell the thou-

sands of pounds it will take to break this apart. As it is tested you take various readings for tensile strength, the tensile strength being the full load at which the piece broke. When you have a broken test piece, you have it about something like this. (Indicating.) You measure its diameter before the piece broke, and the ratio between that and the original diameter of the piece before is the reduction area, stated in percentage. Also these marks show where it has been elongated. We measure that, and the ratio between these two in percentage gives the elongation of the piece.

Q. Were those specimens that were brought to you by Mr. Ragland subjected to the tests that you have described?

A. Yes, sir.

Q. Did you make a record of what that test showed?

A. Yes, sir.

Q. Is that a copy of the record of the tensile test you made of material that came out of the axle involved in this case? (Indicating.)

A. No, sir. This test was not that axle.

Q. What is that test?

A. That is a test representing the manufacturer's lot of axles made when that axle was manufactured.

Q. You mean that is a record of the tensile test, to which the lot of material, from which that axle was made, was subjected?

A. That is right.

Q. Does the test show that the material, in the lot of material from which that axle was manufactured, was less good than the standard specification, or equally as good as the standard specification or better than the standard specification?

A. It was better than the standard specification.

Q. What is the standard of this specification?

A. The standard specification, to which that axle was made in the factory, is A. E. R. A. specification E-6-23, and the general requirements of the specifications are 80,000 pounds per square inch for tensile strength, elasticity as much as 50% of tensile strength, elongation in two inches must be 20% and reduction in area must be 32%.

Q. Does it show that the lot of material, from which this axle was made, conformed to specification, or was less good, or more good than the specification?

A. This is considerably better than the specification.

Mr. Robertson: I offer that in evidence and ask that it be marked Defendant's Ex. Smith #1.

TENSILE TEST REPORT

J. R. JOHNSON & CO., INC.

RICHMOND, VA.

July 13th, 1932

VIRGINIA ELECTRIC & POWER CO.

BROKEN AXLE "5019"

Date Tested	Shop Order	Condition or Treatment	Original		Final		Elastic Limit		Breaking Load		Elong. %	Reduction Area %	Chemical Analysis							Customer Kind or Forging Remarks								
			Diam.	Area	Diam.	Area	Total	Per Sq. Inch	Total	Per Sq. Inch			Heat No.	Car.	Man.	Sul.	Phos.	Sil.	Van.									
12/6/28	H-58	R. A. SPECIFICATIONS E6-23 (Annealed) Minimum Requirements					50% Ten. Str.		80000	20.0	32.0		.60 Max	.40 .70	.05 Max	.05 Max	xx	xx										
							JRJ Shop Tests on Axle Shipped V. E. & P.																					
							48350		87000											24.5	44.3	5019	49	69	024	016	16	xx
			VIRGINIA		ELECTRIC & POWER		CO.		JRJ																			
			ORDER #		REQ #		DATE		SHOP ORDER																			
			28839		V-3756		1/3/27		2115																			
			30577		V-4025		2/3/27		2268																			
			(Signed)																									
			Morris S. Smith Morris S. Smith J. R. JOHNSON & CO., INC.																									

DEFENDANT'S EXHIBIT SMITH #1.

page 417 } Q. Mr. Smith, did you make any record of a tensile test you made of the specimens that came of the axle involved in this case when the break occurred?

A. Yes, sir.

Q. Have you got a copy of that record with you?

A. Yes, sir.

Note: Paper handed to counsel for the plaintiff for inspection.

By Mr. Robertson:

Q. Mr. Smith, have you compared the record of your tests of the specimens of the broken axle involved in this case with the records of the test of the lot of material from which this axle was made?

A. Yes, sir.

Q. Does that comparison show whether or not the specimens that you tested from this particular axle after it broke were equally good, or less good, or better than the material in the lot from which this axle was made?

A. The tests made from the broken axle are better than the original manufacturer's test.

Mr. Robertson: I offer in evidence the record of the tensile test of the material from the broken axle involved in this case and ask that that record be marked Defendant's Ex. Smith #2.

DEFENDANT'S EXHIBIT SMITH #2

TEST AND INSPECTION REPORT

J. R. JOHNSON & CO., INC.

Richmond, Virginia

Customer Va. Electric & Power Co.

Specifications _____

Inspector Wm. F. Lee

Inspector's Signature
for Tensile Test

B. S. Ragland

Test Mr. B. S. Ragland

Heat Number	Carbon	Manganese	Phosphorus	Sulphur	Silicon						
5019											

Test No.	Date	Original		Final		Elastic Limit		Tensile Strength		Elong. %	Red. %
		Diam.	Area	Diam.	Area	Beam	Per Sq. Inch	Beam	Per Sq. Inch		
5019	10/3/32	505	2000	377	1116	9500	47500	18940	94700	26.0	44.3
5019-F	"	505	2000	377	1116	9330	46650	18880	94400	24.5	44.3

5019-F to test piece from broken end of axle

Inspector for Surface

Date of Surface

Inspector's Signature for Surface

Shop Order	Customer's		Pieces	Kind	Print	Destination	Serial Number
	Order	Req.					

page 419 } Q. Mr. Smith, if it should be deemed desirable to do so, can the jury be taken to your plant and see the way that an axle is manufactured from the beginning to end and the way the tests that you have described are made?

A. Yes, sir.

Q. How long does it take you to make one of these tests.

A. If you are are talking about the whole process of manufacture, it will take several days, but just a test will take two or three hours.

Q. To make the tensile test?

A. From start to finish, yes, sir.

Q. I mean, if you would have some specimens already furnished you over in your plant, specimens like you take out at your factory, and all you had to do was to put them in the machine, how long would that take?

A. Take about an hour and a half.

Mr. Williams: I am certain the jury has heard a whole lot of this case and are tired of it. I don't think it is necessary to do that.

page 420 } By Mr. Robertson:

Q. You pulled one specimen out of your pocket that was turned down to the required dimensions and had a thread on it. If you put that in the machine over there and pulled it apart in the way you have described, how long would that take?

A. Take about ten minutes.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Smith, you all replaced this axle, did you not?

A. No, sir, we did not.

Q. You didn't hear Mr. Street testify, did you?

A. No, sir.

By Mr. Robertson:

Q. Did you mend this axle and give it back to them?

A. We can't do that.

By Mr. Williams:

Q. You say the axle was not replaced because it had only run 40,000 miles?

A. According to the Power Company's record, it ran for more than 40,000 miles.

Q. Didn't you consult the same records Mr.
page 421 } Street consulted before he came into this court?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Did you make any test of this axle for the material like Mr. Moody made?

A. No, sir, we don't make that.

Q. If you cut up an axle and drill holes in it to get these specimens in the way that was done in this case, does that destroy the axle, or can it be still used?

A. The axle can't be used any more.

Q. Is there any way of making those tests of any particular axle to determine its tensile strength and the material of which it is composed without destroying the axle?

A. Yes, sir. The general practice is to put a prolongation on the end of the forging, as was stated before, and take the tensile test from it.

Q. Is that before or after it is completed into a rough forging?

A. That is made during the process of forging.

Q. Did the Virginia Electric & Power Com-
page 422 } pany show you the record of this particular axle?

A. Yes, sir, I have seen it.

Q. Do you know whether this is the record that you saw? (Indicating.)

A. I can't say it is the exact one, but I have seen one similar to it.

Q. Did the record that you saw show that this axle had been run approximately 40,000 miles, or more, or less?

A. More than 40,000 miles.

Q. Do you know how much?

A. I think it was close to 200,000.

By Mr. Williams:

Q. You don't know what axle broke on car 1527 on July 11th, 1932, of your own knowledge, do you?

A. No, sir.

Witness stood aside.

page 423 } GEORGE L. STREET, JR.,
a witness on behalf of the defendant, being recalled, further testified as follows:

By Mr. Robertson:

Q. Did the Virginia Electric & Power Company show you the record of the broken axle involved in this case, regarding the number of miles the axle had been run before the break occurred?

A. Yes, sir, I am quite sure they did at the time of the accident.

Q. Do you remember that they showed you either this record of a copy of it? (Indicating—Defendant's Ex. #4, former trial.)

Mr. Williams: Ask him what record it was.

Mr. Robertson: This is an exhibit in the case. I think I have a right to ask him whether he has seen this exhibit.

The Court: Yes, sir.

By Mr. Robertson:

Q. Have you seen that record, or a copy of it?

A. Yes, sir, I have.

Q. Now, when you testified and said that this axle had been run about 40,000 miles before the break occurred, page 424 } did you mean 40,000 miles all told, or 40,000 miles since the last wheels were changed on it?

A. I remember now, Mr. Robertson (seeing this record) that I was in error. I had the figure, 40,000 miles, fixed in my mind since last fall, and I was of the impression the axle broke after only 40,000 miles total running. I now recall it was 40,000 miles after the inspection of the axle.

Q. After what?

A. After inspection of the axle. It was absolutely an honest error of memory on that. I am sorry for it.

CROSS EXAMINATION.

By Mr. Williams:

Q. Has Mr. Robertson talked with you since you left the stand?

A. Not about that matter, but about Mr. Lowry working.

Q. Did you talk to Mr. Lowry and find out when he was employed by your company?

A. Yes, sir.

Q. What did he say?

A. He says about 1908.

Q. Did you find your record?

A. 1908 is a long ways back. I am working page 425 } on it now. One of the oldest men at the mill says he remembers Mr. Lowry did work there.

Q. What is his name?

A. Torbett. He says he thinks Lowry worked there as cutting off lathe man. That I would like to ask Mr. Lowry about.

By Mr. Robertson:

Q. What does he do?

A. Cutting off lathe man cuts off the ends of axles.

Witness stood aside.

page 426 } R. D. BOSHALL,
a witness on behalf of the defendant, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Where do you live?

A. Washington, D. C.

Q. What is your business?

A. Street railway.

Q. What is the name of the company with which you are connected in Washington?

A. Capital Transit Co.

Q. Until how recently were there two street railway companies in Washington?

A. December 1st, last.

Q. They have now been consolidated into one company?

A. Yes. Washington Railway and Capital Company formed the Capital Transit Company.

Q. What is your position with the Transit Company?

A. Superintendent of equipment.

Q. What are your duties in that position?

A. General supervision of maintenance of the page 427 } company's rolling stock and buildings.

Q. How long have you been with either one of the street railways? How long have you been with street railway companies in Washington altogether?

A. Fifteen and a half years.

Q. Did you ever work with any companies prior to that?

A. Yes, sir.

Q. Did you acquire a technical education in college or have you acquired it by actual experience?

A. Mostly by experience. I went to an engineering school but wasn't able to finish my course because I ran out of money.

Q. What school was that?

A. Drexel Scientific Institute, Philadelphia.

Q. How long were you there?

A. About a year and a half—about half the course.

Q. When did you leave there?

A. I believe it was 1905.

Q. What work have you done since you left at that time down to the present time?

A. Electric Railway work practically all the time.

Q. With what companies?

page 428 } A. I was ten years master mechanic and superintendent of transportation of the Tidewater Power Company of Wilmington, N. C., nearly two years superintendent of the Birmingham Electric Railway Co. of Birmingham, Alabama, and fifteen and a half years in Washington.

Q. Are you familiar with good, bad and indifferent street railway tracks generally in the United States?

A. I know but very little about track. That has not been in my line of work.

Q. Can you look at a piece of track and tell whether it is good, bad or indifferent?

Mr. Williams: I object. He says he is not an expert on track.

Mr. Robertson: I offer it for what it is worth.

The Court: Answer that question.

Mr. Robertson: Can you look at a piece of track and tell whether it is good, bad or indifferent?

A. In a general way, yes, sir.

Q. Have you been to the intersection of Halifax Avenue and the Petersburg Pike in the city of Richmond and looked at the piece of track there?

A. Yes, sir, last Wednesday.

page 429 } Q. Do you know enough about tracks to tell whether that is good, bad or indifferent?

A. It appears to me to be very good track.

Q. Are you familiar with the machine shops of street railways generally in the United States?

A. Yes.

Q. At my request have you been to the Reservoir machine

shops of the Virginia Electric & Power Company and looked them over?

A. I was there Wednesday and I paid frequent visits there previously.

Q. Are you familiar with the way that they are equipped?

A. Yes, sir.

Q. And the way that they are operated?

A. Yes, sir.

Q. Would you say that the Virginia Electric & Power Company shops are fairly equipped, excellently equipped or poorly equipped or well equipped?

A. I consider them unusually well equipped.

Q. Are you familiar with the way in which axle work is done in those shops?

A. Only in a general way. I have not investigated that as to detail.

Q. With such general knowledge as you have,
page 430 } do you know whether that work there is in good
practice or not?

A. Yes. From what I know of it they follow standard, recognized practice.

Q. Are you familiar in a general way with the method pursued in the street car business in the United States in the inspection of street car axles?

A. Yes, sir.

Q. Are you familiar with the general way that it is done in your shop?

A. Yes.

Q. Are you familiar with the general system of inspection in the shops of the Virginia Electric & Power Company?

A. Yes, sir.

Q. Do you know whether the system of inspection that is pursued by the Virginia Electric & Power Company is the best known system in the business for detecting breaks in axles?

A. It is entirely in accordance with the standard followed in the street railway industry.

Q. Do you know any better way to do it?

A. I do not.

Q. Are you familiar in detail with the way it is done in your shop?

A. Yes, sir.

page 431 } Q. What is the standard way of inspecting axles
to see whether there is a defect in them or not?

Witness: Applied to our particular shop, do you mean?

Mr. Robertson: Yes, sir.

A. Our method is to test our axles every time the wheels and gears are taken off, which is an average of about 100,000 miles. That is about the time we test them. The axle is fairly cleaned and swiped with oil. We give it a coat of whitening and suspend it in a sling and give a sharp blow on its end with a sledge to set up vibration. Those vibrations will cause a fine crack in the metal to show up in the whitening if there is any crack in the axle.

Q. Do you clean the axle off to inspect it when they run a car over the pit for general inspection at times other than when you take the wheels and gear off?

A. When we bring our cars to the shop for general overhauling the wheels are not necessarily removed, but a visible inspection is made of the axle to see if there is anything apparent to the eye.

Q. What sort of inspection is that?

A. That is more or less a casual inspection. It is wiped off around the axle seat and around behind the hub of the wheel; but, you understand, the wheels must be removed page 432 } from the truck before that can be done. That is only done on the overhauling period, which is the 75,000 miles. It does not necessarily mean the wheels are removed, at that time.

Q. At any time other than the time when you remove the wheels, do you clean it off and whiten it, put oil and whiten on it and hit it for vibration?

A. No, sir.

Q. Why?

A. It would be of no value to it. You wouldn't determine anything unless the wheels are removed. The axle must be free of the wheels and gear. Unless you do that it would be of no value.

Q. If a break occurs inside the hub of the wheel, is there any way of determining any defect inside the hub without taking the wheels off and inspecting the axle?

A. I don't know of any.

CROSS EXAMINATION.

By Mr. Williams:

Q. Suppose the crack is outside the wheel, is there any way of determining by inspection there is a crack several inches from the wheel?

A. If there was a crack several inches from the page 433 } wheel, that wouldn't be covered by dirt and it would be possible to see it.

Q. If it is covered with dirt and you wanted to find it, you would take the dirt off, wouldn't you?

A. Yes, sir.

Q. Now, Mr. Boshall, did Mr. McCarty come down?

A. No, sir. Mr. McCarty had a stroke of paralysis in February and isn't able to leave town.

Q. How much are you being paid to come here, Mr. Boshall?

A. Nothing at all.

Mr. Robertson: We don't object to that, but that is a perfectly improper question and I wish you would tell the jury so.

The Court: Objection sustained.

Mr. Williams: I think it is proper to show the interest of the witness.

Mr. Robertson: I don't object to the question provided the jury be told it is an unfair and improper question.

Mr. Williams: I don't think it unfair. I would like to argue that to Your Honor.

The Court: He said he wasn't paid anything at all.

Witness stood aside.

page 434 }

JOHN B. BLAICKLOCK,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Blaicklock, where do you live?

A. Washington, D. C.

Q. What is your business?

A. Master mechanic of Capital Transit Company.

Q. Is that the same company with which Mr. Boshall is connected?

A. Yes, sir.

Q. Is he your immediate superior?

A. Yes.

Q. Are you subject to him or some one else?

A. To him.

Q. What are our duties as master mechanic of the company there in Washington?

A. I have charge of the shops, all shop work, and maintenance.

Q. How long have you been with street car companies in Washington?

page 435 }

A. Fifteen ears.

Q. Did you have any technical education in school or did you acquire your education by actual experience?

A. I had technical training in London, England, and was apprentice at one time.

Q. What technical training did you have there?

A. Three years at Paddington Technical Institute.

Q. In London?

A. Yes, sir.

Q. Did you get a degree there?

A. No, sir.

Q. Did you finish your course?

A. Yes, sir.

Q. After you finished your course, what practical experience have you had from that time to the present time?

A. During the course of three years, after the course, I served an apprenticeship as electric mechanical engineer and came to this country and went into the railway business for 24 years in the same business I am in now, in the mechanical end.

Q. At my request have you been to the inter-page 436. } section of Halifax Avenue and the Petersburg Pike here in Richmond and looked at the track at that point?

A. Yes.

Q. In your opinion is that track excellent, good bad or indifferent?

A. Well, I would say it is an exceptionally fine piece of track.

Q. When did you go down there?

A. Went down there on Thursday morning.

Q. Did you also go down there before the former trial of this case?

A. Yes, I did.

Q. At my request have you visited the Reservoir shops of the Virginia Electric & Power Company?

A. Yes.

Q. In your opinion how are those shops equipped for the handling of axles?

A. Oh, the equipment is exceptionally good.

Q. Have you seen them working on axles out there at that shop?

A. I have, yes, sir.

Q. In our opinion does the character of work they do on axles conform to the best known standard of practice page 437 } tice, or fail to conform to it.

A. It conforms to the standard of modern practice in shops.

Q. Are you familiar with the methods used in the street car business to inspect axles to find out whether there are any defects in them?

A. Yes.

Q. Do you know the methods pursued by the Virginia Electric & Power Company?

A. Yes.

Q. Is that the standard method?

A. Standard practice.

Q. Do you know of any better method?

A. I do not.

Q. Do you know of any company in the United States that, when it puts a car over the pit for general inspection, without taking off the wheels and gear and motors, cleans the axle off and gives it an oil bath and whitens it and hammers it to see if they can reveal a hair crack, or progressive fracture, or any other defect?

Mr. Williams: I object to that as to what some particular line might do I don't think we are interested in.

The Court: Objection overruled.

page 438 } Mr. Williams: Exception.

Witness: At general inspection do you mean?

Mr. Robertson: Yes, sir.

A. No, indeed.

Q. Why not?

A. Because it is impracticable.

Q. Why?

A. In the first place, with the wheels and gears in place and the motors in place you couldn't see the axle anyhow, and nine times out of ten if a fracture was where it could be seen you couldn't see it because it would be too fine.

Q. Do you know any company anywhere in the United States at any time that inspects its axles with this whitening test except when the wheels and gear and equipment are removed off the axle?

A. No, I do not.

Q. Is it practicable to give it the whitening inspection with the gears and wheels on the axle?

A. I would say not because you have got to get to the axle and hammer it on the end and you couldn't do it. It might fail.

page 439 } Q. If you would clean off all the dirt on an axle with the gears and wheels and motors on the axle and with the axle over the pit, would it be possible to discover

hair line cracks or incipient fractures that were not open fractures?

Mr. Williams: The evidence is that this was not a hair line fracture. Mr. Street so testified.

The Court: Do you object to that?

Mr. Williams: Yes, sir, on the ground that it is not conforming to the hypothesis in this case.

The Court: Objection overruled. You can answer the question.

A. It would be impossible.

By Mr. Robertson:

Q. Is there any known method in the street car business to give an effective inspection of an axle with the gears on the axle and without taking it down and stripping the axle of the gears and taking the wheels off?

A. The test is superficial. You could not see the points on the axle.

Q. Approximately how much time would be required to take an axle with the wheels on it out from under a car
page 440 } and then strip everything on it off of it, including the wheels, and subject it to this whiting test and put everything back on it that belongs on it, fasten it in the car and get it out on the route?

A. It would take a gang of three men, I would say, six hours.

CROSS EXAMINATION.

By Mr. Williams:

Q. Now a gang of men six hours: That in the process of a lifetime is very short, isn't it?

A. I don't know whether it is short or long; that is the time it takes.

Q. That is not a very long period of time though?

Mr. Robertson: I object to the question as immaterial. We are just killing time.

The Court: The jury knows how much time six hours is.

By Mr. Williams:

Q. Mr. Blacklock, if a car is put over the pit for inspection and they clean the dirt off the axle (the part that is exposed) and put whiting on it and tap it with a hammer, they would be able to discover fractures if they appeared

outside the covered parts of the axle, wouldn't
page 441 } they?

A. I would say they could not.

Q. Why couldn't they find them then on the uncovered parts of the axle?

A. It is a rather hard question. I never have tried it. Possibly you might sometimes, but it would not be a thorough test.

Q. It would not be a thorough test but it would be a little more than superficial if you would make it practical by cleaning off the dirty parts and adding whiting and tapping it with a hammer, on the exposed parts, wouldn't you?

A. I don't know how much is exposed on an axle with the gears and wheels in place, except a little piece on each end.

Q. It is exposed, isn't it?

A. Yes.

Q. Then, you could see it with the eye if you whitened it, couldn't you?

A. You couldn't get a blow on the end.

Q. Whitening would not reveal a crack if it was there?

A. It is not whitening that reveals a crack. It is grease going in the crack and the whiting shows a dark line after you make the test. In order to get that dark line you have to hit the axle on the end and get vibration to the axle. It would be hard to do with the wheels on.

page 442 } Q. Don't you think oil would seep in the crack if you put it there?

A. Yes.

Q. Don't you think if you put whiting over that you would see where the oil was?

A. Not until you give it a blow.

Q. What would hinder your giving it a blow?

A. In the first place, couldn't get the end of the axle up to give it a blow because it is in the car.

Q. Couldn't you give it a blow at the end of it?

A. It would be impossible. You couldn't give it a blow enough to see that.

Q. You just don't think it is practicable; is that right?

A. I know it is not practicable.

Q. You know it is not?

A. Yes.

Q. Where did you get your education in the street car line?

Witness: What experience I have had?

Mr. Williams: Yes, sir.

A. I was four years with the Michigan Railway Company in Michigan; one and a half years master mechanic of the Lincoln, Nebraska, Street Car Company, two and page 443 } a half years master mechanic at Atlantic City, six months in Philadelphia and fifteen years with the Washington Railway Company, which is now the Capital Transit Co.

Q. What practice does the street railway company have for inspection in their shops?

Witness: Inspection of what?

Q. (Continued) Axles. What does the Virginia Electric & Power Company have in Richmond for the inspection of axles?

A. They follow the same practice as we do. When the wheels are taken off the axle—

Q. How do you know that? Have you watched them?

A. I have seen them do it.

Q. How long did you see them do it, over what period of time?

A. Just a trip to the shop. I spent these two trips at shops and I have been there before several times.

Q. That is when they put on what you might call an exhibit for your inspection, didn't they?

A. I wouldn't say so. Workmen were working in the shop.

Q. You didn't know what they had done before you got there, did you?

A. We all got together and went out there. I page 444 } have been in that shop three or four times. We have interchanged ideas all the time.

Q. What kind of track is it that you saw on the Petersburg line?

A. What kind of construction? I am not a track man, but the rail looks to me like it might be 90 or 100 pound rail, which is exceptionally heavy for that kind of service. It is open track between intersections, probably wooden ties.

Q. Was it a grooved rail or T-rail?

A. T-rail between intersections and grooved at intersections.

Q. You say you couldn't make an inspection of vital parts. Couldn't you make an inspection of vital parts if you cleaned them off and went through the oil and whitening process?

A. I thought I explained why you couldn't do that. You mean with the gears and wheels in place?

Q. In place or out of place?

A. Without the gears and wheels in place you would have standard practice.

Q. You don't know whether they did that in regard to this axle in this particular case, do you?

A. No, sir, I do not.

page 445 } RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. If an axle is under the car with all the equipment on it and that car is over the pit and you can get inside the journal box where the end of the axle is and hit it with a hammer, would that hammer stroke set up vibrations on the axle the way they are set up when the axle is stripped and put in a sling and hit with a hammer?

A. Oh, no.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. What are you being paid for coming here?

Mr. Robertson: That is in the teeth of the ruling of the court. I don't object to the question if you tell the jury the question is unfair and an illegal question, and the court has so told counsel.

The Court: Is it improper to show the interest of a witness by showing he is being paid, or not?

Mr. Robertson: It is all right with me.

The Court: All right. Answer the question.

A. I am not being paid anything.

page 446 } By Mr. Williams:

Q. Not a dime?

A. Not a dime except my expenses.

Q. How much were you paid the last time for coming down?

A. Not a cent except expenses.

By Mr. Robertson:

Q. I will ask you whether it is customary in the street car business for mechanical experts from one company to exchange views and give information to another company, if called upon to do it, without making charges for it other than actual expenses?

A. We all interchange ideas and views, glad to do it.

Witness stood aside.

page 447 }

ALFRED T. CLARKE,

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

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Mr. Clarke, where do you live?

A. Baltimore, Maryland.

Q. What is your business?

A. Superintendent of rolling stock and shops of the United Railways & Electric Company of Baltimore, Maryland.

Q. Is that the only street car company in Baltimore?

A. Yes.

Q. How long have you been with them?

A. Between 26 and 27 years.

Q. Did you acquire your technical education in any school, or by actual experience, or by both?

A. I graduated from Yale University in 1900 in Mechanical Engineering. I was a year with the Bethlehem Steel Company, a year with the Linkfelt Engineering Company, five years with J. G. Brill Company and the remainder of the time with the United Railways & Electric
page 448 } Company.

Q. What kind of work did you do with the Bethlehem Steel Company?

A. Draftsman.

Q. How long have you occupied your present position with the Baltimore street railway company?

A. I went with the United Railways as assistant to the general superintendent and a year later was advanced to be superintendent.

Q. When was that?

A. 1907.

Q. At my request have you gone to the intersection of Halifax Avenue and the Petersburg Pike and looked at the street car tracks there?

A. I have.

Q. In your opinion is that track good, bad or indifferent?

A. I should say it is a fine stretch of track.

Q. At my request have you gone to the Virginia Electric & Power Company's Reservoir shops and inspected them?

A. I have.

Q. How are they equipped?

A. I should say they have first class equipment.

Q. Have you watched the work in those shops,
page 449 } including the inspection of axles?

A. I have.

Q. What do you think of the operation of those shops?

A. I would say they are conducting the work generally in a first class manner.

Q. Are you familiar with the methods of the inspection of axles in the street car business generally in the United States?

A. I have had a number of years' experience.

Q. Do you know what the general practice is throughout the country?

A. I think I am familiar with it.

Q. Are you familiar with the practice of your company in Baltimore?

A. Quite familiar.

Q. Mr. Clarke, do you know of any company in the United States that make an inspection of street car axles by putting them over a pit under the car with the wheels and all the mechanism assembled on the axle and then cleans them off and bathes them in oil, paints them with whiting and hits them with a hammer to determine whether or not there is any defect there?

A. I can't imagine what they would accomplish page 450 } by that. I don't know of any such procedure.

Q. Would that be a practical thing to do?

A. Impractical.

Q. Why?

A. Because, with the wheels and gears and motors on, they would get no result.

Q. Are you familiar with the way the Virginia Electric & Power Company inspects its axles?

A. I think I am.

Q. Do you know of any practical way to discover any possible defect in an axle without stripping everything off the axle, including the wheels, and giving it the whiting test?

A. I know of none.

Q. Is the method employed by the Virginia Electric & Power Company the method that your company employs?

A. It is, and the best I know of.

Q. Is the method employed by the Virginia Electric & Power Company the best known method in the street car business in the United States?

A. According to my experience it is.

Q. Do you know of any better way to do it?

A. I do not.

page 451 } Q. Do you know of any practical way to inspect an axle each morning before it starts out

into service, to find out whether it is a good axle or a bad axle?

A. No practical method at all.

Q. Why isn't that practical?

A. Because the axle has all these various parts on it from end to end, which makes it most impracticable to do that.

Q. Have you examined the broken axle involved in this case?

A. I have.

Q. In your opinion, is that a standard, up-to-date type of axle—

Mr. Williams: Wait a minute. If this question is going to be related to the axle before the court, all right, but I don't concede that that is the axle in question that was on this particular car. I think his question should be so amended.

The Court: What is the question?

Q. (Continued) I say, have you examined that axle, including the three pieces lying on the floor over there?

A. I would have to see whether it has the holes at the end.

Mr. Robertson: Go and look at it.

Note: Witness examines axle.

Witness: It appears to be the axle that I have seen.

page 452 } By Mr. Robertson:

Q. Is that axle a standard, up-to-date type of axle?

A. It is.

Q. Do you know of any type of axle that is not subject to breakage in service?

A. I know of none.

Q. Do you have them?

Witness: Have what?

Q. (Continued.) Do you have axles break in service in Baltimore?

A. We do.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Clarke, how much are you being paid for coming down here?

A. I am not being paid anything except expenses.

Witness stood aside.

page 453 } Mr. Robertson: Now, if Your Honor please, that is our case with this exception: We wish the jury to have a view of the intersection of Halifax Avenue and the Petersburg Pike and a view of the track at that point, at the intersection, from that point northward to Hull street. If they are interested, we would like for them to inspect the Virginia Electric & Power Company's shop, showing them at work; also the Johnson Manufacturing Company's plant if they want to.

Mr. Williams: If Your Honor please, I wish to call Mr. Tom Martin, the trouble man of the Virginia Electric & Power Company.

The Court: Do you wish to have a view of anything?

Mr. Williams: We will be glad to have it of Halifax Avenue, or up the street as far as I am concerned.

Mr. Williams: I have a plat here which would probably be of help.

Mr. Robertson: To have the thing understood, as stated at the outset of this trial, I am going to object to any testimony now that is not proper rebuttal testimony.

page 454 } It occurs to me that probably that plat would not be.

The Court: The view had better be taken after the testimony is all put in. Does the jury want to view the shops and examine the works?

A Juror: Some of the jury are familiar with the shops of the Virginia Electric & Power Company and the J. R. Johnson Axle Co. We would save time by not going.

Note: At 1 P. M. a recess was taken until 2 P. M.

page 455 } AFTERNOON SESSION.

Monday, May 28, 1934.

Court resumed its session at two o'clock P. M.

Mr. Williams: I will call Mr. Waddill.

Mr. Robertson: This gentleman has been in court about thirty minutes, though we excluded all our experts, and we object to his testifying. He has been in court.

The Court: Does he know anything about the facts in the case?

Mr. Williams: Nothing about the accident itself but just about a sketch he made.

Mr. Robertson: We object to any sketch on the ground that it is not rebuttal.

The Court: Objection overruled.

Mr. Robertson: Exception for the reasons stated.

The Court: Mr. Waddill, have you been in court during the trial of this case?

page 456 } Mr. J. Temple Waddill: I came in this morning and sat down while somebody was testifying—while Mr. Ragland was testifying.

The Court: I will let him testify.

Mr. Robertson: We except for the reasons stated.

page 457 } J. TEMPLE WADDILL,
a witness on behalf of the plaintiff, in rebuttal,
being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Will you kindly state to the gentlemen of the jury your name and your business?

A. J. Temple Waddill, civil engineer and surveyor.

Q. Would you state how long you have been a civil engineer?

A. Practically 26 years.

Q. Mr. Waddill, would you mind giving us some of your professional education? Where did you get your degree?

A. Lehigh University, Pennsylvania.

Q. Have you been following your profession ever since?

A. Yes, sir, with the exception of two years in the army.

Q. What army?

A. United States Army.

Q. In 1917?

A. Yes, sir.

Q. Twenty-six years you have been practicing?

A. Yes, sir.

page 458 } Q. Mr. Waddill, did you go down to Halifax Avenue and make a sketch of conditions you found there?

A. I don't know that I sketched all the features, but I sketched the things you asked me.

Q. Did you make a sketch of the crossing of Halifax Avenue?

A. Yes, sir.

Q. How wide is Halifax Avenue?

A. Halifax Avenue is 60 feet wide.

Q. That is the paved part?

A. From property line to property line.

Q. Did you locate a nick or chip in the rail south of Halifax Avenue?

A. Yes, sir.

Q. How far is that chip from Halifax Avenue, from the curb of Halifax Avenue, south curbing?

A. It is 112.3 feet.

Q. That chip is in the east rail, is it?

A. East rail.

Q. Did you find a groove across Halifax Avenue, the whole avenue?

A. Groove between the curb to the parkway—across Halifax Avenue between the curb to the parkway; also between the car tracks.

page 459 } Q. How far is that from the east rail?

A. It is $7/10$ of a foot south from the west of the east rail.

Q. That would be how many inches?

A. About eight and a half inches.

Q. From the east rail?

A. Yes, sir.

Q. Did you measure the dimensions of that groove at the north side and south side on Halifax Avenue?

A. It is $3/4$ of an inch wide at the north side and $17/8$ inches wide at the south side.

Q. One and seven-eighths at the south side?

A. Yes, sir.

Q. Did you make that little sketch?

A. Yes, sir.

Q. How far is that nick, or piece chipped out of the east rail, from this second pole south of Halifax?

A. That is the last pole down from Halifax street shown on this map. That would be $24\frac{1}{2}$ feet.

Mr. Williams: We offer that sketch in evidence.

The Court: Do you object?

Mr. Robertson: No, sir.

Note: Sketch filed and marked Ex. Waddill #1.

Witness stood aside.

page 460 } ADAM R. LOWRY,
a witness on behalf of the plaintiff, in rebuttal,
being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Mr. Lowry, you are—

Mr. Robertson: I have a motion to make to the court, which I think should be made in the absence of the jury.

Note: The jury were sent from the court room.

Mr. Robertson: If Your Honor please, I think that the questions that are going to be asked this witness are not proper rebuttal questions. The reason I take this matter up at this time in this manner is that, if these questions are asked the witness, the damage is done to this defendant even if the court determines that they are not proper rebuttal questions and whether he be allowed to answer
page 461 } them or not. For that reason I wish to determine in the absence of the jury whether the court is going to allow this witness to testify in rebuttal along the lines of the testimony offered.

The Court: What do you propose to show by the witness?

Mr. Williams: We propose to prove by the witness the plaintiff's case. Now, in a *res ipsa loquitur* case it is similar to a suit on a note; I prove my note and I stop. The defense comes in and prove their case. I then come in and prove my case; that is similar in all respects, and that is the case of the plaintiff. Mr. Robertson has tried to file this and file that and attempt to break up the orderly procedure in a *res ipsa loquitur* case. I don't think there is any authority for that. If there is any doubt in your mind about it, I would like to refer to authorities; that that is the procedure in a *res ipsa loquitur* case, and it is the procedure Your Honor pursued in this same case on the previous trial. I would like to read those authorities if there is any doubt in
page 462 } your mind.

The Court: What particular line of questions are you going to object to, Mr. Robertson?

Mr. Robertson: Anything that is not proper rebuttal testimony. Here is the situation, Your Honor: He proved the facts of the accident and the alleged injury and quit. I introduced here every line of testimony that was offered through the plaintiff at the last trial. Now, I cannot conceive

of anything that this witness can say that is a proper line of rebuttal testimony. If he comes here and says anything about why he didn't come to court, I don't see how he can refute the doctor. If he says anything about the way the accident happened, he has already given his version of it, and his wife has given her version of it, and his son has. He can't come here and rebut what he, himself, said at the former trial. I don't think he can rebut what his wife said either at the former trial. I think he could come here and deny that it was he they saw walking around in the back yard the other day. I can't just conceive of any other than that one thing he has a right to rebut.

page 463 } Mr. Bremner: If Your Honor please, I don't agree with Mr. Robertson on his view of the law as to the admission of testimony. I think Mr. Williams' position is sound; but, even if Mr. Robertson's position was not sound, the position he took on Thursday afternoon when the trial opened, namely, that we would be held down to strict rebuttal, which in this case is to contradict experts as to a hidden defect in the axle, which they claim was in the hub—I think that Mr. Williams is correct when he says he has authorities to substantiate it; but, whether he is correct or not, for the sake of argument now I wish to direct Your Honor's attention to this, that when Mr. Robertson himself put in certain testimony over our objection, which the court permitted to go in, showing facts which are not connected with defendant's latent defect, he waived it. He can't be permitted to pick out such sections as he thinks proper to go to the jury on the case, and then come to the court and say “I
page 464 } put in what I think you all ought to do and you can't put in any more”. Mr. Robertson waived his objection the minute he read the testimony in the previous trial; therefore, for the reasons stated by Mr. Williams and for the additional reasons suggested, namely, that Mr. Robertson waived it—

Mr. Robertson: What I am seeking to do is to hold you to rebuttal and not let you bring in a whole lot of things before the jury, whereas, if the court rules it out, the damage is already done. I think he has a right to put in rebuttal testimony. I am objecting to his going into evidence in chief.

Mr. Williams: Mr. Robertson's statement that this testimony is rebuttal is true on a *res ipsa loquitur* case, and I am proceeding to put in my case. When I prove here I was a passenger and was hurt, I rest. The next procedure is for the defendant to come in and try to explain, or sit still if he wants to; but he hasn't sat still. I could have gone to the jury on a *prima facie* presumption in my fa-

page 465 } vor had he sat still. Immediately he puts on testimony to explain that it did not happen this way and did happen that way and he was not responsible, I can put on testimony to prove many things, among them the speed of the car in proper operation, the sagging down of the car and all those things. They are proper rebuttal testimony. He misunderstands the position, and, if he will read *res ipsa loquitur* cases, he will find that is the procedure. It is called rebuttal testimony and that is the procedure I wish to follow, the orderly procedure in a *res ipsa loquitur* case.

The Court: The manner or the order in which testimony is put on is a matter largely in the discretion of the court. This is a case where both the plaintiff and defendant seem to be very much in earnest in reference to bringing before the court and jury their theory as to how this accident happened. I am very anxious that questions relating to all phases of this case shall be put before the jury. I have been very liberal in allowing both sides, especially the defendant, to introduce testimony. I am going to grant the same privilege to the plaintiff and I am going to in this case allow all the evidence both sides want to introduce, so you can make one objection, Mr. Robertson, or an objection to each question as you desire.

Mr. Robertson: Defendant wishes the record to show that it objects and excepts to all testimony from every witness introduced by the plaintiff of whatsoever character and for whatsoever purpose, except such testimony as permissible under the rules of evidence permitting the introduction of rebuttal testimony.

To save time, the defendant will not interpose a separate objection and exception to each question and answer, but wishes the record to show that it does not hereby waive any objection or any exception, but that it expressly asserts and relies upon every such objection and exception, whether or not hereafter specifically made.

page 467 } The Court: Now, Mr. Williams, as I understand it, what are you going to prove?

Mr. Williams: We will be prepared to prove the car was speeding, it was improperly operated, and was breaking down and the crack was a discoverable one; that the crack was not in the hub, but outside.

The Court: All right, sir. Go ahead.

Mr. Williams: I will withdraw Mr. Lowry for the present and put on Mr. Satterfield.

Witness stood aside.

page 468 } DAVE E. SATTERFIELD,
 a witness on behalf of the plaintiff, in rebuttal,
being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Bremner:

Q. You are an attorney at law?

A. Yes, sir.

Q. Connected with the firm of Tucker, Bronson & Satterfield?

A. Yes, sir.

Q. You were Commonwealth's Attorney prior to that?

A. Yes, sir.

Q. How long have you known Adam R. Lowry?

A. About fifteen years.

Q. Are you acquainted with the general reputation of Mr. Lowry among those with whom he associates and mingles for truth and veracity?

Mr. Robertson: I object. We have not attacked his veracity.

Mr. Williams: That is absolutely permitted in a case of this kind. It is a question for the jury. I will
page 469 } present authorities for that.

The Court: Objection overruled.

Mr. Robertson: Exception for the reasons stated.

Mr. Bremner: Are you acquainted with that reputation?

A. Yes, sir.

Q. Is that reputation good or bad?

A. It is good.

Witness stood aside.

page 470 } ADAM R. LOWRY,
 a witness on behalf of the plaintiff in rebuttal,
resuming, further testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. What day were you hurt?

A. The 11th day of July, 1932.

Q. Where were you going?

A. Going home to my lunch.

Q. About what time was it?

A. As near as I remember, it happened between 11 and 11:30 o'clock.

Q. You paid your fare to the motorman?

A. Yes, sir,—put it in the box.

Q. Who was driving the car?

A. Mr. Upchurch.

Q. Where did you board the car?

A. I got on at Cowardin Avenue and Hull street.

Q. That car turns around there, doesn't it, or page 471 } changes?

Mr. Robertson: I object to the leading question. This car doesn't turn around. It comes back by changing the trolley.

By Mr. Williams:

Q. Does that car come back by changing the trolley?

A. Yes, sir. They change the trolley and it runs back in the other direction.

Q. Now, just state, Mr. Lowry, how that car proceeded on down to Halifax and to the point where you were hurt?

A. Well, I got on that car, as I said a while ago, after 11 o'clock—between 11 and 11:30. I don't know the exact time; I wouldn't like to say. The car didn't leave right away—stood there a minute or two—and I put my glasses on and took my pencil out of my pocket and crossed my legs in this manner, with a piece of paper, and that time the car started out. I started to figuring on the paper and was trying to figure out something connected with my business I was in at that time. As I got to the first street about a square away from where I go on, there was some unusual bumping and I looked over my glasses (I couldn't see through them) to the motorman. They were glasses I used to read. I looked over top of them to the motorman. Crossed page 472 } over the street and went on for a square or so, and the same thing happened again. There was a bump and drag, grind or something. I couldn't figure—

Mr. Robertson: I object to what he thought he could figure or couldn't figure. I object to his telling what his mental processes were.

The Court: Tell what happened.

A. (Continued.) There was a bumping under the car. I could not figure—

Mr. Robertson: We object to his mental processes.

The Court: Tell what you observed.

Mr. Williams: He means he couldn't write on his knee by couldn't figure. Is that what you mean?

Witness: Yes, sir.

Mr. Williams: Now, go ahead.

A. (Continued.) We crossed over the cross-over. The second time I looked over my glasses again, I thought there was something—

Mr. Robertson: We object to what he thought. He is just arguing his case. I think he has a right to state what he saw or did but nothing else.

page 473 } By Mr. Williams:

Q. What else did the car do?

A. It went on for another square. It happened the same way, and so it continued all the way down the line until it got to Halifax street.

Q. What kind of motions, if any, did the car make as it went on down there?

A. Well, as we crossed over each street there was a bumping under the car. It would go down like that. (Indicating.) You could hear the bumping at each cross-over until getting to Halifax street. When we got to Halifax street or avenue (whatever they term it) there was a grinding and a "Bing, bam, boom" right down the track. I had my legs crossed in this manner, as stated, and I was thrown out of the seat over on the other side and back on this side and knocked down in the aisle. My head hit something on this side. Then I crawled to the back seat; I remember crawling to the back seat and getting up. I remember having a handkerchief in my hand and putting it up to my head as it might be bleeding. I was under the impression it was bleeding.

Mr. Owen, the man that was learning the learner that was driving the car (Mr. Owen was learning him to drive it, I believe) opened the back door for me and let me

page 474 } get out. I started crossing the street and remember going by Mr. Bartlett's store. The next thing I knew they were calling Dr. Baker; my wife was.

Q. Calling Dr. Baker?

A. Yes, sir, and they told me they couldn't get Dr. Baker; he was out. I told them "For God's sake get somebody", and they got Dr. Jones. He came and he looked at me and I wanted him to give me something to stop the pain, and he said he couldn't give me anything—

Mr. Robertson: I object to any conversation of the witness with anybody.

A. (Continued.) Well, he didn't give me anything. The next I remember I was in the hospital; at five minutes after 12 I was in the hospital. I remember their shooting something in my arm and then I don't know anything more. What happened I couldn't tell you until perhaps that night later on.

By Mr. Williams:

Q. How long did you stay in the hospital?

A. The exact amount of days I do not recall; something like two weeks or a little more before they let me go home.

Q. How long did you stay in bed after reaching home?

A. I would say somewhere in the neighborhood page 475 } of 7 or 8 weeks.

Q. Now, where were you working before you were hurt, Mr. Lowry?

A. Working for Mr. O. D. Brinser at the Southside Amusement Company, I think it was then.

The Court: He testified to that before—working for Mr. Brinser.

Mr. Williams: Yes, sir, I think that is true.

By Mr. Williams:

Q. Mr. Lowry, since last October have you been affected in your work, able to carry on your work as a result of your injury?

A. No, sir. I have tried to go to work on several occasions but found that in stooping over I couldn't do the work. I got blind and dizzy and would fall out with a sort of vertigo, I suppose they might call it. Things got black before my eyes whenever I stooped over and I could not do the work.

Q. What injuries did you have?

The Court: He has stated it in the former testimony.

By Mr. Williams:

Q. Mr. Lowry, were you able to come to court last Thursday?

Witness: Was it Thursday or Wednesday?

Mr. Williams: Thursday.

page 476 } A. I came home Wednesday evening about 4:30 or 5 o'clock, sick, had a sort of fainting spell on

a Main street car coming down Main street and got a little upset. When I got home I got worse and that pain in my side started. I phoned for Dr. Jones and he came down to see me and gave me a capsule out of his case he had there, and shortly after I went to sleep, and he ordered medicine, and my boy brought it down for me, and my wife gave me one every hour after that—some kind of capsules, I don't know what they were—all through Wednesday. I mean Thursday—all through Thursday. I was in bed, and Friday morning about nine o'clock, I guess it was, I rolled out and came over here to court.

Q. Now, during the day Thursday did you go out into your back yard?

A. Yes, sir, I went to my back yard on Thursday.

Q. What did you do in the back yard?

A. My house is about ninety feet, maybe a little bit more, outside the city limits. We don't have any sewerage. Our closet is about 100 feet from the house, down at the back of the house (I have a cess pool down there) and I went to the toilet, I believe, once during the day.

Q. Did you go there around 4 o'clock that after-
page 477 } noon?

A. No, sir. It was around about 2—half past 1 or a quarter to 2—because at 2 o'clock they gave me another dose of medicine. I remember I came down at that time and went to the toilet.

Q. Now, Mr. Lowry, have you been working in the last few days?

A. Yes, sir, up until last Wednesday. On the 8th day of May, this month, I got a job with the A. B. C. Board. They sent me up here to the depot on Broad street. I was what they termed at that time a checker, I believe. There was only two of us there that day. The first car load of whiskey that came into Richmond there was two of us there, checking the various brands in the car before it was unloaded. It was a very small car load, only one layer in the car. A man named Purcell and myself checked those cases off, and I have been working there ever since up until last Wednesday. I left up there early last Wednesday evening.

Q. Now, did you have any kind of attack there during that day or the day before?

A. Yes, sir, I had on three or four different occasions up there. Those cases have a serial number on them. One is the serial number we have to get off the case and it is called
page 478 } a code number. Sometimes it is on the side of the case, sometimes on top, sometimes on the bottom. We have to lift the case up and turn it

sometimes all the way around to get that code number. All of the cases have the code number. Everything is shipped by come number and bought in the same way. The first time I had any spell of effect in my work I picked one of those cases up and I must have pressed it against my side too much, and I turned it loose, and it dropped. The result was that I broke a bottle of this stuff that was in the case. In other words, it broke. I turned it loose because it hurt me. That made me a little dizzy and I sat down a few minutes and, after sitting there a little while, got up to get some water and got to it fairly well. That happened on two different occasions, just that very way. It was my own mistake in pressing against my right side instead of my left. On another occasion I had a dizzy spell up there and sat down on one of the trucks about 20 minutes until I got over that. The last day I worked up there, which was on Wednesdays, they changed me from that job and put me in a place they call the hospital, where all the broken cases go to be checked. They have to be opened. Bottles that are remaining good have to be checked and a record made of it, and all goods
page 479 } shipped out to drug stores and confectionery
stores are shipped from this hospital, which is a very light job.

Q. Mr. Lowry, as that car was proceeding down there to the point where it cracked up—I mean wrecked up, you might say—how fast was it going?

The Court: Didn't he testify to that in his direct?

Mr. Williams: I think not.

The Court: Have you read it over?

Mr. Williams: Yes, sir. I didn't ask him that.

The Court: Answer the question.

A. Well, in my judgment, I would say it was going about 30 or 35 miles an hour.

Q. How many stops, if any, did that car make between Decatur street and the point where it went across the rail?

A. I wouldn't like to say, because I don't know.

Q. Did it stop at every corner?

A. No, sir, I don't think so. No, I know it did not.

Q. Did it stop at any of those corners between Decatur and Halifax Avenue?

A. I don't remember it stopping at any of them.

Q. Did you ever work in the J. R. Johnson foundry, Mr. George Street's place?

A. Yes, sir.

Q. How long ago was that?

page 480 } A. Several years ago. I wouldn't like to say exactly. It was somewhere around 1907 or 1908, something like that. I don't know exactly but somewhere around that date.

Q. Have you had any experience in the handling of mechanical things like axles and wheels and cars and things of that kind?

A. Axles I have. I worked there. I served my time as machinist with the Newport News Shipbuilding & Dry Dock Company.

Q. Was that car acting, as it was going down there, in a usual manner or unusual manner?

A. Well, it was unusual. As I told you before, I looked over my glasses because it seemed unusual to me that the car should be running like that. That made me look at the motorman.

Q. Did you at any time after you were injured go out there and see marks, if any, made by the car where it went down to Halifax street?

A. Yes, sir. Later on, when I got able to get out and walk around, naturally I wanted to know where I got hurt at, so I walked up there to see the place.

Q. Where did those marks extend to?

page 481 } A. Began at Decatur street.

Q. Where do they end as shown on the paved road?

A. On the paved road they end at Halifax.

Q. Do you remember just the angle that car was resting as you got out of it, or did you pay any attention to it?

A. No, sir, I couldn't tell you; I don't know that part of it; I didn't look back at all.

Mr. Williams: That is all.

Mr. Robertson: No questions.

Witness stood aside.

page 482 } THOMAS F. MARTIN,
a witness on behalf of the plaintiff, in rebuttal,
being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Mr. Martin, please state your name to the jury.

A. Thomas F. Martin.

Q. Where were you working in July, 1932?

A. I was emergency man for the Virginia Electric & Power Company.

Q. How long have you been working with them?

Witness: When this accident happened, do you mean?

Mr. Williams: Yes, sir.

A. I reckon around forty-seven years.

Q. Are you still with them?

A. No, sir.

Q. Where are you working now?

A. Nowhere. I was with them forty-eight years before they retired me.

Q. You were put on the stand in this case in October last by the defendant, weren't you—Virginia Electric & Power Company?

page 483 } A. Yes, sir.

Q. I ask you if you did not testify to this, Mr. Martin, that the break, or fracture, in the axle was six or eight inches from the wheel?

A. No. You might read that, but my idea was it was six inches of the axle in the journal box.

Q. Didn't you testify categorically to the question asked you that it broke up near the motor, six or eight inches from the wheel?

A. Between the motor and the wheel. It broke right in the end of the hub of the wheel.

Q. Didn't you testify it was six or eight inches from the wheel?

A. I don't remember if I did. If I did, I don't remember.

Q. Do you deny that you testified to that?

A. I say I don't remember that I said it was—

Mr. Williams: You have got his testimony and I want to get his very words so we can put it all in. I ask you to lend me his testimony.

Mr. Robertson: Are you going to contradict your own witness?

Mr. Williams: No, sir. I want to prove where the break was. He was trouble man. Defendant didn't put him on.

The Court: You called him.

page 484 } Mr. Williams: We thought they were going to put him on. We were taken by surprise, and we summoned him. We are taken by surprise now, that he changed his statement, and I ask to put in the record that he categorically stated where the break was.

Mr. Robertson: We object to Mr. Williams impeaching his own witness just because he doesn't seem to like him.

Mr. Williams: He is an adverse witness. They put him on before and he was their witness and he testified where the break occurred, and I waited for them to put him on, but they never put him on.

The Court: That has nothing to do with your putting him on. You put him on and now you can't contradict him unless he proves adverse.

Mr. Williams: He proves adverse and I wish to examine him now under the rules of cross examination, as proven adverse. I assumed, if he testified to one thing today, he would do it tomorrow, and for that reason I want to cross examine him.

The Court: Do you object, Mr. Robertson?

page 485 } Mr. Robertson: Yes, sir.

The Court: Objection sustained.

Mr. Williams: I wish to take an exception.

The Court: You can say a witness is adverse, but just because you say so it doesn't make him adverse.

Mr. Williams: The only thing is the witness testified to one thing once in testimony and was going on to testify—

Mr. Robertson: If Mr. Williams is going to testify in the case, we would like the jury to go out until he finishes testifying unless he is going to take the stand.

Mr. Williams: Will Your Honor allow the jury to go out and let us argue this?

The Court: Yes.

Note: The jury were sent from the court room.

Mr. Williams: If Your Honor please, all the law is that a man has a right to assume a witness is going to make the same statement he made previously. We have

page 486 } the record, as previously stated on a certain fact.

We waited for the defendant to put the man on and it has not put him on. We called him as a witness to prove a fact that he testified to before. Now, a witness does not have to be adverse. He is hostile immediately he begins to change his testimony, as I understand the law, and you have a right then to proceed under the rule of cross examination. I would like the privilege of presenting that to Your Honor because I think it is very vital to my case.

The Court: All right. Go ahead.

Mr. Williams: If Your Honor please, if I had talked to the witness before I put him on and he had told me he wasn't going to say that, then I could not come to Your Honor and

say I was taken by surprise. The only way that I can say I am taken by surprise is the witness does not repeat his answers that he did before. Then he comes on and is hostile because he changes his testimony. Now, the law page 487 } gives me a right, when he has shown a change in his testimony, to ask him if he didn't say so and so previously, at the previous trial, and I think I have a right to cross examine him. I think that is the law.

The Court: It was your duty to talk to him before you put him on the stand.

Mr. Williams: No, sir. He is an employee of the defendant, forty-seven years in their service, and is on their retired list, and they didn't put him on. Your Honor said a minute ago you wanted all the light you could get in this case. That is what we all want—real light. Now, we have the testimony of Mr. Lee that the break was not in the hub; it was outside—from the lips of their own witness. Here is another witness right there. Two men right there and saw the axle. They say the axle was not broken in the hub. They put Mrs. Lowry on the stand and put in the previous testimony. I offer his previous testimony in contradiction of page 488 } the witness. You allowed Mr. Robertson to put it in; I don't see why this should be left out in arriving at the facts of the case.

Mr. Robertson: Here is what we have got. I don't suppose there was any lawyer that ever tried a law case who wasn't disappointed in some of his witnesses. Now, I have been trying from the beginning to the end of this trial to get the testimony of a number of witnesses in here and to read it in. I thought we were entitled to have it in, but it was ruled out time and again. Mr. Bremner and Mr. Williams both objected to it. This witness says he hasn't changed his testimony; that the difference was by the six-inch proposition he meant one thing and Mr. Williams is assuming a different thing. The witness denies he made any change in his testimony; so he is begging the whole question. Now, he has been derelict in his duty if he hasn't talked to his witness. I think he has no right to attack his own witness.

Mr. Bremner: In reply to Mr. Robertson: This is the first time in my experience that I remember it arising where a record is taken in a court of proper jurisdiction by a competent court reporter of the testimony of a former employe of the defendant, taken at a former trial, the sworn statement—a man of age, a man of experience, and a former employe of the defendant company—I can't see how an attorney can be taken more by surprise than to have him contradict the sworn statement

taken in the court in which it was formerly given. It is much stronger than a lawyer going into court and saying he understood a witness to say so and so. It is much stronger because here is a sworn statement, and Mr. Williams or any other lawyer has no right to ignore a sworn statement made by a man, and especially in view of the fact that they did not call him this time—a man who was right there immediately after the accident and helped to put the car back on the track, showing, I think we had every right to believe, he would stick to the same statement.

Mr. Robertson: We have a perfectly valid reason for not having called this witness. They have put an interpretation on his testimony which he says he never meant, page 492 { he didn't intend, and it is a mistaken interpretation. They ruled us out about clearing up Lee's testimony. We purposely left him off. They say he has changed it. They admit they put him on without talking to him, and they got disappointed because the witness, instead of saying that he has told a lie under oath, says, "I haven't told a lie; you misunderstood my testimony".

The Court: Gentlemen, the situation is a very unusual one. I am frank to say I am not entirely sure of my ground, but I am going to adhere to my ruling. I don't think under the circumstances you ought to be allowed to contradict your own witness. The witness has not shown any signs of hostility, as far as I see. His testimony to me certainly was not that of a hostile witness. His attitude and conduct indicate a desire to tell the truth, as far as I can see, with no feelings towards the other side; so I will adhere to my ruling, and I will not let you contradict him by his testimony at the former trial.

page 493 { Mr. Williams: We take exception to the ruling of the court for the reasons stated, and now while the jury is out offer the testimony for the record. These gentlemen have the record.

Mr. Robertson: That is my record. I don't think I am compelled to give it to them.

Mr. Williams: I have mine.

Mr. Robertson: I object, unless it is taken by a competent stenographer.

The Court: Objection is overruled, in view of your refusal.

Mr. Robertson: All right. I will let him have it. I think probably I ought to let him have it.

The Court: The court has ruled now.

Mr. Robertson: I think I am wrong. I think I will put it in as the court's record, not as a gift to Mr. Williams. I

understand that can't be read to the jury. I understand that we have to put this in in order that the record may be completed for the court of appeals, but that Your Honor expressly rules that the record can't be read to the jury in this case.

The Court: That is right.

page 494 } Mr. Williams: Mr. Martin, didn't you make this statement at page—

Mr. Robertson: I want to advise the witness that he has a right to read his entire testimony—

Mr. Williams: I object—

Mr. Robertson: I ask the court to instruct the witness that he has a right to take his entire testimony at the former trial and read it to refresh his mind, and then make any explanation or qualification of it that he deems proper.

The Court: Why not save time and put that in, his whole testimony at the former trial, in the absence of the jury?

Mr. Williams: That is all right.

Mr. Robertson: That is satisfactory.

I don't want to be impulsive. If they don't adhere to the ruling of the court in the presence of the jury, the damage is done. I am trying to get through this trial without having to ask for a mistrial. I understand Your Honor rules that they have no right to go through that testimony and use that as a basis of contradicting him before the jury page 495 } in this trial.

The Court: That is correct.

Mr. Bremner: We understand the ruling of the court.

Mr. Williams: All I am going to do is to ask the witness if he did not make a statement as to other matters.

Mr. Robertson: If you do, I am going to ask for a mistrial because it is in the teeth of Your Honor's ruling.

The Court: You are going to ask what?

Mr. Williams: There are other questions I want to ask him about.

The Court: Mr. Williams, he is your witness. Ask him these questions originally, not whether he stated at the former trial.

Mr. Robertson: That is what he is trying to do.

The Court: He must not do that. He can ask him anything he wants to except what he testified at the former trial.

Mr. Robertson: He has already announced he page 496 } is going to ask what you ruled he can't.

The Court: Well, he had better not.

All the testimony of the witness at the former trial is put in here for the purpose of the record, in the absence of the jury.

Mr. Bremner: We note an exception to Your Honor's ruling in this matter for the reasons stated.

page 497 } Note: The testimony of the witness, Thos. F. Martin, taken at the previous trial of this cause, was filed and marked "Exhibit Martin No. 1" for the record, but not read to the jury, and is as follows:

(EXHIBIT MARTIN NO. 1.)

THOMAS F. MARTIN,
a witness on behalf of the defendant, being first duly sworn,
testified as follows:

EXAMINATION IN CHIEF.

By Mr. Robertson:

Q. Are you employed by the Virginia Electric & Power Co.?

A. Yes, sir.

Q. How long have you been working for the Company?

A. Forty-eight years.

Q. How old are you?

A. Seventy years old this coming December.

Q. Were you in charge of the trouble wagon that runs down
page 498 } to Halifax Avenue, on the Petersburg Pike when they had an accident there on the 11th of July, 1932, when car No. 1527 jumped the track?

A. Yes, sir.

Q. Did you get the car back on the track?

A. Yes, sir.

Q. How did you get it back on the track?

A. Well, it was turned a forty-five degree angle. I coupled another car to it and pulled it back.

Q. Did you pull it back towards Richmond or Petersburg?

A. Towards Richmond.

Q. Did you, or not, pull it across Halifax Avenue?

A. I stopped just as we hit the paving. Then put down my rerailer and threw the car on the rail.

Q. You mean at Halifax Avenue?

A. Yes, sir, right at the street.

Q. When you had the rerailer and put the car back on the track, did the car make any marks on the pavement on Halifax Avenue?

A. Yes, sir.

Q. Are those marks there today?

A. Yes, sir. They will be there until it is repaved.

Q. Did the axle drag down? Was it dragged on the pavement?

A. The bottom field pole hit the ground in high page 499 } places.

Q. Did the axle hit the ground?

A. No, sir.

Q. What did you call that thing?

A. Field pole.

Q. What is that?

A. That is the bottom half of the motor—a field in the bottom half and a field in the top.

Q. Did that make any marks in Halifax Avenue?

A. That didn't make any marks.

Q. What did make the marks?

A. Wheels made the marks.

CROSS EXAMINATION.

By Mr. Williams:

Q. Now, Mr. Martin, the field is how far from the wheel?

A. I reckon eight inches from the wheel.

Q. These were power driven axles—motored axles; they were motor driven?

A. Yes, sir, they were both run by power.

Q. In other words, if the front axle breaks down, until the car stops the rear axle will still carry the car, wouldn't it?

A. Yes, sir.

Q. Where was it that the car was across the track, how far down the track from Halifax Street?
page 500 } A. Well, I judge it was about twenty-five feet from the pole that was below the wreck.

Q. That is that pole nearest to the next street, in that plot of grass?

A. Yes, sir.

Q. Did you notice the break in the axle?

A. No, I did not.

Q. Didn't pay any attention to that?

A. No, sir. That was under the car; I didn't pay any attention to that.

Q. It never dragged the ground, at any time, did it?

A. Oh, yes, sir, it hit the ground.

Q. How did you fix it up?

A. Just put it on the track. The bottom half of the truck rides over the rail and slides right on.

Q. Did you put the broken piece of axle back with the wheel, or what?

A. No, sir, that was under the car, in the journal box. It was broken next to the motor and that made the wheels kick over to one side.

Q. Made the wheels kick over?

A. Yes, sir, about forty degrees. That accounts for—

The Court: I can't hear you.

A. (Continued.) That accounts for the groove being cut in the side of the track all the way up.

page 501 } By Mr. Williams:

Q. How far you would say the break in the axle was from the hub?

A. I think it was about six or eight inches.

Q. About six or eight inches?

A. Yes, sir, it was a little longer on one side than the other.

Witness stood aside.

page 502 } Note: The jury returned to the court room and
the examination of the witness was resumed as
follows:

By Mr. Williams:

Q. Mr. Martin, the trouble wagon was the wagon that put the car back on the track, wasn't it?

A. Yes, sir.

Q. You were not summoned by the defendant this time, were you?

A. I don't know who summoned me.

Q. You were summoned today by the plaintiff?

A. I got a summons to come to court. I don't know who summoned me,—

Q. When was that—

Mr. Robertson: Let the witness finish.

The Court: Go ahead.

Witness: I got a summons that they wanted me at the Law & Equity Court today; at 2:00 o'clock, I got a 'phone message, but I did not know who summoned me or what it was about.

Mr. Williams: I offer the original summons that was issued for this witness.

The Court: He was summoned by the plaintiff.

page 503 } EXHIBIT MARTIN NO. 2.

The Commonwealth of Virginia,
To the Sheriff of the City of Richmond—Greeting:

We command you to summon Tom Martin; Dave Satterfield, Jr., Chas. W. Purdy; Lee Purcell, to appear forthwith before the Judge of our Law and Equity Court of the City of Richmond, at the Court room of said Court, in the City of Richmond, on the 28th day of May, 1934, to testify and the truth to say in behalf of the plaintiff in a certain matter of controversy in our said Court, before the said Judge depending and undetermined between Adam R. Lowry, plaintiff, and Virginia Electric & Power Co., defendant.

And have then there this writ.

Witness, Luther Libby, Clerk of our said Court, at Richmond, the 28th day of May, 1934, and in the 158th year of the Commonwealth.

LUTHER LIBBY, Clerk.
By IRA M. BARR, D. C.

Witness stood aside.

page 490 } JOHN T. ROBINSON,
a witness on behalf of the plaintiff in rebuttal,
being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Where do you live?

A. 1121 Decatur Street.

Q. Mr. Robinson, do you remember the time when Mr. Lowry was injured on a street car, in July, 1932? Do you remember that day?

A. Yes, sir.

Q. Look right at those gentlemen of the jury and tell them what you saw.

Witness: In my own words?

Mr. Williams: Yes, sir, in your own words.

A. I was coming from Falling Creek in a truck. When I got to the filling station on the Pike, just before I got to Gray

Street, I think it is, I saw the car coming down the Pike. It was rocking and swaying back and forth, and it looked like it was going about 30 or 35 miles an hour, and when it got to Halifax Street, it came across the intersection and the time it got across the intersection it started to
 page 491 } plow up dirt and plowed up all the way down to where it stopped, which was about 10 feet from that concrete pole at the cross over, and the front end of it went out in the street about four feet, and the rear end of it stayed across the car tracks. It was on an angle.

Q. You said Fairfax. Do you mean Halifax or Fairfax?

A. Halifax.

Q. Did you go up to Halifax street after the car went across the track?

A. Yes, sir, I walked back up to Halifax to the crossing.

Q. What did you see as you went up there?

A. I saw where the car had plowed dirt up all the way up to Halifax, and from there across the intersection was a big groove, running from one side of the street to the other — of the intersection.

Q. Did you stay there until the trouble wagon came?

A. No, sir.

Q. Did you see Mr. Lowry?

A. Yes, sir.

Q. What did he appear to be doing, or what did he do?

A. I saw Mr. Lowry holding a handkerchief up
 page 504 } against the side of his head like this, and he walked right off immediately. I spoke to him, but he didn't seem to see me or hear me, and he started towards his home.

CROSS EXAMINATION.

By Mr. Robertson:

Q. You were in the truck going northbound

A. Yes, sir.

Q. How fast was the truck going?

A. About 15 miles an hour.

Q. Were you driving it?

A. No, sir.

Q. How far away from the street car were you when you first saw the street car?

A. I should judge about 150 yards.

Q. That would be about 450 feet away?

A. Yes, sir.

Q. And you were approaching each other?

A. Yes, sir.

Q. And you figure the street car was going about 30 or 35 miles an hour?

A. Yes, sir.

page 505 } Q. You are a huckster, aren't you?

A. Peddler.

Q. You peddle vegetables?

A. Yes, sir.

Q. Who was in the truck with you?

A. A man named John Thames.

By Mr. Williams:

Q. Where did he live?

A. He lives at 2407 N Street.

By Mr. Robertson:

Q. Did he testify at the former trial?

A. No, sir.

Q. Is he here to testify today?

A. No, sir.

By Mr. Williams:

Q. You stated his name before, didn't you, Mr. Robinson?

A. Yes, sir.

Q. Does Mr. Thames know anything about it?

Mr. Robertson: I object.

The Court: Objection sustained.

By Mr. Williams:

page 506 } Q. One question I forgot to ask you. You made a motion with your hands, but the stenographer didn't get that, and that is not recorded in the record, that as the street car came down it was rocking and swaying, and you moved your hands from side to side.

A. That is the way I mean when I say swaying. (Indicating.)

Q. Moving from one side to the other?

A. Yes, sir.

Q. Did you know either one of the men on the street car?

A. No, sir.

By Mr. Robertson:

Q. What truck were you riding in?

A. T model, open truck.

Q. Was that swaying any?

A. Not that I know of.

Q. Riding perfectly smoothly at 15 miles an hour?

A. Yes, sir.

Q. Was it a one-ton Ford truck?

A. Yes, sir.

Q. How long had you known Mr. Lowry?

A. I didn't know him to speak to him at that
page 507 } time.

Q. Been knowing him ever since that time?

A. Yes, sir, been knowing him since then.

By Mr. Williams:

Q. Your car was on rubber tires, wasn't it?

A. Yes, sir.

Mr. Robertson: I object to the leading question.

Witness stood aside.

page 508 }

D. B. HEATH,

a witness heretofore examined on behalf of the
defendant, being called by plaintiff, in rebuttal, testified as
follows:

By Mr. Williams:

Q. How fast was that street car going as you saw it there?

A. I would say approximately twenty-five or thirty miles
an hour.

Witness stood aside.

page 509 }

C. L. RYNALDO,

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

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Where do you live?

A. 2403 Halifax Avenue.

Q. That is in South Richmond?

A. Yes, sir.

Q. Do you remember the day when a street car went across
the rails down there between Halifax and the next street
south on the Petersburg Pike?

A. Yes, sir.

Q. Did you pass across the street in Halifax Avenue that
morning prior to 11:30?

A. I crossed there just about 11:00 o'clock.

Q. Where were you going?

A. Over to a little garden I had.

Q. Your garden was where with respect to the Petersburg Pike, on the east or west side?

A. On the west side of Petersburg Pike, and south side of Hopkins Road.

page 510 } Q. When you went across that road (Halifax) that morning, was there any grooved mark all the way across Halifax before this car went on up?

A. No, sir.

Q. When you came back there, did you see any marks?

A. Yes, sir, I saw them there when I came back.

Q. About what time?

A. Just about 2:00 o'clock.

Q. Did you see a chip out of the east rail, some distance, 40 or 45 steps south of Halifax Street?

A. Yes, sir, I saw that.

Q. Was that a new chip or old chip?

A. That was a new chip.

Witness stood aside.

page 511 } DR. S. H. SHEIB,
a witness on behalf of the plaintiff in rebuttal,
being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Doctor, would you state your name to the jury, and what is your business or occupation?

A. S. H. Sheib; President of Froehling & Robertson, Inc., chemists and inspection engineers.

Q. You are President of Froehling & Robertson, are you not?

A. Yes, sir.

Q. Doctor, will you state your engineering and chemical education?

A. I was educated at the Virginia Polytechnic Institute, and took post graduate work at Vanderbilt University and Harvard University, and a course at Vanderbilt University in the Medical and Dental Department. Then came as a partner with the concern that I am now with. At the death of the senior member of it, I was elected president, which position I have held since 1930.

Q. As chemical engineer and expert, have you had to do

with pavings of any kind, of asphalt or Tarvia, or concrete,
or things of that kind?

page 512 } A. Yes, sir.

Q. That extended over what period of time?

A. Since 1917.

Q. Did you make an examination of marks extending from Decatur Street to Halifax Avenue, and across Halifax Avenue?

A. I did.

Q. State to the jury then what you found there.

Mr. Robertson: Ask him when he made them.

By Mr. Williams:

Q. When did you make them, Doctor?

A. Last October, and I have recently gone over them again.

Q. Would you kindly describe what you found there to the jury? Have you got a paper? Did you make a report on that?

A. I have my notes. With permission I would like to refer to them to refresh my memory as to the names of streets. Beginning at Decatur Street, there is a mark visible in the asphalt at the intersection. The mark being about 6 inches inside of the east rail, parallel with the rail, continuing across this intersection. The mark there is quite light, barely perceptible. As you continue on, the same mark is apparent

at each intersection and across Halifax Street,
page 513 } becoming progressively deeper. For the last two
or three streets north of Halifax the mark is about of a uniform depth. At certain places the mark is continuous and at others it is intermittent, making a series of dashes, or gaps between. In a number of places, the concrete curb either on one side or both sides of the intersection is scored in a line with this mark. There are some places where the concrete curb has not been touched. In such places, it is apparent that the curb is lower than the remainder of the street. Whatever object it was that caused the scoring had evidently slid across and missed the curb.

Q. Now, at Everett Street, for instance, is there any break or nick in the concrete curb?

A. There is a broken place in the concrete curb on the south side of the street, and nearest the grass plot. There *there* is a piece of concrete that has been broken out and a chip of concrete was found an inch or two distant from the curb, apparently broken from this place.

Q. Now, is that chip that you found there to the south of the concrete or to the north of the concrete?

A. To the south.

page 514 } Q. To the south?
A. Yes, sir.

Q. Now, this concrete curb that you referred to, will you describe to the jury its location and its purpose there from Decatur to Halifax?

Mr. Robertson: I object to the Doctor giving the purpose. That is speculative. I don't object to his giving the dimensions of it, or what it looked like. The jury are going to see it, and they can tell what the purpose is.

The Court: Go ahead, Doctor.

Witness: Will you ask that question again please.

The Court: Just describe the concrete curb.

Mr. Williams: At each intersection, and between them.

A. These grass plots are elliptical, extending from one block to the other. The curb at the intersection is more or less curved at the corners, leaving a sort of rounded area. The track passes through this curb, the curb being interrupted at this point. It is a curb probably four or five inches wide, I don't know how deep, of ordinarily poured concrete.

page 515 } By Mr. Williams:

Q. It is one of those curbs that you have reference to, of which this chip was a piece?

A. Yes, sir.

Q. That would be to the south side of Everett Street?

A. Yes, sir.

Q. Now, at Maury Street, did you find any peculiarity there as to that concrete curb?

A. Yes, sir.

Q. Describe that.

A. Also on the south edge the concrete is chipped with a piece of chipped concrete knocked out, and found rather close to the broken spot.

Q. Where was that chip located with respect to the place that it was broken from—south or north of it?

A. South of it.

Q. Now, at Edwards Avenue, did you notice anything in regard to a piece of wooden form there?

A. Yes, sir. At Edwards Avenue, there is a piece of the original form which was used in pouring the concrete, which was allowed to remain, and in it was also a grooved cut into it in line with the groove scored in the concrete.

Q. Is that groove scored from the north or south, from your observation?

page 516 } Mr. Robertson: We object.
The Court: Objection sustained.

By Mr. Williams:

Q. When you came to Halifax, and below Halifax, did you notice any particular peculiarity about the east rail, say, 45 steps south of Halifax?

A. Yes, sir. At about 45 steps (I stepped it off) there is a nick on the east rail, on the east side of the east rail, a rather deep abrasion, and two other marks, one of which is parallel to this triangular nick. There is a rather smaller abrasion.

Q. Now, is that abrasion to the west, or towards the east?

A. That abrasion is on the side of the rail that is nearer the east; it is on the east side of the east rail—outside of the rail.

Mr. Williams: The witness is with you.

Mr. Robertson: No question.

By the Court: You spoke of chips of concrete you found. Do you mean found by you when you were out there in October, 1932?

A. Yes, sir.

page 517 } By Mr. Williams:

Q. The jury can view them today, can't they?

A. I don't know about today. They were there last week, one day, when I went over there.

By the Court:

Q. You found them?

A. Yes, sir, I found them myself.

Witness stood aside.

page 518 } H. E. LOWRY,
a witness on behalf of the plaintiff in rebuttal,
having been previously duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. You are the son of Mr. Adam R. Lowry, are you?

A. Yes, sir.

Q. Mr. Lowry, what has been your father's health since he was hurt?

A. It has been very poor ever since he was hurt. He has

not been able to get around like he was before, not only in his work, but around the house. He used to work around in the garden and flowers. He hasn't been able to do that much since.

Q. You went up on that car with Mr. Upchurch that morning?

A. Yes, sir.

Q. How did he drive the car?

A. Well, I don't know just how he drove the car. He couldn't seem to stop the car as it should be stopped.

Q. How did he stop it?

A. Stopped in a very rough manner, enough to throw you out of your seat at times.

page 519 } Q. When he would stop it in that rough manner like that, would they open the door too, or go on?

A. Well, no, he didn't open the doors but very few stops that he made. There was no occasion for Mr. Owen was showing him and telling him how to stop the car, and the first few stops he made, it was not passenger stops; it was in between. He merely stopped the car,—going 15 or 20 miles an hour, would bring it to a stop.

Q. Now, that was when he was going towards Hull Street, wasn't it?

A. Yes, sir.

Mr. Robertson: I object to leading the witness.

Mr. Williams: I withdraw that.

By Mr. Williams:

Q. Was that on the journey to Hull Street or from it?

A. Towards Hull Street.

Q. On that journey towards Hull Street, do you go up or are you going down from Halifax?

A. You are going up towards Halifax.

page 520 } Q. You got on at what street?
A. At Stop 3, Ingram Avenue. That is the terminal of the line.

CROSS EXAMINATION.

By Mr. Robertson:

Q. You were not on the car at the time your father was hurt, were you?

A. No, sir.

Witness stood aside.

page 521 } MRS. ADAM R. LOWRY,
a witness on behalf of the plaintiff in rebuttal,
having been heretofore duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Mrs. Lowry, you are the wife of Mr. Adam R. Lowry, the plaintiff in this case?

A. Yes, sir.

Q. Do you remember last Thursday, when this case started, the Sheriff came over there for you and your son?

A. Yes, sir.

Q. At the time that Mr. Mercer, the Sheriff, was there, where did Mr. Mercer serve you with the papers?

A. At the front door in the hall.

Q. Did he come in the door?

A. Yes.

Q. Your door is in what room; what room adjoins it?

A. The front door leads into the hall and then into the living room.

Q. If you go in the front door, can you see the living room and hall?

A. Yes.

Q. Where are your upstairs steps?

page 522 } A. In the hall.

Q. Right there near the front door?

A. Right near the front door.

Q. Are the front steps near the front door?

A. Yes.

Q. Where was your husband at the time that Mr. Mercer was there?

A. He was upstairs.

Q. Whereabouts upstairs?

A. Upstairs in bed when I went up to dress.

Q. You went up to dress for what?

A. To come over here.

Q. To come over here?

A. Yes, sir.

Q. The Sheriff asked you to come?

A. Yes, sir.

Q. Mrs. Lowry, would you kindly state to the jury what has been the effect of the injuries sustained by your husband on July 11th, 1932, on his health and his physical condition?

A. He has not had any health; he has been practically down

and out ever since this happened, and it seems
page 523 } it affects his nervous system as well as his physical condition.

Q. Has he been able to follow his employment?

A. He is able to do but very little.

Q. Do you know for whom he was working at the time he was hurt?

A. O. D. Brinser.

CROSS EXAMINATION.

By Mr. Robertson:

Q. When they served this summons on you was anybody downstairs in the house except you?

A. My son. He was getting ready to go practice baseball.

Q. Were you talking to anybody in the back room at any time while the Sheriff was there?

A. Nobody but my son.

Q. He was in the back room downstairs?

A. Yes, sir.

Witness stood aside.

page 524 }

CHARLES BURKERT,

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

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Where do you live?

A. 1307 Bainbridge.

Q. Where are you employed?

A. Department of Public Utilities.

Q. Of what?

A. City of Richmond.

Q. How long have you been there employed?

A. Twenty-six years this fall.

Q. Mr. Burkert, do you know Adam R. Lowry?

A. Yes, sir.

Q. Do you remember about the time he was hurt by a street car on the Petersburg Pike, in July, 1932?

A. Yes, sir.

Q. Did you go out and make pictures of the scene there?

A. I did.

Q. Will you state to His Honor and the jury how soon after he was injured did you make those pictures?

A. I couldn't say exactly, but it was a couple page 525 } of weeks.

Q. It was in the month of July, 1932?

Mr. Robertson: Don't lead him any more.

A. I wouldn't say.

By Mr. Williams:

Q. You say about a couple of weeks after he was hurt. I hand you these pictures and ask you if they describe conditions and state where you took them? I hand you here picture marked Ex. Burkert #1 and ask you if that is one of the pictures that you took?

A. Yes, sir.

Note: Picture filed, marked Ex. Burkert #1.

Q. Will you state just what that describes?

A. Indentations in the concrete.

Q. That picture is looking in what direction?

A. The Pike runs very near north and south. That is looking north.

Q. I hand you Exhibit Burkert #2 and ask you if that is a similar picture looking in the same direction?

A. Yes, sir.

page 526 } Note: Picture filed, marked Ex. Burkert #2.

Q. I hand you a picture marked Ex. Burkert #5 and ask you if you took that picture, and, if so, describe the scene, what it is?

A. That is the indentation or cut in the rail. That is the north rail.

Q. The north rail would be what rail; if you were going to Petersburg would be the left or right?

A. It would be the left going towards Petersburg, on the east side.

Q. That is the indentation in the rail?

A. Yes, sir.

Q. I notice on either side that there is no grass. What was the condition of that plot there between Halifax and In-

gram Avenues? Did it have grass on it or was it dirt at that time?

A. Ordinary rocks and now and then a sprig, but no grass there to amount to anything.

Q. Hadn't been sown at that time?

A. No, sir.

Q. I ask you how did it happen that you took page 527 } those pictures?

A. Mr. Lowry is a personal friend of mine and always been an acquaintance, and, when he got hurt, I went to the hospital to see him, and then afterwards I went down and took these pictures because of the fact that it might be taken into consideration that it was some alteration in the concrete. I didn't know whether the rail would be taken up or what, and I took the pictures to show actual conditions at that time for future reference. That was voluntary, at no request of Mr. Lowry.

Note: Picture filed and marked Ex. Burkert #5.

Q. I hand you picture marked Ex. Burkert #3, and ask you what is the scene of that and looking in what direction?

A. This is looking north.

Q. At what street?

A. Halifax.

Note: *Pictured* filed and marked Ex. Burkert #3.

Q. I hand you Exhibit Burkert #4 and ask you to acquaint yourself with that and state what that is a picture of?

A. This is the same street, only a different view page 528 } of it, looking north.

Q. Looking north?

A. Yes, sir.

Note: Picture filed and marked Ex. Burkert #4.

Q. Now, I hand you Exhibit #6 and ask you what is that a picture of?

A. That is the same corner of Halifax Avenue and Petersburg Pike. I took that picture at a different angle, from a different point.

Q. Looking north, too?

A. The way I set the camera to take this was looking more west than north.

Q. The idea being to show what?

A. The exact location.

Q. Of Halifax Avenue?

A. Yes, sir.

Note: Picture filed and marked Ex. Burkert #6.

page 529 } Q. Now, Mr. Burkert, how long would you say
you have known Mr. Lowry in the community in
which he lives? How long have you known Mr. Lowry?

A. Oh, over twenty years.

Q. Do you know his reputation for truth and veracity in
the community in which he lives?

A. I never heard anything detrimental to it.

The Court: That is not what he asked you.

By Mr. Williams:

Q. Do you know his reputation for truth and veracity in
the community in which he lives?

A. Well, yes, sir.

Q. Is it good, bad or indifferent?

A. I would say it was good.

Witness stood aside.

Mr. Williams: We have three other witnesses who do not
appear to be here at this time.

Mr. Robertson: I have one other witness I would like to
call while waiting for them.

The Court: I will let Mr. Williams put on his three charac-
ter witnesses; that is all. I will hear Mr. Robertson's wit-
ness now.

page 530 } F. L. CHILDREY,
a witness on behalf of the defendant, being re-
called in sur-rebuttal, further testified as follows:

By Mr. Robertson:

Q. When car 1527 came in from this accident to your de-
partment, did you inspect the car after the accident?

A. Yes, sir.

Q. Is that the inspection report that you made? (Indicat-
ing.)

Mr. Williams: This is not rebuttal testimony.

The Court: I don't know.

Mr. Robertson: I will look it up. I will vouch for it being rebuttal, certainly within the limits that have been stated.

Mr. Williams: I object as not being rebuttal testimony.

The Court: Let him answer whether or not that is the report he made.

A. Yes, sir. That is my report.

The Court: Ask the next question.

By Mr. Robertson:

Q. Mr. Childrey, when the car came in to you after this accident, was there anything broken under it other than the axle?

A. No, sir.

page 531 } Mr. Williams: I object to that as not being rebuttal.

The Court: Objection overruled.

By Mr. Robertson:

Q. With the axle broken under that car the way it was when it came in there to you, was it possible to run that car south from Hull street to Halifax Avenue, a distance of just a little short of a mile?

A. We figure that—

Mr. Robertson: Do you understand the question I ask you? With the axle broken under that car the way it was, was it possible to run that car with that broken axle from Hull street down to Halifax Avenue, where it jumped the track?

A. (Continued) No, sir.

Q. Why not?

A. Because the axle broke inside the wheel with the weight on the journal. The minute that axle broke the wheel went down like that. (Indicating.) I wouldn't like to say how long, but I would say it would only go a few feet, depending on the speed.

Q. Is that the inspection report you made? (Indicating.)

A. Yes, sir.

page 532 } Mr. Robertson: I offer it and ask that it be marked Defendant's Exhibit, Childrey #1.

Mr. Williams: I object because it is not the report the defendant put in in this case before.

The Court: Objection overruled.

EXHIBIT CHILDREY #1.

CAR BARN FOREMAN'S REPORT

Report No. 18798.

Richmond, Va., July 12th, 1932.

Car No. 1527. Time 11:25 A. M. And Date July 11th, of
accident

Motorman T. R. Owen

Conductor Safety car.

Notice from Trans. Dept. Car off track.

Controllers	Examined by	Condition
	T. L. Childrey.	O. K.
Wheels and axles	"	#2 axle broken.
Brakes	"	O. K.
Brake ratchets and dogs both ends	"	"
Brake rigging and connections	"	"
Air Brakes	"	"
Window fastenings	"	"
Headlights	"	"
All steps	"	"
Running-Boards	"	"
Doors	"	"
Broken glass	"	"
Grab-handles	"	"
Trap doors and lifts	"	"
Floors and platforms	"	"
Fenders	"	"
Sand equipment	"	"
Condition of seat.	"	"
Projecting tacks, etc.	"	"

page 533 }

IMPORTANT.

There are so many claims made by people falling while boarding or alighting from standing cars, alleging defective steps, etc. that a very thorough inspection should be made of this particularly.

When the car or trucks are damaged, scratched, or scarred,

or glasses broken out, particularly on the sides, steps or running-boards damaged, the location should be stated; also which end of the car; No. 1 or No. 2.

Additional comments:

T. L. CHILDREY,
Foreman.

CROSS EXAMINATION.

By Mr. Williams:

Q. You didn't see that car on July 11th, did you?

A. I don't remember whether I did or not.

Q. I notice your report is made July 12th. Was the report made July 11th or 12th or when?

A. The report was made on the day of the accident. I don't remember the date, it has been so long.

Q. If the report was made the day of the accident, why did you put July 12th on it, then?

A. It was the day I made the report.

Q. Mr. Robertson asked you about the axle. You said the car would stay on the track a few feet, depending on the speed of the car. If the car was going 20 miles an hour, it would stay on longer than if it was going 35, wouldn't it?

A. No, sir.

Q. It wouldn't stay on the track longer at 20 than 35 if it was broken down like that?

A. No, sir. Going 35 it would stay on longer than if it was going at 20.

Q. You mean to testify it is going better then for passengers when the axle breaks?

A. I don't know about passengers, but I say the higher the speed the longer it would stay in the direction it was going, and naturally it would stay on the track that much longer.

Q. It might be a little rougher riding for the passengers?

A. No, sir, not as long as on the track.

Q. As long as on the track it would be right smooth?

A. Yes, sir.

Q. You think that with a car being driven fifteen or twenty miles an hour and the axle breaks, it will stay on the track less than at 30 or 35 miles?

The Court: He answered that.

By Mr. Williams:

Q. Did you ever run one of those cars?

A. Yes, sir, ran them seven years.
page 535 } Q. In what distance can you stop one, going
fifteen or twenty miles an hour?

Mr. Robertson: I object. That is not rebuttal, or sur-rebuttal, or sur-sur-rebuttal—not any kind of rebuttal.

The Court: Objection sustained.

Mr. Williams: I thought Your Honor had become liberal.

The Court: Not that liberal. I don't think that throws any light on this case to help the jury in any way.

By Mr. Williams:

Q. How far is the field pole from the wheel?

Mr. Robertson: I object to that. I never heard of a field pole. If he is going into that, I want to get my experts back to explain.

The Court: What are you trying to rebut?

Mr. Williams: I am just asking a question, just asking information for the purposes of this case.

The Court: Objection sustained.

Mr. Williams: I wish to note an exception to
page 536 } the ruling of the court.

Witness stood aside.

Note: At 4:40 P. M. court adjourned until to-morrow, May 29th, 1934, at 10 o'clock A. M.

page 537 } FOURTH DAY.

Tuesday, May 29th, 1934.

Court met. at 10 A. M., pursuant to adjournment.

CHARLES R. PURDY,
a witness on behalf of the plaintiff in rebuttal, being first
duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Mr. Purdy, will you kindly state to the jury your name and your occupation?

A. Charles R. Purdy, attorney at law, Richmond.

Q. Mr. Purdy, you stated your occupation is attorney at law?

A. Yes, sir.

Q. Do you know the plaintiff, Adam R. Lowry, in this case?

A. Yes, sir.

Q. How long have you known him, Mr. Purdy?

A. I have known him for something over thirty years.

Q. How old are you?

A. Forty-two.

Q. Mr. Purdy, do you know Mr. Lowry's reputation in the community in which he lives for truth and veracity?

A. I do. It is good.

Q. Would you believe him on oath?

Mr. Robertson: I object.

The Court: Objection sustained.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Is he a client of yours?

A. No, sir.

Witness stood aside.

page 539 } THOMAS B. MORTON,
a witness on behalf of the plaintiff in rebuttal,
being first duly sworn, testified as follows:

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Mr. Morton, would you kindly state your name to the jury?

A. Thomas B. Morton, Superintendent of the City Home.

Q. Do you know Adam R. Lowry, the plaintiff in this case?

A. I do.

Q. How long have you known him, Mr. Morton?

A. Twenty-five or thirty years.

Q. Do you know his reputation in the community in which he lives for truth and veracity?

A. I do.

Q. Would you state to the jury whether it is good, bad or indifferent?

A. It is good.

CROSS EXAMINATION.

By Mr. Robertson:

Q. He doesn't live in the City Home, does he, Mr. Morton?

A. No, sir.

Witness stood aside.

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O. D. BRINSER,

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

EXAMINATION IN CHIEF.

By Mr. Williams:

Q. Mr. Brinser, would you kindly state to His Honor and the jury your name and your occupation?

A. O. D. Brinser; 4114 Riverside Road; President of E. C. Brinser's Sons, Inc., and President of the Southern Bank & Trust Co. I guess that is sufficient.

Q. State a few others you are connected with.

A. Vice President of the North American Finance Corporation and in the real estate business.

Q. Connected with the Bank of Commerce & Trusts?

A. Director of the Bank of Commerce & Trusts.

Q. Can you group them and say how many others you are connected with?

Mr. Robertson: Is Mr. Brinser testifying now as to his own character or the character of Mr. Lowry? I understood he was put on as a character witness for Mr. Lowry.

The Court: He is just identifying himself.

page 541 } By Mr. Williams:

Q. State the others you are connected with.

A. President of Imperial Amusement Corporation.

Q. Mr. Brinser, do you know Adam R. Lowry?

A. Yes, sir.

Q. How long have you known him?

A. I have known Mr. Lowry for at least twenty years.

Q. Do you know his reputation in the community in which he lives for truth and veracity?

A. I do.

Q. Would you state whether it is good, bad or indifferent?

A. It is good.

Mr. Williams: The witness is with you.

Mr. Robertson: No questions.

Witness stood aside.

Testimony Closed.

page 542 } The Court: The jury want to go to Hull street
and Cowardin Avenue and from there south on the
Petersburg Pike to Stop #3, making such observation as they
desire.

You gentlemen will not talk to anybody about this case.
Of course, you may discuss among yourselves.

Mr. Williams: If Your Honor please—

The Court: Counsel also want you to go to Mr. Lowry's
residence.

Note: The jury, in charge of the Sheriff, were taken to
view the scene of the injury and points indicated.

page 543 } PROCEEDINGS IN CHAMBERS.

Mr. Robertson: Defendant again moves the court to strike
from the record and exclude from the jury all testimony in-
troduced on behalf of the plaintiff, upon the ground that all
such testimony is insufficient to support any act of negligence
charged against the defendant, and that any verdict, or judg-
ment, if returned, or entered, for the plaintiff, would be con-
trary to the law and the evidence and must necessarily be set
aside and final judgment entered for the defendant. We base
this motion upon the decision of the court in *Baker v. C. & O.*
Railway Co., reported in 149 Va., and upon rehearing in 150
Va.

The Court: Motion overruled.

Mr. Robertson: Defendant excepts for the reasons stated.

page 544 } Mr. Robertson: Defendant excepts to any ar-
gument in behalf of the plaintiff either that the
axle, which has been exhibited in evidence in this
case, was not the identical axle which broke when the plain-
tiff was injured; or (2nd) to any argument by plaintiff's
counsel that any better method of inspection could have been
adopted by the defendant than was adopted; or (3rd) that
the break occurred outside the hub and not inside the hub;
or (4th) to any argument in behalf of the plaintiff upon any
phase of this case upon the theory that the plaintiff is entitled
to recover either upon the *res ipsa loquitur* doctrine or any
other doctrine.

Defendant also objects to any argument on behalf of the

plaintiff upon any settlement made by this defendant with Mrs. George Nissen.

Defendant asks the court to rule now whether or not any argument objected to will be allowed by the court so that proper objection and exception may be taken now by the defendant and the necessity thereby obviated for
page 545 } continuously interrupting the argument of counsel.

The Court: The court rules that the plaintiff's counsel should not make any argument to the jury on the question of the axle, which was exhibited, not being the axle in the street car.

On the other two points I think the counsel have a right to argue those matters to the jury under the evidence.

Mr. Williams: Counsel for the plaintiff excepts to the ruling of the court for the reasons already stated, which include, among others, that there is a record in this case of previous testimony of Thos. F. Martin, who was trouble man in charge of the trouble wagon, who was called by the defendant in this case, and who went to the relief of the street car which had broken down and was then at a 45 degree angle across the track, that he (Mr. Martin) saw the break in the axle and that it was six or eight inches from the hub, near the motor box; and that this testimony was in part supported by
page 546 } a witness put on by the defendant, who testified that the break was a little more than an inch or two from the hub, outside of the hub; and these particular facts, along with the further fact that the shop mark on the axle, which defendant identifies as #42, appears to be 642; and for the further fact that Mr. George Street stated that the axle in question was turned in to his company and he gave them a new axle therefor; and there being further evidence of the physical facts—the marks between the rails about six or eight inches from the east rail showing a breaking down for nearly a mile, and there being such great contradiction on the question of where the axle went and what was done with it, particularly as Mr. Childrey says that the axle did not come to him the same day it was broken down; and there being such even opportunity for confusion and mixing up (unintentional though it be or inadvertent though it be) and for this axle to have been on another car, the plaintiff claims he would be greatly hampered by not being allowed to
page 547 } make argument before the jury that this is, evidently through misadventures, not the axle in question, and the evidence of Lee only is sufficient to make argument before the jury on that ground.

Mr. Robertson: Defendant excepts to the ruling of the court insofar as it permits any argument on behalf of the plaintiff upon the theory that the plaintiff is entitled to recover.

In deference to the court and to prevent delay and also to prevent interruption in the argument of counsel in behalf of the plaintiff, pursuant to the ruling of the court, to which exception is taken by the defendant, counsel for the defendant will not continuously object and except to the argument in behalf of the plaintiff and will not continuously interrupt plaintiff's counsel; but counsel for the defendant wishes the record to show that such action upon its part is in nowise to be construed as a waiver by the defendant of any objection or exception or motion for a mistrial, which it may page 548 } be entitled to make. To the contrary, counsel for the defendant wishes the record to show that the defendant expressly makes, reserves, relies upon and asserts every objection and exception and motion for a mistrial which it may be entitled to make according to its theory of the case.

Teste: This 22nd day of October, 1934, after to notice to plaintiff's attorneys as required by law.

ROBT. N. POLLARD, Judge.

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CERTIFICATE NO. 2.

On the trial of this action, after the jury had been sworn to try the issue joined, and after all the evidence had been introduced before the jury as set out in Certificate No. 1, which said certificate is hereby specifically referred to and made a part of this certificate, counsel for the defendant moved the court to strike from the record and exclude from the jury all evidence introduced in behalf of the plaintiff upon the ground that the evidence in behalf of the plaintiff is insufficient to establish any negligence charged against the defendant, and any verdict returned for the plaintiff would be contrary to the law and the evidence and the court would be compelled to set aside any such verdict and to enter up final judgment for the defendant; which motion the court overruled and thereupon the defendant by counsel excepted for the reasons stated.

Teste: This 22nd day of October, 1934, after notice to plaintiff's attorneys as required by law.

ROBT. N. POLLARD, Judge.

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CERTIFICATE NO. 3.

The following Fifteen (15) instructions were given by the court and are all the instructions granted on the trial of this cause:

Instruction No. 1 was given by the Court and Instruction Nos. 2, 3, 4, 5, 5-a, 5-b and 6 were given at request of the plaintiff.

Instructions marked A, B, C, D, E, F and G were given at request of the defendant.

No. 1.

The court instructs the jury that the defendant, as a common carrier of passengers, was bound to exercise the highest degree of practicable care to safely carry the plaintiff upon his journey.

No. 2.

The court instructs the jury that on July 11th, 1932, the ordinances of the City of Richmond provided that street cars should be operated at a reasonable speed consistent with public safety and convenience. And the court further instructs the jury that if they believe from the evidence that the defendant violated this ordinance, then the defendant was guilty of negligence and if the jury believes from the evidence that such negligence was the proximate cause of the accident and of any injuries resulting to the plaintiff therefrom, then the jury should find for the plaintiff.

No. 3.

page 551 } The court instructs the jury that it was the duty of the defendant to exercise the highest degree of practicable care to furnish and provide a competent operator of the car on which the plaintiff was riding as a passenger. And if the jury believes that the defendant failed in this duty, then the defendant was guilty of negligence and if the jury believes from the evidence that such negligence was the proximate cause of the accident and of any injuries resulting to the plaintiff therefrom, then the jury should find for the plaintiff.

No. 4.

The court instructs the jury that even though you may believe that the derailment of the car in this case was caused by the breaking of an axle, yet if you further believe that the defendant in the exercise of the highest degree of practicable care could have by inspection discovered the defect in the axle, or that such defect had existed for such length of time that in the exercise of such highest degree of practicable care the defendant should have discovered it and failed to do so, then you must find your verdict for the plaintiff.

No. 5.

The court instructs the jury that preponderance of evidence does not necessarily mean the greater number of witnesses. In ascertaining upon which side is the preponderance of evidence the jury should consider the credibility and reasonableness of the testimony of all of the witnesses when taken in connection with all of the facts and circumstances of the case.

No. 5-a.

The court instructs the jury that if they believe from the evidence in this case that as the car in question proceeded to and crossed Decatur Street some part of the car began to drag and score the street crossings, thereby causing a bumping and swaying and noise within the car which would have put a reasonably prudent operator, in the exercise of the highest degree of practicable care known to human prudence and foresight, on notice that it would be dangerous to continue to operate the car and that the said operator in the exercise of the highest degree of practicable care could have then operated and controlled said car so as to have avoided injury to the plaintiff and failed to do so, then your verdict must be for the plaintiff.

No. 5-b.

The Court instructs the jury that the burden of proof is upon the plaintiff to prove the negligence of the defendant and that when the plaintiff proved that he was a passenger and was injured by the derailment of the defendant's car in which he was a passenger a presumption arose that the defendant had been guilty of negligence and the plaintiff was entitled to such presumption until the defendant had introduced evi-

dence tending to show that it had exercised the highest degree of practicable care for the safety of the plaintiff, and if the jury believes from a preponderance of all the evidence that the derailment of the defendant's car and the in-
 page 553 } juries to the plaintiff was the result of the defendant's failure to exercise the highest degree of practicable care, then the jury should find for the plaintiff.

No. 6.

The court instructs the jury that if you find for the plaintiff in this case, in assessing the damages to which the jury may believe he is entitled, they may take into consideration:

1. The mental and physical pain and suffering endured by the plaintiff up to this time;

2. Any mental or physical pain that the may hereafter suffer as a consequence of said injury;

3. Any disability which he has suffered up to this time or which he may hereafter suffer;

4. The nature, character and extent of his injuries, whether temporary or permanent;

5. Any loss of earnings which he has suffered or which he may hereafter suffer by reason of being unable to follow his usual affairs and employment;

6. Any medical expense or hospital bills incurred or which may hereafter be incurred, but in no event to exceed the sum of Ten Thousand Dollars (\$10,000.00), the amount claimed in the notice of motion for judgment.

No. A.

The court instructs the jury that the defendant is not an insurer of the safety of the passengers upon street cars operated by it, but merely has to use the highest degree of care for their safety, and if the jury believe from the evi-
 page 554 } dence that the defendant used such care in this case, they must find for the defendant.

No. B.

The court instructs the jury that the law does not undertake to hold someone liable for every accident; and in order for the Virginia Electric and Power Company to be held liable in this case, it must be shown that said defendant was guilty of negligence which proximately caused any injuries actually proven by the evidence. If it appears from the evidence that

the defendant was guilty of no negligence then the law considers an accident occurring under these circumstances an unavoidable accident, and under such circumstances the Virginia Electric and Power Company cannot be held liable.

No. C.

The court instructs the jury that the fact that the defendant's street car derailed and the plaintiff was thereby injured, is not sufficient to render the defendant liable to the plaintiff, unless the plaintiff proves by a preponderance of the evidence that the derailment of the street car was due to negligence on the part of the defendant.

No. D.

The court instructs the jury that the plaintiff must prove his case by a preponderance of the evidence; and if the jury believe from the evidence that it is just as probable that the axle in car No. 1527 broke from an unknown cause, page 555 } or from a cause for which the Virginia Electric and Power Company was not responsible, as it is that the break resulted from negligence of the Virginia Electric and Power Company, then the plaintiff has failed to prove his case by a preponderance of the evidence and cannot recover.

No. E.

The court instructs the jury if they believe from the evidence that the axle which broke in this case was approved type of steel axle in a Birney safety car purchased from reliable manufacturers; and that prior to being put in use and operation the axle was subjected to approved scientific inspections, analyses and tests, and that it passed all of said inspections, analyses and tests without the disclosure of any defect therein; and that the defendant exercised the highest degree of practical care in the purchase, use, care, treatment and inspection of the said axle; and that the breakdown of the defendant's axle in this case was solely due to a cause which was not and could not have been discovered in any known practical or scientific way, by the exercise of the highest degree of practical care, then the jury are instructed that the defendant cannot be held liable in this case for any injuries sustained by the plaintiff.

No. F.

The court instructs the jury that they must consider this case solely upon the evidence before them and the law laid down in the instructions of the court, and they must not allow any sympathy they may feel influence their page 556 } verdict. A verdict must not be based, in whole or in part, upon conjecture, or surmise, or sympathy, but must be based solely upon the evidence in the case and the instructions of the court.

No. G.

The court instructs the jury that they must consider the testimony of Mrs. George Nissen regarding a settlement made by the defendant for injuries sustained by her in the accident in question only for the purpose of showing the interest or bias of the witness and the jury is instructed that they must not consider such evidence in determining the liability of the defendant to the plaintiff.

The defendant by counsel objected and excepted to the granting by the court of Instructions Nos. 1, 2, 3, 4, 5, 5-a, 5-b and 6 upon the ground that the evidence in the case is insufficient to prove any negligence charged against the defendant and Instructions Nos. 1, 2, 3, 4, 5, 5-a, 5-b and 6 are therefore all without evidence to support them.

The defendant by counsel further objected to the granting by the court of Instruction No. 5-a upon the additional ground that said Instruction is confusing to the jury and conflicts with Instruction marked C.

Teste: This 22nd day of October, 1934, after notice to plaintiff's attorneys as required by law.

ROBT. N. POLLARD, Judge.

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CERTIFICATE NO. 4.

On the trial of this action, after the jury had been sworn to try the issues joined, and after all the evidence set out in Certificate No. 1 had been introduced before the jury, which the court certifies as a part of this certificate, to be the evidence and all the evidence introduced in this action, and which said Certificate No. 1 is hereby specifically referred to and

made a part of this certificate; and after the court, as set out in Certificate No. 2, had overruled the defendant's motion to strike from the record and exclude from the jury all evidence introduced in behalf of the plaintiff, which said Certificate No. 2 is hereby specifically referred to and made a part of this certificate; and after the court had instructed the jury as set out in Certificate No. 3, which said certificate is hereby specifically referred to and made a part of this certificate; and after argument by counsel the jury retired and later returned to the court the following verdict.

"We the jury on the issue joined find for the plaintiff and assess his damages at \$1,000."

Whereupon the defendant by counsel moved the court to set aside said verdict and enter up final judgment for the defendant or in lieu thereof to grant a new trial upon the following grounds:

(1) That the verdict is contrary to the law and the evidence and without evidence to support it; and

(2) For errors committed by the court in the granting of Instructions Nos. 1, 2, 3, 4, 5-a, 5-b and 6 over the objection and exception of the defendant upon all grounds heretofore assigned.

And thereafter on the 23rd day of July, 1934, the said motion was argued by counsel; and thereafter on the page 558 } 29th day of August, 1934, the court overruled said motion and entered final judgment on the verdict of the jury for the plaintiff, and the defendant by counsel excepted upon the grounds hereinbefore set forth for the reasons stated.

Teste: This 22nd day of October, 1934, after notice to plaintiff's attorneys as required by law.

ROBT. N. POLLARD, Judge.

page 559 } CERTIFICATE No. 5.

Upon the return of the verdict by the jury for the plaintiff in the sum of \$1,000.00, plaintiff, by counsel, moved the court to set aside the verdict as to the amount and remand the case for reassessment of damages by another jury, the verdict not being responsive to the evidence. Which motion

the court overruled, to which action of the court the plaintiff excepted, upon the grounds stated.

Teste: This 22nd day of October, 1934, after due notice to defendant's attorney, as required by law.

ROBT. N. POLLARD, Judge.

page 560 } I, Luther Libby, Clerk of the Law and Equity
Court of the City of Richmond, do hereby certify that the foregoing is a true transcript of so much of the record as was agreed between counsel should be copied in the above entitled case wherein Adam R. Lowery is complainant. and Virginia Electric and Power Company, defendant, and that the plaintiff had due notice of the intention of the defendant to apply for such transcript.

Witness my hand this 16th day of November, 1934.

LUTHER LIBBY, Clerk.

Fee for record \$150.00.

A Copy—Teste:

M. B. WATTS, C. C.

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