

Record No. 2373

IN THE  
Supreme Court of Appeals  
of Virginia  
AT RICHMOND

YELLOW CAB COMPANY, INC., Plaintiff in Error

vs.

ISADORE VIRGINIA EDEN, Defendant in Error

From the Circuit Court of Washington County, Va.

RULE 14

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

¶ 6. SIZE AND TYPE. Briefs shall be printed in type not less in the size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimension to the printed records. The record number of the case shall be printed on all briefs.

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

M. B. WATTS, Clerk.

CLERK  
SUPREME COURT OF APPEALS

RECEIVED  
JAN 13 1941  
RECEIVED  
RICHMOND, VIRGINIA

## — INDEX TO PETITION —

	<i>Side Page</i>
Statement of Proceedings in Trial Court .....	1-2*
Statement of Facts .....	2-15*
Assignments of Error .....	15-17*
Argument .....	17-22*

### Cases and Authorities Cited

N. & W. R. Co. v. Wellons, 155 Va. 218, 154 S. E. 575, and authorities therein cited .....	24-25*
Mize v. Gardener, &c. Co., 166 Va. 415, 186 S. E. 108, and authorities therein cited .....	25-26*
Oney v. Binford, 180 S. E. 11, and cases therein cited .....	26-27*
Sutton v. Bland, 166 Va. 132, 184 S. E. 231 .....	27*
C. & O. R. Co. v. Hibbs, 142 Va. 96, 128 S. E. 538, 41 A. L. R. 10 83 .....	28*
Richmond &c. R. Co. v. Jackson, 157 Va. 628, 162 S. E. 18 .....	28*
Portsmouth v. Madrey, 168 Va. 517, 191 S. E. 598, and cases and authorities therein cited .....	29*
Elliott v. Carpenter, .... Va. ...., 3 S. E. (2nd) 370 .....	30*
5 Am. Jur. page 663 .....	30*
5 Am. Jur., page 666 .....	31*
Burdette v. Henson, 96 W. Va. 131, 122 S. E. 356 ..	31*
Vartanian Law of Automobiles, page 250 .....	31*
Va. &c. Power Co. v. Lowry, .... Va. ...., 184 S. E. 177 .....	32*
Sheppard v. Peabody Ins. Co., 21 W. Va. 368 .....	32*
Bayland v. Parkersburg, 78 W. Va. 749, 90 S. E. 347 ..	32*
Boggs v. Plybon, 157 Va. 30, 160 S. E. 77 .....	32*
Locklear v. Southeastern Stages, .... S. C. ...., 8 S. E. (2nd) 321, and cases therein cited .....	35*
Kenny Co. v. Solomon, 158 Va. 25, 163 S. E. 97, and cases therein cited .....	37*
Section 6214 of the Code .....	39*
Murphey's Hotel v. Cuddy, 124 Va. 207, 97 S. E. 794 ..	40*
Pendleton v. Com., 131 Va. 676, 109 S. E. 201 .....	40*

Ferguson v. Dougherty, 94 Va. 308 .....	40*
Nelson v. Com., 153 Va. 909, 150 S. E. 407 .....	40*
Saunders v. Temple, 154 Va. 714, 153 S. E. 691 ..	40*
Puckett v. Draper, 156 Va. 238, 158 S. E. 68 .....	40*
Code Section 6214 .....	40*
Code Section 6215 .....	40*
22 C. J. Sec. 209 .....	40*
20 Am. Jur., Sec. 556 .....	40*
Hines v. Com., 136 Va. 728, 117 S. E. 843, 35 A. L. R. 431, and cases there cited .....	41*
See Donelly v. U. S., 228 U. S. 243	
2 Wig. Ev., Sec. 1476, 1477, Sec. 1421, Sec. 1455-7	
22 C. J. 235	
25 Va. L. R., Sec. 635 .....	44*
35 A. L. R. 431 .....	45*
48 A. L. R. 348 .....	46*
20 Am. Jur., Sec. 556 .....	46*
Harriman v. Brown, 8 Leigh 697, and cases therein cited .....	46*
189 S. E. 44 .....	48*
Hogan v. Miller, 156 Va. 156, 157 S. E. 540 .....	48*
Riggsby v. Tritton, 143 Va. 903 .....	50*
Murphey's Hotel v. Cuddy, 124 Va. 207 .....	50*



IN THE  
Supreme Court of Appeals  
of Virginia  
AT RICHMOND

---

Record No. 2373

---

YELLOW CAB COMPANY, INC., Plaintiff in Error

vs.

ISADORE VIRGINIA EDEN, Defendant in Error

---

P E T I T I O N

---

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

Your Petitioner, Yellow Cab Company, Incorporated, defendant in an action for damages, respectfully represents that it is aggrieved by a final judgment entered therein by the Circuit Court of Washington County, Virginia, on the 13th day of July, 1940. Your Petitioner presents herewith a transcript of the record of the proceedings in the Court below, including the pleadings and the court proceedings, the testimony, the proceedings had at the trial, and the instructions given and refused.

COURT PROCEEDINGS

This action was instituted by notice of motion, charging in general terms negligence on the part of your Petitioner, the defendant, on account of injuries on the part of the plaintiff.

Petitioner filed a plea of not guilty, and on motion, the plaintiff filed a bill of particulars, and defendant filed its 2\* grounds of \*defense, in addition to the plea of the general issue.

At the conclusion of the case the defendant moved the court to strike the evidence of the plaintiff on the ground that her own evidence showed she was guilty of contributory negligence, and on the further ground that all the evidence in the case showed the defendant's cab had crossed Valley Street with the exception of three feet of the rear end, and that the evidence further showed that it was the negligence of Perkins, the driver of the coupe which collided with the cab, which caused the injuries complained of. This motion was overruled and exception was taken.

Certain instructions were given for the plaintiff, which are set forth in the record, and objection was made to same. Likewise objection was made to the refusal of the court to give certain instructions offered by the defendant; and objection was made to the action of the court in excluding certain testimony offered by the defendant, and objection was also made to the refusal of the court to grant certain instructions for the defendant with reference to the exclusion of certain testimony.

The jury returned a verdict in favor of the plaintiff in the amount of \$2,500.00. Defendant submitted a motion to set aside the verdict for reasons assigned in writing (Tr. 263). which motion was overruled. The Trial Court filed a written opinion, which was made a part of the record, by agreement, and refused to set the verdict aside and grant the defendant a new trial, but overruled the motion and entered judgment in favor of the plaintiff, final judgment being entered on the 13th day of July, 1940.

## STATEMENT OF FACTS

Plaintiff, a woman sixty-two years of age, a resident of Abingdon, Va., on the 19th day of June, 1939, called one 3\* of \*defendant's cabs to come to her home and transport her to the George Ben Johnson Memorial Hospital, located at Abingdon, Virginia. Plaintiff's home is in the west end of the town of Abingdon, and the hospital is located in the eastern part of the town, a distance of approximately 1½ miles from plain-

tiff's home. The defendant company operates cabs for hire. The cab driver was Akers Roark. Roark went to the home of plaintiff shortly prior to 11 A. M. on the 19th of June, 1939. It was raining and the streets were wet. He proceeded east on Main Street in the town of Abingdon, Virginia, to a point at the Court House on Main Street, turned left and north on Court Street, and the accident occurred as the cab emerged from Valley Street in the town of Abingdon, Virginia, at about 11 or 11:30 A. M. Main Street extends in the general direction of east and west. Valley Street likewise extends east and west, and parallels Main Street one block north of Main Street. Court Street runs in the general direction of north and south. The Court House in Abingdon is located on the north side of Main Street and the west side of Court Street, at the intersection of Court and Main Streets. Court Street intersects Valley Street at approximately right angles. The front of the Court House is one block from Valley St., and the hospital in question is about one block from the scene of the accident, located on the west side of Court Street. Valley Street is 36 feet in width (Tr. 55). Court Street from side-walk to side-walk is 54 feet, the hard surface, however, is 24 feet (Tr. 59). There is a stop sign on Court Street at the intersection of Court and Valley Streets. Defendant's cab, traveling north on Court Street, was emerging from Valley Street. A Chevrolet coupe, driven by Isaiah Perkins, traveling west on Valley Street, collided with the rear end of the defendant's cab when the cab had crossed Valley Street

4\* \*with the exception of about three feet. Photographs filed with the record (Tr. 252, et seq.) show the two cars involved in the accident, and their position after the impact. The photograph on page 252 shows the Chevrolet coupe which struck the cab. The photograph on page 253 shows the cab after it came to rest. The photograph on page 254 shows the rear end of the coupe and the intersection, as well as the cab, headed south. The cab was traveling north and as a result of the impact it was turned around, headed south, and was standing on the west side of Court Street, and north of the north curb line of Valley Street.

Mrs. Eden undertakes to give her version of what took place, and states as follows at page 11, et seq. of the transcript:

"Q. 18. Just tell, please, what happened as you came up Court Street and on until the time of the accident. In your own words, tell the Court and jury.

"A. As we came up Main Street?

"Q. 19. And turned?

"A. As we came on up the driver was driving pretty fast, reckless I thought—

\*\*\*

"A. Turned the corner. Of course, he slowed just a little.

"Q. 20. Where?

"A. Right here. (Indicating). Court was going on and lots of cars and he slowed just a little, but not much, and then proceeded down.

"Q. 21. Proceeded down Court Street?

"A. Yes, sir.

"Q. 22. Then what happened?

"A. All I know he was just going pretty fast and I was looking out the window—it was raining pretty hard—and all I know it hit. The car didn't stop motion at all.

"Q. 23. What seat were you riding in?

"A. Back seat.

5\* \* "Q. 24. Which way were you looking?

"A. This way. (Indicating).

"Q. 25. That is toward this way?

"A. Up this way. I wasn't looking down at the ground. I was looking at the clouds, looking at the rain.

"Q. 26. Did the taxicab stop before entering Valley Street?

"A. No, sir."

On cross examination the same witness testified as follows:  
(Tr. 21 and following):

"X. 2. You went straight from your home to the scene of the accident?

"A. Yes, sir.

"X. 3. Didn't stop anywhere along the way?

"A. No, sir.

"X. 4. You say when you turned the corner and started down Court Street as you approached the intersection of Valley Street you were looking off to the west at the clouds?

"A. Yes, sir.

"X. 5. Why were you looking at the clouds?

"A. To see how hard it was raining.

"X. 6. You never did look either up or down for oncoming traffic?

"A. No, sir.

"X 7. Didn't see anything and wasn't looking for anything?

"A. No, sir, I don't bother about that.

"X 8. You don't bother about that?

"A. No, sir.

"X 9. You don't know when you were hit or where you were hit in the street?

"A. No, sir. Just like I said—all I know we were going pretty fast and something hit us.

"X 10. You have no idea at what rate of speed you were traveling?

"A. Pretty fast.

"X 11. You won't attempt to say?

6\* "A. No, sir, I pay no attention to such as that.

"X 12. So when you were struck you were still looking at the clouds?

"A. Yes, that is all the recollection I have of it. About the time I was looking out this way. (Indicating).

"X 13. Toward your left looking at the clouds?

"A. Something hit us.

"X 14. Do you know where the taxicab had gotten in Valley Street when it was hit?

"A. No, sir.

"X 15. You don't know where it was?

"A. No, sir.

"X 16. You don't know where the car came from that struck you?

"A. No, sir.

"X 17. Did you ever see that car or hear it?

"A. Not until after the accident.

"X 18. Before it struck you?

"A. No, sir.

"X 19. Never did?

"A. No, sir.

The witness further testified that she knew they were going when they were struck, but she wasn't paying any attention; she knew about the stop sign; she didn't protest. She states further in answer to question 33 (Tr. 24):

"A. It was all done. He dashed down through there so quick there was no time. I wouldn't had time if I had paid attention.



"X 34. You had all the distance from the Court House to the intersection of Valley Street which is approximately one hundred yards. You had plenty of time to tell him to stop for that stop sign.

"A. I wasn't paying any attention to that."

The witness admits that the driver was driving in a reckless manner and too fast, but she did not protest.

Akers Roark, the driver of the cab, denied that he was  
7\* \*driving too fast or that he had failed to stop, but on the other hand stated he had turned down Court Street at about 10 or 12 miles per hour. Roark testified (Tr. 169) that he spoke to the witness Robert Puckett, who was standing on the west side of Court Street near the Court House; that he stopped at the stop sign and saw a car approaching about two hundred yards away; he put his car in low gear and crossed Valley Street with the exception of three feet of the rear when he was struck on the right rear of the cab, and that his cab turned and came to rest in Court Street, north of the north curb line of Valley Street (Tr. 170 and 171). Perkins undertook to move his car and Roark stopped him (Tr. 171). Perkins assisted Roark in getting Mrs. Eden out of the cab and she was sent to the hospital. Woodward was in the car with Perkins. Perkins was driving (Tr. 172). Roark stated as follows in response to question 34, Tr. 172:

"Q 34. After you stopped him from moving what became of Woodward and Perkins?

"A. Perkins, after I stopped him the last time, he got out of the car and Mr. Maynard, State Police, is dead now, was coming down the street pretty close and Mr. Perkins turned right on up towards the hospital and they was some pick-up truck come along and pulled up to Woodward and taken him on to the hospital.

"Q 35. At the time was any other traffic approaching from east or west on Valley Street?

"A. No, sir."

The witness Roark further testified (Tr. 172) that he was close to Perkins and that he smelled something of an intoxicating nature on the breath of Perkins. He further testified that he crossed Valley Street, after he had stopped, at about seven miles per hour (Tr. 173); that Bob Puckett was the

first he noticed to come to the scene of the accident. Roark further testified that he had a conversation with Perkins at the filling station of Arnold after the accident, at which time Roark was present, and also Musser, Adkins and the two Widener 8\* boys were present, and he stated \* (Tr. 174) as follows:

"Q 51 Did Perkins make a statement to you substantially as follows: That he didn't try to stop, that he could have stopped if he wanted to and that the next time a Yellow Cab got in his way he was going to knock it out of the street even though he had to get a truck to do it with?

"A. Yes, sir. That is if he couldn't knock it out with a car he would get him a truck to knock it out."

The witness Puckett testified (Tr. 120) that he was standing on the side-walk on the west side of Court Street, near the Court House, and that Roark, with whom he was acquainted, passed and this witness further stated as follows (Tr. 121, et seq.)

"Q 12. Did you watch the cab as it went on down the street there?

"A. Yes, sir.

"Q 13 When it got there what did it do?

"A. He pulled up to the sign and stopped.

"Q 14. Pulled up to the sign and stopped, did you see that?

"A. Yes, sir.

"Q 15. You are positive about that fact, are you?

"A. Yes, sir.

"Q 16. Who was in the cab, if you know?

"A. Some woman.

"Q 17. Front or back seat?

"A. Back seat.

"Q 18. How fast would you say the cab was traveling as it proceeded down there before it stopped?

"A. Not over ten or twelve miles an hour.

"Q 19. You say it went down Court Street at about ten or twelve miles an hour?

"A. Yes, sir.

"Q 20. You further say it stopped before it crossed?

"A. Yes, sir.

- 9\* "Q 21 How did you happen to be watching?  
\* "A. I was standing there and he passed and hol-  
laoed and I noticed he was driving a new cab.  
"Q 22. Driving a new cab?  
"A. New car, new painted.  
"Q 23. You were standing looking at it?  
"A. Yes, sir.  
"Q 24. Did you watch it on?  
"A. Yes, sir.  
"Q 25. Are you any kin to him?  
"A. No, sir.  
"Q 26. Do you have any interest one way or the  
other in this lawsuit?  
"A. No."

This witness further testified he was one of the first to the scene of the accident (Tr. 123 and 124); that he saw the Perkins boy and knew him. The witness stated Perkins started to get in the car and pull off and Roark stopped him, and that Perkins got out of the car and said he was going to the hospital, and left the car standing in the street. That was before the Town Sergeant, Garland Patton, had arrived, but one State Officer was there at the time. This witness states as follows with reference to the place of the accident (Tr. 127):

"Q 72. Now you say, as I understood you, that it lacked about three feet of getting across the north side of the street when struck?

"A. Yes, sir.

"Q 73. If you extend the north curb line straight across Court Street, like a pencil and here goes the cab across toward the hospital traveling north, had he gotten across that line?

"A. Yes, sir.

"Q 74. How much across that line, north curb of Valley Street?

"A. He had done cleared that."

On cross examination this witness stated as follows (Tr. 127):

10\* "X 1. His front wheels or rear?

"A. His hind wheels.

"X 2. His hand wheels had cleared the north curb of Valley Street?

"A. Yes, sir."

And further on cross examination in response to a question by the court (Tr. 136):

"By the Court:

I want you lawyers to listen. I may have misunderstood. Did you or not say that the cab had crossed Valley Street when the collision occurred?

"By the Witness:

It had done cleared Valley Street not lacking over three foot.

"By the Court:

He cleared lacking three feet?

"By the Witness:

That is right."

The witness further testified (Tr. 136):

"X 80. You didn't say that the rear wheels of the cab had cleared Valley Street?

"A. Hadn't lacked over three feet, the whole rear end, of clearing.

"X 81. Not over three feet?

"A. Lacked about three feet of the whole rear end clearing.

"X 82. The north side of Valley Street?

"A. Yes, sir."

Garland Patton, Town Sergeant, came to the scene of the accident shortly after it occurred, after Mrs. Eden had been taken to the hospital, and at page 53 of the transcript, he states the positions of the cars which are shown in the photographs exhibited with the record at pages 252 and following. He described the position of the cab (Tr. 56). There were no skidmarks in the street (Tr. 64). The driver of the Perkins car was gone when Patton arrived (Tr. 65), which was five or ten minutes after the accident occurred (Tr. 52), and the car was left in the street.

The witness Perkins stated he left the car in charge of his brother, although he admitted he did not talk to his brother. Patton stated (Tr. 65) as follows:

"I didn't find anyone in charge of it", talking about the Perkins car.

11\* \*The witness Perkins was introduced by the defendant as an adverse witness, and he stated he got his father's car out of the garage that morning, picked Woodward up at Arnold's filling station, and they were on their way to town after a pint of liquor (Tr. 78). He was asked if he was under the influence of some intoxicant on the night before, as well as at the time of the accident. This testimony was excluded (Tr. 78 and 79). The witness Roark testified he smelled the breath of Perkins and that he had been drinking. Perkins said he saw the cab in Valley Street and was one hundred feet away at that time, and was driving between 20 and 25 miles per hour (Tr. 80), and that the front end of his car struck the cab, (Tr. 80). Valley Street is 36 feet in width and Perkins had 33 feet behind the cab, according to all the testimony. Perkins admitted Roark told him not to move the car (Tr. 81). He left the car in the street and went home. He was not injured. He was not there when the officer, Patton, arrived, but a State Officer came before he left. He stated he left his brother in charge, but his brother was not a witness, and he admits that he did not talk to his brother. Again he was asked if he was drinking, and the court excluded this testimony (Tr. 83). He admits that he did talk to the witness Musser and others. He also admits that he talked to Roark and others at Arnold's filling station, but does not remember the date, and admits that Woodward was there. He was asked (Tr. 84) 'if he said he didn't try to stop and would knock the next cab out of his way that got in his way. His answers (Tr. 84) are as follows:

"Q 63. Did you make any such statement or any part of such statement?

"A. I didn't say that I didn't try to stop.

"Q 64. Tell us what you did say then.

"A. Something another was said about putting the  
12\* \*brakes on and I hold him I didn't put them on before I hit because I knew they would slide if I put them on tight enough to lock the wheels, that I didn't put the brakes on enough to slide before I hit the cab.

"Q 65. What is the balance that you said to him?

"A. I don't remember just what the conversation was. So far as the truck is concerned, I never mentioned any truck."



Perkins gave as his reason for not slowing down or turning, the fact that there was another car meeting him on Valley Street. All the other witnesses deny this. The witness admitted, out of the presence of the jury, that he had been up until 3 o'clock the night before, drinking beer (Tr. 88 and 89), and that he was driving after his license had been revoked for driving intoxicated (Tr. 89). The same witness at 194 of the transcript, stated:

"Q 7. Were you talking about cans of beer at the time of the accident to Woodward?

"A. I am not sure.

"Q 8. You are not sure. You might have been?

"A. It might have been mentioned."

Although this witness denied that he made a statement to Roark and others at the Arnold filling station after the accident that he and his companion were fussing, quarreling or arguing over two cans of beer, this is contradicted by the witness Roark and the other witnesses.

The witness F. C. Box was at the Court House when the accident occurred, and went to the scene of the accident. He described the position of the cars (Tr. 148). He stated that glass was about the north curb line of Valley Street (Tr. 150). and that Perkins undertook to move his car and Roark stopped him (Tr. 150).

Preston Rodefer also came to the scene of the accident. He is an employee of the defendant company. Inquiries were made by the officer as to the whereabouts of Perkins. This witness testified that Perkins was not present and that he 13\* moved the Perkins \*car and that it did not have any brakes (Tr. 157), and there was glass on the north side of the north curb line of Valley Street about eighteen to twenty-four inches, and that this glass came out of the tail light of the cab (Tr. 157 and 158).

Worley Henry also came to the scene of the accident and testified as to the position of the cab in the street (Tr. 145). The witness Henry also stated he went to the hospital and asked Mrs. Eden whether the driver had stopped at the stop sign before crossing Valley Street, and she said "I don't remember; I don't remember anything about it in fact." (Tr. 202).

The witness Rodefer, out of the presence of the jury, testified that he talked to Woodward at the hospital, and he smelled the odor of intoxicants on his breath.

Permission was asked to put the witness Woodward on as an adverse witness, but the court limited the evidence of this witness, as is shown by transcript 160 and following, and he was not called.

With reference to the injuries of Mrs. Eden, she had been in the hospital on a prior occasion for a period of time for a malignant tumor of the same collar bone that was broken in this accident, and she was on her way to the hospital for treatment of this trouble when she was injured. Her physician stated she received an impacted fracture of the right collar bone. It was sought to show that her spine was injured by the accident, but her own physician, Dr. Kinsolving, stated there was no connection between any injury to the spine and this accident (Tr. 50).

Dr. F. H. Smith testified for the defendant, and stated that the plaintiff had been in the hospital for treatment. That he had examined her; that the break had healed completely, and that the union was good, and that stiffness of the shoulder bone was the only injury growing out of the accident, and that the stiffness of the shoulder would have been largely overcome if she had used the shoulder (Tr. 74 and 75), and that her 14\* weight had increased. Dr. \*F. H. Smith further testified that plaintiff had suffered previously with a malignant tumor of the same bone. The doctor was asked as to whether there was any connection between the original condition and the trouble caused by the accident, and he answered as follows at page 73 of the transcript:

"The disease which this patient suffered with when she came to us was a malignant disease and that type of malignant disease is most apt to recur locally or in some other part of the body. The fact that she complains in some other part, principally about the shoulder blade, makes me fear she may have a recurrence. I can't say she has and if she hasn't I can't prove it. The more she complains the more I fear she may have a recurrence of that malignant growth."

The doctor was asked this question (Tr. 73):

"Q 8. Is there anything to cause her to complain of the injury back here through the shoulder blade?

"A. Not as far as I can think. There is no reason that I can think that she would complain of pain about the shoulder blade. She might very well have a stiff shoulder joint from misuse but she refers to the pain in the shoulder."

The doctor further testified in response to this question (Tr. 74):

"Q 13. Now then, Doctor, does the X-Ray show that the bone was in good union and properly connected, and so forth?

"A. Yes, firm bone union, practically no displacement and very little shortening—no material shortening.

"Q 14. Was that anything to prevent her from following her usual duties around the house. In other words is it a permanent or temporary proposition and can it be made better by the use of that arm? What would you say about it?

"A. Except for the stiffness of the shoulder, I think she should have recovered completely and I think that should have been very largely overcome if she had used the shoulder joint from the time she was released from the first apparatus (operation) at the shoulder blade. In fact there was quite a good deal of improvement from the time I examined her in September to February."

The doctor further testified (Tr. 75):

"Q 1. Doctor, should that affect the spine, that break here?

"A. I can't see any connection between them."

15\* \*Plaintiff's own physician, Dr. Kinsolving, admits that plaintiff had had a malignant tumor on the same collar bone, and that there is no connection between the injury to the spine and the injuries sustained in the accident, and that she is able to work at home (Tr. 51).

Plaintiff herself admits that she had an operation of the shoulder on March 1, 1939, and remained in the hospital until the 6th of April, 1939, and that she does a portion of her house work (Tr. 16), and that she can use her right arm in doing her general house work to a certain extent.

Dr. Smith testified plaintiff had gained weight.

## ASSIGNMENTS OF ERROR

### NO. I

The court erred in excluding certain testimony of the witness Isaiah Perkins, who was introduced as a hostile or adverse witness (Tr. 78, et seq.).

### NO. II

The court erred in excluding the testimony of Garland Patton, Town Sergeant of the town of Abingdon, Virginia, to the effect that a felony warrant was placed in his hands for the arrest of Perkins on account of leaving the scene of the accident without giving his name and information as required by statute.

### NO. III

The court erred in failing to strike the evidence of the plaintiff because of the contributory negligence of the plaintiff, and erred in its failure to sustain defendant's motion to strike all the evidence for reasons assigned (Tr. 244).

16\*

### \*NO. IV

The court erred in refusing defendant's Instruction A (Tr. 244).

### NO. V

The court erred in refusing defendant's Instruction D (Tr. 228).

### NO. VI

The court erred in refusing defendant's Instruction E (Tr. 228), defendant's Instruction F (Tr. 234), and defendant's Instruction F-1 (Tr. 236).

### NO. VII

The court erred in refusing defendant's Instruction G (Tr. 237).

## NO. VIII

The court erred in failing to sustain the motion of the defendant to set aside the verdict and enter judgment for the defendant or grant the defendant a new trial for reasons assigned in its motion (Tr. 263).

## NO. IX

The court erred in instructing the jury that the testimony of the witnesses Arthur Musser (Tr. 93), Lewis Widener (Tr. 104), Herbert Widener (Tr. 109), Ep Adkins (Tr. 113), and Akers Roark (Tr. 176), could be received only as affecting the credibility of the witness Isaiah Perkins, for the purpose of contradicting certain statements made by Perkins. Perkins, who was introduced as an adverse or hostile witness was asked (Tr. 84) certain questions with reference to certain statements 17\* alleged to have \*been made by Perkins at the filling station of Arnold, after the accident. Perkins denied he made such statements (Tr. 84), and the above mentioned witnesses were called by the defendant and stated that Perkins had made such statements. It is contended that the statements of the five witnesses, Musser and others, should have been permitted to go to the jury as original testimony rather than for the purpose of contradicting the witness Perkins.

## NO. X

The court erred in granting plaintiff's Instruction No. 1 (Tr. 217).

## NO. XI

The court erred in excluding the deposition of defendant's witness, Homer Sapp (Tr. 197).

## ARGUMENT

## ASSIGNMENT OF ERROR NO I

Isaiah Perkins, under section 6214 of the Code, was examined as an adverse or hostile witness. This witness was asked the following questions (Tr. 78):



"Q 17. I will ask you this question: Had you spent the greater part of the night, you and Woodward out here in Mrs. Gillespie's yard and you and Woodward and another fellow had consumed twenty-four cans of beer?

\* \* \* \* \*

Q 18. I will ask you if you were under the influence of some intoxicant when you had the accident?"

Objection was made and this testimony was excluded (Tr. 79).

Out of the presence of the jury, the following questions were asked (Tr. 87, et seq.):

18\* "Q 86. Mr. Perkins, tell us where you spent the \*night before this accident, where you went and how much beer you did consume out of the presence of the jury?

"A. Was at Arnold's service station several times and also at Mr. Hayter's a couple of times and riding different places and we also stopped out in front of Mrs. Gillespie's and we took a case of beer.

"Q 87. How many cans in a case?

"A. Twenty-four twelve ounce cans.

"Q 88. What time were you there at Mrs. Gillespie's?

"A. Some where after twelve o'clock. Between twelve and one o'clock.

"Q 89. How many consumed that beer from whatever time you got there?

"A. We didn't consume it all.

"Q 90. How much did you get?

"A. I don't know. I guess four or five cans out of the case.

"Q 91. What time did you leave Mrs. Gillespie's in the field?

"A. Between two and three o'clock some time.

"Q 92. Did you become intoxicated?

"A. Well, I don't think so.

"Q 93. Is that all the beer that you drank on that night in two or three places?

"A. I don't know. I guess I drank some besides in the fore part of the night.

"Q 94. Did you drink any whiskey?

"A. No, sir.

"Q 95. You were drinking beer from 12 o'clock in the front of the Gillespie home until about three o'clock?

"A. We wasn't there over an hour and half, I don't think outside at that one particular place.

"Q 96. While the jury is out, I want to ask if you took your father's car out of the garage without his knowledge and came to town after more whiskey?

"By Mr. Thompson:  
We object.

"By the Court:  
I have already sustained the objection."

The court excluded this testimony (Tr. 90).

19\* \*This same witness (Tr. 86, et seq.) was asked the following questions about leaving the scene of the accident, in the presence of the jury:

"Q 84. You didn't tell him you were driving?

"A. Didn't see it was necessary.

"Q 85. That was your duty under the law, wasn't it? Somebody was going to the hospital. Why didn't you stay there and tell the officer, you say the State Police was there, why didn't you tell the State Police that you were driving?"

Objection was made and the evidence was excluded. On page 82 of the transcript, this question was asked:

"Q 52. Isn't it a fact that you left there before Mr. Patton arrived there and after the cab driver told you not to move the car and didn't come back at all?

"A. No, I didn't come back.

"Q 53. And it was because you were drinking?"

The foregoing questions were objected to. The objections were sustained and exceptions taken, by the defendant.

The witness, Roark, testified that he smelled the odor of intoxicants on the breath of Perkins when Perkins was assisting Roark in getting Mrs. Eden out of the cab after the collisions, yet the court excluded the foregoing testimony, and we contend that this was error because if Perkins was intoxicated at the time that the injuries complained of were sustained, this

would throw light on the question as to whether the accident was caused by the sole negligence of Perkins. Perkins and his companion had been out on an escapade the night before, had consumed a large quantity of intoxicants, and at the time of the accident were quarreling over two cans of beer. Perkins was driving a car without proper brakes, according to the witness Rodefer, which is undisputed, and was driving while intoxicated, according to the witness Roark, which is undisputed; left the scene of the accident, which is undisputed; attempted to move his car, but was stopped by Roark, and according 20\* \*to Roark did leave the scene before the officers arrived.

Perkins admitted he saw the cab one hundred feet away when the cab entered Valley Street; he had one hundred feet in which to stop; he was only driving 20 to 25 miles per hour; he had thirty-three feet of the street in which to miss the cab, and we contend that the jury was entitled to know all the facts, especially in view of the grounds of defense of the defendant to the effect that the accident was caused by the sole negligence of Perkins, and this theory is supported by the statements made by the witness Perkins to the witnesses Musser and others at the Arnold filling station after the accident that he didn't try to stop, and if another cab got in his way he would knock it out even if he had to get a truck to knock it with. In short, this evidence makes the driver Perkins not only guilty of negligence, but wanton, wilful and deliberate acts, without which the accident could not have happened, and the jury were entitled to know all the facts.

Mrs. Eden's testimony was to the effect that she didn't know where the accident occurred; she was paying no attention, and as a matter of fact didn't see the car that struck the cab until after the impact. The driver of the cab stated he stopped at the intersection, saw the other car approaching two hundred yards away; that there was nothing at that time to attract his attention to the speed, such as wobbling of the car, or recklessness in its operation, and, in the language of the witness, his cab had crossed Valley Street except three feet of the rear when it was struck. The witness Puckett, an eye witness to the accident, corroborated Roark's version of what took place, and his version is also corroborated by the physical facts. The cab stopped in Court Street and not in Valley Street. *The glass out of the tail light was found eighteen to twenty-four inches north of the north curb line of Valley Street.* There were no skid marks on the street to show that Perkins had attempted to

stop or do anything to avoid the collision, and we submit  
21 \* \*there was no evidence of negligence on the part of Roark,  
the cab driver, but that the accident was due to the sole  
negligence and wrongful acts on the part of Perkins, and to  
exclude the foregoing testimony was highly prejudicial to the  
defendant.

## ASSIGNMENT OF ERROR NO. II

The court excluded the testimony of Garland Patton to the effect that a lefony warrant was placed in his hands for the arrest of Perkins, the driver of the Chevrolet coupe which collided with the cab.

Garland Patton was introduced as a witness by the plaintiff. He is Sergeant of the town of Abingdon, Virginia. He came to the scene of the accident shortly after it happened. On cross-examination he was asked the following questions (Tr. 65):

"X 43. Mr. Patton, did you issue a felony warrant or was one placed in your hands for the arrest of the driver of the Perkins car?"

Objection was made by the plaintiff and sustained by the court, and the defendant excepted.

The witness further stated as follows:

"X 44. Was the driver of the Perkins car there when you arrived?

"A. No, sir.

"X 45 Did you make inquiry for him?

"A. Yes, sir.

"X 46. Had he left the scene of the accident?

"A. Yes, sir.

"X 47 Who was in charge of his automobile, or the automobile which was in the accident, the coupe?

"A. I never did find anyone in charge of it.

"X 48. It was just left there in the street?

"A. Yes, sir.

The witness testified (Tr. 52) that he arrived at the scene  
22 \* \*of the accident five or ten minutes after it happened.

At page 249 of the transcript, an avowal was made that if the witness Patton had been permitted to have answered the question which was excluded, his answer would have been in the affirmative that he did have a felony warrant for the arrest of Perkins for leaving the scene of the accident. It is our contention that the attitude of Perkins at the time of the accident, his condition with reference to being intoxicated, and his conduct were material on the question as to whether the negligence of Perkins was the sole proximate cause of the collision in question.

The test of the plaintiff's right to recover was whether the defendant was guilty of either primary negligence or concurring negligence which brought about the accident. However, the defendant contended it was not negligent. The driver testified he stopped at the stop sign, and he was supported in this contention by Puckett, the eye witness to the accident. The testimony of Mrs. Eden, the plaintiff, was in the form of negative testimony as she did not see what took place, the defendant's theory being that Perkins' negligence was the sole proximate cause of the accident. We maintain, therefore, that the jury should have been given all the facts incident to the transaction to ascertain whether the defendant was guilty of any negligence. The fact that the driver of the Perkins car had been drinking on the night before and until 3 o'clock in the morning; that Roark smelled intoxicants on the breath of Perkins at the time of the accident; that Perkins left the scene of the accident; that he did not have any brakes on his automobile; that he saw the defendant's cab one hundred feet away; and that Perkins was driving twenty to twenty-five miles per hour; that the street was 36 feet in width; that all the cab was across

Valley Street with the exception of three feet; that Perkins  
23\* attempted to move his automobile immediately after the  
\*accident; that he was stopped by Roark, driver of the cab; that Perkins left the scene of the accident before the officer, Garland Patton, arrived; that he failed, according to Perkins' own testimony, to disclose his identity to Sergeant Maynard, whom Perkins stated arrived at the accident immediately before he departed; the fact that a felony warrant was placed in the hands of the Town Sergeant for the arrest of Perkins on a "hit and run" charge, all these are circumstances which the jury should have been given to show who in fact caused the accident, and who was negligent. We, therefore,



maintain that the court erred, which error was prejudicial to the defendant, when the witness Patton was not permitted to answer the questions propounded him.

### ASSIGNMENT OF ERROR NO. III

#### *Contributory Negligence of the Plaintiff*

The trial court admitted there was some evidence of contributory negligence on the part of the plaintiff (Tr. 220), in which the court stated as follows:

"There is some evidence of contributory negligence on the part of plaintiff herself. She said he was driving too fast up Main and too fast down Court and didn't stop and she made no protest. She did say she was looking at the clouds. If there is an objection I will refuse it."

The defendant moved to strike the testimony at the conclusion of the case (Tr. 244) on the ground of contributory negligence of the plaintiff, and for the further reason that the defendant was not guilty of negligence, but the accident was caused by the sole negligence of Perkins. Mrs. Eden's own testimony shows that the cab driver was driving *too fast and reckless* on Main Street (Tr. 12); that he drove too fast down Court Street; that there was a crowd at the Court House and a number of cars parked; that he slowed down a little, but 24\* turned the corner too fast, yet \*she continued to look at the clouds and did not say anything until after the cars collided; she did not utter a protest; she was familiar with the streets and the stop sign; she knew it was raining. She contradicts herself (Tr. 23) where she states as follows:

"X 22. You say you were not paying any attention to the speed or traffic to see whether anything was coming?

"A. No, sir.

"X 23. Not paying any attention and being abstracted looking at the clouds, might not the cab have stopped?

"A. It couldn't because I knew it was going."

Plaintiff take the position that the cab did not stop because it was "going" when it was struck. In answer to question 33 (Tr. 24), she says:

"It was all done. He dashed down through there so quick there was no time. I wouldn't had time if I had paid attention."

Again she said she was looking away, thinking about the rain, yet she couldn't give any estimate as to the speed, and finally stated as follows (Tr. 26) :

"A. He drove too fast coming up Main Street.

"X 47. Did you protest then?

"A. No, sir.

"X 48. Why didn't you?

"A. I didn't think it was my business."

It was the duty of Mrs. Eden, the plaintiff, to exercise ordinary care at least for her own protection. See *Norfolk & Western Ry. Co. v. Wellons' Adm'r.*, 155 Va. 218, 154 S. E. 575. This involved a railroad crossing. Mrs. Wellons was a passenger in a car, and the Court held Mrs. Wellons was negligent, and that it was a matter of law for the Court rather than a question of fact for the jury. This case lays down the general proposition that it is the duty of the passenger to  
25\* take ordinary care for her \*own protection, and we quote from the opinion as follows, in which the Court quotes with approval the following language:

" 'The District Court was correct in charging the jury that the negligence of the driver of an automobile is not as a matter of law imputed to one riding with him as a passenger or guest, but nevertheless that one riding as a passenger or guest may not place his safety entirely in the keeping of the driver, but that he must exercise due and reasonable care for his own protection and safety.' *Hines v. Johnson* (C. C. A.) 264 F. 465, 469; *Ilardi v. Central California Traction Co.*, 36 Cal. App. 488, 172 P. 763; *Campbell v. Walker*, 2 Boyce (Del.) 41, 78 A. 601; *United Rys & Elec. Co. of Balt. v. Crain*, 123 Md. 332, 91 A. 405; *Johnson v. Underwood*, 102 Or. 680, 203 P. 879; *Glick v. Baer*, 186 Wis. 268, 201 N. W. 752; *Carter v. Brown*, 136 Ark. 23, 206 S. W. 71; *Parmenter v. McDougall*, 172 Cal. 306, 156 P. 460; *Pope v. Halpern*, 193 Cal. 168, 223 P. 470; *Wagner v. Kloster*, 188 Iowa, 174, 175 N. W. 840; *Sharp v. Sproat*, 111 Kan. 735, 208 P. 613; 26 A. L. R. 1421; *Naglo v. Jones*, 115 Kan.

140, 222 P. 116; *Harmann v. Rhode Island Co.*, 36 R. I. 447, 90 A. 813; *Tennessee Cent. R. Co. v. Vanhoy*, 143 Tenn. 312, 226 S. W. 225, *Bauer v. Tougaw*, 128 Wash. 654, 224 P. 20; *Dansky v. Kotimaki*, 125 Me. 72, 130 A. 871; *Poynter v. Townsend*, (Del. Super) 130 A. 678; *Wayson v. Rainier Taxi Co.*, 136 Wash. 274, 239 P. 559, 45 A. L. R. 290; 20 R. C. L. 159-165; R. C. L. 'Per. Sup.' p. 678, vol. 1.

"These authorities are in harmony with Virginia decisions."

There the passenger was in the front seat; here in the back seat. There the passenger was familiar with the conditions; here the plaintiff was familiar with the conditions; she knew of the stop sign which defendant's driver failed to heed, according to her testimony, but notwithstanding the slick, wet street, the stop sign, the crowd at the Court House, the intersection, the reckless speed—this according to plaintiff's own testimony—and she is bound thereby, we submit—yet she never uttered one word of protest.

The Trial Court in his opinion (Tr. 268) states as follows:

"Ordinarily a passenger in an automobile has no duty to direct and control the driver unless it is obvious that the driver is taking no precautions for their safety.

"*Mize v. Gardener Motor Co.*, 166 Va. 415."

The case of *Mize v. Gardener Motor Co.*, 166 Va. 415, 26\* 186 \*S. E. 108, involved a railroad crossing. A number of cases are reviewed in this opinion, and the Court stated at page 110 of the South Eastern Reporter as follows:

"Ordinarily the passenger has no duty to direct and control the driver unless it is obvious that the driver is taking no precautions for their safety. If there is no apparent danger in the manner in which the driver is operating the car, the passenger is not required to interfere." And further we quote from this opinion at page 111:

"In *Hancock v. Norfolk & W. Ry. Co.*, supra, it was held that the failure of the plaintiff, who was a passenger in an automobile, to look and listen for an approach-

ing train which was visible, and to warn the driver and prevent him from attempting to cross the tracks close in front of it, was such contributory negligence on her part as barred her recovery as a matter of law. The fact that she failed to look and listen for the train and that she failed to warn the driver or to take any precaution for her own safety was established by her own testimony. She testified that she neither looked nor listened, though she could have seen the train if she had looked."

And we quote further at page 112:

"In *Chesapeake & O. R. Co. v. Meyer*, 150 Va. 656, 143 S. E. 478, 482, in concluding that the passenger could not be charged with negligence as a matter of law, the court held:

" 'It is true that a passenger cannot blindly trust to his driver; but in the nature of things one on the back seat is not required to exercise that degree of vigilance which is demanded of the chauffeur. *Director General v. Lucas*, 130 Va. 212, 107 S. E. 675, and *Hancock v. Norfolk & Western Railway Co.*, (149 Va. 829) 141 S. E. 849, *infra*."

In the instant case, according to the passenger's testimony, the driver of the cab was not taking any precaution for the safety of his passenger, and it was her duty, under the authorities cited by the Trial Judge, to protest, if such was the case, and if she did not protest she was guilty of negligence, and according to the case of *Norfolk & Western Ry. Co. v. Wellons*, and *Hancock v. Norfolk & Western Ry. Co.*, she was guilty of negligence as a matter of law.

We call the court's attention to the case of *Oney v. Binford*, \*180 S. E. 11. The facts briefly in that case are as follows:

The plaintiff, a graduate nurse, was riding as a guest in a car. The car ran over a bank. She made no protest about the manner in which the defendant was operating the car. It was foggy, and a mountain road. Plaintiff was injured and she instituted this action. We quote from 180 S. E. page 12 as follows:

"A windshield of an automobile materially limiting the operator's vision ('pretty hard to look through' Hall),

a pocket of fog, a winding road, a speed of 20 to 30 miles per hour, and a 'talking' operator created a situation ripe for disaster. As one experienced with automobile travel, plaintiff is chargeable with knowledge of the danger of that situation. She should have been alert for her own safety. That she was not so is demonstrated by the fact that she was in the front seat and in better position to see the proximity of the car to the brink than was Hall; yet he saw it and she did not until after his cry of alarm. Her concentration on defendant and her complacency with his conduct made her an acceptor of the danger his conduct created. 'Where possible danger is reasonably manifest to an invited guest, and she sits by without warning or protest to the driver and permits herself to be driven carelessly to her own injury, she becomes a coadventurer in the risk, and is thereby barred of recovery.' *Clise v. Prunty* 108 W. Va. 645, 638, 152 S. E. 201, 203; *Accord: Herold v. Clendenen*, 111 W. Va. 121, 124, 161 S. E. 21; *Browning v. Tolley*, 111 W. Va. 548, 163 S. E. 10; *Adams v. Hutchinson*, 113 W. Va. 217, 222, 167 S. E. 135."

See also case of *Sutton v. Bland*, 166 Va. 132, 184 S. E. 231, where recovery was denied on the ground that the plaintiff as a passenger, made no protest as to the manner in which the car was being operated, hence was guilty of contributory negligence.

We contend that under the foregoing authorities Mrs. Eden's own testimony convicts her of contributory negligence as a matter of law.

Certainly, a consideration of this assignment of error shows the grave error committed by the Trial Court in granting plaintiff's peremptory Instruction No. 1.

#### ASSIGNMENT OF ERROR NO. IV

28\* \*The court erred in refusing defendant's Instruction A (Tr. 224), which is in the following words and figures, to-wit:

"The court instructs the jury that the defendant was not an insurer of the safety of the plaintiff while travel-

ing in the taxi cab as a passenger, and that the plaintiff as a matter of law is presumed to have taken upon herself all the risks necessarily incident to the trip by careful and prudent operation and transportation over the road on which she was traveling in the cab at the time of the alleged injury, and if the jury believes from the evidence that without the fault of the defendant, but from causes wholly beyond the control of the defendant, plaintiff was injured, the jury should find for the defendant."

Plaintiff had been granted Instruction No. 1 (Tr. 217), which stated that the defendant company owed the passenger the *utmost* care, diligence and foresight. Defendant's Instruction A was merely telling the jury that the defendant was not an insurer of the safety of the plaintiff while traveling in the taxicab as a passenger. See *Chesapeake & O. Ry. Co. v. Hibbs*, 142 Va. 96, 128 S. E. 538, 41 A. L. R. 1083.

At page 242 of the transcript, the court did grant the defendant Instruction A-1 to the effect that the defendant was not an insurer of the safety of the plaintiff while traveling in the taxicab as a passenger, but we submit that this did not cure the error committed in refusing to grant Instruction A as offered. We urge that Instruction A clearly stated the law to the effect that passengers do assume risks which are necessarily incident to their journey, and utmost care means no more than every care which is practicable under the circumstances. See *Richmond-Ashland Ry. Co. v. Jackson*, 157 Va. 628, 162 S. E. 18, at page 22, from which we quote:

"Of course passengers assume all risks which are necessarily incidental to their journeys. Utmost care means no more than every care which is practicable by carriers engaged in the transportation of their passengers. *Shearman and Redfield on Negligence* (6th Ed.) vol. 1, section 50."

In view of the fact that plaintiff's Instruction No. 1 was given, it would seem it was error to refuse Instruction A 29\* offered \*by the defendant. See quotation from the case of *Richmond-Ashland Ry. Co. v. Jackson*, *supra*. See also the dissenting opinion in that case in which the authorities are collected, in which Mr. Justice Epes stated he thought

Instruction 3 was erroneous in that particular case. That case dealt with an interurban electric line. The reason for limiting the degree of care is all the more apparent in the case of passenger cabs which, by their very nature, must and do use the streets which are filled with traffic, and are therefore subject to hazards. It is not an insurer of the safety of passengers, nor is it a guardian of its passengers. See *Portsmouth v. Madrey*, 168 Va. 517, 191 S. E. 595, where a passenger on a boat was injured, and we quote from the South Eastern Reporter, page 598, as follows:

"The carrier must use the highest degree of practical care for the safety of its passengers, but it is not an insurer. *Norfolk-Southern R. Co. v. Tomlinson*, 116 Va. 153, 81 S. E. 89. Nor is it the guardian of its passengers. *Burr v. Va. Ry. & Power Co.*, 151 Va. 934, 145 S. E. 833."

We contend in view of plaintiff's Instruction No. I, that the court erred in not telling the jury that plaintiff, as a matter of law, is presumed to have taken upon herself all the risk necessarily incident to the trip by careful and prudent operation and transportation over the road on which she was traveling at the time of the alleged injury, which instruction ended by stating "if the jury believes from the evidence that without the fault of the defendant, but from causes wholly beyond the control of the defendant, plaintiff was injured, the jury should find for the defendant", this on the theory that the negligence of Perkins was the sole proximate cause of the injuries complained of.

#### ASSIGNMENT OF ERROR NO. V

The court erred in refusing defendant's Instruction D (Tr. 228), which is in the following words and figures, to-wit:

30\* "The court instructs the jury that if you believe from the evidence \*in this case that the cab operated by Roark, stopped at the intersection of Valley Street, in observance of the stop sign, and that he proceeded across the intersection, driving north, in a lawful manner and in the exercise of reasonable care, that he entered the intersection before the car operated by Perkins, then you are told that the cab had the right of way"

This instruction merely told the jury that the party in the intersection first had the right of way. See *Elliott v. Carpenter*, — Va. —, 3 S. E. (2d) 370, and cases there cited. See also 5 Am. Jur. page 663 and cases there cited. The jury should have been told that if the defendant's cab was in the intersection while the other car was one hundred feet away, it had the right of way. The coupe, according to the witness Perkins, was being operated at a speed of 20 to 25 miles per hour, and according to Roark was two hundred yards away. Hence, there was sufficient time for the cab to cross the street, and it did cross the street all except three feet before it was struck. It became the affirmative duty of Perkins to exercise reasonable care to avoid the accident, and it was the negligence of Perkins which was the sole proximate cause of the injuries complained of. The cab driver, having the right of way in entering the street first, had the right to assume that the Perkins car, some distance away, would not strike him.

#### ASSIGNMENT OF ERROR NO. VI

The court erred in refusing Instruction E offered by the defendant (Tr. 228), Instruction F (Tr. 234), and Instruction F-1 (Tr. 236). It was contended by the defendant's driver that he did stop at Valley Street at the stop sign; that he saw a car approaching about two hundred yards away, and there was nothing about the speed of the car, or the manner in which it was being operated to put him on notice that same was being operated in a careless and reckless manner; that he proceeded across Valley Street and had crossed entirely thirty-three feet of the thirty-six feet of Valley Street. If the defendant's 31\* \*driver, in good faith and acting as a reasonably prudent man, believed that he could actually pass this 36 feet in safety, and was within the intersection first, he had the right of way, and was not guilty of negligence if he acted as an ordinary prudent man. See 5 Am. Jur., page 666, sec. 297; *Burdette v. Henson*, 96 W. Va. 131, 122 S. E. 356, at 357, et seq.; *Vartanian Law of Automobiles*, Va. and W. Va., page 250, et seq.

In this connection, the remarks of the Trial Court are most significant. He at first agreed to give Instruction E (Tr. 232). On pages 232 and 233 of the transcript, the Court said:



"According to his own evidence he was one hundred feet away. There is no doubt about it that the Yellow Cab entered the intersection when the other car was some distance from it. It entered before that car did, and it was certainly his duty to exercise reasonable care to have his car under such control that he could avoid a collision with a car that entered before him."

### ASSIGNMENT OF ERROR NO. VII

The court refused to grant Instruction G offered by the defendant (Tr. 237), which is in the following words and figures, to-wit:

"The Court instructs the jury that, unless the evidence as a whole preponderates in favor of the plaintiff on the question of defendant's negligence, the plaintiff cannot recover. A mere equipoise, or even balancing of the evidence, will not entitle the plaintiff to a verdict. If it is just as probable that the plaintiff's injuries were caused by some other agency than the negligence of the taxi-cab driver, if any, then there can be no recovery by the plaintiff, and your verdict will be for the defendant."

This instruction merely stated the rule with reference to the burden of proof. The burden, of course, is on the plaintiff to prove her case by a preponderance of the evidence, it being the defendant's theory that the injuries complained of were due to the sole negligence of Perkins. The burden of proof is never on the defendant to prove the case, but that burden of proof is always on the plaintiff to prove her case by a preponderance of the evidence. See *Virginia Electric Power Co. v. Lowry*,—Va.,—, 184 S. E. 177, at 181; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, 374; *Bayland v. Parkersburg*, 78 W. Va. 749, 758, 90 S. E. 347.

### ASSIGNMENT OF ERROR NO. VIII

#### *Contrary to Law and Evidence*

The verdict is contrary to the law and evidence, and without evidence to support it, and the court erred in not sustaining the motion to set aside the verdict of the jury.

The mere happening of an accident in itself is not sufficient basis for a verdict, nor for a judgment on the demurrer to the evidence, or otherwise. See *Boggs v. Plybon*, 157 Va. 30, 160 S. E. 77. This is a guest case, but the holding of the Court as to the burden of proof must be the same as though this case involved a passenger for hire.

The facts in the instant case do not show negligence on the part of the defendant cab company, and the plaintiff did not carry the burden of proof which was upon her to prove her case by a preponderance of the evidence. The plaintiff stated that she did not see the car strike her; she stated that she did not pay any attention, and while she stated that the cab did not stop at the stop sign, she stated that she wasn't looking for approaching traffic, she was looking at the clouds, and this is the only witness, with the exception of Dave Byrd, that makes the statement that the cab did not stop at the stop sign, but on the other hand the witness Roark, driver of the cab, and the witness Puckett, who was standing at the Court House and was watching the cab, said it did stop.

After the plaintiff had concluded her case, and the defendant  
33\* had concluded its case, plaintiff did call a witness,

Dave Byrd, a colored man, who undertook to state the cab did not stop, but his evidence was so improbable, and was contradicted, and his admission that he may have been drunk rendered the evidence of Dave Byrd of no consequence and unbelievable. The uncontradicted testimony of Roark, Henry and Rodefer was to the effect that Byrd was taken home drunk prior to the accident and could not have been an eye witness (Tr. 211, et seq.).

The photographs show that the cab was hit with such force that it was knocked completely around and came to rest on Court Street, some distance from the point where it was struck, and all of the cab was on the north side of Valley Street when it came to rest beyond the north curb line of Valley Street.

The evidence is that the witness Perkins saw the cab when it entered Valley Street, and when the car of Perkins was one hundred feet east of the intersection. Perkins did not try to stop, but if the evidence of Musser, Adkins and the two Widener boys and Roark is to be believed at all, this shows conclusively that Perkins was guilty of wilful, wanton negligence, which was the sole proximate cause of the injuries complained of, and that

his negligence was solely responsible for the collision in question. According to the undisputed testimony of the witness Rodefer and the witness Henry, the glass from the tail light of the cab was eighteen to twenty-four inches *north of the north curb line*. There were no brakes on the car of Perkins, according to the witness Rodefer, and this testimony is *uncontradicted*. Perkins left the scene of the accident without divulging his name, and had the *odor of intoxicants on his breath, plainly noticeable*, as did his companion, Woodward; they were arguing over two cans of beer; they had been up the night before on a drinking party. The Sergeant of the town of Abingdon had a felony warrant placed in his hands for the arrest of Perkins for leaving the scene of the accident. This last testimony, however, 34\* \*was excluded. The cab had crossed Valley Street all except three feet of the rear. If the street is thirty-six feet in width, Perkins had thirty-three feet in which to miss the cab, yet he did not avail himself of the opportunity, but on the other hand asserted there was another car approaching. He was the only witness that stated this.

We have this situation in which two young men, under the influence of intoxicants, were riding down the street in a car without adequate brakes, going after more liquor, arguing over two cans of beer, saw a cab crossing Valley Street while Perkins was one hundred feet away, and traveling 20 to 25 miles per hour; a street thirty-six feet wide. Perkins did nothing to avoid the collision, but on the other hand stated to five persons—four of whom were disinterested—after the accident occurred, in substance that he did not try to stop, and that the next Yellow Cab that got in his way he was going to knock it out of the street if he had to get a truck to knock it with. Immediately after the accident, Perkins endeavored to leave the scene, was stopped by Roark, but finally did leave the scene of the accident, and a warrant was issued for his arrest. After the accident was over, apparently he was proud of what he had accomplished, and so stated to five persons.

The evidence of Mrs. Eden is not clear. She does not know where the accident occurred, and she was not looking, and we respectfully submit that this verdict should not be permitted to stand.

We deny that the cab driver, Roark, was guilty of any negligence, or that he failed to stop at the stop sign. However,

Mrs. Eden seems to state as a conclusion that the cab did not stop at the stop sign. For the sake of argument, assuming that she is correct in her view, we still say that this failure to stop, if such was the case, was not the proximate cause of the 35\* \*injuries complained of, and there was no causal connection between said injuries and the cab driver's failure to stop. See *Locklear v. Southeastern Stages, Inc.*, 8 S. E. (2d) 321, at page 325, a South Carolina case.

### FACTS

The facts there were that the defendant bus company was negligent in stopping to take on the plaintiff as a passenger. The bus was negligent in coming to a stop at the place where it did so stop, and as the prospective passengers attempted to get on the bus they were struck by a Chevrolet automobile. The plaintiffs instituted an action for damages for the injuries so sustained against the bus company, and the bus company contended that a third party, over which the defendant had no control, was the sole cause of the accident. The Supreme Court, on appeal, held that the bus company was not liable, and we quote from the opinion of that case as follows, at page 325 of the South Eastern Reporter:

"Our decisions are all to the effect that liability exists for the natural and probable consequences of negligent acts or omissions, proximately flowing therefrom. The intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury. The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising. *Johnston v. Atlantic Coast Line R. Co.*, 183 S. C. 126, 190 S. E. 459; *Crawford v. Atlantic Coast Line R Co.*, supra; *Tobias v. Carolina Light & Power Co.*, 190 S. C. 181, 2 S. E. 2d 686.

"We have held that when the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the for-

mer only the indirect or remote cause. *Carter v. Atlantic Coast Line R. Co.*, 109 S. C. 119, 95 S. E. 357, 11 A. L. R. 1411; *Martin v. Southern Ry.*, 77 S. C. 370, 58 S. E. 36\* 3, 122 Am. St. Rep. 574; *Miller v. Atlantic Coast Line R. Co.*, 140 S. C. 123, 138 S. E. 675.

"Mr. Wharton, in his outstanding work on negligence, says (Section 134): 'Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured.'

"And see the leading and oft cited cases of *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, 259, and *Harrison v. Berkley*, 1 Strob. 525, 47 Am. Dec. 578.

"The test, therefore, by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent act of another, is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of attendant circumstances. The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen. *Horne v. Atlantic Coast Line R. Co.* 177 S. C. 461, 181 S. E. 642; *Johnston v. Atlantic Coast Line R. Co.*, *supra*; *Keel v. Seaboard Air Line Ry.* 122 S. C. 17, 114 S. E. 761; *Harrison v. Berkley*, *supra*; *Cooper v. Richland Co.*, 76 S. C. 202, 56 S. E. 958, 10 L. R. A., N. S., 799, 121 Am. St. Rep. 946"

## THE DAMAGES ARE EXCESSIVE

We submit that the damages in this case are entirely excessive. This plaintiff is a woman sixty-two years of age; had been in the George Ben Johnston Memorial Hospital for a period of weeks, being treated for a malignant tumor on the same collar bone which was broken in the collision. According to all the physicians there was good union and the break had healed completely. Dr. Frank H. Smith testified the stiffness of 37\* the shoulder joint is \*the only damage growing out of the accident, and "except for the stiffness of the shoulder, I think she should have recovered completely and I think that should have been very largely overcome if she had used the shoulder joint from the time she was released from the first apparatus (operation) at the shoulder blade." There was no connection between the break of the collar bone and the alleged injury to the spine, and Dr. Kinsolving, plaintiff's own physician, stated there was no connection between any alleged injury to the spine and the broken collar bone. It is a matter of common knowledge that there is bound to be some stiffness of the shoulder after the break has healed. She is able to do part of her house work, and Dr. Smith, who is more familiar with her than anyone else, who had treated her for the previous trouble while she was in the hospital, said that he was fearful that the pain in the shoulder which plaintiff complained of, was probably due to a recurrence of the malignant tumor (Tr. 73). The only way he could explain the pain was from a recurrence of the malignant disease, in which the accident was in no manner connected.

In the case of *Kenny Co. v. Solomon*, 158 Va. 25, 163 S. E. 97, \$2500.00 was held to be excessive in that case. The court had this to say:

"In personal injury actions, which merely sound in damages, where there is no legal rule for measuring them, the amount to be ascertained and awarded rests largely in the discretion of the jury, but, if the amount awarded is greatly out of proportion to the injury suffered, it may indicate that the jury were actuated by bias or prejudice, or that the evidence of the extent of the injury was disregarded. In arriving at the amount of damages, it is the duty of the court to see that the jury approximates a sane

estimate. Sometimes the size of the verdict alone is sufficient to indicate passion or prejudice on the part of the jury. In ascertaining whether a verdict is excessive, each case must be determined on its own facts. Consideration should be given to all the circumstances, such as the nature and extent of the injury; whether temporary or permanent; the amount of suffering endured as a result of the injury; the probability of future suffering; the expense incurred; and the extent to which earning power has been impaired.

38\* "If the verdict is so disproportionate to the \*injury as to suggest the inference that it is not the result of fair, calm, and unbiased judgment of the jury, the verdict ought to be set aside as excessive.

"In the case of *Chesapeake & O. Ry. Co. v. Arrington*, 126 Va. 217, 101 S. E. 415, 423, the court said:

"The law wisely leaves the assessment of damages, as a rule, to juries, which the concession that there are no scales in which to weigh human suffering, and no measure by which pecuniary compensation for personal injuries can be accurately ascertained. Nevertheless, it is an ancient and accepted doctrine of the common law that judges have the power and are clearly charged with the duty of setting aside verdicts, where the damages are either so excessive or so small as to shock the conscience and to create the impression that the jury has been influenced by passion or prejudice, or has in some way misconceived or misinterpreted the facts or the law which should guide them to a just conclusion. *Phillips v. London & S. W. Ry. Co.*, 8 Eng. Rul. Cas. 447, note, 5 Q. B. D. 78, 41 L. T. 121, 28 W. R. 10." See also the case of *Lorillard v. Clay*, 127 Va. 734, 104 S. E. 384.

"The evidence shows that the injury received by the defendant in error was slight and temporary; that he was away from his work only thirty-four days; that his loss of wages amounted to only \$200; and that he expended a nominal amount for his medical and other expenses. In addition to these things, he suffered a short time with stiffness in his neck. There is no evidence of extreme suffering or of any unusual pain."

In the instant case the plaintiff was sixty-two years of age, suffering with a very serious malady which has probably re-

curred and is causing some of the pain complained of. Under all the facts and circumstances we respectfully submit that the damages awarded were entirely excessive.

#### ASSIGNMENT OF ERROR NO. IX

The court erred in instructing the jury that the testimony of the witnesses Arthur Musser (Tr. 93), Lewis Widener (Tr. 104), Herbert Widener (Tr. 109), Ep Adkins (Tr. 113), and Akers Roark (Tr. 176), could be received only as affecting the credibility of the witness Isaiah Perkins, for the purpose of contradicting certain statements made by Perkins. The witness Isaiah Perkins was introduced by the defendant as an adverse or hostile witness, and this particular witness was asked this question (Tr. 84):

"Q 62. Did you tell Roark at Arnold's filling station on Sunday night, July 9, 1939, that you could have stopped your car down here but you tried to knock the cab out of the way and the next time one got in your way you would knock it out even if you had to get a truck to do it? Did you make any statement like that?"

Perkins denied he had made a statement like that (Tr. 84).

The witness Musser was asked (Tr. 93, Q. 5,) if such a statement had been made, and his answer is as follows (Tr. 95):

"The statement that Perkins made, he said he didn't try to stop. That is what he said. Said he didn't try to stop and was going to get a truck to knock the damned Yellow cabs out of his way."

The other witnesses above mentioned were asked substantially the same question, and they gave substantially the same answer. The court, on motion of counsel for plaintiff, instructed the jury in each instance that this evidence of the witnesses was introduced only for the purpose of contradicting the witness Isaiah Perkins.

The plaintiff summoned the witness Isaiah Perkins, but did not call him as a witness. The defendant asked to be permitted to introduce the witness Perkins as a hostile witness, under the statute (Tr. 67; et seq.). See section 6214 of the Code of Virginia.



The plaintiff was a passenger in the cab of the defendant and was injured in a collision between the cab of the defendant company and an automobile operated by Isaiah Perkins. Woodward, a companion of Perkins, was riding with Perkins at the time of the collision.

The defendant filed its plea of the general issue to the motion of plaintiff, and in addition thereto its grounds of defense which asserted that the accident was caused by an agency over which the defendant had no control (Tr. 7), and which was the sole proximate cause of the accident in question.

It is our view that we had the perfect right, under the 40\* \*facts and circumstances, to call Perkins as a hostile witness, under section 6214 of the Code of Virginia. See *Murphey's Hotel v. Cuddy*, 124 Va. 207, 97 S. E. 794; *Pendleton v. Commonwealth*, 131 Va. 676, 109 S. E. 201; *Ferguson v. Dougherty*, 94 Va. 308; *Nelson v. Commonwealth*, 153 Va. 909, 150 S. E. 407; *Saunders v. Temple*, 154 Va. 714, 153 S. E. 691; *Puckett v. Draper*, 156 Va. 238, 158 S. E. 68. See also section 6215 of the Code of Virginia. See also section 6214 of the Code of Virginia which provides as follows:

"A party called to testify for another having an adverse interest, may be examined by such other party according to the rules applicable to cross examination."

So, also, it is our contention that it was error for the court to instruct the jury that this evidence of the witnesses Musser, Adkins, Widener, Widener, and Roark was admissible only for the purposes of contradicting the witness Perkins. In short, the declaration of the witness Perkins, made to and in the presence of the five witnesses above mentioned, was admissible as substantive evidence and not only for the purpose of contradicting the witness Perkins. A declaration against interest is admissible notwithstanding the declarant is neither a party nor in privity with a party to the action. See 20 Am. Jur., section 556, page 469. It has already been recognized that if the declaration was against the pecuniary or proprietary interest of the declarant, such testimony is admissible under an exception to the hearsay rule. See 22 C. J., section 209, page 231 and following, from which we quote:

"Where a person makes a statement which is opposed to his own interest, an inference arises that such state-

ment would not have been made unless it had been true, and evidence of such statement is for that reason received, under an exception to the hearsay rule, although this class of evidence is not favorably regarded."

See also 20 Am. Jur. page 467, section 556, and we quote from this authority as follows:

41 \*      \* "An important exception to the hearsay rule\* is that which pertains to declarations against interest. The general rule is that a declaration against the interest of the person making it is admissible in evidence, notwithstanding its hearsay character, if the declaration is relevant and the declarant has died, become insane, or for some other reason is not available as a witness. On the other hand, declarations against interest are not admissible if the declarant is available as a witness. There is authority to the effect that the absence of a declarant from the jurisdiction does not render him unavailable within the rule. Furthermore, in order that such a declaration may be admitted in evidence the statement must have been against the pecuniary or proprietary interest of the declarant. The fact that the declaration would probably subject the declarant to a criminal liability is not sufficient to render it admissible as against interest. In addition to the foregoing conditions, some authorities state that admissibility of a declaration against interest depends upon the declarant's knowledge of the facts stated and the absence of a motive on his part to falsify. The true test in reference to the reliability of the declaration is not whether it was made ante litem motam, as in the case with reference to some classes of hearsay evidence, but whether the declaration was uttered under circumstances justifying the conclusion that there was no probable motive to falsify. In fact, declarations against interest are generally admitted without reference to the time at which they were made. The theory under which declarations against interest are received in evidence notwithstanding they are hearsay is that the necessity of the occasion renders the reception of such evidence advisable and, further, that the reliability of such declarations is generally to be depended upon since a person does not ordinarily assert facts which are against his own pecuniary interest. *A declaration against interest is admissible*

*notwithstanding the declarant is neither a party nor in privity with a party to the action. It is admissible as an entirety including parts not against interest, if the latter are substantially connected with the same subject matter as that covered by the part against interest. Both written and verbal declarations are within the rule which renders declarations against interest admissible notwithstanding their hearsay character. Whether a declaration against interest in the form of a conclusion or opinion is admissible is discussed in another part of this article."* (Italics ours.)

See a long list of authorities cited in support of the above rule, including the case of *Hines v. Commonwealth*, 136 Va. 728, 117 S. E. 843, 35 A. L. R. 431.

HINES v. COMMONWEALTH, 136 Va. 728, 117 S. E. 843, 35 A. L. R. 431

## FACTS

42\* \*Hines was accused of the murder of Curtis, a police officer in the City of Richmond, Virginia. Hines was convicted. After the trial Jenkins made certain declarations and admissions to third parties. Jenkins died. Hines sought to prove the declarations of Jenkins, but the court held that the declarations and admissions were inadmissible. This court on appeal held that the admissions of Curtis Jenkins, made to third parties, were admissible.

In the Hines case, this court refused to follow the case of *Donnelly v. United States*, 228 U. S. 243, and quotes from the dissenting opinion in the case, and also refers to 2 Wig. Ev., sec. 1476, 1477, and we quote from the Hines case as follows, page 743 of the Virginia Reports:

"The reasons given by the authorities for rejecting proof of such evidence seem to us unsatisfactory and entirely arbitrary; and no rule of property being involved, we do not think it is even yet too late to abandon the unsound precedents and follow the rule of right and reason. Certainly this is true in Virginia, for we are not hampered by any adverse decisions in this jurisdiction.

"Let us examine a little more closely the reasons for this rule of exclusion. Confessions and admissions of

third parties in criminal cases are excluded because their introduction in evidence is held to be a violation of the hearsay rule. Hearsay evidence is excluded, to state the reasons briefly, because it lacks the sanction of an oath and the test of cross-examination; and facilitates the use of perjured testimony. These are sound reasons and the rule is one of great importance; but one of the exceptions to this rule, universally recognized, is that relevant declarations against interest, where the declarant has since died or otherwise become unavailable as a witness, are receivable in evidence. The basis of this exception to the rule is that the evidence itself is important to the ends of justice, and that the element of self interest affords a reasonably safe substitute for the oath and cross-examination as a guarantee of truth. 2 Wig. Ev., sec. 1421; Id. sec. 1455-6-7.

“It seems that in England prior to 1844 this exception was not limited in such way as to exclude relevant admissions by third parties in criminal cases, but since the Sussex Peerage Case (1844), 11 Cl. & P. 109, it has been held with practical unanimity both in England and in this country that the exception does not exclude a statement of  
43\* facts subjecting the \*declarant to criminal liability; but must be confined to declarations against pecuniary or proprietary interest. 2 Wig. Ev., sec. 1476; 22 C. J. 235.

“But why this distinction? Is a man more likely to speak the truth to his own hurt about a pecuniary obligation or boundary line than about the more serious matter of his responsibility from crime? If it is reasonable and safe to assume that the principle of self protection and self interest will sufficiently guarantee the truth in the former instances; it would seem equally reasonable and safe to assume that the same principle would answer a like purpose in the latter instance.

“Nor can it be fairly said that public policy demands a limitation of the exception to declarations against money or property rights. We are not concerned here merely with the fate of the accused in this case. The principle with which we are dealing may be one of great importance to the public generally. Surely the State is as much concerned in arriving at the truth in trials involving the honor and liberty and life of its citizens as in trials involving their property rights. We can see no reason for making a difference between these two classes of cases, unless, indeed,

there be some reason for making the difference in favor of the former. In neither class can the exception apply when original testimony by the declarant is available; but when it is not, every reason which justifies the exception in the latter class justifies it in the former. The relevancy is as clear, the necessity as great, and the guarantee of truth as potent.

"If it be suggested that a third party making a confession out of court could not be compelled to testify because it would tend to incriminate him, the answer seems easy enough. If he were dead or out of the jurisdiction, the question of privilege would not arise; if he were alive and present and claimed his privilege, he would not be available as a witness, and the exception would apply with as much reason as if he were dead or absent. *And so, too (as seems to have probably happened in Blocker v. State, infra), if he were present and testifying, but denying that he made any such confession, then his own original testimony would not be available, and it would be competent and proper to introduce proof of the alleged confession by others who heard it, and let the jury determine as to the credibility of the testimony.*" (Italics ours).

The italicized portion of the language of the court would seem to fit the instant case. Here Perkins was available. He denied he made any declaration to the five witnesses at Arnold's filling station in the manner and form stated by the five witnesses, hence, Perkins' own testimony was not available to

the court, and it was therefore competent and proper to  
44\* introduce proof of the \*alleged declarations made by Perkins to others who heard it. Under the court's instructions, the testimony of the five witnesses was received for

no purpose other than to contradict the witness Perkins. Perkins denied that he made such statements and the five witnesses were called upon to testify, and they swore he had made such a statement that he did not try to stop, etc. Then the court instructed the jury not to consider the evidence of the five witnesses except to contradict the evidence of Perkins, hence defendant was not allowed to prove anything. It was merely going around in a circle, so to speak; and we submit that under the doctrine of the Hines case this evidence was competent testimony to prove the declarations as a fact that Perkins was alleged to have made.

We quote from the Hines case, at 749 of the Virginia Reports, as follows:

"In a note to *Donnelly v. United States*, supra, Ann. Cas. 1913 E, 710, the majority rule is referred to as one which 'shocks the sense of justice of the ordinary person;' and this further comment is there made: 'The ground on which this vicious rule has been based is of course the hearsay rule. The exception to the hearsay rule made in the case of declarations against interest has been confined to declarations against the pecuniary interests of the declarant. The absurdity of such a limitation on the exception would seem to be apparent, for on what grounds can it be said that a man might truly make a statement detrimental to his interest in realty of small value, and yet not as truly make a statement which might involve penal servitude for life, or even capital punishment.'

This case holds that the declarations of third parties are admissible not only as exception to the hearsay rule in civil cases where the declarations are against the pecuniary or proprietary interest of the declarant, but are also admissible in criminal cases.

The case of *Hines v. Commonwealth* has been cited repeatedly. See article in 25 Virginia Law Review, section 635, from which we quote as follows:

45\*       \* "Until near the middle of the nineteenth \*century the rule prevailed that all declarations of facts against interest were admissible, no distinction being made as to declarations against penal interest and those against pecuniary interest. The famous *Sussex Peerage Case* very definitely modified the rule by limiting its application to declarations against pecuniary interest; and the rule thus limited has been followed in subsequent English cases. The American courts have uniformly adopted the same rule. The United States Supreme Court declared in *Donnelly v. United States* that 'the fact that the declaration, alleged to have been thus extrajudicially made, would probably subject the declarant to a criminal liability, is held not to be sufficient to constitute it an exception to the rule against hearsay evidence.'

"It is difficult to understand the rationale of a rule which contends that a man will be more truthful in speak-

ing against his pecuniary interest, however small, than in speaking adversely to his penal interest, which may involve his very life. It is noteworthy that the Supreme Court of Appeals of Virginia, in *Hines v. Commonwealth*, renounced the usual arbitrary distinction, and held that evidence of confessions by a third person is admissible in criminal trial for the purpose of exonerating the accused. The Virginia court thus adopted the view expressed by Mr. Justice Holmes in his vigorous dissent in the *Donnelly* case, that 'no other statement is so much against interest as a confession of murder.' A few other state courts have also refused to follow the illogical distinction in penal and pecuniary interest made by the *Sussex Peerage Case*. Professor Wigmore thus unreservedly comments on the *Hines* case: 'After the present case, no other court can be exonerated for not following the principle laid down.' "

This case of *Hines v. Commonwealth* has been reported in 35 A. L. R., at page 431, and there is an annotation in 35 A. L. R., beginning at page 441, and we quote from the annotation at page 445 as follows:

"The reasoning in support of admissibility is fully and forcibly expressed by Mr. Wigmore (2 Wigmore, Ev. sec. 1476), and in the dissenting opinion in *Donnelly v. United States* (U. S.) *supra*, both of which are set out at length in the reported case (*Hines v. Comm. ante*, 431). The force of this reasoning is strikingly shown by the fact that it not only appealed to Justices Holmes, Lurton, and Hughes of the United States Supreme Court, but led the Virginia court in the reported case (*Hines v. Comm.*) to a holding in the face of an overwhelming line of decisions.

"On principle, it would seem that, were the matter now *res integra*, few courts would adhere to the prevailing rule. That a declaration should be admissible because against a property interest, and not admissible though it  
46\* may convict the declarant \*of a capital crime, seems opposed to all logic, and the prevailing rule must be regarded as a survival by tradition from a day when courts were more distrustful of juries, and more prone to construe the law harshly against persons accused of crime."

See also 48 A. L. R. 348.

On the general proposition that a declaration against an interest is admissible, notwithstanding the declarant is neither a party nor in privity with a party to the action: See 20 Am. Jur., section 556, page 469. This authority cites the following authorities in support of that rule of law:

"Turner v. Turner, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 76; Georgia R. & Bkg. Co. v. Fitzgearld, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175; Gordon v. Munn, 87 Kan. 624, 88 Kan. 72, 125 P. 1, 127 P. 764; Ann. Cas. 1914A, 783; Carpenter v. Carpenter, 153 Or. 584, 56 P. (2d) 305, 57 P. (2d) 1098, 58 P. (2d) 507, 105 A. L. R. 386; Smith v. Hanson, 34 Utah, 171, 96 P. 1087, 18 L. R. A. (N. S.), 520; Jefferson v. Simpson, 83 W. Va. 274, 98 S. E. 212, citing R. C. L. Annotation: 94 Am. St. Rep. 673."

See also Harriman v. Brown, 8 Leigh 697, at page 713, and we quote from said case as follows:

"If these principles be true, the declarations of Milburn against his own interest (if they are to be considered as declarations) were properly introduced."

In the instant case, we submit that the court erred in instructing the jury that the evidence of the witnesses Musser, Lewis Widener, Herbert Widener, Adkins, and Roark was admissible only for the purpose of contradicting the witness Perkins, but on the other hand we contend that the declarations made by Perkins as to how the accident happened, and that he did not try to stop, and that he would get a truck and knock the next cab out of his way, if necessary, etc., were admissible to prove that the declarations were made, and as such were substantive evidence in the case. If this evidence had been permitted to go to the jury, without the courts erroneous instructions, we submit the result of the trial would have been entirely different. Here the man Perkins, according to the witness 47\* Roark, had the odor of alcohol on his \*breath; his companion was likewise intoxicated; at the time of the accident they were fussing over two cans of beer, not looking where they were going. The cab had crossed Valley Street all except three feet, that being the rear portion of the cab extending back into Valley Street. Perkins had thirty-three feet in which to miss the cab. According to the witness Worley Henry and



the witness Preston Rodefer, glass out of the tail light of the cab was found eighteen to twenty-four inches over the north curb line of Valley Street, and the cab came to a rest in Court Street and not in Valley Street. See photographs filed as exhibits (Tr. 242, et seq.). Perkins wanted to leave the scene of the accident hastily, and did do so. According to the witness Roark, he stopped Perkins, and Roark is corroborated in this by the witness Puckett (Tr. 125), and the witness Box (Tr. 150). The witness Preston Rodefer, testified he arrived at the scene of the accident shortly after it happened, and he heard the officer making inquiries as to the whereabouts of Perkins, the driver of the Chevrolet coupe, which collided with the cab; that pursuant to directions from the State Police, Rodefer (Tr. 157) moved the automobile of Perkins, and the witness Rodefer was asked this question (Tr. 157):

"Q 23. I want you to tell the jury what kind of brakes or what the brakes were like on that automobile?"

"A. It didn't have practically any brake at all. When I moved it I set my foot to the brake and it went to the floor board—didn't take any affect—practically no brakes at all."

We, therefore, respectfully submit that in view of all the evidence, it was error for the court, under the circumstances, and under the pleadings in this case, to instruct the jury to consider the testimony of the five witnesses solely for the purpose of contradicting the witness Perkins, or going to his credibility. That instruction rendered the evidence of the five witnesses incompetent for any purpose other than for contradicting 48\* the witness \*Perkins.

The Hines case is quoted with approval in . . . Va. . . . , 189 S. E. at page 44, and at page 48 of the South Eastern Reporter.

We submit that the holding of the Hines case is to leave to the jury, as a question of fact, whether or not certain declarations are actually made by a third party (here Perkins), and that the jury cannot be limited, as was done by the Trial Court in this case, to the consideration only of the credibility of a third party as a witness.

## ASSIGNMENT OF ERROR NO. X

The court erred in granting plaintiff's Instruction No. 1, which is in the following words and figures, to-wit (Tr. 217):

"The court instructs the jury that at the time of the injury here complained of, the plaintiff was a passenger in a vehicle belonging to the defendant, who was a common carrier, and that said defendant owed the plaintiff the utmost care, diligence and foresight in the operation and management of the vehicle in which the passenger was riding, and that this duty must be performed by the driver of said taxi-cab; if, therefore, you believe from a preponderance of the evidence that at the time of this accident, the driver of the taxi-cab in question failed in any respect to manage and operate the same with the utmost care, diligence and foresight, and that such failure proximately contributed to the accident, then you will find for the plaintiff."

Objection was made to this instruction, and the court overruled the objection and gave the instruction on motion of the plaintiff, and the defendant excepted.

The instruction is taken from the case of Hogan v. Miller, 156 Va. 156, 157 S. E. 540. The instruction given in the case of Hogan v. Miller is in the following words and figures, to-wit:

49\* "The court instructs the jury that at the time of the injuries here complained of, the plaintiff was a passenger in a vehicle belonging to the defendant who was a common carrier, and that the said defendant owed the plaintiff the utmost care, diligence and foresight in the operation and management of the vehicle in which the passenger was riding, and that this duty must \*be performed by the driver of said taxi-cab; if, therefore, you believe from the evidence that at the time of this accident, the driver of the taxi-cab in question failed in any respect to manage and operate the same with the utmost care, diligence and foresight, and that such failure proximately contributed to the accident, then you will find for the plaintiff."

There the sole ground of the objection to the instruction was that there was no evidence to support it, and we quote from the opinion as follows:

"Objection was made to this instruction on the sole ground that there was no evidence to support it."

There no question was raised as to the contributory negligence of the plaintiff. Here issue was raised, and the Trial Court, at page 220 of the transcript, stated:

"By the Court:

There is some evidence of contributory negligence on the part of plaintiff herself. She said he was driving too fast up Main and too fast down Court and didn't stop and she made no protest. She did say she was looking at the clouds. If there is an objection I will refuse it."

Plaintiff admitted that the driver was driving too fast on Main Street, and that he was reckless, but that she paid no attention, was looking at the clouds, and did not protest. We quote from her testimony as follows (Tr. 12):

"As we came on up the driver was driving pretty fast, reckless I thought."

On page 12 of the transcript she stated she was looking at the clouds. On cross examination, plaintiff stated that it was raining; that she wasn't looking for approaching traffic; that she didn't see the car approaching, and didn't see the car until after she was struck; she didn't know where the car came from that struck her; she stated that the driver of the cab didn't stop at the stop sign, and that "he dashed down through there so quick there was no time"; that she was familiar with the streets and knew the stop sign was there (Tr. 25), yet she uttered no protest whatsoever, neither did she see the automobile that struck her until after the accident happened, and the  
50\* Trial Court admitted \*there was some evidence of contributory negligence on the part of the plaintiff.

While this instruction was given in the case of Hogan v. Miller, no objection was made on the ground that the plaintiff was guilty of contributory negligence. Here specific objection was made (Tr. 218) that this instruction disregarded any element of care on the part of the passenger, and further that it

disregarded the theory of contributory negligence on the part of the plaintiff. Notwithstanding this objection, the court gave the instruction, and we believe the court erred in this respect.

A similar instruction was given in the case of *Riggsby v. Tritton*, 143 Va. 903, at page 906 of the Virginia Reports, being Instruction 11½, which instruction is in the following words and figures, to-wit:

"If the jury believe from the evidence that the defendant, H. E. Riggsby, was a common carrier of passengers, and that the plaintiff, on the occasion in question, was his passenger, then the court instructs the jury that H. E. Riggsby owed the plaintiff the utmost care, diligence and foresight in the operation and management of his jitney; and, if they believe from the evidence that the said Riggsby was guilty of the slightest negligence, whereby the plaintiff was injured *without negligence on her part*, they shall find for the plaintiff." (Italics ours).

It is noted that the above instruction, which is similar to the instruction in this case, contained the language italicized above, to-wit: "*without negligence on her part.*"

From reading the opinion in the case of *Riggsby v. Tritton* we do not see that the question of contributory negligence was raised, yet the instruction took notice of this phase of the case. In the instant case the instruction concluded with a finding for the plaintiff, without considering the contributory negligence of the plaintiff, *and directed the jury on a partial statement of the evidence to find for the plaintiff.*

A similar instruction was given in the case of *Murphey's Hotel v. Cuddy's Adm'r.*, 124 Va. 207, at 209, and this 51\* instruction \*reads as follows:

"The court instructs the jury that it was the duty of the defendant in carrying the plaintiff's intestate upon his elevator to use the highest degree of care for his safety known to human prudence and foresight, and is liable for the slightest negligence against such human care and foresight might have guarded. This degree of care is required and applies not only to the manner in which the elevator

was being run and controlled by the operator, but also to the machinery, appliances and equipment of said elevator, and the manner in which same were constructed and maintained; and if you believe from the evidence that the defendant failed to exercise such care in any of these particulars and that such failure proximately caused the death of the plaintiff's intestate *while in the exercise of ordinary care on his part* then your verdict must be for the plaintiff." (Italics ours).

Here again there was no defense of contributory negligence, so far as the record discloses, but the court included in the instruction the italicized portion as above set forth.

Instruction No. 1 granted for the plaintiff in the instant case, was argued at length to the jury by counsel for plaintiff, and was greatly emphasized in the argument, and we do not believe that any other instruction given cured the defect in this particular instruction.

The Trial Court refused plaintiff's Instruction No. 2 (Tr. 219) because it concluded with the finding for the plaintiff and ignored any theory of contributory negligence on the part of the plaintiff, and the court (Tr. 220) recognized this and said there was some evidence of contributory negligence on the part of the plaintiff. The evidence showed that this plaintiff was familiar with the streets; that she knew of the stop sign; that she lived in Abingdon; had been to the same hospital many times, over the same streets, and she stated that the driver was reckless, yet she uttered no protest, knowing that the streets were wet, and she never did see the automobile that struck her until after the injury.

The instruction in the case of Hogan v. Miller was criticized<sup>52\*</sup> by Mr. Justice Epes, who dissented in that case, and the dissenting opinion stated that the instruction went too far in defining the duty of the driver toward the passenger.

We, therefore, submit that the court erred in granting plaintiff's Instruction No. 1 over objection of the defendant, and that this was prejudicial to the defendant.

#### ASSIGNMENT OF ERROR NO. XI

At the trial the defendant offered to introduce the deposition of Homer L. Sapp (Tr. 195, et seq.). The deposition

was excluded by the court and exception taken. The purpose of the deposition was to show that one Woodward, an occupant of the car driven by Isaiah Perkins, had been drinking previous to the accident, and at about 10:30 A. M. he was lying asleep under a tree, "he was asleep and pretty drunk" (Tr. 199). We submit that the evidence bears on the transaction because Woodward had been with Perkins throughout the night preceding the accident, and at the time of the accident they were on their way to Abingdon to buy whiskey. The evidence, as shown by the deposition of Sapp, would have thrown further light on the question as to whether the negligence of Perkins was the sole cause of the accident.

### CONCLUSION

For the reasons above set out, your Petitioner insists that its assignments of error are well taken and that this Court, entering the judgment which ought to have been entered by the lower court, will sustain his assignments of error numbers one to eleven, inclusive, and enter final judgment in its favor.

If, for any reason, this Court does not feel that it can enter final judgment in favor of your Petitioner, your Petitioner respectfully insists that its assignments of error are well taken and that the verdict of the jury should be set aside and a  
53\* new trial \*awarded Petitioner.

A copy of this petition was, on the 13th day of September, 1940, delivered to T. C. Phillips, of counsel of record for plaintiff.

The Justice to whom this petition and the transcript will be presented is asked to allow a brief oral presentation thereof.

If the Court grants a writ of error in this case, we will rely upon this petition as our initial brief.

For the foregoing and other reasons to be assigned at bar, your petitioner prays that a writ of error and supersedeas be awarded it, and that upon a hearing final judgment be entered in its favor, or if this cannot be done, that the case be reversed and remanded for a new trial.

Respectfully,

YELLOW CAB COMPANY, INC.,

By Counsel.

T. L. HUTTON,  
H. E. WIDENER,  
GEO. M. WARREN,  
Counsel.

We, T. L. Hutton, H. E. Widener, and George M. Warren, Attorneys, practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion the decision and judgment of the Circuit Court of Washington County, in the foregoing case, should be reviewed by the Supreme Court of Appeals.

Given under our hands this 13th day of September, 1940.

T. L. HUTTON,  
H. E. WIDENER,  
GEO. M. WARREN.

Filed September 13th, 1940.

P. W. C.

October 15, 1940. Writ of error and supersedeas awarded by the Court. Bond \$3000.00.

M. B. W.

# RECORD

---

VIRGINIA:

In the Circuit Court of Washington County.

Isadore Virginia Eden,

Plaintiff

versus

Yellow Cab Company, Inc.,

Defendant

BE IT REMEMBERED, that heretofore, to-wit, on the 16th day of February, 1940, said Plaintiff filed in the Clerk's Office of said Court her notice of motion for judgment against said defendant, which said notice of motion, and the further proceedings had in said cause, are in the following words and figures, to-wit:

page 2 ]

## NOTICE OF MOTION FOR JUDGMENT

Filed February 16, 1940

To Yellow Cab Company, Incorporated:

You are hereby notified that I will move the Circuit Court of Washington County, Virginia, on Monday, 25th day of March, 1940, for judgment against you in the sum of FIVE THOUSAND DOLLARS, and for grounds of said motion will assign the following:

On or about June 19, 1939, I was a passenger, for hire, in one of your taxi cabs which was being driven by your agent and servant, Akers Roark, and in the due course of his employment, You were then, and you are now, engaged in the business of operating taxi cabs, for hire, in the town of Abingdon, Virginia.

I, as a passenger for hire, had entered your taxicab at my home in the western part of Abingdon, and was being driven to the George Ben Johnston Memorial Hospital by you and as



your taxicab proceeded northward along Court Street and while I was riding in the rear seat thereof, you approached Valley Street in a careless, reckless and negligent manner in that you were traveling at an excessive rate of speed, and you failed to bring said taxicab to a stop before crossing Valley Street, and you failed to keep a proper lookout for automobiles approaching on Valley Street, all in violation of your duty in the exercise of due care, and in violation of the ordinance of the town

of Abingdon; as a result of your careless, reckless  
page 3 ] and negligent action aforesaid you were struck by  
an automobile which was traveling in a westwardly  
direction along Valley Street, while you were undertaking to  
cross Valley Street and as a direct and proximate result of your  
said careless, negligent and reckless actions as aforesaid, said  
collision occurred, and I was violently thrown from the rear  
seat against and onto the back of the front seat and my head  
and my shoulders received a severe blow from the back of the  
front seat, resulting in a severe bruise and contusion to my  
head and other parts of my body, and particularly injuring  
my back by a severe wrench, and breaking my collar bone; it  
was drizzling rain at the time of said collision and in the excitement and confusion of the wreck and in being transferred to  
another car to be carried to the hospital I became wet and chilled. As a direct and proximate result of said careless, reckless  
and negligent actions, I was confined to the hospital for about  
twenty-six days, in receiving treatment and in seeking to be  
cured.

As a result of said wreck I have suffered extreme pain and  
mental anguish and have sustained a permanent injury to my  
right arm so that I am unable to use it freely; and my arm and  
shoulder give me great and frequent pain and discomfort during  
the day and night and I am unable to perform my household  
duties as I had been able to perform them prior to said wreck  
and I will never be able to perform them as fully as I had been  
able to perform them before said wreck; and I am  
page 4 ] unable to sleep and rest at night because of the pain  
from my arm, shoulder and back as a result of said  
wreck.

As a direct and proximate result of your said negligence  
as hereinbefore set out, I have incurred large and sundry bills  
for hospital and medical services and will be compelled to incur  
further bills and obligations for hospital and medical services  
and attention in seeking to be cured of the aforesaid injuries.

As a result thereof I have been damaged to the extent of \$5,-000.00.

WHEREFORE I will make said motion.

ISADORE VIRGINIA EDEN,  
By Counsel.

THOS. C. PHILLIPS,  
ROBY C. THOMPSON,  
Counsel.

Endorsed as follows:

Executed the within notice by delivering a true copy of this notice to Worley B. Henry in person as President of the Yellow Cab Company, Inc., in Abingdon, Washington County. The principal office of the said Yellow Cab Company, Inc., being located in Abingdon, Washington County, Va.

This the 15th day of February, 1940.

J. W. HAGA,  
Deputy Sheriff for J. T. Woodard,  
Sheriff of Washington County.

page 5 ]

## BILL OF PARTICULARS

Filed Apr. 11, 1940

For her bill of particulars in this case the plaintiff will rely upon the following:

FIRST: The plaintiff relies upon her notice of motion in this case for the particulars and details of her claim.

SECOND: The plaintiff's injuries consisted of a permanent partial loss of use of her right arm and hand; continual and intermittent pain and discomfort in her shoulder and back, and an inability to rest at nighttime except on her back, or on her left side intermittently by supporting her right shoulder, so that plaintiff's sleep and rest at night has been greatly interfered with and partially destroyed and as a result thereof her nervous system is suffering severely and being materially impaired; plaintiff is almost wholly unable to perform her household duties as a wife and a housekeeper, such as sweeping, washing, gardening, and in particular plaintiff is unable to do any manual labor that requires the use of her right arm or her right hand other than for a brief space of time.

The driver of defendant's taxi-cab was also negligent in that as he approached Valley Street he was engaged in wiping the fog or moisture off of the windshield in front of him and he did not keep a proper lookout for vehicles approaching on Valley Street; said driver was also negligent in that page 6 ] he did not observe the vehicle approaching on Valley Street which collided with the taxi-cab in which plaintiff was riding; or if he did observe it, said driver was negligent in undertaking to cross Valley Street before said vehicle had passed; said driver was negligent in crossing Valley Street under the weather conditions existing at that time, and the other circumstances then existing, such as a wet road, rain, and an approaching vehicle, all of which made an attempted crossing dangerous and improper.

THIRD: Plaintiff has incurred hospital and doctor bill at Johnston Memorial Hospital of \$111.50, and has expended for help in performing household work the approximate sum of \$ . . . . ., and will be compelled to expend further sums for hospital and medical treatment in seeking to secure relief from pain and in seeking to be cured of the injuries caused by the defendant's negligence, and in employing help about her household duties, in an amount which complainant is unable to specify.

VIRGINIA ISADORE EDEN,  
By Counsel.

THOS. C. PHILLIPS,  
ROBY C. THOMPSON,  
Counsel.

page 7 ] GROUNDS OF DEFENSE

Filed May 28, 1940

In addition to the plea of general issue, and all defenses available thereunder, the defendant says that it was guilty of no negligence that in anyway proximately contributed to the injuries complained of, but says that said injuries, if any, were caused and brought about by an independent agency, over which this defendant had no control, and which was the sole proximate cause of the accident in question.

YELLOW CAB COMPANY, INC.,  
By Counsel.

T. L. HUTTON,  
GEO. M. WARREN,  
Counsel.

page 8 ] Virginia:

In the Circuit Court of Washington County.

Isadore Virginia Eden,		Plaintiff
v.	ORDER	
Yellow Cab Company, Inc.,		Defendant

This day came the parties by their attorneys, and the defendant, by counsel, tendered to the Judge for signature, a stenographic report of testimony and other incidents of the trial therein, and certificate of exceptions, and it appearing to the Court, in writing, that Thos C. Phillips and Roby C. Thompson, attorneys of record for the plaintiff, have had reasonable notice that the said stenographic report of testimony and other incidents of the trial, and certificate of exceptions, would be presented at this time and place to the Judge for his signature, the said stenographic report of testimony and other incidents of the trial, and certificate of exceptions was on this 2nd day of September, 1940, within sixty days from the time final judgment herein was entered, received, signed and sealed by the Judge of this Court, and ordered to be made a part of the record in this case.

WALTER H. ROBERTSON,  
Judge of the Circuit Court of Washington County, Virginia.

page 9 ] In the Circuit Court of Washington County, Virginia.

Isadore Virginia Eden  
v.  
Yellow Cab Company, Inc.

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, all the instructions, offered, amended, granted, and refused, and the objections and exceptions thereto, and all other incidents of the trial of the case of Isadore Virginia Eden v. Yellow Cab Company, Incorporated, tried in the Circuit Court of Washington County, Virginia, at Abingdon, Virginia, on July 1,

*Mrs. Isadore Virginia Eden*

2, 3, inclusive, 1940, before Honorable Walter H. Robertson, Judge of the 23rd Judicial Circuit, and a jury, in the Circuit Court of Washington County, Virginia.

PRESENT:

Messrs. Thos. C. Phillips and Roby C. Thompson, Abingdon, Virginia.

For the Plaintiff

Messrs. T. L. Hutton, Abingdon, Virginia and Geo. M. Warren, Bristol, Virginia.

For the Defendant

page 10 ] The jury was called and sworn to try the issues joined.

The witnesses for both sides were called, sworn and placed under the rule.

Opening statements were made by Mr. Phillips, Counsel for Plaintiff, and Mr. Hutton, Counsel for Defendant.

MRS. ISADORE VIRGINIA EDEN, the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Phillips:

Q1. Your name is Isadore Virginia Eden?

A. Yes, sir.

Q2. Whose wife are you?

A. D. A. Eden.

Q3. How old are you, Mrs. Eden?

A. Sixty-two.

Q4. Where do you live?

A. West end of Abingdon, Route 2.

Q5. Were you in an automobile wreck that occurred on or about June 19, 1939?

A. Yes, sir.

Q6. Whose cab were you in?

A. Yellow Cab Company.

page 11 ] Q7. What time of day was it?

A. Something like eleven o'clock.

*Mrs. Isadore Virginia Eden*

Q8. Where had you entered or gotten in the Yellow Cab?

A. At my home on Route 2.

Q9. Where were you going?

A. Going to the hospital.

Q10. That is the Johnston Memorial Hospital?

A. Yes, sir, Johnston Memorial Hospital.

Q11. Who was driving the Yellow Cab?

A. Mr. Roark. Ake Roark.

Q12. What route had you followed from home?

A. We came up Main Street by the Court House, turned and went down.

Q13. That is down Court?

A. Court Street, I reckon.

Q14. Is it the street directly east of the Court House?

A. Yes, sir, right there.

Q15. Was it raining or not that day?

A. Yes, sir, it was raining.

Q16. How had you secured the Yellow Cab?

A. Well, I just called it by phone.

Q17. Called it by phone?

A. Yes, sir.

Q18. Just tell, please, what happened as you came up Court Street and on until the time of the accident.

page 12 ] In your own words, tell the Court and jury.

A. As we came up Main Street?

Q19. And turned?

A. As we came on up the driver was driving pretty fast, reckless I thought—

By Mr. Hutton:

We object to anything before the scene of the accident.

A. Turned the corner. Of course, he slowed just a little.

Q20. Where?

A. Right here. (Indicating.) Court was going on and lots of cars and he slowed just a little, but not much, and then proceeded down.

Q21. Proceeded down Court Street?

A. Yes, sir.

Q22. Then what happened?

A. All I know he was just going pretty fast and I was

*Mrs. Isadore Virginia Eden*

looking out the window—it was raining pretty hard—and all I know it hit. The car didn't stop motion at all.

Q23. What seat were you riding in?

A. Back seat.

Q24. Which way were you looking?

A. This way. (Indicating.)

Q25. That is toward this way?

A. Up this way. I wasn't looking down at the ground.

I was looking up at the clouds, looking at the rain.

page 13 ] Q26. Did the taxicab stop before entering Valley Street?

A. No, sir.

Q27. What happened to you, or what did it do to you?

A. I was thrown against something, hit my head first and my shoulder. Just a second between. Hit my head first and then my shoulder. Then I was down in between the seats. That is the first I recognized. I was in between the seats on the floor.

Q28. Did they take you to the hospital?

A. Yes, sir. Called Campbell's ambulance.

Q29. How long were you there in the cab before you were removed to the hospital?

A. Not but a little bit. Mr. Roark came to the car and asked if I was hurt.

Q30. Just tell what happened.

A. Anyway, it wasn't but just a few minutes. He said the ambulance would be after me.

Q31. You say you were thrown down between the two seats?

A. Yes, sir.

Q32. What part of your body, if any, was bruised and injured as a result of that blow?

A. Well, just my back back here. (Indicating.)

Q33. What about your head. Did you receive any bruises or blows?

A. Yes, sir, my head.

Q34. What part of the head?

page 14 ] A. Right here over this eye. (Indicating.)

Q35. The forehead or was it over here?

A. Just my forehead. Just above my eye. It injured my eye for some time.

*Mrs. Isadore Virginia Eden*

Q36. Did it break the skin?

A. Not very much. Just a tiny little bit.

Q37. Did it discolor the skin?

A. Yes, sir.

Q38. Did it swell any?

A. Swollen up a lot when I got to the hospital and stayed swollen a good while. Of course, my eyes turned black under here. (Indicating.)

Q39. Both eyes or one?

A. Both eyes.

Q40. Were any bones broken?

A. You mean about my head?

Q41. About your body?

A. Yes, sir, my shoulder.

Q42. Just place your finger on the part of your shoulder where the bone was broken.

A. Across there. (Indicating.)

Q43. How long did you stay in the hospital?

A. From the 19th of June to the 15th of July.

Q44. Mrs. Eden, before this accident happened had you been doing your housework at home?

page 15 ] A. Yes, sir.

Q45. How much of this housework did you do?

A. I could do it all. When the case was necessary I could do it all.

Q46. How much had you been in the habit of doing?

A. I could help with the washing or ironing, and I could go out in the garden and take a hoe and work.

Q47. Had you been doing the washing and ironing, such as that?

A. Yes, sir.

Q48. What use do you now have of your right arm?

A. Well, a lot of times I can get it up, but I can't use it like I used to and get after things or do any lifting. I don't have any strength in that arm—not near as much as I do in the other.

Q49. Just show to the Court—perhaps you had better stand up, and raise your right arm as high as you can. Rotate it backwards and forwards. Raise it up high.

A. (Witness indicating with arm.)



*Mrs. Isadore Virginia Eden*

Q50. Now demonstrate to the Court how you can put that right arm to your back.

A. Just like that. I can't scratch my back with it.

By Mr. Warren:

Turn around this way with your back to the jury and Court and bend your elbow.

By The Witness:

Nothing wrong with my elbow.

page 16 ] (Witness bends elbow.)

Q51. What about combing your hair and dressing, what use do you have of the right arm?

A. I can't comb my hair, except just what I can do with this hand.

Q52. That is your left hand?

A. Yes, sir. I can put my hands up here like this. (Indicating.)

Q53. Do you dress yourself now?

A. Mostly. Sometimes I have a little difficulty with certain things unless they are made open good so I can get in them.

Q54. What about buttoning dresses and things of that nature with your right arm. Do you have any difficulty with that?

A. I don't try to button anything in the back. I can fasten the front of the clothes.

Q55. Now Mrs. Eden, can you sweep your house in the morning?

A. Not all of it. I can take a light broom and kind of help with this hand. I call it brushing up, just brushing.

Q56. What about washing. Are you able to wash?

A. No, I don't wash any.

Q57. Cooking. What about cooking?

A. I do right smart of my cooking. I can make anything I can use my left hand for, put the power with my left hand.

I can do most of my cooking.

page 17 ] Q58. Mrs. Eden, have you been making an effort to use your right arm as much as possible?

A. Yes, sir.

Q59. In your general housework, do you try to use it?

*Mrs. Isadore Virginia Eden*

A. Yes, I use it all I possibly can.

Q60. Do you see any improvement in the past few months in the amount of use that you can get out of the right arm and shoulder?

A. No, sir, I can't see any change.

Q61. What about resting at night? Has that resulted in any change in you about your rest at night?

By Mr. Hutton:

We object to leading. I think she can tell where she was injured.

Q62. Are you able to rest at night?

A. Not good and comfortable.

Q63. Just tell in what way, if any, your rest is affected.

A. Most of the time I have to lie on my back because I can't lie on this shoulder. Never been able to turn clear on this shoulder. Seems I get awful tired on my back.

Q64. What happens if you turn over on your shoulder or side?

A. I just don't go to sleep, that's all.

Q65. Can you rest on your left side?

A. Not long at a time.

Q66. What happens when you turn on to your  
page 18 ] left side? How does it affect it?

A. Naturally my heart palpitates, and you see, of course, your heart's on that side, and I am more uncomfortable when I turn on that side.

Q67. You have someone at home to help about the house work?

A. Yes, sir, my daughter is there.

Q68. If you undertake to do much housework, does it or not cause any pain or discomfort to your shoulder?

By Mr. Warren:

We object to that as leading and suggestive.

By The Court:

Overruled.

By Mr. Warren:

Exception.

Q69. Go ahead and tell in general what happens.

*Mrs. Isadore Virginia Eden*

A. I get tired and I twist my back more in working with my left hand, you see, and pretty soon my back gets so tired and aches, and my shoulder aches until I have to lie down. I can't work long at a time.

Q70. Mrs. Eden, had you had an operation on your shoulder along about March 1, 1939?

A. Yes, sir, a slight operation.

Q71. About when did you leave the hospital from that operation?

A. 6th of April.

Q72. When did this wreck occur?

A. 19th of June, 1939.

page 19 ] Q73. How had you been getting along with that operation after you left the hospital?

A. Well, I was getting along just fine. Of course, I had returned to the hospital a few times for dressing, but when I started the 19th I hadn't been for three or four weeks—hadn't been back.

Q74. Were you suffering any pain or discomfort from that operation at the time you were returning to the hospital?

A. No, sir. Just a little scab on it, a very small scab hadn't removed itself yet.

Q75. Had it been affecting your rest at night?

A. No, sir.

Q76. Had it affected your ability to perform your house work?

A. No, sir.

Q77. Had it affected the use of your shoulder?

A. No, sir.

Q78. What use were you able to make of your right arm and shoulder before you had this wreck?

A. Well, I was doing my work. I could do any of it I wanted to.

Q79. You could do any of it you wanted to?

A. Yes, sir.

Q80. What does your husband do?

A. Foreman W. P. A. workers.

page 20 ] Q81. What is his name?

A. D. A. Eden.

Q82. I believe you said you lived near Abingdon?

A. Yes, sir, I live in the lower end of Abingdon, Route 2.

*Mrs. Isadore Virginia Eden*

Q83. Mrs. Eden, can you state what your hospital bill is as a result of this accident?

A. Yes, sir, it is \$1111.50.

Q84. I show you here a bill from the hospital which gives a total of \$101.50. Is that the amount of it?

A. We have one. I meant to bring it, but our statement is \$1111.50.

Q85. Have you employed anyone to help about the house, or did you employ help about the house after you returned from the hospital?

A. Yes, sir, we had a woman there most of the time.

Q86. Who did you have?

A. Mrs. Sheets.

Q87. How did you pay her?

By Mr. Warren:

We object. That is not material.

Q88. How much did you pay her or have you paid her, or how much have you paid?

A. We didn't keep any item down or anything. We just paid her. In fact, she had a little son and they stayed there most of the time, both of them, and we paid her in whatever she needed, and part of the time some money.

page 21 ] Q89. Do you remember whereabouts the Yellow Cab was when it came to a stop right after the accident?

A. No, sir, I have no recollection.

### CROSS EXAMINATION

By Mr. Warren:

X1. What time did you leave your home that morning as nearly as you can recall?

A. Something around eleven. I was due at the hospital at eleven o'clock.

X2. You went straight from your home to the scene of the accident?

A. Yes, sir.

X3. Didn't stop any where along the way?

A. No, sir.

*Mrs. Isadore Virginia Eden*

X4. You say when you turned the corner and started down Court Street as you approached the intersection of Valley Street you were looking off to the west at the clouds?

A. Yes, sir.

X5. Why were you looking at the clouds?

A. To see how hard it was raining.

X6. You never did look either up or down for oncoming traffic?

A. No, sir.

X7. Didn't see anything and wasn't looking for anything?

A. No, sir, I don't bother about that.

page 22 ] X8. You don't bother about that?

No, sir.

X9. You don't know when you were hit or where you were hit in the street?

A. No, sir. Just like I said—all I know we were going pretty fast and something hit us.

X10. You have no idea at what rate of speed you were traveling?

A. Pretty fast.

X11. You won't attempt to say?

A. No, sir, I pay no attention to such as that.

X12. So when you were struck you were still looking at the clouds?

A. Yes, that is all the recollection I have of it. About the time I was looking out this way. (Indicating.)

X13. Toward your left looking at the clouds?

A. Something hit us.

X14. Do you know where the taxicab had gotten in Valley Street when it was hit?

A. No, sir.

X15. You don't know where it was?

A. No, sir.

X16. You don't know where the car came from that struck you?

A. No, sir.

page 23 ] X17. Did you ever see that car or hear it?

A. Not until after the accident.

X18. Before it struck you?

A. No, sir.

*Mrs. Isadore Virginia Eden*

X19. Never did?

A. No, sir.

X20. Were you thinking about the clouds and the rain when looking at them down to your left or were you thinking about your operation at the hospital?

A. No, sir, just looking out to see—hoping it wouldn't rain.

X21. You might be mistaken whether the taxicab stopped or not, mightn't you?

A. No, sir, it didn't stop. We were going so fast I didn't know what hit us.

X22. You say you were not paying any attention to the speed or traffic to see whether anything was coming?

A. No, sir.

X23. Not paying any attention and being abstracted looking at the clouds, might not the cab have stopped?

A. It couldn't because I knew it was going.

X24. Then you were paying some attention?

A. You can look and know you are still riding.

X25. You are sure it is not possible for you to be mistaken about that?

page 24 ] A. No, sir, I knew we was going.

X26. I asked you the question don't you think it is possible you might be mistaken?

A. Mistaken about stopping.

X27. Of course you were moving when struck, but before you got to Valley Street. Might you not be mistaken as to whether or not it stopped?

A. Well, no, it didn't stop. I am confident it didn't.

X28. You will not admit that you might be mistaken about that?

A. No, I wasn't mistaken.

X29. Did you know, Mrs. Eden, that there was a stop sign in that street?

A. Well, yes. I passed there enough to know it.

X30. You knew that?

A. Sure, a stop sign.

X31. Did you say anything about going through without stopping?

A. No, I didn't.

*Mrs. Isadore Virginia Eden*

X32. You weren't thinking about whether he stopped or not?

A. I don't know. He didn't.

X33. Knowing the stop sign was there why didn't you call attention to the fact that he was running through it?

A. It was all done. He dashed down through there so quick there was no time. I wouldn't had time if I  
page 25 ] had paid attention.

X34. You had all the distance from the Court House to the intersection of Valley Street which is approximately one hundred yards. You had plenty of time to tell him to stop for that stop sign?

A. I wasn't paying any attention to that.

X35. And not paying any attention to the stop signs or nothing he might have stopped without your being conscious of it?

A. No, sir.

X36. You knew a stop sign was there and yet you didn't think about him going through it?

A. They very often do that.

X37. He was going pretty fast and you saw him approaching a stop sign?

By Mr. Phillips:

Objected to.

By The Court:

Overruled.

A. I didn't see him approaching because I was looking this way.

X38. And was not thinking about stopping?

A. Not thinking about Valley Street.

X39. You were not thinking about Valley Street nor anything about stopping there, were you? I said you were not thinking about those things, were you, Mrs. Eden?

A. I was looking this way and thinking about the rain.

X40. And not thinking about stopping?

page 26 ] A. Didn't think about being close enough to stop.

X41. You did not realize you were close enough to stop?

A. I know he didn't stop.

*Mrs. Isadore Virginia Eden*

X42. Did you at any time protest to the driver about his speed or ask him to slacken or lessen his speed?

A. Why no.

X43. Will you give this jury some idea about what speed he was making?

A. I don't know nothing about the speed.

X44. You don't drive?

A. I scarcely ever sit in the front unless somebody I know. Somebody like my brothers. I have rode with them and if they get to going so fast things look like they are flying past, I say, "aren't you going to fast?"

X45. Why didn't you say that to this taxicab driver? You realized he was going pretty fast?

A. He was going that fast, of course.

X46. You do protest to your brother but you didn't protest to the taxicab driver?

A. He drove too fast coming up Main Street.

X47. Did you protest then?

A. No, sir.

X48. Why didn't you?

A. I didn't think it was my business.

X49. This operation that you had before, was  
page 27 ] that for bone disease?

A. No, sir, I don't think so. It was inflammation that had gathered from sore glands and flu. I had the flu and this inflammation had settled down right in there. (Indicating.) And it was swollen up.

X50. Caused a tumor there on that bone?

A. Something like that. Just a little inflammation.

X51. Didn't the doctor tell you it was osteomyelitis?

A. Didn't tell me anything.

X52. Didn't tell you anything?

A. No, sir.

X53. Never told you anything about what was the matter with you?

A. No, sir.

X54. Your operation was March 1st, was it not, or April 1st?

A. April 1st.



*Mrs. Isadore Virginia Eden*

X55. And all you are telling the jury about what that operation was on April 1st is what you concluded yourself without getting any information from your doctor?

A. Of course, they had a name for it.

X56. Was it osteomyelitis?

A. But they won't tell us. He might have told someone else. He didn't tell me.

X57. You have gained some in weight since that accident have you not, Mrs. Eden?

page 28 ] A. Not any heavier than I was, I don't suppose.

X58. When Dr. Smith made this examination which he reported on February 26, 1940, hadn't you gained some weight then?

A. No, I don't think so.

X59. Do you have any idea what it was? Was it around 122?

A. About 122.

X60. Didn't Dr. Smith tell you you had gained several pounds?

A. No. He didn't know how much I weighed before I went.

X61. You could have told him, couldn't you?

A. No, because I hardly ever weigh.

X62. You weighed 124½ and had gained approximately two pounds since you were examined before. Isn't that Dr. Smith's diagnosis of your condition?

A. I don't know. I haven't seen it.

X63. Now Mrs. Eden, I want you, if you will, please mam, to stand up and turn your back to the jury and put your hand on your shoulder like you did, your right hand.

A. Can't do it. I've got no use of it.

X64. There is nothing the matter with your elbow joint, is there?

A. When I start to turn it back it won't go but just so far.

X65. That bone isn't affected, or the forearm? Now bend your elbow.

page 29 ] A. I can't bend it only just so far.

X66. Did you have Mrs. Sheets with you before the accident?

A. No, sir. She lived right close and she was there frequently.

*Dave A. Eden*

1

X67. And worked for you frequently, didn't she?

A. We have never hired her.

X68. Never hired her, but she worked some?

A. Something like she would light in and do herself.  
We didn't hire her.

X69. Never paid her for any services she rendered you?

A. No, sir.

Witness Stood Aside.

DAVE A. EDEN, the next witness, being first duly sworn, testified as follows:

### DIRECT EXAMINATION

By Mr. Phillips:

Q. 1 What is your name?

A. Dave A. Eden.

Q. 2 How old are you, Mr. Eden?

A. Sixty years old.

Q. 3 Are you the husband of Isadore Virginia Eden?

A. Yes, sir.

Q. 4 Do you know anything about how the wreck occurred of your own knowledge?

page 30 ] A. No, sir.

Q. 5 How soon did you get to the scene of the wreck after it happened?

A. About three o'clock.

Q. 6 Had the cars been moved when you got there?

A. Yes, sir.

Q. 7 Mr. Eden, just tell the Court and jury please what condition your wife is in now with reference to her right shoulder and the use of the right arm and shoulder, what use she can make of it about her housework.

By Mr. Hutton:

If your Honor please, he is not a physician or doctor. That would be secondary evidence and I do not believe he is competent to speak in that connection. Anything she told him would be hearsay.

By The Court:

I believe I will overrule the objection.

*Dave A. Eden*

By Mr. Hutton:

Exception.

By The Court:

Of course, he can't repeat anything she said.

Q. 8 Just what you see about the ability to use her right arm and shoulder in her housework.

A. Well, she can't raise her arm up very high, only just above level. She can't put her arm behind her to do any good. She can't raise it up over her shoulder back up this way. (Indicating.) She can't comb her hair with her right  
page 31 ] hand to do any good. She can't iron; can't wash.

If she does any cooking she does it all with her left hand mostly. She hasn't got any strength much in that arm about lifting anything.

Q. 9 Was she able to do her house work and did she use that right arm prior to this accident?

A. Yes, sir.

Q. 10 Did she do her house work before this happened?

A. Practically, biggest part of it.

Q. 11 Has she had help and assistance in the house work since the accident?

A. Yes, sir. Her daughter stays there with us and helps with the work.

Q. 12 How old is your daughter, about?

A. I couldn't say exactly. About thirty-five.

Q. 13 Grown is she?

A. Yes, sir.

Q. 14 What about your wife's rest at night since this accident?

A. Well, most of the time she don't rest very good, and especially when she's trying to do anything much and works right smart and uses that arm a good deal during the day. She's restless way up to midnight and some nights she don't rest any at all.

Q. 15 In what posture does she usually go to sleep or rest in during the night?

page 32 ] A. Laying on her back most of the time.

Q. 16 Does she ever require assistance in being made comfortable in the night?

A. Yes, sir.

*Dave A. Eden*

Q. 17 In what way?

A. She can't get the cover up when she turns on the left side. The cover gets off of her. She can't pull the cover up on her with her right hand.

Q. 18 Has she had any outside help about the house work since the accident?

A. Yes, sir. Some. Not very much. Mrs. Sheets lived there close to us and stayed over there a right smart—I think two or three weeks after she was hurt—and helped with the work some.

Q. 19 Can you observe any difference in the position of this right shoulder from what it was before the accident?

A. Yes, sir.

By Mr. Hutton:

Your Honor please, I think that is a medical question. I don't believe he is competent to answer.

By the Court:

I believe I will overrule it.

By Mr. Hutton:

Exception.

By Mr. Phillips:

I will withdraw the question.

page 33 ]

## CROSS EXAMINATION

By Mr. Hutton:

X. 1 Mr. Eden, your wife does do some work?

A. Yes, she does a little.

X. 2 Gets around to do her work with the left hand all right?

A. Yes, sir, she does it with her left hand.

X. 3 Of course, ever since in April she hasn't been as strong as she was before that?

A. The operation didn't have any effect on her work. She went right on two weeks after she came back from the hospital working in the garden.

X. 4 Do you know the nature of the operation?

A. No, sir, I don't.

*Dave A. Eden*

X. 5 Hasn't she been sick and complaining of various ailments for a period of years?

A. No, sir.

X. 6 Four or five years?

A. No, sir.

X. 7 Before she was operated on by Dr. Motley?

A. Dr. Motley told me he would tell me the trouble but never did tell me.

X. 8 Never has told you yet?

A. No, sir.

page 34 ] X. 9 She cooks, doesn't she, and gets dinner, and so forth? She gets your meals, doesn't she?

A. Part of the time, yes, sir.

X. 10 You haven't paid anybody else to come in and get them?

A. My daughter stays there.

X. 11 Does she make that her home anyway?

A. Yes, sir.

## RE-DIRECT EXAMINATION

By Mr. Phillips:

Q. 1 State whether or not this daughter that lives with you prior to the time of the accident had done some outside work?

A. Yes, sir, she worked up here at the sewing room some.

Q. 2 Sewing room in Abingdon?

A. Yes, sir.

Q. 3 For which she received some pay?

A. Yes, sir.

Q. 4 Has she been able to do that since her mother was injured?

By Mr. Hutton:

We object to leading.

Q. 5 Has she been able to do any work since her mother was injured?

A. Not away from home.

*Dr. H. W. Smeltzer*

### RE-CROSS EXAMINATION

By Mr. Hutton:

X. 1 Your wife doesn't have to have someone to  
page 35 ] care for her, does she?

A. Part of the time.

X. 2 She gets up when you get up and goes to bed when  
you go to bed. You don't have to keep your daughter or any-  
one there with her, do you?

A. Lot of the time she can't put her clothes on by her-  
self.

X. 3 She goes around and does the work at home, does-  
n't she, the cooking?

A. Yes, sir she does some work.

X. 4 And she has been doing it ever since she came back  
from the hospital, is that right?

A. She didn't do any of it when she first come back for  
several weeks.

Witness stood aside.

By Mr. Phillips:

It is agreed by counsel on both sides that these two X-rays  
which I have here may be introduced in evidence without iden-  
tification by the technician and that they are X-Rays of Mrs.  
Eden's shoulder.

page 36 ] DR. H. W. SMELTZER, the next witness, being  
first duly sworn, testified as follows:

### DIRECT EXAMINATION

By Mr. Phillips:

Q. 1 Dr. Smeltzer, where do you practice and how long?

By Mr. Hutton:

We will admit his qualifications.

Q. 2 You are a physician, practicing in Washington  
County, Virginia, is that right?

A. Yes, sir.

Q. 3 For how long?

A. Thirty years.

*Dr. H. W. Smeltzer*

Q. 4 Are you acquainted with Isadore Eden, wife of Dave Eden?

A. Yes, sir.

Q. 5 Have you examined her recently?

A. I made an examination in May, latter part of May of this year.

Q. 6 Now Doctor, I will show you here two X-Rays that were taken of her shoulder at the local hospital and I will ask you to take them and point out to the jury where the bone was broken, if that is a fact, and what sort of break was had?

A. You can see better if you have the light right through it. (Indicating on X-Ray). There is the collar-bone. That is broken. And here is the shoulder. If the light page 37 ] is right probably you can see the break a little to the outer side of the bone. It extends from there to here. See the fragments, one sticking up and one sticking down here. I don't know whether you can see that far off or not. There is the bone, the collar-bone on the right, extending from the breast-bone up to the shoulder-blade across there, and it connects there. Here naturally is the humerus, the humerus which forms an articulation with the shoulder-blade, the scapula, and this comes across the breast-bone and collar-bone and attaches there to the shoulder-blade so you can see the fracture right there about the middle of that bone.

Q. 7 Doctor, what sort of a fracture is that called?

A. That is an impacted fracture.

Q. 8 What is meant by impacted fracture?

A. The fragments are driven into each other.

Q. 9 Can you demonstrate to the jury what is meant by fragments being driven into each other with your fingers or in some manner to make a clear impression of what you mean by impacted fracture?

A. At the point of the break these fragments are jammed (indicating) and they close up to some extent, which makes the bone somewhat shorter than it was originally, and it had healed in that position.

Q. 10 You say it results in the bone being a little shorter than it was to start with, is that right?  
page 38 ] A. That is right.

Q. 11 What function does that collar-bone serve in the anatomy?

*Dr. H. W. Smeltzer*

A. It is the brace bone—helps hold the shoulder in place.

Q. 12 I show you here the second X-Ray and ask you to show there to the jury the break of that bone as shown after it was healed. This is a similar picture made after the healing and you can see the bone and can see the healing which left a little enlargement?

A. A little callus. After healing the bone is larger at that point naturally.

Q. 13 Dr. Smeltzer, have you examined Mrs. Eden and her shoulder with the view of ascertaining what effect, if any, that break has had upon her shoulder and arm?

A. I was requested to examine Mrs. Eden back in January with regards to the injuries sustained in a car wreck in June, 1939. I was requested to examine her later. I examined her in March and also in May, 1940. I have examined Mrs. Eden three times for this same thing.

Q. 14 Have you again briefly examined her this morning?

A. Yes, casually.

Q. 15 Please state what you found.

A. I found the fracture at about the juncture of the outer and middle two-thirds. The fracture is located  
page 39 ] more distantly than otherwise. This was an impacted fracture and resulted in a shortening of the bone. The shortening of the bone resulted in certain deformities of the shoulder. It pulled the point of the shoulder around forward to some extent. It made the shoulder-blade appear more prominent, and by disturbing, I will say, the proper relationship of these different tissues in that area, why, it resulted in an impaired function to the shoulder. Also some cessation of the shoulder, that is limitation in its movement and in the movement of the arm. She complained of pain when I examined her this time, complained of more or less continuous pain and seemed that her arm gave out when used slightly.

Q. 16 Are you able to state how much shorter that right shoulder is than the left?

A. Collar bone?

Q. 17 Yes?

A. About one-half inch. Possibly little over half inch measured.

Q. 18 Would that have any effect upon the spine?



*Dr. H. W. Smeltzer*

A. It has a tendency to twist the spine to some extent, not very material, not a very great extent.

Q. 19 Is there any difference between the scapula on the right side and on the left side of her body?

A. More prominent on the right side.

Q. 20 Just what do you mean? Which is the page 40 ] scapula?

A. That is the shoulder blade. That point sticks out there. (Indicating). It is more prominent on the right side because of it being pulled. All of those tissues are connected together—the shoulder bone, the shoulder blade and the collar bone are part of the shoulder.

Q. 21 Is there, in your opinion, any loss of use of the right arm and shoulder for general household work?

A. Yes, there is an impairment of the function and loss of use.

Q. 22 How much, in your opinion?

A. I would say approximately fifty per cent.

Q. 23 That is about half?

A. Yes, sir.

Q. 24 In your opinion is that a temporary or permanent impairment?

A. It is permanent.

Q. 25 Do you observe any change since you first examined her between the date of the first examination and the present time in that impairment?

A. Not a great deal.

Q. 26 Do you observe any?

A. This morning there seems to be a greater limitation of movement in that arm than there was the last time I examined her.

Q. 27 Just what is a greater limitation of movement? Just what do you mean by that?

page 41 ] A. Well, when I take hold of her arm and undertake to extend it up like I could a normal arm it won't permit being extended more than half way up to horizontal position, hardly half way at the present time. On previous examination I had gotten it up horizontally, but that is when she is sitting up-right, but this morning I can't elevate that arm quite ninety degrees or right angle.

*Dr. H. W. Smeltzer*

Q. 28 Doctor, what is the tendency of scar tissue with reference to the effect it has upon the use of an arm in a break like that? That is, does that scar tissue tend to contract and become harder or to give and become softer?

A. It contracts and becomes harder.

Q. 29 What would be the natural effect of that upon Mrs. Eden's arm or shoulder?

A. That would result in a limitation of her movements. Also likely pain due to impairment or stretching of nerves.

Q. 30 In your opinion will this limitation of use become greater or lesser as time passes?

A. I think it will be more or less permanent.

Q. 31 When you made your examination, Doctor, were you advised of an operation that Mrs. Eden had previously had on one end of that bone?

A. Yes, she mentioned that to me.

Q. 32 Did that operation or the condition of that bone where the operation had been had prior to the accident have any effect or any connection with the breaking of the bone in the accident?

A. Any effect?

Q. 33 Any connection or effect?

A. I don't think so.

Q. 34 Did it appear to have healed, the operation appear to have healed satisfactorily?

A. The X-Ray indicates that it had.

Q. 35 I believe you said that this break was at the outer edge of the collar bone or near the outer side?

A. It is customary to divide the collar bone in three-thirds, and I meant to say this break occurred near the junction of the middle and outer third.

### CROSS EXAMINATION

By Mr. Warren:

X. 1 You don't mean to tell the jury there was any injury to the shoulder bone itself, except as it is limited in motion by reason of the shortening of the scapula?

A. In speaking of the shoulder, there is the scapula and the clavicle, but there is no injury so far as the sockets are concerned where the humerus works into the socket there.

*Dr. D. L. Kinsolven*

X. 2 Ball and socket?

A. Yes, sir.

Witness stood aside.

page 43 ] DR. D. L. KINSOLVEN, the next witness, being  
first duly sworn, testified as follows:

# DIRECT EXAMINATION

By Mr. Thompson:

Q. 1 You are Dr. D. L. Kinsolven?

A. Yes, sir.

Q. 2 How long have you been practicing in Washington  
County?

A. Little over forty years.

Q. 3 I will ask you if some time about March, 1939,  
you examined Mrs. Dave Eden and advised her to go to the  
hospital?

A. Yes.

Q. 4 Do you recall what her trouble was then?

A. Yes, sir.

Q. 5 What was it?

A. She had a tumor just over the clavicle near the junction  
of the sternum and the clavicle.

Q. 6 Now is that what we commonly term the inside  
near the inner end of that collar bone?

A. Right up here close to the breast bone, where the  
collar bone joins the breast bone. And it was extended up into  
the neck, the tumor did, and it seemed you couldn't move it  
about.

Q. 7 Did she have an operation for that?

A. Yes, sir.

Q. 8 Did you see her afterwards?

page 44 ] A. I sent her to the hospital. I disremember  
whether I treated her after she came away from the  
hospital or not.

Q. 9 You are her family physician?

A. Yes, sir.

Q. 10 Have you examined her since June 19, 1939,  
with reference to a broken collar bone?

*Dr. D. L. Kinsolven*

A. I examined her on June 9th.

Q. 11 You mean June 9, 1940?

A. Last June, 1939. I think it was June 19th she went to the hospital or April 1st to have the operation, and I didn't see her or I didn't examine her until January after the injury.

Q. 12 January, 1940, after the accident?

A. January 9th.

Q. 13 What other times, if any, have you examined her?

A. I examined her, I think, on March 27th.

Q. 14 What other times?

A. I examined her again in June, I think, May 27th I examined her again.

Q. 15 You have examined her three times, is that correct?

A. Three times.

Q. 16 Did you examine her briefly this morning?

A. Yes, sir.

Q. 17 Have you examined these X-Rays?

A. Yes, sir.

Q. 18 Which I show you which have been introduced in evidence?

A. Yes, sir.

Q. 19 Refer there to the X-Ray, Doctor, that was taken right after the accident before the bone had healed and tell us what kind of break it was.

A. This is what is called an impacted fracture. (Witness showing picture to the jury.) You can see the fracture there. It is sticking over—an impacted fracture. When the lick is on the shoulder on the end of the bone something had to slip. The bone was too small to take care. Something had to go and just like setting a pencil on the end driven together and it slid. There wasn't any displacement much at the time of the fracture, just a fracture sufficient to leave impacted. If you tie loose bone lying around, why you don't get a very good job out of it, and he couldn't done anything else because if he tore the impaction up he would have had more disability and more deformities than he did have. It shows a very good union but the shortness is still there.

Q. 20 What effect would that have on the bone after it healed?

*Dr. D. L. Kinsolven*

A. The shortness is still there but the balance or new bone or callus is around it.

Q. 21 Dr. Kinsolven, from your examination of Mrs. Eden what condition did you find her shoulder and arm in as a result of that break?

page 46 ] A. Well, there is a shortening from the outside of the shoulder to the sternum, probably from half to three-fourths inch—atrophy of the arm.

Q. 22 What do you mean?

A. Sinking away. Getting smaller. Probably from the lack of use. Motion is limited and apt to make the muscles atrophy from lack of use.

Q. 23 Anything else?

A. She can't raise her arm. She could raise it half way. She can't hardly raise it that high now. As far as scar tissue, everything is torn loose, ligaments and soft parts all mashed, bruised and having scar tissue. Scar tissue will continue to contract and may contract a year after it occurred. It is fibrous tissue and keeps drawing up and getting smaller and smaller. The scar may change its position.

Q. 24 Did you find that had affected her spine or location of the position of her shoulder?

A. Shoulder blade is displaced. The shoulder blade or the scapula only has one bony attachment and that is right up here over the shoulder joint. It and the scapula connect. When the scapula was forced back and fractured, that throwed the lower end of the shoulder back out because the upper end was driven in. She's got a displaced scapula with a muscular attachment. Curvature of the spine—she's got some curvature of the spine. I don't know what caused that. She may have had that before.

page 47 ] Q. 25 That is the curvature of the spine you are speaking of?

A. Yes, sir.

Q. 26 Doctor, just explain please, what effect the shortening of that bone would necessarily have upon the head of the humerus and its position in the socket?

A. The head of the humerus has gone down in the armpit. The armpit is almost obliterated because the head of the bone has gone down there. Just like wrenching a hinge on a

*Dr. D. L. Kinsolven*

door. You set a hinge too far back and the door is not going to open because the attachment is destroyed and out of place.

Q. 27 Is that what causes the limitation of movement in Mrs. Eden's arm and shoulder?

A. Yes, sir.

Q. 28 In your opinion, how much limitation is there in her ability to use that right arm of what percentage in movement does she have in her right arm?

A. Certain movements she can't make at all.

Q. 29 With reference to her ability to perform house work, how much or what percentage of limitation or loss of use would you say she had?

A. At least fifty per cent.

Q. 30 At least one-half?

A. Yes, sir.

Q. 31 Is that temporary or permanent in your page 48 ] opinion?

A. Permanent. What work she can do it is under a disadvantage because she's got a sore shoulder to contend with.

Q. 32 Dr. Kinsolven, did the operation of April 1, 1939, have any effect upon or any connection with the present disability that you say Mrs. Eden has with her arm and shoulder?

A. It has nothing to do with her present disability because it is a different locality. Her other trouble is at a different part of the bone. X-Ray showed no bone removed. No injury to the bone.

### CROSS EXAMINATION

By Mr. Hutton:

X. 1 What was the nature of that previous trouble? You said she had a tumor. Was that a malignant tumor?

A. Supposed to be. Sent her up there for malignant.

X. 2 That means cancer?

A. The Doctor didn't know. He took a picture and sent it off for examination and found it was malignant.

X. 3 Then she went back and found it was and Dr. Motley performed the operation?

A. I believe he did.

X. 4 Dr. Motley, according to his report, said it was osteomyelitis of the right clavicle, that is inflammation of the

*Dr. D. L. Kinsolven*

right collar bone near its attachment to the sternum or breast bone, is that right?

A. I don't remember what he reported, but that's page 49 ] where the trouble was.

X. 5 If she had osteomyelitis there, which is inflammation inside of that, wouldn't that affect that shoulder?

A. Couldn't affect it only at the place where it was.

X. 6 If she had osteomyelitis of the right clavicle, that is inflammation of the right collar bone near its attachment to the sternum or breast bone, wouldn't that give her some trouble?

A. No, sir, because this is over here. (Indicating).

X. 7 Broken at a different point?

A. Different place altogether.

X. 8 What did Dr. Motley do when he operated? Did he scrape the bone or not?

A. In a week or two he wanted me to get the patient for X-Ray that it was malignant, and asked me to get her back. And that report that he give you, it might not be. He might change if he had to give a report after he made another examination.

X. 9 What is osteomyelitis of the bone, Doctor?

A. That is just breaking down of the covering of the bone.

X. 10 If she had osteomyelitis of the right clavicle there, which he defines as inflammation of the right collar bone near its attachment to the sternum or breast bone, and she had an operation on April 1st and was in this wreck in June, can you say whether or not that previous operation didn't contribute to the injury complained of in the wreck?

A. No, it wouldn't have anything to do with page 50 ] it at all because it is a different locality and the sarcoma if it is returned—it couldn't done any damage without returning of the sarcoma—and she didn't have any trouble because the X-Ray didn't show any bone trouble. The X-Ray now doesn't show any bone disease. Osteomyelitis would show in the X-Ray if active.

X. 11 Let me ask you this, Doctor, if the fracture is firmly united now?

A. It is united with a shortening.

X. 12 Should it give any further trouble? Is it permanent?

*Garland K. Patton*

A. The fracture itself won't give any trouble, but it is a permanent limitation.

X. 13 Let us see about this limitation. If I break my arm and it is set and grows back and scar tissue grows around that and makes it a little bit larger there, it would be stronger there than ordinarily, wouldn't it?

A. Generally true.

X. 14 What you prescribe is to keep working it and using it so it won't be stiff, isn't it?

A. Nothing stiff here. The joint is out of place, driven in and the ligaments and everything is shortened.

X. 15 You said there was some effect on the spine, but you wouldn't say that was caused by this accident?

A. I don't think so.

X. 16 Has it anything to do with it?

A. I don't think it's got anything to do with it.

page 51 ] X. 17 She does do work at her home?

A. I imagine so.

X. 18 Have you been down there in regular attendance, or have you?

A. I just examined her. I haven't been down there to see her.

X. 19 How many times have you examined her since last June, do you remember?

A. Three times, except today.

Witness stood aside.

NOTE: Thereupon at 12:00 o'clock the Court recessed for lunch until 1:30 o'clock.

## AFTERNOON SESSION

Abingdon, Virginia, July 1, 1940

The Court met at the expiration of the recess.

Present: The same parties as heretofore noted.

GARLAND K. PATTON, the next witness, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Thompson:

Q. 1 Your name is Garland K. Patton?



*Garland K. Patton*

A. Yes, sir.

page 52 ] Q. 2 What position do you hold in the Town of Abingdon?

A. Sergeant of the Town of Abingdon.

Q. 3 Mr. Patton, did you have an occasion to investigate an accident at the intersection of Court and Valley Streets about the 19th of June last year?

A. Yes, sir.

Q. 4 What cars were involved in that accident?

A. There was a Yellow Cab, Chevrolet sedan belonging to the Yellow Cab Company.

Q. 5 Who was driving it?

A. Akers Roark. And an old Chevrolet coupe, which was owned by Isaiah Perkins. Who was driving, I do not know.

Q. 6 An old Chevrolet coupe. Do you know what model the Chevrolet coupe was?

A. Looked to be about a '29 model. I am not positive. I think probably near a '29 model.

Q. 7 Coupe?

A. Yes, sir.

Q. 8 Mr. Patton, how soon after the accident occurred did you arrive at the scene of the accident?

A. Probably five or ten minutes—just as quick as they could call me.

Q. 9 Was Mrs. Eden, who was an occupant of the cab, there when you arrived?

A. No, sir. I didn't see Mrs. Eden.

page 53 ] Q. 10 She had been taken to the hospital?

A. (No answer.)

Q. 11 Had the cars involved in the accident been changed from the position in which they stopped in the accident?

A. No, sir, they said not.

Q. 12 They were in their position when you arrived?

A. Yes, sir.

Q. 13 Will you explain to the jury the position of the cab and of the Chevrolet coupe when you arrived?

A. The Chevrolet coupe was setting on Valley Street, on the north side of Valley Street headed in a westward direction probably eight or ten feet west of the intersection of Court and Valley Streets. The Chevrolet sedan, the Yellow Cab, was

*Garland K. Patton*

setting up in Court Street on the west side of Court Street over against the sidewalk headed in sort of a southward direction.

By Mr. Warren:

Headed how? Say that again.

By the Witness:

The Yellow Cab was setting in Court Street, north Court Street above the intersection of Valley Street on the west side headed in a more or less southward direction.

By the Court:

You said north of Court Street?

By the Witness:

This way. North of Valley Street is what I meant.

Q. 14 Court Street is the street immediately east of the Court House?

page 54 ] A. Yes, sir.

Q. 15 It extends north and crosses Valley and goes on by the hospital?

A. Yes, sir.

Q. 16 This accident occurred at the intersection of Court and Valley Streets which is immediately south of the Court House?

A. Yes, sir.

Q. 17 Did you take some pictures there that day, Mr. Patton?

A. No, Mr. Austin was there and I asked him to take the pictures with his camera. I didn't take any with mine. I saw him make the ones that were made there.

Q. 18 I hand you a picture here, and ask that it be marked Plaintiff's Exhibit No. 1, and ask you if that is a picture of the Chevrolet coupe involved in this accident?

A. Yes, sir, that is the car. You can see the Virginia license 156-519, the same as on my report.

Q. 19 Does the position of the car have anything to do with the position it was in with reference to the accident?

A. It is in the same position in that picture that it was when I found it when I arrived at the scene.

Q. 20 Which direction of Valley Street is it facing?

A. Facing westward to the left.

*Garland K. Patton*

Q. 21 Where was this coupe with reference to the center of Valley Street?

A. Well, it was on the right side or north side of page 55 ] Valley Street?

Q. 22 How close to the north curb of Valley Street?

A. Seven feet, two inches from right front wheel to north curb. Eight feet, seven inches from right wheel, rear wheel to north curb.

Q. 23 How wide is Valley Street at that point?

A. Thirty-six feet.

Q. 24 Could you tell from looking at the cars what part of the Chevrolet car collided with the Yellow Cab and what part of the cab it struck?

A. Chevrolet coupe, the Perkins coupe, the left headlight was out. The bumper and right fender shows marks and the collision seemed to have been all in the front part of the Chevrolet coupe.

Q. 25 And what part of the cab did it hit?

A. The right rear fender.

Q. 26 Do you know what damage it did to the cab?

A. No, sir, I do not know exactly the amount of damage.

Q. 27 I hand you a picture and mark it Plaintiff's Exhibit No. 2, and I will ask you to tell the jury what that picture is there.

A. This is a picture of the Yellow Cab, Chevrolet sedan, owned by the Yellow Cab and driven by Akers Roark at the time of this collision.

Q. 28 Does it show the position there that it was in when you came to the scene?

page 56 ] A. Yes, sir.

Q. 29 With reference to Valley Street and Court Street?

A. Yes, sir.

Q. 30 I believe it is turned around and headed toward Valley Street, isn't it?

A. Yes, sir.

Q. 31 What kind of day was it, Mr. Patton?

A. It was raining.

Q. 32 What was the condition of the streets?

*Garland K. Patton*

A. They were wet, slick.

Q. 33 Mr. Patton, did you find any glass, mud or marks or anything in the street there to indicate the point of collision?

A. There was glass in the street from the Chevrolet coupe that came out of the windshield or probably the headlight.

Q. 34 I understood you to say you did see some glass in the street?

A. Yes, sir.

Q. 35 Where was the glass with reference to the intersection of Court Street and Valley Street?

A. It was on the north side of Valley Street in the intersection of Court and Valley.

Q. 36 Mr. Patton, I don't know whether I know exactly what you mean by being in the intersection.

A. Of course, when you say intersection you mean from the curb line of Valley Street and the curb line of Court Street. In other words that whole square, that is page 57 ] the intersection. And this was on the north side of the Valley Street intersection.

Q. 37 If the north curb of Valley Street had extended across the street, how far south of that curb line was the glass?

By Mr. Hutton:

We object, if your Honor please. That is leading. He can state where it is in the street. He didn't say it was south of the north curb line.

By the Court:

He can tell where the glass was. It would all depend on what he said preceding that.

A. I don't remember. The fact is, I don't think I measured it to be exact, but it was not across the imaginary curb line of Court Street. It was in Valley Street. It was on the north side of the center of Valley Street.

Q. 38 Did you see any marks or scratches in the street?

A. I don't recall. No, sir. I don't have any record of it.

Q. 39 Was there glass or anything that you saw that would indicate where the cars collided?

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

*Garland K. Patton*

Q. 40 Mr. Patton, I believe you said you were Town Sergeant?

A. Yes, sir.

Q. 41 Please state whether or not there are stop signs facing traffic going south on Court Street into Valley Street?

A. Yes, sir, there are two. One on each side of Court Street.

page 58 ] Q. 42 What size are those signs?

A. I don't know. Probably almost eighteen or twenty-four inches square, something near that.

Q. 43 Where are they placed?

A. One is on the right side of the street and the other is on the left. They are placed on highway poles and are about fifteen feet from the curb line south of the intersection. In other words it is about fifteen feet from the sign to the intersection of Valley Street.

Q. 44 Mr. Patton, have you gone down Court Street here at the intersection and stopped there within fifteen feet of Valley Street with the view of ascertaining how far you can see looking east with the car stopped within fifteen feet of Valley Street on its right side entering Valley Street?

A. Yes, sir.

Q. 45 How far can you see?

A. You can see from 125 yards to 150 yards east very plain.

Q. 46 That is with the car stopped within fifteen feet?

A. Stopped at the stop sign.

Q. 47 125 to 150 yards?

A. Yards, yes, sir.

By Mr. Warren:

East or west that you can see?

By the Witness:

East.

Q. 48 How wide is Court Street as it intersects  
page 59 ] Valley Street on the north, do you know?

A. Yes, sir. The width of Court Street, the hard surface, is twenty-four feet and the width of Court Street from sidewalk to sidewalk is fifty-four feet. There is quite a good deal of space in there that isn't hard surfaced.

Q. 49 I believe you said Valley Street is thirty-six feet?

*Garland K. Patton*

A. Thirty-six feet. I measured both.

### CROSS EXAMINATION

By Mr. Hutton:

X. 1 Mr. Patton, judging from everything you saw about which you related, where was the Yellow Cab with reference to the north curb line of Valley Street when it was struck?

By Mr. Thompson:

I object. He didn't see it.

By Mr. Hutton:

He saw the glass and the physical facts.

By the Court:

You may ask where the cab was when he got there. You can't ask him about it unless he saw it.

X. 2 How many years experience have you had in this type of work, Mr. Patton?

A. Fourteen.

X. 3 You can drive an automobile?

A. Yes, sir.

X. 4 You have been Town Sergeant how many years?

A. Since 1932.

page 60 ] X. 5 You saw the glass there as you say on the north side of Valley Street?

A. Yes, sir.

X. 6 You saw where the cab was injured on the body of the cab?

A. Yes.

X. 7 You saw where the Chevrolet car was injured?

A. Yes, sir.

X. 8 You saw the glass in the street?

A. Yes, sir.

X. 9 Now I am going to ask you by everything that you did see, from your knowledge and experience of wrecks, from your examination of the physical facts there, I want you to please state whether or not from what you did see there the cab or any part of it had passed across the north curb line of Valley Street when the accident occurred.

By Mr. Thompson:

Objection.

*Garland K. Patton*

By the Court:

I think the objection is good. He can tell everything he saw and where everything he saw was.

By Mr. Hutton:

Exception.

X. 10 They have introduced pictures. Now I will show you these pictures made by Mr. Austin. I show you No. "A". Does that correctly represent the position of the cab when you got there?

A. Exactly where both cars were when I arrived.  
page 61 ] X. 11 That shows the front of Mr. Craig's home?

A. Yes, sir.

X. 12 Was there a stop sign right there back of that cab?

A. Yes, sir.

X. 13 Which way was it bent—back toward the hospital or south toward Valley Street?

A. That stop sign has been struck by two cars at different times—accidents there—and it is just not clear in my mind whether this was the first time or second.

X. 14 You don't know?

A. No, sir.

X. 15 Now this photograph which I will mark No. "B" and ask you if that correctly represents the injury to the cab as it is parked there against the pole?

A. Yes, sir, that is the way it was when I got there.

X. 16 That shows it was struck on the right rear fender?

A. Yes, sir.

X. 17 Now then I will mark this one "C" and I will ask you if that correctly represents the cab and picture of Mr. Baker's house which is on the right hand side or east side of Court Street?

A. Yes, sir, that is the correct position.

X. 18 I wish you would take a pen and mark Baker house. I want to show that to the jury.

A. (Witness writes "Baker House" on picture with green ink.)

*Garland K. Patton*

page 62 ] X. 19 That is a stop sign right there in front of the Baker house and shows in that photograph?

A. Yes, sir.

X. 20 Mr. Patton, now Photograph "A" shows the cab headed south, doesn't it?

A. Yes, sir.

X. 21 Now I have another photograph here, No. "D". That shows the left headlight of the Chevrolet coupe knocked out, doesn't it?

A. Yes, sir.

X. 22 Do you know whether the injury to the right side was done in the wreck or not?

A. No, sir, I don't.

X. 23 That is the way you found it?

A. Yes, sir.

X. 24 That is you in the photograph stooping over in the raincoat and cap making measurements, isn't that you in the picture?

A. I don't know which one of these is me.

X. 25 You were the only officer there, weren't you?

A. Yes, sir, but there were a couple of taxi drivers.

X. 26 Here in No. "C" that is your picture, isn't it?

A. Yes, sir, that is my picture there.

X. 27 You recognize yourself there?

A. Yes, sir. I am not sure about this, whether it is myself or a taxi driver.

page 63 ] X. 28 You were there measuring?

A. Yes, sir, I made the measurements.

X. 29 Now you say you stopped within fifteen feet of the south curb line and you could see down east in Valley St. a certain number of yards?

A. Yes, sir.

X. 30 If you stop fifteen feet back can you see that far from Mr. Baker's house? In other words you have to go pretty close?

A. Yes, sir, you have to get to the sign before you can see.

X. 31 If you stop as much as fifteen feet back in Court Street your view is obstructed on the east by Mr. Baker's house?

A. I wouldn't say to the feet, but Mr. Baker's house obstructs the view eastward until you pass his house.



*Garland K. Patton*

X. 32 His house goes right to the sidewalk on the south side of Valley Street and east side of Court, doesn't it?

A. I don't think it hardly goes to the sidewalk.

X. 33 It does on the east side of Court Street. You can step right on the sidewalk, can't you?

A. Oh, yes, on Court Street.

X. 34 How far is it from the sidewalk on the south side of Valley Street?

A. I don't know. I didn't measure that.

X. 35 But you have to get right down to the page 64 ] street before you can see down on account of that house?

A. Yes, sir, get beyond the view of the house before you can see.

X. 36 Take Photograph "C". That shows the north view as well as the west view?

A. Yes, sir, shows the stop sign too.

X. 37 When you were talking about seeing 150 yards you had to be right at the stop sign?

A. Right at the stop sign, or the driver almost facing the stop sign, the front of the car down further. You can sit almost opposite the stop sign and see that far down east Valley Street.

X. 38 Could you tell what distance or how far the cab was knocked around there, Mr. Patton?

A. No, sir, I could not.

X. 39 From the glass to where the cab came to rest how far was it?

A. Well, the glass was some where between the center of Valley Street and the curb line of north Court Street, which would be—I don't know. I just wouldn't want to say.

X. 40 You wouldn't want to say?

A. No, sir.

X. 41 Could you tell whether or not there were any skid marks, or do you recall?

A. I don't recall seeing any, no, sir.

page 65 ] X. 42 Do you know whether or not there was any other traffic approaching at this time?

A. No, sir, I do not.

X. 43 Mr. Patton, did you issue a felony warrant or

*Garland K. Patton*

was one placed in your hands for the arrest of the driver of the Perkins car?

By Mr. Thompson:

I object.

By Mr. Hutton:

I think we can show all the facts.

By the Court:

I believe the objection is good.

By Mr. Hutton:

Save exception.

X. 44 Was the driver of the Perkins car there when you arrived?

A. No, sir.

X. 45 Did you make inquiry for him?

A. Yes, sir.

X. 46 Had he left the scene of the accident?

A. Yes, sir.

X. 47 Who was in charge of his automobile, or the automobile which was in the accident, the coupe?

A. I never did find anyone in charge of it.

X. 48 It was just left there in the street?

A. Yes, sir.

#### RE-DIRECT EXAMINATION

By Mr. Thompson:

Q. 1 How far beyond the intersection was the  
page 66 ] Chevrolet coupe when you arrived, how far west  
of the intersection was the Chevrolet coupe when  
you arrived?

A. I didn't measure it, but I believe it was probably eight  
or ten or twelve feet.

By Mr. Warren:

Did you say from ten to twelve?

By the Witness:

The picture of course shows it there. Yes, I would say it  
was ten or twelve feet.

*Garland K. Patton*

By Mr. Warren:

West of it?

By the Witness:

West of the intersection.

Q. 2 Mr. Patton, I introduced a picture, Plaintiff's Exhibit No. 1, which shows the Chevrolet coupe. Is it in the intersection there?

A. I wouldn't say because there is not enough to see. It doesn't show enough of the street to judge whether that car had been moved before it was made or before I got there. I couldn't say.

Q. 3 It is not in the position there as it is in Defendant's Exhibit "A", is it?

A. I don't know. From the looks it looks like it is right close to the intersection, but as I say, it doesn't show enough of the street to be able to safely say.

Witness stood aside.

page 67 ] By Mr. Thompson:

If your Honor please, by agreement of counsel the Ordinance of the Town of Abingdon with reference to stopping at intersections is introduced.

NOTE: Thereupon Mr. Thompson read the Ordinance into the record, which is as follows:

"It shall be unlawful for any person to drive any vehicle, whether propelled by gas or otherwise, into Main Street, Valley Street or Russell Street from any side street or alley without first bringing said vehicle to a stop within fifteen feet of the street to be entered."

Adopted: This the 3rd day of December, 1928.

T. H. Crabtree, Mayor

John W. Neal, Secretary

NOTE: Thereupon the Plaintiff rested, and following proceedings were had in Chambers out of the presence of the jury:

By Mr. Hutton:

We want to introduce the witnesses Woodard and Perkins

as adverse witnesses for the purpose of cross examination. They are both antagonistic to us and we want to introduce them as the Court's witnesses. The Plaintiff had summoned them, but did not use them and we want to examine them, page 68 ] both had them summoned.

By the Court:

Have you taken to them before summoning them?

By Mr. Hutton:

No, sir. We do not know what they were going to say, but that is the only way we had to get them to Court.

By Mr. Warren:

We will make an avowal that they are antagonistic and we would like for them to be introduced as the Court's witnesses, then we can cross examine them to get the truth.

By the Court:

It seems to me they could be examined as adverse witnesses and if they objected to any of your questions then it might be shown.

By Mr. Hutton:

We are announcing that they are adverse before we put them on.

By the Court:

Are you objecting?

By Mr. Thompson:

We are objecting.

By Mr. Hutton:

This is what we want to prove by him. He is supposed to have made the statement before several witnesses a few days after this happened to the effect that he didn't try to stop, that he tried to hit it, and that if another cab ever got in his way he was going to run over it if he had to get him a truck to knock it out of his way. He was even intoxicated on the day in question and had been up approximately three-fourths of the night before and was drinking at the time and ran from the scene of the accident.

By Mr. Thompson:

I don't think that is admissible.

By Mr. Hutton:

page 69 ] That is the sole proximate cause of this accident.

By Mr. Thompson:

You can show what he did.

By Mr. Hutton:

He was drinking out here at eleven o'clock that day.

By Mr. Thompson:

We would object to that going in.

By the Court:

If they have made inconsistent statements you can show that by leave of the Court. But to call a witness and proceed to impeach him otherwise than as permitted by statute, I don't know.

By Mr. Hutton:

Suppose that it is a fact that he said that. How in the world are we going to get it in unless we ask him if he didn't make that statement and if he denies it show by other witnesses that he did. That is the only way we can. They have summoned him and if they put him on we could do that on cross examination, but we can't make them put him on. We want to call him and ask him if in the presence of certain people he made a certain statement. If he answers yes he is not adverse. If he answers no he is adverse and we want to contradict him.

By the Court:

They have closed their evidence and they have summoned him and now you want to call him?

By Mr. Hutton:

Yes, sir. We want to ask him if on July 9th in the presence of the witnesses, Musser and Widener and I forget the others, there were four I believe present, if he didn't make a statement substantially as follows with reference to the wreck on Valley Street on June 19th: That he didn't try  
page 70 ] to stop, that he could have stopped if he wanted to  
and the next time a Yellow Cab got in his way he was going to knock it out even if he had to get a truck to do it with.

By Mr. Thompson:

We object to that. What does that have to do with this case?

By Mr. Hutton:

Perkins was the driver of the coupe.

*Dr. Frank H. Smith*

By the Court:

You may show he is adverse to the Yellow Cab. I will permit it.

By Mr. Thompson:

Save Exception.

NOTE: Thereupon the following evidence was introduced on behalf of the Defendant:

DR. FRANK H. SMITH, the first witness, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 Dr. Frank, how many years have you been practicing?

A. Since 1904, going on thirty-seven years.

By Mr. Thompson:

We admit his qualifications.

Q. 2 You are now at the George Ben Johnson Hospital at Abingdon?

A. Yes, sir.

Q. 3 Doctor, did you examine Mrs. Eden, the plaintiff, in this case?

page 71 ] A. I examined her twice. Yes, sir.

Q. 4 I wish you would just in your own way tell the results of what you found on this examination, please, sir.

A. I examined her on September 4, 1939, and again on February 26, 1940, and possibly all that she now has is stiffness of the right shoulder joint, I believe as a result of the limitation necessary because of the broken collar bone. The collar bone had healed completely. The union seems to be as firm as it was originally. Practically no displacement and very very little shortening.

Q. 5 Doctor, is there as much as half inch shortness?

A. I don't think as much as half inch shortening of the bone.

Q. 6 Go ahead.

A. That is about all.

*Dr. Frank H. Smith*

Q. 7 Doctor, I believe she was in the hospital prior to this and suffered with some disease. Tell us about that, please, sir, the nature of it and how long she was there and what connection it has with this.

By Mr. Thompson:

Your Honor please, we object unless they can show the present condition is connected with something that happened at that time.

A. At present I am not able to say there is any connection of the disease which brought her to the hospital originally in March, 1939, and her present disability. The  
page 72 ] disease that brought her to the hospital was a malignant one of the same bone but not in the same place it was broken—

By Mr. Thompson:

If your Honor please, we object. He just said he couldn't say that the condition which she was brought in there for had anything to do with the present condition or any connection. If the Doctor can't say, I don't think it is material.

By Mr. Hutton:

We want him to tell the previous condition and the present condition and if it was his opinion it was recurring or likely to recur in this particular case.

By Mr. Thompson:

I understood him to say he could not say it had anything to do with her present condition.

By the Court:

It seems to me that the Doctor could give his opinion as to whether or not the former condition had or now has any effect upon the condition brought about by the accident in question.

By Mr. Hutton:

Whether or not that former condition prevented her from recovering sooner from this condition or has any deterring effects.

By the Court:

I think he can state whether or not the former condition

*Dr. Frank H. Smith*

had or has any effect upon the condition which has been produced by the accident in question.

page 73 ] By Mr. Hutton:

He can state the present symptoms and whether or not that former condition will prevent a recovery of the injury.

By the Court:

I think if the Doctor understands the question you had better let him answer it.

By the Witness:

The disease which this patient suffered with when she came to us was a malignant disease and that type of malignant disease is most apt to recur locally or in some other part of the body. The fact that she complains in some other part, principally about the shoulder blade, makes me fear she may have a recurrence. I can't say she has and if she hasn't I can't prove it. The more she complains the more I fear she may have a recurrence of that malignant growth.

By Mr. Phillips:

We move that that answer be stricken as immaterial and irrelevant.

By the Court:

Overruled.

By Mr. Phillips:

Exception.

Q. 8 Is there anything to cause her to complain of the injury back here through the shoulder blade?

A. Not as far as I can think. There is no reason that I can think that she would complain of pain about the shoulder blade. She might very well have a stiff shoulder joint from misuse but she refers to the pain in the shoulder.

page 74 ] Q. 9 What is the condition of the break? Is that healed?

A. That is healed completely.

Q. 10 Is the union O. K.?

A. Union is all right.

Q. 11 Is there anything, Doctor, that should give her any trouble, except the stiffness?



*Dr. Frank H. Smith*

A. Stiffness of the shoulder joint is the only damage growing out of that accident.

Q. 12 From the break?

A. From the cessation necessary to hold the broken bone in place.

Q. 13 Now then, Doctor, does the X-Ray show that the bone was in good union and properly connected, and so forth?

A. Yes, firm bone union, practically no displacement and very little shortening—no material shortening.

Q. 14 Was that anything to prevent her from following her usual duties around the house? In other words is it a permanent or temporary proposition and can it be made better by the use of that arm? What would you say about it?

By Mr. Thompson:

Let the Doctor tell about it.

By the Court:

I overrule the objection.

By Mr. Thompson:

Save exception:

A. Except for the stiffness of the shoulder, I think she should have recovered completely and I think that should have been very largely overcome if she had used the shoulder joint from the time she was released from the first apparatus at the shoulder blade. In fact there was quite a good deal of improvement from the time I examined her in September to February.

Q. 15 What about her weight between September and February?

A. I believe she had gained about two pounds. I haven't seen her since.

## CROSS EXAMINATION

By Mr. Phillips:

X. 1 You say there is a slight shortening there?

A. Very slight.

*Isaiah Perkins*

## RE-DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 Doctor, should that affect the spine, that break here?

A. I can't see any connection between them.

Q. 2 There is no connection between the break and any claim or alleged injury to the spine?

A. I can't see any connection between those two.

Witness stood aside.

By Mr. Hutton:

We want to call Isaiah Perkins and examine him as an adverse witness.

By Mr. Phillips:

We object to that form of examination on the ground that it is their evidence and they would be bound by his testimony.

By the Court:

Overruled.

page 76 ] By Mr. Phillips:

Exception.

ISAIAH PERKINS, the next witness, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 What is your name?

A. Isaiah Perkins.

Q. 2 Were you driving the coupe on the 19th of June, 1939, which was involved in an accident with a Yellow Cab down here at the intersection of Court and Valley Streets in the Town of Abingdon?

A. I suppose I was driving the coupe in the accident down there.

Q. 3 What part of your coupe was injured?

A. Bumper was broken and headlight and the windshield was busted.

*Isaiah Perkins*

Q. 3 Which headlight?

A. I hardly know. I think it was the right as well as I remember. I am not sure.

Q. 4 I show you a picture No. "D" and ask you if it isn't on the left? Does that correctly show it?

A. I am not sure which one.

Q. 5 That would be the left, wouldn't it?

A. Looks very much like it.

page 77 ] Q. 6 That is your car?

A. Looks very much like it.

Q. 7 Mr. Perkins, where did you get the automobile that morning?

A. Out of the garage at home.

Q. 8 Did your father know about it or not?

By Mr. Phillips:

We object to that. That has no connection.

By Mr. Hutton:

I wanted to know whether he had his father's permission or how he happened to get it.

By the Court:

He was driving it?

By Mr. Hutton:

Yes, sir, he was.

By the Court:

I believe the objection is good.

By Mr. Hutton:

Exception.

Q. 9 What time of the morning did you first get the car?

By Mr. Phillips:

We again object.

By the Court:

Overruled.

By Mr. Phillips:

Exception.

Q. 9 With reference to the time of this accident?

*Isaiah Perkins*

A. Between nine and ten o'clock.

Q. 10 Where did you pick up Woodard?

A. Mr. Arnold's service station.

Q. 11 Did you mean nine or ten at night?

A. Day.

Q. 12 You got him at Bill Arnold's service station  
page 78 ] immediately east of the corporate limits of the  
Town of Abingdon?

A. Yes, sir.

Q. 13 Where were you going?

A. To town.

Q. 14 For what purpose?

A. Well, I couldn't say. I might have been going after  
a pint of liquor. I don't know just exactly what I was going  
down town for.

Q. 15 Was Woodard drinking that morning?

A. I didn't see him drinking.

Q. 16 I am asking you his condition?

By Mr. Thompson:

If your Honor please—

By the Court:

Get to the material part.

Q. 17 I will ask you this question: Had you spent the  
greater part of the night, you and Woodard out here in Mrs.  
Gillespie's yard and you and Woodard and another fellow had  
consumed twenty-four cans of beer?

By Mr. Thompson:

We object.

By the Court:

I sustain the objection.

By the Witness:

I wasn't drinking on the morning.

By the Court:

You can ask about the material facts and show for the  
purpose of credibility.

Q. 18 I will ask you if you were under the influence of  
some intoxicant when you had the accident?

*Isaiah Perkins*

By Mr. Phillips:

We renew our objection.

page 79 ] By the Court:

I don't think that is the right way to go at it, Mr. Hutton. You can show what he knows about the accident and then if it is a fact that he is an adverse witness you can show that by the way the statute fixes.

By Mr. Hutton:

Exception because this evidence is material and relevant.

Q. 19 Now about the accident itself. When did you first see the cab?

A. Well, I couldn't say exactly but I was pretty close to it. Anyway too close to stop as slick as the street was.

Q. 20 Was it raining that morning?

A. Yes, sir.

Q. 21 Where was the cab when you first saw it?

A. I saw it while entering Valley Street.

Q. 22 You saw it as it came into Valley Street?

A. Right about that time.

Q. 23 How far away were you?

A. I couldn't say. Probably one hundred feet—might have been. I don't know whether that far or not. I couldn't say how far.

Q. 24 Now you were driving west on Valley Street and the cab was proceeding toward the hospital driving north on Court Street?

A. Yes, sir.

Q. 25 Now, Mr. Perkins, give us the best estimate you can of the speed of the cab as it crossed Valley Street.  
page 80 ] A. That would be hard for me to tell. I don't know how fast the cab was going.

Q. 26 What was your speed as you approached?

A. Between twenty and twenty-five miles.

Q. 27 Where was the car when struck?

A. Right hand side as you go down on Valley Street.

Q. 28 North side of Valley Street?

A. Yes, sir.

Q. 29 What part of the car struck what part of the cab?

A. Well, sir, the front end of my car hit the rear end of the cab.

*Isaiah Perkins*

Q. 30 I show you Photograph "B". Does that represent a correct picture of it, Mr. Perkins, where the cab was hurt? Now where did you hit it? Point out on the photograph.

A. I think right along here or some where. (Indicating). I couldn't tell just where I hit from the looks of the photograph.

Q. 31 What happened to the cab and your car after you struck?

A. I kept on exactly the course I was on and stopped in exactly the same course.

Q. 32 How far did you go beyond the intersection before you stopped, on toward the west?

A. Don't think over the length of the car.

Q. 33 Did you move before Mr. Patton came?

A. No.

Q. 34 Never did move the car?

page 81 ] A. (No answer.)

Q. 35 Isn't it a fact that Mr. Roark told you not to move your car after you had moved it five or six feet west?

A. Didn't move it. After the lady was taken to the hospital didn't seem to be anybody to take Woodard to the hospital so I decided to take him and said something about it to Roark and he said, "don't move the car."

Q. 36 Where did you go?

A. I went home.

Q. 37 Did you leave the cab there in the street?

A. Yes, sir.

Q. 38 I mean your car in the street?

A. I certainly did.

Q. 39 Were you hurt?

A. No.

Q. 40 Why did you go home and leave your car there in the street?

A. Well, I stayed there until I thought was long as necessary and went home and sent back and got the car.

Q. 41 Why didn't you take it away after Patton and the other officer got there?

A. I wasn't there when Patton come.

Q. 42 Had you left when Patton got there?

A. State Officer come before I left.

Q. 43 Who actually got your car?

*Isaiah Perkins*

page 82 ] A. I left my brother in charge of the car. They towed it down to the service station.

Q. 44 Where is your brother?

A. Walter Perkins.

Q. 45 Where is he?

A. Johnson City at the Soldier's Home.

Q. 46 Did he come to the scene of the accident?

A. He was already down there. He was there shortly after the accident.

Q. 47 How did he get to the scene of the accident?

A. Sir?

Q. 48 How did he get to the place where the accident happened? Did you talk to your brother?

A. No, I didn't talk to him.

Q. 49 You didn't see your brother at all?

A. Yes.

Q. 50 Where?

A. Down there.

Q. 51 Down at the scene of the accident?

A. (No answer.)

Q. 52 Isn't it a fact that you left there before Mr. Patton arrived there and after the cab driver told you not to move the car and didn't come back at all?

A. No, I didn't come back.

Q. 53 And it was because you were drinking?

page 83 ] By Mr. Thompson:  
We object.

By the Court:

I believe that objection is good.

By Mr. Hutton:  
Exception.

Q. 54 Do you know Arthur Musser?

A. No, sir.

Q. 55 Do you know Lewis Widener?

A. Possibly do. I don't know.

Q. 56 Do you know Herbert Widener?

A. I don't know.

Q. 57 Do you know Akers Roark, the cab driver?

A. Yes, sir.

*Isaiah Perkins*

Q. 58 On the night of July 9th, I believe Sunday night, did you see Roark out in front of Arnold's beer place east of town on the road?

By Mr. Phillips:

We object to that designation of Mr. Arnold's beer place.

Q. 59 Did you see him at Bill Arnold's place on Sunday night, July 9th, Akers Roark and Arthur Musser and the two Widener boys and have a conversation with Roark?

A. I remember talking to Roark there one time. I don't remember the date.

Q. 60 Was there a number of people present, young people?

A. I suppose so. I don't know.

Q. 61 Was Woodard there?

A. Yes, sir.

page 84 ] Q. 62 Did you tell Roark at Arnold's filling station on Sunday night, July 9, 1939, that you could have stopped your car down here but you tried to knock the cab out of the way and the next time one got in your way you would knock it out even if you had to get a truck to do it? Did you make any statement like that?

By Mr. Phillips:

We object to that question as being wholly immaterial and improper. It doesn't have any connection with the accident.

By the Court:

I overrule the objection.

By Mr. Phillips:

Exception.

Q. 63 Did you make any such statement or any part of such statement?

A. I didn't say that I didn't try to stop.

Q. 64 Tell us what you did say then.

A. Something another was said about putting the brakes on and I told him I didn't put them on before I hit because I knew they would slide if I put them on tight enough to lock the wheels, that I didn't put the brakes on enough to slide before I hit the cab.



*Isaiah Perkins*

Q. 65 What is the balance that you said to him.

A. I don't remember just what the conversation was. So far as the truck is concerned, I never mentioned any truck.

Q. 66 Didn't you say the next time one got in front of you you were going to knock him out of the road?  
page 85 ] A. Did not.

Q. 67 Did you say anything about not trying to stop or going to knock him out of the road at all?

A. No, sir.

Q. 68 You deny that you made such statement?

A. Yes, sir.

Q. 69 Woodard was there with you, your companion?

A. He was around. I don't know whether he heard the conversation.

Q. 70 How did this conversation arise?

A. I don't remember.

Q. 71 Did you say this on the same occasion that you were going to run through the next Yellow Cab that got in your way and that you didn't try to stop on this occasion?

A. No, sir, did not say it.

Q. 72 Now then down here at the accident. How fast did you say you were driving immediately before the accident?

A. Couldn't say exactly. Between twenty and twenty-five miles.

Q. 73 Why didn't you stop, slow down or turn?

A. The reason I didn't turn to the left a car was coming up Valley Street and no chance of turning left without hitting him.

Q. 74 You say a car was meeting you coming up Valley Street?

A. Yes, sir.

page 86 ] Q. 75 Did that car stop?

A. I don't know.

Q. 76 What kind of car was it?

A. I don't know.

Q. 77 Was it a truck, one-seated or two-seated car?

A. As well as I remember a sedan.

Q. 78 Do you know anything about the type or how many people were in there?

A. No, I didn't have a chance to see. Several cars were there shortly after and I don't know which one it was.

*Isaiah Perkins*

Q. 79 As a matter of fact there wasn't any car except yours and the cab?

A. Yes, sir, there sure was.

Q. 80 What was your hurry to get away after the wreck?

A. If I had been in a hurry I would've left before the officers got there.

Q. 81 What particular officer was there?

A. State Police.

Q. 82 What was his name?

A. I don't know any of their names, but the State Police on duty here at that time was there.

Q. 83 Did they know you were the driver of the car?

A. Couldn't say.

Q. 84 You didn't tell him you were driving?

A. Didn't see it was necessary.

page 87 ] By Mr. Phillips:

We object.

Q. 85 That was your duty under the law, wasn't it? Somebody was going to the hospital. Why didn't you stay there and tell the officer, you say the State Police was there, why didn't you tell the State Police that you were driving?

By the Court:

He objected. I don't see why the objection is not good.

By Mr. Warren:

We except.

By Mr. Hutton:

Your Honor, may I ask this question: If he and his companion Woodard had spent the evening before and had gotten in about three o'clock in the morning and he and Woodard and two other parties had consumed twenty-four cans of beer up until four or five o'clock the next morning preceding this accident to show his condition at the time.

By Mr. Thompson:

We object.

By the Court:

I think the objection will be good.

*Isaiah Perkins*

By Mr. Warren:

We except.

NOTE: Thereupon the jury was excused and the following proceedings were had in its absence.

Q. 86 Mr. Perkins, tell us where you spent the night before this accident, where you went and how much beer you did consume out of the presence of the jury?

page 88 ] A. Was at Arnold's service station several times and also at Mr. Hayter's a couple of times and riding different places and we also stopped out in front of Mrs. Gillespie's and we took a case of beer.

Q. 87 How many cans in a case?

A. Twenty-four twelve ounce cans.

Q. 88 What time were you there at Mrs. Gillespie's?

A. Some where after twelve o'clock. Between twelve and one o'clock.

Q. 89 How many consumed that beer from whatever time you got there?

A. We didn't consume it all.

Q. 90 How much did you get?

A. I don't know. I guess four or five cans out of the case.

Q. 91 What time did you leave Mrs. Gillespie's in the field?

A. Between two and three o'clock some time.

Q. 92 Did you become intoxicated?

A. Well, I don't think so.

Q. 93 Is that all the beer that you drank on that night in two or three places?

A. I don't know. I guess I drank some besides in the fore part of the night.

Q. 94 Did you drink any whiskey?

A. No, sir.

page 89 ] Q. 95 You were drinking beer from twelve o'clock in the front of the Gillespie home until about three o'clock?

A. We wasn't there over an hour and half, I don't think outside at that one particular place.

Q. 96 While the jury is out, I want to ask you if you

*Isaiah Perkins*

took your father's car out of the garage without his knowledge and came to town after more whiskey?

By Mr. Thompson:

We object.

By the Court:

I have already sustained the objection.

Q. 97 Did you get your father's car out without his knowledge?

A. I don't know without his knowledge or not. I got it out and came to town.

Q. 98 You didn't even have a driver's permit, did you?

A. My driver's permit expired June 30, 1939.

Q. 99 You weren't permitted to drive in the Town of Abingdon on this day you were driving?

A. I don't know whether I was or not. My license was taken in '37 for one year.

Q. 100 For driving intoxicated?

A. Yes, sir.

By Mr. Warren:

We want to prove that to the jury.

By Mr. Phillips:

We object to that.

By the Court:

The issue is whether or not the accident was due to  
page 90 ] his negligence. If he was driving drunk there is a  
penalty for that, and if he was driving without a  
permit I guess there is a remedy for that. It seems to me confusing and very prejudicial to the plaintiff in this case.

By Mr. Hutton:

If he was driving intoxicated on this occasion wouldn't that be material? That would tend to show negligence.

By the Court:

Unless he says he was drunk, as the evidence is notwithstanding that, the cab driver was right in front of him and really the cause of the collision. Did his drunkenness have anything to do with it. If he was drunk he ought to be punished if he hasn't been, but I would hate for judgment to go down

*Isaiah Perkins*

and convict him of negligence unless the evidence showed that he was.

By Mr. Warren:

Wouldn't that be one thing tending to show his negligence?

By the Court:

Conflict in the evidence. Why it might be possible to show he was so drunk he didn't know how to drive, but you haven't put on any evidence except his at all as to how it happened.

By Mr. Hutton:

We, of course, expect to introduce other witnesses as to the facts pertaining to the accident.

By the Court:

I think I will sustain the objection.

page 91 ] By Mr. Hutton:

We except.

NOTE: Thereupon the jury returned into Court and the following proceedings were had:

Q. 101 What type of brakes did you have on your car?

A. Mechanical brakes.

Q. 102 Were they in good condition or not?

A. Yes, sir.

### CROSS EXAMINATION

By Mr. Phillips:

X. 1 Did you say it was raining or had been raining?

A. Raining.

X. 2 Raining then?

A. Yes, sir, raining at the time.

X. 3 I believe you said the road was slick?

A. Yes, sir.

X. 4 You didn't have time to stop if you could have?

A. I don't think so.

X. 5 What model car was that, do you recall or know?

A. It's either '29 or '30.

*Arthur Musser*

X. 6 Chevrolet?

A. Yes, sir.

X. 7 This Akers Roark that you were talking  
page 92 ] about up at Arnold's, is that the same Roark who  
was driving the cab?

A. Yes, sir.

X. 8 Akers Roark too?

A. Yes, sir, same one.

Witness stood aside.

NOTE: Thereupon the Court and Counsel retired to Chambers and the following proceedings were had out of the presence of the jury.

By Mr. Phillips:

Plaintiff by counsel moves the Court to strike all the testimony of the witness Perkins and to instruct the jury to disregard it in every portion.

NOTE: This motion was argued by counsel.

By the Court:

I overrule the motion.

By Mr. Phillips:

We except to your Honor's ruling and request that your Honor instruct the jury that the testimony of the witness with regard to the statement made by Perkins only goes to the credibility of the witness Perkins.

NOTE: Thereupon the Court and Counsel returned into Court and the following proceedings were had:

page 93 ] ARTHUR MUSSER, the next witness, being first  
duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 What is your name?

A. Arthur Musser.

Q. 2 Where do you live, Mr. Musser?

*Arthur Musser*

A. High Point.

Q. 3 Were you present out here at Bill Arnold's garage, filling station or store immediately east of town on the night of July 9, 1939, and heard a conversation there between a man by the name of Perkins, Akers Roark and Woodard?

A. Yes, sir.

Q. 4 Tell us what that conversation was.

By Mr. Thompson:

I object.

Q. 5 I will ask you this question: State whether or not Perkins stated in your presence while talking to Woodard substantially this or words to this effect, talking about this accident down on Valley Street on June 19, and Perkins said that he didn't try to stop, meaning his coupe he was driving, and the next cab that got in his way he was going to knock it out of his way if he had to get a truck to do it with.

By Mr. Phillips:

We object to this as not relevant or material and page 94 ] occurred after the time of the collision and not a part of the *res gestæ*, and on the further ground that the plaintiff, being a paid passenger in the Yellow Cab in which she was riding, is only required to show negligence on the part of the Yellow Cab, and that she is not bound by any contributory negligence, if any, on the part of the Chevrolet; that the Yellow Cab having taken her on as a passenger for hire, under the laws of the State of Virginia, is required to exercise the utmost degree of care and such testimony as that is not admissible or proper, if Your Honor please.

By Mr. Warren:

Our defense, if your Honor please, is that this accident was caused by an independent agency over which we have no control, which independent agency was the Chevrolet coupe in question.

By the Court:

My belief is that defendant would have to show that the car, Perkins' car, was the sole proximate cause of the injury. Otherwise if the Yellow Cab were negligent and their negligence was a proximate cause it would be liable. I will overrule the objection.

*Arthur Musser*

By Mr. Phillips:

Exception.

Q. 6 Answer the question. Is that a fact?

A. It is a fact.

Q. 7 The question was did Perkins make that page 95 ] statement?

A. The statement that Perkins made, he said he didn't try to stop. That is what he said. Said he didn't try to stop and was going to get a truck to knock the damned Yellow Cabs out of his way.

Q. 8 Did he say anything about why he didn't try to stop?

A. He said he didn't try to stop.

Q. 9 Who was present there, Mr. Musser, while that conversation was going on?

A. A couple of Widener boys and some more boys I didn't know.

Q. 10 Do you know Perkins?

A. No, I just know his face.

Q. 11 Did he say anything about being the driver of this car on the day in question?

A. Yes, he was driving.

Q. 12 Was the man drinking, the man who was doing the talking?

A. The fellow was kind of drunk trying to raise a racket with Roark looked to me like. He was drinking and out there ya-ya-ing around with him over it.

Q. 13 Where do you live, Mr. Musser?

A. High Point.

Q. 14 And Perkins lives in Abingdon?

A. Yes.

page 96 ]

**CROSS EXAMINATION**

By Mr. Thompson:

X. 1 Roark had a filling station out there?

A. He didn't at that time.

X. 2 He operated a filling station at that end of town?

A. I don't think he did at that time.

X. 3 Where did that take place?

A. Bill Arnold's.



*Arthur Musser*

X. 4 Other side of town?

A. Yes, sir.

X. 5 Roark was in there?

A. Roark was on the outside.

X. 6 And where was Perkins? Was he in there drinking?

A. No, he was not drinking. He was pretty high, all on the outside.

X. 7 Were you high?

A. No, sir.

X. 8 Where do you live?

A. I live between Damascus and Meadow View.

X. 9 You live at High Point?

A. Yes, sir.

X. 10 What time of night was this?

A. Beginning to get dark.

X. 11 What day of the week?

page 97 | A. I don't remember that.

X. 12 What day of the month?

A. September some time.

X. 13 Along in September. What were you doing?

A. I had come down to town.

X. 14 Why had you come to town?

A. Just come to town.

X. 15 How did you get here?

A. Come in my car.

X. 16 Who come with you?

A. Nobody.

X. 17 How long have you been knowing Roark?

A. Several years.

X. 18 What were you doing at Arnold's?

A. Just stopped there to get some gas.

X. 19 What were the rest of them getting?

A. Never seen them getting anything.

X. 20 You say Perkins was drunk?

A. He wasn't drunk. He was pretty high.

X. 21 And mad at Roark and trying to get a fuss?

A. Wasn't acting like he was mad. He was talking about the wreck and carrying on like he was wanting to raise a racket or something about it.

X. 22 What was Roark doing out there?

*Arthur Musser*

- A. I couldn't tell you.
- page 98 ] X. 23 Did he have his Yellow Cab?  
A. Not that I seen.
- X. 24 He was just down there. Did he have any kind of car?  
A. No, sir.
- X. 25 Did you have your car out there?  
A. Setting out there.
- X. 26 You are the only one that had a car?  
A. Only the one I had.
- X. 27 You say it was about dark in September?  
A. My best recollection it was.
- X. 28 What makes you think it was September?  
A. Along there some where. I didn't think there would ever be anything to it and didn't pay any attention.
- X. 29 When was the first time anybody come to you about it?  
A. Mr. Hutton come up to Meadow View and was calling me and talked to me about it.
- X. 30 Who had you told that had told Mr. Hutton about it?  
A. I couldn't tell you who told him about it.
- X. 31 Did you see anybody buy any beer there that night?  
A. No, sir.
- X. 32 What makes you think Perkins was drinking?  
A. He just acted that way.
- X. 33 How was Roark acting?  
A. He acted like he was sober.
- X. 34 How were you acting?
- page 99 ] A. Same way, sober.
- X. 35 What do you do?  
A. Work on the farm and different things.
- X. 36 What had you come to town for?  
A. I come pretty often.
- X. 37 Did you bring stock or anything like that?  
A. I don't remember what I was down here for that time.
- X. 38 Who do you farm for?  
A. For myself.
- X. 39 Do you own a farm?  
A. My daddy does.

*Arthur Musser*

X. 40 Who is your father?

A. Charlie Musser.

X. 41 Never seen Perkins before?

A. No, sir, never seen him before until that night.

X. 42 How many people were there around there?

A. There were several of them around there.

X. 43 How come them to start talking about the Yellow Cab?

A. I can't tell you that. They was talking when I come in there.

X. 44 In where?

A. I stopped in there to get some gas and drink a bottle of pop and they was talking about it when I come up.

X. 45 Did they know you were listening to them?

A. I guess they did. I was standing there.

page 100 ] X. 46 What was the first thing you heard anybody say?

A. The first thing they said was he just didn't try to stop.

X. 47 Did you know what he was talking about?

A. Not right then.

X. 48 Who told you?

A. He come further on and brought it in about the Yellow Cab.

X. 49 Did you know anything about it?

A. I heard something about it some time before that Akers Roark had a wreck down here, and somebody was talking about a Yellow Cab.

X. 50 Who all did you say was up there?

A. Two Wideners.

X. 51 What Wideners?

A. Two Widener boys. I just know they are Wideners.

X. 52 Did you know them before this?

A. Seen them several times.

X. 53 What were they doing up there?

A. Couldn't tell you that.

X. 54 Don't know what they were doing or Perkins?

A. No.

X. 55 Who else was there?

A. Not anybody else that I know of.

*Arthur Musser*

X. 56 Were they all outside talking, none in the  
page 101 ] store?

A. That is right, all on the outside.

X. 57 Sound like they were mad?

A. No, didn't sound like anybody was mad.

X. 58 I thought Perkins was trying to get a fuss?

A. He was arguing. Looked to me like he was trying  
to get a racket out of him.

X. 59 What did Roark say?

A. Roark didn't say anything. Stood there and listened  
at it.

X. 60 What did you say?

A. I didn't say nothing. Wasn't nothing to me.

X. 61 What did the Wideners say?

A. Never said anything either.

X. 62 Perkins is the one who did the broadcasting?

A. Yes, sir.

X. 63 And you all just listened?

A. That is right.

X. 64 Never said a thing?

A. No, sir.

X. 65 That was in September of last year?

A. My best memory.

X. 66 Do you know when this accident occurred?

A. No, sir.

X. 67 Do you know what day of the week it was?

A. No, sir.

page 102 ] X. 68 Was Roark at that time working for  
the Yellow Cab?

A. I wouldn't say.

X. 69 Do you know whether or not he was at the time  
they were talking to him?

A. I don't think he was.

X. 70 Did you meet Roark up there pretty often?

A. No.

X. 71 Do you know how soon after this accident Ro-  
ark stopped working for the Yellow Cab?

By Mr. Hutton:

We object to that.

By the Court:

Overruled.

*Arthur Musser*

A. (No answer.)

X. 72 Do you know whether he wasn't working for them at the time you heard this conversation?

A. Not that I know of.

X. 73 Do you know what Roark was doing then?

A. No, I don't.

RE-DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 About the date. Do you recall Miss Ann Campbell coming to see you about this?

A. I don't know. You was down there too.

Q. 2 Anyway you saw Miss Ann Campbell and myself, is that right?

A. Yes, sir.

page 103 ] Q. 3 Do you know long that was after this statement was made at the filling station?

A. No, I don't remember.

Q. 4 Whether it was September or July? If we were up there on the 15th of July—(Interrupted.)

By Mr. Thompson:

I object to him putting this witness on as adverse.

By the Court:

Go ahead.

Q. 5 Do you know how long after the accident it was that you made this statement to me and Miss Campbell up at Meadow View?

A. No, I don't, but I imagine three or four weeks after.

Q. 6 It wasn't in September then?

By Mr. Thompson:

I object.

Q. 7 Was that the only time you heard any statement?

A. That is the only statement I heard.

Q. 8 You, the two Widener boys and Roark and Woodward and Perkins were present. That is the occasion you were talking about?

A. Yes, sir.

*Lewis Widener*

Witness stood aside.

By Mr. Thompson:

If your Honor please, we would like to move that your Honor instruct the jury that the witness Musser's testimony can only go to the credibility of the witness Perkins, to contradict Perkins who said he didn't make a statement.

page 104 ] By the Court:

I will give that instruction. It is only admitted as going to the credibility of the witness Perkins.

By Mr. Hutton:

Exception.

LEWIS WIDENER, the next witness, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Warren:

Q. 1 What is your name?

A. Lewis Widener.

Q. 2 How old are you?

A. Eighteen.

Q. 3 Where do you live, Lewis?

A. Up here at the east Fair Grounds.

Q. 4 Were you at Arnold's filling station some time in the summer of 1939 and heard a conversation between Isaiah Perkins, Roark, Woodard, yourself and your brother and Arthur Musser?

A. Yes, sir.

Q. 5 What time of day or night was it?

A. Well, it was about three or four o'clock in the evening.

Q. 6 Who was having the conversation?

A. When I walked up it was Perkins and Woodard and Roark sitting there talking.

page 105 ] Q. 7 What were they talking about?

A. They was talking about a wreck, arguing.

Q. 8 You mean with the Yellow Cab at Valley and Court Streets?

*Lewis Widener*

A. Yes, sir.

Q. 9 I will ask you if Perkins made this statement or words to this effect: That he didn't try to stop his car when he came down Valley Street and struck that cab and he was going to knock the next cab that got in his way and going to get a truck to do it with?

By Mr. Phillips:

We renew our objection.

By the Court:

Overruled.

By Mr. Phillips:

Exception.

A. Yes, sir.

### CROSS EXAMINATION

By Mr. Thompson:

X. 1 Where do you live?

A. East of the fair grounds.

X. 2 What were you doing?

A. There was a carnival come in on the show ground and we stopped there, Herber and myself and walked up to Arnold's to get a drink.

X. 3 When was this carnival out there?

A. Some time in September. I believe it was September.

X. 4 Anyway it was the time when the carnival was on that lot?

A. Yes, sir, come in that Sunday.

X. 5 Was it on Sunday that you were out there?

A. Yes, sir.

X. 6 And you said it was in the afternoon around three or four o'clock?

A. Yes, sir.

X. 7 Are you sure about that?

A. Yes, sir.

X. 8 What year was it?

A. '39.

X. 9 September, 1939?

*Lewis Widener*

A. Yes, sir.

X. 10 On Sunday afternoon?

A. Yes, sir.

X. 11 About three or four o'clock?

A. Yes, sir.

X. 12 How do you fix it as being September?

A. Well, I just thought it was September. Anyway the carnival come in that day. It's been so long I didn't pay any more attention to it.

X. 13 Who is the first person you told this?

A. I didn't tell anybody about it. Just summoned me up. Nobody but Mr. Hutton.

X. 14 When did you tell Mr. Hutton?

page 107 ] A. I just don't know when it was.

X. 15 Was Roark working for the Yellow Cab at that time?

A. I couldn't say. He wasn't working that day.

X. 16 Did he have a cab out there?

A. No, sir.

X. 17 Did anybody have a car?

A. I don't know. They were sitting on the barrel.

X. 18 Who was?

A. Akers Roark.

X. 19 Who else?

A. Perkins and Woodard standing up.

X. 20 Woodard?

A. Yes, sir.

X. 21 Was Woodard there?

A. Yes, sir.

X. 22 What Woodard is that?

A. Esmeral.

X. 23 Did you see a fellow Musser out there?

A. Yes, sir.

X. 24 Where was he sitting?

A. He wasn't sitting. He was standing.

X. 25 What was he doing there?

A. I couldn't tell you that. I don't know.

X. 25 Was he there before you came or did he come after you did?

page 108 ] A. I don't know. He was there when we started off and Akers Roark told him, "you heard that,



*Lewis Widener*

didn't you?" And so we just walked off. I looked around and all walked off together.

X. 27 Who was he talking to?

A. Musser.

X. 28 Had you ever seen Musser before?

A. Yes, sir.

X. 29 How many time?

A. Oh, I don't know.

X. 30 Did you see him have an automobile?

A. Yes, sir.

X. 31 What kind of car?

A. Ford, A model.

X. 32 Was anybody drinking that night?

A. Perkins and Woodard was.

X. 33 Anybody else?

A. No, sir.

X. 34 Did Musser go off with you?

A. Musser went off with us and left them standing there.

X. 35 Where did you all go?

A. Back down on the show ground.

X. 36 What did Musser do with his car?

A. We left him on the show ground.

X. 37 Did he take the car?

A. No, he had it parked up along the station up  
page 109 ] there some where.

Witness stood aside.

By Mr. Thompson:

I would like to make the same motion to this witness as to the last one.

By the Court:

The testimony of this witness, Lewis Widener, is only admissible for the purpose of going to the credibility of the witness Perkins.

By Mr. Hutton:

Exception.

HERBERT WIDENER, the next witness, being first duly sworn, testified as follows:

*Herbert Widener*

## DIRECT EXAMINATION

By Mr. Warren:

Q. 1 What is your name?

A. Herbert Widener.

Q. 2 How old are you?

A. Fifteen.

Q. 3 Are you related to Lewis Widener?

A. Yes, sir.

Q. 4 What kin?

A. I think he is my uncle.

Q. 5 Were you present at Arnold's filling station and heard a conversation between Isaiah Perkins and Roark?

A. Yes, sir, I was.

Q. 6 Who else was there?

page 110 ] A. Me and Lewis Widener and Arthur Musser was there as I remember.

Q. 7 Anybody else that you remember?

A. No, sir, not as I remember.

Q. 8 Roark was there, wasn't he?

A. Yes, sir, he was there.

Q. 9 I will ask you if you heard Perkins say there in that conversation or words to this effect: That he didn't try to stop and he didn't apply his brakes and tried to knock the cab out of his way and he would do it the next time one got in his way if he had to get a truck to do it with?

A. Yes, sir.

By Mr. Phillips:

Same objection.

Q. 10. Is that in effect what he said there

A. Yes, sir.

## CROSS EXAMINATION

By Mr. Thompson:

X. 1 How come Perkins and Roark to be talking about the wreck?

A. I don't know how it come about. When I come up they was standing there talking and I heard this Perkins fellow say that he could, a missed the Yellow Cab if he wanted to, that

*Herbert Widener*

he wanted to see how far he could knock it, and said he was going to get him a truck and knock the rest of them out of the way if they got in his way.

page 111 ] X. 2 When was that?

A. I don't know when it was. It's been so long I have about forgot.

X. 3 About forgot what?

A. When that was when they was talking that day.

X. 4 What day of the week was it?

A. On Sunday.

X. 5 What time of the day was it?

A. It was about six o'clock, I imagine.

X. 6 Evening?

A. Yes, sir.

X. 7 Had you had supper?

A. Yes, sir, I had.

X. 8 Who did you come down there with?

A. I rode with my brother.

X. 9 Who is your brother?

A. Leonard.

X. 10 What kin are you to the Widener on the witness stand a minute ago?

A. I think he is my uncle.

X. 11 Was anybody drinking that evening?

A. No, sir, I don't know whether they were or not. Couldn't tell.

X. 12 Who all did you see there?

A. I just saw Roark and Perkins, me and Musser  
page 112 ] and my cousin Lewis and that is all I remember seeing.

X. 13 What was Roark doing?

A. I don't know what he was doing.

X. 14 Was he working at the Yellow Cab at that time?

A. No, sir, I don't believe he was.

X. 15 Was it in September or August?

A. I've just about forgot. I don't know.

X. 16 You do know it was after supper?

A. Yes, sir. I didn't pay no attention to it.

X. 17 Who did you tell about that, what you heard out there?

A. I never told anybody about it myself.

*Herbert Widener*

X. 18 You didn't?

A. No, sir.

X. 19 How come you to be here as a witness?

A. I was standing there when Roark was there.

X. 20 What about Roark, did he bring anybody to see you or did you talk it over with Roark?

A. No, sir, I never talked it over. He told me he was going to have me summoned.

X. 21 Told you that afternoon?

A. Yes, sir.

X. 22 That he was going to have you summoned as a witness?

A. Yes, sir.

X. 23 How long have you known Roark?

A. Well, sir, known him ever since little kid.

page 113 ] X. 24 How long have you known Perkins?

A. I haven't known that fellow until just here awhile back. I didn't even know who he was when Roark was talking to him up there at the station.

X. 25 You didn't?

A. No, sir.

X. 26 Did Roark tell all the boys he was going to summon them as witnesses?

A. Well, sir, I don't know whether he told the rest of them or not, but he told me.

Witness stood aside.

By Mr. Thompson:

I want to make the same motion with reference to this witness's testimony.

By the Court:

I give you the same instruction as heretofore, that it only goes to the credibility of the other witness.

By Mr. Hutton:

Exception.

... EP ATKINS, the next witness, being first duly sworn, testified as follows:

*Ep Atkins*

# DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 What is your name?

A. Ep Atkins.

Q. 2 Where do you live?

page 114 ] A. Out Summers place west of Abingdon.

Q. 2 How old are you?

A. Thirty.

Q. 3 Married or single?

A. Single.

Q. 4 Do you know Esmeral Woodard, Isaiah Perkins and Akers Roark?

A. Yes, sir.

Q. 5 Some time last summer out at Mr. Arnold's place east of town did you see Woodard and Perkins and Roark and Musser and two Widener boys out there?

A. I don't know Musser. I seen Roark and Perkins.

Q. 6 What time of day or night?

A. About eight o'clock.

Q. 7 What day of the week?

A. On Sunday.

Q. 8 Now did you hear any conversation between Roark and Perkins?

A. Yes, sir, they was arguing over that wreck.

X. 9 What wreck?

A. With the Yellow Cab.

Q. 10 Down here at Abingdon?

A. Yes, sir.

Q. 11 Did Perkins make any statement there to Roark about he could have stopped but didn't try to and  
page 115 ] the next time a Yellow Cab got in his way he was going to knock it out if he had to get a truck to do it with?

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

Q. 12 What did he say?

A. Said he was going to get him a truck and knock the next one out of the way.

Q. 13 Did he say anything about not trying to stop?

A. I don't think he did.

*Ep Atkins*

Q. 14 But the next one that got in his way he was going to get a truck and knock it out of the way?

A. Yes, sir.

Q. 15 How did you happen to be there?

A. Oh, I'm up here pretty regular.

Q. 16 Is that the only time you heard this conversation?

A. Yes, sir.

## CROSS EXAMINATION

By Mr. Thompson:

X. 1 You say it was on Sunday?

A. Yes, sir.

X. 2 What time of day was it?

A. About eight o'clock.

X. 3 After dark?

A. No, sir, it wasn't quite dark.

X. 4 Who all was there?

A. Esmeral Woodard, Perkins, two Widener  
page 116 ] boys and I don't know who all.

X. 5 Two or three Widener boys?

A. Yes, sir.

X. 6 Big crowd of boys come up from that carnival?

A. Yes, sir.

X. 7 Any of them drinking?

A. A few of them was.

X. 8 Were Perkins and Roark mad at each other?

A. Wasn't exactly mad, just arguing.

X. 9 Was Perkins drinking?

A. I don't think so.

X. 10 Was Roark?

A. No, sir.

X. 11 Was Roark working for the Yellow Cab at that  
time?

A. I think he had done quit.

X. 12 Did he tell you when you left there he was going to have you summoned?

A. No, sir.

X. 13 Who did you first tell about it?

A. Roark was the first told me about it.

X. 14 You mean he told you he wanted you to come here and testify?

*Ep Atkins*

A. Yes, sir.

X. 15 How soon after?

A. Two or three weeks.

page 117 ] X. 16 How long have you known Roark?

A. Three or four years.

X. 17 Good friends?

A. Yes, sir.

X. 18 What month was it?

A. July.

X. 19 What day of the month?

A. 9th, I think.

X. 20 How do you fix it? What makes you say then?

A. I just heard some of them say it was the 9th.

X. 21 Heard some of them say it when?

A. Two or three months ago.

X. 22 Heard some of them say two or three months ago  
it was the 9th of July when you was up there?

A. Yes, sir.

X. 23 Who did you hear say that?

A. I heard Mr. Rush.

X. 24 Rush, who is that?

A. Andy Rush. He is in Maryland.

X. 25 Was he up there that night?

A. No, sir.

X. 26 How did he know?

A. His boy was up there.

X. 27 How many boys did he have?

A. One.

page 118 ] X. 28 How many people were around?

A. Several.

X. 29 Several?

A. Yes, sir.

X. 30 Practically whole carnival crowd was there?

A. Biggest part of it.

X. 31 Any audience around?

A. Few.

X. 32 Anybody else doing any talking there that night  
except Perkins?

A. Nobody but Perkins and Roark.

X. 33 Everybody was listening to them and they were  
arguing about the wreck?

*Sam Austin*

A. Yes, sir.

### RE-DIRECT EXAMINATION

By Mr. Huppton:

Q. 1 Mr. Rush has moved away and is living in Maryland now?

A. Yes, sir.

Q. 2 Moved since that time?

A. Yes, sir.

Witness stood aside.

By Mr. Thompson:

I want to make the same motion with reference to this witness.

page 119 ] By the Court:

I give you the same instruction for this witness, only goes to the credibility of the witness Perkins' testimony.

By Mr. Hutton:

Exception.

SAM AUSTIN, the next witness, being first duly sworn, testified as follows:

### DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 You are Sam Austin?

A. Yes, sir.

Q. 2 Did you make the pictures marked Defendant's Exhibits "A", "B", "C" and "D"? I will ask you if you made them and if they represent the conditions as you found them there that day?

A. Yes, sir.

Q. 3 How long after the wreck did you take them?

A. Fifteen or twenty minutes.

Q. 4 Your office is right here only half a block away?

A. Half a block from the scene of the accident.

Q. 5 You went down there to the scene, did you?

A. Yes, sir.



*Robert Puckett*

Q. 6 Do you know whether the Yellow Cab had been moved?

A. I do not. I don't think it had.

Q. 7 You don't know?

page 120 ] A. Not positive.

Q. 8 You didn't see the accident?

A. No, sir, I did not see it.

Q. 9 What attracted your attention? Did somebody call you?

A. I just came up to the office and saw it.

Q. 10 Then you went down there?

A. Yes, sir.

Q. 11 That is all you know about it?

A. Yes, sir.

By Mr. Phillips:

No cross examination.

Witness stood aside.

ROBERT PUCKETT, the next witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 What is your name?

A. Robert Puckett.

Q. 2 Do you remember this automobile wreck between the Yellow Cab and the Perkins car?

A. Yes, sir.

Q. 3 Where were you standing?

A. Right out here. (Indicating.)

Q. 4 Right out where?

A. Next to the lower side of the Court House.

page 121 ] Q. 5 On the sidewalk next to the Court House?

A. On this side.

Q. 6 On this side of the street next to the Court House?

A. Yes, sir.

Q. 7 What kind of day was it?

A. Rainy day.

Q. 8 Did you see the cab before it went down there?

*Robert Puckett*

A. Yes.

Q. 9 Where did you first see it?

A. Right out there. He passed and holloaed.

Q. 10 Who passed?

A. Akers Roark.

Q. 11 The driver?

A. Yes, sir.

Q. 12 Did you watch the cab as it went on down the street there?

A. Yes, sir.

Q. 13 When it got there what did it do?

A. He pulled up to the sign and stopped.

Q. 14 Pulled up to the sign and stopped, did you see that?

A. Yes, sir.

Q. 15 You are positive about that fact, are you?

A. Yes, sir.

Q. 16 Who was in the cab, if you know?

A. Some woman.

page 122 ] Q. 17 Front or back seat?

A. Back seat.

Q. 18 How fast would you say the cab was traveling as it proceeded down there before it stopped?

A. Not over ten or twelve miles an hour.

Q. 19 You say it went down Court Street at about ten or twelve miles an hour?

A. Yes, sir.

Q. 20 You further say it stopped before it crossed?

A. Yes, sir.

Q. 21 How did you happen to be watching?

A. I was standing there and he passed and holloaed and I noticed he was driving a new cab.

Q. 22 Driving a new cab?

A. New car, new painted.

Q. 23 You were standing looking at it?

A. Yes, sir.

Q. 24 Did you watch it on?

A. Yes, sir.

Q. 25 Are you any kin to him?

A. No, sir.

*Robert Puckett*

Q. 26 Do you have any interest one way or the other in this lawsuit.

A. No.

Q. 27 Where do you work, Mr. Puckett?  
page 123 ] A. Just here and yonder.

Q. 28 Just happened to be standing out there?

A. Yes, sir.

Q. 29 What did you next see?

A. He started on across and about the time he got across this other car hit him.

Q. 30 How far across had he gotten before he got hit?

A. He wouldn't lacked over three foot no how clearing the whole road.

Q. 31 Wouldn't have lacked three feet clearing the whole road?

A. No, sir.

Q. 32 What part of the cab was hit?

A. The right hind wheel.

Q. 33 Does that picture which is marked "B" show where he was hit?

A. Yes, sir.

Q. 34 Is that correct?

A. Yes, sir.

Q. 35 Is that the Yellow Cab you saw?

A. Yes, sir.

Q. 36 Did you go down there?

A. Yes, sir.

Q. 37 Did you see the other car, that is the car coming that hit him? Did you see where it came from,  
page 124 ] what direction it came from?

A. It came up Valley Street going west.

Q. 38 Where did it go to after the wreck?

A. It stopped right there.

Q. 39 Did you say you went on down there?

A. Yes, sir.

Q. 40 What length of time could you see the other car, that is the coupe, before it struck the cab?

A. You couldn't see it much. It come in in such a dash, you couldn't tell nothing much about it.

Q. 41 Could you tell whether it was running fast or slow?

*Robert Puckett*

A. Running fast?

Q. 42 Where did the Yellow Cab land?

A. Over there against the stop sign.

Q. 43 Front on which side of the street?

A. Over on the left going to the hospital.

Q. 44 Where was it with reference to Mr. Craig's home?

A. Right on the same side he lives.

Q. 45 Did you see that stop sign where it was backed up against?

A. Yes, sir.

Q. 46 Which way was the stop sign pushed, toward the hospital or back south toward the street?

A. Toward the hospital.

Q. 47 You say you went on down to the scene?  
page 125 ] A. I was about the first one got there.

Q. 48 And when you got there did you see this Perkins boy?

A. Yes, sir.

Q. 49 Do you know him when you see him or not?

A. Yes, sir.

Q. 50 Have you known him a long time?

A. No, sir.

Q. 51 What did he do?

A. He started to get in the car and pull off and Roark stopped him.

Q. 52 Then what did he do?

A. He got out of it.

Q. 53 Where did he go after he got out?

A. Said he was going to the hospital.

Q. 54 Said he was going to the hospital?

A. Yes, sir.

Q. 55 Where did he leave his car?

A. Left it sitting there.

Q. 56 Had Patton arrived at that time?

A. There was one State Officer there.

Q. 57 Did you see this boy go on up towards the hospital-

A. I seen him and the other fellow with him.

Q. 58 Who was with him?

A. Perkins.

Q. 59 I am talking about Perkins?

*Robert Puckett*

page 126 ] A. Perkins, both of them went on together.

Q. 60 Do you know who the other fellow was?

A. Woodard.

Q. 61 They left and went on towards the hospital?

A. Yes, sir.

Q. 62 Did they leave or did Perkins leave before Mr. Patton arrived?

A. Just about the time he drove up.

Q. 63 Did you see any glass there in the street?

A. Yes, sir.

Q. 64 Where was the glass?

A. It was right between the two cars sorta.

Q. 65 With reference to the north side of Valley Street where was it?

A. On the right going west kinda on the right side going west.

Q. 66 On the right side going west on Valley Street?

A. Yes, sir.

Q. 67 Were you there when the ambulance came?

A. Yes, sir.

Q. 68 Who brought the ambulance?

A. Paul Campbell's boy.

Q. 69 Do you know how the Chevrolet coupe that Perkins was driving was hurt?

A. The bumper was bent down against the wheel  
page 127 ] one headlight knocked out and the windshield.

Q. 70 What happened to the windshield?

A. It was broke out.

Q. 71 I show you a picture marked Defendant's Exhibit "D". Does that correctly represent that?

A. Yes, sir.

Q. 72 Now you say, as I understood you, that it lacked about three feet of getting across the north side of the street when struck?

A. Yes, sir.

Q. 73 If you extend the north curb line straight across Court Street, like a pencil and here goes the cab across toward the hospital traveling north, had he gotten across that line?

A. Yes, sir.

Q. 74 How much across that line, north curb of Valley Street?

*Robert Puckett*

By Mr. Phillips:

If your your Honor please, we object. That is leading.

Q. 75 Where was he with reference to the north curb line?

A. He had done cleared that.

### CROSS EXAMINATION

By Mr. Phillips:

X. 1 His front wheels or rear?

A. His hind wheels.

X. 2 His hind wheels had cleared the north curb  
page 128 ] of Valley Street?

A. Yes, sir.

X. 3 Robert, whereabouts were you standing over here when Akers Roary passed, in front of whose office?

A. Standing right here on this side.

X. 4 On the sidewalk next to the Court House?

A. Yes.

X. 5 And Akers holloaed as he went down. What did he say?

A. He just holloaed "hello"—"hello Bob".

X. 6 How long have you been knowing Akers?

A. Not long. Two or three years.

X. 7 Pretty well acquainted with you, however, to call you Bob?

A. Not so much.

X. 8 Did you holloa at him first or did he holloa at you?

A. He holloaed at me.

X. 9 Were you looking at him as he passed?

A. I was looking.

X. 10 Which way were you walking?

A. I was standing.

X. 11 Was it raining then?

A. Yes.

X. 12 Did Akers have the glass to his car down?

A. Yes, sir.

X. 13 Robert, you tell this Court and this jury  
page 129 ] that Akers Roark, the driver of the Yellow Cab  
with a passenger in the rear seat, was driving down

*Robert Puckett*

on a rainy day and had the window down next to you on his left hand side?

A. Yes, sir.

X. 14 And took time out to holloa to you as he went by. "hello Bob"?

A. Yes, sir.

X. 15 And you were standing there while it was raining?

A. It wasn't pouring down. Still it was raining, but it wasn't pouring down.

X. 16 Did you spend the day standing there in the rain?

A. I was standing there is all I know now.

X. 17 You have known Akers two or three years?

A. Yes, sir.

X. 18 You insist that the rear wheels of the Yellow Cab had passed out of Valley Street beyond the north line of Valley Street?

A. Yes, sir.

X. 19 Before the collision occurred?

A. Yes, sir.

X. 20 Can you explain, Robert, how the Chevrolet got down here on Valley Street and over on Court?

A. They were just coming up at such a speed that hit them and knocked them off.

X. 21 You say Akers stopped there before he  
page 130 ] entered Valley Street?

A. Yes, sir.

X. 22 How far can you see down Valley Street looking eastward when you stop?

A. In the car you are driving?

X. 23 Yes, sir?

A. I don't know.

X. 24 Have you any idea?

A. No.

X. 25 You say Akers stopped. Do you know whether or not he looked?

A. I couldn't tell you which way he was looking.

X. 26 Couldn't tell which way he was looking?

A. No, sir.

X. 27 If he was looking there was nothing to keep him

*Robert Puckett*

from seeing approaching cars, or nothing to interfere with him seeing cars?

A. I don't know.

X. 28 How did it happen that you watched him on down to Valley and on across?

A. I was standing there and seen the new cab and watched to see where he was going.

X. 29 Whereabouts was the glass that was between the cars?

A. Laying on the right hand side of Valley Street going west.

page 131 ] X. 30 Was it in Valley Street or beyond the North line?

A. Sorta over to one side where the Yellow Cab was setting.

X. 31 Was it in Valley Street or in Court Street beyond Valley?

A. The glass was back out here in the road, sorta on the edge of the road.

X. 32 Robert, look here at this diagram. If this is Valley Street and this is west and Roark's car was coming down Court and crossing Valley and this is the north line of Valley, now, whereabouts was the glass on the surface of the street?

A. Sorta along here. (Indicating.)

X. 33 Take this pencil and mark wherever it is.

A. Right here. (Witness marks.)

X. 34 You are marking a place near the north west intersection of Court Street and Valley and a few feet from the corner. Is that right? Right here, that is where you say?

A. The Yellow Cab lay up against there.

X. 35 I am asking you where the glass was?

A. Oh, it was scattered.

X. 36 For some little bit?

A. Several feet.

X. 37 How many?

A. Five or six feet.

X. 38 Which direction was it headed? What  
page 132 ] direction did it take?

A. Down Valley Street.

X. 39 What time of day was it?

A. I don't remember what time of day it was.



*Robert Puckett*

X. 40 Was it three or four o'clock?

A. I couldn't tell you.

XX. 41 Or six o'clock in the afternoon?

A. I couldn't tell you.

X. 42 Had you had supper?

A. No.

X. 43 Hadn't had supper. Had you had dinner?

A. I don't remember.

X. 44 Had you had breakfast?

A. Yes, sir.

X. 45 You don't remember whether you had had dinner or not?

A. I don't remember what time of day it was.

X. 46 Was it raining so much that it obscured the sun?

A. Yes.

X. 47 It was raining too hard to tell just where the sun was, is that right?

A. Yes, sir.

X. 48 Raining too hard to see what part of the sky the sun was in?

A. Yes, sir.

X. 49 Were there any trees along the west line  
page 133 ] of Court Street? Are there any along there?

A. One down there.

X. 50 What time of the year was that, do you recall that?

A. I don't know. It was April or May.

X. 51 You think it was in the Spring?

A. Yes, sir.

X. 52 You think in April or May?

A. Some where along there. I don't know.

X. 53 You don't remember what time of day it was except that you had had breakfast that morning?

A. That is right.

X. 54 As I understood you Akers Roark had the window down?

A. On the side he was driving on was down.

X. 55 Did you see him reach up and move the windshield wiper on his windshield?

A. No, sir.

X. 56 Did he look around at you when he spoke?

*Robert Puckett*

A. Yes, sir.

X. 57 Did he keep looking?

A. No, he just holloaed "hello Bob" and I holloaed.

X. 58 What did you call him?

A. Akers.

X. 59 What were you doing standing on the sidewalk in the rain?

A. The rain wasn't hitting me there.

page 134 ] X. 60 It wasn't hitting you yet it was raining so much you couldn't tell where the sun was?

A. It wasn't raining so much, but it was raining.

X. 61 You were not in the rain yourself?

A. I was at the side of the Court House.

X. 62 Whereabouts along the Court House were you?

A. Right out there.

X. 63 Right opposite the front window?

A. Yes.

X. 64 Opposite this front window? (Indicating.)

A. Yes, sir.

X. 65 Akers spoke to you as he went down the hill. Were there any cars parked along there?

A. Some parked back up here. (Indicating.)

X. 66 Was Court in session that day?

A. I don't remember.

X. 67 You don't remember whether any Court was going on or not?

A. No.

X. 68 As a matter of fact wasn't that along about the middle of June?

A. I don't remember.

By the Court:

Did he say he saw the collision?

By the Witness:

Yes, sir.

By the Court:

Did you see the collision?

page 135 ] By the Witness:

Yes, sir.

*Robert Puckett*

By the Court:

Why not let him mark on the sketch where the collision occurred.

X. 69 Mark on this sketch where the cars were when they ran together. First mark where you put the glass. This is Valley Street where you put the glass. Now where did the collision actually occur? Just draw a little square for the cab.

A. (Witness marks.)

X. 70 Now where was the Chevrolet at the time of the impact? Where did it hit the cab?

A. Right here. (Indicating.)

X. 71 You said it hit right up here?

A. It hit the cab up here.

X. 72 Draw the Chevrolet at the time it hit the cab. Where was it when it hit the cab?

A. Right in here. (Indicating.)

X. 73 Draw a square there for it. Make a mark for the Chevrolet when it hit the cab. Where did it hit?

A. Up here. (Witness makes mark.)

X. 74 Put a mark where they come together.

A. Right here. (Indicating.)

X. 75 As I understand you this is the place right here where they hit?

A. Yes, sir.

X. 76 This is Court Street, the intersection  
page 136 ] right down yonder. Now, Robert, if I understand you correctly, I will put my yard stick where you now say the Yellow Cab and the Chevrolet came together, is that correct?

A. Yes, sir.

X. 77 That is in Valley Street, isn't it?

A. The Chevrolet was in Valley Street.

X. 78 And you say the glass was right over here where I have the stick now?

A. Yes, sir.

X. 79 This cross mark up here is the cab in Court Street and this long mark is for the cab coming—(interrupted.)

A. The whole mark.

By the Court:

I want you lawyers to listen. I may have misunderstood.

*Robert Puckett*

Did you or not say that the cab had crossed Valley Street when the collision occurred?

By the Witness:

It had done cleared Valley Street not lacking over three foot.

By the Court:

He cleared lacking three feet?

By the Witness:

That is right.

X. 80 You didn't say that the rear wheels of the cab had cleared Valley Street?

A. Hadn't lacked over three feet, the whole rear end, of clearing.

X. 81 Not over three feet?

A. Lacked about three feet of the whole rear end  
page 137 ] clearing.

X. 82 The north side of Valley Street?

A. Yes, sir.

X. 83 Bob, I will ask you if you didn't tell me some time ago that the rear wheels of the cab had crossed and passed beyond the north line of Valley Street when the collision occurred. Didn't you tell me that when you started out?

A. Lacking about three feet.

X. 84 You didn't say anything about three feet, did you?

By Mr. Warren:

Object to him arguing with the witness.

X. 85 Did you say anything about three feet?

A. Yes, sir, I said three feet.

By Mr. Phillips:

I will ask the stenographer to refer back and read the second question of my cross examination.

NOTE: The reporter read the following question and answer into the record.

"X. 2 His hind wheels had cleared the north curb of Valley Street?

"A. Yes, sir."

*Robert Puckett*

X. 86 Now Robert, I want you to go, with the Court's permission, inside the Court Room and point out where you were standing when you saw Akers Roark. I want you to show first where you were standing.

By Mr. Warren:

page 138 ] We object. We will let him go outside to the spot he was standing.

X. 87 I will withdraw that question. Now, Robert, as I understand you were standing just about opposite this window I am pointing?

A. Yes, sir.

X. 88 You were standing against the wall or not?

A. I was standing right up next to the wall.

X. 89 Against the wall of the Court House, is that right?

A. Yes, sir.

By Mr. Phillips:

If your Honor please, we want to take this witness out there or want him to step out and examine it and report whether or not he can see a car as it enters Valley Street according to what he says Akers Roark's car did.

By the Court:

You can prove what the conditions are here.

X. 90 I will ask you this, Robert: If you were standing where you say you were can you see a car entering Valley Street where you say Roark was? I will ask you if you can now or could you at that time see that car?

A. Yes, sir.

X. 91 You swear you could see it?

A. Yes, sir.

X. 92 And you could see it entering Court Street from Valley—could you see on the north side of Valley?

page 139 ] A. Yes, sir, I seen it.

X. 93 That was at the time of the wreck in which Akers Roark was driving a Yellow Cab, was it?

A. Yes, sir.

X. 94 Do you know what car ran into him? Who was driving the car that ran into him?

*Worley Henry*

A. Perkins.

X. 95 Do you recall that there is a tree just north of where you say you were standing? There is a tree?

A. There is one there.

X. 96 Do you know what kind of tree it is?

A. Maple.

X. 97 How tall are you, Robert?

A. I don't know exactly.

X. 98 About how tall?

A. About five feet.

Witness stood aside.

WORLEY HENRY, the next witness, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 You are Worley Henry?

A. Yes, sir.

Q. 2 You are the owner of the Yellow Cab  
page 140 ] Company?

A. Yes, sir.

Q. 3 I believe Roark was driving your cab on that day you had the accident in question?

A. Yes, sir.

Q. 4 Did you come to the scene of the accident shortly thereafter?

A. Yes, sir.

Q. 5 Mr. Henry, where were you when you found out about the accident?

A. Vann's Warehouse.

Q. 6 On Main Street about three-quarters of a mile?

A. Back over at Vann's Warehouse on the southside of the railroad.

Q. 7 You got in the car and came from something like a mile away?

A. Yes, sir.

Q. 8 When you got there what did you find?

A. Well, I found the Yellow Cab turned around in Court Street and heading back this way.

*Worley Henry*

Q. 9 Headed South?

A. Yes, sir.

Q. 10 Where did you find the coupe?

A. Setting in Valley Street just a little west of the center of Court Street.

Q. 11 Now, I show you this picture which has  
page 141 ] been introduced as No. "A". Does that correctly  
represent the position of the coupe and the cab?

A. That is where the cab and coupe was when I got there.

Q. 12 I will show you No. "C" introduced by the defendant showing where the cab was struck and was standing. Is that a correct view of it

A. Yes, sir.

Q. 13 And here is No. "B" which probably shows a little bit better. Where was your cab struck? What part of it?

A. The right rear just about the wheel and fender.

Q. 14 When you arrived there did you make an examination and look around there carefully for glass and parts?

A. Yes, sir.

Q. 15 What was broken out of this car, if anything?

A. The rear tire was punctured and fender all mashed in and glass in the tail light shattered.

Q. 16 Tail light in this car was shattered?

A. Yes, sir.

Q. 17 Which one?

A. Right rear.

Q. 18 Where was that glass with reference to the north curb line of Court Street?

A. Just over the curb line eighteen to twenty-four inches.

Q. 19 Up in the hospital street?

A. Yes, sir.

page 142 ] Q. 20 Any glass or anything from the other car?

A. Glass out of the headlight.

Q. 21 What about the windshield of the coupe?

A. Possibly some from the windshield.

Q. 22 I show you picture No. "D". Does that show the headlight broken out and the windshield also of the Chevrolet?

A. Yes, sir.

*Worley Henry*

Q. 23 It shows that both headlights or one headlight was broken out of the coupe, Perkins' car?

A. I know the glass was broke out because it was reflector glass.

Q. 24 Where was that glass?

A. It was in the street, Valley Street.

Q. 25 Which side, right or left as you proceed toward the station, north or south?

A. On the north side.

Q. 26 North side of Valley Street?

A. Yes, sir.

Q. 27 Over what distance was that glass?

A. Scattered around considerably around the intersection of Valley and Court Street.

Q. 28 Did you notice the stop sign on the hospital side which way it was pushed?

A. It was pushed back toward the hospital back all the way.

page 143 ] Q. 29 Pushed back toward the hospital?

A. Yes.

Q. 30 Now, this picture No. "C", does that show the position of the cab?

A. Yes, sir.

Q. 31 You can't see the stop sign there?

A. It's right back of this. (Indicating.)

Q. 32 Point out to the jury where that stop sign is in Picture "C".

A. The cab hit the sign and pushed it back, back this way. Behind the bumper. The bumper pushed the sign back pointing up about forty-five degrees pointing this way. The bumper hit and pushed the sign back this way.

Q. 33 Now Picture No. "A", does that show the position of them where you found them?

A. I found a piece of pipe where the sign was pushed back all the way backward from the bumper.

Q. 34 When you got there was Perkins there, the driver of the coupe?

A. No, sir, he wasn't there.

Q. 35 Did you try to locate him?

A. I asked the driver of the cab where he was and he said he was gone.



*Worley Henry*

By Mr. Phillips:

We object.

Q. 36 Did you try to locate him?  
page 144 ] A. Yes, sir.

Q. 37 Hunt for him?  
A. Yes, sir.

Q. 38 Did you request Patton to look for him?

A. Yes, sir.

Q. 39 Now, Mr. Henry, was any glass broken out of  
your cab except the little red glass in Court Street?

A. Red glass.

Q. 40 What kind of glass?

A. Tail light.

Q. 41 Could you identify it and know it came out of  
your car?

A. Yes, sir.

Q. 42 You found the pieces there?

A. Yes, sir.

### CROSS EXAMINATION

By Mr. Thompson:

X. 1 You say that red glass was about twenty-four inches north of the north curb line of Valley Street?

A. About eighteen or twenty-four inches.

X. 2 That was red glass and you say red glass had been broken out of your tail light?

A. Yes, sir.

X. 3 I believe you said you saw other glass?

A. There was some windshield and headlight  
page 145 ] glass.

X. 4 Where was that glass with reference to the north side of Valley Street?

A. It was all along this section around here. (Indicating.)

X. 5 Was any in Court Street?

A. Some of it, yes.

X. 6 Or in Valley Street?

A. Some in Court and some in Valley.

X. 7 How close to the line was it?

A. Well, about twenty-four inches outside part of the

*Worley Henry*

glass. Some of it was over the line. Both glasses were broken in the coupe.

X. 8 Where was the coupe?

A. At the time I got there?

X. 9 Yes?

A. Been moved over here some where.

X. 10 How do you know it had been?

A. I didn't see it. They said it had been moved.

X. 11 It was still in Valley Street?

A. Yes, sir, still in Valley Street.

X. 12 How soon did you get there?

A. Around twenty minutes, I guess.

X. 13 All the officers were there, Mr. Patton?

A. Mr. Patton was there and Sergeant Maynard.

By Mr. Hutton:

Sergeant Maynard is dead now, isn't he?

page 146 ] By the Witness:

Yes, sir.

By Mr. Hutton:

What kind of condition was your cab in? Was it in good condition or what was the condition?

By the Witness:

It was in good condition.

By Mr. Hutton:

You said you were the owner of the Yellow Cab. It is a corporation, isn't it?

By the Witness:

Yes, sir.

By Mr. Phillips:

We move that your Honor strike that portion of defendant's testimony in which he says he is the owner. This is a suit against the Yellow Cab Company, a corporation, and it is immaterial who is the owner. It is a corporation authorized to do business in the State of Virginia.

By Mr. Hutton:

Mr. Henry is the owner of the stock in it. I thought you would ask if he was an interested party and I thought I would show.

*F. C. Box*

By the Court:

I believe I will overrule the objection.

By Mr. Phillips:

We except.

Witness stood aside.

page 147 ] F. C. BOX, the next witness, being first duly  
sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Warren:

Q. 1 What is your name?

A. F. C. Box.

Q. 2 What do you do, Mr. Box?

A. Sell life insurance.

Q. 3 In Abingdon?

A. Yes, sir.

Q. 4 Were you in Abingdon on the 19th day of June,  
1939, on which this wreck is alleged to have occurred?

A. Yes, sir.

Q. 5 Did you see any part of it?

A. The actual collision, no, sir.

Q. 6 Did you hear it?

A. Yes, sir.

Q. 7 Where were you?

A. Standing on the Court House porch.

Q. 8 On which end, anyway you heard the collision?

A. Yes, sir.

Q. 9 What did you do?

A. I asked somebody—

Q. 10 Did you go immediately to the scene of  
page 148 ] the wreck?

A. Yes, sir.

Q. 11 Tell the Court and jury what you found when  
you got over there.

A. When I got off the porch and went down the side-  
walk I saw the collision after it had happened.

Q. 12 You saw the physical situation there after the  
accident?

*F. C. Box*

A. Yes, sir, and the Yellow Cab was setting against the stop sign over there on the west side of Valley Street.

Q. 13 Valley Street or Court Street?

A. It was setting on Court Street on the north side of Valley.

Q. 14 Facing which way?

A. It was facing this way.

Q. 15 Facing south?

A. Yes, sir.

Q. 16 Where was the coupe?

A. It was setting in Valley Street.

Q. 17 Whereabouts in Valley Street with reference to the position of the Yellow Cab, was it west of it or east of it?

A. It was west.

Q. 18 How far west of the Yellow Cab was the coupe setting to the best of your judgment?

A. Oh, I would say ten to fifteen feet.

Q. 19 Does this picture No. "A" show the cor-  
page 149 ] rect position of those two cars when you got there  
assuming this to be the Yellow Cab and this to be  
the coupe?

A. This is west on Valley Street.

Q. 20 Yes, sir?

A. I would say it is.

Q. 21 Did you notice any glass there in the street?

A. Yes, sir.

Q. 22 Where was that glass with reference to the inter-  
section of Valley and Court Streets on the north side or south  
side of Valley or where was it?

A. On the north side of Valley Street.

Q. 23 Was it east or west of the center line of Court  
Street running to the hospital?

A. I would say east.

Q. 24 How close to the curb line extended of Valley  
Street would it have been?

A. Well, that I couldn't say exactly. I was figuring  
from the center of the road.

Q. 25 How far was that glass from the center of the  
road north?

A. It wasn't.

*F. C. Box*

Q. 26 That is going toward the hospital, how far from the center of Valley Street?

A. From the center of Valley?

Q. 27 How far was it over that way toward page 150 ] the curb line of Valley Street?

A. On the north curb?

Q. 28 Yes, sir?

A. I would say it was right about the curb line.

Q. 29 Had either of those cars been moved when you got down there?

A. Well, I couldn't say been moved before I got there or not.

Q. 30 Did you go immediately after you heard the crash?

A. Yes, sir.

Q. 31 Was anything moved after you got down there?

A. Well, the Chevrolet coupe was setting in the road as I spoke a moment ago and the driver pulled that automobile up about approximately from four to six feet.

Q. 32 What do you mean up, east or west?

A. West.

Q. 33 Did anybody say anything to him?

A. Yes, sir.

Q. 34 What was said?

A. The driver of the cab told him not to move that automobile before the law got there.

Q. 35 What did he do then, if anything?

A. Well, he stopped.

Q. 36 Did he get out, stay in the car or what became of the driver of the coupe?

page 151 ] A. I couldn't say.

Q. 37 You don't recall.

A. No, sir.

Q. 38 At that time had any officers gotten there?

A. No, sir.

Q. 39 Were you there when the officers came?

A. Yes, sir.

Q. 40 Had Perkins, driver of the coupe, left before the officers got there?

A. I don't remember.

*F. C. Box*

### CROSS EXAMINATION

By Mr. Thompson:

X. 1 You say that picture "A" is a true picture of the position of the cars when you got down there, didn't you?

A. Well, now whether that was after the automobile had been moved or before it was moved I couldn't say because I don't know when the picture was taken.

X. 2 You know where the cars were when you got down there and that is the location of the cars immediately after you left the Court House and got down there and found it or I understood you to say that?

A. I estimated that. You couldn't tell within two or three feet by looking at a picture.

X. 3 What do you mean telling within two or three feet, you mean the car was moved two or three feet?  
page 152 ] A. I estimated it.

X. 4 That the car was moved two or three feet? Is that what you mean?

A. Not exactly. That the car was two or three feet over before or after the picture was taken.

X. 5 I just simply want to know, Mr. Box, whether or not that picture represents the situation as you found it when you got off the porch here at the Court House and rushed right down there. Mr. Warren asked you if that picture portrayed the location and general situation and I understood you to say it did?

A. To the best of my knowledge, as I said, I estimated that it was about four feet or something like that, four to six feet, and I couldn't tell on a picture whether that was taken after or before.

X. 6 Anyway that Chevrolet as shown on "A" is approximately where it was when you got down there immediately after the accident, is that right?

A. Yes, sir.

X. 7 Not over four or six feet either east or west from that place, you would say?

A. Well, west. Or east.

X. 8 You said you saw some glass there in the road. Did you see where the headlights and windshield had been broken out of the coupe—did you see the front of the coupe?

*F. C. Box*

A. Yes, sir.

page 153 ] X. 9 The windshield and headlights had been broken, hadn't they?

A. Yes, sir.

X. 10 Now where was that glass that came from that windshield and headlights of the coupe?

A. It was in the intersection of Court Street about the north curbing of Valley Street.

X. 11 You mean on a line parallel, if extending the north curb line across that the glass would be about in that line?

A. Yes, sir.

X. 12 Did you see any glass south of the north curb line of Valley Street in the intersection?

A. No.

X. 13 South, back this way to the north curb line of Valley?

A. It was about the north curb line.

X. 14 Did you see any south of that point?

By Mr. Warren:

He said at the curb line.

By the Court:

I think the witness can understand.

A. No, sir.

X. 15 Did you see Garland Patton there, the Town Sergeant?

A. Yes, sir.

X. 16 Did you see him making measurements?

A. Yes, sir.

X. 17 Did he point out any glass to you or you to him?

A. No, sir.

page 154 ] X. 18 Did you see any glass over on the west corner of the intersection or where was the glass?

A. There was glass on the right of the north of the center of Court Street.

X. 19 On the right hand side going towards the hospital?

A. Yes, sir.

X. 20 You didn't see any on the west side?

*Preston Rodefer*

A. I don't recall.

X. 21 What did you say you do, sold insurance?

A. Life insurance.

## RE-DIRECT EXAMINATION

By Mr. Warren:

Q. 1 You have no interest in this case?

A. No.

Q. 2 Are you related to any of the parties?

A. No, sir.

Q. 3 Do you know Worley Henry?

A. Yes, sir.

Q. 4 Are you any particular friend of his?

By Mr. Thompson:

I object.

By Mr. Warren:

I withdraw the question.

Witness stood aside.

NOTE: Thereupon at 5:00 the Court adjourned until 9:00 o'clock, July 2, 1940.

page 155 ]

## MORNING SESSION

Abingdon, Virginia, July 2, 1940

The Court met pursuant to the adjournment.

Present: The same parties as heretofore noted.

PRESTON RODEFER, the next witness, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 Your name is Preston Rodefer?

A. Yes, sir.

Q. 2 Preston, I believe you are now employed by the Yellow Cab Company?



*Preston Rodefer*

A. Yes, sir.

Q. 3 You live in Abingdon do you, Mr. Rodefer?

A. Yes, sir.

Q. 4 Do you remember this accident down here at the intersection of Court and Valley Streets last June between the cab and car of Mr. Perkins?

A. I do.

Q. 5 Did you come to the scene of the accident?

A. Yes, sir.

Q. 6 As I understand, you did not see the accident?

A. No, sir.

page 156 ] Q. 7 With whom did you come to the scene?

A. I brought Worley Henry to the scene of the accident.

Q. 8 Now, Mr. Rodefer, when you arrived where was the cab?

A. The Yellow Cab?

Q. 9 Where was it in the street?

A. It was on the extreme left side of Court Street with the back wheel laying up on the stop sign.

Q. 10 In front of Craig's home there?

A. Yes, sir.

Q. 11 West side of Court Street?

A. Yes, sir.

Q. 12 Where was the coupe?

A. It was about ten to twelve feet down Valley Street, that is in the direction of the cemetery.

Q. 13 Did you see Perkins there?

A. No, sir.

Q. 14 Did you go to the hospital?

A. Yes, sir.

Q. 15 Did you see him at the hospital?

A. No, sir.

Q. 16 Did you make inquiries as to where he was?

By Mr. Thompson:

I object, if your Honor please.

By the Court:

Overruled.

Q. 17 Did you make inquiries as to where he was?

A. I did not, but I heard one of the officers making it.

*Preston Rodefer*

Q. 18 Who moved his car from the street?  
page 157 ] A. Do you mean from the point it was setting  
when I got to the scene of the accident?

Q. 19 Yes, sir?

A. I did.

Q. 20 Did you drive that automobile?

A. Yes, sir.

Q. 21 Now, Mr. Rodefer, who told you to move it?

A. Sergeant Maynard, State Police.

Q. 22 He is now dead?

A. Yes, sir.

Q. 23 I want you to tell the jury what kind of brakes  
or what the brakes were like on that automobile?

A. It didn't have practically any brakes at all. When  
I moved it I set my foot to the brake and it went to the floor  
board—didn't take any effect—practically no brakes at all.

Q. 24 Did you look for any glass around there?

A. Yes, sir.

Q. 25 Was any glass broken out of this cab?

A. There was a tail light out of the right rear tail light.  
It was a DeLuxe Chevrolet with double tail lights and the glass  
was broken out of the right tail light.

Q. 26 Where was that glass with reference to the north  
curb line of Valley Street, the side next to the hospital?

A. I judge it was laying from eighteen to twenty-  
page 158 ] four inches inside the curb line on the right hand  
side of Court Street.

Q. 27 Were you there when Worley Henry looked?

A. I was there, Chief Patton, Worley Henry and myself.

Q. 28 Some other glass there, wasn't there?

A. Yes, sir, part of the windshield out of the other car  
and both headlights as I remember.

Q. 29 Where was that glass?

A. That was just on the inside of Valley Street.

Q. 30 North side of Valley Street?

A. On the north side of Valley. I will say the tail light  
and headlight was laying something like three to four feet apart,  
and some of it closer than that.

Q. 31 Now then, did you have occasion to talk to  
Woodard the occupant of the other car?

A. Yes, sir, I did.

*Preston Rodefer*

Q. 32 What was his condition with reference to being intoxicated?

By Mr. Thompson:

If your Honor please, I object to asking the witness the condition of somebody in the other car.

By Mr. Hutton:

I want to show that and I will tell you in Chambers what I am leading up to.

NOTE: Thereupon the Court and Counsel retired into Chambers and the following proceedings were had  
page 159 ] out of the presence of the jury:

By Mr. Hutton:

If your Honor please, I want to show the condition of Woodard, the occupant of the coupe, not the driver, and I will avow if permitted to testify he will say that he smelled whiskey or some intoxicant on his breath at the hospital immediately after the accident and that another witness which we have if permitted to answer will say that either Perkins or Woodard told them—I think they were both present when the statement was made—either Perkins or Woodard told this witness, another witness, that at the time of the wreck they were arguing over two cans of beer. I want to show the condition of the occupants of the coupe to show whether or not they were paying attention and to show whether or not the driver was under the influence of an intoxicant and finally as stated to show the accident was caused by the sole negligence of the coupe. That is our theory on which we ask that this witness be introduced.

By the Court:

You want to prove by this witness what Woodard and Perkins were doing or saying?

By Mr. Hutton:

I want to prove by this witness that he smelled Woodard's breath at the hospital and by another witness that one stated in the other's presence that they were arguing over two  
cans of beer immediately preceding the accident  
page 160 ] and that they weren't paying any attention. In

*Preston Rodefer*

other words we want to show all the circumstances surrounding the accident.

By the Court:

It seems that your theory is that Perkins' negligence was the sole proximate cause of the accident. If the case goes to the jury properly and they should find it a fact that his negligence was the sole proximate cause, I think that would relieve the Yellow Cab, even though it might be negligence in a way that did not proximately cause the accident, but I don't believe you can prove that fact, if it is a fact, in the way you are trying to prove it. Perkins and Woodard are both available and I will sustain the objection.

By Mr. Hutton.

Exception.

By Mr. Warren:

If your Honor please, we want to introduce Woodard as an adverse witness, with the permission of the Court, and ask him if he was drinking at the time of the accident or under the influence of any intoxicant.

By Mr. Thompson:

We object because we say it makes no difference if he was dead drunk. He wasn't operating the car and as I understand they are relying on the theory that this accident was caused solely by the negligence of Perkins. If that is true, what difference would it make if somebody was drinking in the car?

By the Court:

I think that might be a circumstance on the question of the driver's negligence, but when a witness is introduced as an adverse witness, I believe you have first to show that he is adverse and some necessity for cross-examination or contradiction, but just to introduce that man on the question of whether he was drunk or not, I don't believe you can do that. The question is how the accident happened.

By Mr. Warren:

The witness will say that Woodard said to Perkins that he didn't see that cab when he hit it because they were quarreling over two cans of beer.

*Preston Rodefer*

By the Court:

You can put him on and ask him that and then contradict him as to that. I will permit you to do that notwithstanding he is your witness.

By Mr. Thompson:

Does your Honor think that sufficiently material? As I understand it the whole purpose is for the purpose of contradiction to ask him a question and bring another witness to contradict it.

By the Court:

He was an eye witness to that accident.

By Mr. Hutton:

We don't want to put him on as our witness and be bound by him.

By the Court:

I am telling you to put him on and ask him about the occurrence and if he makes a statement under oath as your witness that you can contradict by other witnesses, the Court will permit you to do it, but I don't think you can put him on for the purpose of showing that he has made a contradictory statement.

page 162 ] By Mr. Hutton:

We wouldn't want to put him on under those conditions. We haven't talked to him, but it is our information that he is adverse to us.

By the Court:

I certainly wouldn't give my permission to putting him on unless he would state the facts about how the accident occurred. If you are going to except to the ruling, I think the record ought to show that you have permission to introduce him and if after he has testified to the facts you can contradict him, all right.

By Mr. Phillips:

As I understand it you are sustaining our objection to the question asked this witness out here?

By Mr. Hutton:

We want to show an exception to that and we ask to put

*Preston Rodefer*

Woodard on as an adverse witness and as I understand that request is denied, but the Court will allow us to put him on as our own witness.

By the Court:

I will allow you to call him and examine him on the facts of that collision and then if he makes a statement that you can contradict, I will permit you to do it, but I will not permit you to put him on just for the purpose of showing that he has made inconsistent statements. What the Court and jury wants to know is the facts of the accident.

By Mr. Hutton:

I think the record will show that the witness was summoned by the Plaintiff and they have not used him and it is our information from the witness now on the stand, page 163 ] Rodefer, if permitted to answer he will answer in the affirmative that he did smell some intoxicant on his breath at the hospital immediately after. Our request is to be permitted to show that and if your Honor will not permit us to by this particular witness, then to call the witness Woodard and ask him if he made a statement that they were arguing over two cans of beer at the time of the accident and if he denies that we can contradict him by another witness.

By the Court:

I believe I have stated what my view is.

By Mr. Hutton:

Exception.

NOTE: Thereupon the witness, Preston Rodefer was brought in Chambers and the following evidence was introduced out of the presence of the Jury:

PRESTON RODEFER, the witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hutton:

Q. 1. Mr. Rodefer, out of the presence of the jury I want to ask you a question, and that is if you went to the hos-

*Preston Rodefer*

pital immediately after you arrived at the accident and if you there talked to or saw Woodard, an occupant of the coupe?

A. I did.

Q. 2 Did you have a chance to observe him?  
page 164 ] A. Yes, sir.

Q. 3 How long did you talk to him or were you in his presence?

A. Well, I imagine something like five minutes. I come to the right hand side of the bed in the ward of the hospital on this end, men's ward.

Q. 4 How close were you to him?

A. He asked me to give him a light and I walked to the foot of the bed, to the left hand the way he was turned laying, and I lit the cigarette, got just as close as I could down and handed him the cigarette, twelve to eighteen inches of his face.

Q. 5 Did you smell anything of an intoxicating nature on his breath?

A. I did.

Q. 6 State to the Court if he was under the influence of an intoxicant?

A. He was under the influence of some kind of intoxicant. I wouldn't say what.

Q. 7 Was it noticeable?

A. Very noticeable odor.

Q. 8 How soon was that after the accident?

A. I judge ten minutes after the accident actually happened. The first call was made for the ambulance and the next call was for us and as soon as we could get in the car we went to the hospital after we observed the wreck.

page 165 ] CROSS EXAMINATION

By Mr. Thompson:

X. 1 Was the boy Woodard hurt?

A. A few lacerations on his face and head.

X. 2 He was in bed?

A. Yes, sir.

X. 3 Had they been dressed?

A. Massaged.

X. 4 Do you know whether they had been massaged with alcohol?

*Preston Rodefer*

A. There was a wet towel laying on the floor beside him is all I know.

By Mr. Phillips:

We made our objection before and the Court sustained it.

By Mr. Hutton:

We except to the ruling of the Court in excluding this testimony.

NOTE: Thereupon the Court and counsel returned into Court and the following proceedings were had in the presence of the jury:

PRESTON RODEFER, the witness on the stand, was further examined and testified as follows:

page 166 ] DIRECT EXAMINATION

By Mr. Hutton:

Q. 33 Mr. Rodefer, were you there when the pictures were taken?

A. Yes, sir.

Q. 34 Do you know who moved the car, the wreckage of the coupe?

A. The Virginia Motor Company wrecker.

Q. 35 Hauled it away from the scene of the accident?

A. Yes, sir.

Q. 36 I show you a picture which has been introduced as Plaintiff's Exhibit No. 1, showing the right front of this Chevrolet coupe damaged, is that correct?

A. Yes, sir.

Q. 37 Also No. "D" showing the same thing. Does that correctly portray that condition?

A. Yes, sir.

Q. 38 You never did on that occasion talk to the driver of the coupe?

A. No, sir.

Q. 39 Didn't see him?

A. No, sir.

Q. 40 What time did you come to the accident with reference to the time the Town Sergeant, Mr. Patton, came?



*Akers Roark*

A. I wouldn't say for sure whether he was there when I got there or not.

page 167 ] CROSS EXAMINATION

By Mr. Thompson:

X. 1 There was a big crowd of people?

A. No, sir, hadn't much of a crowd gathered then.

X. 2 How many did you see there?

A. I would say ten to fifteen people when I got to the scene of the accident.

X. 3 You say you are employed by the Yellow Cab?

A. Yes, sir.

X. 4 What do you do, drive or not?

A. Then I was driving.

X. 5 You are not driving any more? What do you do now?

A. Dispatcher. Assistant Manager. Bookkeeper.

X. 6 Been raining that day?

A. Yes, sir.

X. 7 Was it raining when you came up?

A. Yes, sir, still raining.

X. 8 Did you see the pictures taken?

A. Yes, sir.

X. 9 Who took them?

A. Chief Patton.

X. 10 Are those the pictures Mr. Patton took?

A. I wouldn't say whether Patton took these or whether Austin took them.

page 168 ] X. 11 Did you see Austin?

A. I wouldn't say for sure it was Austin. It was either Austin or somebody from the Forum.

X. 12 You saw somebody other than Mr. Patton taking pictures?

A. Two different ones were taking pictures.

Witness stood aside.

AKERS ROARK, the next witness, being first duly sworn, testified as follows:

*Akers Roark*

## DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 What is your name?

A. Akers Roark.

Q. 2 On the 19th of June, 1939, were you driving a Yellow Cab?

A. Yes, sir.

Q. 3 On that day were you taking a Mrs. Eden, the plaintiff in this case, to the local hospital?

A. Yes, sir.

Q. 4 Where did you pick her up?

A. At her home down here near Stone Hill.

Q. 5 How long have you been driving a cab?

A. Well, off and on three or four years.

Q. 6 You were driving for the Yellow Cab Company on this occasion?

page 169 ] A. Yes, sir.

Q. 7 She was a passenger in your car?

A. Yes, sir.

Q. 8 And your destination was the George Ben Johnston Hospital?

A. That is right.

Q. 9 How did you come up Main or Valley Street?

A. Come up Main.

By Mr. Phillips:

We object to leading.

Q. 10 When you got to the Court House where did you go?

A. Turned left hand and came down Court Street.

Q. 11 You were proceeding north on Court Street?

A. That is right.

Q. 12 When you turned down Court did you speak to anybody?

A. Spoke to Mr. Bob Puckett.

Q. 13 Where was Puckett?

A. Standing some where down the sidewalk here. I couldn't tell exactly.

Q. 14 What was your speed as you approached the intersection?

*Akers Roark*

A. I would figure I was making probably ten or twelve miles an hour. Of course I slowed down.

Q. 15 When you went down tell what you did.

A. When I pulled down there, I stopped down there and when I got down there I seen a car coming out it looked to me like two hundred yards—I imagine two hundred  
page 170 ] yards.

Q. 16 What did you do?

A. I put the car in low and I made Valley Street, I would say all but maybe three foot, was done what you might say made, in the intersection.

Q. 17 You mean you crossed Valley?

A. And this car come down and struck the rear end and picked it up and throwed it over on the stop sign.

Q. 18 Which side of Court Street were you driving on at the time he struck you?

A. I was keeping on the right.

Q. 19 You know the stop sign is down there?

A. That is right.

Q. 20 You crossed the street and you say you made it all with the exception of about three feet?

A. I would say three feet. Maybe didn't have that much.

Q. 21 What part of the car was struck?

A. Right on the rear end right at the wheel.

Q. 22 Which way did your car turn?

A. Why, it's bound to have turned this way, but I couldn't say.

Q. 23 And headed back this way?

By Mr. Phillips:

We object to what it is bound to do.

A. I couldn't say it did. It was done so quick.

Q. 24 Anyway it knocked it some distance in  
page 171 ] the street?

A. That is right. Turned it entirely.

Q. 25 You came to a stop sitting up on Court Street?

A. Setting on the stop sign. The stop sign was bent.

Q. 26 Which way was the stop sign bent?

A. Toward the hospital.

Q. 27 You came to rest there?

A. Yes, sir.

Q. 28 Where did the coupe go?

*Akers Roark*

A. The coupe stopped right near about, I would say, with the radiator close to the curbing, maybe not as close as I am thinking, and he jumped out of the coupe and come over to our car and said take her to the hospital and he would pay for it. We raised Mrs. Eden up and she said her chest was hurting. But he had got in the coupe and I laid her back down and I stopped him twice. He pulled up a little distance each time. He pulled up twice. The last time I told him not to move until the officers got there.

Q. 29 Who took Mrs. Eden to the hospital?

A. The ambulance. I think it was Sam Campbell.

Q. 30 Do you know who called?

A. Yes, sir, I did. Then later Mrs. Edward Craig in front of her home where the cab stopped.

Q. 31 She was taken to the hospital in the ambulance?

A. Yes, sir.

Q. 32 What became of the coupe, who was in  
page 172 ] it?

A. Woodard and Perkins.

Q. 33 Who was driving?

A. Perkins was driving.

Q. 34 After you stopped him from moving what became of Woodard and Perkins?

A. Perkins, after I stopped him the last time, he got out of the car and Mr. Maynard, State Police, is dead now, was coming down the street pretty close and Mr. Perkins turned right on up towards the hospital and they was some pick-up truck come along and pulled up to Woodard and taken him on to the hospital.

Q. 35 At the time was any other traffic approaching from east or west on Valley Street?

A. No, sir.

Q. 36 Just you and the coupe and no other cars were on Valley Street at that time?

A. That's right.

Q. 37 No other cars in sight?

A. No, sir.

Q. 38 How close were you to Perkins when you and he were helping Mrs. Eden up?

A. He was right close. We was both crowded in there.

*Akers Roark*

Q. 39 State whether or not you smelled anything intoxicating on Perkins' breath?

A. Yes, sir. I did.

page 173 ] Q. 40 What was your speed, would you say, as you crossed, after you stopped this side of Valley Street before proceeding across Valley Street going north?

A. I was in low gear. You start at nothing. I would figure probably I was making seven miles an hour, some where about. I couldn't say definite.

Q. 41 You wouldn't be definite?

A. No, sir, I couldn't.

Q. 42 It was raining that day?

A. Yes, sir.

Q. 43 Did Mrs. Eden say anything to you about the manner in which you operated the cab?

A. No, sir.

Q. 44 Mr. Roark, about what time of day did this accident happen?

A. About eleven-thirty.

Q. 45 In the morning?

A. That is what I think.

Q. 46 Do you know who was the first at the scene?

A. Mr. Bob Puckett is the first I noticed. Three come approximately at the same time.

Q. 47 Soon the crowd gathered?

A. Yes, sir, crowd gathered pretty fast.

Q. 48 Did you later have a conversation at the filling station of Mr. Bill Arnold east of town with Perkins in which two Widener boys were present and a Musser boy and Ep Atkins?

A. Yes, sir.

Q. 49 Do you recall the date of that conversation?

A. Not exactly, but it was last July after I quit driving for the Yellow Cab and we was up there in front of Arnold's place and Woodard and Perkins came out there and Woodard and I started the conversation first.

By Mr. Phillips:

We renew our objection to this testimony on the same grounds that defendant has stated.

*Akers Roark*

By the Court:

Overrule the objection.

By Mr. Phillips:

Exception.

By Mr. Thompson:

We object to telling what the conversation was.

By the Court:

I believe we decided it was better to ask the question.

Q. 50 Mr. Roark, what time of day was that?

A. Well, it was late in the afternoon. I wouldn't want to say just what time it was.

Q. 51 Did Perkins make a statement to you substantially as follows: That he didn't try to stop, that he could have stopped if he wanted to and that the next time a Yellow Cab got in his way he was going to knock it out of the street even though he had to get a truck to do it with?

A. Yes, sir. That is if he couldn't knock it out with a car he would get him a truck to knock it out.

page 175 ] Q. 52 Did Woodard make any statement there in your presence about two cans of beer?

A. He said when they hit my car he and Woodard were arguing over two cans of beer.

By Mr. Phillips:

We object to that on the grounds heretofore assigned in Chambers and also on the ground that it is immaterial and improper testimony, has nothing to do with the cause of this accident and is not binding upon the plaintiff who was a passenger in the Yellow Cab.

By the Court:

Was that particular point in your foundation?

By Mr. Warren:

Yes, your Honor. If it is not we will call him and put it in.

By Mr. Phillips:

Was that Woodard talking about Perkins?

By Mr. Warren:

Perkins and Woodard talking, made the statement to each

*Akers Roark*

other that they were arguing about two cans of beer when struck this car.

Q. 53 Who spoke those words?

A. Perkins spoke to Woodard and Woodard said, "don't go talking your head off now."

By Mr. Warren:

Said, "don't go talking your head off now?"

By the Witness:

That is right.

page 176 ] By the Court:

Did I understand you to say that Perkins made the statement about the beer?

By the Witness:

Yes, sir.

By the Court:

Was that all at the time Musser and those others were there?

By the Witness:

Yes, sir.

By Mr. Phillips:

We move that that testimony be stricken on the ground that Perkins was not asked any question while on the stand and this is an attempt to impeach him to put in testimony that Perkins was not asked about at all.

By Mr. Hutton:

We will recall him and ask him about it.

By the Court:

I don't remember what the question was that was asked Perkins. In any event I think the jury ought to be told as they were told yesterday that the testimony is admissible only for the purpose of going to the credibility of Perkins.

By Mr. Hutton:

Exception.

By the Court:

I think I will say further that any statement that Mr.

*Akers Roark*

Roark makes that was not included in your foundation question should be disregarded.

By Mr. Hutton:

I will recall Perkins and ask that.

Q. 54 Mr. Roark, was there anything wrong with your cab's condition? What was the mechanical condition of the cab?

A. Mechanical condition of the cab was in No. One shape.

Q. 55 Were any other passengers in your cab at the time?

A. No, sir.

Q. 56 You are not now working for the Yellow Cab?

A. No, sir.

## CROSS EXAMINATION

By Mr. Phillips:

X. 1 Mr. Roark, how old are you?

A. Thirty-three.

X. 2 How long did you say you had been driving for the Yellow Cab?

A. Off and on for about three or four years.

X. 3 It had been raining ever since you had had Mrs. Eden in the cab?

A. Yes, sir.

X. 4 Raining very hard?

A. Yes, sir, it was raining pretty hard. When I got her she walked to the cab with a parasol and I got out and put it down for her after she got in.

X. 5 Raining very hard?

A. Pretty. Hard enough the lady had to carry a parasol.

X. 6 Hard enough to get you wet if you stayed in it a minute or so?

A. I wouldn't say that.

X. 17 It was still raining when you came up to Court Street?

A. It was raining.

X. 8 About the same degree?

A. I couldn't tell you that, Mr. Phillips.



*Akers Roark*

X. 9 Did you have a windshield wiper?

A. Yes, sir, I had the windshield wiper going.

X. 10 I guess you have an automatic wiper?

A. I don't know whether it was automatic or air.

X. 11 You press a button to start it?

A. I believe that's the way it works on a '38.

X. 12 How did yours work?

A. You either pulled a button or pushed. It works different on different models.

X. 13 Was there any fog or mist accumulated at that time on your windshield on the inside?

A. Not as I noticed at all.

X. 14 You weren't reaching up with your hand to get off anything like that?

A. No, sir.

X. 15 Did you have your glass down?

A. I had the left hand glass down. Pulled up out here at Main Street. I give a stop signal and slowed down and went on down the street and Mr. Puckett was standing about the lower end of the Court House. I throwed up my hand at him and by the time I got to Valley Street I hadn't rolled my glass up.

X. 16 Were there any cars parked along side page 179 ] there?

A. I don't think there was.

X. 17 Do you recall whether Court was in session?

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

X. 18 Just whereabouts was your friend Puckett, the one you spoke to?

A. He was standing down here about the lower part of the Court House. I didn't pay any attention. I just spoke and passed him.

X. 19 You spoke in addition to waiving there?

A. Yes, sir.

X. 20 I understand you waved?

A. I spoke and throwed my hand up.

X. 21 Which hand?

A. The left. Had the right on the steering wheel.

X. 22 Any other cars coming up Court?

A. No, sir.

*Akers Roark*

X. 23 You had time to see Bob Puckett and speak and wave?

A. That is right, because I was not speeding.

X. 24 Was Puckett standing out at the curb line or up next to the building or just where?

A. I didn't pay no attention to that.

X. 25 You mean you don't know?

A. I didn't pay any attention. You have to be watching too close to pay attention to the public and drive a car.

X. 26 If you saw him enough that you knew  
page 180 ] him and spoke, don't you think you have enough  
recollection to know approximately where he was  
standing?

A. No, I couldn't tell you. A man over here about the Court House, I wouldn't pay no attention and me driving down the street in the car.

X. 27 I am not trying to get you to say definitely. I just want to know approximately. Was Puckett over near the curb line or back against the building?

A. I couldn't say that.

X. 28 Was he down here toward the north line?

A. He was right down in this territory right in here.  
(Indicating.) I couldn't say definitely where it was.

X. 29 Did you have the windows on the right hand side of the car up or down?

A. Had them up.

X. 30 Was any rain blowing in the left window as you turned around and went down to Valley Street?

A. No.

X. 31 I believe you said awhile ago it was still raining heavy enough to wet you?

A. In some instances.

X. 32 Yet you had your left window down?

A. I rolled it down to give the signals.

X. 33 Where did you roll your left window up, if you rolled it up?

page 181 ] A. That left window was never rolled up any more.

X. 34 It was down on until the accident?

A. That is right. Not rolled up any more.

*Akers Roark*

X. 35 When did your employment with the Yellow Cab cease? With reference to this accident?

A. It never ceased with reference to the accident.

X. 36 With reference to the date of June 19th?

A. I don't remember when we quit. Mr. Rodefer quit at the same time. I imagine they have it on the book.

X. 37 Preston Rodefer quit at the same time?

A. Yes, sir.

X. 38 Could you give us approximately the date? Within a week or two weeks?

A. Well, I couldn't.

X. 39 Now, as I understand, you looked down Valley Street and you say you saw a car coming about two hundred yards?

A. Right in the neighborhood of two hundred yards out Valley Street.

X. 40 About how wide is Valley Street at that intersection, Mr. Roark?

A. I don't know, sir. I am not a road man.

X. 41 Why didn't you stop and wait?

A. I had plenty of time if the man had been driving at any decent rate of speed.

X. 42 What rate of speed was he driving when page 182 ] you saw him?

A. I couldn't say, but he was making a pretty fast rate of speed, but I couldn't tell you just what rate of speed.

X. 43 Now, Akers, are you telling us that you could see the car two hundred yards down Valley Street and started across without ascertaining what speed he was coming?

A. He didn't look at that distance he was coming very fast, but in the time that he made it he was coming very fast. That is the reason I thought I could make it.

X. 44 You thought you could get across but you were mistaken?

A. On his speed, I was.

X. 45 You were mistaken on his speed? As a matter of fact, didn't you not see the car at all?

A. No, I seen it.

X. 46 You insist on that?

A. Yes, sir.

*Akers Roark*

X. 47 Did you observe any unusual features in the way that Chevrolet car was being driven?

A. I don't know what you mean.

X. 48 Did he appear to come straight up the street, wobbling across the road or not?

A. Well, I never paid any mind to it as to how he was running. It looked like I could make it. It didn't look like he was running real fast at that distance, two hundred yards.

X. 49 Would you say he was just driving up  
page 183 ] Valley Street at a moderate speed and there was  
nothing unusual about the manner in which he  
was driving?

A. I just seen him coming and thought I could make it.

X. 50 But you now admit you couldn't?

A. I now admit I didn't.

X. 51 You say you don't know how wide that street is?

A. Well, I don't know.

X. 52 Anyway you tell us that this car was about two hundred yards down Valley Street and you were not able to get your Yellow Cab across Valley Street before he could travel two hundred yards and hit you in the right fender, is that right?

A. I had made Valley Street but around three foot or less.

X. 53 You lacked three feet of clearing it while that car travelled two hundred yards up Valley Street?

A. Yes, sir.

X. 54 Was it still raining?

A. Yes, sir, still raining.

X. 55 And as I understand you did not observe anything abnormal or unusual about the way the other car was travelling, that is right, isn't it?

A. I don't understand what you mean.

X. 56 You didn't observe anything abnormal or unusual about the manner in which the other car was being driven?

A. You mean didn't notice him zigzagging or  
page 184 ] wobbling?

X. 57 Anything like that?

A. No, sir.

X. 58 Didn't notice anything unusual?

A. I just seen him coming.

*Akers Roark*

X. 59 Why didn't you wait long enough to be sure?

A. Two hundred yards is plenty to cross a small street as Valley.

X. 60 It wasn't time enough for you?

A. On his speed.

X. 61 Why didn't you observe what speed he was making before you crossed?

A. At the distance he was it looked like I could make it.

X. 62 You mean regardless of what speed he was making?

A. You couldn't tell what speed he was making.

X. 63 You couldn't start across the street unless you had an idea about what speed he was traveling or do you customarily do that?

By Mr. Hutton:

We object to what he does customarily.

A. Well, if I am driving and a man's far enough until I think there's plenty of time at the rate usually driven I always make it.

X. 64 After you started across Valley Street did you ever look down Valley to see whether the car was getting close to you or not?

page 185 ] A. Just about the time the car struck I looked.

X. 65 After you looked and left Court Street and crossed Court, you never again cast your glance down Valley Street to see whether or not that Chevrolet car was getting close until just a minute before he hit?

A. I figure it was eight or ten feet.

X. 66 In other words the Chevrolet traveled the difference between two hundred yards and eight or ten feet and you never looked to see what was becoming of it or what had happened to it, that is right, isn't it, according to your own testimony?

A. Well, that is right. He come from the distance I estimated, about two hundred yards, down the street. I started out across the street and by the time I got approximately out of the other street he hit.

X. 67 You never looked at him again after you left Court and came into Valley Street?

A. He was in eight or ten feet when I looked.

*Akers Roark*

X. 68 Never looked until he was in eight or ten foot of you?

A. (No answer.)

X. 69 What side of the road was he on?

A. He was on the right of Valley Street coming.

X. 70 On his right hand side?

A. On his right hand side, yes, sir. And I was some where right in the neighborhood on the right of Court Street where a driver's due to drive.

page 186 ] X. 71 I show you here picture marked Exhibit No. 2 and ask you if that is a picture of the Chevrolet you were driving?

A. That is my car.

X. 72 That is your car?

A. Yes, sir.

X. 73 That picture shows the right rear wheel off, does it?

A. That is right. The right rear rim and tire.

X. 74 And it shows a dent in the body of the car just back of there almost touching the door, doesn't it?

A. Yes, sir.

X. 75 How many doors did the car have?

A. Two.

X. 76 How many windows?

A. Two to a side.

X. 77 The front window extends about back to the middle of the car, doesn't it?

A. Yes, sir.

X. 78 Approximately to the middle of the car?

A. Yes, sir.

X. 79 Akers, with reference to this conversation that you say that you had up here about Arnold's station, about what time of day was that?

A. It was late in the afternoon. I wouldn't give a definite time about it.

X. 80 Just give us the approximate time.

page 187 ] A. I would figure some where in the neighborhood of five o'clock. I can't say definitely.

X. 81 Before your supper or had you had supper?

A. I don't remember that.

*Akers Roark*

X. 82 Don't remember whether you had had supper or not?

A. No.

X. 83 What time do you have supper?

A. Eat any where up to ten or twelve at night, no definite time. I eat whenever I get through.

X. 84 Were any cars in front of Arnold's place?

A. Some cars around—probably some citizens'.

X. 85 Did Musser have a car there, Arthur Musser?

A. I don't remember seeing Musser's car there at all.

X. 86 You are unable to say?

A. I never paid no attention. I was interested in Mr. Perkins.

X. 87 You were interested to remember what was being said also?

A. I was.

X. 88 Yet you weren't interested to notice whether or not Musser had a car there?

A. That was a different proposition.

X. 89 Did the other boys leave before you did or did you leave before they did?

A. Well, I couldn't say. I couldn't say who page 188 ] done the leaving first.

X. 90 Did you walk off toward the fair grounds with some of the other boys?

A. The show grounds.

X. 91 Did you walk there with two or three?

A. I think three of us, maybe four, walked that way.

X. 92 Who were they?

A. I believe there was two Widener boys and Musser walked that way. Maybe Atkins, but I think those three did.

X. 93 Had Perkins been drunk when he had that conversation?

A. He acted very much like it.

X. 94 Had you been drinking?

A. No, sir, I hadn't.

X. 95 How long had you been there?

A. Say in the neighborhood of an hour around the show ground and different places.

X. 96 How long had you been at Arnold's?

A. Fifteen or twenty minutes.

*Akers Roark*

X. 97 Had you been to Arnold's before?

A. On the same day?

X. 98 On the same day?

A. No, sir.

X. 99 Who did you come to Arnold's with?

A. I couldn't say who I came with.

X. 100 Was Perkins there when you got there?

page 189 ] A. Yes, sir.

X. 101 You hadn't been drinking?

A. No, sir.

X. 102 Hadn't even taken a beer that day?

A. No.

X. 103 Did you take any soft drinks or anything like that?

A. No, sir.

X. 104 Coca-Cola or any kind of soda?

A. No, sir, not that particular time.

X. 105 Had you been in the filling station?

A. No, sir. On this end of Arnold's driveway.

X. 106 Not in front?

A. On this end of the driveway.

X. 107 Is that in front of the station?

A. On this end of the station.

X. 108 Were you sitting down or standing up?

A. Sitting down part of the time and standing up part of the time.

X. 109 Akers, I will ask you whether or not something like ten days or two weeks after the accident happened you met Dave Eden, the husband of the plaintiff, on Main Street of Abingdon near the Washington County National Bank in the afternoon and made the statement to him substantially this referring to the cab that you were driving at the time of the accident: I drove down toward Valley Street, slow-  
page 190 ] ed up a little bit, looked both ways, didn't see anything and started across and was hit when about two-thirds the way across, or substantially that statement?

A. I did not.

X. 110 You deny that?

A. I sure do.



*Akers Roark*

X. 111 You deny that you made substantially the same statement?

A. Yes, sir.

X. 112 Do you deny talking to him?

A. No, sir, I talked to him.

X. 113 You did talk to him?

A. But it was a different conversation to that.

X. 114 Was it in the afternoon?

A. I won't say, but I remember the conversation with Dave Eden about this.

X. 115 You don't remember whether it was in the morning?

A. One time in the cab with me and one time in front of Kroger's instead of the Washington County Bank on Main Street.

X. 116 What time of the day was that, morning or afternoon?

A. I couldn't tell you that.

X. 117 You deny making any such statement or similar statements to Dave Eden?

A. I talked to Mr. Dave Eden and we were talking about the wreck and he said he wished I would help him out, that he needed all he could get out of it.

page 191 ] By Mr. Phillips:

If your Honor please, that is totally an unresponsive answer and not in response to the question I asked and I move the Court that it be stricken out.

By Mr. Hutton:

I think he asked it.

By the Court:

I don't know about the response to the question but if I understood him correctly he said that he did not have any such conversation as you related with Mr. Eden, but he said he did have a conversation. I believe it is fair to the witness to let him say what the conversation was.

By Mr. Phillips:

We except to the action of the Court because we didn't ask him that at all.

*Akers Roark*

X. 118 Now, you kept your left window down all the way down Court Street and it was down at the time of the accident. Was it raining hard enough to get you wet or rain in the window?

A. No, sir. If it had I would have had the glass up.

X. 119 Was the road slick?

A. Roads are slick when it rains on them.

## RE-DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 Did Mr. Dave Eden patronize your cab and continue to ride with you from the time of the accident?

A. Mr. Dave Eden for a little while after this wreck. Then he got to patronizing somebody else.

page 192 ] Q. 2 Rode with you?

A. Couple or three times after the wreck.

Q. 3 Don't now?

A. Very little. He usually uses Steve's Cab.

By Mr. Phillips:

We object to that.

By the Court:

I don't know that I caught clearly one or two answers. I believe you said you stopped down at the through street?

By the Witness:

Down at Valley Street.

By the Court:

You saw the other car coming?

By the Witness:

Yes, sir.

By the Court:

Did you start across the street before or after you saw the car?

By the Witness:

I started after I seen the other car.

By the Court:

Did you say you started in low or medium?

*Isaiah Perkins*

By the Witness:

In low gear.

By the Court:

Did you change your gear before you crossed?

By the Witness:

I don't remember. I couldn't answer that at all.

By the Court:

I believe you stated your best judgment about what speed you crossed the street?

By the Witness:

About seven miles an hour. Could be more or  
page 193 ] less.

RE-CROSS EXAMINATION

By Mr. Phillips:

X. 1 Did your speed increase as you travelled farther across the street?

A. I couldn't answer definitely. I would rather not answer that. I couldn't say.

X. 2 Why didn't you change gears as you started across?

A. You usually pick up enough speed to get up in second and from that to high.

X. 3 You say that you had not picked up sufficient speed?

A. I didn't.

X. 4 Do you say it now?

A. I ain't going to say it.

Witness stood aside.

ISAIAH PERKINS, being recalled, being first duly sworn, testified as follows:

RE-DIRECT EXAMINATION

By Mr. Warren:

Q. 1 You are the same Mr. Perkins who testified on yesterday and who was driving the coupe at the time of the accident?

*Isaiah Perkins*

A. Yes, sir.

Q. 2 I want to ask you a question. I don't know whether it was omitted yesterday or not. On the page 194 ] Sunday that you admit you were talking to some boys and to Woodard down at Arnold's filling station, I will ask you if you said this or in effect this to your friend Woodard in that conversation: We were fussing or quarrelling or talking or arguing about two cans of beer when I hit that fellow?

A. No, sir.

Q. 3 Did you say that?

A. No, sir.

Q. 4 Or anything to that effect?

A. No, sir.

Q. 5 Did you say anything about two cans of beer there at the time of the accident?

A. I don't remember if I did.

Q. 6 You might have and not remember it?

A. Oh, no, not at the time of the accident.

Q. 7 Were you talking about cans of beer at the time of the accident to Woodard?

A. I am not sure.

Q. 8 You are not sure. You might have been?

A. It might have been mentioned.

Witness stood aside.

By Mr. Warren:

I take it it is not necessary to put the man back to contradict him because he has already testified.

page 195 ] By Mr. Hutton:

We have a deposition of Homer L. Sapp which we want to read.

By Mr. Thompson:

We want to be heard before that deposition is read.

NOTE: Thereupon the Court and Counsel retired into Chambers where the following proceedings were had out of the presence of the jury:

By Mr. Hutton:

We have the deposition of Homer L. Sapp, a witness who was here and summoned but went to Langley Field and joined the army. Anyway we gave notice and had the deposition taken down there and we want to read that deposition.

By Mr. Thompson:

Of course, we weren't present at the taking of the deposition, but we want to object to the introduction of this deposition because the whole deposition is about what Homer L. Sapp knew about Esmeral Woodard who happened to be a passenger in the car and it says that he didn't see Isaiah Perkins and knows nothing about it, and this entire deposition is with reference to seeing Woodard drinking beer and he was an occupant of the car.

By Mr. Hutton:

And that he was drinking at ten-thirty.

By the Court:

Suppose you put Woodard on the stand and he admitted he was drunk at ten-thirty and at the time of the accident?

page 196 ] By Mr. Hutton:

One drunk and arguing over two cans of beer and the other been out the night before, and we want to show how much beer he consumed, if he consumed any, to show whether or not the witness Perkins was drinking because we have some evidence that whiskey was smelled on his breath.

By the Court:

This doesn't even say that he saw the accident. Where is Woodard? I will let you put him on as a witness and if he says anything you can contradict, you can contradict him. I sustain the objection to the introduction of the deposition.

By Mr. Hutton:

Save exception.

NOTE: Said deposition which was excluded by the Court, together with notice, is in the words and figures following, to-wit:

TO VIRGINIA ISADORE EDEN:

YOU ARE HEREBY NOTIFIED that the undersigned, Yellow Cab Company, Incorporated, will, at the offices of

Montague and Holt, Attorneys at Law, Hampton, Virginia, on the 26th day of June, 1940, between the hours of 9 A. M. and 5 P. M., and beginning as nearly as possible at 10 A. M., proceed to take the deposition of Homer L. Sapp, same to be read as evidence in behalf of the defendant in a certain law action now depending in the Circuit Court of Washington County, Virginia, in which Virginia Isadore Eden is plaintiff, and Yellow Cab Company, Incorporated, is defendant.

If, for any reason, the taking of said depositions be page 197 ] not commenced, or, if commenced, be not completed on that day, the taking thereof will be adjourned from time to time and from place to place until same are completed.

Given under my hand this 18th day of June, 1940.

YELLOW CAB COMPANY, INC.,

By Counsel.

T. L. HUTTON, Counsel.

Executed by delivering a true copy of the within notice in writing to Virginia Isadore Eden in person.

This the 18 day of June. 1940.

J. T. WOODWARD, S. W. C.

#### DEPOSITION

Filed Jun 27. 1940

The depositions of witnesses taken and subscribed before me, Doris H. Donely, a Notary Public in and for the County of Elizabeth City in the State of Virginia, taken at the law offices of Messrs. Montague & Holt, 408 The Citizens National Bank Building, Hampton, Virginia, at 11:00 A. M., June 26, 1940.

Notice that said deposition of the said Homer L. Sapp, would be taken at said time and place, duly accepted by counsel for the plaintiff, being hereto attached.

Present: E. Schlater Montague, of Montague & Holt,  
and  
Doris H. Donely, the Notary Public.

*Homer L. Sapp*

MR. HOMER L. SAPP, a witness of lawful age,  
page 198 ] being first duly sworn, deposes and says:

## EXAMINATION

By Mr. Montague:

Q. Will you please state your name?

A. Homer L. Sapp.

Q. Your age?

A. Twenty-three.

Q. Your residence?

A. At Langley Field, Virginia, where I am stationed as  
a member of the 21st Engineers.

Q. Did you have occasion to be in Washington County,  
Virginia, on or about the 19th day of June, 1939?

A. Yes, sir.

Q. Do you know Esmal Woodward?

A. Yes, sir.

Q. How long have you known him?

A. All my life.

Q. Do you recall seeing Esmal Woodward on the 19th  
day of June, 1939?

A. Yes, sir.

Q. Where and at what hour do you recall first seeing  
Esmal Woodward on the 19th of June, 1939?

A. I first saw him about 9:30 A. M., at Clark's Store,  
which is near the town of Abingdon.

Q. Will you please state to the Court whether or not  
Esmal Woodward had or had not been drinking  
page 199 ] at this time?

A. He had.

Q. When did you next see Esmal Woodward on the 19th  
of June?

A. Well, I stayed with Esmal Woodward from about  
9:30 A. M., until about 10:30 A. M. We left Clark's store  
together and walked over to Bill Arnold's filling station to-  
gether. When I left him across from Bill Arnold's filling sta-  
tion about 10:30 I did not see him any more that day.

Q. Where did you leave him across from Bill Arnold's?

A. When I left Esmal Woodward, he was lying down  
asleep under a tree.

*Homer L. Sapp*

Q. Had Esmal Woodward had anything to drink in your presence?

A. Yes, sir. He had one bottle of beer.

Q. Where did you have this bottle of beer?

A. At Bill Arnold's filling station.

Q. Do you recall the brand of beer that you each drank?

A. We had one bottle of Olde Virginia Beer.

Q. When you left Esmal Woodward what was his condition?

A. He was asleep and pretty drunk.

Q. What was the occasion of your leaving Esmal Woodward?

A. I had some things to attend to and Esmal Woodward told me he had not slept any the night before and he was pretty drunk at the time and when he laid down under a tree and went to sleep, I moved along to attend to my own affairs.

Q. Did you see Isaiah Perkins on the 19th day of June, 1940?

A. No, I did not.

page 200 ] Q. Are you interested in the outcome of this proceeding?

A. No. I have no interest in the case whatsoever.

And further this deponent saith not.

/ s / HOMER L. SAPP

NOTE: Thereupon the Court and counsel returned into Court and the following proceeding were had in the presence of the jury:

By Mr. Hutton:

If your Honor please, we are going to ask for a view by the jury. The scene of the accident is right here within one block of the Court House and we would like for these gentlemen to see the scene of the accident.

By Mr. Phillips:

We have some rebuttal testimony.

NOTE: Thereupon the following rebuttal testimony was introduced:



*Dave Eden*

*Mrs. Isadore Eden*

DAVE EDEN, re-called by the plaintiff, further testified as follows:

RE-DIRECT EXAMINATION

By Mr. Phillips:

Q. 1 Mr. Eden, I will ask you if several days after the accident, approximately ten days to two weeks after the accident, if you met Akers Roark on Main Street of Abingdon, Virginia, near the Washington County National Bank Building in the afternoon and if he made this statement to you or a statement substantially to this effect: I drove down Court Street and slowed up at Valley Street and looked both ways and saw nothing coming and went on across Valley Street and was struck or hit when I was about two-thirds across Valley Street?

A. He certainly did.

Witness stood aside.

*Mrs. Isadore Eden*

MRS. ISADORE EDEN, the plaintiff, recalled by defendant, further testified as follows:

RE-CROSS EXAMINATION

By Mr. Warren:

X. 1 Mrs. Eden, when you went to the hospital, a short time after you got there did you see Worley Henry?

A. Yes, sir, some time in the afternoon.

X. 2 Did you talk to him?

A. Very little.

X. 3 But you had some conversation?

A. Just a few words.

X. 4 Please tell whether or not you said to him in effect this: That you couldn't definitely say whether this man stopped before entering Valley Street or not?

A. No, sir, I told him he didn't stop.

Witness stood aside.

*Worley Henry*

page 202 ] WORLEY HENRY, being re-called by the defendant, further testified as follows:

## RE-DIRECT EXAMINATION

By Mr. Warren:

Q. 1 Did you have a conversation with Mrs. Eden some time after the wreck?

A. Yes, sir.

Q. 2 Where?

A. At the hospital.

Q. 3 In her room?

A. Yes, sir.

Q. 4 I will ask you if you asked her with reference to the stopping of the cab before it entered Valley Street and she said she didn't remember whether he stopped or not or words to that effect?

A. I asked if he stopped and she said, "I don't remember." "I don't remember anything about it," in fact.

By Mr. Phillips:

How soon after the wreck?

By the Witness:

About an hour.

By Mr. Hutton:

Defendants rest.

NOTE: Thereupon the Court and Counsel retired to Chambers and the following proceedings were had out of the presence of the jury:

page 203 ] By Mr. Phillips:

There is one witness we overlooked and it will be very brief, Dave Bird, a negro who was standing out here and who saw the accident and we believe in rebuttal we ought to ask whether or not the Yellow Cab stopped.

By Mr. Hutton:

I think that is a witness in chief. He is not rebutting anything. That is an independent fact he is testifying about of his own knowledge. I submit that he ought to have put him on in chief.

By Mr. Phillips:

It is absolutely in denial of the question that he stopped.

By Mr. Hutton:

We closed and they had an opportunity to know what he would say. They had him summoned.

By Mr. Phillips:

We didn't know what Akers Roark would say and he comes in and says he stopped and we have a witness who says he didn't.

By Mr. Hutton:

You had the witness, Mrs. Eden, who testified he didn't stop. Then to corroborate it by this particular witness which you now offer, I don't believe it is proper.

By the Court:

When did you know about this witness?

By Mr. Phillips:

I have known what the witness would say for some time and had him summoned, but in my view of it, I thought about it, but I want to say to the Court I would have used him but I thought that he would be admissible as rebuttal, assuming that Akers Roark said he did not stop and we could dispute that fact by a witness who would say that he did not.

page 204 ] By Mr. Warren:

We have no chance to meet him on contradiction.

By Mr. Hutton:

Except through rebuttal and you come and put him on direct testimony and it doesn't give us any opportunity to. If you had put him on we would have had time to investigate on direct but for him to come now we have no chance to do anything I don't believe.

By the Court:

I think he ought to have been put on in chief.

By Mr. Hutton:

I don't believe that is right.

By Mr. Phillips:

Don't you think it is rebuttal to undertake to show that Akers Roark didn't stop after he said he did stop?

By Mr. Hutton:

I don't agree that that is rebuttal testimony.

By the Court:

You did prove by Mrs. Eden that he didn't stop. The other witness was available. Of course I want to try the case as far as possible right now. Of course you didn't know what Akers Roark was going to say.

By Mr. Phillips:

She was here and answered while on the stand in chief.

By Mr. Hutton:

But you knew what this witness was going to say.

By the Court:

I think on that point it ought to have been.

By Mr. Hutton:

page 205 ] That is just a denial of the fact. That isn't quoting the witness Roark.

By Mr. Thompson:

Suppose he said he was making seven miles an hour. And suppose we had a witness that said he went across there at fifty miles an hour and even though we had known it when we were putting our testimony on in chief couldn't we put that on now in rebuttal of his testimony?

By the Court:

I think that would be properly a matter in chief, but I don't see where there is any real harm to come from letting him testify. Of course, if they have to have some time I would give them an opportunity. I think it will delay the trial some, but I believe I will let you put him on.

By Mr. Hutton:

Exception.

By the Court:

With reference to the view, I believe with this exception as to where Puckett was standing, I don't believe it would be unfair to let Puckett and Roark show where he was standing provided they are not together when the place is pointed out.

By Mr. Phillips:

We would object to Roark telling that. Let Puckett show where he was standing.

*Dave Bird (Colored)*

By the Court:

Let the jury just examine the premises and not ask any questions at all. Suppose I tell them that we are going to view the premises but I don't want any question asked and don't want anybody to make any statements.

By Mr. Hutton:

I think if they want to ask about Craig's house or Baker's or Valley or Court Streets, I think they know but  
page 206 ] if they want to know let the Court tell them. I think they ought to be kept together and if they want to ask anything let them ask the Court:

By the Court:

They might get to asking too many questions. Suppose I tell them for no one to make any statements and any questions they want to ask they can ask the Court and I will decide whether or not to answer them.

NOTE: Thereupon the Court and Counsel returned into Court and the following proceedings were had in the presence of the jury:

DAVE BIRD (COLORED), the next witness, being first duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Phillips:

Q. 1 Your name is Dave Bird?

A. Yes, sir.

Q. 2 How old are you?

A. Forty-nine.

Q. 3 Where do you live?

A. King Mountain.

Q. 4 Abingdon, Virginia?

A. Yes, sir.

Q. 5 Do you remember the occasion of an accident last year down at the corner of Valley and Court Streets between the Yellow Cab and another  
page 207 ] car?

A. Yes, sir.

*Dave Bird (Colored)*

Q. 6 Who was the driver of the Yellow Cab?

A. Mr. Roark.

Q. 7 Akers Roark?

A. Yes, sir.

Q. 8 Where were you at that time?

A. I was right in there at the end of the Court House porch.

Q. 9 Did you see the Yellow Cab pass down from Main Street across Court Street?

A. Yes, sir.

Q. 10 Did you see it as it approached and entered Valley Street?

A. Yes, sir. Some how or another I was looking that way when it passed.

Q. 11 Did the Yellow Cab stop before it entered Valley Street?

A. No, sir.

## CROSS EXAMINATION

By Mr. Warren:

X. 1 You were summoned and have been here ever since the case started?

A. The first time I was in bed with the flu.  
page 208 ] X. 2 You didn't have any flu this time, you

have been right here?

A. Yes, sir, I've been right here.

X. 3 All the time the last two days?

A. Yes, sir.

X. 4 Where were you standing at the end or up on the porch?

A. No, sir, I was leaning back against the porch.

X. 5 Leaning back against the end of the porch?

A. Yes, sir.

X. 6 How did you come to see whether he stopped?

A. I don't see how come me to pay so much attention. I looked down that way at the cab as it passed.

X. 7 You have remembered that all this time. Who did you first tell that to?

A. I told it to—I don't know, sir.

X. 8 You don't know who you told it to?

*Dave Bird (Colored)*

A. No, sir.

X. 9 Don't know when you first told it do you?

A. No, sir.

X. 10 How did they know to summon you if you don't know who and when you told it to?

A. Some time afterwards Mr. Eden was talking to me.

X. 11 Whereabouts?

A. And at the time he was talking about his wife  
page 209 ] getting hurt I didn't know that it was his wife.

I knew it was an Eden woman out here but I didn't know it was Mrs. Eden (Indicating.)

X. 12 Did you go to the wreck?

A. It was raining.

X. 13 You didn't even go down there?

A. No, sir.

X. 14 You saw other people running?

A. I didn't.

X. 15 You saw some going?

A. I seen them gathering around.

X. 16 The truth of it you were drunk that day?

A. Oh, no.

X. 17 Weren't drinking?

A. Along about that time I was drinking most any time.

X. 18 And that very day this taxi had taken you home before this occurred and you still owe for that trip and they have it charged against you down there on the books?

A. No, sir. He didn't take me home before that. No, sir. That come up before. My neighbors. That's the taxi that brought me home.

X. 19 How did you get to your neighbors?

A. They took me.

X. 20 You left out before this accident and they told you what you know. What day was this accident?

A. I don't know the day.

page 210 ] X. 21 What time of day?

A. Well, my recollection it was about ten o'clock in the morning.

X. 22 You didn't even go to the scene of the accident?

A. No, sir.

X. 23 Where did you go?

*Akers Roark*

A. Well, I went to the west end.

X. 24 You remained there leaning against the porch, had no interest in the collision and didn't even know whose wife it was, don't remember who you told or when you told it?

A. (No answer.)

By Mr. Hutton:

We have to get some evidence to rebut that.

By the Court:

Gentlemen of the Jury, we are going to have a view of the scene of the accident and it is very emphatic that you gentlemen keep together and don't let anyone say anything to you about it. If there happens to be some question you feel you ought to ask, ask me. I can decide whether or not to submit it to counsel. Don't let anybody mention anything to you unless it is in response to a question of your own and you may ask the Court about it.

page 211 ] NOTE: Thereupon the Court and Jury and Counsel adjourned to view the scene of the accident, after which time they returned into Court and the following evidence was offered in rebuttal on behalf of the defendant.

AKERS ROARK, being re-called in rebuttal, further testified as follows:

## RE-DIRECT EXAMINATION

By Mr. Hutton:

Q. 1 Mr. Roark, did you see Dave Bird on the morning of this accident?

A. Yes, sir.

Q. 2 Where did you see him?

A. In the alley just behind the Yellow Cab next to a colored restaurant.

Q. 3 About what time?

A. About ten o'clock, or ten-thirty.

Q. 4 What time with reference to the accident?

A. It was the trip before that.



*Akers Roark*

Q. 5 You went and got him and took him home or some where near there he got out?

A. That is right. I went to take him above the colored school on King Mountain. I just headed down the hill.

Q. 6 What was his condition with reference to being drunk or sober?

page 212 ] A. He was drunk.

Q. 7 You let him out over there?

A. Yes, sir. Right below the cab he fell and I went down and picked him up. He fell just a little ways from an alley. I picked him up that time and come back to the cab station.

Q. 8 How did you happen to let him out?

A. I was going to take him on to the house and he said he didn't have any money so I let him out at the colored school-house.

Q. 9 He didn't pay you for the trip?

A. No, sir.

Q. 10 Did you report that?

A. I turned the trip in against him at the cab.

Q. 11 To whom?

A. Rodefer or Worley. I checked to both of them.

Q. 12 Did you keep a record of it?

A. It got burned up when the house burned.

Q. 13 Your house got burned up since that time?

A. Yes, sir.

CROSS EXXAMINATION

By Mr. Phillips:

X. 1 What time did you say it was?

A. Around ten or ten-thirty.

X. 2 A short time before the accident?

A. Next trip to the accident.

page 213 ] X. 3 You had been carrying Dave to work?

A. I turned up at the school house and he headed for home.

X. 4 Then you went back to the office and got the call and went after Mrs. Eden?

A. Call to go to Dave Eden's.

Witness stood aside.

*Preston Rodefer*

PRESTON RODEFER, being re-called by defendant, further testified as follows:

## RE-DIRECT EXAMINATION

By Mr. Warren:

Q. 1 You are the same Preston Rodefer who testified in this case before?

A. Yes, sir.

Q. 2 You are bookkeeper for the Yellow Cab Company?

A. Yes, sir.

Q. 3 On June 19 when this accident is alleged to have occurred on Valley and Court Streets on that particular day was there any charge against Dave Bird?

A. Yes, sir.

Q. 4 Do you have it on that book?

A. Yes, sir.

Q. 5 Is that the book on which you make charges?

A. That is the book we were making them on then. We have several filled up.

page 214 ] Q. 6 Where has that been?

A. On file in the office.

Q. 7 Kept filed away?

A. Yes, sir.

Q. 8 Is there an entry made of the charge made against Dave Bird?

A. Twenty cents.

Q. 9 Has that entry been on the book since 1939?

A. Yes, sir.

Q. 10 Read it.

A. "Dave Bird, June 19, for trip by Ake (Ake Roark) twenty cents."

By Mr. Phillips:

This is the original book?

By the Witness:

Yes, sir.

By Mr. Phillips:

You made this entry?

*Preston Rodefer*

By the Witness:

That is my handwriting.

By Mr. Warren:

Show it to the jury.

## CROSS EXAMINATION

By Mr. Thompson:

X. 1 Preston, when did you make that entry?

A. That entry was made on the following day after the accident. We checked after the day's work the next morning.

X. 2 You didn't charge it when it was turned in?

A. You see, he carried handbooks and then the day's work, each trip, was put on this and the next page 215 ] morning when they checked we would take the money. They turned the money and credit into us and then it was filed on the original credit book.

X. 3 How do you account for entering it back on the August records?

A. Well, I'll tell you. He doesn't, Dave Bird, doesn't have an account and we have to credit him by itself. On the next sheet, that is a standard credit customer. There are some as far back as '37 and some as high as '39.

X. 4 What does this mean, Akers?

A. When he was working at the warehouse when he wasn't employed at the Yellow Cab.

X. 5 Were you keeping a record of him?

A. He was riding on credit and paying at the end of each week. That is in Mr. Henry's handwriting.

X. 6 Here is August and September?

A. That doesn't have anything to do with it. There is June 28. That is Mr. Reed's separate account altogether.

X. 7 August 31?

A. That is Charlie Butt's account, dry cleaner.

X. 8 What about this?

A. That is Mrs. R. C. Hall's account. It doesn't concern the other account. He don't have an open account and we have to put it on the book and collect from him when we see him next, and it's never been paid yet.

*Worley Henry*

- X. 9 You don't know who that trip was for?  
page 216 ] A. It was made and turned in against Dave  
Bird made by Ake Roark.  
X. 10 All you know is what Ake told you?  
A. Yes, sir.

## RE-DIRECT EXAMINATION

By Mr. Warren:

- Q. 1 These accounts are separate individual accounts?  
A. Yes, sir.  
Q. 2 Here is one account against Charles Butt, Dave  
Bird, Willis Reed and over here is Mrs. R. C. Hall and Barter  
Theatre, etc.?  
A. Yes, sir.

Witness stood aside.

WORLEY HENRY, being re-called by defendant, further testified as follows:

## RE-DIRECT EXAMINATION

By Mr. Hutton:

- Q. 1 Mr. Henry, do you know about this entry on your  
book?  
A. Yes, sir.  
Q. 2 How long has it been on there?  
A. Since June 19.  
Q. 3 Have you seen it from time to time?  
A. I have. I asked about it and told them that colored  
boy didn't have any account and not to charge him any more  
unless he made arrangements for it.  
page 217 ] Q. 4 Did you see him on that morning?  
A. No, sir, I didn't.  
Q. 5 You know this account has been on there ever  
since?  
A. Yes, sir.

Witness stood aside.

By Mr. Hutton:  
Defendant rests.

By Mr. Phillips:  
Plaintiff rests.

NOTE: At 12:00 noon the jury was discharged until 1:30 o'clock for lunch.

### AFTERNOON SESSION

Abingdon, Virginia, July 2, 1940

The Court and Counsel met in Chambers at 1:00 o'clock.

Present: The same parties as heretofore noted.

The instructions were considered by the Court and Counsel. Thereupon the plaintiff offered instructions as follows:

#### PLAINTIFF'S INSTRUCTION NO. 1 (Granted)

The court instructs the jury that at the time of the injury here complained of, the plaintiff was a passenger in a vehicle belonging to the defendant, who was a common carrier, and that said defendant owed the plaintiff the utmost care, diligence and foresight in the operation and management of page 218 ] the vehicle in which the passenger was riding, and that this duty must be performed by the driver of said taxi-cab; if, therefore, you believe from a preponderance of the evidence that at the time of this accident, the driver of the taxi-cab in question failed in any respect to manage and operate the same with the utmost care, diligence and foresight, and that such failure proximately contributed to the accident, then you will find for the plaintiff.

Hogan v. Miller, 157 S. E. 540, 542, 156 Va. 166.

By Mr. Hutton:

Defendant objects to the giving of Instruction No. 1 as offered because it constitutes the defendant cab company an insurer of the safety of passengers. It goes further than the case of Hogan v. Miller, in which there was dissenting opinion and

this instruction was criticized. The facts in the Hogan v. Miller case are different from the facts in the instant case. This instruction is not applicable to the instant case. It disregards any element of care on the part of the passenger and disregards the theory of the defendant that the accident was caused by the negligence of Perkins, driver of the other vehicle, and disregards any contributory negligence on the part of the plaintiff. This instruction constitutes the defendant an insurer of the safety of the plaintiff under all the circumstances. There is no evidence upon which to base the instruction. Under all the facts this instruction is misleading and should not be given.

Thereupon the Court overruled the objection and gave the instruction, and the defendant excepted for the reasons stated.

page 219 ] PLAINTIFF'S INSTRUCTION  
NO. 2 (Refused)

The court instructs the jury that it is unlawful for a driver of a car to enter Valley Street in the Town of Abingdon from Court Street without first stopping his car within fifteen feet of Valley Street and looking for approaching traffic, and if you should find from the evidence that the driver of defendant's taxi-cab failed to so stop and that his failure to do so proximately-contributed to the accident then you should find for the plaintiff and fix her damages in accordance with the other instructions given you.

By Mr. Hutton:

We object to this instruction because it was the duty of the passenger in the cab to keep a look out and exercise reasonable care for her own safety and the evidence in the record shows that she was looking at the clouds and paid no attention and did not make any protest, and his failure to stop, if he did fail to stop, was not the contributing or proximate cause of the accident complained of.

By the Court:

The instruction directs finding for the plaintiff and doesn't cover the whole case. It selects one element of negligence only. I don't think the instruction is good but if you have no objection I will give it provided the record shows it.

By Mr. Phillips:

We are a passenger and contributory negligence wouldn't bind us, I mean of the Chevrolet.

page 220 ] By the Court:

There is some evidence of contributory negligence on the part of plaintiff herself. She said he was driving too fast up Main and too fast down Court and didn't stop and she made no protest. She did say she was looking at the clouds. If there is an objection I will refuse it.

By Mr. Hutton:

We object.

Thereupon the Court refused this instruction and counsel for the plaintiff excepted.

#### PLAINTIFF'S INSTRUCTION NO. 3 (Granted)

The court instructs the jury that if under the evidence in this case they find that this plaintiff is entitled to recover, then in estimating her damages they have a right to take into consideration (1) such special damages, if any, as were incurred by plaintiff by reason of her injuries, such as hospital and medical bills; (2) the expenses, if any, incurred by her in employing extra help in the performance of her household duties; (3) fair compensation, if any, for mental and physical pain, suffering and anguish; (4) fair and reasonable compensation for the partial loss of use of plaintiff's right arm and hand, if any, and (5) any lessening, if any, of plaintiff's power to labor and pursue the course of life that she might otherwise have done.

By Mr. Hutton:

I am objecting to the giving of this instruction on page 221 ] the ground there is no evidence to support this instruction, that is no evidence of negligence of the cab driver, and because this instruction sets out or repeats the various things which could be considered by the jury and the instruction should state all the circumstances. It wouldn't be fair, right or just. It leaves out the question of the burden of proof and it points out certain things which they might consider. For instance in No. 5 loss of plaintiff's power to labor

and pursue the course of life that she might otherwise have done.

Thereupon the Court overruled the objection and gave instruction No. 3 and defendant excepted, for the reasons stated.

PLAINTIFF'S INSTRUCTION NO. 4 (Refused)

The court instructs the jury that it was the duty of the driver of the Yellow Cab to stop within fifteen feet of Valley Street and look for approaching traffic in such a careful manner that he would see such vehicles approaching, if any, as a person in the exercise of utmost care and caution for his own safety and the safety of others would have seen under similar circumstances, and if you find from the evidence that the driver of the Yellow Cab failed to see the Chevrolet car approaching on Valley Street, and that in the exercise of the utmost care and caution he could have seen it, and nevertheless he started across the street when the Chevrolet was approaching, and was struck before he got across, the driver of the Yellow Cab was guilty of negligence and you should find for plaintiff, and assess her damages in accordance with other instructions given you.

Kembell & Fink v. Friend, 95 Va. 125, 131; 1 Blashfield 494.

By Mr. Hutton:

Defendant objects to the giving of this instruction for many reasons. It places an absolute duty on the defendant cab driver in the operation of his cab while Instruction No. One says he owes the passenger a high degree of care. In other words this instruction makes it the duty of the operator of a common carrier to exercise the utmost care and caution and concludes by instructing the jury to find for the plaintiff.

By the Court:

I will have to refuse No. Four. I can't give No. Four.

By Mr. Phillips:

Will you give us an instruction along that line?

By the Court:

If you are going to say find for the plaintiff, it has to cover the case, the whole evidence. That instruction is very



strong. It says must have used the utmost care. I believe that is too strong. It is too much like a peremptory instruction.

### PLAINTIFF'S INSTRUCTION NO. 5 (Granted)

The court instructs the jury that it now is the sole judge of the credibility of the witnesses and in weighing the evidence of each of the witnesses who has testified in this case, the jury should consider the accuracy of his recollection page 223 ] and reasonableness and consistency of each part of his evidence with the residue thereof, and his interest in the result of this controversy, if he has shown by the evidence to have any interest therein, his demeanor, while testifying, the appearance and demeanor of the witness on the stand, the apparent candor and fairness of the witness, the apparent intelligence or lack of intelligence, and from all these things, they are to determine which witnesses are the most worthy of credit, and to give credit accordingly.

There was no objection to Instruction No. 5 and the Court gave this instruction.

By the Court:

With reference to No. 4 it seems to me that instruction is misleading, certainly in the way it is written because the driver says that he did see a car and that he saw that car six hundred feet away and that he didn't see it again until it was within a short distance. He looked before he started and didn't look until it almost struck him eight or ten feet which is just an instant of time for an automobile. I couldn't give Instruction No. 4 to my own satisfaction.

By Mr. Phillips:

We will tender Instruction No. 4 after deleting "and you should find for plaintiff, and assess her damages in accordance with other instructions given you."

By the Court:

page 224 ] I think you are entitled to an instruction that it was his duty to look and look carefully. In other words stopping and looking is not sufficient. He says he did look and saw a car coming six hundred feet away, that he didn't pay any attention whether it was traveling fast or slow and crossed. I think it is clearly a question for the jury whether he

exercised proper care, but I think that first instruction is pretty strong on the utmost care and I certainly wouldn't want to repeat. I believe it is all right for the Court to give counsel the impressions that are created on him and I have just stated what mine is. I believe it is for the jury to say whether or not he exercised the proper care, but I can't make any stronger case than the plaintiff makes.

By Mr. Phillips:

Your Honor refuses Instruction No. 4 as amended. We except and will offer another instruction later.

Thereupon the Defendant offered the following instructions.

#### DEFENDANT'S INSTRUCTION NO. A (Refused)

The court instructs the jury that the defendant was not an insurer of the safety of the plaintiff while traveling in the taxi cab as a passenger, and that the plaintiff as a matter of law is presumed to have taken upon herself all the risks necessarily incident to the trip by careful and prudent operation and transportation over the road on which she was traveling in the cab at the time of the alleged injury, and if page 225 ] the jury believes from the evidence that without the fault of the defendant, but from causes wholly beyond the control of the defendant, plaintiff was injured, the jury should find for the defendant.

NOTE: This instruction was passed until a later time.

#### DEFENDANT'S INSTRUCTION NO. AA (Refused)

The Court instructs the jury that it was the duty of the Plaintiff while riding in the taxi-cab on the occasion in question to exercise reasonable care for her own safety. She could not shut her eyes to apparent danger without protest or remonstrance. Therefore, if you believe from all the evidence in this case that Mrs. Eden realized that Roark was driving at an excessive rate of speed on this trip, and at the time and place in question, and that she knew that there was a stop sign at the entrance of the intersection of Valley and Court Streets and that the Yellow Cab was about to enter said intersection without stopping, and made no protest or remonstrance to the driv-

er, but was looking at the clouds, then she would be guilty of contributory negligence that would bar her recovery.

NOTE: This instruction was passed until a later time.

### DEFENDANT'S INSTRUCTION NO. B

(Granted as amended)

The court instructs the jury that the happening of page 226 ] the accident in this case is not in itself evidence of negligence, and before the plaintiff can recover in this action the burden is on the plaintiff to prove, by a preponderance of the evidence, that the defendant was negligent, and that the negligence of the defendant was the proximate cause of the accident.

(As Amended)

The court instructs the jury that the happening of the accident in this case is not in itself evidence of negligence, and before the plaintiff can recover in this action the burden is on the plaintiff to prove, by a preponderance of the evidence, that the defendant was negligent, and that the negligence of the defendant was the or a proximate cause of the accident.

By the Court:

Would you object to "the or a proximate cause". This instruction as it is would be a little misleading. With "or a" inserted between the and proximate, if you will offer it that way I will give it.

By Mr. Hutton:

We will offer the instruction amended as suggested.

By Mr. Phillips:

To the giving of Instruction B the plaintiff by counsel excepts on the ground that it places a greater burden on her than is required by law because the plaintiff is only required to show that the negligence of the defendant contributed to the accident which resulted in injury to the plaintiff.

### page 227 ] DEFENDANT'S INSTRUCTION NO. C. (Refused)

The Court instructs the jury that if you believe from all the facts and circumstances in this case that the injuries com-

plained of by the plaintiff, if any, were caused and brought about by an independent agency, over which this defendant had no control, and which was the sole proximate cause of said injuries, then you shall find for the defendant.

By the Court:

I will give a proper instruction on sole and proximate cause but I will refuse this instruction.

By Mr. Hutton:

We except to the action of the Court in refusing Instruction C because we think this is a correct instruction setting forth the law and states that if some other agency over which the defendant had no control was the sole cause of the accident then this defendant is not liable.

#### DEFENDANT'S INSTRUCTION NO. C-1 (Granted)

The Court instructs the jury that if you believe from all the evidence in this case that the injuries complained of by Mrs. Eden were solely caused and brought about by the negligence of Isaiah Perkins in the operation of his car at the time and place in question, then you will find for the defendant.

NOTE: This instruction was passed until a later time.

#### page 228 ] DEFENDANT'S INSTRUCTION NO. D (Refused)

The Court instructs the jury that if you believe from the evidence in this case that the cab, operated by Roark, stopped at the intersection of Valley Street, in observance of the stop sign, and that he proceeded across the intersection, driving north, in a lawful manner and in the exercise of reasonable care, that he entered the intersection before the car operated by Perkins, then you are told that the cab had the right of way.

By Mr. Phillips:

We object to No. D on the ground that it does not correctly state the law and it ignores the duty of the taxi-cab at all times to observe a high degree of care, and that the right of way is not dependent on who first reaches and enters the intersection because Valley Street is a through street and an ordinance

of the Town of Abingdon in effect gives the cars on Valley Street the right of way.

By the Court:

I believe that instruction is misleading. I will refuse it.

By Mr. Hutton:

We except to the action of the Court in refusing to give Instruction D as offered as we believe this correctly states the law and under the evidence in this case the cab was in the intersection before the Chevrolet coupe.

#### DEFENDANT'S INSTRUCTION NO. E (Refused)

The court instructs the jury that it was the duty of page 229 ] Perkins, in the operation of his car, when approaching the intersection at the intersection of Court and Valley Streets in the town of Abingdon, Virginia, to use reasonable care to keep his car under control, and like care to keep a proper lookout, and like care to keep his car under such control that he could, if necessary, stop same in order to avoid a collision with another car either approaching or entering the intersection at approximately the same time or colliding with another car already within the intersection as Perkins approached same, and under all the facts and circumstances it was the duty of Perkins, having due regard to the width, traffic, surface and all other conditions then and there existing, to exercise ordinary care in the operation of his automobile, and if you believe from the evidence that Perkins did not exercise care, and that the accident involved in this action was proximately and solely caused by the failure of the said Perkins to comply with his duties in the operation of his said automobile, and if you further believe that the cab driver was proceeding in a lawful manner, and was guilty of no negligence, then you must find for the defendant.

By Mr. Thompson:

We object to the giving of Instruction No. E because it says that the operator of a car on Valley Street must keep his car under control so that he may stop the same, if necessary, in order to avoid a collision with another car either approaching or entering the intersection at approximately the page 231 ] same time when the law requires all cars approach-

ing Valley Street to stop, and the driver of a car on Valley Street, even though he may see a car approaching Valley Street from Court, has the right to assume that he will stop, and that the driver coming into Valley Street will stop.

By Mr. Phillips:

And it becomes the duty of the driver on Valley Street to prepare to stop his car only after he observes or should have observed that the car from Court is in Valley Street and there is danger of a collision; the instruction is also objected to on the ground that it is quite misleading on various and sundry points, and also because it leaves the wrong impression with regard to the law based upon the theory that whoever enters the intersection first has the right of way.

By Mr. Thompson:

And we believe that the law as it applies to Perkin's car would be like this: The court instructs the jury that it was the duty of Perkins, in his operation of his car, to exercise ordinary care of his automobile and if you believe from the evidence that the accident involved was proximately and solely caused by the failure of Perkins to exercise ordinary care in the operation of his car and that the cab driver was guilty of no negligence, and so on.

By the Court:

I don't think that instruction itself emphasizes the other man's negligence. It looks to me like the defendant is almost basing its case on Perkins' negligence. I think an instruction, even though from the evidence Perkins was guilty page 231 ] of negligence which was the proximate cause still if they believe that the defendant was guilty of negligence which proximately caused the collision the negligence of Perkins would not bar a recovery. That would be in answer to the instruction that you have already offered. Perkins is not a defendant in this case. You are outlining at great length what his duties were and the jury is being thrown to his negligence to a greater extent than it is to the defendant. You are entitled to an instruction on sole proximate cause of the injury without any concurring negligence as a proximate cause on defendant's part. Then the plaintiff could not be hurt.

By Mr. Warren:

Why shouldn't they be told what was negligence on his part?

By the Court:

If he saw that car six hundred feet away it looked like that he had a reasonable opportunity to have prevented that accident. I wouldn't have any scruples about an instruction based on the negligence of Perkins if there was sufficient evidence for that.

By Mr. Hutton:

Defendant was in the exercise of reasonable care to keep his car under control.

By Mr. Thompson:

He is supposed to exercise reasonable care in the entire operation of his car, not only have it under control.

By the Court:

I believe I will give it if you will put that in there. Reasonable care and such care.

page 232 ] By Mr. Hutton:

Insert "reasonable" before care and after the word Virginia, and insert the word "such" after "that Perkins did not exercise" and before "care".

By the Court:

I will give Instruction E.

By Mr. Thompson:

Plaintiff excepts to the action of the Court in giving Instruction E for the reasons heretofore assigned, that it requires Perkins who was driving his car through on Valley Street to have his car under such control that he could stop the car at the intersection of Court Street where traffic is required to stop before entering the street, and that he must have his car under such control that even though a car approaching Valley Street from Court Street does not stop that he may avoid a collision with it. Whereas we believe he has the right to assume that the car on Court Street will abide by the law and will stop before entering the street.

By Mr. Phillips:

And it only becomes the duty of the driver of the car on Valley Street to be prepared to avoid a collision after it becomes evident to him, or it should have become evident to him, that the driver of the car on Court Street will not observe the law and stop his car.

By the Court:

Or from colliding with another car. It would be better to have those words left out.

By Mr. Hutton:

Not only that but it is his duty to keep a look out.

By the Court:

page 233 ] According to his own evidence he was one hundred feet away. There is no doubt about it that the Yellow Cab entered the intersection when the other car was some distance from it. It entered before that car did, and it was certainly his duty to exercise reasonable care to have his car under such control that he could avoid a collision with a car that entered before him.

By Mr. Hutton:

That applies not only to a car already in the intersection but approaching there.

By the Court:

But the evidence is he was already in there.

By Mr. Hutton:

His duty was to see when he first entered. The fact that he has the right of way doesn't relieve him from keeping a proper lookout.

By the Court:

I guess he had a right to assume that the man would stop. He had the right of way until this car entered. Then it had the right of way. I believe those words ought to come out.

By Mr. Hutton:

We except to the action of the Court in refusing No. E as offered for the reasons stated and because it correctly states the law, and then offer E-1 amended leaving out the following language: "either approaching or entering the intersection at approximately the same time or colliding with another car."

#### DEFENDANT'S INSTRUCTION NO. E-1 (Granted)

The court instructs the jury that it was the duty of Perkins, in the operation of his car, when approaching  
page 234 ] the intersection at the intersection of Court and Valley Streets in the town of Abingdon, Virginia,



to use reasonable care to keep his car under control, and like care to keep a proper lookout, and like care to keep his car under such control that he could, if necessary, stop same in order to avoid a collision with another car already within the intersection as Perkins approached same, and under all the facts and circumstances it was the duty of Perkins, having due regard to the width, traffic, surface and all other conditions then and there existing, to exercise ordinary care in the operation of his automobile, and if you believe from the evidence that Perkins did not exercise such care, and that the accident involved in this action was proximately and solely caused by the failure of the said Perkins to comply with his duties in the operation of his said automobile, and if you further believe that the cab driver was proceeding in a lawful manner, and was guilty of no negligence, then you must find for the defendant.

By Mr. Thompson:

In this E-1 offered there I really believe that the reasonable care ought to be inserted down here too instead of such care.

By the Court:

There is like care in two other places.

#### DEFENDANT'S INSTRUCTION NO. F (Refused)

The Court instructs the jury that if you believe page 235 ] from the evidence in this case that the driver of the cab was proceeding North on Court Street in the Town of Abingdon; that as he reached the intersection of Court Street he stopped; that he looked east and west on Valley Street, and that he saw an automobile approaching on Valley Street some distance away, and that he, in good faith, and acting as a person of ordinary prudence, believed that he could cross Valley Street, and actually did cross Valley Street, and was in the intersection of Court Street when he was struck by the car driven by Perkins, then you are told that the defendant is not negligent.

By Mr. Phillips:

Instruction No. F is objected to on the ground that the words, "in good faith" should be stricken out, and that it does not apply the proper degree of care to the driver of the taxi-cab

company because he should use the utmost degree of care, prudence and diligence, and because it is misleading in that what is meant by the intersection of Court Street is not clear.

By Mr. Hutton:

Intersection of Court and Valley Streets.

By Mr. Phillips:

And because it also ignores the duty of the driver of the taxi-cab to keep a lookout as he crossed Valley Street. Under this instruction it would give him the right to stop and then if he saw the car coming go straight across in front of him.

By Mr. Hutton:

page 236 ] He did cross Valley Street and was across the north curb line of Valley Street when struck by the car driven by Perkins.

By the Court:

I don't think the instruction is proper though because of the fact that Roark said he didn't know how fast the car was running and he didn't look again after he started across there. I am going to refuse it.

By Mr. Hutton:

Defendant excepts to the action of the Court in refusing Instruction No. F for the reason that same correctly states the law and offers F amended as F-1. Amend it to read "did cross Valley Street with the exception of three feet of the cab which was protruding in Valley Street when he was struck."

#### DEFENDANT'S INSTRUCTION NO. F-1 (Refused)

The Court instructs the jury that if you believe from the evidence in this case that the driver of the cab was proceeding North on Court Street in the Town of Abingdon; that as he reached the intersection of Court Street he stopped; that he looked east and west on Valley Street, and that he saw an automobile approaching on Valley Street some distance away, and that he, in good faith, and acting as a person of ordinary prudence believed that he could cross Valley Street, and actually did cross Valley Street with the exception of three feet of the cab which was protruding in Valley Street when he was struck by the car driven by Perkins, then you are told that the defendant is not negligent.

page 237 ] By Mr. Phillips:

We renew our objection on the same ground as to F.

By Mr. Hutton:

He actually did cross with the exception of three feet of the cab which was protruding in Valley Street at the time he was struck.

By the Court:

I will refuse that instruction.

By Mr. Warren:

Defendant by counsel excepts to the Court's action in refusing Instruction F-1, for the reason that same correctly states the law.

#### DEFENDANT'S INSTRUCTION NO. G (Refused)

The Court instructs the jury that, unless the evidence as a whole preponderates in favor of the plaintiff on the question of defendant's negligence, the plaintiff cannot recover. A mere equipoise, or even balancing of the evidence, will not entitle the plaintiff to a verdict. If it is just as probable that the plaintiff's injuries were caused by some other agency than the negligence of the taxi-cab driver, if any, then there can be no recovery by the plaintiff, and your verdict will be for the defendant.

By Mr. Thompson:

We object to the giving of Instruction No. G and to the last part of it particularly, if it is just as probable that the plaintiff's injuries were caused by some independent agency as it was the taxi-cab.

By Mr. Phillips:

page 238 ] And also on the further ground that it is already covered by Instruction No. B.

By the Court:

I believe Instruction B covers it. I will refuse Instruction G.

By Mr. Hutton:

We except because we believe that this instruction under the facts in this case should be given. It is our theory that de-

fendant was not negligent and that the negligence of the driver of the coupe was the sole proximate cause of the accident and the burden is on the plaintiff to show that and there is no burden on the defendant to prove negligence on the defendant's part.

By the Court:

The burden is on the defendant to prove that an independent agency was the sole proximate cause of the injury.

By Mr. Hutton:

The burden is never on us to prove it.

By the Court:

I will refuse Instruction G.

By Mr. Hutton:

Defendant by counsel excepts, for the reasons stated.

#### DEFENDANT'S INSTRUCTION NO. H (Granted)

The court instructs the jury that the defendant in any event would not be liable, if liable at all, for anything other than damages actually caused by the accident in question, and it is not sufficient to prove that the plaintiff has suffered from causes which may have possibly resulted from the accident. She can only recover, if recovery be had, for damages which are shown by the evidence with reasonable certainty  
page 239 ] to be the direct result of the accident.

By Mr. Phillips:

This instruction is objected to because it is not clear. It is misleading and confusing.

By the Court:

I believe I will give that instruction.

By Mr. Phillips:

Plaintiff by counsel excepts on the grounds stated.

By Mr. Hutton:

We offered Instruction No. E which was refused and we except, and without waiving our exceptions we offer Instruction E-1.

DEFENDANTS INSTRUCTION NO. E-1 (Granted)

NOTE: This instruction is copied herein on page 221.

By the Court:

I give Instruction E-1.

By Mr. Phillips:

To the giving of Instruction E-1 plaintiff by counsel excepts on the same grounds assigned to Instruction E, and on the further ground that it singles out and calls particular attention to certain points of the defendant's testimony which may serve to mislead the jury.

By Mr. Hutton:

We offered Instruction AA which was not passed on and we are again offering it at this time.

page 240 ] DEFENDANT'S INSTRUCTION  
AA (Refused)

NOTE: This instruction is copied herein on page 213.

By Mr. Phillips:

Plaintiff by counsel excepts to Instruction AA because it directs a verdict in favor of the defendant and because it altogether ignores the question of time as to whether or not the plaintiff had an opportunity to protest, and whether or not the negligence of the defendant taxi-cab driver in crossing the Valley Street was not the cause of the wreck and which would keep the jury from seeing whether or not it occurred when the plaintiff had no opportunity to interfere.

By the Court:

I do not believe the Court can say that certain things were or were not negligence on the part of the passenger. I am going to refuse that instruction but I am going to tell all of you that I believe this instruction would be proper:

The court instructs the jury that it is the duty of a passenger in an automobile to exercise such care for his or her own safety as a reasonably prudent person would take under like circumstances, and if you believe from the evidence that the plaintiff failed to exercise such care for her own protection, then she would be guilty of such contributory negligence as would bar a recovery.

By Mr. Hutton:

page 241 ] If you won't give the one we offer we will have to take that.

By the Court:

I don't believe the Court can give that under the evidence that it was her duty to protest.

By Mr. Hutton:

We will take that instruction as given there and number it A-3. But we except to the action of the Court in refusing AA as we claim as divulged by the plaintiff's own testimony that it was her duty to protest and remonstrate to show reasonable care for her own safety, and this is a correct statement of the law.

#### DEFENDANT'S INSTRUCTION NO. A-3 (Granted)

The court instructs the jury that it is the duty of a passenger in an automobile to exercise such care for his or her own safety as a reasonably prudent person would take under like circumstances, and if you believe from the evidence that the plaintiff failed to exercise such care for her own protection, then she would be guilty of such contributory negligence as would bar a recovery.

By Mr. Hutton:

We offer Instruction No. A again as a counter instruction.

#### DEFENDANT'S INSTRUCTION NO. A (Refused)

NOTE: This instruction is copied herein on page 212.

By the Court:

I will refuse this instruction.

page 242 ] By Mr. Hutton:

We except to the action of the Court in refusing Instruction No. A as tendered. We offered this instruction as a counter instruction to the instruction given for the plaintiff that it was defendant's duty to exercise the utmost degree of care, diligence and foresight in the operation of his cab.

DEFENDANT'S INSTRUCTION NO. A-1 (Granted)

The court instructs the jury that the defendant was not an insurer of the safety of the plaintiff while traveling in the taxi-cab as a passenger on the occasion in question.

DEFENDANTS INSTRUCTION NO. C-1 (Granted)

NOTE: This instruction is copied herein on page 215.

DEFENDANT'S INSTRUCTION NO. I (Refused)

The court instructs the jury if you believe from the evidence that the cab in which Mrs. Eden was riding was proceeding in a lawful manner, and at a lawful rate of speed, and that the accident was in no way proximately caused or contributed to by any negligence of the driver of the cab, then you must find for the defendant.

By Mr. Phillips:

The giving of this instruction is objected to because it is already fully covered by other instructions in the case and it serves only to re-emphasize the point.

Thereupon the Court refused Instruction No. I and defendant by counsel excepted because this instruction correctly states the law.

DEFENDANT'S INSTRUCTION NO. J (Refused)

The court instructs the jury if you believe from the evidence in this case that the driver of defendant's cab had already entered the intersection before the car operated by Perkins entered said intersection, then you are told it was the duty of Perkins to yield the right-of-way to the defendant's cab.

By Mr. Phillips:

This instruction is objected to because it is not the law and also the law has already been correctly stated in another instruction offered by the plaintiff.

By the Court:

I think it is covered.

By Mr. Phillips:

And also because it ignores the question of duty and proper care.

By Mr. Hutton:

I will amend Instruction J and down at the bottom put duty to exercise ordinary care under all the facts and circumstances to avoid any injury to the defendant's cab.

By Mr. Phillips:

We don't think that corrects the trouble. We object on the same grounds heretofore assigned.

Thereupon the Court refused Instruction J and defendant by counsel excepted because this instruction correctly states the law.

page 244 ] By Mr. Hutton:

We want to make a motion at this time to strike the evidence of the plaintiff on the ground that by her own evidence she is guilty of contributory negligence. She states in the record that she was a passenger in the cab and while the cab was proceeding on Main Street the cab driver was operating too fast, at an excessive speed, and likewise on Court Street proceeding toward the intersection, and she had been in the hospital and was well acquainted with the streets and stop signs, and the cab driver approached the intersection where the accident occurred too fast and she did not protest and that she was looking at the clouds. She did not give the cab driver any directions or any instructions or do anything for her own safety, but she sat there silently even though, by her own admissions, he was driving in a reckless manner, and said nothing, and we respectfully submit that her contributory negligence would bar her recovery.

By Mr. Warren:

And for the further reason that all evidence in the case is to the uncontradicted fact that the Yellow Cab had crossed Valley Street with the exception of three feet of the rear end; that Valley Street is a straight of way street and the evidence clearly points to the fact that it was wilful and wanton action on the part of Perkins and utter disregard of the rights and safety of others.



By Mr. Phillips:

In reply to this motion counsel for plaintiff states page 245 ] that the motion calls upon the Court to do the very thing that it is the duty of the jury to decide. There is a preponderance of evidence to the effect that the driver of the taxi-cab was guilty of negligence, or were that he wilfully and deliberately ignored his duty, certainly when he crossed Valley Street and never once looked to see whether the Chevrolet was going to hit him after he saw it as he says two hundred yards eastward and for other similar reasons, and also that the motion comes too late.

By the Court:

I believe that Mr. Hutton stated when he first came in Chambers that he would make a motion, but after the statements of counsel, the Court overrules the motion.

By Mr. Hutton:

Exception.

By Mr. Phillips:

We want to offer a counter instruction and we have one or two re-written.

By Mr. Thompson:

We want to offer No. 6 and we have re-written 2A.

By the Court:

Gentlemen, I am afraid we will have to wait until in the morning to finish.

NOTE: Thereupon at 4:30 the Court adjourned until 9:00 o'clock, July 3, 1940.

page 246 ] MORNING SESSION

Abingdon, Virginia, July 3, 1940

The Court met pursuant to adjournment on July 2, 1940.

Present: The same parties as heretofore noted.

NOTE: The Court and Counsel resumed their proceedings in Chambers out of the presence of the jury:

## PLAINTIFF'S INSTRUCTION NO. 2-A (Granted)

The Court instructs the jury that it is unlawful for a driver of a car to enter Valley Street without first stopping his car within fifteen feet of Valley Street and looking for approaching traffic, and if you should find from the evidence that the driver of defendant's taxi-cab failed to so stop and to look for approaching traffic and that his failure to so do proximately caused the accident, then you should find for the plaintiff unless you believe the plaintiff was guilty of some negligence that proximately contributed to the accident.

By Mr. Hutton:

Defendant objects to the giving of this instruction because it leaves out our theory that the driver of the coupe was negligent and concludes with finding for the plaintiff based on prejudicial theory of the evidence.

By Mr. Warren:

Further it ignores our theory of defense that the page 247 ] accident was due to an independent agency over which we have no control.

By the Court:

That is a little confusing. My idea is that if Roark was guilty of any negligence that proximately caused the accident, then Perkins' negligence is more or less immaterial. In other words it would be concurring negligence. If your objection is to the omission of Perkins I will overrule it and give it.

By Mr. Hutton:

Even though he may have been negligent in not stopping, if he proceeded across there at a normal speed as shown by the evidence and this other boy could have seen him one hundred feet away he had ample time to stop. This wouldn't be evidence to support the instruction.

By the Court:

His own evidence was that he stopped, looked and saw this car six hundred feet away, but he wasn't willing to say the car was running fast or slow, he didn't notice anything wrong at all with the way the other fellow was driving and proceeded across in low gear. If he had looked at all he was bound to have seen that the other fellow was driving like thunder, that is after he started across. He came six hundred feet while he was going a distance of whatever the street is.

Thereupon the Court overruled the objection and gave the instruction and defendant by counsel excepted.

PLAINTIFF'S INSTRUCTION NO. 6 (Granted)

The court instructs the jury that even though you page 248 ] may believe from the evidence that Perkins, who was operating the Chevrolet coupe, was guilty of negligence which operated as a proximate cause of the accident, nevertheless, if you believe that the defendant cab company, through its agent Roark, was also guilty of negligence which also operated as a proximate cause of the accident, then Perkins' negligence would not be a bar to the plaintiff's recovery.

By Mr. Hutton:

If Perkins was the sole proximate cause it would bar recovery. It looks to me like that instruction is confusing.

By the Court:

This negatives the idea if Roark was the proximate cause, then even though Perkins was negligent and that his negligence was also a proximate cause, still that wouldn't bar the plaintiff's recovery and that is a fact. I can see if Perkins' negligence was the sole proximate cause the plaintiff couldn't recover, but if the driver was the proximate cause, then Perkins' negligence wouldn't bar her recovery. I will give Instruction 6.

By Mr. Hutton:

Instruction No. 6 ignores the theory of any contributory negligence on the part of the plaintiff herself.

By the Court:

We have an instruction on contributory negligence and not a finding for anybody. It simply tells the jury if Roark's negligence was the proximate cause, then even though Perkins was also guilty of negligence which was a proximate cause, Perkins' negligence is not sufficient page 249 ] to bar the plaintiff's recovery, and I think that is the law.

By Mr. Hutton:

We further object because there is no evidence to show the negligence of Roark.

Thereupon the Court gave Instruction No. 6 and defendant by counsel excepted.

By Mr. Hutton:

We asked Garland Patton if he didn't have a felony warrant for the driver Perkins and if he had been permitted to answer his answer would have been in the affirmative that he did have a felony warrant. We avow that would have been his answer, and also we asked Perkins if he had been drinking on the night before the accident and his answer would have been yes, but I think we have that avowal in the record.

Thereupon the Court and Counsel returned into Court and the following proceedings were had in the presence of the jury.

NOTE: The following instructions were read to the jury by the Court:

Instructions Nos. 1, 2-A, 3, 5 and 6 on behalf of plaintiff and Instructions Nos. A-1, A-3, B, C-1, E-1 and H on behalf of defendant. The case was then argued by counsel.

The jury retired, and after deliberation, returned the following verdict:

page 250 ] We, the Jury, find for the Plaintiff \$2500.00 damage.

Thereupon the Court and counsel retired to chambers and the following proceedings were had:

By Mr. Phillips:

In order to make it regular we believe that the verdict should be corrected to read: and assess her damages at \$2500.00. It reads that in effect.

By the Court:

That is as to form. Do you have any objection to that?

By Mr. Warren:

The Court has a right, but I think that verdict is good.

By Mr. Hutton:

If your Honor please, if they are through with the form

we want to make a motion to set aside the verdict and assign the grounds in writing.

page 251 ] PLAINTIFF'S EXHIBITS—X-Ray

NOTE: These two X-Ray pictures are filed herewith under separate cover.

page 252 ] PLAINTIFF'S EXHIBIT NO. 1  
PHOTOGRAPH

page 253 ] PLAINTIFF'S EXHIBIT NO. 2  
PHOTOGRAPH

page 254 ] DEFENDANT'S EXHIBIT "A"  
PHOTOGRAPH

page 255 ] DEFENDANT'S EXHIBIT "B"  
PHOTOGRAPH

page 256 ] DEFENDANT'S EXHIBIT "C"  
PHOTOGRAPH

page 257 ] DEFENDANT'S EXHIBIT "D"  
PHOTOGRAPH

page 258 ] VIRGINIA:

In the Circuit Court of Washington County. .

On Monday the 1st day of July in the year of our Lord nineteen hundred and forty.

Present: The Honorable Walter H. Robertson, Judge.

Isadore Virginia Eden

vs.

Yellow Cab Company, Inc.

This day came the parties by their attorneys and the defendant filed its plea of general issue and also filed its grounds of defense to which the plaintiff replied and issue is joined.

Thereupon came a jury of seven, to-wit: Percy T. Preston, Hubert Hensley, Jesse F. Cunningham, John F. Scott, Zeb Spahr, C. J. Snapp and T. S. Clark, who were selected and sworn according to law to try the issue in this case and having

partly heard the evidence, but the trial of this case running to such a length that it could not be concluded on this day, the jurors aforesaid are adjourned until tomorrow morning at nine o'clock.

(Law Order Book X, page 187.)

page 259 ] VIRGINIA:

In the Circuit Court of Washington County.

On Tuesday, the 2nd day of July in the year of our Lord nineteen hundred and forty.

Present: The Honorable Walter H. Robertson, Judge.

Isadore Virginia Eden

vs.

Yellow Cab Company, Inc.

This day came again the parties by their attorneys, and the jury sworn to try the issue in this case appeared in Court pursuant to adjournment on yesterday and having partly heard the evidence, but the trial of this case running to such a length that it could not be concluded on this day the jury is adjourned until tomorrow morning at nine o'clock.

(Law Order Book X, page 187.)

page 260 ] VIRGINIA:

In the Circuit Court of Washington County.

On Wednesday the 3rd day of July in the year of our Lord nineteen hundred and forty.

Present: The Honorable Walter H. Robertson, Judge

Isadore Virginia Eden

vs.

Yellow Cab Company, Inc.

This day came again the parties by their attorneys, and the jury sworn to try the issue in this case appeared in Court pursuant to adjournment on yesterday and having fully heard the evidence, instructions of the court, and argument of counsel, retired to their room to consider of their verdict and after some time returned into Court having found the following verdict:

"We, the jury find for the plaintiff \$2,500.00 damages. Jesse F. Cunningham, Foreman."

Thereupon the defendant moved the Court to set aside the verdict upon grounds to be assigned in writing, which motion is to be argued at a later date of the term.

(Law Order Book X. page 188.)

page 261 ] In the Circuit Court of Washington County, Virginia:

Isadore Virginia Eden, Plaintiff

v.

Yellow Cab Company, Inc., Defendant

To: Isadore Virginia Eden:

YOU ARE HEREBY NOTIFIED that on the 2nd day of September, 1940, at 9 o'clock, A. M., or as soon thereafter as the Judge may be found at his office, the undersigned will present to the Judge of the Circuit Court of Washington County, Virginia, at his office in the Court House at Abingdon, Virginia, a transcript of the evidence and other incidents of the trial in this law action for his signature and certificate thereto.

In the event said Judge is then holding court in Smyth County, said transcript will be presented to him at the said Court House thereof, at 10 o'clock, A. M., of the same day, or as soon thereafter as he may be available.

And further, on the same date, at 11 o'clock, A. M., the undersigned will apply to the Clerk of the Circuit Court of Washington County, Virginia, at his office at Abingdon, Virginia, for a transcript of the record in this suit, for the purpose of presenting same to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas.

If, for any reason, same cannot be presented to said Clerk at 11 o'clock, A. M., it will be presented to said  
page 262 ] Clerk as soon thereafter as is reasonably possible on the said date.

This the 30th day of August, 1940.

YELLOW CAB COMPANY, INC.  
By T. L. HUTTON,

Attorneys.

Legal service of the foregoing notice is hereby accepted, this 31st day of August, 1940.

THOS. C. PHILLIPS,  
of counsel for plaintiff.

page 263 ] MOTION TO SET ASIDE  
VERDICT

Filed July 13, 1940

Now comes the defendant, Yellow Cab Company, Inc., and moves the Court to set aside the verdict of the jury in this case and enter judgment for the defendant, or grant the defendant a new trial. The defendant assigns the following grounds for said motion:

I.

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

II.

The verdict is against the weight of the evidence.

III.

The Court erred in refusing certain instructions offered by the defendant and granting certain instructions for the plaintiff over objection of the defendant.

IV.

The Court erred in failing to sustain defendant's motion to strike the evidence of the plaintiff on the grounds assigned, and for the reason that by the plaintiff's own testimony she was guilty of contributory negligence which would bar a recovery in this case.

V.

The Court erred in excluding certain testimony of-  
page 264 ] fered by the defendant to which exception was



taken at the time and in admitting certain testimony for the plaintiff over objection of the defendant.

VI.

The Court erred in not permitting the defendant to introduce the witness, Esmal Woodward, as an adverse witness. The record shows that this witness was summoned by plaintiff and was not introduced by plaintiff, and the Court erred in refusing to permit the defendant to introduce Woodward as an adverse witness.

VII.

The Court erred in instructing the jury over objections of the defendant that the testimony of the witnesses Lewis Widener, Herbert Widener, Arthur Musser, Ep Atkins and certain evidence of the witness, Akers Roark was made only for the purposes of contradicting the witness, Isaiah Perkins.

VIII.

The verdict of the jury is entirely excessive.

IX.

There was no evidence of negligence on the part of the defendant's driver.

For the above and other reasons to be assigned at bar, defendant asks that the verdict of the jury be set aside and judgment rendered for the defendant, or that in any event that the defendant be awarded a new trial.

YELLOW CAB COMPANY, INC.,

By Counsel.

T. L. HUTTON, p. d.

page 265 ]

OPINION

Read July 13, 1940

Present: Thos. C. Phillips & Roby C. Thompson  
Counsel for Plaintiff

T. L. Hutton and George M. Warren  
Counsel for Defendant

The case of Eden vs. Yellow Cab Company was tried July 1st, 2nd, 3rd, 1940, resulting in verdict for plaintiff for \$2,-500.00.

Mrs. Eden was a passenger in Yellow Cab going north on Court Street in Abingdon, Virginia. The cab had almost crossed Valley Street when it was struck on its right rear side by a car being driven west on Valley Street by one Perkins. According to the driver of the cab (Roark) and another witness of defendant (Puckett) about three feet of rear end of the cab was in Valley Street when the cab was struck by the Perkins car. Mrs. Eden's collar bone was broken.

The plaintiff contends that the collision was due to the negligence of Roark, driver of defendant's cab.

The defendant contends that the collision was due solely to the negligence of Perkins; that Roark was not negligent, but that even if he was Mrs. Eden was guilty of such contributory negligence as to bar her right of recovery.

For the purposes of this case it may be admitted that Perkins was guilty of gross and wanton negligence, but  
page 266 ] unless it was the sole proximate cause of the collision it can avail the defendant nothing.

Mrs. Eden, the plaintiff, testified that Roark was driving too fast but she did not say what the rate of speed was, and that he did not stop at the stop sign at intersection of Court and Valley Streets. She made no protest when they reached the intersection she was "looking at the clouds".

The verdict of the jury means:

1. That Perkins' negligence, if any, was not the sole proximate cause of the accident.
2. That Mrs. Eden was not guilty of contributory negligence, and
3. That Roark was guilty of negligence which was the proximate cause of the accident.

Roark, the driver of defendant's cab, testified that he stopped at the intersection; that he saw the Perkins car about two hundred yards away coming west on Valley Street; that he did not know whether it was running fast or not; that he thought he could make it; that he put the cab in low gear and

proceeded across Valley Street at about seven miles an hour, and that he saw Perkins car no more until it was almost on him, about ten feet away.

Valley Street is 35 or 40 feet wide. Roark's car lacked 3 feet of having crossed when it was struck. If Perkins' car was running fast enough to travel 600 feet while page 267 ] Roark's was traveling 37 feet Roark was bound to see, had he looked carefully, that Perkins was driving fast and would have known that he, Roark, must move faster than seven miles an hour in order to safely pass in front of Perkins' car. As I see it, the jury could have found on Roark's own statement that he was guilty of negligence, and if there were no other evidence of negligence on his part I do not see how I could disturb the verdict of the jury in that respect. It was not only his duty to look but to look carefully and to have taken his eyes entirely off of the approaching car from the moment he first saw it, did not, in my opinion begin to measure up to that high degree of care he owed to the passenger in his car.

Stratton v. Bergman, 169 Va. 249, 253

Whipple v. Booth, 155 Va. 413, 154 S. E. 545

In *Hogan v. Miller*, 156 Va. 166, 157 S. E. 540 the Court said at p. 543 of 157 S. E.

"The plaintiff was a passenger in a vehicle belonging to the defendant, who was a common carrier, and that the defendant owed the plaintiff the utmost care, diligence, and foresight in the operation of the vehicle is beyond dispute."

In this case (*Hogan v. Miller*) Hogan operated a taxi cab or "car for hire" in Lynchburg, Va.

In *City of Portsmouth v. Mabrey*, 168 Va. 517 the Court said at p. 524:

"The carrier must use the highest degree of practicable care for the safety of its passengers, but it is not an insurer."

page 268 ] In the case at bar the jury was instructed that defendant owed plaintiff the utmost care, diligence &c. It was also instructed that the defendant was not an insurer of plaintiff's safety, &c.

As to the contributory negligence of Mrs. Eden: the jury was told that it was her duty to exercise such care for her own

protection as a reasonably prudent person would take under like circumstances. The question was left to the jury. The jury found for the plaintiff thereby resolving the question of contributory negligence in favor of plaintiff and I do not think I can disturb their finding.

Some times when a passenger observes a known dangerous condition of which the driver is apparently unconscious it is the duty of the passenger to warn the driver.

Linton v. Va. Elec. &c Co., 162 Va. 711

But a passenger on the back seat is not required to use that degree of care required of the taxi driver.

C. & O. v. Myer, 150 Va. 656.

And the duty of the passenger to warn and guide the driver is a doubtful one.

Director General v. Lucas, 130 Va. 212.

Ordinarily a passenger in an automobile has no duty to direct and control the driver unless it is obvious that the driver is taking no precautions for their safety.

Mize v. Gardener Motor Co., 166 Va. 415.

page 269 ] Certainly, in my opinion, this Court has no right to say, as a matter of law, that Mrs. Eden was guilty of contributory negligence and the motion to set aside the verdict should be denied.

W. H. R., Jdg.

7-13-40

page 270 ]

ORDER

(Entered in Law Book "X", page 191, July 13, 1940)

This day came again the parties by their attorneys, and the defendant, by counsel, filed in writing the grounds of its motion to set aside the verdict and grant a new trial, or to set aside the verdict and enter up judgment for the defendant notwithstanding the verdict, and the court having maturely considered said motions, is of opinion to (for reasons assigned in a written opinion), and doth hereby overrule said motions.

It is therefore considered by the court that the plaintiff recover of and from the defendant the sum of \$2,500.00 with legal interest from the 3rd day of July, 1940, until paid, and the costs of this proceeding.

To the action of the court in overruling said motions, and in refusing to set aside the verdict of the jury in this case and granting the defendant a new trial and in refusing to set aside the verdict and enter up judgment for the defendant notwithstanding the verdict, and in entering judgment upon the verdict in favor of the plaintiff and against the defendant, the defendant by counsel excepted.

By agreement of parties by counsel said written opinion of the court is hereby made a part of the record in this case.

The defendant expressing an intention to apply to the Supreme Court of Appeals for a writ of error and  
page 271 ] supersedeas, it is ORDERED that this judgment be suspended for a period of sixty days from this date, provided the defendant, or someone for it, executes before the Clerk of this court within fifteen days from this date, a suspending bond in the penalty of \$250.00, conditioned according to law, with surety approved by said clerk.

page 272 ]

### APPEAL BOND

Filed Jul 23, 1940

KNOW ALL MEN BY THESE PRESENTS, That we, Worley Henry, Principal and National Surety Corporation, Surety, are held and firmly bound unto the Commonwealth of Virginia, in the sum of . . . Two Hundred Fifty . . . Dollars, to the payment whereof, well and truly to be made to the said Commonwealth of Virginia, we bind ourselves and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. And we hereby waive the benefit of our exemptions as to this obligation. Sealed with our seals, and dated this 23rd day of July one thousand nine hundred and forty.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas at a Circuit Court held for the County of Washington on the 13th day of July, 1940, in a certain action at law then pending in the said court between Isadore Virginia Eden plaintiff and Yellow Cab Co. Inc., defendant a judgment was entered against the Yellow Cab Co. Inc., for

\$2500.00 and whereas, on the 13th day of July, during the same term at which the said judgment was entered, the said court, in order to allow the said Yellow Cab Co. Inc., to apply for a writ of error and supersedeas from said judgment, made an order suspending the execution of the said judgment for the period of 60 days from the date thereof upon the said Yellow Cab Co. Inc., or some one for it giving bond before the clerk of said court in the penalty of . . . Two Hundred Fifty . . . dollars, conditioned according to law. And whereas it is the intention of the said Yellow Cab Co. Inc., to present a petition for a writ of error and supersedeas from said judgment; now, therefore, if the said Yellow Cab Co. Inc., shall pay all such damages as may accrue to any person by reason of the said suspension, in case a writ of error and supersedeas to the said judgment shall not be allowed and be effectual within the said period of 60 days, specified in the aforesaid order of the said court, then the above obligation to be void, or else to remain in full force.

Signed, sealed, acknowledged and  
delivered in the presence of                      WORLEY HENRY    (Seal)

   NATIONAL SURETY CORPORATION  
(Seal)                      By H. M. ELLIOTT,

Attorney-in-fact.

page 274 ]                      JUDGE'S CERTIFICATE

I, Walter H. Robertson, Judge of the Circuit Court of Washington County, Virginia, who presided over the foregoing trial of the case of Isadore Virginia Eden vs. Yellow Cab Company, Inc., in said Court at Abingdon, Virginia, July 1, 2, 3, inclusive, 1940, do certify that the foregoing, together with the exhibits therein referred to, is a true and correct copy and report of all the evidence together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court with respect thereto, all the instructions offered, amended, granted, and refused by the Court, and the objections and exceptions thereto; and all other incidents of the said trial of the said cause, with the motions objections and exceptions of the respective parties as therein set forth.

As to the original exhibits introduced in evidence, as shown by the foregoing report, to-wit:

Plaintiff's Exhibits X-Ray (2), Plaintiff's Exhibit No. 1—Photograph, Plaintiff's Exhibit No. 2—Photograph, and

Defendant's Exhibit "A"—Photograph, Defendant's Exhibit "B"—Photograph, Defendant's Exhibit "C"—Photograph, and Defendant's Exhibit "D"—Photograph

which have been initialed by me for the purpose of identification, it is agreed by the plaintiff and the defendant that they shall be transmitted to the Supreme Court of Appeals as a part of the record in this cause in lieu of certifying to the said Court copies of the said exhibits.

page 275 ] And I further certify that the attorneys for the plaintiff had reasonable notice, in writing, given by counsel for the defendant, of the time and place when the foregoing report of the testimony, exhibits, instructions, exceptions, and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication, and that said report was presented to me on the 2nd day of September, 1940, within less than sixty days after the entry of the final judgment in said case.

Given under my hand this 2nd day of September, 1940.

WALTER H. ROBERTSON (SEAL)  
Judge of the Circuit Court of  
Washington County, Virginia.

Virginia:

In the Circuit Court of Washington County

Isadore Virginia Eden,

Plaintiff

vs.

Yellow Cab Company, Inc.,

Defendant

I, Walter H. Robertson, Judge of the Circuit Court of Washington County, Virginia, do hereby certify that the foregoing is an accurate copy of the transcript of testimony and defendant's certificate of exceptions, this day signed by me and filed.

Given under my hand this 2nd day of September, 1940.

WALTER H. ROBERTSON (SEAL)  
Judge

page 276 ]

## STIPULATION

It is stipulated between attorneys for both parties that the foregoing stenographic report of testimony and other incidents of the trial therein shall be considered in lieu of formal bills of exceptions; and that all questions raised, all rulings thereon, all exceptions thereto, and the grounds of such exceptions, respectively, as shown by said report of testimony, and other incidents of the trial therein, may be relied upon by either or both parties, in the Supreme Court of Appeals, without taking separate Bills of Exception to each point raised and excepted to.

This 2nd day of September, 1940.

THOS. C. PHILLIPS,  
of Counsel for Plaintiff.  
T. L. HUTTON,  
of Counsel for Defendant.

page 277 ]

## CLERK'S CERTIFICATE

I, W. Y. C. White, Clerk of the Circuit Court of Washington County, Virginia, do hereby certify that the foregoing is a copy of report of the testimony, instructions, exceptions and other incidents of the trial in the case of Isadore Virginia Eden versus Yellow Cab Company, Incorporated, and that the original thereof and one copy together with the original exhibits,

Plaintiff's Exhibits X-Rays (2), Plaintiff's Exhibit No. 1—Photograph, Plaintiff's Exhibit No. 2—Photograph, and  
Defendant's Exhibit "A"—Photograph, Defendant's Exhibit "B"—Photograph, Defendant's Exhibit "C"—Photograph, and Defendant's Exhibit "D"—Photograph

therein referred to, duly authenticated by the Judge of said Court, were lodged and filed with me as Clerk of the said Court on the 2nd day of September, 1940.

W. Y. C. WHITE,  
Clerk of the Circuit Court of  
Washington County, Virginia.



page 278 ] I, W. Y. C. White, Clerk of the Circuit Court of Washington County, Virginia, do hereby certify that the foregoing pages 1 to page 277, both inclusive, is a true and correct transcript of the record in the case of Isadore Virginia Eden, plaintiff, against the Yellow Cab Company, Incorporated, Defendant, lately determined in the said court, and I do further certify that counsel of record for the said plaintiff had due notice of the intention of counsel for the defendant to apply for said transcript before the same was made out and delivered.

I further certify that upon request of counsel for the defendant, the original exhibits, Plaintiff's Exhibits (2) X-Rays, and No. 1, to 2, both inclusive, and Defendant's Exhibits "A" to "D", both inclusive, are certified to the Clerk of the Supreme Court of Appeals of Virginia.

Given under my hand this 2nd day of September, 1940.

W. Y. C. WHITE,  
Clerk.

Filed Sept. 2, 1940

W. Y. C. WHITE,  
Clerk

A Copy Teste:

J. M. KELLY,  
Deputy Clerk.

## — INDEX TO RECORD —

Petition .....	1
Record .....	52
✓ Notice of Motion .....	52
✓ Bill of Particulars .....	54
✓ Grounds of Defense .....	55
Order .....	56
Stenographic Report of Testimony .....	56

## EVIDENCE

## Plaintiff's Witnesses:

Isadore Virginia Eden .....	57
Dave A. Eden .....	70
Dr. H. W. Smeltzer .....	74
Dr. D. L. Kinsolven .....	79
Garland K. Patton .....	84

## Defendant's witnesses:

Dr. Frank H. Smith .....	98
Isaiah Perkins .....	102
Arthur Musser .....	114
Lewis Widener .....	122
Herbert Widener .....	125
Ep Atkins .....	129
Sam Austin .....	132
Robert Puckett .....	133
Worley Henry .....	146
F. C. Box .....	151
Preston Rodefer .....	156
Akers Roark .....	166
Isaiah Perkins, rec. ....	183
✓ Notice to Take Deposition .....	185
Deposition of Homer L. Sapp .....	187

## Plaintiff's Rebuttal:

Dave A. Eden, rec. ....	189
-------------------------	-----

Yellow Cab Co. Inc. vs. Isadore Virginia Eden	239
---	-----

#### Defendant's Rebuttal:

Isadore Virginia Eden, rec.	189
Worley Henry, rec.	190

#### Plaintiff's Rebuttal:

Dave Bird	193
-----------	-----

#### Defendant's Rebuttal:

Akers Roark, rec.	196
Preston Rodefer, rec.	198
Worley Henry, rec.	200

Instructions	201
Motion to Strike Plaintiff's Evidence	220

## EXHIBITS

#### Plaintiff's Exhibits:

Plaintiff's Exhibits—(See Manuscript)

Defendant's Exhibits—(See Manuscript)

Orders	225
Notice (with reference to Certificate of Exceptions)	227
Judge's Certificate	234
Stipulation	236
Clerk's Certificate	236
Motion to Set Aside Verdict	228
Opinion	229
Order (Appealed from) Dated July 13, 1940	232
Appeal Bond	233
Clerk's Certificate	237