

62-572 687

# Record No. 1305

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**R. L. MILES, JR., Plaintiff in Error,**

VS.

**FRANKLIN H. ROSE, AN INFANT, ETC.,  
Defendant in Error.**

and

**R. L. MILES, JR., Plaintiff in Error,**

VS.

**HAROLD HODGES, ETC., Defendant in Error.**

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FROM THE CORPORATION COURT OF THE CITY OF HOPEWELL, VA.

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

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

H. STEWART JONES, Clerk.

162 Va 572

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

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FRANKLIN H. ROSE, AN INFANT, ETC., Plaintiff,

vs.

R. L. MILES, JR., Defendant,

and

HAROLD HODGES, AN INFANT, ETC., Plaintiff,

vs.

R. L. MILES, JR., Defendant.

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CONSOLIDATED CAUSES.

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PETITION FOR WRIT OF ERROR.

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PRELIMINARY.

Petitioner complains of a judgment of the Corporation Court of the City of Hopewell, entered on the 11th day of May, 1932, in the consolidated causes of Franklin H. Rose, an infant, against T. E. Denton and R. L. Miles, Jr., and Harold Hodges, an infant, against T. E. Denton and R. L. Miles, Jr., wherein it was determined by the Court that each party plaintiff should recover of the defendant, R. L. Miles, Jr., the sum of \$750.00, with interest from the date of judgment, in accordance with the verdicts of the jury rendered in said causes. The parties will hereinafter be referred to in accordance with their designation in the court below, Rose

and Hodges being referred to as plaintiffs and R. L. Miles, Jr., as defendant, no judgment having been awarded against T. E. Denton, the other named defendant.

### ASSIGNMENTS OF ERROR.

The decision of these causes depends upon well established principles of law and very little citation of authorities will be necessary. It is submitted that the judgment of the trial court is erroneous, because:

1. There was no proof of the primary negligence of the defendant, R. L. Miles, Jr., and this defendant's motion to strike out all of the evidence introduced on behalf of the plaintiffs should have been sustained.

2. There was conclusive proof of the negligence of T. E. Denton, the driver of the automobile in which plaintiffs were riding, which negligence caused the collision, and plaintiffs themselves alleged such negligence and acquired jurisdiction in the Corporation Court of the City of Hopewell for the trial of their cause by virtue of such allegation. There was conclusive proof that plaintiffs were engaged in a joint enterprise with the driver of their car, and that his negligence was imputable to them, and by this fact their recovery was barred and the Court should have entered final judgment for the defendant R. L. Miles, Jr.

3. Aside from the matter of joint enterprise and imputable negligence, there was conclusive evidence that plaintiffs, and each of them, were contributorily negligent.

4. The trial court erred in permitting the plaintiffs, who had sued the driver of the car in which they were riding for the purpose of acquiring jurisdiction for the trial of the cause in Hopewell, to take an inconsistent position at a successive stage of the litigation by denying the negligence of said defendant when their joint enterprise with him had been established.

5. There was error in the granting and refusal of instructions.

6. The Court erred in refusing to admit in evidence an ordinance of the Town of Virginia Beach defining the right of way at street intersections.

7. The trial court erred in allowing the jury to apply the doctrine of comparative negligence, and in refusing to set aside the jury's verdicts when it was apparent that they had found for the plaintiffs in spite of the plaintiffs' own negligence.

### STATEMENT OF FACTS.

The plaintiffs, as well as the driver of the car which they were occupying, are residents of Hopewell, Virginia. Defendant R. L. Miles, Jr., is a resident of the City of Norfolk, Virginia. The accident occurred at Virginia Beach, in Princess Anne County, Virginia. Plaintiffs acquired jurisdiction in the Corporation Court of the City of Hopewell by bringing action against their friend and driver, T. E. Denton, as well as against R. L. Miles, Jr., the driver of the car in collision with them. The Denton car was a Ford roadster, and at the time of the collision it was occupied by five persons, whose positions therein or thereon, from the left to right side of the car, were as follows: Mathias, a resident of Virginia Beach, was standing on the left running board; Denton, of Hopewell, was driving the car; Cuddihy, of Hopewell, was seated on his right; plaintiff Hodges, of Hopewell, was seated on the right hand side of the car; plaintiff Rose, of Hopewell, was standing on the right running board. The four Hopewell boys were about the same age (between 17 and 21 years), and they had come to Virginia Beach with other friends for the Labor Day week-end, and had established headquarters at a tourist camp at the West end of 19th Street. About five P. M. o'clock on Sunday, the day of the accident, they left the tourist camp in Denton's car for the purpose of procuring some whiskey for the joint use of themselves and friends, or as one of them said on the stand, "to take on a party". They proceeded first to a public bath house for two of the boys to change from their bathing suits to street clothes, and then stopped at a filling station to inquire about the whiskey. There they met Mathias, who agreed to show them where it could be purchased, and for this purpose they drove several miles into the country where they procured a gallon jug of whiskey. It is undisputed that all of the Hopewell boys were parties to the procurement of the whiskey; all contributed to the cost thereof; it was for the enjoyment of all and each had an equal right of control over it and voice in the trip on which it was procured. The whiskey was wrapped in the coat of the plaintiff Hodges, and placed on the floor of the automobile at the feet of the occupants, and

they were returning to the tourist camp with it when the collision occurred. The cars came together at the intersection of 19th Street and Arctic Avenue in the Town of Virginia Beach, about six P. M. o'clock. It is undisputed that Arctic Avenue extends in a northerly and southerly direction and is paved with concrete to a width of sixteen feet. It is undisputed that 19th Street extends in an easterly and westerly direction and is paved with concrete to a width of sixteen feet. It is undisputed that the corners at this intersection are not obstructed by buildings but that the corners, and particularly the northeast corner, are obstructed by bushes and natural growth extending nearly up to the paved portion of each street, so that the view of a driver proceeding south along Arctic Avenue and looking to his left at 19th Street, and the view of a driver proceeding west along 19th Street and looking to his right toward Arctic Avenue, is impaired until very near the intersection. It is undisputed that both cars approached or entered the intersection at approximately the same time. It is undisputed that the defendant, R. L. Miles, Jr., accompanied by a young lady, was driving a Ford Sedan south along Arctic Avenue, and that he was on the right of the Denton car which the plaintiffs occupied when the two cars approached the intersection. It is undisputed that as he approached the intersection he slowed down to about twenty miles per hour, sounded his horn as a warning when about sixty feet from the intersection, and at least once more before reaching it, and entered the intersection at about fifteen miles per hour. It is undisputed that he could not see the Denton car until he got up to the intersection; that he looked to his left at that point and saw the Denton car which was entering the intersection. The speed at which the Denton car was travelling when it entered the intersection is in dispute. The four Hopewell boys estimated the speed to have been twenty-five miles per hour, saying that the car slowed down to cross the railroad track about five hundred and fifty feet east of the intersection, at which point the driver changed gears, and that the car had been put in high gear about three hundred feet east of the intersection, and had gained speed continually from that time, attaining a speed which they estimate to be twenty-five miles per hour on entering the intersection. All admit that the intersection was apparent as they approached and that the driver made no effort to give warning of his approach or to slow down before entering same. Mathias, the fifth occupant of the car, placed its speed when entering the intersection at forty-five miles per hour, says that it did not slow down before enter-

ing the intersection, and that the driver had driven fast during the entire return trip with the whiskey, so fast in fact that he had remonstrated with him on one occasion (R., pp. 158-159). The defendant Miles, and his companion, Miss Griffith, say that the Denton car was going very fast; that it shot right out in front of them at the intersection; that they had no warning of its approach or opportunity to observe it, and Miles says that even by applying his brakes and turning the front of his car to the left instantly, he was unable to avoid striking the Denton car on its right side at its right rear wheel and fender. The Miles car stopped in the intersection after the impact. It is undisputed that the Denton car continued on West along 19th Street for a considerable distance, then left the Street on the south side thereof, and turned over. Cuddihy, who was pinned under the car when it turned over, and who was dazed by the shock, and who was taken immediately from the scene of the accident when extricated, is the only one of the occupants who attempted to place its location when it came to rest after the impact. Speaking speculatively, he established the distance which it travelled west of the intersection, at twenty feet (R., p. 24), but Ernest Land, the Chief of Police at Virginia Beach, who says he stepped off the distance shortly after the accident, and before the cars had been moved, placed the Denton car just on the South edge of 19th Street, in the bushes, and between fifty and sixty feet west of the intersection (R., p. 149). Land marked the position of the cars and distances on a diagram which was introduced in evidence, but unfortunately this diagram could not be found when the Clerk prepared the transcript of record.

As a result of the overturning of the Denton car, Rose suffered a fracture of the left leg approximately six inches above the ankle; his right leg was fractured and crushed from six inches above the ankle down to and including the ankle joint; he had a severe laceration about the left hand and a severe laceration above the left eye; he suffered a concussion of the brain and was rendered unconscious; he was confined in the Sarah Leigh Hospital in Norfolk for nine weeks, and a part of his injuries, at least, are permanent. His expenses incident to endeavoring to be cured of his hurts amount to about \$1,100.00.

Hodges, as a result of the overturning of the Denton car suffered a fractured skull, and was unconscious for two weeks after the accident. His right leg was also broken, and he

likewise remained in Sarah Leigh Hospital for nine weeks. His medical and general expenses growing out of the injury were approximately \$1,000.00.

A Hopewell jury rendered a verdict of \$750.00 in favor of each plaintiff, and neither plaintiff has complained of the amount awarded him.

#### ARGUMENT AND CITATION OF AUTHORITIES IN SUPPORT OF ASSIGNMENTS OF ERROR.

1. *There is no evidence of primary negligence of the Defendant R. L. Miles, Jr.*

Both plaintiffs were represented by Messrs. Kirk L. Woody and Archer L. Jones, of Hopewell, who filed declarations containing general allegations of negligence against defendants T. E. Denton and R. L. Miles, Jr. (R., pp. 4 and 12). The defendant Miles demanding a bill of particulars, on the day of the trial the plaintiffs specified the particulars of his negligence to consist in—

(a) That the defendant operated his car at an excessive rate of speed;

(b) That the defendant failed to keep his car under complete control;

(c) That the defendant had inadequate and improperly adjusted brakes;

(d) That the defendant drove to the left of the center of the street;

(e) That the defendant violated the provisions of the right of way laws as set out in Code Section 2145, sub-section 19;

(f) That the defendant drove his car on the left hand side of the road and not as close to the right hand side as was possible;

(g) That the defendant failed to keep a proper lookout. (R., p. 21.)

To sustain the allegations of their declarations and the bill of particulars filed, plaintiffs introduced Franklin H. Rose,

Harold Hodges and James E. Cuddihy, at the conclusion of whose testimony the plaintiffs rested.

None of these witnesses testified that they ever saw the Miles car or knew what caused the accident. All they knew was that the accident occurred at this intersection, as witness the following extracts from the testimony:

ROSE TESTIMONY (R., p. 48).

"Q. I believe you stated that, as you entered the intersection, you were on the right-hand side of the Denton car?

A. Yes, sir.

Q. Did you look to see if there was any car approaching?

A. Yes, sir.

Q. Did you see any car?

A. I saw no car.

Q. Now, can you tell the jury whether the car in which you were riding was struck a soft or a hard blow?

A. No, sir, I cannot.

Q. You cannot?

A. No, sir, I was knocked unconscious.

Q. You were knocked unconscious and know nothing more about it?

A. Yes, sir."

And on page 53 of the Record:

"Q. An on what portion of the intersection were you, so far as you know, at the time of the impact?

A. So far as I know, we were across the middle of the intersection.

Q. Across the middle?

A. Yes, sir."

RE-CROSS EXAMINATION.

By Mr. Harrison:

"Q. If you did not see this other car, how do you know where you were when the impact occurred?

A. He asked me so far as I knew. And that was told to me by the people who saw it.

Q. Then of your own knowledge you do not know it?

A. No, sir, from my own knowledge I could not say for sure."



"Mr. Harrison: If your Honor please, we of course ask that his answer, which it now develops is hearsay, be stricken out.

Mr. Jones: We have no objection."

#### HODGES' TESTIMONY (R., p. 60).

"Q. (As you entered the intersection) Did you see an automobile approaching in either direction?

A. No, sir.

Q. Did you see the car that struck you until the time of the collision?

A. No, sir, I did not.

Q. Were you knocked unconscious?

A. I was knocked unconscious and stayed unconscious for two weeks."

And on page 62:

"Q. Can you tell us, or do you know of your own knowledge, on what portion of the intersection the Denton car was at the time it was struck?

A. I would say three-fourths of the way across the crossing.

Q. And you say you did not see the car when it struck you?

A. Yes, sir, I did not see it.

Q. Tell the jury how you can answer that, when you did not see it?

A. I did not see the car at all while I was going across, and I looked both ways when we got within view of the two side roads."

And on page 70:

"Q. Now, when you looked where was the Ford Sedan?

A. I never did see it.

Q. What was there to keep you from seeing it after you passed the brush and got within twenty feet of the intersection?

A. I do not know.

Q. It is a straight stretch to your right-hand? If you looked, you were bound to see it? It was just as clear as this courtroom, wasn't it?

A. It may have been.

Q. And doesn't the same rule apply to the driver? If he had looked at that point, wouldn't he have been bound to see the Miles car?

A. I do not know."

And on page 73:

"Q. Mr. Hodges, as a matter of fact when you were within 20 feet of the intersection of Arctic Avenue, you could then see up Arctic Avenue for quite a long distance, couldn't you?"

A. I do not recall.

Q. You do not know whether you could or not?

A. No, sir.

Q. You never did see the Miles car?

A. No, sir.

Q. At no time?

A. No, sir.

Q. You do not know at what point it was when you looked up Arctic Avenue?

A. No.

Q. You do not know whether it was within five feet of the intersection or whether it was in the intersection; or whether it was within 15 feet of the intersection or within 20 feet of the intersection?

A. No, sir."

JAMES E. CUDDIHY (p. 86).

"Q. What part of Mr. Denton's car was struck by the other car?

A. The right rear fender, and about a foot of the running board on the right-hand rear side.

Q. Did you feel the force of the blow?

A. Well, I was considerably bruised—I do not quite follow you.

Q. When you realized that the Miles car had struck your car, had you seen the automobile of Miles or heard it before?

A. No, sir.

Q. Then, the first idea you had of any collision was the impact itself?

A. That is right."

At the conclusion of the testimony of these three witnesses plaintiffs rested.

Since they had not proven a single one of the allegations of negligence upon which the actions were based, defendants moved to strike out the testimony for the reasons assigned on

page 99 of the Record. The motion was overruled. It should have been sustained.

It has long been regarded as established in Virginia by the decided cases, that—

“The mere happening of an accident, is of itself no evidence of negligence. There must be affirmative and preponderating proof of negligence showing more than the mere probability of a negligent act, or else there can be no recovery.”

*Bristol Tel. Co. vs. Stockton's Admr.*, 140 Va. 42.

See also Michie's Digest of Virginia and West Virginia Reports, Vol. 7, page 685, Sec. 61, where the following authorities are gathered:

*Southern Ry. vs. Moore*, 108 Va. 388.  
*Clinchfield Coal Co. vs. Wheeler*, 108 Va. 448.  
*Jacoby Co. vs. Williams*, 110 Va. 55.  
*Erle vs. Norfolk*, 139 Va. 38.  
*Fleming vs. Hartwick*, 100 W. Va. 714.  
*N. & W. vs. Johnson*, 103 Va. 187.  
*Humphreys vs. Valley R. Co.*, 100 Va. 749.  
*N. & W. vs. Cromer*, 99 Va. 763.  
*Bowers vs. Bristol Gas Co.*, 100 Va. 533.  
*Northington vs. N. & W.*, 102 Va. 446.  
*McVey vs. C. & O.*, 46 W. Va. 111.  
*Tidewater Stevedore Co. vs. Lindsay*, 136 Va. 888.  
*Shiflett vs. Virginia R. Co.*, 136 Va. 72.  
*Lynchburg Tel. Co. vs. Booker*, 103 Va. 594.

“A party alleging negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. The facts from which the jury can determine whether or not there was negligence must be shown by competent evidence, and the jury should not be left to mere conjecture or random judgment.”

*Moore vs. Heat, etc., Co.*, 65 W. Va. 552, at 555.  
*N. & W. vs. Witt*, 110 Va. 117, at 119.  
*So. Ry. vs. Hall*, 102 Va. 135.  
*Consumers' Brewery Co. vs. Doyle*, 102 Va. 402.  
*N. & W. vs. Poole*, 100 Va. 148.

*N. & W. vs. Briggs*, 103 Va. 105.

“The general doctrine is fundamental that in an action to recover damages for personal injuries, negligence will not be presumed, but the burden rests upon the plaintiff to prove it affirmatively and by a preponderance of the evidence. This rule is nowhere more strongly stated, nor more steadfastly adhered to than in the decisions of this Court.”

*V. E. P. Co. vs. Lenuz* (Va.), 164 S. E. 572 at 573.

The learned judge of the trial court could not agree with these principles and stated that he never interfered with a jury in determining suits of this nature.

Plaintiffs having proven on negligence against the defendant Miles, then, if the verdicts of the jury are to be sustained, negligence must be found from his own testimony. It is respectfully submitted that none will be found there. His statement with respect to how the accident occurred is clear, concise and convincing. It is set forth on pages 118 and 119 of the Record, and is as follows:

“Q. You were driving south on Arctic Avenue. Approximately at what speed were you going when you approached 19th Street before you reached the intersection where the accident occurred?

A. 30 miles an hour before I reached that intersection.

Q. And what, if anything, did you do with respect to your speed on approaching the intersection?

A. I slowed down to about 20 miles an hour.

Q. And approximately at what speed were you going when you reached the intersection?

A. Around 15 or 20 miles an hour. I had slowed down considerably.

Q. Tell the jury something about the physical condition of that intersection with respect to the corners there?

A. There were very high bushes, and you cannot see to your left anything at all. You have a very plain view of the road to the right, but not to the left until you get right up to it. It is hard to see to the left. In order to see a car coming down 19th Street, you absolutely have to get into the intersection.

Q. When you approached the intersection what signal did you give, if any?

A. I blew my horn when 50 or 60 feet from the corner.

Q. Once or more than once?

A. More than once.

Q. Did you see or hear the Denton car coming at that time?

A. I could not possibly see it.

Q. Did you hear it?

A. No, sir.

Q. Was there any signal or anything to indicate that it was going west on 19th Street at that time?

A. Not to my knowledge.

Q. Where were you with respect to the intersection when you first could see the Denton car?

A. I had started out into the intersection, and the Denton car was travelling very fast, and it came right in front of me, and the boy, Rose, was standing on the running board; and as soon as I saw the car and saw the back of Mr. Rose, I tried to turn my car so that I would not hit him.

Q. Which car entered the intersection first?

A. My car.

Q. And about how far in the intersection was the Denton car when you entered the intersection?

A. They were right up on us. I could not see it at first, and I did not hear anything. I did not see it because of the bushes, and they were coming pretty fast, and they ran right in front of me. And I knew I was going to hit the car when I saw Mr. Rose's back. He was standing on the running-board; and I turned my car as quickly as I could, so that I would not hit him.

Q. Did you strike their car right behind Mr. Rose?

A. Yes, sir, I just missed Mr. Rose. That was the best I could possibly do.

Q. Can you give the jury any idea at what speed the Denton car was going?

A. Very rapidly. I imagine as fast as they could go. I haven't any idea how fast. They went right by me. I knew I hit them, but I thought I had knocked the fender off; and they went clear by me.

Q. What happened to your car after the accident?

A. My car turned over where it was.

Q. And what happened to their car?

A. Their car went on down the road, west, in the same direction it was going. I saw it go by me before my car turned over. My windshield was not broken until it turned over. It was not broken by the impact. When the top of my car hit the ground, that broke the windshield. I knew that I had just missed Mr. Rose, and then my car turned over. I thought

they were safe until I saw that they were also turned over down the road.

Q. Now, was there anything that you could have done that might have avoided this accident that you did not do?

A. No, nothing. If I had turned to the right, I would have caught Mr. Rose between the cars. And I turned to the left. I did not have much time to think; it happened so quickly."

No other witness testified to any fact tending to show negligence on the part of this defendant, and the above falls far short of establishing negligence by a preponderance of the evidence as required as a condition precedent to a recovery.

*2. Plaintiffs were engaged in a joint enterprise with their driver whose negligence caused or contributed to the collision and is imputable to them.*

There can be no doubt that plaintiffs were engaged in a joint enterprise with their driver Denton at the time of the occurrence of the collision. The parties were returning with the gallon of whiskey which was procured for their common pleasure, was jointly owned by all, each had the right to exercise dominion and control over it, the journey was for the purpose of obtaining it at the expense of all, and all were joint principals in the enterprise. That this enterprise had a direct relation to the accident is shown by the testimony of Cuddihy (R., p. 82):

"Q. Then the place you got the liquor was not on your ordinary route from the service station to the place of the collision?

A. No, sir, it was not.

Q. So that if you had not gone to get the liquor you would have gotten to the point of collision long before the time the collision occurred, wouldn't you?

A. Yes, sir, of course."

It is worthy of mention that the relation of the four Hope-well boys to the transportation of this whiskey was such that each could have been indicted and tried under the criminal laws for its transportation as a principal, and could unquestionably have been convicted upon the facts surrounding the transportation. This, of course, is not conclusive as showing a joint enterprise, but it would indeed be an anomaly in the law if a party who is a joint principle with the driver of the car in which he is riding, in the enterprise for which the

journey is being made, is not chargeable with the negligence of such driver.

The negligence of the driver Denton is abundantly established in the Record. Counsel confidently asserts that plaintiffs having alleged such negligence as a basis for their action and to acquire jurisdiction in the forum in which the case was tried, cannot at a subsequent stage of the litigation take an inconsistent position and deny such negligence. They are foreclosed by their original allegations. Aside from this fact, their testimony on the witness stand convicts their driver of negligence. Knowing of his approach to an intersection, he ran into and through the intersection without slowing his speed, without making any attempt to look for vehicles on the right and having the right of way, without having his car under control, without sounding any warning of his approach, and with a reckless disregard of other vehicles using the cross streets. Denton, himself, did not appear at the trial and has never testified in the cause. His entire indifference to the proceedings denotes the fact that he was confident that plaintiffs did not in reality seek any recovery against him.

The Court recognized the law applicable to a joint enterprise in granting instructions Nos. 7 and 8 offered by the defendant Miles, but the error committed was in leaving the question for decision by the jury. On the plaintiffs' own testimony the joint enterprise was established, and on the plaintiffs' own allegations and testimony, the negligence of their driver Denton was established. These questions should therefore not have been left to the decision of the jury, but the motion to strike out the testimony, which was renewed at the conclusion of all of the testimony, should have been sustained, or the Court should have set aside the verdicts of the jury and entered final judgment for the defendant.

*3. Plaintiffs themselves were contributorily negligent as a matter of law.*

This assignment of error is intended to present for consideration the admitted facts which tend to show personal negligence on the part of plaintiffs themselves, irrespective of the negligence which is imputable to them by reason of their relation to their driver.

Treating the plaintiffs as mere passengers for the purpose of discussing this assignment of error, the question is, whether they used ordinary care for their own safety. Their

positions are somewhat dissimilar because, while Hodges was sitting inside the car, Rose was standing on the right running board, and since two of the occupants of the car were unhurt in the collision it is apparent that his position contributed to the injuries received by him. Except for their different positions in or on the car, both plaintiffs are in a similar situation in that both were entirely cognizant that the car was approaching an intersection where traffic might be expected along the street crossing at right angles; both knew that their driver was sounding no warning of his approach; both knew that he made no effort to decrease the speed of the car, or to accord the right of way to cars approaching on his right; both, according to their testimony, acquiesced in his manner of driving. The testimony of both plaintiffs that they did not see the Miles car *cannot be believed unless the car in which they were riding was going at such a high rate of speed that they had no opportunity for observation*. If it was going at such a high rate of speed and they acquiesced in the manner in which it was being driven, then each was contributorily negligent as a matter of law. If it was not going at such a high rate of speed as to effect their opportunities for observation, then their testimony that they looked, but did not see the Miles car, is inherently incredible, because, reaching the intersection it is an impossibility, looking to the right down the straight street, to avoid seeing an object as large as an automobile, which was indisputably there.

In *C. & O. Ry. vs. Barlow* (Va.), 156 S. E. 397, the Court said:

"This court has repeatedly declared that courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible. Though the case be heard as upon a demurrer to the evidence, the court will not stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, when the physical facts demonstrate such evidence to be untrue, and the verdict to be unjust and unsupported in law and in fact."

The true explanation of why plaintiffs did not see the Miles car is because their car was travelling at such a high rate of speed (as was testified by Mathias), that they travelled the distance in which the Miles car was visible before their pow-



ers of observation had an opportunity to function. No other conclusion is reconcilable with the established facts.

*4. It was error to permit plaintiffs to argue to the Court and Jury that their driver was not negligent after having founded their cause of action and forum for trial upon his negligence.*

In these cases the cause of action arose in Princess Anne County, Virginia, and the defendant Miles, against whom plaintiffs were really seeking a recovery, resided in the City of Norfolk, Virginia. Normally and naturally, the actions would have been brought and cases tried, in one of these jurisdictions. Plaintiffs, however, considered that their opportunity for recovery would be substantially improved by bringing action in Hopewell, where they resided and where they and their attorneys might reasonably expect to be at least acquainted with the members of the jury selected to try their cases. In order to secure jurisdiction in that forum they joined as a party defendant, their friend Denton, the driver of the car in which they were riding at the time of the collision. The allegations of their declarations are general in form and identical in both declarations (R., pp. 4 and 12). The pertinent parts of the Rose declaration are as follows:

“Franklin H. Rose, an infant under the age of twenty-one years, etc., complains of T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr, of a plea of trespass on the case, for this, to-wit:

That on the 31st day of August, 1930, the said J. S. Barr and the said R. L. Miles, Jr., were the owners of and were driving, operating and controlling a certain Ford Tudor Sedan automobile, etc.

And on the said 31st day of August, 1930, the said T. E. Denton was the owner of and was driving and operating and controlling a certain Ford roadster in which the said plaintiff was then and there riding as a passenger at the express invitation and solicitation of the said T. E. Denton, etc.

And it thereby became and was the duty of the said J. S. Barr, R. L. Miles, Jr., and T. E. Denton, and each of them, to drive, operate and control their said automobiles in a careful and prudent manner so as to avoid injury to passengers

riding in their said automobiles, and to others lawfully travelling over, upon and along the said streets and avenues.

Yet the said defendants, and each of them, disregarding their duties in this behalf, on the said 31st day of August, 1930, in the said town of Virginia Beach, Virginia, at a point in the said Town known as the intersection of 19th Street and Artic Avenue, *so carelessly, recklessly, and negligently drove and operated their said automobiles* that the said automobile then and there being driven and operated by the said J. S. Barr and R. L. Miles, Jr., and the automobile then and there being driven and operated by the said T. E. Denton, with great force and violence were driven, run into, and collided with each other, etc.”

The evidence developed that plaintiffs were engaged in a joint enterprise with their driver Denton, and to avoid this, counsel for the plaintiffs argued to the jury that Denton was not guilty of any negligence. (R., p. 181):

“Mr. Woody: Even though the plaintiffs were engaged in a joint enterprise with Denton, yet they ought to recover because the evidence does not show negligence on Denton’s part—”

Counsel for Miles objected to this argument since it placed the plaintiffs in an inconsistent position. Having at the inception of the litigation founded their cause of action upon the negligence of Denton and acquired jurisdiction by virtue of that fact, it was felt that they were not entitled at a subsequent stage of the litigation to deny that negligence. The Court overruled the objection, permitted the argument, and as a result of this line of argument the jury found against the defendant Miles alone, and in favor of defendant Denton. The fact that Denton never appeared in the cases, never employed counsel and was not present at the trial and was at all times friendly with plaintiffs, indicates very clearly that they never intended to actually collect anything from him and simply made him a defendant in the actions in order to acquire jurisdiction for trial at Hopewell. Due exception was taken to their action in this particular and the action of the trial court in permitting the line of argument that was followed.

That a party cannot take inconsistent positions at successive stages of litigation has long been settled in Virginia.

As was said in *Arwood vs. Hill's Admr.*, 135 Va. 235, 117 S. E. 603:

"A party cannot, either in the course of litigation, or in dealings *in pais*, occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, 'to approbate and reprobate'; and where a man has an election of several inconsistent courses of action, he will be confined to that course which he first adopts; the election, if made with knowledge of the facts, is itself binding, and cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position."

Biglow on Estoppel, page 773.

See also:

*Nagel vs. Syer*, 150 Va. 508, 143 S. E. 690.

Counsel for the defendant Miles is frank to admit, however, that at the time the case was tried he was not familiar with the case of *Turner vs. Shackelford* (Ga.), 145 S. E. 913. In that case the action was against three defendants as joint trespassers for damages. There was a finding against two of the defendants and in favor of the other. Jurisdiction for the trial of the cause in the particular locality in which same was tried had, however, been acquired because of the residence in that locality of the defendant against whom there was no verdict. The Court said (p. 914):

"In such a case where it appeared, without dispute and upon the face of the record, that the only two defendants against whom the verdict was rendered resided out of the county, and that the finding of the jury was in favor of the one defendant on account of whose residence in the county of the suit the court acquired jurisdiction, it was proper for the court to arrest the judgment, on motion of the defendants against whom the verdict was returned."

No motion in arrest of judgment was made in these cases, but the Court was asked to set aside the verdicts of the jury because it was urged that the argument erroneously permitted plaintiffs' counsel and the inconsistent positions which they were permitted to take, was a fraud on the Court. It

was felt that this was in all respects sufficient to preserve the defendant's rights.

5. *Error in instructions.*

The attitude of the trial Court seemed to be that every issue involved in the causes presented a question to be decided by the jury, and voluminous general instructions were given. It is felt that the Court erred, however, in amending Instruction No. 6 offered by the defendant Miles, over the objection of that defendant. The instruction as offered was as follows:

"The Court instructs the jury that if they believe from the evidence that the proximate cause of the injury suffered by these plaintiffs was the negligence of the driver of the car in which they were riding, then they should find for the defendant R. L. Miles, Jr."

The Court amended this instruction to read:

"The Court instructs the jury that if they believe from the evidence that the proximate cause of the injuries suffered by these plaintiffs was solely due to the negligence of the driver of the car in which they were riding, then they should find for the defendant R. L. Miles, Jr."

This instruction as amended and given inferentially told the jury that they could not find for the defendant Miles unless they believed that Denton's negligence was the sole cause of the collision. As such it was highly misleading. It inferentially told the jury that irrespective of the doctrine of joint enterprise and imputable negligence, and even contributory negligence of the plaintiffs themselves, yet they were entitled to recover unless the injuries were solely due to the negligence of the driver of the car in which they were riding.

"Positive error in one instruction is not cured by a correct statement in another, as it cannot be told by which the jury were controlled."

*Reliance Life Ins. Co. vs. Gulley*, 134 Va. 468, at 483.  
*Chesapeake Ferries vs. Hudgins* (Va.), 156 S. E. 440.

The Court also refused to give Instructions Nos. 10 and 11, offered by defendant Miles, and each is quoted on page

196 of the Record. It is felt that these were proper instructions which enunciated a principle not covered by any other instruction in the case, and that they should have been given.

6. It is felt that the Court erred in refusing to admit in evidence an ordinance of the Town of Virginia Beach covering the right of way at street intersections, but no point will be made of the error here as same was probably harmless, because the Town ordinance and State statute were in substance the same.

*7. Recognizing that the jury had applied the doctrine of comparative negligence, the trial Court erred in approving this course.*

In the carefully selected forum of the small city in which plaintiffs had resided for many years, and where their principal witness was the son of a prominent public official (R., p. 75), and where it is reasonable to infer that they were favorably known to at least some members of the jury, each was able to recover a verdict of only \$750.00, when the actual expenses attending the cure of each far exceeded that sum.

It is perfectly patent from the verdicts in these cases that the jury recognized that plaintiffs were not entitled to any recovery against the defendant Miles. If the amounts awarded be considered as having been given in compensation for the injuries received by each plaintiff, they are far less than would normally be received at a jury's hands for similar injuries. If they be considered as being awarded to apply on the cost of cure, then they are less than the established cost of cure, leaving nothing for pain and suffering, and for injuries, some of which are permanent; yet, plaintiffs have never complained of the inadequacy of the damages allowed.

When the verdicts were returned, a motion was made by the defendant Miles to set them aside and enter final judgment in his favor, or to set aside the said verdicts and award the defendant a new trial, all for the reasons assigned at page 184 of the Record. In disposing of this motion, the Court said:

“The Court: Unless you want to argue it, I will wind it up now by saying that in granting the instructions I tried to leave in the hands of the jury the question of the ultimate

degree of negligence *that each side was guilty of*, and allow them to fix it according to their view of the evidence. If they have done that and given verdicts accordingly, I would not like to set the verdicts aside. And they seem to have done so.

Mr. Ashburn: We except to that ruling of the Court, and particularly as the Court seems to apply the doctrine of comparative negligence to recovery in an action for damages, which we understand to be contrary to the law.

The Court: *It is apparently so.*

Mr. Woody: Do I understand that the Court overrules the motion?

The Court: Yes."

"The Court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule there can be no recovery."

7 Michie's Digest of Va. and W. Va. Rep., p. 660, where numerous cases are cited.

For the reasons assigned above, petitioner prays that a writ of error, but not a *supersedeas*, may be awarded; that the judgments of the Corporation Court of the City of Hopewell may be reversed and final judgment entered for this defendant or that this defendant may have such other and further relief as the nature of his case may require.

A copy of this petition was mailed to opposing counsel on the 16th day of September, 1932, and oral argument on this petition is requested.

R. L. MILES, JR.,

By W. R. ASHBURN, Counsel.

September 16th, 1932.

I. W. R. Ashburn, counsel practicing in the Supreme Court of Appeals of Virginia, certify that in my opinion sufficient matter of error appears in the proceedings and judgments in the foregoing petition to make it proper that the same be reversed by the Supreme Court of Appeals of Virginia.

W. R. ASHBURN.

Received September 17, 1932.

H. S. J.

Writ of error. Bond \$250.00.

LOUIS S. EPES.

## VIRGINIA:

In the Corporation Court of the City of Hopewell.

Pleas before the Corporation Court of the City of Hopewell, in the case of Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose, his Father and next friend against T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr; and in the case of Harold Hodges, an infant under the age of twenty-one years, who sues by Harry Hodges, his Father and next friend against T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr, defendants, lately pending in the said Court.

## MEMORANDUM OF SUIT.

Virginia:

In the Corporation Court for the City of Hopewell.

Franklin H. Rose, an infant under the age of twenty-one years who sues by J. Frank Rose, his father and next friend,  
Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

Trespass on the case. To 2nd September Rules, 1931.

Damages, Ten Thousand Dollars (\$10,000.00).

Address Spa. to Sgt. of City of Norfolk, except T. E. Denton.

ARCHER L. JONES,  
K. L. WOODY,

p. q.

Filed in Clerk's Office 21st day of Aug., 1931.

G. C. ALDERSON, Clerk.

page 2 }

SUMMONS.

THE COMMONWEALTH OF VIRGINIA:

To the Sergeant of the City of Hopewell, Greeting:

WE COMMAND YOU TO SUMMON T. E. Denton, to

appear at the Clerk's Office of our Corporation Court of the City of Hopewell, at the Courthouse thereof, at the rules to be holden for said Court, on the 3rd Monday in September, 1931, to answer Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose, his father and next friend, of a pleas of trespass on the case.

Damages Ten Thousand (\$10,000.00) Dollars. And have then there this writ.

WITNESS, G. C. Alderson, Clerk of our said Court, at the Courthouse, the 21st day of August, 1931, and in the 156th year of the Commonwealth.

(Signed) G. C. ALDERSON, Clerk.

ON BACK OF SUMMONS.

T. E. Denton could not be found at his place of abode on the 28 day of August, 1931, so the within summons was executed on the 28 day of August, 1931, within the City of Hopewell by delivering a true copy of the same in writing and giving information of its purport to E. L. Denton, his father, who was found at his usual place of abode and who is a member of his family and above the age of 16 years.

(Signed) A. S. J. WHEELER,

By.....  
deputy City Sergeant.

Franklin H. Rose, an infant, etc.,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr.

Summons in an Action for trespass on the case.

A. L. Jones & K. L. Woody, p. q.

Second September rules, 1931.

Corporation Court City of Hopewell.

Filed in Clerk's Office 29th day Aug. 1931.

G. C. ALDERSON, Clerk.



page 3 }                      SUMMONS.

THE COMMONWEALTH OF VIRGINIA:

To the Sergeant of the City of Hopewell, Greeting:

WE COMMAND YOU TO SUMMON, R. L. Miles, R. L. Miles, Jr., and J. S. Barr, to appear at the Clerk's Office of our Corporation Court of the City of Hopewell, at the Court-house thereof, at the rules to be holden for said Court, on the 3rd Monday in September, 1931, to answer Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose, his father and next friend, of a plea of Trespass on the case.

Damages Ten Thousand (\$10,000.00) Dollars. And have then there this writ.

WITNESS, G. C. Alderson, Clerk of our said Court, at the Courthouse, the 21st day of August, 1931, and in the 156th year of the Commonwealth.

(Signed) G. C. ALDERSON, Clerk.

ON BACK OF SUMMONS.

Not finding R. L. Miles, Jr., at his usual place of abode I executed the within in the City of Norfolk, Va., this 27 day of Aug., 1931, by delivering a copy hereof to his Mother, she being then there, a Member of his family and over the age of 16 years, and giving information of its purpose to her.

CHAS. E. FRANCIS,  
Sergt. City of Norfolk, Va.

By C. B. LESNER, Deputy.

Executed in the City of Norfolk, Va., this the 26 day of Aug., 1931, by serving a copy hereof on R. L. Miles in person.

CHAS. E. FRANCIS,  
Sergt. City of Norfolk, Va.

By C. B. LESNER, Deputy.

Franklin H. Rose, an infant, etc.,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr.

Summons in an Action for trespass on the case.

A. L. Jones & K. L. Woody, p q.

Second Sept., 1931, Rules.

Corporation Court City of Hopewell.

Filed in Clerk's Office 29th day Aug. 1931.

G. C. ALDERSON, Clerk.

page 4 }

## DECLARATION.

Virginia:

In the Corporation Court for the City of Hopewell.

Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose his father and next friend, Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr, Defendants.

## DECLARATION.

Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose, his father and next friend, complains of T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr of a plea of trespass on the case, for this, to-wit:

That on the 31st day of August, 1930, the said J. S. Barr and the said R. L. Miles, Jr., were the owners of and were driving, operating, and controlling a certain Ford Tudor Sedan automobile, which said automobile was then and there be-

ing driven and operated over, along, and upon the streets and avenues of the town of Virginia Beach, in the State of Virginia.

And on the said 31st day of August, 1930, the said T. E. Denton was the owner of and was driving and operating and controlling a certain Ford roadster in which the said plaintiff was then and there riding as a passenger at the express invitation and solicitation of the said T. E. Denton, along, over, and upon the said streets and avenues of the said town of Virginia Beach, in the State of Virginia.

And it thereby became and was the duty of the said J. S. Barr, R. L. Miles, Jr., and T. E. Denton, and each page 5 } of them, to drive, operate, and control their said automobiles in a careful and prudent manner so as to avoid injury to passengers riding in their said automobiles, and to others lawfully travelling over, upon and along the said streets and avenues.

Yet the said defendants, and each of them, disregarding their duties in this behalf, on the said 31st day of August, 1930, in the said town of Virginia Beach, Virginia, at a point in the said town known as the intersection of Nineteenth Street and Arctic Avenue, so carelessly, recklessly, and negligently drove and operated their said automobiles that the said automobile then and there being driven and operated by the said J. S. Barr and R. L. Miles, Jr., and the automobile then and there being driven and operated by the said T. E. Denton, with great force and violence were driven, run into, and collided with each other, whereby, and as a direct and proximate result of the carelessness, recklessness and negligence of the said defendants, and each of them, the said plaintiff was greatly wounded, bruised, cut and injured in and about his body, head, legs, and arms, breaking his left leg, crushing his right leg, and inflicting severe cuts on his face, over his eyes, and on his hands; by means whereof the said plaintiff was made sick, sore and lame, and so remained for a long time hitherto and was forced to lay out and expend a large sum of money in and about endeavoring to be cured, to-wit, One Thousand Dollars (\$1,000.00) and was prevented from pursuing his usual avocation or trade and thereby lost the wages and earnings which he otherwise would have made; and the plaintiff says that the injuries to his legs are permanent and that he has been otherwise greatly injured and damaged.

F. H. Rose v. R. L. Miles, Jr., and H. Hodges v. Same. 27  
page 6 } To the damage of the said plaintiff in the sum of  
Ten Thousand Dollars (\$10,000.00).

And therefore he brings this action of trespass on the case.

FRANKLIN H. ROSE,  
An infant, etc., Plaintiff,  
By Counsel.

ARCHER L. JONES,  
KIRK L. WOODY,  
p. q.

Filed in Clerk's Office, 15th day Sept., 1931.

G. C. ALDERSON, Clerk.

#### DEMURRER OF R. L. MILES.

Virginia:

In the Corporation Court for the City of Hopewell.

Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose, his father and next friend, Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

#### DEMURRER OF R. L. MILES.

Now comes the defendant, R. L. Miles, and files this his demurrer to the declaration exhibited against him in the above styled cause of action, and says that same is not sufficient in law in that said declaration alleges no cause of action against him.

W. R. ASHBURN, p. d.

Filed in Clerk's Office 23rd day Sept., 1931.

G. C. ALDERSON, Clerk.

page 7 } DEMURRER OF R. L. MILES, JR.

Virginia:

In the Corporation Court for the City of Hopewell.

Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose, his father and next friend, Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr, Defendants.

### DEMURRER OF R. L. MILES, JR.

Now comes the defendant, R. L. Miles, Jr., and files this his demurrer to the declaration exhibited against him in the above styled cause of action, and says that same is not sufficient in law; and for grounds of demurrer this said defendant says that the declaration so filed wholly fails to allege any negligence on his part sufficient to constitute a cause of action against him, the only allegation as to negligence being by way of recital, and there being no allegation of any act or conduct on the part of this defendant which would be negligent in law or in fact.

W. R. ASHBURN, p. d.

Filed in Clerk's Office 23 day Sept., 1931.

G. C. ALDERSON, Clerk.

### PLEA OF GENERAL ISSUE OF R. L. MILES, JR.

Virginia:

In the Corporation Court for the City of Hopewell.

Franklin H. Rose, an infant under the age of twenty-one years, who sues by J. Frank Rose, his father and next friend, Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr, Defendants.

page 8 }

PLEA OF GENERAL ISSUE.

Now comes the defendant, R. L. Miles, Jr., and says that he is not guilty of the matters and things laid to his charge in the declaration filed against him in the above styled cause of action. And of this he put himself upon the country.

W. R. ASHBURN, p. d.

Filed in Clerk's Office 23rd day Sept., 1931.

| G. C. ALDERSON, Clerk.

PLEA OF CONTRIBUTORY NEGLIGENCE.

Virginia:

In the Corporation Court of the City of Hopewell.

Franklin H. Rose, an infant who sues by J. Frank Rose, his father and next friend, Plaintiff,

vs.

T. E. Denton, R. L. Miles, Jr., and J. S. Barr, Defendants.

PLEA OF CONTRIBUTORY NEGLIGENCE OF  
R. L. MILES, JR.

Now comes the defendant, R. L. Miles, Jr., and says that plaintiff ought not to have or recover anything of him in the above entitled action for the reason that at the time of the happening of the things alleged in he Notice of Motion said plaintiff was himself guilty of negligence which proximately caused or contributed to the injuries of which he complains, in fact—

page 9 } (a) He failed to make reasonable use of his faculties for the preservation of his own safety;

(b) He failed to keep a proper lookout;

(c) He acquiesced in the manner in which T. E. Denton operated the car in which he was riding;

(d) He failed to remonstrate with the driver of the car in which he was riding, about his careless and negligent conduct;

(e) That knowing of the carelessness and negligence of the driver of the car in which he was riding he elected to place his safety entirely in the hands of said driver without reservation;

(f) That when he did or could, in the exercise of ordinary care, have discovered that the driver of said car was placing him in a position of peril, and in sufficient time for him to have warned the driver of this fact, he carelessly and negligently failed to do so;

(g) That he carelessly and negligently occupied a car being operated contrary to law;

(h) That the position in said car in which he was riding was careless and negligent;

(i) That he was engaged in a joint enterprise with the driver of said car and assumed equal responsibility so that the driver's negligence is imputable to him; and in other particulars to be shown at the trial.

And this the said defendant is ready to verify.

R. L. MILES, JR.,

By W. R. ASHBURN, p. d.

Filed in Clerk's Office 22nd day Oct., 1931.

G. C. ALDERSON, Clerk.

page 10 } MEMORANDUM OF SUIT.

Virginia:

In the Corporation Court for the City of Hopewell.

Harold Hodges, an infant under the age of twenty-one years,  
who sues by Henry Hodges, his father and next friend,  
Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

F. H. Rose v. R. L. Miles, Jr., and H. Hodges v. Same. 31

Trespass on the case. To 2nd September, 1931, Rules.  
Damages, Ten Thousand Dollars (\$10,000.00).

ARCHER L. JONEC,  
K. L. WOODY,

p. q.

Filed in Clerk's Office 21st day Aug., 1931.

G. C. ALDERSON, Clerk.

### SUMMONS.

THE COMMONWEALTH OF VIRGINIA:

To the Sergeant of the City of Hopewell, Greeting:

We command you to summon T. E. Denton, to appear at the Clerk's Office of our Corporation Court of the City of Hopewell, at the Courthouse thereof, at the rules to be holden for said Court, on the 3rd Monday in September, 1931, to answer Harold Hodges, an infant under the age of twenty-one years, who sues by Henry Hodges, his father and next friend of a plea of trespass on the case. Damages Ten Thousand (\$10,000.00) Dollars. And have then there this writ.

WITNESS G. C. Alderson, Clerk of our said  
page 11 } Court, at the Courthouse, the 21st day of Au-  
gust, 1931, and in the 156th year of the Common-  
wealth.

(Signed) G. C. ALDERSON, Clerk.

### ON BACK OF SUMMONS.

T. E. Denton, could not be found at his place of abode on the 28 day of August, 1931, so the within summons was executed on the 28 day of August, 1931, within the City of Hopewell by delivering a true copy of the same in writing and giving information of its purport to E. L. Denton, his father, who was found at his usual place of abode, and who is a member of his family and above the age of 16 years.

(Signed) A. S. J. WHEELER,  
City Sergeant.

By.....  
Deputy City Sergeant.



Harold Hodges, an infant, etc.,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr.

Summons in an action of Trespass on the case.

A. L. Jones & K. L. Woody, p q

Second Sept. 1931, Rules.

Corporation Court City of Hopewell.

Filed in Clerk's Office 29th day Aug. 1931.

G. C. ALDERSON, Clerk.

THE COMMONWEALTH OF VIRGINIA:

To the Sergeant of the City of Norfolk, Greeting:

WE COMMAND YOU TO SUMMON R. L. Miles, R. L. Miles, Jr., and J. S. Barr, to appear at the Clerk's Office of our Corporation Court of the City of Hopewell, at the Courthouse thereof, at the rules to be holden for said Court, on the 3rd Monday in September, 1931, to answer Harold Hodges, an infant under the age of twenty-one years, who sues by Henry Hodges, his father and next friend, of a plea of trespass on the case.

Damages Ten Thousand (\$10,000.00) Dollars. And have then there this writ.

WITNESS, G. C. Alderson, Clerk of our said Court, at the Courthouse the 21st day of August, 1931, and in the 156th year of the Commonwealth.

(signed) G. C. ALDERSON, Clerk.

page 12 } ON BACK OF SUMMONS.

Not finding R. L. Miles, Jr., at his usual place of abode, I executed the within in the City of Norfolk, Va. this 27 day of Aug. 1931, by delivering a copy hereof to his mother she

being then there a member of his family and over the age of 16 years, and giving information of its purport to him.

CHAS. E. FRANCIS,  
Sergt. City of Norfolk, Va.

By C. B. LESNER, Deputy.

Executed in the City of Norfolk, Va., this the 26 day of Aug., 1931, by serving a copy hereof on R. L. Miles in person.

CHAS. E. FRANCIS,  
Sergt. City of Norfolk, Va.

By C. B. LESNER, Deputy.

Harold Hodges, an infant, etc.,  
vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr.

Summons in an action of Trespass on the case.

A. L. Jones & K. L. Woody, p q

Second Sept. 1931, Rules.

Corporation Court City of Hopewell.

Filed in Clerk's Office 29th day Aug. 1931.

G. C. ALDERSON, Clerk.

### DECLARATION.

Virginia:

In the Corporation Court for the City of Hopewell.

Harold Hodges, an infant under the age of twenty-one years,  
who sues by Henry Hodges, his father and next friend,  
Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

## DECLARATION.

Harold Hodges, an infant under the age of twenty-one years, who sues by Henry Hodges, his father and next friend, complains of T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr, of a plea of trespass on the case, for this, to-wit:

That on the 31st day of August, 1930, the said J. S. Barr and the said R. L. Miles, Jr., were the owners of and were driving, operating and controlling a certain Ford Tudor sedan automobile, which said automobile was then  
page 13 } and there being driven and operated over, upon,  
and along the streets and avenues of the town of Virginia Beach, in the State of Virginia.

And on the said 31st day of August, 1930, the said T. E. Denton was the owner of and was driving and operating and controlling a certain Ford Roadster in which the plaintiff was then and there riding as a passenger at the express solicitation and invitation of the said T. E. Denton, along, over, and upon the said streets and avenues of the said town of Virginia Beach, in the State of Virginia.

And it thereby became and was the duty of the said J. S. Barr, R. L. Miles, Jr., and T. E. Denton, and each of them, to drive, operate and control their said automobiles in a careful and prudent manner so as to avoid injury to passengers riding in their said automobiles and to others lawfully travelling over, upon, and along the said streets and avenues.

Yet the said defendants, and each of them, disregarding their duties in this behalf, on the said 31st day of August, 1930, in the said town of Virginia Beach, Virginia, at a point in the said town, known as the intersection of Nineteenth Street and Arctic Avenue, so carelessly, recklessly, and negligently drove and operated their said automobiles that the automobile then and there being driven and operated by the said J. S. Barr and R. L. Miles, Jr., and the automobile then and there being driven and operated by the said T. E. Denton with great force and violence were driven, run into, and collided with each other, whereby, and as a direct and proximate result of the carelessness, recklessness and negligence of  
the said defendants, and each of them, the said  
page 14 } plaintiff was greatly wounded, bruised, cut and injured in and about his body, head, arms, and legs breaking his right leg, fracturing his right ankle, fracturing his skull, rendering him unconscious so that he remained so

unconscious for many days thereafter; by means whereof the said plaintiff was made sick, sore and lame, and so remained for a long time hitherto and was forced to lay out and expend a large sum of money in and about endeavoring to be cured, to-wit: the sum of One Thousand Dollars (\$1,000.00) and was prevented from pursuing his usual avocation or trade and thereby lost wages which he otherwise would have made; and that plaintiff says that the injuries to his legs are permanent and that he has been otherwise greatly injured and damaged.

To the damage of the said plaintiff in the sum of Ten Thousand Dollars, (\$10,000.00).

And therefore he brings this action of trespass on the case.

HAROLD HODGES,  
An Infant, etc.,  
By Counsel.

ARCHER L. JONES,  
KIRK L. WOODY,  
p. q.

Filed in Clerk's Office 15th day Sept., 1931.

G. C. ALDERSON, Clerk.

DEMURRER OF R. L. MILES, JR.

Virginia:

In the Corporation Court of the City of Hopewell.

Harold Hodges, an infant under the age of twenty-one years,  
who sues by Henry Hodges, his father and next friend,  
Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

page 15 } DEMURRER OF R. L. MILES, JR.

Now comes the defendant, R. L. Miles, Jr., and files this his demurrer to the declaration exhibited against him in the

above styled cause of action, and says that same is not sufficient in law; and for grounds of demurrer this said defendant says that the declaration so filed wholly fails to allege any negligence on his part sufficient to constitute a cause of action against him, the only allegation as to negligence being by way of recital, and there being no allegation of any act of conduct on the part of this defendant which would be negligent in law or in fact.

W. R. ASHBURN, p. d.

Filed in Clerk's Office 23rd day Sept., 1931.

G. C. ALDERSON, Clerk.

PLEA OF GENERAL ISSUE OF R. L. MILES, JR.

Virginia:

In the Corporation Court of the City of Hopewell.

Harold Hodges, an infant under the age of twenty-one years,  
who sues by Henry Hodges, his father and next friend,  
Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

PLEA OF GENERAL ISSUE.

Now comes the defendant, R. L. Miles, Jr., and says that he is not guilty of the matters and things laid to his charge in the declaration filed against him in the above page 16 } styled cause of action. And of this he puts himself upon the country.

W. R. ASHBURN, p. d.

Filed in Clerk's Office 23rd day Sept., 1931.

G. C. ALDERSON, Clerk.

DEMURRER OF R. L. MILES.

Virginia:

In the Corporation Court of the City of Hopewell.

Harold Hodges, an infant under the age of twenty-one years,  
who sues by Henry Hodges, his father and next friend,  
Plaintiff,

vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

### DEMURRER OF R. L. MILES.

Now comes the defendant, R. L. Miles, and files this his  
demurrer to the declaration exhibited against him in the  
above-styled cause of action, and says that same is not suf-  
ficient in law in that said declaration alleges no cause of ac-  
tion against him.

W. R. ASHBURN, p. d.

Filed in Clerk's Office 23rd day Sept., 1931.

G. C. ALDERSON, Clerk.

### PLEA OF CONTRIBUTORY NEGLIGENCE.

Virginia:

In the Corporation Court of the City of Hopewell.

Harold Hodges, an infant, who sues by Henry Hodges, his  
father and next friend, Plaintiff,

vs.

T. E. Denton, R. L. Miles, Jr., and J. S. Barr, Defendants.

page 17 } PLEA OF CONTRIBUTORY NEGLIGENCE OF  
R. L. MILES, JR.

Now comes the defendant, R. L. Miles, Jr., and says that  
plaintiff ought not to have or recover anything of him in the  
above-entitled action for the reason that at the time of the  
happening of the things alleged in the Notice of Motion said  
plaintiff was himself guilty of negligence which proximately  
caused or contributed to the injuries of which he complains,  
in that—

(a) He failed to make reasonable use of his faculties for  
the preservation of his own safety;

(b) He failed to keep a proper lookout;

(c) He acquiesced in the manner in which T. E. Denton operated the car in which he was riding;

(d) He failed to remonstrate with the driver of the car in which he was riding, he elected to place his safety entirely in the hands of said driver without reservation;

(f) That when he did or could, in the exercise of ordinary care, have discovered that the driver of said car was placing him in a position of peril, and in sufficient time for him to have warned the driver of this fact, he carelessly and negligently failed to do so;

(g) That he carelessly and negligently occupied a car being operated contrary to law;

page 18 } (h) That the position in said car in which he was riding was careless and negligent;

(i) That he was engaged in a joint enterprise with the driver of said car and assumed equal responsibility so that the driver's negligence is imputable to him; and in other particulars to be shown at the trial.

And this the said defendant is ready to verify.

R. L. MILES, JR.

By W. R. ASHBURN, p. d.

Filed in Clerk's Office 22nd day Oct., 1931.

G. C. ALDERSON, Clerk.

### COURT ORDERS.

Virginia:

At a Corporation Court of the City of Hopewell, at the Courthouse of said Court, in said City, on Monday, the 7th day of December, in the year of our Lord, one thousand, nine hundred and thirty-one, and in the one hundred and fifty-sixth year of the Commonwealth.

Franklin H. Rose, an infant, etc., Plaintiff,

vs.

T. E. Denton, et al., Defendants.

Trespass on the case. No. 1336.

This day came again the parties, by their attorneys; and, by agreement between parties, by counsel, it is ordered that this case be continued and set for trial on the 12th day of January, 1932, at ten o'clock A. M.

Harold Hodges, an infant, etc., Plaintiff,

vs.

T. E. Denton, et al., Defendants.

Trespass on the case. No. 1337.

page 19 } This day came again the parties, by their attorneys; and, by agreement between parties, by counsel, it is ordered that this case be continued and set for trial on January 12, 1932, at ten o'clock A. M.

(Signed) THOS. B. ROBERTSON, Judge.

Virginia:

Corporation Court of the City of Hopewell, on Tuesday the 12th day of January, in the year of our Lord, nineteen hundred and thirty-one.

Franklin H. Rose, an infant, etc., Plaintiff,

vs.

T. E. Denton, et al., Defendants.

Trespass on the case. No. 1336.

This day came again the parties, by their attorneys; and, by agreement between parties, by counsel, it is ordered that this case be continued until the next term of this court.

Harold Hodges, an infant, etc., Plaintiff,

vs.

T. E. Denton, et al., Defendants.

Trespass on the case. No. 1337.

This day came again the parties, by their attorneys; and,



by agreement between parties, by counsel, it is ordered that this case be continued until the next term of this court.

(Signed) THOS. B. ROBERTSON, Judge.

Virginia:

At a Corporation Court of the City of Hopewell, at the Courthouse of said Court, in said City, on Monday, the 1st day of February, in the year of our Lord, one thousand, nine hundred and thirty-two, and in the one hundred page 20 } and fifty-sixth year of the Commonwealth.

Franklin H. Rose, an infant, Plaintiff,

vs.

T. E. Denton, et al., Defendants.

Trespass on the case. No. 1336.

This day came again the parties, by their attorneys; and, by agreement between parties, it is ordered that this case be continued until the next term of this court.

Harold Hodges, an infant, etc., Plaintiff,

vs.

T. E. Denton, et al., Defendants.

Trespass on the case. No. 1337.

This day came again the parties, by their attorneys; and, by agreement between parties, it is ordered that this case be continued until the next term of this court.

(Signed) THOS. B. ROBERTSON, Judge.

Virginia:

Corporation Court of the City of Hopewell, on Tuesday, the 26th day of April, in the year of our Lord, nineteen hundred and thirty-two.

Franklin H. Rose, an infant, etc., Plaintiff,

vs.

T. E. Denton, et als., Defendants.

Trespass on the case. No. 1336.

This day came again the parties, by their attorneys; and it appearing to the court that a material witness for the defendants is ill and unable to attend court, on motion of the defendants, by their attorneys, the plaintiff, by his attorneys, not opposing said motion, it is ordered that this case be continued until the next term of this court.

Harold Hodges, an infant, etc., Plaintiff,

vs.

T. E. Denton, et als., Defendants.

Trespass on the case. No. 1337.

page 21 } This day came again the parties, by their attorneys; and it appearing to the court that a material witness for the defendants is ill and unable to attend court, on motion of the defendants, by their attorneys, the plaintiff, by his attorneys, not opposing said motion, it is ordered that this case be continued until the next term of this court.

(Signed) THOS. B. ROBERTSON, Judge.

BILL OF PARTICULARS.

Virginia:

In the Corporation Court of the City of Hopewell:

Harold Rose, Plaintiff,

vs.

R. L. Miles, Jr., T. E. Denton, et al.

Bill of Particulars.

The plaintiff, having been ordered to file his bill of particulars, comes and says that the particulars of the negligence of the defendant consisted in this:

(1) That the defendant operated his car at an excessive rate of speed;

(2) That the defendant failed to keep his car under complete control;

(3) That the defendant had inadequate and improperly adjusted brakes;

(4) That the defendant drove to the left of the center of the street;

(5) That the defendant violated the provisions of the right-of-way laws, as set out in Section 2145, subsection 19;

(6) That the defendant drove his car on his left-hand side of the road and not as close to the right-hand side as was possible;

page 22 } (7) That the defendant failed to keep a proper lookout;

Causing him permanent injuries to his person as set out in the declaration and damaging him in the sum of Ten Thousand Dollars. (\$10,000.00).

HAROLD ROSE,  
By Counsel.

Filed in Court May 10, 1932.

G. C. ALDERSON. Clerk.

### BILL OF PARTICULARS.

Virginia:

In the Corporation Court of the City of Hopewell:

Harold Rose, Plaintiff,

vs.

R. L. Miles, Jr., T. E. Denton, et al.

### Bill of Particulars.

The plaintiff, having been ordered to file his bill of particulars, comes and says that the particulars of the negligence of the defendant consisted in this:

(1) That the defendant operated his car at an excessive rate of speed;

(2) That the defendant failed to keep his car under complete control;

(3) That the defendant had inadequate and improperly adjusted brakes;

(4) That the defendant drove to the left of the center of the street;

(5) That the defendant violated the provisions of the right-of-way laws, as set out in Section 2145, subsection 19;

page 23 } (6) That the defendant drove his car on his left-hand side of the road and not as close to the right-hand side as was possible;

(7) That the defendant failed to keep a proper lookout;

Causing him permanent injuries to his person as set out in the declaration and damaging him in the sum of Ten Thousand Dollars (\$10,000.00).

HAROLD HODGES,  
By counsel.

Filed in Court May 10, 1932.

G. C. ALDERSON, Clerk.

CONSOLIDATED CAUSES. GROUNDS OF DEFENSE  
OF R. L. MILES, JR.

Virginia:

In the Corporation Court of the City of Hopewell:

Harold Hodges, by next friend & Franklin H. Rose, et als.,  
Plaintiffs,

vs.

T. E. Denton, R. L. Miles, Jr., et als., Defendants.

Consolidated Causes. Grounds of *Denfense* of R. L.  
Miles, Jr.

For grounds of defence this defendant says that he will rely upon each and every defence possible under the general issue, and in addition thereto that the driver of the car in which plaintiffs were riding committed the negligence which was the proximate cause of their injuries; that the negligence of such driver is imputable to them and each of them;

that they and each of them were engaged in a joint enterprise with such drivers; that they and each of them were contributorily negligent as set forth in plea filed in page 24 } this cause; and that this defendant was not negligent, and in other particulars to be shown at the trial.

DAVID A. HARRISON, JR.,  
W. R. ASHBURN, p. d.

Filed in Court May 10, 1932.

G. C. ALDERSON, Clerk.

### COURT ORDERS.

Virginia:

Corporation Court of the City of Hopewell, on Tuesday the 10th day of May, in the year of our Lord, nineteen hundred and thirty-two.

Harold Hodges, an infant under the age of 21 years, who  
sues by Henry Hodges, his father and next friend, Plaintiff,  
vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants,

Trespass on the case. No. 1337.

and

Franklin H. Rose, an infant under the age of 21 years, who  
sues by J. Frank Rose, his father and next friend, Plaintiff,  
vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

Trespass on the case. No. 1336.

This day came the plaintiffs, by their attorneys; and the defendants, R. L. Miles and R. L. Miles, Jr., appeared by their attorneys; J. S. Barr, one of the defendants, not having been served with process in these cases, came not; and T. E. Denton, who has been duly served with process in each of these cases, came not. Thereupon, by agreement between parties, by counsel, R. L. Miles, Sr., was dismissed as a defendant

in each of these cases. Thereupon, by agreement page 25 } between parties, by counsel, it is ordered that the above cases be tried jointly. Thereupon, the defendant, R. L. Miles, Jr., by his attorneys, tendered anew his demurrer and plea of the general issue, filed in the Clerk's office of this Court on the 23rd day of September, 1931, and also tendered anew his statement, in writing, of his intention to rely upon the contributory negligence of the plaintiffs, filed in the Clerk's Office of this Court on the 21st day of October, 1931, which said demurrer, plea of the general issue and statement of his intention to rely on the plaintiff's contributory negligence, are hereby again filed in open court; Thereupon, the demurrer was argued by counsel, and which demurred the Court doth overrule, and exception noted. Thereupon the defendant, R. L. Miles, Jr., by his attorney, moved the Court to require the plaintiffs to furnish him with a statement of the particulars of their claim, which motion is granted and the plaintiffs are required to file a statement of the particulars of their claims forthwith. Thereupon the plaintiffs, by their attorneys, moved the Court to require the defendant, R. L. Miles, Jr., to furnish them with a statement of the grounds of his defense, which motion is granted and the defendant is required to file a statement of the grounds of his defense forthwith; which said bill of particulars and grounds of defense are hereby accordingly filed; And, issue is therein joined between the parties. And, thereupon, came a jury, to-wit: G. C. Farley, C. S. Bowcock, K. M. Rosazza, Jesse Strickland, W. W. Hedgpath, C. W. Burnley and R. B. Gill, who having been thereupon duly selected, and impanelled and sworn to try the issue joined as aforesaid, and having heard the evidence introduced on page 26 } behalf of the plaintiffs; the defendant, R. L. Miles, Jr., by his attorneys, moved the Court to strike out all of the testimony offered on behalf of the plaintiff, on the ground that the testimony as offered and admitted does not show any negligence on the part of the defendant R. L. Miles, Jr., upon which a recovery could be predicted, or upon which the Court would be justified in sustaining a verdict; which motion was argued by counsel and which motion the Court doth overrule, to which action of the Court the defendant, by his attorneys, excepted. And the jury having fully heard the evidence introduced on behalf of the plaintiffs and the defendant the defendant, by his attorneys, renew his motion heretofore made, to strike out the plaintiffs' evidence, on the grounds heretofore stated; which motion the Court doth again overrule, and the defendant, by his attor-

neys; excepted, and the jury thereupon were adjourned over until tomorrow morning at ten o'clock. And the further hearing of this case is continued until tomorrow morning at 9:00 o'clock.

(Signed) THOS. B. ROBERTSON, Judge.

Virginia:

Corporation Court of the City of Hopewell, on Wednesday the 11th day of May, in the year of our Lord, nineteen hundred and thirty-two.

Harold Hodges, an infant under the age of 21 years, who  
sues by Henry Hodges, his father and next friend, Plaintiff,  
vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

Trespass on the case. No. 1337.

page 27 } and

Franklin H. Rose, an infant, under the age of 21 years, who  
sues by J. Frank Rose, his father and next friend, Plaintiff,  
vs.

T. E. Denton, R. L. Miles, R. L. Miles, Jr., and J. S. Barr,  
Defendants.

Trespass on the case. No. 1336.

This day came again the parties, by their attorneys; and the jury sworn on yesterday, returned into Court, pursuant to their adjournment on yesterday; And, thereupon, having heard the instructions of the Court, and argument of counsel, retired to their room to consider of their verdict, and after some time returned into Court and reported their verdict in the following words and figures, to-wit: "We, the jury, upon the issue joined find for the plaintiff, Harold Hodges, against the defendant, R. L. Miles, Jr., and fix his damages at Seven Hundred and Fifty Dollars (\$750.00), (Signed) C. W. Burnley, Foreman,"—"We, the jury, upon the issue joined find for the plaintiff Franklin H. Rose, against the defendant, R. L. Miles, Jr., and fix his damages at Seven Hundred and Fifty Dollars (\$750.00), (Signed) C. W. Burnley, Foreman." Thereupon the defendant, R. L. Miles, Jr., by his attorneys, moved the Court first, to set aside the verdicts of the jury rendered in both cases, which have been

jointly tried together, as contrary to the law and the evidence, and wholly without any evidence to support them and to enter final judgment for the defendant, R. L. Miles, Jr., or, if the Court will not enter final judgment for the defendant, R. L. Miles, Jr., to set aside the said verdicts and each of them in these cases which have been jointly tried together, and award the defendant a new trial, because the verdicts, and each of them are not supported by the law and page 28 } the evidence, and are contrary to the law and the evidence; For error in the admission of evidence over the objection of defendant's counsel, and for error in refusing to admit certain evidence tendered by counsel for the defendant, and for error in the granting and refusing of instructions, to which due exceptions were taken at the time the court ruled thereon; and to set aside the said verdict also for the reasons assigned in moving to strike out the evidence offered which motions the court doth overrule, to which action of the court in overruling said motions the defendant, by his attorneys, excepted. Whereupon it is considered by the court that the plaintiff, Harold Hodges, recover of the defendant R. L. Miles, Jr., the sum of Seven Hundred and Fifty Dollars (\$750.00), with interest thereon from the 11th day of May, 1932, until paid, and his costs in this behalf expended; And that the plaintiff, Franklin H. Rose, recover of the defendant, R. L. Miles, Jr., the sum of Seven Hundred and Fifty Dollars (\$750.00), with interest thereon from the 11th day of May, 1932, until paid, and his costs in this behalf expended.

And it being suggested to the Court that the defendant desires to present to the Supreme Court of Appeals of Virginia a petition for a writ of error, and *supersedeas*, to the judgments of the court aforesaid, it is, therefore, ordered that executions of the judgments aforesaid shall be suspended for a period of sixty (60) days from the date hereof, upon execution by the defendant, or someone for him, of bonds in the penal sum of \$1,000.00, each, before the Clerk of this Court, with security to be approved by the said Clerk, and with a condition reciting the aforesaid judgment, and the intention of the defendant to present such petition, and providing for the payment of all such damages as may accrue to any person by reason of the aforesaid suspension, in case, a *supersedeas* to such judgments page 29 } should not be allowed, and be effective within the time so specified.

(Signed) THOS. B. ROBERTSON, Judge.



page 30 } (Copy)

Virginia:

In the Corporation Court of the City of Hopewell:

Franklin H. Rose, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Harold Hodges, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Consolidated Causes Tried Together by Consent of all  
Parties by Counsel.

**BILL OF EXCEPTIONS NO. 1 OF DEFENDANT R. L.  
MILES, JR.**

Be It Remembered that on the trial of these cases, which were tried together by the consent of all parties by counsel, and at the close of the said evidence, the jury found verdicts in the words and figures following:

“We, the jury, upon the issue joined, find for the plaintiff Franklin H. Rose against the defendant R. L. Miles, Jr., and fix his damages at \$750.00.

C. W. BURNLEY, Foreman.”

page 31 } “We, the jury, upon the issue joined, find for the plaintiff Harold Hodges, against the defendant R. L. Miles, Jr., and fix his damages at \$750.00.

C. W. BURNLEY, Foreman.”

Thereupon the defendant R. L. Miles, Jr., by his counsel, moved the Court to set aside the said verdicts and each of them and enter final judgment for the defendant R. L. Miles, Jr., in the case of Franklin H. Rose, plaintiff against said R. L. Miles, Jr., defendant, and in the case of Harold Hodges, plaintiff, against R. L. Miles, Jr., defendant, and each of them, on the grounds following:

1. That the said verdicts and each of them are contrary to the law and the evidence and wholly without any evidence to

support them, and there is no evidence that this defendant was guilty of any primary negligence.

2. That it is conclusively shown by the evidence that the plaintiffs, Franklin H. Rose and Harold Hodges were engaged in a joint enterprise with T. E. Denton, the driver of the car in which they were riding, as a matter of law; that it is conclusively shown by the evidence that the said T. E. Denton was guilty of negligence proximately causing or contributing to the accident out of which the injury to plaintiffs arose, as a matter of law, and that the negligence of the said T. E. Denton is imputable to them and each of them as a matter of law;

3. That it is conclusively shown by the evidence that the plaintiffs and each of them were guilty of negligence as a matter of law, which proximately caused or contributed to their injuries. And the said defendant R. L. Miles, Jr., moved the Court in the alternative, if it would not set aside said verdicts and each of them and enter final judgment page 32 { for the defendant R. L. Miles, Jr., to set aside the said verdicts and each of them and award the said defendant, R. L. Miles, Jr., a new trial on the grounds following:

1. Because the said verdicts and each of them are contrary to the law and the evidence and without evidence to support them;

2. That the Court erred in giving the jury the instructions asked for by the plaintiffs;

3. That the Court erred in refusing the instructions asked for by the defendant R. L. Miles, Jr.;

4. That the Court erred in amending certain instructions offered by the defendant R. L. Miles, Jr., to which due exception was taken at the time;

5. That the Court erred in refusing to admit in evidence an ordinance of the Town of Virginia Beach governing the right of way at street intersections, to which due exception was taken when said ordinance was tendered, as will herein-after appear;

6. That the Court erred in refusing to strike out all of

the evidence offered on behalf of the plaintiffs when said evidence was insufficient to support a verdict for said plaintiffs or either of them, and when said evidence conclusively showed that the plaintiffs were engaged in a joint enterprise with the driver of the car as a matter of law; that said driver was negligent as a matter of law and that his negligence was imputable to the plaintiffs and each of them as a matter of law, and that the evidence showed as a matter of law that the plaintiffs and each of them were guilty of negligence proximately *causcausing* or contributing to their injury;

7. That the Court erred in permitting the jury to apply the doctrine of comparative negligence.

And on said alternative motion the Court refused to set aside the said verdicts, or either of them, and enter final judgment for the defendant R. L. Miles, Jr. The Court further refused to set aside the said verdicts or either of them and grant the defendant R. L. Miles, Jr., a new trial, but entered judgment on said verdicts and each of them for the amount of said verdicts, to which action of the Court the defendant, R. L. Miles, Jr., by counsel, then and there excepted and tenders this his Bill of Exceptions No. 1 which he prays may be signed, sealed and made a part of the record in these cases, and the same is accordingly done.

And the Court certifies that the following is the evidence which was adduced on the trial of these cases and is all the evidence which was adduced at said trial, together with the objections of counsel to the introduction of certain evidence, and the rulings of the Court thereon; the motions of counsel for defendant R. L. Miles, Jr., to strike out the evidence introduced on behalf of the plaintiffs; and the rulings of the Court thereon; and the objections and exceptions of counsel for the defendant, R. L. Miles, Jr., to the instructions granted in behalf of the plaintiffs; the refusal to grant certain instructions offered by the defendant R. L. Miles, Jr., and the amendment by the Court of certain instructions offered

page 34 } by R. L. Miles, Jr., as well as the motions after verdict:

page 35 } In the Corporation Court of the City of Hopewell, Virginia, Before Hon. Thomas B. Robertson, Judge, and a jury, May 10, 1932.

Franklin H. Rose

vs.

R. L. Miles, Jr., et als.;

Harold Hodges

vs.

R. L. Miles, Jr., et als.

Appearances: A. L. Jones, K. L. Woody, Attorneys for the plaintiffs: D. A. Harrison, Jr., W. R. Ashburn, Attorneys for R. L. Miles, Jr.

Both cases heard together by consent of parties by counsel.

On motion of counsel for defendant, R. L. Miles, Jr., the witnesses were separated and excluded.

Demurrers to declarations filed; demurrers overruled; exceptions noted.

page 36 } Bill of particulars and papers filed; and it is understood that they shall be considered as filed in both cases.

Mr. Woody: If your Honor please, when these suits were originally brought, Mr. R. L. Miles, Sr., was made a party defendant. We wish at this time to say to the Court that we dismiss the actions against R. L. Miles, Sr.

NOTE: There was no appearance for or by Mr. T. E. Denton.

page 37 } FRANKLIN H. ROSE,  
the plaintiff in one of the cases, duly sworn:

DIRECT EXAMINATION.

By Mr. Woody:

Q. Mr. Rose, you are the plaintiff in one of these cases, are you not?

A. Yes, sir.

Q. On the 31st of August, 1930, were you at Virginia Beach?

A. Yes, sir.

Q. Do you remember what day of the week that was?

A. It was on a Sunday.

Q. About what time of day did this collision in which you were injured occur?

A. My watch stopped at seven minutes to six. So that I imagine it was at that time.

Q. What day of the week had you gone to Virginia Beach?

A. Saturday afternoon.

Q. With whom did you go?

A. With two young ladies from this town, Miss Mildred Dana; and, at the present time, I do not recall the name of the other one.

Q. Did you go in the car which figured in the collision?

A. No, sir.

Q. When did you meet Mr. Denton?

A. Sunday morning.

Q. What car, if any, was he driving?

A. A Ford model A roadster.

Q. Where did you go after leaving him?

page 38 } A. Back to the automobile camp; at our camp headquarters.

Q. Where was that located?

A. On 19th Street, about four or five blocks from Atlantic Avenue—from the waterfront.

Q. Did you meet Harold Hodges on that day?

A. Yes, sir, at the same time I met Denton.

Q. At what time did you meet James Cuddihy on that day?

A. As well as I recall it was the same time I met these other boys.

Q. After you met Hodges, Denton, and Cuddihy, where did you go?

A. We went to the auto camp.

Q. At what time approximately did you leave the automobile camp before the collision occurred?

A. As well as I can say it was twenty minutes after five.

Q. Where did you go?

A. We first went to the bath house for Hodges and Denton to change out of their bathing suits.

Q. For what purpose was it?

A. For Hodges and Denton to change into their street clothes from their bathing suits.

Q. Do you mean that the clothing was in bath house?

A. Yes, sir, in the locker.

Q. Where was that located?

A. At the lower end of Virginia Beach.

Q. After that, where did you go?

A. We came back to the service station, up in page 39 } Virginia Beach, on Atlantic Boulevard; I believe it was the Texaco Station.

Q. Do you recall what station it was, or where it was located?

A. I am quite sure it was the Texaco Service Station. But I do not know the point it was located. It was on Atlantic Avenue.

Q. And then where did you go?

A. Then we went on the trip to get the whiskey.

Q. Did you get the whiskey?

A. Yes, sir.

Q. How much?

A. One gallon.

Q. Did any member of that party take a drink during the afternoon, so far as you know?

A. Not as far as I know.

Q. You had that gallon of whiskey, which was purchased at that time, and I presume you were taking it back to the automobile camp? Is that correct?

A. That is correct.

Q. Was it touched, so far as you know?

A. It was not, so far as I know.

Q. Did you see any member of the party take a drink during that afternoon?

A. No, sir.

Q. Did you have anything to drink?

A. No, sir.

page 40 } Q. Had you had a drink during that afternoon at all?

Q. At what point did this collision occur?

A. At the corner of 19th Street and Arctic Avenue.

Q. Who was driving the automobile in which you were riding?

A. Mr. Denton.

Q. Whose car was it?

A. Mr. Denton's.

Q. Now, tell the jury who was in that car, and their positions?

A. Mr. Denton was driving, and Mr. Cuddihy was sitting next to Mr. Denton, and Mr. Hodges was sitting next to Mr. Cuddihy, and I was on the right fender, and this boy—I do not recall his name—was on the left fender. That was a boy that we picked up.

Q. Was that Mr. Mathias?

A. Yes, sir.

Q. Where did you pick him up?

A. At the Texaco Station.

Q. Did you know him before that time?

A. No, sir.

Q. How did you happen to get into company with him?

A. I had only talked with him that morning, and it was the man at the service station who told us where to get the whiskey; and Mr. Mathias went with us.

Q. Mr. Mathias went along with you to show you where to get the whiskey?

A. Yes, sir.

page 41 } Q. He did go with you?

A. Yes, sir.

Q. Did he show you where to buy it?

A. Yes, sir.

Q. After you bought it, what happened?

A. We came back; I do not recall the direct route, but we were headed back towards the auto camp, and Mr. Mathias was still with us.

Q. What part did Mr. Mathias have in the purchase of the whiskey? Did he have anything to do with it other than to show you where it was?

A. No, sir.

Q. So he showed you where to go?

A. Yes, sir.

Q. And came back with you?

A. Yes, sir.

Q. Now, at the time of the accident you had left Atlantic Avenue?

A. Yes, sir.

Q. And were headed towards the automobile camp?

A. No, sir.

Q. What was Mr. Mathias still doing?

A. He was going out to the automobile camp with us I suppose to get a drink. That is to the best of my knowledge.

Q. Where did the accident occur?

A. At the corner of 19th Street and Arctic Avenue.

Q. The street close to the shore front is Atlantic Avenue?

page 42 } A. Yes, sir.

Q. And the one next to that, a block away, is Pacific Avenue?

A. Yes, sir.

Q. And the one next to that is Arctic Avenue? Is that correct?

Mr. Ashburn: Between Pacific Avenue and Arctic Avenue is a blind street which has never been opened up. So that Arctic Avenue is really two blocks away.

Mr. Woody: Yes.

By Mr. Woody:

Q. And those avenues run parallel to the beach?

A. Yes, sir.

Q. Now, the streets run at right angles to the beach? Is that correct?

A. Yes, sir.

Q. So that at the time of the accident you all were on 19th Street, headed west, away from the water?

A. That is correct.

Q. And you were crossing Arctic Avenue at right angles?

A. Yes, sir.

Q. Now, tell the jury in your own way just what occurred at the time of the accident?

A. We were returning to the auto camp, and had turned off of Atlantic Avenue and were going out 19th Street. We had to slow down to cross Pacific Avenue because there was a railroad track there, and it is rather rough there, page 43 } and we were rather slow at that point; and then we were going on out towards the automobile camp, and, as well as I can recall, Mr. Denton was not making any excessive speed at that time. We arrived at Arctic Avenue and I looked as best I could both ways on Arctic Avenue and I did not see any car, and, to the best of my knowledge, no one else in the car at the time saw this other car approaching. We started across Arctic Avenue, and, as was shown, we were almost across the intersection when we were hit.

Q. Can you give the jury an approximate idea of how fast the car in which you were riding was traveling at the time it crossed the intersection?

A. To the best of my knowledge the car was not going over 20 or 25 miles an hour at the time we hit the intersection proper.

Q. Mr. Ashburn, in his opening statement, mentioned the fact that some one in the car—I do not know who—had remonstrated with Mr. Denton about the speed he was making. Do you recall any such incident?

A. At the present time I do not.

Q. Do you remember any time during that trip his making such speed as would suggest to any one to call him down?



A. Not at that point where it would be necessary to do that; no, sir.

Mr. Woody: I do not understand you.

A. (Continued) I mean that he was not making any such speed; not in any dangerous manner.

page 44 } Q. Had any one told him to slow down?

A. I do not recall it.

Q. Did you hear it?

A. No, sir.

Q. Did the speed at any time during that trip make you think that he ought to slow down?

A. As well as I recall, no, sir.

Q. From the time that car turned off Atlantic Avenue to the point of collision, had Mr. Denton's speed been excessive, so far as you know?

A. No, sir, it had not.

Q. What was the greatest rate of speed, so far as you can recall—I realize that you will have to make an approximation—from the time you left Atlantic Avenue until you arrived at the point of collision?

A. I am afraid I can not answer that very definitely. I should say 35 or 40 miles an hour.

Q. You do not think at any point, from Atlantic Avenue to the point of the intersection, he operated the car over 35 or 40 miles an hour, at any time?

A. As well as I recall, he did not.

Q. Is that correct?

A. Yes, sir.

Q. What part of the car that Mr. Denton was driving was struck?

A. It was the right rear fender and wheel.

page 45 } Q. Was any portion of the front of the car struck by the other car?

A. I am unable to say that.

Q. Where were you riding?

A. On the running-board.

Q. What was your position?

A. I was standing on the rear part of the running-board, hanging onto the top.

Q. Were you standing or sitting?

A. As well as I recall, I was leaning back against the rear fender.

Q. Tell the jury the extent of your injuries?

A. My left leg was fractured approximately six inches

above the ankle, and my right leg was fractured and crushed from about six inches above the ankle down to and including the upper part of the ankle joint. I had a severe laceration about the left hand, and a severe laceration about the right eye.

Q. Were you conscious after the accident?

A. Not until after I came to in the doctor's office.

Q. What doctor?

A. Dr. Woodhouse.

Q. At Virginia Beach?

A. Yes, sir, at Virginia Beach.

Q. And then where were you taken?

A. We were taken to the Sarah Lee Hospital in Norfolk.

Q. You recovered consciousness in Dr. Woodhouse's office?

A. Yes, sir.

page 46 } Q. Were you conscious from that time on?

A. Yes, sir, until I arrived at the hospital.

Q. How long did you stay in the hospital?

A. As well as I recall, it was nine weeks.

Q. Then, you were not in a position to know the position of your automobile after the accident?

A. No, sir, I was knocked unconscious.

Q. And you stayed in the hospital practically nine weeks?

A. Yes, sir.

Q. Can you tell the jury the expenses incident to your treatment, and your doctor's bill, and medical bill and hospital bill?

Mr. Ashburn: If your Honor please, I do not think that that can be proved in that manner. It should be proved by statements or bills which were paid or not paid, or by some bills rendered.

Mr. Woody: I will change the question.

By Mr. Woody:

Q. What amount was paid out for your medical, doctor's, and hospital bills as the result of this accident?

Mr. Ashburn: Paid out by him, you mean?

Mr. Woody: Yes, sir.

A. \$6.00 a day during the entire stay at the hospital, and the doctor's bill of \$300.00.

By Mr. Woody:

Q. A doctor's bill of \$300.00 and \$6.00 a day for nine weeks in the hospital? Is that correct?

A. Yes, sir. And there were other expenses at page 47 } the time, which I can not tell, such as X-rays.

Q. Now, tell the jury whether or not you suffered to any extent as the result of this accident; I mean, physical suffering?

A. Yes, sir, a great deal, for the first three weeks especially.

Q. Have you recovered to this time?

A. No, sir.

Q. Tell the jury how you are affected now?

A. My legs are still weak. They are not very stable, and then one knee-joint is so affected by the injury to the lower part of the leg that at various times, if any strain is placed upon it, it slips out of joint; and then, in the case of rainy weather or any exposure, my leg aches.

Q. You mean that it is so now?

A. Yes, sir.

Q. Do you limp as the result of it?

A. Not unless they are overtaxed.

Q. If they are overtaxed, what is the result?

A. The result is a swelling and a limp.

Q. At this time?

A. Yes, sir.

Q. Is that condition improving now?

A. I haven't noticed any improvement in the last eight or ten months.

Q. The condition appears to be about the same now as it was eight or ten months ago?

page 48 } A. Yes, sir.

Q. I believe you stated that, as you entered the intersection, you were on the right-hand side of the Denton car?

A. Yes, sir.

Q. Did you look to see if there was any car approaching

A. Yes, sir.

Q. Did you see any car?

A. I saw no car.

Q. Now, can you tell the jury whether the car in which you were riding was struck a soft or a hard blow?

A. No, sir, I can not.

Q. You can not?

A. No, sir, I was knocked unconscious.

Q. You were knocked unconscious and know nothing more about it?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Harrison:

Q. You said, Mr. Rose, that you paid a doctor's bill. Did you pay this bill yourself?

A. My father paid what has been paid; and a part of the doctor's bill is still due.

Q. How about the hospital bill?

A. He paid the hospital bill.

Q. When the Denton car in which you were riding approached Arctic Avenue, what were you doing?

page 49 } Witness: I do not understand your question.

Q. At the time of the approach of the Denton car in which you were riding towards Arctic Avenue, what were you doing? Do you remember? Were you talking or were you making any observations of any kind?

A. I do not recall it, except that I did look when we arrived at the intersection proper.

Q. Did you say anything to anybody in the car?

A. I do not recall.

Q. Were you leaning into the car?

A. To the best of my memory, no, sir.

Q. You stated that there were three men on the front seat?

A. Yes, sir.

Q. There was only one seat in this car?

A. Yes, sir, that is right.

Q. And there were three on that seat, and you were on one running-board on the right-hand side, and another one was on the running-board of the other side?

A. Yes, sir.

Q. Making five in all?

A. Yes, sir.

Q. Was the top down or up?

A. The top was down.

Q. Weren't you carrying on some conversation with the driver of the car?

A. To the best of my memory, no, sir.

Q. Do you remember anything you were doing in the block previous to your crossing Arctic Avenue?

page 50 } A. No, sir, I do not.

Q. Do you recall where you were sitting or whether you were sitting or standing?

A. As well as I recall, I was leaning rather than sitting on the rear fender.

Q. But standing on the running-board?

A. Yes, sir.

Q. Were you facing the automobile you were riding on, that is, the inside of it, or forward, or to the right?

A. As well as I recall, I was facing more forward.

Q. Was any conversation going on in the car; that is, among the passengers on the inside?

A. As well as I recall, there was.

Q. You said there was?

A. Yes, sir.

Q. What was the gist of the conversation? Do you recall?

A. No, sir, I do not.

Q. Mr. Mathias, I believe you said, was on the left running-board?

A. Yes, sir.

Q. Was he talking or carrying on any conversation?

A. I do not remember.

Q. How is it that you can remember looking for an approaching automobile at Arctic Avenue and can not remember anything else that occurred?

A. Well, I paid no particular attention to anything else—not the talk in the car—but, being a driver myself, page 51 } I always do look. And I can say positively that I looked at that point.

Q. In which direction did you look?

A. In both directions, as well as I could see.

Q. Then, in looking to your left, you must have been standing up? You would have to stand up to see over the car, wouldn't you?

A. No, sir.

Q. With the top down, from a sitting position on the fender, you could see over it?

A. Yes, sir.

Q. Could see over the heads of the people sitting in there?

A. Well, upon looking at an angle they were not in the way.

Q. Then you were somewhat behind them, were you?

A. Yes, sir, on the fender.

Q. Now, you testified a while ago, I believe, that, in passing Pacific Avenue, the one on which the railroad track runs, you slowed down?

A. Yes, sir.

Q. Did you look at that crossing also for approaching cars?

A. Yes, sir.

Q. On what part of Arctic Avenue or 19th Street were you when you looked for an approaching car?

A. As soon as I could see.

Q. What do you mean by that?

A. Well, it has been stated by your associate (re-  
page 52 } ferring to opening statement) that bushes had  
grown up considerably at that point. And, as soon  
as we were close enough to the intersection to look, I looked.

Q. Then, you were rather expecting a car to come out of  
and along Arctic Avenue?

A. No, sir, it was just a bare possibility. I was not aware  
that Arctic Avenue was considered a through street.

Q. If you had seen him approaching, wouldn't you have  
given abundant warning to the driver of the car you were  
riding in?

A. Had he not seen him, I would.

Q. Did you give any warning of any kind?

A. No, sir.

Q. When did you first see the car that struck you?

A. I haven't ever seen it.

Q. You never did see it?

A. No, sir, I never did see it.

Q. You do not know whether the automobile struck the car  
you were in or not?

A. That is more hearsay on my part than observation.

Q. You just know something put you to sleep?

A. Yes, sir.

Q. At the time of the collision, then, you must have been  
looking to your left?

A. I can not say for sure. But I did not see the car hit  
us. So, I must have been.

page 53 } RE-DIRECT EXAMINATION.

By Mr. Woody:

Q. Mr. Rose, when the car in which you were riding crossed  
the intersection of Arctic Avenue and 19th Street, on what  
portion of 19th Street was the car traveling?

A. On the right-hand side of the street.

Q. Were you on the right of the center of the street?

A. To the best of my knowledge, yes, sir.

Q. An on what portion of the intersection were you, so  
far as you know, at the time of the impact?

A. So far as I know, we were across the middle of the in-  
tersection.

Q. Across the middle?

A. Yes, sir.

## RE-CROSS EXAMINATION.

By Mr. Harison:

Q. If you did not see this other car, how do you know where you were when the impact occurred?

A. He asked me so far as I knew. And that was told to me by people who saw it.

Q. Then of your own knowledge you do not know it?

A. No, sir, from my own knowledge I could not say for sure.

Mr. Harrison: If your Honor please, we of course ask that his answer, which it now develops is hearsay, be stricken out.

Mr. Jones: We have no objection.

The Court: That will be eliminated from the consideration of the jury.

page 54 } The Court: Did you ask how old Mr. Rose was?

By Mr. Woody:

Q. What is your age?

A. Twenty-two.

Q. How old were you at the time of your accident?

A. Twenty.

Witness stood aside.

HAROLD HODGES,  
one of the plaintiffs, duly sworn:

## DIRECT EXAMINATION.

By Mr. Woody:

Q. You are Harold Hodges?

A. Yes, sir.

Q. And you are one of the plaintiffs in these cases?

A. Yes, sir.

Q. Your father is H. H. Hodges, of Hopewell, Virginia, is he not?

A. Yes, sir.

Q. How long have you lived in Hopewell?

A. About fifteen years.

Q. What does he do?

A. He works at the Tubize Plant.

Q. How old are you at this time?

A. I am eighteen. I will be nineteen this coming July.

Q. At the time of this accident how old were you?

page 55 }

A. Seventeen.

Q. Did you go to Virginia Beach on the 30th of August, 1930, with Mr. Rose?

A. No, sir, I went with Mr. Denton.

Q. And when did you go?

A. Saturday afternoon.

Q. Who was with you besides Mr. Denton?

A. A Mr. Moore from Petersburg.

Q. In whose car were you traveling?

A. Mr. Denton's.

Q. What kind of a car was that?

A. A Model A Ford roadster.

Q. The three of you went to Virginia Beach on Saturday together?

A. Yes, sir.

Q. When did you get with Mr. Rose?

A. Sunday afternoon.

Q. Where did you meet him?

A. As well as I recall, I met him and Mr. Cuddihy at the Tourist Camp.

Q. Where is that camp located?

A. About four or five blocks from the ocean front.

Q. On what street?

A. On 19th Street.

Q. About what time of day did you and Mr. Denton and Mr. Rose and Mr. Cuddihy leave the automobile camp on the trip on which this collision occurred?

page 56 } A. As well as I recall, it was about five o'clock.

Q. Where were you going?

A. To the bath house, for me to change my clothes, and for Mr. Denton to change his clothes. We had on our bathing suits.

Q. You mean you had left your street clothing in the bath house?

A. Yes, sir.

Q. Where was that located?

A. At the lower end of Virginia Beach.

Q. On Atlantic Avenue?

A. Yes, sir.

Q. Did you go to the bath house?

A. Yes, sir.

Q. Did you change your clothes?

A. Yes, sir.

Q. After you left the bath house, having changed your clothes, where did you go?

A. We went to the service station, I believe, to get some



gas, and this fellow there went with us out to the place where we got that whiskey.

Q. Mr. Rose has told us that it was a Texaco Service Station on Atlantic Avenue, but that he could not be any more accurate than that. Can you?

A. No, I do not believe that I can. But I am positive that it was a Texaco Service Station.

Q. You do not know at what point on Atlantic page 57 } Avenue it was located?

A. No, sir.

Q. However, a man there did go with you to get some whiskey?

A. Yes, sir.

Q. Who were with you then?

A. Mr. Cuddihy, Mr. Denton, Mr. Rose, and I cannot recall the other boy's name.

Q. Mr. Rose said it was Mr. Mathias. Is that true? Was it the same man who was in the automobile at the time of the accident?

A. Yes, sir.

Q. How far did you go, approximately?

A. I would say about two miles.

Q. Who showed you the way?

A. This Mr. Mathias.

Q. The same one who went with you?

A. Yes, sir.

Q. And after getting the whiskey you came back?

A. Yes, sir.

Q. Did Mr. Mathias come back with you?

A. Yes, sir.

Q. How much whiskey did you get?

A. A gallon.

Q. Did any member of that party, so far as you know, take a drink of it?

A. No, sir.

Q. Had you seen any member of the party—I page 58 } refer to *any* member—take a drink during that afternoon?

A. No, sir.

Q. Had the whiskey that you bought been touched at all, so far as you know?

A. No, sir, the cap had not been removed.

Q. Where was that whiskey in the car?

A. It was between Mr. Cuddihy's legs, wrapped up in my coat.

Q. And had not been touched?

A. No, sir, it had not.

Q. Had Mr. Denton, the driver of the car, taken a drink, so far as you know?

A. No, sir. I had been with him all day and did not see him take a drink.

Q. Had you had one?

A. No, sir.

Q. And you were on your way back to the automobile camp?

A. Yes, sir.

Q. Now, at the time the car left Atlantic Avenue and until it reached 19th Street, what was the greatest rate of speed that you traveled up to the point of the collision?

A. As well as I recall, from 30 to 35 miles an hour.

Q. I believe you said that Mr. Denton was driving?

A. Yes, sir.

Q. Had he driven that car at an excessive rate of speed at any time during that afternoon, so far as you know?

A. No, sir, he had not.

Q. Where were you sitting?

page 59 } A. On the front, on the right, on the outside.

Q. Was any one sitting between you and Mr.

Denton?

A. Mr. Cuddihy.

Q. He was sitting in the middle?

A. Yes, sir.

Q. Had the speed been much as to make you alarmed at any time during that trip?

A. No, sir.

Q. I believe you stated that so far as your estimate goes he had not run over 30 miles an hour from Atlantic Avenue to the point of collision?

A. Yes, sir, that is right.

Q. Now, Mr. Hodges, without any questions on my part, tell the jury what occurred from the time you left Atlantic Avenue until the collision happened?

A. We left Atlantic Avenue and got up to Pacific Avenue, and then there is a railroad crossing there, and we slowed down and looked both ways before we crossed it, and then he shifted into second gear and crossed the intersection, because it was very rough; and just about the time he got ready to shift back into high gear, we were very near the crossing. So that we were not making a rate of speed over 25 miles an hour, I am sure.

Q. This accident occurred at Arctic Avenue?

A. Yes, sir, that is right.

## Supreme Court of Appeals of Virginia.

Q. Do you recall whether you looked before you entered Arctic Avenue to see if there was any car coming?  
page 60 } A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. You were sitting on the right-hand side of the Ford?  
Is that correct?

A. Yes, sir.

Q. Did you see an automobile approaching in either direction?

A. No, sir.

Q. Did you see the car that struck you until the time of the collision?

A. No, sir, I did not.

Q. Were you knocked unconscious?

A. I was knocked unconscious and stayed unconscious for two weeks.

Q. Did you know anything from the time of the accident until two weeks later?

A. No, sir.

Q. Where were you when you regained consciousness?

A. They were taking me up to the operating room to operate on my leg?

Q. At what place?

A. At the Sarah Lee Hospital in Norfolk.

Q. That was two weeks later?

A. Yes, sir.

Q. And you recovered consciousness on the way to the operating room?

page 61 } A. Yes, sir.

Q. How long did you stay in the hospital?

A. About nine weeks.

Q. What amount did you pay out for doctors' bills, medical expenses and hospital expenses as the result of this collision?

A. I would say altogether \$1,000.00.

Q. About a thousand dollars?

A. Yes, sir.

Q. About what amount of that was doctors' bills?

A. I had three doctors. One was \$300.00, one was \$65.00, and one was \$10.00.

Q. And do you know what your medicines amounted to?

A. That would come in the hospital bill.

Q. What was the hospital bill?

A. I would say \$600.00.

Q. What is their rate per day?

A. It was \$6.00 a day.

Q. For the hospital alone?

A. Yes, sir; and then I had a night nurse with me for two weeks; and that was \$8.00 a day.

Q. What was the extent of your injuries?

A. I had my right leg broken above the knee, and my right ankle fractured, and my skull fractured.

Q. Did you suffer to amount to anything during your stay in the hospital after you regained consciousness?  
page 62 }

A. I suffered with my leg very much, but my head was just about healed when I regained consciousness.

Q. Have you recovered?

A. No, sir.

Q. How are you affected at this time?

A. Well, I have a limp in my right leg, and I suffer from very severe headaches sometimes, from the fracture of my skull.

Q. Did you suffer from those headaches before the accident?

A. No, sir.

Q. Can you ascribe any reason for those headaches other than the accident?

A. No, sir.

Q. How often do they occur?

A. They occur mostly in *rainy* weather.

Q. From your head?

A. Yes, sir.

Q. Have you noted any improvement in your condition in the past four or five months?

A. No, sir.

Q. On what portion of 19th Street was the Denton car traveling at the time of the collision? I mean, was it the right or left-hand side, or middle, or what?

A. It was on the right-hand side of the road about three-quarters of the way across.

Q. Can you tell us, or do you know of your own knowledge, on what portion of the intersection the Denton car was at the time it was struck?

page 63 } A. I would say three-fourths of the way across the crossing.

Q. And you say you did not see the car when it struck you?

A. Yes, sir, I did not see it.

Q. Tell the jury how you can answer that, when you did not see it?

A. I did not see the car at all while I was going across.

And I looked both ways when we got within view of the two side roads.

Q. What part of your skull was fractured? Can you put your hand on it?

A. It was plastered here (indicating back part of head, to the right); and it was cut here (indicating right side of head towards the front).

Q. It was fractured at the base of the skull, on the right-hand side?

A. Yes, sir.

Q. And also a cut?

A. Yes, sir (indicating right side of head towards the front).

Q. You spoke of your right leg being broken. Was that broken to the extent that the bone protruded through the flesh?

A. No, sir.

Q. Do you suffer any inconvenience from that leg?

A. I suffer some in rainy weather. It aches.

Q. I am referring to your leg?

A. Yes, sir, I am talking about my leg. It feels like it is rheumatism, or something. I do not know *exactly* what it is.  
page 64 }

Q. Are those rheumatic pains improving any, or have they improved any in the last four or five months?

A. No, sir.

### CROSS EXAMINATION.

By Mr. Ashburn:

Q. Mr. Hodges, how long had you known Mr. Denton prior to the occasion of this accident?

A. I would say about two years.

Q. He was living here in Hopewell at that time?

A. Yes, sir. He was living here before I knew him.

Q. And you all got up a pleasure party to go down to the beach?

A. Yes, sir.

Q. And I presume you knew Mr. Rose, here in Hopewell too?

A. Yes, sir.

Q. And you expected to see him at the beach?

A. We had not planned to stay at the beach all of the time. We stayed in Norfolk Saturday night.

Q. But you knew that Mr. Rose, too, would be there for the week end?

A. Yes, sir.

Q. And I presume that you knew the young ladies whom he was with—coming from the same town?

A. Yes, sir.

Q. And you went down there to see something of them during the holidays?

page 65 } A. That is right.

Q. Now, where is Mr. Denton at the present time?

A. I believe Mr. Woody (meaning attorney for the plaintiffs) told me he was in Salem.

Q. Did you make any effort to bring him here for this trial?

A. We sent a subpoena to Richmond. That is where he was supposed to be. And they said he had gone to Salem about three days before that.

Q. So you haven't him here this morning?

A. No, sir.

Q. And you haven't made any particular effort to get him here?

A. We sent a telegram to Salem.

Q. And did you get any answer?

A. I do not know. Mr. Woody attended to that.

Q. Now, what did Mr. Denton do, that was improper, at the time of the accident?

A. Nothing that I know of.

Q. Then, why did you sue him? You have sued him, and said in your declaration that the accident was caused by his negligence?

A. We just put it in the hands of our lawyer; and he said that that was the best thing to do.

Q. Your lawyer told you that Mr. Denton was negligent, based on what you told him about how the accident happened? Is that right?

page 66 } A. We just told him how the accident happened. We told our lawyers the same thing that we are telling you all now; and we put it into their hands; and they said to let them do what they wanted to do with it; and they thought it was best to sue Denton also.

Q. They told you that, upon your statement, the driver of the car in which you were riding was negligent, and that you ought to sue him too?

A. They did not tell us that at that time. We just put it in the hands of our lawyers to bring suit.

Q. Mr. Rose described the tourist camp, towards which

your automobile was headed at the time of the collision, as a sort of headquarters for the crowd. I suppose that is right?

A. Yes, sir, that is right.

Q. You all had just gotten this gallon whiskey, and were going back with it at the time?

A. Yes, sir.

Q. And Mr. Mathias was going with you to get a drink, as Mr. Rose said?

A. I cannot recall that exactly, but I think that that is what it was for.

Q. You say you were sitting on the right-hand side of the coupe?

A. Yes, sir.

Q. Now, a gallon of whiskey is right much. How many people were going to drink out of it?

A. Well, we were going to take it on a party.

Q. You were going on a party and were going page 67 } to take the whiskey with you?

A. That is right.

Q. And presumably several were going to drink out of it?

A. That is right.

Q. Was Mr. Mathias going on the party, or was he just going to get one drink and come away, if you remember?

A. I do not exactly remember.

Q. Now, you say when you approached this intersection where the collision occurred, Denton was driving, to the best of your judgment, from 35 to 40 miles an hour?

Witness: About the intersection?

Attorney: As you approached the intersection.

A. We did not go over 25 miles an hour after he crossed Pacific Avenue.

Q. How do you know that?

A. Because we slowed down at the intersection to cross it, and he hadn't gotten up his speed at all.

Q. I understood you to say that he slowed down to cross Pacific Avenue. where the railroad tracks are, and that shortly after that he changed back into high gear when he reached the intersection of 19th Street and Arctic Avenue where the accident happened?

A. That is correct.

Q. Do you know how far it is from Pacific Avenue to the point where the accident happened?

A. Not exactly.

page 68 } Q. Suppose I were to tell you that it was between 550 and 600 feet, what would you say to that? That would be right far to run a model A Ford roadster in second gear, wouldn't it?

A. He did not run it that far in second gear.

Q. Where did he change gear?

A. I will say about half way.

Q. Well, if it is between 550 and 600 feet, he ran it about 275 or 300 feet in second gear, and changed to high, and had been running in high gear about 275 or 300 feet when the accident happened? Is that right?

A. Yes, sir.

Q. Now, a model A Ford roadster picks up speed right fast, doesn't it?

A. Yes, sir.

Q. In 300 feet you can jump it from a stand-still to 50 miles an hour, can't you?

(Witness hesitated.)

Q. You have driven them?

A. Yes, sir.

Q. They pick up in as short a distance as any other car, don't they?

A. That is right.

Q. And this one picked up pretty rapidly after he gave it the gas upon crossing Pacific Avenue, didn't it?

A. Yes, sir.

Q. How near were you to Arctic Avenue, the intersection straight on ahead, before you had a view to your  
page 69 } right to see whether any vehicles were coming out in that direction?

A. As soon as we got close enough to the street to see around that brush there.

Q. How close were you then?

A. I could not say definitely.

Q. Would it be fair to say about 30 feet?

A. No, sir.

Q. Was it closer than that or further than that?

A. I would say we were about 20 feet.

Q. About 20 feet from the intersection?

A. Yes, sir.

Q. And then you had an unobstructed view, and you could see around the brush and up Arctic Avenue?

A. We could see between the brush.



Q. And up Arctic Avenue?

A. Yes, sir.

Q. Did you then look up Arctic Avenue?

A. Yes, sir.

Q. How far could you see?

A. To the left all of the way down; and to my right I could not exactly say.

Q. What did the driver do when he got to the point where he could see to his right up Arctic Avenue?

A. He looked to the right and to the left.

Q. Did the driver look up Arctic Avenue at about the same time that you looked up Arctic Avenue?

A. I do not know.

page 70 } Q. Had you already looked when you saw the driver look, or did you see the driver look first?

A. I did not see him look.

Q. Then, how do you know that he looked? You just told the jury that the driver looked up Arctic Avenue?

A. I do not recall telling the jury that.

Q. You do not know whether the driver looked or not, but you do know that you looked?

A. Yes, sir.

Q. Now, when you looked where was the Ford Sedan?

A. I never did see it.

Q. What was there to keep you from seeing it after you passed the brush and got within 20 feet of the intersection?

A. I do not know.

Q. It is a straight stretch to your right-hand? If you looked, you were bound to see it? It was just as clear as this court room, wasn't it?

A. It may have been.

Q. And doesn't the same rule apply to the driver? If he had looked at that point, wouldn't he have been bound to see the Miles car?

A. I do not know.

Q. Isn't it a fact that neither you nor the driver looked for vehicles coming out of Arctic Avenue?

A. I looked I know. I am sure I looked.

Q. But you cannot tell the jury what kept you from seeing the Miles car?

page 71 } A. That is right.

Q. Now, Mr. Rose was to your right hand and was riding on the running-board, as you described it—or sitting on the fender?

A. Yes, sir.

Q. Did his position in the car have anything to do with the

extent of his injuries? Do you think he would have been hurt as severely if he had been riding on the inside of the car?

A. I do not know. I was riding on the inside of the car and I got hurt very nearly as badly as he did.

Q. Mr. Cuddihy was riding on the inside and did not get hurt?

A. That is right.

Q. And Mr. Denton did not get hurt?

A. That is right.

Q. And you think the car was going about 25 miles an hour at the time of the accident?

A. Yes, sir.

Q. Did you look at the speedometer?

A. No, sir.

Q. That is a pure guess on your part?

A. No, sir, I know about how fast I was riding.

Q. You do not know what happened to the car, in which you were riding, as the result of the collision, do you?

A. No, sir.

page 72 } Q. Suppose I were to tell you that it went on  
55 feet west of the intersection and turned over  
twice, would you be surprised?

A. I do not know. I could not swear to that.

### RE-DIRECT EXAMINATION.

By Mr. Jones:

Q. Approximately how far were you from the intersection when you first looked to your right?

A. I would say about 20 feet.

Q. Approximately how far up the cross street, or Arctic Avenue, could you see at the time you did look?

A. After I looked to my right, I looked to my left.

Q. I am talking about the time you looked to your right. How far up the cross street, or Arctic Avenue, could you see at the time you did actually look?

A. I do not know.

Q. Can you estimate that for the jury?

Mr. Ashburn: We do not want it to be purely a guess.

Mr. Jones: I do not want him to guess, but if he knows I want him to state it, and I want him to state the facts that he bases his estimate on.

A. I do not know. I would be afraid to say.

By Mr. Jones:

Q. Within that distance could you actually see any car?

A. No, sir.

Q. Within the distance that you could see up the cross street from the point at which you looked—about page 73 } 20 feet before you entered the intersection—you tell the jury that there was no car within the radius of your vision?

Mr. Ashburn: We object to that as leading; and he has not stated that.

Mr. Jones: Then, I will change it.

By Mr. Jones:

Q. Within the range which you could see up the street, was there or not a car?

A. No, sir, there was not.

Q. There was no car?

A. No, sir, there was not.

Q. Did you see the approaching car before it struck the car in which you were riding?

A. No, sir, I did not.

Q. Did you have any control over Mr. Denton in the operation of his car?

A. No, sir.

Q. Did you have any interest in that car?

A. No, sir.

Q. Or any right to control the operation of it?

A. No, sir.

#### RE-CROSS EXAMINATION.

By Mr. Ashburn:

Q. Mr. Hodges, as a matter of fact when you were within 20 feet of the intersection of Arctic Avenue, you could then see up Arctic Avenue for quite a long distance, couldn't you?

A. I do not recall.

page 74 } Q. You do not know whether you could or not?

A. No, sir.

Q. You never did see the Miles car?

A. No, sir.

Q. At no time?

Q. You do not know at what point it was when you looked up Arctic Avenue?

A. No.

Q. You do not know whether it was within five feet of the

intersection or whether it was in the intersection; or whether it was within 15 feet of the intersection or within 20 feet of the intersection?

A. No, sir.

Witness stood aside.

JAMES E. CUDDIHY,  
sworn for the plaintiffs.

DIRECT EXAMINATION.

By Mr. Jones:

Q. Please state your name and age?

A. James E. Cuddihy; 21 years old.

Q. Do you live in the City of Hopewell?

A. I do.

Q. How long have you lived here?

A. Approximately 15 years.

page 75 } Q. You are the son of Mr. J. J. Cuddihy, the  
Fire Chief?

A. Yes, sir.

Q. Are you the one that they call Jack?

A. Yes, sir.

Q. What is your present occupation?

A. I am a student at William and Mary College.

Q. How long have you been going there?

A. This is my fourth year.

Q. Were you down at Virginia Beach on Labor Day, or the day before Labor Day, in 1930?

A. Yes, sir, I was.

Q. With whom did you go down there?

A. Jack Foster, an employee of ANCO; Miss Fannie Edwards, Miss Becky Bryant and Miss Eva Coury.

Q. While down there did you get up with T. E. Denton?

A. Yes, sir.

Q. And Frank Rose and Harold Hodges?

A. Yes, sir.

Q. When did you get up with them?

A. On Sunday afternoon.

Q. When did this collision, in which both Frank Rose and Harold Hodges were injured, occur?

A. Sunday afternoon about 6:00 o'clock.

Q. Approximately how long before the accident occurred, which resulted in these injuries, was it that you got up with them?

A. About two hours.

page 76 } Q. After you met up with them, where did you and they go?

A. I met up with them at our camp, and rode with them down to the boulevard, to the bath house, and waited for them to dress; and then we went out to the service station and about four or five miles and back to the scene of the accident.

Q. While you were on this trip, you picked up another boy, did you not?

A. At the service station, in town.

Q. Do you recall his name?

A. Mathias, or something like that.

Q. Mathias?

A. Yes, sir, that is right.

Q. Did you ever know him before that day?

A. No, sir.

Q. I believe you boys went out and got something to drink? How much was that?

A. One gallon.

Q. Who showed you where to get that?

A. Mathias.

Q. Was that the purpose of his mission in going with you, in order to lead you to that whiskey?

A. That is correct.

Q. Now, when you returned, where did this collision take place?

A. We turned off the boulevard, and it was to the right going down 19th Street two blocks from the boulevard. It was at 19th Street and Arctic Avenue.

Q. Approximately how fast was the car in which page 77 } you were riding running down 19th Street?

A. 25 miles an hour.

Q. On which side of the roadway, the body of the road, was the car being driven?

A. We were on the right-hand side of the road.

Q. It was a Ford runabout?

A. Yes, sir.

Q. Where were you sitting?

A. In the middle.

Q. As you approached Arctic Avenue, what did you do, if anything?

A. Nothing at all.

Q. Where were you looking?

A. Straight ahead.

Q. Did you see the Miles car before the collision?

A. No, sir.

Q. As the car in which you were riding entered the intersection of Arctic Avenue and 19th Street, approximately how fast was it being driven?

A. I said approximately 25 miles an hour as we entered the intersection.

Q. Approximately how fast had it been driven before you entered the intersection, as you came on down 19th Street?

A. We turned off the boulevard quite slowly to take the curve there, and proceeded one block and came to the railroad track, and there we slowed down very slowly  
page 78 } to cross the railroad track, or street-car track, whatever it was, and then he shoved the car into second gear, and then into high gear again. That took place within the block. At first we were going approximately 10 or 15 miles an hour, and then we attained a speed of 25 miles an hour at the intersection of 19th Street and Arctic Avenue.

Q. Would you say, or not, that 25 miles an hour was your highest speed between the time at which you crossed the street on which the railroad track was, Pacific Avenue, and the time you entered this intersection at Arctic Avenue?

A. Yes, sir.

Q. Now, can you tell the jury where your car was with reference to the intersection at the time it was struck?

A. We were going down 19th Street, and I was looking almost directly ahead, and I did not see the other car approaching from the right; and I really think we were across the intersection. I saw the intersection, of course. And we were across the intersection. We were so far across it that I was very much surprised that, with a loud crash, we were hit. Our car was over three-fourths of the way across the intersection. The front of our car was, I am sure, all past the intersection; that is, going up 19th Street past the intersection.

Q. What part of the car in which you were riding was struck by the Miles car?

A. About a foot of the running-board, and the right rear fender.

page 79 } Q. Was any part or portion of the front part of your car struck at all?

A. No, sir.

Q. Then you say that it was about a foot of the running-board and the rear fender of the car that was struck?

A. Head-on into the running-board; that is, the running-board and the fender. That received the force of the blow.

Q. Where did your car stop? In what part of the street? Whereabouts in the street?

A. Almost straight across from the point of impact?

Q. How far was that?

A. About 50 or 54 feet.

Q. Do you mean to tell the jury that this on-coming car shoved you approximately 54 feet down the street?

A. I mean to say that the car that hit us was going at such a rate of speed that when it hit us the force of the impact was enough to kill our headway and to drive us almost directly down the street in the direction that the Miles car was coming.

Q. Did you see the Miles car after the collision?

A. Yes, sir.

Q. Will you tell the jury the condition of that car after the collision?

A. On examining the Miles car after the collision, I first noticed the bumper, the front fender, and the hood; that is, the radiator. It appeared that it had hit our car straight on, so as to drive back or buckle up the engine and the radiator. That is, it hit it head-on hard enough  
page 80 } to drive it straight backwards.

Q. Then, where was your car at the time it stopped—the car in which you were riding at the time it came to a rest?

A. It was on top of us.

Recess until 2:00 P. M.

By Mr. Jones:

Q. Mr. Cuddihy, who was driving the car in which you were riding?

A. Mr. Denton.

Q. Did you and Frank Rose and Harold Hodges have any control over the manner and method in which he operated that car?

A. None at all.

Q. Was it Mr. Denton's car?

A. Yes, sir.

#### CROSS EXAMINATION.

By Mr. Harrison:

Q. Mr. Cuddihy, you stated a while ago that you went with these people to get your clothes out of the bath house. did you not?

A. No, sir.

Q. Whose clothes were they?

A. Harold Hodges's and Denton's, I think. I had my clothes on.

Q. You had your bathing suit on?

A. No, sir, I had my suit of clothes on.

Q. Were they changing from their bathing  
page 81 } suits to their ordinary clothes?

A. Yes, sir.

Q. And then they went to get some gas?

A. Yes, sir.

Q. And after that they went to get the liquor?

A. When we went to the service station, Mathias came out and we asked him where we could *procur* some whiskey, and he directed us up the road—that is, he went with us to this place where we got it.

Q. And all of you went along together in the car?

A. Yes, sir.

Q. Where were you going to hold the party at which you were going to use this liquor?

A. At Virginia Beach.

Q. You were all planning a party at that time?

Witness: A party?

Attorney: Yes, at which to drink the liquor?

Witness: What do you mean by a party?

Attorney: Well, you were going to have a little gathering.

A. We were going to drink the whiskey. We were going to a dance.

Q. But the accident occurred before any of that whiskey was drunk?

A. Yes, sir, absolutely.

Q. Approximately how far did you go from the service station to get this liquor?

page 82 } A. I do not know. I did not pay much attention to where he was directing the driver, Denton, to. Denton was driving the car, and I do not know how far it was; somewhere between 2 and 4 miles.

Q. Then, the place you got the liquor was not on your ordinary route from the service station to the place of the collision?

A. No, sir, it was not.

Q. So that if you had gone to get the liquor you would have gotten to the point of collision long before the time the collision occurred, wouldn't you?



A. Yes, sir, of course.

Q. How long have you known Mr. Rose, one of the plaintiffs in this case?

A. Just around Hopewell casually. I do not know how long I have known him.

Q. Five or six years?

A. I do not know whether I have known him that long or not.

Q. You had known him some time before this collision occurred, hadn't you?

A. To be perfectly frank, I did not know Mr. Rose very well before the accident occurred. I knew him casually around town, and I had been in his company when in the company of others.

Q. How long had you known Mr. Hodges before the accident?

A. A number of years.

page 83 } Q. You and Mr. Hodges and Mr. Rose were staying at the same tourist camp at Virginia Beach?

A. Hodges drove up with Denton a little later. We had already gotten to Virginia Beach then and established headquarters at the tourist or auto camp, and had set up tents. We had two tents. I think they came a little bit later.

Q. They were stopping there also, were they not?

A. Yes, sir.

Q. Do you know who first said anything about getting any liquor?

A. No, sir.

Q. It just came up in the course of the conversation among you fellows?

A. I think so.

Q. And no one, according to your recollection, suggested it particularly; it was the whole crowd in the car, the five of you?

A. In the first place, there were only four of us in the car, and the fifth fellow on the side of the car was Mathias. That is the best I recollect.

Q. Then it was the other four that brought up the question about getting the whiskey?

A. I do not know how that came up. It has been approximately two years ago.

Q. But all of you went with the idea of getting it for the crowd to enjoy—for all of you four to drink some of it?

A. I suppose you would say that.

page 84 } Q. Now, coming to the point of the collision, you testified that you were sitting in the middle of the

seat, as I recall; that is, Mr. Hodges was on your right and Denton was on your left, and all on the same seat?

A. Yes, sir.

Q. Now, as you approached the intersection of the streets, did you have any occasion to look, particularly, at Arctic Avenue?

A. I was not driving, and I did not.

Q. You did not?

A. No, sir.

Q. Weren't you on the look-out for cars coming out of Arctic Avenue?

A. No, sir, I was not driving the car.

Q. Then you were not paying any attention to what was going on?

A. No more than a person riding with another person would, to know what was going on around him. If I had been driving the car, probably I would have been a little more on the look-out than I was when sitting in the car.

Q. Did you look up Arctic Avenue or down Arctic Avenue?

A. I was looking straight ahead.

Q. And you continued to look straight ahead until the time of the collision?

A. Why, yes.

Q. Well, did you see the car driven by Mr. Miles at all?

A. No, sir. We were across the intersection when the crash occurred, and that is my first recollection of the page 85 } Miles car at all; it was just the crash; and that was when we were nearly across the intersection.

Q. Now, you said that your car was struck by the Miles car. Which way did it go when it was struck?

A. We were headed down 19th Street when Miles, coming in this direction (indicating), hit us; and he drove us pretty nearly in the direction he was going, with a slight variance to the right. We were three-fourths of the way across the intersection, and there was just enough variance up the road to put us in the field, just off the cement.

Q. He drove you down the way he was going?

A. Yes, sir.

Q. He was moving south on Arctic Avenue?

A. I do not know the points of the compass there.

Q. Well, the direction he was going, if it was south, then he carried your car down Arctic Avenue southwardly?

A. If he was going south, he hit us and drove our car southward, with a very slight variance to the right, in the direction he was going; that is, our momentum, if we had not been hit, would have made the car roll forward down 19th

Street; but the impact of his car was so great as to kill our headway and drive us south, with a slight variance to the right.

Q. Then, when your car came to a rest, it was still on Arctic Avenue, you mean?

A. Why, no, it was not on Arctic Avenue. He drove us down southward. We were driven directly down page 86 } Arctic Avenue in the same direction he was going; not exactly, but we were knocked to the right, along Arctic Avenue, and along 19th Street and out into the field.

Q. What part of Mr. Denton's car was struck by the other car?

A. The right rear fender, and about a foot of the running-board on the right-hand rear side.

Q. Did you feel the force of the blow?

A. Well, I was considerably bruised—I do not quite follow you.

Q. When you realized that the Miles car had struck your car, had you seen the automobile of Miles or heard it before?

A. No, sir.

Q. Then, the first idea you had of any collision was the impact itself?

A. That is right.

Q. As you approached Arctic Avenue coming from the direction of Atlantic Avenue, what were you doing; talking any?

A. I do not remember.

Q. You do not remember?

A. No, sir. I was sitting in the middle, as well as I recall, and we were on our way to our camp, and I do not remember whether I was talking or not.

Q. Did you pay any particular attention to the speed at which your car was traveling?

A. Not any particular attention.

Q. Then you do not know how fast your car was going?

A. Oh, yes, I should judge that we were going page 87 } approximately 25 miles an hour.

Q. That is a very rough estimate, isn't it?

A. No, sir, I do not mean very rough. That was pretty close to the rate of speed we were going.

Q. Do you remember what happened at Pacific Avenue where the street car line crossing is? Did your automobile slow down there or keep across at the same rate of speed?

A. Pacific Avenue is one block back. There is a railroad or street-car crossing there, and we slowed down to get across

that rough place; and then the car was shifted into second gear, and then into high gear, and then we came to this intersection.

Q. How long had it been shifted back to high before you got to Arctic Avenue?

A. It is one block from where we crossed the track to Arctic Avenue; and we got across the track and shifted into second; and that accelerated it slightly, of course; and then we shifted into high, and we were probably about 150 feet or 200 feet from the intersection when the car got finally into high.

Q. From which intersection?

A. Denton shifted the car into second gear and then into high gear, which took it a number of feet. We were not traveling fast, and it did not accelerate the speed of the car very much. So we were around 200 feet from the intersection at which we had the collision when we got into high gear.

Q. Do you know how far it is from Pacific Avenue to Arctic Avenue?

A. About one block.

Q. How far is that in feet or yards?

A. About 550 feet.

Q. Then, do you mean to say that he consumed all except 200 feet of that distance in shifting from second into high and getting into high?

A. That is what I said.

Q. Now, you recall that he shifted to low when he crossed Pacific Avenue, do you?

A. I remember the car went from second to high. I will not say any more than that.

Q. Did he go into low gear or not when he crossed Pacific Avenue?

A. I think he did.

Q. That is where the railroad is?

A. It is very rough there, and we had to take it very slowly. I think he was in low going across there, and then shifted into second, and then shifted into high.

Q. A while ago you told me you did not remember what happened along there, but now you seem to remember quite in detail that part of it. Now, did anything else happen?

Witness: What do you mean?

Q. Was there any conversation there or any reference to the road or to the street, or were there any other cars passing?

page 89 } A. I do not know.

Q. But you remember clearly the shifting of the gears at Pacific Avenue?

A. Well, you see it is very rough there and we slowed down, and naturally we had to get back into high to go along.

By Mr. Ashburn:

Q. Mr. Cuddihy, you were not severely injured in the accident, were you?

A. I think I was.

Q. The reason I asked you is, did you leave there immediately after the accident?

A. I was carried to a doctor for treatment.

Q. You were carried right away to a doctor for treatment?

A. No, sir, but within a very short time I was carried there.

Q. You were not carried at the same time that Mr. Rose and Mr. Hodges were?

A. No, sir, not at the same time; a little later. I was underneath the car, and they got me out and started to put me in a car to carry me to the hospital, or to a First Aid Station; and, when they went to put me in the car, I was very dazed and I wanted to look around to see where the rest of the boys were. And the people were looking around there at the same time.

Q. You were gotten out from under the car?

A. Yes, sir, they pulled me out.

Q. And you were very dazed?

A. I said I was dazed.

Q. And in a few moments you were taken to the  
page 90 } doctor by someone, you do not know who?

A. I later found out that a gentleman named Barco was there.

Q. Mr. Barco, the Mayor, took you to the doctor?

A. Yes, sir, he was one of the gentlemen who were instrumental in getting me out from under the car.

Q. You did not take any measurements there at that time, did you?

A. Well, of course—

Q. Then, when did you—

Mr. Jones: Let him finish.

Mr. Ashburn: Go ahead.

A. (Continued.) I was going to say that when I got out from underneath the car, I did not take the tape measure

and measure the distance, but glancing around at the scene of the accident of course I fixed it in my mind.

Q. And from your observation in your then dazed condition you fixed in your mind what you are now telling the jury?

A. I looked around there and fixed the place, as one would, in my mind; and later, the next day, I went back there. I was carried to the hospital and was released that night or the following morning. And at any rate, the following day, which was Monday, I went back there to the intersection and verified the things that I saw that evening before.

By Mr. Ashburn:

Q. How did you verify them the next day?

A. Well, there was an elevation there, and there page 91 } was a growth of weeds there.

Q. The next day when you went back there, the car in which you had been riding had been moved from the scene, hadn't it?

A. Yes, sir.

Q. And you got your idea of its location from where you saw all those weeds trampled down, didn't you?

A. I know where I lay.

Q. Suppose I were to tell you that the measurement showed that the car in which you were riding was 55 feet west of the intersection in 19th Street—that is, the same direction in which it was going at the time of the impact—and south of the street about 12 feet, would you say that was accurate?

A. We were knocked across the street. You say 12 feet off the cement and 55 feet west?

Mr. Ashburn: In the same direction in which you were traveling, to the west.

A. (Continued.) If you said that the car came to a rest slightly diagonally from the point of impact, I would say that that is correct.

Q. But instead of being 55 feet south in the direction in which Miles was traveling, it was 55 feet west in the direction in which you were traveling? How do you account for that?

Mr. Jones: I object to that question. There is no testimony to show that.

Mr. Ashburn: I will prove it.

page 92 } Mr. Jones: But at this time you have got to predicate the question on the evidence.

Mr. Ashburn: But this witness is on cross examination.

Mr. Jones: But you can not assume that.

Mr. Ashburn: I will ask the question. It will be put in evidence.

By Mr. Ashburn:

Q. (Illustrating.) The car in which you were riding was coming this way (indicating west), and the man who struck you was going this way (indicating south), and he hit your car right here (indicating)?

A. Yes, sir.

Q. And you say he knocked you south for 55 feet?

A. It was going this way (illustrating) and the car came to a rest there (indicating).

Q. 12 feet from the street on which you were traveling?

Mr. Jones: Let him draw a diagram of it.

By Mr. Ashburn:

Q. Do you want to make a diagram of it?

Witness: You can go ahead.

Q. Do you want to make one? If you want to make one, I would be glad to have you do it?

Mr. Jones: Do you want him to make you a diagram of it?

Mr. Ashburn: It does not make a bit of difference 93 } once to me.

Mr. Jones: If you don't want it, we do not insist on it.

Witness: I do not need a diagram. I say the car hit us going down Arctic Avenue and knocked us slightly to the right in the direction that the car was coming down Arctic Avenue.

By Mr. Ashburn:

Q. Then, what caused you to go 55 feet west of the intersection in the same direction in which you were traveling?

Mr. Jones: I am objecting. There is no evidence of that in the record. I insist that counsel can not assume on cross examination a fact that is not in the evidence.

By Mr. Ashburn:

Q. Did the car in which you were riding go 55 feet west of the intersection before it stopped rolling?

A. No.

Q. How far did it go?

A. Just a slight ways to the right.

Q. When you say to the right, you mean the direction in which the Miles car was traveling?

A. I mean to the right of the intersection. My car was going this way (indicating west) and he hit us and knocked us slightly to the right.

Q. I call it to the south. Now, how far did you go to the west in the direction in which you were traveling?  
page 94 }

A. Not far.

Q. As far as 55 feet?

A. No, sir.

Q. Then how far?

A. Twenty feet.

Q. Not over 20 feet?

A. I do not think so.

Q. You, of course, took no measurements and you do not know anybody who did take any measurements?

A. I did not take any measurements.

Q. And your opinion as to the distance that you traveled to the west is gathered from your observation when you were taken out from under the car in your dazed condition?

A. I was taken from under the car. The car rested off the concrete to the south or to the right of where we were hit.

Q. And would you say it rested about 12 feet south of the street on which you were hit? Do you think that is approximately accurate?

A. It was off the cement; over into the weeds—

Q. How far off the cement?

Mr. Jones: I object. I must insist that the witness be allowed to finish his answer.

Mr. Ashburn: I have no objection. Read the question.

(Question read.)

(Witness hesitated.)

page 95 } Mr. Ashburn: I think it is taking him a right long time to answer the question.

Mr. Jones: I do not think counsel has a right to comment on that fact. And I am excepting to it.

Mr. Ashburn: All right, sir. Will you answer the question?



A. (Continued.) Approximately 30 or 35 feet off the cement in the direction in which my car was going. Is that clear enough?

By Mr. Ashburn:

Q. It is not clear to me. I will ask you to make it more clear by drawing a diagram of it. Now, this is west, and this is east, and this is north, and this is south, and Miles was going this way (indicating south) and you all were going this way (indicating west). Now you indicate where your car stopped (drawing diagram)?

(Witness indicated point on diagram and said:)

A. If I am supposed to put a mark where the car stopped, I will put it here. I am judging the distance.

Mr. Ashburn: We will put that diagram in evidence, assuming that those concrete strips (indicating), each of them, are 16 feet wide.

Witness: If that is 16 feet across there, then the point of impact was right about here (indicating).

Mr. Woody: Mark it A, the point of impact.

(Witness marked point as requested.)

Mr. Woody: And mark the other one B where your car rested after the accident.

page 96 } (Witness did as requested.)

By Mr. Ashburn:

Q. Now, mark the distance from B to the south side of 19th Street?

(Witness did as requested and said it was approximately 30 feet to the point which he marked C.)

Q. That is 30 feet from B to C, approximately? That is your idea?

A. Yes, sir.

Note: Witness indicated another point marked D.

Q. Now, give approximately your idea of the distance from B to D?

A. 17 feet.

Q. And D indicates the west side of Arctic Avenue? Is that correct?

A. Yes, sir.

Note: Diagram referred to filed in evidence, marked Exhibit No. 1, and exhibited to the jury, and is to be hereto attached.

#### RE-DIRECT EXAMINATION.

By Mr. Jones:

Q. Jack, after the accident did you have any conversation with Mr. Miles, the defendant, or did you hear him make any statement in reference to it?

A. He was not there after the accident. I was pulled out from under my car very shortly. His car rested page 97 { on its side at the scene of the accident, but Miles was nowhere to be seen. I was told—

Mr. Jones: Don't tell that.

A. (Continued.) I asked where the driver was.

#### RE-CROSS EXAMINATION.

By Mr. Ashburn:

Q. You say that he was nowhere to be seen; and you also said you were taken down to the doctor or the First Aid Station by Mr. Barco?

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

By Mr. Ashburn:

Q. Who took you down there?

A. I do not know.

Q. Did you see Mr. Barco there?

A. I saw a gentleman there whom I later found to be Mr. Barco.

Q. Did you ride down there in that gentleman's car?

A. I do not remember.

Q. You do not remember whether you did or not?

A. I was put into a car, and I got out of that car because I knew that there were others in the wreck. I got out and said, "Did you find the other boys that were in the wreck?"

Q. And then what happened to you?

A. And then they told me that they had everybody that was in my car.

Q. And then did you get back into the car?

A. Then I got into a car. I do not know whose page 98 } it was.

Q. You do not know whether it was the same one or not?

A. I got into a car that was setting on the right-hand side of the road facing back towards the boulevard.

Q. Now, this first car that you got into and then got out of again, who was sitting in that at the time?

A. I got in the back, and got out on the other side without paying any attention to the occupants of the car.

Q. You were dazed?

A. Slightly.

Q. As a matter of fact, you were put into Mr. Barco's car, to be taken down to a doctor, three times, and you got out every time, didn't you?

A. Several times.

Q. Several times?

A. That is right.

Q. And in that same car which you were in, Mr. Miles, the defendant here, was being taken to the doctor, wasn't he?

A. Mr. Miles was not in that car in which I was at any time that I was in there. Nor was he taken to the doctor with me.

Q. Are you positive of that?

A. Why, yes, sir. That is if he looks the same now as he did then.

Q. Look at him and see?

A. No, it is not that gentleman sitting there (indicating the defendant, Mr. Miles).

Witness stood aside.

Mr. Jones: That is our case, if the Court please.

page 99 } TESTIMONY FOR THE DEFENDANT.

Mr. Ashburn: Will your Honor exclude the jury. I have a motion to make.

The Court: Gentlemen of the jury, you will retire.

(Jury retired.)

Mr. Ashburn: May it please the Court, we move to strike

out all of the testimony offered on behalf of these plaintiffs, on the ground that the testimony as offered and admitted does not show any negligence on the part of this defendant, R. L. Miles, Jr., upon which a recovery could be predicated or upon which the Court would be justified in sustaining a verdict.

Your Honor will recall that the allegation of negligence in the declaration is general, and that it was particularized this morning by a bill of particulars filed in writing on behalf of the plaintiffs. The allegations contained in the bill of particulars are:

1. That the defendant operated his car at an excessive rate of speed.

We call your Honor's attention to the fact that there is absolutely no evidence to that effect whatever. Not a single witness on the stand has testified that he saw the defendant's car prior to the actual impact, and, of course, your Honor is familiar with the doctrine that the mere happening of an accident is no proof of an excessive rate of speed.

page 100 } 2. That the defendant failed to keep his car under complete control.

There is no evidence of that.

3. That the defendant had inadequate and improperly adjusted brakes.

Nobody has mentioned in this case anything about brakes.

4. That the defendant drove to the left of the center of the street.

There is an entire lack of evidence on that point.

5. That the defendant violated the provisions of the right of way laws as set out in Sec. 2145, sub-section 19.

There is absolutely no evidence of that. On the contrary, such testimony as disclosed what occurred shows that the two vehicles approached the intersection and entered the intersection at approximately the same time, under which conditions the Miles car had the right of way.

6. That the defendant drove his car on his left-hand side of the road and not as close to the right-hand side as was possible.

In reply to that, there is no evidence on that score, and it has not been mentioned here at any time.

7. That the defendant failed to keep a proper lookout.

Since no one has testified that they even saw him at all, it cannot be said that the defendant did not keep a proper lookout.

After argument of the point, the Court said:

The Court: The plaintiffs having rested, the Court's ruling is that, at this stage of the proceedings, they have shown a case that should go to the jury. From the plaintiffs' testimony it is claimed that when they reached the intersection of the street they looked and saw no car, and, therefore, they claim that they had the right of way at the intersection. I think it is a question for the jury. The motion is overruled.

Mr. Ashburn: All right, sir. We save an exception. The reason for the exception is the same reason urged upon the Court in support of the motion to strike out the testimony offered by the plaintiffs.

The Court: Recall the jury.

(Jury recalled.)

page 102 } Mr. Ashburn: May it please Your Honor, in this case the deposition of Miss Dorothy P. Griffith was taken in Washington, and we will read it to the jury, with Your Honor's permission, at this time.

This is the testimony of

DOROTHY P. GRIFFITH,

who was riding with Mr. Miles at the time of the collision:

By Mr. Shands:

Q. Will you state your full name and address?

A. Dorothy Page Griffith, 1954 Columbia Road.

Q. Would you mind giving us your age also?

A. Present age 24 years.

Q. What is your occupation?

A. Secretary.

Q. Would you mind telling us very briefly what education or special training you had for your present work?

A. I went through High School, away to Boarding School, a year at College and a year business training.

Q. When did you finish your last year?

A. It was five years ago.

Q. Have you been employed in secretarial work since that time?

A. Yes.

Q. Where were you during the latter part of August, 1930?

A. At Virginia Beach.

Q. Where were you staying there?

A. At the Pocahontas Hotel.

Q. Were you at Virginia Beach on Sunday, August 31, 1930?

A. Yes.

Q. Were you acquainted with Mr. R. L. Miles, page 103 } Jr., who is one of the defendants before the court in this case?

A. Yes.

Q. How long had you known him?

A. Possibly a couple of months.

Q. Did you see Mr. Miles on Sunday, August 31, 1930?

A. Yes.

Q. When did you first see Mr. Miles on that day?

A. Well, it was somewhere between two and two thirty, I guess. It was real early in the afternoon right after lunch.

Q. Where did you first see him?

A. Down on the beach.

Q. Did you meet him in company with other persons on the beach?

A. Yes.

Q. About how many other persons were there in the party?

A. Lot of people. I don't know exactly. Guess there were around seven or eight people.

Q. How long were you with this party on the beach?

A. Well, till late in the afternoon.

Q. Can you fix the approximate hour when the party broke up?

A. I guess it was close on to six o'clock.

Q. Was Mr. Miles there all of that time?

A. Yes, I think so.

Q. Have you any doubt as to his being there or not being there?

A. No. I did not see him leave and he was there every time I looked around.

Q. Do you feel quite positive that he did not leave during that time?

page 104 } A. Yes, I know he was there.

Q. About when was it when you left the beach? I mean what time?

A. Close to six.

Q. Was Mr. Miles with you then?

A. Yes.

Q. After leaving the beach did you go with Mr. Miles in an automobile?

A. Yes.

Q. Are you accustomed to riding in automobiles?

A. Yes.

Q. Do you drive a car yourself?

A. Yes.

Q. Have you an operator's license?

A. No.

Q. Do you like to drive fast?

A. No.

Q. Did Mr. Miles know your taste about not driving fast?

A. I think so. I do not know for a fact.

Q. In your opinion did he drive the car in a careful manner?

A. Yes.

Q. Did he pay close attention to his driving?

A. Yes.

Q. Had you ridden a number of different times with Mr. Miles before this Sunday?

A. Yes, three or four.

Q. During the course of your ride did Mr. Miles at any time show any indication of having been drinking?

page 105 } A. No, he did not.

Q. Had he taken a drink from the time you met him at 2:30 until about 6, so far as you know?

A. No.

Q. Are you quite positive of that?

A. Yes.

Q. Did you detect the odor of liquor on his breath?

A. No.

Q. Was it a closed car?

A. Yes, a Sedan.

Q. While returning to the Pocahontas Hotel did Mr. Miles drive in a southerly direction along Arctic Avenue?

A. Yes.

Q. About how fast was he driving along this street?

A. I do not know exactly. It was a moderate rate of speed.

Q. Do you consider it fast or slow?

A. I consider it a moderate rate.

Q. You consider it a reasonable speed?

A. Yes.

Q. As you approached the intersection of Arctic Avenue and 19th Street did Mr. Miles have his car under control, so far as you could tell, also was he proceeding in a prudent manner?

A. Yes.

Mr. Ahalt: Counsel for plaintiff suggests that question rather leading and objects to that character of question.

page 106 } Q. How was Mr. Miles driving as he approached the intersection of Arctic Avenue and 19th Street?

A. He seemed to be driving all right to me. He didn't seem to be going fast.

Q. Was he paying close attention to the road?

Mr. Ahalt: I object to that question as being strictly leading. I want to be fair about it, but when you ask the witness whether or not he was paying strict attention, she cannot tell what was in his mind.

A. He apparently seemed to be paying strict attention.

Q. Was it light or dark as you approached the intersection?

A. It was light.

Q. Was there need for lights at that time?

A. No.

Q. About what hour was it?

A. Around six.

Q. Now, Miss Griffith, will you state in so far as you can recall just what happened as you proceeded to cross the intersection of Arctic Avenue and 19th Street?

A. Just as we were going in the intersection another machine came. It all happened so quickly. Like a flash I just saw this car right in front of us. It seemed to me that Mr. Miles tried to put on his brakes, the car jerked and the first thing I knew the car was over on its side.

Q. What was the impression—



Mr. Ahalt: I object to the question. We do not want her impressions. We want facts.

Q. What did the car in front of you do when you page 107 } first saw it?

A. What did it do?

Q. Did the driver make any attempt to avoid the accident?

A. I do not know about that.

Q. Did both cars come in the intersection about the same time?

A. I think so.

Q. What did Mr. Miles do to avoid a collision? If anything.

A. It seemed to me like he tried to turn the car. Tried to put on his brakes. Then there was a crash.

Q. Can you tell about how many occupants there were in the car that collided with him?

A. No. It just looked like a lot of people piled up in the car.

Q. Did you observe any one standing on the running board?

A. I do not remember particularly about the running board. It seemed like people were piled all over the car. It happened too quick for me to see where they were.

Q. What happened to Mr. Miles' car following the collision?

A. I do not understand.

Q. Did it turn over on its side?

A. Yes.

Q. Which side?

A. I think it was the right side.

Q. Do you know what happened to the other car, the Ford roadster, after that?

A. No.

Q. What happened to you immediately after the accident?

A. Some one pulled me out of the car. At least Mr. Miles got out and pulled me out of the car. Another page 108 } car came up at that time. They put me in that car and drove to the doctor's office.

Q. Did Mr. Miles go with you?

A. Yes.

Q. How long did it take to go to the doctor's office?

A. I do not know. It was just a few blocks.

Q. Then did Mr. Miles return to the hotel?

A. We got out of the car and I wanted to get to the hotel and he took me to the hotel.

Q. What was the extent of your injuries?

A. I had a cut on my nose. A large bump and cut on my forehead. My nose was also cut. I had a black eye, fractured jaw bone. And I do not know just what was the matter with my legs, but they were all swollen and I could hardly walk for about two weeks.

Mr. Shands: That is all.

### CROSS EXAMINATION.

By Mr. Ahalt:

Q. I didn't get it quite straight as to whether you went to the hotel or the doctor's first?

A. Well, they drove us down towards the doctor's office, but there was a whole crowd around there and I got Mr. Miles to take me back to the hotel.

Q. So you did not go to the doctor's office.

A. No.

Q. How far away was the crowd from the scene of the accident? You say you did not go to the doctor's office. Was it a first aid station on the beach that you went to?

A. No, they took me to the doctor's office, but page 109 } I went to the hotel.

Q. Where did you get this first aid treatment you spoke of?

A. I did not get any for two or three hours when I called the doctor at the hotel.

Q. Where was the Ford roadster, operated by Mr. Denton, when you first saw it? About how far was it?

A. I haven't any idea.

Q. Was it the length of this room?

A. I cannot say.

Q. Did you see the Denton car before it reached the intersection of the street?

A. I don't remember seeing it.

Q. You say you operate an automobile. About how fast would you say you were going when you reached this intersection?

A. I do not know. It is hard for me to say.

Q. You were paying attention?

A. Yes, because I am scared and if any one is going fast I would know it.

Q. How fast would you say the automobile was going? Approximately.

A. I do not know.

Q. You haven't any idea whether it was five or thirty-five?

A. It wasn't five and I know it wasn't thirty-five. I think around twenty-five.

Q. Were you watching the speedometer?

A. No.

Q. Were you engaged in conversation at the time you approached this intersection?

A. No. I was looking out of the window.

page 110 } Q. So you don't know what he (Mr. Miles) was doing or where he was looking when you reached the intersection?

A. I do not know, but I wasn't looking out of the window all of the time.

Q. As you reached the intersection which were you doing?

A. I was evidently looking ahead because I saw the car approaching.

Q. Do you want to testify that you were looking out of the window, at Mr. Miles, or ahead as you reached the intersection?

A. I was looking ahead.

Q. When you reached the intersection do you know at what point of the cross street Mr. Denton's car was?

A. No.

Q. I believe you testified in substance that it was like a flash that you saw this other car, and almost immediately the impact came. Is that correct?

A. Yes.

Q. So you don't know at what speed Mr. Denton's car was traveling, do you?

A. No, except it was fast.

Q. Can you refresh your memory at what distance Mr. Denton's car was from Mr. Miles when you first saw it?

A. No.

Q. You said you were with a party of people on the beach from two thirty to six. Did you not?

A. Approximately that time.

Q. How were the people dressed, did they have on bathing suits?

A. Some had on beach pajamas, some had on  
page 111 } bathing suits and some were in regular clothes.

Q. How were you and Mr. Miles clothed?

A. I had on beach pajamas and Mr. Miles had on a bathing suit.

Q. When you went for the drive?

A. Yes.

Q. Did any of the other people go with you and Mr. Miles for the drive?

A. No.

Q. The collision happened at six o'clock?

A. Approximately.

Q. Where did you first meet Mr. Miles?

A. In Washington.

Q. You said something about a moderate rate of speed. What would you call a moderate speed on a roadway such as Arctic Avenue?

A. Well on account of the intersections I certainly wouldn't say over twenty-five miles an hour.

Q. Do you mean at intersections?

A. I mean all along.

Q. You say that the roadster seemed to have folks piled all over it. How many people would you say were on the car?

A. I don't know.

Q. You have some idea?

A. No, I haven't.

Q. Would you say there were four or twenty?

A. I couldn't say how many.

Q. As a matter of fact you didn't have time to see how many people were on that car?

page 112 } A. No.

Q. Now, when Mr. Miles' car reached the intersection you stated that he tried to turn the car to avoid a collision. Which way did he try to turn it to the right or left?

A. I don't know.

Q. Did you see the Denton car as to what damage was done to that car?

A. No.

Q. Did you see what injury was sustained by Mr. Rose or anybody else in the car?

A. No.

Q. How long after you were pulled out of the car would you say that you stayed there in the immediate vicinity of the car that you were pulled out of before you were put into this other car and taken away?

A. Almost right away.

Q. There wasn't any considerable lapse of time, and you say that Mr. Miles went with you?

A. Yes.

Q. Did he first go over to the Denton car to see what had happened?

A. I do not know.

Q. You did not see him go over?

A. No.

Q. Did he stay with you?

A. He went with me to the doctor's office, but I asked him to take me to my hotel instead.

Q. Did Mr. Miles discuss with you afterwards the results of the collision?

page 113 } A. Mr. Miles had concussion of the brain.

Q. Didn't he discuss it with you?

A. No.

Q. So that as far as you know Mr. Miles left the scene of the accident without rendering any aid or ascertaining what had happened to any one in the other car?

A. I don't know.

Q. You did not see him go over and say anything to the people in the other car?

A. No. There was a big crowd there.

Q. You say that you were constantly with Mr. Miles in this party of seven or eight folks on the beach from the time that you came there about two-thirty until you left?

A. We were all together.

Q. Was he there?

A. Yes, he was there.

Q. You did not see him take anything to drink in the way of intoxicating liquor, and you did not smell any intoxicating liquor on his breath either on the beach that afternoon or while in his car to the time of the accident?

A. No.

Q. Did you know that he was charged with driving while drunk?

A. I read it in the paper.

Q. Do you know whether he was convicted or not?

A. No.

Q. What did you read in the paper about the charge of driving while drunk?

page 114 } A. I read a little piece in the paper the next morning. Don't remember just what it was.

Mr. Shands: I object. These questions are irrelevant and immaterial as regards any judicial proceedings.

Mr. Ahalt: The purpose of this inquiry was in connection with cross examination of the direct testimony in which this witness testified that the defendant Miles had not partaken of intoxicating liquors while in her presence between two-thirty and six o'clock, and the question primarily is to as-

certain whether she knew that such a charge had been preferred and not as to the outcome of the charge. I want to renew that question so as to get my point on the record.

Q. Did you know what he had been charged with driving while drunk in connection with this accident?

A. I read it in the paper.

Q. Were you present when the police took Mr. Miles into custody?

A. No.

Q. Did the police come to see you?

A. Yes.

Q. Did you know that they had at that time taken Mr. Miles into custody?

A. No.

Q. Do you know where the police found Mr. Miles?

A. No.

page 115 } Mr. Ahalt: I think that is all.

#### RE-DIRECT EXAMINATION.

By Mr. Shands:

Q. Did you see Mr. Miles again after he left you at the hotel?

A. Not that night.

Q. Did any people from the Denton car come over and endeavor to assist you?

A. No.

Q. In driving along Arctic Avenue, as Mr. Miles approached the intersection of 19th Street which side of the street was he driving on?

A. On the right hand side.

Q. Did he slow down for intersections?

A. Usually, yes.

Mr. Shands: That is all.

The witness dismissed.

(Signed) DOROTHY P. GRIFFITH.

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R. L. MILES, JR.,  
the defendant, sworn on his own behalf:

## DIRECT EXAMINATION.

By Mr. Ashburn:

Q. State your name?

A. R. Lawson Miles, Jr.

Q. And your age?

A. 25.

Q. And where were you born and raised?

A. Norfolk, Virginia.

Q. Are your parents living?

A. Yes, sir.

Q. Is this gentleman sitting here your father (indicating)?

A. Yes, sir.

Q. What is his business?

A. Oyster packer.

Q. Are you familiar with Virginia Beach?

A. Yes, sir, very familiar with it.

Q. Were you spending a week-end there on Labor Day in 1930?

A. No, sir, I was not.

Q. Were you down there on Sunday, August 31st, of that year?

A. Yes, sir.

Q. With whom did you go to the beach?

A. With a boy whose name is Jack Barr. It was in his car.

Q. Please tell us something about him?

A. He was a school-mate of mine at the University of Pennsylvania; and he lives in Philadelphia.

Q. And he was visiting there?

page 117 } A. He was visiting me.

Q. What time did you leave home that day to go to the Beach?

A. Between 2:00 and 2:30.

Q. And it takes how long to go there?

A. 45 minutes.

Q. Where did you spend the afternoon?

A. At the Courtney Terrace Cottage.

Q. In front of the Courtney Terrace Cottage were you on the beach?

A. Yes, sir.

Q. How long had you known Miss Griffith?

A. Approximately a month.

Q. Was she on the beach as a member of the group that afternoon?

A. Yes.

Q. About what time did the group leave the beach?

A. The group did not leave. Miss Griffith and I left alone; and we were on the way to rejoin the group when the accident happened.

Q. For what purpose did you leave the group?

A. Miss Griffith wanted to see a friend of hers with whom she had an appointment at 5:30; and I drove her up there.

Q. Was that where you were going at the time of the collision?

A. No, sir, we had been there, and we were returning.

Q. You were going south on Arctic Avenue at the time of the collision?

page 118 } A. Yes, sir.

Q. What sort of machine were you driving?

A. A Ford sedan.

Q. To whom did it belong?

A. To Mr. Barr.

Q. He was not with you then?

A. No, sir, he was not.

Q. Did you borrow the car from him?

A. Yes, sir.

Q. Had anybody else besides you been driving it that day?

A. Yes, sir, we went to the beach in it. And there were about 12 of us in the party and that was the only automobile there.

Q. And I suppose first one used it and then another?

A. That is right.

Q. You were driving south on Arctic Avenue. Approximately at what speed were you going when you approached 19th Street before you reached the intersection where the accident occurred?

A. 30 miles an hour before I reached that intersection.

Q. And what, if anything, did you do with respect to your speed on approaching the intersection?

A. I slowed down to about 20 miles an hour.

Q. And approximately at what speed were you going when you reached the intersection?

A. About 15 or 20 miles an hour. I had slowed down considerably.

page 119 } Q. Tell the jury something about the physical condition of that intersection with respect to the corners there?

A. There were very high bushes, and you cannot see to your left anything at all. You have a very plain view of the road to the right, but not to the left until you get right



up to it. It is hard to see to the left. In order to see a car coming down 19th Street, you absolutely have to get into the intersection.

Q. When you approached the intersection what signal did you give, if any?

A. I blew my horn when 50 or 60 feet from the corner.

Q. Once or more than once?

A. More than once.

Q. Did you see or hear the Denton car coming at that time?

A. I could not possibly see it.

Q. Did you hear it?

A. No, sir.

Q. Was there any signal or anything to indicate that it was going west on 19th Street at that time?

A. Not to my knowledge.

Q. Where were you with respect to the intersection when you first could see the Denton car?

A. I had started out into the intersection, and the Denton car was travelling very fast, and it came right in front of me, and the boy, Rose, was standing on the running-board; and, as soon as I saw the car and saw the back of Mr. Rose,

I tried to turn my car so that I would not hit  
page 120 } him.

Q. Which car entered the intersection first?

A. My car.

Q. And about how far in the intersection was the Denton car when you entered the intersection?

A. They were right up on us. I could not see it at first, and I did not hear anything. I did not see it because of the bushes, and they were coming pretty fast, and they ran right in front of me. And I knew I was going to hit the car when I saw Mr. Rose's back. He was standing on the running-board; and I turned my car as quickly as I could, so that I would not hit him.

Q. Did you strike their car right behind Mr. Rose?

A. Yes, sir, I just missed Mr. Rose. That was the best I could possibly do.

Q. Can you give the jury any idea at what speed the Denton car was going?

A. Very rapidly. I imagine as fast as they could go. I haven't any idea how fast. They went right by me. I knew I hit them, but I thought I had knocked the fender off; and they went clear by me.

Q. What happened to your car after the accident?

A. My car turned over where it was.

Q. And what happened to their car?

A. Their car went on down the road, west, in the same direction it was going. I saw it go by me before my car turned over. My windshield was not broken until it turned over.

It was not broken by the impact. When the top page 121 } of my car hit the ground, that broke the windshield. I knew that I had just missed Mr. Rose, and then my car turned over. I thought they were safe until I saw that they were also turned over down the road.

Q. Now, was there anything that you could have done that might have avoided this accident that you did not do?

A. No, nothing. If I had turned to the right, I would have caught Mr. Rose between the cars. And I turned to the left. I did not have much time to think; it happened so quickly.

Q. What injuries did you sustain in the collision?

A. I thought that I had sustained none at first. It was not until later that I found that I had a very bad pain in my head. My head was hurting me.

Q. When did that commence to give you trouble?

A. About a half hour after the accident occurred.

Q. How did that give you trouble?

A. It was just a burning pain in the center of my head. It was where my head hit the rib in the top of the car.

Q. Did you have to go to the hospital for it?

A. Yes, sir. And I went to the doctor's office.

Q. Who took you from the scene of the accident to the doctor's office?

A. Mayor Barco of Virginia Beach.

Q. How long was it after the accident when he arrived at the scene of the accident?

A. He was there when I crawled out of my car. I picked Miss Griffith up and took her over to his car, and page 122 } he and I then walked over to the Denton car.

Q. For what purpose did you go there?

A. I went there to see what we could do for them. The gentleman who did not remember me (meaning Mr. Cuddihy) was there, and we took him up and put him in Mr. Barco's car.

Q. That is Mr. Cuddihy?

A. Yes, sir. And he got out of the car; and I think Mr. Denton came over. I only saw him once, but I think it was he that came over. Anyway, some gentleman came over who seemed to know the last witness on the stand here (meaning Mr. Cuddihy). I am not sure, but I think it was Mr. Denton, the driver of the other car.

Q. How many times was Mr. Cuddihy put in Mayor Barco's car, and how many times did he get out?

A. He was put in there twice, to my knowledge. One time I put him in there myself, with the assistance of Mr. Barco; and another time I put him in there with the assistance of the other fellow who came up; and both times he got out.

Q. Did he seem to be dazed or not?

A. Yes, sir, he was.

Q. On which side of Arctic Avenue were you driving as you approached the intersection?

A. The west side.

Q. Is that your right or left-hand side?

A. My right-hand side.

Q. In which direction were you looking out as you approached the intersection?

page 123 } A. I was looking to my right. I could not see to my left, and there was no use to look that way. And it did not make much difference on Arctic Avenue, because that is not an arterial highway. But I was looking to my right until I got to the intersection, and then I looked to my left. But it did not do any good, because the car was right in front of me before I could see it. I had previously blown my horn.

### CROSS EXAMINATION.

By Mr. Jones:

Q. I believe you said you lived in Norfolk?

A. Yes, sir.

Q. How long have you been living in Norfolk?

A. I was born and raised in Norfolk. I was away at school six years.

Q. You are quite familiar with Virginia Beach, are you not?

A. Yes, sir, very familiar.

Q. You usually spend a good part of your summers down there during the vacation periods, I believe?

A. I did not spend any nights there, not all of the night in its entirety, but I would go down there to dances, and to swim.

Q. I mean you are thoroughly familiar with Virginia Beach?

A. Yes, sir.

Q. And, of course, Arctic Avenue at the intersection of 18th Street and 19th Street and the various streets you are familiar with?

page 124 } A. Yes, sir.

Q. You have somewhat the feeling of being at

home there? You go down on week-ends and stay around there during your vacation periods?

A. Yes, sir.

Q. Now, at this particular time there were ten or twelve of you on a party?

A. No, sir, not on a party, but on the beach and swimming. We all knew each other, but it was not a party.

Q. It was for the holidays? Hadn't you all met there by agreement?

A. No, sir, it was not that at all. I think you have the wrong impression of it. Miss Griffith and a number of her friends were on the beach; and we went out on the beach and to swim, and we just saw them; and we were together then.

Q. Who do you mean by "we"?

A. Mr. Barr and myself.

Q. You were down there with Mr. Barr?

A. Yes, sir.

Q. You and he went down there for the holiday?

A. We went down there on Sunday afternoon. We did not go for the holiday. He was visiting me in Norfolk. And there was another gentleman with us. He has since died.

Q. Do you drink?

A. I have taken a drink.

Q. You have taken a drink?

A. Yes, sir.

page 125 } Q. You took one down there on Labor Day, didn't you?

A. I was not down there on Labor Day. I was in the hospital then.

Q. The day before Labor Day?

A. No, sir, I did not.

Q. You took a drink and went off there on Labor Day?

A. It was not on Labor Day that I was there.

Q. Well, you went off there more or less to have a good time?

A. I went down there with a friend.

Q. And you refrained from taking a drink?

A. I did not take a drink. I am not in the habit of taking a drink when I go down there on Sunday afternoons to go swimming. There was no difference then from any other Sunday afternoon. I live in Norfolk and go down there to swim on Sunday afternoons. And I do not drink then.

Q. And when you go off on a vacation of that kind to spend week-ends at a summer resort, you do not then take drinks?

A. I was not spending the week-end, and was not on a vacation. I was doing what I had done every Sunday after-

noon since I can remember, to go down there to swim. I would go there every Sunday afternoon.

Q. You were just there on that Sunday afternoon?

A. Yes, sir.

Q. Well, you were down there on that Sunday afternoon, whether it was a vacation or for a swim?

A. It does not make any difference.

Q. During that time you, of course, would not page 126 } take a drink?

A. I had not taken a drink.

Q. Didn't you tell Mr. Denton, when he asked you if you saw him, "Hell, no, I was too drunk to see anything"?

A. No, sir, that is absurd. It is preposterous.

Q. Do you deny making that statement?

A. Of course I do.

Mr. Ashton: Do you expect to prove it?

Mr. Jones: We certainly do, if Mr. Denton comes; and we are expecting him to come; and we will be disappointed if he does not come.

By Mr. Jones:

Q. Now, when was the first time you saw the Denton car?

A. After I had gone out into the intersection, it appeared ahead of me in a flash, and I saw Mr. Rose's back.

Q. Where were you, as nearly as you can tell the position of your car, at the time you first saw the Denton car?

A. I imagine my front wheels were one yard north of 19th Street, the edge of the road.

Q. That was one yard before you had actually entered the 19th Street?

A. Yes, sir.

Q. You were one yard before you entered into that street when you saw him?

A. Yes, sir.

Q. Now, tell the jury just where the Denton car was at that instant?

A. The Denton car at that instant was about page 127 } one yard from being in front of me. At that time it had not reached me yet, but before I could react, the car was in front of me.

Q. So then the Denton car was about one yard to your left?

A. You can not very well judge distances when the two cars were coming like that. It had not quite reached me, and it took him just that time to get by me.

Q. I understood you to say he was about three feet from there, and I am asking you if you meant that he was three feet to your left?

A. Yes, sir, I did mean that.

Q. You were driving, of course, on the right-hand side of the road?

A. Yes, sir.

Q. That road is 16 feet wide, isn't it?

A. Yes, sir.

Q. You were in a Ford car?

A. Yes, sir.

Q. That is five feet four inches from hub to hub, and five feet six inches from center to center, isn't it? That is approximately correct?

A. Yes, sir.

Q. You were driving somewhere within a foot or eighteen inches of the right-hand side of the street, weren't you?

A. Yes, sir.

Q. And that left 17 feet, 6 or 7 inches—

Witness: I don't understand you.

page 128 } Q. The roadway upon which you were traveling was 16 feet wide?

A. Yes, sir.

Q. If your car was a foot or 18 inches from the right—

Mr. Woody: Mr. Ashburn, do we understand that those streets, Arctic Avenue and 19th Street, are 16 feet wide exclusive of the shoulders?

Mr. Ashburn: The concrete strip is 16 feet wide, there is no shoulder.

Mr. Woody: The concrete portion, exclusive of the rest, is 16 feet wide?

Mr. Ashburn: Yes, sir.

By Mr. Jones:

Q. Now, then, taking one foot from your right-hand side, or 18 inches, and adding 5 feet 6 inches to it, you would use about 7 feet of the right-hand portion of the roadway, leaving your car about 9 feet from the left-hand side of Arctic Avenue?

A. Yes, that is true.

Q. Then, at the time Mr. Denton entered that intersection, if he was about 3 feet in front of and to the left of your car, and you were about 3 feet from the intersection, then

he had traveled some 6 feet into that intersection and you lacked 3 feet of getting to it? Isn't that true? Do you understand that?

A. I lacked 3 feet of getting in there.

Q. At the time you lacked 3 feet of getting into that intersection, Mr. Denton had entered it and had traveled 129 feet } versed at least 6 feet of that intersection, had he not?

A. The question was put to me, if I remember it correctly, asking me where was I when I first saw Mr. Denton's car.

Q. I am asking you now a new question entirely: If it is not a fact that at the time you lacked or were within 3 feet of the intersection Mr. Denton had entered the intersection and had traversed 6 feet of that intersection?

A. No, sir, not at all.

Q. That is not right?

A. No, sir, that is not right.

Q. Now, then, tell me at the time you were within 3 feet of the intersection where Denton was?

A. He had not entered the intersection.

Q. Where was he?

A. He was just about to enter it.

Q. What do you mean by that?

A. He was approximately at the intersection. I do not remember exactly. That thing happened some time in 1930.

Q. Just a few minutes ago you told me that at the time that you were about 3 feet from the edge of 19th Street, Mr. Denton was about 3 feet to your left. That was your answer?

A. If I told you that, I was confused; and I retract that. I did not mean that. The first question put to me was, where was I when I first saw Mr. Denton's car; and that is when I was 3 feet away.

Q. At the time you were within 3 feet of the street upon which Denton was traveling, where was Denton's car?

A. Somewhere in the neighborhood of the same thing from his corner. All of this is an approximation, because that thing happened so quickly that I can not fix the distances exactly in my mind.

Q. Then, at the time you were within 3 feet of the intersection, Denton was within 3 feet of the intersection?

A. That sounds reasonable.

Q. I am not talking about whether it sounds reasonable or not; I am talking about whether it is a fact?

A. I do not know whether it is a fact or not.

Q. You do not know?

A. No, sir, I do not know exactly. I do not know the number of feet he was away.

Q. Now, isn't it a fact that after the collision, the Denton car was turned over and lying almost in a diagonal line right across from the intersection of the street?

A. No, sir, that is not a fact at all. That is not correct.

Q. Where was it?

A. His car passed by me, as I testified a while ago, and went clean down the road in the direction in which he was going, and went off the concrete I should say 10 feet or so.

Q. To his right or left side?

A. To his left.

Q. And then where?

A. He went down the road about 50 feet, and  
page 131 } then 10 feet off the road.

Q. You say that he went down the road the same way he was traveling for about 50 feet, and then went off the road for about 10 feet?

A. Yes.

Q. Isn't it a fact that at that time each one of these corners had high weeds, as high as a man's head and taller?

A. That particular one did have them; that is, on that one corner. Weeds were not that high on the other corners.

Q. There were such weeds growing on all four corners there, so that certainly within two or three days after that time you could tell where a car had dragged over them? There was enough growth on the ground there to indicate where a car had turned over, wasn't there?

A. There was a growth there, but whether or not you could tell where the car had been dragged I do not know. I was in the hospital.

Q. Didn't you go back there after the collision?

A. No, sir, I did not. I did not have a chance to go back there.

Q. When did you go to the hospital?

A. That night.

Q. When did you get out?

A. I was in the hospital about eight days.

Q. You went to which hospital?

A. The Memorial Hospital in Norfolk.

Q. Where is that located?

A. On Manteo Street and Spotswood Avenue.  
page 132 }

Q. And you entered there when?

A. Sunday night.



Q. And stayed there until when?

A. Until the following Tuesday. I know I was there a week.

Q. You mean the following Tuesday week?

A. Yes.

Q. You stayed there, then, about 10 days?

A. I am not positive. I know I was there at least a week. I think it was 10 days. I entered there Sunday night.

Q. And you stayed there from Sunday night for a week?

A. Yes, sir, I know that.

Q. And that was the Memorial Hospital in Norfolk?

A. That is correct.

Q. About how fast were you driving your car at the time you entered this intersection?

A. I was not driving my car over 20 miles an hour.

Q. And the car was equipped with good brakes?

A. Yes, sir.

Q. And it was an A Model Ford sedan?

A. Yes, sir.

Q. I believe, after the wreck, you left your car there in a garage within two or three blocks of the point of the collision?

A. I do not know about that.

Q. Didn't you see the car afterwards?

A. No, sir, I was taken to the Doctor by Mr. Barco and I never saw the car any more.

page 133 } Q. Did you examine the car at the scene of the wreck?

A. I only gave it a cursory glance.

Q. Will you tell this jury that that radiator was not driven back up over the engine as the result of the impact?

A. I did not notice the radiator at all.

Q. I ask you if you will tell this jury that that radiator was not driven back up over the engine as the result of that impact?

A. I cannot tell the jury that, because I did not notice it.

Q. Was that engine driven back up under the footboard?

Mr. Ashburn: Is this an indirect method of testifying by you?

Mr. Jones: No, sir. He is on cross examination.

A. I only gave the car a cursory glance, and I could not tell whether the engine was driven back up under the footboard or not; and I could not tell about the radiator.

By Mr. Jones:

Q. So that you cannot tell the condition of your car after the collision?

A. Not as to the engine being driven back up under the footboard; no.

Q. If it be shown in evidence that the radiator was driven back up on the engine, how do you account for it if this car was driven by your car and kept on down the road?

Mr. Ashburn: Now, you are predicating the question on something that is not in the evidence. There is page 134 } nothing in this evidence about the condition of the Miles car at this time.

Mr. Jones: That is true. But here is the difference between my question and Mr. Ashburn's examination. He assumed in his questions that that was a condition. Now, I ask this witness if it be shown in the evidence. I did not assume that it was.

Mr. Ashburn: You went further than I did.

By Mr. Jones:

Q. Do you know the condition of your car, or the car which you were driving, after the accident?

A. No, sir. I do not know anything about the condition of the radiator or the motor or the footboard.

Q. Didn't you have it fixed?

A. No, sir.

Q. Who did have it fixed?

A. It was not fixed, I do not believe.

Q. It never has been fixed?

A. The car was an old car, and I do not think it was worth being fixed. The top was completely torn off, so I heard.

Q. You mean that it was injured so badly in this collision that it was not worth fixing?

A. I think that is the way it was figured out. I personally was not there at the time it was figured out. Other people would know about that.

page 135 } The Court: You just answer what you know.

By Mr. Jones:

Q. Now, when you first saw the Denton car, what did you do?

A. When I first saw the Denton car, the first thing I could see was Mr. Rose, who was on the running board.

Q. I asked you what was the first thing you did?

A. The first thing I did was to turn my wheel to the left, and at the same time put my foot on the brake.

Q. You turned your car to the left?

A. Yes, sir.

Q. And put your brakes on?

A. Yes, sir.

Q. Approximately how far did you go over to the left?

A. When I started to turn the car, Mr. Denton was almost in front of me, and I went just far enough to miss hitting Mr. Rose, who was standing on the running board practically midway of the car.

Q. What part of the Denton car did your car come in contact with?

A. The front part of the rear fender.

Q. What part of your car struck it?

A. The right-hand side of my front bumper, I imagine, would be the first thing to come in contact with it.

Q. How far does it take you to stop a car of this class, in the condition in which this car was, that you were driving, running about 20 miles an hour, if you know?

A. I do not know. I haven't any idea.

Witness stood aside.

page 136 }

CHARLES E. BARCO,  
sworn for the defendant.

### DIRECT EXAMINATION.

By Mr. Ashburn:

Q. You are Charles E. Barco?

A. Yes, sir.

Q. Where do you live?

A. Virginia Beach.

Q. Do you hold any official position there?

A. As Mayor of the Town, yes, sir.

Q. How long have you lived at Virginia Beach?

A. I have been there since 1913.

Q. Were you in Town on the evening of August 31, 1930, when this accident occurred?

A. Yes, sir.

Q. Where were you at the time of the accident?

A. I had been down to the Cavalier Hotel and was returning home; and when I got to the corner of 26th Street and Arctic Avenue I saw these cars down there; and I remarked to my wife, "There is an accident, and we will go down there".

Q. Did you go down there immediately?

A. Yes, sir.

Q. And when you got to the intersection of 19th Street and Arctic Avenue, what did you find there?

A. I found that they had had this accident; and there was a young man there putting one of these boys who was hurt in his car; and he asked me if I would assist page 137 } him; which I did; and then two or three other people came up and they put these boys into the car; and then there was a lady and Mr. Miles, I believe it was, that I put into my car, and I carried them up to the doctor's office.

Q. How long did you stay there before going to the doctor's office? That is, was it your idea to get the people who needed medical attention to the doctor as quickly as possible?

A. That was my idea, to get them to the doctor as quickly as possible, so that they could have medical attention. I did not stop to look at the cars at all at the scene of the accident.

Q. Was there a young man put into your car who subsequently got out?

A. Yes, sir.

Q. Once or several times?

A. I put him in my car three times, and he got out each time.

Q. What was his condition?

A. I could not tell at that time. I thought he was dazed.

Q. Would you recognize him if you were to see him?

A. (Looking around the court room.) I believe he has gone.

Q. Is that the young man, or do you remember him (indicating Mr. Cuddihy)?

A. No, sir, that is not the young man.

Q. You do not think he is the one?

A. I do not think he is the one.

Q. Do you see the young man here?

A. (Looking around court room) No, sir, I do page 138 } not. The young man that I put in my car was a very light complected fellow.

Q. And did you subsequently take him to the doctor's office, or did he go with some one else?

A. I think I took him up to the doctor's office. I will not be sure of that.

Q. And you did take Mr. Miles and Miss Griffith to the doctor?

A. Yes, sir.

Q. Was Mr. Miles hurt?

A. I could not say. I thought that all of them were hurt pretty badly; and the young lady whom I put in my car had a sort of an abrasion over her eye; and my first thought was to get them to where they could receive medical attention. And, after I got to the doctor's office, I went to the other car and helped to take the other young men out of the other car. Those were the ones who were badly hurt. And then I went back to my car to help the others out of my car, but they had gotten out and I thought had gone into the doctor's office then.

Q. Mr. Jones questioned Mr. Miles rather closely as to whether or not he had been drinking on the day of the accident. Did he give any indication to you as a person who had been drinking?

A. No, sir, he did not.

Q. Were you in close contact with him?

page 139 } A. He and the young lady were on the back seat of my car, and myself and my wife were on the front seat.

Q. You did not notice the location of the cars at the time of the accident?

A. No, sir, I did not.

### CROSS EXAMINATION.

By Mr. Woody:

Q. I believe you are Mayor of Virginia Beach?

A. Yes, sir.

Q. And have been for a number of years?

A. Yes, sir.

Q. At the time of the accident you were six or seven blocks away?

A. This accident occurred at 19th Street and Arctic Avenue, and I was at 26th Street. I could see down there, but I could not tell what had taken place.

Q. And then, as a public official as well as a human being, you went there?

A. Yes, sir, and my first thought was to get them to the doctor as quickly as possible.

Q. You wanted to render as much aid as you could?

A. Yes, sir.

Q. At what point with reference to the intersection did you stop your car?

A. I would say that I stopped around 15 or 20 feet from the intersection. That was on Arctic Avenue.

Q. And then you got out and went to these two  
page 140 } cars and went to where the people were?

A. In fact, there was a young man who was trying to put one of these boys into his car; and the boy's legs were broken and he was in such bad shape that I ran there to assist him. And I helped to put both of the boys into that car.

Mr. Ashburn: You did not know one from the other at that time?

Witness: No, sir, I did not.

By Mr. Woody:

Q. Then, when you saw that they were safely in a car and on their way to the doctor's office, you took Mr. Miles and Miss Griffith in your car?

A. Yes, sir.

Q. And carried them to Dr. Woodhouse?

A. Yes, sir.

Q. And you also stated that the man who got in and out of your car with great regularity was not Mr. Cuddihy?

A. No, sir, it was not.

Q. Do you remember whether or not it was Mr. Denton?

A. Yes, sir, that was the one.

Q. He was the one that was dazed and got in and out of your car two or three times?

A. Yes, sir.

Q. And you did take Mr. Miles and Miss Griffith to Dr. Woodhouse's office?

A. Yes, sir.

Q. And then what?

page 141 } A. When I got there, these boys that I knew were hurt worse than Mr. Miles and this young lady—or at least I thought so because Mr. Miles and the lady were walking and these other boys were not able to walk—so I immediately jumped out of my car and assisted in taking those two boys out and to the doctor. The doctor was alone. Dr. Emerson Land was there at that time. And somebody—I have forgotten who it was—took these people out of my car; and when I got back there, somebody said, "There is not anybody in your car now"; and I thought somebody had taken them to the doctor's office.

Q. When you got out of your car to help those who were more injured, you left Mr. Miles and Miss Griffith in your car?

A. Yes, sir, because I knew that the two boys were hurt more seriously than Mr. Miles or the young lady.

Q. Were Mr. Miles and Miss Griffith talking to each other or to you from the scene of the accident?

A. No, sir, the young lady seemed to be a little hysterical when I first put her in the car; and I told her to be quiet; that I would have her at the doctor's office in a few minutes.

Q. And did she answer you?

A. Yes, sir; she said all right; but she was crying or weeping.

Q. Did she seem to have any difficulty in talking?

A. No, sir, she did not.

page 142 } Q. And the only thing you noticed was an abrasion over her eye?

A. Yes, sir.

Q. And she was hysterical, but she replied to you when you told her to be quiet and that in a few minutes you would have her at the doctor's office?

A. Yes, sir.

Q. Did you go back to the scene of the accident?

A. No, sir. I sent a policeman down there to make an investigation of it.

Q. You personally are unable to tell the jury either the position of the cars after the accident or the condition of them?

A. Yes, sir, because I did not notice the cars at all.

Witness stood aside.

R. E. GRAHAM,  
sworn for the defendant.

#### DIRECT EXAMINATION.

By Mr. Ashburn:

Q. State your name?

A. R. E. Graham.

Q. Where do you live?

A. Virginia Beach.

Q. What is your business?

A. I am Chief Clerk of the Norfolk & Southern Railway Company.

Q. How long have you lived at Virginia Beach?

page 143 } A. 14 years.

Q. Were you there on the afternoon of Sunday August 31, 1930, when this accident occurred?

A. I do not remember the date, but I presume that that is correct. I was near that vicinity.

Q. Where were you at the time of the accident?

A. I was in an automobile driven by Mr. Dale, going south on Arctic Avenue toward 19th Street.

Q. And did the car that was in the collision at the intersection of Arctic Avenue and 19th Street pass the car in which you were riding?

A. Yes, sir.

Q. At approximately what speed was the car traveling in which you were riding?

A. We were, as I recall, going very slowly, because 20th Street on which I live is not cut through to Arctic Avenue, and we were going to 19th Street and cut through to Pacific Avenue and back up to 20th Street where I live.

Q. When this car passed you, which I will call the Miles car, can you state at approximately what speed you were traveling?

A. I would say at a very moderate speed; not to exceed 15 miles an hour.

Q. And approximately how much faster was the other car going that passed you?

A. I do not think he was making a great deal more speed than we were.

page 144 } Q. Was he in your view up to the time of the accident?

A. I did not pay any attention to him after he went by, until we heard the crash.

Q. You were not actually looking at him when the accident occurred?

A. No, sir. I heard the crash.

Q. And that attracted your attention to the intersection at the point of collision?

A. Yes, sir.

#### CROSS EXAMINATION.

By Mr. Woody:

Q. Mr. Graham, I believe you said you were in a car with some one else?

A. Yes, sir, R. W. Dale. He was driving.

Q. What was the occasion of your traveling so slowly at that point between 20th and 19th Streets?

A. 20th Street is not cut through there; and, in addition to that, there are bumps at the intersection of Arctic Avenue,



so that you cannot make any great amount of speed over any one street there.

Q. At the intersection of Arctic Avenue and 19th Street?

A. I do not say at 19th Street, but I do know that 20th Street has a bump in it.

Q. But where did this car pass your car?

A. Somewhere around in the vicinity of 20th Street.

Q. Somewhere between 21st and 19th Street  
page 145 } this car passed you?

A. Yes, sir.

Q. Now, did it take any great length of time to get by you?

A. I could not say. I did not pay enough attention to it. It did not take a great amount of time. I remember the car going by. And that is all.

Q. So that it must have been traveling at at least 10 or 15 miles an hour more than you were in order to pass you?

A. It would not have to travel more than five miles an hour faster in order to get by.

Q. It would take some time to get by if that was the only difference in the speed, wouldn't it?

A. Yes, but at that time there was nothing to call it to our attention.

Q. It was about a city block after he passed you before he got to the point of collision, wasn't it?

A. Yes, I expect so.

Q. And you paid no further attention to that car after it passed you? So you are unable to say at what rate of speed that car was traveling at the point of impact?

A. No, sir, I could not say.

Q. That car may have been traveling 25 or 60 miles an hour, so far as you know, and you are also unable to tell this jury whether the Miles car or the Denton car entered the intersection first?

A. I could not say that.

Q. So you have told the jury all that you know  
page 146 } about this accident?

A. Yes, sir.

Q. How fast did you say your car was traveling?

A. I think around 15 miles an hour.

Q. And the other car had gotten a half block or more ahead of you in the meantime?

A. Yes.

Q. You were still on Arctic Avenue when the collision occurred, were you not?

A. Yes, we stopped as soon as we heard the collision.

Q. And the other car, in the meantime, had gotten a half block ahead of you?

A. Yes, about a half block; about 100 feet; something like that.

Q. And your car did not stop until you heard the crash?

A. No, sir.

Witness stood aside.

ERNEST LAND,  
sworn for the defendant.

DIRECT EXAMINATION.

By Mr. Ashburn:

Q. State your name?

A. Ernest Land.

Q. How old are you?

A. 56 years.

page 147 } Q. Where do you live?

A. Virginia Beach.

Q. Do you hold any official position there?

A. Chief of Police.

Q. How long have you been Chief of Police of Virginia Beach?

A. Three years the first of July.

Q. And how long have you been a police officer?

A. 24 years this summer.

Q. Were you at Virginia Beach on the night of Sunday, August 31, 1930, when an accident occurred at the intersection of 19th Street and Arctic Avenue?

A. Yes, sir.

Q. You did not see the accident?

A. No, sir.

Q. Did you go to that location after the accident occurred for the purpose of making an investigation of what the situation was there?

A. Yes, sir, I went down there I suppose within a half-hour or three-quarters of an hour after the accident.

Q. Did you get there before the automobiles had been moved?

A. They were there.

Q. Will you tell the jury, please, first, what the conditions surrounding that intersection were at that time? It has been testified that Arctic Avenue runs north and south. Is that correct?

A. Yes, sir.

page 148 } Q. And that 19th Street runs east and west?

A. Yes, sir.

Q. What was on those corners at that time? Any buildings?

A. No buildings.

Q. What was the condition at the corners?

A. A growth of bushes around 8 or 10 feet high.

Q. Was that the condition of the northeast corner of 19th Street?

A. All of them. You could not see very much until you got to the crossing of the street. You would have to get pretty close there to see.

Q. Now, it has been testified, without dispute, that the concrete roadway of each street is 16 feet wide at that point. Is that correct?

A. I think so.

Q. About how far is it from the intersection of 19th Street and Arctic Avenue east to Pacific Avenue?

A. I imagine around about 100 yards.

Q. One of the witnesses said 550 feet, he thought?

A. I do not think it is that far. I have never measured it.

Q. You do not know exactly?

A. No, sir.

Q. Now, what sort of cars were involved in this collision?

A. A Ford roadster and a Ford sedan, as well as I remember.

Q. It has been testified that the Ford roadster was driven by Mr. Denton and was going west on 19th Street, and the the Ford sedan was driven by Mr. Miles and was going south on Arctic Avenue. Where did you find the Ford  
page 149 } sedan?

A. It was in Arctic Avenue around about 15 feet from the center of the intersection of the two streets.

Q. Standing upright or how?

A. I do not remember whether it was standing up or lying down.

Q. Where was the Ford roadster?

A. Between 50 and 60 feet to the west of 19th Street, just over on the edge of the bushes—on the edge of 19th Street.

Q. On the edge of 19th Street and how far west of the intersection?

A. Between 50 and 60 feet.

Q. Did you step it off?

A. Yes, sir.

Q. (Showing witness diagram Exhibit No. 1) This is east, and this is west, and that is south, and this is north. The Denton car was going west and the Miles car was going south, here (indicating). I understood you to say that it was just south of 19th Street. Now indicate it?

A. This is the concrete, and the street runs up here (indicating).

Mr. Jones: Just mark where the streets are.

Mr. Ashburn: This is the concrete strip where these marks are (indicating).

Witness: The concrete will come in here (indicating).

By Mr. Ashburn:

Q. And it was between 50 and 60 feet from that point?

A. From the center here (indicating).

page 150 } Mr. Ashburn: The witness marks the spot with an X as the location of the Denton car which the witness saw between 50 and 60 feet from the center of the intersection. Is that correct?

Witness: Yes, sir.

By Mr. Ashburn:

Q. How far was that car south of the line of 19th Street?

A. I do not think it was clean out of the street? A portion of it may have been in the street; on the edge of the bushes and the street.

Q. Was it entirely off of the concrete?

A. Yes, sir, it was off of the concrete.

Q. And about how far from the concrete?

A. Several feet.

Q. Did you step off those distances when you arrived on the scene?

A. Yes, sir.

Q. Do you have any interest in the outcome of this case?

A. No, sir.

Q. Do you know any of the parties?

A. No, sir. I have never seen them before in my life.

### CROSS EXAMINATION.

By Mr. Jones:

Q. Mr. Land, when did you go to the scene of the collision?

A. I suppose maybe 30 minutes or not that long after the

accident. I was near Dr. Woodhouse's office when  
page 151 } they came up there, and I helped to get them out  
of the machine and to get them into the doctor's  
office; and later on I went down to the scene of the accident.  
It was shortly afterwards.

Q. The same day?

A. Yes, sir.

Q. Have you been back there since that time for the purpose  
of making any measurements?

A. Yes, sir.

Q. When?

A. I have been back there several times. I went back there  
the other day to refresh my mind on it.

Q. When was that?

A. A few days ago.

Q. Was that the time you made the measurements?

A. No, sir. I made the measurements that evening, the day  
of the accident, as soon as I got there.

Q. Was that the only time you made any measurements  
there?

A. Yes, sir.

Q. Have you a memorandum of those measurements?

A. Not with me.

Q. Well, you knew you were going to testify here?

A. Well, the memorandum got lost.

Q. When did it get lost?

A. I do not know.

page 152 } Q. You haven't any idea?

A. No, sir.

Q. Was it six months ago?

A. I have told you I do not remember.

Q. You haven't any idea about it, whether it was a month  
ago or when it was?

A. I remember exactly where the cars were.

Q. But you haven't got that memorandum?

A. No, sir. But I drew off a little sketch of it recently.

Q. You made that a few days ago?

A. Yes, sir.

Q. And this thing happened about two years ago?

A. Yes, sir.

Q. And the sketch you have in your pocket and brought  
here, that was made about a week ago?

A. Yes, sir.

Q. Now, going back to the physical location of the ground  
there, the Denton car was coming from the direction of Vir-

ginia Beach and going west. To the left of that crossing, the ground is much lower than it was to the right? Is that a fact?

A. I do not know that it is. It is pretty much on a level.

Q. Now, at the intersection of those two streets, to the south and to the west, isn't there a sharp decline of some foot or 18 inches?

A. I do not think so.

page 153 } Q. Would you say that this corner (indicating) is as high as the northeast corner?

A. I would not say that. I do not know.

Q. Did you notice the contour of the ground there?

A. As I said, it looks to me pretty much all on a level.

Q. At the time of the collision there were tall weeds on all four corners, and on one corner they were higher than on the other three, weren't they?

A. I do not think there was much difference.

Q. There was some difference, wasn't there?

A. It was a right bad place there. There have been several wrecks there.

Q. And everybody around Virginia Beach knew that it was a right bad place?

A. Yes, sir, I suppose so.

Q. It was a dangerous corner and was generally known to be a dangerous corner?

A. I suppose so.

Q. Now, at this particular corner that the Denton car went over to, there were weeds certainly waist high, was there not?

A. Yes, sir, and I suppose higher.

Q. Isn't it a fact that that car turned over twice after the collision?

A. I do not know.

Q. Did you notice where it was struck, what part of the car was struck?

page 154 } A. The right-hand side was struck.

Q. The right-hand rear?

A. I think it was pretty much to the center. It may have been a little to the rear.

Q. You think it was pretty near to the center?

A. Yes, sir, a little to the rear.

Q. Now, it has been testified here that it was within a foot of the right-hand rear fender. Would you say that that is not correct?

A. It seemed to me that the lick struck just about where the door was.

Q. That does not help me very much. It has been testified here that the car was struck on the right rear wheel and towards the front of and not over a foot from the right rear fender. Is that right?

A. The lick was struck very near the center of the car.

Q. Was the front right-hand fender hurt?

A. The car was just shoved in. I do not remember all of the details. I do not remember much about the Ford sedan.

Q. I am not talking about the Ford sedan now. I am talking about the roadster?

A. The side of the Ford roadster was shoved in.

Q. Do you know whereabouts?

A. About the center of the car; very near the center.

Q. Now, I am asking you if the right-hand front fender was touched?

page 155 } A. I would not say.

Q. You do not know?

A. No, sir.

Q. Was the left-hand rear fender hurt?

A. I do not remember that. All I remember is that the side of the car was shoved in.

Q. Then, if you do not know that, explain to the jury how you can tell where this car was hit?

(Witness hesitated.)

The Court: Answer the question.

A. Well, the car was struck in the center. I cannot describe the way the fenders were bent up, or whether they were bent up much.

By Mr. Jones:

Q. Is it all you can tell us that the car was hit in the center?

A. I said the whole side was pushed in. It was two years ago, but it was pushed in. I remember that very well.

Q. And that is all you remember?

A. Yes.

Witness stood aside.

page 156 }

WALLACE MATHIAS,  
sworn for the defendant.

DIRECT EXAMINATION.

By Mr. Ashburn:

Q. State your name?

A. Wallace Mathias.

Q. Where do you live?

A. Virginia Beach.

Q. How old are you?

A. 27.

Q. What is your business?

A. Cleaning and pressing.

Q. Were you at Virginia Beach on the 31st of August, 1930?

A. Yes, sir.

Q. Sunday?

A. Yes, sir.

Q. Did you meet some young gentlemen from Hopewell at that time?

A. Yes, sir.

Q. Had you ever known them before that day?

A. I never say them before that.

Q. Did you go with them to get a gallon of whiskey, or show them where they could get a gallon of whiskey?

A. Yes, sir.

Q. About what time in the afternoon was it?

A. I guess it was around 5:00 o'clock when we left to go after the whiskey.

Q. And how far did you have to go?

page 157 } A. I think it was about two or three miles.

Q. Were you riding on the car at the time that this accident occurred?

A. Yes, sir.

Q. What part of the car were you riding on?

A. On the left running board.

Q. Standing up?

A. Yes, sir.

Q. Who was driving the car?

A. Mr. Denton.

Q. And how many people were in or on it?

A. I think there were five, including me.

Q. How many were inside?

A. Three.



Q. And where was the fifth one? You were on one running board and three inside. That is four. Where was the other one?

A. He was on the other running board.

Q. That put him on the right-hand running board?

A. Yes, sir.

Q. Now, this car was traveling west on 19th Street at the time of the accident, was it not?

A. Yes, sir.

Q. Where was it going?

A. Going out to the tourist camp out there.

Q. Where was that?

page 158 } A. Out there this side of Cypress Avenue.

Q. For what purpose were you going with the party?

A. I was going out there to take a drink.

Q. How was Mr. Denton driving the car on the return trip after getting this whiskey?

A. He was driving all right; only a little faster than I would like to ride. I told him once to slow up.

Q. He was driving a little faster than you would like to ride?

A. Yes, sir. I told him to slow up on account of the road. There was a good deal of traffic there.

Q. And did he slow up?

A. Yes, sir.

Q. Did he come down Atlantic Avenue coming south?

A. Yes, sir.

Q. How did he get on 19th Street?

A. He went through Baltic Avenue and 16th Street and straight across and came up Atlantic Avenue to 19th Street.

Q. Going west?

A. Yes, sir.

Q. Approximately how fast was he going at the time of this collision?

A. Around 45 miles an hour.

Q. That is your best judgment?

A. Yes, sir.

page 159 } Q. Did he slow up any for the intersection?

A. He did when they ran together.

Q. Had he slowed up before this came together?

A. No, sir.

Q. How near were you to the intersection before you saw the Miles car?

A. I was right on top of it. There were bushes growing on the corner and we could not see anything.

Q. Mr. Denton knew that he was coming to an intersection, didn't he?

A. Yes, sir, he could see it then.

Q. Why didn't he slow up?

A. I do not know.

Q. Did Mr. Rose say anything to him about slowing up for the intersection?

A. I do not remember whether he did or not.

Q. Did any of the boys in the car say anything to him about slowing up for the intersection?

A. I do not remember hearing them.

Q. Did any of them say anything to him about looking to see if a car was coming along Arctic Avenue?

A. I do not remember that.

Q. Were you hurt in the accident?

A. Yes, sir, a little.

Q. What happened to you?

A. I got a busted-up knee, and two or three little cuts on my face.

page 160 } CROSS EXAMINATION.

By Mr. Woody:

Q. Mr. Mathias, where do you live?

A. Virginia Beach.

Q. How long have you lived at Virginia Beach?

A. About 21 years.

Q. What is your occupation?

A. Cleaning and pressing.

Q. What was your occupation on the 31st of August, 1930?

A. In the government service; in the Coast Guard service.

Q. And as such, what were your duties?

A. In the boatswain department.

Q. What was the general service that you performed? You were in the life-saving business in the case of wrecks or accident, were you not?

A. To rescue ships more than anything else.

Q. And likewise in the capacity of an officer on the police force?

A. Yes, sir.

Q. And one of your duties was to prevent the importation and use of ardent spirits? Isn't that right?

A. Yes, sir.

Q. And as a police officer and a member of the Coast Guard, you carried these boys to a place and showed them where to get whiskey, didn't you?

A. Yes, sir.

Q. What were you doing at the service station?  
page 161 } A. I was there in front of the drug store, and one of the boys asked the fellow at the service station where they could get some liquor; and he was busy working and he called me over and asked me if I had any idea about it, to show them where they could get a gallon of whiskey; and I did so.

Q. You went with them?

A. Yes, sir.

Q. You were then in the Coast Guard service and you were empowered with police authority?

A. Yes, sir.

Q. And it was then a part of your duty to prevent the use of whiskey, wasn't it?

A. Yes, sir.

Q. And, knowing that, you took these boys to a place where they could get whiskey and got it and you were going with them to get a drink of whiskey, weren't you?

A. Yes, sir.

Q. Where was this filling station or drug store where you were?

A. At 24th Street and Atlantic Avenue.

Q. And in which direction did you go to get to the place to get the whiskey?

A. In two or three directions; north and northeast.

Q. North towards Cape Henry, and then turn to your left?

A. Yes, sir.

Q. Somewhat in the direction of the Cavalier  
page 162 } Hotel?

A. Yes, sir, past the club, and by the Lincoln Park.

Q. And then you came back to Atlantic Avenue and 16th Street?

A. No, sir, down Baltic Avenue and then up 16th Street.

Q. You crossed 17th Street and went to 16th Street?

A. Yes, sir.

Q. I happen to know that in going into Virginia Beach you go into 17th Street or 31st Street?

A. Yes, sir. We crossed down to Baltic Avenue and crossed 17th Street and went to 16th Street and then to the left towards Water Street and back to Atlantic Avenue and to 19th Street and then towards the tourists camp.

Q. Where do you live?

A. On 24th Street.

Q. How far from Atlantic Avenue is this tourist camp?  
How many blocks?

A. Around five blocks; four or five.

Q. You were going down there to get a drink?

A. Going with the boys to have a little drink.

Q. How did you expect to get back about ten blocks, to where you live after you got this drink?

A. I have walked further than that many a time for a drink.

Q. You are one of these fellows who would "walk a mile for a Camel" and ten blocks for a drink?

A. Not necessarily.

Q. What interest did you have in this bootleg station where they sold whiskey?

page 163 } A. I did not know that they sold whiskey.

Q. You went there and got it?

A. Not at the filling station.

Q. I say this bootleg station where you bought the whiskey?

A. I knew it was being sold there.

Q. What interest did you have in it?

A. None whatsoever.

Q. Do you mean to say that you met a party of men that you had never seen before, at Virginia Beach, and went down there to this place with them in the car and came back with them, and were going out to the automobile camp with them, and then would walk ten blocks back home simply for the sake of a drink?

A. I was doing it mostly for a favor to the parties.

Q. You had never seen them before?

A. No, sir.

Q. Couldn't you have told them where to find the place?

A. I could have told them where to find the place, but they would not have found it.

Q. Couldn't you tell them how many blocks up Atlantic Avenue it was, and how many blocks it was then to the left?

A. You do not go up Atlantic Avenue.

Q. Couldn't you have given them verbal directions by which they could have found it?

A. They might have found it by asking somebody else.

Q. Coming back to this trip at the time of the accident and what happened on that trip, was the fact that  
page 164 } Mr. Denton was traveling so fast the reason that you remonstrated with him?

A. He was traveling fast all the way back, and at 31st Street I told him to slow up.

Q. And he did slow up at 31st Street, didn't he?

A. Yes, sir.

Q. And that was the only place?

A. Yes, sir; because there was more traffic there.

Q. That was the only place that you made any remark about his speed? Is that correct?

A. Yes, sir.

Q. And then, after crossing 31st Street, he went to 16th Street and back to Atlantic Avenue and then out to 19th Street?

A. Yes, sir.

Q. And down 19th Street to Pacific Avenue where he had to cross the car track?

A. Yes, sir.

Q. And it is very rough there?

A. Not so rough.

Q. You have to cross the car track there?

A. You have to cross a railroad track.

Q. Is it or not a fact that when he crossed this car track, you slowed down and changed gears?

A. Yes, sir.

page 165 } Q. How far was it from Pacific Avenue to Arctic Avenue?

A. I judge 250 or 300 yards. I do not know. It is a long block.

Q. How long is the average city block?

A. I do not know.

Q. Is it as much as two city blocks, the distance from Pacific Avenue to Arctic Avenue; two ordinary city blocks?

A. You would not miss it very far.

Q. With your knowledge of Virginia Beach, isn't it a fact that the distance from Pacific Avenue to Arctic Avenue is more than an ordinary city block but less than two city blocks?

A. I do not know. I have never paid much attention to it.

Q. Try to refresh your memory, and answer that question if you can?

A. From the railroad tracks out to Arctic Avenue is right around two ordinary blocks.

Q. Tell me whether or not it is more than one city block?

A. Yes, it is more than one city block.

Q. Isn't it a fact that it is less than two city blocks?

A. I do not know.

Q. You will not deny that that is a fact?

A. No, sir, because I could not say.

Q. Do you know whether or not it is a fact that the ordinary city block is 300 feet? It is 100 yards, isn't it?

A. Yes, sir—

Q. That is true, isn't it?

page 166 } A. (Continued) But it is more than 100 yards there; much more.

Q. Do you know whether or not it is a fact that the ordinary city block is 300 feet?

A. No, sir, I do not know. I haven't ever measured it.

Q. But you do know that it is true that when he crossed Pacific Avenue coming down there, he slowed up and changed gears to cross the car track?

A. Yes, sir, I was going on home and he asked me to go and have a drink; and I went with him.

Q. Did he go into low?

A. Yes.

Q. And after having crossed the track there, he went into second and then into high? Is that true?

A. Yes, sir, he was in second going across the railroad track.

Q. And then do you mean to tell the jury that after having crossed the track at Pacific Avenue in low gear, he changed from that into second and changed from that into high and that he was traveling 45 miles an hour when he crossed Arctic Avenue?

A. Yes, sir.

Q. And that is as true as anything else you have said on the witness stand here?

A. The best I could judge he was going around 45 miles an hour.

page 167 } RE-DIRECT EXAMINATION.

By Mr. Ashburn:

Q. You were off on a leave at that time, weren't you?

A. Yes, sir.

Q. You were not stationed at Virginia Beach?

A. No, sir, I was just on a few days' leave.

Q. You do not know Mr. Miles, do you?

A. No, sir. That was the first time I ever saw him. Some one just said that that was Mr. Miles.

Witness stood aside.

HAROLD HODGES,  
recalled:

By Mr. Ashburn:

Q. In testifying this morning as to your medical expenses and hospital bill, etc., you did not say whether you paid them or whether your father paid them?

A. My father paid some of them, but he has not paid all of them.

Q. What has he paid?

A. The hospital bill and a part of the doctors' bills.

Witness stood aside.

Mr. Ashburn: The defendant rests.

Mr. Woody: The plaintiffs rest.

page 168 } NOTE: The jury retired and the matter of the instructions was taken up, and, at 5:12 P. M. the Court adjourned until tomorrow morning at 9:00 o'clock for the further consideration of the matter of the instructions out of the hearing of the jury.

May 11, 1932, 9:00 A. M. Court reconvened, and the following transpired out of the hearing of the jury:

Mr. Ashburn: If your Honor please, I offer this ordinance in evidence:

I, J. E. Woodhouse, Jr., Clerk of the Town of Virginia Beach, do certify that the following is sub-section 6 of section 107 of the ordinances of the Town of Virginia Beach:

“When two vehicles approach each other at an angle, the one to the right shall have the right of way, and the vehicle to the left shall slow down or stop if necessary.”

I further certify that said provision was in full force and effect on August 31, 1930.

(signed) J. E. WOODHOUSE, JR.,  
Clerk, Town of Virginia Beach.

Impressed corporate seal of Town of Virginia Beach.

page 169 } Mr. Jones: We object to the introduction of this ordinance in evidence because, first, the case was

closed on yesterday afternoon, the argument of the instructions was taken up and was adjourned until this morning for the completion of the argument of the instructions and for the argument of the case to the jury; and, second, we further object to the introduction of this ordinance in evidence for the reason that some one must testify that it is the ordinance. An ordinance does not prove itself and that it is in force and effect by the simple certificate of the Town Clerk; and, third, we object to the introduction of this ordinance in evidence for the reason that it is at variance with the State law, and is, therefore, unconstitutional and void under the uniform motor vehicle act; and, fourth, we object to the introduction of this ordinance in evidence for the reason that there is no evidence in this case that this collision occurred within the corporate limits of Virginia Beach; or that the Town of Virginia Beach is incorporated.

Mr. Ashburn: The defendant, R. L. Miles, Jr., says that, while it is true that the testimony of the witnesses was concluded on yesterday afternoon, the case has not been submitted to the jury in any aspect of it, and the instructions have not been argued. They were presented to the Court for consideration last evening without argument; and the defendant says that there is no valid reason why additional documentary testimony should not be admitted at this time; that

the ordinance is certified by the Clerk of the Town  
 page 170 } of Virginia Beach not only as to its being a true  
 copy of the existing local law, but as to its being  
 in full force and effect at the time of the collision; and for  
 the additional reason that counsel who offers it being attorney for the Town of Virginia Beach under its charter offers to be sworn and to prove that it is a true copy of the existing ordinance; and that the general conformity with the motor vehicle law of the state provides for the enactment of different traffic regulations by local municipalities, and that its enactment is in accordance with and in compliance with that fact.

And further, in answer to the suggestion that there is no evidence here that the collision occurred within the corporate limits of Virginia Beach, the defendant says that it is so alleged in the declaration, and that it has been admitted and was so understood by everybody testifying in the trial.

And in reply to the suggestion of counsel for the plaintiffs that there is no proof that Virginia Beach is an incorporated town, counsel for the defendant says that it was incorporated by an act of the Legislature of the State of Virginia, of which the Court will take judicial notice.



The Court: The Court's ruling on the question is that this would be perfectly good evidence in the case if it were proved by a witness that it is an ordinance of the Town of

Virginia Beach; but, in order to do that, I would  
page 171 } be forced to open the case for new evidence. I

can not allow it to be introduced solely of itself, without it being shown by some proof that it is actually an ordinance of Virginia Beach. And at this stage of the case, I do not think I can do that, because the questions involved here, according to my recollection, have not arisen in the testimony; in other words, the testimony did not stress this particular point.

Mr. Ashburn: The case is not closed, and no issue has been submitted to the jury, and no instructions have been given to the jury by the Court.

The Court: My ruling on the point is based on the fact that, at this stage of the proceedings, it would be impossible for the attorneys on the other side to raise the question of the application of the law.

Mr. Ashburn: To which ruling of the Court counsel for the defendant, R. L. Miles, Jr., saves an exception for the reasons stated, and asks that the ordinance be appropriately marked and filed as a part of the record in this case.

Paper accordingly filed, marked for identification Exhibit No. 2.

Mr. Ashburn: Counsel for the defendant, R. L. Miles, Jr., wishes to renew the motion to strike out all of the testimony for the plaintiffs, made at the conclusion of the plaintiffs' testimony, assigning in support of such motion the same reasons that were given and urged in the original motion at

the conclusion of the plaintiffs' testimony, and  
page 172 } which were taken down by the stenographer, together with counsel for the defendant's exception to the then ruling of the Court; and for the further additional reason and on the further additional ground that from all of the testimony introduced in the case it is apparent that the plaintiffs, and each of them, were engaged at the time of the collision in a joint unlawful enterprise with the driver of the car, who was then acting as much in their behalf as in his own.

It is further apparent from all of the testimony in the case that the driver of the car in which they were riding was guilty of negligence as a matter of law; and they have alleged negligence against him in each of their declarations filed in

these cases and certainly can not attempt to controvert their own allegation; and that, it being so apparent that they were engaged in a joint unlawful enterprise, the negligence of the driver is imputable to them, and to each of them; and, in addition to that, that no negligence has been proven against the defendant.

The Court: The motion is overruled.

Mr. Ashburn: To which the defendant excepts, for the reasons assigned.

Mr. Ashburn: Messrs. David A. Harrison, Jr., and W. R. Ashburn desire to have it noted in the record at this point, in the presence of the Court and counsel for the plaintiffs, that they represent only R. L. Miles, Jr., one of the defendants, and that all of their actions in the case, and  
page 173 } all objections urged and exceptions taken by them,  
have been and are in his behalf only and not with  
reference to any other or others who are defendants.

page 174 } OBJECTIONS TO INSTRUCTIONS.

Mr. Ashburn: Instruction No. 1 offered by the plaintiffs is temporarily withdrawn.

Instruction No. 2 offered by the plaintiffs is objected to by the defendant because it improperly refers to the limit of damages that may be awarded by a jury; and the law is that the Court should instruct the jury on the elements going to make up the damages which the plaintiffs are entitled to recover, if entitled to recover at all, without reference to or without any discussion of the limit of such damages.

The defendant objects to instruction designated B, offered on behalf of the plaintiffs, for the reason that it is not supported by any evidence in the case; and that, although it may be a good instruction on an abstract principle of law, it is not applicable to the facts as developed by the testimony here and ignores entirely the doctrine of imputed negligence and a joint enterprise.

Instruction numbered B-1, in the language of the other, is subject to a qualification by the addition of the words "or enter" after the word "approach"; but, since that would not seem to add anything to the applicability of the instruction to this case, we do not require or request the addition. We object to the instruction generally because of the contention advanced by the defendant throughout the case that

there is no evidence on which a verdict for the plaintiffs could be sustained.

page 175 } The defendant objects to instruction numbered C, offered on behalf of the plaintiffs, as being an inaccurate statement of the legal principle, particularly in that it inferentially tells the jury that the plaintiffs are entitled to recover. And for the reasons assigned in objecting to all of the instructions: that there is no evidence in the case on which a verdict for the plaintiffs could be sustained.

Thereupon instruction numbered C, offered on behalf of the plaintiffs, was amended by the Court, with the consent of counsel for the plaintiffs; and the defendant announced that his objection to the instruction as amended is that there is no evidence in the case on which a recovery for the plaintiffs can be predicated, and that the Court should not give any instruction for the plaintiffs.

Mr. Jones: We object to Instruction No. 3, for the reason that the physical facts and circumstances and the testimony in the case establish the facts and tend to establish the fact that the defendant, R. L. Miles, Jr., was speeding.

Mr. Ashburn: We except to the action of the Court with reference to Instruction No. 3, because all of the evidence sustains the instruction, and to refuse to give the instruction is to permit the jury to find an inference on an inference or an inference on a presumption.

Mr. Woody: Counsel for the plaintiffs excepts page 176 } to the granting of Instruction No. 4 as offered by the defendant, for the reason that it unduly emphasizes the duty of the driver of the Denton car, a duty which applies equally to the driver of either car.

Mr. Jones: Instruction No. 6 is objected to by counsel for the plaintiffs because it is not a correct statement of the law, in that if the injury was caused partly by the negligence of the defendant, Miles, and partly by the negligence of some other person, then there can be no recovery, which is not a correct statement of the law. It does not base it upon the sole negligence of the defendant.

Mr. Ashburn: The defendant, R. L. Miles, Jr., excepts to the amendment of Instruction No. 6. The amendment made by the Court was inserting the words "solely due", because the instruction as offered embodied a correct legal principle properly applicable to the evidence in this case, and, as amended, it is unduly favorable to the Plaintiff.

Mr. Jones: If the Court please, we are objecting to this instruction No. 7; and this objection will go to most of the remaining instructions: that there is no evidence in this case which establishes a joint enterprise. A joint enterprise is something more than two people going to a given place by a mutual understanding and consent. There must be some control, some power to command, some power and right to give directions, in order to make it a joint enterprise. In this case there is no evidence whatsoever that any of page 177 } the occupants of this car had any control over Denton. It is true that they went with him and went with him evidently by their mutual consent.

Mr. Ashburn: My answer to that is that the evidence in this case is so strong as to establish not only a joint enterprise such as justifies the Court in giving this instruction No. 7, but is practically strong enough to show an agency on the part of Denton on behalf of these plaintiffs; and I call your Honor's attention to this fact: the testimony was that Denton left the tourist camp to do two things: first, to go down to a bath house where one of the plaintiffs had left his clothes so that he could change them; and, second, having done that, to go out and get a gallon of whiskey for the joint use of the plaintiffs and other members of the party, all contributing to the procurement of that whiskey, all desiring it, all going actively to get it, and they were engaged in unlawfully transporting it jointly at the time of the accident.

Now, the situation is comparable to this illustration: say Mr. Harrison, who is sitting over there in that corner, and myself jointly determine that we would like to have a gallon of whiskey, which we are both going to drink, and that we would like to have it now, and suppose that Mr. Harrison's car is setting up at the corner of the street yonder and my car is setting over here in front of the building; page 178 } we go downstairs for the purpose of engaging in that enterprise in which we are both interested as principals; we get in my car because it is most convenient. I drive. Mr. Harrison sits beside me. We go out two miles on the Petersburg Turnpike and buy a gallon of whiskey, and we both pay for it. It is for our mutual benefit. Mr. Harrison takes it and wraps it in his coat. That is what the plaintiff, Hodges, said that he did. He said that he wrapped it in his coat and put it between his feet in the car. And suppose we start home and have an accident due to my negligence as the driver? Now, should I be held responsible and Mr. Harrison exonerated simply because I happen, by the merest chance, to be driving instead of him? Not at all. We are

joint principals. We have joint control. Now, the control contemplated by the language of the Court of Appeals is not control over the actual physical movements of the car at the immediate moment of collision, but it is control over the enterprise in which the parties are engaged; the right to have a voice in the route to be taken and what is to be done on the trip, and whether or not they will stop or go forward at different and designated points.

Mr. Jones: We are objecting to Instruction No. 8 because it is not a correct definition of a joint enterprise. In order for the negligence of the driver of the car to be imputed to one driving with him, the person driving with him must have some control or right to control the operation of the car.

Instruction No. 8 leaves out of consideration the page 179 } right to control the car at any time.

Mr. Ashburn: As to Instruction No. 9, the defendant makes formal objection to the amendment made by the Court.

Instruction No. 10 is refused and exception noted by the defendant.

Instruction No. 11 is refused and exception noted by the defendant.

NOTE: At this point both Instructions Nos. 10 and 11 were amended by the Court:

Mr. Woody: Instructions Nos. 10 and 11, as amended, are objected to by counsel for the plaintiffs for the reason that there is no evidence in this case to show acquiescence on the part of the plaintiffs, or either of them; and for the further reason that both instructions unduly emphasize the duty of the driver of the automobile in which the plaintiffs were riding, which duty applies to the driver of both cars; and that for this reason both instructions should be amended to show that the duty charged applied to the drivers of both automobiles.

The Court: The Court refuses them on the ground that the law in the case is covered by two other instructions.

Mr. Ashburn: The defendant objects to instruction numbered D, because it is an incorrect statement of a legal principle and entirely ignores the fact that the party entitled to the right of way, under the evidence, is afforded some protection thereby, and that he is entitled to rely upon page 180 } his right of way and the fact that the other party will observe the same until the contrary appears to him in the exercise of ordinary care.

NOTE: At this point the jury was recalled and the instructions were given to the jury by the Court, and the argument of the case followed.

page 181 } During the argument of the case to the jury  
by counsel for the plaintiffs, the following occurred:

Mr. Woody \* \* \*

Even though the plaintiffs were engaged in a joint enterprise with Denton, yet they ought to recover because the evidence does not show any negligence on Denton's part—

Mr. Ashburn: I do not like to interrupt the argument of counsel, but I ask your Honor to instruct the jury that counsel is not entitled to argue contrary to his own declaration; and that he can not argue in the face of it. He is bound by it.

Mr. Woody: That is a declaration. You are bound not by the pleadings, but by the proof introduced under the pleadings.

The Court: You must confine yourself to the proof in the evidence.

Mr. Woody: Absolutely.

We brought a suit against Denton, but the evidence, as brought forth on the stand, did not support any charge of negligence against Mr. Denton, although we brought a suit against him in the beginning.

Mr. Ashburn: We save an exception.

At the conclusion of the argument of the case to the jury, the Court said:

The Court: Gentlemen of the jury, you will retire to your room and consider of your verdict. The instructions apply to both cases.

page 182 } Subsequently the jury returned the following verdicts:

In the Franklin H. Rose case:

"We the jury find the defendant, R. L. Miles, guilty and fix the sum at \$750.00."

And in the Harold Hodges case:

"We the jury find the defendant guilty, R. L. Miles, and fix the sum at \$750.00."

Mr. Woody: We move the Court to amend the verdicts to read:

"We the jury find for the plaintiff, Harold Hodges or Franklin H. Rose, as the case may be, against the defendant, R. L. Miles, Jr., upon the issue joined, and fix his damages at \$750.00."

Mr. Ashburn: We except to that amendment, your Honor.

The Court: You may write that on the declarations.

Whereupon the verdict in the Franklin H. Rose case was amended as follows and read to the jury and signed by the foreman:

"We the jury, upon the issue joined, find for the plaintiff, Franklin H. Rose, against the defendant, R. L. Miles, Jr., and fix his damages at \$750.00."

The Court: Gentlemen of the jury, is that the verdict of each and all of you?  
page 183 } Jurors: Yes, sir.

And the verdict in the Harold Hodges case was amended as follows. read to the jury and signed by the foreman:

"We the jury, upon the issue joined, find for the plaintiff, Harold Hodges, against the defendant, R. L. Miles, Jr., and fix his damages at \$750.00."

The Court: Gentlemen of the jury, is that your verdict?  
Jurors: Yes, sir.

page 184 } Mr. Ashburn: May it please your Honor, we move the Court to set aside the verdicts of the jury rendered in both cases, which have been jointly tried together, as contrary to the law and the evidence, and wholly without any evidence to support them, and move the Court to enter final judgment for the defendant, R. L. Miles, Jr.

Or, if the Court will not enter final judgment for the defendant, R. L. Miles, Jr., to set aside the said verdicts and each of them in these cases, which have been jointly tried together, and award the said defendant a new trial, because the verdicts, and each of them, are not supported by the law and the evidence and are contrary to the law and the evidence; for error in the admission of evidence over the objection of defendant's counsel, and for error in refusing to admit certain evidence tendered by counsel for the de-

fendant, and for error in the granting and refusing of instructions, to which due exceptions were taken at the time the Court ruled thereon.

And we move the Court to set aside the said verdicts also for the reasons assigned in moving to strike out the evidence offered by the plaintiffs, with which reasons the Court is familiar.

The Court: Unless you want to argue it, I will wind it up now by saying that in granting the instructions I tried to leave in the hands of the jury the question of the ultimate degree of negligence that each side was guilty of, and allow them to fix it according to their view of the evidence. If they have done that and given verdicts accordingly, I would not like to set the verdicts aside. And they seem to have done so.

Mr. Ashburn: We except to that ruling of the Court, and particularly as the Court seems to apply the doctrine of comparative negligence to recovery in an action for damages, which we understand to be contrary to the law.

The Court: It is apparently so.

Mr. Woody: Do I understand that the Court overrules the motion?

The Court: Yes.

Case Closed.

page 186 } July 6th, 1932.

THOS. B. ROBERTSON, (Seal)  
Judge of the Corporation Court of the  
City of Hopewell.

I, G. C. Alderson, Clerk of the Corporation Court of the City of Hopewell, Virginia, do certify that the foregoing Bill of Exceptions No. 1 of defendant R. L. Miles, Jr., in the trial of the cases of Franklin H. Rose and Harold Hodges against T. E. Denton, et als., was filed with me, Clerk of said Court, on the 6th day of July, 1932.

G. C. ALDERSON, Clerk.

page 187 } Virginia:

In the Corporation Court of the City of Hopewell:



Franklin H. Rose, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Harold Hodges, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Consolidated Causes Tried Together by Consent of all Parties  
By Counsel.

**BILL OF EXCEPTIONS NO. 2 OF DEFENDANT R. L.  
MILES, JR.**

Be It Remembered, that after the jury was sworn to try the issue joined in these cases, the plaintiffs to prove and maintain the said issue on their part, introduced Franklin H. Rose, Harold Hodges and James E. Cuddihy as witnesses in their behalf, who testified as shown in the evidence contained in Bill of Exceptions No. 1, which is hereby made a part of this Bill of Exceptions as fully as if quoted herein *in extenso*, and at the conclusion of the testimony of said three witnesses plaintiffs rested. Whereupon, the defendant, R. L. Miles, Jr., moved to strike out all of the testimony offered on behalf of said plaintiffs on the ground that the page 188 } testimony as offered and admitted in evidence failed to show any negligence on the part of defendant R. L. Miles, Jr., upon which a recovery could be predicated, or upon which the Court would be justified in sustaining a verdict, and wholly failed to support the allegations of the declarations filed in these cases.

That the motion of the said defendant, R. L. Miles, Jr., by counsel, was then and there overruled by the Court, to all of which action and ruling of the Court the said defendant, R. L. Miles, Jr., by counsel, then and there duly excepted, and tenders this his Bill of Exceptions No. 2, which he prays may be signed, sealed and made a part of the record, which is accordingly done.

July 6th, 1932.

THOS. B. ROBERTSON, (Seal)  
Judge of the Corporation Court of  
the City of Hopewell.

I, G. C. Alderson, Clerk of the Corporation Court of the City of Hopewell, Virginia, do certify that the foregoing Bill of Exceptions No. 2 of defendant R. L. Miles, Jr., in the trial of the cases of Franklin H. Rose and Harold Hodges against T. E. Denton, et als., was filed with me, Clerk of said Court, on the 6th day of July, 1932.

G. C. ALDERSON. Clerk.

page 189 } Virginia:

In the Corporation Court of the City of Hopewell:

Franklin H. Rose, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Harold Hodges, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Consolidated Causes Tried Together by Consent of all Parties  
By Counsel.

BILL OF EXCEPTIONS NO. 3 OF DEFENDANT R. L.  
MILES, JR.

Be It Remembered, that on the trial of these cases at the conclusion of the testimony given by witnesses as contained in Bill of Exceptions No. 1, and before any instructions were given the jury by the Court, or the cause was argued before the jury by counsel, and before the jury retired, the defendant, R. L. Miles, Jr., by counsel, offered in evidence an ordinance of the Town of Virginia Beach, duly certified by the Clerk of said Town and under the corporate seal thereof, in the language following:

“When two vehicles approach each other at an angle, the one to the right shall have the right of way, and the vehicle to the left shall slow down or stop if necessary.”

page 190 } But the Court refused to admit the said ordinance in evidence, to which action of the Court the defendant R. L. Miles, Jr., by counsel, then and there excepted, and tenders this his bill of Exceptions No. 3, which

he prays may be signed, sealed and made a part of the record in these cases, and same is done accordingly.

July 6, 1932.

THOS. B. ROBERTSON, (Seal)  
Judge of Corporation Court  
the City of Hopewell.

I, G. C. Alderson, Clerk of the Corporation Court of the City of Hopewell, Virginia, do certify that the foregoing Bill of Exceptions No. 3 of defendant R. L. Miles, Jr., in the trial of the cases of Franklin H. Rose and Harold Hodges against T. E. Denton, et als., was filed with me, Clerk of said Court, on the 6th day of July, 1932.

G. C. ALDERSON. Clerk.

page 191 } Virginia:

In the Corporation Court of the City of Hopewell:

Franklin H. Rose, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Harold Hodges, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Consolidated Causes Tried Together by Consent of all Parties  
By Counsel.

# BILL OF EXCEPTIONS NO. 4 OF DEFENDANT R. L. MILES, JR.

Be It Remembered, that on the trial of these cases, after the evidence contained in Bill of Exceptions No. 1, which is hereby made a part of this Bill of Exceptions, was submitted and at the close of said evidence, plaintiffs moved the Court to give the jury the following instructions designated B, B-1, C. and D:

“B.

The Court instructs the jury that if they believe from a preponderance of the evidence in this case that the defendant

operated his car at an excessive rate of speed, or that the defendant failed to keep his car under complete control, or that he had failed to keep a proper lookout, or that the defendant violated the provision of the right of way laws, as set forth in instruction No. B-1, and that the failure to observe any of the foregoing provisions was the proximate cause of the injuries complained of and that the plaintiff was not guilty of contributory negligence, then you will find a verdict for the plaintiff.

B-1.

The Court instructs the jury that where two vehicles approach an intersection at approximately the same time, it is the duty of the driver of the vehicle on the left to yield the right of way to the vehicle on the right. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have at such intersection.

C.

The Court instructs the jury that if they shall find for the plaintiff then they are the judges of the extent of the damages which, from the evidence, the plaintiff might be entitled to recover, and in estimating such damages they may take into consideration the plaintiff's age, the extent of his injuries, whether temporary or permanent and allow such damages as they may believe is right and fair from the evidence in this case, such damages not to exceed the sum mentioned in the declaration.

D.

The Court instructs the jury that the same duty of care with reference to control, speed, and lookout applicable to the drivers of both cars."

And the defendant R. L. Miles, Jr., by counsel, then and there moved the Court to give the instructions Numbers 1, 1-A, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13 and 14, as follows:

"INSTRUCTION NO. 1.

The Court instructs the jury that the occurrence of the accident is not proof of the negligence of the defendant, R. L.

Miles, Jr., nor can the jury infer such negligence from that happening, but the plaintiffs must affirmatively prove by a preponderance of the evidence that said accident and the injuries suffered by them were directly and proximately caused by this defendant, before either of them are entitled to recover therefor against the said R. L. Miles, Jr..

#### INSTRUCTION 1-A.

The Court instructs the jury that the word "Road", as used in this case, means that portion of the roadway which has been paved with cement, and which is, upon the uncontradicted testimony in this case, 16 feet wide.

#### INSTRUCTION NO. 2.

The Court instructs the jury that the defendant R. L. Miles, Jr., was not an insurer of the safety of the plaintiffs, and was not required to exercise such a high degree of care as to prevent the possibility of accidents. On the contrary he was required to exercise ordinary care, that is, such care as an ordinarily prudent person would exercise in the same or similar circumstances; and if you believe from the evidence that his automobile was handled with ordinary care, then your verdict should be for the defendant, R. L. Miles, Jr. page 194 }

#### INSTRUCTION NO. 3.

The Court instructs the jury that there is no evidence of excessive speed of the vehicle driven by R. L. Miles, Jr., as of the time of the accident.

#### INSTRUCTION NO. 4.

The Court instructs the jury that in determining whether or not defendant R. L. Miles, Jr., exercised ordinary care immediately prior to or at the time of the collision, they may consider the law that when two vehicles approach or enter an intersection at approximately the same time it is the duty of the driver of the vehicle on the left to yield the right of way to the vehicle on the right, and this means that it is the duty of the said driver of the vehicle on the left to slow down or stop, or take such means as may be necessary to accord the driver of the vehicle on the right a free and uninterrupted way of passage across the intersection; and if the

jury believe from the evidence that defendant R. L. Miles, Jr., and the Denton car approached or entered the intersection at approximately the same time, then it was the duty of the driver of the Denton car to have his car under complete control and to slow down or stop, or take such other means as were necessary to accord the said defendant R. L. Miles, Jr., a free right of passage, and avoid accident.

INSTRUCTION NO. 6.

The Court instructs the jury that if they believe from the evidence that the proximate cause of the in-  
page 195 } jury suffered by these plaintiffs was the negligence of the driver of the car in which they were riding, then they should find for the defendant R. L. Miles, Jr.

INSTRUCTION NO. 7.

The Court instructs the jury that if they believe from the evidence that defendant R. L. Miles, Jr., was guilty of negligence which was a proximate cause of the accident, yet, if they further believe from the evidence that the driver of the Denton car was likewise guilty of negligence contributing to the accident, and that at the time thereof the plaintiff and said driver were using the automobile for their mutual pleasure and advantage, and were engaged in a joint enterprise, then any negligence of the driver is imputable to the plaintiffs, and if it in the slightest degree contributed to the accident and injuries to the plaintiff, or either of them, such one cannot recover of the defendant R. L. Miles, Jr.

INSTRUCTION NO. 8.

In connection with instruction No. 7, the Court instructs the jury that a joint enterprise is an undertaking or enterprise entered into by two or more persons for their mutual pleasure and advantage, where each has some voice in the route to be taken, the time to be devoted to the ride and the manner of conduct of the enterprise and automobile by suggestions in these particulars.

INSTRUCTION NO. 9.

The Court instructs the jury that if they believe from the evidence that at the time of the accident the plaintiffs or either

of them were occupying a position in the car  
page 196 } which was negligent, and that this fact in any  
way contributed to their injuries, then the jury  
should find in favor of the defendant R. L. Miles, Jr.

## INSTRUCTION NO. 10.

The jury are instructed that even if they believe from the evidence that plaintiff was an invited guest in the Denton car and was not engaged in a joint enterprise with the driver at the time of the accident, yet, if the jury further believe that at the time of the accident the driver was careless and negligent in the method of operation of said automobile which negligence caused or contributed to the accident, and injuries received by the plaintiff, and that the plaintiffs knew and acquiesced in his manner of driving said automobile, then the jury should find in favor of the defendant, R. L. Miles, Jr.

## INSTRUCTION NO. 11.

The Court instructs the jury that it was the duty of the driver of the automobile in which plaintiff was riding to have his car in complete control at all times, and if plaintiffs acquiesced in his manner of driving said car, and he did not have same under control at the time of the accident, and this fact caused or contributed to the injuries received by the plaintiffs, then they cannot recover anything from the defendant Miles for such injuries.

## INSTRUCTION NO. 12.

The Court instructs the jury that even a guest or passenger in an automobile should keep a reasonable  
page 197 } lookout for danger, and exercise his faculties for  
the preservation of his own safety, at a time  
when the exercise of such faculties will be effective.

## INSTRUCTION NO. 13.

The Court instructs the jury that the parties who allege negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds; the evidence must show more than a probability of a negligent act; the jury cannot draw an inference from a presumption, but an inference must be founded upon some fact legally established and it

is incumbent upon the plaintiff to furnish evidence to show how an accident occurred. That is to say, the plaintiffs must show some fact or facts by which it can be determined by the jury and not be left entirely to conjecture, guess or random judgment, or pure supposition.

#### INSTRUCTION NO. 14.

The Court instructs the jury that if they find for either plaintiff such party is not entitled to recover for expenses paid in his behalf by other persons."

And the defendant, R. L. Miles, Jr., then and there objected to the giving of instructions designated as B, B-1, C, and D offered on behalf of the plaintiffs, on the following grounds:

1. Because the plaintiffs are not entitled to any instructions in the case, there being no evidence on which a recovery in their favor can be predicated or sustained.

page 198 } 2. Because instruction designated B is misleading in that it impliedly tells the jury that they may find for the plaintiffs if the plaintiffs were not themselves guilty of negligence, entirely ignoring the doctrine of joint enterprise and imputed negligence.

But the Court overruled said objections and granted said instructions B, B-1, C and D, as offered, to which action of the Court the defendant R. L. Miles, Jr., by his counsel, then and there excepted.

And the Court refused to give instructions numbers 3, 10 and 11, offered by the defendant R. L. Miles, Jr., and amended instruction number 6 offered by said defendant, by inserting the words, "solely due to" after the word "was" and before the word "the" in the third line of said instruction, so that said instruction as given by the Court, read as follows:

#### "INSTRUCTION NO. 6.

The Court instructs the jury that if they believe from the evidence that the proximate cause of the injury suffered by these plaintiffs was solely due to the negligence of the driver of the car in which they were riding, then they should find for the defendant R. L. Miles, Jr."



And the said defendant, R. L. Miles, Jr., by his counsel, then and there objected to the action of the Court in amending instruction number 6, because the instruction as offered embodied a correct statement of a legal principle applicable to the evidence in these cases; and because the instruction as amended by the Court told the jury that they could not find for the defendant R. L. Miles, Jr., unless plaintiff's injuries were solely due to the negligence of the driver with whom they were riding, and because said instruction as amended was very misleading in that it inferentially told the jury that irrespective of the doctrine of joint enterprise, imputable negligence, or even contributory negligence of the plaintiffs themselves, yet they were entitled to recover unless their injuries were solely due to the negligence of the driver of the car in which they were riding.

And instructions designated as B, B-1, C and D, offered on behalf of the plaintiffs, and instructions numbers, 1, 1-a, 2, 4, 6 as amended, 7, 8, 9, 12, 13 and 14, offered by the defendant were all of the instructions given in said cases, and the defendant R. L. Miles, Jr., by his counsel, then and there excepted to the action of the Court in giving the instructions designated B, B-1, C and D, offered by the plaintiffs, and in refusing to give instructions numbers 3, 10 and 11, offered in his behalf, and in amending instruction numbers 6, offered, in his behalf, and tenders this his Bill of Exceptions No. 4, which he prays may be signed, sealed and made a part of the record, which is accordingly done.

July 6, 1932.

page 200 }

THOS. B. ROBERTSON, (Seal)  
Judge of the Corporation Court of  
the City of Hopewell.

I, G. C. Alderson, Clerk of the Corporation Court of the City of Hopewell, Virginia, do certify that the foregoing Bill of Exceptions No. 4 of Defendant R. L. Miles, Jr., in the trial of the cases of Franklin H. Rose and Harold Hodges against T. E. Denton, et als., was filed with me, Clerk of said Court, on the 6th day of July, 1932.

G. C. ALDERSON. Clerk.

page 201 } Virginia:

In the Corporation Court of the City of Hopewell:

Franklin H. Rose, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Harold Hodges, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Consolidated Causes Tried Together by Consent of all Parties  
By Counsel.

BILL OF EXCEPTIONS NO. 5 OF DEFENDANT R. L.  
MILES, JR.

Be It Remembered, that on the trial of these cases, after the evidence contained in Bill of Exceptions No. 1, which is hereby made a part of this Bill of Exceptions as fully as if quoted *in extenso* herein, was submitted and after the instructions contained in Bill of Exceptions No. 4, which is hereby made a part of this Bill of Exceptions, were duly given to the jury by the Court, and during the argument of the cause by counsel for the respective parties, Mr. Kirk L. Woody, counsel for the plaintiffs, and each of them, in his argument to the jury said as follows:

page 202 } “Even though the plaintiffs were engaged in a joint enterprise with Denton, yet they ought to recover because the evidence does not show any negligence on Denton’s part”. to which argument the defendant, R. L. Miles, Jr., by his counsel, then and there objected because said plaintiffs, and each of them, in their declarations filed in these cases, which were tried together by consent of counsel for all parties, as aforesaid, had specifically alleged in their said declarations the negligence of the said T. E. Denton, joining him as a party defendant, and because parties to a cause of action are not permitted to take inconsistent positions at successive stages thereof, and this said position of the said plaintiffs by their said counsel is inconsistent with their allegations and the pleadings upon which they seek to predicate a recovery; but the Court then and there overruled the objection of the defendant, R. L. Miles, Jr., by his counsel, and permitted counsel for the plaintiffs to

argue to the jury that the testimony did not show any negligence on the part of Denton, and that the plaintiffs and each of them were entitled to recover in spite of their being engaged in a joint enterprise with the said T. E. Denton, the defendant against whom they had alleged negligence causing their said injury, to which action of the Court the defendant, R. L. Miles, Jr., by his counsel, then and there excepted and tenders this his Bill of Exceptions No. 5, which he prays may be signed, sealed and made a part of the record, which is accordingly done.

July 6, 1932.

page 203 }

THOS. B. ROBERTSON, (Seal)  
Judge of the Corporation Court of  
the City of Hopewell.

I, G. C. Alderson, Clerk of the Corporation Court of the City of Hopewell, Virginia, do certify that the foregoing Bill of Exceptions No. 5 of defendant R. L. Miles, Jr., in the trial of the cases of Franklin H. Rose and Harold Hodges against T. E. Denton, et als., was filed with me, Clerk of said Court, on the 6th day of July, 1932.

G. C. ALDERSON. Clerk.

page 204 } Virginia:

In the Corporation Court of the City of Hopewell:

Harold Hodges, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Harold Hodges, Plaintiff,

vs.

R. L. Miles, Jr., and others, Defendants.

Consolidated Causes Tried Together by Consent of all Parties  
By Counsel.

BILL OF EXCEPTIONS NO. 6 OF DEFENDANT R. L.  
MILES, JR.

Be It Remembered, that on the trial of these cases after the evidence contained in Bill of Exceptions No. 1, which is hereby made a part of this Bill of Exceptions, and after the instructions contained in Bill of Exceptions No. 2 were duly

given to the jury, which is hereby made a part of this Bill of Exceptions, and after the argument of counsel and the jury had returned their verdicts to the Court, counsel for the defendant, R. L. Miles, Jr., moved the Court to set aside the verdicts of the jury in favor of said plaintiffs, and page 205 } each of them, and enter final judgment for the defendant R. L. Miles, Jr., or if the Court would not enter final judgment for the defendant R. L. Miles, Jr., to set aside the said verdicts for the plaintiffs and each of them, and award the defendant R. L. Miles, Jr., a new trial for the reasons assigned in said Bill of Exceptions No. 1, which were then and there assigned in support of said alternative motion. But the Court then and there overruled said alternative motion, and each part thereof, saying as follows:

“The Court: Unless you want to argue it, I will wind it up now by saying that in granting the instructions I tried to leave in the hands of the jury the question of the ultimate degree of negligence that each side was guilty of, and allow them to fix it according to their view of the evidence. If they have done that and given verdicts accordingly, I would not like to set the verdicts aside. And they seem to have done so.”

And the defendant, R. L. Miles, Jr., by counsel, then and there excepted to the ruling of the Court as follows:

“Mr. Ashburn: We except to that ruling of the Court and particularly as the Court seems to apply the doctrine of comparative negligence to recovery in an action for damages, which we understand to be contrary to the law.

The Court: It is apparently so.”

page 206 } To which action of the Court in having allowed the jury to apply the doctrine of comparative negligence to the facts in these cases, and after recognizing the application, in refusing to set aside the verdicts, the defendant, R. L. Miles, Jr., by counsel then and there excepted, and tenders this his Bill of Exceptions No. 6, which he prays may be signed, sealed and made a part of the record, which is accordingly done.

July 6th, 1932.

THOS. B. ROBERTSON, (Seal)  
Judge of the Corporation Court of  
the City of Hopewell.

I, G. C. Alderson, Clerk of the Corporation Court of the City of Hopewell, Virginia, do certify that the foregoing Bill of Exceptions No. 6 of defendant R. L. Miles, Jr., in the trial of the cases of Franklin H. Rose and Harold Hodges against T. E. Denton, et als., was filed with me, Clerk of said Court, on the 6th day of July, 1932.

G. C. ALDERSON, Clerk.

page 207 } Virginia:

In the Clerk's Office of the Corporation Court of the City of Hopewell:

I, G. C. Alderson, Clerk of the Corporation Court of the City of Hopewell, Virginia, do certify that the foregoing is a true transcript of the record in the cases of Franklin H. Rose, an infant, etc., and Harold Hodges, an infant etc., against T. E. Denton, et als., lately pending in the said Court.

I further certify that notice in writing was given to the attorneys for the appellee of the time and place that the attorneys for the appellant would present their certificates and bills of exceptions to the court for authentication by the court, and filing them as a part of the record in this case; and that the record was not made up and completed until notice in writing, had been given to the attorneys for the appellee, that the appellant would apply to the Clerk for a transcript of the record. I further certify that the suspending bond required in these cases has not been executed.

Given under my hand this 7th day of July, 1932.

G. C. ALDERSON, Clerk.

Fee for Transcript of record \$60.00.

A Copy—Teste:

H. STEWART JONES, C. C.

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