

665
728

Record No. 1408

In the
Supreme Court of Appeals of Virginia
at Richmond

**VIRGINIA ELECTRIC AND POWER
COMPANY, Plaintiff in Error,**

v.

RUFUS HOLTZ, Defendant in Error.

FROM THE HUSTINGS COURT, PART TWO, OF THE CITY OF RICHMOND.

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

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

M. B. WATTS, Clerk.

162 Va 665

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 1408

VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiffs in Error,

vs.

RUFUS HOLTZ, Defendant in Error.

PETITION FOR WRIT OF ERROR.

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

The Virginia Electric and Power Company respectfully shows that it is aggrieved by final judgment entered in Hustings Court, Part II, of the City of Richmond in an action *ex delicto* by notice of motion for judgment seeking recovery of \$10,000.00 for personal injuries, automobile damages and property losses alleged to have been sustained December 24, 1931, when a 1927 T-Model one ton Ford Truck owned and operated by Rufus Holtz was struck by an electric street car of the said Virginia Electric and Power Company at the intersection of M Street and Twenty-Seventh Street in the City of Richmond. In said action Rufus Holtz was plaintiff and this petitioner was the defendant.

The notice of motion for judgment charges (M. R., p. 2) that the defendant negligently operated its electric car, without proper lookout or warning of its approach, at excessive speed and without proper control.

Trial by jury was had July 28th and 29th, 1932 (M. R., pp. 8-9); and defendant's motion to strike the plaintiff's testimony having been overruled by the court (M. R., pp. 73-74), the case was submitted to the jury upon the general issue (M.

R., p. 5) and a plea of contributory negligence filed as required by Section 6092 of the Virginia Code of 1930 (M. R., pp. 6-7). No question of the last clear chance is anywhere involved in the case (M. R., pp. 15-143).

Under the instructions given the jury returned a verdict of \$750.00 for the plaintiff (M. R., p. 9), and motion to set aside said verdict and enter up final judgment for the defendant was thereafter overruled and judgment for the plaintiff was entered upon the verdict on the 29th day of October, 1932 (M. R., p. 10).

Petitioner is advised that during the progress of the trial and thereafter in entry of judgment upon the verdict error was committed to the prejudice of petitioner which warrants and calls for a review and reversal of said judgment, and petitioner therefore prays for writ of error and *supersedeas*. Transcript of the record, including all proceedings at the trial and subsequent thereto in the lower court, is herewith submitted, to which transcript reference will be made; plaintiff and defendant in the trial court being for convenience designated by the same terms in this petition.

THE UNDISPUTED FACTS OF THE CASE.

The Plaintiff Was Making a Left Turn With an Unobstructed View.

About fifteen minutes before nine o'clock on the morning of December 24, 1931 (M. R., p. 15), the plaintiff was injured and his 1927 T-Model one ton Ford Truck which he was driving at the time was damaged, together with a load of huckster's supplies (M. R., p. 17), when the plaintiff, who had been proceeding eastwardly on M. Street on Church Hill in the City of Richmond, attempted to make a left turn to the north at the intersection of M Street and Twenty-Seventh Street (M. R., pp. 15-18, 27-31). It was broad daylight (M. R., p. 15) and the plaintiff had an unobstructed view had he looked (M. R., p. 18), but without looking he drove at a speed of about five miles per hour (M. R., p. 39) directly upon the defendant's eastbound track directly in front of an approaching electric street car and was immediately struck (M. R., p. 31) as was inevitable even according to a witness (James Easley) for the plaintiff (M. R., pp. 62-64), who was at the intersection of Twenty-Seventh and M Streets, and witnessed the accident (M. R., p. 61).

M Street, which is straight extends approximately east and west and is intersected approximately at a right angle by

Twenty-Seventh Street, which is straight, and extends approximately north and south; all as appears from plat marked "Defendant's Exhibit 3" filed as a part of the record (M. R., pp. 128-129). The defendant's street railway tracks for eastbound and westbound cars are laid in M Street; there being a fourteen foot space between the south rail of the eastbound track and the south sidewalk on M Street (Defendant's Exhibit 3 (M. R., pp. 128-129). When the plaintiff was injured no automobiles were parked on the south side of M Street between Twenty-Sixth Street and Twenty-Seventh Street (M. R., p. 27).

PLAINTIFF KNEW THE LOCALITY.

The plaintiff had been in business 18-20 years (M. R., p. 17) and when the accident involved in this case occurred his place of business was located on the south side of M Street about midway in the block (M. R., pp. 24-25, 16), between Twenty-Sixth Street on the west and Twenty-Seventh Street on the east, the distance from Twenty-Sixth Street to Twenty-Seventh Street being an ordinary city block (M. R., p. 67), and the view along M Street between these two streets being unobstructed (M. R., p. 18).

The plaintiff was, therefore, thoroughly familiar with the layout of the streets and of the defendant's tracks at the intersection of M Street and Twenty-Seventh Street (M. R., p. 17).

THE PLAINTIFF DID NOT LOOK EFFECTIVELY.

The plaintiff, who is fifty-one years of age (M. R., p. 23), testified he boarded his truck eastbound at his place of business (M. R., p. 17) about midway between Twenty-Sixth and Twenty-Seventh Streets (M. R., p. 16) and drove eastwardly to Twenty-Seventh Street. When about fifty feet west of Twenty-Seventh Street he signalled for a left turn, looked west and saw the car by which he was afterward struck (M. R., pp. 28-29); the car when he saw it being at Twenty-Sixth Street, one block west of Twenty-Seventh Street. According to the plaintiff's own testimony he then proceeded to make a left turn (M. R., p. 29) but he could not say whether the car was west of Twenty-Sixth Street, was crossing Twenty-Sixth Street, or was east of Twenty-Sixth Street when he saw it (M. R., pp. 28-31); and he did not see the car again or hear it (M. R., p. 39) until the moment of the impact (M. R., 21) when his truck was upon the eastbound track

at Twenty-Seventh Street and was actually struck (M. R., p. 31).

The plaintiff's own witness, James Easley (colored), testified he was at Twenty-Seventh and M Streets and saw the accident; and according to this witness it was obvious to him when the plaintiff commenced to make his turn that the plaintiff would be struck. In this connection the witness Easley said (M. R., p. 64):

"Q. You saw Rufus when he commenced to make his turn?

A. I saw him hold his left hand out to make his turn.

Q. You say that when you saw him you saw the car was going to hit him?

A. Seen the car was going to hit him."

ONLY ONE QUESTION OF LAW IS INVOLVED.

There was other evidence in behalf of the plaintiff, such other evidence being sufficient to support plaintiff's recovery, unless the plaintiff himself was guilty of negligence *per se*, which bars his recovery.

As already stated (ante p. 2) no question of the last clear chance is involved in the case. Nor is the defendant charged with violation of any specific ordinance of the city of Richmond.

As previously stated also, after all testimony for the plaintiff had been introduced the defendant moved to strike the plaintiff's testimony (ante p.) upon the ground that the plaintiff himself is bound by his own testimony and that the testimony of the plaintiff himself convicts him of negligence which bars his recovery. This motion the court overruled and the defendant excepted for the reasons stated.

THE INSTRUCTIONS.

The only vital objection and exception to the instructions given for the plaintiff is likewise objection and exception upon the ground that the plaintiff's negligence *per se* bars his recovery.

THE VERDICT AND JUDGMENT.

As already stated (ante p. 2) the jury returned a verdict of \$750.00 for the plaintiff and defendant's motion to set aside the verdict and enter up final judgment for the defendant was thereafter overruled and judgment was entered upon the verdict.

Defendant's motion to set aside the verdict of the jury and enter up final judgment for the defendant was based upon the ground that the plaintiff's own negligence bars his recovery and the defendant duly excepted upon the ground stated to the action of the court in overruling its motion.

ASSIGNMENT OF ERROR.

The defendant likewise submits as its assignment of error that the verdict and the judgment entered thereon are both contrary to the law and the evidence and without evidence to support them, since the plaintiff is bound by his own testimony and the testimony of the plaintiff himself convicts him of negligence as a matter of law and not as an issue of fact and bars his recovery.

THE EVIDENCE OF THE PLAINTIFF HIMSELF SPEAKS FOR ITSELF AND BARS HIS RECOVERY.

The plaintiff gave his own version of the accident as follows (M. R., pp. 14-19, 27-31):

"Q. What day was it that you were hurt, Rufus?

A. The 24th of December.

Q. What year?

A. 1931.

Q. About what time of day was it?

A. About a quarter to nine."

* * * * *

"Q. Where did you intend going?

A. I intended going up to 27th Street and intended to turn to my left.

Q. Did you have a little place of business?

A. Yes, sir.

Q. Whereabouts was that?

A. On M Street, between 26th and 27th."

* * * * *

"Q. What kind of truck was that, Rufus?

A. A T-model truck."

* * * * *

“Q. What kind of stuff did you have on there?

A. Well, it was Christmas times, and I had on everything for Christmas holiday—celery, oysters, eggs, potatoes, walnuts, eggs, lemons, rabbits—everything to put out for Christmas holidays, because I had a lot of trade that was depending on me for Christmas and I had to serve them; Lots of them wanted to use rabbits in place of turkeys; said they wasn’t able to buy turkeys; and I had everything straight for that day’s work.

Q. How long had you been doing that kind of business, Rufus?

A. Oh, I had been doing that for about eighteen or twenty years.

Q. Just tell us of this particular day, just how this collision occurred?

A. Well, me and my man loaded at the store, and after we loaded I came out and got on my truck, and I got on my truck and started off and I got about fifty feet or more from the corner; I looked back and throwed my hand out, but then the car was at 26th Street, and before I could get up to 27th and M to make my turn he hit me in the rear, and I didn’t hear nothing at all, you know; I thought I was all in the clear.

Q. Now, where was the street car when you threw your hand out and looked?

A. About 26th Street.

Q. Going in which direction?

A. It was coming east.

Q. The same direction you were going?

A. Yes, sir.”

* * * * *

“Q. Was there any traffic coming west at the time to keep you from making your turn easily?

A. No, sir, everything was clear.

* * * * *

“Q. What part of your truck did the street car hit?

A. Hit the rear end on the left.

Q. How far from the end of it?

A. I guess it was about that far (indicating with his hands).

Q. How far is that, do you say—about two feet?

A. About two feet.”

* * * * *

“Q. Were there any automobile parked on the south side of M Street that morning?

A. No, sir.”

* * * * *

“Q. I ask you when you first went on the track were you at 27th Street, or did you go on the track before you got to 27th Street?

A. Before I got to 27th Street.

Q. How far west—fifty feet or more?

A. About fifty.

Q. And as you were fifty feet away from 27th Street and went on the track, it was then that you looked back and saw the street car?

A. When I threw my hand out I looked back, and about fifty feet, more or less, from the corner. The car was at 26th Street; I looked to be in the clear, and before I could get up and make my turn the car had hit me.

Q. You commenced to straddle the track fifty feet before you got to 27th Street?

A. I say I drove up—when I threw my hand out—

Q. I am coming to your hand in a minute. I understood you to say a minute ago that you commenced to go on the track about fifty feet before you got to 27th Street.

A. Yes, sir.

Q. And at the same time you threw your hand out and made a signal for a left turn?

A. A left turn.

Q. And at the same time you looked back and the car was at 26th Street?

A. No, not at the same time.

Q. Well, when?

A. When I commenced to make my turn I looked back and the car was at 26th Street.

Q. Isn't it a fact that you were getting ready to make your turn and throwing your hand back and looking back, all at the same time?

A. I was only doing two.

Q. Which two were you doing?

A. When I threw my hand out I looked back, and I had my hand on my wheel to proceed on.

Q. And the car was then at 26th Street?

A. Yes, sir.

Q. Had it crossed over 26th Street, coming towards you?

A. I hadn't paid no attention where it crossed over, but I know it was down at 26th Street.

Q. I ask you whether you looked at it enough to know whether it had crossed over 26th street?

A. No, sir.

Q. How do you know it was at 26th Street if you didn't look at it well enough to know whether it was west of 26th Street, East of 26th Street, or crossing 26th Street?

A. I know it was at 26th Street, coming towards me.

Q. How?

A. By looking at it.

Q. Why can't you tell me whether it was west of 26th Street, east of 26th Street, or crossing 26th Street?

A. I didn't pay that much attention to it, but I know the car was at 26th Street, heading toward me.

Q. Did you judge that by the sound of it, or by seeing it?

A. I seen it.

Q. I want you to tell me where it was when you saw it?

A. It was at 26th Street.

Q. Was it west of 26th Street?

A. It was headed at me.

Q. Was it west of 26th Street?

A. It was heading east towards me.

Q. Now, was it west of 26th Street?

A. On the other side of 26th Street.

Q. Yes, on the far side, away from you?

A. No, sir.

Q. On the near side?

A. That is what I imagine.

Q. I mean do you know it? If you don't know all you have got to do is say so.

A. I didn't pay no particular attention to it. I knew it was down at 26th Street; I threw my hand back and looked, but I didn't pay any attention about the east or the other side.

Q. But the real fact of the situation is that you don't know whether it was east, or west, or crossing; you didn't pay that much attention to it?

A. Yes, sir.

Q. The next time you saw it was when it hit you?

A. Yes, sir.

Q. You never saw it from 26th Street until it hit you and you were turning over?

A. Yes, sir."

ARGUMENT.

The Plaintiff is Bound and Barred by His Own Testimony.

The defendant submits that plaintiff's recovery is barred by his own negligence under the Virginia decisions generally and especially under the decisions and citations in:

Bassett & Co. vs. Wood (1926), 146 Va. 654;
Berent vs. Va. Electric & Power Co. (1930), 153 Va. 586;
Lynchburg Traction Co. vs. Garbee (1932), 158 Va. 656.

Judge Christian delivered the opinion in *Bassett & Co. vs. Wood* (1926), 146 Va. 654, and quoted at pages 660-661 with approval from *Massie vs. Firmstone*, 134 Va. 450, 462, 114 S. E. 652, 656; *Davis Bakery vs. Dozier*, 139 Va. 628, 124 S. E. 411-415:

“As a general rule, when two or more witnesses introduced by a party litigant vary in their statements of fact, such party has the right to ask the court or jury to accept as true the statements most favorable to him. In such a situation he would be entitled to have the jury instructed upon his contention, or if there were a demurrer to the evidence, the facts would have to be regarded as established in accordance with the testimony most favorable to him. This is not true, however, as to the testimony which he gives himself. No litigant can successfully ask a court or jury to believe that he has not told the truth. His statement of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here it depends upon facts within his own knowledge and as to which he has testified.”

In *Berent vs. Va. Electric & Power Co.* (1930), 153 Va. 586, Chief Justice Prentis delivered the opinion and said:

“Plaintiff instituted his action against the Virginia Electric and Power Company, seeking to recover damages for personal injuries to himself and damage to his automobile as the result of a collision with a street car of the company.

“The street car was running south along Hampton Boulevard while the automobile, driven by the plaintiff, had proceeded along Hampton Boulevard in a northerly direction, so that the vehicles were meeting. The plaintiff saw the approaching street car half a block distant, saw that it was mov-

ing rapidly, but paid no further attention to it, and without again looking at it, turned to the left and attempted to drive his automobile across the street car tracks of defendant at Twenty-eighth street immediately in front of the street car, the inevitable result of which was a collision on the south-bound track. There was a colored man also in the automobile, an employee of the plaintiff, spoken of in the testimony as 'the boy'.

"There was a jury trial and a verdict for \$3,000 in favor of the plaintiff, which on motion of the defendant was set aside as contrary to the evidence and because of the negligence of the plaintiff in the operation of his automobile at the time and as a concurring cause of the collision. Final judgment was thereupon entered for the defendant, and the plaintiff assigns error.

"In support of his conclusion, the trial judge, Honorable Allan R. Hanckel, thus expresses his reasons therefor.

" 'This is a motion to set aside the verdict of the jury and enter judgment for the defendant.

" 'A careful consideration of the evidence of the plaintiff himself shows that he did not exercise proper care for his own safety up to the time of the accident. He says that he first 'saw the car half a block away' and that 'when he got pretty close to the corner (the boy) hollered 'Oh Lordy' and I turned my head toward him and the street car was pretty close to us and I went faster and was positive we could escape the street car and all of sudden I remembered flying in the air.' He said that he was driving eight or ten miles an hour and that there is a 'big wide space between the tracks, the street there is a very wide, as wide as City Hall Avenue', and that there was nothing to obstruct the view. When asked if he saw the street car any more after he started to turn (into 28th St.) until the boy hollered, he answered: 'No, I didn't pay more attention to it, I kept looking where I was going * * * the boy hollered 'Oh, Lordy, and I didn't know what he hollered for and I turned and saw the street car.' When asked if he looked any more since the street car was half a block away, he answered: 'No. It was coming this way and I was going that way * * * I didn't look after I turned the corner. I was going straight along 28th Street.' When asked about his brakes he said he had good brakes and that the car had been fixed a week before the accident. That he could stop in less than five feet when going five miles an hour.

" 'From all this it is clearly apparent that he did not look

towards the street car after he made the turn at 28th Street, but seeing persons standing on the sidewalk waiting to board the car, he assumed it was going to stop and take up passengers. This may or may not be excusable assumption on his part, but it does not justify a recovery against the defendant. Before he can recover he must continue to look and keep out of obvious danger. As the court says in a similar case (*Derring's Admr. vs. V. R. P. Co.*, 122 Va. 517): 'It was his duty to see that the car had slackened its speed or stopped before going on the track in such close proximity to it.' He did not look at all after making the turn at 28th street, and his own negligence is a bar to any recovery.

* * * * *

" 'The verdict must be set aside and judgment entered for the defendant.'

"It is necessary to add little, if anything, to this convincing statement. The rules of law applicable to such cases have been so frequently stated that it seems to us entirely unnecessary to repeat them in this case. There are, of course, varying facts in each case, and sometimes it is difficult to apply the correct rule of law. It helps little to quote conclusions and to repeat incidents shown in other somewhat similar cases apart from all of the other peculiar circumstances of such other cases.

"The facts found by the trial judge are amply supported by the testimony and could be supplemented by statements of similar import equally convincing as to the negligence of the plaintiff."

In *Lynchburg Traction Co. vs. Garbee* (1932), 158 Va. 656, the court held, as in *Bassett & Co. vs. Wood*, *supra*, that the plaintiff is entitled to the benefit of no better case than his own testimony presents. *Lynchburg Traction Co. vs. Garbee* was an action by the driver of an automobile for injuries incurred in a collision with a street car. From the plaintiff's own testimony it was perfectly obvious that she made a left hand turn across defendant's car tracks immediately in front of an approaching street car. The plaintiff knew the street car was in close proximity to her, but failed to look and ascertain its position in order to make sure she could turn and cross the tracks safely. The court held that under such circumstances the plaintiff was guilty of contributory negligence as a matter of law and that her recovery against the

defendant could not be sustained. Mr. Justice Gregory delivered the opinion of the court and said at pp. 656-662:

“There are several assignments of error but in our view, the plaintiff is not entitled to recover in any event by reason of her contributory negligence. For the purpose of this decision it will be assumed that the defendant was guilty of primary negligence. It will be unnecessary to discuss any of the assignments of error other than the one based upon the contributory negligence of the plaintiff. The doctrine of the last clear chance was not relied upon in the trial court nor in this court. It is not to be considered.

“The facts which we will now state are drawn, to a large extent, from the plaintiff's own testimony. She was driving her automobile with two lady companions in a northeasterly direction along Fort avenue in the city of Lynchburg. * * * The collision occurred at the intersection of Fort avenue with Oak Ridge boulevard. The end of the defendant's street car line is at a point on Fort avenue 294 feet south of the street intersection, and just prior to the collision a street car had been operated to the end of the line and was standing there preparatory to returning to the business section of the city of Lynchburg. The plaintiff, proceeding down Fort avenue, saw the standing street car as she passed it. She desired to make a left turn from Fort avenue into Oak Ridge boulevard and in doing this it became necessary for her to drive her automobile sharply to the left and over the defendant's car tracks. She indicated that she desired to make a left turn by the proper signal and she proceeded across the tracks, according to her testimony, at some ten miles per hour, and just as she had nearly crossed the tracks the street car which she had just passed collided with her automobile causing the injuries for which she now seeks damages.

“From the testimony of the plaintiff it is perfectly obvious that she drove from Fort avenue making a sharp left-hand turn, crossing the defendant's car tracks into Oak Ridge boulevard, without first looking to see if a street car was approaching from the rear or from her left. This is clearly indicated by her own testimony, a portion of which is as follows:

“Q. You say the street car was standing where?

A. At the end of the line.

Q. When you got ready to make the turn where was it?

A. It was not near enough for me to see it, and bother anything about its being in my way.

'Q. Did you look to see at the time you made the turn whether the car or anything else was in your way?

'A. I was watching my turn and everything generally that came in my natural vision, but I had to look ahead.

'Q. When did you first see the street car before it hit you?

'A. Do you mean standing at the end of the car line?

'Q. No; after you passed it up there, when did you see it next?

'A. The next time I saw it, it was almost touching my face, it had hit me, I thought I was across the track when it hit me, it hit from behind and I was watching ahead of me.' "

Again she testified in answer to these questions:

"Q. 'Now there is nothing which would impede your view or obstruct your view from your seat in the car of that street car track for the whole distance the street car ran, is there?

'A. No.

'Q. Nothing?

'A. No.

'Q. I further understood you to say as you made your turn your vision was in front of you in making your turn and you did not look back. Is that a fact?

'A. I was not supposed to look behind me, I don't know.

'Q. You were not?

'A. I was watching traffic generally.

'Q. And you did not look back to see where the street car was?

'A. I did not have to look back, I just took in a view this way and let an automobile pass me and went across the track and thought there was nothing in the way.'

"A plaintiff is entitled to the benefit of no better case than his own testimony presents. A fair construction of the testimony of the plaintiff here is that she drove her automobile on Fort avenue and made a left turn or drove at a left angle from her direct line of traffic across the car tracks of the defendant immediately in front of an approaching street car knowing that it was in close proximity, but failing to look and ascertain its position in order to make sure that she could turn and cross the tracks safely. Under such circumstances she was guilty of contributory negligence as a matter of law and her recovery against the defendant cannot be sustained.

"The principles in the case of *Va. Electric and Power Co. vs. Bennett*, 156 Va. 910, 159 S. E. 93, 94, are directly in point and controlling here. There, Bennett was driving along the

Petersburg turnpike, and in the middle of the street were the tracks of the Electric Company. He made a left turn at a street intersection and attempted to drive across the tracks. He claimed that he looked up and down the track before starting across. Just as he was nearly across, a street car collided with his automobile, resulting in injuries to him. The only difference in the facts of that case and the one here is that the collision there occurred after darkness and the plaintiff there claimed that he looked for approaching street cars, while here the collision occurred in the middle of the day and the plaintiff testified that she did not look in the direction from which the car came. The difference in the facts does not prevent the application and control of that case here. Justice Browning in delivering the opinion of the court, after having held the Electric Company guilty of primary negligence, said:

“ ‘If this were all, there would have been no such accident as that which occurred, with its lamentable incidents and results, but the plaintiff, in the night time, when darkness prevailed, except for the light afforded by the street electric lights and those on the street car in question, deliberately drove his automobile at a speed of three or four miles an hour on the railway track and while he was leisurely easing his car over the rails, without effective observation, permitted himself to be struck down by an oncoming car, which he admitted that he never saw.

“ ‘We do not see how we can escape the conclusion that this conduct and this admission upon his part convicts him of such contributory or concurring negligence as must defeat his recovery. To be sure, he testified that he looked both ways at two different periods of time; the second time when he was three or four feet from the track. Under the rule adverted to we must accept this as true, but it has been held by this and other courts of like dignity that we are not bound to accept as true what in the nature of things could not have occurred in the manner nor under the circumstances mentioned, nor are we bound to accept the incredible. Our own opinion, from the testimony and the physical facts and happenings, is that the plaintiff candidly believed that he looked as narrated by him, but, if, in reality, he had done so, he would have been bound to observe the oncoming car. We think that the evidence points to the fact that he was much more concerned with the traffic on the turnpike than he was with what might happen to him on the track of the defendant. His conduct was a listless disregard of his own safety. It was negligence that at least concurred with that of the defendant, which precludes his right of recovery.

“ ‘Counsel for both sides have been diligent in their search for authorities to sustain their respective contentions and have filed forceful and able briefs. With this type of case the Virginia Reports are replete. The way is a beaten track and we shall not do more than to say, as Chief Justice Prentis said in the case of *Jones vs. Va. Power Co.*, 153 Va. 704, 712, 151 S. E. 151 S. E. 133, 135: ‘There is no uncertainty as to the law which is applicable. The difficulty is to apply the conceded rules of law to the varying facts.

“ ‘The judgment in this case is supported by the rules applied in many cases, among which are: *Virginia Ry. & Power Co. vs. Boltz*, 122 Va. 649, 95 S. E. 467; *Va. Ry. & Power Co. vs. Harris*, 122 Va. 657, 95 S. E. 403; *Stephen Putney Shoe Co. vs. Ormsby’s Adm’r*, 129 Va. 297, 105 S. E. 563; *Washington-Va. Ry. Co. vs. Struder*, 132 Va. 368, 111 S. E. 239; *Washington & Old Dom. Ry. Co. vs. Thompson*, 136 Va. 597, 118 S. E. 76; *Marvel vs. Va. Ry. & P. Co.*, 138 Va. 532, 121 S. E. 882; *Meade vs. Saunders*, 151 Va. 636, 144 S. E. 711.’

“ A similar principle was applied in the case of *Jones vs. Power Co.*, 153 Va. 704, 151 S. E. 133, 134, where the court, speaking through Prentis, C. J., quoted from the opinion of the trial judge as follows:

“ ‘There is no evidence that the plaintiff looked for an approaching car. There was no obstruction in the street except perhaps the car of the defendant company traveling north, and only one witness testified that there was a car going north. Then it follows that the plaintiff, without assuring himself that the line of traffic going south was clear, pulled out of the line of traffic going north on the southbound tracks of the defendant company, without either looking or listening for a car; and if he did this he is guilty of contributory negligence which will bar recovery. While it is true he is presumed to have exercised ordinary care unless the contrary is shown, but no person of ordinary intelligence or who is exercising the least care for his own safety would deliberately drive on the tracks of a street car company without (reasonably) assuring himself that the tracks were reasonably clear for a reasonably safe distance away. The court is aware of the rule of law which does not require the plaintiff to exercise that degree of care and caution when he is crossing the tracks of a street car company in a city street that is required of persons crossing a right of way of a railroad company; still a person should not be allowed to recover from a defendant street railway company, when he drives on the track of a defendant street railway company without assuring himself that the tracks are reasonably clear for a reasonable

distance. Failing to have exercised this degree of care and caution, the court feels that the verdict should be set aside and a judgment entered for the defendant company * * *.

"A like principle has been recognized and applied in many Virginia cases.

"The judgment of the trial court is reversed and final judgment will now be entered for the defendant."

THE VIRGINIA AUTHORITIES CITED AND APPROVED IN THE FOREGOING DECISIONS BAR PLAINTIFF'S RECOVERY.

At the expense of brevity and even at risk of wearying the court through review of the Virginia authorities upon which the foregoing decisions are based the defendant digests those decisions to aid the memory and thereby lessen the labor of the court in its consideration of those authorities. They all bar plaintiff's recovery.

In *Va. Railway & Power Company vs. Boltz* (1918), 122 Va. 649, the court held that the duty to look and listen is not applied with the same strictness to travelers crossing street railways, as it is with regard to those crossing steam railroads. With regard to the former the general rule is that the failure to look and listen is not negligence *per se*, but this general rule is not inflexible and the final test in every case is whether the court can say that the evidence furnishes no reasonable basis upon which to find that an ordinarily prudent person would have attempted to cross the track under the circumstances of the particular case.

Judge Kelly delivered the opinion of the court and said at pp. 650-651, 653 and 656:

"The negligence charged in the declaration and relied upon as established by the evidence is that the car was being operated at a dangerous and unlawful rate of speed, that no sufficient lookout was maintained, and that no gong or bell was sounded, or other proper warning given. The evidence is in conflict as to these charges of negligence, and we must, therefore, under the rule applicable in this court, assume that the negligence of the defendant was established. The theory of the defendant, however, is that conceding its negligence the plaintiff was guilty of contributory and concurring negligence which bars her recovery."

“The case simply resolves itself into one in which a woman of intelligence and activity, aware of the danger of the situation, and with nothing to distract her attention or hinder her prevision, walked upon a street railway track, not at a regular crossing, but at a point twenty-seven feet beyond the crossing, without adequate precautions for her safety. In such a case, upon settled principles, there can be no recovery as a matter of law.

“We are not unmindful that the duty to look and listen is not applied with strictness to travelers crossing street railways, as it is with regard to crossing steam railroads, and that with respect to the former the general rule is that the failure to look and listen is not negligence *per se*, but this general rule is not inflexible, and the final test in every case is whether the court can say that the evidence furnishes no reasonable basis upon which to find that an ordinarily prudent person could have attempted to cross the track under the circumstances of the particular case.

“The look and listen rule is not applied with strictness to travelers crossing street railway tracks. But a person about to cross or go upon a street car track must use ordinary care in view of all the circumstances and surroundings. He must make reasonable use of his eyes and ears to note the approach of cars, and where there is nothing to obstruct his view or distract his attention and he goes upon the track immediately in front of a moving car he is guilty of negligence. He should look for approaching cars at a place and time when such looking will be effectual.’ 8 Thomp. on Neg. (White’s Supp. 1914), section 1438.

“The general rule is that the failure of a traveler to look and listen before attempting to cross a street railway track is not negligence *per se*; but when the undisputed evidence establishes exceptional circumstances which so conclusively indicate negligence in failing to look or listen that there can be no reasonable basis for drawing a different conclusion, the question is one of law for the court. The duty to look and listen depends largely on the circumstances of each case.’ Citing authority.

“Where the traveler gives a careless look and does not see or hear a car, he is in no better position than if he had not looked and listened at all.” Citing authority.

* * * * *

“There was, as we think, no evidence at all upon which to apply the doctrine of the last clear chance and the most that can be made of the case from the plaintiff’s standpoint is that the accident resulted from a concurrence of her negligence with that of the defendant.”

In *Virginia Railway & Power Company vs. Harris* (1918), 122 Va. 657, the court held that if the defendant was guilty of negligence, plaintiff’s own negligence, which continued down to the moment of the collision, if not the proximate cause of the accident, at least efficiently and concurrently contributed thereto and barred a recovery.

Judge Whittle delivered the opinion of the court in the *Harris Case* and said at page 659:

“It is obvious from his version of the incident (assuming that defendant was guilty of negligence, which we do not think is shown), that the plaintiff’s own negligence, which continued down to the moment of the collision, if not the proximate cause of the accident, at least efficiently and concurrently contributed thereto. It was plainly the duty of the plaintiff, when he discovered the approaching car, to keep a lookout on its movement, and to so regulate his own conduct as to avoid danger of collision. In the circumstances detailed, the dictate of common prudence demanded such precaution; and if plaintiff chose to disregard it, he was the author of his own misfortune and his contributory negligence defeats his recovery for the consequent injury.”

In *Stephen Putney Shoe Co., Inc., vs. Ormsby’s Admr.* (1921), 129 Va. 297, plaintiff’s decedent, a pedestrian, was guilty of contributory or concurring negligence under the circumstances in evidence in stepping from the sidewalk to the roadway, at the intersection of two streets, where, if he had looked before stepping from the curb, he would have been bound to see within a few feet of him a rapidly approaching automobile just at the turn.

The court held that while the look and listen rule is not so strictly applied to street crossings as it is to railroad crossings, a reasonable lookout is required; and nothing but an utter lack of prudence could have accounted for plaintiff’s decedent’s failure to look in stepping from the curb to the street. In other words, if the decedent did look, he was bound to have seen the automobile and was negligent as a matter of

law in stepping in front of it; and, if he did not look he was none the less negligent.

Kelly, P., delivered the opinion of the court and said (pp. 302-3):

"Under the circumstances, as above detailed, which seems to us to be as favorably stated as possible from the standpoint of the plaintiff, we are unable to see how it could reasonably be said that Ormsby was not guilty of contributory or concurring negligence in leaving the sidewalk and going on the street. If he looked before stepping from the curb, he was bound to see within a few feet of him a rapidly approaching automobile just at the turn. * * * If, on the other hand, Ormsby did not look, he was equally negligent. While the look and listen rule is not as strictly applied to street crossings as it is to railroad crossings, a reasonable lookout is required; and nothing but an utter lack of prudence could have accounted for Ormsby's failure to look at all. In other words, if he did look, he was bound to see the truck and was negligent as a matter of law in stepping in front of it; and if he did not look, his negligence as a matter of law is none the less apparent. *Va. Ry. & P. Co. vs. Boltz*, 122 Va. 649, 653, 95 S. E. 467."

In *Washington-Virginia Ry. Co. vs. Struder* (1922), 132 Va. 368, plaintiff's intestate was killed by a car of the defendant company while approaching a station.

In delivering the opinion of the court, West, J., said (pp. 376-378):

"Having due regard for the demurrer to the evidence rule, it conclusively appears from the evidence that Julia Delia Struder came to her death by thoughtlessly and negligently stepping on the defendant company's railroad track just in front of one of its moving trains, under such circumstances that the company was powerless to save her from injury and death, when, by simply looking down the track to the south, before reaching the east rail of the track, she could have seen the approaching train for a distance of 280 feet and saved herself from injury."

* * * * *

"Sims, J., speaking for the court in the Wilmouth Case

(*Wilmouth vs. Southern Ry. Co.*, 125 Va. 520), says: 'The conduct of the plaintiff's intestate in stepping upon the track in front of such visible danger, almost immediately upon him, must, under all the authorities, be regarded as negligence *per se*, which was the proximate cause of his death.' Citing *Thompson on Neg.*, Secs. 1666, 1667, 1672."

* * * * *

"In the case of *Gordon vs. Director General*, 128 Va. 431, 104 S. E. 797, which was the case of a passenger who was killed soon after she stepped from the train, Prentis, J., speaking for the court, said: 'If one who is in the full possession of his faculties steps upon a railroad track, in full view of and immediately in front of a rapidly approaching train, and meets death, his administrator cannot recover because the decedent's own negligence is the proximate cause thereof.'

"This authority, if authority be necessary, is conclusive of the instant case."

In *Washington & Old Dominion Ry. vs. Thompson* (1923), 136 Va. 597, it appeared from the plaintiff's own evidence and from that of one of his witnesses that he attempted to cross an interurban electric railway track at a time when, if he had looked a second time, he would have seen that an approaching car was almost upon him. The court held the fact that the plaintiff stopped his automobile within seven feet of the crossing was an indication to the motorman that the plaintiff would not again move until after the car had passed; and if, on the contrary, the plaintiff approached the crossing cautiously, without stopping, and could easily have seen the approaching car, then the motorman was justified in believing he would stop and remain in a place of safety.

Prentis, J., delivered the opinion of the court and said (p. 605):

"* * * Taking all of the evidence introduced by the plaintiff as true, and discarding all of the evidence for the defendant, the injury was due to the concurring negligence of both."

In *Marvel vs. Virginia Railway and Power Co.* (1924), 138 Va. 532, an action by the owner of an automobile damaged by a street car of the defendant by a collision at a street crossing it was clear from the evidence that the plaintiff saw and re-

alized the rapid approach of the car, or could have seen its approach in time to have prevented the accident. The court held upon a demurrer to the evidence that the concurring negligence of the plaintiff either in failing to look in time, or in failing to stop, or in failing to turn his automobile either to the right or the left, contributed to the collision and barred his recovery. In delivering the opinion of the court Prentiss, J., said (p. 533):

“The facts, disclosed by the plaintiff’s evidence may be thus summarized. His automobile was damaged by a collision with a west bound car of the company while he was driving north along Washington Street and across High street, Portsmouth. High Street is ninety-three feet wide, and from the southern building line to the southern rail of the west bound track is forty-four feet. The street is level, the track is forty-four feet. The street is level, the vision unobstructed for several squares, and there was no interfering street traffic at the time of the collision. The speed of the street car was fixed at thirty miles per hour by one of the plaintiff’s witnesses who was driving his automobile alongside of it just before it reached the Washington street intersection who then observed his own speedometer. The speed of the plaintiff’s automobile is by him fixed at seven or eight miles an hour, and he could have stopped it within five feet. That the plaintiff could and should have seen the rapidly approaching street car as soon as he passed the building line of High street, forty-four feet before he reached the point of collision, is manifest. His testimony as to when he actually saw it, however, is not clear. He says that he did not see it until he ‘ventured across the street’, and then he ‘saw it about the parsonage, which was about 140 feet away’. It is shown that this parsonage is actually 200 feet east of the place referred to. He says also that he was ‘practically one-third across the street’, and that when he got to the sidewalk he looked up and down High street, admits that the approaching car was then within his line of vision, and then followed a number of statements which cannot be reconciled, as that it was then 140 to 150 feet away, that it was the same distance away when he was about to cross the southern rail of the east bound track, that he was there before he noticed the street car, that he ‘noticed it right along. Of course, I saw the street car coming right along’, that he knew it was coming ‘at speed’, and that he made no effort to stop.

“It seems to us perfectly clear from this testimony that certainly he saw and realized the rapid approach of the car

before he reached the first rail of the east bound track, *and if this is not true, then his failure to observe it constitutes negligence which bars his recovery.* It is equally apparent that if at that time the street car was 140 feet or more away there would have been no collision, because it would have been physically impossible for the street car to traverse the intervening distance within the few seconds which would have been required for the plaintiff to cross the tracks in safety. The street car, therefore, must have been very much closer at that time, and the concurring negligence of the plaintiff, either in failing to look in time, or in failing to stop or in failing to turn his automobile either to right or left, contributed to the collision and bars any recovery." (*Italics supplied.*)

In *Meade vs. Saunders* (1928), 151 Va. 636, where a pedestrian was injured when struck by an automobile at a street crossing, the court held from the plaintiff's testimony it was quite apparent that the plaintiff had no knowledge of how the accident occurred. Judge McLemore delivered the opinion and said at p. 640:

"In view of the evidence there is no real conflict between the statements of these several witnesses. The plaintiff never saw the car with which he collided after he stepped from the curb, and does not know how it happened.

"Was the plaintiff guilty as a matter of law of contributory negligence? The learned judge of the trial court so concluded.

* * * * *

"If, as from this record is apparent, the plaintiff never looked for, or saw, the defendant's car, after leaving the sidewalk until he was in collision with the rear end thereof, then his negligence was the proximate cause of his injury, and there can be no recovery. If it can be said that he was struck by the front of the car, which bore down upon him, we are confronted with a situation where a pedestrian who sees an automobile approaching, leaves the curb to cross the street in front of the approaching car. The car is all the while in full view if he but looks, and he knows it is coming. Assume that the defendant was negligent up to the instant of the accident, for failing to see and avoid injuring plaintiff, there was an equal opportunity for the plaintiff to have seen and avoided the collision, and he was, therefore, negligent in not doing so."

CONCLUSION.

In view of the decisions hereinbefore cited and of the reasoning of those decisions, the defendant submits finally that the judgment of the court below is contrary to the law and the evidence and without evidence to support it, since the plaintiff is bound by his own testimony and the testimony of the plaintiff himself convicts him of negligence as a matter of law and not as an issue of fact and bars his recovery.

Counsel for petitioner desire to state orally the reasons for reviewing the judgment complained of in this case and hereby adopt this petition for writ of error as their brief in support of their contention; copy of this petition for writ of error having been delivered in person to counsel for defendant in error on the 27th day of April, 1933, all as required by Rule II of the Supreme Court of Appeals of Virginia as amended November 6, 1929.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY,
T. JUSTIN MOORE,
ARCHIBALD G. ROBERTSON,
Counsel.

Copy of the foregoing petition for writ of error received this 27th day of April, 1933.

ROBERT E. JOSEPH &
THOMAS A. WILLIAMS,
Counsel for defendant in error.

We, T. Justin Moore and Archibald G. Robertson, attorneys practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion there is sufficient matter of error in the record accompany this petition to render it proper that the judgment complained of be reviewed and reversed.

T. JUSTIN MOORE,
ARCHIBALD G. ROBERTSON.

Received April 27,/33.

H. S. J.

Writ of error and *supersedeas* awarded by the court. Bond \$1,250.00.

Received July 5th, 1933.

M. B. WATTS, Clerk.

Pleas had before the Hustings Court, Part II, of the City of Richmond, Va., on the 29th day of July, 1932.

Be it remembered that heretofore, to-wit: On the 7th day of March, 1932, came the plaintiff Rufus Holtz, and filed the following Notice of Motion for Judgment against the defendant, the Virginia Electric & Power Company, a Corporation, to-wit:

Virginia:

In the Hustings Court, Part II, of the City of Richmond.

Rufus Holtz, Plaintiff,

vs.

Virginia Electric and Power Company, a corporation, Defendant.

NOTICE OF MOTION FOR JUDGMENT.

To Virginia Electric And Power Company, A Corporation:

Take notice that the undersigned, Rufus Holtz, hereinafter called the plaintiff, shall on the 21st day of March, 1932, at 11 o'clock A. M., or as soon *theresfte* as the plaintiff can be heard, move the Hustings Court, Part II, of the City of Richmond in the court-room of the city-hall of said city, State of Virginia, for judgment against you, Virginia Electric and Power Company, a corporation, hereinafter called the defendant, in the sum of Ten Thousand Dollars (\$10,000.00), due to the plaintiff by the said defendant by reason of the following facts:

That on or about the 24th day of December, 1931, the defendant was a common carrier of passengers for hire and reward by means of street cars run in and upon the streets of the City of Richmond by means of electricity upon certain stationary tracks and especially on and along M. Street, at and near its intersection by 27th Street; and thereupon it became and was the duty of the said defendant to run
 page 2 } and operate the said street cars with proper care and caution, to keep a proper lookout, to keep the same under proper control and to run the same at a proper rate of speed under the traffic and conditions then existing and to give proper warning of the approach of said street cars so as to avoid injury to others, and particularly the plaintiff, while exercising ordinary care on their part. Yet

the said defendant did not regard its said duty and duties aforesaid, but carelessly, negligently, recklessly and wrongfully failed so to do in that it ran one of its said street cars on the day and place aforesaid Eastwardly on M Street without proper care and caution, without keeping a proper lookout, without keeping the same under proper control, without running the same at a greater rate of speed under the traffic and conditions then existing, without giving proper and timely warning of the approach of said street car so that while the plaintiff, who was proceeding Eastwardly on 27th Street, was making his left turn Northwardly into 27th Street the said street car violently collided with and against the said automobile truck whereby and because thereof the said truck was demolished and the plaintiff was thrown up, in and about the said truck and on and upon the said ground and hard surface thereof whereby and because thereof the plaintiff became sick, sore, lame and disordered and hath continued from thence hitherto, and the plaintiff was injured in and about his head, neck, face, arms, legs, back and his hearing impaired and other parts of his body injured, both internally and externally, and he thereby suffered great mental pain and anguish; and the plaintiff lost large sums of money by reason of the damage and loss of his produce and merchandise and his truck being destroyed, and the plaintiff lost large sums of money by being unable to follow his usual affairs and business and was required to and did expend large sums of money in endeavoring to be cured of his said hurts, wounds and injuries so received.

All to the damage of the plaintiff in the sum of
page 3 } Ten Thousand Dollars (\$10,000.00), and, therefore,
he gives you this notice of motion for judgment.

RUFUS HOLTZ,
By Counsel.

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

page 4 }

RETURN.

Executed in the City of Richmond, Va. March 4-1932 on the Virginia Electric & Power Company, a Corp. by delivering a true Copy of the within Notice to H. S. Klotz, in person Cashier, with Office in Richmond.

J. T. WILLARD, Sergeant,
By G. A. JEWETT, Deputy Sgt.

page 5 }

PLEA OF NOT GUILTY.

The said defendant, by its attorney, comes and says that it is not guilty of the premises in this action laid to its charge in manner and form as the plaintiff hath complained. And of this the said defendant puts itself upon the country.

ARCHIBALD G. ROBERTSON, p. d.

page 6 }

GROUNDS OF DEFENSE.

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

1. The defendant denies that it or any of its agents or servants or employees in charge of the street car in question were negligent as charged in plaintiff's notice of motion for judgment.

2. The defendant denies each and every material allegation in the plaintiff's notice of motion for judgment.

3. The defendant says that it was guilty of no negligent act or omission proximately causing or concurring to cause the alleged accident and consequent injuries to the plaintiff and damages to his automobile truck.

4. The defendant says at the time of the accident complained of plaintiff was guilty of contributory negligence which proximately caused or efficiently contributed to cause the accident, in driving his automobile truck at an excessive rate of speed; in failing to keep a proper lookout for approaching street cars; in driving on the street car track when the street car was dangerously near, without giving warning of his approach, or heeding the approach of the said street car, or keeping his automobile truck under proper control; and said plaintiff generally failed to exercise ordinary care and prudence for his own safety and for the safety of the automobile truck he was driving, which the circumstances surrounding him then demanded, all in violation of the Traffic Ordinances of the City of Richmond, Virginia.

5. The defendant further says that any injuries or damages which the plaintiff may have sustained in person or property at the time and place complained of, were either

proximately caused by the negligence of the plaintiff, or said negligence on the part of said plaintiff efficiently contributed thereto, so as to bar any recovery by the plaintiff in either event. The said plaintiff negligently and recklessly page 7 } drove on the street railway track when the street car was dangerously near, without looking or listening for approaching cars, and without taking any other reasonable or adequate precautions for his own safety or for the safety of the automobile truck he was driving; all in violation of the traffic ordinances of the City of Richmond, Virginia.

6. The defendant denies that the plaintiff was injured or damaged in person or property in the manner or to the extent alleged in his notice of motion for judgment.

7. The defendant reserves the right to amend its grounds of defense at any time, if and as it may be so advised, to demur to the plaintiff's notice of motion for judgment or any part thereof, and to move the court to strike out the same or any part thereof as insufficient in law or for lack of evidence to support it.

VIRGINIA ELECTRIC AND POWER COMPANY,
By ARCHIBALD G. ROBERTSON, Counsel.

page 8 } And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 28th day of July, 1932.

This day came the parties in person & by Counsel and the Defendant by Counsel having heretofore filed in writing its plea of Not guilty, this day filed in writing its Grounds of Defense and put itself upon the country and the Plaintiff likewise and issue joined thereupon, Whereupon came a panel of nine qualified jurors free from exception for the trial of the issue joined in this case and from said panel of nine qualified jurors the parties by their attorneys beginning with the Plaintiff alternately struck from said panel the names of one juror each, the remaining seven constituted and composed the jury for the trial of the issue joined in this case to-wit: J. D. Cook, J. E. Walker, J. W. Trevillian, J. J. Hovey, B. W. Glass, D. A. Welch & D. U. Daggett who being elected, tried and sworn the truth to speak upon the issue joined & having fully heard the evidence, by consent of parties by

Counsel & with the assent of the Court were adjourned over until tomorrow morning at Ten Thirty o'clock A. M. with the usual admonitions given them, and the further consideration of this case is continued until the then tomorrow morning at Ten Thirty o'clock A. M.

page 9 } And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 29th day of July, 1932.

This day again came the parties in person & by counsel & the Jury appeared in Court pursuant to the conditions of their adjournment and having heard the arguments of Counsel retired to their room to consult upon a verdict, after which consultation they returned into Court and rendered the following verdict, to-wit: "We the jury on the issue joined find a verdict for the plaintiff and fix the damages at Seven hundred fifty no/100 Dollars (\$750.00) J. E. Walker, Foreman. And then the Jury was discharged. Thereupon the Defendant moves the Court to set aside the verdict on the ground that the Plaintiffs own testimony convicts him of negligence *per se* as a matter of law, and not of an issue of fact & bars his recovery.

page 10 } And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 29th day of October, 1932.

This day came again the parties by Counsel and the Court having maturely considered the motions made by the Defendant by Counsel to set aside said verdict of the Jury and grant it a new trial at a previous day of this Court, doth overrule the same, to which ruling of the Court the Defendant by Counsel excepted. Therefore it is considered by the Court that the Plaintiff do recover of the Defendant the sum of Seven Hundred & Fifty Dollars with interest from the 29th day of July, 1932 until paid & his costs by him in this behalf expended. And the said Defendant having expressed its desire to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas*, it is ordered that the execution of this judgment be suspended for a period of 90 days in order to enable the said Defendant to apply for said writ, but this order is not to be effective unless the Defendant or

some one for it, shall within 15 days from the entry of this order enter into a bond in the penalty of Three Hundred Dollars with surety to be approved by the Clerk of this Court conditioned to pay such costs as are awarded against it by reason of said appeal. The said Defendant is given 60 days within which to file such Bills of Exceptions as it may be advised are proper.

page 11 }

Richmond, Virginia,
December 13, 1932.

Re: Rufus Holtz v. Virginia Electric And Power Company.

Mr. Thomas A. Williams,
Attorney at Law,
Mutual Building,
Richmond, Virginia.

Mr. Robert E. Joseph,
Attorney at Law,
Mutual Building,
Richmond, Virginia,

Gentlemen:

On December 23, 1932, at 10 o'clock A. M. in the courtroom of the Hustings Court, Part II, of the City of Richmond, Virginia, the Virginia Electric and Power Company will tender certificates of exceptions to Judge E. H. Wells for signature by him in the action now pending on appeal in the Hustings Court, Part II, of the City of Richmond, Virginia, entitled *Rufus Holtz v. Virginia Electric and Power Company*.

On said date at the same hour the Virginia Electric and Power Company will apply to the Clerk of the Hustings Court Part II, of the City of Richmond, Virginia, at the Clerk's office of said Court for transcript of the record in the above entitled action in order that the said Virginia Electric and Power Company may prepare its application for writ of error to the Supreme Court of Appeals of Virginia.

Yours very truly,

VIRGINIA ELECTRIC AND POWER COMPANY,
By ARCHIBALD G. ROBERTSON, Counsel.

Receipt of the above notice is acknowledged this 14th day of December, 1932.

ROBERT E. JOSEPH.
THOMAS A. WILLIAMS,

page 12 } And at another day, to-wit: At a like Hustings Court, Part II, continued by *adhournment* and held for the said city, on the 23rd day of December, 1932.

This day came the Plaintiff & Defendant by counsel & by leave of Court filed their Certificates of Exceptions which were duly signed, dated and sealed and ordered to be made a part of the record of this case, which is accordingly done.

page 13 } Virginia:

In the Hustings Court, Part II, of the City of Richmond.

Rufus Holtz, Plaintiff,

vs.

Virginia Electric and Power Company, Defendant.

CERTIFICATE OF EXCEPTION.

Certificate No. 1.

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

Here insert transcript of evidence designated "This is all the evidence in this case E. H. W." including all proceedings at the trial reported in said transcript. Include also Defendant's Exhibit No. 1, Defendant's Exhibit No. 2, and Defendant's Exhibit No. 3.

See *Lynchburg Traction & Light Co. vs. Garbe* (1932), 164 S. E. 391; *V. E. P. Co. vs. Blunt*, 163 S. E. 329.

REPORTER'S TRANSCRIPT.

VIRGINIA:

In the Hustings Court, Part 2, of the City of Richmond.

Rufus Holtz

vs.

Virginia Electric & Power Co.

RECORD.

Before Hon. Ernest H. Wells and a Jury, Richmond, Virginia, July 28-29th, 1932.

This is all the evidence in this case.

E. H. W.

Dec. 23rd, 1932.

Phlegar & Tilghman,
Shorthand Reporters
532-537 Law Building
Norfolk, Va.

page 14 } In the Hustings Court, Part 2, of the City of Richmond, Va.

Rufus Holtz

vs.

Virginia Electric & Power Company.

RECORD.

Stenographic report of the testimony and other proceedings of the trial of the above-entitled case before Honorable Ernest H. Wells and a jury, in the Husting's Court, Part 2, of the City of Richmond, Virginia, on the 28th and 29th days of July, 1932.

Present: Messrs. Thomas A. Williams and Robert E. Joseph, for the plaintiff; Messrs. Archibald G. Robertson and Murray M. McGuire, for the defendant.

Phlegar & Tilghman,
Shorthand Reporters
Norfolk, Virginia.

page 15 } MORNING SESSION.

Richmond, Virginia, July 28, 1932.

The court convened at 11:00 A. M., and upon the calling of this case counsel announced they were ready for trial. A jury was selected and sworn. On motion of counsel for the defendant, the witnesses were sworn and excluded until called

to testify. Opening statements were made by Mr. Williams for the plaintiff and by Mr. Robertson for the defendant, and the following evidence was then introduced:

RUFUS HOLTZ, (colored),
the plaintiff, having been duly sworn, testified as follows:

Examined by Mr. Williams:

Q. Now, look at the jury, and tell them what your name is.

A. My name is Rufus Holtz.

Q. You are the plaintiff in this case?

A. Yes, sir.

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

A. The 24th of December.

Q. What year?

A. 1931.

Q. About what time of day was it?

A. About a quarter to nine.

Q. About a quarter to nine?

page 16 } A. Yes, sir.

Q. Where did you intend going?

A. I intended going up to 27th Street and intended to turn to my left.

Q. Did you have a little place of business?

A. Yes, sir.

Q. Whereabouts was that?

A. On M Street, between 26th and 27th.

Q. Talk to the jury—they can understand you better. On which side of M?

A. On the east side of M.

Q. Does M run east and west, or north and south?

A. East. My place was going up, right on the corner on the east side of the alley.

Q. On the east side of the alley?

A. Yes, sir.

Q. On which side of M?

A. On the right-hand side coming up M.

Q. "Coming up" means going which direction?

A. Going east.

Q. Then that would be on the right-hand side going east—would be the south side of M?

A. Yes, sir.

Q. What kind of truck was that, Rufus?

A. A T-model truck.

Q. About how long would you say it was?

page 17 } A. I guess it was about fourteen foot.

Q. About fourteen foot long?

A. Yes, sir.

Q. What kind of stuff did you have on there?

A. Well, it was Christmas times, and I had on everything for Christmas holiday—celery, oysters, eggs, potatoes, walnuts, eggs, lemons, rabbits—everything to put out for Christmas holidays, because I had a lot of trade that was depending on me for Christmas and I had to serve them. Lots of them wanted to use rabbits in place of turkeys; said they wasn't able to buy turkeys; and I had everything straight for that day's work.

Q. How long had you been doing that kind of business, Rufus?

A. Oh, I had been doing that for about eighteen or twenty years.

Mr. Williams: (To the jury) Do you gentlemen hear him?

Note: The jury indicated in the affirmative.

Q. Just tell us of this particular day, just how this collision occurred?

A. Well, me and my man loaded at the store, and after we loaded I came out and got on my truck, and I got on my truck and started off and I got about fifty feet or more from the corner; I looked back and throwed my hand out, but then the car was at 26th Street, and before I could get up
page 18 } to 27th and M to make my turn he hit me in the rear, and I didn't hear nothing at all, you know; I thought I was all in the clear.

Q. Now, where was the street car when you threw your hand out and looked?

A. About 26th Street.

Q. Going in which direction?

A. It was coming east.

Q. The same direction you were going?

A. Yes, sir.

Q. At the time that you were driving east there and held out your hand and looked back, where was your truck with respect to the street car tracks?

A. Well, driving up close at the tracks, fixing to make my turn.

Q. Did you have to drive on the tracks to make your turn?

A. I had to drive across the tracks to make my turn, you know.

Q. Was there any traffic coming west at the time to keep you from making your turn easily?

A. No, sir, everything was clear.

Q. Did you have anybody on that truck?

A. That boy was on the rear, that helped me deliver.

Q. What is his name?

A. His name is Willie Meekins.

Q. What part of your truck did the street car hit?

A. Hit the rear end on the left.

page 19 } Q. How far from the end of it?

A. I guess it was about that far (indicating with his hands).

Q. How far is that, do you say—about two feet?

A. About two feet.

Mr. Robertson: I would call it about three feet.

Note: Mr. Williams measured with a ruler the distance as indicated by witness' hands.

Mr. Williams: Two feet and two inches, I would say.

By Mr. Williams:

Q. Now, when that street car struck that two feet and two inches of your truck, where did it knock the truck and you?

A. It turned the truck over and pinned me under the truck so I couldn't move. Part of the truck was on my legs down there.

Q. Did it hit any other part of your body?

A. Head and shoulders and neck. When I went back, you know, it threw me over.

Q. Talk a little louder.

A. When the truck hit me it throwed me back and part of the truck went across my legs here and I couldn't move until somebody come there and took the truck up off of my legs.

Q. Where did they take you?

A. To the hospital.

Q. What hospital?

A. St. Phillip's—on Market Street, ain't it?

Q. In the ambulance?

page 20 } A. In the ambulance.

Q. How long did you stay there?

A. About three days.

Q. Where did they take you then?

A. Taken me home.

Q. How long were you disabled?

A. About five weeks.

Q. Who was your family physician that attended you?

A. Dr. Williamson.

Q. How long did Dr. Williamson attend you?

A. About a month, maybe a little more, I don't know.

Q. Now, Rufus, have you had any bad results from your accident—anything as the result of the accident—any trouble?

A. No more than I just can't hear in this ear much.

Q. That is the left *year*?

A. Yes, sir.

Q. Was your hearing good in the ear before?

A. Yes, sir.

Q. Do you have any trouble from your neck, your back and your shoulders?

A. Yes, sir, from my neck down in my shoulders.

Q. Do you have that trouble today—up to this time?

A. Had it—got it now.

Q. Rufus, were you able to work any during those five weeks that you said you were disabled?

page 21 } A. None at all; just could hobble with a stick.

Q. How much were you able to earn, or were you earning, would you say, on an average?

A. \$5.00 a day.

Q. You lost that as a result of not being able to work?

The Court: Answer out. The stenographer can't hear you when you shake your head. Answer "yes" or "no".

A. Yes, sir.

Q. Now, what was the estimate of damage to your truck?

A. Well, the insurance company sent over there and they had a gentleman to say it was \$42.00.

Q. Who was that gentleman?

A. I just can't pronounce his name now—I just can't pronounce his name, but I know he came over there and they went out there and looked at it.

Q. Would you recognize the name of Mr. Meyer?

A. Yes, Mr. Meyers was his name.

Q. He is here. Do you know what Dr. Williamson's bill is?

A. \$25.00—

Q. At one time?

A. Yes, sir.

Q. Have you seen him since?

A. That was the time he cut me. They said to send all bills in, and I sent it on to the company.

Q. The doctors attended you long after that, didn't they?

A. Yes, sir.

page 22 } Mr. Robertson: I want to ask that counsel stop leading the witness from this point on.

The Court: Don't lead the witness.

Mr. Williams: I certainly will heed the objection.

Mr. Robertson: I object to any of this. It is an attempt to make a compromise settlement, and is inadmissible in evidence. Just let the Court read it (referring to a paper held by Mr. Williams). It is inadmissible as attempting to reach a compromise settlement.

Mr. Williams: I just want to identify the date.

The Court: If it is a fact that it was an effort to settle the matter out of court, it is not proper evidence.

Mr. Williams: I just want to identify the date, that is all, as showing whether the doctor attended him after that time.

The Court: Well, the doctor will know. The evidence will not be admitted.

By Mr. Williams:

Q. What was the value of the stuff that you had in your truck?

A. I figured up and put it down \$62.00—\$60.00 or something, I just can't recall.

Q. How was that stuff in your truck—in what kind of containers?

page 23 } A. We had bushel baskets, had some underneath a shelf, and some in another shelf, going up in lines.

Q. How were your eggs put in there?

A. Eggs was in these little container crates.

Q. How about your oysters? What were they in?

A. They were in cans.

Q. When you were taken to the hospital do you know whether anybody gathered up that stuff?

A. I couldn't tell you nothing in the world about it at all.

Q. Now, how old are you, Rufus?

A. Fifty-one.

Q. You are a widower? You were living by yourself?

A. Yes, sir.

Q. Did you have to have anyone to take care of you during the time you were in bed?

A. Yes, sir.

Q. Who did that?

A. Miss Turner.

Q. Colored?

A. Yes, sir.

Q. Did she stay just during the day, or what?

A. Day and night; give me service any time I called upon her.

Q. Did you agree to pay her, or have you paid her, for the time she stayed with you?
page 24 } A. No, sir; I haven't been able.

Q. Do you owe her for the time she was with you?

A. Yes, sir.

Q. How much do you owe her?

A. I owe her the amount on that paper.

Mr. Robertson: I object to that for any purpose in evidence.

The Court: He knows, if he agreed to pay her, what he agreed to pay her. It doesn't require any other evidence.

By Mr. Williams:

Q. What did you agree to pay her?

A. At \$12.50 a week.

Q. For day and night?

A. Yes, sir, day and night service.

Q. How long was she with you?

A. She was with me the whole time I was in the house.

Q. How many weeks was that?

A. Well, about four weeks.

Q. That truck was registered in your name, wasn't it?

A. Yes, sir.

page 25 } CROSS EXAMINATION.

By Mr. Robertson:

Q. Rufus, you say you are fifty-one years old?

A. Yes, sir, coming about fifty-one.

Q. This little market that you were running there is on the south side of M Street, next to the alley between 26th and 27th?

A. Yes, sir.

Q. And you own that property, don't you?

A. Yes, sir.

Q. And you are now renting it to someone else?

A. Yes, sir.

Q. And you had been in this business, you say, about nineteen years?

A. Yes, sir—about twenty years.

Q. Are your customers mostly colored people, or white people?

A. Most of my trade is white.

Q. Do you sell all for cash, or do you have credit customers?

A. Credit and cash.

Q. You keep an account of what your customers owe you?

A. Yes, sir.

Q. You can read and write all right?

A. No, sir; I can write my name but I can't read and write.

Q. How do you keep your accounts?

A. My method, if I was to tell you, is kind of a page 26 } mystery. What I mean—I can tell you, if you have got time. When I have a customer on 27th Street, such and such a number, I put that down—her number and what she gets. Now, my store business, I had tickets made, cash-and-carry tickets, five cents up to fifty cents, and the number of the street and the number where they live at; had a box made and when you come there and want to get credit I give you so many of these credit cards and take your number and put it in this and keep it all separate. When you come Saturday night, I reach in there and pull them out and let you count them yourself.

Q. You can write?

A. No, sir.

Q. You can sign your name?

A. Yes, sir.

Q. On this morning of this accident, you say, you were intending to make a left turn at 27th Street?

A. Yes, sir.

Q. This Miss Turner that you say nursed you—was she white, or colored?

A. Colored.

Q. You started out from in front of your store?

A. Yes, sir.

Q. And you headed east?

A. Yes, sir.

Q. As you drove from your store down east toward 27th Street, were you straddling the eastbound track, or page 27 } were you to the right of it?

A. When I start off from my store I start off to the left and have to hit the track to make my turn.

Q. Why do you have to go over the track to make your turn?

A. Because I can't go on the other side without going across the tracks.

Q. Were there any automobiles parked on the south side of M Street that morning

A. No, sir.

Q. As you drove from your store to 27th Street, you didn't

have to straddle the track to make your turn?

A. I went up the side of the track and had to go up the track to make my left-hand turn.

Q. When you started from your store, instead of keeping to the right side of the street, you went kind of gradually to the track to make your turn?

A. Yes, sir, right straight on up.

Q. You were straddling the eastbound track most of the way down to the corner?

A. I didn't start straddling the track until I got near about my destination to turn.

Q. But you were cutting in towards the track?

A. Yes, sir.

Q. When did you commence to straddle the track?

A. When I left my place—when I got about fifty feet or more, when I was fixing to make my turn, I looked
page 28 } around and throwed my hand out straight. The car was at 26th Street, and then I proceeded.

Q. So you commenced to straddle the track when you were fifty feet away from the corner of 27th Street?

A. Yes, sir. You can't straddle the track and turn it too short; you have to make a little curve in there.

Q. I ask you when you first went on the track were you at 27th Street, or did you go on the track before you got to 27th Street?

A. Before I got to 27th Street.

Q. How far west—fifty feet or more?

A. About fifty.

Q. And as you were fifty feet away from 27th Street and went on the track, it was then that you looked back and saw the street car?

A. When I threw my hand out I looked back, and about fifty feet, more or less, from the corner. The car was at 26th Street; I looked to be in the clear, and before I could get up and make my turn the car had hit me.

Q. You commenced to straddle the track fifty feet before you got to 27th Street?

A. I say I drove up—when I threw my hand out—

Q. I am coming to your hand in a minute. I understood you to say a minute ago that you commenced to go on the track about fifty feet before you got to 27th Street?

A. Yes, sir.

page 29 } Q. And at the same time you threw your hand out and made a signal for a left turn?

A. A left turn.

Q. And at the same time you looked back and the car was at 26th Street?

A. No, not at the same time.

Q. Well, when?

A. When I commenced to make my turn I looked back and the car was at 26th Street.

Q. Isn't it a fact that you were getting ready to make your turn and throwing your hand back and looking back, all at the same time?

A. I was only doing two.

Q. Which two were you doing?

A. When I threw my hand out I looked back, and I had my hand on my wheel to proceed on.

Q. And the car was then at 26th Street?

A. Yes, sir.

Q. Had it crossed over 26th Street, coming towards you?

A. I hadn't paid no attention where it crossed over, but I know it was down at 26th Street.

Q. I ask you whether you looked at it enough to know whether it had crossed over 26th Street?

A. No, sir.

Q. How do you know it was at 26th Street if you didn't look at it well enough to know whether it was west
page 30 } of 26th Street, East of 26th Street, or crossing 26th
Street?

A. I know it was at 26th Street, coming towards me.

Q. How?

A. By looking at it.

Q. Why can't you tell me whether it was west of 26th Street, east of 26th Street, or crossing 26th Street?

A. I didn't pay that much attention to it, but I know the car was at 26th Street, heading toward me.

Q. Did you judge that by the sound of it, or by seeing it?

A. I seen it.

Q. I want you to tell me where it was when you saw it?

A. It was at 26th Street.

Q. Was it west of 26th Street?

A. It was headed at me.

Q. Was it west of 26th Street?

A. It was heading east towards me.

Q. Now, was it west of 26th Street?

A. On the other side of 26th Street?

Q. Yes, on the far side, away from you.

A. No, sir.

Q. On the near side?

A. That is what I imagine.

Q. I mean do you know it? If you don't know all you have got to do is say so.

A. I didn't pay no particular attention to it. I knew it was down at 26th Street; I threw my hand back page 31 } and looked, but I didn't pay any attention about the east or the other side.

Q. But the real fact of the situation is that you don't know whether it was east, or west, or crossing; you didn't pay that much attention to it?

A. Yes, sir.

Q. The next time you saw it was when it hit you?

A. Yes, sir.

Q. You never saw it from 26th Street until *hit* hit you and you were turning over?

A. Yes, sir.

Q. Now, there is nothing wrong with your leg now, is there?

A. No, sir. It fell right across here (indicating).

Q. The reason I asked you that is that you kind of waddled when you walked; that is because you are bow-legged?

A. No, sir, that is a natural waddle.

Q. Now, Rufus, do you know Mr. Chappell that works for the Power Company?

A. Chappell?

Q. Yes, the white-haired gentleman.

A. Perhaps—I know so many gentlemen.

Mr. Robertson: Ask Mr. Chappell to come in a minute.

The Court: Are there any further questions?

Mr. Robertson: Yes, sir.

The Court: Go ahead with your questions.

By Mr. Roberston:

Q. Rufus, do you know Mr. Eddie Flippen?
page 32 } A. Yes, sir.

Note: Mr. S. M. Chappell came into the court room.

Q. Did that gentleman ever come to see you about this accident (indicating Mr. Chappell)?

A. Yes, sir.

Mr. Roberston: All right, go out, Mr. Chappell.

Note: Mr. Chappell retired from the court room.

Q. He came to see you and asked you to tell him about the accident and how it happened?

A. Yes, sir.

Q. And you told him the best way you knew how?

A. Yes, sir.

Q. And he wrote it down, didn't he?

A. Yes, sir.

Q. And you signed it?

A. Yes, sir.

Q. Did he read it to you before you signed it?

A. Yes, sir.

Q. Now, I am going to ask you if you remember telling him this: "I was going east on M Street and wanted to turn north at 27th Street. As I approached 27th Street I heard the car behind me but don't know how far as I didn't see it. It sounded as though it was running fast. I made a hand signal and turned to the left in 27th Street. As I was crossing the track the car struck the left rear side of the truck and turned it over on me. The boy, Meekins, who was
page 33 } on the rear jumped off before the car struck the truck and was not hurt. I was taken to St. Philip's Hospital and sent home December 26th. The truck was damaged and a large load of produce scattered on the street." Is that what you told him?

A. I just hold him the way it happened.

Q. Did you tell him this: "I was going east on M Street and wanted to turn north on 27th Street?"

A. I was going to turn.

Q. "As I approached 27th Street I heard the car behind me but don't know how far as I didn't see it." Did you tell him that?

A. No, sir.

Q. What did you tell him?

A. I told him just what I told you. When I get on my car I always look around to see what is approaching me. That is what I told him. I got on my car at the store and as I approached I threw my hand out fifty feet or more from the corner, and when I got up to the corner the car had hit me.

Q. As a matter of fact, you had heard the car down there at 26th Street and you judged from hearing it that it was at 26th Street?

A. No, sir, I seen it. Always when I get on my truck I always get on there and look around and see what is approaching me so I can have a clear track.

Q. Do you mean you never make any mistakes when you are driving a truck?

page 34 } A. No, sir; my life and my little change is at stake. I always do that.

Q. You never told Mr. Chappell that you heard the car down there at 26th Street but didn't see it?

A. I can't remember that.

Q. If he would say that you did tell him that, would you say he was mistaken?

A. No, sir; only like I foretold you—when I got on my truck I looked out before I made my turn.

Q. Now, you walk the same now as you did before the accident?

A. I walk the same, but I have a misery in my shoulders and back.

Q. I am talking about your legs; your legs work the same way as they did before the accident?

A. Yes, sir.

Q. Do you know Mr. Eddie Flippen that works for the Power Company?

A. Yes, sir.

Q. Did you tell Mr. Chappell that you were deaf?

A. Deaf?

Q. Yes.

A. I don't know whether I did or not. I am pretty sure I did not.

Q. Do you remember going down to Mr. Eddie Flippen's office the latter part of January, before you got page 35 } any lawyers in the case, and talking to him about the accident?

A. Yes, sir. After they came over there and got my statement and told me to fix up an itemized statement of what my damages was, I thought they would give me some consideration, and they didn't come. I waited about three or four weeks before I went up to Mr. Flippen's office, and when I went up there to see him they said there was nothing they could do for me.

Q. You didn't tell Mr. Flippen you were deaf?

A. I didn't have to—he didn't ask me. All he told me, he couldn't give me no consideration. I said "Thank you, sir", and came on out.

Q. Did you tell Mr. Flippen you never did see the car until it hit you?

A. I never told him nothing because he never asked me nothing.

Q. I just ask you—did you tell him that or not?

A. No, sir, he never asked me nothing.

Q. How long have you been knowing Mr. Flippen?

A. All of his life, ever since he was a boy.

Q. Mr. Flippen is all right, isn't he?

Mr. Willilams: I object to that. What has that got to do with this case?

The Court: Nothing in the world. Objection sustained.

page 37 } DEFENDANT'S EXHIBIT NO. 1.

Broad & 25
7210
12/24/31

Witness Statement of Accident.

Did you see the Accident? Yes.

Where did it occur? 29th & M. Sts.

What day and at what hour did it occur? Dec. 24, about 9:30 A. M.

Where were you when it occurred? Driving Truck.

If on Car or Bus, What Part?

Was there any unusual motion in starting or stopping of Car or Bus?

Did Car or Bus make one or two stops at the time of the Accident? One After Accident.

Where was injured party when the accident occurred? I was only one about.

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

Did you hear operator call to party to wait until Car or Bus stopped?

Was Car or Bus standing? No.

If Moving, about how fast? Cannot say.

About how fast was Vehicle or Auto moving? About 5 miles per hour.

Did driver of Vehicle or Auto signal that he was going to turn? Yes.

About how many feet did Car or Bus move after Accident? Cannot say.

About how close (How many feet) was Car or Bus to object when it first appeared in the way? Cannot say.

Did Car or Bus strike vehicle or Auto, or did Vehicle or Auto strike Car or Bus? Car struck truck.

Who was at fault and Why? Operator of Car because I had right of way.

Was Gong or Horn sounded by operator? If so, to what extent? No.

Direction in which Car or Bus was going, North, East, South or West? East.

Direction in which Vehicle, Truck or Person was going, North, East, South or West? East.

Are you acquainted with others, who witnesses accident? If so, Please give their names and addresses. Wm. Meekins 2905 M. St.

Please state Fully All you saw and heard connected with Accident. I was going East on M. St. and wanted to turn north at 27th St. as I approached 27th St. I heard car behind me but do not know how far as I did not see it. It sounded as though it was running fast. I made hand signal and turned to left in 27th St. As I was crossing track car struck left rear side of truck and turned over on me. The boy Meekins who was on rear jumped off before car struck truck and was not hurt. I was taken to St. Phillip's Hospital and sent home Saturday Dec. 26th. Am being treated by Dr. W. F. Williamson. Truck was damaged and a large load of Groceries etc. broken and scattered on street.

Condition of street or track Cannot Say. Weather Not raining Were Vehicles Lighted

Do you think Operator of Car or Bus could have prevented the accident? Yes.

What is your full name?

Date Dec. 29 1931.

(Signed Rufus Holtz, Col)

Address Rufus Holtz

911 N. 29th St.

page 36 } By Mr. Robertson:

Q. Rufus, that is your signature down there, isn't it (showing a paper to the witness)?

A. Yes, sir.

Q. That is the paper you signed for Mr. Chappell?

A. No, sir.

Q. That is not the paper you signed?

A. It looks to me the writing was—you know—wasn't like that. It looks to me, but I don't know—I wouldn't dare—but that is my signature.

Q. That is your signature, but it looks like the writing up there is different?

Mr. Williams: He said the writing down there.

By Mr. Roberston:

Q. Show the jury which writing is different.

A. Right there.

Mr. Robertson: Indicating writing above signature.

Mr. Williams: Which is in the "Remarks" column.

Mr. Robertson: I ask that this be marked Defendants Exhibit No. 1. (The paper was accordingly marked and filed.)

By Mr. Roberston:

Q. Rufus, were the brakes on your car all right?

A. Yes, sir.

Q. Both the emergency brake and the service brake?

A. Yes, sir. I didn't have to use no brakes; I was turning across the street.

page 39 } Q. How fast were you going when you made that turn?

A. I guess I was going about the *rates* of five miles an hour.

Q. In how many feet could you have stopped?

A. I could stop it short because I wasn't going fast.

Q. I say, how many feet could you stop it at that point going at that speed?

A. I could stop it in ten or fifteen feet.

Q. Was the motorman ringing any bell?

A. I haven't heard no bell.

Q. You never heard it, and never saw it except down at 26th Street

A. No.

Q. When you went down there and talked to Mr. Eddie Flippen, do you remember Mr. Vaughn there being there?

A. Yes, sir.

Q. That was four or five weeks after you were hurt?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. In this letter which you wrote them—

Mr. Robertson: I object, your Honor please. I am going to ask that the jury be excused, because I submit it is getting before the jury an attempt to compromise, which
page 40 } we refused, and it ought not to be before the jury.

Mr. Williams: We are not trying to get it before the jury. We are trying—

Mr. Robertson: If your Honor please,—

Mr. Williams: Please let me make my statement to the Court.

The Court: Let the jury retire.

Note: The jury retired from the court room.

Mr. Williams: • If your Honor please, the evidence about this statement will show this: That they asked Rufus to send in a statement of his expenses and his injuries, and this letter was written by someone for him, and here is what it says: "Gentlemen: I do really appreciate the sympathy and interest your company has taken in my illness. Your representative was over to see me and instructed me to file a statement of all damages and expenses since the accident, and it is as follows:" there it is set out. "Gentlemen. I have not in my statement named any amount for body injuries. I cannot hear in one ear, and my back it hurt me now when I stoop over, and I couldn't tell whether there are permanent injuries or not, and I ask that you give me as much consideration as possible. I ask for \$1,000.00."

We want to show that they knew his hearing was bad on the 11th day of January, before he got out of bed.
page 41 } The Court: He can state whether he knew that or not, but not that letter.

Mr. Williams: I want to ask him whether or not he advised them, and if so, whether he advised them in the letter.

The Court: You can ask him whether he advised them, and whether by letter or not.

Mr. Williams: That is what we want to prove.

The Court: The statement you read to me there is not proper testimony.

Mr. Williams: I read the whole letter for your benefit; I was going to read this: "I can't hear in one ear."

The Court: Let him testify whether he informed them he could not hear and in which ear he could not hear. That is proper testimony.

Note: The jury returned to the court room.

By Mr. Williams:

Q. Rufus, did you advise the street car company whether you could hear or not?

A. I put it in the letter there.

Q. When was that?

A. When I wrote that letter to them.

Q. About what date?

A. When they sent to me for that statement I put it in there.

page 42 } Q. Can you remember the date?

A. I can't remember the date.

Q. Just refresh your mind—

Mr. Robertson: If your Honor please, we object to it. The defendant objects to any reference to the letter by counsel for the plaintiff, objects to any refreshing of his recollection by the letter, upon the ground that the letter is an effort by the plaintiff to effect a compromise settlement which was refused by the defendant. An attempt to prove a compromise settlement is improper.

The Court: The Court has already ruled out the letter except so far as the date is concerned when he advised the company with reference to his hearing in one ear.

Mr. Robertson: We except to the ruling.

By Mr. Williams:

Q. (Showing a paper to the witness) What is the date—two 1's like that?

A. The 11th.

Mr. Williams: I offer the word "January" from the letter as evidence of the date. I don't know of any other way of getting it in. He can't read, your Honor.

The Court: All right, I will let you put in January 11th, the date at which he notified the company.

Mr. Robertson: For the purposes of the record, page 43 } the defendant renews its objection and exception for the reasons heretofore stated.

By Mr. Williams:

Q. On January 11th did you have a lawyer?

A. Nobody—no lawyer or nobody.

Q. You hadn't gotten away from your home at that time

A. No, sir.

Q. You were still in bed?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. You have three lawyers now, haven't you?

A. They are mine, all right.

page 44 } DR. WILLIAM F. WILLIAMSON,
a witness on behalf of the plaintiff, having been
duly sworn, testified as follows:

Examined by Mr. Williams:

Q. Will you state to the jury your name and your occupation, please?

A. William F. Williamson, physician.

Q. You are a graduate of what school, Doctor?

A. University College of Medicine, Richmond, Virginia.

Q. How long have you been practicing?

A. Since 1905.

Q. Doctor, were you called on to attend Rufus Holtz in December, 1931?

A. I was.

Q. Will you state to the jury the time that you saw him and the attention you gave him and what was his condition at the time?

A. The first time I saw him I was called to 27th and M the morning of December 24th. When I got there they were putting him in the ambulance and carrying him to the hospital. I didn't see him any more until the 27th at his home. At the time I saw him he was complaining of pain in his back and shoulders and neck and legs. He was suffering with pain and nervousness, and over the areas which I examined him was some soreness and tenderness; that was all.

Q. About this neck—the left mastoid down?

A. He complained of soreness and tenderness over that area in the middle of which was his mastoid.

page 45 } Q. That was which side?

A. The left side.

Q. Had you treated him before that time—before his injuries on this occasion?

A. About a year or so.

Q. Had you ever known him to be deaf in that ear?

A. I don't recall it.

Q. He never complained to you about it?

A. Never complained to me about it.

Q. Has he complained of that left ear since?

A. He has complained of slight deafness in the left side.

Q. How long did you treat him?

A. I saw him about twice a week for about a month; from the 27th of December to the 25th of January, I think it was.

Q. And have you examined him since?

A. I saw him once or twice since at the office.

Q. In connection with his injuries from this accident?

A. The same complaints.

Q. In addition to the complaint of the lack of hearing in the left ear, did he have other complaints, and do his other complaints continue?

A. Just the complaints he had previously complained of, he repeated those complaints.

Q. In a man of his years would his complaints be a nor-

mal result of the injuries which you ascertained he received?

A. It is rather difficult for me to say, because page 46 } some men are different from others.

Q. Well, what about this particular man?

A. Well, I couldn't say positively.

Q. Do you believe his complaints are make-believe, or natural, or normal?

A. If he said he had an accident and was all right before and complained afterwards, I would attribute that as a result of the accident.

Q. Then, such complaints as he made to you you attributed to the injury, from the history?

A. From the history, yes.

Q. What is the amount of your bill. Doctor, for all?

A. About \$29.00.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Doctor, what did you, in your opinion as a physician, regard the extent of his disability at during the time you treated him?

A. You mean the degree?

Q. Yes.

A. Well, I don't know that I could answer that positively.

Q. Do you mean you don't know to what extent he was disabled?

A. No, I couldn't say. The man complained of these pains and aches without any abrasions of the skin. page 47 }

Q. There were no abrasions of the skin?

A. No, sir. I saw him two or three days after he came from the hospital. I don't know whether he had them before or not.

Q. You couldn't see from looking at him any signs of injuries?

A. No, sir, just the tenderness he complained of.

Q. But you didn't see any bruises or abrasions on him?

A. No.

Q. And the accident happened on the 24th; the testimony is that he came back to his home from the hospital the 26th; and when did you see him?

A. The 27th.

Q. If he had had abrasions and bruises on the 24th would they have still been visible to your eyes on the 27th?

A. I should think so, if there was any depth to them.

Q. And you treated him over a period of about five weeks?

A. From the 27th of December to the 25th of January.

Q. Did you notice any deafness during that time except what he told you?

A. Just what he told me.

Q. Was it noticeable in your conversations with him?

A. Not that I noticed.

Q. You did not notice any differences in the deafness before and the times you had talked to him before the accident?

A. No.

page 48 } Q. Did you have any X-rays made?

A. No.

Q. You did not consider them necessary?

A. No.

Q. Did you call in any ear specialist?

A. No.

Q. You did not consider that necessary?

A. No.

Q. So far as you know, you are the only doctor he has had?

A. I think so, outside of those at the hospital.

Q. And your entire bill for everything you did for him was only \$29.00?

A. That is all.

Q. As far as you know he is all right now?

A. As far as I know, just from the complaints.

Q. As far as you know he was all right when you quit treating him at the end of five weeks?

A. Only he was complaining of these aches and pains—that is all.

Q. And you couldn't see any physical signs of them?

A. No.

Q. Do you know when he returned to work?

A. I don't know positively. I discharged him around the 25th of January.

Q. Do you know whether or not he went to work about that time?

page 49 } A. I couldn't say.

Q. You have never seen him professionally since?

A. Yes, I have seen him since the 25th of January, twice, in the office.

Q. When was that

A. I don't remember the dates, but in the past month, I think. He came there complaining still with the left side of his head and back.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Doctor, it is not very easy to see pain, is it?

A. No, sir.

Q. In examining a person such as Rufus who has had these aches and pains, upon pressure you note tenderness, do you not?

A. Yes, sir.

Q. That is objective. in a sense?

A. Yes, sir.

Q. That is one of the things that you noticed when you treated him and examined him?

A. Yes, sir.

page 50 } RE-CROSS EXAMINATION.

By Mr. Roberston:

Q. Doctor, if you examined me and pressed me around in different places and I flinched, that is evidence of tenderness, isn't it?

A. I would take it for granted it was.

Q. And you would accept it as pain?

A. Yes, sir.

Mr. Robertson: Is that all of your medical testimony?

Mr. Williams: Yes, sir.

Mr. Robertson: We will not put Dr. Herring on then.

WILLIE MEEKINS (colored),

a witness on behalf of the plaintiff, having been duly sworn,
testified as follows:

Examined by Mr. Williams:

Q. Please tell the jury your name.

A. Willie Meekins.

Q. Where do you live?

A. 2905 M Street.

Q. Willie, were you working for Rufus last December?

A. Yes, sir.

Q. Where had you gotten on the truck?

A. In the front of the store.

page 51 } Q. Now, just tell the jury, when Rufus started
to make his turn do you know whether he held out
his hand?

A. Yes, sir.

Q. How do you know that?

A. I seen him with his hand out.

Q. Just tell what you saw.

A. Just after we started off from the store I jumped on the truck. I seen the street car at 26th Street, and then I looked around and seen Rufus' hand out, and I turned back around towards the street car; I seen the street car conductor with his head down. And just as we got to 27th Street, Rufus ready to make the turn and had got most of the truck over the track except about three or four foot, and then he hit him.

Q. Now, on what part of the truck were you?

A. Rear.

Q. Were you standing or sitting?

A. Standing.

Q. Standing on what?

A. On the step.

Q. There is a step on the back of the truck?

A. Yes, sir.

Q. That is what you were standing on?

A. Yes, sir.

Q. Now, when you saw Rufus with his hand out, how far was his truck from 27th Street?

page 52 } A. About forty-five or fifty feet.

Q. When you saw it?

A. Yes, sir.

Q. And where was the street car at that time?

A. A little way past 26th Street.

Q. I interpret that as the—

Mr. Robertson: We object to counsel interpreting the testimony of the witness, and repeating it.

The Court: Objection sustained.

By Mr. Williams:

Q. Now, Willie, as you saw the street car down there a little way past 26th Street and Rufus had his hand out, then what did you do?

A. I turned right around the way I was.

Q. Turned around to look which way?

A. Towards the street car.

Q. Then what did you do?

A. I seen the man with his head down, and I thought he had seen Mr. Rufus when he held his hand out.

Q. Now, just tell then what you saw happen—the man with his hand—

Mr. Robertson: I object to counsel disregarding the ruling of the Court and summarizing the testimony.

Mr. Williams: I am not summarizing.

The Court: You have asked him twice to tell what he saw and he has told it twice. Now you are asking page 53 } him the third time.

Mr. Williams: The events that I want in there,—if your Honor please.

The Court: If there is anything he left out, he can tell it.

By Mr. Williams:

Q. After you saw the motorman with his head down, tell then what the automobile did and what the street car did.

A. After I saw him with his head down, I thought he saw Mr. Rufus when he held his hand out, and Mr. Rufus went to make his turn and the street car conductor got to the corner, it looked like he noticed him when he got to the corner and got up to reach for the brakes and slow down the rate of speed he was going, and hit Mr. Rufus at the rear end of the truck, and I jumped off.

Q. He did not look up until he got to 27th Street?

A. No.

Mr. Robertson: I object to leading the witness.

Mr. Williams: I didn't know how to ask the question.

The Court: All right, I will let that pass.

By Mr. Williams:

Q. When did you get off the truck?

A. After it hit—when it hit.

Q. When the street car hit the truck?

A. Yes; sir.

Q. You didn't get off before that?

page 54 } A. No, sir.

Q. How much of the truck—show by your hands or any other way you want—was struck by the street car?

A. About that much (indicating with his hands).

Q. Now, hold your hands still and let's measure that.

Mr. Williams: But I want to see that.

The Court: He has already stated it in feet.

Mr. Williams: But I want to see that.

Note: The distance indicated by witness was measured by Mr. Williams.

Mr. Williams: It is about two feet and one inch.

Q. Now, when the street car hit the truck, then what happened?

A. I jumped off and the truck turned over.

Q. Where was Rufus?

A. Rufus was down under the truck.

Q. What became of his produce there in the truck?

A. It spread out in the middle of the street.

Q. Did you attempt to gather it up or anything of that kind?

A. Yes, sir.

Q. Did you gather any of it up?

A. Yes, sir.

Q. How much did you gather up?

A. I don't know.

Q. Do you know how much you got up—did you get up all of it?

page 55 } A. No, sir.

Q. Did you get half of it up?

A. No, sir, didn't get half of it up.

Q. Why?

A. Some of it was ruined and some people got some of it.

Q. Was there a big crowd around there

A. Yes, sir.

Q. Many folks from the neighborhood there?

A. Yes, sir.

Q. Did you get a third of it up?

A. Yes, sir, I got about a third of it.

Q. What did you do with it?

A. Put it on the truck.

Q. And where did you carry it?

A. The boy drove it back to the store.

Q. Now, the weather was clear, there was no rain or anything, was there?

A. No, sir.

CROSS EXAMINATION.

By Mr. Robertson:

Q. How old are you, Willie?

A. I am sixteen now.

Q. How near Rufus do you live?

A. About a block and a half.

Q. Were you working for him when this accident happened?

page 56 } A. I was working for him that day.

Q. You didn't help to nurse him any after he got hurt?

A. Yes, sir, I went up to his house and seen him.

Q. Did you help to nurse him?

A. I went to the doctor's place for him.

Q. Who was nursing him when you would go there to see him?

A. The lady living upstairs.

Q. What is her name—Miss Turner?

A. Yes, sir.

Q. Would she stay there and nurse him, or just come down and help him out?

A. I don't know. I didn't stay there.

Q. Did you see her there every time you went there?

A. Yes, sir.

Q. Would she be downstairs, or upstairs where she lived?

A. She would be downstairs where he was.

Q. Are you working for Rufus now?

A. No, sir.

Q. Where do you work now?

A. Nowhere.

Q. Were you on the seat with Rufus?

A. I was standing on the back of the truck.

Q. Were you talking to him?

A. No, sir.

Q. Now, Willie, do you know Mr. Chappell that works for the Power Company, a white-haired gentleman?

page 57 } A. No, sir.

Q. Did a gentleman from the Power Company come and talk to you about this accident and ask you how it happened?

A. Two men—two fellows come about it. I don't know whether they was from the Power Company.

Mr. Robertson: Ask Mr. Chappell to come in.

Note: Mr. Chappell was called into the court room.

Q. Did that gentleman (indicating Mr. Chappell) come and talk to you and ask you how the accident happened?

A. Yes, sir, I think so.

Mr. Robertson: Go out, please, Mr. Chappell.

Note: Mr. Chappell retired from the court room.

Q. And he came to you about the 30th of December, about six days after the accident happened?

A. I don't know about that.

Mr. Williams: Remember this is direct examination by you. I object to it.

By Mr. Robertson:

Q. Do you remember when Mr. Chappell came to see you about this accident? Did you tell him the first time you looked back there he was in ten or twelve feet from the truck and you jumped off the truck to keep from getting hit?

A. I jumped off the truck after it hit.

Q. I say, do you remember telling that gentleman that the first time you looked and saw the street car it was within ten or twelve feet of you and you jumped off the truck to keep from getting hit?

A. No.

Q. What did you tell him?

A. I told him after the street car hit the truck then I jumped off.

Q. How near the truck did you tell him the street car was the first time you saw it?

A. On 26th Street.

Q. Was west of 26th Street, crossing 26th Street, or east of 26th Street?

A. It wasn't east of 26th Street; it was pretty near east of 26th Street.

Q. It was west of 26th Street?

A. Between east and west.

Q. It hadn't crossed over 26th Street?

A. No.

Q. And Rufus was then making his turn, was he?

A. No, sir, he wasn't making his turn then.

Q. What was he doing?

A. Holding out his hand, getting ready to make his turn.

Q. And he was within forty or fifty feet of 27th Street?

A. Yes, sir.

Q. How fast was the truck running?

A. It wasn't going fast.

Q. About how fast do you think it was going? Was it going five miles an hour?

page 59 } A. Going about four—three or four, something like that.

Q. And before he could get down there and make the turn

the street car ran from clear down there west of 26th Street and hit him on the rear end of the truck?

A. I didn't say it was on the west side of 26th Street.

Q. Which side did you say?

A. I said pretty near on the east side.

Q. Do you say it was crossing 26th Street?

A. Yes, sir.

Q. Before Rufus could make his turn it ran down there from 26th Street and hit the truck?

A. The street car was running pretty fast.

Q. I say, before Rufus could make his turn it ran from 26th Street to 27th Street and hit him?

A. He was almost across the track before it hit him.

Q. It hit him before he made his turn, didn't it?

A. Yes, sir.

Q. Didn't you tell Mr. Chappell that the first time you looked and saw the street car it was within ten or twelve feet of the truck, and you saw that it was going to hit the truck and you jumped off to keep from getting hurt?

A. No, sir.

Q. Didn't you tell Mr. Chappell the first time you saw the street car it was within ten or twelve feet of the truck?

A. No, sir.

Q. Did you tell Mr. Chappell anything about page 60 } seeing the motorman with his head down?

A. Yes, sir.

Q. How did you happen to remember that?

A. I seen him.

Q. Did you tell Mr. Chappell that?

A. Yes, sir, I told him that.

Q. You told him that you saw the motorman with his head down and Rufus making his signal for the turn?

A. Yes, sir.

Q. Did you see the motorman looking down at 26th Street?

A. He wasn't looking down then.

Q. And Rufus was down there signaling to make the left turn?

A. Yes, sir.

Mr. Williams: If your please, he has been all over that a number of times.

The Court: Don't let us repeat.

By Mr. Robertson:

Q. When did the motorman begin to look down?

A. About middleway of the block.

Q. Did he look straight down, or did he look sideways when he looked down? Did he look down like this, or look down to one side or the other?

A. Looked down like he was counting some change.

Q. He looked straight ahead until he got midway of the block and Rufus was making the turn, giving the page 61 } hand signal, and when he got midway of the block he looked down like he was counting some change?

A. I wasn't looking at him when he commenced looking down.

Q. When he was down there at 26th Street you saw him looking straight ahead?

A. Yes, sir.

Q. There was nothing to keep him from seeing you as well as you could see him, was there?

A. No, sir.

JAMES EASLEY (colored),
a witness on behalf of the plaintiff, having been duly sworn,
testified as follows:

Examined by Mr. Williams:

Q. Tell the jury your name.

A. James Easley.

Q. Where did you live last December?

A. 622 North 29th Street.

Q. Did you know Rufus Holtz at that time?

A. Yes, sir.

Q. Did you see the street car when it struck his automobile truck?

A. Yes, sir.

Q. Just tell the jury whereabouts you were at page 62 } the same.

A. 27th and M.

Q. On which corner?

A. On the south side going down.

Q. Meaning going east, or west?

A. Going west, on the way up town.

Q. Were you east of 27th, or west of 27th?

A. Well, right on the corner.

Q. Just tell the jury what you saw and what happened?

A. Well, I was on the corner. I saw the street car at 26th and M. He was pulling from the store until he got most to the corner, he pulled to the track to make his turn, and I saw the car was going to hit him, but the motorman was look-

ing down and he couldn't stop his car. He would have hit him with harder force if he hadn't looked up when he did.

Q. Did Rufus give a signal of his turn?

A. Yes, sir, held out his left hand.

Q. How far was he from 27th Street when he gave that signal?

A. A little longer than this room.

Mr. Williams: Now, may we step that off?

The Court: Do it later; I can't be having you making illustrations and stepping off things.

Mr. Williams: Can we agree it is fifty-two by eight-three feet?

The Court: The room sixty by eighty.

Mr. Williams: It is agreed, Mr. Robertson—
page 63 } Mr. Robertson: I don't agree to anything. You
can put it in there.

Mr. Williams: I want to put it in there the way the witness indicated, which is sixty feet, the width of the court room.

By Mr. Williams:

Q. At what point was it that the motorman looked up?

A. Looked up on the other side before he got across, as Rufus was going across.

Q. What do you mean by "the other side"?

A. On the other side of his street; when he made his turn he looked up.

Q. He looked up at the west side of 27th?

A. Yes, sir.

Q. Now, how much did Rufus' truck get by before it was hit?

A. Maybe all of it got by—just hit him in the rear end.

Q. Was that the left or right rear end?

A. The left.

Q. Did you see the boy, Meekins?

A. I noticed him standing up there; that is the onliest thing I know.

Q. What happened after the street car struck the truck?

A. The motorman got out and went to a lot of white people there to get witnesses.

Q. What happened to the truck?

A. Turned over, and the produce all over the
page 64 } street.

Q. Did you notice anybody take up the stuff or anything?

A. Little children was picking up stuff, rabbits and stuff, and walnuts and stuff.

Q. Did you notice Rufus was carried away to the hospital?

A. I stayed there until they carried him away.

Q. Whom do you work for?

A. P. Lorillard Company.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Do they call you James, or Jim?

A. Jim.

Q. What do you do for P. Lorillard Company?

A. Trim bundles.

Q. How old are you?

A. I will be forty years old my next birthday.

Q. You say that when the motorman started across 27th Street there he was looking down?

A. He was looking down.

Q. You say Rufus when he commenced to make his turn?

A. I saw him hold his left hand out to make his turn.

Q. You say that when you saw him you saw the car was going to hit him?

A. Seen the car was going to hit him.

Q. If the motorman had been looking straight ahead you don't think it would have hit him as hard?

page 65. } A. It wouldn't have hit him as hard. If he had hit him with the force he was coming he would have tore Rufus and the truck all to pieces.

Q. I understand. You say when Rufus—

A. When he held out his hand to make his turn the street car was about 26th Street. The car was coming kind of fast. The motorman held up his head and he tried to put on his brakes all at once.

Q. When Rufus commenced to make his turn the street car was down at 26th Street?

A. Down at 26th Street.

Q. Was it west of 26th Street, across 26th Street, or east of 26th Street?

A. Right by the school.

Q. I don't know where the school was.

A. 26th and M.

Q. Had the street car, when you saw it, gotten to 26th Street and crossed over it?

A. Coming to 26th Street.

Q. And had not crossed over it?

A. No, sir.

Q. And Rufus was then commencing to make his turn?

A. Yes, sir.

Q. How fast was Rufus running?

A. He was running slow.

Q. About how many miles an hour?

page 66 } A. I don't know; I know he was running slow.
I don't know much about automobiles.

Q. Was he running about as fast as you could walk?

A. About as fast—I am lame in one leg.

Q. Was the street car coming pretty fast?

A. Yes, sir.

Q. How fast do you think it was coming?

A. I couldn't tell you because I don't know much about the speed, but I know he was coming pretty fast.

Q. Anyway, when Rufus commenced to make his turn, traveling about as fast as you can walk, the street car ran from 26th Street and came down there and hit him before he could make his turn?

A. He had made his turn.

Q. But before he could get off of its eastbound track?

A. Yes, sir.

Q. Did you notice what the motorman was doing when he got off 26th Street?

A. I was looking at both of them. The motorman was looking down and Rufus was holding out his left hand.

Q. Were you looking at the motorman when he started across 26th Street and looking at Rufus at the same time?

A. I was looking direct towards them.

Q. You were looking at the motorman coming across 26th Street and Rufus making a turn across 27th Street?

A. I was watching the car and the truck both
page 67 } at the same time.

Q. They were a block apart, one of them east and one west, and you kept your eyes on them both at the same time?

A. Yes, sir.

Q. You were standing there on the west side of 27th Street?

A. I was on the south side of M Street going down.

Q. Which way were you facing?

A. I was facing towards the way the car was coming.

Q. Which way was the motorman looking when he started across 26th Street?

A. He was looking down the whole time I seen him.

Q. Did you watch him all of the way through the block?

A. I saw him when he come in the block between 26th and 27th.

Q. I mean did you watch him all of the way from 26th to 27th Street?

A. No, I didn't watch him all of the way. I watched him when I seen he was going to hit the truck.

Q. Was he looking down every time you watched him?

A. Every time he was looking down.

Q. Did you hollo out to Rufus and tell him to watch out

A. No, sir.

Q. That is an ordinary block there?

A. Yes, sir, that is a city block, all right,

Q. Do you know Mr. J. H. Griffin that lives around there in that neighborhood?

A. The only Griffin I know is a doctor—he is page 68 } dead.

Q. Did you happen to look up 27th Street there. any way, or M. Street, while you were standing there?

A. No, sir, I looked the way I was going all the time.

Q. You didn't see anybody come walking down the east side of 27th Street?

A. The only fellow I seen was a white fellow that helped me lift him out of the car.

Q. This colored boy—what part of the truck was he on?

A. I couldn't tell you because I didn't see behind the truck until the truck was turned over.

Q. Was anybody sitting up in front with Rufus?

A. No, sir.

Q. How long have you known Rufus?

A. I don't know exactly how long; I have been knowing him a good long while.

Q. How many years?

A. About twenty years, I reckon.

Q. How close to him do you live?

A. He lives in the 900 block, I live in the 600 block.

Q. You live about three blocks from him. Did you see the boy, Willie Meekins, when he jumped off the truck?

A. No, sir, I didn't see him when he jumped off. I seen him after he jumped off.

Q. Did you go around to see Rufus after the accident, at his home?

A. No, sir.

page 69 } Q. How did he find out that you knew about the accident?

A. Because my wife's uncle was working for him at the shop.

Q. What kind of work?

A. In the fish business.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Where was the street car when the motorman looked up?

A. It was coming across 26th Street, you see, and he looked up and then hit this truck.

Q. That was at 27th Street then?

A. Yes, sir.

Q. And he didn't look up until he was at 27th Street?

A. Yes, sir, it was at 27th Street.

RAYMOND MILBURN,

a witness on behalf of the plaintiff, having been duly sworn,
testified as follows:

Examined by Mr. Williams:

Q. Please tell the jury your name?

A. Raymond Millburn.

Q. Where did you live last December?

A. I live at 620 North 27th Street, right on the corner where
the accident happened.

page 70 } Q. Did you see the collision?

A. Yes, sir.

Q. Just tell his Honor and the jury what you saw.

A. I was standing just about three feet from the corner. I was going to the bank to get my check cashed that morning, and Rufus Holtz come up the street, going east on M to make a left turn on 27th Street. I saw him when he held his hand out and looked back. The street car, I imagine, must have been about the middleway of the square, and Rufus had gotten across the tracks and the back part of his truck was just going across the street and the man in the street car was looking down at the fare box or something and he looked up just in time to apply his brakes and keep from hitting him full force, and he hit the truck. I went over there and about that time a crowd had collected around there and they got him out and set him against an iron pole on the other car track.

Q. At the time you saw him holding his hand out, how far was he from 27th Street at that time?

A. He was in the intersection of the street and made his turn. I mean when he held his hand out he was right at the corner, and he made his turn in the middle of the street.

Q. Was he at 27th Street, or before he got to 27th Street?

A. No, sir, he was about fifteen feet from the corner when he held his hand out and looked back.

Q. That is when you saw him?
page 71 } A. Yes, sir.

Q. Did you see him just at the time when he held his hand out, or after he held his hand out?

A. I saw him before and after.

Q. You stated that the street car, when you saw him with his hand out, was about midway of the block?

Mr. Robertson: I object to leading him and summarizing.

The Court: Mr. Williams, if you understood him to say so, then he said so, and don't repeat it.

By Mr. Williams:

Q. Where was the street car when you first noticed Rufus holding his hand out?

A. The street car was just about the alley, middleway of the block.

CROSS EXAMINATION.

By Mr. Robertson:

Q. You say Rufus held his hand out and signalled for a left turn when he got within fifteen feet of the corner?

A. Yes, sir.

Q. What kind of work do you do?

A. What kind of work do I do?

Q. Yes.

A. Do I have to answer that question?

Q. I think so.

A. Well, my work—I follow railroad work.
page 72 } Q. What railroad?

A. Chesapeake & Ohio.

Q. What kind of work do you do?

A. Iron work.

Q. You live at the southwest corner of 27th and M Streets, don't you?

A. Yes, sir.

Q. And this little market that Rufus runs—did run, and now leases to a white man—is right back of your home, isn't it?

A. Yes, sir.

Q. How long have you known him?

A. Well, I haven't known him personally but I have known him like everyone else on Church Hill. I saw him peddling his fish and stuff on the streets, and know him to speak to him, that is all.

Q. Last Friday Mr. Vaughn, that gentleman sitting right there, came over to your house looking for your brother and ran into you and asked you to tell him what you knew about the accident, didn't he?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Did he say what he wanted to see your brother for?

A. Yes, sir, wanted him to be a witness.

page 73 } Q. Was it your brother, or had the summons been issued to you?

A. What I told Mr. Vaughn was this: Mr. Vaughn wanted to know if I saw the accident. I told him "Yes, sir". He wanted to know if I would be a witness for him. I told him I couldn't very well do it and tell the truth. Mr. Vaughn said "I want you to tell the truth".

Mr. Williams: That is our case, if your Honor please.

Mr. Robertson: If your Honor please, I have a motion which I think should be made in the absence of the jury.

The Court: All right, gentlemen, you may go out.

Note: The Court retired, with counsel, to chambers and the following motion was made:

Mr. Robertson: The defendant moves the Court to strike from the record and exclude from the jury all evidence introduced by the plaintiff, upon the ground that the evidence of the plaintiff himself convicts the plaintiff of negligence *per se* as a matter of law, and not as an issue of fact, and bars his recovery.

Note: This motion was argued by counsel.

page 74 } The Court: The Court overrules the motion.

Mr. Robertson: To which action of the Court the defendant excepts for the reasons stated in the motion.

Thereupon, at 12:50 P. M., the court was recessed until 2:00

AFTERNOON SESSION.

The court re-convened at 2:00 P. M., the expiration of the recess, with the same parties present.

Mr. Williams: If your Honor please, I just want to ask Mr. Milburn one question from where he is. Mr. Milburn, could you tell his Honor and the jury how fast that street car was running?

Witness Raymond Milburn: As far as I can say, about thirty or thirty-five miles an hour.

page 75 }

MARTIN L. BRANCH,

a witness on behalf of the defendant, having been duly sworn, testified as follows:

Examined by Mr. Robertson:

Q. Are you employed as a street car operator by the Power Company?

A. Yes, sir, I am employed by the Company.

Q. How long have you been a street car operator for the Company?

A. I have been working for the company seven years, going on eight.

Q. Were you the operator in charge of eastbound car No. 1539 that was in this collision with Rufus Holtz' truck at 27th and M Streets on the 24th of December, 1931?

A. Yes, sir, I was.

Q. About what time did that accident happen?

A. Around 9:10.

Q. Tell the jury what happened, the way you saw it there.

A. Well, I was coming up, going to the end of the line, going east. I was running around, I reckon, fifteen miles an hour, and when I crossed the street—well, I saw this truck going down the street and sort of checked up; I was moving around ten miles an hour, I judge. I got near this corner and he looked as if he wasn't going to turn, so I was ringing the bell and started on across. When I got about twenty feet, I judge, he turned across in front of me. I threw the car in emergency and stopped as quick as possible.

Q. When you came along there and saw the truck
page 76 } proceeding in the same direction that you were, was the truck straddling the rail, or was it to the right of your eastbound track?

A. He was driving on them in his place, about halfway between the rail and the curbing, like he should drive.

Q. Was he far enough to the right for you to pass by without hitting him if he had not attempted to make the left turn?

A. Yes, there was plenty of room.

Q. How fast do you think the truck was traveling when it made the turn?

A. I suppose it was making about seven or eight miles an hour.

Q. How close was the street car to the truck when the truck commenced to make the turn?

A. I judge about twenty feet.

Q. Did the driver of the truck give a hand signal that he was going to turn?

A. No, sir, he did not.

Q. Did he cut the corner when he turned?

A. No, sir; he drove a right good ways—rather far to turn, from the way I could see it. Looked like he went farther than he should have went; looked like he took a notion to turn when he was almost across.

Mr. Williams: I object to his opinion.

The Court: Don't state your opinion.

page 77 } By Mr. Robertson:

Q. When you threw the car into emergency, how far did the car run before it came to a stop?

A. Well, I was about twenty feet from him and had just cleared the rail, so I judge about thirty-five or forty feet.

Q. What part of the truck did the street car hit?

A. It hit right back of the front wheel.

Q. Did it hit the rear end of the truck, or the middle, or the front part more?

A. Well, the first part it hit, it hit right near the front wheel, and it looked like he kind of swung his car around and it sideswiped and turned him over.

Q. When the truck upset was it north of the eastbound track, or south of it?

A. It was laying on the westbound track.

Q. As you came through the block there which way were you looking—as you came from 26th Street toward 27th Street?

A. I was looking straight ahead noticing the truck.

Q. Were you counting any change?

A. No, sir.

Q. Were you looking down in the car?

A. No, sir.

Q. How far were you from the end of the line there?

A. I judge around eight blocks, eight or nine blocks; I wont say for sure.

Q. Did you have any passengers on your car at that time?

A. Not one; hadn't any at all.

page 78 } Q. Where was the truck when you first saw it?

A. When I first saw it it was about in the mid-

dle of the block. I think he must have started from his store, you see.

Mr. Williams: I object to "think".

By Mr. Robertson:

Q. Don't tell what you think. Where was the street car then?

A. Well, I was just a short distance back.

Q. About how far back?

A. I judge around a hundred feet.

CROSS EXAMINATION.

By Mr. Williams:

Q. Did you see the automobile truck start from the curbing?

A. Yes, sir, I saw it start when he went to turn.

Q. What was that?

A. I saw him start just as he went to turn. He didn't start before he turned.

Q. Maybe you don't understand my question. Did you see the automobile truck start from in front of that little place there halfway between the alley and 27th Street?

A. I saw the truck there, but I can't say I saw it start.

Q. Do you mean you don't know whether it started from that point or not?

A. No, I couldn't say whether he started from that corner or not.

page 79 } Q. So when he started off you were not looking that way, were you?

A. Well, I was looking across up the track on that side. The first time I saw it I was about a hundred feet behind the car and he was driving down between the rail and the curbing.

Q. Where was his truck with respect to 27th Street when you first saw it, if you didn't see him start up?

A. He was in the center the the block when I first saw him.

Q. Was his car standing or moving at that time?

A. It was moving the first time I saw it.

Q. Why did you hesitate there before you answered that question, Mr. Branch? You, each time, pause momentarily. Do you have a real fresh recollection of what you say there, or not?

A. Yes, sir, but I don't want to speak too quick.

Q. You want to take your time?

A. Take my time, yes, sir.

Q. How wide is the street from the car track to the curbing on the south side of M Street, between the alley and 27th, would you say?

A. I don't understand what you mean.

Q. How far is it from the south rail of the eastbound track to the curbing on the south side of M Street there?

A. It is just an ordinary space; I don't know, I didn't measure it.

page 80, } Q. Is it ten feet, or twelve feet, or eight feet, or what?

A. I don't know.

Q. Your car overhangs the track a foot and a half, doesn't it?

A. I couldn't say. I have never measured it.

Q. How long have you been driving a car?

A. I have been working with the Company going on eight years.

Q. How long have you been driving the cars?

A. About twelve months.

Q. And before that what did you do?

A. I was a conductor.

Q. Do you mean to tell the jury now, after those seven years you have observed the street cars overhanging the tracks, that you can't tell them how far they overhang the track?

A. Well, I have never measured it.

Q. Can you give them an approximation of how far they overhand the tracks?

A. I judge maybe fourteen, fifteen or sixteen inches.

Q. Maybe eighteen is more correct, isn't it?

A. I couldn't say.

Q. At the time of this collision you had only been driving four months, hadn't you?

A. Around five months at that time.

Q. Is there an alley in the middle of that block?

A. I think there is.

page 81 } Q. How long had you been running on this particular route at that time?

A. Well, I can't say. I worked on that route about as much I did any other.

Q. And you were just as well acquainted with that as with any other street?

A. Yes, sir.

Q. Did you notice there was a little fish place there on the

east side of the alley in the middle of the block between 26th and 27th Streets?

A. I remember there was a little store there; I don't know what it is.

Q. Did you see the truck standing in front of this store as you came around 25th street?

A. I can't say whether it was standing or moving.

Q. When you come around 25th you come from Jefferson into M?

A. Somewhere around there.

Q. It comes in at kind of an angle, doesn't it?

A. Yes, sir.

Q. Did you notice the truck down there at 25th when you came around there?

A. I was about a hundred feet away from this truck when I saw it.

Q. Did you see the truck when you were down at 25th Street, standing in front of this little fish place?
page 82 }

A. I can't say. I don't remember seeing it.

Q. Did you see it when it started from the curbing into the street and went east?

A. No, it was about the same distance all the time.

Q. And how fast was it going?

A. I don't judge it was going more than seven or eight miles an hour, no way.

Q. And how fast were you going?

A. At that time I judge I was going around fifteen miles an hour.

Q. And you saw between your car track and the curbing a truck going east at seven or eight miles an hour?

A. Yes, sir.

Q. And then what did you do?

A. Well, I slackened up.

Q. To what?

A. Around ten miles an hour.

Q. He was how far in front of you when you were going ten miles an hour?

A. I judge he would be about twenty-five or thirty feet.

Q. Now, twenty-five or thirty feet away he was, and he was going eight miles and you were going ten?

A. I said seven or eight.

Q. Excuse me—seven or eight. Now, tell us what happened.

A. Well, when I saw this truck I slacked up the speed of my car, sounding the gong all along, and when I
page 83 } got to this corner he made no effort to turn, so I judged that he was not going to turn, so I started

on across. About the time I got in twenty feet of him he took a notion to turn right short, give no hand signal at all, and before I could stop I hit him.

Q. When you got to 27th Street he was still running on his side of the street, wasn't he?

A. Yes, sir.

Q. At what point after that was it that he began to make his turn?

A. He was in the center of the street before he began to turn.

Q. He did not begin to draw to the center of the street until after you had gotten to the house line of 27th Street, did he?

A. No, sir.

Q. How wide is 27th Street—do you know that?

A. No, sir, I don't know.

Q. 27th Street is just about twenty-five or thirty feet wide?

A. Just the ordinary width of street.

Q. You said you were twenty feet away when he held out his hand?

Mr. Robertson: He never said that. He said he never made any hand signal at all.

page 84 } By Mr. Williams:

Q. Just cut out "holding out his hand"—when he began to make his turn?

A. When he began making his turn I was around twenty feet of him.

Q. And you had already reached 27th Street then, hadn't you?

A. Yes, sir, right at the street.

Q. And he was twenty feet ahead of you, well on the right-hand side of your tracks?

A. He was turning. He was just as far over as he could go to turn—just as far east as he could go to turn north.

Q. On the right-hand side of your car?

A. On the right-hand.

Q. Now, how many times did you gong your bell?

A. I continuously gonged.

Q. What for?

A. For the simple reason to keep him from turning in front of me, to let him know I was coming.

Q. You just kept gonging your bell in case he would absent-mindedly turn in front of you?

A. To let him know I was coming.

Q. Did you see the boy up on the back of the truck?

A. He wasn't in the back.

Q. Where was he?

A. He was sitting in there with the driver.

Q. Whereabouts was that

page 85 } A. On the front seat.

Q. Have you any doubt about it?

A. No, sir.

Q. What kind of truck was it?

A. A Ford.

Q. Did it have anything on it?

A. Had a bunch of stuff on it—I don't know, I never paid no attention to what he had on it—

Q. Oysters were strewn on the street?

Mr. Robertson: Wait a minute. Read his answer.

Note: The reporter read the witness' answer.

By Mr. Williams:

Q. Do you want to say something else?

A. I never noticed what it was. It was groceries like they sell on the street. I didn't notice what it was, I never paid any attention to what it was.

Q. What time of day was it?

A. I can't say because I don't remember.

Q. Did you tell Mr. Robertson a minute ago it was between nine and ten o'clock?

A. It was just about ten minutes after nine o'clock.

Q. Why did you tell me you didn't know?

A. I thought you said the weather.

Q. What time of day was it?

A. It was ten minutes after nine.

Q. And you don't know what kind of day it
page 86 } was?

A. No, I don't know whether it was a cloudy day, but I think it was cloudy.

Q. Did you apply your sand?

A. Yes, sir.

Q. How did you throw your car into emergency?

A. In the proper way.

Q. What do you call "the proper way"—do you know how?

A. I threw it clear across—threw the handle clear across and give it all.

Q. Give it all of what?

A. All of the air—all of the brake we have, and sand.

Q. How do you do that—throw the brake around and throw this around, and do like that?

A. No; when you apply the brakes for emergency you throw it clear around and that goes in emergency.

Q. Was that a so-called "safety car"?

A. It wasn't so-called—it was a safety car.

Q. The way to apply an emergency with a safety car is to take your hands off of it?

A. That is one way.

Q. Isn't that the way to stop a car in an emergency?

A. No, sir; one way is as quick as the other.

Q. In other words, if your motorman would fall dead wouldn't your car stop—isn't that what you advertise?

A. One way is as quick as the other, but I figured that was the quicker way.

page 87 } Q. You didn't take your hands loose from the mechanism so it would stop the quickest way?

A. I stopped it the way I know.

Q. Did they tell you that was the quickest way, what you did?

A. I understand.

Q. You understand that is the quickest way?

A. Yes, sir.

Q. Where, then, does it get its name from, if that is the safest way?

Mr. Robertson: I object. This man is not an expert.

The Court: This man is not an expert; he has not been qualified as an expert. This is not an expert question; this is simply a question as to what method he used in stopping the car.

By Mr. Williams:

Q. How many times did you hit the automobile?

A. I hit it one time.

Q. Now, where did you hit it the first time, or the one time first?

A. I hit it near the front wheel, and by swaying around like that it just rubbed right on up and turned over.

Q. What rubbed up what?

A. The side of the car, the end where it hit it.

Q. What end of your car hit the front of the automobile?

A. The front end.

page 88 } Q. Right or left end?

A. It was hit first near the center and then come around on the left corner, was the last, that turned him over.

Q. In other words, the center of your front and left corner hit the automobile; is that right?

A. Yes, sir, center and left corner.

CHARLES W. MEYER,

a witness on behalf of the defendant, having been duly sworn, testified as follows:

Examined by Mr. Robertson:

Q. Mr. Meyer, can you hear me all right? I will come around there. If I talk too loud or not loud enough, will you yet me know? Mr. Meyer, what is your business?

A. Automobile repair and body business.

Q. How long have you been in that business?

A. I have been about twenty years in the automobile business.

Q. What is the name of your concern?

A. A. Meyer & Son.

Q. At the request of the Virginia Electric & Power Company, did you make an inspection of a Ford truck belonging to Rufus Holtz that had been in a collision with a street car on the 24th of December, 1931?

page 89 } A. Yes, sir.

Q. Talk a little louder so they can hear you. Did you report the result of your examination to the Virginia Electric & Power Company?

A. Yes, sir.

Q. Is that the report that you made (showing a paper to the witness)?

A. Yes, sir.

Mr. Robertson: Shall I read it, your Honor?

Mr. Williams: O. K.

Note: The paper was read by Mr. Robertson and filed, marked Defendant's Exhibit No. 2.

By Mr. Robertson:

Q. Mr. Meyer, can you tell from those items of the statement what part of the side of the truck was hit?

A. Yes, sir, it hit on the left side and the rear end of the body.

Q. How far would you say from the rear end?

A. Well, beginning at the rear. It was really at the end. It was struck from the rear end, on account it hit the back bar which extends out about four or five inches from the

body. That is what broke that back bar. The collision or hit seemed to be right directly from the rear end.

Q. How far towards the front on the side did it extend—could you tell?

page 90. } DEFENDANT'S EXHIBIT NO. 2.

Broad & 25

72710

12/29/31

A. MEYER'S SONS
Body Builders Since 1870
Distributors of
Mifflinburg Bodies
For Light Deliver and One and
One-half Ton Truck
112-20 South 8th Street

Repairing
Painting
Lacquer-Veneer
Spraying
A Complete Auto
Service Under
One Roof

Distributors
of
Republic
Stag-Hound
Truck Tires

Richmond, Virginia.
Dec. 30, 1931.

Va. Elec. & Power Co.,
Claim Dept.,
City.

Gentlemen:

We hereby submit estimate to repair damages to 1927 Ford Ton Truck of Mr. Rufus Holtz, 911 N. 29th St., as follows:

1 new back body bar	4.00
Repair irons, 2 stays & set tailgate	3.50
Repair flare board & 1 new standard in top	3.00
1 New rear header board & repairs top frame	2.50
2 metal running boards & strgn. rear fenders	3.50
new top cover and mouldings	10.00
Straighten & line up body panels & top frame	12.50
1 Used front fender	3.00
	<hr/>
	\$42.00

Lic #T1759 Va-31. Hit on left side, rear end of body.
Foot brake no good, Hand Brake OK.

Very truly yours,

A. MEYER'S SONS
CHAS. W. MEYER

CWM:A

page 91 } A. No, I couldn't tell that. The body was turned
over from the lick; that was broken up and all
out of shape.

CROSS EXAMINATION.

By Mr. Williams:

Q. I don't think I want to ask any question. I just want to read that statement. I see you say it was hit here on the left side, rear end of body; that is so, isn't it?

A. Left side of the body and the rear end.

Q. That extends past the rear wheel?

A. Yes, sir.

Q. How long is that entire truck, from tip to stern, including the seat?

A. The body from the back is eight feet—ninety-six inches.

Q. I mean how much all over.

A. It runs about twelve feet.

Q. Are you talking about this particular truck?

A. This particular truck. A ton truck it runs nearly nine feet long, every one of them. They are ninety-six inches in back of the driver, then from the driver's seat, from the dash, it runs in the neighborhood of three, then of course the top extends over that. We figure the length over all is twelve feet with a loading space of eight feet.

Q. Does that include the step that the boy was standing on in the rear?

page 92 } Mr. Robertson: I object to that.

The Court: Cut out that part about the boy.

A. I couldn't say whether there was a step on the body or not.

By Mr. Williams:

Q. "One used front fender;" that was the right front fender where it turned over?

A. The right fender was bent up and smashed up.

Q. Where it turned over on that side?

A. Yes, sir.

S. M. CHAPPELL,

a witness on behalf of the defendant, having been duly sworn,
testified as follows:

Examined by Mr. Robertson:

Q. Mr. Chappell, are you employed in the Claim Department of the Virginia Electric & Power Company?

A. I am.

Q. In what capacity?

A. Investigator, claim department.

Q. How long have you been working with the Company?

A. Nine years.

Q. Where did you work before you commenced working with the Virginia Electric & Power Company?

page 93 } Mr. Williams: I object to it as being immaterial.
The Court: Are you qualifying him for expert testimony?

Mr. Robertson: I am trying to show who he is, and I am trying to show the position he has held for thirty-five years as relevant to show his credibility.

Mr. Williams: We object to that as being immaterial and irrelevant.

The Court: Whom he worked for is not a question of credibility. The only way you establish a man's character is by showing what his general reputation is.

Mr. Robertson: We offer that evidence to identify him, your Honor.

The Court: Well, he identifies himself. I don't think the evidence is relevant.

By Mr. Robertson:

Q. Mr. Chappell, were you assigned to investigate the claim of Rufus Holtz which has resulted in this case that we are trying here today?

A. I was.

Q. Did you interview him and get a statement from him as to the way in which this accident happened?

A. I did.

Q. Is that the statement that you got from him (showing witness Defendant's Exhibit No. 1)?

A. It is.

Q. In whose handwriting is the written part of page 94 } that *statement* appearing before the signature?

A. Mine.

Q. Whose is the signature?

A. His—it is his signature.

Q. Mr. Chappell, when did you get that statement?

A. On the 29th of December.

Q. Where were you when you took the statement?

A. At his home, 911 North 29th Street.

Q. Do you remember what time of the day it was that you took the statement?

A. I think it was along about—it was in the forenoon, before twelve o'clock; I couldn't give the exact time.

Q. Did you question him about the way the accident happened?

A. I did.

Q. Did you write down what he told you?

A. I did.

Q. Do you remember what he told you, Mr. Chappell, about the way the accident happened?

A. I do.

Q. Will you tell the jury what he told you?

A. Well, he said he was going east on M Street and wanted to turn north at 27th; that when he reached 27th Street he heard a street car behind him but did not see it; that it seemed to be running fast; and he made a hand signal and made his turn and the next he knew the car had struck him and turned him over in the street.

page 95 } Q. Did he say whether he ever, at any time, saw the street car that hit him before it hit him?

A. He said he did not see it.

Q. Did you write down what is written there at the time you interviewed him?

A. I did.

Q. Did you read it over to him before he signed it?

A. I did.

Q. Have you in any way changed what is written there since he signed it?

A. I have not.

Q. Can you tell whether, looking at it, it has been changed?

A. I could. I see no signs of a change there.

Q. Did you interview this colored boy, Willie Meekins, about this accident?

A. I did.

Q. Do you remember when you saw him?

A. The following day, December 30th.

Q. Where was he when you interviewed him?

A. At Rufus Holtz' house.

Q. Was Rufus Holtz present when you interviewed the boy?

A. He was.

Q. Did you ask the boy how the accident happened?

A. Yes, sir.

Q. What did the boy tell you?

page 96 } Mr. Williams: If your Honor please, has that
got anything to do with this case?

The Court: The boy was questioned, himself, on it. On
account of the credibility of the boy it is admissible.

By Mr. Robertson:

Q. What did the boy tell you about the way the accident
happened, Mr. Chappell?

A. He said that he was on the rear end of the truck; the
truck was running about a half a block ahead of the street
car, going east; when they reached 27th Street and Rufus
started to make the turn the car was from twelve to fifteen
feet behind them, and just as the turn was being made the
car struck the left rear of the truck and turned it over, and
as it was turning over he jumped off and escaped being hurt
by doing so.

CROSS EXAMINATION.

By Mr. Williams:

Q. He told you that he was on the back of that truck,
didn't he?

A. He did.

Q. On the step?

A. I don't know about the step—just said he was on the
rear of the truck.

Q. Now, you say in here that Rufus said the boy, Meekins,
was on the rear, jumped off before the car struck
page 97 } the truck and was not hurt; Rufus told you that?

A. He did.

Q. How could he see that?

A. I don't know how he saw it, but that is what he said in
his statement.

Q. You say Rufus told you that?

A. Yes.

Q. Do you carry a fountain pen with you?

A. Oh, yes.

Q. Why didn't you use a fountain pen?

A. Because it is our custom to use a pencil.

Q. Isn't it customary to take statements in pen and ink?

Mr. Robertson: I object to that, your Honor, as irrelevant.

The Court: Objection sustained.

By Mr. Williams:

Q. Now, you said Rufus signed this thing down here. Read his signature for us so that we will know what it is.

Mr. Robertson: I object. Rufus has admitted it was his signature.

The Court: The man identified the paper as bearing his signature.

By Mr. Williams:

Q. Everything here was signed in the presence of Rufus—everything was written on this paper?

A. It was.

page 98 } Q. And when did you write on there "Signed: Rufus Holtz, Colored"?

A. Well, I put that on afterwards, merely to show that the signature was different from my writing.

Q. Did you put it on there, or did you put it on in the office?

A. Probably in the office.

Q. And it looks just the same as most of that stuff written there—can you see any difference between it and what else is written in that "Remarks" column there?

A. No, there is no difference between this. There is a difference between that signature and my writing of the name "Rufus Holtz".

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. When you interviewed Rufus Holtz did he show any signs of being deaf?

A. Not at all. I talked to him in an ordinary conversation.

Q. Did he complain of being deaf?

A. He did not. He did not mention anything of the kind.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Did you get a letter from him in which he said he was deaf?

page 99 } Mr. Robertson: I object to that letter. That is the same old compromise proposition that your Honor has ruled out.

The Court: I have already let it in about notifying the Company of his deafness. You just hold it to that.

Mr. Robertson: The defendant excepts to the ruling of the Court for the reasons already stated.

By Mr. Williams:

Q. Did you get a letter dated January 11th from Rufus?

A. I did not.

Q. You were the investigator of this case, were you not?

A. I investigated it and turned it over to the claim department, the claim agent. After that I saw no further correspondence.

Q. You did not see the letter in which he said he had injured the hearing in his left ear?

A. I have never seen it.

E. H. FLIPPEN,

a witness on behalf of the defendant, having been duly sworn, testified as follows:

Examined by Mr. Robertson:

Q. Are you employed in the Claim Department of the Virginia Electric & Power Company?

page 100 } A. Yes, sir.

Q. How long have you been with the Company?

A. Eleven years.

Q. Did Rufus Holtz come to your office and tell you how the accident happened that resulted in this case?

A. Yes, sir.

Q. About when was it that he came there?

A. It was in the latter part of January, one evening.

Q. This year?

A. This year, yes, sir.

Q. What did he tell you?

A. He came up there to see me about settling the case. I got to talking with him as to how the accident happened—

Mr. Williams: Isn't all of this without any prejudice—

The Court: It is only for the purpose of the credibility of the witness and that is all.

Mr. Williams: I note an exception.

By Mr. Robertson:

Q. Just tell what he said in your office?

A. He explained to me in the presence of two men in our office that he was going east on M Street at 27th; that he heard the car coming and he let his car out and made a turn and the car hit him; that he didn't see the car until it struck him and turned it over.

Q. Who was present when he made that statement?

A. Mr. Vaughn and Mr. Chappell.

page 101 }

CROSS EXAMINATION.

By Mr. Williams:

Q. What time of day was it?

A. It was some time between two and four o'clock in the evening.

Q. What day in January?

A. I don't know the exact date. It was the latter part of January. It was about ten days after I had seen him at the City Hall.

Q. What was the occasion of his telling you if you already had a statement from him?

A. He didn't tell me. I had a statement from him, I had a signed statement from him about the accident.

Q. You had a signed statement in your file when you were talking about the accident?

A. Yes, sir.

Q. What was the reason that you were asking again?

A. I just wanted to ask him if that statement was correct.

Q. You just wanted to add another witness to your statement?

A. No, he just came in the office. I didn't take a statement from him.

Q. Did you tell him what had been written in there and his statement there?

A. I don't know as I read the statement to page 102 } him. I discussed the facts with him and from his statement to the witnesses we had.

Q. Why did he come up there?

A. Come up there to see me.

Q. You didn't go to see him?

A. No, sir.

Q. Had already gotten a written statement from him and didn't have to go to see him any more?

A. No, sir.

Q. And when he came up there to see you, then you went

over this same matter that you claimed to have in writing?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. How long have you known Rufus Holtz?

A. About twenty-five or thirty years.

Q. Did he complain of being deaf when he was in your office?

A. No, sir, he did not.

Q. Did he give any evidence of being deaf?

A. No, sir.

Q. Have you talked to him since the day he was in your office?

A. No, sir.

Q. When was the last time you saw him?

A. It was some time since Mr. Joseph was
page 103 } in the case. I saw him in Fulton one day on a
truck.

Q. Have you talked to him around the court house to-day?

A. No, sir, only when I spoke to him this morning.

Q. At any time you have ever talked to him has he given any indication of being deaf?

A. No, sir.

By a Juror:

Q. What is his general reputation during the time you have known him?

The Court: His general reputation for what?

The Juror: Truth and veracity.

The Court: All right.

A. I have never had any business dealings with Rufus. He used to run a store right in the neighborhood I lived in and my mother used to buy fish from him.

By the Court:

Q. He asked you what his general reputation was for truthfulness.

A. He never told me anything I know of.

Q. Do you know his general reputation? If you do, say it is good, or bad.

A. I don't know it.

page 104 }

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. You say you have been knowing him twenty-five or thirty years?

A. Yes, sir.

Q. And used to buy fish from him?

A. My mother used to buy fish from him when I was a kid.

Q. And you can't tell the jury his general reputation for truth and veracity in the neighborhood there?

A. No.

Q. Don't you know it is good?

A. I couldn't say it is good or I couldn't say it is bad.

Q. You have never heard anything against him, have you?

A. No, sir.

S. M. CHAPPELL,

recalled by the defendant, testified as follows:

Examined by Mr. Robertson:

Q. Mr. Chappell, were you present in Mr. Flippen's office in the latter part of January, this year, when Rufus Holtz came there and discussed with Mr. Flippen the way this accident happened?

A. I was.

Q. Did you hear what Rufus Holtz told him
page 105 } about the facts of the way the accident happened?

A. I did.

Q. What did he tell him?

A. It conformed exactly with what he had told me, as to not seeing the car at any time until he was hit, but that he heard it behind him just before he made that turn and it seemed to be running fast.

CROSS EXAMINATION.

By Mr. Williams:

Q. What was the occasion for his going over the facts again if you had it in writing already?

A. Mr. Flippen was just discussing it with him as to how it happened.

Q. Why was he doing that?

A. You will have to ask him that.

Q. If you don't know why can't you tell me this: Wasn't it just because you wanted to have two more witnesses in addition to the paper writing there as to what this man would say?

A. No, I think it was just more a matter of curiosity on Mr. Flippen's part.

Q. Mr. Flippen had it right in his file and that didn't satisfy his curiosity, did it?

A. I don't know whether Mr. Flippen had ever read it or not.

Q. That was put in the file, so that it was not page 106 } marked on your file here?

A. Yes, sir.

The Court. He has already said it was turned over to the claim department.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Was Rufus Holtz demanding payment for damages?

Mr. Williams: Wait a minute,—

The Court: You go to a certain point and say it is all right, and then you say it is not right. You have to go to a certain point and then stop. The objection to the question is sustained.

T. G. VAUGHN,

a witness on behalf of the defendant, having been duly sworn, testified as follows:

Examined by Mr. Robertson:

Q. Do you work for the Claim Department of the Virginia Electric & Power Company?

A. Yes, sir.

Q. How long have you worked for the Company?

A. Twenty-one years.

Q. And how long in the claim department?
page 107 } A. Three years approximately.

Q. Were you present in Mr. Flippen's office when Rufus Holtz came there and discussed the accident that results in this case with Mr. Flippen?

A. Yes, sir.

Q. Did you hear the conversation?

A. Yes, sir.

Q. What did Rufus say about the way the accident happened?

A. He said he was proceeding east on M Street and that he wanted to make a north turn, or left turn, at 27th Street,

and that he heard the street car coming and made his turn and the next thing that he knew that he was struck; and he also made the statement that he never saw the street car until after it struck him.

Q. Mr. Vaughn, did you go over to the home of Mr. Raymond Milburn last Friday afternoon and talk to him about this accident—that is the gentleman in the green shirt that testified here this morning, the one sitting right over there?

A. Yes, sir.

Q. How did you happen to go over there?

A. I was told by the operator it was possible that we could find a witness at that house; that he tried to get the gentleman's name at the time but couldn't get it, but felt confident that a man there saw it; and I went there on account of that information to try to secure any additional witnesses or information on the case.

page 108 } Q. Did you talk to Mr. Raymond Milburn at his home when you got there?

A. Yes, sir. That was not the man I was looking for, it was his brother; at least he said it was his brother.

Q. When you opened the conversation with Mr. Raymond Milburn, did you know he had been summoned in this case by the plaintiff?

A. No, sir.

Q. Now, tell the jury as near as you can remember it what your conversation was with him about this case.

A. I introduced myself to Mr. Milburn, told him who I was, and asked him if he knew anything about this accident. He said he did, that he saw it. I asked him would he mind to give me a statement of what he saw. He said "Not at this time". I asked what was his objection. He said "Well, what I want to know, who is going to pay me to testify in this case". I explained to Mr. Milburn that we did not pay people to testify but we did pay them for any time they lose in case they were called from their work. He said "I am not going up there and testify for fifty cents a day". He then said he had been summoned by somebody. I knew he had not been summoned by us and, therefore, I dropped the case.

Q. Did he say whether or not those that has summoned him had said anything about paying him?

A. Yes, sir. He said that he had talked to somebody about the case and that he asked them if he would be
page 109 } paid for his testimony and they told him it was against the law to pay a witness for his testimony and yet, in the face of that fact, they had summoned him and

unless they did pay him that they would be sorry that they did summon him.

Q. After he told you about being summoned, what did you do then?

A. I left the case then. That was all of the information we wanted.

Q. During the conversation did he open up and tell you what he knew about the accident?

A. Absolutely nothing about the accident whatever. I asked him repeatedly if he would mind telling me what had happened and he said he preferred not to.

CROSS EXAMINATION.

By Mr. Williams:

Q. Didn't you tell him, Mr. Vaughn, that you would be willing to pay him whatever price he was making—whatever price he named that he would earn if he would come and be a witness for the defendant?

A. No, I did not. I used this illustration: That we paid people for their actual lost time; if he was making \$2.00 and we used him for a day we would pay him \$2.00; if he was making \$5.00 and we used him for a day we would pay him \$5.00; which I explained to him had been passed on by page 110 } all of the courts in the city and we were allowed to do that.

Q. What day was it that you went over there to see him?

A. Last Friday afternoon.

Q. What is the date of that summons? (A paper was handed Mr. Williams by the Clerk.) This summons for him was issued on July 21st to testify for the plaintiff, and you went to see him on the 22nd, or was it the 21st?

A. I don't remember what date it was.

Q. Friday was the 22nd. You went to see him one day after he had been summoned for the plaintiff. Now, just what operator told you where you could find a witness there?

A. The operator who was operating the street car in this accident.

Q. Do you mean the witness Branch?

A. Yes, sir.

Q. Where were you when he told you that?

A. I was in Mr. Robertson's office in the Electric Building.

Q. Where did he learn it—do you know?

A. Where did he learn it?

Q. Yes.

A. His explanation to me was that he tried to get a man's

name that lived over there, and that he saw Mr. Milburn but he told me that was not the man, Mr. Milburn told me "You are speaking of my brother", but he didn't see it.

Q. This accident happened last December and that is the first time you learned anything about Milburn, page 111 } after he had been summoned by the plaintiff?

A. The first time I learned anything about anyone at that address. I didn't know the gentleman's name until I introduced myself.

Q. At that time he told you anybody that summoned him would be sorry?

Mr. Robertson: That is not quoting the witness correctly. He said that they summoned him, and if they didn't pay him for his time they would be sorry.

By Mr. Williams:

Q. Unless they paid him they would be sorry. You didn't know the name of the man you were going over there to see on the 22nd?

A. Hadn't the slightest idea.

Q. How did you happen to come to that corner?

A. Because the operator told me he saw a man come off of that porch at that corner house there.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Did he tell you whether or not he had asked the man to give his name?

A. Yes, sir, he said he had asked him for his name but he told him at the time that he didn't see it, but the fact that he was present there he thought maybe I could get him to tell me something about it.

page 112 } Mr. Williams: If your Honor please, I offer to make the date of the service on Milburn a part of the record.

The Court: It is in the record.

J. H. GRIFFIN,

a witness on behalf of the defendant, having been duly sworn, testified as follows:

Examined by Mr. Robertson:

Q. Mr. Griffin, your initials are J. H.?

A. Yes, sir.

Q. Where do you live?

A. 1206 Bainbridge.

Q. Are you employed by the City of Richmond?

A. Yes, sir.

Q. In what department?

A. Street cleaning department.

Q. Mr. Griffin, did you see an accident between a street car and a truck at 27th and M. Streets, around nine o'clock in the morning of the 24th of last December?

A. Yes, sir.

Q. Where were you when the accident happened?

A. I was coming down 27th Street, walking south on the east side of 27th Street, in about fifteen feet of the corner when I saw the street car coming up.

Q. Did you see what actually happened there?

A. Yes, sir. What I saw I am ready to state.

page 113 } Q. Tell the jury what you saw happen there.

A. I was in about fifteen feet of the corner when I heard the alarm ringing and it drew my attention. I looked and I saw this truck which was just the length of the truck ahead of the street car, and he was ringing his alarm, and it was almost on the track—he was ringing his alarm to get off the track but he didn't get off; and just as he got to the corner of 27th this truck cut right across in front of him and he hit him just behind his left wheel on the left side, and there was no way in the world he could have kept from—

Mr. Williams: We object to that.

The Court: Just tell what happened.

By Mr. Robertson

Q. Go ahead. Don't tell what you think.

A. He hit the truck and turned it over and this boy was in the seat with this gentleman.

By Mr. Williams:

Q. With this gentleman?

A. That boy was sitting with the old fellow in the seat and he fell out of the door and rolled over on the curbing. That Uncle right there they say they pulled from under the car, but they pulled him from under the steering wheel because he fell over where the boy was at on the seat.

By Mr. Robertson:

Q. How far did the car run before it stopped?

page 114 } A. It went about the length of the street car up the track after it hit the track going east.

Q. When you heard the gong ringing and looked over and saw the truck, was the truck far enough for the street car to pass without hitting it?

A. No, sir.

Q. How close to the track was it?

A. It was running about a foot from the track, as well as I could say.

Q. Could you see what the boy was doing just before the collision?

A. Yes, sir.- I was standing on the corner.

Q. What was he doing?

A. Talking to that gentleman right there (indicating).

Q. Was he talking to the man that was driving the truck?

A. Yes, sir.

Q. How fast do you think the street car was running?

A. It wasn't running over eight or ten miles, if that.

Q. How fast was the truck running?

A. The truck was just about the length of it from the street car, so I imagine about the same speed.

page 115 } CROSS EXAMINATION.

By Mr. Williams:

Q. Were you fifteen feet from the curb, or the house line?

A. Who—me?

Q. Yes.

A. I was coming down on the sidewalk on the east side.

Q. That is what I heard you say; I know all of that. Were you fifteen feet from the curbing, or the house line?

A. I was about fifteen or twenty feet from the corner when I saw the street car coming.

Q. Was that M Street?

A. 27th and M.

Q. You were fifteen or twenty feet north of the house line of M Street?

A. I was on the east side of M Street, walking south.

Q. But you were fifteen or twenty feet north of the house line of M Street?

A. I don't know what you mean by "house line".

Q. You don't know what the house line is, and you work for the City?

The Court: He means where the house was, or where the curbing would come.

A. From the curbing.

Q. How wide is that curbing?

A. I didn't measure that, Brother.

Q. Were you in front of the first, or the second, house north of M Street, on the east side?

page 116 } A. I couldn't tell you that. I was just walking down the sidewalk.

Q. It could have been the third house?

A. No, sir, it wasn't that far away.

Q. But it could have been the first or second, since you saw all of this?

A. It could have been the fifth, as far as that is concerned.

Q. Could you see as much if you were at the fifth house as if you were at the third house?

A. No, no.

Q. You said you work in the cleaning department of the streets of the City. Where did you live at the time?

A. 1206 Bainbridge.

Q. The first thing that attracted your attention was what?

A. The sound of the alarm.

Q. What alarm?

A. The street car.

Q. Just how did it ring?

A. It rang like a bell, that's all. I looked and saw him coming.

Q. A continuous clapping?

A. Yes, sir.

Q. At that time the automobile truck was about a foot from the track?

page 117 } A. It seemed—he was on the right-hand side going east—I took notice to it by him ringing the alarm—and from the distance I was there it looked to me like he was a foot or a little more from the street car track, and he kept ringing the alarm, and the truck almost went by the corner of 27th Street before he turned in, and just as he turned across the track the street car hit him just beyond the front wheel on the left side of the truck.

Q. Now, did it crush the front wheel down, or did it dent it, or anything?

A. I didn't notice that.

Q. You are sure that he hit the right front wheel—just beyond it?

A. The left front wheel. You knew I said left.

Q. Excuse me, my mistake. The left front wheel?

A. The left front wheel on the left side.

Q. And then what else did it hit of the truck after it hit the left front wheel?

A. Hit the fender.

Q. Left front fender too?

A. Left fender on the left-hand side.

Q. Then what did it do to the truck?

A. I didn't notice. I didn't stay there to look.

Q. Which way did you go?

A. It don't matter which way I went. I didn't say there long after that, I left there—just saw them picking up oranges. I left and went down to 26th Street.

page 118 } Q. You went down M to 26th Street?

A. Yes, walked on down M. Street. There wasn't anybody on the corner as I seen but me when he hit the truck, but after he hit the truck they gathered all around. If there was anybody there I didn't see them.

Q. On which side of the truck was the little boy sitting?

A. The boy with him?

Q. Yes.

A. I told you he was on the right-hand side, sitting in the seat with him.

Q. You didn't tell me that.

A. Well, I can tell you. He was on the right-hand side and when it turned over it rolled on the rocks and that man they pulled his feet from under the steering wheel.

Q. Why didn't you tell me while ago where you were going?

A. I thought it wasn't any of your business. I don't mean any harm.

Q. You are not mad with me?

A. Not a bit in the world.

Q. The truck was going how fast?

A. The truck was just ahead of the street car and the street car seemed to be making eight or ten miles an hour. Of course, I didn't time it or anything of the sort.

Q. Had the street car reached the east side of 27th Street when you first heard the gong?

A. No, sir, it was about fifteen feet away from
page 119 } the corner, the west side, when I first looked and saw it.

Q. Now, was the truck a foot from the street car track, or more, or less?

A. I didn't measure it, but a distance from here to that man back there (indicating) it looked like it was a foot or more from the street car track.

Q. You know if it was a foot away the street car could not pass?

A. Certainly it couldn't, but it was his business to pull away from it. He claimed he didn't hear the street car and didn't hear the alarm.

Q. When did he claim that?

A. That day, the boy said so. And there wasn't no signal made, he didn't hold out no hand, because I was on the corner and saw it. I am not here to tell a lie for nobody.

Q. You didn't see Mr. Milburn there, did you?

A. Who is Mr. Milburn?

Q. That gentleman right there (indicating).

A. I don't know that boy. I have seen him on the street car a good many times. I don't know his name.

Q. You didn't see him there?

A. Yes, sir, I saw him there after he stopped the street car.

Q. You are talking about the motorman?

A. Yes, sir.

Q. You didn't see the man in the green shirt
page 120 } there?

A. No, sir.

Q. He wasn't on the corner, was he?

A. I didn't see him if he was there.

Q. You don't claim to see everything, do you?

A. No, sir.

Q. And anything that was not seen by you you don't claim it didn't happen, you just didn't see it?

A. No, sir, I don't know anything about it.

Q. Do you have good eyesight?

A. Yes, sir.

Q. Your hearing is good?

A. Yes, sir.

Q. When did you have it tested?

A. I don't know you have a right to ask me that.

Mr. Robertson: I object to it as irrelevant.

The Court: We are not trying this man.

By Mr. Williams:

Q. Now, Mr. Griffin, how did the street car company get hold of your name?

A. That boy took my name.

Q. What boy are you talking about?

A. Sitting right over there (indicating)—see him sitting there laughing? That is the man that took my name.

Q. Is he the boy that you referred to a moment ago that was sitting on the truck with Rufus?

A. No, sir.

page 121 } Q. Where is the boy that you saw sitting on it?

A. He is outside.

Q. Didn't you point over there a minute ago and say "that boy over there"?

A. That boy isn't there.

Mr. Robertson: I think that is unfair to this witness.

The Court: When you asked him about that man over there, he pointed to the man in the corner.

Mr. Williams: I am asking him about the boy sitting on the seat with Rufus.

The Court: He didn't point at him.

Mr. Williams: My mistake.

By Mr. Williams:

Q. Now, Mr. Griffin, when the motorman stopped where was his car with respect to 27th Street?

A. He was just the length of his car past the truck where the truck was lying.

Mr. Williams: Can we agree that that car is twenty-eight feet long, or thirty?

Mr. Robertson: We will agree it is thirty.

Mr. Williams: Just stipulate it is thirty feet long. Can we agree that the truck is eight feet wide?

Mr. Robertson: We don't agree to that; I don't know. We can ask Mr. Meyer. I don't know about the street car.

page 122 } By Mr. Williams:

Q. Now, where was the truck when it was turned over? Was it lying on the east side of 27th, or in M Street?

A. Lying in M Street on the east side.

Q. And the street car then was its length past it?

A. Something like the length beyond it when he stopped.

Q. Was it to the north of the street car track, or was it to the south of the street car track?

A. What do you mean—the truck?

Q. The truck.

A. The truck was lying east of the street car track.

Q. But I mean was it on the north side of the street car?

A. The street car went here; evidently it knocked the truck off.

Q. Was it on the north side, or the south side of the track?

A. It was on the north side of the track.

Q. How did the street car get past that truck if it hit its left front wheel?

A. It pushed it off.

Q. Do you mean hit it so hard it pushed it away from the street car tracks?

A. No, it hit it and turned off. You see there are two street car tracks there; am I right?

Q. He can't help you now.

A. He passed the truck after he hit him and pushed the truck over on its side.

page 123 } Q. When it hit the truck in the front, what part of the street car hit the truck, the right-hand, or the left-hand?

A. The left-hand part of the street car kind of hit him bias-ways.

Q. This is the truck and this is the street car, and the left front of the street car would be like that; how did the street car get the truck away over and go past?

A. The truck was slue-fashioned.

Q. If the truck was like that how could it hit that left side of the truck?

Mr. Robertson: If your Honor please, he said it was slued across the track, and it could be that way or this way, and Mr. Williams tries to put it in his mouth for him to slue it the wrong way.

The Court: I think the witness can take care of himself. Go on.

By Mr. Williams:

Q. I understood you to say the left front of the street car hit the left front of the automobile?

A. No, behind it.

Q. How far behind it?

A. It couldn't have hit it nowhere else because that was on the track. If the rear part of the truck had been over it would have hit the rear part of the truck. He was so close he had to hit him, Brother.

page 124 } Q. What was the position of the automobile when he was going on the track? Was the automobile like this (indicating), or was it at right angles entirely to the tracks?

A. Certainly, he had to make a turn when he crossed the first line.

Q. Here comes the street car and hits the truck and turns it over there; how does it get over there?

A. It turned it over there.

Q. You tell the jury that the left front of the street car hit the left front of the truck, and the automobile was at this angle when the street car came and "crowned" it, and you also tell them that the street car hit it and it was on the north side of the track—

Mr. Robertson: I object.

Q. (Continuing) I ask you to explain to this jury how that automobile and those things being the conditions that you said existed, how that automobile ever got on the north side of the track and the street car by it.

Mr. Robertson: Now, answer the question if you can.

Mr. Williams: I object to the witness looking to counsel before he answers.

The Court: Let him answer the question.

A. What is it you want to know?

Note: The foregoing question was read.

A. Either the north or the east, it was here on this side. He cut across in front of the street car and turned it over.

It was on that side of the street car track. That page 125 } was north or east, either one. It couldn't have been on the west side.

By Mr. Williams:

Q. Do you tell me now that you change your position, that the automobile was either on the north or on the east side of the track or what do you mean to say? I can't understand you.

A. It was lying right against the end of the curbing at the corner. You can call it north or east either one you want to.

Q. What corner?

A. On the east side of 27th and M.

Q. On the north, or south, side of the tracks, or do you know?

A. It was on the east side, I told you.

Q. Well, the tracks run east and west, I will tell you.

A. Yes, they run west and go east.

Q. They don't run north at that point. Now, the truck was

either on the track on the north side or the south side. Tell the jury which it was, on the north of the tracks, or south of the tracks, or whether it was in front of the street car when it stopped; do you know?

A. I have told them where it was lying at. There is the corner of the curbing; it was lying right against the corner. You can put the front of the truck, if you want to—I mean the motor—at 27th, north; you can put the rear end of the truck east.

page 126 } Q. Do you mean the street car cut it in half?

A. No, sir; it turned it slue-fashioned.

Q. Do I understand you to say that you are unable to explain how when that automobile turned at an angle across the track and the left front of the street car hit the left front of the automobile, the automobile got over on the north side of the track? Do I understand that you are unable to explain that?

A. I will let you explain that.

Q. Well, I will tell the jury that. You are unable to say to this jury how that happened? Do I understand you cannot explain that?

A. I have explained the best I know how how that truck was lying.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Griffin, step over here one minute, please. Now, suppose that this is the eastbound street car track and this is the truck coming along here east, and this is the street car coming along here east. Now, can you show the way the truck turned and the way the street car hit it and the way it turned over?

A. From the way I saw it, it was coming up on this side of the track and it cut across and this street car hit in behind its left front wheel. Of course, it pushed it around
page 127 } and turned it over on that side with the rear end of the truck pointing east—and the rear end of the truck point north.

Q. Was it right at the corner where you were?

A. Yes, sir.

Q. Was it off the eastbound track?

A. Yes, sir, off the eastbound track.

By a Juror:

Q. Was the motor of the automobile headed the same di-

rection after the accident that it was when you first saw the automobile?

A. Yes, sir, only it slued around a little.

Q. In other words, it didn't turn it all the way around?

A. No, sir, he wasn't headed back west—just headed slue-fashioned like that.

Q. In other words, the automobile had not reversed its direction

A. No, sir, just lying like that (indicating).

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. If it had not reversed it, how did it get away from the front of the street car?

A. I guess the street car pushed it away from it.

Q. Just kind of like that until it got up like that and turned it over like that (indicating)?

A. Do it any way you want to do it, but it was page 128 } lying over there.

The Court: Stand aside.

Mr. Robertson: Do you object to this map?

Mr. Williams: I can't tell you until I see it. (The map was shown him.) Who made it?

Mr. Robertson: The Engineering Department of the Virginia Electric & Power Company.

Mr. Williams: You don't put the fish place down here.

Mr. Robertson: I am asking you if you object to the map?

Mr. Williams: May I ask you a question? I don't get mad when you ask me.

Mr. Robertson: You were mad before I asked you.

The Court: Is there any objection to the map?

Mr. Williams: Can it be agreed that the alley is 125 feet from 27th Street?

Mr. Robertson: If you know that is correct I will agree to it.

Mr. Williams: That is what Rufus tells me.

Mr. Robertson: I wont agree to what Rufus says, because I don't think he knows. I will admit that the fish place is down at the alley, midway of the block. I wont admit that Rufus' statement of 125 feet is correct.

I offer the map, your Honor.

page 129 } Mr. Williams: I object to the map as not containing the true conditions, as not embodying the alley.

The Court: Does the map show the place where the accident occurred?

Mr. Robertson: Yes, sir.

The Court: The map will be admitted.

Note: The map was filed and marked Defendant's Exhibit No. 3.

Mr. Williams: I wish to prove the width of the truck to be six and one-half feet. Rufus, what is the width of the truck?

Rufus Holtz: I reckon about five and a half feet, taking in the sides, about five and a half feet.

Mr. Williams: He says it is less than an ordinary Ford, and the body sticks over the side. I could testify myself it is about six and one-half feet. We will take five and one-half feet—that is the best we have got.

Mr. Robertson: The defendant rests.

The Court: Is there any rebuttal testimony?

Mr. Williams: That is all, if your Honor please.

The Court: Are both sides through with the testimony?

Mr. Williams: There is just one ordinance, if your Honor please.

The Court: We will take that up with the in-page 131 } structions. All of the witnesses in the case are excused.

And thereupon, at 4:20 P. M., the court was adjourned until the following morning at 10:30 o'clock.

SECOND DAY—MORNING SESSION.

Richmond, Virginia, July 29th, 1932.

The court re-convened at 10:30 A. M. with the same parties present as on the preceding day.

The written instructions were read to the jury, and in addition the following verbal instruction was given by the Court:

Judge Wells: Gentlemen of the jury, these instructions just read to you by the Court are on separate sheets of paper. The Court tells you you must construe them together and in the light of each other, it being the duty of the Court to give prepared instructions on the theory of the plaintiff and that of the defendant.

page 132 } Note: Neither the instructions nor the exceptions of counsel thereto were given to the reporter, but were reserved for inclusion in the bills of exception if and when the same should be made up.

After receiving the instructions of the Court and hearing the argument of counsel—by Mr. Williams for the plaintiff and by Messrs. Robertson and McGuire for the defendant—the jury retired to consider their verdict, and after some time returned to the court room and rendered their verdict in the words and figures following:

“We, the jury on the issue joined, find a verdict for the plaintiff and fix his damages at \$750.00.”

Mr. Robertson: If your Honor please, the defendant moves the Court to set aside the verdict on the ground that the plaintiff's own testimony convicts him of negligent *per se* as a matter of law, and not as an issue of fact, and bars his recovery.

I would like to argue that motion. I would like to submit to you the authorities in the Hurley case and I would like to get the opinion in the Lynchburg case. And in the meantime I am going to ask Mr. Craig to write up the testimony.

Note: Mr. Williams made a brief argument in opposition to the motion.

page 133 } The Court: Gentlemen, I like to get rid of these matters; I don't like for them to hang. At the same time, it is a lawyer's privilege as well as his right to present his views to the court, on both sides, and I never have felt as a judge that I have a right to tell them that I don't want to hear them, or won't hear them, because he is sincere in his view of the case and it is my duty to hear it. If he can show me that this plaintiff was guilty of negligence *per se*, I might as well end the case here as for the Court of Appeals to end it.

So, it will have to go over until some time in October, Gentlemen. In the mean time he can have the testimony written up.

Mr. Williams: I would like to be furnished a copy of the testimony so I can argue the case.

The Court: I have no right to do that. You will have to make your own bargain with counsel.

Mr. Williams: I have no money to buy one.

Mr. Robertson: I certainly wont give you one.

page 134 } Teste: This 23rd day of December, 1932, after
 notice to plaintiff's attorney as required by law.

ERNEST H. WELLS, Judge.

page 135 } CERTIFICATE NO. 2.

On the trial of this action, after the jury had been sworn to try the issue joined, and after all the evidence for the plaintiff had been introduced before the jury as set out in Certificate No. 1, which said certificate is hereby specifically referred to and made a part of this certificate, counsel for the defendant moved the court, to strike from the record and exclude from the jury all evidence introduced in behalf of the plaintiff upon the ground that the evidence in behalf of the plaintiff convicts the plaintiff of negligence *per se* which bars his recovery in this case; which motion the court overruled and thereupon the defendant by counsel excepted for the reason stated.

Counsel for the defendant renewed said motion upon the ground hereinabove set forth after all the evidence had been introduced at the trial of this action; which motion the court again overruled and thereupon the defendant by counsel again excepted for the reason hereinabove stated.

Teste: This 23rd day of December, 1932, after notice to plaintiff's attorneys as required by law.

ERNEST H. WELLS, Judge.

page 136 } CERTIFICATE NO. 3.

The following sixteen (16) instructions were given by the court and are all the instructions granted on the trial of this cause:

Instructions Nos. 1, 2, 3, 4, 5, 6, 7 and 16 were given at request of the plaintiff.

Instructions Nos. 8, 9, 10, 11, 12, 13, 14 and 15 were given at request of the defendant.

(Here insert all instructions)

INSTRUCTION NO. 1.

The court instructs the jury that if they believe from the evidence in this case that on the 24th day of December, 1931, the defendant corporation was the operator of a certain railway line in the City of Richmond, and particularly on M Street, that it was the duty of the said defendant to run and operate said car at a reasonable and proper rate of speed, so as to avoid running into automobile trucks and persons on or near said line and tracks, while exercising ordinary care on their part. And if the jury believe from the evidence that on the day in question the defendant, Street Car Company, negligently ran one of its said cars at the point in question at an excessive rate of speed under the circumstances, and as a proximate result of said *carelessness* and recklessness the said car was with great force and violence run into and against the automobile truck which the plaintiff was then and there, driving, while exercising ordinary care on his part, and the plaintiff thereby injured, then their verdict must be for the plaintiff.

INSTRUCTION NO. 2.

The court instructs the jury that the operator of a street car has no right to assume that no person will attempt to go upon, along or across the tracks in view of a car, and he must use ordinary care to attempt to check its speed as soon as he sees, or ought to have seen, that a person is about to go upon, along or across in dangerous proximity to his car; page 137 } and if they believe from the evidence in this case that the motorman of the defendant company did not use ordinary care in attempting to check his car at a time when he saw the plaintiff, or ought, in the exercise of ordinary care, to have seen him about to go upon, along or across the tracks in dangerous proximity to his car, and by such failure to exercise ordinary care in attempting to check the car the plaintiff was injured while plaintiff was exercising ordinary care on his part, the jury must find for the plaintiff.

INSTRUCTION NO. 3.

The court instructs the jury that if they believe from the evidence in this case that on the day in question the plaintiff, intending to make a left turn to go North on 27th Street

in the exercise of ordinary care held out his arm and gave the proper signal as prescribed by law fifty feet before reaching the point at which he would make his turn, at which time he saw a street car at the corner of 26th Street, that thereupon the plaintiff had the right to assume that the motorman would respect his signal and give him a chance to negotiate the crossing in safety; and if the jury further believe from the evidence that the defendant's motorman in proceeding Eastward failed to observe the said signal and as a consequence thereof collided with the plaintiff's truck, then the plaintiff is entitled to a verdict in his favor.

INSTRUCTION NO. 4.

The court instructs the jury that at the time of the injury to the plaintiff in this case an ordinance of the City of Richmond provided as follows:

“* * * It shall also be the duty of the motormen of cars to give ample notice to drivers of vehicles of their approach, and also to afford all reasonable opportunity for them or either of them to avoid collision or accident * * *”

page 138 } And the court instructs the jury that if they believe from the evidence in this case that the defendant's motorman, on the day in question, violated the terms of this ordinance and as a proximate result thereof the plaintiff was injured, while exercising ordinary care on his part, then the jury should bring in their verdict for the plaintiff.

INSTRUCTION NO. 5.

The court instructs the jury that the mere fact that the plaintiff was injured in a collision between his automobile truck and a street car of the defendant, raises no presumption that he was negligent in operating his truck and if the defendant claims that the plaintiff was negligent and that such negligence contributed to his injury, then the burden of proof is upon the defendant to prove by a preponderance of the evidence such negligence on the part of the plaintiff, unless his negligence appears from his own testimony or is disclosed from all the facts and circumstances of the case.

INSTRUCTION NO. 6.

The court instructs the jury that if they believe from the evidence in this case that on the 24th day of December, 1931, the defendant corporation was the operator of a certain street railway line in the City of Richmond, commonly known as the Broad and 25th Street Line, at and near 27th Street, that it was the duty of the said defendant to exercise ordinary care, to run and operate said car on said line under proper control, so as to avoid running into automobiles, trucks and persons on or near to the said line at said point, while exercising ordinary care on their part. And if the jury believe from the evidence in this case that on the day in question the defendant, without exercising ordinary care, ran one of its said cars at said place, without keeping the said car under proper control, and as a proximate result of said negligence the said car was with great force and violence run into and against the truck on which the plaintiff was riding on or near to the said line at the aforesaid place and

page 139 } the plaintiff injured thereby, while exercising ordinary care on his part, then they must find their verdict for the plaintiff.

INSTRUCTION NO. 7.

The court instructs the jury that the public has the same right to the use of the public streets of the City of Richmond as the defendant company has to use its tracks in such streets, and may go upon, along or across said tracks on said public streets as freely as upon any other part of the street so long as they do not obstruct the cars or carelessly expose themselves to danger, and this being so it is the duty of the motorman operating the defendant's cars in the public streets of the City of Richmond to exercise ordinary care to keep a look ahead for persons on, approaching, near to, going along or crossing the tracks of the defendant company in the public streets ahead of or in front of said street cars, and to exercise ordinary care to so operate said cars as to enable the motorman to stop his car readily and avoid collision with or injury to such person so approaching on, along, near to or crossing the said street car tracks in front or or ahead of said car; and if the jury believe from the evidence in this case that the plaintiff suffered injury as a proximate result of the failure of the defendant's motorman to do his duty in any of these respects, while exercising ordinary care on his part, then you must find your verdict for the plaintiff.

INSTRUCTION NO. 8.

✓ The court instructs the jury that the law does not undertake to hold someone liable for every accident; and in order for the Virginia Electric and Power Company to be held liable in this case, it must be shown that the defendant was guilty of negligence and that such negligence was the sole proximate cause of the collision and of any injuries or damages resulting therefrom.

page 140 } INSTRUCTION NO. 9.

The court instructs the jury that the mere fact that the plaintiff was injured and that his automobile truck was damaged by contact with a street car of the defendant company raises no presumption that either the defendant or its motorman in charge of the street car was negligent; and the burden of proving negligence on the part of the defendant's motorman is upon the plaintiff. And the court instructs the jury that, in order for the plaintiff to recover in this case, he must prove by a preponderance of the evidence that the defendant's motorman was guilty of negligence and that such negligence of the defendant's motorman in charge of the street car was the sole *proximate* cause of the injuries and damages complained of; and unless the plaintiff does establish these facts by a preponderance of the evidence, the jury must bring in their verdict for the defendant.

INSTRUCTION NO. 10.

The court instructs the jury that it was the duty of the plaintiff in making a left turn across the defendant's tracks on M Street at Twenty-Seventh Street to exercise ordinary care to keep a lookout for and to listen for approaching street cars in such a manner as to be reasonably effective, and to exercise ordinary care so to operate his automobile truck as to be able readily to take all reasonable precautions which an ordinary person of prudence acting prudently under the circumstances would take to avoid an accident; and the court instructs the jury that these duties are continuing duties, and are not necessarily discharged by the performance thereof at any particular moment of time; and if the jury believe from the evidence that at any reasonable time before the accident, in the exercise of ordinary care on the part of the plaintiff, in the proper performance of these duties he could have avoided the accident, and that he failed to do so and that his

failure so to do contributed efficiently to cause
 page 141 } the accident, then the plaintiff cannot recover in
 this case, whether the motorman was guilty of
 negligence or not.

INSTRUCTION NO. 11.

The court instructs the jury if they believe from the evidence that the motorman of the street car was guilty of negligence, and that the plaintiff was also guilty of negligence which efficiently contributed in any degree to the *collision* the jury must find their verdict for the defendant, even though they may believe from the evidence that the motorman of the street car was more negligent than the plaintiff, since the law does not apportion negligence, nor consider degrees of negligence, the plaintiff being barred from recovery in this case if he was guilty of negligence in any degree which proximately caused or efficiently contributed to cause the accident.

INSTRUCTION NO. 12.

The court instructs the jury that negligence is the doing or the omission to do an act which an ordinary person of prudence acting prudently under the same or similar circumstances would or would not have done; and ordinary care is that degree of care which an ordinary person of prudence acting prudently under the same or similar *circumstances* would exercise to avert a *collision*. And in this connection the court instructs the jury that although the plaintiff had the right to make free use of the streets, so long as he was exercising ordinary care to avert a collision, and did not violate the ordinances of the City, nevertheless, he was charged with knowledge of the fact that street cars ran along M Street and there was just as high an obligation and just as great a duty resting upon him to look out for street cars and to avoid placing the automobile he was driving in a place of danger as there was on the motorman of the street car to look out for him and to avoid a collision with him.

page 142 } INSTRUCTION NO. 13.

Sympathy
 The court instructs the jury that they must consider this case solely upon the evidence before them and the law laid down in the instructions of the court, and they must not allow any sympathy they may feel influence their verdict. A verdict must not be based, in whole or in part, upon conjecture,

or surmise, or sympathy, but must be based solely upon the evidence in the case and the instructions of the court.

INSTRUCTION NO. 14.

The court instructs the jury that the motorman of the defendant's street car had the right to assume that the plaintiff would obey and comply with all city ordinances introduced in evidence in this case; and the said motorman had the further right to assume that the plaintiff would not undertake to cross the street car track on which the street car was approaching dangerously close in front of the approaching car; and if the jury believe from the evidence that the plaintiff's automobile was negligently run upon the track in front of the approaching car, so that the motorman operating the street car could not avoid the accident, then the jury must find their verdict for the defendant.

INSTRUCTION NO. 15.

The court instructs the jury that the ordinances of the City of Richmond introduced in evidence in this case impose upon the defendant company's motorman only the duty of exercising ordinary care for the safety of persons lawfully using the streets of the City of Richmond, and the court instructs the jury if they believe from the evidence in this case that the motorman of the street car did exercise such ordinary care for the safety of the plaintiff then he was not guilty of any negligence in this case.

page 143 } INSTRUCTION NO. 16.

The court instructs the jury that if they believe from the evidence in this case and the other instructions of the court that the plaintiff is entitled to recover, then in assessing his damages they may do so, with respect to the following:

1. The mental and physical pain endured by the plaintiff;
2. The length and duration of the injury;
3. The damage to his automobile;
4. Any loss of produce and goods as shown by the evidence;

5. Any time lost by being unable to follow his usual employment;

6. Any medical expenses incurred by reason of endeavoring to be cured of his said hurts and injuries so received; but in no event should the jury's verdict exceed the sum of Ten Thousand Dollars (\$10,000.00), the amount claimed in the notice of motion.

The defendant by counsel objected and excepted to the giving of instructions Nos. 1, 2, 3, 4, 5, 6, 7 and 16 upon the ground that the conduct of the plaintiff as disclosed by the evidence convicts the plaintiff himself of negligence *per se* on his part and bars any recovery by him in this case.

Teste: This 23rd day of December, 1932, after notice to plaintiff's attorneys as required by law.

ERNEST H. WELLS, Judge.

page 144 } CERTIFICATE NO. 4.

On the trial of this action, after the jury had been sworn to try the issue joined, and after all the evidence set out in Certificate No. 1 had been introduced before the jury, which the court certifies as a part of this certificate, to be the evidence and all the evidence introduced in this action and which said Certificate No. 1 is hereby specifically referred to and made a part of this certificate; and after the court, as set out in Certificate No. 2, had overruled the defendant's motion to strike from the record and exclude from the jury all evidence introduced for the plaintiff, which said Certificate No. 2 is hereby specifically referred to and made a part of this certificate; and after the court had instructed the jury as set out in Certificate No. 3, which said certificate is hereby specifically referred to and made a part of this certificate; and after argument by counsel the jury retired and later returned to the court the following verdict:

(Here insert verdict)

We the jury on the issue joined find a verdict for the plaintiff and fix the damages at Seven hundred fifty no/100 Dollars (\$750.00).

J. E. WALKER, Foreman.

Whereupon the defendant, by counsel, moved the court to set aside said verdict upon the grounds:

(1) That the verdict is contrary to the law and the evidence and without evidence to support it; and

(2) For error committed by the court over the objection and exception of the defendant in overruling defendant's motion to strike from the record and exclude from the jury all evidence introduced in behalf of the plaintiff upon the ground that the evidence of the plaintiff himself convicts the plaintiff of negligence *per se* as a matter of law and not as an issue of fact and bars his recovery; and

(3) For error committed by the court, over the objection and exception of the defendant, in giving instructions Nos. 1, 2, 3, 4, 5, 6, 7 and 16, since the conduct of the plaintiff as disclosed by the evidence convicts the plaintiff himself of negligence *per se* on his part and bars any recovery by him in this case.

page 145 } And thereafter on the 29th day of October, 1932, the said motion was argued by counsel. Whereupon the court overruled said motion and entered final judgment on the verdict of the jury for the plaintiff and the defendant, by counsel, excepted.

Teste. This 23rd day of December, 1932, after notice to plaintiff's attorneys as required by law.

ERNEST H. WELLS, Judge.

page 146 } I, W. E. DuVal, Clerk of Hustings Court, Part II, of the City of Richmond, Virginia, do hereby certify that the foregoing is a true transcript of the Record in foregoing cause, and I further certify that the notice required by Section 6339 Code of Virginia, was duly given in accordance with said section. Also the bond required to be given in this case suspending the execution for a period of ninety days has been given before the Clerk of this Court with surety, which surety was approved by the Clerk.

Costs of Record, \$46.55.

Given under my hand this 1st day of February, 1933.

W. E. DuVAL, Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

INDEX

	Page
Petition.	1
Record.	24
Notice of Motion for Judgment.	24 ✓
Return.	25
Plea of Not Guilty.	26 ✓
Grounds of Defense.	26
Order, July 28, 1932—Jury Impaneled.	27
Verdict.	28, 101, 109
Judgment, October 29, 1933.	28
Notice of Tender of Certificates of Exceptions. and Ap- plication for Transcript of Record.	29
Certificate of Exception, No. 1—Evidence.	30
Evidence for Plaintiff.	32
Rufus Holtz (Plaintiff).	32
Dr. Wm. F. Williamson.	48
Willie Meekins.	52
James Easey.	59
Raymond Milburn.	64
Motion to Strike Plaintiff's Evidence	66, 102 ✓
Defendant's Evidence.	67
Martin L. Branch.	67
Charles W. Meyer.	75
S. M. Chappell.	78, 85
E. H. Flippen.	82
T. G. Vaughn.	86
J. H. Griffin.	89
Instruction—Verbal.	100 ✓
Defendant's Exhibit No. 1—Statement of Accident, Rufus Holtz.	44
Defendant's Exhibit No. 2—Estimate of Repairs, A. Mey- er's Sons.	76
Motion to Set Aside Verdict.	101
Certificate of Exception No. 2—Motion to Strike Plain- tiff's Evidence.	102
Certificate of Exception No. 3—Instructions.	102
Certificate of Exception No. 4—Motion to Set Aside Ver- dict.	109
Clerk's Certificate.	110