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Record No. 1409

In the
Supreme Court of Appeals of Virginia
at Richmond

VIRGINIA ELECTRIC AND POWER CO.,
Plaintiff in Error,

v.

W. L. VELLINES, Defendant in Error

FROM THE LAW AND CHANCERY COURT OF CITY OF NORFOLK.

“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 671

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AT RICHMOND.

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VIRGINIA ELECTRIC AND POWER COMPANY,
Plaintiff in Error,

vs.

W. L. VELLINES, Defendant in Error.

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

Your petitioner respectfully sheweth unto your Honors that it is aggrieved by a judgment entered on the 3rd day of March, 1933, by the Court of Law and Chancery of the City of Norfolk, in favor of W. L. Vellines against your petitioner for the sum of Five Hundred Dollars (\$500.00), with interest thereon from the 22nd day of December, 1932, until paid. The transcript of the record, together with the original exhibits in the case are herewith presented. The petition is adopted as the opening brief, and a copy was delivered to counsel for W. L. Vellines on the 5 day of May, 1933. The parties will be designated in this petition as they appeared in the lower court. Oral argument on this petition is requested.

FACTS.

This is an action of trespass on the case brought by the plaintiff W. L. Vellines against the defendant for damages to his automobile and personal injuries sustained when an automobile owned and driven by the plaintiff was struck by a street car of the defendant company at what is known as the 8th Street crossing, Willoughby Beach. The defendant

owns and operates a double track electric car line from Ocean View to Willoughby Spit, where it makes connection with the ferry to Old Point Comfort. The roadbed is rough and can only be crossed at certain fixed crossings (M. R., ~~156~~)²³ The tracks run East and West, and on either side of the tracks, and 8.2 feet therefrom, is a 16 foot concrete road running parallel with the tracks. The tracks to the Eastward (the direction from which the car came that struck the automobile) are straight for a distance of 1,500 feet, to a curve, and there is no physical object to obstruct the view. 7th Street is 1,310 feet East of 8th Street, and 9th Street is 900 feet West therefrom. The plaintiff at the time of the accident, had lived for four years at Willoughby Beach, approximately 350 feet North of the car tracks, and on the morning of January 22nd, 1932, between 6:45 and 7 o'clock A. M. drove out of his lane, which is 160 feet East of the crossing in question (M. R., ~~162~~), turned West on the concrete road parallel with the tracks, and 8.2 feet therefrom, and after proceeding the 160 feet West, made a left hand turn Southward, after holding out his hand, on to the tracks of the defendant company and was struck by the Westbound car just before he cleared the track.

FIRST ASSIGNMENT OF ERROR.

After the jury had found their verdict the defendant formally moved the Court to set aside the said verdict upon the ground that the same was contrary to the law and the evidence, and because of improper instructions (M. R., 159). But the Court overruled said motion and entered up judgment in favor of the plaintiff against the defendant, and to this action of the Court the defendant excepted, and assigns this action and ruling of the Court in refusing to set aside the verdict and enter up judgment in favor of the defendant as error.

CONTRIBUTORY NEGLIGENCE.

From the testimony of Mr. Vellines it is clear that he did not see the car that struck him until the impact took place, or certainly until the car was within a few feet of him, and he was on the track.

On Direct Examination he stated:

"Q. Did you see it?

A. No, I didn't see no car or I would never have been struck." (M. R., ~~4~~)

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On Cross Examination he stated:

"Q. I believe you said the first thing you knew of any street car was when the impact took place?

A. Practically.

Q. In other words, you didn't see this particular street car at all that struck you until the impact took place?

A. Every time I looked there was no car in sight.

Q. Then my statement, I assume, from what you just said, is correct, that you did not see the street car which struck you until it did actually strike you?

A. It might have been a little distance from me; it might have been a little distance, you understand, but I was practically across the track when I saw it. I couldn't help but seeing it a little ways from me.

Q. What would you call a little ways—two or three feet?

A. Ten or fifteen feet, I suppose. I couldn't say exactly to save my life.

Q. I understood you, in response to Mr. Coleman's question, to say you didn't see it until the impact took place; am I mistaken in this?

A. I say it must have been about ten or fifteen feet, it was so close on me.

Q. Then I believe you say you did see it, according to your best judgment, when it was about ten or fifteen feet from you?

A. Yes.

Q. And, at that time, you were already on the track.

A. I was nearly across the track.

Q. You were nearly across the track?

A. Yes, sir.

Q. And the impact took place almost before you could think?

A. It was pretty quick, as fast as it was coming." (M. R., pp. ~~1248~~.)

24-25

It is true that he says he looked before going on the track, but this cannot, in the nature of things, be true. He says:

"Q. Now, just before you made that turn, did you look to see if the street car was coming up in the rear of you?

A. Yes, sir. I suppose about as far as to the end of that rail.

Q. The end of what rail?

A. The iron rail there; I guess about twenty feet.

Q. You looked when you were about twenty feet away?

A. Yes, sir.

Q. And you did not see the street car?

A. No car was in sight then.

Q. You could see down to the curve?

A. *I couldn't see clean to the curve without looking back of the car.*

Q. When you started in to make the turn you had a clear view then?

A. I have already explained that to you.

Q. Didn't you have a clear view then to your left?

A. *I had as clear view as I could to see some distance down.*

Q. You could see to the curve then?

A. No, I couldn't see to the curve.

Q. Why?

A. It was not real light anyhow." (M. R., pp, ~~281~~.)

27-28

And again:

"Q. How many feet were you from the track when you looked the last time?

A. I told you along about here (indicating), but I don't know how many feet. I glanced around with my hand out. Now, to look at it, it looks about that.

Q. That would be about forty feet?

A. I didn't mean that at all. I said about ten or fifteen feet.

Q. Ten or fifteen feet when you looked?

A. Yes; you can say that.

Q. I don't want to say it; I want you to say it.

A. I am saying it.

Q. You were ten or fifteen feet from the track?

A. Yes, sir.

Q. And you were traveling about twelve miles an hour?

A. Just about that. I was getting into second gear.

Q. And, at that time, you looked to your left as far as you could see down the track?

A. Yes, sir.

Q. And there was no street car in sight?

A. There was no street car in sight, and when I looked up I saw the other car, and I could just see it ten or fifteen feet, and it came plowing and tore us right up. There was a telegraph pole here."

(M. R., ~~28~~.) 36-31

It is hardly necessary to cite any authorities in Virginia to the effect that the plaintiff's statement that he looked when he was ten or fifteen feet from the track and did not see any car, cannot be true in view of the physical facts. It must

be apparent that whatever he may say about not seeing or hearing the car immediately prior to the accident, the car physically must have been there, and even if not carrying lights could have been seen. *Murden vs. Virginia Ry. & P. Co.*, 130 Va. 449. Had he looked when looking would have been effective, or had he looked in an effective manner he must have seen the approaching car.

In the case of *Shuster vs. V. R. & P. Co.*, 144 Va. 387, at page 393, the Court says:

“While it is true the plaintiff says he looked both ways as he approached the track and did not see the street car which caused the accident, this evidence seems incredible in view of the physical facts. Had he looked, when looking would have been effective, he must have seen the approach of the car.

In *Washington Southern Railway Co. vs. Lacy*, 94 Va. 460, 26 S. E. 834, it is said: ‘The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective. He must not approach the track at such a rate of speed that when he reaches a point where he can see or hear the train it is too late to protect himself from injury. He must exercise ordinary care in attempting to cross or in crossing the track, and care is never ordinary care unless it is proportionate to the known danger’.”

See also *Norfolk etc. R. Co. vs. Crow*, 110 Va. 7; *Norfolk etc. R. Co. vs. Stricker*, 118 Va. 153; *Murden vs. Va. Ry. & P. Co.*, 130 Va. 449; *C. & O. Ry. Co. vs. Barlow*, 155 Va. 863, and cases cited therein.

The plaintiff and his witness Galvin testified that “It was not real light anyway” (M. R., 2~~8~~), “It was dark” (M. R., 35) 42 The plaintiff, however, says: “I could not see clean to the curve without looking back” (M. R., 29). “I could see a good distance, at least 100 yards, or more” (M. R., 3~~2~~ 26), and Galvin, who was standing at the crossing waiting for the East-bound car, actually did see the street car that struck the automobile when it was half a block away, and this block is 1,310 feet long (M. R., 4~~2~~ 42), and he further states that at this time he did not see any automobile on or approaching the crossing (M. R., 3~~8~~).

Mrs. L. M. Lewis, mother-in-law of the plaintiff, says she saw the car at the crossing from her house window (M. R., 62 ~~3~~), which is around 350 feet away. The accident took place between 6:45 and 7 o'clock A. M. (M. R., ~~114~~ ¹¹⁴) and the weather man testified that at this time there was occupational light you can see to read (M. R., 137) ¹³⁷ and the street car could be seen a long way (M. R., 130) ¹³⁰. Hence, even if there was no headlight on the car, as contended by the plaintiff in the lower court, there was ample daylight under the undisputed evidence for Vellines to have seen the street car if he had looked. However this may be, both the motorman on the Westbound car and the motorman on the Eastbound car, testified that the headlight was lit, and this is not contradicted. (M. R., ~~88~~ ⁹⁰ 115 ¹¹⁵). The plaintiff and his witness make extravagant and exaggerated statements as to the speed the car was going. They state that it was traveling 50 to 60 miles an hour. It is apparent, when their position and opportunity for judging the speed is considered, that this statement is nothing more than a guess. The Court should take judicial notice of the fact that a street car cannot and does not run 50 or 60 miles an hour, but in this case it is not necessary, since the evidence shows that the maximum speed in an actual test, is 37 miles an hour (M. R., 129). The undisputed evidence is that the plaintiff was traveling 12 or 15 miles an hour (M. R., 144 ¹⁴⁴) and if he had looked, when he says he looked, that is when he was 10 or 15 feet from the track (M. R., ~~23~~ ²³) he was bound to have seen the approaching car. The plaintiff only had 30 or 35 feet to clear the track, and going at 15 miles an hour or even 12 miles an hour, he would have cleared the track in less than two seconds. The street car traveling even at 60 miles an hour, would only travel 90 feet a second, and therefore it must have been within 180 feet of the crossing, in distance, or less than 2 seconds in time, to have struck the automobile. The plaintiff says he could see at least 300 feet or more (M. R., ~~26~~ ²⁶) and that he looked. No court will stultify itself by 33 ³³ accepting as true, that which is incredible, or that which it knows to be untrue. It is clear that the plaintiff did not look, and that such failure makes him guilty of contributory negligence as a matter of law. He drove on a track that he was thoroughly familiar with, without looking, and was struck by a car which he either didn't see at all, or didn't see until it was within 10 or 15 feet of him, before he could drive directly across.

The case of *Virginia Ry. & P. Co., vs. Harris*, 122 Va. 657, was a collision between a horse and wagon and a street car in the City of Richmond. The Court, at page 659, says:

“The crucial principle in this class of cases is that one who neglects to look for a car when there is an unobstructed view, just before entering upon the track, and is struck by a car before he can walk directly across, is guilty of a neglect of duty in not assuring, or reassuring himself that there is not a car directly upon him, of which situation the fact that he is struck is conclusive proof.”

In the case of *Virginia Electric & Power Co. vs. Boltz*, 122 Va. 649, the Court in denying a recovery, quotes with approval from the *Johnson* case at page 655:

In *Virginian Railway Co. vs. Johnson*, 114 Va. 479, 76 S. E. 916, this court said: “We are of opinion that the record presents a case of concurring negligence. The motorman was negligent in failing to keep a proper lookout for travelers at the Leigh Street crossing; and the plaintiff was likewise guilty of negligence in driving upon the defendant’s track without exercising such ordinary care for his own safety as the exigencies of the situation demanded. Each was visible to the other for a distance of from seventy-five to one hundred feet, and the accident was due to the concurrent negligence of both, which continued down to the moment of the impact. The plaintiff approached the street-car track, with which he was perfectly familiar, and over which he well knew cars were constantly passing, without taking any adequate precautions for his protection. He carelessly drove into a place of known danger with slackened rein and without looking for an approaching car until the point of collision was reached, when looking was useless, and the car instantly crashed into the front wheels of his vehicle. In such case, upon well settled principles, there can be no recovery.”

And again, at page 565:

“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 *Southern Railway Co. vs. Jones*, 106 Va. 412, the Court uses this language at page 417:

“It is a well established principle that the duty to look and listen imposed upon a traveler on a highway approaching a

railroad crossing is a continuing duty, and if there is any point at which, by looking and listening, a person injured could have avoided the accident, and he failed to do so, then his contributory negligence defeats a recovery for the injury. *If he could have seen and did not see an approaching train, then he failed to discharge the duty which the law imposes.*"

In the case of *Virginia Ry. & P. Co. vs. Johnson*, 114 Va. 479, which was a personal injury case, there was a demurrer to the evidence. Judge Whittle, in delivering the opinion of the Court, at page 481, states:

"We are of opinion that the record presents a case of concurrent negligence. The motorman was negligent in failing to keep a proper lookout for travelers at the Leigh Street crossing; and the plaintiff was likewise guilty of negligence in driving upon the defendant's tracks without exercising such ordinary care for his own safety as the exigencies of the situation demanded. Each was visible to the other for a distance of from seventy-five to one hundred feet, and the accident was due to the concurrent negligence of both, which continued down to the moment of the impact. The plaintiff approached the street-car track, with which he was perfectly familiar and over which he well knew cars were constantly passing, without taking any adequate precautions for his protection. He carelessly drove into a place of known danger with slackened rein and without looking for an approaching car until the point of collision was reached, when looking was useless, and the car instantly crashed into the front wheels of his vehicle. In such case, upon well settled principles, there can be no recovery.

The judgment must, therefore, be reversed, the demurrer to the evidence sustained, and judgment rendered for the plaintiff in error."

In the case of *Jones vs. Virginia Electric & Power Co.*, 153 Va. 704, the plaintiff was driving North on Hull Street, in the City of Richmond. He signaled for a left hand turn at 10th Street, and after waiting for a Northbound car to pass, he crossed and was struck by the Southbound car. The Court, in denying a recovery said, at page 707:

"These being the facts, it is to us manifest that his negligence either in failing to look to the north or if he looked, in failing to stop before attempting to cross the southbound track was a contributing and concurring cause of his injury."

In the case of *Virginia Electric and Power Co. vs. Bennett*, 156 Va. 910, the plaintiff was proceeding South on the Western side of the Petersburg turnpike in the City of Richmond. He attempted to make a left hand turn crossing the tracks, after giving a left hand arm signal, and was struck by a car that gave no warning of its approach, which he did not see. The Court, in denying a recovery on the ground of contributory negligence, states at page 913:

“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.”

The case of *Lynchburg Traction & Lt. Co. vs. Garber*, 158 Va. 656, involved a collision between a street car and an automobile in Lynchburg, when the plaintiff made a left hand turn on to the tracks after giving the proper signal. The Court, at page 60, says:

“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 * * * 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.’ ”

The case of *Berent vs. Virginia Elec. & P. Co.*, 153 Va. 586, was a collision between a street car and an automobile in the City of Norfolk. The plaintiff testified that he saw the car approaching, about half a block away, and that he paid no further attention to it, and made a left hand turn across the track and was struck. The lower court, in denying recovery, stated at page 589:

“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 Adm'r vs. Va. Ry. & P. Co.*, 122 Va. 95 S. E. 405): ‘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 Court of Appeals, at page 590, in approving the language of the trial court, states:

“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. The case is controlled by the rules enforced in these cases: *Virginia Ry. & Power Co. vs. Johnson*, 114 Va. 479, 76 S. E. 916; *Reichenstein vs. Va. Ry. & Power Co.*, 115 Va. 862, 80 S. E. 564; *Springs vs. Va. Ry. & Power Co.*, 117 Va. 826, 86 S. E. 65; *Derring's Adm'r vs. Va. Ry. & Power Co.*, 122 Va. 517, 95 S. E. 405; *Va. 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; *Hendry vs. Va. Ry. & Power Co.*, 130 Va. 282, 107 S. E. 715; *Stephen Putney Shoe Co. vs. Ormsby's Adm'r*, 129 Va. 297, 105 S. E. 563; *Marvel vs. Va. Ry. & Power Co.*, 138 Va. 532, 121 S. E. 882; *Meade vs. Saunders*, 151 Va. 636, 144 S. E. 711; *Cashell vs. Southern Ry. Co.*, 152 Va. 335, 147 S. E. 209."

LAST CLEAR CHANCE.

The lower court, however, seemed to think that the last clear chance doctrine was applicable and granted, over the objections of the defendant, instruction No. B at the request of the plaintiff, which action of the Court, in granting instruction No. B, is assigned as error.

It is respectfully submitted that there is no evidence to sustain a recovery under the doctrine of last clear chance. That doctrine is not applicable to the facts of the instant case. There was nothing to admonish the defendant of the imminent peril of the plaintiff until he turned on the track, and there was no appreciable interval of time after the motorman saw, or could have seen the peril of the plaintiff, in which to have stopped the car. Assuming that the motorman was negligent, for the sake of the argument, the negligence of the plaintiff in failing to look continued until the moment of impact, and at best the case is one of concurring negligence. *There was no stopping or stalling of the plaintiff's automobile on the track.* He was traveling at a speed of 12 or 15 miles an hour (M. R. 145), along a concrete road, in a position of safety, 8.2 feet from the track. He turned on the track and was struck in less than two seconds after he turned. The available time for stopping a street car (less than two seconds) was too short for the motorman to act. The car must have been very close when the automobile came on the track, otherwise it would have crossed over in safety. The plaintiff was not in danger, nor was his peril imminent until he got on the track. There was no *appreciable interval* of time between the negligent act of the plaintiff in going on the track, and the impact which necessarily must have followed in less than two seconds.

In the case of *Chesapeake Western Ry. vs. Shiflett*, 118 Va. 63, at page 69, it is said:

“The doctrine of the last clear chance does not come into the case at all. What happened after he changed his course, faced about and walked down, instead of across, the track involved the movement of the engine for a distance of less than forty feet of track *and the lapse of less than three seconds of time, allowing the shortest time* and distance that would necessarily have been required after his peril was, or should have been discovered for the signals to be given and reach the engineer and for him to apply the brakes, it is clear that the mental and physical faculties of the other men would have had to act with more than human precision, and with the quickness of electricity, to utilize the scant time and distance thus remaining in saving this man from the wholly unexpected and unlikely emergency which his inexplicable conduct had precipitated. If they had succeeded, it would have been by the merest chance. The law does not impose liability under such circumstances. As was suggested by Judge Keith in *Norfolk Southern R. Co. vs. White's Admx.*, 117 Va. 342, 84 S. E. 646, ‘the minds, nerves and muscles of men are not so accurately co-ordinated as that there can be instantaneous action to meet an emergency’.”

In the case of *Norfolk Southern R. Co. v. White*, 117 Va. 342, the Court, at page 344, says:

“It is not a case for the application of the doctrine of the last clear chance, because the act of negligence upon the part of White and that upon the part of the railroad company, *if negligence there were upon its part, are so closely connected in point of time as not to have afforded the employees of the railroad company a plain opportunity to avoid inflicting the injury* for which this suit is brought. The record presents, at most, a case of concurrent negligence for which there can be no recovery. *Real Estate &c. Co. vs. Gwyn, supra; Roanoke Ry. & Elec. Co. vs. Carroll*, 112 Va. 598, 72 S. E. 125.”

And in the case of *U. S. Spruce L. Co. vs. Shumate*, 118 Va. 471, at page 481:

“That doctrine presupposes *an appreciable difference in time* between the earlier negligence of the plaintiff and the later negligence of the defendant, and it must appear that, in

contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by it by the exercise of ordinary care, it negligently failed to do something which it had a *clear chance* to do to avoid the accident. *Real Est. Co. vs. Gwynn*, 113 Va. 337, 74 S. E. 208; *Roanoke Ry. Co. vs. Carroll*, *supra*; *Smith vs. N. & P. Tr. Co.*, *supra*.

In *Real Estate Co. vs. Gwynn*, 113 Va. 337, the Court, at page 344, says:

"The catastrophe was continuous and practically instantaneous, covering only a few feet in point of distance and a few seconds in point of time. The doctrine of 'the last clear chance' presupposes an appreciable difference in time between the earlier negligence of the defendant. Moreover, it must appear that, in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by him by the exercise of ordinary care, he negligently failed to do something which he had a clear chance to do to avoid the accident. But the doctrine can have no application to a case where the negligence both plaintiff and defendant is simultaneous and concurrent."

The case of *Washington & O. D. Ry. Co. vs. Thompson*, 136 Va. 579, was a collision between an automobile and an electric line running between Washington and Alexandria. The plaintiff's contention was that he stopped before going on to the track and looked, but could see no car coming. That he could see the track for 30 to 40 feet and the overhead trolley for 100 feet. He then proceeded to cross the track. When the front wheels were on the track he saw a train coming at a high rate of speed. He put on gas and tried to get off the track and was nearly off when the train struck him. The Court said, at page 601:

"Taking his own testimony, along with the testimony of this witness so introduced by him, and the physical facts that in the few seconds which it took him to drive his car from a point seven feet from the first rail to the track, and that he was struck by the electric car just before he had cleared the track, it is evident that he was recklessly negligent in attempting to cross the track when the car was so near. He, himself, locates this approaching car of the company as being about 220 feet away when he first saw it. The collision itself which followed in the few seconds thereafter appears clearly

to indicate that he over-estimated this distance, and convincingly confirms the testimony of his own witness that the approaching car was very much nearer to the crossing than he estimated it to be."

In discussing the question whether the plaintiff could recover under the last clear chance, the Court, at page 603, said:

"The rule has been repeated in *Hendry vs. Virginia Ry. & P. Co.*, 130 Va. 283, 107 S. E. 716, thus: 'In order to apply that doctrine, the burden is upon the plaintiff, who is confessedly negligent, to prove by a preponderance of the testimony that after his peril became imminent there was a clear opportunity afforded the defendant to save him from the consequences of his own negligence, and this fact must be proved like any other fact upon which the plaintiff relies'." (Cases cited.)

"It should and must be emphasized that a plaintiff is not entitled to recover under this doctrine upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant's agents had responded properly, promptly, instantaneously, he might have been saved. The burden is upon him to show affirmatively by a preponderance of the evidence which convinces the average mind, that by the use of ordinary care, after his peril was discovered, there was in fact a clear chance to save him. It is insufficient to show that there was a mere possibility of so doing. Discarding all of the evidence of the company here, and considering only the evidence introduced by the plaintiff himself, it appears that the available time for stopping the approaching car was so short that possibly a second more would have enabled the plaintiff to clear the track. *The fact that before he could drive his automobile the distance of seven feet from the nearest rail across the single track for a sufficient distance to reach a place of safety, his machine was struck, and that he was unable to accomplish it in this short distance, shows that the approaching car, even if traveling at the greatest rate of speed estimated by any witness, thirty-six miles an hour, must have been very close to the crossing before he reached it.* When the evidence of his other witness, Hardy, is considered, it is clearly shown that he attempted to cross the track at a time when if he had looked a second time he would have seen that the approaching car was almost upon him, so close indeed that another witness describes the occurrence as coming about as quick as thought. *The fact*

that the plaintiff, as both he and his own witness say, stopped his automobile within seven feet of the crossing was an indication to the motorman who was driving the approaching car that he would not again move until after the car had passed. Indeed, his witness says that when the automobile thus stopped the car had passed him (the witness), who was over sixty yards away. If, on the contrary, he approached the crossing cautiously or slowly, without stopping, and could, as the company claims, have easily seen the approaching car, then the motorman was justified in believing that he would stop and remain in a place of safety. The statute which requires drivers of vehicles to stop at railroad crossings on public highways in the country is certainly to be commended as tending to promote safety.

There was no stopping or stalling of the plaintiff's automobile on the track, no time when his danger was disclosed, except immediately before or simultaneously with his attempt to cross the track.

In the case of *Marvel vs. Va. Ry. & P. Co.*, 138 Va. 532, involving an accident between an automobile and a street railway car in the City of Portsmouth, Virginia, at page 534, the Court says:

“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 eastbound track, and if this it 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, bars any recovery.”

In the case of *Washington & O. D. Ry. vs. Weakley*, 140 Va. 796, the Court at page 800 quotes with approval the cases of *Ashby* and *Thompson*, as follows:

“The most essential error assigned by the defendant is to the action of the court in permitting the plaintiff to introduce

before the jury evidence to establish the doctrine of the last clear chance, because there was no allegation in the declaration that would warrant the testimony. The doctrine of the last clear chance is well settled in this jurisdiction. 'That where the plaintiff's negligence contributed to his injury, yet if there was some superadded fact or something abnormal in the attitude or situation of the person afterwards injured making it apparent that he is unconscious of his peril, because of his attention being manifestly concentrated upon something else, or because of some other apparent interference with the normal result of the use of his five senses, and this peril was known to the defendant, or by the exercise of reasonable care should have been known, in time to prevent the injury, then the contributory negligence of the plaintiff will not bar his recovery'. *Ashby vs. Virginia Ry. & Power Co.*, 138 Va. 310, 122 S. E. 109. 'But one relying on the doctrine of the last clear chance has the burden of proving affirmatively by a preponderance of the evidence that, by the use of ordinary care after his peril was discovered or should have been discovered, there was in fact a clear chance to save him.' *Washington & O. D. Ry. vs. Thompson*, 136 Va. 597, 118 S. E. 76."

In the case of *Van Sickler vs. Wash. & O. D. Ry.*, 142 Va. 857, involving an accident between a street car and an automobile, the Court, in discussing the last clear chance, says, at page 867, as follows:

"We are fully aware that the theory upon which this case was tried (the doctrine of the 'last clear chance') is one involving nice distinctions, often of a technical nature, and *that courts should be wary in extending its application*. Especially is this so because there can be no 'last clear chance' invoked by a plaintiff unless he himself, by his own negligence, has primarily brought about the situation which put upon the defendant an extraordinary duty which otherwise would not have rested upon him.

"And so the courts have hedged about the application of the doctrine with appropriate precautionary rules. As said by Judge Prentiss in *Gordon's Adm'r vs. Director General*, 128 Va. 426, 104 S. E. 796:

"The doctrine is humane, but there is grave danger that sometimes it may be inhumanely or negligently applied. It is necessary, in order to justify the imputation of such negli-

gence to the engineer, to show that after he discovered, or should have discovered, the pedestrian's obliviousness to his own peril, because in some way indicated, that then—that is, after such discovery—he the engineer, had the clear opportunity or chance to avoid the injury by the use of the available means, and that he failed to exercise ordinary care to do so. This decisive fact should be shown like any other necessary fact, by a preponderance of the evidence; it should not be lightly inferred merely because of the disaster, or from unconvincing testimony.' ”

And also, at page 868, as follows:

“ ‘In order to apply that doctrine (last clear chance) the burden is upon the plaintiff, who is confessedly negligent, to prove by a preponderance of the testimony that after his *peril became imminent*, there was clear opportunity to save him from the consequences of his own negligence, and this fact must be proved like any other fact upon which the plaintiff relies.’ ”

In the case of *Va. E. & P. Co. vs. Jayne*, 151 Va. 694, involving an accident between an automobile and a street car at a crossing where the automobile stalled on the track, in which the plaintiff was held to be guilty of contributory negligence, and also held that the last clear chance did not apply, the Court, at page 700, stated:

“ ‘From the plaintiff's picture of the accident it is quite apparent that the stopping of the engine, the plaintiff's attempt to start it, and the sight of the street car from 100 to 125 feet away, were acts of such rapid sequence as to leave no appreciable interval of time between them. *If the car was traveling thirty miles per hour, the distance to the stalled car would have been covered in about three seconds, and if going at the rate of forty miles as claimed by the plaintiff's witness it would have reached the automobile in about two seconds, after it was discovered by the plaintiff.*

“ ‘Until he discovered, or in the exercise of ordinary care should have seen, the perilous condition of the car, the motorman had no reason to suspect or anticipate a situation which rendered an accident inevitable, or even probable, and was therefore under no duty to reduce the speed of the car.

“ ‘The burden is on the party relying upon the doctrine of last clear chance to prove it by affirmative evidence, as was said in *Ashby vs. Virginia Railway and Power Co.*, 138 Va. 310, 122 S. E. 104,

“ ‘One relying upon the doctrine of last clear chance had the burden of proving affirmatively, by a preponderance of evidence, that by the use of ordinary care, after his peril was discovered, there was in fact a last clear chance to save him.’ ”

In the case of *Cashell vs. Southern Ry. Co.*, 152 Va. 335, involving a collision at a crossing between a railroad train and an automobile in the corporate limits of the City of Richmond, the Court, in discussing the last clear chance, and in meeting the argument that if the car had slackened its speed a little bit there would have been no accident, says, at page 341:

“The principles of law applicable are well settled. In *Washington & D. Ry. Co. vs. Zell*, 118 Va. 755, 88 S. E. 309, the duty of a driver of an automobile to ‘stop, look and listen’, when approaching a railroad crossing is fully discussed by Judge Kelly. In the syllabus to that case, prepared by Judge Burks, we read:

“ ‘At a grade crossing of railroads the rights of a traveler on the highway and of the railroad company are “mutual, reciprocal and co-extensive”, but generally a moving train is accorded the right of way. A traveler approaching such crossing for the purpose of crossing must always exercise care proportioned to the known danger, and this care must be such as one who knows the danger and of prior right of passage would be expected to exercise. The duty of looking and listening for approaching trains must be discharged in such manner as will make the looking and listening effective. The greater the danger, the greater the measure of duty. The track itself is a proclamation of danger, and the traveler has no right to proceed across the track without such looking and listening for approaching trains, and if he does, and in consequence thereof is injured, there can be no recovery, although the railroad company may also be guilty of negligence proximately contributing to such injury.’ ”

“The contributory negligence of the decedent is manifest. Here we have a young man twenty-nine years of age, endowed with physical vigor and fully in the possession of the faculties of sight and hearing, driving (as expressed by the witness), in front of a fast moving train which could be seen at a distance of 2,235 feet when he was within thirty feet of the track. The conclusion that by the exercise of ordinary care he could have avoided the accident is irresistible. It is apparent, therefore, that unless the doctrine of last clear

chance can be invoked the case of the plaintiff must fall of its own weight.

"In the brief of counsel for the plaintiff it is said: 'Consequently, if the speed of the train in the entire distance from the time Cashell's truck got in a position of danger (saying nothing as to what ought to have been done before), had been slackened one-fourth of a second, or possibly less, Cashell would have gotten out of danger and his life been saved. This fact clearly makes the case one for the jury under the last clear chance doctrine.'

"*The answer to the contention that the right of recovery based on the doctrine of last clear chance should be measured by a fraction of a second is found in the language of Mr. Chief Justice Prentiss, in Washington, etc., R. Co. vs. Thompson*, 136 Va. at page 603, 118 S. E. 78. *There it is said:*

" 'The rule has been repeated in *Hendry vs. Virginia Ry. & P. Co.*, 130 Va. 283, 107 S. E. 716, thus:

" ' "In order to apply that doctrine, the burden is upon the plaintiff, who is confessedly negligent, to prove by a preponderance of the testimony that after his peril became imminent there was a clear opportunity afforded the defendant to save him from the consequences of his own negligence, and this fact must be proved like any other fact upon which the plaintiff relies." ' ' ' "

In view of the settled law in Virginia, as set out above, there is no clear, convincing evidence in the case at bar to sustain a recovery on the doctrine of last clear chance, and no instruction on that theory of the case should have been given. If we accept the statement of the plaintiff, and his witness, that the street car was traveling 50 or 60 miles an hour (M. R. 136, and M. R. 2023), and that "A plaintiff is entitled to the benefit of not better case than his own testimony presents", *Lynchburg Traction & Lt. Co. vs. Garber*, 158 Va. 656, there is not a scintilla of evidence to show in what distance the car could have been stopped if it were traveling at that rate of speed, and the burden is on the plaintiff to prove all the facts necessary to establish a last clear chance case.

If, on the other hand, we accept the testimony of the motor-man that he was traveling at 20 or 25 miles an hour (M. R., 109-116) and at this rate of speed the car could be stopped in about 100 feet (M. R. 2414), it is clear that the car was dangerously close to the plaintiff when he got on the track, or even when he turned to go on the track, since as shown above, he would have cleared the track in less than two seconds after he began to turn. Hence, the car was less than two

seconds of time away in lapsed time, and less than 75 feet away in distance, and there was no appreciable interval of time after the plaintiff's peril was imminent for the motorman to have stopped. The last clear chance or opportunity cannot be applied where the interval of time is less than two seconds.

There was no stopping or stalling of the automobile on the track, no time when the danger was disclosed to the motorman except immediately before, or simultaneously with his attempt to cross the track. The automobile was going 12 to 15 miles an hour. The car 20 to 25 miles an hour. Comparing these respective speeds, we find that when the automobile was 10 feet from the crossing the car necessarily was 20 feet away. If the plaintiff looked at this time, as he said he did, he was bound to have seen the street car. *C. & O. Ry. Co. vs. Barlow*, 155 Va. 863. The plaintiff heretofore had the last clear chance, and not the motorman.

For the errors above assigned, in instructing the jury as set forth above, and refusing to set aside the verdict as contrary to the law and the evidence, and as being without evidence to support it, and refusing to enter up judgment for the defendant in accordance with the statute in such cases made and provided, your petitioner prays that a writ of error and *supersedeas* be allowed in this case and that the judgment and ruling of the trial court may be reviewed, reversed, and judgment entered herein by this Honorable Court for the defendant, in accordance with the statute in such cases made and provided, or that said case be reversed and a new trial granted.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY,

By LEIGH D. WILLIAMS,

T. JUSTIN MOORE,

Counsel for Petitioner.

I, Leigh D. Williams, attorney at law of the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion it is proper that the decision in the above entitled action be reviewed and reversed by this Honorable Court.

LEIGH D. WILLIAMS.

Rec'd May 19/33.

LOUIS S. EPES.

June 26, 1933. Writ of error and *sup.* by the Court. Bond \$800.

Received July 5, 1933.

M. B. WATTS, Clerk.

RECORD

VIRGINIA:

Pleas before the Court of Law and Chancery of the City of Norfolk, at the Court House of said City on the 20th day of April, 1933.

Be It Remembered, that heretofore to-wit: At rules held in the Clerk's Office of said Court, on the First Monday in July, 1932, came William L. Vellines, plaintiff, by his Attorneys, and filed his declaration against Virginia Electric and Power Company, a corporation, defendant, in the words and figures following:

DECLARATION.

William L. Vellines, plaintiff, complains of the Virginia Electric and Power Company, a corporation, defendant, of a plea of trespass on the case for this, to-wit:

That heretofore, to-wit, on the 22nd day of January, 1932, the defendant was the owner and operator of a certain Street Car, which it was then and there operating by its agent and servants, over and along Ocean View Boulevard, at and near its intersection with Eighth (8th) Street, both being public streets and highways, in the City of Norfolk, Virginia.

And the plaintiff says that on the day and year aforesaid he was then and there driving and operating a certain automobile over and along Ocean View Boulevard, at and near its intersection with Eighth Street, and was lawfully on and using said Ocean View Boulevard, and the said plaintiff was then and there in the exercise of the care required of him by law for his own safety, when by reason of the carelessness and negligence of the said defendant he was collided
page 2 } with, run into, struck and injured by a certain Street
Car of the said defendant as hereinafter complained
of.

And the said plaintiff says that on the day and year aforesaid while the said defendant was operating its said Street Car over and along Ocean View Boulevard, at and near its intersection with Eighth (8th) Street, it became and was the duty of the defendant to use the care required of it by law to keep its said Street Car from colliding with, striking, running into and injuring the plaintiff while he was then and there

driving and operating a certain automobile and lawfully on and using said Ocean View Boulevard, at and near its intersection with Eighth Street, in said City, and in the exercise of the care required of him by law for his own safety.

Yet the said defendant did not use the care required of it by law towards the plaintiff in that respect, but carelessly and negligently failed so to do, and by reason of the carelessness and negligence of the said defendant, a certain Street Car, which was then and there owned and being operated by the said defendant, by its servants and agents, was caused to collide, strike and run into a certain automobile, which the plaintiff was then and there driving and operating, and was lawfully on and using said Ocean View Boulevard, at and near its intersection with Eighth Street, in said City, and in the exercise of the care required of him by law for his own safety, on, to-wit, the 22nd day of January, 1932, whereby, the plaintiff was seriously and permanently wounded and injured,

his head, neck, shoulders, sides, hips, arms, legs,
page 3 } back, ankle, kness, hands, face, limbs and body
were seriously and permanently wounded and injured, and his nervous system was severely shocked; by reason whereof, he became and was made sick, sore, lame, disabled and disordered, internally an externally, and suffered great paid of body and mind for a long time, to-wit: hitherto, and continues to suffer and undergo great paid of body and mind, and in the future will suffer and undergo great pain of body and mind as a result of said injuries; and thereby also, the said plaintiff has lost, is losing and in the future will continue to lose an be deprived of divers great gains, wages, profits and advantages as a result of said injuries; and by reason of the premises, the said plaintiff has been compelled to lay out, expend and become liable for, to-wit, Two Hundred Dollars (\$200.00) endeavoring to be cured and healed of the aforesaid wounds, injuries and suffering; and the plaintiff also says that as a direct and proximate result of the carelessness and negligence of the defendant, the plaintiff's automobile was injured, damaged, broken, ruined and demolished and its value decreased.

And by reason of the premises, the said plaintiff has been damaged in the amount of Five Thousand Dollars (\$5,000.00).

And therefore he brings his *suite*.

DANIEL COLEMAN,
W. H. BUNTIN, p. q.

Whereupon, the defendant being duly summoned and failing to appear a conditional judgment was entered against it.

page 4 } And afterwards: At rules held in the Clerk's Office, on the Second Monday in July, 1932, came again the plaintiff, by his attorneys, and the defendant still failing to appear the judgment entered herein at rules was confirmed and a writ of enquiry entered against it.

And afterwards: In the Court of Law and Chancery of the City of Norfolk, on the 21st day of December, 1932.

This day came the parties, by their attorneys, and thereupon the defendant filed herein its grounds of defense and contributory negligence.

Then came a jury, to-wit, B. P. Eggleston, Jr., C. M. Baldock, W. E. Doherty, J. L. McCourt, E. L. Sawyer, J. M. Lesner, and C. J. Craft, who being sworn the truth to speak upon the issue joined, and having heard the evidence, at five o'clock P. M. are adjourned until ten o'clock to-morrow morning.

GRUNDS OF DEFENSE.

The defendant says that it intends to rely on the contributory negligence of the plaintiff as one of its defenses to this cause of action in that the said plaintiff did not exercise ordinary care in looking and listening for a street car before going on the track of the defendant company. In that he drove on to the track of the defendant company when the street car was dangerously near.

In that the said plaintiff saw or by the exercise of ordinary care could have seen the car, in time to avoid the accident.

page 5 } VIRGINIA ELECTRIC AND POWER
COMPANY,
By LEIGH D. WILLIAMS, Attorney.

And afterwards: In said Court, on the 22nd day of December, 1932.

This day came again the parties, by their attorneys, and also came the jury according to their adjournment, and thereupon the jury returned a verdict in these words, "We, the Jury, find for the plaintiff the amount of Five Hundred (\$500.00) Dollars damages".

Whereupon the defendant moved the Court to set aside the verdict of the jury and enter final judgment for the defendant on the grounds that the said verdict is contrary to the law and the evidence, and moved the Court to set aside the verdict of the jury and grant it a new trial on the grounds of misinstruction, and error in failure to give and in granting instructions, the further hearing of which motion is continued.

And afterwards: In said Court on the 3rd day of March, 1933.

This day came again the parties, by their attorneys, and the defendant's motion to set aside the verdict of the jury rendered herein December 22, 1932, being fully heard by the Court, is overruled.

Therefore it is considered by the Court that the plaintiff recover of the defendant the sum of Five Hundred Dollars, with interest thereon from December 22, 1932, until paid, and his costs by him in this behalf expended.

page 6 } To which ruling and judgment of the Court the
defendant duly excepted.

At the instance of the defendant who desires to present to the Supreme Court of Appeals a petition for a writ of error and *supersedeas* to this Judgment, it is ordered that when the defendant, or some one for it, shall give bond, with surety, before the Clerk of this Court, in the penalty of \$750.00 conditioned according to law, execution of this judgment shall be suspended from that date for a period of sixty days from the expiration of this term of Court.

And now, in said Court, on the 20th day of April, 1933.

This day again came the parties, by their attorneys, and thereupon the defendant tendered to the Court the report of the testimony and other incidents of the trial in this case and moved the Court to sign same and make it a part of the record in said case, which is accordingly done, and within the time prescribed by law, and after reasonable notice in writing to the plaintiff.

The following is the report of the testimony and other incidents of the trial in said case.

page 8 } In the Court of Law and Chancery of the City of
Norfolk, Va.

W. L. Vellines.

vs.

RECORD.

Virginia Electric & Power Company.

Stenographic report of the testimony and other incidents of the trial of the above entitled cause, tried December 21, 1932, in the Court of Law and Chancery of the City of Norfolk, Virginia, before Hon. W. H. Sargeant, Judge of the Corporation Court of the City of Norfolk, Virginia (sitting for Hon. Richard McIlwaine, Jr., of the Court of Law and Chancery of the City of Norfolk, Virginia), and jury.

Present: Messrs. Daniel Coleman and O. L. Shackleford for the plaintiff; Messrs. Williams, Loyall & Taylor (Mr. L. D. Williams) for the defendant.

Phlegar & Tilghman,
Shorthand Reporters,
Norfolk, Virginia.

page 9 } Note: The jury was selected and sworn. The witnesses were sworn and excluded from the court room.

Mr. Williams: May it please the court, I would like to keep Mr. Jackson in here.

Mr. Coleman: I think this will involve Mr. Jackson.

Mr. Williams: We are entitled to a representative.

Mr. Coleman: He is not a representative of the company.

The Court: Unless there is some special reason, the court allows counsel one representative of a corporation to be present to confer with counsel.

Mr. Coleman: We want to except to the fact of Mr. Jackson sitting here for the reason that we think it improper that he should be present because facts will develop which might bear on it with which he is connected.

Note: Opening statements were made by Mr. Coleman, on behalf of the plaintiff, and by Mr. Williams, on behalf of the defendant.

page 10 } W. L. VELLINES,
the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Coleman:

Q. What is your name?

A. W. L. Vellines.

Q. Are you the William L. Vellines who is the plaintiff in this action of William L. Vellines against Virginia Electric & Power Company, a corporation?

A. Yes.

Q. It is alleged in your declaration that you were injured on the 22nd day of January, 1932, at 8th Street, Ocean View, or Willoughby (both are practically the same)?

A. Yes.

Q. Just tell the jury how this accident occurred, Mr. Vellines?

A. That morning I came out of my lane and backed back, and looked around as I come into the road, all around good, to see everything was clear, and I got the car started and kept looking, and there was no car in sight at all, and when I got near the crossing, some little distance from the crossing, I put the window down, and I put my hand out, and was nearly across the street car track, and the crash came and knocked us.

Q. When you started on that track, how far away was the car?

A. When I first saw it, it looked like about one hundred feet or two hundred feet, or something like that—
page 11 } about one hundred feet.

Q. I am speaking of the car that struck you; how far was it away?

A. I couldn't tell you exactly how far, but a hundred or two feet.

Q. Have you any idea as it came around the curve?

A. There was no car in sight when I first looked around.

Q. There was no car in sight?

A. No car in sight.

Q. Did you continue to look for a car?

A. Yes, I kept on looking.

Q. Did you look both ways?

A. Yes; I saw one coming from that way, and I had plenty of room.

Q. A car was coming from Willoughby Beach?

A. Yes.

Q. And the car which struck you, which way was it going?

A. To Willoughby Beach.

Q. From Ocean View?

A. Yes.

Q. When you got to the track how far was the car that struck you away?

A. I couldn't hardly tell you to save my life.

Q. Did you see it?

A. No, I didn't see no car, or I would never have been struck.

Q. Were you looking?

page 12 } A. Yes, I was looking; I looked down that way; I looked this way until I thought I was safe, and I was looking at this car, and my wife hollered.

Q. Did you go on up there without looking in both directions?

A. No.

Q. When you got on the track was the car going from Ocean View towards Willoughby in sight?

A. When I got on the track?

Q. Yes.

A. No, sir.

By the Court:

Q. What did you say—"No, sir", or "I don't know"?

A. I said no, sir.

By Mr. Coleman:

Q. Your house and garage are about near the middle of the block on the Big Bay or Chesapeake Bay side?

A. Yes, sir.

Q. Where were you going?

A. I was going to Norfolk. I had come out to go down towards that way and to go across at 8th Street.

Q. Is that a one-way street?

A. Yes, sir. It is against the law, and you can't go this way.

Q. Is that a regular crossing provided for automobiles which have to cross the track to get on the right-
page 13 } hand side to come in the opposite direction?

A. Yes, sir, one of the main crossings there.

Q. Did the car sound any horn or give any warning or sound a bell?

A. No; the first thing I heard was the crash.

Q. How fast was the car going at the time of the crash?

A. It must have been going fifty or sixty miles an hour.

Q. You drive an automobile, don't you?

A. Yes, sir.

Q. And are familiar with speeds?

A. Yes.

Q. Do you know the distance from the crossing to the curve?

A. From the crossing to the curb.

Q. The curve in the direction of Norfolk?

A. Do you mean the righthand side?

Q. I mean the curve in the street where the car tracks curve?

A. Oh, the curve: I guess about a thousand feet.

Q. When you started on the track, had the front of it come around the curve?

A. Come around the curve?

Q. Yes, the curve around one thousand feet?

A. When I looked there wasn't no car in sight at all.

Q. There was no car?

page 14 } A. No. I put my hand out, and I was in second gear—

Q. (Interposing) Did you give the proper signal—

Mr. Williams: (Interposing) You interrupted him.

By Mr. Coleman:

Q. Were you in first or second gear?

A. I went in first, and just about the time I got on the track I think I pulled in second gear.

Q. How fast were you running?

A. I suppose ten or twelve miles an hour, just as soon as I got into second gear; of course I couldn't go fast in second gear.

By the Court:

Q. Did you say about twelve miles an hour?

A. Twelve or fifteen miles an hour.

By Mr. Coleman:

Q. Look at that photograph and say whether or not that is a photograph of your car, and whether it was in that condition at the time of the accident?

A. Yes, sir.

Q. Which part of your car was struck?

A. Right in here (indicating).

Q. Name it?

A. The rear left side—the rear end, right at the end. The back wheel had crossed the track when it was struck.

Q. Look at this picture and say whether or not that is a correct picture of that crossing?

A. Yes, sir.

Mr. Williams: Which way is that looking

Q. (Mr. Coleman) Which way is it looking?

A. Towards Willoughby Spit.

Q. Tell the jury the extent of your injury?

A. I had a rib broken and my stomach hurt right bad and was bruised up pretty bad, and soreness in my chest.

Q. You said something about the back wheels of your car that were struck; had you gotten to the—

A. (Interposing) I had gotten to the further track that the car goes on.

Q. The further rail, you mean?

A. Yes; I had passed over that and he struck the rear end. It was just at the rear lefthand corner.

Q. Two feet would have carried you to a place of safety, wouldn't it?

A. Yes.

Q. How far was the car knocked?

A. I guess twenty or twenty-five feet across to a telegraph pole, and landed against the pole. It tore the other side all to pieces when it hit the pole. It is a good thing it did hit it, I reckon.

Q. How far was it from the place where your car was struck to where the street car came to standstill?

A. About 140 to 150 feet, I guess, but I didn't page 16 } measure it.

Q. 140 to 150 feet?

A. Yes, sir, every bit of 140 or 150 feet.

Q. What kind of car were you driving?

A. A Durant.

Q. Was it a heavy or a light car?

A. I guess it weighed 2,400 or 2,500 pounds.

Q. How much did you have to spend to put the car back in condition?

A. I have *don't* it; I haven't been able to do it yet.

Q. How much was the estimate?

A. Two hundred and eighteen—

Mr. Williams: (Interposing) I object. Have the proper man here.

The Court: That would be the proper way.

By Mr. Coleman:

Q. Tell the jury about your personal injury?

A. I had one rib broken and bruised up right bad, and I wasn't able to do anything for about five or six weeks.

Q. How long were you confined to bed?

A. I didn't stay in bed; I could sit up, but I didn't do anything.

Q. Did you have any other injuries?

A. It hurt my stomach; I have a ruptured stomach, and it causes it to get larger; the rupture.

page 17 } By the Court:

Q. The ruptured stomach causes it to enlarge?

A. Yes, sir.

By Mr. Coleman:

Q. Do you mean the blow?

A. Yes, hitting it against the wheel, I suppose.

Q. How long did you suffer as the result of the injury?

A. I suppose every bit of five weeks and maybe longer than that. I couldn't do anything for five weeks. They had me strapped up.

Q. Have you gotten entirely well?

A. No; it hurts at times in rainy weather.

Q. Did you lose any time from your business?

A. Yes, lost about five weeks.

Q. Did you have a doctor?

A. Yes, sir.

Q. Who is your doctor?

A. Dr. Berkeley.

Q. Was an x-ray taken of you?

A. Yes, sir.

Q. Mr. Vellines, is that crossing there a crossing that is frequently used by the public?

A. Yes, siree, that is the main crossing; I don't think there is a crossing within a thousand feet of that. Coming from the Beach they have to come up one or two blocks.

Q. Approximately how many people use that
page 18 } crossing, day and night?

A. I couldn't tell you, but practically all the persons use it for a block up the street.

Q. Would a thousand cars a day be a fair estimate?

Mr. Williams: If the court please, that cannot be anything but a guess; he has stated that he couldn't say.

By Mr. Coleman:

Q. From Ocean View down to the end of that spit, Wilmoughby Spit, are houses on both sides of the road?

A. Yes, sir.

Q. Are they thick?

A. Pretty good and thick.

Q. There are very few vacant lots?

A. There are some vacant lots; there are not many vacant lots. The back part, some are vacant, but on the Big Bay side most of them are built up.

Q. Is that crossing used also by people coming from Willoughby Spit to Ocean View?

A. Lots of them cross there on Sundays, and you can see them all day. It is the most popular crossing from Fourth Street down.

Q. Approximately how many people live at Willoughby Beach?

A. I couldn't hardly tell you that. I couldn't answer it.

Q. Was your wife injured?

page 19 } A. She was shaken up.

Q. She has made no claim?

A. No.

Mr. Williams: I think that is immaterial, and I object to it.

Mr. Coleman: We can bring an action. I think it is perfectly proper to show that she was in this car; it is a part of the *res gestae*. I am asking whether or not his wife was injured to any extent.

Mr. Williams: I submit that it is immaterial. He is suing and he has nothing to do with his wife's claim.

The Court: The jury is so instructed. As a part of the *res gestae*, the transaction may be stated to show who was in the car, but you are not to consider the claim of the wife nor the severity of the shock to her; but how the car was struck and the force of the blow. You may not consider whether any others in the car were injured; and the court specifically instructs you that it hasn't anything to do with this case.

Mr. Coleman: I want to show that she was in the car and was injured.

The Court: The court rules that it is not proper for any other purpose than to show the severity of the accident, as a part of the *res gestae*. If there was no suit for the car and the man was suing for damages to himself alone,
page 20 } I would allow the condition of the car to be shown as showing the effect of the crash, and while he would not be suing for damages to the car I would allow its condition to be shown.

Mr. Coleman: This suit is for damages to the car and for injuries to him.

The Court: I understand that, but I am separating it.

By Mr. Coleman:

Q. Mrs. Vellines is here, is she not?

A. Yes, she is here.

Mr. Coleman: We want to formally introduce these in evidence.

Note: The photographs are marked Exhibits Nos. 1, 2 and 3.

Mr. Williams: When did you take these, Mr. Vellines?

Witness: I guess about a week after the accident.

Mr. Williams: Is that a picture of the car, and say whether that was the condition directly after the accident.

Witness: Yes, sir.

Mr. Williams: Was there any change in it?

Witness: No; it was just like it was pulled off from the telegraph pole.

Mr. Coleman: The witness is with you.

The Court: Mr. Coleman, on further consideration, I am disposed to sustain the objection as to the testimony that Mrs. Vellines was wounded or hurt, and to strike it out. You can save your point.

Judge Shackleford: The testimony is that she was not hurt.

The Court: I sustain the objection to it.

CROSS EXAMINATION.

By Mr. Williams:

Q. The reason I was asking you about those pictures, I notice that that is on the lefthand side of the automobile and the door seems to be entirely off and thrown into the side of it; here is a picture which purports to have been taken the next day, and the door—

A. It was knocked off and they shoved it in.

Q. That is the way it was immediately after the accident, and after the door was pulled off or fell off, and you pushed it inside?

A. That is the way the picture was taken.

Q. I understand the picture shows it?

A. I come into town, and the next day when I saw it the door had fell down, and we shoved it inside.

Q. I wanted to show that the seat had been taken off on the 23rd?

A. Here is the side which went against the telegraph pole.

Q. That is the righthand side, and that is the
page 22 } lefthand side?

A. Yes, sir.

Note: Photographs are filed marked Exhibits Nos. 4 and 5.

Q. (Mr. Williams) Now, Mr. Vellines, you have been living down at Willoughby Spit for approximately how long?

A. Going on four years.

Q. Four years. I suppose you are in the habit of sometimes riding on the street cars, too, are you not?

A. Yes.

Q. And cars that run down there are pretty big street cars, are they not?

A. What?

Q. They are pretty big?

A. Yes, sir.

Q. They are the large type—the largest cars the company has?

A. Yes, sir.

Q. Now, if I understand, your house is situated on the Big Bay side of the car track?

A. That is correct.

Q. And what direction do you designate these tracks as running—east and west or north and south?

A. I call it east and west.

Q. The tracks run east and west approximately?

A. Yes, sir.

page 23 } Q. Your house, then, would be to the north of
the street railway tracks?

A. It is on the righthand side fronting Big Bay.

Q. That would be the north side, wouldn't it?

A. Yes, sir.

Q. And approximately how far from the car track is your house?

A. My house is about two hundred feet or two hundred and fifty feet.

Q. Now, the car tracks at that point are rough except at the regular fixed crossings, are they not?

A. Yes.

Q. And a concrete roadway on either side of them?

A. Yes.

Q. And it is a double car track line with a rough roadbed; is that correct?

A. Yes.

Q. So automobiles cannot cross at any point except at the regularly designated crossings?

A. That is right.

Q. You came out on the boulevard approximately how far from the crossing on which you were subsequently struck?

A. I guess it must have been about possibly 150 feet or something like that. I didn't measure it.

Q. I mean just approximately. Is that east or west of the crossing?

page 24 } A. This 150 feet?

Q. Yes, is your house located east or west of the crossing?

A. It is back this way, which would be called east.

Q. That would be east, towards Ocean View?

A. Yes, sir.

Q. And you came out on the main road and had approximately 150 feet to drive westerly before you got to this particular crossing?

A. Yes, sir.

Q. I believe you said the first thing you knew of any street car was when the impact took place?

A. Practically.

Q. In other words, you didn't see this particular street car at all that struck you until the impact took place?

A. Every time I looked there was no car in sight.

Q. Then my statement, I assume, from what you just said, is correct, that you did not see the street car which struck you until it did actually strike you?

A. It might have been a little distance from me; it might have been a little distance, you understand, but I was practically across the track when I saw it. I couldn't help but seeing it a little ways from me.

Q. What would you call a little ways—two or three feet?

A. Ten or fifteen feet, I suppose. I couldn't say
page 25 } exactly to save my life.

Q. I understood you, in response to Mr. Coleman's question, to say you didn't see it until the impact took place; am I mistaken in that?

A. I say it must have been about ten or fifteen feet, it was so close on me.

Q. Then I believe you say you did see it, according to your best judgment, when it was about ten or fifteen feet from you?

A. Yes.

Q. And, at that time, you were already on the track?

A. I was nearly across the track.

Q. You were nearly across the track?

A. Yes, sir.

Q. And the impact took place almost before you could think?

A. It was pretty quick, as fast as it was coming.

Q. Now, Mr. Vellines, when you came out of your driveway on to the boulevard, did you look to your left?

A. I certainly did.

Q. And did not see any street car?

A. There was no street car in sight.

Q. And then you traveled 150 feet and on to the track and looked again?

A. I looked and looked as I went along; I turned every once in a while and looked, and put my window
page 26 } down and put my hand out.

Q. But you never did see the street car until you had practically crossed the track and it was in ten or fifteen feet of you; that is correct, isn't it?

A. Yes, sir.

Q. Now, Mr. Vellines, you said you saw a street car was proceeding towards Ocean View some long distance up the track?

A. Yes.

Q. Approximately how far would you judge that that street car was?

A. I suppose that that street car, when I first saw it, was half a block or more.

Q. Half a block?

A. Yes, sir.

Q. And was that as you made your turn to come on to the track?

A. I saw it just as I made the turn.

Q. Just as you made the turn to come on the track, that street car was half a block away?

A. Yes, sir.

Q. And they are pretty long blocks, aren't they?

A. Yes, sir, they are pretty long blocks.

Q. Now, how far did you have to travel after you began to make your turn until you got on to the track?

A. How far had I done what?
page 27 } Q. How far did you travel, after you made your turn or began to make your turn, until you actually got on the track?

A. It was not but, I think, five or six feet.

Q. Five or six feet?

A. Yes, sir; I was right up close alongside of the track as I went along.

Q. Were you traveling on the righthand side of the road before you made the turn, or not?

A. I pulled up on the lefthand side to make the turn. I come down here and turned to make the crossing.

Q. You were traveling on the righthand side?

A. I come out like that, and then pulled to go across.

Q. When you came on down the road, were you on the lefthand side, or middle, or right?

A. Before I began to turn?

Q. Yes.

A. I was about middleway, and then turned to the lefthand side to come down the track.

Q. Now, just before you made that turn, did you look to see if the street car was coming up in the rear of you?

A. Yes, sir, I suppose about as far as to the end of that rail.

Q. The end of what rail?

A. The iron rail there; I guess about twenty feet.

Q. You looked when you were about twenty feet away?

A. Yes, sir.

page 28 } Q. And you did not see the street car?

A. No car was in sight then.

Q. You could see down to the curve?

A. I couldn't see clean to the curve without looking back of the car.

Q. When you started in to make the turn you had a clear view then?

A. I have already explained that to you.

Q. Didn't you have a clear view then to your left?

A. I had as clear view as I could to see some distance down.

Q. You could see to the curve then?

A. No, I couldn't see to the curve.

Q. Why?

A. It was not real light anyhow.

Q. Did you have lights on your automobile?

A. Yes, I had lights on my automobile.

Q. You could see lights on a street car a long way off?

A. I didn't see any. I didn't see any car.

Q. I would like, if you will, to come down and look at this map. This is towards—

A. (Interposing) This is towards Ocean View.

Q. Now, that is towards Willoughby. That is going west to Willoughby, and that is coming east to Ocean View. Do you know who lives in 798 residence?

page 29 } A. I don't know that I know any of the numbers but my own.

Q. Don't your driveway come up by a little iron garage?

A. There are two garages; which do you mean?

Q. The first one?

A. Let us get this kind of plain: This should be turned around, because that is the side I am living on.

Q. Which way do you want it turned?

A. Around. (The map is turned around) Where is Eighth Street?

Q. Right there.

A. Here is Eighth Street, and I live about this distance (indicating).

Q. About 150 feet east of Eighth Street crossing, you said?

A. Yes, sir, along about like that, and here is the little garage here that is by the side of the driveway that I come, and here is one of Mr. Clark's.

Q. The garage I understood you are talking about is 150 feet away; that would only be about twenty or thirty feet where you have your finger. Your house is approximately 150 feet away from the crossing?

A. Yes, sir, the entrance to come in. The house is further.

Q. What is the number of your house?

A. 791.

Q. Three inches would be sixty feet (measuring on the map); 150 feet would bring you down there; is page 30 } that about the distance?

A. I just judge that it is 150 feet. I didn't measure it at all.

Q. Then you came out on this road?

A. Yes, sir, on this road.

Q. Whereabouts were you when you looked the first time before going on to that track?

A. Just about along here (indicating).

Q. Right there where I put the "X"?

A. Yes, sir, and I turned out, as I generally do, and there was no car in sight.

Q. Then you traveled from the point "X" until you got on this track without looking again?

A. I was right at it. I was looking all the time until I glanced to the side, and then I—

Mr. Coleman: (Interposing) The jury understands that this is to scale, and how many feet to the inch?

Mr. Williams: Twenty feet to the inch.

Witness: You understand I am guessing.

By Mr. Williams:

Q. How many feet were you from the track when you looked the last time?

A. I told you along about here (indicating), but I don't know how many feet. I glanced around with my hand out. Now, to look at it, it looks about that.

Q. That would be about forty feet?

page 31 } A. I didn't mean that at all. I said about ten or fifteen feet.

Q. Ten or fifteen feet when you looked?

A. Yes; you can say that.

Q. I don't want to say it; I want you to say it.

A. I am saying it.

Q. You were ten or fifteen feet from the track?

A. Yes, sir.

Q. And you were traveling about twelve miles an hour?

A. Just about that. I was getting into second gear.

Q. And, at that time, you looked to your left as far as you could see down the track?

A. Yes, sir.

Q. And there was no street car in sight?

A. There was no street car in sight, and when I looked up I saw the other car, and I could just see it ten or fifteen feet, and it come plowing and tore us right up. There was a telegraph pole here.

Q. That is on there?

A. I don't see any telegraph pole.

Q. There it is?

A. My hindmost wheels were across this track here, and it hit it copang and threw it against the pole and mashed it, and threw the car on the side, and Mr. Galvin came and pulled my wife out.

Q. How far did it run?

page 32 } A. 150 or 175 feet. I was hurt so bad I don't know exactly.

Q. Where was the rear end of the street car with reference to the automobile after everything had come to a stop?

A. It looked like fifteen or twenty feet the other side of the crossing.

Q. The automobile. I asked you where the rear end of the street car with reference to the automobile after everything had come to a standstill?

A. It looked like fifteen or twenty feet the other side of the crossing. I didn't measure it.

Q. Then he ran a car length and fifteen or twenty feet?

A. Yes, sir. I was hurt pretty bad, and I thought my wife was hurt pretty bad.

By the Court:

Q. Where was the other car approaching? Put your finger on that.

A. I think about the middle of this block.

By Mr. Williams:

Q. Did the street car have a headlight on it?

A. I couldn't tell you that to save my life.

Q. You saw it, didn't you?

A. I couldn't tell you to save my life. It hit me so quick I couldn't tell.

Q. When you saw the street car that was ten or page 33 } fifteen feet away, did you see whether it had a headlight on it, or not?

A. I couldn't tell you to save my life because I don't remember.

Q. Was there any difficulty in your seeing down there a thousand feet?

A. I told you that before.

Q. You can tell me again?

A. It was dark and I don't think I could see a thousand feet.

Q. Could you see 750 feet?

A. I don't know. It was dark that morning, but I could see a good distance.

Q. Give me an estimate?

A. I suppose at least one hundred yards or more.

Q. At least one hundred yards or more?

A. Yes, sir.

Q. And that street car, when you were ten or fifteen feet from the crossing, was not in sight

A. No.

Q. So, while you were traveling ten or fifteen feet, at twelve miles an hour, the street car must have traveled over one hundred yards?

A. I guess it did, the way it was coming. If it hadn't been for the telegraph pole I don't think that we would have been here now to tell the tale.

page 34 } Q. And the first intimation you had that there was any street car was, I believe you said, when your wife hollered?

A. Just before she hollered I looked.

Q. Will you tell us whether it was just before or just after or at the time?

A. Just before. It was a second or so before she saw it, about the same time I did.

Q. I can't hear you?

A. I understood she saw it at the same time I did, if she saw it at all.

Q. Have you any way of fixing the time?

A. We generally leave home around about 6:30. I judge coming out there and getting there was about twenty minutes of seven.

Q. This was the car which was to meet the Willoughby seven o'clock ferry?

A. I couldn't tell you about that.

Q. You are not familiar with that?

A. No. Up to that time I seldom used the street cars, but but since that time I have had to use them all the time.

Q. How long did Dr. Berkeley attend you?

A. I think the doctor attended me about three or four weeks, or something like that. I don't know exactly the time, but he can tell you that.

Mr. Williams: Mr. Coleman, is Dr. Berkeley here?

Mr. Coleman: Yes.

page 35 } Mr. Williams: I believe that is all.

RE-DIRECT EXAMINATION.

By Mr. Coleman:

Q. Mr. Vellines, after the car struck your automobile, how far did the street car go?

A. About 150 feet.

Q. Mr. Williams' question looked like you said fifteen or twenty feet; what did you mean?

A. I meant fifteen or twenty feet—the end of the car the other side of the crossing. The crossing is about twenty feet wide, but, of course, I couldn't tell exactly. I couldn't tell because I was hurt bad and I didn't measure it. I just glanced and saw the car there.

Q. Was it beyond the crossing some distance?

A. Yes, beyond the crossing some distance.

Q. You can't say positively how much?

A. No.

Q. You say you were badly hurt at the time?

A. I was badly hurt and couldn't tell.

Q. As to this road going towards Willoughby, on which you came out of your garage and went into, is that a very narrow road?

A. Yes, it is narrow. It is just about wide enough for cars to pass. It is twelve or fifteen feet. It is a one-way street.

page 36 } Q. Automobiles are never allowed to meet each other and pass?

A. No; they have to go on the other side. It is against the law to go on that side east.

Mr. Williams: I don't know whether it is the law, or not, and the ordinance is the best evidence of it.

By Mr. Coleman:

Q. Have they got signs along the roadway?

A. I think that they have signs further up. Any way, if the cops *that* catch you, they will fine you.

Mr. Williams: The ordinance is the proper evidence.

The Court: Objection sustained.

Mr. Coleman: I would like to have a subpoena returned forthwith. Mr. Williams knows it, and he has been over it a dozen times.

Mr. Williams: If you say it is so, I will admit it.

Mr. Coleman: I think you know it. I thought you had been down to Trail's End enough to know it.

Mr. Williams: It may be agreed that the city ordinance makes the boulevard on each side of the company's tracks a one-way street.

Witness: They arrested a man for going up there—

The Court: (Interposing) Just answer the questions.

By Mr. Coleman:

Q. Mr. Vellines, to the best of your judgment, as to what you saw, how far did the car go after it struck you?
page 37 }

A. At least 150 feet.

Q. The street car?

A. The front part?

Q. Yes.

A. At least 150 feet.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Vellines, that is simply an estimate on your part?

A. The best I could judge. I didn't measure it.

Q. And I believe you did say to me a short while ago, and which I assume is correct, that the rear end of the car was about 15 feet—

A. (Interposing) I didn't measure it.

Q. I know you didn't measure either one.

A. That is all I can say. I was very badly hurt, and I couldn't tell you either one.

Q. You did state that the street car rear entrance was about fifteen feet the other side of the crossing?

A. About fifteen, and it might have been thirty or forty, but I don't know.

Q. But, according to your best judgment, it was fifteen or twenty?

A. I know that they were transferring the passengers, and I couldn't tell because I was hurt.

Q. You could tell how far the rear end was from page 38 } there as the front end?

A. I judge about that, but I couldn't tell you to save my life.

Q. So, according to that, the street car, if it ran about 150 feet and the rear end, if it was only fifteen feet, it would have to be over one hundred feet long?

A. I don't know; I couldn't tell you. It was just a rough guess.

JAMES E. GALVIN,

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

Examined by Mr. Coleman:

Q. Mr. Galvin, what is your name?

A. James E.

Q. James E. Galvin?

A. Yes, sir.

Q. How old are you?

A. Sixty-nine years old.

Q. How long have you lived in Norfolk?

A. Sixty-nine. I will not be sixty-nine until the 29th of December.

Q. What is your occupation?

A. Water inspector for the City of Norfolk.

Q. How long have you been with the city?

A. I think twenty-nine years.

page 39 } Q. Did you see any part of an accident or collision between a street car of the V. E. P. Company and a car of Mr. Vellines on the 22nd of January, 1932?

A. Did I see it?

Q. Did you see any part of it?

A. I don't know what you mean.

Q. Do you remember when there was a collision?

A. Yes; I heard the crash.

Q. You didn't actually see the contract, did you?

A. No, sir, I did not.

Q. Did you see the car approaching before Mr. Vellines' car was in contact with the street car?

A. I think I did, yes, sir.

Q. How far were you away then?

A. It may have been in the middle of the block, but I wasn't paying attention and wasn't expecting anything.

Q. What were you doing?

A. I was going to work.

Q. How close do you live to that crossing?

A. I live at eight and a half stop, and that is the eighth crossing, and I reckon it is four or five hundred feet.

Q. Is that a regular stopping place for street cars coming to and going from Willoughby Spit?

A. Yes, sir.

Q. Does the company maintain a waiting room there?

A. A kind of storm shed.

page 40 } Q. And do cars going to Ocean View and to Willoughby Spit stop there to take on passengers?

A. Yes, sir, one at the east and one at the west end.

Q. How long have you lived at Willoughby?

A. I think three years July next.

Q. Do you know whether the road which is on the north side of the track, going one way and one going the other way, do you know whether they are one-way streets?

A. Yes, sir.

Q. Do you know whether people use this crossing who operate automobiles?

A. I have seen it used many times. While waiting for the car, I have seen people go down and cross over there.

Q. Is there any other crossing for people living around Eighth Street to cross from the righthand to the lefthand side?

A. I don't think so until Ninth Street and maybe Seventh Street.

Q. How far apart are the Eighth Street stop and the Ninth Street stop, approximately? You can't be accurate?

A. No.

Q. Is it as much as quarter of a mile?

A. I don't think it is that much. It may be, but I don't think so.

Q. One-eighth of a mile?

A. I don't know.

page 41 } Q. Mr. Galvin, just tell the jury, in your own way, exactly what you saw of this transaction?

A. I was standing waiting for the car to go to Norfolk going to work, and the Norfolk car was coming from Willoughby, and I was standing against the post waiting for it, and I was looking at it coming down, and I heard a crash, and then I turned around and the automobile kind of zig-zagged and come right against the post where I was at, and if I hadn't moved I would have been hit.

Q. It was knocked clean over to a pole at which you were standing?

A. Yes.

Q. Is that pole on the car track?

A. No, it is not on the car track.

Q. And did you help get anybody out of the automobile?

A. No. Mr. Vellines' hat fell, and I picked it up and asked if the lady was hurt, and I didn't get any reply, and I saw the lady came out herself.

Q. Was Mr. Vellines hurt?

A. He said that he was hurt, that he was hurt in the side. He came on the same car with me and went to town, and he said that he was hurt.

Q. You said your only recollection of seeing the street car was when it was between Seventh and Eighth Streets?

A. Yes, sir, that is the car going to Willoughby.

Q. Approximately what distance would you say page 42 } that car was from Eighth Street crossing?

A. I haven't any idea. I never thought about those things.

Q. Was it half a block?

A. Yes, I judge it to be about half block. I was not paying any attention at all, but was waiting for my car to come to Norfolk.

Q. You were waiting for the car coming in the opposite direction?

A. Yes. It was 6:30 in the morning and very dark.

Q. Do you mind coming down here and looking at this plat; here is the crossing; this is Eighth Street; show the jury where you were standing?

A. What is that?

Q. That is a pole?

A. I was standing right there at that pole.

By Mr. Williams:

Q. Here is a cinder platform?

A. Yes, sir.

By Mr. Coleman:

Q. What is the cinder platform for?

A. I don't know. There ain't no cinder until you get there, that I remember; there may be some cinders thrown there, but there is no platform.

Q. What is the little space over there?

A. We call it a storm shed.

Q. Did the automobile come all the way across page 43 } the track?

A. All the way across, and hit that pole, and it turned his head towards Norfolk.

Q. Did you have to jump to avoid being hit?

A. I certainly did. If I had stayed there I would have got hurt, but I come around this way.

Q. Did you hear any bell rung or gong sounded?

A. I don't say it was not, but I didn't hear it if it was. It could have been, but I was not looking for those things.

Q. This car, you say, came all the way to this pole?

A. Wherever it hit at, it came to the pole. I didn't see it hit.

Q. You didn't see that?

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

CROSS EXAMINATION.

By Mr. Williams:

Q. How far did the car run, if you know, after the impact took place?

A. Which car?

Q. The street car?

A. Which street car?

Q. The one that hit the automobile?

A. I couldn't tell you to save my life.

Q. Where was the rear end of it with reference to the crossing?

page 44 A. The street car going to Willoughby?

Q. The one that struck the automobile?

A. That is the one that was going to Willoughby?

Q. Yes. How far was the rear end from the crossing?

A. I don't know.

Q. How far was the rear end from the automobile?

A. I couldn't tell you.

Q. When you saw this street car that was proceeding towards Willoughby, you say it was approximately half a block?

A. I judge that, yes, sir.

Q. When you speak of a block, you mean the distance between the crossing at Seventh and the distance to Eighth Street?

A. Yes, sir.

Q. At that time were you at this landing where you board the street car?

A. Yes, sir. You see I come out of that shed; I wait in the shed, and this was in the wintertime and I saw my car coming down, and I come out of the shed and was standing against the pole.

Q. And, at that time, you noticed a street car?

A. I rather think I seen the car, but I didn't particularly notice it.

Q. I thought you said you saw it?

A. I think I saw a car coming both ways.

Q. About half a block away?

page 45 } A. Yes, sir.

Q. There was nothing out on the crossing at that time, was there?

A. Do you mean out here?

Q. Yes.

A. No, sir.

Q. There was nothing approaching the crossing—any automobile?

A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. Coleman:

Q. Was there anything over here to have kept the motorman from seeing a man make a turn? Was there any object in sight?

A. This is a vacant lot, I think belonging to Mr. Joseph Clark.

Q. I am asking you whether there was anything which would have prevented the motorman seeing the car?

A. On which side is that?

Q. That is the Little Bay side. On the Chesapeake Bay side, was there anything on the track to have prevented it?

A. I didn't see anything.

Q. This is clear here?

A. Yes.

Q. Was there anything, when the motorman was
page 46 } 500 feet away or 200 feet away, to have kept him from seeing Vellines making the turn?

A. I don't see why he couldn't have seen him if Mr. Vellines was making the turn.

Q. Was there anything to have prevented him seeing Vellines making the turn?

A. No, obstruction.

Q. Is that clean and clear?

A. Yes. Mr. Clark owns a lot here.

Q. A motorman one hundred feet away could have seen Vellines, if he had been looking, when he made the turn; there is nothing to prevent him seeing him coming on the track?

A. No, I don't think there was anything to prevent the man seeing it. This is all a clear space, and this is a field belonging to Mr. Clark.

Q. This is the roadway, and it is very narrow—not over ten or twelve feet; the concrete on Willoughby side is narrow?

A. I suppose two automobiles could pass.

Q. And that is all?

A. Yes, sir.

Q. There was nothing that could have prevented him seeing down at this curve; he could have seen Vellines when he made the turn, couldn't he?

A. Yes, it seems to me that he could.

page 47 } RE-CROSS EXAMINATION.

By Mr. Williams:

Q. That is, of course, provided Mr. Vellines was making the turn?

A. Yes, I say if he was making the turn he could have seen him.

Q. When you saw the street car at the middle of this block, there were no automobiles on this street or coming across?

A. I didn't see any.

By Mr. Coleman:

Q. He was obliged to have made the turn to come over here?

A. Or to have kept straight ahead.

By the Court:

Q. See if I can get it clearer: When did you see the car—when you were at what place, when you saw the car approaching?

A. I was standing here (indicating).

Q. When did you first see the car coming to Willoughby from Ocean View, the one that struck the automobile?

A. What do you mean?

Q. Where was it when you first saw it?

A. I couldn't tell you, but somewhere in here (indicating) I was looking for this car, and I naturally turned around and saw this car coming.

Q. Where were you?
page 48 } A. At the pole.
Q. When you first saw the car?

A. Yes, sir.

Q. Designate with your hand about where the car was?

Mr. Coleman: He should know the scale.

The Court: Tell him.

Mr. Williams: Every inch on this means twenty feet on the ground.

Mr. Coleman: Every five inches means one hundred feet.

By the Court:

Q. How many feet was it when you first saw the car which struck the automobile?

A. I don't know, but along here (indicating on map).

Q. Can you describe it any way just where the street car that struck the automobile was when you first it?

A. No, sir, I could not, because I wasn't expecting anything. It may have been down here, but I couldn't tell you exactly where.

Q. Can you tell about how many feet it was?

A. No, sir.

By Mr. Williams:

Q. In response to Mr. Coleman's question, you gave, I believe, some estimate as to the length or distance between Eighth Street and Seventh Street; approximately how far was it?

page 49 } A. I don't think I said that. I told him I didn't know. He asked whether one-eighth or quarter of a mile between that.

Q. From Seventh Street to Eighth Street, approximately how far is it?

A. I couldn't tell you. I don't know anything about this.

Q. How do they compare with ordinary city blocks?

A. In my opinion twice as long as an ordinary city block.

Q. And when you saw the street car it was, according to your judgment, about midway between those two spots?

A. I should think so.

By the Court:

Q. Midway between what?

A. Between $7\frac{1}{2}$ and 8. You see $7\frac{1}{2}$ comes next to 8, and $8\frac{1}{2}$ and 9.

By Mr. Williams:

Q. About midway between the two?

A. Yes, sir.

Q. And the distance between the two is about twice what an ordinary city block would be?

A. Yes, sir.

By the Court:

Q. Do you mean between $7\frac{1}{2}$ and 8?

page 50 } A. Yes, sir, and I think the blocks are longer.

Q. And so, if I get your answers correctly, do I understand you to say when you saw the car approaching which struck the automobile, that you saw no automobile?

A. I saw no automobile. It was very dark, and I was not looking for anything like that. There may have been an automobile coming parallel with the car and running right along with it, but I didn't see it.

By Mr. Coleman:

Q. You don't mean to say there was no automobile passing along that street?

A. Oh, no, I don't mean to say that.

Q. In other words, you were not paying any attention to that, and don't know anything about that?

A. No.

Q. Your mind was more on the car you were going to take to come to work?

A. Yes, and it was very dark at 6:30 in the morning, and I wasn't paying any attention to it.

page 51 }

H. S. CHAPPEL,

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

Examined by Mr. Coleman:

Q. Mr. Chappel, what is your name?

A. Herman—H. S. Chappel.

Q. Were you employed by A. Wrenn & Son about the 22nd of January, 1932?

A. Yes, sir.

Q. Did you make an estimate on a Durant car which had been in a wreck at Willoughby?

A. Yes, sir.

Q. What estimate did you give Mr. Vellines?

A. I think I have a copy of it here. \$218.50.

Q. Was that a fair price for putting the car back in condition?

A. Yes, sir.

(No Cross Examination.)

At 12:55 the court took a recess until 2:30 for lunch.

page 52 } AFTERNOON SESSION,

Norfolk, Virginia, December 21, 1932.

The court met at the expiration of the recess.

Present: The same parties as heretofore noted.

L. M. LEWIS,

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

Examined by Mr. Coleman:

Q. Capt. Lewis, your name is L. M. Lewis?

A. Yes, sir.

Q. You have been in the wrecking and dredging business for years and years?

A. Yes.

Q. For how long?

A. About twenty five years.

Q. You were first with the French Dredging Company and afterwards with the L. M. Lewis Company?

A. Yes, sir.

Q. What is your relationship to Mr. Vellines?

A. He is my son-in-law.

Q. His wife is your daughter?

A. Yes, sir.

Q. On the 22nd of January, when this collision occurred at Eighth Street, Willoughby Beach, did you see the accident?

A. No, sir, I never seen the accident.

page 53 } Q. Did you go there after the accident?

A. Yes.

Q. How quickly?

A. Within two or three minutes, as soon as I could get

Q. Had the street car been moved after the collision?

A. No, sir.

Mr. Williams: I object to that. He could not possibly know whether it had or had not been.

The Court: What did you ask?

Mr. Coleman: I asked if he saw the accident, and he said he did not, then I asked him if he knew the distance that the street car went—how far it was away from the intersection.

Mr. Williams: The next question was had the street car been moved, and that is the question I objected to as he couldn't know of his own knowledge, and it is bound to be based on hearsay.

The Court: How could he tell?

By Mr. Coleman:

Q. Did you hear the crash?

A. Yes.

Q. How quickly did you get there after you heard the crash?

A. About a minute or two.

Q. Was there any possibility in that time of moving the car?

A. No, sir, she couldn't move.

Q. Why?

A. They tried to move her and couldn't.

Q. Why?

A. They jammed the brakes is one thing that occurred, and they couldn't move her.

Q. What was the distance from the intersection to the rear end of the street car?

Mr. Williams: Your Honor understands I object to that question.

The Court: Objection overruled.

Mr. Williams: Note an exception.

By Mr. Coleman:

Q. What was the distance from the rear end of the car to the middle of the intersection?

A. About 120 feet.

CROSS EXAMINATION.

By Mr. Williams:

Q. What was the last answer?

A. About 120 feet.

A. From the rear end of the car to the crossing.

Q. Mr. Lewis, you said it was about 120 feet; did you measure it?

A. I never measured it with a tape line, but just stepped it off.

Q. Whereabouts were you when you heard this crash?

A. At home.

Q. Where is your home?

A. 791 Chesapeake Bay Avenue.

Q. Will you look at this map a minute, Mr. Lewis, and tell me about where your house is? Here is the crossing involved, and here is the Bay side. Big Bay is over here?

A. This is the concrete here, is it?

Q. Yes.

A. Our house sits back in here.

Q. Point to what would be 798?

A. That is not our house. Nichols lived there. Our house is here (indicating).

Q. Your house sits in behind 798?

A. Yes, and the board walk comes down here.

Q. And the driveway leading out of your house comes by the corner of that iron garage?

A. Yes, by this house.

Q. Like I have marked and numbered it "XY", showing the approximate distance of the lane?

A. Yes.

Q. How far is your house from the edge of the concrete? How far back does it sit towards the Bay?

A. I should say 350 feet.

Q. 350 feet, and it is about 150 feet from that page 56 } lane to the crossing?

A. No, sir; it is more than that.

Q. Approximately how far?

A. I should say a couple of hundred feet.

Q. Then you were about 550 feet away, approximately?

A. No, I wasn't no 550 feet. Now, I went over to the car when I seen it.

Q. You said you were at the house when you heard the crash?

A. Yes, sir, and I come down.

Q. Your house is about 350 feet from here, and 200 feet from here to here (indicating on map)?

A. Yes, sir.

Q. That is about 550 feet when you heard the crash?

A. Yes, sir.

Q. Is that the same house Mr. Vellines lived in?

A. Yes, sir.

Q. After the accident was all over, where did you go?

A. I stayed around there and helped shove the car off the track and get her over in the garage and get it out of the way.

Q. Did you go back home?

A. Yes, sir.

Q. Where did Mr. Vellines go?

A. Got on the street car and come to Norfolk; I don't know whether Mr. Vellines come home, or where he
page 57 } went. I think he went to the doctor. He was hurt
mighty bad.

Q. Did he catch the street car?

A. I don't know whether he caught the street car, but I know that he did go into town after a while to see the doctor,—he said his side hurt him so bad.

Q. Didn't he catch the street car standing there when you got there?

A. I couldn't say, but I don't think he did.

Q. How many cars were out there when you got there?

A. Only one.

Q. Only one?

A. Only one to my recollection. There might have been two, but I have no recollection of seeing it.

Q. Now, if there were two, which one did you measure?

A. What did you say?

Q. You said there might have been two?

A. There might have been two, but I only seen one, as I remember.

Q. Then, if another car had come up, you don't remember seeing it?

A. I don't know whether one was coming in going to town, but I remember one was standing there that struck him.

Q. And you say that that car could not be moved?

A. They didn't move it with her own power while I was

Q. They had to tow it away?
page 58 } A. I don't know whether they had to tow it
away, or not.

Q. How do you know that it couldn't move?

A. It didn't move while I was there, and I was there twenty or thirty minutes.

Q. You came to the conclusion that it couldn't move because it didn't move?

A. That is what I took it to be the meaning was. There were passengers on there, and I came to the conclusion if she could have gone she would have carried them away.

Q. That is the only reason you have for saying that it couldn't move?

A. Yes, sir, that is what I took it to be.

RE-DIRECT EXAMINATION.

By Mr. Coleman:

Q. And you saw over the house back of your house. Is the house back of your house taller than yours?

A. What do you mean?

Q. Is there a house built on the lot with yours?

A. Yes, sir, right in front of it—in the back.

Q. In the back?

A. Yes, sir.

Q. Is that house taller than yours?

A. It is about the same height, and maybe a little lower.

page 59 } DR. G. R. BERKELEY,
a witness on behalf of the plaintiff, being duly
sworn, testified as follows:

Examined by Mr. Coleman:

Q. You are Dr. G. R. Berkeley?

A. Yes, sir.

Q. How long have you been practicing medicine in Norfolk?

A. About twenty-five years.

Q. Did you examine and treat Mr. William L. Vellines on the 22nd of January, 1932?

A. I did.

Q. Will you tell the jury what his condition was?

A. The main injury was a fractured rib which we found from an x-ray picture,—a fracture of the seventh rib in an anterior axillary line without displacement.

Q. How long did you treat him?

A. He came to my office from the 22nd of January, and the last time was the 25th of February.

Q. Do you recall how much your bill is?

A. About \$25.

Q. Has that been paid yet?

A. No.

Q. Was that a painful injury or was it a mild injury?

A. He had a fractured rib, and he complained to me of right much pain. I think I strapped him up three or four times during that period.

Q. Would that character of injury cause considerable pain, in your opinion?

page 60 } A. I understand that it does.

Q. The first time you saw him was the 22nd of January, 1932, and when was the last time you saw him?

A. 25th of February.

Q. A little over a month?

A. Yes.

Q. With the kind of injury that he had, he could walk around as well as go to bed?

A. He came to my office. I don't know what he did at home.

Q. That kind of injury does not require him to go to bed?

A. Ordinarily it does not.

Q. He says now in wet weather he suffers with pain; is that the natural result of things of that kind?

A. I think most people who have had a broken bone have a certain amount of pain and discomfort in wet weather. I have heard them complain that way.

CROSS EXAMINATION.

By Mr. Williams:

Q. Dr. Berkeley, you say that the x-ray showed fracture?

A. Yes.

Q. There was no displacement, was there?

A. No displacement.

page 61 } Q. In other words, the rib was cracked?

A. That is all, yes, sir.

Q. And there was nothing in the world to do but strap it up, and it re-knit?

A. That is all the treatment I gave him.

Q. How many times did you see him altogether?

A. Nine times.

Q. And your bill was \$25?

A. Yes.

Q. Does that include the x-ray?

A. No, sir.

Q. What is the x-ray—about ten dollars?

A. Either that or fifteen, I don't remember—either ten or fifteen.

Q. What time of day was it on the 22nd that he came to see you?

A. I think in the morning office hours between eleven and one.

Q. Between eleven and one o'clock?

A. I don't recall; it has been a long time ago, and I haven't anything here to show.

page 62 } MRS. MAGGIE M. LEWIS,
a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Coleman:

Q. Mrs. Lewis, your name is Mrs. L. M. Lewis?

A. Maggie M., they have got here.

Q. You are the wife of L. M. Lewis?

A. Yes.

Q. And you are the mother-in-law of Mr. William L. Vellines?

A. Yes.

Q. Did you see the collision between the street car of the Virginia Electric & Power Company and the automobile belonging to Mr. Vellines on the 22nd of January, at the Eighth Street crossing?

A. Yes, I did.

Q. Did you see the street car before it got to the crossing?

A. Yes.

Q. Where were you?

A. I was at our home at the second story window.

Q. At the second story window had you a view of the street car track and of that crossing?

A. Yes.

Q. Did you see the street car before it got to the crossing?

A. Yes.

Q. Did you see the collision between the street
page 63 } car and the car?

A. Yes.

Q. How far away, when Mr. Vellines got on the crossing or started to make the turn to go on the crossing, was the street car?

A. I guess 150 or 200 feet.

Q. How fast was the street car going?

A. I couldn't judge the speed, but it was going at a very rapid rate.

Q. Did you see it make any effort to stop?

A. Not at all.

Q. What kept you from seeing the street car strike the automobile?

Mr. Williams: She said that she did see it.

A. I saw the collision.

By Mr. Coleman:

Q. You saw the collision?

A. Yes. The automobile was going across the crossing, you know.

Q. Do you know how far across the crossing the automobile was when struck by the street car?

A. No, I couldn't tell you that, but it was almost across.

Q. Almost across?

A. Yes.

Q. Could you see whether or not the street car slowed down or made any effort to stop before it struck
page 64 } the automobile?

A. Not at all. That is what frightened me so terribly, because I saw it was not slowing down.

Q. It made no effort to slow down?

A. No.

Q. After the street car struck the automobile, did it come to a standstill?

A. I suppose so. I jumped up and left the window right away when they struck.

Q. Were you in a position to hear whether or not it blew a whistle or sounded a gong?

A. I didn't hear any sound.

Q. Could you have heard it?

A. I suppose I could.

Q. Did you hear it?

A. No, sir, I didn't hear anything.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mrs. Lewis, you live in the same house with Mr. L. M. Lewis,—you are his wife?

A. Yes.

Q. And I believe Mr. Lewis testified that that house is about 550 feet from the crossing; is that about right?

A. I don't know.

page 65 } Mr. Coleman: Mr. Lewis didn't testify to that,
but the distance that he had to travel was 550 feet.

Witness: I don't know what the distance is from the house to the crossing.

By Mr. Williams:

Q. How far do you think it is?

A. I don't know; I have no idea, but it sits back from the boulevard down to the Big Bay. The house is long.

Q. Is it on the Bay front?

A. Yes. I was at the back window.

Q. You were at the back window?

A. Yes.

Q. And the house is some distance east of the crossing, isn't it?

A. I suppose a little distance east of the crossing.

Q. How far?

A. I don't know.

Q. Approximately?

A. I couldn't possibly tell you because I don't know how far it is.

Q. Isn't there a house between your house and the car track?

A. Yes, sir.

Q. Who lives in that house?

A. Nobody now.

Q. Who did live there at the time?

A. I am not positive whether the house was
page 66 } occupied, or not. I really don't think it was.

Q. Do you know who owned it?

A. No. I don't think it was occupied. I think the house is owned now by Mr. Nichols—Harry Nichols I think has charge of it, but I don't know who owns it.

Q. Is that a one, two or three story cottage?

A. Two story.

Q. How many stories is yours?

A. Two.

Q. Now, when you saw your son-in-law, I believe, Mr. Vel-lines, approach that crossing, just before he made the turn did you see the street car at that time

A. I saw the street car just as he turned to go across.

Q. Just as he turned to go across?

A. Yes, sir.

Q. You saw the street car at that time?

A. Yes, sir.

Q. And you were frightened at that, weren't you?

A. I saw the car approaching, and didn't see the car make any effort to stop, and that is what frightened me. If it had slowed down he would have gotten across.

Q. When you saw the street car and saw him starting to make the turn, then you became frightened?

A. Yes, when I saw he street car didn't slow down.

Q. And, at that time, he was just beginning to make the turn?

page 67 } A. He was going across the track.

Q. At that time?

A. Yes, sir.

Q. And how far away was the street car after he got on the track?

A. Well, I should judge about 150 to 200 feet, maybe.

Q. All right. Then, how far would you say the street car was just as he started to make the turn?

A. How far the street car was away?

Q. You said it was 150 to 200 feet when he was on the track?

A. I thought that is what you meant, when he was going across the track.

Q. No, Mrs. Lewis. Here is what I wanted to find out: When you saw him start to make the turn to come on the track, how far away was the street car?

A. The street car was just coming out from behind the house.

By the Court:

Q. From behind the house?

A. In front of the house in front of us. You asked if there was a cottage in front of us, and that obscured the car, and when it came from behind the house I saw the street car.

By Mr. Williams:

Q. How far was it away just as Mr. Vellines started to make the turn?

page 68 } A. It was behind the house, and he had gotten on the car track when I saw the car approaching.

Q. You could not see it when he started to make the turn?

A. No, not when he was in front of the house.

Q. And you think it was about 150 feet?

A. I suppose that. I am not a very good judge of distances, but I suppose that is what it was.

Q. Can you tell us how far the street car ran after the impact?

A. No, I cannot.

Q. Did you go over there?

A. No, sir.

Q. Did your son-in-law come back to the house?

A. No.

Q. Do you know what he did?

A. What?

Q. Do you know where he went?

A. He went on down town.

MRS. W. L. VELLINES,

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

Examined by Mr. Coleman:

Q. Mrs. Vellines, what is your name?

A. Bernice Vellines.

Q. Are you the wife of Mr. William L. Vellines?

page 69 } A. I am.

Q. Were you in the automobile with him at the time of the collision between a street car of the Virginia Electric & Power Company and an automobile driven and owned by your husband?

A. Yes.

Q. At the time when you all started across that track to make the turn there, did you, or did you not, see a street car approaching?

A. We did not see any street car in sight.

Q. Did you look?

A. Yes.

Q. Did you continue to look?

A. I did.

Q. Did you look both ways?

A. We did.

Q. When was the first time you saw the street car after you got on the track or made the turn?

A. When we made the turn we were almost across the track when I saw the car.

Q. How far away was the car when you first saw it?

A. I judge around 200 or 300 feet away.

Q. Was it coming fast or slow?

A. Coming very fast.

Q. About how fast would you say it was coming?

A. I judge around fifty or sixty miles an hour.

page 70 } It looked as though it was coming that fast.

Q. Did you realize you were in a perilous situation?

A. I did.

Q. Did you call your husband's attention to it?

A. It was too late.

Q. Did you scream, or not?

A. I don't think I did. I don't know.

Q. Were you hurt, Mrs. Vellines?

A. No, I was not.

Q. He was on the left side of the car, and you were on the right; is that right?

A. Yes.

Q. Do you know how far the street car went after it struck the automobile?

A. I should judge it went around 150 feet, or something like that.

Q. From the intersection?

A. Yes, sir.

Q. Did your husband give a signal before he started across the track?

A. He did.

Q. What kind of signal did he give?

A. He put out his hand. He had the window down and put his hand out.

Q. How long did you stay at the scene of the accident after the collision?

page 71 } A. I stayed quite a while because we tried to get the car off the track. I asked the motorman and the men to help push the car off, and they wouldn't give any assistance whatsoever.

Q. Was the car knocked from the lefthand track to the right-hand track against the telephone pole on the opposite side from where you lived?

A. Yes, sort of diagonally across.

Q. When you say it had been knocked, was that the car or the automobile?

A. The automobile.

Q. It had been knocked on the opposite track towards the pole?

A. Yes, sir.

Q. Do you know how long the car remained after it struck?

A. Quite a while, until another car came to get it away.

Q. Did it remain there after it struck your car ten or fifteen minutes?

A. Longer than that.

Q. Was it removed before your car left there?

A. The street car?

Q. Yes.

A. No.

Q. Was any bell-sounded or whistle blown?

A. No.

Q. Are you positive of that?

page 72 } A. I am absolutely sure.

Q. It was not blown?

A. No.

Q. Or the gong sounded?

A. No.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mrs. Vellines, as I understand, when you were almost

across the track was the first time you saw the street car at all?

A. Yes.

Q. Approximately what part of your automobile was on the track on which the street car was coming at that time?

A. I should judge the very end of the car.

Q. Probably the rear wheels in between the two rails?

A. No, I wouldn't say that because it seems to me the tire would have been punctured if it hit that.

Q. Then you think all the wheels of the automobile had gotten clear of the track?

A. Yes.

Q. And there was nothing but the the overhang on the track?

A. No.

Q. And do you think you saw the street car 200 to 300 feet away?

A. Yes.

Q. Approximately how fast was your automobile page 73 } going?

A. We were still in second.

Q. Probably going ten or fifteen miles an hour?

A. I don't know; I couldn't say.

Q. You said the street car was going fifty or sixty miles an hour?

A. Every body who saw it says so.

Q. Are you judging that by what you saw or by what others say?

A. By what I saw.

Q. And you are judging the speed of the street car approaching you as fifty or sixty miles an hour?

A. Yes.

Q. Would you be so kind as to tell the jury your estimate of speed of the automobile in which you were riding?

A. I can't say, but I imagine around ten or twelve miles an hour—just what a car could go in second; maybe five miles an hour. I couldn't estimate that.

Q. As I recall, your husband said twelve miles an hour?

A. Well, probably twelve.

Q. And before your automobile could travel that foot or two to get off the track, the street car had traveled two hundred to three hundred feet?

A. That is when I first saw the car.

Q. When?

A. I told you.

Q. Well, do I understand that your position in page 74 } this matter is before your automobile could travel two or three feet, that was necessary to clear the track, the street car had run from two hundred to three hundred feet?

A. I wouldn't say.

Q. You wouldn't say?

A. No, sir.

Q. Isn't that exactly what you did say?

A. Yes. That is what I say when I first saw it.

Q. When you first saw it, all four wheels of your automobile had cleared the track?

A. I should say so.

Q. So the overhang is certainly not more than two or three feet?

A. I don't know. I never measured it.

Q. Give us your best estimate, will you?

A. No, I can't say.

Q. You wouldn't do that. Anyway, going at ten or twelve miles, before you could go the necessary distance to get the overhang off the rails, the street car had gone two or three hundred feet; is that correct?

A. (No answer.)

Q. Will you answer it?

A. I have answered it two or three times.

Q. Do you mind doing so again?

A. Yes.

Q. You refuse to answer that question; is that page 75 } what I understand?

A. (No answer.)

The Court: Do you want to press the question

Mr. Williams: I want the witness to say.

Witness: I have answered the question two or three times, and why does he keep on?

Mr. Coleman: Just answer all the questions he asks, even if he asks them a dozen times.

Witness: I say yes; I have answered it.

By Mr. Williams:

Q. And that was the first time you had noticed the street car at all? Do I understand you correctly?

A. Yes.

Q. If I understand, Mrs. Vellines, at that time you screamed to Mr. Vellines?

A. I don't know whether I screamed, or not. I didn't say I screamed. I said I don't know.

Q. Did you say something to him about the street car coming?

A. Yes.

Q. What did you say?

A. I couldn't say just exactly what I said.

Q. Was the purpose of whatever you said to warn him of the fact that the street car was coming?

A. Yes.

Q. And, so far as you know, that was the first page 76 } time that he had seen it?

A. I can't say.

Q. Do you know whether he had seen it before that, or not,--before you gave him some warning?

A. I don't think that he did.

Q. Then, when you hollered or gave this warning, did he then look at it?

A. I don't know.

Q. You were sitting there right next to him, weren't you?

A. Yes, I was.

Q. Now, there is a space, I believe, of approximately eight feet between the edge of the rails and the track on which you were traveling; do you know that?

A. I don't know.

Q. There is some little space between the car track and the concrete, is there not?

A. Yes.

Q. Now, at the time your husband started to make the turn, that is just as he began to swing towards the track, did you look at that time?

A. When he swung towards the track?

Q. Yes, before he ever got on the track, when he started to make the turn?

A. Yes.

Q. He looked then?

A. Yes.

page 77 } Q. And you looked?

A. Yes.

Q. What did you see?

A. The street car was not in sight. You know it was dark. It was dawn and it was not light.

Q. You wouldn't have any difficulty in seeing from your house to this crossing?

A. No.

Q. You could certainly see a street car from the crossing the other way, couldn't you?

A. Well, I didn't see it.

Q. You could see a good long ways, couldn't you?

A. I judge I could.

Q. How far do you think you could see?

A. I couldn't tell you that.

Q. Could you see as much as a thousand feet?

A. I don't know.

Q. Could you see as much as five hundred feet?

A. I couldn't tell you.

Q. You certainly could see as much as three hundred feet?

A. I can't say. I know that I can see you and everybody in this room.

Q. And you now tell the jury, I believe, you don't know whether you could see as much as three hundred
page 78 } feet, or not?

A. I didn't say that.

Q. Well, could you see that? I am just trying to get the facts, and I am not trying to make you mad?

A. I am not mad, but I don't see why you have to ask me things like that. I told you the truth. I told you just what I did and what I saw.

The Court: Just answer the questions. If the questions are improper, Mr. Coleman will object to them and the court will rule on them, and until they are objected to and the ruling, it is your duty to answer them as fully and frankly as you can.

Witness: I will, Judge.

By Mr. Williams:

Q. I understood, Mrs. Vellines, you said you didn't see the street car, although you looked just before you made the turn, or just as you were making it?

A. Yes.

Q. And I understood the reason you didn't see it was because it was dark?

A. I said it was dark.

Q. Is that the reason you didn't see the street car when you started to make the turn?

A. I didn't see it because it was not in sight.

Q. How far, approximately, could you see down those tracks?

A. Well, I couldn't say.

page 79 } Q. Could you see as much as 500 feet?

A. I could see as much as 100 feet possibly.

Q. As much as one hundred feet. You don't think anybody

could see, according to the light as it was that morning, a street car approaching over one hundred feet away?

A. I can't say.

RE-DIRECT EXAMINATION.

By Mr. Coleman:

Q. Mrs. Vellines, were you much excited after the accident started before you were struck?

A. Very much so, when I saw the street car.

Q. And you say you are positive, in answer to Mr. Williams' question, that the street car was not in sight when you all made the turn to go on the track?

A. I am.

Q. Could you say *positively* where your rear wheels of the automobile were when you were struck? Is that a guess, or is it your opinion, or could you see the wheels?

A. That is my opinion.

Q. That is your opinion?

A. Yes.

Q. How old is your husband?

A. He is sixty years old.

Q. Is he a careful driver?

A. Yes.

page 80 } Mr. Williams: I object to that.
The Court: Objection sustained.

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. How soon or how quickly, after you saw the street car, was it before the accident occurred?

A. How quickly?

Q. Yes.

A. I don't imagine it was very long.

Q. Could you give us some approximation of how long it was? Did it happen almost immediately or simultaneously?

A. A. I imagine it did.

By Mr. Coleman:

Q. You can't specify the length of the time from the time you saw the street car until you were struck?

A. I judge it was immediately.

Q. But you don't mean to say that the street car was right up on you when you all were going across the crossing?

Mr. Williams: I object to Mr. Coleman leading the witness. He can ask questions in a form not quite so leading.

The Court: Re-frame your question.

By Mr. Coleman:

Q. Did the car have sufficient time to come 150 or 200 feet when you saw it—did that time elapse until you were struck?

A. Yes.

page 81 } Mr. Williams: I object to that.

By Mr. Coleman:

Q. How far away was it?

A. Was the street car?

Q. Yes.

A. I imagine about two or three hundred feet, from what I can judge.

Q. Under the conditions that you were in, you were then in a closed car?

A. Yes.

Q. Were you in a situation where you could even guess at the time—say for you to walk across the room and back? In the situation you were in, were you in position to judge any time?

A. No.

Mr. Williams: I want to call the attention of the court to the form of that question and the one coming behind.

Mr. Coleman: You can't tell what is coming behind.

Q. (Mr. Coleman) Mrs. Vellines, is that a very frequented crossing there? Do many people cross at Eighth Street?

A. Yes.

Q. Twenty-five or fifty or one hundred or a thousand?

A. I would say twenty-five to fifty; I wouldn't say a hundred or a thousand.

Q. I mean in a day?

page 82 } A. I couldn't say how many cars pass by there a day, but very frequently they go over that track.

Q. The company maintains the space in there?

A. Yes.

Q. Do cars stop there going and coming from Willoughby Spit?

A. Do you mean for passengers?

Q. Yes, for passengers?

A. Yes.

Q. Do you know how many of those cross-overs—it is a one-way street on the Bay side?

A. Yes.

Q. And then on the opposite side you go to Norfolk?

A. Yes.

Q. They are one way streets?

A. Yes.

Q. What is the width of that one on the Big Bay side?

A. (No answer.)

Q. Is it broad or narrow?

A. Well, it is a right wide street.

Q. I am talking about the driveway, the concrete part?

A. I don't quite understand.

Q. I am speaking about the concrete on the side of the road on the Big Bay side—the one which goes towards the spit?

A. I wouldn't call it a very wide road.

page 83 } Q. It is a very narrow road, is it not?

A. Yes. There is enough for two cars to pass.

Q. If the street car had been one hundred feet or two hundred feet or fifty feet away, was there anything on earth to keep the motorman from seeing that your husband was going to make the turn?

A. No, there was not.

Q. Were you at all frightened when the thing happened?

A. Yes, I was.

By Mr. Williams:

Q. You have stated to Mr. Coleman that there was nothing to prevent the motorman from seeing your husband when he made the turn; there was nothing to prevent your husband from seeing the motorman, was there?

A. You will have to ask him that because I don't know.

Q. There was nothing to prevent you from seeing the motorman, was there?

A. I saw him. I told you what I saw.

Q. When he started to make the turn—not when he got on the track?

A. I don't quite understand.

Q. You told Mr. Coleman, in response to his question, that when Mr. Vellines started to make the turn there was nothing to prevent the motorman from seeing him at that time; that is correct, is it not?

A. Yes.

page 84 } Q. Now, I say for the same reasons that if the motorman could have seen Mr. Vellines, Mr. Vellines could have seen him?

A. I can't answer questions for him.

Q. You answered Mr. Coleman all right without any trouble?

A. There was not anything to prevent him at all.

Q. To prevent the motorman from seeing him?

A. No.

Q. What was there to prevent Mr. Vellines from seeing the street car?

A. At the time I saw the street car there was nothing to prevent me from seeing the street car. I saw it.

Q. I am talking about when he started to make the turn?

A. Well, I don't know.

Q. You don't know?

A. No.

Q. Then, how do you know that the motorman could have seen Mr. Vellines?

A. There is nothing to prevent him.

Q. There was nothing to prevent Mr. Vellines from seeing the motorman?

A. Well, possibly there isn't.

By Mr. Coleman:

Q. There was a light burning there at that station, wasn't there?

A. Yes.

page 85 } Q. That light was burning at the time?

A. Yes.

Q. You said the reason you didn't see the motorman was because he had not come in sight when you made the turn?

A. Yes.

Q. After you made the turn he came on?

A. Yes.

Q. Did he make any effort to slow down or stop?

A. No.

Q. You all would have been under the light?

A. Yes.

Q. And the light, of course, is stationary?

A. Yes, the light is over on the pole we were knocked to. It is right near the pole, anyhow. You can see it.

Q. At the time Mr. Vellines made the turn, it was perfectly safe for him to make it because there was no car in sight; is that right?

A. Yes, I think so.

Mr. Williams: Did you say you don't ask leading questions?

Mr. Coleman: I say I don't ask any more than you do.

Mr. Williams: I had the right to ask your witnesses leading questions.

The Court: A number of questions that have not been objected to have been asked several times, and I am not interfering with the examination of counsel unless there page 86 } is some objection.

Mr. Coleman: Mr. Williams has violated the rule about the repetition of questions more than I have about leading. That is our case, your Honor.

The Plaintiff Rests.

Mr. Williams: Your Honor, I have a motion I would like to make.

Note: The jury retired from the court room.

Mr. Williams: Your Honor, I wish to move to strike out the evidence I make the motion on the ground that there has been no evidence of negligence on the part of the Virginia Electric & Power Company which was the proximate cause of the accident; (2) on the ground that the contributory negligence of the plaintiff is clearly shown by the plaintiff and his witnesses, so it is a matter of law before the court.

If your Honor will look at this map, you will find that the undisputed testimony is that these tracks were straight for approximately 1,000 feet in the direction from which this car came which struck the automobile operated by the plaintiff. You will see that there is a space between the near rail of the westbound track, which was the track on which page 87 } the street car which caused the damage was, and the concrete, of 8.2 feet. It is clear mathematically that, if we accept the speed at which all of the witnesses testified that the automobile was traveling, to wit: Ten or twelve miles an hour, that he was traveling at the rate of either fifteen or seventeen and a half feet a second. The undisputed evidence is that he was struck when the rear wheel of his automobile was about between or almost between the two rails; that from the time he made his turn to the time he was in position where he was struck, certainly was not over from fifteen to twenty feet. So that, from the time he made his turn to the time he was struck, was less than two seconds in time, because in two seconds he would have traveled thirty feet, which would have put him absolutely in the clear. I think it is a matter of judicial knowledge almost that street

cars will not run fifty or sixty miles an hour, and even taking the wild estimates given, a street car going at fifty miles an hour would travel seventy-five feet in a second. Therefore, it must have been within less than 150 feet at the time he made the turn, and, under all the evidence, it could easily have been seen if it was within that distance, and it is clearly negligence as a matter of law for a person who knows the situation not to look or to look and not to see. Our Court of Appeals has said time and time again that the court will not accept that which they know to be untrue, and with page 88 } the street car headlight burning—

The Court: (Interposing) Was it testified that the headlight was burning?

Mr. Williams: The plaintiff himself testified that he didn't know whether it was burning, or not. I assume, for the sake of the argument that it was, and the assumption is that it was, if it was the proper thing

The Court: But a motion to strike out is as on demurrer to the evidence.

Mr. Williams: That is true, but assuming the headlight was not burning, this lady testified that she saw the car 550 feet, and this man said that he could see down the track 750 feet. The plaintiff's other witness testified that he saw it half a block.

The Court: Mr. Galvin?

Mr. Williams: Yes, sir. There is no dispute about the fact that it could have been seen for some distance, and I say, mathematically, their testimony that it had not come around the curve is absurd. The car must have been within 150 feet, or closer than 150 feet, when he made the turn, and I submit, under numerous decisions of our Court of Appeals, that under those conditions the plaintiff was guilty of contributory negligence as a matter of law.

Note: The motion was then argued by counsel.

The Court: The court is much impressed by the situation outlined by Mr. Williams, but is unwilling to page 89 } take the extreme course of striking out the evidence at this time. The motion to strike out the evidence is denied.

Mr. Williams: We note an exception.

E. A. HOLMES,
on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Williams:

Q. Mr. Holmes, tell the jury, please, your name?

A. E. A. Holmes.

Q. And how were you employed in January, 1932?

A. I was employed by V. E. P. Company as operator of street cars.

Q. Were you at or near the scene of the accident which took place on January 22 of that year?

A. Yes, sir.

Q. Whereabouts were you?

A. I was operating street car eastbound coming from Willoughby.

Q. Willoughby to what point?

A. To Ocean View.

Q. Now, as you were traveling along and got somewhere within the vicinity of 8 stop, what, if anything, did you see?

A. I was coming towards Ocean View and I saw page 90 { a car approaching, a street car, from the other direction about a block away, or one stop away, and an automobile also alongside of it. The angle I was looking at it, they looked like they were both side by side, and as they approached the crossing I saw the automobile make a sudden lefthand turn in front of the street car.

Q. What was the next thing that happened?

A. The street car pushed it off the track.

Q. How far was your street car away from the scene of the accident at the time the accident occurred?

A. I had just crossed 9th stop, and those stops, I imagine, are around between three and four hundred feet.

Q. Just crossed 9th?

A. Yes, sir.

Q. What time of day was it?

A. Early in the morning. I was due to leave Willoughby at 6:45 that trip.

Q. You left Willoughby at 6:45?

A. Yes, sir.

Q. What, if any, lights did you or not notice on the approaching car which had the accident?

A. The headlight.

By the Court:

Q. You say there was a headlight on the car approaching?

A. Yes, sir.

page 91 { By Mr. Williams:

Q. What did you do after you saw that situation?

A. I cut off and applied the brakes of my car and eased down and stopped. The automobile was on the track, and I couldn't go further.

Q. The automobile was on your track?

A. Yes, sir.

Q. Tell the jury approximately, if you can, the distance the Willoughby bound street car was from the crossing when the automobile turned to come on the crossing?

A. I couldn't say exactly, but it looked to me like it was a car length or a car length and a half, or something like that.

Q. How long did you stay there, Mr. Holmes?

A. I don't know exactly, but quite a few minutes. I was between ten and fifteen minutes late coming into town.

Q. Do you know what happened to Mr. Vellines? Did you see him there?

A. Yes, sir.

Q. Where did he go, if you know?

A. I don't know where he went after I left there. After we pushed him off the track I don't know where he went. I left there then.

Q. Where was the Willoughby bound car (that is the car that had the accident) standing with reference to the crossing after everything was over?

page 92 } A. The rear of the car was just about even with the crossing.

CROSS EXAMINATION.

By Judge Shackelford:

Q. What did you say your name is?

A. E. A. Holmes.

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

A. Yes, sir.

Q. Have you talked to anybody about this case?

A. I talked to Mr. Williams and officials of the company.

Q. Who else?

A. I don't know any one particularly but some boys maybe around the barn.

Q. What did you say?

A. Some of the boys around the barn, probably. I talked to Mr. Williams.

Q. Did you talk to the claim agents of the company?

A. I don't know whether he questioned me, or not. Who do you mean?

Q. Any claim agent?

A. I believe I talked to Mr.—I can't speak the name now—Mr. Jackson.

Q. He is claim agent?

A. Yes, sir.

Q. Did you know that he was a claim agent when page 93 } you talked to him?

A. Certainly.

Q. Why did you hesitate then?

A. I didn't hesitate.

Q. You said you didn't remember who you talked to?

A. I didn't remember exactly.

Q. This accident happened at Eighth Street, Willoughby?

A. Yes, sir, 8th stop.

Q. There is a metal platform put there for the purpose of an automobile crossing?

A. A steel rail crossing.

Q. Put there for the purpose of enabling automobiles to cross the track?

A. I presume that is what it was put there for.

Q. Don't you know that is what it was put there for?

A. Yes, sir.

Q. A great many automobiles cross there every day?

A. I don't know. I don't know how the traffic is.

Q. Don't you travel there?

A. Not now. I never worked that line very much.

Q. How many times did you work it?

A. A few times, off and on.

Q. How did you happen to be working it this day?

A. I had a run there.

Q. Where do you live?

A. Norfolk.

page 94 } Q. Whereabouts?

A. 211 16th Street.

Q. At that crossing there is a pole with an arm extending over the track, and that arm has an electric light with a reflector over it, has it not?

A. I believe it has. I know that there is a pole, but I couldn't tell you about the light.

Q. The crossing, even in the night time, is perfectly light?

A. Yes, sir.

Q. You could read a newspaper there at night under that light, could you not?

A. I couldn't say that. I never tried to read a newspaper there.

Q. It is light there?

A. Yes, sir.

Q. You saw from Ninth Street that the man was about to cross there?

A. Yes, I saw the car and the auto.

Q. Now, you say you saw Mr. Vellines' car and the street car coming down parallel to one another?

A. Yes, sir.

Q. How far were they from the street corner when you first saw them?

A. The car was in the middle of the block, as near as I could tell.

page 95 } Q. The middle of the block?

A. Yes, sir, as near as I could tell.

Q. How many feet would that be?

A. I couldn't tell you that.

Q. How long is a block?

A. I couldn't tell you exactly.

Q. How can you tell me it was half way of the block and can't tell how long the block is?

A. I can't say the number of feet.

Q. It is four or five hundred feet between the blocks?

A. I reckon it is.

Q. If the automobile were half way of the block, it must have been two hundred feet or more east of the intersection?

A. When I first noticed it?

Q. Yes.

A. Possibly.

Q. Were they racing?

A. No.

Q. Did they appear to be racing?

A. No.

Q. Was the automobile moving faster than the car?

A. They seemed to be moving at the same speed.

Q. What speed would you say?

A. Looking at anything coming towards you, it is hard to judge the exact speed, but I should say twenty-
page 96 } five miles an hour.

Q. It might have been forty or fifty miles?

A. I don't think the street car will run forty miles an hour.

Q. How fast will they run?

A. Thirty miles maybe at full speed.

Q. Do you mean a street car will not run over thirty miles an hour on the Willoughby line?

A. Not much over that.

Q. What time was the accident?

A. I left Willoughby at 6:45, and it takes about seven minutes to run down there.

Q. About seven minutes to run from Willoughby to Ninth Street?

A. Yes.

Q. And you left at 6:45?

A. Yes.

Q. So this accident happened at 6:52?

A. I didn't look at my watch.

Q. A street car at 8½ Street, at 6:52, couldn't lose any time to catch the seven o'clock ferry, could it?

A. He would have eight minutes and would have plenty of time to make it all right.

Q. The passengers on that car would have about one minute to make connection after they got there?

A. The boat don't leave so exact on schedule.

page 97 } Q. You are supposed to be there on your schedule?

A. Yes, if you can get there, but if you are late you can't help it.

Q. If you are late you have to step on it to get there?

A. I never take any unnecessary chance to get there.

Q. Were not you running a little faster when you were a little late?

A. Not that I know of.

Q. How long have you been street car motorman?

A. Ten years.

Q. Do you mean to say if you find your time is short you take it along leisurely?

A. It matters not how late I am, I always watch out for myself.

Q. I didn't say anything about watching out for yourself, but how about watching out for other people?

A. When watching out for other people I am watching out for myself.

Q. Can you tell this jury how far that street car was from the intersection when Mr. Vellines started to make the turn?

A. Not the exact number of feet. He was about a car length or car length and a half away.

Q. How could you tell when you were four hundred feet away the relative positions of the two vehicles?

A. I say that they appeared to be side and side.

page 98 } Q. They appeared that way, but you don't know whether they were side and side?

A. One might have been a little head of the other, I couldn't tell.

Q. When the automobile turned into the track of the street car, the street car hit it immediately, didn't it?

A. Very soon.

Q. Did you hear any gong sound?

A. No, I didn't hear the gong sound that distance.

Q. How far were you from the corner when the impact occurred?

A. How far from the car?

Q. How far from the intersection of Eighth Street?

A. I had just crossed Ninth Street and was over two-thirds of the stop away.

Q. Do you mean this side?

A. The other side.

Q. Weren't you east of Ninth Street?

A. I would be west of Eighth Street.

Q. Were you east or west of Ninth Street stop when this collision happened?

A. East of it.

Q. And you were two-thirds the distance from Ninth Street going towards Eighth Street; is that what you mean?

A. Two-thirds the distance from Eighth Street, and had just crossed Ninth Street.

page 99 } Q. You were one-third the distance from Ninth Street?

A. Yes, sir.

Q. Did you hear the gong?

A. No, I couldn't hear the gong at that distance.

Q. How far could you hear the gong of the street car?

A. If you are three or four hundred feet away, and enclosed in a car?

Q. You would not hear one?

A. No, not if my car was running.

Q. Could you have told before you examined the car that was hit which part of the automobile was struck by the street car?

A. No, I could not, not exactly.

Q. Have you been present at a meeting of the witnesses in this case and heard the statement of the motorman on this car which hit Mr. Vellines?

A. I was in Mr. Williams' office.

Q. Well, who was there?

A. Mr. Williams and Mr. Jackson and Mr. Frizzell, and I don't know the names.

Q. How many?

A. I don't know, but six or seven.

Q. And each one of you heard the statement of the other?

A. I heard some talk about it.

Q. Did you hear the statement that each witness made as to this occurrence?

page 100 } A. Yes, I heard them make statements.

Q. Why did you say that you heard them talking about it?

A. It is the same but just different wording.

Q. And each one of them heard your statement about it?

A. Yes, I suppose so.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Mr. Holmes, that talk that Judge Shackelford referred to, what time did that take place?

A. What talk is that?

Q. That Judge Shackelford was referring to when you talked in my office,—when did that take place?

A. This morning, do you mean?

Q. This morning?

A. Yes, sir.

Q. What time this morning did you talk?

A. At nine o'clock I was supposed to be there.

Q. What time did it all stop?

A. What do you mean?

Q. What time did we come to attend court?

A. We left there around ten o'clock—five minutes of ten, or something like that. I don't know exactly.

page 101 } G. E. ROBERTS,

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

Examined by Mr. Williams:

Q. Mr. Roberts, tell the jury, please, your name?

A. G. E. Roberts.

Q. What is your occupation?

A. Furniture salesman.

Q. Where do you live?

A. I live at 327 31st Street, Norfolk.

Q. On January 22, 1932, were you at or near the scene of an accident between an automobile and a street car?

A. Yes, sir.

Q. Whereabouts were you?

A. I was sitting about the third or fourth seat from the front of the car on the righthand side going towards Willoughby Spit.

Q. The car which had the accident?

A. Yes, sir, I was on that car.

Q. Where did this accident occur?

A. I wouldn't like to say; I am not acquainted with those streets, but probably within three or four minutes run after you leave Ocean View.

Q. As you were sitting there, what, if anything, did you see before the accident occurred?

A. I had just finished reading my paper and was sitting there with my elbow on the car and my eyes closed but not asleep, and all at once I felt a very sudden motion of the car, and the motorman gonged his bell very suddenly, and I looked up and saw an automobile crossing the track, and, about that time, the collision happened and the car knocked the automobile to the left up against a telephone pole.

Q. You say you felt a very sudden motion of the street car; could you tell, or do you know, what that sudden motion was?

A. He was applying his brakes, I imagine.

Q. At the time you felt that motion and looked up, how far was the motorman from the automobile?

A. Not over, I would say, thirty feet; maybe just a little more than his car length. I don't think it was over thirty feet.

Q. What effect would the application of those brakes have on you as a passenger?

A. It threw me forward, of course, and it caused the brakes on the car to lock so that he couldn't get it started again, and it caused me to miss my ferry.

Q. What ferry were you attempting to catch?

A. The seven o'clock from Willoughby to Old Point.

Q. What was the condition at that time—was it dark or light?

A. If I am not mistaken it was a windy morning and it was rather dark—not a pretty morning, but inclined to be cloudy, as it is now, and windy.

Q. You say you had been reading your paper page 103 } just before?

A. I had finished reading the paper; I had folded the paper after leaving Ocean View and laid it on my lap, and laid my head on my hand, though was not asleep.

Q. Was it sufficient daylight to read the paper, or were you reading it by electric light?

A. I had been reading it by electric light, and I think the motorman cut his lights off after leaving Ocean View and before we got to the scene of the accident.

Q. That is the light inside of the car?

A. The light inside of the car.

Q. If you were going to catch the seven o'clock ferry, you know approximately then what time this accident occurred?

A. I would say within about eight or ten minutes of seven. We usually get to Willoughby Spit just in time to get off the car and walk down one block to catch the ferry.

Q. Are you in the habit of riding these cars? You speak of what you usually do?

A. I rode that car every morning for eighteen months.

Q. Can you tell the jury approximately the speed that that street car was traveling just before you felt a sudden application of the brakes?

A. It was going at a regular rate of speed, but nothing to make me pay any attention to it, either fast or slow. I caught the car at 6:35, at 31st and Granby Streets, and the car was on time, and when it was not on time I usually missed my ferry.

page 104 } Q. Can you give us any idea as to how far the street car ran after the impact?

A. That car stopped so suddenly I don't think it went over eight feet. I don't believe it went that far.

By Mr. Coleman:

Q. How far?

A. I don't think it went over five feet, to be exact, as near as I can.

By Mr. Williams:

Q. Where was it in reference to the crossing, do you recall, when it came to a stop,—the crossing on which the automobile was?

A. I think it was practically on the crossing; it may have been a little over. It was certainly nearer Ocean View than Willoughby Spit, but I don't know what direction that is, whether north, east, south or west.

CROSS EXAMINATION.

By Judge Shackelford:

Q. What do you do?

A. Furniture salesman.

Q. What is your name?

A. G. E. Roberts.

Q. Who do you work with?

A. At that time with W. E. Pleasants.

Q. Did you live in Norfolk.

page 105 } A. Yes, sir.

Q. Who do you work for now?

A. Satterfield.

Q. Where?

A. 426 Granby Street.

Q. You say the motorman cut his lights off at Ocean View?

A. After leaving Ocean View.

Q. You do not know what happened to the headlight?

A. No, sir, I don't know.

Q. Did you see the reflection of any headlight on the car at the time of the accident or just before the accident?

A. No, sir. It was seven o'clock and rather light.

Q. It was seven o'clock?

A. Nearly seven o'clock—about ten minutes of seven.

Q. And the car stopped in five feet after you felt him put on the brakes?

A. I wouldn't say after feeling him put on the brakes, but it wasn't until after he put on the brakes.

Q. And it went about five feet?

A. I would say not over five feet.

Q. After he applied the brakes to stop it?

A. Yes, sir.

Q. How fast was the car going after he started to put on brakes?

A. I don't know exactly, but not enough to make page 106 } me pay special attention.

Q. You had been riding that car how long?

A. I can tell you exactly: Maybe not eighteen months at that present time, but I started riding it October 9th or 10th, and I rode it up until last March.

Q. You said something about eleven months?

A. No; I said probably eighteen months.

Q. You said it was going at the usual speed?

A. Nothing to make me pay attention to either fast or slow.

Q. What is the usual speed of that car?

A. I can't tell you, but I can tell you what time I boarded it.

Q. I am not asking that, but the speed?

A. I don't know.

Q. Was it making as much as twenty miles an hour?

A. I couldn't tell you.

Q. Was it making as much as five miles an hour?

A. Yes, sir.

Q. Was it making as much as fifteen miles an hour?

A. I couldn't tell you.

Q. No matter what speed it was making, it stopped in five feet after he applied the brakes?

A. I said after he hit the automobile.

Q. I understood you to say as soon as you felt him put on the brakes he stopped in five feet, and stopped page 107 } in the intersection?

A. If you will let me explain: I think he stopped the car within its length; after he applied the brakes the car stopped in its length, I think, and, in fact, I can nearly swear to it.

Q. Didn't you tell Mr. Williams that after you felt the jar it didn't go five feet?

A. No, sir.

Q. Didn't you just tell Mr. Williams as soon as you felt the car jerk, as if some one put on the brakes, it stopped in five feet?

A. No, sir; I said after it hit the automobile.

Q. How far did it go from the time he put on the brakes until he hit the automobile?

A. I would say it didn't go over its length.

Q. How long is it?

A. I don't know the length of the street car, but that is what I am going by.

Q. Which did he do first—put on the brakes first, or sound the gong first?

A. I don't know. It seemed to me that he sounded the gong all the time.

Q. How many times did he sound the gong?

A. I don't know, sir.

Q. Did he sound it over once?

A. Yes, sir.

page 108 } Q. And then he put on the brakes?

A. Almost simultaneously, and then I knew there was something wrong.

Q. He hit the car almost simultaneously with the sounding of the gong?

A. In that short distance it don't take long to hit the car after sounding the gong.

Q. It don't take long to hit, it, whether he sounds it, or not?

A. No.

Q. What part of the automobile was struck?

A. The left side of it nearer the rear wheel.

Q. Near the rear wheel on the left side?

A. Yes, sir.

Q. Did you see the car when it was crossing the track?

A. When I felt the jar I immediately opened my eyes and I saw the car.

Q. Did you see any headlight on the car?

A. No, sir.

Q. If there had been a headlight on the car, you would have seen it?

A. I don't know that I would. I don't know that I would have paid any special attention to the headlight.

Q. What position were you in when you saw the automobile crossing the track?

A. There was a gentleman sitting on the seat page 109 } in front of me, and he was leaning this way, and when I felt the brakes applied I looked up quick, but I couldn't tell anything about it, and I couldn't have told whether it was a sedan or touring car.

Q. Did you see the automobile on the track in front of the street car before the street car hit the automobile?

A. It was about the same time.

Q. And you didn't see any reflection of light on the automobile from the street car?

A. No, sir.

Q. Did you get out of the street car?

A. I did.

Q. Did you see any headlight on the street car then?

A. No, sir. I was looking more at the automobile.

Q. The street car didn't have a headlight on it, did it?

A. I don't know.

Q. You didn't see one on it?

A. I didn't see one lighted.

Q. You saw one, but didn't see it lighted?

A. I didn't pay any attention to that. It may or may not.

page 110 } S. W. ARMISTEAD,

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

Examined by Mr. Williams:

Q. Tell the jury, please, your name?

A. S. W. Armistead.

Q. What is your occupation?

A. Civil Engineer.

Q. How long have you been practicing your profession?

A. About thirteen years in Norfolk.

Q. Mr. Armistead, did you prepare a topographic survey which I now hand you?

Judge Shackelford: We do not raise any question about the accuracy of it.

Mr. Williams: I want to ask some other things.

By Mr. Williams:

Q. When was that prepared?

A. It was prepared in February of this year.

Q. What is the scale?

A. One inch equals twenty feet.

Q. Tell the jury, please, the width of the concrete road on the north side?

A. Sixteen feet, and it is so marked on the map.

Q. What is the distance between the northern most rail of the westbound track and the southern edge of the concrete road?

A. 8.2 feet, marked on the map.

Q. What is the gauge of the track?

page 111 } A. Five feet two inches.

Q. And the dummy—that is the space between the two sets of rails?

A. The dummy at this place is 5.8 feet.

Q. Will you tell us the distance from the two parallel lines marked "XY" to the near edge, that is the eastern edge, of the crossing?

A. To the center of the parallel lines 160 feet.

Q. Mr. Armistead, how far are those tracks straight from the center of the Eighth Street crossing eastwardly towards Ocean View?

A. Towards Ocean View is towards Seventh Street?

Q. That is right?

A. From Eighth Street to the beginning of the curve towards Seventh Street (that is towards Ocean View) is 1,300 feet.

Q. And how far is it from the Eighth Street crossing to the Seventh Street crossing?

A. From Eighth Street to Seventh Street is 1,310 feet exactly, center to center of streets.

Q. Where does the curve start?

A. The curve is about 200 feet beyond.

Q. Then you must have misunderstood the question.

Note: The question was read.

A. 1,500 feet to the curve and 1,310 feet from Eighth Street to Seventh Street. It is about 200 feet
page 112 } more to the beginning of the curve.

By the Court:

Q. Something was said about 7½ Street?

A. There is no such street, but there is a stop there.

By Mr. Williams:

Q. In other words, they have a stop at 7th Street, and then they have a 7½ stop?

A. It is a kind of informal stop, more or less. Some have little shelters there, but some have not.

By the Court:

Q. Do you know how far that is from Eighth Street?

A. No, sir, but they are usually around midway of the block.

By Mr. Williams:

Q. Is there, or not, any crossing between 7th Street and 8th Street?

A. There is no crossing, no.

Q. Now, Mr. Armistead, I think it has already been stated, but what is the nature of that track—that is, the construction? Is it a rough roadbed or a smooth roadbed that people can drive across at any point?

A. It approaches more the typical railroad right of way; it is a ballasted roadbed, but not a paved roadbed.

Q. Is there any physical obstruction to prevent any one from seeing a street car approaching down that track until you get to the curve from a point on the road
page 113 } opposite Eighth Street?

A. A person on the concrete road?

Q. Yes.

A. Not a thing in the world except an occasional telephone pole.

CROSS EXAMINATION.

By Judge Shackleford:

Q. What is the nature of this crossing here—the Eighth Street crossing?

A. The center part is steel rails or railroad rails running longitudinally with the track.

Q. And a good smooth driveway?

A. A good smooth driveway.

Q. And you say there is a station there at that crossing?

A. Yes, a station is shown on the map.

Q. There is no doubt about it being there fastened on the ground?

A. It was there at that time.

Q. What does this indicate "Cinder platform"?

A. The ones shown on each side of Eighth Street are beaten down cinders.

Q. That is used for the purposes of passengers boarding and getting off cars at that crossing?

A. Yes.

Q. On both sides of that crossing?

page 114 } A. Yes.

C. G. FRIZZELL,

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

Examined by Mr. Williams:

Q. Mr. Frizzell, tell the jury, please, your name?

A. C. G. Frizzell.

Q. And what is your occupation—what is your business?

A. Motorman.

Q. Are you a motorman at the present time?

A. No, sir.

Q. What do you do?

A. Foundry man in the navy yard.

Q. What were you doing in January of this year?

A. Motorman for the V. E. P.

Q. Were you the motorman involved in an accident on that day?

A. I was.

Q. What type car were you operating?

A. 600.

Q. And where were you going at the time of the accident?

A. I was going to Willoughby, making a trip on the early straight to Willoughby, and my time at the time of the accident was seven o'clock at Willoughby.

Q. What time did the accident occur?

page 115 } A. Around 6:54, the best I can remember now.

Q. What time had you left Norfolk on that run, if you recall?

A. 6:15.

Q. Now, Mr. Frizzell, after you left Ocean View, what did you do with respect to the lights on your car?

A. When I got to Ocean View I was on plenty good time, and when I got to Ocean View I discharged all the passengers except some three or four, and I turned off the lights inside of the car and pulled back the curtains and left the head-light on, and, after I got the passengers off the Old Bay Shore

line, which we are due to pick up going to Willoughby—and that car got into Ocean View just about the time I did,—and off that car I got a couple of passengers, and from there I proceeded to Willoughby, and when I got to Nansemond Hotel I let off one passenger there, and then I started on and never made any more stops going to Willoughby whatsoever until I had this collision with the automobile.

Q. Now, Mr. Frizzell, why did you cut out the lights inside of the car at Ocean View and not the headlight?

A. It was light enough inside of the car, but I always left the headlight on until I got to Willoughby, when I was running there.

Q. As you were traveling along there, and just prior to getting to Eighth Street, approximately how fast page 116 } were you traveling?

A. I would say around twenty or twenty-five miles an hour.

Q. And when was the first intimation you had that an accident was going to happen?

A. When I seen this car, I was in about a length or a length and a half of it, I would say forty or fifty yards of the automobile, and it was traveling midway of the road, and as I seen it and commenced to get closer to it and had got, I guess, in forty yards of this crossing, I raised up and sounded my gong, and this car was going straight up the road as I was going, and I was in twenty-five or thirty yards of it, and he attempted to cross this track at a slow rate of speed, and when he did I threw my car in emergency, and gave it the air and reverse throttle, and by this time I was in on this car and the car had just crossed over the track enough for me to hit it in the rear lefthand corner.

Q. And after you hit it, what happened to it?

A. It slid over the track into the telephone pole, and I went one length beyond, with the rear of my trucks practically on the crossing.

Q. You said something about a car length: How long is one of those 600 type cars?

A. Forty feet.

Q. And how far did you tell the jury you were page 117 } away from the crossing when he turned to come on?

A. About a car length. I mean forty feet instead of forty yards.

Q. You said forty yards, and you meant forty feet?

A. Yes, sir.

Q. What, if anything, did you do with respect to the gong?

A. I rang it.

Q. Tell the jury, please, what kind of gong that is?

A. All the cars have a foot gong.

Q. Does it go at one time?

A. No; ding-a-ling, ding-a-ling, and you mash down on it once, and it rings about thirty seconds.

CROSS EXAMINATION.

By Judge Shackleford:

Q. You saw this car about to cross the track, didn't you?

A. I did what?

Q. You saw the automobile was about to cross and crossing the track ahead of you?

A. Yes, sir, when it went across.

Q. And you appreciated the fact that he was in danger from your car?

A. If he kept on like he was going.

Q. And you were then how far from him?

A. When he was on the track, or when I seen page 118 } start across the track, I was in about twenty-five or thirty feet.

Q. You were twenty-five or thirty feet back of him when you saw him start up on the track?

A. Yes, sir.

Q. How far were you away from him when he was on the track?

A. When he was crossing the track, midway of the track, I will say around fifteen feet from him.

Q. You didn't see him until you got within twenty-five or thirty feet of him?

A. I said I seen him when I was in a car length of him.

Q. But you didn't see him about to cross the track until you were about twenty-five or thirty feet away?

A. He was in the middle of the road.

Q. How did you know that he was going to cross?

A. I didn't know until—

Q. (Interposing) You saw him hold out his hand?

A. No, sir, he didn't.

Q. He didn't hold out his hand?

A. No, sir, positively not. All the windows were up on his automobile.

Q. Was your light shining on his car?

A. Yes, sir, just one headlight.

Q. While he was in the roadway?

A. While he was crossing the track. It couldn't shine on him in the road.

page 119 } Q. How far is Eighth Street from the end of Willoughby Spit?

A. I couldn't say; I don't know.

Q. You had driven down there many times, had you not?

A. Not so many times.

Q. How many times have you driven down there?

A. When I was with the company, about ten or twelve times; I was extra man.

Q. You were a new man on this route?

A. I was extra man.

Q. How long had you been extra man before this accident happened?

A. About seven or eight months.

Q. What do you mean by extra man?

A. On the extra board, and didn't have a regular run.

Q. You were subject to call?

A. No; I was extra man on the board and took a run any and everywhere.

Q. Had you been working steadily for the company?

A. Yes, sir.

Q. For how long—seven months?

A. Yes, sir.

Q. Drawing a monthly salary?

A. No; by the hour.

Q. You only drew when you were on duty?

A. Yes.

page 120 } Q. When you were not on duty, where would you be—at home or where?

A. Anywhere I might want to be.

Q. And you had been down there on Willoughby on the street car only eight or ten times previous to this accident?

A. I would say about that.

Q. You had been there long enough to give us an estimate of the distance between Eighth Street and the end of Willoughby?

A. I judge about half the way.

Q. Well, what is that? We can get at it that way?

A. I don't know the number of miles and never heard any one say.

Q. How many stations are there between Eighth Street and the end of Willoughby Spit?

A. I couldn't tell you.

Q. How far are the stations apart?

A. Five hundred yards, I guess.

Q. What is the number of the last station down there?

A. I couldn't tell you. Willoughby is all I can tell you.

Q. You didn't know much about that route down there, did you?

A. No, sir, I didn't.

Q. What speed were you making?

page 121 } A. Twenty or twenty-five miles an hour.

Q. How do you fix the speed at twenty or twenty-five miles an hour?

A. If you drive the car you can tell practically how fast it is going. These cars at a high rate of speed don't make over twenty-five. I didn't have a speedometer on the car, but I do say from the stop I made at Nansemond Hotel to that stop, I would say not over twenty or twenty-five miles an hour.

Q. You say the accident happened at 6:54?

A. Approximately that. I was due at Willoughby at seven o'clock.

Q. I am not talking about at Willoughby, but at the time the accident happened?

A. I say approximately 6:54.

Q. You made a report of it?

A. Yes, sir, always.

Q. Did you put on the report it happened at 6:54?

A. I think so.

Q. That is correct?

A. Yes, sir.

Q. You were a little behind?

A. No, sir.

Q. Do you mean from Eighth Street to the end of the ferry you can go there in six minutes and give the passengers time to walk to the ferry?

page 122 } A. I think the time from Ocean View to Willoughby is twelve minutes.

Q. Do you mean to say you could have driven at twenty-five miles an hour to Willoughby and given the passengers an opportunity to walk to the ferry?

A. Yes, sir.

Q. How much time would they have to spare?

A. I guess three minutes.

Q. So in three minutes you would have been to Willoughby Beach?

A. I say from where the car stops they would have about three minutes to catch the boat, and I had, from where I was, six minutes to go to Willoughby.

Q. The accident occurred at 6:54.

A. Yes, sir.

Q. And you planned to give the passengers three minutes to get off the car and get to the boat?

A. I don't understand.

Q. I say, you planned to give the passengers three minutes to get off the car and get to the boat after arriving at the end of your route?

A. I say approximately 6:54.

Q. Awhile ago you said it was 6:54 and put it on your report?

A. I said I put it on the report.

Q. Did you look at your watch?

page 123 } A. No; I was going by the time I left Ocean View. I left Ocean View at 6:45.

Q. You did not get to Eighth Street until 6:54?

A. I say approximately 6:54.

Q. That was nine minutes it took you to go from Ocean View to where the accident was?

A. Yes, if it was 6:54.

Q. You said that is about half way from Ocean View to Willoughby?

A. Yes.

Q. And if you had nine minutes you were late?

A. No, sir.

Q. Were not you in a hurry to get there?

A. No.

Q. When did you leave the employment of the company?

A. Three months ago the 6th of this month.

Q. Were you ever employed by them regularly by the month?

A. No, sir.

Q. How much of your time was consumed working for the Traction Company while you were with them? What proportion of your time?

A. I would say I was working two-thirds of my time.

Q. Subject to call?

A. No, sir; we had to report; we had a time to report, and all extra men did.

Q. Within what distance would you be able to
page 124 } stop a car going at twenty-five miles an hour?

A. That depends.

Q. Well, let us find out what it depends on?

A. If the track is in good condition you can stop in a short distance, and if it is bad you would go longer. If the brakes are good, you stop in a short distance, and if they are not, you go longer.

Q. Were the brakes in good condition on this trip?

A. Yes, sir.

Q. Were the tracks in good condition?

A. Yes, sir.

Q. Everything was favorable to stopping the car quickly?

A. Yes, sir.

Q. I ask you in what distance you could stop the car going twenty-five miles an hour?

A. I stopped that in about a couple of car lengths.

Q. A couple of car lengths?

A. Yes, sir; I will say one hundred feet.

Q. A car length is one hundred feet?

A. A couple of car lengths.

Q. Is that the proper distance within which to stop a car going twenty-five miles an hour?

A. Yes, sir, if everything is all right and the tracks not slippery.

Q. Under the conditions that day, a person properly operating the car could stop in one hundred feet?
page 125 } A. Yes, sir, if you slow it down. The air line broke down, and it had nothing else to do.

Q. Did you hit the car hard?

A. I couldn't have hit it hard, or it would have torn it to pieces.

Q. You did not hit it hard?

A. Not as hard as I expected.

Q. You just pushed it across there? One of your witnesses said awhile ago you just pushed it?

A. No, I wouldn't say just pushed it, but I knocked it over there.

Q. You knocked it over there?

A. Yes.

Q. How long did you say this car was?

A. Forty feet.

Q. You stopped in two car lengths, didn't you?

A. Two and a half car lengths.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Mr. Frizzell, Judge Shackelford has asked you some questions with respect to working by the month; do any of the motormen work by the month?

A. Not a man in the Traction Company.

Q. When you speak of being on the extra board, how many men, approximately, are there on the extra board?

page 126 } A. I would say around seventy-five.

Q. They are people who did not have a regular run?

A. No, sir.

Q. Some times during the day more men are required than at other times; isn't that true?

A. Yes, sir. These extra men, if some one gets hurt, or they need a special car, they are due to be there to take the run out, and they are paid by the hour if they stay out five hours, or one hour, or fifteen hours.

Q. Are they, or not, men qualified to run on any line?

A. They are men qualified, and are broke in by one of the highest paid men there to go over any line that the Traction Company has.

RE-CROSS EXAMINATION.

By Judge Shackleford:

Q. Where did you take possession of that car that day?

A. Out at the barn.

Q. Where is that?

A. 18th Street.

Q. 18th and what?

A. Between Monticello and Church Street on 18th.

Q. What time did you leave the carbarn?

A. I left the carbarn that morning at six o'clock and was due down town to leave at 6:15.

Q. You left down town at 6:15?

page 127 } A. Yes, sir.

Q. Then did you go out the Granby Street bridge?

A. Yes, sir.

Q. Did you make any stops on the way?

A. Yes, sir.

Q. You made quite a number, didn't you?

A. Yes, sir, but I was on my regular time and got to Ocean View on my regular time.

Q. Who said you didn't? I didn't say you didn't. What made you say you got to Ocean View on your regular time?

A. You asked awhile ago if I was running late, and I wanted to show I was not running late.

Q. How many passengers did you have on your car at the time of the accident?

A. I think four.

Q. Who were they?

A. I can't recall the names now.

Q. Will you swear that there were only four?

A. No, I will not swear to it.

Q. One witness said there were fifteen or twenty passengers on there?

Mr. Williams: I haven't heard any of them say so.

Judge Shackelford: Capt. Lewis said there were fifteen or twenty waiting.

page 128 } By Judge Shackelford:

Q. Do you know how many were on there?

A. Not exactly. It was not over five, if there were that. It has been so long I have forgotten how many were on there at the time.

Q. What time did you leave City Hall Avenue?

A. 6:15.

By Mr. Williams:

Q. You stated you quit the employment of the company about three months ago; why did you stop?

A. Because I got a call in the navy yard.

Q. Did you get a better job?

A. I thought it would be.

Mr. Coleman: I imagine he got a better job if he got away from the V. E. P.

Witness: I got a call from the Navy Yard, and I thought there would be a better future for me, and I got a leave from Mr. Bishop, and I can go back at any time I get ready.

D. H. CHAPMAN,

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

Examined by Mr. Williams:

Q. Mr. Chapman, you are one of the claim agents for the Virginia Electric & Power Company?

A. One of the investigators.

Q. Have you ever had occasion to test out the
page 129 } speed of the 600 type cars on the Willoughby line?

A. Yes, sir.

Q. What is the maximum speed of the 600 type car?

A. The test we made was with an empty car and one man, and the distance was a thousand feet, and the best we could get it up to was thirty-seven miles an hour.

CROSS EXAMINATION.

By Mr. Coleman:

Q. Was that test made for the purpose of a lawsuit?

A. It was made where there was an accident at Willoughby at Ninth Street.

Q. Were there any outside persons present?

A. Yes; an automobile was used after having the speedometer tested.

Q. Was there anybody on the car to see whether or not you had given it all you could give it?

A. I don't know what you mean.

Q. Was there any outsider present?

A. No.

Q. You were making the test for the purpose of evidence?

A. No. We were making the test for the purpose of finding out how fast it could possibly run under all favorable circumstances.

Q. You are not a mechanic?

A. Not very much.

page 130 } Q. You couldn't say whether that case had been doped up, or not?

A. I think so.

Q. How?

A. With my eleven and a half years' experience with them.

By Mr. Williams:

Q. Who else was present?

A. S. W. Armistead, Mr. Mulford, and I think you were present.

By Mr. Coleman:

Q. Mr. Armistead testifies in every suit you have and makes the maps?

A. No, but he testifies in a good many.

Q. Mr. Mulford is your old time claim agent, brought here from Richmond?

A. He is the head of the claim agents.

Q. And Leigh Williams defends all the suits?

A. Not exactly.

Q. Were you at Mr. Williams' office this morning when all the witnesses were present?

A. No, I didn't go there.

Q. This is Mr. Jackson's case?

A. Yes, he investigated it, except Mr. Vellines made a statement to me.

page 131 }

J. H. LOCKAMY,

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

Examined by Mr. Williams:

Q. Tell the jury your name?

A. J. H. Lockamy.

Q. What is your position with the Virginia Electric & Power Company?

A. Foreman at the carbarns.

Q. Tell the jury, please, the length of the 600 type car?

A. Forty feet one inch.

Q. Did you make an inspection of the car involved in this accident?

A. Yes, sir.

Q. What, if anything, did you find the matter with it after the accident?

A. The left hand corner, the No. 2 end, the bumper was bent, the fender was broken, and the air line was broken.

Q. What effect does the breaking of an air line on a street car have?

A. On this class of car, the emergency brakes go on.

By the Court:

Q. What did you say?

A. On this class of car, the safety car, the brakes go on the same as a one-man car.

page 132 }

CROSS EXAMINATION.

By Mr. Coleman:

Q. You don't know anything about this accident?

A. No. I investigate all cars after an accident.

By Judge Shackelford:

Q. What did you say you found?

A. The bumper on the lefthand corner, the No. 2, dented, and the fender apron broken, and the air pipe broken.

Q. That would indicate that the lefthand side of your car hit something?

A. Yes, sir, a collision.

Q. On the lefthand side?

A. Yes, sir.

Q. There was nothing on the righthand side of the car?

A. Just on the lefthand corner.

Q. That would indicate that it must have struck something, as the object was leaving the front of the car?

A. There would be two indications: It could be a head-on collision on the lefthand corner; it could be hit going or coming either way.

page 133 }

JAMES H. TURNER,

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

Examined by Mr. Williams:

Q. Mr. Turner, tell these gentlemen, please, your name?

A. James H. Turner.

Q. What is your business?

A. My business is barber at the present time.

Q. Were you, or not, on the street car on January 22nd that was in collision with an automobile at Eighth Street, Wilmoughby Spit?

A. Yes, sir, I was.

Q. Whereabouts were you on the car?

A. About the second seat from the front. I couldn't say positively—either the second or third seat from the front.

Q. What was the first thing that called your attention that an accident had happened or was going to happen?

A. The application of the emergerncy brake.

Q. What effect did that have on you?

A. Throwing me in the car that way.

Q. After that occurred, did you look up?

A. Yes, I did look up.

Q. What did you see?

A. I saw the automobile on the track in front of the street car.

Q. And how far was the street car away from it at that time?

A. About ten or fifteen feet.

page 134 } By the Court:

Q. You looked up and saw what?

A. An automobile on the street car track.

By Mr. Williams:

Q. Just prior to the feeling of this sudden application of the brake, how fast was that street car traveling?

A. I don't know that I could answer that question because I have never operated a street car and don't know how fast they run. The street car had been running for sometime without stopping.

Q. Are you in the habit of riding on those cars?

A. Yes, sir.

Q. Tell the jury how that compared with the speed which was usual and customary—whether less or more?

A. I should think that it was about the customary speed.

Q. Now, Mr. Turner, when you felt the sudden application of the brake, how far was the street car from the crossing at that time?

A. About ten or fifteen feet.

Q. And how far did the car run after the impact?

A. The length of the car.

Q. How did you determine that?

A. When I got off the car and walked back, the rear end of the car was practically even with the automobile.

Q. And where were they both with respect to the crossing?

A. The street car was just about over the cross-
page 135 } ing, headed towards Willoughby, and the automo-
bile was on the opposite track headed towards
Norfolk.

Q. What was the time of day, if you know?

A. Between 6:45 and 7:00 o'clock.

Q. Did you look at your watch, or how do you know it?

A. The only reason I know that was the fact that we left Ocean View at 6:45; we were due at Willoughby to catch the ferry at 7:00.

Q. How do you know you were at Ocean View at 6:45?

A. I looked at my watch when the car came in.

Q. Was it dark or light?

A. It was light enough I was in the car reading a newspaper.

Q. Were there any lights inside of the car?

A. Not that I remember.

CROSS EXAMINATION.

By Judge Shackelford:

Q. Was there any headlight on the car?

A. I couldn't tell you.

Q. Did you see any headlight on it?

A. I didn't go in front of the car.

Q. You got out of the car, didn't you?

A. Yes, I got out, but I didn't go in front of it.

Q. Did you see any reflection from the head of the car on the automobile?

page 136 } A. I didn't notice any.

Q. This effort to stop the car was in ten or fifteen feet of the car, as I understand?

A. I didn't understand you.

Q. I say, the jolt you felt was ten or fifteen feet before you got to the car?

A. Approximately that, I should say.

Mr. Williams: That is our case, your Honor. I don't know whether I formally introduced this plat, and if I didn't I would like to do so.

Note: The same is filed marked Exhibit No. 6.

The court, at 5:00 o'clock, adjourned until 10:00 o'clock tomorrow morning.

page 137 } MORNING SESSION.

Norfolk, Virginia, December 22, 1932.

The court met pursuant to adjournment of yesterday.

Present: The same parties as heretofore noted.

D. R. DOBBINS,

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

Examined by Mr. Williams:

Q. Mr. Dobbins, tell the jury, please, on what hour or minute the sun rose on January 22, 1932?

A. 7:15.

Q. What was the condition of visibility that morning?

A. According to the records, the weather was cloudy; visibility was good.

Q. At 28 minutes prior to sun-up, can, or cannot, a man see to read?

A. Yes; that is twilight; twilight would begin at 6:47 A. M., and it is light enough for outside work with occupational twilight.

Q. Forty-five minutes prior to sun-up, would, or would not, a person be able to see an object as large as a street car for a considerable distance?

A. Yes, I would think so.

page 138 } Mr. Williams: Answer Judge Shackelford.
Judge Shackelford: We have no questions.

By a Juror:

Q. What is your occupation?

A. Meteorologist, United States Weather Bureau.

By Mr. Williams:

Q. What is your position?

A. Junior Meteorologist, United States Weather Bureau, temporarily in charge of the Norfolk office.

Q. You are in charge of the Norfolk office?

A. Yes, sir.

Q. And they are from your official records?

A. Yes.

Q. You say it was cloudy; were the clouds high or low?

A. They were the type of clouds known as alto-stratus and high ceiling.

Q. Did you say high ceiling?

A. Yes, sir.

S. W. ARMISTEAD,

a witness on behalf of the defendant, recalled, testified as follows:

Examined by Mr. Williams:

Q. Mr. Armistead, will you tell us the distance from Eighth Street to Ninth Street, which is the next crossing west?

A. From Eighth Street to Ninth Street is 900 page 139 } feet.

Q. Did you, or not, this morning go to Mr. Vel-lines' house and strike a line of vision to ascertain at what point the street car would be visible, proceeding westerly, after it passed the residence 798, as shown on this plat?

A. I did.

Q. Tell the jury what the line of vision was—that is, to what extent the house blocks the line of vision of an approaching car?

A. The house blocks forty feet one inch on the nearest rail (that is the rail going to the west), and then it leaves 102 feet 8 inches between the point of non-visibility and the nearest edge of the Eighth Street crossing.

Q. In other words, a person looking from that house would not see a street car until it was within 102 feet of the crossing?

A. That is correct, from that end.

CROSS EXAMINATION.

By Judge Shackelford:

Q. Where were you when you took a line of vision of the street car?

A. On the line of vision, I was standing on the nearest rail.

Q. And looking right straight down the track?

A. No; I was looking towards the window of that house.

Q. I thought you told Mr. Williams how far
page 140 } you could see down the track there?

A. No, not today I have not. What I was answering Mr. Williams was the line of vision from the house towards the street car.

Q. Where were you in the house?

A. I was not in the house, but stood on the rail and looked towards the house.

Q. There was a space of 102 feet that did furnish a line of vision from the house to the railroad track?

A. From the nearest side of the Eighth Street crossing you can see 102 feet 8 inches; there was that much visibility a car would be visible before it is blocked.

Q. From any point in the Vellines house?

A. Both observations were made looking towards the same house, on the Vellines house,—the same window.

Q. What window was it?

A. What I took to be a bath room window—the center window on the top floor.

Q. How many windows are in that floor?

A. Three.

Q. Why did you take the observation from the bath room window?

A. Because Mr. Jackson said that he wanted it taken from that.

Mr. Williams: She said it was taken from the bath room window.
page 141 } Judge Shackleford: The bedroom.

By Judge Shackleford:

Q. Saying this is Willoughby Spit here (illustrating); a car coming up here, and making a normal turn into this street here at this crossing, how far from the nearest rail of that track would the center of the car be just as it began to turn?

A. From the center of the track, or from the nearest rail?

Q. The nearest rail of the track to the point where it would normally begin to turn.

Mr. Williams: As I understood the testimony, Mr. Vellines testified that he was right close to the lefthand edge.

Judge Shackleford: I don't remember his testifying to that.

Mr. Coleman: He said near the center.

The Court: You can show the center and the lefthand side.

By Judge Shackelford:

Q. Assuming that he was within a foot of the lefthand edge of the concrete driveway, and he came and turned in this fashion, how far would he be from the nearest rail when he started to turn?

A. Do you want the distance that he would have to travel?

Q. Yes.

page 142 } A. If he began to turn right at that point, the distance as shown by this yellow line in here is about twenty-two or twenty-three feet.

Q. And if he went nearer the center, he could be, of course, that much further from the rail?

A. No; I think he would go over further. That is thirty feet.

By Mr. Williams:

Q. That is taken from what would be the center line of the automobile?

A. It is taken along the line Judge Shackelford drew. He may have come this side or that side.

By the Court:

Q. The center is thirty feet from the rail, and closer in on the side would be about twenty-two feet?

A. Yes, sir.

By Mr. Coleman:

Q. In the Lewis house you looked only at the bath room window, which is the center?

A. The bath room window is the center window.

Q. As a matter of fact, there is an open vision from the two other windows?

A. There are two other windows up there.

Q. There is more vision from either of those windows?

page 143 } A. Either window up there would give a dead vision of forty feet, and that would not change it more than a foot.

Q. Isn't the Vellines house higher than the house directly behind it?

A. Yes.

By the Court:

Q. What do you mean by a dead space of forty feet?

A. If there is a street car proceeding that way, and a house

there, and a house at my eye, at a point from there to there you can't see a street car, and that is a blind space.

Q. Do you mean it is blind for forty feet along the track?

A. Yes, sir.

Q. But prior to forty?

A. There is 102 feet 8 inches that is visible.

Q. Did you take both sides of the forty feet?

A. I only looked one side. There would be some visible space on the other side, but how much I cannot testify to.

Q. You were looking on the side towards where the accident occurred—immediately preceding where the accident occurred?

A. I don't know where the accident occurred, but the 102 feet 8 inches is from the crossing to the street,—this space in here (indicating). There is your visible space.

Q. There is 102 feet 8 inches visible. Forty feet dead, and then outside of the forty feet dead you don't know how much is visible?

page 144 } A. After you get here you hit the concrete.

Q. How much out beyond the forty feet you don't know?

By Mr. Coleman:

Q. Did you make any request of Capt. Lewis or his family to be permitted to go there and view it from the window?

A. I don't know Capt. Lewis.

Q. You knew where the house was; did you make any request to go into the house and get into the window to see?

A. No.

Q. You made no efforts, and you were not obstructed? No effort was made so you could get inside of the window?

A. I would rather make it the way I made it. If I went inside of the house I would need more assistance to make that observation, for this reason—

Q. (Interposing) You can stand in the house and look out of the window at different points?

A. Standing in the window I sight by the edge of the house and sight on a bare landscape; what point I hit I don't know, but I have to have an assistant and wave him back and forth.

Q. Say this window here: I have a vision so much, and if I get here it is a different angle?

A. Suppose your vision hit on the center of the shed, it is all the same, and you leave here and you want to get a measurement, you don't know what to measure from.

page 145 } Q. Can you say you can see as well as if you were higher up? Wouldn't your vision be better

if you were higher up than if you made any test not higher up?

A. I don't think I would want a test higher up in the window.

Note: The court and counsel considered the instructions until 12:52, at which time the jury was adjourned until 2:30 for lunch.

The instructions granted, amended and refused are as follows:

INSTRUCTIONS.

Plaintiff's Instruction B (Granted):

Last Clear Chance

"The court instructs the jury that even though they may believe from the evidence that the plaintiff in this case was guilty of contributory negligence, yet if they further believe from the evidence that the defendant company knew of the plaintiff's danger or by the exercise of ordinary care should have known of the plaintiff's danger in time to have stopped its street car and avoided the accident, by the exercise of ordinary care, it was its duty to do so, and if they believe from the evidence that the said defendant company failed to exercise this duty it is liable and your verdict should be for the plaintiff."

page 146 } Mr. Williams: I object and except to Instruction B for the plaintiff upon the ground that, under the evidence in this case, there is no evidence to support a last clear chance instruction, and on the further ground that it entirely leaves out the element that before the last clear chance doctrine is applicable the plaintiff must have been in a position of imminent danger and that some fact or circumstance was or should have been brought home to the knowledge of the motorman that he would not or could not extricate himself from such imminent peril.

Plaintiff's Instruction C (Granted):

Pr. of li.

"The court instructs the jury that the plaintiff is not required to prove his case beyond a reasonable doubt, but all that he is required to do is to prove his case by a preponderance of the evidence, and this does not necessarily mean that he must prove it by the greater number of witnesses. In

ascertaining upon which side is the preponderance of the evidence, the jury should consider not only the number of witnesses, but also their credibility, their interest if any, and the reasonableness of their testimony when taken in connection with all the facts and circumstances of the case."

Plaintiff's Instruction D (Granted):

"The court instructs the jury that if defendant's motor-man did not exercise ordinary care to keep a reasonable lookout and the collision was the result of such failure page 147 } as the proximate cause and that the plaintiff was exercising ordinary care, then they should find for the plaintiff."

Mr. Williams: I object and except to granting of Instruction D for the plaintiff on the ground that it directs a verdict on a partial view of the evidence without taking into consideration the last clear chance instruction offered and granted on behalf of the defendant by the court, thereby directing a verdict on a partial view of the evidence; and on the further ground that there is no evidence in this case that the motor-man was not keeping a proper lookout.

Plaintiff's Instruction G (Granted):

"The court instructs the jury that if they believe from the evidence the plaintiff is entitled to recover, then, in estimating his damages, they should take into consideration his physical suffering; the effect of the injuries on the health of the plaintiff, according to their degree and duration; the inconvenience caused the plaintiff as a result of said injuries, and such sums of money as have been shown by the evidence in this case that he has become liable for in attempting to be cured of his injuries, and also any amount shown by the evidence on account of damage to his automobile."

page 148 } *Defendant's Instruction No. 1 (Granted):*

"The court instructs the jury that the mere fact that the plaintiff was injured by a collision with the defendant's street car raises no presumption whatever that the Virginia Electric & Power Company was negligent, but, on the contrary, the presumption is that the defendant, Virginia Electric & Power Company, was free from negligence and that the street car

was operated with ordinary care. The burden of proving negligence on the part of the Virginia Electric & Power Company is on the plaintiff, and the court instructs the jury that in order for the plaintiff to recover against the Virginia Electric & Power Company in this case, the plaintiff must prove affirmatively, by a preponderance of the evidence, that the Virginia Electric & Power Company was guilty of negligence which was the sole proximate cause of the injuries complained of, and unless the plaintiff does establish negligence on the part of the defendant by a preponderance of the evidence, the jury must bring in their verdict for the Virginia Electric & Power Company. And even if you believe further that the defendant was guilty of negligence, yet if you further believe that Mr. Vellines was guilty of any negligence which contributed to the accident, you shall find for the defendant.

Defendant's Instruction No. 2 (Granted):

Ordinary Care
 "The court instructs the jury that a street railway is not an insurer of the safety of other persons or vehicles crossing its tracks and it is not required to exercise such a
 page 149 } high degree of care as to prevent the possibility of an accident. It is only required to exercise ordinary care, that is such care as an ordinarily prudent person would exercise under the same or similar circumstances and if, in this instance, you believe the defendant, Virginia Electric & Power Company, exercised such care you must find your verdict for the Virginia Electric & Power Company. In determining whether or not the defendant was negligent it is proper for you to take into consideration, along with all the other facts and circumstances, the character of business in which the defendant is engaged and the service it is required to render to the public, including the fact that the street car's operation is confined to rails."

Defendant's Instruction No. 3 (Refused as offered):

"The court instructs the jury that if they believe from the evidence that the automobile in question was traveling along the road beside the car tracks or was approaching the track in the usual and customary manner, then the motorman of the street car had the right to assume that the driver of the automobile so approaching the track, or traveling along the road, would take the usual and ordinary precautions to avoid being struck by the car, and that such driver would exercise his faculties of observation and hearing in order to avoid an ac-

cident. The driver of an automobile is not justified in driving immediately in front of, or dangerously close to, an approaching car, and the motorman rests under no page 150 } obligation to stop his car merely because he sees an automobile approaching the track. The motorman has the right to assume that the driver will stop and not attempt to cross immediately in front of the street car."

Mr. Williams: I object *an* except to refusal of Instruction No. 3 as offered for the defendant on the ground that it correctly states the law, and that it was not proper nor necessary to insert the words "Until the contrary appeared or should have appeared to the motorman by the exercise of reasonable care on his part."

Defendant's Instruction No. 3 (Granted as amended):

"The court instructs the jury that if they believe from the evidence that the automobile in question was traveling along the road beside the car tracks or was approaching the track in the usual and customary manner, then the motorman of the street had the right to assume that the driver of the automobile so approaching the track, or traveling along the road, would take the usual and ordinary precautions to avoid being struck by the car, and that such driver would exercise his faculties of observation and hearing in order to avoid an accident, until the contrary appeared or should have appeared to the motorman by the exercise of reasonable care on his part. The driver of an automobile is not justified in driving immediately in front of, or dangerously close to, page 151 } an approaching car, and the motorman rests under no obligation to stop his car merely because he sees an automobile approaching the track. The motorman has the right to assume that the driver will stop and not attempt to cross immediately in front of the street car."

Note: The exception to this instruction is noted at the end of Instruction No. 3 as offered.

Defendant's Instruction No. 4 (Refused as offered):

"The court instructs the jury that the track of a railroad company is of itself a proclamation of danger to a person go-

ing upon it, and that he must exercise ordinary care to use not only his eyes and ears, looking and listening in both directions, but he must also exercise ordinary care to keep a constant lookout in each direction for approaching cars. And if the jury believe from the evidence that the plaintiff did not exercise ordinary care to keep a constant lookout in each direction for approaching cars, and if they further believe that by such lookout he should have seen the approaching car in time to have warned the driver of the automobile, and avoided the accident, then the jury shall find for the defendant, the Virginia Electric & Power Company, even though they may believe from the evidence that the Virginia Electric & Power Company was guilty of negligence."

page 152 } Mr. Williams: I object and except to refusal to grant Defendant's Instruction 4 as offered on the ground that it correctly states the law, and that a railroad track, such as this, is a proclamation of danger.

Defendant's Instruction No. 4 (Granted after amendment):

"The court instructs the jury that it is the duty of a person before going on a railway track to exercise ordinary care to use not only his eyes and ears, looking and listening in both directions, but he must also exercise ordinary care to keep a constant lookout in each direction for approaching cars. And if the jury believe from the evidence that the plaintiff did not exercise ordinary care to keep a constant lookout in each direction for approaching cars, and if they further believe that by such lookout he should have seen the approaching car in time to have avoided the accident, then the jury shall find for the defendant, the Virginia Electric & Power Company, even though they may believe from the evidence that the Virginia Electric & Power Company was also guilty of negligence."

Note: The exception to this instruction was noted at the end of Defendant's Instruction No. 4 as offered.

Defendant's Instruction No. 5 (Refused as offered):

"The court instructs the jury that the track of a railway company is of itself notice of danger to a driver of an automo-

bile and the street car has the right of way there-
page 153 } on, and that one approaching a crossing must
not only use his eyes and ears, looking and listening continuously in both directions, but he must, when about to cross the track, look and listen so as to make these acts effective. If such looking and listening does, or would warn him of the near approach of a car, then it is the duty of one approaching the crossing to keep off the track until the car is past, and to go on a track under such circumstances is negligence, and if you believe from the evidence that the driver of the automobile was guilty of negligence and this negligence contributed to the accident in any degree, you shall find your verdict for the Virginia Electric & Power Company."

Mr. Williams: I object and except to refusal to grant Instruction No. 5 as offered for the reason that a railroad track is of itself notice of danger to a driver of an automobile.

I further object to the insertion in the instruction the words "to exercise care", since, under the facts of this case, there being no interfering traffic and there being nothing to prevent the plaintiff from seeing the approaching car, it was his duty to listen continuously in both directions, and this duty should not have been qualified by the use of the words "Ordinary care" which were inserted by the court.

page 154 } *Defendant's Instruction No. 5 (Granted after amendment):*

"The court instructs the jury that it is the duty of a person approaching a crossing to exercise ordinary care by using his eyes and ears, looking and listening in both directions, and he must exercise ordinary care when about to cross the track to look and listen so as to make these acts effective. If such looking and listening does, or would harm him of the near approach of a car, then it is the duty of one approaching the crossing to keep off the track until the car is past, and to go on a track under such circumstances is negligence, and if you believe from the evidence that the driver of the automobile was guilty of negligence and this negligence contributed to the accident in any degree, you shall find your verdict for the Virginia Electric & Power Company."

Note: The exception to granting this instruction is noted at the end of Defendant's Instruction No. 5 as offered and refused.

Defendant's Instruction No. 6 (Refused as offered):

"The court instructs the jury that there was just as high an obligation and just as great a duty resting on Mr. Vellines to look out for street cars and avoid placing himself in danger as there was on the motorman to look out for him and avoid injuring him, and if you believe from the evidence that neither Mr. Vellines nor the motorman saw the other until it was too late for either of them to avoid the accident, you shall find for the defendant."

page 155 } Mr. Williams: I object and except to refusal to grant Instruction No. 6 for the defendant as offered and striking out the words "and if they believe from the evidence that neither Mr. Vellines nor the motorman saw the other until it was too late for either of them to avoid the accident, you shall find for the defendant", on the ground that this instruction correctly states the law of comparative negligence.

Defendant's Instruction No. 6 (Granted after amendment):

"The court instructs the jury that there was just as high an obligation and just as great a duty resting on Mr. Vellines to look out for street cars and avoid placing himself in danger as there was on the motorman to lookout for him and avoid injuring him."

Note: The exception to this instruction is noted at the end of Defendant's Instruction No. 6 which was refused as offered.

Defendant's Instruction No. 6-a (Refused):

"The court instructs the jury that there was just as high an obligation and just as great duty resting on Mr. Vellines to look out for street cars and to avoid placing himself in danger as there was on the motorman to look out for him and to avoid injuring him, and if the jury believe from the evidence that Mr. Vellines drove upon the track im-
page 156 } mediately in front of the approaching street car when it was dangerously near, and that he was injured thereby, he was guilty of contributory negligence."

Mr. Williams: That instruction was offered and the court refused to grant it; exception is noted on the ground that it correctly states the law as laid down in the case of *Ashby vs. Virginia Railway & Power Company* in 138 Virginia.

Defendant's Instruction No. 7 (Granted):

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

Defendant's Instruction No. 8 (Granted):

"The court instructs the jury that even though you may believe from the evidence that the defendant was negligent, yet if you further believe from the evidence that the plaintiff knew, or by the exercise of ordinary care should
page 157 } have known, that the street car was dangerously
near, and that he could by the exercise of ordinary
care have avoided the accident, you shall find for the defendant."

Thereupon the court recessed until 2:30.

AFTERNOON SESSION.

Norfolk, Virginia, December 22, 1932.

The court met at the expiration of the recess.

Present: The same parties as heretofore noted.

The Court: These are the instructions of the court, gentlemen, which are to govern you in your deliberations. These instructions are to be taken and construed by you together.

Note: The court then read the instructions which were granted.

Mr. Coleman argued the case on behalf of the plaintiff; Mr. Williams on behalf of the defendant, and Judge Shackelford on behalf of the plaintiff.

page 158 } The jury retired at 4:00 o'clock and returned at 4:48 with the following verdict:

"We, the jury, find for the plaintiff in the amount of \$500. E. L. Sawyer, Foreman."

Mr. Williams: I wish to make a motion to set aside the verdict and enter judgment for the defendant on the ground that the verdict is contrary to the law and the evidence and because of improper instructions.

Note: Hearing on this motion was continued to January 14, 1933, at which time, after argument, the court overruled the motion, and counsel for defendant excepted.

page 159 } I, W. H. Sargeant, Judge of the Corporation Court of the City of Norfolk, Virginia, sitting for Hon. Richard McIlwaine, Jr., Judge of the Court of Law and Chancery of the City of Norfolk, Virginia, who presided over the foregoing trial of William L. Vellines, Plaintiff, vs. Virginia Electric & Power Company, Defendant, do certify that the foregoing, together with the exhibits therein referred to, is a true and correct copy and report of the evidence, and all of the evidence, the testimony, all the instructions granted, refused and amended by the court, and other incidents of the said trial of the said cause, with the exceptions and objections of the respective parties as therein set forth. As to the original exhibits introduced in evidence, as shown by the foregoing report, to-wit: Photographs numbered 1 to 5, both inclusive, and map marked Exhibit No. 6, which has been initialed by me for the purpose of identification, it is agreed by the plaintiff and the defendant that they shall be transmitted to the Supreme Court of Appeals as part of the record in this cause, in lieu of certifying to the court copies of said exhibits.

And I do further certify that the attorneys for the Plaintiff had reasonable notice, in writing, given by the defendant, of the time and place when the foregoing report of the testimony, exhibits, instructions, exceptions and other incidents of the trial would be tendered and presented
page 160 } to the undersigned for signature and authentication.

Given under my hand this 20th day of April, 1933, within sixty days after the entry of the final judgment in said cause.

WILLIAM H. SARGEANT,
Judge of the Corporation Court of the City of
Norfolk, Virginia, sitting for Hon. Richard
McIlwaine, Jr., Judge of the Court of Law and
Chancery of the City of Norfolk, Virginia.

A Copy, Teste:

WILLIAM H. SARGEANT,
Judge of the Corporation Court of the City of Norfolk,
sitting at the request of Honorable Richard McIlwaine,
Judge of the Court of Law and Chancery of the City
of Norfolk.

I, William L. Prieur, Clerk of the Court of Law and Chancery of the City of Norfolk, Virginia, do certify that the foregoing report of the testimony, exhibits, instructions, exceptions and other incidents of the trial of the cause of William L. Vellines vs. Virginia Electric & Power Company, together with the original exhibits therein referred to, all of which have been duly authenticated by Hon. William H. Sargeant, Judge of the Corporation Court of the City of Norfolk, Virginia, sitting for Hon. Richard McIlwaine, Jr., of the Court of Law and Chancery of the City of Norfolk, Virginia, were lodged and filed with me as Clerk of the said Court on the 20th day of April, 1933.

WM. L. PRIEUR, JR.,
Clerk of the Court of Law and Chancery of the City
of Norfolk, Virginia.

By H. L. BULLOCK, D. C.

page 161 } Virginia:

In the Clerk's Office of the Court of Law and
Chancery of the City of Norfolk.

I, W. L. Prieur, Jr., Clerk of the Court of Law and Chancery of the City of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of William L. Vellines, plaintiff vs. Virginia Electric and Power Company, a corporation, defendant, lately pending in said court.

I further certify that the said copy was not made up and completed until the plaintiff had had due notice of the making of the same and the intention of the defendant to take an appeal therein.

Given under my hand this 22nd day of April, 1933.

W. L. PRIEUR, JR., Clerk.

Fee for this record \$15.00.

A Copy—Teste:

M. B. WATTS, C. C.

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