

1544
176-526

Record No. 2256

In the
Supreme Court of Appeals of Virginia
at Richmond

W. G. SAUNDERS AND WILLIAM SMITH

v.

MARY H. HALL, ADM'X, ETC.

FROM THE CIRCUIT COURT OF NORFOLK COUNTY

RULE 14.

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M. B. WATTS, Clerk.

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2256

W. G. SAUNDERS AND WILLIAM SMITH, Plaintiffs in
Error,

versus

MARY H. HALL, ADMINISTRATRIX OF THE ESTATE
OF ERWIN NOLAN HALL, DECEASED,
Defendant in Error.

PETITION FOR WRIT OF ERROR.

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

Your petitioner, W. G. Saunders, respectfully shows unto your Honors that he is aggrieved by a judgment entered on the 17th day of July, 1939, by the Circuit Court of Norfolk County, Virginia, in favor of Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, deceased, against your petitioner for the sum of \$10,000.00, with interest thereon until paid and costs; and your petitioners, William *Smith and W. G. Saunders, respectfully show unto your Honors that they are aggrieved by a judgment entered as of July 17, 1939, by *nunc pro tunc* order entered the 14th day of August, 1939, in the Circuit Court of Norfolk County in favor of Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, on the cross-claims of William

Smith and W. G. Saunders. A transcript of the record, together with the original exhibits in the action, are herewith presented.

This petition is adopted as the opening brief and a copy was mailed to Mr. T. E. Gilman, Attorney at Law, Portsmouth, Virginia, and to Mr. A. R. Bowles, Attorney at Law, Richmond, Virginia, on the 15th day of November, 1939.

Oral argument on this petition is requested.

MATERIAL PROCEEDINGS IN THE LOWER COURT.

The plaintiff in the lower court filed a notice of motion on the 8th day of September, 1938, under the death by wrongful act Statute, alleging that on the 27th day of July, 1937, Erwin Nolan Hall received fatal injuries as the result of a collision between the truck driven by Erwin Nolan Hall and the truck owned by W. G. Saunders and driven by William Smith. The plaintiff filed bill of particulars, and the defendants, William Smith and W. G. Saunders, filed the general issue, affidavits that William Smith was not the agent of W. G. Saunders, and William Smith filed a cross-claim alleging personal injuries to the extent of \$10,000.00, and W. G. Saunders filed a cross-claim for property damage in the amount of \$750.00.

3* *The plaintiff filed a motion to abate the action as to the defendant, William Smith, and made a motion to dismiss the cross-claim of William Smith, which said motions were overruled, and the plaintiff filed an amended notice of motion alleging Elmer Hall to be the agent, servant and employee of W. G. Saunders instead of William Smith, and it was agreed between counsel that all pleas of the defendants in so far as applicable would apply to the amended notice of motion.

The trial of the action was commenced in the Circuit Court of Norfolk County on the 23rd day of June, 1939, before a jury, and the Honorable R. B. Spindle, who presided for and at the request of the Honorable C. W. Coleman, Judge of said Court, and concluded on the 26th day of June, 1939, the jury returning a verdict in favor of the plaintiff against the defendant, W. G. Saunders, for the sum of \$10,000.00.

The defendant, W. G. Saunders, moved the Court to set aside the verdict of the jury on the ground that the same was contrary to law and the evidence and to enter judgment for the defendant, and, if denied, the defendants moved the Court to set aside the verdict of the jury and grant them a new trial on the grounds that the verdict was contrary to law and the evidence, and, further, on the ground that the Court

erred in granting and refusing certain instructions, and that the Court erred in admitting and refusing to admit certain evidence.

On the 17th day of July, 1939, upon a hearing on the motions of the defendants, the Court overruled all of said motions and entered judgment for the plaintiff against W. G.

Saunders for the sum of \$10,000.00, with interest at the 4* *rate of six per cent per annum from June 26, 1939, until paid, with costs, to which action of the Court the defendants excepted.

On the 14th day of August, 1939, the Court entered an order *nunc pro tunc*, entereing judgement for the plaintiff against William Smith and W. G. Saunders on their respective cross-claims as of July 17, 1939, to which action of the Court the defendants excepted.

ERRORS ASSIGNED AND QUESTIONS INVOLVED.

1. The Court erred in granting any and all instructions for the plaintiff, and in refusing to set aside the verdict of the jury on the grounds that the same was contrary to law and the evidence and to enter judgment for the defendant W. G. Saunders.

2. The Court erred in refusing to set aside the verdict of the jury and award William Smith a new trial on the ground that the jury has never passed upon the cross-claim of William Smith and the verdict is not responsive to the issues.

3. That the Court erred in refusing to set aside the verdict of the jury and grant the defendants a new trial, for the following reasons:

a. The Court erred in granting plaintiff's Instructions A, B, C, D, I, K, and L, over objection and exception of the defendants, in so far as these instructions refer to the inadequacy of the brakes on the truck and trailer of W. G. Saunders or their adjustment or mechanical condition.

5* *b. The Court erred in granting plaintiff's Instructions A and K, over the objection and exception of the defendants, for the reason that these instructions required the driver of W. G. Saunders' vehicle to keep and maintain a constant lookout to the front and rear of said vehicle.

c. The Court erred in refusing to permit the defendant W. G. Saunders to impeach the witness William Taylor with a contradictory written statement made and signed by William Taylor.

d. The Court erred in refusing to instruct the jury to disregard improper argument of counsel for the plaintiff to the jury in reference to the amount of Workmen's Compensation insurance awarded Mary H. Hall.

e. The Court erred in excluding relevant and material opinion evidence offered by the defendants through the witness Elmer Hall.

f. The Court erred in refusing to grant Instruction D-5 offered by the defendants.

g. The Court erred in granting plaintiff's Instruction A and plaintiff's Instruction K over the objections and exceptions of the defendants, in so far as these instructions refer to reasonable care, speed and proper control.

6*

*FACTS.

On the 27th day of July, 1937, around One o'clock P. M., or a little thereafter, Elmer Hall was driving a Ford lumber tractor and trailer along the King's Highway, in Norfolk County, and proceeding in a Westerly direction on the North side of said highway (R., p. 76). Elmer Hall was employed by W. G. Saunders, of Chuckatuck, Virginia, who was the owner of said truck, and had taken a load of cross ties (R., p. 74) to a lumber company in Portsmouth, and was on his way back to Chuckatuck.

The truck was unloaded or lightly loaded and had only the lumber on it that formed a bottom or bed for the ties to be placed on (R., p. 67). William Smith was a guest riding on the truck (R., p. 74). The truck was traveling about 25 or 30 miles per hour (R., p. 75).

The highway was a sixteen foot concrete highway and was straight at the point of the accident. There had been a heavy rain and it was drizzling at the time of the accident (R., pp. 76, 94, 101) and water was standing on the highway.

Erwin Nolan Hall was driving a tractor which was pulling a semi-trailer with an oil tank upon same along said highway and proceeding in an Easterly direction on the South side of said highway. This trailer was at least seven (7) feet wide (R., p. 96) and was transporting gas from South Norfolk to Franklin (R., p. 149), a distance of approximately forty (40) miles. This oil truck had made one trip and returned early in the morning (R., p. 150) and left South Norfolk about Ten o'clock A. M. for the second trip (R., p. 148), and was returning with the tractor and trailer empty when the accident happened. The speed of the oil truck was estimated from 25 to 30 miles per hour (R., p. 110) or faster (R., p. 89), up to 50 miles per hour (R., p. 215).

7* *The lumber truck and the oil truck were meeting each other near Main Street, each on the opposite sides of the sixteen foot concrete highway, and when about seventy-five (75) yards apart (R., p. 116), or closer, a green sedan running at a rapid rate of speed came up from behind the lumber truck (R., p. 101) and without blowing its horn (R., pp. 76, 87) or giving any signal of its intention to pass, ran by the lumber truck on the South side of the highway (R., pp. 76, 101). Elmer Hall, the driver of the lumber truck, saw the green sedan about the time it got opposite the cab of his truck (R., p. 76). At this time the oil truck and the lumber truck were so close upon each other that the green sedan could not pass between the two trucks and get back on its right-hand side of the highway (R., p. 101) so the green sedan passed the oil truck on the South side of the highway at Main Street, forcing the oil truck to cut to its left, or the North side of the highway (R., pp. 76, 101). The oil truck kept on coming and Elmer Hall, observing the peril, put on brakes, and when the oil truck turned to its North, he, realizing that a head-on collision was imminent, turned his truck to the left or to the South side of the highway to get out of the way of the oncoming oil truck (R., p. 79), and the oil truck came into him striking the lumber truck just behind the cab (R., p. 79). The collision was of such force as practically to bend the lumber truck in a right angle, and demolish the front of the oil truck.

8* *As a result of this accident the driver of the oil truck, Erwin Nolan Hall, was killed; William Smith was seriously injured, and Elmer Hall was badly hurt.

The brakes on the tractor were regular Ford brakes as it came equipped. The brakes on the trailer were Bendix Air Brakes (R., pp. 63, 200), and the most popular brake on the market (R., p. 133). The brakes on the tractor and trailer were kept up and adjusted by mechanics at Chuckatuck, Virginia (R., pp. 68, 69, 75), and the truck had been inspected by State Officers and Inspection Tag was upon same (R., pp. 75, 200). When applied by the driver the brakes on the trailer and rear wheels of the tractor took at the same time, equally, and with the same tension (R., pp. 68, 70). There was no evidence that the brakes were not in good operating condition, nor that they pulled to one side more than the other, nor that the foot pedal had to be pushed too far before they took, nor that they were inadequate in size or braking power, nor was there any evidence that they were not adjusted in accordance with the Statute providing how they should be adjusted. There was evidence that the brakes were in operation

on the trailer at the time of the accident and had not been cut off (R., p. 67).

The accident happened on a straight highway. There was no evidence that Elmer Hall was not maintaining a reasonable lookout ahead of him when meeting the oncoming oil truck. The Saunders truck was equipped with a rear vision mirror, and the driver did not see the overtaking green sedan until it came up beside the cab of the log truck. The green sedan did not blow its horn.

9* *Mary H. Hall, the widow of Erwin Nolan Hall, deceased, accepted Workmen's Compensation Benefit, and the Indemnity Insurance Company of North America brought suit in her name against W. G. Saunders as principal and William Smith as servant. William Smith filed cross-claim alleging personal injuries and W. G. Saunders filed cross-claims alleging property damage, and the notice of motion and cross-claims were heard before a jury in the Circuit Court of Norfolk County, resulting in a verdict for \$10,000.00 in favor of Mary H. Hall, Administratrix, *v.* W. G. Saunders on the notice of motion, but did not find a verdict for or against William Smith or W. G. Saunders on their cross-claims.

Whereupon, the defendant, W. G. Saunders, moved the Court to set aside the verdict of the jury and enter judgment for the defendant W. G. Saunders, and, if denied, to set aside the verdict and grant him a new trial, and the defendant, William Smith, moved the Court to set aside the verdict and award him a new trial, all motions being on the grounds that the verdict was contrary to the law and the evidence, and that the Court had erred in refusing to grant certain instructions offered by the defendants, and had erred in granting improper instructions for the plaintiff, and had erred in refusing to admit evidence offered by the defendants. The Court overruled all of the motions of the defendants and entered judgment for the plaintiff against W. G. Saunders, to which action of the Court the defendant excepted. Later the Court by order entered *nunc pro tunc*, entered judgment for the plaintiff on the cross-claims of the defendants William Smith and W. G. Saunders, to which action of the Court the defendant excepted.

10* *ASSIGNMENT OF ERROR NUMBER I.

The Court erred in granting any and all instructions for the plaintiff, and in refusing to set aside the verdict of the jury on the grounds that the same was contrary to law and

the evidence and to enter judgment for the defendant W. G. Saunders.

The Court erred in granting any of the instructions offered by the plaintiff on the grounds that there were no facts or evidence in the record upon which the instructions could be based, as will be shown from a discussion of the evidence.

That the evidence does not justify the granting of any of the instructions and that the verdict should be set aside and judgment entered for the defendant, W. G. Saunders, is conclusively shown by the record.

The plaintiff introduced one William Taylor, who, at the time of the accident, was walking West along the South side of the highway (R., p. 101) with his back to the log truck and facing the oncoming oil truck. He saw the oil truck approaching him on the South side of the road (R., p. 101) and heard the flashing of a motor behind him and looked back over his shoulder and saw the log truck headed East on the North side of the road and at the same time saw a green sedan pull out from behind the log truck to pass it (R., p. 101); that the green sedan began to pass when it reached where he was (R., p. 101) and the green sedan was going at a rapid rate of speed and passed the log truck (R., p. 101). The log truck and the oil truck were so close to each other the green sedan could not cut between them and get back on the right-hand side of the road so it stayed on the left or South side of the road (R., p. 101) and passed the oil truck on the South side of the highway at Main Street.

11* *At this time the oil truck turned to the North side of the highway and over the center line of the highway (R., pp. 101, 106) and continued on. Taylor looked back and saw that the log truck had applied brakes and was gradually creeping over or skidding towards him on the South side of the highway and he jumped across the ditch (R., p. 101), and the trucks collided on the South side of the road knocking the oil truck into the ditch at a point 35 or 40 feet East of Main Street.

Elmer Hall, the only other eyewitness, testified that he was driving between 25 and 30 miles per hour and was meeting the oil truck (R., p. 75); that a car came out from behind him at a fast rate of speed without blowing or giving any signal (R., p. 76); that he saw the green sedan when it came up with the cab of his truck (R., p. 76); that his truck and the oil truck were too close together to permit the green sedan to go through between the two trucks (R., p. 76); that the green sedan passed him and was meeting the oil truck head-on, both being on the South side of the concrete highway

(R., p. 76); that he put on brakes (R., p. 118); that the green sedan pulled over to its left, with one side of the dirt and one side on the concrete, and passed to the right of the oil truck and on the South side of the highway (R., p. 78); that this caused the oil truck to cut to the North side of the highway in front of him (R., pp. 77, 78); and he cut to the left to try to follow the passenger car and avoid a head-on collision (R., p. 79); that had he held his course a head-on collision would have been bound to occur (R., p. 79); that after he turned to the left side of the highway, the oil truck turned back to the right into him and collided, striking his truck behind the cab (R., p. 84).

12* *Elmer Hall testified, at Page 79 of the Record, as follows:

"Q. And you attempted to go to your left, did you?

"A. Yes, sir, I went to the left. I wasn't going to stay there and see that man kill—

"Q. What?

"A. I wasn't going to stay there and see that truck run straight over top of me.

"Q. Well, now, when it hit your truck, Elmer, where did it hit?

"A. Just behind the cab.

"Q. Did it hit it with any force or hit it easy?

"A. Hit it with right good force. Carried me clean across the road after it hit me. Just bent me up. That is all I know.

"Q. Knocked you unconscious?

"A. Yes, sir."

William Taylor was walking along the highway with his back to the oil truck and has contradicted his own statement in a number of instances. He says he was walking along the road and was 75 yards from his home when he saw the oil truck and heard the flashing of a motor behind him (R., p. 101). His home is on the Southwest corner of Main Street and the King's Highway (R., p. 122), and Main Street was only 35 feet wide (R., p. 109), which put him approximately 62 yards East of the Southeast corner of Main Street, yet he testifies that he was at the point of the accident, 35 to 40 feet East of Main Street (R., p. 109), and jumped across the ditch to keep from being hit (R., pp. 102, 108). That is, he walked approximately 50 yards in approximately less than 3 seconds time.

13* *If Taylor was 62 yards from the Southeast corner of Main Street and the two trucks were 75 yards apart at the time he saw the green sedan attempting to pass the log truck, and, further, that the green sedan passed the oil truck at Main Street and the accident occurred 35 or 40 feet East of Main Street and behind him, then the following situation would have had to have happened:

(1) The accident would have been bound to have happened in front of William Taylor instead of behind him.

(2) The lumber truck could not have been over 14 or 15 yards behind William Taylor at the time the green sedan attempted to pass, making the green sedan travel at such a terrific speed that after it passed the lumber truck it went to Main Street, over 62 yards, and the oil truck then came from Main Street to where William Taylor was, approximately 62 yards, while the lumber truck was traveling approximately a distance of 14 to 15 yards.

In contradiction to this he again says he was 35 feet from the Southeast corner of Main Street when the accident occurred and that the lumber truck came up behind him and he looked behind him and saw it creeping over or skidding towards him and he jumped into the ditch to keep from being hit.

In one place Taylor says the green sedan and the lumber truck began to pass when they had reached where he was (R., p. 101). If the sedan didn't pass until it reached where he was, then the accident would have happened down the road in front of him. In contradiction to this he testifies, further, that the lumber truck was behind him at all times until the accident occurred.

14* *The testimony of William Taylor is so self-contradictory and confused that no clear-cut conception can be gathered from it as to how the accident occurred. He testified that after the accident all wheels of the oil truck and trailer were off the concrete and that the green sedan passed on the shoulder at Main Street (R., p. 121). His testimony is impeached by the pictures taken immediately after the accident as to whether, or not, the trailer wheels of the oil truck were on the shoulder. The pictures show conclusively that the oil truck trailer wheels were all on the concrete highway and the truck was diagonally across the road.

Mr. Perry Williams, a State Highway Officer, testified that the right-hand trailer wheel of the oil truck was at least 18 inches or 2 feet on the concrete (R., p. 192).

Taylor told Mr. J. C. Harris that the green car was not

on the shoulder but passed the oil truck when only one side of the car was on the shoulder and one side on the concrete (R., p. 153). He told Dr. Ferebee, the Coroner of Norfolk County, that the green sedan went between the two trucks (R., pp. 173, 179) and that the green sedan and the oil truck were going in the same direction (R., p. 178). He told Officer Williams first that the green sedan passed between the two trucks, and, later, told him that it passed to the left of the oil truck (R., p. 194). In Taylor's testimony he says that in the excitement and in the position he was in, he does not know how far the oil truck went over on the North side of the highway (R., p. 106).

Even if Taylor's testimony, which is contradictory, repugnant, incredible and impeached, is to be believed, the following undisputed testimony is presented by the testimony of William Taylor and Elmer Hall:

15* The green sedan, traveling at a fast rate of speed, *pulled out from behind the lumber truck without blowing its horn and attempted to pass the lumber truck when the lumber truck and the oil truck, two seven-foot wide vehicles, were too close to each other to permit the green sedan to cut traffic, and so close to each other that all three drivers had to, and did, act in the emergency created by the sole gross negligence of the driver of the green sedan; the green sedan turning to its left instead of to its right; the oil truck turning to its left instead of keeping a straight course or turning to its right, and the lumber truck turning to its left by necessity to avoid a head-on collision, the width of the two trucks taking up all of the surface of the wet and slippery sixteen-foot highway, except two feet, and under the adverse weather condition of a drizzling rain.

Elmer Hall, the driver of the lumber truck, did not see the green sedan approaching him from the rear until it was even with his cab. Elmer Hall put on brakes and the green sedan being unable to get between the two trucks because they were too close to each other, continued on its left-hand side of the highway and passed the oil truck at Main Street 35 to 40 feet from the point of collision. When the oil truck cut to its left or North side of the highway, the lumber truck was West of the point of accident and tried to get to the left side of the highway because the oil truck was coming head-on towards him on the North side of the road. The oil truck kept on coming and the trucks collided, knocking the lumber truck into the ditch on the South side of the highway.

It is, therefore, perfectly apparent and not contradicted

that this accident was caused through the gross negligence and carelessness of the driver of the green car in attempting to cut traffic when it could not be done; that *Elmer 16* Hall did what a normal person would have done, get out of the way, if possible, of a truck that carries gasoline, and upon that reasonable men not predominated by sympathy could not differ.

It is clear from the evidence that at the time when the driver of the green sedan pulled out to pass, the lumber truck was driving at a reasonable speed well under the speed limit and on its side of the road, and when the green sedan was observed by the driver of the lumber truck and as soon as the mind and muscles could react he put on brakes, and when he saw the oil truck cut towards him and creating another or additional emergency, he cut to the left; that it was first the act of the driver of the green sedan and then the act of the driver of the oil truck that imperiled Elmer Hall, both occurring before he turned to the left and away from the oil truck that was headed to him.

It is further clear from the undisputed facts that of the drivers of the two trucks, the driver of the oil truck had the opportunity of first seeing the movement of the green sedan when it came out from behind the lumber truck; that the driver of the oil truck had a better opportunity to avoid a collision with the green sedan by turning to the right instead of the left, and that the driver of the lumber truck never turned or started to his left until after he and William Taylor both had observed the oil truck cutting towards the North side of the highway. If, under the circumstances, it could be said that Elmer Hall was guilty of negligence, the driver of the oil truck was guilty of negligence, and if the driver of the oil truck was guilty of no negligence, then certainly Elmer Hall was guilty of none. If it was not negligence for the driver of the oil truck to cut to the left in front of Elmer 17* Hall, *certainly it was not negligence for Elmer Hall to cut to the left and away from a large truck with a tank on it used to haul gasoline.

At the time the green sedan pulled out from behind the lumber truck, the oil truck and the lumber truck were, according to Taylor, not to exceed 75 yards apart, and were of necessity much closer when the green sedan came up by the cab of the log truck. According to Elmer Hall, when the oil truck turned to the North side of the highway the two trucks were about 60 feet apart. From the evidence the oil truck and the lumber truck were making at least 25 to 30 miles per hour, and were closing in the gap between them at the

combined rate of between 72 to 88 feet a second. Therefore, from the time the green sedan passed the lumber truck to the time of the collision, less than 3 second elapsed.

It is earnestly contended that the best, fastest thinking, fastest acting and most capable driver, much less an ordinary and reasonable person, could not have, in the exercise of the highest diligence, so handled these large, long and wide trucks on such a narrow, wet and slippery surface, in such a short time and space, as to avoid the consequences of the admittedly gross negligence of the driver of the green sedan.

18*

*ARGUMENT ON AUTHORITY.

The law is well settled in Virginia that in emergency cases the test is not was his judgment at fault, but does his conduct indicate that he failed to use ordinary prudence under the circumstances, at the time, as he conceived them. Extraordinary care is not required in such a case and the conduct of the injured party is not to be measured by that of the highly cautious. The law does not require of him all the presence of mind and care of an ordinarily prudent person under ordinary circumstances, but makes allowance for the reaction of nerves and muscles, and when one acts in an emergency he is not guilty of negligence if his acts were such that it cannot reasonably be said that a man of ordinary prudence might have acted as the one confronted with the emergency.

The above principles are so firmly embedded in our law that it needs no citations.

To hold Elmer Hall guilty of negligence would be to hold that a normal person confronted with a head-on collision with a large truck used for the purpose of hauling gasoline would not shrink from the danger and turn left to avoid it as a matter of self-preservation.

In the case of *Greyhound Lines, Incorporated, v. Noller*, 36 Fed. (2nd) 445, the facts were as follows:

An Oakland car was parked partially on the eighteen-foot concrete highway, headed East and on the South side of the road. The plaintiff was driving West on the North side of the highway, and the defendant's bus was proceeding East on the South side of the highway, when a Chrysler car which was following the bus, passed the bus, cut ahead of it and stopped suddenly behind the parked car. The bus was

19* going *25 to 30 miles per hour and turned left to avoid a collision with the Chrysler automobile, and in doing so

ran into the oncoming car of the plaintiff. There was a judgment for \$6,750.00 in favor of the plaintiff, which judgment was reversed on appeal, and judgment entered for the defendant. Held, There was no negligence on the part of the defendant.

In delivering the opinion of the Court, Page, Circuit Judge, says as follows:

"Where one who is not otherwise at fault is confronted by an emergency, such as here shown, he is not guilty of negligence, even though a deliberate judgment might have shown a better and safer course. *Davis v. Chicago R. I. & P. Ry Co.* (C. C. A.), 159 F. 10, 11, 16 L. R. A. (N. S.) 424. It is not denied that the physical conditions show that there was less probability of an accident in the course taken by the driver in the emergency."

"We are of opinion that there was no evidence of appellant's negligence that justified submission of the case to the jury. *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *International Text-Book Co. v. Heartt* (4th C. C. A.), 136 F. 129, 133. The judgment is reversed."

This case is of further interest in that it holds that testimony such as William Taylor's is worthless.

The Court further says:

"Such testimony is worthless as evidence on which to base the speed of the cars or their location and their relative positions preceding and at the time of the accident."

It was plainly the duty of the Court to set aside the verdict and enter judgment for the defendant, W. G. Saunders, on the notice of motion, pursuant to Section 6215 and Section 6363, of the Code of Virginia.

20* *In the case of *Meade v. Saunders*, 151 Va. 636, Mc-Lemore, Justice, delivering the opinion of the Court, says:

"Where it can be seen from the evidence as a whole that the verdict has recorded a finding in plain deviation from right and justice, the court may, indeed should, set it aside."

In the case of *Yanago v. Aetna Insurance Company*, 164 Va. 258, Holt, Justice, delivering the opinion of the Court, says:

"In *Braswell v. Virginia Elec. & P. Co.*, 162 Va. 27, 173 S. E. 365, 369, it is said: 'We have frequently had occasion to consider Code, section 6363. The jury's verdict may be set aside when "it appears from the evidence that such judgment is plainly wrong or without evidence to support it." That is to say, it may be set aside for either of two reasons; it may be set aside when it is without evidence to support it, and it may be set aside when it is plainly wrong even if it is supported by some evidence.' To the same effect see *Norfolk So. R. Co. v. Hudgins*, 150 Va. 219, 142 S. E. 409; *Meade v. Saunders*, 151 Va. 636, 144 S. E. 711."

ASSIGNMENT OF ERROR NUMBER II.

The Court erred in refusing to set aside the verdict of the jury and award William Smith a new trial on the ground that the jury has never passed upon the cross-claim of William Smith, and the verdict is not responsive to the issues.

The record shows that the jury found only one verdict, that verdict being for Mary H. Hall against the defendant W. G. Saunders (R., p. 418). There was no finding whatsoever by the jury on the cross-claim of William Smith.

21* *The record further shows that on the 17th day of July, 1939 (R., p. 418), the Court entered only one judgment in the case and that being for Mary H. Hall, Administratrix, against W. G. Saunders. The Court took no cognizance of the William Smith cross-claim. On the 14th day of August, 1939, the Court entered an order *nunc pro tunc* giving judgment against the defendants, William Smith and W. G. Saunders, on their respective cross-claims.

It is earnestly submitted that the Court has no power to enter judgment on the cross-claim of William Smith until and after it has been properly adjudicated by the jury, and that the jury, not having returned a verdict on the cross-claim, and the jury's verdict not being responsive to the issues in the case, the defendant William Smith should be granted a new trial on his cross-claim.

ASSIGNMENT OF ERROR NUMBER III.

a. The Court erred in granting plaintiff's Instructions A, B, C, D, I, K, and L, over objection and exception of the defendants, in so far as these instructions refer to the inadequacy of the brakes on the truck and trailer of W. G. Saunders or their adjustment or mechanical condition.

There was no dispute in regard to the brakes on the tractor of the lumber truck, which was a regular Ford tractor with regular Ford equipment. The only contention made by the plaintiff was regarding the brakes on the trailer, and the undisputed evidence regarding the trailer brakes was as follows:

22* *The trailer was an International Trailer that was bought from Sol Abraham. There is no evidence in the record as to its actual or rated carrying capacity, and was equipped with regular Bendix air brakes (R., pp. 63, 200). The Bendix brake is the most popular brake sold and if properly adjusted is as good a brake as one could get (R., p. 133). These brakes on the truck and trailer were kept up by two mechanics who resided at Chuckatuck, Mr. Spady and Mr. Byrd, and the brakes were adjusted by them (R., pp. 68, 69, 75), and the truck had been properly inspected by State Officers, and an inspection tag was upon same (R., pp. 75, 200).

The brakes on the trailer were connected to the brake pedal of the tractor and were engaged simultaneously with the brakes of the tractor by pushing down on the foot pedal in the cab (R., p. 65). There was a button on the dash of the tractor which could cut on or off the brakes of the trailer (R., p. 65) and when applied the brakes of the rear wheels of the tractor and trailer both took at the same time, equally, and with the same tension (R., pp. 68, 70). They were adjusted the same for a light load as for a heavy load (R., p. 71) and were adjusted in this manner by the mechanics (R., pp. 68, 69, 75). At the time of the accident the brakes on the trailer were in operation (R., p. 67).

The plaintiff introduced as a witness H. E. Nichols, a mechanic who never saw or drove the Saunders' truck, and does not know how the brakes were adjusted or anything about it (R., p. 137) and could not tell from the pictures what kind of braking equipment the truck and trailer had on them. He testified that out of one hundred per cent or the entire braking power of the tractor and trailer, fifty to fifty-five per cent of the braking power should be on the trailer when loaded (R., p. 125) (purely a test only to be made on a mechanical braking machine), and that as you come for-

23* ward from the trailer the *braking power should be reduced; that when the trailer was lightly loaded the tension on the trailer brakes should be reduced according to the load (R., p. 125) (he did not give the proportion of braking power to weight involved), and if the trailer was empty he knew of a practice among operators of cutting the brakes

entirely off on the trailer (R., p. 130); that if the trailer brakes were adjusted the same with a heavy load as a light load and the brakes were applied on a wet surface, the trailer would have a tendency to jack-knife (R., p. 129); that some trailers had an instrument connected to the dash of the tractor whereby the vacuum of the brakes could be reduced according to the load, but few people would pay the price (R., p. 130); that the Bendix brakes were the most popular brakes put on tractors and his firm sold them; that if the brakes had been adjusted by mechanics and inspected by a licensed inspector the trailer had proper brakes except for the chance of human error (R., p. 134); that from the operator's standpoint you tested brakes by the way they felt by applying the pedal (R., p. 136), and that if they seemed to be working all right he, as a mechanic, would do nothing to them (R., p. 137).

From the testimony of Nichols, the only thing that Elmer Hall did not do was to follow a practice that Nichols had heard of, of cutting all brakes off the trailer when he returned with his empty truck, which means to take all brakes off the trailer the same as if it were never equipped with brakes, all of which is contrary to the law of Virginia.

Yet, in view of the total lack of all evidence of any negligence on the part of W. G. Saunders, the owner of the truck, and Elmer Hall, the driver of the truck, in respect to any duty they owed the plaintiff, and the lack of evidence as to the inadequacy of the brakes, whether or not they
24* were in *working order or in proper adjustment according to the Statute, the Court, at the request of the plaintiff, granted six (6) instructions on the question of brakes and the duty of the owner and driver, over the objection and exception of the defendants. These instructions are as follows: Instruction A, (R., p. 392); Instruction B (R., p. 393); Instruction C (R., p. 394); Instruction I (R., p. 400); Instruction K (R., p. 401), and Instruction L (R., p. 404).

The law with reference to the adequacy of brakes and their adjustment is covered by Statute in Virginia.

Section 2154 (109), Paragraph (c), Sub-section First, of the Code of Virginia, is as follows:

“Driving a vehicle * * * with inadequate or improperly adjusted brakes.”

Section 2154 (146), of the Code of Virginia, in dealing with the adequacy of the brakes and the maintenance of the brakes, provides as follows:

“(a) Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movements of and to stop such vehicle or vehicles, and such brakes shall be maintained in good working order and shall conform to regulations provided in this section.

* * * * *

“(d) Motor trucks and tractor-trucks with semi-trailers attached, shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty (20) miles per hour within the following distances: thirty feet with both hand and service brake applied simultaneously and fifty feet when either is applied separately, except that vehicles maintained and operated permanently for the transportation of property and which were registered in this or any other State or district prior to August, nineteen hundred and twenty-nine, shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty (20) miles per hour within a distance of fifty (50) feet with both hand and service brake applied simultaneously and within a distance of seventy-five (75) feet with either applied separately.

“(e) Every semi-trailer or trailer or separate vehicle attached by a draw bar, chain or coupling to a towing vehicle and having a rated and/or actual carrying capacity of two tons, or more shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in subsection (d) of this section and shall be of a type approved by the director.”

The Statutes above cited deal with three phases or points involving brakes. (1) The adequacy of the brakes. (2) Maintaining of the brakes in good working order. (3) The proper adjustment of the brakes.

(1) The adequacy of the brakes means, of course, the mechanical equipment such as the bands, drums, linings, pedals, rods, etc., and the size and braking power. The adequacy of the brakes in the case at bar means whether, or not, the brakes as manufactured by the Ford Motor Company and the Bendix Air Brake Company were adequate for the vehicle upon which they were installed.

(2) The maintenance in good working order means that the brakes and the parts thereof will, through proper care, reasonably respond to the driver's efforts in putting them on and releasing them.

26* * (3) Proper adjustment means that the brakes shall, in the exercise of ordinary and reasonable care, be so adjusted as to conform to the requirements of the Statute in reference to the rate of de-celeration required.

From a careful reading of the Statutes and the evidence one is convinced that the above instructions are contrary to the law and the evidence, and without evidence to support them, and should not have been given over the objection and exception of the defendants, as shown by the record.

These instructions were highly prejudicial and erroneous for the following reasons:

1. They deal with the adequacy of the brakes on the truck or tractor. The brakes on the tractor were not in question. There was no evidence regarding the inadequacy of the brakes on the Ford tractor as equipped by the Ford Motor Company.

2. These instructions told the jury that the brakes on the tractor should have been properly adjusted. There was no evidence that the brakes on the tractor were improperly adjusted, and the test is not whether the brakes were properly adjusted without saying more, but is whether the brakes were properly adjusted in accordance with the requirements of the Statute above set out.

3. The Court instructed the jury the brakes on the tractor or truck should be maintained in safe adjustment and operating condition. There is no evidence that the brakes on the tractor were unsafe or that anything was wrong with them, and it is manifest, therefore, that this is an erroneous interpretation of the law and Statutes. The Statute does not

require it and there is no way to make the operating
27* condition *and adjustment of brakes safe under all hazards and circumstances. The Statute clearly fixes the method of adjustment and operating condition by saying the brakes shall be maintained in good working order, not safe working order, and that they shall be capable of stopping the truck and trailer within a given distance at a given speed.

4. These instructions tell the jury that they can find for the plaintiff if they believe the accident was caused *solely* by defective adjustment of the brakes on the tractor, if any. The Court has taken the position that there was sufficient evidence in the case for a jury to find that the brakes on the tractor were defectively adjusted and that the defective adjustment was the sole cause of this accident, and in view of the evidence of the gross negligence of the driver of the green sedan, in view of the uncontradicted evidence that the driver

of the oil truck turned to the North side of the highway, and in view of the emergency in which Elmer Hall acted, and without there being the slightest evidence in the record on the question of the adjustment of the brakes on the tractor, and highly to the prejudice of the defendants, the Court further said, in effect, that the jury could find for the plaintiff on the ground that the brakes on the tractor were defectively adjusted and solely caused the accident, *if any, if any* meaning if there were no brakes at all on the tractor. The evidence shows there were brakes on the tractor and came as regularly equipped and were not defectively adjusted, but properly maintained and adjusted.

28* *5. The Court instructed the jury in reference to the adequacy of the brakes on the trailer. The brakes were Bendix Air Brakes and there was no evidence of their inadequacy.

6. The Court instructed the jury that the brakes on the trailer should be properly adjusted. There is no evidence that the brakes on the trailer were not adjusted in accordance with the Statute and no evidence of improper adjustment.

7. The Court instructed the jury that the brakes on the trailer should be maintained in safe adjustment and operating condition, which is erroneous for the same reasons assigned against the Court instructing the jury on the safe adjustment and operating condition of the brakes on the tractor.

8. The Court in instructing the jury took the position that there was sufficient evidence in the case to justify the jury in finding that the brakes were defectively adjusted on the trailer, and that this defective adjustment solely caused the accident, if there were any brakes on the trailer. This was clearly erroneous for the same reasons assigned against a like instruction with reference to the brakes on the tractor.

9. All of the instructions cover all of the brakes on the tractor and trailer and cover the emergency brakes on the tractor as well as the foot brakes on the tractor, and there was no evidence or any question about the emergency brakes.

10. The Court assumed sufficient evidence in the record to instruct the jury on the defective adjustment of the brakes on the truck or trailer, causing the lumber truck and trailer to turn suddenly across the highway in front of the oil truck.

This was an error not only for the reasons *above assigned and discussed, but there was no evidence that the truck or trailer turned suddenly across the highway in front of the oil truck. William Taylor says the lumber truck

was sliding and gradually creeping over to the South (R., p. 101).

11. The Court instructed the jury that it was the duty of the servant, Elmer Hall, to equip the owner's (W. G. Saunders') truck and trailer with adequate brakes, and this was a continuing duty. This is the first time we have ever heard the rule announced that the servant must equip his master's vehicle with adequate brakes.

12. There is no evidence in the record that this trailer had a rated or actual carrying capacity of two (2) tons or more and required under the Statute to be equipped with brakes.

13. Had there been proof that the trailer was one required to have brakes, then, in accordance with Section (d) of the above Act, the adequacy of the brakes, combined with the working order and the adjustment, should have been capable of stopping the vehicle on dry, hard, approximately level highway free from loose material at a speed of approximately twenty (20) miles an hour within fifty (50) feet. There is no evidence and no tests have been made showing that the brakes on this equipment were not capable of doing what the law required. There is no evidence that the brakes did not conform to this Statute in any respect, in fact, there has been no investigation of any kind made of the brakes and in the absence of such evidence where the brakes have been maintained by mechanics, properly inspected by State Officers, and pulled evenly and uniformly and took at the same time, the presumption is that the brakes were in good order.

30* 14. The Court erred in assuming that the trailer skidded across the road and jack-knifed, and that it was due to defective brakes. William Taylor did not say that the trailer jack-knifed; Elmer Hall denied that the trailer jack-knifed, and the pictures introduced in evidence show clearly that the blow of the oil truck bent the trailer and tractor at right angles.

15. If the truck skidded on a wet and slippery highway in an emergency when brakes were applied, it is not evidence of inadequate or improperly adjusted brakes according to the Statute.

16. The Court told the jury it was the duty of Elmer Hall to put on brakes, assuming, perhaps, that there was evidence he did not put on brakes. All of the evidence shows that he did put on brakes.

17. The Court, on the basis of the testimony of Mr. Nichols, practically instructed the jury that this truck should have been equipped with a mechanical device to regulate the

vacuum in accordance with the load carried, such a device not being required by Virginia law.

18. The difference between the testimony of Elmer Hall and the testimony of Nichols can be summed up as follows: Nichols said on a light load or no load there is a practice of pushing a button, taking all the braking power off of the trailer wheels. Elmer Hall testified he did not do this; that the braking power of the trailer was on at the time of the accident.

31* *19. It is earnestly contended that if the trailer was one required to have brakes, it would have been contrary to the true intent and spirit of the Act regarding brakes, to have operated this truck upon the highway with the brakes entirely cut off, which would have meant that the trailer had no brakes upon it at all. It was his duty if brakes were required, to have brakes on the trailer so that they, along with the brakes upon the tractor, would be capable, when acting together, of stopping the vehicle according to Statute, and it would have been negligence on his part to have cut them off just as much so as if he had operated the trailer without any brakes whatsoever, or the same as if the trailer was never equipped with brakes at all.

(20) The Court has, in effect, told the jury that the brakes must be so safe and so maintained as not to permit the skidding of the trailer upon a concrete highway when it is wet, slippery and with water standing upon it and during a drizzling rain.

(21) It is earnestly submitted that the Statute in Virginia is one of reasonable care and interpretation and that where one has purchased good equipment and equipped with adequate brakes, and has kept the brakes maintained and adjusted by mechanics, and the vehicle and trailer has been inspected and passed the State inspection, and when the brakes so operate from the pedal as to give to the driver the effect of the brakes taking equally and uniformly, the driver and the owner are not guilty of negligence.

32* *ASSIGNMENT OF ERROR NUMBER III

b. The Court erred in granting plaintiff's Instructions A and K, over the objection and exception of the defendants, for the reason that these instructions required the driver of W. G. Saunders' vehicle to keep and maintain a constant lookout to the front and rear of said vehicle.

The evidence discloses that at the point of accident the highway is straight and the view of the drivers of both trucks

was unobstructed; that the driver of the Saunders' truck and William Smith, the guest, were not talking and their attention not diverted at the time; that the driver of the Saunders' truck saw the approaching oil truck and saw the green sedan as it came up beside his cab, the green sedan did not blow or give any signal of its intention to pass; that the driver of the Saunders' truck had a rear vision mirror on the truck.

Counsel for the plaintiff did not contend, and cannot contend, that there was any evidence of a failure to maintain a reasonable lookout. Counsel cannot contend, and did not contend that Elmer Hall failed to keep a reasonable lookout ahead of him. When they offered their instructions on this point, they argued and insisted, and had the Court adopt the view that Elmer Hall owed a duty to the plaintiff to maintain and keep a constant lookout under the circumstances for an overtaking vehicle approaching him from the rear (R., pp. 251-255). The instructions were granted over the objection and exception of counsel (R., pp. 253, 255).

33* *The instructions dealing with the question of lookout are Instruction A (R., p. 392) and Instruction K (R., p. 401). The instructions are exactly alike in verbiage in so far as they deal with the question of lookout. These instructions tell the jury that it was the duty of the driver of the Saunders' truck and trailer "to keep and maintain a proper lookout", and, further, "that the observance of each of the foregoing duties was a continuing duty on the part of the driver of the Saunders' lumber truck."

It is clear that the duty to maintain a reasonable lookout or to exercise ordinary and reasonable care in maintaining a lookout ahead is a Common Law duty and not a Statutory duty; that if there had been any evidence of a failure to maintain an ordinary and reasonable lookout ahead, this instruction would have been clearly wrong in instructing the jury that the driver of the lumber truck owed the plaintiff the duty to maintain and keep a proper lookout, and that this duty was a continuing duty, which left the jury to speculate and to fix their own standard of care at such degree as they desired, and was clearly erroneous. *Armstrong v. Rose*, 170 Va. 190, at page 205.

There was no evidence of a failure to maintain a reasonable lookout ahead, and being none, the Court granted these instructions on the theory that Elmer Hall did not see the green sedan come up behind him until it was opposite his cab when he had a rear vision mirror on the truck, and permitted in these instructions, which was the law on the case, counsel for the plaintiff to argue to the jury that Elmer Hall, while

driving and meeting an oncoming truck under the circumstances of the case, had to maintain and keep a continuous lookout behind him for overtaking vehicles.

34* *Rear vision mirrors are for the purpose of glancing to the rear before attempting to start, turn out, or move from the direct line of travel, and are not put on cars for the purpose of drivers sitting in the vehicles and constantly looking into them and to the rear when they are driving on a straight highway and meeting oncoming vehicles. We know of no rule of law that would cause more highway accidents than the above rule announced by the Court in this case. We earnestly submit that under the circumstances there was not the slightest duty on the part of Elmer Hall to be looking behind him. It was his duty to be looking ahead of him, and it was clearly erroneous and highly prejudicial to the defendants to grant these instructions.

In the case of *J. H. Dreher v. M. W. Divine, Trading as M. W. Divine & Co.*, 47 A. L. R. 696, 135 S. E. 29, the overtaking vehicle was forced into the ditch by reason of the overtaken vehicle not yielding the road. The Court in regard to lookout said:

"Plaintiff says it was the absolute duty of the driver of the truck, under this provision of the statute, to know that plaintiff's car was approaching from the rear, and that, if he did not hear the signal, it was his duty to hear it, or to keep a lookout for approaching vehicles from the rear, and to turn to the right so as to allow plaintiff's car free passage on the left, failing in which he should be held liable for all damage or injury proximately flowing therefrom. We are unable to assent to this interpretation of the statute. We cannot think the legislature intended to require the driver of a vehicle, Janus-like, to keep the same constant lookout backward as in the range of vision looking ahead. *Delfs v. Dunshee*, 143 Iowa, 381, 122 N. W. 236; *Watking v. Byrnes*, 117 Kan. 172, 230 Pac. 1048; *Strever v. Woodard*, 160 Iowa, 332, 46 L. R. A. (N. S.) 644, 141 N. W. 931."

35* *And again the Court said:

"The driver of the front car owes no duty to the rear or trailing car, except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise, he has a right to assume, either that there is no other automobile in close proximity to his rear, or that, being there, it is under such control

as not to interfere with his free use of the road in front of and to the side of him in any lawful manner."

ASSIGNMENT OF ERROR NUMBER III (c) (Page 5).

c. W. G. Saunders filed a cross-claim alleging property damage to his truck and trailer. No personal injuries were claimed. The claim of W. G. Saunders was purely one for property damage. William Taylor, prior to the trial of the case, made a written, signed statement that the log truck was going 30 to 35 miles per hour and the oil truck was going faster, probably 35 to 40 miles per hour (R., p. 112). He testified on the trial of the case that the oil truck was going 25 to 30 miles per hour (R., p. 110) and that he did not know and could not tell the speed of the log truck (R., p. 116). The Court would not permit the prior, written and signed statement, inconsistent with the testimony of William Taylor, to be introduced in evidence, and the defendant, W. G. Saunders, excepted (R., p. 119).

Pursuant to Section 6216, of the Code of Virginia, a prior written and inconsistent statement is always admissible for the purpose of impeaching a witness, except in a death by wrongful act case, or personal injury suit, and this statement should have been admitted in evidence for the purpose of impeaching the witness Taylor, in so far as the defendant

W. G. Saunders was concerned, as his claim was not 36* one of the excepted types *of claim, but was purely for property damage; and it was error for the Court to exclude it.

. ASSIGNMENT OF ERROR NUMBER III (d).

d. The Court erred in refusing to instruct the jury to disregard improper argument of counsel for the plaintiff to the jury in reference to the amount of Workmen's Compensation insurance awarded Mary H. Hall.

Over the objection and exception of the defendants, counsel for the plaintiff was permitted to tell the jury to find a verdict of \$10,000.00 for the plaintiff so there would be a surplus for the widow; that it would be absurd for the law to provide a surplus if she did not get the surplus if the jury gave her \$10,000.00, which means to tell the jury that if she is given \$10,000.00 she will get the surplus after the insurance company has been paid, and the only way to be certain of this is to give her the most the law allows.

Section 1887 (12), of the Code of Virginia, provides as follows:

"The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages."

It is clear that the argument was improper and that counsel for the plaintiff was doing indirectly what the Statute positively prohibited, and that it was error on the part of the Court to allow it to stand as proper and without telling the jury to disregard it.

37* *ASSIGNMENT OF ERROR NUMBER III (e).

e. The Court erred in excluding relevant and material opinion evidence offered by the defendants through the witness Elmer Hall.

Elmer Hall testified that he was twenty-eight years old and had been driving about all of his life, meaning adult life, and, in addition, at the time he acted he did so in an emergency (R., pp. 82, 83).

"Q. If that oil truck had stayed on your side of the road after it came over, would it have had an opportunity to have passed to the wrong side of you?

"The Court: One minute—

"Mr. Bowles: Purely for the jury. It is a question of distance.

"The Court: Objection sustained. You could ask for distances and things of that character, but you are asking for his opinion now.

"Q. Well, now, could you have cleared it on the left-hand side of the road or the right-hand side of the road?

"Mr. Gilman: Same objection.

"The Court: Objection sustained.

"Mr. Gilman: Your Honor, he is not entitled to express an opinion.

"Mr. Bowles: Of course not.

"Mr. Gilman: On the question of whether this truck would have cleared.

"The Court: I do not think he can. Of course he can give estimates of distances and speed and so forth. You are asking him squarely, in my judgment, for his opinion.

"Mr. Godwin: Well, Your Honor, I want to except to the Court's ruling, of course.

"Mr. Williams: Your Honor, let me say this: If a man acts in an emergency he has got to act on opinion. It seems to me it is proper for the witness to tell the jury what his opinion was on which he acted, in taking the course which he took."

38* *It is contended that Elmer Hall had been driving a sufficient length of time to give an opinion under the circumstances, and that his opinion, based upon his experience and knowledge, was admissible, and, in addition, when he acted in emergency he had to act on opinion as he saw the situation confronting him, and that the opinion evidence was admissible under the theory and actual fact of the emergency.

ASSIGNMENT OF ERROR NUMBER III (f).

f. The Court erred in refusing to grant Instruction D-5 offered by the defendants.

The defendants offered Instruction 5, which instruction the Court refused to grant (R., p. 416). This instruction is as follows:

"The driver of a vehicle will not be held to be negligent when he turns to the left side of the road instead of remaining on the right side in an effort to avoid collision with a motor vehicle approaching from the opposite direction on the wrong side of the highway, if a reasonable man under like circumstances would have honestly believed that a collision was imminent if he kept to the right; and if you believe from the evidence that the defendant Elmer Hall was driving on the right side of the highway and that the oil truck in order to avoid a collision with another vehicle approached from the opposite direction on the wrong side of the highway, and that the defendant Elmer Hall honestly believed that a collision was imminent if he kept to the right, and that an ordinarily prudent person might have turned to the left under the same circumstances and conditions, the defendant Elmer Hall was not guilty of negligence."

It is earnestly contended that this instruction correctly

states the law and is applicable to the facts in this case, and that it was error for the Court to refuse to grant it, as the principles contained in said instruction were not granted in other instructions in the case.

39* *ASSIGNMENT OF ERROR NUMBER III (g).

g. The Court erred in granting plaintiff's Instruction A and plaintiff's Instruction K over the objections and exceptions of the defendants, in so far as these instructions refer to reasonable care, speed and proper control.

The Court, over the objections and exceptions of the defendants, granted Instructions A and K, offered by the plaintiff. Both of these instructions instructed the jury that it was the duty of the driver of the defendant's lumber truck to exercise reasonable care; that it was his duty to operate the truck and trailer at a careful speed not greater than reasonable and proper under the circumstances, and that it was his duty to have the truck and trailer under reasonably proper control.

Without repeating the evidence, it is sufficient to say that there was no evidence in the case upon which the Court could base these instructions to the jury, and it was error to grant them.

40* *CONCLUSION.

For the reasons heretofore stated and the errors hereinabove assigned and discussed, your petitioners pray that a writ of error without *supersedeas* be allowed and granted in this action; that the judgment and ruling of the Trial Court may be reviewed and reversed, and that the defendant William Smith be granted a new trial; that the verdict of the jury be set aside and judgment entered for the defendant W. G. Saunders; and, if denied, that the verdict of the jury be set aside and the defendant W. G. Saunders granted a new trial.

Respectfully submitted this 15th day of November, 1939.

W. G. SAUNDERS,
WILLIAM SMITH,
By CHAS. B. GODWIN, JR.,
LEIGH D. WILLIAMS,
Their Attorneys.

Supreme Court of Appeals of Virginia

We, Chas. B. Godwin, Jr., Leigh D. Williams, and Mills E. Godwin, Jr., attorneys at law, practicing in the Supreme Court of Appeals of Virginia, hereby certify that, in our opinion, it is proper that the decision in the above-entitled action be reviewed and reversed by this Honorable Court.

CHAS. B. GODWIN, JR.,
LEIGH D. WILLIAMS,
MILLS E. GODWIN, JR.

This Petition for Writ of Error without *supersedeas* and the record in this action will be filed in the Clerk's Office of the Supreme Court of Appeals, at Richmond, Virginia, and copies thereof in the Circuit Court of Norfolk County.

Received November 16th, 1939.

M. B. WATTS, Clerk.

Received Dec. 12/39.

C. V. S.

January 4, 1940. Writ of error awarded by the court. Bond \$300.

M. B. W.

41* *AUBREY R. BOWLES, JR.
Attorney and Counselor at Law
Richmond, Virginia

901 Mutual Building
Dial 3-0141

Associates
A. SCOTT ANDERSON
H. ARMISTEAD BOYD

December 22, 1939

RE: Hall v. Saunders

Mr. M. B. Watts, Clerk,
United States District Court,
Richmond, Virginia.

Dear Mr. Watts:

Confirming my telephone conversation with you this morning regarding a further apparent error in the record with respect to the copying of the order of the Circuit Court of Norfolk County entered June 26, 1939, at page 418 of the record, I am handing you herewith a certified copy of that order secured from the clerk for me by Mr. Tom Gilman, my associate in this case. You will note that the difference between this order and the copy in the record filed in your office is with respect to the motions made after the verdict, the correct order showing that the motions were made on behalf of both defendants.

Yours very truly,

A. R. BOWLES, JR.

ARB:M.

42* *VIRGINIA:

In the Circuit Court of Norfolk County on the 26th day of June, 1939.

Marh H. Hall, Administratrix of the Estate of Erwin Nolan Hall, Plaintiff, Deceased,

v.

W. G. Saunders, and William Smith, et als., Defendants,

MOTION (#4260M).

This day came again the parties by their Attorneys, and the Jury came in pursuance to their adjournment on Saturday, and after having fully heard the evidence and argument of Counsel, retired to their room to consult of a verdict, and after sometime returned into Court having found the following verdict, "We the Jury find for the plaintiff Mary H. Hall against the defendant W. G. Saunders for the sum of \$10,000".

Thereupon the defendants moved the Court to set aside the verdict of the jury and enter judgment for the defendants on the ground that the same was contrary to the law and the evidence, and further to set aside the verdict and grant them a new trial on the ground that the Court erred in granting and refusing to grant certain instructions, and further on the ground that the Court erred in admitting and re-

fusing to admit certain evidence, the hearing of which motion is continued until the 17th day of July, 1939 term of Court.

Co

V. C. RANDALL, Clerk,
By L. C. ANSELL, Deputy Clerk.

RECORD

VIRGINIA:

In the Circuit Court of Norfolk County.

Mary H. Hall, Administratrix, etc., Plaintiff,

v.

W. G. Saunders and William Smith, Defendants.

The stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all the instructions offered, amended, granted and refused, and the objections and exceptions thereto, and all other incidents of the trial of the case of Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, deceased, plaintiff, v. W. G. Saunders and William Smith, defendants, tried in the Circuit Court of Norfolk County, Virginia, on June 23, 24, and 26, 1939, before a jury and the Honorable R. B. Spindle, Jr., who presided for and at the request of the Honorable C. W. Coleman, Judge of said Court.

Present: A. Russell Bowles and T. E. Gilman, for the Plaintiff.

Leigh D. Williams and Chas. B. Godwin, Jr., for the Defendants.

page 2 } Virginia:

Pleas before the Circuit Court of Norfolk County, at the Courthouse of said County, on the 8th day of September, 1938.

Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, Deceased, Plaintiff,

v.

W. G. Saunders and William Smith, Defendants,

Be it Remembered, that heretofore, to-wit: on the 2nd day of May, 1938, came the plaintiff Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, Deceased, and filed her Notice of Motion against, W. G. Saunders and William Smith, in the words and figures following, to-wit:

To: W. G. Saunders and William Smith.

TAKE NOTICE, that on the 2nd day of May, 1938, at 10:00 o'clock, A. M., or as soon thereafter as she can be heard, the plaintiff, Mary H. Hall, administratrix of the estate of Erwin Nolan Hall, deceased, will move the Circuit Court of Norfolk County, at its courtroom in the City of Portsmouth in said County, for a judgment against you and each of you in the sum of Ten Thousand Dollars (\$10,000.00) for damages for the death of her decedent aforesaid, caused by the negligence of you and each of you, as follows, to-wit:

That on or about July 27, 1937, you, the said W. G. Saunders were the owner of a certain Ford Truck and improvised trailer which was then being operated by William Smith, your agent, servant and employee, on and about your business in said Norfolk County in the State of Virginia, between 1:30 and 2:00 o'clock, P. M. of said day, in a westerly direction on and along a certain highway in said County and State known as Route 460, and thereupon it became and was the duty of you, and each of you, to exercise ordinary care in the operation of said truck and improvised trailer so as to avoid injury to persons and vehicles on and along said highway; to operate said vehicles in a careful and prudent manner with due regard to the life, limb and property of others on and along said highway; to operate the same at a safe and prudent rate of speed having due regard to the traffic, surface and width of said highway and to all other conditions and circumstances then existing; to have your said vehicles under reasonably complete control; to keep and maintain a proper lookout; to have your said vehicles and each of them equipped with adequate brakes properly adjusted; to apply such brakes carefully and efficiently whenever necessary in the exercise of ordinary care; to keep and maintain said vehicles and each of them at all times in a mechanical condition such as to render safe the operation of the same upon the highways of said County and State and to inspect the same and see that the same are mechanically safe for operation thereon before operating or permitting the same to be operated upon the highways of said County and State; to drive said vehicles at all times upon the right half

of the highway and to the right of the center line thereof and particularly when passing vehicles approaching from the opposite direction; to yield to vehicles proceeding in the opposite direction at least one-half of the paved portion of said highway; and to observe each and every statute of the State of Virginia for such case made and provided and governing the ownership, and or operation of motor vehicles and trailers on the highways of said County and State; and it was the further and particular duty of you the said W. G. Saunders, the owner of said truck and improvised trailer, to keep and maintain the same in a mechanical condition such as to render safe the operation of the same on the highways of said County and State and to have said vehicles and each of them equipped with all appliances and devices required by law for the operation thereon of the same and to maintain the same in good and safe working order and condition; and to operate or permit to be operated on the highways of said County and State no vehicle or vehicles owned, maintained or used by you in a condition dangerous to or unsafe for the traveling public; and to entrust the operation of any said vehicle or vehicles owned by you to none other than an experienced, competent, careful and prudent driver.

Yet, notwithstanding your several duties aforesaid, you and each of you negligently failed to observe each and all of your said duties and in negligent disregard and violation of each and all of them, you, the said W. G. Saunders, owner of said Ford truck and improvised trailer, at the time and place aforesaid negligently operated and permitted to be operated on said highway in said county and state said vehicles in an unsafe and dangerous condition, without the equipment, appliances and devices required by law, by an inexperienced, incompetent, careless and reckless driver, your agent, servant and employee; and you, the said W. G. Saunders, owner of said vehicles, and you, the said William Smith, operating the same as the agent, servant and employee of said owner on and about his business and within the course and scope of your said employment by said owner, in negligent disregard and violation of your several duties as aforesaid and of each of them, so negligently, carelessly and recklessly operated the same westwardly along said highway at the time and place aforesaid and in such careless and reckless manner that the said Ford truck and improvised trailer came upon the wrong or left side of said highway and negligently and violently collided with a certain motor vehicle then and there being lawfully operated by the

plaintiff's decedent in an easterly direction on and along said highway, as the direct and proximate result of which the plaintiff's decedent was killed; all as the direct and proximate result of the negligence of you and each of you as hereinabove set forth.

And whereas the plaintiff's decedent was, at the time of his said death employed by E. Brooks Matlack and Mary H. Hall, his widow, made claim against his said employer pursuant to the provisions of the Workmen's Compensation Law of the State of Virginia for compensation and burial expenses as therein provided by reason of the death of her said husband, on which claim and award in favor of said widow was entered by the Industrial Commission of Virginia, dated August 27, 1937, against Indemnity Insurance Company of North America, the compensation carrier of said employer, which became responsible for and assumed the payment of compensation and burial expenses by reason of said death in accordance with the provisions thereof, this notice of motion is brought, pursuant to Section 12 of said Workmen's Com-

page 6 } ensation Act as amended, by said Indemnity Insurance Company of North America, in the name of Mary H. Hall, Administratrix of the said Erwin Nolan Hall, deceased, as plaintiff, who qualified as such before the Clerk of the Circuit Court of Norfolk County on February 8, 1938 and gave bond as required by law, for its own benefit to the extent of the compensation, burial and other expenses paid and incurred, or for the payment of which it has assumed responsibility pursuant to said award, and to secure reimbursement therefor, and also for the benefit of the said Mary H. Hall, widow of the deceased, Erwin Nolan Hall, to secure for said widow, pursuant to the statutes for such case made and provided, fair and adequate compensation for the death of her said husband, as their respective interests in the recovery herein shall appear and may be determined under the several statutes for such case made and provided

WHEREFORE the plaintiff will move the said court for a judgment against you and each of you as aforesaid in the sum of Ten Thousand Dollars (\$10,000.00).

MARY H. HALL,
Administratrix of the Estate of Erwin
Nolan Hall, Deceased,
By Counsel.

AUBREY R. BOWLES, JR.,
Counsel.

page 7. } And the returns of the Sheriff of Nansemond County, Virginia, on the foregoing Notice of Motion are as follows:

Executed on the 8 day of April, 1938, within the County of Nansemond, State of Virginia, by delivering a true copy of the within summons Notice of Motion in *written* to W. G. Saunders in person.

J. F. CULPEPPER,
Sheriff of Nansemond County.

Executed on the 8 day of April, 1938, within the County of Nansemond, State of Virginia, by delivering a true copy of the within summons Notice of Motion in writing to William Smith, in person.

J. F. CULPEPPER,
Sheriff of Nansemond County.

And, at another day, to-wit: on the 2nd day of May, 1938, the following order was entered:

This day came the plaintiff by her Attorney and on his motion it is ordered that this case be docketed, and the defendants appeared by Charlie Godwin their Attorney and pleaded "not guilty", to which the plaintiff replied generally and on which plea issue is joined. And on motion of the plaintiff each of the defendants are required to file their grounds of defense within ten days from this date. Thereupon on motion of the defendants the plaintiff is required to file her Bill of Particulars within ten days from this date. And leave is given the defendants to file special pleas and cross-claim.

And, at another day, to-wit: on the 12th day of May, 1938. The following Bill of Particulars *were* filed by the plaintiff.

In response to order for bill of particulars in the above styled matter, the plaintiff, files the particulars of page 8 } her claim, as follows:

SPECIFICATIONS OF NEGLIGENCE RELATING
SOLELY TO THE DEFENDANT, W. G.
SAUNDERS.

1—The defendant, W. G. Saunders, owned and negligently operated, by and through his duly authorized agent acting on his behalf, on the highways of the State of Virginia, a cer-

tain Ford truck and improvised trailer, in a mechanically unsafe condition in the following respects:

- (a) Without brakes as required by statute;
- (b) With faulty, insufficient and inadequate brakes;
- (c) With improperly adjusted brakes;
- (d) With an improvised trailer improperly, insufficiently, negligently and inadequately attached to said Ford truck, and in violation of the statutes for such case made and provided;
- (e) Without having the same equipped with the appliances and devices required by law for the operation of the same on the highways of this State;
- (f) Without keeping and maintaining the same in good and safe working order and condition such as to render safe the operation of the same on the highways of said County and State.

2—The said W. G. Saunders negligently permitted said vehicle, owned by him, to be operated on the highways of the State of Virginia under all the conditions and circumstances hereinabove set forth in paragraph numbered 1.

3—The said W. G. Saunders negligently entrusted the same to an inexperienced, incompetent, careless and reckless driver.

page 9 } SPECIFICATIONS OF NEGLIGENCE RELATING TO BOTH THE DEFENDANTS, W. G. SAUNDERS AND WILLIAM SMITH.

1—That the said W. G. Saunders, owner of a certain Ford Truck and improvised trailer, negligently operated the same by and through his agent, servant and employee, William Smith, in a westerly direction on and along a highway known as Route #460, in Norfolk County, Virginia, on and about July 27, 1937, between 1:30 and 2:00 P. M. of said day, the specific acts of negligence to be relied on being as follows:

- (a) That you, and each of you, failed to exercise ordinary care in the operation of said truck and improvised trailer so as to avoid injury to persons and vehicles on and along said highway;
- (b) That you, and each of you, failed to operate said vehicles in a careful and prudent manner with due regard to the life, limb and property of others on and along said highway;
- (c) That you, and each of you, failed to operate said vehicles at a safe and prudent rate of speed having due regard to the traffic, surface and width of said highway and to all other conditions and circumstances then existing;

(d) That you, and each of you, failed to have said vehicles under reasonably complete control;

(e) That you, and each of you, failed to keep and maintain a proper lookout;

(f) That you, and each of you, failed to have your said vehicles and each of them equipped with adequate brakes properly adjusted, and failed to apply such brakes carefully and efficiently whenever necessary in the exercise of ordinary care;

page 10 } (g) That you, and each of you, failed to keep and maintain said vehicles and each of them in a mechanical condition such as to render safe the operation of the same upon the highways of said County and State and failed to inspect the same and see that they were mechanically safe for such operation thereon;

(h) That you, and each of you, failed to drive said vehicles at all times upon the right half of the highway and to the right of the center line thereof and particularly when passing vehicles approaching from the opposite direction;

(i) That you, and each of you, failed to yield to vehicles proceeding in the opposite direction at least one-half of the paved portion of said highway;

(j) That you, and each of you, failed to observe each and every statute of the State of Virginia for such case made and provided and governing the ownership, operation, *maintenance* and use of motor vehicles and trailers on the highways of said County and State.

That, in violation of every and all of the aforesaid duties, you and each of you, negligently, carelessly and recklessly drove said vehicles on the wrong side of the road across the path of and directly in front of the vehicle lawfully operated by the plaintiff's decedent at and about the time and place aforesaid, in an easterly direction on and along said highway, as a direct and proximate result of which said negligence the plaintiff's decedent was killed.

The plaintiff reserves the right to amend its said bill of particulars in any respect in which she may be advised, and to add thereto such matter as she may be advised at any time prior to the trial of this cause.

page 11 }

MARY H. HALL,
Administratrix of the Estate of Erwin
Nolan Hall, Deceased,
By Counsel.

AUBREY R. BOWLES, JR.,
Counsel.

And, at another day to-wit: on the 12th day of May, 1938.
The following pleas and affidavits and etc. were filed.

PLEA OF GENERAL ISSUE.

The defendant, William Smith, by his attorney comes and says that he is not guilty of the premises in this action laid to his charge in manner and form as the plaintiff hath complained; and of this the said defendant puts himself upon the Country.

CHAS. B. GODWIN, JR., p. d.

AFFIDAVIT OF WILLIAM SMITH.

State of Virginia,
City of Suffolk, to-wit:

✓ This day William Smith personally appeared before me, William M. Birdsong Commissioner in chancery of and for the Circuit Court of City of Suffolk, in my City aforesaid, and made oath that at the time of the accident alleged in the plaintiff's notice of motion, the affiant William Smith was not operating, controlling or driving the Ford truck alleged to be owned by W. G. Saunders, Jr., that he was not in the employment of W. G. Saunders, Jr., and was not the servant, agent or employee of the said W. G. Saunders, Jr., and that he had no voice in the control, operation or management of said truck, that the said truck at the time of the accident was being driven by Elmer Hall.

page 12 }

WILLIAM SMITH,
Affiant.

Taken, subscribed and sworn to before me this 10th day of May, 1938, in testimony whereof I have hereunto set my hand the day, month and year first above written.

WILLIAM M. BIRDSONG,
Commissioner in Chancery for Circuit Court City of Suffolk.

FILED BUT NOT ENTERED.

ORDER ABATING ACTION AS TO DEFENDANT
WILLIAM SMITH.

This day came the plaintiff and filed her written motion to abate this action as to the defendant, William Smith, and to amend her notice of motion as therein set forth, and it appearing to the Court from the separate affidavits of the defendants, W. G. Saunders and William Smith heretofore filed, by them, herein that the said William Smith was improperly joined as a party defendant in this action, it is Ordered, that this action abate as to the defendant, William Smith, and the plaintiff is given leave to amend her notice of motion for judgment and bill of particulars heretofore filed herein by inserting the words "Elmer Hall" in lieu of the words "William Smith" wherever the same shall occur therein, designating by name the agent, servant and employee of the defendant, W. G. Saunders, alleged to have operated the truck of said defendant at the time set forth in the plaintiff's notice of motion for judgment.

page 13 } CROSS-CLAIM OF WILLIAM SMITH.

And now comes William Smith, one of the above-named defendants, and denying each and every allegation contained in the notice of motion for judgment served on and docketed against this defendant and W. G. Saunders, Jr., in the above-entitled action, files his Cross-Claim against the plaintiff, Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, deceased, and avers as follows, to-wit:

That on the 27th day of July, 1937, William Smith was riding in a certain Ford truck owned by W. G. Saunders, Jr., and driven by Elmer Hall, and proceeding in a Westerly direction along the State Highway leading from Alexander's Corner to the King's Highway bridge, in the County of Norfolk, Virginia, that a certain Federal truck, owned by E. B. Matlack and driven and *operating* by Erwin Nolan Hall, was then and there proceeding along said highway in an Easterly direction; and the said Erwin Nolan Hall so recklessly, and carelessly operated and drove said Federal truck, without maintaining a proper lookout, without keeping said truck under reasonably complete control; without adequate brakes upon same and without keeping and maintaining the brakes upon same in an efficient working condition, and so negli-

gently drove said Federal truck at an excessive and unreasonable speed under the circumstances and conditions then existing, and across and on the left of the center line of the said highway, and without using reasonable and ordinary care, to avoid injury to the undersigned, that the said Federal truck driven by Erwin Nolan Hall ran into, upon and against the Ford truck owned by W. G. Saunders, Jr., with great force; by reason of which negligence, carelessness and recklessness on the part of the said Erwin Nolan Hall, page 14 } and as a proximate cause and result thereof, without any fault or negligence on the part of the undersigned William Smith, the said William Smith was sorely, painfully and permanently cut, bruised, disfigured and injured about his head, body and limbs, his skull, cheek bone and upper jaw bone were fractured, and he suffered concussion of the brain; his right eye was permanently injured, and he has loss his sight and vision in same; he has suffered great pain and mental anguish, and still suffers great pain; he has lost time from his work, has been incapacitated to earn a living, and has had to expend divers sums of money for medicines, doctors' and hospital bills in the attempted healing of his injuries; by reason of which said injuries the defendant William Smith has sustained damages in the amount of Ten Thousand (\$10,000.00) Dollars, for which he will ask judgment herein.

And, therefore, the said defendant William Smith files this, his Cross-Claim, setting out the above injuries and damages, all of which he alleges arose from the transactions set up and alleged in the original notice of motion for judgment filed herein, and he further asks that his Cross-Claim shall be tried at the same time and as a part of the original case.

WILLIAM SMITH,
By CHAS. B. GODWIN, JR.,
Counsel.

CHS B. GODWIN, JR.,
Attorney for William Smith, one of the
above-named defendants.

page 15 } FILED BUT NOT ENTERED.

ORDER DISMISSING CROSS-CLAIM OF WILLIAM
SMITH.

This day came the parties by counsel and, on the written motion of the plaintiff, filed herewith, to dismiss the cross-

claim heretofore filed herein by William Smith, it is Ordered that the cross-claim of William Smith be, and the same hereby is, dismissed to which action of the court the said William Smith, by counsel, excepted.

GROUND OF DEFENSE (WILLIAM SMITH).

The defendant, William Smith, sets out the following as his grounds of defense to the above-entitled action:

(1) The defendant denies each and every allegation of the plaintiff's notice of motion and bill of particulars.

(2) This defendant alleges that the accident was not caused by the negligence of W. G. Saunders, Jr., his agent, servant or employee.

(3) That the accident was the result of the concurring negligence of Erwin Nolan Hall, the agent servant and employee of E. B. Matlack, and the negligence of an unknown person driving a passenger automobile.

(4) The defendant expects to rely on all matters alleged in his cross-claim.

(5) The defendant expects to rely on all matters provable under the general issue.

(6) The defendant, at the time of the accident was not the operator of the motor truck owned by W. G. Saunders, Jr., that the defendant was not the servant, agent or employee of W. G. Saunders, Jr., and the defendant had no voice or control in the management or operation of the motor truck owned by W. G. Saunders, Jr.

(7) That this defendant was not guilty of any negligence contributing to his injuries

PLEA OF GENERAL ISSUE.

The defendant, W. G. Saunders, Jr., by his attorney comes and says that he is not guilty of the premises in this action paid to his charge in manner and form as the plaintiff hath complained; and of this the said defendant puts himself upon the country.

CHAS. B. GODWIN, JR., p. d.

AFFIDAVIT OF W. G. SAUNDERS, JR.

State of Virginia,

City of Suffolk, to-wit:

This day W. G. Saunders, Jr., personally appeared before me, William M. Birdsong, Commissioner in chancery of and for the Circuit Court of City of Suffolk, in my City aforesaid, and made oath that at the time of the accident alleged in the plaintiff's notice of Motion William Smith was not operating, controlling or driving the truck owned by this affiant and defendant; that William Smith was not in the employ of this defendant, and was not the servant, agent or employee of this defendant; and that the said William Smith had no voice in the management, operation and control of said truck; that the said truck owned by this defendant was at the time of the accident being driven by Elmer Hall; and that this affiant did not know that the defendant William Smith was riding on the truck at the time of the accident
page 17 } until after the accident had occurred.

W. G. SAUNDERS, JR.,
Affiant.

Taken, sworn to and subscribed before me this 10th day of May, 1938, in testimony whereof I have hereunto set my hand the day, month and year first above written.

WILLIAM M. BIRDSONG,
Commissioner in chancery for Circuit Court City of Suffolk.

GROUNDS OF DEFENSE (W. G. SAUNDERS, JR.)

The defendant, W. G. Saunders, Jr., sets out the following as his grounds of defense to the above-mentioned action.

(1) The *defendants* denies each and every allegation of the plaintiff's notice of motion and bill of particulars.

(2) This defendant alleges that the accident was not caused by the negligence of W. G. Saunders, Jr., his agent, servant or employee.

(3) That the accident was the result of the concurring negligence of Erwin Nolan Hall, the agent, servant and employee of E. B. Matlock, and the negligence of an unknown person driving a passenger automobile.

(4) The defendant expects to rely on all matters alleged in his Cross-Claim.

(5) The defendant expects to rely on all matters provable under the general issue.

(6) That William Smith was not the operator of the motor

truck owned by W. G. Saunders, Jr., that William
 page 18 } Smith was not the servant, agent or employee of
 W. G. Saunders, Jr., and that William Smith had
 no voice or control in the management or operation of the
 motor truck owned by W. G. Saunders, Jr.

(7) That the accident was unavoidable so far as this defendant and his agent, servant and employee were concerned, and that the agent, servant and employee of this defendant did all ordinary and reasonable acts to avoid the accident.

(8) That Elmer Hall, the agent, servant and employee of this defendant, was suddenly confronted with a situation of danger and peril which was caused by Erwin Nolan Hall, deceased, and an unknown driver of an automobile, that Elmer Hall had to act in sudden emergency and used all reasonable and ordinary care under the circumstances.

(9) That the deceased, Erwin Nolan Hall, had the last clear chance to avoid the accident.

W. G. SAUNDERS, JR.,
 By CHAS. B. GODWIN, JR.,
 Counsel.

CROSS-CLAIM OF W. G. SAUNDERS, JR.

And now comes W. G. Saunders, Jr., one of the above-named defendants, and denying each and every allegation contained in the notice of motion for judgment served on and docketed against this defendant and William Smith in the above-entitled action, files his Cross-Claim against the plaintiff, Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, deceased, and avers as follows, to-wit:

page 19 } That on the 27th day of July, 1937, a certain
 Ford truck owned by W. G. Saunders, Jr., and
 driven by Elmer Hall, was proceeding in a Westerly direction
 along the State Highway leading from Alexander's Corner
 to the Kings' Highway bridge, in the County of Norfolk, Virginia, that a certain Federal truck, owned by E. B. Matlack and driven and operated by Erwin Nolan Hall, was then and there proceeding along said highway in an Easterly direction; and the said Erwin Nolan Hall so recklessly, negligently and carelessly operated and drove said Federal truck, without maintaining a proper lookout, without keeping said truck under reasonably complete control, without adequate brakes upon same and without keeping and maintaining the brakes upon same in an efficient working condition, and so negli-

gently drove said Federal truck at an excessive and unreasonable speed under the circumstances and conditions then existing, and across and on the left of the center line of the said highway, and without using reasonable and ordinary care to avoid damage to the truck and trailer of the undersigned, that the said Federal truck driven by Erwin Nolan Hall, ran into, upon and against the Ford truck and trailer owned by W. G. Saunders, Jr., with great force; by reason of which negligence, carelessness and recklessness on the part of the said Erwin Nolan Hall, and as a proximate cause and result thereof, without any fault or negligence on the part of the undersigned, W. G. Saunders, Jr., or his agent and employee, Elmer Hall, the said Ford truck and trailer, and the parts of said truck and trailer, were crushed, bent, broken, demolished and rendered useless and of no value

to the great damage of the undersigned; by reason of which the defendant, W. G. Saunders, Jr., has sustained damages in the amount of Seven Hundred Fifty (\$750) Dollars, for which he will ask judgment herein.

And, therefore, the said defendant, W. G. Saunders, Jr., files this, his Cross-Claim, setting out the above damages, all of which he alleges arose from the transactions set up and alleged in the original notice of motion for judgment filed herein; and he further asks that his Cross-Claim shall be tried at the same time and as a part of the original case.

W. G. SAUNDERS, JR.,
By CHAS. B. GODWIN, JR.,
Counsel.

CHAS. B. GODWIN, JR.,
Attorney for W. G. Saunders, Jr.,
one of the above-named defendants.

And, at another day to-wit: on the 13th day of July, 1938. The following pleas were filed.

MOTION TO ABATE ACTION AS TO THE DEFENDANT, WILLIAM SMITH.

The plaintiff, by her attorney, moves the court to abate the action now pending in the Circuit Court of Norfolk County, wherein Mary H. Hall, Administratrix of the Estate of Erwin Nolan Hall, deceased, is plaintiff and W. G. Saunders and William Smith are defendants, as to the de-

fendant, William Smith, and to retain the same as to the defendant, W. G. Saunders, and assigns as the grounds of her said motion the following:

page 21 } 1. That Indemnity Insurance Company of North America commenced this action in the name of the plaintiff, administratrix of the estate of Erwin Nolan Hall, against the defendants, W. G. Saunders and William Smith, to recover damages for the wrongful death of her decedent, Erwin Nolan Hall, pursuant to Section 12 of the Workmen's Compensation Act of Virginia, as amended, by notice of motion returnable to this Court on May 2, 1938.

2. That the death of her decedent, the said Erwin Nolan Hall, resulted from a collision between the truck owned by E. Brooke Matlack of Philadelphia, Penna., and operated by the said Erwin Nolan Hall, deceased, and the truck owned by the defendant, W. G. Saunders, and operated by his agent, who was, according to the best information available to the plaintiff at the time of the commencement of this suit, the defendant, William Smith.

3. That, thereafter, on the 10th day of May, 1938, in compliance with Section 6102 of the Code of Virginia, 1936, providing for the abatement of any action against any party improperly joined therein, the defendant, William Smith, made affidavit, and filed the same herein, that, at the time of the aforesaid collision he was neither driving nor operating the truck owned by the defendant, W. G. Saunders, that he was not employed by, not was he the servant, agent or employee of the said W. G. Saunders, and that he had no voice in the control, operation or management of the said truck and that the said truck *and that the said truck* at the time of the said collision was being driven by another, one Elmer Hall.

page 22 } 4. That the plaintiff, upon the information set forth in said affidavit, and upon other information subsequently obtained, verily believes and accepts as true the facts set forth therein, that the said William Smith was not operating said truck and owed the plaintiff's decedent no duty in connection therewith and upon which any action against the said William Smith for the wrongful death of her said decedent could be predicated.

(5) That the defendant, William Smith, was improperly joined as a party defendant herein and is not a proper party defendant to this action.

WHEREFORE, the plaintiff moves the court to abate this action against the said William Smith as a party defendant

hereto for the misjoinder herein of said William Smith and prays leave of court to amend the said notice of motion and bill of particulars herein by inserting therein the words "Elmer Hall" in lieu of the words "William Smith" wherever the same shall occur designating the name of the particular agent of the defendant, W. G. Saunders, the owner of said truck, claimed to have operated the same as the said agent, servant and employee of said owner, on and about said owner's business, and by striking therefrom so much thereof as renders said agent a party defendant in this action.

MARY H. HALL,
Administratrix of the Estate of Erwin
Nolan Hall, deceased.
By Counsel.

TOM E. GILMAN,
AUBREY R. BOWLES, JR.,

page 23 } MOTION TO DISMISS CROSS-CLAIM OF
WILLIAM SMITH.

The plaintiff, by her Attorney, moves the Court to dismiss the cross-claim of the defendant, William Smith, heretofore filed in this action and assigns as grounds for her motion the following:

1. That the defendant, William Smith, on the 10th day of May, 1938, made and filed herein an affidavit and plea in abatement of the plaintiff's action against him, setting forth that the plaintiff did not have a cause of action against him for the matter set forth in the notice of motion for judgment; that the plaintiff accepted as true the facts set out in said affidavit and moved the Court to abate this action as to the said William Smith as a party defendant on the ground of misjoinder as set up by said defendant.

2. That it appears from said affidavit, accepted by the plaintiff as true, that the defendant, William Smith, could not in any manner be or become liable to the plaintiff for the wrongful death of her decedent resulting from the collision alleged in the plaintiff's notice of motion for judgment for the reason that the said William Smith neither operated nor controlled in any manner whatever the truck belonging to the defendant, W. G. Saunders, which was in collision with the truck operated by the plaintiff's decedent, and was not in any manner responsible for its operation.

3. That the defendant, William Smith, was an improper party defendant, improperly joined as a party defendant herein and that the plaintiff's action as to said William Smith has been or should be abated.

page 24 } 4. That this action is brought by Indemnity Insurance Company of North America pursuant to Section 12 of the Workmen's Compensation Act of Virginia, as amended, in the name of the administratrix of the estate of Erwin Nolan Hall, for its benefit and for the benefit, as to any surplus, of the widow of the deceased; that no funds which may be derived from the prosecution of this action can accrue to the benefit of the estate of the deceased, Erwin Nolan Hall, because the compensation insurance carrier above named is entitled, in event of such recovery, to full reimbursement of all compensation paid or due to be paid to the widow of Erwin Nolan Hall, deceased, and of all burial and other expenses incurred in connection therewith, and the widow as such and not as administratrix of the estate of the deceased is entitled to the entire surplus thereafter in any such recovery.

5. That, though this action is brought by the compensation insurance carrier in the name of the administratrix, such administratrix is the nominal plaintiff only and is not a real party in interest representing in this action any part of the estate of the decedent.

6. That it appears from said affidavit, accepted as true, that this plaintiff, either nominally or actually, has not and never could have any right of action against the defendant, William Smith, for the death of her decedent, Erwin Nolan Hall.

7. That there is no mutuality of interest or of parties between the plaintiff and the defendant, William Smith.

8. That it is improper to permit William Smith to prosecute a cross-claim against the plaintiff in an action in which he is not a party defendant and in which the plaintiff has not and could not have a right of action against the said William Smith.

9. That the prosecution herein of the cross-claim filed by the said William Smith is detrimental to the proper interests of the said William Smith as well as of the plaintiff, and can only be beneficial to the defendant, W. G. Saunders, That such prosecution will result in hopeless confusion upon unrelated and separate issues, upon which this plaintiff and the said William Smith are entitled by law to separate trials; and that, in no event has the said William Smith the right to a trial thereon at the same time and before the same jury

empaneled to try the plaintiff's action against the defendant, W. G. Saunders.

10. That no bar of any statute of limitations exists against the prosecution by William Smith of any action which he may be advised to bring for his injuries sustained in said collision, nor will the bar of any such limitation fall until July 27, 1938.

11. That, in no event, has the said William Smith any cause of action against the real parties plaintiff herein for the matter set out in his said cross-claim.

WHEREFORE, the plaintiff moves the court to dismiss forthwith the cross-claim filed herein by the said William Smith.

MARY H. HALL,
Administratrix of the Estate of Erwin
Nolan Hall, deceased.
By Counsel.

TOM E. GILMAN,
AUBREY R. BOWLES, JR.,
Counsel.

page 26 }

FILED ORDER.

This day came the complainant, by her attorney, and asked leave of court to file her amended Notice of Motion for judgment in the above styled cause, which being granted, the same is accordingly filed this day.

And, at another day, to-wit: on the 7th day of October, 1938, the following order was entered.

This day came again the parties by their Attorneys and the Court having fully heard the motion of the plaintiff to dismiss the Cross-Claim of William Smith and to abate the action as to the said defendant, the hearing of which motion is continued.

page 27 } And at another day, to-wit: October 7, 1938, an amended Notice of Motion for Judgment was filed in the following words and figures; to-wit:

To W. G. Saunders:

Take notice that, on the 2nd day of May, 1938, at 10:00 o'clock, A. M., or as soon thereafter as she can be heard, the

plaintiff, Mary H. Hall, administratrix of the estate of Erwin Nolan Hall, deceased, will move the Circuit Court of Norfolk County, at its Courtroom in the City of Portsmouth in said County, for a judgment against you in the sum of Ten Thousand (\$10,000.00) Dollars for damage for the death of her decedent aforesaid, caused, by your negligence, as follows, to-wit:

That on or about July 27, 1937, you, the said W. G. Saunders were the owner of a certain Ford Truck and improvised trailer which was then being operated by Elmer Hall, your agent, servant and employee, on or about your business, in said Norfolk County in the State of Virginia, between 1:30 and 2:00 o'clock, P. M., of said day, in a westerly direction on and along a certain highway in said County and State known as Route 460, and thereupon it became and was your duty, acting by and through your said agent, servant and employee, to exercise ordinary care in the operation of said truck and improvised trailer so as to avoid injury to persons and vehicles on and along said highway; to operate said vehicles in a careful and prudent manner with due regard to the life, limb and property of others on and along said highway; to operate the same at a safe and prudent rate of speed having due regard to the traffic, surface and width
page 28 { of said highway, and to all other conditions and circumstances then existing; to have your said vehicle under reasonable complete control; to keep and maintain a proper lookout; to have your said vehicles and each of them equipped with adequate brakes properly adjusted; to apply such brakes carefully and efficiently whenever necessary in the exercise of ordinary care; to keep and maintain said vehicles and each of them at all times in a mechanical condition such as to render safe the operation of the same upon the highways of said County and State and to inspect the same and see that the same are mechanically safe for operation thereon before operating or permitting the same to be operated upon the highways of said County and State; to drive said vehicles at all times upon the right half of the highway and to the right of the center line thereof and particularly when passing vehicles approaching from the opposite direction; to yield to vehicles proceeding in the opposite direction at least one-half of the paved portion of said highway; and observe each and every statute of the State of Virginia for such cases made and provided and governing the ownership, and/or operation of motor vehicles and trailers on the highways of said County and State; and

it was the further and particular duty of you the said W. G. Saunders, the owner of said truck and improvised trailer, to keep and maintain the same in a mechanical condition such as to render safe the operation of the same on the highways of said County and State and to have said vehicles and each of them equipped with all appliances and devices required by law for the operation thereon of the same and to maintain the same in good and safe working order and condition; and to operate or to permit to be operated

page 29 } on the highways of said County and State no vehicle or vehicles, owned, maintained or used by you in a condition dangerous to or unsafe for the traveling public; and to intrust the operation of any said vehicle or vehicles owned by you to none other than an experienced, competent, careful and prudent driver.

Yet, notwithstanding your several duties aforesaid, you negligently failed to observe each and all of your said duties and in said negligent disregard and violation of each and all of them, you, the said W. G. Saunders, owner of said Ford truck and improvised trailer, at the time and place aforesaid negligently operated and permitted to be operated on said highway in said county and State said vehicles in an unsafe and dangerous condition, without the equipment and devices required by law, by an inexperienced, incompetent, careless and reckless driver, your agent, servant and employee; and you, the said W. G. Saunders, owner of said vehicles, operating the same by and through your said agent, servant and employee on and about your business, in negligent disregard and violation of your several duties as aforesaid and of each of them, so negligently, carelessly and recklessly operated the same westwardly along said highway at the time and place aforesaid and in such careless and reckless manner that the said Ford truck and improvised trailer came upon the wrong or left side of said highway and negligently and violently collided with a certain motor vehicle then and there being lawfully operated by the plaintiff's decedent in an easterly direction on and along said highway, as the direct

page 30 } and proximate result of which the plaintiff's decedent was killed; all as the direct and proximate result of your negligence as hereinabove set forth.

And, whereas the plaintiff's decedent was, at the time of his said death employed by E. Brooke Matlack, and Mary H. Hall, his widow, made claim against his said employer pursuant to the provisions of the Workmen's Compensation Law of the State of Virginia for compensation and burial expenses as therein provided by reason of the death of her said

husband, on which claim an award in favor of said widow was entered by the Industrial Commission of Virginia, dated August 27, 1937, against Indemnity Insurance Company of North America, the compensation carrier of said employer, which became responsible for and assumed the payment of compensation and burial expenses by reason of said death in accordance with the provisions thereof, this notice of motion is brought, pursuant to Section 12 of said Workmen's Compensation Act as amended, by said Indemnity Insurance Company of North America, in the names of Mary H. Hall, Administratrix of the said Erwin Nolan Hall, deceased, as plaintiff, who qualified as such before the Clerk of the Circuit Court of Norfolk County on February 8, 1938, and gave bond as required by law, for its own benefit to the extent of the compensation, burial and other expenses paid and incurred, or for the payment of which it has assumed responsibility pursuant to said award, and to secure reimbursement, therefor, and also for the benefit of the said Mary H. Hall, widow of the deceased, Erwin Nolan Hall, to secure for said page 31 } widow, pursuant to the statutes for such cases made and provided, fair and adequate compensation for the death of her said husband, as their respective interests in the recovery herein shall appear and may be determined under the several statutes for such cases made and provided.

WHEREFORE the plaintiff will move the court for a judgment against you, as aforesaid, in the sum of Ten Thousand (\$10,000.00) Dollars.

MARY H. HALL,
Administratrix of the Estate of Erwin
Nolan Hall, Deceased.
By Counsel.

TOM E. GILMAN,
AUBREY R. BOWLES, JR.,
Counsel.

And on the same day, to-wit: the 7th day of October, 1938, an Amended Bill of Particulars was filed, which is in the words and figures following, to-wit:

The plaintiff, having by leave of Court filed her amended notice for motion of judgment herein, now comes and files her amended bill of particulars, as follows:

SPECIFICATIONS OF NEGLIGENCE OF THE DEFENDANT W. G. SAUNDERS.

1. The defendant, W. G. Saunders, owned and negligently operated, by and through his duly authorized agent acting on his behalf, on the highways of the State of Virginia, a certain Ford truck and improvised trailer, in a mechanically unsafe condition in the following manner:

page 32 } (a) without brakes as required by statute;
(b) With faulty, insufficient and inadequate brakes;

(c) with improperly adjusted brakes;

(d) With an improvised trailer improperly, insufficiently, negligently and inadequately attached to said Ford Truck, and in violation of the statutes for such cases made and provided;

(e) Without having the same equipped with the appliances and devices required by law for the operation of the same on the highways of this State;

(f) Without keeping and maintaining the same in good and safe working order and condition such as to render safe the operation of the same on the highways of said county and state.

2. The said W. G. Saunders negligently permitted said vehicle, owned by him, to be operated on the highways of the state of Virginia under all the conditions and circumstances hereinabove set forth in paragraph numbered 1.

3. The said W. G. Saunders negligently entrusted the same to an inexperienced, incompetent, careless and reckless driver.

4. That the said W. G. Saunders, owner of a certain Ford truck and improvised trailer, negligently operated the same by and through his agent, servant and employee, Elmer Hall, in a westerly direction on and along a highway known as Route #460, in Norfolk County, Virginia, on and about July 27, 1937, between 1:30 and 2:00 P. M. of said day, the specific acts of negligence to be relied on as follows:

(a) That you failed to exercise ordinary care in the operation of said truck and improvised trailer so as to avoid injury to persons and vehicles on and along said highway;

page 33 } (b) That you failed to operate said vehicles in
a careful and prudent manner with due regard to
the life, limb and property of others on and along
said highway;

(c) That you failed to operate said vehicles at a safe and prudent rate of speed having due regard to the traffic, sur-

face and width of said highway and to all other conditions and circumstances then existing;

(d) That you failed to have said vehicles under reasonable complete control;

(e) That you failed to keep and maintain a proper lookout;

(f) That you failed to have your said *vehicle* and each of them equipped with adequate brakes properly adjusted, and failed to apply such brakes carefully and efficiently whenever necessary in the exercise of ordinary care;

(g) That you failed to keep and maintain said vehicles and each of them in a mechanical condition such as to render safe the operation of the same upon the highways of said County and State and failed to inspect the same and see that they were mechanically safe for such operation thereon;

(h) That you failed to drive said vehicles at all times upon the right half of the highway and to the right of the center line thereof and particularly when passing vehicles approaching from the opposite direction;

(i) That you failed to yield to vehicles proceeding in the opposite direction at least one-half of the paved portion of said highway;

(j) That you failed to observe each and every statute of the State of Virginia for such cases made and provided and governing the ownership, operation, maintenance and use of motor vehicles and trailers on the highways of said County and State.

That, in violation of every and all of the aforesaid duties, you negligently, carelessly and recklessly drove said vehicles on the wrong side of the road across the path of and directly in front of the vehicle lawfully operated by the plaintiff's decedent at and about the time and place aforesaid, in an easterly direction on and along said highway, as a direct and proximate result of which said negligence the plaintiff's decedent was killed.

The plaintiff reserves the right to amend its said bill of particulars in any respect in which she may be advised, and to add thereto such matters as she may be advised at any time prior to the trial of this cause.

MARY H. HALL,
Administratrix of the Estate of Erwin
Nolan Hall, Deceased.
By Counsel.

AUBREY R. BOWLES, JR.,
Counsel.

And at another day, to-wit: the 28th day of November, 1938, the following order of this Court was entered in the words and figures following, to-wit:

This day came the plaintiff by her attorney, and it appearing to the court that the above styled case is set for trial on the 6th day of December, 1938, thereupon on motion of the plaintiff it is ordered that this case be continued from said 6th day of December, 1938.

page 35 } And on the same day, to-wit: the 28th day of November, 1938, the following order of this court was entered in the words and figures, to-wit:

This day came the parties by their attorneys, and the plaintiff's motion to abate the action as to the defendant William Smith, and the plaintiff's motion to dismiss the cross-claim of William Smith were fully heard.

It appearing to the court that after the plaintiff instituted suit against William Smith and filed its bill of particulars in said suit, that William Smith filed a cross-claim pursuant to the statute in such cases made and provided, and that at the present time the statute of limitations has barred the defendant William Smith's right to bring a separate suit against the plaintiff, it is considered by the court that the motions be overruled.

And at another day, to-wit: the 23rd day of June, 1939, the following order of this court was entered in the words and figures, to-wit:

This day came the parties by their attorneys, thereupon came a jury to-wit: C. W. Gregory, G. D. DeBaum, J. B. Flora, C. J. Rountree, W. R. Hayson, Earlie Armstrong and W. H. Vandergrift, who were duly sworn the truth to speak upon the issue joined, and after having partly heard the evidence it is ordered that this case be adjourned until tomorrow at ten o'clock, A. M.

And on the another day, to-wit: the 24th day of June, 1939, the following order of this court was entered in the words and figures following, to-wit:

page 36 } Mr. Bowles: If Your Honor please, the plaintiff would like to be advised as to which of the notices of motion we are being required to proceed under. There

was a great deal of preliminary argument preceding Your Honor's consideration of the matter, and we wish to make exceptions to the rulings of Judge Coleman with respect to those matters before the jury is sworn, and also to see if we can determine whether the amended notice of motion which was filed here is necessary. I would like the jury to be excluded while this argument is going on.

Note: Jury sent out of courtroom.

Mr. Bowles: I won't go into it at any length, if Your Honor please, but I think it might be advisable if I would very briefly review the background of what I am speaking of at this moment.

The Court: I sent for the file of papers yesterday afternoon and have been through them, but just casually, in my office. Now I wish you would start in chronological order. I reviewed these pleadings from the standpoint of chronology.

Mr. Bowles: Yes, sir. Now, the background of this situation is this, Sir: that the plaintiff as the executrix or administratrix of this decedent filed this notice of motion and filed it against the owner of the lumber truck and the page 37 } one of two negro men who were on the truck who at that time she was advised was the driver of the truck. It subsequently appeared by affidavit filed by both of those defendants that the negro who was sued as a party defendant and as the driver of the lumber truck was not the driver, was not the agent, servant or employee of the defendant Saunders, the owner of the truck, and that the other negro on the truck was the driver and was the agent of the owner. Now, with that appearing by affidavit filed by both, on behalf of the defendant Smith, the one that we thought was the driver, and on behalf of the owner, the defendant Saunders, the plaintiff accepted the truth of that affidavit and moved to abate the action as to the misjoined defendant Smith. The plaintiff did not ask to include the other negro as the driver, but left the suit, or desired to leave the suit, against the owner of the truck alone, the grounds of defense and the affidavits having admitted the agency of the other driver.

At that juncture, and at the time the affidavits were filed, Saunders, the owner, filed a cross-claim for his property damage, and Smith, the passenger on the truck, or the person riding on the truck, and having no connection in the trial of the matter whatsoever, filed a cross-claim also. The plaintiff moved to dismiss, in a separate motion, to dismiss the cross-claim, following its motion to abate, and accepting the truth of the affidavit, on the ground that there

page 38 } was no mutuality, and that there was no suit against the defendant Smith on which the cross-claim could depend. That was argued a great many times, and so the first, second, and perhaps—I am not sure about that—the third argument took place before any statute of limitations could have run, if it has run, that is, I mean the time had for suit against the defendant Smith. Now, the position that this plaintiff has taken throughout is that in effect the affidavit of the defendant Smith set up the fact that no suit could by any possibility be brought against him on any theory, because he was neither the operator nor in any wise connected with the accident, that the basis for his cross-claim had been destroyed upon our motion to abate, and that there was nothing on which to hang the cross-claim. There was some contention in the course, I think, that they admitted the non-suit but that we were affected by the statute which provides that a non-suit cannot be taken after a cross-claim is filed, this being a motion to abate under the section for misjoinder.

The party Smith was joined as a defendant through mistake, and having been joined through mistake, we asked that the suit against him be abated, and then that his cross-claim be dismissed.

There was a second ground, if Your Honor please, for that motion, namely, that the action here, though nominally in the name of the administratrix, is for the benefit page 39 } of the compensation insurance carrier, who was subrogated to the rights of the widow upon her acceptance of compensation and for the benefit of the widow herself as to the surplus; that the estate of the decedent was in no way involved; that the cross-claim of Smith was unavoidably against the estate of the decedent, which is not brought into this Court in this proceeding. Though the plaintiff and the defendant in such suit would be nominally the same, the interest before the Court was entirely different, and again there is no mutuality.

Now, those matters were argued, and the decision on them was awaited for a great length of time, and that is the reason why this suit has not been tried heretofore. Under the circumstances, we would certainly wish to except to the Court's ruling, and having had no opportunity of doing so previously, if Your Honor would permit, we would like a reconsideration of those matters before the jury is sworn.

Now, at the time that all of these motions were filed, and in expectation and in the hope that they would be granted, we filed an amended notice of motion. The particulars of

the plaintiff's claim had already been filed on the call of the defendant. When they were filed they naturally related to the two defendants. We subsequently filed an amended notice of motion and an amended bill of particulars eliminating the defendant Smith from any reference as the operator and agent of the owner, as the operator of the truck, page 40 } and the suit, as we feel, should proceed, Sir, should proceed on the amended notice of motion and the amended bill of particulars against the defendant Saunders alone.

The Court: Well, one minute. This Court has passed on the question of the abatement of the suit as to the defendant and Smith. It is immaterial whether I am sitting or Judge Coleman is sitting. This Court has passed upon the question.

Mr. Bowles: I understand so, Sir, but I do not understand just what the Court has done in passing upon that. I do not apprehend whether the Court has refused the motion to abate as to Smith or whether the Court has granted the motion to abate as to Smith and refused the motion to dismiss.

The Court: There is the file.

Mr. Bowles: I understand, but as I recall the order—I have not seen it recently, Sir—it was not clear to me what the Court actually did.

The Court: This order is endorsed on the back: "November 28, 1938. C. W. Coleman." "This day came the parties by their attorneys on the plaintiff's motion to abate the action as to the defendant William Smith and the plaintiff's motion to dismiss the cross-claim. It appears page 41 } ing to the Court that after the plaintiff instituted suit against William Smith and filed a bill of particulars in said suit, that William Smith filed a cross-claim pursuant to the statute in such cases made and provided, and that at the present time the statute of limitations has barred William Smith's right to bring suit against the plaintiff, it is considered by the Court that the motions are overruled. Motions are overruled. Both motions are overruled.

Mr. Bowles: Your Honor, that is where the confusion results in my mind, if Your Honor please. It is an admitted fact irrespective of that order that there is no suit against William Smith, and both sides agree to that.

Mr. Williams: No, we don't.

Mr. Bowles: Now, he overrules my motion to abate. Well, now, where do we stand on that? We have no suit against William Smith, if Your Honor sees the point that I make,

because William Smith on his affidavit could not possibly be sued by this administratrix.

Mr. Williams: She did sue.

The Court: He had been brought into the suit by her, by process.

Mr. Bowles: Yes, sir, I understand, but by affidavit 42 } fidavit and the acceptance of the affidavit it is established in the pleadings here now that no judgment could in any possibility be rendered against William Smith. Now, then, if that be true, and the motion to abate having been made on that ground and the facts lying behind to substantiate the motion to abate having been established by agreement by both sides, how can we proceed in a suit against William Smith? That is the question that presents itself to my mind, Your Honor.

The Court: The only thing I see, it seems to me that has been passed on. The only thing I see is, whether you are proceeding under the original notice of motion or the amended notice of motion.

Mr. Bowles: That was what I was coming to, Sir.

The Court: Because I notice your amended notice of motion eliminates Smith as a party in the complaint.

Mr. Bowles: Yes, sir.

The Court: I notice also that there is a decree filing that amended notice. The Court now has to determine just what the procedure is on that.

Mr. Bowles: We, of course, have no case against William Smith after it was established that we sued him page 43 } erroneously. What I am saying is this, Your Honor, that though William Smith was a rider on that truck, as he and both defendants, he and Saunders maintain, and which we accept as true, if that be the truth, no one could have any action against William Smith.

The Court: That really is anticipating what the facts will be. He is here; he is brought into Court.

Mr. Bowles: But that is established by affidavit, which we have accepted, and our motions to abate and dismiss accepted as a matter of record the truth of those affidavits. Now, I think that is a matter already concluded by the record, that there is no basis for a suit against William Smith, he having been erroneously misjoined. That was the ground for the motion to abate.

The Court: I take it that was the essence of the argument before Judge Coleman as to whether it should be—?

Mr. Bowles: The essence of the argument before Judge Coleman, sir, was whether or not the cross-claim could be

dismissed in view of those facts. Of course, if Your Honor please, we have no action against Smith, and we would be glad to dismiss as to Smith, and we have attempted to do so by filing an amended notice of motion. Now, the point around which all of the argument centers was whether or page 44 } not that resulted in a similar dismissal of Smith's cross-claim. Now, that matter went to the Court of Appeals on an application or a petition for a writ of prohibition, and the Court simply dismissed the petition. Judge Campbell informally said that it was on the ground that there was an adequate remedy at law; we could take it up on through by appeal. There was no order entered other than dismissing in the Court of Appeals.

Now, under the circumstances, sir, we still feel that William Smith should not be allowed here in this case, where the decedent's administratrix is attempting to recover against the owner of the truck, to get his case tried at the same time, because the two matters are wholly unrelated.

The Court: The result has been that the motion has been overruled, and William Smith's cross-claim is in the record and subject to trial by this jury. The only question left; what is your position with reference to the amended notice of motion and the original notice of motion?

Mr. Bowles: Your Honor, we desire to go to trial, sir, on the amended notice of motion, and we would like to separate, that being the alternative remedy asked for; separate these trials, even if the apparent basis of Judge Coleman's ruling was his apprehension that the man Smith might have lost his rights by delay. I do not know whether Your page 45 } Honor noticed it or not, but in the motion, written motion which we filed, we called attention to the fact that there was still six weeks in which his independent suit could be brought. How the statute on saving time during the pendency of the suit would affect him, I have not undertaken to consider.

The Court: Now, get the record straight. Let us get your motion or position stated definitely to the stenographer. You are making a definite motion now? If so, what is it?

Mr. Bowles: Well, sir, I will make this motion now, or renew the motion previously filed herein, to abate this action as to William Smith and dismiss the cross-claim for reasons therein assigned, and to file and try this case on the amended notice of motion and the amended bill of particulars, and to except to the Court's ruling, for the reasons previously stated, that previous order; a like motion, failing in that, to separate these independent cases, for I so consider

them, and have separate trials of the cases of Smith against this administratrix and of the administratrix against Saunders.

The Court: That is a rather involved motion you have for me to pass on. Would you mind making this motion now or renewing your motion with reference to the page 46 } abatement of the suit and the dismissal of the cross-claim, and let me pass on that?

Mr. Bowles: Certainly, sir.

The Court: Is that contested by the other side?

Mr. Williams: Yes sir.

The Court: Then those motions are overruled. Make your exceptions to that.

Mr. Bowles: We except both to the entry of the previous order of the Court and to this ruling.

The Court: Now, make the next motion.

Mr. Bowles: Now, my motion, is, sir, in the alternative—

The Court: I have ruled against you on that. Now, here you are with the cross-claim asserted as a pleading in this case. Now, what is your position on that?

Mr. Bowles: Your Honor, without waiving the exceptions previously stated, to proceed to trial in this case upon the amended notice of motion for judgment and the amended bill of particulars and to request the Court to set down a separate date of trial for the cross-claim of William Smith page 47 } against this administratrix, it being an independent matter unrelated to the action asserted by the amended notice of motion.

The Court: Now, let us get the defendants' position with reference to that.

Mr. Williams: Your Honor, that is inconsistent with the statute. The statute says it shall be tried together. The cross-claim is in. That is the end of that argument.

The Court: Your second motion is overruled.

Mr. Bowles: We note an exception. Now, if Your Honor please, I would like to make a new motion which has not been previously ruled on: To dismiss the cross-claim of W. G. Saunders in this action, on this ground, that the action of Saunders is against the estate of the decedent, Erwin Hall; that the parties plaintiff here were nominally suing in the name of his administratrix, the parties plaintiff and the substantial parties for any liability against them—no liability whatever to W. G. Saunders—those parties being, as shown by the record, the Indemnity Insurance Company of North America, the compensation carrier, and the widow in her individual own right; any recovery being wholly insusceptible

of any attachment for debts of the decedent's estate.

The Court: Now, let us get the defendants' page 48 } position with reference to that.

Mr. Williams: Your Honor, that or a similar motion was argued by Mr. Bowles and Mr. Gilman before Judge Coleman in reference to allowing the cross-claim of Smith. Isn't it just the same argument that Judge Coleman passed on as to the Smith cross-claim? Exactly the same thing. Identical.

The Court: Well, that is overruled. I am now overruling it, and you can note your exception to that.

Mr. Bowles: Exception noted. Are you going to trial on the original notice of motion? Is that the ruling of the Court? Or the amended notice of motion?

Mr. Williams: If Your Honor please, I would like to have a word to say about that. Mr. Bowles has stated that the purpose of filing, and the only purpose of filing the amended notice of motion was the purpose of dismissing Smith from this suit.

The Court: As a party defendant?

Mr. Williams: As a party to this suit. That being so, we submit that that question has been passed on, and it should be tried on the original notice of motion. When Judge Coleman passed on that, we conceived that that ended page 49 } that question, and there have been no pleadings or anything filed on the amended notice of motion.

The Court: Is there any occasion for an amended notice of motion and amended bill of particulars if Smith remains in the litigation?

Mr. Williams: Not except in order to separate the two suits entirely one from the other, two claims entirely.

The Court: There isn't any substantial difference between the amended notice of motion and the original notice of motion except the naming of this man named Hall as driver instead of—?

Mr. Bowles: No, sir. I think that was what the Court misapprehended. The original notice of motion sued Saunders as the owner and named Smith as the driver. The amended notice of motion eliminates Smith, says that Hall was the driver, but does not make him a party.

The Court: Alleges the proper driver in the body of the pleading but does not make him a party to the suit?

Mr. Bowles: It is a suit against the owner of that truck only. It is not a suit against William Smith, passenger. In other words, if Your Honor please—I do not want to bore the Court to restate the situation: If we go to

page 50 } trial on the original notice of motion, we go to trial in this situation, that we are suing a man who was admittedly a passenger on the truck as a party defendant on the theory that he was the driver in control of the truck, which puts us in a very anomalous situation.

The Court: It is an anomalous situation to go to trial on the amended notice of motion, with Smith remaining in the litigation with a cross-claim established by decree of the Court.

Mr. Bowles: I heartily agree with you about that, sir.

The Court: I will rule that we go to trial on the original notice of motion. Get the record straight on that.

Mr. Bowles: I note an exception to Your Honor's ruling. Will Your Honor just forget us and dismiss it as to Smith at this time?

Mr. Williams: Your Honor, he is asking you to do the same thing that Judge Coleman has passed on and you have passed on.

The Court: How can I dismiss as to Smith and permit him to remain in the litigation on his cross-claim?

Mr. Williams: Your Honor, that is what we page 51 } have claimed all along.

The Court: I am not going to review all those phases of the case. I am trying to get the record in as clear a shape as possible now. It is a little confused, I admit, but to my mind the way out of it is to go to trial on the original notice of motion with the cross-claim of William Smith sustained to go before the same jury. That passes on the question of liability on the original notice of motion.

Mr. Bowles: I know Your Honor is not interested in my own personal reaction in this matter, but it seems to me a great pity that we have got to take up the time, if for some reason it would be necessary to appeal this case and go to the Court of Appeals to correct the error, come back and do the thing all over again. That has been our reason for insistence upon it, because we have felt so certain that, under the facts shown, Smith's case should not be tried at the same time over our objection with the administratrix's case against the owner. Now Your Honor has decided to abide by the rulings of Judge Coleman, and may I ask this question: Is it clear that Your Honor has the right of dismissing him as a party defendant and still holding, still letting the cross-claim remain here? I realize that we are up against that problem; but we would rather be in that situation, having no party defendant, with the cross-claim still here, than to be page 52 } in the position of having to go to trial on an ab-

surd allegation of fact as to which we have not put in any proof.

The Court: What is the defense's position on that?

Mr. Williams: May it please Your Honor: It is an absurd allegation, but it is our friends who made the allegation; they brought this man in here under process, and the filing of the affidavit does not release him from any suit or put him out of any suit. It just simply shifts the burden of proof there to show whether he was or he was not driving. We see no difficulty about it. We have got an ordinary suit with a cross-claim filed here by a party who was served with process. Now, until the proof is in, we have nothing but the statement of counsel. They haven't done anything to prove that Smith was driving. I take it that the affidavit is not evidence in the case, and I see no difficulty about the situation.

Mr. Bowles: I do not want to reopen again the argument on that, sir, at all. I do not think the facts are as Mr. Williams states them, a correct statement of what I have in mind. We are not in a situation where we do not know what the facts are until proof is in. We are in a position where an affidavit has been filed on a so-called semi-jurisdictional question, and the truth of that affidavit has been accepted as a matter of record by the plaintiff. Now, there page 53 } isn't any question of proof. I do not think Your Honor could possibly admit proof in contradiction of that situation. We have come into Court, and it is a matter of record, admitted, their statement that William Smith was not the driver, the statement under oath that William Smith was not the driver, was not the operator, was not an agent of the owner, and had nothing to with it. Now, we come in Court and admit that thing and say that we are sorry, that we were mistaken in alleging those facts, and proceed under the very section of the Code that is provided for that situation and say that we regret the fact that we have erroneously misjoined him. Now, we do not want to go on and keep on suing him on that theory. Now, I know of nothing, sir, that prevents a person from dismissing a case provided it does not prejudice someone else.

The Court: Except for the filing of the cross-claim.

Mr. Bowles: Well, in a case of non-suit, sir, that of course might be applicable, but on dismissal, is there anything to prevent us from dismissing it? Your Honor still ruling that the cross-claim stays irrespective of our dismissal?

Mr. Williams: I cannot follow the argument. Talking about dismissing it and allowing it to stay.

page 54 } Mr. Bowles: I think that has frequently been done, in the books or cases that I have read. The error that we complain of, sir, is allowing the cross-claim to stay.

The Court: If it were not for the cross-claim it would be very simple to straighten out these pleadings.

Mr. Bowles: I do not see how, under the circumstances, on the admitted facts shown by the record, on the pleadings, on the admitted facts, how Your Honor can permit us to sue somebody whom we stand here in open Court and as a matter of record say we have no suit against, and, as Mr. Williams says, wait until proof comes in to see whether we really have any. That seems to me—of course, Your Honor, the whole difficulty here was created by this mistake; but it seems unfortunate that in a court of law, having made a mistake and recognized it after it is pointed out by the other side, that a person, a litigant, should not be allowed to correct it, purely because—and this is the only reason, if Your Honor please—not to protect this man's rights, but because he wants to insert himself into something that he has got no business having anything to do with. That is what he is seeking to maintain here; not the right to sue the owner and operator of this oil truck, but he is maintaining here the right to pursue that right and sue in a case in which the widow of that man

page 55 } is suing the man that owned the truck on which he was riding. That is the thing that he is insisting upon; not to save his rights, but he is insisting on the right to try this case against the owner against a party that he had nothing in the world to do with.

The Court: You have noted an exception. I am going to trial on the original notice of motion and cross-claim as filed.

Mr. Bowles: We note an exception. Also to the failure to permit us to dismiss at this time without prejudice to the maintenance of the cross-claim by Smith, without waiving our rights and objections.

Note: At this point the panel was sworn and examined on *voir dire*.

Mr. Bowles: Would Your Honor bear with me one moment? I have never been in a situation like this before, and I can see that on this notice of motion evidence by the plaintiff with respect to who was driving the truck would be inconsistent with the allegations of the notice of motion. Is it not perhaps in order at this stage to request permission to

amend the notice of motion and insert the name of Elmer Hall as the driver rather than William Smith in the notice of motion, to keep ourselves from being cut off from evidence, and not to change the defendants, because Your page 56 } Honor has already ruled on that, the defendants?

The Court: Now, you might do that. You might amend the body of the notice of motion and allege that Hall was the driver.

Mr. Bowles: And not Smith, leaving Smith in the caption as a defendant?

Mr. Williams: I think that is all right.

Mr. Godwin: We would have to file all the pleadings to that amended notice of motion, which would be the general issue and grounds of defense.

Mr. Bowles: Assuming that they would be the same.

Mr. Godwin: Unless you would not ask for grounds of defense and assume that the other grounds of defense would be sufficient.

Mr. Williams: Why couldn't we stipulate that the present bill of particulars and the present grounds of defense may be treated as if filed anew to the amended notice of motion?

The Court: Any objection to that, Mr. Bowles?

Mr. Bowles: What do you mean by "present"? page 57 } Mr. Williams: The one that was filed to the original notice of motion shall be considered filed as to the amended notice of motion.

Mr. Bowles: We have no objection to that in so far as they are applicable and they refer to Smith, but—

Mr. Godwin: That is right, in so far as applicable.

Mr. Bowles: In other words, if I apprehend what is authorized here, we are going to be tied strictly to these pleadings as made up right now, sir, and I do not think we ought to be in any such position as that.

The Court: We have an issue and we have got to get it disposed of. I do not think you would be held to proof that Elmer Hall was driving the car and the case go off on the point that Hall was driving the car as alleged in the face of all the pleadings and the proceedings thereunder that have been had during the last year and a half.

Mr. Bowles: I would be perfectly agreeable to a stipulation with counsel that Elmer Hall, a negro man, was the driver, and the allegations of the notice of motion with respect to that matter as to Smith, and the grounds of defense, bill of particulars, and all of them, should be so considered.

The Court: Any objection, gentlemen of the defense?

Mr. Godwin: No objection. We have no ob-

page 58 } jection to including this man's name in the notice
of motion.

The Court: The stipulation includes amendment of the name of Elmer Hall as the driver of the truck alleged to be owned by W. G. Saunders, and all of defendants' pleadings heretofore filed to the original notice of motion are taken as filed to the amendment now made and entered of record.

Note: Here followed swearing of jury and witnesses and opening statements of counsel.

Mr. Williams: If Your Honor please, may we ask that the witnesses be excluded?

Note: Witnesses excluded from the courtroom.

Mr. Bowles: If Your Honor please, there are certain formal parts of this record I would like to ask counsel to stipulate to. The proof of the qualification of the administratrix. A copy of the qualification certificate was attached to the original notice of motion. Can we stipulate that she is so qualified?

Mr. Williams: Why don't you just introduce it in evidence?

Mr. Bowles: I will be glad to do so. Also as to proof of death of the decedent. Can we stipulate that he
page 59 } was killed in this accident?

Mr. Williams: Yes, we will stipulate that he was killed in this accident.

Mr. Bowles: Can we stipulate the American Mortality Table with respect to probable longevity?

Mr. Williams: I don't know about that.

Mr. Bowles: What is that?

Mr. Williams: I don't know what it is, to be frank with you, sir.

Mr. Bowles: I would suggest that you look at it. I am sure you are familiar with the mortality table, Mr. Godwin.

Note: Here followed discussion of mortality table.

Mr. Williams: Let's admit it.

Mr. Godwin: All right.

The Court: He said he admits that.

Mr. Williams: We admit it.

Elmer Hall.

The Court: You are admitting the life expectancy of the man at age 28? At 28-29, the life expectancy is 30—what?

Mr. Bowles: 36.73 for 28 and 36.03 for 29. I page 60 } would be prepared to put the table in as an exhibit, sir.

The Court: I do not think there is any need for the table. It has a great lot of other ages there, hasn't it?

Mr. Bowles: Yes, sir. It is all right; it is not my statement, however, sir. It is a table—

Mr. Williams: Unless you are going to vouch for the correctness of the statement, I certainly am not going to vouch for it.

The Court: We have a stipulation that the life expectancy of a man at 28 and 29 years of age is as the stenographer has recorded.

Mr. Williams: We agree to that stipulation.

The Court: All right.

Note: At this point the hearing of testimony was commenced.

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ELMER HALL;

introduced as an adverse witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Bowles: If Your Honor please, I want to ask the driver, Elmer Hall, a few questions as an adverse witness.

Mr. Williams: You Honor, we object to calling the witness as an adverse witness unless he is proved to be adverse. He has no interest in this suit.

The Court: All right.

By Mr. Bowles:

Q. Your name is Elmer Hall?

A. Yes, sir.

Q. How old are you?

A. Me?

Q. Yes.

A. I am 28.

Q. Twenty-eight?

A. Yes, sir.

Q. You were the driver of this truck of Mr. Saunders on

Elmer Hall.

the day of the accident up there on the King's Highway in Truxton?

page 62 } A. Yes, sir.

Q. On the 27th of July, 1937?

A. Yes, sir.

Q. What kind of a truck was that?

A. Ford truck. Ford truck and trailer, 1936 model.

Q. Ford truck and trailer, 1936 model?

A. Yes, sir.

Q. What kind of a trailer was that?

A. Sol Abrahams' trailer.

Q. Were you employed by Mr. Saunders at the time that he bought this truck?

A. Sir?

Q. Were you one of his drivers at the time that he bought this truck?

A. No, sir.

Q. Do you know when he bought it?

A. Yes, sir, I was working for him when he bought it.

Q. Did he have the trailer at the time he bought the tractor?

A. The tractor?

Q. Did he already have the trailer when he bought the Ford front part of it?

A. No.

Q. Bought both at the same time?

A. No, sir.

Q. Well, then, he already had the trailer?

page 63 } A. No, sir; bought the trailer—truck first and then turned around and bought the trailer.

Q. What kind of trailer was it?

A. It was a trailer—he bought it right away from Sol Abrahams.

Q. What kind of a trailer was it?

A. International.

Q. What kind of brakes did it have on it?

A. Air brakes.

Q. Were they air brakes or vacuum brakes?

A. Air brakes.

Q. How were they operated?

A. Sir?

Q. How were they operated?

A. Operated? Just turn the air brake on if you were going to start.

Q. How did you turn it on?

Elmer Hall.

A. You could turn it on with your hand.

Q. You could turn it on with you hand?

A. Yes, sir.

Q. Was it a button or a lever or what?

A. Little button, button up there.

Q. Did you have to screw it in or what?

A. No, sir. All you do—just here—

Q. Tell us what kind of thing it was. Describe
page 64 } it to us as to what you had to do to apply brakes
on the trailer.

A. Ain't do anything; applied drums on the trailer and stay there, the brakes was already on. All you do, mash it on, the brake, air brake, as much as you—

Q. What is the button? You say you do it with your hand.

A. Just put the button on when you get ready to start in the morning. Just turn the air on and go on.

Q. Don't you mean that the button you are talking about is a gadget on the dash of your car that you cut the brakes off the trailer?

A. You cut them off if you want to.

Q. You haven't got any brake, foot brake that runs back to the trailer with a rod, have you?

A. No, sir.

Q. There isn't any hand brake that goes back to the trailer by a rod, is there?

A. No, sir.

Q. It is altogether controlled by air?

A. Yes, sir.

Q. Now, whether the air is working or not is operated by this little lever under your hand?

A. Yes, sir.

Q. If you arrange it one way the brakes are cut off?

A. Yes, sir, you could cut them off, choke them off, cut them off, either way. When you go in there in the morn-
page 65 } ing you cut your brakes on, get in the truck, it goes
on. You mash it on the brake with your foot, air
brakes, and all take.

Q. Now, when you say "mash", you mean push on hard?

A. Push on the brake.

Q. You mean push on hard when you say "mash"? What do you mean by "mash"?

A. You don't have to push them on hard; just push them.

Q. What do you mean by "mash", just pushing with your foot?

Elmer Hall.

A. Yes, sir.

Q. When you came into Norfolk you brought in a load of lumber, didn't you?

A. Yes, sir.

Q. Did you deliver that lumber there?

A. Yes, sir.

Q. Some of it you had to take back, I believe, didn't you?

A. Yes, sir.

Mr. Williams: Your Honor, I object to this leading question. Every question as to form has been a leading question.

Mr. Bowles: I understood I was examining this witness as an adverse witness.

Mr. Williams: He has not been shown to be adverse.

The Court: Well, proceed along the lines of normal expectancy until it develops he is adverse; then you page 66 } can cross examine him. I do not see why you should not proceed with the ordinary line of questioning of the witness.

By Mr. Bowles:

Q. Did you deliver all of the lumber?

A. No, sir. I left some right on the truck.

Q. How much was left on the truck?

A. I had about—carried some ties down at the Atlantic Creosoting Company—

Q. I didn't hear you.

A. Carried some lumber to the Atlantic Creosoting Company. I had just took them some ties—

By the Court:

Q. Railroad ties?

A. Yes, sir.

Q. That kind of stuff?

A. Yes, sir.

Q. To the Atlantic Creosoting Company?

A. Yes, sir.

Q. All right.

By Mr. Bowles:

Q. About how much lumber did you have on the truck at the time this accident occurred?

A. I didn't have over about six or seven—just about—the

Elmer Hall.

bottom of the truck, just a lot of ties in there, just like this here (indicating), the bottom of the truck, the page 67 } trailer.

The Court: Use that banister there.

A. Just enough lumber, like this; here is the trailer and the truck; here is the bolster next to the cab, this—

Q. Bolster?

A. That is the thing that goes up and down the side to hold the things on.

The Court: Bolster?

A. Just had enough lumber on each side here on the bed to hold the ties. That is all we had.

Q. Well, would you say that this trailer was heavily loaded or lightly loaded at the time this accident occurred?

A. It was lightly loaded. Didn't have no load at all.

Q. Can you tell me whether or not the air brakes to the trailer wheels were in operation or not in operation at the time?

A. They was in operation.

Q. In other words the air was on?

A. Yes, sir.

Q. Now, Elmer, how long have you been driving a tractor-trailer truck, tractor-trailer?

A. Driving long about—I been driving—I been driving about all my life.

Q. How old are you?

A. Twenty-eight.

page 68 } Q. And you have been driving tractors and tractor-trailers both?

A. I drove trucks and trailers both.

Q. Now, when you put on the brakes on a tractor-trailer job, why, you have got a fifth wheel in there, and there is a part of the vehicle that is pulling it and another part that is being pulled; which way do your brakes pull the hardest; the front part of it or the rear part of it?

A. Which one takes first, you mean?

Q. Yes.

A. The rear part takes first.

Q. The rear part?

A. Yes. The front wheels, I don't never let them—let the back wheels take at one time.

Elmer Hall.

Q. I don't hear that, sir.

The Court: He didn't hear you.

A. The back wheels on the truck and trailer, it is at one time, right together.

Q. And then what about the front ones?

A. I don't let them take at the same time, just a little after.

Q. How do you control that?

A. Sir?

Q. How do you control that, so that it will do that?

A. Why, our mechanic fixed it. Mr. Byrd and Mr. Spate. They keep the brakes in shape.

Q. Who is Mr. Byrd?

page 69 } A. He lives at Chuckatuck.

Q. What is he?

A. A mechanic.

Q. Is he employed by Mr. Saunders?

A. No, sir.

Q. Does he run a garage there?

A. Runs a garage.

Q. Now, did I understand you correctly, Elmer, to say that the back wheels on your tractor and the back wheels on your trailer apply at the same time?

A. Yes, sir.

Q. So that those brakes go on at the same time?

A. Yes, sir.

Q. And the front wheels of your tractor go on a little later?

A. Yes.

Q. Now, with respect to the back wheels of your tractor and the wheels of the trailer: which one of those holds the hardest?

A. All of them take at the same time.

Q. So that truck was equipped that way?

A. Sir?

Q. Was that truck so equipped that day? Was that truck equipped in the manner and adjusted in the manner that you have just stated on that day, in that way?

page 70 } A. Yes, sir. Yes, sir.

Q. All of the brakes held the same tension?

A. All but the front.

Q. All except the front?

Elmer Hall.

A. Yes, sir. All the back ones took at one time.

Q. Took at one time?

A. Yes, sir.

Q. Applied with the same strength at one time, you mean?

A. Yes, sir.

Q. What kind of brakes did you have on the tractor part of the truck?

A. Air brake.

Q. Same kind?

A. Yes.

Q. What?

A. What do you mean, on the trailer?

Q. On the tractor.

A. On the truck? Yes, sir, air brakes on it.

Q. Air brakes on that?

A. Yes, sir.

Q. Do you know what kind they were?

A. What kind of brakes they were?

Q. What is the name of the kind of brake; do you know?

A. No, sir, I don't know.

Q. And you had air brakes on the back wheels
page 71 } of the tractor part of it and air brakes on the
trailer part?

A. Yes, sir—no, not air brakes on the back part of the tractor part; air brakes was on the trailer.

Q. Now, what kind of brakes did you have on the tractor part?

A. I don't know what kind of brakes they were. Mechanical brakes, I reckon; mechanical brakes.

Q. Did you have any booster brakes on them or anything?

A. The truck part?

Q. Yes.

A. No.

Q. Now, Elmer, you say you have driven tractor-trailers for a considerable length of time: Do you drive with the adjustment of brakes on the trailer with a heavy load and with a light load the same?

A. Yes, sir.

Q. You do not make any adjustment for the difference of load that is on the trailer?

A. You see, I keep the brakes dressed up all the time.

Q. I didn't ask you that. I asked you whether or not you made any difference, as the operator of this vehicle, going in with a full load of lumber and coming back with an empty.

Elmer Hall.

truck, with the exception of a few pieces: whether you made any difference or distinction between the adjustment of the brakes on the trailer part of it, for the air, between going and coming.

page 72 } A. No, sir.

Q. You say you have driven trailers a considerable time?

A. Yes, sir.

Q. Tractor-trailers?

A. Yes, sir.

Q. Do you know whether the operation of a trailer with respect to the tension of its brakes and the adjustment of its brakes should be the same whether it is loaded or unloaded?

A. Yes, sir.

Q. It should be the same?

A. Yes, sir. Air brakes should be the same.

Q. And you have studied that proposition or considered it?

A. Sir?

Q. And you have considered that proposition before?

A. Yes, sir.

Witness stood aside.

Mr. Godwin: We shall reserve the right, Your Honor, to cross examine Elmer Hall at a later time.

page 73 }

ELMER HALL,

previously introduced as an adverse witness on behalf of the plaintiff, being recalled as a witness for the defendant, testified as follows:

DIRECT EXAMINATION.

By Mr. Godwin:

Q. What is your name?

A. Elmer Hall.

The Court: Wait a minute. Take that chewing gum out of your mouth. Put it down in the spittoon, get rid of it, so you can talk plainly.

Q. Elmer, how old are you?

A. Twenty-eight.

Q. Where do you live?

A. Chuckatuck.

Elmer Hall.

Q. And what is your occupation?

A. Farming and driving a truck.

Q. Now, on the 27th day of July, 1937, were you in the employ of Mr. W. G. Saunders of Chuckatuck?

A. Yes, sir.

Q. What were you doing for him?

A. Driving a truck for Mr. Saunders.

Q. Now, on that morning, did you come down to Portsmouth, down in this section?

A. Yes, sir.

page 74 } Q. What did you bring down here?

A. I brought some oak ties on the truck.

Q. Brought some ties?

A. Some oak ties and some pine lumber.

Q. Where did you carry it?

A. Atlantic Creosoting Company.

Q. Now, who was with you on the truck?

A. William Smith.

Q. How did he happen to be with you?

A. Well, I went up to the store to get some gasoline to put in the truck and William asked—I said: “William, you want to ride out with me?” And he says: “Yes.” And he says: “I am going down the bridge.” I says: “All right, get on the truck.” On the bridge he says: “Elmer, I believe I will ride over with you,” and so he rode on over with me.

Q. Did he work for Mr. Saunders at all?

A. Yes, he worked for him once.

Q. What?

A. Yes, sir, a little bit.

Q. He worked for him once, you say?

A. Yes.

Q. Was he working for Mr. Saunders at the time?

A. I don't know, sir, whether he was or not. He wasn't working that morning.

Q. He wasn't working—? I mean, was he working for him the day that this accident occurred?

A. No, sir.

Q. Now, you did come down here, and on your way back, did you have an accident?

A. Yes, sir.

Q. What kind of truck were you driving, Elmer?

A. Driving a Ford truck.

Q. Do you know whether or not that truck had been inspected?

Elmer Hall.

A. Yes, sir.

Q. Did it have a sticker on it?

A. Yes, sir.

Q. I believe you said on your direct examination the other day what mechanic kept that truck up for Mr. Saunders.

A. Mr. Byrd and Mr. Spady.

Q. At Chuckatuck?

A. Yes, sir.

Q. Now, Elmer, when you were coming along back—let us get to the scene of the accident. When you were coming along back, just prior to this accident, about how fast were you traveling, your truck?

A. I was traveling between 25 and 30 miles an hour.

Q. Were you meeting another automobile?

A. I was meeting an oil truck.

Q. Could you state anything about his speed at the time?

A. He was driving pretty good and fast, and
page 76 } this—fast enough, as the passenger car come up
by me, didn't blow, whether—this threw this car
right off against me; this oil truck couldn't cut between me,
and that oil truck—that throwed the oil truck in front of me,
and I had to go over the other side of the road and try to
get by the best way I could. Then after that I went over that
side, then this oil truck struck me.

Q. Well, now, when you were driving along there, was it raining?

A. Yes, sir. Drizzling rain.

Q. Now, did you know—You were going in which direction?

A. I was going towards Chuckatuck.

Q. Going towards Chuckatuck? That is west, isn't it?

A. Yes, sir.

Q. What side of the road were you on?

A. Sir?

Q. What side of the concrete were you on?

A. I was on the right-hand side.

Q. Well, now, when did you first see this car that came up behind you?

A. I didn't see it until he got right even, even with the cab of my truck.

Q. Didn't he blow?

A. He did not blow.

Q. And at that time do you know about how far
page 77 } the oil truck was away coming to you?

A. The oil truck wasn't far from me. It was

Elmer Hall.

close enough on me—in fact he would have got clean on my side of the highway and let this car go by him on the other side of the road, on the wrong side, on the wrong side of the road—

Q. Do you know about how wide that concrete road is there, Elmer?

A. I imagine about 16 feet.

Q. Well, now, when that car came out there from behind you, did it pass you?

A. It didn't pass—it passed by me, but it run the truck straight in front of me after getting by me, it was driving at such speed.

Q. The truck came in front of you?

A. Yes, sir, it run around straight in front of me; he went by on the wrong side, passed on the wrong side, and put the oil truck over on me.

Q. Well, now, which way did the man—did the oil truck turn when he was confronted with this passenger automobile?

A. Turned on the left side of the road; turned on my side of the road.

Q. Turned on your side of the road?

A. Yes, sir.

Q. And which side did the man in the passenger car pass him?

A. Passed him on his right side, on the oil truck's right side.

page 78 } Q. It did?

A. Yes, sir.

Q. Well, now, did the man in the passenger car stay on the concrete or go off?

A. One wheel went off the concrete.

Q. What do you mean by one wheel?

A. Well, one of his back wheels—two back wheels on the left-hand side of his car dropped off of the concrete.

Q. On the oil truck or on the passenger car?

A. Yes.

Q. What?

A. The passenger.

Q. Well, did the wheels on the passenger car's left-hand side go off of the concrete or not? I mean—

A. Go off of the concrete?

Q. Yes, go off of the concrete, on the shoulder.

A. No, just two of the wheels dropped off the concrete on the shoulder; just two of them.

Elmer Hall.

Q. Well, about how far off the concrete did they go, do you know?

A. They just dropped off the concrete, and this car went by when this oil truck—he just switched a little bit like that (indicating), and this oil truck—threwed him right in front of me.

Q. Well, Elmer, when the man in the oil truck page 79 } turned to the left, or apparently towards you, what did you do?

A. I had to go behind the passenger car, either he come headon into me; I had to go behind this passenger car; throwed this oil truck right straight in the front of the car.

Q. And you attempted to go to your left, did you?

A. Yes, sir, I went to the left. I wasn't going to stay there and see that man kill—

Q. What?

A. I wasn't going to stay there and see that truck run straight over top of me.

Q. Well, now, when it hit your truck, Elmer, where did it hit?

A. Just behind the cab.

Q. Did it hit it with any force or hit it easy?

A. Hit it with right good force. Carried me clean across the road after it hit me. Just bent me up. That is all I know.

Q. Knocked you unconscious?

A. Yes, sir.

Mr. Bowles: I object to leading questions.

Mr. Godwin: Well, I was just trying to get through with it if I could—

Mr. Bowles: Don't let us do it that way, please, sir.

Q. Well, now, Elmer, what would have happened to you if you had held your course and attempted to stop?

A. He would run over me. He would just hit page 80 } the truck right full in the face.

Mr. Bowles: That is not proper, if Your Honor please: Tell what would have happened, and so forth. That is the jury's province.

The Court: What he means is his observation as to what was imminent, and in that sense of the word I think that his question was proper.

Elmer Hall.

Mr. Bowles: I note an exception.

By Mr. Godwin:

Q. Well, now, did you attempt to turn to the right at all?

Mr. Bowles: I object. That is leading. Let us get away from that.

Q. Well, what would have happened, then, to you—

Mr. Bowles: I object to that, sir. As Mr. Williams says, that is already wrong before he gets through with the question.

The Court: I cannot pass on that yet because I have not heard it.

Q. I want to know why you didn't turn to the right then.

A. The reason I didn't turn to the right, because it was a ditch over there, and I didn't know how far that ditch was over there, the green grass was along there; the surest plan was to go to my left side of the highway. The driver of the oil truck had of hit the passenger car and not me—maybe probably he could have got the automobile—in—
page 81 } stead of hitting the car together right in front of me, gentlemen.

Q. Elmer, if the oil truck, when it was meeting the passenger car on its side of the highway—if that had turned to the right and gone off of the shoulder, could the passenger car then have gone between you all?

A. No, sir.

Mr. Bowles: If Your Honor please, that is a question for the jury.

The Court: I think the objection is sustained as to that.

Mr. Bowles: That is just a question for the jury. Tell exactly what they did and let the jury decide.

The Court: Objection sustained to the question as now asked.

By Mr. Godwin:

Q. Elmer, at the time that you saw this truck and this passenger car facing each other, did you do anything besides turn to the left?

A. Yes, sir. I slapped on the brakes one time, and then

Elmer Hall.

I saw the oil truck turn out in front of me; I throwed this truck in second gear and tried to get out of the way of it.

Q. Well, now, do you know whether or not the oil truck put on any brakes?
page 82 } A. No, I do not.

Q. Well, now, how far over on your side of the road did the oil truck come, Elmer?

A. Come clean over on my side.

Q. Came clean over on your side?

A. Yes, sir.

Q. Well, now, if that oil truck had stayed on its side of the road—

Mr. Bowles: Same objection, if Your Honor please.

The Court: I will have to wait until he gets the question completed. Do not answer the question.

Q. If that oil truck had stayed on your side of the road after it came over, would it have had an opportunity to have passed to the wrong side of you?

The Court: One minute—

Mr. Bowles: Purely for the jury. It is a question of distance.

The Court: Objection sustained. You could ask for distances and things of that character, but you are asking for his opinion now.

Q. Well, now, could you have cleared it on the left-hand side of the road or the right-hand side of the road?

Mr. Gilman: Same objection.

The Court: Objection sustained.

Mr. Gilman: Your Honor, he is not entitled to
page 83 } express an opinion.

Mr. Bowles: Of course not.

Mr. Gilman: On the question of whether this truck would have cleared it.

The Court: I do not think he can. Of course he can give estimates of distances and speed and so forth. You are asking him squarely, in my judgment, for his opinion.

Mr. Godwin: Well, Your Honor, I want to except to the Court's ruling, of course.

Mr. Williams: Your Honor, let me say this: If a man

Elmer Hall.

acts in an emergency he has got to act on opinion. It seems to me it is proper for the witness to tell the jury what his opinion was on which he acted, in taking the course which he took.

Mr. Bowles: If Your Honor please, it is a question for the jury, maybe, whether he was in an emergency.

By Mr. Godwin:

Q. Well, now, let me ask you this question. The Court has overruled those others. When you turned to your left, as you say you did, in order to prevent a headon collision, had you turned soon enough to have permitted the oil truck coming down on your side of the road to have passed to the rear of your truck?

page 84 } A. Yes, sir.

Mr. Bowles: Objection.

The Court: Go ahead. He has answered that, and I will let it stay in the record.

Mr. Bowles: We note an exception.

Q. What did you say?

A. I said "Yes."

Q. Well, now, after the oil truck got on your side of the highway, did it stay over there?

A. No, sir, it didn't stay over there. After he went over to my side, then he pulled over to me.

Q. He cut back to you?

A. Cut back to me.

Q. Is this a picture of the oil truck that ran into you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Which way are the truck wheels, the front wheels, cut on that truck?

Mr. Bowles: I object to that, if Your Honor please. The picture speaks for itself.

The Court: The picture shows for itself. Objection sustained.

Q. All right, sir. Is this the log truck that you were driving?

Elmer Hall.

page 85 } A. Yes, sir, this is the one.

CROSS EXAMINATION.

By Mr. Gilman:

Q. Elmer, what time did you leave Chuckatuck?

A. What time did I leave Chuckatuck? I left Chuckatuck just as soon as I could load. I imagine that was about—

Q. That doesn't mean anything to me. What time did you leave Chuckatuck?

A. I don't know, sir, right now, whatever time I left there, but I went to work at seven o'clock that morning; I had to load.

Q. How long did it take you to load?

A. I don't know. It must have been half an hour or an hour.

Q. You left there between seven-thirty and eight?

A. Somewhere like that.

Q. And how far out from Chuckatuck to Portsmouth?

A. To Portsmouth?

Q. Or to the place, the creosoting place, right here on the edge of Portsmouth?

A. It is about twenty, twenty-two or twenty-three miles.

Q. What were you doing from seven-thirty to eight until the time you got here?

A. After I got down to Portsmouth I had to wait until the man signed the ticket and unloaded the truck, showed me where to put the stuff at.

page 86 } Q. Then where did you go?

A. After I got the truck unloaded I was coming on back home.

Q. Where did you get your lunch?

A. Where did I get my lunch?

Q. Yes.

A. I eat there, right down there at the plant. I had my lunch in a bag.

Q. You ate at the plant?

A. Yes, sir.

Q. Was it raining?

A. Yes, sir.

Q. And you and this boy Smith were on your way home?

A. On my way home.

Q. And the road was straight?

A. Sir?

Elmer Hall.

Q. The road was straight?

A. Yes, sir.

Q. At the point of the accident?

A. Yes, sir.

Q. And you were traveling 25 or 30 miles an hour?

A. Yes, sir.

Q. And the oil truck going much faster, I believe you stated?

A. Yes, sir.

Q. Now, did you look in your mirror or did you see this car coming from behind?

page 87 } A. No, sir. I didn't see the car, because it didn't blow, until he got right up against me.

Q. You said it didn't blow; now you say it did blow?

A. I say it didn't blow.

Q. What?

A. I say right then it didn't blow.

Q. Well, did it blow?

A. No, sir, it did not blow.

Q. And you did not look in your mirror overhead?

A. No, sir.

Q. And did you have a mirror?

A. Yes, sir.

Q. On the side with an arm?

A. On the side of the truck.

Q. And you didn't look in that?

A. No, sir.

Q. Now, you say this sedan didn't get by you?

A. No, sir; it didn't blow.

Q. Did it come by you? Did it pass?

A. After it got right up against me, I see the car then, and then it went on by like that (indicating), and he were too close to me, and the oil man were too close, for me to do anything, and I had to go on the other side of the highway and let the car pass him on the other side.

Q. How close were you to the oil truck?

page 88 } A. Well, I wasn't far from it.

Q. As far as from me to you, or—?

A. Sir?

Q. As far as from me to you?

A. About as far as from me to about—close to me from here back over there where that wall is.

Q. Over here, this wall? How far is that, for the purposes of the record? You mean over there to the "No Smoking" sign?

L. S. Spruill.

A. Right beyond, where that little light is at, that little button. About 60 feet.

Q. About 25 or 30 feet?

Mr. Godwin: May I have it stepped off?

Mr. Gilman: The courtroom is forty feet, and that is certainly less. He said to this corner, and I should say it cannot be over 35.

Mr. Godwin: You said 30.

The Court: All right, put it in the record. Somebody step it off. It is stipulated it may be measured and put in the record. Go ahead.

Mr. Godwin: All right, sir.

By Mr. Gilman:

Q. Now, at that point the oil truck came over entirely on your side of the road?

A. Yes, sir.

page 89 } Q. And it was then within thirty or thirty-five feet of you and traveling at a considerably more rapid or greater rate of speed than thirty miles an hour?

A. Traveling much faster than I was. I don't know how fast he was traveling. But he was traveling faster than I was.

Q. And then I believe you stated that you put on your brakes and shifted to second gear and made an effort to follow the sedan?

A. Follow this car.

RE-DIRECT EXAMINATION.

By Mr. Godwin:

Q. Elmer, about what time was it that this accident happened?

A. Just after one o'clock.

Q. What?

A. I had dinner at the plant at one o'clock, and it was just on our way up there—

Q. Shortly after one?

A. Shortly after I ate my lunch, yes, sir.

Witness stood aside.

page 90 }

L. S. SPRUILL,

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

L. S. Spruill.

DIRECT EXAMINATION.

By Mr. Gilman:

Q. What are your initials, Mr. Spruill?

A. L. S.

Q. And where do you live?

A. Geneva Park.

Q. That is in Norfolk County?

A. That is in Norfolk County, yes, sir.

Q. And you are employed by whom?

A. Rose Supply Station.

Q. Were you employed by the Rose in July, 1937?

A. Yes, sir.

Q. Did you go to the scene of an accident in July between two trucks on the King's Highway?

A. Yes, sir.

Q. I believe you moved one or both of those trucks?

A. We moved the tank car.

Q. The oil truck?

A. And we helped pull this lumber truck back off of this tank car.

Q. Do you know how soon after the accident you got there?

A. How soon after it happened I got there?

page 91 } Q. Yes.

A. About—not over half an hour, I don't think.

Q. Well, how far is your place of business from the scene of the accident?

A. Two miles.

Q. Now, what did you find when you got there, Mr. Spruill?

A. When I got on the scene of the accident this tank car was on the right-hand side of the road with the front part of it in the ditch, the two front wheels.

Q. Now, that is the right-hand side headed which way?

A. It was coming into town, headed east.

Q. Headed east, and the two front wheels were where?

A. In the ditch.

Q. On which side?

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

Q. All right, go ahead.

A. And the right wheels of the tractor, the back part of it, the back wheels, the right wheel was right on the edge of the concrete. I disremember whether it was off or on the edge, but it was so near it. The trailer wheels—one of the dual wheels was setting off of the edge of the concrete; it

L. S. Spruill.

was two dual wheels there, you see, double tires; and this lumber truck was wrapped around the front part of it. If I can remember it was a long wheel-base truck, and page 92 } the tractor part was setting out in the middle of the road.

Q. Maybe you can illustrate it better with these toys. Come down here. Stand so the jury can see you. Assuming this is the road; this is east, coming into town, and this is west. That is the shoulder on that side and here is the shoulder on this side. Now take—or rather the edge of the concrete—Take these toys—

A. Which is the oil truck?

Q. This is the oil truck headed in; you place that approximately how you found it. This is the edge of the concrete, that pencil mark.

A. Well, this one—(Witness places truck)—this was wrapped around here, you see.

The Court: A little louder.

Q. Talk a little louder, so everybody can hear you. You said that was wrapped around here?

A. This truck was bent in, bowed like. In other words, right around—the front of this truck—up against the headlights—

Q. You say “this truck”. That is the lumber truck?

A. The lumber truck was bowed around the oil truck.

Q. The front of the oil truck?

A. This is the best I can put it, the best of my knowledge, as long as it has been.

Q. For the record, you have got the oil truck page 93 } placed on its extreme right, with the front two wheels of the tractor entirely off of the concrete and the right rear wheel of the tractor—where is that, off, or approximately?

A. Well, the dual wheels; one of the dual wheels was approximately off the edge of the concrete.

Q. And the rear right wheel where?

A. The rear right wheel?

Q. Yes.

A. You mean on the truck?

Q. No, on this—

A. Tractor?

Q. No, this—whatever you call it.

L. S. Spruill.

A. On the concrete.

Q. How far on the concrete approximately?

A. You mean the dual wheels?

Q. Yes.

A. Well, they were pretty good and big, you know. You can just use your own judgment as to how the dual wheels was.

Q. You mean the right one—was the right wheel on the edge of the concrete on the right side?

A. Well, the outside dual was right on the edge of the concrete, but the inside dual was about six inches, I should judge.

Q. You have the lumber truck directly in front of the oil truck on the oil truck's side of the road, with the
page 94 { tractor part entirely off the concrete on the truck's right side of the road; is that correct?

Mr. Williams: That is not the way he has got them placed.

Q. I believe the right rear wheel of the tractor is on the concrete.

A. The road was blocked by the back part of this lumber truck.

Q. And you carried which one in?

A. Carried the tank car in.

Q. Take your seat. (Witness does so) What was the condition of the weather and the road, Mr. Spruill, do you remember?

A. The road was wet. It was raining then.

Q. Hard rain or drizzling or what?

A. Well, it wasn't raining so hard; just drizzling.

CROSS EXAMINATION.

By Mr. Williams:

Q. It had been a hard rain that day, hadn't it, Mr. Spruill?

A. It has been so long; it seems like it rained hard a little while and then slacked up, drizzling. When I got there it was only drizzling.

Q. Yes. Now, how wide a tractor was that that was hooked to this oil trailer?

A. How wide?

Q. Did that have dual wheels, rear dual wheels?

A. Yes, it had dual wheels.

L. S. Spruill.

page 95 } Q. Now, how wide was the oil trailer?

A. I couldn't tell you that. I didn't measure it. I mean, so far as being wide, I don't know the width of it.

Q. Well, the ordinary tread is five and a half feet, isn't it? Isn't it?

A. I couldn't tell you a thing in the world about that part of it. I don't know the width of trailers.

Q. You are a mechanic?

A. No, sir, I am not a mechanic.

Q. Well, this trailer with the oil tank on it had extra heavy large tires on it, didn't it?

A. It didn't have any extra large tires required for the load, I don't think.

Q. Well, they are at least ten or eleven inch tires, aren't they?

A. I imagine they were.

Q. Yes. Now, in addition to that there is a space between those wheels; the two tires do not fit right close to each other; there is a space of an inch or two between the two tires, isn't there?

A. Not more than an inch.

Q. Yes. Well, that would make it about a foot wider on each side above the ordinary tread, wouldn't it?

A. Not above the ordinary tread; I wouldn't think so.

Q. Well, if the ordinary tread comes to the outer edge of the inner tire, then if you have a ten or eleven inch tire and an inch or two tread, it is about a foot wider, isn't it?

A. I don't know a whole lot about those tires.

Q. Well, now, this picture shows there is a slight overhang over the outer tire, doesn't it?

A. You mean of the fender of that truck?

Q. Yes, and the tank on top of it.

A. It has been so long I don't remember how that was.

Q. Well, it has dual wheels, anyhow?

A. Yes, sir, it has dual wheels.

Q. Well, what width would you say that trailer is, do you know? Isn't it approximately a seven and a half foot trailer?

A. It had clearance lights on it, so evidently it was probably—it must have been seven feet because it had clearance lights, and I don't think any law requires them under seven feet.

L. S. Spruill.

Q. You don't think any law requires them under seven feet?

A. And it had clearance lights required under the law there.

Q. Yes, sir. Now, there was an overhang beyond the rear wheels, wasn't there, right there?

A. I don't remember whether it was or not.

Q. All right, sir. Now, then, of course you do not say that this is accurate as you have put these here, do you?

A. That is the best of my knowledge, as long as it has been, to place it just about as close as I could get at it.

Q. Well, now, you have there in that illustration page 97 } with these two little toys the Matlack truck colliding with the Saunders truck about the front wheel and just in front of the cab, haven't you?

A. That is the way I have got it there. The truck was so short—

Q. Well, now, isn't this picture that has been introduced in evidence a picture of the Saunders car that you pulled out?

A. Yes, that is a picture of it.

Q. Now, doesn't that picture show that the Saunders truck was hit behind the cab, about the fifth wheel, and wasn't damaged at all in the front?

A. It shows it was hit right in the door here, right in the cab door, right in the cab part.

Q. Where is it bent? Isn't it the chassis behind the cab that is bent?

A. Yes, sure. I say I had forgotten all about this until I had got that summons.

Q. You had?

A. Yes.

Q. Then there is nothing definite about it so far as you are concerned? Now, as a matter of fact, Mr. Spruill, wasn't this truck about in this position, and didn't this truck go into it and smash the front of it down, and wasn't the back of this oil truck, now, diagonally across the highway, about a forty-five degree angle?

A. No, sir.

page 98 } Q. Didn't it form a V?

A. No, sir.

Q. You are not exactly certain about this thing, it happened a long time ago; you haven't remembered it, have you?

William Andrew Taylor, (Col.)

A. I remember enough about it, it wasn't setting like that.

Q. Well, the rear wheel was on the concrete, wasn't it?

A. Of course it doesn't mean anything to me, either way.

Q. I understand. I am just trying to get the truth of it, if you know it, if you remember it. That is what I am trying to find out.

A. What did you ask me?

Q. Was this truck in the ditch?

A. Which, the lumber truck?

Q. Yes.

A. The front part of it was.

Q. What?

A. The front part of it was.

Q. And you are not certain about where it was hit?

A. I know where it was hit. I mean, so far as it was being hit; it was hit in the side.

Q. I mean about the front of the cab or behind the cab.

A. You haven't got either truck there, either one.

Q. When you say "either truck" you mean the toys there?

A. Yes, the toy, that is what I mean.

Witness stood aside.

page 99 } Mr. Godwin: If Your Honor please, these pictures have not been introduced in evidence.

The Court: Yes, they have been introduced. See if they are not marked on the back by the stenographer?

Mr. Godwin: "A" to "E" with a circle around them, yes.

page 100 } WILLIAM ANDREW TAYLOR, (COL.),
a witness introduced on behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gilman:

Q. Taylor, you live on the King's Highway?

A. Yes, sir.

Q. On the corner of the King's Highway and what is that?

A. I live on the corner of Main Street and King Highway, on the southwest corner.

Q. And where were you at the time of this accident?

A. I was walking down the King's Highway on the south side of the road and within a short distance of my home.

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Q. And traveling in which direction?

A. I was going west.

Q. That would be going in the direction in which the lumber truck was going?

A. Yes, sir.

Q. And the oil truck was approaching it?

A. Going east.

Q. Going east. And how far from the scene of the accident?

A. Well, right at that particular time I judge—I didn't make a good survey or anything, but I think I was about fifty yards at that time.

page 101 } Q. Now, tell the jury just what you saw.

A. I was walking down the King's Highway. I had been held up at the D. P. store on account of a down-pour of rain, and it had slowed up, and it was drizzling, and I was on the south side of the King's Highway going west. As I got within fifty or seventy-five yards, more or less, of my home, I saw an oil truck approaching me, also on the south side of the King's Highway. I heard a *flashing* of a motor behind me and I looked back over my right shoulder, which would be on the north side of the King's Highway; I saw a log truck coming along, the lumber truck. Just at that same time I saw a green sedan pull out from behind it and begin to race down the road to get by. They raced down the road until they had reached where I was then and began to pass; about that time this green sedan was going at such a rapid rate of speed it had gotten too close to this oil truck, which was approaching from the west, going east, and he going west. He couldn't get in front of that oil truck so he went by that oil truck on the south side at Main Street. When he went by I saw the driver of the oil truck made a little turn northwardly and continue on. I looked back and I saw this lumber truck had put on brakes, apparently had, and the wheels wasn't turning no more. It then began to go in a kind of sliding form and gradually creeping across the road to the south. Just about that time I heard

page 102 } a a distressing cry and the crash. I had to jump the ditch, and when I jumped in the ditch they piled up on the south side of the road in the ditch.

Q. Now, the south side of the road would be the oil truck's right side of the road; is that correct?

A. Yes, sir.

William Andrew Taylor, (Col.)

Q. You have stated that the oil truck pulled a little to the left. Did the oil truck at any time ever cross the center of the road?

Mr. Williams: I object to that question, Your Honor, as leading, definitely leading.

The Court: I sustain the objection.

Q. How far to the left, relative to the center of the road, did the oil truck go? Put this toy here as near as you can, in the center—

Mr. Godwin: Tom, let's make that road a little bit nearer to scale. You have got it all out of proportion there.

Mr. Gilman: You want to make it nearer—?

Mr. Godwin: I want to make it about what it would be.

Mr. Gilman: That is not wide enough.

Note: Mr. Godwin draws diagram.

Mr. Gilman: You mean in proportion to the toy?

Mr. Godwin: Yes, in proportion to the toy.

Mr. Gilman: All right; Taylor, will you come page 103 } down here?

Note: Witness goes down to counsel table.

Q. This coupling is bad. Main Street will be over here.

A. I know, but not that way. You see, I live on this side here. That is north over here.

Q. No, this is north.

Mr. Williams: Let him have north where he wants it. Then he can get it straight.

Q. Turn it around. There is east. Well, here: turn it, fix it like you want it, Taylor.

Mr. Williams: Let him have—

A. This is Main Street.

Q. Mark it "Main". That is a street, an unimportant highway, is that correct?

A. Yes, sir. Yes, sir, Main Street.

William Andrew Taylor, (Col.)

Q. This is east. I will have to change it. That is west.

A. These cars was traveling in that direction; when this green sedan came around, when he got about here, this oil truck had reached about there; this oil truck pulled a little like that. This green sedan come in Main Street, back out behind here. This truck then had begun to skid, just like that (indicating).

Q. What truck? When you say—

A. This lumber truck began to skid, just like that. When he got right here, this truck struck him, right page 104 } here, like that, between the chassis and the cab of his car. This bent across the road in such an angle with it, and the cab—pulled kind of like that, and completely blocked the highway. The front—this oil truck—this wheel, left front wheel, was off; these two wheels on the trailer of this oil truck on the south side was off of the concrete. The two on the north side of the truck were up on the concrete, but the one to the rear was a little more out on the middle of the road in the north than the one in front on the oil truck.

Q. Now, I understand, Taylor, from the position you have there, that all of the tractor of the oil truck was off of the road on its right side?

A. No, sir, all of the oil truck was not off; the front of the oil truck.

Q. I say, the tractor; the tractor I am talking about now.

A. Yes, sir, the motor.

Q. Yes.

A. Yes, sir.

Q. And the two right wheels of the trailer were off?

A. On the south side, on the dirt.

Q. On the dirt?

A. Yes, sir. The front one to the east was a little more off than the one to the rear, the west, that would be the west; that was a little nearer the concrete than the one page 105 } in front, the rear one a little more farther out in the road than the front of the car.

Q. Then the green car, I understand you, came around here, going into Main Street?

A. Into Main Street. Main Street at that time was about 40 or 45 feet at—it was no ditches along that street; of course it is now, since the County has ditched it and drawed it in.

Q. You said you heard a noise and looked behind and saw what truck coming?

William Andrew Taylor, (Col.)

A. I saw the lumber truck coming. Just at that same moment I saw the green sedan pull out from behind it.

Q. You also said that it continued down the road—that they continued down the road racing. Which two were you speaking of?

A. Sir?

Q. Which two were you speaking of when you said they were racing down the road?

A. The lumber truck and the green sedan was coming, the motors were roaring as if racing to get by one another.

Q. And racing, going in which direction?

A. Going west.

Q. Now, going back to my question about the oil truck: you say when the green car made an effort to pass it turned a little to the left; how far did it turn to the left?

page 106 } A. Well, made a little sharp turn, I would say turn; I said it made a commotion in the statement I once said; they asked what I meant by a commotion, and I said as if to turn out and allow the green sedan to pass it.

Q. Well, how far did it go to the left relative to the center of the road?

A. Well, it probably went that far over the center, as near as I could say; in my position right there and the excitement I was in I couldn't say just exactly how far, but seemingly not far, because when he crashed he was on his right side of the road.

Q. Was he entirely on his right side of the road, both tractor and trailer, when the crash came?

A. Yes, sir.

Q. For the purpose of the record, you said that this oil truck, you thought, went over the center about a certain distance: how many inches would you say that was?

A. Well, he went over some distance; as near as I could see it, now, I couldn't make any survey just about how far.

Q. Six inches, eight inches, or a foot?

The Court: Let him place it himself.

A. Well, them cars looked—well, I figure about like that. About that much over the center.

The Court: About eighteen inches?

A. Yes, about eighteen inches, I would say.

William Andrew Taylor, (Col.)

page 107 } Q. Not over eighteen inches, I believe you said?
You say not over eighteen inches?

A. I said about, more or less, somewhere in that neighborhood.

Q. I believe the driver of the oil truck was killed. Do you know what hit him?

A. There was some lumber being carried back, some lumber in some way on this truck, and when the trailer swung around—we saw blood on one of the pieces of timber that was on there, and it was a large jagged wound, tore his throat out and cut the side of his mouth. Whether that lumber got blood from that or the other parties I could not say.

Q. Was he killed instantly?

A. When we pried him out he was dead, when we laid him on the ground.

Q. How did you have to pry him out; why was it necessary to pry him out?

A. He was pinned in there in such shape that he couldn't get out; he was pressed against the steering wheel, and I run over in my shed and got a crowbar and myself and Mr. Monroe and old man Lyons pried him out and laid him on the side of the road.

Q. Taylor, was anyone else present, or were you the only one at the scene of the accident?

A. I was the only person in sight; didn't see nobody coming down the road. I didn't see anyone around ap-
page 108 } proaching anywhere, and it was drizzling raining,
and it didn't nobody come to the scene until after
the crash, and they run out of the store and around in different places.

Q. And I believe you have been summoned by both sides?

A. Sir?

Q. You have been summoned by both sides in this case?

A. Yes, sir.

Q. How far from Main Street was this lumber truck when it started this skidding?

A. I never have stepped that off or measured that, because I never thought any more of it, but I will say it was about 35 yards or more, practically 35 or 40 yards. I have never stepped it off.

Q. Thirty-five or forty yards east of Main Street?

A. East of Main Street.

Q. When he started skidding?

A. That is right.

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Q. And did he ever stop skidding until he went in the ditch on the left-hand side?

A. Well, he never stopped until the crash, because he was skidding right directly to me, because that is why I jumped in the ditch.

Q. And the crash was where relative to Main Street?

A. Sir?

Q. Where was the crash; how far was the crash from Main Street?

page 109 } A. The crash from Main Street? I would say the crash was about 35 or 40 feet; 35 or 40 feet or a little more, maybe, though I would say about 35 or 40 feet.

Q. And how far—

A. Sir?

Q. How far was the oil truck from Main Street when it turned a little to the left?

A. How far was he from Main Street?

Q. Yes.

A. He was just west of Main Street, entering the edge of Main Street.

Q. About how many feet?

A. That road at that time was around about 35 feet wide, I would say.

Q. About how many feet from that?

A. Sir?

Q. How many feet from Main Street would you say?

A. He was just at the edge of Main Street as the green sedan cut in Main Street.

Q. And Main Street at that time was how wide?

A. About 35 feet then.

Exhibit

CROSS EXAMINATION.

By Mr. Godwin:

Q. William, I believe you said that it had been raining and you had been held up on account of showers?

page 110 } A. A hard rain, I said.

Q. Hard rain? It was then raining when the accident occurred?

A. Yes, sir, it was raining when the accident occurred.

Q. What was the condition of the concrete and of the shoulders?

A. Water was sloshing on the concrete.

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Q. Was it a—

A. It was still drizzling rain.

Q. Was it slick, slippery?

A. Well, the concrete was wet; water standing on it.

Q. Now, as you walked along, William, to your home, you saw this oil truck coming meeting you, didn't you?

A. Yes, sir.

Q. Yes. Now, what speed would you say that that oil truck was going?

A. Well, as I said once before in talking and saying to different people, I can't term speed very well walking and the car traveling, but I did say and I would say around 25 or 30 miles an hour, probably 25 or 30.

Q. Now, is that the oil truck, William?

A. Sir?

Q. Is that the oil truck?

A. Yes, sir, that is the oil truck.

Q. Now, William, didn't you say right after this accident happened that you saw the oil truck coming in
page 111 } one direction and you turned around and saw a log
truck coming in the other direction, and that—?

Mr. Bowles: If Your Honor please, I think he is making him his witness when he is asking these questions. We have never asked him one solitary question about the speed feature. Now he has asked him and Taylor has answered, and I think he is bound by it.

The Court: What position do you take, Mr. Williams?

Mr. Williams: If Your Honor please, it is his witness and he is on cross examination.

Mr. Bowles: I understand, but we have asked him nothing in the world about that particular feature of the accident.

Mr. Williams: That is the only way in the world I can show it, isn't it?

Mr. Bowles: Our position is you have no right to cross examine him on new matters; he is your witness.

Mr. Godwin: Your Honor, I don't care whose witness he is, if I know he has made a statement that is different from that, and I am taken by surprise, whether he is my witness or his witness, I think I have got a right to ask—

The Court: I overrule the objection.

page 112 } Mr. Bowles: Exception. If Your Honor please,
I think we ought to except also to Mr. Godwin's statement, his testimony as given in the record, as to what he knows.

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The Court: I did not catch that last.

Mr. Bowles: I just want to note an exception to Mr. Godwin's statement as to what he knows. His testimony, Mr. Godwin's.

Mr. Godwin: Well, I was taken by surprise, Your Honor.

Mr. Bowles: You have already said what you said, and I have excepted to it.

The Court: Proceed.

By Mr. Godwin:

Q. William, right after this accident, didn't you tell me that you saw these two trucks coming, and that the oil truck was traveling faster than the lumber truck, and that the lumber truck was going 30 to 35 miles an hour, and that the oil truck was going a little bit faster, probably 35 to 40 miles an hour? Didn't you tell me that?

A. No, sir, I don't remember saying that ratio of speed. I do remember telling you that I couldn't term speed walking, especially where I was meeting a car, and you say: "Well, would you say this much and that much," and I said: "Well, for the sake of argument, say whatever speed you want to."

That is the words I told you. In other words I page 113 } told you if you wanted a sworn statement to this regard, I wanted you to give me a carbon copy, so my exact words could not be transmuted into something, bring it to me and go before a notary public, that I would sign it and notarize it. You never did come and do that. Of course I will admit having any conversation with you, and probably maybe you say: "Well, would you say 35?" And I probably said "Yes" to it for the sake of argument.

Q. For the sake of argument?

A. Yes, sir, just to keep from harassing me, trying to make me term speed after I told you I couldn't term speed from walking and a car approaching. Those are the facts that I am telling as I saw them in this accident. I am not interested in either party, and I told you that in the beginning.

Q. Well, now, William, you said that—

A. Yes, sir.

Q. —you would make a sworn statement?

A. Yes, sir.

Q. No one asked you to make a sworn statement; that was your own suggestion, wasn't it?

A. Sir? No, sir, you asked me to make a sworn statement and I told you if you carry me before a notary public; you told me you were a notary public in Nansemond County.

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Q. Well, didn't you make a statement, William?

A. Sir?

page 114 } Q. Didn't you make a statement and read it,
and haven't you a copy of it?

A. Copy of it?

Q. Yes.

A. I merely talked it over with you. Yes, I made the statement, yes, sir.

Note: Witness produces a paper from his pocket.

Q. Well, I am not asking you to read it.

A. Here it is.

Q. Who did you make this statement to, William?

A. I don't know, sir. That is what I told the man, he asked me for a statement about the crash; he told me he was a claim agent for an insurance company, and I told him that I was not interested in nobody; I was telling him just as it happened, and just as I saw it, and if he would go down and notarize it I would sign it, so my exact words would be there just as I said it. He dictated it just as I told him, word for word.

Q. Well, now, William, isn't this statement one that you made for someone else and not me?

A. No, but you asked me to make one for you and said you were a notary public and you said you would bring it back and notarize it. You never did. I would have given you the same statement that I gave. We were merely talking, and a statement would have to be—

page 115 } Q. Just one minute, now.

A. Sir?

Q. Just one minute. Haven't you got another statement that you signed?

A. No, sir, I have not.

Q. Never have signed any other statement in your life?

A. No, sir. I have not got any that I have signed.

Q. Now, this statement that you talked about is a statement made by you to someone else, and it was notarized by someone named Claudia Major in the City of Portsmouth, wasn't it?

A. Yes.

Q. You never went with me to any notary public?

A. No, sir. I don't say you notarized; I say if you did I would make you a statement.

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Q. Well, who did you make this statement to? It wasn't me, was it?

A. No, sir. But you said I made a statement.

Q. It was for someone else, wasn't it?

A. Sir?

Q. It was for someone else, wasn't it?

A. I don't know, sir. I asked you to bring me a carbon copy so my exact words would be there, so they couldn't add anything to it or take it away, take anything away, just what I actually saw.

page 116 } Q. Now, William, then this statement was made to somebody other than myself, that written statement that you made to somebody?

A. Yes, sir, yes, sir, yes, sir, yes, sir.

Q. Now, I believe you said, William, that when they came down there, approaching from different directions—do you know the speed those trucks were making at all?

A. I do not.

Q. You don't know?

A. No, sir.

Q. Well, now, when this car was on the north side of the road, the Saunders lumber truck going west, how far were these two trucks, the oil truck and the Saunders truck, apart when you observed this green car attempting to pass?

A. About 75 yards, I should say.

Q. About 75 yards?

A. Yes, sir.

Q. Did this car go on by the lumber truck?

The Court: The green car pass by the truck?

A. It did, yes.

Q. Then when you said "racing" just now, you didn't mean to tell the jury that the lumber truck and the green car were racing up and down the highway, did you?

A. I said the motors was roaring as if racing; that is what I said.

page 117 } Q. Wasn't this car pulling out to pass the lumber truck?

A. Pulling out to pass it?

Q. And the lumber truck let it pass, didn't it?

A. I don't know whether it did or not.

Q. Well, it passed it, didn't it?

A. It passed it, yes.

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Q. And this lumber truck put on brakes, didn't it?

A. Apparently.

Q. When they got up here I believe you said that the oil truck cut to the left, didn't you?

A. A little to the north.

Q. A little to the north?

A. Yes, sir.

Q. Did at any time the oil truck cut to the right and attempt to do on the shoulder?

A. I don't know. I jumped in the ditch about the time the crash come and I wasn't watching; this truck was skidding towards me when they crashed; that is when I jumped in the ditch. After I saw this truck skid right directly towards me, then I jumped—I attempted to jump, when the crash came, into the ditch; I wasn't watching that oil truck at that particular time.

Q. Did this car there stay on the concrete?

A. What car?

Q. The green car.

page 118 } A. No, I told you it pulled in Main Street, on the shoulder of the road; Main Street was about 35 feet wide at that time, and it pulled off on the dirt to pass, and when he—

Q. Passed on the shoulder, or was he still on the concrete?

A. He passed on the shoulder. Passed the oil truck on the shoulder of the road, in Main Street, right in front of Main Street.

Q. You mean that man came down and whipped his car in a 30-foot street and then whipped it out and passed on around?

A. There is room between that concrete and the ditch at that time for a car to pass, even though he didn't get in Main Street. You can park a car on the shoulder of the road behind that sixteen-foot road; there is space to do that.

Q. Now, when they came down there and they were confronting each other, the green car and the oil truck, you say the oil truck did not turn to its right but turned to its left, towards the north side?

A. Cut a little north, yes, sir.

Q. To the north?

A. Yes, sir, to the north.

Q. And it was after he cut to the north that the truck attempted to cut over to the left, wasn't it?

A. That is when I looked back and saw him skidding.

Q. To the left?

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A. His wheels were locked; they wasn't turning over.

Q. Yes?

page 119 } A. They were skidding.

Note: At this point the Court and counsel retired to chambers. Mr. Godwin presented to the Court the question of the admissibility of a statement in writing attributed to the witness. After discussion and argument the Court ruled as follows:

The Court: I think the statement is inadmissible.

Mr. Godwin: We note an exception on the grounds stated and offer the statement in evidence of what we intend to prove.

Note: The Court and counsel return to the courtroom.

page 120 } By Mr. Godwin:

Q. Now, William, I believe you said that two of the wheels of the oil truck were off of the highway on the south side, were off of the concrete portion of the highway on the south side of the road after the accident occurred; is that true?

A. I said both of the front wheels of the oil truck was off of the concrete on the south side; the two rear wheels of the oil truck was on the north side—was on the concrete; the rear wheels on the south side was off on the shoulder, on the dirt.

Q. Now, come here and place this here.

A. Sir?

Q. Come here a minute and place this here and show us just exactly what you mean by that, about that car. Now, there is the side of the road.

A. There is the side of the road. These two on this over here are further out on the road than the two wheels, these two front wheels of the truck. Here, this wheel was down in the edge of the ditch, and this wheel was off of the concrete.

Q. Well, now—

A. These two wheels over on the north side was on the concrete; the rear wheels were further out on the concrete than the front wheels; these two wheels were off on the dirt.

Q. Then you mean that all of the wheels of the oil truck on its right-hand side were off of the concrete

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page 121 } on its right-hand side?

A. On the south side.

Q. Yes.

A. Yes. Including the front wheel of the oil truck on the left side.

Q. Yes. Now, William, I believe you said in response to a question by counsel that—

A. Sir?

Q. I believe you said in response to a question by counsel that this green car, unknown car, went off of the concrete and passed this oil truck off the concrete; is that right?

A. Yes, sir.

Q. William, do you know Mr. J. C. Harris?

A. J. C. Harris?

Q. That man who took the pictures of this wreck at the very time it happened?

A. No, sir, I don't know Mr. Harris. I saw somebody out there, somebody taking pictures out there, about 15 times.

Q. You saw him again after that?

A. Yes, sir, I saw him again the other day, yes, sir.

Q. Didn't you make a statement in his presence the other day that this green car passed the oil truck on the concrete?

A. No, sir.

Q. You didn't make that statement?

A. No, sir.

page 122 } Q. All right. You told the Coroner when you were at the Coroner's inquest that the green car passed between the oil truck and the lumber truck, didn't you?

A. No, sir.

Q. What?

A. I told the Coroner the oil truck passed between which?

Q. Between the two trucks, didn't you?

A. No, sir.

Q. You didn't tell him that?

A. No, sir.

RE-DIRECT EXAMINATION:

By Mr. Gilman:

Q. Taylor, this little place I have marked over here represents your home; is that correct?

A. Yes, sir.

H. E. Nichols.

Mr. Gilman: I want to introduce this diagram.

Note: Diagram in question marked "Exhibit W. A. Taylor No. 1" and filed in evidence.

Q. I will mark that "Taylor". That is on what corner?

A. That is on the southwest corner.

Q. And at the time of this accident Broad Street was about how wide?

Mr. Bowles: Main Street.

A. About 35, around 35 feet. It was running north and south.

Witness stood aside.

page 123 } H. E. NICHOLS,
a witness introduced on behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. Your name is Mr. H. E. Nichols?

A. Yes, sir.

Q. What is your business, Mr. Nichols?

A. Brake mechanic.

Q. Brake mechanic?

A. Yes, sir.

Q. With what firm are you connected?

A. Johnson Brake Sales and Service, Norfolk.

Q. Can you talk a little louder so that these gentlemen can hear you? How long have you been in that business?

A. A little more than ten years.

Q. Do you in the course of your business adjust brakes on trailer and tractor jobs?

A. Yes, sir. I more or less specialize in it.

Q. Have you ever driven a tractor-trailer job?

A. Yes, sir.

Q. Have you ever driven them to base the adjustment of brakes in the course of your business?

A. We have to adjust them on each job.

page 124 } Q. And you have been doing that for about ten years?

H. E. Nichols.

A. Yes, sir, better than that.

Q. What brake outfit does your company represent? What type of brake?

A. We are dealers for B. K. power brake.

Q. Mr. Nichols, it is in evidence here—

Mr. Williams: I object to counsel stating what is in evidence. That would be giving the witness what he should not know.

Mr. Bowles: I am offering this witness as an expert, if Your Honor please, and I am going to ask theoretical questions, and not questions as to directly what occurred in connection with this accident.

The Court: Well, preface your question: "If it appears in evidence," and so forth.

Mr. Bowles: I accept the suggestion, sir. I am sorry; that is what I meant.

By Mr. Bowles:

Q. Mr. Nichols, assuming that you have what is known as a lumber truck and trailer, which is a 1936 Ford with an International trailer, a picture of which has been introduced in evidence, these two pictures, Exhibits A and B, representing the truck to which I refer after it had been in a collision and damaged; and assuming also that there was page 125 } a power brake—power air brake on the wheels of the trailer; that is, the last set of wheels on this whole double bill, the tension of which was controlled through a foot brake, but which could be cut off or not cut off by a gadget or lever on the dashboard of the car which would cut out the power brake on the trailer wheels of such a vehicle: what is the proper and safe adjustment of the brakes of the trailer in relation to the adjustment of the brakes on the tractor portion of that vehicle, specifying the rear wheels of the tractor, the rear wheels of the trailer, and the front wheels of the tractor, also with respect to when it is loaded and unloaded?

A. Well, I know that—

Q. Talk loud enough.

A. Well, when a truck is heavily loaded, naturally at that time you want the most brakes on the rear wheels of a trailer such as—

Mr. Godwin: I can't hear you.

H. E. Nichols.

A. I say, when a trailer is loaded, you would want the most brakes on the trailer rear, rearmost wheels, because you could retard with more pressure without sliding than you could on the others. If you don't have such a load on it, and when the trailer is empty, the brakes naturally should be reduced, because if you don't you would have a jack-knifing accident if the trailer had the same amount of page 126 } of brake running empty as it did when it was loaded, you would have a jack-knifing accident.

Q. What do you mean by a jack-knifing accident?

A. Well, the trailer would have a tendency to go around the tractor which is pulling it.

Q. Mr. Nichols, what is the normal adjustment of the brakes of a trailer-tractor job in respect, first, as to which shall take first, and, second, as to which shall take the hardest?

A. Well, you should have more brakes, or, we will say, approximately 50 or 55 per cent where it is possible, on your trailer wheel, because you have your load there, which you can hold it down. Fifty to fifty-five per cent.

Q. Fifty to fifty-five more braking power on the trailer?

A. And as you go forward, why, the brakes, of course, are reduced in their holding power.

Q. Now, see if I understand you. If I understand you correctly, the correct relationship of braking power on the trailer should be fifty to fifty-five per cent more than on the tractor?

A. No, not more, but approximately, judging from 100 per cent, you should have about 50 or 55 per cent of the braking or retarding pressure on the trailer.

Q. Oh, I see what you mean. Now, suppose the brakes were adjusted—suppose that the braking power of such page 127 } a double-header vehicle on the trailer wheels and the rear wheels of the tractor were the same: is that proper adjustment?

A. Well, it would not be considered—No, not proper adjustment.

Q. As I understand you, if the braking power on the rear wheels of the tractor and the wheels, the only one set of wheels on the trailer, I believe that would be the rear part of the trailer, is the same, that is not a proper adjustment?

A. No, it is not.

Mr. Godwin: Now, if the—Just a minute: you mean loaded or unloaded?

H. E. Nichols.

Mr. Bowles: You can ask him questions—

Mr. Godwin: I object to the statement unless it appears whether he is speaking about a loaded or unloaded truck.

The Court: He has outlined previously what his conception is of the standard of a loaded and unloaded truck. The question now asked has no reference as to whether the truck is loaded or unloaded.

Mr. Bowles: None whatsoever. I expect to develop that at a later stage, but I cannot cover it in one question.

The Court: I will overrule the objection at present.

Note: Last question and answer read.

page 128 } Q. Now, Mr. Nichols, assuming such a truck as I have stated in my previous questions and as shown by that picture, with that kind of adjustment, that is, equal braking power on the tractor rear wheel and the same braking power on the trailer rear wheel, and that truck with six or seven pieces of lumber on it, that is to say, not loaded, or very slightly if any, what is the effect, in such condition, of the application of this kind of brakes upon a wet pavement, concrete?

A. Well, it would—your tractor, the front part, the drive wheels of the tractor, I should say, naturally would have more load on them than your trailer, and if it were adjusted the same, it would be apt—they would be apt to go just the way they were led by the tractor. In other words, if you cut your wheels this way, it would feel like coming around there.

Q. Go ahead there and let us see what you mean with those cars, if you don't mind. Turn around so the jury can see you.

A. If you were coming down in this manner and the brakes were equal on here—

The Court: Louder, please, sir.

A. If the brakes were equal on both parts, the wheels of the trailer and the rear wheels of the tractor, and you apply brakes on a wet pavement, the trailer wheels
page 129 } would be likely to bind, that is, would be retarded more, and if it happened to get out of line a little bit, would have a tendency to turn this way.

Q. This way; you mean to the left?

H. E. Nichols.

A. Well, this way; if you get that trailer out of line with the tractor, and the trailer would then get out of line one way or the other, it would be likely to, because if the brakes hold, naturally the trailer has to go on this line (indicating), and if it comes around this way, it is going to jack-knife this way.

Q. In other words, if the trailer has a tendency and comes to the left, that would have a tendency to jack-knife the whole truck to the left side of the road?

A. Yes, sir, in that manner.

Q. Now, that is unloaded?

A. Yes, sir.

Q. In jobs of this sort that carry a load and then come back empty, what is the safe practice with respect to the trailer and the brakes on the empty return?

Mr. Williams: Your Honor, it is not a question—that is for the jury to say, what is safe practice.

Mr. Gilman: What the general custom is, if there is a general custom and he knows it.

The Court: I think the objection is well taken. You can re-phrase your question there.

page 130 } Q. Mr. Nichols, with respect to such jobs as we have described and are talking about, is there a practice or custom, and do you know of any such, with respect to the method of operation of such vehicles as to a difference in what to do with the rear brakes on the going trip that has a full load and on the return trip that has no load?

A. Well, they do have a vacuum control valve which is used somewhat, but there is very few people that pay the price to have it put on. But they do have as a rule a shut-off between the tractor and the trailer.

Q. And what do they shut off?

A. They cut off, use the cut-off so that they don't have but very little or no brakes on the trailer when it is empty.

Q. Is that the gadget or lever of some sort on it that can cut off the brakes to the trailer and have no brakes on the trailer in such instances with an empty trailer?

A. Yes.

Q. From your experience and knowledge of such custom, if any such exist, can you state to us whether or not operating a truck without cutting the brakes off is a safe practice or not?

H. E. Nichols.

Mr. Williams: Your Honor, I object to that. That is for the jury to say.

The Court: I think the objection is well taken.

Q. Well, then, not safe practice: whether there
page 131 } is or is not any such custom; do you know about
that?

A. Yes, they have a custom of doing that, yes.

Q. What do they do?

A. They reduce the vacuum or cut it off.

Q. Or cut it off?

A. Yes.

Q. And why do they do that?

A. Reduce the brakes, because they have no control over it other than that.

Q. Because what?

A. Because they have no control over it other than that when they are empty, because their only control that they have is by reducing the vacuum.

Q. Now, is there anything else left that you know of with respect to custom about the connection between the truck and trailer under such circumstances, the no-load trip?

A. I don't quite understand your question.

Q. What is the distance, what is the method of connecting the two when it is loaded and when it is not loaded? Is there any distinction between those?

A. Speaking of log trucks?

Q. Log trucks, yes.

A. Well, as a rule they do shorten them on a return trip, because in most cases of logs and piles they haul they are extra long. They do shorten the shaft, or what-
page 132 } ever they call it, in the hauls, the rear trailer wheels, since they don't have a firm support there, they more or less have a shaft or shafts, and they do shorten when they come back. Naturally, the shorter they have it the easier it is to handle it, the better to drive it, too.

Q. Can you look at that picture and tell which way this truck was coupled, in Exhibit A and B?

A. Well, it is not out, it isn't full length out, apparently; of course it must have slid forward some in the impact described here; it might be short.

Mr. Williams: Talk a little louder, Mr. Nichols, please.

H. E. Nichols.

Q. Is that truck in that picture coupled short in the way that you are talking about?

A. It is coupled shorter than it would be ordinarily with a load, I should say, unless they were hauling short lumber.

Q. Short lumber?

A. Yes.

Q. Well, could it be coupled any shorter than that?

A. Well, the pieces of lumber that he has got in, he couldn't very well, not with that lumber, because he wouldn't have anything to support it.

CROSS EXAMINATION.

By Mr. Godwin:

Q. Mr. Nichols, what kind of brakes has it got on?

A. Well, the picture is not quite clear enough
page 133 } for that. The Fords, of course, that model Ford
has got Ford Company manufactured brake on it.

Q. Well, I mean the trailer.

A. The trailer? It has a vacuum brake on it.

Q. Are you familiar with the Bendix vacuum brake?

A. Yes, sir, we sell them and service them.

Q. Is that a good brake?

A. It is the lowest and most popular brake sold.

Q. Well, now, if that truck were equipped with Bendix vacuum brakes, would you say as an expert you had as good brakes as you could get? Wouldn't you?

A. If they were properly adjusted.

Q. Now, most trucks do not have these automatic cut-offs, do they? These things that adjust the amount of air pressure that goes into them?

A. Yes. Not all of them do have it.

Q. They do not?

A. No.

Q. The law does not require them, does it?

Mr. Bowles: I do not think that is proper.

The Court: Whether the law requires them, objection sustained as to that question.

Q. Well, they are out on the highway without it aren't they?

A. Yes, they are, some of them.

page 134 } Q. Now, if Mr. Saunders' truck was equipped
with Bendix brakes and equipped with the auto-

H. E. Nichols.

matic cut-off and the gadget that regulates the air, he had equipped it with the best that could be possibly bought, hadn't he?

A. If he had that on there and it was in proper adjustment and used as it should have been used.

Q. Yes, sir. Yes, sir, and if he had had those brakes tested and inspected and approved, you would not say to this jury that they were not proper brakes, would you?

A. Well, that just depends.

Q. If he had them properly inspected by a licensed inspector as required, you would not tell this jury that they were improper brakes, would you?

A. That is if it was properly done, I would say it was proper brakes on it.

Q. Yes.

A. But there is a chance of it not being properly done.

Q. By the inspector?

A. Well, regardless of whoever it may be; human nature is apt to be wrong.

Q. Well, you said something about that was proper connection for hauling short lumber, with the short connection.

A. Apparently, from the picture.

Q. Well, if he was hauling railroad ties, which are about seven or eight feet long, on there, that was a page 135 } proper connection, wasn't it?

A. I should imagine so, yes.

Q. Yes. Now, then, from the standpoint of the operation of an automobile, whether they had more braking pressure on the rear end than the front or not—if in the operation of an automobile, when you put on your brakes, on your brake and your booster brakes and your brakes on your trailer, those brakes take at the same time and take evenly and equally so far as the operation is concerned, those brakes are adjusted properly, aren't they?

A. Not for the tractor drive wheels and the trailer wheels so adjusted, they are not.

Q. What?

A. They are not.

Q. I am not talking about adjusted the same but take the same from the pedal, as far as the operation and movement of the car is concerned. If you get in a truck, of course you have a gadget to tell how much pressure is on this wheel and how much is on that, don't you?

A. Yes.

H. E. Nichols.

Q. And the only way you can tell how much pressure is on them is by your instrument, isn't it?

A. That is right.

Q. Now, you so adjust in your shop that when you get them on the road and you put on your brakes they take
page 136 } together and evenly, without throwing their ends around, don't they?

A. Well, now, that depends on whether it is loaded or unloaded.

Q. What would be the effect of a properly adjusted brake when you put it on from the average standpoint, of not the mechanic but the average man who is driving the car; what would be the effect that he would get as a driver?

A. Well, it is still whether or not it is loaded.

Q. Well, suppose it was not loaded?

A. If it was not loaded, why, then the brakes would take more or the same on the trailer wheel as they would on the tractor drive, so it would have a tendency to jack-knife whichever way it went, because naturally when you put on brakes the trailer goes up and down, because it slides the trailer wheel.

Q. Let us get away now from the technical adjustment of a brake, of a machine, and let us take it from the standpoint of the use of the car after they are adjusted. As an expert on brakes, if you were to get into a truck that when you put the brakes on the brakes applied evenly and took proportionately according to the weight on the brake and the trailer, and did not give any trouble, would you suggest that that man come in to have them adjusted?

A. That would be going entirely by the way it would feel.

Q. By the way it felt?

A. Whether it was right or not. The only thing
page 137 } you can say in a case like that stopped and felt that it was stopping properly. You couldn't check it otherwise.

Q. If this man should drive this car, if he found that in putting these brakes on that the brakes took at the same time, and they took evenly, so far as the weight was concerned that he had on his truck, and they gave him no trouble as to jack-knifing: in your opinion was there anything practically wrong with the brakes?

A. Well, as long as anything seems to be working all right, why, naturally you don't do anything to it.

Q. That is just what I want.

Mrs. Mary H. Hall.

A. But if a thing comes up to the point that something might be out of whack, and you still use it—

Q. Yes.

A. —not a thing you could see, and continue to use it, why, then it is not sure.

Q. You have never seen this truck?

A. I don't know anything about it, no, sir.

Q. And you do not know just exactly the type of equipment and how the brakes were adjusted or anything about it, do you?

A. I do not.

Witness stood aside.

page 138 } MRS. MARY H. HALL,
the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. You are Mrs. Mary H. Hall?

A. Yes, sir.

Q. Mrs. Hall, did you on the 8th day of February, 1939, qualify in this Court—

A. Yes, sir.

Q. —as the Administratrix of your deceased husband?

A. Yes, sir.

Mr. Bowles: I stated, if Your Honor please, in the beginning, that a copy of the qualification certificate was attached to the notice of motion.

Mr. Williams: We admit the qualification.

Mr. Bowles: What is that?

Mr. Williams: We admit the qualification.

Mr. Bowles: I beg your pardon, sir, they asked me to prove the qualification that was attached to the notice of motion. I find that it was not attached, and I am offering it now, in accordance with your demand.

Mr. Williams: We have no objection to it.

page 139 } By Mr. Bowles:

Q. Mrs. Hall, how old are you?

A. Twenty-four.

Mrs. Mary H. Hall.

Q. Twenty-four?

A. Yes, sir.

Q. Where are you living?

A. In Beaver Dam, in Spotsylvania County.

Q. That is north of Richmond?

A. Yes, sir.

Q. With whom do you live?

A. My mother and little brother, about eleven years old.

Q. Is your father living?

Mr. Williams: I object to that line of questioning, Your Honor. It is entirely immaterial as to whether he is or not.

The Court: I sustain the objection.

Mr. Bowles: I note the exception.

Q. Your husband was Erwin Nolan Hall?

A. Yes, sir.

Q. About when were you married, Mrs. Hall?

A. June 13th, 1936.

Q. 1936?

A. Yes, sir.

Q. How long had you known your husband prior to that?

Mr. Williams: I object to that as being immaterial. It don't make any difference how long she had known him before she married.

Mr. Bowles: We have a right to show the character, disposition and habits of this deceased, sir. This is the party plaintiff, and the question of sustaining the—

Mr. Williams: The question was how long she had known her husband before she married him. I submit it is totally irrelevant and immaterial in this case.

The Court: I sustain the objection.

By Mr. Bowles:

Q. Where was your husband born?

A. In Hanover County.

Q. Where were you born?

A. Hanover County.

Q. How close to one another?

Mr. Williams: I object to that, Your Honor. It don't make any difference how close they lived to each other before they were married. Totally irrelevant.

Mrs. Mary H. Hall.

The Court: I think so. Objection sustained.

Mr. Bowles: I cannot show, if Your Honor please, how long she had known him before they were married?

The Court: I just think it is immaterial. You page 141 } can show all of his status and all of that that goes into the case, but—

Mr. Bowles: May I ask this question, if Your Honor please?

Q. How long were you engaged to marry or intend to marry him before you did marry him?

Mr. Williams: I object to that as immaterial.

The Court: I sustain the objection.

Mr. Bowles: I note an exception.

Q. Do you know what schooling your husband had?

A. Well, he didn't finish high school, and I don't know just how far in high school he went.

Q. He did go to high school?

A. Yes, he went to high school, but he never finished.

Q. Do you know how long?

A. No, I do not.

Q. Do you know where he went to high school?

A. Montpelier, Beaver Dam District.

Q. You married him on June 13th, 1936; where did you go to live?

A. I stayed with my mother up the country for three weeks. Then we came to Norfolk, South Norfolk. That is where we made our home after three weeks.

Q. What kind of home did you establish? I mean, were you housekeeping, or—?

page 142 } A. Yes, sir, we were housekeeping.

Q. Did you keep house for him?

A. Yes, sir.

Q. How long, about, did you and he live together and housekeep before his death?

A. It was over thirteen months; I don't remember just how many weeks.

Q. Now, Mrs. Hall, what was your husband's wage?

A. Well, it was \$27.50 a week.

Q. At the time of his death?

A. Yes, sir.

Q. Do you know whether he was on salary or piece—time worked, or what?

Mrs. Mary H. Hall.

A. Yes, salary; he got that whether he worked or not.

Q. Tell us something about your husband with respect to his stature; about what height was he?

A. Well, he was about five feet eleven, I reckon; something like that. Nearly six feet tall. I don't remember just the inches, and I don't know just what he weighed.

Q. Mrs. Hall, what was his nearest birthday at the time of his death?

A. August 12th.

Q. 1937?

A. Yes, sir.

Q. On that date how old would he have been?
page 143 } A. Twenty-nine.

Q. He was then lacking a few weeks of being twenty-nine? When he was killed?

A. Yes, sir.

Q. What was the state of his health?

A. Well, he was healthy so far as I knew. I have never known him to have any serious illness. He has been in good health ever since I have been knowing him.

Q. Did you ever know him to have a serious spell of illness?

A. No.

Q. Did you ever know him to consult a doctor?

A. No, I don't believe I do.

Q. How long had you known him?

A. I have been knowing him ever since we were children.

Q. Have you a picture of your husband?

A. Yes, sir.

Note: At this point certificate of letters of administration of Mrs. Hall was marked "Plaintiff's Exhibit G" and filed in evidence.

Mr. Bowles: If Your Honor please, I would like, after some questions, to introduce this picture in evidence.

The Court: All right.

Q. Mrs. Hall, you have handed me a picture of three men.
Which of the three is your husband?
page 144 } A. This one (indicating).

Q. On the right-hand side as you look at the picture?

A. Yes, sir.

The Court: Mark an "X" by him.

Mrs. Mary H. Hall.

Mr. Bowles: Yes, I will put an "X" at the top.

Q. I have put an "X", Mrs. Hall, over top of the gentleman standing as you look at the picture on the right.

A. Yes, sir.

Q. That is your husband?

A. Yes.

Q. Do you recall the circumstances under which that was taken, with reference to how near it was to the time of his death?

A. Yes, sir. It wasn't long, because he never saw the picture.

Mr. Williams: Mr. Bowles, would you stand so I can see? I can't see the witness.

Mr. Bowles: I beg your pardon. Very sorry.

Q. It wasn't long before that?

A. No, because I never received the picture before he got killed and he never saw the picture.

Note: Photograph in question marked "Exhibit M. H. H. No. 1" and filed in evidence.

Q. Mrs. Hall, tell me whether or not your husband was a steady worker.

A. Yes, sir.

Q. What was his treatment of you?

page 145 } A. Well, I could hardly explain—I—he was so good to me. We lived, you could well say, sweet-hearts all our lives. After we were married we were just so devoted to each other. We never had a quarrel, and he treated me—I could not have wanted any better treatment than he treated me.

Q. When he went out for his amusements and recreations, did he take you, or did he do like some husbands do and leave you at home?

A. No, we always went together. You would hardly ever see him, unless it was during his working hours, that I wasn't with him.

Q. You lived here in South Norfolk at what address, did you say?

A. 1150—we lived there a right good while; we did live on Hull Street a little while. We made our home at 1150 Bainbridge.

Mrs. Mary H. Hall.

Q. Now, Mrs. Hall, your husband was killed, it appears, on July 27th, 1937.

A. Yes, sir.

Q. At a time around between one-thirty and two o'clock of that day. When did you learn of his death?

A. Well, it was around five o'clock before I ever heard.

Q. How did you learn of it?

A. The undertaker, one of the undertakers came over there, and I was sitting out on the porch, and he just
page 146 } came in and asked if my husband lived there, if Mr. Hall lived there, and I told him yes, and he told us about him being killed.

Q. How were you affected by that?

A. Well, I couldn't hardly explain that, either; but I can't hardly remember what happened right after then. Of course it was such a shock to me. I remember an undertaker there who wanted to give me some ammonia or something to quiet me down so he could explain to us just how it happened, but I never did know just how he explained it.

Q. Mrs. Hall, when had you last seen your husband?

A. About—around ten minutes—around ten or a few minutes after ten o'clock in the morning.

Q. What was the occasion of that?

A. Well, he had made one trip to Franklin that morning and came back, and he had breakfast about ten, and he made a second trip, and was coming back from the second trip when the accident occurred.

Q. You had been married about a year when this accident took place?

A. Sir?

Q. You had been married about a year, thirteen months or thereabouts?

A. Yes.

Q. Were there any children of this marriage?

A. No, sir.

page 147 } Q. At the time of this accident were Mr. Hall's mother and father both living?

A. Yes, sir.

Q. Can you tell us whether or not you and Mr. Hall had discussed the question of whether you would or would not have children?

Mr. Williams: Your Honor, I object to that question as improper and irrelevant.

Mrs. Mary H. Hall.

The Court: Objection sustained.

Mr. Bowles. I note the exception.

CROSS EXAMINATION.

By Mr. Godwin:

Q. Mrs. Hall, I believe that you last saw your husband at ten o'clock that morning?

A. Around ten o'clock.

Q. What time did you leave home to go to work that morning?

A. That morning?

Q. Yes.

A. Well, I don't just remember just what time it was, but it was early in the morning.

Q. About what time was it?

A. He came from his trip by ten.

Q. Would he leave by perhaps six o'clock?

A. Yes.

Q. About six o'clock.

page 148 } A. Yes, sir, if he was loaded, and sometimes he had to leave earlier to get loaded.

Q. Then he would come back about ten, and this morning he got back about ten, and ate breakfast; do you know about what time it was he left his home the second time?

A. Well, just a little after ten; he didn't stay but just a little while after ten; he didn't stay but just a little while after he had breakfast.

Q. And after he had breakfast, did he then go and load his truck and make the second trip?

Mr. Bowles: Do you know about that? If Your Honor please—

Mr. Godwin: Wait a minute, Mr. Bowles—

The Court: You can only state what you know of your own knowledge.

A. I don't remember whether his truck was loaded or whether he had to go—

Q. What?

A. I don't remember.

Q. Well, did he usually come home and eat after he got back from his first trip—

Mrs. Mary H. Hall.

Mr. Bowles: I object to that.

Q. —or wait until he had loaded his truck?

The Court: Is the question finished? I do not see any relevancy in that.
page 149 } Mr. Williams: Well, Your Honor, from the time that he left home until the time that he accident occurred, it was perhaps about three hours, as I understand it.

Mr. Bowles: Ten to two is four.

Mr. Williams: Didn't it happen around one o'clock?

Mr. Bowles: Two is what I understood. I don't know; I wasn't there.

Mr. Williams: Well, it is just a question of the time element in it. That is what I am driving at.

The Court: I do not see how it is relevant. I will sustain the objection.

Q. Well, I want to ask the question, then, Mrs. Hall, where was he hauling gasoline from? Where is the place that he was taking the gasoline to carry it to Franklin?

A. You mean where he hauled it from or where he hauled it to?

Q. Where did he haul it from?

A. From the Gulf Refining Company.

Q. Where is that?

A. It is up in South Norfolk, near the river.

Q. Up in South Norfolk near the river?

A. Yes, sir.

Q. And where was he hauling this gasoline to?

A. Well, he hauled to Franklin, and that morning he had hauled to Franklin; he had Franklin and Boykins,
page 150 } were two service stations.

Q. Do you know whether or not he made the first trip to Franklin or Boykins?

A. He made the first trip to Franklin.

Q. Where was he making this trip to?

A. And he made the second trip to Franklin.

Q. To Franklin too? Do you know how far Franklin is from where he was taking this gas?

A. No. I do not.

Q. You do not? That is all.

Witness stood aside.

J. C. Harris.

Mr. Williams: Mr. Bowles, according to this witness you have got the wrong man. I thought you said his name was Ervin.

Mr. Bowles: Erwin.

Mr. Williams: Do you want to amend it again?

Mr. Bowles: Not unless the Court requires us to, I believe. That is the plaintiff's case, if Your Honor please.

page 151 } J. C. HARRIS,
a witness introduced on behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Godwin:

Q. What is your name?

A. J. C. Harris.

Q. Where do you live, Mr. Harris?

A. Patton and B Streets, Portsmouth.

Q. That accident that occurred out here on the King's Highway between a truck owned by Mr. Saunders and a truck owned by Matlack: did you go to the scene of this accident?

A. I did.

Q. Did you have with you at that time a Kodak?

A. Yes, sir.

Q. Did you take some pictures of the accident?

A. I did.

Q. There? Now, since that time did you go back out there the other day to the scene of this accident?

A. Yes, sir, I went out there and showed you where it happened there.

Q. Yes, sir. Well, now, at the time that we were there, was William Taylor, the colored man who claimed to be a witness or saw it, was he there at that time?

page 152 } A. Well, I wouldn't know whether it was him or
not. I understood that he was a witness, that
he lived there in the house. He came off the
porch.

Q. Came off the porch?

A. Came off the porch.

Q. Was he the one that claimed he saw it and was walking along the road at that time?

A. Yes, sir.

J. C. Harris.

Q. Well, now, did he make any statement to you about how these cars met and passed each other?

A. Well, when I first asked him how the oil truck was—you asked me how the oil truck was sitting; I showed you the position there about where it was out in the road—

Q. Yes.

A. And he said that the oil truck was clear off of the road.

Q. Yes.

A. That the back wheels wasn't on, that it set right along the edge of the ditch—

Q. Yes.

A. And then he said that the car passed the lumber truck and the oil truck on the left side of the road.

Q. Yes, well, now, did he—?

Mr. Bowles: May I ask, Mr. Godwin, is this a few days ago when he was with you or at the time of the accident?

Mr. Godwin: A few days ago.

page 153 } A. A few days ago he asked me if I would go out there and show him where the accident was and I went out there and showed him where the accident was and this man came off the porch there and came out there.

By Mr. Godwin:

Q. Well, now, did he say after the green car passed the lumber truck how it passed the oil truck with respect to the shoulder and the hard surface?

A. He said that he started to go around between, and he was—he couldn't make it and he swung out and went on the left side of the truck.

Q. Yes. Did he say anything in reference to how much of the car was on the dirt and how much was on the hard surface?

A. He did say that there was two wheels of the car on the concrete and the other two came off in the dirt.

Q. That was on the green car?

A. On the green car.

Q. Yes, sir.

Q. Mr. Harris, you took these pictures in the rain, didn't you?

A. Yes, sir.

Q. And was it hard to get them under those circumstances?

A. Yes, it was.

J. C. Harris.

Q. It was?

A. It was a dark day and drizzling raining.

By the Court:

Q. What day or what time of what day?
page 154 } A. Well, I am—I don't remember the day, what
day, but it was the day that the Saunders truck
and the Matlack ran together.

Q. What time of that day?

A. It was in the afternoon, and I judge around two o'clock,
one or two o'clock.

Q. All right.

By Mr. Godwin:

Q. Well, now, did you take that picture, and was it enlarged from the picture that you took, sir?

A. This here was a little one; I had the little ones taken and developed.

Q. Yes.

A. And that evening the Virginian Pilot called me and said they heard I had taken pictures and wanted to know if they could see them, and I sent them over to the Virginian Pilot, and they sent them back to me the next day and said they wasn't clear enough for the paper. A few days later there was a man came—I have forgotten his name, told me he was from Richmond I know—with Mr. Matlack—not with Mr. Matlack, I had an understanding with Matlack in Suffolk there, asked me if I would meet him and I did meet him in Suffolk, and came back with Mr. Matlack, and when he asked me to show—

Q. So you had them enlarged?

A. No, there was another insurance man came
page 155 } there and I forget what his name is; he talked to
me and he asked me if he could get them, and I
told him, yes, it could be done. And Gladstone—he said he
came back once for the purpose—came back to Mr. Glad-
stone's and paid for them and I didn't hear any more from
him.

Q. And they were enlarged by Mr. Gladstone? Now, does that represent there exactly what you saw there and what happened there—

A. Yes, sir.

Q. —after you got there?

A. Yes, sir.

J. C. Harris.

Q. After the accident?

A. Yes, sir.

Mr. Godwin: I want to introduce that picture.

Note: Photograph marked "Defendant's Exhibit No. 1."

Mr. Bowles: If Your Honor please, it seems to me the little picture that goes with this ought to be introduced at the same time.

Mr. Gilman: The one that he introduced was made from the original. We want the ones that he made introduced.

The Court: Any objection to that?

Mr. Godwin: Well, give it to me. Your Honor, I will find it and introduce it if you—

Mr. Bowles: If you want to. I have no—
page 156 }

Mr. Godwin: You said you wanted it done.

Mr. Bowles: I will object to that one there, and ask that—

Mr. Godwin: Well, that is the—

Mr. Bowles: Wait a minute; let me get through, please. I object to the enlargement and ask that the original picture be introduced, if it is necessary to go at it by that means.

Mr. Williams: Well, Your Honor, I think as long as the picture represents exactly what in the witness's mind happened at the scene, on the place, it can be introduced whether it is large or small.

Mr. Godwin: Now, I will try to accommodate him by getting out and sorting out the pictures.

The Court: I think they are entitled, if this witness took the Kodak pictures, to have them both introduced, and the stenographer can mark them "Defendant's Exhibit A-1, A-2, B-1, B-2."

Mr. Bowles: I will get them out.

Mr. Godwin: Can we do that as we go along? If we introduce them that should be satisfactory to you, Mr. Bowles.

Mr. Bowles: I say, I will not be long. I am sorry, Mr. Godwin. I would like to have the privilege of
page 157 } cross examination on some things that you are examining him on.

Mr. Godwin: All right, I will stop now and see if I cannot find them for you.

J. C. Harris.

The Court: Would there be any objection to the witness going down to the table and sorting the pictures out?

Mr. Bowles: None whatsoever.

The Court: We might save some time.

By Mr. Godwin:

Q. This is the one that I was talking with you about. Did you take the original small picture from which that larger picture was made?

A. Yes, sir.

Mr. Godwin: Well, I want to introduce that as an exhibit.

Note: Enlargement previously marked "Defendant's Exhibit No. 1" now marked "Defendant's Exhibit A-2" and corresponding small print marked "Defendant's Exhibit A-1".

Q. Did you take that small picture from which the larger picture was enlarged?

A. Yes, sir.

Mr. Godwin: I want to mark that "B-1" and page 158 } "B-2". Pictures of the scene of the accident immediately afterwards.

Note: Enlargement and original print so marked and filed in evidence.

Q. Did you take that small picture there?

A. Sir? Yes, sir.

Q. From which the larger picture has been enlarged?

A. Yes, sir.

Mr. Godwin: I want to introduce that in evidence marked "Exhibit C-1 and Exhibit C-2".

Note: Enlargement and original print so marked and filed in evidence.

Small print in each case marked "1" and enlargement "2".

Q. Now, on this picture which is marked Exhibit A-1, and from which A-2 was enlarged: does that show the position of

J. C. Harris.

the oil truck across the highway after the accident?

A. It shows the back end of the truck out in the highway.

Q. It does, sir—?

A. The front end, and it was two wheels off and two wheels on the concrete.

Q. So the oil truck didn't sit—wasn't sitting diagonally, sitting there, had two wheels—

Mr. Bowles: That is leading.

The Court: Objection sustained.

Q. Well, then, in what position was the oil
page 159 } truck sitting in the highway?

A. The oil truck was sitting in a position like
this—

Q. It was?

Mr. Williams: You say "like this". Let him designate what that is directly for the record.

A. Well, I mean, if the road was here, the back end of the oil truck, the wheels on the oil truck, which would be inside wheels, on the left side of the truck, was about 18—I would say anywhere from 18 to 24 inches off of the concrete, and the front wheels of the truck—the left wheel was clear off and the right wheel was sitting on the edge of the concrete, maybe six or eight inches on the concrete.

By the Court:

Q. Which do you have reference to, now, the oil truck or the lumber truck?

A. The oil truck.

By Mr. Godwin:

Q. Then, as I understand you, the rear wheels, both rear wheels of the trailer, of the oil truck, were up on the concrete?

A. Yes, sir.

Mr. Bowles: That isn't what he said.

Mr. Godwin: I understood him to say so.

The Witness: Yes, sir.

The Court: They were off.

Mr. Bowles: They were off.

J. C. Harris.

A. No, I said they was both on the concrete.
page 160 } Q. That is, the rear wheel—

A. The left rear wheel was about 18 inches to two feet on the concrete, off of the dirt, and the front wheels, the front left wheel was off on the dirt and the right wheel about six or eight inches on the concrete.

Q. Let's take them up—

A. Now, I can give it to you on a piece of paper; that would help you some.

Q. Well, does this picture show the rear wheels of the trailer of the oil truck?

A. Yes, sir, it does.

Q. Well, now, what is the position of the right rear wheel of the trailer of the oil truck after the accident?

Mr. Bowles: If Your Honor please, I object to this line of examination. This witness was there and saw what he saw, and can tell, but I think it is improper examination with relation to the picture, except for what he knows about it. I object to the question also as leading.

The Court: He can examine the photographs as a means of refreshing his recollection.

A. The truck—the wheel, I am talking about the left wheel, this wheel here (indicating).

Q. Which one?

A. That is the left one if you are standing this
page 161 } same way the truck was—I mean the right wheel,
this wheel was 18 to 24 inches—

The Court: Which do you mean, right or left?

Q. Now, listen, don't be facing that truck; look at it from the rear and place it.

A. If it was facing the truck it was on the left; if you are standing facing the same way the truck was headed, it would be the right wheel, and if you were looking the other way it would be the left wheel.

Q. Well, now, looking at the truck from the rear, as that picture shows there, how far was the right rear trailer wheel from the edge of the concrete?

A. About 18 to 24 inches.

Q. Was it all on the concrete?

A. Yes, sir.

J. C. Harris.

Q. Did it have dual wheels?

A. Yes, sir.

Q. And in about what angle was that truck, the oil truck, on the highway?

Mr. Bowles: If Your Honor please, I object to that. His testimony shows that only the back part of it was on the highway.

A. And one front wheel.

Mr. Godwin: Counsel is directing his objection to something that is contrary to his testimony.
page 162 } The Court: I think that that question is all right.

Mr. Bowles: On the highway, sir? He said it was off the highway.

The Court: This line of questioning with reference to the edge of the concrete, that is easily defined, and the strip of concrete runs along the highway in a definite way. If he makes his observations with reference to the concrete strip of this highway, it seems to me it ought to be perfectly clear to all of us.

Mr. Godwin: All right, sir.

By Mr. Godwin:

Q. Well, about what was its position in respect to the concrete highway, then, Mr. Harris, I will ask you?

A. Well, it was one wheel, one front wheel on the concrete and both back wheels on the concrete.

Q. Three of the wheels were on the concrete?

A. Three of the wheels were on the concrete.

Q. And with respect to whether it was straight up and down the highway or across the highway, what was the position?

Mr. Bowles: I object to that, sir.

The Court: I think with reference to the concrete part.

A. As to the concrete, that is what I say, the concrete part of the highway, looking at it from the back of the truck, the right front wheel was over towards the ditch,
page 163 * off of the concrete. The left wheel was on the concrete.

Q. Facing the truck?

A. Facing the truck.

J. C. Harris.

Q. Well, now, have you any idea as to the position of the truck with respect to whether or not it was straight up and down the highway or in any other manner, diagonally across?

Mr. Bowles: I object to that, if Your Honor please. The man's testimony shows that only a part of the truck was on the highway and it could not be across the highway.

The Court: I sustain the objection. You can rephrase the question.

Mr. Godwin: Your Honor, I am asking him the position, trying to direct his attention to that method, because each time I have asked him—

The Court: Let us illustrate it. You have a six-wheel model. Perhaps you could illustrate it with the edge of the paper or ruling indicating the line of the concrete.

Mr. Godwin (To the witness): Suppose you come down here.

The Witness: Do what?

The Court: Take that six-wheel model there, take the paper, rule it to indicate the concrete part of the highway.

page 164 } A. Now, when this here happened—

The Court: Turn around so the jury can see.

A. —this truck was across the highway like this.

Q. Leave it right there. This represents the edge of the concrete?

A. Yes, that represents the edge of the concrete.

Mr. Godwin: Can you gentlemen see?

Mr. Bowles: Now, if Your Honor please, just one minute. Could the jury take special notice of the way he has placed it on there before it gets moved?

Mr. Godwin: Well, mark it on there if you want to.

Mr. Bowles: I would like for you to do it.

Note: Pencil line marked around model.

Mr. Williams: Is that the way you want it? Mark it in front. Put one, two and three on each set for the first, second and rear wheels, left-hand side of truck.

Q. Now, from that diagram which you have made, Mr. Har-

J. C. Harris.

ris, how far was this wheel here, which is the right rear wheel of the trailer of the oil truck, from this edge of the concrete?

A. Between, I would say, anywhere from 18 inches to 24 inches.

Q. The truck headed in which direction?

page 165 } A. Just like it was there, only the highway goes this way, the same way.

Q. What direction was the oil truck generally headed in?

A. It was coming towards Portsmouth.

Q. Which way is that direction along there, do you remember?

A. I think it is east.

Q. East? All right, sir.

Mr. Godwin: Now, Your Honor, I want to introduce this in evidence marked "Defendant's Exhibit D".

Note: Diagram so marked and filed in evidence.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Harris, you took a whole lot of pictures that day, didn't you? About three rolls, didn't you?

A. Yes, sir.

Q. Did you give all those to Mr. Godwin?

A. I don't know how many he got. I left them all up—when this insurance man from Richmond had me make them up I went up there and told him to make them all up for him, and I don't know—I gave them all up there to them, to Mr. Gladstone.

Q. When did Mr. Godwin get the ones he has been looking at?

A. Well, he got them from Gladstone; he came and asked me if I had them and I told him yes, I had them, I had sent them up to Mr. Gladstone to have them developed, page 166 } and I thought they were still up there.

Q. Did you develop these little ones?

A. Do what?

Q. Did you develop these little ones?

A. No, I had them developed.

Q. Now, I understood you to testify with respect to this Exhibit A-2 when it was handed to you by Mr. Godwin that that is a fair representation of what you saw when you got there.

J. C. Harris.

A. Yes, sir.

Q. That picture is a fair representation of what you saw when you got there?

A. Yes, sir. That is what I did see when I got there.

Q. Well, what is the picture supposed to represent, Mr. Harris, this picture?

A. In other words, I just took them; never had no idea anybody would ever want them. I take pictures all the time in traveling around, accidents, animals, and different things, and I happened to come there just a couple of minutes after the accident happened and I took several of them from different angles.

Q. Well, what is this picture supposed to represent?

A. It shows the oil truck headed into the side or back of the cab of the lumber truck, is what that one shows.

Q. The lumber truck was in the ditch, wasn't it?

A. No, sir, it was not.

Q. The front of the lumber truck?

page 167 } A. It was across the road, the front of it was at the edge of the ditch.

Q. Wasn't it down in the ditch?

A. No, sir.

Q. Wasn't the right front of the oil truck in the ditch?

A. No, sir, it was not. It was at the edge of the ditch.

Q. Was the lumber truck sitting up on all wheels?

A. Yes, it was pushed over and the wheels was up in the air like this (indicating).

Q. You mean cocked up?

A. Yes.

Q. Is this blurred mark up there in that place supposed to be the lumber truck?

A. That is the lumber truck.

Q. Where is the back end of the lumber truck on this?

A. Back here.

Q. Back end of the lumber truck is back there?

A. That is right.

Q. You mean this is a picture of the lumber truck—

A. Yes, sir.

Q. —but not of the oil truck?

A. No, this is the front of the oil truck. The oil truck is back this way. The lumber truck is this way.

Q. Well, what is this over out here? Is that the road or truck?

A. Here is your road, from here, there.

Q. Well, where is the lumber truck?

J. C. Harris.

page 168 } A. Right here; here is your lumber truck. There is part of it right there on the pavement.

Q. Well, the wheels you see in this picture are the wheels of the lumber truck?

A. Yes, sir. This is the road, you see, the concrete road, here.

Q. Well, this lumber truck was sort of wrapped around the oil truck?

A. Oh, no. No, no.

Q. I mean, it—

A. The oil truck was—I can take that truck and show you,

Q. I have no doubt about that, but I thought you said that this picture was a fair representation of what you saw there.

A. That is what I did say.

Q. You mean you were trying to take a picture of what you saw?

A. I did take it. In fact, I was in front, I walked around in front of that, took that looking back up that road.

Q. What I mean, Mr. Harris, is, you undertook to snap it, but the picture didn't turn out?

A. It turned out what you see there. That is what turned out.

Q. Yes, I understand. Now, this one, B-2. Which truck is that?

A. This here is the lumber truck, the cab of it, and this part back in here is the oil truck.

page 169 } Q. That is the edge of the concrete right there, isn't it?

A. Yes, sir; these are the back wheels of the front cab of the lumber truck.

Q. The back wheels of the front part of the lumber truck are on the edge of the concrete looking west?

A. That is right.

Mr. Bowles: Have you seen these pictures, Your Honor?

The Court: No, I have not.

Mr. Bowles: Well, you can see why I wanted to look at them a minute or two longer when you do see them. For the sake of the record, if Your Honor please, my last question is not identifiable.

Q. What I refer to and you said was the left side of the concrete looking west, is where I have my pencil?

A. No, not there. This is it here.

J. C. Harris.

Q. Right here?

A. Yes.

Q. Now, extending it that way, to indicate that, that mark I have just put on Exhibit B-2.

A. Yes, sir.

Q. Now, Mr. Harris, is your recollection about this matter now any clearer than these pictures?

A. I just remember the position the trucks was in, that is all. I didn't see the accident.

Q. I understood you didn't see the accident.
page 170 } Can you tell me whether your recollection of it
now is any clearer than these pictures?

Mr. Godwin: Well, I don't know that that is a fair question to ask a man, whether his recollection is as clear as a picture which he has tried to take on a rainy day.

The Court: I think the objection is well taken to that question.

Mr. Bowles: Your Honor, I want to find out—

The Court: You may test his recollection in any way that is proper, but I think you asked the question if his recollection was as clear as a picture. You can proceed with cross examination as far as you see fit to test his recollection.

Q. You have testified by refreshing your memory from these pictures, then?

A. No, sir. I could almost draw a plan of the very position the trucks was out there.

Q. Well, then, you would say your recollection is clearer than these pictures; is that it?

A. Them pictures are very clear to me when I look at them. I couldn't want them any clearer.

RE-DIRECT EXAMINATION.

By Mr. Godwin:

Q. You have no interest in this case whatever, have you?

A. No, sir.

page 171 } Q. All right, that is all. I do want to ask you
this: In this picture marked A-2 it shows a house
there. Where is that house?

A. That house is right there. There is a kind of a lane.

Q. On a lane?

A. Yes.

Dr. L. C. Ferebee.

Q. Does that house face the highway?

A. It faces the highway.

Q. Do you see the edge of the highway on that picture there?

A. Yes, sir, right here.

Q. Will you mark the edge of that highway on the picture, sir?

Note: Witness makes mark.

Witness stood aside.

page 172 } DR. L. C. FEREBEE,
a witness introduced on behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Godwin:

Q. What is your name, sir?

A. L. C. Ferebee.

Q. What is your occupation, Doctor, your profession?

A. Physician; Coroner, Norfolk County.

Q. As Coroner of Norfolk County did you go to the scene of the wreck in question?

A. Yes.

Q. Did you there take a statement from one William Taylor who claimed to be an eyewitness of this accident, sir?

A. I wrote down what he told me, yes.

Q. Well, now, just tell the jury what William Taylor told you about how this accident occurred, Doctor.

A. Well, I arrived there about two o'clock in the afternoon; it was raining; the two trucks were piled up on the side of the road. A man was lying dead in one truck. I tried to find witnesses who had seen it and I could only find one person. The man whom I talked to there told me that the sedan—

Mr. Bowles: Isn't this rather irregular, sir?
page 173 } Hearsay evidence, what people had said to him?
It was what William Taylor—

The Court: What is the objection that is to be taken?

Mr. Godwin: I asked this man didn't he tell Dr. Ferebee that the sedan ran between the two automobiles, and he denied it.

Dr. L. C. Ferebee.

The Court: I sustain the objection to the present form of the last inquiry.

By Mr. Godwin:

Q. Well, now, what did William Taylor tell you in reference to the passenger automobile, what it did, Dr. Ferebee?

A. He told me that the passenger car went between the oil truck and the lumber truck.

Q. He told you that?

A. Yes.

Q. Well, what did he tell you then in reference to whether or not the passenger car was going in the same way as the oil truck?

Mr. Bowles: Going what?

Mr. Williams: Same direction as the oil truck.

A. Yes.

Mr. Bowles: There is no contradiction vouched as to that, sir.

Mr. Godwin: I understood William Taylor to testify the passenger automobile was meeting the oil truck, page 174 } and we understand Dr. Ferebee will testify he told him he was going in the same direction.

Mr. Bowles: No foundation has been laid for contradiction on that basis. William Taylor was not asked whether he told him that thing or not. It is not proper, sir, to get up here and just proceed to attack the witness.

Note: Jury retires from the courtroom.

Mr. Godwin: If Your Honor please, if there is any question about it I will call William Taylor back to the stand and ask him if he didn't say that. I ask him to stand up for that purpose.

The Court: I do not know what the stenographer's notes show, but the little diagram here I have, sketched while William Taylor was testifying, indicates the passenger car and the oil truck coming in the opposite direction.

Mr. Godwin: That is right, sir.

The Court: Which I put down here with arrows, my note on William Taylor.

Mr. Godwin: Yes, sir.

William Taylor.

The Court: If that is correct, then William Taylor testified that the green sedan passed the lumber truck and met the oil truck going in the opposite direction.
page 175 } Mr. Godwin: That is right, sir.

The Court: That is the diagram, that is, of what he testified.

Mr. Godwin: That is what he testified.

Mr. Bowles: Now, then, you offer to prove that he said something different.

Mr. Godwin: Exactly.

Mr. Bowles: Well, then, they haven't laid a foundation as to prior inconsistent statements.

Mr. Godwin: Doctor, just step down off of the witness stand a minute. I will ask William Taylor if he did not make that statement.

Note: At this point Dr. Ferebee stood aside and William Taylor took the stand.

WILLIAM TAYLOR.

By Mr. Godwin:

Q. William, did you tell Dr. Ferebee, the Coroner of Norfolk County, that the passenger automobile was going in the same direction that the oil truck was?

A. No, sir.

Mr. Godwin: That is all.

Note: William Taylor stood aside.

Mr. Bowles: If Your Honor please, at this time I want to object to that on the ground that this witness
page 176 } is the plaintiff's witness—I mean, defendants' witness, as to such matter, and I object to the question as leading.

Mr. Godwin: This was all on direct examination, Your Honor.

Mr. Bowles: I think you are going at this thing in an entirely wrong way.

The Court: Who originally called this man?

Mr. Bowles: We did, sir, but not until this morning, and not until this moment, has there been any intimation that this man had the cars going in the wrong direction, and Mr. Godwin has already dictated into this record, for what pur-

Dr. L. C. Ferebee.

pose I do not know, his own statements regarding the taking of statements from this man, a written statement, none of which showed any such statement of any kind, and not until this moment do they begin to attack this witness.

Mr. Godwin: Your Honor, if he has finished, the only objection that he could possibly have for Dr. Ferebee not stating what William told him was that I had not laid a foundation.

Mr. Bowles: I object to it—

Mr. Godwin: Now, in order to lay a foundation I had dismissed Dr. Ferebee from the witness stand and
page 177 } called William Taylor back to the stand and asked
him did he tell him this, to lay a foundation; and
now they can certainly have no objection to it.

Mr. Bowles: To which action at this stage of the trial I strenuously object, sir, and *not* my exception if it is permitted.

The Court: The objection is overruled.

Note: At this point Dr. L. C. Ferebee resumed the witness stand.

DR. L. C. FEREBEE.

By Mr. Godwin:

Mr. Godwin: Now, Your Honor, the question I propose to ask Dr. Ferebee when the jury returns to the room is whether or not William Taylor told him that the passenger car was traveling in the same direction as the oil truck.

Note: The jury returns to the courtroom.

Mr. Gilman: What did the Court rule on that?

The Court: I rule that he can ask that question.

Mr. Gilman: Will you instruct the jury, Your Honor, that it only goes to the credibility of William Taylor?

The Court: Yes, sir.

page 178 } Q. Dr. Ferebee, as County Coroner, did you
talk to William Taylor on the very day that this
accident occurred, and did William Taylor tell you that the
passenger automobile was going in the same direction that
the oil truck was going in?

Dr. L. C. Ferebee.

A. Yes.

Q. He did?

A. Yes.

CROSS EXAMINATION.

By Mr. Gilman:

Q. Dr. Ferebee, you say that he said the green car made an effort to go between the two?

A. Yes.

Q. Well, how did he finally tell you the green car got by the two?

Mr. Williams: Well, now, Your Honor, this is hearsay, as far as that goes. They objected to my asking anything about what William said without laying the foundation, and now they are asking him what William did say, without any foundation being laid, on another matter, one with relation to the passing of the green car.

The Court: The rule is a little broader for cross examination.

A. Can I tell you just the way he told it to me at the time?

page 179.} The Court: They asked for it; go ahead.

Q. Go ahead.

A. He stated that the oil truck was going east, that the lumber truck was coming west, that the automobile, going east passed by the oil truck, cut in front, around the other car, and the other car applied brakes, and there was a collision.

Q. It still is not clear to me how he told you the green car finally got by the two. I understand that he made an effort to go between the two, but how did he finally get around the two?

A. He did go between them before they hit.

Q. Before they hit?

A. Yes. The lumber truck, trying to stop to keep from hitting the passenger car—passed the car and got through before this thing skidded into the oil—

Q. You say it did go through?

A. Yes, it went through.

Dr. L. C. Ferebee.

Mr. Godwin: That is what he said?

Q. Did you make those notes then?

A. Yes, I made those notes then.

Q. Did Taylor sign them?

A. No, sir.

Q. Did you question the drivers of the truck—?

A. No, I did not. One of them was dead and the other one was unconscious. It wasn't possible to question them.

Q. You say one of them was dead?

page 180 } A. Yes.

Q. Who was that, Mr. Hall?

A. Yes.

Q. Where was he, his body?

A. He was lying in the front seat, partly—the oil truck which Hall, which we found Hall was driving, the front wheels were in the ditch; the man's feet were caught—

Q. The front wheels of what, the oil truck, was in the ditch?

A. Yes, and the man's feet were caught under the front of the car and his body pitched forward over into the right-hand side of his car, over the dash.

Q. Did you examine the body?

A. Yes.

Q. What were the injuries that killed him?

A. An examination of the body showed that the throat was cut from ear to ear.

Q. Throat cut?

A. Throat. Both jugular veins were cut *into*; even cut the trachea and esophagus. Left forearm broken, and left wrist fractured. With reference to the chest, both sides of his chest crushed in. Cuts on left knee, with various small cuts over the entire body. The windshield cut him all to pieces, because I pulled glass out of his neck.

Q. Doctor, I believe you stated that both front
page 181 } wheels of the oil truck were in the ditch. Where
was the lumber truck?

A. No, I wouldn't say both were in the ditch. I know one front wheel was down in the ditch, the car pretty low; the two trucks were bunched together where they came together; the truck was skidding across the head—front of that truck, and that were standing up something like that (indicating).

Q. Maybe you can illustrate down here with these things. Suppose you come down here, take that same diagram. Here is the oil truck and here is the lumber truck. These pencil

Dr. J. C. Dunford.

lines represent the edge of the concrete. Now, about where were they?

A. This is the edge of the concrete; this car was over here, and this car was up here like that. That is the way they were locked up, tied together.

Q. Is that the way you saw it?

A. Yes, sir.

Q. And you got there before the man had been removed from the cab or anything had been done?

A. Yes, sir, his car was turned over like that.

Q. That oil truck, you say?

A. The whole front of it was smashed in.

Q. The whole front smashed in?

A. Yes, sir; this seat in here; this part was down in the ditch. That was the position of the cars.

Q. Was the front of the lumber truck smashed in?

A. Yes, some of the lumber truck, but not as page 182 } much as the other car.

The Court: Gentlemen of the jury, the testimony of Dr. Ferebee with reference to statements made by the prior witness, William Taylor, are admissible only for the purpose of showing contradictory statements made by the witness Taylor. They are not evidence of the facts stated in those statements.

Mr. Williams: But go to the witness Taylor's credibility?

The Court: But go to the witness Taylor's credibility, that is right.

Mr. Gilman: And not to prove or disprove any of the issues in this case.

The Court: But not to prove or disprove any of the statements that were made.

Witness stood aside.

page 183 } DR. J. C. DUNFORD,
a witness introduced on behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Godwin:

Q. You are a practicing physician in Portsmouth, are you, not, sir?

Dr. J. C. Dunford.

A. Yes, sir. I have been a practicing physician here for 27 years.

Q. Did you have occasion to see William Smith, who was injured in an automobile accident on July 27th, 1937?

A. Yes, sir.

Mr. Bowles: If Your Honor please, I want for the sake of the record to note an exception to the introduction of this evidence on behalf of William Smith, to be consistent with my former position.

The Court: Yes, sir.

Mr. Bowles: Can we let that be understood, that that applies to all of the evidence?

The Court: Yes, sir.

Mr. Godwin: We will all agree to that.

Mr. Bowles: He agrees now.

The Court: Yes.

By Mr. Godwin:

Q. Doctor, what were his injuries and what was page 184 } his condition when you saw him? What were his injuries?

A. Well, now, here is an exact copy from the hospital records.

Mr. Bowles: Have you got the hospital record?

A. Sir? The records do not belong to me and I could not remove the records unless—

By the Court:

Q. Did you examine them?

A. Yes, sir, I examined them.

Q. Can you state what his condition was then?

A. Yes, sir. The patient was admitted to the emergency room at two p. m. on July 27th. He was bleeding from his nose, and both eyes, in a semi-conscious condition, talking at random; both eyes were swollen; the right side of his face and head was badly swollen, and his lips were terribly swollen. He was spitting mouthfuls of blood.

Q. And he was admitted at what time?

A. At two p. m. on July—

Dr. J. C. Dunford.

Mr. Bowles: We object to that item of the hospital record, if Your Honor please, unless the admitting person is produced here.

By Mr. Godwin:

Q. What time did you see him, Doctor?

A. That was 2:00 P. M. when he came to the emergency room—

By the Court:

Q. Did you see him at 2:00 P. M.?
page 185 } A. Yes, sir.

The Court: Objection overruled.

Mr. Bowles: Exception.

By Mr. Godwin:

Q. Dr. Dunford, what was his condition when he was brought there? Upon your examination what did you find to be his trouble?

A. His nose was broken, the interior part, part of his maxillary bone was terribly fractured here—

Q. Well, now, just in—?

A. That is, the upper cheek bone was fractured.

Q. Is that what it is?

A. Yes, sir. He was suffering with concussion of the brain.

Q. What was his condition?

A. Well, the man was in a dying condition from shock when he came to the emergency room.

Q. And when you saw him in that condition what did you all do for him?

A. We worked on him there for nearly an hour and then admitted him to the ward, by stimulating him with coramine; that is about the strongest stimulant that we have.

Q. And how long did that condition last?

A. He was in a semi-conscious condition for six days.

Q. Well, now, during those six days did he bleed any?

A. Yes, sir.

page 186 } Q. What did you do about that, sir?

A. Well, we just did nothing but the accepted treatment.

Q. What is that?

A. Well, I was under the impression the man had a basal fracture, because I detected some blood coming from his ears, and he had been bleeding at the eyes, and I recommended an

Dr. J. C. Dunford.

X-ray picture. Dr. Barrett took the X-ray picture.

Q. Were there any transfusions given?

A. Yes, sir.

Q. How many? How many transfusions were given?

A. They gave him two transfusions, what they call a glucose solution; not a blood transfusion, now. They gave him a glucose solution, which is a solution of glucose.

Q. Doctor, from the nature of his injuries, how long was he totally incapacitated from work?

Mr. Bowles: I understand he left the hospital in ten days.

A. Yes, he was in the hospital eleven days.

Q. Did you see him any more?

A. Well, he came home and then took treatments for some time.

Q. He did?

A. Yes, sir.

Q. How long would you say that that injury would incapacitate a man, or did incapacitate him?

A. I would say that he was, well, incapacitated for six months.

page 187 } Q. In your opinion has he had any permanent effect or disabilities by reason of this injury, Doctor?

A. Well, now, from subjective symptoms this man still is suffering as a result of this accident.

Q. Yes.

A. That is, chronic headaches; he complains that his memory is somewhat affected. Now, I have to accept that.

Q. Exactly.

A. I mean, the objective symptoms—

Mr. Bowles: You mean subjective?

A. I said, I had to accept subjective symptoms.

Mr. Bowles: I thought you said objective.

Q. In other words, the only thing you can do is to diagnose his case according to his statements of his disability?

A. According to his statements.

Q. That is all?

A. Yes, sir.

Dr. J. C. Dunford.

Q. Have you noticed his eyes particularly?

A. Well, he says his eyes still bother him. I told him he should manage to consult some oculist and see if glasses would get rid of it. He says his sight is still defective. I am not an oculist, so I could not confirm that.

Q. Well, now, has he been disfigured as a result of that accident? Is there any open displacement there?

A. No, sir, I re-set his nose and fixed his maxillary bone. His facial disfigurement you can hardly tell. I could tell.

Q. Yes, sir. Doctor, how much was the hospital bill, do you remember?

A. His hospital bill was \$51.50.

Q. And how much was your bill?

A. My bill is \$50.00. The hospital bill was \$51.50.

Q. And yours was \$50.00?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Gilman:

Q. Doctor, you say he was discharged in eleven days?

A. Yes, sir, with instructions to return to my office for further treatments, yes.

Q. Where did he live?

A. Chuckatuck.

Q. How far is that from Portsmouth?

A. I suppose that is twenty-some miles.

Q. How many?

A. I suppose it is twenty-some miles coming across the bridge.

Q. And how many times did he return to your office for treatment?

A. I don't know, Mr. Gilman. I didn't keep any accurate account of it, because I wasn't expecting to get any fees from it.

page 189 } Q. You didn't keep any account of it?

A. Because I had no idea I was coming into Court with this.

Q. How in the world do you figure the amount of your charges if you have no record of what you did?

A. I charged what I did for him in the hospital, and made no extra charge for office calls he had. It was eleven days' treatment in the hospital, the transfusions and treatment I

Perry Williams.

had given him. If you want me to add in there what the office calls were he made, I could charge him, it is considerably more than that.

Q. How many times did he come to your office?

A. I don't know, sir. I would have to estimate that. I can give you the accurate amount as far as the hospital treatment is concerned.

Q. And the transfusions?

A. We don't call them transfusions. We give them a solution of glucose.

Q. It is not a transfusion?

A. It was not a blood transfusion.

Q. Not a blood transfusion?

A. No, no blood transfusion. We charge \$5.00 for transfusions.

Q. Solution of glucose?

A. Yes, sir. That was during the period of his shocked condition.

Witness stood aside.

page 190 } PERRY WILLIAMS,
a witness introduced on behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Godwin:

Q. What is your name?

A. Perry Williams, sir.

Q. Mr. Williams, what is your occupation?

A. I am a State highway patrolman.

Q. Were you a State highway patrolman on July 27, 1937, sir?

A. Yes, sir.

Q. And as such did your duties take you to the scene of an accident, this accident in question?

A. Yes, sir.

Q. Now, Mr. Williams, it has been testified here—I won't ask you that way. I will ask you, when you got there, did you see the position of the trucks that were involved in this accident?

A. Yes, sir.

Q. What were the positions of those trucks?

A. Shall I explain, or—

Perry Williams.

Q. Yes. Let us take a sheet of paper—

The Court: All right, proceed.

page 191 } A. (Drawing) Here are the trucks.
Q. Yes, sir. Now you can mark on that west
and east, either way that you want to, Mr. Wil-
liams.

A. This is the direction of Portsmouth, east.

Q. All right, sir.

A. This is the direction—the new Suffolk road there. I
will call it west. When I arrived at the scene of the accident
I found the automobiles, the trucks involved in the approxi-
mate positions; this will represent the Saunders truck, which
was a flat bodied lumber, long type trailer.

Mr. Bowles: Now, could we draw around those like we
did before without moving them?

Mr. Godwin: Yes, sir, I think so.

A. I was trying to get an approximate angle there. I still
assume that this is the shoulder—

Mr. Bowles: Don't move it.

Note: Witness proceeds to mark outlines of model trucks.

A. Oil truck. Lumber truck.

Q. And this is about the position, similar to that?

A. Yes, sir.

Q. And this is the rear wheel?

Mr. Williams: Mark them 1, 2 and 3.

By Mr. Godwin:

Q. Now, Mr. Williams, I want to ask you about approxi-
mately how far the outside wheels of the oil truck,
page 192 } meaning the right-hand trailer wheels of the oil
truck, are from the edge of the concrete.

A. Approximately 18 inches to two feet.

Q. Now, was that a dual wheel?

A. Yes, sir.

Q. Dual wheel. Now, about how much wider are they than
the ordinary wheels of a regular automobile, the dual wheels?

Perry Williams.

Mr. Gilman: What do you mean, over all?

Mr. Godwin: Yes, over all.

Q. From end of axle to end of axle, or from the outside of the outside wheel to the outside of the outside wheel.

A. I should say it would be a difference, the width would be between 14 and 16 inches.

Q. Of one wheel?

By the Court:

Q. Is that all you want with the diagram?

Mr. Godwin: Yes, sir.

The Court: Take your seat in the witness chair, then.

Mr. Bowles: Better have that diagram marked as an exhibit, sir.

Note: Diagram in question marked "Defendant's Exhibit E" and filed in evidence.

By Mr. Godwin:

Q. Mr. Williams, what I want to get at is this: Another wheel, extra wheel, on the oil truck, with the space page 193 } between that wheel and the wheel itself, would extend out here how much farther?

A. It should extend approximately about seven or eight inches.

Q. Each wheel?

A. Each wheel, yes, sir.

Q. Now, did this oil truck have an overhang behind the wheels, do you remember?

A. Yes, sir, there was an overhang behind the wheels; the truck extended beyond the rear axle.

Q. Do you know how much, approximately?

A. It was an overhang of approximately four feet.

Q. About four feet. Did you talk to William Taylor, the witness who said he knew all about how this happened, and he was the one that was an eyewitness there?

A. Yes, sir.

Q. Did you base your investigation and actions on his statement to you?

A. Yes, sir.

Q. What did he tell you about it, Mr. Williams?

Mr. Gilman: Going back to the same thing.

Perry Williams.

The Court: I think we have got that issue pretty well straightened out. The specific statements that have been heretofore made by Taylor to either Dr. Ferebee or this witness may be shown and contradicted to attack his credibility, but they have been limited to questions of the page 194 } passing of the green car and some other questions.

By Mr. Godwin:

Q. Were you present when Taylor made his statement to Dr. Ferebee, the Coroner? Were you and Dr. Ferebee present together there?

A. Yes, sir.

Q. Well, what did he tell Dr. Ferebee in your presence, or to you, in reference to what this green car did?

A. Well, we was there talking to Taylor; the story he told us, the way I understood it, was that the two trucks were approaching each other; there was an unidentified green automobile bearing an out-of-State license, presumably a Maryland license plate, that attempted to overtake the lumber truck, and the way I understood it then that he passed the lumber truck, then cut back to the right-hand side of the road, to his right-hand side of the road, and proceeded on. I later understand that, talking with him later, that the car ran off the left shoulder of the road and attempted to and passed the oil truck on its left and proceeded on.

Q. Your first understanding from his statement was, as given to you and Dr. Ferebee, was that the other truck cut between the two; is that right?

A. That car, automobile, cut between the two.
page 195 } Q. I see. And it was later that you understood that it passed on the left-hand side of the road?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Williams, Mr. Godwin has referred to your investigation. You reported that William Smith was driving this truck, did you not?

A. Yes, sir.

Q. You were mistaken about that?

A. Yes, sir.

Q. Could it be possible that you misunderstood this man Taylor as to the account that he was trying to give you as to

Perry Williams.

whether the car went between or went on the shoulder?
Whether the car went between or went on the shoulder?

A. It could have been, but I don't think so.

Q. You mean you do not think you misunderstood him?

A. No, sir.

Q. You didn't say which way it went on your report, did you?

A. No, sir, I did not.

Q. Now, you later understood it went on the shoulder; you later understood from William Taylor?

A. Yes, sir. We have talked about that accident on several occasions, Taylor and myself.

Q. You and Taylor?

page 196 } A. Yes, sir.

Q. And you understood from Taylor on later occasions that the car passed on the shoulder and that that was the correct statement?

A. Yes, sir.

Q. And you have said it is possible that you could have misunderstood him the first time?

A. It is possible, yes, sir, that I could have misunderstood him the first time.

Q. You did not understand him to the effect that the green car was going in the same direction as the oil truck, did you?

A. No, sir. I understood him to say that the green car was going in the same direction as the lumber truck.

Q. Now, how soon do you suppose that you got there after this accident occurred?

A. Possibly four or five minutes.

Q. Four or five minutes?

A. Yes, sir.

Q. Had Mr. Hall been taken out of the wreck?

A. No, he was still in the cab of the truck when I arrived there.

Q. Whereabouts in the truck?

A. He was in the driver's seat.

Q. In what condition was he?

A. He was in a dying condition.

Q. What position was he in?

page 197 } A. He was sitting up erect in the cab. The wheel was pressed back against his chest.

Q. The cab was pretty much demolished, was it not?

A. Yes, sir.

Q. Of the oil truck?

Perry Williams.

A. Yes, sir.

Q. The lumber truck was sort of wrapped around the front of the oil truck, wasn't it?

A. It was in a sort of scissors position.

Q. In a jack-knife position?

A. Yes, sir.

Q. Now, the fronts of those trucks were in the ditch off the side of the road, that is, the right side going east?

A. Yes, sir.

Q. Now, Mr. Williams, there was right much confusion, I take it, around there, was there not?

A. Well, other than the usual confusion that takes an accident like that.

Q. You got your own first impression of that accident during that confusion from Taylor?

A. No, sir, it was—I talked to Taylor twice there. Once I talked to him, and Dr. Ferebee drove up and Dr. Ferebee talked to him and I was there when Dr. Ferebee talked to him.

Q. In your presence?

page 198 } A. Yes, I had to wait until Dr. Ferebee arrived.

Q. Now, was the trailer of the lumber truck blocking the highway?

A. Yes, sir.

Q. For passage of vehicles either way?

A. Yes, sir.

Q. In other words, the trailer of the lumber truck went all the way across the entire part of the concrete to the north side?

A. Yes, sir.

Q. Now, was there any damage to the lumber truck forward of the cab, Mr. Williams? Do you recall?

A. No, sir. The point of impact seemed to be right behind the cab.

Q. Of the lumber truck?

A. Of the lumber truck.

Q. And on the front of the oil truck?

A. On the front of the oil truck.

RE-DIRECT EXAMINATION.

By Mr. Godwin:

Q. Mr. Williams, what time did this accident happen? What time was it when you got there?

W. G. Saunders.

A. Approximately 1:45 P. M.

Q. When you got there?

A. Yes, sir.

Q. And you say the accident had happened
page 199 } how long?

A. About four or five minutes previously.

Q. Well, now, how far is it from South Norfolk to Suffolk?

A. From South Norfolk to Suffolk?

Q. Yes. Across the bridge.

A. Across the toll bridge?

Q. Yes, sir.

A. It is approximately eighteen miles.

Q. How far is it from Suffolk to Franklin? Do you know?

A. It is approximately twenty-odd miles. I don't know exactly, Mr. Godwin. It is around twenty-five miles.

Q. How far?

The Court: Twenty-two miles, isn't it?

Q. Twenty-two?

A. I don't know exactly, Judge.

Q. Then it is approximately forty miles from South Norfolk to Franklin?

A. Yes, sir.

Witness stood aside.

page 200 }

W. G. SAUNDERS,

one of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Godwin:

Q. Mr. Saunders, you owned this lumber truck, did you not?

A. Yes, sir.

Q. What kind of brakes did you have on it? Some question has been raised here about brakes.

A. The truck, as well as I remember, wasn't but six or eight months old, not over that, and I bought it from the Taylor Company; they had regular Bendix brakes, regular equipment that you find on those trailers.

Q. Had that truck been kept in proper running order?

W. G. Saunders.

A. Yes, sir.

Q. Had it been regularly—

Mr. Bowles: I object to leading questions.

Q. Had it been inspected?

Mr. Bowles: I object to that; that is leading. Tell him to do it in the right way, sir.

By the Court:

Q. Had it or had it not been inspected?

A. Yes, sir, it had.

By Mr. Godwin:

Q. What is the difference, Mr. Saunders, in the page 201 } fair market value of that truck just prior to the accident and immediately after the accident?

Mr. Bowles: If Your Honor please, I think for the record he should be qualified to speak on such subjects.

The Court: I didn't hear you.

Mr. Bowles: I think for the record he should be qualified to speak in such subjects.

Q. How long have you been in the trucking business?

A. Well, I think that is truck No. 15.

Q. Truck No. 15?

A. I think it is the 15th one I owned. I have driven, worn out about eight or nine of them myself.

Q. And you are regularly trading them in?

A. Practically every year. I usually run them 12 or 14 or 16 months.

Q. Mr. Saunders, may I ask what did that truck cost you, and the tractor cost?

A. Well, the job complete, I think, was fourteen hundred and some dollars. That is, the tractor and the truck.

Q. And how much was the tractor worth after the accident?

Mr. Bowles: Objection.

A. Well, I got about \$50.00 worth of junk off of it.

Q. Was it or not injured beyond repair?

A. Sold it to the junk man.

W. G. Saunders.

page 202 } Q. Was the motor hurt?

A. Broken; sent it to the Ford Motor Company to have an extra motor—trade it for an extra motor, but they wrote me a letter that it was cracked and wasn't any good for trading. So I didn't ever get that back.

Q. Well, now, how much did it cost you to fix up your trailer?

Mr. Bowles: If Your Honor please—if you are going to prove the value they don't go on the repair theory. They have to stick to one or the other.

Mr. Godwin: Your Honor, I have got to go on the theory of the difference of value of the tractor, because it was a total wreck, so the witness says. Now, I am willing to go the same way on the other one or as to the damages, either one. It would amount to the same thing.

The Court: Do you withdraw the objection?

Mr. Bowles: For the moment, sir.

A. Well, the tractor wasn't of any value, scarcely; I would guess \$50.00 is all I would value that in junking, the few parts that I used myself. The fenders and the hood and the cab and all that stuff is around there back of my field now, never use it. And I expect—I am kind of guessing—I expect it cost me a little better than \$100.00 to fix the trailer up.

Q. You fixed it in your own shop, did you?

page 203 } A. Fixed it in my own shop, Chuckatuck. And of course I had to buy a new tractor, bought a new tractor, practically had to—

Q. What was your total damage, Mr. Saunders, as a result of this accident?

Mr. Bowles: Objection.

Q. What, then, was the difference between the value of this tractor and trailer—

The Court: Let me take them separately. Go ahead.

Q. We will take them separately, then. What was the difference between the fair market value of your tractor immediately prior to that accident and immediately after the accident?

A. The difference?

W. G. Saunders.

Q. Yes, the difference in the value.

A. Well, the tractor had been used some. I would say \$500.00; five or six hundred dollars. I believe I could have gotten that for it in trade.

Q. Yes. Well, now, what was the difference in the value of your trailer immediately prior to and after the accident? The fair market value, I mean?

A. Well, that trailer cost around \$500.00.

Q. And you repaired it for \$100.00?

A. I reckon \$125.00 or maybe \$150.00; I didn't keep accurate account of it because I did it in my own shop, and
page 204 } we just worked on it gradually. I had to wait
for a truck; couldn't get a truck at that time. We
had to do possibly ten days' work on it after we got it home.

By the Court:

Q. Well, when you finished, was it as good as it was before, worse than it was before, or better than it was before?

A. Well, I would say it was as good, because I had a good coupling made; you can't haul long logs on there without a coupling on there; costs about \$40.00 to have one made. I could have the man that made it to testify to that. In fact he charged—tried to charge me \$45.00, the difference with another coupling when you buy a new trailer.

Q. Then other than the loss on your tractor you had about \$100.00 damage to your trailer?

A. That is a reasonable guess, yes.

Q. Mr. Saunders, have you been to the scene of this accident?

A. I have been where it was, yes, but everything was moved when I got there.

Q. Are there some houses there on the corner of the highway where the accident occurred?

A. Yes, it is one on each corner on the dirt road there.

Q. Do those houses face the highway?

A. Yes.

Q. Are they parallel to it?

A. They are square, as near as you can get one, with the road.

page 205 } Q. Do you remember seeing the house as shown
in this picture?

A. Yes, sir.

Mr. Bowles: What picture is that?

Mr. Godwin: That is Exhibit A-2.

William Smith.

Q. Is that parallel to the road there?

A. Yes, sir. Yes, sir. I don't think it would vary more than an inch or two.

Witness stood aside.

Mr. Bowles: Same exception, Your Honor, it is understood, as to Mr. Saunders' testimony.

The Court: Same exception.

page 206 } WILLIAM SMITH,
 one of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Godwin:

Q. Your name is William Smith?

A. Yes, sir.

Q. What do you do, William, for a living?

A. I have been farming for the last year or so, but now, I am on public work now.

Q. Public work?

A. Yes.

Q. William, were you on the truck that had that this accident occurred?

A. Yes, sir.

Q. Were you working for Mr. Saunders?

A. No, sir.

Q. How did you happen to get on that truck?

A. Well, the truck stopped at the service station down there at Chuckatuck, you know, and I went out, I came out; I just *road* out on the truck.

Q. Just rode out on the truck?

A. Yes, sir.

Q. Who was driving the truck?

A. Elmer Hall.

page 207 } Q. Where was Mr. Saunders, do you know?

A. No, I don't.

Q. Did Mr. Saunders know you were on the truck?

A. No, he didn't know I was on there.

Q. I see. Now, where had you been with Elmer?

A. Been down to the Atlantic Creosoting plant.

Q. Where?

William Smith.

A. Atlantic Creosoting plant.

Q. Atlantic Creosoting plant?

A. Yes, sir.

Q. And where were you going when the accident happened?

A. We were on our way home when it happened.

Q. You were?

A. Yes.

Q. Do you know about what speed you all were going, William?

A. The last time I looked at the speedometer we was going around 20 or 25 miles.

Q. Well, now, just tell us as best you can what happened.

A. What happened? We was driving around 20 or 25 miles an hour, and the road was slick, it was raining, you know, and he met—a car came up behind him, and the other truck was coming in front of him on the right-hand side, same side he was on, and I just remember when the car just got about the length of the car, hit the truck, and that is all I remember.

page 208 } Q. Knocked you unconscious?

A. Knocked me unconscious.

Q. How long were you in the hospital?

A. Oh, around eleven or twelve days.

Q. How long were you out after you got home?

A. Out?

Q. How long were you out of work or in the house?

A. I was in the house I reckon about a month or two before I could do anything; probably longer than that. I didn't do nothing the balance of the year to amount to anything except piddle around, that is all; I wasn't able to work.

Q. You say you were farming?

A. Yes, sir.

Q. Whose farm were you on?

A. Dr. Eley.

Q. Are you bothered any now from headaches?

A. Yes, sir, pretty near all the time.

Mr. Bowles: I object to that leading testimony.

The Court: Objection sustained. Strike that.

Q. Do you have any troubles at all from your injuries now, and if so, what are they?

A. I suffer with the headaches pretty nearly all the time.

Q. Do you have any other troubles?

A. No, sir.

William Smith.

Q. Now, William, I believe you said when you
page 209 { were riding along there a car came up behind
you?

A. Yes, sir.

Q. What did that car do? Did you hear it blow or not?

A. No, sir, I didn't hear it blow.

Q. Did it pass you or not?

A. Yes, it passed us.

Q. And what did the oil truck do?

Mr. Bowles: He said he didn't know.

A. I don't remember seeing the oil truck.

Q. You don't remember seeing that at all?

A. No, sir, not at all.

Q. The last you remember is seeing the car?

A. Yes, sir.

Q. Do you know how long you were unconscious?

A. I imagine it happened on Tuesday, and it was about
Thursday before I knowed anything.

Q. About Thursday?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Gilman:

Q. William, you say Elmer was driving?

A. Yes, sir.

Q. You and Elmer were good friends?

A. Yes, sir.

Q. And you were just riding out with him that
page 210 { day to pass the time away, were you?

A. Yes, sir.

Q. What time did you leave Chuckatuck?

A. I don't exactly know what time we left there.

Q. What?

A. I don't exactly know what time we left.

Q. I assume you came down with a load? Did you have a
load?

A. Yes, sir, he had a load.

Q. Load of what?

A. Big oak sills; pine—

Q. Oak sills?

A. Yes, sir.

Q. Pine, you say?

A. Oak or pine ties, something.

William Smith.

Q. Pine ties and oak sills? You don't know what you had aboard?

A. They were pine ties.

Q. Pine ties?

A. Ties.

Q. Crossties?

A. Yes, sir.

Q. You use pine for crossties?

A. Yes, sir.

Mr. Williams: They do.

Q. When you came to the Atlantic Creosoting
page 211 } place you put your load off?

A. Yes, sir.

Q. Then what did you do?

A. We started off back home.

Q. Where did you stop from the Atlantic Creosoting Company to the time of the accident; how many stops did you make?

A. We didn't make any stops.

Q. No stops at all?

A. No stops at all.

Q. What were you and Elmer talking about?

A. We weren't talking about anything.

Q. Sitting there not saying a word to each other?

A. We weren't saying nothing to each other.

Q. Not a word?

A. Yes, sir, we were.

Q. Quaker meeting?

A. Sir?

Q. Quaker meeting?

A. Quaker?

Mr. Godwin: He don't know what you mean by a "Quaker meeting." He never saw a Quaker up in the country.

Q. No conversation between the two of you?

A. No, sir, neither one of us.

Q. You were keeping a lookout straight ahead?

A. Yes, sir.

page 212 } Q. And you heard this car behind you?

A. Yes, sir.

Q. Elmer was keeping a lookout too?

Paul T. Mertel.

A. Yes, sir.

Q. Straight ahead?

A. Yes, sir.

Q. And you didn't see any oil truck?

A. No, sir, I don't remember seeing any oil truck.

Witness stood aside.

page 213 }

PAUL T. MERTEL,

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

DIRECT EXAMINATION.

By Mr. Godwin:

Q. What is your name, age and occupation?

A. My name is Paul Mertel.

Q. Paul what? How do you spell it?

A. M-e-r-t-e-l. I am 29 years old.

Q. And your occupation?

A. Machinist's helper.

Q. Machinist's helper? Mr. Mertel, did you go to the scene of an accident that happened up here on the King's Highway on July 27th, 1937, between a lumber truck and an oil truck?

A. Yes, sir.

Q. Where were you at the time the accident occurred?

A. Well, I was, I would say, about as far as from here not quite to Middle Street from where it happened.

Q. From where it happened?

A. Yes, sir. I was on the same road and I was up that far up from it.

Q. Did you see the oil truck before the accident?

A. Yes, sir.

Q. Well, now, will you look at the jury here,
page 214 } sir, and tell them just what you know about this
accident? From the time you first observed the
oil truck until it happened?

Mr. Bowles: If Your Honor please, how far away was it?

The Court: Less than from here to the middle of the street, he said.

Mr. Bowles: When he first saw the oil truck?

A. When the accident happened.

Paul T. Mertel.

The Court: That is what he said.

Mr. Bowles: I didn't so understand it.

The Court: Tell what you saw; just proceed.

A. From the start to the—?

Q. Yes, just tell the jury.

A. I was walking from Powers' Hill to the south side of Truxton on the King's Highway coming into Portsmouth; it was raining, and I was walking on the shoulder of the road, off the highway; I didn't see this truck—I didn't see it until it was on top of me, and when it was, why, I jumped in the ditch to avoid being hit, because when he passed—

Q. What truck was that?

A. That is the oil truck. Just as I jumped I noticed as best I could and his rear wheels of the trailer were off the road. So I got back on my feet again, slipped again; I kept noticing him go a little ways, go off the concrete and come back on again; I don't know how long he kept that up. The last time I saw that truck, noticed the oil truck, he was
page 215 } about—I would say the rear wheels of the trailer
on the right-hand side were at least three feet
from the edge of the highway, concrete, in the middle of the road, and he was going at least between 45 and 50 miles an hour. He was really what I call going to town.

Mr. Bowles: If Your Honor please, I object to this testimony until we find out what I first asked, how far away this was from the point of the accident. If I am not mistaken this man was half a mile away, or a quarter of a mile away, around a curve, and that is what I tried to get at just a moment ago. And if so, I think it is clearly inadmissible, highly prejudicial, and should not have been offered.

Q. Well, Mr. Mertel, when it first passed by you—

Mr. Bowles: I object, if Your Honor please, until we first establish where he was.

The Court: I have got to find out how close he was to the scene of the accident.

Q. When you first saw the oil truck—I think he said it once, Your Honor—when you first saw the oil truck, and when it passed you, how far were you away from where the accident occurred down the road?

A. You mean when the accident happened where was I?

Paul T. Mertel.

The Court: The lumber truck—

page 216 } Q. When the accident occurred, did you see it?
 Could you see it?

A. Yes, sir, I could see it.

Q. How far were you from the—

By the Court:

Q. One minute. Did you see it?

A. No, I didn't see it happen. I saw the after-effects of it, when the two trucks stopped I saw what was there. I saw a car come up behind the lumber truck, the log truck. I saw that. I was watching that at the time.

Q. All right, sir. Now, how far were you away from the place where the accident happened when they all went together like?

A. About as far as from here to almost to Middle Street, up here, the next block street.

Q. Middle Street?

A. Middle Street, and Court.

Mr. Bowles: That is about four hundred feet.

Mr. Godwin: I don't know where Middle Street is, Your Honor.

Mr. Gilman: The next block.

Mr. Godwin: It is one block? He was one block away.

Mr. Gilman: It is more than a block from here.

By Mr. Godwin:

page 217 } Q. Put in yards, how far would you say it was?
 A. About 125 yards.

Q. About how far?

A. About 125 yards.

Q. About 125 yards, and was the road straight from where you were to where the accident occurred?

A. Yes, sir.

Q. Or not?

A. Yes, sir, it was straight.

Q. Now, you say the oil truck passed you and you fell down getting out of the way of it?

A. Jumped out of the way of it, yes, sir.

Q. Was anybody with you?

A. Yes, there was a boy with me.

Q. Was he on the inside or the outside?

A. He was near the ditch.

Paul T. Mertel.

Q. He was near the ditch? You say after it passed you it went on down the road, and then you said you saw a passenger car. What did the passenger car do?

A. To the best of my knowledge I saw that car cut from behind the log truck. I saw that, but how it got back and got in the highway I don't know.

Q. You don't know?

A. To the best of my recollection he must have went around to the right of that oil truck and come back down that way and went around his left instead of his right.

page 218 } Q. Went to the oil truck's left?

A. No, oil truck's right.

Q. Do you know which way he went?

A. What?

Q. Did you see him, which way he came through?

A. I didn't see him come through but I saw him go there.

Q. You didn't see him come through?

A. No, but I saw him go through there.

Q. You say you estimate the oil truck was running about what speed at that time?

A. Between 45 and 50, because I told this boy, made the remark, I said—

Mr. Bowles: I object to it, if Your Honor please.

The Court: Objection sustained.

Mr. Williams: Part of the *res gestae*, Your Honor.

The Court: I sustain the objection. Whatever he knows he can testify to.

Q. And after you fell down in getting out of the way of it, did you notice it any more? Did you watch it when it went on down the road?

A. Yes, sir, I watched it.

Q. And you said that the last time that you noticed it, that it was about how far, the right rear wheel was about how far from the edge of the concrete?

A. About between two and a half and three feet.

page 219 } Q. It was?

A. Yes, sir. That is, the trailer wheels.

Q. Going down the highway?

A. Yes, sir.

Q. You have been summoned here today by the defense, have you not?

A. Yes, sir.

Paul T. Mertel.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Your name is Mertel?

A. Yes, sir.

Q. Paul T. Mertel?

A. Yes, sir.

Q. You live at 1500 Laurel Avenue?

A. No, sir.

Q. You did live there on July 29th, 1937, didn't you?

A. Yes, sir.

Q. In Portsmouth, Virginia?

A. Yes, sir.

Q. Now, where did you work?

A. I was working in Powers Inn on the over pass, that new toll road over to Norfolk.

Q. You had just come across the railroad track, hadn't you?

A. No, sir, I had passed that track.

Q. You had just come across it, I said?

page 220 { A. No, sir. I didn't come across it. I was already past it.

Q. If you came past it you came across it, didn't you?

A. You said I just came across it. I had not. I was already across it.

Q. Did you not cross the railroad track walking along?

A. Yes, sir.

Q. There is a curve there, and about two-tenths of a mile there is another curve there, and then about two-tenths of a mile there is another curve there?

A. There is only two curves in that road.

Q. Three of them, aren't there?

A. Two.

Q. Two and a little one?

A. I know of two curves.

Q. Are you sure?

Q. And you can't show it.

Q. Do you walk it often?

A. I haven't walked it often, but I drove it four years right steady.

Q. Where did you come from?

A. New York City.

Q. What?

A. New York City. Ex-Navy man.

Q. Now, you got down to this curve, had you?

Paul T. Mertel.

A. I passed two curves.

Q. You hadn't passed the third one?
page 221 } A. I don't know; it is two curves in that road
that I can tell you anything about.

Q. Mr. Mertel, do you know Mr. Mercer?

A. Mr. who?

Q. Mr. Mercer.

A. No, sir.

Q. Didn't a man with dark hair, rather slight and rather short, come to see you just two days after this accident happened?

A. No, sir, not as I know of.

Q. Didn't anybody come to see you? Your name is Paul T. Mertel, isn't it?

A. Yes, sir.

Q. You lived at 1500 Laurel Avenue at that time, didn't you?

A. Yes.

Q. On July 29th did you make a statement and talk about the facts of this accident?

A. Not that I know of.

Q. You don't remember that? Didn't you give him a statement about it, and didn't you sign it?

Mr. Williams: May it please the Court—

Mr. Bowles: I am not going to offer it.

A. Not that I know of, no, sir.

Mr. Williams: I ask the Court to instruct the jury to disregard the remark of counsel and the question.

Mr. Bowles: I am not going to introduce the
page 222 } statement, Your Honor.

Mr. Williams: What is the difference?

The Court: I think the reference to the statement is immaterial and improper. The further examination with reference to the witness Taylor was with reference to the oral statements he had made to other people.

Note: The jury retired from the courtroom. After extended argument and discussion between the Court and counsel the Court adjourned until the next day at 10:00 A. M.

Mr. Godwin: I wish to introduce in evidence a picture of the truck of W. G. Saunders marked "Defendants' Exhibit

Paul T. Mertel.

F", and I wish also to introduce in evidence a picture of the E. B. Matlack truck marked "Defendants' Exhibit G."

Note: Photographs in question so marked and filed.

June 24, 1939. 10:00 A. M.

Note: After additional argument out of the presence of the jury, the witness, P. T. Mertel resumed the stand before the jury.

page 223 }

10:00 A. M., June 24, 1939.

Note: After extended argument of counsel as to admissibility of testimony in contradiction of prior written statements, the Court ruled as follows:

The Court: My final conclusion is that the statute prohibits doing indirectly what it prohibits doing directly, and I will so rule in this record. That means, according to my interpretation of it, that witnesses may not be permitted to testify in contradiction of the witness on the stand as to statements made on the occasion of the reduction of these statements to writing, signed by the witness.

Mr. Bowles: I note an exception. If Your Honor please, we would like to get this contradiction into the record, of course, which I assume Your Honor will permit, out of the presence of the jury.

The Court: Yes.

Mr. Bowles: In order to do that I think we must—Now, will Your Honor permit a question of the witness now under cross examination, did he make such a statement at such and such a time? Because he may admit it.

The Court: I will permit that with the jury out, certainly.

page 224 } Mr. Bowles: I mean with the jury present. It would seem to me that I should be permitted to ask the question, Did you on such and such an occasion make such a statement? Now, then, if he admits it, I have a right to that before the jury. On the contrary, if he denies it, then I am not permitted to contradict it.

The Court: You could see what he says, and if he admits it—

Mr. Williams: My friend is trying to do indirectly what

Paul T. Mertel.

the Court has ruled he would not be permitted to do directly.

Mr. Bowles: No, that is not my purpose. There may be some guilty conscience that makes you feel that way, sir. All that I want is to get my record clear, sir.

Note: At this point P. T. Mertel resumed the witness stand.

page 225 } Jury out.

PAUL T. MERTEL,
a witness previously introduced on behalf of the defendants,
upon being recalled, testified further as follows:

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Mertel.

A. Yes, sir.

Q. Did you ever see that gentleman before?

A. I don't recognize either one of them.

Q. Did you ever see them before?

A. I don't believe I ever saw them before. I saw them outside this morning.

Q. Did you ever see them before this morning?

A. Not that I know of, no, sir. Neither one of them.

Q. Do you know a boy named Julian Moore?

A. No, sir.

Q. Who was the man that was walking with you that day?

A. Some boy, I didn't even know him.

Q. You never saw him before nor since?

A. No, sir.

Q. Did you not state to these two gentlemen on July 29th, when they came to see you about this accident, one of them being Mr. Marshall Mercer of Richmond and the other being

Mr. Massey T. Holden of Richmond—did you not
page 226 } state to them that you had just shortly crossed
this railroad track and that the oil truck passed
you and went out of your sight around a curve?

A. I don't think so.

Q. You don't think so?

A. I didn't see them men that day you are talking about.

Q. Didn't you make that statement to these two men, that the oil truck passed you and went out of sight around a curve?

A. I don't think so.

Paul T. Mertel.

Q. You don't think so?

Mr. Bowles: Now, if Your Honor please, at that point, that answer, it seems to me, I am entitled to *to* have before the jury. He doesn't think so.

Mr. Godwin: May I ask for the purpose of the record who is Mr. Marshall Mercer and who is this other gentleman? I can't remember the name—

Mr. Bowles: Mr. Marshall Mercer was investigating for the workmen's compensation carrier, the Indemnity Insurance Company of North America, which carried the workmen's compensation insurance on Matlack, which was claimed by reason of this man's death, Hall, Erwin H., an employee of E. B. Matlack.

Mr. Godwin: Who is the other fellow?

Mr. Bowles: If you will give me a chance—Mr. Massey Holden is an employee of the Nichols Company, page 227 } a private investigating company.

Mr. Godwin: Who was he investigating for?

Mr. Bowles: I do not think that this record should be required to show that any further. That is a question which could not possibly be asked before this jury.

The Court: I do not think the statement the witness has just made ought to go before the jury.

Mr. Bowles: I note an exception.

The Court: In order to preserve your exception on the record, do you want to offer either of these gentlemen as witnesses?

Note: Here followed discussion, after which the jury returned to the courtroom.

The Court: Gentlemen of the jury, the Court sustains the objection made to the last question asked when you were present in the courtroom. Proceed.

Mr. Williams: As Your Honor sustains the objection, would you tell the jury to disregard the last question?

The Court: They should disregard any implication. The record doesn't show any answer—

Mr. Williams: But disregard the question, because the question was in the form of a statement by counsel.

The Court: I think that is correct. I so in-
page 228 } struct the jury.

By Mr. Bowles:

Paul T. Mertel.

Q. Mr. Mertel.

A. Yes, sir.

Q. Where were you coming from at the time that you have just testified?

A. Powers Hill.

Q. Where were you working?

A. Driving a truck out there on the new road going to Norfolk.

Q. Where was your truck at night?

A. Powers Hill.

Q. Had you knocked off from work or what?

A. Yes, sir, on account of the rain.

Q. What time was it you were walking along there?

A. I don't know; in the afternoon some time.

Q. About two-thirty?

A. I couldn't say. I didn't have no watch with me.

Q. What day was it?

A. It was a week day, but I couldn't tell you what day it was.

Q. What month was it?

A. I don't know that, either.

Q. What year was it?

A. 1937.

Q. Now, you had come across the railroad track?

A. Yes, sir.

page 229 } Q. And you had gone how far?

A. Around two curves.

Q. Gone around two curves?

A. Yes, sir.

Q. And you said that you were away from the place—

A. What was that?

Q. You said on questions by one of these gentlemen here that you were away from the scene of this accident the distance from here—a distance of about from here to—what was it, what street?

A. Middle Street.

Q. Middle Street. How far would that be, about 400 feet?

A. From here to Middle Street, about 600 feet.

Q. About 600 feet. Now, after the crash occurred, you went up to the crash?

A. Yes, sir.

Q. When you got there this man had been taken out of the cab, had he not?

A. Yes, sir.

Q. He had been. Had the drivers of the lumber truck been

Paul T. Mertel.

gotten out of their truck?

A. They were out, sitting down.

Q. Did you run up to the scene of the accident?

A. I walked fast. I didn't run. I walked fast.

page 230 } Q. Now, you saw this accident was occurring,
but you couldn't see anything about what was occurring; isn't that true?

A. What do you mean by that?

Q. You didn't see how it happened?

A. No, sir, I didn't see how it happened at all.

Q. Did you see the lumber truck skid across the road?

A. I told you everything I saw was that green car. That is all I saw.

Q. When the green car was coming towards you—

A. Yes, sir.

Q. —you saw that an accident had occurred beyond that?

A. I didn't see it.

Q. You didn't see the accident?

A. No, sir.

Q. I thought you testified the other day that you did see it.

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

Q. It didn't happen in your sight, then?

A. I was watching the green car.

Q. You were watching the green car?

A. That is what I said yesterday.

Q. I didn't understand you. You didn't see the accident, though you were looking right at it?

A. I can tell you in my own words what I actually saw.

Q. I would like for you to tell me whether or not you saw the accident first.

page 231 } A. No, sir, I didn't see the accident happen at all.

Q. You were looking right in the direction of it?

A. Well, I was looking right over there, but I didn't see it happen. I had my eye on the green car coming up the road.

Q. You kept your eyes on the green car and the green car passed you?

A. Yes, and turned around and watched it.

Q. Did you get his number?

A. No, sir. It was right much dust back there, and it was raining, drizzling.

Q. You saw the name on the oil truck as it went by?

A. No, sir, I didn't see the name on the oil truck as it went by.

Q. Did the boy with you see it?

Paul T. Mertel.

A. No, sir.

Q. Didn't the boy with you tell you—?

Mr. Williams: I object to that, Your Honor, what somebody else may have told him.

The Court: Objection sustained.

Mr. Bowles: I think if Your Honor would hear the rest of my question the Court might not sustain the objection. I was interrupted in the middle of it.

Mr. Williams: Your Honor, I understand Mr. Bowles to have started off in a manner which I thought it page 232 } was proper to interrupt in the middle of it. It does not make any difference what somebody told this gentleman. It is not evidence in this case, because it is bound to be hearsay.

The Court: It would be of the fact, what he said, if it resulted in his taking some action.

Mr. Williams: This witness was asked whether or not he saw this name on the truck, and he said No. Now, the question that immediately follows, I think is entirely irrelevant to that situation.

The Court: State the question, then. Complete the question.

By Mr. Bowles:

Q. Didn't the boy with you tell you, as the truck went by, what the name was on the truck?

Mr. Williams: I object to that, Your Honor, and ask the Court to instruct the jury to disregard it.

The Court: Objection sustained, and the jury so instructed.

Mr. Bowles: I note an exception.

Q. Now, why were you watching the green car?

A. I don't know. I was just watching it, that is all.

Q. Well, you saw the lumber truck on the road?

A. I saw a truck. That is all I saw. I didn't know whether it was a lumber truck or not.

Q. You saw two trucks?

page 233 } A. I saw one coming towards me and the other one going past me.

Q. And you were 600 feet away?

A. I can't see—a truck 600 feet away, in the rain, with lumber in back, a big cab in front—

Q. Was there lumber in the back of it?

Marshall P. Mercer.

A. Well, when I got up there and saw it, after the thing happened.

Q. How much lumber was in the truck?

A. I would say the lumber truck was loaded.

Q. You would say the lumber truck was loaded? What kind of lumber did it have on it?

A. Green pine.

Q. Green pine?

A. It looked to me; I don't know—green pine—I don't know what it was.

Q. Are you sure it was green?

A. It was green.

Q. That is all. Thank you.

RE-DIRECT EXAMINATION.

By Mr. Godwin:

Q. Mr. Mertel, have you any interest in this case one way or the other?

A. No, sir.

page 234 } Q. Do you know any of the parties or not?

A. I knew her husband, I didn't know his name or where he lived, anything about him, but I passed him on the highway on the truck, but I didn't know it was him, though, that got killed.

Witness stood aside.

The Court: Do you want to preserve anything further in the record on my rulings?

Mr. Bowles: I think I should, sir.

The Court: Out of the presence of the jury, for the purpose of preserving exceptions heretofore made.

Note: Jury retires from the courtroom.

page 235 } MARSHALL P. MERCER,
a witness introduced on behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. You are Mr. Marshall P. Mercer?

A. That is right, sir.

Q. I believe you are at this time connected with the George

Marshall P. Mercer.

R. Mercer Company, rug cleaning business, in Richmond?

A. That is my business at this time.

Q. In July of 1937 you were the Claim Representative or Manager of the Claim Office of the Indemnity Insurance Company of North America in Richmond, I believe?

A. That is right, sir.

Q. I believe you investigated this accident that we are discussing here on behalf of that Company and in its interest because of its connection with it as having the workmen's compensation insurance on E. B. Matlack, who was the employer of the decedent here, Erwin Hall; is that correct?

A. That is right. That is correct, sir.

Q. Did you go to Portsmouth—

Mr. Williams: Your Honor, that is all over our objection.

Mr. Bowles: I understand, simply for the purpose—

The Court: For the purpose of preserving exceptions heretofore made, and this is what he offers to prove page 236 } under it.

Mr. Bowles: I am fully cognizant of the fact, sir, I am asking some leading questions. I do it for the purpose of hurrying along. If there is no objection to it I would like to do so for the—

The Court: Go ahead.

Q. I believe you went to Portsmouth and that vicinity on July 29th for the purpose of making an investigation?

A. Yes, I did. I came down on the morning of the 29th of July, 1937.

Q. That was two days after the accident occurred?

A. Yes. The accident occurred on July 27, 1937.

Q. Now, you have seen this witness, Paul Mertel?

A. Yes, sir. I have seen him, been in his home.

Q. Did you interview him on the 29th?

A. Yes, sir, I did.

Q. Where?

A. At his home in Portsmouth, Virginia.

Q. In Portsmouth. I want to ask you, sir, whether or not this man Mertel fixed the time of this accident at about two-thirty?

A. Yes, he did.

Q. Do you have any doubt about it?

A. No, it was no doubt about it; having got off from work.

Q. I ask you this question: Whether or not

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page 237 } that man told you that he had gone over the railroad track when this oil truck passed, and that prior to the accident the oil truck passed out of his view around a curve, and then he later came upon the fact that an accident had happened?

A. It was entirely out of his view when the accident occurred. He did not see the accident. He was very positive as to that.

Mr. Williams: Wait just a minute. There isn't anything contradictory about that. The witness said on the stand he didn't see it.

The Court: On the stand he said he was in range of vision of the accident.

A. I say he said he didn't—

Mr. Williams: I didn't understand that gentleman to—

A. He was around the curve and he couldn't see the accident.

The Court: He does contradict him as to the range of vision.

Q. Did he or not tell you that the truck had gone around a curve and passed out of his view before the accident happened?

A. He did.

Q. Did he or not tell you that the name on the truck, E. Brook Matlack, Richmond, Virginia, was observed by him and the boy that was with him, and that the boy remarked upon it as it passed?

page 238 } A. He did. He recognized it.

CROSS EXAMINATION.

By Mr. Williams:

Q. You are testifying from your independent recollection of that conversation, or have you examined some written statement recently?

A. I recollect a good portion of it, sir, the major features.

Q. Have you examined any written statement taken at that time recently?

A. I have, sir, this morning.

Marshall P. Mercer.

Q. When? This morning?

A. This morning.

Q. Did you take it?

A. I wrote the statement out myself, sir.

Q. In your own handwriting?

A. That is right, sir.

Q. Did he sign it?

Mr. Bowles: I object to that on this theory, that Your Honor has ruled; this is all for the purpose—

Mr. Williams: I understand, sir, but I must be consistent.

The Court: I will let it go into the record.

Q. There was somebody with you, was there not?

A. That is right, sir.

Q. And he was also making an investigation for some company?

page 239 } A. I understand he was.

Q. Mr. Mercer, did I understand you to say that you recollected this independently of the statement? The question I asked you—?

A. I say I remember the facts very clearly as to what he had to say. I sat in the living room of the home that he lives in. I called at his home and was in there when shortly afterwards another investigator, Mr. Holden, came in. I had no idea he was whatever interested in the case.

Q. You didn't go there together, then?

A. We did not. I was already there. I had no idea that Mr. Holden knew anything about the case whatsoever.

Q. Well, now, do you have an independent recollection, independent of this written statement, of this interview between yourself and Mr. Mertel?

A. Yes, sir. I recollect it very clearly.

Q. Independently of the written statement?

A. Absolutely.

Q. Do you recall his telling you that that first truck was gone out of his view around a curve?

A. He certainly did.

Q. And the other questions that I have asked you?

A. He certainly did, yes, sir.

Q. Why did you examine the written statement this morning?

A. Why?

Q. Yes.

Massey T. Holden.

page 240 } A. Just to refresh my memory on some of it.

Q. That is all.

A. It brings to mind all of the facts that transpired.

Q. That is all.

Witness stood aside.

Mr. Bowles: I will be very glad to stipulate that Mr. Holden will testify the same thing, if you want to shorten up the time.

Mr. Williams: It is all right with me.

page 241 } MASSEY T. HOLDEN,
a witness introduced on behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. Mr. Holden, you are Mr. Massey T. Holden?

A. Yes, sir.

Q. You live in Richmond?

A. Yes, sir.

Q. By whom are you employed?

A. Nichols Company.

Q. That is a company that makes independent investigations for various and sundry insurance companies and others?

A. Yes, sir.

Q. Did you undertake to investigate this case?

A. Yes, sir, I did.

Q. Did you interview Mr. Paul Mertel, who is the gentleman that just testified on this witness stand?

A. Mr. Mercer, who just testified, was commencing to interview him, had just evidently just gotten to his home, just started talking to him, when I got there, and I talked to him also, yes, sir.

Q. Was that on the 29th of July, 1937?

page 242 } A. Is it all right for me to ask a question, Mr. Bowles, or am I supposed to go ahead and—

Q. Answer as far as you can. If you do not understand the question—

A. What I was going to ask you, I don't remember that particular question, the answer to this question, from my own memory, the day, but I do remember the occasion. Now, I know the date was the 29th, because it was written down.

Massey T. Holden.

Q. You know that because of the written statement which Mr. Mercer took, and you have refreshed your memory from that; is that what you mean?

A. Well, I remember a great deal of what happened without refreshing my memory, Mr. Bowles, from that. I wish I hadn't even seen the statement this morning.

Q. You didn't take a statement?

A. No, sir, I did not.

Q. You were present when it was taken?

A. Yes, sir, I was present when it was taken.

Q. Mr. Holden, can you tell me whether or not, independently of the written statement that Mr. Mercer took, whether or not at the time of your conversation with this man Mertel, whether he stated that the accident was in his view, that the accident occurred in his view?

A. He stated the truck had already gone around a curve and that he could not see the accident, or did not see it, or words to that effect. If you are familiar with the page 243 } location up there you know it is impossible to see the accident around that curve. There is bushes and houses and things there.

Q. Where did he place himself?

A. He gave the statement that he had just passed over the railroad track. The man with him said he hadn't even passed over the railroad track.

Mr. Williams: Your Honor, of course that would not be admissible under any—

Q. Did he say what time it had occurred?

A. I don't remember that independently. It was in the afternoon, I remember that.

Q. Refreshing your memory from the statement, do you know what time he said?

A. Two-thirty, I believe he said. About that time.

Q. Now, did he say whether or not the name of the Matlack truck was identified by himself and the boy as it passed him?

A. Yes, sir. He stated that Mr. Moore, who was with him, remarked about the name Matlack on the truck.

Massey T. Holden.

CROSS EXAMINATION.

By Mr. Williams:

Q. What did you say a minute ago when you said you wanted to ask some question, and then I understood you to say something about not having any independent recollection?

A. Well, what I was getting at was this. I page 244 } would have first been called to have testified as to what I remembered independent of any statement written down.

Q. You said you had no independent recollection as to some question, didn't you?

A. That was about the date, sir. I didn't remember on my own what date it was.

Q. What company were you representing?

Mr. Bowles: I object to that, sir.

Mr. Williams: Why?

Mr. Bowles: If you mean by what insurance company. Representing the Nichols Company.

Q. Well, what was the interest of the Nichols Company in this case that caused you to go there and investigate it?

A. Well, the case was assigned to me for investigation by Mr. Ryan.

Q. You don't know who employed your company to investigate this case?

A. Yes, sir, I know the name of the company.

Q. All right, who was it?

Mr. Bowles: I don't think this is proper to go into the record, sir.

Mr. Williams: The jury is not here, Mr. Bowles.

Mr. Bowles: I understand that.

The Court: What is the objection, Mr. Bowles?

Mr. Bowles: Well, I think, sir, that this is the page 245 } objection. Several times during the course of this trial our friends over here have brought out with several witnesses that insurance question, that an insurance man came to see them. Now, it seems to me that under those circumstances, or even for the Court or the Court of Appeals, it should not be necessary. I do not see what particular relevancy that matter has, or that it is proper to go into this record. All they want now is the name of the in-

Massey T. Holden.

insurance carrier. That is what they want to know, and at the appropriate time, if it becomes necessary, I will tell them, sir.

The Court: I do not see any reason why the witness should not say what his connection with it is.

Mr. Bowles: He has already done that.

The Court: He says he is employed by a detective agency or some investigating company. It is perfectly obvious that there is a client or beneficial party in it, and that the Nichols Company is merely the instrumentality or agency through which some beneficial party has sought this information. I will overrule the objection.

Q. Answer the question, please.

page 246 } Mr. Bowles: I note the exception.

A. Keystone.

Q. What?

A. Keystone.

Q. Keystone what?

A. As a matter of fact I don't know the whole name of the insurance company. Keystone Casualty Company, I believe. I may have handled one case—

Q. Don't get excited.

A. I am not excited, no, sir.

Mr. Bowles: I want to make an exception to my friend's comments in the record now.

Q. Give me, as near as you can, please, sir, the name of the insurance company.

Mr. Bowles: He has done that. I object to that question.

Q. Give me as near as you can the name of the insurance company which you were investigating this case for.

Mr. Bowles: I object to that as repetition. He has done it.

The Court: The objection is overruled, and exception noted. Let us get along. Give us the name, and let us get along. We have a long way to go.

Massey T. Holden.

A. You want me to give a further answer?

By the Court:

Q. Just state the name of this company as near page 247 } as you can tell it from your knowledge of the name of the company.

A. Judge, I am thinking right now. I may be able to give you the exact name, but I am not positive. You understand I do this work for a number of different companies, and some of them I very rarely ever look at the name of the company.

Mr. Bowles: Just give it as near as you can, Mr. Holden. Keystone something?

A. All right. As near as I can get to it would be the Keystone— You see, we carry these records under the name of the owner of the truck and not under the name of the insurance carrier.

By Mr. Williams:

Q. Yes. Some more. Let us have it as near as you can, please.

A. Keystone Club Casualty Company, is about as near as I can come to it.

Q. Your independent recollection of that isn't as good as a written statement?

A. Oh, I don't remember the names of a number of the companies I do work for.

Witness stood aside.

page 248 } Mr. Bowles: If Your Honor please, without waiving our position previously taken and exceptions taken with respect to these two cross-claims, at this stage of the trial I wish to move the Court to strike the evidence on the cross-claims that these defendants have put in, cross-claims, coming as plaintiffs against the defendant, on the grounds previously stated with respect to lack of mutuality and the impropriety of this proceeding and in addition thereto on the ground that the evidence in this case on the part of those plaintiffs in the cross-claims is such that the defendant Saunders and the defendant Smith—I don't know what to refer to him as; just Smith, sir, because he is not a defendant; we haven't got him here, cannot recover—with respect to Saunders, that he has not established negligence

on the part of the plaintiff's decedent, and in the alternative, in any event he was guilty of negligence which would bar him from recovery, and in the alternative, without admitting negligence of the plaintiff's decedent, on account of the contributory negligence of Smith, whose testimony shows that he never saw anything.

The Court: The motions are overruled, it being a jury question.

Mr. Bowles: I note an exception.

The Court: All right. Exception noted. Let page 249 } us take the plaintiff's instructions first.

(Thereupon counsel for the plaintiff offered instructions lettered A to D, inclusive, E-1, F to I, inclusive, K, K-1, K-2, and L to N, inclusive, which were granted by the Court with certain amendments, as hereinafter appears; and the defendant offered instructions numbered 1 to 3, inclusive, 3-A, and 4 to 13, inclusive, which were granted, the Court amending certain of said instructions, as hereinafter appears; and the defendant offered also instructions 5-D and 15, which were refused by the Court. A copy of all of said instructions as originally tendered by the parties and as amended and granted and/or refused appears at page 397, *et seq.*, of this transcript.

The objections of the parties to said instructions, the action of the Court with respect thereto, and the exceptions of the parties appear at the following pages 250-391.)

page 250 } Mr. Williams: Your Honor, Instruction A for the plaintiff, we object to on the ground that, as we see this case, violations of the statutes are not negligence as a matter of law if in emergency. In other words, the statutes were not designed for the purpose of making a person liable for negligence or liable in damage suits unless—the statute is designed to prevent the act which occurs. Now, the whole case here, as I see it, there is no evidence of any negligence on the part of W. G. Saunders' truck prior, until the time this emergency was created, and the only possible negligence that the operator of the W. G. Saunders truck could be guilty of would be in taking a course which an ordinarily prudent man would not have taken under those circumstances. We submit that the statutes in regard to operating so as to avoid injuries to persons, having the truck and trailer under reasonably proper control, to keep and maintain a proper lookout, have no application to the facts in this particular case. The statutes must be construed reasonably.

For instance, if a truck breaks down on the road so it cannot be moved—

The Court: You are now advocating the *Howell v. Jones* case.

Mr. Williams: I do not know the specific case.

page 251 } The Court: That is a case where they let a man turn over to the left of the center of the road, construing and reviewing *Standard Oil v. Roberts*, which lays down the doctrine that no violation of an ordinance or statute would overthrow the negligence that brought on an emergency, the doctrine in *Howell v. Jones*.

Mr. Williams: Yes, sir, there are any number of cases on that point. For instance, here is *Waterman on Automobiles*. It is perfectly well settled law that a driver, the driver of each of the meeting vehicles may assume a driver will use the right half of the highway, and a driver will not be held for contributory negligence when he turns to the left-hand side instead of the right to avoid a collision with an automobile approaching in the opposite direction driving on the wrong side of the highway, if he had reasonable ground to believe that to do so was the only way to avoid a collision, but will be held guilty of contributory negligence if a reasonable man under like circumstances would not have honestly believed that a collision was imminent. In other words, it is simply confusing to the jury to stick in all the various statutes. There is no evidence of speed prior to the accident, and no evidence of speed after the accident, no evidence that care and caution was not used; there is no evidence that it was not under reasonable control prior to the emergency. There

page 252 } is no evidence that no proper lookout was being kept. On each one of those things there is not a bit of evidence in this record in regard to them.

Now, to get our view before the Court, I notice in going over these instructions that in No. 5 or 6, I think, there is an allegation or statement in regard to the defective brakes claimed, or improperly adjusted brakes; and we submit that under the facts in this case there is no proof in this record of any improper brakes on this trailer and truck. It is true, as I recall the evidence, that they testified that some trucks are equipped with a device whereby when they are traveling light you turn a thing, and the brakes are one thing, and when you are traveling heavy you can turn the thing, and the brakes either go on harder or not. In this case it is not shown that this truck was equipped, and in addition to that, it is not shown that this truck, if it was equipped with such device, was improperly adjusted at the time of this accident. It is true that the driver stated that he did not do anything

about having the brakes changed when he was traveling with a light load or heavy load; but it is equally consistent with this evidence for the jury to say that it was improperly adjusted, if that be so, for him to carry a heavy load, and it was properly adjusted when it was light. So it is simply a case of speculation, and there is no evidence here by which, we submit, that question can be submitted to the jury. That is about all I have to say about that No. 1.

page 253 } Mr. Bowles: If Your Honor please, the grounds stated by Mr. Williams assume that there was an emergency as a matter of law, and his argument was predicated upon that assumption. That is perhaps—I think that is decidedly for the jury to determine. It is our position that there is no emergency here of which this defendant can take advantage, because that emergency was not created without fault on his part, and these very things go into determining whether an emergency was or was not created without fault on his part. He had a mirror out on the side, had a mirror up in his front, but he did not see this car that was passing him that he claims created this emergency until the car was up beside him and getting ready to pass. We have the car right beside him, but he didn't see it. Is that not a failure to keep a proper lookout? Our Court has said many times that lookout is not necessarily straight ahead. The lookout is on the road. It is for the jury to determine just what lookout he should have kept to the side or rear. We are not claiming here that it was negligence as a matter of law. They were duties which this man has under emergency or otherwise. Now, whether he observed those rules should be submitted to the jury.

The Court: The one here that concerns me is page 254 } No. 6: "To drive his lumber truck and trailer to the right of the center of the highway."

Mr. Bowles: That was his duty, sir.

The Court: Yes, but certain evidence shows an alleged emergency. It certainly ought to carry to the jury the question whether in turning, in not keeping to his right, he was not in some emergency. But this instruction tells them arbitrarily as a matter of law it was his duty to stay to the right of the center, irrespective of that.

Mr. Bowles: I think Your Honor has something there. I see what your point is, sir, but I think that that is taken care of in other instructions here too.

The Court: I am concerned with having this arbitrary statement put in this first one.

Mr. Bowles: I see, sir.

The Court: I think there is sufficient evidence to justify 1 to 5, Mr. Williams, but I think No. 6 ought to come out. I think it is covered in other instructions.

Mr. Williams: Your Honor, I do not understand my friend's position. He says he is not claiming a violation of these statutory requirements as negligence *per se*, as a matter of law, but he says, if you believe from the page 255 { evidence, a preponderance of the evidence, that

he violated any of these duties, and such violation concurred with any negligence of anybody else, you should find for the plaintiff. So I think, although he says it is not negligence *per se*, he instructs the jury that violation is negligence *per se*. Now, an act of negligence has got to be a proximate cause, and it is inconceivable in this case that the failure to look in the mirror and see the automobile coming up behind him could be a proximate cause of an accident which did not occur with that automobile, but with another truck which he was looking right at. How in the world could that have any proximate bearing on the facts in this case? If he swung out and hit that car, the failure to look in his mirror might have something to do with it.

Mr. Bowles: I did not put in this instruction, which I might have done, that when a car attempts to pass it is his duty to hold back and let it pass. Had he seen it soon enough he might have fallen back and let it go by, instead of which—but there is evidence here that this green car and this truck raced down the road to see which one was going to let the other one go by.

The Court: All right. My view is to strike out No. 6 from this instruction and grant it with No. 6 eliminated.

Mr. Bowles: Now, does Your Honor want my page 256 { answer at this time as to the faulty brake proposition?

The Court: The Court will hear that.

Mr. Bowles: I think Mr. Williams is forgetful of the evidence that this driver—his evidence that there was a gadget by which he could or could not turn off brakes.

The Court: I think you have got sufficient evidence here to justify this.

Mr. Williams: Where is the evidence that it was adjusted for a heavy load rather than a light load when he went to the creosoting plant? He didn't say which way it was adjusted.

Mr. Bowles: It is not a question of adjustment there, sir. It is a question of turning off the gadget and cutting the brakes off.

The Court: I think that question should go to the jury.

Mr. Bowles: For the sake of the record, sir, we will except to the elimination of 6.

The Court: Yes, sir.

Mr. Bowles: On the ground that it states the page 257 } law applicable to the facts of this case.

The Court: Now, Mr. Williams, how about B?

Instruction B.

The Court: You have already stated your objection to B about these brakes, but here is a question that gives me some concern: "It was the further duty of the defendant, Saunders, to exercise reasonable care in selecting a proper and competent driver," *et cetera*. Where is the evidence of incompetence?

Mr. Bowles: We alleged that, of course, sir. The evidence is that this man was wholly ignorant of what was the proper and correct method of operating a double-coupled vehicle. He did not know that the brakes should not have been adjusted as he says that they were adjusted at the time. He didn't know that if he had a light load he should have made a change on this gadget, or whether he should keep his brakes on his trailer or whether he should not have.

The Court: What is your view as to "incompetent"? I do not see there is sufficient evidence to justify "incompetent".

Mr. Godwin: There is none.

Mr. Williams: I have already stated we do page 258 } not think that there is any evidence that brakes were improperly adjusted, and I do not know of any evidence in this record that this man was not competent. It is hard to argue a negative.

Mr. Godwin: Your Honor, I might say that this instruction further says: "and to provide safe and proper connections" between the truck and the trailer, and there is no evidence of that. The man himself says it was connected properly for short lumber.

Mr. Bowles: I think that should come out, sir. I didn't notice that. Under this evidence.

The Court: All right, now: "to maintain both his lumber truck and trailer in a good and safe operating condition; and to provide safe and proper connections," that language there—

Mr. Bowles: I think that language should come out.

The Court: I think that language should come out.

Mr. Bowles: I could take time to explain how it was put there, sir.

The Court: Yes, sir. That is not necessary. I can not personally recall sufficient evidence to justify an instruction to the jury on negligence in hiring him as a page 259 } servant, the driver. There was no evidence here that he was not a licensed driver.

Mr. Bowles: No, sir.

The Court: And it seems to me that it is almost a scintilla of evidence there about his driving. I think that should come out, Mr. Bowles.

Mr. Bowles: That sentence, "further"?

The Court: "Further", yes. "It was the further duty," and so on.

Mr. Bowles: Your Honor will permit us to save the point?

The Court: Yes; we will come back and let you dictate all objections.

Mr. Williams: Where is any evidence of that?

Mr. Bowles: Just what we have been talking about, sir.

Mr. Godwin: The feature of his brakes—it is covered in the other instructions, Your Honor.

The Court: He has cut out "provide safe and proper connections between them," that is, between the truck page 260 } and the trailer.

Mr. Williams: Your Honor, the point I make, if I understand these gentlemen's position, there was nothing the matter with the truck, but their contention is the brake was on wrong; their contention is the driver failed to turn some gadget that he ought to have turned.

The Court: There is some evidence here, Mr. Williams, about the way they were adjusted at the wheels

Mr. Bowles: That is right.

The Court: No—no—there is some other evidence here, as I recall it—

Mr. Williams: I would like to know what *it* that is, because I don't see—that fellow testified he never saw this truck, never had laid eyes on it, the expert.

Mr. Bowles: The first witness that we called, sir, said the braking power on the rear wheels of the tractor and the rear wheels of the trailer were identical and even, and the expert witness which we put on said that was improper adjustment for any case.

The Court: As I thought I heard it, it was with reference to the particular truck, about the brake drums and equipment.

page 261 } Mr. Bowles: That is true, sir. That is true.

Mr. Williams: Your Honor, he never laid eyes on that truck in his life.

The Court: But the driver was asked how his brakes were adjusted, and the expert came along and—

Mr. Williams: The driver's testimony was that in operation they applied evenly, and the expert stated that if that was so, they were properly adjusted.

Mr. Bowles: Oh, no, sir. The expert stated if they were even that was wrong, because the rear one should take more than the middle one.

Mr. Williams: Under a load, Your Honor. In other words, if I get the proposition, when you have got a load, a heavy load, your rear wheels are supposed to be adjusted so they will hold harder so as to make them even with the front wheels and apply evenly with the front wheels.

Mr. Bowles: May I explain to you what our conception of the evidence is on which we rely? We put on the driver to find out what was the adjustment of the brakes on this particular truck. He testified that the rear wheels of the tractor and the wheels of the trailer were adjusted so that they applied equally. I was not referring at all to the front wheels of the tractor, that is, the supporting part page 262 } of it. We put on the expert, who testified that with a load, the adjustment on those two rear wheels, that is, the rear of the tractor, or the middle wheels of the six-wheel vehicle, should be less than on the rear wheel of the trailer, in order, when it was loaded, that the trailer would not ride up on the tractor. That likewise there was, as the driver had said, a lever—we referred to it as a gadget—on the dashboard, by which he could cut out all brakes on the trailer; and the expert said that when the adjustment was correct for the trailer wheels, in order to keep it from riding up when it was loaded—when it was unloaded, that that should have been turned off, so that all brakes would be taken off the trailer. Now, that is what the evidence shows. Likewise, the driver says that he did not turn it off, that he left an equal adjustment on the truck.

Mr. Williams: I still don't understand it.

The Court: I will give that as Instruction B with the elimination of providing safe and proper connection between them and cutting out the sentence as to the competency of the driver.

Mr. Williams: Now, that instruction is telling them that that turn is negligence as a matter of law.

The Court: One minute—

page 263 } Mr. Bowles: If it was negligence that was a proximate cause of the injury.

Mr. Williams: There is no statutory duty that provides any of these brakes. Does Your Honor mean to say if you

do not have a certain kind of brake on a truck that you are negligent as a matter of law?

Mr. Bowles: We certainly have a statute that says "adequate brakes", and that would apply as to whether those brakes were fixed so back there, where there was such an adjustment on the load. The duty would be the same. Also there is a statute that the truck must have been passed by the Motor Vehicle Director.

The Court: There wasn't any evidence that it had not been passed.

Mr. Williams: There was evidence here it was inspected and passed inspections.

Mr. Godwin: Your Honor, as a matter of law about these brakes, the statute provides what the brake shall be. The statute says that four-wheel brakes and certain types of brakes shall be so adjusted and maintained as to stop a loaded truck within a certain number of feet, and there has been no evidence in this case at all that these brakes were not adjusted to conform to the statute. Not a bit. The page 264 } question has not been asked. Now, the statute plainly describes what brakes, how efficient they shall be, and what shall be bad brakes and what shall be good brakes, and there is not a word said about it in this record. If Your Honor wants the law about that, I will get it.

The Court: You mean the statute?

Mr. Godwin: Yes, sir, about the brakes.

Mr. Williams: In other words, you can use mechanical brakes or hydraulic brakes on private vehicles. It is not negligence to use one or the other.

Mr. Bowles: You can't use those mechanical brakes on a double wheel. It says it must be equipped with independent brakes operated in a manner which is approved by the Director. Now, I happen to know that Bendix has been passed by the Director.

Mr. Williams: You haven't proved that it has been approved by the Director.

Mr. Bowles: I have not attempted to, Mr. Williams, at all.

The Court: You have not?

Mr. Bowles: I know this. I say, I know that page 265 } the Bendix brake has been approved.

Mr. Williams: You are telling this jury under this instruction that if they had a certain type of brake, wasn't properly adjusted—

Mr. Bowles: Here is the section of the Code, sir. Section 99 of this pamphlet issued by the Motor Vehicle Direc-

tor. It is the Act of 1934 amended up to date as applicable to this accident. I don't know whether it has been amended since 1937 or not.

"Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movements of and to stop such vehicle or vehicles—" now, then, that is control the movement and to stop—"and such brakes shall be maintained in good working order and shall conform to regulations provided in this section. . . .

"On a dry, hard, approximately level stretch of highway free from loose material, the service brake shall be capable of stopping the motor vehicle at a speed of twenty miles per hour within a distance of twenty-five feet with four-wheel brakes or forty-five feet with two-wheel brakes. The hand brake shall be capable of stopping," on a dry, hard surface, approximately level, and so on, within twice this distance.

Mr. Williams: That is all the requirements?
page 266 } Mr. Bowles: (Reading) "Every semi-trailer or trailer or separate vehicle attached by a draw bar, chain or coupling to a towing vehicle and having a rated and/or actual carrying capacity of two tons, or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in subsection (d) of this section and shall be of a type approved by the Director."

Now, we have not undertaken, and we have no means, so far as I know, of proving whether these brakes were adjusted from the standpoint of stopping. What we are referring to is the relative adjustment to the rear, as to whether it could be caused to jack-knife, as this one did, by the application of the brakes, in the adjustment which was had, as shown by the driver, not related to how quickly it would stop, sir, but whether it would stop evenly.

Mr. Godwin: Your Honor, as far as brakes are concerned, and that is what I think we are addressing ourselves to now—however, the first part of this instruction says this: "to maintain both his lumber truck and trailer in a good and safe operating condition." Now, on that, the jury can speculate as to the steering gear; they can speculate as to the tires; they can go over the whole field of conjecture on that first statement there, when brakes are the only thing about the truck that they have attempted to show any-
page 267 } thing about, and that is dealt with in the subsequent sentence. So I say that that turns the jury

loose to look at those pictures and try to find out if there was anything wrong about the truck from end to end, even after the accident. And that certainly is not proper.

Mr. Bowles: I can stop a lot of talk there, sir. If you think that language is susceptible of any such speculation by the jury, I don't think it adds anything particular to the instruction, and the brakes are the thing I am after.

Mr. Godwin: Now, about the brakes: the statute says what shall be and what shall not be efficient brakes; to put on brakes that are capable of stopping it within a certain distance on a dry, level road, free from loose gravel and dirt. Now, they are to be maintained in that same condition. Now, Your Honor, the only thing that they have gotten into this record at the most is that Elmer Hall said when he put on the brakes they took equally; and they put a man on to say that maybe it might jack-knife if they did take equally. Now, the statute says what the brakes shall be and how they shall be put on and maintained, and there is not a bit of evidence in this case that these brakes were not conforming to the statute. It was proven that they were the best you could buy, that they had these gadgets
page 268 } on them that all trucks did not have, and were not required by law. Now, then, there is no evidence that they were not conforming to the statute, and I say under those circumstances that it would be error to give that consideration.

The Court: I will let that go to the jury. I am striking out this first sentence that Mr. Bowles has about maintaining in safe operating condition; and so the instruction then reads: "to exercise reasonable care to see that both his truck and trailer were equipped with adequate brakes; and to see that such brakes were properly adjusted and to maintain them in safe adjustment and operating condition. If you believe from the evidence that he failed," and so forth. Strike out the last "to" on the second line, and strike on down to "to see".

Mr. Godwin: Now, then, Your Honor, I think there are two points about the brakes. He says that the truck should be equipped with adequate brakes, that is, perfect brakes, proper brakes. Now, the evidence is that it was equipped with adequate brakes. The only evidence that he can claim by any stretch of the imagination would be as to the maintenance of the brakes. You see what I am driving at? Now, the witness they had said it was the best brake you could buy.

Mr. Bowles: But the adjustment was not adequate, sir.

Mr. Godwin: Your Honor, we except to the instruction on that ground.

The Court: All right. I think we will let it stand like it is indicated.

Instruction C.

Mr. Williams: Your Honor, that is the same brake situation there which we have already argued, I think, and you have given it in B right before. It is repetition.

The Court: What do you say to that, Mr. Bowles?

Mr. Bowles: I didn't hear that, sir. I beg your pardon.

The Court: He claims that that is a repetition of B.

Mr. Bowles: No, sir, I do not agree there. This was the duty on the part of him to see that his brakes were properly adjusted. Now, if they believe from the evidence that he failed in one or more of those duties, and that either caused or concurred in any efficient degree with the negligence of the driver of the green car to cause the collision and death of the plaintiff's husband, then you must find your verdict for the plaintiff, Mary H. Hall. Now, this instruction relates to cross-claims against her.

Mr. Williams: That is true, but the repetition of the same act—

Mr. Bowles: We can't help that.

The Court: He can't help that. I have got to instruct the jury with reference to the liability of—

Mr. Godwin: Your Honor is again there telling the jury as a matter of law—without leaving it to the jury whether or not it was negligence to have them adjusted in the way they did. "and that such defect was negligence." The Court cannot tell them it was negligence. Your Honor, that instruction is clearly repetition.

The Court: Well, you see it applies with reference to different defendants. If you notice, he has got an instruction based upon the liability of various parties here; B against the defendant, W. G. Saunders; and this is in favor of Mary Hall, the verdict must be in her favor on the cross-claim. We have got to get that cross-claim situation before this jury.

Mr. Bowles: Would Your Honor change the word "the" in front of "defective" to "a"? I think that would eliminate any difficulty about the—

page 271 } Mr. Williams: What are you eliminating?

Mr. Bowles: Change the word "the" to "a".

The Court: Instruction C.

Mr. Williams: We can do this now for the benefit of the Court, and then whoever loses can dictate their exceptions afterwards.

The Court: Is that agreeable, to dictate these exceptions on instructions afterwards, or do you want to do it now?

Mr. Bowles: It is immaterial to me, sir, if they are limited to the same things that are mentioned now.

Note: At this point the jury was called in and was adjourned over until 9:30 A. M., Monday, June 26, 1939.

Mr. Bowles: Would Your Honor go back a moment to Instruction B? We were conferring about this phrase which has been objected to: "both his truck and trailer were equipped with adequate brakes." What we have reference to there is solely the proposition, not whether it is a good make of brake, because that is conceded, but whether it was adequate by reason of the adjustment. Now, if that is repetition of the next sentence, or could be so construed, possibly

to relate to those two things, I think Your Honor page 272 } had better possibly take that sentence out, too, because the only thing we have in mind is the question of the adjustment. In other words, I don't want to let possible error creep in here when I am not intending the error. Mr. Boyd's suggestion is that we might fix it by saying: "adequate brakes in that it was his duty to see that it was properly adjusted." I think the following sentence would probably take care of the whole thing.

The Court: Or you might say: "adequately operating brakes."

Mr. Bowles: I think that would clear it entirely. "Adequately operating brakes."

Mr. Williams: Where are you putting that?

Mr. Bowles: Between "adequate" and "brakes".

The Court: "Adequately," Mr. Williams; instead of "adequate brakes", "with adequately operating brakes."

Mr. Bowles: That dispels the idea that the type of brake was not adequate. Now, will there be any objection to that other than the general objection?

Mr. Godwin: Yes, sir.

Mr. Bowles: I mean, will there be an objection page 273 } to that on the ground that they are speaking of at the moment, because if there is, I would rather take the sentence out.

Mr. Godwin: We are excepting to it, Your Honor, because we made it plain, our exception on that score.

The Court: I will grant the instruction as indicated, with the words "adequately operating", or I will strike it out; if you prefer it stricken out, I will take it out.

Mr. Williams: We take the position, Your Honor, that that meant adequate brakes. I don't see any difference; if brakes are not adequately operating they are not adequate brakes.

The Court: The question is whether the type of brake was adequate.

Mr. Gilman: Strike it out.

Mr. Godwin: Have we finished with C?

Mr. Bowles: I have got two others—

Mr. Williams: That is confusing. Negligence of Saunders or the driver of the lumber truck? Saunders could not be guilty of negligence except derivative.

Mr. Bowles: That is the point we make, that page 274 } it was independent.

Mr. Williams: It seems to me it ought to be negligence of Saunders or the operator of the lumber truck, either one or the other.

The Court: His position is that Saunders was originally negligent in what he equipped this truck and trailer with.

Mr. Williams: I thought it had been stated that there is no evidence that the equipment on the truck was wrong.

Mr. Bowles: Your Honor, the owner of the truck must maintain the equipment, and if he put the best brake in the world on there and didn't have it adjusted right, and put the truck on the road improperly adjusted, then he is guilty of the original negligence.

The Court: You mean if he sent his driver out, any man—

Mr. Bowles: With his brakes in maladjustment.

Mr. Godwin: D does not deal with the brakes. Is it D under discussion now?

Instruction D.

page 275 } The Court: D is under discussion now.

Mr. Godwin: Well, Your Honor, that instruction is clearly wrong, for this reason, Your Honor, because if the negligence of the Saunders truck and the negligence of the green car concurred to cause or contribute to the injuries of William Smith. why, then you should not find for William Smith against Hall. Well, now, how about—suppose all three of them were guilty of negligence, still Smith could recover, if all three of them were guilty of negligence, all three cars, still Smith could recover. It is not limited to the

sole proximate negligence of those three cars, and it is bound to be wrong.

Mr. Bowles: Well, now, negligence of Saunders in either of those shapes, either his driver or himself, and the negligence of the green car, if they had caused the collision, then William Smith cannot recover. Now, there is nothing in this instruction—to go back, we shouldn't go at the thing and say the same thing twice.

The Court: Let's see; William Smith is in the role of guest on the Saunders truck, isn't he?

Mr. Godwin: Yes, sir.

Mr. Bowles: Now, if there were two causes concurring out of three, and two of them concurred to cause, then
 page 276 } Smith is not entitled to recover against the one that did not have negligence. Now, it does not seem to me that it was necessary to go at the thing in the reverse also and say the driver of the oil truck was not guilty of negligence; that is just making the thing unnecessarily favorable to the other position. I don't think we are required to put it in that form. I think, if Your Honor has any doubt about the matter, it carries with it the inference that the oil truck driver was exercising ordinary care on his part; if Your Honor thinks that ought to be covered, why, that could be inserted. "While the plaintiff's deceased husband was exercising ordinary care on his part," after the words "William Smith the first time. The instruction was drawn to convey the idea, and I think it does convey the idea, that there were only two causes, and those concurring causes were Saunders and the green car, in which circumstances Smith can recover against Saunders and the green car, but not against this plaintiff. The Fifth line, after the words "William Smith" the first time they occur: "while the plaintiff's husband was exercising ordinary care on his part."

Mr. Williams: When you say "the", that is an eliminative word.

The Court: Obviously there is no way that Smith could recover against Mary Hall, Administratrix, un-
 page 277 } less Mrs. Hall was guilty of negligence.

Mr. Bowles: Certainly—

The Court: Certainly, I don't think there would be any possible doubt about D.—

Mr. Williams: Where is that, now, after—?

The Court: —except the words "if any" ought to go in here, I think. It seems to me the instruction raises that.

Mr. Bowles: That is dependent on "if" to begin with.

The Court: I do not see how it could be misleading.

Mr. Williams: Your Honor is telling the jury that the driver of the green car was negligent and that Saunders was negligent.

The Court: No, it says, if you believe they were negligent.

Mr. Williams: Believe from the evidence that the negligence. The negligence. Not if you believe he was guilty of negligence.

Mr. Bowles: Cut out the word "the", then, sir. That negligence, without the word "the", of Saunders, if any.

The Court: How about the word: "any negligence" page 278 } instead of "the negligence"?

Mr. Bowles: I am afraid of that, sir, because you might get into a scintilla proposition. I am scared of that word "any" because it might be less than a substantial degree. Let's put it "if any" three times. Give my friends all the breaks.

Mr. Williams: We don't want breaks. Leave it the way it is. Leave the instruction as it is and give us our exception to it.

Mr. Bowles: If you want to stand on that, we are satisfied. (Reading from Instruction C) "by the defective adjustment of the brakes on the Saunders' truck or trailer, if any." Now, these three "if anys"—

The Court: Wait a minute. C?

Mr. Bowles: I want to put in "if any".

The Court: Read C to me, Mr. Bowles.

Note: Mr. Bowles reads Instruction C.

Mr. Bowles: There certainly can't be any trouble about that.

Mr. Godwin: This D, you put three "if anys" page 279 } in there?

The Court: Here is the way it reads now: "The Court instructs the jury that if you believe from the evidence that the negligence—"

Mr. Bowles: Take out the "the".

The Court: —"negligence of the driver of the green car, if any, concurred with negligence of Saunders, if any, or the driver of his lumber truck, if any, to cause the collision and injuries to William Smith, while the plaintiff's husband was exercising ordinary care on his part, then William Smith cannot recover damages for his injuries of the plaintiff, Mary Hall, on his cross-claim against her and you must find your verdict for the plaintiff not only in her action against Saunders but also on the cross-claims of both Saunders and Smith against her."

Mr. Godwin: Your Honor, I don't know what he means. The only negligence that Saunders could have would be negligence of the man who was driving his truck as agent. I just wonder what you mean by "green car, if any, concurred with negligence of Saunders, if any, or the driver of his lumber truck, if any." There is only one thing that could be negligence as far as Saunders is concerned, which would be that of his driver.

page 280 } The Court: I am going to grant you that one.

Mr. Godwin: All right. sir. I just want to note an exception—

The Court: How about E? You object to E?

Mr. Godwin: And except to all of them on the ground that—unless disclosed by the plaintiff's evidence or shown from all the facts and circumstances of the case.

Mr. Williams: We object to it on the ground that the statute says you have to show it unless it appears from the plaintiff's own evidence and from the facts and circumstances of the case.

Mr. Bowles: If you can put your finger on the statute, I would certainly like to find it.

Mr. Godwin: The statute says: "unless disclosed from the plaintiff's testimony," and the courts have held, from the facts and circumstances of the case.

Mr. Bowles: I think that is true. The basis of it I have never been able to find.

Mr. Godwin: It is Section 629 of the Code.

Mr. Bowles: I offer E-1 and have withdrawn E.

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Instruction E-1.

Mr. Williams: Your Honor, he hasn't got to prove that such negligence did efficiently contribute in a substantial degree. It is either contribute in a substantial degree or efficiently contribute. He can't double the adjective. One of those words ought to come out.

Mr. Bowles: Well, now, I will say this to the Court about that. I went to the Court of Appeals not long ago in a case—I just cannot remember the style of it right now—and on two cases since that I took up the question of this language: "efficiently contributed in any degree." The Court had a right long discussion of that proposition, and in its own language said: "efficiently contributed in a substantial degree." Now, I don't care about it. I just want the idea I have got in there, that the scintilla doctrine is wiped further away, and there must be an efficient contribution of some substantial negli-

gence. I think that is the idea that is now prevailing. I have been afraid ever since in using them for defendants of that word "any". We have two more cases going up behind that.

Mr. Williams: That has been settled law for fifty years.

The Court: It hadn't been settled before the page 282 } term before the last one of the Supreme Court, about the word "substantial", because they had many times approved "any degree" up until that time; that case that came up in January—

Mr. Bowles: They don't want "substantial" and "efficient". The two things relate to different things, an efficient contribution, and the degree of negligence that efficiently contributes must be substantial. But I don't care, sir. You all fix that.

Mr. Williams: It is your instruction.

The Court: What is your objection to it? You object to both the use of the word "efficient" and "substantial"?

Mr. Williams: The only thing we have got to say is "proximately contributed."

The Court: How about substituting the word "proximately" for "efficiently"?

Mr. Williams: That is the same thing: "proximately contributed in a substantial degree."

Mr. Bowles: I am not concerned about it myself, sir, but if you do not put "efficiently" in there I think it may be error against the defendant.

page 283 } Mr. Williams: The only thing, as I understand, you have to do on contributory negligence is to show that it proximately contributed. Now, the Courts years ago have held that you could not use "contributed in any degree," any small amount or degree, but I have never seen an instruction approved in which they said it had to be a substantial degree. The only thing we have got to do is prove that it proximately efficiently contributed. It is not a question of degrees at all.

Mr. Bowles: Do I understand now that the defendant thinks that the word "substantial" ought to be changed to "any"?

Mr. Williams: Read back what I said.

Note: Mr. Williams' statement read.

Mr. Williams: Proximately contributed.

The Court: As I get the defendants on this, the four words "in a substantial degree", those four words should come out.

Mr. Bowles: That was done at his instance.

The Court: "on his part efficiently contributed to cause his death."

page 284 } Mr. Bowles: Your Honor understands my position, that it is stricken out at the defendants' instance.

Mr. Williams: Mr. Bowles, don't misunderstand me. I am not requesting the Court to change any of these instructions.

Mr. Bowles: Then you are not objecting to them?

Mr. Williams: Yes, I am, but I have a perfect right to object to them as written, and you can change them or not as you see fit. I mean by that I do not want you to put me in the position of asking the Court to grant your instructions.

Mr. Bowles: I didn't realize that we were trying this at such arm's length, sir. What I mean by that is this: that if the defendant objects to the specific word "substantial," and that is his objection, that is what the Court of Appeals said in January, that "any" was error, and reversed a case on that precise ground, the use of the word "any"; said it must be a substantial degree and not any degree. That is why—you can draw your own instruction on that, but I am not willing to withdraw that word, because I think it would be error in favor of the defendant.

The Court: Is that case you referred to *Yeary v. Holbrook*?

page 285 } Mr. Bowles: Yes, sir, that is the case. I just cannot remember names offhand. I think it was January that it came out, the early part of this year. And I was so struck by it that I went through the office files, all forms we had, and changed them.

Mr. Williams: "guilty of negligence however slight" has been error for fifty years.

Mr. Bowles: "However slight", you are right about that. "Slightest degree" was ruled out ten or fifteen years ago.

The Court: I thought I had a note for this case on that point. I cannot put my hands on it, but I think that is the case that we had.

Mr. Williams: That is undoubtedly true, Your Honor. I would not ask for an instruction on contributory negligence, any negligence. It has got to proximately contribute. But the question of degree has no place in negligence, because we do not deal with that. Efficiently or proximately contributed.

The Court: I think, to save any doubt—I have stricken out the words “in a substantial degree.”

Mr. Bowles: That is all right with me, sir, if page 286 } there is any objection on the part of the defendant.

The Court: Yes. “* * * that such negligence on his part efficiently contributed to cause his death.”

Mr. Williams: I think, so far as that language is concerned, I think that is all right, so far as that phase of it is concerned. I do not object to it on that ground.

The Court: You substituted E-1 for E?

Mr. Bowles: Yes, sir.

Instruction F.

Mr. Williams: We do not think that F is right, Your Honor. We think—“guilty of negligence that proximately caused” his *death*. Not only it may have proximately caused it, but may have proximately contributed to his *death*. In other words, negligence in which one of the other automobiles concurred, he was liable. Proximately caused or contributed.

Mr. Gilman: That was one of the proximate causes.

Mr. Bowles: That was a proximate cause.

Mr. Williams: Seventh line, after “proximate caused”, it should be “proximately caused or contributed to.”

Mr. Bowles: Was a proximate cause of Smith’s page 287 } injury.

The Court: I think if the negligence of Hall concurred with the negligence of the green car, and the green car is not sued, and Hall is, and Hall contributed to it, then Hall is liable.

Mr. Bowles: Yes, sir, but it might also be negligence on the part of the Saunders truck that concurred. If you started in that, you would have to know who is—

Mr. Williams: It wouldn’t make any difference, as far as Smith is concerned, if all three of them—

Mr. Bowles: That is true. That is true. We are starting just as we did in that other one. I think, sir, if we were a proximate cause of Smith’s injury, it doesn’t make any difference who else was guilty of proximate cause.

Mr. Williams: Now, that is a trick that we all know—

Mr. Bowles: I resent that.

Mr. Williams: I don’t mean it is an underhanded trick at all, but a trick that will mislead the jury.

Mr. Bowles: I don’t know but one kind of trick.

Mr. Williams: Your Honor yourself knows, everybody, it is misleading.
 page 288 } Mr. Bowles: "proximately caused or contributed to."

The Court: Here is the way it reads: "to prove by a preponderance of the evidence that the plaintiff's deceased husband was guilty of negligence that proximately caused or contributed to Smith's injury."

Instruction G.

The Court: Now, this G applies to the cross-claim.

Mr. Williams: I have written in there: "or concurred with the negligence of the green car." Caused or concurred. Caused or concurred with the negligence—

Mr. Bowles: Put the same amendment in that one. Get the same language. "Proximately caused or contributed to the damage." It is the same instruction on a different case.

Mr. Williams: The only thing about that, I don't think it takes care of that. They might believe that he couldn't recover if Saunders was guilty of contributory negligence.

The Court: I think from the legal standpoint the words "contributed to" would be sufficient. Now, whether counsel would prefer language in there that brought it more closely home to the jury as to what that contribution is, page 289 } is another matter.

Mr. Williams: " * * * proximately caused or contributed" is all right with me.

Mr. Bowles: Your Honor, let us get the language here on that contributory negligence of Saunders, in the same instruction, on Saunders' failure to bear the burden of proof that Hall was guilty of anything. That is the reason why that is drawn like this. There is another instruction that says Saunders cannot recover if guilty of contributory negligence.

The Court: My feeling, gentlemen, is that F is framed on William Smith, and G is framed in reference to W. G. Saunders, and that the words "or contributed to", added in G as in F, ought to cover the situation.

Instruction H.

The Court: How about H?

Mr. Williams: No dispute about that, but I think you ought to put in there "negligence of Saunders or the driver."

We do not make any contention—in fact, our contention is there is no negligence on the part of Saunders except such as might be derivative from Hall.

The Court: As a statement of law it is all page 290 } right. I will grant that.

Instruction I.

The Court: Now, I raises the question here we had in B, doesn't it?

Mr. Bowles: Yes, sir.

The Court: Raises the question in B in reference to the cross-claim.

Mr. Bowles: That is right, and should be made to conform to it.

Mr. Gilman: Same changes in I as in B?

The Court: "to" comes out to "proper connections between them." "* * *" to see that both his truck and trailer were equipped with adequately operating brakes."

Mr. Bowles: Now, that next sentence about selecting a competent driver comes out. Now, in order that you won't pass it, I call your attention to the fact that that word "substantial" is in there in that instruction.

The Court: The words "in any substantial degree" should come out.

Mr. Williams: We object to taking them out now.

The Court: Oh, you do?

page 291 } Mr. Williams: Yes. (Laughter.) I won't quibble about that. I won't make any exception on that. They ought to be sustained.

The Court: All right. I granted.

Instruction K.

The Court: Now, K.

Mr. Bowles: I didn't number one "J", sir.

The Court: No, sir. The next one is K. K raises the same one as A, doesn't it?

Mr. Bowles: Yes, sir.

The Court: Now, we struck out 6 out of A.

Mr. Gilman: We struck out "substantial" and put "efficiently contributed."

Mr. Bowles: The same thing, same language in there, sir.

The Court: It is "in any substantial degree" here, isn't it?

Mr. Bowles: Yes, sir.

page 292 } The Court: Is that the only change in K?

Mr. Williams: Now, Your Honor, you cut out No. 6 in A before.

The Court: I cut out 6.

Mr. Williams: Oh, you did?

The Court: Yes.

Mr. Williams: I want to call Your Honor's attention to that 5, in which you say "equipped with adequate brakes," and we insist that there is no evidence here—

Mr. Bowles: "Properly adjusted."

The Court: All right.

Mr. Williams: Your Honor, we make the same objection to these enumerated items—

The Court: As you did to A?

Mr. Williams: As we did to No. A.

The Court: I say, you make the same objections to the first five there that you made to A?

Mr. Williams: That is right.

The Court: All right.

page 293 }

Instruction L.

Mr. Bowles: This instruction, sir, is offered on the assumption that they will ask for an emergency instruction, and on the further assumption that it is offered if that emergency instruction is granted. Now, we would like to append that to an emergency instruction if you grant it for them, which we will object to, or have it as a separate instruction. The theory of that, Your Honor, is this, that if there was an independent act of negligence on the part of one of those two, to put the truck on the road that is so equipped, with faulty adjustment of the brakes, the application of the brakes if an emergency occurs in the accident,—he cannot claim the emergency is the cause, because the emergency does not arise solely without his fault, even if the jury should so believe, and if independent negligence should come in and help cause the accident, if it was a pre-existent condition.

The Court: They are certainly going to ask for an emergency instruction.

Mr. Williams: Several of them, I think.

Mr. Bowles: I mentioned it because I thought we might pass it by for the moment.

The Court: Yes, let us pass it.

page 294 }

Instruction M.

Mr. Bowles: Let's leave it in.

Mr. Williams: Your Honor, we object to M on the ground that we understand it does not correctly state the law. My understanding is that the jury has got to accept the evidence of a witness who is uncontradicted unless it is incredible. You cannot discard undisputed testimony. You have got to consider it.

Mr. Bowles: That is covered in "when considered in connection with the whole evidence before you."

Mr. Williams: I do not agree with you. That instruction is not properly drawn.

The Court: This instruction on credibility is one that is very greatly used in similar cases. I don't recall here and now seeing the language in here, you may disregard, or "you have a right to discard or accept the testimony, or any part thereof, of any witness—"

Mr. Williams: You can't do it.

The Court: I haven't the books here. I don't recall seeing that language in there. You may have found it. What is that instruction—?

page 295 } Mr. Bowles: We asked for this, to which it was excepted, and the Court said—

Mr. Williams: It is bound to be wrong, for this reason, that a witness gets on the witness stand and he testifies certain facts that are not disputed. The jury cannot throw them out of the window. The jury and the Court are bound by that.

Mr. Bowles: Let's *note* dispute, and jump down to "in determining the credibility." Let's leave that out about discarding. The Court of Appeals has approved it in two cases in which I appeared, *Ford v. Virginia Electric and Power Company*, *Driscoll v. Virginia Electric and Power Company*—

Mr. Williams: It was harmless error, because you lost your appeal.

Mr. Bowles: That is true, but they were expressly excepted to. In this instruction, jump from "credibility of witnesses" down to "in determining", and that will eliminate any discussion there. We will withdraw the language intervening: "you have the right to discard."

I agree with Mr. Gilman; I don't think it is particularly applicable in this case.

The Court: The instruction will then read:
page 296 } " * * * you are the sole judges of the weight of the evidence before you and of the credibility of the witnesses, and, in determining the credibility of the witnesses," *et cetera*.

Mr. Bowles: That is right. We withdraw that, sir, so as not to make any—

Instruction N.

Mr. Williams: Your Honor, in regard to N. The Court of Appeals, according to my recollection, has stated it is not error to stick on the end of an instruction not to exceed a certain sum, but it is not proper. It is not reversible error to do it, but it is not proper to do it.

The Court: Calls attention to the—

Mr. Williams: Calls the attention of the jury to a fixed amount, which should not be done.

Mr. Gilman: The situation is of a death case. That is true in a personal injury case, but it is not in a death case. There is reason behind that.

The Court: I have had that question raised on me before. "You should fix the amount of your verdict in a sum which to you shall seem fair and just," if you don't say "\$10,000", or say "not exceeding the amount claimed in the notice of motion," the way I think is the better way to do it.

page 297 } Mr. Williams: That is customary in death cases.

Mr. Bowles: I don't know what the custom here is, but the custom in death cases is this generally because the statute fixes that maximum, and they are told about it. We don't care ordinarily—

The Court: If the point is raised, I think that the amount named in the notice of motion is the better phraseology than putting the amount.

Mr. Bowles: That same question was raised—

Mr. Williams: I think local judges say "not exceeding the amount claimed."

Mr. Bowles: Archie Robertson had the same situation on the Driscoll and Ford cases on that point.

The Court: I don't think it makes any difference. It is just something for them to work out when they take up the instructions.

Mr. Bowles: The amount sued for?

The Court: "The amount claimed in the notice of motion for judgment" is the way I had it in mind.

Mr. Bowles: That is all right, sir. I have made the same objection many times.

page 298 } Note: At this point the Court recessed until 2:45 P. M.

Instruction No. 1.

Mr. Bowles: The second sentence, sir, is not correct, as I understand it. There is no inference of negligence from the mere happening of an accident, and there is no presumption that Saunders' driver is free from negligence and that his truck was operated with due care. In other words, sir, there is no presumption of fact. There is a legal presumption until evidence is introduced. That language, I think, sir, has been disapproved.

Now, the burden is not upon the plaintiff to prove that Saunders was the sole cause. The burden is upon the plaintiff to prove that Saunders was a cause, and he is excused from contributory negligence unless the defendant bears the burden of proving that he was guilty of contributory negligence. That would reverse the burden of proof as to contributory negligence.

The Court: You have got instructions about this green car involved in this case.

Mr. Godwin: That is true.

Mr. Bowles: Some such word as "efficiently" page 299 } or "substantial" or something should go down at the bottom of this instruction. Now, when the instruction is phrased in this manner, sir: "And the Court further instructs the jury that even though you should believe that the defendant, W. G. Saunders, was negligent"—now, when the instruction is put on the reverse angle in that manner: "yet if you further believe from the evidence that the plaintiff's intestate—"

Mr. Williams: Change the word "sole" to "a".

The Court: Let us take this first objection made on the presumption.

Mr. Williams: What is the objection to that?

The Court: He says that is a presumption of law, not of fact. "The presumption is that W. G. Saunders' driver was not free from negligence."

Mr. Williams: I see very little difference between that language and the language that you have passed in regard to his instruction: "that there was a collision raises no presumption that Mary Hall's deceased husband was guilty of negligence." What is the difference?

Mr. Bowles: That is the same language you have got in the first instance, but you go further than that. You say the presumption is that he was free from negligence.

page 300 } Mr. Williams: I don't believe I—

Mr. Bowles: As a matter of law, but imme-

diately there is evidence on the subject that presumption goes down. You are stating what is a presumption of law and not a presumption of fact contrary to negligence. There is no presumption of fact.

The Court: Here is his instruction, Mr. Williams, on that subject: "The mere fact that there was a collision raises no presumption that Mary Hall's deceased husband was guilty of negligence. On the contrary, the burden is on William Smith to prove—"

Mr. Williams: Well, I understand that, Your Honor, but I see very little, if any, difference between that language and the language I have in this instruction, if the presumption is free from negligence, and bound to be that he was operating with due care; otherwise he would be guilty of negligence.

Mr. Bowles: The difference I am pointing out, Your Honor, is that the language which I have deals solely with the mere fact of the accident; raises no presumption one way or the other. I tell them that in the first instance, "you cannot infer negligence from the mere happening of the accident."

Mr. Williams: That is true.

page 301 } Mr. Bowles: Now, he goes further and says: "The presumption is that Saunders' driver was free from negligence." Now, if you tell them that the mere fact of the happening of the accident raises no presumption—

The Court: You cannot infer negligence. That is the same thing.

Mr. Bowles: It is expressed differently, but the first sentence covers the same idea.

Mr. Williams: We wish to change the word "sole", in view of the third car, to "a" proximate cause.

The Court: This language might have this added to it: "The presumption is that W. G. Saunders' driver was free from negligence until the contrary is shown."

Mr. Williams: Your Honor, sometimes the Court says: "unless and until the contrary appears." But we would rather have it stricken out than to have that language written in.

The Court: I will strike it out.

Mr. Williams: Both parties start off with the presumption that they are free from negligence.

The Court: The words "the sole" stricken out
page 302 } require "a" to be put in place of "the sole".

Mr. Williams: That is right.

The Court: "* * * was a proximate cause of the accident."

Mr. Bowles: Now, if Your Honor please, on account of the confusion that results here from the cross-claims here, I think the instruction is still inaccurate unless it is limited to the action of the Administratrix against Saunders and does not include the cross-claim of Saunders against her. Because it concludes with the finding that they must find for the defendant Saunders, the jury might interpret that to mean on his cross-claim against the Administratrix. This is a burden of proof instruction, and he might not be able to recover on his cross-claim.

Mr. Williams: On the cross-claim he is not defendant, a defendant. He would be the plaintiff.

Mr. Bowles: But the jury would never be able to make that distinction.

Mr. Williams: I have no objection to stating it "W. G. Saunders on the main suit or notice of motion."

The Court: "Notice of motion" I think would convey it to them. We use the words "notice of motion" page 303 } in one of the other instructions.

Mr. Bowles: I think it would make it still more clear if you say: "* * * in the plaintiff's action against him."

The Court: I used the words "notice of motion" in the other one.

Mr. Williams: "Find for the defendant, W. G. Saunders, on the notice of motion."

The Court: Or you might say: "filed against him."

Mr. Williams: All right, sir.

The Court: After the words "you shall find for the defendant, W. G. Saunders." "on the notice of motion filed against him."

Mr. Bowles: On the second paragraph, I think we are terribly confused there, sir, because of this situation: "And the Court further instructs the jury that even though you should believe that the defendant, W. G. Saunders, was negligent, yet if you further believe from a preponderance of the evidence that the plaintiff's intestate was guilty of negligence which efficiently contributed to the accident, you shall find for the defendant, W. G. Saunders." Now, that applies certainly to the notice of motion, because in that event he could not possibly recover if those facts were page 304 } true. I think that the second paragraph is extremely confused, in view of the situation which we have, sir, and attempted to go into something, the consideration of something that is considered several times in instructions offered by the defendant.

Mr. Williams: You could say "W. G. Saunders, defendant on the notice of motion."

The Court: There is another way. Instead of putting those words "on the notice of motion filed against him," as filed here previously, add the sentence: "This instruction is applicable to the plaintiff's notice of motion against Saunders."

Mr. Godwin: That is all right.

Mr. Williams: Wait a minute—

The Court: Do not put in the words: "on the notice of motion filed against him." Put the language about Saunders, third line from the bottom, but just add at the conclusion: "This instruction is applicable to the plaintiff's notice of motion against Saunders."

Mr. Bowles: It is only applicable to that.

The Court: Yes.

page 305 } Mr. Bowles: I don't want to be particular, sir, but I think the jury is going to be terribly confused by the situation.

The Court: That is what inspired me to the thought possibly that if we add: "This instruction is applicable to this particular claim, and not to the cross-claim, the jury couldn't possibly misunderstand that.

Mr. Williams: Why don't you put it this way: "This instruction is not applicable to the cross-claim filed by W. G. Saunders"?

Mr. Gilman: That doesn't say what the instruction is applicable to.

Mr. Bowles: It is not applicable to Smith.

The Court: It doesn't deal with Smith.

Mr. Godwin: It certainly could be made clear by saying: "The plaintiff cannot recover against W. G. Saunders."

Mr. Bowles: I think that is all right.

Mr. Godwin: Rather than limit it to one set of pleadings.

Mr. Williams: Wait a minute. That might be a good suggestion. "You cannot find for the plaintiff
page 306 } against W. G. Saunders." Just say: "cannot find for the plaintiff."—

Mr. Bowles: You have still got a right of recovery against Smith.

Mr. Williams: This has got nothing to do with Smith. All you need say there is that "he was not guilty of negligence as that he was, you cannot find for the plaintiff."

Mr. Bowles: Against the defendant W. G. Saunders.

Mr. Williams: Who else could he find against?

Mr. Bowles: There isn't any harm in specifying it.

Mr. Williams: It seems to me that is just adding on more language that has no application at all, because Saunders is the only person he could recover against, anyhow.

Mr. Bowles: That is thoroughly understandable to us lawyers, but I think it is clearly—It is all right by me; “cannot find for the plaintiff.”

The Court: We have got to frame instructions here that deal with various features. I do not see that it is confusing to say “you cannot find for the plaintiff against the defendant W. G. Saunders.” It differentiates in the minds of the jury as these various defendants.

page 307 } Mr. Williams: That is all right, Your Honor. We will say “you cannot find a verdict”—?

The Court: The way I have got it, the words “shall find for” are stricken out, and in place of “shall find for”, “cannot find for the plaintiff against the,” interlined, which makes it read: “or if it appears equally probable that he was not guilty of negligence as that he was, you cannot find for the plaintiff against the defendant, W. G. Saunders.”

Mr. Bowles: Now, you have got to put it in the second paragraph to make it do the same thing: “* * * yet if you further believe from a preponderance of the evidence—”

Mr. Williams: That is dealing with the weight of the evidence.

Mr. Bowles: It is a burden of proof instruction. It must deal with it. They have got to believe from a preponderance of the evidence that we were guilty of any negligence at all.

Mr. Godwin: Put “preponderance of the evidence” in there.

Mr. Bowles: I say, that only gives it to us—add it in this “yet” clause—“a preponderance”. “* * * the plaintiff’s intestate was guilty of negligence which efficiently contributed.” That is the same language you use in ours.

The Court: Efficiently?

Mr. Bowles: Efficiently contributed. You haven’t got “in a substantial degree.”

The Court: You eliminated the words “substantial degree.”

Mr. Bowles: Yes, sir. You cannot find—

Mr. Williams: —for the plaintiff—

Mr. Bowles: —for the plaintiff against the defendant, W. G. Saunders. I think we cannot except to it in that form, sir.

The Court: What about that language I had in there first on the notice of motion?

Mr. Bowles: I do not think it is necessary now.

Mr. Williams: It is not necessary.

Mr. Bowles: So I can mark it as "no objection," sir, this last paragraph now reads: "And the Court further instructs the jury that even though you believe, should believe, that the defendant, W. G. Saunders, was negligent, yet if you further believe from a preponderance of the evidence that the plaintiff's intestate was guilty of negligence which efficiently contributed to the accident, you cannot find for the plaintiff against the defendant, W. G. Saunders, and this is true even though you believe—" The Court: One minute. That is all right.

Instruction No. 2

The Court: No. 2.

Mr. Bowles: If you give that instruction, you cannot give any emergency instruction.

Mr. Williams: What?

The Court: On what ground?

Mr. Bowles: Because if it is an emergency, it is not what an ordinarily prudent person would do under ordinary circumstances.

Mr. Godwin: What is it?

The Court: It is what an ordinarily prudent person would do in that situation.

Mr. Bowles: No, sir, it is the other way around. I have never seen this instruction before. I don't know that it hurts anything.

page 310 } Mr. Williams: What?

The Court: Generally as I have seen it before it is failure to exercise a legal duty.

Mr. Williams: It may be failure to exercise, or it may be doing something that you ought not to do.

Mr. Bowles: Well, let it go.

The Court: I cannot see any serious objection to that myself. No. 2 passed.

Instruction No. 3.

The Court: No. 3.

Mr. Bowles: Now we come to the meat of the defense. If Your Honor please, this does not seem to me a case in which the unavoidable accident theory applies, on this evidence. I would object to this instruction on the ground that there is no evidence to support it, and it is contrary to the evidence.

The Court: Well, if Saunders' driver was guilty of no negligence, and the plaintiff's intestate was guilty of no negligence, what happens to the—?

Mr. Bowles: Well, sir, how can the jury find on this evidence that one of those things isn't true, that both page 311 } of them are true? I just do not see a basis in the evidence for that. It is according to the evidence, without any contradiction, that there was ample room on both sides of the road for the green car to have passed to the left of the oil truck on the shoulder; there was ample room on the other shoulder for an automobile to get off, fully off the road. Now, the worst aspect of the case from the plaintiff's angle in reference to the unavoidable accident theory would be the testimony of the driver, that the oil truck turned directly in his face. Now, would that be an unavoidable accident if that state of facts were true, if the jury accepted that state of facts?

The Court: Well, if he turned directly, the oil truck turned directly in the path of the lumber truck, unless he were excused or something, that does show negligence on the part of the driver of the oil truck.

Mr. Bowles: If that be so, sir, then by this instruction you inject into this case the thing that the defendant wants to get in, the idea of this unavoidable accident in this entire situation across to the jury. I do not think that on this evidence the jury could find as to this accident, among all of these three parties that are here, that this was an unavoidable accident.

The Court: Wasn't there some contradiction page 312 } in the testimony as to whether that green car could have passed on either side?

Mr. Bowles: I do not think so. There was some contradiction as to whether he could have gotten through between, but no contradiction as to whether or not there was room enough on the shoulder for him to pass where he did pass. The fact that he did pass is proof of that.

Now, this is an instruction which unquestionably should be objected to by Smith.

Mr. Williams: No, we represent Smith.

Mr. Godwin: We are trying to base the instructions on what the evidence may be from the set-up of the case, Your Honor.

Mr. Bowles: From your—?

Mr. Godwin: From the standpoint of the driver who testified here, we know that a green car was involved. We know that a green car primarily caused this accident by attempt-

ing to cut traffic, the most dangerous thing that automobiles can do. Now, if, as the jury cannot help but think, this man was confronted with that, and in the exercise of ordinary care that man might have done, under similar circumstances, turned to the left to get away from that immediate emergency, thinking perhaps that the other car would

page 313 } let him by, if he did that, why, then it is excusable, and there has been no negligence. Now, on the other hand, if he popped out in front of our man, and he, being confronted with that emergency produced by the driver of the oil truck, he cut to the left, if the jury believes that, then they can believe that there was a green car that came through there and caused this whole thing, putting both of these people in a position of peril in which they had to act instantly to get out of that, and neither one of them *were* at fault. And that is the situation. That is what is testified to by your driver. He said that he didn't think that the man in the oil truck, as I understand his evidence, had an opportunity to get over to the right-hand side of the road. Now, he said that.

Mr. Bowles: That is in the teeth of the driver's statement, that argument, sir.

Mr. Godwin: That is what our driver said.

Mr. Bowles: Your argument is right in the teeth of your driver's testimony, in this respect: It is now argued as if those were two successive emergencies. Your argument might apply in such a case. But this driver, Elmer Hall, was not in two successive emergencies. He sat there just a little while ago and told the jury that when this green car came

beside him, the first time he saw it, that the oil
page 314 } truck was then no farther than that chair to the light button back there. That was not a succes-

sive emergency for a man cutting over and coming back. That puts the oil truck driver in the position to turn directly in front of the lumber truck, the bigger of the two vehicles, in a distance of 35 feet, sir. That could not be an unavoidable situation if he did that, sir. Now, if there was a tremendous distance between them, and he turned over and ended one emergency, and then turned back again to avoid a succeeding emergency, and there were two successive emergencies, there might be some possibility of that. Bu those were placed together in a distance of 35 feet. Otherwise the plaintiff's car would have gone through. Now, I just do not think, sir, that this idea of *of* an unavoidable accident ought to be gotten to the jury's mind on this evidence, and particularly in favor of the defendant Saunders, whose driver testifies that it was all one simultaneous occurrence.

The Court: Do you have anything more to say on that, Mr. Williams?

Mr. Williams: As I understand, it is the contention that the instruction is all right as a statement of law, but the evidence here does not bear it out. Well, now, my recollection about this testimony is that William Taylor himself stated that when the lumber truck started to skid, page 315 } that is, when he saw it, it was 35 or 40 yards, which is 120 some feet, from the intersection of this particular road, which was Main Street, at the point the accident happened, or rather the point that the automobile passed the oil truck. So at the time the automobile passed the oil truck—

The Court: William Taylor's testimony?

Mr. Williams: —the lumber truck was 120 feet away. He said that he cut to his left as the oil truck went by—I mean, as the automobile. Now, instead of being 35 feet, as my friend stated, there is 120-some feet. Now, if that automobile attempted to go through, it is a question for the jury to say whether or not that automobile was guilty of negligence. He may have misjudged the speed of the oil truck, and in the exercise of reasonable care thought that he had ample to go through, found out he was mistaken, and had to—came to the conclusion he had to go to the left, which he did; the other driver, being confronted with that, either turned to his left or kept on. If he turned to his left he was not at fault, in order to gain a little more room on the shoulder, and if our driver, according to his evidence, seeing the truck turn to the left, he cut to his left in order to give a little more room for the fellow to pass on his right, then I submit there is no negligence in this case on anybody, and it is absolutely an unavoidable accident. So there is page 316 } ample evidence, if the jury believe parts of these testimonies of this driver of our truck and of William Taylor to show that it could not have been prevented by the exercise of ordinary care by either the Saunders truck or the Hall truck. That is what an unavoidable accident is.

Mr. Bowles: Then, in this situation, what is the purpose—?

Mr. Williams: We are not bound by the colored driver of our truck's testimony. We are representing Saunders, and we have a perfect right to argue to the jury that this 120 feet that William Taylor puts it is correct.

Mr. Bowles: Well, what is the purpose here of getting to the jury the words "unavoidable accident"? This instruction is asked for by Saunders in order to repel the action brought against him by the plaintiff. Now, in this instruc-

tion you say: "if it appears from the evidence that the driver of the W. G. Saunders truck was guilty of no negligence," then the plaintiff cannot recover against Saunders. That is all Saunders is entitled to have the jury told of what is in that instruction. Why do they want to drag in by the ears that they were not guilty of negligence, and it was unavoidable, and the law won't hold anybody responsible? That is just an effort to get a basis, as I see it, to argue to the jury that nobody was at fault. Now, I do not page 317 } think that Saunders is entitled to that. Saunders is entitled to have the jury instructed that if his driver was not guilty of negligence, then they cannot recover against him. That is as far as he is entitled to go, and that is as much as that instruction ought to tell the jury. To drag in by the ears the unavoidable accident theory on this thing, I think that is improper.

Mr. Godwin: Your Honor, if neither one of those parties were guilty of negligence, it is certain that neither one of them should pay damages. Now, as far as that is concerned, just because we have got a suit here, it doesn't mean anybody has got to pay damages. Now, the Court would get itself in this position by refusing this instruction, if it should not give this instruction; if this accident was due to the sole negligence of the driver of the green car, if the accident was occasioned by the sole negligence of the driver of the green car, then neither of these parties was guilty of negligence, and it is an unavoidable accident so far as they are concerned.

Mr. Gilman: Put "so far as they are concerned," or "caused solely by the green car."

Mr. Bowles: I might put my objection this way, sir: by every argument they use, everybody concedes that the green car was negligent. Then the accident was not un- page 318 } avoidable.

Mr. Williams: The jury might think so.

Mr. Bowles: There is no possible evidence on which the jury could think so.

Mr. Williams: That instruction has been given many times.

The Court: I am inclined to think that there is sufficient evidence to sustain it.

Mr. Bowles: I want to note an exception to that.

Instruction No. 3 a.

The Court: No. 3 a. Have you got that?

Mr. Bowles: Isn't that the same thing? What is the difference between the two?

Mr. Godwin: That is an instruction where the driver of the green car—if they believe that he attempted to cut traffic when the highway was not free from oncoming traffic a sufficient distance ahead to be permitted to be made in safety, and that by reason of that the accident was caused, by his sole proximate negligence, why, then, certainly none of the parties, none of the parties, including William Smith, the plaintiff, or the defendant Saunders would be entitled to recover. Your Honor will have to tell them that when you tell them how to write the verdict, anyhow, unless you give them that instruction.

Mr. Bowles: You tell them, sir, in 3 that this is an unavoidable accident if Saunders and Hall, the dead Hall, were not guilty of negligence. Then you come over in the next instruction 3 a, I believe, and tell them that it could not be an unavoidable accident because the green car was solely guilty of negligence. It is the same idea that permeates both of the two things.

The Court: If they believe.—

Mr. Williams: Of course.

The Court: —That the green car caused the accident.

Mr. Bowles: What evidence here is there that the green car was not guilty of negligence? On what evidence could such a supposition be predicated?

Mr. Williams: We are saying, if he was guilty of negligence which was the sole proximate cause.

Mr. Bowles: How can you give the jury an opportunity to determine whether he was or was not when there is no evidence here on the subject?

page 320 } Mr. Godwin: This is just, if Your Honor please, so far as the parties to this suit here are concerned. This 3 a here is purely on the question of the sole negligence of the green automobile; and if that green automobile caused all this trouble, which is perhaps the better thought on the whole case, certainly none of the parties in this suit would be entitled to recover anything.

Mr. Bowles: I think 3 a is nearer right than your No. 3.

Mr. Godwin: There isn't anything wrong with either one of them.

Mr. Bowles: It is certainly a duplication, sir, of the same idea.

The Court: I think No. 3 a is justified.

Mr. Bowles: I note the exception.

Instruction No. 4.

Mr. Bowles: That one has got something left out of it, evidently. The sentence is not finished, and it appears you must have left out something. Something is wrong in the fourth line: "If you believe from the evidence that the driver of the defendant's truck proceeding west on the highway . . ."

page 321 } Is that intended to say: "proceeding west on the highway at the place," or—?

Mr. Williams: There is no dispute about the fact that it was proceeding west.

Mr. Bowles: Well, then, why put it to the jury to determine?

Mr. Godwin: Insert there, Your Honor, in the fourth line, right after "defendant's truck," "was."

Mr. Bowles: Now, if Your Honor please, the succeeding language presents an error which the Court of Appeals has many times condemned, and that is, to pick out a specific piece of evidence and emphasize it by calling attention to it in the instruction; unless it embodies the entire evidence it cannot be done. Furthermore, sir, this does not present all of the alternatives that were available and open to the driver of the lumber truck, and omits a specific one which I assume the defendants will not care to have attention called to, namely, that he could have gone out on the right shoulder and avoided the whole thing. As the oil truck bore on him, according to his testimony, had he borne to the right shoulder, the entire emergency might have been avoided. Now, that alternative is specifically omitted.

Mr. Williams: I do not recall any evidence—
page 322 } the driver of the truck testified that there was grass in the ditch over there.

Mr. Bowles: Well, there is other evidence to the effect that there is a shoulder there.

Mr. Williams: Whose?

Mr. Bowles: Taylor's evidence.

Mr. Williams: He testified as to the south side of the road.

Mr. Bowles: I beg your pardon, he said both sides.

Mr. Williams: I do not recall evidence as to the north side.

Mr. Bowles: I made a special note of it, because if he hadn't said so I would have put a witness on to prove it.

The Court: Elmer Hall said there was a ditch there.

Mr. Bowles: He said there was a ditch over there, but he didn't know how far it was, and he didn't want to go over on that side.

The Court: There was no plat made of this, but there were numerous sketches made. None undertook to show the surrounding—

page 323 } Mr. Bowles: Taylor testified that there was a shoulder there on both sides sufficient for a car to drive on.

Mr. Gilman: Pretty near all the pictures so show.

The Court: Pictures show it?

Mr. Gilman: Yes, sir.

Mr. Bowles: I particularly noted that, sir, because I would not have left that hole open. It is wrong in an emergency instruction, in any event, sir, to tell the jury what other alternatives that man could have used without telling them all the possible ones.

Mr. Godwin: Your Honor, maybe a decision of the Court of Appeals will settle that, that there is no doubt about that. In the case of *McGowan v. Tayman*, which is generally recognized as the leading authority in Virginia on the question of sudden emergency, which has been followed in 170 Virginia by the case of *Otey v. Blessing*, the Court says this:

“It is true, as contended, that men confronted by sudden emergencies are not required to follow the safest course. The doctrine of error in *extremis* is a humane one and has frequently been applied by this Court, but it cannot be invoked by one who is at fault and whose negligence or misconduct brings about the peril in which he is placed.” It goes on to say, then, of this instruction given in *McGowan v. Tayman*, 144 Va. 358. Now, this is, as the Court pointed out in that case, what this man could have done or what he could not have done—

Mr. Bowles: In the instruction?

Mr. Godwin: In the instruction, and approved by every case that I have ever followed. “The Court instructs the jury that if they believe from the evidence that when the defendant, driving his automobile down Harrison Street, was approaching the intersection of Harrison and Seventh Streets, he discovered the bicycle of the plaintiff moving rapidly down Seventh Street not in control, and that a sudden emergency was then presented to him of either going forward or stopping his car—” just as here; he is going west; he could have turned left or turned right, he can't stop—and the Court pointed out those two things—“to avoid imminent collision,

and that he undertook to speed up his car and thus avoid the danger, and that his action was such that a person of ordinary prudence might have done under—in a like situation, but he failed to thus avoid the collision, he would not be guilty of negligence because another course might have been more judicious.” Been cited ever since 144 Virginia, approved in every case in which that has ever been cited; a leading case.

page 325 } Mr. Bowles: Was that specific point raised?

Mr. Godwin: Specific?

Mr. Bowles: I mean, was any exception taken?

Mr. Godwin: I don't know, sir.

Mr. Bowles: The point was not raised, sir, unless an exception was taken.

Mr. Godwin: Well, I know at least that that instruction has been given so many times that it has become permanent, almost, in the law of Virginia.

Mr. Bowles: Your Honor, they certainly have eliminated from this one choice, and that is, to turn to the right hand, even if there was a ditch there; they didn't put that in there. I submit to the Court that it is wrong for the Court to state and fix what were his choices and say to the jury: “Now, all these are the choices he had. He did not have any other one.” That is bound to be error, sir.

Now, the main objection to the instruction, I have not gotten to yet, sir. It does not say that the emergency was created without fault on his part.

Mr. Williams: Yes, it does.

Mr. Bowles: Where does it?

page 326 } Mr. Williams: “without negligence on his part,” second line.

Mr. Bowles: No, that is a general statement of law.

The Court (Reading): “if you believe from the evidence that the driver of the defendant's truck was proceeding west on the highway and that the actions of the drivers of the unknown automobile and of the oil truck presented to him a sudden emergency”—created without fault on his part—

Mr. Bowles: You do not leave anything to the determination of the jury in that first sentence.

The Court: Well, it is not the Court—the Court is not undertaking to say what the things were. The Court puts into the instruction such actions as were taken. Now, he did turn to his left, and aren't they entitled to have the Court say “if you believe that is an emergency, and he did turn to his left”—?

Mr. Bowles: That is not what you say, sir, if you read that. If you believe he was confronted with an emergency

—which presented to him a sudden emergency, to do one of two things, either hold his course or turn to his left, not that he cut to his left.

page 327 } Mr. Williams: Well, Your Honor, put in there: “turn to his right or turn to his left.

Mr. Bowles: Certainly it should go in there, “turn to his right,” sir, but I think it is error to specify all those things. You ought to leave it, sir, for the jury to determine. You have limited it to three alternatives. There might have been some others.

The Court: We are drawing our instruction as to what is in evidence, not speculation.

Mr. Bowles: You cannot pick out a piece of evidence and emphasize it, sir.

The Court: They seem to have done it.

Mr. Bowles: There was no objection to it.

Mr. Godwin: They did it, Your Honor. A man confronted by an emergency, as to whether he will stop or slow down or give the car more speed—they held that instruction was based on that state of facts.

Now, right after “either to hold his course—”

The Court: Turn to his right or turn to his left.

Mr. Bowles: Those questions as to whether or not those specific things should be put in this instruction
page 328 } are not raised in this case at all. The question was whether he was entitled to one or whether he was not entitled, and that was what was decided. The Court decided whether they ought to have gotten an emergency instruction or not.

Mr. Godwin: Well, there was a similar instruction in the case of *Larcustein v. Maile*.

Mr. Bowles: And that case was reversed.

Mr. Godwin: The Court in approving the decision in that case said that the defendant precipitated into an unexpected situation was not required to make a wise choice; he is only required to do what a person of ordinary prudence would have done.

Mr. Bowles: That is all right—

Mr. Godwin: But whether he uses reasonable care under the circumstances is ordinarily a question for the jury. Now, it not only approves what was said in four or five other cases, it picks out this instruction in *McGowan v. Tayman* and holds that that is the law in Virginia, and repeats that it is. So I do not see there can be any question in the world about that.

Mr. Bowles: *Jones v. Hanbury* is the first case, sir, that

ever adequately dealt with error *in extremis*.
 page 329 { Judge Epes wrote an opinion of unusual length
 in that case. That is a case where, if Your Honor
 will recall, a man in a car was riding with a girl, and let her
 drive, and there was a car coming over the brow of the hill,
 and when she went to pass was blocked in before she could
 make up her mind whether she could get through, and the
 owner of the car, who was sitting in the seat, reached over
 and grabbed the wheel and headed it in the ditch on the left
 side. The oncoming car, which was a Packard, as I remem-
 ber, crashed into the right side of that car and injured the
 lady who was driving. Now, she sued the owner, her friend,
 on the ground that he did not let her drive but pulled the
 wheel, that she would have gotten through. That is an
 amusing case where the Judge took judicial notice of the fact
 that women cannot step three feet. In that case the ques-
 tion was considered as to whether you could go into all these
 alternative propositions and specify as to what might have
 been done, and Judge Epes laid down in one page what was
 the proper statement of the emergency doctrine. That is 158
 Virginia 842.

Mr. Gilman: 164 S. E. 545.

Mr. Bowles: And in that opinion said the question is not
 what an ordinarily prudent person would do under the cir-
 cumstances, but it is a question whether or not
 page 330 { a person acting in sudden emergency created with-
 out fault on his part, whether or not it can be
 reasonably said that an ordinarily prudent man under those
 circumstances might not have done what he did. In other
 words, it catches it on the reverse angle. But I submit to
 the Court it is wrong for you to determine for the jury what
 were the possibilities and restrict them to those possibili-
 ties.

Now, I am not going to say any more about it, sir, except
 to call attention to the fact that you must—I think in the
 part of the instruction where you say “if you believe”—you
 have got to tell them there he was in an emergency created
 without any fault on his part, and then so and so.

The Court: You mean after the words in the sixth line
 “presented to him a sudden emergency”—created without
 fault on his part?

Mr. Bowles: “Without fault on his part”, yes, sir.

Mr. Godwin: Well, you can write it in here, Your Honor.
 Was proceeding west on the highway and that without fault
 on his part the actions of the drivers of the unknown vehicle,
 automobile, and of the oil truck, presented to him a sudden
 emergency.

The Court: I happened to put it this way. Any page 331 } objection to this? “* * * confronted by an emergency, is not required to make a wise choice; and if you believe from the evidence that the driver of the defendant's truck was proceeding west on the highway and that the actions of the drivers of the unknown automobile and of the oil truck presented to him a sudden emergency created without his fault, either—”

Mr. Bowles: Created without his fault.

The Court: “—either to hold his course or, turn to his right or to his left in order to avoid a collision, and that he cut to his left in an effort to avoid the accident, and that his action in so doing was such as a person of ordinary prudence might have done under like circumstances—” I do not think there is anything in the evidence to show any other alternative that he had.

Mr. Bowles: Stop was one of them.

Mr. Gilman: Or seen this green car in time to slow up.

Mr. Bowles: We do not think he is entitled to sudden emergency for two reasons: one of them is his failure to keep a proper lookout and have his car under control was evidence of negligence which he himself admits and which contributed to cause this emergency, if such existed. The page 332 } second is that the evidence, uncontradicted, to the effect that these brakes were not equalized properly, was an independent cause coming in there that prevents him from claiming emergency, because he had a vehicle which was not equipped to deal with an emergency.

The Court: I think they are entitled to an instruction on sudden emergency.

Mr. Bowles: On those grounds we except to it, sir.

Instruction No. 4 a.

The Court: No. 4 a.

Mr. Godwin: Your Honor, that is largely a repetition of the doctrine of sudden emergency.

Mr. Williams: We withdraw that.

The Court: You withdraw 4 a?

Mr. Williams: Yes, sir, we withdraw that.

Instruction No. 5.

The Court: All right. No. 5.

Mr. Bowles: That is the same thing.

Mr. Williams: No, sir, it is not.

page 333 } Mr. Bowles: Isn't that an emergency, what he is talking about?

Mr. Godwin: Your Honor, that has not been taken from the doctrine of sudden emergency at all. You have been discussing whether you should give an instruction on the duty of a man to stay on the right-hand side of the road. You remember that came up in *Vartanian v. Huddy* and the other cases on staying on the right-hand side of the road. We have two statutes: one of them is that you shall drive as near as you can to the right-hand side of the road, as near as practicable, it says; the other one says that cars meeting each other shall pass each other on the right and give each other as nearly as possible one-half of the main roadway. Now, to excuse that man in not conforming to that statute—Now, in dealing with whether or not a person meeting parties has to remain on his side of the road, and whether he is guilty of negligence as a matter of law if he goes to the left-hand side, this is what Vartanian has to say about it. "The driver of each of the meeting vehicles may assume that the others will yield half of the way and will drive or turn to the proper side of the road. A driver will not be held contributorily negligent where he turns to the left instead of the right in an effort to avoid collision with an automobile approaching him from the opposite direction on page 334 } the wrong side of the highway, if he had reasonable ground to believe that so to do was the only way to avoid the collision." Now, that not only goes to the primary negligence of our man but it goes to the question was he guilty of contributory negligence if this other man came out in front of him. So it goes to both, an excusable action, leaving that side of the highway. Now, that is the theory upon which that instruction is based.

Mr. Bowles: If Your Honor please, there is so much law, good law, but inapplicable.

Mr. Godwin: Now, under that theory, I doubt whether or not it has to be predicated on the basis of whether or not he was primarily negligent, as is the rule under the doctrine of sudden emergency; because suppose both of them were guilty of negligence to begin with; the man has gotten back over there, and then the other fellow came over to him, and then they went off on the wrong side.

Mr. Bowles: Your Honor, this is predicated—you notice the language—on approaching from the opposite direction, two vehicles approaching from the opposite direction on the wrong side of the highway. Vartanian and Mr. Godwin are both trying to state the law which would be applicable to a

situation where that prevailed: suppose two vehicles were driving along the road and one man was on the wrong side of the road, and the approaching vehicle in the opposite direction was wondering whether he was going to get over or not. That is not the situation here. Now, if that instruction were given on that proposition, it is wholly and entirely inconsistent with the emergency theory that he suddenly came over there, and there was no approach. Furthermore, if Your Honor please, you are by giving this instruction linked up with the other one, telling the jury as a matter of law that they must assume that there was a sudden emergency created without fault on the part of the Saunders driver, and on that assumption the proposition was whether it was right in going over to the left. Now, we talk here about turning to the left to avoid an approaching vehicle. Exactly the same thing we have just finished talking about.

Mr. Godwin: Your Honor, here is this about this instruction, too: Suppose they say that Saunders did have brakes that were not properly adjusted, and suppose he was driving down the road with some brakes that were improperly adjusted—we will assume that for the sake of this argument—but that he was traveling on his side of the road, not guilty of any negligence, and that suddenly a car comes out in front of him: he has got a right, irrespective of whether he has got good brakes on his car or not, to try to get to the other side of the road. Now, that is what happened in this case; he tried to get to the other side of the road. They say that he had defective brakes; but whether he had defective brakes or not, as a matter of law he did not have to stand a head-on collision. No man has to do that; and it is excusable to go to the other side of the road under those circumstances.

You take the testimony of this witness here that said the last time he saw that truck, just before the accident, when the green car came through, this man was driving with his right wheels about three feet from the right side of the road, which put him over in the middle of the road to begin with.

Mr. Bowles: That is too remote to hook up with the accident, 600 feet away.

Mr. Williams: That is not remote. The witness testified he saw it happen right in front of him.

Mr. Godwin: He said it ran on off, where he fell in the ditch, and he went off again, and the last time he saw it it was about the middle of the road, about three feet from the side of the road. That is his testimony.

The Court: That instruction is refused.

Mr. Godwin: Instruction No. 5 refused?
 page 337 } The Court: Yes, sir. You have got a specific
 instruction here that there can be no recovery
 against William Smith.

Instruction No. 6.

Mr. Williams: Yes, sir.

The Court: So you do not need this?

Mr. Godwin: Yes. This is where there can be no recovery against William Smith. You know William Smith was sued, Your Honor, and that brought up the complication.

Mr. Williams: This is not the instruction. This instruction says "you shall find for the defendant W. G. Saunders and the defendant William Smith."

Mr. Gilman: You mean on the cross-claim?

Mr. Williams: "shall find for him on the cross-claim", if that will make it clearer, Your Honor. And we will ask to add "on the cross-claim".

Mr. Bowles: Well, what has Saunders got to do with this one?

Mr. Williams: Both of them. "* * * his negligence was the sole proximate cause of the accident, you shall find for the defendant W. G. Saunders and the defendant
 page 338 } William Smith on the cross-claim."

The Court: Haven't you got other instructions that deal also with the cross-claim?

Mr. Williams: If Your Honor please, we have got three situations, whereas he had one. Now, this is the sole proximate cause of the accident. Then we have got it where they are concurring with the negligence of the green car.

Mr. Bowles: I think this is the first time he has done that.

The Court: No objection to No. 6?

Mr. Bowles: What has he added on to that?

The Court: "on their cross-claims".

Instruction No. 7.

Mr. Bowles: I don't think, sir, it is proper to leave the jury up in the air on the statement "proximately contributed."

Mr. Williams: If they did proximately contribute, isn't William Smith entitled to recover?

Mr. Bowles: In other words, what you are getting at here is negligence of Erwin Hall, which negligence
page 339 } concurred with somebody else's to cause William Smith's injury?

Mr. Williams: If that is so, William Smith is entitled to recover.

Mr. Bowles: Just to say "proximately contributed", sir, I don't think sufficiently states the proposition at all.

The Court: Just intended to cover this cross-claim?

Mr. Bowles: Yes, sir.

Mr. Williams: In his cross-claim.

Mr. Godwin: You might add to the bottom of that, Your Honor, "on his cross-claim".

Mr. Bowles: 6 and 7 are separate; sole negligence and contributing negligence—

The Court: Yes.

Mr. Bowles: You see what I mean, sir?

Mr. Williams: The two together are half: put what the third one says—when you put them all together in—

Mr. Bowles: I think we ought to say some-
page 340 } thing about negligence concurred with somebody else's to contribute to William Smith's injuries. It doesn't even say contributed to cause them. Do I make myself clear as to what I am talking about?

The Court: Yes, sir.

Mr. Godwin: Well, point out some negligence that you—

Mr. Bowles: This 8 is a repetition of 7, it seems to me.

Instruction No. 8.

Mr. Bowles: 8 is a better one than 7. 8 and 7 are the same thing.

The Court: It seems to me that they ought to be limited—I don't want to confuse the jury more than I have to. I have got to confuse them some on that. I cannot help that. The issue itself is very complicated. 7 is the one I first picked up. I will grant 7 and refuse 8.

Mr. Godwin: Your Honor, we want to offer 8 as drawn, as it correctly states the law applicable to the case. Then, if the Court refuses that, then we would present it with the last three lines stricken out, which read: "and if you further believe that such negligence was the proximate or
concurring cause of the accident, you shall find
page 341 } for the defendant William Smith." That would tell the jury what negligence was, tell them about the specific act of negligence.

The Court: I will take 8 instead of 7, then.

Mr. Williams: You want 8 rather than 7?

Mr. Godwin: Suppose we leave No. 7 where it is, granted, and then strike out the last three lines of 8, which says he was guilty of negligence, which applies both to Saunders and Smith.

The Court: Now, let us see what you want.

Mr. Bowles: Now, Your Honor, I might say this to that proposition: There isn't any use writing a whole lot of little pieces of features and putting them together to make the same feature. This objection has been advanced by my friend against my own instruction. In 7 you say: "if you believe from a preponderance of the evidence that Erwin Nolan Hall was guilty of negligence in the management and operation of the truck." In 8, with the elimination that has been mentioned, after having submitted to them the issue of negligence in operation and management, you repeat the item of negligence, which is operation and management; pick out a specific one and repeat it. I don't see any use in doing that, sir.

Mr. Godwin: Your Honor, I wouldn't complain page 342 } of that—

Mr. Bowles: We put them all together. We haven't repeated a single element of negligence.

Mr. Godwin: The only specific act of negligence that we name in these instructions was that part of the Code, the language that is copied in this instruction, which says that if he was driving at that time under those conditions he was guilty of negligence. The statute says "reckless driving", but we say "negligence". Now, he has denied them, those different specific acts of negligence which he claims in two instances here.

The Court: I don't see any use in separating them out on different pieces of paper, two different instructions on the same thing. However, the Court takes them as presented here. I have got to pass on them as presented. I will grant 8 with the last three lines stricken out.

Mr. Bowles: We object to that as a duplication, unnecessary repetition.

The Court: It seems to me if you tell the jury what constitutes an act of negligence on the part of some, you ought to be able to state what constitutes acts of negligence on the part of all.

Mr. Bowles: I think so, but you have no instruction on the part of Saunders except one grab bag—"in the operation and management". Still, let it go, sir.

The Court: All right. No. 9.

Instruction No. 9.

Mr. Bowles: Now, this is certainly repetition.—

Mr. Williams: Of what?

Mr. Bowles: —it seems to me.

Mr. Godwin: No, this is the case of the joint concurring negligence of your driver and the green car, Mr. Bowles.

Mr. Bowles: Didn't you tag Saunders on to that one up there?

Mr. Godwin: We have got him in enough.

The Court: You ought to add there "on his cross-claim" so as to make this clear to the jury.

Mr. Bowles: Now, look at 6, sir, and see if that is not the same thing. They have taken their instructions page 344 } on the theory of separate instructions on sole negligence, sole negligence, his negligence, making Hall the sole proximate cause, contributing, and now hooked up in here with the green car. But you see, Judge, each time, when you are talking about Smith, they say "and Saunders", and when they talk about Saunders, they say: "and Smith." That is what I am talking about there. This says "Saunders and Smith." 6 says "Smith and Saunders".

The Court: Wait a minute. There is another point in this Instruction 9: I do not think this instruction was conceived as a cross-claim instruction. Here you say: "which negligence concurred to proximately cause the damages to the truck of Saunders." Now, you do not say anything about injury to Smith. You haven't got any injuries to Smith. I do not quite follow this, the drift of that instruction. If it was meant for a cross-claim instruction for both of them, surely you mean to put in there that this negligence caused the damages to Saunders' truck and personal injuries to Smith.

Mr. Godwin: Let's see, Your Honor. I think we can arrange it. Yes, probably you should have had "Smith" in it.

The Court: It is confusing.

page 345 } Mr. Godwin: Your Honor, will you strike out "and also William Smith"? That should not be on that instruction. That is on the next one.

The Court: Then you are asking this instruction as a cross-claim instruction?

Mr. Williams: "you shall find for W. G. Saunders on his cross-claim."

Mr. Godwin: On his cross-claim, he is free of contributory negligence.

The Court: Now, let us see. "which negligence concurred to proximately cause the damages to the truck." Now, I think that is all right, sir.

The Court: No. 9 granted.

Instruction No. 10.

The Court: No. 10. This is primarily for Smith, isn't it?

Mr. Godwin: That is right. That means that neither W. G. Saunders nor the other man can recover, but Smith is the only man who is entitled to recover.

Mr. Bowles: No. 10: I will very briefly give my objection to it. That instruction could be—I offer a suggestion to fix it at the same time: that their joint negligence con-
page 346 } curred to cause the injuries, or contributed to, is
entirely confusing, and leaves the situation open. And it does not take into consideration whether Smith on his testimony was guilty of contributory negligence in failing to keep a lookout for his own safety. Under the Ford and Driscoll cases he might have jumped out.

Mr. Godwin: Oh, shuh.

Mr. Bowles: I do not think we can eliminate that, his possible contributory negligence.

Mr. Godwin: Does that want the word "proximately" caused or contributed to?

The Court: Concurred to cause—

Mr. Godwin: And that their joint negligence—

The Court: —concurred to cause—

Mr. Godwin: Concurred to cause.

Mr. Bowles: I think that is it. This instruction is drawn on the theory that the negligence of those together caused all those things.

Mr. Godwin: And that their joint negligence—

Mr. Bowles: —concurred to cause all these injuries and damages. Contributed means contributed to
page 347 } something else.

The Court: That their joint negligence—

Mr. Godwin: Your Honor, may I suggest this: that their joint negligence proximately concurred to—proximately contributed to the accident. Would that be—?

Mr. Bowles: No.

Mr. Godwin: If we get it without objection—it means the same thing.

Mr. Bowles: Do you anticipate any such result? " * * * that their joint negligence proximately caused the damages to the truck and injury to Smith." I don't want to be meticulous, sir, but—

The Court: It seems to me that when you say that their joint negligence—

Mr. Bowles: —caused it—

The Court: I don't see why you need "contributed" when you say their joint negligence—

Mr. Williams: Caused—contributed to cause?

The Court: If their joint negligence proximately caused it, doesn't it present all that?

page 348 } Mr. Williams: No, but it might contribute with the negligence, if any, of the automobile driver.

Mr. Bowles: The third, the green car? Then if that is what you mean, I think you ought to say so. You can't just say "contributed", hanging it up in the air.

Mr. Williams: I mean contributed to the injuries.

Mr. Bowles: Contributed to what?

Mr. Williams: To the injuries.

The Court: I infer that this instruction is drawn upon the theory that it covers all joint negligence.

Mr. Williams: That is right.

The Court: I can not see why contribution should be inserted in the joint negligence.

Mr. Williams: Because you have got another party whose negligence also might contribute.

The Court: Yes, but you have covered it in another instruction.

Mr. Williams: I do not think so. Have we? All right. All right. Just say "proximately caused." Joint negligence proximately caused the injury.

page 349 } Mr. Bowles: We are all getting tired, and what not, but I would like to insist upon the instruction being correct. Erwin Hall was not injured; he was killed. It should be death.

Mr. Godwin: Want to put "death" in there?

Mr. Bowles: I would much prefer it.

Mr. Williams: He was injured before he died.

Mr. Godwin: Well, just write "death" over "injuries" there.

Mr. Bowles: Does Your Honor not think that you should insert after "William Smith", "while exercising ordinary care on his part"?

Mr. Godwin: Your Honor, I think there certainly can not be any question of contributory negligence on the part of William Smith.

Mr. Bowles: When he never saw any of it?

Mr. Godwin: He said, Your Honor—he did say he saw it; he said he was riding, and the last time he saw the speedometer it was going 25 miles an hour—

The Court: Never looked, never saw anything.

Mr. Godwin: He said he saw the car come up
page 350 } beside him, and the oil truck, but he was injured
and stayed in the hospital for three or four days,
and he didn't know what else happened.

Mr. Bowles: He never has yet seen the oil truck.

The Court: Never seen the oil truck.

Mr. Williams: Well, Your Honor, suppose he hadn't seen
the oil truck; would that be contributory negligence?

The Court: He was a passenger in this truck.

Mr. Williams: Of course he was.

The Court: And he cannot sit there, as I understand the
law, supinely—

Mr. Williams: Of course not.

The Court: —and commend himself to the care of the
driver.

Mr. Williams: Of course he can't, but he cannot be held
to any greater duty than that he would have seen if he had
looked. What would he have seen? He would have seen the
oil truck coming down the road, exactly what the driver saw.
What could he have done? Not a thing in the world. The
only thing, he could have told the driver what he
page 351 } saw: "Here comes an oil truck." But he would
only be telling the driver what the driver already
knew.

The Court: He might have seen the green car coming up
on his side.

Mr. Williams: What would he have done if he had seen
the green car coming up on the side? What would anybody
have done?

The Court: He might have slowed down.

Mr. Williams: There is no evidence of any excessive speed.

Mr. Gilman: That is all the more reason why he should
have slowed down.

Mr. Williams: A man doesn't have to slow down simply
because a man—

Mr. Bowles: The law requires you to do that. When a man
overtakes you you must immediately let him pass you.

Mr. Williams: I haven't seen a statute that if you are go-
ing 20 miles an hour you have got to slow down and let a man
pass you.

Mr. Bowles: If a man undertakes to pass, you must im-
mediately let him pass. There is evidence here
page 352 } that the driver raced him to keep him from pass-
ing. Smith could have told him not to do that.

Mr. Williams: Heard the racing of the motors is what
the witness said. Heard the racing of the motors, as if
racing.

Mr. Bowles: As if racing? Well, on cross examination he said the cars came by and raced to see who was going to pass, or words to that effect.

Mr. Williams: The fallacy, I think, in my friend's argument, that you can not give an instruction on negligence unless it can be one that the jury could find that the negligence that you give the instruction on is or can be a proximate cause of the accident. If this man was going 20 or 25 miles an hour, which is all the evidence about speed, and he had seen this car coming up behind him until he attempted to pass, and he saw him pass, he was under no duty to slow down. You don't slow down an automobile if you are going at a reasonable rate of speed because somebody passes you.

The Court: Your view is that there is no evidence here in this case at all to justify any finding on the part of the jury that William Smith is guilty of any negligence?

Mr. Williams: Absolutely. The evidence is page 353 } undisputed.

The Court: Therefore that instruction should not even suggest it?

Mr. Williams: Yes; because there is no evidence that he did not do what an ordinarily prudent person would have done, or that he did anything in any way that concurred with anything else to produce the accident; even if he be conceded to be guilty of some negligence.

The Court: What do you claim that you could put his negligence on? What is your reply, Mr. Bowles? Mr. Williams states that these facts which have been brought—admitted here, are not sufficient to pass that to the jury. As I understand it, the argument presented is that if William Smith was guilty of negligence, it would not efficiently contribute so as to bar him. That is what I understand.

Mr. Bowles: Well, Your Honor, I can not point to any. I can point to evidence from which an inference might be drawn that he might have prevented the accident, but I can not point to any evidence from which it is conclusively shown.

The Court: I do not ask you to point to any that conclusively shows. I mean from which inferences page 354 } could be drawn.

Mr. Bowles: I think Your Honor has proved that. Isn't that the situation, that as the car came up there beside him, which he said it did, I believe, that he might have avoided it had he been keeping a proper lookout for his own safety, could have said: "Here comes an oil truck. Let that fellow go by, or drop back, do something or other." In other words, he can not just sit supinely by and do nothing, and abandon himself to the care of the driver.

The Court: That is unquestionably true. We are dealing with a situation that developed immediately. The cases that have applied that cover long distances, where the passenger is oblivious to the driving of the driver over some considerable period of time. I have in mind one right now. A car was sitting in the road, on the right of way, and the party driving was not aware of the fact of an approaching train. And the very argument was made, if she had seen the train, what could she have done about it? The Court said that is not the point; she didn't see it, and by merely turning her head she could have seen it, and it was her duty to look and listen. That situation, that was a crossing accident. That was negligence, putting herself in a position where she didn't observe her duty.

Mr. Bowles: That is true. This man has never yet seen that there was an oil truck in front of him, notwithstanding the fact that he *he* should have heard the thing, page 355 } the fact that it was racing up the road.

Mr. Williams: I am not going to say any more. It is getting late.

The Court: It is so intangible I will give the instruction, but—

Mr. Bowles: I note an exception.

Mr. Godwin: At this time we would like to ask the Court to strike the evidence as to William Smith being sued under the notice of motion.

The Court: There is no evidence against William Smith at all.

Mr. Godwin: We would like to ask the Court to strike the evidence and direct the jury that there is no evidence upon which they can find a verdict against William Smith on the notice of motion.

Mr. Williams: Instruction No. 11—

Mr. Bowles: Your Honor, that is technically perhaps correct, but I do not fancy the idea of putting to this jury the idea that we are attempting to sue him, and we have failed.

The Court: I think you are entitled to sue him. page 356 } Mr. Williams: Your Honor, he did sue him.
Mr. Godwin: You sued him.

The Court: Yes, but he has tried his best to unsue him. I have got to put it in here some way.

Mr. Bowles: Why can't we dismiss it, Your Honor? This is the most anomalous situation I ever saw. They have us suing someone that we don't hold and can not sue. We can't dismiss it, and we don't produce any evidence, and then they make a motion to strike it out.

Mr. Gilman: We can't do it, but they can.

Mr. Bowles: I say it again, Your Honor: I review all my motions following his motion to strike, that we have never offered to non-suit this case. Now, I think that this motion to strike William Smith reopens that entire question, and I make the motion right now to the Court to abate this action as to William Smith, following his motion to abate the action as to William Smith, and dismiss the cross-claim as improperly filed, and to dismiss the cross-claim of W. G. Saunders as improperly filed. I think you can take that under consideration now in the light of that motion, after all the evidence is in. Mr. Godwin has said that was one of the things Judge Coleman was talking about, whether page 357 } he could do anything with it until the evidence has been presented. I think the defendant has reopened this question now and enables Your Honor to take charge of it.

Mr. Godwin: Of course, there is no use arguing the thing backwards and forwards. We have been over it so many times.

Mr. Bowles: We object to the withdrawal of your motion.

Mr. Godwin: The Court actually held that the cross-claim when filed became a part of the original suit, original action, and if the original action was dismissed the cross-claim could be dismissed without the defendants' consent, who became plaintiffs, and that, of course, was a sound proposition. Suppose, for instance, that when a plaintiff files suit against another defendant, and when they get to the conclusion of the testimony, you find that the plaintiff has no case, but the defendant is entitled to recover. The same thing is true in this case. There is no evidence, oh, certainly there is no evidence in this case upon which the jury can base a verdict against William Smith on the notice of motion.

The Court: It is conceded on both sides. The only question is how it should be raised. They want to dismiss as to William Smith.

page 358 } Mr. Godwin: But we will have conceded—

Mr. Bowles: Exactly, one of the things that we have been contending for; if we were to proceed even under the non-suit statute, which he has tried to hold us to all the time, that he could never prevent us even in that situation from dismissing as to Smith. That the only penalty they would suffer if we dismissed is they couldn't file a cross-claim, but they have been arguing all through this proposition that we couldn't even dismiss as to Smith.

Mr. Williams: Your Honor, what is the objection to simply giving this Instruction No. 11?

The Court: That is what I am trying to find out, why that doesn't present the issue to the jury that there is no evidence—I am disposed to tell this jury that there is no way they could find a verdict against William Smith.

Mr. Williams: Well, then, withdraw any motion there is in reference to striking the evidence and let the Court give the instruction.

Mr. Bowles: Let the record show that we object to the withdrawal of the motion.

Mr. Williams: All right; the record so shows.

Mr. Bowles: Without passing on our motion, Your Honor, can't you tell them that we do not claim anything page 359 } against William Smith.

Mr. Williams: Isn't that what you tell them?

Mr. Gilman: You tell them that we have failed to prove anything against William Smith, which is entirely different.

Mr. Williams: Won't it serve the same purpose if you tell the jury that you don't claim anything against him?

The Court: I will make this change in this after "upon which": instead of saying "you can find", "to base a verdict".

Mr. Williams: It will read now, Your Honor—?

The Court: " * * * there is no evidence in this case upon which to base a verdict in favor of the plaintiff," instead of leaving that—just a slight change, slight difference.

Mr. Bowles: We note an exception, for the reasons stated.

Instruction No. 12.

Mr. Bowles: No. 12, sir, is objectionable to us for three reasons: the first one is, there is not sufficient page 360 } evidence here to show the difference between the fair market value of the tractor-trailer prior to and after the accident; that there is no evidence of a difference in market value, and no credit shown by the evidence allowed, because the man did not dispose of the tractor-trailer. He has still got it. He repaired the trailer. As to the tractor part of it, he said it was worth something, but he still had it. And, of course, the general exception that we have previously stated against any instruction in his favor.

The Court: He did say—you did ask a question what was the difference between the market value of the truck and tractor, and he did say that he repaired the trailer—

Mr. Godwin: In his own shop at a cost of approximately \$100.

Mr. Gilman: I think that is right.

Mr. Bowles: That is correct.

Mr. Williams: The difference in value of them was \$500. Now—He said it was \$500 but it was worth \$50—

Mr. Bowles: That is all he got.

Mr. Williams: No, he didn't get it, but he said page 361 } that was what he thought it was worth.

The Court: If you are going to distinguish between the tractor and trailer, I am of the view that there is sufficient evidence of fair market value of the tractor to go to the jury, the difference between the fair market value of the tractor prior to the accident and immediately after the accident, and the damaged proved as to his trailer.

Mr. Godwin: All right, sir.

Instruction No. 13.

The Court: No. 13.

Mr. Bowles: Now, sir, we have got some very material, I think, objections to that. There is no evidence that he will incur any medical attention in the future; no loss, no evidence of any loss of earnings—

The Court: Wait a minute—(Note: The Court studies the instruction.)

Mr. Godwin: He has still got these terrible headaches. Perhaps the best way is to read the evidence there about it.

Mr. Gilman: Yes, but the headaches haven't been connected with the injury.

Mr. Godwin: The doctor said he was permanent page 362 } permanently injured.

Mr. Gilman: Oh, no. Oh, no. What doctor?

Mr. Godwin: Dr. Dunford said it was permanent. (To reporter.) I would like for you to read that statement back to him. Dr. Dunford's.

Note: Dr. Dunford's testimony subsequently read to Mr. Godwin.

Mr. Gilman: He said his symptoms, all symptoms were subjective.

Mr. Godwin: Subjective? Well, that means that he can feel them.

Mr. Gilman: As I understand it it means that whatever the patient states prevails, has to prevail.

Mr. Godwin: Well, that is true.

Mr. Gilman: He can't find anything to base it on.

Mr. Godwin: Just like a man that has appendicitis; they diagnose it from the pain. Read Dr. Dunford's statement to make certain he was permanent. Your Honor, I do not take

it a man can not recover from injuries simply because it was subjective, because 90 per cent. of damage suits it is subjective only.

page 363 } Mr. Bowles: He didn't say that he never had headaches before, or this accident caused them, but he merely said: "I have headaches."

Mr. Godwin: Well, the best way to settle it is on the record. Read the record on that.

Mr. Bowles: There isn't any evidence that he has got to have medical attention for the headaches. That is what we are talking about now.

The Court: I am striking out of this instruction right now: "and the necessary expenses for medical attention that will probably be incurred by him in the future, if any, consequent upon the injuries received." I have already stricken that out.

Mr. Godwin: All right, sir. The loss of earnings,—

The Court: Proof of what he made before and whatever he is making now?

Mr. Godwin: Just that—

The Court: That is the only reason I didn't put that in there; of course he didn't prove it.

Mr. Godwin: Well, of course he did, but he didn't prove it. He said he wasn't working, anyhow. He said page 364 } he was working for the Government now.

Mr. Bowles: Better work.

Mr. Williams: My recollection about the testimony there was he was working on his father's farm and he wasn't able to do any work for about a year.

Mr. Bowles: Is that on the loss of earnings, sir? I understand that there is no definite measure of actual loss of earnings in money value.

The Court: I don't think there is sufficient proof of loss of earnings to put it in. Now—

Mr. Bowles: Now as to whether it is permanent or not. We say it is not. There is no evidence that this headache would disable him or limit his earning money in the future. On the contrary, he is working right now for the Government.

The Court: I confess that I do not recall anything that came to my mind that he had any permanent injury.

Mr. Bowles: Now, they have got to show diminished earning capacity. They have diminished earning capacity; that instruction is wrong on that.

Mr. Godwin: Well, the only way I know to settle it is to read the doctor's statement back. I thought that page 365 } he said that he was permanently injured, and permanently suffering from this subjective condition. Dr. Dunford—if he will read it.

Mr. Bowles: He can't read it while I make objections, Your Honor. You see, we don't want him to lose his place.

The Court: That is just a question of what the evidence shows. Now let us see No. 14 while we let him look it up.

Mr. Bowles: Well, Your Honor, irrespective of whether he said it was permanent or not, there is no evidence at all that his injury will partially disable him to labor and earn money in the future—"and find such sum as will, if paid now, be a fair compensation for his diminished capacity." There isn't any proof of anything of that sort. Not a thing on that.

The Court: I agree with you on that.

Instruction No. 14.

Mr. Bowles: What is this No. 14, now?

The Court: Now, 14.

Mr. Bowles: It is a duplication of what we said before, isn't it?

page 366 } Mr. Godwin: That is where all three of them are connected. This is the only one on it.

The Court: It seems to me that—I thought you had one on sole negligence, concurring negligence, and joint negligence.

Mr. Godwin: No, sir; this is one where all three of them are guilty of negligence; only one party is entitled to recover, and that is William Smith.

Mr. Williams: The defendants' instructions always seem more numerous than the plaintiff's. As a matter of fact they had thirteen.

The Court: That would leave this No. 10 in this shape—you say "find for the defendant William Smith against the plaintiff."

Mr. Bowles: Yes, sir. How could everybody be negligent and cause William Smith's injury, and the concurrent negligence of all of them jointly contribute with what? What would be connected with those to produce his injury or contribute to produce it? Contributed with whom?

The Court: I think No. 10 adequately presents your theory there.

Mr. Godwin: No. 10, Your Honor?

page 367 } The Court: Yes, No. 10.

Mr. Godwin: No, sir, that is not in conjunction

with the third party. That is where the Saunders and Matlack trucks were guilty of negligence.

Mr. Williams: That is right. Now, this is where all three of them were guilty of negligence.

The Court: Let us see. Let us take them. Three instructions—No. 8—

Mr. Williams: We went through them, Your Honor. It is not covered where all three of them were guilty of negligence.

The Court: Which gives which?

Mr. Godwin: When we made an objection to his instruction on the ground that it covered a third party, we found out that we didn't have one that covered three-party negligence, and then we put this one in as No. 14.

Mr. Bowles: I want to make an exception in the record, because it is prejudicial to this plaintiff in a case where she is combating a cross-claim that ought not to be here anyhow, to have the contention in the instructions of William Smith's right to recover against her separated into a repetition of negligence of her deceased, the negligence of her deceased concurring with one other party, the page 368 } negligence of her deceased concurring with two other parties, and the negligence of her deceased concurring with everybody; four times saying the same thing against her.

Mr. Godwin: That is unfortunate.

Mr. Bowles: Fortunately the Court of Appeals agrees with me on that proposition, on that ground.

The Court: If we are going to give No. 14, why not put it right down here following 10?

Mr. Williams: Make it 10-a if you want to.

The Court (reading): "The Court instructs the jury that if you believe from the evidence that Erwin Nolan Hall and an unknown party driving—Erwin Nolan Hall, Elmer Hall and an unknown party driving * * * were all guilty of negligence and that their joint negligence—" You want to make that 10-a? Yes, I want this 14 read following 10.

Mr. Bowles: Now, if everybody in here that could be negligent was guilty of causing this thing, what did they contribute to? I object to that instruction in that it is confusing and unnecessarily repetitious.

The Court: The first time in my life I ever saw this instruction granted.

page 369 } Mr. Williams: Your Honor, this Instruction F, Instruction No. 4, which is the sudden emergency instruction, and Instruction No. 5, all sort of tie in together.

The Court: Now, let us see; Instruction 5; that is the numbered instruction.

Mr. Williams: That is the one you refused, Your Honor.

The Court: Oh, yes.

Mr. Williams: I want to address myself to this sudden emergency doctrine just a second. When this Instruction No. 4 was prepared I had no idea that there would be any contention that there was any negligence on the part of the Saunders truck existing prior to the time that the automobile—the damage took place of the Saunders truck. Therefore this Instruction 4 was drawn under the theory that there would be no proof of any negligence prior to the time the sudden emergency, as we call it, arose. Under the sudden emergency doctrine it does not make any difference how guilty of negligence a person was prior to the occurrence of the sudden emergency; he is still entitled to an instruction on the sudden emergency unless his negligence caused or contributed to the emergency. You get what I am driving at? Therefore the question of the defective page 370 } brakes which was an existing fact has nothing to do with the application of the principle of sudden emergency, and the instruction should not be limited by saying: "without fault on the part of the defendant," as Instruction L says—as Instruction 4 as granted says. We think that that Instruction 4 should be amended. You have already granted it as it is, but, having refused 5, which covered the point that I am making, we think Instruction 4 ought to be amended to read: "where a person is suddenly confronted by an emergency which is negligence does not create", rather than as we have it in this instruction, without negligence on his part, to avoid a collision without negligence on his part. Your Honor, you give them an opportunity to argue before this jury that if they were negligent in not having brakes properly adjusted when the collision happened, the sudden emergency doctrine does not apply. We do not think that is the law.

As stated in this case of Otey against Blessing, "it is true that men confronted by a sudden emergency are not required to follow the safest course. The doctrine of error *in extremis* is a humane one and has been frequently applied, but it can not be invoked by one who is at fault and whose negligence or misconduct brings about the peril." Now, if he was running at an excessive rate of speed and that excessive rate of speed had created this emergency, he could not invoke the sudden emergency. But if he was page 371 } negligent in driving a defective truck, we can invoke the emergency doctrine. You get the

point that I am attempting to make? This Instruction 4, as you have granted it—you see you allowed them to put in there that a person who, without negligence on his part, is suddenly confronted by an emergency, and again to avoid a collision without fault on his part. Now, they are going to argue that these brakes keep this instruction from being applicable, and we say, therefore, that in view of the fact that there is no negligence, according to our view of the situation, that could possibly have caused this, no negligence that could have created this emergency, that Instruction 5 should be granted, and that Instruction L should be refused.

Mr. Bowles: If Your Honor please, the converse of that view is exactly what they have in mind, and I think Your Honor is familiar with the principle that a person who puts himself in a position where he is incapable of acting or exercising the kind of care in any situation, is never excused, his failure so to do, on the theory that somebody else has done something wrong. This is an illustration: for example, suppose there is a collision that had happened; a person exercising ordinary care should realize in time to stop. Now, he might have realized; he claims sudden emergency; but he is now starting with independent negligence; the claim that there is negligence puts him in the position
page 372 } of whether he does or whether he doesn't,
whether the emergency is sudden—in any case he is not in a position to exercise care, in whatever circumstances he finds himself. He is guilty of independent negligence which comes in and strikes across the corner, so to speak, and precludes him from excusing himself on the fact that he is faced with an emergency; because, irrespective of whether or not there was a sudden emergency, his negligence was there, made effective clean through the thing, which puts him in the position of emergency. He has got defective equipment; for example, a man driving a car with no brakes, and he is confronted with an emergency. What difference does it make, if he has got no brakes and can not stop? He is not entitled to rely on the emergency to excuse himself from having no brakes. Now, he comes up here and claims that: "Here, I am confronted by an emergency. I have these alternatives; and I am not to be charged with the duty of an ordinary man because of this emergency." And we say: "Oh, no, you are not permitted to avail yourself of the emergency because you are guilty of this negligence; it doesn't make any difference whether it is an emergency or not; your independent negligence in operating a defective vehicle—" Now, that is, of course, all as we stated

in Instruction *F*, upon the theory, I believe, that that defect in adjustment of brakes was there, that it existed and that it was a contributing cause either to the emergency or to the collision. Now, if you assume those things, he can not rely upon the emergency if the defective brakes contributed to cause this emergency, for it is not without fault on his part. If the defective brakes contributed to cause the collision, he can not excuse himself on the theory of a sudden emergency. And Your Honor will remember it is not a finding instruction, but merely applies to the emergency doctrine as an excuse for failure to have proper brakes.

Mr. Godwin: Your Honor, just now when I was arguing this question you refused this Instruction No. 5. I thought perhaps I had made myself clear to the Court, because the language of this decision can not be misconstrued: "but it can not be invoked by one who is at fault and whose negligence or misconduct brings about the peril in which he is placed."

Now, the negligence which the Court deals with there is negligence that brings about the peril. That brings about the peril. Now, in Instruction No. 5, as we asked for it, we can not get an instruction that takes into consideration both theories of this case. The plaintiff's theory and the defendants' theory are different. Since this be so, our instructions should run on the defendants' theory of the case, and we feel like they should be granted.

Now, in this instruction which is offered here, it goes clearly against the language of this decision. It says this (Instruction L): "The Court instructs the jury that, if you believe from the evidence that either the defendant Saunders or his driver failed to maintain the brakes on either his lumber truck or his trailer in proper and safe condition—"

Mr. Bowles: Adjustment.

Mr. Godwin: "—and that such failure either caused or contributed to cause either the emergency or the collision, then the defendant, Saunders, can not rely on the emergency to excuse the actions of his driver."

That is the ground on which that instruction is offered. So we say, Your Honor, we think we are entitled to Instruction No. 5, and that "without fault on our part" should be taken out of Instruction No. 4.

The Court: In Instruction No. 4?

Mr. Godwin: Yes, sir.

Mr. Bowles: Of course, Your Honor, that case that is being read is all right law, as far as it goes, but there is no

question in that case of independent negligence such as we have here. There was no need to discuss it there.

Mr. Williams: The only time his rights are taken away from him is by virtue of acts that create or contribute to the emergency. I don't care what kind of brakes this fellow had; they would not prevent—

The Court: They might not stop.

Mr. Williams: That may be true, and we can not absolutely guess whether or not failure to have proper brakes would cause an accident. We are dealing here with the question of whether or not that trailer or the oil truck caused the accident.

Mr. Bowles: The Court decided in a case, where they attempted to rely upon emergency because it occurred suddenly, where two girls were bumped in front of a Clay Street car. The Court said that failure on the part of the motorman to observe that wet leaves were on his track, causing his car to slide when he hadn't put on brakes—that his negligence in failing to see that was a situation such that a jury could believe that he ought to have put on his brakes earlier and allowed for that sliding distance, that that was prior negligence which would deprive him of the opportunity of relying on the proposition that he suddenly had to put them on, because he was approaching a place where, if he was confronted with the necessity of putting on his brakes, he ought to have known that the car would slide. Now, the evidence in that case showed that the car would stop. That was the defense he spoke of, that at the time there were wet leaves, and he slid into them, that if it had not been for the wet leaves he would have stopped.

Mr. Williams: That was a case where the street car motorman had only one of two things; just had the alternative of putting them on and sliding. In other words, the Court says this: when a man puts himself in a position where the prior negligence was such that he has got to act suddenly at the time, he has got to do something and his prior act makes him incapable of doing anything that he subsequently might be confronted with, he can not claim to be suddenly confronted with it, because it is immaterial, suddenly or not suddenly; he couldn't do anything about it. His prior negligence has preempted the field.

The Court: According to your theory—this may be very crude—he might have attempted to turn to the left or turn to the right or continue to drive on; if it was a situation

where he could not turn to the left, he can not avail himself of the emergency even by turning to the right?

Mr. Williams: That is right.

Mr. Bowles: One of these alternatives here page 377 } was stopping. He hasn't got a choice; negligence has precluded his choice.

Mr. Williams: Your Honor, that is not the case here. Here is a case where Elmer Hall, as I recall his testimony, was driving along there 20 miles an hour; his brakes were good; he was confronted with this situation; he could have done two or three different things, and he did one thing. Now, that is our case. Now, they come along and say we drove with bad brakes, and because the brakes were defective he skidded into this other car. Well, now, that is not sudden emergency; that is a question of primary negligence. That is not a question of making a choice—"misconduct brings about the peril in which he is placed." Now, according to the defendants' theory of this case, which we are entitled to an instruction on, what act of negligence created this emergency? It is undisputed, I submit, that this automobile cut through there and created a condition in which some action had to be taken by both parties. That was not created at all by the driver of our truck, by virtue of any brakes or anything else.

Now, of course, if the jury believe these brakes were defective, and he put on the brakes, and because the brakes were defective he slid across the road right in the path of this other truck which was coming on the right-hand side of the road, I do not think there is any sudden emergency there. That is just a question of simple primary page 378 } ordinary negligence.

Mr. Bowles: May I say one more word on that, sir, and I really mean to quit. Here is a man coming up the road and he comes on that emergency and he is faced with several choices: very definitely his choice was to stop, because that is what he testified to; the first thing he did was put his brakes on. What happened when he put his brakes on? He shot across the road and jack-knifed, jack-knife fashion, just exactly like the expert said he was bound to do on account of the defective adjustment. What was his choice? He took his choice, he states to the jury, in an emergency—and he had an emergency, we will state for the sake of argument—an emergency created by the green car attempting to pass him. If he should have seen it—that is another question; but assume he was all right up to that moment: the one of the alternatives in the emergency that he himself elected, Your Honor, to choose, caused this accident. Now, can he claim emergency?

I will leave the matter with you on that thought. I just do not think it is possible. And that is why this instruction is written on a double-barreled proposition. If the jury believe that that created the emergency—and the emergency spoken of there is the emergency of this car going across the road there and causing this collision.

The Court: Is that all, now?

Mr. Bowles: I do not want to bore the Court, page 379 } but we did not ask for that emergency instruction in the beginning, because we argued to you and objected to the granting of an emergency instruction, and ones on the theory of emergency so far as Erwin Hall is concerned on the cross-claims against the Administratrix—we return to those, sir, without waiving our objections and exceptions to the emergency instructions you have granted for the defendants.

Mr. Godwin: We withdraw Instruction No. 4 and ask for Instruction No. 4-a and 5, which I think we are really entitled to have. 4-a is a similar instruction, and even in their instruction—

The Court: Wait a minute. I am not following you. You withdraw Instruction No. 4?

Mr. Godwin: We withdraw Instruction No. 4 and ask the Court to grant Instructions 4-a and 5.

The Court: You mean his Instruction F?

Mr. Godwin: No, sir, on our instruction.

The Court: And withdraw what?

Mr. Godwin: Instruction 4 withdrawn.

The Court: Yes, sir.

page 380 } Mr. Godwin: And then ask the Court to grant Instruction 4-a and Instruction 5.

The Court: 4-L?

Mr. Godwin: 4-a. Yes, 4-a.

The Court: There is no 4-a drawn.

Mr. Godwin: Yes, sir, there is 4-a. You have it before that—

Mr. Bowles: They withdrew that.

Mr. Godwin: We withdrew it just now, see?

The Court: Oh, yes. 4-a. Yes.

Mr. Godwin: Yes, sir. Now, in their instruction which they have just asked for, you will see that they follow the same line of reasoning that Mr. Williams and I have been arguing, in which they state: "The Court instructs the jury that if you believe from the evidence that the plaintiff's deceased husband was suddenly confronted with an emergency, created without fault on his part—" They follow the same

line in their instruction that we have been trying to get over to the Court here this afternoon.

Mr. Bowles: We haven't done anything wrong page 381 } with our brakes, sir.

Mr. Godwin: You have fifty miles an hour, running down the road in the rain.

Mr. Bowles: Well, that would be created without our fault.

Mr. Williams: No emergency would be created, that is correct; confronted with an emergency created.

Mr. Godwin: The negligence complained of must be some which created the emergency.

Mr. Bowles: The plaintiff's theory is, the first thing that happened, the green car went through, and that was the first act creating an emergency. The truck cut over to the left; that was the second act creating an emergency; and from the plaintiff's standpoint there were the definite things done prior to anything that he did creating an emergency.

The Court: What do you say with reference to K-1? Have you read K-1 and K-2?

Mr. Godwin: Not closely, Your Honor.

The Court: I don't mean to interrupt you, sir, but I made no notes about 4-A because it was withdrawn. There are a whole lot of other things wrong with 4-a. We page 382 } will have to dress that one up if they put it in place of 4.

Mr. Godwin: Your Honor, down to the last part of it, I don't know that we have any particular objection to it.

Mr. Williams: We think that is a right statement—

The Court: That last part of it: "And the Court therefore tells you that neither W. G. Saunders nor William Smith can recover from the plaintiff on their cross-claims unless it is clear from the evidence—"

Mr. Godwin: Now, it is his duty, when he is defending, to say acting in a sudden emergency. It is a defense.

The Court: It is his defense to the cross-claim.

Mr. Godwin: His defense to the cross-claim, but he says it must be clear from the evidence.

Mr. Bowles: That case of *Jones v. Hanbury*, which has not been overruled, sir, goes further than that and says that they cannot recover unless it is clear from the evidence that the acts of the person recovery against whom is sought amount to wanton and wilful negligence. That is what *Jones v. Hanbury* says. I have never tried to push it that far.

Mr. Godwin: " * * * were such that it cannot page 383 } reasonably be said that a man of ordinary prudence might have acted as the plaintiff's husband

did." Now, I always thought it was whether or not he acted as a man of ordinary care might have acted.

Mr. Bowles: Judge Epes spent three pages explaining that distinction. In other words, sir, when you get in a proposition of emergency, the ordinary rules of damages—if you get in an emergency proposition, the ordinary rules of damages—you approach it from a reverse direction, and you say that when the defendant—

Mr. Godwin: Well, now, it is certainly right in the doctrine of last clear chance; he must have a clear chance, but I have never read it in the sudden emergency doctrine, that it must be—

Mr. Bowles: Have you got 158 Virginia here?

Mr. Godwin: No, sir. . . .

Mr. Bowles: 158 Virginia. It is the only case that has gone completely and fully into the language of error in *extremis*. The language of Judge Epes is: "Unless this was so clear from the evidence that the acts of the party," and so forth, "are such that it cannot reasonably be said that a man of ordinary prudence might not have so acted." In other words, that is, the acts must be such as to amount to wanton and wilful neglect. Now, I don't think that last language is right, but that is what the Court of Appeals has said in that case about it, and they have followed it right straight along, in *Jones v. Hanbury*, on sudden emergency instructions.

Mr. Godwin: Your Honor, if the Court of Appeals has taken his position about it—there cannot be a verdict amounting to wanton or wilful in the matter—certainly he could not take any objection to Instruction No. 4-a or 5 of ours. I don't want to put in there "without fault on his part." I have no use for strong language.

Mr. Bowles: As far as I am concerned, if that is what is disturbing you, that is correct language in an emergency instruction: "unless it is clear from the evidence that the acts of the plaintiff's deceased husband were such that it cannot be reasonably said a prudent man would have done," "were not such that a reasonably prudent man would have done."

Mr. Godwin: That suits me all right, sir.

Mr. Bowles: That is correct, yes.

The Court: It is not in happy language, to my mind, to tell the jurv. That is quoted from the opinion. page 385 } He also said once or twice the language of the Court should not always be given in instructions.

Mr. Bowles: That is right, sir; that is quite true, but I have had this up three times up there since then, on specific exception to it, and they have not said anything about its

being wrong. I don't want to lose the instruction on account of that particular language, though, sir.

The Court: What about K-2?

Mr. Godwin: Well, that is more or less a repetition of the doctrine of last clear chance, Your Honor.

Mr. Bowles: One is on the cross-claim and the other is on the main action. One is going and the other is coming. I just separated those.

Mr. Godwin: Your Honor, if William Smith and W. G. Saunders cannot recover from the plaintiff on the cross-claim, that lets them all out. K-1 says that if they were guilty of negligence then she is entitled to recover—

Mr. Williams: Your Honor, the defect in this instruction is that they don't take into consideration at all the contributory negligence of the plaintiff.

Mr. Bowles: Yes, it does.

Mr. Williams: Where?

Mr. Bowles: If he were suddenly confronted
page 386 } with an emergency, and in the emergency he was
guilty of negligence.

* * * * *

The Court: I think on the cross-claim you are entitled to have go before the jury the doctrine of sudden emergency. It is just a question of working it out here to cover both angles.

* * * * *

Mr. Godwin: Your Honor, I don't think there is anything wrong with his instruction there unless it is K-1 we are dealing with.

The Court: Yes.

Mr. Godwin: Unless it is that portion of it which says that the jury cannot find for W. G. Saunders or Smith unless it is shown clearly from the evidence. Now, that puts the burden on Smith and Saunders to show clearly from the evidence that he did not act in an emergency.

Mr. Bowles: Let's put it: "unless it appears from the evidence—"

* * * * *

The Court: Gentlemen, we must reach a conclusion. K-1 and K-2 go along with those changes. I didn't make any changes in K-2.

page 387 } Mr. Bowles: I don't mean to start up something else: just change K-1 to conform to K-2. "unless you believe from the evidence." The other one says "it is clear."

* * * * *

The Court: I am going to grant K-1 and K-2 and L and adhere to my ruling as to Instruction No. 5. It is rejected. It is covered, as far as I can see.

* * * * *

I feel that the jury is very amply instructed; I cannot say how efficiently instructed. I reject No. 5.

Mr. Godwin: I note an exception.

Your Honor, we have discussed at great length here, the record must be very long with reference to these objections. I understood before lunch that perhaps it would be agreeable with counsel on both sides if the party who loses would be permitted to make his objections to the instructions at some later time.

The Court: Gentlemen, I should think if you undertook to have the stenographer write up what we have said here since before one o'clock, that you would have a record here that would equal an ordinary record, and that the objections to instructions might be re-stated, maybe, and condensed into some definite form here if you see fit to do so. The stenographer there has, I think, been recording us practically continuously in the last four hours on instructions, at least four hours, and he has got an enormous number of pages there.

* * * * *

Mr. Godwin: Can we agree, Your Honor, between counsel, to put it in the record that we agree that the losing party in this case shall have a week to dictate his exceptions, objections and exceptions to instructions?

Mr. Bowles: No, sir. Emphatically, no. No, no.

Mr. Godwin: Well, could we agree to do it right after—?

Mr. Bowles: If Your Honor please, to save time about this thing: Mr. Bradbury has taken down every single word that has been said. Any losing party can get him to go through there and pick out essentials and sit down and read that and set them down from what he has got. It will save a great deal of trouble to furnish that and dictate my exceptions as

I go along. He has recorded the entire argument, back and forth, of Court and counsel for both sides.

* * * * *

page 389 } Mr. Williams: The defendant excepts to the granting of each and every instruction for the plaintiff on the ground that there is no evidence of negligence which was a proximate or concurring cause of the accident; on the further ground that under the evidence the plaintiff was guilty of contributory negligence as a matter of law; and because the instructions offered for the plaintiff are contrary to the law and the evidence, without evidence to support them, and on the further grounds of the objections stated against each instruction offered by the plaintiff during the argument in reference to same; and excepts to the refusal of the Court to grant the instructions offered by the defendants as offered on the grounds as stated in their objections to said instructions in the argument upon the same; and on the further ground that the instructions correctly state the law, and the facts in the case justify the granting of the same.

page 390 } (Argument of Mr. Bowles.) * * * Gentlemen, I can only say this to you: that if you find your verdict in the sum of what the law allows for death, \$10,000, it would be absurd if the law provided a surplus for the widow if there would not be some surplus there if you gave \$10,000—

Mr. Williams: I object to that, right in the teeth of your statute.

The Court: Gentlemen, the law was correctly stated to you in the argument. The amount of compensation insurance is beyond this issue, and I think it is beyond it directly or indirectly. To say that there must be some surplus there is not proper argument.

* * * * *

Mr. Bowles: However, gentlemen, I think the Court will permit me to say that the way you can be certain of that is to make your finding the most you can find for this widow.

Mr. Williams: I object to that. I think that is improper.

The Court: Well, I will settle the whole argument by simply reading to you again the last part of Instruction No. N: And you should fix the amount of your verdict at a sum which to you shall seem fair and just, but not

page 391 } exceeding the amount claimed in the notice of motion for judgment.

Mr. Williams: I wish to note an exception to the Court's refusal to instruct the jury that it was improper argument.

page 392 } *Plaintiff's Instruction No. A (Granted)*:

The Court instructs the jury that it was the duty of the driver of Saunders' lumber truck and trailer:

1. To exercise reasonable care in the operation of his lumber truck and trailer so as to avoid injury to persons and vehicles on and along the highway;
2. To operate his lumber truck and trailer at a careful speed not greater than was reasonable and proper, having due regard to the traffic, surface and width of the highway and to all conditions and circumstances then existing;
3. To have his lumber truck and trailer under reasonably proper control;
4. To keep and maintain a proper lookout;
5. To have his lumber truck and trailer equipped with adequate brakes, properly adjusted, and to apply the same whenever necessary in the exercise of ordinary care; and
6. To drive his lumber truck and trailer to the right of the center of the highway.

The Court further tells you that the observance of each of the foregoing duties was a continuing duty on the part of the driver of Saunders' lumber truck. If you believe from a preponderance of the evidence that the driver of Saunders' lumber truck failed to observe any one or more of those duties and that such failure on his part either caused, or concurred in any efficient degree with the negligence of the driver of the green car to cause, the collision and resulting death of the plaintiff's husband, while exercising ordinary care on his part, then you must find your verdict for the plaintiff, Mary H. Hall, against the defendant, W. G. Saunders.

(The foregoing instruction was amended by the Court, upon motion of the defendant, by striking therefrom paragraph numbered 6, and with said amendment was given to the jury.)

Plaintiff's Instruction No. B as Offered:

"The Court instructs the jury that it was the duty of the defendant, W. G. Saunders, to exercise reasonable care, to maintain both his lumber truck and trailer in a good and safe operating condition and to provide safe and proper connections between them; to see that both his truck and trailer were equipped with adequate brakes; and to see that such brakes were properly adjusted and to maintain them in safe adjustment and operating condition. It was the further duty of the defendant, Saunders, to exercise reasonable care in selecting a proper and competent driver for his lumber truck and trailer. If you believe from the evidence that he failed in any one or more of these duties and that such failure on his part either caused or concurred in any efficient degree with the negligence of the driver of the green car to cause, the collision and death of the plaintiff's husband, while exercising ordinary care on his part, then you must find your verdict for the plaintiff, Mary H. Hall, against the defendant, W. G. Saunders."

page 394 } *Plaintiff's Instruction No. B. (Granted as amended:)*

"The Court instructs the jury that it was the duty of the defendant, W. G. Saunders, to exercise reasonable care to see that both his truck and trailer were equipped with adequately operating brakes; and to see that such brakes were properly adjusted and to maintain them in safe adjustment and operating condition. If you believe from the evidence that he failed in any one or more of these duties and that such failure on his part either caused or concurred in any efficient degree with the negligence of the driver of the green car to cause, the collision and death of the plaintiff's husband, while exercising ordinary care on his part, then you must find your verdict for the plaintiff, Mary H. Hall, against the defendant, W. G. Saunders."

Plaintiff's Instruction No. C (As Offered):

The Court instructs the jury that, if you believe from the evidence that the collision between the Saunders lumber truck and the oil truck operated by the plaintiff's deceased husband was caused solely by the defective adjustment of the brakes on the Saunders' truck or trailer, which caused the lumber truck and trailer to turn suddenly across the highway in front of the oil truck, then the plaintiff, Mary Hall,

is entitled to recover and you must find your verdict in her favor on the cross-claims of both Smith and Saunders.

Plaintiff's Instruction No. C (Granted as Amended:)

The Court instructs the jury that, if you believe from the evidence that the collision between the Saunders lumber truck and the oil truck operated by the plaintiff's deceased husband was caused solely by a defective adjustment of the brakes on the Saunders' truck or trailer, if any, which caused the lumber truck and trailer to turn suddenly across the highway in front of the oil truck, then the plaintiff, Mary Hall, is entitled to recover and you must find your verdict in her favor on the cross-claims of both Smith and Saunders.

Plaintiff's Instruction No. D (As Offered:)

The Court instructs the jury that if you believe from the evidence that the negligence of the driver of the green car concurred with the negligence of Saunders or the driver of his lumber truck to cause the collision and injuries to William Smith, then William Smith cannot recover damages for his injuries of the plaintiff, Mary Hall, on his cross-claim against her and you must find your verdict for the plaintiff not only in her action against Saunders but also on the cross-claims of both Saunders and Smith against her.

Plaintiff's Instruction No. D (Granted as Amended:)

The Court instructs the jury that if you believe from the evidence that the negligence of the driver of the green car, if any, concurred with negligence of Saunders, if any, or the driver of his lumber truck, if any, to cause the collision and injuries to William Smith, while plaintiff's husband was exercising ordinary care on his part, then William
page 396 } Smith cannot recover damages for his injuries of the plaintiff, Mary Hall, on his cross-claim against her and you must find your verdict for the plaintiff not only in her action against Saunders but also on the cross-claims of both Saunders and Smith against her.

Plaintiff's Instruction No. E-1 (As Offered:)

The Court instructs the jury that if the defendant relies on contributory negligence of the plaintiff's husband as a defense, the burden of proving such defense is on the defend-

ant to establish by a preponderance of the evidence that the plaintiff's deceased husband was, in fact, guilty of negligence and that such negligence on his part efficiently contributed in a substantial degree to cause his death, unless the same appears from the plaintiff's testimony or may fairly be inferred from all the facts and circumstances shown by the evidence. If you believe that it is just as probable from the evidence that the plaintiff's deceased husband was not guilty of contributory negligence as that he was, then the defendant has not borne such burden of proof and you cannot deny Mary Hall a recovery on the ground that her husband was guilty of contributory negligence.

Plaintiff's Instruction No. E-1 (Granted as Amended:)

The Court instructs the jury that if the defendant relies on contributory negligence of the plaintiff's husband as a defense, the burden of proving such defense is on the defendant to establish by a preponderance of the evidence that the plaintiff's deceased husband was, in fact, guilty of negligence and that such negligence on his part efficiently contributed to cause his death, unless the same appears from the plaintiff's testimony or may fairly be inferred from all the facts and circumstances shown by the evidence. If you believe that it is just as probable from the evidence that the plaintiff's deceased husband was not guilty of contributory negligence as that he was, then the defendant has not borne such burden of proof and you cannot deny Mary Hall a recovery on the ground that her husband was guilty of contributory negligence.

Plaintiff's Instruction No. F (As Offered:)

The Court instructs the jury that the mere fact that there was a collision raises no presumption that Mary Hall's deceased husband was guilty of negligence. On the contrary the burden is on William Smith throughout the trial of this case to prove by a preponderance of the evidence that the plaintiff's deceased husband was guilty of negligence that proximately caused Smith's injury. If you believe that it is just as probable from the evidence that the plaintiff's husband was not negligent as that he was, then William Smith has not borne the burden of proof and cannot recover on his cross-claim and you must find your verdict for Mary Hall on Smith's cross-claim against her.

Plaintiff's Instruction No. F (Granted as Amended:)

The Court instructs the jury that the mere fact that there was a collision raises no presumption that Mary Hall's deceased husband was guilty of negligence. On the page 398 } contrary the burden is on William Smith throughout the trial of this case to prove by a preponderance of the evidence that the plaintiff's deceased husband was guilty of negligence that proximately caused or contributed to Smith's injury. If you believe that it is just as probable from the evidence that the plaintiff's husband was not negligent as that he was, then William Smith has not borne the burden of proof and cannot recover on his cross-claim and you must find your verdict for Mary Hall on Smith's cross-claim against her.

Plaintiff's Instruction No. G (As Offered:)

The Court instructs the jury that the mere fact that there was a collision raises no presumption that Mary Hall's deceased husband was guilty of negligence. On the contrary the burden is on W. G. Saunders throughout the trial of this case to prove by a preponderance of the evidence that the plaintiff's deceased husband was guilty of negligence that proximately caused the damage to Saunders' truck. If you believe that it is just as probable from the evidence that the plaintiff's husband was not negligent as that he was, then W. G. Saunders has not borne the burden of proof and cannot recover on his cross-claim and you must find your verdict for Mary Hall on Saunders' cross-claim against her.

Plaintiff's Instruction No. G (Granted as amended:)

The Court instructs the jury that the mere fact that there was a collision raises no presumption that Mary page 399 } Hall's deceased husband was guilty of negligence. On the contrary the burden is on W. G. Saunders throughout the trial of this case to prove by a preponderance of the evidence that the plaintiff's deceased husband was guilty of negligence that proximately caused or contributed to the damage to Saunders' truck. If you believe that it is just as probable from the evidence that the plaintiff's husband was not negligent as that he was, then W. G. Saunders has not borne the burden of proof and cannot recover on his cross-claim and you must find your verdict for Mary Hall on Saunders' cross-claim against her.

Plaintiff's Instruction No. H (Granted):

The Court instructs the jury that the driver of Saunders' lumber truck was Saunders' servant, agent and employee at the time of this accident and that any negligence of which you may believe the driver of the lumber truck was guilty in the operation of the lumber truck is chargeable to the defendant, W. G. Saunders, the same as if he, Saunders, had committed the negligent act himself.

Plaintiff's Instruction No. I (As Offered):

The Court instructs the jury that it was the duty of the defendant, W. G. Saunders, to exercise reasonable care to maintain both his lumber truck and trailer in a good and safe operating condition and to provide safe and proper connections between them; to see that both his truck and trailer were equipped with adequate brakes; and to see that such
 page 400 } brakes were properly adjusted and to maintain them in safe adjustment and operating condition.

It was the further duty of the defendant, Saunders, to exercise reasonable care in selecting a proper and competent driver for his lumber truck and trailer. If you believe from the evidence that he failed in any one or more of these duties and that such failure on his part efficiently contributed in any substantial degree to cause the collision, then Saunders cannot recover on his cross-claim and you must find your verdict for the plaintiff, Mary Hall, on Saunders' cross-claim against her.

Plaintiff's Instruction No. I (Granted as Amended):

The Court instructs the jury that it was the duty of the defendant, W. G. Saunders, to exercise reasonable care to see that both his truck and trailer were equipped with adequately operating brakes; and to see that such brakes were properly adjusted and to maintain them in safe adjustment and operating condition. If you believe from the evidence that he failed in any one or more of these duties and that such failure on his part efficiently contributed to cause the collision, then Saunders cannot recover on his cross-claim and you must find your verdict for the plaintiff, Mary Hall, on Saunders' cross-claim against her.

Plaintiff's Instruction No. K (As Offered):

The Court instructs the jury that it was the duty of the driver of Saunders' truck and trailer:

1. To exercise reasonable care in the operation of his lumber truck and trailer so as to avoid injury to persons and vehicles on and along the highway;
2. To operate his lumber truck and trailer at a careful speed not greater than was reasonable and proper, having due regard to the traffic, surface and width of the highway and to all conditions and circumstances then existing;
3. To have his lumber truck and trailer under reasonably proper control;
4. To keep and maintain a proper lookout.
5. To have his lumber truck and trailer equipped with adequate brakes, properly adjusted, and to apply same whenever necessary in the exercise of ordinary care, and
6. To drive his lumber truck and trailer to the right of the center of the highway.

The Court further tells you that the observance of each of the foregoing duties was a continuing duty on the part of the driver of Saunders' lumber truck. If you believe from the evidence that he failed to observe any one or more of these duties and that such failure on his part efficiently contributed in any substantial degree to cause the collision, then Saunders cannot recover on his cross-claim and you must find your verdict for the plaintiff, Mary Hall, on Saunders' cross-claim against her.

(The foregoing instruction, No. K, was amended by the Court, by striking therefrom paragraph numbered 6, and also by striking therefrom the words "in any substantial degree", appearing in the last sentence after the words "efficiently contributed", and with said amendment page 402 } was given to the jury.)

Plaintiff's Instruction No. K-1 (As Offered):

The Court instructs the jury that if you believe from the evidence that the plaintiff's deceased husband was suddenly confronted with an emergency, created without fault on his part, then the law does not require of him all the presence of mind and care of an ordinarily prudent person under ordinary circumstances but the law makes allowance for the

reaction of nerves and muscles; it does not hold him, acting in such an emergency, responsible for errors of judgment, even if the course he takes to escape therefrom is an unwise one or if some other course might have avoided the collision. And the Court therefore tells you that neither W. G. Saunders nor William Smith can recover from the plaintiff on their cross-claims unless it is clear from the evidence that the acts of the plaintiff's deceased husband were such that it cannot reasonably be said that a man of ordinary prudence might have acted as the plaintiff's husband did.

Plaintiff's Instruction No. K-1 (Granted as amended):

"The Court instructs the jury that if you believe from the evidence that the plaintiff's deceased husband was suddenly confronted with an emergency, created without fault on his part, then the law does not require of him all the presence of mind and care of an ordinarily prudent person under ordinary circumstances but the law makes allowance
page 403 } for the reaction of nerves and muscles; it does not hold him, acting in such an emergency, responsible for errors of judgment, even if the course he takes to escape therefrom is an unwise one or if some other course might have avoided the collision. And the Court therefore tells you that neither W. G. Saunders nor William Smith can recover from the plaintiff on their cross-claims unless you believe from the evidence that the acts of the plaintiff's deceased husband were such that it cannot reasonably be said that a man of ordinary prudence might have acted as the plaintiff's husband did.

Plaintiff's Instruction No. K-2 (Granted):

The Court instructs the jury that if you believe from the evidence that the plaintiff's husband was suddenly confronted with an emergency created without fault on his part and that the driver of the Saunders truck was guilty of negligence which either caused, or efficiently concurred with the negligence of the driver of the green car to cause, the collision and death of the plaintiff's husband, then you must find your verdict for the plaintiff unless you also believe from the evidence that the acts of the plaintiff's decedent in the emergency were such that it cannot reasonably be said that a man of ordinary prudence might have acted as he did under the same or similar circumstances.

page 404 } *Plaintiff's Instruction No. L (Granted):*

The Court instructs the jury that, if you believe from the evidence that either the defendant, Saunders, or his driver failed to maintain the brakes on either his lumber truck or his trailer in proper and safe adjustment and that such failure either caused or contributed to cause either the emergency or the collision, then the defendant, Saunders, cannot rely on the emergency to excuse the actions of his driver.

Plaintiff's Instruction No. M (As Offered):

The Court instructs the jury that you are the sole judges of the weight of the evidence before you and of the credibility of the witnesses, and you have the right to discard or accept the testimony, or any part thereof, of any witness which you regard proper to discard or accept when considered in connection with the whole evidence before you; and, in determining the credibility of the witnesses and the weight to be given to their testimony, you may take into consideration their appearance on the witness stand, their manner of testifying, their apparent candor and frankness, their bias, if any, the reasonableness of their testimony, and, from all the facts and circumstances appearing in the case, determine which witnesses are more worthy of credit and give credit accordingly.

Plaintiff's Instruction No. M (Granted as Amended):

The Court instructs the jury that you are the sole judges,
of the weight of the evidence before you and of
page 405 } the credibility of the witnesses, and, in determin-
ing the credibility of the witnesses and the weight
to be given to their testimony, you may take into considera-
tion their appearance on the witness stand, their manner of
testifying, their apparent candor and frankness, their bias,
if any, the reasonableness of their testimony, and, from all the
facts and circumstances appearing in the case, determine
which witnesses are more worthy of credit and give credit
accordingly.

Plaintiff's Instruction No. N (As Offered):

The Court instructs the jury that if you find your verdict for the plaintiff, Mary H. Hall, in ascertaining the amount of the damages that she is entitled to recover, you should find the same with reference to:

1. The pecuniary loss sustained by the widow of the deceased, fixing such sum in the light of the probable earnings of the deceased, taking into consideration his age and health, during what would have been his lifetime, if he had not been killed.

2. And also compensation to the widow of the deceased for the loss of his care, attention and society.

3. And also such further sum as you may deem fair and just by way of solace and comfort to Mary Hall, widow of the deceased, for the sorrow, suffering and mental anguish occasioned her by her husband's death.

And you should fix the amount of your verdict at a sum which to you shall seem fair and just, but not exceeding \$10,000.00.

(The foregoing instruction was amended by the Court by striking out "\$10,000.00" appearing in the last paragraph and substituting therefor the words "the amount claimed in the notice of motion for judgment".

page 407 } *Defendant's Instruction No. 1 (As Offered):*

The Court instructs the jury that the basis of this action is negligence and you cannot infer negligence from the mere happening of an accident. The presumption is that W. G. Saunders' driver was free from negligence and that his truck was operated with due care. The burden is upon the plaintiff to prove, by a preponderance of the evidence, that the defendant, W. G. Saunders, was guilty of negligence which was the sole proximate cause of the accident complained of. If, after hearing all of the evidence, you are unable to determine whether the defendant's driver was guilty of negligence, or if it appears equally probable that he was not guilty of negligence, as that he was, you shall find for the defendant, W. G. Saunders.

And the Court further instructs the jury that even though you should believe that the defendant, W. G. Saunders, was negligent, yet if you further believe from the evidence that the plaintiff's intestate was guilty of negligence which contributed to the accident, you shall find for the defendant W. G. Saunders, and this is true even though you believe that the defendant W. G. Saunders was more negligent than the plaintiff.

Defendant's Instruction No. 1 (Granted as amended):

The Court instructs the jury that the basis of this action is negligence and you cannot infer negligence page 408 } from the mere happening of an accident. The burden is upon the plaintiff to prove, by a preponderance of the evidence, that the defendant, W. G. Saunders, was guilty of negligence which was a proximate cause of the accident complained of. If, after hearing all of the evidence, you are unable to determine whether the defendant's driver was guilty of negligence, or if it appears equally probable that he was not guilty of negligence, as that he was, you cannot find for the plaintiff against the defendant, W. G. Saunders.

And the Court further instructs the jury that even though you should believe that the defendant, W. G. Saunders, was negligent, yet if you further believe from a preponderance of the evidence that the plaintiff's intestate was guilty of negligence which efficiently contributed to the accident, you cannot find for the plaintiff against the defendant, W. G. Saunders, and this is true even though you believe that the defendant W. G. Saunders was more negligent than the plaintiff.

Defendant's Instruction No. 2 (Granted):

The Court instructs the jury that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances, or in doing what such a person, under the circumstances, would not have done.

Defendant's Instruction No. 3 (Granted):

The Court instructs the jury that the law does not undertake to hold someone liable for every accident, page 409 } and if it appears from the evidence that the driver of the W. G. Saunders truck was guilty of no negligence, and that the plaintiff's intestate, the driver of the other truck, was guilty of no negligence, then the law considers an accident occurring under these circumstances as an unavoidable accident and under such circumstances the defendant W. G. Saunders cannot be held liable for any injury resulting therefrom.

Defendant's Instruction No. 3-A (Granted):

The Court instructs the jury that if they believe from the evidence that the truck owned by E. B. Matlack and driven by Erwin Nolan Hall, and the truck owned by W. G. Saunders and driven by Elmer Hall, were meeting each other upon the highway, and that an unknown driver of automobile overtook and passed the truck of W. G. Saunders driven by Elmer Hall when the left side of the highway was not free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be done in safety on the proper side of the road, then the said unknown driver was guilty of negligence; and if you believe that such negligence was the sole proximate cause of the accident then none of the parties to this accident can recover damages.

Defendant's Instruction No. 4 (As Offered):

The Court instructs the jury that a person who, without negligence on his part, is suddenly confronted by
 page 410 } an emergency is not required to make a wise choice; and if you believe from the evidence that the driver of the defendant's truck proceeding west on the highway and that the actions of the drivers of the unknown automobile and of the oil truck presented to him a sudden emergency, either to hold his course or turn to his left in order to avoid a collision, and that he cut to his left to turn in an effort to avoid the accident, and that his action in so doing was such as a person of ordinary prudence might have done under like circumstances, then he was not guilty of negligence even though he failed to avoid the collision and even though you believe he could have avoided the accident had he stayed on his side of the road.

Defendant's Instruction No. 4 (Granted as Amended):

The Court instructs the jury that a person who is suddenly confronted by an emergency, created without his fault, is not required to make a wise choice; and if you believe from the evidence that the driver of the defendant's truck was proceeding west on the highway and that the actions of the drivers of the unknown automobile and of the oil truck presented to him a sudden emergency created without his fault, either to hold his course or turn to his right or to his left in order to avoid a collision, and that he cut to his left in an effort to avoid the accident, and that his action in so doing was such

as a person of ordinary prudence might have done under like circumstances, then he was not guilty of negligence even though he failed to avoid the collision and even though you believe he could have avoided the accident had he stayed on his side of the road.

Defendant's Instruction No. 6 (As Offered):

The Court instructs the jury that if you believe from a preponderance of the evidence that Erwin Nolan Hall, deceased, was guilty of negligence in the operation and management of the truck driven by him, and that his negligence was the sole proximate cause of the accident, you shall find for the defendant W. G. Saunders, and the defendant William Smith.

(The foregoing instruction was amended by the Court by adding at the end of Instruction No. 6 the words "on their cross-claims.")

Defendant's Instruction No. 7 (As Offered):

The Court instructs the jury that if you believe from a preponderance of the evidence that Erwin Nolan Hall was guilty of negligence in the management and operation of the truck driven by him and that his negligence proximately contributed to the injuries of William Smith, you shall find for the defendant William Smith.

(The foregoing instruction was amended by the Court by adding at the end of Instruction No. 7 the words "on his cross-claim".)

page 412 } *Defendant's Instruction No. 8 (As Offered):*

The Court instructs the jury that if you believe from a preponderance of the evidence that Erwin Nolan Hall was driving a motor vehicle upon the highway at the time of the accident at a speed and in a manner such as to endanger, or be likely to endanger the life, limb, or property of another, under all of the facts and circumstances in this case, then he was guilty of negligence; and if you further believe that such negligence was the proximate or concurring cause of the accident, you shall find for the defendant William Smith.

(The foregoing instruction was amended by the Court by striking out the concluding portion of said instruction "and

if you further believe that such negligence was the proximate or concurring cause of the accident, you shall find for the defendant William Smith", and with said amendment was given to the jury.)

Defendant's Instruction No. 9 (As Offered):

The Court instructs the jury that if they believe from the evidence that Erwin Nolan Hall and an unknown party driving a motor vehicle upon the highway at the time of the accident were both guilty of negligence, which negligence concurred to proximately cause the damages to the truck of W.

G. Saunders, and that the driver of the truck of
page 413 } W. G. Saunders was not guilty of contributory
negligence, then you shall find for W. G. Saunders and also William Smith.

(The foregoing instruction was amended by the Court by striking the words "and also William Smith" from the end of the instruction, and adding the words "on his cross-claim", and with said amendment was given to the jury.)

Defendant's Instruction No. 10 (As Offered):

The Court instructs the jury that if you believe from a preponderance of the evidence that both Erwin Nolan Hall and Elmer Hall were guilty of negligence in the management and control of the trucks operated by them, respectively, and that their joint negligence caused or contributed to the injuries of Erwin Nolan Hall, the damages to the truck of W. G. Saunders, and the injuries of William Smith, then neither the plaintiff nor W. G. Saunders can recover damages, but you shall find for the defendant William Smith against the plaintiff.

Defendant's Instruction No. 10 (Granted as Amended):

The Court instructs the jury that if you believe from a preponderance of the evidence that both Erwin Nolan Hall and Elmer Hall were guilty of negligence in the management and control of the trucks operated by them, respectively, and that their joint negligence proximately caused the death of Erwin Nolan Hall, the damages to the truck of W. G. Saunders, and the injuries of William Smith, then neither the
page 414 } plaintiff nor W. G. Saunders can recover damages, but you shall find for the defendant William Smith against the plaintiff.

Defendant's Instruction No. 14 (As Offered):

The Court instructs the jury that if you believe from the evidence that Erwin Nolan Hall, and an unknown party driving an automobile upon the highway at the time of the accident were both guilty of negligence and that their joint negligence approximately contributed to the injuries of William Smith, you shall find for William Smith.

Defendant's Instruction No. 14 (Granted as Amended):

The Court instructs the jury that if you believe from the evidence that Erwin Nolan Hall, Elmer Hall, and an unknown party driving an automobile upon the highway at the time of the accident were all guilty of negligence and that their joint negligence proximately contributed to the injuries of William Smith, you shall find for William Smith against the plaintiff.

Defendant's Instruction No. 11 (As Offered):

The Court instructs the jury that there is no evidence in this case upon which you can find a verdict in favor of the plaintiff against William Smith.

Defendant's Instruction No. 11 (Granted as Amended):

The Court instructs the jury that there is no evidence in this case upon which to base a verdict in favor of the plaintiff against William Smith.

page 415 } *Defendant's Instruction No. 12 (As Offered):*

The Court instructs the jury that if under all of the evidence and instructions of the Court they should find for the defendant, W. G. Saunders, they should fix his damages against the plaintiff at the difference between the fair market value of his tractor and trailer immediately prior to the accident and immediately after the accident.

Defendant's Instruction No. 12 (Granted as amended):

The Court instructs the jury that if under all of the evidence and instructions of the Court they should find for the defendant, W. G. Saunders, they should fix his damages against the plaintiff at the difference between the fair market value of his tractor immediately prior to the accident and

immediately after the accident, and the damage proved as to his trailer.

Defendant's Instruction No. 13 (As Offered):

The Court instructs the jury that if under all of the evidence and instructions of the Court they should find for the defendant, William Smith, they should allow him such sum as they believe from the evidence will compensate him reasonably for the injuries received, and in estimating the damages, if any, may take into consideration the necessary expenses for medical attention and hospital bills incurred by him, and the necessary expenses for medical at-
 page 416 } tention that will probably be incurred by him in the future, if any, consequent upon the injuries received, the mental and physical pain and suffering, if any, consequent upon the injuries received; and if they believe from the evidence that such injuries are permanent and will partially disable him to labor and earn money in the future, then they may, in addition to the above, find such sum as will, if paid now, be a fair compensation for his diminished capacity, if any, to labor and earn money in the future.

Defendant's Instruction No. 13 (Granted as Amended):

The Court instructs the jury that if under all of the evidence and instructions of the Court they should find for the defendant, William Smith, they should allow him such sum as they believe from the evidence will compensate him reasonably for the injuries received, and in estimating the damages, if any, may take into consideration the necessary expenses for medical attention and hospital bills incurred by him, the mental and physical pain and suffering, if any, consequent upon the injuries received, which he has or may hereafter suffer.

Defendant's Instruction No. 5 (Refused):

The driver of a vehicle will not be held to be negligent when he turns to the left side of the road instead of remain-
 ing on the right side in an effort to avoid col-
 page 417 } lision with a motor vehicle approaching from the opposite direction on the wrong side of the highway, if a reasonable man under like circumstances would have honestly believed that a collision was imminent if he kept to the right; and if you believe from the evidence that the defendant Elmer Hall was driving on the right side

of the highway and that the oil truck in order to avoid a collision with another vehicle approached from the opposite direction on the wrong side of the highway, and that the defendant Elmer Hall honestly believed that a collision was imminent if he kept to the right, and that an ordinarily prudent person might have turned to the left under the same circumstances and conditions, the defendant Elmer Hall was not guilty of negligence.

Defendant's Instruction No. 15 (Refused):

The Court instructs the jury that the drivers of the respective trucks owed exactly the same duty in driving their vehicles.

page 418 } This day again came the parties by their attorneys, and the jury sworn on yesterday came in pursuance to their adjournment, and said jury having further heard the evidence, it is ordered that they be adjourned until Monday morning at 9 o'clock.

And at another day, to-wit: the 26th day of June, 1939, an order of this court was entered in the words and figures following, to-wit:

This day came the parties by their attorneys, and the jury came in pursuance to their adjournment on Saturday, and after having fully heard the evidence and argument of counsel, retired to their room to consult of a verdict, and after some time returned into Court having found the following verdict, "We the jury find for the plaintiff Mary H. Hall against the defendant W. G. Saunders for the sum of \$10,000.00".

Thereupon the defendant moved the court to set aside the verdict of the jury and enter judgment for the defendant, on the ground that the same was contrary to the law and the evidence, and further to set aside the verdict and grant him a new trial on the ground that the court erred in granting and refusing to grant certain instructions, and further on the ground that the court erred in admitting and refusing to admit certain evidence, the hearing of which motion is continued until the 17th day of July, 1939 term of court.

And at another day, to-wit: the 17th day of July, 1939, an order of this court was entered in the words and figures following, to-wit:

page 419 } This day came the parties, plaintiff and defendants, by counsel, and the motions heretofore made herein by said defendants to set aside the verdict of the jury and enter judgment for the defendant or to set aside the verdict of the jury and grant a new trial having been fully heard and maturely considered by the court, are overruled. Whereupon, it is considered by the court that said plaintiff do recover against the defendant, W. G. Saunders, the sum of Ten Thousand Dollars (\$10,000.00) with interest at the rate of six per centum (6) per annum from June 26, 1939, until paid, together with her costs about her suit in this behalf expended; to all of which the said defendants, by their counsel, duly excepted.

And the defendant, W. G. Saunders, having signified his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the foregoing judgment, it is ordered that execution upon said judgment be suspended for a period of ninety (90) days from the entry of this judgment upon the said defendant, W. G. Saunders, or someone for him entering into such acknowledgement within fifteen days a bond before the clerk of this court in the penalty of Twelve Thousand Dollars with surety to be approved by the said clerk pursuant to section 6338 of the Code of Virginia and conditioned according to section 6351 of said Code.

And at another day, to-wit: the 14th day of August, 1939, the following order of this court was entered in the words and figures following, to-wit:

This day came the parties, the plaintiff and the defendants, by counsel, and it being brought to the attention of the court that the ruling of the court on July 17, 1939, on the defendants' motion to set aside the verdict of the jury was that the defendant William Smith and W. G. Saunders recover nothing of the plaintiff on their respective cross-claims filed hercin and that said order of this court of July 17th, 1939, did not specifically so state, it is now considered by the court *nunc pro tunc* that the defendants William Smith and W. G. Saunders do take nothing by their respective cross-claims and that the plaintiff recover of said defendants respectively her costs by her about her defense of said cross-claims respectively expended.

To which action of the court the defendant William Smith, as well as the defendant W. G. Saunders, duly excepted on each and every ground stated during the trial, and stated at the time the order of July 17th, 1939, was entered, and on the

further ground that the verdict is indefinite, uncertain and not responsive to the issues in the case.

page 421 }

NOTICE OF APPEAL.

PLEASE TAKE NOTICE: That on the 8th day of September, 1939, at Ten o'clock A. M. or as soon thereafter as we may be heard, the undersigned will present to the Judge of said Court their certificate of exceptions to be signed by the Judge and made a part of the record in this case.

YOU WILL FURTHER TAKE NOTICE: That the undersigned will, on the same day, request the Clerk of said Court to make up and deliver to them a transcript of the record in the above-entitled case for the purpose of presenting the same, together with a petition for writ of error without *supersedeas* to the Supreme Court of Appeals of Virginia.

Date this 28th day of August, 1939.

WILLIAM SMITH,
W. G. SAUNDERS,
By LEIGH D. WILLIAMS,
CHAS. B. GODWIN, JR.,
Their Attorneys.

Due, legal and sufficient service of the within notice is hereby accepted this 6th day of September, 1939.

MARY H. HALL,
Administratrix of the Estate of Erwin
Nolan Hall, Deceased,
By TOM E. GILMAN,
Her Attorney.

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JUDGE'S CERTIFICATE.

I, R. B. Spindle, Jr., Judge of the Corporation Court of the City of Norfolk, Virginia, who presided for and at the request of Hon. C. W. Coleman, Judge of the Circuit Court of Norfolk County, Virginia, at the trial in said Circuit Court of Norfolk County of the case of Mary H. Hall, Administratrix, Etc., v. W. G. Saunders and William Smith, which trial was commenced on the 23rd day of June and concluded on the 26th day of June, 1939, do hereby certify that the foregoing is a true and correct copy and report of all the evidence introduced, including the exhibits offered, all the instructions offered, and the action of the Court thereon, and all other incidents of the trial of said case, together with the

motions, objections, and exceptions of the respective parties as therein set forth.

And I further certify that all the original exhibits introduced upon the trial of said case, to-wit: Three pencil sketches, marked "Exhibit A. A. Taylor No. 1," "Defendant's Exhibit D," and "Defdt's Exhibit E," respectively; a paper titled "Statement," signed, "Wm. A. Taylor," marked "For Identification X", and fifteen photographs, marked respectively "Exhibit M. H. H. No. 1," "Exhibit A," "Defendant's Exhibits A-1 and A-2," "Exhibit B," "Exhibits B-1 and B-2," "Exhibit C," "Defendant's Exhibits C-1 and C-2," "Exhibit D," "Exhibit E," "Exhibit F," "Exhibit G," and "Defendant's Exhibit H," as shown by said report, have been initialed by me for the purpose of identification; counsel for the parties having agreed that said original exhibits be transmitted to the Supreme Court of Appeals as a part of the record in said case, in lieu of certifying copies thereof to said Court.

And I further certify that the attorneys for the plaintiff had reasonable notice, in writing, given by counsel for the defendants, of the presentation of said report to me for signature and authentication.

Given under my hand this 8th day of September, 1939, within sixty days after the entry of the final judgment in said case.

R. B. SPINDLE, JR., Judge.

page 424 } CLERK'S CERTIFICATE.

I, V. C. Randall, Clerk of the Circuit Court of Norfolk County, Virginia, do hereby certify that the foregoing report of the testimony, exhibits, instructions, motions, objections, exceptions, and other incidents of the trial of the case of Mary H. Hall, Administratrix, Etc., v. W. G. Saunders and William Smith, together with the original exhibits therein referred to, all of which have been duly authenticated by the judge who presided over the trial of said case in said court, were lodged and filed with me as Clerk of the said Court on the 8th day of September, 1939.

V. C. RANDALL, Clerk.
By L. C. ANSELL, D. C.

page 425 } I, V. C. Randall, Clerk of the Circuit Court of
Norfolk County, Virginia, do certify that the fore-
going is a true transcript of the record in the suit of Mary
H. Hall, Administratrix, Etc., *v.* W. G. Saunders and William
Smith, lately pending in said Court.

I further certify that said record was not made up and com-
pleted and delivered until the plaintiff had received due no-
tice thereof, and of the intention of the defendants to apply
to the Supreme Court of Appeals of Virginia for a writ of
error and *supersedeas* to the judgment therein.

Given under my hand this 8th day of September, 1939.

V. C. RANDALL,
Clerk of the Circuit Court of Norfolk County, Virginia.
By L. C. ANSELL,
Deputy Clerk.

Fee for copy of record \$.

Teste:

....., Clerk.

A Copy—Teste:

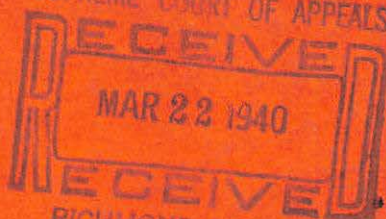
M. B. WATTS, C. C.

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CLERK
SUPREME COURT OF APPEALS



RICHMOND, VIRGINIA