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Record No. 3600

In the
Supreme Court of Appeals of Virginia
at Richmond

W. W. OLIVER AND JESSE JAMES ALLEN

v.

GORDON FORSYTH

FROM THE CIRCUIT COURT OF PRINCESS ANNE COUNTY.

RULE 14.

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

¶6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

190 VA 710

RULE 14—BRIEFS

1. **Form and contents of appellant's brief.** The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

(d) Argument in support of the position of appellant.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

2. **Form and contents of appellee's brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate reference to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

3. **Reply brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him, not referred to in his petition or opening brief. In other respects it shall conform to the requirements for appellee's brief.

4. **Time of filing.** (a) *Civil cases.* The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than thirty days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than fifteen days, and the reply brief of the appellant not later than one day, before the first day of the session at which the case is to be heard.

(b) *Criminal Cases.* In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

(c) *Stipulation of counsel as to filing.* Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

5. **Number of copies to be filed and delivered to opposing counsel.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

6. **Size and Type.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

7. **Non-compliance, effect of.** The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief the cause will not be heard. If one of the parties fails to file a proper brief he cannot be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.

CLERK
SUPREME COURT OF APPEALS

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 3600

W. W. OLIVER AND JESSE JAMES ALLEN,
Plaintiffs in Error,

versus

GORDON FORSYTH, Defendant in Error.

PETITION FOR WRIT OF ERROR AND
SUPERSEDEAS.

*To the Honorable Chief Justice and Justices of the Supreme
Court of Appeals of Virginia:*

Your petitioners, W. W. Oliver and Jesse James Allen, respectfully represent unto the Court that they are aggrieved by a final judgment of the Circuit Court of Princess Anne County, Virginia, rendered on January 19th, 1949, against your petitioners in an action at law in which Gordon Forsyth was plaintiff and your petitioners were defendants.

The transcript of the record with the original exhibits is herewith presented.

2* *The parties will be referred to according to their relative position in the Trial Court.

**STATEMENT OF PROCEEDINGS IN THE TRIAL
COURT.**

This was an action brought by notice of motion to recover damages for personal injuries sustained by the plaintiff, Gor-

don Forsyth, in a collision between an automobile driven by the plaintiff, and a farm truck owned by W. W. Oliver and driven by his servant Jesse James Allen.

The defendant, W. W. Oliver, filed a cross-claim against the plaintiff to recover the damages to his truck.

Both the original action and the cross-claim were tried together before the Court and a jury on October 4, 1948, resulting in a verdict for the plaintiff for \$2,000.00 on the original claim.

Thereupon the defendants moved the Court to set aside the verdict and grant a new trial on the grounds of errors of the Court in granting Plaintiff's Instructions A and 4, and in refusing Defendant's Instruction No. 4, and because the verdict is excessive. By judgment order of January 19, 1949, the Trial Court overruled the motion and rendered final judgment for the plaintiff on the verdict, to which the defendant duly excepted. This petition seeks a writ of error and *superseas* to that judgment.

3*

*FACTS.

The accident occurred between eight and nine o'clock on the morning of November 10, 1947, at the intersection of Virginia Beach Boulevard (U. S. Route 58), and Witch Duck Road in Princess Anne County. Virginia Beach Boulevard is a hard surface highway consisting of three lanes, each lane 11 feet wide, running between Norfolk on the West and Virginia Beach on the East. Witch Duck Road is a hard surface highway approximately 20 feet wide, running North and South, and intersecting Virginia Beach Boulevard at approximately right angles. There is a stop sign on Witch Duck Road; but none on Virginia Beach Boulevard.

The passenger automobile, driven by Gordon Forsyth (plaintiff), was proceeding East towards Virginia Beach in his far right-hand lane. According to Mr. Forsyth, he was traveling about 50 miles per hour; and, according to the defendant, Allen, "mighty fast"—"around 65 miles an hour" (M. R., p. 85).

The defendant's vehicle was a 1½ ton Ford farm truck belonging to the defendant Oliver, and driven by the defendant Allen (employee of Oliver). It was proceeding South on Witch Duck Road. Before crossing Virginia Beach Boulevard it stopped at a point where the front bumper of

4* *the truck was approximately 4 feet from the Boulevard, and remained stopped while cars passed on the Boule-

vard, 3 or 4 from Virginia Beach, and 2 or 3 from Norfolk (M. R., p. 64). Allen then looked down the Boulevard in both directions, saw no vehicles approaching, and proceeded to cross the Boulevard not to exceed 5 or 6 miles per hour (M. R., p. 68).

When the truck reached a point where its front wheels were off the hard surface (M. R., p. 57), it was struck in about the center on the right side by the front end of the plaintiff's car. The plaintiff's car left skid marks, measuring straight down the Boulevard for a distance of 55 feet, the right-hand mark constantly 4 inches from the South edge (its right), of the hard surface, to the point of impact, and then turning to the right off the Boulevard for 15 feet. Exhibit No. 1, drawn by State Patrolman Guy gives a fair representation of the position of the respective vehicles at the time of the accident.

Officer Guy testified that after one got out in the boulevard he could see down the boulevard to the west (direction from which the plaintiff came), half a mile at least; but that he did not know the condition of the trees and bushes in the Northwest angle, and did not know how far down the boulevard Allen could have seen from his stopped position (M. R., p. 12).

5* *The defendant Oliver testified that directly after the accident he performed the following test. He stopped his car in the approximate position as that occupied by the truck according to Allen, and from that position, looking West in the direction of Norfolk, he could not see down the boulevard beyond 175 yards (M. R., p. 97).

ASSIGNMENTS OF ERROR.

I. The Court erred in granting Plaintiff's Instruction A telling the jury that the defendant's driver was guilty of negligence as a matter of law if he *failed to see* the plaintiff's approaching car.

II. The Court erred in refusing Defendant's Instruction No. 4, on Last Clear Chance.

III. The Court erred in refusing to set aside the verdict and grant a new trial, and erred in entering final judgment for the plaintiff on the grounds of error above assigned, and because the verdict was excessive.

ARGUMENT.

I.

The Court Erred in Granting Plaintiff's Instruction A.

Plaintiff's Instruction A (Granted).

6* *“The Court instructs the Jury that if they believe from the evidence that the Plaintiff, Gordon H. Forsyth, was proceeding East on the Virginia Beach Boulevard and approaching its intersection with the Witch Duck Road when Oliver's driver, Jesse Allen, had stopped the Oliver truck at such intersection, and that Allen failed to see this approaching automobile, then Allen was guilty of negligence, and if such negligence contributed to the collision, Oliver cannot recover on his cross-claim against Forsyth.”

That instruction was granted by the Court at the request of the plaintiff over the objection and exception of the defendants (M. R., p. 107).

The vice of this instruction lies in the fact that it placed the burden of an insurer upon the defendant driver while stopped, actually to see the plaintiff's approaching car and thus avoid the collision. According to the instruction, reasonable care to see, or a reasonable and proper lookout were not the measure of the defendant's duty. The jury were told that the defendant's driver was required to see the approaching car, and if he did not see the approaching car in time to prevent the plaintiff from running into him, he was guilty of negligence as a matter of law. He was to be an insurer guaranteeing the actuality of seeing the car, regardless of the degree and amount of care expended to that end, if the net result fell short of seeing.

7* *Such is not the law. All that was required of the defendant driver in that regard was that he exercise such ordinary and reasonable care in maintaining a lookout as an ordinarily prudent person would have maintained under the same or similar circumstances.

Voight v. Reber, 187 Va. 157, at page 164.

In *Smith v. Clark*, 187 Va. 181, the trial court had given an instruction stating that it was the duty of the defendant to see that the movement of a left turn could be made in safety, using practically the same language as used in the statute, namely, “first see that such movement can be made

in safety" (Code Section 2154 (122) (a)). This court held that it was reversible error to have given the instruction in that form, without the qualifying words of reasonable care, and reversed the trial court solely upon that point. Quoting from the opinion at p. 190:

"This Court has therefore interpreted this language, 'first see that such movement can be made in safety' to mean that it is incumbent upon the driver to use reasonable and ordinary care under the circumstances to see that such movement can be made safely.

"The language of the Code section is however susceptible of a construction that would impose upon the driver a higher degree than reasonable care. It could easily be interpreted by a jury as requiring an absolute duty to negotiate the turn without mishap. To guard against this construction, the 8* court has determined that any *instruction using the words of the statutes, namely, 'first see that such movement can be made in safety', must be qualified with appropriate language relieving the driver of the burden of insuring the safety of his turn."

Without further belaboring the obvious, it is clear that the instruction is an erroneous statement of the law. We assume that counsel for the plaintiff will reply that though error it is not reversible, because he will say that there is no reasonable explanation for the failure of the defendant driver while he remained in his stopped position actually to see the approaching plaintiff's automobile, and therefore "failure to see" is synonymous with "failure to observe a reasonable lookout", under the evidence.

The correctness of such claim depends upon whether under the evidence reasonable and fair-minded men might differ with counsel for the plaintiff on that score. *Yellow Cab Co. v. Gulley*, 169 Va. 611 at p. 616:

"If the question of contributory negligence depends on a state of facts, upon which reasonable and fair-minded men might arrive at different conclusions, it is then a question for the jury, and their verdict should not be disturbed. But where the uncontroverted evidence and the direct inferences therefrom are such that reasonable and fair-minded men should not differ in their conclusions, the question then becomes one of law, and must be decided by the Court."

9* *So tested, and admitting that the defendant driver, while standing in the stop position, did not actually see

the plaintiff's car, it is submitted that the question of whether he exercised reasonable care in the matter of lookout was for the jury; and that his failure actually to see from the stop position the approaching car is not incompatible with a reasonable lookout.

Officer Guy testified that after one got in the boulevard he could see down the boulevard to the west (direction from which the plaintiff came), half a mile at least; but that he did not know the condition of the trees and bushes in the Northwest angle and did not know how far down the boulevard Allen could have seen from the stop position.

M. R., p. 12:

Q. How far could Allen have seen West on the Virginia Beach Boulevard if he had looked?

A. I don't know whether there are trees there or not, or bushes grown up in that lot next to it. But, if he had gotten out on the road, he could have seen half a mile, at least. .

Q. As I understand it, Mr. Guy, you say that after he got out on the road he could see half a mile; but as to how far he could see back in the stopped position, you don't know?

A. That is true. I don't know the condition of the bushes at that time.

10* *The defendant driver Allen testified that before crossing the Boulevard he stopped opposite the stop sign at a point where the front of his truck was about four feet from the Boulevard; that while standing still he let several cars pass going each way; that after those cars had passed he again looked both ways and saw nothing coming, and then started across; that after he got across to the next lane he heard the brakes squealing on the plaintiff's car and then saw the plaintiff's car for the first time bearing down upon him.

M. R., p. 56:

Q. Jessie, did you stop before you started across there?

A. Yes, sir, I come to a complete stop.

* * * * *

Q. How close were you to the boulevard while you were standing there?

A. I was in 4 feet of it.

* * * * *

A. Yes, sir, I looked both ways. I stood there and looked both ways. Several cars came from the Beach going to Norfolk, and several cars came from Norfolk going to the Beach. So, after they all passed, I looked back again this way and I seen no cars, and I looked back towards the Beach, and I pulled across. After I got across to the next lane, I heard brakes squealing. When I turned around, the car was on me then, so I throwed on the brakes to keep from sliding around any further. He hit me.

11* *(M. R., p. 67:

Q. You had passed the trees and bushes in that vacant lot?

A. I don't know whether I had or not, but I stopped where the stop sign said to stop.

Q. How far up the road towards Norfolk could you see when you were parked just 4 feet from it?

A. I could see far enough to know my way wouldn't have been clear if there had been a car coming.

Q. And then you started on across?

A. Certainly.

M. R., p. 80:

Q. The law requires you to stop where you can see. So, if there were bushes there, you could not see where you did stop?

A. I come up here and came to a stop about 4 feet from this surface here. I come to a full stop and stood there waiting for cars to pass going each way before I made an attempt to go across. I looked then each way, and no car was coming, so I proceeded.

Q. Did you stop at a point where you could see if a car was coming?

A. Yes, sir, I did.

Q. Did you stop at a point where you could see?

A. Yes, sir.

Q. And you tell the jury there was no car coming, so you proceeded to drive across?

A. That is right.

12* *The defendant Oliver testified that directly after the accident he performed the following test. He stopped his car in the approximate position occupied by the defendant's truck according to Allen, and from that position, looking West in the direction of Norfolk (the direction from which

the plaintiff's car came), he could not see down the boulevard beyond 175 yards.

M. R., p. 94:

A. * * * If it is permissible, I would like to tell the jury about that view down the road there.

The Court: You can do that.

* * * * *

A. Stopping at the stop sign, with my driver's seat opposite to the stop sign, after this accident in order to satisfy myself—

The Court: Wait a minute, Mr. Oliver. Just tell what you can see down there.

A. I stopped opposite that stop sign.

* * * * *

The Court: He can tell how far he can see down that road from the stop sign.

A. From that position, I would say 175 yards. * * *

* * * * *

13^a *A. I stopped at that sign, and it was my judgment that I could not see beyond 175 yards up that road.

M. R., p. 96:

Q. Mr. Oliver, when you stopped at that stop sign, how close was your front bumper to the side of the hard surface?

A. Well, I would say that stop sign is probably 12 or 14 feet from the edge of the pavement of the Virginia Beach road; maybe 15 feet.

Q. Did you stop with your bumper approximately 4 feet from there?

A. It was headed South. I stopped with my driver's seat right opposite the stop sign.

Q. Did you then pull forward so that your bumper would be 4 feet? Jessie Allen testified that he stopped with his

bumper 4 feet from the hard surface. Did you stop there?

A. I would think my bumper would be around 4 or 5 feet from the hard surface of that road, at the point I stopped.

Under the above evidence it is clear that the jury had a right to conclude that from the position occupied by Allen in the stop position he could not see down the boulevard beyond 175 yards.

Allen could hardly be held guilty of negligence as a matter of law in failing to see an object that was beyond his line of vision. Therefore, we inquire as to whether, under the evidence, reasonable fair-minded men might conclude that at the time Allen looked the plaintiff's car could have been more than 175 yards from the intersection.

14* *The plaintiff was traveling at a rapid rate of speed, testified by the plaintiff to be "approximately 50 miles an hour" (M. R., p. 23), and by Allen "around 65 miles an hour" (M. R., p. 85). On the other hand the defendant, from his stop position, crossed the boulevard in low gear "not over 5 or 6 miles an hour" (M. R., p. 68). The hard surface of the boulevard was 33 feet wide. At the point of impact the front wheels of the defendant's truck had cleared the hard surface (M. R., p. 57). Therefore, from the stop position the truck traveled something more than 37 feet before it was struck. It is submitted that from the evidence reasonable and fair-minded men had a right to conclude that when Allen looked from the stop position the plaintiff's truck was further from the intersection than 175 yards, and hence beyond the vision of Allen. Yet the instruction told the jury that if Allen "failed to see" from his stop position the plaintiff's car, although beyond his line of vision, he was guilty of negligence as a matter of law.

We claim that the question whether Allen maintained such a lookout as an ordinarily prudent person would have maintained under the same or similar circumstances, was a question for the jury rather than the Court; and that the granting of the instruction was prejudicial and reversible error.

15*

*II.

The Court Erred in Refusing Defendant's Instruction No. 4.

Defendant's Instruction No. 4—Refused.

"The Court instructs the jury that if you believe from the evidence that the defendant's truck entered and started across the intersection at a time when its position and course should

have been discovered by Gordon Forsyth by the exercise of reasonable care for Forsyth to have slowed up or stopped or changed the course of his vehicle and thus avoided the accident, then you should find for the defendant Oliver and assess his damages."

This is the last clear chance instruction. It was offered by the defendant, and refused by the Court. It is submitted that there was credible evidence to support it, and that it should have been granted.

We have already shown under Point I of the argument that there was credible evidence from which the jury had a right to conclude that at the time the defendant's truck started across the boulevard, the plaintiff's car was further from the intersection than 175 yards. It seems to the writer that no argument is necessary to support the proposition that an automobile traveling at 50 miles per hour under the conditions could be brought to a stop within a distance of 175 yards, in the exercise of reasonable care.

Yet the evidence is uncontradicted that the plaintiff left only 55 feet of skid marks up to the point of impact; from which we conclude that he did not put on brakes *until 16* he was 55 feet from the truck, then immediately in front of him crossing the boulevard at "not to exceed 5 or 6 miles an hour". On impact the front of the truck had completely cleared the 33 feet wide hard surface portion of the boulevard. Certainly there was ample time to enable the plaintiff to bring his car to a stop by the exercise of reasonable care after the danger and peril of the defendant should have been apparent to the plaintiff. The inference is strong that the plaintiff was not observing a reasonable lookout. Even so, there was nothing to prevent the plaintiff passing around the truck. Under the circumstances, it is submitted that the doctrine of last clear chance was applicable.

Keeler v. Baumgardner, 161 Va. 507, at p. 513:

"If from all of the evidence the jury could reasonably find that regardless of the state of negligence of the plaintiff, the defendant, by the exercise of ordinary care, had a clear chance to save him and failed to do so, then an instruction on the doctrine is justified. In cases, such as the one here, where a defendant is required by law to keep a proper lookout, the test is not whether he actually saw the plaintiff in time to have saved him, but whether he could have seen him in time to have avoided the injury, by exercising ordinary care, and failed to do so."

III.

The Verdict Was Excessive.

The injury to the plaintiff consisted of a few cuts and bruises. He received first aid at the hospital *and was
 17* released. He lost no time from his work. His special damages were:

Hospital bill	\$ 7.00
X-ray bill	25.00
Doctor's bill	23.00
	<hr/>
	\$55.00 ✓

It is submitted that \$2,000.00 verdict is excessive.

There is no difficulty in the statement of the law on the subject of excessive damages. This Honorable Court has clearly stated the applicable law many times; nowhere more clearly and concisely than in *Kenny Co. v. Solomon*, 158 Va. 25, at page 30:

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

And again at page 31:

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

See also:

Rawle v. McIlhenny, 163 Va. 735, at p. 744.

Glass v. David Pender Grocery Co., 174 Va. 196.

C. O. Ry. v. Arrington, 126 Va. 194, at p. 217.

18* *While there is no difficulty in the statement of the law, there is difficulty involved in the application of the law to the facts of the particular case. The exercise of a

sound judicial discretion based upon mature judgment is called for, which is the peculiar function and qualification of this Honorable Court.

We submit that the amount of the verdict is so disproportionate to the injury as to suggest the inference that it is not the result of fair, calm and unbiased judgment of the jury. As stated by the Court in the Kenny case (*supra*), it is the duty of the Court to see that the jury approximates a sane estimate.

PRAYER.

Wherefore, your petitioners pray this Honorable Court to grant them a writ of error with *supersedeas* to the judgment aforesaid, review and reverse said judgment, and set aside the verdict and grant a new trial.

In conformity with paragraph 8 of Rule 9 of this Court, it is stated that the sole plaintiffs in error (appellants) are W. W. Oliver and Jesse James Allen; and the only defendant in error (appellee) or party who will be interested in sustaining the judgment of the court below or will be affected by a reversal thereof is Gordon Forsyth.

19* *Copies of this petition were delivered on the 14th day of May, 1949, to Messrs. Pilcher & Pilcher, Western Union Building, Norfolk, Va., and to Messrs. Ashburn, Agelasto & Sellers, Citizens Bank Building, Norfolk, Va., counsel for the plaintiff in the Court below.

Petitioner adopts this petition as his brief, and desires to state orally his reasons for reviewing the decisions complained of. This petition is being presented to Mr. Justice Eggleston at his office in the City of Norfolk, Virginia.

Attention is invited to the fact that combination suspending and *supersedeas* bond in the penalty of \$2,500.00 has been filed in accordance with the statute (M. R., p. 128).

Respectfully submitted,

W. W. OLIVER,
JESSE JAMES ALLEN,
By JOHN S. RIXEY,
Of Counsel.

RIXEY & RIXEY,
Attorneys for Petitioners,
Citizens Bank Building,
Norfolk, Virginia.

I, John S. Rixey, an attorney-at-law practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion it is proper that the judgment and decision complained of in the foregoing petition should be reviewed by said court.

JOHN S. RIXEY,
Citizens Bank Building,
Norfolk, Virginia.

Received May 16, 1949.

J. W. E.

June 17, 1949. Writ of error and *supersedeas* awarded by the court. No additional bond required.

M. B. W.

RECORD

Virginia:

Pleas before the Circuit Court of Princess Anne County on the 19th day of January, 1949.

Be It Remembered, that heretofore, to-wit: on the 7th day of February, 1948, came the plaintiff Gordon Forsyth, and filed his Notice of Motion against W. W. Oliver and Jessie James Allen, in the following words and figures, to wit:

Gordon Forsyth, Plaintiff

v.

W. W. Oliver and Jessie James Allen, Defendants.

NOTICE OF MOTION FOR JUDGMENT

To: W. W. Oliver

Route #1

Lynnhaven, Virginia

and

Jesse James Allen

Kempsville, Virginia.

TAKE NOTICE: That Gordon Forsyth, plaintiff will on the first day of March, 1948, move the Circuit Court of Prin-

cess Anne County for judgment against you and each of you in favor of the plaintiff for Ten Thousand Dollars (\$10,000.00) damages, for this, to-wit:

That heretofore, to-wit: on the 10th day of November, 1947, in the daytime, at the intersection of Witch Duck Road and U. S. Route #58, Princess Anne County, Virginia, you and each of you negligently owned and operated and ran your truck so as to cause it to then and there come into violent collision with an automobile in which the plaintiff was
page 2 } driving and by reason thereof plaintiff was injured;
that the plaintiff was traveling east on U. S. Route #58 at a moderate and lawful rate of speed, to-wit: about fifty miles per hour, and that you, the defendants, approached the plaintiff traveling south on Witch Duck Road in a reckless, negligent, and unlawful manner and unlawful rate of speed, wrongfully running your said truck into the automobile driven by the undersigned plaintiff and damaged and injured all of the person of the plaintiff, breaking divers bones, bruising and cutting the plaintiff about his body including his face and caused the plaintiff to suffer great pain and anguish, and caused the plaintiff to spend in attempts to be cured of said injuries large sums of money which he otherwise would have earned.

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

GORDON FORSYTH
By Counsel.

PILCHER & PILCHER,
p. q.

And the return of the Sheriff of Princess Anne County, Virginia, on the foregoing notice of motion is as follows:

Not finding W. W. Oliver at his usual place of abode in Princess Anne County I executed the within in the County of Princess Anne, Va., this 3 day of Feb. 1948, by delivering a copy hereof to Mrs. W. W. Oliver she being then there a member of his family and over the age of 16 years, and giving information of its purport to her.

D. J. VAUGHAN, Sheriff
of Princess Anne County, Va.

Not finding Jessie James Allen nor any member of his family above the age of 16 years at his usual place
page 3 } of abode in Princess Anne County, I executed the
within process in the County of Princess Anne, Va.,
this the 3 day of Feb., 1948, by leaving a Copy hereof posted
at the Front Door of his place of abode.

D. J. VAUGHAN, Sheriff
of Princess Anne County, Va.

And on another day, to-wit: on the 23rd day of February, 1948, the following Plea of General Issue was filed:

The defendants, by their attorneys, come and say that they are not guilty of the premises in this action laid to their charge, in manner and form as the plaintiff hath complained. And of this the said defendants put themselves upon the Country.

RIXEY & RIXEY,
P. D.

And on the same day, to-wit: on the 23rd day of February, 1948, the following Cross-claim was filed on behalf of W. W. Oliver:

The defendant, W. W. Oliver, hereby files in writing his cross-claim, and avers that the plaintiff is liable to this defendant for a tort for damages in the sum of Two Hundred Ffty Dollars (\$250.00), arising out of the same transaction as is involved in the original action, for this, to-wit:

That heretofore on or about the 10th day of November, 1947, at the intersection of Witch Duck Road and Virginia Beach Boulevard in Princess Anne County, Virginia, the plaintiff did so carelessly and negligently drive a certain automobile as to cause the same to collide with great force and violence with a certain automobile truck belonging to this defendant, as the result of which the said truck of this
page 4 } defendant was greatly damaged, and this defendant
was deprived of the use of his said truck, all to the
damage of this defendant in the sum of \$250.00.

W. W. OLIVER
By RIXEY & RIXEY
His attorneys.

And on another day, to-wit: on the 4th day of October, 1948, the following Plaintiff's Special Plea to Cross-claim of W. W. Oliver was filed:

Now comes the plaintiff and says that the defendant W. W. Oliver ought not to have or recover anything of him in the above styled action, for this, to-wit:

That heretofore, to-wit: on the 10th day of November, 1947, at the time of the happening of the automobile collision for which this action was brought the plaintiff was driving a certain automobile owned by State Farm Automobile Insurance Company, Incorporated which was damaged in said collision, and thereafter the said State Farm Automobile Insurance Company, Incorporated brought its action in this Court against W. W. Oliver and Jesse James Allen to recover the damages to said automobile on the ground that said W. W. Oliver was guilty of negligence which proximately caused said collision, the acts or omissions constituting negligence having been committed by Jesse James Allen, the agent or servant of said W. W. Oliver then acting in the scope of his employment. That said action, so brought as aforesaid, was tried in this Court with the result that there was a final judgment against the said W. W. Oliver and Jesse James Allen recorded in Common Law Order Book 21, at p. 295, the said judgment being in favor of State Farm Mutual Automobile Insurance Company, and the same judicially determining that said W.

W. Oliver was guilty of negligence which was a page 5 } proximate cause of the said collision. Wherefore this plaintiff says that it having been judicially determined that W. W. Oliver was guilty of negligence which was a proximate cause of the collision he is barred from a recovery on his cross claim, and ought not to have or recover anything of this plaintiff. And this the plaintiff is ready to verify.

ASHBURN, AGELASTO & SELLERS,
Counsel for pl. on Df's.
Cross claim.

GEORGE PILCHER, JR.,
Counsel for Plaintiff.

And on the same day, to-wit: on the 4th day of October, 1948, the following order was entered:

This day came the plaintiff by his attorneys, and the defendants appeared by Rixey & Rixey, their attorneys, and

pleaded the general issue, to which the plaintiff replied generally and upon which plea issue is joined, and thereupon came a jury, to-wit: Albert Gomez, Jessie T. Sherwood, Robert J. Steinhilber, Early W. Nosay, James P. Guzzy, Ernest L. Posey and Thomas B. Wright, who were duly sworn the truth to speak upon the issue joined, and after having fully heard the evidence and argument of counsel retired to their room to consider of a verdict, and after sometime returned into Court with the following verdict, to-wit: We the jury find for the plaintiff and fix his damages at \$2,000.00".

Whereupon, the defendants, by counsel, moved the Court to set aside the verdict of the jury and enter judgment for the defendants, or grant them a new trial upon the grounds that the same is contrary to the law and the evidence, the hearing of which motions are continued.

page 6 } And on another day, to-wit: on the 19th day of January, 1949, the following order was entered:

This day came again the parties by their attorneys and the Court having fully heard and considered the motion of the defendants, made herein on the 4th day of October, 1948, to set aside the verdict of the jury and grant them a new trial, on the grounds that the same is contrary to the law and the evidence, doth overrule the same.

Whereupon, it is considered by the Court that the plaintiff recover of the defendants the sum of \$2000.00 with interest thereon from the 4th day of October, 1948, until paid and his costs in this behalf expended.

And the defendants having signified their intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas*, it is ordered that the issuance of an execution upon the said judgment be suspended for a period of sixty (60) days, upon the defendants or someone for them executing a bond before the Clerk of this Court with approved surety, in the penalty of \$2500.00, conditioned according to law.

page 6A } Virginia,

In the Circuit Court of Princess Anne County.

Gordon Forsyth

v.

W. W. Oliver and Jessie James Allen.

NOTICE OF APPEAL.

To: Messrs. George Pilcher, Jr. and W. R. Ashburn, attorneys for Gordon Forsyth:

PLEASE TAKE NOTICE, That on the 11th day of March, 1949, the undersigned will present to the Honorable Floyd E. Kellam, Judge of the Circuit Court of Princess Anne County Virginia, at the courthouse of said county, the stenographic report of the testimony and other proceedings of the trial of the above-entitled case for certification by said Judge, and will, on the same date, make application to the Clerk of said court for a transcript of the record in said case, for the purpose of presenting the same to the Supreme Court of Appeals of Virginia with a petition for a writ of error and *supersedeas* to the final judgment of the trial court in said case.

W. W. OLIVER and
JESSIE JAMES ALLEN

By RIXEY & RIXEY
Attorney.

Legal service of the above notice is hereby accepted this 8 day of March, 1949.

PILCHER & PILCHER
GEO. PILCHER, JR.
Attorneys for Gordon Forsyth.

ASHBURN, AGELASTO &
SELLERS
FRANK E. SELLERS.

page 7, } Virginia,

In the Circuit Court of Princess Anne County.

Gordon Forsyth

v.

W. W. Oliver and Jessie James Allen.

TRANSCRIPT OF TESTIMONY.

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled case, in

H. C. Guy, Jr.

said court, on the 4th day of October, 1948, before the Honorable Floyd E. Kellam, Judge of said court, and a jury.

Appearances: Mr. George Pilcher, Jr., Attorney for the plaintiff. Mr. W. R. Ashburn, Attorney for plaintiff on the counter claim.

Messrs. Rixey & Rixey (By Mr. John S. Rixey), Attorneys for the defendants.

Phlegar & Phlegar
Shorthand Reporters
Norfolk, Virginia.

page 8 }

Princess Anne Court House, Virginia
October 4, 1948

A jury was impaneled and sworn; the witnesses were sworn; opening statements were made by counsel; and the following evidence was introduced.

TROOPER H. C. GUY, JR.,
called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examined by Mr. Pilcher:

Q. Tell the jury your name.

A. H. C. Guy, Jr.

Q. What is your occupation?

A. State trooper, Virginia State Police.

Q. Were you called on the morning of November 10, 1947, about 8:30?

A. Yes.

Q. Where were you called to?

A. I was called to Chinese Corner to investigate an automobile accident.

Q. Did you make an investigation?

A. I did.

Q. Will you please tell the jury the result of your investigation?

A. On arrival at the scene I found that an accident had occurred at the intersection of Virginia Beach Boulevard and Witch Duck Road. I found that a '47 Plymouth sedan, operated by Gordon H. Forsyth, had struck a truck that was operated by Jessie James Allen. The automobile operated by Gordon Forsyth was traveling

H. C. Guy, Jr.

cast on Virginia Beach Boulevard. The truck that was operated by Jessie James Allen was going south on Witch Duck Road.

At the time I got there the truck was in Witch Duck Road, just south of the Virginia Beach Boulevard. The Plymouth sedan was partially on the boulevard and partially in Witch Duck Road, headed south. I found tire marks on the road—on Virginia Beach Boulevard—that were left by the Plymouth before the collision. The marks were 55 feet. After the collision, in the form of a right angle, the skid marks were 15 feet in length.

Q. Did you talk to Mr. Forsyth and Jessie Allen?

A. I talked to Jessie Allen on the scene just as soon as I arrived. When I got to the scene, Mr. Forsyth had been carried to the hospital. It was not until some time later that I had a chance to talk to him.

Q. Where were the skid marks relative to the Plymouth insofar as the right-hand side of the road is concerned? In which lane were those skid marks?

A. The Virginia Beach Boulevard runs east and west. The right-hand skid marks of the two right-hand wheels
page 10 } of the Plymouth were approximately 4 inches from the south side of the road.

Q. That was the far right-hand side—

A. That would be the right-hand side going east.

Q. Did Allen have a driver's permit?

Mr. Rixey: If Your Honor please, I object to that.

(The following proceeding was had in the absence of the jury:)

Mr. Rixey: Whether or not he has a driver's permit has nothing to do with the question of negligence. It has no probative value on the question.

Mr. Pilcher: I think when a person does not have a driver's permit, his failure to have one is considered reckless driving.

The Court: Have either of you anything to show me?

Mr. Pilcher: I don't have any more to show you than that.

The Court: You don't have any cases?

Mr. Rixey: I don't have any cases, if Your Honor please. As a matter of fact, I don't know that I am familiar with any Virginia case on the subject. I have seen a number of cases outside, holding whether or not one has a driver's per-

H. C. Guy, Jr.

mit has no probative value on the question of whether or not he is negligent.

page 11 } Mr. Pilcher: I think a driver's permit is certainly required.

The Court: Would that show whether he was, or was not, negligent in this particular case that we are now discussing, except to influence the jury?

Mr. Pilcher: It is a fact that he never has had a driver's permit.

The Court: But that doesn't show negligence.

Mr. Pilcher: It shows he is not complying with the law.

Mr. Rixey: I think the evidence will show you that this man has driven for quite a number of years. I don't recall now how many years. But, this is the first accident that he has ever had.

Mr. Pilcher: There are certain physical requirements that have to be taken care of before a person can get a driver's permit. If his eyesight is inferior—

The Court: We cannot go into that matter here. I am going to sustain the objection, to which you except.

Mr. Pilcher: I except.

(The trial was then resumed in the presence of the jury.)

By Mr. Pilcher:

Q. Did Allen make any statement to you as to how the accident occurred?

page 12 } A. Allen's statement to me was that he stopped and looked both ways, and thought the road was clear, and went ahead. Those were not his exact words.

Q. How far could Allen have seen west on the Virginia Beach Boulevard if he had looked?

A. I don't know whether there are trees there or not, or bushes grown up in that lot next to it. But, if he had gotten out on the road, he could have seen half a mile, at least.

Mr. Pilcher: Answer Mr. Rixey.

CROSS EXAMINATION.

By Mr. Rixey:

Q. As I understand it, Mr. Guy, you say that after he got out on the road he could see half a mile; but as to how far he could see back in the stopped position, you don't know?

H. C. Guy, Jr.

A. That is true. I don't know the condition of the bushes at that time.

Q. You say that when you arrived there, Mr. Forsyth had been taken to the hospital?

A. He had gone to the hospital.

Q. But you talked with Allen, and Allen told you that he stopped before entering the boulevard and looked both ways, and did not see anything, and he thought he had
page 13 } time to go, and he went?

A. I believe he said that he waited for a car, and it was traveling west, and after the car cleared, traveling west, he started out.

Q. As I understand it, sir, you looked at the skid marks there and you saw skid marks which you were of the opinion had been made by the Forsyth car?

A. They led up to the Forsyth car.

Q. As a matter of fact, Mr. Forsyth came back there with you at the scene, didn't he?

A. Yes, sir.

Q. And he identified those skid marks as his skid marks, didn't he?

A. There never was any question as to whose skid marks they were. I don't know whether he identified them or not.

Q. You were satisfied that they were his marks?

A. Yes.

Q. I understood you measured those marks for 55 feet, and then there was a gap?

A. The skid marks were 55 feet up to the point of impact. After the car and the truck collided, the skid marks turned at a right angle. In other words, the truck dragged the car, because the mark to turn right into Witch Duck Road was
15 feet long.

page 14 } Q. 15 feet long? And that was still a burned tire mark made by the Forsyth car?

A. It was a black rubber mark on the road.

Q. And they were double marks made by both sides of the car?

A. They were parallel marks.

Q. Did you see any marks made by the Oliver truck?

A. Not before the point of impact. There was quite a bit of dirt and collection of stuff, that accumulates on a farm truck, that was knocked off on the road at the point of impact.

Q. And all of that dirt, as I understand it, was in the right-hand lane going towards Virginia Beach; is that right?

H. C. Guy, Jr.

A. The collision occurred on the south side of the road, or in the eastbound lane.

Q. That would be the right-hand most lane going towards Virginia Beach?

A. Yes.

Q. That was where the collision occurred, and that was where the dirt was?

A. It was in the right-hand lane going east.

Q. And there was no dirt, as I understand, in either the center lane or in the left-hand lane going towards Virginia Beach?

page 15 } A. No.

Q. Did you talk with him afterwards?

A. Mr. Forsyth?

Q. Yes.

A. After Mr. Forsyth had received medical attention, he came back to the scene, and I talked with him. He told me at that time that he saw the truck stop there—or, he saw the truck was stopped, and he thought it was going to stay stopped.

Q. So he told you he saw the truck while it was in a stopped position?

A. He was the one who confirmed the point where Jessie Allen had definitely stopped.

Q. Did Mr. Forsyth say anything to you about looking at some men on the side of the road; that he was watching them?

A. If he said anything about watching men on the side of the road, I don't recall.

Q. Did he say anything about how fast he was traveling?

A. I asked him how fast he was going. He said he was traveling at a speed of approximately 50 miles an hour.

Q. I am going to get you, if you will, Mr. Guy, to draw a little diagram in order to make it a little clearer to me the positions of those two vehicles after the accident
page 16 } was all over?

A. (Does as requested.)

Q. Which would be east?

A. This is towards Virginia Beach, in this direction. This is a diagram of the roadway at the point of the accident. This is Witch Duck Road coming into Chinese Corner, and this is the Virginia Beach Boulevard, going to Virginia Beach. The Forsyth car was going in that direction, and the truck, operated by Allen, was going in this direction. There is a stop sign here. The truck came up here and stopped. The car

H. C. Guy, Jr.

was going this way. The truck came out here and got in this lane, and the Forsyth car struck it right about the door, right here. Now, that was the point of impact. As they hit, the car went in this position. The truck dragged the car—changed the direction of the car, and it went up here. The truck was wholly in the Witch Duck Road. The car was partially on the road back here and partially on the Virginia Beach Boulevard, right beside the truck—on the right-hand side of the truck.

(The diagram was received and marked “Defendant’s Exhibit No. 1”.)

By Mr. Rixey:

Q. Mr. Guy, would you know the width of Witch Duck Road?

A. No, sir. I did not measure it. I think I can page 17 } give you a pretty close approximation. It is about a 20-foot road.

Q. You are talking now about the hard surface part?

A. Yes.

Q. Now, the hard surface part of the Virginia Beach Boulevard is how wide?

A. 33 feet—there are three 11 foot roads.

Q. So I take it that at the moment of impact, as you have shown there, two lanes were clear?

A. Two lanes were open.

RE-DIRECT EXAMINATION.

By Mr. Pileher:

Q. How long was the truck? Do you recall?

A. The length of the truck?

Q. Yes.

A. No, sir, I did not measure the truck.

Q. Can you give us an approximate length?

A. If I answer that, it would be purely a guess.

The Court: Well, you cannot guess, but if you can approximate it, you can say so.

By Mr. Pileher:

Q. Was it a tractor-trailer unit?

A. No; it was a straight farm truck.

H. C. Guy, Jr.

Q. Did it have a stake body on it?
page 18 } A. It is what I would call a stake body. It is
just a regular farm truck that you see every day.

RE-CROSS EXAMINATION.

By Mr. Rixey:

Q. You mean it did not have dual wheels?

A. It had one set of dual wheels, but it did not have auxiliary wheels.

Q. What make of truck was it?

A. It was a '40 Ford.

By Mr. Pilcher:

Q. A 1940 Ford?

A. Yes.

Q. And where was the point of impact on the truck?

A. At the back part of the door, in the body.

Q. Just in front of the body, or right in the corner of the body, or where?

A. The door of the truck and the body are right close together. There is only a small panel between them. It hit right there.

Q. Had the rear of the truck cleared the north lane or the center lane of the Virginia Beach Highway at the time of impact?

A. I should not think that the center lane would have been cleared at the time of impact. I should think that
page 19 } a portion of the truck would still have been in the
center lane at the point of impact.

Q. Which is the primary road and which is the secondary road at that intersection?

A. Well, there is a stop sign on Witch Duck Road. That would make it a secondary road. Virginia Beach Boulevard would be a primary road, or Route 58.

By Mr. Rixey:

Q. Do you know a man named Larry Hamilton?

A. When I see him.

Q. Did you see him at the scene of this accident?

A. I did not see him that morning, no, sir.

Mr. Pilcher: I object to this line of questioning.

The Court: I sustain the objection.

Gordon Forsyth.

Mr. Rixey: You say you won't permit it?

The Court: Unless the man shows up, and he offers him for evidence, then I will let you show it. I think you will have to keep the officer here if he objects to it. Do you object to it, Mr. Pilcher?

Mr. Pilcher: No, sir, because I do not think it makes any difference.

The Court: Go ahead.

By Mr. Rixey:

Q. You say you know him, and you did not see him at the scene?

page 20 } A. I didn't see him that morning. It took some time, from the time the accident occurred, for me to get to the scene of the accident.

Q. How long did it take you to get there?

A. Between 15 and 20 minutes.

Q. How long did you stay after you got there?

A. I stayed there quite a good while. I guess I stayed there an hour and a half.

Q. And you are satisfied that this Mr. Larry Hamilton was not there at any time that you were there?

A. Mr. Hamilton lives right there, and I would not like to say whether he was there. If he was, I don't remember seeing him. Mr. Hamilton's place of business is right in sight of where this thing occurred.

By Mr. Pilcher:

Q. If Mr. Hamilton said he saw the accident, would you discredit him?

A. No.

Q. Did you get any subpoena for today?

A. I got two.

page 21 }

GORDON FORSYTH,

the plaintiff, having been first duly sworn, testified as follows:

Examined by Mr. Pilcher:

Q. Mr. Forsyth, are you the plaintiff in this suit?

A. I am.

Q. Will you tell the Court your name and address.

A. Gordon H. Forsyth. At the present time I live at 410 16th Street, Virginia Beach. At the time of this accident I lived at 32 Holly Road, Virginia Beach.

Gordon Forsyth.

Q. Mr. Forsyth, were you in an accident on the morning of November 10, 1947?

A. I was.

Q. By whom were you employed at the time of this accident?

A. At the time of this accident I was employed by the State Farm Insurance Company, as an automobile claims-adjuster.

Q. Will you tell the jury the circumstances surrounding this accident?

A. The Thursday previous to the accident I had gone to the Eastern Shore for the State Farm Insurance Company to investigate some claims. My business over there was ended on Friday around noon. Instead of returning—

Mr. Rixey: If Your Honor please, I do not see what that has to do with this case.

page 22 } The Court: I do not either, Mr. Pilcher.

Mr. Pilcher: He started back a little previous. He will get right up to the morning of the accident.

The Court: Bring him up to the morning of the accident.

A. I arrived in Norfolk on Monday morning from Washington, D. C., on the boat. The boat arrived around 8 o'clock, or a little before. At the time I got my car off, I guess it was about 8. I wanted to go down to Virginia Beach to change my clothes and wash, preparing to go to the office. I had no specific time to be in the office, as I had no appointments. Most of my work was confined to the outside—on the road.

I was traveling east on Virginia Beach Boulevard, approaching the intersection of Witch Duck Road. As I approached that road—it is very straight going down from Davis corner to Chinese Corner; it is a perfectly straight road—I saw a group of colored people standing in the triangle, waiting for one of the buses going down to Virginia Beach. I guess I was approximately 100 feet from the intersection when I took my foot from the accelerator, or put it over to the brake pedal in order to slow down while I passed them. Just as I got my foot on the pedal, this truck—

page 23 } By Mr. Rixey:

Q. On the propeller?

A. On the brake pedal. The truck was southbound on Witch Duck Road, and which I thought—I had seen it come

Gordon Forsyth.

up. I can't really remember, gentlemen, whether I saw it come up and stop, but I remember seeing the truck there. Here was traffic coming towards me from Virginia Beach going toward Norfolk, and, as one of the cars went past this road, this truck suddenly came out—drove out in front of me. I guess I was 75 or 80 feet from the intersection at that time. I immediately applied my brake—pushed it as far as I could to the floor—and skidded and hit the truck. There was absolutely no opportunity to stop my car prior to the point of reaching that intersection or avoid hitting the truck.

Mr. Rixey: If Your Honor please, that is a conclusion.

The Court: I sustain it, because I think that is argumentative. You tell the jury the facts, and they will draw their own conclusions.

A. That is the story.

By Mr. Pilcher:

Q. How fast were you going prior to seeing these people on the side of the road?

A. I was going approximately 50 miles an hour
page 24 } just prior to the point where I saw these people
waiting for the bus.

Q. You say approximately. Do you mean you were going over 50 miles an hour or under 50 miles an hour?

A. No, sir.

Mr. Rixey: I think that is improper. That is a leading question.

Mr. Pilcher: I withdraw the question then.

By Mr. Pilcher:

Q. Are you familiar with that intersection?

A. Yes, sir, I am. I have lived at Virginia Beach since 1946, and I travel that road back and forth every day; sometimes more than once or twice a day. I knew that there were stop signs on both sides of the intersection, on Witch Duck Road.

Q. Did you rely on that knowledge?

A. I did, to the point that when I saw this truck was stopped and the other cars were traveling towards Norfolk, I just could not expect any truck to pull out, because there was other traffic going to Norfolk. This other traffic I could see was still below—as a matter of fact, this slipped my mind just now: When that truck came across the intersection, Jessie Allen had his head turned to his left, looking down east, down the road at the traffic that was approaching him.

Gordon Forsyth.

I could see his head turned directly east, as I am
page 25 } looking at you gentlemen now. He at no time that
I saw him looked to his right; rather, to the west
towards Norfolk from the direction that I was coming.

Q. You said first you saw the truck stopped at the stop
sign?

A. Yes.

Q. Where was the next time you saw the truck?

A. Coming from behind an automobile that was going west.
As that automobile cleared the intersection, there was a distance—I can't estimate the distance between that car and the cars that were following it—but then this truck immediately pulled out behind the westbound car and started across Virginia Beach Boulevard.

Q. After the accident did anyone stop there?

A. Yes, they did.

Q. Who?

A. One in particular was Dr. Taylor.

Q. What did you do after the accident?

A. Dr. Taylor took me over to his car and put a bandage on my head, and took me in his car to DePaul Hospital. We left within two minutes of the time of the accident.

Q. How long did you stay at DePaul Hospital?

A. I think I got back to the scene of the accident around 11:30. I may be wrong. It seemed to be about 11 or 11:30.

Q. Did you have any medical expense with re-
page 26 } gard to this accident?

A. Yes, I did. I have a \$7 hospital bill in the Emergency Room, \$25 for X-rays, and I think \$23 to Dr. Taylor.

Q. What injuries did you sustain in this accident?

A. I received a laceration right up here in the center of my forehead.

Q. Show that to the jury.

A. (Does.)

Q. This laceration here (pointing)?

A. That is right.

Q. Was that as a result of the accident?

A. That is the result of the accident. There is one across the bridge of my nose, one on my right knee, and my shoulders and muscles were injured. I don't know how severely, but they were all bandaged for several days.

Q. You heard the officer testify just now relative to skid marks. Could you tell the jury the approximate locations of the cars after the accident—the skid marks?

Gordon Forsyth.

A. Well, I did not get much chance to look at the cars right after the accident, because blood was coming out of my head pretty severely right then. But my skid marks, as the officer testified, were 55 feet, 4 inches from the extreme right-hand side of the road, and they were perfectly
page 27 } straight. There was no weaving in them showing that the brakes were bad, or that one brake was tighter than the other which would pull it out of line. It led, as I say, for 55 feet right to the point of impact. My car struck the truck right at the door—the right door—with the bumper going underneath the truck's running board. There wasn't any damage to my front bumper at all. It was completely on the front of the grill.

Q. Did you have any conversation with Mr. Allen relative to the accident?

A. Yes. When Dr. Taylor pulled up and stopped and took me over to his car to bandage my head, Allen had also received a slight cut, and Dr. Taylor put a little patch on that. At that time I asked him why he came out on the road. He said, "Mister, I didn't see you." They were his only words. At that time Dr. Taylor got me into his car and pulled away.

Q. You have testified that you were employed by the State Farm Insurance Company?

A. Yes, sir.

Q. Do you know how quickly you can stop your car going at 50 miles an hour; how far you will skid your tires at 50 miles an hour?

A. Well, according to the safety regulations, Mr. Pileher, at 50 miles an hour you are traveling 73 and three-
page 28 } tenths feet per second. The brakes of an automobile at that speed will cause it to stop at a minimum of 128 feet. The average driver's reaction time per second in feet is 55 feet. A total stopping distance for driver and automobile would be 183 feet. In other words, at 50 miles an hour, according to the Safety Council, they have figured it takes 183 feet to stop an automobile in a skidding process.

CROSS EXAMINATION.

By Mr. Rixey:

Q. Mr. Forsyth, I understood your testimony was that you saw a group of colored people alongside the road. Was that to your right?

Gordon Forsyth.

A. Mr. Rixey, that group of colored people was standing in a triangle that is east of the intersection—east of where the accident occurred. They were directly in front of me. As I drove down the road, I could see those colored people.

Q. Were they in the center of the road?

A. No, not in the center of the road. There is a very wide opening there, and there is a triangle that comes in. If I can borrow this diagram, I can describe it.

Q. Instead of destroying that, suppose you take another one, if you will, sir.

A. I will just draw it roughly. This is my diagram page 29 } rection, going east on Virginia Beach Boulevard.

The colored people that I refer to were standing down here in this triangle.

Q. Just put a "C" there.

A. All right, sir (does). They were standing right in that triangle, waiting for the bus.

Q. As I understand it, that triangle is made by the southern edge of the Virginia Beach Boulevard and another road that goes off at an angle?

A. That is right.

Q. That is in addition to the Witch Duck Road?

A. Yes, sir.

Q. So there is another road that comes in at that point at the junction of Witch Duck Road and Virginia Beach Boulevard?

A. That is right, sir. There is a service station over here, and a store right down in here.

By Mr. Pilcher:

Q. But those colored people were further east than Witch Duck Road?

A. That is right. The accident occurred here, and colored people were some 35 or 50 feet east.

By Mr. Juror:

Q. Is that the Holland Swamp Road?

A. Yes, sir.

Q. And this is Tommy Davis' place right here? page 30 }

A. That is right.

Q. Is there a store or building in here?

A. There is a service station, or old store of some sort, that has some pumps up in there.

Gordon Forsyth.

By Mr. Rixey:

Q. I understand, Mr. Forsyth, that your testimony was that you saw a group of colored people when you were about 100 feet away; is that correct?

A. That was my approximate distance, Mr. Rixey. I can't be exact.

Q. That was the first time you saw the colored people?

A. I can't say that it was the first time I saw them.

Q. If those colored people were 35 to 50 feet east of the intersection, then at the time you saw those colored people you were 50 to 85 feet from the intersection; is that right?

A. Approximately. As I said before, about 100 feet. It may have been a little bit more or a little bit less.

Q. Had you *see* the truck at that time or not?

A. Yes, Mr. Rixey, I think I had.

Q. You had already seen the truck?

A. That is right, sir.

Q. I understood your testimony before was that you saw the colored people first and then you saw the truck
page 31 } afterwards. But, I am mistaken about it?

Mr. Pilcher: May it please the Court—

The Court: He is on cross examination.

By Mr. Rixey:

Q. Which did you see first?

A. Mr. Rixey, I won't be able to answer that truthfully; I mean, whether I saw the colored people first or the truck first. That has been 11 months ago. I saw them both within a fraction of a second.

Q. I understand that your attention was primarily centered upon the colored people?

A. No, sir.

Q. It was not?

A. No, sir. My attention was centered straight ahead.

Q. There was a stop sign over there?

A. Yes, sir. I knew there was a stop sign, and I saw the truck.

Q. You saw the truck standing there?

A. That is right.

Q. There is no question about that?

A. There is no question about that.

Q. It was standing perfectly still when you first saw it?

A. It may have been still or just moving up there; I don't know.

Gordon Forsyth.

page 32 } Q. I want to know what you do know about it?
A. Sir?

Q. I want to know what you do know.

A. To me it appeared to be standing perfectly still.

Q. How far away from the boulevard was it when you saw it?

A. It was pretty well close up to the boulevard, Mr. Rixey.

Q. How far do you think you were from the intersection when you saw the truck standing there?

A. Approximately 100 feet.

Q. And you say you were traveling at 50 miles an hour. Traveling at 50 miles an hour, how fast were you going a second?

A. I think it is about 53 feet.

Q. At 50 miles an hour?

A. 73 feet (referring to card).

Q. So from the time that you say that you saw the truck standing there off the boulevard, standing still, when you were about 100 feet away, you would travel that distance to the intersection in something over a second? Is that your testimony?

A. Rephrase that question for me.

Q. I understood you to say that when you first saw the truck standing still off the boulevard, you were about 100 feet away traveling at 50 miles an hour?

page 33 } A. Yes, sir.

Q. You say that traveling at 50 miles an hour you would go 73 feet per second?

A. That is right.

Q. So how long would it take you to travel 100 feet, traveling at 50 miles an hour?

A. Approximately a second and a half or a second and three-quarters.

Q. About a second and a third it would be, wouldn't it?

A. Approximately.

Q. So you never saw that truck, whether it was standing still or whether it was moving, until a second and a third, or approximately, before you struck it, did you?

A. Until he started to pull out—

Q. Just answer that question.

A. No, that is not so. You are getting me kind of balled up.

Q. I think the jury can judge that. You were traveling 50 miles an hour?

A. That is right, sir.

Gordon Forsyth.

Q. Your attorney here tried to suggest to you that you might have been going a little less than 50 miles an hour, but you would not say that, would you?

A. Mr. Rixey, I wasn't looking at the speedometer. I judge that my speed was approximately 50 miles an hour. It could have been less.

Q. You told the officer you were going 50 miles an hour, didn't you?

A. I told him approximately 50 miles an hour.

Q. You told your lawyer you were going 50 miles an hour, didn't you?

A. Approximately 50 miles an hour.

Q. And so you tell this jury here today that you were going 50 miles an hour.

A. Approximately 50 miles an hour.

Q. At the time you first saw the truck, wherever the truck was, you were traveling at 50 miles an hour and you were 100 feet away from the intersection; that is right, isn't it?

A. When that truck started to pull out on me, Mr. Rixey, I had my foot on the brake.

Q. I am talking about when you first saw the truck.

A. There was no waiting period for me to put my foot from the accelerator to the brake pedal.

Q. I am going to ask you to answer my question, if you will. I understand that when you first saw the truck, wherever the truck was, whether it was moving or standing still or where it was, you were traveling at 50 miles an hour and you were within 100 feet of the intersection?

page 35 } A. Approximately 50 miles an hour. My judgment was 100 feet, more or less.

Q. And you say that your skid marks were perfectly straight?

A. Perfectly straight.

Q. And the right-hand mark was 4 inches from the right-hand edge of the hard surface?

A. That is right.

(The second sketch was received and marked "Defendant's Exhibit No. 2.")

Mr. Pilcher: May it please the Court, at this time I would like to determine whether Larry Hamilton is here.

(Does not answer.)

Mr. Pilcher: May it please the Court and gentlemen of

Gordon Forsyth.

the jury, this is what Dr. Taylor would testify to if he had remained. Mr. Rixey, Dr. Taylor and I just jotted down a few notes.

“That Gordon Forsyth had been in an accident November 10, 1947, about 8:30 A. M. I came by just after it happened. Mr. Forsyth was bleeding from a cut over his forehead and abrasions of the face. I took him in my car to the emergency room of DePaul Hospital, and sutured the lacerations and X-rayed his head and right arm for fractures. No fractures were found. He came to my office for dressings until his injuries were healed. My bill was \$23.”

I rest, if Your Honor please.

Mr. Ashburn: Your Honor, it is necessary for me to offer some testimony in support of the special plea which I filed. Is this the appropriate time?

The Court: I will leave it entirely with you gentlemen.

Mr. Ashburn: Which do you prefer, Mr. Rixey?

Mr. Rixey: If Your Honor please, I think possibly we had better take that matter up with Your Honor.

The Court: Suppose you wait a little while. You have no objection to his offering the evidence?

Mr. Rixey: Well, I understood that Your Honor struck the plea out, so there is no evidence to be admitted.

The Court: No. Let me say this:—

Mr. Rixey: We can take the matter up later.

A Juror: Your Honor, can I ask a question?

The Court: You cannot ask anybody a question except a witness.

page 37 }

GORDON FORSYTH,

being recalled, further testified as follows:

By a Juror:

Q. I would like to know what time you left the boat.

A. I left the boat at approximately 8 o'clock. That was about the time I got my car off.

By Mr. Rixey:

Q. You came in from Washington?

A. That is right, sir.

Q. And you brought your car down on the boat?

Junius Miller (col.).

A. Yes, sir.

Q. What time does the boat dock from Washington?

A. It depends upon whether it is early or late, Mr. Rixey.

Q. Was it early or late on this particular occasion?

A. As far as I remember, it was on time.

Q. What time would it get there if it were on time?

A. It is supposed to get in around 7 o'clock.

Q. How long did it take you to get the car off the boat?

A. I think I waited about 15 minutes for my car to come off the boat. I was on the pier about 7:30.

Q. And you traveled all the way down there at 50 miles an hour, did you?

A. No, sir, not through the city.

page 38 } Q. How long had you been traveling at 50 miles an hour before this accident?

A. From the time that I was on the highway.

JUNIUS MILLER (col.),

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Examined by Mr. Rixey:

Q. Your name is what?

A. Junius Miller.

Q. Where do you live?

A. Lynnhaven is my mail route.

Q. How long have you lived in Princess Anne County?

A. All my life.

Q. We are talking about an accident that occurred at Chinese Corner on November 10, 1947, somewhere around 8:30, or thereabouts, between a truck driven by Jessie Allen and a car driven by Mr. Forsyth here. You remember the accident, do you?

A. Yes, I do.

Q. Where were you?

A. I was standing on the curbstone waiting for the man I was working for, Mr. Kramer.

Q. How many people were there with you?

A. There wasn't anybody standing there with
page 39 } me.

Q. You were there by yourself?

A. By myself.

Q. I want you, if you will, to designate that place on this sketch. Look at this. This is the Virginia Beach Boulevard, with three lanes?

Junius Miller (col.).

A. Yes, sir.

Q. This is in the direction of Norfolk, and this is in the direction of Virginia Beach. This is the Witch Duck Road and this, I understand, is the Holland Swamp Road. Are you familiar with that?

A. Yes, sir.

Q. Show us where you were standing?

A. Let me see how you are pointing your pencil. This is the Witch Duck Road?

Q. That is right. Norfolk is in this direction and Virginia Beach is down here.

A. Well, if this is the Witch Duck Road here, which way would Jessie be coming? Which way would the truck be coming?

Q. I want you to do the testifying. This is Norfolk down in this direction?

A. That is right.

Q. And Virginia Beach is down here. There are three lanes in the Virginia Beach Boulevard. Here is the Witch Duck Road back here. Here is the Holland Swamp Road. Does that mean anything to you?

A. Yes.

Q. Where were you standing, and which way were the two cars going? I want you to do the testifying.

A. This is going towards Virginia Beach?

Q. That is right.

A. This should be the Witch Duck Road coming here.

Q. Right across here?

A. Yes. This curbstone that I have reference to, that is not exactly parallel with the road here. But, I would say I was standing probably—if I would say this was the curbstone I was standing on—

Q. Would you be able to draw that if I gave you a piece of paper—a diagram of what you want to say?

A. If you will let me tell you what I have in mind, because I am afraid I would not draw it exactly right.

Q. All right.

A. If this is the road coming here, there was a State Highway stone that I was standing on.

Q. You were standing on a State Highway stone?

A. Yes.

Q. How far from the hard surface of the Virginia Beach Boulevard is that highway stone?

A. I could not say definitely.

Gordon Forsyth.

Q. Approximately? Is it 1 foot, or 10 feet, or 50
page 41 } feet, or what is it?

A. Probably 3 feet.

Q. It is on which side of Virginia Beach Boulevard as you face towards Virginia Beach?

A. The stone?

Q. Yes; where you were standing?

A. That stone wasn't exactly opposite the direction coming out from Witch Duck Road.

Q. Just listen to my question. I want to know on which side of Virginia Beach Boulevard was that stone. Was it on the left-hand side or the right-side side as you face towards Virginia Beach?

A. On the right-hand side.

Q. Where was it in reference to the Witch Duck Road?

A. It wasn't exactly parallel with the road, but kind of off just a little bit. I don't know definitely how far it was.

Q. Do you know the points of compass there: North and south?

A. I think I do.

Q. As you are going down towards Virginia Beach, you are going east, so north would be to your left?

A. Yes.

Q. And south would be to your right going down the Virginia Beach Boulevard, facing Virginia Beach; is
page 42 } that right?

A. Yes.

Q. Where would that stone be in reference to the Witch Duck Road?

A. Let me show you how I was standing. I was standing in this direction. This road wasn't exactly parallel with the stone. I was standing, looking in this direction across the highway. While I was standing there, Jessie Allen drove up. When he drove up I did not notice in what direction he was looking. I would say say that. But, as he drove up there, he stood there.

Q. Did he come to a dead stop?

A. He said he came to a dead stop.

Q. How long did he stay there?

A. I could not say, but he came to a stop. While he stood there, I was still looking not exactly at him, but I was waiting for my man. I didn't have my mind exactly on him, but I saw him come to a stop. Then in the meantime I heard a man applying his brakes to his car. That caused me

Junius Miller (col.).

to look then in that direction. Then when I looked, all of a sudden I saw the car hit.

Q. From what you saw, could you give the jury an idea of how fast that car going?

Mr. Pilcher: May it please the Court, I object to that.

A. I could not, because I don't know.

page 43 } The Court: He has said he doesn't know.

By Mr. Rixey:

Q. How far away was that car from the intersection when you first heard the application of brakes and looked at it?

A. I don't know because when I heard the brakes—naturally I would listen then—when I heard the brakes applying, I was still looking for my man. I was afraid he might get by me and I would not see him. When I heard the brakes applying to his car, then I looked.

Q. And you can't tell us how far it was away from the intersection when you first it?

A. No, I could not tell that.

Q. When you first saw it, it had its brakes on?

A. I am sure he had them on, because that noise I heard, I knew it was the brakes from his car.

Q. Tell us, please, what part of the automobile struck the truck?

A. Well, I don't know definitely. When the crowd began to rush up there, then I had to leave. I looked across and I saw my man coming. I am not able to tell you any more than what I saw just then.

Q. Did you talk with either one of these drivers after the accident?

A. No, I didn't.

page 44 } Q. How long after the accident did you get in a car and go off?

A. After the accident happened, in a few seconds I looked across the road and I saw Mr. Kramer coming. I got in his car. We didn't move away then, but I didn't hear no conversation from either one of them.

Q. In whose car did you get?

A. Mr. Kramer's—Dan Kramer, the man I was working for.

W. W. Oliver.

Q. When you talk about the highway stone, are you referring to the abutment of the highway ditch?

A. Yes.

Q. It is the abutment to the ditch?

A. This stone, I guess, must be the highway stone. That is the stone I stood on every morning.

Mr. Rixey: If Your Honor please, might I ask this witness to stand down and let Mr. Oliver draw a little diagram of that scene there?

The Court: I do not see any objection to it. Have you anything to say about it, Mr. Pilcher?

Mr. Pilcher: No, sir. I would like to have it cleared up for my own benefit, Judge.

page 45 }

W. W. OLIVER,

one of the defendants, having been first duly sworn, testified as follows:

This Witch Duck Road is supposed to be 30 feet—15 feet from center to center. But at this point, there is an angle there. There is an angle here of land that is not paved entirely. Right up in here is paved. There is an abutment right here. Here is where I think he was standing.

Junius Miller: That is where I was standing.

A. There is a distance from the south side of the Virginia Beach Boulevard at this point to this abutment of 30 feet; from the south side of the paved Virginia Beach Boulevard to this abutment is a distance of 30 feet.

By Mr. Rixey:

Q. And that abutment is the abutment to a culvert, I take it, that goes under the boulevard?

A. Yes.

Q. This is the Holland Swamp Road?

A. The Holland Swamp Road. The first building is probably 25 feet from the road here. Then it is several hundred feet from Witch Duck Road to the second store. Now, this store up in here is probably 200 feet from this point. There is a bus stop here. I don't know whether the group Mr. Forsyth was talking about was there, or whether he was talking about this man here.

page 46 }

JUNIUS MILLER,
being recalled, further testified as follows:

Examined by Mr. Rixey:

Q. Junius, you have heard Mr. Oliver describe this abutment here at the end of the culvert that goes under the boulevard. Was that where you were standing?

A. That was where I was standing.

CROSS EXAMINATION.

By Mr. Pilcher:

Q. You were waiting for Mr. Dan Kramer?

A. Mr. Dan Kramer.

Q. Where was Mr. Dan Kramer coming from? Was he coming from Norfolk or was he coming from Virginia Beach, or where?

A. I don't know where he was coming from. He was supposed to come in the same direction as Jessie was coming from.

Q. He comes up Witch Duck Road just like Jessie came from?

A. Yes.

Q. Were you standing to get in his automobile before he crossed the Virginia Beach Boulevard or after he crossed the Virginia Beach Boulevard.

A. I was standing there waiting for him.

page 47 } Q. On which side of the Virginia Beach Boulevard?

A. I was standing on the right-hand side. That stone I had reference to, that is on the right-hand side headed towards Virginia Beach.

Q. Mr. Kramer would have to cross the Virginia Beach Boulevard before he picked you up?

A. He was already across there. He had been out probably looking after some other matters. When I looked towards the store over there, I saw him coming.

Q. He had crossed the Virginia Beach Boulevard and was coming on down Witch Duck Road towards Princess Anne Court House?

A. He had already crossed. He was over on that side towards the store.

Q. Did you see Jessie Allen stop?

A. Yes, I saw him stop.

Q. Do you know Jessie Allen?

Junius Miller.

A. Yes, I know him.

Q. When he stopped, did you say any words to him? Did you say anything to him when he stopped there?

A. I couldn't say anything to him, because he was on the other side of the road.

Q. After the accident?

A. No, I didn't say a word to him.

Q. You were facing towards Virginia Beach page 48 } Boulevard?

A. I was facing towards the Witch Duck Road.

Q. Right up the Witch Duck Road towards the Virginia Beach Boulevard?

A. I had the privilege of looking in either direction.

Q. Which way did this automobile come from—

A. From Norfolk.

Q. From your left?

A. He was coming from my left.

Q. Going to the right?

A. Yes.

Q. When was the first time you saw the automobile?

A. The first time I saw this automobile was when I heard the brakes applied. That was the only time I recognized the car then, when I heard the brakes, as it was such a noise. Then I turned to look, and then I saw this car.

Q. How long did Jessie Allen stay stopped?

A. I could not possibly say.

Q. Did you see him when he drove up to this stop sign?

A. Yes, I saw him. My mind was on this man as I was afraid he would get away from me.

Q. But you looked at Jessie Allen?

A. I looked at him for a second or two.

Q. Did he stay stopped for a second or two?

A. Certainly he did.

page 49 } Q. Did he wait for any traffic to go by before he started out?

A. He waited; how long he was waiting, I can't tell you.

Q. When you saw Jessie Allen—did you see Jessie Allen start up again?

A. I did not notice that.

Q. How far had Jessie Allen gotten when you first heard Mr. Forsyth's brakes?

A. I did not understand you.

Q. You say you saw Jessie Allen stopped?

A. Yes, I saw him.

Junius Miller.

Q. How far was he stopped from the Virginia Beach Boulevard? How far back up Witch Duck Road was he from the Virginia Beach Boulevard?

A. I really don't know, because I could not look that far across the road to see. I could not give you no answer on that.

Q. Where was he when he was hit?

A. Where was he?

Q. Where was Jessie Allen when his truck was hit?

A. He was on the highway there. How far he was, I could not say.

Q. He was in the middle of the highway?

A. I could not say definitely whether he was or not.

Q. Did Jessie Allen try to stop? Did you see any page 50 } evidence of his trying to stop at all?

A. I don't really know. I was looking for my man, and I was afraid if I saw too many things, I would lose the man who was to take me away.

Q. Where was Jessie Allen when you first heard Mr. Forsyth's brakes? When you looked around to see Mr. Forsyth, where was Jessie Allen?

A. He was coming across then.

Q. Was he in the middle of the road?

A. I said that I don't know whether he was in the middle or not.

Q. You don't know where he was?

A. He was on the highway when the other man hit him, but how far over I don't know. I would not dare say, because I don't know.

Q. When you saw Jessie Allen in the middle of the road—you have heard the brakes, and here is Jessie Allen in the Virginia Beach highway—could you see Jessie Allen in the truck then? Could you recognize that Jessie Allen was driving the truck?

A. I knew him, to begin with.

Q. You knew he was driving that truck?

A. Certainly, he was driving it.

Q. Could you see him in the truck?
page 51 } A. I did not notice.

Q. Could you see him through the windshield?

A. If I had took time to look; but, when I saw the accident, I was still looking for my man.

Q. There is no criticism about that. Did you see him behind the windshield? Did you see him steering the truck?

Lucas Jones (Colored).

A. Did I see him steering the truck?

Q. Yes. Could you see through his windshield?

A. I did not notice.

Q. Was his windshield clean enough to see through it?

A. I did not notice that.

Q. You don't know in which direction Jessie Allen was looking when he came out on the highway, do you?

A. I could not say.

LUCAS JONES (Colored),

called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Examined by Mr. Rixey:

Q. Your name is Lucas Jones?

A. Yes, sir.

Q. Where do you live?

A. Kempsville.

Q. How long have you lived in the County?

page 52 } A. About 8 years.

Q. Where were you at the time of the accident,

Lucas?

A. Chinese Corner.

Q. Where were you there?

A. Standing, waiting for the bus.

Q. Were you there at the same place where Junius Miller was, or were you down further?

A. I was down farther.

Q. I want you to tell the jury here in your own words what you saw about this accident. Did you actually see the accident?

A. Yes, sir, I did. I was standing up there.

Q. Tell us everything you saw.

A. All I know, Jessie Allen come up to the stop sign and stopped.

Q. Do you know he stopped?

A. Yes, sir.

Q. How long did he stay stopped there?

A. I would say about 2 or 3 minutes.

Q. What is that?

A. About 2 or 3 minutes.

Q. Did he let any traffic go by?

A. Yes, sir; both ways.

Q. Do you know how much?

Lucas Jones (Colored).

- A. He let several cars pass.
- page 53 } Q. And then he came on across, did he?
- A. Yes, sir.
- Q. How close did he stop to the hard surface part of the boulevard?
- A. I would say about 2 feet back.
- Q. And then he started across from a stopped position?
- A. Yes, sir.
- Q. Did he come across there fast or did he go slow, or what?
- A. He come across gradually.
- Q. Did you see the other car that struck him before it struck?
- A. No, sir, I didn't.
- Q. What?
- A. No, sir, I didn't.
- Q. You never saw it?
- A. No, sir.
- Q. Did you hear it?
- A. I heard it when he put on brakes.
- Q. When you heard him put on brakes, did you then look at it?
- A. Yes, sir. I looked around and, when I looked around, he was into the truck.
- Q. Did he hit it a hard blow?
- A. Yes, sir.
- Q. How far did he knock it?
- page 54 } A. I would say he knocked the truck about 2 or 3 feet.
- Q. You did not see the automobile before the actual impact?
- A. No, sir.

CROSS EXAMINATION.

By Mr. Pilcher:

- Q. You say that Jessie Allen was 2 feet from the Virginia Beach Boulevard?
- A. I said he drove about 2 feet to the road and stopped.
- Q. Two feet to the hard surface?
- A. That is right.
- Q. How far could Jessie Allen have seen towards Norfolk?
- A. About half a mile or a mile.
- Q. Half a mile or a mile?
- A. Yes, towards Norfolk.

page 55 } JESSIE JAMES ALLEN (colored),
one of the defendants, having been first duly
sworn, testified as follows:

Examined by Mr. Rixey:

Q. Your name is what?

A. Sir?

Q. What is your name?

Q. My name is Jessie Allen.

Q. How old are you, Jessie?

A. 60 years old.

Q. Where do you live?

A. I live in Princess Anne.

Q. How long have you lived in Princess Anne County?

A. I have been here ever since 1907.

Q. For whom do you work?

A. I work for Mr. Oliver.

Q. How long have you been working for Mr. Oliver?

A. Around 30 years.

Q. Are you trained for anything?

A. Yes, sir; driving, I was trained for that.

Q. Driving?

A. Yes, sir.

Q. Are you a mechanic?

A. Yes, sir.

Q. How long have you been a mechanic? How long have
you driven automobiles?

page 56 } A. About 25 years.

Mr. Pilcher: May it please the Court, I would like to object to some of these leading questions.

The Court: Sustained.

By Mr. Rixey:

Q. State whether not you were driving this truck belonging to Mr. Oliver at the time of this accident.

A. Well, on the 10—

Q. Wait a minute. You were driving it, were you?

A. Yes, sir.

Q. And you were working for Mr. Oliver at the time?

A. Yes, sir.

Q. I want you to describe this truck to the jury.

A. Well, this truck is a Ford truck, 1940, panel body.

Q. What?

A. 1940 Ford truck. It is a panel body. I was driving it on the 10th of November. I went out to work, and I had for-

Jessie James Allen (colored).

gotten some of my tools, so I turned around and started back home to get what I had left.

When I got back up there to the Virginia Beach Boulevard, I stopped and waited for several cars to pass coming from the Beach and coming from Norfolk.

Q. Jessie, did you stop before you started across there?

A. Yes, sir, I come to a complete stop.

page 57 } Q. How long did you stay stopped?

A. I stood there 2 or 3 minutes, or a little longer.

Q. How close were you to the boulevard while you were standing there?

A. I was in 4 feet of it.

Q. And then you looked both ways?

A. Yes, sir.

Mr. Pilcher: I object, may it please the Court.

The Court: I sustain the objection.

A. Yes, sir, I looked both ways. I stood there and looked both ways. Several cars came from the Beach going to Norfolk, and several cars came from Norfolk going to the Beach. So, after they all passed, I looked back again this way, and I seen no cars, and I looked back towards the Beach, and I pulled across. After I got across to the next lane, I heard brakes squealing. When I turned around, the car was on me then, so I throwed on the brakes to keep from sliding around any further. He hit me.

Q. When you were hit, where was your truck?

A. My front wheels was off the hard surface—the concrete. My cab was just about in a foot, I guess, off the concrete.

Q. About a foot from where?

A. Just like this is the front part of the truck
page 58 } and this is the cab.

Q. About a foot from the edge of the hard surface?

A. That is right.

Q. How far was the rear end of your truck at the time of the impact across the road?

A. That would make my wheels just across that center line.

Q. Would any part of your truck be extending into the middle lane?

A. The body is around 12 feet long, and it is about 2 feet, I guess, that sticks over the body—over the wheels.

Jessie James Allen (colored).

Q. What sort of blow did he hit you?

A. He hit me a terrible blow. He hit me hard enough to knock me around, I reckon, 15 feet.

Q. He knocked you 15 feet?

A. Yes, sir.

Q. What part of your truck did he strike?

A. He struck just between the cab and the back wheels; just about the center.

Q. Just about the center?

A. Just about the center of the truck.

Q. And you say he knocked you 15 feet?

A. Yes, sir, around 15 feet—the rear end of it.

Q. Did he blow any horn before he hit you?

page 59 { A. No, sir, no horn was blown.

Q. State whether or not there was sufficient room for him to have turned to his left and gone to the rear?

A. Yes, sir, there was plenty of room.

Mr. Ashburn: If Your Honor please, I object to that question, because it calls for an expression of opinion.

The Court: I think so.

Mr. Rixey: If Your Honor please, that is not an expression of opinion. I am asking him if there was sufficient room over there—

Mr. Ashburn: You asked him whether or not in his opinion there was sufficient room.

The Court: I sustain the objection.

By Mr. Rixey:

Q. I ask you then how much room there was between the rear end of your truck and the left-hand edge of the hard surface?

A. Well, there was a lane and two-thirds, any way, I will say that.

Q. Was anything coming at that time?

A. No, sir, there was nothing coming to the left of me at that time.

Q. Did you have any conversation with Mr. Forsyth, the driver of that car, there on the scene?

page 60 { A. No, sir, I didn't.

Q. Did you hear Mr. Forsyth say whether he saw you or not?

A. When I seen him, he was getting out of his car and coming on around there. About that time Dr. Taylor was around there, so he treated him. He asked me was I hurt. I had a

Jessie James Allen (colored).

cut up over my face, so he treated that. He put a plaster on it.

Q. I am not talking about Dr. Taylor. I am talking about Mr. Forsyth.

A. I said that I didn't have any talk with him.

Q. So you didn't say anything to him, and he didn't say anything to you; is that right?

A. Yes, sir, that is right.

CROSS EXAMINATION.

By Mr. Pilcher:

Q. Do you wear glasses, Jessie?

A. No, sir; only just when I am reading.

Q. You wear them when you are reading?

A. Yes, sir.

Q. Where had you been on the morning of November 10?

A. Where had I been?

Q. Where had you been?

A. I had just come from home and went down to page 61 } my work, and I had forgotten some of my tools, and I turned around to come back to get them.

Q. Who was in the truck with you?

A. No one.

Q. No one was in the truck with you?

A. No, sir.

Q. Had you already crossed the Virginia Beach Boulevard one time that morning?

A. I had crossed one time, yes, sir.

Q. And you went on up Witch Duck Road?

A. I went on up Witch Duck Road to the place where I work at.

Q. Then you turned around and started back?

A. Yes, sir.

Q. Did you have any special job up there to do where you were going to work that morning? What were you going to do?

A. Yes, sir, I had a special job there.

Q. What were you going to do that morning?

A. I work in a garage.

Q. You work in a garage?

A. Sure.

Q. What time are you due at work?

A. I am supposed to be at work at 8 o'clock.

Jessie James Allen (colored).

- page 62 } Q. You were late for work that morning?
A. No, sir, I wasn't late; I was on time.
Q. You were on time?
A. Yes, sir.
Q. Did you have time to go back home and pick up those other tools and still get to work on time?
A. No, sir, not to get back in that time.
Q. Had you already been to work that morning?
A. I had been to work, yes.
Q. Did anybody tell you to go and get those tools?
A. No, sir, no one told me.
Q. Did you tell anybody you were going to get them?
A. No, sir.
Q. You did not tell anybody you were going to get them?
A. No, sir.
Q. How long did it take you to go home and get those tools?
A. It is about six miles, I guess. I make it down there in about 20 or 25 minutes.
Q. What job did you have to do that morning?
A. Working on cars—automobiles.
Q. Working on automobiles?
A. Sure.
Q. Do you get paid by the hour?
A. Yes, sir.
page 63 } Q. Were you being paid while you went home?
A. I get paid by the day.
Q. Were you being paid while you went home that morning?
A. Sure.
Q. When you came to the Virginia Beach Boulevard, did you see a stop sign?
A. Yes, sir.
Q. Did you stop at the stop sign?
A. Yes, sir.
Q. How close is the stop sign to the Virginia Beach Boulevard?
A. I could not tell exactly how close it is, but I stopped right off of it.
Q. Where was the stop sign relative to your front bumper?
A. My front bumper, I will say, was in 4 feet of the hard surface.
Q. Your front bumper was?
A. Yes, sir. I was in four feet of it.
Q. Where is the stop sign? Is that four feet from the hard surface?

Jessie James Allen (colored).

A. No. I guess that is a little bit farther back.

Q. 25 feet or 30 feet?

A. No, sir, it is not that far.

page 64 } Q. Did you see Junius Miller?

A. Yes, sir, I saw him standing on the other side when I came to a stop.

Q. Did you speak to him that morning?

A. Not until after I had the wreck. I didn't have any talk with him.

Q. When you got up to the highway, how long did you wait?

A. I waited 3 or 4 minutes before I started to cross.

Q. Do you know how long 3 or 4 minutes are?

A. Yes, sir.

Q. I am not going to ask you to tell me how long it is, or to time it. How many automobiles went by?

A. Well, as near as I can guess, about 3 or 4 from the beach, and 2 or 3 from Norfolk.

Q. Three automobiles from the Beach?

A. Yes, sir.

Q. Where were they when they first came up there?

A. About as far as from me to that store out yonder.

Q. When you first came up?

A. When I came up.

Q. And those three cars went right by?

A. Yes, sir; and some more came from towards Norfolk.

Q. How fast were they going?

page 65 } A. They were driving around 40 or 45 miles an hour.

Q. And it took three or four minutes for them to go by there?

A. I guess it did. I stood and looked until I seen my way clear.

Q. Do you know how long an average traffic light stays green?

A. It is according to how much traffic runs under it.

Q. The average traffic light, how long will it stay green?

A. Three or four minutes, I guess; something like that.

Q. Would it surprise you to know that it stays green about 20 seconds?

A. I would not say. That is something I don't know.

Q. When you started off across the street, did you look towards Virginia Beach to see if anything was coming?

A. Sure.

Q. Did you see Dr. Taylor's car coming?

Jessie James Allen (colored).

A. No, sir. I seen him when he passed around me while I was standing there.

Q. Did you see him as you started out?

A. I said I seen him as he passed by me.

Q. Dr. Taylor's car?

A. Yes, sir. I was standing still then.

Q. You were standing still when Dr. Taylor's
page 66 } car went by?

A. When it went by.

By the Court:

Q. You mean after the accident?

A. No, sir. He went by and turned around. I think he said he turned around and came back. He heard the accident.

By Mr. Pilcher:

Q. Did you see any other cars coming from Virginia Beach?

A. No other cars.

Q. Did you look towards Norfolk when you started out?

A. Yes, sir, I looked towards Norfolk.

Q. How far could you see up the road when you looked towards Norfolk?

A. I could see up the road far enough to see a car.

Q. Could you see a mile?

A. No, sir, I couldn't see a mile.

Q. I think Lucas Jones said you could see half a mile to a mile up the road; is that right?

A. You probably could if you got out there in it.

Q. He said you were right there at the road, and you could see up the road?

A. I was 4 feet from it.

Q. Did you hear the police officer testify that if you were out of the road you could see half a mile?

page 67 } Mr. Rixey: He said in the road.

A. He sure did. I was looking right at him. He said in the road.

By Mr. Pilcher:

Q. Were you in the road?

A. No, sir, I wasn't in the road.

Q. How wide is the shoulder on the Virginia Beach Highway?

Jessie James Allen (colored).

A. I guess it is around 10 feet; 9 or 10 feet, or maybe farther.

Q. You had passed the trees and bushes in that vacant lot?

A. I don't know whether I had or not, but I stopped where the stop sign said to stop.

Q. How far up the road towards Norfolk could you see when you were parked just 4 feet from it?

A. I could see far enough to know my way wouldn't have been clear if there had been a car coming.

Q. And then you started on across?

A. Certainly.

Q. How many gears does that truck have?

A. Four.

Q. Four gears?

A. Four.

Q. Which gear did you start off in?

page 68 } A. I started across in first.

Q. First?

A. First gear. I have got a low speed on it, but I don't never use that, no way, unless we are pulling a heavy load.

Q. So you started off in second?

A. First gear.

Q. But then there is one lower than that?

A. First, second, and third.

Q. And you drive all the time in third gear?

A. High gear.

Q. So the fourth gear is an extra low gear?

A. Yes.

Q. How fast can you go in that first gear or second gear?

A. I don't know, sir. I have never tried it out.

Q. How fast do you usually "get going" before you shift?

A. I wouldn't have been going across there much more than—I would say not over 5 or 6 miles an hour, anyway.

Q. You were going 5 or 6 miles an hour?

A. Not any more in that first gear.

Q. How long did it take you to go across the road?

A. I would not know how long it takes me to go across there.

Q. How far did you actually go from the time
page 69 } you started until the time you were hit? How
far did you travel?

A. I traveled across there to the last lane.

Q. How far is that in feet—10 feet, or 15 feet, or 50 feet?

A. 18 feet.

Jessie James Allen (colored).

Q. 18 feet?

A. It is supposed to be. Each lane is 9 feet, isn't it?

Q. Your truck went how far now?

A. I say, I suppose these lanes are 9 feet, aren't they?

Q. Each lane?

A. Yes, sir.

Q. I think the police officer said that it was 11 feet for each lane.

A. Well, I don't know.

Q. So you went 33 feet, plus the 4 feet that you were off the highway?

A. Well, my front wheels were extending in the last lane.

Q. So in other words, you went about 37 feet?

A. I guess so.

Q. How long would it take you to go that 37 feet?

A. I could not tell you long it take me.

page 70 } Q. You were going 10 miles an hour when you were hit?

Mr. Rixey: He said he was going 5 or 6 miles an hour.

A. I said 5 or 6 miles an hour.

By Mr. Pileher:

Q. Did you have any load on the truck?

A. Nothing at all.

Q. When was the first time you saw Mr. Forsyth?

A. When was the first time? When I heard the brakes squeal, and he was right up on me.

Q. You did not see him before?

A. No, sir, I did not.

Q. How close was he to you when you first saw him?

A. He was the distance from here to that chair.

Q. Is that five feet?

A. Yes, sir. He was so close that I just threw my foot on the brake and come to a stop.

Q. Did he damage your right front fender?

A. Yes, sir; he bent up the corner.

Q. He bent up the right front fender?

A. I say, he bent up the corner of the step, back of the cab.

Q. Did he damage your right front fender?

A. Yes, sir, he caused damage there by hitting
page 70 } the step.

Jessie James Allen (colored).

Q. He hurt the right front fender?

A. Yes, sir.

Q. Did he hurt your right front wheel at all?

A. No, sir; he did not get up that far.

Q. How about the door?

A. He broke the motor mount all off.

Q. He broke the motor mount off?

A. And bent both sides of the chassis, in a rainbow fashion.

Q. He broke the motor mount?

A. Yes, sir.

Q. That is up in front of the cab, isn't it?

A. That is right. He did that when this car struck in the center and jerked the motor around.

Q. So he did a lot of damage up around the front end of your truck, too, didn't he?

A. He did by hitting something.

Q. How much damage did he do to the right front fender?

A. No more than just bent it up. When he struck the running board, he bent the fender up.

Q. Do you have hub caps on the truck?

A. No, sir. It just has little cams that you screw in.

Q. Did he hurt that?

A. No.

page 72 } Q. He did not hit that far?

A. No, sir.

Q. Where did his right front fender hit your truck?

A. It just hit the edge of the cab and the running board.

Q. And the edge of the fender?

A. The fender runs out about even with the cab, behind.

Q. I am talking about his right front fender. Did his right front fender hit your right front fender?

A. That is about where it hit at.

Q. His right front fender hit your right front fender?

A. Yes.

Q. And his left front fender hit your cab?

A. His right front fender hit.

Q. This (model) is a bus, and this is an automobile. You can place the back wheel here and the front wheel. Whereabouts along there would he have hit; approximately whereabouts?

A. This is the front part of the truck right here. This is the edge of my fender.

Q. Was that where he hit?

A. Right at the back.

Jessie James Allen (colored).

Q. You have got a lot of body on that truck?

A. Here is the wheel back here. He just did miss the rear wheel.

page 73 } Q. Then he hit you just about in the middle?

A. Just about the middle.

Q. How long is your truck?

A. I guess it is around 16 or 17 feet.

Q. You have got a 12 foot body?

A. Yes, sir.

Q. And you have got a door on there?

A. Yes, sir.

Q. How wide is that door?

A. I don't know how wide it is.

Q. It is an average door about 4 feet.

A. No, sir.

Q. About a 3 foot door?

A. Yes.

Q. How far out is your hood?

A. Well, it extends about three feet.

Q. The hood is about 3 feet?

A. Yes, sir. That would 18 feet.

Q. You have got a bumper out there, so it would be about 20 feet?

A. Yes.

Q. And your bumper was one foot over the Virginia Beach Boulevard when you were hit?

A. No, sir; the front wheels were.

Q. So then you say 18 feet for the truck, and it would be 20 feet if you include the bumper?

page 74 } A. It would not be 20 feet.

Q. How far would it be?

A. The garage we have, it would not go in there.

Q. You have a 20 foot garage, and the truck would not fit in there?

A. I say, if it were that long, it would not go in there.

By Mr. Rixey:

Q. Does the truck go in the garage?

A. Yes, sir.

By Mr. Pilcher:

Q. In other words, how far is it from your front wheel to the back of your truck—to the back of the body? Is it about 18 feet, or 15 feet?

Jessie James Allen (colored).

A. From the front wheel to the back end of the body?

Q. That is right.

A. I reckon it would run 17 or 18 feet.

Q. From the front wheel to the back of the body?

A. Yes.

Q. And your truck was one foot over, which mean you extended back on the highway about 17 or 18 feet?

A. The cab was one foot over there.

Q. Just now you said the front wheels.

Mr. Pileher: That is all.

Mr. Ashburn: Your Honor, I want to ask him page 75 } one or two questions.

Mr. Rixey: Your Honor please, I think only one counsel ought to examine the witness.

The Court: Do you object to it?

Mr. Rixey: Yes, sir.

The Court: I will overrule you. You can except to it.

By Mr. Ashburn:

Q. Jessie, have you decided how long you think this truck was?

A. Have I decided?

Q. Have you decided how long you think it was?

A. I said it is around 17 or 18 feet.

Q. An ordinary Ford passenger car is a little over 16 feet long, isn't it? You say you are a mechanic.

A. I haven't measured either one.

Mr. Rixey: I object to counsel doing the testifying here. Mr. Ashburn says an ordinary Ford car is a certain length.

The Court: He was asking him if it was.

Mr. Rixey: But, he was telling him.

Mr. Ashburn: Your Honor, the witness is on cross examination. I am entitled to lead him or interrogate him in any manner I please.

page 76 } Mr. Rixey: He is not entitled to testify.

The Court: No.

By Mr. Ashburn:

Q. Jessie, do you agree, as a mechanic, that an ordinary Ford passenger car is at least 16 feet long, from the front bumper to the rear?

A. I don't think it is.

Jessie James Allen (colored).

Q. Certainly, this Ford truck that you were driving is much longer than an ordinary Ford passenger car, isn't it?

A. I said about 17 or 18 feet.

Q. This is a big stake body Ford truck?

A. No, it is not a big stake body.

Q. Is it a ton and a half?

A. A ton and a half.

Q. You told the jury on your direct examination, in response to your counsel's question, that it had an overhang. I understood you to say, of 2 or 3 feet?

A. What do you mean?

Q. On the rear, behind the wheels?

A. Yes, sir, about 2 feet.

Q. Have you ever measured it?

A. I have measured the body part.

Q. But you never measured from the front bumper to the rear bumper?

A. No.

page 77 } Q. Would you say it is not as long as 24 feet?

A. The truck?

Q. The whole business—from the front bumper to the rear end?

A. I would swear it is not 24 feet.

Q. You would?

A. Yes, sir.

Q. But you have never measured it?

A. I have never measured it, but I know it is not 24 feet.

Q. Although you knew this case was going to be tried, and you knew the length of the truck was an important question, and the truck was in your possession, you never measured it?

A. No, I never measured it.

Q. Mr. Rixey asked you if you had any special training for anything, and you said you had special training as a driver?

A. Yes, sir.

Q. Where did you take that training?

A. I taken it down at the Base.

Q. As a matter of fact, how long have you been a qualified driver?

A. Ever since 1918.

Q. Have you ever held a driver's permit?

page 78 } A. Have I ever had one?

Q. Yes.

A. Yes, sir.

Q. When did you last have one?

Jessie James Allen (colored).

A. I had one.

Q. Do I understand that you did not get a driver's permit the last time you were supposed to renew it?

A. No, sir, I did not get one then.

Q. You did not get any then?

A. No, sir.

Q. How many years has it been since you were not entitled to drive?

A. It has been ever since that three year pardon was over.

Q. That was in '42 or '43?

A. I don't know just what year that was.

Q. You were customarily driving for Mr. Oliver at the time of this accident?

A. No, sir. I worked on the farm there.

Q. So you were not the regular driver of this truck at all?

A. No, sir.

Q. They just loaned you the truck that day for you to go home and get your tools?

A. No, sir, he didn't loan it to me. He always
page 79 } kept it down at the shop.

Q. So you just got in it to go home and get your tools?

A. I always do what I am required to do down there.

Q. The shop is an automobile repair shop?

A. That is right.

Q. And the truck happened to be there, and you took it?

A. Yes, sir.

Q. Jessie, come down here before this jury just a minute. (Does.) You came out from the north side of the Witch Duck Road and crossed over to the south side?

A. Yes, sir.

Q. If you had special training as a driver, you knew the law required you to come to a full stop before entering the Virginia Beach Boulevard?

A. Yes, sir.

Q. And you did so?

A. Yes, sir.

Q. And you knew you were required to come to a stop for the purpose of looking for approaching traffic on the boulevard?

A. Yes, sir.

Q. Therefore, you were required to come to a stop at a point where you could see the boulevard in both directions?

A. Yes, sir.

Jessie James Allen (colored).

Q. Isn't it a fact that the Virginia Beach Boulevard is straight all the way from Chinese Corner to Davis Corner, in a beeline due west, so there is absolutely nothing to obstruct your view?

A. There could have been bushes there.

Q. The law requires you to stop where you can see. So, if there were bushes there, you could not see where you did stop?

A. I come up here and came to a stop about 4 feet from this surface here. I come to a full stop and stood there waiting for cars to pass going each way before I made an attempt to go across. I looked then each way, and no car was coming, so I proceeded.

Q. Did you stop at a point where you could see if a car was coming?

A. Yes, sir, I did.

Q. Did you stop at a point where you could see?

A. Yes, sir.

Q. And you tell the jury there was no car coming, so you proceeded to drive across?

A. That is right.

Q. Please tell the jury where this automobile came from that put on its brakes as you started across, and struck you in the right side. It did not drop down out of the sky, did it?

A. Well, I didn't see it. It must have dropped page 81 { down from somewhere, or come mighty fast.

Q. You tell the jury now that it descended from the heavens and was there?

Mr. Rixey: He said it came mighty fast.

By Mr. Ashburn:

Q. How far would you say Davis Corner is west of Chinese Corner?

A. How is that?

Q. How far to the west would you say Davis Corner is? You have lived in that section all of your life, haven't you?

A. Not all my life.

Q. You said you had been here since 1907. That is 41 years?

A. I am 60, too.

Q. How far do you think it is to Davis Corner in a straight line on that road?

A. How far can I see?

Q. How far is Davis Corner?

Jessie James Allen (colored).

A. I don't know, sir. I could not say that.

Q. A couple of miles?

A. I would estimate it is around a mile and a half.

Q. There is absolutely nothing to break your view for a mile and a half up the road, is there?

A. You can't see up that road standing back. It page 82 } is not worth while stopping there.

Q. You told the jury you could see where you stopped?

A. You can see in a clear distance.

Q. What do you call a clear distance?

A. In taking a chance across the road.

Q. You mean you were taking a chance in going across the road?

A. I said, in taking a chance.

Q. Did you take a chance to cross?

A. No, sir, I did not take a chance until I seen my way was clear.

Q. What I am trying to understand is how you could say to the jury that your way was clear when you drove out to cross the highway, and an automobile was right there that ran into you? It is perfectly apparent that you drove across the path of this on-coming car, isn't it? You drove right out in front of it?

Mr. Rixey: Let him answer your questions. I object to counsel doing all the talking.

The Court: Ask the question and give him an opportunity to answer, Mr. Ashburn.

Mr. Ashburn: Judge, he can have just as long as he likes.

page 83 } By Mr. Ashburn:

Q. Now tell me.

A. I don't understand what you want me to explain.

Q. You want to say something, so your lawyer said.

Mr. Rixey: Counsel asked him two or three questions in one breath. He asked two or three at one time.

By Mr. Ashburn:

Q. Jessie, you came up to cross this boulevard?

A. Yes, sir.

Q. Did you cross the path of an on-coming automobile?

A. No, sir.

Jessie James Allen (colored).

Q. You didn't? Well, where was Mr. Forsyth's automobile when you started across?

A. I don't know where it was, but it got up there, and when it got up there, it got up there in a hurry; I know that.

Q. What you actually mean to tell the jury is you did not see it?

A. I did not see the car, and I had plenty of chance to look up the road, and which I did look up the road and there was no car, whatever, coming.

Q. Explain to the jury where it could have come from if you had a clear view.

A. I don't know where it came from, but I know it got there.

Q. It is perfectly obvious that you never did see page 84 } it?

A. I didn't see it until it struck me; just a few seconds before it struck me.

Q. Therefore, you drove right across the path of this on-coming car, because you didn't know it was there; that is right, isn't it?

A. Well, if he had been coming up that road the distance I was looking up there at the time, and if he had put on his brakes just as he explained it, he would have never hit me no way.

Q. What distance were you looking up the road?

A. I was looking up the road in clear enough view so that he could have stopped if he had seen me. He did say he seen me.

Q. As a driver with special training, Jessie, you knew that the law required you to stop until the way was perfectly clear, didn't you?

A. That is right.

Q. But you did not do that?

A. I did stop.

Q. You stopped, but you did not wait for the way to be clear?

A. Yes, sir, I did. The way was clear when I started up.

Q. You did not see any automobile?

A. That is right.

page 85 } Q. An automobile was there?

A. He was coming mighty fast, too.

By Mr. Rixey:

Q. How fast was he going?

A. Around 65 miles an hour.

N. B. Wolfe.

Mr. Ashburn: Just a minute, Mr. Rixey.

By Mr. Ashburn:

Q. Jessie, you say to the jury that he was coming very fast?

A. Yes, sir, he sure was.

Q. How can you make that as a statement of fact when you just told the jury you never saw him at all until he struck you?

A. I said he must have been coming very fast, for I did not see him.

Q. If you did not see him, you can't tell the jury he was coming fast?

A. Until he got right up on me, and then it was too late. So, I came to a stop right away.

Q. The cars had come together then?

A. No, sir. Just as I looked around like that, I heard his brakes squeal, so I threw my foot on the brake.

Q. How did you think that would help if you were right in the line that he was traveling?

page 86 } A. If I had kept on going or speeded up, probably I would have killed him.

Q. You had time to think about all that?

A. Yes.

Q. But you did not have time to think about this on-coming automobile?

Mr. Ashburn: That is all.

(Thereupon, at 2:10 P. M., a recess was taken until 2:50 P. M.)

page 87 } AFTERNOON SESSION.

Met pursuant to the morning session, with the same parties present as heretofore noted.

N. B. WOLFE,
called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Examined by Mr. Rixey:

Q. Your name is N. B. Wolfe?

A. Yes, sir.

Q. What is your occupation, sir?

N. B. Wolfe.

A. Automobile mechanic.

Q. Where is your place of business?

A. Bayside Repair Service.

Q. Did you repair the truck of Mr. W. W. Oliver as a result of this accident that we have been talking about?

A. Yes, sir.

Q. Is this the repair bill?

A. Yes, sir, that is it.

Q. What is the total of that, sir?

A. \$188.20.

Q. And that was paid by Mr. Oliver?

A. Yes, sir.

Q. Was that work necessary as a result of this accident?

A. Yes, sir.

page 88 } Q. Were those charges reasonable?

A. I would say so, yes, sir.

Q. I want you to tell the jury, please, what the physical damage, itself, was on the truck?

A. Where the truck was damaged?

Q. Yes, sir.

A. Apparently it was between taking in a small section of the rear end of the cab, between there and the rear wheel; but I think the front end, the reason that was sprung up and bent was because the running board is a short running board, and it is anchored on the front end to the front fender, and on the rear end there is no anchorage at all except the running board bracket. It hit right at the edge of that running board bracket. When that sprung down, that buckled up the front end of the fender. Of course, when the chassis was bent in, that broke both engine hangers. It twisted the engine. It drove the driving shaft in this position. That kicked the rear end of the motor around and broke the engine supports.

Q. So the impact was taken up there about in the center?

A. It was on the right-hand side, in the neighborhood of half-way between the front axle and the rear axle.

Mr. Rixey: I wish to introduce that in evidence,
page 89 } if Your Honor please.

(The bill was received and marked "Defendant's Exhibit No. 3.")

N. B. Wolfe.

CROSS EXAMINATION.

By Mr. Pilcher:

Q. Was any damage done to the body of the truck, Mr. Wolfe?

A. The body?

Q. Yes.

A. Nothing but the rail; I would call it the rail of the body. It is a piece of metal about four inches wide. That was turned under. Of course, that looked to me like maybe the top part of the hood of the car hit that. But, the main lick was in at the chassis, itself.

Q. How about the door of the truck?

A. Sir?

Q. How about the door of the truck?

A. Well, from the door to the rear end of the cab is, I would say, about 8 inches. It hit the rear end of the cab.

Q. You have here: "Repair radiator." Why was the radiator damaged?

A. When the motor was knocked around, the fan hit it. You see, when it hit the side of it, the chassis sprung like that. It threw the motor in this position, and the page 90 } chassis this way. That threw the fan against the radiator.

Q. Are there any crossarm supports of the chassis at the point of impact, running from one side of the chassis to the other side of the chassis?

A. That wasn't where it looked to me that the point of impact was. It was ahead of it.

Q. Where the transmission is?

A. Yes.

Q. Did the door have any damage to it?

A. I don't think there was any damage other than it sprung a little bit, the best I can remember.

Q. You have on here a repair for the glass of the door. Was that done in the accident?

A. That apparently was done in the accident.

Q. Do you know whether or not that was done in the accident?

A. No, sir, not exactly, but I considered it was. In other word, I had not checked the truck before. I didn't know whether the glass was broken out or not.

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W. W. OLIVER,

being recalled, further testified as follows:

Examined by Mr. Rixey:

Q. Mr. Oliver, you are a defendant in this case, are you not, sir?

A. Yes, sir.

Q. And you were the owner of this truck, as I understand it?

A. Yes, sir.

Q. Some question has been raised here about whether or not glass was broken in the truck in this accident. Do you know about that?

A. I don't know positively, no, sir.

Mr. Rixey: If your Honor please, in as much as he doesn't know, I take it that that item ought to come off the bill. It is in the amount of \$5.50.

By Mr. Rixey:

Q. Mr. Oliver, did you get to the scene of the accident shortly afterwards?

A. Yes, sir. I was around the house, and they phoned me that the truck had had an accident. I immediately went over there.

Q. Did you get there before either vehicle was moved?

A. I did.

Q. I want you to tell the jury, please, what you saw.

A. When I got there Mr. Guy and some other
page 92 } officer were taking measurements. I found my
truck nearly in the center of the Witch Duck Road,
headed south, with Mr. Forsyth's car close to it. I think
probably it was shoved away just a little bit. It seems to
me there was just a little space between the car and the truck
when I got there, sort of on a little angling position. The
center of his car would have been almost at the center of
my truck's chassis, just behind the door on the cab; between
the cab and the body would have probably been about the
center of his car.

It was clear. The marks that the officer testified about
on the road were just as straight as they could have been
drawn with a plumb-bob. They were just as straight as they
could be. Evidently rubber had burned there. 55 feet, I
think his measurements were. I did not measure the distance,
but it was a considerable distance from the impact to the

W. W. Oliver.

truck. His testimony was 15 feet. It could have been 15 feet or a little more.

Q. Was your truck entirely off the hard surface of the boulevard?

A. I would say the rear end of the body might have been probably 2 feet, on the outside, on the Virginia Beach highway. I don't know positively, but it could not have been further than that. It may not have been that far. Would I be permitted to take that drawing that Mr. Forsyth page 93 } has made there?

Mr. Rixey: Is there any objection, if Your Honor please?

The Court: No, indeed.

Mr. Pilcher: May it please the Court, I do not think he ought to mark on there.

A. I will not. Now, this truck and automobile were stopped somewhere along near this point here. From this point here, where these two roads intersect, to the ditch is a distance of 35 feet of clear roadway. It is not a paved road. It is partly paved where the road has been patched, and there is gravel scattered out there. But, there is 35 feet from that point to the corner of the ditch where Mr. Forsyth could have swung.

By Mr. Rixey:

Q. You mean he could have swung to his right?

A. He could have swung to his right.

Mr. Pilcher: If Your Honor please, I object.

The Court: He can testify as to what he found.

A. I found that distance there. I measured it.

By Mr. Rixey:

Q. If he turned to his right in that 35 feet, would he have struck the truck?

A. I don't think he would have touched the truck. It would have been my instinct to make that turn there page 94 } when I saw I was close to him.

Q. How far back did that area go back up the boulevard towards Norfolk?

A. A considerable distance, Mr. Rixey, but it wasn't as wide here as it was there. The intersection of the roads left a triangle there. But, back here—that is, from the pavement

W. W. Oliver.

to the road—I would say it is 8, or 10, or 12 feet before you ever approach that culvert.

Q. Is that level space?

A. Level space, yes, sir.

Q. I understand your testimony is that these skid marks, which you saw left by the Forsyth car, were right straight down the road?

A. Just as straight as that line, showing to me or indicating to me that those brakes were perfect.

Mr. Ashburn: Your Honor, I object.

The Court: I sustain that. You can't tell what they indicated?

A. This road shows a little too quickly here. This is surface treated, but there is no road intersection here until it comes way down here. This is where the road begins, between a store and a dwelling. This is all open space between two roads, partly paved.

If it is permissible, I would like to tell the jury about that view down the road there.

page 95 } The Court: You can do that.

Mr. Ashburn: Just a moment. Your Honor, he is going to do what?

The Court: He is going to tell about the view down the road.

Mr. Ashburn: This gentleman was not present at the time of the accident. It was his employee who was in the accident. He is not entitled to state his opinion about it.

The Court: You can tell the condition of the road, looking in both directions, if you desire.

A. Stopping at the stop sign, with my driver's seat opposite to the stop sign, after this accident in order to satisfy myself—

The Court: Wait a minute, Mr. Oliver. Just tell what you can see down there.

A. I stopped opposite that stop sign.

Mr. Rixey: If Your Honor please, I think this was an experiment that he performed directly after this accident, as to how far he could see.

W. W. Oliver.

The Court: He can tell how far he can see down that road from the stop sign.

A. From that position, I would say 175 yards. Now, knowing that that road is straight for three-quarters of a mile there, I felt that my man was negligent until I did page 96 } that. When I did that, I was astonished.

Mr. Ashburn: If Your Honor please, we move the Court to strike out that observation, and tell the jury to disregard it.

The Court: Gentlemen of the jury, disregard that statement.

By Mr. Rixey:

Q. You can give your opinion.

A. I stopped at that sign, and it was my judgment that I could not see beyond 175 yards up that road.

Mr. Rixey: Answer these gentlemen's questions.

CROSS EXAMINATION.

By Mr. Pilcher:

Q. Mr. Oliver, when you stopped at that stop sign, how close was your front bumper to the side of the hard surface?

A. Well, I would say that stop sign is probably 12 or 14 feet from the edge of the pavement of the Virginia Beach road; maybe 15 feet.

Q. Did you stop with your bumper approximately 4 feet from there?

A. I was headed south. I stopped with my driver's seat right opposite the stop sign.

Q. Did you then pull forward so that your page 97 } bumper would be 4 feet? Jessie Allen testified that he stopped with his bumper 4 feet from the hard surface. Did you stop there?

A. I would think my bumper would be around 4 or 5 feet from the hard surface of that road, at the point I stopped.

Q. But you don't know?

A. No, sir.

Q. You say that over here you have got a space of—

A. 35 feet, if my recollection serves me right. It was about a year ago when I measured it.

Q. How far is it back from this side where traffic has been

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turning right there? How far back can you go on that side?

A. There is very little traffic that turns that way.

Q. There is a shoulder here?

A. There is a shoulder there, yes, sir. That shoulder I would say is approximately the same width as the shoulder is over here.

Q. You have got 10 feet over there and 10 feet over here?

A. I would say so.

Q. And is the stop sign 10 feet back of that shoulder?

A. 10 feet from the hard surface.

Q. If you have a 10 foot shoulder, then the stop sign is 3 or 5 feet from the shoulder?

A. It is right near the ditch line on the Virginia page 98 } Beach highway—the north ditch line. It is sitting just north of that ditch line.

Q. How far is the ditch line then from the side of the hard surface?

A. I would say probably 10 or 12 feet of shoulder is there at that point, between the ditch and the hard surface.

Q. How long is your truck, Mr. Oliver?

A. I don't know, sir, but it is my judgment that it is around 19 or 20 feet. I have never measured it, but that would be my judgment.

By Mr. Ashburn:

Q. Mr. Oliver, I understood you to tell the jury—

Mr. Rixey: If Your Honor please, I again object to more than one counsel examining the witness.

The Court: I believe, Mr. Rixey, I will overrule your objection. It is the usual custom for one counsel to examine.

Mr. Ashburn: The situation is a little peculiar, which the jury will understand presently.

By Mr. Ashburn:

Q. Mr. Oliver, I understood you to say that sometime after the accident, for the purpose of seeing to what extent a driver has a view, you stopped with the cab of the car that you were in opposite the stop sign and looked to the westward?

A. That is right.

page 99 } Q. And by selecting that point to stop your car, I suppose you assumed that the stop sign indicated the precise point where a driver should stop?

A. Well, I had to fasten to something, so I just fastened to that stop sign.

W. W. Oliver.

Q. Actually, as a licensed and experienced driver, you know the stop sign simply indicates that you must stop before entering the intersection road?

A. That is correct.

Q. And that you are supposed to stop at a point where you have an unobstructed view?

A. Well, if you would go to the point, Mr. Ashburn, where you would have an obstructed view down that road, like a man would have the right to expect he would have there, just from thinking about it without looking, it is very deceiving.

Q. Let's take your figure, though, from the place where you did stop. I understood you to say that at that point, as far back from the highway as that, you had an unobstructed view for a distance that you estimated to be 175 yards?

A. Down to the front of that old packing place.

Q. That would be 525 feet; three times 175 yards?

A. That is right.

Q. Your driver said that he entered the highway at 5 miles an hour and traveled, in his own language he said, about 18 feet before the collision.

Mr. Rixey: 37 feet, he said.

Mr. Ashburn: I understood him to say 18. The jury will rely upon their memory.

By Mr. Ashburn:

Q. During that time, unless Forsyth's car was further west than 525 feet, he was approaching at the same time, wasn't he?

A. Approaching at the same point.

Q. During the time it would take your driver to go 37 feet, if that is what Mr. Rixey would have it, Forsyth—

Mr. Rixey: It is a question of what the witness said.

Mr. Ashburn: The jury will rely on their recollection of what he said. Your recollection was 37 and mine was 18.

By Mr. Ashburn:

Q. Then unless Forsyth was further back than that, he would have to travel more than 525 feet while your driver was traveling whatever distance he did travel?

A. Yes, I reckon he would. I don't know about that calculation. I would have to take a pencil to figure it out.

W. W. Oliver.

Q. Mr. Oliver, I think we all know that a rough page 101 } basis of figuring is that you travel the number of feet per second which represents one and one-half times your speed in miles per hour. You have heard that many times, haven't you?

A. Yes, sir.

Q. So if you are going 50 miles an hour, you travel roughly 75 feet, or exactly 73 feet. If you are going 80 miles an hour, you would go 120, wouldn't you?

A. That is my judgment of what Forsyth was doing.

Q. You think he was doing 80?

A. I think he was doing 80 miles an hour. I don't know how fast he was going, but he was going like the mischief.

RE-DIRECT EXAMINATION.

By Mr. Rixey:

Q. Let's take it at 80 miles an hour. You say he was going that fast. One and a half times 80 is what?

A. 120.

Q. And that goes into 525 how many times?

A. 120 into 525?

Q. 120 into 525? One and a half times 80 is 120?

A. Yes.

Q. Divide 120 into 525 feet, which is the distance of 175 yards?

A. It would be pretty close to 5 times.

Q. It is 4 and a little less than a half, isn't it?

page 102 } A. Yes, sir.

Q. Now, if you take five miles an hour, one and a half times 5 is 7 and a half, isn't it? And 7 and a half divided into 37 is how much?

A. Five.

Q. About the same?

A. Yes, sir.

Q. If your man went 37 feet, it would take him longer to go 37 feet than it would take Mr. Forsyth to go 525 feet?

Mr. Pilcher: If Your Honor please, I object.

The Court: I think you are leading. If you object to it, I will sustain it.

Mr. Rixey: We rest.

GORDON FORSYTH,

being recalled in rebuttal, further testified as follows:

Examined by Mr. Pilcher:

Q. Mr. Forsyth, Jessie Allen testified to two matters which I would like to clear up. He testified that you had sufficient space to go behind his truck?

A. If I had tried to go behind, I would have run headon into the traffic that was coming from Virginia Beach, because I would have had to go over into the west-bound traffic lane, or the north lane on the highway.

page 103 } Q. Was there traffic in that lane?

A. There was traffic in that lane approaching.

Q. Jessie Allen also testified to the fact that Dr. Taylor had gone by, and for some reason came back. Do you know where Dr. Taylor was at the time of the accident?

A. Yes, sir. He was on the curve, which is about one-tenth of a mile, I think, or a little bit more than that, east of the intersection. It is right opposite that little tavern, or something, on the right-hand side. He drove up alongside my car as I was getting out of the automobile, and backed his car into Witch Duck Road, and pulled over to the store where there are a couple of service pumps. That was where he took me to patch me up, and I got in his car there.

CROSS EXAMINATION.

By Mr. Rixey:

Q. Was that the car that you say was coming from the Beach?

A. No, sir. There was another car in front of that.

Q. You remember that, do you?

A. Yes, sir.

Q. Why didn't you testify to that on your original examination?

A. I did, Mr. Rixey. I said there were automobiles coming from the Beach.

Q. Why does your lawyer put you back on then

A. For the simple reason that your Jessie Allen testified that Dr. Taylor had already passed the cars at the point of impact, and he had not. He was approaching the scene of the accident at the time of the impact.

Q. Your lawyer asked you about traffic coming from Virginia Beach?

Gordon Forsyth.

A. And I said there was traffic coming from Virginia Beach, and Jessie Allen was looking at that traffic when he pulled across that road.

Q. Why does your lawyer put you back on for rebuttal and go over that again? Do you know?

A. Because your man contradicted what was said before; rather, bringing in the testimony that Dr. Taylor had already passed the accident, and had turned around and come back.

Q. Is that all you can contradict Jessie Allen about?

A. No, sir. I can contradict him about several things. He said he never talked to me. He did. If Dr. Taylor was here, he would testify to that. Dr. Taylor was a witness to our conversation.

Mr. Pilcher: I would like to find out if Larry Hamilton has shown up.

page 105 } (No answer.)

The Court: Do you rest?

Mr. Pilcher: Yes, sir.

Mr. Ashburn: Your Honor, I just want the record to show that I offer that testimony which I understand Your Honor permits me to introduce after the jury retires. I want to show that I offer it before they retire.

The Court: All right.

(The following proceeding was had in the absence of the jury:)

Mr. Ashburn: If Your Honor please, as counsel for the plaintiff in defending the cross claim brought by the defendant, I move to strike out the defendant's testimony tending to support a recovery on the cross claim, upon the ground that the defendant's agent, Jessie Allen, testified, as a witness in behalf of the defendant concerning said cross claim, that he did not see the on-coming Forsyth car when he entered the Virginia Beach Boulevard, which of itself and by his own statement makes him guilty of negligence which contributed to produce the collision, and by reason of that testimony the defendant cannot have a recovery against the plaintiff on the cross claim.

page 106 } (The motion was further argued, after which
the following occurred:)

The Court: I am going to overrule your motion, Mr. Ashburn, to which you except. These matters can be dealt with, if it becomes necessary, at a later time.

Mr. Ashburn: Yes, sir, that is true.

page 107 } INSTRUCTIONS.

Plaintiff's Instruction A (Granted):

"The Court instructs the jury that if they believe from the evidence that the plaintiff, Gordon H. Forsyth was proceeding east on the Virginia Beach Boulevard and approaching its intersection with the Witch Duck Road when Oliver's driver, Jessie Allen, had stopped the Oliver truck at such intersection, and that Allen failed to see this approaching automobile, then Allen was guilty of negligence, and if such negligence contributed to the collision, Oliver cannot recover on his cross claim against Forsyth."

Mr. Rixey: The defendant excepts to the action of the Cour in ~~granting~~ Instruction A, granted at the request of the plaintiff, on the following grounds: First, this instruction puts the burden of insurer upon the defendant's driver to see the approaching automobile. Under the law, the defendant's driver's duty was fully performed if he exercised reasonable care to observe a proper lookout. Further, on the ground that this instruction tells the jury that if the Oliver truck had stopped and failed to see, and entered the intersection, he was guilty of negligence as a matter of law. It is submitted that under the law, if he exercised reasonable care and if he entered at a time when, according to the exercise of
page 108 } reasonable care, he would be justified in entering,
then he was not guilty of negligence. This instruction neglects to take that into consideration.

Plaintiff's Instruction B (Granted):

"The Court instructs the jury that it was the duty of Jessie Allen not to attempt to cross the Virginia Beach Boulevard while any vehicle, traveling thereon was approaching the intersection in such proximity as to be likely to cause an accident, and it was the further duty of Jessie Allen to use reasonable care to see that the crossing could be made with reason-

able safety. If the jury believe from the evidence that Jessie Allen violated either of these duties and such violation was the proximate cause of the accident, and if the jury further believe that Gordon Forsyth was not guilty of any negligence which contributed to the accident, then you shall find for the plaintiff."

Plaintiff's Instruction No. 1 (Refused):

"The Court instructs the jury that it was the duty of James Allen to bring the truck which he was driving to a full stop before entering the Virginia Beach Boulevard from the Witch Duck Road, and it was his further duty not to attempt to cross the said Boulevard while any vehicle was approaching the intersection in either direction within a distance of 500 feet. If the jury believe from the evidence that James
page 109 } Allen violated either of these said duties at a time when the plaintiff's automobile was approaching the intersection he was guilty of negligence, and if such negligence was a proximate cause of the collision which resulted then the plaintiff is entitled to recover its damages from the defendants."

Mr. Pilcher: The plaintiff excepts to the refusal to grant Instruction P-1 which sets forth that it was the duty of Jessie Allen not to attempt to cross the boulevard while any vehicle was approaching the intersection within 500 feet, in that that is substantiated by Code Section 2154 (108-b 8); and the evidence to support this instruction was to the effect that Forsyth was approximately 100 feet from the intersection when the truck entered it, and Allen entered the highway from this Witch Duck Road when there was traffic within 500 feet of said intersection, this being a question for the jury to determine.

Plaintiff's Instruction No. 2 (Granted):

"The Court instructs the jury that if they believe from the evidence that Gordon Forsyth was not guilty of any negligence and was confronted by a sudden emergency by the act of James Allen in driving the truck out onto the Virginia Beach Boulevard at a time when the plaintiff's automobile
page 110 } driven by Gordon Forsyth was approaching in dangerous proximity to the intersection, then Gordon Forsyth was not required to exercise the best possible judgment and he was not guilty of any negli-

gence if he did what a prudent person might have done under like circumstances to attempt to avoid the collision.”

Mr. Rixey: The defendant excepts to the action of the Court in granting plaintiff's Instruction No. 2, on the ground that this instruction tells the jury, as a matter of fact, that Allen drove the truck onto the boulevard at the time when the plaintiff's automobile, driven by Forsyth, was approaching in dangerous proximity thereto. It is submitted that the instruction should have left that question to the jury.

Plaintiff's Instruction No. 3 (Refused):

“The Court instructs the jury that if they believe from the evidence that *James Allen* drove the defendant's truck out into the Virginia Beach Boulevard in the path of plaintiff's automobile, and was unable to avoid said truck by the exercise of reasonable care under the circumstances then existing, then the jury should find for the plaintiff.”

Mr. Ashburn: The plaintiff objects and excepts to the refusal of plaintiff's Instruction No. 3, which states that if the jury believe from the evidence that Allen drove the truck into the path of the plaintiff's automobile, and that
page 111 } the plaintiff was unable to avoid the truck under the exercise of reasonable care, then they should find for the plaintiff. This instruction is substantiated by the evidence and submitted by the plaintiff, and it is a jury question to determine under the circumstances whether or not this was true.

Plaintiff's Instruction No. 4 (Granted):

“The Court instructs the jury that Gordon Forsyth, driving in an eastwardly direction along the Virginia Beach Boulevard, had the right to believe that no vehicle would enter said boulevard from the Witch Duck Road unless the maneuver could be made with reasonable safety and he had the right to rely upon such belief until the contrary appeared to him, or should have appeared to him, in the exercise of ordinary care.

“The Court further instructs the jury that if they believe from the evidence that James Allen did drive the defendant's truck into the intersection while Gordon Forsyth was approaching said intersection and in dangerous proximity thereto, then James Allen was guilty of negligence and if such neg-

ligence was a proximate cause of the collision which resulted, then they shall find for the plaintiff, unless they further believe that the plaintiff was guilty of negligence page 112 } which contributed to the collision."

Mr. Rixey: The defendant excepts to the action of the Court in granting Plaintiff's Instruction No. 4, on the ground that this instruction fails to predicate the right of the plaintiff to assume that no vehicle would come out of the Witch Duck Road upon the jury's believing that the plaintiff was, himself, free of negligence. It is submitted that only when a party is free of negligence, he has a right to assume that anyone else will also be free of negligence.

Plaintiff's Instruction No. 5 (Granted):

"The Court instructs the jury that it was the duty of James Allen to bring the truck which he was driving to a full stop before entering the Virginia Beach Boulevard from the Witch Duck Road, and one who is required to stop has not the right of way, that right, assuming that it had theretofore existed, is then suspended and remains suspended until he can proceed with reasonable safety."

Plaintiff's Instruction No. 6 (Granted):

"The Court instructs the jury that if they find for the plaintiff then in estimating the damages sustained by him, take into consideration the bodily injury, disability and disfigurement sustained by him, if any, the mental suffering, the pain undergone, and fix the amount of damages at such page 113 } sum as will be a just, reasonable and proper compensation therefor, however, such damages shall not be in excess of the amount sued for."

Defendant's Instruction No. 1 (Granted):

"The Court instructs the jury that if you believe from the evidence that the defendant's truck stopped before entering Virginia Beach Boulevard, then he was not required to stay stopped until the road was entirely free of oncoming traffic, but he had a right to proceed if he did so in the exercise of reasonable care as hereinafter defined. After stopping, the defendant's driver had a right to proceed under such circumstances that a reasonably prudent person so situated would have concluded that it was reasonably safe to do so, acting

under the assumption that the drivers of oncoming cars would themselves obey the law and keep their cars under proper control."

Mr. Ashburn: Plaintiff excepts to the action of the Court in granting any instruction for the defendant which would permit a possible jury verdict in favor of the defendant on his cross claim, upon the contention that the negligence contributing to the happening of the collision is established beyond peradventure by the evidence, and particularly by the testimony of James Allen, the defendant's driver, page 114 } and upon the contention by the plaintiff that the only open question, if any there be in this case, is whether the plaintiff was guilty of contributory negligence.

The plaintiff further excepts to Instruction No. 1, granted for the defendant, upon the ground that said instruction is misleading and not supported by any evidence in this case, and that it is improper to grant it.

Defendant's Instruction No. 2 (Granted):

"The Court instructs the jury that it was the duty of the plaintiff to observe a proper lookout and keep his car under proper control, and to make reasonable and timely use of his brakes if necessary to avoid running into the defendant's truck. These were continuing duties and should be exercised when they would be reasonably effective to avoid an accident.

"If you believe from the evidence that the plaintiff failed in his duty in any such particular, and such failure was the sole proximate cause of the accident, you should find for the defendant Oliver and assess his damages."

Mr. Ashburn: Plaintiff excepts to the action of the Court in granting Instruction No. 2, tendered for the defendant, upon the ground that there is no evidence to support any contention by the defendant that plaintiff's car was page 115 } not under proper control, that it did not make reasonable and timely use of his brakes; and that the instruction as granted is simply a statement of an abstract principle of law which has no application to the evidence in this case, and should not be given. And, for the further ground that it is improper to state it in the misleading language contained in the second paragraph.

Defendant's Instruction No. 3 (Granted):

"The Court instructs the jury that it was the duty of the plaintiff to operate his car at a rate of speed not greater than was reasonable and proper under the circumstances, and in no event in excess of 50 miles per hour, and to operate the same in such a manner as not to endanger the life, limb or property of another.

"If you believe from the evidence that the plaintiff failed in his duty in any particular as above set forth and such failure was the sole proximate cause of the accident, you should find for the defendant Oliver and assess his damages."

Mr. Ashburn: Plaintiff excepts to the action of the Court in granting Instruction No. 3, tendered for the defendant, upon the ground that there is no evidence upon which to support such an instruction in this case, and that it page 116 } is nothing more or less than a statement of traffic regulations contained in the Motor Vehicle Code of Virginia, which should not be given unless there is particular evidence showing the violation of such a regulation, and that such violation tended to cause the collision.

Defendant's Instruction No. 4 (Refused):

"The Court instructs the jury that if you believe from the evidence that the defendant's truck entered and started across the intersection at a time when its position and course, should have been discovered by Gordon Forsyth by the exercise of reasonable care for Forsyth to have slowed up or stopped or changed the course of his vehicle and thus avoided the accident, then you should find for the defendant Oliver and assess his damages."

Mr. Rixey: Defendant excepts to the action of the Court in refusing Instruction 4. This is a last clear chance instruction and is applicable to the facts and evidence in this case. It is submitted that Allen testified he came up to the boulevard, stopped at or about 4 feet from the boulevard and looked in both directions, and did not see anything within his line of vision, and that there was nothing within his line of vision, and then he proceeded after having exercised proper care.

Mr. Oliver also testified that he went there and page 117 } and tested the situation afterwards, stopping in the place where Allen said that he stopped; and in the position that Allen was standing, Oliver could not see

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more than 175 yards up the road in the direction from which Forsyth was coming.

It is submitted that from this evidence the jury has the right to come to the conclusion that at the time Allen started across the boulevard, the Forsyth car was further from the intersection than 175 yards. Under those circumstances it is submitted that it would be purely a jury question as to whether or not Mr. Forsyth had a last clear chance to avoid the accident.

The evidence is further to the effect that at the place of the accident, and as Forsyth approached it, he had a full opportunity to turn to his right and also to his left to avoid running into the defendant's truck; that he did neither, but came on, burning his tires for over 55 feet, in a direct straight line and struck the defendant's truck in the center.

Defendant's Instruction No. 5 (Granted):

"The Court instructs the jury that even if you believe that the defendant's driver was guilty of negligence, yet if you also believe from the evidence that the Plaintiff was guilty of contributory negligence, then the plaintiff is not
page 118 } entitled to recover and you should find for the defendants on the plaintiff's claim."

Defendant's Instruction No. 6 (Granted):

"If you believe from the evidence that the accident was caused by the concurrent negligence of both drivers, then the Court instructs you that neither party is entitled to recover of the other, and you should find for the defendants without assessing damages."

(The case was then argued by counsel. The jury retired to consider its verdict, at which time the following occurred outside of the presence of the jury.)

W. W. OLIVER,

being recalled, further testified as follows:

Examined by Mr. Ashburn:

Q. Mr. Oliver, you are one of the defendants in this case, and you have a cross claim in this cause for \$188.20 as a result of damage to your truck, have you not?

L. S. Belton.

A. Yes, sir.

Q. Is it not a fact that the State Farm Mutual
page 119 } Automobile Insurance Company brought an action
against you to recover the damages to its auto-
mobile caused in the same collision of November 10, 1947?

A. Yes, sir.

Q. And they recovered a jury verdict and a judgment of
the court for \$458 and some cents?

A. I think that is correct.

Q. The record shows \$474.73. That is generally in accord-
ance with your recollection, is it not?

A. Yes, sir.

Q. And that verdict and judgment was against you and
against your driver, Jessie James Allen, as well; that is cor-
rect, is it not?

A. Yes.

Q. And this order appears to have been entered on the 4th
day of May, 1948. Would that be in general your recollection
of the trial date, if you recall?

A. I don't know, Mr. Ashburn. I know there was a trial, and
I know the jury found against my driver.

CROSS EXAMINATION.

By Mr. Rixey:

Q. And I believe you did not file any cross claim in that
suit?

A. I did not.

page 120 } Q. It was testified in that suit by Mr. Gordon
Forsyth, was it not, that while he was driving the
automobile belonging to State Farm Mutual Insurance Com-
pany at the time of the accident, he was not about any busi-
ness for the State Farm Mutual, but was about the business
and pleasure entirely of himself, Mr. Forsyth; is that not
correct?

A. That is correct.

L. S. BELTON,

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

Examined by Mr. Ashburn:

Q. You are Mr. L. S. Belton, deputy clerk of this court,
are you not?

L. S. Belton.

A. Yes, sir.

Q. Mr. Belton, I hand you herewith a jacket containing certain law action papers entitled "State Farm Automobile Insurance Company, and others, against W. W. Oliver, and others", marked on the back of the jacket "Document No. 868, File No. 855", and ask you if you can identify those as the papers, pleadings for the plaintiff and defendant respectively in that action, the instructions granted and refused by the Court, and other pertinent papers to the trial, and final judgment in that case?

A. Yes, sir.

page 121 } Q. I understand that they are such?

A. They are.

Q. Mr. Belton, will you refer to Common Law Order Book 21, at page 275, of this Court, and see if the order set forth there is the final judgment of this court in that cause?

A. It is the final judgment, dated May 4, 1948.

Mr. Ashburn: Your Honor, we tender the original suit papers and the order book, and ask permission of the court, if it becomes pertinent or requisite, to substitute certified copies, to be marked as plaintiff exhibits by appropriate serial numbers in this cause.

The Court: That is all right.

The following papers are the pertinent papers in the case of State Farm Automobile Insurance Company, etc., v. W. W. Oliver and Jesse James Allen, referred to by L. S. Belton in the foregoing testimony:

State Farm Automobile Insurance Company, an Illinois corporation, Plaintiff,

v.

W. W. Oliver and Jesse James Allen, Defendants.

NOTICE OF MOTION FOR JUDGMENT.

Please take notice that on Monday, March 1, 1948, at 2:00 P. M. o'clock or as soon thereafter as counsel can be heard, the undersigned plaintiff by counsel will move the Trial Justice for Princess Anne County, Virginia, at his Courtroom at Princess Anne Courthouse for a judgment against you and each of you for Four Hundred seventy-four dollars and

73/100 (\$474.73), with interest thereon from November 10, 1947, until paid and the costs of this proceeding, page 122 } for this, to-wit:

That heretofore, to-wit, on November 10, 1947, Gordon H. Forsyth was a gratuitous bailee of a certain automobile then and there owned by the undersigned plaintiff, which he was driving in an eastwardly direction along the Virginia Beach Boulevard, a State highway, at or near its intersection with the Witch Duck Road, and the defendant Jesse James Allen was then and there driving a certain motor truck owned by the defendant W. W. Oliver for and on behalf of the said W. W. Oliver and in the scope of his employment in a southwardly direction, and at said intersection the said defendant Jesse James Allen carelessly, negligently and unlawfully drove and operated the said motor truck for and on behalf of the defendant W. W. Oliver into, upon and against the said automobile owned by undersigned plaintiff.

As a direct and proximate consequence of the said carelessness and negligence of the defendant W. W. Oliver and the defendant Jesse James Allen, the automobile owned by the undersigned plaintiff was damaged to the value or amount of Four hundred seventy-four dollars and 73/100 (\$474.73), which sum this plaintiff is entitled to recover of the said defendants, and therefore it bring this action by notice of motion for judgment.

STATE FARM AUTOMOBILE INSURANCE
COMPANY,

By W. R. ASHBURN, Counsel.

And the returns of the Sheriff on said Notice of Motion are as follows:

Executed in the County of Princess Anne, Va., this the 21 day of Feb., 1948, by serving a copy hereof on Jesse James Allen, IN PERSON.

D. J. VAUGHAN,
Sheriff of the County of Princess Anne, Va.

page 123 } Not finding W. W. Oliver nor any member of his family above the age of 16 years at his usual place of abode in Princess Anne County, I executed the within process in the County of Princess Anne, Va. this the 21 day

of Feb., 1948, by leaving a COPY hereof posted at the FRONT DOOR of his place of abode.

D. J. VAUGHAN,
Sheriff of Princess Anne County, Va.

And the final judgment order referred to above and entered in Common Law Order Book 21 at page 275, is as follows:

This day came the plaintiff by its attorneys, and the defendants appeared by Rixey & Rixey, their attorneys, and pleaded the general issue, to which the plaintiff replied generally, and upon which plea issue is joined, and thereupon came a jury, to-wit: Meredith H. Williams, Fred M. Wilkerson, Alton J. Ackiss, Alton E. Williams, Andrew W. Shipp, W. W. McClellan and James G. Kontopanos, who were duly sworn the truth to speak upon the issue joined, and after having fully heard the evidence and argument of counsel retired to their room to consider of a verdict, and after some time returned into Court with the following verdict, to-wit: "We the Jury find for the plaintiff and fix *his* damages at \$474.73."

Whereupon, it is considered by the Court that the plaintiff recover of the defendants the sum of \$474.73, with interest thereon from the 10th day of November, 1947, until paid and its costs in this behalf expended.

CROSS EXAMINATION.

By Mr. Rixey:

Q. Mr. Belton, there was no cross claim filed in that cause by Mr. Oliver, was there?

A. I will check it. I can't remember, Mr. Rixey. (Does.) No, I do not see a cross claim.

page 124 } (The jury returned, after which the following occurred:)

The Court: Gentlemen, have you agreed on a verdict, or do you want to ask some questions?

A Juror: We would like to ask some questions. Judge, we know the verdict will be either for the plaintiff or the defendant. Just for the sake of argument, if it is for the plaintiff—

The Court: Let me say this to you: If you gentlemen find a verdict for the plaintiff, you will find against both the defendants.

A Juror: We do not fix the amount?

The Court: You fix the amount; of course you do. If you decide that the plaintiff is entitled to recover, there would be a verdict against both of the defendants, and the form of your verdict would be: "We, the jury, find for the plaintiff and fix his damage at—" I am not attempting to tell you what it is.

A Juror: That is what we did not understand.

The Court: The gentlemen can retire to your room and consider the matter. Is there anything else you men want to ask?

A Juror: We did not understand as to the verdict.

The Court: If you finally come to the conclusion that the plaintiff is entitled to recover, your verdict will be: "We, the jury, find for the p'aintiff and fix his damages at—" If you think the defendant ought to recover on his cross claim, then it will be, "We, the jury, find for the defendant on his cross claim, and fix his damages at —" Now, if you think neither one should recover, it should be: "We, the jury, find for the defendants." That means nobody recovers.

(The jury retired to consider its verdict and returned with the following: "We, the jury, find for the plaintiff and fix his damages at \$2,000.00.")

page 125*} Thereupon the defendants moved the Court to set aside the verdict and grant a new trial on the grounds that the verdict is contrary to the law and the evidence, and because of errors on the part of the Court in reference to the evidence and in granting and refusing instructions, especially in granting Plaintiff's Instructions A and No. 4; and in refusing Defendant's Instruction No. 4, and because the verdict is excessive.

The motion was argued and heard on a subsequent day whereupon the Court overruled the motion and rendered final judgment for the plaintiff on the verdict, to which action of the Court, the defendants by counsel duly excepted.

page 126 } JUDGE'S CERTIFICATE.

I, Floyd E. Kellam, Judge of the Circuit Court of Princess Anne County, Virginia, do hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings of the case of Gordon Forsyth v. W. W. Oliver and Jessie James Allen, tried in said court on the 4th day of October, 1948, and includes all the testimony offered, the motions and objections of the parties, the rulings of the Court,

and the exceptions of the parties, and all other proceedings of said trial.

I further certify that the exhibits offered in evidence, as described by the foregoing record, and designated as Defendant's Exhibits 1 to 3, inclusive, are all of the exhibits offered upon said trial, and that the originals thereof have been initialed by me for the purpose of identification.

I further certify that said transcript was presented to me for certification and signed within 60 days after the final order in said cause, and that the attorneys for the plaintiff had reasonable notice in writing of the time and place at which the same would be tendered for certification.

Given under my hand this 11th day of March, 1949.

FLOYD E. KELLAM, Judge.

A Copy—Teste:

FLOYD E. KELLAM, Judge.

page 127 } CLERK'S CERTIFICATE.

I, William F. Hudgins, Clerk of the Circuit Court of Princess Anne County, Virginia, do hereby certify that the foregoing transcript of testimony and other proceedings of the trial of the case of Gordon Forsyth v. W. W. Oliver and Jessie James Allen duly certified by the Judge of said court, together with the original exhibits introduced upon the trial of said case identified by the initials of said judge, were filed in my office on the 16 day of March, 1949.

WILLIAM F. HUDGINS, Clerk.

page 128 } Virginia:

In the Clerk's Office of the Circuit Court of Princess Anne County.

I, William F. Hudgins, Clerk of the Circuit Court of Princess Anne County do hereby certify that the foregoing and annexed is a true transcript of the record in the case of Gordon Forsyth against W. W. Oliver and Jesse James Allen, lately pending in said Court.

I further certify that the said copy was not made up and completed until the plaintiff had had due notice of the making

of the same, and the notation of the defendants to take an appeal therein.

I do hereby further certify that a bond conditioned as required in Section 6351 of the Code of Virginia, as amended for a writ of error and *supersedeas* has been duly executed on behalf of the defendants in the penalty of \$2,500.00, with Standard Accident Insurance Company, as approved surety.

Given under my hand this 18 day of April, 1949.

WILLIAM F. HUDGINS,
Clerk of the Circuit Court.

A Copy—Teste:

M. B. WATTS, C. C.

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