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Record No. 1643

In the
Supreme Court of Appeals of Virginia
at Richmond

**VIRGINIA ELECTRIC AND POWER COM-
PANY AND W. E. BLANTON, Plaintiffs
in Error,**

V.

**LULA AGNES FORD, ADMINISTRATRIX,
ETC., Defendant in Error.**

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

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

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

M. B. WATTS, Clerk.

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1643

**VIRGINIA ELECTRIC AND POWER COMPANY AND
W. E. BLANTON, Plaintiffs in Error,**

versus

**LULA AGNES FORD, ADMINISTRATRIX OF THE
ESTATE OF JOSEPH BOYCE FORD,
DECEASED, Defendant in Error.**

**PETITION FOR WRIT OF ERROR AND SUPERSE-
DEAS.**

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

Virginia Electric and Power Company and W. E. Blanton respectfully represent that they are aggrieved by final judgment for the principal sum of Ten Thousand Dollars (\$10,000.00) entered against them in Hustings Court, Part Two, of the City of Richmond, November 1, 1934, in an action *ex delicto* by notice of motion for judgment wherein recovery is sought for the death of Joseph Boyce Ford, which resulted from injuries sustained by him February 27, 1933, when an automobile milk delivery truck owned by the Zeller Dairy Company and driven by Ford was struck by an interurban electric car of the Virginia Electric and Power Company at Concord Avenue on the Petersburg Turnpike in Chesterfield County, about one and one-fourth miles South of the City of Richmond. W. E. Blanton was the operator of the interurban electric car.

In said action Lula Agnes Ford, Administratrix of the

Estate of Joseph Boyce Ford, deceased, was plaintiff, and these petitioners were the defendants.

The notice of motion for judgment charges the defendants with unlawful operation of the interurban electric car without proper lookout or warning of its approach at excessive speed in violation of specified common law and statutory duties.

Trial by special jury was had August 1, 2, 3, 1934. Motions by petitioners to strike the testimony were overruled by the court and the case was submitted to the jury upon the general issue, and a plea of contributory negligence filed as required by Section 6092 of the Virginia Code of 1930.

Under the instructions given, the jury returned a verdict of Ten Thousand Dollars for the plaintiff, and motion to set aside the verdict was thereafter overruled; and on the 1st day of November, 1934, judgment was entered upon the verdict.

Petitioners are advised that during the progress of the trial and thereafter in entry of judgment upon the verdict, errors were committed to the prejudice of petitioners, which warrant and call for a review and reversal of said judgment; and petitioners pray for a writ of error and *supersedeas*. Transcript of the record, including all proceedings at the trial and subsequent thereto, and including also all exhibits introduced at the trial, is herewith submitted, to which transcript and exhibits reference will be made; plaintiff and defendants in the trial court being for convenience designated by the same terms in this petition.

THE UNDISPUTED FACTS OF THE CASE.

Some time after eleven o'clock (R., p. 223) on Monday morning, February 27, 1933 (R., p. 93), Joseph Boyce Ford was fatally injured when an automobile milk delivery truck owned by the Zeller Dairy Company and driven by Ford (R., pp. 93, 103) was struck (see photographs, Exhibits Nos. 4, 5, 6, 7, 8) by a southbound interurban electric car when Ford attempted to make a left turn from North to East at a crossing on the Richmond-Petersburg Turnpike at Concord Avenue. According to the testimony for the plaintiff, Ford drove upon the track in front of the car, which was then approaching at a speed of approximately forty-five miles per hour within a distance of some 335 feet.

Ford was an able-bodied man, thirty-two years of age (R., pp. 136, 138), and had driven a milk truck from four to six weeks (R., p. 124) over a route serving customers on both sides of the interurban track and requiring the truck to cross the track at Concord Avenue and elsewhere (R., pp.

93-4). Ford was, therefore, thoroughly familiar with the locality and knew that interurban cars were operated over the crossing at Concord Avenue.

The over-all length of the truck was 18 feet (R., p. 124). The collision occurred in Chesterfield County, about one and one-fourth miles South of the City of Richmond (R., p. 262).

The Richmond-Petersburg Turnpike extends approximately North and South, and Concord Avenue enters the Pike at right angles from the East; all as appears from plat marked Exhibit No. 1 filed with the manuscript record.

The interurban electric railway of Virginia Electric and Power Company occupies a strip of ground between a paved driveway for southbound traffic and a paved driveway for northbound traffic; and both North and South of Concord Avenue the railway is separated from the driveway on each side of it by a shallow depression (Ex. No. 10). The strip of land occupied by the railway is not used for automobile traffic, and is crossed by automobile traffic only at certain fixed crossings, such as Concord Avenue (Ex. No. 10).

At the Concord Avenue crossing the distance between the two paved driveways is 34 feet (R., p. 57).

From Concord Avenue an approaching southbound interurban car can be seen for a distance of 3,100 feet (R., p. 187). From the center of the crossing at Concord Avenue to the center of the next crossing toward the North, the distance is 335 feet (R., 54); and from the center of the crossing at Concord Avenue to a trestle still further North, where the railway grade changes, is 670 feet (R., p. 52). Opposite the trestle there is a black patch in the paved driveway for northbound traffic (R., pp. 59, 96, 130).

The only two actual witnesses for the plaintiff were Joseph C. Driscoll and J. B. Bradshaw. Driscoll was riding in the truck with Ford (R., pp. 93, 94), and Bradshaw was driving a northbound automobile and was a short distance South of Concord Avenue when the collision occurred (R., pp. 128, 133, 134).

According to Driscoll, Ford signalled properly and commenced to make a left turn (R., p. 94), and looked northwardly and saw the car about at the trestle (R., pp. 95, 103, 104), 670 feet away (R., p. 52). Driscoll did not estimate the speed of the car, but other witnesses for the plaintiff testified that the car was approaching at a speed of from approximately forty to forty-five miles per hour (R., 110, 133).

Driscoll testified that Ford proceeded slowly onward toward the crossing (R., pp. 94-96), after both Ford and Driscoll had seen the approaching car (R., pp. 96-97); and when the truck had reached the track (R., pp. 96-97), Ford again looked

northwardly and saw the car approaching about at the crossing 335 feet away (R., pp. 54, 97, 104); and according to the testimony of J. E. Williams, for the plaintiff, the speed of the car was at no time diminished before the collision (R., p. 111).

According to Driscoll, also, Ford continued slowly across the track, but was prevented from clearing the crossing by northbound traffic on the Petersburg Pike (R., p. 97). Ford looked northwardly a third time when the car was approximately fifty feet away from him, and immediately thereafter the collision occurred (R., p. 98).

According to Driscoll, four or five seconds intervened between the first and second time when Ford looked northwardly (R., p. 107); four or five or six seconds intervened between the second and the third time when Ford looked northwardly (R., pp. 106, 107); and two or three seconds intervened between the third time when he looked northwardly and the impact (R., p. 108).

Bradshaw corroborated the testimony of Driscoll that Ford leaned out of the truck and looked northwardly before he commenced to make a left turn (R., p. 128).

It appears without contradiction that the car could not have been stopped within a distance less than two hundred feet (R., pp. 259-261).

ASSIGNMENT OF ERROR.

In the trial court the defendants contended *inter alia*, and they submit now as their assignment of error, that Joseph Boyce Ford was guilty of negligence, *per se*, as a matter of law and not as an issue of fact, and that plaintiff's recovery is thereby barred; and this in final analysis is the only question for review here.

THE EVIDENCE SPEAKS FOR ITSELF AND BARS PLAINTIFF'S RECOVERY.

As already stated (Ante, p. 5), the only two eye-witnesses for the plaintiff were Joseph C. Driscoll and J. B. Bradshaw; and the testimony of these two witnesses demonstrates conclusively that the plaintiff cannot recover.

The testimony of Driscoll, for the plaintiff, was, in part, as follows:

Pp. 94-95:

"Q. When you got towards the place where the accident happened what did Mr. Ford do, if anything?

"A. He put his hand out at the time and a car passed about that time and he made a long turn and cut sharp back to the left.

"Q. Which side of that southbound driveway was he driving on?

"A. On the right hand side.

"Q. When he made the turn what was the position of the truck with relation to the street car track when it started to leave the concrete? Was it headed straight towards the track or on an angle or how was it?

"A. No, sir, kind of straight up; made a right turn, a deep one and cut back left to get into position to go over the track.

"Q. When was the first time you saw the street car?

"A. After the truck started on across, had got around and put me in position so that I could see.

"Q. How did you see it?

"A. All I had to do was to look.

"Q. The truck had turned around so it was straight towards the crossing?"

Pp. 95-96-97:

"A. Yes; made the turn and just put me in position coming around.

"Q. Do you know what gear Mr. Ford was driving in then?

"A. He had changed gears when he made his turn.

"Q. What gear was he in?

"A. Low.

"Q. Where was the street car when you first saw it at that time?

"A. Down at the trestle; down about the trestle.

"Q. Did you notice anything on the highway with reference to the lanes of travel?

"A. Yes, sir; that is the reason I said it because it was a dark asphalt patch there in the road.

"Q. Now, then, Mr. Driscoll, what happened then? What did Mr. Ford do then?

"A. He started up on the track.

"Q. About how fast was he driving as he started up on the track?

"A. Moving along just about like a truck would, I guess. I don't know. I reckon about 10 miles an hour; something like that.

* * * * *

"Q. Now when was the next time you saw the car and where was the truck when you saw the street car the next time?

"A. The street car when I saw it the next time was down about the next crossing below us.

"Q. Do you mean towards Richmond?

"A. Yes, sir, north of us."

Pp. 97-98:

"Q. Where was the truck then?

"A. The truck was coming up on the—it was up on the track.

"Q. It was up on the track?

"A. Yes, sir.

"Q. Now what happened then, Mr. Driscoll?

"A. Well, I was watching—my attention was on the traffic there.

"Q. What about the traffic? Tell about that.

"A. It was some cars passing along there; seemed to be a bunch of cars like on the highway.

"Q. In which direction were they going?

"A. Going north and we were going straight across.

"Q. They were on the northbound lane?

"A. Yes, sir.

"Q. Was there anything particular about those cars that attracted your attention?

"A. Yes, sir, passing; one trying to pass another at a rapid rate of speed there, running abreast along there.

"Q. What did Mr. Ford do then?

"A. He was inching along, trying to look for an opening to get across.

"Q. Did you see the street car another time?

"A. The next time I saw the street car it was right on me.

"Q. How did you happen to see it?

"A. *I glanced and about the time I glanced Mr. Ford glanced.*"

P. 98:

"Q. You were hurt in this accident, weren't you, Mr. Driscoll?

"A. Yes, sir.

"Q. You said you glanced back and saw the street car the third time you saw it. Now about what was the distance that the street car was away from you, if you can estimate it?

"A. The best I can estimate the third time I saw the street car it was almost on top of us; around I would say 50 feet; something like that.

"Q. Now when the street car hit the truck where were the front wheels of the truck?

"A. Almost over on the concrete.

"Q. You mean by the concrete—

"A. On the other side as we were going across.

"Q. The northbound lane?

"A. Yes, sir.

"Q. Why didn't Mr. Ford go farther?

"A. Because it was cars—another car was coming along there just a little bit opposite us. We didn't have any opening.

"Q. Where was the truck hit by the street car?

"A. It was hit right in the rear."

* * * * *

P. 102:

"Q. Was there a door on Mr. Ford's side?

"A. Yes, sir.

"Q. By the side of him?

"A. Yes, sir.

"Q. Was there a window in that door?"

Pp. 102-103-104:

"A. Yes.

"Q. Was it up or down?

"A. It was down.

"Q. *When you looked and saw the street car the first time did you see whether or not Mr. Ford was looking at the street car?*

"A. *The first time I saw it?*

"Q. Yes, sir.

"A. *Mr. Ford saw it, yes, sir.*

"Q. *When you looked at it the second time did you see whether or not—*

"A. *He was looking; looked about the time I did.*"

* * * * *

"Q. Mr. Driscoll, after you got up on the track you say Mr. Ford was just inching along due to the fact some cars were passing on the northbound lane?

"A. Yes, sir.

"Q. Did he have his attention on the northbound traffic?

"A. He was watching the traffic some, yes, sir; he was watching it.

"Q. He was driving the car?

"A. The truck, yes, sir.

"Q. Now you say Mr. Ford looked when he turned to come up on the track?

"A. Yes, sir.

"Q. You mean he looked after he got up on the track?

"A. He glanced back, yes, sir, after he was up on the track."

Pp. 104-105:

"Q. Now when was it that he glanced back the second time?

"A. The second time? About the time I did. The street car was down about the next stop—next crossing below us.

"Q. That is approximately three hundred and some feet?

"A. I don't know, sir, how far it is.

"Q. It was the next crossing between Concord Avenue and Stop 8 $\frac{1}{2}$?

"A. The next crossing down below us, yes, sir.

"Q. Now after that did he look at all, as far as you know?

"A. After that—that was the second time. The next time we looked the street car was right on us. He saw it, I reckon, about the time I did.

"Q. Did he look at the same time you did?

"A. I reckon he did; glanced at it.

"Q. Both of you looked at it at the same time?

"A. I glanced at it and Mr. Ford was looking at it.

"Q. Then Mr. Ford looked at it three times; he turned and looked after getting into the crossing?

"A. Yes, sir.

"Q. The next time when he got up on the track when you looked at it when it was down at the next street?

"A. Yes, sir.

"Q. And then the third time the same time you looked?

"A. When it was right on top of us, yes, sir."

Pp. 105-106:

"Q. Now when he looked at it at the time that you looked at it when it was at the crossing north of Concord Avenue where the collision occurred the car was coming, was it?

"A. How was that?

"Q. I say the car was coming towards you then?

"A. Yes, sir.

"Q. And it was just about at the crossing—

"A. A little below.

"Q. That is to say, nearer Richmond than the crossing?

"A. Yes, sir.

"Q. Was the window down in Mr. Ford's—in the door on Mr. Ford's side?

"A. Yes, sir.

"Q. How did that door open and shut?

"A. Just like any other door; had a handle on it.

"Q. All you had to do was to open the handle?

"A. Yes, sir.

"Q. How was it built on the other side; that is to say, on Mr. Ford's side? Did it have a running board there?

"A. Yes, sir.

"Q. In getting in on that side you step from the ground to the running board and from the running board into the car?

"A. Yes, sir.

"Q. Just as you step into an ordinary automobile?

"A. Yes, sir."

Pp. 106-107:

"Q. Now at the time of this collision did those same conditions obtain there as to the northbound traffic or had the cars practically passed?

"A. It was a car, as I said before, opposite of us and some on up.

"Q. One car?

"A. Yes, sir. The biggest of the traffic had just about passed. The thickest of the traffic had passed, but another car was blocking the truck, just opposite us.

"Q. Now the cars that were passing each other had passed at that time?

"A. Yes, sir.

"Q. *Did Mr. Ford or you notice the northbound traffic when you started across?*

"A. *I did. I guess he did, too.*

"Q. You don't know whether he did or not?

"A. No.

* * * * *

"Q. Mr. Driscoll, can you tell us about the time that elapsed between the first time you looked at the electric car and the second time you saw it?

* * * * *

"A. I don't know, sir, exactly. About four or five seconds, I reckon.

"Q. Now the second time that you looked at it—

"A. I guess about five or six; somewhere around there.

"Q. Five or six seconds?

"A. Yes, sir.

"Q. How long was that before the crash?"

P. 108:

"A. It wasn't very long.

"Q. A matter of four or five or six seconds?

"A. That is something that is hard to estimate."

* * * * *

"Q. When you looked the last time you say the car was 50 feet away from you?

"A. Yes, sir.

"Q. Or about; you estimate that. How soon after that did the accident happen?

"A. It might have been two seconds or three seconds or something like that.

"Q. Did it happen right away?

"A. Yes, sir; didn't have time for anything."

Exhibit No. 3 is a blue print, which was prepared for the plaintiff by H. R. Noel, who testified that the distance from the trestle to the center of the crossing at Concord Avenue is 670 feet (R., p. 52); that the distance from the crossing immediately North of Concord Avenue to Concord Avenue is 335 feet (R., p. 54); and that the distance between the paved driveway for southbound traffic and the paved driveway for northbound traffic is 34 feet (R., p. 57).

ARGUMENT.

From the foregoing testimony for the plaintiff it appears that Joseph Boyce Ford turned toward the interurban crossing in broad daylight. He was thoroughly familiar with the locality and with interurban and automobile traffic conditions there. He was in a place of safety, and before he reached a place of danger he actually saw the interurban car when it was some 670 feet away from him; and the car was then approaching the crossing at a speed of forty or forty-five miles per hour without any indication whatsoever that it would slacken its speed.

At the same time northbound automobile traffic was approaching the crossing, and it was obvious to Ford that the automobile traffic would impede the passage of his automobile over the interurban track.

Yet he persisted in his attempt to negotiate the crossing, even though the car was then bearing down upon him at undiminished speed, and even though the car was only some 335 feet away from him when he actually started over the crossing; and all the while the northbound automobiles were developing a *cul-de-sac* before him.

As was inevitable, the collision occurred.

Nor will any negligence of the motorman exculpate Ford. He was in full possession of all his faculties. He had already seen the car approaching. No signal was required to attract his attention. The danger was open and obvious. He was not oblivious to his situation.

And the doctrine of the last clear chance does not apply. Before the plaintiff can invoke that doctrine the plaintiff must show the time and place at which the motorman should have realized that Ford was in danger from which he would not extricate himself, and the plaintiff must further prove that the motorman thereafter had time and space within which to have stopped his car. This the plaintiff has not done.

The obligation to discover the last clear chance is mutual, and in the case at bar every argument advanced by the plaintiff to convict the motorman applies against Ford.

When Ford commenced to make his left turn, he, no less than the motorman, should have realized he could not safely negotiate the crossing.

If the motorman should have realized before the truck reached the track that the truck would not stop in a place of safety, Ford also should have realized that the approaching car would not stop.

If the motorman relied solely upon Ford to avoid the collision, Ford also relied solely upon the motorman.

If the motorman should have realized that the approaching northbound automobile traffic would impede the passage of the truck over the track, Ford himself should also have realized the same situation.

THE VIRGINIA AUTHORITIES BAR PLAINTIFF'S RECOVERY.

Familiar principles control the case at bar. As was said by Judge Burks at pp. 519-20, in *Derring's Admr. v. Va. Ry. & P. Co.*, (1918) 122 Va. 517, where there was a demurrer to the evidence:

“ * * * The application of the simplest principles to the facts bars recovery. * * * The intestate was laboring under no physical disability. The car was in full view and he was ‘looking at the car approaching’. The motorman had the right to assume that he would not step in front of it. It was his duty to see that the car had slackened its speed or stopped before going on the track in such close proximity to it. * * * ”

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

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

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

* * * * *

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

“We are not unmindful that the duty to look and listen is not applied with strictness to travelers crossing street rail-

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

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

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

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

* * * * *

Page 656: “There was, as we think, no evidence at all upon which to apply the doctrine of the last clear chance, and the most that can be made of the case from the plaintiff’s standpoint is that the accident resulted from a concurrence of her negligence with that of the defendant.”

In *Shephen Putney Shoe Co., Inc., v. Ormsby’s Admr.* (1921), 129 Va. 297, plaintiff’s decedent, a pedestrian, was guilty of contributory or concurring negligence under the circumstances in evidence in stepping from the sidewalk to the roadway, at the intersection of two streets, where, if he had looked before stepping from the curb, he would have been

bound to see within a few feet of him a rapidly approaching automobile just at the turn.

While the look and listen rule is not so strictly applied to street crossings as it is to railroad crossings, a reasonable lookout is required; and nothing but an utter lack of prudence could have accounted for plaintiff's decedent's failure to look in stepping from the curb to the street. In other words, if the decedent did look, he was bound to have seen the automobile and was negligent as a matter of law in stepping in front of it; and if he had not looked, he was none the less negligent.

Kelly, P., delivered the opinion of the court and said, pp. 302-4:

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

* * * * *

"The doctrine of the last clear chance does not apply. Redford says that the car could not have stopped at the rate at which it was going in time to save Ormsby. If this be true, then, of course, the truck driver had no last clear chance to avoid the accident, and the case is one of contributory negligence. If, on the other hand, it be conceded that the truck was going slow enough to stop or to reduce its speed sufficiently to save Ormsby, then it is self-evident that Ormsby likewise would have had sufficient time to get out of the way either by simply stopping or stepping back, and he himself would have had the last clear chance, or at least an equal chance to avoid the accident. See 7 Am. & Eng. Ency. L.

(2d Ed.), p. 387. In any view of the case it must be held to have been one of either contributory or concurring negligence."

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

The court held that it should and must be emphasized that a plaintiff is not entitled to recover under the doctrine of the last clear chance upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant's agents had responded properly, promptly, instantaneously, he might have been saved. The burden is upon him to show affirmatively by a preponderance of the evidence which convinces the average mind that by the use of ordinary care, after his peril was discovered, there was in fact a clear chance to save him. It is insufficient to show that there was a mere possibility of so doing.

Prentis, J., delivered the opinion of the court, and said, pp. 602-3:

"The plaintiff, apparently realizing that he might himself be held negligent, relied upon the last clear chance doctrine, and the jury were instructed accordingly. If a recovery can be sustained in this case, it can only be upon the contention that, after his peril was discovered, the servants of the company, who were operating the car, had a last clear chance to avoid the collision.

"The principles which are applicable in such cases have been recently stated in the cases of *Gordon's Admr. v. Director General*, 128 Va. 426, 194 S. E. 796; *Canody v. N. & W. Ry. Co.*, 129 Va. 56, 105 S. E. 585.

"The rule has been repeated in *Hendry v. Virginia Ry. & P. Co.*, 130 Va. 283, 107 S. E. 716, thus: 'In order to apply that doctrine, the burden is upon the plaintiff, who is confessedly negligent, to prove by a preponderance of the testimony that after his peril became imminent there was a clear opportunity afforded the defendant to save him from the

consequences of his own negligence, and this fact must be proved like any other fact upon which the plaintiff relies.' *Real Estate, etc., Co. v. Gwyn's Adm'x.*, 113 Va. 337, 74 S. E. 208; *Norfolk Southern R. Co. v. Smith*, 122 Va. 302, 94 S. E. 789; *Gunter v. Southern Ry. Co.*, 126 Va. 565, 101 S. E. 885; *Virginia Ry. & P. Co. v. Boltz*, 122 Va. 649, 95 S. E. 467; *Virginia Ry. & P. Co. v. Harris*, 122 Va. 657, 95 S. E. 403.

"It should and must be emphasized that a plaintiff is not entitled to recover under this doctrine upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant's agents had responded properly, promptly, instantaneously, he might have been saved. The burden is upon him to show affirmatively by a preponderance of the evidence which convinces the average mind that by the use of ordinary care, after his peril was discovered, there was in fact a clear chance to save him. It is insufficient to show that there was a mere possibility of so doing." * * *

* * * * *

P. 605:

"Our conclusion then is, from the plaintiff's evidence, that he failed to show that his peril was, or by reasonable care could have been, discovered in time to afford the company's servant, the motorman, a last chance, or any chance whatever, to save him, and that the verdict is without evidence to support it. Taking all of the evidence introduced by the plaintiff as true, and discarding all of the evidence for the defendant, the injury was due to the concurring negligence of both."

In *Cashell v. Southern Railway Co.* (1929), 152 Va. 335, Judge Campbell delivered the opinion of the court, and said, pp. 341-4:

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

"At grade crossings of railroads the rights of a traveler on the highway and of the railroad company are 'mutual, reciprocal and co-extensive', but generally a moving train

is accorded the right of way. A traveler approaching such crossing for the purpose of crossing must always exercise care proportioned to the known danger, and this care must be such as one who knows the danger and of the prior right of passage would be expected to exercise. The duty of looking and listening for approaching trains must be discharged in such manner as will make the looking and listening effective. The greater the danger, the greater the measure of duty. The track itself is a proclamation of danger, and the traveler has no right to proceed across the track without such looking and listening for approaching trains, and if he does, and in consequence thereof is injured, there can be no recovery, although the railroad company may also be guilty of negligence proximately contributing to such injury.'

"The contributory negligence of the decedent is manifest. Here we have a young man 29 years of age, endowed with physical vigor and fully in possession of the faculties of sight and hearing, driving (as expressed by the witness) in front of a fast moving train which could be seen at a distance of 2,285 feet when he was within 30 feet of the track. The conclusion that by the exercise of ordinary care he could have avoided the accident is irresistible. It is apparent, therefore, that unless the doctrine of last clear chance can be invoked the case of the plaintiff must fall of its own weight.

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

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

" 'The rule has been repeated in *Hendry v. Virginia Ry. & P. Co.*, 130 Va. 282, 107 S. E. 716, thus: "In order to apply that doctrine, the burden is upon the plaintiff, who is confessedly negligent, to prove by a preponderance of the testimony that after his peril became imminent there was a clear opportunity afforded the defendant to save him from the consequences of his own negligence, and this fact must be proved like any other fact upon which the plaintiff relies." *Real Estate, etc., Co. v. Gwyn's Adm'x.*, 113 Va. 337, 74 S. E.

208; *Norfolk-Southern Ry. Co. v. Smith*, 122 Va. 302, 94 S. E. 789; *Gunter v. Southern Ry. Co.*, 126 Va. 565, 101 S. E. 885; *Virginia Ry. & P. Co. v. Boltz*, 122 Va. 649, 95 S. E. 467; *Virginia Ry. & P. Co. v. Harris*, 122 Va. 657, 95 S. E. 403.

“‘It should and must be emphasized that a plaintiff is not entitled to recover under this doctrine upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant’s agents had responded properly, promptly, instantaneously, he might have been saved. The burden is upon him to show affirmatively by a preponderance of the evidence which convinces the average mind that by the use of ordinary care, after his peril was discovered, there was in fact a clear chance to save him. It is insufficient to show that there was a mere possibility of doing so.’

“‘The contention of plaintiff in error that the doctrine of discovered peril applies to this case is untenable. While it is undisputed that the engineer saw Cashell, it is also true that Cashell could have, and as a matter of law should have, observed the approaching train. Even when within a few feet of the track, the deceased could have stopped the truck and avoided the accident. The uncontroverted evidence that Cashell did hesitate before driving upon the track justified the belief of the engineer that he would not disregard the primary law of self-preservation. When we view such unfortunate accidents in retrospect, it is easy to perceive how they might have been avoided. The test of legal ability is not applied retrospectively, but is measured by the facts, the circumstances, and the events as they appear prior to the injury, combined with the facts, the circumstances, and the events which appear at the time of or immediately following the accident.’”

The rule applicable to the operator of the interurban car in the case under review is the rule which was applied in *Virginia Electric & Power Co. v. Jayne* (1928), 151 Va. 694, where Judge McLemore delivered the opinion of the court, and said, pp. 700, 701:

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

“‘The burden is on the party relying upon the doctrine of last clear chance to prove it by affirmative evidence, as was

said in *Ashby v. Virginia Railway and Power Co.*, 138 Va. 310, 122 S. E. 104:

“ ‘One relying upon the doctrine of last clear chance has the burden of proving affirmatively, by a preponderance of evidence, that by the use of ordinary care, after his peril was discovered, there was in fact a last clear chance to save him.’ *Shuster v. Virginia Railway & Power Co.*, 144 Va. 387, 132 S. E. 185; *Norfolk Southern Railroad Co. v. Smith*, 122 Va. 302, 94 S. E. 789; *Real Estate Trust and Insurance Co. v. Gwyn’s Adm’r.*, 113 Va. 337, 74 S. E. 208; *Norfolk Southern Railroad Co. v. White’s Adm’r.*, 117 Va. 342, 84 S. E. 646.”

In *Virginia Electric & Power Co. v. Power Co. v. Bennett* (1931), 156 Va. 910, Mr. Justice Browning delivered the opinion of the court, and said, pp. 911-915:

“ * * * The plaintiff, in the afternoon of the day of the accident, had driven with his wife and some friends to Petersburg, and later returned to Richmond, taking his friends to their home, and then started to Oak Grove for his daughters, who were visiting at the latter place. He was driving south on the western side of said turnpike, and when he was approaching Boston Avenue, where he intended crossing the track of the defendant company to get over on the eastern side of said turnpike, it was approximately 6:15 o’clock P. M., and dark. He gave a left-hand signal to warn oncoming traffic of his intention to make the turn and cross at the Boston Avenue intersection; when about fifty feet from the intersection he looked back as far as he could see on the pike and checked the speed of his car. Again he said that he looked both ways but saw no street car. At a point about three or four feet from defendant’s track he again looked towards Richmond and towards Petersburg but with the same result. There were street lights at the intersection and there were also electric lights between the intersection of said turnpike, and, of course, there were lights on the automobiles going to and fro on the turnpike.

“The plaintiff testified that the windows of his car were down, and that no bell or gong on the street car was sounded. After his second observation, when three or four feet from the track, he did not look again, but said that his attention was directed to the traffic from Petersburg. He said that he could not see over a half or three-quarters of a block. He proceeded at the intersection up a slight grade about as fast as a man could walk, with his car in low gear, and as the

front wheels went over the second rail, without any warning, the crash came. * * *

"The facts as we have stated them is the evidence, in epitome, which we may say is corroborated by the testimony of his wife.

* * * * *

"The assignments of error are four in number, but as we view the case we need only concern ourselves with consideration of the second assignment, which is that 'the evidence in the record convicts the plaintiff of negligence which bars his recovery'.

"The verdict shows that the jury found the defendant guilty of the primary negligence alleged in the notice in that it failed to sound a gong or bell upon the approach of its car to the intersection where the plaintiff driving his automobile was struck; in other words, that it violated the requirements of the city's ordinance applicable to such condition.

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

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

conduct was a listless disregard of his own safety. It was negligence that at least concurred with that of the defendant which precludes his right of recovery.

“ * * * With this type of case the Virginia Reports are replete. The way is a beaten track and we shall not do more than to say, as Chief Justice Prentis said in the case of *Jones v. Va. Power Co.*, 153 Va. 705, 712, 151 S. E. 133, 135: ‘There is no uncertainty as to the law which is applicable. The difficulty is to apply the conceded rules of law to the varying facts.’ ”

Dick v. Virginia Electric & Power Co. (1932), 158 Va. 77, was an action for injuries resulting from a collision between a street car and an automobile. Plaintiff’s automobile was stalled upon a crossing of the defendant’s street car line, and although the plaintiff saw the approaching street car she took no steps to save herself. She admitted she could have gotten out of the automobile in time to save herself when the street car was 100 feet away from her. The motorman of the street car testified that he saw the plaintiff’s automobile on the crossing when the street car was about 175 feet away, but thought the automobile would move on as he had no idea it was stalled. When he was about 125 feet from the automobile, he came to the conclusion that the automobile was stalled and attempted to stop the car.

In that case, despite any negligence of the motorman, the fact remained that the plaintiff saw the oncoming car for more than 561 feet, and that she saw it within 100 feet of her, which was admittedly in time for her to have gotten out and to have saved herself. Yet she sat in the presence of imminent danger without taking action or thought for her own safety.

The court held that the last clear chance did not apply and that the plaintiff was guilty of negligence continuing to the time of her injury and contributing thereto so that she could not recover.

And so in the case at bar. Before Ford proceeded into a place of danger he admittedly saw the interurban car 670 feet away from him when the car was approaching at a speed of approximately forty-five miles per hour. He saw the oncoming car approaching at undiminished speed 330 feet away from him when he proceeded upon the track. Before he proceeded upon the track and even thereafter he had occasion, time and opportunity to save himself. Yet he proceeded onward in the presence of imminent danger without taking action or thought for his own safety. Certainly this case is not a case of the last clear chance, for Ford was guilty of negligence continuing to the time of his injury

and contributing thereto so that plaintiff's recovery is barred. Mr. Justice Browning delivered the opinion in the Dick case, and said, pp. 80-2:

P. 80:

"The plaintiff's case was based on the theory of the last clear chance.

"The Special Court of Appeals, in the case of *Virginia Ry., etc., Co. v. Leland*, 143 Va. 930, at page 925, 129 S. E. 700, 701, quoted from other Virginia cases as follows: 'The foundation of the doctrine is that the parties are guilty of concurring negligence, and there must be some condition, circumstance, or superadded fact which one of the parties saw, or by the exercise of ordinary care could have seen, that made it his duty to endeavor to avoid injury to the other negligent party, and the obligation of discovering the last clear chance is mutual.' *Green v. Ruffin*, 141 Va. 628, 125 S. E. 747 (127 S. E. 486); *McNamara v. Rainey Luggage Corp.*, *et al.*, 139 Va. 197, 123 S. E. 515.

"One relying on the doctrine of the last clear chance has the burden of proving affirmatively by a preponderance of evidence that by the use of ordinary care, after his peril was discovered, there was in fact a last clear chance to save him.' *Washington & O. D. Railway v. Thompson*, 136 Va. 597, 118 S. E. 79; *Hendry v. Virginia Ry. & Power Co.*, 130 Va. 283, 107 S. E. 716; *Ashby v. Virginia Ry. & Power Co.*, 138 Va. 310, 122 S. E. 104.

"In the well reasoned case of *Barnes v. Ashworth*, 154 Va. 218, at pages 244, 245 and 247, 153 S. E. 711, 718, this court, speaking through Justice Epes, says: 'In the second class of cases (those in which the defendant does not see or have actual knowledge of the peril of the plaintiff, but owes to him the duty of lookout), the defendant as a matter of law is charged with the actual knowledge of what he must have seen and known had he performed his duty and kept such a lookout as he is required by law to keep. Hence, in the second class of cases the rule of the last clear chance has no application where the negligence of the person injured continued up to the time of the injury *unless and until* it is established that had the defendant kept such a lookout, as he was required by law to keep, he would or ought to have been aware, from the facts and circumstances which would have been brought home to his knowledge, that the plaintiff was unconscious of his peril and would take no steps to secure his own safety, or was in a situation from which the exercise of ordi-

nary care on his part would not thereafter extricate him.
* * *

“When the defendant is aware, or ought to be aware from facts and circumstances brought home to his knowledge, that the plaintiff is unconscious of his peril, or is in a situation of peril from which he cannot by the exercise of ordinary care on his part thereafter extricate himself, or when in the second class of cases such state of facts would have been known to him had he been performing the duty of lookout imposed upon him by law, *then, and not until then*, does the rule of the last clear chance become applicable and the new duty of the defendant to use the last clear chance, if such there be, to avoid the injury arise. * * *

“In cases in which (assuming that the defendant has been negligent) the plaintiff has also been guilty of negligence which continued to the time of the injury and contributed as a factor thereto, but it is sought, nevertheless, to recover for the injury under the doctrine of the last clear chance, there are three questions, which arise in the order below stated, all of which must be answered in the affirmative before a recovery may be had:

“(1) Does the evidence show a state of facts which, under the rule above stated, make the rule of the last clear chance applicable?

“(2) If so, does the evidence show a state of facts existing after the rule of the last clear chance has become applicable, which presented an opportunity for the defendant by the exercise of reasonable care to avoid the injury?

“(3) If so, does the evidence show that after the opportunity arose the defendant, under all the facts and circumstances of the emergency presented to him, failed to use ordinary care to avoid the injury?

“If the preponderance of the evidence fails to give an affirmative answer to any one of these inquiries, then contributory negligence on the part of the plaintiff, continuing to the time of his injury, will bar his recovery.”

Virginia Electric and Power Company v. Vellines (1934), 162 Va. 671, was an action resulting from a collision between a street car and an automobile at an intersection. Both the street car and the automobile approached the intersection at undiminished speed, and if the plaintiff did not see the street car, it was merely because he failed to look. The court held the last clear chance doctrine was inapplicable to the case. Mr. Justice Hold delivered the opinion of the court, and said, pp. 680-4:

Pp. 680-681:

"It is the contributory negligence of the plaintiff which prevents a recovery. Plaintiff undertook to cross the car track without taking reasonable precautions for his own safety. This not only was due to himself but to others whose rights were co-equal with his own. Our reports are full of cases to this effect. See *Virginia Elec. & Pow. Co. v. Bennett*, 156 Va. 910, 159 S. E. 93."

* * * * *

"It is entirely probable that plaintiff's attention was directed to a street car approaching from the west on the far track. This, though it may explain his conduct, does not excuse it; one must look with care in both directions.

"The court was of the opinion that the doctrine of the last clear chance might be applied and so told the jury. This was error. This is a humane doctrine and should be upheld but it must be applied with caution. The burden of proof is upon the plaintiff and he must show that he chance was clear. 'Perhaps' is not enough. The minds, nerves and muscles of men are not so accurately coordinated as that there can be instantaneous action to meet an emergency. *Norfolk Southern R. Co. v. White's Adm'x.*, 117 Va. 342, 84 S. E. 646. Plainly it was not intended that it should wipe away and supersede the defense of contributory negligence.

"In *Norfolk Southern R. Co. v. Smith*, 122 Va. 302, 94 S. E. 789, 790, Judge Prentiss said: 'The doctrine of the last clear chance has nowhere been better stated than in the syllabus to the case of *Roanoke Ry. & Elec. Co. v. Carroll*, 112 Va. 598, 72 S. E. 125, thus: 'The underlying principle of the doctrine of the "last clear chance", as declared by the decisions of this court, is that, notwithstanding the contributory negligence of the plaintiff, there is something in his condition or situation at the time of the injury to admonish the defendant that he is not able to protect himself. The doctrine is one of prior and subsequent negligence, or of remote and proximate cause, and presupposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of defendant. Where the negligence of both continues down to the moment of accident and contributes to the injury, the case is one of concurring negligence, and there can be no recovery.'

"It is only when some new active negligence on the defendant's part becomes the immediate and proximate cause of the accident that the rule applies. In such a case the

antecedent negligence of the plaintiff becomes remote. *Barnes v. Ashworth*, 154 Va. 218, 153 S. E. 711.

"It has no application 'where the proximate and efficient cause of the accident involved the concurrent negligence of both plaintiff and defendant, unbroken by any efficient supervening cause and to such case the exception referred to obviously has no application'. *Southern R. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365, 369, 27 L. R. A. (N. S.) 379. This is a leading case in Virginia and deals with the history of the doctrine. Keith, P., said: 'We are dealing here with a case where a plaintiff, who could, up to the moment of impact, have placed himself in a position of safety, if he had exercised ordinary care to discover the approaching train, is seeking to recover from the defendant company because, by the exercise of like care, it could have avoided inflicting the injury of which he complains; and the question is whether or not a plaintiff can recover of a defendant where they are equally guilty of the breach of an identical duty, the consequences of which continue on the part of both to the moment of the injury. Of course, before the doctrine of the last clear chance can be invoked, it must be shown that the defendant has been guilty of negligence, either before or after the discovery of the peril constituting the proximate cause of the accident.' A recovery in that case was denied.

"There is this exception to the rule which prevents a recovery where there is continued and concurring negligence. If, while these conditions exist, the defendant sees, or in the exercise of reasonable care should have seen, that plaintiff is oblivious of his danger or unable to extricate himself from a position of peril in which his negligence has placed him, then a reasonable effort should be made to avoid an accident. If the driver of a car saw some man whom he knew was blind, undertake to cross the street in front of him where he had no right to cross, it would be the driver's duty to take all reasonable precautions, and he should not be permitted to say, 'Though I was negligent, he too was concurrently negligent up to the moment of impact.' In such a case the driver's negligence would be culpable and the latest in the succession of causes. *Roanoke Ry. Co. v. Carroll, supra; Barnes v. Ashworth, supra.*

"Continued and concurring negligence is a complete defense unless there be some circumstances or superadded fact which would make reliance upon it inhuman and culpable. One cannot maim or injure another merely because he is negligent. It is only when these superadded facts or circumstances make the conduct of the defendant the proximate cause that the rule applies.

“This doctrine is not intended to protect the interest of any special class of litigants. Plaintiffs and defendants each may invoke it. Their rights and obligations are the same.

“‘The foundation of the doctrine is that the parties are guilty of concurring negligence and there must be some condition, circumstance or superadded fact which one of the parties saw or by the exercise of ordinary care could have seen, that made it his duty to endeavor to avoid injury to the other negligent party, and the obligation of discovering the last clear chance is mutual.’ *Green v. Ruffin*, 141 Va. 628, 125 S. E. 742, 747, 127 S. E. 486. In that case it was also said: ‘Assuming that the plaintiff was negligent, it was her duty, with the automobile in plain view coming toward her, to have looked and stopped when such act would have been effective. She had the same last clear chance to protect herself as the defendant had to protect her, for the doctrine of the last clear chance is a duty imposed by law on both the plaintiff and defendant. If being in plain view of each other and with equal opportunity to prevent the accident, they are guilty of concurring negligence, there can be no recovery.’

“The statute which gives to the driver of the vehicle on the right, when approaching intersecting roads, the right of way does not apply to railroads and street car companies. See Acts of 1926, ch. 474, pp. 763-766, defining vehicles. In the instant case both the street car and the automobile approached an intersection at undiminished speed. If the plaintiff did not see the street car it was because he failed to look. This was of course negligence and the situation is not changed if he did see it when it was just upon him and when a collision was inevitable. If the motorman saw the automobile proceeding in a manner which indicated a purpose to cross the intersection it was his duty to check his speed. His failure to take this precaution was negligence, and if he did not see the automobile, he should have seen it. We have here a simple case of concurring and continuing negligence up to the moment of the accident, in which the law gives no relief. There was no intervening cause.

“If, without more, two automobiles, traveling upon intersecting highways, were to run into each other at the point of intersection, plainly there could be no recovery by either driver. The rights of each would have been equal and their negligence the same. The chance which each had to avoid the accident was common to both and of course to permit both of them to invoke the doctrine of the last clear chance would lead to impossible results.”

was also an action which resulted from a collision between a street car and an automobile; and in that case the court applied the principle which determines the case at bar and held that the motorman of a street car can be charged only with what he saw or would have seen if he had been keeping a proper lookout. In that case, as in the case under review, there was nothing which the motorman would have seen which ought to have put him on guard that the driver of the automobile had not seen the street car, or that he was unconscious of its approach. Mr. Justice Epes delivered the opinion of the court, and said, pp. 730-731:

“The evidence is silent as to whether the motorman was keeping a lookout. But whether he was or was not he can be charged only with what he saw or would have seen if he had been keeping a proper lookout. According to the testimony given by the plaintiff himself, if the motorman was keeping a proper lookout, as he approached the curve he would have seen Umphlett’s automobile some distance away approaching the intersection at from fifteen to twenty miles an hour (a comparatively slow speed). After he had actually entered the curve and the turning movement of the street car had become readily apparent to anyone keeping a lookout, he would have seen that the automobile was still somewhere from eighty-five to 114 feet distant from the point that the nearest rail of the tracks crossed the center line of the boulevard. At this time, so far as the record discloses, there was nothing which he would have seen which ought to have put him on guard that the driver of the automobile had not seen the street car or was unconscious that it was turning across the boulevard. Not only does the driver Umphlett testify that at the speed he was going he could have stopped his automobile in about a car’s length (that is, about twelve feet), but it is a matter of common knowledge that at such a speed an automobile can be stopped in a very short distance. It is further a matter of common knowledge that automobile drivers ordinarily do not bring their cars to a stop at a street railway crossing when they are eighty-five feet distant. They are accustomed to approaching much closer before stopping. The headlight of the street car was lighted, as were the lights inside the street car, and it was necessarily a conspicuous object visible to anyone who was keeping even the most casual lookout; and the turning movement of the front of the street car was such as to make its change of direction apparent to one facing it from the instant the car began the turn.

“In this situation no legal duty rested upon the motorman

to give an audible signal before proceeding to make the turn, or to stop and wait until the automobile had passed over the crossing. He had a right to assume that the driver was obeying the law and keeping a lookout, had seen the street car and observed that it was turning across the boulevard, and would stop before his automobile came into dangerous proximity of the car tracks; and he was warranted in acting upon this assumption until the automobile was so close as to make it practically impossible to prevent a collision. The motorman of a street car is not charged with the duty of anticipating the negligence of the driver of an automobile and taking steps to counteract it. He is only required to take steps to avoid the results of the negligence of a driver when it has become, or should have become, apparent to him that the driver is negligent and will not or cannot take steps to protect himself or his passengers."

CONCLUSION.

In view of the decisions hereinbefore cited and of the reasoning of those decisions, the defendant submits finally that the judgment of the court below is contrary to the law and the evidence since the driver of the automobile was guilty of negligence as a matter of law, and not as an issue of fact, and recovery by the plaintiff is thereby barred.

Counsel for petitioners desire to state orally the reasons for reviewing the judgment complained of in this case, and hereby adopt this petition for writ of error as their brief in support of their argument; copy of this petition for writ of error and *supersedeas* having been delivered in person to Aubrey R. Bowles, one of counsel for defendant in error, on the 22nd day of February, 1935, all as required by Rule II of the Supreme Court of Appeals of Virginia as amended November 6, 1929.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER
COMPANY AND W. E. BLANTON,

T. JUSTIN MOORE,
RICHARD H. MANN,
ARCHIBALD G. ROBERTSON,
Counsel.

Copy of the foregoing petition for writ of error received this 22nd day of February, 1935.

AUBREY R. BOWLES, JR.,
of Counsel for Defendant in Error.

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

T. JUSTIN MOORE,
ARCHIBALD G. ROBERTSON.

Received February 22nd, 1935.

M. B. WATTS, Clerk.

March 15, 1935, writ of error and *supersedeas* awarded.
Bond, \$12,000.00.

M. B. W.

RECORD

VIRGINIA:

Pleas had before the Hustings Court, Part II, of the City of Richmond, Va., on the 3rd day of August, 1934.

Be it remembered that heretofore, to-wit: on the 31st day of January, 1934, came the Plaintiff Lula Agnes Ford, Administratrix of the estate of Joseph Boyce Ford, deceased, and filed the following notice of motion for judgment against the defendant, Virginia Electric and Power Company, to-wit:

Virginia:

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

Lula Agnes Ford, Administratrix of the estate of Joseph Boyce Ford, deceased, Plaintiff,

v.

Virginia Electric and Power Company, a corporation, and
W. E. Blanton, Defendants.

NOTICE OF MOTION FOR JUDGMENT.

To Virginia Electric and Power Company, a Corporation,
and W. E. Blanton.

Take notice that, on February 17th, 1934, at eleven o'clock A. M., or as soon thereafter as I may be heard, I, Lula Agnes Ford, Administratrix of the estate of Joseph Boyce Ford, deceased, shall, pursuant to the provisions of Section 5787 of the Code of Virginia, move the Hustings Court, Part Two, of the City of Richmond, at its courtroom in said city, for a judgment against you and each of you in the sum of Ten Thousand Dollars (\$10,000.00) for damages for the
page 2 } death of my decedent, aforesaid, caused by the willful and wanton negligence of you and each of you, as follows, to-wit:

That, on or about February 27th, 1933, Virginia Electric and Power Company, a corporation, was the owner and operator of an electric railway duly authorized by its said charter and by franchise to operate cars propelled by electric power on, along and upon the Richmond-Petersburg Highway, being State Highway Route No. 31, and generally known as U. S. Route No. 1, said highway being a public highway open to travel by the public; that, on or about said day, at about noon thereon, a certain street car propelled by electricity was being operated on your behalf and in the course of your business by W. E. Blanton, your agent, servant and employee, in the course of his employment, in a southerly direction on, along and upon said public highway; and that, thereupon it became and was the duty of you and each of you to exercise ordinary care in the operation of said electric car on, along and upon said public highway; to give notice and warning of the approach of said electric car to persons and vehicles on, along and upon said public highway; to give notice and warning of the approach of said electric car at or near the intersection of public streets, roads, ways and highways with said highway to persons and vehicles on, along and upon said highway; to operate said electric car on, along and upon said highway at a speed not greater than was reasonable and prudent under the circumstances then existing; to operate said electric car on, along and upon said highway at or near its intersection with other public streets, roads, ways and highways at a speed not greater
page 3 } than was reasonable and prudent under the circumstances then existing; to keep a constant and careful lookout for persons and vehicles using said highway and

persons and vehicles on, along and upon said highway so as to avoid injury to them; to keep said electric car under control; to have said electric car equipped with adequate appliances, brakes and apparatus, properly adjusted, for the stopping of said electric car, and to make use of the same in the exercise of ordinary care to avoid injury to persons and vehicles on, along and upon said highway; to observe the right of way laws at the intersection of said highway with other public streets, roads, ways and highways; to observe all and every statute of the State of Virginia for such cases made and provided for the operation of electric cars and electrically propelled vehicles on rails on, along and upon public highways of this state.

Yet, notwithstanding the several duties aforesaid of you and each of you in the operation of said electric car on, along and upon said public highway, in negligent, willful and wanton disregard and violation thereof, you and each of you negligently, carelessly, recklessly, willfully and wantonly operated your said electric car on, along and upon said public highway in a willfully and wantonly negligent, careless and reckless manner at an excessive rate of speed; negligently, willfully and wantonly failed to exercise ordinary care in the operation of said electric car on, along and upon said public highway; negligently, willfully and wantonly failed to give notice and warning of the approach of said electric car

on, along and upon said highway; negligently, will-
 page 4 } fully and wantonly failed to give notice and warn-
 ing of the approach of said electric car at the inter-
 section of said public highway with another public street,
 road, way or highway, namely, Concord Avenue; negligently,
 willfully and wantonly failed to operate said electric car on,
 along and upon said highway at a speed not greater than
 was reasonable and prudent under the circumstances then
 existing; negligently, willfully and wantonly failed to oper-
 ate said electric car on, along and upon said highway at a
 speed not greater than was reasonable and prudent on ap-
 proaching the intersection of said public highway with an-
 other public street, road, way or highway, namely, Concord
 Avenue; negligently, willfully and wantonly failed to keep a
 constant and careful lookout for persons using said highway
 so as to avoid injury to them and, more particularly, the
 plaintiff's decedent; negligently, willfully and wantonly failed
 to keep said electric car under control; negligently, will-
 fully and wantonly failed to have said electric car equipped
 with adequate appliances, brakes and apparatus, properly
 adjusted for the stopping of the same, and negligently, will-
 fully and wantonly failed to make use thereof in the exer-

cise of ordinary care to avoid injury to persons and vehicles on, along and upon said highway, and, more particularly, the plaintiff's decedent; negligently, wilfully and wantonly failed to observe the right of way laws at the intersection of said public highway with another public street, road, way or highway, namely, Concord Avenue; negligently, wilfully and wantonly failed to observe any and every statute of the State of Virginia for such cases made and provided for the operation of street cars and cars propelled by

electric power on rails on, along and upon the public highways of the State of Virginia; and you negligently, carelessly, recklessly, willfully and wantonly, and with willful and wanton disregard for the safety of plaintiff's decedent, drove your said electric car into and upon a certain truck owned by one Emil E. Zeller and lawfully operated by the plaintiff's decedent, and which was then and there being lawfully operated along and across said highway at or near its intersection with said Concord Avenue, in Chesterfield County, in the State of Virginia, in a lawful manner and in the exercise of ordinary care.

And, as a proximate result of your said willful, wanton, careless, reckless and negligent disregard of your aforesaid duties, said truck was negligently struck by said electric car and dragged a great distance, thereby causing serious, severe, painful and fatal bodily injuries to plaintiff's decedent, and whereby plaintiff's decedent was thrown about, knocked, bruised, cut, lacerated and fatally injured about his back, head, legs, arms and body; and by reason of which said injuries plaintiff's decedent suffered great pain and became mortally sick and died, all as a direct and proximate result of your said willful and wanton carelessness, recklessness and negligence.

And, I, Lula Agnes Ford, having duly qualified before the Chancery Court of the City of Richmond as Administratrix of the estate of the said Joseph Boyce Ford, my decedent, on January 30, 1934, therefore, bring this notice for judgment for damages for the death of my said decedent as the proximate result of your said carelessness and willful and wanton negligence.

And, I, Lula Agnes Ford, having duly qualified before the Chancery Court of the City of Richmond as Administratrix of the estate of the said Joseph Boyce Ford, my decedent, on January 30, 1934, therefore, bring this notice for judgment for damages for the death of my said decedent as the proximate result of your said carelessness and willful and wanton negligence.

And, whereas an award was entered on March page 6 } 25, 1933, by the Industrial Commission of the State of Virginia for the medical and burial expenses incident to, and for compensation to the dependents of my decedent by reason of the death of my said decedent as an employee of said Emil E. Zeller; and, whereas said Emil Zeller was insured against liability for such expenses and compensation arising under the Workmen's Compensation Act of the

State of Virginia by Indemnity Insurance Company of North America; and, whereas said Indemnity Insurance Company of North America has, pursuant to said award, become liable for said employer's liability thereunder, and has become subrogated to all the rights, duties and privileges of said employee, my decedent, and of his said employer, under and by virtue of and in accordance with Section 12 of said Workmen's Compensation Act, this notice of motion for judgment is brought in my name for the benefit of said Indemnity Insurance Company of North America, of Lula Agnes Ford, the widow of said Joseph Boyce Ford, deceased, and of Agnes May Ford, age eight, and Jean Evelyn Ford, age four, the minor children of the said Joseph Boyce Ford, deceased, as their respective interests in the recovery hereunder shall appear and be determined pursuant to the statutes for such case made and provided.

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

LULA AGNES FORD,
Administratrix of the Estate of Joseph Boyce
Ford, deceased.

By Counsel.

page 7 } AUBREY R. BOWLES, JR.,
WILLIS D. MILLER, Counsel.

RETURN.

Executed in the city of Richmond, Va., January 31-1934 by delivering a true copy of the within Notice to W. E. Blanton in person, and Further Executed on Virginia Electric and Power Co., a Corporation, by delivering a true copy of the within Notice to H. S. Klotz as Cashier in person, with Office in the city of Richmond.

J. T. WILLARD, Sergeant,
By J. H. LEE,
Deputy Sergeant.

page 8 } PLEA OF NOT GUILTY.

Filed Feb. 3, 1934.

The defendants, Virginia Electric and Power Company and W. E. Blanton, by their attorney, come and say 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.

ARCHIBALD G. ROBERTSON, p. d.

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

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 17th day of July, 1934.

ORDER FOR GROUNDS OF DEFENSE.

On motion of the plaintiff, by counsel, the defendants are ordered to file herein within five days from this date their grounds of *defendant* in each of the above causes and to furnish the plaintiff's counsel with a true copy thereof.

page 10 } GROUNDS OF DEFENSE.

Filed July 20, 1934.

GROUNDS OF DEFENSE AND NOTICE OF INTENTION TO RELY UPON NEGLIGENCE OF PLAINTIFF'S DECEDENT.

The defendants, W. E. Blanton and Virginia Electric and Power Company, by their counsel, pursuant to Section 6092 of the Code of Virginia, state that they intend to rely upon the contributory negligence of plaintiff's decedent as a defense to this action, and state the following grounds of defense of negligence on the part of plaintiff's decedent.

1. The said defendants deny that the operation of defendant Virginia Electric and Power Company's car was negligent as charged in plaintiff's notice of motion for judgment.

2. The said defendants deny each and every material allegation in the plaintiff's notice of motion for judgment.

3. The said defendants say they were guilty of no negligent act or omission proximately causing or concurring to cause the alleged accident and consequent injuries to plaintiff's decedent.

4. The said defendants say that plaintiff's decedent was guilty of contributory negligence which proximately caused or efficiently contributed to cause the accident in failing to keep a proper lookout for approaching electric interurban cars; in his manner of driving an automobile milk delivery truck belonging to Emil E. Zeller; in making a left turn with

said automobile truck in a negligent manner at a crossing between Stop #8½ and Stop #9 on the Richmond-Petersburg electric line of the Virginia Electric and Power page 11 } Company when the said defendant Virginia Electric and Power Company's interurban electric car was dangerously near without heeding the approach of the said interurban electric car; and said plaintiff's decedent generally failed to exercise ordinary care and prudence for his own safety which the circumstances surrounding him then demanded; all in violation of the traffic ordinances of the City of Richmond, Virginia, and in violation of the traffic laws of the Commonwealth of Virginia.

5. The said defendants further say that any injuries plaintiff's decedent may have sustained at the time and place complained of, were proximately caused by negligence on the part of plaintiff's decedent and said negligence on the part of plaintiff's decedent efficiently contributed to cause said accident, and thereby recovery by the plaintiff is barred. Plaintiff's decedent negligently and recklessly attempted to make a left turn at a crossing between Stop #8½ and Stop #9 on the Richmond-Petersburg electric line of the said defendant, Virginia Electric and Power Company, when the interurban electric car was dangerously near, without looking or listening for approaching interurban cars, and without taking any other reasonable or adequate precautions for his own safety, all of which contributed to cause the alleged injuries to plaintiff's decedent.

6. The said defendants deny that plaintiff's decedent was injured in the manner alleged in plaintiff's notice of motion for judgment.

7. The said defendants reserve the right to amend their grounds of defense at any time if and as they may be so advised, to demur to the plaintiff's notice of motion page 12 } for judgment, or any part thereof, and to move the court to strike out the same or any part thereof as insufficient in law, or for lack of evidence to support it.

VIRGINIA ELECTRIC AND POWER
COMPANY,

W. E. BLANTON,
By T. JUSTIN MOORE,
R. H. MANN,
ARCHIBALD G. ROBERTSON, Counsel.

page 13 } And at another day, to-wit:

At a like Hustings Court Part II, continued by adjournment and held for the said city, on the 23rd day of July, 1934.

On the motion of the Defendants by counsel and for reasons appearing to the Court it is ordered that a *Venire Facias* be issued by the Clerk of this Court for a Special Jury of 20 men to be summoned from a list of 30 men furnished by the Judge of this Court for the trial of the above style case on August 1st 1934 at 11 o'clock A. M. the said Special Jury to be at the expense and cost of the said defendants.

page 14 } And at another day, to-wit:

At a like Hustings Court Part II, continued by adjournment and held for the said city, on the 1st day of August, 1934.

This day came the parties in person and by counsel and thereupon the defendants by counsel filed in writing their Plea of Not Guilty, Grounds of Defense and Notice in writing of Intention to Rely upon Contributory Negligence of Plaintiff's decedent filed at a former day of this Court and put themselves upon the country and the Plaintiff likewise and issue is joined thereupon. And the said Sergeant having executed and returned the *Venire Facias* to him directed summoning 20 men from the City of Richmond as a Special Jury for the trial of this case, and thereupon 4 of said Jurors were stricken from said panel of 20 by lot as provided for by law and the said Plaintiff and Defendants by counsel having alternately stricken from said panel the names of four more of said jurors from the remaining sixteen the remaining twelve constituted and composed the jury for the trial of the issue joined in this case, to-wit: R. P. Swineford, J. B. Tatum, A. L. Tenser, B. M. Walker, C. H. Stout, E. D. Cottrell, E. S. Carter, J. H. Jones, Eldridge Reams, W. A. Pleasants, A. B. Sadler and J. S. Renner, who being elected, tried and sworn the truth to speak upon the issue joined and thereupon evidence was introduced by the Plaintiff and at the conclusion of the Plaintiff's evidence the Defendant by counsel moved the Court to strike Plaintiff's evidence on the grounds stated in the record which motion the court after hearing arguments of counsel overruled, to which action of the Court the defendants by counsel excepted. By consent of parties by counsel and with the assent of the Court the jury were adjourned

over until tomorrow morning at ten o'clock with
 page 15 } the usual admonitions given them. And the fur-
 ther consideration of this case is continued until
 the then tomorrow morning at ten o'clock.

page 16 } And at another day, to-wit:

At a like Hustings Court Part II, continued by ajourn-
 ment and held for the said city, on the 2nd day of August,
 1934.

This day came again the parties in person and by counsel
 and the jury appeared in court pursuant to the conditions of
 their adjournment and having fully heard all the evidence on
 both sides and at the conclusion of all the evidence the de-
 fendants by counsel renewed the aforesaid motion upon the
 grounds mentioned in the record to strike all the evidence of
 the Plaintiff which motion the Court overruled. To which ac-
 tion of the court the defendants by counsel excepted. By
 consent of parties by counsel and with the assent of the Court
 the jury in the custody of the sergeant of this Court were
 sent to the place of the alleged accident, and also were
 permitted to view the truck involved therein upon their re-
 turn were adjourned, over until tomorrow morning at ten
 o'clock with the usual admonitions given them. And the
 further consideration of this case is continued until the then
 tomorrow morning at ten o'clock.

page 17 } And at another day, to-wit:

At a like Hustings Court Part II, continued by adjourn-
 ment and held for the said city, on the 3rd day of August,
 1934.

This day again came the parties in person and by counsel
 and the jury appeared in Court pursuant to the conditions
 of their adjournment and having fully heard the evidence
 and being instructed on the law by the court and arguments
 of counsel retired to their room to consult upon a verdict
 after which consultation they returned into court and ren-
 dered the following verdict to-wit: We the Jury on the issue
 joined fined for the plaintiff against the defendants and
 assess the damages at Ten Thousand Dollars (\$10,000.00).
 A. L. Tenser, Foreman. And then the jury was discharged.
 Thereupon the Defendants by counsel made the following
 motions to set aside the verdict and enter up judgment for
 the defendants on the ground that the verdict is contrary to

the evidence and without evidence to support it and that motion being denied moved the court to set aside verdict and grant a new trial upon the ground that the verdict is contrary to the law and the evidence, that the court erred to the prejudice of the defendants in the granting and refusing of instructions and the admission and rejection of evidence, which motions were continued to 1st Monday in October, 1934.

Memo.: During the trial of this case various and sundry exceptions were taken both by the Plaintiff and Defendants to sundry rulings of this Court.

page 18 } And at another day, to-wit:

At a like Hustings Court, Part II, continued by adjournment and held for the said city, on the 1st day of November, 1934.

This cause having been further continued from the first day of October, 1934 by consent of counsel for both the plaintiff and the defendants, this day came again the parties by their attorneys, pursuant to said continuance, and the court having heard arguments of counsel upon and maturely considered the motions made by the defendants by their counsel on the third day of August, 1934, to set aside the verdict of the jury and enter up judgment for the defendants and, failing so to do, to set aside the verdict of the jury and grant the defendants a new trial, on the grounds heretofore stated, the court doth overrule said motions, to which rulings of the court the defendants, by counsel, excepted.

And it appearing to the court that the jury sworn to try the issue herein failed to specify and direct in what proportion the damages awarded by them shall be distributed among the beneficiaries, to-wit: Lula Agnes Ford, widow, and Agnes May Ford and Jean Evelyn Ford, infant daughters, of the deceased, Joseph Boyce Ford, thereupon by leave of court the plaintiff by counsel filed herein a certified copy of an award of the Industrial Commission of Virginia, dated March 25th, 1933 in the claim of Lula Agnes Ford, et als., *v. E. E. Zeller*, employer, and Alliance Casualty Company, insurance carrier, which is in the following words and figures, to-wit:

page 19 } "Take notice that the Industrial Commission of Virginia has examined the memorandum of agreement entered into in the above styled case, for the pay-

ment of compensation under the Virginia Workman's Compensation Act, and has found the same in accordance with the provisions of the said Act.

Wherefore, the Industrial Commission of Virginia directs the payment of compensation as follows:

To Mrs. Lula A. Ford, \$11.50 per week for the joint and equal use of herself and the infant dependents; Agnes May Ford and Jean Evelyn Ford, payable every four weeks, beginning February 27, 1933, to continue for a period of three hundred (300) weeks, unless subsequent conditions require a modification.

To proper parties, the cost of burial expense not to exceed the sum of One Hundred Fifty (\$150.00) Dollars.

INDUSTRIAL COMMISSION OF VIRGINIA,
W. H. NICKELS, JR., Chairman.

Attest:

W. F. BURSEY, Secretary."

And it being further represented, shown and appearing to the court that Indemnity Insurance Company of North America has assumed all the liability of Alliance Casualty Company under said award and has become solely responsible for and is discharging all liability and making all payments thereunder in the place and stead of the said Alliance Casualty Company;

And it appearing further to the court that, pursuant to the statutes for such case made and provided, the court should make such specification, division and distribution of the recovery herein against the defendants amongst the persons entitled thereto;

Therefore, it is considered by the court that
page 20 } the plaintiff recover from the defendants the sum
of Ten Thousand Dollars (\$10,000.00) with interest from the third day of August, 1934, until paid, and her costs by her in this behalf expended. And the court now proceeding to make such specifications, division, and distribution of the damages awarded by the jury herein and of the sum of which said judgment is entered doth order that, upon payment by the defendants of said judgment, interest and costs, said sum shall be divided as follows, to-wit: first, to the reimbursement of the said Indemnity Insurance Com-

pany of North America, the amount of said compensation paid or payable together with all reasonable expenses and attorney fees incurred, and thereafter the balance of said sum to be divided, one-third thereof to Lula Agnes Ford, the widow, and one-third thereof to each, Agnes May Ford and Jean Evelyn Ford, the infant daughters of the deceased, Joseph Boyce Ford, but the court, not being now advised of the extent of the services which may become necessary to be rendered by plaintiff's counsel on the appeal from this judgment intimated by defendants' counsel as hereinafter shown, doth reserve for its further determination the amount of the attorneys' fees to be allowed out of said recovery to plaintiff's attorneys for their services in this cause.

And the said defendants, having expressed their intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment of this court in this action it is ordered that the execution of this judgment be suspended for ninety days from this date in order to enable the said defendants to apply for said writ, on conditions that the defendants, or someone for them, shall within fifteen days from the date hereof execute
page 21 } before the clerk of this court a good and sufficient
bond in the penalty of Four Thousand Dollars (\$4,000.00) with security approved by the said clerk and conditioned according to law.

page 22 }

December 12, 1934.

Re: Lula Agnes Ford, Administratrix of the Estate of Joseph Boyce Ford, deceased,

v.

Virginia Electric and Power Company, a corporation, and
W. E. Blanton.

Mr. Aubrey R. Bowles, Jr.,
Attorney at Law,
Mutual Building,
Richmond, Virginia.

Mr. Willis D. Miller,
Attorney at Law,
State Planters Bank Bldg.,
Richmond, Virginia.

Gentlemen:

On December 20, 1934, at 10 o'clock A. M. in the Courtroom of the Hustings Court, Part II, of the City of Richmond,

Virginia, the Virginia Electric and Power Company and W. E. Blanton will tender to Judge E. H. Wells the stenographic report of the testimony, the instructions given and refused with the objections and exceptions thereto, and the other incidents of the trial of the above styled action now pending in the Hustings Court, Part II, of the City of Richmond, Virginia, for signature and authentication by Judge Wells in accordance with Rule XXIV of the Supreme Court of Appeals of Virginia.

On said date at the same hour the Virginia Electric and Power Company and W. E. Blanton will apply to the Clerk of the Hustings Court, Part II, of the City of Richmond, Virginia, at the Clerk's Office of said Court for transcript of the record in the above entitled action and for all exhibits offered in evidence at the trial of said action, in order that the said Virginia Electric and Power Company may prepare their application for writ of error to the Supreme Court of Appeals of Virginia.

Yours very truly,

VIRGINIA ELECTRIC AND POWER
COMPANY and W. E. BLANTON
R. H. MANN
By ARCHIBALD G. ROBERTSON
Counsel.

Receipt of the above notice is acknowledged this 12th day of December, 1934.

AUBREY R. BOWLES, JR.
WILLIS D. MILLER.

COPY

STENOGRAPHER'S TRANSCRIPT

Virginia:

In the Hustings Court, Part II, of the City of Richmond.
Lula Agnes Ford, Admx., etc.,

^{v.}
Virginia Electric & Power Co. and W. E. Blanton.

August 1-2-3, 1934.

A. COLTON WILLIAMS
Shorthand Reporter
Travelers Building,
Richmond, Va.

page 23 } Virginia:

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

Lula Agnes Ford, Administratrix of the estate of Joseph
Boyce Ford, deceased,

v.

Virginia Electric and Power Company, a Corporation, and
W. E. Blanton.

UPON A NOTICE OF MOTION FOR JUDGMENT.

I, Ernest H. Wells, Judge of the Hustings Court, Part Two, of the City of Richmond, Virginia, do hereby certify that the following is an accurate and authentic stenographic report of the testimony, the instructions given and refused and the objections and exceptions thereto, and the other incidents of the trial of the above-styled case, and that it appears that counsel for the plaintiff were given reasonable notice of the time and place that the said report would be tendered and presented to me for authentication.

ERNEST H. WELLS,

Judge of the Hustings Court, Part Two,
of the City of Richmond, Virginia.

page 24 } Virginia:

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

Lula Agnes Ford, Admx., etc.

v.

Virginia Electric & Power Co. and W. E. Blanton.

Judge Ernest H. Wells presiding.

Appearances: A. R. Bowles, Jr., W. D. Miller and A. S. Anderson, counsel for plaintiff; R. H. Mann, A. G. Robertson and Virgil Randolph, counsel for defendants.

August 1-2-3, 1934.

page 25 } Before the jury was sworn the following took
place.

Mr. Bowles: Judge, under this Section 12 of the Compensation Act this is a subrogation case in part and I think it is

possible we have to show an award has been entered. The statute expressly says we are not entitled to have go into the evidence the amount of the award.

The Court: I haven't seen that statute for sometime, but it used to be if the man had been already compensated the man himself could not sue.

Mr. Bowles: That has been changed. Either the employer or the insurance carrier sues in the name of the man and any surplus goes to the administrator.

The Court: Those are the only two allowed to sue, used to be.

Mr. Bowles: That was changed in 1932.

The Court: Who can sue now?

Mr. Bowles: The rights of the employee or the employee's administratrix are subrogated to the employer or the insurance carrier. It is an insurance carrier in this instance and the insurance carrier can bring the suit in the name of the employee or his personal representative, and the employee has a right to any excess the jury bring in over the amount of the award.

The Court: But you can't show the amount of that award.

Mr. Bowles: I don't want to bring out anything page 26 } in this case with reference to the amount that would be improper, but I apprehend it possibly would be necessary for us to show that an award had been entered in connection with the matter. Now I have a certified copy of the award, but that, of course, shows the amount. I would be very glad to put that in evidence with the amount stricken out.

The Court: If you can't show it you ought to strike it out.

Mr. Bowles: I thought we better discuss that matter with the Court before we went into trial.

Mr. Mann: I think that is immaterial that an award has been made, for the purpose of this case. Here is a suit against this company for damages growing out of an accident. Whether the plaintiff has received compensation or not seems to me is immaterial evidence and incompetent. For that reason we object.

Mr. Bowles: Then, if Your Honor please, we proceed in this case without reference to any subrogation whatever to the insurance company, which takes out of this case any reference in the evidence at all to the fact that there is an insurance company interested as a beneficiary in the result, if there be one.

The Court: All right.

page 27 } Mr. Bowles: If that is the agreement, sir, that is perfectly agreeable to us.

The Court: Well, they object to it.

Mr. Bowles: That is what I understood, but I want the agreement made.

The Court: Then we won't have any reference to it at all.

Mr. Bowles: In our notice of motion we had to show that to show who are the beneficiaries, and in dealing with the question of beneficiaries we will just refer to the widow and the two children.

The Court: All right.

The jury was thereupon sworn.

* * * * *

page 28 } Mr. Bowles: If Your Honor please, I have here certain formal proof that is apparently necessary for this record and I would like to just offer that at the beginning of this case and get it out of the way so we can proceed to the witnesses. I want to offer, if Your Honor please, the qualification of Mrs. Ford as administratrix.

Note: Filed and marked Exhibit No. 1.

Mr. Bowles: I want to offer, if Your Honor please, the death certificate to prove the death of the deceased by the coroner.

Note: Filed and marked Exhibit No. 2.

Mr. Bowles: Now I also wish to offer in evidence the franchises whereby pursuant to the authority of the board of supervisors of Chesterfield County the Virginia Electric & Power Company was permitted to use a portion of the public highway known as the Richmond-Petersburg Pike, and also a deed between the Virginia Electric & Power Company and the Highway Department of the State of Virginia with reference to the use of the Richmond-Petersburg Pike when the double driveway was put there.

Mr. Robertson: No objection.

page 29 } Mr. Bowles: We have already selected the portions of the franchise—it is a great long franchise and some sections are entirely immaterial and we have agreed on those sections and I think Mr. Williams, the reporter, is familiar with them and can it be understood that he will just put them into the record?

Mr. Robertson: Yes.

Mr. Mann: We understand he can put in what he wants and we will put in what we want of the franchise.

Mr. Bowles: If Your Honor please, under those circumstances possibly we better offer the entire franchise. We had already agreed on what portions were material, but if there is any disagreement about that I would like to offer the entire franchise.

Mr. Robertson: We will let you put in what you want and we will leave out everything else, provided you put in everything you put in before.

Note: The sections of the franchise and deed referred to are as follows:

page 30 } Virginia:

At a meeting of the Board of Supervisors of Chesterfield county, held on the 27th day of March, 1899.

In the matter of the petition of the Richmond and Petersburg Electric Railway Company for the right of way to said company to construct a railway upon and along the public or county road or highway commonly called the Manchester and Petersburg Turnpike.

This day the Richmond and Petersburg Electric Railway Company presented its petition in writing, signed by its president, to the Board of Supervisors of Chesterfield county, Virginia, setting forth that in pursuance of the provisions of an act of the General Assembly of Virginia, approved March 3, 1898, granting a charter to said railway company for the construction of said line of railway, said company had been duly organized and was about to commence construction of its said line of railway and praying the said Board of Supervisors to grant the right of way, privileges and franchises for the construction of its proposed railway upon and along the public road and highway commonly known as the Manchester and Petersburg turnpike, from a point on the southern corporation line of the city of Manchester at Maury street, where the said street crosses said turnpike, to the northern corporation line of the city of Petersburg at Ap-

page 31 } pomattox river, said Board of Supervisors being authorized by the said act of Assembly, approved March 3, 1898, to grant such rights, privileges and franchises; and the said Board of Supervisors, having maturely considered the said petition, and believing that the construction and

operation of the said railway as set forth in said petition will promote the public welfare, doth grant to said railway company the right to construct its said railway upon and along the said public road and highway for the distance and between the points above set forth; but this grant is made upon and subject to the conditions, restrictions and limitations following, which are agreed upon by and between the said Board of Supervisors and the said railway company, and which shall bind all persons, companies or corporations claiming or holding with, by or under said petitioner in any manner whatsoever.

First: The said petitioner and those holding under it, may hold the privileges, rights and franchises hereinabove granted for the term of a period of forty years from this date, and shall also have the right to one renewal of the same for a like term or period of forty years from the expiration of the first term or period, unless such privileges, rights and franchises shall be forfeited by said petitioner, or its assigns, as hereinafter set forth.

Second: The strip of land to be used for said railway shall not be of greater width than thirty-five feet, but
page 32 } said railway shall not occupy said road at any point where by so occupying or using said road that part thereof reserved for the use of the public would be made less than thirty feet wide; nor shall said company use, occupy or interfere with any of the public bridges on said road; said strip shall be located on the eastern side of said road, except where it may diverge therefrom as is hereinafter provided for, one of the lines of said strip at every point, however, to be the line of said turnpike road, and said railway company is hereby authorized, to cross said road or highway when necessary to go upon adjoining lands to afford facilities to residents for shipping and receiving their products and supplies, or to construct a branch line to the westward, or to obtain more favorable grades, returning to said turnpike as soon as practicable after making said divergence; provided, however, that said railway after diverging from said turnpike road at or near the point where the Richmond and Petersburg Railroad Company crosses said turnpike road near Port Walthall station shall be compelled to return to said turnpike road at the first point where it may be done at a grade of two per cent. Said railway company shall in all cases and at all times at its own expense provide on the one or the other side of its railway and the line occupied by it, such sufficient roadway and proper crossings for the

use of the public as the said Board of Super-
 page 33 } visors, or such other public authority as may have
 charge of roads in lieu of said board, may re-
 quire, not less than thirty feet wide, and wherever the grade
 of said road shall be changed by said Company it shall pro-
 vide such safeguards to the public as to the residue of said
 road as the Board of Supervisors, or other public authority
 in lieu thereof, as aforesaid, may require, and shall keep
 the same in repair.

Third: The grades of said railway line shall conform to
 the present grades of said road or highway, so far as it may
 be practicable, with due regard to the establishments of such
 grades as will tend to facilitate the operation of said rail-
 way, but in no event shall such grades be such as to inter-
 fere with the convenient public use of said turnpike, or road,
 on the one side or the other, for public travel with wagons
 or other vehicles, and for animals.

* * * * *

Fifth: The said petitioner in constructing or operating the
 said railway shall not use, occupy or interfere with any of
 the public bridges, unless hereafter authorized so to do by
 the said Board of Supervisors upon such conditions as said
 board may impose, and the said petitioner in constructing,
 using or operating its said railway on said public road shall
 not interfere with the public use and travel thereon, and

wherever it may be necessary to interfere with,
 page 34 } change, remove or occupy any culvert or other
 drainage, said railway company shall at its own
 expense provide an equivalent satisfactory to the Board
 of Supervisors, or such other authority as may have charge
 of the public roads. Whenever the said Board of Supervi-
 sors or other proper public authority, shall construct any cul-
 vert, or other improvement across said road, the said railway
 company, petitioner, shall bear a proportionate part of the ex-
 pense thereof, based upon the width of said road and the
 part or extent thereof held by said petitioner, or entitled to
 be held by it.

Sixth: The petitioner shall provide and maintain all nec-
 essary public crossings now or hereafter required by the pub-
 lic authorities over its tracks and works, and along the tracks
 throughout the whole line shall at such intervals as may be
 required by the said Board of Supervisors, or other proper
 authority, provide and maintain safe and easy crossings for
 the passage of the public with vehicles, animals and the like.

* * * * *

Thirteenth: The rights, privileges and franchises hereby granted the said petitioner upon and along the said public road shall not be deemed exclusive, the said Board of Supervisors reserving to itself and to such other public authority as may succeed it in power as to same the right to grant the use of such part of said road not granted to said petitioner to any other persons or corporation for like pur-
page 35 } poses.

* * * * *

Virginia:

At a meeting of the Board of Supervisors of Chesterfield county held at the courthouse on the 14th day of February, 1901:

In the matter of the petition of the Richmond and Petersburg Electric Railway Company.

Whereas, at a meeting of this board held on the 27th day of March, 1899, certain rights, privileges, etc., were granted the said Richmond and Petersburg Electric Railway Company upon its application by petition duly filed, upon certain conditions, restrictions, limitations, etc., fully set out in an order and contract entered of record by this record on the said 27th day of March, 1899; and

Whereas, by another order entered by this board on the 26th day of March, 1900, the rights, privileges, etc., theretofore granted said railway company were, upon application by another petition duly filed on the 26th day of February, 1900, renewed and extended to the 3rd day of March, 1901, upon certain terms and conditions, etc., fully mentioned and referred to in said order of March 26, 1900; and

Whereas, this day came again the said Richmond and Petersburg Electric Railway Company by Corbin Warwick, its president, and J. L. Haner, its secretary, and filed its petition praying for a further extension of time and certain
page 36 } amendments and changes in said original franchise granted on March 27, 1899, and amended March 26, 1900;

And the board having maturely considered the said petition this day filed, and all matters therein contained and connected therewith, and it appearing to the board that the charter of the said Richmond and Petersburg Electric Railway Company has been extended by an act of the General Assembly of Virginia, approved February 2, 1901, therefore be it,

Resolved, That the rights, privileges and franchises heretofore granted to the railway company by contract, grant and order of this board of March 27, 1899, and amended by an order of this board entered March 26, 1900, be, and the same are hereby changed, altered and amended so as to read as follows:

First: The said petitioner, the Richmond and Petersburg Electric Railway Company, and those holding under it, may hold the privileges, rights and franchises hereinabove granted for the term or period of forty years from the 6th day of February, 1901, and shall also have the right to one renewal of the same for a like term or period of forty years from the expiration of the first term, or period, unless such privileges, rights and franchises shall be forfeited by said petitioner, or its assigns as hereinafter set forth.

page 37 } Second: The strip of land to be used for said railway shall not be of greater width than thirty-five feet, but said railway shall not occupy said road at any point where by so occupying or using said road that part thereof reserved for use of the public would be made less than thirty feet wide, nor shall said company use, occupy or interfere with any of the public bridges on said road; said strip shall be located on the eastern side of said road, except where it may diverge therefrom as hereinafter especially provided for, one of the lines of said strip at every point, except at the crossing made by said strip over said turnpike, as hereinafter provided, however, to be the line of said turnpike road; and for the purpose of determining the boundaries of the turnpike, it is ordered that the western line of said strip, where and so far as the said strip follows the eastern side of said turnpike, shall be thirty-five feet from the western boundary line of said turnpike; and parallel with the said western boundary line of said turnpike; and said railway company is hereby authorized to cross said road or highway when necessary to go upon adjoining lands to afford facilities to residents for shipping and receiving their products and supplies, or to construct a branch line to the westward, or to obtain more favorable grades, returning to said turnpike as soon as practicable after making said
page 38 } divergence; provided, however, that said railway after diverging from said turnpike road at or near the point where the Richmond and Petersburg Railroad crosses said turnpike road, near Port Walthall station, shall be compelled to return to said turnpike road at some point within one and one-half miles from said point of divergence; provided, however, that when said railway shall cross said

turnpike as above provided, it shall not be necessary for it to recross to the eastern side of said turnpike, but it may continue upon the side to which it has crossed rather than make another crossing unnecessarily. Said railway company shall in all cases and at all times, at its own expense, provide on the one or the other side of its railway and line occupied by it such sufficient roadway and proper crossings for the use of the public as the said Board of Supervisors, or such other public authorities as may have charge of roads in lieu of said board, may require, not less than thirty feet wide, and wherever the grade of said road may be changed by said company it shall provide such safeguards to the public as to the residue of the said road as the Board of Supervisors, or other public authorities in lieu thereof, as aforesaid, may require, and shall keep the same in repair.

Third: The grades of the said railway line shall conform to the present grade of said turnpike road or highway so far as it may be practicable, with due regard to the
 page 39 } establishment of such grades as will tend to facilitate the operation of said railway, but in no event shall such grades be such as to interfere with the convenient public use of said turnpike, or road, on the one side or the other for public travel with wagons or other vehicles, and for animals; provided, however, if at any point or points on the line of said turnpike said company shall depart from the grade of said turnpike by making a cut or excavation for its roadway, for its tracks, and said railway company shall excavate the roadway of said turnpike to be left as aforesaid for the county road, down to the same grade of said railway company's tracks at said points so cut or excavated, and the earth taken out of said cuts or excavations shall be distributed along the approaches to said cuts or excavations so as to make the grades on the approaches to said cuts or excavations as easy as may be practicable under the circumstances, the portion of the county road so cut or excavated and the approaches over the fills to be made as aforesaid shall be put in as good condition as said portion of said county road was before such change of grade, and shall be properly rolled to a smooth and hard surface, so as to put the same in proper condition for public travel.

All work under this section shall be done to the satisfaction of the said Board of Supervisors, or other public authority which may be in charge of said roads and under the
 page 40 } supervision of the County Surveyor.

Fifth: (same as in original franchise.)

Sixth: (same as in original franchise.)

* * * * *

Thirteenth: (same as in original franchise.)

* * * * *

Fifteenth: The said petition in writing of the said railway company, filed March 27, 1899, as aforesaid, being in part the inducement to the said board to grant the franchise and privileges herein granted, it is hereby constituted and made a part of this contract and agreement in the same manner as though fully copied herein.

* * * * *

Eighteenth: All of the foregoing terms, conditions, restrictions, limitations, covenants and agreements are consented and agreed to by said railway company which consent and agreement is evidenced by their acceptance of this amended franchise and grant, and the operation of said railway on said turnpike hereunder.

* * * * *

page 41 } ⁺ THIS AGREEMENT, Made this 25th day of SEPTEMBER, 1929, by and between the COMMONWEALTH OF VIRGINIA, acting by and through the State Highway Commissioner, party of the first part, and the VIRGINIA ELECTRIC AND POWER COMPANY, a corporation duly organized and doing business under the laws of the State of Virginia, party of the second part.

× WHEREAS, the Board of Supervisors of Chesterfield County, Virginia, by resolution adopted March 27, 1899, granted to the Richmond and Petersburg Electric Railway Company a franchise to operate an electric railway on and along the Richmond and Petersburg Turnpike in Chesterfield County, Virginia, this being the main public highway connecting the Cities of Richmond and Petersburg, Virginia, which said franchise was extended and amended by resolution of the said Board adopted February 14, 1901; and,

WHEREAS, pursuant to the said franchises so granted to the said Richmond and Petersburg Electric Railway Company, the said Company occupied the said Turnpike and constructed thereon an electric railway extending along the east-

ern portion of the said Turnpike from the southern corporate limits of the City of Richmond, Virginia, to a point in Chesterfield County, Virginia, known as Bellwood, and at the said point the said line of the electric railway crossed the said Turnpike in a westernly direction and diverged from the said Turnpike over a private right-of-way through portions of Chesterfield County, and then returned to the western side of the said Turnpike at a point just south of Swift Creek, Chesterfield County, and thence extended along the said Turnpike in a southerly direction on the western side thereof to the corporate limits of the City of Petersburg, Virginia; and,

WHEREAS, Sections "Third" and "Fourth" of the said franchise of February 14, 1901, above mentioned, provided as follows:

"THIRD: The grades of the said railway line shall conform to the present grade of said turnpike road or highway so far as it may be practicable, with due regard to the establishment of such grades as will tend to facilitate the operation of said railway, but in no event shall such grades be such as to interfere with the convenient public use of said turnpike or road, on the one side or the other, for public travel with wagons or other vehicles, and for animals; provided, however, if at any point or points on the line of said turnpike said company shall depart from the grades of said turnpike by making a cut or excavation for its roadway, for its tracks, and said railway company shall excavate the roadway of said turnpike to be left as aforesaid for the county road, down to the same grade of said railway company's tracks at said points so cut or excavated, and the earth taken out of said cuts or excavations shall be distributed along the approaches to said cuts or excavations so as to make the grades of the approaches to said cuts or excavations as easy as may be practicable under the circumstances, the portion of the county road so cut or excavated and the approaches over the fills to be made as aforesaid shall be put in as good condition as said portion of said county road was before such change of grade, and shall be properly rolled to a smooth and hard surface, so as to put the same in proper condition for public travel.

"All work under this section shall be done to the satisfaction of the said Board of Supervisors, or other public authority which may be in charge of said roads and under the supervision of the County Surveyor."

"FOURTH: Whenever the county, or other public authorities having control of the same, shall improve said turn-

pike, road or street, or any part thereof, by graveling, macadamizing or paving the same, or otherwise, the petitioner, shall at its own cost and expense in like manner and with like material so improve the strip or portion of said turnpike, or public road, or street, which it is entitled to occupy, and two feet on the side thereof next to the portion so improved by the public * * * if such public authority shall deem it reasonable and necessary for the public welfare to require said railway company so to do."

page 44 } WHEREAS, the Richmond and Petersburg Electric Railway Company by deed dated November 20, 1909, granted and conveyed unto the Virginia Railway and Power Company (now, by change of name, the Virginia Electric and Power Company), the party of the second part herein, all of the right, title and interest of the said Richmond and Petersburg Electric Railway Company in and to its electric interurban railway line between the Cities of Richmond and Petersburg, Virginia, including the said franchises of March 27, 1899, and February 14, 1901, and the party of the second part herein assumed and agreed to perform all of the duties and obligations imposed by the said franchises; and,

WHEREAS, the State of Virginia has taken over, as a part of the State Highway System, the said Richmond and Petersburg Turnpike extending from the southern corporate limits of the City of Richmond, Virginia, through Chesterfield County to the northern corporate limits of the City of Petersburg, Virginia, which said highway is now known as State Highway Route #31; and,

WHEREAS, the Commonwealth of Virginia, acting by and through the State Highway Commissioner, has paved with concrete a roadway in and along the westernmost portion of said Turnpike, and has determined that it is now necessary and advisable to widen the said Turnpike in order to provide a oneway drive on each side of the

page 45 } electric railway tracks of the party of the second part herein, and, to accomplish this purpose at a minimum expense to the party of the first part, the party of the first part has requested the party of the second part to vacate and release to the Commonwealth of Virginia the easternmost portion of said 35-foot strip of land, which it was authorized to occupy in the said franchises of March 27, 1899, and February 14, 1901, which said portion so to be released is that portion lying east of the pole line of the party of the second part as now constructed along the said 35 foot strip and beginning at the southern corporate limits of the City of Richmond and extending in a southerly di-

rection to a point 200 feet north of the place at which the tracks of the party of the second part cross said Turnpike at Bellwood; and,

WHEREAS, the party of the second part is willing to release the said portion of said 35 foot strip to the State of Virginia under certain terms and conditions;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That for and in consideration of the sum of \$10.00 cash in hand paid by the party of the first part unto the party of the second part, the receipt whereof is hereby acknowledged, and for other good and valuable considerations, the parties of the first and second parts hereby covenant and agree as follows:

page 46 } (1) The party of the second part herein hereby releases and forever quit-claims unto the Commonwealth of Virginia, the party of the first part herein, all of its right, title and interest in and to that portion of the said thirty-five (35) foot strip of land lying east of the pole line of the party of the second part as now constructed along the said thirty-five (35) foot strip of land and beginning at the corporate limits of the City of Richmond, Virginia, and extending in a southerly direction to a point 200 feet north of the point at which the electric railway tracks of the party of the second part cross the said Richmond and Petersburg Turnpike, now known as "State Highway Route #31", at Bellwood, in Chesterfield County, Virginia; the portion of said thirty-five (35) foot strip released to the party of the first part being that part of said strip lying east of the red lines on blueprint map of said Highway marked "A" hereto attached and made part hereof, said map being signed for identification by H. G. Shirley, State Highway Commissioner, and W. E. Wood, President, Virginia Electric and Power Company.

(2) The party of the second part herein agrees to pay to the party of the first part herein one-half of the actual costs of the party of the first part of moving and acquiring certain houses on the eastern side of the said Turnpike which will have to be moved or acquired in order to widen the said

Turnpike in accordance with the plans of the State
page 47 } Highway Commission in the section of the Turnpike described in the next preceding paragraph hereof, provided however, that the one-half of said cost so to

be paid by the party of the second part shall not exceed the total sum of \$10,000.

(3) In consideration of the release by the party of the second part to the party of the first part of the portion of the said 35 foot strip along said Turnpike and the payment of the said one-half of the actual cost to the party of the first part of moving or acquiring certain houses on the eastern side of the said Turnpike, as hereinabove set forth, the party of the first part hereby releases and forever discharges the party of the second part, its successors and assigns, from any and all obligation to pave, grade or conform its tracks to grade of, any part or portion of the said Richmond and Petersburg Turnpike, now known as "State Highway Route #31", between the southern corporate limits of the City of Richmond, Virginia, and a point 200 feet north of the intersection of the crossing of the tracks of the party of the second part of the said Richmond and Petersburg Turnpike at Bellwood, which said obligations to pave and grade are specifically provided for in paragraphs "Third" and "Fourth" of the said franchises of March 27, 1899, and February 14, 1901.

It is expressly covenanted and agreed by and between the parties hereto that the release and quit-claim to
 page 48 } the party of the second part and the payment of the said one-half of the actual cost of moving or acquiring the said houses, as hereinbefore set forth, is accepted by the party of the first part in full settlement, satisfaction, and discharge of any and all obligations of the party of the second part with respect to the improvement of the entire 35 foot strip or any portion thereof or any part of the said Turnpike or of any public road or street which the party of the second part is entitled to occupy within the section of its rights of way described in the preceding paragraph (1) hereof, under and by virtue of the said franchises of March 27, 1899, and February 14, 1901, or any extensions or renewals thereof.

(4) It is further covenanted and agreed by and between the parties hereto that in the event the party of the second part shall ever be required by any public authority lawfully acting under paragraphs "Third" or "Fourth" of the said franchises of March 27, 1899, or February 14, 1901, to pave, or re-pave, grade, or re-grade any part or portion of the said 35 foot strip of land within the section of its right of way described in the preceding paragraph (1) hereof, then the party of the first part hereby covenants and agrees to repay to the party of the second part herein the said \$10,000, and interest from date of its payment, or so much thereof as

the party of the second part shall have paid to the party of the first part as one-half of the actual cost to the page 49 } party of the first part of moving or acquiring the said houses on the eastern side of the said turn-pike, as hereinabove set forth.

IN WITNESS WHEREOF, the party of the first part, acting by and through the State Highway Commissioner, has caused this agreement to be executed by the said State Highway Commissioner, and the party of the second part has caused its name to be signed hereto by its President and its seal to be hereunto affixed and attested by its Assistant Secretary, all the day and year first above written.

COMMONWEALTH OF VIRGINIA

By H. G. SHIRLEY,
State Highway Commissioner.

VIRGINIA ELECTRIC AND POWER
COMPANY

By W. E. WOOD, President.

Attest:

A. H. HERRMANN,
Assistant Secretary.

State of Virginia,
City of Richmond, To-wit:

I, Thos. V. Chalkley, a Notary Public in and for the City and State aforesaid, do hereby certify that H. G. Shirley, whose name is signed to the foregoing agreement, bearing date on the 25th day of September, 1929, as State page 50 } Highway Commissioner of the Commonwealth of Virginia, has this day acknowledged the same before me in my City and State aforesaid.

My commission expires on the 2nd day of Oct., 1932.

Given under my hand this 23rd day of October, 1929.

THOS. V. CHALKLEY,
Notary Public.

State of Virginia,
City of Richmond, To-wit:

I, G. A. Miller, a Notary Public in and for the City and State aforesaid, do hereby certify that W. E. Wood and A. H.

Herrmann, whose names are signed to the foregoing agreement, bearing date on the 25th day of September, 1929, as President and Assistant Secretary, respectively, of Virginia Electric and Power Company, have this day acknowledged the same before me in my City and State aforesaid.

My commission expires on the 8th day of March, 1931.

Given under my hand this 15th day of October, 1929.

G. A. MILLER,
Notary Public.

page 51 } HUGH R. NOEL,
 a witness introduced in behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. Mr. Noel, your name is Hugh R. Noel?

A. Yes.

Q. What is your business, sir?

A. Surveying.

Q. Where do you live, sir?

A. 2915 Hanes Avenue.

Q. Where are you now located?

A. At Salem, Virginia.

Q. You have come here from Salem for this trial?

A. Yes, sir.

Q. Mr. Noel, did you prepare at my request a plat of the Richmond-Petersburg Pike from a point where there is a trestle in the bottom on the Richmond side of Stop 8½ to a point somewhat west of a street known as Concord Avenue?

A. Yes, sir.

Q. Is this the plat, sir?

A. It is.

page 52 } Q. When did you make that plat, please, sir?

A. On August 1, 1933.

Q. Now, Mr. Noel, will you file that as an exhibit with your testimony and in answering the following questions will you please refer to this plat?

A. Yes, sir.

Note: Filed and marked Exhibit No. 3.

Q. Does this plat show the general conditions between the points I referred to a moment ago?

A. With the exception of grades, yes, sir.

Q. Now refer to that plat, Mr. Noel, and state what is the distance from the place on that plat marked "Trestle" where there is a trestle that the street car runs over, up to the center of Concord Avenue?

A. 670 feet, as near as I could determine the center of the crossing at Concord Avenue.

Q. Now what is the distance from that trestle up to Stop 6?

A. 2,130 feet.

Q. Now that 2,130 feet is not on that plat, is it, Mr. Noel?

A. Yes, sir, it is shown here.

Q. I mean the land that is represented by that?

A. No, sir; the distance only is given.

Q. Where does the plat stop? Just beyond the trestle?

A. Just enough to take in the trestle.

Q. Now at what point at Stop 6 did you make
page 53 } your mark for your measurement from Stop 6 to
the trestle?

A. From the point opposite the pole bearing the sign
Stop 6.

Q. Is that about the top of the hill there or not?

A. Just about, sir.

Q. Now, Mr. Noel, what is the distance from the trestle to the street coming into the Petersburg Pike between the trestle and Concord Avenue?

A. I will have to refer to my notes for that or scale it.

Q. All right, sir, do either you like.

A. That is 323 feet.

Q. 323 feet from the trestle?

A. To this first street shown.

Q. Is that the center of the first street?

A. It is the center of the crossing opposite the first street.

Q. Now what is the distance from the center of that crossing to the center of Concord Avenue—center of that crossing in between the trestle and Concord Avenue to the crossing at Concord Avenue?

A. From that street to the next one, Concord?

Q. Is that the rest of the distance of 670 feet you have testified to?

A. Yes. Pardon me; the distance from street to street, you mean?

Q. Yes.

A. That distance would be the difference; 377 feet.

page 54 } By Mr. Mann:

Q. Is that 377 or 347?

A. 337.

Q. 323 from 370?

A. 337.

By Mr. Bowles:

Q. Have you got your notes there as to your exact measurements?

A. Yes.

Q. Get those out instead of scaling the map, please, sir. Give me the distance from the street in between the trestle and Concord Avenue to Concord Avenue?

A. My notes show it to be 335 in each case.

Q. 335 feet?

A. From the center of the trestle to the first street and from the center of the first street to Concord Avenue.

Q. How did you measure that?

A. With a steel tape; engineer's tape.

Q. Now, Mr. Noel, what is the difference in elevation between the railroad tracks at Stop 6 and the railroad tracks at the trestle?

A. There is a difference of 30.13 feet.

Q. Now have you there the difference in elevation between the trestle and the center of the track at Concord Avenue?

A. Yes, sir.

page 55 } Q. What is that, sir?

A. That is a difference of 4.76 feet.

Q. Can you tell us what that is in percentage of grade going down the hill and then coming up?

A. Taken on the rail the average per cent of descent from Stop 6 down to the trestle was 1.48%.

Q. How about from the trestle up to Concord Avenue?

A. From the trestle up to Concord Avenue was .71%.

Q. Now you have shown on this plat a number of little white dots marked "Pole". What are they?

A. They represent the trolley-wire poles.

Q. About what distance apart are they, Mr. Noel?

A. My recollection is about 125 feet. I can check that.

Q. Will you check it, please, sir? How will you check it?

A. By scaling the plat; it is drawn to scale. (Witness scales the plat.) I have one here that shows it to be 100 feet; another one shows it to be 98 feet. None of them are exactly the same. They vary evidently around 100 feet.

Q. Now at Concord Avenue, Mr. Noel, is there any difference in elevation between the crossing at the level of the rails and the concrete roadways on each side of it?

A. A slight difference.

Q. About what is it?

A. I am speaking entirely from recollection page 56 } now. You didn't ask me to get that at the time. I think it is about 4 or 6 inches higher at the crossing than it is at the concrete on the north side.

Q. Now what are those dotted lines you have got on that plat there by the crossing?

A. They indicate the location of ditches alongside the road and alongside the tracks.

Q. Did you make a measurement as to the width of that crossing there between the tracks?

A. Yes, sir.

Q. What was that?

A. 17 feet.

Q. Now what was the width of the crossing, the used portion of the crossing on that track?

A. Probably about 12 feet, from my recollection.

Q. Now what is the distance from the eastern edge of the southbound concrete to the center of the western rail; that is, the righthand rail going to Petersburg?

A. Will you repeat that question?

Q. What is the distance from the eastern edge of the concrete driveway going towards Petersburg and the center of the western rail of the street car track going towards Petersburg; that is, the righthand rail going towards Petersburg?

A. 13.8 feet.

page 57 } Q. I am talking about the eastern edge of the southbound driveway to the western edge of the righthand rail going to Petersburg.

A. Is this the distance you mean (indicating)?

Q. I mean the distance, as you go to Petersburg—the distance from the eastern edge; in other words, how far is it on the crossing from the time you leave the concrete until the time you get to the edge of the nearest rail when you turn east from the concrete to the first rail?

A. That is 13.8 feet.

Q. Now what is the distance between the rails?

A. 4.7 feet.

Q. Now what is the distance—the total distance from the edge of concrete to edge of concrete?

A. At that point it is 24 feet, sir.

Q. The total distance across from concrete to concrete?

A. Yes, sir.

Q. How much?

A. 24 feet—no; 34 feet.

Q. Now what is the distance from eastern rail to the

western edge of the northbound driveway? You have those figures marked on the map, I believe.

A. 16.6 feet.

Q. I was going to call your attention to that. That distance shows on the blueprint as 26.6 feet. Is that page 58 } correct or should it be 16.6 feet? 16.6 feet and 13.7 make that difference, don't they?

A. 16.6 is correct.

Q. Will you make that correction on the plat, or rather on the blueprint of the plat?

A. Yes.

Q. You have marked on here a dwelling. Can you designate that as to which corner that dwelling is on, and the store? Just tell the jury about that.

A. Why there is a dwelling at the corner of the Petersburg Pike and Concord Avenue.

Q. Which corner?

A. Southeast corner.

Q. Now is there a store up at the next crossing?

A. There is a store at the crossing above, which would be the northeast corner.

Q. Now can you tell us, looking at the crossing at Concord Avenue—there is a pole in the southeast corner of the crossing. How far is that pole from the eastern rail and how far is it from the crossing?

A. That is around 5 feet south of the extreme edge of the crossing and it is 4 feet—maybe an inch or two one way or the other—east of the east rail of the track.

Q. Now you have marked over in the righthand bottom corner of that plat another dwelling and there is a page 59 } round dot there with the word "Pump" behind it. What does that represent?

A. That is a brick dwelling with a pump at the rear of it.

Q. Now did you note when you made this sketch a spot in the concrete road anywhere near the crossing on the northbound concrete highway, a difference in texture of the roadbed?

A. I don't recall that, sir.

Q. Anywhere near the trestle?

A. Oh, yes; there was a patch.

Q. What do you mean by a patch and about where was it?

A. It was some asphalt or something of the kind had been placed across the road.

Q. You mean asphalt on top of the concrete?

A. I don't know whether it was on the top or whether the concrete had been dug out and just a repair made of it, in other words.

Q. Was that a pretty large thing or just a small thing?

A. It was quite large, according to my recollection.

Q. Is it about opposite the trestle?

A. Yes, sir.

Q. This map is drawn to what scale?

A. A scale of 1 inch to 20 feet.

Q. You have your notes with you, haven't you?

A. Yes, sir.

page 60 } Q. When you were testifying about the width
of the traveled portion of the crossing were you
testifying from your notes or your recollection?

A. From my recollection.

Q. Have you got that width in your notes?

A. I am not just sure.

Q. Let's see whether you have or not. If you have, we
would like to have the accurate measurement on it.

Note: Witness examines his notes.

A. No, sir, I made no record of that.

Q. Have you been back to this place since you made this
plat?

A. No, sir.

Witness stood aside.

page 61 } W. F. BURTON,
a witness introduced in behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. What is your name?

A. W. F. Burton.

Q. Where do you live?

A. Chester.

Q. Where do you work?

A. American Oil Company.

Q. Did you ever operate a store near Stop 8½ on the Pe-
tersburg Pike?

A. Yes, sir.

Q. About when did you operate that store? When did you
start and when did you stop?

A. From July 13, 1932, until January 30, 1933.

Q. Now have you known this crossing at Concord Avenue
for any length of time and, if so, how long?

A. Well, I have known this sub-division there for several years, but then I became closely connected with it when I opened that store there.

Q. You are familiar with the crossing?
page 62 } A. Yes, sir.

Q. Is that a place where the public generally go across the track?

A. Yes, sir, it is necessary for them—it is a street opening there and necessary to cross the car track either coming from Richmond or going to Petersburg.

Q. See if I understand you correctly. If somebody is going towards Petersburg and wants to turn into Concord Avenue do they have to cross the car track?

A. Have to cross the car track.

Q. Those lanes on the Petersburg Pike, one is northbound, oneway drive, and the other a oneway southbound drive?

A. Yes, sir.

Q. If a person coming out of Concord Avenue wants to go to Petersburg, do they have to cross the car track?

A. It is necessary to cross the car track.

Q. Have you any idea how many houses there are up in that section on Concord Avenue or that general neighborhood there?

A. Well, twelve or fifteen, probably more or less, but I am satisfied it is that many.

Q. Now, Mr. Burton, you didn't see this accident, did you?

A. No, sir.

Q. Did you come up shortly afterwards?

A. I was there shortly after the accident.
page 63 }

Q. How did you get there and what were you in and where were you?

A. I left Richmond at Hull Street at eleven-thirty, following the car, and driving my own automobile and I saw this accident and stopped.

Q. Were you going towards Petersburg?

A. Going towards Petersburg, going home.

Q. When you got there where was the street car?

A. Well, the street car was standing partially on this truck. The accident had happened and the truck was shoved ahead of it and the front of the street car was partially on this truck.

Q. How far was the back end of the street car from the crossing, or I will ask you this way: about how far had the street car gotten from the crossing when you got there?

A. I imagine it was about twice the length of the car or say 60 or 70 feet.

Q. Are you talking about the front of the street car?

A. The front of the street car, yes.

Q. Now you said the milk truck was how located with reference to the street car?

A. The milk truck was shoved around. The rear end of the truck was towards Petersburg. The front end was partially in the Pike on the lefthand side going from page 64 } Richmond.

Q. Now you mean in the Pike—you don't mean the concrete roadway of the Pike?

A. Well, the front end of the truck was shoved out into the ditch next to the concrete. Of course, I don't know that it was on the concrete.

Q. Did you see this pole that was there in the corner of the crossing?

A. Yes, sir.

Q. What was the condition of that?

A. This pole was broken off; leaning badly.

Q. Just how was it broken off? Just describe it, just how it was broken off.

A. Well, it was splintered from the impact and broken and the top of it leaning to the righthand side across the track.

Q. Now, Mr. Burton, is that a wide crossing or a narrow crossing?

Mr. Mann: The testimony is here as to the number of feet, the width of it. That is for the jury to determine.

Mr. Bowles: I asked him whether that was from his notes or not and he said it was from his recollection.

The Court: He gave the dimensions of it more or less; the whole thing about 17 feet and the traveled portion about 12 feet.

Mr. Bowles: He said he was giving it as to his recollection. I want to find out what this witness knows about it.

Mr. Mann: The question is addressed as to whether it is wide or narrow. He can give the width of the crossing.

The Court: You can give approximately how wide it is.

By Mr. Bowles:

Q. Mr. Burton, can you say how wide is the traveled part of that crossing where people cross over there?

A. Well, I would say it is a one-way crossing, a one-track crossing; probably not over 12 foot.

Q. Have you ever crossed at that place?

A. Several times.

Q. Can you tell us whether or not it is necessary to ap-

proach that crossing, in order to cross it, in a more or less straight on fashion rather than on an angle?

A. This crossing the concrete on each side is very narrow and it is a ditch between the car track and the concrete and it is absolutely necessary for a man driving correctly to drive to the lefthand side, making his signal and drive on this crossing.

Q. To drive how?

page 66 } A. To drive on the lefthand side to make the crossing on account of the traffic on the Pike.

Q. Well, now, can a man get on this crossing at an angle or does he have to go on more or less straight?

A. It is practically straight. It is a very short turn on all of those crossings.

Q. Now when you got there did you see where Mr. Ford, the driver of the milk truck, was?

A. When I got there Mr. Ford was lying partially on the ties under the car.

Q. What was his condition; did you observe that?

A. Well, Mr. Ford never spoke a word; very pale and his clothes had been cut to pieces and in bad shape.

Q. Did you bring him to the hospital?

A. Yes, sir.

Q. Was he alive when you got to the hospital with him?

A. No, sir; when we arrived at the hospital the interne came out and said he was dead, which I could easily see myself.

Q. I want to ask you one more thing. Did you notice the rails there at the crossing, the street car rails?

A. Well, just beyond the pole that we spoke of the car track was shoved to the right going towards Petersburg in kind of an elbow shape.

page 67 } Q. Did you notice the ties? The ends of the ties?

A. I didn't notice the ties. Only the ties—of course, the rails were attached to the ties and the whole thing shoved over.

Q. Did you notice any marks on them?

A. No, I never paid any attention to any marks.

Note: No cross examination.

Witness stood aside.

page 68 }

A. L. ROUNTREE,

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

DIRECT EXAMINATION.

By Mr. Bowles:

Q. Are you Mr. A. L. Rountree?

A. Yes, sir.

Q. Where do you live?

A. I live at Stop 8½ on the Petersburg Pike.

Q. Stop 8½ is the street north of Concord Avenue, isn't it?

A. Yes, sir.

Q. Will you tell us is the number for the stop on the telephone pole that is at the street north of Concord Avenue?

A. Yes, sir, there is a number at Stop 8½ there.

Q. On the pole there at that stop?

A. Yes.

Q. Did you see this accident that happened last February a year ago at Concord Avenue on the Pike?

A. No, sir, I didn't see the accident itself.

Q. Where were you when it happened?

A. I was over at the house putting up a garage and I was up on top of the frame-work when the accident
page 69 } occurred.

Q. Did you hear the crash?

A. No, sir, I didn't hear the crash. The reason I didn't hear the crash was due to a right strong wind that was blowing this way. I didn't hear the crash myself.

Q. Did you go over to the accident soon after it happened?

A. Yes, sir, I went over there immediately when I saw the people gathering there.

Q. When you got there did you see the man that was driving the milk truck?

A. Well, now, I don't know which one was driving the milk truck, but I saw the man—I saw both of the injured men there.

Q. Where were these men?

A. One of the men was up in the—sitting up in the seat of the truck, of the Zeller's milk truck.

Q. Where was the other man?

A. The other man was lying on the ground. He was between the Zeller's truck and the street car. He wasn't exactly wedged up there, but he was lying on the ground up on the—where the roadway is built up.

Q. Can you tell us which of those two men was the one that died; which of the two that died?

A. Mr. Ford.

Q. Which of the two you have just told about, the one on the ground or the one in the truck?
page 70 } A. Mr. Ford was the one on the ground.

Q. Did you take him to the hospital?

A. Yes, sir.

Q. Who was with you?

A. I was with Mr. Burton.

Q. When you got there Mr. Rountree, what was Mr. Ford's, the man on the ground, what was his condition? Was he conscious, do you know?

A. He was unconscious.

Q. What was his condition? Was he badly hurt?

A. Yes, he was.

Q. Just tell what you saw.

A. Well, when I got to the accident Mr. Ford was lying there and he was unconscious and the wound was exposed—

Mr. Mann: If Your Honor please, we are objecting. It is admitted here Mr. Ford died as a result of the accident and we are objecting to any description.

The Court: Just tell what you saw and the condition of the man and everything you saw surrounding it.

Mr. Mann: We are objecting to the statement as to his condition. He died as a result of the accident. That is the allegation and there is no dispute about that.

Mr. Miller: We have a right to prove it whether
page 71 } you admit it or not.

Mr. Mann: You have a right to prove he died.

The Court: Objection overruled.

Mr. Mann: We want to put in the grounds; that it is irrelevant and immaterial and not permissible. We understand Your Honor overrules us and we except.

The Court: Yes, sir.

Mr. Robertson: Without renewing their objection and exception to each question and answer along this line of testimony both defendants wish the record to show they object and except to every question and answer along this entire line of testimony.

The Court: Mr. Williams will not record any objection that is not made. You make your objection at the time.

Mr. Bowles: In view of the objection on the part of counsel for the Virginia Electric & Power Company and this motorman about our showing the condition of this man and what condition he was in we will ask him no further questions along that line.

Mr. Mann: Now, if Your Honor please, we except to the

statement of counsel for the plaintiff as to his re-
 page 72 } sons for not asking further questions, on the
 ground that it is prejudicial to the defendants.

The Court: The objection is overruled.

By Mr. Bowles:

Q. Mr. Rountree, do you know where this man died—Mr. Ford?

A. Yes, sir, I think Mr. Ford died over on Main Street.

Q. Were you with him then?

A. Yes, sir, he was in my arms.

Q. Where were you?

A. I was sitting in the back of the automobile holding him.

Q. In whose car?

A. Mr. Burton's.

Q. Did you go on to the hospital?

A. Yes, sir.

Q. Can you tell us whether or not you found he was dead when you got to the hospital?

A. Yes, sir, he was dead when we got to the hospital. The doctor came out and examined him.

Q. Mr. Rountree, when you got to the scene of this accident can you tell us, please, sir, if you recall how far the back end of this street car was from the south edge of that crossing; that is, the Petersburg side of the crossing to the back edge of the street car?

A. You mean from the crossing?

page 73 } Q. From the crossing to the back end of the street car.

A. I think it was approximately around—the back end of the car from the south side of the crossing was approximately 30 feet.

Note: No cross examination.

Witness stood aside.

Mr. Mann: If Your Honor please, we desire to make a motion at this point and ask Your Honor to exclude the jury because we don't think it proper to make it in the presence of the jury.

Note: The jury retires from the courtroom.

Mr. Mann: Now, if Your Honor please, I have just observed in looking around that inside the bar are a lady and two children. I assume that it is Mrs. Ford and her two

children. We have absolutely no objection to Mrs. Ford being present, but we do object to the presence inside of the bar of this Court of the two children inasmuch as their ages, of course, can be stated, but as far as they are concerned they are not plaintiffs here, although she may be suing for their benefit, and their presence is calculated to page 74 } prejudice the jury in the case. We therefore ask that they be excluded.

The Court: The motion to exclude the children is denied. I don't know anybody else that they can stay with unless you have a nurse for them.

Mr. Bowles: If Your Honor please, the children are the beneficiaries and they have—

The Court: I am going to allow the children to stay in.

Mr. Bowles: I was going to say we would send them out. Let the record show we are going to send those children out. Let the record show the jury were sent home.

Note: The children retire from the courtroom.

Note: The jury returns into the courtroom.

page 75 } T. A. S. MOODY,
a witness introduced in behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. Your name is T. A. S. Moody?

A. Yes, sir.

Q. Mr. Moody, where do you live?

A. Chester.

Q. What is your business?

A. State police officer.

Q. You work Chesterfield County, I believe?

A. Yes, sir.

Q. Did you go down to the scene of this accident at Concord Avenue that happened about eighteen months ago when Mr. Ford was killed?

A. How is that?

Q. Did you go to the scene of the accident where Mr. Ford was killed, where the collision took place?

A. Yes, sir.

Q. Had the truck or the street car been moved when you got there?

A. No, sir.

page 76 } Q. Did you make any measurements there?

A. Yes, sir, we made some measurements.

Q. Did you observe or measure or step the distance of the street car from the center of this crossing? The center of Concord Avenue?

A. To the center of Concord Avenue?

Q. Yes, from the center of Concord Avenue to the street car? Did you step that or measure the distance?

A. Yes, sir.

Q. Do you recollect or have you your notes on the distance there?

A. I have got my notes that I took off my accident report. From the center of the crossing to the rear of the street car—I am not positive about it, but I am pretty sure, though, it was the rear of the street car—was 20 yards.

Q. To the rear of the street car?

A. Yes, sir.

Q. That is taken from the center of the crossing?

A. Center of the crossing, yes, sir.

Q. Did you notice any sanding of the track there at any place?

A. Yes, sir.

Q. Where did you see the sand relative to the crossing?

A. North of the crossing.

Q. Now how far north of the crossing was there
page 77 } any sanding?

A. I don't know, sir.

Q. You don't remember how far?

A. No, sir. I remember stepping it off. I know Officer Holland, I think it was, stepped it off; somebody stepped it off, but I remember very distinctly seeing the sand on the track north of the crossing and I put it down on my accident report, but I haven't got it here.

Q. Is it possible for you to get that?

A. I would have to go to 12th and Main Streets to get it.

Q. I would like for you to get that and bring it back over here.

A. They won't allow us to use the accident report; won't allow us to bring it out of headquarters.

Q. You are not able to ascertain exactly how far that sand is?

A. No, sir, I couldn't say exactly how far the sand appeared on the track above—that is, north of the crossing, but I would be safe to say it was 10 yards.

Q. 10 yards?

A. Yes, sir.

Q. That is, measuring from the center of the crossing?

A. Center of the crossing, yes, sir. Now I don't know how much farther it was north of the crossing, but I can safely say 10 yards.

Q. Did you notice the condition of the rails page 78 } there, the street car rails just south of the crossing?

A. Well, as well as I remember it was a kind of S in there; wasn't straight after the car went by.

Q. A kind of S?

A. Yes, sir; a kind of crook in the rail after the accident happened.

Q. Did you notice the telegraph post just in the southeast corner?

A. On the crossing?

Q. Yes.

A. That had been hit, yes, sir.

Q. What was its condition?

A. It was not broke.

Q. Was it standing or what?

A. It was pushed out, the top of it.

CROSS EXAMINATION.

By Mr. Mann:

Q. Mr. Moody, you said from the center of the crossing to the rear of the car—

A. Yes, sir.

Q. 20 steps. Were you stating that from your memorandum or your recollection?

A. From the accident report I made. I got a copy of it this morning.

page 79 } Q. Did you say 20 yards or 20 steps?

A. 20 yards, approximately.

Witness stood aside.

page 80 }

J. K. HALDER,

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

DIRECT EXAMINATION.

By Mr. Miller:

Q. Your name is J. K. Halder?

A. Yes, sir.

Q. Where do you live?

A. I live in Chester.

Q. What is your business?

A. Police officer.

Q. How long have you been on the Chesterfield police force?

A. I have been on the full-time force near two years.

Q. You were an officer that time, were you not?

A. Yes, sir.

Q. Were you anywhere near Concord Avenue when this accident took place in which one man was injured and Mr. Ford was killed?

A. Yes, sir.

Q. Were you in your automobile?

A. Yes, sir.

Q. Which way were you proceeding; whether you were going to Petersburg or going to Richmond?
page 81 } A. I was going towards Richmond.

Q. And you were on the north driveway?

A. On the north driveway, yes, sir.

Q. Where were you at the time the collision took place?

A. I was at the entrance to what is known as Lock Haven. It is just the next street south of the Belt Boulevard; entrance to the Pike.

Q. The next main crossing south?

A. Yes, sir.

Q. And you said you were headed towards Richmond. Were you going to keep on towards Richmond or were you intending to turn there at Lock Haven?

A. I intended to turn at Lock Haven. Chief Smith—the Chief of the Chesterfield County police—lived in this street and I was in the act of turning, going to his house.

Q. You were in the act of turning when you learned of the accident?

A. Yes, sir.

Q. Did you hear it?

A. Yes, sir.

Q. Did you see it?

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

Q. Now when you heard the accident or heard the crash and were in the act of turning did you keep on and complete your turn or go on up to the accident?

page 82 } A. I had just entered into the cross street there, just slightly turned, when I heard the crash and looked ahead of me and I saw the pile-up down there and I straightened my car back around and proceeded down the Pike to the accident.

Q. How far is the place where you were making the turn

at Lock Haven Street from Concord Avenue where the accident happened, approximately?

A. I would say in the neighborhood of 600 yards.

Q. Now, then, as you were about to make your turn into Lock Haven Avenue did you see anything up the Pike ahead of you?

A. I saw quite a few cars.

Q. About how many cars would you say were between you and Concord Avenue when you were getting ready to make the turn? I mean in the space between the scene of the accident and where you were going to turn?

A. Well, I would say in the neighborhood of ten or twelve cars; maybe one or two more or less.

Q. Up ahead of you?

A. Yes, sir, between me and the point of the accident.

Q. Did you notice where any of those automobiles were with reference to Concord Avenue?

A. Concord Avenue?

Q. Yes.

page 83 } A. Of course, I couldn't say the exact position of a car 600 yards down the road from me, the exact position. It is only an approximate distance.

Q. Well, now, how were those cars traveling?

A. The ones that I had noticed were traveling north, the same direction in which I was going. They were the ones I was paying attention to. They were zig-zagging off and on down the Pike; some about in the act of passing others or from my vision they were. Several cars had passed me between Stop 12 and where I turned off there, a distance of probably a mile or less; less than a mile.

Q. These cars you are speaking of that were zig-zagging or passing each other were the cars that were ahead of you in the vicinity of Concord Avenue?

A. Yes, sir.

Q. When you got up there did you notice the two men?

A. Yes, sir.

Q. Did you make any measurements or step any distances as to where the street car was relative to the crossing?

A. No, I didn't make any actual measurements. I only made a visual survey of it at the time and proceeded to take care of the traffic and the injured as best I could. I was the only officer there at the time.

Q. Mr. Halder, with reference to these cars you spoke of that were ahead of you, were you able to ascertain
page 84 } what distances were between the cars? I mean roughly; I know you can't tell accurately.

A. Well it is mighty hard for a person going in the same

direction of a car or cars all the way down the Pike ahead of you to tell how close they were behind. When a car is in the act of passing another you don't know whether it is 25 yards behind it or right opposite from straight behind it. The only way you could ascertain it would be on an elevation to see what position they were relative to one another. I wouldn't like to say how far any of them were or whether they were abreast at the time.

Q. What was the condition of that truck?

A. The truck was very much demolished; torn practically entirely to pieces.

Q. Did you notice the telegraph pole there?

A. Yes, sir.

Q. What was the condition of that?

A. It was broken; the dirt was knocked to one side and the pole broken; not broken entirely off, but bent over right badly.

Q. Did you have any conversation with the motorman?

A. Yes, I asked him some questions.

Q. What did he tell you with reference to what the automobile did; what he saw?

A. He told me that he had seen the car—the page 85 } truck, rather, coming up there and he thought it was going to stop and let him go by and when he saw the car was proceeding across in front of him he didn't have time to stop; he done all he could, but he couldn't possibly stop when he saw the car was coming up on the track.

Q. So he said he saw it, but thought it was going to stop and let him go by?

A. Yes, sir.

Q. Are you familiar with that crossing?

A. Yes, sir.

Q. Do you know how many houses are around on Concord Avenue to the left or towards the river?

A. Towards the river?

Q. Yes.

A. To the right going north?

Q. That is right.

A. I couldn't tell you how many houses are down there, but there are several houses down that street and over the brow of the hill practically out of sight.

Q. Anyone going to Petersburg from Richmond intending to cross over and go down in that little sub-division, where do they cross?

A. Most of them cross there at Concord Avenue.

Q. Is that used as a public crossing?

page 86 } A. Yes, sir, that is a regular crossing.
Q. That is a regular crossing?

A. Yes, sir.

Q. Now what is the condition of that crossing; that is, we will say where the railroad track is laid, with reference to its elevation, considering it with reference to the concrete?

A. The car line is somewhat higher than the concrete on both sides of it. I would say it would be approximately—the height would be approximately a couple of feet—close to a couple of feet higher than the concrete. It is a right good rise up from the concrete and over there and back down to the concrete on the other side. Then beyond the concrete to those houses is another rise up.

Q. Then to go off the concrete and go over to the other driveway you have got to go over this little elevation there?

A. Yes, sir.

Q. Did you notice anything concerning the crossing; that is, on the west side of the crossing, what its condition was?

A. I don't exactly understand your question.

Q. I mean whether it was in good condition or wasn't in good condition.

A. It seemed to be in about the average condition; cinders there on that crossing, if I remember right or was at that time.

page 87 } Q. Now in approaching that crossing from Richmond to make a left turn on it what sort of turn would you have to make?

A. A sharp turn. It is a narrow crossing. Only one car could go across there at one time comfortably. It is possible, probably, for two to go through. but it would be mighty close.

Q. It is a one-way crossing?

A. It is really a one-way crossing.

CROSS EXAMINATION.

By Mr. Mann:

Q. Mr. Halder, you have been examined in connection with the statement made by the motorman to you shortly after the accident?

A. Yes, sir.

Q. How long was that after the accident?

A. I spoke to him just very casually at the time; asked him if he was driving the street car and he said he was, and I could see from the scratch on his face he had been slightly injured, but my main conversation with him was after I came back from Richmond to the hospital where I took Mr. Ford.

Q. Now with reference to this milk truck did he state to you that he thought it was stopping?

A. Yes, sir.

Q. And said he couldn't understand why a man page 88 } would pull directly in front of him knowing he was there?

A. Yes, sir, that was his statement.

Q. Did he say as soon as he saw the man was trying to make the turn he did everything possible to try to stop the car?

A. That was his statement.

Q. Did you observe the rear end of the electric car with reference to its position from the crossing after the accident?

A. It was just about to the end of the crossing. The rear of the car was just about even or may have been a foot beyond the crossing elevation or the roadway of the crossing. I believe they have some boards there at each side of the track and just at the end of that board; probably a foot or foot and a half off the end of that board the car stopped.

Q. Could you tell at what point the car struck the truck, the point of the impact on the automobile, as to where the point of the collision between the two vehicles occurred?

A. It seemed the main contact point seemed to be just about the driver's seat or to the rear of the driver's seat, just to the rear of the driver's seat.

page 89 } RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. Did the motorman say anything to you about the speed of his street car?

A. He said he was making a very good speed; didn't say just how fast. He said he was going a right good rate of speed and did everything he could to stop when he saw the car was going on the crossing.

Witness stood aside.

page 90 } R. H. HOLLAND,
a witness introduced in behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. Your name is R. H. Holland?

A. Yes, sir.

- Q. What s your business?
 A. State police.
 Q. Did you go to the scene of this accident at Concord Avenue where Mr. Ford was killed?
 A. Yes, sir.
 Q. Did you make any measurements there?
 A. Yes, sir.
 Q. Will you state to the jury what those measurements disclosed as to how far the street car had passed the center of the crossing before it came to a standstill?
 A. I stepped the measurement from the center of the crossing to the front of the street car and that distance from the center to the front of the street car was 25 steps; the distance from the center of the crossing to the rear of the street car was 12 steps.
 Q. Did you notice any sand there?
 page 91 } A. Yes, sir.
 Q. Where did you notice the sand?
 A. On the crossing towards Richmond, headed north.
 Q. On the north edge of the crossing?
 A. Yes, sir.
 Q. Did it extend any distance beyond the north crossing—
 I mean how many steps beyond the north side?
 A. From the center of the crossing to the end of the burnt sand going north was 8 to 10 steps.
 Q. From the center of the crossing to the end of the burnt sand as you come towards Richmond was 8 to 10 steps?
 A. Yes, sir.

CROSS EXAMINATION.

By Mr. Mann:

- Q. I understand that sand was burnt sand?
 A. Yes, sir.
 Q. On top of the rails?
 A. Yes, sir.
 Q. By burnt sand you mean the car—

Mr. Bowles: He doesn't know what it meant.

The Court: He can ask him what he means by burnt sand.

By Mr. Mann:

- Q. What do you mean by burnt sand?
 page 92 } A. I meant sand put on the rails and it looked
 like the wheels had skidded on it like you see on
 the tracks here in Richmond.

Witness stood aside.

Note: At this time the Court recessed until 2 o'clock P. M., at which time the hearing of testimony was resumed.

page 93 } JOSEPH C. DRISCOLL,
 a witness introduced in behalf of the plaintiff, being
first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. You are Joseph C. Driscoll?

A. Yes, sir.

Q. Mr. Driscoll, were you in this collision when Mr. Ford was killed on the 27th of February, 1933?

A. Yes, sir.

Q. That was a Monday morning, wasn't it?

A. Yes, sir.

Q. Whose truck was this?

A. Mr. Zeller's.

Q. Who was driving the truck?

A. Mr. Ford.

Q. Who had charge of that route?

A. Mr. Ford.

Q. Was the route on the south side out by the Petersburg Pike?

A. Yes, sir.

Q. Now where did you all first go that morning with reference to delivering your milk on that route?

The Court: Bring him up to the time of the accident. We are not concerned with going all around his route.

page 94 } Mr. Bowles: I wasn't going all around the route.

The Court: You asked where he went that morning.

Mr. Bowles: I was going to show—Mr. Robertson made the statement—

The Court: That isn't part of the evidence.

By Mr. Bowles:

Q. Where did you first go across the Pike just before the accident?

A. Stop 6.

Q. When it came over there which way did Mr. Ford turn?

A. Turned left, to go towards Petersburg.

Q. That is a southerly direction?

A. Yes, sir.

Q. Now going from Stop 6 is that down hill or up hill or what?

A. Down grade, yes, sir.

Q. When you got towards the place where this accident happened what did Mr. Ford do, if anything?

A. He put his hand out at the time and a car passed about that time and he made a long turn and cut sharp back to the left.

Q. Which side of that southbound driveway was he driving on?

A. On the right hand side.

page 95 } Q. When he made the turn what was the position of the truck with relation to the street car track when it started to leave the concrete? Was it headed straight towards the truck or on an angle or how was it?

A. No, sir, kind of straight up; made a right turn, a deep one and cut back left to get into position to go over the track.

Q. When was the first time you saw the street car?

A. After the truck started on across, had got around and put me in position so that I could see.

Q. How did you see it?

A. All I had to do was to look.

Q. The truck had turned around so it was straight towards the crossing?

A. Yes; made the turn and just put me in position coming around.

Q. Do you know what gear Mr. Ford was driving in then?

A. He had changed gears when he made his turn.

Q. What gear was he in?

A. Low.

Q. Where was the street car when you first saw it at that time?

A. Down at the trestle; down about the trestle.

Q. Did you notice anything on the highway with reference to the lanes of travel?

page 96 } A. Yes, sir; that is the reason I said it because it was a dark asphalt patch there in the road.

Q. Now, then, Mr. Driscoll, what happened then? What did Mr. Ford do then?

A. He started up on the track.

Q. About how fast was he driving as he started up on the track?

A. Moving along just about like a truck would, I guess. I don't know. I reckon about 10 miles an hour; something like that.

Q. Now when was the next time—

By the Court:

Q. How fast?

A. It would be hard to judge, but I reckon—it is hard to tell; maybe 10 miles an hour or 6 or 10. It is hard to tell.

Q. How many miles an hour would you say?

A. Somewhere, the best I could figure, moving along coming up on it I guess around about—might have been going as much as 10 or less than 10; maybe 6. It is hard to tell.

By Mr. Bowles:

Q. Now when was the next time you saw the car and where was the truck when you saw the street car the next time?

A. The street car when I saw it the next time was down about the next crossing below us.

page 97 } Q. Do you mean towards Richmond?

A. Yes, sir, north of us.

Q. Where was the truck then?

A. The truck was coming up on the—it was up on the track.

Q. It was up on the track?

A. Yes, sir.

Q. Now what happened then, Mr. Driscoll?

A. Well, I was watching—my attention was on the traffic there.

Q. What about the traffic? Tell about that.

A. It was some cars passing along there; seemed to be a bunch of cars like on the highway.

Q. In which direction were they going?

A. Going north and we were going straight across.

Q. They were on the northbound lane?

A. Yes, sir.

Q. Was there anything particular about those cars that attracted your attention?

A. Yes, sir, passing; one trying to pass another at a rapid rate of speed there, running abreast along there.

Q. What did Mr. Ford do then?

A. He was inching along, trying to look for an opening to get across.

Q. Did you see the street car another time?

page 98 } A. The next time I saw the street car it was right on me.

Q. How did you happen to see it?

A. I glanced and about the time I glanced Mr. Ford glanced.

Q. You were hurt in this accident, weren't you, Mr. Driscoll?

A. Yes, sir.

Q. You said you glanced back and saw the street car the

third time you saw it. Now about what was the distance that the street car was away from you, if you can estimate it?

A. The best I can estimate the third time I saw the street car it was almost on top of us; around I would say 50 feet; something like that.

Q. Now when the street car hit the truck where were the front wheels of the truck?

A. Almost over on the concrete.

Q. You mean by the concrete—

A. On the other side as we were going across.

Q. The northbound lane?

A. Yes, sir.

Q. Why didn't Mr. Ford go farther?

A. Because it was cars—another car was coming along there just a little bit opposite us. We didn't have any opening.

Q. Where was the truck hit by the street car?

A. It was hit right in the rear.

Q. On the left-hand side?

A. Yes, sir, on the left-hand side.

page 99 } Q. Now what happened to the truck, Mr. Driscoll, then and what happened to you and what happened to Mr. Ford?

A. It hit the *street car* on the rear and threw it against the telegraph pole and threw the truck around up against the street car, I imagine, and hit the pole and dragged us up the track.

Q. Where was Mr. Ford and where were you?

A. I had fell back over across—kind of back like towards the driver's seat.

Q. Did you see where Mr. Ford was?

A. Not at that time.

Q. Were you taken to the hospital?

A. Yes, sir.

Q. Do you know whether or not Mr. Ford was taken to the hospital?

A. Since then I know he was taken.

Q. Now when you looked at the street car or glanced back at it that last time and saw it had you heard any whistle blown?

A. No, sir.

Q. Had you heard any bell rung?

A. No, sir.

Q. Did you hear any sound of brakes being applied or anything?

A. No, sir.

Q. Did you see the motorman when you looked
page 100 } back that time?

A. Yes, sir, at a glance.

Q. Did you see what he was doing?

A. Well, it just looked like he was casually glancing, looked up. It looked like he might have been looking at something and raised his head just about as I looked.

Q. Mr. Driscoll, do you know why Mr. Ford was inching across the track, as you expressed it?

A. Yes, sir, trying to get across.

Mr. Mann: If Your Honor please, we object to the statement as to why he was inching across the track.

The Court: He can state what he saw and what he heard, but can't give his opinion and the question did call for an opinion.

By Mr. Bowles:

Q. When Mr. Ford was inching across the track after you saw the street car down at the street next north what did you see in front of you and to the right of you?

A. It was automobiles along there.

Q. Did you notice anything particularly about any one automobile?

A. Yes, sir.

Q. What?

A. It was trying to pass. The man was off almost on the dirt. His car was off the concrete and I was afraid
page 101 } he was going to hit the front of the truck.

Q. When the street car struck the truck had all of those automobiles passed?

A. No, sir.

Q. Now, Mr. Driscoll, tell us something about this truck. Where were you sitting on the truck?

A. I was sitting on a milk crate next to the driver.

Q. How many seats were there in front?

A. It wasn't but one seat in the truck.

Q. Who was sitting in that?

A. Mr. Ford.

Q. Was that the seat behind the wheel?

A. Yes.

Q. What was your relation to Mr. Ford in reference to whether you were sitting behind him, in front of him or what?

A. I was sitting a little forward to where Mr. Ford was, on the crate.

Q. Did that truck have any back doors to it?

A. Yes, sir.

Q. What other openings were there in the truck?

A. It had an opening through the back of the truck so you could step in and get your milk out of it.

Q. Was that behind the driver?

A. Behind the driver's seat.

page 102 } Q. Was there one on either side?

A. Yes, going clean through the truck.

Q. Was there any opening by you?

A. It was an opening there, yes, sir.

Q. What was that; a door?

A. It was an opening, but wasn't any door on the right-hand side.

Q. Was it a place where a door had been?

A. Yes, sir; the door had been taken off.

Q. Where were your feet?

A. Kind of up under the dash. I was sitting forward.

Q. What was right behind you?

A. The refrigerator sit right back of me.

Q. Was there a door on Mr. Ford's side?

A. Yes, sir.

Q. By the side of him?

A. Yes, sir.

Q. Was there a window in that door?

A. Yes.

Q. Was it up or down?

A. It was down.

Q. When you looked and saw the street car the first time did you see whether or not Mr. Ford was looking at the street car?

A. The first time I saw it?

page 103 } Q. Yes, sir.

A. Mr. Ford saw it, yes, sir.

Q. When you looked at it the second time did you see whether or not—

A. He was looking; looked about the time I did.

Q. I have forgotten whether I asked you—did you say how many cars there were out there in front of you, or if you didn't tell me, about how many were out there on the north-bound lane coming north towards Richmond?

A. Well, just at a rough estimate I guess it was four or five or six; something like that.

CROSS EXAMINATION.

By Mr. Mann:

Q. Mr. Driscoll, after you got up on the track you say Mr. Ford was just inching along due to the fact some cars were passing on the northbound lane?

A. Yes, sir.

Q. Did he have his attention on the northbound traffic?

A. He was watching the traffic some, yes, sir; he was watching it.

Q. He was driving the car?

A. The truck, yes, sir.

Q. Now you say Mr. Ford looked when he turned to come up on the track?

page 104 } A. Yes, sir.

Q. You mean he looked after he got up on the track?

A. He glanced back, yes, sir, after he was up on the track.

Q. Now when was it that he glanced back the second time?

A. The second time? About the time I did. The street car was down about the next stop—next crossing below us.

Q. That is approximately three hundred and some feet?

A. I don't know, sir, how far it is.

Q. It was the next crossing between Concord Avenue and Stop 8½?

A. The next crossing down below us, yes, sir.

Q. Now after that did he look at all, as far as you know?

A. After that—that was the second time. The next time we looked the street car was right on us. He saw it, I reckon, about the time I did.

Q. Did he look at the same time you did?

A. I reckon he did; glanced at it.

Q. Both of you looked at it at the same time?

A. I glanced at it and Mr. Ford was looking at it.

Q. Then Mr. Ford looked at it three times; he turned and looked after getting into the crossing?

A. Yes, sir.

Q. The next time when he got up on the track when you looked at it when it was down at the next street?

A. Yes, sir.

page 105 } Q. And then the third time the same time you looked?

A. When it was right on top of us, yes, sir.

Q. Now when he looked at it at the time that you looked at it when it was at the crossing north of Concord Avenue where the collision occurred the car was coming, was it?

A. How was that?

- Q. I say the car was coming towards you then?
 A. Yes, sir.
 Q. And it was just about at the crossing—
 A. A little below.
 Q. That is to say, nearer Richmond than the crossing?
 A. Yes, sir.
 Q. Was the window down in Mr. Ford's—in the door on Mr. Ford's side?
 A. Yes, sir.
 Q. How did that door open and shut?
 A. Just like any other door; had a handle on it.
 Q. All you had to do was to open the handle?
 A. Yes, sir.
 Q. How was it built on the other side; that is to say, on Mr. Ford's side? Did it have a running board there?
 A. Yes, sir.
 Q. In getting in on that side you step from the ground to the running board and from the running board into the car?
 A. Yes, sir.
 page 106 } Q. Just as you step into an ordinary automobile?
 A. Yes, sir.
 Q. Now at the time of this collision did those same conditions obtain there as to the northbound traffic or had the cars practically passed?
 A. It was a car, as I said before, opposite of us and some on up.
 Q. One car?
 A. Yes, sir. The biggest of the traffic had just about passed. The thickest of the traffic had passed, but another car was blocking the truck, just opposite us.
 Q. Now the cars that were passing each other had passed at that time?
 A. Yes, sir.
 Q. Did Mr. Ford or you notice the northbound traffic when you started across?
 A. I did. I guess he did, too.
 Q. You don't know whether he did or not?
 A. No.

RE-DIRECT EXAMINATION.

By Mr. Bowles:

- Q. Mr. Driscoll, you said when you looked the first time and looked the second time that Mr. Ford had looked. Do you know whether or not Mr. Ford looked any other times?

A. The third time when the street car was on page 107 } us? Is that what you have reference to?

Q. In between the times you looked what were you looking at?

A. I was looking at the traffic.

Q. Were you looking at Mr. Ford then or at the traffic in between those times?

A. I was looking at the traffic.

Q. Now you said there was another car right in front of you?

A. Yes, sir.

Q. When the accident happened?

A. Yes.

RE-CROSS EXAMINATION.

By Mr. Mann:

Q. Mr. Driscoll, can you tell us about the time that elapsed between the first time you looked at the electric car and the second time you saw it?

A. Somewhere close to it.

Q. How much?

A. I don't know, sir, exactly. About four or five seconds, I reckon.

Q. Now the second time that you looked at it—

A. I guess about five or six; somewhere around there.

Q. Five or six seconds?

A. Yes, sir.

Q. How long was that before the crash?

A. It wasn't very long.

page 108 } Q. A matter of four or five or six seconds?

A. That is something that is hard to estimate.

RE-DIRECT EXAMINATION.

By Mr. Bowles:

Q. When you looked the last time you say the car was 50 feet away from you?

A. Yes, sir.

Q. Or about; you estimate that. How soon after that did the accident happen?

A. It might have been two seconds or three seconds or something like that.

Q. Did it happen right away?

A. Yes, sir; didn't have time for anything.

Witness stood aside.

page 109 } J. E. WILLIAMS,
a witness introduced in behalf of the plaintiff,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. You are Mr. J. E. Williams?

A. Yes, sir.

Q. Where do you live?

A. Stop 9, Petersburg Pike.

Q. With whom do you live?

A. Mrs. T. A. Fitzgerald.

Q. What relation is she to you?

A. Mother-in-law.

Q. Is that place right near where this accident happened last year—February 27, 1933?

A. About 75 yards from it.

Q. Look at this plat, Mr. Williams. Have you ever seen this plat before?

A. Yes, sir.

Q. I am pointing to Concord Avenue where this accident happened and the Petersburg Pike, and over to the south and the west is marked a dwelling and by that dwelling is a little round dot with the word "Pump" by it. Is that
page 110 } the dwelling where you live?

A. Yes, sir.

Q. Were you living there when the accident happened?

A. Yes, sir.

Q. When this accident happened what were you doing?

A. In the yard getting water.

Q. At that pump?

A. At the pump.

Q. Did you see this street car before the accident happened?

A. Yes, sir.

Q. Where did you see it?

A. Down the road about 250 yards, down by the little trestle.

Q. How did you happen to see it? Which way were you looking?

A. Looking out towards the highway. My mother-in-law asked me to see if the horse was tied all right.

Q. You were looking what?

A. Looking to see if the horse was tied all right.

Q. Where was the horse?

A. On a direct line between me and the accident.

Q. Now did you see the street car all the way from the time you first saw it until the accident happened?

A. Yes, sir.

Q. Could you give us any estimate as to how fast that car was running?

A. 40 to 45 miles an hour.

page 111 } Q. Could you tell us whether or not the speed of the street car changed between the time you first saw it and the time the accident happened?

A. It did not.

Q. Did it slow down any?

A. Not at all.

Q. Did you hear any whistle blown?

A. No.

Q. Did you hear any bell rung?

A. No.

Q. Now your front yard is on the Pike, isn't it?

A. Yes, sir.

Q. Did you see this accident actually happen?

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

Q. Why didn't you? Explain the situation there.

A. All I could see was the top of the car; couldn't see below the windows.

Q. Of the street car, you mean?

A. Yes, sir.

Q. Is the Pike at the point of Concord Avenue below the level of your yard?

A. It is below the level; about 6 or 7 feet difference.

Q. How much of the street car could you see when the accident actually happened?

A. I could see from the tops of the windows up.

page 112 } Q. When you first saw the street car could you see from the street car to Concord Avenue in front of the street car?

A. Yes, sir.

Q. Did you see any truck in there?

A. I couldn't see it on account of the elevation.

By Mr. Mann:

Q. You didn't see it?

A. No.

By Mr. Bowles:

Q. You didn't see any truck in there?

A. No.

Q. Now when the accident happened I understand you were looking right straight in that direction?

A. I was.

Q. What did you see the street car do? I reckon you heard the crash?

A. Yes, sir.

Q. What did you see when you heard the crash?

A. I saw the front of the street car jump up and the pole wave.

Q. Where is that pole?

A. It is on the corner of Concord Avenue on the south side going towards Petersburg.

Q. And on which side with relation to the car track?

A. It is on the Richmond side, on this side (in-
page 113 } dicating).

Q. It is on the south side of Concord Avenue and on the river side of the car track?

A. Yes, sir.

Q. Which is the east side. How far in front of that street car could you see so that you could see an object on the Petersburg Pike?

A. Well, from where the accident happened to the corner of the house I could see 100 or 150 feet.

Q. In that 150 feet did you see any truck on the Pike in front of the street car?

A. No.

Q. Now about that crossing there, Mr. Williams: is that a crossing where people generally cross?

A. Yes.

Q. Do you know whether or not any number of people live up in Concord Avenue?

A. Fifty or sixty people live back up in there.

Q. That is a public crossing?

A. Yes, sir.

Mr. Mann: Whether it is a public crossing is a matter of law.

By Mr. Bowles:

Q. I will phrase it this way: it is a crossing generally used by the public, isn't it?

A. Yes.

page 114 } Q. When you heard that crash and saw the street car jump up what did you do?

A. I ran to the Pike.

Q. Did you get there almost immediately?

A. I got there within half a minute to a minute.

Q. How far had the street car gotten from the crossing?

A. About 60 or 65 feet.

Q. Did you see the condition of the pole?

A. Yes, sir.

Q. What was the condition of the pole?

A. It was broken off about 3 feet from the ground and splintered up.

Q. Was it broken all the way off?

A. No; broke about half way in and then splintered up.

Q. Did you see the condition of the rails there?

A. They were sprung.

Q. In which direction?

A. They were sprung towards the south side.

Q. You mean sprung which way as you face Petersburg?

A. Sprung to your right as you face Petersburg.

Q. How big a pole was that pole?

A. About 12 inches in diameter.

Q. Did you see these men that were in the truck after the accident happened?

page 115 } A. Yes.

Q. Where were they?

A. Well, Mr. Ford was in between the street car and the truck on the ground; Mr. Driscoll was in the truck.

Q. Were they taken off to the hospital?

A. Yes, sir, taken off in about ten or fifteen minutes.

Q. A new pole was put down in that place, wasn't it?

A. Yes, sir.

Q. Is that pole that is there now as big as the one that was there?

A. No.

Q. Do you know whether they put that pole—the new pole down on the Richmond side or the Petersburg side of where the old pole was?

A. They put it on the Richmond side.

Note: No cross examination.

Witness stood aside.

page 116 }

E. E. ZELLER,

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

DIRECT EXAMINATION.

By Mr. Bowles:

Q. You are Mr. E. E. Zeller?

A. Yes, sir.

Q. Do you run Zeller's Dairy?

A. Yes.

Q. Where is Zeller's Dairy?

A. One mile east of Fulton on the Osborne Turnpike.

Q. Was this your truck that was in that accident?

A. Yes, sir.

Q. Who was driving that truck?

A. Mr. Ford.

Q. Who was in charge of that route?

A. Mr. Ford.

Q. What kind of a truck was it?

A. Dodge.

Q. Was the truck governed?

A. What do you mean?

Q. Did it have a governor on it?

A. Yes, sir.

page 117 } Q. What effect did that governor have on the speed of the truck?

A. Well, after the truck was governed—you can set them. That truck was set—all my trucks are set anywhere from 26 to 28, but this particular truck was set from 22 to 24.

Q. What speed would that truck make in low gear?

A. In low gear I would say anywhere from 3 to 5 miles.

Q. You say Mr. Ford was in charge of this route. What was Mr. Driscoll doing on the truck?

A. He was learning the route.

Q. Did you go out there the day that the accident happened?

A. Yes, sir.

Q. When you got there how far did you find that the street car was from the crossing?

A. The street car from the crossing?

Q. Yes.

A. I would say the street car was approximately 65 or 70 feet; that is, from the back end of the street car.

Q. From the crossing?

A. Yes, sir.

Q. Did you notice the pole?

A. Yes, sir.

Q. What was the condition of that pole in the southeast corner of the crossing?

page 118 } A. I would say the pole was almost broken off; wouldn't take much more to have broken it off.

Q. How far would you say that pole was from the left side of the street car track as you look towards Petersburg?

A. I would say from the left-hand track it would have been 4 or 5 feet.

Q. Did you see the rails there?

A. Yes, sir.

Q. What was the condition of the rails?

A. The rails seemed to be pushed out of place.

Q. In what direction?

A. Pushed to the left, looking towards Petersburg.

Q. As you look towards Petersburg which direction were they pushed?

A. Pushed to the right.

Q. Did you look at the ties?

A. Yes, sir.

Q. What was the condition of the ties?

A. Well, from the wheel or chassis going over them they were bruised considerably.

Q. Whereabouts was the truck with reference to the street car when you got there?

A. Well, the truck—the rear part of the truck and the rear left wheel was under the car. In other words, the left wheel—the tire was off and the hub was on the inside
page 119 } of the left rail looking to Petersburg.

Q. You mean the hub of the wheel was in between the two rails?

A. Just inside the rail; hooked in the rail.

Q. What about the right front wheel of the truck?

A. The right front wheel was off the truck.

Q. And how about the left front wheel?

A. That was off.

Q. Right back wheel?

A. The right back wheel and tire was on.

Q. When you say left and right you mean sitting in the driver's seat looking forward?

A. Yes, sir.

Q. Had the men been taken away when you got there?

A. Yes, sir.

Q. What was going on when you got there?

A. When I got there a few men were jacking up the street car and the Virginia Electric & Power Company truck was hooked to my truck, endeavoring to pull it off the track.

Q. What were they jacking up the street car for?

A. It was necessary to jack the street car up in order to get that hub which was locked on the rail off the rail. In other words, the street car was resting on top of the truck and pushing the truck and the hub down against the rail.

Q. What was this truck; four cylinder or six cylinder?

A. Four cylinder.

page 120 } Q. Now, Mr. Zeller, when you got there what gear was this truck in?

A. Low gear.

Q. Who moved the truck away for you?

A. After it was pulled out from underneath the street car The Richmond Auto Wrecking, if I am not mistaken.

Q. Where did they carry it to?

A. They carried it to my place.

Q. Where is your place?

A. One mile east of Fulton.

Q. In Henrico County?

A. Yes, sir.

Q. When the truck got to your place in Henrico County—it was taken out there the same day?

A. Yes, sir.

Q. That is, February 27, 1933?

A. Yes, sir.

Q. Was the truck in exactly the same condition when it got to your place as it was when you saw it out there?

A. Yes, sir; I followed it all the way out.

Q. Has the truck been at your place in your possession all the time since?

A. Yes, sir.

Q. Is the truck now in the same condition that page 121 } it was the day you saw it out there?

A. Exactly the same condition, other than for the weather. It has been out in the weather and the paint is showing weather.

Q. Did you take any pictures of this truck?

A. Yes, sir.

Q. Did you take them the same day?

A. Yes, sir.

Q. I hand you these pictures and ask you to identify them and file them with your evidence. Are those the pictures you took?

A. Yes, sir.

Q. Do they show the condition the truck was in when you got there that morning at the scene of the accident?

A. Yes, sir.

Note: Filed and marked Exhibits Nos. 4, 5, 6, 7, 8.

Mr. Bowles: If Your Honor please, we wish to offer in evidence the truck itself and will bring it to the court at the proper time at such time as will be available to the Court; don't want to stop to do that right now.

The Court: No, sir, we won't stop for that now.

By Mr. Bowles:

Q. Mr. Zeller, how long had Mr. Ford worked for you?

A I don't know that I could tell you accurately page 122 } on that, but I would say a year and a half, any-way.

Q. Before I leave this truck; was there any damage on this truck from the cab forward on the left-hand side?

A. Very little; the front part of the chassis and the wheels was broke out from underneath it.

Q. I mean the cab body.

A. I would say just a few marks, as far as the body part, other than the fender and running-board.

Q. What was the general condition of that truck when you saw it?

A. When I saw it?

Q. Yes.

A. I don't know how you want that answer—how to answer it.

Q. I mean was it broken up pretty bad?

A. Absolutely; nothing left of it. In other words, if your question is this, it is unrepairable.

Q. As to Mr. Ford you say you can't give us how long he worked for you. Give us an estimate?

A. I would say a year and a half.

Q. Before the accident?

A. Yes, sir.

Q. Certainly not since. Mr. Ford hasn't worked for you since the accident. He is dead, isn't he?

A. Yes, sir.

Q. What was Mr. Ford's business with you? page 123 } What did he do particularly?

A. Well, he was a salesman on the route and it was his duty to take out the milk, sell it, collect for it and occasionally we used him as a builder; sent him out on a route and let him build the route for the man and after he built it turn that man aloose and then let him go back to his old route or give him another route. In other words, he was a leading man, a good salesman, and when we find we have a good salesman we take that man to help build up the other routes.

Q. Now did he work on a salary or work on a commission?

A. He worked on a commission.

Q. Did he have any base pay, you might call it; something than which he got nothing less?

A. If he went on a smaller route he maintained the salary of his past route.

Q. What he was making at the time he left the one he had built up?

A. That is right.

Q. And if the one you put him on wasn't as good you kept him on that salary until he equalled it?

A. Yes, sir.

Q. What did he make as an average while he was working for you a week?

A. I would say \$20.00 to \$21.00.

page 124 } Q. What was his physical condition? Was he an active man or what was his general physical condition as you observed his state of health?

A. He was a very well man as far as I knew. I don't know that he was ever sick.

Q. Did he work for you continuously during the time he did work for you?

A. I think he did, as far as I know.

CROSS EXAMINATION.

By Mr. Mann:

Q. How long had Mr. Ford been on this route?

A. On this route?

Q. Yes.

A. I couldn't say accurately, but I should think he was on there either four or six weeks; wasn't on there very long.

Q. He went over the same route every day?

A. Yes, sir.

Q. You said something about the truck that you had. How many low gears did you have?

A. Four low gears—not four low gears, but four gears and two of them were low. In other words, it has one lower gear than the ordinary passenger car and then what you would call a second low. He was in the ordinary low.

Q. He wasn't in the lower gear?

A. Not the lowest, no.

page 125 } Q. But he was in low gear?

A. Yes.

Q. Which is the second, starting from the bottom?

A. Second from the bottom, yes, sir. In other words, the lowest gear is never used unless they have got two or three tons of stuff on them on heavy duty work.

Q. Now when those pictures were taken which have been exhibited to the jury the wreckage of the car itself had been removed; I mean the loose pieces?

A. The loose pieces were around there; they were lying there. I don't know whether they are in the pictures or not. A lot of it was piled up on the truck which couldn't be set up where a picture could be taken.

Q. What were the dimensions of that truck?

A. Approximately 18 feet long overall.

Q. And the width of it?

A. Standard width. I think the tread on that type truck is 56 inches and the body was approximately 6 to 8 inches narrower than what the tread was from center of tread to center of tread.

Q. Narrower than what?

A. The body was about 6 or 8 inches narrower than what the centers of the treads are. In other words, the fenders stuck out on each side of the body about that much. Therefore the center of the tire would give you just
page 126 } about 3 or 4 inches on either side.

Q. What was the total height of the truck?

A. 7 foot approximately.

Q. What was the number of the truck?

A. No. 7.

Q. Have you any other trucks of the same kind?

A. Similar, but not of that make motor or chassis.

Q. Is No. 12 of that same type?

A. The body is similar, yes.

Q. What is the difference between those two trucks?

A. It is a Chevrolet, while this is a Dodge.

Q. The dimensions are substantially the same?

A. Practically the same.

Witness stood aside.

page 127 }

J. B. BRADSHAW,

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

DIRECT EXAMINATION.

By Mr. Miller:

Q. Your name is Mr. J. B. Bradshaw, is it not?

A. Yes, sir.

Q. Where do you live?

A. 318 North Addison Street, Richmond.

Q. What business are you in?

A. In the clothing business; 6th and Broad.

Q. Mr. Bradshaw, are you in business there with your father at 6th and Broad?

A. Yes, sir.

Q. What is your education?

A. Graduate of the University of Pennsylvania in Philadelphia.

By the Court:

Q. In what?

A. Bachelor of Science.

By Mr. Miller:

Q. How old are you?

A. Thirty-two.

Q. Were you on the Petersburg Pike the morning that this accident happened down at Concord Avenue in which Mr. Ford was killed?

A. Yes, sir.

Q. Will you state to the jury the occasion of your going down the Pike and where you had been?

A. I had been down to Sergeant Nunn's house there at the intersection where that Belt Line road comes into the Petersburg Pike. His wife had recently died and she was to be buried that afternoon and I couldn't go to the funeral, so I went down to leave my card and pay my respects to the family.

Q. He lives on the right-hand side of the Pike going towards Petersburg does he not?

A. Yes, sir.

Q. Now when you started back to Richmond—came over on the northbound driveway and started to Richmond what did you notice ahead of you as you approached Concord Avenue?

A. Well, as I left Sergeant Nunn's house I turned around, went over the car tracks and hesitated there because several cars were coming by and I followed in behind. I think it was three cars.

Q. How were you driving; driving fast or slow?

A. No, I was going very slow because the condition that I had just left had kind of unnerved me. The young woman was a friend of mine—

Mr. Mann: If Your Honor please I think that is immaterial.

The Court: Just tell what you did.

A. (Continued.) I was coming on up the Pike and following these three cars. They were going faster than I was and had gotten, I reckon, the distance of a block ahead of me and as I was going on up I noticed this Zeller's dairy truck coming down the Pike on the opposite side.

Q. What did the driver of that truck do as he approached the crossing at Concord Avenue?

A. Just as—just before the driver approached that cross-

ing why an automobile passed the driver going towards Petersburg and after the automobile passed why the driver stuck his head out and looked back up the Pike there and then pulled over from the—well, it was his right hand-side of the road to the left-hand side of the road, preparing to make his turn up on the crossing there.

Q. Now which did you see first; the truck as it was pulling over from his right-hand side preparing to make the turn—did you see the truck first or the street car first?

A. I noticed the truck first.

Q. Then when you first saw the street car that was after the driver started to make his turn? Where was page 130 } the street car?

A. The street car was down in kind of a little depression down there. I noticed it was a black spot there in the road and a little trestle near by. It was just in that vicinity.

Q. Now, what, if anything, did the truck driver do after he straightened his truck out and started up on the track?

A. Well, he came up on the track real slow. It is a little rise there on that crossing and he was heavily loaded, I reckon, with milk bottles and crates, and came up on the driveway slow and he pulled off on the side of the tracks so that his front wheels were off the tracks and his rear part of his truck was on the track and he hesitated there, stopped there.

Q. What stopped him there, if anything?

A. Well, the three cars that had passed me—one of them was—the first one was ahead and then the second one was just a little bit behind that and the third one was in the act of passing the second car, second automobile.

Q. They were passing in front of this truck?

A. Yes, sir, they were passing. It seemed like the truck stopped there to let these two cars go by. In fact, he couldn't get over on the highway—

Mr. Robertson: We object.

The Court: Just tell what you saw.

page 131 } A. (Continued.) I saw that he couldn't—

Mr. Robertson: We object.

The Court: Don't express your opinion. Just tell what you saw, the cars passing and what he did.

A. (Continued.) Well, the cars passed directly in front

of that crossing and the truck was standing there for the cars passing, the two automobiles.

Q. Did the street car slow down at all?

A. No, sir.

Q. Had the last automobile cleared the crossing in front of the truck before the collision took place?

A. As the last automobile was just about in the act of passing or had just about passed was when the crash came.

Q. When this truck, as you say, hesitated or slowed up on the crossing where was the street car?

A. The street car, of course, had gotten farther on towards the scene of the accident than when I first noticed it. It was coming on at a very rapid rate and I noticed at that time that there was going to be an accident, that the street car was going to hit that truck sitting there on that track.

Q. About how far away from the truck with regard to Stop 8 $\frac{1}{2}$ where that next crossing is towards Richmond was the street car when the truck was in this situation on the crossing that you have described?

page 132 } A. What do you call the Stop where the accident happened?

Q. That is Concord Avenue.

A. What is the number of that stop?

Q. That is no stop; that is Concord Avenue where the accident happened, and the next street this way—I will let you look at this map. This is the way to Richmond; this is the crossing where the accident happened; this is the trestle (indicating). Now you have described the situation that the truck was in when these cars were coming towards Richmond.

A. Yes, sir.

Q. When the truck was in the situation you have described where was the street car?

A. The street car was down here in this vicinity (indicating). You see, when I first noticed it—

Q. Down in this vicinity; what do you mean?

A. Whatever this thing is here. When I first noticed the street car—that is where that little trestle is and that black spot, reckon, is right there (indicating). It seemed just about at that point on the trestle.

Q. Then you have described the street car as being at the street next north of Concord Avenue?

A. Yes, sir, that is it.

Q. Now was there any slowing down of that street car from that street up to the time it struck the
page 133 }

A. No, sir.

Q. Could you notice what the manner of movement of the street car was as it came on down?

A. Yes, sir, it was swaying from side to side on the rails.

Q. Could you ascertain about what the speed was?

A. Well, I don't know. Just about—it is hard to calculate the speed of street cars, but judging from the speed of an automobile—then the street car was coming to me and it is mighty hard to tell what speed it is, but it was going very fast and I should judge around 40 miles an hour, maybe 45. I don't know.

Q. Now after the accident when you drove up there did you have any conversation with the motorman or did he say anything to you?

A. Yes, sir.

Q. What did he say to you relative to his car, how it was running?

A. Yes, sir, he said he had it wide open.

Q. You were continuing to approach the accident from the time you saw those cars, were you not? You were getting in closer proximity?

A. When the accident happened it so unnerved me that I just practically came to a stop and then when I saw what the situation was I drove up to the point of the accident.

Q. Now about where were you when the accident happened relative to that store that is down there on the side of the Pike?

A. I was just about opposite that store or somewhere right near the store. I remember that.

Q. You mean the store that is on the right-hand side as you come towards Richmond?

A. That is right.

Q. Mr. Bradshaw when the truck was still astride the rails; I mean part of the truck over the rails, whereabouts was the street car at that time? Had it reached 8½?

A. Well, that is—you see, those things happened all so sudden, such a quick proximity—I thought that was the question I just answered; about 8½ Stop to the point where the truck was.

Note: No cross examination.

Witness stood aside.

page 135 } MRS. LULA AGNES FORD,
the plaintiff, introduced in her own behalf, being
first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Bowles:

Q. You are Mrs. J. Boyce Ford?

A. Yes, sir.

Q. Your name is Lula Agnes?

A. Yes, sir.

Q. You are the widow of Joseph Boyce Ford, are you not?

A. Yes, sir.

Q. Did you qualify as administratrix on his estate?

A. Yes, sir.

Q. Mrs. Ford I hand you this bill from A. W. Bennett and ask you if that is the bill you received for the funeral expenses of your husband?

A. Yes, sir.

Mr. Mann: We object to the admissibility of that bill for the funeral expenses of her husband. This money doesn't go to the estate; not part of the assets of the administratrix.

Mr. Bowles: If Your Honor please I don't agree with Mr. Mann, but in view of our conversation this morning
page 136 } ing I think I should not reply to that in the presence of the jury.

The Court: I will let the bill in. Objection overruled.

Mr. Mann: Exception.

Note: Filed and marked Exhibit No. 9.

By Mr. Bowles:

Q. What is the amount of that bill?

Mr. Mann: In view of Your Honor's ruling this morning that the objection had to be repeated each time, we have to object to that question for the same reasons given in the objection to the preceding question.

The Court: Same ruling. Objection overruled.

Mr. Mann: Same exception.

A. \$440.00.

Q. How old was your husband?

A. He was thirty-two.

Q. Who was he working for at the time of his decease?

A. Zeller's Dairy.

Q. Do you recall about how long he had been working for Zeller's Dairy?

A. About around a year and a half.

Q. Do you know about what he was making a week?

A. He was making between \$20.00 and \$25.00.

page 137 } Q. When did you hear of his death?

A. I heard about it, I guess, around half an hour after it happened.

Q. How many children were there of the marriage between you and Mr. Ford?

A. Two.

Q. What are their names?

A. Agnes May and Jane.

Q. How old is Agnes?

A. She will be nine years old the 24th of December.

Q. Is she in school?

A. Yes.

Q. I don't mean now, but does she go to school?

A. Yes.

Q. How old is the other child?

A. Five the 17th of May.

Q. Has she gone to school?

A. Not yet.

Mr. Mann: We object to that.

The Court: Objection overruled.

Mr. Mann: Exception.

By Mr. Bowles:

Q. They are both girls?

A. Yes, sir.

Q. Mrs. Ford, I want you to point out your page 138 } two daughters to the jury, please.

Mr. Bowles: Bring those two girls in.

Mr. Mann: We object to that, sir, on the ground that is incompetent and immaterial as to pointing them out. They are not exhibits in the case and ought not to be so.

The Court: I don't think that necessary to exhibit the children.

Mr. Bowles: If Your Honor please, they are beneficiaries and I think the jury—

The Court: The jury has already seen them. They were in here this morning.

Mr. Bowles: Very well, we won't bring them in.

Q. What is your age, Mrs. Ford?

A. I will be thirty-four next Saturday.

Mr. Mann: We object to that as immaterial.

The Court: Objection sustained.

Mr. Bowles: I believe in the death by wrongful act statute the jury is entitled not only to hear all the facts and circumstances about it, but take into consideration the longevity tables.

The Court: Of the deceased.

Mr. Bowles: The beneficiaries are the people dependent on the deceased.

The Court: You don't take that into consideration; you take the deceased and his expectancy of life, according to the actuary tables.

By Mr. Bowles:

Q. Mrs. Ford, what was the state of your husband's health prior to his death?

A. He was in excellent condition as far as I know; good health.

Note: No cross examination.

Witness stood aside.

Mr. Miller: Your Honor, the plaintiff rests except for the request that the jury view the premises. We want to ask for a view of the premises.

Mr. Mann: Before the plaintiff rests we would like to have the opportunity of recalling Mr. Driscoll for a few questions.

Mr. Miller: Mr. Driscoll was excused and I don't know whether he is here.

The Court: I will take that up later. I won't send the jury to the scene in the midst of the case.

page 140 } Mr. Miller: We rest. We didn't mean to send them out now, but we do desire a view by the jury at the proper time.

The Court: I will decide that later.

Mr. Mann: We ask that Mr. Driscoll may be recalled so that he may be asked one or two questions on cross examination.

Mr. Miller: If Your Honor please, he has had an opportunity to cross examine him when he was on the witness stand and he called him back twice and even Your Honor spoke about keep calling him back. I don't think they can

cross examine a witness and then wait for the case to develop to call him back again.

The Court: If you call him back you have to take him back as your own witness.

Mr. Mann: We are not willing to take him back as our own witness, but for cross examination.

The Court: All right sir.

Mr. Mann: We want to put in the record of course—

The Court: I will let you have Mr. Williams do that.

Mr. Mann: We want to put in the record the request.

Mr. Bowles: He was excused and has gone.

Mr. Mann: We didn't excuse him.

page 141 } The Court: The witness had been examined in chief and cross examined and then brought back twice.

Mr. Mann: Once.

The Court: You brought him back twice for cross examination again and the witness has been excused and the Court declines to send for him or have him brought back for further cross examination.

Mr. Mann: Very well sir, we except.

Note: The jury retires from the courtroom.

Mr. Mann: We are now going to make a motion to strike the evidence in this case on the ground that it is not sufficient as a foundation for a verdict against the defendants or either of them. We don't care to argue it at this time, sir, but the motion will be renewed at the end of the case, unless Your Honor wants it argued at this time.

The Court: I don't wish any argument. The Supreme Court has ruled that while you may at the conclusion of the plaintiff's evidence make your motion to strike, the proper place is when all the evidence is in.

Mr. Mann: We are making it both ways.

page 142 } The Court: So the motion to exclude the plaintiff's testimony at this juncture will be overruled and denied.

Mr. Mann: Exception.

Note: The jury returns into the courtroom.

page 143 } MRS. L. D. JOHNSON, JR.,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. You are Mrs. L. D. Johnson, Jr.?

A. Yes, sir.

Q. Where do you live?

A. Stop 19 on the Petersburg Pike.

Q. Were you a passenger on a south-bound interurban car that had a collision with one of the Zeller's trucks on the morning of February 27, 1933?

A. I was.

Q. Where had you gotten on that interurban car?

A. Where it started at the head of the Pike and Hull Street.

Q. And where were you going?

A. To Stop 19.

Q. Going home?

A. Yes, sir, going home.

Q. Do you remember whereabouts in the car you were?

A. I was either on the fourth or third seat—I have never been able to remember—on the right-hand side.

Q. Were you next to the window?

page 144 } A. Next to the window, yes.

Q. Do you remember whether or not anyone was in the seat with you?

A. No, no one was in the seat with me.

Q. Now as the car proceeded south and before the accident happened do you remember the car passing 8½ Stop?

A. No, I can't say that I do.

Q. Did you see the truck before the accident happened?

A. Yes, I saw it after the man applied the brakes; I saw the truck.

Q. Now what first attracted your attention to the accident?

A. Well, when the motorman applied his brakes very suddenly.

Q. Now before he applied his brakes could you estimate how fast the car was going?

A. I should imagine about 35 miles an hour. It is rather hard to say when I wasn't paying much attention to it at the time.

Q. When he applied his brakes what happened to you?

A. I was thrown forward until I hit the seat in front of me.

Q. Then you hadn't seen the dairy truck before that time?

A. No, sir.

Q. Then when you were thrown forward did you look up and see the dairy truck?

A. Yes, I looked up and saw the truck out of the front windows.

page 145 } Q. Had the truck gotten on the track or was it coming toward the track?

A. It looked to me as though the front wheels of the truck must have been on the rail—first rail of the track because the truck made an angle with the post that the front of the car forms.

Q. Was the truck moving or standing still?

A. It was still moving.

Q. Could you say how fast it was moving?

A. No, I couldn't, it happened so quick, but it seemed to have pulled up until it was just about across the track by the time we hit.

Q. Was it crossing from the west towards the east?

A. Yes, sir.

Q. And how far was the front end of the street car away from the truck when you looked up there and saw it?

A. Oh, it was almost on it; maybe about the length of the car; couldn't have been much more.

Q. Could you point out something here in the room to indicate how close it was?

A. No, I don't know. It seems to me it wasn't much farther than the corner of this room.

Mr. Bowles: Could we fix on that distance or get it measured, sir?

page 146 } By Mr. Mann:

Q. You mean that corner (indicating)?

A. I might be a little mistaken, it happened so quick, but we were right on the truck.

Mr. Mann: Can we estimate it afterwards?

The Court: Yes, you can approximate it. The dimensions of this room are 60 by 40.

Mr. Robertson: What do you approximate from the witness chair to the corner?

Mr. Bowles: Around about 45 feet.

The Court: About 45 feet.

Mr. Robertson: Let the record show about 45 feet.

By Mr. Robertson:

Q. Now after the accident could you see what part of the truck was struck by the street car?

A. Well, it looked like when we struck it was moving across the track, as well as I could tell, it happened so quickly. The truck was still moving and seemed when we struck it was almost broadside.

Q. Did the truck ever stop moving before it got hit from the time you first saw it?

A. I don't think so.

Q. Then after the accident happened and the street car came to a stop did you notice how far the back end of the street car was south of the crossing?

page 147 } A. Oh, I should say 15 or 20 feet.

CROSS EXAMINATION.

By Mr. Miller:

Q. Are you certain about what the speed of the street car was?

A. Well, there is no way to be absolutely certain. The only way I could judge was I have driven a car for ten or fifteen years.

Q. And you estimate it was running as much as 35 miles an hour?

A. Yes, I imagine it was.

Q. As it approached the crossing where the truck was?

A. It might not have been quite that fast for this reason: I think when a car is making so much noise you feel like you are going faster than if you are in an automobile.

Q. What made this one make so much noise; running so fast?

A. They always make a noise even when moving slow.

Q. You looked up just as soon as you felt the brakes?

A. Yes, sir.

Q. And you saw the truck out the front window of the car, didn't you?

A. Yes, sir.

Q. And the truck was then on the rails of the track, wasn't it?

A. You know, the corner of the street car would make a post there at the corner and that post was just
page 148 } about the middle of the truck.

Q. You were on the right-hand side?

A. Yes, sir.

Q. And you were next to the window, weren't you?

A. Yes, sir.

Q. And when you looked up you saw the truck on the track out of the front of the street car?

A. I saw about half of it through the front of the window and the other was flush with the post on the side.

Q. So you were looking out of the front window of the street car when you saw the truck?

A. Yes, sir.

Q. And it was on the rails then?

A. The front wheels were just about on the rail.

Q. And you looked immediately as the man put the brakes on?

A. Yes, sir.

Q. And he was so close to the truck when the truck was astride the track—

Mr. Robertson: She didn't say that.

Mr. Miller: I am asking the question.

Mr. Robertson: I object to the question.

The Court: Let him finish the question. She is on cross examination and not direct.

By Mr. Miller:

Q. Wasn't the truck on the track when the
page 149 } brakes were put on?

Mr. Robertson: He changed the form of the question and I don't object to it.

A. Well, when I saw it after the brakes were put on when I looked up it seemed to me that the front wheels of the truck would have been just on the first rail, the view I got of the truck.

Q. When you first saw the truck and when the brakes were first put on it was sufficiently on the track to have been hit, wasn't it?

A. Yes, sir.

Q. When the motorman first touched his brakes?

A. Yes.

Q. Then it was on the rails, wasn't it?

A. Well, I said the front wheels must have been on the first rail.

Q. When the motorman first touched his brakes of you felt them operate?

A. When I looked up after I was thrown forward.

Q. You didn't see the truck until it was in front of you?

A. No, I didn't see it.

Witness stood aside.

page 150 } MRS. A. M. HITER,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mann:

Q. Mrs. Hiter, where do you live?

A. Near Drewry's Bluff.

Q. Were you on the interurban electric car of the Virginia Electric & Power Company on February 27th last at the time of this collision?

A. Yes, sir.

Q. Where were you seated?

A. I was seated near the center of the car.

Q. On which side?

A. On the right-hand side going south.

Q. In which direction was the car traveling?

A. Towards south.

Q. Towards Petersburg?

A. Yes, sir.

Q. Did you see the milk truck before it collided?

A. Yes, sir.

Q. Where did you first see it?

A. I saw it just a little beyond Stop and a half
page 151 } 8—I mean Stop 8½, going south in the same direction the street car was going.

Q. Did you observe it coming down over on your right on the concrete before it turned?

A. It was on the left-hand side of the Pike before it made a short turn on the tracks.

Q. Was it going south or north?

A. It was going south.

Q. The same way the street car was going?

A. Yes, sir.

Q. Now did you see that truck when it made its turn?

A. Yes, sir.

Q. Did you see it when it went up on the track?

A. Yes, sir.

Q. Now how long was it before it got up on the track—after it got up on the track before the collision came?

A. Only a few seconds.

Q. Now tell us when it turned off if it was coming up on the track or had been on the track at the time of the collision?

A. It was going about 10 or 12 feet in front of the street car and all of a sudden he made a sudden left-hand turn and

turned right on the tracks without making any sign that he was going to do so and the car was only about 5 or 6 feet in the rear when he turned around and looked
page 152 } at the street car and then the crash came.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mrs. Hiter, you were sitting in the middle of the car on the right-hand side?

A. Yes, sir.

Q. You saw the truck before it went on the tracks?

A. Yes, sir.

Q. You were on the left-hand side or right-hand side?

A. I was on the right-hand side.

Q. Now the tail end of the truck—back end of the truck, you say, was about 10 feet in front of the street car as it was going along there?

A. Yes, sir.

Q. And then the truck made a sudden turn and got right up in the middle of the track before it got hit?

A. Yes, sir.

Q. And when it got up in the middle of the track the street car was still 5 or 6 feet away from it before it got hit; is that your testimony?

A. Yes, sir.

Q. Now did the man look out after it got up there before he got hit?

A. Yes, sir.

Q. How many seconds was it after it got up
page 153 } on the track until the car hit it?

A. It was almost instantly.

Q. How many seconds would you say it was?

A. I have no idea how many seconds; it appeared it was all instantly.

Q. Was it three or four seconds?

A. I reckon about three or four seconds.

Q. Now the truck was on the concrete driveway going south, wasn't it?

A. Yes, sir.

Q. Was it on the right side or left side of the concrete?

A. On the left side.

Q. Where was it with reference to that?

A. It was going on the left-hand side and all of a sudden he made that sharp left turn.

Q. You thought they were going to side-swipe before this collision occurred?

A. Yes, it looked that way to me.

Q. Because it was so close to the street car on the left-hand side?

A. Yes, sir; looked like he would get side-swiped.

Q. Now the truck turned on that crossing when the tail end of it was only 10 feet ahead of the front of the street car?

A. Yes.

page 154 } Q. How far do you think the front of the street car was from the crossing when he turned on?

A. About 10 feet.

Q. Now let me see if I get you exactly right. The front of the street car was within 10 feet of the crossing before the truck ever started to turn?

A. About that I would judge; about that length.

Witness stood aside.

page 155 } JAMES M. LEWIS,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mann:

Q. Mr. Lewis, where do you live?

A. 2301 Harwood Avenue.

Q. Were you on the electric car of the Virginia Electric & Power Company going south on February 27th of last year at the time of this collision?

A. Yes, sir.

Q. Where were you seated on that car?

A. On the third seat back, on the right-hand side.

Q. Were you next to the window or next to the aisle?

A. Next to the aisle.

Q. Did you see this milk truck that morning that had the collision with the street car?

A. I seen it just before the wreck happened.

Q. Where was it when you first saw it?

A. Well, it was right up pretty close to that crossing, ready to make the turn.

Q. Had it turned in the crossing or just going along the western lane?

page 156 } A. When I seen it it was just getting ready to make the turn.

Q. What?

A. When I first seen it it was just starting to make its turn.

Q. When it started to make the turn how far was the electric car from the crossing, would you say, north?

A. Well, it was practically on the crossing, right at it.

Q. Now when it made that crossing—made the turn you say the car was practically on the crossing. Did the truck get to the rails before the street car got to the crossing?

A. Sure, the truck got there first—truck just starting across as we hit the crossing.

Q. Truck just starting across?

A. Yes; it was bound to get there first.

Q. Now when the front wheels went up on the rails can you give us any idea how far the electric car was away from it?

A. I couldn't say positive how far it was from it. It was right on the street car—I mean right on the truck when its wheels were on the track.

Q. Is it any object you can point out here to enable us to get the distance?

The Court: What he wants is an approximation of it; not the accurate distance, but approximately how many feet.

page 157 } A. I would say when the front wheels of the truck started on the track we were about as far as from here to the corner of that railing right here from it (indicating); something like that.

Q. Which railing?

A. This one right here; at the end of that desk you are writing on.

Q. Right here (indicating)?

A. I would say somewhere along there. I won't be positive.

Mr. Mann: Can we agree on that?

Mr. Bowles: Somebody suggested some footage. What was it?

By Mr. Bowles:

Q. What did you say when you said about that; what number of feet?

A. I was talking about where that man was standing over there.

The Court: I told him to approximate it in number of feet and he didn't; just pointed out to the rail.

Mr. Bowles: I thought somebody said approximately so many feet and he replied about that, and I was wondering what number of feet was said.

Mr. Mann: Will Your Honor approximate that for us?

The Court: No, sir.

Mr. Mann: Can we agree on 20 feet?

page 158 } Mr. Bowles: I think it is more than 20 feet. I will agree on any distance you say, but it looks more than 20 feet to me.

Mr. Mann: If you say 30, I will take your estimate. All right, make it 30 feet. I don't mind giving you 10 feet.

By Mr. Mann:

Q. Before this collision did you observe or hear any action of the operator of the electric car?

A. I heard him blow for Stop 9 and for that crossing before I noticed the truck.

Q. Did you see the driver of the truck give any intention—any notice of his intention to turn to the left when he made this turn?

A. No, I didn't.

Q. When he made his turn were you looking at him—the driver of the truck when he made his turn?

A. I was looking at him just as he made the turn until he started on the track.

Q. Did you observe the rear of the car—the electric car after the accident as to how far it was from the crossing?

A. I didn't pay any particular attention, no.

page 159 } CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Lewis, you said a minute ago that you saw the truck just before the wreck. That is the first time you saw the truck?

A. When I first noticed it driving along.

Q. And it was right close to the crossing? The truck was right close to the crossing?

A. Yes.

Q. What distance from the crossing, would you say?

A. I wouldn't say exactly how far it was from the crossing.

Q. You wouldn't say about that? Estimate it for us, please, sir. Was it right at the crossing?

A. I should say he was about between 30 and 35 feet from the crossing.

Q. 30 or 35 feet. Now that is the first time you saw it?

A. The first I noticed it.

Q. And the truck was 30 to 35 feet from the crossing; that is your estimate?

A. Yes, the truck.

Q. Now you testified in the case when Mr. Driscoll brought a suit against the power company, didn't you?

A. Yes, sir.

Q. Didn't you testify in that case that when you first saw the truck it was about 50 yards from the crossing?

A. I don't remember. I might have. I don't
page 160 } remember for certain.

Q. Well, which is right?

A. I wouldn't say either one of them was right.

Q. You don't know where it was when you first saw it?

A. I know it was pretty close to the crossing.

Q. Well, you can't tell us whether 50 yards or whether it was 30 feet?

A. Not for certain, no.

Q. You didn't see this truck turn up on the crossing, did you?

A. I saw it.

Q. Isn't it a fact you saw the truck out on the highway and then you saw it again when it was on the track; isn't that correct?

A. I saw him when he went up on the track.

Q. What do you mean went up on the track?

A. When he drove up on it.

Q. You saw him when he was starting to turn?

A. Yes.

Q. But then you looked front, didn't you?

A. No, I watched the truck.

Q. Now you are certain you saw him make the turn?

A. Yes.

Q. Didn't you testify in the Driscoll case: "Well, I don't
remember seeing it make the turn"?
page 161 } A. I don't think so.

Q. You don't think so?

A. No, sir. I seen him make the turn.

Q. I will read you this, sir: "Did you see it when it made the turn?"—wasn't that question asked you and didn't you make this answer: "Well, I don't remember seeing it make the turn. I seen it just before he made it, just as he got right at the crossing." Didn't you make that answer to that question?

(No answer.)

Q. Can you tell us whether you did say it or didn't say it?

A. No. I guess I said it, all right.

Q. Now which is right about that?

A. I seen the man. Naturally, if you see him start to make the turn you see him make it.

Q. But didn't you say in that other case that you didn't remember seeing him make the turn?

A. I don't remember. I might have.

Q. That you saw him just before he made it, just as he got right at the crossing. Now you say you did see him make the turn. As a matter of fact, Mr. Lewis, when you saw him start to make the turn didn't you then look at the motorman and stop looking at the truck?

A. I don't think so.

Q. What do you think was the distance that
page 162 } truck was in front of the street car when he
started to make this turn? I am talking about the
back end of the truck to the front end of the street car in
parallel lines on that Pike.

A. How far was he in front of the street car?

Q. You have testified that you saw the man on the right hand drive and the street car was going in the same direction as the truck and that you saw the milk truck start to turn. Now what I want to know is how far was the front of the street car from the rear of the milk truck when it started to started to turn. I don't mean sideways; I mean on parallel lines on the Pike. How far behind the truck was the street car?

A. Well, when he started making the turn I would say as far as from here to that wall (indicating).

Q. How many feet would you say that is?

A. I don't know. I guess about 35 feet.

Q. Didn't you testify in Mr. Driscoll's case that it was about 15 or 20 feet and didn't you also say you didn't know, that that was an estimate?

A. Sure; that is what this is, an estimate. I don't know.

Q. You can't tell us whether it was 15 feet or 35 feet? You can't estimate any better than that? I just want to get the facts.

(No answer.)

page 163 } Q. Do I understand you say no?

A. No, I don't say. I won't be positive what the distance was.

Q. I ask you this again: didn't you see the truck out on the Pike and then didn't you look at the motorman and then look back at the truck?

A. I think I was watching that truck make the turn.

Q. I ask you, Mr. Lewis, if you weren't asked these ques-

tions in that trial and made these answers—didn't you make this statement: "The time the truck started on the track the motorman jumped and tried to throw the reverse and tried to stop just as the truck started to pull on the track," and you were then asked this question: "I thought you said you didn't see the truck come upon the track?" and then you answered: "I didn't, but I seen the motorman." Now did you make that statement?

A. I suppose so, if it is down there.

Q. Well, don't you remember whether you made it or not, sir?

A. I guess I made it.

Q. You guess you did make it. Your testimony now at this time is that the truck was right at the crossing and so was the street car right at the crossing and that the man turned over here from on that concrete when the street
page 164 } car was right at the crossing in front of the car,
is that it?

A. The truck turned right over in front of the street car.

Q. Can you tell us now how far the street car was from the crossing when the man started to turn to the crossing?

(No answer.)

The Court: Go ahead, witness, and answer some way.

Mr. Bowles: I will save him the trouble and withdraw the question and ask him no further questions.

Mr. Robertson: We ask that his entire testimony at the former trial be allowed to go in the record here so the jury may know whether or not the witness is going back on his former testimony.

Mr. Miller: No, he has just been questioned as to extracts.

Mr. Robertson: They have questioned him from the testimony in the former trial, pulled out isolated sentences here and there at places they thought it would be favorable and I ask that all his testimony at the former trial go in so the jury can have it all at the former trial.

Mr. Bowles: There isn't any former trial.

Mr. Robertson: The Driscoll case.

page 165 } The Court: I don't know anything about the Driscoll case. Both sides asked questions from the record—I presume it is the Driscoll case. I am not going to permit the whole evidence to go in. You gentlemen can pick out any part you want or the witness wants and read the testimony. You can do that, but I am not going to let you get two records in here. I am making one now and am not going to let another one in.

By Mr. Bowles:

Q. How fast was the street car going?

A. I should say between 30 and 40 miles an hour.

Q. How fast was the truck going?

A. Well, I would say the truck was going between—around 10 miles an hour when it started to make the turn.

Q. The street car was going lots faster than the truck, is that what you mean?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Mann:

Q. You have been questioned about that statement on the Driscoll trial. Did you make this statement—

Mr. Bowles: If Your Honor please, I object to that. He can ask him on direct examination anything he
page 166 } wants to, but can't read him something out of
something he testified before except for contradiction.

Mr. Mann: You just asked some questions on the same line.

The Court: You have a right to ask any questions on any new matter brought out on cross examination.

Mr. Bowles: If Your Honor please, can he undertake to cross examine his own witness by what he said in another trial?

Mr. Bowles: That is what he is doing. He said: Did you answer this question?

By Mr. Mann:

Q. Mr. Lewis, I wish you would please state to the jury whether you did or did not testify in the Driscoll trial to the following effect—

Mr. Bowles: Now we object to that.

The Court: Objection overruled.

Mr. Bowles: Exception.

By Mr. Mann:

Q. To this effect: "Now at that minute when you thought he was going to turn on the crossing how far was the street car from the crossing? Can you estimate that distance?"

and whether you answered: "I reckon around
page 167 } 40 or 45 feet from it." Can you state to the jury
whether you made that statement or not at that
trial?

A. Yes, sir, I think I did.

RE-CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Lewis, didn't you make this statement immediately following that question and answer: "Now I believe you said on your direct examination that you didn't see the truck from that time until it was right in front of you. The next time you saw it it was right in front of you right on the crossing?" and you said: "Yes, after he started over there and turned." Didn't you say that?

A. I didn't quite catch the last of that.

Q. The next question and answer after what Mr. Mann read you: "Now I believe you said on your direct examination that you didn't see the truck from that time"—that is, the first time you saw it—"until it was right in front of you. The next time you saw it it was right in front of you right on the crossing?" and you made this answer: "Yes, after he started over there and turned." Didn't you make that statement?

A. Yes, sir, I said after he made the turn I seen him on the track.

Q. Now I ask you if you didn't answer this
page 168 } to the next question: "And the crash happened
then. Now was the truck right directly on the
rails when you saw it next; that is, when the crash hap-
pened?" "Yes, it was on the rail." You made that state-
ment, too, didn't you?

A. Yes, it was on the rails.

Witness stood aside.

page 169 } J. H. SMITH, JR.,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mann:

Q. Mr. Smith, you are Mr. J. H. Smith, Jr.?

A. Yes, sir.

Q. Where do you live?

A. New York City.

Q. Before you lived in New York City where were you living?

A. Dinwiddie courthouse.

Q. Down at Dinwiddie courthouse?

A. Yes, sir.

Q. Were you on the highway from Richmond to Petersburg on February 27, 1933, at the time of this collision?

A. Yes, sir.

Q. How were you traveling?

A. Traveling in a Ford panel delivery truck.

Q. Was anybody with you?

A. Yes, sir.

Q. Who was it?

A. Mr. T. W. Groht.

Q. Did you see the milk truck that morning before it arrived at the crossing?

page 170 } A. I saw it as it turned and approached the crossing, the first glimpse I had.

Q. Which way were you going?

A. I was going south towards Petersburg.

Q. Were you going on the same lane that the milk truck was going?

A. Yes, sir.

Q. Were you in front of the truck or was the truck in front of you?

A. The truck was in front of me.

Q. Please state at the time you saw it just as it turned the circumstances?

A. I just glanced up in time to see the truck approaching the crossing and the street car approaching at the same time and it all happened very quickly. The truck approached the crossing, got up to it and started across it and the street car hit it about midway, about the middle of the body.

Q. Now when the front wheels of the truck hit the rails of the crossing how far was the car from it?

A. I would say about 25 feet—20 or 25 feet; not fuarther.

Q. How far were you from the scene of the accident at the time?

A. About 100 yards, I imagine, behind the street car.

page 171 } CROSS EXAMINATION.

By Mr. Bowles:

Q. Now, Mr. Smith, I understand you to say you saw this truck when it was approaching the track?

A. Yes, sir.

Q. Or the crossing?

A. Yes, sir.

Q. You didn't see this truck until its front wheels were on the rail, did you?

A. No, I think I saw it before it got on the rails. It was at right angles with the street car approaching the rails.

Q. When you looked up—you were driving your car, were you?

A. Yes, sir.

Q. You hadn't seen this truck before in front of you?

A. No, I hadn't seen it.

Q. How fast were you running?

A. I don't know; I imagine 35 to 40.

Q. How fast was the street car running?

A. I imagine about the same speed. I wasn't gaining on it.

Q. Had you been running along by the side of it?

A. No, I had been behind it.

Q. Had you been running along behind it for some little time?

A. Yes, sir.

Q. And hadn't seen any truck in front of you?

A. I hadn't noticed it, no.

page 172 } Q. When you first saw this truck it was when you looked up? Is that right?

A. Yes, sir.

Q. Now when you did look up and saw the truck weren't the front wheels on the rail?

A. I don't know that they were. I couldn't swear to that. The truck was approaching it; it was in motion.

Q. Can you swear it wasn't?

A. I couldn't swear they were or weren't. The truck was in motion and so was the street car.

Q. You testified in Mr. Driscoll's case?

A. Yes.

Q. Last August?

A. Yes.

Q. Weren't you asked this question: "When you looked up the front wheels were on the rail?" and you answered: "Yes, sir", didn't you?

A. I don't remember if I did.

Q. Isn't that right?

A. I couldn't swear it was or wasn't. As I remember it, the truck was approaching the tracks. It was in motion at the time.

Q. You didn't see the truck on the concrete in motion, did you?

A. No, sir, I didn't.
page 173 } Q. It was up on the crossing and the wheels
near the rail?

A. Yes, sir, near the first rail.

Q. And headed directly east at right angles to the track when you saw it?

A. Yes, sir.

Q. Now you had been running along behind that street car about 100 yards behind it for how far?

A. I couldn't say. I hadn't noticed the street car any more than I had the truck.

Q. You were, of course, watching down the road?

A. I saw the street car, yes, before I saw the truck.

Q. But, of course, you were looking down the southbound lane you were driving on?

A. That is right.

Q. You were keeping a lookout down that road?

A. Yes.

Q. And you had never seen this truck in front of you until you saw it crossways of the crossing—

A. Until I sensed it was going to be an accident. That is what attracted my attention.

Q. You never had seen the truck in front of you on the right hand lane until you looked up and saw it off the concrete with its front wheels near the rail at right angles to the track crossing over there?

A. That is correct.

page 174 } RE-DIRECT EXAMINATION.

By Mr. Mann:

Q. Mr. Smith, did you observe that morning traffic conditions on the north lane, the lane leading towards Richmond?

Mr. Miller: That is nothing we have examined him about. He turned him over to us for cross examination and we haven't asked him anything about traffic.

Mr. Mann: I am asking him now.

Mr. Miller: We are objecting to his making him a witness in chief again.

The Court: What was the question?

Mr. Mann: If he observed the condition of traffic on the northbound lane.

The Court: Objection overruled.

A. I didn't notice any traffic on the northbound lane, no, sir, or either on the southbound.

Q. You mean by that you didn't pay any attention to it or whether it was there or not?

A. I didn't pay any attention to it.

Mr. Bowles: If Your Honor please—

The Court: He said he didn't see any, so why go any further into it? Why go into anything if he didn't notice it?

Mr. Mann: I just wanted to know whether he page 175 } looked and it wasn't any there or just didn't look.

Mr. Bowles: He answered it. He has said he didn't notice any either way.

Mr. Mann: The question is whether he looked and didn't see it or just didn't look.

The Court: He said he looked ahead of him while he was driving along the right hand lane and didn't see any.

Witness stood aside.

page 176 } SYLVAN BROWN (col.),
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Roberston:

Q. How old are you?

A. Twenty-one years old.

Q. Where do you live?

A. Falling Creek, R. F. D. 10. I live in the country; R. F. D. 10, Box 27.

Q. Were you riding on the street car that ran into one of Zeller's dairy trucks down there at Concord Avenue in February a year ago this last February?

A. Yes, sir.

Q. Where were you going?

A. I was living at Stop 9 at that time. I moved since that happened.

Q. Now do you remember before you got to Stop 9 whether or not the car blew for Stop 9?

A. Sure, the whistle blowed.

Q. Just before the car got to Stop 9 did you signal the motorman that you wanted to get off?

Mr. Miller: I object to those leading questions.

The Court: The question is leading. Objec-
page 177 } tion sustained.

By Mr. Roberston:

Q. What did you do after the car left Stop 8½ and before it got to Stop 9?

A. That car didn't get to 9 before the wreck. It had a wreck before the car got there. He blew the horn after he passed 8½.

Q. Did you do anything after it left 8½ and before the wreck happened?

A. I rang the bell a little after we passed 8½.

Q. Why did you ring the bell?

A. Because it had passed 8½ and I wanted to get off at 9.

Q. Then when you rang the bell what did the motorman do?

A. He blew the horn.

Q. Which way did he blow it? How many times did he blow it?

A. Twice.

Q. Two good long blows or two little short blows?

A. Just short blows. I don't remember, but I know he blowed twice.

Q. Now did you see the truck before the wreck happened?

A. No, I was paying attention in front, so I never saw the truck. I saw the truck just as it came up on the track—front wheels of the truck came up on the track and the car ran into it.

Q. When you first saw the truck had the truck
page 178 } already gotten up on the track or was it coming
towards the track?

A. No, the front wheels were just about coming on the track when I saw it.

Q. How far were the front wheels away from the track when you first saw it?

A. Coming right up on the track when I saw it. When I looked at it the wheels were coming right up on the track.

Q. You mean just in the act of going up on the track?

A. Yes, sir.

Q. How far was the car away from the truck at that time?

A. Right close up on it. I don't know how many feet or nothing like that. I reckon from the distance from where I am sitting to right along where he is sitting at the end of that board (indicating); right down to where that hat is.

By the Court:

Q. Where those four hats are?

A. To where that first hat is.

By Mr. Randolph:

Q. About here (indicating)?

A. A little closer than that, up higher.

Q. About here (indicating)?

A. I guess about that distance.

Mr. Robertson: What will we call that?

Mr. Bowles: Anything you like.

page 179 } Mr. Robertson: All right, I will say 20 feet.

By Mr. Robertson:

Q. Then what part of the truck did the street car hit?

A. I don't know. I reckon he hit it as soon as he came on the track; hit him just about the center part of it, I reckon.

Q. Did it hit the front part or the middle part of the back part?

A. I think it hit just about the middle. I am not sure. I think it hit the middle of the truck.

Q. Then after the street car stopped could you tell how far the back end of the street car was south of the crossing?

A. I can't really tell you that, but I remember sitting the third seat from the rear I had to look back to see the truck. I know it passed by the telegraph post. I remember looking back to see the truck.

Q. How far was the truck away from you when you looked back to it?

A. It looked like just about 2 feet back from the car.

Q. Could you have reached out and touched it?

A. No, couldn't reach out and touch it.

Q. When you rang the bell to get off at Stop 9 did you look out in front the way the car was going?

A. Sure, I was looking in front of me. I page 180 } wasn't looking on the side.

Q. When you rang the bell and looked down the track in front of the street car was there any truck on the track in front of the street car?

A. No, the truck hadn't gotten on the track then. It wasn't nothing on the track when I rung.

Q. Where was the car when you rang the bell?

A. The car just had passed 8½ Stop. I always rung just as it passed the stop to get off at 9.

CROSS EXAMINATION.

By Mr. Miller:

Q. Did the motorman get your name down there the day the accident happened?

A. No, he didn't get my name.

Q. How far is 8½ from where the accident happened?

A. How far is $8\frac{1}{2}$ from where the accident happened?

Q. Yes.

A. It happened just the next road past $8\frac{1}{2}$.

Q. You rang your bell down at $8\frac{1}{2}$, didn't you?

A. Just after the car pulled off from $8\frac{1}{2}$ I rung the bell.

Q. You mean while it was starting up leaving $8\frac{1}{2}$?

A. Just leaving $8\frac{1}{2}$ Stop.

Q. Just as it was leaving $8\frac{1}{2}$ Stop you rang the bell?

A. Yes.

Q. Now you said the distance that the truck
page 181 } was from the street car when it drove—when the
truck got to the rail was at this hat or this hat
(indicating)?

A. That last hat.

Q. You mean this one (indicating)?

A. Yes.

Q. And you don't think it was this far away (indicating)?

A. No; in my way of judgment I think the distance of that first white hat.

Q. The other one is down about six inches. You don't think it was that far?

A. No.

Q. You think you are pretty accurate about that?

A. Pretty accurate about that.

Q. That would be about say 25 feet. You don't think it could have been as much as 26 feet away, do you?

A. I don't know that.

Q. You didn't testify in the case down at the other court in the other case, did you?

A. No, I didn't testify.

Q. Who did you talk to about this case before you came here this morning?

A. I talked to Mr. Robertson—I reckon that is his name.

Q. Who did you talk to before you talked to Mr. Robertson?

A. The gentleman right back of Mr. Roberston.

Q. When did you first talk to him about it?

page 182 } A. Monday before last he asked me concerning
it.

Q. That is the first time you talked to anybody since the accident happened?

A. First time I talked to anybody.

Q. Monday before last?

A. Yes, sir.

Q. And the accident happened how long ago?

A. February 23rd, that was, 1933, wasn't it?

Q. It happened eighteen months ago?

A. Yes.

Q. And you can tell the jury now how many times the motorman tooted his horn in response to your signal when you left Stop 8½?

A. Sure I can.

Q. You remember he tooted it twice?

A. Yes.

Q. And you hadn't talked with anybody for eighteen months and you remember that all right?

A. No, I hadn't.

Q. You hadn't talked to anybody about fixing that distance and you know it is 25 feet and not 26 feet?

A. I don't know it is 25 feet. I don't know whether 25 or 30 feet. I just know just about that distance.

Q. You fix that distance at the first hat and not the second hat?

page 183 } A. The first one; not the second one.

Q. You were sitting in the rear?

A. Three seats from the rear—third seat from the rear.

Q. And the first time you saw the truck you saw it out in front of the car, didn't you?

A. Sure; I wasn't looking on the side. I saw the truck, just the front wheels hadn't quite gotten on the tracks, coming up on the tracks.

Q. Which side of the car were you sitting on?

A. Sitting on the left hand side, right behind the motor-man.

Q. Next to the left hand window?

A. Sir?

Q. Were you on the inside?

A. No, I was sitting on the outside.

Q. On the aisle side?

A. Yes.

Q. Did you see the truck's wheels as it rolled up on the track right in front of you?

A. I didn't see the wheels, but I saw the truck as it was coming up on the track.

Q. What part of it?

A. The front part.

Q. You testified the wheels were at the rail. Didn't you see the wheels?

A. No, I don't remember seeing the wheels, but
page 184 } just remember seeing the truck coming up on the track.

Q. How long was it before the street car hit it? Was it three or four seconds?

A. No, as soon as it came on the track the car went into it.

Q. The car never stopped at all until it hit it?

A. No, never stopped until it hit it.

Q. Didn't put the brakes on or anything?

A. I don't know about that.

Q. You hadn't felt the brakes going on until you felt the crash, had you?

A. No, I don't know whether I did or not.

Q. You remember everything about these distances here now and the crash threw you forward, didn't it, when it hit the truck?

A. Threw me forward?

Q. Didn't it throw you forward in the seat when it hit the truck?

A. Yes, I had to hold on to keep from going out.

Q. That was the first time you were thrown forward, when it hit the truck, wasn't it?

A. Sure.

Witness stood aside.

page 185 } T. G. VAUGHAN,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. What are your initials, Mr. Vaughan?

A. T. G. Vaughan.

Q. Are you employed in the claim department of the Virginia Electric & Power Company?

A. I am.

Q. How long have you been working for the company?

A. Twenty-three years.

Q. Did you make an investigation when the Driscoll case came up for trial to find out the witnesses in that case?

A. Yes, sir.

Q. At that time did you ascertain that this girl Sylvan Brown was a passenger on the car at the time the accident occurred?

A. No, sir, I didn't.

Q. Then did you investigate this case and help prepare it for trial that we are engaged in trying now?

A. I did.

Q. In your investigation of this case for trial did you find that Sylvan Brown had been a passenger on that
page 186 } car?

A. I did.

Q. How did you find that out?

A. A young fellow by the name of Frank Collins, who works for the Virginia Electric & Power Company, told me—

Mr. Miller: Don't go into his conversation.

A. (Continued) I found out through Frank Collins.

Q. Then what did you do?

A. I went to see the girl in question.

Q. Then at my request was she summoned as a witness here or not?

A. She was.

Q. Do you remember whether or not she came to my office to tell me what she knew of the accident?

A. She did.

Q. Mr. Vaughan, do you remember the young man named J. E. Williams that testified this morning that he was at the pump and saw the top part of the street car coming along and ran over there where the accident happened?

A. Yes, sir.

Q. Did you interview him in your investigation before the trial of the Driscoll case?

A. I did.

Q. Did you ask him to tell you what he knew about the accident?

A. I did.

page 187 } Q. What did he tell you?

A. He told me he didn't know anything about it, that he was behind his home there and heard the crash and immediately went out.

Q. Mr. Vaughan, have you visited the scene of this accident since the accident happened?

A. I have.

Q. Have you made any experiment there to see how far north of Concord Avenue an approaching street car can be seen?

A. I did.

Q. How far can one be seen?

A. 3,100 feet.

Q. How did you determine that fact?

A. By making the measurement with a hundred foot tape line.

Q. Tell me the kind of measurement you made.

A. Well, I measured it—in other words, I first picked out the point that the street car was partially visible and I measured that distance from the center of Concord Avenue to the point where the street car first came into view over a slight

knoll 3,800 feet north of the accident. Then I measured it from the point where the entire street car was visible, which was a distance, counting from the center of Concord Avenue, north 3,100 feet to where the entire street car was plainly visible.

Q. If you stood down at Concord Avenue to page 188 } watch the car come over the knoll where could you tell where to measure?

A. Mr. Smith was with me—Mr. Harvey Smith. In other words, we worked it together. He carried one end of the tape line and I the other and he stood at the point where the street car was visible and then we measured to that point.

Q. At my request did you make any pictures there at the intersection?

A. I did.

Q. Looking north towards Richmond?

A. I did.

Q. Is that the picture you took at my request?

A. Yes, sir.

Q. This picture has on the back of it: "Looking north towards Richmond in the direction from which the street car involved in this accident was approaching. By T. G. V. August 2, 1933." What is the crossing there in the foreground of the picture?

A. That is Concord Avenue, the crossing involved in this accident.

Note: Picture filed and marked Exhibit No. 10.

Q. Mr. Vaughan, at my request did you take a picture of the street car that was involved in this accident, showing the end of it that hit the truck?

page 189 } A. Mr. Alexander took that.

Q. Mr. Vaughan, at my request did you take two pictures of Zeller's dairy truck No. 12?

A. I did, sir.

Mr. Bowles: Now, if Your Honor please, this is not a picture of the truck that was involved in this accident. The pictures offered here have people sitting in them and I think it is improper to take a picture of another truck that isn't the truck involved in the accident. I don't know what purpose it is for and I object to it. We have got pictures of this truck in the record and these are pictures of another truck.

Mr. Robertson: The pictures they have introduced of the truck that was in the accident are pictures of a demolished truck and you can't tell what it looked like. Mr. Zeller testified this morning that truck No. 12 was to all practical pur-

poses the same in appearance as the truck which was in the accident. We offer them in here to show the kind of truck that was in the accident so you can see the whole truck and not one with the whole side knocked out.

Mr. Bowles: We are very sorry we can't show
page 190 } him the truck without having been demolished, but
while Mr. Zeller testified the dimensions were substantially the same, I don't think he testified it was the same kind of truck.

The Court: No, he said it was a Chevrolet and the other one was a Dodge.

Mr. Bowles: Besides that, they have people sitting in it.

Mr. Mann: I don't think that makes any difference.

Mr. Robertson: The evidence is two people were sitting in the truck.

The Court: Gentlemen, I don't see any good that can be served by a picture of truck No. 12. The demolished truck may be exhibited to the jury, as I understood it would be brought here.

Mr. Robertson: You will have to talk to Mr. Bowles; I haven't any access to it.

Mr. Bowles: You could have had access to it at any time.

Mr. Robertson: Here is the point I am getting at: that picture there you can't tell anything about it.

The Court: We can tell by looking at the truck. Exhibit
No. 6 shows right much of the truck and here is
page 191 } another one that shows more than half.

Mr. Robertson: You rule the picture of No. 12 out?

The Court: Yes.

Mr. Mann: My recollection is this, that Mr. Zeller testified that to all intents and purposes the bodies of the trucks were the same.

Mr. Miller: He said the dimensions.

The Court: I don't see what good it would do us to see another truck, even if it was exactly like this one or the same make truck. We are not interested in that; we are interested in this truck that had the collision with the street car.

Mr. Mann: The only thing would be to show us the truck before it was destroyed. We can reproduce this truck back, of course. That is the reason we offer this picture.

The Court: The truck, Mr. Bowles said, would be brought over.

Mr. Mann: Possibly we could reconstruct that in imagination. That is the only reason we want to put this in. I understand Your Honor excludes it?

The Court: I sustain the objection to the picture of No. 12.

Mr. Robertson: Exception by both defendants
page 192 } upon the grounds already stated and that the evidence is properly admissible.

Mr. Robertson: By agreement of counsel for all parties it is stipulated that the car involved in this case was car No. 416.

Mr. Bowles: Operated by Mr. W. E. Blanton.

Mr. Robertson: Yes.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Vaughan, I understood you to say that you investigated this accident in preparation for Mr. Driscoll's trial?

A. Yes, sir.

Q. And you had not found Sylvan Brown then?

A. No, sir.

Q. Didn't the motorman furnish you with the names of the people on that street car?

A. I got some of the names off the report the motorman turned in.

Q. How many names did he turn in?

A. I don't recall.

Q. It was pretty nearly everybody on the street car, wasn't it?

A. I don't recall the number of people.

Q. Did he turn in this girl's name?

page 193 } A. No, sir, he didn't.

Q. Can you tell me how many names he did turn in?

A. It would be purely a guess.

Q. Haven't you some record showing that?

A. I think so.

Q. Will you look at it and find out for me?

A. It might be in the file there, the only record I know we have.

Q. I want to find out if you have got anything that can show how many witnesses—the names of how many passengers on that street car were given you by the motorman. I would like for you to find that record and tell me.

A. All right, sir.

Mr. Mann: I don't understand or agree that that is admissible.

Mr. Bowles: I want the information, not your original report; that is your own private property.

Mr. Robertson: We offer the report and ask it go in evidence as an exhibit. There it is. We offer it in evidence.

The Court: The report itself cannot go in. Mr. Vaughan can look at it and refresh his memory as to how many people the motorman reported.

page 194 } Note: The witness examines the report.

A. There were the names of eight witnesses. Seven of them were located and one given on this report is Herman Haskins, 1329 Groveland Street, who has never been located. In other words, there is no such number and I have never been able to locate such a person.

Q. All I asked you was to tell me the number of names that the motorman got, the names of those that were on the street car; that is all I asked you.

The Court: He has just told you that, but said one reported he couldn't get.

Mr. Bowles: He said eight names on the report, but I asked the names of how many on the street car.

Mr. Robertson: The report doesn't show whether they are on the car or not. You have to question them to find out.

Mr. Bowles: I have asked him how many passengers on the street car did the motorman turn in.

A. (Continued) In other words, I had no idea whether the motorman turned in any of them or not. When this report came to me for investigation there were the names of eight prospective witnesses on it.

Q. I thought you said a while ago you did have a record that would show what names of witnesses or passengers on the street car the motorman did take down. Have page 195 } you got it or not?

A. No, sir; I have got a record of a report that was made out by the motorman, but these records at any time that any additional witnesses are found are subject to be added to this report by any official or employee of the company.

Q. Don't you know that the motorman did get the names of the witnesses on the street car that have testified before?

A. As far as I know he got them, yes, sir.

Q. Now you testified here that you interviewed Mr. J. E. Williams with reference to the preparation of the Driscoll case and that Mr. Williams told you he didn't know anything about the accident?

A. I did, sir.

Q. Now you testified in the Driscoll case, didn't you?

A. Yes, sir.

Q. You didn't testify to that, did you?

A. I only answered questions, as I am doing now.

Q. But you are the investigator of this company?

A. Yes, sir.

Q. And you are the person that works up these cases for trial?

A. Yes, sir.

Q. And you knew that fact and didn't say any-
page 196 } thing about it then?

A. I don't volunteer any information on the
witness stand except to answer questions that are asked me.

Q. Had you told Mr. Robertson that fact?

A. I couldn't positively say at this time whether I had or
not. Possibly I had and possibly I hadn't.

Mr. Robertson: I can answer that right now.

Mr. Bowles: I am not asking you. If you want to testify,
you can do so.

Q. Now, Mr. Vaughan, you also have testified here that
you made a test about seeing a street car, as to whether a
person standing at Concord Avenue could see a street car
coming over the hill 3,100 feet away?

A. Yes, sir.

Q. Did you make a test to see whether a motorman in
front of a street car if looking straight ahead could see a
truck standing on Concord Avenue also 3,100 feet off?

A. I didn't make that test, but I would say from my ob-
servation there that he could.

Q. If he was looking in front?

A. Yes, sir.

Witness stood aside.

page 197 } G. E. ALEXANDER,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Alexander, you are employed by the Virginia Elec-
tric & Power Company?

A. Yes, sir.

Q. What is your position with the company?

A. Foreman of the inspection department.

Q. How long have you been connected with the company?

A. Twenty years.

Q. Do you make inspections of street cars involved in accidents?

A. Yes, sir.

Q. Did you inspect car No. 416 that was involved in the accident that has resulted in this case?

A. Yes, sir.

Q. Did you make a written inspection report?

A. Yes, sir.

Q. Mr. Alexander, is this the report of the inspection you made of car 416 after the accident on February 27, 1933?

A. Yes, sir.

page 198 } Q. I am going to ask you to look at that report
and refresh your memory and then from your
memory, as refreshed, state what the damage to the street
car was in the accident?

A. The bumper under the right-hand vestibule window was bent in and the dash above it; that is, the dash and the bumper were bent in between the entrance door and the headlight.

Q. Is what you speak of as the dash that round thing that is like a bay window in the front of the street car?

A. Yes, sir.

Q. At my request did you take a photograph of car No. 416 after this accident?

A. Yes, sir.

Q. Is that the picture that you took?

A. Yes, sir.

Q. When did you take it?

A. I took it the following day after the accident.

Mr. Robertson: I offer this picture in evidence and ask that it be marked as an exhibit, the picture having written on the back of it: "Picture of street car No. 416 involved in this accident. By G. E. A., February 27, 1933."

Note: Filed and marked Exhibit No. 11.

page 199 } Q. If you took it on February 28th why is it
marked: "By G. E. A., February 27, 1933."

A. I didn't mark that. It must have been a mistake after getting to your office.

Q. What is the width of car No. 416?

A. 8 feet.

Q. What is the length of it?

A. 40 feet.

Q. What is the height of it?

A. To the trolley around 11 feet.

Q. What is the weight of it?

A. 34,000 pounds.

Q. What is the overhang of the car outside of the rails?

A. It is approximately 18 inches.

Q. That 18-inch overhang on the outside of each rail is included within the overall width of 8 feet?

A. Yes, sir.

Q. Is this car what is known as a safety car?

A. Yes, sir.

Q. Why is it called a safety car?

A. Well, those cars are called safety cars and are equipped as safety cars due to the fact of one-man operation. Should anything happen to the operator while the car is in operation—should he fall from his post of operation the car automatically goes—applies the brakes, knocks the
page 200 } line breaker, and goes into emergency and will sand the rail all in the same operation.

Q. If that car is thrown into emergency or goes into emergency, how many different things occur intended to stop the car?

A. Well, it applies the brakes and sands the rail, and when this car goes into emergency it is a current-breaker which knocks this line breaker, which is equivalent to pulling the trolley off the trolley wire; you disconnect your current.

Q. With reference to the wheels how many different places does sand go on the track if the car goes into emergency?

A. Well, it flows the sand from both ends, front and back.

Q. Does it apply it to four wheels?

A. No, sir.

Q. Say the car is going south towards Petersburg, is any sand applied at the front wheels?

A. Yes, sir.

Q. Do you know which wheel it would be or would that vary?

A. It would be on the right-hand side of the car.

Q. Would that sand go on the track in front of the front wheel or back of it?

A. In front of the wheel.

Q. Would any sand go on the track at the back wheels?

A. Yes, sir.

page 201 } Q. Would it be on the right-hand side going to Petersburg?

A. No, sir; the left-hand side.

Q. Then the sand goes on at opposite wheels?

A. Yes, sir.

Q. Does the sand that is applied at the back wheel go on the track in front of the back wheel or behind the back wheel?

A. Behind the back wheel.

Q. Why is that?

A. Because it is intended for operation in the opposite direction.

Q. You mean so if the—can those cars be operated from either end?

A. Yes, sir.

Q. Then what was the back end going to Petersburg might be the front end coming back to Richmond?

A. Yes, sir.

Q. So if the sand went on the track back of the back wheel going to Petersburg, it would be in front of the front wheel coming back to Richmond?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Alexander, I want to find out about this safety car.

Do I understand if a man is driving a street car
page 202 } with the safety appliances which car 416 had that
to stop the car all he has to do is lift his hand
up from that control?

A. Yes, sir.

Q. Is that the quickest way to stop it?

A. Yes, sir.

Q. There are other ways to stop it, aren't there?

A. Well, of course, you might possibly stop it by reversing.

Q. That isn't as quick as this, is it?

A. No, sir.

Q. Isn't it a danger if you do stop a car with the reverse it may start skidding and sliding?

A. It is possible.

Q. Now when you are driving a street car, the motorman sitting up there, he either in order to keep the current on the street car has to push that controller handle down or else has to push a pedal down with his foot?

A. That is right.

Q. He can do either one of the two, can't he?

A. Yes.

Q. If he has his foot on the pedal at the bottom of that

controller box and holds that down then he can take his hand off the controller, can't he?

A. That is right.

Q. If he takes his foot off the controller—I mean the pedal at the bottom of the controller box, he has got to put his hand on the controller before he does that to keep the car from going into reverse?

A. Yes, sir.

Q. So if the motorman is driving a street car and sees an object coming towards him like it is going to run into him, to stop that street car all he has to do is either raise his hand or, if he has his foot on there, raise his foot?

A. Yes, sir.

Q. He doesn't have to wind anything, does he?

A. No, sir.

Q. He doesn't have to put on any brakes?

A. No, sir.

Q. He doesn't have to turn any gadgets?

A. No, sir.

Q. He doesn't have to turn the current off with his controller?

A. No, sir.

Q. All he has to do is raise his hand?

A. Yes, sir.

Q. Now you said something about his sand that I don't understand. It doesn't apply sand that is any good to do any stopping with except on the right-hand front wheels?

A. That is right.

Q. That is a safety car?

page 204 } A. Yes, sir.

Q. It doesn't apply any sand on the left-hand front wheel?

A. No, sir.

Q. And the sand it puts out at the back wheel the wheel never runs over?

A. No, sir.

Q. So it is just one place that it puts the sand?

A. Yes, sir.

Q. Can you throw sand on all those wheels by hand?

A. No, sir.

Q. In other words, it is not any way on that street car to put any sand on the track except on the one single wheel, is it?

A. Yes, that is right, that one single wheel. I want to get that right; it sands four wheels going in the same direction on the same rail.

Q. How do you mean four wheels?

A. You have eight wheels on that car.

Q. Yes, I understand.

A. These four wheels pass over this sand you throw on that one wheel—that rail.

Q. Four wheels; two front wheels on the right and two front wheels on the back?

A. Two right wheels on the rear.

Q. So you don't put sand on but one side of page 205 } the street car?

A. That is it exactly.

Q. I see what you mean by the four wheels. You say this street car weighs 34,000 pounds?

A. Yes, sir.

Q. That is 17 tons, isn't it?

A. Yes, sir.

Q. What is the speed of that street car?

A. I don't know, sir, Mr. Bowles.

Q. You don't know what maximum speed it will run?

A. No, sir, I don't.

Q. Do you think it will run as fast as 45 miles an hour?

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

Q. Now I want to ask you this: if the man that is operating a street car does undertake to throw his car into reverse instead of using this emergency thing it takes longer to do that, in the first place, doesn't it?

A. Yes, sir.

Q. And that is not the proper way to stop it, in the second place, is it, quickly?

A. No, sir.

Q. Now this picture: you say you took this picture?

A. Yes, sir, I took that picture.

Q. Did you take it the same day the accident happened?

A. No, I took it the day after the accident.

Q. Is this the hind end of this street car?

page 206 } A. That is the end which was in the accident.

Q. Well, the trolley seems to indicate it is going the other way?

A. Well, it might have been, but that is the end that was in the accident.

Q. That is the end the accident happened to?

A. Yes, sir. You see, when they come into the shops they would be running from the opposite end from over here.

Q. Now the damage on the dash you are talking about was all the way across the front of that car, wasn't it?

A. No, sir.

Q. It wasn't?

A. No, sir; the damage to the dash and bumper were in between the right-hand corner post and the headlight.

Q. Are you positive about that?

A. I think I am positive about it.

Q. You testified in this case before, didn't you?

A. I think so.

Q. I don't mean this case, but the case of Mr. Driscoll. On page 210 you testified in Mr. Driscoll's case and weren't you asked this question: "Is the damage nearer to the right, or the left?" and didn't you make this answer: "Well, the damage is practically all the way across."?

A. Is that what is in that book?

page 207 } Q. You better look at it.

A. Well, I guess I said so.

Q. Well, was that true or what you just said?

A. What I just said, as I recall the accident. The damage to the dash of the car was in between the right-hand corner post and the headlight.

Q. Wasn't the damage all the way across it?

A. No, sir.

Q. Didn't you say so in the Driscoll case?

A. You say so; I don't deny it.

Q. I ask you didn't you say it was all the way across in the Driscoll case?

A. You say it is in there; I must have said so.

Q. Which is right? This time, and the other time is wrong?

A. Yes, I am telling it just as I recall it this time.

Q. Why did you take this picture, Mr. Alexander, looking toward the right side of that street car as it was headed towards Petersburg instead of taking the picture looking towards the left side of it as it was headed towards Petersburg?

A. I took the picture to show the damage on the car.

Q. You know it to be a fact that the truck got hung between the left side and the telegraph pole, don't you?

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

Q. You don't know that?

page 208 } A. No, sir, I don't.

Q. Is it not true and didn't you know when this picture was developed and given to you that the left side of that street car, the front of it—left side of the front as it was headed towards Petersburg didn't show up clear on that picture and I ask you now does it show up clear?

Mr. Robertson: I think the picture speaks for itself.

A. I think the picture would speak for itself.

Q. Can you tell from that picture whether there is any damage on the left side of the front?

A. No, sir.

Q. You can't tell from that picture whether there is any damage there or not?

A. No, sir.

Q. And you saw it when it was first developed?

A. I suppose so.

Q. Why didn't you make one of that street car so the damage on the left could be shown?

A. I took the picture to show the damage to the car.

Q. It wasn't any damage to the left-hand side of the front of the street car?

A. No, sir.

Q. Not a bit?

page 209 } A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Alexander, is this a single truck or double truck car?

A. Double truck car.

Q. Has this car modern, standard, up to date equipment?

A. Absolutely.

Q. If you throw a car in reverse does that sand the track?

A. Yes, sir—no, sir not if you throw it in reverse. You mean your current?

Q. I mean if a motorman undertakes to stop the car—tries to stop it by throwing it in reverse in the way Mr. Bowles examined you?

A. No, sir, that doesn't sand the track.

RE-CROSS EXAMINATION.

By Mr. Bowles:

Q. A motorman can throw his car in reverse and can sand his track by hand, can't he?

A. No, sir.

Q. Do you mean there isn't anything on that street car that the motorman can touch that will put sand on the wheels?

A. Oh, yes, he has a handle there for that purpose.

Q. That is what I asked you. He could have put this car in reverse and sanded the track, too?

page 210 } A. By shoving his lever in emergency.

Q. Where is that lever?

A. His brake handle.

Q. He could have cut the current off and then pushed the handle down on the controller box and then cut the current back on and throw it in reverse?

A. Yes, sir.

Q. And then thrown his lever here and that would have sanded the track if he had done all those things?

A. If he had done all those things, yes, sir.

Witness stood aside.

page 211 } T. W. GROHT,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mann:

Q. You are Mr. T. W. Groht?

A. I am.

Q. Where do you live?

A. At the present time down in Louisiana.

Q. Mr. Groht, were you in an automobile with Mr. J. H. Smith, Jr.—

A. Yes, sir.

Q. —proceeding southwardly on the Pike at the time of this accident under investigation?

A. Yes, sir.

Q. What direction was the automobile truck traveling, the one you were in?

A. The one we were in was going south.

Q. Now did you see the milk truck which was in collision with the electric car?

A. I don't quite understand that question.

Q. I say did you see the milk truck which had the collision with the electric car?

page 212 } A. Yes, sir.

Q. When did you first see that?

A. Just about approaching the track.

Q. Just what?

A. Just about approaching the street car track.

Q. After it made the turn?

A. Yes, sir.

Q. When you saw it how close was it to the track, would you say?

A. Just about approaching the track.

Q. How far was the electric car from it at that time, would you judge?

A. I should judge about 25 or 30 feet.

Q. Did you see the accident?

A. Yes, sir.

Q. Had the wheels of the truck at the time you first saw it gotten on the track at all, as far as you could judge?

A. Well, judging from the distance I don't think they were quite on the track; perhaps just about approaching the track; that is, the first rail.

Q. How far were you from the accident at the time it happened?

A. Probably 150 feet or 200 feet.

Q. Do you have any idea about the rate of speed the truck was moving at the time of the accident—the milk truck?

A. Just normal speed, I imagine, about, turn-page 213 } ing a corner; turning a sharp curve.

Q. At the time of this accident was there any traffic on the north-bound lane; heavy or light or anything of that sort?

A. I didn't notice any traffic.

Q. Did you look over that way?

A. I crossed the highway and I didn't dodge any vehicles whatsoever.

Q. Did the truck stop on the track before the collision or was it constantly moving?

A. It was moving.

Q. Do you recall the position of the street car as to how far it was after the accident from the crossing itself?

A. I should judge it was about 15 or 20 feet, probably 25 feet from the crossing.

Q. Did you make any attempt after the accident to try to find an automobile to take the men to the hospital?

A. I went over to a little store and tried to get in contact with a telephone and the store was closed, the door was locked. That was my intention in crossing the highway.

Q. And there were no automobiles there at that time going along?

A. I didn't see any there.

page 214 } CROSS EXAMINATION.

By Mr. Bowles:

Q. You live in Louisiana?

A. Yes, sir.

Q. Where did you live before that, sir?

A. I lived in McLean, Virginia.

Q. Who do you work for now?

A. Stone & Webster.

Q. Stone & Webster own the Virginia Electric & Power Company, don't they?

A. I don't know.

Q. It is a holding company for the Virginia Electric & Power Company; isn't that a fact?

A. I work for the construction outfit, Stone & Webster.

Q. You are an employee of the Stone & Webster organization?

A. Right now, yes, sir.

Q. You have come all the way up here from Louisiana to this trial?

A. Yes.

Q. Now, Mr. Groht, you were sitting in the car with Mr. Smith?

A. Yes.

Q. You were on the right-hand side of that car? He was in the left-hand, driving?

A. Yes.

page 215 } Q. How long had you seen the street car before this accident happened?

A. Just before it happened.

Q. Had you been driving along behind the street car?

A. Probably alongside of it or behind it some feet.

Q. How far were you behind the street car?

A. I should judge 100 feet or so.

Q. 100 feet behind the street car. Did you keep that distance behind the street car?

A. I don't recall seeing the street car very much until this thing came up in front of me and I saw the accident. As far as being alongside I can't say I saw it.

Q. How fast was the street car running, would you say?

A. I would say about 25 or 30 miles an hour.

Q. About 25 or 30. How fast were you all running?

A. Probably 25 or 35 miles an hour.

Q. Were you going as fast as the street car or faster or what was it?

A. Well, it must have been about the same if we were both traveling about the same rate of speed.

Q. The first time you saw this truck it was on the track, wasn't it?

A. The first time I saw the truck it was approaching the track.

Q. What do you mean by approaching the
page 216 } track?

A. Going on to it.

Q. How far away from it?

A. I didn't get your question.

Q. You know what I mean by how far away?

A. Ask the question again.

By the Court:

Q. How many feet from it?

A. When I first saw it?

Q. Yes.

A. I should say about a foot probably, two feet; just before it approached the track.

By Mr. Bowles:

Q. You mean by that the front wheels?

A. Well, you might say the front wheels, the front fenders or front headlights; the front part of the truck just about entering on the track.

Q. Had you been looking ahead on the highway?

A. Just casually riding along, yes.

Q. You didn't see the truck in front of you on the highway?

A. No.

Q. Didn't notice it or didn't see any truck in front of you on the highway?

A. No.

Q. And when you first saw the truck it was off the concrete, wasn't it?

page 217 } A. It was entering—I don't say that, no, because I haven't measured the distance between the track and the concrete.

Q. Hadn't it already turned off of the highway onto the track?

A. It was just approaching the track.

Q. Now there is a distance between the track and the concrete highway you were riding on?

A. Yes, sir, I imagine so.

Q. Well, the truck was off of the concrete highway, wasn't it?

A. I don't know; I didn't measure it. I don't know the length of the truck and don't know the distance between the concrete and the first rail of the track.

Q. Did you notice whether it was off of the concrete or not at the time?

A. I didn't notice those things. I saw the accident.

Q. Did you notice whether it had turned off of the highway or not?

A. It was approaching the track when I saw it. This all happened very quick.

Q. You testified in Mr. Driscoll's case last August, didn't you?

A. I believe I did, yes, sir.

Q. When he was suing the Virginia Electric & Power Company?

A. I believe I did.

Q. Weren't you asked this question on your page 218 } direct examination, a question asked by Mr. Robertson: "When you saw the truck that got hit had it already turned off of the highway or was it turning off the highway?" and didn't you make this answer: "I should think already turned off the highway. It was going straight across the track." Didn't you make that answer?

A. If it is down there. I can't remember a year what I said. I must have said it.

Q. If you made it, which is right, approaching or going straight across the track?

A. As I recall it now, I saw that car just about entering the first rail; that is, entering the track at this crossing.

Q. You were then asked by Mr. Robertson, after having made the statement I read: "I should think already turned off the highway. It was going straight across the track." "Had it already reached the track or was it approaching the track?" and didn't you make this answer: "I should say the front end of it was just about on the first rail. It all happened pretty quick. It was just about approaching the track, on the track." Did you say that?

A. I must have said it. I can't remember it.

Q. You can't remember what you said then?

A. No, not word for word, no.

Q. Now you say it was moving about like a page 219 } person would make a turn. You didn't see this truck turning, did you?

A. I say it was moving about that speed as you would expect a car to make a turn.

Q. But you didn't see the truck turning?

A. No.

Q. It was already east about perpendicular to the street car track when you saw it?

A. Well, I don't know. When you go along the Petersburg Pike and see car, whether 90 degrees or 80 degrees I couldn't tell you.

Q. Well, was it going east or going south or going south-east?

A. What?

Q. The truck when you first saw it?

A. Well, if the Petersburg Pike is going south, if that is the direction of the compass, this car was apparently going east.

Q. Now, Mr. Groht, you didn't notice any traffic on that highway at all, did you?

A. No, sir.

Q. You didn't notice whether there was any there or wasn't any there, did you?

A. Well, I noticed there wasn't any because I didn't see any. I crossed the highway.

Q. But that is after the accident happened, isn't it, that you are talking about?

page 220 } A. Very soon after.

Q. Didn't you pull up some distance beyond the south of the crossing before you stopped?

A. We pulled up probably abreast of the trolley car.

Q. Where was the trolley car; some distance beyond the crossing?

A. 15 or 20 feet.

Q. The back of it?

A. Beyond the crossing.

Q. The back of the street car was 15 or 20 feet beyond the crossing?

A. Yes.

Q. Now when the accident happened you were 100 or 150 feet behind the street car?

A. I should judge that.

Q. Then you kept on up to the crossing and went beyond the crossing and then stopped—Mr. Smith stopped the car and you got out?

A. Yes.

Q. And that is the first time you noticed whether there was any traffic or not?

A. Well, yes, I suppose so.

Q. You hadn't noticed whether there was traffic or whether there wasn't traffic while the accident was happening?

A. Well, it was no traffic anyway. We were
page 221 } traveling along and couldn't see any traffic.

Q. If you didn't notice, how can you say it wasn't any?

A. I didn't see any at the time I crossed the highway.

Q. But that is after the accident, isn't it?

A. Yes.

Q. After you had gotten out of the automobile and gone around to the men and walked across the street car track?

A. Yes.

Q. And back to the crossing. You didn't see any traffic then?

A. No.

Q. But you can't say what the traffic was when the accident happened?

A. No.

Witness stood aside.

The Court adjourned until ten o'clock A. M., tomorrow morning, August 2, 1934.

page 222 }

August 2, 1934.

The Court convened pursuant to adjournment.

T. H. BURROUGHS,

a witness introduced in behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. You are Mr. T. H. Burroughs?

A. Yes, sir.

Q. Where do you live, Mr. Burroughs?

A. 200 West 31½ Street.

Q. What is your business?

A. Kind of grocery business, small grocery business.

Q. What was your business on the 27th day of February, 1933, the day Mr. Ford was killed in an accident down on the Petersburg Pike?

A. Same business.

Q. At the same place?

A. Same place yes, sir.

Q. Were you running that business in your own name?

A. Yes, sir.

Q. Did you buy milk from the Zeller Dairy
page 223 } through Mr. Ford?

A. Yes, sir, I did.

Q. How long had you been buying milk from him before the accident?

A. I couldn't tell exactly. I started sometime in January, about the first of January.

Q. And you had been buying milk from him every day from then up to the time of the accident?

A. Yes, sir, every day.

Q. What was the usual time for Mr. Ford to come to your place to deliver the milk that you bought?

A. Around nine o'clock.

Q. Did you buy any milk from him on the day of this accident?

A. Yes, I did.

Q. What time did he come there that day?

A. It was around eleven o'clock, but, of course, I didn't look at the clock at the time. It was around eleven o'clock.

Q. Did he come into your place of business by himself or with somebody?

A. With somebody.

Q. Do you know who that was?

A. Yes, sir; Mr. Driscoll.

Q. While he was in your place of business did you hear Mr. Ford or Mr. Driscoll say anything to each other about whether they were late or early or on time?

Mr. Miller: I object to that as leading, Your page 224 } Honor.

The Court: The objection is sustained as leading. Ask him what he said, if anything. That isn't leading.

By Mr. Robertson:

Q. What, if anything, did you hear Mr. Ford and Mr. Driscoll say to each other while they were in your place of business that morning?

Mr. Miller: I object to what Mr. Driscoll said to Mr. Ford; that isn't evidence. We are trying Mr. Ford's case. The question as phrased is still objectionable.

The Court: Objection sustained.

By Mr. Robertson:

Q. Mr. Burroughs, what, if anything, did you hear Mr. Ford say to Mr. Driscoll when they were in your place of business that morning?

A. Mr. Ford said to Mr. Driscoll—just said he was running a little late that morning.

Q. How long were they in your place of business?

A. Well, it wasn't hardly—just around about a minute possibly a minute; something like that.

CROSS EXAMINATION.

By Mr. Miller:

Q. Mr. Burroughs, you said that they got there around nine o'clock every morning?

page 225 } A. Yes, sir.

Q. You said that a minute ago?

A. Yes, sir.

Q. And you testified in Mr. Driscoll's case at Chesterfield, didn't you?

A. Yes, sir.

Q. And weren't you asked this question: "Did you look at the clock the other mornings they came there?" and your answer was: "Yes, sir, because I generally get in the store about nine o'clock, being as I live out near Forest Hill Park." and then you were asked this question: "They always got there at nine o'clock every morning?" and your answer was: "Around nine-thirty." Now why have you advanced it and say they got there at nine o'clock? It is half an hour's difference in there.

A. I know it was between nine and nine-thirty every morning because I noticed after I got to work and I got to work—sometimes I would be late, but not later than nine or nine-thirty.

Q. You tell this jury he got there around nine o'clock in the morning and told another jury he got there around nine-thirty. Now which do you mean to be correct?

A. Well, to be correct, I didn't notice the clock any other morning, to tell the truth, but sometimes our clock wasn't running, which was true, and I know several mornings he hit there around nine-thirty.

Witness stood aside.

page 226 } MISS RUTH ELLYSON,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mann:

Q. Miss Ellyson, you are Miss Ruth Ellyson?

A. Yes, sir.

Q. Where do you live?

A. Chester, Virginia.

Q. What is your business?

A. Clerk at the Chesterfield County Bank.

Q. Were you a passenger on the car of the Virginia—

A. Yes, sir.

Q. —of the Virginia Electric & Power Company on February 27th of last year at the time of this collision?

A. Yes, sir.

Q. Where were you sitting?

A. I was sitting on either the third or fourth seat on the left side.

Q. Did you see the collision

A. Yes, sir.

Q. Did you see the truck which came up and had the collision with the car?

page 227 } A. I saw it just as it came up on the track.

Q. You mean before it hit it?

A. Yes, sir.

Mr. Bowles: Don't lead the witness.

By Mr. Mann:

Q. Where was it when you saw it?

A. It was just coming up in front of the street car when I saw it.

Q. Do you know about how far or can you say about how far the electric car was away from it at that time?

A. Well, I would say when I first saw it it was about as far as from here to that railing (indicating).

Q. This railing (indicating)?

A. Yes, right there.

Q. This railing here?

A. Yes, sir.

Mr. Mann: Can we designate that?

Mr. Bowles: Name your distance.

Mr. Mann: 20 feet?

Mr. Bowles: O. K.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Miss Ellyson, when you saw this truck you hadn't felt any jerk of the street car like it was stopping, had you?

page 228 } A. Well, from what I can remember it seemed like as soon as I saw it the motorman started putting on the brakes.

Q. How did he start to put on the brakes?

A. I don't know. It just seemed like the car, from what I can remember, was stopping; kind of jerked.

Q. Did you see him winding his hand or doing anything like that (indicating)?

A. I think—yes, sir, whatever the thing is.

The Court: Louder.

A. (Continued.) Yes, sir, he was putting on the brakes.

Q. Do you remember just what he was doing? Was his hand moving around like he was turning off the current?

A. Yes, sir.

Q. Now you saw the truck before you saw the motorman turning his hand around?

A. Yes, sir.

Q. You were sitting in the seat with your sister, Mrs. C. E. Vaughan, I believe, weren't you?

A. Yes, sir.

Q. When you saw this truck—when you first saw this truck it was on the track, wasn't it?

A. It was just coming up on the track.

Q. Are you sure of that?

A. Yes, sir.

Q. Wasn't it directly in front of you?

A. No, sir, not when I first saw it. When I first saw it it was coming up on the track.

page 229 } Q. I just want to be sure you understand my question. The first time that you saw this truck wasn't it directly in front of you on the track?

A. No, sir, not exactly, from what I can remember. It wasn't exactly right in front of me.

Q. You testified in Mr. Driscoll's case out at Chesterfield Courthouse, didn't you? You testified out there, didn't you?

A. Yes, sir.

Q. Weren't you asked this question by me then: "Miss Ellyson, the first time you saw the truck it was right directly in front of you on the track, wasn't it?" and didn't you make this answer: "From what I can remember it seems like to me it was"?

A. I think, from what I can remember, it was coming up on the track when I saw it.

Q. I will ask you this again, whether you were asked this question and made this answer. The question was: "Miss Ellyson, the first time you saw this truck it was right directly in front of you on the track, wasn't it?" and didn't you make this answer: "From what I can remember it seems like to me it was"?

A. Well, I might have said that.

Q. When you testified in Chesterfield was last August, wasn't it?

page 230 } A. Yes, sir.

Q. The accident happened on February 27, 1933?

A. That is right.

Q. Your recollection was fresher about this thing a year ago than it is now, wasn't it?

A. From what I can remember I told you when I first saw the truck it was coming up on the track, in court last summer.

Q. Do you remember making that answer to me at that time or do you not

A. Not exactly. I don't think I made it exactly that way. From what I can remember I told you just like I am telling it today, that I saw it just as it come on the track. Of course, it was in front of me; it was in front of the car because it was coming in front of the car.

Q. It was in front of the car?

A. It was coming up in front of the car when I first saw it.

Q. Was the truck on the track or not on the track?

A. Well, as I looked at it—it all happened so quick, but it was just coming on the track.

Q. How did you happen to see it?

A. I just happened to look up as it came on the track.

Q. You just happened to look up when you were sitting in the seat there?

A. Yes.

page 231 } Q. For any reason? Did anything attract your attention?

A. No, sir. I recollect just seeing the truck; that attracted my attention.

Q. You just happened to look out and see the truck out of the front window of the street car?

A. Yes, sir.

Q. And then you saw the motorman starting to wind his controller or brake or whatever it was?

A. Yes, sir.

Q. And then almost instantly the crash came?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Mann:

Q. Miss Ellyson, you were cross examined at the last trial, I believe, by Mr. Bowles?

A. Yes, sir.

Q. Please state if you recollect making this statement. Mr. Bowles asked you this question: "When you glanced up you saw the truck directly in front of you?" and you answered: "It was coming up on the track when I looked up, from what I can remember."

A. Yes, sir.

Q. What, if anything, did you do when you saw that?

A. I threw up my hands and kind of holloaed and I guess my sister thought something was wrong with me—

page 232 } Mr. Miller: We object to what her sister thought.

The Court: Don't say what your sister thought.

RE-CROSS EXAMINATION.

By Mr. Bowles:

Q. I am sorry to have to ask you another question, but immediately following the question Mr. Mann read to you I ask you if you weren't asked this question: "When you saw it coming up on the track wasn't it in front of the street car when you first saw it?" and didn't you say: "Yes, sir."?

A. Well, if it was coming up in the front there it was bound to be in front of the street car.

Q. Did you hear any whistle blown?

A. No, sir, I couldn't remember that.

Witness stood aside.

page 233 } G. N. THOMPSON,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Thompson, where do you live?

A. Stop 12, Richmond-Petersburg Pike.

Q. Do you remember a collision between an interurban car and a Zeller's dairy truck out on the Petersburg Turnpike on the 27th of February, 1933?

A. Yes, sir.

Q. Where were you when that accident happened?

A. I was on the car.

Q. Whereabouts on the car were you?

A. Third seat on the left-hand side.

Q. Were you next to the window or next to the aisle?

A. Next to the window. I was in the seat by myself.

Q. In the seat by yourself?

A. Yes, sir.

Q. Did you see the truck before the accident happened?

A. Yes, sir.

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

A. The truck looked like the front end of it was
page 234 } right up on the track when I looked up. I was
looking over a list I had carried to town to get
some groceries and somebody rang the signal bell at Stop
8½ and that is getting down near my stop—I get off at 11
sometimes and walk across and sometimes at 12. When they
rang the signal bell I looked up to see where I was and I
looked straight ahead and seen the truck.

Q. When you saw the truck had it already gotten on the
track or was it coming on the track?

Mr. Miller: We object to that as leading. He stated
“When I looked up the front end was right on the track”
and Mr. Robertson is suggesting it was coming to the track.

Mr. Robertson: I am not suggesting anything. I am asking him.

Mr. Miller: He answered the question.

The Court: A leading question is susceptible of the answer
yes or no and I don't care how you frame it—did you or did
you not, it is still leading. You ask the witness what he saw
or what happened and that doesn't suggest any answer and
isn't leading. The question is leading; not only leading, but
practically asking the same question over.

Mr. Robertson: Both defendants except on
page 235 } the ground the question is not leading and is
proper.

By Mr. Robertson:

Q. Mr. Thompson, where was the truck the first time you
saw it?

Mr. Miller: He has answered that.

The Court: All right, let him answer it again.

A. The front wheel was up on the track, the front end of
the truck.

Q. On what part of the track were the front wheels?

A. The front wheel was over the right-hand rail, near the
left-hand rail, the best I remember.

Q. You mean headed towards Petersburg?

A. The truck—

Q. You mean as you were facing Petersburg?

A. I was facing Petersburg and the truck was going east,
coming from the west side; started across towards the east
side of the track.

Q. And where were the front wheels?

A. The front wheels were crossing over the front rail—the rail on the right-hand side and hadn't gotten over to the east side yet.

Q. And how far away was the electric car from the truck at that time?

A. Well, now, that is hard to say. I don't know exactly because I wasn't paying any attention. I would say anywhere from 30 to 40 to 100 feet. I don't know page 236 } what to say. I wasn't paying no attention to that.

Q. Did you hear the motorman blow his whistle at any time before the collision?

Mr. Miller: I object to that as leading. That is putting the answer right in the witness' mouth.

The Court: It is not putting the answer in the witness' mouth, but it is susceptible of the answer yes or no.

Mr. Robertson: If Your Honor please, as I understand a leading question, it indicates the answer I want. Now this question doesn't indicate what I want.

The Court: Yes, you want to know whether the whistle was blown or not.

Mr. Robertson: Yes, and I think that is not leading.

The Court: Ask what the motorman did at the time. That isn't leading; doesn't suggest any answer.

Mr. Robertson: Do you rule the question out?

The Court: As leading.

Mr. Robertson: Both defendants except upon the ground the question is not leading.

By Mr. Robertson:

Q. What signal, if any, did you hear the operator of the car give from the time he left Stop 8½ until the accident occurred?

A. I don't remember whether he gave any or not.

Witness stood aside.

page 237 } MRS. PALMER COCKERILL,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mann:

Q. You are Mrs. Palmer Cockerill?

A. Yes, sir.

Q. Where do you live?

A. 1306 Westmoreland Avenue. That is in South Richmond; Stop 3.

Q. Were you a passenger on the interurban car of the Virginia Electric & Power Company on February 27th last year at the time of the collision with the milk truck?

A. Yes, sir.

Q. Where were you seated?

A. I was seated on the right side of the street car somewhere about the fourth or fifth seat, I guess.

Q. Did you see the milk truck before the collision?

A. I saw it as it was approaching on the street car crossing up on the crossing.

Q. Had it gotten on the crossing when you first saw it?

A. It seemed like to me it was going up on the crossing when I saw it.

page 238 } Q. How far was the electric car from it at that time, if you know?

A. Well, I couldn't say exactly how far it was because when I saw it as it approached to the car I saw the conductor put on the brakes and that attracted my attention and that is when I looked up and saw the truck and the crash came all of a sudden. I couldn't say exactly how far the car was.

Q. Could you point out any object or anything of that sort to indicate about the distance, as you recollect it?

A. No, I couldn't. I don't remember now. You see, I was with my son and I was talking to him at the same time.

Mr. Miller: Don't say what you said to your son.

The Court: No, don't say what you said to your son. The fact you were talking to your son is all right, but don't say what you said.

By Mr. Mann:

Q. Then you have no way to judge, as I understand it, how far the car was from the track?

A. No, I wouldn't say because I don't know.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mrs. Cockerill, you say you saw the motorman putting on his brakes?

A. Yes.

page 239 } Q. What was he doing; turning his hand around?

A. I suppose that is the way you put on brakes.

Q. I am asking you what you saw, not what you suppose.

A. Well, I guess that is right, because I saw it; that is what I saw.

Q. You know what the controller box is, don't you?

A. I don't know whether I do or not.

Q. You know the lever the motorman has to turn on his current and turn it off? You have seen one of those, haven't you?

A. Yes, I guess I have.

Q. Well, when you saw the motorman was he turning that lever?

A. Yes, he was turning the lever.

Q. Now what made you look up?

A. When he put on his brakes.

Q. Was it the jolt or something that made you look that way?

A. Well, I don't know as it was a jolt, but at the time when I saw the car and the truck I suppose he put on the brakes and that is what made me look up.

Q. Did you hear any whistle blown?

A. I can't say I heard the whistle blow because I don't know whether he blew it or not.

Q. Now when you first saw this truck it was on the track, wasn't it, Mrs. Cockerill?

A. When I first saw the truck it was coming up on the track, turning up.

page 240 } Q. Now let's differentiate between coming up on the track and being on the track. Now which was it?

A. Well, it had turned and was going up on the track.

Q. Well, was it up on the track when you first saw it?

A. No, I don't think it was. It was going into the track, going up in front of the car.

Q. You testified in Mr. Driscoll's case, didn't you?

A. Yes.

Q. Didn't you state in answer to a question: "When I glimpsed the truck it was turning into the crossing", and then you were asked the question: "Was it on the track?" and didn't you answer: "Well, I am sure it was on the track. It was turning across it. The truck was crossing the track." Didn't you say that?

A. Well, I might have said it, but it has been so long, you know, I am just going by having it in my mind exactly what I was seeing.

Q. That was last August, wasn't it?

A. Yes.

Q. Your recollection was better last August than it is now, wasn't it?

A. I am sure it is the same thing because I don't think I will ever forget the scene and all.

Q. Well, which is right?

A. Well, I suppose it must be right what they page 241 } have down.

Q. Well, then, the truck was on the track when you first saw it, wasn't it?

A. Is that what I said before? It was going on the track. I said it was going up on the track. It was going into the crossing.

Q. I didn't understand your answer; didn't hear what you said.

A. I said it was going up on the tracks. That is what I said before.

Q. I understand you did say that before, but when I asked you about it didn't you also tell me you were sure it was on the track when you first saw it?

A. I don't know. I don't remember.

Q. You don't recall that? You don't remember whether you did say it or not?

A. I don't remember it.

Q. Your husband is employed by the power company, isn't he?

A. Yes, sir, that is right.

Q. He works at the 12th Street power house?

A. Yes.

Q. You ride a pass?

A. I rode a pass at that time, but haven't ridden one since.

Q. You haven't ridden one since?

A. Haven't ridden one since.

Q. It was a complimentary pass?

A. Yes, sir; they are issued by the power com-
page 242 } pany.

Q. Did your son ride on one?

A. I don't know whether he rode one or not.

RE-DIRECT EXAMINATION.

By Mr. Mann:

Q. Now I am going to ask this question. In your testimony at the Driscoll trial were you asked this question by Mr. Bowles: "It was on the track when you first saw it, wasn't it?" and your answer: "It was on the track when I first saw it. When I saw it it was turning into the crossing."

A. Yes, sir.

Q. "I suppose it was on the track. I don't know whether all the way across the track or not." Another question by Mr. Bowles: "I am not talking about whether all the way across the track, but when you first saw it it was on the track, wasn't it? The front of it was on the track?" and your answer was: "Yes, I suppose so." You made those statements, didn't you, in the last trial?

A. Yes, sir.

Q. Didn't you make this statement also: "And the street car was then—

Mr. Miller: We object to that. We haven't been into the distance or anything at all about that on cross examination and he didn't go into it on direct examination.

The Court: He has a right to go into it now page 243 } and you have a right to cross examine on it.

The admission of testimony is in the sound discretion of the Court.

Mr. Bowles: I am not objecting on that ground. I am objecting on the ground that he has asked this lady already on direct examination how far the street car was from it and she said she didn't know. Now he is trying to show she did say it.

The Court: He can refresh her memory.

Mr. Bowles: By her previous testimony?

The Court: Yes, sir. That is what both sides are trying to do.

Mr. Bowles: Exception.

By Mr. Mann:

Q. And the question was: "And the street car was then 40 feet from the crossing, you think?"

. Mr. Miller: I object, Your Honor, on the additional ground it is leading.

A. That is what I said.

Mr. Miller: We didn't go into that.

The Court: I understand he is reading from the record there. The objection is overruled.

Mr. Miller: Exception.

page 244 } By Mr. Mann:

Q. Answer: "I guess it was. I don't know for sure because I didn't measure it and I left the scene just as soon as it happened."

A. That is exactly what I said.

RE-CROSS EXAMINATION.

Q. Now, Mrs. Cockerill you can remember that statement, can't you?

A. Well, yes; certainly, I can remember that because I left the scene, but I just glanced at it and said it was 30 or 40 feet, somewhere about the length of a street car.

Q. Mr. Mann asked you how far it was and you told him you couldn't remember. Then he read you from this record and you said you remembered that statement there, but couldn't remember the statement I asked you first; isn't that true?

(No answer.)

Witness stood aside.

page 245 } W. R. BOWMAN,
a witness introduced in behalf of the defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Bowman, you are Mr. W. R. Bowman?

A. Yes, sir.

Q. Where do you live?

A. Stop 26, Petersburg Pike.

Q. Were you a passenger on the interurban car that collided with one of Zeller's trucks on the 27th of February, 1933?

A. Yes, sir.

Q. Do you remember whereabouts in the car you were?

A. On the left-hand side, front seat.

Q. Where were you going to get off?

A. Stop 26, Petersburg Pike.

Q. Mr. Bowman, as the car approached the place where the accident happened did you hear any whistle sounded before it got there?

Mr. Miller: Now, if Your Honor please, you have ruled on that and Mr. Robertson knows it.

The Court: The objection is sustained as leading.
page 246 }

Mr. Robertson: Both defendants except upon the ground the question is not leading. I wish to add an-

other objection in the record. Both defendants further object to the ruling of the Court in excluding this type of question upon the ground that it makes it impossible for counsel for both defendants or either of them to develop the particulars and details of the case in a way that is necessary for their defense and is proper under the rules of evidence.

Mr. Miller: If Mr. Robertson feels hampered like that, we will withdraw the objection, Your Honor.

The Court: Don't make objections and then waive them.

Mr. Robertson: Then I want to stop with this witness and bring back all the other witnesses we previously had.

Mr. Miller: No, I am not doing that.

The Court: I have ruled you can ask what signal, if any, was given, but when you don't do that it is leading.

Mr. Robertson: I am trying to abide by Your Honor's ruling and I have practiced law twenty years and I have never had to examine a witness the way you are ruling today which I never heard any court rule this way before. page 247 }

The Court: Well, you have heard this Court rule that way before and hear it again.

Mr. Robertson: I have to keep on objecting, then.

The Court: That is your privilege.

Mr. Robertson: That is what I am going to do and I now except.

Mr. Miller: I withdraw it.

By Mr. Robertson:

Q. Did you hear any signal given before the car got to Concord Avenue?

A. It blew for 8½; no passenger to get off at 8½.

Q. I can't hear you.

A. He blew for 8½; no passenger to get off at 8½, well he went ahead. He blew for Stop 9; one passenger to get off at Stop 9.

By Mr. Bowles:

Q. What?

A. I said he blew his whistle for Stop 9 after he passed 8½.

Q. And what else about a passenger?

A. I didn't say anything about a passenger.

By Mr. Robertson:

Q. Did you hear any signal—any passenger signal from any passenger to get off, inside the car?

A. She blew—rang the bell; rang the bell.

Q. Do you mean the motorman or the passenger? page 248 }

A. The passenger rang the bell.

Q. Now did you see the truck before the collision occurred?

A. I saw it as it come up on the car track; whipped right up on the car track.

Q. When you first saw the truck was the truck on the car track or off the car track?

A. It was coming right up on the car track.

Q. And how far was the interurban car away from it at that time?

A. About 15 or 20—I mean about 15 feet.

CROSS EXAMINATION.

By Mr. Miller:

Q. Mr. Robertson, asked you if a whistle was blown for Stop 9 or a signal given by a passenger for Stop 9 and your answer was: "She rang the bell."

A. Yes. He blew his whistle after she rang the bell.

Q. Now who is "she" that rang the bell?

A. It was a colored girl.

Q. Now the colored girl was sitting back of you. You were sitting on the front seat—

A. Yes, sir, I don't know—

Q. Wait a minute. You were sitting on the front seat on the left-hand side?

A. Yes, sir.

Q. And the colored girl was sitting in the rear? page 249 }

A. Yes, sir.

Q. Now why are you telling the jury that she rang the bell, that the colored girl rang the bell? Who told you she rang the bell?

A. Didn't anybody tell me.

Q. How do you know she rang the bell?

A. Well, she got up there; she was going to get off.

Q. Did she get off at 9?

A. No, she didn't get off at 9 because the car stopped—

Q. She got off when the crash came?

Mr. Robertson: Let him answer the question.

The Court: Give the witness time.

By Mr. Miller:

Q. Is there anything else you want to say?

A. That is all.

Q. Who got off when the crash came?

A. I don't know. All of them got off; all of them got off.

Q. How do you know that colored girl was the one that gave the signal?

A. Well, I couldn't say she was the one, but it was rung for Stop 9.

Q. Now you have told the jury looking straight at them, that she gave the signal and you said you meant the colored girl. Now I am asking you how did you ever learn the colored girl gave the signal?

A. Didn't anybody tell me anything about it.

page 250 } Q. Well, how do you know it?

A. Because I have seen her get off there lots of times.

Q. You were sitting up on the front seat and the car had a number of passengers on it and because you heard a signal sounded you undertake to tell the jury it was a colored girl sitting in the rear of the car that was going to get off and that she gave the signal. Is that what you are undertaking to say?

(No answer.)

Q. Now I am going to ask you this question. Do you know who gave that signal?

A. No, I couldn't come right out and say who gave it.

Q. Why did you undertake to tell that jury who gave it?

A. Because I saw her when she got off and I knew she was going to get off at that stop.

Q. Where did you get on the car?

A. At Stop 2.

Q. You took the seat right next to the motorman, didn't you?

A. Yes, sir, left side.

Q. And you know the motorman, don't you?

A. I know them all.

Q. I am not interested in the other motormen. You know that motorman, don't you?

A. Yes, sir, I know him mighty well.

Q. You have known that motorman for ten
page 251 } years, haven't you?

A. I have been knowing him longer than that.

Q. How long?

A. Around about twenty years.

Q. In the trial out at Chesterfield you told the jury you had only known him ten years, didn't you?

A. Well, I might be wrong about that.

Q. It hasn't been but a year since that trial. How do you make eleven years into twenty?

A. Well, I mean I knew him for about twenty years, but knowing him on that carline for ten years.

Q. You had known him before that?

A. Yes, sir.

Q. Did you ever work with him?

A. No, sir, never worked with him.

Q. Did you ever work with the company?

A. Never worked with the company.

Q. You sat down in the front seat next to him and spoke to him, didn't you?

A. I spoke to him when I got on.

Q. And you were talking to him when the accident happened?

A. No, I wasn't talking to him when the accident happened.

Q. What did you say to him?

A. I didn't say anything. Oh, when I got on the car, you mean?

Q. Yes, sir.

A. Just common remarks: "How do you do?"
page 252 { "How are you feeling?" or "How is everything?"

Q. You picked the nearest seat to him to sit in, didn't you?

A. Just like I always do.

Q. Do you always get that seat?

A. I don't know. It just depends on who is sitting there.

Q. Why did you tell the jury you picked that seat like you always did? Is that seat reserved for you?

Mr. Robertson: I object.

The Court: Objection sustained.

A. No; it just depends on who pays the fare.

The Court: Objection sustained. You don't have to say anything.

By Mr. Miller:

Q. Where did you hear the whistle blow?

A. Where did I hear the whistle blow?

Q. Yes.

A. I told you it blew for 8½ and Stop 9.

Q. How many blows at 8½?

A. He just blew his whistle.

Q. How many times?

A. I couldn't say how many times.

Q. You said in the trial at Chesterfield how many times he blew it, didn't you?

A. I might have forgotten that. That is a long time ago.

It is mighty hard for a man to keep all that in page 253 } his head.

Q. Then you have forgotten now how many times he blew?

A. Yes, sir.

Q. Do you know how many times he blew before he got to 9?

A. He blew once after he left 8½; I remember that much.

Q. Haven't you said—

Mr. Robertson: If he is going to ask him didn't he say how many times it blew at the former trial the witness is entitled to have the question and answer read to him to refresh his memory on it one way or the other. It is not right to ask him a question like that without giving the witness a fair opportunity by referring him to the specific question and answer.

The Court: The question ought to be read to him and then ask him if he said that.

By Mr. Miller:

Q. Mr. Bowman, you stated to Mr. Robertson a while ago that when the truck came on the crossing that the street car was about 15 feet from it, didn't you?

A. Yes, sir.

Q. Weren't you asked these questions: "When did you first see the truck?" and your answer was: "When he pulled right up on the track right in front of him." Then you were asked this: "When he was up in front you saw him?" and your answer was "Yes, sir." Question: "He page 254 } was up in front of you on the track when you first saw him?" and your answer was: "Yes." You made those answers, didn't you?

A. I might have made it, but I just don't remember.

Q. Weren't you asked this question: "Now he was up in front of you and on the track and you tell the jury that was the first place you saw him. How far was the street car from him?" and your answer was: "50 foot." Did you make that answer?

A. I might have made it.

Q. Now you tell the jury the street car was 15 feet from him when you first saw him. Didn't you tell them that just now?

A. Yes, sir.

Q. Which is correct; what you said at Chesterfield or here?

A. I just can't remember, you see, because it has been so long I have forgotten.

Q. Mr. Bowman, I have the written transcript of the testimony and at Chesterfield your answer was that the street car was 50 feet from the truck when you first saw the truck. Your answer today is that it was 15 feet from it. Now I am asking you which is correct?

A. 15 feet now, if you want to know.

Q. Then you gave the wrong answer at Chesterfield?

A. I might have given the wrong answer out page 255 } there.

Q. And that was much nearer to the time of the accident?

A. Yes.

Q. Why is your recollection better today than it was a year ago?

Mr. Robertson: I object to that as immaterial.

The Court: Objection overruled.

Mr. Robertson: Exception for the reason stated by both defendants.

By Mr. Miller:

Q. Why can you recollect a year later; that is, today, better than you could last August?

A. I don't know.

Q. Can't you answer that question?

A. I don't know.

Q. Who have you talked—

A. I haven't talked to anybody.

Q. Let me finish the question. Who have you talked to about this case since last August?

A. Nobody at all.

Q. You haven't talked with anybody?

A. Nobody.

Q. And you are undertaking now when your memory hasn't been refreshed at all to give it as 15 feet when you fixed it at 50 feet last year?

(No answer.)

page 256 } RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. I am going to ask you if you remember having been asked these questions and made these answers when Mr. Miller questioned you at that trial last summer: "You have

known this man for ten years, haven't you?" No answer. "That is a simple question. Have you known this man ten years?" "Yes, sir." "Why did you hesitate to answer?" "I have known him ten years." Are those answers correct that you had known him ten years last summer?

A. I had been knowing him on that carline for ten years.

Q. You had been knowing him as much as ten years at least?

A. Yes, longer.

Q. You now say you had known him ten years and also known him twenty years?

A. Twenty years, yes.

Q. Now regardless of who gave the passenger signal to get off the car, I understand you to say you did hear the passenger signal given?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Miller:

Q. How did the motorman undertake to stop the car; wind his lever and throw it in reverse?

A. Yes, sir.

page 257 } RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Have you ever been a motorman?

A. No, sir; no, sir.

Q. Do you know how to throw a car into reverse?

A. No, I don't know exactly how you throw it in reverse.

Mr. Robertson: Now I ask that that previous question and answer be stricken out.

The Court: He asked him if he saw him turning the handle.

Mr. Robertson: I ask that the question and answer be read.

Note: The stenographer reads as follows:

"Q. How did the motorman undertake to stop the car; wind his lever and throw it in reverse?

A. Yes, sir."

Mr. Robertson: The point is this, that he said he threw it in reverse when he now says he doesn't know how to throw it in reverse.

The Court: The motion is denied.

Mr. Robertson: Both defendants except for the reason stated.

Witness stood aside.

page 258 } W. E. BLANTON,
one of the defendants, introduced in behalf of
the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Mann:

Q. You are Mr. W. E. Blanton?

A. Yes, sir.

Q. Mr. Blanton, where do you reside?

A. 232 Grove Avenue, Petersburg, Va.

Q. How old are you?

A. I am 51 years old.

Q. What is your business?

A. I am a motorman or operator on the Richmond-Petersburg interurban line.

Q. Were you the motorman in charge of this interurban car at the time of the accident?

A. Yes, sir.

Q. How long have you been in the employ of the Virginia Electric & Power Company?

A. I have been with the company over an extended period of 31 years, but I left the service once and I have been back with them 15 years.

page 259 } Q. Are you familiar with the operation of the car which you were handling on that occasion?

A. I think so, yes, sir.

Q. Would you mind stating to the jury how the car operates in emergency, how it is done to make a stop, as well as in reverse?

A. Well, these cars are equipped with an emergency brake and a service brake. The service brake you use in ordinary—making ordinary stops. The emergency brake is to be used in case of an emergency and it works by air. Of course, the air—there is no brake there except the air, and the controller—you feed the controller around to nine; that gives it the current; and they can be stopped two or three different ways. It can be stopped by throwing the car into emergency, it can be stopped by using the service brake, and it can be stopped by reversing, but it has been tested out and proven by the company that the quickest way to stop a

car running at high speed is to throw it in emergency. When you reverse a car it locks and the wheels will slide at high speed, and that is done—you can throw it in emergency by throwing the service brake to an off position and turning the handle aloose and, of course, it takes a fraction of time for air to work. The brakes are bound to be empty when the car is running, free of all air, and that has to have
 page 260 } time to flow and apply that brake in the proper way to make the stop at a certain distance.

Q. On the occasion of this accident did you make an effort to stop the car or not?

A. I certainly did, yes, sir.

Q. What method did you use?

A. I threw the car into emergency.

Q. How long had you been running that type of car?

A. About two years now. At that time of the accident it was about a year, I think. I think those cars have been on two years this last July. I am not sure to the very day, but about two years they have been on at the present time.

Q. How often had you operated that specific car?

A. How often? I suppose I operated it two or three times a week. You mean that number car or the type?

Q. That number car; that specific car. Were the other cars of that type operated the same way as that car?

A. All of the 400s that run on the interurban road, yes, sir.

Q. Mr. Blanton, you say you operated that car for—that type of car for a considerable period. Can you state how quickly a car of that sort can be stopped?

A. Well if you are—a car of that type running 35 miles an hour if you want to test it out and stop in 200 feet if you know the point where you know what to do when
 page 261 } you get there; that is, I mean by that it is a different thing testing a car out—say you are going to test from that post there to the next one and you know what you are going to do when you get there, but in case of an accident, something happens, you see danger, you have got to think what to do and do it, which takes a fraction of time and 200 feet is as good as it can be stopped by knowing what you have got to do when you get to a point of accident.

Q. At what speed was your car running?

A. I suppose running about 35 miles an hour, I would judge. We have no speedometer on there and it wasn't quite full speed and I think it will make about 40 miles an hour.

Q. Was the current on in full or not?

A. Well, at what point do you mean it was on? The current was on when I saw danger.

Q. Well, now, when you saw the danger how much current did you have on?

A. I had the car on nine points.

Q. Is that wide open, as you term it?

A. That is wide open, yes, sir. I had just fed up to nine points. I drifted down the hill to the bridge and it is a little rise there and, of course, when we hit the bottom we naturally feed the current back to nine. We have to do that to keep the car in proper motion.

page 262 } Q. Does turning on all the power put it to its maximum speed immediately?

A. No, sir. No, when you start off and you get the car on nine it may not be running over 5 or 10 miles an hour, hardly that. It depends on how fast you feed the current. You can't feed it too fast; you feed on around gradually and it picks up speed gradually as it goes on.

Q. Now where did this accident occur?

A. It occurred at this crossing—what is the name of it? Carolina Avenue, I think; just beyond $8\frac{1}{2}$; between $8\frac{1}{2}$ and 9.

Q. Is that in the City of Richmond or the county of Chesterfield?

A. Chesterfield county.

Q. About how far from the city limits?

A. I think it is about a mile and a quarter; something like that. I can't be exact.

Q. How often do those interurban cars run from Richmond to Petersburg?

A. They run—the regular schedule is an hour and at that point cars pass there about every thirty minutes because they come in and go back and then the extras running out there during the DuPont rush hours makes them sometimes go by there every fifteen minutes for certain
page 263 } times of the day.

Q. Do the cars run from Richmond to Petersburg at the same time; pass each other on the road?

A. Yes, sir; same schedule.

Q. Now the road on which you were traveling was an interurban electric railway from Richmond to Petersburg?

A. Richmond to Petersburg, yes.

Q. Now how is that track of the car located, the rails of the track?

A. Between two highways. Is that what you mean? It is a highway on each side.

Mr. Bowles: Now, if Your Honor please, we object to that. That is a matter of law determined by the minutes

and franchises of this company and the board of supervisors. This man doesn't know anything about that, I don't suppose.

The Court: This is addressed to the physical facts; where are the tracks.

Mr. Bowles: He says it is between two highways. That, I submit, is incorrect.

The Court: Objection overruled.

By Mr. Mann:

Q. Except at crossings does any traffic of any kind occupy or go over the railroad right-of-way at that point, except at the crossing?

A. No. It is a ditch on either side; no way for page 264 } you to go over unless he goes in the ditch.

Q. Is that part of the space between what you say these two eastern and western lanes of the traffic on that road devoted exclusively to the running of the electric cars?

Mr. Bowles: If Your Honor please, that is not only leading, but calls for a conclusion and involves a matter of law. I object to it on all three grounds. He can state what the physical facts are there and we have asked for a view and they can be seen and they have already put a picture in the record. I object to that.

The Court: I think all he can do is testify to the physical facts; that is all. He can't say whether it is a highway or exclusive or whether it is not. That is a question of law for the Court to pass on.

Mr. Mann: Read the question.

Note: The stenographer reads the question..

Mr. Bowles: Now, if Your Honor please, we object to the re-reading of the question to the jury.

The Court: Objection overruled. Counsel asked that it be read.

Mr. Bowles: Your Honor had already overruled it.

Mr. Mann: I will ask the witness to answer the question.

Mr. Bowles: The Court has sustained the objection page 265 } jection.

The Court: I sustain the objection to the question.

Mr. Mann: Exception on the ground that the question is proper.

By Mr. Mann:

Q. Mr. Blanton, can you state to the jury how many passengers you had on your car on that trip on which you had this collision?

A. I couldn't say. The car wasn't anything like—I don't think half full. I would judge about maybe fifteen or eighteen passengers; something like that, but I wouldn't say positively because I don't know exactly.

Q. Now on the morning of this trip, this particular trip, were you on schedule time, behind time, ahead of time or what?

A. On schedule, yes, sir.

Q. Did you see the truck with which the collision was had that morning before the collision?

A. Oh, yes, sir.

Q. I wish you would tell the jury, starting from that point, where you saw him and what happened.

A. Well, I was going south and the truck was on the highway; I suppose might have been a couple of hundred feet, something like that—I couldn't say exactly because in a case of that kind when you see a truck and not paying
page 266 } any particular attention to it when he is on the highway and I am on the right-of-way I have got to pitch back and see how far it is; it is hard to judge right to the foot. It could have been 200 feet, might have been 250, might have been more or less, but, of course, I saw it, but paid no particular attention to it than any other traffic going up and down the road on each side and everything was clear in front of me. I was standing up; I hadn't sat down. We can run standing up or sitting down. Very often we stand up a while and then sit down. I happened to be standing up at that time and when I struck the bottom down there, down there where the black spot is in the road, I blew the whistle signal for the crossing, two long blows and two shorts. A car running at 35 miles an hour while you are doing that will go two or three hundred feet. At that time I was about $8\frac{1}{2}$. The truck then was—I had gained on it probably a little bit. The truck then was still on the highway on the right-hand side of the road or near the right-hand side and someone rang the bell just as I struck $8\frac{1}{2}$ to get off at 9 and I recognized it with two short blows, which we do, and at that time, of course, I was watching the crossing probably, I reckon, maybe 100 or 75 feet off and this man deliberately cut across. I had fed the car up to nine points and when he started to cross I was standing up and
page 267 } I slid my foot on the gong, which is a rotary gong and goes kind of brrrr, and he paid no at-

tention to it and I saw he was coming on and I then threw the car in emergency. I might have cut the current off; I don't know; probably I did, no doubt. A man running an automobile when he sees danger he slides his foot on the brake before he even hardly thinks. I might have done that. It really wasn't necessary to do it. All I had to do was throw the brake off to an off position and turn it aloose, which I did, and the crash came, which was all over in a flash and I was cut up pretty bad from the glass and all. I caught him right broadside, just like come right on and into him like a bullet almost. It cut me all up and mighty near broke my arm. My arm was hurt right bad. Do you want me to continue on and tell the balance?

Q. Yes, sir; go ahead.

A. Of course, as I say, I was bleeding all over and I stepped back in the car to see if anyone was hurt. Then I ran out to see about who was hurt on the outside and I ran down and saw two men, saw they were seriously hurt and I tried to get some help as quick as I could. I was by myself except the passengers. It was no one there at that time except the passengers on the car and, of course, in a minute
page 268 } or two the crowd began to gather. I ran over to this store on the corner of the next street—I don't know what the name of it is; anyhow, that store there, to get hold of a telephone and the store was closed. I ran back to the road, ran back down to see the man and the people were there giving the ones that were hurt assistance. I ran over to the highway and a man said: "Where do you want to go?"

Mr. Miller: We object to his conversation.

The Court: Don't tell your conversation. Tell what happened.

A. (Continued.) He picked me up and carried me up to the company's phone, which was about seven or eight hundred feet away from the scene of the accident. I went there and called up the dispatcher—

Mr. Miller: What he told to the telephone company hasn't anything to do with it.

The Court: Don't tell about that, but just that you reported it to the company.

A. (Continued.) I reported it to the company and told them the men were hurt and send assistance at once, and I went back to the scene of the accident then.

Q. Were you hurt yourself?

A. I was, yes, sir.

Q. How?

A. I don't see why it didn't kill me, nothing in page 269 } the front there but glass, and that truck—I think I hit in the door; you know, the opening of the truck, right about middle way. I hit right in that. I think that is about all that saved me.

Q. Can you state to the jury how far the rear of your car was from the crossing at the time it stopped?

A. I think it was about 15 or 20 feet, maybe; 15 feet; I would judge about that.

Q. What is the length of that car?

A. 40 feet.

Q. Did you take down the names of any passengers at that time?

A. I think I got eight; seven or eight, I don't remember. I got all I could. Some of them had scattered. I didn't know who was on the car. I had to go around and ask to find out who saw it and who didn't and I think I got eight names; seven or eight, I don't know. I don't remember exactly.

CROSS EXAMINATION.

By Mr. Bowles:

Q. Mr. Blanton, I understand you to say that maybe you did throw your current off?

A. I might have done that, yes, sir. I don't doubt I did.

Q. Do you recall whether you did or not?

A. I think I did.

page 270 } Q. Now the way you throw this car into emergency right in front of your right hand is the air valve, isn't it?

A. Yes, sir.

Q. And it goes this way and that way (indicating)?

A. Yes, sir.

Q. Now that air valve has two ways; a service brake and an emergency brake; is that right?

A. Yes, sir.

Q. Now you turned your current off and reached for the air valve?

A. Threw the air off.

Q. Threw it into the service end and turned it aloose which then threw the car into emergency; is that correct?

A. You don't throw it into service; throw it out of service.

Q. Well, whichever way you threw it.

A. If I threw it into service the emergency broke wouldn't work.

Q. You threw it out of service on the other side and you had to think to see which side to throw it, did you

A. Well, I reckon I have been at it long enough to know; ought to be.

Q. You threw it out of service and then turned it aloose and the turning aloose of it after throwing it out of service you say would throw the car into emergency?

A. Yes, sir.

page 271 } Q. Now that flows the sand?

A. Yes, sir.

Q. How many wheels does it throw the sand to?

A. It puts the sand on the right-hand rail and, of course, four wheels has the effect from it.

Q. All the wheels on the right-hand side?

A. Yes, sir, going this way—of course, the right-hand side either way.

Q. Now I understand that this emergency operation of that car is a safer way than throwing it into reverse, is it?

A. Yes, at high speed.

Q. You have testified, I believe, that if you throw it into reverse the car is liable to get locked and skid; is that right?

A. It will at high speed.

Q. Throwing it into emergency is in order to prevent the car from skidding, isn't it?

A. No, it is apt to slide then some, but the emergency works automatically. The emergency brake works automatically. We don't have to use it, don't have to apply it like a service brake. When we apply the service brake we have to know how much air to put in and how much not to make a reasonable stop, make a comfortable stop.

Q. Now, then, this emergency thing you have,
page 272 } as you have described, is calculated so as to apply the brakes so that it won't skid; isn't that right?

A. Well, I say under some conditions it may skid then. It will skid some, but not as bad. The sand will start to flow before the wheels lock and the sand will help to prevent it skidding.

Q. That will stop it from skidding?

A. Not always, no.

Q. Now when you were driving that car along there—standing up, I believe you said?

A. Yes, sir.

Q. Did you have your foot on the lever at the bottom or have your hand on the controller?

A. No, I would have to get in an awkward position to put my foot on the lever standing up. We use that sitting down.

Q. You were driving this car immediately before the accident with your hands on the lever?

A. No, on the controller.

Q. That is the way you were keeping the car from going into emergency?

A. Yes, sir.

Q. Then you unwound the current and reached over to the air valve?

A. I had my hand on the air valve.

Q. And turned it to the left?

page 273 } A. Pushed it off and turned it aloose.

Q. And then turned it aloose and that threw it into emergency?

A. Yes.

Q. And you say it takes some little while to think about all that when you see danger?

A. No, I didn't say it took some little while. I said there was a difference in knowing what you are going to do when you get to a point of action and having to find out what to do after you get there.

Q. You mean you had an instant to decide what you were going to do there?

A. I had to see the danger and then decide what to do, certainly.

Q. What?

A. I say I had to see the danger there and then decide what to do and the action had to take effect.

Q. This car weighs 3,400 pounds, 17 tons?

A. Yes, sir,—34,000.

Q. What is its top speed, you say?

A. I suppose around 40 miles an hour. In some places it might make 45, but not over that at any point or under any condition.

Q. So its top speed is 45 miles an hour?

A. I suppose so, yes.

Q. Is that right?

page 274 } A. About that, I suppose.

Q. Now you have testified, I believe, that when you know what you are going to do, making a test, etc., going at 35 miles an hour 200 feet is about as good as it can be stopped; is that right?

A. Yes, sir.

Q. Now, you, naturally, testified in Mr. Driscoll's case, didn't you?

A. I did, yes, sir.

Q. Weren't you asked this question when you testified in that case last August: "In what distance, Mr. Blanton, can that street car be stopped on level ground going at full speed?" and didn't you make this answer: "About 200 feet, I judge about that, under good conditions."

A. Yes, sir.

Q. So, Mr. Blanton, you can stop this car going at full speed or 45 miles an hour on level ground in 200 feet by applying the emergency, can't you?

A. If you know what you have got to do before you get there.

Q. You didn't put that qualification in then in that case.

A. No; that makes a difference.

Q. Well, did you call attention to that difference when you testified in the Driscoll case?

A. I don't remember now.

Q. Now, then, Mr. Blanton, you had come down page 275 } a hill, hadn't you?

A. Yes, sir.

Q. Into a bottom and fed it nine points, which was all she had in the way of current, and you were going up a hill, weren't you?

A. A slight grade, yes, sir.

Q. But it was a grade, wasn't it?

A. Slightly.

Q. And you weren't going 45 miles an hour, but going 35, weren't you?

A. About 35, I judge.

Q. So you were going 10 miles less than its top speed and going up a grade and not on level ground; isn't that correct?

A. Not exactly level, no, sir; up hill just a slight grade.

Q. Do you know what the per cent of the grade is?

A. No, I don't.

Q. Now your schedule from Richmond to Petersburg is an hour or fifty-eight minutes?

A. Fifty-eight minutes.

Q. What is the distance?

A. 22—21.3 I think is the mileage.

Q. How many stops are there from Richmond to Petersburg?

A. About fifty-six, I think

Q. Mr. Blanton, isn't it true that from Stop 6 page 276 } on until about Stop 9 there are no houses on the right-hand side of the Pike and no streets that come into it?

A. There is one house on the right-hand side.

Q. Which one is that?

A. That is the one that the lady was thrown in the well, as near as I can come at it.

Q. That house was vacant at the time of this accident, wasn't it?

A. Yes, vacant then.

Q. Now you saw this truck the first time at Stop 6, didn't you?

A. No, I don't think at Stop 6. It was coming down the hill there. I can't recall exactly. I noticed it on the pike driving down in front of me.

Q. Did you see it at Stop 6 or did you not?

A. I don't think so. I don't remember. It might have been along in that district or that vicinity; somewhere along there. I noticed it coming down the hill or saw it; paid no particular attention to it, had no occasion to.

Q. It was near Stop 6 when you first saw it, wasn't it?

A. Might have been.

Q. I am not asking you that. Do you know?

A. No, I don't know.

Q. You knew that at the Driscoll trial, didn't you?

A. I don't remember. I might have said some-
page 277 } where about 6. I might have said it was in that
vicinity; something like that.

Q. Weren't you asked this question at that trial: "And you were at Stop 6 when you first saw it?"—

A. I might have been at Stop 6, yes, sir.

Q. Let me finish the question. "And you were at Stop 6 when you first saw it?" and you made this answer: "Yes, I saw it coming on down the Pike." Isn't that right?

A. Didn't say I was at Stop 6?

Q. That is what I have been asking you. "And you were at Stop 6 when you first saw it?"

A. I was at Stop 6 coming over the hill, probably, and the truck was ahead of me.

Q. The truck was ahead of you? How much?

A. Probably 200 feet, a little more or less; might have been. I couldn't estimate it exactly to the foot.

Q. Now the truck was on the right-hand side of the right lane, wasn't it, driving down the road?

A. Yes, sir, near the right-hand side.

Q. It was traffic on both sides of you, wasn't it?

A. Some, I guess. I never paid any particular attention to see how much it was. It was always some there.

Q. I am asking you whether there was then or not.

A. The traffic was very light, as well as I remember, that morning.

page 278 } Q. Was it usual or unusual?

A. It was unusually light.

Q. I ask you, sir, if you weren't asked this question and made this answer in the Driscoll trial: "Will you please state whether or not you saw that milk truck in which Mr. Driscoll was seated on your trip going south that day around eleven-thirty?" I believe that was a question by Mr. Mann, and you said: "Yes, sir, I saw him. I noticed him the first time—of course, traffic on each side of us, nothing unusual."

A. Yes, sir.

Q. Did you say that?

A. I guess I did.

Q. Now you say it was unusually light. Which is right?

A. I said rather light. I believe I stated in there somewhere, if you read it, that I stated it before.

Q. Now, sir, as you were going on down there with the truck ahead of you the truck was going at about the same speed you were, wasn't it?

A. I don't know about that. It might not have been running quite as fast. I guess I gained some on it.

Q. Do you know what the distance is from Stop 6 to where this accident happened?

A. No, sir, I don't.

Q. You heard it testified it was 3,100 feet?

A. I heard that, yes.

page 279 } Q. Were you maintaining about the same relation with the truck all the way down there or not?

A. I guess I was running a few miles faster than he was, probably. I don't know exactly. I know he was ahead of me a good distance when I first noticed it.

Q. Now you were in the bottom at the trestle when you gave it the nine points, were you not?

A. I was leaving the bottom.

Q. And you gave it nine points, which is to give it all the power that the car had?

A. Yes, sir, that is all it has got.

Q. I don't mean it was all the speed, but it was all the power?

A. All the power, yes.

Q. What speed were you going when you hit the bottom? You said you were driving down the hill.

A. I suppose about 35 miles an hour. We generally going down a long grade use the service brake to maintain a reasonable speed.

Q. When you hit the bottom you were going 35 miles an

hour and then you gave it all the power it had; is that right?

A. I don't know whether I was going exactly 35. I would estimate somewhere around that, probably.

Q. You blew these two long blows and two short blows and you were at $8\frac{1}{2}$ when you turned the whistle
page 280 } aloose, weren't you?

A. Yes, sir.

Q. And it was at $8\frac{1}{2}$ that this buzzer rang, wasn't it, just as you struck Stop $8\frac{1}{2}$?

A. Just as I struck Stop $8\frac{1}{2}$.

Q. Now at the time you were at $8\frac{1}{2}$ you saw two or three cars across on the Pike besides this man, didn't you?

A. I saw two or three? I don't remember now. I don't know as I did. It might have been a few scattered along the highway.

Q. Whatever cars there were on that Pike, both on the northbound and southbound lanes, you saw them, didn't you?

A. I reckon I did.

Q. Well, don't reckon. This is too serious a matter, Mr. Blanton. Let's say exactly, if you know.

A. I don't remember paying any particular attention to any cars except this truck starting across in front of me.

Q. You were keeping a lookout ahead?

A. I was looking right ahead, yes, sir.

Q. And you did see when you were at $8\frac{1}{2}$ two or three cars besides this machine?

A. I don't remember seeing any since I left $8\frac{1}{2}$. My whole attention was turned to him after I got past there, seeing him crossing the track.

page 281 } Q. Now, Mr. Blanton, in Mr. Driscoll's suit against you and the power company, didn't you testify that when you were at $8\frac{1}{2}$ you did see two or three more cars?

A. I don't remember. I don't know as I did.

Q. You don't remember whether you did or not?

A. No, I don't remember now.

Q. That is the place, Mr. Blanton, that you said you thought there was very little traffic?

A. Traffic was light, yes.

Q. I ask you if you didn't say this, sir: "I was about at $8\frac{1}{2}$ and just as I turned the whistle aloose and there was very little traffic on the road, hardly any, except this man and maybe two or three more that I noticed." Is that true?

A. I said maybe two or three more and I say it yet.

Q. Now, Mr. Blanton, when you were at $8\frac{1}{2}$ this man was preparing to make his turn, wasn't he?

A. No, he wasn't preparing when I was at $8\frac{1}{2}$. I had

passed 8½. These people had rung and I had recognized the whistle—the signal of the passenger, whoever it was, to get off at 9. At that time, of course, the car was running, wasn't standing still; and the man started across and it was all over like that (slaps hands); he shot right up on the track without any warning. He didn't give page 282 } any warning, didn't look, didn't do anything.

Q. So you don't know whether he knew you were on the track or not, do you?

A. No, I don't know. I don't think he did.

Q. So far as you know, you know he didn't know?

A. No, I don't know it.

Q. You knew he hadn't looked?

A. I wasn't supposed to see whether he looked or not.

Q. You weren't? But you saw he wasn't looking, didn't you?

A. Yes, he didn't look out.

Q. And you saw that he wasn't seeing you, didn't you?

A. Well, I was too close to him then.

Q. I didn't ask you that.

Mr. Robertson: Let him finish.

A. When he turned in—

Mr. Bowles: If Your Honor please—

The Court: Answer the question and then give any explanation you wish.

(Question read.)

A. I knew he hadn't looked out, but when he started to turn in, of course, it was all done in a flash almost, just in a second or two. He showed no sign of turning in for me to have any warning to stop before I got to the crossing or to make any effort to stop any quicker than I did.

Q. I understand all that, sir, is your testimony, page 283 } but I am asking you the question you saw that that man wasn't looking; isn't that true?

A. Well, I knew he hadn't made—hadn't showed any sign of looking or coming across there until he deliberately did come across.

Q. He didn't look back?

A. I didn't see him look back, no, sir.

Q. But you were looking at him, weren't you?

A. I was looking down the track until he showed signs of coming across.

Q. Now he was driving on the right hand side of the right hand lane, wasn't he?

A. About the right hand or probably the middle. I don't know. Probably somewhere along there.

Q. Now don't you know?

A. No, I don't know exactly. I think he was about—I think he was near the right hand.

Q. On the right hand side of the right hand lane going to Petersburg?

A. Yes, sir.

Q. And isn't that what you testified in the Driscoll case?

A. Something like that. I think he was about the right hand side or nearer the right hand side than the left.

Q. Now you knew he had to turn out to make the turn before he did make one, didn't you?

page 284 } A. No, the way he was driving on the right hand all he had to do was go right across. If he had been driving on the left hand side if he come up on the left he couldn't have made his turn on the left hand side right close to it.

Q. He couldn't have made the turn if he had been on the left hand side of the road close to the car unless he turned out, could he?

A. No, he would have to turn out first and then turn back.

Q. Now I ask you if you weren't asked this question on the witness stand at the Driscoll trial: "So that when he began to turn he had some distance forward to go and cross the cement and come up on the track—a distance of that 12 feet you spoke of; is that correct?" and didn't you make this answer: "Well, yes. He had to turn out to make the turn."

A. I might have said that. I don't know, but it is equivalent, means the same thing, anyway, to what I said today and what I said then because I am telling it exactly like it happened.

Q. So anybody approaching that crossing would have to make a wide turn to get on it, wouldn't they?

A. Anybody approaching the crossing would have to be—they couldn't make that turn without putting the rear wheel in the hole there.

Q. It was a hole in that crossing, wasn't it?

page 285 } A. Where the water runs down on each side, drainage from the track.

Q. Now, Mr. Blanton, when you were going down that track when this man was getting ready to slow up you were looking right at him and watching him, weren't you?

A. Of course, when he started to slow. He didn't slow up very much. Of course, he slowed up some and came right

on across. It was all in less than a second that he was half way up on the track.

Q. In less than a second?

A. About a second, I reckon, when he started across. It didn't take—maybe a second or two. I didn't have the watch in my hand; I couldn't estimate it exactly.

Q. Let me ask you this again: when he was getting ready to slow up you were looking right at him and watching him, weren't you?

A. After I saw he was making an attempt to come across I was watching him, of course.

Q. Will you pay attention to my exact words, please, sir? When he was getting ready to slow up or when he looked like he was getting ready to slow up you were looking right at him because you were watching him; isn't that true?

A. Well, if I was looking at him I was watching him.

Q. Can't you say yes or no?

page 286 } A. I can say when he showed any sign of going across my track my attention was turned to him and I looked at him and was looking at him, continuing until he got on the track.

Q. Now why were you watching him?

A. Because I knew if he came across there in fact I was bound to hit him.

Q. You were watching to see if he was coming across there, weren't you?

A. Yes. I was close to him, too.

Q. You had been watching him to see if he was coming across there from the time you were at 8½?

A. No, not at 8½.

Q. Let me ask you if you weren't asked this question and made this answer in the Driscoll case: "Were you looking right at the truck all the time; were you watching it?" and didn't you answer this: "When he started on down, looked like he was getting ready to slow up, of course, I was looking right at him because I was watching him."

A. That is when he started to come across.

Q. That is what?

A. That is when he made the first attempt to come across.

Q. That was when he looked like he was getting ready to slow up; is that correct?

A. Slowing up to come across, yes.

page 287 } Q. When you started watching him was when he looked like he was getting ready to slow up; isn't that right?

A. I don't know.

Q. What made it look like he was getting ready to slow up, to you?

A. It wasn't anything to look like it. He simply done it to come on across.

Q. I am asking you why you used that language when you testified in the Driscoll case, that you started watching him when he looked like he was getting ready to slow up?

A. I don't remember making that. If I made it, it means practically the same thing. I can't remember what I said word for word, but as I have stated and tried to answer your questions that my attention was drawn to him when he showed any sign of coming across, which he was turning and coming over.

Q. And the sign he showed was that he looked like he was starting to slow up; isn't that right?

A. He had already slowed up to come on across; didn't have to slow up very much because I don't suppose he was running over 20 or 25 miles an hour.

Q. When he started to slow up was the time you thought he might come on your track, wasn't it?

A. No, the time that he started to slow up. I didn't know whether he was coming on the track or not.
page 288 } Q. From the time he started to slow up you realized he might come on your track, didn't you?

A. I realized he might do so, yes.

Q. And you started to watching him for that reason to see whether he was going to turn on the track?

A. When he started to do that I put my foot on the gong to try to warn him I was there and the next instant the crash came.

Q. Now, Mr. Blanton, let me ask you this question over again, please, sir. The minute that man started to slow up you started to watching him and you started to watching him for the particular reason to see whether he was going to turn in; isn't that true?

A. He was already turning in.

Q. Can't you answer me yes or no?

A. I think I have answered it.

Q. All I am asking you is a simple question, just this: when that man started to slow up on the highway, started to slow up, you began to watch him particularly and the reason you began to watch him particularly was to see whether he was going to turn in; isn't that true?

A. No. Of course, I had my eyes on him—

Q. Answer me yes or no and then explain it.

Mr. Robertson: I don't think he has to answer it yes or no.

page 289 } The Court: I think the witness has already answered that question two or three times.

Mr. Bowles: I don't understand what his answer is.

The Court: I can't help that.

Mr. Bowles: I want him to answer me yes or no.

The Witness: I have answered it, I think.

By Mr. Bowles:

Q. All right, sir; I will ask you if you didn't make this answer to this question in the Driscoll case immediately following what I read you a moment ago: "You were watching him?" "Yes." "And you watched him from that minute until the time of the accident?" and you made this answer: "Until he got in the middle of the track, yes, sir." "What were you watching him for?" Answer: "I was watching him to see if he was going to turn in there on me. I didn't watch him so close." Didn't you make those answers?

A. I would say that—

The Court: Answer whether you did or not and then make the explanation.

A. (Continued) I don't remember.

Q. Didn't you make that statement?

A. I don't remember whether I did or not.

Q. Didn't you also make this statement: "Mr. Blanton, you have testified that from the minute you saw
page 290 } that truck starting to turn that you kept your eyes right on him?" and you answered: "Yes, sir, I saw him. Naturally I would." "And the minute you saw that truck start to turn you also realized that there was danger he would come on your track?" and you answered: "Yes, sir." Isn't that true?

A. I did realize when he started on.

Q. And you realized there was danger he would come on your track because you knew he wasn't looking? Isn't that true?

A. I don't know about that, but I realized if he came on there it would be dangerous because I was too close to stop.

Q. And at the time you realized the danger you put your foot on the gong to see whether he was coming on there?

A. I certainly did.

Q. And you expected him to do like people frequently do, to come around to your crossing and stop and let you go by, didn't you?

A. Well, I thought probably he might stop and I threw the car in emergency right then at that very instant as soon as I stepped on the gong and he kept coming. I threw the car in emergency and it was all over.

Q. Mr. Blanton, you waited to see whether that man was really coming on your track or to see whether
page 291 } he was going to turn around there to the crossing and stop like people frequently do and you didn't throw this car into emergency until you found out he wasn't going to stop?

A. It wasn't much time to wait; wasn't any waiting to do. It was all done in two or three seconds.

Q. But you haven't answered my question, sir. You didn't put your emergency on until you saw that he wasn't going to stop and was going to come on your tracks?

A. I put the emergency on when I saw that he appeared to be coming on the track.

Q. You didn't put your emergency on until after he had gone towards your crossing, headed towards it, did you?

A. Well, I didn't put it in emergency while he was riding down the highway.

Q. You didn't put the emergency on when he first started turning, did you?

A. I stepped my foot on the gong and then threw it in emergency right after he kept coming.

Q. How far had he gone from the time you put your foot on the gong until you threw it in emergency?

A. How far had who gone?

Q. I said he. That ain't you, is it?

A. I don't suppose—I don't know; hadn't gone but a very little distance. He was turning. When I stepped
page 292 } my foot on the gong he was starting to turn into the crossing. I stepped my foot on the gong and he kept on driving and I threw the car in emergency.

Q. Now, Mr. Blanton, when that truck began to slow up how far was it from the crossing?

A. I couldn't say exactly.

Q. Well, you did say exactly at the Driscoll trial, didn't you?

A. I don't remember. It might have been 25 or 30 feet; something like that.

Q. And might have been 50 feet, mightn't it?

A. I don't think it was that far. Might have been. I don't know.

Q. Well, didn't you testify in the Driscoll trial that it was 50 feet from the crossing?

A. I testified it was 50 feet when he started to turn in.

Q. What is that?

A. I think I testified it was somewhere around 50 feet probably when he started turning in, or I was 50 feet from the crossing. I don't remember. Something about that.

Q. Weren't you asked this question and made this answer at the Driscoll trial: "How far was it"—that is, the truck—"from the point opposite the crossing on the highway when it began to slow up, when you saw it begin to slow page 293 } up?" and you answered: "Oh, I don't know. I suppose 50 feet maybe; something like that."

A. Well, I say that now.

Q. You say 25 or 30 feet now.

A. I say I don't know. May have been 50; may have been 25.

Q. How far were you behind the truck when you put your emergency on?

A. Behind the truck?

Q. Yes, sir.

A. I was about 75 feet, I reckon, maybe, or 50 feet. I couldn't tell exactly; of the crossing.

Q. Didn't you testify in the Driscoll case you were 100 feet behind the truck when you put your emergency on?

A. Might have been 100 feet.

Q. Now how fast was the truck going, Mr. Blanton?

A. What do you mean? When coming on the track or going down the Petersburg Pike?

Q. Either way and both.

A. I reckon running 25 miles an hour, maybe, going down the Pike; couldn't say exactly, and I suppose when it turned across going about 10 miles an hour.

Q. Was it going about 25 miles an hour?

A. Something like that. I don't know exactly.

Q. Now when it was turning how fast was it going?

A. I suppose about 10; 10 or 12; something like page 294 } that.

Q. In the Driscoll trial you said 5 or 10, didn't

A. I don't remember. I am not making it exactly that. I am not estimating exactly, but I say somewhere around that.

Q. I am asking you to estimate it. I know you can't tell us with the degree of accuracy of a speedometer.

A. If I had known the accident was going to happen I could have drawn better conclusions on it before it happened, but I didn't know it.

Q. Do you think it was 5 or 10 or 12 that the truck was moving when it was turning?

A. Somewhere around between 5 and 15 miles an hour.

Q. Now when the truck slowed up you didn't slow up, did you?

A. I didn't slow up until I threw it in emergency.

Q. When the truck slowed up you didn't slow up at first, did you?

A. No, I didn't slow up until I threw the car in emergency; couldn't do it.

Q. You were asked on the Driscoll trial about the distance between the truck and didn't you make this answer to a question about how far you were behind the truck: "I suppose probably he had to slow up a little bit to turn in there and I didn't slow up at first. My car was running at the usual speed and, of course, I would judge that I had
page 295 } gained a little bit on him." That is true, isn't it?

A. Well, I didn't slow up until he showed a sign of coming across and I threw the car in emergency. That is all I could do and the car had to take care of itself after that.

Q. I understand all your explanations, sir, but you have made them several times. I would like for you to answer my question specifically. You didn't slow up at first and what I read you is correct, isn't it?

A. I didn't slow up at first. No, I didn't slow up until I saw he was coming straight across.

Q. When the truck slowed up you didn't slow up is all I asked you.

A. When the truck slowed up, no, not when he was on the highway. I had no right to slow up. If he slowed up I didn't know it.

Q. Now, Mr. Blanton, I want to ask you if you didn't give this account of the way this accident happened when you testified in the Driscoll case: "I said when I first saw him coming down the hill I was probably 200 feet from him, would estimate it at that, maybe more or might have been less, and he was running apparently at the same speed. Of course, I hadn't picked him out as a particular object to watch to
page 296 } see: I didn't know he was going to turn in there in there and I probably gained on him some. When he started to turn in he was going on down and he slowed down. It was nothing unusual for cars to slow down on the highway. I see them every day; plenty of them do that all the time. It is nothing unusual for them to slow down, and I saw when I got about 8½—I saw that he was going—preparing to make the turn, but he hadn't showed any sign of it." Didn't you tell them that?

A. I guess I did.

Q. So when you were at Stop 8½ you saw that he was preparing to make that turn, didn't you?

A. No, I didn't say he was preparing while at 8½, only 300 feet away from the scene of the accident.

Q. That is 400 feet north, isn't it?

A. 330 feet, I think.

Q. It is 335 feet from Concord Avenue to the street, isn't it?

A. Well, something like that.

Q. And the stop is north of the street, isn't it?

A. The stop is north of the street at 8½?

Q. That is true, isn't it?

A. Yes, that is true; it is north.

Q. All right, sir. When you were at 8½ you saw he was going—preparing to make the turn, but he hadn't showed any sign of it and so you saw when you were at 8½
page 297 { that man was getting ready to turn in there, didn't you?

A. Not exactly—I don't remember saying at 8½. I told you I had sounded the gong—

Q. I don't want to hear all that, sir.

Mr. Mann: The jury wants to hear it.

Mr. Bowles: He has told them two or three times.

The Court: I have ruled several times answer the question and then make any explanation you want to.

By Mr. Bowles:

Q. Is that a true statement you made there I have just read to you?

A. I think it is. Yes, it is true. That is the essence of it. That is true.

Q. Then the essence of it is true that when you were about at 8½ you saw that this man was going—was preparing to make the turn. Isn't that true?

A. Might be, just across 8½.

Q. What is that?

A. A car running 35 miles an hour is going 52½ feet a second.

Q. I understand that. I can do mathematics, too. Now I want to ask you just this, Mr. Blanton: why didn't you just lift your hand off that controller like Mr. Alexander said and let that be the only thing you had to do to stop
page 298 { this car?

A. When something jumps in front of you, an automobile—

Q. You know how to run this car?

A. Yes.

Q. You know it is a safety car?

A. Yes.

Q. And you know all you had to do was lift your hand to stop it in the quickest possible way?

A. It didn't hurt any to do that; didn't do any harm.

Q. That is your conclusion, sir, and the jury can tell about that, but you heard Mr. Alexander say that the quickest way to stop it was just lift your hand off of that controller?

A. I knew that.

Q. And you didn't do that?

A. I said I knew that.

Q. You knew that, but you didn't do that, did you?

A. I certainly did, yes. I raised my hand and cut the controller. You can give it a sling and take your hand off.

Q. You cut your controller off, but you didn't do like Mr. Alexander said, that all you had to do was lift your hand off that controller, did you?

A. I said I might have cut the current off. I don't doubt but what I did.

Q. You put the emergency on this car with the
page 299 } air valve, didn't you, which is a separate and distinct thing from your controller handle?

The Court: You have been all over that three times. I can't let you keep on repeating.

RE-DIRECT EXAMINATION.

By Mr. Mann:

Q. Mr. Blanton, you were asked if you didn't make a statement that it was nothing unusual. Is it anything unusual for cars to turn in and stop and let the car go by?

A. Nothing unusual, no, sir. They do it every day.

Witness stood aside.

Testimony Concluded.

Note: The jury was sent to view the scene of the accident.

page 300 } Mr. Mann: Now, if Your Honor please, we move the Court to strike out all of the evidence in this case on the ground that it is not sufficient to sustain a verdict for the plaintiff against either or both of the defendants. There is no negligence has been shown on the part of the defendants or either of them, and that contributory negli-

gence or concurrent negligence has been shown on the part of the plaintiff's decedent.

Note: The motion was argued at length.

The Court: Well, gentlemen, I shall refuse to strike the evidence.

Mr. Mann: Well, sir, we except.

The following instructions were given to the page 301 } jury by the court:

INSTRUCTION NO. 1.

The court instructs the jury that the defendant, W. E. Blanton, was the agent of the defendant, Virginia Electric and Power Company, in the operation of its electric car No. 416 on the day of the collision *complied* of, and if you find a verdict for the plaintiff in this case that verdict must be against both defendants.

INSTRUCTION NO. 2.

The court instructs the jury that the rights of the Virginia Electric and Power Company at the crossing at Concord Avenue were no greater than the rights of J. Boyce Ford or any others using the said crossing.

INSTRUCTION NO. 3.

The court instructs the jury that, in using the public highway known as Richmond-Petersburg Pike for the operation thereon of an electric car, the law requires that the defendants must at all times observe the following duties:

1. To maintain a reasonable lookout for vehicles approaching near to and upon the tracks.

2. To keep said electric car under reasonable control.

3. To operate said electric car thereon at a speed not greater than is reasonable under the surrounding facts and circumstances and conditions then existing.

4. To exercise reasonable care in the operation page 302 } thereon of said electric car.

And all of the foregoing duties on the part of the defendants were continuing duties and the defendants were re-

quired to exercise them when such exercise would have been effective.

And, if you believe from the evidence that the operator of the electric car failed to observe any one or more of these duties, then the court tells you that the defendant, Virginia Electric and Power Company and W. E. Blanton, were guilty of negligence; and, if you believe from the evidence that such negligence was the sole proximate cause of the collision and that J. Boyce Ford was thereby killed, while in the exercise of ordinary care on his part, then you must find your verdict for the plaintiff, Lula Agnes Ford, Administratrix of the estate of J. Boyce Ford, deceased, against the defendants.

INSTRUCTION NO. 4.

The court instructs the jury that the burden of proof rests on the defendants, throughout the trial of this case, to prove the contributory negligence of the plaintiff's decedent, if any, by a preponderance of evidence, unless such negligence appears from the plaintiff's testimony or may be fairly inferred from all the facts and circumstances of the case. If you believe that it is just as probable that the deceased, J. Boyce Ford, was not negligent as that he was negligent the charge of contributory negligence of the plaintiff's decedent is not proved. The jury cannot deny the plaintiff a recovery in this case on the ground of the contributory negligence of her decedent unless they believe from the evidence that the deceased, J. Boyce Ford, was negligent and that
page 303 } such negligence caused or efficiently contributed to cause his death.

INSTRUCTION NO. 5-A.

The court instructs the jury that, if you believe from the evidence that the continued progress of the milk truck across and off of the car track was blocked or retarded by north-bound traffic on the Richmond-Petersburg Pike, and the truck so placed in a position of danger, and that when it became so blocked or retarded the operator of the electric car, by keeping a reasonable lookout, saw or should have seen the danger in which the milk truck then was, and then had a reasonable opportunity to avoid the collision by the exercise of ordinary care, and that he failed to exercise such care to avoid the collision, and that such failure was the sole proximate cause of the collision and of Ford's death, then you should find for the plaintiff against the defendants

in this case; and you should so find notwithstanding that you may also believe that Ford was himself guilty of negligence in driving on the track in the first instance.

INSTRUCTION NO. 6.

The court instructs the jury that if you believe from the evidence that, when the operator of the electric car saw, or in the maintenance of a reasonable lookout should have seen, that the milk truck was turning onto the track into a position of danger, the operator of the electric car then had a reasonable opportunity to avoid the collision by the exercise of ordinary care on his part in bringing his electric car under control at that time; and that he failed so to do and negligently permitted his electric car to continue its approach toward the crossing at unreduced speed and failed to make use of his emergency stop apparatus until it was too late to avoid the collision by doing so, and that such failure on his part was the sole proximate cause of the collision and of Ford's death, then you should find for the plaintiff against the defendants, notwithstanding that you may also believe that Ford was himself guilty of negligence in going on the track in the first instance.

INSTRUCTION NO. 7.

The court instructs the jury that a preponderance of the evidence does not mean the greater number of witnesses, but it is the greater weight of all the evidence on both sides before the jury, and the court further instructs the jury that you are the sole judges of the weight of the evidence and the credibility of the witnesses and you have the right to discard or accept the testimony, or any part thereof, of any witness which you regard proper to discard or accept when considered in connection with the whole evidence in the case. And in determining the credibility of witnesses and the weight to be given their testimony you may take into consideration the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor and frankness, their bias, if any, their apparent intelligence or lack of intelligence, their opportunity to observe the matters about which they testified, the reasonableness of their testimony, and from all the other facts and circumstances appearing in the case, determine which witnesses are more worthy of credit and give credit accordingly.

page 305 } INSTRUCTION NO. A.

The court instructs the jury that W. E. Blanton, the operator of the interurban electric car, had the right to assume that Joseph Boyce Ford was obeying the law and keeping a lookout and had seen the electric interurban car and observed that it was approaching down the tracks, and that he would not drive his automobile dairy truck upon the tracks in dangerous proximity to the approaching car.

INSTRUCTION NO. F.

The court instructs the jury if you believe from the evidence that before Joseph Boyce Ford entered the track of the interurban railway he knew that the interurban car was rapidly approaching the crossing, it was his duty to observe the condition of the traffic on the north-bound portion of the highway affecting the safe passage of the truck over the said track, and if he failed to do this, or having so observed such condition he continued to cross the said track, he was guilty of negligence.

INSTRUCTION NO. G.

The Court instructs the jury that the law of Virginia required that before turning the truck from the western portion of the highway to the eastern portion thereof Joseph Boyce Ford should give notice of his intention so to do by an appropriate hand signal and that he should first see that such movement could be made in reasonable safety before crossing the defendant's railway tracks; and if the jury
page 306 } believe from the evidence that he failed to comply with any one or more of these requirements, then the court tells the jury that the said Joseph Boyce Ford was guilty of negligence and the plaintiff cannot recover.

INSTRUCTION NO. H.

The court instructs the jury that the law of Virginia fixes no limit as to the rate of speed of an interurban electric car, but the same should be operated at a speed according to existing facts and circumstances on the highway.

INSTRUCTION NO. K.

The court instructs the jury that the law does not undertake to hold someone liable for every accident; and in order

for the Virginia Electric and Power Company and W. E. Blanton to be held liable in this case, it must be shown that W. E. Blanton was guilty of negligence and that his negligence was the sole proximate cause of the accident.

INSTRUCTION NO. L.

The court instructs the jury if you believe from the evidence that W. E. Blanton was guilty of negligence, and that Joseph Boyce Ford was also guilty of negligence which efficiently contributed to his injuries, then you must find your verdict for the defendants, even though you may believe from the evidence that W. E. Blanton was more negligent than Joseph Boyce Ford, since the law does not apportion negligence, nor consider degrees of negligence, the plaintiff being barred from recovery in this case if Joseph Boyce
page 307 } Ford was guilty of negligence in any degree which proximately caused or efficiently contributed to cause the collision.

INSTRUCTION NO. M.

The court instructs the jury if you believe from the evidence that W. E. Blanton was placed in a position of sudden peril, without negligence on his part, he cannot be held to the same degree of care as is ordinarily imposed on him when there is no emergency.

INSTRUCTION NO. N.

The court instructs the jury that you must consider this case solely upon the evidence before you and the law laid down in the instructions of the court, and you must not let any sympathy you may feel influence your verdict. A verdict must not be based in whole or in part, upon conjecture, or surmise, or sympathy; but must be based solely upon the evidence in the case and the instructions of the court.

INSTRUCTION NO. O.

The court instructs the jury that there was just as high an obligation, and just as great a duty resting upon Joseph Boyce Ford to look out for the interurban car and avoid a collision as there was on the operator of the interurban car to look out for Joseph Boyce Ford; and if the jury believe from the evidence that Joseph Boyce Ford negligently drove upon the track immediately in front of the approaching in-

terurban car when it was dangerously near, then the said Joseph Boyce Ford was guilty of contributory and concurrent negligence and the jury must find for the defendant.
page 308 } ants.

INSTRUCTION NO. T.

The court instructs the jury that if you believe from the evidence that Joseph Boyce Ford at any time after getting into a position of peril and after he saw or in the exercise of ordinary care should have seen that he was in peril, could have avoided the collision by the exercise of ordinary care on his part and failed to do so, then Joseph Boyce Ford was guilty of negligence and the plaintiff cannot recover.

INSTRUCTION NO. 8.

The court instructs the jury that, if you find your verdict for the plaintiff, Lula Agnes Ford, Administratrix of the Estate of Joseph Boyce Ford, deceased, in ascertaining the amount of the damages that the plaintiff is entitled to recover, you should find the same with reference to—

1. The pecuniary loss sustained by the widow and two minor children of the deceased, fixing such sum in the light of the probable earnings of the deceased, taking into consideration his age and health, during what would have been his lifetime, if he had not been killed.

2. And also compensation for the loss of his care, attention and society to the widow and two minor children of the deceased.

3. And also such further sum as you may deem fair and just by way of solace and comfort to the widow and two minor children of the deceased, for the sorrow, suffering and mental anguish occasioned to them by his death.

And you should fix the amount of your verdict
page 309 } from the evidence at a sum which to you shall seem fair and just, not exceeding the sum sued for.

Instructions Numbers 1, 2, 3, 4, 5-A, 6, 7 and 8 above set out, were offered by the plaintiff. The defendants objected and excepted to the said Instructions, Numbers 1, 2, 3, 4, 5-A, 6, 7 and 8, on the grounds hereinafter set out under the headings, "Objections to Instructions" and "Except-

tions". Instructions Numbered A, F, G, K, L, M, N, O and T above set out were offered by defendants. Instruction Numbered H was offered by the defendants in the following form: "The court instructs the jury that the law of Virginia fixes no limit as to the rate of speed of an interurban electric car." The court amended the said instruction by adding thereto the following language: "but the same should be operated at a speed according to existing facts and circumstances on the highway," and gave such amended instruction to the jury; and the defendants excepted thereto on the grounds hereinafter set out under the heading, "Exceptions".

The plaintiff objected and excepted to Instructions Numbered A, F, G, H, K, M, O and T, on the grounds hereinafter set out under the heading, "Objections to Instructions", and "Exceptions".

The plaintiff offered the following instruction:

The court instructs the jury that if you believe from the evidence that the continued progress of the milk truck across and off of the car track was blocked or retarded by north-bound traffic on the Richmond-Petersburg Pike and that when it became so blocked or retarded the street car of the defendant was at sufficient distance from the milk truck to have enabled the operator thereof, in the exercise of ordinary care, to have stopped said car and avoided
page 310 } a collision, and that he failed to do so and as a proximate result thereof the collision occurred and Ford was killed, then you must find your verdict for the plaintiff notwithstanding that you may also believe that Ford was himself guilty of negligence in driving on the track in the first instance.

Which said instruction was refused by the court,—and the plaintiff excepted to the refusal of the court to grant the said instruction as hereinafter set out under the heading, "Exceptions".

page 311 } **OBJECTIONS TO INSTRUCTIONS.**

PLAINTIFF'S INSTRUCTIONS:

No. 1: No objection.

No. 2: Mr. Robertson: Both defendants object and except to instruction No. 2 in any form upon the ground that the space occupied by the Virginia Electric & Power Company's interurban track is occupied by it exclusively, subject to the right of the public to cross at crossings, and upon the ground that the law applicable to steam railways applies in this case.

The Court: To which the Court replies that in its opinion the Virginia Electric & Power Company's interurban line has no exclusive right on the Richmond-Petersburg Turnpike, and that it is not governed by the law applicable to steam roads.

No. 3: Mr. Mann: We object to No. 3 for this reason, that it denies the principal of our exclusive rights under the franchise, and that the last part of the instruction as to proximate cause of the collision should be that such negligence should be the sole proximate cause; further, that the duties therein stated are not the duties required by law.

No. 4: No objection.

page 312 } No. 5: Mr. Mann: We object, first, that it deals with the doctrine of last clear chance, which we say has no application to this case; that is the first objection. The second is that it directs a verdict and leaves out the obligation of the plaintiff to save himself under the doctrine of the last clear chance. Third, that it is defective on the ground that it mentions proximate cause and fails to use the word "sole" in front of it. Fourth, because in the instruction the duty is placed upon the motorman to stop the car and avoid the collision when the plaintiff's truck was blocked without stating whether he saw or under reasonable care ought to have seen the plaintiff's truck was blocked.

No. 5-a: Mr. Mann: Instruction No. 5-a as offered by the plaintiff is objected to by the defendants on the following grounds: first, no evidence to sustain the instruction under the facts in this case; second, that it directs a verdict for the plaintiff notwithstanding the fact that the plaintiff himself might have had the last clear chance to avoid the collision.

No. 6: Mr. Mann: The defendants object to instruction No. 6 for the following reasons: First, that there is no evidence to sustain it; second, that the language of the instruction puts the defense of sudden emergency on the operator of the electric car when the measure of his duty
page 313 } is what a reasonable man might have done under an emergency; third; that it disregards any concurrent negligence of Ford in driving on the track in front of a rapidly moving car and makes the defendants liable notwithstanding such concurrent negligence; and sudden emergency based on the doctrine of last clear chance.

No. 7: Mr. Mann: That is objected to because it gives the jury the right arbitrarily to disregard the testimony of witnesses on uncontradicted evidence.

No. 8: Mr. Mann: No. 8 is objected to for the reason that it ends with the words Ten Thousand Dollars as the amount

of the verdict; there is no evidence to show the probable earnings or length of his life if he had not been killed; third, there is nothing to show that he was a kind or attentive father or husband; fourth, there is nothing to show that there is any loss by way of solace and comfort to the widow and two minor children, nor as to suffering or mental anguish occasioned them by his death.

Mr. Robertson: In addition to all the preceding objections and exceptions to each individual instruction offered for the plaintiff in either its original or amended form both defendants object and except to all such instructions upon the ground that the plaintiff himself is guilty of negligence *per se* which bars his recovery and that, therefore, he is not entitled to any instructions upon his theory of the case.

page 314 } DEFENDANTS' INSTRUCTIONS:

A: Mr. Bowles: The plaintiff excepts to the giving of the instruction in the modified form or in its original form on the ground that it is contrary to the law of Virginia as set forth in the Linton case, 174 S. E., page 667, *et seq.*, and it amounts to telling the jury that he was entitled to assume a fact which he knew not to be a fact.

B: Mr. Bowles: We object to that as contrary to the franchise and the deed.

C: Mr. Bowles: We object to that on the ground that there is no evidence to support the instruction, that it leaves the jury to surmise and conjecture as to whether or not Mr. Ford could have alighted from the truck and reached a place of safety, and that is not proper.

D: Mr. Bowles: We object to that on this ground, sir: it tells the jury that the operator of the interurban car had no reason to suspect or anticipate a situation until he discovered or in the exercise of ordinary care should have seen the perilous situation. Now it doesn't say to the jury that until he saw the perilous situation it wasn't any duty on him; it tells the jury as a matter of fact that until he saw the perilous situation he had no reason to suspect that a situation would arise. Now that is the jury's province entirely and you are stating this as a matter of law, that that man didn't have any reason to suspect anything,
page 315 } whereas he has testified himself that he was looking at that truck all the way down that Pike.

F: Mr. Bowles: Instruction F is contrary to the evidence in that it tells the jury if they believe from the evidence that before Joseph Boyce Ford entered the track of the interurban railroad he knew the interurban car was rap-

idly approaching the crossing—doesn't say whereabouts or anything about it, and the law is that a person may cross a street car track or interurban track if a reasonable man would think it was prudent to do so and there is no evidence upon which to predicate that statement in this instruction; and further, if Your Honor please, the instruction tells the jury that it was his duty to observe the condition of traffic on the north-bound portion of the highway affecting the safe passage of the truck over the said track when he first went on there. The evidence is, as I recall it, when he first went on it appeared safe and open; that when he got on it the traffic had come up.

G: Mr. Miller: We object to G, that he has got to look and listen; that is railroad law.

Mr. Bowles: And it is a duplication of Instruction F that the Court has just given over our objection. We object to the instruction on the further ground that it makes an effort to apply the Motor Vehicle Act to electrically propelled vehicles on tracks which are expressly excluded page 316 } from the provisions of the Motor Vehicle Act.

H: Mr. Bowles: Instruction H is objectionable, we think, because they must proceed at a speed which is reasonable under the circumstances. The law does not fix any limit to it except that, but they are not turned loose there to run wild, and that is what you would be telling the jury if you gave Instruction H without any qualification to it.

I: Mr. Bowles: This is look and listen, to begin with, sir. It is an attempt to apply railroad law; it is an attempt to give the electric car a right-of-way at the intersection to which it was not entitled, and it incorrectly states every proposition that is expressed in it.

J: Mr. Bowles: This instruction tells the jury, if Your Honor please, that regardless of what might be the situation out there that his failure to blow the whistle or sound a gong cuts no figure in the case and they have undertaken to prove it all the way through the case. It might be very well that the jury might believe that he did not give a signal and that he ought to have given one under the circumstances that existed at the time.

K: Mr. Bowles: The only objection we have to that is that it ignores the theory of the last clear chance.

L: No objection.

M: Mr. Bowles Now, if Your Honor please, M is objectionable on two grounds. The first one is that page 317 } there is no evidence in this case, we submit, that will entitle the defendants to a sudden emergency

instruction; and the second ground is that even if there were that is an improper sudden emergency instruction and does not contain the elements that are necessary.

The plaintiff excepts to the giving of Instruction M in the original form or as amended on the ground, first, that the sudden emergency instruction is contrary to the evidence of the defendant W. E. Blanton, whose evidence plainly and fully discloses that he was not placed in any sudden emergency by the acts of the plaintiff; second, that there is no evidence to support the giving of a sudden emergency instruction; third, that the instruction as given is not a correct statement of the law of sudden emergency and that it fails to show that the peril was not created by Blanton; it fails to show that the defendant Blanton after the emergency was created is still held to the degree of care that the ordinary prudent man would exercise under the facts and circumstances of this particular sudden emergency as set forth in the case of *Jones v. Hanbury*, 158 Va.

N: No objection.

O: Mr. Bowles: Instruction O is objectionable for these reasons: that it is a repetition of matter already stated to the jury several times in instructions previously considered; that it is a finding instruction based upon an in-
page 318 } complete statement of the facts necessary to be
stated with reference thereto, and that it is confusing to the jury.

Mr. Mann: Now in view of the fact that the Court has indicated that the question of last clear chance enters into the case, without waiving our claim that there is no room in this case for the doctrine of last clear chance, we ask for three instructions on the doctrine of last clear chance.

Q: Mr. Bowles: We object to this instruction because you are leaving the jury to surmise, conjecture and guess at what he could have done when there is not a piece of evidence in there to show he could have done anything.

Mr. Mann: I think we have R in such a way as to meet that objection and if the Court gives that we will withdraw Q.

R: Mr. Bowles: The same objections are applicable to that one.

S: Mr. Bowles: Now S we object to because it is telling the jury that if a man gets on the track and sees a car approaching 300 feet away that he has to flee for his life and is not entitled to assume, as said in the Holtz case, that the man won't run up behind him and bump him off.

T: Mr. Bowles: Objected to on the ground it page 319 } doesn't say the motorman failed to see his peril; doesn't put in there that he had to realize that the motorman had failed to see his peril and would take such precautions as he ought to in order to have avoided the injury; no evidence to support it; and undertakes to make a last clear chance.

EXCEPTIONS:

Mr. Bowles: The plaintiff excepts to the action of the Court in refusing to grant certain instructions asked for by the plaintiff and excepts to the action of the Court in granting certain instructions asked for by the defendants over the objections of the plaintiff.

B: Mr. Mann: The defendants except to the action of the Court in refusing Instruction B offered by them on the ground that it fairly states the law and is applicable to the facts of the case.

C: Mr. Mann: The defendants except to the action of the Court in refusing Instruction C for the reason that it correctly states the law, it is applicable to the facts of the case, and should be given under the decision in the case of *Dick v. Virginia Electric & Power Company*, 158 Va.

D: Mr. Mann: The defendants except to the action of the Court in refusing Instruction D as offered upon the ground that the instruction correctly sets forth the law page 320 } applicable to the facts of the case under the decision of *Virginia Electric & Power Company v. Jayne*, 151 Va. 694.

E: Mr. Mann: We except to the action of the Court in refusing Instruction E on the ground that it correctly states the law as applicable to the facts of the case.

H: Mr. Mann: The defendants except to the amendment of Instruction H by the Court on the ground that the instruction as offered fairly states the law and is applicable to the facts and circumstances, and that the amendment is not applicable to the facts of the case.

I: Mr. Mann: We object to the action of the Court in refusing Instruction I on the ground that it fairly states the law and is applicable to the facts of the case.

J: Mr. Mann: The defendants except to the action of the Court in refusing Instruction J as offered on the ground it correctly states the law and is applicable to the facts of the case.

The Court: The Court says in reply to that the defend-

ants undertook and did show by their own testimony that they blew the whistle and now ask the Court to tell the jury to disregard it.

P: Mr. Robertson: Both defendants except to the refusal of the Instruction P as offered on the ground it correctly states the law applicable to the facts of the case.

Q: Mr. Mann: We except to the action of the page 321 } Court in refusing to grant Instruction Q on the ground it correctly states the law and is applicable to the facts of the case.

Q, R, S: Mr. Mann: The defendants except to the action of the Court in refusing Instructions Q, R and S as offered by them on the ground that each and all of them correctly state the law and are applicable to the facts of the case.

page 322 } I, Ernest H. Wells, Judge of the Hustings Court, Part Two, of the City of Richmond, Virginia, do certify that here ends the stenographic report of the testimony, the instructions given and refused, and the objections thereto, and the other incidents of the trial of the case of Lula Agnes Ford, Administratrix of the estate of Joseph Boyce Ford, deceased, *v.* Virginia Electric and Power Company, a Corporation, and W. E. Blanton, on a Notice of Motion for Judgment in the Court aforesaid.

ERNEST H. WELLS,
Judge of the Hustings Court, Part Two, of
the City of Richmond, Virginia.

page 323 } I, A. I. DuVal, Clerk of Hustings Court, Part II, of the City of Richmond, State of Virginia, do hereby certify that the foregoing is a true transcript from the foregoing cause, and I further certify that the notice required by section 6339 Code of Va. was duly given in accordance with said section. Also the bond required to be given in this case suspending the execution for a period of ninety days has been given before the Clerk of this Court with surety, which was approved by the Clerk.

Costs of Record \$69.20.

Given under my hand this 4th day of January, 1935.

A. I. DuVAL,
Clerk of Hustings Court, Part II, Richmond, Va.

A Copy—Teste:

M. B. WATTS, C. C.

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