2736
No. 19
191-647

Record No. 3704

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIAM J. BRYAN

v.

JAMES FEWELL

FROM THE CIRCUIT COURT OF FAUQUIER COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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

M. B. WATTS, Clerk.

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

191 VA 647

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held OCT 1950

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

M. B. WATTS, Clerk.

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

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

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

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

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

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

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

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

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

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

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) The opening brief of the appellant shall be filed in the clerk's office within twenty-one days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

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

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 3704

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Wednesday the 8th day of March, 1950.

WILLIAM J. BRYAN, Plaintiff in error,

against

JAMES FEWELL, Defendant in error.

From Circuit Court of Fauquier County

Upon the petition of William J. Bryan a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Fauquier county on the 9th day of December, 1949, in a certain notice of motion for judgment then therein depending wherein James Fewell was plaintiff and the said petitioner was defendant, upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of seven thousand dollars, with condition as the law directs.

RECORD

Virginia:

In the Clerk's Office of the Circuit Court of Fauquier County.

Pleas, before the Circuit Court of Fauquier County, Virginia, at the Court House of said County on 19 December 1949.

BE IT REMEMBERED, that heretofore, to wit: on the 27 August 1949, there was filed in the Clerk's Office of said Court, a Notice of Motion, wherein James Fewell was plaintiff and William J. Bryan was defendant: in the following words and figures:

To William J. Bryan, 224 W. Washington St., Harrisonburg, Virginia;

You are hereby notified that the undersigned, James Fewell, will on September 26, 1949, between the hours of 10:00 a. m. and 1:00 p. m., or as soon thereafter as it may be heard, I, James Fewell, will move the Circuit Court of Fauquier County at the Courthouse thereof in the town of Warrenton for judgment against you for the sum of $10,000.00, which sum is due and owing by you to me for damages, wrongs and injuries hereinafter set forth.

Heretofore to-wit, on the 12th day of December, 1948, about 11:00 p. m. (E.S.T.), I was walking West on the sidewalk in the town of The Plains, Virginia, said sidewalk being on the North side of the main street, or Route 55 through said town, and I had proceeded a short distance West from the Branch Bank of the Fauquier National, I started to cross said Route 55 to the other, or South, side. Before doing so, I looked in both directions to see if any vehicles were approaching, and seeing none I proceeded to step from the curb and into said street. After I had crossed half of the street and was on the South side of the center line, I was suddenly and violently struck by your 1946 Plymouth Sedan, bearing Virginia 1948 license number 632-641. I was given no warning of the approach of your vehicle by means of blowing your horn or otherwise, which vehicle it

page 2 } was your duty to use due and reasonable care in the operation thereof; to drive said vehicle at a reasonable and proper rate of speed under the circumstances and traffic conditions existing at the time; to

keep and maintain said vehicle under proper control; to drive said vehicle in such a manner so as not to endanger the life or limb of any person thereof; and while driving said vehicle to refrain from negligence, carelessness and recklessness in every respect.

Yet in violation of said duties and while said automobile at the time aforesaid was being driven and operated by you over said Route 55 through the town of The Plains, Fauquier County, Virginia, you did drive and operate said vehicle in a negligent, careless and reckless manner, and as a result thereof did with great force and violence run into the undersigned and as a result of said impact, the undersigned was violently struck and suffered severe injuries thereof, receiving a badly crushed right leg as well as other injuries which caused me to be hospitalized for some time and put me under the care of several Doctors and caused me to expend large sums of money for Doctors, x-rays, etc. Even after said treatment above, my leg was in such condition that I will be permanently injured.

By reason of all which I was damaged by you in the sum of $10,000.00 as above alleged. Wherefore judgment will be asked for said sum in the hands of said court at the time and place hereinabove set forth.

Given under my hand this 24th day of August, 1949.

JAMES FEWELL, By Counsel

UPTON H. RICHARDS
Counsel for Plaintiff

page 3 } And in said Court on 26 September 1949:

Case called and docketed, and came the parties by their attorneys; and the defendant filed his plea of the general issue, to which the plaintiff replied generally and issue was joined; and this case is continued to 1 December 1949.

Which said plea is in the following words:

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

And in said court on 1 December 1949:

This day came again the parties by their attorneys; and came a jury, to wit: P. Carlin Ashby, J. North Fletcher, James W. Noland, Jesse P. Ruffner, Ashton B. Schwab and D. J. Weiner and Paul H. Tobler, who being elected tried and sworn the truth to speak upon the issues joined, having heard the evidence adduced and argument of counsel and received the instructions of the Court, were sent out of Court to consult of their verdict; and after some time returned into Court, and upon their oaths do say: We, the Jury, on the issues drawn, find for the plaintiff, and fix his damages at the sum of six thousand dollars; and they are discharged; and thereupon the defendant by counsel moved the Court to set aside the verdict of the jury and grant him a new trial on the ground that the same is contrary to the law and evidence in this case, and is without evidence to support it; which motion is continued to the 9 day of

page 4 } December 1949.

And in said Court on 9 December 1949:

This day came again the parties by their attorneys; and the motion of the defendant to set aside the verdict of the jury rendered on the 1st day of December 1949, on the ground that the verdict is contrary to the law and the evidence and is without evidence to support it, and to enter up final judgment for the defendant, being argued; the Court doth overrule the said motion, to which action of the Court, the defendant by counsel excepted; whereupon it is considered by the Court that the plaintiff recover of the defendant the sum of six thousand dollars for his damages, with legal interest thereon from 1 December 1949 until paid and his costs by him in this behalf expended. And the defendant indicating his intention to apply to the Supreme Court of Appeals for a writ of error and *supersedeas* in this case, upon his motion the execution of this judgment is hereby suspended for a period of sixty days from this date, on condition that the defendant or some one for him do within ten days from this date enter into a suspending bond with security to be approved by the Clerk of this Court in the penalty of one hundred dollars, conditioned as the law directs, and upon the further condition that the defendant do within sixty days from this date tender to the Court of the judge thereof, his bills or certificates of

page 5 } exception.

Norris Royston.

Virginia:

In the Circuit Court of Fauquier County.

James Fewell, Plaintiff
v.
William J. Bryan, Defendant

CERTIFICATE OF THE TRIAL JUDGE.

page 6 } Virginia:

In the Circuit Court of Fauquier County.

James Fewell,
v.
William J. Bryan.

EVIDENCE.

Transcript of evidence taken in the Circuit Court of Fauquier County, Virginia, before Honorable J. R. H. Alexander, Judge of the Circuit Court of Fauquier County, Virginia, and jury, on the 1st day of December, 1949.

Present:
Upton H. Richards, Esquire, Attorney for plaintiff;
Wallace N. Tiffany, Attorney for defendant.

NORRIS ROYSTON,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Richards:
Q. Your name is Norris Royston? Is that correct?
A. Yes, Sir.
Q. Where do you live?
A. In Middleburg.
page 7 } Q. And what is your business?
A. Funeral Director, and Ambulance Service.
Q. Were you called on the night of December 12, 1948, to go to the Town of The Plains, to take an injured person to the Hospital?
A. Yes, Sir.

Norris Royston.

Q. About what time did you receive the call, Sir, if you recall?

A. As near as I can recall, it was between ten and eleven o'clock, somewhere along in there.

Q. At night?

A. Yes, Sir.

Q. And you went directly from Middleburg to The Plains?

A. I was up at Marshall, and they called me, and I went to The Plains.

Q. What did you find when you went there?

A. Found it was Mr. Fewell, and they had taken him over on the pavement, and I found him in very much pain, and we worked around, and got him on the stretcher, and I took him on to Winchester.

Q. You knew nothing about how the accident happened, or how he was hit?

A. No, Sir.

page 8 } Q. Did you go on to Winchester, with Mr. Fewell?

A. Yes, Sir.

Q. Was anyone in the back of the Ambulance with him?

A. Yes, my Father. We lifted Mr. Fewell from the sidewalk into the Ambulance.

Q. And after you got him to Winchester, did you have occasion to be close enough to him to notice whether he had alcohol on his breath, or not?

A. I was close enough to him, but I never did smell anything on Mr. Fewell that night. I would not say he was under the influence. He was very normal; he was in perfect condition, and he talked perfectly normal, and I had no reason to suspect that he was. He did not give me any reason that he was.

Q. Did you or did you not smell alcohol on his breath at the times when you were going along?

A. No, I did not smell alcohol on him at all.

Q. How long have you known Mr. Fewell?

A. Ever since I was a little boy.

Q. In your opinion, the night of the accident, when you went to pick him up, was he as normal then as any time you have known him, outside of being injured?

A. Yes, he was. I kidded him in the Hospital; told him, "I heard you are going to get married again."

page 9 } Later when they put him on the operating table, in the Operating Room, I stayed with him, and

helped to get his clothes off him, and kidded him before the Nurses.

Q. When Dr. Adams called you, was it your understanding that the accident had just occurred?

A. I did. Called my wife, and just called, and said go down to The Plains, there was an accident down there, and I was right there.

Q. You went directly to The Plains?

A. Yes, Sir.

Q. How long did it take for the trip to Winchester?

A. I do not know how long it took. I did not drive too fast, because I knew he was in pain, and I drove along, I would say about an hour.

Q. What was the condition of the weather that night? Was it raining, or clear, or cloudy, or do you remember?

A. It was a little cloudy; wasn't too clear.

Q. Had it been raining that night, do you recall?

A. I do not remember. We got a call that night, after dark, and had to go to Haymarket, and when we got back, it was hazy.

Q. Were the streets and the roads wet, or do you recall?

A. I do not recall that.

page 10 } CROSS-EXAMINATION.

By Mr. Tiffany:

Q. You drove the Ambulance to Winchester, and you did not get in the back with Mr. Fewell?

A. No, Sir.

Q. And you say you arrived between ten and eleven o'clock? That time is not fixed in your mind?

A. It is not fixed. I did not get the call to go to Haymarket until after night, and when I got back, I was nearly ready to go home, and the 'phone rang, so I went on to Winchester, and I know I did not get back to Middleburg until after three o'clock.

Q. You did not notice any evidence of Mr. Fewell drinking, and you had no reason to pay any particular attention to see about it?

A. That is right. He was perfectly normal as far as I could see. I was kidding him on the table, and he was perfectly normal.

page 11 } W. C. COLLEY,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Richards:

Q. Your name is W. C. Colley? Is that correct?

A. Yes, Sir.

Q. Where do you live, Colley?

A. At The Plains.

Q. And what is your business?

A. Barber.

Q. On the night of December 12, 1948, did you talk with Mr. Jim Fewell prior to the time he was injured in this accident?

A. I came down the Street, and I met Mr. Fewell, and he went down to the Shop, and I showed him some things I had at the Shop, for Christmas, and he gave me an order, and I said I did not have them in stock at the time, and I would order them, and he said, "I am going home." I said, "I am going back to the Shop. I have got along day before me tomorrow." It was Saturday.

Q. It was on a Saturday when he came to the Shop?

A. No; when Mr. Fewell came to the Shop, it was on Friday evening.

page 12 } Q. What time was it when he came to the Shop, to ask about this order?

A. That was the same night.

Q. About what time?

A. I judge that it was a little after ten o'clock.

Q. How long have you known Mr. Fewell?

A. I guess a year; after I came to The Plains.

Q. Mr. Tiffany in his opening statement, said there would be evidence that Mr. Fewell was drinking, or under the influence. How long were you with Mr. Fewell that night?

A. Probably twenty minutes. About twenty minutes.

Q. Did you notice alcohol on his breath, or notice that he was under the influence of alcohol?

A. No, Sir, I did not, no, Sir.

Q. When Mr. Fewell left, you were in your Shop or on the Street?

A. I was on the sidewalk with him.

Q. Where did you leave him?

A. At the corner of the bank, and went back to the Shop.

W. C. Colley.

Q. Did he turn around and go on the other way, or was he still standing there?

page 13 } A. Started down the Street.

Q. Towards Marshall, that is West?

A. That is right, going West, on the North side.

Q. Was he on the sidewalk when he left you?

A. Yes, Sir.

Q. In your opinion, was he perfectly normal?

A. He was when I talked to him; he was.

Q. And you do not know that he was under the influence of alcohol, or had been drinking?

A. No, Sir.

Q. You are positive of that?

A. Not the time I talked to him.

Q. You know nothing about the accident, how it occurred?

A. No, Sir; about ten o'clock some of them came in the Shop, and said he was struck. On Saturday some of the cars on the Road to Warrenton apply their brakes, and I very seldom pay any attention to it.

CROSS-EXAMINATION.

By Mr. Tiffany:

Q. Ten o'clock on Saturday?

A. Probably a little after ten.

Q. You were in your Barber Shop?

A. Yes, Sir.

page 14 } Q. You do not work on Sunday?

A. No, Sir, very seldom, unless somebody calls up.

Q. You are positive then, this was not Sunday Night?

A. Sure it was not.

Q. You are sure it was not Sunday Night this accident occurred?

A. No, it was not.

Q. The Barber Shop is not open on Sunday Night?

A. No.

Q. It was the same night the accident occurred? Is that right?

A. He was in there on Friday night.

Q. He was in there on Friday night? Was he back in there on Saturday night?

A. No, Sir; they say he was in the Hospital.

Dr. Samuel Adams.

Q. The night he was in your Shop, was the night this accident occurred?

A. Yes, Sir.

Q. And it could not have been Sunday Night, because you are not open on Sunday Night?

A. No, Sir.

Q. I think that the Calendar will show this accident happened Sunday Night, December 12th. Do you want to change your testimony?

page 15 } A. What is that?

Q. I think it happened Sunday night, December 12th. The evidence will show that it was Sunday Night. You do not want to change your testimony, do you?

A. I did not notice the date. I was figuring it was on a Saturday.

Q. You know it was not Sunday Night? You are positive of that?

A. It was not Sunday Night, because I do not work there on Sunday.

page 16 } DR. SAMUEL ADAMS,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Richards:

Q. Dr. Adams, you have been practicing in the Town of The Plains, Virginia?

A. Yes, Sir.

Q. How long have you been practicing there?

A. About three and one-half years.

Q. Are you acquainted with James Fewell, the plaintiff in this case?

A. I am.

Q. How long have you known Mr. Fewell?

A. All my life.

Q. You are a resident of The Plains? You were born and raised there?

A. Yes, Sir.

Q. On the night of December 12th, were you called to administer aid to Mr. Fewell, after he had been injured in an automobile accident?

A. Yes, Sir.

Q. Would you state to the Court and jury when you were

Dr. Samuel Adams.

called, and what you found after you got to the scene of the accident?

page 17 } A. I do not recall the time. It was fairly late, as I recall, I had gone to bed, and they had to get me up, and I think Yugurtis called me, as I recall, so I went on up, and found him. He was lying in the Road at the time, on the left-hand side of the Road as you go to Marshall. I do not recall exactly the distance. It was probably ten or fifteen feet from the sidewalk. I saw he had a fractured leg, and seemed to be in rather bad pain, and I asked someone to call Mr. Royston, and the State Police, and we got him up on the sidewalk, and gave him some morphine.

Q. As far as you know, had Mr. Fewell been moved before you got there?

A. He was lying out in the road; apparently he had not. I do not recall whether anybody said they moved him, or not.

Q. Which leg was fractured?

A. His right one.

Q. Were both of the bones of his leg broken, or did you make an examination at the time?

A. I did not examine it. I picked his leg up.

Q. And you stated that he was lying a little to the left, that is the South side of the center line? Is that

page 18 } correct, Sir?

A. Yes, sir, fairly close to the sidewalk, as I recall it, about ten feet from the sidewalk. I cannot tell you that for sure. I showed the Policeman where it was.

Q. Was he lying parallel to the white line, or at angles to it, if you recall?

A. I do not recall.

Q. You state that you have known Mr. Fewell all your life. At the time you went to administer first aid to him, did you notice alcohol on his breath, or notice whether or not he was under the influence of alcohol?

A. He seemed to be very rational from the condition he was in.

Q. He was suffering a great deal no doubt?

A. Yes, Sir.

Q. Was he conscious and able to talk to you?

A. Yes.

Q. As soon as Mr. Royston came, he was taken to Winchester? Is that correct?

A. Yes, Sir.

Dr. Samuel Adams.

Q. Have you had occasion to look at this leg since the date of the accident?
A. I have.
Q. What is the condition of his leg now?
page 19 } A. He has a very bad leg, a fracture that has healed to some extent; still a great deal of motion in it, and a great deal of bend.
Q. As far as a recovery is concerned, is it as well healed as it will ever be in your opinion?
A. I think so.

The Court: Was the heel the only fracture?

A. Leg.
Q. Where was the break?
A. About the lower third of the leg; about right in here. (Indicating).

Mr. Richards:
Q. This leg you state is in a bended condition at the present time?
A. Yes, Sir.
Q. Will it ever be any better than that? Will it ever be straight again?
A. Not in my opinion.
Q. He is as well off now as he will ever be, in your opinion?
A. Yes, Sir.
Q. Have you seen X-Rays of his leg?
A. I have not seen them.
page 20 } Q. Have you had any report from Dr. Custer, in Winchester, as to the condition of his leg?
A. Yes, Sir.
Q. Do you recall what he said about it?
A. The last report I had, healing was not complete; still motion in his leg, and left it permanent.

Mr. Tiffany: I think the other Doctor should testify as to that.

CROSS EXAMINATION.

By Mr. Tiffany:
Q. Had Mr. Fewell been a patient of yours before this accident?

James Fewell.

A. Yes, Sir.
Q. I note his left eye is imperfect?
A. Yes, Sir.
Q. That was not caused by this accident?
A. No, Sir.
Q. The only injury sustained in this accident was the right leg?
A. Yes, Sir.
page 21 } Q. Do you know whether he had been in an automobile accident before this, or not?
A. Not as I know of.
Q. When you got to the scene of the accident, you were primarily interested in seeing this leg?
A. Yes, Sir.
Q. You testified he did not talk like he was intoxicated to you. Didn't you detect the smell of alcohol on his breath?
A. I did not.
Q. Is it possible that you might have smelled it at the time, and have forgotten about it?
A. No, I did not smell it.
Q. Do you recall Mr. Bryan saying he seemed like he had been drinking, and you made the remark, "It appears that he has."? Does that refresh your recollection?
A. No, it does not.
Q. For whom was Mr. Fewell working before this accident occurred?
A. He just did odd jobs.
Q. He lives with Mr. J. B. Adams?
A. He has been living in one of our houses.
page 22 } Q. Is Mr. Adams a relative of yours?
A. He is my brother.

page 23 } JAMES FEWELL,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Richards:
Q. Jim, how long have you lived in the Town of The Plains, if you recall?
A. I do not know how long. I stayed there with Mr. Adams sixteen years, I know when he first came there.
Q. How old are you?

James Fewell.

A. I was seventy-four years old the 27th of May. Born the 27th of May, 1875.

Q. The night of this accident, December 12th, 1948, had you been up-town, that is the center part of The Plains, earlier before you were hurt?

A. No, I do not think I had. I had been no further than Dr. Schulze's, to his Drug Store.

Q. You had been up-town?

A. Yes.

Q. Did you talk to Colley back here, the Barber, did you talk to him that night any time?

A. Yes, when I came from up-town.

Q. Did you have any idea what time it was when you talked with him?

A. Mr. Templeman was getting ready to close up; I reckon it was pretty close to eleven o'clock.

page 24 } Q. Where did you leave Colley?

A. I came on down to the bank, and was talking to him about some stuff he was going to get; he said, "Come on down, and see if I got it." He said he was going to order it for me. He came on back up to the bank with me.

Q. You left him there?

A. Yes, Sir; he turned around and went back to the Barber Shop.

Q. And at that time you were living at Mr. John Adams'?

A. Yes, Sir, the Old Hotel.

Q. After you left Colley, you started towards where you were living?

A. Yes, Sir.

Q. Which side of the sidewalk were you on? Were you on the side of the bank?

A. Yes, Sir, down about maybe a little over one hundred yards from the bank.

Q. One hundred yards or feet?

A. One hundred yards.

Q. Were you on the sidewalk or on the street?

A. I was on the sidewalk.

Q. Do you remember whether or not there were any cars driving along the side you were walking down?

A. No, Sir.

page 25 } Q. You are positive there were no cars driving along on your side?

A. No, Sir.

James Fewell.

Q. After you got down a little over one hundred feet, did you start to cross to the other side?

A. No, I stood on the sidewalk, and never seen any car.

Q. You went on across? How far did you stand out in the Street?

A. I stopped on the street. I never got off the Street at all.

Q. You were on the sidewalk when you looked?

A. Yes, Sir.

Q. Did you look both ways?

A. Yes, Sir, both ways.

Q. Before we get across the Street,—you don't have the use of your left eye at all, do you?

A. No, Sir.

Q. How did you hurt that eye?

A. I stumbled and fell at a Filling Station.

Q. When was that?

A. That was 1946, the year my Old Lady died.

Q. You started on across the Street, and looked both ways? Did you see a car coming from your left or right, either way?

page 26 } A. Indeed, I did not.

Q. Did you ever hear a horn blow, the approach of a car?

A. No, Sir.

Q. What is the next thing you remember after you started across the Street?

A. I remember I got a little over,—I remember crossing the white line; I looked, and I never seen any car; I got I would say a foot, I was stepping as hard as I could to get on the other side. I had made a foot across the white line, maybe might have been a little more, a car came right down, when I went to pull my leg up to go, the car hooked around, and his brakes commenced to squeak.

Q. You never heard any horn?

A. No, Sir.

Q. Were you knocked unconscious?

A. Yes, I was. I was lying there. It knocked me clear out. When I came to, I think it was the fellow that hit me, I think he was hollering for help, when I came to.

Q. Do you remember at the time you started across the Street, do you remember if there were any other persons on the Street, walking on the Street?

A. No, Sir, was not a soul.

James Fewell.

page 27 } Q. Do you remember Dr. Adams coming to give you first aid?

A. Yes, Sir.

Q. Mr. Tiffany, in his opening statement, made the statement that he would show you were under the influence of alcohol; that you had alcohol on your breath? Is that correct, or not?

A. No, Sir. I hold my hand to Christ, if I had it. The only thing I had was a bottle of beer Mr. Templeman gave me, that day I ate my dinner.

Q. Did you take any whiskey?

A. No, Sir, hope to die if I had any whiskey. I never had any money to buy it with.

Q. Mr. Royston came, and you were taken to the Winchester Hospital?

A. Yes, Sir.

Q. How long did you stay in the Hospital, Mr. Fewell, in Winchester?

A. I suffered. I could not tell you. I know I stayed in there a long time.

Q. This is a bill that was sent to you from the Hospital. (Hands witness paper referred to). Is this the bill that was sent you from the Winchester Memorial Hospital?

A. I do not know. I guess it is. Yes, this is the same one, that is right.

page 28 } Q. This bill shows you were admitted to the Hospital, on the 13th of December, and remained in the Hospital ninety-six days, in other words, until the 18th day of March. Then you returned to The Plains, did you not?

A. Yes.

Q. Did you go back to the Hospital?

A. Yes, I went back and stayed three days.

(Paper referred to is introduced in evidence, marked Exhibit "1", with plaintiff's evidence).

Q. This bill shows two days?

A. Two or three; I cannot remember; something like that.

Q. This bill shows that the total Hospital bill was seven hundred and thirty-seven dollars and fifteen cents. Mr. Fewell, what were your injuries?

A. Broken leg.

Q. Was that put in a cast?

James Fewell.

A. Yes, put in three or four casts.

Q. At the time you were in the Hospital, I believe you were attended by Dr. Custer? Is that correct?

A. Yes, Sir.

Q. And he set your leg, and put the cast on?

A. Yes.

Q. I wish for the benefit of the jury that you would stand there, I would like for these gentlemen, any way you can show them your leg. I would like them to look at Mr. Fewell's leg to see how bad that leg is. (Witness
page 29 } exhibits to jury his leg).

Q. Have you ever had any breaks or anything wrong with that leg prior to the accident?

A. No, Sir.

Q. Does that leg bother you now?

A. When it is cloudy, it gives me thunder.

Q. Was not in a bended condition like that before?

A. No, Sir, none at all.

Q. At the time of the accident were you working for anyone?

A. Yes, I was working up there with Mr. Pawley.

Q. Did you work regularly or do day work?

A. Day work. Anytime it was not fit to make hay, I could not work. Doctor told me that.

Q. Have you received assistance or aid from the Welfare Board?

A. Yes.

Q. Are you receiving anything from them now?

A. Yes, twelve dollars I think it was; twelve or fourteen dollars.

Q. Week or month?

A. No, month. It is twelve or fourteen dollars. It was twelve dollars.

Q. I show you a bill from Dr. Monford D. Custer, of Winchester, Virginia, and ask you if that is the bill you received from him? (Hands witness papers referred to).
page 30 } A. Yes.

Q. Which shows his fee for services rendered, three hundred and fifty dollars? Is that correct?

A. Yes.

(Paper referred to is introduced in evidence as Exhibit "2", with plaintiff's evidence).

James Fewell.

CROSS EXAMINATION.

By Mr. Tiffany:

Q. You were not working regularly before this accident? Is that correct?

A. No, Sir, I could not work regularly on account of high blood pressure; I could not work over two or three days.

Q. When you worked you did day work?

A. Yes, Sir.

Q. Were you receiving assistance from the Welfare Board before this accident occurred?

A. Yes, Sir.

Q. There has been some discussion about whether you had alcohol on your breath that night. You said something about having had a beer?

A. Yes; I got one at twelve o'clock, over at the Drug Store.

page 31 } Q. In the middle of the day?

A. Yes, and that evening before I got supper, somebody gave me one in Mr. Templeman's.

Q. What time was that?

A. A little after ten o'clock, I reckon; before he closed up.

Q. A little after ten o'clock that you had one beer?

A. Yes, Sir.

Q. That would probably be on your breath?

A. Yes, Sir, only thing I taken, and I certainly did not have any whiskey. I never seen any whiskey.

Q. As I understand before this, immediately before the accident occurred, you left the corner near the bank and walked along the sidewalk on the North side of the Street, about one hundred or one hundred and twenty-five feet?

A. Yes, Sir.

Q. You walked down to the entrance to the Turner House?

A. Yes, Sir; I was up this side of the Turner House, Old Clark Place, used to call it.

Q. When you got to that approximate location, it was your intention to cross the Street?

A. Yes, Sir.

Q. You said something about stopping in the Street, to look before you continued across?

A. I did.

page 32 } Q. Before you started across the Street, you stopped on the sidewalk?

A. Yes, Sir.

James Fewell.

Q. And then you started into the Street, and stopped and looked again?
A. Yes.
Q. And there was nothing coming in either direction?
A. No, Sir.
Q. And you walked on across the Street?
A. Yes.
Q. You stated that you got a little beyond the middle of the Street, at the time you were struck?
A. Yes; I am sure I walked past that white line.
Q. A person standing on the sidewalk looking, don't you have a perfectly clear view of any traffic coming from the East for a distance of at least one hundred and fifty yards?
A. Oh, yes, of course, I could see, and there was not any car there.
Q. And as a matter of fact, it is perhaps two hundred yards you can see?
A. Yes, Sir.
Q. When you walked out on the Street, how far did you walk out on the Street, four, five or six feet?
A. I remember when I crossed that white line.
page 33 } Q. I am referring to when you walked out on the Street, and stopped and looked again. How far did you walk?
A. I reckon about two feet; something like that.
Q. You stopped and looked again?
A. Yes, and I kept on looking, and I was going to step with my left leg, and the car came right down.
Q. After getting on the Street, there was still nothing coming in either direction?
A. No, Sir.
Q. Then you kept looking?
A. Yes, I kept looking.
Q. Both ways?
A. Yes, Sir.
Q. When did you first see this car?
A. I never seen it until I saw the lights right on me. No, Sir, not until the lights were on me. I heard the brakes screech. When I came to, I was lying right beside the car.
Q. Could you estimate how close he was to you when you first saw him?
A. I could not actually tell you. It did not look like it was over five or ten feet; something like that.
Q. When you first saw him?

James Fewell.

A. Yes, Sir. I cannot remember whether they were coming from Warrenton, or straight down the Road.
page 34 } I know he was hollering for help.

Q. Do you remember the Trial Justice hearing we had downstairs, in February?

A. Yes, Sir.

Q. And you testified at that hearing, didn't you?

A. Yes, Sir.

Q. Do you recall testifying that you had almost reached the South side of the Street, when you were struck?

A. Yes, Sir.

Q. You said that?

A. Yes, Sir.

Q. And on the stand a little while ago you said you were just a little past the middle of the Street?

A. It has been so long, I cannot remember.

Q. The matter is a little confused in your mind?

A. Yes.

Q. At the Trial Justice hearing, you testified you were nearer the South side?

A. I thought I was nearer. I know I had done crossed the white line a little; I was nearer to the walk. They took me and laid me on the walk. I was knocked clear out. I was suffering.

page 35 } Q. There were no obstructions in the Street to prevent your seeing the car?

A. No, Sir, indeed there was not any.

Q. And you just cannot account for this car being five or ten feet from you when you first saw it?

A. Indeed I cannot. It ran up on me so quick; I heard the brakes.

Q. You were not on crutches at the time this accident occurred?

A. No, Sir. I was going then.

Q. You could get along very well then?

A. Yes, Sir.

page 36 } Mr. Richards: Before the Doctor goes on, I would like to ask,—he has some X-Rays, which were taken by the Hospital Authorities. When I went to Winchester, to talk to Dr. Custer, and to talk to the authorities at the Hospital, they stated that these X-Rays, they could not give them up; that they would let us use them. Is

it admissible to use them and show them to the jury, and let him take them back. If not, I cannot use them.

The Court: I think they can be copied.

Mr. Tiffany: I have no objection.

page 37 } DR. MONFORD CUSTER,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Richards:

Q. Dr. Custer, you are a practicing Physician, in the City of Winchester, Virginia? Is that correct?

A. That is right.

Q. How long have you been practicing there?

A. Two years.

Q. Was Mr. James Fewell admitted to the Winchester Hospital, on the 13th of December, 1948, under your care?

A. That is right.

Q. What was his injury at that time?

A. He had a fracture of the right leg.

Q. Where was this fracture?

A. The fracture was approximately the juncture of the middle and lower third of the leg, above the ankle.

Q. Between the ankle and the knee of his right leg?

A. Yes, Sir.

Q. Were both bones of the lower leg fractured?

A. Both bones fractured, and the fragments were over it.

Q. What treatment did you give Mr. Fewell on that particular night?

page 38 } A. That night we treated him by a wire going to his skeleton traction. By that I mean it is a wire through the lower fragments; put weights on it to maintain the bone. The two bones were over the surface, and pulled some, and got fair reduction by that means.

Q. Was a cast placed on his leg at that time?

A. It was not.

Q. When was the cast placed on it, if you recall? If you have your notes, you can refer to those.

A. I might clarify that by saying that everything appeared to be successful that night, proved to be unsatisfactory, over the next week, and ten days later we operated on him, and at that time put a cast on him, on the 23rd of December.

Q. How long did that first cast stay on, Doctor?

Dr. Monford Custer.

A. The cast was changed several times. I cannot tell you exactly.

Q. He had several casts on his leg?

A. Yes, Sir.

Q. During the time he was at the Hospital. The Hospital records showed he was admitted the 13th, and discharged after ninety-six days. The Hospital record also shows he came back on the 22nd of April, for two days. What was that for?

page 39 } A. On the 13th we put a wire in. By the 23rd we were satisfied that would not suffice, and put him in a cast on the 27th. The cast was changed, and on the 18th of February the cast was removed, and an X-Ray examination was made, and a good healing by X-Ray was noted, and we put a very light cast on; was not a plaster cast; a different type of support, and we thought that probably the situation was pretty well in hand. However, we found he needed further support. There was still clinical motion. We could still move the fragments,—so then we put him in a short cast, and sent him home.

Q. When he left the Hospital, was he using crutches?

A. Yes.

Q. The first time?

A. Yes, Sir.

Q. The second time was he still using them?

A. He came back in the Hospital, on the 22nd of April. We took the cast off, and found rigid healing, and discharged him two days later, and he was on crutches at that time.

Q. Did the bones heal correctly, or whatever would you state?

page 40 } A. I have not seen Mr. Fewell for some months. The last time I saw him they had healed firmly, but not in true alignment.

Q. Will that leg ever be any straighter than it is now?

A. No.

Q. Is that the finished product?

A. That is it. That is unfavorable by the location of the fracture.

Q. Does the fact that he is a big man have anything to do with it?

A. Yes.

Q. Did you see him the night he was brought in there?

A. I did. Dr. Adams called me.

Dr. Monford Custer.

Q. Dr. Sam Adams?

A. He did, or somebody at The Plains sent word to me that Mr. Fewell was coming over. I was there at the Hospital at the time.

Q. Do you recall about what time you first saw him?

A. Approximately one-thirty A. M., the 13th of December.

Q. Mr. Fewell was suffering, of course, at the time you saw him. There is an allusion here that Mr. Fewell was under the influence of alcohol, and had been drinking.

A. It was my impression that he had not. At page 41 } the time I saw him there was no evidence of it.

Q. You saw him an hour or so after the accident? Was he, or was he not under the influence of alcohol when you saw him?

A. He was not. There was no evidence of it, and I roughtly made some observations,—patient denies alcoholic indulgence.

Q. This bill that I showed Mr. Fewell, in the amount of three hundred and fifty dollars, is your correct bill, is that right, Sir?

A. That is right.

CROSS EXAMINATION.

By Mr. Tiffany:

Q. You saw Mr. Fewell at one-thirty A. M. that night? You would not be prepared to say he had alcohol on his breath at eleven o'clock that night, two and one-half hours earlier? You are not prepared to say whether he had alcohol on his breath at eleven o'clock, two hours earlier?

A. No, Sir.

page 42 } Q. With reference to your bill, I believe you submitted a bill for three hundred and fifty dollars? Wasn't Mr. Fewell admitted to the Hospital as a Welfare Patient, under a contract?

A. I cannot give you any information about that. I do not know the facts.

Q. The Hospital did not admit him as a Welfare Patient?

A. I do not believe any suggestion was made. My information, all I knew about the patient, was the information I had from Dr. Adams. I do not usually check to find what their status is. I doubt if any arrangement had been made. It was an emergency situation. Those patients come in, and are cared for.

William J. Bryan.

Q. Doesn't the County here have an arrangement with the Winchester Hospital to enter patients as Welfare Patients?
A. I think so, but I do not know the details.
Q. Covering all expenses, as well as Hospital?
A. You mean professional services?
Q. Yes.
A. No, Sir. There is no contract with the Welfare, that covers professional services.
Q. Only covers Hospital?
page 43 } A. Yes, Sir, if it does that, and I presume it does.

Mr. Richards: That is our case, if the Court please.

It is stipulated between counsel that the night of December 12th, 1948, was Sunday Night, as shown by the Calendar.
It is agreed between counsel that plat of the area in The Plains in question, marked defendants Exhibit "1", is the correct representation of the Street surroundings in that area.
Mr. Tiffany: I offer this plat in evidence.

(Plat referred to is introduced in evidence, marked defendant's Exhibit "1").

page 44 } WILLIAM J. BRYAN,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Tiffany:
Q. Please state your full name and age?
A. William J. Bryan, twenty-seven.
Q. Where do you live?
A. Harrisonburg.
Q. Where do you work?
A. Bridgewater, Virginia.
Q. On the night of December 12th, 1948, where had you been, and where were you going?
A. I had been to Arlington, Virginia. I was going to Harrisonburg.
Q. On that night you passed through The Plains, driving your automobile?
A. That is right.

William J. Bryan.

Q. At what time did the accident in question occur?
A. I would say about eleven-thirty.
Q. As you entered The Plains, what speed were you driving?
A. About twenty miles an hour.
page 45 } Q. I show you the plat, Exhibit "1", and ask you at what point on the Road, with reference to the Turner House, did the accident occur? (Hands witness plat referred to). The Turner House being this house on the North side.
A. I would say about directly in front of his gate there.
Q. Directly in front of the Turner Gate?
A. Yes, Sir.
Q. Will you describe what occurred as you entered The Plains from the direction of Haymarket, to the point of the accident?
A. I came into The Plains, and I got to a Street there, I do not know what the name is, I would say about one hundred and twenty feet from there to where I struck Mr. Fewell on my right.
Q. You have reference to this Lane beside the bank on the North side of the Street?
A. That is right. That is where I first saw Mr. Fewell step off from the sidewalk, and he walked out I would say four or five feet off the sidewalk, and stopped, and looked up the Street, and whether he looked in both directions, I do not remember, and during that time, I got
page 46 } maybe half-way down the Street, and he had started across the Street to go on the other side, and when he did, I had already gotten halfway from the bank to the point where I hit him. He was directly in front of the car then. He was on the right side of the Street.
Q. Driving along there, you were on your side of the Street?
A. Yes, Sir.
Q. Which would be the North side of the Street?
A. Yes, Sir.
Q. You say you saw him step out into the Street from the North sidewalk?
A. That is right.
Q. And stop and pause and look?
A. That is right.
Q. Then he started again crossing the Street, diagonally across the Street, or approximately straight?

William J. Bryan.

A. I would say approximately straight; possibly diagonally.

Q. At that time do you think that you had covered about half the distance to the point of the accident? What did you do?

page 47 } A. I did not know what he was going to do; if he was going back. I assumed he saw me. My first instinct was to put on my brakes, which I did.

Q. What course did your car take?

A. It went straight up to the point where I hit him; it swerved a little bit to the left.

Q. Where did your car come to rest?

A. It came to rest with the left front near the double line.

Q. Was the rest of your car in the right lane?

A. In the right lane.

Q. Did your car strike Mr. Fewell?

A. Yes, Sir.

Q. How far did it go after striking him, do you know?

A. I was practically stopped. I may have traveled a foot.

Q. Where was Mr. Fewell lying?

A. On the left side of my front bumper.

Q. Within what distance from the bumper?

A. Right in front of the car. I would say within two feet of the car.

Q. Did you immediately get out of the car, and go to Mr. Fewell?

page 48 } A. Yes, Sir.

Q. Did anybody else come up about that time?

A. I think Mr. Yurgurtis came out of the house at the time, and several people gathered around there.

Q. Do you know whether Mr. Yurgurtis came out of the house or up the Street?

A. I do not remember about that.

Q. Was he the first person there?

A. I believe he was.

Q. Did Mr. Turner come up very shortly?

A. Yes, Sir.

Q. Was Mr. Fewell moved at that time, or later?

A. He was not moved until the Doctor got there.

Q. When you first went to Mr. Fewell, did you observe whether there was any alcohol on his breath, or not?

A. Yes, Sir.

Q. Was there a smell of alcohol on his breath?

A. There was.

William J. Bryan.

Q. Was it distinct?
A. Yes, Sir.
Q. What damage was there to your car?
A. Did not hurt the car, just a little dent on the left front fender.
Q. Or bumper?
page 49 } A. The fender.
Q. As you drove down the Street, you testified you were driving on your right-hand side of the center line. Were you lights burning?
A. Yes, Sir.
Q. Is the Street straight in the direction which you were going?
A. For a distance.
Q. What distance would you say the Street is straight to the point of the accident?
A. I would say about one hundred and forty feet.
Q. There is a curve beyond that?
A. Yes, Sir.
Q. It is not a sharp curve?
A. No, Sir.
Q. Did you observe whether a person standing on the sidewalk, in front of the Turner House, could see up the Street a good distance around that curve, or not.

Objection by Mr. Richards to the above question.

Mr. Tiffany:
Q. Have you returned to the scene of the accident since it occurred?
A. Yes, Sir. I observed later a person could
page 50 } see right up the hill, from the point where I hit him.
Q. For a substantial distance?
A. Yes, Sir.
Q. You do not know how far?
A. I would say at least a couple of hundred yards.
Q. What was the weather that night? Was it dry or raining, or what?
A. It had rained, but at the time of the accident, it was not raining.
Q. Was the Road damp or wet?
A. It was wet.
Q. Do you know whether you blew your horn, or not?

William J. Bryan.

A. No, Sir, I do not remember.

Q. Did you have time to do anything but think about what you were going to do after you saw Mr. Fewell start out again from his position four or five feet from the sidewalk?

A. No, Sir.

Q. When Dr. Adams came there, do you remember mentioning to Dr. Adams that Mr. Fewell appeared to be drinking?

A. Yes, Sir, I did.

Q. Do you remember what response Dr. Adams made?

page 51 } A. After Mr. Fewell had been removed to the sidewalk, there was an odor of alcohol, and I wanted to clarify that that odor was not coming from me. I asked Dr. Adams at the time, I asked him doesn't it appear that Mr. Fewell had been drinking, and he made some sort of affirmative gesture or remark. I do not know what he said.

Q. After Dr. Adams came, Mr. Secrist arrived, did he not?

A. Yes, Sir.

Q. Had your car been moved at the time Mr. Secrist arrived?

A. No, Sir.

Q. Do you know where Mr. Fewell was when Mr. Secrist came?

A. I think Mr. Fewell had been moved to the sidewalk, out of the Road, when Trooper Secrist got there.

Q. According to your recollection, were there any other cars parked along the Street at the time the accident occurred?

A. No, Sir.

Q. Was there any other traffic on the Street?

A. No, Sir.

Q. At the time the accident occurred?

A. No, Sir.

page 52 } Q. Was there anything to prevent Mr. Fewell from seeing the approach of your car, if he was looking?

A. No, Sir.

CROSS EXAMINATION.

By Mr. Richards:

Q. You stated that you were going about twenty miles an hour as you came into The Plains?

William J. Bryan.

A. Yes, Sir.

Q. This is the plat, we introduced it. This is the bank here, and this is the Road coming from Warrenton into The Plains. My understanding is you were coming down from Gainesville? (Indicating).

A. That is right.

Q. You did not make the turn from Warrenton?

A. No, Sir.

Q. You were coming directly straight through The Plains?

A. Yes, Sir.

Q. No other cars in front of you, going in the same direction?

A. No, Sir.

Q. Anything coming towards you?

A. I do not remember.

page 53 } Q. Were there any cars parked on either side of that Street, from the bank to the point where Mr. Fewell was struck?

A. No, Sir.

Q. This map shows that this Street is forty feet wide through the Town of The Plains. Do you recall what line is in the center of the Street, if any at all?

A. Yes, Sir.

Q. What kind?

A. A double white line, very dim.

Q. That is in the center of the Street?

A. Yes, Sir.

Q. You stated the first time you saw Mr. Fewell, you were about one hundred and twenty feet away from him? Is that correct?

A. Yes, Sir.

Q. Was he on the sidewalk, or on the shoulder at the time you first saw him?

A. He was in the process of stepping off the sidewalk when I saw him.

Q. When he stepped from the sidewalk and went several steps, I thought you stated he paused. How far away from him were you at that time, just as well as you remember?

A. From the time he paused?

page 54 } Q. When you saw him step from the sidewalk and pause, how far were you away from him then. Were you one hundred and twenty feet?

A. When he paused, I would say about.

Q. Did you notice whether or not he looked both ways?

William J. Bryan.

A. No, Sir; he looked in my direction, but did not look in the other direction.

Q. You did not blow your horn at that time?

A. I do not know whether I did, or not.

Q. You do not know whether you did, or not?

A. No, Sir.

Q. You were traveling by yourself? Is that correct?

A. Yes, Sir.

Q. With regard to this double center line, where were you driving as you came by the bank? Were you up against the center line, over on your right-hand side?

A. The bank is on the corner of Main Street.

Q. You were coming down here. The bank is there, and this is the Lane, and here is the Turner House, in front of which Mr. Fewell was struck. (Indicating). Were

page 55 } you over next to the sidewalk, or where?

A. I was on the right-hand side of the line.

Q. What caused you to turn your car to the left? Why did you turn your car to the left?

A. I do not recall turning my car to the left.

Q. If you were next to the sidewalk, and Mr. Fewell was struck approximately in the middle of the Road?

A. I was on the right-hand side of the line.

Q. How far were you from the line?

A. I do not know, but I was not close to the sidewalk by any means.

Q. Was there anyone else on the Street, outside of Mr. Fewell, on the sidewalk, any person that you noticed?

A. I did not notice any when I hit him. There was quite some time before anybody came around. Whether there was anybody on the Street at that time, I do not know.

Q. You were the first person that saw Mr. Fewell. Was he conscious or unconscious when you got out of the car?

A. He was conscious.

Q. Did you get down and look at him in the face? How close did you get to him at that time?

A. I got down and looked at him.

page 56 } Q. Then what did you do?

A. Someone was coming down the Street at that time, and I hollered for them to help me. I think it was Mr. Yurgurtis, and I think he came out of a house, I do not know. I asked him to call the Doctor, and then call a State Trooper.

Q. Did I understand you to state you observed alcohol on his breath?

William J. Bryan.

A. Yes, Sir.

Q. Are you in a position to say whether he was under the influence of alcohol, or not?

A. No, Sir.

Q. Do you take a drink yourself?

A. Occasionally.

Q. Had Mr. Fewell gotten at the center line, or across the center line? Where was he with regard to the center line at the time you struck him?

A. He was on the right-hand side of the center line; very close to it.

RE-DIRECT EXAMINATION.

By Mr. Tiffany:

Q. As you came down the Street you had a clear enough view of Mr. Fewell all the time after you left the Lane? You could see Mr. Fewell after you left the Lane by the bank?

A. Yes.

page 57 } Q. There was no obstruction between you and him, and nothing to obstruct your view of him?

A. No, Sir.

Q. You were driving on the right side of the center lane?

A. Yes, Sir.

Q. When you applied your brakes did your car go straight or to the left?

A. Went straight up until the point where it almost stopped, and swerved a little bit to the left; the left wheel on the double line.

Q. When Fewell walked off the walk, four or five feet, was there anything to indicate to you that he had not seen you, and was going to start up again, until after he started?

A. No, Sir.

Q. Did you assume when he looked your way, he had seen the car?

A. Yes, Sir.

The Court:

Q. If he had continued on his way, would you have cleared him?

A. I believe so, because I hit him almost the end of the left bumper.

S. S. Secrist.

page 58 } RE-DIRECT EXAMINATION.

By Mr. Richards:

Q. Mr. Tiffany asked you about skid-marks. How far did you skid, Mr. Bryan?

A. I did not measure it.

Q. Could you see your skid mark in the Road after you came to a stop?

A. Yes, Sir.

Q. Was it as far as from here to the hall, or to the trees out there? (Indicating). How far would you say they were?

A. I do not remember that.

Q. You have no idea how long those skid-marks were?

A. Trooper Secrist measured them off. I did not notice at the time how long it was.

Q. You said you had a clear vision of Mr. Fewell. Did you see him walk down the sidewalk prior to the time that he started to cross?

A. No, Sir.

Q. Do you remember whether you had your lights up high, or down low?

A. No, Sir.

Q. You did have them on?

A. They were on, yes, Sir.

page 59 } Q. Mr. Fewell is a large heavy man. He moves slowly with that leg now. Was he going at a pretty good gait across the Street?

A. He was more or less lumbering; going at a pretty good gait.

page 60 } S. S. SECRIST,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Tiffany:

Q. You are a State Trooper of Virginia?

A. Yes, Sir.

Q. You were called to the scene of this accident, the night of December 12, 1948?

A. Yes, Sir, I was.

Q. What time did you arrive, if you recall?

A. I was called shortly after mid-night. I do not recall the time, but a short time after I was called, I went on to the

S. S. Secrist.

scene. My recollection is that Billy Yurgurtis was the one who called me. When I arrived I found the Bryan car parked in the West Lane of the Road, West-bound Lane, parked at an angle. My impression is that the left front was over the line, but most of the automobile was still in the West Lane. The Road was damp. I talked to Dr. Adams. He was there when I arrived, and I asked him about the nature of the injury, and he told me that the man suffered a broken leg. The Ambulance was parked in the East Lane, and Mr. Fewell had been placed in the Ambulance, and several witnesses were there at the time.

Q. Did you go up to the Ambulance to talk to Mr. Fewell?

page 61 } A. No, Sir, I did not. I understood at the time that Mr. Fewell was suffering considerably, so I did not bother him.

Q. You found the Bryan car in the West-bound or North Lane of the Street?

A. Yes, Sir.

Q. With its left front wheel to the left of the South of the center line?

A. Yes, Sir.

Q. The balance of it to the North of the center line?

A. Yes, Sir.

Q. Parked at a slight angle, headed West?

A. Yes, Sir.

Q. Did you observe any skid-marks made by the Bryan Car?

A. Yes, you could trace the skids clearly leading from the two rear wheels. I traced them back for a distance of approximately forty feet. You could also trace the skids leading from the left front wheel. It also had laid down a light skid.

Q. Did those skid-marks start in the North Lane, and continue in that Lane up to the point of the accident?

A. Yes, Sir, they did.

page 62 } Q. There were no skid-marks made by the Bryan Car in the South or East-bound Lane, except possibly the left front wheel?

A. Except at the point where he apparently swerved the car to the left. Mr. Bryan stated at the scene that night, that at the time he was struck, the pedestrian,—he had come almost to a complete stop, and the car did go over to the left.

Q. The skid-marks originated in the West-bound Lane,

and continued that way right up to the point of impact, where they went slightly to the left?

A. Yes, Sir.

CROSS EXAMINATION.

By Mr. Richards:

Q. Using our picture again, this is the Lane by the bank, this is the point in front of Mr. Turner's house, where Mr. Fewell was struck. Were these skid-marks parallel to the white center line, or were they at an angle? In other words, which way was Mr. Bryan's car traveling?

A. I would say at a slight angle.

Q. Can you recall how far the beginning of the left-hand skid-marks was from the center line?

A. No, Sir, I do not have that.

Q. Would you say it was closer to the center line than the sidewalk, or can you state that?

page 63 } A. I would say it was nearer the white line than the sidewalk on the North.

Q. And your information was that the car had not been moved at the time you arrived?

A. Yes, Sir.

RE-DIRECT EXAMINATION.

By Mr. Tiffany:

Q. Mr. Secrist, at what point in the Road, with reference to the Turner House on the North side of the Road, did this accident occur?

A. It was in direct line with Mr. Turner's gate.

page 64 } R. C. TURNER,
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Tiffany:

Q. Your full name is R. C. Turner?

A. Yes, Sir.

Q. Where do you live, Sir?

A. I live at The Plains.

Q. You are a former Mayor of The Plains, I believe?

A. Yes, for a short while.

Q. Have you known Mr. Fewell very long?

R. C. Turner.

A. Yes, I have known him since about 1920, or 1922.

Q. The night of December 12, 1948, when this accident occurred, where were you?

A. At my cousin's, Mrs. Evelyn Turner's house, right opposite where the accident occurred.

Q. That is the house indicated on defendant's Exhibit "1", as the Turner House?

A. That is right.

Q. What attracted your attention to the collision?

A. The squealing of the brakes, and then I heard the bump, and I was upstairs in an Apartment, and I went to the window and looked out, and saw the car standing there, with the lights burning, and could see Mr. Fewell lying on the Road.

page 65 } Q. Did you immediately go out?

A. I went back to the other room and put my overcoat on, and went straight on out, a very short time.

Q. When you got out to the scene was Mr. Yurgurtis there ahead of you?

A. I think he was. There was someone there.

Q. What did you find? What position was the car in, and where was Mr. Fewell?

A. I would say that the car was on a slight angle. The left front wheel was slightly over the white line, probably six or eight inches over the left side of the double line, and Mr. Fewell was lying with his head towards the car, his feet down, and his shoulder was almost opposite the left wheel. He was lying lengthways the Street.

Q. The general direction of the car was headed towards the West?

A. Yes, Sir, almost due West; just swerved a little bit to the South at that point, where the brakes grabbed.

Q. The left front wheel of the car were six or eight inches to the South of the center line?

A. Yes, Sir.

Q. The balance of the car was in the North Lane?

A. Yes, Sir.

page 66 } Q. Mr. Fewell's shoulder was where?

A. His shoulder was almost under the bumper.

Q. Left side?

A. Left side of the bumper.

Q. When you got to Mr. Fewell, did you observe whether he had any alcohol on his breath?

A. I did not at that time. I only noticed that when I

R. C. Turner.

helped to left him after Dr. Adams came, across to the sidewalk, on the South side of the Street.

Q. You helped carry him across?

A. Yes, Sir—Somebody on the other side, I do not remember who, we took his shoulders; Dr. Adams had his feet.

Q. Did you notice he had alcohol on his breath?

A. Yes, he had. I am not prepared to say what kind it was. It was not whiskey, I do not think; it smelled more like beer or wine.

Q. Was it distinct or plain?

A. When I *stopped* over you could smell distinctly.

Q. Do you remember the hearing had in the Trial Justice Court, in February, of this year, about this same accident?

A. I think it was later than that,—after Mr. Fewell came back, yes, Sir.

Q. Do you remember Mr. Fewell testifying at that hearing?

page 67 } A. Yes, I think I do.

Q. Do you recall whether he at that time said he was almost to the South curb, when he was struck?

A. My recollection is I think he said one more step would put him on the South curb. That was my recollection of his testimony at that time. I was a little surprised at that, because I know he could not possibly have wriggled over to the middle of the Street.

CROSS EXAMINATION.

By Mr. Richards:

Q. You did not see anything prior to the time you heard the brakes squeal, did you?

A. No, Sir.

Q. Did you see the skid-marks later from the rear wheel of the car?

A. Yes.

Q. Could you state how far they came from the center line?

A. They were near the middle of the Street not close to the North side.

Q. Mr. Secrist testified these marks went for about forty-five feet. Were they uniform all that way back?

A. I do not recall that. I think I stepped it off, about fourteen steps. I do not remember whether any places looked like a break.

George William Yurgatis.

page 68 } Q. Were there any cars parked on either side of the Street, next to the curb?

A. I am sure there not.

Q. Nothing on the Street except Mr. Fewell and Mr. Bryan?

A. I am sure *there not.*

Q. You stated when you were assisting to get Mr. Fewell to the sidewalk or Ambulance, you did detect alcohol on his breath?

A. Yes, Sir.

Q. Smell more like beer than whiskey?

A. Yes, Sir; I do not think it was whiskey. Possibly a mixture of beer and wine.

Q. Was Mr. Fewell under the influence, or not?

A. I could not tell. He was suffering greatly when I was there, and was perfectly conscious, and grateful for everything that was done for him. I could not tell whether he was under the influence, or not?

page 69 } GEORGE WILLIAM YURGATIS, a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Tiffany:

Q. Will you please state your full name and age?

A. George William Yurgatis, twenty-one.

Q. Do you live at The Plains?

A. Yes, Sir.

Q. Is your house almost directly across the Road from the Turner House?

A. It is a little bit opposite of the Turner House.

Q. You recall the night of the accident that Mr. Fewell was injured?

A. Yes.

Q. Where were you at the time this accident occurred?

A. Coming down the sidewalk from the Drug Store, on the South side, I think it is.

Q. The Drug Store is on the South side of the Street?

A. Yes.

Q. You mean going in the direction of your home?

A. Yes, going towards Marshall.

page 70 } Q. Did you see Mr. Bryan's car pass you as you were walking there on the South side?

A. Yes, I did.

George William Yurgatis.

Q. When you first saw it, did you notice what speed it was going approximately?

A. Twenty or twenty-five, or something like that.

Q. After he had passed did anything occur to attract your attention that there might be an accident?

A. I did not notice anything until I heard his brakes and I heard the tires make a little fuss.

Q. Tell the jury what you heard or saw?

A. I saw Mr. Fewell leaving the sidewalk, and he stepped a couple of feet off, like he wanted to get across in front of the car, and made a couple of steps fast to get across.

Q. When you first saw Mr. Fewell was he on the sidewalk?

A. I think he was a little bit off the sidewalk.

Q. You said he took a couple of fast steps?

A. Yes, he started off; he was out from the sidewalk, and then he started off again, and he stopped to look.

Q. You mean the sidewalk on the North side of the Street?

A. Yes.

Q. Walking from the North side of the Street to the South side?

page 71 } A. Yes.

Q. When Mr. Bryan's car brakes began to squeal, can you state approximately what distance Mr. Bryan was from Mr. Fewell?

A. No, I do not.

Q. Do you know whether it was one, two or three car lengths?

A. Somewhere around two car lengths, I guess.

Q. You do not know exactly?

A. No, Sir.

Q. Was he pretty close to Mr. Fewell when his brakes began to squeal?

A. Not too close.

Q. You say about two car lengths?

A. Something like that.

Q. Did Mr. Fewell continue going on across the same Street where Mr. Bryan was approaching there?

A. Yes; he kind of made a couple of real fast steps so he could get on across.

Q. Did you see the Bryan Car hit Mr. Fewell?

A. Yes.

Q. Did you see the position where the Bryan Car stopped?

A. Yes. The front wheel was a little bit on the East side of the white line.

George William Yurgatis.

page 72 } Q. You mean the front wheels left front wheel?
A. Just the left front wheel. The rest of the car was on the right side.
Q. Was Mr. Bryan in the West-bound or North Lane, before the accident occurred, driving on his side of the Street?
A. Yes, he was driving on his side of the Street.
Q. Where was Mr. Fewell lying following the accident?
A. Just about right opposite the left front wheel.
Q. Within what distance of the left front wheel?
A. About a foot or two feet.
Q. Within one, two or three feet of the center line after the accident?
A. Yes, Sir.
Q. In the South Lane, South side of the Street?
A. Yes, Sir.
Q. Do you know whether Mr. Bryan blew his horn?
A. It seems to me he did.
Q. When was that, at the time the brakes squealed?
A. About the time the brakes started squealing. Somewhere along in there.
Q. You do not know? It is your impression?
A. I think he did.
page 73 } Q. After the accident did you help carry Mr. Fewell to the Street, or did you direct traffic?
A. No; I went in the house, and got a flashlight so I could slow the cars down.
Q. You did not get very close to Mr. Fewell?
A. No, I did not get close to him.

CROSS EXAMINATION.

By Mr. Richards:
Q. You had come out of the Drug Store did I understand you to say?
A. No, I did not come out of the Drug Store. I had been around it. I had just put my car in the garage.
Q. Here is the Road coming from Warrenton into The Plains, (indicating) and where had you come from?
A. From down this way. (Indicating).
Q. Turning to your left?
A. Yes.
Q. Where were you when you saw the Bryan Car the first time? If you will point out on the map here. This is the Road from Warrenton. (Indicating).

George William Yurgatis.

A. This is Dr. Schulze's. (Indicating). Along about in there.

Q. When you saw the Bryan Car?

A. Yes.

page 74 } Q. Did you see it coming from behind you? See any lights on it, conscious of it coming towards you?

A. Just another car coming.

Q. Were there any other cars on the Street that you remember?

A. No.

Q. Where was Mr. Fewell when you first saw the Bryan Car?

A. He was about a couple of feet from the sidewalk, I guess.

Q. You said it seemed like Bryan blew the horn. How far was he away from Mr. Fewell when he blew the horn, if you remember?

A. He had already put on his brakes about that time.

Q. Where was Mr. Fewell with regard to the double center line, when he was struck? Was he at the center line going over it?

A. He was right along about the center, somewhere, I think.

Q. Did you look at those skid-marks that Mr. Secrist referred to?

A. I looked at the, I did not pay any attention to them.

Q. Did you notice whether or not they were fairly close to the center line or a good ways away?

page 75 } A. I believe they were kind of close.

RE-DIRECT EXAMINATION.

By Mr. Tiffany:

Q. The skid-marks were in the West-bound Lane?

A. Yes.

Mr. Tiffany: The defendant rests, Sir.

page 76 } INSTRUCTIONS GRANTED AT REQUEST OF PLAINTIFF.

The Court instructs the Jury that if they believe from the evidence that the defendant, Bryan, was, at the time of the accident, operating his vehicle in a careless and reckless

manner and not keeping a proper lookout then he was guilty of negligence and if you believe such negligence was the proximate cause of the accident and that the plaintiff was not guilty of contributory negligence then you should find for the plaintiff.

(The Defendant by counsel objected to the granting of the foregoing instruction on the ground that there was no evidence that Defendant was operating his vehicle in a careless and reckless manner and no evidence that Defendant was not keeping a proper lookout and on the further ground that the evidence showed Plaintiff was guilty of contributory negligence as a matter of law. The objection was overruled and Defendant excepted.)

The Court instructs the jury that the rights of pedestrians and of motorists to use of the highway are equal and that their duties are mutual and reciprocal except in places where favored positions are assigned to one or the other by law and it was the duty of the defendant, Bryan to keep a lookout for and to exercise reasonable care not to in-
page 77 } jure the plaintiff, if he (Fewell) was exercising reasonable care for his own safety. A pedestrian about to cross a highway cannot blindly or negligently expose himself to danger, but he is not required to be continuously looking and listening to ascertain if automobiles are approaching. He must use such care as a reasonably prudent person would have used under the same circumstances.

The Court instructs the Jury that if they believe from the evidence that the plaintiff is entitled to recover, they should in estimating the damages to which the plaintiff is entitled take into consideration the bodily injuries he sustained, his mental suffering, the pain he underwent, the effect of the injury he received on his health, his loss of earning power, his physical condition according to the degree and probable duration thereof and as to whether the same is temporary or permanent, the amount expended or incurred and any amount which will be necessary to be expended or incurred by him for doctors, nurses, medicine, hospital treatment in endeavoring to be relieved or cured of the disabilities suffered as a result of the said accident, the inconvenience caused to the plaintiff by his injury and assess his damages at such sum as they may think just and proper under the evidence in this case not exceeding the sum of
page 78 } $10,000.00 claimed in the Notice of Motion.

INSTRUCTIONS GRANTED AT REQUEST OF DEFENDANT.

The Court instructs the jury that James Fewell has the burden of proving by a preponderance of the evidence that William J. Bryan was guilty of negligence and that this negligence was the proximate cause of the injury.

The Court instructs the jury that the plaintiff, James Fewell, cannot recover anything from the defendant, William J. Bryan, unless Bryan was guilty of negligence which was a proximate cause of the accident. Negligence is the failure to use ordinary care, that is, such care as an ordinarily prudent person would use under similar circumstances. Therefore, if the jury believe from the evidence that Bryan operated his car as an ordinarily prudent person might have done under the circumstances, then Bryan was not guilty of negligence and Fewell cannot recover anything from Bryan. James Fewell was under a similar duty not to be negligent, that is, he was under a duty to use ordinary care, or such care as an ordinarily prudent per-
page 79 } son would use for his own safety under the circumstances. Even if Bryan was negligent, if Fewell was also negligent in failing to use ordinary care for his own safety, and such failure contributed to the accident, then Fewell cannot recover anything from Bryan.

The Court instructs the jury that Fewell was not relieved of the duty of exercising ordinary care for his own safety by the fact that he was blind in his left eye. On the contrary, it was Fewell's duty to exercise such care as an ordinarily prudent person, also having such defective eyesight, would use under similar circumstances.

The Court instructs the jury that a person crossing a highway or street shall use ordinary care to see that such crossing can be made with safety. If the jury believe from the evidence that Fewell was crossing the highway or street without using ordinary care to see that the crossing could be made with safety, then Fewell was guilty of negligence and if the jury further believe from the evidence that such negligence contributed to the accident, then Fewell cannot recover anything from Bryan.

The Court instructs the jury that if Bryan, without fault of his own, was suddenly confronted by an emer-
page 80 } gency and to avoid hitting Fewell was compelled to act instantly, either to try to stop or to turn to the right or the left, then Bryan was obligated only to make such decision as a person of ordinary prudence in such a

position might have made, even though such a decision might not have been the wisest choice. If the jury believe from the evidence, that Bryan acted as a person of ordinary prudence in such a position might have acted, then Bryan was not guilty of negligence and you cannot find a verdict for Fewell.

* * * * *

I, J. R. H. Alexander, Judge of the Circuit Court of Fauquier County, Virginia, certify that the foregoing certificate contains all the evidence received and all the instructions given in the above styled case before me, together with the objections and exceptions of counsel, the rulings of the Court thereon, and other incidents of trial. I have authenticated the exhibits offered in evidence by writing my name on each of them, the exhibits being designated "Exhibits 1 and 2 with Plaintiff's evidence" and "Defendant's Exhibit 1", and being the original exhibits introduced in evidence.

Reasonable notice in writing was given to the attorney for the Defendant of the time and place at which this certificate was to be tendered. In accordance with that page 81 } notice, the certificate was tendered to me on the 16th day of December, 1949. Witness my hand this 16th day of December, 1949.

J. R. H. ALEXANDER,
Judge of the Circuit Court of
Fauquier County, Virginia.

I hereby certify that the foregoing is an accurate typewritten copy of the Certificate of the Trial Judge in the above styled cause. Witness my hand this 16th day of December, 1949.

J. R. H. ALEXANDER,
Judge of the Circuit Court of
Fauquier County, Virginia.

The foregoing certificate of the Trial Judge was received by the undersigned this 16th day of December, 1949.

T. E. BARTENSTEIN,
Clerk, Circuit Court of Fauquier
County, Virginia.

page 82 } I hereby certify that the foregoing is a true and correct copy of the *entrie* record of the cause lately pending in this Court styled James Fewell *v.* William J. Bryan, with the exception of plaintiff's No. 1 and No. 2 and Defendant's Exhibit No. 1, which original Exhibits are enclosed herewith; as requested by the attorney for the defendant:

That the required suspending bond under Section 6338 of the Code was filed in my said Office on 13 December 1949;

And that the Notice required by Section 6339 of the Code was given.

Given under my hand this 21 December 1949.

T. E. BARTENSTEIN,
Clerk, Circuit Court of Fauquier County.

Cost of this record $8.50.

A Copy—Teste:

M. B. WATTS, C. C.

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