Record No. 4849

In the
Supreme Court of Appeals of Virginia
at Richmond

BAMMA BATES, ADMINISTRATRIX, ETC.

v.

EMORY A. THOMPSON, SHERIFF, ETC.

FROM THE CIRCUIT COURT OF ALLEGHANY COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4849

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 26th day of February, 1958.

BAMMA BATES, ADMINISTRATRIX, ETC.,
Plaintiff in Error,

against

EMORY A. THOMPSON, SHERIFF, ETC.,
Defendant in Error.

From the Circuit Court of Alleghany County

Upon the petition of Bamma Bates, Administratrix of Ellis G. Bates, deceased, a writ of error was awarded her by one of the Justices of the Supreme Court of Appeals on February 21, 1958, to a judgment rendered by the Circuit Court of Alleghany County on the 14th day of October, 1957, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as such Administrator of Gordon Bates, deceased, was defendant; no bond being required.

RECORD

* * * * *

Commonwealth of Virginia

In the Circuit Court of the County of Alleghany.

Bamma Bates Admx. of Ellis G. Bates, Deceased

v.

Emory A. Thompson Sheriff of Alleghany County, Virginia, and as such Admr. of Gordon Bates, Deceased

NOTICE OF MOTION FOR JUDGMENT.

You are hereby notified that unless within twenty-one (21) days after service of this Notice of Motion for Judgment on you, response is made by filing in the Clerk's Office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default, without further notice.

Done in the name of the Commonwealth of Virginia, this 31 day of Oct., 1956.

F. E. DILLARD, Clerk
CLARA JOHNSON, Deputy Clerk.

R. B. STEPHENSON, p. q.
Covington, Virginia.

page 2 }

* * * * *

MOTION FOR JUDGMENT.

To the Honorable Earl L. Abbott, Judge of said Court:

The plaintiff, Bamma Bates, Administratrix of Ellis G. Bates, deceased, hereby moves the said Court for a judgment against the defendant named above, for the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) for damages for the death, by wrongful act, of Ellis G. Bates, by the negligent acts of Gordon Bates as follows:

(1) The plaintiff alleges that she has duly qualified as the Administratrix of Ellis G. Bates, deceased, before the Clerk of the Circuit Court of Alleghany County, Virginia, and the estate of Gordon Bates, deceased, has been duly committed to Emory A. Thompson, Sheriff of Alleghany County, Virginia.

(2) The plaintiff alleges that on November 2, 1955, in the night time of that day, that the said Ellis G. Bates was riding as a passenger and guest in a certain automobile which was then owned, operated, controlled and driven by the said Gordon Bates, in and along a certain highway known as U. S. Highway 60, and that the said automobile, driven as aforesaid by Gordon Bates, was proceeding in a westerly direction along said highway about four miles west of the City of Covington; that the said Gordon Bates then and there drove and operated said automobile at a great and illegal rate of speed in and along said highway, upon an abrupt curve in said highway, which curve was to the right of the said Gordon Bates; that the said Gordon Bates then and there failed to keep his said automobile under reasonable and page 3 } proper control, and to keep a proper look-out for approaching traffic on said highway; and that the said Gordon Bates carelessly, negligently and unlawfully, then and there, ran said automobile to the left of the center of said highway, and then and there collided with and struck a certain other automobile which was proceeding in and along said highway in an easterly direction, and on the right-hand side of the said highway going easterly; and that the plaintiff's decedent, Ellis G. Bates, was then and there thrown against and upon the automobile in which he was riding as aforesaid with great force and violence, and the said Ellis G. Bates was then and there killed; and that the said *Gorden* Bates, the driver of said automobile, was also then and there killed; and the plaintiff alleges that the death of plaintiff's decedent was then and there caused by the gross carelessness of the said Gordon Bates as aforesaid; and the plaintiff moves the said Court for a judgment against the said defendant for the said sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) damages which the plaintiff is entitled to recover from the said defendant.

BAMMA BATES
Admx. of Ellis G. Bates
By Counsel.

Filed in the Clerk's Office the 31 day of Oct., 1956.

Teste:

F. E. DILLARD, Clerk
SLOAN JOHNSON, D. C.

* * * * *

page 4 } PROOF OF SERVICE.

Virginia:

In the Circuit Court of the County of Alleghany.

LAW NO.....

Bamma Bates Admx. of Ellis G. Bates, deceased

v.

Emory A. Thompson Sheriff of Alleghany County, Virginia, and as such Admr. of Gordon Bates, Deceased.

Returns shall be made hereon, showing service of Notice issued October 31, 1956, with copy of Motion for Judgment filed Oct. 31, 1956, attached:

Executed on the 31st day of October, 1956, in the County of Alleghany, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to Emory A. Thompson, Sheriff, Alleghany County, and as such Admr. of Gordon Bates, Deceased in person.

..... Deputy Sheriff.
of Alleghany County, Va.

75c Sheriff's Fee Paid.

Returned and filed the 31 day of Oct., 1956.

F. E. DILLARD, Clerk
C. SLATER, Deputy Clerk.

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* * * * *

ANSWER.

For answer to that certain Motion for Judgment heretofore filed against him, the defendant Emory A. Thompson, Sheriff of Alleghany County, Virginia, and Administrator of Gordon Bates, deceased, now comes and says:

A. In so far as the defendant is advised, the allegations of paragraph numbered 1 of said Motion for Judgment are correct, although the dates of the qualifications mentioned therein are not given.

B. Other than paragraph numbered 1, the residue of the Motion for Judgment consists of one paragraph only, which is rather long and somewhat involved, and for answer to this paragraph defendant denies that plaintiff's intestate was riding as a passenger and guest in an automobile owned, operated, controlled and driven by Gordon Bates and specifically denies that Gordon Bates was operating said automobile at the time of the death of the plaintiff's intestate; and defendant further denies that the automobile was being driven at a great and illegal rate of speed in and along said highway, upon an abrupt curve in said highway; and defendant denies that the driver of the automobile, if the same were Gordon Bates, was guilty of gross or culpable negligence which brought about or caused the death of plaintiff's intestate, and defendant calls for specific proof of the allegations contained in paragraph numbered 2 of the Motion for Judgment that are denied in this defensive pleading.

page 6 } C. For further answer to said Motion for Judgment defendant alleges that plaintiff's intestate was guilty of negligence which proximately caused or contributed to bring about the situation resulting in his death.

And now having fully answered, this defendant prays that the Motion for Judgment against him be dismissed at the costs of the plaintiff.

EMORY A. THOMPSON, Sheriff of Alleghany County, Virginia, and as such Administrator of Gordon Bates, deceased

By W. H. JOLLY
Of Counsel.

Filed Nov. 9, 1956.

F. E. DILLARD, Clerk.

* * * * *

page 7 }

* * * * *

Motion to strike out the answer filed by counsel for the defendant in the above suit on November 8, 1956.

The plaintiff, by counsel, moves to strike out the answer filed by counsel for the defendant upon the following ground:

The motion for judgment alleges that the automobile in which the plaintiff's intestate was riding at the time of his death was then and there owned, operated, controlled and driven by Gordon Bates. The defendant has filed no affidavit with his said answer denying that the said Gordon Bates owned, operated, controlled and drove said automobile, as is required by Section 8-115 of the Code of Virginia; therefore, the plaintiff, by counsel, moves that said answer be stricken out, and that a time be fixed for hearing this motion.

BAMMA BATES, Administratrix of
Ellis G. Bates, deceased
By R. B. STEPHENSON
Counsel for the plaintiff
Covington, Virginia.

* * * * *

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* * * * *

AFFIDAVIT.

The defendant, Emory A. Thompson, Sheriff of Alleghany County and as such Administrator of Gordon Bates, deceased, denies that on November 2, 1955, in the County of Alleghany, on U. S. Route 60 that the automobile in question was operated by the deceased, Gordon Bates, at the time and place of the accident, which resulted in the death of plaintiff's intestate, Ellis G. Bates, and calls for strict proof thereof.

EMORY A. THOMPSON
Sheriff of Alleghany County and
as such Administrator of Gordon
Bates, deceased.

State of Virginia,
City of Covington:

This day personally appeared before me, Sandra..... ....., a Notary Public in and for the county and state aforesaid, Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as such Administrator of the estate of Gordon Bates, deceased, whose name is subscribed to the foregoing affidavit and after first having been duly sworn deposes and says that the allegations of the foregoing affidavit are true to the best of his knowledge and belief.

Given under my hand this 21st day of November, 1956.
My commission expires May 11, 1959.

SANDRA .....
Notary Public .

* * * * *

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* * * * *

ORDER.

This day came the plaintiff, by her attorneys, and there likewise came the defendant, by his attorneys, in response to a pre-trial conference had this day.

After a discussion by counsel and the Court, it is ORDERED as follows:

1. That the pictures tendered by plaintiff, marked by the Court as Plaintiff's Exhibits 1, 2 and 3, are to be admitted as evidence in the trial of this case, which is set for the 20th day of May, 1957, without it being necessary to have present the photographer who took said pictures for their identification; there is reserved to the defendant, however, the right to otherwise object to the introduction of said pictures as evidence and which objections, if made, shall then be ruled upon by the Court as to their sufficiency.

2. That the defendant shall file further grounds of defense in amplification of paragraph numbered "C" of the original answer heretofore filed herein, which additional grounds of defense is hereby received and filed.

3. That the Motion of plaintiff to strike out the affidavit heretofore filed herein by defendant denying that the auto-

mobile in question was operated by the deceased, Gordon Bates, at the time and place of the accident, is hereby overruled, to which action of the Court the plaintiff, by counsel, excepted.

Enter 5-8-57.

E. L. A.

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* * * * *

ADDITIONAL GROUNDS OF DEFENSE.

For further answer to the Motion for Judgment brought against the defendant, and in amplification of paragraph numbered "C" of the answer heretofore filed herein by defendant, defendant now comes and says:

That plaintiff's intestate was guilty of negligence which proximately caused or contributed to bring about the situation resulting in his death, in that if Gordon Bates was the operator of the automobile in question, plaintiff's intestate continued to ride in the automobile in which he was subsequently killed after knowing that said automobile had been, and was being, driven in a reckless and dangerous manner and after ample opportunity had been offered plaintiff's intestate to leave the automobile, if he so chose, and still further, both occupants of the Bates automobile were engaged in drinking intoxicating beverages and each assumed the risk of riding with the other.

W. H. JOLLY
Of counsel for the defendant,
Emory A. Thompson.

I certify that on May 7, 1957 I mailed a true copy of the foregoing pleading to each counsel of record for the plaintiff.

W. H. JOLLY, p. d.

Filed May 8, 1957.

EARL L. ABBOTT, Judge.

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B 85063

RECEIPT FOR FEES COLLECTED.

County of Alleghany Virginia May 16 1957
Received of W. H. Jolly Atty. $1.50 One & 50/100 Dollars For Summons On May 16, 1957 In matter of Bamma Bates *v.* Sheriff Thompson.

M. W. SWAZE
Deputy—Sheriff.

page 12 } Commonwealth of Virginia

To the Sheriff of Alleghany County, Greetings:

WE COMMAND YOU TO SUMMON Dr. M. I. Hanna, Alvin Vance to appear before the Judge of our Circuit Court of the County of Alleghany, at the Courthouse thereof on the 20 day of May, 1957, 10:00 A. M. to testify and the truth to say in behalf the Defendant in a certain matter of controversy in our said court before the Judge depending and undetermined between Bama Bates, Admr. etc. Plaintiff and E. A. Thompson, Sheriff, etc. Defendant and this ..... he .... shall in no wise omit under penalty of $100. And have then there this writ.

Witness, F. E. Dillard, Clerk of our said Court at the Courthouse, the ..... day of ....., 19 ...., and in the 18 .... year of the Commonwealth.

F. E. DILLARD, Clerk.

(on back)

Executed by delivering an office copy of the within Summons to the within named Alvin Vance in person in Alleghany County, Virginia, on 16th day of May 1957.

E. A. THOMPSON
Sheriff, Alleghany County, Virginia
By M. W. SWAZE
Deputy Sheriff Alleghany County, Virginia.

E. A. Thompson, Sheriff, etc.
Ads.
Bama Bates, Admr., etc.

To April Term

On the 16th day of May 1957 in Alleghany County, Virginia, upon the within named M. I. Hanna at his usual place of abode by tacking a true copy of the within writ/notice upon the door of his residence, the said Dr. M. I. Hanna being absent from his usual place of abode.

E. A. THOMPSON
Sheriff Alleghany County

M. W. SWAZE
Deputy Sheriff Alleghany County.

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* * * * *

May 20, 1957.

ORDER.

This day came the parties by their Attorneys, and a jury being demanded thereupon came a jury of seven persons of this County, drawn, summoned and selected in the manner directed by law, to-wit: J. E. Williams, Arthur P. Martin Jr., Virgil J. Harmon, Randall E. Brungart, George E. Garten, Lundy Perry and Seymour Kern, to whom there was no objection and who were sworn the truth to speak upon the issues joined, and having heard the evidence adduced on behalf of the plaintiff, thereupon the defendant moved the Court to strike the evidence of the plaintiff, which motion being argued is overruled by the Court, to which ruling of the Court the defendant by counsel excepted; and having heard the evidence in full, the defendant renewed his motion to strike the evidence of the plaintiff, which motion being argued is again overruled by the Court, to which ruling of the Court the defendant by counsel excepted, and the jury having heard the argument of counsel retired from the bar to consider of the verdict, and after sometime returned into Court and upon their oaths say: "We the Jury find in favor of the plaintiff and award in the sum of $25,000." and the jury are discharged. Thereupon the defendant by counsel, moved the Court to set aside the verdict of the jury and to enter judgment in favor of the defendant, on the grounds that

the same was contrary to the law and the evidence; without sufficient evidence to support it; misdirection of the Court to the jury; Verdict was excessive and shows prejudice by the jury; further that the Court erred in failing to sustain the motions of the defendant to strike the plaintiff's evidence. Whereupon the Court ordered the motion to be docketed for hearing at a later date of this Court.

page 14 } May 20, 1957.

Bamma Bates Admrx.

v.

Emory A. Thompson Admr.

1 J. E. Williams
2 ~~Rose Somers Beirne~~
3 ~~Wm. E. Hodges~~
4 ~~Pete P. Byers~~
5 ~~Roy E. Swartz~~
6 Arthur P. Martin Jr.
7 Virgil J. Harmon
8 Randall E. Brumgart
9 George E. Garten
10 ~~R. M. Loving, Jr.~~
11 ~~Robert E. Friel~~
12 Lundy Perry
13 Seymour Kern

page 15 } We, the jury find in favor of the plaintiff, and award in the sum of $25,000.

Signed RANDALL E. BRUNGART
Foreman.

page 16 } INSTRUCTION NO. 1.

The court instructs the jury that it has been established by a preponderance of the evidence in this case that Gordon Bates was the owner and operator of the Buick automobile involved in the accident and it has been further established by a preponderance of the evidence in this case that Gordon Bates was guilty of gross negligence in the operation of his automobile and if such negligence was the proximate cause of the death of Ellis Bates, then the jury must find the

verdict for the plaintiff, unless the jury believe from a preponderance of the evidence that Ellis Bates was guilty of negligence which proximately caused or contributed to his death.

Given 5-20-57.

E. L. A.

page 17 } INSTRUCTION NO. 2.

The court instructs the jury that Ellis Bates, deceased, is presumed to have used ordinary care for his safety and unless disclosed by the plaintiff's evidence, the burden of the proof is upon the defendant to show by a preponderance of the evidence that Ellis Bates was guilty of negligence in failing to use ordinary care for his safety and that his negligence, if any, proximately caused or contributed to his injury and death.

Given 5-20-57.

E. L. A.

page 18 } INSTRUCTION NO. 3.

The court instructs the jury that it was the duty of Ellis Bates to exercise ordinary care for his safety, that is, such care as an ordinary prudent person would exercise under similar or like circumstances and if the jury believe from the evidence that Ellis Bates exercised ordinary care for his safety, then Ellis Bates would not be guilty of contributory negligence.

Given 5-20-57.

E. L. A.

page 19 } INSTRUCTION NO. 4.

The court instructs the jury that under the influence of intoxicants means as follows: "Any person who has drunk enough alcoholic beverages to so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation, shall be deemed to be intoxicated."

The court further instructs the jury that unless you be-

lieve from the evidence that Gordon Bates had drunk enough *alocholic* beverages to so affect his manner, disposition speech, muscular movement, general appearance or behavior as to be apparent to observation, then he would not be deemed to be under the influence of intoxicants while operating his automobile.

Given 5-20-57.

E. L. A.

page 20 } INSTRUCTION NO. 5.

The court instructs the jury that if they find for the plaintiff in ascertaining the damages the plaintiff is entitled to recover, the jury shall fix such amount as they feel fair and just under all of the circumstances of the case not to exceed, however, $25,000.00, the amount sued for and in ascertaining the damages the jury may take into consideration the age, intelligence and health of Ellis Bates and may allow such sum as they may deem fair and just by way of solace and comfort to his parents for the sorrow, suffering and mental anguish occasioned to them by his death and such sum as they may deem fair and just by way of compensation for the loss of his care, attention and society.

Given 5-20-57.

E. L. A.

page 21 } INSTRUCTION NO. D.

The Court instructs the jury that if you believe from the evidence in this case that as Gordon L. Bates and his brother, Ellis G. Bates, were proceeding from Fort Belvoir, Virginia, towards Covington, Gordon L. Bates commenced to drink intoxicating beverages and during the course of said drive operated his said automobile at an unreasonable and unlawful rate of speed, and was stopped and given a summons by State Trooper Talbert, in the vicinity of Lexington, and if you further believe that despite his getting a ticket, or summons, he continued to drink intoxicating beverages and to operate his automobile in a careless and reckless manner, and was again stopped in the City of Covington by Officer Vance and warned about the manner of his said operation of the Buick automobile, and if you still further believe that during the happening of these events, and throughout the

course of said drive, Ellis G. Bates was present and a passenger in said automobile, and had actual knowledge of the same and yet continued to ride therein, despite the fact that he had several opportunities to get out of said automobile, and if you still further believe that the proximate cause of the accident was the gross negligence of Gordon L. Bates, brought about by his drinking of intoxicating beverages which rendered him an unfit and unsafe driver, then the Court tells you that Ellis G. Bates was guilty of contributory negligence, as a matter of law, in continuing to ride in said automobile, and your verdict should be for the defendant.

Given 5-20-57.

E. L. A.

page 22 } INSTRUCTION NO. E.

The Court instructs the jury that if you believe from the evidence there was, at the time of the accident, present in the blood of Gordon L. Bates a quantity of alcohol as much or more than .15 per cent by weight, as indicated by a chemical analysis of his blood made after the accident, then the Court tells you there is a presumption in law that Gordon L. Bates was under the influence of intoxicants at the time of the accident.

Given 5-20-57.

E. L. A.

page 23 } INSTRUCTION NO. F.

The Court instructs the jury that your verdict must not be based on surmise, conjecture or sympathy for the parties but must rest entirely upon the evidence in the case and the Court's instructions.

Given 5-20-57.

E. L. A.

page 24 } INSTRUCTION NO. C.

The Court instructs the jury that the mere unexplained happening of an accident is not of itself evidence of any

negligence on the part of the defendant's decedent, but instead the burden rests upon the plaintiff to prove each and every element of her case by a preponderance of the evidence.

Refused 5-20-57.

E. L. A.

page 25 } INSTRUCTION NO. B.

The Court instructs the jury that the burden of proof rests upon the plaintiff in this case, the administratrix of Ellis G. Bates, deceased, to prove by a preponderance of the evidence:

1. That Gordon L. Bates was the driver of the automobile in question at the time of the accident:
2. That the said Gordon L. Bates was guilty of gross and culpable negligence, amounting to a willful and wanton disregard of the safety of his brother, Ellis G. Bates, and that such gross and culpable negligence was the sole proximate cause of the accident.

And the Court further tells the jury that even if the jury shall believe from a preponderance of the evidence the above facts, yet if they further believe from the evidence that Ellis G. Bates was negligent in assuming the risk of continuing to ride in his brother's automobile, and that such assumption of risk on his part contributed to his death, then the Court tells you his estate cannot recover against the estate of his brother, and your verdict should be for the defendant.

Refused 5-20-57.

E. L. A.

page 26 } INSTRUCTION NO. A.

The Court instructs the jury that unless you believe from a preponderance of the evidence in this case that Gordon L. Bates was the driver of the Buick automobile at the time of the accident, or if it appears equally as probable that Ellis G. Bates was the driver of said automobile as it does that

Gordon L. Bates was the driver thereof, then the Court tells you that your verdict must be for the defendant.

Refused 5-20-57.

E. L. A.

page 27 } B 85017

RECEIPT FOR FEES COLLECTED.

County of Alleghany Virginia May 18, 1957
Received of R. B. Stephenson $3.75 Three and 75/100 DOLLARS For serving summons On May 17, 1957 In matter of Bates Admr. *v.* Thompson.

LEON P. SMITH
Deputy—Sheriff.

ORIGINAL—TO PAYEE

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* * * * *

ORDER.

This day came the plaintiff, by her attorneys, and there likewise came the defendant, by his attorneys, whereupon the defendant, by counsel, moved the court to set aside the verdict of the jury awarding the plaintiff a judgment in the sum of $25,000.00 and enter final judgment in favor of the defendant, on the grounds that the evidence disclosed that plaintiff's decedent was guilty of contributory negligence, or assumption of risk, as a matter of law, and that the Court should have sustained the motion of the defendant to strike the plaintiff's evidence at the conclusion of the evidence introduced on behalf of the plaintiff, or at the conclusion of all of the evidence, and for the further reasons assigned at the bar of this Court and set forth in the transcript of the trial.

And the Court, after having duly and maturely considered the briefs filed by counsel for the parties herein, and the transcript of the trial, and after having heard the argument of counsel, being of the opinion that the evidence establishes that as a matter of law plaintiff's decedent was guilty of con-

tributory negligence, and that, therefore, said motion should be sustained, it is, accordingly, ORDERED that the verdict of the jury, in favor of the plaintiff herein, be, and the same is hereby set aside, and final judgment is entered in favor of the defendant, together with his costs in this
page 29 } behalf expended, to which action of the Court, in setting aside the verdict of the jury, counsel for the plaintiff duly except.

Enter 10-14-57.

E. L. A.

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GROUNDS OF EXCEPTION.

The plaintiff, Bamma Bates, Administratrix of Ellis G. Bates, deceased, excepted to the action of the Court in setting aside the verdict of the jury and entering final judgment for the defendant, and assigns the following grounds in support of her exception:

ONE.

The verdict of the jury is plainly right and amply supported by the evidence.

TWO.

The jury were fully instructed on the issues of contributory negligence or assumption of risk.

THREE.

As a matter of law and as a matter of fact, plaintiff's decedent was not guilty of contributory negligence.

FOUR.

The sole proximate cause of the death of plaintiff's decedent was the gross and wanton negligence of Gordon Bates.

page 31 } FIVE.

The Court should have entered final judgment in favor of the plaintiff on the verdict of the jury.

Respectfully,

BAMMA BATES, Administratrix of
Ellis G. Bates, deceased

T. W. MESSICK
By Counsel.

Filed Oct. 15, 1957.

F. E. DILLARD, Clerk.

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To: Kime and Jolly, Attorneys for E. A. Thompson, Admr. of Gordon Bates, deceased.

You are hereby notified that on December 3, 1957 at 10:00 o'clock A. M. of that day at the Courthouse of Alleghany County, Virginia, we will present a transcript of testimony and incidents of the trial to Judge Earl L. Abbott, Judge of the Circuit Court of Alleghany County, Virginia, in the case of Bamma Bates, Admr. of Ellis G. Bates, *v.* E. A. Thompson, Admr. of Gordon Bates, and request the said Judge to sign said transcript and make same a part of the record, in order that we may apply to the Supreme Court of Appeals of Virginia for a writ of error in said cause.

Given under our hands this November 27, 1957.

T. W. MESSICK
R. B. STEPHENSON
R. B. STEPHENSON, JR.
Counsel for Bamma Bates, Admr.
as aforesaid.
By R. B. STEPHENSON
Of counsel.

Filed Nov. 27, 1957.

F. E. DILLARD, Clerk.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: R. S. Kime and W. H. Jolly, Attorneys for Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as such, Administrator of Gordon Bates, deceased:

You are hereby notified that Bamma Bates, Administratrix of Ellis G. Bates, deceased, plaintiff in the above suit, intends to appeal from a certain final judgment entered by the Circuit Court of Alleghany County in the above styled suit on October 14, 1957, and this is to give you notice of an appeal to the Supreme Court of Appeals of Virginia from said final judgment; and we hereby set out and assign the following errors of the Trial Court, which notice of appeal and assignments of error is given you as provided by Rule 5, Paragraph 4, as set out in the rules of the Supreme Court of Appeals of Virginia.

FIRST, the Trial Court erred in setting aside the verdict of the jury and entering up judgment for the defendant. The question of the contributory negligence of Ellis G. Bates was submitted to the jury under the instructions of the Court and this issue of fact was decided by the jury in favor of the plaintiff; and the said verdict of the jury was plainly right and amply supported by the evidence.

SECOND, the Trial Court erred in holding as a matter of law that Ellis G. Bates was guilty of contributory negligence as a matter of law and in setting aside the verdict of the jury and entering up judgment for the defendant.

THIRD, the Court erred in refusing to enter up judgment for the plaintiff on the verdict rendered by the jury.

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T. W. MESSICK
R. B. STEPHENSON, JR.
R. B. STEPHENSON
Counsel for Bamma Bates,
Administratrix of Ellis G. Bates.

Filed Dec. 11, 1957.

F. E. DILLARD, Clerk.

* * * * *

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* * * * *

August 26, 1957.

Messrs. Kime & Jolly
Attorneys at Law
Salem, Virginia

Mr. R. B. Stephenson
Attorney at Law
Covington, Virginia

Mr. R. B. Stephenson, Jr.
Attorney at Law
Covington, Virginia

Mr. T. W. Messick
Attorney at Law
Roanoke, Virginia

Re: Bamma Bates, *Administrix* of Ellis G. Bates, Deceased *v.* Emory A. Thompson, Sheriff etc. and as such Administrator of Gordon Bates, Deceased.

Gentlemen:

I am of the opinion that the deceased, Ellis G. Bates, at the time of the collision in which he died, was guilty of contributory negligence as a matter of law, and as a result his administratrix is not entitled to recover judgment in this case. I should have sustained the motion to strike on this ground but was so sure the verdict would be for the de-

fendant I overruled it to have the jury's verdict. Frankly, I was shocked by the verdict and I am setting it aside.

The motion to set aside is sustained, the verdict is set aside and judgment will be entered in favor of the defendant. The defendant will recover his costs.

An order may be drawn to be entered in accordance herewith.

Sincerely yours,

EARL L. ABBOTT.

Filed and made a part of the record 8-26-57.

E. L. A.

* * * * *

TRANSCRIPT OF EVIDENCE.

Appearances: R. B. Stephenson, Sr., Esq., T. W. Messick, Esq., and R. B. Stephenson, Jr., Esq., of counsel for the plaintiff.

R. S. Kime, Esq., and W. H. Jolly, Esq. (Kime and Jolly), of counsel for the defendant.

Stenographic report of all the testimony, together with the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, the objections and exceptions to instructions, and other incidents of the trial of the case of Bamma Bates, Administratrix of Ellis G. Bates, deceased, *versus* Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as such Administrator of Gordon Bates, deceased, tried at Covington, Virginia, on May 20, 1957, before Honorable Earl L. Abbott, and jury, in The Circuit Court of Alleghany County, Virginia.

Reported by: Marcus A. Bieler, Court Reporter, 1743 Devon Road, S. W., Roanoke, Virginia.

Received and filed Dec. 3, 1957.

EARL L. ABBOTT, Judge.

* * * * *

Trooper H. R. Crush.

page 3 } May 20, 1957
10:00 o'clock, A. M.

(The reporter was sworn.)

(A jury of seven men was duly impaneled and sworn.)

(Mr. Stephnson, Jr., opened to the jury in behalf of the plaintiff at 10:30 o'clock, A. M., and concluded at 10:40 o'clock, A. M.)

(Mr. Kime opened to the jury in behalf of the defendant at 10:40 o'clock, A. M., and concluded at 10:45 o'clock, A. M.)

Mr. Messick: Your Honor, before proceeding with the evidence, would it be all right to take a view?

The Court: Not now; I'm not denying it but I will just wait and see whether there is a necessity for it or not.

TROOPER H. R. CRUSH

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

DIRECT EXAMINATION.

By Mr. Messick:

Q. Your name is Mr. H. R. Crush?

A. Yes, sir.

Q. You are a Virginia State Trooper?

A. Yes, sir.

Q. How long have you been a trooper, Mr. Crush?

page 4 } A. A little over ten years.

Q. Mr. Crush, on the 2nd of November, 1955, did you investigate an accident in which Gordon Bates, Ellis G. Bates and a Mr. Wilkerson were killed?

A. Yes, sir.

Q. What were the—what kind of automobiles were involved in the accident?

A. There was a 1955 Buick operated by one of the Bateses and a '47 Cadillac being driven by Mr. Wilkerson.

Q. Who was the owner of the 1955 Buick car?

A. Mr. Gordon Bates.

Q. Gordon Bates?

A. Yes, sir.

Trooper H. R. Crush.

Q. Officer, where did this accident happen—in what vicinity?
A. 3 miles and 6/10 west of the City limits of Covington—just west of Hump Back Bridge.
Q. On what road did the accident occur on?
A. On Route 60.
Q. Have you determined the width of the paved portion of that highway at the point of the accident?
A. 20 foot and 10 inches.
Q. Now, what is the nature of the road—is it a straight road, a winding road; what character of road is it at the point where this accident occurred, both east and
page 5 } west, for approximately a half a mile either side?
A. Well, that would be a winding road—it was on a hill; a grade rather, going west.
Q. Was the road straight where the accident—is it a curve or is it a winding, curving road?
A. Going west, the road is a curve to the right—just in my judgment, I'd say, about a 30° turn.
Q. Is that classified as a blind curve, or not, sir?
A. I couldn't say.
Q. Well now, you told us that the highway, the paved portion, was 20 feet and 8/10 inches wide. As you proceed west toward the Hump Back Bridge, is it upgrade or what is the condition of the road, or downgrade, sir?
A. It's upgrade, going west.
Q. Now, at the point of this accident and for some distance, approximately we'll say, a half a mile east and west of where the accident occurred, is the road marked with any white line or lines?
A. Yes, sir; double solid lines.
Q. Double solid lines—meaning, that double sold white line, I think everybody knows and understands prohibits the passing of vehicles in that vicinity, doesn't it?
A. Yes, sir.
Q. Vehicles proceeding west are prohibited from passing and vehicles proceeding east were likwise prohibited from passing?
page 6 } A. Yes, sir.
Q. And you told us it was about a 40° curve to the right as you proceeded west and uphill?
A. Yes, sir.
Q. A steep grade or not, sir?
A. Not at the point of impact; no, sir.
Q. As you approach the point of impact, was it—

Trooper H. R. Crush.

A. Well, it's steeper as you start up the hill than it is at the point of impact; yes, sir.

Q. At the point of impact—anywhere near the brow or the crest of the hill?

A. Yes, sir; just east of the crest.

Q. That's in the direction towards Covington—it was just slightly east. About how far east of the crest of the hill?

A. I didn't measure—just a slight distance, a short distance.

Q. Now, Mr. Crush, east of the point of the accident, has the Highway Department erected any warning signs of any character?

A. There were some maximum safe speed signs on each end of the curve. The one on the east end of the curve is east of the Dunlap Creek, or east of the bridge, and the one on the west end of the curve is just west of the steel bridge on Dunlap Creek.

Q. Known as the Hump Back Bridge, I believe; page 7 } is it not, sir?

A. No, sir.

Q. There are two bridges. Which one is the Hump Back?

A. The steel bridge on Route 60 is the one I'm speaking of.

Q. Yes, sir. Now, what do these signs say?

A. 40 miles per hour as the maximum safe speed.

Q. Does it describe it as a winding road, maximum safe speed 40 miles per hour; is that the way the signs are?

A. Well, it has an arrow at the top of it and then a 40 miles maximum safe speed below the arrow on the same post.

Q. And this was in a restricted safe speed—maximum safe speed zone as shown by those signs, both east and west of the point of the accident?

A. Yes, sir.

Q. Now, Mr. Crush, about what time did you reach the scene of this accident?

A. Approximately 8:20 P. M.

Q. From your investigation, about what time did the accident occur?

A. Approximately 8:05.

Q. What were the weather conditions?

A. The road was dry.

Q. Now, from your investigation, were you able to determine on which side of the center of the highway page 8 } this accident occurred?

A. Yes, sir.

Trooper H. R. Crush.

Q. Which side did it occur?
A. It occurred on the eastbound lane as you head west.
Q. In other words, were you able to ascertain in which direction the Buick car was driven?
A. Yes, sir; it was headed west.
Q. It was driven west. That was the Buick car owned by Gordon Bates?
A. Yes, sir.
Q. In which direction was the car owned by Mr. Wilkerson being driven?
A. It was headed east.

(Mr. Messick then produced some photographs.)

The Court: Do you want to make your objections out of the presence of the jury?
Mr. Kime: Yes, sir.
The Court: Gentlemen of the jury, suppose you go to your room for just a few moments.

(The jury retired from the courtroom at 10:55 o'clock, A. M.)

The Court: I suppose those pictures, #1, #2 and #3, the Court previously marked at a pretrial conference.
Mr. Messick: Yes, sir, your Honor.
page 9 } The Court: All right.
Mr. Jolly: I presume they are being offered now.
Mr. Messick: Yes, sir.
Mr. Jolly: By the plaintiff. All right, sir, counsel for the defendant objects to the admission of pictures #1, #2 and #3 offered by the plaintiff and, especially, pictures #2 and #3 that show the body of Gordon L. Bates and part of the body of Ellis G. Bates on the ground; that they would tend to inflame and incite the jury and create sympathy for the parties in this case. They are nothing but sensational type newspaper photographs; they don't disclose any pertinent information that is proper in this case, or in a case of this character.
Picture #1 simply shows the two vehicles and our objection, very frankly, is not strenuously made to picture #1, but is very strenuously made as to numbers 2 and 3.

Trooper H. R. Crush.

The Court: What is the purpose of offering the pictures, Mr. Messick, when the defendants concede the collision took place on the east lane or left-hand lane, or the wrong side of the road, as far as the Bates car is concerned? I know what the pictures are.

Mr. Messick: Well, there are a number of these, if your Honor please. The first reason is, the pictures page 10 } show the damage, the great damage, done to the vehicles, which is proper evidence for the jury to take into consideration in determining the force of impact.

The Court: Wouldn't picture #1 show that?

Mr. Messick: Sir?

The Court: Wouldn't picture #1 show that?

Mr. Messick: It shows some of it but not all of it. Now, if your Honor please, pictures #2 and #3 are most important in this respect, it has been denied here that Gordon Bates was the driver of this vehicle and they said, in their opening statement, that they don't know who was the driver, that both of them were killed and killed instantly. Now, we will show by picture #1—

Mr. Kime: Number 1?

Mr. Messick: Not #1, I mean by picture #2.

Mr. Kime: All right.

Mr. Messick: That the body of this man here on the driver's side of the car (indicating) was Gordon Bates. He will be identified, by people who knew him, as being the driver. Now, picture #3, we will show if your Honor please, that the young man on the right side of the car there (indicating) in the front seat away from the steering wheel was Ellis Bates and we will show that he had on a uniform. He had been working for a motel in the vicinity of Washington. That uniform, he has on, and there page 11 } was a stripe down his trousers that shows that it was Ellis Bates (indicating). We will identify the driver and the guest in the car by their respective positions that they occupied as shown by these photographs and identify Gordon Bates as the driver and Ellis Bates as the passenger, or guest, in the car.

The Court: I think, gentlemen, the pictures are proper.

Mr. Kime: May it please the Court, we'd like to be heard on that, and for the purpose of the record, we want to here state that we have—that what has been said by Mr. Jolly in his original objection and what has just been said by Mr.

Trooper H. R. Crush.

Messick has been said in the presence of State Trooper H. R. Crush and that we know that he knows the position of the bodies and all and he can testify from what he actually saw right there. We have no objection to that; we couldn't object to that. Now, if the evidence—if there is evidence here before the Court and before the jury that can identify these men and can describe them, we are still objecting to the pictures because of the fact that they were taken for newspaper purposes; they are sensational pictures and it is not necessary to use the pictures for that purpose. The firsthand evidence would be the evidence of the trooper himself who saw them and the position, or the positions which they oc-
page 12 } cupied.

The Court: Objection overruled; I'm going to let the pictures go in.

Mr. Kime: We object to the ruling of the Court and except.

The Court: While the jury is out, let's take up with the trooper your question that you were raising in your opening statement that counsel objected to about what was found in one of the men's pockets—the summons. Can't we take that up now or do you want to wait until later?

Mr. Kime: No, sir; we would like to take it up now.

The Court: All right; let's take it up now.

By Mr. Kime: (Addressing the witness)

Q. I want to ask you, Trooper Crush, did you not find in the pockets of Gordon Bates what is commonly termed a speeding ticket that had been issued that same morning by Trooper Talbert of the State Police?

A. Yes, sir. It was issued that same day; I don't know the exact time—sometime that day it had been issued.

Q. Where is that ticket?

A. It was left with Mr. Bates's personal belongings, as far as I know.

Q. You never took charge of the ticket?
page 13 } A. No, sir; I did not.

The Court: Mr. Talbert would have a copy. You had him summonsed here.

Mr. Kime: Oh, yes; we got him but we want to show he found it and connect it up.

The Court: All right; you stated that to the jury when there was an objection. Now, what is the objection?

Trooper H. R. Crush.

Mr. Messick: Well, as we understand, that they found in his pocket a ticket for speeding in Augusta County—I think it was—or Rockbridge County or Augusta County, Virginia, on U. S., I suppose, Route 11 near Fairfield, 60 or 70 miles from here on a four-lane or three-lane straight highway and we take the position that any evidence that he may have received a ticket for speeding is not admissible as being entirely too remote and is not bearing on the issue of what occurred west of Covington here.

The Court: Well, it would in the sense that you were contending that he was the driver. Of course, I see the reason you are objecting to it; you don't want to bring in any question of contributory negligence or the fact that the younger Bates, Ellis, assumed any risk or was guilty of contributory negligence. That's probably your objection to it.

Mr. Messick: The fact that he may, or may
page 14 } not, have been speeding in Augusta County—

The Court: Let us see what Mr. Kime's purpose in bringing it in was.

Mr. Kime: Not only that, may it please the Court, we are also going to connect it up with what happened when the Bates brothers got here in Covington; not only was that ticket issued for speeding but we are going to prove by Officer Talbert that both of these boys got out of the car; that the younger brother knew that he got that ticket and his older brother went to Lexington to the dispatcher and discussed the matter with the dispatcher and the dispatcher will be here and both the state troopers and the dispatcher will testify that Gordon Bates was drinking. In addition to that, when he got to Covington, Virginia, he was again stopped by a police officer here in Covington and warned of the way he was driving recklessly.

The Court: I think that would be admissible, Mr. Messick.

Mr. Messick: Well, as to what occurred in Augusta County, Virginia?

Mr. Jolly: Rockbridge County.

Mr. Messick: In Rockbridge County?

The Court: It would be admissible to show that Ellis
Bates was driving with this man under those con-
page 15 } ditions when he was driving under an excessive
speed and he was drinking and, therefore, he was assuming the risk.

Mr. Messick: Well, it depends as to what he was drinking. Anybody may have had a beer to drink and not be under the influence of intoxicants—

Trooper H. R. Crush.

The Court: That's true.

Mr. Messick: —in any respect.

The Court: Let's see how the evidence develops. If it develops along that line, I'll admit it but at the proper time you can make your objection.

Mr. Messick: Our position is this, does this defendant in this case take the position, as the defense—we may as well get this straight because they haven't alleged that in their statement of defense or in their opening statement—do you take the position that Gordon Bates was under the influence of intoxicants in the operation of his car?

Mr. Kime: May it please the Court, the position that we take as defendant in this case is that, first, the burden rests upon the plaintiff in this case to prove that the actual driver of the car at the time of the happening of the accident and mind you we call the Court's attention to the fact that these boys were in Covington together shortly before this and we don't know whether the younger boy got under the wheel after having—the older brother having gotten this ticket and having been warned by a police officer in Covington. We don't know who was under the wheel. That is our first position. And this, the burden is on them to show that the other brother, Gordon, was driving, and if he was not driving the younger brother knew all about the drinking. He knew all about being warned by the state trooper and being actually given a ticket and his attempt to pay his fine and he also knew he was in the car when stopped by the police officer here in Covington.

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The Court: Well, I assume you are not going to admit or deny that Gordon Bates was under the influence of intoxicants; you are not going to do either?

Mr. Kime: We understood Gordon Bates was under the influence of intoxicants.

The Court: All right. Are you going to admit it; are you going to put on proof to show it?

Mr. Kime: We are going to put on proof to show it.

Mr. Jolly: Yes, sir.

Mr. Messick: Well, we object to it unless he alleges it in his statement of defense.

Mr. Kime: What was that now?

Mr. Messick: We asked for a statement of defense in this case and if you are going to take the position that this man, Gordon Bates, was under the influence of intoxicants at the time of the operation of the

page 17

automobile or was under the influence of intoxicants, then we want you to put it in your statement of defense.

The Court: They don't have to right now, sir.

Mr. Kime: Well, may I answer that, may it please the Court? As a matter of fact, we did not know definitely whether this man was under the influence at that time or not. We knew he was drinking and we knew he had been arrested and stopped and I want this record to show—and if I'm wrong about it, I want the record to show it—let the Commonwealth Attorney of this County, who is one of plaintiff's counsel, or one of the plaintiff's attorneys, state in this record that he didn't know it and he didn't know exactly what Dr. Hanna had done in connection with taking this man's blood test and what Dr. Hanna had ascertained. They are not taken by surprise.

Mr. Stephenson, Jr.: I will answer that. First of all, my being Commonwealth's Attorney doesn't have anything to do with this case. All three occupants of this vehicle were immediately killed and there was no prosecution to ensue; there was no criminal investigation to speak of other than what Trooper Crush here knows about it; there was no reason for any thorough investigation.

page 18 } The Court: We are not getting anywhere right now.

Mr. Kime: I said that only, may it please the Court, as to knowledge and not being taken by surprise, that's all.

Mr. Stephenson, Jr.: It's up to them to claim what their defense is.

The Court: It's up to you to prove your case. If they are going to come in later and their evidence will not hurt you that Gordon Bates was under the influence.

Mr. Stephenson, Jr.: Your Honor, will your Honor direct them to file a grounds of defense on contributory negligence?

The Court: (Reading):

> Both occupants of the Bates automobile were engaged in drinking intoxicating beverages and each assumed the risk of riding with the other.

The grounds of defense doesn't say either one was under the influence; it just said—

Mr. Kime: Of course, we don't think we have to go that far.

The Court: Just one at a time, gentlemen. What do you want now?

Trooper H. R. Crush.

Mr. Messick: I want the defense to state whether or not they rely on Gordon Bates being under the in-
page 19 } fluence of intoxicants as a defense in this case in that they claim that Ellis Bates was contributorily negligent in riding with him. Now, if they take the position that he was under the influence of intoxicants, then certainly they should state it in their statement of defense.

The Court: They don't have to state it then if they will state it now.

Mr. Kime: May it please the Court, how under the sun could we as defense attorneys say we are relying on the defense that Gordon Bates was under the influence when that may be a jury question, or a question for the Court, if the evidence was submitted to the Court? We don't know whether he was under the influence or not. All we know is he was drinking and we can prove they smelled liquor on his breath and there was a blood test made and we understand that Dr. Hanna—M. A. Hanna— has that test and we will introduce it in Court for whatever it is worth. That is as far as we can possibly go.

The Court: All right.

Mr. Stephenson, Jr.: He charges me with greater knowledge that he has, your Honor.

The Court: I expect both of you know more about it even than you are telling the Court:

Mr. Stephenson, Jr.: Hasn't he got to state
page 20 } whether or not he was under the influence? That's what the report required him to do.

The Court: Not necessarily. I'm admitting the photographs, marked #1, #2 and #3, over the objection of defendants. I'm going to permit the defendant to examine the witness, Crush, with reference to the summons found in his pocket and produce evidence later on, if he can, as to the nature of that summons, and as to whether or not Gordon Bates was under the influence or not, they don't admit it. They don't actually deny it. But if, when the time comes for them to put on their evidence that he was under the influence, it will inure to your benefit so the question may come down in this case as to whether or not Ellis Bates was guilty of contributory negligence; that may be the sole issue. I don't know. But, let's go ahead with this trial on that basis.

Mr. Messick: Judge, I might say at this point, the mere fact that there was found on his person by this officer a summons—

Trooper H. R. Crush.

The Court: Standing alone, would be inadmissible but that, coupled with all the other facts, may make the evidence to show that Ellis Bates was guilty of contributory negligence and they have a right to show that and that's part of the grounds of their defense.

Mr. Kime: That's part of our case.

page 21 } Mr. Messick: I understand but what I was getting at is that, if they have the officer that they say summonsed here who issued the summons and will prove the circumstances, he merely may have been running in excess of 55 miles an hour on a perfectly straight road.

The Court: Let's see what that officer will testify to and in the meantime I think it's proper to ask him if he found that summons in his pocket.

Mr. Messick: Well, suppose he didn't have any evidence to come on later on?

The Court: Then, I will instruct the jury to disregard that statement.

Mr. Messick: All right, sir; that will be all right. Well, his Honor said he would instruct the jury to disregard it so that will be all right. Of course, your Honor understands we are objecting to the admissibility of it as being too remote.

The Court: I understand and, offhand, standing alone, I think your objection is well taken but in view of Mr. Kime's statement what they will tend to prove, or what they intend to prove, then I should let the evidence go in and on their failure to prove what they say they will prove then I shall strike it out.

Mr. Messick: All right, sir.

The Court: Bring the jury out. Now, Mr. Bie-
page 22 } ler, take those photographs and put the official numbers on them.

(The photographs referred to above were then received in evidence and marked, PLAINTIFFS EXHIBITS #1, #2 and #3, respectively.)

(The jury returned to the courtroom at this time, 11:13 o'clock, A.M., and the trial continued before the jury.)

By Mr. Messick: (continues examination)

Q. Officer, I hand you Plaintiff's Exhibit #1 and ask you if that is a picture of the Buick automobile and Cadillac automobile together at the scene of this accident?

A. Yes, sir; I would say so.

Trooper H. R. Crush.

Q. Had the vehicles been moved before you got there, sir?
A. No, sir.
Q. Now, I notice in this picture a double white line (indicating). Are those vehicles on the north or south side of the double white line?
A. South side.

The Court: It would be a whole lot easier for the jury to understand if you would say on the right side or the wrong side.

By Mr. Messick:
Q. All right, sir. Were they on the wrong side or the right side of the double white line—which is which?

page 23 } By The Court: (interposing)
Q. As far as the Bates automobile.
A. Bates automobile. It was on the wrong side.

By Mr. Messick:
Q. On the wrong side, and this is the Bates automobile here, is it not, sir (indicating)?
A. Yes, sir.
Q. And this is the Cadillac automobile of Mr. Wilkerson's here (indicating)?
A. Yes, sir.

(Defendant's exhibit #1 was then handed to the jury for inspection.)

Q. Now, take plaintiff's exhibit #2 and I will ask you if that is a picture of the Buick automobile and the body of one of the Bates brothers lying on the left side of the car.
A. Yes; yes, sir.

(PLAINTIFFS EXHIBIT #2 was then handed to the jury for inspection.)

Q. The bodies were in that position when you got there?
A. Yes, sir.
Q. Had it been moved at all, sir?
A. No, sir.

The Court: All right; go ahead and ask him further on picture #3.

Trooper H. R. Crush.

By Mr. Messick:

page 24 } Q. Yes sir. I hand you Exhibit #3 and ask you if you know that is the picture of both the automobiles involved and if this is the foot or shoe and white sock of one of the Bates boys (indicating) and over on the right side of the car you can see the picture of another Bates boy in a uniform and a stripe down his trousers (indicating). Is that correct, Officer?

A. Yes, sir.

Q. Now, would you mind coming over before the jury and let me point that out?

The Court: Let him point it out.

Mr. Messick: All right, sir.

(Mr. Messick and the witness approached the jury.)

Q. (Continued) In regard to that foot there, sir, is that the foot of—

A. This is the foot of the boy that was shown in the other picture (indicating). His foot is up in the car. And this is the other boy that has the uniform on, on the right-hand side of the car. This is his left leg here with a stripe in the uniform (indicating).

By A Juror:

Q. Is that the driver of the car or—

A. I couldn't say.

By Mr. Messick: (continues examination)

page 25 } Q. Now, this is the foot of the man who was on the driver's side of the car, the left side (indicating)?

Mr. Jolly: Ask the officer, Mr. Messick.

The Court: Let him testify; don't lead the witness.

Mr. Jolly: We object, sir; it's leading.

By Mr. Messick:

Q. What is it; is that the foot of anybody and, if so, who; do you know?

A. That's the foot of Gordon Bates on the left side of the Buick (indicating).

Q. May I have that picture back just a minute, please sir? Is that the body of Gordon Bates there (indicating) with the

foot extended into the car on the driver's side as shown by those pictures, sir?

A. According to his credentials, that was on his person, yes.

Q. And the picture of the man on the right side, with the uniform on, do you know who he was?

A. That was Ellis Bates.

Q. Yes, sir; the steering wheel, of course, of the Buick automobile is on the left side of the car, isn't it, sir?

A. Yes, sir.

Q. And that is the steering wheel of this car (indicating) and the body of Gordon Bates, identified as such, with the foot there (indicating), as shown in Exhibit #3, is on the left side where the steering wheel was; isn't that correct?

A. Yes, sir.

page 26 } Q. And that's the man who operated the automobile—Gordon Bates?

A. Yes, sir.

Q. All right, sir. Do those pictures show the damage done to those cars, sir, pretty well?

A. Considerable damage; yes, sir.

Q. Practically demolished, weren't they, sir?

A. Yes, sir.

Q. Both of them?

The Court: Well, let's return to your seat then.

(The witness resumed the witness chair.)

(The three exhibits were then handed to the jury for inspection.)

By Mr. Messick:

Q. Now, Officer, were there any skid marks or tire marks behind this Buick automobile and, if so, where did they start and what were the length and do you have a diagram or picture of them, sir?

A. Yes, sir; there was one mark apparently made by the left wheels. It wasn't a skid mark; it was a swerve mark made by the side of the tire. It started out as a narrow black mark and widened out as the distance extended. The total distance of that mark was (witness referred to a diagram) —it was 158 feet and 6 inches. The mark started on the south side, or in the east-bound lane, 2 foot 5 inches to the left of

the double solid lines and this mark extended up
page 27 } to the back of the Bates car (indicating).
Q. Where the head-on collision occurred?
A. Yes, sir.

By the Court: (interposing)
Q. How far from the white lines was it at the point of the collision? You said it was 2 feet where it started.
A. It was 3 foot and 2 inches.
Q. At the point of the collision?
A. Yes, sir; after the cars came to rest.

By Mr. Messick:
Q. Now, do you have a diagram there showing that, Officer Crush?
A. Yes, sir.

Mr. Messick: Would you gentlemen like to see this diagram?
Mr. Jolly: Yes, sir.

(Diagram was then handed to counsel for the defendant for inspection.)

By Mr. Kime:
Q. Trooper Crush, how far did you say the tire mark was? The Court asked you at the point of collision, from the double white mark.
A. Oh, the tire mark?

The Court: Yes.

By Mr. Kime:
page 28 } Q. Yes, sir; that's the question the Court asked you.
A. I was wrong. I was figuring it from the car.

By The Court:
Q. I said from the double white line.

(The diagram was returned to the witness.)

A. It was 7 foot 8 inches from the line to the skid mark. I was figuring to the car.

Trooper H. R. Crush.

Q. From the skid mark to the double white line was 7 feet 8 inches?
A. Yes, sir.

The Court: All right; that's what I asked you.

A. I'm sorry, sir.

Mr. Kime: At the point of collision.
The Court: Well, where it stopped.
The Witness: Yes, sir.
(The diagram was then handed to Mr. Messick.)

By Mr. Messick:
Q. I believe you wrote some names on here that we will tear off, Officer. Those names there; is that right, and is that all right?
A. Yes, sir.

(Mr. Messick removed the names of certain parties from the diagram, with permission from defendant's counsel and the witness.)

By Mr. Messick: (continues examination)
Q. You have November 2, 1955, Time: 9:15 P.M.
page 29 } A. Yes, sir.
Q. What time did you say you got to the scene of the accident?
A. That diagram wasn't drawn at the scene. 8:20 is when I arrived at the scene of the accident.
Q. What time did you draw the diagram about it?
A. That was sometime later, after.
Q. Do you have your original notes and original diagram that you made out there on the back of your notes, sir?
A. Yes, sir; that was made off of this stuff here (indicating original notes).
Q. It was taken off of this diagram in your book here?
A. Yes.

Mr. Messick: You see, gentlemen, he just copied it from this diagram in the book (indicating original notes of the witness).
Mr. Kime: That's all right.

Trooper H. R. Crush.

By Mr. Messick:

Q. The time should be there, instead of 9:15, about 8:15 or 8:20?

A. 8:20 is when I arrived; yes, sir.

Q. All right now, sir, we want to offer this in evidence as plaintiff's exhibit #4.

The Court: All right. Mark the diagram #4.

page 30 } (The diagram referred to above was received in evidence and marked, PLAINTIFF'S EXHIBIT #4.)

By Mr. Messick:

Q. And I will get you to come over and explain it to the jury. Now, if you will come over here to the jury, Mr. Crush, I think we can explain it better.

(Witness approached the jury.)

Q. You have this road being marked in a westerly direction (indicating) and east in this direction (indicating).

A. Yes, sir.

Q. And you have marked this along here ((indicating) as the shoulder of the road on the south side?

A. Yes, sir.

Q. What is this road "Lick Run Mountain"? (indicating)

A. That's a dirt road that goes up on the mountain off to the right of Route 60 on Lick Mountain.

Mr. Messick: (Addressing the jury) Do you all see all right?

The Jury: Yes.

By Mr. Messick: (continues examination)

Q. And you have impact 28.4 feet. What does that mean, sir?

A. That's the distance from point of impact to this dirt road (indicating), the corner of this dirt road.

Q. I see. That was in a southeasterly direction

page 31 } 28 feet; is that correct?

A. Yes, sir.

Q. All right, sir. Now, the width of the paved portion, you have marked it as 20 feet 10 inches?

Trooper H. R. Crush.

A. Yes, sir.

Q. And this is a double white line that you have in the center of this road; is it not, sir (indicating)?

A. Yes, sir.

Q. Now, you told us that a tire mark—a long tire mark made by the left wheels of the Bates automobile began 2.5 feet south of the double white line and continued for 158.6 feet to that point there (indicating), and this is the front end, showing the collision of the two vehicles; is it not, sir?

A. Yes, sir.

Q. Now, how far was—the Judge asked you how far was the tire mark to the south of the center lines when the vehicles came to stop.

A. 7 foot 8 inches.

Q. In other words, it came from 2½ feet to 7 foot and 8 inches and showed a leaning tire mark on this curve for a distance of 158.6 feet to the point where the two vehicles came together?

A. Yes, sir.

Q. Did that accident occur entirely on the Bates car's wrong side of the road?

page 32 } A. Yes, sir.

Q. And this tire mark made by his vehicle was entirely on his wrong side of the road, too, wasn't it, sir (indicating)?

A. Yes, sir.

Q. Now, the front end of the Bates car, and shown by your figures was 3 feet and—3.2 feet south of the center line at the point of impact, wasn't it, sir?

A. Yes, sir.

Q. Was the Cadillac car driven by Mr. Wilkerson entirely on its right side of the road?

A. Yes, sir.

Q. From your investigation, Officer, was this collision a sideswipe, a head-on, or what was it?

A. It was a head-on.

The Court: All right.

(The witness returned to the witness chair.)

By Mr. Messick: (continues examination)

Q. I believe that, as shown by your map there, that after you got to the scene of the accident that the left rear wheel

of the Bates car was 1 foot and 8 inches off of the hard surface on the south side, wasn't it, sir?

A. I don't remember the distance it was off the shoulder.

Q. Well, here are your notes right here, sir (indicating).

A. Yes, sir; 1 foot and 8 inches off the hard
page 33 } surface.

Q. Now, were you able to determine whether the two cars, from the impact—when the two cars came together, if there was any swerving either way and, if so, what did it show there, Officer?

A. Apparently from the marks in the road, the Bates car, the rear end, had veered to the left as they hit and the rear of the Cadillac had also veered to the left. It hit in a twist (indicating), twisted the rear of both cars to the left.

Q. And that's the reason for the Bates car being—the rear end being a foot and a half off the hard surface on the extreme left or wrong side of the road?

A. Yes, sir.

Q. Because of the twist when they hit, it twisted like that (indicating)?

A. Yes, sir.

Mr. Messick: That's all we care to ask Mr. Crush.

CROSS EXAMINATION.

By Mr. Kime:

Q. Trooper Crush, I want to ask you just several questions. In your measurements, where you first started to measure them, the marks that you have been testifying to that you saw on the road, 2 feet 10 inches you said from the white line—the double white lines. Now, there's a space between these lines. Were you measuring from the center of
page 34 } the space or were you measuring from the side of the white lines, or how?

A. That was 2 foot 5 inches to the south side of the white line, to the outside of the line, not from the center of the road.

Q. Well, I thought that you said it was; I didn't exactly understand but it's 2 feet 5 inches from the white mark on the Wilkerson side of the road?

A. Yes, sir; the south line.

Q. And were all your measurements taken from the south side of the line, of the white line, or the two white lines, the south side?

A. Yes, sir; yes, sir.

Trooper H. R. Crush.

Q. Now, the road that you spoke of is a little—I don't know whether it's a county road or not—but that goes up the hill going from Covington towards—what is that little place—Callahan. It turns to the right and goes up the hill. It's a kind of a little wood road of some kind, isn't it?

A. Yes, sir; I think that's a privately owned road.

Q. Just a private entrance that Mr. Messick was asking about?

A. Yes, sir.

Q. When you got to the scene of the accident, I believe you testified, as far as you knew, that none of these bodies had been moved?

A. Yes, sir.

page 35 } Q. Did you know the Bates brothers?

A. No, sir; I did not.

Q. You didn't recognize them as such; you didn't know who they were?

A. That's true.

Q. But you found in the pocket of one who turned out to be Gordon Bates you said to the Court and jury that he had on him—you found in his pocket a speeding ticket?

A. Yes, sir.

Q. And that ticket had been issued by Officer—State Police Officer, I should say, Talbert, who was stationed in Rockbridge County?

A. Yes, sir.

Q. Do you know Officer Talbert?

A. Yes, sir.

Q. And you know he is a state police officer?

A. Yes, sir.

Q. You recall whether or not that ticket said on its face how fast that Gordon Bates was going at the time he was stopped?

A. Yes, sir; it was on there but I couldn't say exactly what it was now.

Q. Don't you remember?

A. Either 70 or 75.

Mr. Messick: Wait just a minute, if your Honor

page 36 } please.

Mr. Kime: He can testify from his recollection.

Mr. Messick: But if he has the witness here, the trooper here that made out the ticket—

Mr. Kime: I just asked him what he said.

Trooper H. R. Crush.

The Court: I think he can ask what this officer saw. Of course, with the other trooper, or what the other trooper will testify, will establish exactly what it is.

Mr. Messick: We think that's the best evidence.

The Court: I think so, too, but it's not important right now.

Mr. Kime: We will connect it up.

Q. (Continued) And that ticket bore a date on the same day of this accident?

A. Yes, sir.

Q. And you say as far as you know the ticket remained with the body; you did not pick the ticket up?

A. No, sir; it was left with his personal stuff at Mr. Arritt's Funeral Home.

Q. Who is he?

A. Arritt's Funeral Home.

Q. At the funeral home. I see what you mean. Trooper Crush, you were testifying from this sheet of ruled paper that was shown to the jury (indicating) and you page 37 } also showed this sheet of ruled paper to the jury (indicating), and this paper was prepared later on from what you had in your official field notebook?

A. Yes, sir; it was taken off of the notebook?

Q. The information was. You just simply sat down and put the information on a larger sheet of paper later on; you don't know when you did it, do you?

A. Just after the accident.

Q. Well, do you mean after the accident?

A. 9:15 P.M., on November 2, 1955.

Q. How long did you stay there?

A. I don't know how long I was at the scene.

Q. You were there at 8:20?

A. Sergeant Lambert came out.

Q. Then, Sergeant Lambert came out?

A. Yes, sir.

Q. And this is 9:15 P.M. (indicating) and you meant that 9:15 P.M., then to be the time of day on November 2nd that you made this little drawing?

A. That's true; yes, sir, that wasn't the time of the accident.

Q. As a matter of fact, you were on your way to West Virginia with a supply of blood; isn't that correct?

A. Yes, sir.

Trooper H. R. Crush.

Q. And you went ahead and you made your trip, didn't you?

page 38 } A. Yes, sir.

Q. Well, it has some significance but you could have prepared this some other time (indicating diagram), couldn't you?

A. I prepared it after I left the funeral home, after I came from West Virginia, and was at the funeral home.

Q. Did you make much of an investigation there at the scene of the accident? You testified about the marks you saw there in the road. Was there anything else you saw there?

A. (There was no response.)

Q. Did you examine the Bates car?

A. Yes, sir; I examined both of them.

Q. Did you examine the interior of the Bates car?

A. To a certain extent; yes, sir.

Q. When you say that, what do you mean by "to a certain extent"?

A. I don't know what you are getting at.

Q. Didn't you find a broken whiskey bottle in it?

A. Yes, sir.

Q. And you made a note of that on your notes, didn't you, "pint bottle broken in floor of car" —I reckon; is that "in floor" or "on floor"?

Q. "Broken". Were there also some other bottles there that are generally used for a chaser, like little gingerale bottles or Seven-Up bottles?

page 39. A. I don't remember; I couldn't say.

Q. Well, you don't say that they were not there, do you?

A. No, sir; I do not.

Q. Do you remember what brand of whiskey that was?

A. No, sir.

Q. You have also testified at some length about the pictures there and you testified to the fact that these two cars struck head-on?

A. Yes, sir.

Q. And they came together with a considerable impact. Now, as a matter of fact, you don't know who was driving the Bates automobile, do you?

A. No, sir; I do not.

Mr. Kime: That's all.

Mr. Messick: That's all. Your Honor, I think we would save a lot of time by going to the scene of this accident.

The Court: Not now, sir.

(The witness stands aside.)

MR. CECIL BATES,

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

DIRECT EXAMINATION.

page 40 } By Mr. Messick:

Q. You are Mr. Cecil Bates?

A. That's right.

Q. Mr. Bates, where do you live, sir?

A. I live on Snake Run, Route 3.

Q. Route 3?

A. Covington, Virginia. Put it that way, Route 3, Covington, Virginia, Box 286.

Q. About how far do you live from Covington?

A. About 19 or 20 miles—19½ to be exact.

Q. You had two sons, Gordon Bates and Ellis G. Bates, that were killed in this accident?

A. That's right; yes, sir.

Q. How old was Gordon at the time of his death?

A. Gordon was about 26.

Q. How old was Ellis?

A. Ellis was past 18. He had registered for the Army in June; he was 18.

Q. About 8 years younger than Gordon?

A. That's right; yes, sir.

Q. Now, did Gordon own an automobile?

A. That's right.

Q. Did he own a Buick car that was involved in this accident?

A. Yes; that's right—1955 Buick.

page 41 } Q. Now, where was Gordon working at the time of this accident?

A. He was working at Fort Belvoir.

Q. Fort Belvoir, Virginia?

A. That's right.

Mr. Cecil Bates.

Q. What kind of work was he doing; do you know?
A. Well, he was just working around on the Fort—just a regular jack of all trades, first one thing and another; that's what the meaning of it is.
Q. Jack of all trades?
A. Yes, sir.

The Court: Mr. Bates, just keep your hand down from your mouth. The rest of us can't hear you.

A. All right.

By Mr. Messick:
Q. Where was your son, Ellis, working?
A. He was working for the Hunt Club there next to Washington; that was the name of it. He was a bellboy at this Hunt Club. That was the name of the place he stayed—the Hunt Club.
Q. Did he wear a uniform?
A. That's right.
Q. Is this the uniform that he wore at this Hunt Club (indicating uniform)?
A. Yes; that's right.
page 42 } Q. This hotel Hunt Club?
A. That's right.
Q. Are these the trousers, with the gray stripe on it?
A. Yes, sir; that was the trousers.

Mr. Messick: We will consider these the trousers and the coat as—
The Court: 5 and 6.
Mr. Messick: 5 and 6. The trousers are #5 and the coat #6.

(The trousers and coat, referred to above, were then received in evidence and marked, Plaintiff's Exhibits #5 and #6, respectively.)

Q. (Continued) I show you Plaintiff's Exhibits #2 and #3. There has been identified as a body on the left side of this Buick automobile which is the driver's side of the automobile and in the picture you can see a toe up in the door of the car there (indicating). And in #3 you can see it—come over here before the jury, sir—

Mr. Cecil Bates.

(The witness went to the jury with Mr. Messick.)

Q. (Continued)—the toe of the shoe over here at that point (indicating) and in this #3 you can see the foot and the shoe there (indicating).

The Court: The jury have seen them, Mr.
page 43 } Messick.
Mr. Messick: Yes, sir; I understand.

Q. Can you tell who the person is that is lying there with his feet up in it?
A. That's Gordon.
Q. That's your son, Gordon?
A. Yes, sir.
Q. How do you know that is your son, Gordon?
A. I know him by his hair, by his arm; I'd know him anywhere. A man knows his own child.
Q. You'd know him anywhere?
A. Yes, sir; that's positively right.
Q. Now, wait just a second. You have told us that *you* son, Ellis, was wearing this uniform at the time he was killed. Can you point out to the jury his body in the car and show them the uniform?
A. Yes, sir.
Q. Come over here and point it out to them.
A. This is the boy that's over here (indicating).

The Court: Speak out louder.

A. This is the boy over here (indicating), and on the right side is Ellis and this is the stripe on the pants (indicating). This is the coat he had on; I believe you can see it. It was there at the funeral home.
By Mr. Messick:
Q. Just one more thing I want to point out to
page 44 } you. The coat is a gray coat. Is that gray
trousers here on this man and the white shirt—the difference in the two?
A. Same; more the trousers.
Q. I see it and the white shows up much whiter than the gray does, if you gentlemen want to see the white shirt there. Now, any question about your son, Ellis, on the right side?
A. No question about it.

Mr. Cecil Bates.

(The witness then returned to the stand.)

Q. The stripe in the trousers on Ellis's leg in the right side of the car is the stripe shown there?

Mr. Kime: He has answered that.
The Court: I believe so, and you are leading, sir.
Mr. Messick: All right, sir; I just wanted to compare it.
Mr. Kime: We object.

(Mr. Messick displayed a picture to the jury.)

Mr. Kime: We object to that.
The Court: I'll sustain the objection.

By Mr. Messick: (continues examination)
Q. What size boy was Ellis?
A. He was larger than the other boy was, some inches say, taller.
Q. About how tall was he?
page 45 } A. I'd say about 5 foot, 11.
Q. And about how much did he weigh?
A. Oh, about 150, I imagine; I just don't know his weight.
Q. What was the condition of his health?
A. He had good health.
Q. Never sick?
A. He was never sick; he had awfully good health.
Q. What did you say about him having registered to go in the Army?
A. He registered in September.
Q. He registered prior—after he registered he went to work?
A. Yee, sir; he had before he went to work. I mean, before he went to work, for the Army.
Q. What kind of a boy was he?
A. He was a very good boy.
Q. Was good to you and your wife?
A. Yes, sir.
Q. You, of course, loved him as a parent would?
A. Yes, sir; that's right.
Q. And he loved you all the same way?
A. That's right.
Q. You said he was 18. Do you remember his birthdate?

Mr. Cecil Bates.

A. Yes; he was 18 when he had registered, you
page 46 } know; he had to register for the Army.

The Court: Mr. Messick, just to save time, that is the third time you have asked him that question. Let's don't go into that again.

The Witness: Then, he was killed on November following, just two or three months later, so he was 18 for two or three months.

By Mr. Messick: (continues examination)

Q. About how far was he from home?

The Court: You have asked him that question.

Mr. Messick: No; I haven't.

Q. (Continued) How far—he lived from Covington—how far was he from home at the time he was killed?

The Court: I'm sorry.

By Mr. Messick:

Q. How far was he from home at the time he was killed?

A. About 17 or 18 miles.

Mr. Messick: That's all. Thank you, sir.

CROSS EXAMINATION.

By Mr. Jolly:

Q. Mr. Bates, I just want to ask you one or two little questions.

A. Yes, sir.

Q. Mr. Messick asked you if you didn't love your son, Ellis, and you also loved your son, Gordon, too,
page 47 } didn't you?

A. Yes, sir.

Q. You loved one just about as much as the other?

A. Absolutely; all the same. That's right.

Q. Now, you said Ellis was 18 and was working at the Hunt Club.

A. That's right. It was a kind of a motel but that was the name of it and he was a bellhop there.

Q. Had he finished school, Mr. Bates?

A. Well, yes, he finished school.

Mr. Cecil Bates.

Q. Finished high school?

A. Yes; he went down there and he had registered and he had been down there working, oh, about 2 or 3 months. He went down there for about a month and he didn't get a job and he had been working something over a month—he drawed two checks.

Q. That was near where Gordon was?

A. Well now, I really don't know—somewhere close, I imagine. He lived at Fairfax and this Club—I wasn't at it, I don't know—was maybe 30 or 40 miles, 50 or something—whatever it was; I don't know.

Q. Did Gordon get him his job up there?

A. I don't know that. He had went up there with Gordon to get work and he had been working and I know they were coming home.

Q. He and Gordon were pretty close, I reckon?

A. That's right. They all loved one another—page 48 } all of them—that way.

Q. Now, you say Gordon was kind of a jack of all trades; he did a little bit of everything?

A. I said I imagine that was what he was doing. I mean, working around the Fort; I imagine just whatever they wanted him to do, he would do. I don't know whether he had a special job is why I made that remark. I don't know.

Q. On this occasion, you didn't know they were coming home, did you, Mr. Bates?

A. No; no, I didn't know nothing about it until, I believe, Mr. Crush brought us word of the accident. That was somewhere near 10:00 or after 10:00, I don't know. I didn't look at the clock. I couldn't tell you the time because I didn't look. I know it was around 10:00 o'clock, maybe, or could be later.

Q. And at that time, did Mr. Crush turn over to you his personal effects?

A. No; I got this at the funeral home (indicating uniform).

Q. At the funeral home?

A. That's right.

Q. And among his personal effects that were turned over to you was this ticket that Mr. Crush is talking about, wasn't it, sir?

A. Yes; there was a ticket, yes. The ticket from Lexing-

Mr. Cecil Bates.

ton, I believe it was. I didn't read it. I saw it
page 49 } was a ticket and he was supposed to be back at
Lexington at a certain day and I couldn't tell you what day it was, at that time. I wasn't very much interested in reading too much.

Q. Of course, not. You and Mrs. Bates were upset about both your sons.

A. That's right; I didn't read it.

Q. Were there turned over to you some other legal papers—a box where his wife had gotten a box of papers—

Mr. Messick: We object, if your Honor please.

The Court: I don't think that would enter into it.

Mr. Jolly: All right.

Q. (Continued) After the accident, Mr. Bates, a day or two later, didn't you go down to the Snead Buick and look at the automobile?

A. I did.

Q. And you got some papers out of the glove compartment at that time; isn't that right, sir?

A. Mr. Snead had them out for me.

Q. He got them out for you?

A. That's right.

Q. And when you looked at that automobile, did you open the doors and look inside of it?

A. Yes; I looked in.

Q. And then you saw this whiskey bottle that the trooper testified?

page 50 } A. I saw a whiskey bottle broken in there.

Q. Yes, sir; and there was a strong odor of whiskey in the car?

A. There was an odor of whiskey in the car.

Q. Wasn't there also some little gingerale bottles or Seven-Up bottles?

A. I saw some bottles but I didn't look at them closely to explain what kind they was. It could have been most any kind. There was some in there.

Q. Some in the floor of the car?

A. I didn't look at them that close.

Mr. Jolly: All right. That's all. Thank you.

The witness stands aside.

MR. WILLARD S. GRIFFITH, JR.
called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Stephenson, Jr.:
Q. Your name is Willard S. Griffith, Jr.?
A. Yes, sir.
Q. Do you go by another nickname?
A. Pete.
Q. Are you a resident of Alleghany County?
A. Yes, sir.
page 51 } Q. How long have you resided in Alleghany County?
A. I'm 30 years old.
Q. And you have lived here all your life?
A. Yes, sir.
Q. Who is your father, Willard S. Griffith?
A. Yes, sir.
Q. What does he do?
A. He's a farmer.
Q. Are you employed?
A. At the Rayon.
Q. For the Industrial Rayon Corporation?
A. That's right.
Q. Mr. Griffith, were you acquainted with Gordon L. Bates?
A. Yes, sir.
Q. How long had you known him, Mr. Griffith?
A. Well, we lived within 5 miles of each other and went to school together. He was a few years behind me in school but we rode the bus and went to the same school.
Q. You all attended the same school and rode the same bus to school; is that right, sir?
A. That's right.
Q. He was slightly younger than you?
A. Yes, sir.
Q. And I believe you stated that you were 30
page 52 } years of age?
A. Yes, sir.
Q. Do you know how old Gordon would be, if he were living today?
A. No, sir; he was, I think, maybe 2 years or 3 years younger than me.
Q. Be about 28, you think?
A. Maybe.

Willard S. Griffith, Jr.

Q. But did you happen upon the scene of the collision that took place on Route 60 on the hill above what is known as Hump Back Bridge?
A. Yes, sir.
Q. November of 1955?
A. Yes, sir.
Q. November 2nd?
A. Yes, sir.
Q. Was that in the nighttime or daytime?
A. It was at night.
Q. Were you in a vehicle at that time?
A. Yes, sir.
Q. Of course, when you arrived, the accident had already occurred; is that right, sir?
A. Yes, sir.
Q. Did you get out of your automobile and make an inspection—
page 53 } A. Yes, sir.
Q. —of the accident, as you found it there?
A. Yes, sir.

By the Court : (interposing)
Q. Approximately what time was it when you arrived?
A. I couldn't tell you. It wasn't but just a couple of people there. It must have been directly after.
Q. Had Mr. Crush gotten there?
A. Sir?
Q. Had Trooper Crush arrived?
A. No, sir.
Q. So you were there before Mr. Crush?
A. Yes, sir.

By Mr. Stephenson, Jr.: (continues examination)
Q. Had the first aid squad arrived when you were there?
A. No, sir.
Q. Neither the officer nor the first aid had arrived when you arrived there?
A. No, sir.
Q. And you say possibly one or two other people had arrived shortly before you?
A. There was a green Hudson and a tractor-trailer truck and me. I was following the Hudson and the tractor-trailer.
Q. Now, you have told the Court and jury that you knew

Willard S. Griffith, Jr.

Gordon Bates, having attended school with him,
page 54 } and knew him personally.

A. Yes.

Q. I will ask you whether or not you saw Gordon Lanier Bates on that occasion?

A. Yes, sir.

Q. And tell the jury, please, where you saw him?

A. He was laying on the left-hand side of the car. He was laying on the ground.

Q. His body was lying on the ground?

A. Yes; and his feet were in the floorboard.

Q. Can you tell the Court and jury whether his body was ever moved from the time you arrived—

A. No, sir.

Q. —until the first aid and, even afterwards, when the officers arrived?

A. No, sir. Some man said that you weren't supposed to touch nobody there. I don't know who he was but he said don't touch nobody.

Q. Then, were any of the bodies of persons killed in this collision moved for some time after the accident and while you were there?

A. No, sir; it wasn't moved until the first aid men moved them.

Q. Did you see another body in the car that Gordon Bates had been in?

page 55 } A. Yes, sir.

Q. Where was that body?

A. He was laying down in the seat—the front seat.

Q. Did you know that person?

A. No, sir; I couldn't see his face.

Q. Now, I wonder if you will come around here in front of the jury.

Mr. Kime: May it please the Court, we admit that it was Gordon Bates, whose feet were in the car and whose body was partly out of the car, and who has been identified by his own father, and that the other boy was Ellis and he was on his right-hand side, entirely in the automobile.

Now, we admit that. Now, what is the purpose now of going over this evidence except to keep exhibiting the pictures to the jury?

The Court: I don't know what the purpose would be now, Mr. Stephenson.

Willard S. Griffith, Jr.

Mr. Stephenson, Jr.: Well, your Honor, it's the first time that I had ever heard the defense admit that. I'm glad to know they admit that.

The Court: With that admission, I don't think this witness should testify about these pictures.

Mr. Stephenson, Jr.: We would like to show that these pictures correctly portray what this man, who

page 56 } was one of the earlier arrivers—

The Court: They don't deny that.

Mr. Kime: We don't deny that.

Mr. Stephenson, Jr.: You admit that these pictures represent the location of the automobiles immediately after the accident?

The Court: They have admitted that all along.

Mr. Stephenson, Jr.: And the location of the bodies immediately after the accident?

Mr. Kime: Yes, sir; and the trooper testified to it.

Mr. Messick: And you now admit it was Gordon Bates's body, with his feet underneath the steering wheel there, lying along the left side of the car, partly in and partly out of the car?

Mr. Kime: I object to that. I object to you stating that. We are denying it and said it to the Court and tried to state, in the opening statement, that it's up to you to show who was driving the car. We have never denied the identity of those people.

Mr. Messick: You filed an affidavit saying that Gordon Bates was not the driver of the car.

Mr. Kime: All right, sir. We have an absolute right to stand on that and that has nothing whatever to do—

The Court: The objection was made to the

page 57 } photograph. I mean, to the witness testifying about the photograph. I am sustaining the objection on the ground that they are admitting that the body on the left-hand was the body of Gordon and has been identified as the body of Gordon Bates.

Mr. Messick: All right, sir. That's all that's necessary.

The Court: And that is all.

Mr. Messick: But that is the first time they have admitted it just now. They have denied specifically by affidavit that he was the driver.

Mr. Kime: Now, we object to that.

The Court: They denied he was the driver. There is a lot of difference there.

Willard S. Griffith, Jr.

Mr. Kime: Yes, sir.
Mr. Stephenson, Jr.: Shall I proceed?
The Court: Yes, but not with the photographs, sir.
Mr. Messick: Well, doesn't your Honor think it permissible to ask about it?
The Court They concede that.
Mr. Messick: They concede that was the condition; that's all that's necessary. There's no use in proving something that is conceded.
Mr. Kime: You are worse than a woman; you want to get in the last word. (Laughter) And sometimes
page 58 } you get worse than that.
The Court: Both of you are guilty of the same thing. Please go ahead, Mr. Stephenson.

By Mr. Stephenson, Jr.: (continues examination)
Q. Mr. Griffith, did you look closely at the face of, and head of, Gordon Bates?
A. Yes, sir.
Q. Would you state whether or not, from your observation there, there was a severe injury to the head of Gordon Bates?
A. Yes, sir; there was a hole in the side of his head (indicating) where it was bleeding.
Q. There was a hole in the side of his head?
A. Yes, sir; there was a lot of blood coming out of his head.
Q. Did you observe the windshield of the Bates car in front of the driver?
A. Yes, sir.
Q. Will you state to the jury whether or not that windshield had been forced out and cracked?
A. It was crushed.
Q. The windshield was crushed?
A. Yes; and shattered.
Q. And I believe these photographs show that (indicating)?
A. The steering wheel in it was pushed to the
page 59 } top of the car.
Q. The steering wheel had been pushed loose from the—
A. Yes; and drove up (indicating).

Mr. Stephenson, Jr.: That's all.
Mr. Kime: No questions.
The Court: Let's take an adjournment at this time until

1:00 o'clock. While you are at lunch, do not talk to anyone about the case and do not stop on the street or anywhere and talk to any of the witnesses, even about the weather, or what they are doing on the farm or how the family is at home. Gentlemen of the jury, don't talk to anyone about anything, if you understand what I mean. And, when you come back here at 1:00 o'clock, go immediately to your jury room and we will get started at 1:00 o'clock as soon as we possibly can. The Court will taken an adjournment until 1:00 o'clock for lunch.

(Court recessed for lunch at 12:07 o'clock, P. M., to 1:00 o'clock, P. M.)

May 20, 1957
1:00 o'clock, P. M.

AFTERNOON SESSION.

(Met at 1:00 o'clock, P. M., pursuant to Noon recess.)

SERGEANT W. E. LAMBERT
called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

page 60 } DIRECT EXAMINATION.

By Mr. Stephenson, Jr.:

Q. I believe your name is W. E. Lambert; is that correct?

A. Yes, sir.

Q. Mr. Lambert, you are a sergeant with the Virginia State Police, are you not?

A. Yes, sir.

Q. How long have you been with the Virginia State Police, Mr. Lambert?

A. 21 years.

Q. As sergeant for the Virginia State Police, are you in charge of a territory in the Commonwealth of Virginia?

A. Yes, sir.

Q. What is your territory?

A. Bath, Alleghany and Rockbridge County.

Q. And in that territory, how many state troopers are under your supervision, sir?

A. 14.

Sergeant W. E. Lambert.

Q. Did you, along with Trooper Crush, make an investigation at the scene of this collision in which a car driven by Gordon Bates collided with a car driven by a Mr. Wilkerson—Henry Wilkerson?

A. Yes, sir. I arrived at the scene of the accident just before the bodies were removed.

pag 61 } Q. Are you familiar with the physical evidence that was discovered there at the time, sir?

A. Yes, sir.

Q. Now, based on your experience as a police officer, of 21 years of experience, in the light of the physical evidence that you found there, I wish you would state to the Court and jury whether or not, in your opinion, that physical evidence indicates a high degree of speed by the Bates automobile?

Mr. Kime: Well now, may it please the Court, we object to the question. The question is what he observed.

The Court: I don't believe he can express an opinion, Mr. Stephenson. He can tell what he saw.

Mr. Stephenson, Jr.: As an expert witness on this. Actually, what he said he observed at the time.

Q. (Continued) What did you observe there, Sergeant Lambert; will you please tell the Court?

A. This Buick car was a total wreck; it had struck the Cadillac with such force that it drove the motor back, the transmission was all out in the highway, the radiator was smeared back all over the car, the steering wheel was driven up in the roof and it gave the appearance of having struck with a terrific impact.

The Court: Wouldn't that have been the same if the Cadillac had hit the Buick, though? That's the point I'm trying to make.

page 62 } Mr. Stephenson, Jr.: I'm coming to that, your Honor.

Q. (Continued) Was there some other physical evidence there on the highway to the rear of the Bates automobile?

A. Yes, sir; there was this long swerve mark which was made by the Buick and led up to the rear—the left rear of the Buick. It started out narrow and then it got wider as it went towards where the impact occurred. It showed signs of the car being turned to the right and traveling at such a momen-

tum—why, of course, it pressed the tires down on the highway and made a wider mark as it neared closer to the impact.

Q. From the markings that you have testified about, showing this momentum that you have testified to, did it appear that this car was able to get back on the right-hand side of the road?

Mr. Kime: Now, may it please the Court, we object to that. How does he know that it was able to get back or what happened to it?

The Court: All right; I sustain the objection.

Mr. Messick: As a part of the question of tire marks?

The Court: I don't think so. It didn't get back. That's not the problem.

Mr. Messick: That's enough then; that will be page 63 } enough.

Mr. Stephenson, Jr.: All right, sir.

CROSS EXAMINATION.

By Mr. Kime:

Q. Sergeant, you went there to make an investigation?

A. Trooper Crush was making the investigation. When I *ariived* there, I mostly assisted with traffic and assisted in having the cars and debris moved off the highway after he left.

Q. Well now, you have testified about the damage to the automobile that you saw—

A. Yes, sir.

Q. —and you have testified to the mark?

A. Yes, sir.

Q. Will you testify to the whiskey bottle?

A. There was a lot of debris around there. I don't remember—there could have been a whiskey bottle there.

Q. In the car, Sergeant; not on the outside.

A. I don't remember it, sir.

Q. Did you look in there?

A. I think—I'm sure I did. It could have been there and I could have forgotten it but—

Q. Did you detect the odor of alcohol in the car?

A. I wouldn't say that.

Q. Well, you wouldn't say that you did and you wouldn't say that you didn't; is that the point?

Sergeant W. E. Lambert.

A. No, sir; I just don't remember.

page 64 } Q. Did you see the small bottles, like gingerale bottles or Seven-Up bottles; did you see that?

A. I don't remember that, sir. There was a lot of debris there, in and out of the car. We had to take a scoop and scoop it off—the parts of this Buick.

Q. What other debris was on the inside of the car?

A. There was parts of glass from the windshield, I can remember, in the highway and also in the car. There was some of the dash and stuff, the glass from the dash, on the inside, and there could have been a broken whiskey bottle in there but I don't know; I don't remember.

Q. Did you make any other notes like Trooper Crush did?

A. No, sir; I did there at the scene of the accident find out one witness that had passed—that this vehicle had passed—just prior to the crash and I remember turning that over to Trooper Crush.

Q. In other words, you made no written notations of any kind?

A. No, sir.

Q. And the only notations you made were mental?

A. Yes, sir.

Q. And this was in November, 1955?

A. Yes, sir.

page 65 } Q. Generally, if there are contributing causes, the troopers are very much interested in ascertaining those contributing causes; that's correct, isn't it?

A. Yes, sir.

Q. Did you go down to Snead Buick place after the car had been taken down there and examine the wreck again?

A. No, sir.

Q. Did you send any of your men down there to examine it?

A. Trooper Crush was handling that end of it so I assume that he went. I don't know.

Q. Was any report made to you?

A. No, sir.

Q. Did you know where it had been taken—where the car had been taken?

A. Yes, sir; I was there when the wrecker removed the car from the scene. Trooper Crush was on a blood relay when he stopped to check this accident and after he got the

Sergeant W. E. Lambert.

pertinent information there, why I just took over so far as having the cars removed and taking care of the highway conditions there and so far as traffic conditions were concerned in getting the cars moved.

Q. Did I understand you to say that you were—that you had 14 troopers under you and you had Bath, Highland—

A. No, sir; Bath, Alleghany and Rockbridge.

Q. —Bath, Alleghany and Rockbridge?

A. Yes, sir.

page 66 } Q. Is Trooper Talbert—is he under you?

A. Yes, sir.

Q. Then, you know Trooper Talbert, the one that seems gave a ticket—

A. Yes, sir.

Q. —to Gordon Bates?

A. Yes, sir.

Q. He is a good trooper, isn't he?

A. Yes, sir.

Mr. Kime: All right. That's all.

Mr. Messick: That's all, Sergeant. Thank you, sir.

The witness stands aside.

Mr. Stephenson, Jr.: We rest, your Honor.

The Court: All right; plaintiff rests.

Mr. Jolly: Could we see the Court in chambers?

The Court: All right, gentlemen; suppose you go to your jury room for a moment.

(The jury retired from the courtroom at 1:15 o'clock, P. M.)

Mr. Jolly: Now, may it please the Court, at the conclusion of the evidence for the plaintiff, counsel for the defendant, move the Court to strike the plaintiff's evidence, first, on the grounds that they have not borne the burden of proving, by a preponderance of the evidence, or

page 67 } making out a *prima facie* case on gross negligence. They have only proved that an accident occurred and where it occurred and where the vehicles wound up after the accident. There is not one scintilla of any evidence as to what caused the accident, as to why the Bates automobile wound up on the left-hand side of the road, and it

could have been any one of a number of things. It could have been that the driver suffered a fainting spell, that there were mchanical difficulties, all of which, if this matter is submitted to the jury on the state of the evidence as it presently is, the jury could speculate from beginning to end.

Now, in regard to this motion, I would like to call the Court's attention to the case of *Richter* v. *Seawell*, 183 Va. 379, 32 S. E. (2d) 62. In that case, which was a non-collision accident, and in which the parties were both killed, both the passenger and the driver—and, incidentally, in that case, there was no contention made as to who was driving. It was admitted that the defendant in that case was the operator of the automobile. The physical evidence, as testified to by the state trooper, was that the car had gone off of the highway on the right-hand side and traveled along the dirt shoulder for a distance of 118 yards, that it had then swerved to the left onto the pavement and after skidding sideways to the left had proceeded diagonally along the pavement for a distance of approximately 74 yards and had gone thence off the pavement on the left and down a 7-foot em-
page 68 } bankment and struck a tree some 27 feet to the left of the road. The car was demolished, the motor and radiator—everything—having been thrown clear of the body of the car.

Now, the Court, in commenting and particularly in the light of what the Sergeant has said, "while the physical facts which we have just stated, justify the inference that the car was proceeding at considerable speed, there is nothing to indicate that the speed itself was so great as to constitute gross negligence or that it was the proximate cause of the accident."

Now, that is precisely what is present in this case. We don't think that in the Richter case the fact that there was not a car coming on the left-hand side, that it had struck and killed the driver, that that could possibly have made any difference under the reasoning of the Court. Furthermore, there is serious question still present in this case as to who was driving the automobile. The state trooper put on the stand by the plaintiff has testified in his opinion he couldn't tell who was driving. That is the plaintiff's own evidence and in the light of this Richter case and the evidence at this stage of the record, we don't think they have borne the burden of making out a *prima facie* case of gross negligence, that the evidence now leaves it entirely to the jury to speculate on what caused this accident.

The Court pointed out, in the Richter case, "Evidently, for some reason, the driver of this car lost control of it, but there is a total lack of evidence as to what page 69 } caused this. The fact that it ran off the pavement on the right was probably, at least, a contributing factor but the record is likewise silent as to why this occurred. It may have been due to a number of reasons, any one of which would have been consistent with the lack of gross negligence on the part of the driver. He may have been crowded off the road by another vehicle, or blinded by the lights of an oncoming car, again a sudden illness of the driver or a sudden break in the mechanism of the car may have caused it to leave the highway."

Now, any one of those things could have caused this accident and if it is submitted to the jury, on the state of this record, they would have a complete right to speculate from beginning to end and the burden is on the plaintiff, not only to prove the physical facts but as to what caused the accident and there is not any evidence which bears on that point.

The Court: I believe I should overrule your motion, sir.

Mr. Jolly: We respectfully except.

The Court: Are you gentlemen ready to go forward now?

Mr. Jolly: Has Trooper Talbert come?

Sergeant Lambert: He's in the Circuit Court in Rockbridge County.

The Court: Sergeant Lambert, suppose you go page 70 } and check.

Sergeant Lambert: Yes, sir; I will check.

Mr. Jolly: We would like a few minutes, your Honor, to confer. Incidentally, Judge, the sheriff notified us—he put a little notation before us—that he was supposed to testify and we called him and he said he had contacted you through another trooper.

The Court: Well, Trooper Talbert said he would be here at 12:00 o'clock. Would he be your first witness, your next witness?

Mr. Jolly: Yes, sir; we'd like to have him as the first witness.

Mr. Kime: Well, he and Mr. Wilhelm will, no doubt, be together, you see.

The Court: You don't have any other witness's evidence to put on before them?

Mr. Kime: No, sir; we have got nobody prepared in advance. We don't want to put Dr. Hanna on now because it wouldn't be connected up.

Trooper S. W. Talbert.

(A recess was taken from 1:40 o'clock, P. M., at which time Trooper Talbert arrived. At this time, the trial was resumed before the jury.)

EVIDENCE ADDUCED IN BEHALF OF THE DEFENDANT.

TROOPER S. W. TALBERT

called as a witness in behalf of the defendant, being duly sworn, testified as follows:

page 71 } DIRECT EXAMINATION.

By Mr. Jolly:

Q. Will you state your full name, please sir?

A. Trooper S. W. Talbert.

Q. And where do you live, Trooper Talbert?

A. I live in the City of Buena Vista.

Q. Are you stationed in Rockbridge County?

A. Yes, sir.

Q. How long have you been a state trooper?

A. I have been with the department slightly over 3 years.

Q. In the course of your official duties as a state trooper, did you have occasion, on November 2, 1955, to stop an automobile that was operated by Gordon Bates?

A. Yes, sir.

Q. Where did you stop that automobile, Trooper?

A. Stopped the automobile approximately a mile south of Fairfield on Route 11.

Q. And what kind of car was that?

A. It was a '55 Buick Sedan.

Q. Was anyone else in the car at the time?

A. The subject's brother; I don't know his name. I didn't get it. I do know that it was his brother, apparently.

Q. Now, at the time you stopped the automobile, you said the subject's brother was in the car with him. Was
page 72 } he wearing a uniform just like this one (indicating Exhibits #6 and #7)?

A. Well, he didn't have a coat. He had a shirt and the pants, if I recall correctly, were similar to those pants that you have there.

Q. Were they the same color as these?

A. Yes, sir; seemed to me he had on a light shirt—possibly white.

Trooper S. W. Talbert.

Q. Did you see the jacket in the car?

A. I didn't particularly notice the jacket; no, sir.

Q. Did you notice the pants?

A. Yes, sir; I did notice the pants and I believe it was a beaded belt. I noticed that it stood out.

Q. About what time was that, Trooper Talbert?

A. Approximately 6:10 P. M.

Q. Now, just tell the Court and jury why did you stop the automobile?

A. I and two other troopers had been parked in crossover. It's a dual highway north of Fairfield. We had been discussing a matter which, at this time, I do not recall, when I noticed this car going south and appeared to me to be at an excessive speed.

Q. Yes, sir.

A. And so I proceed to follow the car to attempt to check it, which I did so south of Fairfield for approximately a mile.

page 73 } The speed was slighly in excess of 70—I'd say from 70 to 75. I stopped the car approximately a mile south of Fairfield when apparently he noticed me checking him and slowed down and I issued Mr. Gordon Bates a summons and the charge was speeding at 70 miles per hour in a 55 zone.

Q. Now, when you—did you signal him by the use of your siren?

A. Yes, sir.

Q. Now, what did he do; did he pull off on the right-hand side?

A. He pulled over on the right shoulder; yes, sir.

Q. And where did you pull over with reference to the Bates car?

A. I pulled off right in behind him on the right shoulder.

Q. And then did you get out of your automobile?

A. Yes, sir.

Q. Now, just tell the Court and jury what did the two occupants of the Bates car do just from the time you stopped them?

A. I got out of my car and went up to the driver's side of the Bates automobile and asked for his operator's license and his registration card and after he presented those I advised him of the violation and that I was going to issue him a summons for the violation and asked him to step back to my automobile while the summons was written, which he

Trooper S. W. Talbert.

did, and I had the book on the hood of my car and
page 74 } he stood next to me and his brother also got out
and came back. However, he had nothing to say.

Q. Did you—how close were you to Gordon Bates?

A. Well, I got right up on Gordon Bates, the driver of the car.

Q. Did you smell anything on his breath?

A. The odor of intoxicants was definitely on his breath.

Q. Could you smell anything on Ellis Bates's breath?

A. I don't recall having detected any odor on him. He gave no indication to me that he had been drinking.

Q. Now, could you just tell the Court and jury what else you observed about Gordon Bates while you were standing there talking to him about this ticket?

A. Well, he was very talkative. He advised me of his personal difficulties with his family—

Mr. Messick: That isn't necessary; we object.

The Court: Well, I don't think so either.

Mr. Jolly: Well, it's not the point; it's not what he said—it was his manner of speaking, and so forth.

The Court: Don't tell what he said but you may tell the manner in which he said it.

A. Yes, sir. He was very talkative. Outside of that, he
didn't give any indication to me of being real
page 75 } drunk—just the odor and the fact that he was very
talkative.

By Mr. Jolly: (continues examination)

Q. And after you issued him this summons, did you give him any further advice in regard to his operation of the automobile?

Mr. Messick: That would be pure hearsay, if your Honor please.

The Court: I think so, too, unless it was something to do with the use of intoxicants since he smelled the odor of alcohol on his breath.

By Mr. Jolly:

Q. Well, did you—without saying what you did, did you give him any warning about operating the automobile?

A. Yes, sir; I did.

Trooper S. W. Talbert.

Mr. Messick: Object.

By Mr. Jolly:
Q. Wait a minute. Was that based on the fact of the way he was driving and the fact that you smelled intoxicants on his breath?
A. Yes, sir.

Mr. Messick: We object to that; that's suggestive.
Mr. Stephenson, Jr.: It's very leading and suggestive.
The Court: I don't see why you object to lead-
page 76 } ing. Objection overruled. He's not testifying as to what was said.

By Mr. Jolly:
Q. What was your warning?

Mr. Stephenson, Jr.: Your Honor holds that he warned him was admissible; that he warned the driver?
The Court: Certainly, you can warn the driver.
Mr. Stephenson, Jr.: To slow down?
The Court: It's just as much a duty to warn a driver as to arrest him.
Mr. Jolly: I think it will shortly become apparent why he warned him.

Q. (Continued) What was that statement?

Mr. Messick: Objection.
The Court: I have to sustain the objection as to what he said to him.

By Mr. Jolly:
Q. All right, sir. When you made the warning—don't say what it was—but when you made the warning, was anyone else present?
A. Both Bates boys were present, the driver and the passenger.
Q. And was Ellis Bates in close proximity to where you were talking to Gordon Bates?
A. Yes, sir; he was standing right next to his brother.
All three of us were there together, as I issued
page 77 } the summons.
Q. And did he overhear everything that was said, sir?

Trooper S. W. Talbert.

A. Yes, sir.

Mr. Kime: Now, may it please the Court, we think that is pertinent.

The Court: I think that would be admissible.

By Mr. Jolly:

Q. All right. Go ahead and tell what you told Gordon Bates about his driving.

Mr. Stephenson, Jr.: Is that admissible, sir?

The Court: Yes, sir; because they are charging contributory negligence and that would put Ellis Bates on notice.

A. I advised Mr. Bates—

Mr. Stephenson, Jr.: We want to save the point on that.

A. —that he should be more cautious in his driving as I had no desire to have to clean him up off the highway. They were the exact words that I used.

By Mr. Jolly: (continues examination)

Q. Did you later on learn of this accident?

A. I was advised later that night of the accident; yes, sir.

Q. And did you then recall the conversation you had had and the incident?

A. Yes, sir; I certainly did.

page 78 } Mr. Jolly: All right, sir; that's all.

CROSS EXAMINATION.

By Mr. Messick:

Q. Trooper, I'd like to ask you a few questions, sir. You say this was at 6:10 P. M., on November 2nd, about a mile south of Fairfield?

A. Yes, sir.

Q. How far is Fairfield from Lexington?

A. Approximately 11 miles.

Q. And how far is Lexington from Covington?

A. I believe it's approximately 42 miles.

Q. 42 miles. So, it was 3 and 3 and this accident occurred

about 2 hours late—56 miles then from the point where you stopped Mr. Bates, if you stopped him at 6:10, and it occurrd about 8:05—that would be 2 hours later and it would be 56 miles from where you stopped him.

A. Approximately; yes.

Q. Yes, sir. Take 56 and 2 hours to drive approximately 56 miles then.

A. Apparently.

Q. Yes, sir. Now, Mr. Talbert, when you stopped Mr. Bates, he was running about 70 miles an hour; that's correct, isn't it?

A. I checked him slightly in excess of that.

Q. Well then, he was in a Buick automobile?

page 79 } A. Yes, sir.

Q. And there was no question about the fact that Gordon Bates was the driver of the car?

A. No, sir.

Q. And he was the owner of the car, wasn't he?

A. I believe I have him as the owner.

Q. You have the registration?

A. Yes, sir; I have it only listed as "same."

Q. All right, sir. Now, where you stopped him, I believe it was down in the Shenandoah Valley on U. S. Route 11; isn't it?

A. That is correct.

Q. Yes, sir. That's a dual highway, a four-lane highway, and in some instances three-lane highway; isn't it?

A. At this particular location, it's dual.

Q. It's a dual highway. In other words, it's a four-lane highway?

A. Correct.

Q. And it is a nice smooth level highway, isn't it, sir?

A. It's not particularly smooth—a few ups and downs. It's relatively straight at this particular location.

Q. Just about one of the finest highways that we've got in the state, isn't it, sir?

A. Well, I'm afraid I'm not qualified to answer

page 80 } that.

Q. Well, do you know of any better ones?

A. I haven't traveled enough over the state, I'm afraid, for that comparison of purposes.

Q. You mean to tell me, in three years of being a state trooper, that you haven't traveled enough over the state to know that U. S. Route 11 along there at Fairfield, a dual

four-lane highway, a divided highway, is one of the best that we've got in the state?

A. It's a mighty nice highway but, as I say, I'm not familiar enough with the other highways to form an opinion.

Q. It's a whole lot better than this Route 60 out here, isn't it?

A. Yes, sir; certainly.

Q. This happened to be a good straight road, nice, level four-lane road; you see a few ups and downs—it's sort of rolling like the Shenandoah Valley is—rather rolling country.

Mr. Kime: We object to all of the statements on the part of counsel.

The Court: I think you've got a right to cross examine, Mr. Messick, but let's don't roll too much with him. (Laughter)

Mr. Jolly: Just rock and roll.

Mr. Messick: I expect the jury's been down there and I don't expect I can roll enough to convince them.

page 81 } Q. That is a fact that it is rolling country, isn't it?

A. Yes. (Laughter)

Q. Now, this young man got out of the automobile and talked to you and wrote, I suppose, his name in acceptance of the summons for the speeding ticket, we will call it; didn't he?

A. Yes, sir.

Q. And he was close up to you and you all were there together, I expect, some 5 or 10 minutes, weren't you?

A. Approximately.

Q. Yes, sir. If he had been under the influence of intoxicants, you'd have certainly arrested him, wouldn't you, Mr. Talbert?

A. If I had felt that he had been intoxicated to the extent that I could have charged him, I would have; yes, sir.

Q. Why certainly. You are a state trooper—if he was under the influence of intoxicants, you would have arrested him; no question about that, is there? You knew you saw nothing about him to indicate that he was under the influence of intoxicants in order to arrest him for operating the car under the influence of intoxicants, did you?

A. That's correct.

Q. It was not apparent to you that it affected his speech

or his manner, or his talk or his general muscular movement; he seemed to be in possession of all his faculties, didn't he?

page 82 } A. Outside of his apparent excessive talking. Of course, I don't know him normally and I don't know how he talks.

Q. He had been a nice friendly person and liked to talk and some people do and some don't.

A. That's right.

Q. Some keep a tight lip and some are friendly and are talkative and you found him a friendly person?

A. Very talkative; yes, sir.

Q. Yes, sir; and very friendly. Now, this 18 year old boy, his brother, was wearing these trousers, wasn't he, sir (indicating)?

A. The passenger, apparently his brother, yes.

Q. He said he was a brother. You found out he was his brother and he was wearing these trousers (indicating)?

A. They were similar; they appear to be probably the same ones. They certainly are similar to the ones you have.

Q. Yes, sir. Now, there was nothing wrong with that boy, was there?

A. Nothing indicated to me wrong with him.

Q. As you said, you didn't smell any alcohol on him and he didn't give any indication of having had anything to drink at all?

A. That is correct.

Mr. Messick: That's all, sir.

By Mr. Jolly:

page 83 } Q. Trooper Talbert, there is no question in your mind but what Gordon Bates was drinking, is there?

Mr. Messick: Now, if your Honor please, he went into that on direct examination a half a dozen times.

The Court: Well, both of you asked him.

Mr. Stephenson, Jr.: That's certainly repetitious, your Honor.

The Court : Well, I think you have been into that.

Mr. Jolly: All right; that's all.

The witness stands aside.

MR. ANDREW WILHELM, JR.
called as a witness in behalf of the defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Jolly:
Q. Would you state your full name, please?
A. Andrew Wilhelm, Jr.
Q. Mr. Wilhelm, you will have to speak just a little more loudly so these gentlemen can hear you. Where do you live, Mr. Wilhelm?
A. In the Town of Lexington, Virginia.
Q. What do you do, sir?
A. I'm a dispatcher for the Town of Lexington.
Q. Now, would you explain to the jury, what do
page 84 } you mean by you are the dispatcher for the Town of Lexington? What are your duties and what do they consist of?
A. Well, I am a file clerk. I take care of the radio, the teletype and also take care of the telephone for the state police.
Q. And where is your office?
A. In the City Police Building in Lexington.

Mr. Kime: (Interposing) Can you gentlemen hear him? Is he talking loud enough for the jury to hear?

(The jury nodded their heads.)

By Mr. Stephenson, Jr.: (interposing)
Q. Office of the City Police Department?
A. Yes, sir.

Mr. Kime: Talk a little louder, please, Mr. Wilhelm.

A. All right, sir.
By Mr. Jolly: (continues examination)
Q. On November 2, 1955, were you so engaged in your work?
A. I was, sir.
Q. And were you on duty on the afternoon of November 2, 1955?
A. I was, sir; yes, sir.
Q. On that afternoon, did you have occasion to come into contact with Gordon L. Bates?

Andrew Wilhelm, Jr.

A. Yes, sir; I did, sir.

page 85 } Q. Just tell the Court and jury how did that occur?

A. Well, he came in with a summons. He said he had a summons from State Trooper and he'd like to post bond. Well, that isn't part of my duty—well, that is part of my duty, to call the Justice of the Peace for anyone that comes in and wants to post bond so he handed me the summons but it was the wrong one. It was something to do with a divorce suit.

Mr. Stephenson, Jr.: We object to that; that isn't pertinent.

The Court: Go ahead.

A. It was something to do with a divorce suit but I told him that was the wrong thing so he handed me the ticket and I called the Justice of the Peace and the Justice of the Peace advised me to advise him that he would have to come back to the Court, that the Judge requires, in Rockbridge, for all parties involved in a speeding charge over the limit of 70 miles an hour that he has to come back to the Court in Lexington. They are not allowed to post bond.

So, I told him, and he said something about like, "Somebody is going to catch hell for this" and out the door he went. And that's the last time I saw him.

By Mr. Jolly: (continues examination)

Q. Now, Mr. Wilhelm, was anyone with him when he came in your office?

A. No, sir; he was by himself.

page 86 } Q. How long would you say he was in there?

A. I'd say approximately 10 minutes.

Q. Did you talk to him while he was there?

A. Yes, sir; I did, sir.

Q. Did you observe him while he was in your office?

A. Yes, sir; I did, yes, sir.

Q. Did you smell any odor of alcohol on his breath?

A. Yes, sir; I was close enough to smell his breath between the counter and me and I did smell alcohol on his breath.

Q. What did you observe about him otherwise?

A. He was very unsteady on his feet.

Q. Any question about that in your mind?

A. No, sir; no question at all.

Andrew Wilhelm, Jr.

CROSS EXAMINATION.

By Mr. Messick:

Q. Mr. Wilhelm, as I understand, you are a dispatcher for the police department?

A. Yes, sir.

Q. You call out on the radio to the various cars, do you not, sir?

A. Yes, sir; I do.

Q. And Mr. Bates had been given a summons by Trooper Talbert a few minutes before that?

A. Yes, sir.

page 87 } Q. And he came to Lexington and came to the Police department and came right into the police department office where all the police officers are around Lexington and the state troopers, too, I suppose come there?

A. That's right, sir.

Q. And he came in and asked you whether or not he could post bond on this charge for speeding that Trooper Talbert had given him a summons for, didn't he?

A. Yes, sir.

Q. And you called the Justice of the Peace and the Justice of the Peace told you that Mr. Bates would have to come back for trial and it wouldn't be necessary to post bond, didn't he?

A. That's right, sir.

Q. And he couldn't pay any fine there but would have to come back for trial?

A. That's right. It's a requirement.

Q. And Mr. Bates then walked out of the police department?

A. That's right.

Q. And are you an officer?

A. No, sir; I'm no officer.

Q. How old are you, sir?

A. 31, sir.

Q. You know Trooper Talbert had just talked to him just a few minutes before that, don't you?

page 88 } A. Well, I know he had a summons but I don't know how long it was between the time he came in and the time he talked to me cause I don't remember.

Q. Well, Mr. Talbert—you don't remember what time it was when he came in?
A. No, sir; I do not.
Q. Shortly after 6:00 o'clock, wasn't it?
A. Well, I couldn't say to be exact because I do not remember.
Q. Don't remember but this man was trying to do what was the right thing in regard to a summons and went to the proper place, namely, to the police department there in the City of Lexington, didn't he?
A. Yes, sir.

Mr. Messick: That's all. Thank you, sir.

RE-DIRECT EXAMINATION.

By Mr. Jolly:
Q. What was the remark that was made, sir, when he left?

Mr. Stephenson, Jr.: He already testified to that.
Mr. Jolly: He already testified to it? I didn't hear it.
Mr. Kime: Mr. Jolly didn't hear all that.

A. Do you want me to state what it was?

The Court: Go ahead. Mr. Jolly didn't hear.

A. He said, "Someone's going to catch hell for this," and out the office he went.

page 89 } Mr. Jolly: That's all.
Mr. Stephenson, Jr.: Everybody else heard it the first time, Judge.
The Court: Well, Mr. Jolly didn't hear it, I guess, so he wanted it repeated. (Laughter)

The witness stands aside.

OFFICER ALVIN VANCE
called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Officer Alvin Vance.

DIRECT EXAMINATION.

By Mr. Jolly:

Q. I believe you are Officer Alvin Vance?

A. Yes, sir.

Q. And you are a police officer in the City of Covington?

A. Yes, sir.

Q. How long have you been an officer, Mr. Vance?

A. About 2 and a half years.

Q. Were you engaged in your police work on November 2, 1955?

A. Yes, sir.

Q. What time did you go on duty that evening?

A. 7:00 P. M.

Q. And when were you supposed to go off duty?

page 90 } A. 5:00 A. M.

Q. 7:00 P. M., to 5:00 A. M.?

A. Yes, sir.

Q. Now, in the course of your official duties on that particular evening, did you have occasion to come in contact with Gordon Bates?

A. Yes, sir; I did.

Q. Just tell the Court and jury how that occurred and what happened.

A. Sometime between 7:10 and 7:45, I don't recall the exact time, but I hadn't been on duty too long. This car was headed, coming up Main Street, and was making a crying noise with his tires momentarily—it would disappear. It happened several times. He came through the red light at the intersection of Main and Court Street. Upon leaving that red light, he cried and the squealing of the tires started again momentarily. Me, being in the block across the street from in this building, I saw the car coming up the street, making a rocking noise up and down movements and each time the car would rock up, it would be a slight cry of the tires.

I attempted to stop the car but the car ran by me and the red light caught him and several other cars at the intersection of Main and Bridge Street. I was fortunate enough to overtake the car while it was stopped for the red light and checked the driver. I checked his registration and his

Officer Alvin Vance.

driver's permits. I detected alcohol on his breath
page 91 } but his appearance, otherwise, seemed almost normal. I gave the guy a warning, which was Gordon Bates, and I asked him what his excuse was for driving in that manner. Mr. Bates said, "Well, this is my home town. I've been in the Army for 2 or 3 years and just been getting home. You know how it is."

I told him it was nice to know that he was home and that this was his home town but I had spent 4 years in the Air Force and when I came home I hadn't conducted myself in that manner. Mr. Bates said, "Well, you know how it is. Just feels good to be home." I told him that I wouldn't advise him to drive like that and we didn't permit it here and I let Mr. Bates go.

Upon leaving the red light there, he made a left turn down Bridge Street to the intersection of Riverside and Bridge. The red light caught him there and he stopped for it but, upon leaving that light, he apparently ignored what I had told him and he left there and the car was going at a high rate of speed. The tires crying all the way up onto the bridge at Rosedale, heading west.

Q. Was anyone in the car with him?

A. Yes, sir; there was. It was another boy. He said it was his brother.

Q. Was he wearing a uniform like that one laying on the counsel table over there (indicating)?

A. Yes, sir; he was wearing the pants. I re-
page 92 } member those because it had a stripe in it—pants similar to those (indicating).

Q. Was he—where was he in the automobile?

A. He was sitting on the right side.

Q. Was he on the right side of the driver?

A. Yes, sir.

Q. Was he there when you talked to Gordon Bates?

A. Yes, sir.

Q. And when you talked to him, did he hear everything that was said?

A. Yes, sir.

Q. Now, when you talked to him, did he get out of the automobile?

A. No, sir; he didn't.

Q. And you testified that he told you he had just gotten back out of the Army. As a matter of fact, had he gotten back out of the Army just then?

Officer Alvin Vance.

Mr. Stephenson, Jr.: We object to that.

By Mr. Jolly:
Q. Do you know whether he had just gotten out of the Army?
A. No, sir; I do not.

Mr. Jolly: All right, your witness.

CROSS EXAMINATION.

By Mr. Stephenson, Jr.:
page 93 } Q. Mr. Vance, if I understand you, sir, you tell the jury that you saw nothing out of the way about the appearance of Gordon Bates at this time?
A. That's right, sir.
Q. Seemed perfectly normal to you?
A. Yes, sir; except that I detected alcohol on his breath.
Q. Alcohol on his breath. But, other than that, he appeared normal?
A. Yes, sir.
Q. And any infraction with regard to the operation of the motor vehicle was not of such a nature that you, yourself, thought it constituted a reckless driving charge and you placed no charge against him, isn't that right, sir?
A. Yes, sir.
Q. If I understand it, it was simply a screeching noise that you detected there and maybe a little racing of the engine?
A. Yes, sir.
Q. No question but that Gordon Bates was driving the car; is that right?
A. Yes, sir; Gordon was driving it.
Q. And was driving it—and he was driving it when it went out of your sight, going west toward the point of this accident?
page 94 } A. Yes, sir.
Q. He was on U. S. Route 60 headed west, going across the bridge—
A. Yes, sir.
Q. —at Rosedale?
A. (The witness nodded his head.)
Q. And that is approximately 3 miles or a little more from the scene of this accident; is that correct, sir?
A. Yes, sir.

Officer Alvin Vance.

Mr. Stephenson, Jr.: That's all, sir.

RE-DIRECT EXAMINATION.

By Mr. Jolly:

Q. I forgot to ask you, Mr. Vance, were you patroling on foot on this particular occasion?

A. Yes, sir; I were.

Q. If you had been in a car, after he left, you would have placed him—you would—or would you have placed any charge against him, if you could have caught him?

Mr. Messick: I object.

Mr. Kime: Wait a minute. He asked the question whether he thought his driving was of such a character as to place a driving charge against him for reckless driving. We have got a right to ask him a question, if after he had stopped and warned him, when he saw him leave, if he could have gotten him, whether he would or would not.

page 95 } Mr. Stephenson, Jr.: He is suggesting the answer, your Honor. That's very leading. This man has answered that question and he is trying to put words in his mouth.

The Court: Objection overruled. Let him answer the question.

A. Yes, sir; I would have—if I had had transportation, I would have.

Mr. Jolly: That's all, sir. Thank you.

RE-CROSS EXAMINATION.

By Mr. Stephenson, Jr.:

Q. Well, let's see now, Mr. Vance. You're not prepared to state how fast he was traveling when he left the stop light and went west, are you?

A. No, sir; I am not, but he left at such a high rate of speed that I would have checked him to see how fast he was going.

Q. Well, how fast would you say he was going between the stop light and the bridge—that's about half a block?

A. He had that Buick in the wind. I couldn't—

Q. Well, let's see now. He was at a stopped position at the stop light; is that right?

Officer Alvin Vance.

A. Yes, sir.
Q. He stopped for the red light?
A. Yes, sir.
Q. And you saw him travel for approximately
page 96 } half a block, didn't you?
A. Yes, sir.
Q. And, based on that travel of half a block, you tell the Court you think he was speeding?
A. Yes, sir; I do.

Mr. Stephenson, Jr.: That's all.

The witness stands aside.

Mr. Kime: Call Dr. Hanna.
Mr. Messick: Your Honor, before the doctor testifies, there may be a question I'd like to take up.
The Court: All right, gentlemen, suppose you go to your room.

(The jury retired from the courtroom at 2:10 o'clock, P. M.)

Mr. Messick: I don't know what would be the purpose of this evidence. He said something about a blood test.
The Court: Well, let's see. You are the one that wanted to make objection, so what is it?
Mr. Messick: Well, if he is going to try to introduce any blood test, we'd like to object to it now, sir.
The Court: Well, let me see what it is. I don't know what this witness is going to testify to.
Mr. Kime: May it please the Court, he is going to testify
to the fact that he was called and went out to the
page 97 } very scene of this accident. When he came back
later on, he made a blood test.
Mr. Messick: Just a minute. Would you mind letting the witness step out while we are discussing it?
The Court: All right. Step outside a minute, Dr. Hanna.

(Dr. Hanna then retired from the courtroom.)

Mr. Kime: I reckon that's the first time we ever excused a doctor. (Laughter)
And that, later on, at the Radar he made a blood test of

alcohol in the blood of Gordon Bates and also made a similar test for alcohol in the blood of Mr. Wilkerson, who was driving the Cadillac automobile, and he took the blood himself and sent it in in the regular manner. The report came back to him and he has the report.

The Court: Sent it down to the state laboratories?

Mr. Kime: Yes, sir; in the regular course.

The Court: All right; what is your objection?

Mr. Messick: We object to it, if your Honor please, that that means nothing. It doesn't prove that Gordon Bates—testimony by the people who made the test in Richmond in regard to it, and furthermore that this accident occurred before the statute was ever in effect and it only applies in a criminal proceeding—blood test proceedings.

page 98 } The Court: No; I think it applies to all proceedings.

Mr. Messick: The statute says in criminal proceedings only.

The Court: All right. Since then it would limit it to the charge of driving under the influence, but I don't think the statute would limit it as to any other charge.

Mr. Messick: This particular statute was not in force and effect at the time.

The Court: As of that time, it wasn't amended. In criminal cases, you could do it, and in any case.

Mr. Messick: Yes, sir; it has.

The Court: Oh, no; we have been having blood tests long before the statute came into being.

Mr. Messick: What does the blood test mean?

Mr. Stephenson, Jr.: Your Honor, you've got to follow the chain of proof for identification purposes. That was the law before the statute.

The Court: Well, I think probably they can do it if Dr. Hanna shows that it didn't leave his possession until it was mailed and he got it back.

Mr. Stephenson, Jr.: What happened to it in Richmond? Under *Rogers* v. *Commonwealth,* they go into that question.

The Court: I am going to admit it.

page 99 } Mr. Jolly: Does the Commonwealth Attorney follow that, Judge?

Mr. Stephenson, Jr.: You defense attorneys do.

The Court: We didn't do it because the Rogers case went out then.

Mr. Stephenson, Jr.: After the Rogers case, it was im-

possible to get a blood test in unless you got or brought a man up from Richmond and that's one of the reasons why the legislature passed that statute in 1956. You couldn't introduce a blood test unless you had every person in the chain that had handled that blood for identification purposes.

Mr. Kime: Well, there you are trying to convict a man of a crime and this is a civil case.

Mr. Stephenson, Jr.: Well, the same rules of evidence apply, for identification.

Mr. Kime: We have a right to introduce this because we will connect it up right smack down to the very point where the blood was taken from the one who you say was the driver of the automobile and upon which you are basing your case.

Mr. Stephenson, Jr.: The same law applies, your Honor, for identification in criminal or civil cases and Mr. Justice Whittle clearly expressed that rule, which has always been the law, in *Rogers* v. *Commonwealth.*

The Court: I don't see why you are objecting to it. It seems to me like you'd want to show Gordon
page 100 } Bates was under the influence.

Mr. Stephenson, Jr.: Well, they proved he wasn't by competent witnesses.

Mr. Stephenson, Sr.: Now, they are trying to prove he was.

Mr. Stephenson, Jr.: I don't know which way they are going.

The Court: It may be wrong but I'm going to admit it.

Mr. Messick: We save the exception.

The Court: This is the blood of Gordon Bates and Mr. Wilkerson. That is not Ellis.

Mr. Kime: No, sir; he didn't take that and he will testify to that.

The Court: All right; I am going to admit it.

Mr. Messick: All right, we save the exception for the reasons stated.

(The jury then returned to the courtroom at 2:15 o'clock, P. M., and the trial continued before the jury.)

DR. MICHAEL I. HANNA

called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Dr. Michael I. Hanna.

DIRECT EXAMINATION.

By Mr. Jolly:

Q. Doctor, will you state your full name, please sir?

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A. Michael I. Hanna—Michael Ignatius Hanna.

Q. Are you a licensed and practicing physician in the City of Covington?

A. Yes, sir.

Q. And, are you also County Medical Examiner for the western part of Alleghany County?

A. That's right.

Q. Were you acting in that capacity, Doctor, on the night of November 2, 1955?

A. Yes, sir.

Q. And on that night, did you receive a call in your capacity as County Medical Examiner?

A. I received a call at 8:10 P. M., November 2, 1955, to examine occupants in an automobile accident.

Q. Did you go out to the scene of the accident, sir?

A. Yes; that's right.

Q. Where was that—just where approximately?

A. That was approximately 3 miles west of Covington on U. S. Route 60 at the crest of the hill just went of Hump Back Bridge.

Q. Was that the accident involving the two Bates brothers and Mr. Wilkerson; is that correct, sir?

A. That's right.

Q. Now then, did you in your capacity as County Medical Examiner, examine the three persons involved at the scene of the accident?

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A. I examined the two persons, the occupants of the automobile which was going in a western direction.

Q. Those were the two Bates brothers?

A. Yes; that's right.

Q. And were they dead when you got there?

A. Those two were dead when I arrived at the scene.

Q. Could you tell whether they were instantaneously killed in the accident, or not?

A. They were instantaneously killed.

Q. And then what was done with the bodies, Doctor?

A. The bodies were removed to Arritt Funeral Home.

Q. Arritt Funeral Home?

A. Yes, sir.

Dr. Michael I. Hanna.

Q. And did you go also to the funeral home?

A. Yes; I proceeded to the Arritt Funeral Home and completed my investigation and examination and investigation as medical examiner.

Q. As medical examiner. And while you were at Arritt Funeral Home, as County Medical Examiner, did you have occasion to make a blood test on Gordon L. Bates?

A. That's right.

Q. Now, Doctor, would you just explain to the Court and jury—is it possible to test the alcoholic contents of a person's blood chemically?

page 103 } A. It is possible to determine, with a reasonable degree of accuracy, the chemical—by chemical analysis, the percentage of alcohol that is present in blood.

Q. Now, approximately how long after you received your first call, which I believe you said was 8:10, was it until you took this blood?

A. It was about an hour and a half after I arrived at the scene, which was 8:15 P. M.

Q. So that would make it about a quarter of 10:00?

A. A quarter of 10:00; that's right.

Q. And did you personally take the sample of the blood?

A. Yes; I took the specimen myself, placed it in a mailing container and mailed it to the state laboratory.

Q. You personally did all that?

A. That's right.

Q. And did you receive back from the state laboratory a report on those samples?

A. That's right.

Q. And do you have that report?

A. I don't have that report with me.

By Mr. Kime: (interposing)

Q. What did you do with the report?

By Mr. Jolly: (continues examination)

Q. Do you know where the report is?

page 104 } A. I have that with my records at the office.

Q. Well, Doctor, would you go and get that report for us, sir?

Mr. Kime: If necessary.

Dr. Michael I. Hanna.

By Mr. Jolly:
Q. Yes; if necessary.
A. Yes, sir.
Q. Did you examine the reports yourself?
A. Yes; I examined the report.
Q. Can you testify what the report showed as to the alcoholic contents of Gordon L. Bates's blood?
A. Yes, sir; I can.
Q. What did that show, sir?
A. It showed alcoholic content, percentage .15.
Q. Now, Doctor, I want to ask you this, is that .15%?
A. .15%.
Q. As a licensed physician and County Medical Examiner, that blood sample was taken approximately an hour and a half after you arrived at the scene, either at 9:30 or at 9:45?
A. That's right.
Q. Now, what, if anything, would that report of .15 indicate as to the alcoholic content of Gordon L. Bates's blood at the time the accident occurred?
A. After one hour, it would indicate some degree of decrease in percentage.

page 105 } Mr. Messick: On a dead man?
The Court: That would be when he was alive, wouldn't it?
Mr. Messick: Why, certainly.
The Witness: By oxidation.

By Mr. Jolly:
Q. Now, if you qualify as a medical expert, you can testify.

Mr. Messick: Well, you'd better qualify him then.
The Court: Please make your objections to the Court, if you please. Now, make your objections to the Court, not across the hall.
Mr. Messick: Both of us, Judge, said, "dead man" at the same time.
The Court: No; I didn't put it exactly the same way you did but I did say would it occur if a person was dead.
Mr. Messick: Yes, sir.
The Court: O. K.
Mr. Messick: Our objection is, until he is qualified. There's never been a qualification of Dr. Hanna.

Dr. Michael I. Hanna.

By Mr. Jolly: (continues examination)
Q. Doctor, did you answer the Court's question, sir?

By the Court:
page 106 } Q. Well, the Court's question was this, Doctor. You took this blood test an hour and something after the time of the collision. Would the percentage be the same then, or a little greater or less?
A. It is my impression that the percentage of alcohol would be less.
Q. Even though the person was dead?
A. Even though the person is dead, that occurs.
Q. All right.
A. That occurs in it. I feel sure I am correct in that but I may not be—I may not be—I would have to review the technical points on that.

By Mr. Jolly:
Q. Excuse me; I thought you were through.
A. And in narcotics, the percentage would be decreased even after death.

Mr. Messick: We are not dealing with the question of narcotics. We object—we are not dealing with the question of narcotics.
The Witness: By oxidation, and it is my impression that alcohol is also oxidized even after death, by a greater degree for the first two hours and then to a much lesser degree after that.

By Mr. Jolly: (continues examination)
page 107 } Q. Doctor, a specimen of a person's blood taken an hour and a half more after an accident itself, it certainly wouldn't increase, would it, sir?
A. It is my impression that it would not increase but I am not qualified to make that statement, I'm afraid.

By the Court:
Q. Well, oxidation of the alcohol in the blood would take place through the liver, wouldn't it, and the organs of the body, the lungs and liver and—
A. And in the blood stream.
Q. Blood stream?

Dr. Michael I. Hanna.

A. There is still oxygen present in the blood stream to carry on the chemical process.

Q. But if a person is dead, there is no oxygen in the blood stream?

A. But the chemical process continues for some few hours after that. That point, I'm not sure about, and that point is how long.

Mr. Messick: Well, I move that his testimony be stricken because he says he is not qualified in his own statement to express an opinion.

The Court: I don't think I should strike it but I think the jury should consider his testimony as to the extent that he, himself, has put his knowledge on it. He said it hadn't gotten any greater so I believe I will have to let that much to the jury, that it hadn't increased.

page 108 } The Witness: I'd like to be permitted to explain my answer to that question.

The Court: Well, if you don't know, you can't explain it. That's the only difficulty.

Mr. Messick: Exception noted, your Honor.

The Court: But, if you want to explain it, I think you are entitled to it, but just explain what you know, not what you think.

The Witness: There is oxygen present in the blood after death, enough to carry on the process of oxidation of alcohol, which would decrease the percentage of the alcohol that is present in the blood. What I am not sure about is at the exact rate of oxidation that takes places or at what degree and how long the time involved is and at what degree the rate *of* oxidation or the amount of the alcohol would decrease, in percentage, after death.

By Mr. Jolly: (continues examination)

Q. Did I understand your testimony, Doctor, that you are certain that it does decrease some, but are not certain as to the rate?

Mr. Messick: I object, if your Honor please. The witness has not said that.

The Court: Yes; he said that.

Mr. Messick: He said he was not qualified to give an opinion.

page 109 } Mr. Jolly: That's what he said; he just said it.

Dr. Michael I. Hanna.

Mr. Messick: He said it was his impression. That was his testimony. Now, a witness put on the stand, an expert is either qualified or not, one of the two. He can't come in and in one breath say he doesn't know or it is his impression, and in the next breath make a statement in regard to it.

The Court: Well, if you are objecting, I will have to overrule your objection right now.

Mr. Messick: All right, sir; we except to the ruling of the Court.

By Mr. Jolly:

Q. Do you remember that question I just asked you?

(Addressing the reporter): Read the question, please.

(The following question was read:

Did I understand your testimony, Doctor, that you are certain that it does decrease some, but are not certain as to the rate?)

A. That's right.

Q. After death?

A. After death; that's right.

Mr. Messick: That's leading.

Mr. Jolly: All right; your witness.

page 110 } CROSS EXAMINATION.

By Mr. Messick:

Q. Doctor, did you file this "Report of investigation, Cause of Death," and everything with the Chief Medical Examiner, the death certificate of Gordon Bates?

(A paper was then handed to the witness.)

A. Yes; that's a copy of my report.

Q. You certified that as being a true and correct report as to your findings in regard to the matter?

A. That's right.

Mr. Messick: We'd like to offer that in evidence.

Dr. Michael I. Hanna.

(Report of Medical Examiner was handed to counsel for the defendant for examination.)

Mr. Jolly: Mr. Messick, we don't object to the introduction of this report, with one exception, and that is the "X" mark made on here in the blank after "whether or not this person was the driver of the automobile." I'd like to ask the doctor whether he knows—he filled this out—

Q. Whether you know, of your own knowledge, that he was the driver when you filled that out?

Mr. Messick: I'm asking the witness now.

The Court: He's got a right to object to that condition, Mr. Messick:

Mr. Kime: You gave it to us to look over be-
page 111 } fore you undertook to examine him on it.

The Court: What they are trying to do is determine the admissibility of the report.

Mr. Messick: That's his investigation, as Chief Medical Examiner.

The Witness: That is—I can only answer that as "said to be the driver."

By Mr. Jolly:

Q. And you don't know that of your own knowledge?

A. Not with accuracy. I mean, not with certainty.

Mr. Jolly: With that reservation, we have no objection.

The Court: Mark that Number 7, Mr. Bieler.

(The report of the medical examiner was received in evidence and marked, Plaintiff's Exhibit #7.)

By Mr. Messick: (continues examination)

Q. Now, you told us that you went to the scene of this accident, didn't you, sir?

A. Yes, sir.

Q. And that you examined the two occupants of the Bates car?

A. That's right.

Q. And you saw them there at the scene of the accident?

A. That's right.

Dr. Michael I. Hanna.

Q. And you saw them in the car?
page 112 } A. I saw the occupants of the car.
Q. Well, and you, as medical examiner and as coroner, made this report and you reported that, "I hereby declare to the best of my knowledge and belief that this is true and correct information regarding the death—" and you reported that Gordon Bates, from your investigation, was the driver of the car, and that's what you reported to the State of Virginia, didn't you, sir? Isn't that correct?

A. That's right.

Q. Yes, sir. When you reported that to the office of the Chief Medical Examiner, you certainly believed it to be true, from your investigation, didn't you, sir?

A. That was to indicate the blood sample which was removed from the person.

Q. "If motor vehicle accident, check one of the following: Driver, passenger, pedestrian," and you checked that he was the driver, didn't you, sir?

(Exhibit #7 was then handed to the witness.)

A. Yes; you know we are—

The Court: Just go ahead and answer the question.

A. We were told to check one block there and that was the only—

By Mr. Messick: (continues examination)

Q. Well, you checked him as the driver. Now, you told the jury you didn't check the blood of Ellis
page 113 } Bates. Now, why didn't you check the blood of Ellis Bates?

A. That was the only specimen—the only one specimen indicated in the medical examiner's procedure, and that is believed to be the driver.

Q. Believed to be the driver. In other words, you checked Gordon Bates because, from your information, and what you observed, Gordon Bates was the driver of this automobile that brought about this accident and not Ellis Bates?

Mr. Jolly: Well, we object to that question.

The Court: He can ask the question.

Mr. Jolly: That brought about this accident?

Dr. Michael I. Hanna.

By Mr. Messick: (continues examination)

Q. Yes.

A. I indicated the driver on the check mark there to identify the blood specimen as that believed to be the driver.

Q. Well—

A. The blood sample was sent in as that believed to be the driver.

Q. Yes, sir. You reported to the State that he was the driver and marked him as the driver, didn't you, sir?

A. Yes, sir.

Q. Now, if you'd have had any information that Ellis Bates was the driver, you would have made a test of his blood, wouldn't you, sir?

A. That's right.

page 114 } Q. Now, did you make a test of the other man's blood, Mr. Henry Wilkerson, the driver of the Cadillac car who was headed the other way?

A. That man was not dead when I arrived at the scene.

Q. Well, if he wasn't dead, when did he die?

A. Several days later.

Q. Uh-hum. Did you make a test of his blood?

A. A test was ordered for his blood. I'm not sure whether that was made or not.

By the Court:

Q. Well, did you make it; that's the question?

A. No; I wasn't present at the time of his death. That was some days later at the hospital.

Q. Well, what Mr. Messick wants to know is, did you make a test that night of Mr. Wilkerson's blood?

A. No; not that night. I was not qualified to make the test of the man or even to treat the man.

By Mr. Messick: (continues examination)

Q. Were not qualified to even treat the man or make the test as a doctor? Who ordered the blood test then?

A. On Wilkerson?

Q. Yes.

A. The man was in—the man was not dead when I arrived at the scene.

Q. Yes, sir. I said, who ordered the blood test?

page 115 } A. I ordered the blood test after the death occurred at the hospital.

Q. Did you order any blood test that night?

A. On Mr. Wilkerson?

Dr. Michael I. Hanna.

Q. Yes, sir.
A. No, sir.
Q. Well, why would you be ordering a blood test three days after his accident—I mean, after he was—why would you be ordering any blood test three days later?
A. The order was given to proceed with a blood test of the man, if death occurs when brought into the emergency room.
Q. Well, who—
A. To my knowledge, a specimen was not taken.
Q. Well, who issued the order directing that a blood test be made when he was brought to the emergency room?
A. That was my order.
Q. I thought you just told the jury you didn't issue any order for any blood test until after he was dead.
A. Well, if the man was dead on arrival, why I told them I wanted the blood test from him.
Q. If he was dead on arrival, you wanted a blood test; if he wasn't dead, you didn't want one, is that right?
A. That's right.
Q. Well, was there ever any blood test made on him?
A. Not to my knowledge.
page 116 } Q. Did you ever receive any information back from Richmond or any place else on him?
A. Not to my knowledge.

Mr. Messick: You may stand aside.

RE-DIRECT EXAMINATION.

By Mr. Jolly:
Q. Just a second. Dr. Hanna, do you recall making any reports to anyone regarding the result of Gordon Bates's blood test?

Mr. Messick: We object to that. What difference does that make?
The Court: Objection sustained.

By Mr. Jolly:
Q. Doctor, before we got off this report here (indicating exhibit #7) Mr. Messick has asked you about in great detail, in this information that you put on this report as the driver, of your own personal knowledge or was it the best information you had at the time?

Dr. Michael I. Hanna.

A. That was from the best information I had at the time.

Q. As a matter of fact, Doctor, were the Bates brothers in the automobile when you got there?

A. One of the brothers was in the automobile and the other was partly in the automobile.

Q. Then, of your own knowledge, Doctor, do page 117 } you know who was driving the Bates car?

Mr. Messick: He's asked him that a number of times and he saw the conditions there, too.

The Court: Well, he's already answered that he did not.

Mr. Jolly: All right. I just wanted to be correct. That's all.

The Court: Because of his own knowledge, he said he did not know who was driving.

Mr. Jolly: That's all, Doctor.

RE-CROSS EXAMINATION.

By Mr. Messick:

Q. Your report as to the driver was based on what you saw and observed as well as what you were able to ascertain then, too, wasn't it, Doctor?

Mr. Kime: You've asked him that direct question, too, and his answer was yes.

The Court: He answered that, too.

Mr. Messick: In the first place, I asked him whether or not they were in the car. He didn't remember when I examined him. Now, he's telling us one of them was in the car and the other partly in. Let me show him the picture and see if he remembers that.

The Court: Show him the picture and see if that brings back anything.

page 118 } The Witness: I have got a mental picture of it.

Mr. Kime: Where are the pictures?

Mr. Stephenson, Jr.: We object to statement of counsel

The Court: Both counsel—on both sides have been making statements all day that were inadmissible and improper. I wish you would make your objections to the Court and not to each other and I am probably just as guilty of it myself; I don't know.

Mr. Jolly: We are all partners in crime, sir.

Mr. Messick: It is a bad habit that we all get into.

Dr. Michael I. Hanna.

The Court: Yes; I know, and I'm getting worse today then I have ever been.

(Photographs were then handed to the witness.)

The Court: Now, which picture are you showing him?
Mr. Messick: I am showing him #2 and #3, your Honor.

By the Court:
Q. Look at those pictures, Doctor, and see if those pictures represent what you saw when you were there or if the facts are different. I will ask you the questions with the hope that it might save a little time.

Mr. Messick: All right, sir.
page 119 } The Witness: I beg your pardon; what is the question, sir?
The Court: The question was, when you arrived at the scene of the accident and observed the cars and the bodies, were they represented as shown by those pictures or were the facts different?
A. Yes; this is representative exactly (indicating).
Q. Look on the back of the picture and see the number.
A. Yes; just as it was. This is Exhibit #3.
Q. All right, #3 represents what you saw when you arrived?
A. That's right.
Q. Now, from #3 and from what someone may have told you, did you make up your report and send it in to Richmond?
A. That's right.

The Court: Now does that answer your question, Mr. Messick?
Mr. Messick: What he saw and observed.
Mr. Jolly: It was a whole lot quicker that way, Judge, too.
The Court: I wish I could ask all the questions.
Mr. Messick: To be perfectly frank with you, Judge, I wish you could too, sir, and I'll turn it all over to you. (Laughter)
page 120 } The Court: Except, I don't know what the witnesses are going to say.
Mr. Messick: I don't either. That's what I tried to find out. (Laughter) That's all. Thank you, sir.

The Witness stands aside.

* * * * *

The Court: Gentlemen, I didn't really mean what I said when I said I wanted to ask all the questions. I was just fooling.

SHERIFF EMORY A. THOMPSON.

the defendant, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kime:

Q. I believe you are Emory Thompson and you are the Sheriff of Alleghany County?

A. That is correct, sir.

Q. And as such, in your capacity as Sheriff, you have been made defendant to this suit that we have been trying here today

A. Yes, sir.

Q. And now,—

Mr. Messick: Not made in his capacity as Sheriff; in his capacity as Administrator of the Estate.

The Court: As Sheriff, he is the Administrator.

Mr. Kime: As Sheriff, and that's exactly what

page 121 } I said.

Mr. Messick: He's not being sued as sheriff; he's sued as administrator and the Sheriff is the Administrator of the Estate.

The Court: Gentlemen, it's not material to the case. The fact that Mr. Thompson, by reason of being Sheriff is the Administrator.

Mr. Kime: Yes, sir.

Q. (Continued) Now, Mr. Thompson, for fear that either the Court or the jurors may think you know something about this, did you make any investigation of this accident, personally?

A. No, sir.

Q. And can you throw any light on it, other than the testimony that's—that you have heard here related from the stand?

A. No, sir.

Sheriff Emory A. Thompson.

Q. As to what happened or what caused the accident or who were involved?
A. No, sir.

Mr. Kime: That's all I want to ask him.
Mr. Messick: We certainly don't want to cross examine that, sir.
Mr. Kime: At least, we got one witness that you don't want to cross examine.

The witness stands aside.

* * * * *

page 122 } Mr. Kime: We rest, may it please the Court.
The Court: All right, gentlemen, the defense rests. Have you got any rebuttal? It has got to rebut what these witnesses have testified to.
Mr. Messick: No, sir; there is nothing to rebut, Judge.
The Court: All right, gentlemen; suppose you go to your room and we will get the instructions ready for you, sirs.

(The jury retired from the courtroom at 2:45 o'clock, P.M.)

IN CHAMBERS AT 2:45 O'CLOCK, P.M.

(Out of the presence of the jury.)

Mr. Jolly: Now, at the conclusion of all of the evidence, counsel for the defendant renew their motion to strike the plaintiff's evidence for reasons heretofore assigned and for the further reason that, as disclosed by the evidence of the defendant, that if Gordon Bates was driving the automobile it shows, as a matter of law, that his brother, Ellis Bates, had several opportunities to leave the car, that he was present when Gordon was warned by two different officers of the manner and fashion in which he was driving and that he was guilty of assuming the risk, as a matter of law.
And there still has been no evidence introduced in the case as to what caused this accident or why it occurred
page 123 } but only that it did occur and where it occurred and that under the doctrine of the Court of Appeals, and especially in the Richter case, that that is not

sufficient to make a jury question where it is a guest case and the doctrine of gross negligence applies.

The Court: Motion overruled.

Mr. Jolly: And we except.

Mr. Kime: May it please the Court, can we add this to it. If the Court is satisfied that it is a jury question as to whether or not Gordon Bates was operating the automobile at the time of this accident—and we conclude that the Court is so satisfied, otherwise, the Court would not have overruled our motion made at the conclusion of the plaintiff's evidence and again just overruled at the conclusion of all the evidence—then, surely for that very reason the Court, we feel, should be satisfied that if Gordon Bates was driving the automobile then his brother, Ellis, is bound to have known that he was drinking during the trip as far back as Fairfield, where he was stopped first by Officer Talbert and thence right on down to the time of the accident.

Now, I am emphasizing the fact that he was drinking and, too, the manner in which he was operating the automobile both, because that is all the evidence in the case and there is no evidence in the case to contradict that whatsoever.

The Court: Mr. Kime, I don't want to commit myself as to that right now, as to what I think, but the trial
page 124 } having progressed this far, I would prefer to make it a jury question at this time and if the jury bring out a verdict against the defendant then I am willing to hear any motion you might make to set the verdict aside on the same reasons that you have now assigned to strike the evidence, but at this point I would like for the case to go to the jury, so if you have any instructions to offer we will hear them.

Mr. Stephenson, Jr.: Your Honor, we would like to make a motion, too.

Mr. Messick: Yes, sir. Is there any evidence in this case that there was anybody driving the car other than Gordon Bates and to—

The Court: I mean, let the jury pass on that.

Mr. Messick: You think even that is a jury question, as to whether he was driving?

The Court: It may not be, if I were out there. It may not be.

Mr. Stephenson, Jr.: We'd like to move to strike out the evidence of the defendant as to any drinking because there is no evidence—even the defendant's evidence shows that Gordon Bates was not under the influence of intoxicants and unless they show that, as your Honor has held in other cases,

I am sure the fact that he had something to drink is of no moment. That is all their evidence shows. If you take the evidence of Trooper Talbert, he says he was, as far as he could tell, all right, from a standpoint of intoxication.

page 125 } The evidence of our other witness, Mr. Vance, said he was absolutely sober. He left Mr. Vance and the accident happened a few miles west of there. There is no evidence in this case that he was intoxicated and I say that with full understanding of the blood analysis and I say it, moreover, because the blood analysis—there is no evidence to indicate what the blood analysis means. There has been no evidence and, certainly, your Honor wouldn't entertain a thought of construing the blood analysis in the light of the statute which was subsequently passed. At the time of this accident, it was not the law that these presumptions are in the statute.

The Court: Oh, I think it was, Mr. Stephenson. The legislature just made statutory law what the courts had been practicing a long time before that because one court had one rule and another court had another rule. The statute made it uniform. It is a question of admissibility of evidence, really.

Mr. Stephenson, Jr.: It is a question of what the various percentages of alcohol meant to an expert and by explanation.

The Court: We have had several of them before here of which I have instructed the jury on presumption as a matter of fact, and as a matter of fact I have got a little chart which I carried with me before, ribbing Dr. Mann, who went into the subject in detail and which I used all the time and I've got it now.

page 126 } Mr. Stephenson, Jr.: Your Honor, of course, I don't want to argue with the Court, but assume you take that position and I still maintain there is no evidence that, from observation—now, from observation—that Gordon Bates, as to his demeanor or muscular movements, speech or any other outward manner of observing him, it could be noticed by an individual, a trained officer or—

The Court: That's an argument to the jury.

Mr. Stephenson, Jr.: The more so it follows then that it couldn't be detected by the passenger in the car.

The Court: That is something you can argue to the jury.

Mr. Stephenson, Jr.: But they have got to stay within their pleadings.

Mr. Messick: We want to now know, gentlemen, at the conclusion of all the evidence, do you here and now claim that Gordon Bates was under the influence of intoxicants at the time of this accident?

Mr. Kime: If you're asking me, of course, I don't necessarily have to take the stand but we claim the benefit of all the evidence along that line that you have introduced and that we have introduced.

Mr. Stephenson, Jr.: We note an exception to the Court's ruling.

The Court: Let's see what the instructions
page 127 } are. That might answer the question.

Mr. Messick: Well, my instructions are simply this, Judge. In the first place, I want to take this position, that if they contend that Gordon Bates was under the influence of intoxicants at the time of the happenings of this accident then the only issue in this case is contributory negligence.

The Court: Is contributory negligence. Isn't that really the question in this case, whether the man was intoxicated or whether it was reckless driving or whatnot. You all can't very well deny he wasn't driving from the reasonable inferences that the jury would have a right to draw from the facts and circumstances. He was almost immediately—from the witness that came along in the car, he was practically under the wheel, dead.

Mr. Kime: Of course, it could have been that after he had been given a ticket and after he had further been warned by Officer Vance here in Covington that he may have changed places with his brother.

The Court: I don't believe that happened.

Mr. Kime: We'll admit that in all probability that didn't happen but we say it could have happened, plus the additional fact that there is no evidence in the case right now as to what period of time elapsed between the time he started across the bridge of the City of Covington going out on Route 60 and the time of the accident.

page 128 } Mr. Messick: It couldn't have been over 20 minutes.

Mr. Kime: Well, it was not but 3 miles and a fraction. He could have covered that in 3 minutes or less.

Mr. Stephenson, Jr.: Vance didn't attempt to fix the time.

Mr. Kime: That's what I said.

Mr. Stephenson, Jr.: He said it was 7:10.

Mr. Kime: All I'm trying to do is point out in response to what the Court said that there was plenty of opportunity for them to have stopped on the outside of Covington and changed drivers. Now, the probability is they did not. We'll go along with the Court on that but I don't see how it could be completely ruled out.

The Court: Of course, in the same period of time he could have gotten intoxicated, too. Where he wasn't noticeable in advance, he could have gotten under the influence later in that 20 minutes. That's the reason I say the probable issue in the case is whether or not contributory negligence is the sole issue or not.

Mr. Kime: Professor Carson and his wife got in the car. He was driving, she was sitting next to him, and they had an accident and when the thing wound up, there were yet two witnesses who saw it and who actually saw her under the wheel and she, of course, stated she was under the wheel of the car but that she was thrown right over on top of him.

Mr. Jolly: And right out of the automobile.

page 129 } Mr. Kime: And fractured a vertebra in her back.

The Court: Of course, I say that could happen but in this case in all probability Gordon was the operator of the car and the jury would have the right, from all the evidence, to draw that inference from the evidence that he was.

Mr. Kime: And wouldn't the jury have the right to draw the inference that he was not?

The Court: On what?

Mr. Kime: But the burden is on them to prove, by a preponderance of the evidence—not on us to show anything—he said we haven't proven that Ellis was driving.

The Court: No; you don't have to prove anything. You don't have to prove anything at all. You could have stopped when they finished—you could have stopped completely and not put on anything.

Mr. Kim: And we could have demurred right then.

The Court: That's right. That's right. Why don't you do it now?

Mr. Jolly: That's the second time the Judge has asked us that.

Mr. Kime: When was the other time?

Mr. Jolly: Was in the Basham case. He said, "Why don't you demur to the evidence?"

The Court: Well, it seems to me, just from the

page 130 } evidence now, frankly, I think it's a question that should go to the jury but I feel inclined to say that the only issue in this case is whether or not the defendant —the deceased defendant—I mean, the deceased plaintiff—was guilty of contributory negligence, which would bar his administratrix from any recovery. Now, I don't know but what it isn't best to proceed along that line but I don't know what your position is.

Mr. Kime: Well, that puts us in the position to have to abandon one part of our case, at least, and that it is up to them to prove their case first.

The Court: That's right.

Mr. Messick: Well, we have proved our case. There is no question about it and there is no evidence to the contrary. There are no facts or circumstances from which the jury could draw any inference other than that Gordon Bates was driving the car and, that being true, it is absurdity for them to take such a position.

Mr. Kime: Mr. Messick, I agree with you in that in all probability Gordon Bates was the driver.

Mr. Messick: Well, there is no evidence to the contrary and all the physical facts—and you establish things by circumstances just as well as you do by direct proof, otherwise, you could never establish a case in which the occupants of a car were killed.

The Court: I think he was the driver. I think
page 131 } he was driving the car at a high rate of speed.
Now, what caused him to drive at that high rate of speed on the wrong side of the road, I am not prepared to say but I do think the facts show that much.

Mr. Kime: I believe the Court is of the opinion that old demon Rum caused him to do that. (Laughter)

Mr. Messick: Now, I think, as the Judge says, there is really only one issue in this case because, under the Richter case, in Va. 183, he was on the wrong side of a double white line and had a head on collision with an approaching vehicle. *Of* he was as sober as a judge—

The Court: Which judge are you talking about? (Laughter)

Mr. Messick: Present company excluded, your Honor. (Laughter)—he'd be guilty of gross negligence as a matter of law. A man can't drive on the left side of a white line.

The Court: Assume he is guilty of gross negligence, as a matter of law, that still brings it down to a question of contributory negligence.

Mr. Messick: That's right. As to whether or not the boy exercised ordinary care for his own safety, I don't know what he could have done. I don't care. Leave out any question of speed in this case, he'd be guilty of gross negligence in driving across a double white line on a curve, on a grade, on a crest
of a hill where his view was obstructed in the
page 132 } path of an oncoming car so I think the Court's
instruction that should be given—the way I take the Court to mean—to tell the jury that if you are going to go

into the question of whether or not he was the driver of the car, if they believe from the evidence that by a preponderance of the evidence he was the driver of the car and in the operation of the car he was guilty of gross negligence, if that was the proximate cause of the accident and death of this young man, that then they would find a verdict for the plaintiff unless your Honor thinks there was sufficient evidence on the question of contributory negligence to go to the jury.

The Court: I will let that question go to the jury.

Mr. Messick: All right. We will have to amend our instructions to that effect.

The Court: I'm not prepared to say he is guilty of negligence, as a matter of law, because he was the driver although I think so. I think I should tell the jury that.

Mr. Messick: If he was the driver of the car, he was guilty of negligence as a matter of law.

Mr. Kime: Something may have happened; the accelerator may have stuck; something may have happened to the mechanism of the car.

The Court: I don't think so, Sagen, but he was clocked at 75 miles per hour. It wasn't the mechanism, except he could have gone faster, maybe. The whole thing of this page 133 } case was he was having trouble with his wife and she had divorced him and he was mad and he was drinking. I mean, that's probably what happened.

Mr. Jolly: And all of that was known to his brother just as well as it was to him.

The Court: Well, there's no evidence that his brother knew anything about his domestic trouble.

Mr. Jolly: Well, yes; he told Talbert right there in the evidence.

Mr. Stephenson, Sr.: It is not in the evidence.

Mr. Jolly: Yes, it is. Talbert testified to that. His father also testified that they were very close.

Mr. Messick: Well, in the first place, he wasn't in any particular trouble. A divorce suit, I think—he had a summons for non-support.

Mr. Kime: If that isn't domestic trouble, what is?

Mr. Messick: He has an absolute defense of non-support.

Mr. Jolly: Yep; he's got one now.

Mr. Messick: Judge, we are certainly entitled to know from the defendant—

The Court: Whether they are claiming he was under the influence or not?

Mr. Messick: Yes, sir. If they claim he was under the in-

fluence of intoxicants, then we are entitled to an
page 134 } instruction on that.

The Court: What position are you going to take now with Gordon? He was, or was not under the influence of intoxicants. You've got Dr. Hanna here now to prove he was.

Mr. Kime: We are going to take the position he was under the influence. Now what is being under the influence? .15 is definitely under the influence.

Mr. Stephenson, Sr.: The other witnesses say he was not.

Mr. Kime: He was under the influence—that is the position we are taking.

The Court: Of course, he was not when he left here at 7:45 and, according to Vance, when he saw him but he was later when they took blood tests. He was under the present law *prima facie* presumed to be under the influence.

Mr. Jolly: And the witness Wilhelm testified he was very unsteady across the counter on his feet.

The Court: Yes, sir; you are going to say he was under the influence?

Mr. Kime: Yes, sir.

Mr. Messick: Then, if he was the operator of the car, he was guilty of gross negligence as a matter of law.

The Court: And the whole question is whether he was guilty of contributory negligence.

Mr. Jolly: Or whether he was the operator.

page 135 } The Court: Well, I think I had better instruct the jury he was operating and eliminate that question.

Mr. Kime: Well, you don't—the Court doesn't mind us excepting to the Court's ruling?

The Court: No; you have done that all day long.

Mr. Stephenson, Sr.: That comes down to the Thompson affidavit and he comes on the stand and says he doesn't know.

Mr. Kime: He's still going back to that affidavit.

The Court: The issue is this, gentlemen, the Court will instruct the jury that in this case Gordon Bates was the driver of the automobile at the time and he was guilty of gross negligence as a matter of law, and the only question in this case now is whether or not the other boy—I can't remember his name—Ellis, was guilty of contributory negligence. Now, you say that Gordon was not under the influence (indicating plaintiff's counsel) and you say that he was (indicating defense counsel) and you can argue that question to the jury as to whether he was or wasn't and they have got a right to argue what happened before the accident and such a speed

at 6:10 in order to put Ellis on notice as to the type of driver he was riding with and the way he was riding.

Mr. Messick: Well, I see your Honor's position but I take the position it is an entirely different position in speeding and that is pointed out in the Richter case and very page 136 } clearly pointed out in the Garst case—in the *Garst* v. *Obenchain*—that for a man to be traveling on a three-lane or wide highway—in the Richmond case it was 42 feet—even though he was speeding it wouldn't be gross negligence.

The Court: No; it is not gross negligence but all those things added together is enough to put him on notice.

Mr. Messick: Yes, sir.

The Court: Well, let's see what the instructions are.

Mr. Jolly: So the record will be clear, we respectfully except to the Court on the question of who was driving the automobile and also instructing the jury that Gordon Bates was guilty of gross negligence as a matter of law.

Mr. Messick: Judge, since we changed that, it will take me a minute to change the instructions because I have them drawn differently.

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS.

(Instruction #1 offered by the plaintiff.)

Mr. Jolly: Counsel for the defendant object to the granting of instruction #1 on the grounds that it rules, as a matter of law, that Gordon Bates was the operator of the Buick automobile and further takes away from the jury the question of whether or not Gordon Bates, if he was the driver, was guilty of gross negligence and leaves only the issue for page 137 } the jury as to whether or not the passenger, or alleged passenger, Ellis Bates was guilty of negligence which proximately caused or contributed to his death.

And without waiving our objection to this instruction, we would like to request that the instruction be amended in the last line to read, "believe from a preponderance of the evidence that Ellis Bates was guilty of negligence or an assumption of risk which proximately caused or contributed to his death."

The Court: I believe that ought to be in there, "assumption of risk" because he assumed that, under the facts.

Mr. Messick: He assumed the ordinary risk of travel but he doesn't assume the gross negligence, Judge. No, sir; he doesn't assume it.

Mr. Kime: He doesn't assume gross negligence, Mr. Messick, but—

Mr. Messick: There may be some question of an assumption of risk. The only thing an ordinary passenger assumes is the—

Mr. Kime: But he's barred by it if he doesn't take some action to protect himself.

Mr. Messick: That's entirely a different proposition.

The Court: What is the assumption of risk, if it doesn't mean that?

Mr. Messick: Assumes the ordinary risk of travel; he doesn't assume any question of any gross negli-
page 138 } gence on the part, or any reckless or wrongful conduct. He assumes that the automobile is in reasonably safe condition.

The Court: Let's see now what you mean by it, because it is used in all these reported cases, "assumption of risk." What do you mean by it?

Mr. Kime: We understand that if he continued to ride with his brother, after he knew or by the exercise of reasonable care should have known that his brother was drinking, that he was in an intoxicated condition, that he had been violating the law of the road in the manner and way in which he operated his automobile then that bars his recovery as a guest passenger in the automobile.

Mr. Messick: By reason of his contributory negligence; not by the reason of assuming any risk.

The Court: That's what I mean. Is that contributory negligence or assumption of risk?

Mr. Stephenson, Jr.: Same thing.

Mr. Kime: Well, I think it's a difference between tweedledum and tweedledee.

The Court: I think so, too. I don't think it makes a whole lot of difference because when he does—

Mr. Kime: He doesn't say contributory negligence; he just says simply negligence.

The Court: That caused or contributed to his death; that's the same thing. I believe I'll give #1, as offered.
page 139 } Mr. Jolly: We except, for the reasons heretofore assigned.

(Instruction #2 offered by the plaintiff.)

The Court: This means the burden of proof is on you to prove contributory negligence. I will have to give this Instruction #2.

Mr. Kime: May it please the Court, we object and except to Instruction #2 on the grounds that the only evidence in this case is evidence to show that Ellis Bates did not exercise any care for his own personal safety and they are not entitled to an instruction in the face of the evidence in this case that he is presumed to have exercised ordinary care for his own safety. The evidence here shows he didn't exercise any care.

The Court: I don't believe there would be a presumption that he did it. The burden is just on them to show—

Mr. Messick: *Armstrong* v. *Rose*, 170 Va. 190, and in a number of cases—

Mr. Kime: I'm talking about the evidence in this case, Mr. Messick.

Mr. Messick: I'm talking about the evidence in this case, too, that he is presumed to have exercised due and reasonable care for his own safety unless it appears from our evidence to the contrary. Now, he's dead; he can't speak. Here's what the Court said, "Until the contrary is proven, there is a presumption that the deceased acted with the page 140 } instincts of self-preservation in exercising due and proper care for the protection of his person and the preservation of his life. This presumption prevails where the plaintiff is incapable of testifying and there are no eye witnesses."

The Court: All right; that's all right.

Mr. Kime: Wait a minute. That says there, right at the very beginning,—read that again.

Mr. Messick: "Until the contrary is proven,—"

Mr. Kime: Yes; that's the only evidence in the case.

The Court: I'm going to give #2 here.

Mr. Kime: We except to the granting of Instruction #2 for the reasons stated.

(Instruction #3 offered by the plaintiff.

Mr. Kime: Actually, doesn't that conflict with Instruction #2?

The Court: You mean, where it says, "duty to exercise ordinary care," and it says he is presumed to have done it.

Mr. Kime: Yes, sir.

Mr. Messick: Yes, sir; it is his duty and he is presumed to have performed his duty.

The Court: Is that your only objection, that it is in conflict; otherwise, I am going to go on and give it. It looks

a little repetitious but I think he is probably entitled to it.

page 141 } Mr. Kime: Well, we object to it on the same grounds stated in objection to instruction #2, that the sole and only evidence in the case shows he didn't exercise any care for his safety at all.

The Court: All right; granted.

Mr. Kime: Exception noted.

(Instruction #4 offered by the plaintiff.)

The Court: Any objection to #4?

Mr. Kime: Yes, sir; may it please the Court, how can the Court reconcile Instruction #4, with what the Court has indicated that he would do and has done insofar as Instruction #1 is concerned, because the evidence in this case from the medical examiner is that the alcoholic content of Gordon Bate's blood was 0.15, which the statute says conclusively shows that he was under the influence?

Mr. Messick: It doesn't conclusively show.

The Court: No; it's *prima facie*. .15 is *prima facie* evidence.

Mr. Kime: Well, *prima facie* then, and this instruction certainly is in conflict with that and it doesn't take into consideration all the evidence in this case.

Mr. Messick: Well, the position that we take is simply this, that—

Mr. Kime: That that didn't mean anything?

page 142 } Mr. Messick: The position that we take is simply this, that in order for a man to be under the influence of intoxicants while operating an automobile, it doesn't make any difference what his blood shows; it's got to be apparent to observation, in other words.

The Court: But if it is .15, he is *prima facie* presumed to be, although it is not apparent to observation except it is *prima facie* presumption that can be rebutted.

Mr. Messick: That's right and it's rebutted by the evidence in this case that it was not apparent to observation at all.

The Court: Well, I'm going to give #4, and I'm also going to give the one on *prima facie* presumption.

Mr. Kime: We except to the giving of Instruction #4.

Mr. Jolly: And also except for the further reason that the definition as set forth in the first part of the instruction so as to be apparent to observation, it's drawn in the disjunctive

and the way it is prepared in the second paragraph, then you'd have to notice every one of them in order to say he was under the influence. In other words, what I am trying to say is that you don't have to observe every one of those things and every one of those things don't have to be observable.

Mr. Kime: Have you followed the language of the statute? We don't have the Code here, sir. I don't know whether he is following the statute.

page 143 } The Court: I think that's all right.

Mr. Kime: Have you followed the language of the statute?

Mr. Messick: Yes; taken directly from the Gardner case.

The Court: It follows the statute. All right, gentlemen, let's hurry along because I want to finish this case this afternoon.

Mr. Messick: That's it. I think there is an instruction on damages.

(Instruction #5 offered by the plaintiff.)

Mr. Kime: You haven't proven anything in regard to his care. Do you claim that he made any contributions to his parents, monetary contributions?

Mr. Messick: I'm not claiming—but his care and attention from a child may be.

Mr. Kime: I mean you are not going to undertake to argue it?

The Court: He didn't have any proof on it.

Mr. Kime: All right.

The Court: Number 5 is granted.

Mr. Kime: Of course, we object to all instructions on the grounds that the Court should have sustained our motion to strike the plaintiff's evidence.

The Court: Yes, I understand that. All right,

page 144 } gentlemen, the instructions for the defendant now. Let's call the first one Number A.

(Instruction A offered by the defendant.)

Mr. Kime: We expect the Court to refuse that but then we offer it anyway.

The Court: I will have to refuse it in view of what I have already given in Number 1.

Mr. Jolly: To which action of the Court, counsel for the defendant except.

(Instruction B offered by the defendant.)

The Court: I have already ruled under Number 1, so I will have to refuse B.

Mr. Kime: To which action of the Court, we except. Of course, that has a double proposition in there, too. That has both propositions.

The Court: That's right.

Mr. Kime: An exception is noted.

(Instruction C offered by the defendant.)

The Court: I will have to refuse C, too.

Mr. Kime: Well, we are getting along pretty good aren't we? Your Honor, we note an exception. (Laughter)

(Instruction D offered by the defendant.)

The Court: No objections?

Mr. Messick: Yes, sir.

The Court: All right; state them.

page 145 } Mr. Messick: Well, there may have been an unreasonable and unlawful speed and he was stopped and given a summons by State Trooper Talbert in the vicinity of Lexington and if you further believe that despite his getting a ticket or summons he continued to drink intoxicating beverages—

Mr. Stephenson, Jr.: No evidence of that.

Mr. Messick: —and to operate his automobile in a careless and reckless manner, there is no evidence he continued to operate his automobile in a careless and reckless manner.

Mr. Kime: It is. The officer testified he was given a ticket for reckless driving. Vance did—

The Court: All right; state your objection.

Mr. Messick: And was again stopped in the City of Covington by Officer Vance and warned about the manner of his operation of his Buick automobile, and if you still further believe that during the happening of these events and throughout—now, where does any evidence—

The Court: Go ahead and state your objection.

Mr. Messick: Yes, sir—you further believe that these events throughout the course of said driving that Ellis G. Bates was a passenger of the automobile and had actual knowledge of the same and yet continued to ride therein, despite the

fact that he had several opportunities to get out of said automobile,—why, where did he have the opportunity?

The Court: Just state your objection to it.

page 146 } Mr. Messick: —and you still further believe that the proximate cause of the accident was the gross negligence of Gordon Bates, brought about by his drinking of intoxicating beverages, which rendered him unfit and an unsafe driver, he had brought about by his drinking of intoxicating beverages and that he became intoxicated apparent to observation, then the Court tells you that Ellis G. Bates was guilty of contributory negligence as a matter of law in continuing to ride in said automobile and your verdict should be for the defendant.

We object, Judge, because the instruction is not supported in a number of instances by the evidence and, furthermore, it has never been shown that he was intoxicated to be apparent to observation and that is all that is necessary and essential before you could say that this man was guilty of contributory negligence as a matter of law. It is a finding instruction and singling out numbers of things that are not supported by any evidence at all.

The Court: I think I will give the instruction.

Mr. Kime: May I call attention of the Court to one fact and that while Wilhelm distinctly said that this man was unsteady on his feet—

The Court: I am going to give Instruction D.

Mr. Messick: Well, we except, Judge, for a number of reasons.

The Court: All right. Let me have Number E.

page 147 } (Instruction E offered by the defendant.)

Mr. Messick: We object to that instruction for the following reasons. In the first place, Judge, the statute passed in 1956 that makes the presumption is applicable only in criminal cases. It was not in force and effect at the time of the happening of this accident; there was no presumption under the law in Virginia at the time of the happening of this accident from any alcoholic contents of the blood. Furthermore, that there is no evidence that the quantity of alcohol was as much or more than .15% by weight and there is no evidence in this case as to the effect of alcohol in the blood. It is a matter that has got to be established and proven and the defendant hasn't undertaken to prove it at all.

The Court: All right; I am going to give Number E.

Mr. Messick: All right, sir; we except to the ruling

of the Court.

Instruction F offered by the defendant.)

Mr. Messick: That's all right, sir.
The Court: All right; F is given.
Mr. Kime: That's all, sir.
Mr. Messick: You might give us just a moment, your Honor; just a moment here. We take the position that the law, as laid down in the case of *Garst* v. *Obenchain*, 196 Va. 664, as to the duty of the guest and that this long instruction here—what is that number—

page 148 } The Court: Number D, I expect.

Mr. Messick: —that Number D is right in the teeth of this instruction laid down in *Garst* v. *Obenchain*, and your Honor is telling the jury in this matter that he was guilty of contributory negligence, as a matter of law, without taking into consideration whether or not he was under the influence of intoxicants or it was apparent to observation and taking into consideration in this instruction you further say, in spite of getting a ticket or summons, he continued to drink intoxicating beverages and operating the automobile in a careless and reckless manner. That was before he got to Covington; there was no evidence he continued to drive in a careless and reckless manner. As a matter of fact, the evidence from the standpoint of the defendant was that here in Covington he was perfectly normal.
The Court: You can argue that to the jury.
Mr. Kime: He went around the block 2 or 3 times here in Covington and kept doing the same thing.
Mr. Messick: He was just coming through the town.
The Court: It is now 10 minutes after 4:00. How much time do you want on the side?
Mr. Messick: 30 minutes to a side would be enough.
Mr. Stephenson, Jr.: Judge, I might say that, under the *Massie* v. *Firmstone* rule, under the evidence of intoxication, their evidence can't rise higher than their own witnesses.

By their own witnesses, it was brought out that

page 149 } he wasn't intoxicated to the extent that it was apparent to observation.

The Court: All right. Let's proceed with the arguments now.

(Court, counsel and the jury returned to the courtroom at 4:15 o'clock, P. M. At this time, the Court addressed the jury as follows:)

The Court: You gentlemen know, from your service on juries before, that the instructions is the law in the case for you gentlemen to go by and that you determine what the facts are from the evidence given you by the witnesses from the witness stand and apply the law that the Court gives you in the instructions and in that way arrive at your verdict. The first thing you do when you retire to your room is to elect a foreman; then consider what the facts are and the law that the Court gives you, and then determine in whose favor the verdict should be.

(The Court then read Instruction #1 to the jury. After having read Instruction #1, the Court stated as follows:)

The Court: Now, this instruction, gentlemen, makes the issue in this case for you gentlemen to consider a very narrow one and that is this, that the Court tells you in Instruction #1 that Gordon Bates was the driver of the automobile and that he was guilty of gross negligence, so that the only question for you gentlemen now to determine, which will be shown by the rest of the instructions, is whether or not page 150 } Ellis Bates was himself guilty of contributory negligence which would bar the right of his administratrix to recover. So, the only issue now before you, gentlemen of the jury, if whether or not Ellis Bates was guilty of contributory negligence which proximately contributed to his own death.

(The Court then read the remainder of the instructions to the jury.)

The Court: These, gentlemen of the jury, are the Court's instructions.

(Mr. Stephenson, Jr., commenced the opening argument in behalf of the plaintiff at 4:23 o'clock, P. M., and concluded at 4:42 o'clock, P. M.)

(Mr. Kime commenced the opening argument in behalf of the defendant at 4:42 o'clock, P. M., and concluded at 5:05 o'clock, P. M.)

(Mr. Jolly commenced the closing argument in behalf of the defendant at 5:05 o'clock, P. M., and concluded at 5:06 o'clock, P. M.)

(Mr. Messick commenced the closing argument in behalf of the plaintiff at 5:06 o'clock, P. M., and concluded at 5:18 o'clock, P. M.)

The Court: All right, gentlemen, you have heard the evidence and the instructions of the Court and argument of counsel. You may now retire and consider your verdict. Just write your verdict on the yellow piece of paper, on the bottom thereof.

(The jury retired from the courtroom at 5:19 o'clock, P. M. to deliberate over their verdict. At 5:30 o'clock,
page 151 } P. M., the jury returned with their verdict as follows:)

Clerk of the Court: Gentlemen of the jury, have you agreed upon a verdict?
Foreman of the Jury: We have.
Clerk of the Court: May I have it, please?

(Verdict handed to the Clerk of the Court.)

(Reading:)

We, the jury, find in favor of the plaintiff and award in the sum of 25,000.00.

Signed,

BAUMGARD, Foreman.

Q. Is this your verdict, gentlemen?

Foreman of the Jury: Yes.
The Court: Let me see that just a moment, please. Any objection to the form of the verdict?
Mr. Kime: Let me see it, your Honor.

(Verdict shown to Mr. Kime.)

The Court: I think the form may be all right.
Mr. Kime: Yes, sir; it's all right as to form.

(The jury was excused and left the courtroom.)

Mr. Jolly: Now, may it please the Court, counsel for the

page 152 } defendant move the Court to set aside the verdict of the jury and enter up final judgment for the defendant, or the alternative of granting a new trial on the grounds the verdict is contrary to the law and testimony and without evidence to support it, upon the misdirection of the Court—of the jury by the Court, and that upon the grounds that, under the peculiar facts and circumstances in this case and the evidence in the case, the verdict is so excessive that it clearly shows passion and prejudice on the part of the jury and sympathy as distinguished from the evidence in the case and, fourth, on the further grounds the Court erred in failing to sustain the motion of the defendant to strike the plaintiff's evidence both at the conclusion of the plaintiff's evidence and at the conclusion of all of the evidence.

The Court: All right. Now, just a minute. Did you get all that, ma'am?

Clerk of the Court: I think I have it.

The Court: All right.

Mr. Jolly: And we would like an opportunity to file authorities and to be heard on it.

The Court: I expect, in view of the amount involved here, that I had better take a little time to consider it. How much time do you want?

page 153 } Mr. Jolly: Judge, whatever the Court thinks proper or feels is reasonable under the circumstances.

Mr. Kime: We will leave it to the Court.

The Court: How about, would you take 20 days just to furnish your authorities and let me have it and give it to the opposite side. I would like to have the authorities ahead of time so I could get time to read them.

Mr. Messick: We can give you ours, *Garst* v. *Obenchain* and—

The Court: Suppose you write them on a piece of paper on a typewriter and let me have them and give me a copy of it and also Mr. Jolly, and let the other side have 10 days in which to answer.

Mr. Stephenson, Jr.: Are you going to give your authorities now, too?

Mr. Kime: No; no. He said about 20 days—in about 20 days.

The Court: Let the order show that the motion is to be docketed. How about getting me your authorities by June 20th and could I hear you on July 1st?

Mr. Jolly: All right, sir.

Mr. Kime: Let me see, June 20th—18th, 19th, 20th. Your Honor, if we try that case, that will be the third day of that case.

The Court: Well, let's make it later *than* if
page 154 } you want to.

Mr. Kime: And your Honor is in that case, of course.

The Court: Well, I want plenty of time so I can read the authorities, too. Well, that's 30 days. I thought maybe you might give them to me before that.

Mr. Kime: Well, that's all right. Make it by the 20th.

The Court: You furnish your authorities by the 19th (indicating defense counsel) and you furnish your authorities by the 19th of June (indicating plaintiff's counsel). All I want is the list of cases you are relying on and could I hear you gentlemen on July 1st; that's Monday.

Mr. Messick: That's on a Monday, Judge. How about the 2nd? The 1st is our opening day in Court in Roanoke.

The Court: Well, on the 2nd I have a condemnation case that's going to take all day long and another one on the 3rd. How about July 5th?

Mr. Kime: That's all right.

Mr. Messick: That will be all right, Judge.

The Court: Are you planning a trip or something, Mr. Messick?

Mr. Messick: No, sir; I'm trying to get caught
page 155 } up with my work.

*H*he Court: I realize that is a long week-end, July 4th, 5th and 6th comes along on Thursday, Friday and Saturday, and if you have made any plans I don't want to interrupt them in anyway.

Mr. Messick: I haven't any plans. I don't know whether these gentlemen do or not.

The Court: Mr. Stephenson, do you have any plans?

Mr. Stephenson, Jr.: No, we don't.

The Court: But I have already got a matter set on that day.

Mr. Jolly: What day of the week is that—on Saturday?

The Court: No; on a Friday.

Mr. Jolly: That's all right.

Mr. Messick: You mean the 4th is on a Thursday?

The Court: All right. You all let me have your authorities by June 19th and I will hear it orally on July 5th.

Mr. Kime: All right.

Mr. Messick: All right, your Honor.

(The proceedings were concluded at 5:40 o'clock, P. M.)

page 156 } CERTIFICATE.

I, Earl L. Abbott, Judge of The Circuit Court of Alleghany County, Virginia, who presided over the foregoing trial of Bamma Bates, Administratrix of Ellis G. Bates, deceased, *versus* Emory A. Thompson. Sheriff of Alleghany County, Virginia, and as such Administrator of Gordon Bates, deceased, in said Court, at Covington, Virginia, on May 20, 1957, do hereby certify that the foregoing is a true and correct copy and report of the evidence, the objections and exceptions to instructions of the respective parties as therein set forth, and other incidents of the said trial of the said cause. As to the original exhibit introduced into evidence, as shown by the foregoing report, to-wit: Plaintiff's Exhibits 1 to 3, inclusive (photographs), Plaintiff's Exhibit #4 (diagram), and Plaintiff's Exhibit #5 (trousers), Plaintiff's Exhibit #6 (coat), Plaintiff's Exhibit #7 (report of medical examiner), which have been initialed by me for the purpose of identification, they shall be transmitted to the Supreme Court of Appeals as a part of the record in this cause in lieu of certifying to said Court copies of said exhibits.

And I do further certify that the attorneys for the defendant had reasonable notice, in writing, given to counsel for the defendant, Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as such Administrator of Gordon Bates, deceased, of the time and place when the foregoing report of the testimony, exhibits, motions, ob-
page 157 } jections and exceptions to instructions, and other incidents of the trial would be tendered and presented to the undersigned for signature and authentication and was received within sixty days from the date of the final judgment.

Given under my hand this 3rd day of December 1957, within seventy days after the entry of the final judgment in said cause.

EARL L. ABBOTT
Judge of the Circuit Court of
Alleghany County, Virginia.

page 158 } I, F. E. Dillard, Clerk of the Circuit Court of Alleghany County, Virginia, do certify that the foregoing report of the testimony, exhibits, motions, ob-

jections and exceptions to instructions, and other incidents of the trial in the case of Bamma Bates, Administratrix of Ellis G. Bates, deceased, *versus,* Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as such Administrator of Gordon Bates, deceased, together with the original exhibits therein referred to, all of which have been duly authenticated by the Judge of said Court, were lodged and filed with me as Clerk of the said Court on the 3 day of Dec., 1957.

F. E. DILLARD
Clerk of The Circuit Court of
Alleghany County, Virginia.

I, F. E. Dillard, Clerk of The Circuit Court of Alleghany County, Virginia, do certify that the foregoing is a true transcript of the record of the case of Bamma Bates, Administratrix of Ellis G. Bates, deceased, *versus,* Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as such Administrator of Gordon Bates, deceased, and I further certify that notices as required by Section 8-340 and Section 8-466 of the Code of Virginia were duly given, as appears by paper writings filed with the record of said case.

The fee for making this transcript is $ .....
Given under my hand this 3 day of Dec. 3, 1957.

F. E. DILLARD
Clerk of The Circuit Court of
Alleghany County, Virginia.

page 159 } I, Marcus A. Bieler, Court Reporter, do hereby certify that I was duly sworn prior to the commencement of this cause, that the proceedings herein contained were taken down by me in machine shorthand and accurately transcribed to the best of my abilities, and that this transcript is a true and accurate account of all of the evidence taken, motions made and the Court's action with respect thereto, all of the objections and exceptions to instructions, and other incidents of the trial of Bamma Bates, Administratrix of Ellis G. Bates, deceased, *versus,* Emory A. Thompson, Sheriff of Alleghany County, Virginia, and as

such Administrator of Gordon Bates, deceased, tried in The Circuit Court of Alleghany County, at Covington, Virginia, on May 20, 1957.

MARCUS A. BIELER,
Court Reporter
1743 Devon Road, S. W.
Roanoke, Virginia.

A Copy—Teste:

H. G. TURNER, Clerk.

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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 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) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five 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. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; 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) With the consent of the Chief Justice or the Court, 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.

§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.

§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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RICHMOND, VIRGINIA