201 Va. 557

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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5004

In the Supreme Court of Appeals of Virginia at Richmond

JOHN W. WALTHEW

v.

B. W. DAVIS, SHERIFF, ADMINISTRATOR, ETC.

FROM THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

NOTICE TO COUNSEL

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

NOV 1959

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

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

AT RICHMOND

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5004

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of March, 1959.

JOHN W. WALTHEW, Plaintiff in Error,

against

B. W. DAVIS, SHERIFF, ADMINISTRATOR, ETC., Defendant in Error.

From the Circuit Court of Spotsylvania County

Upon the petition of John W. Walthew a writ of error is awarded him to a judgment rendered by the Circuit Court of Spotsylvania County on the 10th day of October, 1958, in a certain motion for judgment then therein depending wherein B. W. Davis, Sheriff-Administrator of Helen Elizabeth Taylor, deceased, was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

MOTION FOR JUDGMENT.

THE UNDERSIGNED Sheriff-Administrator of Helen Elizabeth Taylor, as will be shown by the certificate of his qualification hereto attached and made a part hereof, moves the Court for a judgment of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, against the defendant, John W. Walthew, which sum is due by the said defendant to the undersigned for the death by wrongful act of said Helen Elizabeth Taylor, for this, to-wit:

1. That, on the 22nd day of December, 1956, plaintiff's decedent, who, with her aunt, had arranged to fly to Beckley, West Virginia, with the defendant as pilot in a plane loaned or leased to the defendant by Davenport Airlines, Incorporated, Richmond, Virginia, the original intent being to fly from some field near Washington, D. C., but because of weather conditions the defendant grounded the said plane in Spotsylvania County, just immediately south of Fredericksburg, Virginia, called the decedent in Alexandria, and asked decedent and her aunt to drive to Fredericksburg for the purpose of making the trip; defendant, at that time, being at the Shannon Airport.

page 1-a } 2. It was after 6:00 o'clock P. M. and dark before the plane was ready for the take-off. The weather conditions were bad; there was ground fog formed, or forming, over the field. There were no instruments in the plane rated for night flying; the runway lights were fogged in, and the windshield was fogged up, with no windshield wipers, obscuring the front vision of the pilot.

Notwithstanding these conditions, the defendant, with two entirely inexperienced women, attempted a take-off from one of the airstrips on the field, ran the plane off of the airstrip before it left the ground and crashed into a cinderblock building on the field, wrecking a portion of the building and killing the decedent.

The undersigned charges that the said defendant was guilty of both ordinary and gross negligence in his operation of the plane and as the result of such negligence, decedent lost her life.

PLAINTIFF therefore moves the Court for a judgment

against the defendant in the sum of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS.

Respectfully,

B. W. DAVIS, SHERIFF-ADMINISTRATOR of HELEN ELIZABETH TAYLOR, deceased
By C. O'CONOR GOOLRICK
Of Counsel.

Filed in the Clerk's Office the 16th day of August, 1957.

Teste:

W. CARY CRISMOND, Clerk.

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page 4 }

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ADDITIONAL GROUNDS OF DEFENSE.

In addition to the Grounds of Defense filed by the defendant in the above case in September 1957, the defendant sets forth the following additional grounds of defense.

1. The defendant denies each and every allegation of negligence on his part set out in the Bill of Particulars filed in this case.

2. The defendant avers that there should have been some light to show the location of the building situated close to the runway with which the airplane operated by the defendant collided and that the failure to have this building designated by a light was the primary cause of the accident.

3. The defendant avers that any acts on his part in attempting to take off under the then existing circumstances which contributed to the collision would in no event constitute more than errors in judgment and would not be such negligence as to render him liable for damages in this case.

4. The defendant avers that in no event was there any gross negligence on his part which caused the injuries and resulting death of Helen Elizabeth Taylor, and that in order for the plaintiff to recover in this case, it is necessary to prove that

this defendant was guilty of gross negligence which caused the death of Helen Elizabeth Taylor.

JOHN W. WALTHEW
By Counsel.

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page 4-a }

* * * * *

Filed May 3, 1958.

W. C. C.

* * * * *

page 12-b } INSTRUCTION E.

The Court instructs the jury that if you believe from the evidence that the building with which the airplane collided was not lighted and that the failure to have a light on this building was the proximate cause of the collision, then you will find your verdict for the defendant.

Refused May 9, '58.

L. M. B.

page 12-c } INSTRUCTION F.

The Court instructs the jury that in order for the plaintiff to recover in this case he must prove by a clear preponderance of the evidence that the death of Helen Elizabeth Taylor was caused or resulted from the gross negligence of the defendant, Walthew, that is, such utter disregard or prudence as to constitute total indifference and complete disregard of the safety of his guest, Helen Elizabeth Taylor, and if the plaintiff fails to prove this, you will find for the defendant.

Refused May 9, '58.

L. M. B.

page 12-d } INSTRUCTION G.

The Court instructs the jury that although you may believe from the evidence that Walthew was negligent, that is, he failed to observe the care which a reasonably prudent man would have done under the circumstances in attempting to take off under the then existing circumstances, this does not justify a verdict against the defendant and before the plaintiff can recover in this case he must prove that the defendant, Walthew, in attempting to take off at the time was guilty of utter disregard of prudence amounting to total indifference and complete neglect of the safety of his guest, Helen Elizabeth Taylor.

Refused May 9, '58.

L. M. B.

page 12-e } INSTRUCTION H.

The Court instructs the jury that if you believe from the evidence that the attempt on the part of the defendant, Walthew, to take off under the then existing circumstances constituted an error in judgment on the part of Walthew but did not indicate a heedless and reckless disregard of the rights of his guests, nor show such utter disregard of prudence as to constitute total indifference and complete disregard of the safety of his guests, you will find your verdict for the defendant.

Refused May 9, '58.

L. M. B.

page 13-a } INSTRUCTION NO. 1.

The Court instructs the jury that the defendant, Walthew, as pilot of the airplane in which Miss Taylor was riding, owed to her the duty of exercising ordinary and reasonable care to avoid injury to her; that is, the same degree of care for her safety which would be required of any reasonably competent and prudent airplane pilot with regard to a guest in his plane, and if the jury believe from the evidence that Walthew violated this duty, then he was guilty of negligence, and if you find that said negligence was the proximate cause of the death of Miss Taylor, the jury should find for the plaintiff.

Given May 9, '58.

L. M. B.

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page 13-b } INSTRUCTION NO. 2.

The Court instructs the jury that negligence, as spoken of in the Court's instructions, means the failure to use such care and caution as a reasonably prudent man would ordinarily have used under the circumstances shown by the evidence.

Given May 9, '58.

L. M. B.

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page 13-c } INSTRUCTION NO. 4.

The Court instructs the jury that if they believe from the evidence that the defendant Walthew in attempting to take off from Shannon field drove his plane off of the 300 foot air strip, collided with a building approximately 36 ft. from the left boundary of the air strip, looking to the direction in which he was going, killing Miss Taylor, and if you further believe that under all the facts and circumstances shown by the evidence that this was negligence on his part and that such negligence was the proximate cause of Miss Taylor's death then the jury should find for the plaintiff.

Given May 9, '58.

L. M. B.

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page 14-e } INSTRUCTION NO. 5.

The Court instructs the jury that one who voluntarily rides as a guest in an airplane does not assume or undertake any risk, other than the usual risk of flying with a reasonably competent pilot. Such guest does not assume the risk that the plane may be improperly, carelessly or negligently operated.

Given May 9, '58.

L. M. B.

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page 17 }

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Filed Sept. 26, '58.

L. M. B.

OPINION OF THE COURT.

This is an action for death tort growing out of an airplane accident.

The facts appear to be as follows: The plaintiff's intestate and the defendant were engaged to be married. They intended to visit some friends in West Virginia during the Christmas holidays.

The deceased lived in Washington. The defendant rented a plane from Davenport Airline Company in Richmond. The plane was to pick up Miss Taylor and her aunt and her small son in Alexandria.

There was such a ground fog in the area of Washington, he could not land. About Quantico he ran into the fog and after some time turned back to Fredericksburg and landed about 4:00 o'clock P. M. at the Shannon airport at Fredericksburg, Virginia.

There he 'phoned Miss Taylor and her party to come to Fredericksburg.

They arrived at the airport shortly before 5:45
page 17-a } P. M. It was then dark.

The defendant testified that before he took off he knew that the ground fog was rising.

He had only seen the runway from which he was to take off from the air.

At the time he took off his windshield was obscured by fog; although he said he did not know that it was otherwise, he would have gotten out and cleaned it.

There were lights along the runway to show the marker line thereof. But due to the fog he apparently mistook some lights in a house off the runway for the marker lights.

The defendant testified that the safe mileage visibility for a takeoff at night is three miles and although the visibility was only about half a mile he attempted to take off, because he had done so before and was familiar with the area.

Just before he took off the fog was about three feet thick and about that height above the ground.

He testified that his lights were of no value in a fog. His airplane had no windshield wipers.

When he took off he could see nothing out of the windshield and his only view was out of the window to the left.

As he came down the runway he saw a marker light on his left which was closer to his left than it should have been and he turned his plane sharply to get nearer the center of the runway and at a speed of 40 miles per hour without
page 17-b } seeing where he was going he ran off the left side of the runway and collided with a building off of the runway.

Miss Taylor died as a result of this collision. The defendant was injured.

The lights along the runway on both sides thereof were at 100 feet intervals and they were lighted every 200 feet.

Due to the condition of his windshield instead of lining his plane with the marker lights he lined it with the lights of a house some distance to the left of the marker lights and got so far to his left that notwithstanding his turn to the right, he collided with the building off of the runway on the left.

The runway was 300 feet wide and 3000 feet in length.

The marks left by the wheels of the plane showed that it started from about the center of the runway and then went in a gradual variation to the left until it contacted first a fence and then the building. These tracks were visible for 428 feet and they ran on a course about 200 degrees which was 20 degrees to the left of the center line of the runway; and the tracks of the plane showed that it went between some of the runway lights before it went off of the runway; and these tracks showed that the bearing of the runway was 220 degrees and that the tracks made by the airplane were 20 degrees to the left for a distance of 428 feet.

The fence between the runway and the building collided *with* was 36 feet off of the runway.

The defendant testified that when he saw the marker light to his left, he was so close to it he turned his
page 17-c } plane to the right and in less than one second he collided with the building.

Although this was the first time the defendant had attempted to take off from Shannon airport, he arrived there in day-light and admitted that he saw all of the buildings around there including the one he collided with.

He testified that it was at his request that the lights of the field were turned on and notwithstanding this instead of lining up with these lights he lined up with the lights of a house to the left of the runway.

On cross examination the defendant was asked this ques-

tion: "You mean to say that you, without any investigation of the 300 foot right of way, that you deliberately lined up without any investigation with a light on the run way and another one in a private house and took off? That is what you did, was it not?"

"A. That is what I did in effect."
"Q. You do not call that negligence, do you?"
"A. That was an error in judgment, yes, I don't deny that" (R., p. 106).

Mr. Gorin the inspector for the Civil Aeronautics Administration testified that he examined the plane after the collision and found that it was not fully equipped for instrument flying. The defendant told Gorin that at the time he took off the visibility was less than one-half mile with ground fog (R., p. 55).

Counsel for the defendant took the position
page 17-d } that the rule of *Boggs* v. *Plyborn,* 157 Va. 30, 160 S. E. 77 (1931) should be applied to the operation of an airplane while counsel for the defendant contended that the rule of ordinary negligence ought to be applied.

While the Court has no quarrel with the gross negligence doctrine as it applies to automobiles it did not feel that that doctrine should be extended to the operation of airplanes.

Automobiles in the hands of a careful driver are about as safe a mode of *conveyane* as there is to-day; in the hands of a reckless driver they are about as dangerous a vehicle as is on the roads.

Between recklessness and slight deviations which the most careful driver will occasionally fall into there is a vast difference and it is to be noted that the General Assembly of Virginia has made statutory the ruling in *Boggs* v. *Plyborn, supra.* Code Section 8-646.1. This section reads as follows: "No person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and no personal representative of any such guest so transported shall be entitled to recover damages against any such owner or operator for death or injury to the person or property of such guest resulting from the operation of such motor vehicle, unless such death or injury was caused or resulted from the gross negligence or wilful and wanton dis-
regard of the safety of the person or property of
page 17-e } the person being so transported on the part of such owner or operator."

The General Assembly, however, has by Code Section

22-289 made Section 8.646.1 inapplicable to injuries to school children where the damage is covered by a liability policy of insurance. Code Sec. 22-288.

By Code Section 46-1 (13) a motor vehicle is defined as "Every vehicle as herein defined which is self propelled or designed for self propulsion."

All of the sections of this chapter makes it clear that this definition applies to motor vehicles of the automobile and truck species and that it has no reference to airplanes.

When we come to consider airplanes we find that the General Assembly has enacted a comprehensive statute with reference to Aircraft, Airmen and Airports generally. This is Chapters 1-5 of Title 5 of the Code.

Section 5-1 (c) defines an aircraft as follows: " 'Aircraft' means any contrivance now known, or hereafter invented, used or designed for navigation of or flight in the air, except a parachute or other contrivance designed for such navigation used primarily as safety equipment."

Nowhere in the five chapters on the subject of Aviation is there found any statute similar to Code Sec. 8-646.1 which applies to automobiles and other such motor vehicles.

The rule *Expressio Unis Est Exclusio Alterius* which means that the expression of one thing is the exclusion
page 17-f } of another is of frequent application in the construction of statutes. 25 Am. & Eng. Enc. of L. (2nd Ed.) 604.

It seems to the Court that the General Assembly having made the gross negligence doctrine applicable to automobiles and such vehicles and having at a later date enacted a comprehensive statute relating to airplanes without such a provision shows that the General Assembly intended that the gross negligence rule should be limited to motor vehicles which travel over the roads.

Now we come to consider whether the Courts in view of this should make the gross negligence rule applicable to airplanes.

There is no similarity between an automobile and an airplane. They cannot be operated on the same kind of motor fuel. Their motors are different; whereas, an automobile is intended to travel within one ten foot lane and on some roads within an eight foot lane, an airplane has a great spread of wings.

Almost anybody can learn to drive an automobile; that is not true of airplanes; the operator must be specially trained and he must be licensed by both the Commonwealth and the Federal government to do so.

Cars equipped with fog lights can go through the heaviest fogs without difficulty.

Planes are subject to fogs, rain, wind, etc. and require the highest degree of care for their operation at all times. The slightest deviation from what a pilot ought to do may, and generally, results in disaster.

When we consider what a dangerous instru-
page 17-g } ment an airplane is, it would seem that there is no justification for applying the gross negligence doctrine to the operation of airplanes.

Certainly no Court so far as this Court has been able to ascertain has applied the gross negligence doctrine to the operation of airplanes.

In *Cape Charles Flying Service* v. *Nottingham*, 187 Va. 444, 450, 47 S. E. (2d) 540 (1948) the plaintiff who was injured was a guest of the defendant corporation. The trial court applied the Ordinary Negligence rule and the appellate Court in an able opinion by Mr. Chief Justice Hudgins affirmed the lower court.

The negligence of the defendants in that case was slight compared to the negligence of the defendant in the case at bar.

The Chief Justice said (187 Va. 452): "* * * It is conceded that plaintiff was injured by a machine owned by defendant corporation, and operated by its employee. The dominant issues were (1) whether the defendants were guilty of negligence, and (2) whether the plaintiff was guilty of contributory negligence. These issues were fairly submitted to the jury in the five instructions given for plaintiff and the six instructions given for defendants. * * *"

Although our Court has adopted the gross negligence doctrine as to automobiles it has held that the negligence of the driver is sometimes so gross that it becomes gross negligence as a matter of law. *Collins* v. *Robinson*, 160 Va.
page 17-h } 520, 169 S. E. 609 (1933). In that case the trial court on the authority of *Boggs* v. *Plyborn*, 157 Va. 30, 160 S. E. 77 and *Jones* v. *Massie*, 158 Va. 121, 163 S. E. 63 (19) set the plaintiff's verdict aside. The Court reversed the trial court and said:

"The great weight of the evidence in the case at bar shows clearly that the defendant who admittedly knew of the approach of the oncoming car, with ample time to pull to his side of the road, drove his car around the curve, on the inside thereof, in the night time on a twenty-two foot road and directly in the lawful path of the oncoming car. He was not driving on the right side of the road as required by law and he

could not see around the curve or over the curve, by reason of the bank on the inside, though he could and did see the reflection and flash of the lights of the Turner car. *He was solely responsible for the collision and his conduct on that occasion, as a matter of law, amounted to gross or great negligence.* There being no evidence of any contributory negligence on the part of the plaintiff, he was entitled to recover." (Italics supplied)

So it has likewise held that the defendant was guilty of gross negligence as a matter of law in *Steele* v. *Crocker,* 191 Va. 873, 62 S. E. (2d) 850 (1951).

There Mr. Justice Spratley speaking for the Court said: (191 Va. 830) "If reasonably fair minded men may differ as to the conclusion of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given the testimony a jury is the proper tribunal to decide the question of negligence, ordinary or gross. *Thornhill*
page 17-i } v. *Thornhill,* 172 Va. 553, 2 S. E. (2d) 318. But where fairminded men cannot differ as to the conclusion, it becomes a question of law for the Court. *Drumwright* v. *Walker,* 167 Va. 307, 189 S. E. 310; *Lennon* v. *Smith,* 173 Va. 322, 2 S. E. (2d) 340; *Smith* v. *Turner,* 178 Va. 172, 178, 16 S. E. (2d) 370, 136 A. L. R. 1251."

See also *Hanson* v. *Lewis,* 11 Ohio Ops. 42, 5 Ohio Supp. 195 U. S. Av. 73 (19); *Rich* v. *Finley,* 325 Mass. 99, 12 A. L. R. (2d) 669 (1949); 6 Am. Jur. p. 36, Sec. 60; and 2 C. J. Sec., p. 907 sec. 19. See also *Read* v. *New York City Airport Inc. et al.,* 259 N. Y. S. 245, 145 Misc. 294 (1932) and *Bruce* v. *O'Neal Flying Service Inc.,* 231 N. C. 181, 56 S. E. (2d) 560, 563 (1949) and *Southern Air Transport* v. *Gulf Airways, Inc.,* 215 La. 366, 40 So. (2d) 787 (1949).

So here the facts are few and as to the question of negligence undisputed. There can be no doubt about the fact that he violated section 5.10.1 of the Code in what he did.

Without having his plane completely equipped for night flying, he attempted to take off after dark and in a fog from an air field which he had never used before, and therefore, was unfamiliar with. His windshield was so fogged he could not see out of it and he neglected to clean it before attempting to take off. Through his fogged windshield he saw what he thought were the marker lights of the field and lined his plane up with one of these lights and with a light in a building some distance to the left of the runway. By so
page 17-j } doing he got his motor speed up and was travelling about 40 miles per hour when he ran off the left side of the runway and through a fence 36 ft. off of the runway and into a building beyond that fence.

If this was not gross negligence of the grossest kind the

Court would be unable to recognize such negligence. The runway was 300 feet wide and 3000 feet long. His plane was about 25 feet wide. If he had not been flying blind he might have gotten by. But the conditions under which he took off made the collision inevitable. He could not see where he was going; and, although he knew that the building which he collided with was to his left he steered his plane so far to the left of the runway and off of it that he collided with this building.

This in the opinion of the Court was gross negligence as a matter of law.

Mrs. Taylor, the mother of the deceased, testified that deceased was 19 years of age and employed by the Federal Government; that she had eight other children, the youngest being ten years of age and had social security; that she was not employed; that her daughter earned about $200.00 per month and assisted her. She further testified that she had paid certain bills including the doctor and hospital; but had not paid the funeral bill of $537.70 and that she had obligated herself to pay this bill.

She was briefly cross examined about the relationship of the deceased to the defendant and dismissed.

After plaintiff rested, the defendant recalled Mrs. Taylor for further cross examination.

page 17-k } She was asked this question: "Mrs. Taylor, you spoke about some bills; was there any insurance on your daughter?"

Counsel for plaintiff objected and the Court sustained his objection.

The Court asked her: "Did your daughter leave any estate?" She answered: "She didn't have any estate to my knowledge."

Exception was taken to the action of the Court in refusing to allow him to inquire into insurance.

This was an action in tort. The issue was: Did the deceased come to her death through the negligence of the defendant?

It was elementary that when one dies funeral expenses are incurred. The mother assumed the bill and the Court was justified in refusing to permit counsel to inquire into insurance on the life of deceased.

Our Court has been very strict in refusing inquiry to be made as to whether a defendant in tort is covered by indemnity insurance. *Rineheart & Dennis Co.* v. *Brown*, 137 Va. 670, 675, 120 S. E. 269 (1923) and *Lanham* v. *Bond*, 157 Va. 167, 173, 160 S. E. 89 (1931).

In *Rineheart & Dennis Co.* v. *Brown, supra*, Burks, J. said

"* * * It is too manifest to need argument, and is conceded everywhere, that the fact that a defendant is insured against liability can throw no light on whether or not he has been negligent in a given case. Consequently, evidence of such insurance is irrelevant and inadmissible in an
page 17-l } action against a defendant for a negligent injury * * *"

No matter how much insurance the deceased may have had on her life it could not affect the right of her administrator to recover for her wrongful death. And the question was clearly improper.

There is nothing in the case of *Basham* v. *Terry*, 199 Va. 817, 102 S. E. (2d) 285 (1958) to the contrary.

There is one other question that should be considered. When Hamilton B. Gorin was on the stand, objection was made to his using the report of his investigation for the purpose of refreshing his memory on the ground that Section 581 of the U. S. Code provides, that: "No part of any report of the Civil Aeronautics Board relating to any accident, or the investigation thereof shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report."

Notwithstanding this objection, the Court held that while the report could not be admitted in evidence that the witness could use the same to refresh his memory.

In the leading case on the subject *Harrison* v. *Middleton*, 11 Gratt. 527, 543-4 (1854) Moncure, J. said: "* * * The law on the subject is thus laid down in Greenleaf on Evidence, Sec. 436: 'Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory by the use of a
page 17-m } written instrument, memorandum, or entry in a book, and may be compelled to do so if the writing is present in Court. It does not seem to be necessary that the writing thus used to refresh the memory should have been made by the witness himself, nor that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection.' 'And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence.' Numerous authorities are cited by the author which, I think, fully sustain his view of the law; * * *."

He also referred to the case of *Jacob* v. *Lindsay*, 1 East Rep. 460 in which a "witness was permitted to refer to a paper which itself was not admissible in evidence."

This has been the law of Virginia for more than one hundred years.

Certainly the Congress of the United States has no lawful authority to amend, repeal or otherwise regulate the law of evidence in this Commonwealth.

Indeed the Supreme Court of the United States in *Putnam* v. *United States,* 162 U. S. 687, 694, 40 L. Ed. 1118 (1895), quoted the same statement of Greenleaf quoted by Judge Moncure in *Harrison* v. *Middleton, supra* and before doing so said: "It is elementary that the memory of a witness may be refreshed by calling his attention to a proper writing or memorandum."

page 17-n For the foregoing reasons the motion to set aside the verdict of the jury will be overruled and judgment entered on the verdict. Counsel will prepare the proper order.

LEON M. BAZILE, Judge.

June 11, 1958.

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ORDER.

THIS DAY CAME again the plaintiff and defendant, by their respective attorneys, and the Court having maturely considered the motion heretofore submitted by counsel for the defendant to set aside the jury's verdict, is now of the opinion that the motion be overruled for the reasons set out in the written opinion of the Court dated June 11, 1958 and heretofore filed, and said opinion is made a part of the record in this action.

WHEREUPON, it is considered by the Court that the motion to set aside the jury's verdict be and the same is hereby overruled and that the plaintiff, B. W. Davis, Sheriff-Administrator of the Estate of Helen Elizabeth Taylor, Deceased, recover of the defendant, John W. Walthew, the sum of TEN THOUSAND ($10,000.00) DOLLARS, in accordance with the jury's verdict, with interest thereon from the 9th day of May, 1958, the date said verdict was rendered, as well as his costs in this behalf expended, to which action of the Court in overruling the motion to set aside the verdict and award a new trial the defendant duly objected and excepted, and the defendant having indicated his intention to apply to the Supreme Court of Appeals for a writ of error, the execu-

page 18-a } tion of this judgment is suspended for a period of sixty (60) days from this day, provided the said defendant, or someone for him, shall within fifteen (15) days hereafter enter into a suspending bond in the penalty of FIVE HUNDRED ($500.00) DOLLARS, with good security to be approved by the Clerk of this Court, the said bond to be conditioned according to law.

Enter.

LEON M. BAZILE, Judge.

Date October 10, 1958.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The defendant, John W. Walthew, hereby gives notice of appeal from the order entered October 9, 1958, by the Circuit Court of Spotsylvania County in the above styled case and sets forth the following assignments of error.

1. The Court erred in granting at the request of the plaintiff and over the objections of the defendant instructions Nos. 1, 2, 4, and 5.
2. The Court erred in refusing to grant instructions F, G, and H offered on behalf of the defendant.
3. The Court erred in refusing to grant on behalf of the defendant instruction E as in the form originally offered and in the form as re-offered (p. 114 of the transcript).
4. The Court erred in refusing to permit counsel for the defendant to ask Calla Taylor on cross examination whether or not she had received insurance upon the death of Helen Elizabeth Taylor.
5. The Court erred in denying the motion of the defendant to set aside the verdict of the jury and grant a new trial.

JOHN W. WALTHEW
By Counsel.

John W. Walthew.

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page 20-a }

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Filed Nov. 15, 1958.

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JOHN W. WALTHEW,
upon being called by Mr. Goolrick as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Goolrick:

Q. Will you please state, Mr. Walthew, your full
page 5 } name, your age, residence, and present occupation?

A. My name is John W. Walthew, 27, I am from West Point, Virginia. I work for the Chesapeake Corporation of Virginia at West Point, and that is a pulp and paper mill.

Q. For whom were you working at the time of this accident, or just before the accident happened?

A. I was working for Carter Aviation in Richmond as an aircraft mechanic.

Q. Was the plane in which you were to travel to Beckley your plane, or did it belong to some other corporation?

A. The plane I rented from Davenport Airlines, also of Richmond.

Q. That is a Richmond Airline Company, do they lease planes?

A. They do.

Q. You leased this plane for the trip to Beckley, West Virginia. From Richmond, were you going first to Alexandria to pick up Miss Taylor, her aunt, and her little boy?

A. I was going to Alexandria to pick up Miss Taylor, her aunt, and little boy.

Q. You might tell the jury at this point what prevented you

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from going there and taking on the passengers at that point.

A. There was ground fog in the area of Washington and I could not land.

page 6 } Q. Where did you first come in contact with this ground fog, was it north of Fredericksburg?

A. It was north of Fredericksburg in the vicinity of Quantico.

Q. Do you happen to know how far Quantico is from Fredericksburg?

A. Not off hand.

Q. About nineteen miles, is it not?

A. About nineteen.

Q. Then you had to turn back to Shannon Field?

A. No, I did not turn back.

Q. What say?

A. I did not turn back at Quantico.

Q. I didn't say you turned back at Quantico, I said you had to turn back before you got to Alexandria.

A. No, sir. I was returning to Richmond.

Q. You went back to Richmond?

A. No, I was returning to Richmond to call the trip off; but in the vicinity of Fredricksburg the weather was clear and I landed there.

Q. What was the approximate hour that you landed at Fredericksburg?

A. It was approximately 4 o'clock.

Q. What was the approximate hour of your attempted take-off from Shannon Field?

page 7 } A. It was approximately 5:45.

Q. It was dark then, was it?

A. It was dark. Yes.

Q. Isn't it a fact, Mr. Walthew, that before you took off you knew and saw this ground fog rising?

A. Yes, I knew and saw the ground fog. That was the object of my taking off, getting away from the coastal areas. If I didn't I would have been grounded there for several days, maybe.

Q. How long had you been a pilot?

A. Since 1951.

Q. Did you take a view, before this attempted take-off with the plane, of the runway?

A. I had landed on the runway and had seen it from the air. Yes.

Q. Well, is it a fact, or not, that when you did take off that the obstruction lights at the western end—I suppose you

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would call it the western end of that runway—that you couldn't see them at all?

A. When I got in the plane I could see them.

Q. You could see?

A. I could see them.

Q. Isn't it a fact that your windshield was fogged up so that you couldn't see through it, and you had to look out the side?

page 8 } A. That assumption I made several days after the accident, due to the fact that I did see an unlighted marker out of the side window, and due to the fact I did not see the building until after the crash and the windshield was gone. That assumption I made that the windshield was at fault.

Q. Are you going to deny that assumption now?

A. No. I deny the assumption then. I didn't know it was fog at the time or I would have got out and wiped it off.

Q. Before you took off?

A. Yes.

Q. You got out of your plane?

A. I said I would have gotten out and wiped it off if I had known it was fog.

Q. Didn't you make the positive statement that it was fogged up and I couldn't see through it?

A. That is the assumption I made several days after the accident.

Q. Is that a different assumption and statement from that which you are making now? Did you tell the truth then, or not?

A. I was telling the truth then, yes, sir.

Mr. Sutton: If Your Honor please, I respectfully submit that the question is irrelevant and improper. He stated he made an assumption several days later because of

page 9 } certain other circumstances.

The Court: He may ask what he meant by the assumption.

Mr. Sutton: Certainly.

Q. You make a positive statement to that effect, did you not?

A. That the windshield was fogged?

Q. Yes.

A. I said I thought the windshield was fogged, and I still think it was fogged.

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Q. You say you could see those obstruction lights at the end of the runway?

A. When I got into the plane, yes.

Q. Could you see them when you took off? You said you couldn't see through the windshield?

A. I saw what I thought was the lights through the windshield.

Q. You thought they were lights?

A. Well, they were lights.

Q. Were they obstruction lights at the end of the runway?

A. No. Apparently they were lights in someone's kitchen window.

Q. Oh. You mistook lights in someone's kitchen window for the lights on the field?

page 10 } A. It could very easily have been done. I mean the lights are the same color.

Q. Well, as a pilot, I don't know how experienced you are, you said you had right much experience, you regarded that as a safe course to follow when you could see lights in somebody's kitchen window but you couldn't see the lights on the air field, the obstruction lights on the air field, and you couldn't see through the windshield?

A. These lights—You need two points to establish a straight line. Whether they were two runway lights, or whether they were some other kind of lights they established a straight line. That would have been the runway had they been the runway lights.

Q. Were you qualified for flying at night?

A. I was.

Q. How long have you been qualified for that?

A. Since I got my commercial license.

Q. Did you have any instrument for night flying in the plane?

A. The plane was completely equipped for night flying. Yes.

Q. Was it equipped for night flying?

A. Yes, sir, it was.

Q. You say you were qualified for night flying?

A. I was.

page 11 } Q. How long had you been qualified?

A. Since I got my commercial license in February.

Q. Have you any document here to prove that you are qualified for night flying?

A. Not here with me, no, sir.

Q. Where did that qualification issue from?

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A. It was issued from Washington, D. C., the Civil Aeronautics Commission.

Q. You do not have it with you?

A. No, sir, I did not bring it with me. I do not have it with me.

Q. You did not make any statement to anyone that you were not qualified for night flying?

A. No, sir, I did not.

Q. Did you have any discussion about that with Mr. Gowin as to whether you were qualified for night flying?

A. No, sir, I don't recall any discussion.

Q. Before you left Richmond you had been at the airport in Richmond for quite a while, had you not?

A. Yes, sir.

Q. Did you make any inquiry, I am not talking about inquiries from other pilots, did you make any inquiry at the Weather Bureau there as to weather conditions?

A. Yes, sir. I was in the weather bureau all morning long, from approximately 7 o'clock until after noon.

page 12 } Q. I didn't ask you whether you were in there, I asked you whether you made any direct request for information for your trip to Beckley?

A. Yes, I made direct request. I went over the screens myself, with the help of the meteorologist there. I also listened to other pilots' discussions as to where they came from and where they were going.

Q. Wasn't your inquiry directed chiefly to the trip chiefly between Richmond and Alexandria, and not between Alexandria and Beckley?

A. No, I wouldn't say that. It was chiefly a general outlook of the whole trip.

Q. Did you have, before you left Richmond, reports that it was fogged-up north of Fredericksburg?

A. Yes. It was fogged-up and then it cleared up for a while, and then it fogged-up again. It was variable.

Q. Are you sure that you had any weather briefing for the trip to Beckley, or not?

A. Absolutely.

Q. From Richmond to Beckley?

A. Absolutely. I had briefing on the complete picture.

Q. What was the ceiling, in your judgment, at the time you attempted take-off from Shannon Field, and crashed?

A. The ceiling?

page 13 } Q. Yes.

A. That is straight up.

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Q. Yes.

A. I would estimate it to have been about four thousand feet.

Q. Four thousand foot ceiling?

A. Yes.

Q. What is considered a safe ceiling?

A. At that time one thousand.

Q. You estimated the ceiling at that time to be four thousand feet at Fredericksburg when you took off?

A. The ceiling, yes.

Q. What was the mileage visibility, in your judgment?

A. The visibility was varying. At times it was four miles, other times less than half.

Q. What was it when you took off?

A. Apparently it was less than half.

Q. What is supposed to be the safe mileage visibility for a pilot to take off at night?

A. Three miles.

Q. Yet you took off with half a mile?

A. Yes.

Q. Why?

page 14 } A. I had taken off with less than half a mile before. I had experience in it. I was also very familiar with that area. The majority of my night flying was in this area.

Q. But the point is, as a careful pilot is that a safe mileage distance when you just said that it should be three miles?

A. That is a limit put on it by a regulation.

Q. Are you supposed to follow those regulations?

A. In some conditions it would be safe with less than that, and in some conditions it would not be safe with even more than that.

Q. Despite the fact that you knew what the safe mileage was you took off when the visibility was less than one-half a mile?

A. Yes.

Q. What was the—what we call the thickness of the fog when you attempted take-off?

A. The last time I looked at the fog before getting in the plane it was about three feet thick.

Q. In other words the fog was about that high from the ground?

A. About that high (indicating), yes, sir.

Q. Was it a sketchy fog, or was it a steady fog all over?

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A. I found out later, through discussion with the
page 15 } police officer who was there, that it was in patches,
and moving slowly forward horizontally.

Q. Did you have or use any landing lights when you took off because of fog?

A. The lights do you no good in fog.

Q. Didn't you use your landing lights?

A. I used them for taxiing, yes. I used the taxiing lights.

Q. You used the taxiing lights?

A. Yes, sir.

Q. Did you have an instrument rating, Mr. Walthew?

A. No, sir, I didn't have an instrument rating.

Q. Well then, instruments, you say, were in the plane, but you had no instrument rating?

A. The instruments were there. I knew how to use them. I had taken an instrument course.

Q. The point is: Were you supposed to use them if you had no instrument rating?

A. If I have an understanding of instruments and know how to use them, certainly I am supposed to use them.

Q. Even if it is a fact that you have no rating?

A. If you have to use them you would be a fool to ignore them.

Q. What type of instruments were in this plane for night flying?

page 16 } A. For night flying?

Q. Yes.

A. It had the lighted instrument panel; it had the navigation lights, and taxi lights.

Q. It was equipped with a basic blind panel?

A. It was equipped with a basic blind panel.

Q. Tell the jury what this means.

A. It is a gyro instrument to give you your rate and direction of turn. Without being able to see the horizon you cannot tell which way you are turning; and with a gyro instrument you are able to ascertain your rate and direction of turn. It is for that purpose. That is the basic instrument, along with your air speed indicator, and your rate of climb indicator, and all other instruments you need for any kind of flying.

Q. Was the plane equipped with wipers?

A. No. Airplanes with a plastic windshield cannot have windshield wipers.

Q. It wasn't equipped with them?

A. No. No airplane, other than airline type, have windshield wipers.

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Q. Neither the jury nor myself know anything about airplanes, you do not have to go into detail.

A. I would like to explain it.

page 17 } Q. Do you remember, going back to the statement about the windshield being fogged up, do you recall making, in the presence of Miss Patricia A. Giles of Richmond, a statement, as follows:

"But the thing which restricted my visibility was the windshield its being fogged up. The reason I say this is because, just like I said, I saw that marker at the left side. Everything at the left was perfectly clear. Yet in front I couldn't see anything."

A. That is just what I just told you that I decided after the accident. After the windshield was gone then I could see. But I didn't deliberately take off knowing that it was fogged up and I couldn't see.

Q. You said, though, "Yet in front I couldn't see anything." That is quite a positive statement, is it not?

A. Yes, sir. Aferwards realizing I didn't see it I knew I couldn't have.

Q. Yet, notwithstanding that, you took off and the accident happened?

A. I said this was all decided after the accident. Not while I was taking off.

Q. You are talking about the accident?

A. That's right. Yes.

Q. What you said was what you believed to be true, was it not?

page 18 } A. I believed it after the accident, not when I was taking off.

Q. You believed it after the accident, but not when you were taking off?

A. That's right.

Q. Would you have made the statement that you couldn't see anything after the accident, if you could have seen at the time of the accident?

A. I saw everything I expected to see when I was taking off.

Q. But you said afterwards you couldn't see anything.

A. Yes. I decided I could not see.

Q. Try to explain that to the jury, will you? I cannot get that through my head.

A. All right. Taking off I lined up with these lights, that to me were the runway rights; and on the way down the runway

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I glanced out the side of the window and I saw the cone, the yellow cone, with no light on it. It was closer to my left than it should have been, but not close enough to be alarming. So, I started a slow, gentle turn to the right to take myself back out toward the center of the runway.

I had been instructed to stay away from the right edge of the runway because of the roughness. So, I was going a little bit further than that, and I was riding the left edge to make sure I missed it. But after making this turn I
page 19 } struck the building. This building was gray cinder block; there was no paint on it at all; and it blended in very well with the fog; and there were no lights on it.

Well, after I had hit it of course the windshield disintegrated. It was gone. And when the plane settled down I could see what I had hit, although I couldn't see it before. From this I just assumed that the windshield must have been fogged, although I didn't know it when I started to take off.

By the Court:

Q. How much of a turn did you make?

A. It wasn't much of a turn. It was just a gentle, very slight turn. I mean I wasn't—There wasn't anything frantic, nothing to be alarmed about.

By Mr. Goolrick: (Continuing)

Q. How fast were you moving at the time?

A. At approximately 40 miles-an-hour, I would say.

Q. Were there any other injuries to the people in the plane?

A. I was injured, yes, sir.

By the Court:

Q. Which side of the building, which side of the runway was the building on?

A. The building was on my right.

Q. On your right?

page 20 } A. Pardon me. On my left as I was taking off.

Q. The field itself was supposed to have lights to keep you within the runway, was it not?

A. Yes, sir. There were white lights along the left and right edge of the runway.

Q. The building was not within those lights, was it?

A. No, sir, it was on the left.

Q. How far was it off the runway?

A. I couldn't say without going out and looking.

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Mr. Goolrick: We will have some testimony about the distance it was off.

Q. How close were those side lights together?
A. I think the space between the markers are a hundred feet; every other one being lighted. That would give you two hundred feet between lights.
Q. They only light every other one?
A. Every other one, yes, sir.

By Mr. Goolrick: (Continuing)
Q. You said something about a light or lights which you took to be the runway lights. What lights were you speaking of?
A. Well, when the windshield was gone I could see ahead of me. There was a light in a window in the house across the road, that I could distinguish the light before
page 21 } the windshield was gone; but I couldn't distinguish the outline of the house.
Q. Where was that house, Mr. Thacker's home, where was that home located relative to the concrete building with which you collided?
A. It would have been behind it from where I was coming from.
Q. And to the left of it?
A. And to the left of it.
Q. At some distance off the runway?
A. That's right, and to the left, because I had made the right turn after passing the marker. Before that it was directly in front of me.
Q. Getting back to the runway, and I will be through in a minute or two, I understood you to say, and I think it is true, they have the runway lighted; this is a three hundred foot runway?
A. Three thousand feet.
Q. I mean the width of it.
A. Three hundred feet wide, yes, sir.
Q. Three hundred feet wide and three thousand feet long in length, and just like this, the runway lights are on each side at intervals. They are what, yellow lights?
A. White lights with yellow markers.
Q. At the end of the runway they have at the end
page 22 } what they call obstruction lights, do they not?
A. No. At the end on the ground they are called threshold lights. Obstruction lights are on utility poles, and such as that.

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Q. How are they located, at the end of the runway?
A. They wouldn't necessarily be at the end of the runway. Anywhere in the vicinity they could have obstruction lights.
Q. Don't they have lights on posts at the end of the runway?
A. Yes.
Q. They are red lights, are they not?
A. Red lights.
Q. That is what I am getting at. You say you could see those obstruction lights at the west end of that runway when you took off?
A. You mean at the south end?
Q. Well, south or west.
A. Before I got into the plane, yes, I could see them.
Q. Could you see them after you had gotten in the plane?
A. My back—
Q. You went this way and then you came back that way
A. I was lined up—
page 23 } Q. After you taxied up to the north end and turned and went south—
A. Yes.
Q. —could you see the runway lights then, the obstruction lights, I mean?
A. I was looking at the boundary lights then.
Q. But could you see the obstruction lights?
A. I did not see the obstruction lights after I turned around. No.
Q. Because the weather was too bad and fogged up?
A. It may have been the reason, it may have been because I wasn't looking at them. I was looking at something else.
Q. The visibility wasn't what the regulations called for?
A. That may have been.

By the Court:
Q. Will white lights show through a fog?
A. If the fog isn't too thick, yes.
Q. They usually use yellow lights for fog, do they not?
A. Not around airports, no, sir. The runway boundary lights are white; threshold lights are green; obstruction lights
are red. They use that regardless of what weather
page 24 } there is.

By Mr. Goolrick: (Continuing)
Q. When you left Richmond, if you hadn't encountered this fog north of Fredericksburg which caused you to come back and land at Shannon Airfield, your trip to Beckley would have been entirely in the daylight, would it not?

A. Yes.

* * * * *

Mr. Goolrick: One more question. Sit right there. You said the plane was equipped for night flying. Was it equipped for instrument flying at night?

Mr. Walthew: It wasn't completely legal at the time for instrument flying due to the fact that it didn't have a directional gyro in it. That is a compass, a gyro-compass is what it is.

page 25 } JAMES B. DORMAN,

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

DIRECT EXAMINATION.

By Mr. Goolrick:

Q. Will you please state your age, residence, and occupation?

A. My name is James B. Dorman, age 48, I live in Hampton, Virginia, and I am employed by the National Advisory Committee of Aeronautics at Langley Field, Virginia.

Q. Did you previously live in Fredericksburg, or in the vicinity of Fredericksburg?

A. Yes. I was employed by Shannon School of Aeronautics from October '53 to March '57.

Q. Were you the manager of the field?

A. At the time of leaving, yes.

Q. I wish, before I go into any other questions, I wish you would give to the jury a brief description of that field and this particular runway.

A. The field is what we call a sod field, and quite a great deal of those are used in the aviation industry. The fields are usually taken care of somewhat like a golf course; of course, the grass may not be as smooth as that, but the idea is a drainage problem.

One runway is what we call a northeast-south-
page 26 } west runway, and that is a three thousand foot
runway; and the other one is a short runway, which is two thousand feet.

Now the one in particular, the three thousand foot runway is three hundred feet wide, so is the other one, and is three thousand feet long; and to do night flying there, why it is

equipped with white lights on each side of the runway, and we have the blue lights at the end of the runway, and then for the obstructions, for telephone poles or anything of that nature, why we have the red lights. That is what we call the obstruction lights; and the blue lights are boundary lights as well as the white lights, which are called boundary lights.

Q. Will you state at what intervals those boundary lights are placed, approximately?

A. The approximate distance, and this would have to be very roughly, let's see, I will say that is lined up down both sides of the runway that they are two hundred feet apart, now they can be more or less, plus or minus fifty feet. I don't know exactly.

Q. But they are supposed to clearly mark the two sides of the runway?

A. That is correct.

Q. All the way from one end of the runway to the other?

A. That is correct.

page 27 } Q. We have spoken about the Thacker house. Can you describe, or can you tell the jury, from your recollection as being manager down there, about how far, I don't know whether you can tell them or not, about how far to the left the Thacker house is from the concrete building that he collided with? How far off the runway is that concrete building, approximately?

A. Well, from the edge of the runway and the boundary lights approximately fifty feet. I am not sure on that distance.

Q. Where is the Thacker house situated?

A. The residence?

Q. Yes.

A. The residence house then would be across, say plus ten feet and probably plus twenty-five or thirty feet more.

Q. Both the concrete house and the residence being to the left of the runway looking south?

A. Yes. That is correct.

Q. Did you see Mr. Walthew the evening of this accident?

A. Yes, I talked to John somewhere about 4 o'clock when he landed. I don't remember our conversation, it was just a greeting. I had known him just briefly through the business; and then at approximately 5:30 that evening I went to go to supper, and I stepped outside the door with John and Russell Stewart, the boy that was employed at the time

page 28 } there, and I remarked then that ground fog was moving in and that it looked like it was going to be rough.

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Q. To whom did you make that remark? To John?

A. To John and Russell Stewart. It was just a casual remark that you make about the weather as pilots do, and he replied, "I am going to be okay. I am going to use the Gordonville range facilities." With that I went on to supper.

Then I got back—Too, now, the house is not very far away—

Q. Wait a minute. What was the approximate time of that conversation?

A. Well, I would say it had to be—It wasn't too long. I didn't stay there very much. About 5:30 or 5:33 something like that, because I went on to the house and ate, and got back by my watch it was about five minutes to 7:00, and I heard the engine reving up then, and I went into the—

Q. 7:00 or 6:00?

A. Excuse me, did I say 7:00?

Q. Yes.

A. Five minutes to 6:00. I hadn't been gone more than twenty minutes, and I went into the radio room, what we call the unicom, and called—I don't recall the airplane number right now, if you want me to refer to notes I can—the airplane on the radio. That facility is there just as merely page 29 } as an assistance to the pilot if he wants to use it he can, and if he doesn't, it's nothing compulsory about it at all. So after I received no reply, why then I came back out of the radio room and walked across, probably the distance from here to the end of this building, and looked down to the right, which is down to the southwest end of the runway. Russell Stewart was there, and I remarked that—

Mr. Sutton: If Your Honor please, we object to the remarks.

Mr. Goolrick: You cannot make any unless they were in the presence of Mr. Walthew.

A. Yes, sir.

Q. That is all right. Now I will ask you a question.

A. All right, sir.

Q. At the time that Walthew took off, it was dark, of course?

A. Yes, sir.

Q. Being five minutes to 6:00?

A. Yes, sir.

Q. What was the state of the ground fog at that time?

A. At the time I looked down the runway?

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Q. Yes.

A. Definitely no more than a half-mile visibility.

page 30 } Q. If it was only half a mile visibility, you couldn't see the lights, the obstruction lights at the end of the field?

A. No, sir.

Q. At the end of the runway?

A. No, sir.

Q. Were all the lights of the field on that night, so far as you know?

A. To the best of my knowledge, yes, sir.

Q. You had, you say, told Mr. Walthew that ground fog was rising, and it looked like it was going to be pretty rough, but he said he could make it any how?

A. Yes, sir.

Q. Was it daylight when he got to the airport?

A. Yes, sir.

Q. Do you know whether he looked over the runway in the daylight?

A. No, I don't know. I mean as to that, because we were busy that afternoon. I spoke briefly with him, and then we were busy at the time. We had other airplanes in.

Q. You said that the obstruction lights at the time of take-off couldn't be seen; where were you, what point were you when you were trying to look at them to see?

A. I would say approximately, from the obstruction lights, something like twenty-five hundred feet.

page 31 } Q. I will hand you a picture and will you describe that now, and then I will pass it over to the jury, what that is, what that scene is?

A. This is a picture of the three thousand foot runway, looking southwest, in the direction that the take-off was started.

Q. What is the building?

A. The building over here to the left, the little white building to the left is the power house building, the old power house building. The building to the right is what we call the administration building and shop building. And back of the little house, the little power house building, you can make out the outline of the home of Thacker.

Q. I will give you a better picture of that in a minute. The administration building is the chief building on this field?

A. Yes.

James B. Dorman.

Mr. Goolrick: Will you look at that and pass it along to the other jurors?

Note: At this point the jury examines the above described photograph.

Q. That is a view looking southwest, I believe?
A. Yes. That is looking southwest.
Q. That was the way he was proceeding?
A. Yes.

page 32 } The Court: Do you want it marked?
Mr. Goolrick: Yes, sir. Mark it Plaintiff's Exhibit No. 1, Judge.
The Court: All right.

Note: The above described photograph is now marked and filed Plaintiff's Exhibit No. 1.

Mr. Goolrick: I think I will hand this picture, which will be Plaintiff's Exhibit No. 2 to the jury first, and then I will ask you to describe it. I believe they will understand it better if I hand it to them first, so they can see it.

Note: At this point another photograph is handed to the jury.

Q. Mr. Dorman, the jury having seen this picture, will you describe what it portrays, what it shows?
A. It shows a closer view of the power house, the little power house to the left of the runway, and the Thacker home.
Q. Is the building that you refer to as the power house, is that the one with which Mr. Walthew's plane collided?
A. Yes, sir.
Q. The Thacker home is the one standing a little to the left and behind?
A. Yes, sir.

page 33 } The Court: Do you want that one introduced?
Mr. Goolrick: Yes, sir. I beg your pardon. I will introduce that as Plaintiff's Exhibit No. 2.

Note: The above described photograph is now marked and filed as *Plaintiff's Exhibit No. 2.*

James B. Dorman.

Q. Did you, the next morning, make an attempt to follow the course of this plane after it had left the runway, and before it collided with this house? In other words, can you tell the jury what course it followed as shown by the marks on the ground?

A. Yes. Trooper Townsend was taking photographs and we went over the course that the airplane took at that time.

Q. Did Mr. Gowin go over it, too?

A. That, I don't know.

Q. I think he went over it. I will ask him, possibly, about that. Can you detail, generally speaking, the course it followed before it came in contact with that building, and what happened?

A. Well, the tracks that we think were made by the—that I saw, showed the course of the airplane starting out in the center of the, approximately in the center of the runway, and then a gradual variation to the left until it contacted the fence, as well as the building, I think, about the same time.

page 34 } Q. Did you hear Mr. Stewart make any statement about a bump to the right-hand side of the runway to Mr. Walthew?

A. No, sir, I didn't.

* * * * *

CROSS EXAMINATION.

By Mr. Sutton:

Q. You were not out there while Mr. Stewart was talking to Mr. Walthew just before he started, were you, Mr. Dorman?

A. No, sir, I was not.

Q. You had gone to your supper, I believe you said, shortly before he began to take off?

A. That is correct.

Q. As a matter of fact you didn't see Mr. Walthew any more, or did you, sir, after you went to supper?

A. No, sir. I make one exception to that, sir. After I directed the rescue squad—

Q. I mean before the accident. I mean between the time you went to supper and until after the accident was over you did not see Mr. Walthew?

A. No, sir.

James B. Dorman.

Q. You were not there when the folks arrived
page 35 } and got in the plane, were you?
A. No, sir.

Q. This concrete building, what do you call it, the power house building?

A. We call it the power house building, but it has the electrical transformer over there for stepping up the voltage.

Q. Were there any lights of any kind on that building?

A. No, sir.

Q. Now, the time you made the remark about the ground fog moving in was a half hour or so before he took off, was it not, Mr. Dorman?

A. Yes, sir. Approximately so.

Q. Ground fog is a variable thing, is it not, Mr. Dorman?

A. Yes, sir.

Q. I mean it may change considerably in a period of fifteen to twenty minutes, or half an hour; it may get worse, or better, as the case may be?

A. Yes, sir.

By the Court:

Q. On this night, did it get worse or did it get better?

A. It got worse.

page 36 } By Mr. Sutton: (Continuing)

Q. In attempting to take off there are a lot of factors as to which the pilot has to exercise judgment, are there not, Mr. Dorman?

A. Yes, sir.

Q. There are many factors of judgment that you have to exercise your judgment in connection with?

A. Yes, sir.

Q. Were you inside, or outside, at the time of the crash?

A. Inside.

Q. Inside this building?

A. In the building.

Q. That is the larger building that is on that picture?

A. Yes, in your first exhibit, on the right looking down. On that first picture.

Q. You were inside this building at the time of the crash?

A. Yes, sir.

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James B. Dorman.

By the Court:

Q. Mr. Dorman, these side lights on that field,
page 37 } how close was the nearest side light to that building that he collided with?

A. Well, that's in my previous statement. About fifty feet from it.

Q. But I mean along the edge of the runway?

A. Yes, sir.

Q. Is it approximately opposite the building, or on either side? Look at this picture and see if you can tell me.

Note: The witness is looking at photograph.

A. What, state your question again?

Q. I want to know along the side of this runway how close is that light from the southwest or northwest, or whatever direction he was going, to the building?

A. I think this particular one would be farther away, maybe not. This may not be a marker. The edge of the runway is here, then this ditch, and from this—say these are runway markers down here—I would estimate that to be on a direct perpendicular line to the runway, fifty feet. This marker here is farther away because we are looking up closer at it this way.

Q. Look at these markers here.

Mr. Goolrick: What picture are you referring to?

The Court: Plaintiff's Exhibit No. 1.

page 38 } Q. Don't you see the markers along the edge of the runway?

A. Yes.

Q. I am not talking about how far they were on a side view, but along the runway how far were they from that building?

A. Approximately fifty feet.

Q. Fifty feet from the building?

A. Yes, sir.

Q. Coming down that field, could you see that marker light if your view wasn't obstructed?

A. Oh, yes. Oh yes, you can see—To answer your question there, you can see if the visibility is not obstructed you can see these lights clearly on both sides of the runway at least, I would say, two thousand to twenty-five hundred feet down, these lights down here.

James B. Dorman.

Q. What are those lights put there on the side of the runway for?

A. For that purpose, to help you line up. For instance, if we had a row of lights down here, they can be just flare pots for that matter, and you could line up like that. They help you line your airplane up down the runway and guides you on out as you come down.

Q. In coming down the runway, aren't you sup-
page 39 } posed to keep in the runway?

A. Oh, yes. Oh, yes. Anyone knows you are supposed to do that.

Q. You are not supposed to drive off the runway?

A. No, sir. These are called boundary lights, and that is what they are for. They are the boundary lights of the width of the runway and the length of it.

Q. If you have any visibility there you can see those lights?

A. Yes, sir.

Q. On this night, do you think you could have seen the lights?

A. You mean—You want—

Q. As he came down the runway—

Mr. Sutton: We would necessarily object to that question, if the Court please, for the reason that the witness testified he was inside the building at the time of the crash.

Q. You had to be outside before you went inside, did you not?

A. The point is that I don't recall looking at the boundary lights.

The Court: All right, then, you cannot say.

Mr. Sutton: We respectfully except to the ac-
page 40 } tion of the Court, and save the point.

The Court: He hasn't answered the question. He says he didn't look at it.

A. I just don't recall whether I looked at the boundary lights.

The Court: If you did not look at the boundary lights you cannot say. He hasn't answered anything that I asked him.

James B. Dorman.

RE-DIRECT EXAMINATION.

By Mr. Goolrick:

Q. Some reference has been made by Mr. Sutton to some remark of Mr. Stewart in his opening statement about a bump on the right-hand side of the runway. Do you know anything about that?

A. Yes. To picture it for the jury, let's suppose that this width here is three hundred feet; down there where the Sheriff is, is three thousand feet long; and over there where the Clerk of the Court is, to the left of the runway is a roadway leading in. It's a macadam roadway that we call a little taxi roadway that leads into the hangers. Now sometimes a pilot will taxi too close to the boundary lights—

Q. On the right-hand side?

A. No, now we are taxiing out now. Supposing we are taxiing out. It would be to the left. You make
page 41 } your run up, check, turn around, and take off.
We have the airport, not only for service stations and to teach people to fly, but we try to assist in every way we can. So we try to tell every pilot there to avoid the bump there because sometimes they might hit it excessively. They have hit it and—People have in taxiing out, and sometimes it makes a pilot apprehensive, and he taxis back thinking perhaps it has broken something. So far as that goes it has been taxied over lots of time and nothing has happened. That was a matter of assistance, that is all that was.

That is all, now. I didn't hear them, Mr. Stewart say that.

Q. I understand.

A. That was our policy there to try to help to assist the pilot.

Q. It is not clear to me whether the pilot would come across that little bump, wherever it was, in taxiing up, or whether it would be after he started south?

A. As he taxied north he would. I will say this to clarify it, all that was done for was to help assist him in taxiing out, because normally no one would take off that close to the runway where the bump is.

Mr. Goolrick: All right, that is all.

Witness stood aside.

page 42 } Mr. Goolrick: If Your Honor pleases, counsel for the defendant, Mr. Sutton, and counsel for the plaintiff have agreed that if Albert R. Stewart were present as a witness he would testify as follows, and I am going to read this into the record at this point:

"Cessna—" that is a plane, "—172 N7243A, piloted by John Walthew arrived at Shannon Airport and took on 19.5 gallons of gas at approximately 1600.—" That is the hour—1600. They go by numbers instead of by the hour of the clock. "At 1755 he attempted to take off for Beckley, West Virginia, when the visibility appeared to be less than one-half mile, at this time the red obstruction lights at the southwest end of runway 22 could not be seen. When the airplane attempted to take off I observed him heading to the left of runway 22 and crash into the power building for the airport. I could not see if the landing gear was off of the ground or not. I then proceeded to help these people in the airplane. When I got to the airplane it was burning around the right cylinders. I then came back to the building to get fire bottle. When I arrived back at the airplane the pilot had put the fire out."

May I say for the benefit of the jury that Mr. page 43 } Stewart is in service in New Hampshire, and if he were here he would be expected to testify as to what I have just read.

Mr. Dorman, will you come back for one second? I failed to ask you one question.

JAMES B. DORMAN,

upon being recalled by Mr. Goolrick, having been previously sworn, testified further as follows:

RE-DIRECT EXAMINATION.

By Mr. Goolrick: (Continuing)

Q. You heard Mr. Walthew testify that at the time of his take-off that the ceiling was four thousand feet. What have you got to say about that?

A. You are asking for an opinion.

A. Yes, sir, from your observation immediately preceding the take-off.

A. I cannot say, because I was inside the building, as I can recall, and I just can't say.

Q. One other question: When you arrived, when you reached the plane, did you go to the plane after the crash?

A. Did I?
Q. Yes.

A. No, sir. Hearing the engine rev up for take-
page 44 } off and then a few second later silence, I mean a crash and then silence; I met Russell Stewart half way—I came out of the radio room; I met him half way. I told him to go to the scene of the crash. I immediately went to the telephone and called the rescue squad.

Q. Did you find out that the young lady, Elizabeth Taylor, had been killed?

A. When I got there with the rescue squad? No. She was living at that time.

Mr. Goolrick: All right, that is all.
Mr. Sutton: No questions.

Witness stood aside.

Mr. Goolrick: At this point Mr. Sutton and myself have further agreed that if Dr. W. W. Butzner were here he would testify that this girl died as a result of this plane accident.

page 45 } HAMILTON B. GOWIN,
introduced as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lilly:

Q. What is your name, sir?
A. Hamilton B. Gowin.
Q. Where do you live, Mr. Gowin?
A. I live at 8 East Union Street, Sandston, Virginia.
Q. What is your business, or occupation?
A. I am an inspector for the Civil Aeronautics Administration.
Q. How long have you been an inspector for the Civil Aeronautics Administration?
A. I entered on duty in the fall of 1941. Almost seventeen years.
Q. As such inspector was it part of your duties, and did you, as such governmental inspector, investigate the airplane accident involved in this suit?
A. I did.

Hamilton B. Gowin.

Q. Do you recall, was it the next day after the crash that you came to Fredericksburg, Mr. Gowin?

A. Yes, sir. I came up very early the next morning.

Q. It is the requirement of the Civil Aeronautics Authority to make a report of each of these cases in writing?

page 46 } A. That is correct.

Q. I hand you a photostatic copy. Is that such a report?

A. Page 1 here, form 2400, is the report submitted by the pilot.

Q. I am not asking you to identify the separate parts; I am asking you if that is—

A. Yes. This appears to be a photostatic copy of my report.

Q. Which you submitted to the proper governmental agency?

A. That's right.

Q. May I have it please? Mr. Gowin, the next day when you came to Fredericksburg to investigate this crash, did you track the course of the plane on the runway there?

A. Yes, sir.

Q. Tell the jury what that course was?

A. I would like to say at this point that without the reports I could not make such statements.

The Court: You can use them to refresh your memory.

A. I investigate from sixty to seventy accidents a year—

Q. Do not read from it, but you may refresh

page 47 } your memory.

A. I will have to take my figures from the report.

Mr. Goolrick: Refresh your memory, but do not read from the report.

The Court: No, don't read the report.

A. I will have to use the figures in the report, sir.

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By Mr. Lilly: (Continuing)

Q. Can you answer the question?

A. You asked if I could track the airplane?

Q. Yes, and I asked you, if you said you could, for you to tell the jury what the result of your tracking showed.

A. Yes. We tracked the airplane the following morning. The tracks were plainly visible. As a matter of fact we took some photographs. The State Troopers were there, and we used that as a part of our report.

The tracks were visible for approximately 428 feet, and they ran on a course about 200 degrees, which is 20 degrees to the left of the center line of the runway. Is there anything further that you need?

A. The tracks of that plane showed that it went between the runway lights that were on each side of the runway, or between some, on outside the actual runway before it struck this building.

page 49 } A. Well, I can give the jury a better picture—I will do like Mr. Dorman, using the same description here of the runway, with your boundary lights on either side, and the bearing of the runway is 220 degrees, the tracks are 20 degrees to the left for a distance of 428 feet, which carried the airplane off the runway 20 degrees off to the left of the center line.

Q. Did you ascertain how far that power house building was off of the edge, left side edge of the runway, which was the direction he was taking off? In other words, going south?

A. May I ask a question here? I want to be sure I understand you.

Q. Yes.

A. Are you taking a direct 90 degree bearing from the center of the runway, from the edge of the runway to the edge of the building?

Q. 90 degrees. In other words, straight from the power house building over to the edge of the runway, did you ascertain that distance?

A. I feel sure we did. I will have to refresh my memory.

Note: The witness refers to photostatic report.

Mr. Sutton: If Your Honor please, you under-
page 50 } stand, of course, we object to the testimony wherever he refers to the report. We note the exception and I will not repeat it.

Hamilton B. Gowin.

The Court: I do not think the statute means he cannot refresh his memory.

Mr. Sutton: That is one reason to keep the record out. That would be as much a violation to allow something to be done indirectly as it would be to allow it to be done directly.

The Court: I do not think the Supreme Court can prevent or set aside the rules of evidence on a Virginia court.

By Mr. Lilly: (Continuing)

Q. Do you have that?

A. The answer?

Q. Yes.

A. I will have to answer that somewhat indirectly, yes. I can visualize the building in my mind. I have a diagram of it in this report. There was a fence that ran to it. That would be the outside of the building, or the furtherest side from the building, as I recall it, that paralleled the runway, and from the edge of the runway to the fence was 36 feet.

Q. Of course, Mr. Gowin, over your seventeen years of experience I suppose that you have investigated
page 51 } many accidents?

A. Yes.

Q. Or numerous accidents?

A. Yes, sir.

Q. Did you check the plane as to this particular accident?

A. Oh, yes.

Q. I will ask you to state whether or not it was equipped for instrument flying according to the Civil Aeronautic's Regulations?

A. No, sir, it was not fully equipped for instrument flying.

Q. I will ask you if, in your investigation of this case, you ascertained whether or not Mr. Walthew, the pilot, was qualified to do instrument flying?

Mr. Sutton: If Your Honor please, we respectfully object to that, sir. It calls for his opinion from his investigation.

The Court: No, I do not think he can say that.

Q. Mr. Gowin, Mr. Walthew held a commercial license?

A. That's right.

Q. Did he have an instrument rating at the time of the plane crash?

Hamilton B. Gowin.

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By Mr. Lilley: (Continuing)

Q. Mr. Gowin, as part of your investigation, did you interview Mr. Walthew about this accident after it happened?

A. Yes, sir.

Q. Did he state to you, or explain to you the cause, or causes, of the accident?

Mr. Sutton: If Your Honor please, we respectfully submit that a general question of that kind is not proper. He may ask if he made some specific statement and he can
page 53 } reply to that, but as to a general question, "Did he tell you all about the accident," we respectfully submit is not proper testimony.

The Court: I think you have to direct the question to a specific statement he made.

By Mr. Lilly: (Continuing)

Q. At this time, did you particularly inquire of him, or did you ascertain the visibility at the time of this crash, that is the ceiling?

Note: Counsel hands the photostatic copy of the report to the witness.

Mr. Sutton: If Your Honor please, we object to this general line of questioning. The witness was handed the report apparently being asked to read something in the report.

The Court: No, he is not going to read from the report.

Mr. Sutton: If Your Honor please, the record wouldn't show it, therefore I state that counsel has just handed the report to the witness.

The Court: The only thing the witness can use the report for is to refresh his memory. That is the only purpose he can use it for.

Mr. Goolrick: That isn't a general question at
page 54 } all, pardon me, he asked if he made any statement to him about the visibility.

The Court: Yes, that is a specific thing.

Hamilton B. Gowin.

Mr. Sutton: We save the point, sir.
The Court: All right.

A. I believe your question was with regards to the ceiling?
Q. Yes, sir.
A. No, sir. Visibility—

The Court: Ceiling, I think it was.

Note: The witness is apparently reading the report.

A. I don't think I can give you a direct answer, sir, on the ceiling. The visibility was the thing at stake more so than the ceiling. You are speaking now at the time of the actual take-off?
Q. Attempted take-off, yes, sir. Then what statement, if any, did he make with reference to visibility?

Mr. Sutton: If Your Honor please—
The Court: Do not read the report.
Mr. Sutton: —for the reasons stated, the witness, in answering both questions regarding the report, has read the report before he purports to answer.
The Court: He has a right to refresh his
page 55 } memory.
The Witness: Your Honor, may I make a statement? I have appeared on these types of cases many times, and I know about what I can or cannot do. I will not attempt to read the report. But in inspecting an average of from sixty to seventy accidents a year I cannot remember each specific accident.
The Court: You may use the report to refresh your memory, sir.
The Witness: Your question again?
The Court: He asked you to tell us what the visibility was at the time.

A. Right. Yes. The visibility at the time of the take-off was reported to be less than one-half mile with ground fog.
Q. Less than one-half mile with ground fog?
A. That's right.
Q. At the time of the purported take-off it was night time, was it not?
A. Yes, sir.

Q. In other words, it was darkness also added into the feature of the visibility plus fog?
A. That's right.

Mr. Sutton: If Your Honor please, we respect-
page 56 } fully submit that that is highly improper, because Your Honor has said he cannot bring evidence in here except to contradict the witness. He certainly has not done that.
The Court: I don't know. Your witness said the visibility was one-half mile; this man told him it was less than half a mile. I reckon it does contradict him.
Mr. Lilly: All right. That will be all. I do have one further question.

By Mr. Lilly: (Continuing)
Q. Did Mr. Walthew tell you that he tentatively planned to call the trip off?
A. Yes, he did.

Mr. Lilly: That is all.

CROSS EXAMINATION.

By Mr. Sutton:
Q. That was when he couldn't land at Alexandria, was it not, and he started back to Richmond? In other words, at that time he planned to call the trip off, did he not?
A. No, I cannot say that that is entirely the case. John and I had a long talk, both at the scene, we discussed the thing, this accident several times later.
John had, the way he told me, he had made this promise to get these people to Beckley; he himself wanted
page 57 } to get there for the Christmas holidays. Verbally he told me he just simply hated to call the thing off, it would have been such a tremendous disappointment to his sweetheart, and I think he—Well, that would be an opinion. I better not say it, but he did indicate that perhaps he went against his better judgment in doing this.
Q. Mr. Gowin, flying involves a lot of judgment, does it not, sir?
A. Certainly.
Q. You have to make decisions on a number of variable factors, do you not, sir?
A. Yes, you do.

Q. The situation with regard to fog and ceiling can change from half hour to half hour, can it not, or even shorter periods of time, much shorter periods of time than that, can it not, sir?

A. Yes, sir.

Q. The situation may be good now and it may be bad in five minutes from now and *vice versa?*

A. Yes, sir. That, too, depends on a lot of factors.

Q. Yes, sir. This fence that you spoke of, the building is on the airport side of the fence, is it not?

A. As far as my memory serves me it is. The fence runs to the outside—

page 58 } Q. Yes, sir.

A. —of the building, so far as I can recall.

Q. Did you make any measurements, do you have the size of that building and how far it sets out?

A. It was about an 8 x 10 building.

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page 59 } HERMAN THACKER,

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

DIRECT EXAMINATION.

By Mr. Goolrick:

Q. Mr. Thacker, give the reporter your name, address, age, and occupation?

A. Herman Thacker, age 28, millwright for Avisco.

Q. Mr. Thacker, were you at your home, which has been shown on the picture here, the night of this crash of this plane with that power building on the Shannon Airfield?

A. Yes, sir.

Q. Did you hear the noise of the crash?

A. I did.

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

A. Yes, sir. I rushed right out there.

Q. Approximately how long did it take you to get there?

A. Well, not over a minute, I'm sure.

Q. Will you tell the jury from a layman's standpoint, we have had men that are familiar with ground fog describe the condition, but will you tell the jury from a layman's standpoint whether there was any fog that night and what kind of fog it was, in your judgment?

A. It was fog all right. Quite heavy. Ground
page 60 } level.

Q. Did you have some light in your house that night?

A. Yes, sir, in the front room.

Q. In the front room?

A. Yes, sir.

Q. Looking at photograph, Plaintiff's Exhibit No. 2, you see your house practically faces that air strip?

A. That's right.

Q. The light, was it in the end window up here or was it in the front window?

A. In the front window.

Q. Front window?

A. Yes, sir.

Q. I see an upstairs window on the north end of the house, was any light in that window?

A. No, sir.

Q. The only light then was in the front window which faces the air strip?

A. That's right.

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page 61 } CALLA TAYLOR,

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

DIRECT EXAMINATION.

By Mr. Goolrick:

Q. Mrs. Taylor, will you state your name and your present residence?

A. Calla V. Taylor, Jacksonville, Florida.

Q. Where were you living at the time this accident happened?

A. In Glen White, West Virginia.

Q. Elizabeth, of course, was your daughter?

A. What did you say?

Q. Elizabeth was, of course, your daughter?

A. Yes, sir.

Q. At the time of this accident and her death how old was that girl?

A. She was nineteen.

Calla Taylor.

* * * * *

page 65 } Q. Did you pay any bills in connection with Elizabeth's death?

A. Yes, sir.

Q. Did you pay Dr. Butzner $15.00?

A. Yes, sir.

Q. Did you pay the Mary Washington Hospital $29.94?

A. Yes, sir.

Q. Wheeler and Thompson Funeral Home $537.70?

A. I haven't yet.

Q. You owe that, you still owe that?

A. Yes, sir.

Q. Did you pay, or do you owe the Webb and Neil Funeral Directors at your home $51.50?

A. Yes, sir. I have paid that.

Q. You paid that?

A. Yes, sir.

Q. You have paid all those bills, except you haven't paid Wheeler and Thompson in Fredericksburg?

A. Yes, sir.

Q. But you assumed the liability for that, you agreed to pay it?

A. Yes, sir.

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CROSS EXAMINATION.

By Mr. Sutton:

Q. Your daughter and this young man were going together?

A. Yes, sir.

Q. And they were engaged to be married?

A. Yes, sir.

Q. They had flown out on Thanksgiving for the holiday, had they not?

A. Yes, sir.

Q. They were planning to fly out to spend the Christmas holiday the same way?

A. Yes, sir.

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CROSS EXAMINATION.

By Mr. Sutton: (Continuing)

Q. Mrs. Taylor, you spoke about some bills, was there any insurance on your daughter?

Mr. Goolrick: I object to that. That hasn't anything to do with this case.

The Court: That has nothing to do with the case.

Mr. Sutton: If Your Honor please, they have brought it in by implication that there was no cause from which the bills might be paid. We respectfully submit, sir, it would be proper to show that cause. She was asked the pointed question if she had become liable for the payment of that bill, and we respectfully submit that it would be proper.

The Court: You may ask whether or not the daughter had any estate.

Mr. Goolrick: I object to anything along the line as to whether or not this girl had an estate. I do not know myself whether she had an estate or not—

page 69 } Mr. Sutton: Neither do I, sir.

Mr. Goolrick: I say, I do not know, but it doesn't make any difference. The Court has held dozens of times that a cautious act does not make any difference. That would be money coming from somebody else. The question here is whether the man that caused this accident is liable.

The Court: Certainly.

Mr. Goolrick: Not whether somebody else paid something. I object to that question.

Mr. Sutton: If the Court will not permit us to ask the question in that form, since she was asked by Mr. Goolrick, then we respectfully submit, he having asked that particular question "If she had become liable for the payment of certain expenses," that especially under those circumstances would we have a right to ask this question; and we will ask it in the language of the Court.

The Court: I do not think you have any right to bring that in. Not in a tort case.

Mr. Sutton: Then I will ask it in the language of the Court.

Mr. Goolrick: Why don't you just ask her did she become liable for the debt to Wheeler and Thompson?

page 70 } Mr. Sutton: We submit that would be an additional reason why we would have a right to ask the question.

Mr. Goolrick: You haven't a right to ask whether the daughter had any insurance or not.

The Court: I do not think so.

Mr. Goolrick: I do not object to Mr. Sutton's cross examination, except that I do not know whether she had any or not. To tell you the truth I hope she did.

The Court: I do not think you can ask about insurance. If she did have insurance the mother might not have been the beneficiary.

Mr. Sutton: That would be the next question, sir.

Mr. Goolrick: Then that would open it up so he could go into the whole question of insurance policies, and so forth.

The Court: Yes. I do not think you can ask that question.

Mr. Sutton: We except and save the point. Then we would ask the following question in the language which I understood the Court stated:

By Mr. Sutton: (Continuing)

Q. If she left an estate, what estate did she leave?

page 71 } The Witness: Do you want me to answer that?

Mr. Goolrick: I do not think what estate she left has anything to do with it. Mr. Sutton can, of course, cross examine Mrs. Taylor. She said she assumed the responsibility for the payment of Wheeler and Thompson. The girl might have left an estate, and the mother might have still assumed that responsibility. I do not object to the question about that insurance, but he doesn't know anything about it, and I don't know anything about it. It might cause a lot of corollary questions.

By the Court:

Q. Did your daughter leave any estate?

Mr. Lilly: Do you understand what he means by that question?

Mr. Sutton: It is better for the Court to inquire since the Court questioned her.

Mr. Lilly: Do you understand what he means by the word "estate"?

A. She didn't have any estate to my knowledge.

The Court: She had no estate. Is there anything further?

Mr. Sutton: Subject to the approval of the Court I will ask this question:

page 72 } By Mr. Sutton: (Continuing)

Q. Are you receiving social security benefits from your daughter?

A. Am I now?

The Court: If a person is covered by social security they give you some kind of payment, a lump sum payment at death, about a hundred dollars; I think about $108.00, or something like that.

Mr. Goolrick: Go ahead and ask her. That is still not enough.

By the Court:

Q. Did you get anything from social security?

A. No, sir, I haven't so far. I haven't got anything from social security yet.

Q. Not yet?

A. No. The only thing I get from social security is after the bills of her funeral expenses are paid up. I might get something then. But there is nothing yet.

Q. You mean nothing has been applied toward her funeral expenses now?

A. No. It hasn't yet. Not until they are all paid up. I don't know how much I would get, or anything.

The Court: I do not know anything about social security. I know a woman came to my house the other night

page 73 } and she told us she had to pay the funeral bill before she would get her social security. So, there it is.

Mr. Goolrick: If you are through may I ask Mrs. Taylor a question? Are you through, Mr. Sutton?

John W. Walthew.

Mr. Sutton: We except to the ruling of the Court and will not pursue the other question which we thought quite proper in view of the fact that it came out on direct examination.

RE-DIRECT EXAMINATION.

By Mr. Goolrick:

Q. Mrs. Taylor, I will ask you again: At the present time are you obligated to Wheeler and Thompson to pay the funeral bill?

A. I suppose I am.

Q. Didn't you make the bill there?

A. Yes, it was arranged there by my son, at the Wheeler and Thompson Funeral home.

Q. It was charged to you?

A. Yes, sir.

* * * * *

page 74 } JOHN W. WALTHEW,

upon being called by Mr. Sutton to testify in his own behalf, having been previously sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION.

By Mr. Sutton:

Q. Mr. Walthew, where do you live?

A. In West Point, Virginia.

Q. With whom do you live, or who lives with you?

A. My mother lives with me.

Q. I believe you testified you work for the pulp and paper mill at West Point, is that right, sir?

A. I do.

Q. Mr. Walthew, had you and this young lady flown together before this occasion?

A. Yes, we had. We had made plans—At Thanksgiving we had flown from Alexandria to Beckley and returned, and on several occasions around home before she had moved to Alexandria.

Q. How long had you been planning this trip that you were contemplating taking at Christmas?

A. We had talked about it Thanksgiving. During the time we were taking that trip it was a tentative thing, and we talked about it, and wrote back and forth to each other several times between then and the time we attempted it.

John W. Walthew.

Q. Were you and Elizabeth engaged to be mar-
page 75 } ried?
A. We were.

Mr. Goolrick: I object to that. He has made that statement to the jury, and what bearing has that got on this issue in this case?

The Court: I suppose he can say that. I overrule your objection.

Mr. Goolrick: We except to the ruling of the Court.

Q. When were you planning to be married?

A. We had no definite date. It would be some time—

Mr. Goolrick: The same objection goes to all these questions about that.

Q. On this particular occasion, what was the purpose of going to West Virginia, to spend the Christmas holiday?

A. To spend the Christmas Holidays. Yes, sir.

Q. Was your home out there?

A. My home was in Glen White at that time. Yes.

Q. Near Beckley?

A. Near Beckley.

Q. Her home was in that vicinity, too?

A. The same place. Yes, sir.

Q. Your homes were at the same place in West Virginia?

A. The same town.

page 76 } Q. As originally planned, where were you going to pick her up?

A. I was going to pick her up in Alexandria, and proceed from there to Beckley.

Q. You rented a plane at Richmond, is that correct, sir?

A. That is correct.

Q. Did you check at Richmond before you left there on the weather condition?

A. I did. I was in the Weather Bureau from practically 7:30 that morning until after 12:00.

Q. Were you, during that time, checking on the weather then, the weather conditions along various routes?

A. I was. I was interested in the weather all over the United States really, because I had friends going to different places.

Q. About what time did you leave Richmond?

A. I left Richmond approximately 1:30 that afternoon.

Q. When you left Richmond did it appear to you that it

John W. Walthew.

was reasonable to undertake the flight that you were going to take at that time?

A. Richmond Airport is controlled. They have a control tower, and you have to get permission from the control tower operator to take off. The weather has to be above

page 77 } the minimum; and all this was so.

Q. What did you do then when you left Richmond? To what point did you fiy?

A. I flew to the vicinity of Alexandria, using radio and navigation, on top of the fog.

Q. How did you find the weather, or conditions at the airport at Alexandria?

A. It was completely fogged in.

Q. What did you decide to do at that time?

A. Well, nothing. The general condition—I decided to call it off. I was returning to Richmond until I got in the vicinity of Fredericksburg and saw the weather here was reasonably good, and I landed, then called Miss Taylor, and she said that she could drive down, would be there in approximately an hour.

Q. You saw the condition at Fredericksburg. Was it proper to land there, in your opinion?

A. It was proper then, yes.

Q. Then you called Elizabeth, where was she?

A. She was in Alexandria.

Q. At her aunts?

A. At her aunts.

Q. What arrangements did you make then? You called her from where, the airport, Shannon's Airport?

A. I called her from Shannon Airport. Yes, sir.

page 78 } Q. What arrangements were then made?

A. She said that they would drive from Alexandria to Fredericksburg, and we would leave from there, and continue the trip as planned.

Q. Who, if anyone, accompanied you and Elizabeth on this flight?

A. Her aunt and her aunt's son.

Mr. Goolrick: Give the boy's age if you know.

Q. What was the lady's name, do you recall?

A. Christine Taylor, and the boy's name is Paul Anthony Taylor. He was twelve years old.

Q. Do you recall who drove them to Fredericksburg, or did they drive the car, or did someone bring them there?

John W. Walthew.

A. The aunt's daughter and son-in-law drove them.
Q. They brought Elizabeth and her aunt and this twelve year old boy to Fredericksburg?
A. To Fredericksburg. That's right.
Q. About what time did they get to Fredericksburg?
A. They arrived at approximately 5:30.

By the Court:
Q. Was it then dark?
A. It was then dark. Yes, sir.

By Mr. Sutton: (Continuing)
Q. What did your folks do then?
page 79 } A. Well, we unloaded the baggage, put it in the plane, and got ready to go. We didn't want to wait around too long because of the conditions that were developing.
Q. During the time that you were waiting at Fredericksburg, did you notice the weather conditions, particularly in the direction in which you were going?
A. Yes. Just prior to sundown, and immediately after sundown, there was a break in the overcast toward the West, the direction I was going, and I also talked to the boy from Charlottesville—

Mr. Goolrick: Wait a minute, don't say what you heard when you were talking to somebody else.

Q. Did you—I am asking the question—have occasion to talk to a pilot there which just came from Charlottesville?

Mr. Goolrick: Wait a minute. You cannot answer that.
The Court: He can say he talked to him, but he cannot tell what he said.
Mr. Sutton: If Your Honor please, we respectfully submit that one of the best ways to find out the weather condition is by inquiry of a person.
The Court: He cannot tell or repeat hearsay.
page 80 } Mr. Sutton: All weather reports are hearsay, sir. Any way you find out about the weather is hearsay; somebody tells you the weather in Denver is such and such, radio reports—
Mr. Goolrick: I would like to suggest that if they wanted to prove anything of that kind they should have brought the man who told him that here to testify.

John W. Walthew.

The Court: Yes, and you can get weather charts that would be admissible, too, as to what the weather was on that day.

Mr. Sutton: We respectfully submit, sir, that when a pilot comes in the other pilots talk with him, and that is one way of ascertaining what the weather conditions are at different places.

The Court: I do not think he can tell what the other man told him, because that is hearsay. I do not think the weather will abolish the hearsay rule. I can tell you the sun is shining right now, but if you want to prove that in Court you have to bring me to testify that the sun was shining at a particular time.

Mr. Sutton: Our position in this instance is you can necessarily rely on what you may be referring to as hearsay. Being a pilot you would inquire and you necessarily page 81 } would depend on what other people are saying as to weather conditions at other places. It is especially so when it was a question of personal judgment. It is a question of whether, under all of the circumstances, the information which he had and on which he based his judgment is hearsay.

The Court: I think what the man told him was hearsay, and the man himself is the one who should come and testify as to what he told him.

By Mr. Sutton: (Continuing)

Q. Did you know the name of the pilot with whom you were talking?

A. No, I don't know the name of the pilot.

Q. You did discuss with him the situation at Charlottesville?

A. Yes, sir.

Mr. Goolrick: We know the name. He could have gotten the name.

Mr. Sutton: We except to the ruling of the Court in not allowing us to go further on that matter.

The Court: All right, sir.

By Mr. Sutton: (Continuing)

Q. Were you going to fly over Charlottesville?

page 82 } A. Charlottesville is on course, yes, sir.

Q. Did this plane take off ahead of you?

A. Yes, he went to Charlottesville.

Q. How long ahead of you did he take off?

John W. Walthew.

A. About thirty minutes.

Q. Mr. Dorman, while we are on the subject, said something about, I believe you said you would use a Gordonsville Range. What does that technical term mean?

A. Well, the Gordonsville Range is a radio station. It's on very high frequency, and from that you can draw a bearing to or from that station; and by tuning your radio into that station, I mean set your selector on the radio that you have drawn, you can maintain a perfectly straight course to or from that station from any point.

Q. When the folks arrived you said that you loaded the baggage in and they got in the plane. As soon as the baggage was loaded and they had gotten in the plane, did you start to take off?

A. I would say within five minutes.

Q. In other words, they were there only a very short time before you began to move the plane?

A. That's right. A very short time.

Q. How many seats were there in that plane?

A. Four.

Q. How are they arranged? Two in front and
page 83 } two in the back.

A. Two in front and two in the rear.

Q. Where was Elizabeth sitting?

A. In the front right. On my right.

Q. Tell the jury, please, where your plane was with regard to this main building they have there?

A. Before leaving the administration building?

Q. Yes, sir. Where was it loaded, and where did the folks get on?

A. In front of the administration building. If you have the picture I can show you. The plane was parked in front of the administration building by a gas pit. They had to dig a hole and put a tank in the ground, and I had pulled out to gas the plane.

Q. Did you see Mr. Dorman just before you left, or was he there?

A. I saw him until the time he went to lunch or dinner.

Q. You did not see him any more?

A. Not until after the crash.

Q. As you were getting ready to leave in your plane was Mr. Stewart there, the other attendant at the airport?

A. Yes, Mr. Stewart was the attendant, and he was there.

John W. Walthew.

Q. Did he make any statement to you as you
page 84 } were getting ready to leave as to where you should,
what part of the runway you should use?

A. Yes.

Mr. Goolrick: I do not know whether that is proper or not. Mr. Sutton should have taken Mr. Stewart's deposition.

The Court: I think that that would be hearsay as to what Stewart told him, too. I think what anybody told him that was not the plaintiff would be hearsay.

Mr. Goolrick: Mr. Stewart is not present and subject to any cross examination.

The Court: You have to bring that witness here to tell what he told him so he could be cross examined.

Mr. Sutton: If Your Honor please, Mr. Dorman has already testified that it was the practice at the field to tell people about this bump there.

The Court: That is true, but Mr. Dorman was here and subject to your cross examination; but this man isn't here, and he isn't subject to cross examination as to what he told him. That is hearsay.

Mr. Sutton: It is a matter they brought out, if
page 85 } Your Honor please.

The Court: I know, but you cannot rebut something he brought out from a witness who testified directly by hearsay of somebody else.

Mr. Goolrick: If Your Honor please, it was agreed very nicely on the part of my friend, Mr. Sutton, that Mr. Stewart's statement should go in the record as to what he would have said if he had been here, but not a word was in there about any bump, or anything he told Mr. Walthew about a bump. Now he comes here and Mr. Sutton wants him to testify as to what Stewart told him. There is no opportunity for us to cross examine him and find out whether he really told him that or not.

The Court: Yes, sir. That is hearsay and I cannot admit hearsay evidence.

Mr. Sutton: We note the exception.

By Mr. Sutton: (Continuing)

Q. Were you told which part of the runway to use by an attendant at the airport?

A. Yes.

Mr. Goolrick: I object to that.

John W. Walthew.

By the Court:
Q. Who was that attendant?
A. That attendant was Mr. Stewart.

page 86 } The Court: I do not think you can testify as to what he told you.

By Mr. Sutton: (Continuing)
Q. Did you use the part of the runway that he told you to use?

Mr. Goolrick: I object to all questions along this line, if Your Honor pleases, because Mr. Sutton is simply trying to get around the Court's ruling by asking questions along the exact same line on which Your Honor has already ruled.
Mr. Sutton: We respectfully submit he can certainly relate what took place as he was taking off there at the airport.
The Court: I do not think that the airport will abolish the rules of evidence.
Mr. Sutton: I think, if Your Honor please, he has a right to say why he was taxiing at a certain place. He certainly has a right to give a reason why he was taxiing at a certain place.
The Court: He said before he was instructed to stay on the right side, or the left side, or whatever it was. He was on the right side coming up. I suppose he was told to stay on the runway.

By Mr. Sutton: (Continuing)
page 87 } Q. Those were the instructions you received?
A. Yes.
Q. To stay on which side as you were getting ready to take off, would it be the left or the right?
A. It would be the left as I was taxiing out; the right after I turned around to come back.

By the Court:
Q. Would it be the side next to the administration building, or away from it?
A. It would be the side next to the administration building.
Q. He told you to stay on that side?
A. He told me to avoid that side.

The Court: All right.
Mr. Goolrick: That is the same thing. That is letting in

nothing but hearsay testimony; that is all it is. It hasn't been shown here that Stewart had any authority down there. There is nothing here to show that he had any authority down there.

The Court: He was coming up the right side of the runway.

Mr. Sutton: If Your Honor please, it depends on which direction he was going. He was told to avoid the side next to the administration building. In the direction in which he was taking off, as I understand it, the administration
page 88 } building would be to his right.

By the Court:

Q. He was going south when the thing happened. You were going south and then you turned west, that is what caused the accident, was it not?

A. No, sir.

Q. You were headed south, were you not?

A. I was headed south. Yes, sir.

Q. The plane turned west to hit the building, did it not?

A. Very slightly, but that is on the left side of the runway going in that direction. It's on the side opposite the administration building.

Mr. Sutton: If Your Honor please, he didn't hit the administration building, he hit the little cement building on the other side.

The Court: The building that is to the left of the administration building.

The Witness: The left going in the direction for take-off, yes.

By Mr. Sutton: (Continuing)

Q. As you were taking off the administration building was to your right, is that correct?

A. To my right.

page 89 } Q. The concrete building with which you collided was to your left?

A. That's right.

Q. When you got your people loaded into the plane, your plane was headed, of course, in the opposite direction from which you would take off, isn't that correct?

A. Yes.

Q. Which direction would you call that, that it was headed at that time?

A. It was headed north at that time.

John W. Walthew.

Q. What did you do then?

A. Well, like I say, I avoided this side of the runway next to the administration building. I wasn't told the nature of this bump or rough spot, whatever it was. I wanted to avoid it. I gave it a little extra room.

Q. Which way did you taxi when you started? Where did you taxi to?

A. I taxied north to the fence on the north side of the airport.

Q. As you were taxiing to the northern end of the runway, that is, when you first started your plane to taxiing—As a matter of fact you were on the ground all the time, were you not?

A. Yes, sir.

Q. You never got off the ground?

page 90 } A. I never got off the ground.

Q. As your plane was moving on the ground toward the north end of the runway could you at that time see the lights at the end of the runway and on both sides of the runway?

Mr. Goolrick: Which end now are you talking about, the north end or the southern end?

A. Yes, sir. The north end. The way I was facing.

Q. You were going in a northerly direction, were you not? In other words, you were taxiing up in a northerly direction and you could see the lights on both sides and at the end of the runway, isn't that correct?

A. That's right, and I also saw the fence not lighted.

Mr. Goolrick: When you say the end of the runway, Nelson, put in there whether it is the northern end or the southern end of the runway.

Mr. Sutton: He was starting in front of the administration building, as I understand it, and went all the way to the northern end of the runway, is that correct?

A. That's right.

Q. The administration building is somewhat in the middle of the field?

A. Somewhat in the middle, yes.

page 91 } Q. At that time, as you were taxiing on up there and saw the lights on both sides of the runway and

the obstruction lights at the end of the runway, you say you also saw a fence there?

Mr. Goolrick: Which end? I insist that you put in the record which end.

A. There is a fence there. Yes.
Q. Could you see the fence?
A. I could see the fence.
Q. Did it appear to you at that time that it was all right for you to take off?
A. Yes. I wouldn't have attempted it if it hadn't appeared all right.
Q. When you got up to the north end of the runway did you turn your plane?
A. I turned it about 45 degrees, which is the habit—
Mr. Goolrick: I would prefer if you let the witness say what he did, and not let Mr. Sutton testify.

Q. What did you do then after you turned 45 degrees?
A. After I ran up there I reved up the motor to the normal speed of 1500 revolutions per minute; checked the magneto for the ignition; the carburetor heat; the freedom
page 92 } of the controls, and set the flaps for take-off.
Q. Go over that a little more slowly if you will? Those are things you do before you take off?
A. Those are normal procedures, yes.
Q. You say you did what?
A. I reved up the motor to 1500 revolutions per minute, that is the normal speed; I checked the magneto for the ignition system; carburetor heat, which is material in checking the carburetor; hot air; and I checked the freedom of the controls.
Q. Did everything mechanically appear to be in proper working order for the take-off?
A. Everything mechanically was proper.
Q. What did you do then?
A. Set the flaps for take-off, which is ten degrees. That is the little trailing edge of the wing; you can drop them. I swung around more to the right, lined up with lights, and put full power to the engine and started to take off, started the take-off run. During this run—
Q. The lights that you lined up with, did you understand those to be the lights marking the sides of the runway?
A. Yes.

John W. Walthew.

Q. All right, sir, and you say you did what about power?

A. Naturally you put full power to the engine
page 93 } when you start your take-off run.

Q. As you were starting off did you see anything that indicated where you might be with regard to the runway?

A. Yes, sir. I saw the marker on my left. It was an unlighted marker. Every other one of those are lighted, as I said. There is 200 feet between the lights and there is an unlighted marker between; and this one was unlighted. It was close to the left but not close enough to be alarming. I did a gentle turn to the right—

Mr. Goolrick: Talk just a little bit louder, if you will, please?

A. (Continuing) This unlighted marker was close to my left. It was closer than it should have been, but not close enough to be alarming. I did a slight turn to the right to move further away from the edge of the runway and continued on, and immediately after making the turn I collided with the building, which was probably less than a second.

By the Court:

Q. Which way were you going?

A. We were going south now.

Q. You were going south?

A. Yes.

Q. Wasn't the buiding on your left?

page 94 } A. It was on my left.

Q. If you turned your plane to the right how did you collide with the building?

A. Because this light that I had lined up with was in the house behind this building and not a runway light.

By Mr. Sutton: (Continuing)

Q. You learned that after the accident?

A. Naturally I learned it after the accident. If I had known it was the house before I wouldn't have aimed at it.

Q. Was there any light on this building that you collided with?

A. There was no light on the building. The building is gray cinder block and no paint.

Q. Had there been a light on it, would you have seen it in time to avoid it?

John W. Walthew.

Mr. Goolrick: He had his own lights on.

The Court: If it was lighted it might have given him warning. Whether he collided with it or not is a different question since he was lined up with the house light.

Q. Had you seen a light on the building would you have realized there was an obstruction there?

A. If there was a light on the building naturally it would have to be red to comply with regulations, and a
page 95 } red light means there is an obstruction there and it is to be avoided.

Mr. Goolrich: I object to all of this. It is pure speculation. Mr. Sutton asked him if there had been a light on the building if he would have seen it. He was there two or three hours before and he is bound to have seen that building if he looked around, it is in plain full sight; he was there in the day time; now to come in here and talk about there being no lights on the building is just an aftermath, that is all. I object to it.

Mr.Sutton: If Your Honor please, my friend says that you are bound to see a building at night, and we respectfully submit that you are not bound to see an unlighted building at night.

Mr. Goolrick: I did not say that. He was there two hours or more and the building was in plain sight. He was there in the day time and he is bound to have seen it.

Mr. Sutton: The dwelling house was in plain sight in the day time, too.

Mr. Goolrick: Certainly, he should have seen both of them.

Mr. Sutton: That is not the situation here. Here is a building inside the fence of the airport, and within
page 96 } twenty some feet of the edge of the runway.

Mr. Goolrick: It is not twenty feet, but fifty feet.

Mr. Sutton: The testimony is, of your witness, that it is thirty-six feet from the edge of the runway to the fence.

Mr. Goolrick: That's right.

Mr. Sutton: The building is 8 x 10 feet, and it stood on the entire inside of the fence, which would make it twenty-six feet from the edge of the runway.

Mr. Goolrick: I recall very distinctly that Mr. Dorman estimated the distance to be fifty feet. There were two witnesses, one your own witness, Mr. Walthew, and the other Mr. Dorman, Superintendent of that plant, said it was approximately fifty feet.

Here is what he is leading up to: Apparently you want to

put the burden of this thing on the Shannon Airfield because they didn't have a light on that building, I suppose.

Mr. Sutton: I am not trying to put the burden anywhere.

Mr. Goolrick: I object to this line of examination. There is no rule requiring any light on that building.

page 97 } It is off the runway, and he just ran into it. That is all.

Now he says if there had been a light on it he might not have ran into it; he was lined up with the light in the other house and he might have run into that, instead.

Mr. Sutton: My friend, since he has quoted one of his witnesses, I respectfully submit, sir, that his witness Mr. Gowin gave the exact measurement. He did not say exactly what Mr. Dorman stated. He said, "I don't know. It may be about fifty feet." But, Mr. Gowin gave the exact measurement after looking at the paper which he held in his lap, from which the Court said he could refresh his memory. He said the exact distance was 36 feet, and that the building sat on the inside of the fence, and that the building was 8 x 10 feet, which would put it—

The Court: He certainly did say the building was 8 x 10 feet, and that the fence was back a bit; but how far he said it was, I do not know.

Mr. Sutton: I will vouch the record, sir, he said it was 36 feet.

Mr. Goolrick: All right then, suppose he did. The point you are trying to make now is that the building didn't have a light on it, and—

page 98 } Mr. Sutton: That is exactly it.

Mr. Goolrick: —that is not in your Grounds of Defense.

Mr. Sutton: It is in the Grounds of Defense. You will find it is set out in the Grounds of Defense.

Mr. Goolrick: Maybe I am wrong, if it is I will retract my statement. I cannot remember all of these things. (Obtaining the Court file) "The defendant avers there should have been some light to show the location—" this is the Grounds of Defense, sir, "—to show the location of the building situated close to the runway with which the airplane operated by the defendant collided, and that the failure to have this building designated by a light was the primary cause of the accident."

It may be Shannon Airfield's responsibility, but it is not ours.

Mr. Sutton: I don't care whose it is.

Mr. Goolrick: All right, go ahead.

John W. Walthew.

Mr. Sutton: That is our position, sir, and that is in our Grounds of Defense.

By Mr. Sutton: (Continuing)

Q. I understood you to say that from the time you saw this unlighted marker until the time you struck the
page 99 } building was a fraction of a second, is that what you said?

A. From the time I made the turn after seeing the marker until striking the building, yes.

Q. Did you realize at that time that you had lined up with the light of that dwelling?

Mr. Lilly: Objection. I object to that question, Your Honor.

The Court: What was the question?

Mr. Sutton: I asked him if he realized at the time he lined up with the light that it was not on the airport.

The Court: He has already stated he didn't realize it.

Mr. Sutton: That is what I understood him to say.

By Mr. Sutton: (Continuing)

Q. Mr. Goolrick asked you at great length when he called you as a witness this morning about an assumption which you made some time later that there had been some fog or mist gathered on the windshield; when did you make that assumption?

A. I imagine it was a day or two after. I thought about it and I wanted to know the reason about this accident, too. I was with Mr. Gowin when he investigated it. I also helped him.

page 100 } Q. As you were going north, taxiing north on that runway from in front of the administration building down to the north end of the field, you stated you could see lights on both sides of the runway and at the end of the field. Were you looking through the windshield at that time?

A. Yes.

Q. As you started to take off, after having reved your engine, checked the various things there, did the situation, as it then appeared to you, seem proper for you to take off?

A. Yes.

Mr. Lilly: Objection. That is a leading question.

The Court: It is a leading question.

John W. Walthew.

Mr. Lilly: It is a question for the jury to answer, too.
The Court: All right.
Mr. Sutton: Their own witnesses said that the taking-off is always a matter of judgment, that it is a matter of personal judgment, and that a number of different factors have to be taken into consideration.
The Court: It is a leading question.
Mr. Sutton: One witness testified that the circumstances could change in five minutes. I know I cannot ask
page 101 } leading questions, but I can if they don't object to it.
Mr. Goolrick: We did object to it, though. What are you arguing about?

By Mr. Sutton: (Continuing)
Q. Did you ever see this building before you struck it?
A. I saw the whole airport when I landed. Yes.
Q. I am talking from the time you started to take off.
A. Not from the time I started to take off, no.
Q. I believe the Court asked you this morning about your speed: What would you estimate your speed to be at the time?

The Court: He said 40 miles-per-hour.

Q. At the time of the accident?
A. 40 miles-per-hour.
Q. Did you receive injuries yourself?
A. Yes, I received injuries.
Q. Were you required to go to the hospital?
A. Yes, for treatment.
Q. Do you have any scars to show the jury?
A. Yes, the one on my neck.

Note: The witness is pointing out the scar to the jury.

Mr. Sutton: You may examine the witness.

page 102 } CROSS EXAMINATION.

By Mr. Goolrick:
Q. Had you ever landed at Shannon Airfield before this?
A. Before that day?
Q. Yes.
A. No. That was the first day I landed there.
Q. What did you say?

John W. Walthew.

A. That was the first day.
Q. That was the first time you had ever been there?
A. Yes.
Q. Had you flown over it?
A. On several occasions.
Q. You were there before your take-off, Mr. Walthew, about how long?
A. From 4 o'clock.
Q. You had ample opportunity to see those buildings, did you not?
A. I had.
Q. You had seen them, had you not?
A. I had seen them, yes.
Q. You knew there were no lights on there, did you not?
A. I wasn't aware that there were no lights on it, no.
Q. You didn't see any lights on it, did you?
page 103 } A. There were no lights turned on during day light.
Q. When it became dark, did you see any lights on it?
A. They didn't turn the lights on until I requested them to.
Q. What is the width of your plane from wing to wing?
A. About 25 feet, maybe 30.
Q. About 25 feet, and you had a 300 foot runway there.
A. I did.
Q. And the only reason, excuse you can give to the jury for running off that 300 foot runway is that you saw a light in Thacker's house and lined up with that?
A. It is not an excuse, it is a reason.
Q. I know, it is the same. Call it reason or excuse, or whatever you please, that is what you did?
A. That is what I did, yes.
Q. With lights on both sides of this field marking the boundaries of the field you didn't line up with those lights, but, instead, you lined up with something in a house some distance off the field.
A. The light in the house looked the same as the lights on the runway, and I used the two lights to make my
page 104 } flight lane.
Q. You couldn't have seen the lights at the far end, the south end of the runway, the warning lights, the obstruction lights at the end, because you would have lined up with them, would you not?
A. State the question again, please?
Q. If you could have seen the obstruction lights at the south

end of this field, you wouldn't have lined up with the house, with the light in somebody's house, would you?

A. You do not line up with obstruction lights. They are to be avoided.

Q. You know they are to be avoided, but you also know they are at the end of the runway, and you know if you have your plane pointed toward those lights you are on the runway, you do know that, don't you?

A. If you have your plane pointed towards obstruction lights it is not necessarily lined up with the runway.

Q. Obstruction lights are at the end of the runway, are they not?

A. Obstruction lights are on utility poles, or anything that could be an obstruction.

Q. The lights are down—

A. They have no relation whatsoever with the runway.

Q. The lights are right at the north end and

page 105 } right at the south end, are they not?

A. Yes, but obstruction lights have no bearing to the runway whatsoever. You are not supposed to line up with obstruction lights.

Q. You are supposed to line up with the other lights on the side?

A. They are not obstruction lights.

Q. I know they are not obstruction lights. They are lights for your guidance, and you had those lights on both sides of you, and you carelessly ran off the place and crashed into that building.

A. I was still lined up with the lights that were the same as the lights which were the guidance lights.

Q. The only reason you can give to this jury, or excuse—You call it reason and I call it excuse—that you thought Thacker's house was on the runway?

A. I didn't think his house was on the runway.

Q. Why did you line up with it then?

A. I said I lined up with two lights. Two white lights. One was on the runway and the other one happened to be in the window of Mr. Thacker's home. A white light is something to line up with.

By the Court:

Q. Where were you when you lined up with that light?

John W. Walthew.

A. State the question again, please?

page 106 } Q. Where were you when you lined up with that light in the window? At the north end of the runway?

A. At the north end of the runway.

Q. Could you see the light in Thacker's house from the north end?

A. Yes, sir.

By Mr. Goolrick: (Continuing)

Q. The light in Thacker's house, I don't know the exact distance, but it is some distance to the left of the lights on the runway, and that is what you were going by; the lights on the runway are what you are supposed to go by, are they not, according to the law?

A. May I have the picture? If you have the light here, and the light in the house directly behind it, that establishes the straight line over here.

Q. You mean to say that you, without any investigation of the 300 foot right-of-way, that you deliberately lined up without any investigation with a light on the runway and another one in a private house and took off? That is what you did, was it not?

A. That is what I did in effect.

Q. You do not call that negligence, do you.

A. That was an error in judgment, yes. I don't deny that.

page 107 } Mr. Goolrick: That is all I want to ask you.

By the Court:

Q. How far did you have to run on that runway before you could take off?

A. Well, that would be—That is variable. It depends on the wind, your loading of the airplane, also the temperature has an effect on that.

Q. Do you have to run the whole three thousand feet before you can take off?

A. No. No, probably I could have gotten off that night in less than a thousand feet.

Q. Less than a thousand feet?

A. Yes, sir.

Q. How many feet had you gone from the north end of the runway to where you had the collision?

A. I think they measured it and it came out somewhere in the vicinity of 600 feet.

John W. Walthew.

Q. How high were those side lights that were supposed to guide you? How much above the ground were they?
A. About a foot, maybe eight inches.
Q. A foot to eight inches above the ground?
A. Yes, sir.
Q. How high was the light in the house?
page 108 } A. I couldn't tell you, sir.
Q. Wouldn't the light in the house be much higher than the lights on the ground?
A. Not necessarily. It depends on where you are looking from. You can have a light downstairs and have a light upstairs and it looks like one is further behind the other.
Q. I thought the man didn't have a light in his bedroom.
A. It was in his living room, yes. I am not saying—I just gave that as an example. When you have a light exactly over the top of the other at a distance it looks like it is behind the other.
Q. How far was it from the place where you saw this side light to your right that wasn't burning?
A. To my left?
Q. To your left?
A. Yes, sir.
Q. Were there any lights to your right?
A. Yes, sir. They were 300 feet over there.
Q. Why didn't you see the lights on your right?
A. I saw the lights on the administration building, but they were over there to my right, and I was told to avoid the right.
Q. You were going south, were you not?
page 109 } A. South.
Q. You did not see any lights to your right?
A. I said I was told to avoid the right, and I was avoiding the right deliberately.
Q. Wasn't this building to your right?
A. The building that I hit?
Q. Yes.
A. It was to the left side of the runway the way I was going. It was directly in front of me.
Q. Which way were you going?
A. I was going south.

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HERE BEGIN THE OBJECTIONS TO INSTRUCTIONS.

Mr. Sutton: The defendant objects to the giving of *INSTRUCTION NO. 1* on the ground that it would allow recovery on proof only of ordinary negligence. We respectfully submit that on the evidence in this case, there being no dispute about the fact that the decedent was a guest, that the plaintiff would not be entitled to recovery upon the proof only of ordinary negligence; that in order to recover she must prove something more than ordinary negligence, what is normally termed "gross negligence".

The Court: Yes, sir. I understand that the same objection goes as to his Instruction No. 2?

Mr. Sutton: Yes, sir. There would be a similar objection to *INSTRUCTION NO. 2*. The defendant objects to the giving of *INSTRUCTION NO. 2* on the ground that the basis of this case if the plaintiff is to recover in this case, we respectfully submit, the plaintiff must prove gross negligence.

Mr. Sutton: We object to the giving of *INSTRUCTION NO. 4* for the reasons we objected to the other instructions: That it would allow recovery on proof only of ordinary negligence, and it would not require the plaintiff to prove gross negligence; it is based on a partial view of

page 113 } the evidence since it does not include the fact that the situation had changed from the time the pilot had started taxiing his plane down to the north end of the runway where he stopped to rev it up and turn around, the situation had changed without his knowledge, and the windshield apparently had become obscured without his knowledge. The instruction does not include the fact of those circumstances having taken place, and since it is a finding instruction, we respectfully submit that the other portion of the evidence should be included. It unduly calls the attention of the jury to certain portions of the evidence.

Mr. Sutton: The same objection applies to *INSTRUCTION NO. 5*.

Mr. Sutton: We do not object to *INSTRUCTION NO. 6*, the damage instruction.

Mr. Sutton: Your Honor having implied that *INSTRUCTION NO. E* is being refused, we except to the action of the Court in refusing this instruction. We respectfully submit that the evidence fully justifies this instruction, and that the failure to have the building lighted, if the jury believes that that was the proximate cause of the collision, then

page 114 } surely the defendant is not liable.

In view of the fact that the Court has refused to give the instruction in the language as offered, we now

offer the instruction with the word "sole" between "the" and "proximate", and the instruction would then read: "The Court instructs the jury that if they believe from the evidence that the building with which the airplane collided was not lighted and that the failure to have such a light on this building was the sole proximate cause of the collision, then you will find your verdict for the defendant."

If Your Honor please, we offer that, since the Court has refused the other instruction.

The Court: I think I will refuse that, too.

Mr. Sutton: We except to the Court's ruling in refusing to give this instruction.

Mr. Goolrick: We object to the instruction, either as originally offered or as substituted by inserting the word "sole", because it totally ignores all of the testimony in this case showing that this pilot took off on a lighted field 300 feet wide, that he ran off of that field and

page 115 } crashed into this building.

The Court: Unless and until the Court of Appeals says that law is applicable to the operation of airplanes, I am not going to apply the gross negligence doctrine to anything other than automobiles.

Even Massachusetts, which is the basis for our gross negligence doctrine, has refused to apply it to airplanes. I think I shall do the same. I refuse these instruction, E, F, and G, which are gross negligence instructions.

Mr. Sutton: We except to the action of the Court in both granting instructions where recovery can be had in this case by proof only of ordinary negligence, and in refusing to instruct the jury that before the plaintiff could recover the plaintiff must prove gross negligence.

* * * * *

page 119 } Mr. Sutton: May it please the Court, we move the Court to set aside the verdict of the jury and grant a new trial, or enter final judgment for the defendant, on the ground that the verdict is contrary to the law and the evidence; for error of the Court in admitting over objection of the defendant certain evidence as appears from the record; in the refusal of the Court to admit certain evidence offered on behalf of the defendant as appears from the record; error of the Court in the giving of instructions offered on behalf of the plaintiff over the objection of the defendant; and for the refusal of the Court to give certain instructions offered on behalf of the defendant.

The Court: All right, sir. Are you going to have the record written up?

Mr. Sutton: Yes, sir.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

RULE 5:12—BRIEFS

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

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

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

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

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

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

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

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

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

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

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

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

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

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of 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.

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