

FILE COPY

Record No. 5077  
Clerk, Supreme Court of Appeals of Virginia,  
Richmond, Va.

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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RAILWAY EXPRESS AGENCY, INC.  
OF VIRGINIA, ET AL.

v.

BRAINARD FRANKLIN MOORE

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FROM THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH

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**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.

IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND

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**Record No. 5077**

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 7th day of October, 1959.

RAILWAY EXPRESS AGENCY, INCORPORATED, OF  
VIRGINIA, ET AL., Plaintiffs in Error.

*against*

BRAINARD FRANKLIN MOORE, Defendant in Error.

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From the Court of Hustings for the City of Portsmouth

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Upon the petition of Railway Express Agency, Incorporated, of Virginia, and William R. Harding a writ of error and *supersedeas* is awarded them to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 12th day of June, 1959, in a certain motion for judgment then therein depending wherein Brainard Franklin Moore was plaintiff and Railway Express Agency, Incorporated, of Virginia, and another were defendants.

And it appearing that a *supersedeas* bond in the penalty of six thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

**RECORD**

page 23 } INSTRUCTION NO. P-3.

The Court instructs the jury that the law of Virginia provides that the driver of a motor vehicle shall drive his vehicle upon the right half of the highway or street upon which he is driving. And if the driver of the defendant's truck, in driving west on High Street, did not drive his truck to the right of the center of said street, then he was negligent in not doing so. And if the jury believe that such negligence was a proximate cause of the injuries to the plaintiff, and that the plaintiff was free from negligence under the circumstances, then you should find for the plaintiff against both defendants.

Moore v. RR. Ex.

Refused as no evidence to justify and ex. 11/12/58.

R. F. M.

page 24 } INSTRUCTION NO. P-5.

The Court instructs the jury that the law of Virginia provides that the driver of a vehicle entering a public highway from a private road or driveway shall, immediately before entering such highway, stop and, upon entering such highway, shall yield the right of way to all vehicles approaching on such highway.

If you believe from the evidence that the "Seaboard Parking Lot" entrance was not a public highway but was a private road or driveway which entered onto Water and High Streets then there was a duty on the driver of the defendant's truck immediately before entering upon Water and High Streets from said parking lot to stop and upon entering said streets to yield the right of way to vehicles approaching on such streets and if you further believe from the evidence that the driver of defendant's truck failed in this said duty and that such failure on his part was a proximate cause of the injuries to the plaintiff, and that the plaintiff was free from negligence under the circumstances, then you should find your verdict for the plaintiff against both defendants.

Refused 11/12/58.

R. F. M.

Moore v. RR. Ex.

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INSTRUCTION NO. 14.

*Tha* Court instructs the jury that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. Therefore, if you believe from the evidence that the defendant Harding had the right of way and the plaintiff did not yield the right of way, as required by law, then you shall find for the defendants.

Granted 11/12/58.

R. F. M.

page 41 } Virginia:

At the Court of Hustings for the City of Portsmouth held on the 12th day of November, 1958.

This day again came the parties by their attorneys, the jury returned in its entirety, and Court convened as of its adjournment of November 11, 1958; whereupon, evidence being fully heard, as well as argument of counsel, the jury retired to their room to consult of their verdict, and after sometime returned into Court, having found the following verdict: "We, the Jury, find for the Plaintiff against the Defendants, Railway Express Agency, Inc., of Virginia, A. G. Williamson, Agent, and, William R. Harding, and fix his damages at Five Thousand Dollars (\$5,000.00). W. A. Warner, Jr., Foreman;" whereupon, the defendants, by counsel, moved the Court to set aside the verdict of the jury and grant them a new trial on the grounds that the said verdict is contrary to the law and evidence, the misdirection of the jury, and excessive damages, which motion is continued.

page 42 }

June 8, 1959.

Mr. Russell T. Bradford  
Attorney at Law  
National Bank of Commerce Building  
Norfolk, Virginia

Messrs. Moody and Mattox  
Attorneys at Law  
Professional Building  
Portsmouth, Virginia

In *Re*: B. F. Moore v. Railway Express Agency, et al.

Gentlemen:

This action, brought by the plaintiff to recover for personal injuries received by him for the alleged negligence of Wm. R. Harding, driver and agent of the Railway Express Agency of Virginia, Inc., resulted in a verdict by the jury of \$5,000.00 in favor of the plaintiff against W. R. Harding and the Railway Express Agency.

The defendants have moved to set aside the verdict of the jury as being contrary to the law and evidence and to enter judgment for the defendants *non obstante veredicto*. Counsel for the defendants, in his oral argument before the Court, has stated that the defendants have no complaints or objections to any rulings of the Court on the evidence or in the granting or refusing of instructions; that the sole ground upon which the defendants rely for their motion, is that the plaintiff was guilty of contributory negligence as a matter of law.

Although the Court had the benefit of the oral argument of able counsel, the case presented some difficulty. The Court frankly states that had he been on the jury he could not have voted for a verdict for the plaintiff, but the Court cannot substitute its opinion for that of the jury unless the verdict is plainly wrong or without substantial evidence to support it.

page 43 } Viewing the evidence in the light most favorable to the plaintiff and resolving all conflicts in evidence in his favor, it appears that the plaintiff entered the intersection of Water and High Streets before the defendants' truck. The plaintiff first looked to his right when about ninety feet from the intersection. He stated that the truck was not in sight which is plausible under the evidence. He next looked toward his left for traffic travelling in an easterly direction on High Street. After he had entered the intersection, he again looked to his right and the truck came from his right across his path, going at a speed of about ten miles per hour. The

plaintiff was travelling at the time of the accident between three and four miles per hour, which is about the speed a man walks. Although the roadway at the eastern end of High Street where the accident occurred is not a private roadway, yet it is not a normal intersection, and taking this fact into consideration the jury could reasonably have concluded that the actions of the plaintiff at the time of the collision were those of a reasonably prudent person and therefore he was not guilty of any contributory negligence which proximately contributed to the accident.

The defendants' motion to set aside the verdict will be overruled and judgment entered thereon on June 12, 1959.

Respectfully,

ROBT. F. McMURRAN, Judge.

RFM/mvw

page 44 } Virginia:

At the Court of Hustings for the City of Portsmouth held on the 12th day of June, 1959.

. . . . .

This day came again the parties by their attorneys, and the Court having fully heard the motion of the defendants, Railway Express Agency, Incorporated, of Virginia, and William R. Harding, heretofore entered herein to set aside the verdict of the jury heretofore rendered and to enter a judgment for the defendants on the ground that the plaintiff as a matter of law was guilty of contributory negligence, doth overrule the same and doth sustain the verdict of the jury and doth order that the plaintiff do recover of the defendants, Railway Express Agency, Incorporated, of Virginia, and William R. Harding, the sum of Five Thousand Dollars (\$5,000.00) with interest thereon to be computed at the rate of six per cent per annum from the 12th day of November, 1958, until paid and his costs by him about his suit in this behalf expended, to which actions of the Court, the defendants, by counsel, except for the reasons stated in their motion. The

page 45 } defendants having indicated their intention to apply to the Supreme Court of Appeals for a writ of error, the execution of this judgment is suspended for a period of sixty (60) days upon the execution before the Clerk of this Court by the defendants or by someone for them a

bond in the penalty of Six Thousand Dollars (\$6,000.00), conditioned according to Sections 8-465 and 8-477 of the Code of Virginia.

. . . . .

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. . . . .

ASSIGNMENTS OF ERROR.

The following are the errors assigned:

1. The Court erred in not striking out the evidence introduced for the plaintiff.
2. The Court erred in not setting aside the verdict as contrary to the law and the evidence, without evidence to support it, and plainly wrong for not setting aside the verdict and entering final judgment for the defendants, because the evidence showed that the plaintiff was guilty of contributory negligence as a matter of law, and in entering judgment for the plaintiff.

RAILWAY EXPRESS AGENCY, INCORPORATED, OF VIRGINIA, AND  
 WILLIAM R. HARDING  
 By RUSSELL T. BRADFORD  
 Counsel for Defendants.

. . . . .

Filed Jul. 1, 1959 9:04 A. M.

JOHN R. PORTER, JR., Clerk.

. . . . .

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. . . . .

ASSIGNMENT OF CROSS-ERROR.

The plaintiff, Brainard Franklin Moore, assigns the following Cross-Error:

*Mike Williams.*

1. The Court erred in refusing to grant Plaintiff's instructions P-3 and P-5.
2. The Court erred in granting defendant's instruction D-14.
3. The Court erred in its ruling that the driveway leading from the Seaboard Railroad Parking Lot was not a private driveway.

BRAINARD FRAKLIN MOORE  
 By RICHARD D. MATTOX  
 Of Counsel.

(on back)

Filed Jul. 3, 1959 11:55 A. M.

JOHN R. PORTER, JR., Clerk.

page 5 }                    MIKE WILLIAMS,  
 called as a witness on behalf of the plaintiff, having  
 been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

page 15 }

By Mr. Moody:

page 16 }                    Q. Now, Mr. Williams, you say you have been  
 down there eleven years in that particular area  
 and that you have seen the area, I believe you said,  
 in connection with one of the photographs every day. Have  
 you made a count of the number of signs in the Seaboard  
 passenger station parking lot saying that it is "Private  
 Property, no parking" allowed?

A. There is about ten or eleven.

Q. Ten or eleven?

A. Yes, sir.

*Mike Williams.*

Mr. Moody: I think that is all.

The Court: All right, Mr. Bradford, do you wish to examine?

CROSS EXAMINATION.

By Mr. Bradford:

Q. You say you have been there for about eleven years, Mr. Williams?

A. Yes, sir.

Q. Do you remember when the Wiggins cabs used to park over there next to the terminal?

A. Next to the terminal?

Q. Yes?

A. Where do you mean exactly, sir?

page 17 } Q. Well, I mean within the entrance and next to the Berkley Ferry which used to be on the other side of it there, the Wiggins taxi cabs?

A. I don't remember what company it was. I remember some cabs used to park in there one time, but it has been a right good while back, I think.

Q. And they had permission from the City Manager to park in there, didn't they?

A. Well, I don't know anything about that, sir.

Q. But you remember the cabs being there?

A. I remember seeing cabs in there, particularly late in the afternoon and at night.

The Court: Can you point it out on those photographs?

Mr. Bradford: I think if the jury will give me Photograph Number 4.

Mr. Moody: Did you ask Mr. Williams to point that out?

By Mr. Bradford:

Q. The point that we are speaking about is this shown by this exhibit. This is the side of the ferry slip, and the entrance is out here, isn't it (pointing on photograph)?

A. Correct.

page 18 } Q. And the driveway comes down through here, the cabs you saw parked were parked along here, weren't they, the Wiggins cabs?

A. How many, I don't know; but I have seen cabs parked in there, yes.

Q. Yes, sir. Now, Mr. Williams, down in that warehouse

*Mike Williams.*

section there, there has been a lot of activity by different people other than the Seaboard, haven't there?

A. That I don't know. What are you referring to specifically, sir?

Q. I am referring to the C. & O. which has an office, doesn't it, in one of the warehouses?

A. I think so.

Q. Well, you know it, don't you, Mr. Williams?

A. No, sir.

Q. Have you ever seen the sign there?

A. I remember seeing a sign but I just couldn't say definitely.

Q. And you also have seen a sign that the Pennsylvania Railroad has an office down there, doesn't it, in those warehouses?

A. No, sir, I have never seen a Pennsylvania Railroad sign down there.

Q. Now, isn't it true that the Old Bay Line used to come in there and load freight into those warehouses?

page 19 } A. It has been years ago, yes, sir.

Q. And isn't it true that the Port Wardens Line used to come there and load and unload freight in those warehouses?

A. I don't know whether it did or not. That might have been before my time, sir.

Q. You don't remember that?

A. No, sir.

Q. Do you remember a man by the name of Wallace who used to park his trucks in there?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. The traffic that goes down into that area beyond Water Street is not limited to the Seaboard at all, is it?

A. I don't know whether it is or not, sir. I have seen other people go down there besides the Seaboard.

Q. That right of way through there, or that street through there, how long to your knowledge has it been open to the public?

A. (Pause) That I don't know, sir, because I have never tried to drive down there; I don't know.

Q. Well, it has been open ever since you have been at the Portsmouth Star, hasn't it?

page 20 } A. I said I don't know. I couldn't swear to it because I don't know. I don't know whether it

*J. M. Matthews.*

has been open or not. If I did know I would tell you, but I don't know.

Q. Yes. You being a newspaper man, you know at one time the Portsmouth police were putting tags on people's cars who parked in there, didn't you?

A. Parked in where, sir?

Q. Parked in this area that we have just described?

A. (Pause).

Q. The Portsmouth City Police?

A. I don't know whether they did or not, sir. I never parked over there; I never got one because I never parked there.

Q. You did not know that then if they were giving tickets for parking in there?

A. No, sir, I do not.

. . . . .

page 21 }

RE-DIRECT EXAMINATION.

By Mr. Moody:

Q. You have never known the police to give parking tickets in that private parking lot?

A. Mr. Moody, I vaguely may have but I just could not pin point it. I just would not swear to it because I don't know.

Mr. Moody: I see. All right, sir.

. . . . .

J. M. MATTHEWS,

page 22 } called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please, sir.

A. J. M. Matthews.

Q. Mr. Matthews, where are you employed, sir?

A. Seaboard Airline Railroad, Special Agent in charge.

Q. Special Agent in Charge?

A. Yes, sir.

Q. What does that consist of?

*J. M. Matthews.*

A. General police work, investigations and so forth.

Q. How long have you been with the Seaboard, Mr. Matthews?

A. 24 years.

Q. And are you still here in Portsmouth based here primarily?

A. Yes, sir.

Q. You were subpoenaed, I believe, is that correct, sir?

A. Yes, sir.

page 23 } Q. Now, were you there with the Seaboard Railroad in October of '57?

A. Yes, sir, I have been there ever since 1939.

Q. And did your duties at the time consist of the same as they do at the present?

A. Yes, sir.

Q. Did the Seaboard Railroad pay employees to take care of the parking area in front of the Seaboard passenger station or not?

A. Well, that came under our duties.

Q. And what were your duties in connection with that area right in front of the Seaboard Building?

A. To keep down as much illegal parking as was possible. We had—

Q. And—excuse me, go ahead.

A. We had a tag that we put on them saying that they are on private property and was used for the business of the Seaboard.

Q. I show you a tag and ask you whether or not this is what you refer to, sir.

(Handed to the witness for examination.)

A. Yes, sir.

Q. Mr. Matthews, would you read to his Honor and the jury what is on that tag, please, sir?

page 24 } A. You want me to read it?

Q. Yes, sir.

A. (Reading) "Your car is now parked on private property of the Seaboard Airline Company which greatly *interfers* with the transaction of our business and inconvenience to our patrons. We are therefore forced to ask your cooperation in keeping these premises clear. A record of this notice which includes license number and description of your car is being maintained. Should your car be found parked in the

*J. M. Matthews.*

restricted area again we will be compelled to take further action.”

page 25 }

Q. Mr. Matthews, I show you a photograph marked Plaintiff's Exhibit Number 3 and ask you whether or not the area that you patrol there and in which you use these tickets is shown on this photograph.

(Handed to the witness for examination.)

A. Yes, sir.

Q. Would you please describe that area by using the photograph that you have in your hands?

A. Right through here (pointing).

Q. Now, you are running your hand—

A. Right behind that automobile there is a bulkhead there made out of wood that the automobiles park up to.

Q. All right, sir. And Mr. Matthews, in connection with your employment there did you patrol—and I may be using the wrong term—but were you in charge of that general area behind these vehicles so that you could, if necessary, cause a person to move his car or to keep him from page 26 } driving it in an improper manner?

A. We always ask them to out of the goodness of their heart to keep that space clear.

Q. All right, sir, and how many men did you have working out there in that area?

A. Well, we had a man that came on duty at 4:00 o'clock in the afternoon as a rule, and he attended to it till the train left. After that we did not bother with it too much. And also we did not patrol it too much except at train time for our patrons.

Q. Now, then, did the control that you had include the movements of vehicles into the area as well as parking?

A. No, sir, I never have said anything to the moving of vehicles.

Q. All right, sir. Now how long has the Seaboard Railroad, as far as you know, maintained and supervised and controlled that area that you have referred to?

*J. M. Matthews.*

A. As I said I came here in '39 from Richmond and at that time they were still using it and still were until the city took it over.

Mr. Moody: I think that is all.

CROSS EXAMINATION.

page 27 } By Mr. Bradford:

Q. Mr. Matthews—

A. Yes, sir.

Q. —if that roadway coming down from Water Street, at the extension of High Street, traffic goes in and out to the warehouses and back of the Seaboard station for baggage, express and freight, doesn't it?

A. Yes, sir.

Q. And how many activities are carried on there other than the Seaboard activities?

A. We have the C. and O. agent. They have an agency there.

Q. Now, where is his office?

A. Right in the corner of the warehouse. Inside the warehouse.

Q. And the warehouse is down rather some distance from the entrance to the street here (indicating)?

A. You can see it there on that photograph.

Q. Yes, all right; what else?

A. Then we have the Pennsylvania Railroad agent in there also.

Q. Did Mr. Wiggins park his cabs in there while you were there?

A. No, sir.

Q. Did Mr. Walsh park his trucks in there since page 28 } you have been there?

A. They used that for business, Mr. Bradford, going in and out, but Mr. Walsh have never parked inside.

Q. Since you have been there?

A. No, sir, since I have ever been there.

Q. But it was open to the public to go down to these warehouses, wasn't it?

A. As far as I know, yes.

Q. And it had been open to the public for 24 years that you have known about it?

A. Well, now, wait a minute. I said I came here in '39. I have been with the Seaboard for 24 years.

*J. M. Matthews.*

Q. I beg your pardon, I misunderstood you. You have been here since '39?

A. Since '39.

Q. That would be 19 years instead of 24. You have been with Seaboard before you came here?

A. Yes, sir.

Q. I understand you. Well, in 19 years it has been open to the public to come down to the warehouses and go in there?

A. Yes, sir.

. . . . .

By the Court:

page 29 } Q. You say it is open to the public; you mean for vehicular traffic or pedestrian traffic or what?

A. Well, it has never been fenced off, your Honor and anybody goes in there that wants to go in there to carry on business with the Seaboard. There is a lot of them go in there, pull in there and carry on business with the Portsmouth Star.

The Court: All right.

By Mr. Bradford:

Q. And there has never been any objection to that kind of conduct?

A. Only when it is around train time we ask them not to park there.

Q. That is if they get off of the road?

A. When they get off of the highway, off High Street, when they get off of that road and clutter up traffic.

Q. But if they stay on that driveway leading down to the warehouse you have never said anything?

A. We never said anything to anybody that came in there, park, turn around and head on out.

RE-DIRECT EXAMINATION.

. . . . .

page 32 }

. . . . .

By Mr. Moody:

Q. My question to you, sir, is whether or not if a vehicle

J. M. Matthews.

would pull in there and stop out in the driveway behind those parked vehicles whether or not you had authority or authorized to get the vehicle moved?

A. I would ask the gentleman driving that vehicles to move it, even if he is going in the station and not to obstruct the driveway.

. . . . .

page 33 }

. . . . .

Q. Do you know whether or not those warehouses are leased only to other railroads?

A. No, sir, I don't know anything other than hearsay that they pay the Seaboard rent for space.

. . . . .

page 34 }

. . . . .

Q. All right, sir. I ask you this question, Mr. Matthews: do you know how many men they have got working at the C. & O. Office down there now?

A. Only one; that is the Clerk and the agent, or agent's representative.

Q. Do you know how many they got working at the *Pennsylvania* Railroad office?

A. One.

Q. One man. Has business decreased down there or not?

. . . . .

page 35 }

. . . . .

RE-CROSS EXAMINATION.

By Mr. Bradford:

Q. Mr. Matthews, if a man were to park in that roadway leading from High Street down to those warehouses and parked in the regular roadway, you wouldn't run him off the property but you would tell him to get aside there so traffic would not be blocked, isn't that so?

*Clifford Stuck.*

A. I would tell him if he was carrying on business with the Seaboard it was perfectly all right, but not to block it.

Q. Well, if he parked there and he was carrying on business with the Pennsylvania Railroad and the C. & O., it is all right?

A. Yes, sir.

page 36 }

. . . . .

CLIFFORD STUCK,

page 37 } called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please, sir?

A. Clifford R. Stuck, Jr.

Q. Mr. Stuck, where are you employed?

A. Tidewater Engraving, 105 High Street.

Q. Now, I ask you whether or not on October the 29th, 1957, you were present in the area of Water and High Streets when an accident took place there.

A. Yes, I was.

Q. Where were you standing at the time?

A. Right at our door, which is the second door from the corner.

Q. And you would be on which side of High Street?

A. The southside.

Q. The southside. Now, which direction, or do you recall which direction you were looking at the time the accident took place?

A. I don't recall. I didn't see the accident. I heard it and turned around immediately.

. . . . .

page 38 }

. . . . .

Q. Now, from your location, was the area where the accident took place clearly visible?

*Clifford Stuck.*

A. Oh, yes.

Q. How far were you from it?

A. Oh, probably fifty feet, maybe; or less, but it wasn't over that.

Q. And I ask you whether or not you looked immediately upon hearing the impact.

A. Yes, I did.

Q. And will you tell his Honor and the jury at that time just where the vehicles that were involved in this accident were located. Where was the truck and where page 39 } was the motorcycle?

A. Well, the motorcycle was laying on its side just about the center of the intersection, I would say, and the truck was a little bit beyond that, maybe the length of the truck beyond it.

Q. Now, Mr. Stuck, were you able to ascertain whether or not the impact took place on the south side or north side of High Street?

A. From where the vehicles were stopped, I would say it happened right about the center of the intersection or a little bit on the east side.

Q. East; and how about north or south or over on your side?

A. Yes, it was on the south side of the center line.

Q. All right, sir, it happened on the south east quadrant of the intersection there?

A. I would say so; yes, sir.

Q. All right, sir. Which way was the truck headed at that time?

A. The truck was headed west on High Street.

Q. All right, sir, and was the truck on the north or south side of High Street or straddling the center or where was it?

A. It was in the center of the street, probably page 40 } on the south side.

Q. All right, sir. Now, when you say on the on the center and on the south, do you mean taking the south side of High Street and it was in the center of that side of the street?

A. Yes, it was over on our side of the street.

Q. Over on the side you were on?

A. Yes, sir.

Mr. Moody: I think that is all. Answer Mr. Bradford.

*Clifford Stuck.*

CROSS EXAMINATION.

By Mr. Bradford:

Q. If I understand you, Mr. Stuck, the motorcycle you said when you saw it, to the best of your recollection was about in the center of Water Street, is that right?

A. Somewhere near the center.

Q. Near the center, and the truck was about a car length on up heading towards High Street?

A. (Pause) Yes, sir, the truck was a car length from the motorcycle.

Q. All right. Now, did you go to the scene of the accident?

A. Yes, sir, I was right there.

page 41 } Q. You walked over there. Did this young man make any complaints?

A. No, sir, not then. He picked up his motorcycle and I offered to take him to the hospital or to the doctor, and he was all nervous and couldn't talk very well and acted like he did not want to go, so I went on about my business.

Q. Did he tell you there wasn't anything wrong, that he was just excited?

A. No, sir, he did not.

Q. He didn't tell you anything?

A. No, sir.

Q. But you offered to take him to the hospital, and what did you say to that, "No, thank you?"

A. I know there was a group of people there and they talked to him and I knew the officer offered to take him too.

Q. And the officer offered to take him too?

A. Yes, sir.

Q. Did you see him get up and ride away on the motorcycle?

A. No, sir, when I saw him he had the motorcycle and he was walking against the curb on the south side of High Street right in front of the newspaper office.

page 42 } Q. Did you hear him make any statements that he did not see the express truck?

A. No, sir.

Q. You did not hear him say anything?

A. No, sir.

Q. Now, there is one thing that I think these pictures might help here. I show you, Mr. Stuck, Plaintiff's Exhibit Number 2, this entrance to the intersection is practically up at the curb or on the south side of the street, of High Street, and coming out of there you have to gradually get over to the

*Clifford Stuck.*

right. It is impossible to get over to the right immediately; isn't it?

A. (Examining photograph) That is correct, sir.

. . . . .

page 44 }

. . . . .

Q. This is Water Street, and this is the entrance to the Seaboard, and the warehouses here (pointing). Now, this entrance is on the south side of this intersection, isn't it (indicating)?

A. Yes, sir, I would say so.

Q. And to get out in here you necessarily can not be on the right, can you, until, or unless you get way over here (pointing)?

A. That's right.

. . . . .

RE-DIRECT EXAMINATION.

By Mr. Moody:

Q. Mr. Stuck, I ask you whether or not if a vehicle comes out of this Seaboard lot and comes out to here, it could or could not cross over to the north or right side page 45 } and then proceed up the right side of High Street?

A. Yes, it could.

Q. Does it necessarily have to go out into the street on the left or south side?

A. No, sir.

Q. And I believe your testimony was that the truck did come out or was on the south side or this side of the street?

A. That is correct.

Q. And it was headed west on High Street?

A. That is correct.

. . . . .

page 47 }

. . . . .

*Cecil Johnson.*

RE-DIRECT EXAMINATION.

By Mr. Moody:

Q. Is there anything to keep a vehicle—and I stop to say that I am referring here to Plaintiff's Exhibit Number 2—is there anything to keep a vehicle coming out of the parking lot from going over to the right or north side of High Street before going out into the street?

A. No, sir.

Mr. Moody: All right, sir, that's all.

page 48 } RE-CROSS EXAMINATION.

. . . . .

By Mr. Bradford:

Q. Now, this picture here, is there anything to keep a motorcycle coming up the street to have seen the movement of a car coming out this road? There is no building there.

A. Yes, sir, the Seaboard Building.

Q. I know, but how far is that back from the intersection?

A. I would hesitate to say in feet, sir; I don't know.

Q. Well, roughly.

A. I don't know; 75 feet maybe.

Q. But it is quite a distance back here?

A. Yes, sir.

page 49 } Q. From this entrance?

A. Yes.

Q. And there is—

A. No, your view is also obstructed by parked cars along there, and a lot of times I have had several near collisions at that intersection coming up Water Street.

. . . . .

page 59 }

. . . . .

CECIL JOHNSON,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

*Cecil Johnson.*

page 60 } DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please?

A. Cecil Johnson.

Q. Mr. Johnson, I believe you are an attorney practicing law in the city of Portsmouth?

A. That is correct.

Q. Mr. Johnson, pursuant to a request by me, have you made an examination of records concerning certain property located in front of the Seaboard passenger railroad station, that is, the north side of the Seaboard passenger station in Portsmouth?

A. I have.

Q. And I believe the photographs that have been introduced, some of them, probably show the area that you have examined. Would you look at this photograph marked Plaintiff's Exhibit 3 and state whether or not that photograph shows the area that you have been concerned with or not?

(Handed to the witness for examination.)

A. Yes, I examined this area in here (indicating).

Q. Now, would you show it to the jury what area you referred to?

A. This area in here (pointing on photograph) beginning somewhere in here back to here.

Mr. Bradford: Will you repeat that again?

(Witness complied).

By Mr. Moody:

Q. Now, I would like to say that he has drawn a rectangular motion with his fingers on the photograph on the north side of these automobiles parked in front of the Seaboard Building and the general area in the rear of those cars is what he has referred to; is that correct?

A. Yes, and of course the property would extend farther than this picture does.

*Cecil Johnson.*

Q. All right. Now, the purpose of the examination, I believe, was to ascertain what there is, if anything, on record to indicate whether or not this private or public property; is that correct?

A. That was my purpose.

Q. State what you found, if anything, to indicate that this area is private property.

A. The first instrument I found in the record was an agreement dated April 14, 1890, between the City of Portsmouth and the Seaboard and Roanoke Railroad Company. This was a lease of the property by the City of Portsmouth to the Seaboard.

Mr. Bradford: And also the Atlantic and Danville Railroad was a party to it, wasn't it?

The Witness: That's right. The Seaboard and Roanoke, and the Atlantic and Danville Railroad.

By Mr. Moody:

Q. All right, sir, go ahead and tell—

By the Court:

Q. Leased from who to who?

A. The City of Portsmouth to the Seaboard and Roanoke Railroad Company and the Atlantic and Danville Railroad.

Q. The City owned the title at that time?

A. That I am not sure about, sir.

Q. The City was lessor?

A. It was the lessor.

Q. And they leased it to these two railroads?

A. That is correct.

page 63 } By Mr. Moody:

Q. All right, sir, what was the next thing you found?

A. On June the 25th, 1919, the Seaboard Airline Railroad Company succeeded the Seaboard and Roanoke Railway Company and the director of the railroads leased it to the United States of America, acting through the Bureau of Industrial Housing and Transportation of the Department of Labor, the right to use and occupy the property, and their lease contained this clause: "Provided, however, that in the event the property shall at any time cease to be used for the purpose herein specified same shall revert to the Seaboard Airline Railway Company, its successors and assigns."

*Cecil Johnson.*

Q. —the original plat of all that property in that area was the Crawford Plat, wasn't it?

A. I believe so, yes, sir.

Q. And the Crawford Plat platted High Street right on through to the Port Wardens Line?

A. That's right.

page 66 }

Q. Are you familiar with the lease of 1890?

A. April 14; is that correct?

The Court: Have you got a copy of it, Mr. Bradford?

Mr. Bradford: I have the agreement of April 14th, 1890.

By Mr. Bradford:

Q. Did you look at the report of the Committee for the Board of Exchange which is a part of that instrument?

A. Yes, sir.

Q. Did you note on page 10, that the Union Passenger Depot would act as the terminal for any of the railroads and landings for the connecting railroads and must be on the water front. Do you recall seeing that language?

A. I remember seeing something to that effect.

Q. And the most eligible site was the Seaboard and Roanoke property extending south from High Street?

A. That is very likely, but I don't recall the exact terminology.

Q. Well, in other words they were asking for part of High Street. Now, you said a while ago that the Crawford Plat platted that property for public use from High Street right through to the Port Wardens

Line?

A. I said it did show High Street.

Q. All right. Now, the City eventually gave it to the railroad and any other railroad; it wasn't limited to the Seaboard, was it?

A. Well, any other railroad could use it provided they paid compensation to the Seaboard.

Q. That's right, they would come in and be a party to this contract?

*Cecil Johnson.*

Q. Now, Mr. Johnson, let me see if I understand that. It is leased from the railroad to the U. S. Government?

A. Yes, sir.

Q. From the Seaboard Railroad to them to use the property for the ferry, is that correct, or was there any specified purpose?

A. Specified for the ferries.

Q. And you say, I believe, that it further provided that in case of a termination of that then it would revert back to the Seaboard Railroad?

A. That is correct.

page 64 } Mr. Bradford: Do you have a copy of that agreement?

Mr. Moody: No, sir.

By Mr. Moody:

Q. Go ahead, Mr. Johnson; did you find anything else on record?

A. On May the 11th, 1954 the Seaboard Railroad granted the City of Portsmouth a lease of the same portion of the property that was the subject of the lease dated June 25, 1919 for the purpose of the ferries. This was to clear up, I assume from the record, and also it was stated in this lease that the lease of 1919 had ceased to exist and therefore they leased the same property to the City of Portsmouth.

Q. In other words the Seaboard Railroad leased it to Portsmouth to use for ferries after the United States Government quit using it for that purpose?

A. That is right, sir. This lease contained the clause that if the ferry ceased to operate the rights granted under the lease would revert to the railroad.

Q. Now, Mr. Johnson, in your examination did you find anything in the records whatsoever to indicate that this property had at any time ever been used as a public street or highway?

A. Not from my examination of the records.

page 65 } Mr. Moody: All right, sir, that is all.

#### CROSS EXAMINATION.

By Mr. Bradford:

Q. Mr. Johnson—

A. Yes, sir?

*Cecil Johnson.*

A. I wouldn't say to that contract, sir. I believe it would be a separate contract between the Seaboard and the railroad that wanted to come in.

Q. But this right was specified in this agreement that any other railroad could come in and the Seaboard said it was all right if they paid just compensation of part of the expenses?

A. That's right, to the Seaboard.

Q. Now, the City did grant to the Seaboard or to these railroads the use—on page 2, if you look at it, it says "Double track south to north and the use of the east end of High Street from Water Street to the Port Wardens Line," and granted to them the use of it?

A. Yes, sir.

The Court: For what length of time?  
page 68 } Mr. Bradford: Sir, apparently there was no  
limit on it. They may have a cancellation period,  
and it was for the purpose of this station.

By Mr. Bradford:

Q. Now, the station never was built on this particular piece of property, was it?

A. From the records I could not determine, sir.

Q. Here he proposes to erect the main building or that part of the depot on which will include all waiting rooms and so forth. He claims there was not enough room in back of that. Now, did the City propose to close that street prior to entering into their agreement with the Seaboard?

A. (Pause) I am not aware of that. The record did not show, sir.

Q. Did not show any provision to close that public right of way; it was a public right of way, wasn't it?

A. I am not prepared to answer that question.

Q. Well, you said that the Crawford Plat platted that and extended High Street to the water.

A. I don't know the legal significance of that plat, though, sir.

The Court: What is the language as to the  
page 69 } uses at the end of High Street? For what pur-  
pose?

Mr. Bradford: To put a double track on Crawford Street to the south of the east end of High Street to the Port Wardens Line. He proposes to erect the main building or

*Cecil Johnson.*

that part of the depot in which will be the waiting rooms and so forth. He claims there is not enough room on this property.

The Court: That is not in the lease, is it?

Mr. Bradford: This is in this contract that Mr. Johnson has referred to of April the 14th, 1890.

The Court: All right, sir.

Mr. Bradford: It says—and this whole thing is incorporated—“We therefore recommend to the Board of Trade and Exchange and request the City Council to grant the privileges asked for under the following conditions.”

By Mr. Bradford:

Q. And now the entire fee was conveyed on the market house, isn't that correct? Do you remember see—page 70 } ing that?

A. I remember the provision as to the market place. But I don't believe that the fee was conveyed. I believe the Seaboard already owned it—no, wait a minute, I am wrong on that, too. I don't recall.

Q. Well, there are different restrictions on any other road entering the city to have the right to use the Union Depot and tracks on Crawford as by paying a just compensation provided that the freight trains at a low rate of speed be allowed on Crawford Street tracks. We did not recommend the use of the east end of High Street for any other purpose than for the site of the building; do you remember seeing that?

A. In the Committee Report to the Board of Exchange, I believe that was on there. On the special committee report that provision was not contained.

Q. And only when the council was convinced that it was necessary to enable them to build such a depot as the road requires and further recommends that the railroad company be charged \$2,500.00 a year for the use of Crawford Street. Now, that is apparently all they paid for that, wasn't it?

A. I believe that was for the use of Crawford Street, for \$2,500.00.

\* \* \* \* \*

page 72 }

\* \* \* \* \*

*Cecil Johnson.*

By the Court:

Q. Now, the title that you examined showed that the City of Portsmouth owned High Street out to the Port Wardens Line extending east?

A. The title did not show that.

Q. The Crawford Plat.

A. That plat was made in 1752, and I don't know what the law was—

Q. Well, what I am trying to get at, so far as your examination showed does the City of Portsmouth still owned that street in 1890?

A. In 1890, so far as my examination goes, they leased it.

Q. Well, suppose that. Assume they had, they had the rights in it as a street?

page 73 } A. Yes, sir.

Q. Now, the title that you examined then is a prolongation of High Street eastward?

A. That's right.

Q. And it is in the property that is in there to the Port Wardens Line?

A. Yes, sir.

Q. When you speak of the street, you mean not only the curb line but the sidewalks too?

A. That's right, 100 feet wide.

Q. So the title that you examined from this point here is prolonged out into the road?

A. Yes, sir.

Q. And it shows here that this hole is about on a line with that building line?

A. I don't know whether it is or not.

Mr. Bradford: I think this is the end of the curb.

The Court: The end of the curb?

Mr. Bradford: The end of the curb is the prolongation of the line of the pavement on High Street, as I recall it, sir. That is what I am getting at here. Here is the building line

page 74 } here that would be prolonged here eastward going that way from the Portsmouth Star Building. I am trying to find how much of that language here would be taken into High Street. I think it is 51 feet, 51½ feet from—this contract provided that High Street was 100 feet wide. We can measure from curb to curb. Now, I think it is 60—

*Cecil Johnson.*

The Court: There are 20 foot sidewalks on each side of High Street, which would be 100 feet, 60 feet of it is the street and 20 feet on each side for sidewalks. But what I am trying to get, so that the jury can see, is this pole about in line with that building or not?

Mr. Bradford: I can't answer that. This line here of the curb and this and this point here, my recollection is on the line.

The Court: You mean then at the building and the point here would be about the line?

Mr. Bradford: Yes, sir, this line of curb and page 75 } that point, and that there, I don't know.

The Court: You see, you have to draw it back a little bit. High Street would take in a part of that area in there; isn't that what you examined?

Mr. Bradford: Now, if your Honor please, I offer in evidence a plat of the Seaboard Airline—Portsmouth Terminal, dated June 18, 1918, and the part ruled in green is the very point that you were asking about.

Your Honor was asking about—excuse me for not—

(Shown to opposing counsel for examination.)

Mr. Bradford: (Shown to the Court) That underlined in green.

The Court: Now, you see that, Mr. Moody, this would be High Street. That is a prolongation of this. Show that to the jury.

Mr. Moody: That was the original plat, Mr. Bradford.

Mr. Bradford: Did the Court permit me to in-page 76 } troduce this?

The Court: Yes.

Mr. Bradford: I would like to withdraw this too.

That is the 51 feet that they let them use.

The Court: That would be from side to side.

Mr. Bradford: And that is what they were using for the entrance now.

Will your Honor please mark that?

(Marked by the Court as Defendants' Exhibit Number 2.)

Mr. Bradford: Now, lady and gentlemen of the jury, in order that you may follow what is taking place, this is somewhat complicated, but the portion of the property—

*Cecil Johnson.*

Mr. Moody: Your Honor, I am going to object. I think the jury should know, but I think he can get Mr. Johnson to explain it. He is not under oath.

The Court: Mr. Johnson is a sworn witness. Mr. Bradford is not a sworn witness.

Mr. Bradford: Well, I would still try to state it page 77 } truthfully even if I am not sworn.

By Mr. Bradford:

Q. Mr. Johnson, the property that the Court has been asking about and the 51 feet that was permitted by the Seaboard is indicated by this green mark?

A. Yes, sir.

Q. Now, this was originally the street down to the Port Wardens Line under the Crawford Plat?

A. Yes, sir, under the Crawford Plat.

. . . . .

page 78 }

. . . . .

Q. The contract provided for a building to be placed here, didn't it?

A. No, sir, I can't say that. Now, as you recall, and you will see in the agreement, a committee reported to the Board of Trade and Exchange. I don't know what that was; then the City council appointed a committee to confer with the railroads. This Committee returned and reported to the council and there report consisted mainly of a letter from a representative of the railroad and this representative requested the following in his letter: "To provide for increased business it is important that one-half of the 50 feet at the end of High Street be granted for that purpose," and from that I would assume it would be used for the purpose of increased business of the railroad, and could be used for parking facilities for patrons of the Seaboard.

. . . . .

page 98 }

. . . . .

*Dr. Arthur A. Kirk—F. J. Bergeron.*

DR. ARTHUR A. KIRK,  
called as a witness on behalf of the plaintiff, having been  
first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

. . . . .

page 99 }

A. \* \* \*

page 100 }

. . . . .

He stated that he was not unconscious at the time of the  
accident.

. . . . .

page 108 }

. . . . .

F. J. BERGERON,  
called as a witness on behalf of the plaintiff, having been  
first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please?

A. F. J. Bergeron.

page 109 }

Q. Mr. Bergeron, what is your position, sir?

A. Director of Public Works for the City of  
Portsmouth.

Q. How long have you been employed in the Public Works  
for the City of Portsmouth?

A. 38 years.

Q. 38 years. Now, Mr. Bergeron, I would like to show  
you a photograph of the area at the foot of High Street in  
front of the Seaboard passenger station. This is marked  
Plaintiff's Exhibit Number 3, and I would like to ask you

*F. J. Bergeron.*

some questions regarding the area behind the automobiles that are parked in here facing that building (indicating on exhibit), and if you will refer to the picture or photograph here.

. . . . .

page 110 }

. . . . .

Q. I now ask you whether or not, going back as far as you can remember in your 38 years with the City, and I ask you whether or not the City has at any time ever paved the area in that photograph that we referred to?

A. As a parking area that goes back to the warehouse and down about the Seaboard Building?

Q. Yes, sir.

A. No, sir.

Q. All right, sir, has the City done any maintenance work in that area?

A. Not to my knowledge, no, sir.

Q. I see. So far as you can remember what has the area been used for?

A. For the use of the C. & O. Railroad, the Pennsylvania Railroad and the Seaboard Railroad and various trucking concerns and—

. . . . .

CROSS EXAMINATION.

. . . . .

page 111 }

. . . . .

By the Court:

Q. Mr. Bergeron, you say that that roadway is for the convenience of what railroad?

page 112 } A. Well, the Seaboard, of course, primarily, and the Pennsylvania, they have a freight office, you know, in this old warehouse, and the C. & O. receive

*F. J. Bergeron.*

freight there, and the Baltimore Packing Company, the Old Bay Line.

Q. You mean it is only used for the vehicles of those companies or is it publicly used?

A. Well, they have since restricting it, your Honor.

Q. What I am trying to find out is if the public wanted to go in there to deliver freight.

A. Oh, yes.

Q. It is open to the public use to go to the services that these railroads might have?

A. That's right. The same as the public would be allowed to go to John's Market and drive on their parking lot.

Q. In other words it is open for vehicular as well as pedestrian traffic?

A. Yes, sir.

## RE-DIRECT EXAMINATION.

page 113 }

By Mr. Moody:

Q. I will ask you then whether or not you know whether it is restricted to the use of vehicles using the C. & O. and Pennsylvania and the Seaboard, or not?

A. Primarily, yes, sir.

Mr. Moody: All right, that's all.

The Court: Are you gentlemen through with him?

## RE-CROSS EXAMINATION.

By Mr. Bradford:

Q. And that has been an open place there for how many years?

A. Well, more than 30 years to my knowledge.

Q. More than 30 years that roadway has been in there?

A. Yes, sir.

page 114 }

OFFICER L. H. NUGENT,  
called as a witness on behalf of the plaintiff, having been first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please, sir?

A. L. H. Nugent.

page 115 } Q. I believe you are employed as a police officer  
with the City of Portsmouth?

A. Yes.

Q. Officer Nugent, did you have occasion on October the  
29th, 1957, to investigate an accident down on Water Street?

A. Yes, sir.

Q. And what time was it, approximately?

A. About two o'clock P. M.

Q. 2:00 P. M., and what were the weather conditions  
generally?

A. Clear.

Q. And would you describe for his Honor and the jury the  
area involved?

A. I was in the Evans Gas Station using the 'phone when  
I was told there was an accident on the corner. I went to the  
corner and about midway of the intersection there was a  
truck heading west up High Street. The motorcycle appeared  
to be headed north. It was laying on its side. They had col-  
lided there. I asked the drivers for information, the drivers'  
license, name and so forth, for them to tell me how it hap-  
pened. The gentleman driving the express truck said—

Mr. Bradford: I object to the hearsay testi-  
page 116 } mony.

The Court: No, this is what the driver of the  
truck, who was driving the express truck was telling him.

Mr. Bradford: All right.

The Court: He asked the driver. Was that what I under-  
stood you to express?

A. The truck driver told me that he come out of that Sea-  
board lot over there, or in front of the station. He said "I  
didn't see him," the young fellow on the motorcycle. Mr.  
Moore, the young fellow on the motorcycle said: "I didn't  
know what he was going to do."

By Mr. Moody:

Q. Now, were you able to ascertain the point of impact on  
the truck?

*Officer L. H. Nugent.*

A. It was near the front of the truck; yes, sir.

Q. On which side?

A. On the driver's side.

Q. The left side. Now, were you able to ascertain where the impact took place. That is, what point in the intersection the impact took place?

A. No, sir, other than I can tell where the truck and the motorcycle was sitting at the time I got there.

Q. Where were they?

A. Just about the center of the intersection.

page 117 } Q. All right, sir. Now, did you examine the  
Railway Express truck that was involved in this  
accident?

A. I noticed something about it that was peculiar to me for a truck or a vehicle of any kind. It has a post down the center of it, and when the door is closed it would be approximately that wide (illustrating). It had a post in the door, too.

Q. Now, Mr. Nugent, let's see if I can understand what you mean. You mean the cab of this truck?

A. That's right, yes, sir.

Q. On the door. Would that be the left door to the left of the driver?

A. The left and right door also, both of them is built the same. The windshield comes around this way.

Q. And the door was closed. There was a panel running down the center about how wide?

A. When the door was closed the glass fits in the door and it's—how would you say it—anyhow when the door is closed the post and the door itself would be approximately six or seven inches wide, I'd say.

Q. Now, would that be in a position to block the view of the driver sitting in that cab when he attempted to look to his left?

A. Maybe and maybe not. This lot, when they come out  
of that lot on High Street, it comes out on an  
page 118 } angle, and you have to cut all the way across  
High Street to straighten up.

Mr. Bradford: You mean across Water Street to straighten up?

The Witness: Yes, sir, across Water Street. I have a diagram.

*Officer L. H. Nugent.*

page 119 }

The Court: He wants to know at the time of this accident were cars parked along there. You got there right after the accident, didn't you?

The Witness: Yes, sir.

The Court: Did you see any cars parked along there?

The Witness: No, sir, I can't say that I did; but as the usual thing there are cars parked there.

page 120 }

By Mr. Moody:

Q. And do you know whether there were any there or not?

A. I couldn't say for sure, sir.

Q. All right.

Mr. Moody: I think that is all. Answer Mr. Bradford.

CROSS EXAMINATION.

By Mr. Bradford:

page 121 }

Q. And that is the point that you put as the location of the truck and the motorcycle?

A. I also added, sir, that it was about the center of the intersection.

page 123 }

*Officer L. H. Nugent.*

Mr. Bradford: He has not denied it though.

The Witness: No, sir, I didn't deny it, but I did tell you that it was in the center of the intersection, I also mentioned that; or approximately the center of the intersection. I did not measure the approximate inch.

page 125 }

Q. I'm not interested in that, I am interested in where did you find the truck in the intersection.

A. Just about the center right here (pointing).

Q. Well, the center. That is not the center of Water Street.

A. The center of the intersection would be just about here.

page 128 }

Q. Officer Nugent, you got there right promptly after the accident, didn't you?

A. Yes, I would say within five minutes, yes, sir.

Q. And you say that the young man, Moore said he didn't know what he was doing, where he was going?

A. No, sir, I never said that.

Q. On your testimony a few moments ago you said that Mr. Harding said he didn't see him?

A. Yes, sir.

Q. And then you quoted what Mr. Moore had said?

A. Yes, sir.

Q. And I've got it written down that Mr. Moore said he did not know what he was going to do.

A. He meant the truck driver.

Q. Oh, but he saw the truck, didn't he?

A. He didn't tell me he saw the truck, he just page 129 } told me he didn't know what he was going to do.

Q. What, who was he referring to?

A. I suppose the truck driver, sir.

*Officer L. H. Nugent.*

Q. Well, when he said he didn't know what he was going to do, he evidently have to see him to make such an expression, didn't he?

A. I don't know, sir.

Q. But you're sure that was what he said?

A. That is what both of them said.

Q. That he didn't know what he was going to do. That is your testimony now, is it?

A. That is what Mr. Moore said.

Q. That is what Mr. Moore said. The plaintiff said he did not know what he was going to do, referring to Mr. Harding?

A. Yes, sir.

Q. And that is the only explanation you have of the accident?

A. Yes, sir.

Q. One of them saying he did not know what the other one was going to do and the other one saying he didn't see him. That is what happened right after the accident, is that correct?

A. That's right.

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page 130 }

• • • • •

### RE-DIRECT EXAMINATION.

By Mr. Moody:

Q. Officer Nugent, I just want to ask you one question. In coming out of the parking area in front of that building and coming onto High Street, referring to Plaintiff's Exhibit Number 2 that is, I ask you whether or not there is anything to keep a vehicle coming out of this lot from going over to the right-hand or north side of High Street before going onto High Street?

A. No, sir, at that time, it is about wore out now, you just can see a faint print of it, there was a white line down to there, and this truck was on an angle going this way. In other words when they come out here they are on the left-hand side of the street crossing to the right, because this is the left-hand side of the street going up High Street. When you come out here you are cutting across that corner.

*Raymond Westmoreland.*

Q. Now, you say—well, this showed the position of the truck so there is no use of your telling whether it was on the north side as far as High Street is concerned; but you say there is nothing to keep a truck from going page 131 } over to the right-hand side of High Street proceeding up High Street?

A. That's right.

Mr. Moody: All right, sir, that's all.

## RE-CROSS EXAMINATION.

By Mr. Bradford:

Q. Well, now, Officer, he does come out of the left-side of the street facing west?

A. West?

Q. He comes out on the left-side. There is no other way of coming out of there, is there?

A. No, sir.

Q. And he was reclining over to the right from the physical facts that you found there?

A. Yes, sir, from the entry to this parking lot or Seaboard lot or whatever they call it down there at that time you have to come from the left-side of the street straight across; see what I mean?

Q. Yes.

The Court: Show it to the jury.

By Mr. Bradford:

Q. Get down here and explain to the jury. Ex- page 132 } plain it in your own words.

A. I think all you people are familiar with this down there, coming across here, you have to come across this way. You actually cut into High Street, I suppose. You have to come up here like this and go here and coming up—

Q. But you never saw anybody do that, did you?

A. No, I haven't.

## RAYMOND WESTMORELAND,

page 133 } called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

*Raymond Westmoreland.*

DIRECT EXAMINATION.

By Mr. Moody:

Q. State your name, please?

A. Raymond Westmoreland.

Q. Where are you employed?

A. Seaboard Airline Railroad Company.

Q. I show you a photograph, Plaintiff's Exhibit Number 4, a photograph of the warehouse, and ask you if that is where you work or in that vicinity.

(Shown to the witness for examination.)

A. Yes, sir, I work there from February up till August, when I worked in the station. I didn't work in the warehouse, I worked at the station.

Q. Is this also a photograph of—plaintiff's Exhibit Number 3 shows the warehouse—where you were working?

A. No, sir, I never worked in the warehouse. I worked at the station. The warehouse right opposite from the station.

Q. All right. Now—

page 134 } A. I wasn't working in the warehouse.

Q. I see. Were you working down there in that vicinity in October, 1957?

A. No, sir, I went down February of '58. I don't know the exact date.

Q. Where were you working in '57?

A. I was working at the shop. I got laid off in the shop and January I went to the station and asked the fellow for a job and started to work in February.

Q. Can you state how many men are employed down there where you are working now?

A. Well, I am working at the dock now. That is at the foot of Water Street.

Q. Well, let's see. Two weeks ago when I talked to you at the foot of High Street.

A. I imagine it was around about four men.

Mr. Bradford: Now, if your Honor please, I object to this. It isn't a question of how many people are working there now.

The Court: I don't know what his purpose is.

Mr. Bradford: I don't understand it. Whatever it is it has no bearing in this case.

page 135 } Mr. Moody: My purpose is that the question apparently, Mr. Bradford has attempted to say

*Raymond Westmoreland.*

here that this is not a private business or a private area from which this truck came. I gathered that from his pleadings, and this person here, my purpose was indicating whether or not there was any amount of traffic of any consequence coming in and out of that there and just how much business those warehouses are doing. They have a slight bearing on the legal question.

The Court: Well, at the present time, since January of '58. Now, this accident happened back in '57.

Mr. Moody: Well, now, I was under the impression he had been down in that area and could testify regarding the '57 conditions.

By Mr. Moody:

Q. I ask you whether or not you were familiar with it in '57 or whether you can testify?

A. Oh, yes, sir, I was.

Mr. Bradford: I object to that. How much.  
page 136 } It isn't a question of how much traffic.

The Court: It is a question of whether it is for public usage.

Mr. Moody: The cases, your Honor, refer to the amount of business that is done in these particular places.

The Court: You want to argue that matter in the office?

Mr. Moody: Not necessarily, but I thought it might come up later.

The Court: In order to rule correctly on this witness, I will be glad to hear you on the question.

Mr. Moody: I think it might help the Court to see the significance of that evidence.

The Court: All right, we might save time in doing it.

Mr. Moody: All right, sir.

(The Court and counsel for both sides retired in chambers after which the following occurred:)

The Court: I will hear some further evidence  
page 137 } on it right now.

(The Court and counsel for both sides then returned into the court room and the trial was continued as follows:)

By Mr. Moody:

Q. Raymond, I believe my last question was whether or not

*Dr. Robert Henry Thrasher.*

you could tell us anything about the circumstances down there in October, 1957, and whether or not you could tell us anything about how many people were employed or what work was going on down there in '57.

A. What do you mean, in the warehouse or at the station?

Q. Well, at both the warehouse and the station.

A. Well, in the warehouse only two men is in the warehouse. That is the C. & O. and the Pennsylvania Railroad clerks.

Q. Yes?

A. And the Seaboard don't have much business no more than they had some records stored in the back end. But it's very little traffic in and out of the warehouse. But coming between the warehouse and the station, during work hours and the office was there, right much traffic there around five o'clock.

Q. All right, sir. How many trains did they page 138 } have coming in from October, 1957?

A. Just one in and one out.

Mr. Moody: That's all.

Mr. Bradford: No questions.

Mr. Moody: Just a second.

By Mr. Moody:

Q. Now, you referred to people coming in there at certain times of the day, right much?

A. Yes.

Q. Were they using the trains or do you know?

A. Well, the office and the train too. See, the train used to leave around 5:30, and the office turned out at five. At that hour it was right smart heavy.

Q. Were they employees of the Seaboard Railroad?

A. That's right, at that particular time.

page 139 } DR. ROBERT HENRY THRASHER,  
called as a witness on behalf of the plaintiff,  
having been first duly sworn, was examined and testified as  
follows:

DIRECT EXAMINATION.

By Mr. Mattox:

Q. Doctor, would you state your name, please, sir?

A. Robert Henry Thrasher.

*Dr. Robert Henry Thrasher.*

Q. Are you licensed to practice medicine in the State of Virginia?

A. I am.

Q. Did you attend any medical schools?

A. I attended the Medical College of Virginia from 1941 to 1944 and graduated in 1944 with a medical degree. Following that I was an intern at Rex Hospital in Raleigh, North Carolina, then I served two years in the United States Army as a medical officer and then I had a medical residency at DePaul Hospital in Norfolk. Following that I had two years and a half residency at St. Elizabeth Hospital in Washington, D. C.

Q. And have you been practicing since that time in psychiatry?

A. I have been practicing medicine and psy-  
 page 140 } chiatry in Norfolk since 1951, January, and I have  
 been psychiatry director of the Mental Hygiene  
 Center for 3 years. I am now in private practice and consultant to the Marine Hospital and on the staff of the three general hospitals in Norfolk.

page 142 }

Q. Now, did you have occasion to examine the plaintiff in this case, Brainard Franklin Moore?

A. I examined Mr. Moore on the 13th, 15th, 20th and 22nd of September, 1958, and on the 27th of October, 1958.

Mr. Bradford: Give me those dates again, please, sir.

The Witness: 13th, 15th, 20th, 22nd of September, '58; and the 27th of October, 1958.

By Mr. Mattox:

Q. Now, would you state what your examination revealed?

A. Yes.

Q. Beginning with the first time that you saw this man, if you will?

A. Um-huh. My examination revealed that the patient felt in good health until the latter part of October, 1957, at which time he was riding a motorcycle and was involved in an accident. Following this there was a momentary loss of con-

*Brainard Franklin Moore.*

consciousness, and the patient was dazed for a while,  
page 143 } then developed a severe headache and pain in the  
lower part of the neck and in the back and was  
hospitalized several days later and treated, released from the  
hospital and approximately a week after he left the hospital  
returned to work.

. . . . .  
page 156 }  
. . . . .

RE-DIRECT EXAMINATION.

By Mr. Mattox:

. . . . .  
page 157 }  
. . . . .

A. It is my opinion that this man had a momentary un-  
consciousness based on two things. His lack of memory, and  
this can be characterized when he returns to consciousness by  
lack of memory and amnesia. You see? Things that hap-  
pened immediately after the time of the accident, for a day's  
period, for an hour or so following the accident. He didn't  
tell me that he lost consciousness. It is my opinion that he  
did. I think that is exactly what happened, but I think it  
was extremely momentary. But there is no question in my  
mind, according to all that I can find, that there was severe  
headaches and things like that which go along with this sort  
of thing.

. . . . .  
page 212 }  
. . . . .

BRAINARD FRANKLIN MOORE,  
the plaintiff, called as a witness on his own behalf, having  
been first duly sworn, was examined and testified as follows:

*Brainard Franklin Moore.*

DIRECT EXAMINATION.

By Mr. Moody:

. . . . .

page 215 }

. . . . .

Q. Now, on October the 29th, 1957, you were involved in this accident which we are concerned with here today. Where had you been just prior to the accident?

A. I had been home for lunch.

Q. And where was that?

A. That was 422 McClean Street.

Q. And where were you going at the time it happened?

A. I was going back to work.

Q. Were you in any hurry of any kind or not?

A. No, sir.

Q. Now, you were at the time, I believe, operating a motorcycle; was it your motorcycle?

A. No, sir.

Q. Have you ridden motorcycles before?

A. Yes, sir, several times.

Q. Do you know how to operate a motorcycle all right?

A. Yes, sir.

Q. Have you operated this motorcycle previously?

A. Yes, sir.

Q. I ask you whether or not the operation, that page 216 } is, the mechanical operation of the motorcycle from your viewpoint had anything to do with the accident happening?

A. No, sir.

. . . . .

Q. All right. Now, prior to the happening of this accident, you were proceeding north on Water Street, is that correct, sir?

A. Yes, sir.

Q. That is in the City—?

. . . . .

page 217 }

. . . . .

*Brainard Franklin Moore.*

By Mr. Moody:

Q. What street were you on when this happened?

A. Water Street.

Q. And in which direction were you proceeding?

A. North.

Q. Now, will you tell us, beginning with the time that you were coming up Water Street approximately what your speed was.

A. Ten miles an hour, sir.

Q. Now, as you neared the intersection of Water Street and High Street which direction were you looking at that time?

A. I was looking off on my right.

Q. And will you tell us what was located to your right?

A. As I was entering, as I was going toward  
page 218 } High Street there was a blank wall on my left, a  
building, the Star Building, and on my right  
it is open. There are parked cars over here, and there is the  
Seaboard Building.

Q. Now, were there any vehicles parked on the parking lot in front of the building or not?

A. Yes, sir, there was.

Q. Do you know where they were parked?

A. No, sir, but I know there was parked cars there.

Q. All right, sir, did you see these cars?

A. Yes, sir.

Q. Was there anything in the intersection as you—strike it out. Was there anything in the lot, parking lot moving toward the intersection at that time or not?

A. No, sir, there was not.

Q. Now, as you got to the intersection of the street there, what did you do?

A. As I came into High Street I slowed down and switched gears on the motorcycle.

Q. To what speed approximately?

A. To approximately three to four miles an hour.

Q. And then what did you do?

A. I looked to my left, east, going on out onto  
page 219 } High Street. There were parked cars and I had  
to go further into the intersection to make sure  
there was nothing coming, because I couldn't see around  
these parked cars. As I went out and saw that nothing was  
coming I went to make my approach across High Street.  
As I looked back I saw this truck coming out of the Seaboard  
parking lot right out in front of me.

*Brainard Franklin Moore.*

Q. Now, when you arrived at the intersection which way were you looking?

A. When I arrived at the intersection?

Q. Yes, sir?

A. To my right.

Q. And as you entered the intersection, and just as you entered, or you were at the intersection which direction were you looking?

A. As I entered the intersection I was looking to my left.

Q. And when did you change the direction of your looking?

A. When I made sure there was nothing to my left I looked across—

Q. Go ahead, I'm trying to get it. Prior to that you said you were looking to your right and then you said you looked to your left. When did you change your direction from looking to your right to looking to your left?

page 220 } A. Just as I went into the intersection

Q. And as you entered the intersection you were looking to your right, or not?

A. Yes.

Q. And then you changed to your left?

A. And then I changed to my left.

Q. Now, why didn't you look to your left earlier?

A. Because the Star Building is there.

Q. All right, sir. Now, as you looked to your right, as you entered into the intersection, was this truck which later came out of there and struck you—

Mr. Bradford: Now, if your Honor please, he is still leading.

The Court: Reframe your question, Mr. Moody.

By Mr. Moody:

Q. I ask you whether or not—I was going to add to the question—but I ask you whether or not there was anything coming out of the parking lot as you entered the intersection.

A. No, sir.

Q. Was there—I ask you whether or not there was anything at the intersection to your right headed or stopped coming into the street?

page 221 } A. No, sir.

Q. Now, as you came into the intersection you stated you had changed gears. What gear did you change to?

*Brainard Franklin Moore.*

A. Into low gear, sir.

Q. And tell us then, if you will—I think you said you looked to your left and then saw nothing and looked back to ahead of you and then proceeded and saw the truck. Where was the truck when you first saw it?

A. He was on my right-hand side. My motorcycle was going straight across and he came across this way (indicating).

Q. And in which direction, speaking from your standpoint, did he come from?

A. He came from my right.

Q. Now, as you saw him, can you tell us approximately his speed, the truck?

A. The only thing I can say, sir, is he was going twice as fast.

Q. Would you have any estimate of it or not?

A. Maybe ten miles an hour, I don't know.

By the Court:

Q. How much?

A. Maybe ten.

By Mr. Moody:

Q. Now, what happened then?

page 222 } A. I really don't know. Well, I know that there was a collision, and after that I don't know just exactly what happened.

Q. What was the next thing you remembered?

A. I remember people asking me how I felt and if they wanted me to take me to the hospital, and that's all, sir.

Q. Now, you have heard the testimony of Officer Nugent. I think he stated that you gave him your driver's permit; do you recall that or not?

A. No, sir.

Q. Do you recall giving any statements to him?

A. No, sir, I don't.

Q. Do you recall—you said the next thing you recall was people asking questions about going to the hospital. Well, then what happened after that?

A. Well, sir, we had gotten the motorcycle off the street and put it up close to the sidewalk. I don't recall riding the motorcycle away.

Q. Where did you go?

*Brainard Franklin Moore.*

A. Well, the accident happened half a block from where I worked. I carried the motorcycle to the shop where I worked.

Q. Now, I ask you whether or not—or I will ask you what was your condition at that time?

page 223 } A. Well, sir, I wasn't sure of anything I was doing. I was very upset, and I had a headache.

Q. Getting back to the intersection, I forgot to ask you: Are there any traffic controls of any kind at the intersection?

A. No, sir, there aren't.

Q. Any signs?

A. No, sir.

Q. Now, going further into this particular location, you are familiar with that area down at the foot of High Street, is that correct?

A. Yes, sir.

Q. You know what buildings are located there?

A. Yes, sir.

Q. Will you tell his Honor and the jury what was on your right all the way across Water Street. Are there any buildings to your right or not?

A. On this side of High Street?

Q. I am talking about on your right from the direction in which you were proceeding, which would have been on the east side.

The Court: From what point?

Mr. Moody: He was proceeding north. My question was whether or not there were any buildings.

page 224 } By Mr. Moody:

Q. You mentioned the Seaboard passenger station; you mentioned the parking lot. Now, going further north on your right, that is to the east, what other buildings, if any, are located down there?

A. There is the ferry slips, the ferry building; then the old machine shop which then was the City of Portsmouth Building and grounds, the office and the printing department.

Q. Now, you said the ferry slip and ferry building. What is in there, if anything, at the present time?

A. Nothing, sir. In the Ferry building there was the School Board offices.

Q. And were they there at that time?

A. Yes, sir.

*Brainard Franklin Moore.*

Q. And is that building located directly east or the extension of High Street?

A. Yes, sir.

Q. In other words it sits right on what would be High Street if it continued?

A. The ferry slip does, yes, sir.

Q. And is that School Board office in that building or not?

A. Yes, sir.

Q. That sits on High Street?

page 225 } A. Yes, sir.

By the Court:

Q. The ferry building sits at Water and High?

A. Yes, sir.

Q. The ferry slips, in other words, if you were going straight down High Street right straight on, if you kept straight and didn't turn either way you would run off the ferry slips, not into the building?

A. No, sir.

By Mr. Moody:

Q. Now, I ask you whether or not this truck stopped.

A. No, sir, it didn't.

Q. And where was your cycle when the impact took place; just what location were you with respect to the intersection of High Street and Water Street?

A. Approximately half-way across the south side of High Street.

Q. Now, were you to the left or to the right of Water Street?

A. I was on the right-hand side of Water Street.

Q. Do I understand that you were about half-way across the south side or not; is that correct, the south side of High Street?

A. Yes, sir.

page 226 } Q. Then you had gotten about half-way across the whole street?

A. Just about a fourth of the way across the whole street, sir.

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page 244 }

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*Brainard Franklin Moore.*

CROSS EXAMINATION.

By Mr. Bradford:

. . . . .

page 249 }

. . . . .

Q. Now, coming back to the accident itself, I understand you to say that you were going north on Water Street?

A. Yes, sir.

Q. And you have talked about the Star Building on your left as you approach the intersection of High Street, and that protrudes out to the edge of the sidewalk?

A. Yes, sir.

Q. There is a 20 foot sidewalk there and a 60 foot pavement; and then a 20 foot sidewalk on the other side, isn't that correct?

A. I am not sure; I don't think that sidewalk is 20 foot.

Q. According to the plat High Street is—

page 250 } A. High Street isn't 20 foot but—

Q. I didn't ask you that. High Street would protrude south when you are coming up Water Street, the distance out there would make you see across the corner; there would be a sidewalk on High Street on that corner, wouldn't it?

A. Yes, sir.

Q. All right. Now, on your right there is the Seaboard Building, the passenger station; and how far up does that sit back from the intersection?

A. I don't know, sir.

Q. It is about a hundred feet, isn't it?

A. I don't know, sir.

Q. Well, do you have any idea?

A. No, sir, I don't.

Q. Don't have any idea. Well, it doesn't sit up to the curb, does it?

A. No, sir.

Q. There is quite a distance back from the curb?

A. It is away from the curb.

Q. And if it is about a hundred feet—

*Brainard Franklin Moore.*

Mr. Moody: If your Honor please, I object to that question. He asked the witness if he knew and the page 251 } witness told him that he didn't know how far it was.

The Court: I sustain the objection because you are assuming that he said that. He says he doesn't know, Mr. Bradford.

By Mr. Bradford:

Q. Well, would you give us some idea about how far back—

A. I don't know; I don't have any idea.

Q. Could you give us an estimate?

A. No, sir.

Q. You couldn't give us one?

A. No, sir.

Q. Well, will you designate in this court room how far from where you are sitting. Is it about the distance of that wall back there (pointing)?

A. Are you speaking from the Seaboard Building to the intersection?

Q. To the intersection on the east side of Water Street where that curb juts out there.

The Court: To what point to the south side of High Street?

Mr. Bradford: From the south side of High page 252 } Street on the west side to the building.

By Mr. Bradford:

Q. Would that be about the distance?

A. I wouldn't think it would be any closer than this.

Q. Well, that is approximately the distance?

A. I really don't know, sir.

Q. You wouldn't think it would be any further?

A. I don't think it would be any closer than that.

Q. Any closer than that. All right. Now, if that is the approximate distance, when you are coming up Water Street there was nothing to prevent you from seeing any traffic that would be in that intersection, was there?

A. No, sir.

Q. And this express truck has a high body, hasn't it?

A. Yes, sir.

Q. If you looked there was nothing to prevent you from seeing the top of that truck moving out towards the intersection, was there?

*Brainard Franklin Moore.*

A. No, sir.

Q. And you didn't see it?

A. The truck was not there, sir.

Q. Well, now, you were only moving at the  
page 253 } rate approaching this intersection, you have testi-  
about ten miles an hour?

A. Yes, sir.

Q. And you slowed down to three miles an hour?

A. Yes, sir.

Q. As you entered the intersection. Now, that truck could not possibly have gotten that hundred feet from the back of the warehouse out there in front of you without your being able to see it before you went into the intersection, could it?

A. I don't know, sir.

Q. You don't know?

A. I know that the truck was not there when I pulled into the intersection.

Q. All right. Now, why did you then tell Officer Nugent—Officer Nugent said “Moore said he did not know what he was going to do,” referring to the express truck?

Mr. Moody: Now, wait a minute, your Honor, I am going to object to that because the officer, of course, assumed he was referring to it, and I think he might have been; but on the other hand there is no testimony to what he was referring to.

page 254 } Mr. Bradford: Yes it was.

The Court: Yes, it was. He asked him specifically: “Mr. Nugent, what did you understand him to mean by him when he said he didn't know what ‘he’ was going to do,” and he asked him specifically who he was referring to.

Mr. Moody: I agree that the officer stated that he thought Mr. Moore was referring to the truck, but what I am saying is that nobody, as far as I know, but Mr. Moore, would know what he was referring to.

The Court: I think the jury can certainly arrive at their own conclusion.

Mr. Moody: But not other people giving their opinion as to what Mr. Moore was referring to.

Mr. Bradford: If your Honor please, this is cross examination.

The Court: You can ask him if he made that statement and what he meant by it.

*Brainard Franklin Moore.*

page 225 } By Mr. Bradford:

Q. Did you make a statement to Officer—

The Court: Nugent.

By Mr. Bradford:

Q. —Nugent that you did not know what he was going to do, meaning the operator of the truck?

A. I don't know, sir.

Q. You don't know?

A. No, sir.

Q. You remember showing him your operator's license, don't you?

A. No, sir, I don't.

Q. You don't remember that?

A. No, sir, I don't.

Q. You don't remember what you said?

A. No, sir, I don't.

Q. You did not make any complaint about the truck driver, did you?

A. If I said anything to him, I don't know, sir.

Q. Well, now, that truck couldn't have gotten out of there after you got into the intersection or gotten in front of you if it was going 60 miles an hour, could it?

Mr. Moody: Your Honor—

The Court: I sustain the objection. That is argumentative, Mr. Bradford.

. . . . .

page 257 }

. . . . .

Q. Now, you testified that you were going ten miles per hour as you approached the intersection?

A. Approximately, sir, yes.

Q. And then you slowed down to three miles an hour changing gears as you entered the intersection?

page 258 } A. Yes, sir.

Q. And yet you ran into the door of the truck on the left-side, didn't you?

A. I didn't, sir.

Q. Well, now, what did you run into?

A. The truck ran into me, sir, with his left-front fender. The front of my motorcycle was in his left-front fender.

*Brainard Franklin Moore.*

Q. You did not run into the side of the door?

A. No, sir, I did not.

Q. Well, how do you know that so well and you don't remember that you made that statement to Officer Nugent?

A. Are you asking me that question, sir?

Q. Yes.

A. The exact reason that I remember that so well is that is because the gentleman that was driving the truck and some man from the company brought the truck back over there the next day with the place in the fender where I hit the truck and we went over exactly where it happened.

Q. But the front-fender runs down to the door where you get into the truck. Where the dent was it was the left-front fender, the back part of it where you open the door to the truck, isn't that right?

A. I don't recall whether it is connected with the door or not, sir.

page 259 } Q. Well, where you get in and out of the truck?

A. I don't know.

Q. Isn't that right?

A. I don't know.

Q. You don't know that?

A. I do recall that it was definitely in the fender.

Q. In the fender but you don't know what part of the fender?

A. No, sir.

By the Court:

Q. Was it back of the wheel?

A. I believe it was in the front of the wheel. I was thinking it was, sir.

By Mr. Bradford:

Q. You are thinking?

A. I know it's in the fender. It has nothing to do with the door because the door would open.

Q. Well, you are not positive then it was the front or back of the axel?

A. I wouldn't say, sir, I'm not sure.

Q. You are not sure. Didn't you get up and ride the motorcycle around the block after the accident?

A. No, sir, I did not.

Q. How do you remember that?

page 250 } A. I don't know about getting up, but as far as riding the motorcycle around the block I know I did not ride it around the block.

*Brainard Franklin Moore.*

Q. Did you ride it afterwards?

A. Yes, sir.

Q. You did ride it?

A. Yes, sir.

Q. Now, where did you ride it?

A. I rode it to the shop approximately half a block from where the accident happened.

Q. How do you remember that and don't remember these other things?

A. I don't know, sir. I don't remember falling on the ground or whether I fell on the ground or not.

Q. Well, now, you say that the truck was going about twice the speed that you were going when the impact took place?

A. Yes, sir.

Q. Then the truck was—if you were going three miles an hour, according to your testimony, would have made the truck go six miles?

Mr. Moody: I think he added—Mr. Bradford is leaving out part of his statement. He thinks also maybe about ten miles an hour.

page 261 } The Court: That is what he testified.

Mr. Bradford: He said two things.

The Court: I understand, but he is on cross examination.

Mr. Bradford: He said—

The Court: Go ahead, you are on cross examination. You can go ahead.

By Mr. Bradford:

Q. Now, if that truck was moving six miles or even ten miles an hour, the distance that you had gone the truck would have been in your view approaching the intersection, wouldn't it?

Mr. Mattox: This is argumentative, *you* Honor.

Mr. Moody: He has nothing to base it on whatever. He has no distances.

The Court: I think that is a conclusion, Mr. Bradford.

Mr. Bradford: I don't see any conclusion to that.

page 262 } The Court: "He would have been in your view" is a conclusion. You can ask him under the facts why he did not see that car, from all the facts.

Mr. Bradford: All right, sir.

*Brainard Franklin Moore.*

By Mr. Bradford:

Q. Well, now, why didn't you see the truck?

A. He wasn't there. He wasn't there at the intersection when I went into the intersection.

Q. Was he approaching the intersection?

A. He was not, sir. If he was approaching it he would have been approaching from behind me. I didn't see him, sir.

Q. Well, how far back of you; what do you mean by "back of you?"

A. Well, sir, the road that comes out into this intersection kind of bears off to the back of it, kind of comes into an angle, and as I went across the intersection I looked to my left. I was looking to my left. Now, he may have come on in there when I was looking to my left. I don't know, sir, but when I looked back to my right and started my approach to go across that was when he hit me.

Q. How long did you look to the left?

A. (Pause) I looked at first to my left and there was some parked cars, and I couldn't see for sure. As I eased on out  
page 263 } low just enough to keep the motorcycle stand-  
ing up I was still looking, seeing that there was  
nothing there, when I made sure there was  
nothing there, when I made sure there was nothing there I  
turned and made my approach across High Street.

Q. You didn't look to the right any more?

A. No, sir.

Q. Where was it that you looked to the right. You testified here in your direct testimony you looked to the right. Where were you, how far away from the intersection was it when you looked to the right?

A. I was at the intersection when I looked to my right. I looked to my right all the way up to the intersection.

Q. Then you turned to the left and looked to the left and never looked back to the right?

A. Yes, sir, I looked back; I looked back this way, straight ahead as I started to go across, and the truck came right out then, sir.

. . . . .

page 264 } By the Court:

Q. What was the condition of the weather, Mr. Moore?

*William R. Harding.*

A. No, sir, I didn't know of any traffic rolling in and rolling out, sir.

page 266 } Q. Well, going in and going out?

A. I have seen cars go in there, and I have seen trucks go in there and come out, sir.

Q. You knew the physical layout of that street?

A. Yes, sir.

Q. How long had you been there?

A. (Pause).

Q. Working down there in that area?

A. Approximately a year, sir, I'm not sure.

. . . . .

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. . . . .

WILLIAM R. HARDING,

the defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

page 269 } DIRECT EXAMINATION.

By Mr. Bradford:

. . . . .

Q. What is your occupation?

A. I am delivery man for Railway Express.

Q. And that includes the operation of trucks?

A. Yes, sir.

Q. How long have you occupied this position?

A. 17 years.

Q. How old are you, Mr. Harding?

A. 41.

Q. Mr. Harding, on October the 29th, an accident occurred at the intersection of Water Street and High Street in Portsmouth, Virginia. Were you involved in that accident?

page 270 }

A. Yes, sir.

Q. Would you tell the Court and jury what kind of a truck you were driving?

A. It's a GMC, the model year I am not sure whether it is '55 or '54; I don't remember just what the model is, and I think it's a ton and a half, sir.

Q. How long have you been operating that truck?

*Brainard Franklin Moore.*

A. It was a clear day, sir.

Q. A clear day?

A. Yes, sir.

Q. There wasn't any rain?

A. No, sir.

Q. What was the condition of the streets, were they wet or dry?

A. They were dry, yes, sir.

Q. Now, did I understand you to say that when you were going north on Water Street, when you reached the north end of the Seaboard Building that you looked to your right?

A. Yes, sir.

Q. Did you see any cars parked in the parking area there?

A. Yes, sir, there were cars there.

Q. Did you see this truck at all?

A. No, sir.

Q. The top of it?

A. No, sir.

Mr. Bradford: One other question.

The Court: All right.

page 265 } By Mr. Bradford:

Q. You continued to look till you got to the corner?

A. Yes, sir.

Q. Then you looked to your left?

A. When I got far enough so I could see to my left I looked to my right.

Q. Then you looked back to your right when you already passed the intersection; that is when you looked back to your right?

A. No, sir, when I looked to my left I was—I had looked to my right until I reached inside the intersection, then I looked to my left to make sure there was nothing coming.

Q. The place that you worked at was located right down there at the ferry slip on Water Street?

A. Yes, sir.

Q. And you were familiar, entirely familiar with this intersection?

A. Yes, sir.

Q. Entirely familiar with the traffic rolling in and rolling out from this intersection; you knew the physical situation there?

*William R. Harding.*

A. We got those trucks in whatever year—I think we have had them about three years.

Q. Do you operate the same truck?

A. The same truck every day, yes.

Q. Now, how did you approach this intersection where the accident occurred?

A. When I came to the intersection I came to a stop, and proceeded out across Water Street at an angle to get over on the right-hand side of High Street going up High Street.

Q. That was the only way—

A. That is the only way you can get over is to go at an angle, naturally, to go across to get to the other side because the entrance to the lot is over to the side and you have to go at a diagonal angle to go across.

Q. Where had you been, Mr. Harding?

A. In back of the Seaboard Building to carry page 271 } mail for the Seaboard.

Q. And how far back in there had you been?

A. Well, I had been all the way to the back where the trains come up and we back up to the ramp where the doors are where we unloaded the mail.

Q. When you left the mail did you stop before you got to the intersection?

A. I stopped at the intersection. The ramp is at the back end of the building.

Q. I understand that but did you make any other stops?

A. Yes, when I came down the ramp you got to turn sharp to your left to get back in that driveway.

Q. That is back of the Seaboard station?

A. That is back of the Seaboard where the trains come up.

Q. All right, after you got down the ramp and stopped and made the left turn and then as you proceeded to the intersection did you make any more stops before you got to the intersection?

A. No, sir.

Q. How fast were you driving?

A. It couldn't have been very fast because there were cars parked along there and it was pretty narrow. I would say approximately from five to ten miles an hour.

page 272 } Q. And you came to a stop as you approached the intersection?

A. Yes, sir.

Q. Did you look before you entered the intersection?

A. I looked but I didn't see the motorcycle.

*William R. Harding.*

Q. And how long did you stop there?

A. A matter of seconds.

Q. Was it a matter of seconds or a fraction of a second?

A. Just long enough to halt.

Q. And you halted and then proceeded.

A. And proceeded out.

Q. And you didn't see anything?

A. No, sir.

Q. How far had you gotten into the street before the *accident* happened?

A. Well, I was almost when he struck me even with the curb on the other side of the street.

Q. Do you know how wide Water Street is?

A. No, I declare I don't.

Q. But do you mean that you had almost cleared Water Street?

A. I had almost gotten into or out of the intersection, almost over into the right side going up High Street which I was trying to go up High Street.

Q. Well, now, you entered, let me see, you entered the east side of Water Street, didn't you?

A. Yes, sir.

Q. And then you proceeded through the intersection west on High Street?

A. That's right. I was going up High Street.

Q. And were you still in the intersection when you were struck?

A. I was almost through the intersection.

By the Court:

Q. Almost what?

A. Almost through the intersection. The front end of the truck was almost—the back end had cleared the right-hand side of the intersection.

By Mr. Bradford:

Q. When did you first see the motorcycle?

A. I didn't see him till he hit me.

Q. You didn't see him till he hit you?

A. No, sir.

Q. You didn't see him till he hit you?

A. No, sir.

Q. What did you do when he hit you?

A. Well, immediately I stopped. He hit just in front

*William R. Harding.*

of the front door, and then when the truck stopped  
page 274 } the motorcycle was laying approximately at my  
back wheel; and as soon as I got out he was  
standing up and the motorcycle was laying in the street, and  
the first thing I did, I went up to him and asked him was he  
hurt, and he said, no. He said "I'm frightened but I'm not  
hurt." And I kept repeating it to make sure, because it  
frightened me when I saw the motorcycle, because he might  
be actually hurt and I went to find out for sure if it had hurt  
him. And after asking him again he pulled up his pants leg  
and showed me his knee which was scuffed or scratched. It  
looked more like it was scratched or scuffed on the cement  
when it hit the cement, and I asked him did he want me to get  
him to a doctor. He said, "No, I'm all right, the only thing  
I am concerned with is this motorcycle;" he said, "I'm not  
hurt." He said "This motorcycle doesn't belong to me, it's  
a borrowed motorcycle. That is what I am concerned about  
is this motorcycle."

Q. Now, what part of the truck that you were driving did  
the impact take place on the truck?

A. Just in front of my door on the left-side where the  
fender comes down back of the left wheel.

Q. Back of the left wheel; and how far is that from the  
bumper on the car?

A. I'd say—I don't know exactly, but approximately three  
foot.

Q. And how fast were you proceeding through  
page 275 } this intersection, Mr. Harding?

A. Well, I just started across. I don't know,  
probably five miles an hour. I don't even know, the truck  
being an automatic transmission, I don't know whether the  
transmission had a chance to shift into second gear.

Q. Now, Officer Nugent came to the scene of the accident  
soon after it happened, didn't he?

A. A few minutes after, yes.

Q. But he didn't see the accident?

A. No, sir.

Q. But he interviewed both you and the plaintiff, Mr.  
Moore?

A. Yes, sir, he took our—he made me write my license  
number down and my name and also Mr. Moore, and we gave  
each other our names and addresses and telephone numbers  
and license numbers and so forth.

Q. What did you tell the officer how fast you were going,  
do you remember?

*William R. Harding.*

A. No, I don't.

Mr. Mattox: We object to that, it's self-serving.

The Court: I sustain the objection. He says he doesn't know anyway.

A. I don't know whether he asked me how fast I was going to tell the truth.

page 276 } By Mr. Bradford:

Q. How fast were you going?

A. Approximately five miles an hour.

Q. Why couldn't it have been more than five miles an hour?

A. Because I just started.

Q. Now, did you hear Mr. Moore make any—did you make any statement to the officer about how the accident happened?

A. Yes, he asked me did I see him. I told him no, I didn't see the motorcycle.

Q. And did the officer interview Mr. Moore?

A. Yes, he talked to Mr. Moore, and he stated to the officer, he says "I didn't know what he was going to do."

Q. Did you hear him say that?

A. Yes, sir, I was standing there, I was talking to him when the officer came up. The officer came up while I was talking to him and he asked him practically the same questions as I asked him about. The first thing the officer asked him was he hurt and if he was hurt about getting him to a hospital.

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page 277 }

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Q. Officer Nugent stated that Mr. Moore said that he didn't know what he was going to do, referring to you. Did you hear that statement made?

A. Yes, sir. He was talking—

The Court: That is what he testified to.

Mr. Bradford: He has. All right.

A. He told me he didn't see the truck.

*William R. Harding.*

By the Court:

Q. He told you what?

A. He told me before the officer came, he said "I didn't see the truck." And when the officer came he said, "I didn't know what he was going to do."

By Mr. Bradford:

Q. You don't know anything about the street measurements down there, do you?

A. No, sir, I don't.

Q. How long—how did Mr. Moore leave the scene of the accident?

A. Immediately after the accident, we was trying to determine the amount of damage that was done to his motorcycle and to the truck to see if it was over \$50.00 damage because the officer knew we had to make a report, page 278 } and the officer asked me what damage did I think was done to the truck, and I showed him it and I said it couldn't be very much because it's not dented very bad, it's just pulled a little and I took my hand and pulled it out to get the wheel from touching it. Then we went and looked at the motorcycle and the motorcycle, when it fell over, it broke the headlight of one of the lights and the handlebar grip on that side was torn when it hit the cement. So, we asked him to take it up and try it to see if it would run, and had a little difficulty starting it at first, but he got it started in a matter of a few minutes and he rode it away to try it out to see if it was damaged, if it was operating all right. And he came back in a matter of a few minutes. Now, whether he went around the block, I don't know, but he was gone a few minutes and the officer was standing there at the time.

Q. He rode away and came back?

A. He rode away and came back, and as far as I can see it works all right, he said, and then later after we swapped names and all the information that they had to have he drove on down Water Street.

Q. Well, now, was Mr. Moore—what side of Water Street was he on?

A. He had to be on the left side coming down next to where these parked cars were because if he hadn't been he could have gone back of my truck, if he had been page 279 } on the right he could have gone back of it, because there is no parking—you can't park on the right coming, it's a one way street coming towards High Street—no

*William R. Harding.*

parking on the right-side but cars can park on the left.

Q. Then, your testimony is that he was driving on the left of the center of Water Street?

A. Well, he approximately had probably had to be to hit me where he did. If he had been on the right he could have gone clear of my back or he would have hit the back end of the truck, or he could have gone around the back end and cleared the back end.

Q. Now, I want you to place a point there where the impact took place. Mark this street; what is this page 280 } street?

A. This is High Street.

Q. All right, put "High Street" in there.

A. (Witness complied.)

Q. And what is this street here?

A. That is Water Street.

Q. Write "Water Street" there.

A. (Witness complied.)

Q. And these are the ferry slips down there?

The Court: Go down there where he is marking that.

A. Now, this is Water Street here from which he was coming. Water Street is one way going this way; he was coming this way. Now, I was coming out of here. I had gotten to approximately here when he struck me from this side and my truck went over on this side of this. Cars were parked here. On this side there is no parking.

By Mr. Bradford:

Q. You mean the impact occurred there or came to rest there?

A. My truck came to rest a little further back further. His motorcycle was laying right where the impact took place, just how far from my front wheel to the back, I don't know the distance.

Q. You don't know the distance?

A. I don't know the width of High Street, and page 281 } I don't know the width of this.



*William R. Harding.*

A. Yes, sir—

Q. Well, how—

A. I always come to a stop.

Q. Excuse me.

A. I always come to a stop when I come out there. There is quite a bit of traffic down Water Street lots of times.

Q. Mr. Bradford here has asked you about how long you stopped and you said a matter of seconds and then he asked you was it more or less than a second. It was momentary, wasn't it?

A. How long can you estimate a stop. It could be any amount of time, from one second to five minutes or longer.

Q. Well, was it less than a second?

A. No, it couldn't have been less than a second.

Q. Why couldn't it have been?

page 285 } A. Because I couldn't stop and do it in less  
than a second, because those trucks have automatic transmissions, they don't take off like your manual shift.

Q. With an automatic transmission you couldn't take off faster than one without?

A. No, I don't think so, they have to build up the pressure.

Q. You don't have any problem of shifting gears, do you?

A. No, no problem shifting gears.

Q. Just step on the gas and that's all you have to do?

A. No, you don't, you don't just step on the gas.

Q. Well, if you—

A. Oh, yes, you can do that, sure.

Q. There is no problem there as you cross changing gears or as you are getting ready to pull out to make any change in your gear shift?

A. No, sir.

Q. Now, the impact, you say, was about three feet back from your front bumper on your left-side, is that correct?

A. Yes, um-huh.

page 286 } Q. Regarding Mr. Moore's statements at the scene, let's see if I correctly heard what you said.

First of all, you asked him if he was hurt twice, you say, and he told you what?

A. That's right. He said he was all right.

Q. He told you he was all right?

A. Yes, that's right.

Q. But then later he showed you the injury to his knee?

*J. C. Williams.*

A. Later, the second time I asked him, since I wanted to make sure he wasn't hurt, because I knew he was frightened, but he told—because he told me he was, and he pulled his pants leg up and showed me a scar or scuff mark on his side of the knee. He didn't show me the elbow; I didn't know about the elbow.

Q. And so he was wrong about being injured, wasn't he?

A. He was wrong that he didn't have that; yes.

Q. And you say, I believe he told you that "I didn't see the truck?"

A. That's what he said.

Q. And you also heard him tell the officer that he didn't know what he was going to do?

A. He didn't know what I was going to do.

Q. As a matter of fact his statements were irrational and didn't make a lot of sense, did they?

page 287 } A. Well, he told me one thing and told the officer that he didn't know what I was going to do.

Q. And that was only a matter of a few minutes and the same people were present, is that correct?

A. Yes, sir, a matter of five minutes, I'd say.

Q. And then he took up and rode the motorcycle someplace and came back?

A. Yes, sir.

Q. Now, Mr. Harding, I want you to think carefully about that, whether or not he came back or whether he got up and rode off to the print shop.

A. The first time he rode away he took it off to try it out to see if it would operate all right, to see the extent of the damage, and if it was damaged to see if it would operate properly, so we would have the information to file my accident report. I had to put the extent of the damage to both vehicles on it.

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page 288 }  
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**J. C. WILLIAMS,**

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

*J. C. Williams.*

DIRECT EXAMINATION.

By Mr. Bradford:

Q. You are Mr. J. C. Williams?

A. Yes, sir, Williams.

Q. Mr. Williams, what is your occupation?

page 289 } A. Supervisor of vehicle service with Railway  
Express.

page 290 }

By the Court:

Q. Have they changed the street line down there since the accident, or do you know when the accident happened?

A. I know when the accident happened, yes, sir.

Q. Has the street line been changed or have any of the buildings been moved back at all?

A. Not to my knowledge.

page 291 } Mr. Moody: I didn't know whether they had  
changed the sidewalk or not from the curb.

By Mr. Bradford:

Q. What was that distance, Mr. Williams?

A. By stepping it off roughly, Mr. Bradford, it was 96 feet.

Q. Allowing three feet to the step?

A. I came right on up to the building. It was 96 feet.

Q. 96 feet.

Mr. Mattox: His question was how many paces and he comes out with feet.

Mr. Bradford: Well, he has changed it.

By the Court:

Q. Give the number of paces.

A. I stepped of 32 paces.

Q. What is the length of your pace?

A. Three foot is what I was judging it would be.

Q. As your estimate?

A. Yes.

*J. C. Williams.*

The Court: All right.

page 292 } By Mr. Bradford:

Q. Did you take long steps or short steps?

A. I had taken long steps.

Q. Now, did you talk to Mr. Moore after this accident happened on October the 29th, 1957?

A. I talked to Mr. Moore in the afternoon, approximately 4:30 or 5:00 o'clock, and made an appointment to meet him the following morning at the Portsmouth office, which we did. We came up to the scene of the accident at High and Water Streets the following morning.

Q. Did you ask him about his injuries?

A. Yes, sir, I asked him about his injuries, and he said that he pulled up his pants—I don't remember which leg—but one leg had some, what looked like to me skids on it, burns from the concrete.

Q. How about his elbow, did he show you his elbow?

A. I don't recall seeing the elbow.

Q. Did he make any other complaint?

A. No, sir, not as far as that. He made complaint about his motorcycle. He had borrowed a motorcycle belonging to someone else.

Q. Did he tell you how the accident happened?

A. The only thing he said was that he was coming out Water Street and our driver was coming out and  
page 293 } didn't see each other until the accident occurred.

Q. Until the impact took place?

A. Yes, sir.

Q. One was going north on Water Street and the driver was coming out going west on High and they didn't see each other. That is what he told you?

A. That is what he told me.

Q. Did you tell him you wanted to have him examined?

A. Not at that time, no, sir.

Q. Now, when was that, 4:30 of the same day of the accident?

A. No, sir, the following morning.

Q. The following morning; what time?

A. He was supposed to be at the Portsmouth office at 9:00 o'clock at which time I showed up, and the young man was there but he didn't see me. I must have been to the rest room; but he did come back up and we went to the scene of the accident.

*J. C. Williams.*

Q. Did he point out where the impact took place in the intersection down there, Mr. Williams?

A. Yes, he pointed out someplace just a little bit next to a water meter, a top that goes to a water meter or something, just the other side of that.

Q. Where was that?

page 294 } A. That was somewheres around, let's see, this is County Street, Water Street. There, it was out almost—well, it's off into High Street; it sits into High Street.

Q. Well, did he point out to you—could you draw a diagram and point—

A. No, sir, I don't know as I could; but I know where we have it on paper.

Q. Well, now, what part of the intersection?

A. Well, this water cap, what I call it, comes out kind of on the side of Water Street.

Q. Wait a minute. Here I will show you a plat. I think that this is the best thing. Maybe you can point it out.

A. I don't know too much about—

Q. Now, Mr. Williams, I will have to explain this to you. This is the entrance here to the Seaboard station and warehouse down in here.

A. Where do you come out on High Street?

Q. These are the ferry slips in here; this is Water Street; this is High Street. This is the intersection where the accident occurred, in that intersection.

A. Is this Water Street here? Now, we are going across to High right here?

Q. That's right.

page 295 } A. That water thing sits right down, right along just about—

Mr. Moody: Mark that.

Mr. Bradford: Well, now, he didn't say that is where it is. He didn't say it was at the water tap. He said it was some distance away.

A. It was on the other side of the water tap.

Mr. Moody: Well, show us just where it was.

The Court: Suppose you take the pen.

By Mr. Bradford:

Q. Now, get this right, now. This is the—

*J. C. Williams.*

A. That's the curb on Water Street.

Q. Wait a minute, I'm wrong. That's Water Street.

Mr. Moody: You were right the first time. This is Water Street, and this is High Street.

By Mr. Bradford:

Q. And here is where the truck came out?

A. All right, this is Water Street right here coming out into the intersection of High Street, am I correct?

Q. That's correct.

page 296 } Mr. Moody: That's correct.

A. I don't know how many feet, but it's right in here; there is a water cap.

Mr. Moody: What does that represent?

Mr. Mattox: Do you see it on the photograph?

The Witness: No, sir, I don't.

Mr. Mattox: Do you think it might be this one over here?

The Witness: It couldn't have been that one.

Mr. Mattox: Is that the only one there?

The Witness: There is a large one in there, and then a small one. There is two in there.

Mr. Moody: Is that where it occurred?

Mr. Bradford: Wait a minute, Mr. Moody, I'm examining him.

Mr. Mattox: You are putting it to the best of your recollection?

The Witness: The best of my recollection.

page 297 } By Mr. Bradford:

Q. And that is about in line with the curb on the western side of Water Street?

A. If it is, I don't know which is west.

Q. This is east; this is west; so it is along about the prolongation of the curb line?

A. Our truck—I don't know how many feet—but that's where they said they went together.

Mr. Mattox: Wait a minute, did you see that?

The Witness: No, I didn't see that.

The Court: No, this is what the boy told him.

The Witness: No, I didn't see that.

*J. C. Williams.*

By the Court:

Q. Who told you that?

A. Mr. Moore.

The Court: That's right.

The witness: And that is also what our driver told me.

Mr. Mattox: We object to any statements by page 298 } the driver.

The Court: Strike it out.

Mr. Bradford: Strike it out, Mr. Reporter. All right, I think we got that.

Mr. Mattox: Well, now, just a minute, that is the mark you are making?

The Witness: I will make that.

Mr. Mattox: I think it would be better if it's got a "W" on it.

By Mr. Bradford:

Q. Now, did you see Mr. Moore any more, Mr. Williams?

A. Yes, I saw Mr. Moore, I believe, the following day when we brought our truck with Mr. Fisher, the acting general agent over and our driver.

Q. Now, Mr. Williams, you are in charge of those trucks. Will you tell the Court and jury whether you saw any marks on the truck as a result of this impact?

A. Yes, there was some marks on our truck right back of the front-rear wheel between the rear wheel and our corner post and where the door slides and strikes that, down along about that. Our trucks are way low.

Q. On which side of the truck is that on?

page 299 } A. That is on the left-hand side of the truck.

Q. The left-side of the truck?

A. Yes, sir.

Q. And how far was that indentation from the front of the truck approximately?

A. You mean now from the bumper?

Q. From the bumper, yes.

A. I don't know how long those trucks are. We got 12 foot bodies but where the cab of the truck is, probably just before they—probably four or five foot from the front of our truck.

Q. Where this place was that you estimate was four or five feet back?

A. Yes, sir. It's got a 12 foot body.

Q. A 12 foot body, and what would be the complete length of the hood and the engine and all?

*J. C. Williams.*

A. I couldn't answer that, but I imagine about 16 foot, something like that, or 18 foot, I wouldn't know right off. I haven't measured one, but I do know they have a 12 foot body on them.

Q. A 12 foot body; and about 16 foot total. That would be your estimate?

A. Yes, sir.

. . . . .

page 300 } CROSS EXAMINATION.

By Mr. Moody:

. . . . .

page 303 }

. . . . .

Q. Now, you say he told you that this accident took place on the point that you pointed out on that photograph?

A. To the best of my recollection it was just over what I would say would be a water meter, to the side maybe three or four feet or two or three feet.

Q. That is what I want to ask you.

A. It was located probably on the other side, three feet on the other side of that water meter.

By the Court:

Q. Which way?

A. Out on the intersection of High Street.

Q. You mean north or west of it?

A. I don't know which would be west.

Q. North would be this way from the meter and west—

A. That would be coming in this direction  
page 304 } coming from Water Street this way.

Q. North of the water meter?

A. Three or four feet north of the water meter.

. . . . .

page 305 } By Mr. Moody:

Q. I just have one more question, please, sir. Mr. Williams, I ask you is Water Street one way?

A. One way coming north.

. . . . .

page 314 } BRAINARD FRANKLIN MOORE,  
the plaintiff, recalled as a witness in rebuttal,  
having been first duly sworn, was examined and testified as  
follows:

DIRECT EXAMINATION (Reb.)

By Mr. Moody:

Q. Mr. Moore, just one question: State whether or not you rode the motorcycle off around the block or any other place and came back on the motorcycle after the accident.

A. I did not.

Mr. Moody: That's all.

CROSS EXAMINATION.

By Mr. Bradford:

Q. How do you remember that?

A. With my memory, sir.

Q. Now, there has been several other witnesses that I have asked you about who testified since I asked you about the statement that the officer said you made. Mr. Harding said that you told him that you didn't see the truck. Did you make that statement to Mr. Harding?

A. I don't know, sir.

Q. And then he said after the officer came up  
page 315 } he heard you say that "I didn't know where he  
was going," referring to Mr. Harding. Did you  
make that statement?

A. I don't recall that statement, sir.

Q. Then the next day Mr. J. C. Williams testified you came to the office to see him at his request, is that correct?

A. He was on the corner, sir; he asked me to meet him on the corner.

Q. That is where he requested you to meet him, but I am not interested in that. But he said you went to the scene of the accident and you stated that you didn't see each other, referring to you and Mr. Harding; you all didn't see each other. Did you make that statement to Mr. Williams?

A. I'm not sure.

Q. But you may have made it?

A. I may have made the statement; I'm not sure.

Q. That was the next day.

A. I do recall the meeting.

Q. Well, did you see each other?

A. Yes, I saw the truck.

*A. G. Williamson.*

Q. When?

A. Maybe half a second—I don't know you would describe the time before I saw him.

Q. And he was out in the intersection when you  
page 316 } saw him?

A. Yes, sir.

Q. Was he right in front of you when you saw him?

A. Yes, sir.

Q. He was right in front of you when you first saw him?

A. Yes, sir.

Q. Right out in front of you just before the collision;  
that is the first time you saw him?

A. Yes, sir.

Mr. Moody: Your Honor, he has asked him that three times.

Mr. Bradford: Well, that is a right important question.

Mr. Moody: Well, it might be but—

Mr. Bradford: That's all.

• • • • •

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• • • • •

A. G. WILLIAMSON,

recalled as a witness on behalf of the defendants, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION (Rec).

By Mr. Bradford:

• • • • •

Q. Did you proceed from the witness chair to Water Street and measure its width?

A. Yes, sir.

Q. From curb to curb; is that where you measured, from curb to curb?

A. Yes, sir.

Q. How many feet did it measure?

A. 28 feet.

*A. G. Williamson.*

. . . . .

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. . . . .

CROSS EXAMINATION.

By Mr. Moody:

Q. I believe there is parking on the west side of that street, is that correct?

A. (Pause).

Q. There are parking meters on the left-side going north or is that the west side, in other words?

A. That's right.

. . . . .

page 320 }

. . . . .

(The Court and counsel for both sides retired in chambers to take up instructions and other matters.)

. . . . .

Mr. Bradford: Yes, sir.

If your Honor please, I would like to read into the record and introduce in the record certain portions of the Charter of the City of Portsmouth, and the Code of the City of Portsmouth.

The Court: All right, sir.

You are reading the Charter and Code of the City of Portsmouth as published by the authorities of the City of Portsmouth, 1951?

Mr. Bradford: That is correct.

First I read into the record Section 29 of the Code which is on page 30 beginning on page 30 of the volume page 321 } your Honor has referred to.

“Whenever any street, alley or lane shall have been opened to and used by the public for the period of five years, the same shall thereby become a street, alley or lane for all purposes, and the City shall have the same authority and jurisdiction

over, and right and interest therein, as they have by law over the streets, alleys, and lanes laid out by it; and any street or alley reserved in the division or subdivision into lots of any portion of the territory within the corporate limits of the City by a plat of record, shall be determined and held to be dedicated to the public use; and the council shall have authority, upon the petition of any person interested therein, to open such street or alley, or any portion of the same.

No agreement between or release of interest by page 322 } the persons owing the land immediately contiguous to any such alley or street, whether the same has been opened and used by the public or not, shall avail or operate to abolish said alley or street, so as to devise the interest of the public therein, or the authority of the council over the same (Acts 1908, Chapter 157, page 202)."

Then, your Honor, also I would like to read into the record the Ordinances of the said City of Portsmouth, that portion of Section 30.1 under the heading of definitions that describe and define and gives a definition of the word "street."

This is on page 452: "Street \* \* \* The word "street" shall mean every way or place of whatever nature open to the use of the public for purposes of vehicular travel."

With that, I rest.

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Mr. Mattox: Well, almost but not exactly the same or there wouldn't be any point. It is in the same book, Section 30.1, "Definitions, Private road or Driveway \* \* \*

The words "private roadway" or "driveway" shall mean every road or driveway not open to the use of the public for the purpose of vehicular travel."

Then 30.42: "Except as otherwise provided in Section 30.44 of this chapter, except upon all highways of sufficient width the driver of a vehicle shall drive the same upon the

page 324 } right-hand side of the highway, unless it is impracticable to travel on such side of the highway and except whenever overtaking and passing other vehicles subject to the limitations applicable in over-

taking and passing set forth in Section 30-46, 30-48 and 30-50 of this chapter.”

Mr. Mattox: Section 30-61, “Exception to Right of Way Rules:

“The driver of a vehicle entering a public highway from a private road or driveway shall, immediately before entering such highway, stop and, upon entering such highway, shall yield the right of way to all vehicles approaching on such public highway.”

page 327 } OBJECTIONS AND EXCEPTIONS  
TO INSTRUCTIONS.

Mr. Moody: The plaintiff excepts to the Court’s refusal to grant Plaintiff’s Instruction Number P-3 on page 328 } the basis that the vehicle operated by the defendant, according to the evidence, was on the left or south side of High Street traveling in a westerly direction; and that this was negligence on his part which should be considered by the jury and upon which the jury should have an instruction.

The plaintiff excepts to the Court’s refusal to grant Plaintiff’s Instruction Number P-5 on the basis that the evidence has been that the area from which the defendants’ vehicle approached Water Street was a private road or driveway and not a public highway, and under these circumstances the plaintiff is entitled to this instruction. There has been no evidence by the defendants regarding the nature of this area. All of the evidence of the plaintiff had been that this particular area is under the control of the Seaboard Railroad and is only used by and with their permission. It is not open to the public without the implied or specific permission of the Seaboard Railroad.

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A. Copy—Teste:

H. G. TURNER, Clerk.

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## RULE 5:12—BRIEFS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

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

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

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

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

