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Richmond, Va.

Records Nos. 5166, 5167

In the Supreme Court of Appeals of Virginia at Richmond

WILLIAM (BILL) BROWN, ADMINISTRATOR, ETC.,

v.

GRANDVILLE E. PETERS, ADMINISTRATOR, ETC.

ERNEST WILLIAM AYERS

v.

GRANDVILLE E. PETERS, ADMINISTRATOR, ETC., ET AL.

FROM THE CIRCUIT COURT OF AMHERST COUNTY

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5166

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 8th day of March, 1960.

WILLIAM (BILL) BROWN, ADMINISTRATOR, ETC.,
Plaintiff in Error,

against

GRANDVILLE E. PETERS, ADMINISTRATOR, ETC.,
Defendant in Error.

From the Circuit Court of Amherst County

Upon the petition of William (Bill) Brown, administrator of the Estate of John Brown, deceased, a writ of error is awarded him to a judgment rendered by the Circuit Court of Amherst County on the 14th day of October, 1959, in a certain motion for judgment then therein depending wherein Grandville E. Peters, administrator of the Estate of Douglas Lee Peters, deceased, was plaintiff and Ernest William Ayers and the petitioner were defendants; no bond being required.

* * * * *

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5167

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 8th day of March, 1960.

ERNEST WILLIAM AYERS, Plaintiff in Error,

against

GRANDVILLE E. PETERS, ADMINISTRATOR, ETC., ET AL., Defendants in Error.

From the Circuit Court of Amherst County

Upon the petition of Ernest William Ayers a writ of error is awarded him to a judgment rendered by the Circuit Court of Amherst County on the 14th day of October, 1959, in a certain motion for judgment then therein depending wherein Grandville E. Peters, administrator of the Estate of Douglas Lee Peters, deceased, was plaintiff and the petitioner and another were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

* * * * *

RECORD

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* * * * *

Virginia:

In the Circuit Court of Amherst County.

Grandville E. Peters, Administrator of the Estate of Douglas Lee Peters, Deceased, Plaintiff,

v.

Ernest William Ayers, Route #1, Madison Heights, Virginia and William (Bill) Brown, Administrator of the Estate of John Brown, Deceased, 419 C Street, Lynchburg, Virginia, Defendants.

This the 12th day of October, 1959, came again the parties by their attorneys, and the Court having taken under advisement the motions of the defendants, took time to consider thereof, and now being advised of its judgment, the Court doth overrule the motions of the defendants to set aside the verdict of the jury heretofore rendered in this action on September 8, 1959, in favor of the plaintiff, and it is, therefore, considered by the Court that the plaintiff recover of the defendants the sum of Twenty One Thousand Dollars ($21,000.00), with interest from September 8, 1959 until paid, and his cost by him in this behalf expended, for the benefit of Grandville E. Peters and Mary M. Peters, the father and mother of Douglas Lee Peters, deceased; and the defendants, by their attorneys, duly object and except to the foregoing action of the Court for reasons heretofore stated.

Enter.

C. G. Q.

Entered Law Order Book No. 24 Page 567 Oct. 14, 1959.

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Filed in Clerk's Office Amherst Circuit Court Dec. 8, 1959.

WM. E. SANDIDGE, Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: William E. Sandidge, Clerk of the Circuit Court for the County of Amherst, Virginia.

TAKE NOTICE, That Pursuant to Rule 5:1, §4 of the Rules of the Supreme Court of Appeals of Virginia, the defendant, Ernest William Ayers, by counsel, files his notice of appeal from the final judgment rendered against him and William (Bill) Brown, Administrator of the Estate of John Brown, deceased, defendants, in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas Lee Peters, deceased, by the Circuit Court for the County of Amherst, Virginia, on the 12th day of October, 1959, and within sixty days from the date of final judgment, and assigns errors as follows:

(1) The verdict is contrary to the law and the evidence and without evidence to support it;

(2) The action of the Court in excluding the testimony relative to the prior inconsistent statements made by Fred Martin;

(3) The action of the Court in admitting the prejudicial hearsay testimony of Fred Martin and in refusing page 103 } to grant a mistrial;

(4) The action of the Court in refusing to strike the evidence of the plaintiff at the end of the plaintiff's evidence as to the defendant Ernest William Ayers, on the ground that there was no credible evidence to establish that the defendant Ayers was guilty of gross negligence which was a proximate cause of the collision;

(5) The action of the Court in refusing to strike the evidence of the plaintiff at the conclusion of all of the evidence as to the defendant, Ernest William Ayers, on the ground that there was no credible evidence to establish that the defendant Ayers was guilty of gross negligence and if there were credible evidence of excessive speed, it was not a proximate cause of the collision; that the negligence of the co-defendant's decedent was the sole proximate cause of the collision; and the plaintiff's decedent was guilty of contributory negligence as a matter of law;

(6) The action of the Court in granting instructions Nos. 1 and 2A for the plaintiff;

(7) The action of the Court in granting instructions Nos. A-1, B-1, C-1, D-1, E-1, F-1 and H-1 for the defendant, William (Bill) Brown, Administrator of the Estate of John Brown, deceased;

(8) The action of the Court in refusing to grant instructions Nos. F, M and P for the defendant, Ernest William Ayers; and

(9) The action of the Court in refusing to grant counsel for the defendant, Ernest William Ayers, sufficient time to argue the case.

WM. ROSENBERGER, JR.
Attorney for Ernest William Ayers, 407 First Colony Life Bldg., Lynchburg, Va.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR OF THE DEFENDANT, WILLIAM (BILL) BROWN, ADMINISTRATOR OF THE ESTATE OF JOHN BROWN, DEC'D.

To W. E. Sandidge, Clerk of the Circuit Court of Amherst County:

The defendant, William (Bill) Brown, Administrator of the Estate of John Brown, deceased, by counsel, hereby gives notice, pursuant to the provisions of Sec. 4 of Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia, of his appeal from the final judgment entered for the plaintiff in the above action on the 12th day of October, 1959.

The defendant, Willaim (Bill) Brown, Administrator of the Estate of John Brown, deceased, assigns the following errors to the said judgment:

1. The court erred in refusing to permit State Trooper W. K. Turpin to describe the nature of the damage to the two vehicles involved in this accident, and the appearance of the damage revealed by his own observation of said vehicles.

page 106 } 2. The court erred in refusing to permit the witness R. L. Wilmer to estimate the speed of the

automobile operated by the defendant, Ernest Ayers, and in withdrawing said testimony from the consideration of the jury. Said testimony was competent and relevant evidence upon the issue of the speed of the defendant Ayers.

3. The court erred in refusing to permit the witnesses Lester N. Martin, Jr., and Mrs. L. N. Martin to testify about conversations that Lester N. Martin, Jr., had with the witness Fred Martin in the presence of his mother, Mrs. L. N. Martin, at the Lynchburg General Hospital the night of the accident, and at his home the following Sunday, on the grounds (1) that the utterances of the witness, Lester N. Martin, Jr., as to what he told Fred Martin was a part of the issue in this law suit and was a fact in controversy rendering the evidence of the said Lester N. Martin, Jr., and Mrs. L. N. Martin admissible in proof of the same; and (2) that the evidence of Lester N. Martin, Jr., as to his conversations with Fred Martin at the Lynchburg General Hospital the night of the accident was part of the *Res Gestae* and as such was admissible in evidence.

4. The court erred in refusing to sustain the motion of the defendant Brown to strike the plaintiff's evidence on the theory that the plaintiff failed to prove by proper and competent evidence that John Brown was the operator of his automobile at the time and place of this accident.

5. The court erred in granting Instruction
page 107 } numbered 1 offered by the plaintiff for the reason
that the portion of the instruction dealing with the fixing of the plaintiff's damages with reference to the probable earnings of the decedent Peters was not supported by the evidence.

6. The court erred in granting Instruction E offered by the defendant Ayers for the reason that the language of the instruction dealing with the duties of the defendant Brown if he saw or should have seen the approaching vehicle of the defendant Ayers, in effect made the defendant Brown an insurer of the safety of the plaintiff's decedent, regardless of the speed of the defendant Ayers or where his car was when it was first seen by Brown. The defendant Brown contends that the concluding portion of the instruction reading "if you believe from the evidence that it is as likely as not that such negligence was the sole proximate cause of the collision then you can not return a verdict in favor of the plaintiff, Granville E. Peters, etc. *v.* Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers," not only does not cure the alleged defect in the instruction but was an improper statement of the law tending to confuse the jury to the prejudice of the defendant Brown.

7. The court erred in granting Instruction I offered by the defendant Ayers for the reason that the instruction does not embody a proper statement of the law applicable to this case.

8. The court erred in granting Instruction O offered by the defendant Ayers for the reason that the instruction does not embody a proper statement of the law applicable
page 108 } to this case.

9. The court erred in granting Instruction Q offered by the defendant Ayers for the reason that the instruction tells the jury that the operation of the automobile of the defendant Ayers at a speed of 55 to 65 M. P. H. would not of itself constitute gross negligence, whereas under the facts and the law applicable to this case, the jury could believe that the operation of the defendant Ayers' automobile at a speed of 65 M. P. H. constituted gross negligence.

10. The court erred in refusing to grant Instruction G-1 offered by the defendant Brown for the reason that the instruction embodied a proper statement of the law applicable to this case and that the matter covered in said instruction was a vital part of the defendant Brown's defense not covered by any other instruction.

11. The court erred in refusing to set aside the jury's verdict for the plaintiff against the defendant, William (Bill) Brown, Administrator of the Estate of John Brown, deceased, for the errors assigned and on the grounds that the evidence disclosed as a matter of law that plaintiff's decedent was guilty of contributory negligence which contributed to his death.

Respectfully,

HENRY M. SACKETT, JR.
Attorney for the defendant,
William (Bill) Brown, Administrator of the Estate of John Brown, dec'd.
709 First Colony Life Building
Lynchburg, Virginia.

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Filed in Clerk's Office Amherst Circuit Court, Dec. 8, 1959.

WM. E. SANDIDGE, Clerk.

* * * * *

Virginia:

In the Circuit Court of Amherst County.

Grandville E. Peters, Administrator of the Estate of Douglas Lee Peters, deceased, Plaintiff,

v.

Ernest William Ayers, and William (Bill) Brown, Administrator of the Estate of John Brown, deceased, Defendants.

TRANSCRIPT OF EVIDENCE.

A stenographic report of the oral evidence and other incidents of the trial of the case of Grandville E. Peters, Administrator of the Estate of Douglas Lee Peters, deceased, plaintiff, against Ernest William Ayers, and William (Bill) Brown, Administrator of the Estate of John Brown, deceased, defendants, tried on the 2nd and 8th days of September, 1959 in the Circuit Court of Amherst County, at Amherst, Virginia, before Honorable C. G. Quesenbery and Jury.

Appearances: Paul Whitehead, attorney for the plaintiff.
William Rosenberger, Jr., of counsel, and also guardian *ad litem,* for the defendant, Ernest William Ayers.
William B. Kizer, of counsel, for the defendant Ernest William Ayers.
Henry M. Sackett, Jr. and Preston Sawyer, Jr., attorneys for the defendant, William (Bill) Brown, Administrator of the Estate of John Brown, deceased.

* * * * *

page 4 } Note: On motion of Mr. Sackett, all witnesses present, including the plaintiff and the two defendants, are sworn and all witnesses, except the parties, are excluded from the court room.

OPENING STATEMENT BY MR. WHITEHEAD

May it please your Honor, and you lady and gentlemen of the jury, I represent Mr. Grandville E. Peters who sits at my left and whom most of you know. He has qualified as administrator of the estate of his late son, Douglas Lee Peters, who was a young boy who died in the accident which I will relate the facts we expect to prove in a moment. He died the night of the accident while at that time he was at the age of fifteen.

This suit, as I say, is brought by Mr. Peters, administrator of the estate of Douglas Lee Peters, deceased, against the drivers of the two automobiles involved in this accident. This accident occurred on Saturday night, March the 7th, 1959, around 11:00 P.M. The evidence will show that the drivers of the two vehicles were Ernest William Ayers, this young gentleman sitting here, and the driver of the other
page 5 } vehicle was John Brown, and in this accident John Brown was killed and Bill Brown has qualified as his administrator and he is the other defendant. He is the administrator of the estate of John Brown, deceased. This suit is against either the driver or the administrator of the deceased driver.

Now, the evidence will show in this case that on this night it was a clear night, cold, kind of chilly for that time of the year, and that this accident occurred near Monroe, Virginia on U. S. 29 and I know you all are familiar with it but it is down in the dip which would be just a short distance south of the overhead bridge over the railroad tracks, and it is also just south of a small place on the road called Steve's Tavern, and it also happened at the intersection of U. S. 29 and a secondary road there called State Route No. 671 which leads off, if you are going in a southern direction, to your left up in that hollow.

Now, the evidence will show that U. S. 29 at this point is a three-lane highway around 30 feet of hard surface width, and the course to the point of accident is downgrade, whether proceeding north or proceeding south, and the road runs generally in a northerly and southerly direction.
page 6 } It has been stipulated that these pictures will be introduced and you will be shown a number of pictures when we get into the evidence.

The evidence will show first that the negligence of the operator, John Brown, deceased, was a proximate cause of this accident. He was driving a black 1949 or '50 Ford automobile. He was proceeding in a southerly direction on 29.

Now, the evidence will show that when John Brown came down and was approaching the intersection of 29 and this side road, 671, that the other car involved in the accident driven by Mr. Ayers was south of him but proceeding in a northerly direction and when he got near where this accident happened Brown, without giving any signal, without giving any notice at all, evidently was attempting to make a left turn, but the evidence will show some people he had in the car lived up in that hollow off of that side road and that when Brown came down there he left his right lane of travel, he left his center lane of travel, and he went over into what would have been the left lane of travel, or the northbound lane of travel and the evidence will show that when his car was hit it was hit in the right side. In other words, the evidence will show that he was in the process
page 7 } of making that turn or had gotten around so when this other car hit him he was crossways the road.

Now, the evidence will show that the other car was driven by young Mr. Ayers; that it was proceeding in a northerly direction; that there is a long downhill approach before you get to the point of accident and the evidence will be varied as to his speed. Some will tell you that his speed was 70 or 80 or 90 miles an hour but the evidence will be overwhelming that this car was going at a terrific rate of speed. He was also driving a Ford but a much later model. He was driving a 1956 model Ford automoble, and the evidence will show—say this is the Brown car (indicating a red toy automobile) and this is the Ayers car (indicating a blue toy automobile) and the evidence will show that when the Ayers car came into the Brown car that then it just took the whole right side of the Brown car away. It ripped both the wheels off. It took these wheels and it came in contact in such a way that it took the wheels off the car and hurled the wheels through the air and one of these wheels went a distance, and some upgrade, for about 142 feet and came in contact with a house
page 8 } there which the evidence will show is on the right-hand side of the road going in a northerly direction and that wheel at that time was up in the air and it hit the weatherboarding on the house.

Now, the evidence will show that after that impact then this Brown car when it was hit was heading east and when it wound up it wound up around 80 to 100 feet away, pushed back going in a northerly direction and it was turned around so that when it came to rest it was headed in a westerly direction; that the Ford automobile when the impact took place was going at such speed that then it went on—

The Court: What Ford are you talking about? They were both driving Fords.

Mr. Whitehead: The Ford automobile driven by Mr. Ayers, when it hit it was going at such a speed it continued north down the road for approximately a distance of 125 to 150 feet; that then in the process that car then turned around and was heading back south when it came to rest.

The evidence will show that in this accident that there was John Brown and two women riding with him and all three of those were killed in the accident, and in the other
page 9 } automobile was Mr. Peters, little Douglas Peters who was on the front seat and who was killed and also a young Mr. Woody who was riding in that car. He was killed also, and also in that car was a Mr. Shrader and a Mr. Martin riding also but they were not killed.

Now, the evidence will further show that as this Ford automobile driven by Ayers came over the top of the hill and before it started down the hill, which the evidence will show was somewhere between an eighth and a fourth of a mile downgrade, that not only could you see it was going a terrific speed but the thing was making such a noise which will be described to you as just like it was wide open.

Now, the evidence will further show that this was at night-time and as I say, around 11:00 P.M.

Then, as a result of that accident, as I say, young Douglas Peters was killed.

It is our contention in this case that the driver of the Ford automobile, the 1949 Ford, John Brown, he was guilty of negligence which was a proximate cause of the accident and also that Ernest William Ayers was guilty of gross negligence —This boy was riding with him as his guest—was guilty of gross negligene which was a proximate cause of
page 10 } the accident and that the driver of both cars, or their estates, are liable as a result.

Now, as a result of that accident this young boy has been killed and under the law of the State of Virginia death by wrongful act whenever suit is instituted here is for the sum of $30,000.00.

Now, the evidence will further show that young Douglas Peters was born in 1943, lived at the home of his father and mother which would be over near Price's store; that his father runs that garage near Price's store; that he would have been this year in the ninth grade; that he played in the band; that he was a nice upright high type young boy and he attended the Baptist Sunday School and Baptist Church at Monroe, Virginia.

Now, the court will tell you in its instructions that if you award a verdict for the plaintiff in this case you may award what verdict you think is fair and right and the court will tell you what you may consider and also in this case it will be shown that he was survived by his father, his mother and three brothers and two sisters and when a verdict is received at your hand we ask you to return that verdict in the sum of $30,000.00.

page 11 } OPENING STATEMENT BY MR. ROSENBERGER.

May it please your Honor, and lady and gentlemen of the jury, some of you I know. I am William Rosenberger, Jr. from Lynchburg, and this is Mr. William Kizer who is sitting there with me. He and I represent Ernest Ayers, this young man sitting here. Mr. Sackett and Mr. Sawyer from Lynchburg represent the defendant's administrator of the Brown estate. This man, as I understand it, is the Brown administrator. He wasn't in this accident.

This lawsuit today involves a suit against Ayers, who was the operator of the automobile in which young Mr. Peters was riding. Ayers was the driver coming toward Amherst and the allegation in the lawsuit against Ayers is that he was grossly negligent in causing the death of young Peters and we believe, after you have heard all of the evidence, you will agree that he was not guilty of gross negligence.

The charge is that Brown was guilty of ordinary negligence. There is a substantial difference in law and facts between the two and you will have that differene all the way through.

page 12 } Brown was the driver of the automobile going toward Lynchburg and he is the one that made the left turn in front of the oncoming automobile.

Now, in order that you might have some idea of the location these pictures give you a view. The first one shows 29 looking toward the railroad crossing up there above Monroe, down in the bottom is the road 671, this little bitty secondary road that Brown was going to cut into.

The middle picture was taken on last week. You see the difference it shows all the foilage on the trees but the reason for this is that it shows a close-up of this road that goes over to the east. The tavern you see is right here. It is hidden by these trees and here is the road that goes off just a little bit on the other side of the road from the tavern. This picture shows the tavern and the area beyond. Mr. Whitehead was telling you about a house located close by.

This is the house shown in Ayers' Exhibit No. 2 which is a little white house on the east side of the highway.

Then the pictures at the bottom show a southern view looking toward Lynchburg and that shows a long length of distance as you come over the bridge going
page 13 } down to the bottom to Steve's Tavern in the bottom and in the bottom on the right-hand side as you go toward Lynchburg is Steve's Tavern. The road is right across here. Here is a billboard and you see this in the opposite direction of this, in other words, Exhibit 5 is looking toward Lynchburg with the tavern on this side of the road.

Exhibit No. 6 is looking toward Amherst with the house on the right-hand side of the road. Then Exhibit 6 shows you up this long winding hill in the direction of Lynchburg and, of course, if you are going to Amherst you come down that long hill.

Now, so that everybody will understand this, Ayers was driving the 1956 Ford automobile down this hill toward Amherst. He was approaching this intersection and he doesn't remember exactly the distance that he was away from this automobile when it cut in front of him. His recollection is hazy about it because of the injuries that he got in the accident but he remembers the other car pulling to this lane and he has some recollection of trying to get his foot on the brake and he is not actually conscious of the collision of the two automobiles but the physical facts will show that Ayers was in the northbound lane, in the outside lane;
page 14 } that Brown had come out of this little side road up here beyond this knoll—if you will look at picture, Exhibit 3, you will see that little side road that goes goes up there to the sausage plant, Blankinship's place—Brown had pulled out of that road and come into 29 just ahead of an automobile operated by Preston Garrett. Garrett was going toward Lynchburg and behind Garrett's car was an automobile operated by Jerry Sutton who was also going toward Lynchburg.

Now, Brown pulled out in front of those two automobiles—at least in front of the Preston Garrett automobile, and caused Garrett to slow down and Garrett couldn't tell when he pulled out into the road to come this way—here is your sausage plant over here and this is the little road coming in —Garrett couldn't tell whether he was going to get in the middle of the road or go to the right-hand edge and get off the road but he slowly got over into the right-hand lane as he was going toward Lynchburg, drove partly in that lane and partly in the center lane until he got down to ap-

proximately this little intersection and then he pulled over into the middle lane. Some of them will tell you that Brown stopped that 1949 Ford, an old model Ford; that
page 15 } he stopped in the center lane when Garrett was pretty near over-taking him and passing him on the right, and that Brown pulled out from this stop right in front of Ayers' automobile and Garrett knew he couldn't miss him and Garrett says what he did was to step down on his passing gear, stepped on his gas hard to put it in passing gear and he, Garrett, got just beyond the point of impact before the two automobiles collided, so you had the two lanes coming toward Amherst blocked and that was what Ayers was confronted with. The Brown automobile was right across in front of him and the Garrett automobile was in the southbound lane and Ayers did hit Brown's automobile in the right side just on the back end of the front fender, practically the middle of the front fender, and he had no time, as far as we can tell, to put on his brakes. There were some marks in the road just before the collision, a short mark maybe about a 30 foot mark. He hit this automobile right in the side. It knocked it back about 80 feet and it took the right side off of it. Any automobile going around 55 miles an hour running right square into something you can understand the damage that it did, and the auto-
page 16 } mobile of Ayers continued on toward Amherst in the direction it was going and continued on here and crossed and got over on the side of the road by Steve's Tavern and headed back toward Lynchburg.

I have been told, and I believe the evidence will be, that this boy, Ayers, got out of his car and was asked how he was and he said "All right" and he fell in the road. He doesn't recall those things. He was put in the ambulance and taken to Lynchburg and he was there in the same ambulance with E. W. Woody, Jr. who was riding on the right front seat with him. Now, I think Douglas Peters was riding in the middle of this front seat and I think Mr. Woody was riding in the outside of the front seat. Mr. Woody was just a young boy, E. W. Woody, Jr.

In the rear seat was a boy named Thomas Shrader, in the rear seat of the Ayers automobile, and on the left side of the rear seat was Fred Martin.

Now, of course, Mr. Woody and the young Peters boy died in the collision and the Brown people in the other automobile that pulled across the road right in front died as a result of that collision.

page 17 } I am told that earlier in the evening Ernest, who was a real good friend of E. W. Woody, Jr., met

him at the skating rink there in Madison Heights and then they met Douglas Lee Peters. They had been around in that area and then they went on down to Bill's Barn, which is a restaurant there on the hill north of Lynchburg, and there they met Thomas Shrader and Fred Martin. They stayed there for awhile and decided to leave Fred Martin's automobile there at Bill's Barn and to come out here to Amherst High School to a beauty contest and that is where they were coming about 11:00 o'clock when this collision occurred.

Now, the evidence will be as to the speed by Mr. Garrett who was driving the automobile and he will estimate that Ernest Ayers was going from 60 to 65 miles an hour. There was a fellow named Layne in that automobile who will give an estimate of around 60 miles an hour, and I believe the other man in that automobile was named Manley and I think his estimate will run between 55 and 60 approximately. In other words those three people who were right there estimate that Ayers was going from 55 to 65 miles an hour.

page 18 } The reason that we are defending this lawsuit is that as a matter of law we believe that Ayers was not, as a matter of fact, guilty of any gross negligence in driving down that open highway on his side of the road at the average speed that automobiles drive along there, and that the sole cause of this collision was this man Brown pulling right in front of him, an obvious oncoming motor vehicle, and blocking the road, with another one right on the other side, and that that was the sole cause of the collision and the death of these people.

Now, Fred Martin is the other passenger in the automobile who might know something about the speed. He is a boy that is deaf and dumb and I believe there will be some question as to whether he has formerly said he was going 55 to 60 and he now says he was going at a speed much in excess of that. That will be for you to determine, what he actually knows.

The third automobile following the Garrett car—this third one, is the one also going into Lynchburg. That was the one that Mr Sutton was riding in and he is a fellow who worked out at the B. and W. and he had a Miss Vaughan in the automobile with him and they were coming from a play at Sweet

page 19 } Briar and I think all those two people will be able to tell you is that—number one, Sutton saw it as the thing happened and the automobile coming back down the road toward him, and Miss Vaughan saw it with the Brown automobile occupying the lane in front of the automobile driven by Ayers and that Ayers hit him in the

side. I don't believe that she will be in a position to approximate the speed of the Ayers automobile.

I believe that after you have heard all of the evidence that you will conclude that the sole cause of this thing was John Brown turning that Ford automobile right in front of an oncoming automobile that had a right to expect the lane to be open and for him not to go across the road in front of him.

Thank you!

OPENING STATEMENT BY MR. SACKETT.

May it please the court, and you lady and gentlemen of the jury, you have gathered by now, of course, from the two opening statements thus far made the identity of the several parties involved, where the accident happened and when it happened, and I need not repeat those details to you. You know who I and my associate, Mr. Sawyer, rep-
page 20 } resent. We represent Bill Brown, the brother of John Brown who was killed, and Bill having qualified as administrator of his estate in the Clerk's Office of this court, is one of the defendants in this case.

This unfortunate and tragic accident—and I say that with real conviction because it was unfortunate and a very tragic accident in the sense that five lives were lost as a result of the collision of these two cars—and it becomes our responsibility and it becomes your duty to determine from the facts and the evidence to be presented to you from the witness stand today which, if either, of these parties or their drivers or their estates are responsible to this plaintiff, or whether the plaintiff is entitled to recover of them.

You will hear the testimony from the witnesses sworn and under the instructions of the court you will decide this case but let me say this to you from the standpoint of the defendant Brown—unfortunately everybody in John Brown's car was killed and killed instantly. John Brown is not here to tell you how the accident happened nor are either of the two occupants. The other two occupants were Helen
page 21 } Brown, his wife, and Hattie Elizabeth Brown, his wife's sister.

I think the evidence will indicate rather clearly, as Mr. Rosenberger has pointed out, that John Brown came into U. S. Route 29 from the east side of the highway at a point that has been decribed here as a sausage plant. His destination was to proceed south on 29 and to make a left turn to go into State Route 671, and the evidence will indicate that his purpose in so doing was to take his wife's sister home as she lived up on State Route 671, so the point from which

he came when he came into the highway was just a short distance north of his destination he was destined for and, of course, which he never arrived at. I think the evidence will indicate clearly, and without much contradiction, that John Brown came into the highway, proceeded for a short distance in the southbound lane, then, as the law required, moved into the center lane as he was making preparation for a left turn, and there will be evidence, and I say competent evidence, that he gave the signal required of him by law for that turn. Now, what he was confronted with is the way of his own description as he started to make that left turn is

page 22 } something that neither he nor the occupants of his car are here to tell you but I think the evidence will indicate conclusively that having started into

the middle lane, and having proceeded down to the point where 29 intersected with 671, he either stopped or pulled his car to such a slow movement that it was equivalent of a stop, and having given his signal, then he was confronted with what I think will indicate very, very excessive speed. Now, what his reaction to it was we can only speculate but the evidence will be that this car proceeding north on 29 operated by Ernest Ayers and occupied by these four other boys, one of whom was Peters who was killed, the other Woody who was killed, and two occupants on the back seat, were proceeding north and there is no question about that. The boys had congregated, or some of them had, as Mr. Rosenberger pointed out to you, at the skating rink and they had proceeded from there to Bill's Barn where they had all gotten into Ayers' car and then had proceeded north and in their approach to this intersection, based upon the testimony of speed from one of the occupants of the car itself, and from other facts about which I say there can be no real

page 23 } serious contradiction, that car was traveling at not 60 to 65 miles an hour but some of the testimony will indicate that it was going in excess of 100

miles an hour, but that when they got to this point and Brown having pulled into the center lane to make his left turn, and having given his signal for a left turn, and may have even partially begun his turn, when this car traveling at that rate of speed collided with it. There will be some testimony that he turned partially to his left, and, as I say, when Ayers struck this car it was partially in the center lane, so we say to you after you have heard the evidence in this case, and after you have heard the instructions of this court, you can reach but the one conclusion that speed, excessive speed, was the sole proximate cause of this accident. If you reach that

conclusion you must of necessity return a verdict for the defendant Brown and we think when you have heard the evidence that must inevitably be your conclusion.

Mr. Whitehead: May I put this in the record if I may so it will be in there that William (Bill) Brown qualified in the Clerk's Office of the Circuit Court of Amherst County, Virginia on March 13, 1959 as administrator of the estate of John Brown, deceased, and that Grandville E. page 24 } Peters on the 24th day of March 1959 qualified in the Clerk's Office of the Circuit Court of Amherst County, Virginia as administrator of the estate of Douglas Lee Peters, deceased.

The Court: Allright.

Mr. Whitehead: Now, if your Honor please, we have stipulated and agreed that certain pictures may be put in the record.

The Court: Are they identified?

Mr. Whitehead: I have identified mine, and if it is agreeable with the other gentlemen, I would like to put these in to show the whole thing at one time.

Mr. Rosenberger: That is all right.

The Court: It is agreed that the six pictures on the board and the nine pictures you have in your hand will be admitted.

Mr. Rosenberger: I have already marked my six as Ayers' Exhibits No. 1 through 6 with the direction on each exhibit. They are photographs and are admitted by agreement.

The Court: They are the ones on the board?

Mr. Rosenberger: Yes, sir, and these I hand you are identical copies.

Mr. Whitehead: We agree that these pictures, page 25 } Plaintiff's Exhibit No. 1 through and including Plaintiff's Exhibit No. 9, may be admitted and, if your Honor please, in order to get along, if counsel for the other side have no objection, we can explain very briefly to the court and jury what these pictures represent and that will save time. Do you all have any objection to it?

Mr. Rosenberger: No, sir.

Mr. Sackett: We have no objection.

The Court: All right, but just don't testify.

Mr. Whitehead: Plaintiff's Exhibit No. 1 shows the front of the Ford automobile after the accident which was driven by Mr. Ayers.

Plaintiff's Exhibit No. 2 shows the right front and side of the Ford automobile driven by Mr. Ayers.

Plaintiff's Exhibit No. 3 shows the right front and also the right side of the door of the car driven by Mr. Ayers.

Plaintiff's Exhibit No. 4 shows the left front and the left side of the Ford car driven by Mr. Ayers.

Plaintiff's Exhibit No. 5 shows the right side of the Ford automobile driven by John Brown deceased.

page 26 } Plaintiff's Exhibit No. 6 shows the front of the Ford automobile driven by John Brown, deceased.

Plaintiff's Exhibit No. 7 shows the left side of the Ford automobile driven by John Brown deceased.

Plaintiff's Exhibit No. 8 shows the close-up on the Ford automobile driven by John Brown deceased, showing the hub on the right side of the car.

Plaintiff's Exhibit No. 9 shows the house which the evidence will show at that time was being lived in by Stephen Hutton and which is just north of the intersection of U.S. 29 and 671 on the east side of the road.

Mr. Rosenberger: Ayers' Exhibit No. 1 is a view looking north showing the intersection in the distance. It shows the Hubbard house to the righthand side of the road as you look north and the tavern to the west side of the road. Those marks, I might say, are at another intersection and I don't believe they have any connection with this collision.

Ayers' Exhibit No. 2 is looking north and shows the intersection in the foreground. This photograph is only taken about two weeks ago as you will notice from the leaves on the trees. It shows a skid mark down the center lane.

page 27 } That has nothing in the world to do with this accident and the only reason for the picture is to show you a close-up of the intersection and on the right-hand or east side of the picture you will see the little road called 671 and the Hubbard house there in the right side of the picture.

Ayers' Exhibit No. 3 is taken showing Route 29 north beyond the intersection and it shows the Steve's Tavern on the west side of 29 and the road-way right here beyond this knoll, this little road-way here. That is the one you come in from Blankinship's slaughtering house up there and up here in the distance is the bridge over the Southern Railroad.

Now, Ayers' Exhibit No. 4 shows 29 looking south and the intersection in the distance. I point to this road that Brown had come out of which is to the left side of the picture and on the east side of the road and I point also to the little road that Brown was going into on the east side of the road.

Ayers' Exhibit No. 5 is looking south which shows that intersection right in the foreground. It shows on the west side of the road Steve's Tavern. It shows right here where I have my finger the little road that Brown was

page 28 } going into on the east side of the the road and there is a billboard which you see on the east side of the road.

Ayers' Exhibit No. 6 is a view looking south and that is taken and it shows south on the other side of the intersection. It does not show the intersection but it does show the hill that Ayers was coming down as he was coming from Lynchburg going toward Amherst.

Gentlemen, it is stipulated between counsel that these copies you have holding in your hands are indentical copies with those on the board and we will probably use them interchangeably.

Mr. Whitehead: It is also stipulated that this picture, Exhibit No. 2, has recently been taken and the skid marks in the middle lane has nothing to do with this accident.

Mr. Rosenberger: That picture was made long after the accident and the mark in the road has nothing to do with the accident.

I have no objection to this trooper explaining the pictures.

The Court: He can explain them if he knows what they are.

page 29 } EVIDENCE FOR THE PLAINTIFF.

W. K. TURPIN,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. What is your name?

A. W. K. Turkin.

Q. Where do you live now, Mr. Turpin?

A. Goode, Virginia. That is in Bedford County.

Q. Now, on March the 7th, 1959 were you a member of the Virginia State Police?

A. I was.

Q. And how long had you been a member of the Virginia State Police on active duty prior to that time?

A. Seven years and nine months.

Q. And after that time you continued with the Virginia State Police up to what time?

A. To April 18th of this year.

Q. You were then with them from the time you started out with them continuously until April 18th, 1959 and at that

time you resigned and went back to the County of Bedford?

A. Yes, sir.

Q. Mr. Turpin, on March 7, 1959, in the night-
page 30 } time thereof, were you called to investigate an accident?

A. Yes, sir.

Q. And whereabouts were you when you received the call?

A. Just south of Shrader's Field on 29, as I recall, somewhere between Shrader's Field and the city limits of Lynchburg.

Q. Would you approximate approximately how far you were from the scene of the accident at that time?

A. Approximately five to six miles.

Q. When you got the call did you go straight to the scene?

A. Yes, sir.

Q. You went immediately?

A. Yes, sir.

Q. And do you know approximately what time you received the call?

A. No, sir, I do not. It was approximately 11:00 o'clock or a few minutes after 11:00 o'clock, somewhere between 11:05 and 11:10.

Q. You say you proceeded straight to the scene. Tell us first where did this accident occur?

A. It occurred on Route 29 in Amherst County at the intersection of Route 29 with State Route 671, which is in Monroe, Virginia.

page 31 } Q. Now, is there any place of business anywhere near where the accident happened?

A. Steve's Tavern. It happened just south of Steve's Tavern and about opposite where Mr. Wilmer runs a sawmill. The sawmill was practically just east of where the impact occurred, Wilmer's sawmill.

Q. Tell us what is the width of United States Route 29 in the vicinity of the accident?

A. It is supposed to be 30 feet.

Q. That is approximately correct?

A. Yes, sir, approximately.

Q. Are *are* there shoulders on each side of the road?

A. Yes, sir.

Q. And how many lanes?

A. Three lanes.

Q. Now, does this Route 29 run generally north and south?

W. K. Turpin.

A. Yes, sir.

Q. And this Route 671 which you referred to, is that the road that runs into 29 and leaves 29 going in a easterly direction?

A. Yes, sir.

Q. That road does not cross 29, does it?

A. No, sir, it leads off to the east.

Q. And is that road hard surfaced or is that a
page 32 } secondary road?

A. It is a graveled secondary road.

Q. Now, will you please tell us in your own words what you found when you got there? Let me ask you this, to bring you up: On this night what was the weather condition?

A. It was clear and dry.

Q. What was the condition of the road surface that night?

A. Dry.

Q. Now, this was March 7th. Was it a chilly night or a cold night or a hot night? Do you recall?

A. I don't recall.

Q. All right, tell us what you found when you got there, please.

A. When I arrived at the scene there was a '49 Ford in the ditch with the front headed toward the west, the '49 Ford Sedan, and a 1956 two-tone blue Ford was headed south in the northern entrance to the tavern against the bank, headed south in front of Steve's Tavern or just to the north of Steve's Tavern against the bank.

Q. Now then, at that time did you find any of the occupants of the automobiles or had they been moved then?

A. All of them were there.

Q. Were all of them in the cars or were some out of the cars?

page 33 } A. There were three out of the car in the '49 Ford lying on the ground and four in the '56 Ford at that time when I arrived.

Q. Will you please refer to your notes? Who was the owner of the 1949 Ford?

A. John Brown of Monroe, Virginia.

Q. He was the driver?

A. Yes, sir.

Q. He was the owner and driver?

A. Yes, sir.

Q. And who was the owner and driver of the other automobile?

A. Mr. Ernest William Ayers of Madison Heights, Virginia.

W. K. Turpin.

Q. Would you mind please coming here and looking at these photographs and tell us do they represent the true conditions that you found there on the scene that night?

A. Yes, sir.

Q. I will ask you this so as to speed things up as much as we can: First, from your investigation and the marks on the road could you determine approximately the point that these vehicles collided?

A. Yes, sir.

Q. And with reference to the lanes of travel on 29 approximately what point did they collide?

page 34 } A. In the northbound lane.

Q. And what was the point of collision with reference to where Route 671 intersects 29?

A. Just to the south edge of 671.

Q. Will you please take what is marked Plaintiff's Exhibit No. 10 and explain to the court and jury what that is? Let me hold it like that and you can show the court and jury.

A. This is skid marks you see on the left side.

Mr. Sackett: Have you introduced that?

Mr. Whitehead: I am asking him to identify it now and then I will introduce it.

Q. Do you recognize that picture?

A. Yes, sir.

Mr. Sackett: Why don't you go ahead and introduce them now?

Mr. Whitehead: I will introduce these as Plaintiff's Exhibits No. 10 through 14.

Mr. Sackett: Ask him when the pictures were taken?

The Witness: They were taken at the scene of the accident that night by Trooper Bosworth. I was present when they were taken.

By Mr. Whitehead:

Q. Will you tell them what the pictures show?

page 35 } A. These gouges in the road indicate approximately where the impact occurred. This is the broken line on the northbound side of the road. In other words, there is my car parked off on the shoulder off of the northbound lane and as you see there are skid marks just to the left of that broken line which lead up to the point of im-

W. K. Turpin.

pact there at the scene of the wreck. Approximately from this point over to the right you see a car which is on Route 671 that leads off there to the right. It doesn't show it there.

Q. In other words, in this picture the photographer is looking in a northerly direction?

A. In a northerly direction.

Q. That is Plaintiff's Exhibit No. 10. Now, we will take Plaintiff's Exhibit No. 11. What does that show?

A. That shows the front of Mr. Ayers' car as it was the night of the wreck.

Q. After the accident?

A. Yes, sir, taken on a slight angle on the right side.

Q. Now, with reference to this picture, where is the Ayers car or where was the Ayers car sitting after the accident?

A. Steve's Tavern is approximately at this point. It was sitting directly on the north side of the driveway of Steve's Tavern, the extreme north edge of it.

page 36 } Q. And is there a bank there behind it?

A. Yes, sir, there is a bank to the left.

Q. And the photographer there is looking in a general northerly direction?

A. In a northerly direction and a little to the left getting an angle on the right side of the car.

Q. Now, we go to Plaintiff's Exhibit No. 12. What does that show?

A. This shows the skids here leaving the hard surface. It is taken also a little more on the angle of the left side.

Q. And the photographer is looking in a general northerly direction?

A. Yes, sir.

Q. This is Plaintiff's Exhibit No. 13. What does that show?

A. That shows the Ayers car looking directly into the right side.

Q. The photographer there is looking in a general northerly direction?

A. In a general easterly direction.

Q. I see what you mean. In other words he was looking across the road?

A. Across the road.

Q. Then, here is Plaintiff's Exhibit No. 14. What does that show?

page 37 } A. That shows Mr. Brown's car in the condition I found it and sitting where it was when I arrived. That is looking in a northerly direction and that is the left side of his automobile.

W. K. Turpin.

Q. And the car is facing after it came to rest in what direction?

A. In a westerly direction headed toward the Town of Monroe, the front of it was facing toward the railroad tracks at Monroe.

Q. Then when it was at rest was it facing across 29?

A. Directly across 29, yes, sir.

Q. Now, with reference to this Ford automobile driven by Brown, the '49 Ford in Plaintiff's Exhibit No. 14, where is that car sitting with reference to the road? Is it sitting over on the east shoulder or the west shoulder?

A. On the east shoulder.

Q. On the east shoulder and headed west?

A. Yes, sir.

Mr. Whitehead: If I may I will let the jury look at these now in the same order that I introduced them.

Note: Mr. Whitehead hands the photographs to the jury one at a time for their inspection.

Q. Mr. Turpin, will you come around here and look at these pictures that have been introduced in evidence
page 38 } by the defendant Ayers? So that we will get it clear before the court and jury in this case, Exhibits 1, 2 and 3 were taken with the photographer looking north and 4, 5 and 6 were taken with the photographer looking south. Is that correct?

A. Yes, sir.

Q. Now I want to ask you this: Take this defendant's Exhibit No. 1 or this Exhibit No. 2, is that the side road that leads up into that hollow on 671?

A. Yes, sir.

Q. And also Defendant's Exhibit 1, Avers' Exhibit 1, is that the house shown right there which is just north of the road?

A. Yes, sir.

Q. It is on the right-hand side going in a northerly direction just past 671, isn't it?

A. Yes, sir.

Q. And also in these pictures you have referred to Stephen's Tavern. Now, that is right there, is it not?

A. Yes, sir.

W. K. Turpin.

Q. And that, as you say, is just a short distance north of the entrance to 671, is it not?

A. Yes, sir.

Q. And looking in a southerly direction this is Stephen's Tavern there, is it not?

A. Yes, sir.

page 39 } Q. And then the entrance along there is the entrance of 671, is it not?

A. Yes, sir.

Q. Does this picture, No. 1, looking in a northerly direction, does that show the road leading down to the point of accident?

A. Yes, sir.

Q. That is the road right there. Also this picture right here shows the view leaving the railroad bridge going down to the point of accident, does it not?

A. Yes, sir.

Q. Mr. Turpin, when you got there who was in the Ayers automobile at that time?

A. Mr. Peters, Mr. Woody, Martin and Mr. Shrader.

Q. Mr. Shrader and Mr. Martin were on what seat in the car? Where did you find them?

A. In the back.

Q. And you found Douglas Peters and young Mr. Woody in the front seat. Is that right?

A. Yes, sir.

Q. Now, when you got there was Mr. Peters at that time? Did he say anything to you or was he unconscious?

A. He was unconscious. He was in the front seat in the center.

Q. Did you see Mr. Ayers?

page 40 } A. Yes, sir. He was lying outside the automobile on the hard surface directly beside the car.

Q. You stayed there and made a complete investigation. Did you saty there until the ambulance came and moved all the people?

A. Yes, sir.

Q. Now, will you tell us, please sir, from the point you determined as the point of impact what the measurements were from that point down to where you found the Brown automobile—that is, the 1949 Ford?

A. Yes, sir.

Q. Would you please tell us what distance that was?

A. It was 81 feet.

W. K. Turpin.

Q. And you found that car 81 feet from the point of accident over on the east shoulder of the road facing west?

A. Yes, sir.

Q. Then with reference to the Ayers automobile, the 1956 Ford automobile, from the point of impact what distance was it to that automobile?

A. In a straight line it was 129 feet but following the way I thought it went to where it was sitting it was 167 feet.

Q. Could you trace the skids from the point of impact to where it came to rest?

A. Yes, sir.

page 41 } Q. And I believe you just testified that that car, the rear of it, was kind of up against that bank or near that bank and that it was heading in a general southerly direction over on the west shoulder of the road?

A. Yes, sir.

Q. Now, do you recall as to where the Brown automobile was sitting? Is there any marker or anything to indicate where that was, anything like a highway marker or a post? Do you recall anything like that?

A. No, sir, I don't.

Q. Then after you made your investigation later on you went over to Lynchburg General Hospital, didn't you?

A. Yes, sir.

Q. When you arrived at the hospital was the little Peters boy living then?

A. No, sir.

Q. He was dead?

A. Yes, sir.

Mr. Whitehead: All right, gentlemen.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Turpin, will you come up here? Mr. Turpin, I refer to Plaintiff's Exhibit No. 2 which you have described as showing the gouge mark in the northbound lane

page 42 } which would be the Ayers car lane of travel.

A. Excuse me. That is No. 10. You said No. 2.

Q. It is No. 10. Will you take this pen and mark on that exhibit the gouge mark in the road that was caused at the time

W. K. Turpin.

Note: The witness does as requested.

Q. What about this mark shown in the picture? Is that a gouge mark?
A. No, sir, that is not.
Q. Now, would you take your pen and draw the skid marks that you designated in that picture? Make the pen follow along the skid marks.

Note: The witness does as requested.

Q. Will you tell us whose skid marks you have just traced with that straight line?
A. Mr. Ayers'.
Q. They are Mr. Ayers' skid marks?
A. Yes, sir.
Q. The one I point to in the northbound lane, is that the right wheels?
A. That was the right side of the Ayers car.
Q. And the wheel on the left side, that is the one I mark down here with a pen?
A. Yes, sir, that is the left side of the Ayers car.

page 43 } By the Court:
Q. Did those marks continue on to where you found the Ayers car?
A. Yes, sir. They continued from this point to where I found his car.

By Mr. Rosenberger:
Q. You say they continued but they were not continuous skid marks but scoured marks and things like that?
A. Skid marks and scoured marks together.
Q. I don't know if the jury understood you to reply that this mark was a straight continuous skid mark to the point Ayers stopped.

The Court: I meant was there something to guide him to the other car.

By Mr. Rosenberger:
Q. Will you tell us the approximate distance between the right tire mark and the left tire mark in feet? You have got them on the picture but what is the width between those two marks?

W. K. Turpin.

A. I think it is about four and a half feet. I don't recall exactly.

Q. If you will, hold that a minute. Looking at Plaintiff's Exhibit No. 10 which you show to be the various marks and tire marks in the northbound lane of Ayers, then looking at Plaintiff's Exhibit No. 5 which is the right side

page 44 } of the Brown car, where was the extreme right point of impact on the Brown car?

A. Just behind the right front wheel.

Q. Is that shown here on this fender?

A. Yes, sir.

Q. What did that point of impact in that fender indicate to you went in there? What did it look like?

A. It appeared to be a headlight.

Q. The right headlight of the Ayers car?

A. Yes, sir.

Q. Where I make this pen mark right around there is the mark you refer to, is it?

A. Yes, sir.

Q. Now, if the Ayers car right headlight went into it at that point there was no damage to the right of it?

A. No, sir.

Q. Then the right side of the Brown automobile was further over in the northbound lane than the point of impact, wasn't it?

A. Yes, sir.

Q. Assuming that the right headlight of the Ayers automobile was approximately over the right tire mark then and that went into the right side of the Brown automobile, then the Brown automobile extended about how much further into the northbound lane?

page 45 } A. Three or four feet.

Q. About three or four feet from the front back to that point?

A. Yes, sir.

Q. So, based on the physical facts and the road there, the Brown automobile approximately occupied the northbound lane at the time of the impact?

Mr. Sackett: If your Honor please, he is going too far with the witness. He is testifying himself.

The Court: He is drawing conclusions.

Mr. Sackett: Let the witness testify to the facts.

W. K. Turpin.

Mr. Rosenberger: He has testified to what he saw. If Mr. Sackett objects I will not press the point further.

Q. This is Plaintiff's Exhibit No. 6 which shows the front end of the Brown automobile, doesn't it?

A. Yes, sir.

Q. That apparently was not involved in the accident, was it?

A. The front part, no, sir.

Q. You said that John Brown was the owner and operator of that vehcile at the time?

A. Yes, sir.

page 46 } Q. How did you determine John Brown was the operator?

A. It has never been definitely established he was the operator. We are assuming he was from where his body was found and he was the owner of the automobile. He was the only one that had an operator's license that was in the car.

Q. Plaintiff's Exhibit No. 14 shows the Brown automobile to the east side of the highway and north of the point of collision and headed west toward Monroe?

A. Yes, sir.

Q. Tell us, if you will, where John Brown's body was.

A. It was directly under the left rear portion of the '49 Ford, under his car.

Q. Will you say that again and point to the Ford where he was?

A. This is the car. He was found back in this vicinity under the left corner of his car. His body was face down and the car was resting on him, the back bumper was resting on his body.

By the Court:

Q. Where were the two women?

A. One lady was approximately 16 to 18 feet from the automobile further south and there was a dog lying along here and then there was one colored lady just north of the automobile lying in the ditch.

page 47 } By Mr. Rosenberger:

Q. If she were north of the automobile then that would put her on the right side of the automobile?

A. Yes, sir.

Q. Do you know her name?

W. K. Turpin.

A. No, sir.

Q. Do you know the name of the woman that was approximately 15 feet north of the Brown Ford automobile?

A. No, sir. One of them was named Helen Brown and the other one was named Elizabeth Brown.

Q. But you can't tell from recollection which one was where?

A. No, sir, not right now I can't.

Q. When you spoke of the fact that John Brown was to the left rear of the automobile with the rear bumper on his body was he between the rear wheel and the bumper?

A. Yes, sir.

Q. Was any part of his body extending out to the left of the automobile or was it all under the automobile?

A. It wasn't all under it as I can recall, just the upper portion of his body.

Q. And his feet were out?

A. Yes, sir.

Mr. Rosenberger: That is all I care to ask Mr. Turpin at this time.

page 48 } CROSS EXAMINATION.

By Mr. Sackett:

Q. Trooper, with reference to Plaintiff's Exhibit No. 10, the picture about which you have just been asked questions by Mr. Rosenberger on cross examination, and upon which you have indicated skid marks which you attribute to the vehicle operated by the defendant Ayers, I will ask you if, based upon that picture and those skid marks, that would indicate to you that the Ayers car was partially in the center lane when the accident happened?

A. The left side was approximately one foot over toward the center?

Q. So his car, to that extent, was partially in the center lane when this accident happened?

A. Yes, sir.

Q. Based upon those skid marks do they indicate that he was turning the vehicle either to the left or to the right?

A. It appeared from the collision that his automobile was swerving to his left. From the appearance of his car it appeared he cut his automobile sharp to the left.

W. K. Turpin.

Q. Would you indicate from this picture how you arrived at that conclusion?

A. It was not by this picture.

Q. Based on this picture, would this picture indicate he was turning his vehicle to the left or right?

page 49 } A. It appeared there that he was practically in a straight line.

Q. And that it was partially in the center lane when the accident happened?

A. Yes, sir.

Q. My questions are directed to you now with reference to Plaintiff's Exhibit No. 14. Mr. Rosenberger asked you who was driving and how you could determine John Brown was driving this automobile and I understood your answer to be that you didn't know who was driving; that your conclusion was based on the deductions from the position where the body was found and that he had an operator's license?

A. Yes, sir.

Q. You do not know who was driving the car?

A. No, sir.

Q. And you have assumed thus far that Brown was driving and you have placed Brown when you arrived at the scene approximately at the left rear corner of the Brown car?

A. Yes, sir.

Q. But you found other occupants of that car further south of that car than you did Brown, did you not?

A. Yes, sir.

Q. And you don't know who that was?

A. No, sir.

Q. This woman was some 15 feet south of that

page 50 } car and further south than Brown?

A. Yes, sir.

Q. Mr. Turpin, would you describe the nature of the damage—of course, the pictures speak for themselves, but based upon your investigation, your own observation of the two cars involved, would you describe to the jury how the metal appeared to you and what appearance the damage to the two cars gave?

Mr. Rosenberger: I object to the question. It calls for a conclusion that is beyond this man's ability.

The Court: He can state what he saw.

Mr. Sackett: That is all I am asking, how the metal appeared.

W. K. Turpin.

Q. From the way the metal appeared and based upon your observations of the physical damage to the car will you describe how it was damaged?

Mr. Rosenberger: I think that calls for an opinion of a metallurgist.

The Court: He can say how the car was damaged, on which side and to what extent.

Mr. Sackett: And I am asking him to say how that damage appeared to him, to transmit to the jury the damage to the two cars.

Mr. Rosenberger: If your Honor please, we
page 51 } have about 14 pictures of the car and the jury
can determine what the damage was.

The Court: I think the jury will have to draw its own conclusions, Mr. Sackett.

Mr. Sackett: I am not asking this witness to draw any conclusions. This man was charged with the official investigation of this accident. He went there and he examined the cars closely. He examined them, I assume more closely than did a photographer who was standing back some distance from them.

By the Court:

Q. Did you observe any damage to the cars that wasn't portrayed in the pictures?

A. No, sir.

The Court: I think that is the answer, the only answer he could make, and anything in addition would be some expression of opinion as to what the damage might mean and, of course, I think that is up to the jury to draw their own inferences.

Mr. Sackett: If your Honor please, I respectfully except to the court's action because I am asking him not to express any opinion but just to express to the jury what his observa-
tions of the two cars revealed in the way of dam-
page 52 } age. Of course, the pictures speak for themselves.

The Court: Mr. Sackett, I can't see a bit of difference in that and what the pictures reveal.

Mr. Sackett: It may be the pictures were taken 15 or 20 feet from the car. This man looked at it from a distance of two to three feet.

W. K. Turpin.

By the Court:

Q. Can you throw any light on the damage to the cars that is not revealed in the pictures?

A. No, sir.

Mr. Whitehead: We respectfully except to the court's action.

Mr. Sackett: That is all, your Honor please. We have summonsed him as a witness for the defendant and reserve the right to put him back on the stand.

Mr. Rosenberger: We have done the same thing, your Honor.

RE-DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Let me ask you this, Trooper Turpin: From your observation of the cars, with reference to the motor, was the motor where it would ordinarily have been after the accident or was it pushed backwards or forwards?

page 53 } A. The Ford driven by Ayers had its motor pushed backwards.

Q. That would be back toward the dash?

A. Back toward the dashboard where the driver sits.

Q. Now, Mr. Rosenberger asked you, and I believe Mr. Sackett asked you something, with reference to where you found John Brown's body. Do you have a picture here that was taken showing exactly where Brown's body was after the accident?

A. Yes, sir.

Q Will you show that to the jury?

The Court: Let counsel see it. Was this taken before the body was removed?

The Witness: Yes, sir.

Mr. Whitehead: We would like to offer this as Plaintiff's Exhibit No. 15.

The Court: Mark that Exhibit No. 15.

By Mr. Whitehead:

Q. Does that show the rear of the Ford automobile, the Brown automobile?

A. Yes, sir.

Q. And what is the little white mark here?

W. K. Turpin.

A. That is a post, either a highway post or a post of some other kind.

Q. It is a white marker, a highway post, is it not?

A. I don't recall whether it is a road marking
page 54 } post or whether a guard rail post.

Q. This picture shows the left door is open?

A. Yes, sir.

Q. And is this the body of John Brown?

A. Yes, sir.

Q. And that is shown in the picture to the left here of the center, is it not?

A. Yes, sir.

Q. Now also a question was asked you where was the body of one of the women and I believe you testified you didn't know which one was which. Have you got any pictures showing where the body of any colored women were?

A. Here is a picture showing the body of one.

Q. Would you please show that to counsel?

By the Court:

Q. Does this picture show where she was when you arrived and before the body was moved?

A. Yes, sir.

By Mr. Whitehead:

Q. Now, you say you don't know which one of the women that was?

A. No, sir.

Mr. Whitehead: We would like to introduce that picture as No. 16.

The Court: Mark that Plaintiff's Exhibit No. 16.

page 55 } By Mr. Whitehead:

Q. This is where you found the Brown automobile sitting when you arrived there?

A. Yes, sir.

Q. And that picture of the colored woman, is that where you found her when you arrived?

A. Yes, sir.

Q. And this picture shows the right side of the car?

A. Yes, sir.

Q. Let me ask you one more question. With reference to the Brown automobile, the '49 Ford, was the right side of that

damaged so you couldn't get in or out of the car?
A. Yes, sir, the right side was all open.
Q. Could you get up in the car? Was it damaged in there so you could sit down?
A. It was severely damaged inside of the automobile.

Mr. Whitehead: That is all.

The witness stands aside.

page 56 } THOMAS (STEVE) HUBBARD,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:
Q. Your name is Mr. Steve Hubbard?
A. My name is Thomas Hubbard. Steve is a nickname.
Q. What is your age?
A. I will be 31 this month.
Q. You are actually 30 right now?
A. That is right.
Q. Now, where do you live, Mr. Hubbard?
A. I live now on the Victory Airport Road back of Price's store.
Q. In Amherst County?
A. In Amherst County. That is right.
Q. On March 7th, 1959, and up to around September the 1st, just before September the 1st, where were you living?
A. I was living in a home where this accident occurred, in the house right on the corner.
Q. Will you come here so we can get it straight, please sir, and tell us where it is on these pictures? Is that the home right there that you were living in?
A. That is right.
Q. In that home right there?
page 57 } A. Yes, sir.
Q. Now then, if you are standing out in the intersection and looking in an easterly direction toward the intersection of 29 and 761, at that intersection is that your home shown in Plaintiff's Exhibit No. 9?
A. That is right.
Q. Now, on the night of this accident, March 7, 1959, where were you living at that time?
A. I was living in that home right there.

Thomas (Steve) Hubbard.

Q. Were you at home that night?
A. Yes, sir, I was.
Q. Had you gone to bed?
A. I had just gone to bed.
Q. Now, taking this picture here, and showing this window on the right side of the house, whereabouts was your bedroom in that house?
A. Right at that window.
Q. Had you gone to bed and were the lights out?
A. I just had cut them out when the accident happened.
Q. Then will you please sir tell us what you heard out there?
A. Well, I heard this awful impact. It sounded like I would say two railroad cars jammed together at all at once something hit my window and I jumped out of my bed and run to the door and saw this accident and all the people
page 58 } laying in the road.
Q. Have you stepped off from about the middle of the intersection—that is, the middle of the intersection of 761 and 29, in a straight line and up this hill and down this hill to your house?
A. Yes, sir.
Q. Could you tell us how many of your steps it was?
A. I stepped 44 steps as large as I could make them. I would say it is approximately 142 or 143 feet.
Q. You say you heard something hit your house?
A. Yes, sir.
Q. What was that?
A. That was the tire that was torn off of the '49 Ford.
Q. Did it make any mark on your house?
A. Yes, sir, it left the whole tread of the tire on the side of the house.

By the Court:
Q. It left an imprint of the tread?
A. Yes, sir, an imprint of the tread.

By Mr. Whitehead:
Q. Will you look at Exhibit No. 9 and tell the jury whether or not it can be shown in this picture the imprint of that tread?
A. Yes, sir, it can be shown in that picture.
page 59 } Q. Will you please get around here and point it out to the jury, the imprint that is on there now?
A. That is the imprint right there.

Thomas (Steve) Hubbard.

Q. What was that other thing?
A. That is the light meter registering my lights at home.

By the Court:
Q. How do you know that wheel of the Brown car hit your house?
A. That is the only one that was off.

By Mr. Whitehead:
Q. When you got out there where was that wheel with reference to the house?
A. The wheel had bounced off my house and was laying back approximately five feet from the house.
Q. Is it downgrade from the house?
A. Downgrade, that is right.
Q. Did you find any other wheels in your yard?
A. I found two other wheels in my yard.
Q. Do you know what they came off of?
A. They also came out of the '49 Ford.
Q. And where did you find those? Were they laying in your yard all together with the one that hit the house?
A. They were not right together.
Q. You found three wheels?
page 60 } A. Three wheels.
Q. Now then, what kind of board is that on the house?
A. Ordinary weatherboard.
Q. Could you tell us approximately, standing on the ground, how far from the bottom of the cement up to where you say that mark was. how many feet it was up there?
A. From the ground to the cement or from the top of the cement?
Q. I am talking about from the ground, how far up was it?
A. I would say about three and a half or four feet.
Q. And you say your bedroom is where this one window is shown here?
A. That is right.
Q. Now, as soon as the impact took place and you heard this noise what did you do, Mr. Hubbard?
A. Well, I got out of the house and got my light and ran across the yard to where the '49 Ford was sitting. The back end of it was sitting in the ditch and I saw these colored people laying there dead or about dead when I got there.
Q. Then did you go to the other car?

Thomas (Steve) Hubbard.

A. Mr. Manley, the boy who followed these colored people down the road, said somebody was—

Q. You can't tell what was said but what did you do?

page 61 } A. I went to the house and got blankets and put over the colored people. Then I saw this other car in front of Mr. Stephen's Tavern and I also got blankets and put on those people laying there in the road.

Q. When this thing occurred had you actually gotten to sleep?

A. No, sir, I wasn't asleep. I had just reached and cut the bedroom light out when the accident happened.

Q. Did you then wait there until the officers came?

A. Yes, sir, I was there until the whole thing was over with.

Mr. Whitehead: All right, gentlemen.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Hubbard, I probably misunderstood you. Did you say you found three tires or wheels off of the '49 Ford that had been operated by Brown?

A. Yes, sir, I did that. Now, one of them could have been a spare. The trunk at that time was open when I got there. It could have been the spare in the trunk.

Q. It could have been a spare in the trunk. That would have been two then and I understood you to say you found three?

page 62 } A. I found three wheels in the yard. That was two off the car and it could have been the spare in the trunk made three.

Q. Will you come up here? Here is the Ford automobile in Plaintiff's Exhibit 15 and that is the left rear wheel that is on there now, isn't it?

A. Yes, sir.

Q. That is the left rear right there. Plaintiff's Exhibit No. 14 shows the left front wheel on, doesn't it?

A. That is right.

Q. So that is two still on the Ford. Plaintiff's Exhibit 16 shows the right front wheel is still on there?

A. It was three in my yard.

Q. Is that the right front wheel?

A. That is it right there.

Q. So then, the damage to the left front of the automobile indicates there were three wheels still on the automobile.

Thomas (Steve) Hubbard.

Plaintiff's Exhibit No. 5 also shows a wheel on the right front and the only one any picture shows that is missing is the right rear wheel?

A. Yes, sir.

Q. When you were telling Mr. Whitehead three wheels were off you didn't mean to tell the jury three wheels were knocked off the automobile?

A. Three wheels were found in my yard.

Q. You don't know where they came from?

page 63 } A. No, I couldn't say definitely where they came from.

By the Court:

Q. You do know one hit your house?

A. I do know one hit the house.

By Mr. Rosenberger:

Q. And where the other two came from you don't know?

A. No, sir, I do not.

Q. You say you got blankets and put over the colored people that were in the road and then there were some people in the road over there by Stephen's Tavern. It was only one boy in the road over there, wasn't it?

A. During an accident like that you know you get excited and you can't tell about this, that and the other right off.

Q. I understand that that is the reason and I want you to be real careful about what you tell us. The State Trooper told us there were four people in the Ayers Ford when he got there, the one at Stephen's Tavern. You know what I am talking about?

A. Yes, sir.

Q. And that there had been one other boy in the car, which was Ayers, and I understand he was out on the road. Do you have any recollection of covering up anybody else in the road. any white fellow other than the Ayers boy?

A. I covered up Mr. Ayers.

page 64 } Q. He was lying in the road?

A. Lying in the road.

Q. And he was unconscious at the time, wasn't he?

A. Yes, sir.

Q. And he didn't, of course, realize you were covering him up?

A. No, sir, I don't imagine so.

R. L. Wilmer.

Mr. Rosenberger: Thank you, sir.
Mr. Sackett: No questions.

RE-DIRECT EXAMINATION.

By Mr. Whitehead:
Q. I will ask you to look at this picture and see whether or not there are two white boys or one white boy in the road in that picture.
A. Well, in that picture it is two.
Q. Did you cover up both of those boys?
A. I would say this is Mr. Ayers here. I just don't know. From the pictures I can't say but I covered up Mr. Peters after they took him out of the automobile. I would say it was Mr. Peters.
Q. Before the ambulance got there they took the Peters boy out of the automobile?
A. Yes, sir, and I covered him up.

page 65 } By Mr. Rosenberger:
Q. He was out of the car when you covered him up?
A. Yes, sir.

By Mr. Whitehead:
Q. Did you notice in the excitement that night whether or not there were any wheels or tires left in the trunk of the automobile?
A. No, sir, I did not notice any tires but there was not any wheels left in the trunk.
Q. But before the accident you don't know what was in the trunk?
A. No, sir, I do not.

The witness stands aside.

R. L. WILMER,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:
Q. Mr. Wilmer, where do you live?

R. L. Wilmer.

A. At Monroe.
page 66 } Q. What are your initials?
A. R. L. Wilmer.

Q. Now, so as to make it clear to the court and the jury, would you mind coming around here just one minute so we can show them where you live. Now, this is Ayers' Exhibit No. 5 and the photographer here is looking in a southerly direction. Can you understand that?

A. Yes, sir.

Q. And right here is Stephen's Tavern?

A. Yes.

Q. Where is your home?

A. It must be over there.

Q. That is your home. Look at it. Can you see it?

A. It looks to be.

Q. Is that your home sitting up there?

A. Yes, sir. That is my home.

Q. Now, here is a closer up view. This is your home right here?

A. Yes, sir.

Q. And also when you are looking in this No. 1, looking in the direction of Amherst or in a northly direction, is that your front yard there?

A. Yes, sir, that is my front yard.

Q. Let me ask you this: Looking at your home up here would you tell us whereabouts is your bedroom?
page 67 } A. It is on the south side upstairs.
Q. Would that be on the side toward 29 or away from 29?

A. That is on the side toward 29.

Q. And was your bedroom on the front of the house?

A. Yes, sir.

Q. You say it was upstairs. That would be on the left front corner. Is that right?

A. That is right.

Q. Now, on March 7, 1959, the night of this accident here in question, had you gone to bed before the accident occurred?

A. Yes, sir, I had gone to bed.

Q. Now, just before the accident would you please tell the court and jury what you were doing and what you observed or heard just before and at the time of the accident, if you heard or saw anything?

A. Well, I just got up and went to the bathroom. That is what I was doing up.

R. L. Wilmer.

Q. Where is your bathroom with reference to your bedroom?

A. It is right straight across the hall, and I come in and snapped the light out and walked up at the window and I heard this roar of this car and just a few minutes it struck something down there. I could just see the lights and that is

page 68 } all.

Q. You saw the lights of which car?

A. This car coming down the road.

Q. Which way was it going?

A. It was going north.

Q. You say you heard a roar. What do you mean by a roar?

Mr. Rosenberger: I object to the leading question.

By Mr. Whitehead:

Q. You say you heard a roar. Did you see lights of the automobile?

A. I saw lights of the automobile. I was standing at the window.

Q. Did you see the lights of the car long enough to give an estimate in your opinion as to how fast the car was going?

A. I don't know how fast it was going.

Mr. Rosenberger: I object to anything further. He has answered the question that he didn't know how fast it was going.

Mr. Whitehead: He hasn't finished.

The Court: Go ahead. He can explain his answer.

page 69 } By Mr. Whitehead:

Q. Can you tell us whether or not in your opinion what speed, in your opinion, the car was going?

A. I really couldn't tell but it was really going fast. It seemed to be over the speed limit.

Mr. Rosenberger: I object to any further questions. He is leading the witness.

The Court: He is speculating from here on.

Br. Mr. Whitehead:

Q. Did you see the lights of the automobile?

A. Yes, sir.

Mr. Whitehead: I want to ask him whether or not in his

opinion he could give us an estimate of the speed the car was going.

The Court: You have asked him that two or three different ways and he has answered the best he could. I think that is as far as he can go. You are trying to put words in his mouth.

Mr. Whitehead: May I get it in the record in the absence of the jury?

The Court: Yes, sir.

(In Chambers)

By Mr. Whitehead:

Q. Mr. Wilmer, with reference to the car that you say you heard roar and saw the lights of did you see the page 70 } lights of that automobile long enough to give us an estimate of approximately in your opinion what speed it was traveling?

The Court: You have asked him that once and he has answered it.

By Mr. Whitehead:

Q. Can you give us an estimate of what speed it was traveling?

A. Awfully fast, probably 80 or 90 miles an hour from the way it looked to me, the lights. The lights is all I seen. I was standing by the window.

The Court: You asked him three or four times and he couldn't give an estimate in miles and you kept hammering on him and I think you led him into expressing opinion.

Mr. Whitehead: In all fairness, I went to see him the other night and that is what he told me then; that in his opinion it was going 80 or 90 miles an hour.

Mr. Rosenberger: But on the witness stand he said he didn't know exactly the speed.

The Court: I won't let it in.

Mr. Rosenberger: If your Honor please, I further move that any evidence that this man gave in regard to speed be stricken out because it is purely speculative and descriptive of what he tried to see at a long distance at night-page 71 } time and he wasn't in a position to judge it.

The Court: I think the answers he has given up to this point are all right.

R. L. Wilmer.

Mr. Rosenberger: We except for the reason stated. We don't think it is reliable enough to go to the jury.

Mr. Whitehead: And we want to except to the court's ruling in not permitting the witness to give his opinion. He said before he couldn't say exactly.

The Court: He is your witness. You asked him three times and he said he couldn't say. On one occasion he said he thought it was going faster than the speed limit. Only by repeatedly asking the man you led him into saying something which I think is unreliable under the circumstances. He was looking out of the window at night and saw some lights flash. I have been driving a car for 40 years and I couldn't say how fast a car was going at night by just seeing the lights.

Mr. Whitehead: You could give an estimate whether it was going 50 or 80?

The Court: No, I could not.

page 72 } Mr. Sackett: If your Honor please, I unite in this exception Mr. Whitehead has just taken so far as the exclusion of the testimony just taken.

Note: The examination of the witness is resumed in the court room in the presence of the jury.

By Mr. Whitehead:

Q. Mr. Wilmer, as shown on the picture which you have identified your home on, Ayers' Exhibit No. 6, and also in this picture No. 5, would you tell us approximately what is the distance from your bedroom window where you say you were standing out to the hard surface of 29?

A. Well, I would say about 250 feet. That is just a guess now.

Q. Then on that night was your bedroom in your room open or closed?

A. You mean the door?

Q. No, the window?

A. The window was *raied* up about a foot from the bottom.

Mr. Whitehead: All right.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Wilmer. you remember seeing me yesterday when I

R. L. Wilmer.

came to your house and you were sitting by the
page 73 } shed under that oak tree in the shade?
A. Yes, sir.
Q. When I came I told you I was checking to find out if anybody knew anything—

Mr. Sackett: I object to this. This lawyer is undertaking to testify himself now.
Mr. Rosenberger: I am asking him a question leading up to what I think is proper to show.
Mr. Sackett: If he undertakes to testify he should get on the witness stand.
The Court: He can answer him if he asked a certain question and what his answer was.

By Mr. Rosenberger:
Q. Mr. Wilmer, my question to you was, or my statement to you was that I was checking to find out if anybody knew anything about this collision that happened down there at the intersection, wasn't it?
A. Yes, sir.
Q. And didn't you at that time tell me that you had gone to bed and didn't know anything about it?
A. No. The boy spoke up and said he had gone to bed and didn't know anything about it. You asked me wasn't I out on the porch at 11:00 o'clock at night and seen this wreck and I told you no, that I wasn't.
Q. Then didn't I ask you if you knew anything about it?
page 74 } A. I told you very little.
Q. You didn't tell me at that time that you saw the Ford go by, did you?
A. No, I didn't. You didn't ask me.
Q. You knew I was up there to try to find out.

The Court: Don't argue with the witness.

By Mr. Rosenberger:
Q. You knew why I was there?
A. No, I didn't, and I didn't ask you either.
Q. I told you when I got there, didn't I?
A. You told me something.
Q. I told you I was there to try to find out anything that anybody knew about the collision, didn't I?
A. Yes.

R. L. Wilmer.

Q. And did you tell me you were up at the time the collision happened?
A. No I didn't tell you. You didn't ask me.
Q. Did you tell me you heard the Ayers car go by?
A. No, I don't think you asked me that.
Q. Did you tell me at that time that you heard the collision happen?
A. No.
Q. Did you tell me at that time that you saw the lights of the Ayers car?
A. No, I didn't.
page 75 } Q. Did you tell me at that time you heard the roar of the Ayers car?
A. No, sir.
Q. As a matter of fact, you didn't tell me anything, did you?
A. I told you very little.
Q. What did you tell me?
A. Well, I just told you I didn't know much about it and you were trying to find out.
Q. And you were not going to tell me anything?
A. Well, I didn't tell you.
Q. And you knew I was a lawyer interested in the case and that was what I was there for, to find out what you knew?
A. No, I didn't know what you were there for.
Q. How far is your bedroom where you were from where this collision occurred?
A. Well, it is a right good ways. I have never measured it.

Mr. Rosenberger: That is all.

CROSS EXAMINATION.

By Mr. Sackett:
Q. Mr. Wilmer, questions have been asked you now by both Mr. Whitehead and Mr. Rosenberger about what your observations were. I want to get it clear in my own
page 76 } mind. Did I understand you correctly to say you were standing at the window that was partially open?
A. Yes, sir.
Q. You were looking right out on the highway where you could see cars passing?
A. Yes, sir, I was.

R. L. Wilmer.

Q. You were looking out of the window at the time you saw the car pass that later was involved in the wreck down at the intersection. You saw that car pass?
A. I did.
Q. You saw it proceed down the hill.
A. I did.
Q. And you saw the lights on?
A. Yes, sir.
Q. And I believe you said you heard a roar?
A. I heard a roar before he got there.

By the Court:
Q. Before he got where?
A. I heard the roar up the road. It was making an awful noise.
Q. You mean before you saw it pass your window?
A. Yes, sir, before I saw it pass the window.

By Mr. Sackett:
Q. Is that what directed your attention to it?
A. Yes, sir.
page 77 } Q. Then you watched that car?
A. I did.
Q. And you saw it as it proceeded down the highway and you said on direct examination it was really going?
A. Yes, sir.
Q. Now, I want to know, based on what your observations were looking at it through a window and your attention having been directed to it by a roar you heard, and having watched it down the highway in its approach to where it had the accident, I would like for you to state to the court and jury, based on those observations from what you saw and heard, how fast you think that car was going.

Mr. Rosenberger: We object to that because this man has said he did not know.
The Court: At that time we hadn't got to cross examination where the rules are different and I suppose now he can answer the question.
Mr. Rosenberger: It would mean the same as far as I am concerned. This man was not in position to know.
The Court: This is a different situation.

By Mr. Sackett:

R. L. Wilmer.

Q. How fast did that car look to be going when you saw it?

page 78 } A. It looked to be going about 80 or 90 miles an hour.

By the Court:

Q. How far could you see down the road from your window?

A. It was about 200 feet from my house to the road looking out the window.

Q. How far to the right could you see?

A. Well I could see all the way down to Steve's Tavern.

By Mr. Sackett:

Q. And your attention was directed to the car?

A. Yes, sir.

Q. And your attention was directed to it by the roar?

A. Yes, sir.

Q. And you later heard the accident almost instantaneously?

A. Yes, sir.

Q. And you estimate it was going 80 to 90 miles an hour?

A. That is right but that is just a guess.

The Court: We don't want a guess.

Mr. Rosenberger.: I move the answer be stricken out.

The Court: I ask you jurors to disregard anything he is guessing at. We want his best estimate not a guess.

Mr. Sackett: I asked him what his best estimate

page 79 } was.

The Court: And he said it was just a guess.

Mr. Rosenberger: I move that that answer as to speed be stricken out and the jury be told to disregard it.

The Court: He said it was a guess. They will have to disregard it.

Mr. Sackett: If your Honor please, this thing is very vital in the trial of this lawsuit. The witness was asked the question, based upon his own observations—

Mr. Rosenberger: I think this is prejudicial argument. If he wants to argue the matter we might go in chambers.

Mr. Sackett: He has already testified that his estimate was based on those observations.

The Court: I think we had better discontinue this. I think

we had better recess for lunch. It is quarter after twelve. We will adjourn for lunch and be back at quarter after one.

page 80 } September 2nd, 1959,
Afternoon Session.

(In Chambers)

Mr. Sackett: I would like to dictate into the record my exceptions. The defendant Brown, by counsel, excepts to the action of the court and states his grounds for his positon. It is the contention that the evidence of the witness, Wilmer, when read as a whole furnishes an estimate of the speed of the automobile of the defendant Ayers; that he testified that he observed the car; that he was in a position to see it and watch it and that his attention was directed to it by the sound of the car, and the defendant Brown contends that this jury is entitled to have this witness state his opinion as to the speed of that car and that when he expresses himself as he did, when reading his testimony as a whole, it is an opinion, as any estimate of speed must of necessity be.

Mr. Whitehead: And the plaintiff, by counsel, joins in the same exceptions taken by Mr. Sackett, attorney for the Brown estate.

Note: The further taking of testimony is resumed in the court room in the presence of the jury and the wit-
page 81 } ness, R. L. Wilmer, is not recalled for further examination.

DR. LOUIS J. READ,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:
Q. You are Dr. Louis J. Read?
A. Yes, sir.

Mr. Rosenberger: For the purpose of the record, and to save time, the defendant, Ayers, admits that Douglas Peters died as a result of injuries received in this collision and we see no reason for taking any more time about that. I assume the other defendant likewise does.

Mr. Whitehead: We would like to put the doctor on.

Dr. Louis J. Read.

The Court: What do you need the doctor for, Mr. Whitehead?

Mr. Whitehead: I want to prove the situation.

The Court: It couldn't have any purpose.

page 82 } Mr. Whitehead: I would like to show the greatness of the impact he received and the injuries he received and the type of blow.

Mr. Rosenberger: I don't think that would prove anything material to this case, your Honor. It would just be for prejudical purposes only.

The Court: Come on around, Doctor.

By Mr. Whitehead:

Q. I believe you have already testified you are Dr. Louis J. Read?

A. Yes, sir.

Q. What is your age, Doctor?

A. Thirty-seven.

Q. You practice your profession where?

A. In Lynchburg, Virginia.

Q. And are you officially a representative of the state with reference to being a coroner?

A. That is correct. I have been duly appointed by Dr. Mann, Chief Medical Examiner in Richmond.

Q. And on the early morning of March 8th, or the late night of March 7, 1959, were you called to see a young boy by the name of Douglas Lee Peters at the Lynchburg General Hospital?

A. Yes, I was.

Q. And where did you first see him, Doctor?

page 83 } A. I first saw Mr. Peters in the emergency room.

Q. Do you know approximately what time that was?

A. It so happens I happened to be in the emergency room that night when this accident came in and I was in the morgue examining several other bodies, at which time the emergency room personnel called me to tell me that Mr. Peters had deceased at approximately 12:16.

Q. Had you seen him before he died?

A. No, sir, I hadn't.

Q. Then did you go and observe the body?

A. I went to the emergency room at approximately 12:25 and viewed the body and asked that it be removed to the morgue so I could make a further investigation.

Dr. Louis J. Read.

Q. What did you find was the condition of the body? What injuries, if any, had he received?

Mr. Rosenberger: If your Honor please, I think to detail the injuries is not proper in this action. This is not action for personal injury.

By the Court:
Q. What was the cause of death, Doctor?
A. The cause of death was attributed to a severe crushing chest injury and by that I mean the entire rib cage was crushed in; also—

Mr. Rosenberger: If your Honor please, I suggest that is sufficient.

The Court: I asked him what the cause of death
page 84 } was and he can answer it fully.

The Witness: Also he sustained a very severe skull fracture with severe brain damage and both injuries were the cause of his death.
The Court: I think that is as far as you can go.
Mr. Sackett: No questions.

CROSS EXAMINATION.

By Mr. Rosenberger:
Q. Doctor, did you take any blood test of Ernest William Ayers to determine whether or not he had any alcohol?

Mr. Whitehead: I object.
Mr. Sackett: Mr. Rosenberger knows that evidence is not admissible and he knew it before he asked any questions.
Mr. Rosenberger: I am asking if he took a blood test of my defendant. I want to show the results of that.
The Court: Took a blood test of Ayers?
Mr. Rosenberger: Yes, sir.

By the Court:
Q. Did you make any examination of Ayers?
A. I had absolutely nothing to do with Mr. Ayers. I was acting strictly in the capacity of medical examiner.

page 85 } By Mr. Rosenberger:

Q. My question to you is, as medical examiner, did you get a report on the examination of his blood?

J. W. Sutton.

Mr. Whitehead: I object to that. Your man is not dead.

The Court: That has nothing to do with this case. If he got a report you would have to get the person who made the examination to testify about the report.

The witness stands aside.

J. W. SUTTON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Mr. J. W. Sutton?

A. Yes, sir.

Q. Where do you live?

A. Apartment No. 8, Mayflower Apartments in Lynchburg.

Q. And on the night of March the 7th, 1959 page 86 } where had you been on that night?

A. I was in Sweet Briar watching a play.

Q. Who did you have with you?

A. Miss Katherine Vaughan.

Q. And shortly before the accident here in question had you left Sweet Briar and were on your way returning to Lynchburg?

A. Yes, sir, I had.

Q. Will you please tell us in your own words what you saw just prior to the accident?

A. Just prior to the accident?

Q. Prior to the accident and at the time of the accident.

A. Of course, prior to the accident I didn't see anything. I was driving back to Lynchburg and Miss Vaughan cried out to stop, or something to that effect—I am not quite sure what she said, but she indicated I should stop the car and I looked in my rear view mirror to check to check to see if I could stop safely and I stopped the car. After I stopped I saw a car coming at me backwards toward my car. It missed my car by about three feet and that car turned out to be the late model Ford driven by the persons in the accident.

Q. You did not see the vehicles collide?

A. I did not see the impact, no, sir.

J. W. Sutton.

Q. But you were in view if you had been looking
page 87 } that way. You could have seen it if you had been
looking?

A. Probably if I had not looked at my rear view mirror to see if I could stop I probably would have seen the accident.

Q. Then when the accident occurred when the Ford automobile driven by Ayers came to rest were you near that car then?

A. I was just about three or four feet away from it, yes, sir.

Q. North of it?

A. I was north of it, yes, sir. The car stopped parallel to my car and diagonally away from it.

Q. Did you see the automobile owned and driven by John Brown?

A. No, sir, I did not see that car.

Mr. Whitehead: All right, thank you.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Sutton, the first thing you realized anything unusual was going on was when the young lady, Miss Vaughan, said "Jerry, stop"?

A. That is right.

Q. Then you looked in the rear view mirror?

A. Yes, sir.

Q. And the fact you looked in the rear view
page 88 } mirror is why you think you didn't see the collision?

A. I think that is the reason because I did not see the collision.

Q. Then I would draw the conclusion from that and am I right that Miss Vaughan yelled "Stop" just before the collision?

A. Yes, sir, I believe she did.

Q. Now then, did you see this young man get out of the car?

A. No, sir. I believe this is the young man that was driving the car. He fell out of the car, kind of stumbled out of the car, and fell directly in front of my car.

Q. Did he make any remark when he got out?

A. Yes, he said "Leave me alone and help the other boys."

J. W. Sutton.

Q. Then what did he do?
A. Then he fell down and, of course, he had pain in his chest and he was crying out because he had pain in his chest and we got out of the car to help him as much as we could. We looked around to see if we could help other people. There were people in the back of the car and one boy in front of the car and we decided it would be dangerous to move them.
Q. Did this boy then pass out there?
A. I am not sure. I don't think he was unconscious.

page 89 } By the Court:
Q. You were going back toward Lynchburg?
A. Yes, sir.
Q. Did you see the Ayers car approaching before the accident?
A. No, sir, I did not.
Q. Well, you met it really, didn't you?
A. He was going one way and I the other but when I saw him coming at me he was coming at me backwards.
Q. He had already collided then?
A. Yes, sir.

By Mr. Rosenberger:
Q. And the boy said "Don't help me, help the boys in the car"?
A. Yes, sir.
Q. Then he collapsed?
A. That is right, fell down in front of my car.
Q. And as the car was coming to you backwards was it just rolling or was it driving backwards or could you give us any idea?
A. I would say it was rolling more than anything else. It didn't have a great speed at all. I don't know how fast it was going. I would say between 5 and 10 miles an hour, sort of just rolling along.

page 90 } CROSS EXAMINATION.

By Mr. Sackett:
Q. Were you aware of any car in front of you?
A. No, sir, I was not.
Q. And you heard the collision, I suppose?

Katherine Vaughan.

A. To tell the truth I am not sure I heard the collision. I don't think I did.

Mr. Sackett: That is all, Mr. Sutton.

The witness stands aside.

MISS KATHERINE VAUGHAN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. Miss Vaughan, you live in Lynchburg?

A. Yes, sir.

Q. On that night were you with the gentleman who just testified, Mr. J. W. Sutton?

A. Yes, sir.

Q. And you all had been over to Sweet Briar?

page 91 } A. Yes, sir.

Q. And you all were returning back to Lynchburg at the time of the accident?

A. Yes.

Q. Now, will you please tell the court and jury in your own words what you saw of the accident, what you saw at the time of the accident and after the accident?

A. Well, the first thing I saw was the old car turning across the road to its left and it was across but I can't say exactly what angle. I just saw them just before the two cars hit and the car coming from Lynchburg with the boys in it was close to the old car when I saw them. When they hit I think they were in the far left lane.

Q. Left lane in the direction you were going?

A. The left lane from us, the lane for the boys to be in for the boys coming from Lynchburg. He was in his right lane I think.

Q. He was in what we call the northbound lane?

A. Yes, sir.

By the Court:

Q. You were in the southbound lane and they were in the northbound lane?

A. That is right. Then I saw the two cars hit like this (indicating). This is the Ayers car and this is the colored man's car and the Ayers boy's car came like this.

Katherine Vaughan.

page 92 } By Mr. Whitehead:

Q. May I assist you? Use these two cars if you like.

A. (Demonstrating with toy automobiles) The old car cut across the road like this and the car coming from Lynchbug was coming down like this and they hit and the old car, I think, turned all the way around and went off the road on the other side. It was a pretty good ways away from us, and the Ayers boy's car bounced back and came across the road backwards and we were coming up from Sweet Briar and he crossed, coming backwards he crossed three or four feet in front of us and Jerry Sutton had stopped and then the Ayers boy stopped three or four or five feet in front of us to the right and he was all the way off the road.

Q. You mean to your right?

A. Yes, but diagonally in front of us too. Then the driver's door to the Ayers car opened and the driver fell out and then he stood up and he said—well he jumped up and he said "I am all right. Don't worry about me. Look in the car," or words to that effect. "Look in the car at the other boys," and then he said something about somebody couldn't say anything and said "Look in the back seat." He said "I am all right. Don't fool with me" and he kept on in that manner for us to look in the back seat. Then he took a couple of steps toward the highway and fell on the road in front of Mr. Sutton's car and I never did go across to the

page 93 } other side of the road and I don't know what happened over there.

Q. Then after the car stopped there did you wait there until the State Trooper came?

A. Yes.

Q. After they came to a standstill were either the old Ford, the '49 Ford, or the later model Ford, the one driven by Ayers, was either of those cars moved until the Trooper got there?

A. No, not to my knowledge.

Q. You were there and if they had been moved you would have seen it?

A. Well, I know the Ayers boy's car was not moved and I am sure the other one wasn't either.

Q. Do you know where the overhead bridge is across the railroad tracks? Do you know where the bridge is across the railroad tracks?

A. I can't remember except it is on a curve.

Katherine Vaughan.

Q. Do you recall you crossed the bridge before you got to where the accident happened going toward Lynchburg?

A. I just don't remember.

Q. Anyway coming on down that hill when you came down the hill from the bridge going on toward Lynchburg, going in a southerly direction, with reference to either the Brown automobile or the Ayers automobile, tell us what was the first thing you noticed about either car?

page 94 } A. When I first saw them before they hit, you mean?

Q. Yes. What was the first thing you noticed with reference to the cars?

A. The first thing I noticed was the one across the road and one was close to it coming into it.

Q. In other words, I believe you testified the Brown automobile was across the road and the Ayers car was coming into it. Is that correct?

A. Yes, sir, coming toward it.

By the Court:

Q. Could you see the driver of the Brown car?

A. No. I just saw them just before they hit.

By Mr. Whitehead:

Q. Then after you stopped your car you say at that time the Ayers car backed back toward you but you were about five feet from it when he stopped?

A. He crossed probably five or six feet in front of us and he stopped just to our right about four or five feet, just to our right.

Mr. Whitehead: All right.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Miss Vaughan, I think we understand you correctly but when you say that they collided in the left lane

page 95 } by that do you want the jury to understand that it was in the northbound lane and the Ayers boy's proper lane?

A. Yes.

Mr. Rosenberger: That is all.

Fred Martin.

CROSS EXAMINATION.

By Mr. Sackett:

Q. Miss Vaughan, I gather from what you have said that you didn't see either car until just a moment before the impact?

A. Just a few second before the impact.

Q. You don't know the movements of either car in their approach to the point where the collision occurred. I mean you don't know the speed of either car?

A. No, I couldn't say anything about their speeds.

Q. You don't know whether the man making the left turn gave a signal or not, do you?

A. No, I don't.

Q. So all you actually know is when you first saw them you saw one vehicle that seemed to be diagonally across the road and another one coming right into it?

A. Yes, sir.

Q. But what took place prior to that you have no knowledge at all, do you?

A. No, sir.

The witness stands aside.

page 96 } FRED MARTIN, (a deaf mute) and his interpreter, C. Jackson Holt, both being first duly sworn, testify as follows, the interpreter relaying the answers given by the witness:

DIRECT EXAMINATION.

By Mr. Whitehead:

Q. You are Mr. Jackson Holt?

A. C. Jackson Holt.

Q. Where do you live, Mr. Holt?

A. Staunton, Virginia.

Q. And what is your age, please sir?

A. Forty-eight.

Q. And what is your profession?

A. I am a teacher at the Virginia School for the Deaf and Blind, in the deaf department.

Q. And how long have you been a teacher at that school?

A. I have been at that school for 11 years.

Fred Martin.

Q. Now, prior to this time, Mr. Holt, have you testified in court as an interpreter for persons?

A. I have acted as an interpreter for persons who were deaf or mute. I have testified in several courts in Virginia as well as in North Carolina.

Q. What training did you have to become a teacher?

A. I took a normal training course at North
page 97 } Carolina School for the Deaf.

Q. In that training what are you trained to do?

A. To teach the deaf.

Q. Trained to teach them. Are you trained to get them so that they can tell you something too?

A. I guess I will have to define the word teacher to you. The teacher has to communicate with the child before they can get anything over to them.

The Court: They necessarily know how to communicate back and forth.

By Mr. Whitehead:

Q. Now, Mr. Holt, how long have you known Fred Martin?

A. Since 1950.

Q. How did you become acquainted with him?

A. He entered Virginia School for the Deaf and Blind.

Q. In 1950?

A. That is right.

Q. And how long was he a student at that school?

A. For about eight years, I believe, eight school terms.

Q. What is his condition with reference to hearing? Can he hear all right?

A. He is considered very hard of hearing. He isn't totally deaf but he is very hard of hearing.

Q. Now, what is his condition with reference to
page 98 } talking?

A. His speech is understandable by people who are in the habit of working with him. I imagine you would have great difficulty in understanding anything he says.

Q. Now, through the training he received at the school and through your communications with him can you all communicate between each other in a conversation?

A. Very well.

Q. And how do you do that?

A. With my hands, supplemented by lip reading.

Q. With the hands, supplemented by lip reading?

A. Yes.

Fred Martin.

Q. This boy came there in 1950 and was there for eight years so he must have left there last year sometime?

A. That is right.

Q. Now, Mr. Holt, will you please ask Fred Martin whether or not he was riding in an automobile driven by Ayers on March the 7th, 1959 that was in an accident with an automobile owned and driven by John Brown near Monroe in Amherst County, Virginia. Is that question too long?

A. I think I can make it, being a college graduate, but may I interpose a word here?

Q. Yes, sir.

A. This boy finished the fifth grade in our school so let's cut down a little bit if you don't mind.

Q. I think maybe I could make the question
page 99 } shorter. Will you ask him first what his age is?

A. He is 21.

Q. Will you ask him next was he riding in an automobile with Ayers on the night of March 7, 1959 when they had an accident with a car owned and driven by John Brown?

A. He says "Yes, I was."

Q. Will you ask him where he was riding in the Ayers automobile, whether on the front seat or rear seat?

A. He says he was on the back seat.

Q. Will you ask him who was on the back seat with him?

A. Mr. Shrader.

Q. Will you ask him in approaching the Town of Monroe going down the long hill before you reach the hill leading to the point of accident what speed the automobile was going he was riding in?

A. Riding 55 miles an hour.

Q. Now then, they came up that long hill and started down the hill toward the accident and just before the time of the accident what speed were they going?

A. 110.

Mr. Whitehead: That is all I want to ask him.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Holt, were you employed to come over
page 100 } and interpret for Fred Martin today?

A. I was summonsed. I received a court sum-

mons. I didn't have anything to do with it. I was asked if I could come and I got a court summons.

Q. You were summonsed, according to this summons, over here by the defendant Brown?

A. I don't know who was back of it but the Superintendent called me in the office and asked me if I would come and I told him I would and the next day I got this.

Q. Mr. Whitehead didn't seem to know your name when he started to talk to you today. Did you talk to Mr. Sackett with Mr. Martin before this trial this morning?

A. I talked with both of them.

Q. Mr. Sackett and Mr. Sawyer?

A. Yes, sir, that is right.

Q. Do you expect to be paid for your mileage and time?

A. I do.

Q. And you expect Mr. Sackett and Mr. Sawyer to take care of it, don't you?

A. No, I expect the court to take care of it.

By the Court:

Q. You refer, Mr. Holt, to regular mileage and attendance fees?

A. No, I have a certain fee. I have been paid that way before.

page 101 } Mr. Sackett: I arranged to have Mr. Holt come over here to interpret the testimony of Fred Martin for this jury. We agreed to pay him his professional fee for service. We have agreed to pay him his expense and mileage.

By Mr. Rosenberger:

Q. When did you first talk with Mr. Sackett, Mr. Holt?

A. About 8:30 this morning.

Q. And at the time you talked with Mr. Sackett was Fred Martin with you?

A. No, sir.

Q. After you talked with Mr. Sackett where did you see Fred Martin?

A. I talked with Mr. Sackett for a few minutes and then this other gentleman, Mr. Sawyer came in with Fred and all four of us talked in this room here together just before court convened.

Q. In other words, you and Mr. Sackett were in conference, together with Mr. Sawyer, Mr. Sackett's associate,—

Fred Martin.

A. I don't know if Mr. Sawyer is Mr. Sackett's associate or not but he brought Fred in.

Q. Now, before this morning, Mr. Holt, had you talked to Fred Martin about this collision?

A. No, I had not.

page 102 } Q. Do you know that his father and mother sometimes act to communicate his thoughts to other people?

A. I don't know.

Q. Do you know that Fred Martin works regularly and is paid a regular salary for working commercially?

A. He told me that he was working. I just have his word for it.

Q. You know that alone he communicates his thoughts to his fellow workers at the Burkville Veneer Company, don't you?

A. I really know very little about his duties over there and how much communication is necessary but he told me that he had to measure pieces of wood and cut them and that he was very good at several different machines. He told me that this morning.

Q. You being a former teacher you know he is able to communicate his thoughts to other people and to get other people's thoughts enough to be able to be employed?

A. Certainly he can.

Q. Do you know that his younger brother oftentimes communicates his thoughts to other people and their thoughts to him?

A. To my knowledge I have never seen his younger brother and know nothing about him.

Q. Did you see his father and mother?

A. I met them at lunch today.

page 103 } Q. Both of them are here in court today?

A. I think so. I see his father. I don't see his mother.

Q. Can his father understand Fred without you communicating back and forth?

A. I don't know how well he understands him. He understands some of it. As I told this gentleman, some people who are in the habit of understanding a person who is that deaf can understand it real well and other people just can't.

Q. Will you ask Fred Martin if he didn't communicate through his mother or younger brother to a man named John Eikin at his home?

A. He doesn't remember it.

Fred Martin.

Q. Ask him if he remembers an instance when an adjuster named John Eikin came to his house to talk to him about this collision.

A. He says "yes, I remember the insurance man."

Mr. Rosenberger: Will you call John Eikin from downstairs and ask him to come up here?

The Court: This is a very unusual request.

Mr. Sackett: If your Honor please, I would like to talk to the court in chambers if I may before Mr. Rosenberger proceeds any further.

The Court: Mr. Rosenberger, we would like to see you in chambers.

page 104 } (In chambers).

Mr. Sackett: If your Honor please, I think we ought to know where we are headed before we go any further.

Mr. Rosenberger: We are going to attempt to impeach this man about the speed and I have to lead up to it by the man he talked to. He didn't recognize the man by name so I had to use the word insurance agent. I know when I put the man on the stand Mr. Whitehead is in position to say "You are employed by an insurance company and you have an interest in the matter."

The Court: I think he has a right to say whose insurance is involved.

Mr. Rosenberger: I am going to say "The insurance man for Mr. Ayers" and I have also summonsed Mr. George Sanderson to be here at 2:30. He is the insurance adjuster for the State Farm who is Brown's insurance company, and we propose to show by him that this man has said the automobile was going only 55 or 60.

Mr. Sackett: My position at this time, and it is not necessarily a considered one, if he wants to inject insurance company from the standpoint of his own defendant

page 105 } he can do that.

Mr. Rosenberger: I will have to do it to show what the man's interest in the case is.

Mr. Sackett: Let me finish. If he wants to inject it into the record from the standpoint of his defendant I think that is up to him. That is his decision. I want to know when he is doing it whether he proposes to use the witness' statement that he may have taken from Fred Martin to contradict him. If he does he has got to follow the Statute.

Fred Martin.

Mr. Rosenberger: I will save you a lot of time. This man didn't write any statement. I don't have any written statement, neither does your adjuster have a written statement, as far as I know. It is oral contradiction.

Mr. Sackett: Apart from that he has indicated he is going to call George Sanderson and when he does he inevitably is injecting insurance into the case from the standpoint of my client.

The Court: That is right. I don't think you can do that.

Mr. Rosenberger: If Mr. Sackett objects I will not ask Mr. Sanderson by whom he is employed. It will be up to Mr. Whitehead to show whether he is biased or prejudiced.

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The Court: You are putting him in position where Mr. Whitehead can bring out the question of insurance which is improper.

Mr. Rosenberger: I am in position to impeach this witness who is a very vital witness and he is the one witness that ties us into the case in any aspect when he says we were going 110 miles an hour.

The Court: You can't bring in a witness to impeach on cross examination and go into his background. I don't think you have a right to bring Mr. Sackett's insurance company into this case.

Mr. Rosenberger: It is not a question of Mr. Sackett's insurance company. I have a right to bring in the man who went to see him. If anybody else brings out Mr. Sackett's company I can't help it. It will be like when you ruled Mr. Whitehead couldn't ask that witness how fast he was going because he indicated he didn't know.

The Court: The minute you bring Mr. Sackett's witness in here then I will be compelled to let Mr. Whitehead cross examine him. You bring him in as your witness and I am compelled to let Mr. Whitehead have a free field to cross examine him.

Mr. Rosenberger: That is right, but is there any question of limitation on cross examination that will prohibit me from putting the witness on the witness stand? I am entitled to prove my case and prove this man is lying.

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The Court: That is right but you are not entitled to put Mr. Sackett's insurance company before this jury. You

Fred Martin.

can put your own man on but I think it would be error to let you use Mr. Sackett's insurance adjuster.

Mr. Rosenberger: When we get to it I want it all in the record.

Mr. Sackett: What he is doing he is predicating the injection of insurance in the case on the theory that "If I do it I am going to pull yours in too."

Mr. Rosenberger: I haven't said anything about your company. I feel certain it is going to come in, Mr. Sackett, but I am not going to let that man sit on the stand and take a different position when I can prove he has made an inconsistent prior statement in front of two people.

Mr. Sackett: That is your position and if you want to do it at the expense of bringing your carrier in that is fine.

Mr. Rosenberger: You are the man who arranged to have this interpreter here.

page 108 } The Court: If he didn't have the interpreter here you wouldn't understand him. I had him in court with his mother and *borther* and had them all together and we couldn't understand him. I am not going to let you put Mr. Sackett's insurance company in.

Mr. Rosenberger: I have him summonsed and I want to bring him in here and get his evidence in the record.

Mr. Sackett: If your Honor please, Mr. Rosenberger has indicated that he has summonsed Mr. Sanderson who is an adjuster for the State Farm Mutual Automobile Insurance Company. He says he wants to bring him into court as a witness in the case and have the court pass upon the admissibility of his evidence at that time. I want to say to this court that I object strenuously to that.

The Court: I am not going to pass on that now.

Mr. Sackett: I want to say to the court now that George Sanderson is an adjuster known throughout this county. He is identified closely with the State Farm Mutual Insurance Company. If he is brought into the court room there are going to be people on this jury who know inevitably who he is.

Mr. Rosenberger: They won't know what com-

page 109 } pany he represents.

The Court: They will know he is an adjuster. I think Mr. Sackett's point is well taken and I rule right now I won't allow this man to testify and he shall not be brought into the court room.

Mr. Rosenberger: I will have to get him in the court house somehow so I can get his testimony in the record.

Fred Martin.

The Court: You can bring him in the office.

Mr. Rosenberger: And I will have to bring Fred Martin in here.

Mr. Sackett: You summonsed him to be here. He called me from Charlottesville and said he was served with a summons at 11:30 to be here at 2:30.

The Court: When he arrives have him come up the back stairs.

Note: The trial is resumed in the presence of the jury.

Mr. Rosenberger: Mr. Eikin, will you come around here?

Note: Mr. Eikin appears before the witness.

By Mr. Rosenberger:

Q. Mr. Holt, will you ask Fred if he has talked to this man, John Eikin, about the speed of the car?

A. He says "Yes."

page 110 } Q. Didn't he tell this man that Ernest Ayers at the time of the collision was driving 55 to 60 miles?

A. He says "He told him he was driving 55 to 60 part of the time and part of the time up as much as 120."

Q. Did he say that he told Eikin that he was going as fast as 120 at any time?

A. He said "Over 55."

Q. In other words, he never did tell Eikin he was going any definite speed more than just over 55?

A. That is right, over 55.

Q. Am I correct that he never stated any speed over 55 to Eikin, any specific speed over 55?

A. He didn't mention any specific speed.

Q. Just over 55?

A. Over 55.

Mr. Rosenberger: This next question I know we are going to have to go out on so rather than ask it in front of the jury we might as well go out now.

(In Chambers).

By Mr. Rosenberger:

Fred Martin.

Q. Mr. Holt, would you ask Fred if he talked to another man that came there to ask about the accident?

A. That came to his home?

Q. Yes.

page 111 } A. No, he doesn't remember any other man.

Q. Does he remember a man named George Sanderson, Jr., a heavy-set fellow that came there?

A. He didn't remember the name. He just told me "heavy-set fellow."

Q. Does he remember another insurance man coming there to talk to him?

A. Just that one.

Q. Do you remember a man coming there who represented the insurance company that carried the insurance on the colored man's car?

A. No.

Q. Then you deny talking to George Sanderson or any other man about the speed?

A. He says "man with glasses." He remembers that.

Q. He remembers talking with him?

A. Yes, sir.

Q. Did you tell him how fast?

A. He tells me he said he had been driving 55 to 60 before the accident.

Q. At the time of the accident did you tell him how fast he was going?

A. 110.

Q. So you know you told George Sanderson that he was going at 110 at the time of the accident?

page 112 } A. He says "No."

Q. Fred, you didn't tell George Sanderson, the other insurance man, about the 110 miles an hour, did you?

A. No.

Q. You just told him that he was going 55 to 60 at the time of the accident?

A. Which man do you mean?

Q. George Sanderson, the man with glasses.

A. Told him 55 to 60 and other man told 110.

Q. And the other man that you told 110 was John Eikin, the man that just was identified in the court room?

A. No.

Q. Who did he tell 110 then?

A. Told this man here (indicating Mr. Sackett).

Q. He told Henry Sackett in Mr. Buddy Tinsley's office didn't he?

Fred Martin.

A. That is right. He says "That is what I told him."
Q. And Buddy Tinsley is your lawyer, isn't he?
A. Yes, he is my lawyer.
Q. Then we are correct in understanding that he told Sanderson, the insurance adjuster with glasses, that the speed was 55 to 60, and John Eikin, the insurance adjuster whom he saw in the court room, that the speed was over 55?
A. That is right.

page 113 } Mr. Rosenberger: Now, your Honor, we would like to show by this witness who now understands George Sanderson's name and the man with the glasses that he told him the speed was 55 to 60 and we think the jury is entitled to know that to show there is a change in the man's statement about speed.

The Court: He said before the accident. He has never said at the time of the accident. He said at the time of the accident it was 110.

Mr. Rosenberger: And the only one he told that to was Mr. Sackett. I want to get that straight on that point.

The Court: You have brought your insurance agent in here and you can ask him but I don't think it is right to let you use Mr. Sackett's insurance agent.

Mr. Rosenberger: I want to bring out by this man, Martin, in front of the jury that he didn't tell George Sanderson he was going over 55 or 60.

Mr. Sackett: If you do that that is what we are objecting to.

Mr. Rosenberger: I want to ask him if he didn't tell George Sanderson, without more, that he was going 55 to 60 at the time of the accident.

page 114 } The Court: I am going to have to rule out Mr. Sanderson.

Mr. Rosenberger: I want to be certain my evidence is correct.

Q. We want to be very certain that we understand that you told Sanderson, the man with the glasses, that the speed of Ayers' car at the time of the collision was 55 to 60.
A. I told him that.
Q. You never told Eikin, the insurance adjuster you saw in the court room, or you never told Sanderson, the man with the eyeglasses, that he was going 110?
A. No.

Fred Martin.

Mr. Rosenberger: We think that should be shown to the jury and we offer that without more and then if Mr. Whitehead wants to bring in insurance it is up to him but we think that is very necessary to be shown the jury.

Mr. Holt: He says the boys told him never to tell 110 because afraid get him in jail but now he will tell you the truth. He says "Those boys told me to tell those men 55 to 60."

The Court: I still am not going to let Mr. Sackett's adjuster be brought in.

Mr. Rosenberger: I am just trying to get the evidence in.

The Court: I am not going to let you ask him page 115 } about Mr. Sanderson.

Mr. Rosenberger: Or what he said to Mr. Sanderson about the prior inconsistent statements?

The Court: That is right.

Mr. Rosenberger: We object and except for the reason stated.

Note: The further taking of testimony is resumed in the court room in the presence of the jury.

CROSS EXAMINATION.

By Mr. Sackett:

Q. Mr. Holt, Mr. Rosenberger, representing Ernest Ayers, asked some questions of Fred Martin through you with reference to what he told the man by the name of Eikin. I will ask you to ask the witness Martin why he told Eikin what he did.

A. He was afraid of the boys.

Mr. Rosenberger: I object. The interpreter has already said he was afraid of these boys but he doesn't say what boys and I am objecting to any hearsay testimony about boys.

The Court: Let him answer the questions.

The Interpreter: Several boys told him if he told how fast he was really going they might put him in jail.

page 116 } By the Court:

Q. Ask him what boys told him that. Name them.

A. My brother for one and the Campbell boy and several of them.

Fred Martin.

Mr. Rosenberger: I am objecting to that question and answer. I object before he asked the question on the grounds that it had nothing to do with the defendant Ayers It is highly prejudicial. It was let in over my objection and I move for a mistrial for that reason. Counsel is still insisting on trying to get out the same immaterial answers.

The Court: I overrule your motion.

Mr. Rosenberger: We object and except for the reason stated.

By Mr. Sackett:

Q. Did any boy—

Mr. Rosenberger: I object to "any boy."

The Court: He hasn't asked the question.

By Mr. Sackett:

Q. Did any boy in the car operated by Ayers tell him not to say how fast the car was going?

A. No.

Mr. Rosenberger: He said "no" but I still object. Mr. Sackett knows the question isn't proper.

page 117 } The Court: All right, go ahead.

Mr. Sackett: This witness was summonsed by me and I reserve the right to put him back on the stand.

The Court: Any questions, Mr. Whitehead?

Mr. Whitehead: I would like to ask a question. Mr. Sackett has asked him there with respect to "any boy" and let me put the question to him this way.

Q. Mr. Holt, ask him did any of the occupants of the Ayers automobile on the night of the accident who are living later after the accident tell him not to tell that they were going 110 or 120 miles an hour?

Mr. Rosenberger: We have the same objection. He has answered that once before.

The Court: Let him answer the question.

The Interpreter: He says no.

The Court: Is that all?

Mr. Whitehead: That is all.

The witness stands aside.

page 118 } RICHARD TANNER,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:
Q. Your name is Mr. Richard Tanner?
A. Yes, sir.
Q. Where do you live?
A. In Madison Heights.
Q. Do you live on the road behind Price's store in that community?
A. Yes, sir.
Q. On the night of this accident, Mr. Tanner, did you come by the accident shortly after it happened?
A. Yes, sir.
Q. Did you see the little Peters boy that night?
A. Yes, sir.
Q. Where was he when you saw him?
A. He was still in the car. He was sitting in the middle with his head over on the shoulder of the Woody boy and E. W. Woody had his arm around him.
Q. Who is E. W.?
A. E. W. Woody, Jr.
Q. Mr. Skinner Woody's son who was also killed?
A. Yes, sir.
page 119 } Q. Did you help to move him out of the car?
A. Yes, sir.
Q. Now, at the time that you saw him there was he still living?
A. Yes, sir.
Q. And did you notice anything about his head or mouth or ears that would indicate his condition?
A. He was bleeding from his mouth, nose and his ears.
Q. Did you know Douglas Lee Peters?
A. Yes, sir.
Q. Will you tell us what type of boy he was? Was he a—

The Court: Just ask him what type of boy he was.

By Mr. Whitehead:
Q. What type boy was he?
A. He was a very high type Christian young man, a fine young man.
Q. Did you ever observe him with reference to whether he would work or not?
A. Well, every time I was up and down the road he was

always helping in the yard, helping his mother, doing anything his father would ask him to do without any trouble.

Mr. Whitehead: All right, thank you.

Mr. Rosenberger: No questions.
page 120 } Mr. Sackett: No questions.

The witness stands aside.

GRANDVILLE E. PETERS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:
Q. You are Mr. Grandville E. Peters?
A. Yes, sir.
Q. And you are the father of little Douglas Lee Peters, deceased?
A. Yes.
Q. Where do you live, Mr. Peters?
A. Victory Airport Road.
Q. And where is your place of business?
A. It is on Route 29 near Price's store.
Q. And, of course, all this is in Amherst County?
A. Yes, sir.
Q. Now, on the night that this accident occurred when did you hear about the accident?
page 121 } Two fellows came to my house, John Campbell and another fellow.
Q. You heard about it around midnight?
A. Around pretty close to midnight, maybe not quite that late.
Q. Now, when was Douglas born?
A. May 18th, 1943.
Q. To save time if you don't mind, I will read off the names so they will be in the record, the names of you and your wife and children. The father, Grandville E. Peters, age 44; mother Mary M. Peters, age 40; brother, Grandville E. Peters, Jr., age 21. brother, Paul R. Peters, age 20; brother, James R. Peters, age 18; sister, Linda D. Peters, age 11 and sister, Mary Jane Peters, age 5. Is that correct?

Grandville E. Peters.

A. Yes, sir.

Q. Now, at the time of his death where was your son, Douglas, attending school?

A. He was going to Amherst High School.

Q. That is the consolidated high school, the one near Amherst Court House?

A. Yes, sir.

Q. And what grade was he in?

A. He was a freshman. He would have been a sophomore this fall.

Q. Did he get along all right in school?

page 122 } A. Very good.

Q. Did he attend church and Sunday School?

A. Yes, sir.

Q. Where was that?

A. First Baptist Church, Monroe, Virginia.

Q. And he attended Sunday School there too?

A. Yes.

Q. Now, up to the time of this accident will you please tell us whether or not he had been a good, cooperative son or not?

A. He was one of the best.

Q. Did you give him any chores to do and did he do them?

A. Yes, sir. He helped my wife at the house.

Q. Now, what was the relationship within your family? Did you all work together or not?

A. Yes, sir.

Q. Did he help you up at the garage any?

A. He would come up and sweep up for me on Saturdays sometimes and in the evenings.

Q. I believe two of your other sons work with you?

A. Two of them work regular and one of them works spare time during his vacation and after school.

Q. Do you have a photograph taken recently of Douglas before his death?

page 123 } A. Yes, sir.

Mr. Rosenberger: We have no obbjection.

Mr. Sackett: We have no objection.

By Mr. Whitehead:

Q. Is this a photograph of Douglas taken in the fall of '58?

A. Yes, sir.

Mr. Whitehead: Now, if your Honor please, we would like to introduce this as an exhibit.

Ernest William Ayers.

The Court: Mark it Exhibit No. 17.
Mr. Whitehead: We would like to offer this as Exhibit No. 17 and I would like to pass it to the jury.

Note: The photograph is passed to the jury.

Q. Now your wife, who was Douglas' mother, is she still living?
A. Yes, sir.
Q. Is she here today?
A. No, sir.
Q. Was she able to come to court?
A. No, sir. She is under a doctor's care.
Q. Did you permit or allow any of your children to come to the trial today?
A. No, sir. This thing hit us awfully hard and I would rather them not to have to go through with it.
page 124 } Q. Now, with respect to Douglas, did he take any part in activities of the school other than just his studies?
A. He was in the art class and played in the band, in the high school band.

Mr. Whitehead: All right.
Mr. Rosenberger: No questions for the defendant Ayers.
Mr. Sackett: No questions for the defendant Brown.

The witness stands aside.

Mr. Whitehead: I want to call one of the defendants, Ernest William Ayers, as an adverse witness.
The Court: Very well.

ERNEST WILLIAM AYERS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:
Q. You are Ernest Wiliam Ayers?
A. Yes, sir.
page 125 } Q. And you were driving on the night of this accident the 1956 Ford automobile?
A. Yes, sir.

Ernest William Ayers.

Q. And you were proceeding in a northerly direction, were you not?

A. Yes, sir.

Q. Now, as you proceeded down the hill approaching the intersection of U. S. 29 and Virginia State Route 671 where the accident occurred, as you approached that intersection did you see the automobile driven by John Brown?

A. No, I didn't remember seeing it until just about up on it. I don't know the distance but I was right up on the car before I seen it.

Q. Did you see it give any signal whatsoever it was going to make a left turn?

A. No, sir.

Q. And did the car cut right in front of you?

A. Slowly like, and the next thing I knew all I seen was the car and then I hit it.

Mr. Whitehead: That is all I want to ask him.

Mr. Rosenberger: I will put him on on direct examination when I get ready to offer my case.

The Court: You want to question him at this time?

Mr. Sackett: I don't care to question him.

page 126 } The witness stands aside.

Mr. Whitehead: We rest, if your Honor please.

The Court: Which of you want to put on your evidence first?

Mr. Rosenberger: I would like to make a motion first.

(In chambers)

Mr. Rosenberger: If your Honor please, the defendant, Ernest William Ayers, by counsel, moves the court to strike the evidence on the ground that there is no credible evidence upon which the jury could find that the defendant Ayers was guilty of gross negligence which proximately caused this collision, and since that is so then the court should strike the evidence and not submit it to the jury for its determination.

In making this motion I am not unmindful of the testimony of the witness, Fred Martin, and he is the only witness who has testified as to speed that we now have before the jury. The evidence is not worthy of belief since he himself admits prior inconsistent statements as to the speed of this automobile. He gives as a reason that he was afraid because of a remark

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page 127 } made to him by other boys that he might have to go to jail. Any person acting on any such reasons indicates incompetency and unreliability as a witness and lack of responsibility, and for that reason in a case of this character it is our opinion that his testimony should not be given any credit and the court should strike the evidence.

We also now renew the motion for a mistrial in the event the court decides to let the evidence go to the jury, on the ground that this witness' testimony, when considered as a whole, indicates that he was frightened by some boys. The only living witness who would have any reason to have him frightened about his evidence would be the defendant Ernest William Ayers, and since there is an innuendo there that maybe these boys acted through or on behalf of Ayers we think that that testimony was highly prejudicial and that the defendant cannot receive a fair and impartial trial at the hands of this jury. The evidence, of course, was irrelevant and immaterial in any event.

The Court: I live pretty close to these people and several of the teachers are very good friends of mine. I know these people live in a world to themselves and so called normal boys

page 128 } are prone to make fun of them and try to frighten them and do all sorts of things to them. This boy's actions are entirely normal for an abnormal young man, one who is deaf. There is some evidence here of speed and that is corroborated by the facts themselves, the fact it knocked the Brown car 70 or 80 feet, and that alone I think is sufficient to infer a terrific rate of speed. It had to be terrific speed.

Mr. Rosenberger: We would like to point out that the Court of Appeals has said that a result of an accident, standing alone, is insufficient on which to arrive at any particular amount of speed.

The Court: But this is not standing alone.

Mr. Rosenberger: It is alone except as to the testimony of Fred Martin and that is the reason I directed my motion to him and I sincerely direct my objection to the testimony of that young man.

The Court: Then I would be taking the prerogative of the jury in saying the evidence was unbelievable. It is not incredible to me.

Mr. Rosenberger: Since he made those prior inconsistent statements which he admits and since during the course of

Ernest William Ayers.

our examination he apparently answered first one way and then the other, I feel like the court would have to
page 129 } rule, as a matter of law, that this man's testimony is unworthy of belief.

The Court: I will overrule your objection.

Mr. Rosenberger: We object and except for the reason stated.

Mr. Sackett: If your Honor please, the defendant Brown, moves the court to strike the plaintiff's evidence as to him on the ground that the plaintiff has failed to prove by a preponderance of competent evidence that John Brown, this defendant's decedent, was operating the automobile at the time and place of this accident.

The Court: What about that, Mr. Whitehead?

Mr. Whitehead: It is alleged in the motion for judgment John Brown was the owner and operator of this vehicle and it is not denied in the pleadings.

Mr. Rosenberger: And counsel stated in his opening statement that Brown was operating the automobile and where he was going and how he was taking his sister home.

Mr. Sackett: That was the opening statement.

The Court: If you didn't deny it in your pleadings—

Mr. Sackett: I did this. I set up in my plead-
page 130 } ings that this defendant's decedent was guilty of no negligence and that he violated no duty which he owed to this plaintiff and if the evidence reveals that he is not the driver of the car certainly those pleadings with a denial of any negligence or breach of any duty which this defendant's decedent might have owed to the plaintiff was certainly a basis for the position now revealed by the evidence that there is a lack of any proof that John Brown was actually operating the car. The officer said nobody else had a permit and the positions of the bodies were such as to indicate he was driving. On that particular score there is evidence indicating, as you will recall very definitely, that there was a second body further south at the scene of the accident than was this body and if you are going to draw any inferences the natural inference to draw from it is if that was the driver that is the body more likely that would be furthest south.

The Court: I am frank to say the question bothers me some. I will overrule the motion.

Mr. Rosenberger: I don't think that should give the court any bother for this reason: Counsel on the record and in his

opening statement makes an admission. It is an
page 131 } admission which he cannot get away from and
when he has made an admission in his opening statement there would be no necessity for anybody else to bring any evidence here to establish who the driver was.

The Court: I will look at the pleadings but I will overrule the motion.

Mr. Sackett: And we except to the court's ruling.

page 132 } Evidence for the Defendant Ayers.

THOMAS N. MANLEY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You are Mr. Thomas N. Manley?

A. That is right.

Q. Where do you live, Mr. Manley?

A. On Main Street in Madison Heights.

Q. Where do you work?

A. For James T. Davis, Incorporated.

Q. In Lynchburg, Virginia?

A. That is right.

Q. Mr. Manley, were you on Route 29 on Saturday night, March 7th, 1959 at the time these two cars collided at Monroe, Virginia?

A. Yes, sir.

Q. Will you tell us who you were riding with?

A. Preston Garrett.

Q. In which direction was Preston Garret's automobile going?

page 133 } A. South.

Q. As you approached the bridge over the Southern Railroad at Monroe going south, which is in the direction of Lynchburg, what did you notice in the road?

A. A dead dog laying in the road.

Q. What did the driver of your vehicle do?

A. Slowed down.

Q. Then what is the next thing you noticed?

A. After we crossed the bridge and started down the hill a car pulled out from our left, a '49 Ford.

Q. Could you come to this board? I am now pointing to

Thomas N. Manley.

Ayers Exhibit No. 3, and your automobile was coming down this hill which is in the background of this picture, was it not?

A. Yes, sir.

Q. And you were coming toward Lynchburg?

A. That is right.

Q. Now, do you see the road that that '49 Ford pulled out of in front of you?

A. That is it. (indicating on photograph)

Q. Will you on the original exhibit No. 3 take this pen and mark the road with it that the '49 Ford came out of?

Note: (The witness does as requested.)

page 134 } Q. How close were you on that automobile when he pulled out in front of you?

A. Approximately fifty feet.

Q. What did your driver do?

A. He checked and almost stopped. He had to slow down considerably.

Q. Had to do what?

A. He had to slow down to avoid striking that car.

Q. Then in what direction did the Ford go?

A. South toward the southbound lane and proceeded along and then got into the center lane.

Q. When he got into the center lane what did he do?

A. He pulled to the intersection not shown on here.

Q. Will you look at Defendant's Exhibit No. 2, the original, and point to that intersection if you see it?

A. This is it.

Q. Where did that '49 Ford pull to?

A. Pulled in the center lane and stopped.

Q. Can you sort of mark on that picture approximately where he stopped?

A. He pulled to the center lane and stopped in the center lane right here.

page 135 } The Court: Which exhibit is that?

By Mr. Rosenberger:

Q. This is Ayers Exhibit No. 2. He pulled to the center lane and stopped in the center lane where you have marked it?

A. Yes, sir.

Q. Then what happened after that?

A. I was watching the '49 Ford and Preston Garrett who was driving said something about "he is going to pull out in

Thomas N. Manley.

front of that car and going to hit". When he said that I turned around and looked and saw Ayers' car and it seemed to me this man put the car in low gear and pulled right into the northbound lane.

Q. When you say "this man put the car in low gear and pulled into the northbound lane" you mean Brown, the driver of the '49 Ford?

A. Yes, sir.

Q. When he did that what happened?

A. Well, of course, Ayers' car was pretty close to him and he hit him at that point.

Q. He hit him in the northbound lane?

A. That is right.

Q. Then approximately what part of Brown's automobile was hit?

page 136 } A. It seemed to have caught him right at the right front door and from there to the rear of the car.

Q. Could you give us an estimate of the speed that the Ayers automobile was going—that is, the automobile coming down the hill?

A. It looked like to me it was normal speed.

Q. What would you estimate normal speed?

A. 55 to 60.

Q. Now, what lane was Ayers driving in?

A. Northbound lane.

Q. He was in his proper lane?

A. Yes, sir.

Q. Now, when the two automobiles collided approximately where was your automobile?

A. We were pretty close to the side of Brown's car, passing on the right pretty close to the side of Brown's car. We were passing in the right lane over here. We could have been maybe a car length behind or car length back. I didn't pay exact attention to it.

Q. Will you tell the jury whether you were close or far from it?

A. We were very close, I would say within ten or twenty feet of it anyway.

page 137 } Q. Did you see Brown give any signal or any notice that he was going to pull out at all when he pulled suddenly out in front of Ayers?

Thomas N. Manley.

Mr. Sackett: He is leading the witness now in the manner in which he is asking the question.

By the Court:

Q. Did you see Brown given any signal of any kind?

A. No, sir, no signal whatsoever.

Q. Did you see whether he gave one of these flashing signals?

A. No, sir. I am positive he didn't.

Q. Could you see whether he gave an arm signal?

A. No, sir.

By Mr. Rosenberger:

Q. Could you tell whether the driver was a man or a woman?

A. I couldn't tell.

Q. Now, after the collision what did you do?

A. We immediately pulled to the right shoulder of the road and got out of the car and went over to the Brown car and saw Brown laying on the left-hand side of his car back at the back bumper and someone made the statement that they thought he was drunk. Then Kenneth Layne went back to the Ayers car and hollered and told us it was Ayers.

page 138

Mr. Sackett: I object to what somebody told him.

By the Court:

Q. Just state what you saw and what you did.

A. He called out, said it was the Ayers car, and we went back to that car.

By Mr. Rosenberger:

Q. Had you known Ernest Ayers before?

A. I knew him, yes.

Q. Were you a friend of his or just knew him?

A. Well, I guess you could consider it a friend. I never did run around with him. I just knew him. My brother is a close friend of his.

Q. Your brother is a good friend of his?

A. Yes, sir.

Mr. Rosenberger: You may examine.

Thomas N. Manley.

CROSS EXAMINATION.

By Mr. Sackettt:

Q. Your brother is a close friend of Ernest Ayers?

A. Yes, sir, a friend of all three of the boys that page 139 } were in the front seat of the car.

Q. That would include Ernest Ayers, the Woody boy and the Peters boy, close friend of all of them, and you knew them all yourself, did you not?

A. Yes, sir.

Q. If I understood you correctly, you saw the car come out of what we call the slaughter house road, moved first into the southbound lane, then into the middle lane, and came up to the intersection at the point where 671 intersects and stopped?

A. That is right.

Q. And you knew he was going to make a left turn?

A. I thought he was. We wasn't sure. That is why we stayed behind him because we thought he was drunk.

Q. But you had no reason to think it other than from his method of driving?

A. The way he pulled out into the road and moved back to the center without giving any signal whatsoever.

Q. He moved into the center lane and came to a stop and by virtue of that your attention was attracted to the car?

A. Yes, sir.

Q. So you had no real opportunity to observe the movements of the other car?

page 140 } A. I didn't observe him until he had gotten within I would say 100 or 150 feet of the Brown car.

Q. That is the only opportunity you had to observe that car. You hadn't seen it prior to that time?

A. No, sir.

Q. The Judge asked you about signals. You said you saw no blinker signal. You said you didn't see the hand signal?

A. No, sir. I was in position, I think, if he had given one I could have seen it.

Q. You were passing that car on the right.

A. We were passing the car on the right but when he went into the center lane we were behind him. He didn't give any signal going into the center lane.

Q. From that point on you wouldn't be prepared to say what signal, if any, he gave?

A. No.

Thomas N. Manley.

Q. And the people in your car, the other two boys, they were on the front seat of the car operated by Preston Garrett. Do you know in what position you were in the car?

A. I am not definitely sure. We had stopped here in Amherst and gotten out of the car and I thought I had gotten back in against the door but didn't exactly remember at the time.

page 141 } Q. So you are not real sure where you were sitting?

A. I am not real sure whether I was in the middle or against the door.

Q. Tom, you remember discussing this case with me before, of course?

A. Yes, sir.

Q. Am I correct in the statement that you have told me once before that you couldn't estimate the speed of the northbound car?

A. I said I would rather not estimate the speed.

By the Court:

Q. You said what?

A. I said I would rather not estimate the speed and my reason is Mr. Sackett told me he was sure the car was going well over a hundred miles an hour and for that reason I just didn't want to estimate the speed of the car at that time because I didn't want to go into it.

By Mr. Sackett:

Q. In other words, you felt under the circumstances you weren't sure how fast it was going?

A. Well, I felt under the circumstances when you called me that I didn't want to discuss it, I would rather not discuss it at the time, but you kept insisting and I did tell

page 142 } you I would come by your office and you told me that you were sure the car was going well over a hundred miles an hour and I felt that the car wasn't so to save time I just didn't go into it.

Q. I see. You just felt you would rather not discuss it under those circumstances at all?

A. Yes, sir.

Mr. Sackett: That is all.

Thomas N. Manley.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Mr. Manley, I have Ayers Exhibit No. 2 here. As I understand it—you see where that car is sitting in that picture right there?

A. Yes, sir.

Q. Now, is that the driveway where that car came out of?

A. Yes, sir.

Q. And right behind it—kind of back here and not shown in this picture, is a home right behind there.

A. That is right.

Q. And then you can follow around to the slaughterhouse?

A. I don't know.

Q. But you know there is a home where people
page 143 } live right behind that bank there?

A. It is a house there.

Q. Then you said something on direct examination that there was a dog in the road—what was it about the dog?

A. Well, we just slowed down for a dead dog in the road and then this man pulled out in the road.

Q. You were not talking about the dog shown in the picture down there at the accident?

A. No, sir, this was a dog in the road before we got to the scene of the accident.

Q. This Brown automobile came across here and got over in the southbound lane?

A. That is right.

Q. When it got in the southbound lane how far were you behind it?

A. Fifteen to twenty feet—not more than a car length.

Q. You just followed it along at that distance, about fifteen or twenty feet apart?

A. Yes, sir.

Q. Then did you follow it along at that distance up to the time he pulled in the middle *land?*

A. Well, we dropped back some after he got the
page 144 } car started out.

Q. After he pulled the car in the middle lane did he come to a dead standstill?

A. Yes, sir.

Q. Then did you all proceed on?

A. We started to go around him on the right because we

Thomas N. Manley.

didn't see a signal and didn't know whether he was coming back into our lane, turn left, or what.

Q. And the first thing you noticed about the car coming down the hill was when Preston Garrett hollered something, wasn't it?

A. Yes.

Q. And at that time the Brown car had left the middle lane and had gone over into the northbound lane, hadn't it?

A. It started into it.

Q. Then when he started into that lane where were you with reference to being opposite the Brown car? Were you north of it, south of it, about opposite, or where?

A. Well, like I was saying, I didn't pinpoint it.

Q. But anyway, when you were in the southbound lane proceeding on then he pulled out or was pulling into the northbound lane and then you heard Preston Garrett holler something?

page 145 } A. Yes, sir.

Q. Then that was the first time that you noticed the Ayers car?

A. That is right.

Q. You tell us then at that time you would estimate the speed at 55 or 60 miles an honr?

A. Yes, sir.

Q. Now, you tell us that this car was pulling into the northbound lane and in that 150 feet did the Ayers car slow up any?

A. Well, he slowed up some. I would say 150 feet would be the maximum, but I wouldn't know exactly.

Q. Did he make any marks there with his brakes?

A. I don't think so.

Q. If you saw him 150 feet away approximately and this car was then pulling into that lane can you tell us whether or not Ayers in that 150 feet slowed down any or not?

A. Seems to me that he started to cut out but as far as slowing down I don't know.

Q. As a matter of fact, when you all were coming along here in that lane when this car pulled over in that lane then this car came on down here and hit it and glass from one of these vehicles shot under your car, didn't it?

page 146 } A. Might have been some glass under it.

Q. In other words, you were so close to that car when the impact took place some of the glass flew through the air and landed on the car you were riding in, didn't it?

A. Yes, I think so.

Thomas N. Manley.

Q. Then, as I understand it, you can not tell us whether or not Ayers in that space you saw him applied his brakes or not?
A. No, sir. I couldn't say.
Q. Then you say he was going 55 to 60 miles an hour when you first saw him. Then how fast was he going when he hit the car?
A. Well, I would say probably going that fast when he hit the car.
Q. Let me ask you one thing—
A. Speed is something I am not too familiar with.
Q. Then after this terrible accident took place where did you all drive to to park?
A. We pulled right off to the right somewhere along the road here.
Q. In other words, you pulled on up here on what would be the west side of the road?
A. That is right.
Q. How long was the car Brown was driving
page 147 } stand still in the middle lane?
A. He was there for a few seconds, I don't know how long. I know he came to a stop.
Q. And then you know he pulled out?
A. Yes, sir.
Q. And when he was pulling out then that was when the boy hollered and you noticed Ayers?
A. Yes, sir.

Mr. Whitehead: All right.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:
Q. Mr. Manley, did you ever look at the '49 Ford of Brown's to see whether or not it had any signal lights on it?
A. Yes, sir.
Q. Did it have any mechanical signal lights on it?
A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Sackett:
Q. When and where was that?

Thomas N. Manley.

A. That was at John P. Hughes' warehouse
page 148 } approximately a month ago.

Q. You don't know what had taken place in the meantime. You just saw it a month ago and would you say that was in August or in late July?

A. Sometime in July.

Q. And the accident happened in March?

A. Yes, sir.

Q. And how did you happen to go over there?

A. One of our store delivery trucks had been wrecked and I went over to look at that.

Q. And you just casually looked at the Brown car then?

A. I looked it over pretty good.

Q. How did you know it was the Brown car? Did you recognize it as being his car?

A. No, sir. I asked the man at the warehouse.

RE-RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Manley, will you come here to this board? Do you recognize the Brown car in any of those pictures?

A. Yes. This is it.

Q That is a picture there of the front end of it?
page 149 } A. That looks like the front end of it.

Q. Do you see where there has been any change from that picture until the time you saw it at Hughes' warehouse?

A. None that I can tell.

Q. Was there anything on the automobile that you saw in Hughes' warehouse to indicate any signal lights had been taken off the car or knocked off the car?

A. No, sir.

Q. Look at the front of Plaintiff's Exhibit No. 6 and tell us if you see any signal lights on it.

A. That was not taken on the road. That was taken in the warehouse.

Q. Could you see any signal lights on the front end of it?

A. No, sir. I don't see any signal lights. Of course, if it did have any signal lights they would have been in the parking lights, I imagine. They are in mine.

Q. What model car is yours?

A. 1950.

Q. Did the '49 Ford have signal lights on it?

Mr. Sackett: He is asking this man something he doesn't know anything about.

The Witness: I don't know anything about that.

page 150 } Mr. Sackett: You have had this man on direct examination and on re-direct examination and now you are going into something brand-new.

Mr. Rosenberger: It is about the signals, your Honor.

Q. I want you to look at Plaintiff's Exhibit No. 16 and tell me whose automobile that is down there in the road.

A. That is Brown's.

Q. Have you seen that automobile since it was in the road?

A. Yes, sir.

Q. Where did you see it?

A. John P. Hughes Motor Company warehouse.

Q. Did it look any different at John P. Hughes' from what it does in that picture?

A. Nothing obvious.

The witness stands aside.

page 151 } KENNETH LAYNE,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You are Mr. Kenneth Layne?

A. That is right, sir.

Q. Where do you work?

A. I work for B. & W.

Q. And when was the last time you worked there?

A. I worked last night.

Q. All night?

A. Yes, sir.

Q. Have you had any sleep?

A. No, sir.

Q. Now, on the night this collision occurred down there between the Ayers automobile and the automobile of Brown were you along on that road?

A. Yes, sir.

Q. Whose automobile were you riding in?

A. Preston Garrett's.

Kenneth Layne.

Q. We just heard from Mr. Manley. You were riding in the same seat with him?

page 152 } A. I was on the front seat on the right side.

Q. You were on the outside front seat?

A. Yes, sir.

Q. And Tom Manley was on the middle?

A. Yes, sir.

Q. And Preston Garrett was driving?

A. Right.

Q. What was the first thing you saw about the accident or the first thing you noticed?

A. Up on top of the hill at the Monroe bridge we spotted a dog in the road. We slowed down there and came on down and this car from the slaughter pen pulled out, a '49 Ford, in the right lane, and went on down. I thought I saw a signal light but I found out later there wasn't a signal light on the car. He might have put his foot on the brake and the brake light came on and I thought he was giving a signal; so he went over to the center lane making his turn. As we were going on up closer Preston Garrett said "Watch out, the fool is going to pull out!" It may have been a car length ahead of us then. That is when I looked forward again and I saw lights and that was it, and when he said that it looked like to me it was just like this (witness snaps his fingers), it happened so fast.

Q. It happened fast?

page 153 } A. Right.

Q. Could you give us an estimate of the speed of the Ayers car just before the collision?

A. From the lights and just seeing the car coming forward at me I would estimate it 55 to 60. That is what I estimated it that night.

Q. 55 to 60 miles an hour?

A. That is right.

Q. Before the '49 Ford pulled to its left across the road did it come to a stop or not?

A. Yes, sir, it come to a stop.

Q. For how long?

A. I couldn't say how long.

Q. Now then, where did the collision occur? Where did it happen?

A. He was over in the center lane when I turned to look at the other car and when I looked back it looked like an atomic blast.

Kenneth Layne.

By the Court:

Q. Looked like what?

A. Looked like an atomic blast, a blast of dust and lights. It looked like he was in the northbound lane then.

page 154 } By Mr. Rosenberger:

Q. The northbound lane was Ernest Ayers' lane?

A. Right.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION.

By Mr. Sackett:

Q. Kenneth, you have testified, and I understand from Thomas Manley too, that this car pulled out from the slaughter pen and you say it moved into the southbound lane and then you saw what you thought was a signal. It was a blinking light, in any event?

A. Seemed like it was to me. The car was a wreck, I would say. The car looked like to me it was beat up.

Q. But you saw what you thought then was a signal light?

A. Yes, sir.

Q. And you knew he was going to make a left turn?

A. He was in the center lane and that is what I thought.

Q. You saw him go from the southbound lane to the center lane and saw what you thought was a blinker light?

A. Yes, sir.

Q. And it gave you the impression of being a left-hand signal?

page 155 } A. Yes, sir, and I found out later there wasn't a signal on the car.

Q. But at the time you thought it was a signal?

A. That is right.

Q. You saw the car pull down and stop and in a matter of a moment the accident happened?

A. The accident happened quick.

Q. And it was on the basis of that moment that you would estimate the speed of the other car at 55 or 60?

CROSS EXAMINATION.

By Mr. Whitehead:

Kenneth Layne.

Q. You saw this car when it pulled out from what is called the slaughter house road?

A. The sausage place.

Q. That is the place back here, the same place as the slaughter house road. There is a little residence or little home back there?

A. That is right.

Q. Now, when that car pulled out of there then it came on in front of you all, didn't it?

A. Right.

page 156 } Q. And came down to where Stephen's Tavern is?

A. Yes, on the right.

Q. Then you saw that car pull into the middle lane?

A. Right.

Q. Then how far behind that car were you at that time would you say?

A. When he pulled into the center lane?

Q. Yes.

A. I would say at least 50 or 60 feet.

Q. About 50 feet behind it?

A. Yes, sir.

Q. And you say it stopped?

A. Yes, sir.

Q. Then you saw it pull out again?

A. Pull out?

Q. Did you see it pull into the northbound lane? You know what I mean. The northbound lane would have been the lane coming from Lynchburg.

A. When we came by it looked like he was moving a little bit.

Q. Then when the impact took place didn't glass from one of the vehicles fly on the vehicle you were riding in?

A. When I got out of the vehicle it was all in

page 157 } the road and there was a bunch of it in the road I tripped over going back to the car.

Q. Then with reference to the Ayers car—that is the car coming down—you hadn't paid any attention to that car or to its lights?

A. Except for its lights.

Q. Had you paid any attention to the lights?

A. I saw the lights coming in the northbound lane.

Q. When you first saw those lights that was right at the time of the accident?

A. I saw the lights a hundred foot from it but it just happened so fast.

Kenneth Layne.

Q. That is right. You figure you saw the lights of the Ayers car about a hundred feet?

A. Maybe more than that.

Q. And did you follow the lights all the time up to the time of the accident, all during that hundred feet?

A. No, sir. I did look back and when I looked back it looked, like I said, an atomic boom had bursted.

Q. You really got a glancing look at the Ayers car?

A. That is right.

Q. And as to what speed it was going you hon-
page 158 } estly don't know, do you?

A. Sir, just looking at it hit I would say 55 to 60.

Q. And that is just a guess, isn't it?

A. I would have to say yes.

Q. When this car was proceeding in that distance, that hundred feet, did it seem to slow up any?

A. No, sir. The way it happened it looked like to me it went by mighty fast.

Q. Looked like Ayer's car went by you mighty fast?

A. What from seeing the lights and then the accident it just all happened at once.

Mr. Whitehead: If your Honor please, from the testimony of this witness we would like to have his evidence be stricken as to his evidence of speed. He says it is just a guess.

The Court: I didn't hear him say it was a guess.

Mr. Sackett: Yes, sir, he did say it was a guess.

The Court: If the jury heard him say anything about it being a guess I instruct you to disregard anything that a witness says is a guess. We can't try a case on a guess. If it is an estimate it is one thing but if it is a wild
page 159 } guess that is not a thing to base any judgment on. That is as far as I can go on that.

By Mr. Whitehead:

Q. Then after you saw this atomic bomb burst where did you go then?

A. Pulled over to the right shoulder.

Q. And got out of the car?

A. Got out of the car and went back.

Mr. Whitehead: That is all.

Kenneth Layne.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Layne, I understood you to tell Mr. Sackett you estimated Ayers' speed at 55 or 60 miles an hour the night of the collision.

A. Yes, sir.

Q. Have you talked to Mr. Sackett since that time?

A. I talked to him, went over the statement I made.

Q. Did you tell him in that statement the estimate of speed of this automobile?

A. It was in the statement, yes.

Q. Was the estimate you gave him at that time
page 160 } the same you are giving the jury now?

A. Yes, sir.

Q. Did you talk to Mr. Whitehead or to Mr. Shepherd in Mr. Whitehead's office?

A. Ask that question again.

Q. Did you ever talk to Mr. Whitehead or Mr. Shepherd about this collision?

A. No, sir, I did not.

Q. Can you tell the jury whether or not you saw the automobile long enough to get any estimate of the speed that they can reliably rely on?

A. Like I said, I saw it a hundred foot or more. I figured I could estimate it from the lights that he was doing 55 or 60 miles an hour.

Q. Mr. Whitehead says that is just a guess and you told me it was an estimate. He makes a distinction between a guess and an estimate.

A. I thought he said "estimate". I gave an estimate.

RE-CROSS EXAMINATION.

By Mr. Sackett:

Q. Did Mr. Rosenberger come to see you about the accident?
page 161 } A. No, sir.

Q. Did he send anybody to see you about the accident?

A. No, sir, but I came to see him.

Q. You went to see him?

A. Yes, sir. I got off from work and I drove by there. I figured I better read over my statement I made.

Q. In other words, he asked you to come to his office?

A. Yes, sir.

The Court: The court will assume that experienced counsel saw and interviewed their witnesses so as to know something about what they were going to testify before they came to court.

Mr. Rosenberger: The relevancy is whether he made a different statement at any other time. I will ask him about that.

Q. Have you made any other estimate of speed other than what you testified to here today at any other time?

A. No, sir.

By Mr. Whitehead:

Q. I have never talked to you about the thing, have I?

A. No, sir.

The witness stands aside.

page 162 } PRESTON GARRETT,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Will you look to the jury and talk so they can hear you? Most witnesses don't talk as loud as I do and the jury has to hear what you say. Will you do that?

A. Yes, sir.

Q. Your name is Preston D. Garrett, isn't it?

A. Yes, sir.

Q. Now, Preston, it has been testified here that you were the driver of an automobile going south on 29 toward Lynchburg on the night that this collision happened down there at Monroe. Is that right?

A. Yes, sir.

Q. What kind of automobile were you driving?

A. A '53 Oldsmobile.

Q. Now, as you drove along there these boys, Manley and Lane, who have testified, they were in the car with you. Is that right?

A. Yes, sir.

Preston Garrett.

Q. You were the driver?

page 163 } A. Yes, sir.

Q. As you drove on toward Lynchburg tell the court and the jury in your own way just what you saw and tell them loud enough so they can hear it.

A. Well, just before I got to the overhead bridge there was a large dog that had been killed laying in the road and I slowed down to go around him, and then after I got over halfway on the bridge this car—or maybe across the bridge—a car pulled out down from this road to the left at the slaughter pen and he came on over. He was driving in the right lane and center lane—looked like he hadn't made up his mind which way he was going, so I stayed on behind him and he pulled on over in the center lane and stopped to make a left turn. By that time I was three or four car lengths behind him. Well, by the time I got maybe a car length or two behind him he started to make his left turn. Well, right then I could see the other Ford car coming north. I knew that he couldn't keep from hitting him so by the time my front bumper got even with his back bumper—no, before that when he went to make his left turn I said, "Look at that fool pulling in front of that car", and by the time my front bumper got up even with his back bumper well, I said, "He has got him", and about the time I got maybe a car length or two in front of him I heard the crash and I pulled

page 164 } completely off the road and got out and went back.

Q. You had passed how far when they collided?

A. When I saw they were going to hit I hit my passing gear and went on by and was maybe a car or two car lengths past where they collided when they hit.

Q. What did you hit the passing gear for? How do you do that?

A. Pushed all the way down on the accelerator and that put it in passing gear. That gives you more speed to pass, a quick speed.

Q. And why did you want a quick speed?

A. To get out of the way to keep from getting hit myself. I knew it was no way that the Ford coming north had to avoid hitting the car turning because he was, I would say, 150 feet from him when he started to make his left turn.

Q. What did you mean by that remark, "Look at that fool pull out in front of that car"?

A. I meant just that. Anybody ought to have better sense

than to pull out in front of a car like that. He was just committing suicide almost, I would say.

Q. Mr. Garrett, could you give us an estimate, based on your observations of the Ayers automobile going

page 165 } north, of the speed of that automobile?

A. He wasn't going over 60 or 65 at the most, I would say, judging his speed.

Q. What lane was the automobile in operated by Ayers?

A. He was in the right lane going north.

Q. That would be the northbound lane?

A. The northbound lane.

Q. When Brown turned in front of him did he have anywhere to turn to?

A. You mean Ayers?

Q. Yes.

A. No. The only way he could turn was to turn over in my lane and hit me and it happened so quick I don't think he even had time to know which way to go but straight.

Q. Have you ever estimated the speed of the Ayers car at any different rate than 60 to 65 to anybody you have talked to?

A. No, sir.

Q. Have many people been interested in learning the rate of speed that you estimated?

A. Oh yes, quite a few.

Mr. Rosenberger: You may examine.

page 166 } CROSS EXAMINATION.

By Mr. Sackett:

Q. Preston, I understood you to say you saw the car moving as you came over the bridge. You saw the car coming out of the slaughter house road. It may have been while you were on the bridge or as you came off. Then you saw it proceed partially in the southbound lane and partially in the middle lane but then it pulled into the middle lane.

A. Yes, sir.

Q. And you knew he was going to make a left turn?

A. From all indications, yes, sir, but I didn't see any signal.

Q. You don't know whether he gave any signal or not?

A. No, I don't.

Q. And you have said that all along, haven't you?

A. Yes, sir.

Preston Garrett.

Q. And you have said all along you thought he was going 60 or 65 miles an hour, as Mr. Rosenberger pointed out.

A. Yes, sir.

Q. And you have said all along that this car came up to the intersection of 671 and stopped.

A. Yes, sir.

page 167 } Q. And I believe you think, just based on your estimate, that the car was about 150 feet away.

A. 150 to 200 feet.

Q. And the accident happened right quickly, didn't it?

A. Yes, sir.

Mr. Sackett: That is all.

By the Court:

Q. Did you see the driver of the Brown car give any signal of any kind?

A. No, sir, I didn't.

Q. Could you see whether it was a man or a woman driving the car?

A. No, sir. I wasn't paying too much attention to that. I was paying more attention to the automobile itself.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Preston, after this Ford pulled out from the slaughter house road and came in front of you when it pulled out in the middle lane and stopped how far were you behind it then?

A. I would say I was four or five car lengths behind him.

page 168 } Q. That would be 50 or 60 feet or something like that?

A. Something like that.

Q. Now then, was that the first time you noticed the lights of the other car coming toward you?

A. Well, when I noticed the car coming north it was when I saw him start to make his left turn.

Q. In other words, he started to make his left turn you saw the lights. That is when he started to pull from the middle lane to the northbound lane.

A. How is that question?

Q. On other words, as I understand it, am I correct in what you say when you first saw the lights of the Ayers car, or what turned out to be the Ayers car, at that time then Brown

was pulling from the middle lane into the northbound lane?

A. Yes, sir. All along it was a glare. I knew a car was coming but I didn't pay any attention to it. The only time I paid any attention to it was when I knew they were going to hit.

Q. The first time you paid any attention to that car was when you knew they were going to hit and you estimate then he was 150 or 200 feet away?

A. Yes, sir.

page 169 } Q. In that distance of 150 to 200 feet, and while the Brown car was pulling over in the northbound lane, did this other car slide brakes and try to stop?

A. It happened so fast and he was so close on it I don't think he had time to hit his brakes.

Q. As far as you could see or observe did the Ayers car look like it slowed up?

A. No, I don't think the boy even had time, don't think the Ayers boy had time to apply his brakes.

Q. In other words, the faster he was going the less time he had to apply his brakes?

A. Yes, sir.

Q. Now then, you never took notice of the Ayers car lights until you were 150 or 200 feet away from it?

A. When he was 150 or 200 feet from where they hit.

Q. And in that time you say it happened so quick you didn't believe Ayers had time to apply the brakes?

A. No, I don't.

Q. And that is the only way you can judge the speed and you estimate it to be, I believe you said, 60 to 65 miles per hour.

A. Yes, sir.

page 170 } Q. Now, let me ask you this: After this impact took place did you see how many times the old Ford, the '49 Ford, turned around in the road?

A. No, By that time I had done passed the car. By the time they hit I would say I was maybe a car length or two car lengths in front of the Brown car.

Q. Did you look through your rear view mirror?

A. Oh no. I just automatically pulled off the road.

Q. Let me ask you this: After the Brown car came to rest did it remain at that same point until the trooper came? Did anybody move the car before the trooper came?

A. No, sir.

Preston Garrett.

Q. Did anybody move the Ayers car before the Trooper came?

A. No, sir.

Q. Did you yourself step off to see how far the Brown car was knocked north? Did you make any measurements there yourself?

A. Oh no.

Q. Well, was it knocked north any distance?

A. I didn't pay a whole lot of attention to that part.

Q. When it came to rest it was facing in the opposite direction from the way it was facing when it was hit, wasn't it?

A. No, the front end was sitting parallel across the road,

Q. And when it came to rest it was headed the other way?

A. No. When it came to a complete stop the

page 171 } front end was diagonally across the road.

Q. After everything was over, after everything was settled, it was facing the opposite direction from what it was when it was hit?

A. Oh yes.

Q. Did you see what course the Ayers car took after it was hit? Did you see that go on north? In other words, were you able to look back until after the cars had come to a standstill?

A. I stopped and got out of the car before I looked back.

Q. Now, I believe Mr. Manley and Mr. Ayers and Mr. Layne are all good friends of yours.

A. Oh yes.

Q. And you all go to the beach together, I believe, don't you?

A. Not Ayers. I never did know Ayers too much, just seeing him. I wasn't close to him like I was to Manley and Layne because I run around with them.

Q. You are a friend of his brother's?

A. No, I don't know his brother. I just know him when I see him.

Q. Let me ask you this: When this impact took place did any glass fly on your car or anything hit you?

page 172 } A. I didn't feel any and I didn't notice any.

Mr. Whitehead: That is all.

RE-DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Did you know the Woody boy?

A. Yes.

Thomas Henry Shrader.

Q. Did you know Douglas Lee Peters?
A. Yes, sir, I knew him.
Q. Did you know them as well as you knew Ernest Ayers?
A. I knew them better. I just knew Ernest when I saw him. I never did buddy around with him or anything like I did—well, I never did buddy around with the Woody boy, just knew him better.
Q. How did you happen to know the Woody boy?
A. Well, I dated his sister some.

Mr. Rosenberger: That is all.
Mr. Sackett: No questions.

The witness stands aside.

page 173 } THOMAS HENRY SHRADER,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:
Q. You are Thomas Henry Shrader?
A. Yes, sir.
Q. To save time, Mr. Shrader, I am going to lead you a bit. You were riding in the automobile of Ernest William Ayers on the night it was in collision with a Ford operated by Brown, or which Brown owned?
A. Yes, sir.
Q. That was at Monroe, Virginia in March of this year?
A. Yes, sir.
Q. Speak louder. The lady and those gentlemen up there have to hear everything you say. Now, where did you start from?
A. We started from Bill's Barn.
Q. That night when did you first meet Ayers?
A. I saw him at the skating rink and then I met him later at Bill's Barn.
Q. Were you with him earlier in the evening or were you with somebody else?
A. I was with Fred Martin earlier in the even-
page 174 } ing.
Q. Is Fred Martin a boy that is a deaf mute?
A. Yes, sir.
Q. Where did you meet Fred Martin?

Thomas Henry Shrader.

A. I met him at Wright's Grill in Lynchburg.
Q. What time?
A. Approximately 4:00 or 5:00 o'clock.
Q. What did you all do in Lynchburg?
A. Well, we were sitting in the restaurant there talking and I drank a few beers.
Q. Did Fred drink anything with you?
A. Yes, sir, I think Fred drank one beer.
Q. Then when you left Lynchburg who did you ride with to Amherst?
A. When I left Lynchburg I didn't go to Amherst. I went to the skating rink.
Q. Out in Madison Heights?
A. Yes, sir.
Q. Who did you go to the skating rink with?
A. Fred Martin.
Q. And what time did you leave Wright's Cafe to go to the skating rink?
A. About 7:00 o'clock.
page 175 } Q. Did you and Fred stay at Wright's Cafe from about 5:00 to 7:00?
A. Yes, sir.
Q. How long have you known Fred?
A. I have known him for about four or five years.
Q. How old are you?
A. Twenty.
Q. And how old is Fred?
A. He is twenty-one, I think.
Q. Have you had any service in the armed forces?
A. Yes, sir. I was in the Marines.
Q. How long were you in the Marines?
A. Two years and eight months.
Q. Now, after you and Fred left the Wright Cafe around 7:00 o'clock who drove the automobile to the skating rink at Madison Heights?
A. Fred.
Q. You were in Fred's automobile?
A. Yes, sir.
Q. When you went to the skating rink what did you do out there?
A. I roller skated.
page 176 } Q. Fred and you still together?
A. Yes, sir.
Q. Did you see Ernest out there?
A. Yes, sir, I saw Ernest.

Thomas Henry Shrader.

Q. Did you join up with Ernest and the boys that were with him?
A. No, sir.
Q. Who was Ernest with?
A. I don't know who he was with. He was standing by himself when I saw him.
Q. When was the next time you saw him?
A. Out at Bill's Barn.
Q. Did you and he leave the skating rink together?
A. No, sir.
Q. Who took you from the skating rink to Bill's Barn?
A. Fred Martin.
Q. In Fred's car?
A. Yes, sir.
Q. You know whether you went to Bill's Barn first or whether Ernest did?
A. Ernest did. He was there when we got there.

Q. When you got there who was with Ernest?
page 177 } A. He was with Woody and Douglas Peters.
Q. And after you stayed there awhile where did you go?
A. We started out to the Beauty Contest at Amherst.
Q. In whose automobile?
A. In Ernest Ayers' automobile.
Q. Who was driving the automobile?
A. Ernest Ayers.
Q. Who was on the front seat?
A. Douglas Peters and E. W. Woody and Ernest.
Q. In what order were they seated?
A. Woody was sitting on the right-hand side of the front seat, Ernest Ayers was sitting on the left, and Douglas Peters was sitting in the middle front.
Q. Where were you sitting?
A. I was sitting in the back right-hand side.
Q. Where was Fred?
A. He was in the back left-hand side.
Q. Do you remember driving from Bill's Barn on the way out to where this accident occurred?
A. I remember up to about the Amherst Drive-In. I think I went to sleep at the Amherst Drive-In.

Q. You remember anything from that time on to
page 178 } when the accident happened?
A. No, sir, I don't remember anything from that time on. I was asleep.

Thomas Henry Shrader.

Q. How far is it from Amherst Drive-in to where the collision occurred?

A. I would guess about three or four miles.

Q. Do you remember any of the details of the collision?

A. No, sir.

Q. Do you know anything about the speed of the Ayers automobile as you approached coming down the hill just before the collision?

A. No, sir. I was asleep at that time.

Q. Will you look at the jury and tell them positively whether you know anything about the speed of that automobile just before the collision?

A. No, sir, not just before the collision.

Q. Do you know anything about the speed of that autotomobile a mile before the collision?

A. No, sir.

Q. Then are we correct in assuming that the last thing you knew was at the Drive-In Theatre four miles away?

A. Yes, sir.

page 179 } Q. What is the next thing you knew after the collision?

A. I just remember laying in the car and when the ambulance driver took me out and put me in the ambulance.

Q. You remember that?

A. Yes, sir.

Q. You remember who was in the ambulance with you?

A. No, sir.

Q. Did you stay conscious from the time you got in the ambulance until the time you got to the hospital?

A. No, sir. I passed out just a few minutes before I got to the hospital.

Q. Do you remember going in the hospital?

A. No, sir.

Q. Mr. Shrader, while you were with Fred Martin from 4:00 o'clock until 7:00 o'clock at the cafe were you able to understand what he was talking about?

A. No, sir. He wasn't talking to me very much. He was just sitting with me talking to some more deaf and dumb boys with his hands.

Q. Now, after you left the deaf and dumb boys did you talk to him any?

A. No, sir.

page 180 } Q. Are you generally able to understand what Fred Martin says?

A. Yes, sir, usually.

Thomas Henry Shrader.

Q. Can Fred usually understand what you say?
A. Yes, sir, usually he can.
Q Does Fred go around with the same boys that you do in Madison Heights?
A. No, sir.
Q. Do you see him over there at the Coffee Shop in Madison Heights?
A. Yes, sir, I see him over there a lot.
Q. Do you see him at Bill's Drive-in?

The Court: Bill's Barn.

By Mr. Rosenberger:
Q. Do you see him at Bill's Barn?
A. Yes, sir.
Q. Is he able to make those boys he goes with understand what he is talking about?
A. Some things—not too well. If he knows you real good then he can make you understand pretty good.
Q. Can he make you understand pretty good?
A. Yes, sir.
page 181 } Q. Can he understand you?
A. Yes, sir, he can understand me pretty good.
Q. Have you ever seen him with his brothers?
A. Yes, sir.
Q. Do they understand him?
A. Yes, sir.
Q. Does he understand his brothers?
A. Yes, sir.
Q. Have you ever seen him with his mother and father?
A. Only one time.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION.

By Mr. Sackett:
Q. You know Fred Martin's brothers real well, better than you do Fred, don't you?
A. Yes, sir.
Q. His brother is a close friend of yours, is he not?
A. Yes, sir.
Q. Tommie, isn't it a fact that the boy you were with in Lynchburg that day was Fred's brother?

Thomas Henry Shrader.

A. I rode into Lynchburg with Fred's brother
page 182 } that evening. That was earlier.
Q. And then you just ran up on Fred in Lynchburg?
A. Yes, sir.
Q. Then you all came back together but you had been with Fred's brother earlier in the evening?
A. Yes, sir.
Q. Was he with you at Wright's Cafe?
A. No, sir.
Q. But you say you saw Fred have one beer and that is all?
A. Yes, sir.
Q. Did he have his beer there?
A. Yes, sir.
Q. Then you went on out to the cafe and went on out to the skating rink and it was there you saw Peters and Woody and you left there and went from there to Bill's Barn?
A. Yes, sir.
Q. You say you had gone to sleep over about the Amherst Drive-In?
A. Yes, sir.
Q. Approximately how many beers had you had?
A. When?
Q. That is a real good question. When you
page 183 } were over at Wright's Cafe and from then on?
A. I had about nine or ten.
Q. I see the relevancy of your question "When."

The Court: I think that is a pretty satisfactory explanation about his going to sleep too.

By Mr. Sackett:
Q. But you just don't know anything about this accident at all—period.
A. No, sir.
Q. You saw Ayers at the skating rink and saw him at Bill's Barn?
A. Yes, sir.
Q. Do you know Ayers well enough to know whether he had been drinking?
A. No, sir.
Q. Did he give you the impression that he had been drinking?
A. No, sir.

Thomas Henry Shrader.

Q. Not one way or the other?
A. No, sir.
Q. Did you see him take anything to drink?
A. No, sir.
Q. How does he generally act?
page 184 } A. He is always quiet.
Q. Could you tell anything about whether any of the other boys in the car had been drinking?
A. Not that I could tell.
Q. How did they act?
A. They acted perfectly normal.
Q. How long were you at Bill's Barn?
A. Somewhere around an hour.
Q. Inside or out?
A. Both.

Mr. Sackett: That is all.

CROSS EXAMINATION.

By Mr. Whitehead:
Q. Tom, you went to sleep out there about Amherst Drive-In and that is about at the intersection of U. S. 29 and 130? Is that right?
A. Yes, sir.
Q. Then the next thing you say you knew was when they were taking you out of the car and putting you in the ambulance?
A. Yes, sir.
Q. And all the time you were with Fred Martin
page 185 } you had only seen him have one beer?
A. Yes, sir.

By the Court:
Q. Do they sell beer at the skating rink?
A. No, sir.
Q. Do they sell it at Bill's Barn?
A. No, sir.
Q. That is where you all left from, isn't it?
A. Yes, sir.
Q. What time was it?
A. Approximately 11:00 o'clock.
Q. Was the Beauty Contest going on at 11:00 o'clock around here?

A. Yes, sir. I think it was over at 12:00 o'clock.

The witness stands aside.

Mr. Rosenberger: Judge, we want to call Mr. R. L. Tinsley as a witness and examine him in chambers. This is a complete surprise to him.

page 186 } In Chambers.

Mr. Rosenberger: If your Honor please, I want to offer this gentleman as a witness in the presence of the jury but anticipating there might be some objection I think it would be fairer to start in here.

R. L. TINSLEY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. Mr. Tinsley, you are now the lawyer for Fred A. Martin, are you not?

A. That is correct.

Q. Do you represent his interest to collect damages following this collision which occurred between an automobile operated by Ernest William Ayers and one operated by John Brown in Amherst County on March 7, 1959?

A. I do.

Q. As his attorney did you agree with the attorney for the defendant Brown to take a compromise settlement on the claim of Fred A. Martin for personal injury?

page 187 } A. I did, before I ever talked to Mr. Martin himself. I had only talked with his father.

Q. Why was it you only talked with his father?

A. It was my understanding at that time—I assumed that much—that Mr. Martin was deaf and dumb and could not be understood or couldn't understand me.

Q. And his father was acting on behalf of Fred Martin?

A. Yes, sir.

Q. Having been employed in the case you investigated it to find out what you could about the circumstances, did you not?

A. Yes, sir.

Q. And you relied on the information given you by Fred

Martin's father, as Fred Martin's agent, as to what Fred Martin knew about it, didn't you?

A. Yes, sir.

Q. Based on that information you agreed on a compromise settlement of the claim of Fred A. Martin for $350.00 with the defendant Brown's estate, didn't you?

A. Yes, sir. That was in conjunction with the medical report I had received from Dr. Bryan who had treated him.

Q. You knew that when you accepted that settlement that that would release any claim that Fred A. Martin
page 188 } had against Ernest William Ayers, didn't you?
A. I did.

Q. If the settlement had been completely negotiated the joint tortfeasor would be released—

The Court: There has been no settlement. I declined to let them settle.

The Witness: No settlement has been made.

By Mr. Rosenberger:

Q. Fred A. Martin is twenty-one years old, isn't he?

A. I believe he is twenty-two now, Mr. Rosenberger.

Q. Why was it that you and the attorney for the defendant Brown wanted it approved by the court?

A. Well, I felt that Mr. Shrader, whom I also represented, had settled his case and he was under twenty-one years of age and I suggested to the attorney for Brown's estate that we go ahead and handle Mr. Martin's settlement at the same time in the same manner. I said, "There might be some question."

The Court: This man came into court here and declined to settle and no settlement was made.

Mr. Rosenberger: I want to show a change in his position.
The Court: I am not going to let this witness
page 189 } testify to all this stuff. A lot of it is privileged communication.

Mr. Rosenberger: I would like to point out it is not privileged communication.

The Court: Any dealings he had with his client was privileged.

Mr. Rosenberger: He reached an agreement with the defendant Brown as to a settlement which he knew released Ernest Ayers.

The Court: This boy didn't agree to it.

Mr. Rosenberger: He agreed to it through his father who gave him the information and who acted for the son.

The Court: Oh no.

The Witness: I told him I had done the best I could and he would not accept it.

Mr. Sackett: I make the observation and I would like for it to go in the record, that this man has testified he never talked to Fred A. Martin but more than that all of these settlements and negotiations were completely without prejudice and what he is undertaking to do now is to
page 190 } impute to the defendant Brown liability for this claim based upon settlement negotiations that were without prejudice and without admission of liability on the part of anybody.

The Court: This boy, Martin, was very indignant about the thing. He was resentful. He said he didn't want to settle for that because he had bad injuries or had been badly injured.

Mr. Sackett: And he stated to the court then that the basis for his decision in not settling was that the car that was operated by Ayers was traveling at an excessive rate of speed and that he had tried to get him to slow down and protested without avail.

Mr. Rosenberger: Your Honor, let me make this observation: The purpose of my showing this is to show an agreement was reached acting on information that this man's father gave.

The Witness: He was acting on erroneous information and so was I.

Mr. Rosenberger: And this was a change of position by this man, Fred A. Martin, which was the same sort of change as his change in his testimony as it relates to his
page 191 } estimate of the speed. That is the point.

The Court: I rule that out.

Mr. Rosenberger: We object and except.

Mr. Whitehead: May I say this before you rule, if your Honor please? What he is trying to get in is the fact that Fred Martin by that settlement was trying to put all the blame on one and releasing the other while all of us know that all he wanted was money and he didn't care where he got it from and the other man could bring suit against you for contribution.

Mr. Rosenberger: His lawyer knew he was releasing you and when he was he was saying impliedly "we know that

Ernest Ayers did nothing wrong'' and that is the same thing this man started out on when he said this man was going only 55 miles to 60 miles an hour.

Mr. Whitehead: I want to say for the record that that is not so at all because all the evidence shows that Martin if all he wanted was money and after he got his money then Brown's estate could sue the Ayers estate.

The Court: I am not going to let it in.

Mr. Rosenberger: We object and except for the reasons stated.

page 192 } Note: At this point court and counsel return into the courtroom and at Mr. Rosenberger's Request immediately return to the Judge's Chamber.

Mr. Rosenberger: If your Honor please, during that recess I noticed some person not connected with the trial or with counsel communicate with a juror and I would like to—

The Court: Who was it?

Mr. Rosenberger: It was a fellow named McDearmon. I would like to ask the court to ask the jury if anybody spoke to them about the case, just that general question, without any comment from them about what was mentioned about the case.

(In the Courtroom—jury present).

The Court: Lady and gentlemen of the jury, has any spectator, witness or anyone spoken to any of you all about this case today?

Note: (All jurors answer in the negative either by saying ''no'' or by shaking their heads.)

page 193 } ERNEST WILLIAM AYERS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You are Ernest William Ayers?

A. Yes, sir.

Q. How old are you, Ernest?

Ernest William Ayers.

A. Nineteen.
Q. Where do you live?
A. Route 1, Madison Heights.
Q. Who is your father?
A. "O. B." Ayers. He is dead now.
Q. When did he die?
A. July 22nd, 1959.
Q. What is your mother's name?
A. Mary Ayers.
Q. She is the lady sitting here?
A. Yes, sir.
Q. Do you live in the home with her?
A. Yes, sir.
Q. Now, will you tell the jury where you first met the young Woody boy and the Young Peters boy on the night this collision occurred?

page 194 } A. I believe I met them at the Coffee Shop at Shrader's Field. I am pretty sure that is where I met them. We stayed there a little while.

Q. And from the Coffee Shop where did you go?
A. Well, we rode around so much—I think I went to the skating ring next.
Q. Who was riding with you?
A. E. W. Woody, Jr. and Douglas Peters.
Q. How long had you known those boys?
A. A couple of years, I imagine. I knew E. W. about three or four years and Douglas about two years.
Q. And had you and E. W. been used to going around together?
A. Yes, sir.
Q. Now, where did you first see Fred Martin and Tom Shrader?
A. I believe the first time I seen them was at Bill's Barn.
Q. And did you boys then join up with them?
A. No. They came over and sat in my car.
Q. Came over and sat in your car?
A. Yes, sir.
Q. Had you had anything to drink that night?
A. Yes, sir.

page 195 } Q. What had you had to drink?
A. I had about one and a half beers.

Q. Could you tell us when you had that?
A. Somewhere around 6:00 o'clock.
Q. Had you had anything to drink after that of an alcoholic nature?

Ernest William Ayers.

A. No, sir.
Q. Are you sure of that?
A. Yes, sir.
Q. Did you have that to drink before or after you were with E. W. Woody and Douglas Peters?
A. I had it before I met them.

The Court: Is this young man of age?
Mr. Rosenberger: No, sir.

Q. How old are you?
A. Nineteen.

The Court: Has a guardian *ad litem* been appointed?
Mr. Whitehead: Yes, sir.

By Mr. Rosenberger:
Q. After you were at Bill's Barn for awhile where did you decide to go?
page 196 } A. Decided to go to the Beauty Contest.
Q. Had you earlier that night or evening been to this beauty contest?
A. Yes, sir. We had been there about 8:00 o'clock when it started.
Q. How did you happen to leave then?
A. Well, it was just little children then, two and three years old.
Q. And they were going to run from the little children through the different age groups up to the young ladies?
A. Yes, sir.
Q. And that is the reason you left?
A. Yes, sir.
Q. Who was driving when you left Bill's Barn?
A. I was.
Q. Who was on the front seat with you?
A. Douglas Peters in the middle and E. W. Woody was on the front seat on the right side.
Q. And Fred Martin was in the back seat behind you and Shrader on the right side?
A. Yes, sir.
Q. Now, as you drove on out the road were you
page 197 } speeding at any time?
A. No, sir.
Q. As you started down that hill could you give us an idea

of what rate of speed you were going as you came down the hill toward where the collision occurred?

A. Well, I imagine I was going at a moderate rate of speed, 55 or 60.

Q. Moderate rate, 55 or 60?

A. Yes, sir.

Q. Whose automobile were you driving?

A. It was mine.

Q. Now, will you tell us what you first noticed, if anything, wrong?

A. Well, I really don't remember too much about it. I seen the car out in the middle lane and seems like the next thing I knew was the collision.

Q. Do you remember being hurt anywhere?

A. Yes.

Q. Where were you hurt?

A. In my chest.

Q. Where were you when you knew about your
page 198 } chest hurting you?

A. I knew about that while I was laying on the road before the ambulance came.

Q. Do you remember hearing any noise when the two cars went together?

A. Yes, sir.

Q. You do remember that noise?

A. Yes, sir.

Q. You remember what happened after that?

A. No, sir.

Q. Do you know what direction your car went in?

A. No. I didn't know where I was at when it was over.

Q. Do you remember talking to a Miss Vaughan and Jerry Sutton?

A. No, sir.

Q. Remember seeing them or saying anything to them about "Look out for the other boys?"

A. I might have said that but I don't remember who I was talking to.

Q. You remember saying it?

A. I believe so, yes, sir.

Q. Then what is the next thing you remember?

A. Riidng in the ambulance.

page 199 } Q. You remember all the ride in the ambulance?

A. No, sir.

Q. You remember when you got in the ambulance?

Ernest William Ayers.

A. No, sir.
Q. Do you know who was in the ambulance with you at that time?
A. I didn't know at the time, no, sir.
Q. You did not know?
A. No, sir.
Q. Did you know anything when you got to the hospital?
A. I remember coming to and I was laying on a bed or table.
Q. And how long did you stay in the hospital, Ernest?
A. About two weeks.
Q. What did you have wrong with you?
A. Just in my chest, side and shoulder.
Q. Your chest, back and shoulders?
A. Yes, sir.
Q. Did you get this mark on your forehead in the accident?
A. No, sir.

By the Court:
Q. Did the car you collided with give any signal that you could see?
page 200 } A. I don't remember seeing no signal, no, sir.

By Mr. Rosenberger:
Q. Did you see anything to indicate that the automobile was going to pull across your lane?
A. No, sir. When I first seen the car it was in the middle lane but the next thing I knew it was in my lane and I hit it. At least I feel like it was in the middle lane when I first saw it.
Q. When you say you feel like you saw the car in the middle lane by that do you mean to tell the jury you are not sure you saw it in the middle lane or not?
A. In a way, yes, sir.
Q. Are you clear about what happened is what I am getting at.
A. No, I am not very clear about it.
Q. It is just hard for you to remember?
A. That is right.
Q. Have you tried hard to think and reconstruct this to get back what happened?
A. Yes, sir.
Q. Have you been able to do it?
A. No, not too much.

Ernest William Ayers.

Mr. Rosenberger: You may examine.

page 201 } CROSS EXAMINATION.

By Mr. Sackett:

Q. Ernest, you remember things that took place earlier in the evening, of course.

A. Yes, sir.

Q. And you say you first met Peters and Woody, you think, at the Coffee Shop at Shrader's Field and you think that was around 8:00 o'clock?

A. No, I met them earlier than that, somewhere around 7:00 o'clock.

Q. Met who?

A. Met E. W. Woody.

Q. Where did you meet him?

A. At the Coffee Shop.

Q. Then where did you meet Peters?

A. I believe Peters was over at the skating ring, or at the coffee shop one.

Q. I don't mean to press you on these details but it is rather important that I find out. You met Peters first at the Coffee Shop, you think, around 7:00 o'clock?

A. I met E. W. Woody first.

Q. And that was at the Coffee Shop?

page 202 } A. Yes, sir.

Q. Then Peters was over at the skating rink?

A. Yes, sir, I believe so.

Q. Then the three of you all got together there?

A. Yes, sir.

Q. Where had you had the beer that you said you drank?

A. Well, I had them in my car and, of course, I was under age and I stopped at the gravel pit up on 130 coming to town.

Q. Is 130 the Elon Road?

A. Yes, sir.

Q. And you stopped there. Where had you bought the beer?

A. Well, I would rather not say, being under age.

By the Court:

Q. You would rather not say but you can say. Where did you get it?

By Mr. Sackett:

Q. Where did you get it?

Ernest William Ayers.

A. Aker's Service station.
Q. On 130?
A. Up on 29.
Q. Who was with you?
A. I was by myself.
page 203 } Q. How much did you buy?
A. Just two.
Q. And you took them to the gravel pit?
A. I kept them in my car and went home.
Q. You had supper first and then went out the Elon Road?
A. I live at Elon. That was on my way to town.
Q. You were on your way from home coming into town on the Elon Road and you stopped at the gravel pit and that is where you drank the beer?
A. Yes, sir.
Q. And you were by yourself then?
A. Yes, sir.
Q. Then you went to the skating rink?
A. Coffee Shop.
Q. The Coffee Shop and then the skating rink?
A. Yes, sir. It is really one and the same thing.
Q. Mr. Rosenberger wants me to ask you how much beer you drank at the gravel pit.
A. I had two cans and I drank one and about half of the other and threw the can out.
Q. So you didn't have anything more in the car?
A. No, sir.
page 204 } Q. Then you went to the Coffee Shop or the skating rink and there you met Peters and Woody?
A. Yes, sir.
Q. Do you know where you went when you left there?
A. Went back to Amherst.
Q. Did you have anything to drink there at the skating rink or Coffee Shop?
A. No, sir.
Q. Had Peters or Woody had anything there?
A. No, sir.
Q. Did you all skate there that night?
A. No, sir.
Q. Then you all went to Amherst?
A. Yes, sir.
Q. And that is when the younger children were being judged in the beauty contest?

Ernest William Ayers.

A. Yes, sir.
Q. You think that was around 8:00 o'clock?
A. We were there at the time it started.
Q. How long did you stay?
A. Just a few minutes.
Q. Did you stop anywhere between the Coffee
page 205 } Shop and Amherst?
A. No, sir.
Q. What time did you leave Amherst?
A. We stayed just a few minutes. I don't know how long we stayed.
Q. Where did you go?
A. We came back toward town.
Q. Did you stop anywhere?
A. We might have stopped at the skating rink again.
Q. Don't you remember one way or the other?
A. Been seven months and I can't recall all the stops we made at this time.
Q. You say you had been roaming around and it might be hard for you to remember but that is what I want to ask you to try to do. You think you stopped at the skating rink and the Coffee Shop?
A. Yes, sir.
Q. Did you skate there?
A. No, sir.
Q. Were Peters and Woody both there?
A. Yes, sir.
Q. Did you see Fred Martin there?
A. I don't remember seeing him.
page 206 } Q. Did you see Tom Shrader there?
A. Don't remember seeing him.
Q. How close friends are Fred and Tom to you?
A. I didn't know them before the accident, just knew them by face.
Q. But you, of course, had known Woody and Peters?
A. Yes, sir.
Q. Do you know about what time you left there to go to Bill's Barn?
A. No, sir.
Q. You know how long you stayed there approximately?
A. It would have been thirty to forty minutes—I don't know. I didn't have a watch at the time.
Q. When you went to Bill's Barn did you have anything to drink there?
A. No, sir.

Ernest William Ayers.

Q. Was there any wine in the car?
A. I don't think so. It could have been in the trunk. I don't think it would have been anything in it.
Q. Do you drink wine?
A. I will have a glass of it.
Q. Had you bought any wine that day?
page 207 } A. No, sir.
Q. Was any whiskey in the car?
A. No, sir.
Q. Do you know whether either Woody or Peters had bought any wine or whiskey?
A. No, sir.
Q. You don't know?
A. No, sir.
Q. Did either of them give to you the appearance of drinking?
A. No, sir.
Q. Now, you were driving when you left Bill's Barn as you started north on 29 and your plan was to go back to Amherst, was it not?
A. Yes, sir.
Q. And if I understood you correctly Mr. Rosenberger asked you had you been speeding at any time before you got to the scene of the accident and you said you didn't think so.
A. That is right.
Q. And he asked you as you went down the hill toward the point where the accident happened what speed you were driving and you said you imagined you were still going at a moderate rate of speed.
page 208 } A. Yes, sir.
Q. Actually, Ernest, this thing is so hazy in your mind you really have no definite recollection of what took place, do you?
A. I know some things that took place, yes, sir.
Q. You remember leaving Bill's Barn, of course.
A. Yes, sir.
Q. But when you get to the immediate area of the accident it is all hazy to you, isn't it?
A. Yes, sir.
Q. You really don't know what took place then?
A. No.

Mr. Sackett: That is all.

Ernest William Ayers.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Ernest, I believe you told us that you took E. W. Jr., and Douglas Peters and you three came over to the high school earlier in the evening along about 7:00 o'clock and then you all left while they were having the little tiny children judged and you went back around the Coffee Shop or skating rink. Then you tell us you left from over there around the skating rink or in that neighborhood somewhere around 11:00 o'clock.

page 209 } A. I don't know what time it was. It wasn't that late, no, sir.

Q. Was it after 10:00?

A. When we left the skating rink to go to Bill's Barn, yes.

Q. And then a little later you struck out to Amherst and you knew this little boy, Douglas Peters, you knew he was just a young kid, just fifteen. You knew that, didn't you?

A. Yes, sir.

The Court: Speak up, Mr. Whitehead. I can't hear you.

Mr. Whitehead: I beg your pardon. That is the first time I have ever been accused of this.

Q. Then you say it was around 10:30 when you left Bill's Barn?

A. Yes, sir.

Q. Then you came on back on 29 going north and you came on back in the vicinity of his home, didn't you?

A. Yes, sir.

Q. Did you put him out there at his home?

A. No, sir. He told us he had to be home about 1:00 o'clock.

Q. Then you proceeded on to the scene of the accident?

A. Yes, sir.

page 210 } Q. Then as you proceeded on to this accident I understood you to say you were going about a normal rate of speed, 55 to 60 miles an hour.

A. Yes, sir.

Q. Don't you know the maximum speed limit is 55?

A. Yes, sir.

Q. Then if you are going 60 you say that is normal?

A. I drove the limit.

Q. Do you think 60 is normal?

Ernest William Ayers.

A. No, sir.

Q. You say you were driving 55 to 60. Was it 58 or 59, somewhere in that territory?

A. Well—

Q. You know anything you go over 55 miles an hour is exceeding the speed limit under any conditions. You know that, don't you?

A. I imagine so.

Q. What?

A. Yes, sir.

Q. Then you came down the hill. When was the first time you observed the Ford automobile driven by Brown that you collided with?

page 211 } A. I seen it when I was right close on it. I seen the car. I say I seen the car, I imagine I did,—seen the headlights.

Q. Was it standing still then?

A. It was standing still or it could have been moving slowly.

Q. That is the first time you had seen it?

A. Yes, sir.

Q. Now I want you to come here a minute, Ernest, please, and look at this picture. Now, this is Ayers No. 6. That is the top of the hill where you started to turn down to the accident, isn't it? That is the top of the hill right up there, isn't it?

A. Yes, sir.

Q. Then take it from this angle here and when you were up here at the top of the hill which would have been south of the accident—you understand that?

A. Yes, sir.

Q. You were up here south of the accident and then this is the direction you were going, which was a northerly direction, and you could see way back up here next to the railroad track, couldn't you?

A. I guess so.

Q. Yet you tell us you never saw the Brown car until it was sitting there in the middle lane of the road?

A. I said I seen the headlights while it was in

page 212 } the middle lane. I could have.

Q. I know you could have but did you?

A. I might have.

Q. You don't know if you did?

A. I feel like I did.

Ernest William Ayers.

Q. When did you first notice the Brown car?

A. I wasn't far from it. I don't know how many feet.

Q. Now, take this number 5. You know where Stephens' Tavern is. You know the accident happened south of that. When you first noticed the Ford automobile was it in the middle lane or in your lane?

A. I believe it was in the middle lane when I first seen it but I don't remember so much. I just hit it then.

Q. You just hit it. Do you remember applying your brakes?

A. No, sir.

Q. Well, before you got to the point of the accident you were proceeding downgrade, weren't you?

A. Yes, sir.

Q. You were driving a pretty modern car, weren't you?

A. Yes, sir.

Q. Was that a 1956 model?

A. Yes, sir.

page 213 } Q. And that was a hardtop 1956 automobile?

A. Yes, sir.

Q. And it was in good working shape, wasn't it?

A. Yes, sir.

Q. Running good?

A. Well, I had it up to Mr. Peters' garage two or three weeks before that.

Q. This gentleman here. I believe his garage is known as "Pete's Garage."

A. Yes, sir.

Q. And it was running good, wasn't it?

A. Yes, sir.

Q. And it passed inspection all right?

A. Yes, sir.

Q. And you had it so controlled that it didn't make so much noise that you couldn't get a sticker for it. Was the mufflers on it all right?

A. Yes, sir, had a brand-new muffler.

Q. Now, let me ask you this: Why when that car came down the hill if you were just going 55 or 60 miles an hour, why was it humming and making such a noise?

A. I don't know why it would have been hum-

page 214 } ming.

Q. You know it was speed, don't you?

A. No, sir.

Q. Won't speed make it hum?

A. I don't know.

Ernest William Ayers.

The Court: Nobody said the car was humming as far as I know.

Mr. Whitehead: Whatever expression the man used.

The Court: He said it was roaring.

Mr. Whitehead: Thank you. That is a better word.

Q. Why was it roaring?

A. I don't know.

Q. You know if you press down on the accelerator and get it to going fast that will make it roar, won't it?

A. It should.

Q. And that is the only thing that will make it roar is speed, isn't it?

A. No, sir.

Q. What else?

A. Like you say, if you had a bad muffler on it it would make a lot of noise.

page 215 } Q. You didn't have any bad muffler, did you?

A. No, sir.

Q. So the roaring couldn't come from the muffler because you didn't have a bad muffler. Is that right?

A. Yes, sir.

Q. So the only thing the roaring could have come from was speed, wasn't it?

A. No, sir.

Q. What else could it come from?

A. I don't know.

Q. How fast would that car go that you were driving?

A. I imagine it would go as fast as any other car that model.

Q. How fast is that?

A. It has 120 on the speedometer and that is as fast as any of them of that model.

Q. Then when this actual impact took place what happened to your car?

A. I hit the other car. That is all I know.

Q. You don't remember what happened after that time?

A. Well, I didn't sit up in the car and watch it when it was spinning around, no, sir.

Q. Do you know how many times it spun

page 216 } around?

A. No, sir. I have no idea.

Q. You knew at the speed you were going those boys sit-

ting up there with you didn't have the steering wheel to protect them and they were really hurt, didn't you?

Mr. Rosenberger: I object to that.

The Court: I didn't hear the question entirely.

Mr. Whitehead: I asked him this: I said, "You knew that at the speed you were going and the two boys sitting beside you without the steering wheel to protect them they were really hurt."

The Court: That is not a question. That is a statement and the jury will disregard it.

By Mr. Whitehead:

Q. In other words, sitting in your car you had hold to the steering wheel, didn't you?

A. Yes, sir.

Q. And when the impact took place you had the steering wheel to protect you, didn't you?

A. That is right.

Q. And your steering wheel was bent down, wasn't it?

A. Yes, sir.

Q. And did Woody or Peters have any steering
page 217 } wheel or anything to catch hold of until they went
to the dash of the car?

A. No, sir.

Q. How was your steering wheel bent? Do you remember?

A. No, sir.

Q. Have you ever looked at the car to see?

A. I looked at it one time.

Q. But where you pushed against it it had bent the steering wheel in, hadn't it?

A. Yes, sir.

Q. I ask you to look at that picture. Is that the condition your steering wheel was in after the accident?

A. Yes, sir.

Mr. Whitehead: We would like to introduce this as Plaintiff's Exhibit No. 18.

The Court: Do you have any objection?

Mr. Rosenberger: No objection.

Mr. Sackett: No objection.

Mr. Whitehead: We want to offer it as Plaintiff's Exhibit No. 18.

The Court: Mark it "Plaintiff's Exhibit No. 18".

Ernest William Ayers.

By Mr. Whitehead:

Q. I believe after the accident you were taken
page 218 } to Lynchburg General Hospital.

A. Yes, sir.

Q. And while at the hospital you also had a growth removed that you had before the accident, didn't you?

A. Yes, sir.

Mr. Whitehead: All right, thank you.

The witness stands aside.

The Court: The hour is late. We will adjourn until 9:30 tomorrow morning and I will ask everybody to be here promptly. Call all the witnesses out of both rooms and let me tell them and I expect you had better put those easels in my office where they will be locked up.

I repeat to the jury that in our recess overnight do not allow anyone to talk to you about the case nor discuss it with you or in your presence and if anyone tries to talk to you about it tell them they can't do it and if they insist tell me who they are.

(Adjournment).

page 219 } September 3rd, 1959.
Morning Session.

Note: At or about 9:30 o'clock A. M. on the morning of September 3rd, 1959 the following announcements were made by Mr. Lloyd Storey after he had called and polled the jury:

Lady and gentlemen of the jury, unfortunately Judge Quesenbury is sick this morning. He was taken sick last night at the Thomas Motor Lodge and called this morning and said he would not be able to hold court. For that reason he has continued this case until September 8th, 1959, next Tuesday morning, at 9:30. All of you are instructed to please not discuss this case amongst yourselves or with anyone else nor are you to allow anyone to discuss this case with you or in your presence. It is very important that you do not discuss this case with anyone. You will be present in court Tuesday morning at 9:30. You are excused until that time.

All witnesses summonsed and who are here to
page 220 } testify in this case today come forward.

Note: Four witnesses and the defendant come to the Clerk's Desk.

I think all of you witnesses heard the statement made to the jury as to when to be back. This also applies to the witnesses. You are all supposed to be back here Tuesday morning, September 8th, at 9:30. You are excused until that time.

(Adjournment).

page 221 } September 8, 1959,
Morning Session.

The Court: Where were we when we adjourned?
Mr. Rosenberger: Mr. Ayers, I believe, had completed his testimony. He was the last witness.
The Court: He had just finished and you were putting on your defense?
Mr. Rosenberger: Yes, sir.
The Court: Call your next witness.
I think we had better let the record show that Mr. L. L. Rudacille, who was selected as one of the jurors in this case, had an emergency operation at the end of the first day of the trial and it is stipulated and agreed by counsel for all parties that the trial shall continue with the six remaining jurors.
Mr. Rosenberger: Before the defendant Ayers rests his case we would like to make a motion.
The Court: All right.

(In chambers).

Mr. Rosenberger: If your Honor please, the defendant Ayers will at this time ask the court for permission to introduce the evidence of Fred Martin which he gave in chambers
limited to that part of his testimony that he told
page 222 } George Sanderson, a heavy-set fellow with glasses,
on a previous occasion that the speed of this automobile was 55 to 60 miles an hour. We reoffer that testimony because it has come to our attention that we did not specifically point out to the court that counsel would not be in position to show who George Sanderson was or his interest or that he was an insurance agent because the witness readily

admits such a statement to Sanderson. We would not have to use Sanderson to impeach his testimony. Therefore counsel would have no valid reason to show who Sanderson was to prove his interest in the case. We think under those circumstances the jury should have the benefit of this testimony because, frankly, this is all the testimony in the record that would tie Ayers into the case as going at an excessive speed and we don't think it is credible evidence and that this will demonstrate to the jury that it is incredible.

The Court: What do you gentlemen think of that?

Mr. Sackett: If your Honor please, the defendant, Brown, reiterates his objection expressed to the court in the consideration of this matter when the trial of the case was commenced on September 2nd and we restate the position now thus:

page 223 } George Sanderson is an adjuster for the State Farm Mutual Automobile Insurance Company. There has already been one insurance adjuster brought into this case by name and it has been readily admitted that he is an insurance adjuster. When Mr. Rosenberger, representing the defendant Ayers, offers now the testimony of the witness Martin as to what he told George Sanderson it will proclaim to this jury, in which county George Sanderson has been identified very closely with the State Farm Mutual Automobile Insurance Company, and it is equivalent—and Mr. Rosenberger knows it—it is equivalent of telling this jury that George Sanderson was an insurance adjuster and he represented the carrier of John Brown and we think it is improper and we object to it.

Mr. Rosenberger: If your Honor please, George Sanderson when he was in this area was located at Lynchburg. To my knowledge he has never had an office nor sold insurance in Amherst County and it is my understanding that he now works at the regional office of the State Farm in Charlottesville and I think it is a long presumption to say that this jury would know he is an insurance adjuster.

The Court: I don't see how I could shut off
page 224 } Mr. Whitehead and he would have the right to inquire who Sanderson was and what the circumstances were when the statement was made and I don't see how you could keep the question of insurance, as affecting Brown, out of the case if you let this testimony in regard to Mr. Sanderson in.

Fred Martin.

Mr. Rosenberger: It wouldn't be proper for Mr. Whitehead to interrogate as to who Sanderson was because the witness Martin has admitted that he made the statement. Now, if Martin had denied having made the statement and if we had put Sanderson on the stand then Mr. Whitehead would have a reason to show that Sanderson was a biased witness with an interest for an insurance company and that would be some reason for him making the statement and to impeach or show an interest on the part of Sanderson so as to let the jury determine whether Sanderson was telling the truth or Martin was telling the truth, but that isn't the situation here.

The Court: Martin first testified before the accident he was driving about 55 to 60, as I recall, and he said immediately before the accident they were traveling about 110 and he kept on saying that and said that in here except on one occasion and I am not sure whether he meant
page 225 } what he said or not, but beside from that fact I don't see how I could let that come in without injecting this insurance. I just have to rule that out.

Mr. Rosenberger: We object and except for the reason stated, and the defendant Ayers rests.

Note: The further taking of evidence is resumed in the court room in the presence of the jury.

page 226 } EVIDENCE FOR THE DEFENDANT BROWN.

FRED MARTIN, (a deaf mute)
and his interpreter, C. Jackson Holt, being recalled, testify as follows, the interpreter relaying the answers given by the witness:

DIRECT EXAMINATION.

By Mr. Sackett:

Q. Mr. Holt, it has been testified to, and by way of prefacing the first question that I will ask the witness Martin, it has already been testified to that he and the four other boys in the Ayers automobile were together at Bill's Barn on the night of this accident. The question is this, Mr. Holt: Was he with Ernest Ayers, Woody, Peters and Shrader at Bill's Barn?

A. He wasn't with them at The Barn.

Q. Ask him if he got into Ernest Ayers' car in the parking lot at Bill's Barn.

Fred Martin.

A. Yes.

Q. Now, who else was in the car at that time?

A. Peters, Woody, Ayers, and he and Shrader had been together and they came and got in the car—made five altogether.

Q. Now, I will ask you to ask the witness Martin if he can read lips.

page 227 } A. He can read some people's lips. He says "Some people pretty hard and some people I can read them very well."

Q. Does it lie within your knowledge from your observations of him that he can read lips?

A. Yes, very well, considered a very good student.

Q. Will you ask him on this occasion in the parking lot at Bill's Barn whether there was any bet about how fast the Ayers car would go?

Mr. Rosenberger: I object to that question.

The Court: I think it is a very leading question.

Mr. Rosenberger: I would like to be heard on that.

(In chambers).

Mr. Rosenberger: If your Honor please, we object to the question on the ground that it is leading, and in addition, it is very prejudicial because there is no showing by this question that this boy, Ayers, had anything to do with the bet or that he was taking any part in the bet, or that he was even present at the time of the discussion.

The Court: He placed all five of them together.

Mr. Sackett: I have just begun the question and I am going to tie it in if Mr. Rosenberger will let me complete the question and proceed with the interrogation

page 228 } of this witness.

Mr. Rosenberger: My reason for asking the court to come in here is this: We understand that the plaintiff, through his attorney, Mr. Whitehead, has resummonsed the witness, Thomas Shrader. We have known that Thomas Shrader said that there was some conversation that night and that there was a bet between Shrader and E. W. Woody, Jr., one of the boys who is dead, as to whether Woody's father's automobile would run faster than Roy Cash's automobile in Amherst. We are informed that was all of the discussion of a bet. Now, we would like to point out to the

court now that when we get into this nebulous state as to a bet as to somebody else's automobile that it will be highly prejudicial.

Te Court: I thought the question was directed at Ayers' automobile.

Mr. Sackett: It was. If your Honor please, Mr. Rosenberger can put this evidence on the stand if he wants to to refute these statements and the testimony that Fred Martin is going to give and the testimony of Fred Martin is going to relate to a bet between occupants of this automobile as to the speed this automobile could be driven.

The Court: I think the question ought to be
page 229 } "Was there any bet made in the presence and hearing of this Ayers boy as to whether his car would run at a certain speed".

Mr. Sackett: That is what I propose to do.

The Court: If you will frame the question that way I will let it in and then, depending on the answer, I will determine whether you can go any further. If he says Ayers wasn't present or wasn't in it I will stop it.

Mr. Rosenberger: Or that Ayers did not participate in it?

Mr. Sackett: The bet was between Ayers and Thomas Shrader.

The Court: You may ask the question.

Mr. Rosenberger: We except for the reason stated.

Note: The further taking of evidence is resumed in the court room in the presence of the jury.

The Court: All right, Mr. Sackett.

By Mr. Sackett:

Q. Mr Holt, will you ask the witness Martin if a bet was made in Ayers' automobile at Bill's Barn just prior to this accident?

A. Yes.
page 230 } Q. Who was the bet between?
A. Ayers and Shrader.

Q. What was the bet?

A. $20.00 each—make $40.00 in all.

Q. Did Ayers give the money to somebody else?

A. Yes.

Q. Who?

A. Peters.

Q. Did Shrader give money to Peters?

Fred Martin.

A. Yes.
Q. What was the bet about?
A. For going fast in car.
Q. Was there any bet as to how fast the car would go?

Mr. Rosenberger: I object to the question as being leading. The witness answered that question and now I think it is very material if he leads him at this time.
The Court: Ask him what he means by going fast.

By Mr. Sackett:
Q. What does he mean by going fast?
A. He said when started out were driving 55 but you see he thinks what you mean is what did they do and Mr. Sackett wants the question to mean what was the bet about.
Q. I want to know what the bet was about.

page 231 } By Mr. Rosenberger:
Q. In other words, Mr. Martin didn't understand you?
A. That is right.

By Mr. Sackett:
Q. What was the bet about?
A. Whether or not the car could go 120 miles an hour.

By the Court:
Q. When was the trial to be made, if at all? When was the bet to be determined or when was it to be decided?
A. He doesn't understand.

By Mr. Rosenberger:
Q. Tell us what he said.
A. He said was going to decide when going down a hill. That isn't what you asked him but that is what he told me.

By the Court:
Q. It was going to be decided when going down a hill. That is what he answered?
A. That is what he said.

By Mr. Sackett:
Q. Now, Mr. Holt, would you ask the witness Martin when

Fred Martin.

they left Bill's Barn and started north on 29 how fast were they going then?

A. 55.

Q. Now, when was it that he noticed the car going at a speed in excess of 55?

page 232 } A. Between 55 and 60 all along there for quite a ways.

Q. Did the car ever go at a speed in excess of 55 to 60 and where?

A. Yes. Where they began to get past a lot of houses and nearing the community known as Monroe.

Q. How fast was the car going then?

A. 120.

Q. Ask him was he looking at the speedometer?

A. Yes, sir, he says "Needle went all the way over."

Q. Did he complain to Ernest Ayers?

A. He didn't complain.

By the Court:

Q. Ask him why he didn't complain.

A. He doesn't know why. He just sat there.

By Mr. Sackett:

Q. Did he ever before they got to the scene of the accident say anything to Ernest Ayers?

A. Yes.

Q. What did he say to him?

A. He said "I told him to stop but he refused to listen to me."

Q. Did anyone else in the car tell him to stop?

A. No.

Q. How did he try to make himself known to Ernest Ayers when he asked him to stop?

page 233 } A. He said "I called out 'Stop, stop!' and hit him on the shoulder".

Q. Ask him as they passed the school at Monroe and started down the hill in the approach to the accident how fast Ayers was going.

A. 110 miles an hour.

Q. Was he looking at the speedometer then?

A. Yes "I was looking right at it".

Q. Will you ask the witness Martin as he went down the hill to the point where this accident happened if he saw the car of John Brown's.

A. I will ask him if he saw the other car.

Fred Martin.

Mr. Rosenberger: I suggest the interpreter is deciding these things for the witness as he has done previously and I would like to have the court have him ask the question and have the witness answer the question.

The Court: He is doing the best he can. These boys take everything very literally.

The Witness: If you recall, I mentioned this boy only finished the fifth grade.

Mr. Rosenberger: We would like to have his answer without your interpretation.

By Mr. Sackett:

Q. Ask him when he went down the hill did he
page 234 } see the other car.

A. He saw two cars coming.

Q. Did he see one car in the middle lane?

A. Yes, one in the middle lane.

Q. Did he see the driver of that car give a signal?

A. Yes.

Q. What sort of signal did he give?

Note: The witness Martin extends his arm horizontal with his shoulder.

A. He says he could see the left hand when the lights from his car shown on the hand. He could see the hand.

Q. Was the car in the middle lane then? Was the other car in the middle lane then?

A. Yes.

Q. Does he know how far his car, or Ayers' car, was from that car when he saw the left signal?

A. About 250 feet.

Q. Ask the witness Martin where the collision occurred, in the center lane or in the northbound lane?

A. He says "About half in the middle lane and half in the right lane".

Q. Will you ask the witness Martin if he saw his mother and brother, Dickey Martin at Lynchburg General Hospital the night of the accident?

A. He says he saw them in the car. I don't
page 235 } know which car he is talking about but that is
what he said.

Q. Did he also see them at the hospital?

A. Yes, saw them both places.

Fred Martin.

Mr. Sackett: That is all.

CROSS EXAMINATION.

By Mr. Rosenberger:

Q. (Addressing the question directly to the witness) Where were you when they were talking about the bet?

Mr. Sackett: His questions, of necessity, have got to be directed to Mr. Holt.

Mr. Rosenberger: I am directing them to both of them.

Mr. Holt: That is all right. Then he can turn to me. He says "In the car".

By Mr. Rosenberger:

Q. Where was the car in the parking lot?

A. In the parking lot at Bill's Barn.

Q. How long were you sitting in the car in the parking lot at Bill's Barn?

A. About 30 minutes.

Q. How long did the discussion go on about the bet?

A. About five minutes.

Q. What part of the car were you sitting in when they were talking about the bet?

page 236 } A. On the back seat.

Q. What part of the back seat—what side?

A. On the left behind the driver.

Q. Did they talk about anybody else's automobile racing?

A. No.

Q. Did Thomas Shrader and E. W. Woody, Jr. talk about how fast Mr. Woody's automobile would go?

A. No.

Q. Did Thomas Shrader tell Woody that the Cash automobile in Amherst would go faster than Woody's Oldsmobile?

A. He says "I didn't know anything about that."

Q. Fred, it was dark in the car you were sitting in, wasn't it?

A. Pretty dark.

Q. He hadn't known Ernest Ayers very well, had he?

A. Never seen him before then.

Q. He couldn't read Ernest Ayers' lips, could he?

A. It was hard because it was dark.

Q. He couldn't hear Ernest Ayers talk, could he?

A. He says "Most of the conversation I couldn't hear but when started betting they got excited and I did hear the bet".

Fred Martin.

Q. You didn't see Ayers use the word bet, did you?
A. Yes, sir, with his hands and with money—held it out.
page 237 } Q. Did you know that maybe they were talking about Woody's automobile and Cash's automobile?
A. "No, I didn't know for sure" and I don't think you want the rest, but do you?
Q. Yes.
A. "But when they got excited right there the boys came up with the money." He says he saw the lips of both boys. They were both excited and he drew the conclusion it was between their cars.
Q. If he hadn't ever talked to Ayers how could he read Ayers' lips when he can't read my lips?
A. Did you ask him if he could not read your lips?
Q. I can tell from looking at him that he hasn't been doing it.
A. He says "Ayers called out the word 'bet, bet' and Shrader and him both pulled out the money."
Q. Fred, can you hear me say "$20.00"?
A. $20.00.
Q. You heard me say $20.00?
A. Yes.
Q. Was Woody talking?
A. He says "No, he was quiet and laughing".
Q. Fred, answer this question to me: Did you hear Peters talking?
A. Yes, I heard him talk and could understand.

page 238 } Mr. Sackett: He has to ask the interpreter what he said.
Mr. Holt: He says Peters was talking fast and he couldn't understand all of it.

By Mr. Rosenberger:
Q. Was Peters betting too?
A. He don't know.
Q. Did Peters know what was going on?
A. What do you mean by what was going on?
Q. You answer this question: Did Peters know there was a bet?
A. (The witness answers this question himself audibly) Yes.

Fred Martin.

Q. Did Peters himself know there was a bet.
A. Yes.
Q. Did Woody know there was a bet?
A. Yes.
Q. How long was there a bet before you left Bill's Barn?

Mr. Sackett: Address your questions to the interpreter.
Mr. Rosenberger: I want to know how much this man understands himself.
The Court: He has a right to test his capacity.

By Mr. Rosenberger:
Q. Do you know what I said?
page 239 } A. No.
Q. How long was it before you left Bill's Barn that the bet was made?
A. (Mr. Holt) He says quick. He says "The bet then started right away".
Q. Did anybody ask to get out of the car?
A. No.
Q. When I ask him a question and he looks to you does that mean he doesn't understand me?
A. That is right.
Q. Ask him that question.
A. He can't understand what you say and he wants me to sign it to him.
Q. I am closer to you than Ayers was, am I not?
A. He says "No, he was sitting right behind the driver, a little bit closer than you are now".
Q. Wasn't there more than one person talking at a time that night?
A. Yes, they were getting excited. He heard the word "bet" from two or three different places.
Q. You say you heard the bet from two or three different places?
A. He says "I am sure I heard it from Shrader and Ayers".
Q. Isn't it harder for you to hear and understand when more than one person is talking at a time?
page 240 } A. Yes, that makes it very hard.
Q. As you drove from Bill's Barn out to the open air drive-in movie at Elon Road how fast did you drive?
A. Right between 55 to 60.
Q. Did Thomas Shrader go to sleep at the drive-in movie or about that location?

Fred Martin.

A. He was asleep from along there about that place to the place where the accident happened.

Q. If Thomas Shrader was making a bet why did he go to sleep?

A. He says "He drank so many beers I think he just went to sleep and couldn't stay awake."

The Court: I think he said himself he drank nine or ten beers.

By Mr. Rosenberger:

Q. How many beers did you drink with Thomas Shrader?

A. He says he drank two and Thomas drank about ten and Shrader drank ten beers with some wine also.

Q. Did you and Tommy drink the beer before you met Ayers?

A. No.

Q. Where did you drink the beer?

A. In car on parking lot at Bill's Barn.

Q. Did you get any beer at Wright's Cafe in Lynchburg?

A. I didn't.

page 241 } Q. Did Thomas Shrader?

A. Not to my knowledge.

Q. Whose car were you in when you and Shrader drank the beer?

A. In my car. He was with me in my car.

Q. What time was that?

A. About 9:00 o'clock.

Q. What time did you meet Ayers and get in Ayers' car?

A. I don't know. I wasn't paying any attention to it.

Q. Where did you get the beer?

A. In car.

Q. Where did you buy the beer?

A. I don't know.

Q. Who put it in your car?

A. He said "Shrader".

Q. How much did Shrader have?

A. He had about six beers and then he bought more.

Q. Where did he buy it?

A. He says "Got in my car and had some with him but don't know where he got it".

Q. You said Shrader drank six beers and then he got some more?

A. He says "Got more in car".

Fred Martin.

Q. Where did he get the other beer?

A. I don't know where he got it, probably
page 242 } bought it at a store.

Q. Wasn't he in your car at the time?

A. Yes.

Q. Where did he get the wine?

A. He says "I don't know. He had a bottle."

Q. Did Woody ask to get out of the car after the bet was made?

A. No. Stayed right there.

Q. Did Peters ask to get out of the car?

A. No. Stayed right there.

Q. When I ask you a question and you look at Mr. Holt does that mean you don't understand me?

Mr. Sackett: Judge, he has asked him that question several times.

The Court: And he said he didn't understand him.

By Mr. Rosenberger:

Q. You were driving 55 to 60 miles an hour from Bill's Barn to the drive-in movie. Is that right?

A. Yes, that is right.

Q. Then you were driving from Bill's Barn on out to Monroe as you go down the long hill—

A. (The witness Martin himself) Down long hill.

Q. Still going 55 to 60?

A. (The witness Martin himself) No. 120 miles an hour.

Q. Were you going 110 or 120?

page 243 } A. (Mr. Holt) He says 120 going down long hill, then going up next one it was 110.

Q. Didn't you tell Mr, Whitehead last week that you went down the first hill and you were going 55 miles an hour?

A. He said that he was going 55 from Bill's Barn to Monroe. That is what he meant.

Q. Don't you remember that Mr. Whitehead asked you in court last week as when yon were approaching the Town of Monroe going down the long hill before you reached the hill leading to the point of accident what speed the automobile was going?

A. He says he can't understand.

Q. Ask him again.

A. He said "Before we reached that long hill 55 before we reached that long hill".

Fred Martin.

Q. That was the hill before the hill that the accident happened on, wasn't it?

A. That is right. There is a third little hill in there too but the real long hill before that long hill was where he said 55 to 60, then when hit the long hill was when the needle went all the way over.

Q. My question is, the long hill just before the hill leading to the point of accident didn't you say you were going 55?

Mr. Sackett: Your Honor, this is the third
page 244 } time he has asked that question.

The Court: Yes.

Mr. Rosenberger: I want to be certain the witness understands the question.

The Court: He said on the long hill he was doing 120 and on the hill of the accident 110.

Mr. Rosenberger: I am trying to impeach him by what he said last week.

Mr. Sackett: And he has asked the question three different times.

The Court: He understood you I think.

Mr. Rosenberger: I can't hurt anything if I ask him once more specifically to be certain he understood it.

The Court: All right, but ask the question fairly.

Mr. Rosenberger: I am.

Q. Didn't you tell Mr. Whitehead in court last week that when you were going down the long hill before you reached the hill leading to the point of accident that you were riding at that time 55 miles an hour?

A. No. He said "No, I didn't say that"

The Court: That is a pretty emphatic no.

By Mr. Rosenberger:

Q. Now, you say at that time you were going
page 245 } 120 miles an hour?

A. That is right, down that long hill it was 120.

Q. And at the time of the accident it was 110?

A. That is right. He says "Now you have got it".

Q. Now, were you sitting down or standing up looking over Shrader's shoulder?

A. He says "I was sitting leaning with my head over and looked over his shoulder".

Fred Martin.

Q. And you saw the oncoming automobile in the middle lane?

A. Yes, I saw it?

Q. Was the automobile straight toward you or cut across the road?

A. It was gradually turning, kind of in between.

Q. Are you sure you saw the man's hand out of the car?

A. Yes, a hand. He says "Yes I saw it, I cross my heart. I am not trying to tell you no lie. I am trying to tell you the truth".

Q. Was this a man driving the Ford or a woman?

A. I couldn't see. I couldn't tell.

Q. You saw the hand out of the window, didn't you?

A. Yes.

Q. Did you see a sleeve out of the window?

A. He says "Yes, I think I could see it where it stopped".

Q. Was that a shirt sleeve or a bare arm?

page 246 } A. I could see the arm and hand. He says "It was pretty black but when light shined on it I could see it very distinctly".

Q. How far did that person give the signal, how long?

A. I don't know how long, it happened so quick. I couldn't tell.

Q. Even though it happened so quick you saw the speedometer and you saw the signal?

A. Yes, I looked at speedometer and I saw the car coming and I looked back at speedometer and I saw the hand.

Q. Why was it that Ayers waited until he got to Monroe to see how fast the car would go?

A. I don't know. He gave money before he left the Barn.

Q. Did Ayers say anything to Peters as they drove along the road before he started speeding?

A. Yes, they were talking—seemed to be excited.

Q. Could you tell what Ayers and Peters were saying?

A. No. I was watching the speedometer.

Q. I am talking about before the speedometer got up over 55.

A. It was too dark and I couldn't see them well enough to know whether talking or not.

Q. Was Woody talking to Peters?

A. They were talking but I couldn't hear.

Mr. Rosenberger: That is all, your Honor.

page 247 } CROSS EXAMINATION.

Fred Martin.

By Mr. Whitehead:

Q. Ask him does he have an automobile driver's license.

A. Yes, I have one.

Q. And does he drive an automobile?

A. Yes.

Q. Ask him is his vision all right?

A. Okay—all right.

Q. Ask him was his vision all right on the night of this accident?

A. He says "Okay".

Q. Ask him if he is deaf.

A. He says "I am really considered deaf but I still talk some".

Q. I didn't ask him a question about talking. I asked him if he could hear.

A. For people who are hard of hearing that is common terminology. A person doesn't talk because he can't hear so therefore they are considered deaf.

Q. Ask him can he hear?

The Court: He has told you that once. He says he can hear a little bit but don't always understand everybody.

By Mr. Whitehead:

Q. I am going to make a statement and ask him
page 248 } if he can hear this: (Mr. Whitehead says "Boo" with his hand in front of his mouth).

A. He says he can't hear anything.

Q. I will ask him if he can hear this: (Mr. Whitehead holds a paper in front of his mouth and says "Thursday").

The Court: I can't understand you either.

By Mr. Whitehead:

Q. I will say it again. (Mr. Whitehead again says the word "Thursday" with a paper in front of his face.)

A. He says he didn't hear anything.

Mr. Whitehead: Could the court hear that?

The Court: I could hear that.

Mr. Whitehead: If the court reporter can hear this I will ask him to put in the record that the court and the court reporter heard what I said.

The Court: And let the record show that counsel is hold-

ing a paper in front of his face so the witness couldn't see him. They rely on lip movement to aid their hearing.

Q. Is that correct, Mr. Holt?

A. That is correct, but I would like for the record to show that Mr. Whitehead is not as close to the witness as the boys were sitting together that night. When you are ten feet away it is a hundred times weaker than when you are one foot away.

page 249 } Note: Mr. Whitehead places himself close to the witness.

The Court: They weren't sitting with something in front of their faces.

Mr. Whitehead: I want it so he can't read my lips.

Mr. Rosenberger: Ask him something to see if he can understand what you are talking about.

Mr. Whitehead: I am now sitting about two feet in front of the witness and I am going to make a statement and ask him when I make this statement whether or not he can hear me: "Wednesday".

A. He says he heard your voice but he didn't understand you. He wants you to get more excited.

Q. I will ask him this: Wednesday.

A. He says he thought you used the word "bet" but, of course, that is not right.

Mr. Rosenberger: I would like for the record to show that Mr. Whitehead was sitting in front of the witness like the driver in the front of a car with his back to the witness.

The Court: All right.

Mr. Whitehead: I would like for the record furthermore to show that I asked the word "Wednesday" and his answer was he thought I said "bet".

page 250 } Mr. Holt: Can I tell him that or shall I keep quiet.

Mr. Whitehead: I did it for the record.

Mr. Holt: Everybody in court heard it but him.

The Court: The witness is telling you something, Mr. Holt. What is he saying?

Mr. Holt: He says "I have a picture I could show you that would prove some things if you want to see it." I don't know what he is talking about.

Lester M. Martin, Jr.

By Mr. Whitehead:

Q. Now, will you please ask him if it was dark when they were sitting in the Ayers automobile in the parking lot at Bill's Barn?

A. There were several lights around the parking lot.

Q. Was there sufficient light for him to read the lips of the different people in the automobile?

A. Yes, plenty light for that.

Q. Could he read the lips of the persons unless the person was looking at him?

A. By the side he could read it.

Q. Then ask him this, please: Ask him whether or not he can make a noise?

A. Yes.

Q. Ask him what he said to complain of the speed that Ayers was driving the car when he said he was

page 251 } going 110 miles per hour.

A. (The witness Fred Martin answers audibly): Stop, stop, stop, stop!

Q. Ask him if that was the manner in which he said it to Ayers.

A. He says "Yes".

Mr. Whitehead: Now, if your Honor please, I would like the record to show that the witness Martin said "Stop, stop, stop," and that was audible to the jury and the court and counsel; that we could all hear the remark.

The Court: All right.

By Mr. Whitehead:

Q. Ask him were the light burning on the automobile he was riding in.

A. Good lights.

Q. Ask him if the lights were burning on the dash of the automobile he was riding in.

A. It was very plain.

Mr. Whitehead: All right, that is all.

The witness stands aside.

page 252 } LESTER M. MARTIN, JR.,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

Lester M. Martin, Jr.

By Mr. Sackett:

Q. You are Lester M. Martin, Jr.?

A. Yes, sir.

Q. How old are you?

A. Twenty-two.

Q. Your initials are L. M. but how are you commonly called?

A. Dickey.

Q. Is Fred Martin your brother?

A. Yes, sir.

Q. Dickie, I will ask you if on the night of this accident you saw your brother, Fred, at the Lynchburg General Hospital in the presence of your mother?

A. I did.

Q. Was he in the emergency room at Lynchburg General Hospital at the time?

A. He was.

Q. Did you have a conversation with him about this accident?

A. Yes, sir.

Q. I will ask you if you told him then or I will
page 253 } ask you what you told your brother, Freddie, then?

Mr. Rosenberger: I object to that.

The Court: I don't think this is proper.

Mr. Sackett: I would like to in chambers explain the basis of the question.

(In chambers)

Mr. Sackett: If your Honor please, the background of the evidence that I propose to elicit from the witness L. M. Martin, Jr., is this: Mr. Rosenberger, representing the defendant Ayers, has sought to impeach Fred Martin by introducing what he says is a prior inconsistent statement made by Fred Martin. Fred Martin has admitted that he said to Eiken, the adjuster of Mr. Rosenberger's carrier, that at the time of the accident the car was going 55 to 60 miles an hour. The boy has sought to explain why he said that in answer to the questions propounded to him by Eiken by saying that his brother and a boy named Cash and others told him if he said the car was going 110 miles an hour he would likely get himself and others in trouble, or words to that effect, or that they might all go to jail. Now, that was the boy's explanation of why he told Eiken what he did. I propose by this witness to prove,

page 254 } to corroborate Fred in his own explanation of why he told Eiken what he did, and this boy will testify that he did tell Fred not to say he was going 110 miles an hour because if he did he would go to jail or maybe he and others would get in trouble. Fred has offered that explanation of why he said what he did to Eiken and I am entitled to corroborate it and I am prepared—I don't know what Mr. Rosenberger's objection to it is—but I am prepared and would like to, if the court is concerned about the admissibility of the evidence, I am prepared, I think, to submit competent authority to show the probative value of this testimony and its admissibility.

Mr. Rosenberger: It would be entirely a collateral matter, a self-serving thing, not by the man himself but by a second witness, not in the presence of my man. It is hearsay. It violates all rules of evidence. It has no probative value as to the speed of that automobile. Now, this man explained why he gave that statement which he gave but we couldn't open the inquiry as to everybody he told that to.

page 255 } The Court: He asked him about the inconsistent statement and he admitted and stated why he made it and I permitted that. I don't think this should go any further.

Mr. Sackett: If your Honor please, I am not offering this testimony for the truth of the statement of Freddie Martin that the automobile was going 110 miles an hour at the time of the accident, I am not offering the statement for the truth of that evidence. I am offering it to corroborate the witness Martin in his explanation why he made the statement.

The Court: They don't deny that somebody told him that. There is no contradiction.

Mr. Sackett: No, sir, but I am entitled to corroborate the boy. He is going to seek to impeach him. He is going to state that Martin was telling the truth at the time he made the statement and is not telling the truth now.

The Court: This boy has testified under oath and offered his explanation and, from the standpoint of the court, if he seeks to impeach him then this testimony is admissible. If he seeks to impeach him you can then bring it in. I doubt if it is proper at this time.

Mr. Rosenberger: We have no way of knowing the truth or falsity of this man's explanation.

Lester M. Martin, Jr.

The Court: I don't see how he could impeach
page 256 } him. I tell you I am afraid of it. I believe we are
going to get way out of base.

Mr. Sackett: Will your Honor listen to me a minute about the admissibility of the evidence, even at the risk of repeating?

The Court: I will hear you.

Mr. Sackett: I want the court to realize this is vital evidence for the defendant Brown. We are offering the evidence not for the truth of the boy's testimony, it doesn't make his testimony trustworthy now, and we are not offering it for that purpose.

Mr. Rosenberger: What would be its purpose?

Mr. Sackett: The purpose of it is this, and what I have stated before: The boy has offered his explanation of why he told Eiken what he did and I am entitled now to bring in evidence to corroborate him in that statement that his brother did tell him that and I think, from the standpoint of the objection to the hearsay rule, this authority will govern that particular feature or that particular objection:

"It does not follow because the writing"—

and I am quoting from Greenlea on Evidence, Volume I, 16th edition, Page 185—"It does not follow because the writing or
words in question are those of a third person not
page 257 } under oath that therefore they are considered as
hearsay, on the contrary it happens in many cases that the very fact in controversy is whether such things were written or spoken and not whether they are true. In such cases it is obvious that the writing or words are not within the meaning of hearsay but are original and independent facts admissible in proof of the issue."

I say that they are admissible and independent facts to prove that actually Fred Martin's brother, Dickey, did tell him not to say he was going 110 miles an hour. That is the boy's explanation of why he said to Eiken what he did and I am entitled to have the jury hear not from Fred Martin's mouth as to what somebody told him not to do but from the man who gave him the very instruction itself, the man who gave him the very advice which quieted his mouth and explained why he told this adjuster what he did.

Now, Wigmore on Evidence, Third Volume, Second Edition, Section 1770, under the heading "Utterances Constituting a Part of Issue", and I say this utterance of Fred Martin and his explanation of why he told Eiken what he did is part of

the issue in this lawsuit and this authority goes on to say this:

page 258 "A variety of issues may involve the facts and terms of another issue." Whether Fred was told by his brother not to say he was going 110 miles an hour; that if he did he was told he might get himself and others in trouble, that is the fact. That is what I want to prove and I can prove it by Lester M. Martin, Jr. and, as this authority says, "A variety of issues may involve the facts and terms of an utterance as a part of the case and the present principle declares all such utterances not obnoxious to the hearsay rule so long as they are sought to be used as essential evidence in the matter asserted", and I am not offering it for the truth of the statement. I am offering it to prove that he was advised and told not to say how fast he was going because he would get himself and others in trouble.

The Court: Mr. Whitehead, what do you think of this proposition?

Mr. Whitehead: Well, Judge, it looks like to me there are some ifs and some ands to it. I don't know exactly what the answer is. I do know it is new matter to me.

The Court. It is a novel sort of thing.

page 259 Mr. Rosenberger: Judge, it is very simple. It is not an issue involved. We are not trying whether Fred Martin had some statement made to him by some third party, the issue is as to speed and he testified he made one statement one time and another statement another time. That is admitted. Then he gave his explanation, which is a third point removed and a collateral matter. Nobody has questioned the fact that he said that he was told that. We are not trying the truth or falsity of that and this is just a self-serving thing. We are just trying the truth of whether or not the speed of the automobile was 55 to 60 or whether it was 110. When we get beyond that we are getting into collateral matters.

Th Court: I think we are getting off the track. I don't think I will let it go any further. The boy said he was told he would go to jail. I believe that is what happened and I believe the jury believed it.

Mr. Sackett: Of course, thus far the whole purpose of Mr. Rosenberger's cross examination was to discredit Martin and he has raised an issue in this lawsuit as to the credence that this jury should give that witness.

Mr. Rosenberger: He has admitted he told two different stories.

Lester M. Martin, Jr.

Mr. Sackett: And I have a right, and a fun-
page 260 } damental right of this defendant, to offer this evidence, the testimony of this witness, to prove that what the boy said is the truth in the sense that he was told by his older brother not to say how fast he was going and if he did he would get himself and others in trouble.

Mr. Rosenberger: What you want to do is get off in trying a collateral matter as to what somebody else said.

Mr. Sackett: You may think it is collateral.

The Court: I tell you it is a novel question to me and my best guess is we had better stop it now.

Mr. Sackett: Then I will have to put in the record what the witness will say.

The Court: Bring the witness in here.

Note: The witness is brought in chambers.

Mr. Sackett: And I propose to do the same thing by his mother.

The Court: Go ahead and ask the witness what you want to ask him.

By Mr. Sackett:

Q. You have testified on direct examination in the presence of the jury that you were present at Lynchburg General Hos-
page 261 } pital on the night of this accident with your mother and that there the three of you discussed this accident?

A. That is correct.

Q. I will ask you what, if anything, you told your brother, Freddie Martin, that night at the hospital?

A. I told him not to say anything about the wreck to anyone.

Q. Was your mother present at the time?

A. Yes, sir.

Q. We are apart from the jury now and I will ask you if he told you at the time how fast the car was going?

A. He did.

Q. And what did he tell you?

A. He said they were running 110 miles per hour.

Q. Now, how long did Freddie remain in the hospital?

A. He was taken there on Saturday night after the wreck and we brought him home about 2:30 the following Sunday afternoon.

Mrs. L. M. Martin.

Q. Did you have a conversation with Freddie at your home after his return from the hospital?
A. Yes, sir.
Q. What did you tell him then?
A. I told him not to tell anyone that they were going 110 miles per hour.
Q. Why?
A. Because I thought it would get him in trou-
page 262 } ble at the time.

Mr. Sackett: Now, if your Honor please, I would like for the record to show that had I put this witness on the stand I would not have asked him the question as to whether his brother told him how fast the car was going on the night of the accident but I would have asked him only, not what his brother told him, but what he told his brother and then I would have asked him the questions that I have propounded to him and with the answers as to the conversation he had with his brother the following day.
The Court: Very well.

The witness stands aside.

MRS. L. M. MARTIN,
having been first duly sworn, testifies in the absence of the jury, as follows:

DIRECT EXAMINATION.

By Mr. Sackett:
Q. Mrs. Martin, you are the mother of Fred Martin?
A. Yes.
page 263 } Q. And is this your son, Dickey, here, L. M. Martin, Jr.?
A. Yes, sir.
Q. Were you present at the hospital on the night of this accident when you and your son Dickey went there to see Fred?
A. Yes, I was.
Q. Did you see Fred in the emergency room at Lynchburg General Hospital?
A. Yes, I did.
Q. Was Dickey there at the time?
A. Yes.

Mrs. L. M. Martin.

Q. Was Fred fully conscious?
A. Yes, he knew everything.
Q. Did he talk to you about the accident?
A. Yes, he did.
Q. Did you ask him how the accident happened?
A. Yes, I did.
Q. Did you hear your son Dickie tell Freddie that night not to tell anybody about how the accident happened, or to keep quiet?
A. Yes, I did.
Q. Now, when Freddie returned from the hospital he came to your home. When did he come home?
page 264 } A. He came home Sunday afternoon late. It must have been 4:00 o'clock.
Q. Now, your son Dickey has testified to a conversation which he had with Freddie at home and in which he told Freddie not to say he was going 110 miles an hour; that he might get himself and others in trouble if he did. I don't believe you were present when that conversation took place?
A. No, I didn't know anything about that.
Q. Did Freddie tell you at the Lynchburg General Hospital when you saw him on the night of the accident that he was going 110 miles an hour?
A. Yes, he did.

The Court: Of course, that is a self-serving declaration.
Mr. Sackett: If your Honor please, apart from the basis upon which I have offered the evidence I have stated to the court, and it is still my contention that I wasn't offering that evidence on the basis I have outlined to you for the truth of the statement as to whether he was or was not going 110 miles an hour.
The Court: What are you offering Mrs. Martin's statement for?
Mr. Sackett: I was offering Mrs. Martin's statement to corroborate the fact that her son Dickey told
page 265 } Freddie at the hospital that night not to talk.
The Court: And you did not propose to ask her about the speed?
Mr. Sackett: No, sir, I did not, not in the presence of the jury.
The Court: It is my best judgment, Mr. Sackett, that the evidence is inadmissible. It is certainly something new to me. It wasn't in the presence of anybody except members of the

family. It is self-serving. It is hearsay and I think it has too many frailties to permit it to go to the jury.

Mr. Sackett: I have outlined the basis upon which I have offered the evidence and I am going to offer it now on another basis and that is that the statement made by Freddie Martin to his mother and to his brother at the hospital immediately following the accident as to how fast the Ayers car was going at the time of the accident is a part of the *res gestae* and is trustworthy and would be admissible as an exception to the hearsay rule.

The Court: Of course, the *res gestae* should be pretty close. It should be pretty close to the actual occurrence and I think the elapsed time is such that I don't think it could be considered part of the *res gestae*. If he were lying there
page 266 } in the road, or while putting him in the ambulance, he would say "My God, he was going 110 miles an hour!" I think that would properly be a part of *res gestae* but I doubt, with this lapse of time, that it would be part of the *res gestae*.

By Mr. Sackett:

Q. Mrs. Martin, what time did you get to the hospital?

A. It must have been a little after one when I got to the hospital.

Q. And you saw him immediately upon arrival?

A. Yes, I did.

The witness stands aside.

Mr. Sackett: We respectfully object and except to the ruling of the court in excluding this testimony on the basis I have stated in the record.

The Court: You have two very ingenuous points, very intriguing and very perplexing.

Note: The further taking of evidence is resumed in the court room in the presence of the jury.

page 267 } W. K. TURPIN,
recalled, testifies as follows:

DIRECT EXAMINATION.

By Mr. Sackett:

W. K. Turpin.

Q. Mr. Turpin, you were on the stand the first day of the trial of this case. I will ask you if you have made a measurement to determine the distance from the entrance to Mr. Wilmer's home on the east side of U. S. Route 29 to the point where this accident happened?

A. Yes, sir, I have.

Q. Would you state to the court and jury how far it is?

A. Approximately one and one-half tenths of a mile.

Q. So that would be one and one-half tenths.

The Court: That would be fifteen one hundredths.

By Mr. Sackett:

Q. Have you reduced that to feet?

A. No, sir. It is somewhere around 800 feet.

Mr. Sackett: Judge, I figure that to be about 790 feet.

Mr. Whitehead: I make it 792 feet.

Mr. Rosenberger: He said one mile plus one-half of a tenth.

The Witness: One tenth of a mile plus one-half of a tenth of a mile.

page 268 } By Mr. Sackett:

Q. Based upon your testimony it would be approximately 792 feet from the entrance to Wilmer's home to the point of accident?

A. Approximately that.

Q. As you proceed north in your approach to the scene of the accident is there any obstruction to the vision of a northbound driver in the way of physical obstacles in the roadway?

A. Will you repeat the question?

Q. If a northbound driver got to the point in his travel north toward Amherst when he gets to a point at Mr. Wilmer's driveway is there any obstacle or any obstruction to his vision down to the point of accident?

A. No, sir.

Q. Do you know approximately how far it is, or have you made a measurement from the point of accident to the overhead bridge?

A. It is approximately two tenths of one mile.

The Court: That would be 1,056 feet.

By Mr. Sackett:

W. K. Turpin.

Q. So from the point of the accident to the overhead bridge would be 1,056 feet?

A. Approximately that.

Q. Can you see the overhead bridge and cars
page 269 } coming off of that bridge when you are at Mr. Wilmer's entrance?

A. Yes, sir.

Q. So then actually a northbound driver would have unobstructed vision in the highway from the point of Mr. Wilmer's entrance up to the overhead bridge?

A. Right.

Q. And that would be 792 feet plus 1,056 feet. That would be 1848 feet approximately?

A. Approximately that.

Mr. Sackett: That is all, Mr. Turpin.

Mr. Rosenberger: No questions.

CROSS EXAMINATION.

By Mr. Whitehead:

Q. Mr. Turpin, let me ask you a question. Come here, please sir. Take Ayers' Exhibit No. 6 shown here, can you tell us approximately where the entrance to the Wilmer home is?

A. You see a little pumphouse there. That is sitting right on the side of the road and the road goes right in here. It follows around that telephone pole.

Q. So the entrance to the Wilmer home would be south of where this little cement house is shown on Ayers' Exhibit No. 6?

A. Yes, sir.

page 270 } Q. Can you tell us approximately what is the distance from the entrance to the Wilmer home to the top of the hill proceeding in a southerly direction?

A. Mr. Whitehead, I have never measured that. It would be a mere guess.

Q. Could you approximate it? I wouldn't want you to guess.

A. From the point of his driveway?

Q. From the point of his driveway to the top of the hill proceeding south.

A. I would say at least 400 feet.

Mr. Whitehead: That is all.

The witness stands aside.

Mr. Sackett: If your Honor please, the defendant Brown rests.

The Court: Mr. Whitehead, do you have any rebuttal?

Mr. Whitehead: Yes, sir. I want to call Mr. Thomas Shrader.

page 271 } REBUTTAL EVIDENCE FOR THE PLAINTIFF.

THOMAS HENRY SHRADER,
recalled in rebuttal, testifies as follows:

DIRECT EXAINATION.

By Mr. Whitehead:

Q. Your name is Thomas Shrader?
A. Yes, sir.
Q. Thomas, can you hear me all right?
A. Yes, sir.
Q. And can you see all right?
A. Yes, sir.
Q. And can you talk all right?
A. Yes, sir.
Q. Now, you know Freddie Martin, do you not?
A. Yes, sir.
Q. He is a friend of yours, I believe?
A. Yes, sir.
Q. Now, does he have trouble hearing?
A. Yes, sir.
Q. Now, on this night I believe the testimony has been brought out that you and Freddie had been together before you got in the car with Mr. Ayers. Is that correct?
A. Yes, sir.
page 272 } Q. And how did you get to Bill's Barn? Do you know how you got to Bill's Barn that night? What were you riding in when you went there?
A. I think I was with Fred.
Q. In whose car?
A. In Fred's car, I think.
Q. Fred was driving?
A. Yes, sir.

Thomas Henry Shrader.

Q. Do you recall you went and got in the back seat of the Ayers car?
A. Yes, sir, I remember getting in there.
Q. When you got in the back seat of the Ayers car who got in the back seat with you?
A. I don't remember.
Q. Was anybody in the back seat with you?
A. I don't remember whether there was or not.
Q. Was Fred in the back seat with you or not?
A. I don't remember.
Q. When you were at Bill's Barn was the car there in the parking lot?
A. Yes, sir.
Q. Now. before the car was driven away did you and Ayers have any bet with reference to how fast Ayers' car would go?
A. No, sir.
page 273 } Q. Did you give anyone in the car $20.00?
A. No, sir, not that I remember.

By the Court:
Q. Do you know whether you did?
A. No, sir, I don't think I did because I would have missed it.

By Mr. Whitehead:
Q. While you were in the car did you discuss with anyone in the car about the speed of another automobile?
A. No, sir, not about the speed.
Q. What did you say to anyone?
A. Well, I was discussing about drag racing.
Q. And who did you discuss that with?
A. E. W. Woody, Jr.
Q. With Mr. Woody?
A. Yes, sir.
Q. Did you all have any conversation there in the car with reference to how fast automobiles would go?
A. Yes, sir. We were betting that one car would out drag the other one.
Q. Which car?
A. I was betting E. W. Woody's father's car.
Q. Would do what, would out drag what?
A. Roy Cash's father's car.

Thomas Henry Shrader.

page 274 } By the Court:

Q. What do you mean by a drag race?

A. Start out from a certain point and see who can get to another point first.

Q. Why do you call it a drag race.

A. That is what they call it.

Q. Both cars start at the same time from a standing position?

A. Yes, sir, to a certain point.

By Mr. Whitehead:

Q. You say you and E. W. Woody were betting as to whether or not E. W. Woody's father's car or Cash's automobile would go the fastest on a drag race?

A. Yes, sir.

Q. Is that the only cars you all were discussing with reference to a race?

A. Yes, sir.

By the Court:

Q. How much did you bet?

A. Well, it never was no actual bet. We just had some money shaking it but wasn't never any actual bet.

Q. Had the money doing what?

A. Shaking it. We were just playing around. We weren't actually betting because nobody ever held the money or anything and no cars were involved.

page 275 } Q. What kind of money were you shaking, $20.00 bills?

A. No, sir. I think it was a $10.00 bill. It could have been a $20.00 bill.

Q. But you were betting one car could outrun another and were brandishing this money?

A. Yes, sir, shaking it around.

By Mr. Whitehead:

Q. That was betting whether E. W. Woody's father's car or Cash's car could go the fastest?

A. Yes, sir.

Q. Now, did you pull any money out of your pocket?

A. Yes, sir.

Q. And when you pulled the money out of your pocket what did you do with it?

A. I just held it in my hand.

Q. Then what did you later do with it?

Thomas Henry Shrader.

A. Put it back in my pocket.
Q. Did you ever hand that money to anyone else?
A. No, sir.
Q. Then you say that you and Woody were passing words which would beat but no actual money was passed for anybody to hold. Is that right?
A. That is right.
Q. And that was with respect to Woody's father's automobile and Cash's automobile?
page 276 } A. Yes, sir.

Mr. Sackett: I object to the whole line of questioning on the ground he is leading the witness. He is his own witness.
Mr. Whitehead: I beg your pardon.

By Mr. Whitehead:
Q. Now then, was there any other bet by you with anybody else? Was anything said about a bet there in that car that night by you except what you have told us?
A. No, sir.

Mr. Whitehead: That is all.

CROSS EXAMINATION.

By Mr. Rosenberger.
Q. Thomas, you were with Fred Martin from the time you left Lynchburg and Wright's Grill until you came to Bill's Barn and then you came to the skating rink and then you went back to Bill's Barn. Isn't that right?
A. Yes, sir.
Q. Fred Martin was driving the automobile, wasn't he?
A. Yes, sir.
Q. Did you get anything to drink or have anything to drink at Bill's Barn?
A. No, sir.
Q. Did you have any beer in Fred Martin's car at Bill's Barn?
page 277 } A. No, sir, not that I remember.
Q. Would you remember or not? Do you have a definite recollection about that?
A. No, sir.
Q. Did you drink six beers and then get some more beer?
A. I don't remember.

Thomas Henry Shrader.

Q. Did you have any wine?
A. No, sir.
Q. You are sure?
A. Yes, sir.

By the Court:
Q. Why are you so sure about that and still don't know too much about this beer?
A. I know I had some beer but I know it wasn't any wine. I didn't drink any wine.

By Mr. Rosenberger:
Q. Are you positive about that? Didn't you have a wine bottle?
A. No, sir.
Q. You didn't have a wine bottle in Fred's car?
A. No, sir.
Q. If Fred said you had a wine bottle in his car would you think that his recollection is better than yours?
A. No, sir.
Q. Now, who was in Ernest's car when you got in it?
A. The only one I remember is E. W. Woody
page 278 } and Ernest.
Q. Do you remember the other boys being in the car too?
A. No, sir.
Q. Didn't you tell me in the presence of Ernest that Fred was on the back seat by you?
A. Yes, sir, he was at one time. You asked me when I got in.
Q. What I am talking about is when the bet was going on. That is what we are talking about. Was he in the back seat by you when the bet was going on?
A. Yes, sir, I believe he was.
Q. Fred was in the back seat?
A. Yes, sir.
Q. Who was in the front seat?
A. I remember E. W. Woody and Ernest was in the front seat.
Q. Was Peters in the front seat in the middle?
A. I don't remember whether he was or not.
Q. Did Peters ever hold any money for you?
A. No, sir.
Q. Did E. W. Woody give any money to Peters?
A. I don't know.
Q. Did he give it to him or not?

Thomas Henry Shrader.

A. I don't know.

Q. Are you positive about that?

page 279 } A. Yes, sir.

Q. Was Ernest waving any money in the car?

A. No, sir, I didn't see him wave any.

Q. Was he betting with E. W. about how fast E. W.'s father's car would go against Roy Cash's car?

A. I don't remember. If he did I don't remember it.

Q. Who was betting on Roy Cash's car?

A. I was.

Q. What kind of car is Roy Cash's?

A. A '58 Chevrolet.

Q. Now, after this conversation about the bet how long did you all stay there at Bill's Barn?

A. I don't remember how long.

Q. Was it a little while or did you leave immediately?

A. I have forgot.

Q. When you all left Bill's Barn was anybody betting on anything at that time?

A. No, sir, I don't think so.

Q. Now, if you had had any bet on any automobile would you have gone to sleep?

A. I don't know.

Q. Did anybody bet in the automobile as to how fast Ernest's car would go?

Mr. Sackett: He has asked that question twice.

Mr. Rosenberger: I want to be certain he knows.

page 280 } By Mr. Rosenberger:

Q. Your answer is "No sir"?

A. Yes.

Q. Did anybody ask to get out of Ernest's car before they left Bill's Barn?

A. No, sir, I didn't hear anyone.

Mr. Rosenberger: You may examine.

CROSS EXAMINATION.

By Mr. Sackett:

Q. Tommy, you have no clear recollection as to what took place, do you?

A. Yes, sir.

Thomas Henry Shrader.

Q. You didn't remember when you were asked as to whether anybody had bet upon how fast the Ayers car would go and you said "Not as I remember" and when you were asked the question about the beer and where you had gotten it and how much you had drunk and you said "Not that I remember", and you repeated yourself in response to a number of questions "Not that I remember". You had enough beer, had you not, so that you went to sleep soon after you left Bill's Barn?

A. I went to sleep about the Amherst Drive-In.

Q. Did you stop anywhere between Amherst Drive-In and Bill's Barn?

A. No, sir, not that I remember.

Q. So there is another response "Not that I re-
page 281 } member". So your recollection is not so good?

A. Yes, sir. It has been so long I can't remember everything.

Q. And you had what, eight to ten beers?

A. Yes, sir.

Mr. Sackett: That is all.

By Mr. Rosenberger:

Q. Over what period of time did you have the beers? When did you start drinking and when did you stop drinking?

A. From about 5:00 o'clock to 7:00 that evening.

Q. You mean you didn't have anything to drink after 7:00?

A. No, sir.

Q. Where did you drink your last beer?

A. In Wright's Grill.

Q. Where is that?

A. That is on Main Street in Lynchburg.

Q. After you left Wright's Grill where did you go?

A. I went to the skating rink.

Q. What did you do at the skating rink?

A. I was roller skating.

Q. Were you able to roller skate after eight to ten beers?

A. Yes, sir.

Q. How long did you roller skate?
page 282 } A. Until 10.00 o'clock or until they closed.

Q. You stated you stayed there until 10:00 o'clock?

A. Yes, sir.

Q. And you are sure about that?

A. Yes, sir.

Grandville E. Peters.

Q. Then you went to Bill's Barn?
A. Yes, sir.
Q. And the officers testified this thing happened around 1:00 o'clock. Then you were at Bill's Barn, between those two places, from 10:00 to 1:00?
A. Yes, sir.
Q. Did you stop anywhere after you left the skating rink except Bill's Barn before the collision occurred?
A. No, sir.
Q. Did you have anything to drink at the skating rink?
A. No, sir.
Q. You know that?
A. Yes, sir.

By Mr. Sackett:
Q. You had some beer in the car though?
A. No, sir.
Q. Didn't you say just now you didn't remember whether there was beer in the car or not?
A. In Fred's car?
Q. Yes.
page 283 } A. I don't know whether there was any in there or not but I didn't have any in there.

Mr. Sackett: That is all.

The witness stands aside.

GRANDVILLE E. PETERS,
recalled in rebuttal, testifies as follows:

DIRECT EXAMINATION.

By Mr. Whitehead:
Q. Mr. Peters, I overlooked asking you on direct examination the other day a question. Will you please state to us what was the health of your son at the time that he was killed?
A. He was in excellent health.
Q. And based on the mortality table was his life expectancy at that time 45 years?
A. At least 45 years.
Q. Now, how much money was found on the person of your son after this accident?

A. Three pennies.

page 284 } Mr. Rosenberger: No questions.
Mr. Sackett: No questions.

The witness stands aside.

Mr. Whitehead: We rest.
Mr. Rosenberger: I would like to call Mr. C. R. McCarthy as a witness.

C. R. McCARTHY,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:
Q. Mr. McCarthy, during the taking of evidence in this case on Wednesday, September 2nd, will you tell me whether or not Mr. Whitehead asked the witness, Fred Martin, the speed that the automobile was traveling in which he was riding on the long hill just before the hill that the collision occurred?
A. Yes, sir. The witness was asked this question by Mr. Whitehead: "Will you ask him in approaching the Town of Monroe going down the long hill before you reached the hill leading to the point of accident what speed the
page 285 } automobile was going he was riding in?" The answer was "Riding 55 miles an hour."
Q. That was the answer of Fred Martin in answer to the question Mr. Whitehead asked him?
A. Yes, sir.
Q. At the time that question was asked and the answer was given were you the court reporter who took it down and transcribed it?
A. Yes, sir.

Mr. Rosenberger: You may examine.
Mr. Sackett: No questions.
Mr. Whitehead: No questions.

The witness stands aside.

The Court: Is there anything further, Mr. Rosenberger?
Mr. Rosenberger: Yes, sir. I want to recall Ernest Ayers.

ERNEST AYERS,
recalled in surrebuttal, testifies as follows:

DIRECT EXAMINATION.

By Mr. Rosenberger:

Q. You are Ernest William Ayers?

page 286 } A. Yes, sir.

Q. Now, Ernest, you have heard Fred Martin and Thomas Shrader testify about the discussion that was had in your automobile at Bill's Barn on the night of this collision, have you not?

A. Yes, sir.

Q. While you were in the automobile will you tell us whether you made any bet with anybody as to how fast your automobile would go?

A. No, sir, I didn't make no bet.

Q. Did you make any statement as to how fast your car would go?

A. No, sir.

Q. Now, did you hear anybody in the automobile discuss a bet as to how fast somebody else's automobiles would go?

A. No, sir. I left the car for a few minutes and when I came back it must have been all over and I knew nothing about a bet until a month or so after the accident when I talked to Thomas Shrader.

Q. You mean you weren't in the automobile at the time Thomas Shrader was talking about a bet?

A. I didn't hear of any bet, no, sir.

Q. And when was the first time you heard about Thomas Shrader's bet?

A. It was after the accident I talked to him,

page 287 } about a month afterwards, I imagine.

Q. Did he tell you substantially what he told this morning?

A. Yes, sir.

Mr. Sackett: If your Honor please, I object to that.

The Court: That is a self-serving declaration.

Mr. Sackett: I object to it and ask that it be stricken.

The Court: I ask the jury to disregard the question and answer.

Ernest Ayers.

By Mr. Rosenberger:

Q. Were you racing any automobile at the time of this collision?

A. No, sir.

Q. Did you have any bet with anybody as to how fast your car would go at the time of this collision?

A. No, sir.

Q. Did you give Douglas Peters $20.00 to hold while you were sitting in the automobile?

A. No, sir.

Q. I refer to the time while you were at Bill's Barn.

A. No, sir, I didn't give nobody no money.

Q. Did you have $20.00?

A. No, sir.

page 288 } Q. How much money did you have, Ernest?

A. I had somewhere around $10.00. I had $8.00 at the hospital. I got my money when I left the hospital and I had somewhere around $8.00.

Q. Was it one $10.00 bill?

The Court: It could hardly be a $10.00 bill if he only had $8.00.

By Mr. Rosenberger:

Q. I want to know if you had a $10.00 bill?

A. No, sir.

Q. Your money was in change and you think it was how much?

A. Somewhere around $8.00.

Q. Ernest, did anybody ask to get out of your automobile before you left Bill's Barn?

A. No, sir.

Q. Where were you going when you left Bill's Barn?

A. Going to Amherst.

Q. Did everybody know what your destination was or where you were going?

A. Yes, sir.

Q. Did everybody in the car want to go?

A. Yes, sir.

Q. Did anybody ask you to let them off at home anywhere?

A. No, sir.

page 289 } Q. Before this collision occurred did Fred Martin tap you on the back and tell you to stop?

A. I don't remember him tapping me on the back.

Ernest Ayers.

Q. You saw him here this morning and heard him say "Stop, stop", did you not?
A. Yes, sir, I heard it this morning.
Q. Did he say that in the automobile that night?
A. I didn't hear him.
Q. Was there any reason for him to tell you to stop?
A. No, sir.

Mr. Rosenberger: You may examine.
Mr. Sackett: No questions.
Mr. Whitehead: No questions.

The witness stands aside.

Mr. Rosenberger: We rest:
The Court: Everybody rests. I am going to adjourn until quarter after one o'clock. It is now quarter after twelve and I will ask counsel to be back at 1:00 o'clock.

September 8, 1959,
Afternoon Session.

(In chambers)

page 290 } Mr. Sackett: If your Honor please, I want to renew our motion to strike the plaintiff's evidence as being insufficient in law to support a verdict against the defendant Brown for the reasons stated when the motion was made at the conclusion of the plaintiff's evidence.
The Court: I will have to overrule that motion.
Mr. Sackett: The defendant Brown, by counsel, objects and excepts to the action of the court in overruling his motion to strike the plaintiff's evidence for the reasons stated.
Mr. Rosenberger: The defendant Ayers, by counsel, moves the court to strike the evidence as to him on the ground that there is no credible evidence of gross negligence on behalf of the defendant Ayers; that in the event the court disagrees with this point that even if there is evidence that Ayers was going at an excessive speed this is insufficient to show that that was a proximate cause of the collision and the collision was as a result of a sole proximate cause of the negligence of Brown, and in the event the court disagrees with this motion of the defendant and believes the evidence of the witness Martin to be credible and that it should go to the jury then the

page 291 } evidence of the witness Martin shows that the deceased, Douglas Peters, was guilty of contributory negligence as a matter of law in remaining in the automobile when he knew when he left Bill's Barn that they would try to see if the automobile would go as much as 120 miles an hour, and for that reason he could not maintain his action against the plaintiff Ayers.

The Court: Of course, there is a conflict on practically everything and I will not substitute my judgment for the jury's and I will let them resolve the facts.

Mr. Rosenberger: The defendant Ayers objects and excepts to the action of the court for the reasons stated.

page 292 } INSTRUCTIONS.

The Court: In regard to instructions offered by the plaintiff I am going to give Instruction No. 1, refuse Instruction No. 2 as offered and substitute for No. 2 Instruction No. 2A which incorporates the contributory negligence feature; Instruction No. 3 will be refused as offered and Instruction No. 3A, as amended by the court, will be given as a substitute, incorporating the contributory negligence feature; Instruction 4, Instruction 5 and Instruction No. 6 will be given, and Instruction No. 7 will be refused.

Now, in regard to instructions offered on behalf of the defendant Brown, I will give Instructions A-1, B-1, C-1, D-1, E-1, F-1, H-1. I-1, and J-1. Instructions G-1 and K-1 will be refused.

Now, in regard to instructions offered on behalf of the defendant Ayers I will give instructions lettered A, B, as amended, C, D, E, G, I, K, N, O, and Q.

I will refuse instructions lettered F, H, J, L, M, and P.

I will limit the time of argument to 50 minutes for the plaintiff and 50 minutes for both defendants.

page 293 } Mr. Rosenberger: The defendant Ayers, by counsel, makes a request that he be given an equal amount of time to argue the case as the plaintiff has and this is particularly necessary because the co-defendant Brown has an adverse interest in this case and I am not only defending against the plaintiff Peters but against the co-defendant Brown.

Mr. Sackett: You won't have an opportunity to answer me.

Mr. Rosenberger: I have got to answer Mr. Whitehead and Mr. Sackett both, in anticipation.

The Court: I think you are capable of doing it in 25 minutes.

Mr. Rosenberger: We object to your Honor's ruling in giving me only 25 minutes to argue the case and giving Mr. Whitehead 50 minutes and we except for the reasons stated.

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS.

PLAINTIFF'S INSTRUCTION NO. 1.

(Given):

"The Court instructs the jury that if you find for the plaintiff you may award such damages as to you may seem fair and just, not exceeding the sum of $30,000.00, and in ascertaining the damages you may find the same with reference to the following:

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"(a) The pecuniary loss, if any, sustained by the father, mother, brothers and sisters of Douglas Lee Peters, deceased, fixing such sum with reference to the probable earnings of the deceased, Douglas Lee Peters, taking into consideration his age, intelligence and health, during what would have been his probable lifetime, if he had not been killed;

"(b) In ascertaining the probability of life of the deceased, you have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life;

"(c) Compensation for loss of his care, attention and society to his father, mother, brothers and sisters; and,

"(d) By such further sum as you may deem fair and just by way of solace and comfort to his father, mother, brothers and sisters, for their sorrow, suffering and mental anguish occasioned to them by his death ,and you may direct in what proportion any damages which you may assess shall be distributed to the father, mother, brothers and sisters of the deceased, Douglas Lee Peters."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in granting Plaintiff's Instruction No. 1 on the ground that it contains improper elements of damage and there is no evidence on which to base that part of Instruction 1, Paragraph (a), dealing with the pecuniary loss, if any, sustained by the father, mother, brothers and sisters etc., and excepts for the reason stated.

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Mr. Sackett: The defendant Brown, by counsel, objects and

excepts to the action of the court in granting Instruction No. 1 for the plaintiff on the grounds it embodies elements of plaintiff's damages not supported by the evidence. I have particular reference to Sub-paragraph (a) of the instruction dealing with the pecuniary loss, if any, sustained by the father, mother, brothers and sisters of Douglas Lee Peters, deceased, and that portion of the instruction dealing with the fixing of damages with reference to the probable earnings of the decedent when there is no evidence in the record to support such an element of damage.

PLAINTIFF'S INSTRUCTION NO. 2.

(Refused, as offered):

"The Court instructs the jury that at the time and place this accident occurred it was the duty of the defend-
page 296 } ant, Ernest William Ayers, to use slight care to perform or comply with each and all of the following duties:

"(a) To drive the Ford automobile under proper control;
"(b) To drive said automobile in a manner so as not to endanger the life or limb of the plaintiff
"(c) To drive said automobile so as not to exceed a reasonable speed under the circumstances and conditions existing at the time, and in no event to exceed 55 miles per hour; and,
"(d) To keep a proper lookout.

"The Court further instructs the jury that if you believe from a proponderance of the evidence that the defendant, Ernest William Ayers, failed to perform any one or more of his aforesaid duties and that his failure, if any, under the circumstances then and there existing showed an utter disregard of prudence amounting to complete neglect of the safety of the plaintiff's decedent, then the defendant, Ernest William Ayers, was guilty of gross negligence and if you believe that such gross negligence, if any, was a proximate contributing cause of the accident, then you shall find a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas Lee Peters, deceased, against the defendant, Ernest William Ayers."

page 297 } Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in refusing to give Instruction No. 2 as offered and giving in lieu thereof Instruction No. 2A on the ground that as a matter of

law the plaintiff's decedent was not guilty of contributory negligence and the plaintiff was entitled to Instruction No. 2 as offered and should not have been required to offer Instruction No. 2A.

PLAINTIFF'S INSTRUCTION NO. 2A.

(Granted:

"The Court instructs the jury that at the time and place this accident occurred it was the duty of the defendant, Ernest William Ayers, to use slight care to perform or comply with each and all of the following duties:

"(a) To drive the Ford automobile under proper control;
"(b) To drive said automobile in a manner so as not to endanger the life or limb of the plaintiff's decedent;
"(c) To drive said automobile so as not to exceed a reasonable speed under the circumstances and conditions existing at the time, and in no event to exceed 55 miles per hour; and,
"(d) To keep a proper lookout.

"The Court further instructs the jury that if you believe from a preponderance of the evidence that the de-
page 298 } fendant Ernest William Ayers, failed to perform any one or more of his aforesaid duties and that his failure, if any, under the circumstances then and there existing showed an utter disregard of prudence amounting to complete neglect of the safety of the plaintiff's decedent, then the defendant, Ernest William Ayers, was guilty of gross negligence and if you believe that such gross negligence, if any, was a proximate contributing cause of the accident, then you shall find a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas Lee Peters, deceased, against the defendant, Ernest William Ayers, unless you also believe from a preponderance of the evidence that the plaintiff's decedent, Douglas Lee Peters, was guilty of contributory negligence which was a proximate contributing cause of his death."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in granting Plaintiff's Instruction No. 2A on the ground that this instruction separates and states as separate duties what, in effect, is the one duty in issue relative to the question of speed and by combining the various duties of operating the Ford under proper control;

page 299 } operating it in a manner so as not to endanger life or limb of another; and 3, operating it so as not to exceed a reasonable speed under the circumstances; and 4, so as not to exceed 55 miles an hour, are all separate statutory duties but as far as this particular case is concerned it exaggerates the single duty of Ayers to use slight care to operate his automobile at a reasonable speed under the circumstances and the near violation of one of these duties would not be sufficient to constitute gross negligence under the circumstances and the instruction is similar to and is erroneous as the one given in *Smith's Executor* v. *Smith,* 199 Virginia, 55, which stated as his separate duties the single act of driving on the proper side of the road. In the Smith case we have the question of operating the automobile on the right side of the road. In this case we have the question of speed and whether it constituted gross negligence under the circumstances, and by separating them into four different duties then we have exaggerated the matter in the eyes of the jury apparently for the purpose of saying it constituted gross negligence, and the defendant Ayers, by counsel, excepts for the reasons stated.

page 300 } PLAINTIFF'S INSTRUCTION NO. 3.

(Refused as offered):

"The Court instructs the jury that at the time and place this accident occurred, it was the duty of the defendant's decedent, John Brown, to use reasonable care to perform or comply with each and all of the following duties:

"(d) To keep a proper lookout;

"(f) If he intended to make a left turn, shall give a signal for a left turn continuously for a distance of at least 100 feet before turning, and when reaching the intersection of U. S. Highway 29 and Virginia State Route 671, and turning therein to the left across the line of travel of vehicles within or approaching the intersection, shall yield the right of way to such other vehicles.

"That these were continuing duties to be exercised when they would be reasonably effective, and that if the defendant's decedent, John Brown, failed to perform in any one or more of said duties as above set forth, and that such failure, if any, was a proximate contributing cause of the accident, then you shall find for the plaintiff, Grandville E. Peters,

Administrator of the Estate of Douglas Lee Peters, deceased, against the defendant's decedent, John Brown."

Mr. Whitehead: The plaintiff, by counsel, ob-
page 301 } jects and excepts to the action of the court in re-
fusing to give Instruction 3 as offered, and in giving in lieu thereof Instruction 3A, on the ground that as a matter of law the plaintiff's decedent was not guilty of contributory negligence and the plaintiff was entitled to Instruction No. 3 as offered and should not have been required to offer Instruction 3A.

PLAINTIFF'S INSTRUCTION NO. 3A.

(Given):

"The Court instructs the jury that at the time and place this accident occurred, it was the duty of the defendant's decedent, John Brown, to use reasonable care to perform or comply with each and all of the following duties:

"(d) To keep a proper lookout;

"(f) If he intended to make a left turn, shall give a signal for a left turn continuously for a distance of at least 100 feet before turning, and when reaching the intersection of U. S. Highway 29 and Virginia State Route 671, and turning therein to the left across the line of travel of vehicles within or approaching the intersection, shall yield the right of way to such other vehicles.

"That these were continuing duties to be exercised when they would be reasonably effective, and that if the defendant's decedent, John Brown, failed to perform in any
page 302 } one or more of said duties as above set forth, and
that such failure, if any, was a proximate contributing cause of the accident, then you shall find for the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas Lee Peters, deceased, against the defendant's decedent, John Brown, unless you also believe from a preponderance of the evidence that the plaintiff's decedent, Douglas Lee Peters, was guilty of contributory negligence which was a proximate contributing cause of the accident."

PLAINTIFF'S INSTRUCTION NO. 4.

(Given):

"The Court instructs the jury that as Douglas Lee Peters, deceased, was riding in the Ford automobile with the defendant, Ernest William Ayers, as a guest, no negligence, if any, of Ernest William Ayers may be imputed to Douglas Lee Peters, deceased, so as to bar recovery by his Administrator in this case."

PLAINTIFF'S INSTRUCTION NO. 5.

(Given):

"The Court instructs the jury that even though you may believe from the evidence that the plaintiff's decedent, Douglas Lee Peters, was guilty of negligence, yet in order for such negligence to bar plaintiff's recovery, it
page 303 } must be a proximate contributing cause of his death."

PLAINTIFF'S INSTRUCTION NO. 6.

(Given):

"The Court instructs the jury that the burden rests on the defendant to prove by a preponderance of the evidence that the plaintiff's decedent was guilty of contributory negligence, unless it is disclosed by the plaintiff's own evidence or may be fairly inferred from all the facts and circumstances of the case."

PLAINTIFF'S INSTRUCTION NO. 7.

(Refused):

"The Court instructs you that although you may believe from the evidence that the plaintiff's decedent, Douglas Lee Peters, was guilty of negligence, but if this negligence was remote and was not a proximate contributing cause of the accident, then no negligence of Douglas Lee Peters, deceased, would bar recovery by his Administrator."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in refusing to give Instruction No. 7 offered by the plaintiff on the
page 304 } ground that this instruction correctly states the law and should have been given.

Mr. Whitehead: The plaintiff, by counsel, objects and ex-

cepts to the action of the court in granting the defendant Brown any instruction which would make it a question of fact for the jury as to whether or not Brown was guilty of negligence on the ground that the evidence shows, as a matter of law, that Brown was guilty of negligence that was a proximate contributing cause of the accident.

The plaintiff, by counsel, objects and excepts to the action of the court in giving any instruction for the defendant Ayers as to his theory of the case making it a question of fact for the jury to determine for the evidence shows in the case, as a matter of law, that Ayers was guilty of gross negligence that was a proximate contributing cause of the accident, and the plaintiff, by counsel, objects and excepts to the action of the court in giving any instructions that might exonerate either of the defendants from liability for, as a matter of law, both defendants are guilty of negligence that was a cause of the accident, the defendant Brown being guilty of
page 305 } ordinary negligence and the defendant Ayers being guilty of gross negligence.

DEFENDANT BROWN'S INSTRUCTION A-1.

(Given):

"The Court instructs the jury that even though you may believe from the evidence in this case that the plaintiff's decedent came to his death as the result of a collision between an automobile operated by John Brown and one operated by Ernest William Ayers, this is not of itself proof that John Brown was guilty of negligence or that he is liable in damages to the plaintiff. The court instructs the jury that before the plaintiff can recover of the defendant William (Bill) Brown, administrator of the estate of John Brown, deceased, he must prove by a preponderance of the credible evidence that John Brown was guilty of some act of negligence as charged in plaintiff's motion for judgment and that such negligence was the sole proximate cause or a contributing proximate cause of this accident. And, if upon consideration of all the evidence the jury believe that John Brown was guilty of no negligence then the plaintiff is not entitled to recover of the defendant Brown in this case and the jury should find for the defendant Brown."

Mr. Rosenberger: The defendant Ayers, by
page 306 } counsel, objects to the action of the court in granting defendant Brown's Instruction A-1 on

the ground that there was no evidence on which the jury could find that John Brown was not guilty of negligence which proximately caused this collision. The uncontradicted facts are that he stopped or slowed to an approximate stop in the center lane of the highway, apparently for the purpose of letting the oncoming Ayers car pass in the northbound lane, but having done so he continued on or pulled out into the northbound lane in front of the Ayers car when it was so close that all of the witnesses to the collision said that they knew there would be an accident when he pulled out. Under the circumstances it is obvious that he did not use reasonable care to see that his movement could be made in safety from one lane to another. He did not use reasonable care to see that he could make a left turn in safety and he pulled out in front of an oncoming car which his counsel's and his theory is was proceeding at a high rate of speed and that has been the object of the defense of Brown to put the blame on the defendant Ayers whom it is claimed was proceeding at a very high rate of speed, and under these circumstances Brown convicts himself of negli-
page 307 } gence that proximately caused the collision, and the defendant Ayers excepts for the reasons stated.

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the ruling of the court in giving Instruction A-1 on the ground that as a matter of law the negligence of Brown was a proximate contributing cause of the accident.

DEFENDANT BROWN'S INSTRUCTION B-1.

(Given):

"The Court instructs the jury that if you believe from the evidence in this case that at the time and place of this accident John Brown was operating his automobile in a lawful manner and using such care as a reasonably prudent person would have used under the same or similar circumstances then he was not guilty of negligence as a matter of law and you must return a verdict in favor of the defendant Brown."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in granting Instruction B-1 on behalf of the defendant Brown for the reason that
page 308 } the uncontradicted evidence in the case shows that Brown was not driving in a lawful manner or using reasonable care. There is no evidence on which to base

this instruction and we refer to the same objections which were made to Instruction A-1 and incorporate those as objections to Instruction B-1, and the defendant Ayers excepts for the reason stated.

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in giving Instruction B-1 as there is no evidence to base the instruction on and furthermore Brown was guilty of negligence as a matter of law.

DEFENDANT BROWN'S INSTRUCTION C-1.

(Given):

"The Court instructs the jury that at the time and place of this collision it was the duty of Ernest William Ayers to use reasonable care to perform each and all of the following duties: ? for a kept

"1. To drive his automobile in a careful and prudent manner so as to keep the same under proper and effective control;

"2. To keep a reasonable and proper lookout page 309 } for other motor vehicles using the highway;

"3. To drive his automobile at a speed or in a manner so as not to endanger the life, limb or property of any person;

"4. To drive his automobile so as not to exceed a reasonable speed under the circumstances and traffic conditions existing at the time.

"The Court further instructs the jury that if you believe from the evidence that Ernest William Ayers failed to perform any one or more of his duties and that such failure was the sole proximate cause of the collision then the plaintiff is not entitled to recover of the defendant Brown in this case and the jury must return a verdict for the defendant Brown."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in granting Instruction C-1 on behalf of the defendant Brown because this instruction likewise breaks down and shows three statutory duties:

1. To drive his automobile in a careful and prudent manner so as to keep the same under proper and effective control;

2. To keep a reasonable and proper lookout for other motor vehicles using the highway;

page 310 } 3. To drive his automobile at a speed or in a manner so as not to endanger the life, limb or property of any person;

4. To drive his automobile so as not to exceed a reasonable speed under the circumstances and traffic conditions existing at the time.

This instruction aggravates the error incurred by the court in granting Plaintiff's Instruction 2-A, and further the instruction is objectionable on the ground that it makes it a jury question as to whether Ayers was the sole proximate cause of the collision and there is no evidence to base such an instruction for the same reasons that we gave regarding the negligence of Brown as a matter of law in stating our objections to Instructions A-1 and B-1, and the defendant Ayers, by counsel, excepts for the reasons stated.

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in giving Instruction C-1 setting out the duties of the defendant Ayers but objects to the instruction stating that if Ayers failed to perform duties enumerated in the instruction that it was a ques-

page 311 } tion of fact whether these acts were the sole proximate cause of the collision when, as a matter of law, Brown was guilty of negligence that was a proximate contributing cause of the collision.

DEFENDANT BROWN'S INSTRUCTION D-1.

(Given):

"The Court instructs the jury that it was the duty of the defendant Ernest William Ayers at the time and place of this accident not to operate his automobile at a speed in excess of 55 M. P. H. and if the jury believe from a preponderance of the evidence in this case that just before and at the time this collision occurred the defendant Ernest William Ayers was operating his Ford automobile at a speed in excess of 55 M. P. H. then he was guilty of negligence as a matter of law. And if the jury further believe that such negligence was the sole proximate cause of this accident then the plaintiff is not entitled to recover of the defendant Brown in this case and the jury must return a verdict for the defendant Brown."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in granting Instruction D-1 on behalf of the defendant Brown which again deals page 312 } with speed, and which again overemphasizes the question of speed in regard to the defendant Ayers, and the same objection obtains to this instruction as we stated to Instruction C-1, that the mere violation of the statute is not sufficient but the issue is whether Ayers was driving at such a speed as to show an utter disregard of prudence amounting to complete neglect, and the instruction is further objectionable on the ground that the jury could not conclude that Ayers' negligence, if any, was the sole proximate cause of the collision under the evidence in this case for the reasons stated in objections to Instructions A-1, B-1 and C-1, and the defendant Ayers, excepts for the reasons stated.

Mr. Whitehaed: The plaintiff, by counsel, objects and excepts to the action of the court in giving Instruction D-1 on the ground that under no circumstances could the negligence of Ernest William Ayers be the sole cause of the accident but, as a matter of law, the negligence of Brown and the negligence of Ayers were proximate contributing causes of the accident.

page 313 } DEFENDANT BROWN'S INSTRUCTION E-1.

(Given):

"The Court instructs the jury that if you believe from the evidence in this case that just before and at the time this collision occurred John Brown drove his automobile into the center lane of the highway and gave a lawful signal of his intention to turn left and if the jury further believe from the evidence that the defendant Ayers saw or in the exercise of reasonable care should have seen said signal then it was the duty of Ayers to use reasonable care to keep his automobile under complete control."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in granting Instruction E-1 on behalf of the defendant Brown because there is not one scintilla of evidence that John Brown gave a lawful signal of his intention to turn. The instruction is further objectionable on the ground that it is not a duty of Ayers to keep his automobile under complete control and this instruction states

his duty to be higher than the law requires, and the defendant Ayers excepts for the reasons stated.

page 314 } Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the ruling of the court in giving Instruction E-1 on the ground that there is no evidence that Brown gave a lawful signal.

DEFENDANT BROWN'S INSTRUCTION F-1.

(Given):

"The Court instructs the jury that even though you may believe from the evidence in this case that as the defendant Ernest William Ayers was approaching the intersection of U. S. Route 29 with State Route 671 where this accident happened John Brown was turning therein to the left across the line of travel of the defendant Ayers still if you further believe from the evidence that the said Ernest William Ayers was then and there operating his automobile at a speed in excess of 55 M. P. H. then the said Ernest William Ayers forfeited whatever right of way he might have had in said intersection."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in granting Instruction F-1 on behalf of Brown on the ground that this instruction is misleading in regard to Ernest William Ayers because there is no issue in the case as to whether Ayers had the page 315 } right of way on this road but the sole issue is whether Brown used reasonable care in making a left turn in front of an oncoming automobile which was open and obvious, and whether Ayers was operating his automobile at a reasonable speed or whether he was operating it at such a speed as to be guilty of gross negligence: whereas the inference of this instruction is that he forfeited his right of way if he exceeded 55 miles an hour but that has nothing to do with the issues in the case and is misleading to the the jury; and the instruction further implies that since Ayers forfeited his right of way that Brown then had a right to proceed across the road in front of him when he was in close proximity, and the defendant Ayers excepts for the reasons stated.

DEFENDANT BROWN'S INSTRUCTION G-1.

(Refused):

"The Court instructs the jury that even though you may believe from the evidence in this case that as the defendant, Ernest William Ayers, was approaching the intersection of U. S. Route 29 with State Route 671, where this accident happened, John Brown was turning therein to the left across the line of travel of the defendant Ayers still the court tells the jury that John Brown in making such move-
page 316 } ment had the right to assume that Ernest William Ayers in his approach to said intersection would obey the law and would not operate his automobile at a speed in excess of 55 M. P. H. and that John Brown had the right to act on that assumption until he knew or in the exercise of resaonable care he should have known otherwise."

Mr. Sackett: The defendant Brown, by counsel, objects and excepts to the action of the court in refusing to give Instruction G-1 tendered by the defendant Brown on the ground that the instruction embodies a proper statement of the law applicable to this case and the matter covered in said instruction was a vital part of defendant Brown's defense not covered by any other instruction. This instruction, in effect, tells the jury that the defendant Brown in making his left turn had a right to assume that Ayers in his approach to the intersection would obey the law and would not operate his automobile at a speed in excess of 55 miles an hour and that Brown had the right to act under that assumption until he knew, or in the exercise of reasonable care should have known otherwise. There was ample evidence to support the instruction and the defendant Brown con-
page 317 } tends that the court committed prejudicial error in refusing this instruction.

DEFENDANT BROWN'S INSTRUCTION H-1.

(Given):

"The Court instructs the jury that it was the duty of the defendant Ernest William Ayers at the time and place of this accident to use reasonable care to operate his automobile as nearly as practicable entirely within a single lane of the highway and not to move from such lane until he had first ascertained that such movement could be made with safety and if the jury believe from a preponderance of the evidence that the defendant Ayers drove his automobile from the northbound lane into or partially into the middle lane striking the automobile of John Brown and that in the exercise of

reasonable care he could have avoided the collision by continuing his travel in the northbound lane or by turning his automobile to the right then he was guilty of negligence and if the jury believe that such negligence was the sole proximate cause of this accident then the plaintiff is not entitled to recover of the defendant Brown and the jury should find for the defendant Brown."

page 318 } Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in giving Instruction H-1 on the ground that there is absolutely not one scintilla of evidence to show that Ayers had an opportunity to avoid the collision or that Ayers was driving in the left lane before he was put into an emergency by Brown turning in front of him. On the contrary the evidence of the witness Garrett, the witnesses Manley and Lane was that there was nothing that Ayers could do when Brown suddenly pulled in front of him when Ayers was close on him, and excepts for the reasons stated.

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the ruling of the court in giving Instruction H-1 for the defendant Brown on the ground that Brown was guilty of negligence as a matter of law which was a proximate contributing cause of the accident.

DEFENDANT BROWN'S INSTRUCTION I-1.

(Given):

page 319 } "The Court instructs the jury that it was the duty of plaintiff's decedent, Douglas Lee Peters, in riding with the defendant Ayers to use reasonable care for his own safety, and if the jury believe from the evidence that the danger arising out of the operation of the defendant Ayers' motor vehicle, under the circumstances existing at the time, was manifest to the plaintiff's decedent and that the plaintiff's decedent had adequate opportunity to have warned the defendant Ayers of such danger or to have protested as to the manner in which said automobile was being operated, but failed to do so, then the said Douglas Lee Peters was guilty of negligence and if the jury further believe from the evidence that such negligence proximately contributed to his death then the plaintiff is not entitled to recover of either defendant in this case and the jury should find for the defendants."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the ruling of the court in giving Instruction I-1 on the ground that there is no evidence of contributory negligence on the part of Douglas Peters and, as a matter of law, he was not guilty of contributory negligence.

DEFENDANT BROWN'S INSTRUCTION J-1.

(Given):

"The Court instructs the jury that if you believe from the evidence in this case that the hazard or risk re-
page 320 } sulting in the death of the plaintiff's decedent was known to the plaintiff's decedent and was one which he voluntarily assumed when he undertook to ride or continued to ride with the defendant Ayers, under the circumstances proven in this case, then the plaintiff is not entitled to recover of either defendant and the jury should find for the defendants."

Mr. Whitehead: The plaintiff, by counsel, excepts to the ruling of the court in giving Instruction J-1 on the ground that there was no evidence that Douglas Peters assumed any risk. The evidence shows tha tthe excessive speed began within a mile of the accident and that up to that time the defendant had been driving all right.

DEFENDANT BROWN'S INSTRUCTION K-1.

(Refused):

"The Court instructs the jury that if you believe from the evidence in this case that at the time and place of this accident John Brown was not the operator of the 1949 Ford involved in this accident then the plaintiff is not entitled to recover of the defendant Brown and the jury should find for the defendant Brown."

page 321 } DEFENDANT AYERS' INSTRUCTION A.

(Given):

"The Court instructs the jury that the least showing upon which the plaintiff may recover against Ernest William Ayers is that he was guilty of gross negligence which proximately caused the death of Douglas L. Peters. There is a distinction

between ordinary negligence and gross negligence in that mere carelessness, inadvertence, lack of attention, failure to skillfully operate an automobile, to act intelligently, or to operate an automobile at a low rate of speed may constitute ordinary negligence. Gross negligence, however, is substantially and appreciably higher in magnitude than ordinary negligence and means a complete absence or lack of care to avoid inflicting an injury to the person of another and is such a heedless and reckless disregard of the rights of another as to shock reasonable men. If you believe from the evidence that the driver of the automobile was guilty of some negligence but that such negligence did not show an utter disregard of prudence amounting to complete neglect of the safety of Douglas L. Peters or that such negligence did not indicate such heedless and reckless disregard of the rights of another as to shock reasonable men, then Ernest William Ayers was not guilty of gross negligence and you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in
page 322 } favor of the defendant, Ernest William Ayers."

Mr. Whitehead: The plaintiff, by counsel, excepts to the action of the court in giving Instruction A on the grounds that as a matter of law the defendant Ayers was guilty of gross negligence.

DEFENDANT AYERS' INSTRUCTION B.

(Given):

"This Court instructs the jury that if you believe from the evidence that the death of Douglas L. Peters was caused alone and only by certain acts of mere inattention or inadvertence on the part of Ernest William Ayers and not from such negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of Douglas L. Peters or that such death did not proximately result from such negligence as to indicate a heedless and reckless disregard of the rights of another as should shock reasonable men, then Ernest William Ayers is not guilty of gross negligence and you cannot return a verdict in favor of Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

page 323 } Mr. Sackett: The defendant Brown, by counsel, objects and excepts to the action of the court in granting Instruction B offered by the defendant Ayers on the ground that the instruction and the language used does not embody a proper statement of the law applicable to this case and would tend to confuse the jury.

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in giving Instruction B on the ground that as a matter of law the defendant Ayers was guilty of gross negligence.

DEFENDANT AYERS' INSTRUCTION C.

(Given):

"The Court instructs the jury that at the time and place that this collision occurred, it was the duty of John Brown to use reasonable care to perform each and all of the following duties:

"1. To see that he could turn his motor vehicle to the left in safety, before attempting to make such a turn, and whenever the operation of any other vehicle may be affected by such turn, to give a signal thereof, plainly visible
page 324 } to the driver of such other vehicle, of his intention to make such a turn;

"2. To signal his intention to turn left for a distance of at least 100 feet before turning.

"The Court further instructs the jury that if you believe from a preponderance of the evidence that John Brown failed to perform any one or more of his aforesaid duties and that such failure was the sole proximate cause of the collision, then you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the ruling of the court in giving Instruction C on the ground that as a matter of law the defendant Ayers was guilty of gross negligence and could not be exonerated.

DEFENDANT AYERS' INSTRUCTION D.

(Given):

"The Court instructs the jury that if you believe from the evidence that at the time and place that this collision occurred, that John Brown failed to give a signal
page 325 } continuously for a distance of 100 feet of his intention to turn, plainly visible to the defendant, before attempting to turn the Ford automobile across the highway in front of the automobile operated by the defendant, then the defendant, Ernest William Ayers, had the right to assume that the John Brown automobile would continue in a straight course, or stop in the center lane of the highway until the defendant, Ernest William Ayers, knew, or in the exercise of reasonable care should have known otherwise."

DEFENDANT AYERS' INSTRUCTION E.

(Given):

"The Court instructs the jury that if you believe from the evidence that at the time and place that this collision occurred, John Brown saw the automobile operated by the defendant, Ernest William Ayers, approaching the intersection where the collision occurred, or in the exercise of reasonable care should have seen the approaching automobile of Ayers, but despite such knowledge, John Brown made a left turn into the path of the automobile operated by Ernest William Ayers, and that John Brown failed to exercise reasonable care under the facts and circumstances then and there obtaining, then John Brown was guilty of negligence, and if you believe from the evidence that it is as likely as not that such negligence was the sole proximate cause of
page 326 } the collision, then you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in giving Instruction E on the ground that under no circumstances could the negligence of John Brown be the sole proximate cause of the collision; that from the evidence in the case, as a matter of law, John Brown was guilty of ordinary negligence, Ayers

was guilty of gross negligence, and their negligence both were a proximate contributing cause of the accident.

Mr. Sackett: The defendant Brown objects and excepts to the action of the court in giving Instruction E offered by the defendant Ayers and states as his ground for the objection the instruction does not embody a proper principle of law applicable to this case. The instruction tells the jury that if they believe from the evidence at the time this page 327 } collision occurred John Brown saw the automobile operated by the defendant Ayers approaching the intersection, or that in the exercise of reasonable care he should have seen the automobile, then the instruction continues with certain duties and obligations to be performed by the defendant Brown. The instruction in that language makes the defendant Brown an insurer, or the equivalent of an insurer, and the instruction should be qualified in such a way to impose upon Ayers the duty and the obligation to operate his automobile in a lawful manner in his approach to the intersection. The defendant Brown states as a further ground for his objection that the language employed in the instruction "If you believe from the evidence that it is as likely as not that such negligence was the sole proximate cause of the collision" is an improper statement tending to confuse the jury to the prejudice of the defendant Brown.

DEFENDANT AYERS' INSTRUCTION F.

(Refused):

"The Court instructs the jury that at the time and place that this collision occurred, it was the duty of John Brown to use reasonable care to drive the Ford auto- page 328 } mobile as nearly as is practicable entirely within a single lane of the highway and not to move from such lane until he has first ascertained that such movement can be made with safety, and if you believe that it is as likely as not that John Brown failed to perform this duty and that such failure was the sole proximate cause of the collision, then you cannot return a verdict in favor of the plaintiff, Grandville E Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in refusing Instruction F

offered by the defendant Ayers on the ground that this was the only instruction that told the jury Brown's duty to stay within the single lane of the three-lane highway until in the exercise of reasonable care he could ascertain that he could pull from the single lane into the northbound lane, and it was a jury issue to determine whether or not the negligence of Brown in this particular was the sole proximate cause of the collision and the defendant Ayers has been denied the right to submit this theory of his defense to the jury, page 329 } and the defendant Ayers, by counsel, excepts for the reason stated.

DEFENDANT AYERS' INSTRUCTION G.

(Given):

"The Court instructs the jury that the basis of this action against Ernest William Ayers is gross negligence, which is that degree of negligence that shows an utter disregard of prudence amounting to complete neglect and is such heedless and reckless disregard of the rights of another as to shock reasonable men. The jury cannot infer gross negligence on the part of the defendant, Ernest William Ayers, from the mere fact that an accident happened, as the mere happening of an accident places no responsibility on anyone and does not raise any presumption of gross negligence or warrant a recovery against the defendant, Ernest William Ayers. You may not return a verdict in favor of the plaintiff based on conjecture, surmise or speculation as to what you think may have happened and the law imposes upon Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, the burden of proving his case by a preponderance of all of the evidence, and the jury cannot find a verdict in favor of Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers unless and until he proves by a preponderance of all of the evidence page 330 } that the defendant, Ernest William Ayers, was guilty of gross negligence and that such gross negligence was a proximate cause of the death of Douglas L. Peters.

"The Court further instructs the jury that if after hearing all of the evidence the jury believes that the evidence is equally balanced as between the plaintiff and the defendant, Ernest William Ayers, or if the jury is uncertain as to whether the defendant was guilty of gross negligence and that it appears equally probable that he was not guilty of gross negligence as that he was, then the plaintiff has failed to carry the

burden of proof against the defendant, Ernest William Ayers, and you cannot return a verdict in favor of the plaintiff Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the ruling of the court in giving Instruction G on the ground that as a matter of law the defendant Ayers was guilty of gross negligence which was a proximate cause of the accident.

page 331 } DEFENDANT AYERS' INSTRUCTION H.

(Refused):

"The Court instructs the jury that if you believe from the evidence that the defendant, Ernest William Ayers, was operating the motor vehicle in a lawful manner and using such care as a reasonably prudent person would have used under the same or similar circumstances, then he was not guilty of negligence as a matter of law and you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

DEFENDANT AYERS' INSTRUCTION I.

(Given): X

"The Court instructs the jury that at the time and place that this collision occurred, it was the duty of John Brown to use reasonable care to drive the automobile so as not to block or obstruct the highway in front of the automobile operated by the defendant, Ernest William Ayers, and if you believe from the evidence that he failed to do so and that such failure was the sole proximate cause of the collision, then you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against the defendant, Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest
page 332 } William Ayers."

Mr. Sackett: The defendant Brown, by counsel, excepts

to the action of the court in giving Defendant Ayers' Instruction I on the ground that the instruction as given does not embody a proper statement of law applicable to this case.

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in giving Instruction I on the grounds that under no circumstances could Ernest William Ayers not be guilty of gross negligence and furthermore, as a matter of law, that his gross negligence was a proximate contributing cause of the accident.

DEFENDANT AYERS' INSTRUCTION J.

(Refused):

"The Court instructs the jury that when a person is suddenly confronted with an emergency through no negligence of his own but through negligence of another person, such person is not required to act instantly, but is allowed a reasonable time to comprehend the situation before being required to act. The court further instructs the jury that if you believe from the evidence that it is as likely as not that Ernest William Ayers, while operating his automobile in a lawful manner, was suddenly confronted with an emergency caused by the negligence of John Brown, then you must allow Ernest William Ayers a reasonable time to react to the situation, and if you find that he acted as promptly and in a manner such as a reasonable person would have under the same or similar circumstances, then you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

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DEFENDANT AYERS' INSTRUCTION K.

(Given):

"The Court instructs the jury that at the time and place that this collision occurred, Douglas L. Peters was an invited guest riding in the automobile of Ernest William Ayers and Ernest William Ayers was not under the same obligation to his guest to use the same measure of care as he would have been to a passenger for pay. The driver of such an automobile makes no implied representation to a guest except:

"(1) That he will not operate his automobile with gross negligence nor knowingly or wantonly add to
page 334 } those perils which ordinarily may be expected;
"(2) That he will not intentionally injure his guests; and
"(3) That there are not known defects in the automobile which would make its operation particularly dangerous. "Beyond this all risks are assumed by the guest, Douglas L. Peters."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the action of the court in giving Instruction K on the ground that Ayers was guilty of gross negligence as a matter of law which was a proximate contributing cause of the accident and under no circumstances could Brown's negligence be the sole proximate cause of the accident.

DEFENDANT AYERS' INSTRUCTION L.

(Refused):

"The Court instructs the jury that at the time and place that this collision occurred, it was the duty of John Brown to use reasonable care to perform each and all of the following duties:

"1. To drive the Ford automobile under proper control;
"2. To drive said automobile at a speed and in
page 335 } a manner so as not to endanger the life and limb of any person;
"3. To drive said automobile so as not to exceed a reasonable speed under the circumstances and traffic conditions existing at that time;
"4. To keep a proper lookout; and
"5. To drive said Ford automobile upon the right hand side of the highway in the direction he was traveling.

"The Court further instructs the jury that if you believe from the evidence that John Brown failed to perform any one or more of his aforesaid duties and that such failure was the sole proximate cause of the collision, then you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

DEFENDANT AYERS' INSTRUCTION M.

(Refused):

"The Court instructs the jury that even if you believe from the evidence that at the time and place that this collision occurred, the defendant, Ernest William Ayers, operated his automobile at an excessive speed under the facts and circumstances then and there existing, and even if you may believe that he failed to keep a reasonable lookout and that such speed or such failure to keep a reasonable lookout page 336 } constituted the lack of reasonable care, then the defendant, Ernest William Ayers, was guilty of negligence, however, if you believe from the evidence that it is as likely as not that under the facts and circumstances then and there existing such excessive speed or failure to keep a reasonable lookout was not due to the failure to exercise slight care so as to show an utter disregard of prudence amounting to complete neglect of the safety of another, or such heedless and reckless disregard of the rights of another as to shock reasonable men, then the defendant, Ernest William Ayers, is not guilty of gross negligence, and you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in refusing Instruction M offered on his behalf on the ground that the defendant admitted that he was driving 55 to 60 miles an hour but it was his defense that that speed under the circumstances of the case where he had a right to assume that Brown page 337 } would remain stopped until he passed was such that it did not constitute gross negligence, and even if the jury concluded that he did not keep a reasonable lookout, nevertheless, under the circumstances in this case they may conclude that his actions in regard to exceeding the speed limit and not keeping a reasonable lookout did not constitute gross negligence, or such negligence as would indicate an utter disregard of prudence amounting to complete neglect, and the defendant Ayers was denied this defense to his case and the defendant Ayers objects and excepts for the reasons stated.

DEFENDANT AYERS' INSTRUCTION N.

(Given):

"The Court instructs the jury that even if you believe from the evidence that the defendant, Ernest William Ayers, was guilty of some negligence which proximately caused the death of Douglas L. Peters, yet if you further believe from the evidence that Douglas L. Peters was guilty of negligence in failing to take proper care and caution for his own safety, such as a person of ordinary prudence would have taken and that his failure to take such care proximately caused or contributed to his death, then you must return a verdict for the defendants since in such case the law will not undertake to apportion negligence and this is true even though
page 338 } the negligence of the driver might have been greater than the negligence of Douglas L. Peters."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the giving of Instruction N on the ground that there is no evidence as a matter of law that Douglas L. Peters was guilty of any negligence which was a proximate contributing cause of his death.

DEFENDANT AYERS' INSTRUCTION O.

(Given):

"The Court instructs the jury that if you believe from the evidence that it is equally as probable that the collision of the vehicles and the death of Douglas L. Peters resulted from one of two causes, for one of which the defendant Ayers is responsible and the other he is not, then the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, has not carried the burden of proof and you must return a verdict in favor of the defendant, Ernest William Ayers."

page 339 } Mr. Sackett: The defendant Brown, by counsel, objects and excepts to the action of the court in granting Instruction O offered by the defendant Ayers on the ground that the instruction does not embody a proper statement of the law applicable to this case.

Mr. Whitehead: The plaintiff, by counsel, objects and

excepts to the action of the court in giving Instruction O on the ground that, as a matter of law, the defendant Ayers was guilty of gross negligence that was a proximate contributing cause of the accident.

DEFENDANT AYERS' INSTRUCTION P.

(Refused):

"The Court instructs the jury that even if you believe from a preponderance of the evidence that the defendant, Ernest William Ayers, was operating his automobile at such an excessive rate of speed under the facts and circumstances then and there existing as to be guilty of gross negligence, nevertheless, if you believe that it is as likely as not that John Brown was guilty of negligence in making a left turn and that such negligence was the sole proximate cause of
page 340 } the collision, then you cannot return a verdict in favor of the plaintiff, Grandville E. Peters, Administrator of the Estate of Douglas L. Peters, against Ernest William Ayers, but you must return a verdict in favor of the defendant, Ernest William Ayers."

Mr. Rosenberger: The defendant Ayers, by counsel, objects to the action of the court in refusing Instruction P offered on his behalf which dealt solely with the question that excessive speed under the facts and circumstances did not constitute gross negligence and this instruction related solely to the question of speed and omitted the question of lookout and in refusing this instruction the court denied this defense to the defendant Ayers, and the defendant Ayers, by counsel, excepts for the reasons stated.

DEFENDANT AYERS' INSTRUCTION Q.

(Given):

"The Court instructs the jury that even if you believe from the evidence that the defendant, Ernest William Ayers, was operating his automobile at a speed of 55 to 65 miles per hour, the operation of the automobile at such speed alone is not gross negligence for which the defendant,
page 341 } Ernest William Ayers, would be liable."

Mr. Whitehead: The plaintiff, by counsel, objects and excepts to the giving of Instruction Q on the ground that the physical facts and the evidence show as a matter of law that

the car was being driven much in excess of 55 miles per hour.

Mr. Sackett: The defendant Brown, by counsel, objects and excepts to the action of the court in granting Instruction Q offered by the defendant Ayers on the ground that the operation of an automobile even at 55 to 65 miles an hour under some conditions could constitute gross negligence and that under the facts of this case and the vision that the defendant Ayers had the operation of his automobile at 65 miles an hour could constitute gross negligence and in this sense the instruction is not a proper one.

page 342 } Note: The jury having returned its verdict in favor of the plaintiff in the amount of $21,000.00 the jury's verdict was reworded and upon the jurors being individually polled each answered affirmatively that the verdict, as reworded, was his verdict; thereupon the following motions were made:

Mr. Rosenberger: If your Honor please, the Defendant, Ernest William Ayers, moves the Court to set aside the verdict of the jury on the grounds that it is contrary to the law and the evidence, without evidence to support it; that the evidence of the witness Martin is incredible and cannot establish gross negligence on the part of Ayers, and in the event the jury accepted that evidence, as it indicated it did, then that would convict the plaintiff's decedent, Douglas Peters, guilty of contributory negligence as a matter of law which would bar his recovery in this case; and, also on the further grounds: The Court's refusal to admit the prior inconsistent statement of the witness, Fred Martin, to George L. Sanderson; on the ground that the Court refused to strike the plaintiff's evidence at the end of the evidence page 343 } offered by the plaintiff; because of the Court's refusal to strike the plaintiff's evidence at the conclusion of all of the evidence; for the action of the Court in giving plaintiff's instructions 1 and 2A; for the action of the Court in giving instructions offered on behalf of the defendant Brown numbered A-1, B-1, C-1, D-1, E-1, F-1 and H-1; and for the action of the Court in refusing instructions F, M and P offered on behalf of the defendant Ayers.

The Court: Mr. Rosenberger, you have so many points in your motion there ought to be error in some of them, I am frank to admit, but had I been on the jury I think I would have arrived at the same conclusion that they did. I think

that this fellow Brown made a left turn there and didn't exercise any care, probably didn't see these boys coming, and I think on the other hand that Ayers was really going. I think it is inescapable that this young man Ayers was driving at a high rate of speed, so I think he was guilty of gross negligence.

Mr. Sackett: I want to dictate into the record my motion to set aside the jury's verdict.

page 344 } The defendant Brown moves the Court to set aside the jury's verdict for the plaintiff against the defendant Brown on the grounds:

1—That there is no evidence in the record upon which the jury could find that John Brown was the driver of the car;

2—That the verdict is contrary to the law and the evidence and without evidence to support it;

3—For the error of the Court in refusing to admit certain evidence offered by the plaintiff and certain evidence offered by the defendant Brown, which the defendant Brown submits should have properly gone before the jury.

4—For the error of the Court in granting and refusing certain instructions to which the defendant Brown objected and excepted; and

5—On the ground that the uncontradicted evidence disclosed that the plaintiff's decedent Peters was guilty of contributory negligence as a matter of law, or that he assumed the risk as a matter of law of the hazard resulting in his death, and consequently under those circumstances the plaintiff was not entitled to recover of the defendant Brown.

page 345 } The Court: Mr. Whitehead, do you think it ought to be set aside?

Mr. Whitehead: No, sir. I ask you to enter up judgment.

The Court: Gentlemen, I think I am going to leave it undisturbed but I will think about it for a day or two. Really, I think there are novel questions in this case, one in particular that Mr. Sackett put in there that frankly I never ran into before and it is a very interesting question to me, something I want to look into.

Mr. Sackett: Judge, I can give you these authorities.

The Court: I don't think there is much merit to it but I do want to look into it.

Mr. Whitehead: May I invoke this thought into it, that the question Mr. Sackett raised would be solely the question of putting the burden on Ayers and the jury has found against

Ayers also so that eliminates any question of the admissibility of that evidence, or the pertinency of it.

The Court: Martin's evidence is a bit unreliable because of his handicap. I think the boy was trying to tell the truth.

page 346 } I have a fairly good knowledge of these people because I have lived with them all of my life, used to play football with them; however, there certainly was a bet the way he explained it. If it was a bet about Mr. Woody's car and the Cash car in Amherst, of course, if you believe that there is no reason for young Peters to think any race was going to be had with the car he was in and then, his youthfulness, compared to the age of these other boys, he being a little boy, he would hesitate to say much, I imagine, or make much protest. I will think the whole thing over. I don't want to hold out any great hope. I rather think I am going to let it stand but you never can tell.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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