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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5241

In the
Supreme Court of Appeals of Virginia
at Richmond

ROBERT E. JONES, JR.

v.

ERVIN J. BUSH

FROM THE CIRCUIT COURT OF SMYTH 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. 5241

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 7th day of October, 1960.

ROBERT E. JONES, JR., Plaintiff in Error,

against

ERVIN J. BUSH, Defendant in Error.

From the Circuit Court of Smyth County

Upon the petition of Robert E. Jones, Jr., a writ of error is awarded him to a judgment rendered by the Circuit Court of Smyth County on the 16th day of May, 1960, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Ervin J. Bush was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

5/16/60

page 9 } We the jury find for the defendant not guilty of negligence.

EARLE S. HORNE
Foreman of Jury.

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* * * * *

Circuit Court of the County of Smyth, on Monday, the 16th day of May, in the year of our Lord, Nineteen Hundred and Sixty.

MOTION FOR JUDGMENT.

This day came the plaintiff in person and by his counsel, H. E. Widener, Jr. and Robert I. Asbury; came also the defendant in person and by his counsel, R. Crockett Gwyn, Jr. and Roy H. Burke, Jr.; came also Ruth J. Greiner, Court Reporter, who was duly sworn to take down and transcribe the proceedings of this action.

And upon the issue joined came a panel of thirteen persons who were selected by lot from the venire summoned for the trial of cases at this term of Court, who were examined and found free from legal exceptions and qualified in all respects to serve as jurors for the trial of this action. Thereupon, counsel for plaintiff and counsel for defendant alternately struck off six of said jurors and the remaining seven jurors against whom no objections were found constituted the jury for the trial of this issue, to-wit: Algie Crouse, Lonnie Blevins, L. A. Brooks, W. H. Fullen, Hugh M. Jones, Earle S. Horne, W. O. Clear, who were sworn to well and truly try the issue between Robert E. Jones, Jr., plaintiff and Ervin J. Bush, defendant.

Thereupon evidence was introduced on behalf of the plaintiff and at the conclusion of the evidence of the plaintiff, counsel for the defendant, out of the presence of the jury, moved the Court to strike the evidence of the plaintiff on the grounds that plaintiff had failed to proove any negligence on

behalf of the defendant Ervin J. Bush and upon further grounds that even if defendant was negligent that plaintiff was contributory negligent as a matter of law. Such motion being sustained by the Court, thereupon the jury was informed of the Courts action in striking the evidence of the plaintiff and were sent to their room to consider of their verdict and after sometime returned into Court page 11 } and presented their verdict in the following words, to-wit: "We the jury find for the defendant not guilty of negligence," Earle S. Horne, *Forman.* Thereupon the said verdict was ordered received and the Jury was discharged from further action in this matter. To the action of the Court in striking the evidence of the plaintiff, the plaintiff by counsel excepted.

And the plaintiff, by counsel, having indicated his intention to apply by petition to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment herein rendered, it is ordered that execution on the judgment herein rendered be suspended for a period of sixty (60) days from this date conditioned however upon the plaintiff, or someone for him, entering into a suspension bond, with surety approved by the Court or Clerk thereof in the penalty of $250.00 Dollars, such bond conditioned according to law, to be given within thirty days from this date.

A Copy—Teste:

RUTH ALLEN, Deputy Clerk.

Common Law Order Book No. 16, page 124.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

NOTICE OF APPEAL.

You are hereby notified that the undersigned, Robert E. Jones, Jr., will apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* from a final order and judgment entered in the case above against the plaintiff on the 16th day of May, 1960.

ASSIGNMENTS OF ERROR.

You are further notified that the undersigned will rely on the following assignments of error:

I.

The court erred in sustaining the defendant's motion to strike the evidence of the plaintiff, and in directing a verdict for the defendant.

II.

The action of the court in sustaining the motion of the defendant to strike the evidence of the plaintiff and in directing a verdict for the defendant is contrary to the law and the evidence, and without evidence to support it.

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III.

The court erred in refusing to apply the doctrine of *res ipsa loquitur*.

IV.

The court erred in its finding that the evidence of the plaintiff as to the negligence of the defendant was not sufficient to be passed upon by a jury.

V.

The court erred in holding that the plaintiff was negligent as a matter of law.

ROBERT E. JONES, JR.
By ROBERT I. ASBURY
H. E. WIDENER
Counsel for Plaintiff.

Copies of the foregoing notice of appeal and assignments of error were delivered to us, counsel for Ervin J. Bush, this 13 day of July, 1960.

R. CROCKETT GWYN
ROY H. BURKE, JR.
Counsel for Defendant.

Received and filed, this the 13 day of July, 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

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* * * * *

DEPOSITIONS.

First Witness:

GAYLE H. WARREN,
a witness of lawful age having first been duly sworn, deposes and says:

DIRECT EXAMINATION.

By H. E. Widener, Jr.:
Q. Will you state your name and age, please?
A. Gayle H. Warren, age thirty seven.
Q. What is your address?
A. General Delivery, Leesburg, Virginia.

* * * * *

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Q. What is your occupation, Mr. Warren?
A. Superintendent for M & L Trucking.
Q. How long have you been employed at that job?
A. Since March 1st, 1959.
Q. You say you are the Superintendent of Trucking?
A. Yes.
Q. As such what are your duties?
A. To see that the trucks are maintained and where they stay on the road, hiring and firing the drivers and payroll and buying parts.
Q. How many trucks under your supervision?
A. Ten for M & L.
Q. Are there any other trucks under your supervision?
A. Yes, sir, Nichol's, but they don't pay me. M & L pays me so I would just say it is just M & L.
Q. I want to know exactly how many trucks are under your supervision.

Gayle H. Warren.

A. Thirty five. Nichols bought half interest in M & L Trucking.

Q. The job is the Dulles International Airport at Chantilly?

Q. Mr. Warren, do you know Mr. Ervin J. Bush, the defendant in this case?

A. Yes, sir.

Q. Do you remember when a truck belonging to Mr. Bush was involved in an injury to Robert E. Jones?

A. Yes, sir, I don't remember the exact date.

Q. But do you remember it?

A. Yes, sir.

Q. Do you remember the particular truck involved?

A. Yes, sir, but I didn't see the accident.

Q. Where did the truck come?

A. Ohio. I believe it was Marion Auto Sales.

Q. It was either Marion Auto Parts or Marion Auto Sales?

A. Marion Auto Sales, Columbus, Ohio.

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Q. And had you been there in Columbus, Ohio when the truck was purchased?

A. Me and Mr. Bush were together.

Q. You and Mr. Bush were together when it was purchased?

A. Yes.

Q. Were you helping to bring back the truck to Virginia?

A. Yes, I drove the car and he drove the truck.

Q. Mr. Bush drove the truck and you drove the car?

A. Yes.

Q. I will ask you whether or not, Mr. Warren, at any time during the trip back from Columbus, Ohio to Marion, Virginia the air was let out of the rear tire of the truck?

A. We just let a little air out to approximately 30 pounds.

Q. You let the air out to approximately 30 pounds?

A. Yes.

Q. Why did you do that?

A. There was no bed on the truck and with a full pressure in the tire it was bouncing all over the road and without a full bed or load it is dangerous to run one like that.

Q. About how far is it from here to Columbus, Ohio?

A. I guess it would be 300 miles.

Q. About how far toward Marion, Virginia were you from Columbus, Ohio when the air was let out of the tire?

A. Between 0 and 50 miles.

Gayle H. Warren.

Q. Did you stop at a filling station to let the air out?
A. I believe it was along the side the road.
Q. Did anything happen to call it to your attention, to the truck?
A. The road was wide and the truck was bouncing around. If we put the brakes on it would turn around. It was too dangerous to run it like that and it has better traction when the tires are low then when the tires are high.
Q. Then when the tires are high?
A. Yes.

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Q. Did you all drive straight through from Columbus to Marion, Virginia?
A. Yes.
Q. Did you know when the air was put back in the tires?
A. No. You would never put it in until you got ready to haul the loads.
Q. About when was that when this happened, about what month and year do you remember, Mr. Warren?
A. It was in 1957 along the last of September.
Q. The last of September?
A. Yes.
Q. What kind of truck was it?
A. 1957 Ford C 600 cab over engine.
Q. When Mr. Bush bought the truck in Ohio did it have a body on it?
A. No, there was no body on it, just the cab and chassis.
Q. You are familiar with trucks of that type?
A. Yes, sir.
Q. Have you ever worked as a mechanic on trucks?
A. Yes, sir.
Q. How long have you worked as a mechanic?
A. Off and on for about eighteen years.
Q. Eighteen years?
A. Yes, sir.
Q. I believe that you said you let the air out of the tires from 80 pounds to 30 pounds?
A. Yes.
Q. Was that your best estimate?
A. Yes.
Q. When you let the air out of the tires to that estimate would that have been apparently low to somebody observing them?

Gayle H. Warren.

A. No, sir.

Q. When the air was let out of the tires Mr. Warren was Mr. Bush present?

A. Yes.

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Q. And were you present?

A. Yes, sir.

Q. Was anyone else present?

A. Not that I remember.

Q. Who went to *Hio* with you to get the truck if anyone?

A. Lewis and myself went there. We were going to get a job and we saw two trucks sitting along the road and we bought them and my wife and I went back and got the other one.

Q. Was anyone with you when you went up other than Mr. Bush?

A. No.

Q. What happened to the truck when you and your wife went back?

A. I sold it.

Q. Then you bought the one you and your wife went after?

A. We just bought the two for the one price. We just jewed them down. It was $6,400.00 for both.

Cross examine.

CROSS EXAMINATION.

By Roy H. Burke, Jr.:

Q. You say you and Mr. Bush went up there to get the truck?

A. Yes. We didn't go there after the trucks, we seen the trucks while we were there.

Q. I believe you testified you let some air out of the tires on your way back between 0 and 50 miles?

A. Yes, sir.

Q. Did you let any air out of the front tires?

A. No, sir.

Q. How much air did you let out of the rear tires?

A. We didn't have a gauge, I would estimate maybe fifty pounds.

Q. I believe you have driven trucks quite a bit, have you not?

A. Yes, sir.

Gayle H. Warren.

Q. Then you yourself let the air out of the tires on the rear?

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A. I won't say whether it was myself or Bush. I don't know which one, but we were present when one or the other of us let the air out.

Q. You say that you don't remember who let the air out. How do you know that both of you were present?

A. I was right behind the truck and I know that Bush was there.

Q. How do you remember that the air was let out and you can't remember that you let it out?

A. Well, it has been several years. I know we let the air out.

Q. But did you let the air out of the front wheels?

A. No.

Q. But actually you aren't sure that the air was even let out of the tires except due to the bouncing of the truck?

A. I am positive we let the air out of the tires. I know it was bouncing around and I knew it was not safe to run that way.

Q. You don't remember Bush letting the air out, do you?

A. It is like the job up here, telling a man to let the air out and standing over him while he is doing it and then several years later you can't remember whether it was you or him who let the air out.

Q. But the plain fact was that you don't remember whether Bush was in front of the truck or behind the truck or whether the air was let out of the tires?

A. He was present. He could have been at the front of the truck or behind the truck and I was letting it out. I know we wouldn't have been miles apart.

Q. Now you stated that you believe on direct examination that you couldn't tell whether any air had been let out that you couldn't tell by observation?

A. They would stand up at twenty pounds or 30 pounds. There were four big tires on that truck, I don't believe the truck would have weighed more than eighteen hundred pounds.

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Q. Could you tell how much air was in them by kicking them?

A. No, sir, you couldn't tell unless they were real soft.

Q. They wouldn't have been tight?

A. No, sir, but they wouldn't have shown it, but if we had let that much air out it would have damaged the tires running low.

Gayle H. Warren.

Q. Mr. Warren, about how much air does it take to lock the rims on these wheels?

A. I would say ten to twenty pounds should lock them.

Q. Then you all wouldn't let enough air out of the tires to unlock the rims?

A. It wouldn't have come unlocked unless it had hit a curb.

Q. But you couldn't tell that the tire had become unlocked?

A. No. You couldn't even push it with your hand with ten pounds of air in it.

H. E. Widener: I submit that he is your witness for the last two or three questions.

Roy H. Burke, Jr.: Such a matter is proper cross examination.

Mr. Burke:

Q. Whose name was the truck bought in, Mr. Warren?

A. Shepherd Motors.

Q. Who was Shepherd Motors?

A. Billy Ray Shepherd.

Q. Does your name appear on the title anywhere?

A. No, sir.

Mr. Widener:

Q. The fact is, Mr. Warren, that you have loaned Mr. Bush the money to buy that truck in Ohio and he had paid you back immediately upon return to Marion?

A. Yes.

Q. And isn't it a fact while that tire and rim assembly such as the one on that truck operated at low pressure than at high pressure you could hit them and knock them loose a lot easier at low pressure than you could at high?

A. Yes, sir.

Dep. 5/14/60 page 24 } Q. And they are a lot easier to knock loose at 30 pounds than they are at 80 pounds?

A. If you were to hit a curb you couldn't take it off with your hand at that pressure.

Q. But hitting a curb or something of that nature could knock the rim loose so that when the tire was inflated it would blow off?

A. If it is not locked it could blow off.

Q. And the only way that type of rim could become unlocked is for the pressure in the tire to be lowered?

A. Unless that were a tremendous lick.

Q. Unless that were a tremendous lick?

Gayle H. Warren.

A. Yes.

Q. Now Mr. Burke was saying something about this a moment ago. You do remember stopping to let the air out of the tires?

A. I remember stopping.

Q. And you were following the truck in your personal automobile and Mr. Bush was operating the truck?

A. Yes, sir.

Q. And no one was in the truck with Mr. Bush?

A. No, sir.

Q. And you stopped because the back end of the truck was bouncing around too much?

A. Yes.

That is all.

Mr. Burke:

Q. Mr. Warren, under ordinary driving on the pressure that you state were in the tires the rim would not come unlocked. Isn't that what you testified to?

A. Yes, sir.

Mr. Widener:

Q. But the rim is more easily unlocked at 30 pounds than it is at 80?

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A. Correct.

Q. Do you waive your signature to this deposition, that is may the Reporter sign your name to this deposition?

A. Yes, sir.

And further this deponent saith not.

Filed this 14 day of May 1960.

LLOYD E. CURRIN, Clerk.

* * * * *

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Mr. Widener: We would like next to introduce the deposition that was taken on Saturday afternoon in this case.

Robert E. Jones, Jr.

The Court: All right. Read it. You read the direct and let them read the cross.

(Thereupon the deposition of Gayle H. Warren was read and filed.)

Mr. Widener: May it please the Court, there were three transcribing errors which I showed to Mr. Burke, which we agreed to and which we can get the reporter to change, if that is all right.

The Court: You may proceed, gentlemen. Your next witness, please.

ROBERT E. JONES, JR.,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

page 10 } By Mr. Widener:

Q. Would you state your name and age, please.

A. Robert E. Jones, Jr., age 32.

* * * * *

Q. Have you ever been in the service?

A. I was in the Navy for 33 months.

Q. What kind of discharge did you get from the service?

A. Honorable.

Q. How long have you been in the filling station business, Mr. Jones?

A. 3½ years.

Q. What filling station do you operate?

A. Triangle Service Station, Main Street, Marion.

Q. Before the 3½ year period you just mentioned, had you ever worked at filling stations before or for

page 11 } other people?

A. Yes, sir.

Q. Who did you work for?

A. Worked for Mr. Estep.

Q. How long did you work for him?

A. That was a part time job after school, Saturdays and Sundays, back when I was going to high school, a couple of years. I worked for Mr. Frank Atkins.

Q. Frank Atkins. How long did you work for him?

A. About a year, sir.

Q. Are you married, Mr. Jones?

A. Yes, sir.

Q. Have any children?

A. Yes, sir, I have got two.

Q. Mr. Jones, were you injured by a tire and wheel assembly of a truck belonging to Ervin Bush on October 7, 1957?

A. Yes, sir.

Q. Would you tell us what happened that day when you were injured, sir?

A. In the process of servicing this truck, it consisted of an oil change and gassing it up, he requested that I gauge his tires, that he was going out for a load of coal the following day, and I gauged the right front tire, and on put-
page 12 } ting the air hose on the right rear outside tire, the outside half of that wheel immediately blew off, striking my left leg, my right leg and left shoulder.

Q. Had you had any trouble with the front tire?

A. No, sir.

Q. Which wheel was it that blew off?

A. It was the outside right rear.

Q. Outside right rear?

A. Yes, sir.

Q. To what pressure were you gauging the tire?

A. 90 pounds.

Q. State whether or not Mr. Bush had told you to what pressure to gauge them?

A. Yes, sir.

Q. By that do you mean that he had—

A. He had told me to gauge them, yes, sir.

Q. Mr. Jones, I notice you have two pieces of metal there next to you and I ask you what those are?

A. That is a wheel identical to the one that was on Mr. Bush's truck. It is a drop center wheel, interlock. This, of course, bolts to the axle and this is locked in by drop center (indicating).

Q. Would you call them, please, sir, the black piece and gray piece, and take those and explain to the jury how this wheel assembly is put together and how it comes
page 13 } apart.

A. Well, in mounting a tire on that, you will unlock it (indicating).

Q. Scoot up just a little bit further.

A. This would, of course—

Q. Instead of saying "this would" would you say the black piece. What is the black piece?

A. That is your inside half of your wheel assembly.

Q. Inside half?

A. Yes.

Q. What is the gray piece?

A. That is the outside half. This is the one that blew off (indicating). The gray piece.

Q. All right, explain to the jury how that is assembled. Take it apart and put it together.

A. In assembling it, you would take your tire and take one half and one side and turn it over and lay the other, and it has along in the center, the air pressure forces it out, I think is the idea of the structure of the wheel (indicating).

Q. Would you show the jury how it is placed when it is locked, Mr. Jones?

A. I will probably have to have tools.

* * * * *

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HOWARD MALLOYED,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Widener:

Q. Mr. Malloyed, if you will speak to the Judge, everybody can hear you. Would you state your name.

A. Howard Malloyed, age 24.

Q. Where do you live, Mr. Malloyed?

A. 434 South Main Street, Marion, Virginia.

Q. Where do you work?

A. At present time I am employed at Hayden Motor Company, Saltville, Virginia.

Q. What kind of trucks does Hayden Motor Company sell?

A. The only trucks we deal in is used trucks.

page 35 } Q. What sort of dealership?

Mr. Gwyn: We can't see that it is material.

Mr. Widener: Withdraw it.

Howard Malloyed.

By Mr. Widener:

Q. Mr. Malloyed, did you work for Mr. Jones at the time this accident we have been referring to happened?

A. Yes, sir.

Q. How long have you been employed as an automobile mechanic?

A. Well, I would say approximately nine, maybe ten months at two different places.

Q. How long did you work for Mr. Jones?

A. Well, I was working on weekends with him.

Q. With him?

A. Yes, sir.

Q. Have you ever worked as a truck driver?

A. Yes, sir.

Q. How long did you do that?

A. Three years.

Q. What kind of trucks did you drive then?

A. Tractors and trailers.

Q. Tractors and trailers. Who did you drive for?

A. I drove for Mr. Ray Barr and C. W. Tucker, B & S Produce out of Detroit, Michigan.

page 36 } Q. Were you ever employed by the company in Marion that sells Fords?

A. Yes, sir.

Q. How long did you work there?

A. I would say around six months, or seven.

Q. Mr. Malloyed, were you present when the accident to Mr. Jones' leg happened?

A. Yes, sir, I was.

Q. Tell us what you saw there.

A. Mr. Bush drove the truck in, asked us to change the oil, fill it up with gas, and he drove it in, Mr. Bush drove it onto the grease rack. Mr. Jones and myself, we changed the oil, checked under, checked all the motor serviced that. Mr. Bush backed it out to the gas pumps and filled it up with gas, and Mr. Bush backed it up to the air, at the back side there, and asked us would we gauge his tires, put 90 pounds all the way around. So Mr. Jones set the machine, air machine on 90 pounds. He gauged the right front tire and then walked right on back to the rear tire, and when he started walking back, I had stepped out in front of the truck. My back was turned to Mr. Jones, and all of a sudden I heard a big loud bank and turned around. Mr. Jones was laying on his back on the ground there with the rim and things laying

at the side, and Mr. Seavers and them, they hap-
page 37 } pened to hear, and we told what happened, and
they brought an ambulance over and took him to the hospital.

Q. Immediately following that, Mr. Malloyed, did you and Mr. Bush have any conversation about the accident?

A. Well, just a few minutes after it happened, it was after they took Mr. Jones to the hospital—

Mr. Gwyn: We object, if the Court please.

The Court: On what ground?

Mr. Gwyn: When was it?

The Court: Immediately after the accident when they took him to the hospital.

The Witness: I would say approximately 20 minutes after the accident. We didn't talk anything, there wasn't no conversation or anything until after Mr. Jones was in the hospital. We were all anxious to get him into the hospital.

Mr. Widener: Mr. Gwyn may have misunderstood.

Mr. Gwyn: We just don't think it is part of it.

The Court: He was talking to this man here,
page 38 } the defendant.

Mr. Gwyn: All right.

The Court: I will overrule your objection.

The Witness: After Mr. Jones was on his way to the hospital—

The Court: That is this Mr. Bush, defendant in the case that you are speaking of?

The Witness: That is right. Yes, sir.

The Court: That is what I understood. Proceed.

The Witness: Mr. Bush and myself and one or two more was there, I don't exactly recall who they were, was talking about how the accident occurred.

The Court: You can't quote a bystander or somebody else. I will permit you to state what Mr. Bush said, if anything.

The Witness: Mr. Bush stated that he had let the air out of the rear tires, and I asked him, I said, "With the air let out and running the tire low, won't that let that lock rim work in there?" What I mean, through the bounce of the road and jar. And he said that it would.

By Mr. Widener:

Q. Mr. Malloyed, did Mr. Bush tell you prior to the acci-

dent that the air had been let out of the rear tires?

page 39 } A. That is before the accident?

Q. Before it blew off did he say anything to you or Mr. Jones in your presence that the tires had been run low, or dangerous, or anything like that?

A. No, sir, he did not.

Mr. Widener: You may ask him.

CROSS EXAMINATION.

By Mr. Burke:

Q. Mr. Malloyed, didn't he ask you all to check the tires?

A. Mr. Bush did after we filled up with gas.

Q. Isn't that an indication that the tires may be low?

A. Not necessarily, no, sir.

Q. It is an indication that he wants them checked, to see if they are low?

A. Well, if he had any doubt or anything, there is a possibility, yes, sir.

Q. Isn't it customary in a large part of the time when people ask you to check tires in a service station that they have some doubt about the tires, or they would not ask you?

A. Well, sometimes—

page 40 } Mr. Widener: Objection on that. He couldn't know what is in people's mind.

The Court: He is trying to show the custom. I don't know. We are not dealing with custom, we are dealing with this particular case. This man says he is an experienced service station operator. Mr. Jones said the same thing. The question answers itself. If you ask the attendant to check, that would be to ascertain whether or not it needs inflation. The question answers itself. Let's proceed.

By Mr. Burke:

Q. Did you observe the tires before the accident?

A. No, sir, I did not.

* * * * *

HAL HARKRADER,

having been duly sworn, was examined and testified as follows:

Hal Harkrader.

DIRECT EXAMINATION.

By Mr. Widener:

Q. Would you state your name and age, please, sir.

A. Hal Harkrader, 33.

page 41 } Q. What is your occupation, Mr. Hackrader?

A. Service station owner.

Q. Where do you own a service station?

A. Bristol, Virginia, Piedmont.

Q. Do you operate the station yourself?

A. That is correct.

Q. Where were you educated, Mr. Harkrader?

A. V. P. I.

Q. How long have you been in the service station business?

A. Approximately twelve years.

Q. Mr. Harkrader, there is on the floor in front of you a wheel and rim assembly concerning which there has been previous testimony. Are you familiar with that type of wheel and rim assembly?

A. Yes.

Q. Will you explain to the jury, sir, how that wheel and rim assembly operate?

A. You mean from taking to start mounting a new tire, for example, start from scratch?

Q. Yes, show us how it operates.

A. This right here (indicating) is for the insertion of a tire tool, placing your new tire upon the black part of the rim here. Then take this, place your tire tool in there, page 42 } prizing it open, which leaves it comparatively free. The principal of all these drop rims is the air forcing outward locking the two together here, and by the constant pressure here they stay locked (indicating). Any time they become free, they are prone to drop off. That, in essence, is it.

Q. Is there any way such a wheel and rim assembly can come apart, other than having the pressure lowered in the tires?

A. Contact, damaging the rim could cause it.

Q. Damaging the rim?

A. The metal portion of it.

Q. Assume that the rim is undamaged. Is there any way that they could come apart, other than having the pressure lowered in the tire?

A. Not if it is a hundred per cent, in new condition, and nothing has happened in the past; no, that is the only way.

Hal Harkrader.

Q. The only way. Is there any mechanical device that you can unlock it by?

A. No, strictly pressure.

Q. Show the jury what position it is in when a tire is on there and fully inflated.

A. It is extended outward (indicating).

page 43 } Q. All the way around?

A. Just like that (indicating).

Q. Mr. Harkrader, assume that such a wheel and rim assembly has been operated at an air pressure of 30 pounds for a distance of between 250 and 300 miles, between Columbus, Ohio, and Marion, Virginia, and assume that it has been operated around Marion, Virginia for about two weeks, after arriving here. Is that tire and wheel assembly more likely to be in a dangerous condition than if it were operated at 80 pounds?

A. More likely, yes, sir.

Q. Mr. Harkrader, you have heard the testimony as to how this accident happened, have you not?

A. Yes.

Q. Is such an accident of a character and nature which will ordinarily occur, if due care has been used in the maintenance and upkeep of such a tire assembly?

A. No, not if it was in A-1 shape, it would not occur, no.

Mr. Widener: You may ask him.

CROSS EXAMINATION.

By Mr. Burke:

Q. Mr. Harkrader, you say that tire is held on there by pressure, the air pressure?

page 44 } A. Yes.

Q. Or the rim is held?

A. The outward pressure against the two walls, yes, sir.

Q. If there is 30 pounds, as Mr. Widener asked you, if there is 30 pounds of air in that tire, isn't that sufficient pressure to hold the rim on there?

A. I wouldn't feel capable of answering that. I know you could not dismount one normally at 30 pounds, no.

Q. At what pressure will that tire, that rim, unlock?

A. Well, I have never attempted to unlock one. As I say, on a general tire repair, unless we remove the valve and know

Hal Harkrader.

it is fully deflated, because most of the time your work is not with the tire in getting it apart, but getting the two pieces out of the tire. They are usually pretty well bonded in there, tied together, and take the air completely out. I would have no way of knowing, because of different circumstances, to answer that question.

Q. Isn't it a fact, Mr. Harkrader, that very little air will lock that rim on there?

A. For the actual locking it and leaving it, yes. It is more subject to, as the question stated, it is more sub-
page 45 } ject to flying apart with the less air that is in it.

Q. I believe you said you had no experience on that little point?

A. How's that?

Q. You had no experience on that point?

A. I said I had never attempted to take one apart under the condition you stated, under the pressure you stated. Never attempted it.

Q. Mr. Harkrader, doesn't that rim have to be slightly twisted before that will come off?

A. Yes, that is the object.

Q. Even on slight pressure or no pressure?

A. Yes.

Q. It still has to be slightly twisted?

A. Yes.

Q. Isn't that obvious to any one looking at it? Can't you tell when a rim, in other words, is slightly twisted and not on there straight by simple observing it?

A. No, sir, I don't think you could. You will be more prone to on a single, but on the rear dual, the air in one tire will compensate for the other one. If all the pressure was on one tire, such as the front, it would be more
page 46 } obvious.

Q. But isn't it true that that rim has to be cocked a little, what I mean—

A. I know what you mean.

Q. It has to be out simply like that (indicating), maybe not quite that much.

A. Off 180 degrees here, a couple degrees, yes, sir.

Q. Isn't it true that you take certain precautions when you are putting air in those tires?

A. Once again, definitely so, if we have had it off the vehicle to repair and have just finished the repair.

Hal Harkrader.

The Court: More distinctly, sir. Now repeat your answer.

The Witness: Never would I attempt to inflate one of these without protection, such as a cage that I put them in or a chain serves the same purpose.

By Mr. Burke:

Q. Then you regard when you are inflating one of those, there is danger of it flying off, is that right?

A. Any of them, yes, sir.

Q. Even when you are checking the air in the tire, isn't there danger of it flying off?

A. Yes, there is danger in about anything, but
page 47 } there is always an amount of danger, but the decreasing amount of air would up the amount of danger.

Q. Mr. Harkrader, on the air hoses found at filling stations, don't they have a nozzle something similar to this (indicating) with a double end on it?

A. Yes, sir, I use the exact one you have.

Q. Isn't it true that the purpose of that nozzle is so that you can put that nozzle on that tire in checking the tires and be out of danger, away from that tire?

A. I can't see where it would get me out of danger under similar circumstances. The valves on dual wheels in the back, some of them point inward or outward, therefore, the double end on the chock.

Q. Isn't it true that you can hook this over that outside tire and instead of getting down right in front of it you can stand over to the side where you are not likely to get into danger?

A. No, you couldn't go to the side. You could go way off straight ahead, provided the tube valve on the out tire or the outer tire is pointed inward, and you could apply your pressure outward and walk straight away, but as you get off to the side your valve will go with you.

Q. You can hook your hand around there and just have your arm in there?

page 48 } A. Yes, sir.

Q. Isn't the safe way to check a tire, pressure in a tire, when you are asked to take pressure, to take a gauge or something of that type and find out how much air the tire has got in it? If you had any question at all, isn't that the way to do it? Wouldn't you test the air in this with with this type gauge (indicating)?

A. If I have any question, yes, sir. I keep that kind. I

would say the vast majority of the time it is not used. I use it to check against my other meters to regulate them, to make sure they are accurate, but by and large we use the meter.

Q. If you put this on there when you are asked to check a tire, you know by that how much air is in that tire, don't you?

A. Oh sure, if you check it with that, yes, sir.

Q. Isn't it true, Mr. Harkrader, that you can kick a tire and tell whether it is low or got plenty of air in it?

A. If you have a wide variance, it is definitely true.

Q. If a tire was low enough that it would come unlocked, it would—you could tell, could you not?

A. Not on the dual.

page 49 } Q. By kicking?

A. Oh by kicking? Yes. That is the purpose. I mean the dual would hold the other tire up.

Q. Isn't it true if you had little enough air to come unlocked, that it would be just hanging there, be hardly any air in it?

A. Well, the tire pieces against the bed of your tire would still be secure, if you had that little in it, but if you had little or no air, the chances are that your volume of your tube would have already dropped through the hole and wouldn't be visible.

Q. Isn't it true that 30 pounds of air, assuming that is all the tire had in it, was sufficient for keeping the rim locked?

A. Provided it didn't move, had no road impact or anything, vibration from travel, yes, I would say probably. I would have no way of knowing. Once again, I never run one at that low a pressure.

Q. You never run trucks very much then, I take it?

A. I fool with the tire end of it. I have never driven them as a livelihood, no.

Mr. Burke: That is all.

RE-DIRECT EXAMINATION.

By Mr. Widener:

page 50 } Q. The question was asked you if you have any question at all do you use the gauge, and if you have no question at all, you don't use that gauge, do you?

A. That is common procedure.

Q. If nobody, if a tire is apparently inflated, how would

you go about filling it at your filling station with air, a tire on a wheel and rim assembly such as the one you see in front of you?

A. The most feasible way I can, engage the valve. That differs with the different directions that the valves are mounted. That could be either inward or outward. I would use the method that I discussed with him. If it happened to be inward, of putting the chock on it and backing off from it. If it was outward, there is nothing much you can do except stand there.

Q. Stand there and put it right in front of it?

A. Yes.

Q. You were asked the question about inflating the tire and using the cage. In answering the question, you mean when you have the tire all the way off the rim and—

A. For repair, yes.

Q. You didn't mean when someone would drive into the station and ask to gauge the tire, you didn't mean then?

A. No, surely not.

page 51 } Mr. Widener: That is all.

RE-CROSS EXAMINATION.

By Mr. Burke:

Q. Do you know anything at all about the pressure on this particular tire that we are discussing that blew off?

A. You mean the tire in particular or the one like it?

Q. The tire in particular.

A. No.

Mr. Burke: That is all.

The Court: State whether or not the force or the speed with which the tire is inflated, what effect that would have and whether or not a tire would blow off a rim. In other words, if you put it in fast, would that be more apt to make it blow, or if you put it in by degrees or slowly.

The Witness: No, you would just—it would depend on an element you couldn't answer there, because it would depend on how close—I would say the speed under normal circumstances would not increase the possibility of it blowing apart. It was to what point those happened to be set.

The Court: Stick the air hose and give it all
page 52 } the force you have and blow it up as quick as you could, would that make it blow than if you put it in slowly or gradually?

Hal Harkrader.

The Witness: No, sir. It is based entirely—the meter is based entirely on what you set the pressure on as to how fast it is going to go in.

The Court: All right. You are an expert in fooling with these tires around stations for many years. What is the normal procedure when you get a tire of this character and the man says, "Please check my tires." What do you do? What is the average normal procedure in the exercise of reasonable ordinary care?

The Witness: Just as I said, I will get as far away as I can, depending on the valve, as I explained, which direction it is in, set the meter, of course, to the desired pressure that he asks, and place it on the tire from the best vantage point.

The Court: Do you make any inquiry from the owner whether or not it is inflated or deflated?

The Witness: No, sir.

The Court: Never asked that question?

The Witness: No, I don't recall.

page 53 } The Court: Ever have one to blow on you?

The Witness: No, sir. I have not on a truck. We have had it happen in repair work, but no injury or anything like that, because of our precaution with the cage.

The Court: The standard procedure was what, just outline to the court and jury in your own way.

The Witness: Get the requested pressure, set your meter at that, and then depending upon the condition of the valve, the access to it, I should say, engage your chock, your air hose at that point.

The Court: A man comes in with 30 pounds pressure, you just proceed as you have outlined it?

The Witness: Well, the air gauge in itself, if allowed to run, will tell you—the bell on it rings at a decreasing rate. In other words, if you have a tire set on 60 pounds and it would have 56 in it, it would take several slow rings to acquire that. If you had the same tire, for example, 60 pounds set on 30, the bell would ring at a very rapid pace. That is the warning that I normally use.

The Court: If it rings at a rapid pace, as you

page 54 } stated—

The Witness: You know you are deflated. You know that you are way under the desired pressure.

The Court: Would you put it in slow or fast, what would you do?

The Witness: I would inspect the rim and find out and check everything before I continue to put the air in, if the bell had given me adequate warning.

Hal Harkrader.

The Court: If there is low pressure, you say the bell will warn you?

The Witness: It rings at a decreasing rate as the tire is filled.

The Court: It will ring fast at 30 pounds?

The Witness: Yes, the same principle on a car tire that might be down 10 pounds, it would start off very much faster than one that would be down four pounds.

The Court: If it rang fast, you would cease your activity and look around and inspect before you proceeded further?

The Witness: Yes, sir.

The Court: You say that is normal procedure,
page 55 } standard procedure?

The witness: With me, yes, sir.

The Court: Is that standard procedure in your trade?

The Witness: For any one that has seen one blow, I would say that it has to be. I can't speak for the other people.

The Court: Have you ever gone to school or heard lectures on it?

The Witness: Heard lectures.

The Court: Tire people give you instructions as to how to act?

The Witness: Yes, sir.

The Court: Anything further, please?

By Mr. Burke:

Q. I believe you stated that you try to stay as far out of the way as you can when you are checking tires?

A. That is correct.

Q. What is the normal procedure for this size tire?

A. That will vary with the owner and his load capacity. I find that this tire, on the rear, rears usually carry more. They request more than the front. I would say from 60 to 80 cover practically all my requests.

page 56 } Q. What would happen if you would put, say, 125 pounds air in that?

Mr. Widener: If the Court please, we object to the question. There is no evidence of 125 pounds, except from the question.

The Court: There is no evidence—he said he set the machine at 90 pounds, is what he said he did. Mr. Gwyn asked him if he had any reason to believe it might be 125 pounds, or could he put in 125. His answer was no. This is an expert. I will let him test the accuracy of the machine in any proper way that he can propound the question to that end.

Ervin J. Bush.

A. That is beyond the maximum of my facilities.

The Court: Beyond what?

The Witness: That is beyond the maximum of my air facilities, 125 pounds pressure.

The Court: Are you familiar with this particular type of machine used in this particular case?

The *Witnes*: As described, I believe I use the same one, maximum reading on the gauge is 110.

The Court: 110.

The Witness: That is it roughly. It is some-
page 57 } thing near that.

The Court: I believe he said the maximum pressure was 150 pounds.

The Witness: That depends upon your compressor and your compressor will point up, having reserve up to 140 or 50. I am talking about the regular recording system in the gauge. Your compressor runs your grease and air lift also, so it has to be bigger, but this is strictly on the air to be dispensed for tires. It is regulated through the machine at a maximum of 110 to 15.

The Court: When it is working and in normal condition?

The Witness: That is correct.

The Court: Anything further?

Mr. Burke: No further questions.

The Court: Anything further?

Mr. Widener: No, sir.

The Court: You may stand aside.

(Witness excused.)

Mr. Widener: We would like to call Mr. Bush as an adverse witness.

ERVIN J. BUSH,

having been duly sworn, was examined and testi-
page 58 } fied as follows:

DIRECT EXAMINATION.

By Mr. Widener:

Q. You are the defendant in the case, Mr. Bush?

A. Yes, sir.

Q. After the accident that has been referred to all morning, didn't you have that rim, the same rim put back on the same

Ervin J. Bush.

wheel and used it for many months thereafter with no trouble?
A. Yes, sir.

Mr. Widener: That is all.

(Witness excused.)

Mr. Widener: We rest.
The Court: Are you gentlemen ready to proceed? You may proceed as you may be advised.
Mr. Gwyn: Yes, sir. I believe we will make a motion.

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The Court: In the absence of the jury, you may state the grounds of your motion, gentlemen for the defendant.
Mr. Gwyn: If the Court please, we move to strike the evidence on the ground that the plaintiff has failed to carry the burden by the preponderance of evidence, and if there has been any negligence shown on the part of the defendant, that the plaintiff is guilty of contributory negligence as a matter of law here, it is so obvious that he himself would be guilty. For that reason, we move the court to strike the evidence in the case. The plaintiff hasn't made out the case by a preponderance of the evidence, shown any negligence, that he himself didn't take the proper precautions by his own evidence, and there is evidence of the witness, and
page 60 } if there is any negligence on behalf of the defendant, the plaintiff is barred from recovery by contributory negligence. I think we could say that as a matter of law, and the cases will support it.
The plaintiff has failed to show that Mr. Bush, the defendant, knew of anything here or did anything. That is our motion.
The Court: In the opening statement, I will give you a chance to answer that, I understood Mr. Widener was going to invoke the doctrine of *res ipsa loquitor* and by a question propounded there to the expert witness, Mr. Harkrader of Bristol, apparently he was going to rely upon that. Now what do you say to that phase of the case, before you sit down, gentlemen for the defendant?

Mr. Gwyn: We, your Honor, don't think that doctrine applies, that it does not speak for itself. It is not inherently dangerous. We feel, your Honor, that the plaintiff went there and didn't use the proper precaution, that Mr. Harkrader himself said should have been used. You just can't stick your hand in the fire and don't think that you will be

page 61 } burned. You are going to get burnt, and that is what he did. He just went there without using any precaution, a man of experience. If it had been a greenhorn there in the service station, but here is a man of many years experience and admitted himself that it was dangerous, and the fact that the defendant told him to gauge his tires, I think that within itself put him on notice, and further, the proper precautions, as Mr. Harkrader says, the standard procedure, coming from the court there, convinced me that Mr. Jones just failed to take the proper, use reasonable care that is imposed upon him before he could make out a case against the defendant. He has got to use reasonable care himself, and the doctrine of *res ipsa loquitor,* I don't think that applies here.

Something happened. We know an accident in itself is not sufficient to make the defendant liable. He has got to be negligent before there can be any recovery. The defendant has to be negligent and the plaintiff has to be without any fault of his own.

Mr. Burke: Not only that, but this was a new

page 62 } truck. Mr. Bush had just bought it, as shown by the evidence of the plaintiff.

Mr. Gwyn: No defect anywhere.

The Court: I will hear from Mr. Widener and Mr. Asbury, if they care to be heard.

Mr. Widener: May it please the Court, the evidence is that this truck was in the exclusive possession and control of the defendant in this case. They said it was not inherently dangerous when due care is used. That is true, and there was no mechanical defect in it according to the gentleman's own statement. It can only be negligence and that is what *res ipsa loquitor* is. When an instrumentality is within the exclusive control of the defendant and the accident complained of was of such nature and character as does not ordinarily occur if due care is used, then it is up to the defendant to explain what happened. The evidence is that the gentleman lowered the air in these tires to 30 pounds, as Mr. Harkrader said, I never heard of operating a truck at such low pressure. The evidence is that it is much more likely to get dangerous if operated at 30 pounds, which he took the air out to, rather

than 80 pounds that he started out with. He
page 63 } had that, he had the truck in his possession and
control. He never told Jones a word about anything, didn't say, "I have run it low." Didn't say a word about it. Jones did just exactly what Harkrader said he would have done. If he has no warning and it is apparently all right, walked up and put the air in—if you are taking it apart and putting it back together, or if you have a warning or knowledge, of course, there are precautions to be taken, that is true of anything.

The Court: He says, Mr. Widener, before you sit down, that you have not shown any negligence on the part of the defendant which is a proximate cause, and if you did show why then your man was guilty of negligence on his part which would bar a recovery. What do you say to that? Please.

Mr. Widener: We don't concede that statement.

The Court: Just point out to the court wherein the defendant was negligent What do you say his negligence consisted of?

Mr. Widener: The defendant had these tires in
page 64 } his possession. He had driven them from 50 miles
this side of Columbus to Marion on low tires and then around Marion and then driven them into the filling station. It was the latter part of September when the truck was brought back here. This happened on October 7. Assuming to give him every benefit of the doubt, he had been driving around a week or more, more than a week, if it was the last day of September, on these low tires, tires which were too low. He took 50 pounds of air out of the tire. The evidence is that such tires are more likely to become dangerour than tires which are inflated at 80 pounds. He didn't tell Jones anything about it. All he had to do was say, "I ran these tires back from Ohio with 30 pounds in them," and he would have given Jones all the warning that Jones needed, but he didn't say a word about it. He said, "Gauge the tires to 90 pounds. I am going to get a load of coal tomorrow." He gauged the front tire and nothing happened to it, which is the very proof of the pudding that when he gauged the back tire, that had been run at a deflated condition. The evidence is that that is the only way to take this tire and rim assembly
off, is to have that lower pressure, to have the lower
page 65 } pressure. That is the only way it can come apart.
There is no mechanical device on it of any kind. There is no mechanical defect in it, because the gentleman put it back on the truck and operated it for many months after the accident. Jones had no reason to believe that it was dangerous and it is not dangerous unless it is unlocked.

The Court: I have before me several authorities on the doctrine of *res ipsa loquitor*. One authority here is Michie's Jurisprudence, Volume II, page 569:

"The doctrine of *res ipso loquitor* is a rule of necessity, to be invoked only when necessary evidence is absent and not readily available, or lies peculiarly within the breast of the defendant. When the facts appear in the evidence there is no occasion to resort to evidential presumptions."

Of course the burden is always upon the plaintiff to prove his case, and he cannot rely upon supposition.

Reading from 13 Michie's Jurisprudence, page 577:

"There must be reasonable evidence of negli-
page 66 } gence in all cases where the action is based on negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those of the management used proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

You are all familiar with the doctrine of *res ipso loquitor*. It "rests upon the assumption that the thing which causes the injury is under the exclusive management of the defendant and the evidence of the true cause of the accident is accessible to the defendant and inaccessible to the person injured." That is at page 577, same Volume. "Consequently, to justify the application of the doctrine of *res ipsa loquitor*, a showing that the instrumentality was under the exclusive control of the defendant and that the cause of the accident was unexplained or unidentified is required."

Of course, we all understand the proof of the
page 67 } happening of the accident establishes the *prima facie* case which calls for rebuttal and explanation on the part of the defendant when the doctrine is applicable, but the mere happening of the accident *per se* is not evidence, and the burden of proof rests, of course, always upon the plaintiff.

"The doctrine of *res ipsa loquitor* has nothing to do with the burden of proof at all. It shifts the burden of evidence but not the burden of proof," and so forth.

It has been applied many times. For example, here in this *Virginia Transit Company* v. *Durham*, where the man was injured on the sidewalk, and applied in this Murphey hotel case, I think that is one of the best considered cases in Vir-

ginia, *Murphy Hotel* v. *Cuddy*, 124 Va. That is one of the outstanding cases in Virginia, this case of *Boggs* v. *Plybon*, 157 Va. 30 you recall what the court said there about the doctrine. Also other cases in 13 M. J. page 575 and .....

Virginia Transit, 190 Va.: "Having proved that she was injured by an instrumentality which was within the
page 68 } exclusive control of the defendant, and that the accident was of such nature and character as does not ordinarily occur if due care is used, plaintiff relied upon the doctrine of *res ipsa loquitor* and rested her case," and cites *Norfolk So. Ry.* v. *Tomlinson, Murphy Hotel* v. *Cuddy*, and numerous other cases.

In the Cuddy case: I remember especially Mr. Cuddy was Deputy Sheriff of Washington County and took a prisoner, as I recall, to Richmond, and stayed over night at the Murphy Hotel. The elevator became stuck or something and Mr. Cuddy was killed. It was held under the facts of that particular case the elevator being the exclusive control of the hotel, the operator of the mechanism, Cuddy knew nothing about the operation, had no chance to know it. He got in as a passenger, rode down, and the Court applied the doctrine there, and it is a very well considered case. It was a death case, and a verdict for $10,000, the maximum as the law then stood.

Here we have a wholly different situation. I didn't understand Mr. Harkrader's testimony as you claim. Mr. Harkrader testified that the warning bell, if it rang fast, would be an indication of warning to him that there was low
page 69 } pressure, and that he would see and look around and inspect before inflating the tire further.

Here Mr. Jones was injured, his leg fractured. He was there doing the work for hire, and he bought the gas and oil and requested the tires to be serviced, and the method by which he did it and the tire there was just as available to him, the condition of the tire was just as plain to him as it was to anybody else.

Gentlemen, I think the motion is good. I don't see that you have proved any negligence on the part of this defendant here. I don't see that there is any duty there to warn him. You haven't shown it to be a dangerous situation, and it looked to me like there was no negligence shown. I don't think the doctrine is applicable at all, the doctrine of *res ipsa loquitor*. I don't believe there is anything under his exclusive control. There is no substitute for evidence where the evidence is readily available.

Mr. Jones had just as much opportunity, he was an experienced automobile man, been in the service station business

for a number of years, had experience with inflating
page 70 } tires on various vehicles. It would seem to me if
the other man was negligent, which I don't concede at all, I don't see any proof of negligence on the part of the defendant which would be a proximate cause of this accident. In any eventuality, the court is of the opinion that the plaintiff did not exercise due care for his own protection in the manner in which he inflated that tire.

I am going to sustain the motion, gentlemen.

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(Thereupon, court reconvened at 1:35 o'clock, p. m., the jury being present.)

The Court: Gentlemen of the Jury, at the conclusion of the plaintiff's testimony there was a motion interposed by the gentlemen for the defendant to what is termed strike the evidence on the ground that no negligence has been shown and so forth, and the court sustained that motion.

Now in accordance with Section 8-218 of the Code of Virginia I am going to direct you gentlemen to return a verdict, "We the jury find in favor of the defendant."

So give them a sheet of paper and let them go to their room.

(Thereupon, the jury retired from the courtroom at 1:39 o'clock, p. m.)

Mr. Widener: We would like the record to show an exception to the ruling of the court on the motion and also in directing the verdict.

The Court: I did that in compliance with 8218 of the Code.

Mr. Widener: Yes, sir, but we, nevertheless, except to it.

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* * * * *

(Thereupon, the jury returned at 1:44 p. m.)

The Court: "We the jury find for the defendant not

guilty." That is all right. Earl S. Holmes, Foreman. Let that verdict be received.

Gentlemen of the Jury, you are discharged.

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Received and filed 14 day of July, 1960.

LLOYD E. CURRIN, Clerk.

A Copy—Teste:

H. G. TURNER, Clerk.

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