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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6842

In the Supreme Court of Appeals of Virginia at Richmond

VANCE LEE HILL, JR.

v.

VERNIE LEE, JR.

FROM THE CIRCUIT COURT OF GREENSVILLE COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6842

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 1st day of December, 1967.

VANCE LEE HILL, JR., Plaintiff in error,

against

VERNIE LEE, JR., Defendant in error.

From the Circuit Court of Greensville County
Ligon L. Jones, Judge

Upon the petition of Vance Lee Hill, Jr., a writ of error is awarded him to a judgment rendered by the Circuit Court of Greensville County on the 18th day of May, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Vernie Lee, Jr., 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 $300, with condition as the law directs.

RECORD

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* * * * *

MOTION FOR JUDGMENT

Comes now Vance Lee Hill, Jr., hereinafter called the plaintiff, by counsel, and moves the Court for judgment against Vernie Lee, Jr., hereinafter called the defendant, for the sum of Fifty Thousand ($50,000.00) Dollars, together with the costs incident to this proceeding, all of which is justly due to the plaintiff by reason of the following:

1. That on or about the 12th day of February, 1966, around 6:10 o'clock, p.m., the defendant, Vernie Lee, Jr., was operating a certain Buick automobile in a northerly direction over and along State Highway No. 627 approximately 200 feet north of *Interestate* No. 95 overpass in Greensville County, Virginia.

2. That at the same time and approximate place the plaintiff, Vance Lee Hill, Jr., was a pedestrian off the hard surface and on the east shoulder of State Highway No. 627.

3. That at the time and place aforesaid, the defendant, Vernie Lee, Jr., did operate his automobile in a careless, reckless and negligent manner so as to collide with and strike the plaintiff, Vance Lee Hill, Jr., with great force and violence.

4. That as a direct and proximate result of the carelessness, recklessness, and negligence of the defendant, as aforesaid, the plaintiff was seriously, permanently, and progressively injured about his body and person; that he was rendered lame, sore, sick, and disabled, and sustained serious and permanent injuries to his bones, organs, ligaments, tissues, nerves, nervous system, limbs, and body, and has sustained great shock, pain and mental anguish, as well as embarrassment, requiring x-rays, hospitalization, medications, surgery and medical attention; that he has been forced to endure great pain and suffering in the past, as well as mental anguish and embarrassment and prevented from enjoying normal pleasures and activities of life, and has sustained loss of earnings and income; and plaintiff verily believes that he will continue to suffer great pain in the future, as well as mental anguish and embarrassment; and continue to be disabled about his affairs and activities; that he has

page 2 } been caused to incur divers expenses for x-rays, drugs, doctors, hospitalization and medical attention incident to said injuries, and verily believes that he will continue to incur divers expenses in the future in an attempt to effect a medical cure.

WHEREFORE, plaintiff moves the Court for judgment against the defendant for the sum of $50,000.00, together with costs incurred herein.

Trial by jury is demanded.

VANCE LEE HILL, JR.

By: BOLCE C. WORNOM
Counsel

* * * * *

Filed in the Clerk's Office the 18 day of May, 1966.

Teste: M. A. TAYLOR, Clerk

* * * * *

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GROUNDS OF DEFENSE

The defendant, Vernie Lee, Jr., for his grounds of defense, says:

He denies he is indebted to the plaintiff in the amount of $50,000.00 or in any amount or in any event.

1. That he admits he was upon the highway mentioned in Paragraph One of the motion for judgment at the approximate time stated therein.

2. That he denies the allegations of Paragraph Two, Three and Four of the motion for judgment.

3. That he denies he was guilty of any negligence proximately causing or efficiently contributing to cause the plaintiff's alleged injury received by him therein.

4. That the plaintiff was himself guilty of negligence proximately causing or efficiently contributing to his alleged collision with the said automobile and any injury or damages suffered by him therein.

5. The said defendant avers that the accident occurred without negligence on his part and as to him was unavoidable.

6. The said defendant will rely upon any and all other properly provable defenses to this action and reserves the right to amend his grounds of defense at any time he be so advised.

VERNIE LEE, JR.

By H. BENJ. VINCENT
Counsel

page 4-A }

* * * * *

Filed: June 8, 1966.

KATHERINE L. SADLER, Deputy Clerk.

* * * * *

page 16 } INSTRUCTION NO. 10

The Court instructs the jury that if you believe from the evidence that the plaintiff was on the hard surface of the highway when the accident occurred, then he was guilty of negligence as a matter of law and if the jury believe that any such negligence proximately caused or efficiently contributed to cause the accident in question, then you must return your verdict in favor of the defendant.

Granted 1/4/67. L. L. J.

* * * * *

page 20 } INSTRUCTION NO. 14

The Court instructs the jury that any person who has drunk enough alcoholic beverages to so effect his manner, disposition, speech, muscular movement, general apperance or behavior, as to be apparent to observation, shall be deemed to be intoxicated.

The Court further instructs the jury that if you believe that at the time and place of the accident in question, the plaintiff, Vance Hill, Jr., was intoxicated, then he was negligent. And if you further believe that such negligence was a contributing cause of his injury, then you shall find your verdict for the defendant, Vernie Lee, Jr.

Granted 1/4/67. L. L. J.

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This action came on for trial before a jury, regularly selected and sworn, on January 4, 1967, the plaintiff being present in person and by counsel, and the defendant being present in person and by counsel. And the jury being sworn to well and truly try the issues joined and a true verdict give according to the law and evidence, the trial proceeded regularly and being concluded the same day.

And the jury, namely: Pender Lee Smith, Jr., Edward M. Pulley, Lawrence L. Delbridge, Willis M. Driver, Clyde A. Moss, Cyrus W. Ferguson and Isadore Novey, having heard all the evidence, the instructions of the Court and the argument of counsel, retired to their room to consider their verdict and after deliberation the jury returned to Court with the following verdict:

"We, the jury, upon the issues joined, find for the defendant. Clyde A. Moss, Foreman."

And there being no objection to the form of verdict, the jury was regularly discharged. Whereupon, the plaintiff, by counsel, moved the Court to set aside the verdict of the jury and grant a new trial on the grounds that the verdict was contrary to the law and evidence and without evidence to support it and on the following grounds, to-wit:

(a) That the Court erred in refusing to admit photographs marked Exhibits "A" and "B".

(b) That the Court erred in permitting the State Trooper to testify giving his opinion and conclusion based on a hypothetical question, to-wit: ". . . assuming the car had gone off of the hard surface road between the point where the plaintiff's body was lying and where the bridge was, would a car have made tracks on that soil?"

(c) That the Court erred in permitting counsel for the defendant to interrogate the plaintiff as to the fact that he had been drinking and in permitting Trooper Barefoot to testify that while observing the plaintiff at the accident scene he detected an odor of alcohol.

(d) That the Court erred in granting instruction number 14.

page 26 } Whereupon, the motion was set for argument on April 17, 1967, and counsel having been fully

heard and the Court having fully considered the applicable law, does overrule said motion of the plaintiff, to which action of the Court in overruling said motion the plaintiff, by counsel, duly objects and excepts.

I ask for this judgment order:
H. BENJAMIN VINCENT
VINCENT, WARRINER & OUTTEN
Counsel for Defendant

I have seen this judgment order and object and except to the Court's ruling.
BOYCE C. WORNOM
TOWNSEND & WORNOM
Counsel for Plaintiff

Enter this judgment order this 18 day of May, 1967.

LIGON L. JONES, Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To: M. A. Taylor, Jr., Clerk
Circuit Court of Greensville County, Virginia

NOTICE is hereby given that the plaintiff, Vance Lee Hill, Jr., does appeal in this case and will apply for a writ of error from the final judgment rendered herein by the Court on May 18, 1967.

ASSIGNMENTS OF ERROR

The plaintiff, Vance Lee Hill, Jr., assigns the following errors:

(1) The trial Court erred in refusing to admit Exhibits A and B.

(2) The trial Court erred in permitting the State Trooper to testify giving his opinion based on a hypothetical question, to-wit: ". . . assuming the car had gone off the hard surface road between the point where the plaintiff's body was lying

and where the bridge was, would a car have made tracks on that soil?"

(3) The trial Court erred in permitting counsel for the defendant to interrogate the plaintiff as to the fact that he had been drinking and in permitting Trooper Barefoot to testify that while observing the plaintiff at the accident scene he detected an odor of alcohol.

(4) The trial Court erred in granting instruction number 14.

(5) The trial Court erred in refusing Motion of the plaintiff, made after the jury had rendered the verdict in favor of the defendant, to set aside the verdict as contrary to the law and evidence and in failing to grant to the plaintiff a new trial and in entering judgment for the defendant.

VANCE LEE HILL, JR.

by BOYCE C. WORNOM
Cousel

* * * * *

Filed 6/1/67. M. A. TAYLOR, Clerk

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page 2 }

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TRANSCRIPT of the evidence and other incidents in the above-styled case which was heard on January 4, 1967, before Honorable Ligon L. Jones, Judge, and a Jury.

* * * * *

page 3 } NOTE: After Court is convened, the court reporter duly sworn, the jury selected and sworn, the hearing proceeds as follows:

The Court: Are there any preliminary motions, gentlemen?

Mr. Wornom: Yes, I have a matter I would like to take up with the Court.

The Court: In chambers or in open court?

Mr. Wornom: In chambers, if Your Honor please.

The Court: We will take a brief recess.

NOTE: At this point Court and counsel retire to chambers and out of the presence of the jury the hearing continues as follows:

Mr. Wornom: May it please the Court, this is a case involving an automobile operated by the defendant and the plaintiff who at the time of the accident in question was a pedestrian on or near the highway. The plaintiff had shortly before this accident taken a drink of wine and I am anticipating that the defendant will want to insert the matter of drinking and, perhaps, the odor of alcohol on the page 4 } plaintiff's breath before the jury as an issue in this case.

I submit to the Court that I do not believe that there is any evidence at all that this plaintiff was under the influence of intoxicants and, unless the defendant can vouch for the record that he can raise a valid issue on that particular point, then we would move the Court that the defendant be prohibited from bringing the matter before the jury which would only serve to prejudice the jury against this particular plaintiff.

The Court: What do you have to say?

Mr. Vincent: I have this to say. I am going to develop the evidence as fully as I can and let the jury come to their own conclusion. I cannot say what the evidence is going to be. I am not going to allege or assert anything at this point because I don't know what the evidence is going to be at this time.

Mr. Wornom: If Your Honor please, in the case of *Burks* v. *Webb, Administratrix* 199, Va. 296 the defendant attempted to show that the plaintiff had an odor of alcohol upon his breath. He had not alleged in the grounds of defense that the plaintiff was intoxicated. The Court granted page 5 } him leave to amend his Grounds of Defense if he wanted to alleged that as a ground of defense, which the defendant refused to do, and the Court held in that case, and there was evidence in that case and they vouched the record to the effect that the man had the odor of alcohol on his breath, and that was all, and the Court held in that case that "The mere odor of intoxicants on the breath of a person is not evidence of negligence. Under the circumstances the Court did not commit reversible error in rejecting the evidence offered."

I submit in this case, unless the defendant is in a position to prove that this man was under the influence of intoxicants, just showing that he had the odor of alcohol on his breath, it would not be evidence of negligence and it would

be merely for the purpose of prejudicing the jury and inflaming them against him.

The Court: Mr. Wornom, as I understand the rule on this subject I am not going to be in a position to rule on it at this particular time. Of course, the mere odor of alcohol on the breath of an individual is not sufficient to raise any question of the negligence of the plaintiff. In this particular case the defendant would have to go so far as to

page 6 } show he consumed enough alcohol to affect his movements and activities at the time.

If it comes out in evidence, I am just going to have to hear the evidence to determine whether there is sufficient evidence to go before the jury and be of sufficient weight to affect the defendant's position in this case.

I presumed he has alleged that the plaintiff was contributorily negligent?

Mr. Wornom: Yes, sir.

The Court: I will just have to meet that issue when it comes up.

Mr. Wornom: I think the defendant should be able to state to the Court whether he can make out an issue on that. If it is just the evidence of mere odor of alcohol—my client if he were asked to testify if he had a drink of wine would so testify, and I have talked with the doctors who talked with him in the hospital and they will testify that there was no evidence of intoxication as far as they were concerned, and the state trooper likewise.

The Court: I am not going to permit him to bring out the fact that there was a mere odor of alcohol on his breath. I think you have to go further than that.

page 7 } Are you in a position to show that he had consumed a sufficient amount of alcohol to affect his physical ability or do you know at this time?

Mr. Vincent: Judge, I know what I know. I will put it that way. I don't know what is going to develop. As far as I know the witness may not testify to that effect. I know that he had consumed some whisky. Now whether or not it comes out in evidence, I don't know.

I will tell you this, sir. I am intending to get it in there.

The Court: Before you bring out that subject I want to exclude the jury to determine whether there is sufficient evidence to present to the jury. I will have to rule on it at that time. I am not asking you to divulge your case or you either and we will leave it that way.

Before you go into that subject give me an opportunity to exclude the jury so that I can pass upon the credibility of this testimony.

Mr. Vincent: All right, sir.

* * * * *

page 9 } W. H. JOHNSON, called as a witness in behalf of the Plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wornom:

Q. You are W. H. Johnson, Virginia State Trooper?

A. Yes, sir.

Q. Trooper Johnson, did you on February 12 of 1966 have occasion to investigate an accident on the Brink Road?

A. Yes, sir.

Q. What time did you receive the call to go to this accident?

A. I received a call by radio at 6:25 P.M.

Q. What time did you arrive?

A. I arrived at 6:32 P.M.

Q. When you arrived what was the weather at that time? Was it daylight or dark?

A. It was dark at that time. The highway was not lighted.

Q. The highway was not lighted? All right, sir, you arrived on the scene, who did you find there?

A. I found Vernie Lee, Jr. and Vance Lee Hill, Jr.

Q. Where did you find Vance Lee Hill when you page 10 } arrived?

A. Vance Hill was lying down on the east shoulder of the highway. He was laying face down 200 feet north of the overpass.

Q. Now when you say on the east shoulder, you are assuming for that statement that the highway runs north and south?

A. Yes, sir, it would be on the right side of the road coming to Emporia.

Q. Yes, and how far on the shoulder was the plaintiff lying?

A. He was lying at an angle to the pavement. His feet were approximately two feet from the edge of the road. That was the nearest point of his body to the pavement.

Q. You say his feet were two feet from the pavement?

A. Yes, sir.

Q. What, if any, markings did you find on the hard surface?

A. I found no markings at all on the hard surface.

W. H. Johnson

Q. At that particular point is there a shoulder on either side of the road?

A. Yes, sir.

Q. On which side of the road is there a shoulder?

A. There is a shoulder on both sides of the road.

page 11 } Q. Approximately how wide is the shoulder on the east side?

A. Approximately 8 feet.

Q. What is immediately to the east of that 8 feet? What do you have? Would you describe the terrain?

A. There is a sharp embankment going downhill.

Q. Did you find the defendant's car there?

A. Yes, sir.

Q. What was the make of that car?

A. It was a 1956 Buick sedan.

Q. Where was it parked in relation to the plaintiff, where he was lying?

A. The automobile was parked approximately 200 feet north of the plaintiff. It was on the east shoulder of the highway.

Q. Do I understand you that the plaintiff was lying 200 feet north of the bridge and the car was parked 200 feet north from where the plaintiff was?

A. Yes, sir.

Q. Do you know whether the car had been moved or not from your own knowledge?

A. No, sir.

Q. What, if any, marks did you find on the defendant's car?

A. On the defendant's car there was a dent in

page 12 } the hood of his automobile. It was in the top portion of the hood slightly to the righthand side of the center. There was an oval-shaped dent approximately a foot in diameter and approximately an inch deep. The hood ornament was slightly bent. The hood ornament is in the center of the hood.

Q. Was there any broken glass?

A. No, sir, I found no broken glass.

Q. No marks on the pavement?

A. That is correct.

Q. Did you have occasion to talk with Vernie Lee at the scene of the accident?

A. Yes, sir.

Q. When you arrived on the scene you said that you found cident?

W. H. Johnson

A. Lee said he was coming to Crutchlow's Store at about 35 miles per hour and he met a car that did not dim his lights. Lee stated he dimmed his lights about 100 yards away and had just passed the other car, and the next thing he knew the man was on the hood of his car and then he was in the center of the overpass when he dimmed the lights on his car, and he stated that he got out and went back after he had stopped and the plaintiff was on the road and had rolled away from the road after being struck, and he stopped him to keep him from rolling down the embankment.

Q. That embankment is 8 feet from the shoulder?

page 13 } A. Approximately.

Q. Who, if anyone, was with the defendant, Vernie Lee, at the time of the accident?

A. Joe Louis Hicks was with Vernie Lee. I did not question Hicks at all.

Q. Have you at my request taken some photographs of the accident location?

A. Yes, sir.

Q. Do the photographs which you have taken fairly and accurately show the highway as it existed in February of 1966, at the time of the accident?

A. Yes, sir.

Q. I believe there have been some changes made out there recently though?

A. Yes, sir, the Highway Department has installed a guard rail on both sides of the pavement.

Q. But they were placed there since you took these pictures?

A. Yes, sir.

NOTE: At this point the photographs are tendered to counsel for the defendant.

Q. Do you know approximately when these photographs were taken?

A. Approximately a month ago.

Mr. Vincent: I object to them, Your Honor.

page 14 } Q. Do they fairly and accurately portray the lay of the highway and the accident scene as it existed in February or on February 12, 1966?

A. Yes, sir.

NOTE: At this point the photographs are tendered to the Court.

The Court: All right, gentlemen, there is an objection to it on the basis I presume that they were taken too late?

Mr. Vincent: Yes, sir, and there are other reasons, too, and if you want me to go into it, I will be glad to do it.

The Court: Gentlemen of the jury, step into your room for a moment.

NOTE: At this point the jury retire to their jury room and in the absence of the jury the hearing continues as follows:

JURY OUT

Mr. Vincent: Your Honor, in addition to these pictures being taken some six or seven months after the accident happened, these pictures were taken during the daylight and they were taken during the sunshine and they were taken

page 15 } from within, I assume, the Trooper's automobile, but I don't know. It doesn't depict the period at the time the accident happened.

I think they would mislead the jury. This is a clear shot there and the sun shining and the trees blooming and everything else, and I think it would give the jury a false impression of the time and of the way it looked to the plaintiff and the defendant.

This was at night time and as has already been testified to during a period in which it was raining.

Mr. Wornom: Apparently, Your Honor, you do not have to take a picture at 12:00 o'clock at night just because an accident happened at 12:00 o'clock at night—

Mr. Vincent: You don't have to take pictures at all.

Mr. Wornom: The Trooper testified that they fairly and accurately portray the condition of the highway.

The Court: I am going to exclude these pictures.

Mr. Wornom: We note an exception on the ground the

page 16 } Trooper said they represented a fair and accurate representation of the highway at the time of the accident.

NOTE: At this point the jury return to the courtroom and in the presence of the jury the hearing continues as follows:

W. H. Johnson

JURY IN

Mr. Wornom: Thank you, Trooper. You may answer Mr. Vincent.

CROSS EXAMINATION

By Mr. Vincent:

Q. Trooper Johnson, when you arrived on the scene on the night of February 12 was it raining at that time?

A. Yes, sir.

Q. Had it been raining all day?

A. I don't recall if it had been raining all day, but it had been raining for several hours.

Q. Was it raining very hard at that time?

A. It was raining—

Mr. Wornom: Your Honor, I object to the Trooper's testimony what the condition was when he arrived some thirty minutes or perhaps longer after the accident.

Mr. Vincent: If Your Honor please, he is on cross examination and exactly I would like to know what Mr. Wornom put him on the stand for.

page 17 } The Court: Objection overruled. Proceed. Put your question at the time of the accident.

Mr. Wornom: That is my objection.

By Mr. Vincent: (Continuing)

Q. Do you know whether it was raining at the time of the accident?

A. Yes, sir.

Q. It was raining?

A. Yes, sir.

Q. How hard was it raining?

A. It was a light rainfall. It was raining just slightly more than it was this morning prior to the time court began.

Q. What, if anything, did he have to say about the ac- Vernie Lee, the defendant, and you found Vance Hill. Where was Vernie Lee when you got there?

A. Vernie Lee was beside the plaintiff.

Q. Standing beside him?

A. Well, trying to render aid to him.

Q. And he was about 200 feet I believe according to your evidence south of his own vehicle?

A. Yes, sir.

Q. And where was his vehicle parked in relation to the hard surface?

A. His vehicle was on the shoulder of the highway.

page 18 } Q. Was it completely on the shoulder or were part of the tires on the hard surface?

A. The righthand side of his car was on the shoulder. The left side as I recall was right at the edge of the pavement.

Q. And there was some 200 feet down from where the plaintiff was lying?

A. Yes, sir.

Q. At the point where the car ran off the road down there where he parked, did his tires make any tracks on the shoulder of the road?

A. There was a track in the shoulder that led to the right wheels of his car. This track was 75 feet long.

Q. And this was down beyond from where the plaintiff was lying?

A. Yes, sir.

Q. Towards Emporia?

A. Yes, sir.

Q. Now from the point where the plaintiff was lying to the overhead bridge was some 200 feet also; is that correct?

A. Yes, sir.

Q. Were there any markings on the shoulder of the road between the plaintiff's body and the Route 95 bridge?

A. No, sir.

page 19 } Q. Did you see any tire markings there at all?

A. No, sir, I did not.

Q. Did you say whether there were any tire marks between the plaintiff's body and the road?

A. There were none.

Q. The shoulder of the road from the bridge down to where the defendant actually parked his car, is the surface there generally the same, dirt and grass and what have you?

A. Yes, sir.

Q. Was the shoulder of the road wet and muddy at this particular time?

A. Yes, sir.

Q. Now, Trooper, if an automobile had run off of the road between the plaintiff's body and the bridge of Route 95, would the car have made tracks on that surface?

Mr. Wornom: If Your Honor please, I object to the question. I think that is a question for the jury here.

The Court: Objection sustained.

Mr. Vincent: If Your Honor please, I would like to point out a few things to Your Honor concerning some law on the point.

The Court: All right, I will see you in chambers, gentlemen.

page 20 } NOTE: At this point the hearing continues in chambers with Court and counsel and outside of the presence of the jury as follows:

Mr. Vincent: Your Honor, this calls for a conclusion of the witness. *Wigmore on Evidence,* Sec. 1924, states that "Where the witness has no greater skill than the jury in drawing inferences or conclusions from the kind of data in question, opinion is admitted where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of judgment or opinion of the witness who has had the benefit of personal observation."

Then it goes on in following sections, stating negatively, and says "Such a witness' inferences are admissible when the jury can be put into a position of equal vantage for drawing them. . . " Obviously we can't do that now. We cannot put the jury in a position to draw them because we cannot put them out there on a wet, rainy night when this happened. "In other words, when by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as page 21 } fully and exactly as the witness had them at the time he formed his opinion." Now that is stating negatively.

Now I think it states clearly in Sec. 1924, when the witness has no greater skill than the jury in drawing inferences or conclusions from the data, then such witness' conclusions or opinions are admissible, and I submit if they were there at that night they could have drawn the same inferences as he did, but they weren't there.

Mr. Wornom: It is like asking an officer if a man applied his brakes because there are tire marks. That calls for a conclusion. The officer is no better an expert.

The Court: I think you can ask it in a little better way. You are asking it in a hypothetical question, which is a question the jury has to conclude.

Mr. Vincent: I will ask him if in his opinion a car had gone off the road there, due to the circumstances and the conditions of the hard surface or the condition of the shoulder, would a car have made a track there.

Mr. Wornom: I think that is the very thing the jury has to decide, Judge. I expect to show that con-
page 22 } ditions there now are the same as they were then.

The Court: I don't want to tell either of you how to handle your case, but certainly you could ask the witness if the texture of the shoulder was the same.

Mr. Vincent: I have already.

The Court: That it was just as soft and he found no tire marks, and up at the other place the tire marks were made where it left the road some 75 feet away.

Mr. Vincent: Yes, sir, I have asked him that, but I still think that I am entitled to his conclusion based on the law of evidence, and Wigmore here supports it.

That is all I can argue.

The Court: I will permit the question.

Mr. Wornom: I would like to note an objection. I think it is calling for a conclusion, an opinion, a conclusion of an officer concerning what a car could have done assuming certain things. I think the officer is entitled to testify concerning questions of fact, and fact only. The Court of Appeals has ruled on many occasions experts cannot give their
page 23 } opinion as to points of impacts, and this is even more far reaching than that decision by the court, that is permitting an officer to testify what a car would have done, assuming that it would have taken a certain course of travel, and we accordingly object and except.

NOTE: At this point Court and counsel return to the courtroom and in the presence of the jury the hearing continues as follows:

By Mr. Vincent: (Continuing)

Q. Based on your observations of the shoulder of the road and the conditions of the weather and the conditions of the soil, would you state whether or not, assuming the car had gone off of the hard surface road between the point where the plaintiff's body lie and where the bridge was, would a car have made tracks on that soil?

A. Yes, sir.

Q. Now when you observed the defendant's automobile, I believe you stated that you saw a dent in the hood of the car?

W. H. Johnson

A. Yes, sir.

Q. Where in reference to the little thing that is on the front of the hood, the little hood piece, was the dent in reference to that?

A. The dent was just to the right of it. It was actually touching right up to the hood ornament.

page 24 } Q. Was the center piece on this particular car there; do you recall?

A. Yes, it was there; it was bent. It wasn't in the proper place at that time.

Q. That was also bent?

A. Yes, sir.

Q. I believe you stated it was a 1956 Buick automobile?

A. Yes, sir.

Q. What is the speed limit on that highway?

A. 55 for automobiles.

Q. I believe that you stated that the defendant stated to you that he was going in the neighborhood of 35 miles an hour?

A. Yes, sir.

Mr. Vincent: That is all.

RE-DIRECT EXAMINATION

By Mr. Wornom:

Q. Trooper, you say the hood piece was bent? You don't know when it was bent, do you?

A. No, sir.

Q. You don't know when the dent was put in there, do you?

A. No, sir.

page 25 } Q. Talking about the shoulder of this road out there, hasn't it been raining now several days off and on? When were you last at the accident scene?

A. Yesterday afternoon.

Mr. Vincent: I object to this, Your Honor, talking about the shoulder as it is today. This is one year almost later.

Mr. Wornom: I haven't asked him yet.

By Mr. Wornom: (Continuing)

Q. Was the surface of the shoulder essentially the same as it was February a year ago?

Mr. Vincent: I object to that on the ground it is obvious it has been changed.

The Court: Objection sustained.

Q. Trooper, isn't it a fact that near the road the shoulder is harder than it is farther over from the hard surface?
A. Yes, sir.
Q. In fact, there are some rocks and gravel for a distance of two or three feet from the hard surface portion of the pavement. Isn't that true?

The Court: You are speaking of at the time of this accident?
Mr. Wornom: Yes, sir.
A. Yes, sir, there was some loose rocks at the edge.

page 26 } By Wornom: (Continuing)
Q. Wouldn't it have been possible for a car to travel on those rocks without you necessarily seeing where it had traveled?
A. I couldn't say for sure, based on the length of time that has elapsed.
Q. From the time of the accident until the time you got there—
A. I don't remember too much about the immediate edge of the roadway at that time.
Q. You didn't remember too much about it that night. Isn't that true? It was dark?
A. That's right, I didn't get a real good look at the surface. I took my flashlight and searched the area to see if I could find a mark on the shoulder.
Q. And you didn't see one that night?
A. That is correct.
Q. The shoulder out there is relatively hard, rock and gravel, for a distance of two or three feet from the hard surface and then it gets muckier over further, grass and mucky; is that correct?
A. That is true.

page 27 } RE-CROSS EXAMINATION

By Mr. Vincent:
Q. You didn't actually just find out there were no tracks there. You were actually searching for tracks, were you not?
A. Yes, sir.

W. H. Johnson

Q. During your investigation you, of course, were searching for some evidence—

A. Yes, sir.

Q. —were you not?

A. Yes, sir.

Q. And at that time which was some few minutes after the accident happened you were not able to find any tracks whatever, were you?

A. That is correct.

Q. Now you didn't have any trouble finding the tracks down where the car actually pulled off the road and parked, did you?

A. No, sir.

Q. You found them from the hard surface right up to the tires; is that correct?

A. They led right up to the tires from where they left the hard surface. I couldn't state exactly at what point they began.

Q. How wide is the defendant's car?

page 28 } A. Approximately 7 feet.

Q. Now the dent that you saw in the car was approximately in the middle of the car. Wouldn't you say that?

A. It was slightly to the right of the center.

Q. When you say slightly, do you mean a few inches?

A. Approximately—well, the center of this dent was about six or seven inches to the right of the center of the hood.

Q. All right, how wide is the shoulder from the hard surface to where the embankment goes abruptly down? I believe you testified it abruptly goes straight down?

A. Yes, it is about 8 feet wide.

Q. Beyond that 8 feet point could a car navigate on that shoulder?

A. He would run off the ditch.

Q. He would go down the hill, wouldn't he?

A. Yes, sir.

Q. As a matter of fact, if this car had struck the plaintiff off the hard surface road, where would the right wheels of the car have been?

Mr. Wornom: Your Honor, I object to the question.

The Court: Objection sustained.

Mr. Vincent: All right, sir, that is all.

W. H. Johnson

page 29 } RE-DIRECT EXAMINATION

By Mr. Wornom:

Q. Trooper, you say it was raining at the time of the accident. What time did this accident happen from the best that you could determine?

A. From questioning Vernie Lee, Jr. it happened approximately 6:10 P.M.

Q. And you arrived on the scene at 6:32 I believe?

A. Yes, sir.

Q. 22 minutes later?

A. Yes, sir.

Q. Where were you at 6:10?

A. 6:10 I was in the vicinity of Emporia. I don't remember exactly where.

Q. How do you know it was raining out here on the Brink Road at 6:10?

A. Well, it appeared to be a general rain, but I don't know of my own knowledge that it was raining at that point.

Q. You don't know? You say when you arrived you found the defendant's car 200 feet north from where Vance Lee Hill was lying?

A. Yes, sir.

page 30 } Q. And you found a mark 75 feet long on the shoulder of the road?

A. Yes, sir.

Q. But you couldn't tell you say at what point that mark left the pavement?

A. That is correct.

Q. How far was it off the pavement before you could pick it up?

A. It was approximately I would say a foot from the edge of the pavement to where the mark began.

Q. So this mark you picked up, you don't know what point it left the hard surface portion of the road?

A. No, sir. The tract itself began about a foot from the edge of the pavement and led to the rear wheel.

Q. And it was raining when you got there you say?

A. Yes, sir.

Q. Your primary consideration was the welfare of these injured people there?

A. I didn't hear you.

Q. You were primarily interested in the welfare of the injured people?

Mr. Vincent: I object to the leading question.
The Court: Objection sustained.

Q. When did you go back and look for tire marks?
A. When I arrived the plaintiff was injured
page 31 } and I gave him a quick examination and I didn't determine any bleeding at that time, and I covered him up with a sweater that one of the bystanders had presented, and while we were waiting for the rescue squad is when I looked for the tire marks in the shoulder.
Q. How did the rescue squad come in? Which way were they headed when they picked him up?
A. They came in from Emporia and drove south on Route 627 and they drove right to the plaintiff.
Q. Did they get on the shoulder of the road?
A. Yes, sir.
Q. Was it soft or mucky where they got off of the hard surface portion of the road?
A. They drove on over on the grass. They drove across the shoulder.
Q. Have there been any changes made in the shoulder of the road since the accident?
A. From looking at it yesterday there appeared to have been no changes.

Mr. Wornom: That is all.

RE-RECROSS EXAMINATION

By Mr. Vincent:
Q. Trooper, did the rescue sqaud truck make
page 32 } any tracks on the shoulder?
A. Yes, sir.

* * * * *

VANCE LEE HILL, JR., the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wornom:
Q. State your name?
A. Vance Lee Hill, Jr.
Q. How old are you, Vance?

Vance Lee Hill, Jr.

A. 22.

page 33 } Q. Are you married or single?

A. Married.

Q. Where do you live?

A. 301 South.

Q. On February 12 of 1966 were you involved in an accident on Brink Road?

A. Yes, sir.

Q. What had you been doing that day, Vance?

A. I had been to work.

Q. What time did you get off from work?

A. 3:00 o'clock.

Q. Where had you been just or where had you left from just before the accident?

A. I had carried my wife to the beauty parlor.

Q. Then where?

A. And then I went to Joe's and I left Joe's house—

Q. How long had you left Joseph Boone's house and Edna Boone's house before this accident?

A. I would say about ten minutes.

Q. Where does Edna and Joseph Boone live in relation to the Route 95 overpass there?

A. They live on the Brink side of 95 on the right.

Q. On the right, looking which way?

A. Looking towards Brink.

page 34 } Q. When you left Boone's house how did you proceed?

A. I came out from the path and I got to the road and I turned down on the left side and started to walk towards town.

Q. Where were you going?

A. I was going to pick up my wife from the beauty parlor.

Q. Talk so these members of the jury can hear you. You say you started walking on the left side?

A. Yes, sir.

Q. Tell us what happened after you continued walking along there?

A. Well, I continued walking and then I looked back and I saw the car coming from Brink's.

Q. Where were you when you looked back and saw the car coming?

A. I was on this side of the bridge like coming into town.

A. Yes, sir.

Q. On the Emporia side of the overpass?

Vance Lee Hill, Jr.

Q. Approximately how far were you across the overpass?
A. About a block.

Q. Where was the car you saw coming when you
page 35 } first observed it in relation to the overpass?

A. It was about two blocks from the bridge.

Q. All right, what, if anything, did you do then?
A. Well, I went across the road and got over on the other side of the road and I pulled my hat off for to flag the car.
Q. Where were you standing in relation to the hard surface portion of the road when you waved at the car?
A. I was standing about two feet from the hard surface.
Q. What was that?
A. Two feet from the hard surface.
Q. What happened?
A. Well, the car got about three lengths distance to me from the car and the car came to the shoulder of the road, and the lights blinded me and I didn't have time to do anything.
Q. When you started across the road did you observe any other traffic coming from Emporia?
A. No, sir.
Q. As far as you recall were there any cars coming from Emporia?
A. No, sir.
Q. What was the next thing that you remembered after the accident?

page 36 } A. The first thing I remembered after the accident I was in the hospital and I remembered that Irvin Boone, the boy that lives next to me where I live at now—

Q. After you crossed the highway there and flagged the car did you at any time get into the hard surface part of the highway again?
A. No, sir.

* * * * *

page 39 }

* * * * *

Q. What was the condition of the weather, Vance, at the time of the accident?
A. It was raining.

Vance Lee Hill, Jr.

Q. How was it raining? Will you describe it? Was it a light rain, heavy rain, mist or what?
A. It was a light rain.
Q. And the next thing you remember you say you were in the hospital?
A. Yes, sir.

page 40 } CROSS EXAMINATION

By Mr. Vincent:
Q. What time did you get off from work that day, Vance?
A. Three o'clock.
Q. Three o'clock?
A. Yes, sir.
Q. What had you been doing since three o'clock?
A. I got off from work and I went home and then I cut some wood and then my wife had come by and I carried her to the hair dresser's.
Q. Did you ever go to Joseph Boone's house?
A. Yes, sir.
Q. Is that where you cut the wood?
A. No, sir, I cut the wood at my house before my wife came.
Q. You cut the wood at Joseph Boone's house?
A. At my house.
Q. You did not cut any at Joseph Boone's house?
A. No.
Q. Why did you go there for? Is that where your wife was?
A. No, she was at the beauty parlor and after I carried her to the beauty parlor I went to Joe's house.
Q. How did you do that?
page 41 } A. Joe was driving his car.
Q. You went with Joseph in Joseph's car?
A. Yes, sir.
Q. You don't drive?
A. No, sir.
Q. Where were you headed when this happened?
A. I was headed back to town to pick up my wife from the beauty parlor.
Q. How were you planning to pick her up?
A. I was going to get a cab and carry her back home.
Q. And this was some three hours after you had gotten off from work?

Vance Lee Hill, Jr.

A. Yes, sir.
Q. You said it was a light rain?
A. Yes, sir.
Q. When you came over to the Route 95 bridge there, did you see another car coming towards you?
A. No, sir.
Q. Did you ever see another car coming towards you?
A. No, sir.
Q. You did not?
A. No, sir.
Q. But you saw the car coming back from be-
page 42 } hind you?
A. I saw the car coming from that way, that's right.
Q. From back over on the other side of 95?
A. That's right.
Q. You saw this car first?
A. That's right.
Q. How far was it when you first saw it?
A. About two blocks.
Q. Two blocks?
A. On the other side of 95, on the other side of the bridge over 95.
Q. About two blocks?
A. Yes, sir.
Q. Are you talking about a city block, a block here in town?
A. Yes, sir.
Q. Are you talking about ones from the theater down to the bank? You call that a block?
A. Yes, sir.
Q. About twice that distance?
A. Yes, sir.
Q. When you first saw the car coming what did you do?
A. I walked across the road.
Q. You walked across the road?
page 43 } A. Yes, sir.
Q. Did you walk immediately across the road?
A. Yes, sir, I walked just like, you know, anybody walks.
Q. When you got over on the other side of the road what happened?
A. I went to the shoulder of the road about two feet off from the hard surface and pulled my cap off and hold it up to flag the car.
Q. When you got over on the other side of the road and

pulled your hat off and started waving it, where was the car then?

A. On this side of the bridge.

Q. On this side of the bridge?

A. Yes, sir.

Q. It had come about a block and a half? How close were you to the bridge?

A. I was about a block from the bridge.

Q. You were about a block from the bridge?

A. Yes, sir.

Q. And you were standing on the righthand side of the road coming towards Emporia according to your testimony; is that right?

A. Yes, sir.

page 44 } Q. Then the car was where now? Where was the car when you first got over on the other side of the road and started to waving your hat?

A. It was on this side of the road—this side of the bridge.

Q. How far on this side of the bridge?

A. It was about half the distance of that block to me.

Q. So it was about a half a block away from you?

A. Yes, sir.

Q. And you stood there and waved your hat. Is that what you say?

A. That's right.

Q. What side of the road was the car on?

A. That car was on the right.

Q. Was it on the hard surface road?

A. Yes, sir.

Q. Can you tell us how it came on down towards you and you were still about two feet off the hard surface road?

A. Yes, sir.

Q. Was it muddy underfoot?

A. No, sir.

Q. It was not?

A. No.

page 45 } Q. Can you explain to us why it wasn't?

A. No, sir, I can't.

Q. It was raining, wasn't it?

A. Yes, sir, it was raining.

Q. You weren't standing on the hard surface road, were you?

A. No, sir.

Q. You were on the dirt, weren't you?

A. Yes, sir.

Vance Lee Hill, Jr.

Q. But you don't remember whether it was muddy or not?
A. No, sir.
Q. You don't remember or are you saying it wasn't muddy?
A. I didn't take notice of it. I will put it that way.
Q. You did not take notice of it?
A. No.
Q. But you were about two feet off the road?
A. Yes, sir.
Q. And you were standing there two feet off the road waving your hat?
A. Yes, sir.
Q. What kind of hat did you have on?
A. I had on one of these steel hats.
Q. Construction steel hats?
page 46 } A. Yes, sir, something like that. It was grey.
Q. What color clothes did you have on?
A. I think I had on a blue pair of pants and a blue shirt and dark grey jacket.
Q. A dark grey jacket?
A. Yes, sir.
Q. And you never did see the car go on towards Brink?
A. No, sir.
Q. You never saw it?
A. No, sir.
Q. What happened then to the car you were waving at? Tell us again what happened.
A. The car came on up the road and got about three car lengths to me and it started off on the shoulder of the road.
Q. How far did it get off on the shoulder of the road?
A. I couldn't tell you, the lights were shining.
Q. How do you know it was off on the shoulder of the road?
A. I know it was because it was coming towards me.
Q. If you know it was coming towards you on the shoulder, why can't you tell us how far it was off?
A. I don't know.
page 47 } Q. Why can't you tell us? You were there, weren't you?
A. I can't tell how far a car gets off the road when the lights blind me.
Q. If the lights blinded you, how could you tell it was on or off the hard surface of the road?
A. I know it was off on the shoulder.
Q. How do you know it, because you see it; is that right?
A. That's right.

Vance Lee Hill, Jr.

Q. Then if you saw it go off on the shoulder of the road, why can't you tell us how far it went off on the shoulder of the road? Either you saw it go off on the shoulder of the road or it didn't go off on the shoulder of the road?

A. I can't tell you how far it went off on the shoulder of the road.

Q. You can't?

A. No, sir.

Q. How many feet do you consider a car length?

A. I don't know; I haven't never measured one.

Q. What do you estimate it to be?

Mr. Wornom: Your Honor, maybe if he cannot estimate the feet, maybe he can point something out.

page 48 } Q. Can you point out some object in the courtroom, from one object in the courtroom to another, what you estimate to be a car length?

A. Yes, sir.

Q. Will you do that?

A. About as long as that rail down there to that last one back there.

Q. You mean from that point right there?

A. Yes, sir.

Q. To the wall?

A. Yes, sir.

Mr. Vincent: Let the record show he is pointing to the rail that separates the audience of the courtroom to the wall.

The Court: Can we agree upon that distance, gentlemen?

Mr. Vincent: 15 feet?

Mr. Wornom: That is about right, 15 or 16 feet.

The Court: All right, 15 or 16 feet.

By Mr. Vincent: (Continuing)

Q. All right, when you say that car was approximately three lengths from you—

A. Yes, sir.

Q. —when you noticed it going off the road?

page 49 } A. Yes, sir.

Q. And when you noticed it going off the road what did you do?

A. I didn't do anything.

Q. Why didn't you?

A. Well, I couldn't move. I didn't have time to do nothing.

Vance Lee Hill, Jr.

The lights were blinding me and I didn't know which way to go.

Q. You didn't know which way to go?

A. No, sir.

Q. You mean in three lengths of that there you didn't know what to do? You couldn't decide what to do? Do you know how fast the car was coming?

A. No, sir.

Q. Was it going fast?

A. No, sir, I wouldn't say it was going too fast.

Q. Did you ever move at all after that point? When you first noticed the car at that point, did you ever move at all?

A. No, I didn't move.

Q. You just stayed right there?

A. Yes, sir.

Q. Can you tell us whether the car was a long ways off the hard surface or was it just off the edge?

page 50 } A. I told you I couldn't tell you how far it was off the shoulder because I didn't measure the thing and I couldn't see.

Q. You couldn't what?

A. I couldn't see. I couldn't see how far it was off the road.

Q. That is the whole point I want to make. How do you know it was off?

A. I know it was off because it came over to me, but I don't know how far it came off.

Q. Can you estimate it?

A. No, sir.

Q. You cannot tell us whether it was a foot, two feet, three feet, four feet?

A. (Shaking head).

Q. Did you see any mud, dirt and water fly up when he went off?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Are you sure you were off the hard surface road?

A. Yes, sir.

Q. Who else did you see out there on the road?

A. Nobody.

page 51 } Q. You didn't see anybody before the accident?

A. No, sir.

Q. Nobody?

A. No, sir.

Q. No one was with you?

A. No, sir.
Q. Was Shirley Powell out there?
A. No, sir.
Q. Was Richard Robinson out there?
A. He said he was, but I didn't see him.
Q. You were walking on the road on the other side, on the lefthand side, before you saw the car; is that right?
A. That is correct.
Q. Just before you saw the car come off the road, as you say, you did not see the oncoming car—
A. No, sir.
Q. Was there any reason why you couldn't have seen it if it had been there?
A. Yes, sir, I had my back turned.
Q. Well, you could see the lights, couldn't you?
A. I don't know; I didn't see it.
Q. You didn't see it?
A. No, sir.
Q. Anything wrong with your vision?
A. No, sir.
page 52 } Q. Had you been doing anything that day that would impair your vision?
A. No, sir.
Q. Had you been drinking at all—

The Court: Gentlemen of the jury, suppose you retire to your jury room.

JURY OUT

The Court: Go ahead with your line of questioning.
Mr. Vincent: I am sorry, I was under the impression you were talking about odor of alcohol by the trooper.
The Court: Go ahead and cross-examine him.

By Mr. Vincent: (Continuing)
Q. Had you been drinking that day?
A. Yes, sir, I drinked some.
Q. You had?
A. Yes, sir.
Q. How much had you been drinking and what were you drinking?
A. I drink about that much wine in a glass (indicating).
Q. You did what now?
A. I drank about that much wine in a glass.

Vance Lee Hill, Jr.

page 53 } Mr. Wornom: Let the record show that it is about an inch and a half to two inches.

Q. You said you drank that much wine?
A. Yes, sir.
Q. What kind of wine?
A. Richard's.
Q. Whose was it?
A. We bought it together.
Q. Who is "we"?
A. Me and Joe Boone.
Q. How much did you buy?
A. Just one fifth.
Q. One fifth?
A. Yes, sir.
Q. Did you drink that fifth?
A. No, sir.
Q. I mean did you and Joe drink that fifth?
A. No, sir, we didn't drink it all?
Q. You didn't?
A. No, that is all I took, about that much, in a glass.
Q. Who drank the rest of it?
A. I don't know.
Q. Where did you leave it?
A. It was sitting there on the table.
page 54 } Q. At whose house?
A. At his house.
Q. And you had not had anything else to drink that day?
A. No, sir.
Q. Had you walked up that road before?
A. You mean had I walked up that road—
Q. That same night?
A. No, sir.
Q. You had not been on that road that same night?
A. No, sir.

By The Court:
Q. How much earlier had you consumed the wine before this accident occurred?
A. Sir?
Q. How much time delay was there from the time you drank the wine and the occurring of the accident?
A. I drunk the wine, let me see, about fifteen minutes before the accident.
Q. Fifteen minutes before the accident?

A. Yes, sir.

The Court: All right, gentlemen, what do you have to say about it?

By Mr. Vincent: (Continuing)

Q. How much did you say you had to drink?

page 55 } A. About that much (indicating).

Q. In what?

A. In a glass.

Q. In a regular water glass?

A. Yes, sir.

Mr. Vincent: If Your Honor please, I think that is evidence that the jury ought to consider.

The Court: I am going to let it come in, gentlemen.

Mr. Wornom: I object to it, Your Honor. I again say there is no evidence before the Court this man was under the influence. The only evidence is that he has taken a drink. Certainly the fact that a man takes a drink is no evidence of intoxication.

Mr. Vincent: It's a jury question.

Mr. Wornom: No, it is not a jury question. He is not under the influence and there is no evidence here that he even was feeling it.

The Court: Save your exception.

Mr. Wornom: We object and except for the reasons previously stated.

The Court: All right, bring the jury in.

JURY IN

page 56 } By Mr. Vincent: (Continuing)

Q. All right, Vance, had you had anything to drink that day?

A. Yes, sir.

Q. Would you tell us how much you had to drink?

A. I took about that much wine in a glass (indicating) and I drank it. That is all I had to drink.

Q. You drank about that much wine in a glass?

A. Yes, sir.

Q. What type?

A. An ordinary water glass.

Q. What kind of wine was it?

A. Richard's.

Vance Lee Hill, Jr.

Q. Whose wine was it?
A. Mine and Joe's.
Q. You and Joseph Boone?
A. Yes, sir.
Q. You and Joseph Boone bought it yourselves?
A. Yes, we bought it ourselves.
Q. When did you buy it?
A. We bought it that evening.
Q. After you got off from work?
A. Yes, sir.
Q. Where did you buy it, in town?
A. Yes, sir, at the ABC store.
page 57 } Q. What did you do with it then?
A. Do with what?
Q. The wine?
A. Put it in the car and took it to Joe's house and me and him took a drink.
Q. You took a drink right after you got back in town? Did you take a drink immediately?
A. No, we didn't take that then.
Q. How long afterwards did you take one?
A. I would say we got to the house and we was there fifteen or twenty minutes and we took a drink. It was about fifteen or twenty minutes before the accident happened.
Q. Then you took another drink about fifteen or twenty minutes before you went down the road?
A. Before I went down the road?
Q. Yes, before you walked down the road?
A. No, sir, I didn't have but one drink of wine.
Q. Didn't you take a drink fifteen minutes before the accident happened?
A. Yeah.
Q. The accident happened at 6:10, is that right?
A. That's right.
Q. You took a drink fifteen minutes before, which would make it what, five minutes to six?
A. Yeah.
page 58 } Q. So that is when you took a drink of wine, five minutes to six?
A. That's right.
Q. And that is the only drink you had?
A. That is the onliest one I had.
Q. When did you get the wine from the whisky store?
A. We got the wine from the whisky store, it was getting late. It was something to six.

Vance Lee Hill, Jr.

Q. It was when you took your wife to the beauty parlor, wasn't it?

A. Yes, sir.

Q. That was right after you got off from work you said. Is that right or wrong?

A. I didn't say I took my wife to the beauty parlor right after I got off from work.

Q. When I asked you in the beginning what had you done that afternoon after you got off from work, you said you went home and you took your wife to the beauty parlor and then you went to Joe Boone's house and you stayed there a while and then was going back to town to get your wife from the beauty parlor.

A. I told you I went home and I cut some wood and then Joe Boone came and I took my wife to the beauty parlor.

Q. What time was that?

A. I don't know.

page 59 } Q. How long did *you* wife stay at the beauty parlor?

A. She stayed there a right good while.

Q. How long would you say, an hour?

A. Maybe more.

Q. Maybe more than that?

A. Yes, sir.

Q. Say two hours?

A. I don't know exactly how long it was, what time it was when she got there and when she came away.

Q. You were going to get her when the accident happened?

A. That's right.

Q. So she must have been ready to come home; is that right?

A. I won't for sure.

Q. What time did you and Joe come up and get the wine?

A. We got the wine when I carried my wife to the beauty parlor.

Q. What time was that?

A. I don't know, about four or five o'clock.

Q. Then right after you got the wine or first you took your wife to the beauty parlor and then went by the whisky store and got the wine?

A. Yes, sir.

page 60 } Q. Then you went back home to Joseph's house?

A. Yes, sir.

Q. And you said the bottle stayed there about fifteen minutes before you took a drink?

A. That's right.

Q. You took a drink and Joe took a drink?

A. That's right.

Q. You said it was about four or five o'clock when you went to town. How long did it take you to get the wine?

A. It don't take but about a minute to get wine and come on back out.

Q. And then you went on back home?

A. Yes.

Q. Then you said you took a drink right after or about fifteen minutes after you got back there?

A. Yes, sir.

Q. And, yet, you said you only took one drink and then you said you took a drink about fifteen minutes before the accident happened. How do you explain that?

A. I didn't take but one drink of wine.

Q. And that is about fifteen minutes before the accident?

A. Yes, sir.

Q. So that was five minutes to six?

page 61 } A. I left the bottle sitting right there on the table.

Q. You paid for half of it, did you not?

A. Yes, sir.

Q. You left it sitting there on Joe Boone's table?

A. Yes, sir.

Q. From the time you brought it there until five minutes to six you didn't take a drink out of it; is that right?

A. That's right.

Q. Do you know whether or not the lights on the car that was coming to you were on high beam or low beam?

A. No, sir.

Q. Why did you decide to cross over the highway?

A. You can't flag on the lefthand side.

Q. You can't flag?

A. No, sir.

Q. Why not?

A. What's the use of flagging a man on the lefthand side when the man is on the right?

Q. What?

A. It don't do no good for a car on the lefthand side of the road when the man is on the righthand side.

Q. Why not? What portion of the lefthand side of the road were you walking on? Were you on the hard surface portion of the road or on the shoulder?

page 62 } A. I was on the shoulder.

Vance Lee Hill, Jr.

Q. You were on the shoulder?
A. Yes, sir.
Q. Walking towards Emporia?
A. Yes, sir.
Q. So you walked on the other side?
A. Yes, sir.
Q. To flag the car?
A. Yes, sir.
Q. You didn't know who it was
A. No, sir.
Q. I believe you stated you don't drive; is that correct?
A. That's right.
Q. Do you walk just about everywhere you want to go?
A. Yes, sir, well, when my brother don't carry me.
Q. Who is your brother, Thomas Hill?
A. Yes, sir.
Q. Now you were knocked unconscious when you were struck; is that right?
A. That's right.
Q. Do you remember anything that happened immediately after that?
page 63 } A. No, sir.

Mr. Vincent: That is all.

RE-DIRECT EXAMINATION

By Mr. Wornom:
Q. Vance, what, if any, effect did you feel from the wine you had consumed?
A. I couldn't feel nothing from the wine.

Mr. Wornom: Can we stipulate that he indicated about two inches?
Mr. Vincent: It's in the record.
The Court: Yes, I understand it's in the record.

By Mr. Wornom: (Continuing)
Q. Was that the only thing you had to drink that day?
A. Yes, sir.
Q. And you had worked until three o'clock?
A. Yes, sir.

* * * * *

Trooper W. H. Johnson

page 65 } TROOPER W. H. JOHNSON, recalled for further examination, testified as follows:

DIRECT EXAMINATION

By Mr. Wornom:

Q. Trooper, when you were at the accident scene did you see this man here?

A. Yes sir.

Q. Did you or did you not personally detect any odor of alcohol on him?

A. I could not detect any odor that could be traced to the person.

CROSS EXAMINATION

By Mr. Vincent:

Q. Did you make any attempt to do it?

A. I believe I did make an attempt, but I—it's been so long, I didn't make any notes to the effect.

Q. Do you recall whether or not you got very close to the plaintiff's head?

A. I don't recall. It seems that I did, but I am not sure.

* * * * *

page 75 }

* * * * *

Mr. Wornom: Your Honor, we at this time move the Court to permit the jury to take a view of the accident location.

The Court: Any objection to that?

Mr. Vincent: No objection, no, sir.

The Court: All right, gentlemen of the jury, at this time we will view the scene of this accident. While at the scene of the accident you will be in the company of the sheriff. Of course, we will drive to the scene also. You are not to ask any questions of any of the counsel, myself or
page 76 } anyone else. If you have any questions, submit them to me, not to counsel or anyone else.

Of course, while we are there we cannot take evidence. We cannot ask any parties any distances or make any comments with reference to the accident. Just view the scene

and keep it to yourself and then we will return to this courtroom.

Mr. Wornom: Before we go, I think the trooper testified this morning that rail had been put up since this accident. Can we stipulate that?

Mr. Vincent: Yes, we can stipulate that the guard rail on the shoulder of the highway has been installed subsequent to the date of this injury.

NOTE: At 1:39 P.M. the Court, counsel and the jury leave the courtroom to take a view of the accident scene and return at 2:03 P.M. * * *

* * * * *

page 78 } VERNIE LEE, JR., the defendant, having previously been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Vincent:

Q. Would you state your name please to the jury?

A. Vernie Lee, Jr.

Q. How old are you?

A. 33.

Q. Where are you employed?

A. Weldon Mills.

Q. Are you a resident of Greensville County?

A. Yes, sir.

Q. Have you been a resident of Greensville County for sometime?

A. Yes, sir.

Q. How long?

A. Quite a while.

Q. On the 12th of February of this past year, 1966, what type of automobile did you own?

A. A 1956 Buick.

Q. Where do you live in the county?

A. On Highway 627 west on Brink Road.

Q. How far is that from the bridge that overspans Interstate Route 95?

A. I don't know, possibly 200 yards.

page 79 } Q. 200 yards on the other side or on this side?

A. On the other side from where I live.

Q. You live on the other side?

Vernie Lee, Jr.

A. On the other side, that's right.
Q. South of 95?
A. That's right.
Q. On this particular day, that is February 12, 1966, or on this particular night were you operating your automobile?
A. Yes, sir.
Q. Was anyone with you?
A. Yes, sir.
Q. Who was with you?
A. Joe Hicks.
Q. What were you doing and where were you going?
A. Going to Mr. Crutchlow's store.
Q. Mr. Crutchlow's store?
A. Yes.
Q. That is where?
A. Right down the road from the bridge at the intersection of 301 and 627.
Q. How fast were you operating your automobile?
A. 35 miles an hour.
Q. What was the condition of the weather?
A. It was raining and foggy.
page 80 } Q. Did you have your windshield wipers on?
A. I had them working.
Q. Did you have your headlights on?
A. I had them on, yes, sir.
Q. Which beam were they on when you got to the bridge?
A. Well, I seen an automobile coming and I kept blinking, dimming my lights, and he wouldn't ever dim his.
Q. All right, where were you in relation to the bridge itself when you met this other car?
A. I was coming across the bridge.
Q. Going towards Emporia?
A. That's right.
Q. And the other car was going towards Brink?
A. That's right.
Q. You were meeting a car?
A. Yes, sir.
Q. Which beam was your lights on, low or high?
A. I had them on low.
Q. You had them on low?
A. Yes, sir.
Q. At what point did you actually meet this other car, at a point on the bridge or near the bridge?
A. I had already crossed the bridge.
Q. You had already crossed the bridge?

Vernie Lee, Jr.

page 81 } A. Yes, sir, crossed the bridge.
Q. You did then meet the car?
A. Yes, sir.
Q. What happened after you met the car?
A. Just as I was passing the car, I had done dimmed my lights before I got to him. He wouldn't ever dim his lights and it was raining and foggy, and just as I pass the car I seen something on my hood.
Q. On the hood?
A. On the hood.
Q. What part of the hood of your car?
A. About the middle way of the hood.
Q. Do you know what it was?
A. Well, I recognized it was a man after I seen it on the hood.
Q. Did you at any time before that see anyone in the road or on the side of the road?
A. No, sir, I didn't.
Q. All right, is the road level there?
A. No, sir, it's kind of a grade down.
Q. Where was your car located at this time when you first saw him on the hood of your car?
A. Oh, I was on my side, on my side.
Q. Were you on the hard surface?
A. Yes, sir, on the hard surface.
page 82 } Q. Did your car leave the hard surface before you saw this object on your hood?
A. No, sir.
Q. How far would you say you had gotten across the bridge before you saw this object on your hood?
A. Well, I wouldn't say how many feets, but it wasn't too far.
Q. After you saw this object on your car what did you do?
A. I stopped as quick as possible.
Q. Where did you place your car after that?
A. After I stopped—I pulled down the road a few feets and run my right hand wheels on the shoulder of the road and the other wheels was on the hard surface.
Q. Then what did you do?
A. I came back and see what happened.
Q. What did you find when you came back?
A. I found a heel laying there just in the edge of the road.
Q. What did you do?

Vernie Lee, Jr.

A. And I stood over him and kept him from going down the hill.

Q. Was he rolling or tumbling?

A. He was rolling.

Q. You kept him from rolling down the embankment?

page 83 } A. That's right, kept him from rolling any farther.

Q. Now this impact on your car, when you saw this object on your car, did it do any damage on your car?

A. It bent my hood, and the little design, what you got right in the middle of the car, it bent that.

Q. Was there a dent in your car that you could see?

A. Yes, sir, a dent in the hood, sure.

Q. Was there a dent there before the accident?

A. No, sir.

Q. Was there any damage to your little center piece before the accident?

A. No, sir.

Q. Was there any other part of your car dented?

A. No, sir.

Q. Any glass broken?

A. No, sir.

Q. What time of night or day was this?

A. I expect this was around 6:00 o'clock. It might have been a little after.

Q. Had you had anything to drink?

A. No, sir.

Q. Had you worked that day?

A. I worked until 9:00 o'clock that morning

page 84 } Weldon Mills and I came home and ate breakfast at 10:30 and went to bed and got up at 5:00 and went to Mr. Crutchlow's store.

Q. You work night duty?

A. Yes, sir, all the time.

Q. Were the shoulders of the highway wet?

A. Well, it's possible because it had been raining some, which it was raining a little bit and it was wet.

Q. Did the trooper ask you any questions cencerning whether or not your car left the hard surface road?

A. No, sir.

Mr. Wornom: I object to the leading question.

The Court: I don't see any relevancy to the question anyway. Objection sustained.

Q. All right, sir. Did your car ever leave the hard surface road?

A. Not until I made a complete stop; I pulled the right wheels on the right side of the road and the rest of the wheels were on the hard surface.

Mr. Vincent: All right, answer Mr. Wornom.

page 85 } CROSS EXAMINATION

By Mr. Wornom:

Q. Vernie, you say Joe Louis Hicks was with you?

A. Yes, sir.

Q. Where had you been since you left home?

A. Nowhere but at home asleep.

Q. And you say you live about 200 yards to the south of the Route 95 overpass?

A. To the best I could estimate from the bridge to my house.

Q. Now the lights on your car were in good condition, weren't they?

A. Yes, sir.

Q. As you came along you had them on bright you said at first?

A. I dimmed them.

Q. Where were you when you put them on dim?

A. Coming across the bridge.

Q. Where?

A. Coming across the bridge.

Q. How far can you see with your lights on bright?

A. I wouldn't say how far, but with your lights you can see a pretty good ways.

Q. I am asking you how far could you see? How far is a pretty good ways?

page 86 } A. 75 or 100 feet.

Q. Is that as far as you could see with your lights on bright?

A. I had them on dim when I passed the car.

Q. I asked you on bright how far can you see with them?

A. I would say 75 or a hundred feet.

Q. That is with them on high beam?

A. Yes, sir.

Q. How far can you see with them on low beam?

A. Well, you can't see too far with them on low beam with rain and fog.

Q. How far could you see with them on low beam?
A. I would say 25 or 30 feet.
Q. You mean to say you couldn't see any further than from the width of this courtroom with them on low beam?
A. Well, it was raining and fog and you couldn't see in the fog.
Q. And you were driving 35 or 40 miles an hour?
A. 35 miles an hour.
Q. This car that you were approaching, did the lights from that car blind you?
A. Yes, sir.
Q. And you continued on?
A. I just turned just gradual on driving on 35 page 87 } miles an hour.
Q. Continued on at 35 miles an hour?
A. Yes, sir.
Q. And the next thing you knew Vance Lee was on the hood of your car?
A. On the hood of my car.
Q. Now you live out there 200 yards you say south of 95. You are familiar with the area in there?
A. Yes, sir.
Q. Isn't it true that people frequently walk along the shoulders of that road in that particular area?
A. (No answer)
Q. Very often people walk to and fro along there—

Mr. Vincent: I object, Your Honor, to that as having no relevance whether they do or they don't.

Q. Do you understand the question?

The Court: Objection sustained, Mr. Wornom. You may ask him at the immediate time.
Mr. Wornom: Judge, he didn't see him at the immediate time. I think we are entitled to show whether or not pedestrians frequently use the shoulders of the road there.
Mr. Vincent: What other people do doesn't have anything to do with this particular night. We are page 88 } interested in what happened on February 12, 1966, not the rest of the year.
The Court: I will permit the question.
Mr. Vincent: I note my exception.

Vernie Lee, Jr.

By Mr. Wornom: (Continuing)

Q. Are you familiar with this area where the accident happened?

A. Yes, sir.

Q. And had been for a number of years before the accident?

A. Yes, I am familiar with it.

Q. There are houses to the left of the road next to the old highway there as you come into town; is that right?

A. That's right.

Q. People frequently use the shoulders of the road in that area for walking; isn't that correct?

A. Yes, sir, I think so.

Q. And you were aware of that that night?

A. Sir?

Q. You were aware of that that night when you came towards Emporia?

A. I didn't understand you.

Q. You knew that that night coming towards Emporia people frequently walk along the shoulders of the

page 89 } road there?

A. Yes.

Q. You say you met a car approaching you with bright lights?

A. That's right.

Q. And that you were blinded by the lights?

A. Yes, sir.

Q. And that you were running 35 miles an hour?

A. Yes, sir.

Q. And that you continued down the road at 35 miles an hour?

A. Thats' right.

Q. And the next thing you knew Vance Lee Hill was on the hood of your car?

A. That's right.

Q. Were the brakes on your car in good shape?

A. Yes, sir.

Q. Did you try to stop? You said you tried to stop as soon as you could?

A. When I seed him on the hood of the car I hit my brakes and stopped as quick as I could.

Q. You heard the trooper say that Vance Lee was laying 200 feet to the rear of your automobile, is that right?

A. I didn't understand you.

Q. Did you hear the trooper testify this morn-

page 90 } ing that Vance Lee Hill was laying on the shoulder some 200 feet to the rear of your automobile?

A. 200 feet?
Q. Yes, back behind your car?
A. Possibly that is what it was then after I hit him.
Q. After you hit him and came to a stop he was 200 feet back of you?
A. Well, I wouldn't say exactly. I didn't measure.
Q. Whatever the trooper says—
A. I wouldn't say; I didn't measure.
Q. Whatever time it took you to stop on that occasion, that was as quick as you could stop your car?
A. Yes, sir.
Q. I understood you to say Vance Hill was laying near the edge of the road and you held him to keep him from rolling over the edge of the embankment?
A. Yes, sir.
Q. That bank is at least 8 feet from the edge of the road, is it not?
A. (No answer).
Q. That embankment is at least 8 feet from the edge of the road?

page 91 & 92 } A. I still kept him from rolling down the edge of the hill.

Q. You say at the time you could see as far as one side of the courtroom to the other with your lights?
A. It was pretty dim that night the way it was raining and foggy and the lights of the car blinded me.

Mr. Wornom: That is all.

Witness stood aside.

LAWRENCE BOND HICKS, also known as JOE LOUIS HICKS, called as a witness in behalf of the defendant, first being duly sworn; testified as follows:

DIRECT EXAMINATION

By Mr. Vincent:
Q. Would you state your name for the record?
A. My name is Lawrence Bond Hicks.
Q. Are you known also as Joe Louis Hicks?
A. That's right.
Q. Joe, were you riding with Vernie Lee, Jr. in his automobile on the night of February 12, 1966 when Vance Hill was hit?

page 93 } A. Yes, sir.

Lawrence Bond Hicks

Q. Was anyone else in the car with you who had anything to drink?
A. No.
Q. Do you know approximately how fast he was traveling?
A. Not really; I estimate about 30 or 35.
Q. What was the weather like that night; do you recall?
A. It was kind of raining and wet.
Q. Was it night time or day time?
A. It was dark, night.
Q. In which part of the car were you seated?
A. On the righthand side.
Q. In the front seat?
A. Front seat.
Q. Were you doing anything particularly?
A. No, not particular, no.
Q. Tell the jury what you saw, if anything, after you got to the bridge there where it goes over Route 95?
A. Well, after it got across there it was meeting a car, and after the car, time the car passed by it went into Vance. I didn't see him, not before it hit him.

page 94 } Q. When you first saw him, where did you first see him?
A. When I first saw him he was on the hood coming up, hit on the hood and come up.
Q. What part of the hood was he on?
A. About the middle, about the middle of the hood.
Q. The car that Vernie was operating, where was that located?
A. I beg your pardon?
Q. Where was he located in the highway?
A. Well, he were in the road.
Q. Was it a hard surface road, that portion of it?
A. Yes.
Q. Did he ever get off the hard surface road?
A. No, not before he stopped and then he pulled one wheel off.
Q. At any time from the point that he left the bridge to the point that you saw Vance Hill on your hood did Vernie's car ever get off the hard surface portion of the road?
A. No.
Q. After you saw him on the hood of your car what did Vernie do then?

page 95 } A. Vernie said, lawd-a-mercy, who I done hit? Then he started putting on brakes and pulled over to the side.

Lawrence Bond Hicks

Q. Then did you pull off of the hard surface of the road?
A. Yeah, Vernie.
Q. What did you do then?
A. We got out of the car and looked over there. I didn't recognize him at first, so I told him I was going to Mrs. Freddie Brown's and call the rescue squad, and I went up there and left.
Q. You went to call the rescue squad and he went back?
A. He stayed there with him.

Mr. Vincent: All right, answer Mr. Wornom.

CROSS EXAMINATION

By Mr. Wornom:
Q. Where were you going, Lawrence?
A. We were going down to the store.
Q. What store?
A. Buddy Norwood's.
Q. Buddy Norwood's?
A. Yes, I think, one of them.
page 96 } Q. Don't you know where you were headed?
A. I got so frustrated.
Q. You have talked to Mr. Vincent since the accident?
A. Yeah.
Q. And you don't know where you were going that night?
A. Yeah, we were going to Buddy Norwood's store.
Q. You are sure of that?
A. Yes.
Q. Where had you left from?
A. Left with Vernie.
Q. Who was with you when you left?
A. When we left Vernie's?
Q. Yes.
A. Me and him.
Q. Did you go anywhere to get anything to drink first?
A. No.
Q. You were going to Buddy Norwood's store?
A. That's right.
Q. Did he have a radio on the car or not?
A. I don't know whether he did or not, but it wasn't playing.
Q. As you were coming towards Emporia you
page 97 } say you saw a car coming?
A. Yeah.

Q. Vernie had his lights on, didn't he?
A. Yes.
Q. Did he dim his lights for this oncoming car?
A. I don't know to be frank with you.
Q. You don't know?
A. No, I don't.
Q. You were looking out the windshield?
A. Yeah, I was.
Q. How far could you see out in front of you as you looked out that windshield?
A. I couldn't see fur, but I could see.
Q. How far could you see? Could you see a couple times the length of this courtroom here?
A. No.
Q. Could you see one time the length of this courtroom?
A. About as far as from here to that desk there.
Q. And that is as far as you could see with the lights on?
A. Yeah.

Mr. Wornom: Your Honor, can we stipulate that distance?

page 98 } NOTE: At this point Mr. Vincent steps off the distance indicated.

Mr. Vincent: About 22 feet.
Mr. Wornom: May we stipulate that?
Mr. Vincent: Yes.

By Mr. Wornom: (Continuing)
Q. And you could see 22 feet in front of you as you were going down the road?
A. Yeah.
Q. Were you blinded by the lights of this oncoming car?
A. Not what you say blinded. I really wasn't paying any attention.
Q. You were looking, weren't you?
A. Yeah, I was looking.
Q. Were you talking?
A. Yeah, we were talking.
Q. What were you talking about?
A. I don't know to be frank with you.
Q. But you were talking?
A. Yeah.
Q. And you were looking out front?
A. Yeah.

Q. And with the lights on and you say you couldn't see but 22 feet in front of you?

A. That's right.

page 99 } Q. And how fast did you say Vernie was going?

A. I would say 30 or 35.

Q. You weren't looking at the speedometer?

A. No.

Q. It could have been 35 or 40?

A. That's right.

Q. And you didn't see Vance Hill until he landed up on the car?

A. No, I didn't.

Q. You say you weren't blinded by the lights?

A. No, I wasn't looking directly at the other car.

Q. Where were you looking, at the other shoulder?

A. No, but—

Q. And it didn't blind you?

A. No.

Q. And you say after it hit Vance he put on his brakes?

A. Yeah.

Q. And pulled over to the side as quick as he could?

A. Yeah.

Mr. Wornom: That is all.

Witness stood aside.

page 100 } RICHARD ROBINSON, called as a witness in behalf of the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Vincent:

Q. Will you state your name for the record?

A. Richard Robinson.

Q. Where do you live, Richard?

A. Well, I live just across the bridge on the Brink Road on that section of highway on the left.

page 101 } Q. How long have you lived out there?

A. Ever since 1959.

Q. Where are you employed?

A. State Highway Department.

Q. On the night of the 12th of February, 1966 when the car of Vernie Lee struck Vance Hill, where were you that night?

A. I was right beside the road there where Vernie stopped after he hit the boy. I saw Hill first. It was a car approaching me behind. I was on the righthand side of the road going back—

Q. Let me ask you this: were you walking or—

A. I was walking.

Q. You were walking?

A. Yes.

Q. Were you walking towards the bridge or away from the bridge?

A. I was walking towards the bridge.

Q. All right, go ahead.

A. I was walking towards the bridge and a car come behind me and I could see Hill by the light. Well, Hill was standing beside the road first—

Q. Which side?

A. He was standing on the righthand—no, he was standing on the lefthand side of the road according to me
page 102 } when I first saw him. He was standing, wasn't going either way.

Q. Where was he standing?

A. He was standing on the shoulder of the road.

Q. On which side?

A. From where I was going it would be on the left to me. You see I was going back over the bridge and it would be on my left.

Q. All right.

A. As this car came behind me, that made me see Hill real good and Hill flagged this car behind me, it seemed to me, with a hat. It seemed he was flagging this car and when he stepped out and flagged this car, that is when Vernie Lee came over the bridge, and from the way it seemed to me standing in the highway where I was—

Mr. Wornom: If Your Honor please, I don't think we want to know what it seems to be.

By The Court:

Q. Just tell what you saw.

A. I can't tell you actually how many feet he was in the road, but he stepped in the road and flagged a car which was behind me.

By Mr. Vincent: (Continuing)

Q. Did you see him when he was struck?

Richard Robinson

A. I saw both the cars were just about together
page 103 } and this fellow that passed me, I figured they were going to hit him in the middle of the road, it seems, and when they hit I didn't see them just when it hit—well, I didn't see him any more until this boy passed and then I could see him laying beside the road.

Q. When you saw him was he off the road or on the road?

A. He was in the road.

Q. Was he in the middle of the road or—

A. He was in the middle of the road, about right center. The car coming behind me, and he was going to stop him, that is what it seemed to me, when Vernie Lee came over the bridge—

Q. And the car behind you passed over the bridge?

A. Yes.

Q. Were the lights on on that car?

A. Yes, they were on.

Q. Were they shining up the road towards Brink?

A. Yes, sir.

Q. Could you see Hill?

A. Yes, I could see Hill good.

Q. Where was Hill?

A. He was standing beside the road first, but he wasn't going either way, and when this car came along by me, he stepped in the road, where he was going to stop
page 104 } him. He stepped in the righthand lane where he was flagging him, and that car put on brake lights and I could see that and he didn't stop.

Q. Was it at that point that he was hit?

A. Yes, Vernie Lee came along about the same time. It looked like they was going around him in the middle of the road, the way it looked to me.

CROSS EXAMINATION

By Mr. Wornam:

Q. Richard, you are practically a nextdoor neighbor of Vernie Lee here; isn't that right?

A. Yes, sir.

Q. You live within a stone's throw of each other right there; that is correct? That is right, isn't it?

A. Say what?

Q. I say you live within a stone's throw of each other?

A. Yes, sir.

Q. How long have you been neighbors there?

Richard Robinson

A. Well, I have been neighbors to him after I been out there; since 1959, that is where I learned him at.

Q. Do you know who was driving this car you say was going towards Brink?

A. No, I don't know exactly who was driving the car.

page 105 } Q. You don't know?

A. No, I don't actually know who it was.

Q. Where were you coming from?

A. I was coming from the store. I went down to get me a pack of cigarettes.

Q. What store?

A. I had been to Mr. Norwood's.

Q. And you were walking back home?

A. Yes, sir, on the right side.

Q. On the right side?

A. Yes, but there are two roads and I walked the lower road and came up.

Q. You hadn't even gotten up on the main road that Vernie Lee was driving on?

A. I was on the main road. The reason I hadn't crossed the road, this car was coming and I wasn't going across then.

Q. You say it seemed like and you say you saw this car pass and you saw Hill wave at it, but you didn't see him—

A. Yes, I saw him.

Q. You said a minute ago when he was hit—

A. I couldn't see him when the cars came together, but I see him flag.

Q. That was before he was hit that you saw him

page 106 } flag this other car?

A. I saw him before he was hit, and when this car went this way and Vernie Lee approached him, I couldn't see him right then, and all you could see was when he hit just like that (snapping fingers), and after this boy stopped I could see him laying beside the road.

Q. You were right on the scene that night, weren't you?

A. Yes, sir, that's right.

Q. And you were there when the trooper was there?

A. No, sir.

Q. You weren't there when the state trooper was there?

A. No, sir, I wasn't there then.

Q. Where were you then?

A. I reckon I was just about home then.

Q. You went home after seeing the man hit?

A. No, I didn't stay there.

Q. You didn't wait there knowing that he had been hit and you never told the police?
A. No.
Q. You never told the police you saw it or anything?
A. No, sir.

* * * * *

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

DIRECT EXAMINATION

By Mr. Vincent:
Q. State your name and occupation for the record?
A. Roy Barefoot, Virginia State Police.
Q. Were you on duty on the 12th of February, 1966?
A. I was.
Q. Were you called to the scene of the accident where Vance Hill was injured?
A. No, I heard Trooper Johnson when he got his call. I was close by and I went on down; I went on by to give him assistance.
Q. Did you render him any assistance when you got there?
A. When I got there this gentleman here was on the shoulder of the road and the rescue squad, the
page 114 } members were around him, so I went over to see could I be of any help there, which I couldn't, and so the only thing I did was assist with the travel.
Q. While you were over there observing the plaintiff on the shoulder of the road did you smell any alcoholic odors?
A. I did.

Mr. Wornom: Your Honor, I object to the question and answer on the grounds previously stated, that the odor of alcohol is not—
The Court: For the same grounds previously stated?
Mr. Wornom: Yes, sir.
The Court: All right, and I will overrule you.
Mr. Wornom: I note an exception.

Q. Did you?
A. I did.
Q. Could you tell us whether it was faint, mild or strong?
A. It was strong.

Mr. Vincent: Answer Mr. Wornom please.

page 115 } CROSS EXAMINATION

By Mr. Wornom:
Q. Trooper, actually this accident was being investigated by Trooper Johnson; isn't that correct?
A. Yes, that's right.
Q. Is there any reason that you know of why Trooper Johnson couldn't have smelled alcohol on this man?
A. No, if he had gotten close enough to him, I am sure he could have.
Q. Where was the plaintiff when you were there?
A. He was lying on the shoulder of the road.
Q. And all you did was assist in directing traffic?
A. Yes.

Mr. Wornom: No further questions.

* * * * *

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VANCE LEE HILL, the plaintiff, recalled on rebuttal, having previously been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Wornom:
Q. Vance, you have heard Richard Robinson testify here?
A. Yes, sir.
Q. Did you at any time wave your hat or attempt to flag any automobile that was coming from Emporia going towards Brink?
A. No, sir.
Q. Did you ever see any automobile?
A. No, sir.

Vance Lee Hill, Jr.

Q. Do you recall seeing one coming from Emporia any where?

page 125 } A. No, sir.

CROSS EXAMINATION

By Mr. Vincent:

Q. Vance, didn't you tell me when you first took the stand that you had your hard construction helmet in your hand?

A. That's right.

Q. I thought you just said you didn't?

A. He asked me did I flag any car coming from Emporia.

Q. Excuse me, but you were flagging your hat?

A. That's right.

* * * * *

page 129 } The Court: Gentlemen of the jury, we will take a brief recess and prepare the instructions for you.

NOTE: Court and counsel retire to chambers and out of the presence of the jury the hearing continues as follows:

Mr. Wornom: If Your Honor please, I move the Court to strike all of the evidence in this case relating to the plaintiff's having drunk a quantity of wine, that being two ounces, and that being the only evidence of drinking on his part. There is no evidence at all of intoxication or that he consumed a sufficient quantity of alcoholic beverages so as to affect his speech or to impair his physical abilities. The Court of Appeals has held that the mere odor of alcohol on a person's breath is not sufficient evidence of intoxication, and that is all of the evidence we have to go to the jury.

The Court: Your motion is overruled.

page 130 } Mr. Wornom: Exception, if Your Honor please, for the reasons previously stated.

* * * * *

page 132 } NOTE: The jury retires to the jury room at 5:46 P.M. to deliberate and at 6:13 P.M. return to the courtroom and the hearing continues as follows:

Clerk (Reading) We, the jury, upon the issue joined find for the defendant.

NOTE: At this point the jury is discharged and the hearing continues as follows:

The Court: Are there any motions?

Mr. Wornom: Yes, Your Honor. The plaintiff moves the Court to set aside the verdict of the jury and grant a new trial on the grounds that the verdict is contrary to the law and the evidence and without evidence to support it; that the Court erred in refusing to admit Exhibits A and B which were photographs of the accident location; that the Court erred in permitting the state trooper to give his opinion and conclusion that "if the car had left the road, that it would have made marks on the shoulder," or words to that effect, as the record will show; that the Court erred in permitting the counsel for the defendant to interrogate the plaintiff as to the fact he had been drinking, and the Court erred in permitting the Virginia State Trooper Barefoot to testify that the plaintiff had the odor of alcohol on his breath, page 133 } there being no other evidence of intoxication; that the Court erred in refusing Instruction A as submitted for the grounds stated at that time, and that the Court erred in granting Instruction No. 14 dealing with the question of intoxication, and for the reasons previously stated.

The Court: Do you wish to argue the motion, Mr. Wornom?

Mr. Wornom: Yes, Your Honor, I would like to have a date set for that.

The Court: We will continue it until the first Tuesday in February and I will docket the motion and take it up on the first day of the term. I will reset it at that time should counsel desire.

Court is adjourned for the day.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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