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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6854

In the
Supreme Court of Appeals of Virginia
at Richmond

HENRY HOWARD POWELL

v.

W. N. NICHOLS, ADMINISTRATOR, ETC.

FROM THE CIRCUIT COURT OF CHARLOTTE 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. 6854

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 4th day of December, 1967.

HENRY HOWARD POWELL, Plaintiff in error,

against

W. N. NICHOLS, ADMINISTRATOR OF THE ESTATE OF G. W. NICHOLS, DECEASED, Defendant in error.

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(31) From the Circuit Court of Charlotte County
George F. Abbitt, Jr., Judge

Upon the petition of Henry Howard Powell a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Charlotte County on the 20th day of April, 1967, in a certain motion for judgment then therein depending, wherein W. N. Nichols, Administrator, etc., was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $25,000, with condition as the law directs.

RECORD

* * * * *

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* * * * *

GEORGE F. ABBITT, JR., JUDGE
Fifth Judicial Circuit
Appomattox, Virginia

March 29, 1967

Honorable R. H. Pettus
Attorney at Law
Keysville, Virginia 23947

Honorable R. Page Morton
Attorney at Law
Charlotte Court House, Virginia 23923

Honorable Frank M. Slayton
Attorney at Law
South Boston, Virginia

Gentlemen:

Re: W. N. Nichols, Adm.
vs.
Henry Howard Powell

The above styled case was heard before a jury which rendered a verdict in favor of the Plaintiff in the sum of $20,000. The matter is now before me on a motion by the Defendant that the verdict be set aside as being contrary to the law and the evidence and for the further reason that the verdict is accessive and also for the admission of certain evidence which will be pointed out later in this opinion and also for the granting of certain instructions requested by the plaintiff.

The facts are not complicated and therefore I will only recite those directly involved or raised by the defendant's motion to set the verdict aside.

The case grew out of an accident and *collission* between the decedent George W. Nichols who was driving a 1951 Chevro-

let and a 1966 Ford driven by Henry Howard Powell. Nichols was killed as a result of the accident. The Trooper, C. R. Wilmore, who investigated the accident, testified that Nichols had been driving in an Eastern direction along highway 647 and approached highway 746 (647 ran generally East and West, and 746 ran generally North and South). The Trooper testified that there was a stop sign ten feet west of the edge of the hard surface of 746 which sign faced the traffic using road 647; the Trooper further testified that he found "some gouged places in the highway as if you had taken page 37 } a hammer and chiseled and driven it in and dug up the pavement" pp. 31 trs.; at page 51, trs. the Trooper described the marks as: "some rather severe cuts in the highway, several deep gouges in the highway. They were five feet, ten inches from these cuts here, very, very close together to here in the East edge of the highway."

The Trooper p. 25 and 26, trs. testified that the skid marks made by the Powell car which was heading South on road #746 began at a point where passing was permitted, where passing "just became permissible" (there had been a solid center line prohibiting passing of vehicles up to this point). The Powell car left 185 feet of skid marks from its point of beginning, as set forth above, to the point of gouged marks in the road, p. 23 trs.

Trooper Wilmore further testified from his observation, the gouged marks were about 90 feet from the stop sign. (this was an estimate, however) When the Trooper returned to the scene of the accident on the morning of the second day of the trial, he measured the distance from the "drop marks" p. 152 trs., back to the stop sign as 120 feet. This, of course was by actual measurement by stepping the distance. The trooper testified without uncertainty that he was able to see the same drop marks that he saw on the day of the accident, p. 152 trs. and that it was the same distance that he had *estimated* to be 90 feet, p. 152, trs.

The defendant, by counsel, objected to the trooper being recalled on two grounds: first, that it was not rebuttle evidence, and; second, that the date of the measurement, namely the date of the trial, was too long after the day of the accident.

The case of *Fink* vs. *Gas and Oil Co.* 203 Va. 86 at p. 89 appears to fully answer the first ground of the defendant. There are many other Virginia decisions that go even further than the *Fink* case. I will not labor this opinion with these additional citations. The test appears to be, however, that if the matter has been omitted from the proof in the case that

is vital to a just decision of the case, then the trial court may in its discretion, permit it to be introduced at any
page 38 } stage of the case provided there is no unfair surprise and no undue hardship on the opposing party.

As to the second ground of objection, namely that too much time had elapsed between the date of the accident and the actual measurement by the trooper, the two cases of *Stevens* vs. *Summers* 207 Va. 320 and the case of *Venable* vs. *Stockner* 200 Va. 900 appear to fully answer the defendant's objection. First it is to be noted that the trooper identified the marks from which he measured on the second day of the trial without question as being the marks that he observed and saw on the day of the accident. This, of course, meets the objections made by the defendant, however the *Summers* case held that the trial court properly permitted evidence of skid marks observed and found by a witness on the morning after the accident, although the witness said: "Although he did not know when the marks were made, or who made them, they were the only marks on the highway on the morning after the accident" p. 323 of the *Stevens* decision.

In the *Venable* case at page 905, the court held "A witness may describe tire marks, skid marks, or cut marks which he has observed on the pavement at or near the place of an automobile accident." Even more significant than the statement above quoted at p. 905 in headnote #3 p. 905 of the *Venable* case, the court held that the trial court properly admitted "photograph of the roadway taken three months after the accident". Now this was approved notwithstanding the fact the trooper who examined the pavement shortly after the collision did not see these marks and there was no evidence that they were made by the vehicle involved, but the trooper did admit that they were "somewhat similar". In the pending case, the trooper stated that they were the same marks that he saw on the date of the accident p. 152, trs.

It therefore appears to me that it was proper for the trooper to return to the scene of the accident and give the jury the benefit of an *acurate* measurement rather than merely his estimate which he had previously given. This appears to be a valuable piece of testimony that the jury should have had. The defendant could not be taken by surprise in asmuch as he was present when the accident occurred and knew
page 39 } all of the information furnished by the trooper when he was recalled to the stand.

The defendant also takes the position that the verdict should be set aside because the plaintiff was guilty of contributory negligence as a matter of law.

The evidence and circumstances responsive to this point of the defendant's motion is as follows: The stop sign was ten feet from the western edge of highway 746; the decedent was traveling east on highway 746 planning to enter highway 747; the defendant was traveling south on highway 746; the trooper testified that in his opinion, the decedent could see at a point from the stop sign north a distance as much as 500 feet (this being so, of course, the defendant could have seen the decedent the same distance); Mr. J. Walter Jones, the surveyor called by the defendant when asked by the defendant's attorney, p. 127, trs. if he was able to measure the line of sight from the *stop sign* up state route 746 in the direction of Pheonix, gave this answer: "The sight distance is 742 feet from here back up this was to where you could see this Ford car approaching"; 128, trs; both vehicles were heavily damaged: the defendant testified that the speed of the decedent, when he, the defendant first saw the decedent, was "somewhere about 5 to 10 miles per hour" p. 163, trs; the defendant's testimony as to the position of the decedent when he, the defendant, first saw the decedent is set forth on page 171 and 172 of the transcript of the record. In his testimony he states that the decedent was "entering the highway" when he first saw the decedent. He further states: "When I first saw him (the decedent) he was coming out in the road and coming kind up on my side. . . ". He further stated: "He, (the decedent) was between the stop sign and road". He, the defendant, further testified that he did not know if the decedent had stopped at the stop sign or not.

The decedent, in this case, is presumed to have exercised ordinary care for his own safety, as he approached the intersection, looked out for vehicles approaching, and did only what an ordinarily prudent man would have done under the circumstances prevailing. See *Unger* vs. *Rackley,* page 40 } 205 Va. 520 at 527 where the exact language as I have just set forth is used in the second paragraph on page 527.

Further the collision having *takin* place on the east side, that is, in the decedents half of highway 746 at a point, 120 feet North of the stop sign involved in this case, places upon the defendant the burden of explaining his presence in the decedents lane. The physical facts coupled with the testimony of one of the plaintiff's witnesses that the defendant's car was traveling at a high rate of speed at a point only one-half a mile from the accident, is sufficient to *develope* a jury question.

It is not to be overlooked that our court of appeals has

consistantly held that the burden is on the defendant to prove by a preponderance of the evidence, the fact of negligence on the part of a plaintiff and also that such negligence was in fact a direct, efficient, contributing and proximate cause of the resulting accident. Certainly in this case, the defendant did no more than to make a jury question of such. A case, although not precisely parallel in all of its facts, but one that does have sufficient similarity to be of help, is the case of *Irvan* vs. *Oil Co.* 205 Va. 1.

It was reasonable for the jury to conclude, based on the testimony, the circumstances and the presumptions prevailing in this case, that the decedent stopped at the stop sign and seeing no approaching traffic, concluded that he had time to properly enter the intersection involved.

Another case that throws some light upon the problem now being considered, is that of *Newman* vs. *Dalton,* 206 Va. 119.

Justice Gordon, delivering the opinion for the court in the *Newman* case, assembles and digests and distinguishes several of the "intersection cases" that are somewhat similar to the one now before me. See his digest of cases set out on page 124 of the *Newman* decision. It is a fair conclusion, I am satisfied, to say that generally our court of Ap-
page 41 } peals has held that where a person enters a main road from the side thereof when traffic is approaching within two or three hundred feet, such is probably negligence *per se;* on the other hand, however from a reading of the cases digested on page 124 of the *Newman* decision, it appears that our court has generally left the question of negligence and contributory negligence to the jury where the driver has entered a main highway from the side thereof, and the approaching traffic was either not in sight when such drivers stopped at a proper place or if the approaching traffic was as much as 500 feet or more distance from the intersection involved.

In the case before me, it is obvious that the defendant was traveling at a high rate of speed, that the jury concluded that the defendant was not in sight when the decedent stopped at the stop sign as he was presumed to have done.

The Virginia decisions hold that a person in the position of the decedent only has to stop at the stop sign. He does not have to stop again between the stop sign and the edge of the highway and further that he is required to yield the right of way only to those cars "lawfully approaching so near the intersection that he cannot safely enter it". See *Irvan* vs. *Oil Co.* 205 Va. 1 at p. 6 and also *Temple* vs. *Ellington* 177 Va. 134 at p. 142.

See the case of *Umberger* vs. *Koop* 194 Va. 128 at p. 130 holding that a driver only had to stop once, namely at the stop sign. And at page 131 the court observed: "Mrs. Koop was not required to make two stops before entering the intersection, unless traffic conditions were such that she could not proceed in safety."

See also the case of *Hall Admx.* vs. *Miles* 197 Va. 644 at p. 650, our court used this language: "Nor do the statutes require a car to be brought to a stop within the boundary lines of a public highway before entering upon this hard surface. The words 'public highway' means the whole surface, not merely the hard surface, or only the main traveled part of the highway."

page 42 } The two last above cited cases appear to cover the objections made by the defendant to the instructions given by the court to which he objected.

Instruction number C clearly defined to the jury the full duty on the part of the decedent. The decedent was presumed to have stopped at the stop sign; there was no evidence to contradict or overcome this presumption. Therefore the instruction correctly defined the decedents duty for the jury.

It appears to me that the jury was instructed in such a manner as to fully set out the duties of the two parties involved in this accident.

As a matter of fact, the defendant was given a more favorable position under the instructions than that to which he was entitled. The defendant requested and inasmuch as the plaintiffs made no objection, an instruction on sudden emergency was given. There was no evidence in this case to justify such instruction in favor of the defendant, however, the defendant cannot complain of an instruction more favorable to his position than that to which he was entitled. Our court has so held recently.

The last point that was seriously presented by the defendant in his motion is that the verdict is excessive. See p. 215 of trs. where the attorney for the defendant urged; "In all seriousness . . . I also ask the court to set aside the jury verdict as being grossly excessive. . .".

Our court has, beyond question, set at rest this question of law. See the case of *Matthews* vs. *Hicks* 197 Va. 112 at p. 119: "Subject *only* to the statutory maximum, the amount of damages is solely within the discretion of the jury and *may not be* set aside because inadequate or excessive, unless it is clearly shown that the verdict was a result of passion, prejudice, or corruption." For further authority, if such be needed, see the case of *Harris* vs. *Roger* 165 Va. 461 where only the

sum of $750.00 was allowed for the death of an adult. Our court in using language equally as strong as that of the *Matthews* case stated: "The Virginia statute contains *no words of limitations as to amount.*" And further on in the opinion, the court states: "The courts are clothed with no authority to *disturbe* their (the jury) findings but are inhibited from so doing." And further the court
page 43 } observed: ". . . (the award) may be exemplary, punitive, or given as solatium".

And concluding the opinion, the court states: "The language of the statute is plain, and this court must follow it."

I assume that the last three cases amply resolve the question of the *quantum* of the verdict.

I therefore am of the opinion that the motion to set aside the verdict of the jury should be overruled.

An order will be prepared sustaining the jury's verdict and entering judgment for the plaintiff in accordance with the verdict of the jury.

However I would like to confer with you gentlemen inasmuch as the jury did not designate to whom the sum should be paid. Therefore it will be necessary for the court to make this determination.

May I take this opportunity to express my appreciation to all of you gentlemen for the help you gave me in considering this matter.

Sincerely yours,

GEORGE ABBITT, JR., Judge

cc: Mr. Edwin Hoy
Clerk
Charlotte Court House, Virginia 23923

Filed 3/31/67. EDWIN H. HOY, Clerk

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* * * * *

APPENDIX TO OPINION IN NICHOLS, ADM. VS. POWELL

Additional authorities in support of position and reasons for conclusion reached beginning with last paragraph on page 4: See *Hall, Admx.* vs. *Miles* 197 Va. 644 at p. 650 the court

observes that, if the party is shown to have failed to stop as required by the Code Section, the evidence must disclose that: "The failure of defendant to stop her car after she started to back was the proximate cause of the accident". In the pending case, even if it be assumed, (which it is not to be so done) that the decedent did not stop under the facts in this case, the evidence does not disclose that such failure would have in any way whatever contributed to the cause of the accident. Also in the *Hall* case the court instructed the jury, p. 648, Instruction P.-3, the trial court told the jury; "It was the duty of the defendant to keep a reasonable look-out while backing her vehicle out of the driveway into the street". Here, the court, in the *Hall* case, emphasizes that the important fact and duty of such a party, is that of "a reasonable look-out". The jury in the pending case was fully and properly so instructed.

Also, in the case of *Umberger* vs. *Koop,* 194 Va. 123, the court of appeals took the position that even though the defendant was guilty of negligence in failing to see the headlights of the truck until immediately before the impact: "Such failure was not necessarily a proximate cause of the collision. Whether such failure was a proximate cause of the collision was a jury question and was, by proper instructions submitted to them. Mrs. Koop (the driver of the car that was entering the road in the *Umberger* case) was killed in the accident and it is *not known* whether she saw the headlights of the approaching truck. It was her duty to see them. She may have seen them and decided that she had ample time in which to cross the west-bound traffic lane in safety". This reasoning applied by the court in the *Umberger* case applies with equal force to the pending case. The *Umberger* decision at page 130 quoting from the case of *Temple* vs. *Ellington* 177 Va. 134 uses the following language: "When a driver on a private road approaches an intersection, stops, and looks in both directions for approaching traffic in the public highway, acting as a reasonably prudent person, exercising due care would act, he is not negligent as a matter of page 45 } law if he attempts to enter the intersection under the belief that he has time and opportunity to cross safely." It appears that under facts and circumstances similar to those under consideration, whether the decedent exercised reasonable care is the question. This was a jury question, the cases all so hold.

Further authority in support of the conclusions set forth in the second paragraph on page 7 of the court's letter, see *Burks* vs. *Webb, admx.* 199 Va. 296 at 303: "There is no

direct testimony tending to prove that the decedent looked, or if he looked, whether he saw the defendant's automobile approaching from his left. In the absence of evidence to the contrary, he is presumed to have exercised ordinary care for his own safety." See also page 307 to the same effect for further authority in support of this position.

The legal effect and force of a presumption is set forth with clarity in 29 Am. Juri. (2d) p. 200 section 165 evidence: "A rebuttable presumption of law is a rule of the substantive law declaring that for procedural purposes a certain *prima facie* probative force will and *shall, until evidence sufficient to prove to the contrary is introduced,* be provisionally attached to a given state of facts. The existance of such a presumption is generally held to impose on the party against whom it is invoked the duty to offer evidence as to the facts, *and in absence of such evidence, the trier of the facts is compelled to reach a conclusion in accordance with such presumption*". (emphasis added)

Examples illustrating the correctness of the above pronouncement of law is found in the Virginia cases holding that "every unlawful homicide is presumed by law to be murder in the second degree." When evidence showing an unlawful homicide is presented, second degree murder is proven and stands unless the Commonwealth *by evidence* elevated the charge to first degree murder or the accused *by evidence* introduces evidence reducing the presumption. In other words, the presumption prevails and stands until and unless evidence is introduced receding the force and effect of the presumption.

Also another incidence that illustrated the weight and effect of a presumption is the presumption under page 46 } Virginia law that an accused is presumed to be innocent. Of course it is elementary that this presumption has the force of evidence. See vol. 1 Va. Practice p. 18 section 3.04: there it is called to our attention that the instruction on presumption of the innocence "Must conclude with the phrase 'until his guilt is established beyond a reasonable doubt' ". In other words Virginia law, in effect, holds that the presumption prevails and controls "until *evidence* overcomes the presumption." Another instance of the strength and effect of the presumption is that of sanity on behalf of all persons. Even in criminal cases, the accused must prove, *by evidence,* his lack of sanity *to the satisfaction of the jury.* In other words, a presumption stands as a fact in a particular case until circumstances or evidence dissolves such presumption. Vol 10 Michie's Juri. Va. & W. Va. p. 216

section 20, evidence, note 6 states the law as follows: "And where there is no evidence on a given point, a peremptory instruction eliminating that question from the consideration of the jury is proper". In addition to the case cited by Michie's in support of this position, see the case of *Gwaltney* vs. *Reed* 196 Va. 505 at 506 where the court in headnote 1 held that where there was no evidence to support a particular phase of damages alleged by the plaintiff, that not only should no instruction be given on this phase of the case, but in fact: "the latter instruction (The latter instruction was the one that was refused by the court and would have told the jury "the jury should not consider any loss of earnings because there was no evidence from which to *assertain* such loss) should have been given and the former refused". In other words the court took the view that it was not only proper not to instruct on a point not in controversy in the case but that the court should affirmatively have told the jury that such a point was not in controversy and that they could limit their deliberations to those facets of the case that were controversial.

The case of *Irvin* vs. *Oil Co.* 205 Va. 1 at p. 5-6 illustrate also the fact that where there is no evidence producing a factual controversy in a particular case an instruction on a particular duty not presented by the evidence, should not be given. At page 5 the court held it was improper for the trial court to have given an instruction on the duty of the plaintiff to keep his car "under proper control" when there was no evidence showing that there had been no improper control. On page 6 the court reached the same conclusion in reference to the instruction given by the trial court that it page 47 } was the duty of the truck driver to operate his truck "at a careful and prudent speed". The *appelate* court held this to be error inasmuch as "there was no evidence that the vehicle was being operated other than at a careful and prudent rate of speed". Also its comment on page 6 as to instruction number 3 was objectionable for the same reason as to the other parties vehicle not being kept "under proper control" when there was no evidence of such lack of proper control.

The cases abound in decisions to the same effect. Namely, that if there is no evidence contraverting a fact or a presumption, then it is not necessary that instruction be given on such.

In support of the observation made in the fourth paragraph on page 7 of the opinion letter, see the case of *Irvan* vs. *Oil Co.* 205 Va. 1 at p. 5. There the facts are substantially

similar to the one under consideration, where the court held that the defendant driver was not confronted with a sudden emergency or if so, what brought it about.

G. F. A., JR.

Filed 3/31/67. EDWIN H. HOY, Clerk

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* * * * *

This cause having been duly docketed and set for trial on December 30, 1966, came on that day to be heard by the jury, and it appearing to the Court that all pleadings were duly filed and that the parties hereto were ready for trial, the Court proceeded to impanel the jury according to law, and the following jurors were selected to determine the issues between the parties hereto, namely: Leonard Cauthorne, W. V. Purcell, Jr., Marshall A. Tucker, Henry E. Ferrell, J. Russell Harvey, George W. Brown and Frank B. Rutledge.

The jury, having heard the evidence of witnesses, arguments of counsel and instructions of the Court, retired to the jury room for deliberation, and after a period of time returned to the Courtroom with the following verdict, to-wit:

"We, the jury, upon the issue joined find for the plaintiff, W. N. Nichols, Administrator of the Estate of G. W. Nichols, deceased, and fix the damages at $20,000.00, and we direct that the said sum be awarded to the beneficiaries."

Whereupon the Court inquired of the jury if this were their verdict, and each juror indicated that it was. The Court inquired of counsel whether they had any motion to make, and Frank M. Slayton, Esquire, indicated to the Court that he wished to make a motion that the verdict be set aside, it being contrary to law and evidence. He further asked that he be given an unspecified period of time to have the evidence typed so that he could argue his motion before the Court. Whereupon, the Court granted him some time in which to do this.

The defendant then filed with the Court a brief and moved therein that the jury verdict be set aside, it being contrary to the law and the evidence and to enter final judgment for the defendant.

The Court, on the 29th day of March, 1967, overruled the motion of the defendant, and notified counsel by letter of even date, directing that an order be prepared sustaining the jury's verdict; and it appearing to the Court proper to do so, the Court doth ADJUDGE, ORDER and DECREE that the plaintiff, W. N. Nichols, Administrator of the page 49 } Estate of G. W. Nichols, deceased, recover of the defendant, Henry Howard Powell, the sum of TWENTY THOUSAND DOLLARS ($20,000.00) with interest from December 30, 1966, until paid, and the costs expended of $30.50, and the Clerk is directed to docket this judgment granted herein according to law; and the Court doth further ADJUDGE, ORDER and DECREE that the Administrator of the Estate of G. W. Nichols, deceased, do divide the said money one-third to the widow, and the remaining two-thirds to the children of the said G. W. Nichols, deceased, since no division was made by the jury.

And it being intimated that a petition for appeal from the adverse judgment for the defendant will be filed by him in the Supreme Court of Appeals, it is further ordered and directed that said judgment shall be suspended for a period of sixty days from the date of this order upon proper bond being given by the defendant or someone for him with adequate surety in the amount of $20,500.00 to be executed before the Clerk of this Court within 20 days from the date hereof and conditioned according to law.

ENTER: This 20 day of April, 1967.

GEORGE ABBITT, JR., Judge

WE ASK FOR THIS:

R. H. PETTUS
R. PAGE MORTON
Counsel for Plaintiff

SEEN AND OBJECTED AND EXCEPTED TO:

FRANK M. SLAYTON
Counsel for Defendant

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO THE HONORABLE EDWIN H. HOY, CLERK OF THE CIRCUIT COURT OF CHARLOTTE COUNTY:

Notice is hereby given, in accordance with Rule 5:1, Section 4 of the Rules of the Supreme Court of Appeals of Virginia, relating to appellate proceedings, of the intention of Henry Howard Powell to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment heretofore entered against him on April 20, 1967, and the assignments of error are as follows:

1. The verdict of the jury is contrary to the law and the evidence and is without evidence to support it.

2. The Court erred in failing to grant the motion of the defendant to strike the plaintiff's evidence at the conclusion of the plaintiff's evidence.

3. The Court erred in failing to grant the motion of the defendant to strike the evidence of the plaintiff at the conclusion of all of the evidence.

4. The Court erred in admitting into evidence the State Trooper's testimony as to the precise location of the accident and the entrance the plaintiff's decedent's vehicle made into the highway since the Trooper based his testimony upon observations made over five months after the accident and hence was necessarily based upon conjecture and surmise.

5. The Court further erred in allowing the Trooper to be recalled to testify as to the alleged location of the accident after the plaintiff had rested his case and defendant had moved to strike the plaintiff's evidence and in spite of the fact that the Trooper's testimony was not rebuttable evidence.

6. The Court erred in granting Instruction Nos. 3 and 11 over the objections of the defendant.

7. The Court made other errors during the

page 51 } course of the trial and conferences held by the Court and counsel during the course of the trial, over the objection of counsel for the defendant, as will ap-

pear from the transcription of the evidence and incidents of trial.

Respectfully submitted,

FRANK M. SLAYTON
Counsel for Defendant

EASLEY, VAUGHAN AND SLAYTON
Attorneys at Law
South Boston, Virginia

* * * * *

Filed 5/27/67.

Teste: EDWIN H. HOY, Clerk

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page 2 }

* * * * *

TROOPER C. R. WILMORE, a witness for the plaintiff, testifies as follows:

DIRECT EXAMINATION

By Mr. Pettus:
Q. You are Trooper C. R. Wilmore?
A. Yes, sir.

* * * * *

page 3 } * * * this accident is one in which Mr. Powell is involved as well as Mr. Nickols?
A. Yes.
Q. Will you read your notes or what your investigation revealed?
A. On this morning at 8:45 A.M. I was called to an automobile accident on State Route 746 and the location they gave me was at Fears Corner. At the time I was working on another accident near Wylliesburg and I did not arrive at the scene of this one until about 10:00 O'Clock.

Trooper C. R. Wilmore

I found 2 vehicles involved, a '51 Chevrolet pickup and '66 Ford 2-door sedan. The '66 Ford I found to be operated by Henry Howard Powell of Clover. The damage to this vehicle was to the entire front, windshield was broken. I believe it was a total loss. I carried it on my report as a total loss. The damage to the '51 Chevrolet whom I found to be operated by George Washington Nickols was damage to the entire front and windshield was broken and I estimated this vehicle to be a total loss.

Of course, when I arrived all of the occupants of the vehicles had been taken to the hospital by ambulance. They were not at the scene.

page 4 } Q. What is the width of the road at this location?

A. When this accident occurred the surface was dry and, of course, it was a clear hot summer day. The surfact was blacktop; of course, it was daylight. I measured the road to be 24 feet 9 inches.

I found the '66 Ford sedan in the left ditch. The '51 Chevrolet was partly in the northbound traffic lane headed in a southerly direction.

* * * * *

page 8 }

* * * * *

The Court: Can you develop just enough so we won't have to go over all of this for the jury to indicate the accuracy of the plat?

By The Court:

Q. You said, Mr. Wilmore, 84 feet was from the point you found glass, cuts and gouges to what point? Can you pinpoint that specifically where this 84 feet started as you measured?

A. I don't think you could pinpoint it to the inch. I measured right here where you would normally stop, where the front of your vehicle would normally stop before

page 9 } entering this highway.

Q. Would you put an X with the pencil showing the point? I suggest you not use the words "Normally exit from the road." Show the point from which you measured

and that would be of some help to the jury in using your diagram.

Mr. Slayton: We will object to that figure. It's pure speculation on his part. He doesn't know how the vehicle entered the highway. That's the basis of the measurement. That would show the point of the debris from some point in the intersection.

The Court: That's why I told him not to mention the place of normal outlet.

Mr. Slayton: The effect is to give the plaintiff something to argue before the jury that is tantamount to saying *the* the Nickols truck had gone 84 feet from this intersection up the highway when it was struck headon by the Powell car coming in the other direction. If the Trooper can't tie this 84 feet to something he could be definite in his testimony about it doesn't serve any useful purpose at all. It's entirely to our prejudice to have the measurement in because it doesn't mean anything.

page 10 } By The Court:

Q. Aren't you going to measure from some point at the intersection?

A. No, sir.

Q. Mr. Wilmore, can you measure from the point you started to the stop sign?

A. I don't understand.

Q. From the point you started from there to the stop sign from the point of the pencil mark?

A. I didn't measure from here to the stop sign. I don't know what that is. I measured at a point between the stop sign and the north edge of the outlet road or side road. This distance from the stop sign was from the edge of the pavement over to the 10 feet I talked about.

By Mr. Slayton:

Q. Let me ask you this: How wide is this road here?

A. I don't know.

Mr. Slayton: The width of the road and the angle of entry would decidedly effect how a vehicle entered the road. In other words, if this road is this much wider, if this corner is not as sharp as shown on this drawing, the page 11 } vehicle if it came this way could have come in a sharper angle than that which you measured?

Trooper C. R. Wilmore

Witness:
A. I think so.

By The Court:
Q. Is there any way you can give us the distance from the debris to the stop sign?
A. No, sir.
Q. Could you measure it today if you were to go out there?

Mr. Slayton: There is no debris there.

Witness:
A. I don't believe I could to say this is exact number of feet from where they collided to the stop sign. There is nothing there now.

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page 13 }

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By The Court:
Q. How far, Mr. Wilmore, is the point you started to measure from either the north or south edge of the outlet road? I assume that's 647. Is that 647, Trooper?
page 14 } A. Yes.
Q. Where was your beginning point in relation to the north and south edge of 647? If you can give us a known beginning point without reference to the normal entry into 647?
A. I don't have it written in my notes how far it was from the edge of here over to here either.

By Mr. Pettus:
Q. Is your beginning point at the edge of the pavement?
A. Yes, sir, right at the edge of the pavement.
Q. Your 84 feet was measured from the edge of the pavement at the entry—
A. With the front bumper right at the edge of the southbound lane.

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Trooper C. R. Wilmore

page 15 }

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By Mr. Slayton:

Q. How close to that dark spot on which the stop sign is put?

A. I don't know.

Q. You don't know how wide this is either?

A. No, sir.

Q. You measured an arc rather than straight line for 84 feet?

A. Yes, sir.

By The Court:

Q. If you could establish your beginning point it would be admissible. Is there any way you could establish your beginning point?

A. No, sir, I don't think I can actually say anymore about it to be sure than what I have already said. This is the way I measured it and—

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page 21 }

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(Whereupon, the jury returned to the courtroom, and the following proceedings were had in their presence:)

By Mr. Pettus:

page 22 } Q. Mr. Wilmore, did you determine where there was debris on the highway and drop marks or broken glass?

A. When I arrived, yes, sir, there was some broken glass. There was a lot of dirt. There was several cut places in the highway and this was 5 feet and 10 inches from the east shoulder.

Q. And when you say east shoulder in whose lane of travel was that?

A. That would have been in the Nickols vehicle's lane of travel.

Q. How far was the Nickols vehicle from its right shoulder of that road—of the drop marks?

Mr. Vaughan: He just said 5 feet 10 inches. I object to that.

By Mr. Pettus:

Q. What does the 5 feet 10 inches represent?

A. The 5 feet 10 inches represents the distance from where I found the dirt, the broken glass and cut places in the highway to the east shoulder.

Q. Will you turn to the jury and explain to the jury what you mean by east shoulder?

A. Of course, this road runs at the point of the

page 23 } accident north and south; and I found this glass, dust and several cuts in the highway in the Nickols vehicle lane of travel 5 feet 10 inches from the east shoulder of the road.

Q. Then in whose lane of travel was that?

A. In the Nickols vehicle's lane of travel.

Q. Were you able to measure back from that debris and dust any skid marks?

A. Yes, sir.

Q. What were those skid marks?

A. As you look tracing the skid marks up to the point where I found the glass and dirt there was 185 feet of skid marks left by the left side of the Powell vehicle and 96 feet of skid marks by the right side.

Q. Then you are telling the jury that the Powell vehicle—from those marks were you able to trace it to the Powell vehicle?

A. Yes, sir.

Q. After that point of drop marks and debris, how far did the Powell vehicle travel?

A. 33 feet.

Q. In which direction?

A. In a southerly direction.

page 24 } Q. In the same direction in which he was travelling?

A. Yes.

Q. Did he veer any after that point?

A. From where I found the glass and dirt it veered to the left into the dirt probably south easterly, somewhat southerly direction these 33 feet.

Q. How far was the Nickols vehicle then from the point where you found the debris and drop marks?

A. 45 feet.

Trooper C. R. Wilmore

Q. Which direction was it then facing?
A. It was facing a south easterly direction too.
Q. Could you determine from your investigation which direction the Nickols vehicle was headed at the time of the impact?
A. It was headed north.
Q. How could you determine that?
A. It had severe damage to the front of it. Of course, the Powell vehicle had severe damage to its front also.
Q. But the Powell vehicle was headed south and the Nickols vehicle was also headed south after the accident?
A. Yes, sir.
page 25 } Q. Was the Nickols vehicle turned around after the accident?
A. Yes, sir, it was turned around and headed approximately in the same direction as the Powell vehicle.
Q. And that was as you testified 45 feet from where you found the drop marks?
A. Yes, sir.
Q. Again now I ask you in which lane of travel was all of this debris and drop marks, in whose lane was it?
A. Mr. Nickols lane of travel.
Q. Mr. Nickols was driving a '51 pickup truck?
A. Yes, sir.
Q. And Mr. Nickols is the deceased?
A. Yes, sir.
Q. Now, was passing permitted in the direction in which Mr. Nickols was traveling?
A. No, sir.
Q. At the point where the skid marks began on the Powell car was passing permitted for Powell?
A. I believe his marks started, the left side of his car, right at the end of a double line which would make it permissible for him to pass.
page 26 } Q. In other words, his skid marks began at a point where the passing just became permissible?
A. Yes.

By The Court:
Q. The skid marks of which vehicle?
A. The Powell vehicle.

By Mr. Pettus:
Q. You say the right mark of the Powell vehicle was 96

feet and the left was 185 feet. When you say skid marks, describe to the jury what they are and what causes those marks?

A. Of course, these were marks made by tires where you apply your brakes very hard. When I first could trace these marks the 185 feet were light for a short distance and then all marks on both sides of the car became very heavy and black.

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page 27 }

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By Mr. Pettus:

Q. At the point of the intersection of 746 and 647 was there a stop sign?

page 28 } A. Yes, sir.

Q. How far was the stop sign from the pavement?

A. 10 feet.

Q. Would traffic going north turn to the left of the stop sign or right of the stop sign?

A. Left. Traffic going south would turn to the right of the stop sign.

Q. Was there any debris or any indication of skid marks in Powell's lane of travel or the right lane of travel?

A. His marks began with the left side of his car. They began over in his traffic lane for a short distance and then continued over to the left lane.

Q. I am talking about at the point of drop marks and debris and so forth is there anything in his lane whatsoever?

A. There were no marks whatsoever after the debris, cut places and so forth in the highway by either vehicle.

Q. No, at the point where you found the drop marks and debris and so forth was there anything in the right hand lane at that point in Mr. Powell's lane?

A. No, sir.

Q. Everything was in Nickols' lane?

page 29 } A. Yes, sir.

Q. Could you determine from those marks

whether they were straight or whether they veered to the right or left or which of the Powell vehicle?

A. From the time you could first trace them they started as I already stated in his traffic lane and continued slightly at first to the left and continued on over then further into the Nickols lane of traffic in a straight. The skid marks weren't an arc or anything. They were straight as if all wheels on the vehicle were sliding.

Q. Mr. Wilmore, how far could Mr. Powell or one see traveling in a southern direction from the intersection? How far could Mr. Powell or one traveling in a southerly direction as Mr. Powell see?

A. I would say 500 feet.

Q. See the intersection from 500 feet back. I show you a picture which we will describe as Plaintiff's Exhibit No. 2. Is this a picture of the scene showing the skid marks?

A. Yes.

Q. Could you come to the jury and explain to the jury the skid marks and in whose lane of travel these skid marks are?

page 30 } A. This is Plaintiff's Exhibit No. 2. This represents the skid marks I testified to as 185 feet. This is the mark here I testified to as being 96 feet.

Q. Whose marks are those?

A. These are marks made by the Powell vehicle.

Q. In whose lane of travel is this on this side?

A. This is Nickols' lane of travel here.

Q. This is the Powell vehicle's lane of travel?

A. Yes, sir.

Q. Which part of the Nickols vehicle is the damage on, the front or side?

A. The entire front has severe damage to it. The left front is more severely damaged than the right front. The left front fender and bumper and pieces of metal have been driven back over the left front tire.

Q. I show you a picture designated as Plaintiff's Exhibit No. 3. Does that depict the scene of the accident and will you explain the picture to the jury?

A. Yes, this is more skid marks. This is the left side skid mark I talked about being 185 feet. This shows the right one being 96 feet.

Q. Will you show the jury where the debris or

page 31 } drop marks or broken glass was found in the highway?

Trooper C. R. Wilmore

A. At the end of these skid marks.

Q. In whose lane of travel was that? You say drop marks. Explain to the jury what drop marks might mean?

A. At the end of these marks was glass in the highway, a considerable amount of dirt and dust and there were some gouged places in the highway as if you had taken a hammer and chisel and driven it in and dug up the pavement.

Q. Is that what you refer to as drop marks?

A. Yes, sir.

* * * * *

page 32 } Q. Where would the Powell car be with reference to those skid marks? Where would the left front of the Powell car be with those skid marks?

A. It would be over in Nickols' lane of travel.

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By Mr. Pettus:

Q. If the Powell vehicle made these skid marks how far were these skid marks from the edge of the highway, left skid mark from the left edge of the highway?

A. I don't know.

Q. Are you able to determine that from the picture? Did you measure it?

A. No, sir, I didn't measure it.

Q. Did you measure how far the right skid mark was from the center line of the highway at that position?

page 33 } A. No, sir.

By Juror Ferrell:

Q. Is this the highway right here Mr. Nickols' pickup come out of?

A. Yes, sir.

Q. How far is it from these skid marks to the intersection, approximately?

By The Court:

Q. Can you give that to any definite point, to the point of the front of the stop sign or any other known point there.

Mr. Pettus: The plaintiff's attorney requests the Trooper be allowed to answer the juror's question to the best of his ability.

The Court: If he can give some specific point or approximately to a definite point.

Witness:

A. Approximately 90 feet from these skid marks back to this stop sign.

By Mr. Pettus:

Q. How far was the Powell vehicle at the time you saw it from the end of these skid marks?

page 34

A. 33 feet.

Q. And how far was the Nickols vehicle at the time you saw it from the end of these skid marks?

A. 45 feet.

Q. And the Nickols vehicle had been headed north previously. In which direction was it found at the time you saw it?

A. It was headed in a southerly direction right in this direction but going south.

Mr. Pettus: That's Plantiff's Exhibit No. 3.

The Court: I don't believe the record is clear from what that 90 feet represents?

Witness:

I have talked about the debris here and cut places in the road and glass. I estimate it to be 90 feet from this dust and so forth back to the stop sign.

By Mr. Pettus:

Q. I show you a picture we will call Exhibit No. 4. Does this picture likewise depict the scene of the accident showing the skid marks?

A. Yes, this is a view looking south showing the marks of the Powell vehicle and showing the intersection.

page 35

Q. I show you Plaintiff's Exhibit No. 5. Does this depict likewise the scene of the accident?

A. Yes, sir, it's another picture looking south showing the intersection here and skid marks by the Powell vehicle.

Q. I now will show you Plaintiff's Exhibit No. 6. Will you explain to the jury what that shows?

A. This is a picture looking north showing 746 which runs from north to south and this shows the intersection of 746 and 647 over here. This is a picture looking back north.

Trooper C. R. Wilmore

Q. Would that be the way which Mr. Nickols' vehicle would be traveling from the evidence?

A. Yes, sir.

Q. Point to the jury which way the Powell vehicle would be traveling?

A. Powell is, of course, traveling south.

Q. I show you picture Exhibit No. 7. Will you explain to the jury what that is?

A. This is a picture of Mr. Nickols' pickup truck showing damage to it.

Q. Plaintiff's Exhibit No. 8, will you explain to
page 36 } the jury what that shows?

A. This is a picture of Mr. Powell's '66 Ford showing the damage to it.

Q. I show you Plaintiff's Exhibit No. 9. Will you explain to the jury what that picture shows? I would like for them all to see that?

A. This picture shows the approach—This is State Route 647 running back this way. This road over here you see is 746, the one we talk about running north and south. This shows the approach to that intersection, the intersection of 647 and 746.

Q. Which way would the Nickols vehicle be traveling?

A. He would be traveling toward the stop sign.

Q. And that stop sign you say is 10 feet from the side of the pavement?

A. Yes, sir.

Q. And you told the jury the point of impact was approximately 90 feet from the stop sign up 746 going north.

Q. I believe, Mr. Wilmore, you testified the time of day was approximately 8:45 when you got the call?

A. Yes, sir.

Q. In the morning?

A. Yes, sir, A.M.

page 37 } Q. What was the weather and traffic and highway condition?

A. I believe I already testified the road was dry; the traffic lanes were marked at this point; the surface was blacktop; it was clear and daylight and open country; and it was a very hot July morning.

Q. Was the surface free of loose gravel?

A. Yes, sir.

Mr. Pettus: That's all.

Trooper C. R. Wilmore

CROSS EXAMINATION

By Mr. Slayton:

Q. Your Honor, at this time I have 3 photographs I will introduce by agreement of counsel, photographs which I designate as Exhibit A, B and C for the defendant.

Trooper Wilmore, I hand you a photograph which has been designated as Defendant's Exhibit A and ask you to look at that photograph and the license number of the truck and ask you if that is a photograph of the truck being operated by Mr. Nickols on the day this accident occurred?

A. Yes, it is.

page 38 } Q. Is that a front view of that truck?

A. Yes, sir.

Q. I hand you another photograph taken of the same vehicle and designated as Exhibit B and ask you if that photograph is the left side of the truck?

A. Yes, sir.

Q. I hand you a photograph which has been identified as Exhibit C and ask you if that is a view of the right side of that truck?

A. Yes, sir.

Q. Now, I ask you, please, to refer to your notes and find in there that section of your notes which refers to the damage to the vehicles involved in this and I would like to ask you whether or not you found more extensive damage to the left front of the truck than to the right side of it?

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Q. Trooper, I ask you to refer to your notes to the damage you found to the 2 vehicles involved. I call your attention to the damage you found to the truck first and ask you if you did not find that there was more damage to the left front than the right of the truck?

A. Of course, it was damage to the entire front of the '51 Chevrolet pickup truck. The left front was more *severaly* damaged than the right front.

Q. Now, do your notes reveal what you found with regard to the damage to the automobile?

Trooper C. R. Wilmore

A. The damage to it was more to the left front than it would be to the right front. Of course, the entire front was damaged on it some also.

Q. Now, when Mr. Powell's vehicle began to lay down skid marks for the first time did you find that both of these skid marks were in his proper lane of travel?

A. I first traced the left side of his skid marks in his lane, yes, sir. And the right one started just about on the center line mark.

Q. Now, did you investigate the happening of this accident pretty thoroughly?

page 42 } A. I try to investigate them all pretty thoroughly.

Q. I know that, but I am concerned with this one accident. You investigated it to your own satisfaction, did you not?

A. Yes, sir.

Q. Were you able to find any witnesses to the happening of the accident other than Mr. Powell?

A. No, sir.

Q. Now, from the stop sign back toward Phenix which would be in the direction from which Mr. Powell was traveling how far could the driver of a vehicle see in a northerly direction?

A. I said approximately 500 feet.

Q. Now, if Mr. Nickols had come out of this road as it is contended he did, north would have been the direction in which he was looking?

A. Yes.

Q. Now, did you observe the highway at the point where this accident occurred to attempt to determine whether or not Mr. Powell's vehicle made any skid marks prior to the collision?

A. Yes, sir, I could trace the marks up on his

page 43 } vehicle as I previously testified to 185 feet by the left side and 96 feet by the right.

Q. Did Mr. Nickols pickup truck make any marks before the collision?

A. I could find none whatsoever.

Q. Is it true that the only traffic control indication is the stop sign that would have been facing Mr. Nickols prior to entering 746?

A. Yes, sir.

Q. You testified with regard to these skid marks which were laid down by Mr. Powell's vehicle. You say there was 185

feet by the left side, was that with 2 wheels skidding or one?

A. It would be hard to say. At first when you could first trace the marks for the first 50 feet they were fairly light and then they became very heavy or very dark. At that time I would think all 4 wheels were braking.

Q. You found no physical indication that both of the wheels on the left were braking, did you?

A. If you mean—there wasn't any 4 marks there, if that's what you mean, no, sir.

Q. Now, on the right side you testified that you found 96 feet of marks. Could you tell how many wheels

page 44 } were braking when these marks were made there?

A. No, sir.

Q. You testified earlier that you found broken glass and dirt and that sort of thing. Over how wide an area was this scattered?

A. Of course, there was a little glass in the right traffic lane, but it was over probably a circle 4 feet in diameter, I would say.

Q. So, it's true that some of this debris that you found was in what would have been Mr. Powell's lane of travel?

A. It was a piece of glass or two scattered over there, yes, sir.

By The Court:

Q. For my information, Mr. Wilmore, I believe you said the first 50 feet of the tire marks were light?

A. Yes, sir, by the left side of the car. The ones that were 185 feet long were fairly light for 50 feet.

Q. Was that just one side of the car?

A. Yes, sir, I could trace the left side first; that was the long mark, 185 feet. And the first part of them, about 50 feet, were light.

page 45 } Q. How soon after the first tire marks were made did the one over on the other side start?

A. Of course, on the other side he only had 96 feet. They were fairly heavy all the way.

Q. 96 against 185?

A. Yes, sir.

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Hugh Bryant

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HUGH BRYANT, a witness for the plaintiff, being first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Morton:

Q. Please state your name and occupation?

A. Hugh Bryant, Deputy Sheriff of Charlotte County.

Q. Mr. Bryant, did you receive a call concerning this collision of Mr. Powell and Mr. Nickols on the morning of July 25th?

A. Yes, sir, I did.

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Q. In other words, you called Appomattox and Appomattox called Wilmore and Wilmore called back to Appomattox and Appomattox called you by radio?

A. Yes, sir.

Q. What message did you get about what you

page 54 } should do?

A. Trooper Wilmore asked me to go over and stand by and help with traffic until he could get there.

Q. Did you go?

A. Yes, sir.

Q. Could you tell us approximately the time of day it was, Mr. Bryant?

A. You mean when I received the call?

Q. When you received the call?

A. I would guess approximately around 8:30.

Q. Around 8:30?

A. Yes, sir.

Q. Were you the first officer to arrive at the scene so far as you know?

A. Yes, sir.

Q. No other officer there when you got there anyway?

A. No, sir.
Q. Were the vehicles there when you arrived?
A. Yes, sir.
Q. Was Mr. Nickols there?
A. Yes, sir.

Q. Where was Mr. Nickols?
page 55 } A. He was laying in the road back of the pickup.

Q. Which direction was the pickup headed?
A. The pickup was headed southeast, I imagine, kind of diagonally across the road. Almost back in the same direction the car was.
Q. Where was Mr. Nickols in relation to the truck?
A. Right behind it.
Q. Was he standing or lying or what?
A. He was lying on the road.
Q. Lying on the road?
A. Yes, sir.
Q. And where was the car? Where was Powell's car in relation to the truck?
A. Well, it was off the road and on the—
Q. Was it toward Phenix or this side of the truck or was it below the truck?
A. It was—I don't remember exactly. It was pretty close in together. I believe it was up toward Phenix from the truck.
Q. Up toward Phenix?
A. Yes, sir.

Q. Were you there when the ambulance came?
page 56 } A. No, sir, the ambulance got there ahead of me.
Q. Ahead of you?

A. I was right behind the ambulance?
Q. But Powell and Mr. Nickols were still there?
A. Yes, sir.

* * * * *

Q. Tell what you saw there on the highway?
page 57 } A. I went in—I don't know the road number—I come in up near the store where the cross roads come by Mr. Vassar's house, went into 746 there and pulled up at the intersection of 746. I could see the cars down to my left. I drove on down where they were.
Q. All right, what else did you see, if anything?
A. Well, it was a bunch of them around, several people

Hugh Bryant

around, and the skid marks from up toward the store, the tire marks.

Q. What did you say about skid marks?

A. I say you could see them. It seemed like to me it was further than they were when we measured it.

* * * * *

Q. Where were the skid marks?

A. Most of the skid marks were on Mr. Powell's left as he was coming down the road.

Q. On the left hand side. Did you help Mr. Wilmore make his measurement?

A. I did, yes, sir.

page 58 } Q. Did the skid marks where they began were they in which lane were they in, the right hand lane going toward Halifax or the left hand lane?

A. In the left hand lane going toward Halifax.

Q. Were any in the right hand lane?

A. Best I recall, it seems like one part of them was over the line some, part of one of the skid marks on the right hand lane.

* * * * *

page 59 } Q. Did you follow up these skid marks to where they stopped, Mr. Bryant?

A. Yes, sir, I followed them up helping Mr. Wilmore measure.

Q. What did you find, if anything, in the highway where the skid marks stopped?

A. Dirt, glass, blood in the road there where Mr. Nickols was laying.

Q. Did you find any of this dirt or debris or whatever you found there, was any of that in the right hand lane going toward Halifax or was it all in the left hand lane?

A. I don't recall seeing any of it in the right hand lane. It might have been some scattered glass or something over there.

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MRS. WATKINS ALLEN, a witness for the plaintiff, being first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Morton:
Q. Please state your name?
A. Mrs. Watkins Allen.
Q. Are you the daughter of Mr. G. W. Nickols?

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Q. How far do you live from the point where your father was killed?
A. About a half mile.
Q. Half a mile?
A. Yes, sir.
Q. Were you at home on the morning of July 25, 1966, when your father was killed?
A. Yes, sir.
Q. Did you see this car which collided with your father pass your house?
A. Yes, sir.
page 62 } Q. How far is your house approximately from the highway?
A. It's less than a hundred feet.
Q. About what?
Q. Less than a hundred feet.
Q. Less than a hundred feet?
A. Yes, sir.
Q. Where were you at the time you saw this car pass?
A. I was in my bedroom facing the road.
Q. Just explain to the jury exactly what you saw?
A. I was in the bedroom and I heard this car was making a lot of noise as it came up the road and I looked out of my —as I looked out of my window it went by and I saw it from the other window too, and when I got to the accident that day I got out of the car and I recognized it was the one that just

passed my house. I said, "That's the car that just passed my house flying and it killed my daddy."

Q. Do you drive a car?

A. Yes, sir.

Q. Could you tell the jury—Could you give the jury an estimate of the speed the car was going when it passed your house?

page 63 } A. It was going at high speed. It was going between 75 and 80 or more. I drive a car and I know the speed limit.

Q. You have a front window to your bedroom?

A. Yes, sir.

Q. Did you see through the bedroom?

A. Yes, sir.

Q. Do you have a side window?

A. Yes, sir.

Q. Is that side window on the side—did you look at the car again out of that side window?

A. Yes, sir.

Q. What made you watch it so close?

A. It was making a lot of noise and was going fast and that's the reason I recognized it.

Q. How soon would you say after the car passed did you get word about your father?

A. Well, it was about 10 or 15 minutes the phone rang and I went to it and Millie Johnson called and told me to come up, daddy was laying in the road. I asked her what was wrong—

Mr. Slayton: We object to what somebody told—

page 64 } By Mr. Morton:

Q. It was 10 or 15 minutes. Did you go up there?

A. Yes, sir, I did.

Q. Did you see the car that had just passed your house?

A. Yes, sir, I did.

Q. What color was it?

A. Red Ford.

* * * * *

CROSS EXAMINATION

By Mr. Slayton:

Q. How long have you been driving, Mrs. Allen?

A. I been driving over 25 years.

Q. How many doors did this car have on it that passed your house?

A. I didn't see but two. It was a hard top.

Q. Oh, was the car that passed your house a hard top?

A. Yes.

Q. What model car was it?

A. About a '65, I think.

Q. '65. Do you keep up with the different makes
page 65 } of cars?

A. I recognize them right often, yes.

Q. You do. How long have you been studying the various makes of cars?

A. I just watch them on the highway. I know one car from another.

Q. Do you wear glasses?

A. No, I don't wear glasses.

Q. Did your father wear glasses, Mrs. Allen?

A. Yes, sir.

Q. His eyes were right bad, weren't they?

A. No, they was not so bad.

Q. He had difficulty hearing, didn't he?

A. He heard everything I told him.

Q. I didn't ask you that. Your father had trouble hearing, didn't he? That's a fact, isn't it?

A. I think he had some trouble.

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page 66 }

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By Mr. Slayton:

Q. Tell us how old your father was if I misstated a fact?

A. He was 79.

Q. He was 79?

A. Yes, sir.

Q. It's a fact he did have trouble hearing?

A. Yes.

Q. He did have some trouble with his eyes?

A. I think so.

* * * * *

Lacy Nickols

LACY NICKOLS, a witness for the plaintiff, being first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Morton:

page 67 } Q. State your name, please?
A. Lacy Nickols.

Q. You are the son of Mr. G. W. Nickols who was killed in an automobile accident near your home?

A. Yes, sir.

* * * * *

Q. What time did you fix the accident, Mr. Nickols?
A. Approximately 8:30.

page 68 } Q. Did you go to the scene of the accident?
A. Yes, sir.

Q. Where was your father?

A. Laying behind the pickup truck. The pickup truck was headed south down the road and he was laying at the rear end of it.

Q. Did you see Mr. Powell?

A. Yes, sir.

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page 70 }

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Q. How was your father's hearing? Did he have any difficulty?

A. He wore a hearing aid.

Q. Wore a hearing aid?

A. Yes, sir.

Q. Do you know whether that corrected it or whether he could hear all right with that?

A. He seemed to could hear pretty good with it.

Q. You talked to him and you knew him. How was his eye sight?

A. His eye sight was all right.

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page 72 }

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W. N. NICKOLS, a witness for the plaintiff, being first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Pettus:

Q. You are Mr. Noel Nickols?

A. Yes, sir.

Q. Mr. Nickols, whose truck was that in which your father was driving?

A. That was mine.

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page 73 }

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Q. Did you help remove the truck from the point it was standing?

A. Not right then. When Mr. Pettus came from Drakes Branch down here—

Q. That's Pettus Motor Company?

A. Pettus Motor Company, yes, sir. He came up and some of them asked him which one of the vehicles he come after and he said somebody called him about the—

Mr. Pettus: Don't tell what he said. Tell what you know happened.

Witness:

A. He hooked to the pickup truck.

page 74 } Q. Your truck?

A. My truck, to move it. When he started to pulling it the back wheels slid on it. He asked some of them, said it must be in gear.

Q. Tell exactly what happened?

A. I got up in the truck and tried to pull the gear shift lever out from in gear.

Q. Which gear was it in?

I. H. Vassar

A. It was in low gear, and it was so hard I had to take my foot and kick it out of gear.

Q. Were you able to get it out of low gear?

A. Yes, sir, I kicked it out from low gear with my foot.

Q. Did the truck remain in gear after you kicked that out?

A. The wheels were still sliding on it. Mr. Pettus said he couldn't move the truck unless he move it off—

Q. By the time you arrived and got in the truck and when they were going to move it it was in low gear?

A. Yes, sir.

Q. Well you describe the vehicle to the jury, how
page 75 } it drives and so forth?

A. The truck drives good. Any time you can't shift back to low gear unless you come to a dead stop to change back into low gear unless you double clutch it to get it back in gear. It takes a good driver to double clutch a truck.

Q. How fast will it travel in low gear?

A. Approximately 10 miles per hour.

Q. How slow do you have to come to to get it in low gear?

A. You have to come to a dead stop to get it in low gear.

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page 78 }

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Q. Mr. Nickols, when you arrived at the scene of the accident did you see the debris and so forth in the highway?

A. Yes, it was a lot of dirt and glass and so forth right at the back end of the red car.

Q. And you have heard the Trooper testify today. In whose lane of travel was that debris?

page 79 } A. All of that was in the lane going toward Phenix.

Q. In the lane of your father?

A. Yes, sir.

* * * * *

I. H. VASSAR, a witness for the plaintiff, being first duly sworn, testifies as follows:

I. H. Vassar

DIRECT EXAMINATION

By Mr. Morton:

Q. Please state your name?

A. I. H. Vassar.

* * * * *

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

A. Yes, sir.

Q. How did you know there had been an accident?

page 80 } A. The ambulance went by and I followed the ambulance up there.

Q. You had not heard of it before and you followed the ambulance?

A. Yes.

Q. What time was this, Mr. Vassar?

A. Somewhere between 8:00 and 9:00 O'Clock, Mr. Morton.

* * * * *

Q. Did you take any notice of the highway? Tell what you saw on the highway, if you will, in regard to any debris or anything and where it was located?

A. The highway was very badly marked where brakes was applied and a lot of debris there up from where Mr. Nickols pulled out in the road, where his truck pulled out in the road.

page 81 } His truck was traveling west and turned around headed south. Right much debris and glass and such as that was in the road.

Q. Did you notice any skid marks?

A. Yes.

Q. Were they light or heavy?

A. Heavy.

Q. What was the nature of this debris that you saw?

A. Glass and dirt and such of the truck and car.

Q. In which lane was it?

A. In the right lane.

Q. In the right lane, going which way?

A. Going west.

Q. Going west?

A. Yes.

Q. That's toward Phenix?

A. Yes, sir.
Q. Did you see any of the debris in the opposite lane?
A. Yes, sir.
Q. Will you tell us whether or not these skid marks which you saw led up to where the debris was?
A. Yes, sir, they led up to the debris.
page 82 } Q. Did those skid marks at any time turn toward the right to go into the opposite lane or did they go straight?
A. The skid marks were on the right side and the skid marks started and went straight over to the left lane. He was traveling south.

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page 83 }

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Q. Did he have any trouble with his hearing?
A. Yes, sir, he corrected that with a hearing aid.
Q. Corrected it with a hearing aid?
A. Yes, sir.
Q. Did he wear glasses?
A. Yes.

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page 92 }

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W. N. NICKOLS, being recalled, testifies out of the jury's presence as follows:

DIRECT EXAMINATION

By Mr. Pettus:
Q. Mr. Nickols, are you familiar with the highway where your father's accident occurred?
A. Yes, sir.
page 93 } Q. Is it today comparable to what it was at the time of the accident, the highway and area?
A. The area is the same thing as it were then and it's still

skid marks in the road just like it were when the accident happened.

Q. Has there been any change in the area at all, any change in the road at all, anything?

A. Not to my knowing at all.

Q. In consideration of the view and the circumstances and evidence which you have heard, is a view necessary in order for the jury to get a complete picture of this matter?

A. I would think they could get a better picture of it if they go and look at it in the road.

Q. Is it necessary from your knowledge of what happened, is it necessary for them to go there in order to get a complete picture of it?

A. I would think so.

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page 101 }

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Mr. Slayton: We will stipulate at this time that Mr. Nickols died as a result of this accident.

* * * * *

Mr. Pettus: No, sir. We rest.

page 102 } Mr. Slayton: Your Honor, at this time counsel for the defendant would like to move the Court to strike the plaintiff's evidence. The burden is upon the plaintiff to prove the case by a greater weight of the evidence and he must prove that the decedent died as a result of negligence of the defendant.

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page 110 }

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Gentlemen, I am disposed to overrule your motion and here we have evidence of high speed and, although, the wit-

page 111 } ness was half mile away, Judge Huggins in writing an opinion has admitted 2 and a half miles

from the scene of the accident a car driving at an excessive rate of speed around 75 or 80 by Judge Huggins formerly Chief Justice. He held although that alone was not sufficient to establish negligence to create liability it was a pertinent piece of evidence that would indicate speed at the time of the accident. The rule is an act setting up a particular standard of conduct shortly before a particular thing happened or act immediately after a thing happened is some evidence of the fact it happened at the time of the incident involved. Mr. Nash has quoted it more eloquently. I am of the opinion it's sufficient to overrule your motion based on the testimony of the plaintiff's witness with reference to 80 miles per hour and the physical condition of the cars. If he was going that fast he was traveling as much as 118 feet a second. In 5 seconds immediately prior to the accident he was about 590 feet from the scene of the accident. That was out of sight of the decedent. If the decedent was traveling 10 miles per hour, and there is some evidence from which the jury can draw that conclusion—Mr. Nickols

page 112 } said the truck of the decedent was in low gear and about 10 miles per hour was the speed of low gear, he would travel 75 feet in 5 seconds. That is not inconsistent with the presumption that the decedent is entitled to. It would be even stronger than the ordinary plaintiff, where there are no eye witnesses that established the evidence before me. A decedent is strongly presumed to have complied with the law. In the case of the deceased it's even more prevalent than the general rule. For the time being, I overrule your motion. I realize it's some merit to it but I am inclined to think it's a jury question.

Mr. Slayton: We except to the ruling of the Court, Your Honor.

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page 114 }

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J. WALTER JONES, a witness for the defense, being first duly sworn, testifies as follows:

J. Walter Jones

DIRECT EXAMINATION

By Mr. Slayton:

Q. Would you state your name to the jury?

A. J. Walter Jones.

Q. Where do you live, Mr. Jones?

A. South Boston.

Q. What is your profession?

A. Certified Land Surveyor.

page 115 } Q. What educational qualifications do you have for that profession?

Mr. Pettus: To save time we acknowledge the fact Mr. Jones is a Certified Land Surveyor. You don't have to qualify him any further.

* * * * *

Q. Did you make a survey of the intersection of State Route 647 and 746 in Charlotte County, Virginia?

A. I did.

Q. When did you make the survey?

A. On December 20th.

page 116 } Q. How long did it take you to do the field work involved in this survey and to compute your findings and to make the plat of survey?

A. The field work took approximately a day and I spent about a day and a half in the office compiling and plating up the profile.

Q. When you did the field work did you have a crew and others helping you?

A. Oh, yes.

Q. How many people were in your crew?

A. 3 besides myself.

Q. Is this the map of survey that you made on December 20th?

A. It is.

Q. Tell the jury if you will how wide State—the paved portion of State Route 746 is?

A. 20 feet.

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J. Walter Jones

page 123 }

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Q. Mr. Jones, what is the total length of the highway represented on that plat of survey?

A. About a thousand feet.

Q. Now how wide is State Route 746?

A. 20 feet.

Q. Is this survey drawn precisely to scale?

A. It is.

Q. What is the scale?

A. 1 inch equals 30 feet.

Q. Explain to us what that means, please?

A. It means that 1 inch is 30 feet, equals 30 feet.

Q. 1 inch on this drawing here is equal to 30 feet on the ground?

A. That's right, 1 inch on that map is 30 feet on the ground.

Q. Now, when you made this survey did you find a stop sign at the intersection of State Route 746 and 647?

page 124 } A. Yes.

Q. Come around please and point that stop sign out to the jury.

Now, what is the width of the entrance? What is the total width of the entrance of State Route 647 into State Route 746?

A. 150 feet.

Q. And that's measured from what points?

A. From where this hard surface leaves this travel line here to where it intersects here.

Q. Take this blue pencil, please, and put down the 150 feet that will show what point you measured to and from.

Now, Mr. Jones, I want you to draw a straight-line beginning at the stop sign 90 feet up 746 toward Phenix.

A. You want me to project it across this way?

Q. Now, put that measurement on there, please, the beginning and the end of it.

Now, Mr. Jones, is that a straight level highway?

A. No, it's not.

Q. How do you know it's not?

A. Because we ran a profile of it to prove the upgrades and curves and the downgrades.

page 125 } Q. What is the profile? Tell the jury what a profile is?

J. Walter Jones

A. The profile is taken at intervals of every 300 using one base point we picked here assumed 100 feet. These are 50 foot points along this line. This scale is 1 inch each 5 feet vertically and 30 feet horizontally. So, you get a picture of it.

Q. What does that dark line represent?

A. That is the profile of the pavement of State Route 746.

Q. Is that how the surface of the road would appear if you looked from the side?

A. Yes.

Q. What kind of instrument did you use to obtain this information?

A. We used a level and level rod after placing the stations on the road.

Q. Is this a standard way?

A. Yes, sir.

Q. Does the Highway Department use this same method?

A. Same method.

Q. Is there anything unusual or extraordinary about obtaining this information?

page 126 } A. Nothing at all.

Q. Looking in the direction toward Clover, what is the rate of fall of the highway?

A. Well, after it gets past this vertical curve the decline is 2.8 percent grade which is 2 and 8/10 feet drop every 100 feet.

Q. How much is that?

A. 2 and 8/10 dropping every 100 feet.

Q. Going back in the other direction what is it?

A. The incline going up is 2.4 percent and it reaches its maximum right here. From here it's going up and from here it's going down.

Q. I hand you a photograph which has been introduced as Defendant's Exhibit B and ask you if you have ever seen that vehicle?

A. I have.

Q. Now, what model vehicle is that?

A. I believe—I measured one—Let me see what I got. It's a '51 Chevrolet truck.

Q. How long is a '51 Chevrolet truck?

A. Length?

Q. Yes, sir.

A. 17.3 feet.

page 127 } Q. Did you measure the width of a truck?

A. Yes, sir.

J. Walter Jones

Q. Now, did you measure this, the length of a 1966 Ford?
A. 17.8 feet.
Q. Did you measure the width of the Ford?
A. Yes, sir, they are both the same, 6 and a half feet.
Q. Did you measure the height of a 1951 Chevrolet pickup?
A. 6.2 feet.
Q. That's the height of it from where?
A. From the ground to the top of the cab.
Q. And how high is a Ford automobile from the ground?
A. 4.7 feet.
Q. How high is the truck?
A. 6.2 feet.
Q. Now, after you obtained the profile of this highway were you able to measure the line of sight from the stop sign up State Route 746 in the direction of Phenix or the intersection of State Route 40?

page 128 } A. Yes, sir.
Q. What is the line of sight?

A. The sight distance is 742 feet from here back up this way to where you could see this Ford car approaching.
Q. Measure on there the distance of 742 feet from this stop sign back? I want you to put that on there showing it from that point back to the stop sign. Now, Mr. Jones, that is the sight distance from the stop sign to—Well, that's as far as you can see from the stop sign?
A. Yes, that you can see the height of a '66 Ford.
Q. How did you arrive at that figure?
A. Well, you get the eye level of the man in the truck. You get the height of the Ford car.
Q. How high do you sit up in the truck?
A. The eye level of a man in the truck is 5½ feet.
Q. And how do you arrive at that 742 feet then?
A. Well, this right here represents the eye level of the man in the truck.
Q. Mark that as being how high above the ground. Now, explain to the jury how you arrived at that?
A. That line is projected back to where it becomes tangent with a vertical curve. This top dotted line is

page 129 } the profile of a moving vehicle, '66 Ford. The roof line and where the car traveling on the pavement projected up the height of the Ford 4 and 7/10 feet where this line intersects this lane, which at this point from there back is 742 feet.

Q. Just assuming that a person is not up in the air 5½

feet how far can you see back up toward this highway, back up toward Phenix, suppose it's not 5½ feet. Just down from lying flat on the highway how far could you see?

A. You mean flat on the highway?

Q. Yes.

A. 260 feet.

Q. If you were laying flat on the highway?

A. Wait a minute. That's not right. You mean to see a vehicle coming?

Q. I mean any object that would move up there?

A. 260 feet.

Q. Now, explain to the jury why the distance is greater if you are in a vehicle looking at an object coming from the direction of Phenix? Why is there a difference between the 200 feet and 700 feet? Why can you see a greater

page 130 } distance.

A. Because you are raised up in the air 5½ feet, the eye level of the height of the cab.

Q. How do you know that's the height of the cab of the truck?

A. Height of the cab or height of the eye level?

Q. Height of the eye level?

A. We put a man in the truck and measured his eye level.

Q. What kind of truck?

A. '51 Chevrolet truck. We measured his eye level.

Q. Mr. Jones, you have previously testified that the entrance was 150 feet wide where State Route 647 comes into 746. How wide is it from the stop sign at that intersection to the northerly edge of State Route 647?

A. The northerly edge. I don't quite follow you, Frank. That's 105 feet from the stop sign to where this intersects. Is that what you mean?

Q. Yes.

A. That's 105 feet.

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page 131 }

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By The Court:

Q. Mr. Jones, now did you make the measurement of the width of the road or did one of your men?

J. Walter Jones

A. I made it personally, sir.

Q. Now, you said it was 1,000 feet shown on the plat. Was that measured by you?

A. Sir?

Q. You said your survey showed a total of a
page 132 } thousand feet—I have here a thousand feet shown

A. That means the limitation of the map is about a thousand and 50 feet more or less. That's the limitation of it.

Q. Did you make that measurement or one of your men?

A. One of my men made that measurement, 2 of my men made it.

Q. I believe you placed a stop sign on the map there. How can you assure you are—I don't question it. I want to clarify. How can you assure the mark you have indicated?

A. That is our basic point for measurement.

Q. Can you personally say that the place you have indictated as representing the stop sign on that survey map is absolutely correct?

A. Absolutely.

Q. Did you measure the 150 feet representing the entrance point where 647 enters 746?

A. It was—to me and I checked it to be sure it was correct. I am satisfied it's correct.

Q. Now, I believe Mr. Slayton asked you to draw a line 90 feet north up 746 beginning at the stop sign. You do
that, of course, by the fact that drawing is to
page 133 } scale, you can do that. You can personally say
that drawing is to scale?

A. Absolutely to scale.

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By The Court:

Q. Now, are you in a position to say that the profile there of every 50 feet is correctly shown on that?

A. Yes, sir, I tell you how that was proved, because the elevations have to check themselves. They have to plat in a straight line or in a regular curve and if one was out of place it would be readily detected. It was none.

Q. I believe you said it was 2.8 feet drop in every 100 feet toward Clover. Did you calculate that or measure it yourself or did one of your helpers?

A. I did that.

Q. What did you say was the rise in the opposite direction?
A. 2.4 percent.
Q. That's going up, coming from Phenix from Route 40.

page 134 } A. That would be rise in elevation, yes, sir.
Q. Are you in a position, did you check that enough to say that is correct?
A. Yes, sir.
Q. Did you personally measure 2 vehicles?
A. I did.
Q. I believe you stated from the stop sign looking in the direction of Phenix you could see 742 feet to the top of a '66 Ford approaching.

Mr. Slayton: That is 4.7 feet high.

By The Court:
A. 4.7 feet above the pavement you could see the vehicle approaching at 742 feet. Who made that observation?
A. It was done from this map. This was based on the profile and from the profile on the map we determined that distance.
Q. You didn't actually make a demonstration on the highway?
A. No, sir, this is common practice I always used.

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page 136 }

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By The Court:
Q. You say from the stop sign to the northern edge of 647 is 105 feet?
A. That was actually measured on the ground, Your Honor, and drawn to scale. We had our base point on the edge of the pavement opposite that stop sign from which we made our measurement to locate the intersection details there and also at the other one also.
Q. I assume you didn't take the measurement of 105?
A. I checked it myself when the Trooper was there.
Q. What do you mean by checked?
A. I had a tape with him. I measured on down the 90 feet

J. Walter Jones

and came across when we were looking at some other things.

Q. Your answer is the measurement of 105 feet as checked by you was given by you?

page 137 } A. Yes, sir.

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page 138 }

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Q. Did you personally put in this angle of approach on Highway 647 and have you checked it to make certain that is correct?

A. You mean the entire length of it?

Q. Exactly as you have it in your drawing?

A. Not that portion beyond whereas I stated—I extended it some. I put State Route 647 all in line.

Q. Then your drawing in that point is not correct, is it? The drawing, we recognize that the entry of Route 647 is not correct. He said, no, that isn't right.

A. We located this road to approximately this point.

Q. What does the road do at that point?

A. I don't know.

page 139 } Q. Why did you put this long length?

A. So I could write that name in there.

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page 142 }

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Q. Now, using that photograph again when you sighted this were you at the stop sign or were you in the highway opposite the stop sign?

A. We were at a point on the edge of the highway right opposite the stop sign 90 degree to the stop sign.

Q. Were you at the edge of the highway?

A. We were just enough off the highway to keep from getting hit.

Q. How far would that be?

A. 4 feet.

Q. How far is the stop sign off the highway?

A. From the edge of the pavement it's 11½ feet.

J. Walter Jones

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page 143 }

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Q. Then your line of sight as you have described to the jury is along the middle of the highway in this line of sight?

A. The station was placed along this line and at every 50 foot point we got a shot.

Q. Along the edge of the highway?

A. No, along the center line.

Q. Where did you have this man in the pickup truck at 5 feet 6 inches?

A. At the center line of the highway.

Q. Therefore, a man to have seen 700 and some feet would be at that point sitting in a pickup truck 5 feet 6 inches and looking down the middle of the road and he would then be in the middle of the road, correct?

A. Ah huh.

page 144 } Q. What is the line of sight if a man has stopped at the stop sign or before the stop sign?

A. Mr. Pettus, I checked that and I found that the elevation going in this direction was practically level.

Q. What is the line of sight if his vehicle had stopped here in that fashion at the stop sign as one would normally stop, what would be his line of sight in that direction then?

A. That would be subject to the growth of trees along this edge.

Q. Then he couldn't see?

A. Not as far.

Q. Could the vehicle coming in the opposite direction?

A. It would effect one as it would effect the other. It varies with the exact position of where he stopped.

Q. Let's say he stopped at the stop sign before you passed the stop sign, how far away would Mr. Powell have seen him if he stopped before he arrived at the stop sign?

A. That calls for a considerable amount of speculation.

Q. You got a shoulder of the road that comes

page 145 } in here. You got growth in here the picture will show.

Q. You made your measurements. You have given us all of the information Mr. Slayton has asked you. I ask you on cross-examination how far could he see or how far could Mr. Powell see if he stopped before passing the stop sign?

J. Walter Jones

A. I don't know.

Q. Is there any way you could determine that?

A. I doubt it seriously.

Q. No surveyor would be able to do that?

A. Precisely, no.

Q. Would it not be better evidence for jury to take a view of that to see it?

A. Absolutely. They also will see the road goes in that direction.

Q. Then it would be necessary in your opinion for a jury to have a view of that in order to get a correct picture of it to verify your findings.

Now, in measuring this 1951 Chevrolet pickup truck you said you measured both vehicles. Did you measure Mr. Nickols' vehicle?

A. Not that precise vehicle. I measured one just like it.

page 146 } Q. How did you know it was one just like it?

A. Same model, same body style, everything.

Q. What was the style of the 1951 Chevrolet truck?

A. Just a quarter ton pickup.

Q. What is the difference between a quarter ton and a half ton?

A. I think ones got a longer body.

Q. Which is longer, the body on the quarter ton, half ton or three-quarter ton? The quarter ton would be the shortest, wouldn't it?

A. I presume it would.

Q. You measured a quarter ton truck. Would a quarter ton truck have a different sight from a half ton, from 5 feet 6 inches or 4 or 3 or can you say?

A. I couldn't tell you that. That was a '51 quarter *on* truck I measured, Mr. Pettus.

Q. A '51 quarter ton truck as you measured would be 5 feet 6 inches at a point in the middle of the highway?

A. Yes.

Q. Was that a short man or tall man you measured from?

A. Average height.

page 147 } Q. Which was Mr. Nickols, was he tall or short?

A. I don't have the faintest idea.

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page 148 }

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Q. Now, when was the last time you were at the scene where this survey was made?

A. The day we met the Trooper over there.

Q. Have you seen it since then?

A. Came by this morning.

Q. Do you get the same perspective of this scene since it has snowed that you got before it snowed?

A. No, You don't because the entire pavement isn't visable at the time we came by nor the shoulder or the ditches. They are filled with snow.

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page 151 }

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(Whereupon, Court was adjourned until the following morning, at which time, the following proceedings were had:)

TROOPER C. R. WILMORE, recalled by the plaintiff, testifies as follows:

DIRECT EXAMINATION

By Mr. Pettus:

Q. Mr. Wilmore, have you been to the scene of the accident this morning?

A. Yes, sir, I have.

Q. Is the road at the scene of the accident substantially the same as it was on the day of the accident?

page 152 } A. Yes, sir.

Q. Were you able to see the drop marks that you saw the day of the accident?

A. Yes, sir.

Q. Did you this morning step from those drop marks to the stop sign?

A. Yes, sir.

Q. How many steps was it or how many feet?

A. 120 feet.

Q. Is that the same distance you other day estimated at 90 feet?

A. Yes, sir.

Mr. Slayton: Your Honor, this isn't rebuttal.

Mr. Pettus: His surveyor testified.

Mr. Slayton: We took the Trooper's testimony and scaled on the survey what the Trooper testified the distance was. If he is going to continue to come back in and put on one witness to put his case back together the thing will never end.

By Mr. Pettus:

Q. Is, in your opinion, a view necessary for the jury to get a proper picture of this accident?

page 153 } A. Yes, sir.

Q. Why is it necessary?

A. The stop sign is so located should you stop behind it you are not able to see north. If you pull on past the stop sign and then look north, you can see.

Q. Where were you standing when you stated yesterday you could see 500 feet?

A. I took one large stop from the west edge of 746 into 647 and was standing there looking north.

Q. And you were standing up and not in your car but standing?

A. Yes, I was standing.

Mr. Slayton: I would like to say to the Court I would like for you to strike the part of the Trooper's testimony that deals with the measurement he made today and instruct the jury to disregard it because it's not rebuttal evidence.

Mr. Pettus: May it please the Court, it would appear to me to be necessary for the view to know where the drop mark is. We talked about the drop mark. We reserve the fact we bring up the view later. It's necessary to know that drop mark figure when they go there to look at

page 154 } the scene.

The Court: I will rule on that motion, Mr. Slayton, when we complete all of the evidence. It's a right close question. The Court has said if it's a matter that's pertinent to the issue involved it may come in at any stage. I would rather wait until I hear it all; and don't overlook your renewing the motion.

Trooper C. R. Wilmore

CROSS EXAMINATION

By Mr. Slayton:

Q. Trooper Wilmore, Mr. Pettus keeps talking about a drop mark. There is no debris there now, is there?

A. No.

Q. No glass there now?

A. No, sir.

Q. You are talking about the cut place in the highway, isn't that right?

A. Yes.

Q. This cut place is not different from any other cut place in the highway, is it?

A. Well, I wouldn't think so, no, sir.

Q. The skid marks you observed in July that stopped at a cut place found by you in the highway are no

page 155 } longer there, are they?

A. No, sir.

Q. They have now been obliterated and don't continue down to where you now think this cut place is, do they?

A. No, sir, most of the skid marks are gone.

Q. And the conclusion you drew as a result of your investigation in July as to the so-called drop marks were based upon your findings of debris and glass and that sort of thing at the scene when you arrived there, isn't that right?

A. Yes, sir.

Q. All of that has been obliterated since then, hasn't it?

A. Yes, sir.

RE-DIRECT EXAMINATION

By Mr. Pettus:

Q. Are these the same drop marks you saw in July?

Mr. Slayton: I object.

By Mr. Pettus:

Q. Are part of the skid marks left today whereby you can see it this morning?

A. Yes, sir.

page 156 } The Court: Is it agreeable with you, gentlemen, that Mr. Wilmore may be excused?

Mr. Slayton: Let me ask you one other question while you are on the stand, please, sir?

By Mr. Slayton:
Q. Mrs. Allen, a daughter of Mr. Nickols, testified that she saw this red car go by her house at an excessive rate of speed. Did she ever report that to you?
A. No, sir, I know nothing about that.

Mr. Slayton: That's all.

The witness stands aside.

Mr. Slayton: At this time, Your Honor, I believe it would be appropriate for the record to show that the plaintiff is willing to stipulate that the survey which was presented yesterday by us was made by Mr. Jones and that it's an accurate survey. Is that right, Mr. Pettus?
Mr. Pettus: That's sufficient.

HENRY HOWARD POWELL, a witness for the defense, being first duly sworn, testifies as follows:

page 157 } DIRECT EXAMINATION

By Mr. Slayton:
Q. Tell the jury your name, please?
A. Henry Howard Powell.
Q. How old are you, Mr. Powell?
A. 20.
Q. Where do you live?
A. Clover, Virginia.
Q. Who do you live with?
A. My parents.
Q. Are you employed?
A. Yes, sir.
Q. Where do you work?
A. Drakes Branch Mill.
Q. How long have you worked there?
A. About a year and a half.
Q. How long have you worked at Burlington Mills?
A. About a year and a half.
Q. Are you married?

Henry Howard Powell

A. No, sir.

Q. Were you driving a red ford that was involved in an accident in this County on July 25, 1966?

page 158 } A. Yes, sir, I was.

Q. What time did you get off work that day?

A. 8:00 O'Clock.

Q. Where did you go after you got off work?

A. Well, I rode around, come up through here, hit 40 and went up and turned on 746 and started home.

Q. Was anyone with you?

A. No, sir, it wasn't.

Q. Were you in any particular hurry?

A. No, sir.

Q. As you proceeded down Route 746 toward the Watkins Bridge how fast were you going?

A. Somewhere between 50 and 60.

Q. How do you know you were going that fast?

A. I looked at the speedometer back up the road about 4 or 5 miles and I didn't speed up much more. I try to keep the same speed.

Q. As you went down the highway toward where this accident occurred tell the jury what kind of road that road is?

A. What do you mean, straight? Well, it's pretty straight, some places straight and then again it's right

page 159 } curvy.

Q. Just before this accident happened is the road straight?

A. No, sir.

Q. Is there a hill there?

A. It's a little knoll like.

Q. When did you see Mr. Nickols' truck?

A. Well, just before he entered the highway.

Q. Was it stopped or moving?

A. It was moving when I saw it.

Q. What did you do when you saw this truck?

A. I blowed my horn and stayed on my lane and I see he won't going to make no effort to stop so I applied my brakes and pulled over. I thought he might stop, but he didn't. He come in on me and I didn't have no where to go. I tried to miss him.

Q. Now, did he ever do anything to avoid this accident that you saw?

A. Not as I saw.

Q. What model car were you driving?

A. A 1966 Ford.

Henry Howard Powell

Q. What kind of condition was it in?

page 160 } A. Well, brand new. I mean I hadn't had it but 5 months. I hadn't had it checked.

Q. Had you ever had any trouble with the brakes on it?

A. No, sir, none at all.

Q. This is looking toward Clover. Which way were you going?

A. I was going toward Watkins Bridge.

Q. And this is 647 as it comes up to 746 now. Where did Mr. Nickols come from?

A. He came from over here, come out right here, and he came around this side of the sign.

Q. Now, you said a minute ago that you saw him before he entered the highway. Which highway was he on when you first saw him?

A. This one over here, 647.

Q. And had his truck cleared this lane when you all came together?

A. No, sir.

Q. How much of his truck blocked your lane of travel?

A. About half.

page 161 } Q. With half of his truck?

A. Yes, sir.

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page 162 }

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Q. Now, when you came passed this store up here, could you tell the jury how fast you were going or give them your best estimate?

A. No, sir, I don't believe I could.

Q. Well, had you increased your speed or decreased your speed from the time you looked at your speedometer?

A. I had kind of slowed down. I hadn't increased none.

Q. Now, when you saw Mr. Nickols coming out of that road how fast was he going, do you know?

A. No, sir, I don't.

Q. Could you give the jury an estimate of how

page 163 } fast he was going?

A. Somewhere about 5 to 10 miles per hour.

Q. Was he stopped at any time after you first saw him?

Henry Howard Powell

A. No, sir, he didn't stop.
Q. He didn't stop. All right, these gentlemen will ask you some questions.

CROSS EXAMINATION

By Mr. Morton:
Q. Mr. Powell, I believe you say you are 20 years old and you are not married and you live with your parents?
A. Yes, sir.
Q. Do you live in Clover?
A. Down in the Cove next to Clover.
Q. In the Cove?
A. Yes, sir.
Q. In Halifax?
A. Yes, sir.
Q. And you have been working at Pacific Mills or Burlington Mills for approximately a year and a half?
A. Yes, sir.
Q. What shift do you work on?
page 164 } A. Third, go on at 12:00 at night and get off 8:00 in the morning.
Q. From 12:00 to 8:00?
A. Yes, sir.
Q. And you were working on that shift on the night of July 24th and 25th?
A. Yes, sir.
Q. You got off at 8:00 O'Clock?
A. Yes, sir.
Q. Did you leave the mill shortly after you got off?
A. Yes, sir.
Q. Where did you go?
A. I come up 47 and hit 40 and went up next to Phenix until I hit 746 and started home.
Q. Where did you go up on 40?
A. Up to that service station and took my left. Right at the intersection is a service station on the left and you can see it in front and I turned.
Q. Do you know whose service station it was?
A. No, sir, I don't.
Q. You say it's at an intersection?
A. Yes, it's where 746 comes into 40.
page 165 } Q. Where 746 comes into 40?
A. Yes, sir.

Henry Howard Powell

Q. You mean you didn't go as far as Phenix?
A. No, sir, I didn't.
Q. Now, Mr. Powell, I want you to understand my question exactly: You tell this jury you did not go to Phenix that day?
A. No, sir.
Q. You tell this jury that you did not go beyond Phenix?
A. I turned before I got to Phenix?
Q. You understand my question and you make that a positive statement?
A. Yes, sir.
Q. Was anybody traveling with you when you left the mill to go to where you went?
A. No, sir. I was by myself.
Q. Is that your normal and usual way of going home?
A. No, sir.
Q. What was your purpose in going up there?
page 166 } A. Well, some morning I come over here and eat breakfast down here. I didn't have nothing else to do. Some mornings I go straight home and help my daddy and them.
Q. Did you stop anywhere between the time you left the mill and when you went up there and made your turn?
A. No, sir, not that I remember.
Q. You didn't?
A. Not as I remember.
Q. You didn't stop at Charlotte Court House? You came through Charlotte Court House?
A. Yes, sir.
Q. You came out of Drakes Branch?
A. Yes, sir.
Q. Did you stop at Ramsey's 66 that morning?
A. No, sir.
Q. You did not?
A. No, sir.
Q. I want to give you plenty time and opportunity to think about it. See if you can recall if you stopped there?
A. I don't think I stopped that morning.
Q. In other words, you tell this jury you didn't stop anywhere from the time you left the mill until the accident?
page 167 } A. Not that I remember.
Q. Is there any reason why you couldn't remember whether you went up to Phenix or not?
A. I didn't go to Phenix, I don't think.

Henry Howard Powell

Q. You know that?
A. Yes, sir.
Q. Then you went down 746?
A. Yes, sir.
Q. Are you familiar with that road?
A. Yes, sir.
Q. You are—You travel it pretty frequently?
A. Yes, sir, sometimes with my father, come to Phenix to the stock market.
Q. If you are familiar with the road you know the point you were entering is known there as Fears' corner, has 649 crossing it at that point, you know that's an intersection?
A. I mean if I see it. I don't know the road number too much. I just travel that one road.
Q. You might not know the number of the road, but you do know at Baker's store there is a highway crossing 746. You know that?
A. Yes, sir.
page 168 } Q. Do you know that down just about 500 feet below there is another road, 647 coming in?
A. Yes, sir.
Q. You know that?
A. Yes, sir.
Q. You also were familiar with the fact that there is a knoll or rise there in 746 and you can't see beyond it for traffic that might be coming up on the other side, you know that?
A. Yes, sir.
Q. You knew that on that morning as you went down the road?
A. Yes, sir.
Q. Will you tell the jury how far you had traveled that morning from the time you left the mill until you reached the point out here where you had this collision?
A. —

Mr. Slayton: He described the route he took, Your Honor.
The Court: Your question was what?
Mr. Morton: I asked him how many miles he had traveled from the time he left the mill until the point of
page 169 } the accident.
The Court: Do you object to that?
Mr. Slayton: Yes, sir, I said he told them the route he took.

Henry Howard Powell

Mr. Morton: You object to that on what ground?

Mr. Slayton: He already told you how he went; that he left the mill and he came through Charlotte Court House.

Mr. Morton: I didn't say how he went. I didn't ask him the course. I asked the number of miles.

The Court: I suppose it might be all right. It seems repetitious.

Witness:

A. I don't know.

Q. You don't know how far it is from the mill—

A. I know how many miles from the mill up to here, but I don't know from the other way.

Q. Do you know approximately what time it was—

A. About quarter to 9:00 or somewhere in there.

Q. Quarter of 9:00?

A. Yes, sir.

Q. You have been present here during all of the trial?

page 170 } A. Yes, sir.

Q. You heard the evidence it was 8:25 or 8:30?

A. That's wrong.

Q. You didn't hear that?

A. I heard it, but it was wrong.

Q. Didn't you hear Mr. Wilmore say he received the call from Appomattox at quarter of 9:00?

Mr. Slayton: That's just an estimate on his part.

By Mr. Morton:

Q. Did you hear that?

A. Yes, sir.

Q. Mr. Powell, when you came to this place at Fears' corner you said you are familiar with the fact that it's a crossroad and a store and another intersection?

A. Yes.

Q. Did you slow up anymore for that situation?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. You slowed up to what?

A. I won't driving watching the speedometer. I

page 171 } let up off the gas some and that's when I saw the pickup truck.

Henry Howard Powell

Q. Where was your vehicle when you first saw the vehicle of Mr. Nickols?
A. I was in my lane.
Q. Where was it?
A. I was in my lane going toward Clover.
Q. I mean the distance from Mr. Nickols. Were you in that cross-road at the time where 649 crosses 746?
A. No, sir.
Q. Where were you in relation to his vehicle?
A. I was beyond that intersection.
Q. You were beyond the intersection? How far beyond?
A. I don't know.
Q. What distance were you from Mr. Nickols when you first saw his car?
A. I wouldn't know.
Q. You don't know?
A. No, sir.
Q. When you first saw his vehicle you said it was moving?
A. Yes, sir.
page 172 } Q. And it was entering the highway?
A. Yes, sir.
Q. That's the first time you saw it?
A. Yes, sir.
Q. Is that what you saw when you came over the knoll?
A. No, sir. When I saw him he was coming out in the road and coming kind up on my side and I blowed my horn and I seed he won't going to stop so I put on brakes and pulled over and tried to miss him.
Q. When you saw him he was between the stop sign and the road or entering the road?
A. He was between the stop sign and road.
Q. Whether he stopped at the stop sign or not, you don't know, do you?
A. No, sir.
Q. You don't know because when you saw him he was out there entering into the highway? Is that correct?
A. It was just before he entered the highway.
Q. And he was traveling, you say, about 5 or 10 miles per hour?
A. Somewhere along there.
Q. Did he pull directly across in the right lane? He got over on the right side, didn't he? He was on the
page 173 } right hand side when you hit him, wasn't he?
A. Part of it.

Henry Howard Powell

Q. Part of it—Weren't you on the right side? Wasn't your car over on his side, completely over on the opposite side of the highway when you hit him?

A. He had my side blocked. I didn't have nowhere to go. I thought he was going to stop, and I tried to miss him.

Q. Well, Mr. Powell, you said your car was practically new, a 1966 model about 5 months old, is that right?

A. Yes, sir.

Q. Perfect brakes so far as you know?

A. Yes, sir.

Q. Yet you were traveling between 55 and 60 miles per hour and you said you had decreased your speed because of the intersection? That's what you tell this jury? You always do it. And yet you slid your tires on the left 185 feet and weren't able to stop, is that right?

A. That's right.

Q. And on your right 96 feet and couldn't stop, is that correct?

A. Yes, sir.

page 174 } Q. And you met Mr. Nickols and he was going one way and you the other, that's right, isn't it? It was more or less a head-on collision?

A. I hit him on the left front.

Q. I mean the front of the vehicles hit. He was going toward Phenix and you were going toward Halifax?

A. Yes, sir.

Q. And you hit him hard enough to turn his vehicle around and knock it 45 feet down the road?

A. Yes, sir.

If you hit on the end it's going to spin around. If you hit any automobile on the front end and hit it *catibias* it's going to spin around.

Q. You continued to go down the road 33 feet.

A. After you have an accident, after you hit, you don't know where it's going. You haven't got any control of it.

Q. He was thrown out of the truck and he was behind the truck on the ground?

A. Yes, sir.

Q. You got out of your car and what did you do?

A. I asked him was anything I could do to help. He was *laying* there moaning and I ran up and called. I took a coat out of my car of one of the girls and put it

page 175 } under his head.

* * * * *

Henry Howard Powell

A. I blowed my horn then. I stayed on my side. He come out in the highway. I applied my brakes and pulled over.

Q. If you could, give us any estimate as to how far you were from him when you first saw his vehicle?

A. No, sir, I couldn't.

Q. You can't?

A. No, sir.

page 176 } Q. You say you had crossed the intersection at 649?

A. Yes, sir.

Q. Do you know whether you had just crossed it or not?

A. No, sir.

Q. You couldn't tell us that?

A. No, sir.

Q. Tell me if you turned to the left as soon as you saw him?

A. No, sir. I blew my horn and he come out in the highway and I put my brakes on and pulled to the left.

Q. When you saw him at first you did what, blow your horn?

A. Yes, sir.

Q. And then the next was what?

A. I put on my brakes and pulled to my left.

Q. Did you slow your car down any?

A. Yes, sir.

Q. I believe you said Mr. Nickols was going 5 or 10 miles per hour?

page 177 } A. Pretty close, somewhere like that.

Q. And yet he collided with your car when he *was* approximately a hundred feet from that stop sign?

A. Somewhere like that.

Q. Going 5 or 10 miles per hour he had gotten a hundred feet. That's what you tell the jury?

A. Yes, sir.

Q. Mr. Powell, did you make any effort to turn to the right to get back in your proper lane to avoid this accident?

A. No, sir.

Q. Is it correct as far as you know that all of the debris and glass and everything was on the side of the road that Mr. Nickols was coming up?

A. Yes, sir, part of it.

Q. Is it correct as far as you know the officer testified as to the distance of 5 feet 10 inches from the north side of the highway?

A. Yes, sir.

Mr. Pettus: East side.

By Mr. Morton:

Q. And yet you say even though that is correct and all of that was on Mr. Nickols' side of the highway, the
page 178 } right hand side and that close to the edge you tell this jury part of his truck was still in the other lane?

A. Yes, sir.

Q. When you knocked it did you knock it back into that lane or did it all go into the right lane?

A. About middle way. It was across the white line.

Q. When it came to a stop, you think it was across the white line?

A. Part of it.

Q. You said you made no effort to turn to the right, you continued in a straight course?

A. That's right.

Q. Didn't you see Mr. Nickols on the right hand side?

A. He was middle way of the road. I put on my brakes. I was already headed for the left lane. He was over here. He came right into me.

Q. You were going so fast you couldn't stop, that's the truth of it?

A. No, sir.

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page 180 }

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Q. Did you see Mr. Wilmore—Did you talk with State Police Officer Wilmore on the 11th of August concerning this case?

A. Yes, sir, I was in the hospital.

Q. Did you give him a statement as to concerning this accident?

A. Yes, sir.

page 181 } A. Yes, sir.

Q. Did you tell Mr. Wilmore that you were coming on home driving 50 to 60 miles per hour and "I saw

this truck coming out into the highway from a stop sign. I blew the horn. I thought he was going to stop. I cut in the left lane and applied my brakes, but could not stop." Did you tell Mr. Wilmore that? Now, if that was too much I will go over it if you want me to.

By The Court:

Q. Did you understand the question? He wants to be sure you understand what he asked.

By Mr. Morton:

Q. Maybe I shouldn't have read the whole statement. This is it, Mr. Powell: Did you tell Mr. Wilmore that you were coming on home driving 50 to 60 miles per hour?

A. Yes, sir.

Mr. Slayton: Your Honor, I question the relevancy of this. This wasn't brought out on direct-examination. It's not rebuttal because the man hasn't denied that he was going 50 or 60 miles per hour. He stated on direct and

page 182 } cross-examination that when he first saw the truck being driven by Mr. Nickols it had not entered the highway, he blew his horn, applied his brakes and cut to the left. The statement is identical to the one just read here and serves no purpose other than to harass the witness.

The Court: So far, that is so. What is the purpose of it?

The Court: The purpose as to this statement is whether he said that with reference to where Mr. Nickols was, whether he said, "I saw this truck coming on into the highway from a stop sign." Coming on into the highway from a stop sign—as to whether he told Mr. Wilmore that.

The Court: You take the position it's a slight variance to what he said here today. It would be admissible only for that purpose. It's mighty close as to whether it's the same.

Mr. Slayton: I object and except to the ruling of the Court.

The Court: If there has been a prior inconsistent statement that has been shown—

page 183 } Mr. Slayton: The statement is not inconsistent with the testimony here today.

The Court: That concerns me. Is it inconsistent with what he has said? If it's not—

Mr. Morton: If it's agreed that his statement today, "I saw the truck coming into the highway" is not inconsistent

we withdraw it. If it's not inconsistent we don't want to put it on.

Mr. Slayton: I object to the question. Both statements say Mr. Nickols was not in the highway—

The Court: When he first saw him?

Mr. Slayton: Yes.

By Mr. Morton:

Q. I would like to ask Mr. Powell this question: Was Mr. Nickols coming into the highway when you saw him?

Mr. Slayton: I object to the question. You asked it 3 times. You have gotten 3 answers. I would like to have the statement of the Trooper stricken from the record.

The Court: Gentlemen, the statement read from the former hearing or statement made by Mr. Wilmore will page 184 } be disregarded.

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Mr. Slayton: We rest. The defense rests.

REVA NICKOLS, a witness for the plaintiff, called in rebuttal, being first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Morton:

Q. Please state your name?

A. Reva Nickols, Mrs. James Nickols, Jr.

* * * * *

Q. Where do you work?

A. I work at Drakes Branch for Burlington Mills.

Q. How long have you been working there?

page 185 } A. Since 1960.

Q. Do you know Mr. Henry Powell?

A. Yes, I do.

Q. Do you work on the same shift there that he works on?

A. I did for a while.

Q. What shift is that?

A. Third shift.

Reva Nickols

Q. Did you work on the third shift on the night of July 24th-25th of this year?
A. I did.
Q. What time did you leave the mill?
A. 8:00 O'Clock.
Q. Do you drive your own car?
A. No, I don't.
Q. Were you driving that day or was—
A. I was riding with someone else.
Q. Did you see Mr. Powell that morning after you left Burlington Mills?
A. I saw him leaving Ramsey's 66 Service Station as we pulled in, because we usually stop to get Cokes and something to eat on the way home.

page 186 } Q. Do you know about what time that was?
A. I'd say it was around 10 after 8:00.

Q. After you came out from work?
A. Yes.
Q. And you stopped at Ramsey's 66?
A. Yes, sir.
Q. And Mr. Powell was there?
A. He was leaving.
Q. He was leaving when you all came?
A. Yes, sir.
Q. Was anyone with him?
A. I didn't see anyone.
Q. Did you see Mr. Powell later that morning?
A. I sure did.
Q. Where did you see him?
A. Between Bethel and Louse Creek headed up the long hill. He was coming back this way and we was going toward Brookneal.
Q. Do you know what sort of car he drives?
A. He was driving a '66 red Ford and had those white tapes on it. I knew it when I saw it because I had seen it in the parking lot. We usually park right beside it in the morning.

page 187 } Q. Now, Mrs. Nickols, this jury, I don't believe, knows where Louse Creek is. You said between Bethel Church and Louse Creek?
A. Yes.
Q. Do you know how far—where is Bethel Church? You know what highway it's on?
A. It's on 501 the other side of Phenix.

Reva Nickols

Q. The other side of Phenix?
A. Yes, sir.
Q. How far on the other side of Phenix?
A. Around 2 to 3 miles.
Q. 2 or 3 miles.
Q. And on the other side of Bethel?
A. Yes.
Q. Is that in the direction of Brookneal from Phenix?
A. Yes, it is.
Q. On the other side of Bethel between Bethel and Louse Creek you met this automobile?
A. Yes, sir.
Q. Who was operating it?
A. He was.
page 188 } Q. Did you see anyone with him then?
A. No, I didn't see anyone with him. I meant 40 when I said 501.
Q. Now, this is Highway No. 40 between here and Brookneal, isn't it?
A. I still get that mixed up because 501 joins it.
Q. You tell this jury after you left work at 8:00 O'Clock you saw Mr. Powell at Ramsey's 66 about 10 minutes after 8:00 and he left as you all came up and when you went on home when you got between—past Bethel Church up here at Phenix you met him again? He was coming from the direction of Brookneal?
A. Yes.

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Mr. Pettus: We have no further evidence to offer.
The Court: I believe you, gentlemen, were in agreement that we would take the view.
page 192 } Mr. Pettus: The truck is right here at this service station. The officer will take them to it while we are arguing instructions, if they like.
Mr. Slayton: I don't object to that. As I said, I think they should just see the physical scene.

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(Whereupon, the jury retired from the courtroom to view the scene of the accident, and the following proceedings were had in their absence:)

Mr. Slayton: I would like to renew the motion to strike the testimony of Trooper Wilmore concerning the measurement that he went there this morning and made from the stop sign to cut places he found in the highway
page 194 } there today. The motion is made to strike that portion of his testimony because in the first instance it was offered in rebuttal and the Trooper testified yesterday from his notes which were made at the time he investigated this accident. He testified this morning that these marks that he found there today had no particular significance to him but on the day of this accident these marks that he measured from at that time were significant because he found debris and he found dirt and he found glass there which indicated to him that the marks in the highway were connected with the accident. Now, the plaintiff put on the Trooper relying from the measurement made by him at the scene and he testified in the presence of the jury that these marks upon being questions by a juror were approximately 90 feet from the stop sign. Before, in the absence of the jury and after extended and close direct—examination and including questions from the Court, he testified that with the assistance of the Deputy Sheriff he measured these marks with a tape and they were 84 feet from that point that he decided was a normal point at which traffic came
page 195 } into the highway. Then he comes in this morning and testified that these marks now are 120 feet away. So, I submit to the Court that it doesn't rebut anything. All it does is buttress the testimony that he was unable to be positive about yesterday.

We put a surveyor on who went there on December 20th and surveyed the scene and we asked him to take that scaled drawing that he made as a result of this survey and to scale 90 feet on the survey from the stop sign up the highway. And that's all he did. And the plaintiff has come and offered this Trooper's evidence to rebut what the surveyor put on the map which was from the Trooper's direct testimony to the Court and to the jury. And so for 2 reasons I say that his testimony should be stricken and the jury instructed to dis-

regard it. First he says that these marks out there today are marks that he finds in the road that could have been made by another accident and he thinks they are the same marks but on the day of this accident he had good reason to believe that those were marks that were apparently made

page 196 } when this accident occurred because of the other surrounding physical facts in the proximity of the automobile and how the skid marks came to them and stopped. He said today those marks don't do that. For that reason I ask his Honor to strike that testimony in that particular only and for the second reason it's not rebuttal in the sense rebuttal is supposed to be offered in after the case in chief has been presented by the party.

Mr. Pettus: May it please the Court, the officer testified on direct examination that it was approximately 90 feet from the scene to the drop marks. This morning he testified that these were the drop marks. They were the same marks that were at the point where the glass was there and he stepped it this morning and it was 120 feet. What he is simply doing is being accurate. He is simply enabling the jury to be better informed and give a correct view of the circumstances. It's nothing wrong with giving an accurate piece of information or correcting an error that he had made previously. Had it been 80 feet or had it been 60 feet then Mr. Slayton would have had no objection to it and likewise the officer

page 197 } should have so informed the jury. For that reason, we think it's clearly admissible.

The Court: Gentlemen, the way I understand the testimony, it's not limited to the scope of just being rebuttal, although it might be considered as such it does involve what to me is a critical point, factual point, in the case. I think the location of the 2 cars at the time of the impact is important to the jury in arriving at just where Mr. Nickols may have been when the defendant first saw him and where the defendant probably was. I realize it's different from what the Trooper testified to yesterday. I believe it would be a matter that the attorneys would argue as to the credibility of the witnesses' accuracy rather than as to the admissibility. Our Court in the case of *Fink* -vs—*Gas and Oil Company,* 203 Virginia 86 at 89 permitted a party after having rested to call a witness in. One of the leading trial lawyers in Virginia got caught—Here is what the Court says the law is: "It's well settled that the reopening of a case and admission of additional evidence after one or both parties have rested (here we haven't gotten to the point) is a matter within the discretion of the trial Court and will

page 198 } not be reviewed unless it affirmatively appears that this discretion has been abused. The Trial Court has a wide discretion in reopening any case." Certainly if it applies to reopening it would apply to recall. "Such discretion to be deliberately clear in behalf or allowing the whole case to be presented with best advancement for the end of justice." The rule as I found it is this: Not only may additional evidence be offered even after resting of both parties if it's pertinent to the case, the Trial Court shall—it's mandatory if it doesn't take the opposing party by surprise or work an unfair hardship. I don't believe this comes within those 2 exceptions.

Mr. Slayton: I am not complaining, Your Honor, about reopening this evidence. What I am complaining about is that when he testified first he testified to a measurement which he made with a tape at the time the accident occurred when the debris and everything was there and he goes—The accident happened in July—

The Court: We ruled out his beginning point

page 199 } was so uncertain it wasn't permitted.

Mr. Slayton: He was then allowed to give this estimate of 90 feet. Then you permit him to go out in December after a heavy snow and the road has been plowed and a lot of things have happened and pick a point on the road, in the middle of the road. There are no skid marks that stop in front of this.

The Court: He said from the gouge mark, which was immovable.

Mr. Slayton: Yes, sir, but what I am saying is he is picking a gouge mark there now that he couldn't have positively—if he hasn't been there in August, it would be no way he could connect this mark to this accident today and he is guessing and speculating that these are the same marks that he measured from today and he went out there and he stepped it and my chief complaint was to the entry of this evidence and it's critical. The case is going to rise and fall, as I see it.

The Court: That's the reason I think it's admissible. It's a critical point in this case.

page 200 } Mr. Slayton: I am saying now he has got nothing to connect it to this accident. The skid marks are not there. The debris is not there. The glass is not there. It's pure speculation and guess work on his part.

The Court: I am of the opinion that you could argue forceably to the jury even as of the date of the accident he couldn't state it came from either one of the cars. All

he could state is what he found. I appreciate what you say he had supporting debris to locate the gouge mark. But I believe rather than rendering his testimony inadmissible my opinion goes to the credibility of it, the weight of it. In support of my view there is a very recent Virginia decision in which a photograph was held proper to have been admitted that was taken over 90 days after the accident. The Court gave the same reasoning I am giving now. That witness couldn't say they were the skid marks and the after accident physical evidence of that particular evidence, but for what it was worth to the jury it was admissible and
page 201 } I am of the opinion here that this is for what it's worth properly admissible.

Mr. Slayton: I except to the ruling of the Court.

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The Clerk: Have you agreed upon a verdict, gentlemen?

Foreman: Yes, sir.

Clerk: "We the jury upon the issue joined find for the plaintiff, W. N. Nickols, Administrator of the Estate of G. W. Nickols, deceased, and fix the damages at $20,000.00, and we direct that the said sum be awarded to the beneficiaries." Signed, W. V. Purcell, Foreman.

(Whereupon, the jury was discharged from further consideration of the case, and the following proceedings were had:)

The Court: Are there any motions?

Mr. Slayton: Counsel for the defendant moves the Court to set aside the jury verdict as being contrary to the law and evidence and without evidence to support it for the reason that the plaintiff is clearly guilty of contributory negligence which proximately caused this accident and sub-
page 213 } sequent injuries resulting from it. I previously stated to the Court with great detail the reasons why I think the Court should have struck the plaintiff's evidence, having made the motion at the conclusion of the plaintiff's evidence and also at the end of all of the evidence. Also, again, I call your attention to the testimony of Trooper

Wilmore which the Court admitted this morning over the objection of Counsel for the plaintiff and point out to the Court that this constituted error of such consequence that it made it impossible for us to get a fair trial in as much as the Court was aware of the time and so commented this was a *crutial* point and counsel failed to prove it on direct-examination of the officer and then offered it in rebuttal this morning. I think for those reasons that the verdict should be set aside and a new trial awarded.

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A Copy—Teste:

Howard G. Turner, Clerk.

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