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## The Preclusiveness of a Party's Testimony: Sixty Years of *Massie v. Firmstone* in Virginia

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# COMMENTS

## THE PRECLUSIVENESS OF A PARTY'S TESTIMONY: SIXTY YEARS OF *MASSIE v. FIRMSTONE* IN VIRGINIA

### I. INTRODUCTION

The rule that a party may rise no higher than his own testimony was first articulated in Virginia in *Massie v. Firmstone*.<sup>1</sup> It has been criticized,<sup>2</sup> misunderstood,<sup>3</sup> and misapplied,<sup>4</sup> but since its inception in 1922, it has grown into an important rule of evidence and procedure.<sup>5</sup> The practi-

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1. 134 Va. 450, 114 S.E. 652 (1922). This comment includes the Virginia cases which have been decided on the "conclusiveness of a party's testimony" rule of *Massie v. Firmstone*. For a discussion of *Massie's* holding concerning real estate commissions, see Hawthorne v. Hannowell, 202 Va. 70, 115 S.E.2d 889 (1960); Hensley v. Moretz, 197 Va. 440, 90 S.E.2d 183 (1955); Snider v. New River Ins. & Realty Corp., 187 Va. 548, 47 S.E.2d 398 (1948); Riche-son v. Wilson, 187 Va. 536, 47 S.E.2d 393 (1948); Glasscock v. James, 183 Va. 561, 32 S.E.2d 734 (1945).

In researching the rule in *Massie v. Firmstone*, the practitioner who employs the West Publishing Company's "Key Number" system will find that cases on the *Massie* point under *Evidence* § 589 are combined with the "incredible testimony" doctrine, and cases on the *Massie* point under *Evidence* § 591 are combined with those cases which have held that the plaintiff who calls a defendant as an adverse witness is bound by the defendant's "clear," "reasonable," and "uncontradicted" testimony. Either of these issues can appear independently of or in conjunction with a *Massie* issue. This comment includes those cases which have dealt with those points only if a *Massie* argument also was made in the case.

2. See *infra* notes 48-61 and accompanying text.

3. See, e.g., Williams v. Greene, 181 Va. 707, 26 S.E.2d 89 (1943) (car-bus collision). Plaintiff administrator, bringing a wrongful death action, asserted that the *Massie* doctrine is not applicable to the testimony of a plaintiff suing in a representative capacity. It was not necessary for the court to reach that issue; however, it decided that when the trial judge instructed the jury to find the bus driver negligent only if they believed the plaintiff's version of the accident, *Massie* was not being employed, since the plaintiff's testimony was the only evidence of the bus driver's negligence. *Id.* at 713-14, 26 S.E.2d at 92.

In Tyree v. Lariew, 208 Va. 382, 158 S.E.2d 140 (1967), the court held that *Massie* does not deny a party the benefit of other testimony that corroborates his own; the defendant had contended that *Massie* precluded the consideration of other testimony as supporting the verdict for the plaintiff. See also Utility Control Corp. v. Prince William Constr. Co., 558 F.2d 716 (4th Cir. 1977), where the Fourth Circuit explained the district court's misunderstanding and resulting misapplication of *Massie*. See also *infra* note 5.

4. See *infra* notes 62-71 and accompanying text.

5. The *Massie* rule was applied in a number of federal decisions prior to the ruling in Hanna v. Plumer, 380 U.S. 460 (1965), that federal procedural rules apply in diversity cases. In Utility Control Corp. v. Prince William Constr. Co., 558 F.2d 716 (4th Cir. 1977), the court pointed out that *Massie* no longer has any application in the federal courts. *Id.* at 719-21. But because the lower court had misapplied *Massie* to (1) prevent the defendant from

tioner must consider the implications of the rule from the moment he begins to gather evidence that he expects to present in the form of live testimony.

The doctrine of *Massie v. Firmstone* must be considered by the court when ruling on a motion to strike at the conclusion of plaintiff's evidence,<sup>6</sup> on a motion to strike at the conclusion of all the evidence,<sup>7</sup> and on a motion to set aside the verdict.<sup>8</sup> On one occasion, the Virginia Supreme Court invoked the rule to hold the admission of certain evidence as reversible error.<sup>9</sup> A court may not employ the rule after a party has testified, but before he has rested his case.<sup>10</sup>

*Massie* does not apply to ex parte statements of opinion used to impeach a party's credibility;<sup>11</sup> and in certain situations, not yet clarified, it does not apply to statements made in a deposition.<sup>12</sup> The rule may not be employed to preclude the recovery of a foreign-born party, solely on the basis of damaging, isolated statements, when the party probably did not understand the meaning of the question posed,<sup>13</sup> or a term that he him-

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examining one of the plaintiff's witnesses (defendant's former president) and (2) award summary judgment at the close of the plaintiff's case, *id.* at 718-19, the Fourth Circuit undertook to explain the *Massie* doctrine. *Id.* at 719-20. For earlier federal cases applying *Massie*, see *Gillette v. Kelling Nut Co.*, 185 F.2d 294 (4th Cir. 1950) (breach of warranty); *Alamo v. Del Rosario*, 98 F.2d 328 (D.C. App. 1938) (personal injury action where car collided with bus); *Norfolk Southern Bus Corp. v. Lask*, 43 F.2d 45 (4th Cir. 1930) (personal injury action resulting from bus collision with horse and rider); *Zoby v. American Fidelity Co.*, 137 F. Supp. 38 (E.D. Va. 1955) (breach of contract).

6. See, e.g., *Rigney v. Neuman*, 203 Va. 822, 127 S.E.2d 403 (1962) (plaintiff's testimony and other evidence offered by the plaintiff negated allegation of gross negligence against host driver); see also cases cited *infra* note 157.

7. See, e.g., *Gordan v. Tazewell*, 184 Va. 536, 35 S.E.2d 816 (1945) (by implication, plaintiff's and defendant's witnesses combined testimony showed that plaintiff was not the procuring cause of a sale for which he claimed a commission).

8. See, e.g., *Von Roy v. Whitescarver*, 197 Va. 384, 89 S.E.2d 346 (1955) (defendant's testimony); see also cases cited *infra* note 30. The court affirmed the trial court's judgment setting aside the verdict in favor of the defendant.

9. See *Chappell v. White*, 182 Va. 625, 29 S.E.2d 858 (1944) (personal injury action resulting from car accident where plaintiff's version of defendant's child's statement was hearsay and not admissible under any exception).

10. See *Durham v. National Pool Equip. Co.*, 205 Va. 441, 448, 138 S.E.2d 55, 60 (1964) (party "entitled to adduce other evidence" in action concerning verbal indemnity agreement and written contract).

11. See *Worrell v. Worrell*, 174 Va. 11, 17, 4 S.E.2d 343, 345 (1939) (statement of opinion concerning bus driver's operation of a vehicle given to insurer of plaintiff's father, bus company owner, prior to plaintiff's institution of personal injury action).

12. See *Travelers Ins. Co. v. Lobello*, 212 Va. 534, 186 S.E.2d 80 (1972) (per curiam). Defendant insurer contended that plaintiff's recovery was barred because of a statement he had made in a discovery deposition. The court rejected that contention, holding that the statement, which does not appear in the opinion, "was not of the nature to invoke *Massie v. Firmstone*." *Id.* at 535, 186 S.E.2d at 81-82. But see *Chakales v. Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933) and discussion *infra* note 13 and accompanying text.

13. See *Chakales v. Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933) (all testimony by deposi-

self used in testifying.<sup>14</sup> It does not apply to statements of opinion,<sup>15</sup> including estimates of distances or speed,<sup>16</sup> and it cannot be employed to hold a party to his most damaging of two estimates of speed.<sup>17</sup>

*Massie* applies only to the testimony of a party and not to testimony of a party's witnesses.<sup>18</sup> The doctrine may not be invoked with respect to witness testimony where the party himself does not testify;<sup>19</sup> it does apply, however, when the witness offered by a corporate party is a "representative" of that party.<sup>20</sup>

The doctrine is employed against a party who has testified to facts peculiarly within his knowledge.<sup>21</sup> It is not applied when the party does not purport to give a complete account, as when a plaintiff's attention was diverted just before a car accident<sup>22</sup> or when he was not attentive to events which led up to an accident.<sup>23</sup> In such cases, the party can call witnesses to fill in the gaps in his own observations. In addition, *Massie* does not bar recovery by a party who was severely injured in an accident and whose memory of the facts leading up to it is confused.<sup>24</sup>

Throughout *Massie's* history, the doctrine has been consistently applied to the testimony of both plaintiffs and defendants,<sup>25</sup> but because the plaintiff must meet his burden of proof, the rule, by its nature, has

tion in equity suit to foreclose a trust deed, with an affirmative defense that an illegal brokerage fee had been charged). The defendant introduced the deposition of her husband, who was a co-defendant. English was not the native language of the parties; the husband did not testify "at the peril of being concluded by . . . a slip of his tongue," *id.* at 84, 170 S.E. at 853, or by a statement made without understanding "the full import of the question." *Id.* at 83-85, 170 S.E. at 860. *Chakales* was not overruled by *Travelers*, 212 Va. 534, 186 S.E.2d 80; see *supra* note 12 and accompanying text. In another equity case, where all the testimony offered was by deposition, the court probably would still entertain a *Massie* argument, rather than extending the *Travelers* holding to apply to all depositions; *Travelers* apparently involved a deposition that was used for impeachment purposes.

14. See *Krikorian v. Dailey*, 171 Va. 16, 197 S.E. 442 (1938). The plaintiff, who was foreign-born was not held to a literal interpretation of the term "partner," which he had used in his testimony; it was doubtful that he understood the meaning of the term "partnership." *Id.* at 27, 197 S.E. at 447.

15. See *infra* notes 74-83 and accompanying text.

16. See *infra* notes 84-85 and accompanying text.

17. See *infra* note 86 and accompanying text.

18. See *infra* note 115 and accompanying text.

19. See *infra* notes 116-24 and accompanying text.

20. See *infra* notes 125-28 and accompanying text.

21. See, e.g., *infra* note 153 and accompanying text. This aspect of the rule sometimes is expressed as "[testifying] unequivocally to matters 'in his peculiar knowledge.'" *McCORMICK, EVIDENCE* § 266, at 637 (2d ed. 1972) (testimony by the party against himself).

22. See *infra* notes 96-99 and accompanying text.

23. See *infra* notes 89-95 and accompanying text.

24. See *infra* notes 101-08 and accompanying text.

25. The doctrine was first applied to a defendant's testimony in *W.B. Bassett & Co. v. Wood*, 146 Va. 654, 132 S.E. 700 (1926) (wrongful death action).

trapped plaintiffs more frequently than it has defendants.

A *defendant* is entitled to have instructions based on the testimony of his own witnesses or his adversary's witnesses or the testimony of his adversary even though such testimony [is] at variance with his own. . . .

. . . .  
A *defendant* testifying in his own behalf is not so bound by his own admissions as to be precluded from availing himself of defenses brought out in the evidence of his adversary. A *plaintiff* must recover, if at all, on the strength of his own case not on the weakness or falsity of the defense. . . .<sup>26</sup>

Obviously, if the defendant asserts an affirmative defense, the *Massie* doctrine is as easily applicable to him as it is to the plaintiff.<sup>27</sup>

The rule also has been applied to a pre-trial stipulation,<sup>28</sup> to a defendant who attempted to amend his pleadings after he had testified,<sup>29</sup> and to the testimony of a defendant whose witnesses corroborated his testimony concerning at what point the plaintiff's decedent stepped in front of the defendant's vehicle, but whose own testimony showed that his duty to

26. *Kidd v. Little*, 194 Va. 692, 697, 74 S.E.2d 787, 790 (1953) (emphasis added) (quoting *Brubaker v. Bidstrup*, 163 Mo. App. 646, 653, 655, 147 S.W. 541, 543-44 (1912)). *Kidd* is not a *Massie* case, but it was cited with approval in *National Union Fire Ins. Co. v. Bruce*, 208 Va. 595, 600, 159 S.E.2d 815, 819 (1968), which is a *Massie* case; see *infra* note 27 for further discussion of the *National Union Fire Ins. Co.* case.

27. See, e.g., *Mullins v. Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951). The lessor's defense in this conversion action was that title to trade fixtures had passed to her, but her testimony that she would have allowed the defendants to remove all the equipment after her new lessees finished using it was inconsistent with ownership. *Id.* at 662-63, 66 S.E.2d at 489. See also *Newell v. Riggins*, 197 Va. 490, 90 S.E.2d 150 (1955) (personal injury action resulting from single car crash). The defendant asserted contributory negligence, but admitted that the plaintiff had nothing to do with his going to sleep at the wheel, and that her sleeping with her head on his shoulder did not disturb his driving. *Id.* at 492-93, 90 S.E.2d at 151-52. See also *Hargrow v. Watson*, 200 Va. 30, 104 S.E.2d 37 (1958) (defense of interspousal immunity). But see *National Union Fire Ins. Co. v. Bruce*, 208 Va. 595, 159 S.E.2d 815 (1968). The defendant host driver, after testifying that he was driving with his lights on, was allowed to rely on the testimony of the other defendant driver and his passengers that the host driver was driving with his lights off. This enabled the host driver to assert a defense of contributory negligence against the plaintiff, the host driver's passenger. *Id.* at 599-600, 159 S.E.2d at 819.

28. See *Story v. Norfolk-Portsmouth Newspapers, Inc.* 202 Va. 588, 118 S.E.2d 668 (1961) (pre-trial conference admission by plaintiff's attorney that there was no malice).

29. See *Lyric Theatre Corp. v. Vaughan*, 168 Va. 595, 191 S.E. 600 (1937) (trustee's suit to ascertain interest in a corporation and for an accounting). The defendant testified, denying the interest of the trustee's assignor. After the assignor's interest had been proved, the defendant sought to amend his answer to admit the assignor's interest, but to set up a different theory of the case. *Id.* at 599, 602-03, 191 S.E. at 601, 603. The chancellor held that filing an amended answer would violate the rule against assuming successive inconsistent positions. *Id.* at 603, 191 S.E. at 603. The court upheld the decision not only on that ground but also on the alternate ground that *Massie* prevents a party from shifting his position on a controversial question of fact as to which he has testified. *Id.* Because of the emphasis on testimony, it is believed that this case is still good law, despite the liberalization of pleadings; see VA. CODE ANN. § 8.01-272 (Cum. Supp. 1982) and VA. SUP. CT. R. 1:4, 1:8.

discover the decedent arose much earlier than that point.<sup>30</sup>

## II. THE FACTS AND THE DECISION IN *Massie v. Firmstone*

Massie brought an action against Firmstone to recover compensation which Massie claimed was due him for finding a purchaser for real estate owned by Firmstone. Firmstone had "permitted Massie to bring prospective purchasers to see the property, but was careful always to retain the privilege of selling it himself."<sup>31</sup> Massie brought Dashiell to see the property. Dashiell testified that he "considered the property sold to him" by virtue of his conversation with Firmstone on this occasion, and that he was to examine the title and make payment within two weeks to two months, at his convenience. "Massie's oral testimony [corroborated] Dashiell's in this respect."<sup>32</sup> On the other hand, "Firmstone testified . . . that he did not so understand the agreement, and did not consider that he had sold the property to Dashiell or that he had surrendered the right to withdraw the offer at any time before acceptance."<sup>33</sup> Some ten to twelve days after the meeting between Dashiell and Firmstone, Firmstone wrote Massie "that another purchaser had turned up, and that he would not deal further with Dashiell."<sup>34</sup>

Massie's motion for judgment asserted that Firmstone owed him \$5,000 "as compensation for securing for [him] at [his] request a purchaser for a tract of land which [Firmstone] informed [Massie] [he] desired to sell."<sup>35</sup> But his evidence

[did] not make out the case set up . . . , or any other case upon which he [was] entitled to recover. His own testimony [showed] that he was not requested, but asked permission, to furnish a purchaser; that his compensation depended upon a consummated sale to such purchaser; that Firmstone was careful to reserve the right to sell the property to others if he chose; and that no sale was in fact made to the proposed purchaser [Dashiell] whom he introduced.<sup>36</sup>

"If Dashiell's testimony as a whole [could] be said to show [there was a verbal sale], and if a verbal sale could be regarded as compliance with the conditional contract for commissions,"<sup>37</sup> it would be necessary, the court

30. See *W.B. Bassett & Co. v. Wood*, 146 Va. 654, 659-61, 667-68, 132 S.E. 700, 702, 704 (1926). See also *Von Roy v. Whitescarver*, 197 Va. 384, 89 S.E.2d 346 (1955) (damages to automobile). The defendant had a duty to keep a proper lookout, but his own testimony showed that he had "[failed] to look [ahead] when looking would have been effective." *Id.* at 393, 89 S.E.2d at 352.

31. *Massie v. Firmstone*, 134 Va. 450, 452, 114 S.E. 652, 653 (1922).

32. *Id.* at 453, 114 S.E. at 653.

33. *Id.*

34. *Id.*

35. *Id.* at 454, 114 S.E. at 653.

36. *Id.* at 455, 114 S.E. at 653.

37. *Id.* at 461-62, 114 S.E. at 655-56.

stated, to disregard Dashiell's testimony. The court then stated what has become known as the rule in *Massie v. Firmstone*:

As a general rule when two or more witnesses introduced by a party litigant vary in their statements of fact, such party has the right to ask the court or jury to accept as true the statements most favorable to him. In such a situation he would be entitled to have the jury instructed upon his contention, or if there were a demurrer to the evidence, the facts would have to be regarded as established in accordance with the testimony most favorable to him. This is not true, however, as to the testimony which he gives himself. No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends upon facts within his own knowledge and as to which he has testified.<sup>38</sup>

Correspondence introduced by Massie also showed that his commission was dependent upon an actual sale.<sup>39</sup> The court found the testimony of Firmstone, who died after the trial, to have been "refreshingly frank"<sup>40</sup> and found that there was no view of the case under which the jury's verdict for Firmstone could be disturbed;<sup>41</sup> further, "[t]he judgment for the defendant would have been right if it had been rendered upon a demurrer to the evidence."<sup>42</sup> The court thus apparently anticipated one of the future uses for the rule it was establishing.<sup>43</sup>

Since the court has followed *Massie v. Firmstone* for sixty years, it is perhaps of historical interest only to note that the rule as originally expressed in *Massie* was dictum. Massie's testimony and correspondence<sup>44</sup> and Firmstone's testimony<sup>45</sup> showed that no commission was due unless there was an *actual* sale. The decision in the case thus turned on the point that Massie had not proved that an *actual* sale had taken place and the court noted in dictum that Massie's testimony showed there was *not even a verbal sale*.<sup>46</sup> The testimony of his witness, Dashiell, *even if* it could be said to show that a verbal sale had taken place, and *even if* a verbal sale could be regarded as compliance with the conditional contract, would have to be discarded, because Massie was testifying to "facts within his own knowledge," and his case could not rise higher than the

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38. *Id.* at 462, 114 S.E. at 656.

39. *Id.*

40. *Id.* at 453, 114 S.E. at 653.

41. *Id.* at 463, 114 S.E. at 656.

42. *Id.* at 452, 114 S.E. at 653. The demurrer to the evidence has been replaced by the motion to strike the evidence. See VA. CODE ANN. § 8.01-276 (Repl. Vol. 1977).

43. See *supra* note 6 and accompanying text.

44. 134 Va. at 462, 114 S.E. at 656.

45. *Id.* at 453, 114 S.E. at 653.

46. *Id.* at 461, 114 S.E. at 655.

testimony he had given.<sup>47</sup>

### III. CRITICISM OF THE RULE THAT A PARTY'S CASE MAY RISE NO HIGHER THAN HIS OWN TESTIMONY

The rule that a party is concluded by his own unimpeached and uncontradicted testimony<sup>48</sup> has been criticized by the commentators.<sup>49</sup> McCormick notes that there are three approaches. First, the party's testimony is viewed like that of any other party; the party is free to contradict himself, or to call other witnesses to contradict him.<sup>50</sup> Under the second view, "the party's testimony is not conclusive against contradiction except when he testifies unequivocally to matters 'in his peculiar knowledge.'"<sup>51</sup> The third view is that "a party's testimony adverse to himself is in general to be treated as a judicial admission, conclusive against him, so that he may not bring other witnesses to contradict it, and if he or his adversary does elicit such conflicting testimony it will be disregarded."<sup>52</sup>

After listing these three approaches to the application of the rule, McCormick details the exceptions.<sup>53</sup> But he closes with criticism of the rule, which, he says, "leads to mechanical solutions, unrelated to the needs of justice and calculated to proliferate appeals, in certain special situations. One is the situation where the opponent by adroit cross-examination has maneuvered the party into an improvident concession."<sup>54</sup>

McCormick also considers that the

moral emphasis [of the rule] is wrong. Early cases where the rule of conclusiveness was first used may have been cases where the judges were outraged by seeming attempts by parties to play fast and loose with the court. But examination of numerous decisions demonstrates that this is far from being the typical situation of the party testifying to self-disserving facts. Instead of the unscrupulous party, it is the one who can be pushed into an admission by the ingenuity or persistence of adverse counsel, or it is the unusually candid or conscientious party willing to speak the truth to his own hurt, who is penalized by the rule of conclusiveness.<sup>55</sup>

Wigmore notes that the rule is

a flexible one, requiring especial judicial wisdom for its sound application. Therefore, while seeking justice, it might often do injustice. . . . [I]t assim-

47. *Id.* at 461-62, 114 S.E. at 655-56.

48. *See* McCORMICK, *supra* note 21, § 266, at 636-37.

49. *Id.* at 638-39; *see also* 9 WIGMORE, EVIDENCE § 2594a, at 841 (1981) (effect of judicial admissions: party's testimony as a conclusive admission).

50. McCORMICK, *supra* note 21, § 266, at 637 (citations omitted).

51. *Id.*

52. *Id.*

53. *Id.* at 637-38.

54. *Id.* at 639. *But see infra* notes and 136-52 and accompanying text.

55. *Id.*



lates testimony on the stand to formal deliberate admissions. But testimony cannot be treated that way. Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory-stirring between all concerned. It is full of surprises at the trial. The truth of the case depends on a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself.<sup>56</sup>

The commentators' criticisms that the "conclusiveness of a party's testimony" rule is mechanically applied,<sup>57</sup> and that it may result in injustice<sup>58</sup> do not apply in Virginia. Section V of this comment attempts to demonstrate this point by detailing the "gloss" which has been placed on the rule by the Virginia Supreme Court.<sup>59</sup> It is only in the rare case that the rule seems to operate with particular harshness;<sup>60</sup> even when it does so operate, the effect can be justified.<sup>61</sup>

#### IV. "MISAPPLICATIONS" OF THE RULE

From the inception of the *Massie* doctrine, the Virginia Supreme Court has not limited its application solely to cases in which the party has presented his own testimony as well as that of at least one other witness.<sup>62</sup> A straightforward reading of the language of the *Massie* opinion,

56. 9 WIGMORE, *supra* note 49, § 2594a, at 844.

57. See *supra* text accompanying note 54 and *infra* notes 136-52 and accompanying text.

58. See *supra* note 56 and accompanying text.

59. See *infra* notes 72-152 and accompanying text.

60. See, e.g., *Baines v. Parker*, 217 Va. 100, 225 S.E.2d 403 (1976) (personal injury). Plaintiff called defendant mother-in-law, the driver of the car, and another defendant, the driver of the truck that had collided with the car, as adverse witnesses. *Id.* at 101, 225 S.E.2d at 405. But because plaintiff's testimony, which showed her attention was focused on her mother-in-law's driving at all times, *id.* at 105-06, 225 S.E.2d at 407, completely absolved her mother-in-law of negligence, *id.*, she could not take advantage of the testimony of the truck driver and an investigating officer which tended to show negligence on the mother-in-law's part, *id.* at 105, 225 S.E.2d at 407, and which supported the verdict and judgment for the defendant truck owner on his cross-claim against the mother-in-law for damage to his truck and lost profits. *Id.* at 107, 225 S.E.2d at 408. Plaintiff and her mother-in-law had stipulated that the gross negligence rule was not applicable. *Id.* at 105 n.\*, 225 S.E.2d at 407 n.\*.

61. See, e.g., *Newton v. Veney*, 220 Va. 947, 265 S.E.2d 707 (1980) (personal injury). The plaintiff car passenger's case could rise to the level of the testimony of both adverse witnesses she had called (the drivers of both cars) because the plaintiff "did not 'know exactly what happened.'" *Id.* at 950, 265 S.E.2d at 709. The "focused attention" on events which results in a party's testifying unequivocally to facts within his knowledge, in contrast to his failure to so focus his attention which results in his offering less certain testimony, accounts for the different results in *Baines*, 217 Va. 100, 225 S.E.2d 403 and *Newton*, 220 Va. 947, 265 S.E.2d 707.

62. In fact, it was not until 14 years after the *Massie* decision that the court applied the doctrine to a case meeting both *Massie* requirements: that the party offer the testimony of a witness or witnesses other than himself, and that the testimony of the other witness of wit-

as well as a knowledge of the facts in that case, shows that this is a misapplication of the doctrine. It is not unusual for *Massie's* "[n]o litigant can successfully ask a court or jury to believe that he has not told the truth"<sup>63</sup> language to be lifted to stand apart from the "two witness" language that precedes it, and from the "[t]his is not true, *however*, as to the testimony which he gives himself"<sup>64</sup> language which joins the two parts of the rule. The presence of this "joining" language requires the language that "[n]o litigant can successfully ask" portion to be interpreted as a statement concerning how the court views a party's testimony when the party himself is *one of two* witnesses whom he offers who "vary in their statements of fact."<sup>65</sup>

When the court applies *Massie* in cases where the party has offered no testimony other than his own or where the testimony of the party's witnesses rises no higher than the party's, it might just as well cite not *Massie*, but an older case, *Virginia Railway and Power Co. v. Godsey*.<sup>66</sup> There, the plaintiff's testimony showed that the proximate cause of her injury was the pushing of passengers and not the negligence of the defendant's driver in starting the streetcar;<sup>67</sup> she apparently offered no witnesses other than herself.

The misapplication of *Massie* appears to have been recognized only in the opinion of another court.<sup>68</sup> But it cannot be said, after sixty years of *Massie* opinions, that this application is not good law. Numerous cases employing a *Massie* test have been decided, but in instances where the party either presented no witnesses other than himself,<sup>69</sup> or where the

nesses be more favorable to the party than his own testimony. See *Tignor v. Virginia Elec. & Power Co.*, 166 Va. 284, 184 S.E. 234 (1936) (personal injury action resulting from bus/motorcycle collision). Under one version of the plaintiff's testimony, he would have been guilty of contributory negligence as a matter of law; under a more favorable interpretation, he would not. *Id.* at 290-91, 184 S.E. at 236. The testimony of the plaintiff's witnesses, *id.* at 288-89, 184 S.E. at 235, convinced the court to reinstate the jury verdict for the plaintiff. *Id.* at 293-94, 184 S.E. at 237. The case also marked the beginning of the "whole testimony" requirement of *Massie*. See *Tignor* at 290-91, 184 S.E. at 236, citing *Hancock v. Anderson*, 160 Va. 225, 237, 168 S.E. 458, 462 (1933). See also *infra* notes 139-52 and accompanying text. There was no mention of *Massie* in the *Tignor* opinion.

63. 134 Va. at 462, 114 S.E. at 656.

64. *Id.* (emphasis added).

65. *Id.*

66. 117 Va. 167, 83 S.E. 1072 (1915).

67. *Id.* at 170-71, 83 S.E. at 1073-74.

68. See *Alamo v. Del Rosario*, 98 F.2d 328 (D.C. Cir. 1938). "[M]any cases which intimate that a plaintiff is conclusively bound by his own testimony are not authority for the proposition, because they contain no contrary testimony." *Id.* at 330-31 (citing cases from Virginia and other states).

69. See *Dial v. Deskins*, 221 Va. 701, 273 S.E.2d 546 (1981) (per curiam) (plaintiff bound by testimony that he would have purchased property whether or not streets were paved); *Watson v. First Nat'l Bank*, 213 Va. 687, 194 S.E.2d 749 (1973) (bank vice-president's testimony that the consent of endorsers was required to renew note precluded the holding that

testimony of his witness or witnesses made no better case than he had made with his own testimony,<sup>70</sup> or where the testimony of his witnesses

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the bank urged); *White v. Doe*, 207 Va. 276, 148 S.E.2d 797 (1966)(plaintiff bound by his testimony which showed he was overtaking a vehicle at an intersection); *Atwell v. Watson*, 204 Va. 624, 133 S.E.2d 552 (1963) (plaintiff passenger's testimony concerning host's careful driving bound passenger; no gross negligence could be shown); *Harris v. Dunham*, 203 Va. 760, 127 S.E.2d 65 (1962) (party precluded by testimony of his own independent investigation from claiming fraud); *Virginia Elec. & Power Co. v. Mabin*, 203 Va. 490, 125 S.E.2d 145 (1962) (5-2 decision) (roofer's testimony did not preclude jury from finding no contributory negligence); *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 118 S.E.2d 668 (1961) (summary judgment for defendant proper in libel action after plaintiff's stipulation that there was no malice on the part of the defendant); *Clark v. Moore*, 196 Va. 878, 86 S.E.2d 37 (1955) (plaintiff's testimony showed that he had performed as a civil engineer without a Virginia license, thereby rendering the contract void); *Martin v. Williams*, 194 Va. 437, 73 S.E.2d 355 (1952) (plaintiff's testimony denying her signature prevented her claiming that the signature was procured by fraud); *Neapolidis v. Theofana Maritime Co.*, 192 Va. 90, 63 S.E.2d 795, *cert. denied*, 342 U.S. 831 (1951) (attachment for balance due on earned wages—seaman could not complain that his version of the transaction was accepted as true); *Shorter v. Shelton*, 183 Va. 819, 33 S.E.2d 643 (1945) (unlawful entry and detainer—plaintiff bound by her testimony showing she was a tenant at will); *Federal Land Bank v. Birchfield*, 173 Va. 200, 3 S.E.2d 405 (1939) (defamation—plaintiff's testimony showed he did not think defendant's agent bore him any malice); *Krikorian v. Dailey*, 171 Va. 16, 197 S.E. 442 (1938) (breach of lease covenants—plaintiff is bound by his own statements provided they are intelligently made); *Virginia Elec. & Power Co. v. Vellines*, 162 Va. 671, 175 S.E. 35 (1934) (plaintiff's testimony as to failure to keep a proper lookout when driving across streetcar tracks required a finding of contributory negligence); *Hendricks v. Virginia Elec. & Power Co.*, 161 Va. 793, 172 S.E. 160 (1934) (plaintiff bound by own testimony that he walked in front of streetcar); *Thalhimer Bros. v. Casci*, 160 Va. 439, 168 S.E. 433 (1933) (plaintiff who fell into ventilating shaft, mistaking it for restroom, was bound by her testimony that she did not follow directions to restroom); *Virginia Elec. & Power Co. v. Lenz*, 158 Va. 732, 164 S.E. 572 (1932) (streetcar passenger bound by his testimony that he was familiar with operation of mechanical step).

70. *See, e.g., Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975) (plaintiff's testimony showed misuse of product and his witness's testimony was hearsay); *Barnes v. Caluneo*, 200 Va. 631, 107 S.E.2d 484 (1959) (personal injury action resulting from car/bus collision); *American Health Ins. Corp. v. Newcomb*, 197 Va. 836, 91 S.E.2d 447 (1956) (*dictum*) (action against health insurer who had refused to pay claim); *Stark v. Hubbard*, 187 Va. 820, 48 S.E.2d 216 (1948)(4-3 decision) (plaintiff's witnesses did not see the accident occur); *Gordan v. Tazewell*, 184 Va. 536, 35 S.E.2d 816 (1945) (both plaintiff and his witness testified that plaintiff would be entitled to a commission only if the government became interested in the property as a result of plaintiff's efforts); *Locker v. Carter*, 177 Va. 610, 15 S.E.2d 39 (1941) (4-3 decision) (personal injury action resulting from car-pedestrian incident in which the dissent stated that plaintiff's witnesses did not place plaintiff's actions in a better light than her own testimony, which showed contributory negligence); *South Hill Motor Co. v. Gordon*, 172 Va. 193, 200 S.E. 637 (1939) (personal injury action resulting from car-pedestrian accident where plaintiff's own evidence disclosed contributory negligence); *Yellow Cab Co. v. Gulley*, 169 Va. 611, 194 S.E. 683 (1938) (action for personal injuries and property damage resulting from car-taxi collision; contributory negligence shown by the testimony of both the plaintiff and her chauffeur); *Frazier v. Stout*, 165 Va. 68, 181 S.E. 377 (1935) (plaintiff's detailed testimony of crossing the road in front of a speeding car required a holding of contributory negligence); *Fagg v. Carney*, 159 Va. 118, 165 S.E. 419 (1932) (personal injury action involving boy skating in street where testimony of plaintiff's witness concerning the speed of a car was based on "too fleeting" an observation); *W.B. Bassett &*

actually was detrimental.<sup>71</sup> These cases are good law as a subdivision of the *Massie* doctrine, even if they do not meet the broader requirement that there be testimony by the party and at least one other witness offered by the party.

## V. THE "GLOSS"<sup>72</sup> ON *Massie v. Firmstone*: "EXCEPTIONS" TO THE RULE

### A. *Opinion Testimony*

Virginia practitioners have the benefit of seventy-seven Virginia Supreme Court cases<sup>73</sup> in which the rule in *Massie v. Firmstone* has been interpreted. A degree of predictability concerning the court's application of the rule along with the corresponding rationale for its interpretation has been present, at least tentatively, since the court's 1939 decision in *Worrell v. Worrell*.<sup>74</sup> There, the court first articulated the "opinion exception" to the *Massie* doctrine, thereby giving a party the benefit of his witnesses' testimony where it is more favorable to him than his own testimony.<sup>75</sup> Application of the "opinion exception" can be seen in such cases as *Semones v. Johnson*,<sup>76</sup> where the plaintiff who braked to avoid hitting dogs near the road testified that the cars traveling behind her were a "proper distance" from her.<sup>77</sup> The court considered this testimony to be opinionary and held that the plaintiff was not precluded from taking advantage of other testimony that the car of one of the defendants had left heavy skid marks, whereas the plaintiff's car had left none.<sup>78</sup>

In a recent products liability case involving a defective automobile transmission, the defendant car company contended that the plaintiff

Co. v. Wood, 146 Va. 654, 132 S.E. 700 (1926) (wrongful death action resulting from truck hitting pedestrian—defendant bound by his testimony where that of his witnesses was corroborative, but not on the decisive issue).

71. See, e.g., Harrell v. Virginia Elec. & Power Co., 177 Va. 59, 12 S.E.2d 833 (1941) (action for personal injury and property damage resulting from streetcar-car collision); Davis Bakery, Inc. v. Dozier, 139 Va. 628, 124 S.E. 411 (1924) (plaintiff who fell through skylight testified that defects could not be seen by an ordinary inspection, while his witnesses said the danger was open and obvious).

72. The term is Justice Poff's; he wrote, "[w]hile the rule in *Massie* has been explicated and refined, it has not been overruled or consumed by qualification or exception. Indeed, it has only been strengthened and validated by the gloss put upon it." Baines v. Parker, 217 Va. 100, 105, 225 S.E.2d 403, 407 (1976).

73. See Appendix.

74. 174 Va. 11, 4 S.E.2d 343 (1939).

75. *Id.* at 16-17, 4 S.E.2d at 345. The "opinion exception" was only tentatively present after *Worrell*, in which it was first applied, because in that case an ex parte, out-of-court statement was at issue. After *Worrell*, practitioners would not have been certain that the court would extend the application to live testimony. See also *supra* note 11 and accompanying text.

76. 217 Va. 293, 227 S.E.2d 731 (1976).

77. *Id.* at 294, 227 S.E.2d at 732.

78. *Id.* at 294, 295-96, 227 S.E.2d at 732, 733-34.

could not rely on her expert's theory "that defective design had induced plaintiff not to shift fully into park, because plaintiff had testified that the car *was* in park."<sup>79</sup> The court disagreed, holding that the plaintiff was merely stating her opinion, and was not precluded by *Massie* from relying upon her expert's explanation.<sup>80</sup>

The opinion exception also has been applied to an individual's "opinion" of his obligations under a written contract. In *Erlich v. Hendrick Construction Co.*,<sup>81</sup> it was held that a contractor who had testified that he understood that he was not working under a time deadline<sup>82</sup> was not precluded from relying on evidence excusing delay.<sup>83</sup> The "opinion exception" of *Worrell v. Worrell*<sup>84</sup> frequently has been applied to "mere estimates" of distances and speeds, "made in fleeting moments and related months after the occurrence."<sup>85</sup> Further, a party is not bound by the most damaging of his two estimates of speed given in different parts of his testimony.<sup>86</sup> Estimates of speed and of the proximity of objects to an accident scene, made by a party unfamiliar with the place where he was injured, can be said to be a subcategory of the "mere estimates" exception.<sup>87</sup>

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79. *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430-31, 297 S.E.2d 675, 680 (1982).

80. *Id.* at 431, 297 S.E.2d at 680.

81. 217 Va. 108, 225 S.E.2d 665 (1976).

82. *Id.* at 111, 225 S.E.2d at 667.

83. *Id.* at 114, 225 S.E.2d at 669.

84. 174 Va. 11, 4 S.E.2d 343 (1939).

85. *Sink v. Masterson*, 191 Va. 618, 623, 61 S.E.2d 863, 865 (1950) (dictum) (new trial ordered for error in an instruction not related to the *Massie* issue). *Sink* quoted *Saunders v. Hall*, 176 Va. 526, 11 S.E.2d 592 (1940), which is not a *Massie* case, as authority for its "distances and speeds" statement. *Saunders* had said:

In the very nature of things an estimate of distances in feet and yards is not intended to be accurate. It, at best, is an approximation involving estimates, best judgment, and opinion. Estimates of distances naturally will vary and witnesses will differ. This kind of evidence is peculiarly for a jury. If a witness has given incorrect estimates of distances where events are happening quickly, this is a matter to be considered by the jury in weighing his testimony. It is not ground for holding that his entire testimony is incredible, unworthy of belief, and as a matter of law to be excluded.

*Id.* at 538-39, 11 S.E.2d at 596.

Other cases employing the distance-speed exception are *Parker v. Davis*, 221 Va. 299, 269 S.E.2d 377 (1980) (personal injury action resulting from car/pick-up truck collision); *Shelley v. West*, 213 Va. 611, 194 S.E.2d 899 (1973) (personal injury action resulting from two-car collision; estimates concerning how far from the collision the host driver had engaged in a drag race with a third car); *Vaughan v. Eatton*, 197 Va. 459, 89 S.E.2d 914 (1955) (personal injury action resulting from car/ice truck collision). The plaintiff "did not claim to be an expert on estimating speed and distance. She frankly stated that she did not know the exact distance the truck was from the intersection . . . , nor did she know the speed it was traveling." *Id.* at 461, 89 S.E.2d at 915; *Clayton v. Taylor*, 193 Va. 555, 69 S.E.2d 424 (1952) (personal injury action resulting from two-car collision).

86. See *Yates v. Potts*, 210 Va. 636, 172 S.E.2d 784 (1970) (personal injury action—plaintiff, a police officer in pursuit of a speeding car, crashed into another car).

87. See *Barnes v. Caluneo*, 200 Va. 631, 634, 107 S.E.2d 484, 487 (1959).

In a number of *Massie* cases, the court has been unimpressed with the mathematical formulas and other arguments which have been urged in support of the contention that if distances and/or speeds were as the other party testified, the accident could not have happened, and thus the party's testimony was incredible as a matter of law. All such arguments in the *Massie* context have been rejected.<sup>88</sup>

*B. Not Paying Attention; Attention Diverted; or Party Does not Purport to Give a Full Account*

Some of the most intriguing of the court's opinions fall into this category. In *Saunders v. Bulluck*,<sup>89</sup> plaintiff brought an action against her brother, the host driver, and against the driver of the other car involved in the collision. Although the plaintiff testified that her brother was not driving fast or recklessly, the court considered that she was sixteen at the time of the accident, that she had never driven a car, and that she was seated on the back seat close to the man she later married.<sup>90</sup> Under such circumstances, the court said, the plaintiff was entitled to have the benefit of "other evidence on the question of defendant's [host driver's] negligence."<sup>91</sup>

In *Waller v. Waller*,<sup>92</sup> plaintiff brought an action against his brother, the host driver, and against the owner and driver of the other vehicle involved in the collision. In *Waller*, the plaintiff testified that he was not aware of whether his brother had been drinking, and "as far as he knew [his brother] was driving on the proper side of the road."<sup>93</sup> Other evidence indicated that the host driver had driven up a hill completely on the wrong side of a double line.<sup>94</sup> The plaintiff was given the benefit of this evidence which was in conflict with his own testimony. Since the plaintiff was riding in the back seat and playing his banjo at the time of the accident, he did not purport to testify to facts within his knowledge.<sup>95</sup>

The plaintiff in *Bond v. Joyner*<sup>96</sup> testified that the host driver had been driving in a normal manner and that she felt perfectly safe with him,<sup>97</sup> but because her attention was diverted and she did not see the collision,<sup>98</sup>

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88. See, e.g., *Parker v. Davis*, 221 Va. at 303-05, 269 S.E.2d at 380-81; *Barnes v. Caluneo*, 200 Va. at 634-35, 107 S.E.2d at 486-87; and *Clayton v. Taylor*, 193 Va. at 559-62, 69 S.E.2d at 427-29.

89. 208 Va. 551, 159 S.E.2d 820 (1968).

90. *Id.* at 553-54, 159 S.E.2d at 822-23.

91. *Id.* at 554, 159 S.E.2d at 823.

92. 187 Va. 25, 46 S.E.2d 42 (1948).

93. *Id.* at 32, 46 S.E.2d at 45.

94. *Id.* at 29, 31-32, 46 S.E.2d at 44, 45.

95. *Id.* at 31-32, 46 S.E.2d at 45.

96. 205 Va. 292, 136 S.E.2d 903 (1964).

97. *Id.* at 294, 136 S.E.2d at 905.

98. *Id.*

she was given the benefit of the testimony of "many disinterested witnesses [who said that the host's car] crossed two or three feet to the west of the center line into the . . . line of travel"<sup>99</sup> of the truck with which it collided.

### C. *Fast-Moving Events and/or Party Severely Injured in an Accident*

The Virginia Supreme Court has made significant inroads into the harsh effect of the *Massie* doctrine by refusing to apply it in instances where the party is testifying to a series of fast-moving events<sup>100</sup> and where the party was severely injured in an accident. The court also makes allowances for uncertainty of a party's testimony in such circumstances. The view that the doctrine should not apply when a party suffering serious after-effects of an accident was subjected to a vigorous cross-examination was first recognized by Justice Hudgins in his dissent in *Driscoll v. Virginia Electric and Power Co.*,<sup>101</sup> but the principle was not applied by the majority until its decision in *Burruss v. Suddith*.<sup>102</sup> The plaintiff in *Burruss* had suffered a violent blow when the defendant's ripsaw machine discharged a log.<sup>103</sup> His testimony contained such qualifying statements as "I think," "I don't know," and "maybe."<sup>104</sup> He thought two "and possibly three" men had been operating the machine.<sup>105</sup> The *Massie* rule, the court said,

[has] no application to evidence of this character. It is intended to compel the exercise of good faith on the part of a litigant not to penalize him for honest mistakes or infirmities of memory. Particularly would this be true in an expression of opinion as to the lapse of time between links in a swiftly moving chain of events. . . . Under the circumstances . . . it was for the jury to weigh the testimony of the several witnesses.<sup>106</sup>

This clarification of the *Massie* rule has been applied in a number of

99. *Id.* at 294-95, 136 S.E.2d at 905. However, an evaluation of all the plaintiff's evidence showed that she had failed to establish gross negligence, and the court should have sustained the defendant's motion to strike. *Id.* at 296, 136 S.E.2d at 906.

100. *See, e.g., Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939), where the plaintiff bus passenger testified that she "could not see the truck until we were on it and it all happened so quickly I couldn't say definitely where we were or where he was." *Id.* at 16, 4 S.E.2d at 345. She was allowed to rise to the level of the testimony of her witnesses, the driver of the truck with which the bus collided and fellow bus passengers, and the physical evidence of the bus driver's negligence. *Id.* at 15-17, 4 S.E.2d at 344-45. For a discussion of another aspect of the *Worrell* case, *see supra* notes 74-75 and accompanying text.

101. 166 Va. 538, 547-49, 181 S.E. 402, 609 (1935) (Hudgins, J., dissenting). The dissenting opinion is printed separately from the majority opinion in the *Southeastern Reporter*.

102. 187 Va. 473, 47 S.E.2d 546 (1948).

103. *Id.* at 481-82, 47 S.E.2d at 550.

104. *Id.* at 481, 47 S.E.2d at 550.

105. *Id.*

106. *Id.* at 482, 47 S.E.2d at 550 (citations omitted).

cases since *Burruss*, including *Crew v. Nelson*,<sup>107</sup> where the plaintiff, who had been severely injured, "repeatedly stated throughout persistent questioning . . . that she did not 'know,' did not 'remember,' and had 'no idea how far'";<sup>108</sup> *Vaughan v. Eatton*,<sup>109</sup> where, after the accident, the plaintiff "was hazy, momentarily unconscious and excited";<sup>110</sup> *Anchor Motor Freight, Inc. v. Paul*,<sup>111</sup> where the plaintiff testified that his truck was not damaged by the impact with a second truck, but that he could not tell whether his physical injuries were caused by the impact with the first truck or the second truck;<sup>112</sup> and *Shelley v. West*,<sup>113</sup> where the plaintiff did not remember the impact when her host's car collided with another car, and her testimony included such statements as "to the best of my memory," and "the way I remember."<sup>114</sup>

*D. The Rule Applies Only to a Party's Testimony, Not to that of His Witness or His Least Favorable Witness; "Alter Ego" Application*

The court has further refined the *Massie* rule through opinions in which it has stated that the rule applies to a litigant, not to the litigant's witnesses.<sup>115</sup> In *West v. Anderson*,<sup>116</sup> a condemnation proceeding, the commission's award was contested. The *Massie* rule was held applicable to the landowner defendant who had "freely and voluntarily reduced the amount claimed in his original grounds of defense";<sup>117</sup> however, *Massie* was held inapplicable in *May v. Malcolm*,<sup>118</sup> also a condemnation proceeding. In *May*, the highway commissioner, who was a party, did not testify.<sup>119</sup> The landowners contended that the district engineer who testified was the "alter ego of the highway commissioner,"<sup>120</sup> but the court said he was only an employee; he was a witness, not a party litigant, "and the highway commissioner [was] not bound by [his] testimony."<sup>121</sup> In *Colonial Pipeline Co. v. Lohman*,<sup>122</sup> the landowners were not bound by the

107. 188 Va. 108, 49 S.E.2d 326 (1948).

108. *Id.* at 114-15, 49 S.E.2d at 329.

109. 197 Va. 459, 89 S.E.2d 914 (1955).

110. *Id.* at 464, 89 S.E.2d at 917.

111. 198 Va. 480, 95 S.E.2d 179 (1956).

112. *Id.* at 487-88, 95 S.E.2d at 185-86.

113. 213 Va. 611, 194 S.E.2d 899 (1973).

114. *Id.* at 613, 194 S.E.2d at 900-01.

115. See *Birtcherds Dairy, Inc. v. Randall*, 180 Va. 311, 315, 23 S.E.2d 229, 232 (1942) (personal injury resulting from bus/dairy truck collision; testimony of defendant dairy company's driver).

116. 186 Va. 554, 42 S.E.2d 876 (1947).

117. *Id.* at 563-64, 42 S.E.2d at 880.

118. 202 Va. 78, 116 S.E.2d 114 (1960).

119. *Id.* at 82, 116 S.E.2d at 118.

120. *Id.*

121. *Id.*

122. 207 Va. 775, 152 S.E.2d 34 (1967) (condemnation proceeding).



testimony of the one witness they had offered, a real estate appraiser.<sup>123</sup> The court said that *May v. Malcolm* was applicable, not *West v. Anderson*.<sup>124</sup>

The same issue has arisen in a different setting. In *Watson v. First National Bank*,<sup>125</sup> the testimony of the bank's representative, its sole witness, was held binding.<sup>126</sup> He was the vice-president who handled the loan and prepared the note in question;<sup>127</sup> his testimony was "clear, definite and unequivocal, [and] preclude[d] the holding that [the] Bank urge[d]."<sup>128</sup>

That a party is not bound by the testimony of the least favorable of two witnesses that he offers was noted in *Massie v. Firmstone*,<sup>129</sup> although dictum, since *Massie* was held an exception to the proposition. The court has since applied the rule in *Newton v. Veney*,<sup>130</sup> where the plaintiff who was unsure of the cause of an accident involving two cars in a school parking lot, called both defendants as adverse witnesses.<sup>131</sup> The court said that in such circumstances the party has a right to ask the court or jury to accept as true the statements most favorable to him.<sup>132</sup> In *Diggs v. Lail*,<sup>133</sup> the plaintiff was not bound by the least favorable testimony given by the several physicians who testified as to her injuries and whether her depression had resulted from those injuries.<sup>134</sup>

#### E. *Massie Does Not Apply to the Least Favorable Portion of a Party's Own Testimony; a Party's Testimony Must be Viewed as a Whole*

In *Yates v. Potts*,<sup>135</sup> a case that turned in part on whether the plaintiff was exceeding the speed limit at the time of the accident, the defendant contended unsuccessfully that *Massie* should bind the plaintiff to his highest estimate of speed. The accident had occurred in a forty-five mile per hour zone.<sup>136</sup> On direct examination the plaintiff had estimated his speed at forty to fifty miles per hour, and at forty-five to fifty miles per hour. On cross-examination he replied affirmatively when asked, "I un-

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123. *Id.* at 778, 780, 152 S.E.2d at 37-38.

124. *Id.* at 780, 152 S.E.2d at 38.

125. 213 Va. 687, 194 S.E.2d 749 (1973).

126. *Id.* at 689, 194 S.E.2d at 751.

127. *Id.* at 688, 194 S.E.2d at 751.

128. *Id.* at 689, 194 S.E.2d at 750.

129. 134 Va. at 462, 114 S.E. at 656.

130. 220 Va. 947, 265 S.E.2d 707 (1980).

131. *Id.* at 950, 265 S.E.2d at 709.

132. *Id.* at 951, 265 S.E.2d at 710.

133. 201 Va. 871, 114 S.E.2d 743 (1960).

134. *Id.* at 877, 114 S.E.2d at 748.

135. 210 Va. 636, 172 S.E.2d 784 (1970).

136. *Id.* at 637, 172 S.E.2d at 785.

derstand you to say, you were going approximately 50?"<sup>137</sup> The court stated that the plaintiff's testimony created a jury issue as to speed since the jury could reasonably have decided to accept either the highest or the lowest estimate, or to fix the speed at some midpoint.<sup>138</sup>

The *Yates* concept perhaps should be viewed as part of the larger doctrine that has developed in *Massie* cases—that a party's testimony must be viewed as a whole; neither isolated statements in his favor,<sup>139</sup> nor isolated statements to his detriment<sup>140</sup> are viewed as controlling. The "whole testimony" doctrine appears to have been advanced first in *Tignor v. Virginia Electric and Power Co.*,<sup>141</sup> where, under one view of the plaintiff's testimony he would have been guilty of contributory negligence and under another view he would not.<sup>142</sup> In *Edmonds v. Mecklenburg Electric Cooperative*,<sup>143</sup> the court expanded this concept to include not only the consideration of the plaintiff's evidence as a whole, but also "other evidence, if any."<sup>144</sup> The doctrine also was a factor in *Anchor Motor Freight v. Paul*,<sup>145</sup> in *Bond v. Joyner*,<sup>146</sup> and in *Virginia Electric and Power Co. v. Mabin*,<sup>147</sup> where the plaintiff's testimony was highly conflicting on cross-examination, and redirect.<sup>148</sup> In *Mabin*, the court said that the *Massie* rule

must, of necessity, be subject to a qualification, so that a litigant with a meritorious claim or defense will not be cast out of court because of some single, isolated statement which, when taken out of context and pointed to in the cold, printed record on appeal, appears to be conclusive against him.<sup>149</sup>

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137. *Id.* at 639, 172 S.E.2d at 786.

138. *Id.* at 639, 172 S.E.2d at 787.

139. *See, e.g.*, *Harrell v. Virginia Elec. & Power Co.*, 177 Va. 59, 12 S.E.2d 833 (1941) (action for personal injury and property damage). The plaintiff's car stalled on the streetcar tracks. He saw the streetcar when it was 1,000 feet away, but remained in the car, trying to start it. *Id.* at 61, 12 S.E.2d at 834. Plaintiff's isolated statement in his favor was that when he got out of the car, he "might have made it" if the streetcar had been 20 feet farther away. *Id.* at 61-62, 12 S.E.2d at 834.

140. *See, e.g.*, *Anchor Motor Freight, Inc. v. Paul*, 198 Va. 480, 95 S.E.2d 179 (1956) (plaintiff said his truck was not damaged by one of the trucks involved in the collision); *see also supra* notes 111-12 and accompanying text.

141. 166 Va. 284, 184 S.E. 234 (1936).

142. *Id.* at 288-91, 184 S.E. at 235-36; *see also supra* note 62 and accompanying text.

143. 197 Va. 549, 90 S.E.2d 188 (1955) (personal injury action—crew working on power line left hole near path to plaintiff's privy).

144. *Id.* at 543, 90 S.E.2d at 190.

145. 198 Va. 480, 95 S.E.2d 179 (1956) and discussion *supra* notes 111-12, 140 and accompanying text.

146. 205 Va. 292, 136 S.E.2d 903 (1964) and discussion *supra* notes 96-99 and accompanying text.

147. 203 Va. 490, 125 S.E.2d 145 (1962) (5-2 decision).

148. *Id.* at 492-93, 125 S.E.2d at 147.

149. *Id.* at 493-94, 125 S.E.2d at 148.

The court said that a litigant's testimony must be read as a whole, and a harmful admission on cross-examination should be balanced against a clarification on redirect.<sup>150</sup>

The court pointed out in *Dial v. Deskins*<sup>151</sup> that a party cannot rely on the "testimony as a whole" doctrine when the party's statements, against which the *Massie* doctrine is invoked, are not "isolated," but rather relate directly to the substance of the case.<sup>152</sup>

## VI. POSITIVE APPLICATIONS OF THE DOCTRINE

As the *Massie* rule stands today, in its positive applications, a person "of average intelligence and in possession of his faculties, [who] testifies clearly and unequivocally to facts within his knowledge,"<sup>153</sup> and who pur-

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150. *Id.* at 494, 125 S.E.2d at 148. The opinion points to the plaintiff's explanation on redirect, *id.* at 493, 125 S.E.2d at 147, which the court classified as a "clarification." *Id.* at 494, 125 S.E.2d at 148. However, two justices thought that the evidence showed "beyond peradventure" that the plaintiff was guilty of contributory negligence. *Id.* at 496, 125 S.E.2d at 149 (Whittle, J., dissenting). In a later case, *Smith v. Virginia Elec. & Power Co.*, 204 Va. 128, 129 S.E.2d 655 (1963), the plaintiff was a highway department survey crew member who was injured when a survey rod came in contact with a power line. In *Smith*, the court said that the plaintiff was negligent as a matter of law; it distinguished *Mabin* on the grounds that in *Mabin* there was a question as to whether the plaintiff was guilty of contributory negligence, but in *Smith* there was "no conflict in the evidence as to plaintiff's negligence." 204 Va. at 134, 129 S.E.2d at 660. In *Mabin*, the plaintiff roofer had come in contact with a power line.

151. 221 Va. 701, 273 S.E.2d 546 (1981).

152. *Id.* at 703, 273 S.E.2d at 547. *Dial* involved an alleged breach of an agreement to pave subdivision streets. The plaintiffs admitted that they would have purchased the property whether or not the streets were paved. *Id.* at 702-03, 273 S.E.2d at 547.

153. *Holland v. Holland*, 217 Va. 874, 874, 234 S.E.2d 65, 66 (1977) (per curiam). The plaintiff's testimony that a driver had "just cut right in front of" her husband's car absolved her husband of negligence. *Id.* at 875-76, 234 S.E.2d at 66. See *Baines v. Parker*, 217 Va. 100, 225 S.E.2d 403 (1976), *supra* note 60 and accompanying text; *Harris v. Harris*, 211 Va. 459, 177 S.E.2d 534 (1970) (personal injury action). The plaintiff who said her son was driving carefully, and that he ran off the road to avoid a collision with an approaching unknown motorist, *id.* at 461, 177 S.E.2d at 535, could not take advantage of the testimony of her witness, another motorist, who said that he saw no other vehicle, but that the son had run onto the shoulder twice before he ran into a bridge abutment. *Id.* at 461-62, 177 S.E.2d at 535-36. See also *Scott v. Foley*, 205 Va. 382, 136 S.E.2d 849 (1964) (personal injury action). The plaintiff, who was a passenger in defendant's car, "was . . . in a better position than [her witness, a bystander on the road] to see and hear all that took place. She claimed no loss or lapse of memory . . ." *Id.* at 388, 136 S.E.2d at 853.

The "person of average intelligence and in possession of his faculties" language originated in *Crew v. Nelson*, 188 Va. 108, 114, 49 S.E.2d 326, 329 (1948), where the plaintiff, who was severely injured and rendered unconscious by the collision, *id.* at 115, 49 S.E.2d at 329, was not precluded by her testimony. *Id.* at 114, 49 S.E.2d at 329. See also *Wieringa v. Moody*, 221 Va. 95, 266 S.E.2d 891 (1980), where the court itself used this argument to uphold the striking of the plaintiff's evidence against two "John Doe" motorists. Both the plaintiff and the named defendant objected to this ruling at the trial, but it was argued only by the named defendant on appeal. *Id.* at 97, 266 S.E.2d at 892.

ports to give a full account of the matters which he must prove in order to survive a motion to strike the evidence, will be precluded from relying on the more favorable testimony of his witness that is inconsistent with his own testimony.<sup>154</sup>

It seems to be a comparatively simple matter to bring personal injury cases within a *Massie* exception,<sup>155</sup> but this type of litigation is also demonstrative of the full range of the court's decisions against parties whose testimony has failed to survive a *Massie* attack. For example, a plaintiff may not rise to the higher level of conflicting testimony when his own testimony shows contributory negligence as a matter of law,<sup>156</sup> or when his own testimony shows "clearly and unequivocally" that he has failed, as a matter of law, to establish primary negligence,<sup>157</sup> or both.<sup>158</sup> The rule has been applied in many other types of cases where the plaintiff's testimony showed that he had no case or when a defendant failed to prove an affirmative defense.<sup>159</sup>

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154. See, e.g., *Baines v. Parker*, 217 Va. 100, 225 S.E.2d 403 (1976); *Harris v. Harris*, 211 Va. 459, 177 S.E.2d 534 (1970). An excellent statement of the *Massie* rule in its positive application is found in 7 MICHIE'S JUR. OF VA. & W. VA. *Evidence* § 278, at 728-29 (1976) (weight and credibility of evidence generally).

155. See personal injury cases cited *supra* notes 72-152 and accompanying text.

156. See, e.g., *White v. Doe*, 207 Va. 276, 148 S.E.2d 797 (1966) (overtaking vehicle at intersection); *Whichard v. Nee*, 194 Va. 83, 72 S.E.2d 365 (1952) (3-2 decision; two justices absent) (plaintiff pedestrian guilty of contributory negligence as a matter of law as shown by his testimony describing the manner in which he crossed the street and, by implication, the physical evidence); *Stark v. Hubbard*, 187 Va. 820, 48 S.E.2d 216 (1948) (4-3 decision) (plaintiff "bound by her account of what she saw and did"); *Locker v. Carter*, 177 Va. 610, 619, 15 S.E.2d 39, 43 (1941) (Hudgins, J., dissenting) (the dissent thought that the plaintiff pedestrian was guilty of contributory negligence as a matter of law because she testified that she knew a car was approaching but thought she was far enough over for it not to strike her); *Yellow Cab Co. v. Gullely*, 169 Va. 611, 194 S.E. 683 (1938) (blew horn, but made no other attempt to avoid collision until last moment); *Driscoll v. Virginia Elec. & Power Co.*, 166 Va. 538, 181 S.E. 402 (1935) (plaintiff did not get out of truck because he knew the streetcar motorman could stop); *Frazier v. Stout*, 165 Va. 68, 181 S.E. 377 (1935) (plaintiff crossed in front of car that was "flying"); *Virginia Elec. & Power Co. v. Vellines*, 162 Va. 671, 175 S.E. 35 (1934) (plaintiff driving across tracks did not see streetcar until it was 10-15 feet away); *Hendricks v. Virginia Elec. & Power Co.*, 161 Va. 793, 172 S.E. 160 (1934) (plaintiff walked in front of streetcar he was looking at "practically all the time").

157. See, e.g., *Crawford v. Quarterman*, 210 Va. 598, 172 S.E.2d 739 (1970) (plaintiff testified he was not concerned about the host driver's speed, and his testimony showed the accident was caused by another driver's pulling into the passing lane without signaling after the host driver had pulled into the passing lane); *Rigney v. Neuman*, 203 Va. 822, 127 S.E.2d 403 (1962) (plaintiff testified host driver did not do anything he would not have done had he been driving); *Fagg v. Carney*, 159 Va. 118, 165 S.E. 419 (1932) and discussion *supra* note 70.

158. See, e.g., *South Hill Motor Co. v. Gordon*, 172 Va. 193, 200 S.E. 637 (1939) (plaintiff pedestrian who thought he was "clear" of passing car, did not take the two steps necessary to place him on the shoulder of the road); but see *Locker v. Carter*, 177 Va. 610, 15 S.E.2d 39 (1941) (where the plaintiff, on similar facts, recovered in a 4-3 decision).

159. See, e.g., *Dial v. Deskins*, 221 Va. 701, 273 S.E.2d 546 (1981) (plaintiffs would have

It is only when a party does not purport to state all the facts upon which his case rests,<sup>160</sup> when his attention was diverted at a crucial moment during the event which gave rise to his cause of action,<sup>161</sup> when he was severely injured in an accident or when he is unable to remember all the facts leading up to the ultimate event,<sup>162</sup> that one of the *Massie* "exceptions" will allow him to rely on testimony other than his own in order to survive a motion to strike the evidence.

Justice Poff has said that

[t]he rule rests upon the sound premise that a man should not be permitted to profit at another's expense by contradicting his own sworn statements concerning facts within his own knowledge. Such statements, when unequivocal and against his own interest, are judicial admissions, and unless they are explained or clarified elsewhere in his testimony, he cannot disown them and adopt contrary statements made by others.<sup>163</sup>

The Virginia Supreme Court has shown itself willing to accept explanation and clarification of harmful admissions,<sup>164</sup> except in those cases

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bought property even if there had been no "agreement" to pave streets); *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975) (plaintiff's testimony in products liability case showed misuse of hoist); *Watson v. First Nat'l Bank*, 213 Va. 687, 194 S.E.2d 749 (1973) (bank vice-president testified that the bank had no right to renew the note after its first maturity without consent of the endorers); *Harris v. Dunham*, 203 Va. 760, 127 S.E.2d 65 (1962) (plaintiff's testimony showed he did not rely on representations by sellers of franchise); *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 118 S.E.2d 668 (1961) (plaintiff's attorney admitted there was no malice); *Hargrow v. Watson*, 200 Va. 30, 104 S.E.2d 37 (1958) (defense of interspousal immunity negated by defendant's testimony concerning date of marriage); *American Health Ins. Corp. v. Newcomb*, 197 Va. 836, 91 S.E.2d 447 (1956) (dictum) (suit against insurer where plaintiff's testimony concerning date of wife's hospital admission established that she was hospitalized prior to the effective date of the policy); *Clark v. Moore*, 196 Va. 878, 86 S.E.2d 37 (1955) (contract for services void under state statute); *Martin v. Williams*, 194 Va. 437, 73 S.E.2d 355 (1952) (failure to show fraudulent inducement to sign deed); *Mullins v. Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951) (defendant's testimony concerning property showed title had not passed to her); *Gordan v. Tazewell*, 184 Va. 536, 35 S.E.2d 816 (1945) (plaintiff's testimony showed government did not acquire property as a result of plaintiff's efforts); *Shorter v. Shelton*, 183 Va. 819, 33 S.E.2d 643 (1945) (plaintiff's testimony showed she was a tenant at will); *Federal Land Bank v. Birchfield*, 173 Va. 200, 3 S.E.2d 405 (1935) (plaintiff testified he did not think defendant's agent bore any malice toward him); *Thalhimer Bros. v. Casci*, 160 Va. 439, 168 S.E. 433 (1933) (plaintiff's testimony showed she was a "bare licensee"); *Maryland Cas. Co. v. Cole*, 156 Va. 707, 158 S.E. 873 (1931) (collateral attack against insurer; plaintiff's testimony showed that circumstances of employee's injury were not covered by policy).

160. See *supra* notes 89-95 and accompanying text.

161. See *supra* notes 96-99 and accompanying text.

162. See *supra* notes 101-14 and accompanying text.

163. *Baines v. Parker*, 217 Va. 100, 105, 225 S.E.2d 403, 407 (1976).

164. See, e.g., *supra* notes 147-50 and accompanying text.

where the party against whom the *Massie* rule is asserted has shown by the unequivocal nature of his testimony that he lacks a valid cause of action.<sup>165</sup>

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165. See *supra* notes 155-59 and accompanying text.

APPENDIX<sup>166</sup>

*Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167, 83 S.E. 1072 (1915) (personal injury, streetcar passenger). P's testimony showed that the proximate cause of her injury was other than D's negligence. Often cited in the *Massie* line of cases; see, e.g., *Crew*, 188 Va. 108, 49 S.E.2d 326; *Mabin*, 203 Va. 490, 125 S.E.2d 145; *Bond*, 205 Va. 292, 130 S.E.2d 426; and *Durham*, 205 Va. 441, 432 S.E.2d 476. *Footnotes*: 66-67.

*Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922). The principal case; action for real estate commission. *Footnotes*: 31-47 (facts and decision).

*Davis Bakery, Inc. v. Dozier*, 139 Va. 628, 124 S.E. 411 (1924). 1/ yes; 2/ yes, but damaging; 3/ personal injury. P's testimony showed he had performed the work in a dangerous manner (fell through skylight). P said that the defects could not be seen by ordinary inspection; P's witnesses said that the danger was open and obvious. *Footnotes*: 71.

*W.B. Bassett & Co. v. Wood*, 146 Va. 654, 132 S.E. 700 (1926). 1/ yes; 2/ yes, but see 3; 3/ wrongful death. D's witnesses corroborated his testimony as to the position of P's decedent (pedestrian) before D's truck struck her, but D's testimony showed his duty to discover her arose much earlier. *Footnotes*: 25, 30, 70.

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166. This Appendix is presented as an aid to the practitioner preparing or defending a *Massie v. Firmstone* argument. Notations accompanying each case indicate the footnote numbers where the case is cited in this comment. Each case also includes the following numbers: 1) A "yes" or "no" here indicates whether the case cites *Massie v. Firmstone* by name; many later cases do not cite *Massie* so that it is impossible to obtain all later cases by reference to Shepard's Citations alone. 2) A "yes" or "no" here indicates whether the party against whom the *Massie* rule was invoked offered the testimony of witnesses other than himself. A (?) indicates that other witnesses testified, but that it is not possible to determine from the opinion whether they were plaintiff's or defendant's witnesses. 3) indicates the type of action or suit and includes comments on the case.

The following sources were consulted to obtain Virginia cases which have followed *Massie v. Firmstone*: McCORMICK, EVIDENCE § 266 (testimony by party against himself) (2d ed. 1972); 9 WIGMORE, EVIDENCE § 2594a (effect of judicial admissions: party's testimony as a conclusive admission) (1981); 7 MICHIE'S JUR. OF VA. & W. VA. EVIDENCE § 278 (weight and credibility of evidence generally) (1976 & Supp. 1982); 20 MICHIE'S JUR. OF VA. & W. VA. WITNESSES § 71 (credibility of witnesses, general considerations) (1979 & Supp. 1982); 30 AM. JUR. 2D EVIDENCE § 1087 (testimony of party favorable to adverse party) (1967 & Supp. 1982); 32A C.J.S. EVIDENCE § 1040(3) (party's own testimony) (1964 & Cum. Supp. 1982); West Publishing Co. Digests EVIDENCE §§ 589 (testimony of party), 591 (conclusiveness of evidence on party introducing it); Annot., 50 A.L.R. 979 (1927) (right of party to have case submitted to jury when his own testimony negatives his right of action or defense), superseded by 169 A.L.R. 798 (1947); Annot., 80 A.L.R. 624 (1932) (conclusiveness of testimony of a party favorable to adverse party), superseded by 169 A.L.R., 798; Annot., 169 A.L.R. 798 (1947 & Supp. Dec.) (binding effect of party's own unfavorable testimony); indices to all Virginia Reports from 134 Va. to 224 VRR 648. See also W. BRYSON, NOTES ON VIRGINIA CIVIL PROCEDURE 147-48, 173-74 (1979); C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 263 (judicial admissions—admissions in testimony) (1977 & Supp. 1980).

*Maryland Cas. Co. v. Cole*, 156 Va. 707, 158 S.E. 873 (1931). 1/ yes; 2/ apparently not; 3/ P v. his liability insurer. P's testimony in the first action (personal injury, P's employee), introduced in the second action, showed that the circumstances of his employee's injury were not covered by an insurance policy. Collateral attack not allowed. *Footnotes*: 159.

*Virginia Elec. & Power Co. v. Lenz*, 158 Va. 732, 164 S.E. 572 (1932). 1/ yes; 2/ no; 3/ personal injury, streetcar passenger. P's testimony showed he was familiar with the operation of streetcar steps, and that he saw the step was not fully down, but that he stepped on it anyway and was pitched forward. *Footnotes*: 69.

*Fagg v. Carney*, 159 Va. 118, 165 S.E. 419 (1932). 1/ yes; 2/ yes, but see 3; 3/ personal injury, boy skating in street. The testimony of P, age 10, concerning the point of collision with an oncoming car when P skated from behind a wagon, was overcome by physical evidence. Testimony of P's witness concerning the speed of the car was based on "too fleeting" an observation. P failed to show primary negligence. *Footnotes*: 70, 157.

*Thalhimer Bros. v. Casci*, 160 Va. 439, 168 S.E. 433 (1933). 1/ yes; 2/ apparently not; 3/ personal injury. P's testimony showed she was an "unwitting trespasser" or "bare licensee" who took the situation as she found it when she failed to follow directions to the restroom and stepped into a ventilating shaft. *Footnotes*: 69, 159.

*Chakales v. Djiovanides*, 161 Va. 48, 170 S.E. 848 (1933). 1/ yes 2/ yes, but see 3; 3/ suit to foreclose trust deed. D raised the affirmative defense that an illegal brokerage fee had been charged. D introduced depositions of her husband (a co-D) and of her attorney; the latter was not particularly favorable. As the parties were not American-born, the husband was not concluded by a slip of the tongue or by his failure to understand the meaning of a question. *Footnotes*: 13.

*Hendricks v. Virginia Elec. & Power Co.*, 161 Va. 793, 172 S.E. 160 (1934). 1/ yes; 2/ no; 3/ personal injury, streetcar/pedestrian. P, who testified that he was looking at the streetcar "practically all the time," walked in front of it before it had come to a stop. *Footnotes*: 69, 156.

*Virginia Elec. & Power Co. v. Vellines*, 162 Va. 671, 175 S.E. 35 (1934). 1/ yes; 2/ no; 3/ personal injury and auto damages. P proved D's negligence, but recovery was precluded by his contributory negligence as shown by his testimony that he drove across the tracks but did not see the streetcar until it was 10 to 15 feet away. *Footnotes*: 69, 156.

*Frazier v. Stout*, 165 Va. 68, 181 S.E. 377 (1935). 1/ yes; 2/ yes; 3/ personal injury, car/pedestrian. P was precluded by her own contributory negligence based on her testimony that she crossed the road in front of a car that was "flying" and whose driver was "looking the other way." *Footnotes*: 70, 156.



*Tignor v. Virginia Elec. & Power Co.*, 166 Va. 284, 184 S.E. 234 (1936). 1/ no; 2/ yes; 3/ personal injury, bus/motorcyclist. Under one interpretation of P's testimony he would have been guilty of contributory negligence. However, the court held that the jury must look at all P's testimony, and it is within the province of the jury to pass on inconsistencies. *Footnotes*: 62, 141-42.

*Driscoll v. Virginia Elec. & Power Co.*, 166 Va. 538, 181 S.E. 402 (1935). 1/ yes (dissent); 2/ yes; 3/ personal injury, streetcar/milk truck. P's truck was unable to move off the tracks; P was precluded from recovery because he was held contributorily negligent based on his testimony that he did not get out of the truck because the streetcar motorman could have stopped. The dissent urged that *Massie* should not apply to a severely injured party who is subjected to rigorous cross-examination. *Footnotes*: 101, 156.

*Lyric Theatre Corp. v. Vaughan*, 168 Va. 595, 191 S.E. 600 (1937). 1/ yes; 2/ yes; 3/ trustee's suit to ascertain interest in a corporation and for an accounting. D, who had already filed an answer and testified, could not amend the pleadings to assume a position inconsistent therewith. *Footnotes*: 29.

*Yellow Cab Co. v. Gulley*, 169 Va. 611, 194 S.E. 683 (1938). 1/ no; 2/ yes, but consistent with P's; 3/ personal injury and auto damages. D conceded negligence, but P was precluded from recovery by contributory negligence, based on her testimony and that of her chauffeur. The chauffeur blew the horn but made no attempt to avoid the collision until the last moment. *Footnotes*: 70, 156.

*Krikorian v. Dailey*, 171 Va. 16, 197 S.E. 442 (1938). 1/ no; 2/ no; 3/ breach of lease covenants. P, foreign-born, was not held to the literal interpretation of the term "partner," which he used in his testimony; the court stated that it was doubtful that he understood the meaning of the term "partnership." *Footnotes*: 14, 69.

*South Hill Motor Co. v. Gordon*, 172 Va. 193, 200 S.E. 637 (1939). 1/ yes; 2/ yes, but no better than P's; 3/ personal injury, car/pedestrian. P failed to show primary negligence and his own testimony showed contributory negligence. P stated that he thought the car was "clear" of him and did not take the two steps necessary to reach the shoulder of the road so as to avoid being struck. P had been drinking. *Footnotes*: 70, 158.

*Federal Land Bank v. Birchfield*, 173 Va. 200, 3 S.E.2d 405 (1939). 1/ yes; 2/ no; 3/ action for defamatory statements. P was precluded by his own testimony that he did not think D's agent bore him any malice. *Footnotes*: 69, 159.

*Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939). 1/ yes; 2/ yes; 3/ personal injury, bus passenger. P was not precluded by an ex parte statement of opinion used to impeach. P's testimony showed lack of

knowledge of the facts, but it was not in conflict with the testimony of her other witnesses with respect to the bus driver's negligence and physical facts of the collision. *Footnotes*: 11, 74, 75, 84, 100.

*Saunders v. Hall*, 176 Va. 526, 11 S.E.2d 592 (1940). *Saunders* is not in the *Massie* line of cases, but it is the origin of the "mere estimates of distances and speeds" exception to *Massie*, first articulated in *Sink*, 191 Va. 618, 61 S.E.2d 863. *Footnotes*: 85.

*Harrell v. Virginia Elec. & Power Co.*, 177 Va. 59, 12 S.E.2d 833 (1941). 1/ yes; 2/ yes, but damaging; 3/ personal injury and property damage, streetcar/car collision. P's car stalled on the tracks. He saw the streetcar 1,000 feet away but made no attempt to get out until it was thirty to thirty-five feet away. Had the streetcar been 20 feet farther away, he "might have made it." P's testimony must be viewed as a whole, and the weight of his testimony will not turn on a statement more favorable to him. *Footnotes*: 71, 139.

*Locker v. Carter*, 177 Va. 610, 15 S.E.2d 39 (1941) (4-3 decision). 1/ yes (dissent); 2/ yes, but no better than P's; 3/ personal injury, car/pedestrian. Verdict for P affirmed. *Dissent*: P was guilty of contributory negligence; P was walking on the road and knew a car was approaching, but thought she was far enough over for the car not to strike her. *Footnotes*: 70, 156, 158.

*Birtcherds Dairy, Inc. v. Randall*, 180 Va. 311, 23 S.E.2d 229 (1942). 1/ yes; 2/ yes; 3/ personal injury, bus passenger. *Massie* applies to a litigant, not to the litigant's witness (defendant dairy company's driver). *Footnotes*: 115.

*Williams v. Greene*, 181 Va. 707, 26 S.E.2d 89 (1943). 1/ yes; 2/ no; 3/ wrongful death, car passenger, car/bus collision. P, administrator of his wife's estate, was the driver of the car in which his wife (decedent) was riding. P asserted that *Massie* is inapplicable to a P suing in a representative capacity. The court did not reach that issue based on its decision that the lower court was not applying *Massie* when it instructed the jury that they should find the bus driver negligent only if they believed P's testimony, because the only evidence of bus driver's negligence was P's testimony. *Footnotes*: 3.

*Chappell v. White*, 182 Va. 625, 29 S.E.2d 858 (1944). 1/ yes; 2/ yes; 3/ personal injury, single car crash. P was limited by her own testimony, which should not have been admitted because it was hearsay (P's version of what child of defendant host driver said following crash). *Footnotes*: 9.

*Shorter v. Shelton*, 183 Va. 819, 33 S.E.2d 643 (1945). 1/ yes; 2/ no; 3/ unlawful entry and detainer. P was precluded from recovery by her testimony which showed that she had an estate at will which either party could terminate at his option. *Footnotes*: 69, 159.

*Gordan v. Tazewell*, 184 Va. 536, 35 S.E.2d 816 (1945). 1/ no; 2/ yes, but no better than P's; 3/ action for real estate commission. Testimony of P and his witness showed that P was entitled to a commission only if the government acquired the property as a result of P's efforts. P's testimony showed he was not the procuring cause for the government's acquisition. D's witness's testimony showed that the procuring cause was. *Footnotes*: 7, 70, 159.

*West v. Anderson*, 186 Va. 554, 42 S.E.2d 876 (1947). 1/ no; 2/ yes; 3/ condemnation proceeding. D (landowner) was held to his voluntary reduction of the value of his property claimed in the original grounds of defense. *Footnotes*: 116-17.

*Defonis v. Clinchfield Coal Corp.*, 186 Va. 715, 43 S.E.2d 852 (1947). Decided on other grounds; the *Massie* issue was not reached. *Footnotes*: None.

*Waller v. Waller*, 187 Va. 25, 46 S.E.2d 42 (1948). 1/ yes; 2/ yes; 3/ personal injury, car/truck collision. P stated that so far as he knew, his brother was driving properly but P was riding in back seat playing his banjo. P could rely on other evidence showing that his brother drove up a hill on the wrong side of a double line. P was not testifying to facts within his knowledge. *Footnotes*: 92-95.

*Burruss v. Suddith*, 187 Va. 473, 47 S.E.2d 546 (1948). 1/ yes; 2/ yes; 3/ personal injury. P, assistant commissioner of revenue for a county, was injured when a rip saw operated by D's employees discharged a log. A severely injured P should not be penalized for "honest mistakes or infirmities of memory." This concept was particularly applicable to a "lapse of time between links in a swiftly moving chain of events." *Footnotes*: 102-06.

*Stark v. Hubbard*, 187 Va. 820, 48 S.E.2d 216 (1948) (4-3 decision). 1/ no; 2/ yes, but P's witnesses did not see the accident occur; 3/ personal injury, car/pedestrian. P was "bound by her account of what she saw and did" which showed contributory negligence. *Footnotes*: 70, 156.

*Crew v. Nelson*, 188 Va. 108, 49 S.E.2d 326 (1948). 1/ yes; 2/ yes; 3/ personal injury, car/tractor-trailer truck. P was severely injured and his testimony, which was "vague and confusing," involved "swiftly moving events." P had called the host driver and the driver of the truck as adverse witnesses. P could rely on the truck driver's testimony, and it could not be said as a matter of law that P's testimony corroborated that of the host driver's. *Footnotes*: 107-08, 153.

*Sink v. Masterson*, 191 Va. 618, 61 S.E.2d 863 (1950) (dictum). 1/ no; 2/ no; 3/ personal injury, car/truck collision. A verdict for P was reversed and a new trial ordered for error in instructions. In dictum, the court dealt with the *Massie* issue of "mere estimates" of distances and speeds "made in fleeting moments and related months after the occurrence."

*Footnotes: 85.*

*Neapolidis v. Theofana Maritime Co.*, 192 Va. 90, 63 S.E.2d 795, cert. denied, 342 U.S. 831 (1951). 1/ yes; 2/ no; 3/ attachment for balance due on wages. The seaman could not complain if his version of the transaction was accepted as true. *Footnotes: 69.*

*Mullins v. Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951). 1/ yes; 2/ no; 3/ conversion. D's (lessor) affirmative defense was forfeiture by lessee, but her testimony concerning the property alleged to have been converted established a waiver of such forfeiture. *Footnotes: 27, 159.*

*Clayton v. Taylor*, 193 Va. 555, 69 S.E.2d 424 (1952). 1/ yes; 2/ yes, but less favorable than P's; 3/ personal injury, two-car collision, driver v. driver. P's testimony consisted of "mere estimates of distances and speed," and he had been rendered unconscious by the collision. Taken as a whole, his testimony did not show clearly and unequivocally that he had no case. *Footnotes: 85, 88.*

*Whichard v. Nee*, 194 Va. 83, 72 S.E.2d 365 (1952) (3-2 decision; 2 justices absent). 1/ no; 2/ (?); 3/ personal injury, car/pedestrian. P was found to be guilty of contributory negligence as shown by his own testimony describing the manner in which he crossed the street (and, by implication, the physical evidence). The dissent thought a jury question was presented as to whether the accident occurred at an intersection, where P would have the right of way. *Footnotes: 156.*

*Martin v. Williams*, 194 Va. 437, 73 S.E.2d 355 (1952). 1/ yes; 2/ no; 3/ bill to set aside conveyance for fraud or forgery. P could not ask the court to believe alternatively that she did not sign the deed (as she testified she had not) and also to hold that she did sign it by reason of fraud when no fraudulent inducement was shown. *Footnotes: 69, 159.*

*Kidd v. Little*, 194 Va. 692, 74 S.E.2d 787 (1953). *Kidd* is not a *Massie* case, but is included because of its importance in *National Union*, 208 Va. 595, 159 S.E.2d 815. *Footnotes: 26.*

*Clark v. Moore*, 196 Va. 878, 86 S.E.2d 37 (1955). 1/ yes; 2/ no; 3/ action for compensation for services performed under oral contract. P's testimony showed that his services embraced general engineering; therefore, the contract was void by statute since P was not licensed. *Footnotes: 69, 159.*

*Von Roy v. Whitescarver*, 197 Va. 384, 89 S.E.2d 346 (1955). 1/ yes; 2/ no; 3/ damages to car. Jury found for D. Trial court sustained motion to set aside the verdict. Affirmed. D's testimony showed he had failed "to look when looking would have been effective." When turning left, he was looking behind him to see if the driver behind him had seen his signal and thus missed seeing an oncoming car. *Footnotes: 8, 30.*

*Vaughan v. Eatton*, 197 Va. 459, 89 S.E.2d 914 (1955). 1/ yes; 2/ yes; 3/

personal injury, car/truck collision. P, driver of car, challenged the setting aside of the verdict in her favor. The trial court was reversed, and a final judgment was entered for P. P was "hazy, momentarily unconscious and excited" after the accident. It did not clearly and unequivocally appear from her testimony that she was guilty of contributory negligence. *Footnotes*: 85, 109-10.

*Newell v. Riggins*, 197 Va. 490, 90 S.E.2d 150 (1955). 1/ yes; 2/ no; 3/ personal injury. The verdict and judgment for D were reversed and a new trial ordered. D had asserted contributory negligence, but admitted that P had nothing to do with his going to sleep at the wheel, and that her sleeping with her head on his shoulder did not disturb his driving. *Footnotes*: 27.

*Edmonds v. Mecklenburg Elec. Co-Op*, 197 Va. 540, 90 S.E.2d 188 (1955). 1/ yes; 2/ (?); 3/ personal injury. D power company's crew had left a hole near the path to the plaintiff's privy. P could not say exactly how she had fallen, but the jury had the right to conclude that she stepped into the hole while picking up her child who had fallen in front of her. P's evidence must be considered as a whole, "together with other evidence, if any." *Footnotes*: 143-44.

*American Health Ins. Corp. v. Newcomb*, 197 Va. 836, 91 S.E.2d 447 (1956) (dictum). 1/ yes; 2/ yes, but not of assistance to P; 3/ action against insurer who had refused to pay claim. The case was decided on an issue other than the *Massie* argument, which concerned P's testimony relating to the date on which his wife's illness had begun. *Footnotes*: 70, 159.

*Anchor Motor Freight, Inc. v. Paul*, 198 Va. 480, 95 S.E.2d 179 (1956). 1/ yes; 2/ no; 3/ personal injury and property damage. P was not precluded from recovery by his testimony that no damage was done to his truck by truck #1, because he also said that he did not know whether his personal injuries were caused by the collision with truck #1 or truck #2 ("whole testimony" analysis). *Footnotes*: 111-12, 140, 145.

*Hargrow v. Watson*, 200 Va. 30, 104 S.E.2d 37 (1958). 1/ yes; 2/ no (because of the nature of D's testimony, he was not permitted to introduce other testimony); 3/ wrongful death, car passenger. D asserted the defense of interspousal immunity, but his own testimony concerning the date of the "marriage," combined with P's showing that at the date of the "marriage" D was married to someone else, negated the defense. *Footnotes*: 27, 159.

*Barnes v. Caluneo*, 200 Va. 631, 107 S.E.2d 484 (1959). 1/ no; 2/ yes, but supported P's and rose no higher; 3/ personal injury, car/bus collision. P's were not precluded from recovery by their testimony because they did not undertake to fix the exact speeds and locations of physical objects; in addition, the P's were strangers to the community and their observations

were "fleeting and momentary." *Footnotes*: 70, 87-88.

*Diggs v. Lail*, 201 Va. 871, 114 S.E.2d 743 (1960). 1/ no; 2/ yes, but witnesses offered conflicting evidence; 3/ personal injury. Medical testimony for P was in conflict as to her injuries and whether or not the car accident had brought about her depression. Held: *Massie* applies to a party, not to the party's witness. *Footnotes*: 133-34.

*May v. Malcolm*, 202 Va. 78, 116 S.E.2d 114 (1960). 1/ yes; 2/ yes, but not at issue; 3/ condemnation proceeding. Highway commissioner, who was a party to the suit, did not testify. He was not bound by the testimony of a highway department district engineer. *Massie* applies to a party, not to his witness. *Footnotes*: 118-21.

*Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 118 S.E.2d 668 (1961). 1/ yes; 2/ no; 3/ libel and statutory action for insulting words. Summary judgment was proper where P's attorney admitted at the pre-trial conference by a stipulation that there was no malice. *Footnotes*: 28, 69, 159.

*Virginia Elec. & Power Co. v. Mabin*, 203 Va. 490, 125 S.E.2d 145 (1962) (5-2 decision). 1/ yes; 2/ no; 3/ personal injury. Roofer raised up near uninsulated wire containing high voltage electricity. His testimony was highly conflicting on direct, cross, and redirect. The "whole testimony" analysis was employed (a harmful admission on cross must be balanced against a clarification on redirect). *Footnotes*: 69, 147-50.

*Harris v. Dunham*, 203 Va. 760, 127 S.E.2d 65 (1962). 1/ yes; 2/ no; 3/ cross-bill asserting fraudulent misrepresentation. The party's own testimony showed that he had conducted an independent investigation of the franchise he purchased, so he could not contend that he relied on a previous misrepresentation of fact. *Footnotes*: 69, 159.

*Rigney v. Neauman*, 203 Va. 822, 127 S.E.2d 403 (1962). 1/ no; 2/ (?); 3/ personal injury. P's testimony that the host driver did nothing that he would not have done had he been driving failed to establish gross negligence. *Footnotes*: 6, 157.

*Smith v. Virginia Elec. & Power Co.*, 204 Va. 128, 129 S.E.2d 655 (1963). 1/ yes; 2/ (?); 3/ personal injury. P, a member of a highway department survey crew, was injured when the survey rod came in contact with a power line. Affirmed: P was held to be negligent as a matter of law based on his testimony that he had had conversations with crew members concerning the danger of the lines, and that he was injured while going down a slope, looking backward toward the level man. Other testimony showed that the brush was thinner 20 to 30 feet on each side of the right of way than elsewhere on the slope. *Footnotes*: 150.

*Atwell v. Watson*, 204 Va. 624, 133 S.E.2d 552 (1963). 1/ no; 2/ no; 3/ personal injury. P testified unequivocally to the host driver's operation of

the vehicle at the time of the accident, describing the speed as normal; P also testified that the host was within one or two car lengths of the oncoming truck when it began to turn left. The verdict for P in *Atwell v. Watson* (P v. truck driver) was reversed because of error in the jury instructions not pertaining to the *Massie* issue. *Godwin v. Atwell* (P v. host) was reversed and final judgment entered for D. *Footnotes*: 69.

*Bond v. Joyner*, 205 Va. 292, 136 S.E.2d 903 (1964). 1/ yes; 2/ yes; 3/ personal injury. Where P testified that her host was driving normally and that she felt safe with him, she was not precluded from rising to the level of other testimony with respect to the host's negligence; however, all of her evidence failed to establish gross negligence, and the trial court should have sustained D's motion to strike. *Footnotes*: 96-99, 146.

*Scott v. Foley*, 205 Va. 382, 136 S.E.2d 849 (1964). 1/ no; 2/ yes; 3/ personal injury. P's own testimony, which was clear and unequivocal, did not establish gross negligence on the part of the host driver. She was in the vehicle and thus in a better position than her witness, a bystander on the road, to observe all that took place. "She claimed no loss or lapse of memory." *Footnotes*: 153.

*Durham v. National Pool Equip. Co.*, 205 Va. 441, 138 S.E.2d 55 (1964). 1/ yes; 2/ no, but see 3; 3/ verbal indemnity agreement and written contract. The sufficiency of P's testimony to sustain proof of an oral agreement could be questioned, but he was entitled to adduce other evidence. It was error for the court to sustain the motion to strike before P had rested his case. *Footnotes*: 10.

*White v. Doe*, 207 Va. 276, 148 S.E.2d 797 (1966). 1/ yes; 2/ no; 3/ personal injury, unknown motorist. The trial court's setting aside of the verdict for P was affirmed because P's own testimony showed that he was guilty of contributory negligence. (P, police officer pursuing D, testified that he had pulled up beside D's rear wheel at an intersection, just prior to the accident.) *Footnotes*: 69, 156.

*Colonial Pipeline Co. v. Lohman*, 207 Va. 775, 152 S.E.2d 34 (1967). 1/ no; 2/ see 3; 3/ condemnation proceeding. D landowners were not bound by testimony of the one witness they called, a real estate appraiser. *Massie* applies to a litigant, not to a litigant's witness. *Footnotes*: 122-24.

*Tyree v. Lariew*, 208 Va. 382, 158 S.E.2d 140 (1967). 1/ yes; 2/ yes; 3/ personal injury. A tire blew out on a car being driven by P. P and his mother testified that D (P's employer and owner of the car) admitted that the tires were "not much good." D denied making the statement and contended that the only evidence supporting the jury verdict was P's testimony because *Massie* precluded reliance on P's mother's testimony. The court held that *Massie* was inapplicable and reinstated the jury verdict. *Footnotes*: 3.

*Saunders v. Bulluck*, 208 Va. 551, 159 S.E.2d 820 (1968). 1/ yes; 2/ (?);

3/ personal injury. P, who said that the host driver was not driving fast or recklessly, could rise to "other evidence" because P was sixteen at the time of the accident, had never driven a car, and was seated in back seat with the man she later married. *Footnotes*: 89-91.

*National Union Fire Ins. Co. v. Bruce*, 208 Va. 595, 159 S.E.2d 815 (1968). 1/ yes; 2/ yes; 3/ personal injury. D, host driver, who testified that he was driving with his lights on was allowed to rise to the testimony of the other defendant driver and his passengers that he was driving with his lights off, so as to assert the defense of contributory negligence against P, his passenger. P had called both drivers as witnesses. D can avail himself of defenses brought out in his adversary's evidence. *Footnotes*: 26, 27.

*Crawford v. Quarterman*, 210 Va. 598, 172 S.E.2d 739 (1970). 1/ yes; 2/ (?); 3/ personal injury. P, age 12 at the time of the accident and 22 at the time of the trial, was precluded by his own testimony that he was not concerned about the host driver's speed; P's testimony also showed that the driver of the other car had pulled into the passing lane as his host was in the act of passing. *Footnotes*: 157.

*Yates v. Potts*, 210 Va. 636, 172 S.E.2d 784 (1970). 1/ yes; 2/ yes (D was called as adverse witness); 3/ personal injury. Where the case turned in part on whether P, a police officer, was speeding at the time of the accident, P was not bound by his highest estimate of speed (40 to 50 mph in a 45 mph zone). The statement was an opinion. *Footnotes*: 86, 135-38.

*Harris v. Harris*, 211 Va. 459, 177 S.E.2d 534 (1970). 1/ no; 2/ yes; 3/ personal injury. P's testimony that her son's driving was careful and that he drove off the road to avoid an unknown motorist exonerated the son of any negligence. P could not rise to the testimony of a witness, another motorist, who said that he saw no other vehicle, but that the son had driven onto the shoulder several times before he drove into a bridge abutment. *Footnotes*: 153.

*Travelers Ins. Co. v. Lobello*, 212 Va. 534, 186 S.E.2d 80 (1972) (per curiam). 1/ yes; 2/ no; 3/ personal injury, car accident. P's recovery was not barred because of a statement in a discovery deposition. The statement was "not of the nature to invoke *Massie*." *Footnotes*: 12-13.

*Shelley v. West*, 213 Va. 611, 194 S.E.2d 899 (1973). 1/ yes; 2/ yes; 3/ personal injury. P testified that her host driver had engaged in a drag race with a third car about ½ mile from the point of collision with a second car. Because she was only testifying "to the best of her memory," she could rise to the level of the testimony indicating that the drag race occurred ¼ mile from the point of collision. *Footnotes*: 85, 113-14.

*Watson v. First Nat'l Bank*, 213 Va. 687, 194 S.E.2d 749 (1973). 1/ yes; 2/ no; 3/ action on note against maker and two endorsers. The bank vice-president who had handled the loan transaction testified that the bank would have no right to renew the note after first maturity without the



consent of the endorsers. The bank was precluded from recovery by this testimony. *Footnotes*: 69, 125-28, 159.

*Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975). 1/ yes; 2/ yes, but hearsay; 3/ products liability. P's testimony showed that the hoist was being misused at the time of the accident, and his witness's testimony was hearsay. *Footnotes*: 70, 159.

*Baines v. Parker*, 217 Va. 100, 225 S.E.2d 403 (1976). 1/ yes; 2/ yes; 3/ personal injury. There was a stipulation that gross negligence was not applicable. Read as a whole, P's testimony absolved her mother-in-law, the driver, of any negligence. The owner of the truck involved in the collision recovered damages to his truck and lost profits based on proof of the mother-in-law's negligence alleged in a cross-claim. *Footnotes*: 60-61, 72, 153-54, 163.

*Erlich v. Hendrick Constr. Co.*, 217 Va. 108, 225 S.E.2d 665 (1976). 1/ yes; 2/ yes; 3/ contract, liquidated damages. The contractor was not precluded from recovery by his "opinion" testimony as to his duties under written contract; he could rely on the evidence to excuse delay. *Footnotes*: 81-83.

*Semones v. Johnson*, 217 Va. 293, 227 S.E.2d 731 (1976). 1/ no; 2/ yes; 3/ personal injury. P (driver) stopped to avoid hitting dogs near the road. The driver immediately behind her swerved to avoid a collision. The driver behind him hit P. P's testimony that the cars were a "proper distance" behind her was determined to be opinion. She could rise to the level of testimony that showed her car left no skid marks but that heavy skid marks were left by driver #2's car. *Footnotes*: 76-78.

*Holland v. Holland*, 217 Va. 874, 234 S.E.2d 65 (1977) (per curiam). 1/ yes; 2/ yes; 3/ personal injury. P's testimony that the other driver "cut right in front of" her husband, the host driver, absolved her husband of negligence. She could not rely on the other driver's testimony. *Footnotes*: 153.

*Newton v. Veney*, 220 Va. 947, 265 S.E.2d 707 (1980). 1/ yes; 2/ yes, see 3; 3/ personal injury. P, who testified that she did not know exactly what happened in the car accident in a school parking lot, called both drivers (D's) as adverse witnesses. She could rise to the level of their testimony which showed that one or both of them had caused the accident. *Footnotes*: 61, 130-32.

*Wieringa v. Moody*, 221 Va. 95, 266 S.E.2d 891 (1980). 1/ yes; 2/ yes, called D as an adverse witness; 3/ personal injury. D, a named motorist, appealed the striking of P's evidence as to John Doe #1 and John Doe #2. Held: P was in full possession of his faculties, of average intelligence, and his testimony was clear and unequivocal. P said that he never saw one of the unknown motorists that D claimed to have seen, and that the other unknown motorist had nothing to do with the accident. *Footnotes*:

153.

*Parker v. Davis*, 221 Va. 299, 269 S.E.2d 377 (1980). 1/ yes; 2/ yes; 3/ personal injury. The court held that it was error to rule as a matter of law that P, motorist, was contributorily negligent; the holding was based on the "mere estimates" rationale. P had witnesses supporting him, and inferences reasonably deductible from the physical evidence could be considered to support either P's or D's account of the cause of the accident. *Footnotes*: 85, 88.

*Dial v. Deskins*, 221 Va. 701, 273 S.E.2d 546 (1981) (per curiam). 1/ yes; 2/ no; 3/ damages for alleged breach of agreement to pave subdivision streets. The "whole testimony" exception does not apply where P's statements were not "isolated," but went to the substance of the case. P's had testified that they would have purchased property whether or not the streets were paved. *Footnotes*: 69, 151-52, 159.

*Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982). 1/ yes; 2/ yes; 3/ products liability (defective automobile transmission). P, who testified that she had placed the vehicle in "park," was not precluded from relying upon her expert's theory that because of defective design, the shift lever was between "park" and "reverse." *Footnotes*: 79-80.

