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Record No. 1308

VIRGINIAN RAILWAY COMPANY,
Plaintiff in Error,

VS.

W. J. HILLSMAN, Defendant in Error.

FROM THE CIRCUIT COURT OF CHARLOTTE COUNTY, VIRGINIA.

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

162 Va 359

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

VIRGINIAN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. J. HILLSMAN, Defendant in Error.

From the Circuit Court of Charlotte County.

PETITION.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of Appeals of Virginia:*

Your petitioner, the Virginian Railway Company, respectfully represents that it is aggrieved by a judgment of the Circuit Court of Charlotte County, Virginia, entered on the 6th day of July, 1932, in an action at law pending in said Court, in which W. J. Hillsman was plaintiff and your petitioner was defendant.

STATEMENT.

The parties on this appeal will be referred to as plaintiff and defendant according to the positions respectively occupied by them in the Court below.

On February 21, 1931, the plaintiff went to the defendant's station at Abilene in Charlotte County to meet his daughter, who was returning home from Bedford County. The train, on which the plaintiff's daughter was a passenger, arrived at Abilene some time after midnight. Prior to the arrival of this train it had been raining hard, and when the train arrived there was a gentle rain falling. While awaiting the ar-

rival of the train the plaintiff parked his car on the north or northeast side of the passenger station, which is located north or northeast of the defendant's Railway line. There is a driveway approaching this station from a county road, which county road is approximately eighty to ninety feet north of the station. From this county road to the station there is a driveway located on the defendant's property which affords access to the station. Between the county road and the station there was, at the time of the accident, an open ditch from five to seven feet deep and six to eight feet wide at the surface of the ground for drainage purposes. This ditch was located approximately forty feet north of the station building and twenty-five or thirty feet north of the driveway leading to the station. The driveway as it enters the station grounds, was carried over this open ditch by a timber bridge from eighteen to twenty feet in width and where it leaves the station grounds it was carried over this ditch by a fill with timber cribbing, the width of this fill or roadway over the ditch being sixteen feet wide. The timber cribbing extended to the surface or level of the roadway over the fill, and some witnesses say that the top of the cribbing was about level with the surface of the roadway, and other witnesses say that the cribbing extended from three to six inches above the surface of the roadway. All of the witnesses seem to agree that this timber cribbing, marking the sides of the roadway, was visible to any one approaching along the driveway.

The driveway approaching defendant's station was covered with cinders or slag, and this driveway appears to have been used generally as a turning place by people who used the county road coming to the post office and LaPrade's Store, as the county road did not extend or was not improved beyond that point. The effect of this use of the driveway was to make a well defined roadway obvious to any one, day or night, in the use of the driveway. There is a blueprint drawn to scale and based on actual measurements made a part of the record, which shows the location of the station driveway, ditch and other objects above referred to.

The plaintiff's car, while he was waiting for the train, was parked somewhere in the rear or north of the station, the exact location not being made definite by the evidence. Upon the arrival of the train, on which plaintiff's daughter was a passenger, the plaintiff and his daughter started to leave in the car for their home at Farmville, Virginia, the plaintiff being the driver of the car. The plaintiff failed to follow the driveway leading over the fill across the ditch and went

into the ditch west of this fill, as indicated by the arrows shown on the blueprint. The car, when it went into the ditch, was running at a very slow rate of speed, the speed being estimated by the plaintiff at about three miles an hour. The car seems to have dropped into the ditch gently and was not injured to any great extent by the accident. After the car had settled headforemost into the ditch the plaintiff broke one of the glass windows in the car, as he says, for the purpose of enabling himself and daughter to get out of the car and on the surface of the ground at the top of the ditch.

The accident occurred within a very short time after the arrival of the train, as the train was still standing at the station when the plaintiff left the car and went to where the train was standing for the purpose of asking the train crew to assist him in getting out of the ditch. Members of the train crew went to where the car was located, but seeing that they could not remove the car either called, or suggested to the plaintiff to call, the section foreman located at that point. The section foreman was called and he, with the assistance of some of his men and the men of an extra gang then located at that point, assisted the plaintiff in removing his car from the ditch. The plaintiff appears to have taken an active part in removing the car by helping to place the necessary timbers and assisting in prizing the car out of the ditch. While the car was being removed from the ditch the plaintiff stated to the men who were assisting him, that neither he nor his daughter had received any injuries as a result of the accident. When the car was removed from the ditch the plaintiff and his daughter, after obtaining some oil at the LaPrade Store, and being assisted up a hill near the station by the section foreman, drove in the car to their home at Farmville, a distance of fifteen or twenty miles, the exact distance not appearing in the record.

The accident occurred on Friday night, and on the following Monday, February 24th, the plaintiff wrote a letter to an employee of the defendant claiming damages to put his car in repair in the amount of Twenty-five (\$25.00) Dollars. In this letter (R.; p. 39) the plaintiff expressed his appreciation of the courteous treatment accorded him by the railroad men in assisting him to get the car out of the ditch, and in this letter made no claim that either he or his daughter had been injured. This letter not being addressed to the claim agent was afterwards turned over to him by the employee to whom it was addressed, and on March 6th the claim agent acknowledged the receipt of the letter, informing the plaintiff

that his claim would be investigated at once. This letter of the claim agent bears date of March 6th, 1931 (R., p. 41), and in the letter the claim agent uses the following language: "In the meantime I wish you would write and tell me if either you or your daughter were injured in any way when the car became involved in the accident. I understand that neither of you were injured at all and only desire the information to complete our file on the matter." The plaintiff admits receiving this letter but made no reply. Again on March 20th the claim agent wrote the plaintiff (R., p. 43), and after referring to previous correspondence used the following language: "I will be obliged if you will tell me if either you or your daughter sustained any injuries in the accident. I am making an investigation of the accident, and hope to be in a position to dispose of it by the time your reply is received." The plaintiff does not remember whether he received this letter or not (R., pp. 43, 44), but admits that if the letter was received he made no reply to it. The letter was shown to have been properly addressed and to have been regularly deposited in the mail and as the plaintiff received all other letters addressed to him in the same way he evidently received this letter. The claim agent, on April 3rd, mailed to the plaintiff a draft for Twenty-five (\$25.00) Dollars, the amount claimed as damages to the automobile. Upon receipt of this draft the plaintiff, under date of April 4th, wrote the claim agent (R., p. 45), in which letter he stated that he had been suffering with his left knee continually since two days after the accident, and that he thought that there was a piece of glass in his knee and wanted to have an X-ray made of the knee. He suggested having the defendant's doctor make this X-ray, and, thereupon, it was arranged for the plaintiff to have the X-ray made by Dr. Kendig, the defendant's surgeon at Victoria. The plaintiff went to Dr. Kendig's hospital on April 19th for the X-ray of his knee to be made and for an examination. Dr. Kendig says that the plaintiff, in giving the history of his case, said that he did not notice any injury at the time of his accident but that the pain in his knee developed some-time later, his impression being the plaintiff said three or four weeks after the accident (R., pp. 146, 147). This examination and X-ray picture did not disclose any trouble with the plaintiff's knee except that it was slightly larger than the other knee. The plaintiff continued to complain of his knee and afterwards went to Dr. Southgate Leigh, the defendant's chief sergeant at Norfolk, for an examination, but it does not appear that this examination, or the X-ray pic-

ture taken at the time disclosed any trouble with the plaintiff's knee. The plaintiff was afterwards referred to Dr. Moore at Farmville, Virginia, the defendant's surgeon located at that point. Dr. Moore made several examinations of the plaintiff and X-ray pictures were made of both knees. These examinations and X-ray pictures did not disclose any trouble with the plaintiff's knee other than that the left knee was slightly larger in circumference than the right knee, and the only trouble that Dr. Moore discovered was that the plaintiff limped slightly in going up and down stairs. The plaintiff did not apply to his family physician, Dr. Trent, of Farmville, for treatment until July 9th, 1931 (R., p. 67), and he found the left knee joint was enlarged; that there was swelling, tenderness and pain, but he did not see any evidence of the accident (R., p. 64). All of these examinations and X-ray pictures did not disclose any injury to the knee other than the enlargement or swelling and possibly tenderness, the other symptoms of which the plaintiff complained being purely subjective.

All of the doctors who testify in the case, agree that the X-ray pictures disclose the formation of callus around the joints of both of plaintiff's knees, and that this condition shows that the plaintiff has been afflicted with arthritis for a period of several years; that these callus formations are typical of an arthritic condition. Some of the doctors say that this arthritis is bound to give the plaintiff trouble at some time or other, and some of them also say that a severe lick, bruise or strain might aggravate or cause the development of the arthritic symptoms. All of the doctors who testified on the question, say that a larger percentage of arthritis cases, such as are evidenced by the plaintiff's symptoms, result from infection than from accidental causes such as a lick, bruise or strain. The plaintiff's witness, Dr. Knight, says that in his experience sixty per cent of such cases are due to natural causes, while only forty per cent are due to traumatic injuries.

The evidence does not disclose that there was any lick, blow or strain inflicted on the plaintiff's left knee as a result of the accident. The plaintiff at first thought that a small piece of glass had gotten into his left knee joint from the window in the car which he broke in order for him and his daughter to climb out of the car. The only suggestion the plaintiff makes as to how he could have been injured in the left knee is that his daughter fell over against him when the car went into the ditch. His daughter was on his right side, and if any injury had been inflicted in this way it probably

would have been in the right knee. After the accident there was no break in the skin on the plaintiff's left knee or other evidence of traumatic injury to that knee. The plaintiff relied solely upon the alleged injury to his left knee as a ground for recovery of damages in this action.

The negligence relied on as a basis of recovery in this action is that the open ditch or drain on defendant's premises created a dangerous situation for persons using defendant's station grounds in the exercise of due care. The defendant relied on as defenses to the action the following:

(1) That its driveway, including the bridge and fill over the ditch, was safe and suitable for persons using the same in the exercise of ordinary care, and that it was not guilty of negligence in its failure to provide a safe approach to its station and station grounds.

(2) That the plaintiff was guilty of negligence in the use of the driveway in question without which negligence of the plaintiff the accident could not have happened.

(3) That the plaintiff was not injured in the manner and to the extent claimed by him.

Upon the trial of the action the jury rendered a verdict in favor of the plaintiff for Twelve Hundred and Fifty (\$1,250.00) Dollars, upon which verdict the court entered the judgment complained of herein.

ASSIGNMENTS OF ERROR.

The petitioner makes the following assignments of error to the rulings of the court in the entry of the judgment complained of.

I.

The court erred in refusing to admit proper evidence offered by the defendant.

II.

The court erred in giving instructions offered by the plaintiff and in refusing to give instructions 6 and 9 offered by the defendant.

III.

The court erred in refusing to hold that the plaintiff was guilty of contributory negligence in the manner in which he drove into the ditch on the defendant's premises.

IV.

The court erred in refusing to set aside the verdict and enter judgment for the defendant on the ground that plaintiff's evidence failed to show that his alleged injuries resulted from the accident which occurred on the defendant's premises.

These assignments of error will be presented in the order above set out.

FIRST ASSIGNMENT OF ERROR.

This assignment of error presents the question of the refusal of the court to admit in evidence the photograph designated as "McDowell Exhibit A". This photograph was designed to show to the jury the layout around defendant's station at Abilene, and the location of the driveway approaching and leading from said station, as well as the appearance of the driveway customarily used by travelers. In connection with defendant's defense of negligence on the part of the plaintiff it was important for the jury to see the exact situation around defendant's station, as disclosed by this photograph. There was, it is true, evidence to show that from time to time this driveway was kept in order by additional cinders being spread thereon, and because the defendant's witness who took this photograph could not say that no additional cinders had been placed on the driveway between the time the photograph was taken, and the time of the happening of the accident, the photograph was excluded (R., pp. 256, 7 & 8).

If additional cinders had been placed on the driveway between the time of the happening of the accident and the taking of the photograph it is self evident that the driveway would have been less clearly defined and not as plainly visible as it would have been if no additional cinders had been added to the driveway. It is also self evident and is certainly clearly established by the evidence, that in its general course the driveway was in practically the same location and that the constant use of this driveway would make a

roadway surface that would be plainly discernible to any one who used said driveway in the exercise of any degree of care. If the photograph had been admitted it would have aided the jury in passing upon the indefinite and uncertain testimony of the plaintiff's witnesses, which was in conflict with the defendant's evidence as to the location and appearance of the driveway. The court, therefore, erred in refusing to admit this photograph in evidence.

SECOND ASSIGNMENT OF ERROR.

This assignment of error involves the rulings of the court in giving instructions for the plaintiff and in refusing instructions offered by the defendant. The plaintiff's instructions were objected to as a whole on the ground that the evidence was not sufficient to warrant the giving of the instructions, and instruction "E" was especially objected to on the ground that the evidence failed to show any lick, blow or jar at the time of the alleged accident that could have caused or accounted for the arthritic or other conditions of which the plaintiff complained. The latter instruction, as well as the evidence bearing upon the plaintiff's alleged injury as a result of the accident, will be considered under the fourth assignment of error.

The defendant's instruction 6 was designed to cover in a very definite and concrete way the defendant's defense based on the contributory negligence of the plaintiff. There was ample evidence before the jury to show that the driveway in question was covered with cinders or slag; that it could be clearly seen and was obvious to any one using the same in the exercise of ordinary care. The jury were further told by this instruction that if, through the plaintiff's failure to turn on the lights of his automobile, or because his vision through the windshield was obstructed, or through any other cause for which the defendant was not responsible, the plaintiff failed to see said driveway and drove into the ditch or drain, then the plaintiff was guilty of contributory negligence. Presumably the court refused this instruction on the ground that there was no direct evidence that the plaintiff failed to turn on his lights when the plaintiff himself testified that the lights were turned on before he started the car. There was, however, circumstantial evidence in conflict with the plaintiff's statement which the jury had the right to consider on this question. In the first place several witnesses testified that the lights were off when they first went to the car after it had run into the ditch. After the car was

gotten out of the ditch several witnesses testify that the plaintiff was asked if his lights would burn and he stated to them in substance that he would turn them on and see if they would burn. If the plaintiff turned off the lights, as he says after the car went into the ditch, it is hardly probable that he would have made this statement testified to by various witnesses. The whole physical situation and the physical conditions surrounding the station grounds go strongly to show that if the plaintiff had the lights on his car burning with a clear vision in front of him it would have been impossible for him to have run into the ditch in traveling at a rate of from two to three miles per hour. One witness, thoroughly familiar with the situation, says (R., p. 140), in effect that if his lights had been on he was bound to have seen the ditch and the honeysuckles on both sides of the ditch.

The evidence is that it had been raining and that the rain was continuing at the time the plaintiff started to leave the station. His daughter does not know whether there was a windshield wiper on the car or not. The plaintiff does not say that he had a windshield wiper on the car. If there was no windshield wiper on the car it is evident that the view through the windshield was obstructed by the rain, which had accumulated thereon, and thereby the plaintiff's vision would be very materially obstructed. This instruction embodies a sound principle of law, and was based upon facts of which there was sufficient evidence for the jury to consider, and the instruction should have been given.

The refusal of the court to give defendant Instruction No. 9 (R., p. 277) is assigned as error. This Instruction was designed to inform the jury as to the degree of care required of the defendant in the construction and maintenance of the driveway used as an approach to its station. The standard of care in such cases is that the owner of premises is required to use ordinary care not to expose persons lawfully using such premises to danger. A railroad company is not required to use any higher degree of care to protect persons lawfully using its stations and station grounds than the owner of any other premises is required to use.

Clark vs. Fehlhaber, 106 Va. 803.

N. & W. Ry. Co. vs. Parish, 119 Va. 670.

Meanley vs. Petersburg, etc., Ry. Co., 133 Va. 173.

The usual test of what constitutes ordinary care is the conduct of the average prudent man which is determined by

the ordinary usages and customs of the line of work or business in which he may be engaged. It is said that no one is required by law to use a higher degree of skill or care than the fair average of his profession or trade. This principle was first applied to negligence cases arising out of the relation of master and servant and has been extended to cases involving other relationships.

Bertha Zinc Co. vs. Martin, 93 Va. 791.

Norfolk, etc., Co. vs. Daily, 111 Va. 665.

Lane Bros. Co. vs. Barnard, 111 Va. 680.

The instruction in effect told the jury that if the driveway over the ditch on defendant's premises was of sufficient width and was constructed and maintained by the defendant in view of this particular situation in as safe condition for travel as county and other roads over similar drain pipes in that locality, that defendant was not guilty of negligence in the construction and maintenance of the driveway over the ditch on its premises at Abeline. There was ample evidence before the jury to show that this driveway over the drain pipe in defendant's ditch was similar in its construction to the roadway over many drain pipes in the county and other roads in that locality and that it was as safe if not safer than many drain pipes located in the roads in that section. The Supervisor of that district of Charlotte County and the county road manager both testified that there were many similarly constructed drain pipes under county roads with no guard rails, posts or other obstruction to warn travelers of the location of the drain pipes. The court below gave as a reason for refusing this instruction that there was a difference in the liability of a railroad company from that of the county or state in the construction and maintenance of county and state roads. The point is not a question as to the difference in liability, but as to the test of the standard of care that should be exercised in the construction of roads or driveways over drain pipes or culverts. The fact that the county or state may not be liable in such cases does not change the rule as to what should constitute the standard of due or ordinary care. There can be no foundation for the contention that county and state officers in charge of the roadways of the state do not exercise in their construction the degree of care ordinarily exercised by a prudent man on the ground that there is no legal liability in such cases. This instruction properly told the jury as to the standard or degree of care required of the defendant in the construction of the drive-

way over the station grounds at Abeline and should have been given.

THIRD ASSIGNMENT OF ERROR.

This assignment of error involves the question of the negligence or contributory negligence of the plaintiff in the use of the driveway at the time of the accident.

When the owner of premises by invitation or otherwise induces persons to come upon his premises for any lawful purpose he is liable for injuries occasioned by the unsafe condition of the premises or their approaches. The persons using such premises must exercise due care and the unsafe condition of the premises must be unknown to the person who claims to have been injured.

Nesbitt vs. Webb, 115 Va. 362.

The plaintiff was familiar with the layout of the grounds around defendant's station at Abeline, having been there twice before (R., pp. 30, 32). The plaintiff knew that the driveway passed over a ditch and he was watching the right side of the roadway to prevent the car going over into the ditch on that side (R., pp. 10, 12). He knew that there was a cinder driveway on plaintiff's premises, although he thought that the cinders were not entirely confined to the driveway (R., 32, 33, 34). He thought that the road was at least about ten feet wide over the ditch and that he had ample room, possibly two and one-half feet, on each side of his car (R., p. 15). His car was moving two or three miles an hour and he watched the road on the right and went as near to the edge of the road on that side as he could. He could see the edge of the road on the right side plainly and drove as close to the right side of the road as he thought it was prudent to drive. He claims never to have looked at the left side of the road on account of the fact that he was on a curve and his lights were thrown in the direction of the right of the road. (R., pp. 59, 60, 61.) From this testimony of the plaintiff it is very evident that he knew that he was approaching the roadway across the open ditch or drain and that he was driving as near the right side of the road as he thought prudent in order to avoid going into the ditch or drain. The car went into the ditch or drain on the left side of the road and the plaintiff has either not given a correct account of how the accident occurred or knowing the ditch or drain was there was

not exercising due care to avoid going into the ditch or drain. The plaintiff's estimate of the width of the roadway across the ditch or drain is eight or ten feet, but he never measured the distance (R., pp. 35, 36, 37). The plaintiff's witness, Chappell, who is the plaintiff's brother-in-law, estimated the width of the roadway over the ditch or drain at twelve or fourteen feet. (R., p. 99.) It is shown by the testimony of Priddy (R., 131), La Prade (R., 178, 184), Skinner (R., 217), Keyser (R., 232), and Hudson (R., 244), that the driveway across the ditch or drain was by actual measurement sixteen feet wide. Regardless of the width of the driveway, as shown by the estimated distance of the plaintiff and his witness, or the measured distance as shown by the evidence of the defendant's witnesses, there was ample room for the plaintiff to pass over this driveway in safety if he had been watching the right side of the road and driving as close to the right side of the road as he thought it was prudent to do. Knowing the situation and the existence of the alleged dangerous place, it was the duty of the plaintiff to see to it that he kept his car in the roadway and followed the roadway across the ditch or drain. If he left the roadway, which was plainly and well defined as shown by the testimony of numerous witnesses, or misjudged the distance between his car and the right side of the roadway across the ditch or drain, he alone was responsible for the accident. Knowing the situation, it was the plaintiff's duty to make sure that he was on the regularly used driveway over the drain. With the exercise of proper care he could not be mistaken as to this, because there was not but the one driveway across the ditch or drain and there could be no indication of a traveled roadway on either side of the ditch or drain. The plaintiff's own evidence in this case shows that he did not exercise due care, and for that reason his right to a recovery should be defeated.

FOURTH ASSIGNMENT OF ERROR.

This assignment of error involves the question as to the sufficiency of the plaintiff's evidence to show that his alleged injuries resulted from the accident which occurred on the defendant's premises. The sole injury for which the plaintiff claims damages is the condition of his left knee. He says that he has suffered from soreness, pains and lameness in his left knee, and it appears that the left knee is slightly enlarged as compared with the right knee. As already stated, there is no evidence of any blow, strain or other injury to

the plaintiff's knee at the time the accident occurred. There is nothing in the record from which any reasonable inference can be drawn that the plaintiff suffered any injury to his knee in the accident. The plaintiff's evidence as to his injury and the consequent effects thereof is most uncertain and indefinite, and when his statements on the witness stand are compared with his previous statements and his course of conduct the conclusion is irresistible that his evidence as to his injuries is totally unreliable.

On the night of the accident he stated to numerous witnesses that neither he nor his daughter received any injury. He assisted in removing his car from the ditch and thereafter drove from the scene of the accident to Farmville, which indicate that he had not received any injury of which he was conscious. The medical testimony of Dr. Kendig and others is that if he had received an injury in the accident he would have felt the pain instantly, certainly as soon as he recovered from the shock or excitement caused by the accident (R., pp. 149, 152).

On February 24th, more than two days after the accident, he wrote defendant about damages to his car, but made no complaint as to an injury received by him in the accident (R., p. 39). A week or ten days after the accident he stated to the witness Priddy that he was not hurt in the accident. (R., pp. 226, 228.) On April 19th he stated to Dr. Kendig, in giving the history of the case, that the pain in his knee developed some time after the accident, his recollection being that plaintiff stated that it was three or four weeks after the accident. Plaintiff admits receiving the letter of March 6th from the claim agent, in which he was asked if either he or his daughter was injured in the accident, and he made no reply to this letter (R., p. 41). He was again asked the same question in the letter from the claim agent in his letter of March 20th. The plaintiff does not remember whether he received this letter or not, but he admits that if he did receive it he made no reply to it. His first complaint, made directly to the defendant, was by his letter of April 4th, after he had received the draft for the damages to his car (R., p. 45). In this letter he states that he has been suffering with his left knee continuously since two days after the accident. The first direct complaint shown to have been made by the plaintiff was to the witness Keyser ten days or two weeks after the accident, when he said that his knee was giving him trouble and that he thought probably there was a piece of glass in it (R., p. 239).

When these statements and this conduct on the part of the plaintiff are compared with his testimony on the witness stand, the indefinite and uncertain statements of the plaintiff on the witness stand are fully accounted for and their unreliability is manifest. All of these statements of the plaintiff on the witness stand, covering his alleged injury, may briefly be referred to as follows: In describing the accident he states that the car turned over, that his daughter fell on him and he thinks that is when his knee was strained (R., p. 11). When asked if at the time of the accident he thought he was in any way injured he replied that he felt a little sprain in his knee, but did not think it was serious or would amount to anything (R., p. 13). Again, when asked if he had any trouble immediately after the accident or any noticeable injury, he replied that he had trouble directly afterwards and that this knee got to paining him very badly at night. He thought that he had gotten a piece of glass in his leg when he broke the window out of his car and climbed through the window (R., p. 18). His excuse for the delay in making any complaint to the defendant about his injury is that he did not know who was the defendant's claim agent (R., pp. 16, 28, 31, 38). This claim is made by the plaintiff in face of the fact that he received the letter of March 6th from the claim agent asking him if either he or his daughter was injured in the accident, and probably received the letter of March 20th asking him the same question, and made no reply to these letters. The first time he complained to the claim agent about his alleged injury was by his letter of April 4th after he had received the check for damages to his car. When he was asked on cross examination if he had been suffering with his knee since two days after the accident why he did not say something about it he replied, "I could not tell you, one reason was because I thought the knee would get better" (R., p. 47). When asked about his statement in his letter that he commenced suffering with his knee two days after the accident he said it commenced giving him more trouble then; that he always felt like it was sprained or that he thought there was a piece of glass in it, but he did not think it amounted to anything (R., p. 49). When asked if he felt any sprain or lick on his knee as soon as the accident occurred his reply was that, "naturally when a man has a jar like that he feels some soreness, but I did not think it would amount to anything".

The plaintiff was not examined by his physician, Dr. Trent, until July 9th following the accident. Dr. Trent did not see any evidence of the accident and the symptoms noted by him

were swelling, tenderness and pain (R., p. 64). Dr. Trent admits that these symptoms, from which the plaintiff was suffering, could have come from other causes such as arthritis and rheumatism (R., pp. 70, 71). Dr. Knight, the plaintiff's witness, found tenderness and swelling in the left knee and a roughness in the joint, and also found from the X-ray picture a spur formation, which is common in anybody past middle life (R., p. 74). On cross examination Dr. Knight admits that these symptoms of the plaintiff are frequently found in patients especially after they pass middle life, and that in sixty per cent of the cases they result from natural causes and not from an accident or injury (R., pp. 77, 78). Dr. Moore found that plaintiff was suffering with chronic arthritis; that the spurs and roughness in the joint resulted from this chronic arthritis, and says that it was bound to give trouble sooner or later, and that in the majority of cases the symptoms suffered by the plaintiff result from arthritis rather than from a lick, blow or strain; that this condition had existed for several years and that arthritis could not be caused by a blow (R., pp. 156, 157, 161, 174). Dr. Kendig's testimony was to the same effect, and in his opinion the arthritic condition had existed for a period of two or three years (R., pp. 146, 147, 148). He further testified that most cases of this kind with symptoms similar to those suffered by the plaintiff come from an infectious conditoin rather than from a lick, blow or other traumatic injury (R., pp. 149, 150).

In the light of this testimony and in view of the fact that there was no objective evidence of a lick, blow, strain or other traumatic injury, as a result of the accident, it is evident that the chances are largely in favor of the plaintiff's alleged injuries being the result of infection causing rheumatism or arthritis rather than that they resulted from any injury received in the accident. It is, therefore, more probable that the pain, swelling and soreness in the knee, of which the plaintiff complains, resulted from natural causes than it is that they resulted from injury received in the accident. This being true the plaintiff has failed to carry the burden of showing by a preponderance of the evidence that his alleged injuries resulted from the accident. The legal principles applicable in such cases are well settled in Virginia. The principle is that where damages are claimed for injuries, which may have resulted from one of two causes for one of which the defendant is not responsible, the plaintiff's action must fail.

N. & W. R. Co. vs. Poole, 100 Va. 148.
C. & O. R. Co. vs. Heath, 103 Va. 64.
Stonega Coal & Coke Co. vs. Neece, 111 Va. 302.
Kendrick vs. Norfolk, 139 Va. 702.
Farmers' Admrx. vs. C. & O. R. Co., 144 Va. 65.
Turner vs. Va. Fire Works Co., 149 Va. 371.

In the last cited case it is held:

"If the claimant's injuries were the natural and unavoidable result of an accident, she should be allowed compensation, but if they resulted from an occupational disease, without an accident, there can be no recovery. Since the disease may have resulted from either of the two causes for one of which the employer is liable and for the other of which he is not liable, the burden was on the claimant to show that her injuries resulted from the former."

The following three Virginia cases are more directly in point:

In *C. & O. R. Co. vs. Whitlow*, 104 Va. 90, the plaintiff brought suit against the Railway Company to recover damages for malarial fever caused in his family by reason of stagnant ponds of water located along the defendant's right of way. It appeared that there were also stagnant ponds of water on the plaintiff's premises as near to his residence as the ones on the Railroad right of way from which the mosquitos causing the malarial fever may as well have emanated as from the ponds on the Railroad right of way. The court applied the principle that where damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiff cannot recover unless his evidence shows that the damages are produced by the cause for which the defendant is responsible, and if it is just as probable that the damages were caused by the one as by the other the plaintiff must fail because he is bound to make out his case by a preponderance of the evidence.

In the case of *Honaker vs. Whitley*, 124 Va. 194, the plaintiff brought an action against a dentist for alleged malpractice. The plaintiff had suffered a fracture of one of his jawbones, the fracture resulting from an effort to extract an impacted wisdom tooth. He had been operated upon by two

dentists within a period of from four to five days. The action was against the dentist who first operated and who was not successful in removing the tooth. Immediately following this operation the plaintiff suffered severe pains which may have resulted from the fractured jawbone or from other causes arising out of the attempted operation. In the first operation it was shown that the dentist used considerable force in his effort to extract the plaintiff's tooth, which may have caused the fracture of the jawbone. Four or five days later the plaintiff went to another dentist who, on account of his jaws being locked, had to use considerable force in prizing open the plaintiff's mouth and in extracting his teeth. It appeared that the jawbone was broken by one or the other of these operations and that the fracture may have been caused by either. The court held that the plaintiff must fail in his action because it was just as probable that the damages were caused by the one operation as the other and that the plaintiff was bound to make out his case by a preponderance of the evidence.

The case of *General Accident, &c., Corp. vs. Murray*, 120 Va. 115, was an action to recover damages for an alleged accidental death. Murray, the husband of the plaintiff, had a mild case of smallpox and was sent to a hospital for smallpox patients. After he had practically recovered from the smallpox, and the doctor had told him he was going to send him to his home, plaintiff put on a new pair of shoes, which he had owned ten days or two weeks, and took a walk. He returned to his room about four or five o'clock in the afternoon, and that night told his roommate that his foot was hurting him by smarting. The next morning he had a high fever and the next day a case of erysipelas developed in his leg, and about two weeks later he died from erysipelas. The alleged ground of the action against the Insurance Company was that Murray died from erysipelas caused by infection through abrasion on his heel, which resulted from the rubbing of his shoe and that, therefore, his death was from an accidental cause. The defendant demurred to the evidence and the trial court overruled the demurrer and entered judgment for the plaintiff. On appeal the judgment was reversed and final judgment was entered for the defendant. This decision was placed on the ground that when the erysipelas developed the deceased's body had not been cleared of the smallpox and that there were sores still there, as well as weak places in the skin that were subject to infection, and that the question was whether the infection of erysipelas entered the de-

ceased's body through the sores incident to the smallpox or through a sore or raw place caused by accidental means. It was held that the finding of the court or jury in such a case must necessarily be based upon surmises and conjectures and could not be based upon reliable or established facts shown in the evidence. The principle was applied that the burden was on the plaintiff to show by a preponderance of the evidence that the death of the deceased resulted from an accidental cause and that it being just as probable that the death resulted from other than an accidental cause the plaintiff could not recover.

Applying the principles established by these cases the conclusion is inescapable that it is more probable that the plaintiff's alleged injuries resulted from natural causes, such as impurities in the system, which caused rheumatic or arthritic conditions than it is that such injuries resulted from any lick, blow, strain or other traumatic injury received in the accident. This being true the plaintiff's action must fail and this court should reverse the judgment of the court below and enter judgment here for the defendant.

Petitioner alleges that a copy of the foregoing petition was mailed to Watkins and Brock, counsel for the plaintiff, on the 23rd day of September, 1932, and that in case the writ of error and *supersedeas* herein prayed for are granted petitioner will rely on this petition as its opening brief. Petitioner further alleges that its counsel desire to present orally to the Honorable Edward W. Hudgins, one of the Justices of the Supreme Court of Appeals of Virginia, its reasons for asking a review of the judgment complained of herein.

Petitioner, therefore, prays that it may be awarded a writ of error and *supersedeas* to the judgment herein complained of, and that said judgment may be reviewed and reversed.

Respectfully,

THE VIRGINIAN RAILWAY COMPANY.

By H. T. HALL, Counsel.

THOMAS W. OZLIN,
HALL, BUFORD & LEFTWICH,
Counsel for Petitioner.

We, the undersigned attorneys practicing in the Supreme Court of Appeals of Virginia, certify that, in our opinion,

the judgment complained of in the foregoing petition is erroneous and should be reviewed by the Supreme Court of Appeals of Virginia.

Given under our hands this 17th day of September, 1932.

THOS. W. OZLIN,
H. T. HALL.

Received September 27, 1932.

E. W. H.

Writ of error granted; *supersedeas* awarded. Bond \$1,500.00.

E. W. HUDGINS.

October 21, 1932.

Received October 24, 1932.

H. S. J.

VIRGINIA:

W. J. Hillsman

vs.

Virginian Railway Company, a corporation.

Pleas before the Circuit Court of the County of Charlotte at the courthouse of said Court on the 6th day of July, 1932.

Be it remembered that heretofore, to-wit, on the 5th day of February, 1932, came W. J. Hillsman, by his attorneys, and filed, in the Clerk's office of said Court, his notice of motion for judgment against the Virginian Railway Company, which said notice is in the words and figures following, to-wit:

W. J. Hillsman

vs.

Virginian Railway Company, a corporation.

NOTICE OF MOTION FOR JUDGMENT.

Please take notice, that the undersigned, W. J. Hillsman, hereinafter called plaintiff, will on the first day of the next

regular term of the Circuit Court of the County of Charlotte, it being the March Term, 1932, move the said Court for a judgment against you in the sum of Five Thousand Dollars (\$5,000.00), with interest from the 21st day of February, 1931, until paid, due by you to him, for this, to-wit:

page 2 } That you are the owner and operator of a certain railroad, whose tracks pass through Charlotte County, State of Virginia, at a point commonly known as New Abilene Station, not far distant from the County line between Prince Edward and Charlotte Counties, at which point for the accommodation of passengers getting on and off the trains so operated by you, you have erected what is commonly known as a railroad station or depot; and that it became and was your duty to provide a safe approach to and from your said railroad station or depot over your premises; that on or about the 31st day of February, 1931, and for a long time theretofore, to-wit, for many years, you knowingly, negligently and carelessly permitted upon your said right of way a dangerous and hazardous situation to exist, you having constructed a deep ditch of the depth of from 8 to 10 feet and of the width of from 8 to 12 feet upon your said premises, running roughly parallel with the aforesaid station or depot, and about 36 feet therefrom and between said station or depot and the county road or highway leading into your said premises, over which said ditch you had constructed a narrow roadway for the use of those who desired to travel upon your said railway or who conveyed passengers to and from your said station or depot; your invitees, both of which said ditch and roadway were on your premises, which passed over a culvert in said ditch, said ditch being filled in above said culvert approximately to the level of the ground on

either side of the said ditch; that the said roadway
page 3 } upon said right of way leading from the station or depot crossed over said ditch where the culvert aforesaid is located; that the width of the said roadway over said ditch as aforesaid, is from 6 to 10 feet, there being on both sides of the narrow roadway, the ditch aforesaid, which was of considerable depth on both sides, to-wit, the depth of 8 to 10 feet; and it became and was your duty to exercise due and proper care to see that said roadway and premises were safe for the use of passengers taking and leaving your said trains and for those, your invitees, lawfully coming to said station to convey passengers to and from said station; and that to that end, it became and was your duty to see to it

that those lawfully using said roadway and premises as aforesaid were protected from falling into said ditch by the erection of barriers or guard rails or other structures or safeguards for the protection of those so lawfully coming into and leaving said station or depot and it was further your duty to see that the said roadway and premises were properly lighted in the night time for the protection of persons lawfully using said roadway as aforesaid and that said roadway and premises were kept in a reasonably safe condition.

Yet, nevertheless and notwithstanding, your said duty, you knowingly, carelessly and negligently permitted such dangerous and hazardous condition to exist and failed to use due and proper care to keep said approach or roadway and premises in a reasonably safe condition and failed
 page 4 } to erect proper carriers or guard rails or other structures or safe guards for the protection of your invitees lawfully using the same and to prevent them from falling into said ditch and being injured and that further, you failed to keep said roadway and premises properly lighted in the night time, so that your invitees, those desiring to travel on the trains operated by you or those lawfully conveying passengers to and from your station or depot were likely to be precipitated into such ditch and be injured.

And by reason of your said carelessness and negligence, plaintiff sustained the injuries herein complained of and the said negligence on your part was the proximate cause of the injuries and damages sustained by him, as is hereinafter set out.

That on or about the 21st day of February, 1931, plaintiff, your invitee, came to New Abilene Station to meet his daughter, a passenger upon your train which arrived at New Abilene Station about 2 P. M. on that day; that at that hour it was dark and a drizzling rain was falling; that plaintiff, your invitee, lawfully drove his automobile up to said station or depot and after his daughter had alighted from said train, she and plaintiff got into his said automobile and plaintiff lawfully, carefully and without negligence on his part, attempted to drive his said automobile along the said roadway where said roadway crosses the said ditch as aforesaid, upon your said premises, and notwithstanding the care of the said plaintiff and by reason of your carelessness and negligence in not using due and proper care for the safety of

those using said roadway and premises as afore-
page 5 } said in that you failed to provide barriers or guard-
rails or other structures or safe-guards and to keep
said roadway and premises, properly lighted in the night time
and in a reasonably safe condition to prevent passengers or
other invitees from falling into said ditch and being injured,
the automobile which plaintiff was driving slipped off of the
said roadway on the left hand side thereof, falling into said
ditch and upon said automobile's falling into the said
ditch, plaintiff's left leg was badly injured, so that though
he has made every effort to be cured and has spent large
sums of money in seeking to be cured, the leg still remains
stiff and at times painful, so that he limps and walks with
difficulty and is greatly injured in his ability to transact his
business; that plaintiff is a merchant by occupation which
necessitates him to have to stand on his feet a great deal of
the time and that such injury is permanent; that he has un-
dergone great pain and suffering and inconvenience and
mental worry and anxiety and that his ability to transact the
ordinary affairs of his business has been greatly curtailed
and his earning power greatly reduced.

WHEREFORE, he has sustained damages to the amount
of Five Thousand Dollars (\$5,000.00), no part of which has
been paid and all of which is still due and payable and that
the same is due to your carelessness and negligence as afore-
said.

Respectfully,

(Signed) W. J. HILLSMAN,
By Counsel.

WATKINS & BROCK, p. q.

page 6 } At another day, to-wit, on the 6 day of April,
1932, The Virginian Railway Company, by counsel,
filed in the Clerk's office of said Court its statement of
grounds of defense and plea of contributory negligence, which
is in the words and figures following, to-wit:

W. J. Hillsman

vs.

The Virginian Railway Company.

STATEMENT OF GROUNDS OF DEFENSE AND PLEA
OF CONTRIBUTORY NEGLIGENCE.

Upon the trial of this action the defendant, in addition to what it is entitled to prove under the general issue, will rely upon the following defenses:

(1) That defendant was not guilty of negligence in any of the particulars alleged in the plaintiff's notice of motion.

(2) That the driveway leading to defendant's passenger station at Abilene, Virginia, is a smooth safe driveway covered with cinder surface; that the bridges carrying this driveway over the open ditch, mentioned in the plaintiff's notice of motion, were of sufficient width and were ample to accommodate any traffic to or from plaintiff's station, and that there was no hazard connected with the use of said driveway to anyone using the same in the exercise of ordinary care.

(3) That the defendant will rely upon the negligence of the plaintiff as the proximate cause of the accident, which negligence consisted in the plaintiff's failure to exercise due care in the operation of his automobile upon the station grounds of the defendant at the time the accident occurred. The said plaintiff drove his car directly into an open ditch adjoining defendant's station grounds from where his car was parked on the station grounds some distance away from the open ditch. The said open ditch was eight to ten feet wide and approximately eight feet deep, and could readily be seen by anyone in the exercise of any degree of care. The plaintiff's automobile was driven forward directly into the said open ditch, and the plaintiff drove his car into said ditch either without during on his lights, which were in good order, or without looking in the direction in which the car was being driven.

(4) The defendant will show that the plaintiff was not injured in the manner and to the extent alleged in the plaintiff's notice of motion and bill of particulars filed herein.

THE VIRGINIAN RAILWAY COMPANY.

By Counsel.

THOS. W. OZLIN,
HALL, BUFORD & LEFTWICH,
Attorneys for Defendant.

page 8 } W. J. Hillsman

vs.

Virginian Railway Company.

RECORD.

Stenographic report of all testimony and other incidents of the trial, including instructions offered, given and refused upon the trial of the above-entitled action before Honorable R. F. Hutcheson and a jury which trial began on May 4, 1932, and ended on May 5, 1932.

Appearances: Messrs. Brock & Watkins, and J. Kent Early, for plaintiff; Messrs. H. T. Hall and Thomas W. Ozlin for defendant.

page 9 } EVIDENCE INTRODUCED ON BEHALF OF
PLAINTIFF.

W. J. HILLSMAN,
Plaintiff, Sworn.

DIRECT EXAMINATION.

By Mr. Watkins:

Q. Mr. Hillsman, you are the plaintiff in this case?

A. Yes, sir.

Q. Did you go to the New Abilene station some time in 1931, around about the 21st of February, 1931?

A. Yes, sir.

Q. What purpose did you go there for?

A. I went there to meet my daughter who was coming in on the two o'clock train, I think it was about two o'clock. She was off teaching school and she was coming in that morning to go home and I went there to meet her.

Q. Approximately what time in the morning was this?

A. About 2:15, I think it was, I don't know the exact time.

Q. Explain to the jury just as far as you can what you did and how you approached this station?

A. I had been to Abilene on previous occasions and I knew that there was a driveway in like that (indicating) and I came in, and I was very careful to drive in the roadway going in,
page 10 } it is pretty straight coming in, and you can see it
for some distance, and I drove in and turned
around by the side of the depot, so as to come out
and I crossed there.

Q. Have you ever made a map of that ground around the station?

A. I have a kind of a sketch, it is very crude.

By Mr. Hall: We have a good sketch or map here of the layout, which you can use, if you want to.

By Mr. Watkins: All right, we will make use of that one.

Q. Now, using that map there, point out to the jury, just reverse yourself around, and show them the way you came into that station?

A. Here is the driveway coming in, I came in across there (indicating), here is the ditch, and here is the road to the depot and I stopped here (indicating), about near this place, I came by this place and stopped out there (indicating). Then when the train came in I came around this end of the depot and got her and put her in the car and we started off. I did not take my car out of low gear, and I moved off very cautiously, making the turn here, you will notice there is a right sharp turn there, and in turning I went over here, and I watched this side of the road, and tried to go as near as I could to here (indicating), so as not to go over, and when

I got about here, I commenced slipping, and I
page 11 } slapped on the brakes, and it just kept on slipping
and the car turned over, and my daughter, she
fell on me, and I think that is when my knee was strained,
and after I got in there the light was shining down and there
was some water there, and after the car turned down in the
ditch the light was shining down there, and there was a little
water down in the ditch and oil, I could see oil running down
in there, and I thought there was danger of fire, by gasoline
flowing down on the engine, I thought it might catch fire,
and I immediately knocked the glass out of the door, then I
got out of there and reached down and got my daughter by
the hand, and she stepped on the steering wheel, and I let
her out. Then I hollered to the train crew to come out there
and they came and rendered me everything they could do,
they came out there but they had nothing to work with, and
they told me or offered to take us to another station, and I
told them that would not be necessary as I wanted to get my
car out, and someone—

Q. One minute—let me ask you this question—you say the employees came out there and were very courteous and did everything in their power to help you?

A. Absolutely, they were as courteous as they could be.

Q. Now, you said you had your car in low gear, and had

gone approximately what distance, do you think?
page 12 } A. Not more than a car and a half length, I was
just moving on easy.

Q. Very slowly?

A. Yes, sir, and it went down there as easy as anything could, and when it got to the very steepest part it went suddenly.

Q. Now you said you were watching this side, or watching the right hand side, now why were you doing that?

A. Because in coming around the curve the car headed that way, the light is thrown on the right side and not the left side.

Q. Could you see the edge of the road on the right hand side?

A. Yes, by leaning out that way (indicating), but you couldn't see on the left because the head of the car was passing the outside of the curve and I was looking that way, and watching that side of the road so as not to go over, but the car slipped over on the other side.

Q. How deep is that ditch there?

A. I suppose the ditch must have been eight or ten feet, about ten feet, I reckon, but I didn't measure it.

Q. Did the car go down to the bottom?

A. Yes, and chunked down into the end of the
page 13 } culvert.

Q. Was it raining that night?

A. Yes, sir, it was raining, but not very hard just at that time, just sprinkling, but the roads were very muddy as it had been raining considerably, and it was very dark.

Q. At that time did you think that you were in any way injured?

A. I felt a little sprain in my knee but I didn't think it would amount to anything, as I had had on different parts of my body sprains of that much and I thought it would be all right in a day or two, I didn't think it would be anything serious, that was my idea when it occurred.

Q. Approximately, or to the best of your knowledge, how wide is that ditch?

A. I should judge, looking at it, it is at least I reckon about 10 feet, or something like that, I had ample room, and possibly 2½ feet on each side of my car.

By the Court:

Q. Are you speaking of the width of the roadway or the width of the ditch?

A. The roadway.

Q. He asked you about the width of the ditch?

A. I do not suppose there is much width at the bottom, but I suppose a couple of feet, and the top was about eight feet wide, and the car went down endways and laid on the side with the radiator chunked down into the culvert, it was wide enough for that, and I suppose it was
 page 14 } wider than that at the top, it must have been 12 feet wide, because it took nearly the length of the car.

By Mr. Watkins:

Q. How wide do you think the top of that passage way over there or that drive way across that ditch was?

A. The width I gave you there, when I said possibly $2\frac{1}{2}$ feet on each side of the car, if I had stood in the center. It didn't look any more, sitting in the car.

Q. What distance in feet, do you think that was?

A. About 10 feet.

Q. Were there any railings along by the side of this driveway?

A. On the side that I slipped in, I didn't notice any, and I didn't notice any anywhere else, and where I slipped in, they seemed to have a piece of timber or tie, sorter kind of down level with the roadbed, and that was very much decayed on top, and I suppose that the car got about an inch or something like that on it and that sorter slid off with the car.

Q. Did this tie go down into the ditch?

A. No, sir, the car went off and went in the ditch and the top or the decayed part mashed off as I went down.

Q. Did the car slip off of that part of the wood?

A. Yes, sir, it slipped off and a little part of the wood went with it, it just sort of mashed off and went right
 page 15 } off, but I was very near the edge of it, I suppose, when that happened.

Q. Was this decayed part that you speak of level with the roadway or the bed of the road?

A. It was lower than the center of the road, the road gradually sloped and the cars running in it had cut a kind of a ravine and there was a little dirt right there, and as soon as I got over that part the log was a little lower.

Q. There was a slant to the ditch, and these pieces of ties were on each side?

A. It looked so to me, it looked as if the tie was put there to hold the dirt back but not intended for protection, just put there to hold the dirt back where it was filled in.

Q. How far had you gotten on this crossing over this ditch?

A. I suppose I was about half way when I slipped. It was very dark out there and I blew the horn and when I got out I hollered and the train crew came out there and brought some torches out of the train and stuck them in the ground so I could see to go to the house to wake up these men. I think they pointed out Mr. Moore's house, and I think he said he was the Section Foreman, and I went and woke him up, and then he got the balance of them up.

Q. Have you ever been treated for your knee?
page 16 } A. Yes, sir.

Q. Who have you been treated by, give me the names of the doctors?

A. You mean that treated me?

Q. Yes, that treated you or examined your knee?

A. Only two doctors that treated it at all, and that was Dr. Trent and Dr. Kendig.

Q. What other doctors have examined you?

A. I went to Norfolk to Dr. Southgate Leigh for examination. I thought I was going for treatment but I found afterwards it was for an examination.

Q. Who sent you there, if anybody did?

A. It was at the suggestion of Mr. McDowell, and Dr. Kendig wrote Dr. Leigh a letter.

Q. Who is Mr. McDowell?

A. I found out that he was the Claim Agent of the Virginian Railway Company. Now I want to say something there about the delay in my putting in this claim—

Q. One minute, I will come to that in just a little while.

A. Mr. McDowell, as I understand, is one of the Claim Agents.

Q. This gentleman here is taking down your answers to these questions, and I want to get these things straight in the record.

A. Well, Mr. McDowell is one of the Claim Agents, I understand, of the Virginian Railway Company.

page 17 } Q. Who did he suggest that you go to see in Norfolk?

A. Dr. Southgate Leigh.

Q. Did any other doctor there examine you?

A. Dr. Southgate Leigh, I do not think made a personal examination, but he sent me into his Bone specialist, who was Dr. Todd, and he made the examination.

Q. Go ahead and name any other doctors?

A. They did not send me to any other doctor, but I was

taken in to the laboratory to have my blood tested and also my urine taken.

Q. Have you seen any other doctors?

A. I thought you meant for me to get through at the hospital there.

Q. No, sir, I am asking you to name the different doctors.

A. Before I went to Dr. Southgate Leigh I went to Dr. Kendig.

Q. How many times did you go to see Dr. Kendig?

A. I am sure I went as many as three times.

Q. Who suggested that you go to see Dr. Kendig?

A. Mr. McDowell suggested it—may I enlarge on that answer a little bit?

Q. One minute—after going to see Dr. Southgate Leigh, did you go to see any other doctor?

A. Yes, sir.

Q. Who?

page 18 } A. I went to see Dr. Hillsman at Richmond.

Q. Any other?

A. When I went to see Dr. Southgate Leigh, he suggested if I had any further trouble to go to Dr. Moore.

Q. To where?

A. To Farmville, that he was the local man for the railroad company and was located at Farmville, and he would look after me.

Q. Did you go to see Dr. Moore?

A. Not until after I talked with Mr. McDowell.

Q. Had any other doctor examined you?

A. Dr. Trent was treating my knee; he lives at Farmville.

Q. Any other doctors?

A. Dr. Knight.

Q. Where does Dr. Knight and Dr. Trent live?

A. They both live at Farmville.

Q. Did you have any trouble immediately after this accident, or any noticeable injury?

A. I had trouble directly afterwards and this knee got to paining me very bad at night and I had a stinging sensation in there and I got it in my head there was a piece of glass in it, after breaking the door out of my car and coming out through there, the sharp edges of the glass made three or four cuts in my overcoat and one in my pants right
page 19 } above the knee, and that sharp pain in there, I got it in my head that it was a piece of glass in there, but of course I found out it was not correct.

Q. When you went to see Dr. Kendig did he give you any treatment?

A. He made me use a hot water bandage or massage on my knee five minutes apart for a good part of the time at night.

Q. Was any x-ray taken at that time?

A. Yes, sir.

Q. Dr. Kendig had an x-ray taken?

A. Yes, sir.

Q. When you went to Norfolk to see Dr. Southgate Leigh did they take an x-ray down there?

A. Yes, sir.

Q. Did they examine you otherwise?

A. Dr. Todd made a thorough examination of my blood pressure and heart and of my person and then he had me in his laboratory and had a blood test made and a urine test made.

Q. Did he give you any treatment for your knee?

A. None whatever.

Q. About what time of year did you go to see Dr. Southgate Leigh, if you know?

A. It was in the spring or late spring, I don't know just what time, I don't remember the dates, but if I had thought of it I could have gotten that.

page 20 } Q. Now, did Dr. Southgate Leigh or Dr. Todd advise or give you any treatment?

A. They gave me no treatment. This examination was made one day and Dr. Southgate Leigh asked me to come back to his office the next morning at nine o'clock and I went there and he made several suggestions, that possibly my blood showed a trace of sugar and he said "when you get back to Farmville call your physician's attention to that", and Dr. Todd who was with him that morning, commented on the fact that my general condition was of a man ten years younger than my actual age, but they gave me no treatment whatever. They asked me if it was necessary for them to wire the results of this examination to the railroad company, or write to them, and I remarked to them, I said "Doctor Leigh, I am not after the railroad company, I am after this knee getting right, and I am not in that big a hurry and you can write to them", and he told me he would write to the railroad company the result and if I needed any further attention to call on Dr. Moore. And adding to that other question, he also suggested that my teeth were bad, and I did have some bad teeth and he told me if he were in my place, while there might possibly be no trouble with them, to

either have the teeth take out or have them looked at by a dentist.

Q. Did you have a dentist look at them?

A. Yes, sir.

page 21 } Q. Who was that?

A. Dr. Hawkins.

Q. Where from?

A. Richmond.

Q. Did Dr. Hawkins find any trouble there?

A. He said I had no diseased teeth at all, but that my teeth were in bad shape and needed attention.

By Mr. Hall: I do not think that is proper, I think he is going too far in repeating what others told him.

By Mr. Watkins:

Q. Did Dr. Moore examine you and treat you?

A. Mr. McDowell sent me to Dr. Moore for treatment, and Dr. Moore said he wanted to get a thorough examination before he started treating me, I didn't know exactly what he was then, but I did go to Dr. Moore and he made a urine test and gave me a thorough examination of my blood pressure.

Q. Did he have any x-rays made?

A. Afterwards he had an x-ray made. But just a minute, I didn't get through with this examination, he told me during this examination that he was not perfectly satisfied yet, and that he would prescribe for me in a few days.

Q. Did he ever prescribe for you?

A. He said he wanted to get an x-ray of his own, and I told him that Dr. Kendig and Dr. Leigh had gotten one but he said he wanted me to go to the hospital at Farmville and he would have an x-ray made. I went there and
page 22 } they made an x-ray but I don't think they were satisfied with that and they wanted me to go back and take it over, and I think they took it over two or three times, anyway, finally they got this x-ray picture, and he said he was going to get Dr. Knight to read it, which he did do.

Q. Did he get Dr. Knight to read it?

A. Yes, and then they sent this reading on, they were not satisfied with Dr. Knight's reading and they sent it on to Richmond to Dr. Talley, an expert.

Q. Did Dr. Moore tell you he was not satisfied with the reading?

A. Yes, sir, afterwards Dr. Moore and Dr. Knight they both agreed as to the reading of the x-ray.

By Mr. Hall: We object to the foregoing answer, and there is too much of what everybody told him and all of these conversations. It is all right for him to say they made these x-rays and examined them, and the doctors will be here to tell what their interpretation of them is.

By the Court: I sustain the objection.

By Mr. Watkins:

Q. Don't tell what other people told you.

A. He asked if Dr. Moore prescribed for me.

By Mr. Hall: You can say he did or did not, and that is enough.

A. He did not, he never did prescribe.

page 23 } By Mr. Watkins:

Q. Now, Mr. Hillsman, have you been suffering with your knee much?

A. I have a continuous pain at the knee, it hurts all the time, especially if I use it.

Q. In what respect, or how does the injury to this knee interfere with your work, if any?

A. It interferes with it to the extent, I cannot get around no more than about half as fast as I would ordinarily, and I cannot go up and down the steps, except one at a time.

Q. Can you lift your injured leg or knee when going up the steps?

A. I can lift it up but I cannot get my weight up to it. I have to lift the right one up first and then bring this other one up.

Q. In other words, you cannot put much weight on that leg?

A. Very little, it seems that that knee has an inclination to bend backward.

Q. Does the injury to this leg interfere with your walking any?

A. It does.

Q. In what respect ordinarily?

A. I have a limp to it and I cannot walk anything like as fast as I could before, and it would be impossible for me to run, and in trying to walk fast I have a limp.

page 24 } Q. Does it give way at any time?

A. If I step on an uneven piece of ground it does, and I have fallen down once or twice when the knee gave way, one time at Roanoke when I was there at a Convention

at the Odd Fellows Convention, it gave way with me coming down the steps and before I could catch myself, I went down some of the steps and two or three people standing by caught me.

Q. What is your occupation?

A. A merchant.

Q. How long have you been a merchant?

A. 25 or more years.

Q. You have a place of business in Farmville?

A. Yes, sir.

Q. Can you do all the work you did do before you had this accident?

A. I cannot do the work that I did before. My partner and myself could do the work all right, but for my knee and I have to hire a boy to do the work I could do, but of course I have to wait on some of my old customers.

Q. In what way does this injury to your knee interfere with your doing your regular work in the store there?

A. In getting about in the store, I cannot get about as well, and I cannot stand as long to do the ordinary and necessary work around the store. I cannot do
page 25 } laborious work, I have to have a boy to do the laborious work for me.

Q. What do you pay for this boy?

By Mr. Hall: We object to what he pays a clerk in his store.

By the Court: His testimony just now was that the employment of this Clerk was caused by the injury to this knee. I do not see any objection to that testimony.

A. \$7 a week.

By Mr. Hall: If he means to testify and does testify that he did not have this boy before and that it was made necessary to hire the boy by reason of his inability to get around and do laborious work then his testimony would be proper, otherwise, it would not, and I do not think they have laid the proper foundation for this evidence.

By the Court: Mr. Morris, read what the witness said in regard to that.

(Testimony read to the Court.)

By the Court: I think he has laid the foundation.

By Mr. Watkins:

Q. Do you know which one of the doctors that you have called here today are the Virginian Railway Company doctors? If you do, just name them?

A. Dr. Kendig, Dr. Southgate Leigh, and I suppose Dr. Todd, he is an Assistant for Dr. Southgate Leigh, and Dr. Moore, and Dr. Knight made this x-ray for Dr. Moore, but whether you call him a railroad company doctor, page 26 } or not, I don't know, he was not my physician at that time.

Q. Which leg is injured?

A. My left leg.

Q. Have you incurred any doctors' bills in the treatment of this leg?

A. My doctors bills have been very light. Dr. Trent is my family physician and when I have any minor trouble I go to him and discuss it and he prescribes some local treatment and he doesn't charge me for it. He hasn't sent me any bill and so I don't know exactly what Dr. Trent's bill is.

Q. Has any of the doctors you have gone to see for treatment or examination sent you a bill?

A. Dr. Talley from Richmond, the man Dr. Moore sent this x-ray to have re-read sent me a bill for \$20, but I haven't paid it and I haven't answered it, I didn't have it done, Dr. Moore had it done, and the hospital at Farmville sent me a bill.

Q. How much was that?

A. \$17, and I sent that back with instructions that I did not have it done, but that Dr. Moore did, and I haven't heard anything more from it.

Q. Have you had any other medical expense?

A. Nothing except for medicines which I bought for treating this trouble, in Farmville.

Q. Have you had any travelling expenses in visiting these doctors?

A. I went three times to Victoria to see Dr. Kendig. I was in Norfolk to see Dr. Leigh, I went to Richmond to see Dr. Hillsman, who is a cousin of mine, about my knee, and he examined it, and all, but he made no charge, he is a first cousin of mine, and he did the work and made no charge.

Q. You did incur expense of going to Richmond?

A. Yes, sir.

Q. How far is it from Farmville to Victoria, approximately?

A. About 32 miles, I think, or something like that.

Q. How far is it to Norfolk, approximately?

A. I don't know, 160 miles I reckon.

Q. How far is it from Farmville to Richmond?

A. About 68 miles.

Q. Now, Mr. Hillsman, has your knee improved any in the past year?

A. My knee is larger now than it was, and it is gradually getting larger—I had the doctor to measure it yesterday evening, and my left knee is an inch larger now than the right knee—and I don't think it has been that large before.

Q. Is your knee any stronger now?

A. It is not any stronger now than it has been—it is not as acute right now as it has been, and the suffering now is not as great as it was at other times, it has a kind of a deadened suffering, not acute, nothing to keep me from sleeping or anything of that sort, but if I am awake I can feel it all the time.

Q. Now, Mr. Ozlin stated that you never made any complaint to the railroad company about your knee until after you had been paid for your car. Is that true?

A. No, sir—it is—and it is not—

Q. Explain to the jury about that.

A. I will explain it this way, there was some other gentleman at Victoria that is connected with the railroad company, that is not the claim agent, I reckon Mr. McDowell recalls who it is, and Mr. Flournoy McGee at Charlotte gave me his name. I wrote to him and I received a letter back that he was not the claim agent but that Mr. McDowell was and when Mr. McDowell returned he would turn this letter over to him. Then I got a letter from Mr. McDowell which I answered promptly. I wrote him that my car was damaged \$75 or more, but it was an old car and I did not expect to have it put in thorough repair, but that I would be satisfied with \$25 to make it *useable*, which he sent right back by return mail. Then I wrote him that before using the check that the development in my knee was so bad and if that affected that in any way I would not use that check and he wrote me word to go ahead and use the check that that had no bearing on any personal damage I had. I reckon that they have that correspondence, and then I used the check.

Q. This accident occurred in Charlotte County?

A. Yes, sir.

Q. And New Abilene Station is in Charlotte County?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Hall:

Q. This accident occurred on the night of the 21st of February, or the morning of the 22nd of February?

A. I think so, yes, sir.

Q. And you had gone to this station to meet your daughter who was coming in on the train?

A. Yes, sir.

Q. She was in the habit of coming here on that train?

A. I had met her there—I don't think I met her there before, but I took her to the depot when she went away, and this was the first time she had been home that way, she came by automobile at other times but this was the first time I had met her there.

page 30 } Q. But you had taken her there?

A. Yes, sir.

Q. What time of day did you take her there to take the train?

A. I think it was about one o'clock in the day, it was somewhere about mid-day.

Q. Had you been to this station at any other time?

A. I think so. I think I had been to the station possibly twice before this.

Q. You mean twice in addition to the time that you took your daughter there?

A. Yes, sir, I think so.

Q. So this was your fourth visit to the station?

A. No, sir, this was my third visit, two and one makes three.

Q. My question was whether you had been there twice before you took your daughter to the train?

A. I said I had.

Q. Before you took her to the train?

A. No, sir, I hadn't been there but once before, I don't know when, but some time before, and I went twice before the accident.

Q. Now please understand my question before you try to answer it.

A. All right, I will try to do it.

page 31 } Q. So if I get you straight you had made two previous visits to the station, to the one when you went to meet your daughter the night you went into the ditch?

A. That is right.

Q. I believe you said it was raining that night?

A. Yes, sir.

Q. Was it raining that night?

A. Yes, sir.

Q. On your previous visits when you took your daughter there did you drive your car?

A. I did.

Q. On the other visit, did you drive the car there?

A. Yes, sir.

Q. Did you drive around this loop to the station?

A. I don't think so, on one visit I did, the time I took my daughter to the depot I did, I had her trunk on when she went off to teach.

Q. The other time where did you drive your car?

A. To be very candid with you, I cannot remember that, but it was some time before, and I just do not remember very much about it, except I went there. I know there was a lady at Farmville who asked me to take her there, page 32 } and we had to drive very fast to get there before the train, but what happened or where I left my car, I do not remember. That was some time before this, possibly a year or two.

Q. How long was it before this that you took your daughter there to take the train?

A. She went to teaching, I think, some time about the first of September, and this was in February.

Q. And you went there about one o'clock in the day?

A. Yes, sir.

Q. And drove your car in right back of the station?

A. Practically the same way I went this time.

Q. And you noticed the drive way that led into there?

A. Yes, sir.

Q. There was a cinder drive way?

A. I don't think so, except after you pass the ditch, I came in around the depot and in coming out there was some cinder there, but I don't think you could call it a cinder drive way all the way, when you came in there it was red dirt and the place was a very dangerous place as it appeared to me.

Q. On the other side of the ditch from the station?

A. I do not recall that was cinder.

Q. You do not recall that it was, but you do not page 33 } say it was not?

A. No, sir, I wouldn't say it was not.

Q. Then from the drain pipe or bridges or culverts, or whatever you call them, across this drain, on to the ditch, they were covered with cinders?

A. They had some cinders on them, I think.

Q. It was a regular cinder roadway, was it not?

A. I don't know that you would call it a cinder roadway, but it had some cinders on it.

Q. Haven't you seen a cinder roadway that is covered with cinders or slag?

A. Yes, some are covered four or five inches, and some have a little slag put on them, but I don't know the distinction or which you would say was cinder and which was not.

Q. I am not splitting hairs with you—

A. I expect it had some cinders on it, I think so.

Q. Now you came in this way as you have described (indicating)?

A. Yes, sir.

Q. You crossed a bridge there (indicating)?

A. Yes, sir.

Q. You went on around and came out this way, at least you were coming out this way when you went into the ditch?

A. Yes, sir.

Q. Now my question is, isn't it a fact that there was a cinder driveway all the way around from the north
page 34 } side of this bridge to the north side of the fill over
the drain pipe?

A. I think there is some cinder on there, but I don't think it was confined to the roadway entirely, I think all around there, all around the depot there were some cinder, if I remember right.

Q. You have said that roadway was about ten feet wide?

A. I think so.

Q. Did you mean that the road was 10 feet wide, the travelled part of it?

A. I mean the top of the road from outside to outside.

Q. All the way around?

A. After you cross one bridge the ground out there was level all the way from the bridge to the depot, that was a level space, and they didn't have any designated place to drive there, you could drive two or three feet nearer the depot, they just had a designated place to drive here (indicating) the other part of the surface of the road is a level piece of ground.

Q. Do you mean to tell the jury there was no travelled roadway around this circle here (indicating)?

A. Absolutely, between the ditch and the station there is a piece of level ground there and nobody followed the same track, some went nearer the depot and some out this way,

but when you approached here, it was over one page 35 } beaten way, but when you struck this place (indicating), and between that place and the depot that was a level piece of ground and I do not think cars followed one another there.

Q. Did you mean to say that the distance across the top of this drain pipe where you went into the ditch is ten feet wide?

A. I think so, somewhere around 8 to 10 feet wide, possibly 10, that was the top of the driveway where it crossed the bridge.

Q. You said there was a piece of timber on this side (indicating) coming out.

A. There was a piece of timber in the ground.

Q. You don't know whether there was any timber on the other side, or not?

A. No, sir, I do not. I noticed timber where my car was on it and where it slid off, and it was down under the level of the ground, it wasn't level with the ground, but the other side, I didn't notice.

Q. Did you measure the distance across that drain pipe there that the road followed?

A. I went back there to measure it and the railroad company had filled it in. I was passing by there and went there to measure it.

Q. So you did not measure it?

A. Not at that time, no, sir.

Q. And the ten feet that you are talking about page 36 } is just an estimate and not a measurement?

A. I did measure it the time I went back there, I didn't finish my answer.

Q. I am talking about before the ditch was filled in.

A. No, sir, I didn't measure it before it was filled in.

Q. When did you go back there?

A. I was passing there, and went in there to measure it, I went there for that purpose.

Q. When was it, is my question?

A. I couldn't answer that exactly, it was last Fall some time, I don't know the date, I went there to measure it and it was still like this, the old piece of sill was on the side, and as near as I could tell from the beaten way, I measured there, and I could get approximately, I couldn't get the exact measurement, but there seemed to be a couple of pieces of tin culvert which came under it, and it is there now and Mr. Kizer was out there.

Q. There was a tin culvert there before?

A. It hadn't been moved, and he said—

Q. Don't tell what he said; there was still a tin culvert there. You are talking a good deal but my simple question was this, you estimated that measurement, the driveway or space across that pipe at the time of your accident was 10 feet. Is that correct?

page 37 } A. About eight to ten feet?

Q. Eight to ten feet?

A. I didn't measure it at all then.

Q. All right, you didn't measure it then, but that was your estimate that it was eight to ten feet wide across that drain pipe?

A. That is right.

Q. You say you didn't make any complaint about this accident for some time because you didn't know who the claim agent was?

A. I think about three days or something like that. I think Monday was the first day I asked the doctor about it, and then I had an idea that there was a piece of glass in my knee as I had that pain in there.

Q. You made some explanation of why you did not say anything to the railroad company?

A. I did.

Q. About the accident, that is what I am asking you about.

A. On Monday following the accident Mr. Flournoy McGee was in Farmville and I asked him the Claim Agent's name, and he gave me a name of some man there, Mr. McDowell will tell you that, who is working for the railroad company but not the claim agent, and I wrote to him and he wrote me he was not the claim agent but would
page 38 } turn my letter over to Mr. McDowell, who was out of town.

Q. You were not making any complaint then except as to your car?

A. I wrote to him about the accident and about the car, I did not complain about the knee, and he said I would hear from Mr. McDowell when he got back, and when I heard from him he sent me a check for \$25, and I wrote him then about my knee.

Q. You had several letters from Mr. McDowell before he sent you a check?

A. Mr. Brock, have you got that correspondence? I cannot trust my memory entirely about that.

Q. All right, I will refresh your memory. The first letter you wrote was on February 24th, 1931.

A. That was about three days after the accident.

Q. Two days after the accident, if it happened on the morning of the 22nd?

A. Saturday, Sunday, Monday and Tuesday. I wrote then on Tuesday, following the accident.

Q. If Saturday was the 22nd—

A. Sunday and Monday.

Q. Sunday would be the 23rd and Monday would be the 24th.

A. Monday, then, you say the 24th.

Q. That is your letter?

A. Yes, sir.

Q. The letter will speak for itself.

page 39 } A. Do you want me to read this to the jury?

Q. I will read it to the jury.

A. That is my letter all right, and that was to Mr. Nevins you see.

By Mr. Hall: I will read it to the jury and you gentlemen can check it by that letter which he identifies. The letter is as follows:

EXHIBIT "A".

W. J. HILLSMAN,

DRY GOODS, NOTIONS, SHOES AND READY TO WEAR.

Farmville Va. February 24, 1931.

Mr. Nevins,
Claim Agent,
Virginian Ry.,
Victoria, Va.

Dear Sir:—

My daughter who is teaching in Bedford County, came to Abilene on No. 4 Saturday morning about 2 o'clock. I met her there. The approach to the depot is a narrow roadbed running in and out from the depot over a ditch about eight feet deep, unprotected by railing or otherwise. In coming out from the depot the front wheel of my car slipped over the bank and the front of my car went down to the very bottom of the ditch after turning the car over on its side. I got

Mr. Moore and together with other railroad men got the car out for me. All the RR. men were very nice to me and did all they could to help me. The braces to my running board were torn up and the running board broken page 40 } up very badly. One door glass is broken out and fender is so I cannot possibly use it. The electric switch had to be fixed. The tie rod underside had to be straightened to make the front wheel plumb. I believe it would cost about \$75 to have the car properly fixed, but as it is an old car I am making you a compromise offer. If the railroad company will send me a check for \$25 to have it repaired, I would use it to make it usable. I want to commend the RR. Co. for having polite and accomodating men. They were as courteous to me as they could be—both the train and road men.

I reported the accident to Mr. McGee, Magistrate in Charlotte County today and to Magistrate in my County next morning.

If for any reason the RR. Co. does not think as I do after investigating you can write me and I will take such steps as are necessary to protect my interest.

Yours truly,

(Signed) W. J. HILLSMAN."

Q. You got an answer to that letter from Mr. Nevins telling you that he was not the claim agent?

A. Yes, sir.

Q. But that Mr. McDowell was the claim agent and that he was away at that time and would take the matter page 41 } up with you when he returned?

A. I think that is right.

Q. You did get a letter from Mr. McDowell?

A. Yes, sir.

Q. I show you a carbon copy of that letter and will ask you if that is not the letter you got from Mr. McDowell under date of March 6th?

A. That is right, I received that letter.

Q. You received that letter from Mr. McDowell dated March 6th, 1931?

A. Yes, sir.

Q. The letter is as follows:

EXHIBIT "B".

March 6th, 1931.

Mr. W. J. Hillsman,
Farmville, Virginia.

Dear Mr. Hillsman:

Your letter dated February 24th has been turned over to me for attention. I will investigate the matter at once and you will hear from me shortly.

In the meantime I wish you would write and tell me if either you or your daughter were injured in any way when the car became involved in the accident. I understand that neither of you were injured at all and only desire the information to complete our file on the matter.

page 42 }

Yours truly,

DIVISION CLAIM AGENT."

Q. Did you answer that letter?

A. I don't remember, I don't think so.

Q. Now I show you another letter dated March 20th, 1931, from Mr. McDowell to you and will ask you if you got that letter?

A. I cannot say whether I did, or not, I don't remember.

Q. You will not say that you did not get it?

A. No, sir. Mr. Brock will you see if I have that letter there?

By Mr. Brock: No, we haven't got it.

By Mr. Hall:

Q. You don't remember whether you got this letter or not?

A. No, sir, I never saw it before that I know of.

By Mr. Hall: I am going to offer the letter in evidence with the understanding that Mr. McDowell will say that he wrote it and mailed it in due course.

By the Court: Very well, if there is no objection.

By Mr. Hall: If Mr. McDowell does not say that
page 43 } is the letter, it can go out. It is dated March 20th,
1931, and is as follows:

EXHIBIT "C".

March 20th, 1931.

Mr. W. J. Hillsman,
Farmville, Va.

Dear Mr. Hillsman:

This has reference to your letter of the 24th and my letter of the 6th concerning the accident to your automobile at Abilene on February 21st.

I will be obliged if you will tell me if either you or your daughter sustained any injuries in the accident.

I am making an investigation of the incident, and hope to be in a position to dispose of it by the time your reply is received.

Yours truly,

DIVISION CLAIM AGENT."

Q. You say that you will not say whether you got that letter, or not?

A. I do not remember having gotten it.

Q. If you did get it you did not make any reply to it, did you?

A. I suppose you have it there if I did. And
page 44 } I would have a copy of it yonder if I did, because
I kept his letters and copies of mine.

Q. You have copies of your letters, have you?

A. Yes, sir, most of them.

Q. You did not make any reply to that letter of March 6th, the first one you wrote or the first one he wrote and which you said you got?

A. I said I don't remember, but I remember I got that letter.

Q. You don't remember whether you made any reply to it?

A. No, sir.

Q. You did not write Mr. McDowell and tell him that you suffered any trouble with your knee in reply to that letter?

A. I don't think so.

Q. And if you got this letter of March 20th you did not write him any reply to that telling him you were having any trouble with your knee?

A. I don't think so, I don't think I got it.

Q. If you had gotten it you would have answered it?

A. I suppose you would have it there, if I did. If I answered it you would have the letter there, wouldn't you?

Q. I suppose we would, but we haven't got it.

A. I don't think I wrote it either.

Q. You did write another letter on April 4th. page 45 } That is in your handwriting, is it not?

A. I suppose so, if it is in my handwriting I certainly wrote it.

Q. Look at it and see; don't you recognize your handwriting?

A. Yes, that is my handwriting; absolutely.

By Mr. Hall: Have you gentlemen a copy of this letter dated April 4th?

By Mr. Brock: No, sir.

By Mr. Hall: I will read it.

EXHIBIT "D".

Farmville, Va., April 4th, 1931.

Mr. A. J. McDowell, DCA.,
Victoria, Va.

Dear Sir:—

Your letter of April 3rd just received with draft for \$25 for damage to automobile at Abilene February 21st.

I can't use this draft until I hear from you again. I have been suffering with my left knee continually since two days after the accident. I have been doctoring this carefully hoping it would pass away. I can't see that it is any better. I want to have an x-ray made of it, and if you had rather get the RR. Co's doctor do this—if, however, he can't do this

I will have to go to Richmond and have a Specialist page 46 } x-ray and examine it. I fear there is a small piece of glass at work in this knee, and if I have to undergo an operation I don't want to do anything that will jeopardize the RR. Co's liability.

So if you care for me to use the check with this understanding write me and I will do so.

Yours very truly,

W. J. HILLSMAN."

Q. Now, Mr. Hillsman that letter of April 4th is the first complaint you made to the Railroad Company about having any trouble or any injury to your knee isn't it?

A. I think so,—it seems so.

Q. Although you had gotten the letter dated March 6th, in which you were specifically asked the question as to whether you or your daughter, or either of you, were injured, and you did not reply to that letter?

A. I didn't say I got it.

Q. Yes, you did say you got it.

By Mr. Brock: No, he didn't say that.

By Mr. Hall: He said he did not remember the one of the 20th but he did say he got the one of the 6th.

By the Court: I think he said he got the letter page 47 } of March 6th, the first one.

A. Yes, I got that first letter.

By Mr. Hall:

Q. And it was dated March 6th.

A. Those two letters that I said I did not get, I did not reply to those.

Q. You said you got the letter of March 6th?

A. Yes, sir.

Q. And that letter specifically asked you the question, 'in the meantime I wish you would write and tell me if either you or your daughter were injured in any way when the car became involved in the accident'. You got that letter and you did not make any reply to it. saying that you were injured until you wrote your letter of April 4th, did you?

A. I think that is right.

Q. Why didn't you?

A. I couldn't tell you.

Q. If you had been suffering with this knee since two days after the accident, as you now say, why didn't you say something about it?

A. I couldn't tell you, one reason was because I thought the knee was going to get better. I told you that, and I had different operations and had my body sprained worse than I did this time, many times, and it was well in a few days, and

page 48 } naturally when a man gets a little minor trouble like that, naturally they are going to pass away, which I hoped it would, but to the reverse, it would not.

Q. After you got the letter of March 20th, which you do

not remember, or said you did not remember, in which you were asked the same question, why didn't you reply to that?

A. I think if I had gotten it you would have gotten your answer to it. Haven't you got a copy of the letter from him, Mr. Brock?

Q. I am asking you, I want to know what you know.

A. The March 6th letter is all right. The other I do not remember a thing in the world about.

Q. You did not write and say anything about your knee although you were asked the question and you had your other claim pending?

A. Yes, sir.

Q. And if you got the letter of March 20th in which you were asked the same question, you made no reply to that?

A. No, sir.

Q. And you said nothing about any injury to your knee until April 4th, or until after you got the check?

A. No, sir.

Q. Do I understand you to say now that you commenced suffering with this knee two days after the accident?

A. It commenced giving me more trouble then, yes, sir.

Q. Commenced giving you more trouble?

A. Yes, sir, I always felt like it was sprained, or I thought there was a piece of glass in it, but I thought it would pass away, I didn't think it amounted to anything.

Q. Now speaking about this glass, you said your pants were cut there about the knee?

A. Yes, sir.

Q. Was the skin cut?

A. I couldn't find any, and still I thought there was a little piece of glass that had worked in there, but the x-ray showed that had not happened.

Q. You found a place cut in your pants, but you did not find any place cut in your skin with a piece of glass, or that a piece of glass could have gone in?

A. No, sir, I didn't find any glass.

Q. Did you feel this sprain or lick on your knee as soon as the accident occurred?

A. Naturally when a man has a jar like that he feels some soreness from it, but I didn't think it would amount to anything, I thought it would pass away, and I didn't make any complaint because I didn't think it was necessary.

Q. Now, in answer to that letter of April 4th, did you get a letter under date of April 9th from Mr. McDowell?

A. I couldn't tell you about that.

Q. Look at this letter and see.

A. Yes, I got this letter.

Q. You had previously asked in your letter of April 4th about having an x-ray made to see if there was glass in there, and Mr. McDowell then wrote you this letter of April 9th, didn't he?

A. Yes, sir, this is April 9th.

By Mr. Hall: Now I offer that letter in evidence and will read it to the jury.

EXHIBIT "E".

April 9th, 1931.

Mr. W. J. Hillsman,
Farmville, Va.

Dear Mr. Hillsman:—

I have your letter of the 4th which would have been replied to before but for my absence from town.

In regard to your knee which appears to be giving you some trouble. If you would care to drive over to the page 51 } Kendig Brothers Hospital at Victoria, I will have Dr. E. L. Kendig make an examination and x-ray, without expense to you. Dr. Kendig is one of our surgeons and is thoroughly competent to take care of such cases, and it is my suggestion that you drive over and let him look you over.

As to the draft for damage to the automobile. I think you can safely use it. That settlement was made without prejudice and suggestions made in this letter are in the same spirit.

Yours truly,

DIVISION CLAIM AGENT.

Q. You say you saw Dr. Kendig two or three times?

A. Yes, sir.

Q. And he made this x-ray examination of you and also made a thorough examination of you?

A. No, I don't think Dr. Kendig made a thorough examination of anything except the knee.

Q. He did examine the knee?

A. Yes, sir.

Q. Then you went to Dr. Leigh?

A. Yes, sir.

Q. And they put you through a thorough physical examination?

A. Yes, sir.

Q. They tested your urine?

page 52 } A. Yes, sir.

Q. And they tested your blood?

A. Yes, sir.

Q. And they found some trouble with your urine, or sugar in it?

A. They did not report that to me.

Q. Didn't you say he told you that?

A. No, sir, I said he found a trace of sugar in my blood.

Q. In your blood

A. Yes, sir.

Q. That is my mistake then. Did he make any report to you about your urine?

A. He made no report to me, except just talking to me in a general way about my age and he said my general condition was that of a man ten years younger than my age was, and then they told me they were going to make a full report to the railroad company, but I have never seen the report. He suggested to me that I tell my family physician there was a trace of sugar in the blood so he could look after it and see if it needed attention.

Q. How old are you?

A. 63. I was 62 at that time.

Q. Did you ever have any pains in your joints anywhere?

A. I never had any unusual pain. I suppose I may have had a chill possibly in my life, or possibly something of that sort, but I cannot recall it.

page 53 } Q. Did you ever have any rheumatic pains?

A. I never had any rheumatism that I know of.

Q. That you know of?

A. No, sir, I never had any.

Q. Did you ever have any pains in your muscles and joints?

A. No, sir.

Q. You never even had a crick in your neck, I suppose?

A. Yes, sir.

Q. Did you ever have any pains in your back?

A. Yes, sir.

Q. But you never had any in your knee before?

A. I cannot recall that I ever did.

Q. Then you never had any in your ankle?

A. No, sir, I don't remember it if I did. I have been an especially active man all of my life.

Q. You have seen people that suffered with arthritis or rheumatism haven't you?

A. I have seen people suffering with rheumatism, yes, sir.

Q. And with arthritis?

A. I don't know about arthritis, I am not familiar with that.

Q. That is the disease that Bishop Cannon has, page 54 } and he is going about on crutches.

A. I have not seen Bishop Cannon since I heard that he had it.

Q. Plenty of people do have rheumatism and stiffness in their joints and pains in their joints?

A. Yes, sir.

Q. Isn't it a comparatively rare thing for a man 62 or 63 years old not to suffer with pains of that kind in his joints and in his back and neck and different places?

A. I cannot say, I don't know, I have had very few pains. I have been a very healthy man all of my life, and I never suffered with rheumatism, and have been especially active in my life.

Q. Did you ever wake up in the morning with your fingers stiff?

A. I have waked up in the night and my legs have been crossed and they would go to sleep on me, but that didn't last very long.

Q. That is the extent of any trouble of that kind that you have had?

A. I think so. I don't think I have ever had a spell of sickness as long as ten days in my life, I don't recall it if I have.

Q. You are in the mercantile business, are you?

A. Yes, sir.

Q. What character of mercantile business?

page 55 } A. Fresh meats and groceries, butcher store
grocery store.

Q. By yourself or in partnership with anyone?

A. No, sir, I have a special partner.

Q. A special partner?

A. Yes, sir.

Q. But you are the active man?

A. Yes, sir, I furnish the finances.

Q. I don't care about the details of the business, what I want to know is whether you are the man who is actively in charge of the work, I mean the storekeeper?

A. Yes, sir.

Q. Does your partner stay in the store?

A. Yes, sir, all the time, he has active work to do also, he is the man that does the meat cutting and things of that sort.

Q. So you and this man are both in this store?

A. Yes, sir.

Q. And he does the meat cutting and he helps to sell groceries?

A. Yes, sir.

Q. And you sell groceries?

A. Yes, and I do the buying.

Q. Do you do any meat cutting?

A. No, sir.

Q. And this boy that you are talking about is
page 56 } employed by the firm?

A. Yes, sir.

Q. And he stays in there and helps you two men?

A. Yes, he does the heavy work in the grocery department, he does most of the work in the grocery department, with my assistance, and my partner is the butcher.

Q. He is the general helper around the place?

A. Yes, sir.

Q. And he helps the meat man?

A. He helps where he is needed.

Q. And he helps you?

A. Yes, sir.

Q. He sells groceries and he handles packages and does work of that kind?

A. Yes, sir, he works in the store generally, anywhere he is needed.

Q. And he is paid by the firm?

A. Yes, sir.

Q. Now on July 9th, 1931, you wrote another letter to Mr. McDowell, didn't you?

A. Yes, sir, I wrote this letter.

Q. And you also sent him a copy of your letter of the same date to Dr. Southgate Leigh?

A. Yes, sir.

Q. Do you recognize your signature to that?
page 57 } A. Yes, sir.

By Mr. Hall: I desire to introduce these two letters in evidence, dated July 9th, 1931, to Mr. McDowell and to Dr. Leigh.

EXHIBIT "F".

Farmville, Va.
July 9th, 1931.

Mr. A. J. McDowell,
Victoria, Va.

Dear Sir:—

I am still having lots of trouble with my knee—in fact I believe I will have to resort to crutches.

I am sending you herewith copy of letter I have just written Dr. Southgate Leigh, Norfolk, Va.

Yours truly,

W. J. HILLSMAN.

EXHIBIT "G".

July 9th, 1931.

Dr. Southgate Leigh,
Norfolk, Va.

Dear Sir:

I was in Norfolk about the middle of June to see page 58 } you about my knee which was hurt on the Virginia RR. Feb. 22nd. At that time my knee wasn't giving me as much trouble as it is giving me now. Since then it gets worse. Around the knee cap it is about one inch larger than the other and two inches above the knee it is one inch larger than the other.

I have had my teeth taken out as you suggested against the advice of my dentist. I also had my doctor to look after sugar in my system as you advised, which he claims is all right by test. I was to see him this morning. He took my blood pressure which he says is 130 and normal. He gave me a prescription for ointment to rub the knee several times a day. Unless my knee is better I will be forced to stay in or use crutches. If you have any suggestion to make please advise me.

I am sending a copy of this letter to the Claim Agent of the Virginian RR. at Victoria, Va.

Yours truly,

W. J. HILLSMAN."

Q. So you did have your teeth pulled then?

A. Yes, sir.

Q. You are not on crutches yet?

A. No, sir.

Q. I think you said a little while ago that your knee was
paining you less now than it had previously?

page 59 } A. Yes, sir. I don't know whether I said so, or
not, but it is.

Q. Now Mr. Hillsman, I would like for you to tell us in a
few words, just exactly how you slipped off that bridge on
the left side, as you attempted to go over it?

A. I was standing with my car running parallel with the
depot, and after my daughter got in I put it in low gear and
started off, I suppose I was moving two or three miles an
hour, I never did shift the gears, as I was going off, and I
watched the road on the side of the curve which comes around
that way (Indicating), and naturally your light would throw
to the left, and I went as near to the edge as I could, and I
felt the car giving way and I slapped my brakes on and it
slided very gradually into the ditch, and after it went down a
little bit it fell right in.

Q. As you approached that bridge you were looking at
the right?

A. Looking forward but to the right.

Q. That is what I understand, I mean on the right of the
road?

A. Yes, sir.

Q. And you could see the right of the road distinctly from
your light?

A. I could see it very well by leaning over, yes,
page 60 } I could see it.

Q. You could see it by leaning over and you
could see it perfectly well?

A. Yes, sir.

Q. Why did you have to lean over?

A. Because my light was all on this side (indicating), the
head of the car was facing that way (indicating) and I was
making the turn and the light of the car goes the way the car
was going and I was turning and the light went that way
(indicating) and it was dark and drizzling rain.

Q. In order to get a better view, you leaned over to the
right and you could see perfectly well on the right?

A. I could see what I thought was all right.

Q. What you thought, and it was all right?

A. Yes, sir.

Q. And you drove as close to the right of the road as you thought it was prudent to drive?

A. Yes, sir.

Q. You did not look to the left?

A. I could not see to the left because it was dark on that side.

Q. I mean when you got your car straightened page 61 } out?

A. I didn't get straightened out.

Q. You didn't get straightened out?

A. No, sir, I was making the curve there. If you will notice the map, I hadn't gotten all straightened out.

Q. And you never did look to the left?

A. I don't think so.

Q. You were looking all the time to the right and you could see perfectly well at the right, and you were moving as close to the right side of the roadway as you thought it prudent to do?

A. I think so.

RE-DIRECT EXAMINATION.

By Mr. Watkins:

Q. Just one or two questions. Why were you looking to the right?

A. Because the head of my car was forward to the right, and I had my light in front.

Q. The question is why you were watching the right side of the road there?

A. Because the road makes a turn and naturally I was afraid the car would go over the embankment.

Q. Is there a fill on the right hand side?

A. No, no special embankment, but the road went across the ditch and there is an embankment outside the road, and road is a little higher on the outside than it was on page 62 } this side (indicating).

Q. Isn't there a slant down in the ditch on the right hand side of the driveway?

A. The sides of the ditch on both sides slant in.

Q. I am not talking about the side of the ditch, I am talking about the fill that goes across, if it is perfectly level on the right hand side, of the ditch.

A. Not perfectly level; I don't know what you mean.

Q. Does the ditch extend on to the right of this culvert?

A. It keeps straight on through, yes, it extends on some distance, I don't know how far.

Q. When had you been to this station before?

By the Court: Is that new matter or rebuttal?

By Mr. Watkins: Yes, I think so. I don't think he has stated the first time he was there.

By the Court: He said he did not remember, but he thought it was some time in September.

Witness stands aside.

page 63 }

DR. T. M. HAWKINS,
Sworn for Plaintiff.

DIRECT EXAMINATION.

By Mr. Brock:

Q. What is your profession?

A. Dentistry.

Q. Where do you practice?

A. Richmond, Virginia.

Q. Did Mr. W. J. Hillsman come to see you in a professional capacity some time about the summer of last year?

A. Yes, sir, he did.

Q. What, if anything, did you do for him?

A. I extracted some lower teeth for him and made a set of teeth.

Q. In making your examination did you, or not, see any signs of pyorrhea?

A. No, he was not a case of pyorrhea.

No Cross Examination.

Witness stands aside.

page 64 }

DR. J. B. TRENT,
Sworn for Plaintiff.

DIRECT EXAMINATION.

By Mr. Brock:

Q. What is your profession?

A. Physician and surgeon.

Q. Where do you practice?

A. Farmville.

Q. How long have you been practicing?

A. You mean in Farmville?

Q. Altogether.

A. 26 years.

Q. In Farmville how long?

A. 19.

Q. Are you the family physician for Mr. W. J. Hillsman?

A. Yes, sir.

Q. Dr. Trent, this is an action brought by Mr. Hillsman claiming that he sustained damages by reason of an accident. Have you had any occasion to make any examination of Mr. Hillsman?

A. Yes, I examined him after this accident, it was some time after, I examined him on July 9th.

Q. What condition did you find then?

A. I found the joint enlarged.

Q. Which joint?

A. Of the left knee, and tender, I did not see any evidence of the accident, of course, but there was swelling, tenderness and pain.

Q. Did you prescribe any treatment for it?

page 65 } A. Yes, sir, I prescribed local treatment and advised bandaging. I did not bandage it myself, but he got a bandage after I advised him, and kept it for some time.

Q. Have you made any examination of him since that time?

A. Yes, I measured his knee once and examined him pretty thoroughly.

Q. Have you recently made an examination of that knee?

A. Yes.

Q. In what condition did you find it at that time?

A. I found the knee enlarged.

Q. What, if anything else, did you find?

A. I found it enlarged, is all I can say; the knee on the left is about an inch larger than the one on the right.

Q. Could you state as a physician whether this injury is likely to become better or worse, or what about it?

A. I doubt whether it gets any better, I think it is permanent, whatever injury is there, is permanent, that is the general history of an injury to the knee.

Q. You, I believe, stated you were the family physician.

page 66 } What has been the general condition of Mr. Hillsman as to his health since you have been his physician?

A. It has been good, I never did very much for him.

Q. Had you prescribed any medicine for Mr. Hillsman prior to that time, that you recall?

A. You mean for this accident?

Q. No, sir, for anything else.

A. In 1925 I treated him for a couple of days for renal colic, or Kidney Colic, I reported it as Renal Colic any way.

Q. And that was in 1925?

A. Yes, sir.

Q. And he was sick for several days then?

A. I saw him three times, I saw him twice one day, and I think maybe I saw him the next day. That was in August, 1925.

Q. Could, in your opinion, this suffering which he has now with his knee, could that be the aftermath of this kidney colic that you treated him for in 1925?

A. No, sir, I don't think so at all.

Q. How long have you been Mr. Hillsman's family physician?

A. Ever since the 13th day of May, 1913, or about 19 years ago when I first went in the family.

Q. Knowing Mr. Hillsman as you have and having been his family physician for the last 19 years, and knowing his general condition, could you express any opinion as to this injury having been caused by some other things than this accident?

A. No, sir, I have known Mr. Hillsman all of my life, I have known him intimately for 19 years, and I boarded with him for three years when I first came to Farmville and I don't know of a healthier man in my whole practice. I have done very little for him, except for this injury and the Gall Stone colic, in fact, I don't remember ever doing anything for him. I was in the house and I never knew him to have any trouble except this, he has been as healthy a man as I ever saw.

CROSS EXAMINATION.

By Mr. Hall:

Q. You say you have been his family physician for 19 years?

A. Yes, sir.

Q. And you heard nothing whatever about any injury to his knee until the 9th of July?

A. No, sir. He came in to me—I did not make a record of this—but he came in to me sometime after the knee was hurt and told me he was hurt on the railroad and I advised

treatment, and gave him some local applications, and he told me Dr. Moore was treating him for the railroad, page 68 } and you know how we doctors are, I did not say very much about it, because he was under Dr. Moore's treatment.

Q. And you made no sort of an examination?

A. No, sir, no more than just to look him over and give him local treatment.

Q. The only way you have any knowledge of any accident is what he told you?

A. Yes, sir.

Q. There were no bruises or cuts or contusions on the knee at all?

A. None at all.

Q. If a man's knee is injured in an accident, doesn't he almost invariably feel it within a very few hours after it happens?

A. It depends on how severe it is, yes, and he can feel it later. A man may have a fracture and there will be no sign of external injury, but—

Q. That is not my question, would not a man who is hurt, feel it and know it within a very few hours, or usually within a very few minutes after it happens?

A. Certainly, he ought to feel some pain.

Q. When you examined him on July 9th you only found some enlargement and some tenderness at that time?

A. Yes, he was complaining of pain.

Q. And you prescribed local treatment at that page 69 } time?

A. Yes, and bandage and rest, I advised him to stay off it.

Q. You say you examined it on yesterday?

A. Yes, sir.

Q. It is no worse now than it was when you examined it on July 9th, 1931, is it?

A. I think it is larger.

Q. If he testifies that it is not giving him as much trouble as it did previously, you would not undertake to deny that?

A. No, sir, I don't deny anything he said, but it has become chronic now, it has been over a year, and that enlargement probably was from the accident, and is a permanent injury and he will never be better as far as the enlargement is concerned.

Q. Can you tell what is the permanent injury in that knee?

A. I would say the joint is enlarged, and I believe from the traumatic injury or enlargement, it is probably perma-

ment. I cannot give you any further answer in regard to it without going into the pathology about it.

Q. There was no broken bone there?

A. The bones were bruised and that set up inflammation and of course there can be a good deal of injury
page 70 } inside the joint without any apparent injury being seen.

Q. That condition would show up in an x-ray picture, would it not?

A. I did not take an x-ray picture.

Q. I asked you if that condition which you just described would show up in an x-ray?

A. That enlargement and the injury to the joint?

Q. Yes, sir.

A. I think an x-ray would show that.

Q. But you are not in a position even to say that he has had an accident other than what he told you?

A. No, sir, I did not see it.

Q. Can you state positively that the trouble he is having with his knee came from an accident at all?

A. I believe it, from the fact it dates from the date of the accident. People come to me all the time, every day, with something of the kind, and of course, I don't see the accidents always, but I take the symptoms and from observation can tell, but of course, I did not see Mr. Hillsman's accident, but I don't doubt it.

Q. You saw no evidence of it on his knee?

A. No, except an enlargement of the knee.

Q. Couldn't that trouble come from other causes?

A. Yes, sir.

page 71 } Q. Don't men of his age particularly, older and younger too, have trouble with joints from other causes?

A. Yes, sir, you can have arthritis.

Q. And rheumatism?

A. Yes, sir.

Q. Does not rheumatism and arthritis cause enlargement of the joints?

A. Yes, sir.

Q. And they cause pain?

A. Yes, sir, injuries to the joints, if you had arthritis, you can injure the joint and it could set up a condition there that certainly makes it worse.

Q. Isn't it true that the condition of a man's kidneys will cause swelling of the joints?

A. If he had Bright's disease and it affected his heart very much; but the kidneys don't affect the joints.

Q. Sugar in the urine and sugar in the blood, is that a symptom of Bright's Disease?

A. No, sir, sugar in the blood is not.

Q. What effect would heart trouble have on the joints?

A. None.

Q. None at all?

A. No, sir, he could have swelling of the tissues and have dropsy without any swelling of the bones at all. Heart trouble does not affect the joints.

Q. And the bones don't swell?

page 72 } A. His bone is enlarged, yes, you take many cases, the bones are certainly enlarged.

Q. And these enlargements occur from rheumatism and arthritis, too?

A. Yes, sir.

Q. You did treat him for kidney colic in 1925?

A. Yes, I saw him twice one day and once the next day.

By Mr. Brock:

Q. You never treated Mr. Hillsman for arthritis, have you?

A. No, sir, I never treated Mr. Hillsman for anything except that gall stone colic. He has been to me for urinalysis since then and I never found any sugar or albumin, in checking him up. I did not even treat him for anything but I made an analysis for sugar and albumin.

Q. And so far as your knowledge, as his family physician is concerned, you never heard any complaint with regard to this knee or any other knee?

A. No, sir.

Q. I also understood you to say that an accident such as this, the tendency would be for arthritis to set in and create a permanent condition?

By Mr. Hall: I object to that question, I don't think he said it, and it is clearly leading.

By Mr. Brock: I will withdraw it.

page 73 } By Mr. Hall: The gentleman cannot lead his witness like that.

By the Court: He has withdrawn the question.

Witness stands aside.

DR. THOMAS E. KNIGHT,
Sworn for Plaintiff.

DIRECT EXAMINATION.

By Mr. Brock:

Q. What is your profession?

A. Physician and general practitioner.

Q. Where are you located?

A. Farmville.

Q. Have you any connection with the South Side Community Hospital, with respect to the x-ray department?

A. Yes, sir, I am director of the x-ray department.

Q. Please state to the jury whether you made an examination of Mr. W. J. Hillsman relative to this injury complained of?

A. The first examination was an x-ray examination. He was sent in by Dr. Moore, and the first examination was made on October 9th; my personal examination was page 74 } made November 19th.

Q. What did you find in the personal examination?

A. The general examination included the heart, lungs, blood pressure, urinalysis, and the general examination was negative, other than the patient came in with a pronounced limp, and on examination of the left knee I noticed some swelling and it was at that time half an inch larger than the opposite knee and tender on pressure. That is about all I found.

Q. What did the x-ray disclose?

A. X-ray was taken of both knees, of the right knee for comparison. An x-ray unfortunately does not show a disease or traumatic changes or injuries to the cartilage or joints or surfaces in the joint, it does not show changes, but there was a spur formation which is common in anybody past middle life, so that the x-ray was considered to be normal from the sense there was nothing in it, normal in a person past middle age.

Q. Was there anything wrong with the left knee except as you say there was some spur formation, which is normal?

A. On a closer examination there seemed to be a roughening of the joint surfaces.

Q. Was that the right knee or the left knee?

A. The left knee.

Q. Then you found some roughening on the sur-
page 75 } face of the left knee?

A. Yes.

Q. Which did not appear on the right knee, or did I understand you to say that?

A. Yes, sir.

Q. Speaking as a physician what would be the effect of an injury such as is claimed here with respect to this condition which you say frequently obtains in people past middle age?

A. I have never seen a severe injury to the joint in a person past middle age where there wasn't some permanent damage done, and it is liable to increase and the joint surface is liable to be completely destroyed and they might get ankylosis or complete stiffening of the joint and they are prone to go ahead or to progress rather than get better. That is my opinion, and I think it is the opinion of most every one of the authorities and Dr. Seeley, is supposed to be the greatest authority on joint diseases and he said practically the same thing.

Q. Explain to the jury just what you mean by ankylosis?

A. Stiffening of the joint. I can hardly explain it very good to the jury but the cartiliginous substance of the joint surface, as it gets rougher and rougher, the more calcium is laid down and forms true bone.

page 76 } Q. In other words, it tends to destroy the movement at that joint?

A. Yes, he has a stiff joint.

Q. You stated just now your first personal examination of Mr. Hillsman was negative. Just what do you mean by that?

A. The heart, lungs, blood pressure, urinalysis and other portions of the body that I examined were normal, and I examined his knee again yesterday and it is one inch larger, while it was half an inch larger at the first examination, which, I think, proves that it is a progressive condition.

Q. Something has been said about arthritis. Just what is arthritis, for the benefit of the jury.

A. Arthritis is a condition of the joint where there is an inflammatory process set up, whether due to trauma or an infection of the joint surfaces. Is that clear?

Q. Does such a condition follow an accident?

A. That is what we mean by trauma, an accident

Q. The joint is lubricated by some fluid called synovial fluid, isn't that true?

A. Yes.

Q. What effect on the fluid does this condition of arthritis or ankylosis have?

A. It generally loosens it, the space in between the two

bones becomes less, the fluid is generally lessened
page 77 } to a smaller amount of fluid, except when it first
occurs, and then we generally have some fluid in
there, that is taken up, and the joint spaces get smaller, as a
rule.

Q. And the bone enlarges?

A. Yes, sir.

Q. These spur formations which you say are apt to occur
in anybody over middle age, what effect does an accident have
as to these spur formations?

A. You can have all these things, spur formation and
lipping at the joint surfaces without symptoms, and a great
many people do, most people past middle age have that, and
to that extent the symptoms are brought out, it seems to act
as a match to light a fire.

CROSS EXAMINATION.

By Mr. Hall:

Q. Doctor, in your practice you come across a lot of peo-
ple that have enlarged joints and have pains and trouble with
the joints when they are not as immobile as usual, don't you?

A. Yes, sir.

Q. That is a very frequent condition in patients, especially
after they pass middle life?

A. Yes, sir.

Q. And that very frequently comes from Ar-
page 78 } thritis or from rheumatism, doesn't it?

A. Yes, sir.

Q. And in a great many cases you do not have any trauma
or a lick to account for it?

A. No, sir, that is the infectious type, you have the trau-
matic infectious type.

Q. What proportion of the cases of that kind that you have
known of enlarged or affected joints, come from injury or
trauma as you call it, and what proportion of them come
just from natural causes?

A. I judge most of them come from infectious sources.

Q. What percentage of them would you say, in your prac-
tice that you have had with people affected that way?

A. I reckon they will run from 60 to 40.

Q. You mean 60% come from natural causes and infection
and 40% come from some accident or injury, or trauma, as
you call it?

A. Yes, sir.

Q. Now, Doctor, isn't that a pretty high percentage that

you have given there of forty coming from accidental injuries?

A. He has a similar condition on the right knee, and he does not have any trouble with the right knee, there is nothing wrong with it at all.

page 79 } Q. Similar in what way?

A. He has spur formations on the right knee.

Q. That is not answering my question. Isn't it, in your experience, a comparatively rare thing that the stiffness or enlargement of joints come from a lick or trauma, as you call it?

A. Will you ask that question again please?

Q. Read the question. (Question read.)

A. No, sir, it is not rare.

Q. And you still maintain that the percentage is as high as 40?

A. That is about my percentage, I don't know just exactly, I couldn't make a definite statement as to that.

Q. And you have people who have rheumatic troubles which cause enlargements of the joints, don't they?

A. Yes, sir.

Q. And a great many people have what is known as arthritis that causes enlargement or swelling of the joints?

A. Yes, sir.

Q. And they both cause pain?

A. Yes, sir.

Q. And they come on suddenly sometime, don't they?

A. Yes, sir.

Q. They really come without any warning?

A. They might come that way, yes, sir.

page 80 } Q. And sometimes they run for a period of a few weeks or few months and then clear up and generally get better?

A. They generally get worse. I don't believe I have ever seen anybody get over it after middle life.

Q. You mean if you are once affected with rheumatic pains or arthritis, that it continues?

A. With this type of arthritis, yes, sir.

Q. From whatever cause it comes?

A. Yes, if you get the proliferative change, yes.

Q. I don't know what you mean by proliferative change?

A. The spur formations which I spoke of are proliferative changes.

Q. How about rheumatism, don't people have temporary spells of rheumatism?

A. Rheumatism is a different thing from arthritis.

Q. I know you doctors make a distinction, and I am asking you about that distinction.

A. Rheumatism is a blanket term, it includes sore joints, muscles and several other diseases, rheumatism don't necessarily follow, that is, the joints are swollen.

page 81 } Q. I didn't mean to say it does, but you said a little while ago that you have seen people with swollen joints and stiff joints and painful joints from rheumatism, didn't you?

A. That happened to be arthritis.

Q. But they call it rheumatism.

A. People call all pains in the legs rheumatism.

Q. Do you mean to say those pains that they call rheumatic don't clear up and get better?

A. They do if they are in the muscles, yes, sir, they might clear up.

Q. Your x-ray does not show any bone trouble about this man's points?

A. No, sir.

Q. And as far as his bones are concerned, there is no difference between the right and left?

A. No, sir.

Q. He could have trouble, of which he complains, just as well from rheumatism which has affected the muscles or ligaments, as he could from arthritis, couldn't he?

A. He wouldn't have that pronounced limp as he has.

Q. You mean rheumatism would not make a man limp?

A. It would make him limp some, yes, sir.

Q. And arthritis might make him limp some?

A. It does.

page 82 } Q. A man may have a pronounced limp coming from either rheumatism or arthritis and it will clear up and get better?

A. It won't clear up from arthritis.

Q. But it will clear from rheumatism?

A. Yes, sir, rheumatism, speaking of it as a muscular thing.

Q. It affects the ligaments, too, didn't you say?

A. Yes, sir, muscles and ligaments.

Q. And some people have chronic rheumatism in certain places, don't they, of their body?

A. Yes, sir.

Q. And they will continue to have it for a while and then get rid of it entirely. Isn't that so?

A. That might occur, yes.

Q. In some cases they clear up and get better?

A. If it is in the muscles it might clear up, yes, but this man's joint right around his knee has increased from half an inch in size to one inch since I saw it the first time, that is, right around the joint, where there are no muscles.

Q. Haven't you seen people with enlarged joints in their fingers and other parts of the body considerably enlarged from what we call rheumatism, or it may be page 83 } arthritis?

A. If it is arthritis they don't get well in people past middle age.

Q. What is it that causes it?

A. That is an infectious type.

Q. What is it that causes sometimes when you wake up in the morning your fingers are so stiff you can hardly use them, and then they will clear up?

A. Probably from lying on that side and upsetting circulation.

Q. Suppose you have it on both sides, suppose both hands are stiff, how do you explain it then?

A. Maybe you laid on both sides.

Q. You stop the circulation on both sides?

A. You do not stop it, you just compress the small capillaries.

Q. What I am trying to get at is a simple thing, that sometimes you know, as I know, you wake up in the morning with your hands feeling stiff and your joints sore. That is true, isn't it?

A. I suppose so.

Q. And probably you may feel that today and you won't feel it again for a week or two or a month or two? Isn't that so?

A. I don't know about that, I never had that to happen to me. I imagine what it is there, of course, the circulation is not as good as when you are up and moving page 84 } about, the blood doesn't flow as rapidly and does not go through as many capillaries, so your hand goes to sleep, is what people speak of it as, I suppose that is what you are talking about.

Q. No, I am not talking about that. That is all.

RE-DIRECT EXAMINATION.

By Mr. Brock:

Q. Mr. Hall questioned you before lunch on the question of arthritis and rheumatism, &c., and I understood that you

were trying to explain to the jury the difference between the two. Could you illustrate that in any way?

A. We have a very good case of it right here, Mr. Brock's hand, it was injured, and his right hand shows it, and these joints are enlarged, but he has perfect use of them, but the injury to these joints, which is a traumatic thing, he cannot bend them at all. I think that shows you the whole picture of it better than I can tell you, that is a beautiful illustration of it, he cannot use this part, and he will always have that trouble, though it might improve a little bit.

By Juror:

Q. Is that rheumatism?

A. No, sir, that is arthritis, that is a joint trouble, in the joint.

page 85 } By Mr. Hall:

Q. Suppose you look at my joints and see if you see any sign of either arthritis or rheumatism?

A. Not as pronounced as his.

Q. Do you see any sign of a traumatic injury?

A. No, sir. We know he has had a traumatic injury though.

Q. Look at that finger.

A. You have good flexion in it.

Q. Did you ever know of a fellow getting his joint dislocated playing baseball?

A. Yes, sir.

Q. You would call that traumatic, wouldn't you?

A. Yes, sir, but he is a younger man. If an older man got his joint dislocated he would probably have a permanent injury. the chances are he would, age is a big factor.

Q. What kind of an injury did Mr. Brock have to his hand?

A. Mr. Brock had a fracture of his wrist, as I recall. It was not my case, but I just happened to notice his hand today and it illustrates the condition, you can see the end of the joints here are enlarged but he has perfect use of it here, and will probably never have any trouble.

page 86 } Q. You say in his right hand the injury is what you call rheumatism?

A. No, sir, I said arthritis.

Q. If I ever had any stiffness of the fingers or my joints here, what caused it?

A. Several things can cause it, infection or trauma either.

Q. If it is due to infection I believe you said it would not clear up?

A. I didn't say that I don't think.

Q. You did not?

A. The chances are it will not though?

Q. Even if it is due to an infection it will clear up sometimes?

A. Not after a person passes middle age, I don't think, no, sir, I never have seen it.

Witness stands aside.

page 87 }

S. H. ANDERSON,
Sworn for Plaintiff.

DIRECT EXAMINATION.

By Mr. Early:

Q. Where do you live?

A. I live near Abilene.

Q. Are you, or not, thoroughly familiar with the ground around the station at Abilene?

A. I have been there a good deal in my life.

Q. How long have you lived at your present place?

A. All of my life.

Q. How often are you over at the station,

A. I couldn't say about that now, I get over there sometimes.

Q. I hand you a map that has been made of the location of the grounds at the station at Abilene and will ask you to examine it. This map shows on it a well-defined road making a loop in front of the station, or to the rear, I don't know which it is. Is that a well-defined road there?

A. You mean right along here?

Q. Let us show it to the jury. I mean right here now (indicating) is this a well-defined road, right in here, any more defined than it is up here (indicating)?

A. No, sir, it is all just alike, gravels and coal cinders.

Q. Then I understand you to say there is nothing to distinguish this in here (indicating) as a drive-way
page 88 } from this up here adjoining this place (indicating)?

A. No, sir.

Q. What is the condition of all this in here (indicating)?

A. Just gravel and cinders.

Q. It is all covered with gravel and cinders?

A. Yes, sir.

Q. From the ditch line back to the station?

A. Yes, sir.

Q. And when you are up here (indicating) you are as much in the road as you are here (indicating)?

A. Exactly so.

Q. State whether or not in your opinion, and from your observation, whether that road is drawn accurately there. I want to get whether or not the curve is more pronounced or whether that exactly represents the curve as it crosses the ditch.

A. That would be sorter hard for me to say. There is a right smart turn there, I have driven around there in a wagon a good many times.

Q. There is a right smart turn there?

A. Yes, there is a turn there, a right smart turn there, and if you get to turning here too much (indicating) you are going to jump off the road there with your hind wheels.

Q. Have you been over that a good many times?
page 89 } A. Yes, sir, I have driven over that a good many times.

Q. If you know how this crossing across this ditch is constructed, please state to the jury?

A. It is a driveway across there, but it wasn't very wide, I thought it was rather narrow.

Q. I mean is there a bridge across it or a culvert, with dirt on top of the culvert?

A. There is a culvert under there and dirt on top of it. It is pretty smooth now.

Q. There has been some reference to the switch ties laid alongside this driveway. Did these switch ties act as a barrier to keep a car from going off?

A. Not at all.

Q. Tell the jury why you say that?

A. Because the drain under there, the thing would cave in some from the top if you didn't have something there to catch it, I think it was just thrown in there to keep from washing out.

Q. To hold the dirt on the culvert and keep it from washing out in the ditch?

A. Yes, that was down under there some, it didn't come to the top of the road.

Q. The switch ties did not come up to the top of the road?

A. No, sir.

Q. Do you know how wide it is across that cul-
page 90 } vert, going across the ditch?

A. No, sir, I don't know how wide it is, but I thought it was plenty narrow in crossing it.

Q. You thought it was plenty narrow in crossing it?

A. Yes, sir, most too narrow, because of that turn around there.

Q. Are you related to Mr. Hillsman?

A. No, sir.

Q. Have you any interest in this case?

A. None as I know of.

CROSS EXAMINATION.

By Mr. Ozlin:

Q. You drive a wagon, don't you?

A. I have been driving one a good long time.

Q. You never have undertaken to drive a car around there?

A. No, sir.

Q. You have no trouble in making the turn around there with your wagon, did you?

A. I consider I am a good wagon driver, and I knew the way to drive.

Q. Anybody that is a fairly good driver could make that drive around there without any difficulty, couldn't they?

A. That depends on where they drove, about page 91 } that.

Q. Of course it does, but the roadway across the drain was there, wasn't it?

A. Certainly it was.

Q. And there would have been no trouble for a man to go over it if he kept in the roadway?

A. No, sir.

Q. You never had any difficulty getting around there, did you?

A. No, sir, because I generally look where I am driving.

Q. A wagon and a pair of horses or mules hitched to it are a good deal longer than an automobile?

A. I don't know whether it is so much longer either.

Q. Isn't it a good deal longer, a pair of horses, from the head part to the body—or do you mean to say they are as long as an automobile?

A. No, sir.

Q. You don't think so?

A. No, sir.

Q. The wagon itself is almost as long as an automobile, isn't it?

A. The wagon and tongue would be something like that, maybe a little bit longer, but an automobile takes right smart to turn, I have been in them.

Q. I want to ask you one or two questions about this map again. I believe you testified that this space right page 92 } in here was covered with cinders just as it was in the roadway?

A. I never seen any roadway there.

Q. Practically every team or vehicle that came to this station would come in there and make this loop, wouldn't they?

A. Yes, sir.

Q. You don't mean to say they would turn down the edge of this drain here as much as they would come up by the station?

A. No, sir.

Q. Wouldn't vehicles coming around there and making that turn, have to necessarily follow the beaten path?

A. No, they wouldn't have to because it was all the same, all along here.

Q. I mean to make the turn across the drain here, wouldn't they have to take somewhat of a course as is outlined on this map?

A. Yes, sir.

Q. And wouldn't that make a beaten track or a defined track through the cinders around there?

A. I don't think it had made it.

Q. Are you testifying about conditions that ob- page 93 } tain now or at the time this accident happened.

A. At the time this accident happened.

Q. Conditions are not the same there now, are they?

A. No, sir.

Q. Do you mean to say that the cinders extended all the way back around here to the railroad track?

A. I think they do.

Q. Your testimony is that there is no difference between these lines marked "Cinder drive-way", and that mark in the drain?

A. To the drain, you mean?

Q. Yes, sir.

A. No, sir.

Q. That one does not show the effect of wheel tracks any more than the other?

A. It may have shown a little more, I won't say that now, but it was all the same, cinders and gravel.

Q. But you could see the tracks of vehicles going around there, couldn't you?

A. I don't remember about seeing any tracks. It stands

to reason that anybody going to make that turn they would try to lean as close to the depot so as to make that turn.

Q. But vehicles constantly going around there, page 94 } would not that make a beaten track around these cinders?

A. Yes, there is some beaten track.

Q. And wouldn't that show to any casual observer?

A. I suppose it would.

Q. You say that the culvert here across the drain was plenty narrow?

A. Yes, sir, I think so.

Q. Wasn't it plenty wide, also?

A. That depends how long you wanted it, about being plenty wide.

Q. Wasn't it as wide as drains or culverts across your county roads through here in Charlotte County?

A. I never measured them, I cannot tell you.

Q. Just the observation of it, what your eyes show you?

A. Some roads are plenty narrow.

Q. That is not the question I am asking you. Wasn't that culvert across that drain as wide as culverts across your county roads here in Charlotte County?

A. I am not a Charlotte man.

Q. In Prince Edward County then?

A. I don't travel about very much, but I don't think that was as wide as we have them on our county roads.

Q. You don't think so?

A. No, sir.

page 95 } Q. Don't your county roads, as a rule, narrow in at the culverts?

A. Yes, sir.

Q. Narrower than the road is elsewhere?

A. Very often they do.

Q. You say you don't think that your county roads have any culverts as narrow as this one was?

A. They may have some, I won't say they don't have any because I don't go all over the county.

Q. If the evidence shows by actual measurement that this driveway across the culvert was 16 feet wide, wouldn't you say that is just as wide as a great many culverts across county roads?

A. Yes, sir, I would; was it 16 feet?

Q. I think we will establish that by undisputed evidence. You do get around over the roads in your locality, don't you?

A. I get to town and to Abilene.

Q. And where you have little drains under the roads they simply put a pipe in there and throw dirt over it?

A. They are using cement now.

Q. They used to use a pipe?

A. Yes, sir, they put in a pipe and have cement on each side of them, and if this had cement on each side that would have made it wider.

Q. How would it make that wider?

A. It was wider at the bottom than it was at the top.

Q. What was wider?

page 96 } A. That road where that pipe went in, it was wider at the bottom than at the top.

Q. What do you call the bottom of the road?

A. I mean where that pipe went through there, the dirt went slanting like that (indicating), and if you had cement you would have it straight up.

Q. Were there not switch ties laid across that drain at each end of that culvert across there; here is the drain coming along under there and the road way comes like that (indicating), wasn't there a switch tie laid over there and another one over here (indicating)?

A. I don't think so, I wouldn't say about that, I think these old ties were thrown in there to sorter hold that dirt up there.

Q. But they were lying across there like that (indicating)?

A. I don't think so, I think they were thrown in that ditch to sort of hold that dirt and cinders up there in proper place and to sort of catch it.

Q. You never went there and made an inspection of this thing, did you?

A. No, sir.

Q. And you didn't measure it to see how wide it was?

A. No, sir.

Q. You just know you have been going over it
page 97 } ever since the station has been there?

A. Yes, sir.

Q. And you never had any trouble?

A. No, sir.

Witness stands aside.

T. O. CHAPPELL,
Sworn for Plaintiff.

DIRECT EXAMINATION.

By Mr. Early:

Q. Are you familiar with the grounds at New Abilene, at the Station?

A. Yes, I think so.

Q. How close do you live to Abilene?

A. About three miles.

Q. Are you often at New Abilene?

A. In the last few years not as often, but that is my station, all my shipping comes from that place, and I used to haul timber to that station and was there every day, but now it is my shipping point, railroad station, and fertilizer point.

Q. What is your occupation?

page 98 } A. Farming.

Q. I hand you a map that has been prepared by the Railway Company of the grounds around the station at New Abilene and will ask you to look at it. (Witness does so.) On this map they have shown a well-defined roadway making a loop here at the rear of the station and crossing this ditch. Please state if that is a well-defined roadway or if it is of a character similar to the balance of the land up to the ditch?

A. In all my travelling I never noticed any cinders there to my knowledge. This has been filled with coal cinders, from here back to here (indicating), and there is not any definite road there.

Q. Then as I understand you, a man coming to the station would be as likely to go in between the road that they have indicated on the map and the ditch as he would be to go in the roadway they have indicated?

A. Certainly, if there wasn't any place like this he is liable to go from here to here (indicating), if there isn't anything to guide him from here to the station (indicating).

Q. Are you familiar with this place at which Mr. Hillsman had his accident?

A. Yes, sir.

Q. How is the road constructed across that ditch?

A. That road was simply filled with these cinders projected right at that ditch, if that answers the question.

page 99 } Q. Is there a bridge or culvert across there?

A. There is a culvert laid down and this is filled to it, I suppose the fill would be 12 or 14 feet, it couldn't be any more than that. I remember the time when they constructed it and naturally without a cement abutment this

fill couldn't come directly up as it would do if there was cement there. I never had occasion to measure it but I think it is 12 or 14 feet, there is two 8-foot culverts.

Q. Two 8-foot culverts, and dirt is put on top of these pipes?

A. Yes, sir.

Q. And at the base it is 16 feet wide?

A. Supposed to be, if they were completely covered up.

Q. And it slopes on an incline to the top?

A. It had to, naturally.

Q. And the roadbed is on top and according to your theory it is necessarily narrower than 16 feet here (indicating).

A. Yes, sir.

Q. Is this a deep ditch at that point?

A. I would guess that ditch as being something like 7 feet. It is higher than my head, but that is guess work, I never measured it, it is some seven or eight feet deep.

page 100 } Q. Does the road make a pronounced curve at that point as it crosses the ditch?

A. Yes, sir.

Q. Just look at this map and say in your judgment whether the curve was more pronounced than it is on that plat?

A. It is hard to tell by this drawing because there was no direct road there, and in my travelling it I will give you my experience, in driving up here, we came back to that bridge in more this line, there wasn't anything to guide where you would go that way, is my way in travelling with a car or wagon, and in coming from there in a wagon you had to be mighty peart to get the team and wagon in the proper place to come out. That was my experience in travelling the place, or ever since the road was built, I helped to put the cinders there when it was built, and I have been hauling timbers and cross-ties to the place.

CROSS EXAMINATION.

By Mr. Ozlin:

Q. You say you once hauled lumber to this station?

A. Cross-ties.

Q. You were there practically every day?

A. Yes, sir.

Q. And you crossed this same place?

A. No, sir.

page 101 } Q. You would cross it practically some time during the day every day, wouldn't you?

A. No, sir.

Q. How often do you cross it?

A. I hauled the timber on the opposite side of the road.

Q. Even since you ceased hauling lumber you go around fifty times a year hauling your fertilizer and farming products, don't you?

A. That is just an estimate.

Q. And on those occasions you usually make that loop around there?

A. No, sir, not all the time. When I come for anything at the station we went in this loop to deliver but there wasn't room in there for parking, and we parked our cars a heap of times and go there, if we had a message or anything to send over to the depot and a heap of times I didn't cross the bridge.

Q. But you have crossed it numerous times?

A. Yes, sir.

Q. With a team and with a car?

A. Yes, sir.

Q. Which is the longer, a team, wagon or car?

A. A team and wagon.

Q. It is considerably longer, isn't it?

A. Not considerably longer, but some longer, I was driving a model "T".

page 102 } Q. It never occurred to you that there was any danger going across there?

A. No, except you would see where some people had gone pretty close towards the old ties.

Q. You are familiar with the county roads through your section of Charlotte?

A. I live in Prince Edward.

Q. Was not this drive way across that culvert as wide as the average culvert on the county roads in your section?

A. It was not at the bottom, 16 foot is about the average and in building a fill that high you naturally would have to come to more of a slope, I don't think it was as wide.

Q. Even with that slope it was from 12 to 14 feet at the top?

A. That was my estimate.

Q. If the evidence would show that at the time of the accident to Mr. Hillsman it was 16 feet, you are not in a position to say that is not true?

A. Certainly not.

Q. Is the average culvert on the county roads in Prince Edward County and Charlotte County, where you have observed it, as much as 16 feet?

A. The average culvert they are building on the State roads are 16 feet pipes.

Q. That is just recently, isn't it?

page 103 } A. Yes, sir.

Q. Before that they were considerably narrower?

A. I rather think they have been 16 feet for a number of years, or since automobiles have been travelling over them.

Q. This culvert or this drive way over the culvert was about in line with the driveways over culverts in the county roads through Charlotte and Prince Edward County?

A. In that kind of surface road.

Q. You stated that all of this space in here from the depot to the ditch was covered with these cinders?

A. Yes, sir.

Q. And naturally vehicles coming in here and making the loop and going back across would have to bear over towards the station in order to make the loop, wouldn't they?

A. Yes, sir.

Q. And in doing that constantly, wouldn't the wheels make a defined track through these cinders?

A. They possibly would, but as I told you at the times I have travelled it there was no defined road, to my knowledge, that is the question I answered.

Q. Anybody knows that wheels continually following a route around here would make a track.

page 104 } A. Yes, sir, if they followed it continually, I think so.

Q. And those cinders continued right on across that driveway over to here (indicating), didn't they?

A. Yes, sir.

Q. And there was absolutely no slipping, like slipping in mud, anywhere where these cinders were?

A. Except on the end of that culvert where those ties were thrown in there on account of the slope.

Q. What I mean is there would be no skidding?

A. No, sir, not unless you got off here entirely.

Q. You say there were two 8-foot pipes put in this drain and the dirt filled in over it, you mean put in end to end?

A. Yes, sir.

Q. And not side to side?

A. Yes, sir.

Q. Were you there when they were put in?

A. I was there when they were on the bank.

Q. Do you know whether they were eight foot pipes?

A. I was judging it was 8 foot.

Q. It has been a good many years ago?

A. 25 or 27 years ago.

Q. It has been several years?

page 105 } A. Yes, sir.

Q. There was nothing especially to attract your attention to the length of them at the time?

A. No, sir.

Q. One other question, during the times you have made trips to the station there at Abilene, driving your team, &c., as you have testified, you never found any dangerous condition that caused you to complain to the railroad company about it, did you?

A. No, sir, I never made any complaint.

Q. You have had no trouble yourself getting around there and you made no complaint?

A. I made no complaint to the railroad company.

RE-DIRECT EXAMINATION.

By Mr. Brock:

Q. Although you never made any complaint to the railroad company, you did always consider it a dangerous place?

A. Yes, sir, even today I consider that a dangerous place, and all my life I was very particular in travelling around there with my team and automobile, and people would have to take notice of a place of that sort, and I considered it in my estimation a very dangerous place, and it was a close drive to get around there with a team or car, but as to the foot or inches I never had occasion to measure it, or how wide the road was, it is just estimates that I am
page 106 } giving you, I haven't measured it, but I consider it a dangerous place.

Q. You have referred to some switch ties that were laid along side this crossing. Did they have the effect of acting as a barrier or obstruction to keep a car from running over?

A. No, sir, they were simply thrown in there, and as these gravels worked down, they were put there to hold those cinders from going down and making the road narrower. As the banks began to slip away they throwed some old ties to keep the cinders back, but I have never seen anything there to hold a car, they simply seemed to be thrown against that bank to hold the cinders, and when you go on cinders they keep crawling like that (indicating) was just my idea about it, but I have never seen anything there that was put there to keep a car or anything from going over.

Q. Did I understand you to say in crossing this bridge the back wheels of your car or wagon you felt these switch ties give?

A. You could feel them give in that bank and the hollowness under those cinders, that has been my experience with them.

By Mr. Ozlin:

Q. Mr. Chappell, do you consider your county roads, where there is a 16 foot pipe under the culverts, dangerous? page 107 }

A. It depends upon the location of the culvert as to whether I would consider it dangerous, or not. If it was just a shallow ditch simply over a drain, I think it was all that was necessary, but if you are going to put a fill six or seven feet deep, I would consider it dangerous. That is my opinion, I don't know whether I am right in giving my opinion.

Q. That is what I asked you.

A. And that is what I think, if it went down flat, just barely over the drainage, I wouldn't hesitate at all to speed right on 12 feet, but it depends on the height of the fill as to the danger of it, would be my opinion of it, but I am not building roads.

Q. These pipes or culverts under your public roads, where there is an 18 inch to 24 inch pipe laid under the road, would you consider that dangerous?

A. The length?

Q. 16 feet wide.

A. How deep?

Q. 24 inch pipe.

A. That is more dangerous, but I wouldn't consider that as dangerous as I would over a seven or eight foot fill. I wouldn't consider it a wise idea if I was a road builder to put a pipe that length on a ditch of that kind.

Q. You have plenty of them in your county? page 108 }

A. I understand that we have, and we have lots of things in the county I would like to get rid of.

Q. You have seen places just as dangerous as this place you are talking about at Abilene station?

A. Not according to the location, we haven't a curve in Prince Edward county that I know of with such an angle as that. It depends on the location of the approach to the fill or pipes. You see in that special place we had to make a special bend to get on that, and it made it much more dan-

gerous. You could stand a lot more if the road was straight. That is my idea, if I am allowed to speak from that point.

Witness stands aside.

page 109 } MISS EMILY HILLSMAN,
 Sworn for Plaintiff.

DIRECT EXAMINATION.

By Mr. Watkins:

Q. Are you a daughter of Mr. W. J. Hillsman, the plaintiff in this case?

A. Yes, sir.

Q. On the night of February 21, last year, did you come to Abilene station on the Virginian Railway train?

A. Yes, sir.

Q. Where did you come from?

A. From Leesville.

Q. Had you paid your way?

A. Yes, sir.

Q. Did your father meet you there?

A. Yes, sir.

Q. Did your father, when he started off, have his lights on his car?

A. Yes, sir.

Q. Was it raining that night?

A. It had been raining very hard but it was drizzling at the time I got off the train, it was still raining some then.

Q. Your father was driving the car?

A. Yes, sir.

Q. When you started away was he driving very fast?

page 110 } A. No, sir, he hadn't gone far enough to have
 gotten any speed, he couldn't have been.

Q. Do you know whether or not he had changed the gears?

A. I wouldn't be certain but I don't think he did.

Q. Did you notice it when it first went over the bank?

A. I felt the car give, and it went over.

CROSS EXAMINATION.

By Mr. Hall:

Q. Did this car have a windshield wiper on it?

A. I don't know.

Q. You know what wiper is?

A. I know what it is, but I don't remember, I never noticed.

Q. After you all went into the ditch the railroad men came out there almost immediately, didn't they?

A. Yes, sir, the people on the train came on out there by the time we had gotten out of the car.

Q. You heard your father tell them there wasn't anybody hurt?

A. He said he didn't think they were hurt at the time. I didn't think I was hurt, but the skin was off my head, and I didn't know it until I got home. I wasn't hurt to amount to anything, but the skin was off and I didn't know it until I got home.

page 111 } Q. Then when the foreman of the gang came out and the section men got you out, you heard your father tell them that nobody was hurt, didn't you?

A. I don't remember, I know we didn't either one think we were hurt at the time.

Q. There was no complaint about either one of you being hurt?

A. Not at that time.

Q. As you went home that night, you drove to Farmville?

A. Yes, sir.

Q. Did either one of you complain on the way home?

A. When he got home his leg was hurting him some.

Q. That night?

A. It was morning then, he said he had been hurt, but it wasn't hurting to amount to anything at that time.

Q. So as soon as you got home that morning, after driving straight on home, your father complained a little bit?

A. I remember him complaining of the leg hurting, but I didn't think there was anything much then, but he was complaining of his leg hurting him a little bit then.

Q. That same morning?

page 112 } A. Yes, sir.

Witness stands aside.

End of testimony for Plaintiff.

EVIDENCE INTRODUCED ON BEHALF OF THE
DEFENDANT.

C. H. WARWICK,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. Were you the conductor on the train which Miss Emily Hillsman came from Leesville to Abilene on the night of February 21, 1931?

A. Yes, sir.

Q. Just tell what occurred when you got to Abilene station?

A. When we pulled up there to get water she was on there, and said she expected her father to meet her
page 113 } there. I told her if she got off there I would walk to the depot with her to see if her father was there, and if nobody was there to meet her she could go to some house across the track and we walked up there and met her father right in front of the depot, so I left and went on back to the train and went in the coach and was eating my supper, and in a few minutes I looked out of the window and saw a torch, an engineer's torch back of the depot, so I got up then and went out to see what the trouble was, and when I got out there I saw somebody going up the hill with a fuzee burning, and I got out there and saw the condition the car was in and the foreman was there with a torch, and I asked him if anybody was hurt.

Q. Don't repeat what you heard or what he said

A. I asked him if anybody was hurt.

Q. When you got out there neither Mr. Hillsman nor his daughter were there?

A. No, sir.

Q. Now go ahead and tell what you did?

A. I told them as I could not do anything, they would have to get somebody to get it out of there, and we left there then.

Q. Who was this going up the hill with a fuzee?

A. Mr. Hillsman and his daughter.

Q. You did not personally speak to either one of them that night?

page 114 } A. No, sir.

Q. In other words, they got away from there, before you got there?

A. They went up towards the section foreman's house.

Q. And Mr. Cummings, the foreman, had gotten out there ahead of you?

A. Yes, sir.

Q. As soon as you saw there was nothing you could do, you went back to your train and left?

- A. Yes, sir.
 Q. Did you notice the car in the ditch?
 A. Yes, sir.
 Q. Were there any lights on it?
 A. No lights that I saw.
 Q. Would you have seen the lights if they had been burning?
 A. I think I would.
 Q. Was it dark out there?
 A. Except for the engineer's torch.
 Q. What do you mean by a torch, is it a thing that blows up or is it a lantern?
 A. It is a thing that blazes up, it has got a big wick in it about an inch around, and it blazes up.
 Q. And you say there were no lights on the car?
 A. No, sir.

page 115 } CROSS EXAMINATION.

By Mr. Early:

- Q. Did you go and examine this car and look down in the ditch?
 A. I went to the side of it and saw what condition it was in.
 Q. Mr. Hillsman has testified the lights were burning on this car after the accident. Will you state whether or not that is true?
 A. When I got out there they were not burning.
 Q. You do not recall seeing them burning?
 A. No, sir.
 Q. You don't know whether they had been turned off, or not?
 A. No, sir.

Witness stands aside.

page 116 } C. W. CUMMINGS,
 Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Hall:

- Q. Were you on the train the night that Mr. Hillsman's car ran in the ditch at Abilene?
 A. Yes, sir, I was.

Q. What position did you occupy on the train?

A. I was the fireman.

Q. What attracted your attention to the fact that the car was in the ditch?

A. I was taking water there and Mr. Hillsman came around the station and hollered to come and help him get out of the ditch, and just as soon as I finished taking water I went around there with a torch, and told him I couldn't help him to get out of the ditch, there was nothing that I could do.

Q. When you went around there were there any lights burning on the car?

A. No, sir, I didn't see any.

Q. Did you have any conversation with Mr. Hillsman about being hurt, or ask him whether he was hurt, or not?

A. About the first thing I asked him was if he was hurt, and he said he was not.

Q. What did Mr. Hillsman do then?

A. He went ahead and got somebody to help him get out of the ditch, I think.

Q. Did he ask you who you could get, or did you give him any directions?

page 117 } A. Yes, sir, we told him to get the section foreman.

Q. Did you show him where the section foreman lived?

A. Yes, sir.

Q. Did you give him a light?

A. Yes, sir, I gave him a fuzee.

Q. And he went after the section foreman?

A. That I don't know, we went on away then.

Q. Did you see Mr. Hillsman start?

A. Yes, sir, he left before we did.

Q. He and his daughter both?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Brock:

Q. You did not see the accident yourself at all?

A. No, sir.

Q. The first you knew of it was while you were getting water there?

A. Yes, sir.

Q. Mr. Hillsman came up and asked you to get him out of the ditch?

A. Yes, sir.

Q. And then you say you went down there to the ditch
and you didn't see any lights burning on the car?
page 118 } A. No, sir, I had a torch with me.

Q. If Mr. Hillsman says that the lights were
burning, would you deny it?

A. It seems to me like if the lights had been burning I
would have noticed that. I had a torch but I was really
afraid to get too close to the car on account of the torch?

Q. Then you didn't see the lights burning?

A. No, sir, I did not.

Q. Did you examine the automobile at all?

A. No, sir.

Q. Was not the front of the automobile down in the ditch?

A. Yes, sir, it was down like that (indicating), the front
of it.

Q. Close against the bank?

A. Yes, sir.

Witness stands aside.

page 119 }

W. F. MOORE,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. Mr. Moore, I believe you were the section foreman for
the Virginian Railway Company at the time this car of Mr.
Hillsman went into the ditch at Abilene station?

A. Yes, sir.

Q. Who came up and got you up that morning?

A. Mr. Hillsman.

Q. Then what did you do, after he told you of his predicament?

A. The first thing I asked him was if he was hurt and he
said he was not, and the lady that was with him, I asked
if either one was hurt, and he said no, I think not, neither
one of us are hurt, and then he said "I thank God that neither
one of us are hurt". Then I partly dressed and went on
down and got the extra gang and went down to the station
and went in the station and made a light for this lady and
fixed her so she would be comfortable and then I went down
and got the gang and came up there and got the car out
of the ditch.

Q. What do you mean by the extra gang?

A. That is a gang that does work all up and down the railroad, from place to place, and they happened to be at Abilene that morning, and they had men on the camp car.

Q. When you got to this car were there any page 120 } lights on it?

A. No, sir.

Q. Was it headed over in the ditch?

A. Yes, sir.

Q. Did you and the extra gang get them out of the car?

A. No, sir, they got out of the car themselves.

Q. I mean get the car out of the ditch?

A. Yes, sir, we did that.

Q. What happened in regard to the lights after you got the car out of the ditch?

A. I asked Mr. Hillsman if he had any lights, and he said "I don't know, I will see", and he got to the car and turned the lights on and they burned.

Q. Did they get in the car and go on away?

A. Yes, sir, though I think they went to the store and got some oil and put in the car and then left, and the car wasn't running very good and before he got on top of the hill I went to my garage and got my car and pushed them on top of the hill and he went on. I also offered to carry him to Farmville if the car wouldn't work, but he made it all right.

Q. In getting the car out of the ditch, did Mr. Hillsman assist you all and lift and prize just as you did?

A. He helped to do everything he could to get page 121 } the car out of the ditch.

CROSS EXAMINATION.

By Mr. Early:

Q. Mr. Moore, you don't know whether the lights were burning on this car at the time it ran off this culvert?

A. No, sir, I don't know whether they were burning at the time it went off the culvert, or not.

Q. And you don't know whether Mr. Hillsman had turned the lights off before coming after you?

A. No, sir, I don't know whether he did or not.

Q. Do you know anything about the condition of this culvert?

A. Yes, sir.

Q. These switch ties that are alongside this culvert, are they there for the purpose of holding the cinders and dirt?

A. Yes, sir.

Q. They are not there as barriers to keep anyone from running off?

A. No, sir, that is to hold the road together, so anybody could see them, they set up a couple of inches probably above the road and anybody could see them.

Q. You know the condition of those ties, whether they were decayed or rotten in anyway on top?
page 122 } A. They were not decayed, they were good ties.

Q. Do you know how long they had been there?

A. No, sir, but whenever needed we put new ones in there.

Q. Do you remember when you put any in there last?

A. No, sir, that is not on my job, the Colleen man looks after that job.

By Mr. Ozlin:

Q. Mr. Early has asked you about something that we did not, you say these cross-ties were put up and extended two or three inches above the top of the road?

A. Yes, sir.

Q. Were they built up from the pipe in the ditch all the way up to the top of the road and two or three inches beyond the top?

A. There was some timbers all the way up, I don't say they were plumb close together, but they had been built all the way up to keep it from caving in on the end of the pipe.

Q. What is the width of that driveway across that drain?

A. The pipe was 16 feet long, and the driveway was equally as wide as the pipe was long and might have been a little bit wider, on account of building it up.

page 123 } Q. In other words, was this driveway 16 feet wide at the top?

A. Yes, sir.

Q. And these timbers were built up straight from the pipe down here (indicating) to the top of the road and a few inches above?

A. Yes, sir.

By Mr. Early:

Q. You mean to say this was built up perpendicular from this pipe?

A. Yes, sir.

Q. There wasn't any incline coming up at all?

A. It didn't go in at all.

Q. How deep is that ditch there?

A. 4½ or 5 feet, or something like that.

Q. Don't you reckon it was 8 or 10 feet?

A. No, sir, it wasn't that deep.

Q. According to you it could have been as much as 5 feet?

A. Hardly that deep.

Q. Call it four feet then, there was a four feet perpendicular drop and the only protection for that place that you know of was possibly these switch ties extending two inches above the top?

A. Timbers all the way from the pipe a long up.

Q. And that was the only protection to keep page 124 } a man from dropping off a distance of four or five feet, possibly a two-inch projection above the level of the road, and a sheer drop of five feet?

A. He had a 16-foot road that he could drive around there on.

Witness stands aside.

E. E. JONES,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. I believe you were the foreman of this extra gang that happened at Abilene on the night that this car of Mr. Hillsman's went into the ditch?

A. Yes, sir.

Q. Did you get up and go down to the car that morning when the car was in the ditch?

A. Yes, sir.

Q. Who called you up?

A. Mr. Moore, the section foreman at Abilene.

Q. When you got down to the car was Mr. Hillsman and his daughter out there?

A. Mr. Hillsman was, I didn't see his daughter. page 125 } ter.

Q. Were there any lights on the car?

A. No, sir.

Q. Did you assist in getting the car out of the ditch?

A. Yes.

Q. What was said about the lights after the car had been gotten out of the ditch?

A. After we got the car up on the bank Mr. Moore said to him "have you got any lights" and he said "I will see", and he switched them on and they burned.

Q. Did he get in the car to switch them on?

A. I don't just remember.

Q. In getting the car out of the ditch, did Mr. Hillsman assist you all in lifting and prizing?

A. Yes, sir.

Q. And after you got it out he and his daughter got in the car and went on?

A. Yes, sir.

Q. Who went on away with them?

A. Mr. Moore, he went up that way with them, and of course I went back to the camp car.

Q. And you don't know what happened after that?

A. No, sir.

Q. You do not stay around Abilene station any more than you do any other station along the road, do you?

A. No, sir.

page 126 } Q. About how deep would you say that ditch is where the car went over in it?

A. Something like four feet, it might be a little more, four and a half.

CROSS EXAMINATION.

By Mr. Brock:

Q. You did not see the accident?

A. No, sir.

Q. You don't know how soon after the accident you got there, or do you?

A. I think it was something like two o'clock when I was called and the train gets there at 1:41, I think.

Q. Was the train still there?

A. No, sir, the train had gone.

Q. You say Mr. Hillsman would help. In what way did he help to get the car out?

A. In getting the ties and prizing it and things like that, and he helped to lift.

Witness stands aside.

page 127 }

THEO. CARTER,
Sworn for Defendant.

• DIRECT EXAMINATION.

By Mr. Hall:

Q. Were you at Abilene at the time Mr. Hillsman's car went into the ditch?

A. Yes, sir.

Q. What were you doing there?

A. Working on the extra gang there.

Q. How did you happen to be there?

A. They called me that night. I was with Mr. Jones and they called me.

Q. Did you go up with Mr. Jones, the foreman?

A. Yes, sir.

Q. How many of your men went?

A. I don't remember now exactly how many it was, we had a right smart gang of them.

Q. When you got up there what did you find?

A. We found the car in the ditch.

Q. Who was there?

A. Mr. Priddy and Mr. Moore.

Q. Was Mr. Hillsman there?

A. Yes, he was there.

Q. Were there any lights on the car when you got there?

A. No, sir.

Q. Was anything said about lights after you got the car out of the ditch?

page 128 } A. Yes, Mr. Moore asked him about the lights, and he tried his lights to see if he had lights, he got in there and tried it and his lights still burned all right.

Q. Was there anything said about Mr. Hillsman being hurt or whether anybody was hurt, or not?

A. He said he wasn't hurt. Mr. Jones asked him the question "if any of them was hurt" and he said "no, nobody hurt at all".

Q. You were just there with the extra gang?

A. Yes, sir.

Q. You were not in the habit of staying there?

A. No, sir, I was just there with the extra gang working with Mr. Jones.

Q. When you were getting this car out what did Mr. Hillsman do in connection with getting it out?

A. What did he do?

Q. Yes, sir.

A. He helped around with us, he helped us to prize it up, we took and prized it up on the front end and tilted it up on the bank.

No cross examination.

Witness stands aside.

page 129 }

A. E. PRIDDY,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. Mr. Priddy, you live at Abilene, don't you?

A. Yes, sir.

Q. I believe you run the pumping station there for the Virginian Railway Company?

A. Yes, sir.

Q. Did you go out there the night when this car dropped in the ditch?

A. Yes, sir.

Q. Do you recall who was at the car when you got there?

A. When I got there I don't think there was anybody there but Mr. Hillsman. Mr. Moore went after the extra gang force, and they soon came back.

Q. There was nobody there but Mr. Hillsman when you first got there?

A. No, sir. His daughter might have been there, up there by the side of the station, probably.

Q. Were there any lights on the car when you got there?

A. No, sir.

Q. Did he have a fuze or any light in his hand?

A. No, sir, I guess it burned out before he got down there, I did not see the fuze, but he came up and woke me up and asked me to come down and help him out of the ditch.

page 130 }

Q. Mr. Hillsman himself came after you?

A. Yes, sir, him and his daughter.

Q. Did you ask them anything about being hurt?

A. When I got down there I did.

Q. What did they say?

A. He said there wasn't anybody hurt and he done as much prizing and all like that as most of us did while we were down there.

Q. After you got the car out of the ditch what was said about the lights?

A. He said he reckoned his lights would burn, and I told them to try them, and Mr. Moore and all were present and Mr. Hillsman put them on and they burned, and he said he reckoned he could get to Farmville if he had a gallon of cylinder oil in there, and we woke Mr. LaPrad up and put half a gallon in there and they went on off, and Mr. Moore went with him.

Q. Mr. Moore went away with them from the station?

A. Yes, sir.

Q. You have lived there at Abilene how long?

A. 23 years.

Q. Are you familiar with that culvert in the road where this car went in?

A. Yes, I reckon I am, I travel across that culvert three or four times a day, I have to go across there to
page 131 } go to the pump house.

Q. Do you go across it in your car?

A. Yes, sir, ever since 1921.

Q. Did you ever have any trouble about it?

A. No, sir.

Q. How wide are the pipes under that culvert?

A. Mr. Mack, was there and we measured it, and it was
16 feet.

Q. How wide is it at the top?

A. We measured at the top.

Q. And it is 16 feet at the top?

A. Yes, sir.

Q. Are there any timbers built up from the pipe up to the top of the road?

A. Probably about 3 or 4 inches above the cinders.

Q. What I am asking you is, did the timbers extend from down at the bottom where the pipe is all the way on up to three or four inches above the top of the road?

A. You mean the cribbing?

Q. Yes, sir.

A. Yes, sir.

Q. What were those timbers?

A. Cross-ties and like of that.

Q. Did those ties extend three or four inches above the road on both sides of the road?

A. Yes, sir, I imagine three or four inches.

page 132 } Q. Were they visible to anyone driving around there and crossing that culvert?

A. If anybody was looking where they were going, and had their lights on; I never had any trouble.

Q. Could anyone see them going around there and across that culvert?

A. Yes, sir, certainly they could.

Q. Now here is a map which shows the driveway there at the station, here is the station, this road comes in here like this and around by the station, and across here (indicating). As I understand this car went into the ditch right there, didn't it (indicating)?

A. Yes, sir.

Q. The car was going this way, here is the station house, and he went this way (indicating)?

A. Yes, sir.

Q. That would be right in here, wouldn't it?

A. Yes, sir.

Q. Now what I want to ask you is this, was there a well-defined track or roadway about where these two white lines go around there?

A. Yes, sir.

Q. What was that roadway, and this part in here (indicating) covered with, if anything?

A. Cinders.

page 133 } Q. Did those cinders extend on across the ditch and over beyond it to here (indicating)?

A. Yes, sir.

Q. And anyone coming up here at night, could they see a beaten track where other wheels had been along about where those lines show the roadway?

A. Yes, sir.

Q. Is there any doubt about that?

A. No, I don't have any doubt about it at all because I travel over there about two or three times a day coming across to the station and down to the pump house.

CROSS EXAMINATION.

By Mr. Watkins:

Q. You are employed by the Virginian Railway Company, are you not?

A. Yes, sir.

Q. You receive your salary while you are testifying in this case?

By Mr. Hall: We object to the question because we do not think it has anything to do with this case.

Objection overruled.

A. Yes, sir.

By Mr. Watkins:

Q. Now Mr. Priddy, you stated that you have been working there for 23 years. How deep is that ditch
page 134 } there?

A. I never did measure it.

Q. Just estimating it, how deep do you think it is?

A. I don't simply know.

Q. You can tell about how deep it is; I am about six feet, and was it as deep as that?

A. It might have been as deep as that, I don't know, I never measured it.

Q. It might be deeper than over my head?

A. It might be, I never measured it.

Q. Wasn't that automobile turned straight down in the bottom?

A. You mean when he got in the ditch?

Q. Yes, sir.

A. It seemed like it turned on its side to me.

Q. The front end of the automobile was down in the bottom of the ditch.

A. The engine part was in the ditch.

Q. Where the lights were?

A. The lights were jabbed up in the other end of the ditch, over that way (indicating) it went in this way.

Q. How far was that from the bottom of the ditch?

A. I don't know, about a foot maybe.

Q. It might have been a little more?

A. Yes, sir.

Q. Wasn't that automobile practically clean
page 135 } down in that ditch and didn't it come practically
up to the level of the road?

A. You mean was all of the automobile in the ditch?

Q. Yes, sir.

A. No, all of the automobile wasn't in the ditch.

Q. How much was above the top of the ditch?

A. I couldn't say exactly how much was above.

Q. Do you reckon it was a foot above it?

A. Two foot maybe.

Q. Was the top of the roadway as wide as those two pipes down there, in other words, was it 16 feet across the top of that road?

A. It was 16 feet across the top.

Q. You are satisfied of that?

A. Yes, sir.

Q. Did these cross-ties that you put in there to hold the dirt back, did they go straight up or did they kind of slant in?

A. They went straight up, I think.

Q. You have been travelling there for 23 years, you ought to know whether they went straight up or slanted down?

A. You meant slanting over on the side?

Q. Was there a slant away from the road?

A. No, sir, there wasn't a slant away from the road.

Q. In other words from the edge of the top
page 136 { of the road right straight down to the bottom of
the ditch was a straight fall, or a straight bank?

A. You mean straight up and down?

Q. Yes, sir.

A. Yes, sir, I reckon so, as well as it could be made that way.

Q. What I want to know is, could it have gone straight up?

A. I don't guess anybody put no level or anything of that kind on it.

Q. What I am trying to get at is, ain't it a fact that from the edge of the road down to the end of those culvert pipes was a gradual slant?

A. You meant a slant that way (indicating)?

Q. Yes, sir.

A. No, sir.

Q. You say that it was straight down?

A. Yes, sir, as near as possible, I don't reckon anybody used no plumb or anything of that kind to set the thing straight.

Q. Then didn't that pipe jut out on both the lower and upper side about 15 inches beyond the dirt?

A. Yes, sir, to catch the water, I reckon, a little bit.

Q. About 15 inches?

A. Probably so.

Q. It might have been a little bit more, might
page 137 { it not?

A. It might have been.

Q. If both ends of that pipe juttred out about 15 inches down at the bottom where there was no dirt over the top of it, and they were 16 feet long, the road couldn't have possibly been 16 feet wide, could it?

A. There could have been an 18-foot pipe in there.

Q. Do you know what length the pipe was?

A. I am not certain what length it was, I didn't measure the pipe, you understand? Don't they jut out on the County road?

Q. The pipe always juts out 15 or 20 inches, don't they, in a ditch that deep?

A. I couldn't say anything about that, because I don't know anything about no county road?

Q. Have many people have ever gone over in that ditch?

By Mr. Hall: We object to that question.

By the Court: I would like to hear you state your reasons for your objection.

By Mr. Ozlin: We do not think what other people have done has anything to do with it. If they want to go into that we can meet that all right, but we do not think it has anything to do with the case. They might have been drunk or ignorant drivers that caused them to go in page 138 } there, is it is true.

By Mr. Brock: This thing has been there for twenty years and we want to know if anybody else has ever gone in that ditch.

By the Court: I will overrule the objection.

By Mr. Watkins:

Q. How many people have gone over in that ditch there?

A. It might have been a few, sort of like Mr. Hillsman.

Q. What do you mean by a few, 10?

A. The reason I said that, a lady came down there and aimed to stop at the station and didn't know how to stop the car and went on down in it.

Q. Have any others been over in there?

A. Mr. Frank Bell's wife didn't know how to stop at the station; you can kill yourself anywhere, if you want to.

By the Court: Stop arguing the case and answer the questions.

By Mr. Watkins:

Q. Did you say that some others had gone over in that ditch?

A. They might have done so, but liquor might have been the cause of it.

Q. Liquor might have been the cause of it. I want to know how many have gone over, just say so?

A. I really don't know, I didn't keep no check page 139 } of it.

Q. Would you say five?

A. I ain't saying anything, I told you what I know.

By Mr. Ozlin: If you know, tell him.

A. One or two got loose on the hill and ran in there at Mr. LaPrad's store, and the wind blowed them down. You are laughing like that is foolish, but that is the state of facts.

By Mr. Watkins:

Q. Have any wagons ever gone over in there?

A. I don't know whether they have, or not.

By Mr. Ozlin: If you know, just tell him.

By Mr. Watkins:

Q. Answer the question.

A. I heard one went in there, but I didn't see him in there.

Q. Did you see them getting him out?

A. No, sir, I did not.

Q. Did a truck ever go in there?

A. I don't know of no truck going in there.

Q. You never saw one in there?

A. No, sir.

Q. Mr. Priddy, isn't it a fact that some of the cinders that are on that bed are over on the top of those two sills that run across on the edge of the road?

A. No, sir.

Q. Isn't it a fact that the cinders are up above those two sills?

page 140 } A. No, sir, there was some filling in done when you came up there, Mr. Watkins.

Q. How many inches above?

A. About three or four inches, I didn't measure it exactly.

Q. Up to your knee?

A. I said three or four inches.

Q. Isn't it a fact that where cars have to make that sharp turn back to the left there they have thrown up cinders over on top of those rails there and there is a slant from there down over the top of these holes?

A. No, sir, we have men to see about that all the time, rolling out cinders all the time.

Q. And he always keeps it about two inches from the top of these rails?

A. I said three or four inches.

Q. In other words, he fills up to about three or four inches of the top?

A. He keeps it up nice.

Q. And they keep it smooth?

A. You can see where cars have been running around there, the tracks of them. If you want me to tell you, I believe if Mr. Hillsman had his lights on he never would have went in there.

Q. How did it get in your head that he didn't have any lights?

A. Because he could have seen the ditch, I don't believe he had any lights on, and he could have seen the page 141 } honeysuckle.

Q. Where were the Honeysuckles?

A. On the side of the ditch, on both sides.

Q. So that the honeysuckles covered up those things on the edge?

A. I didn't say on the bridge, there is no honeysuckles on the bridge, I said on the side of the gully.

Q. Mr. Priddy, isn't it a real sharp turn to the left right here, don't you have to make a sharp turn in order to make that bridge?

A. Here is the station and you go around this way (indicating).

Q. The road runs this way (indicating) and here is where you come to, and come back out here, and here is Mr. La-Prad's store here.

A. Yes, sir.

Q. Now isn't there cinders all over here between this ditch and the railroad station?

A. You mean now?

Q. I mean at the time of this accident.

A. Between the ditch and the station?

Q. Yes, sir.

A. Part of the way out to the ditch and they were around the station nice, and part all out to the honeysuckles.

Q. And out to the honeysuckles was just ex- page 142 } actly like it was practically up near the station?

A. No, sir, you could see grass growing around here next to the ditch.

Q. Before you got to the edge, hadn't this cinder and stuff come in five or six feet of the top of the ditch?

A. You mean going on around this road?

Q. No, right out here between the station, wasn't the cinders there over to five or six feet from the top of the ditch?

A. You mean higher than the road crossing?

Q. No, the edge of the ditch.

A. No, sir, I don't think so. As I told you a little while ago there was grass out there and the cinders.

Q. How wide were these cinders scattered out there; how wide was it from the ditch to the depot?

A. I don't know. You know more about it than I do, you came up there surveying.

Q. Isn't it a fact that from the edge of that honeysuckle back to the depot, that the man who attends to that station kept that smooth or tried to keep it smooth?

A. From the driveway back to the station?

Q. No, from the edge of the honeysuckle that used to grow alongside the ditch.

A. No, sir, they didn't keep that nice, until the page 143 } county road took it over. I think the railroad promised to do that work there but now the ditch is filled in.

Q. Here is what I am asking you, did not the railroad company keep from the edge of the honeysuckle back to this station in a good smooth condition, covered with cinders and other things?

A. Out to the ditch?

Q. Out to the honeysuckle that was on the edge of the ditch?

A. There might have been a few cinders put there, but from the road to the station I don't know that there was any more than grass growing out to the honeysuckle.

By Mr. Ozlin:

Q. Mr. Priddy, he asked you about other cars going into that ditch there and you spoke of Mrs. Frank Bell or Mr. Frank Bell's wife?

A. Yes, sir.

Q. You say she came down there and was unable to stop her car and got in the ditch?

A. Yes, sir, and maybe it was a good thing the ditch was there, she might have ran somewhere else and killed herself.

Q. Was she an inexperienced driver?

A. It didn't seem so, but that was at the mouth of this ditch what leads from this place, the one she ran page 144 } into.

Q. Not this same ditch we are talking about today?

A. The mouth of it, next to the coal house.

Q. She was nowhere near this bridge when she went into the ditch?

A. No, sir.

Q. Was it a steep hill or downgrade to that ditch where she went in?

A. Yes, sir.

Q. You said there was another one went in there, and that liquor might have been the cause of it? Was that the car Mr. Skinner was in?

A. Yes, the one he got out of and came up to my house. He was boarding at my house at the time.

Q. And did the car he had been riding in go into the ditch?

A. Yes, sir.

Q. Was the man driving the car drunk?

A. They said he was, I didn't see him.

Q. That was the common report?

A. Yes, sir.

Q. You say one or two got away up at Mr. LaPrad's store, and drifted or were blown down there. Were they cars with nobody in them?

A. One was, one drifted off or something and ran into that ditch.

Q. Was there anybody in it?

A. Yes, sir.

page 145 } Q. It went down there by itself?

A. Yes, sir.

Q. You say you heard that a wagon got in there once but you know nothing about that?

A. No, sir, I didn't see that in there.

Q. You had never known a truck to get in there?

A. No, sir.

Q. You say the railroad company keeps a man there at all times and keeps that crossing in good shape?

A. He rolls out the cinders there of a morning that the trains dump at night and before he goes out on the track to walk the section, he attends to that.

Witness stands aside.

page 146 }

DR. E. L. KENDIG,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Hall:

Q. You practice medicine, I believe?

A. Yes.

Q. And surgery?

A. Yes.

Q. Where?

A. At Victoria.

Q. Do you conduct a hospital there?

A. Yes, we run a hospital at Victoria.

Q. Do you do the work of the Virginian Railway Company in that hospital?

A. Yes, I have been surgeon for them for about 20 years I reckon.

Q. Was Mr. Hillsman sent there to you to make an examination of him?

A. Mr. McDowell wrote me a letter some time in April and asked me if Mr. Hillsman came there to make an x-ray examination of his knee.

Q. Did you make such an examination?

A. Yes, sir, I made an examination on the 19th of April.

Q. When Mr. Hillsman came there did you have any talk with him about what injury he had suffered, or when he noticed it or anything of that kind?

A. I ran over a brief history of the case with page 147 } him. I asked him when he was hurt and he said on February 22nd, and I also asked him about his injury to the knee, and he said he did not notice any injury when the accident happened, but the pain in the knee developed some time later.

Q. How much later, did he say?

A. My impression is that he said it was three or four weeks afterwards.

Q. Did you make a physical examination of both of his knees?

A. I made an examination of his knees, I did not make a general physical examination of his body, I made an x-ray examination of the knee that was injured and then I made a manual examination or inspection of the other knee, although I did not make an x-ray examination of the other knee.

Q. Take your manual or physical examination of his two knees: What condition did you find them in?

A. From an inspection and examination of the two knees, I did not see any difference in them.

Q. Were either of them or both of them enlarged any?

A. I don't think they were, I don't know what they are generally but both appeared to be the same size at that time, that is, comparing the two.

Q. A stout man like Mr. Hillsman, it would be hard to distinguish any enlargement of either one of them page 148 } or both?

A. I imagine it would, yes, sir.

Q. When you made the x-ray picture, what did it show?

A. Mr. McDowell asked me specifically to make an x-ray picture to determine whether there was any fracture of the knee or any foreign body in the knee. Mr. Hillsman thought perhaps there might be a piece of glass in it but the x-ray examination did not show any fracture of the bone, or any

fracture then or previous and did not show any foreign body.

Q. Did it show any enlargement of the bone or any deposit of callus?

A. There was some callus formation or a slight spur on the bone of the knee, several of those.

Q. What do those callus formations usually come from?

A. They come from an arthritis.

Q. How long after the arthritis condition develops is it until these callus formations will come?

A. A person usually has a case of arthritis for several years before those callus formations appears, they do not appear right away, they are a gradual deposit on the bones and take some years for them to form.

page 149 } Q. Could those callus formations that you found on his knee, on the x-ray picture have developed there as a result of an alleged accident on February 22nd?

A. No, sir, I don't think so, I think it will take several years for them to form.

Q. Suppose he had had an injury in this accident that would have brought on the pain and lameness of which Mr. Hillsman complains, how long after the accident would it have taken him to know that there had been an injury?

A. I think the pain would appear almost instantly. An injury to the knee of that kind would more than apt produce pain almost at once, or certainly after he got through the shock or excitement of the injury. Of course if he was excited in that way he might not have noticed pain, but he would certainly have noticed it as soon as that is over.

Q. You mean as soon as the excitement wore off?

A. Yes, sir.

Q. Do many people suffer from stiff or enlarged bones, or painful joints especially when they have reached Mr. Hillsman's age, who was then about 62 years old?

A. Yes, it is very common in people of that age.

page 150 } Q. In your experience, in medicine and surgery what percentage would you say of those enlarged and painful joints result from some kind of infection or muscular rheumatism, and what proportion of them result from licks or blows?

A. I could not answer that question, it is right hard to say what the percentage would be. I might say in my experience the larger part of people suffering with painful knees come from chronic arthritis, which is a form of rheumatism,

but as far as the comparative percentage of the two, that would be right hard to say.

Q. I would not expect you to say any definite percentage, but the idea of my question is does the larger number of them come from rheumatic trouble or arthritis?

A. I might say that most of them come from it.

CROSS EXAMINATION.

By Mr. Brock:

Q. You say that arthritis, which is a form of rheumatism, commonly manifests itself in people of Mr. Hillsman's age?

A. Yes, sir.

Q. In case an accident occurs where, we will say, the leg is injured, what is the tendency, is the tendency to aggravate the arthritic condition, or not?

A. In case he has previously had arthritis and page 151 } had it long enough to produce these deposits from it, it is possible for an injury of the kind to excite it and start the pain off, but in a condition of that kind that pain would start off sooner or later, any how, he would have pain from it later on, but that injury might be the cause of setting up the pain.

Q. Isn't it a fact where an injury is received to, we will say, the joint, particularly in a man who is past 50, isn't the tendency for any predisposition towards arthritis to settle in that joint; isn't that the tendency?

A. I don't think so unless the man previously had arthritis.

Q. Let me ask you again, take the case of Mr. Hillsman, we will assume that being 62 years old, symptoms of arthritis had set up in both knees little spur formations; you did not examine the right knee for spur formations, then he has an accident to the right knee, would not the tendency be to accentuate and excite that arthritis?

A. An injury of that kind might excite and bring on pain, but the injury of itself would not make the arthritis any worse, arthritis is a disease that develops in itself, and any injury or shake up or anything of that kind would not affect the arthritis except it might bring on an attack page 152 } of pain.

Q. Isn't it a fact that in most diseases, the disease is going to attack the weak spot; isn't that the tendency in all diseases to go to the weak spot; isn't that the natural tendency?

A. In a case of this kind, a case of arthritis, we don't know

which is the weak spot. You may have a case of arthritis that would affect one joint and not affect another, and we have no reason to say that joint is weaker than any other, but it is natural to suppose that any infection that you may have, any infection will attack the place in the body that is most susceptible to it, and the one which becomes infected, but it is impossible from a medical standpoint to say what causes that, what makes that weakness, or why one particular spot has a predilection for it and another has not. That is especially so in arthritis.

Q. And where a man has received an injury at the particular joint, a man who is predisposed to arthritis doesn't that injury he received, create a weak spot in that joint and create the tendency for arthritis to be excited and accentuated?

A. In this particular case the man had evidence of arthritis before the injury and it is possible for a jar of that kind, they say he sustained, to excite pain and make him know that he has arthritis there, but as far as bringing on an arthritis, as far as causing it is concerned, it page 153 } does not do that.

Q. Do you recall how many times Mr. Hillsman came to you?

A. I examined him on the 19th of April and I saw him several times after that, but I did not make any specific examination of him after that time. I saw him in Farmville once or twice, but as far as making an examination, I think it is limited to the one time, although I had some observation of the case after that.

Q. Did you, or not, on one of his visits to you, suggest that he go and see Dr. Southgate Leigh of Norfolk?

A. He came down to see me sometime after I examined him and he was still complaining and seemed to be dissatisfied with the general condition of affairs, so I told him I thought it would be a good thing for him to go down to Norfolk and see Dr. Leigh and I would write Dr. Leigh for him and send him down there. I did that, though mainly because his case was referred to me, it was not a case I had handled before that, and Dr. Leigh was Chief Surgeon of the Railroad, and I felt that I could not find any trouble there, and that I would refer him to Dr. Leigh to see whether he could, or not, so as to be certain about it.

By Mr. Hall:

Q. Did you find out whether Mr. Hillsman was page 154 } going to Norfolk any way at the time he visited Dr. Leigh?

A. He told me he was going to Norfolk, yes, sir, and I suggested he see Dr. Leigh while he was down there, and wrote Dr. Leigh a letter.

Q. Was he making the trip to Norfolk especially to see Dr. Leigh or not?

A. He told me he was going down there, that is all I know about it.

Q. You were asked something about an injury starting off this arthritis that had been dormant. What kind of a blow or injury would be necessary to effect the starting off of an arthritis, would it be a heavy blow or a light blow?

A. I don't know whether or not I could give you exactly in terms how much of a blow it would be, but I would imagine one that would cause arthritis, probably to be set off, it might be a lighter blow in one case than another one would, but I would imagine he would have to have certainly enough of an injury there to jar the knee considerably to do it, but that is a question I could not answer or tell you in exact terms.

Q. In any case would the injury have to be great enough for him to know he received an injury?

A. I think if he received an injury sufficient to start it off he would certainly know it at the time, or he
page 155 } should know it.

Witness stands aside.

DR. RAY A. MOORE,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Hall:

Q. What is your profession?

A. I practice medicine.

Q. Where do you practice?

A. Farmville, Prince Edward County.

Q. How long have you been engaged in practicing medicine?

A. About 25 years.

Q. Has your practice been general or have you specialized?

A. General.

Q. Did you make any examination of Mr. Hillsman of Farmville at the request of Mr. McDowell?

A. Yes, I examined him several times.

Q. Please state the dates of your several examinations?

A. I made a note of them before I came up here because

I did not think I could remember it.

page 156 } Q. You can refer to your record if you want to.

A. September 18th, 19th, 22nd, 24th, 25th, 26th, and 28th, 1931, and the following month, October 10th, 13th and 16th. I saw him repeatedly because Mr. McDowell asked me to go over him thoroughly.

Q. Did you have an x-ray picture made?

A. Yes, I had several x-ray pictures made.

Q. Of what portions of the body did you have x-ray pictures made?

A. I first had an x-ray picture made of the knee, and then of both knees for comparison and then I had an x-ray of the chest made.

Q. What did the x-rays of his knees show?

A. The x-rays of the knees showed practically the same thing in each knee. The report of the x-ray man was that there was no evidence of bone disease or displacement or any injury other than what we call chronic arthritis, that is, there were spurs or roughness about the bone, and lipping in where the joints came together, they showed that there were little spurs from this chronic arthritis, and that was the only thing he could find in the x-ray.

Q. Was there any difference between the two knees?

A. The two joints were practically the same.

Q. Did both of them show these formations of
page 157 } callus?

A. It was so stated in the x-ray man's report.

Q. If these enlargements of the bone or formation of callus there about the knees were due to arthritis within what time would they form after the arthritis developed?

A. All questions connected with arthritis or rheumatic conditions are rather indefinite, it is such a common infection. Patients do not consult a doctor as early as they do in things that are more acute. I never have seen the exact time stated when we get x-ray evidence of an arthritis, but I imagine it would be several years before you would see any x-ray evidence, because callus has to form bone enough to obstruct the x-ray, it would certainly be a year or two. I have never been asked that question before, or had it come to my attention, but I know that in treating, or thinking over cases that I have treated, they complained of the arthritis a long time before I have been able to feel that gritty feel as though there were little gravel in the knee joints, or

sand. That is what I felt at the end of Mr. Hillman's knee and asked the x-ray man particularly to look for this arthritis which I thought was present from that condition.

Q. In your physical or manual examination of him, you examined both knees?

A. Yes.

Q. Did you find in both knees evidences of this page 158 } callus formation?

A. Yes, I found in both knees, but I found more evidence of it in the right knee than I did in the left, but I did find it in both knees though.

Q. In moving his knee could you notice any roughness or friction?

A. There was no limitation of motion, that is, you could move the knee, both knees freely, but you could get that friction sound when you move your knee and keep your hand like that (indicating), not the cracking of it but a little gritty like in that joint.

Q. Did you find that in both?

A. Yes.

Q. In which was the roughness more discernable?

A. In the right.

Q. What would be your conclusion as to the condition of the arthritis in the two knees, in other words, in which one was it worse?

A. I don't think I could tell. When I made this examination there was about one-eighth of an inch, I took it to be swelling of the left knee, one-eighth of an inch further around than the right. I do not recall whether Mr. Hillsman is right handed, or not, but that would mean probably a little more than one-eighth of an inch swelling in that knee, page 159 } at irregular intervals, accompanying arthritis, there is a slight congestion or swelling, and I couldn't see any reason why he wouldn't have as much arthritis in one knee as the other, and in the x-ray plate later I had that evidence that said the same thing in both. I explained the fact that I did not hear it any more in the left than I did, that that was due to the fact that there was a little more fluid in the left so that the parts would float better, in other words, it is greased up, we compare it to lubrication of the bones, and the little spurs off the edge of the bone being forced apart just slightly on account of this little fluid in there, I thought that kept it from my getting a gritty sound, but I have no reason to say the arthritis is any worse in one knee than the other.

Q. I will ask you whether or not it is more or less common

to find arthritic condition in a man of Mr. Hillsman's age, he being around 62 years old at the time you examined him?

A. That is another question I have to answer purely right off the bat, I hadn't thought about that question, nor do I recall any statistics on it. From my study and knowledge of arthritis I feel that it is always due to some infection or some previous disease. I know we have so many technical terms, I don't want to get into it, but I don't know page 160 } how to talk about it here.

Q. I am asking you that question for you to tell the jury in plain, simple language, according to your experience how often you find that arthritic condition that you found in Mr. Hillsman, in a man of his age?

A. I believe any man who has lived to be 60 years old and has had a severe infection or severe toxic condition long enough to absorb and be present in his system would develop arthritis, on the other hand, I believe if a man can live to be 60 and not accumulate either the poison or infections, or from toxins in the intestinal tract, I do not see any reason why he should have any arthritis there, and I have seen x-ray plates, I mean without it.

Q. The point of my question is, is it a common occurrence?

A. It is a very common occurrence, yes.

Q. Now being a very common occurrence, from what does it come ordinarily, that is, from an infection or from some lick or blow or how?

A. It comes from infection, infectious causes would be frequent, tonsilitis, inflammatory rheumatism, diphtheria, any infection, and the toxic causes would be bound to be present, with constipation or faulty food habits, anything that interfered with elimination, and my idea page 161 } is arthritis is due to one of these two causes, either infectious or a toxic condition.

Q. In your experience have you run across many cases where arthritis or rheumatic condition was developed by what you doctors call a trauma or blow?

A. Trauma or a blow will cause it to flare up, arthritis, that has been dormant for some time, just because temporarily it congests and disturbs circulation, for the same reason that chilling will cause a cold.

Q. If it had not been in existence or was not, what you call, chronic arthritis, would a blow develop it?

A. No, I never heard of arthritis developing from an injury.

Q. Suppose a man has arthritis, does it come on him sud-

denly and unexpectedly often, and does he have these pains constantly?

A. Pain and disability comes on suddenly and unexpectedly and lasts for a while and then disappears, but arthritis has probably been existing for some time when that happens.

Q. Have you had any experience of a pain suddenly coming on in a joint that had arthritis in it or a condition of that kind?

A. Probably the reason I have studied it so much is because I have both of those cases working on me that I have mentioned, infection and the toxic condition. I page 162 } had inflammatory rheumatism in youth and later gall bladder trouble that gave me both causes and I am watching for arthritis. I will be taken with a pain immediately and sometimes it will last a day or two when I can hardly walk, then it clears up just like it came, maybe in the shoulder. I won't say, and I don't know how many doctors have been talking here today, and I don't know whether I am making myself clear, but in the medical profession you cannot find two doctors that will agree on what is rheumatism or arthritis, and every fellow has his own ideas about it, but I am stating to you the theory or basis or the classification on which I have been working for a number of years, and on which I think the majority of doctors in the United States are working on.

Q. You made a general examination of Mr. Hillsman and you had an x-ray picture taken of his chest. What did that show?

A. Yes, there was an x-ray picture of the chest, but I don't remember exactly what the x-ray man stated, that is, Dr. Knight read the plate and he said that there was an enlargement of the heart shaft but he wasn't satisfied just what that was due to, but there was no lung trouble.

By Mr. Brock: We object to this evidence, the x-ray man should come here and testify himself.

By Mr. Hall: If he has got Dr. Knight's report, he can testify.

page 163 } A. I am not an expert x-ray man myself.

By Mr. Hall:

Q. Look at his report and see what he says about the enlarged condition of his heart, if anything.

A. It was made on October 9th, 1931.

Q. Just take his report and turn to it, the x-ray picture of Mr. Hillsman's chest and see what he says about it.

A. "The linear markings and hilus shadows are somewhat exaggerated but there is no evidence of a pulmonary lesion. The heart shadow is almost triangular in outline. The aortic shadow is six cm. in diameter and the mitral border is almost straight in outline. This is somewhat suggestive of a pericarditis but the apex of the heart cannot be seen for it is obliterated by a rather high diaphragm."

Q. Would that condition of the heart that is reported there have anything to do with this arthritic condition, or this lameness or pain that he has in his leg?

A. That is the reason I had the plate made. I thought in thumping over the chest I found that area to be larger than normal and I thought this was a result of an old infection showing itself on the heart, and the x-ray man, you see, finds the area enlarged, the broad part at the bottom, where it ought to have been the small part at the bottom. You notice he said that was not positive and he thought probably it was the diaphragm, pushed up so high on the heart that he did not get a correct picture.

Q. Now going back to my original question, would that have any effect or any bearing on the pains or lameness that Mr. Hillsman has been complaining of?

A. That would give you the basis of the infectious arthritis. I was trying to get the cause of the trouble with hopes of giving relief and my diagnosis was heart weakness, shown by a slight enlargement of the heart, and that is why I had the x-ray made, and this is shown by the swelling of the feet and shown by fast breathing on exertion, and that is why I had the examination made, to show that the cause of such condition could have been an infection.

Q. You had his urine examined?

A. I examined the urine.

Q. What did that show?

A. The examination was negative. The Mosenthal test, that showed slight limitation of breathing, function, but I wouldn't say any more than you expect in a man 60 years old.

Q. So you found no infection of his urine, that did cause any trouble?

A. No, sir.

Q. Did you make a blood test?

A. I don't think I made a blood count. I usually take a blood test in routine but I have forgotten about that.

Q. Can you refer to your report and say whether you did, or not.

A. I haven't got it all over here, but I am practically sure if any blood tests were made they were negative, but I haven't my record here.

Q. After these examinations you made of Mr. Hillsman, and these x-ray pictures and the report, what were your general conclusions as to his physical condition and the causes of his condition, as you found them?

A. You have made no reference to what Mr. Hillsman came to me complaining of. Do you want me to state that?

Q. Yes, sir, he was complaining of soreness and lameness in his left knee, wasn't he?

A. Yes, he came to me complaining of weakness in going up and down steps, and in certain position of pain in the left knee, and the question was, what was it caused by and what to do for it. I examined both knees and I did not find any limitation of motion I could not tell anything about the power in his joint, I didn't have an apparatus to test that, but I saw no physical evidence of trouble in the knee, he did have a little tenderness on the inner side of
page 166 } this left knee.

Q. What could that tenderness have been caused by? Could that tenderness have been caused by arthritis?

A. He thought it was caused by this jar that he got, but I couldn't tell whether that had anything to do with it, or not.

Q. What else?

A. I could not make a diagnosis as far as the knee was concerned. The only evidence I could get of any trouble about the knee was Mr. Hillsman's statement, and the only trouble that I found the matter with him was, as I wrote up my findings, miocardic weakness and obesity.

Q. What do you mean by that?

A. I mean he was overweight, he has lived too well, and chronic arthritis. I could not make out any acute condition or anything in that knee except pain, a subjective symptom.

Q. What is the most common cause of the kind of pain that you found, or that he said he was troubled with?

A. Barring accidents or trauma, the most common cause would be what we term rheumatism or arthritis.

CROSS EXAMINATION.

By Mr. Watkins:

Q. Doctor, you say that everybody who is 50 years old has all these things that you call spurs, and these page 167 { big names, you say that is ordinary with everybody over 50 years old, and they are affected that way?

A. I hope not, I am over 50 and I have not developed any yet.

Q. You have not developed any spurs?

A. I said I believed if a person could live to be 60 and not have any infections or any toxic condition and that their joints would be as smooth as they were in their younger life, but I said it is very seldom we get to 60 without developing something.

Q. So generally speaking everybody except those exceptional cases have these little difficulties you have been talking about here, these spurs, &c. Isn't that true?

A. If your exceptional cases are people who are not diseased.

Q. You made about as thorough an examination of Mr. Hillsman as it is impossible to make, didn't you? And he was coming to you off and on for about a month, wasn't he?

A. Yes, I studied him as carefully as I could.

Q. And didn't you find that he was as near perfect condition, considering a man 60 years old, as you ever found?

A. No, I did not.

page 168 { Q. Didn't you say to Mr. Hillsman that his physical condition was that of a man 50 years of age?

A. No, sir.

Q. You never did?

A. No, sir.

By Mr. Hall: That was Dr. Leigh who said that, or Mr. Hillsman said it was Dr. Leigh.

By Mr. Watkins:

Q. Did you find any other noticeable trouble with Mr. Hillsman except this knee?

A. I didn't find trouble with the knee, the only evidence of trouble with the knee was Mr. Hillsman's statement, which, of course, I did not question, and that is why I studied it so

hard, but I did find sufficient cause, I found as I thought, this heart condition.

Q. You didn't find that diseased?

A. We did not follow it up.

Q. You were looking for all kinds of disease that would cause this trouble in his knee?

A. I was looking for infection which would explain that arthritis, which I did find.

By the Court:

Q. What was that, I did not understand you.

A. I found chronic miocarditis, I found heart failure when he walked up the steps, he was puffing, and both ankles were swollen, the heart sounds were muffled and difficult to hear, those are definite stereotype chemical findings that the heart muscle is giving away, and that is what I tried to state.

By Mr. Watkins:

Q. That his heart was giving away?

A. Yes, sir.

Q. And that was the cause of the condition in his knee?

A. The same thing that caused that infection, I don't know what, would also cause the condition in the knee.

Q. You got Dr. Knight to take these x-rays?

A. Yes, sir.

Q. I understood you to say you could read x-rays too?

A. Every doctor, I think, does a certain amount of his own interpretation, but we always rely on a person who has been doing it all the time.

Q. Dr. Knight is doing it all the time?

A. Most of the time. We both sent these plates off, I got other interpretations and so did he.

Q. Who suggested sending them off and getting other interpretations?

A. It is just up to you, whenever there is a question. He sent for his own satisfaction and I sent for mine.

Q. Were you satisfied with his reading?

page 170 } A. I wanted to be absolutely sure, I don't take one person's opinion on anything, if I can get another.

Q. But you did send it off?

A. I sent it to a man in Lynchburg.

Q. Didn't you send it to Mr. Talley in Richmond, an expert?

A. Dr. Knight sent his to Talley.

Q. Did you ever see that report?

A. Yes, sir.

Q. Is his report different from Dr. Knight's?

A. I believe Dr. Knight gave me his report over the telephone, my recollection is that Dr. Knight told me his report included his consultation.

Q. You did not have a consultation with Dr. Knight prior to the sending of those x-rays off to Richmond?

A. Yes. There is nothing unusual about that, we doctors all check on those things, and I told him I wanted to check, and he said he wanted to check it, we talked about it beforehand.

Q. You think that you found no difference in the measurement of the leg except one-eighth of an inch, which might be due to the fact that Mr. Hillsman might be right handed?

A. No, sir, I said just the opposite, I said if he was right handed that left knee would be a little smaller.

Q. So if it happens to turn out that his left leg page 171 } was larger when you took those x-rays by half an inch, wasn't it?

A. I did not measure it at that time—at the time the x-rays were taken.

Q. If Dr. Knight states that was his measurement you would not contradict him, would you?

A. No, sir, but the x-ray would not show the size of the leg.

Q. Didn't you measure that left leg yourself and find that was larger than the right?

A. That is what I stated.

Q. Now did Dr. Knight report to you that there was any permanent injury in that left leg?

A. No, Dr. Knight told me that the x-ray did not show anything.

Q. Now isn't it a fact that if you have got what you call arthritis or rheumatism and you have a severe sprain in the joints, that it irritates the covering of that joint and causes eventually, if it is not arrested, to become bone and that knee becomes stiff?

A. I don't believe I quite understand that.

Q. Read the question. (Question read.)

A. A sprain is a pull on the ligaments and does not get the joint at all, it pulls the cartilage, and it would bring about a congestion, a painful condition there that should dis-

appear. You probably mean after a jar, he didn't
page 172 } get any sprain, he told me he thought he just
jarred the knee.

Q. I don't know the difference between a jar or otherwise, but what I have in mind is this, isn't it a fact that if your knee is knocked out of joint that it injures the surface of that bone?

A. If the knee was knocked out of joint it would be obliged to tear several ligaments, and the person would be disabled at the time.

Q. You have already testified here that you found a certain amount of trouble on the surface of his joints. Is that true, in his left leg?

A. I testified to that gritting when he moved the knee, and there was x-ray evidence of spurs from arthritis, and on my physical examination of the joints absolutely there was no evidence of any injury except on pressure on the internal or inside of the head of the leg bone, right here (indicating), in certain ways I would rub it and I would find a tender spot, and with him moving the leg like this (indicating) you would hit that tender spot, and that is the only evidence of injury I ever mentioned in the left knee.

Q. Was Mr. Hillsman limping?

A. He limped when he would go up and down the steps, he told me that is why he could not understand it, he could walk on the level all right, but when he would go to step up or step down especially, he would seem to lose
page 173 } power.

Q. That is a natural cause from an accident of that kind, isn't it?

A. Any cause that will disable the knee joint.

Q. Have you treated Mr. Hillsman for this injury?

A. I treated him some.

Q. What kind of treatment did you give him?

A. I advised him to use heat, I used the infra-ray on it, but I don't think we followed it up long enough. And I am not equipped to do it, and I advised him to go somewhere and try it out, where they were fully equipped, that is what I wanted him to do, and I don't remember whether I gave him any medicine or not, I don't remember.

Q. In other words, you thought the joint was injured, didn't you?

A. I will be frank with you, I never figured out whether there was an injury, I couldn't see that an injury that was as slight as that seemed to be at the time would have given

anybody trouble, when I saw him, but I didn't see him until September.

Q. You would not suggest to Mr. Hillsman to go away and take electrical treatment for a knee that you didn't think there was anything wrong with?

A. I wanted him to take it for both knees, I wanted him to take it for the arthritis.

Q. Is that a very expensive treatment?

A. I don't know what it costs, I think most every hospital treatment is expensive. Mr. Hillsman was not interested enough for me to take it up for him, I was going to see what I could arrange to do it for.

Q. Arrange with who?

A. I suggested that he go to Dr. Leigh, because Dr. Leigh had seen him once.

Q. Who is Dr. Leigh?

A. He is the Chief Surgeon of the Virginian Railway Company.

Q. Isn't it quite likely that if Mr. Hillsman had not this accident to his knee that this arthritis would have remained dormant, just exactly like the other joints?

A. No, it would certainly give him trouble one time or another. I have never heard of a person that you feel this grittiness in the joints, not having other symptoms.

Q. Breaking out on the left joint shows that there was weakness in that joint that was not in the right joint?

A. I could not answer that.

Q. Are you a surgeon for the Virginian Railway Company?

A. Yes, sir.

By Mr. Hall:

Q. Does the fact that you are a surgeon for the railroad company influence your testimony?

page 175 } A. If anything could influence my testimony in stating anything except the way I see it, it would be the fact that Mr. Hillsman was a fellow townsman of mine and Bob Brock has been a friend of mine since childhood. I have studied this thing, it is a very hard case and I wanted to see if I could do anything for him, but I haven't had a chance to do that. We like to have a patient a long time but I did not get him very long. Then another thing, I knew that I was going to have to testify and I have studied statistics and I have talked over the situation with other

doctors, men who make a specialty of that work, and I have not been able to make a diagnosis. I have not ever been able to determine to my own satisfaction whether the injury had anything to do with it, or not.

Q. This electrical treatment you refer to, is that a common treatment for arthritis?

A. Yes, but the only part of this treatment I have at the office is just what we call infra-ray, it is a very powerful heat ray that is used for all forms of arthritis, and used for any kind of pain, and I use that at times, and wanted him to take that treatment because I thought whatever the condition was due to, whether arthritis or injury, that that would have been beneficial and that is why I advised him to go away and take this treatment.

Q. Isn't this electrical treatment of the joint page 176 } for arthritis often *giving* by these electrical pads that they have?

A. Yes, but an electrical pad merely gives a straight heat. There are three forms of heat used in the treatment, the infra-red, and the heat ray, which compares to the ultra-violet, and the light ray.

By the Court: What has that evidence got to do with this case, gentlemen?

By Mr. Hall: He recommended that treatment to Mr. Hillsman for his arthritis. However, I do not want to go into it, I do not think it is material, but the only point I wanted to bring out is that the electrical treatment is an approved treatment for arthritis. That is all.

By the Court: All right then.

By Mr. Hall:

Q. That is what you say, Doctor?

A. Yes, sir.

Witness stands aside.

page 177 }

J. C. LaPRAD,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. You live at Abilene, do you not?

A. Yes, sir.

Q. I believe you are a merchant there?

A. Yes, sir.

Q. How long have you been a merchant at Abilene?

A. Since 1915.

Q. Your store is right across from the station, is it not?

A. Yes, sir.

Q. It is shown here on this map?

A. Yes, sir.

Q. There is no obstruction between your store and the station?

A. None at all.

Q. And you can see out there from the front of your store?

A. Yes, sir.

Q. Did Mr. Hillsman come to your store and get you up the night his car went into this ditch?

A. He got me up early that morning.

Q. Before he left Abilene?

A. Yes, sir.

Q. He wanted some oil, I believe?

A. Yes, sir.

Q. And you sold it to him?

page 178 } A. Yes, sir.

Q. Did he say anything about being hurt?

A. No, sir, he did not.

Q. Are you familiar with the loop driveway that is shown on that map?

A. Yes, sir.

Q. Is there a well beaten track around there as outlined on this map?

A. Yes, sir.

Q. Is it apparent to anyone making that turn around there, where other vehicles have gone previous?

A. Yes, sir.

Q. Are you familiar with this crossing over the drain?

A. Yes, sir.

Q. How wide is it at the top?

A. 16 feet.

Q. Did you measure it?

A. Yes, sir.

Q. Is it timbered up from down at the pipe, at the bottom of the ditch, up to the top of the road?

A. Yes, sir, it is timbered from the top of the culvert.

Q. Does that timber run perpendicular or does it slope?

A. It runs right straight up.

Q. Is there any soil around there that would
page 179 } be slippery in wet weather?

A. No, sir, it is cinders all the way around there.

Q. Do those extend across the drain and over towards your store?

A. Yes, sir.

Q. Are you familiar with how culverts are constructed on roads in Charlotte County?

A. I have crossed a good many of them, yes, sir.

Q. Is it customary to put any barrier or boards or anything at the end of culverts on your county roads, such as this one was?

A. No, sir, I never seen one with anything more than just like that.

Q. Is that driveway across this drain as wide as the average on the county roads in Charlotte County?

A. I think so.

Q. Is there anything in that situation there to make it dangerous to people, passengers or people coming to Abilene Station and leaving?

A. None at all that I know of.

Q. Have you personally ever had any trouble in making that drive around there?

A. No, sir.

Q. Are you in any way connected with the Virginian Railway Company?

A. No, sir.

Q. Have you any interest in this case one way
page 180 } or the other?

A. None at all.

Q. Did those timbers that I have asked you about extend up higher than the surface of the road?

A. About three or four inches high.

Q. Was that perfectly apparent to anyone coming around that curve to cross the bridge?

A. Yes, sir.

Q. Did it mark the outlines of the road across that bridge?

A. Yes, sir, it was visible, about four inches high, up above the top of the surface.

Q. Was there anything in the world to keep a man with lights on his car from seeing the timbers on both sides of that bridge?

A. Nothing at all that I know of.

CROSS EXAMINATION.

By Mr. Early:

Q. Before this accident and before this ditch was filled up what was the depth of that ditch?

A. I think about four feet, or something like that.

Q. Wasn't that ditch deeper than your head?

A. I don't think so, no, sir.

Q. You are just guessing at it?

A. Yes, sir, I have been in it and I can see over it.

Q. When was that?

page 181 } A. Several years ago.

Q. How much did that pipe extend out from the end of the roadway?

A. I don't think it extends any, it came up even.

Q. You mean the roadway was built up from the very tip end of the pipe?

A. Yes, sir, there are some cross-ties in there about even with the end of the pipe.

Q. And it was built up perpendicularly?

A. Right straight up.

Q. And according to you there was a sheer drop there of some four or five feet?

A. Something like four feet.

Q. A perpendicular drop?

A. Yes, sir.

Q. And the only protection to that place was, you think possibly these switch ties which might have been three or four inches up above the road?

A. Yes, sir.

Q. And it is a fact these cinders on this roadway and all around the station grounds were constantly being replenished?

A. Not constantly, but they were sometimes.

Q. From time to time this was done?

page 182 } A. Yes, sir.

Q. That is true, is it not?

A. Yes, sir, from time to time.

Q. And not only up on the roadway but they were put from the ditch bank back to the station?

A. I don't remember any being put between the station and the ditch, there were some there but they never replenished that.

Q. You don't know of anything put between the station and the ditch?

A. Being replenished, but there was some there.

Q. You do not recall some additional cinders being put there?

A. Yes, sir.

Q. The railroad company kept the ruts out of this place?

A. I never saw any ruts in it.

Q. And this roadway was made of cinders?

A. Yes, sir.

Q. And it was cindered on the side next to the station?

A. Yes, sir.

Q. And on the other side?

A. Yes, sir.

Q. So there was nothing to distinguish the roadway there from the balance of that land?

page 183 } A. The wear of the cars going around there, you could see that.

Q. On a dark rainy night it would be mighty hard to distinguish that roadway from the land four or five or six feet on either side of it?

A. Not if you had good lights on your car, I don't think so, it would be about as plain as in the day time.

Q. Why do you say that it was all cindered and no ruts in it, and people would drive beyond what you call the driveway, they drove off sometimes to park?

A. I never saw but one car over there at one time, they parked between my store and the station.

Q. There were tracks leading in and out of that roadway?

A. Yes, sir, all around.

Q. And you couldn't tell when you were in the road or out?

A. Yes, sir, you could tell that by the cinders being down where they travelled.

Q. You say you measured the width of the road?

A. Yes, sir.

Q. Did you do that at the request of the Virginian Railway Company officials?

page 184 } A. No, sir, I did not.

Q. Who?

A. I heard them talking about it and I went down there one day with Mr. Kiser, and carried my tape line with me, and at the same time I had measured it with Mr. McDowell there, but I did it at my own suggestion.

Q. He is the Claim Agent of the Virginian Railway Company?

A. Yes, sir.

Q. And Mr. Kiser is the depot agent at Abilene?

A. Yes, sir.

By Mr. Ozlin:

Q. You say you suggested measuring it yourself?

A. Yes, sir.

Q. It was not suggested by Mr. Kiser?

A. No, sir, I took my tape line down there and measured it.

By Mr. Early:

Q. Mr. Archie Priddy testified that the pipe projected out 15 inches on each side of that roadway.

By Mr. Ozlin: He said it may have.

A. I think it came up even.

By Mr. Early:

Q. You will not contradict him in that respect if he said that?
page 185 } A. No, sir, but I think it came even.

Witness stands aside.

S. A. NELSON,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. Where do you live?

A. In Charlotte County.

Q. You are not connected with the Virginian Railway Company and never have been, have you?

A. No, sir.

Q. You are familiar with the Abilene station and the surroundings, are you not?

A. Yes, sir.

Q. I believe you drive a school bus, don't you?

A. Yes, sir.

Q. How long have you been driving that school bus?

A. I began in 1929.

Q. Do you drive the school bus to Abilene station?

A. Yes, sir.

page 186 } Q. Do you drive around the loop there at the station in making your turn?

A. Yes, sir.

Q. Do you do that daily?

A. Yes, sir.

Q. How long is the school bus?

A. I don't know, I never measured it.

Q. Is it longer than an ordinary automobile?

A. I think so.

Q. How many children does it hold?

A. I have had 52 on it.

Q. Did you ever have any trouble making that curve around there and crossing the culvert over the drain?

A. No, sir.

Q. Is there a well defined roadway leading around by the station and down across this drain over towards Mr. LaPrad's store?

A. I think so.

Q. What I mean by that is tracks of vehicles making that curve around there, visible to anyone going around there?

A. It is to me.

Q. In other words, the wheels make an impression in those cinders, do they not?

A. Yes.

Q. Is it a well beaten track around there?

A. Yes, sir.

page 187 } Q. How wide is that culvert over that drain?

A. I don't know, I never measured it.

Q. Have you ever observed the way it is timbered up at each end?

A. I never paid no particular notice to it, I noticed there was a piece of timber something like a switch tie at each end of it.

Q. Did that extend above the level of the road?

A. I think so.

Q. About how many inches?

A. I don't know, but you could see the wood up there.

Q. On both sides?

A. Yes, sir.

Q. That would mark out the road around across that culvert?

A. Yes, sir.

Q. About how many times a year do you reckon you drive around there?

A. We go around there twice a day, five days a week, from 8 to 8½ or nine months.

Q. Ten times a week for eight or nine months a year?

A. Yes, sir. Morning and evening I go around there.

Q. And you never had any trouble in going
page 188 } around there?

A. No, sir.

Q. Have you driven around there at night?

A. Yes, sir.

Q. Did you have any trouble going around there at night and making the curve?

A. No, sir.

Q. Mr. Nelson, are you familiar with the culverts on the County Roads in Charlotte County?

A. I don't know, I don't travel very much over Charlotte County, but I am familiar with the road from here to Abilene.

Q. All right, take that road, are there any culverts on that road that are no better constructed and no better protected than the one at Abilene Station?

A. I don't know, but there are some bridges that we cross that are mighty narrow.

Q. Are there any bridges where there is a drain pipe under the road?

A. Yes, sir.

Q. Is there any barrier put at the end of those drain pipes?

A. Some of them there is not anything, but some of them have got concrete abutments put up.
page 189 } Q. Those concrete abutments, how far above the top of the road do they extend?

A. I don't know.

Q. Just a few inches, isn't it?

A. Yes, sir.

Q. And some of them don't have anything?

A. No, sir, some of them haven't got anything.

CROSS EXAMINATION.

By Mr. Early:

Q. Mr. Nelson, where this accident occurred, and where these switch ties were lying alongside of the road, they were put in there to hold the cinders in the road and not as a barrier?

A. I don't know what they were put there for.

Q. That is a fact, isn't it, and it is no barrier to keep a man from running off the road?

A. I don't know what it was put there for.

Q. They are no barrier to keep a man from running off the road, you say they are running alongside, that is true, isn't it?

A. I don't know.

Q. They have the effect of holding the dirt up there.

A. Is this mark for the sills or ties?

Q. I suppose that indicates the ties, or the end of the culvert.

A. They stick up there some, and it looks like to me it would help some if a person was to butt up
page 190 } against them, it would check them up some.

Q. In answer to a question by Mr. Ozlin you said you reckoned they were up about the level of the road?

A. I said you could see them.

Q. Didn't you say you reckoned they were up about the level of the road?

A. I don't know about that, I said they were up where you could see them.

Q. And at times new cinders are put in here between these switch ties? And the cinders are built up higher than these switch ties?

A. I don't know whether they are, or not.

Q. You just don't know the condition of the road across that culvert?

A. I think I do.

Q. You think you do?

A. I ought to know, I go over it twice a day.

Q. Isn't it a fact that cinders are scattered all along here between this ditch bank and back to the depot?

A. From the ditch bank to the depot?

Q. Yes, sir.

A. They are now.

Q. Were they not at the time this accident happened?

A. I don't know whether they were, or not.

Q. If you don't know whether they were, or
page 191 } not, how can you be certain there was such a well-defined road?

A. Because I went around there.

Q. Witnesses have testified that there were cinders on this side of what you call the driveway and back to the depot, and witnesses have testified this was kept raked and no ruts were allowed to be made in this so-called roadway. How could you distinguish the roadway from the balance of this ground around here?

A. How could I distinguish it?

Q. When there were no ruts and it was all cinders?

A. I never saw any ruts in the cinders, unless they were powerful deep.

Q. And cars would drive off this, what you call, travelled roadway and park on both sides. That is true, isn't it?

A. I don't know, I haven't seen them park on both sides.

Witness stands aside.

page 192 }

J. M. DANIEL,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. I believe you are now a merchant in this County?

A. No, sir, just over the line, in Prince Edward.

Q. You have lived in this County, have you not?

A. Yes, sir.

Q. And didn't you for a number of years drive a public conveyance or jitney, I believe they call them?

A. I did a few years ago.

Q. How long ago was that?

A. I think 1916, 1917 and 1918.

Q. Is Abilene your station for getting your merchandise now?

A. Yes, sir, what stuff I have shipped in.

Q. How often do you go there?

A. I am not going there as often as I did six or eight months ago, I go there every couple of weeks now.

Q. Previous to that time did you go there oftener?

A. Yes, sir.

Q. And in driving that conveyance how often would you go to that station?

A. Sometimes every day, sometimes two or three times a week at least.

Q. Are you familiar with the condition of the station grounds, and that driveway that goes across this
page 193 } drain?

A. I think so.

Q. Tell the jury if there was a well defined roadway leading around by the station and then on across this drain over towards Mr. LaPrad's store?

A. Yes, sir, there was a plain road all the way around, I had occasion to go there day and night.

Q. Was there anything to keep a man from staying within this beaten track as he went around there?

A. I didn't see any reason why he couldn't stay in the beaten track.

Q. Do you know how wide that culvert over the drain was?

A. No, sir, I don't.

Q. You never measured it?

A. No, sir.

Q. Did you ever have any difficulty in making it across there or making that turn?

A. No, sir.

Q. You say you have been across there day and night?

A. Yes, sir.

Q. What was it to mark each edge of this culvert over the drain?

A. A piece of timber.

Q. What were they, switch ties?

A. They looked something like that, I never
page 194 } measured them at all, they were on each end.

Q. Did they extend above the level of the roadway?

A. Yes, sir, two or three inches, possibly more.

Q. And were they clearly visible to anyone coming around that loop?

A. Yes, sir.

Q. Are you familiar with the general county roads in the vicinity of Abilene Station?

A. I travel them some.

Q. Is this culvert constructed as safely as the average one on the county road?

A. I should think so.

Q. Is there anything on the usual culvert or drain in the public roads, at each end, to mark it or keep anyone from going off the end of it; I am talking about a drain under the road.

A. You mean on the county roads?

Q. Yes, sir.

A. In Charlotte County they have some concrete abutments. In Prince Edward, between my place and Hampden-Sidney I do not think there is any abutments on the side.

Q. Is there anything at each end of the culverts to mark them at all in that county?

A. No, sir.

Q. These concrete abutments, how high above the level of the roadway do they usually extend?

page 195 } A. They vary to some extent.

Q. From a few inches up to what?

A. Eight or ten inches, I would think.

Q. Is there any more danger about this particular culvert than about the average culvert on county roads, in Prince Edward and Charlotte Counties?

A. I should not think so.

CROSS EXAMINATION.

By Mr. Brock:

Q. About how deep is that ditch on each side of that culvert?

A. I haven't any idea, I never had any occasion to get in that ditch.

Q. You say you don't know how wide the bridge was?

A. No, sir, I don't. I never had any occasion to measure it.

Q. Did you ever drive there on a rainy night?

A. Yes, sir.

Q. Do you know where the pipes were put underneath it?

A. I couldn't tell you where the pipes were underneath the bridge.

Q. Do you know whether this roadway was the same width at the bottom of the ditch as it was at the top; you say you don't know how wide it was at the top, do you
page 196 } know whether it was as wide at the top as the bottom of the ditch?

A. I couldn't say.

Q. How was it constructed; do you know?

A. All I know it is a piece of timber on each end, and filled up, it seems like, with cinders on top.

Q. From the bottom of the ditch where the drain pipe runs to the surface, what was that filled in with, if you know; you say there were cinders on top, what was the rest of it?

A. I couldn't tell you.

Q. And you don't know whether it was as wide as it was at the top?

A. No, I wouldn't say.

Q. Do you know whether the pipe jutted out on each side of this fill?

A. I don't know that there was any pipe in it.

Q. These cinders, do they extend from the bank of the ditch all the way up to the station?

A. How is that?

Q. In between the ditch and the station, is that all cinder in there?

A. I think so.

Q. Is the roadway itself marked or is it all pretty smooth from the ditch running back to the station.
page 197 }

A. The roadway was filled all around there.

Q. Would you be able to say how wide that road was?

A. No, sir, I couldn't say how wide the road was.

By Mr. Hall:

Q. Mr. Brock asked you if the road was well marked around there, and you didn't answer that part of his question?

A. The road was well marked, I think.

Witness stands aside.

Court adjourned until tomorrow morning, Thursday, April 5th, 1932, at 10 o'clock A. M.

page 198 }

Thursday, May 5th, 1932.

MORNING SESSION.

By Mr. Brock: If Your Honor please, with the consent of these gentlemen, we want to recall Dr. Thos. E. Knight out of order.

By Mr. Hall: That is all right.

DR. THOS. E. KNIGHT,
Recalled, for Plaintiff.

By Mr. Brock:

Q. Dr. Moore testified on yesterday that the x-ray plates showed that the heart was in an abnormal position, and the apex, I believe he said, could not be seen. You testified you made this x-ray examination?

A. I have a report made on the 13th day of October, 1931, and I took the report from the hospital files. The heart was measured from an x-ray standpoint, and the total diameter of the heart is compared with the transverse diameter of the chest and is within normal limits. This rules out cardiac hypertrophy, that is, cardiac enlargement. There is also no evidence of pericardial effusion or fluid in the pericardial sac, that is the sac that covers the heart. Conclusions: Negative for the heart. This was written on the 13th of October, 1931.

Q. So I understand your x-ray findings are that page 199 } the heart was normal?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Ozlin:

Q. This report was made by somebody in Richmond, was it not?

A. No, sir, it was made by me.

Q. Is that your writing?

A. It is the stenographer's writing.

Q. Didn't you send these plates to Richmond to be read?

A. I sent them down there, I thought probably it might come up in Court, and the plates were sent to Richmond sometime in December, I think, after I had seen Mr. Hillsman. The heart was normal, according to Dr. Talley's report, he approved my report and he did not even mention the heart, that it was normal. If it had been abnormal, he would have mentioned it.

By Mr. Brock:

Q. You made this report to Dr. Moore yourself?

A. Yes, sir, all reports are sent out in duplicate.

By Mr. Ozlin:

Q. The fact is that you and Dr. Moore simply disagree on that point?

A. I don't know, I sent the report to Dr. Moore.

page 200 } By Mr. Brock:

Q. You made the x-ray for Dr. Moore?

A. Yes, sir.

By Mr. Hall:

Q. Did you and Dr. Moore discuss this situation, with reference to what the x-ray showed as to the heart?

A. I don't recall, I know I sent my report in.

Q. Didn't Dr. Moore say then, as he stated on the witness stand yesterday, that the diaphragm was in the way there, so that you couldn't tell from the x-ray picture?

A. This was the final report.

Q. Was there any enlargement of the heart, or not?

A. The first examination—I don't know whether I can explain it, or not—but the x-ray plate was on the wrong slant, so the second plate was taken and I read you the final report.

Q. You did not make any measurements or any physical examination.

A. Yes, sir, I measured the heart from the picture.

Q. I mean from the subject itself, you made no measurement?

A. I don't think you can measure the heart accurately from the subject, but this is absolutely accurate, the x-ray measurements.

By Mr. Brock:

Q. You made this x-ray plate for Dr. Moore and made this report to him?

A. Yes, sir, in October, 1931.

page 201 } By Mr. Ozlin:

Q. Did you make your final report to Dr. Moore and discuss that with him?

A. I made a final report the day he was examined and copies were sent out to Dr. Moore and one was kept in the hospital.

Witness stands aside.

page 202 }

P. O. CHAPPELL,
Recalled, by Defendant.

FURTHER CROSS EXAMINATION.

By Mr. Ozlin:

Q. Mr. Chappell, are you interested in the outcome of this case

A. No, sir.

Q. You are a brother in law of Mr. Hillmans, are you not?

A. Yes, sir.

Q. Did he marry your sister or did you marry his sister?

A. We married sisters.

Q. You have, since you testified on yesterday, been back to that station making some measurements there, haven't you?

A. Yes.

Q. So you are right much interested in the outcome of the case, are you not?

A. Of course, personally I am.

Witness stands aside.

page 203 }

J. H. WATKINS,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. What part of the county of Charlotte do you live in?

A. Charlotte Courthouse.

Q. You were on the Board of Supervisors of this County for a number of years, were you not?

A. Four years.

Q. As Supervisor, did you have charge of the working of the County roads in your District?

A. The Road Superintendent had charge of the working of the roads, but of course he reported to us.

Q. Mr. Watkins are you familiar with the situation around Abilene Station, on the Virginian?

A. Yes, I am pretty well acquainted with it.

Q. Do you go there?

A. I have been there a dozen times, I guess, but I haven't been there recently.

Q. What do you mean by very recently?

A. I was there last summer, that was the last time I was there.

Q. Were you familiar with the condition of this driveway around the station and the crossing over that drain in February, 1931?

A. Yes.

Q. Please state to the jury if you considered that a safe driveway for any man using ordinary care in
page 204 } making the curve and crossing this drain?

By Mr. Brock: We object to the question because it is asking for an opinion. That is for the jury to determine.

By the Court: On what theory do you ask his opinion?

By Mr. Ozlin: I will withdraw the question.

Q. Please state to the jury what were the conditions of that driveway and the culvert over this drain?

A. While I was a member of the board the people around Abilene asked the County to take over that little piece of road and maintain it, which we finally did.

Q. You mean the road up to the station?

A. Yes, just a very short distance there. The County did not take the road over, but just graded and maintained it. I was down there several times during that time to look

at it, and as I remember, there was a ditch between LaPrad's store and the station and two culverts across it, and it made a loop to go to the station. I could not say exactly how wide the road was over these culverts, I never measured it, but the construction was good and it was covered with cinders.

Q. Was the roadway around between those two crossings of the ditch a well defined roadway?

A. It was when I was there. I think everybody page 205 } came down to the station or to LaPrad's store made that turn, it was a regular road and you had to turn around to get back.

Q. Did you drive around there yourself, or not?

A. Yes, sir.

Q. Did you have any trouble in the world in making that drive around there?

A. No, sir.

Q. Was your attention directed to any dangerous situation in connection with the crossings over that drain?

A. No, sir, my attention was not called to it, and it never occurred to me that there was anything dangerous about it.

Q. Was there any situation there to prevent any man using ordinary care, in making a crossing over that drain in safety?

A. I wouldn't say that there was.

Q. Mr. Watkins, in the construction of your roads through the District and the County what is your method of putting in these drain pipes under the road, particularly with regard to placing any barriers or guard rails at the ends of the drains?

Objection. Overruled. Exception.

A. I don't believe I know of any place where guard rails are put over the culverts. We put guard rails generally where bridges are over streams. We have a good page 206 } many culverts, we use a concrete culvert now entirely, and the length of these culverts, they vary, I think from 12 to 16 or 18 feet, never less than 12, and I don't think over 18 feet, according to how wide the road is there. There may be some places where the ditches are very deep, where they have guard rails, but I don't know of any.

Q. Take where you construct a drain under the road to take care of wet weather streams, and also on either side of the road there is a ditch anywhere from three to four feet

deep, do you consider it necessary for the safety of the public to put guard rails at each end of this drain?

By Mr. Early: We object to the question as calling for the opinion of the witness. Objection sustained.

By Mr. Ozlin:

Q. I will change the question. In the construction of roads in the district and county where you put drains under the highway to take care of an ordinary branch or wet weather stream, and even though the ditch may be anywhere from two to four feet deep, do you erect guard rails or barriers at the ends of those drains?

A. It is not customary. It might be a wise precaution but we do not do it, or haven't done it.

page 207 } CROSS EXAMINATION.

By Mr. Early:

Q. Does the county of Charlotte use culverts or do they construct bridges across places six to eight feet deep and 10 to 12 feet wide. Isn't it a fact they bridge these places instead of using culverts?

A. They have got some pretty big culverts in, they make some pretty big culverts, but on the larger culverts they probably bridge them.

Q. Do you know of any places in Charlotte County on any road in Charlotte County where there is an abrupt curve and there is a bridge there right where the curve enters the bridge that hasn't got guard rails on it?

A. I cannot recall it.

By Mr. Ozlin:

Q. Mr. Watkins, have you not in the past certainly used a great many of these corrugated pipes to go under the road, to take care of drains?

A. That was done mostly before I was on the board, but since I came on the Board we began making concrete, that is one of the first things we did after I came on the board.

Q. Do you know as a matter of fact they did use these corrugated pipes under the road before your coming on the board?

A. Yes, sir, they used them altogether.

Q. And the only difference between the corrugated pipe and the concrete that you are now using is that the one is made

out of concrete and the other was made out of
page 208 } iron?

A. Concrete is more permanent and cheaper.

Q. So far as the construction of them on the road there is no difference. is there?

A. I wouldn't think so.

By Mr. Early:

Q. What time of day were you there at Abilene?

A. When?

Q. The last time you were there?

A. I couldn't tell you but some time in the morning, the man was there with the mail, it must have been about 12 or 1 o'clock.

Q. You simply went down there to see whether there was sufficient demand for the county to take over that piece of road or agree to maintain it?

A. That was year before last.

Q. That is what you went down for at that time, to see whether there was sufficient public interest to require the county to maintain that road?

A. Yes, sir, and we were requested by all the people around there, and we just agreed to do it.

Q. What were you doing there on this last occasion you have mentioned?

A. I was down there, I think, canvassing.

Q. And you were not paying much attention to the road?

A. No, sir, but I turned around that road though.

page 209 } By Mr. Ozlin:

Q. At the time you took over that road down there, you did not make one trip there, did you, you made a number, didn't you?

A. I think I was down there twice during that time.

Witness stands aside.

page 210 }

J. H. GARBER,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Hall:

Q. Do you live in Charlotte County?

A. Yes, sir.

Q. What position do you occupy?

A. County Road Manager.

Q. How long have you been road manager?

A. Eight years.

Q. Are you familiar with the situation up at Abilene Station, where that drive way went over a ditch?

A. Yes, sir, I worked there this May a year ago, putting a road to the station down there, or nearly to the station.

Q. Did you observe the driveway there at the station?

A. I drove around on it a good many times. That was my turning point there, looking over this work.

Q. What condition was it in at the time you were driving around there so much?

A. I didn't notice anything wrong with it or anything out of the ordinary with it.

Q. Was there a well-defined driveway around there?

A. Yes, sir, as well as I remember.

Q. Was it a well-beaten road?

A. I don't know about that, I just drove over these culverts, but I couldn't tell you what was under there, whether a pipe or a bridge or what, but there was a drive-
page 211 } way that went around there, and across the cul-
vert, a circle that came around across there.

Q. That circle that ran around there, was there a roadway that was defined and that you could see to follow?

A. If you mean was there ditch lines on it, I don't think so.

Q. I don't mean ditch lines, I mean a circle that you followed around there, adjacent to the station?

A. Yes, sir, it was clear and open and all right.

Q. Could you see where other vehicles had been running there?

A. I wouldn't remember 12 months whether I saw any vehicles had been in there, or not.

Q. Could you see the path of other vehicles?

A. I saw where to drive, there wasn't any trouble about that at all.

Q. Was it like a path through a field or a road through a field, was it open and well-defined?

A. Yes, sir, it was open and clear, you could see from one bridge to the other, everything was wide open.

Q. As Superintendent of Roads in Charlotte County, you have put in a great number of these drain pipes, haven't you?

A. Yes, sir.

Q. Both corrugated or concrete and cement drain pipes.

A. Yes, sir.

Q. What size do you use, what diameter?
 page 212 } A. We use in this county from 12 to 24 inch.

Q. What length pipes do you put in?

A. According to the width of the roads and according to what type of road we are building.

Q. What do they vary from?

A. From 20 feet down to 10.

Q. In installing those pipes, whether you have a 12 inch or 24 inch pipe, do you put any barriers or anything at the end of them?

A. No, sir.

Q. When you have a 24 inch pipe that you install, do you put up any rails or anything like that to protect people from going into the ditch on the sides of the road?

A. Not as a rule. There are some places though that sometimes we put up a pole to guide people forward, where the fill is so high that the road may narrow down very narrow, there is a pole or marker laid on the end of it, just so (indicating) when there is a pipe under there, showing if you drive beyond that you might drop over into this ditch. The pipe should reach under the fill and beyond it but it don't always do it, and sometimes we have to place something there, a couple of stobs or a pole to show people there is an opening there.

Q. That is not ordinarily done?

A. No, sir, because we usually have the pipe long enough to go the whole length under the ditch.

Q. Did you notice when you were driving around this place whether there was any logs or cross-ties at either end of the fill over the ditch there at Abilene?

page 213 } A. I don't remember to have noticed anything there at all.

Q. And you don't know what the width of the driveway was?

A. No, sir, I don't.

CROSS EXAMINATION.

By Mr. Earley:

Q. Generally speaking, in constructing county roads, if you have got a ditch something like 5 to 8 feet, and 10 to 12 feet wide, you would not use a culvert, but you would use a bridge, ordinarily speaking?

A. That would depend on the amount of water that used to come under it. If there is a 24 inch pipe or two 24 inch pipes, and that would probably take it, it would not be a ques-

tion of whether the pipe was bridged, but which would be the cheapest for the amount of water, but we wouldn't put down too many pipes.

Q. In the construction of a road, if you had an excavation that you had to cross 10 or 12 feet wide and 5 or 6 feet deep, and that place you had to cross was on a curve, would you put up any side rails there?

A. Mr. Early, I couldn't tell you what I would put up unless I was there looking at the particular place, if it looked to me like it was a very dangerous place and page 214 } that some guide would help traffic, I would try to place something there to show it.

Q. When you came down to the station at Abilene you say there may be places there that shows where cars drove, but there is no ditch line to that road?

A. I don't remember that there was any ditch line there.

Q. And there is cinders scattered all around there?

A. I wouldn't say whether it was cinders or dirt or gravel.

Q. The main thing you know is you have been to Abilene?

A. No, I drove the road down to this loop, that took in this loop, and each and every time I drove in there I went over this loop.

Q. But you don't remember the physical condition at that time

A. No, sir, I didn't make an examination of the Railroad Company's culvert, &c., but I drove around there a number of times during this construction.

By Mr. Hall:

Q. Did you see anything that looked dangerous there around Abilene station when you were driving around there?

A. Yes, sir, I think I did.

Q. What was it?

A. The ditch between these two bridges, to me, if a man parked his car against that depot and undertook page 215 } to back into that road, I thought he always took a chance of going down into that ditch, not on the road, I am not talking about the bridge, but I am talking about the ditch between the two bridges.

Q. You mean if he parked over on the side next to Mr. LaPrad's store?

A. No, sir, I mean if he parked up against that depot, he could, in undertaking to back to get in line with this bridge, he might possibly get too far back and keep on backwards down into that ditch.

Q. But there was plenty of room back there without backing into the ditch?

A. Yes, sir, plenty of room.

Q. But it would be dangerous if he let it get away from him?

A. Yes, sir, if he let it get away from him he might go into that ditch.

By Mr. Early:

Q. How deep do you think the ditch was?

A. I don't know.

Q. It was deep enough for a man to back into it?

A. I thought so.

Witness stands aside.

page 216 }

C. E. SKINNER,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. Where do you live?

A. Abilene.

Q. How long have you lived there?

A. Practically all of my life.

Q. Are you in any way connected with the Virginian Railroad?

A. No, sir.

Q. What is your business?

A. Truck Driver and lumber business.

Q. Truck driver and lumber business?

A. Yes, sir.

Q. Do you haul lumber to the Abilene station?

A. Part of the time, and part of the time the other side.

Q. Are you in the habit of driving around the loop there by the station?

A. Yes, sir, I drive there right often.

Q. What kind of a truck do you drive?

A. I have driven two or three different kinds, a Chevrolet and big 2½ ton Stewart truck, and I have parked the cars there lots of times.

Q. Are they longer or shorter than an average automobile?

A. Longer.

Q. Was there a well-defined roadway around that loop from

one of those bridges to the other, in going over towards La-Prad's store?

page 217 } A. Yes, sir.

Q. I mean by that, were the tracks of other vehicles shown on the cinders so that you could see it around there?

A. Yes, sir, a good track there and you could see.

Q. Is that true all the time?

A. Yes, sir.

Q. Did you have any trouble in the world in making that drive around there with your trucks.

A. I never did.

Q. Have you been around there at night?

A. Yes, sir.

Q. Did you have any trouble at night?

A. I never had any.

Q. Do you know the width of that roadway where Mr. Hillsman's car went in, the width of the roadway over the ditch there

A. Yes, sir.

Q. What is it?

A. 16 feet.

Q. Did you measure it?

A. Yes, sir.

Q. Who was with you when you measured it?

A. Mr. LaPrad and Mr. McDowell.

Q. Did you measure it with a tape line?

A. Yes, sir.

By the Court:

Q. When was that measurement made?

page 218 } A. I don't hardly remember what day it was.

Q. Was it recently or just after this accident,

or when?

A. It was after the accident.

Q. Soon after?

A. I reckon about a week or a couple of weeks, maybe.

By Mr. Ozlin:

Q. Wasn't it much longer than that; what time of year was it?

A. I don't remember what time it was. I happened to be down there at the store the morning they were there.

Q. You were not asked to come there to measure the culvert, were you?

A. No, sir.

Q. Do you remember what time of year it was? Can you fix it that way?

A. I just don't remember exactly when it was.

Q. What was on each end of the culvert over the drain to mark the edges of it, if anything?

A. There was big timber on each side, about 8 or 10.

Q. Did that project up above the level of the roadway?

A. About three or four inches, I imagine.

page 219 } Q. Was it perfectly visible to anyone making the drive around that drain?

A. I would think so, I never had any trouble crossing there.

Q. Could anyone coming around driving see those timbers lying on either side?

A. Yes, sir.

Q. Now I think at the time you were there with Mr. LaPrad and Mr. McDowell and the time you measured the width of the roadway across there, the ditch had been filled up?

A. Yes, sir.

Q. How did you find the boundaries of the roadway across there?

A. You could tell by the—I don't remember whether the sills were there, or not, but you could tell by the tracks, and I think the sills were still there.

Q. Did you dig down to find the cribbing to the culvert?

A. Yes, sir.

Q. You did dig in there and you found where that cribbing came up from the pipe to the top of the roadway?

A. Yes, sir.

Q. And that is the way you determined exactly where the old roadway was?

A. Yes, sir.

page 220 } Q. And it was 16 feet from one of these logs lying across there to the other?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Watkins:

Q. Was that a log or was it an 8 by 10 cross tie?

A. It was longer than a cross tie.

Q. It was larger than a cross tie?

A. Longer and larger, too.

Q. Those were not cross ties that they put there but big guard rails, were they not?

A. 8 by 10 laying on the cinders.

Q. It has been testified here before by different witnesses

on behalf of the defendant that these were cross ties across there.

A. The tops wasn't,

Q. Was that cross piece there?

By the Court: My recollection is they said switch ties, is there a difference between them, in the size of them?

By Mr. Watkins:

Q. Is there a difference in a switch from a cross tie?

A. First class cross ties are the same size of a switch tie.

Q. They are the same size?

A. Yes, but these pieces were 8 by 10 on top page 221 } and they were larger than a tie.

Q. How long was that switch tie?

A. I don't know, I never measured the length across there, but I imagine they were something like 10 feet across there, that long.

Q. What is the usual length of a cross tie or switch tie?

A. A cross tie is 8 feet 6 inches long, and a switch tie runs from 9 foot on up in length.

Q. To what?

A. Some go as high as 20 and 22 feet.

Q. Was that piece of timber there of sufficient height above there that if a car just hit against it, it would keep it from going over in that ditch?

A. I think so.

Q. In other words, if your car wheels just hit it, or just hit up against it, it would keep the car from going over in the ditch?

A. Yes, sir, I reckon it would; it would depend on how you hit it, I reckon.

Q. Did you ever fall in that ditch at night?

A. No, sir.

Q. Did you ever make a mis-step while crossing that crossing there and fall in the ditch?

A. No, sir, I have never been in that ditch at all.

Q. You said you went there, as I understood page 222 } you, and made these measurements after the place had been filled over, and you dug down; how far did you dig down in these cinders to find that cross tie?

A. About six inches.

Q. And that was, you say, a short time after the accident?

A. I just don't remember what time it was, I know it wasn't so awfully long, I thought it was around two weeks,

but I don't know, I just happened to be down at the store that day.

Q. Did you have to dig down to find the cross tie, or whatever the thing was, on the top there, on the other side?

A. Yes, sir.

Q. You had to dig down to find that?

A. Yes, sir, the one that was on top, they may have moved this top piece when they filled the ditch in, I don't know about that, but we had to dig down to find the tie that was on top of the cinders.

Q. You had to dig down to find that?

A. Yes, sir, to measure it.

Q. Isn't it a fact, when you went there, and right at the present time, that on the lower side of that bridge that was filled there, that these pipes jut out about 15 inches to 20 inches?

A. No, sir.

Q. It doesn't jut out at all, does it?

page 223 } A. No, sir.

Q. Mr. Priddy, who testified here on yesterday said that it did. Mr. Priddy was mistaken, wasn't he?

A. Yes, sir.

Q. Tell me this, how did—or how were these cross ties there, you said laid on top of the road, were there any other ties below there?

A. Yes, sir, they were built all the way up.

Q. Right straight up?

A. Yes, sir.

Q. There wasn't any leaning away at all?

A. I don't think so, it was perfectly straight up, as well as I know.

Q. How about on the lower side?

A. Both sides were built up.

Q. And that is in the same condition right now that it was at the time of this accident?

A. I guess so.

Q. But you don't know.

A. When this ditch was filled in, I don't know.

Q. I am talking about the other side, the lower side?

A. Yes, sir.

Q. It is in the same condition?

A. Yes, sir.

Witness stands aside.

page 224 }

W. M. PRIDDY,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. I believe you live at Abilene, don't you?

A. Yes, sir.

Q. You used to be employed by the Virginian Railway but are not now?

A. No, sir, I have been cut off about six months, I worked a few days during that time.

Q. How long have you lived there at Abilene?

A. The last time, about 16 years.

Q. You have been there for about 16 years?

A. Yes, sir, but before that, practically all of my life, but I have been there the last time about 16 years.

Q. Were you thoroughly familiar with the driveway around between those ditches over the drain?

A. Yes, sir.

Q. Tell the jury if there was a well-defined driveway around that loop, I mean by "well-defined", could you see where other vehicles had been along and the tracks marked out?

A. Yes, sir.

Q. Is there any doubt about that?

A. No, sir.

Q. Was that the condition all the time?

A. All the time I was there.

Q. Do you know the width of that culvert over the drain where the car went in?

page 225 } A. No, sir, I never measured it.

Q. Was there anything marking the ends or outside of the culvert over the drain?

A. Yes, sir.

Q. What was it?

A. Great big timbers, built up from down at the bottom.

Q. Did those timbers come straight up or were they slanting?

A. They came straight up.

Q. Did the top one extend above the edge of the roadway, or not?

A. Yes, sir.

Q. How much?

A. I would say two or three inches, but I never measured it.

Q. Were they clearly visible to anyone driving around that loop and crossing this drain?

A. Yes, sir.

Q. Mr. Priddy, do you know Mr. Hillsman?

A. Yes, sir.

Q. How long have you known him?

A. 25 or 30 years.

Q. Did you have any conversation with him some time after his car went in this ditch at Abilene?

A. Yes, sir, a week or ten days.

Q. Where did you have that conversation?

page 226 } A. On the street in Farmville.

Q. Did the question of this accident, about his car going into the ditch come up in that conversation?

A. Yes, sir, I asked him was he hurt.

Q. What did he say?

A. He said he was not.

Q. And that was a week or ten days after the accident?

A. Yes, sir.

Q. What else did he say?

A. He said that he wrote the claim agent that it had done his car \$25 damages.

By Mr. Brock: We object to that statement. He is attempting to quote a letter and the letter is in evidence.

By the Court: Very well, go ahead.

By Mr. Ozlin:

Q. Tell us what else he said.

A. He said he wrote the claim agent that it did his car \$25 damage and if they would pay that he would be entirely satisfied.

Q. And you are sure this was a week or ten days after he went in the ditch?

A. I don't remember the exact date but about a week or ten days.

Q. Was that all the conversation you had with Mr. Hillsman?

A. Yes, sir.

page 227 } CROSS EXAMINATION.

By Mr. Brock:

Q. That space between the ditch and the station is practically level, isn't it, from the ditch to the station?

A. There is a well-defined track all the way around and has been all the time.

Q. You mean to say that there are ditches on each side of the road to show where the road is?

A. No, sir, not on each side.

By the Court:

Q. He asked you if the ground around the station was level?

A. I would say it was practically level.

By Mr. Brock:

Q. So that in coming into the station over the first bridge, and driving up to the station, a driver could drive almost anywhere in between the ditch and the station without any difficulty?

A. I didn't say that.

Q. What would you say about that?

A. I say there is a good track around where he could see all the way around.

Q. Could he see this track at night?

A. If he has got a good light he could see it.

Q. Was it perfectly level?

A. No, sir, I didn't say that.

Q. I understood you to say it was level.

page 228 } A. I said practically level.

Q. Do you know anything about the depth of that ditch?

A. No, sir, I never measured it.

Q. Do you know anything about the width of the road going over the ditch?

A. I never measured that.

Q. You never paid any particular attention to it?

A. Yes, sir, I have been across there enough to pay attention to it.

Q. Did you pay particular attention to it?

A. Yes, sir.

Q. What made you pay special attention to it?

A. Naturally when you walk along anywhere like that you look at it.

Q. But you did not notice the depth of the ditch?

A. I mean I did not measure the ditch, but I would say it was 4 or 5 feet deep, just guessing at it.

Q. You say you had this conversation with Mr. Hillsman in Farmville about ten days after the accident?

A. I said a week or ten days.

Q. How did you happen to have this conversation with Mr. Hillsman?

A. I met up with him on the street and I told him I heard he had an accident at Abilene and asked him was he hurt, and he said he was not.

Q. So you came up to him, he did not approach page 229 } you?

A. No, sir.

Q. Whereabouts on the street was it that you saw him?

A. Right at the Peoples National Bank, at Third Street, right on that corner.

Q. People coming to the station at Abilene they can back their trucks right straight up to the doorway to get freight or whatever they want to get, can't they?

A. Yes, sir, they go by the side of the station or they back up, either one they want.

Q. And they can drive as close to the station as they please, no trouble about getting right up to the station?

A. What do you mean, going up to the side of the station to get freight?

Q. Yes, sir.

A. Yes, sir, they can do that.

Q. And while your car was up at the door to get freight or something else, another car could come by him and pass him, or two or three cars could pass between the station and the ditch?

A. I don't know about two or three, but one could pass all right, while another one was getting freight.

Q. You wouldn't have to get out of the road to let somebody pass, would you?

page 230 } A. I don't think so, I don't know, I never tried it.

Witness stands aside.

M. KIZER,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. I believe you are the station agent at Abilene?

A. Yes, sir.

Q. How long have you been holding that position?

A. Very near 13 years.

Q. Your home is at Abilene?

A. Yes, sir.

Q. You are familiar with the entire yard and the station around there, are you?

A. Yes, sir.

Q. Now I will show you this map, here is the road coming into the station and crossing the drain here, this goes on by the station and back across the drain again. Was that curving of the roadway around there well-defined?

A. Yes, sir, it was.

page 231 } Q. What defined it?

A. There was a heavy travelled road, it was a cinder driveway and it was a heavy travelled road.

Q. Would the wheels of vehicles make an impression in the cinders so you could see where others had been?

A. I hardly think so.

Q. You have just stated it was a heavily travelled road?

A. Yes, sir.

Q. What made the impression in the cinders; it was the wheels of other vehicles, wasn't it?

A. Yes, sir, but a single vehicle would not make an impression in it.

Q. But the number that went around there created a well-defined road?

A. Yes, sir.

Q. Was this space in here (indicating) covered with cinders, too?

A. No, sir.

Q. In here between the highway and the ditch?

A. No, sir, it was not.

Q. Was any of it covered with cinders?

A. No, sir, I think not.

Q. Are you speaking of this part here (indicating)?

A. Yes, sir.

Q. Was this space all between the roadway and up by the side of the station covered with cinders?

A. This down here was covered with gravel.

page 232 } Q. Was this space west of the station covered with cinders?

A. You mean in here (indicating).

Q. Yes, sir.

A. No, sir, that didn't have any, that has grass on it.

Q. Do you know the width of that culvert over this drain there?

A. This way (indicating)?

Q. Yes, sir.

A. It was 16 feet.

Q. Did you measure it?

A. Yes, sir.

Q. What marked the ends of that culvert at each end?

A. Oak Timber.

Q. What were those timbers, switch ties or cross-ties? or just ordinary oak timber?

A. They were bridge timbers.

Q. About what was the length of those timbers across there?

A. I should say the top one was about 10 feet.

Q. Tell the jury if the cribbing of that culvert was built up from the iron pipe all the way to the top?

A. It was built up, there was a terra-cotta pipe, it wasn't an iron pipe, and it was built right straight up.

page 233 } Q. Did the top piece of timber extend above the level of the roadway?

A. Very little.

Q. About how much would you say?

A. About 3 or 4 inches.

Q. Could anyone coming around the driveway see those pieces of timber above the gravel and cinders?

A. Yes, sir, they could see them.

Q. Now, Mr. Kizer there has been some evidence here about other people getting into that ditch, in cars. Have you ever known any car other than Mr. Hillsman's to get into that ditch between these two culverts?

A. No, sir.

Q. Point out to the jury where they did go into the ditch?

A. Mrs. Bell went into the ditch about 35 feet below this culvert.

Q. Did the culvert have anything on earth to do with her going into the ditch?

A. No, sir, it was about nine o'clock in the day time.

Q. Do you know why she happened to go into the ditch?

A. She said she was fooling with the brakes.

Q. What other car, to your knowledge, has been page 234 } in the ditch?

A. Mr. Marshall Pullen drove Mr. LaPrad's car in that ditch, just projecting, and he couldn't make this turn and went in there.

Q. Was it generally understood that he was drinking?

A. No, sir.

Q. What other car?

A. That is all I know.

Q. Have you ever known a wagon to get into that ditch there?

A. No, sir.

Q. Have you had any complaint as station agent from people coming to Abilene station and using this crossing, about any danger in these culverts there?

A. No, sir, I have not.

Q. Had the public made any suggestions to you or complained to you about conditions there?

A. No, sir.

Q. Now Mr. Kizer in stating there were no cinders between the driveway and the ditch, you were referring to the time when this accident happened?

A. Yes, sir.

Q. Are there cinders there now?

A. There is.

Q. This ditch has been filled in since this accident happened, hasn't it?

A. Yes, sir.

Q. Had the material, or do you know that this material had been ordered to be sent to Abilene prior to this accident?

By Mr. Brock: We object to that.

By the Court: Material for what. I think it is immaterial and I sustain the objection.

By Mr. Ozlin:

Q. I will ask you this question, did you have any trouble with keeping an open ditch, clear of debris, trash, leaves and other things that would get into it?

A. Yes, sir.

Q. Did it have to be frequently cleaned out, or otherwise?

A. Yes, sir, it had to be frequently cleaned out.

CROSS EXAMINATION.

By Mr. Brock:

Q. You stated at the time this accident occurred that the cinders did not extend from the station to the ditch; there was gravel or slag or something of that character though between the ditch and the station, wasn't there?

A. No, sir.

Q. What was the character of the ground?

A. Honeysuckle grew over the ground.

page 236 } Q. How far did that honeysuckle grow from the ditch in the direction of the station:

A. It came to the driveway.

Q. About how far?

A. I should judge about 10 or 15 feet.

Q. Do you know how far the edge of the ditch is from the station?

A. Yes.

Q. How far is it?

A. Between 30 and 40 feet.

Q. So from where the honeysuckle stopped, to the station was between 20 and 30 feet then?

A. Ask that question again please.

Q. So where the honeysuckle stopped to the station was between 20 and 30 feet?

A. Yes, sir.

Q. Was there a roadway then between 20 and 30 feet wide?

A. Yes, sir, it was at that point (indicating).

Q. In other words, the roadway ran from the honeysuckle all the way up to the station?

A. Yes, sir, that is, up here near the warehouse door.

Q. Now, Mr. Kizer, how deep was this ditch?

A. I judge it was between six and seven feet on the upper side.

page 237 } Q. Do you know what it was on the lower side?

A. Practically the same depth.

Q. Now possibly a week or ten days after this accident happened, didn't you ask Mr. Hillsman how he was getting along and didn't he tell you that he was having trouble and was afraid he had a piece of glass in his knee?

A. Yes, sir.

Q. He complained of having trouble with his knee?

A. Yes, sir, he did.

Q. Now Mr. Kizer I understood you to say that the culvert was built of cribbing?

A. Cribbing at the end, from the top of the terra cotta.

Q. On this side here where the car went in was that cribbing straight up and down or was it a gradual slope on that side?

A. No, sir, it was straight up and down.

Q. And straight up and down on this side (indicating)?

A. Yes, sir.

Q. It is a fact that the pipe jutted out some eight to ten inches beyond the cribbing?

A. No, sir.

Q. On the lower side I mean.

A. That is not a fact.

Q. On either side?

page 238 } A. No, sir, it was flush with the sewer pipe.

Q. Has there been any change on the lower side of this ditch or roadway?

A. Yes, sir, there has been an extension of about 16 feet.

Q. In other words, if I understand you correctly, this roadway as shown here now is filled in here some 16 feet below where the road used to be?

A. No, sir, this ditch is filled in below where it used to be.

Q. Where the accident was?

A. Yes, sir.

Q. And that has been done since the accident?

A. Yes, sir.

Q. So the position of that pipe there now is different from what it was when the accident took place?

A. Yes, sir, it is different.

Q. Is that roadway in the same place as it was before?

A. It is very near the same, if anything it is drawn in just a little bit.

By Mr. Ozlin:

Q. By saying the road is drawn in just a little bit, you mean the curve is even sharper than it was before, if there is any change at all?

A. Yes, that is the only change in the road-
page 239 } way.

Q. Now, Mr. Kizer, you mentioned a conversation you had with Mr. Hillsman. Where did you have it?

A. In Mr. Hillsman's store.

Q. Can you fix the time when you had it?

A. You mean by the year or what?

Q. No, how long after the accident?

A. No, I cannot fix the time positively.

Q. Could it have been as much as a month or two?

A. No, sir, it wasn't that long, it was about ten days to two weeks.

Q. Was he in the store attending to his business that day?

A. Yes, sir.

Q. And he said what about his knee?

A. He said his knee was giving him trouble.

Q. And he thought probably he had a piece of glass in it?

A. Yes, sir.

Q. But he was out attending to his business?

A. He was in the store that day, or that night, rather, it was night.

Q. Did you notice any limp in his walk?

A. Yes, sir.

Q. There was some limp in his walk?

A. Yes, sir.

Witness stands aside.

page 240 }

J. C. PRIDDY,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Ozlin:

Q. How long have you been Sheriff of Charlotte County?

A. 20 years.

Q. You are pretty familiar with the entire county, are you not?

A. Yes, sir, especially back this way.

Q. Are you familiar with the section around Abilene?

A. I go there frequently, three or four times a year.

Q. Were you familiar with the station and around the station yard there, in February, 1931?

A. I don't know about that month, but I went there right many times last summer.

Q. Did you go there, off and on, all during the year?

A. Yes, sir, I would go there occasionally.

Q. Have you noticed the driveway around by the station, between the two culverts over that drain?

A. Whenever I go to Abilene I drive around by the station to save backing up in front of LaPrad's store, I drive around that loop.

Q. Tell the jury if there is a well-defined driveway around there?

A. It is open, I couldn't tell you now if there was cinders there, you could probably see the tracks of cars,
page 241 } but if you take cinders that have been travelled over right much, I don't know whether you could see, or whether a car would make a track, or not, I cannot answer that question.

Q. Would not the cinders around where the wheels went be beaten up practically and show where traffic went?

A. If the cinders had not been beat down it would make a track, but you take, if there has been a great deal of traffic along there, well, to be perfectly frank, I never noticed whether it made any tracks or not. I have made that trip around there a good many times, but I didn't look to see whether they made any track, I never had any trouble in driving around there dozens of times, I never had any trouble

getting around there, that is about all I can tell you, I couldn't tell you how deep the ditch was, I never noticed it that close.

Q. In going around there you had no difficulty in following the usual travelled route, did you?

A. None in the world.

Q. Was there any trouble about the station there to keep a man from following around across that drain, if he was using ordinary care?

A. If there was, I didn't see it. As I said, I never had any trouble when I made that loop, going this way, I would go right around next to the station, pretty close to the station and come back and make that other bridge.

page 242 } Q. You wouldn't have to change your gears?

A. I almost always stop there and speak to Mr. Kizer, there is always somebody there that I would speak to and would have to change gears, I don't know that I ever made a trip around without changing.

Q. You know the road well enough to say whether you could make the trip around there without any difficulty?

A. I would have to be kind of particular, it is not like driving on a straight road, there is right much curve there.

Q. And that is true on any curve?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Early:

Q. You wouldn't like to make these two bridges on high gear?

A. I would watch pretty close.

Q. In order to make that last bridge there, you would have to pull in pretty close to the depot?

A. I always do.

Q. If a man should park a few feet over in that circle, in starting out there, he would be mighty apt to miss that bridge, wouldn't he, that is, if he was parked on the inside of the curve, he wouldn't hit the bridge straight?

page 243 } A. He would have to go right slow, I never measured it, but I just imagine—this is guess work—

Q. If it is guess work, don't tell it.

A. I was going to give the distance from the ditch to the depot.

Witness stands aside.

J. D. HUDSON,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Hall:

Q. What position do you occupy with the Virginian Railway Company?

A. Division Engineer.

Q. How long have you been Division Engineer?

A. Between three and four years.

Q. Located at Victoria?

A. Yes, sir.

Q. Has the station and that section of the road at Abilene been within your territory all of that time?

A. Yes, sir.

Q. I show you a map and I will ask you if that page 244 } correctly represents the station grounds, driveway and the approaches to the bridges, the bridges and drain pipes across the drain, as they existed there in February, 1931?

A. Yes, sir, they do.

Q. What is the width of this lower driveway across the pipe that runs under it?

A. The driveway itself, the defined portion of the driveway was about 10 or 12 feet wide.

Q. How wide was it between the ends of the fill that covered the drain pipe?

A. 16 feet.

Q. How were those ends protected?

A. By what we call head walls or cribs made of timber.

Q. What kind of timber was used?

A. It was large size timber, 8 by 10, or switch ties, I don't know the exact size.

Q. Were those timbers built straight up from the drain pipe or were they built up on an angle?

A. They were laid one right on top of the other.

Q. So they were built up perpendicular?

A. Yes, sir.

Q. What kind of timbers were on the top and what was the length of the top timbers?

A. I never took any measurements, but some-page 245 } thing like 12 or 14 feet.

Q. How high did that timber extend, if any, above the surface of the ground?

A. It was visible above the surface. At different times

it might have been different heights, because of the fact that cinders were put in there to repair the road, and they were put in practically to the top of the timbers, and then as it wore down more timbers showed, of course.

Q. Was there any trouble about seeing these timbers at each end of that drain pipe?

A. No, sir, they were visible.

Q. What kind of a driveway was around there, I mean to say, was it a well-defined driveway?

A. Reasonably so, there were quite a few automobiles that made exactly the same turn coming in on one side and going around here across the other side, and they made practically the same route all the time.

Q. What would be the effect of those automobiles running over this cinder, would they pack it and make it a well-defined roadway?

A. The effect would be to make it a defined driveway.

Q. What was the width of this driveway around here, generally speaking?

A. It varied in width, from 10 to 12 feet.

Q. Was this space all between the driveway page 246 } and the station there filled?

A. It was the same elevation as at the driveway.

Q. I mean filled with cinders or gravel?

A. Cinders.

Q. Do you recall whether any cinders were between the driveway and the ditch?

A. There was some, yes.

Q. When were they put there?

A. They had been put there from time to time since the station was built, I suppose, they were there the first time I ever saw the station building.

Q. Has that ditch between the two bridges been filled?

A. It has.

Q. Why was it filled?

A. There was considerable complaint about the pipes being stopped up, and the honeysuckle overgrowing the ends of it, and it was filled for the express purpose of improving drainage conditions in and around the station grounds.

Q. Was it necessary to go and clean out this ditch often, or not?

A. It was necessary occasionally to take the trash out of the ditch.

Q. Have you any record of when that work of filling that

ditch was ordered to be done, in other words, when was it arranged to make it?

page 247 } A. It first came to my attention in July, 1930, and I was asked to make a survey and to determine, as near as I could at that time, what the cost would be to place pipe between the small bridge above this culvert, and the culvert, and to extend it on each end.

Q. And you received directions to do that in 1930?

A. Yes, sir.

Q. What drainage did that ditch carry?

A. There is a cut west of the station and a side ditch from the two drains, and the water tank is just west of the station and the waste from that goes into that ditch, and then there are several acres of land immediately north of the track and west of the station that comes into that drain ditch.

Q. And that comes into this ditch here?

A. Yes, and there is a fill north of the track.

By the Court: Is the drainage area there necessary in this case?

By Mr. Hall: No, sir. I don't think the drainage area has anything to do with the case, but all I wanted to do was to show the necessity of having the drain there, but that is all.

No cross examination.

(Witness was told to stand aside, and later on was asked the following questions:)

page 248 } By Mr. Watkins:

Q. I just want the fact in the record when those maps were made.

By Mr. Hall: I don't know when the tracing was made.

By Mr. Watkins: I want to know when the engineer made the survey.

By Mr. Hall: Suppose you ask him, or I will ask him.

Q. Mr. Hudson, when was this blueprint or tracing from which it is made, actually made?

A. The survey was made prior to August 23, 1931.

Q. I am asking you about the map.

A. The map was made as of the date it shows in the corner.

Q. When was the data gotten together and the survey made as to the matters that are shown on this map?

A. In August, prior to the date of the accident.

Q. Was the map made from actual measurements and survey that was made on the ground?

A. Yes, sir, it was.

Q. Why were you making that survey in August, prior to the accident?

A. To make an estimate of the cost of the improvement which we contemplated.

Q. Does that map show conditions as they existed in August, prior to the accident?

A. It does.

page 249 } Q. And up to the time of the accident?

A. Yes, sir.

By Mr. Watkins:

Q. Mr. Hudson, you say that these measurements were made in August, prior to the accident?

A. Yes, sir.

Q. In 1930? Did you make them yourself?

A. I was one of the party.

Q. Who was the surveyor?

A. I am the Division Engineer and was in charge of the party.

Q. Were you present at the time these measurements were made?

A. Yes, sir.

Q. Who was the surveyor?

A. There were several in the party, I probably held one end of the chain part of the time and some other members of the party held the other.

Q. Who used the instrument?

A. I don't have that data with me.

Q. Are you positive that these curves are made exactly according to survey, or approximately so?

A. They were made according to survey.

Q. In other words, you took the angles of these different curves and platted it accordingly?

A. We took measurements from points along the station to the center line, established the roadway or
page 250 } original measurements, and we took measurements from the station to that small bridge and to the culvert and platted it according to those measurements.

Q. And according to the angles?

A. It was not necessary to plat the angles.

Q. It was not?

A. No, sir.

Q. In other words, in making this plat here, you did not go exactly according to the way that you would make a survey of a railroad track, did you?

A. If conditions were the same we did.

Q. Did you, or did anybody in your presence lay down a tape line and measure the exact number of inches from each cross tie to each cross tie?

A. Are any cross ties shown there?

Q. Switch ties then?

A. I don't think there are any switch ties there.

Q. Those heavy timbers then?

A. No.

Q. You did not put the tape line down to measure from those pieces of wood across there, did you?

A. No, sir.

Q. And you did not measure off with the tape line the width of that roadway, did you?

A. Yes, sir.

Q. You did?

page 251 } A. Yes, sir.

Q. What was the width of it?

A. It varied.

Q. From what?

A. From 10 to 12 feet.

Q. And you actually took measurements on that?

A. Yes, sir.

Q. On this map it shows the same width practically all the way around until it gets back over here, doesn't it (indicating).

A. They are practically the same; they are not exactly the same.

Q. So you cannot state positively that that roadway at the top was exactly 16 feet?

A. I didn't say the roadway was 16 feet.

Q. Between those pieces of wood, could you state on your oath that it is exactly 16 feet from those cross-pieces?

A. I said it was about 16 feet, I said we had a 16-foot pipe under there and that those head walls were built up practically straight, one timber laying right on top of the other.

Q. Practically straight; was there any going into the driveway at all or was it perpendicular?

A. You don't make things like that, perpendicular, because you cannot, I said it was practically perpendicular.

Q. That is it, you cannot do it exactly like that
page 252 } especially in that condition. Do you on this map
show any jutting out of the pieces of pipe at the
end?

A. Just enough to show the pipe is right at the abutment
or head wall.

Q. Approximately how many inches from this map would
that be or how many feet, using this scale here?

A. It is too close to scale.

Q. Were the ends of these pipes out?

A. They were visible.

Q. One gentleman here has testified they were 15 inches
out. Was he in error, and he has been working for the rail-
road company for a number of years.

By Mr. Hall: We object to the question, that is not a proper
question.

Objection overruled.

By Mr. Watkins:

Q. Mr. Priddy stated he has been working for the rail-
road company ever since that place has been there, and that
it was jutting out about 15 inches or more. Was he in er-
ror?

A. They were not jutting out 15 inches or more.

Q. And he was in error; you made a close examination of
that?

A. I did.

Q. Personally?

A. Yes, sir.

Witness stands aside.

page 253 }

A. J. McDOWELL,
Sworn for Defendant.

DIRECT EXAMINATION.

By Mr. Hall:

Q. Mr. McDowell, what position do you hold with the Vir-
ginian Railway Company?

A. I am Division Claim Agent for the Virginian.

Q. When did you first see Mr. Hillsman?

A. I think along in April was when I first saw him.

Q. Had you seen Mr. Hillsman prior to the time you sent him a check or draft for \$25?

A. No, sir, I had not.

Q. You had certain correspondence with him, which has been introduced in evidence here. Mr. Hillsman says that he received this letter of March 6, 1931, addressed to him at Farmville, Virginia, but he does not remember receiving the one of March 20, 1931, addressed to him at the same place. Did you write Mr. Hillsman that letter of the 20th of March, 1931?

A. I did.

Q. Did you mail it in the usual course?

A. In the Postoffice at Victoria.

Q. Properly addressed to Mr. Hillsman?

A. I think so, yes, sir.

Q. Was it addressed the same as all other letters you sent him?

A. Yes, sir.

page 254 } Q. Did you receive any reply from that letter?

A. I received no reply to either of those two letters.

Q. Either the letter of March 6th or the letter of March 20th?

A. No, sir.

Q. In both of those letters you asked Mr. Hillsman to let you know whether or not either he or his daughter had been injured in this accident. When did Mr. Hillsman first inform you that he thought he had been injured in the accident?

A. I think his letter dated April 4th, in which he told me he was having trouble with his knee.

Q. That is the first information you had of it, was it not, when you got that letter?

A. Yes, sir.

Q. He had not answered any of your previous correspondence about it?

A. No, sir.

Q. Are you familiar with the driveway that is around the station grounds out there?

A. Yes, sir.

Q. What was the character of that driveway prior to February, 1931?

A. It was a cinder driveway on a gradual curve around behind the station, going in over one bridge or culvert and out of another.

page 255 } Q. What was the character of it as being well-defined, or not?

A. The cinders in the driveway proper were well pulverized or crushed, those on the side were not.

Q. Was there, or not, a distinct track around there?

A. Yes, sir, there was a distinct track.

Q. I show you a photograph of the station, Mr. McDowell, and I will ask you when this photograph was taken and by whom?

A. I took the photograph but I am sorry I did not make a note as to when it was taken, but it was taken during the summer of 1931.

Q. Does that show the driveway that you have described in your evidence?

A. Yes, sir, that shows it.

Q. Was that driveway the same at the time that photograph was taken as it was at the time the accident occurred?

A. No, I cannot say it was but it was the same material.

Q. I mean as to its appearance, as to being well defined, so that it could be seen?

A. Yes, sir, it was just as well defined at that time as it was when this picture was taken.

By Mr. Early:

Q. Had this ditch been filled at the time the
page 256 } photograph was taken?

A. Yes, sir, it had.

By Mr. Early: Then we object to the photograph because it was taken after this ditch had been changed and it is not the same as it was at the time of the accident.

By Mr. Hall: The photograph does not show the ditch or where the bridges were, that part of it don't appear in the photograph, it is only designed to show the character of the driveway around there.

By the Court:

Q. Did you testify the station grounds were the same when this picture was taken as it was in February?

By Mr. Hall: As to the roadway?

A. Yes, as to the roadway?

By the Court: I overrule the objection.

By Mr. Early:

Q. Can you say those cinders had been placed in between what appears to be the roadway and that ditch, between the time of the accident and the time this picture was taken?

A. Between the roadway and the ditch?

Q. Yes, sir.

A. I cannot answer that question.

By Mr. Early: We renew our objection because that would change the situation altogether, if additional cinders had been put in between the time of the accident and the time the photograph was taken.

(Photograph filed in the Clerk's Office in Supreme Court.)

page 257 } By the Court:

Q. Do you testify you do not know whether the condition is the same?

A. I testify that I could not answer the question.

By the Court: Then the Court changes its ruling, made a moment ago and excludes this photograph on the ground that it was taken at a time considerably subsequent to the date of the accident and no satisfactory evidence that conditions were the same at the time the pictures were taken as it was when the accident occurred.

Defendant excepts.

By Mr. Hall: I want to ask the witness one question which I think he has already answered, but I want to be certain about it.

Q. Is the roadway as shown on this photograph in the same condition and does it show up in the photograph as being well-defined, in the same way that it did, prior to the accident?

A. It certainly does.

By Mr. Hall: All right, with that question answered as it is, we offer the photograph again.

By Mr. Early: I want to ask another question.

Q. If no cinders had been placed on this roadway between the time of the accident and the time the photograph was taken it is a certain fact that the photograph would show

the road to be much more well-defined at the time
page 258 } the picture was taken than at the time of the ac-
cident, that is, if no additional cinders had been
placed on there in the meantime?

A. That is rather theoretical, I am afraid I cannot answer it.

By the Court: The Court excludes the photograph.

Defendant excepts.

(Said photograph is marked for identification Exhibit
"McDowell A.)

No cross examination.

Witness stands aside.

page 259 } W. J. HILLSMAN,
Plaintiff, Recalled.

By Mr. Ozlin:

Q. I simply want to ask you, Mr. Hillsman, where you parked your car that night while you were waiting for the train to come, and for that purpose only I show you a photograph of the station and ask you to point out on that photograph at what point you parked?

A. I believe I could answer it better if you would show me the map.

Q. Here is the map then, here is the station which shows three windows in the station.

A. My car was parked right at this window.

Q. The center window?

A. Yes, the center window there.

Q. And you came in from this way (indicating)?

A. Yes, sir.

Q. And you drove up beyond where the roadway goes around?

A. I couldn't see any roadway, this line wasn't there then, I drove along here, this space was flat here and I drove up to the depot and waited for the train.

Q. And when you got ready to leave you backed up?

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

Q. You didn't back up?

A. I cannot recall that I did. I was right there and aimed

to turn and come in here (indicating), I was right
page 260 } there at that window and aimed to turn and come
right in here, and when I got here, I dropped
over in the ditch.

Q. Are you sure you didn't back up?

A. I wouldn't swear to it, but I don't think I backed up
at all. The front of my car was right at this window and I
think I tried to make the turn from that.

Q. You parked opposite the center window and then you
say you started up and undertook to come back across here
(indicating).

A. Yes, sir, I think that is right.

Witness stands aside.

Defendant rests.

page 261 } REBUTTAL TESTIMONY OFFERED BY
THE PLAINTIFF.

W. J. HILLSMAN,
Plaintiff, Recalled, in rebuttal.

By Mr. Brock:

Q. It has been testified by several witnesses for the de-
fendant that the lights of your car were not burning when
they got to the car, after the accident. What about that?

A. That is right, they were not burning when anybody
came there.

Q. Why were they not burning?

A. The lights were shining in the water and there was some
oil on it and I was afraid of fire from the gasoline running
on the electric wires or something of the sort and I broke
the light out of the car and got out, and after I got out I went
back and blowed my horn three or four times, turned the light
out, and hollered as loud as I could to the people on the train,
and they heard me and came there.

Q. Then after the accident you turned your lights out for
the reasons you have stated?

A. Yes, sir.

Q. You were afraid something might catch on fire?

A. Yes, sir.

Q. When was it that you had this conversation with Mr.
Moore, I believe it was, about the lights?

A. Mr. Moore?

page 262 } Q. I think it was Mr. Moore—or one of the witnesses here on yesterday?

A. He asked me after I got the car out if my lights were all right, and I told him I would see. We had used heavy levers to get the car out of the ditch and prized it and jarring them and I didn't know whether the lights would burn or not, and he asked me if my lights were all right and I told him I would see, and they were all right.

Q. They were all right when you started off?

A. Yes, sir, and in the ditch they were all right, and after I got it out the ditch I turned it on again and they were still all right.

Q. In the testimony on yesterday Mr. Hall asked you, when you stated you had to employ a boy in the store since this accident, if this boy was not paid by the partnership and you replied, "yes". What is the nature of your partnership?

A. The partnership is that I give my partner one-third of the net profits of the store for his assistance and I furnish the capital, and my labor and I give him one-third of the profits of the store, which would make two-thirds of the boy's salary on me.

Q. It was also stated here yesterday that you did as much work in getting the car out of the ditch as anyone else did.

What did you work consist of?

page 263 } A. Mr. Moore told me it would be impossible to get the car out until the next morning as we would have to get a block and fall or something, and I told him I thought we could get it out all right, and he said "all right, if you can get it out, we will give you any assistance whatever, we will do all we can to get it out". I instructed them and they got some ties and put some levers on there and we prized the car up and I sat on the lever while they would be re-blocking it, and practically managed the getting of the car out.

Q. You mean you were the Director?

A. Yes, sir, in getting the car out.

Q. Did you go down in the ditch and put some of the levers under the wheels yourself?

A. I did not go in the ditch at all but I did help to maneuver the lever and I might have helped to move some of the ties in building up the place there.

Q. Now when Dr. Moore was examining you did he say anything about your condition, or about a man '50 years old or 60?

A. Dr. Moore said that my condition was that of a man ten years younger than my age, and that he hoped or wished he would be in the same condition as I was in when he was 60.

Q. Did he say anything about your heart affecting this situation that you complained of?

A. No, sir.

page 264 } Q. Your heart being responsible for it?

A. No, sir, he never raised any question about my heart.

Q. You have heard Mr. Priddy on the stand say that he had a talk with you in Farmville near the People's Bank, or at the corner near the People's Bank and that you told him you were not hurt at all. Did you have any such conversation with Mr. Priddy?

A. I have no recollection of having any conversation with Mr. Priddy whatever.

Q. Do you know Mr. Priddy?

A. I have seen him before, but I didn't know who he was, I didn't know his name.

CROSS EXAMINATION.

By Mr. Hall:

Q. You say you and your partner divide the proceeds of this business one-third and two-thirds?

A. Yes, sir.

Q. And that means the net profits of the business are divided in that proportion?

A. Yes, sir.

Q. And the boy's salary—

A. Comes out of the business.

Q. Before there is any division made?

A. Yes, sir.

Q. And that boy does all the heavy work such as lifting and handling cases of groceries and things of that kind?

page 265 } A. No, sir, the boy is a salesman in the store also, and does the bulk of the heavy work.

Q. You do some of that yourself?

A. Yes, sir, in the store, I give what assistance I can. Of course, I cannot get around now like I have done before.

Q. Didn't you say in your examination on yesterday that either Dr. Leigh or Dr. Todd at Norfolk told you you were in the physical condition of a man ten years younger?

A. Dr. Todd told me that. He is the man that gave me a thorough examination.

Q. You didn't say anything on yesterday about Dr. Moore telling you that you were in the same condition as a man ten years younger, did you?

A. I answered the questions asked me on yesterday, and once or twice I started to tell, and the Court ordered me to answer questions asked me.

Q. I am not asking you about any certain questions, I am asking you the direct question, whether or not you testified on yesterday that Dr. Moore told you that you were in the same condition as a man ten years younger?

A. No, sir, I did not testify to that.

Q. So Dr. Todd and Dr. Moore both told you the same thing?

page 266 } A. Yes, sir.

Q. In the same language?

A. Practically the same language.

Q. Did you tell Dr. Moore what Dr. Todd had told you about being in the condition of a man ten years younger?

A. I did.

Q. Then he said the same thing?

A. Yes, sir.

Q. Before you told him that or after?

A. I think after I told him that.

Witness stands aside.

End of all testimony.

page 267 } OBJECTIONS AND EXCEPTIONS TO IN-
 STRUCTIONS.

By Mr. Hall: Defendant objects to all of the instructions given for the plaintiff numbered "A, B, C, D and E", on the ground that the evidence is not sufficient to warrant any of said instructions being given, and especially objects to Instruction "E" the other instruction dealing with the plaintiff's alleged injuries upon the ground that the evidence fails to show that the plaintiff received any lick or blow or jar at the time of the alleged accident that could have caused the arthritis or other conditions of which the plaintiff complains. The evidence is totally insufficient to show that the plaintiff received any injury in the alleged accident which caused or might have caused the bodily infirmities of which

he complains, and excepts to the ruling of the Court in giving said instructions.

The defendant excepts to the ruling of the Court in refusing to give Defendant's Instructions 6 and 9, on the ground that said instructions state correct propositions of law and are applicable to the facts offered in evidence in this case.

page 268 } By Mr. Early: To the ruling of the Court in refusing to grant Instructions "F, H and I" on behalf of the plaintiff the plaintiff excepts on the grounds that the evidence discloses a situation of a dangerous excavation adjoining a private road, which excavation was not protected by guard rails and were, therefore, a nuisance *per se* and that said instructions were proper statements of law under such conditions.

To the ruling of the Court in refusing to grant Instruction "G" the plaintiff excepts on the ground that the evidence introduced by defendant as to what was the custom in the construction of roads over culverts made by County authorities was irrelevant, and no proper test or standard as to what the defendant should have done or what was done in the present case; that such evidence did not show any similar conditions in the county road as was shown in the case at bar, and that the duties imposed on a public service corporation, such as the defendant, are not the same as those which are imposed on the State or County authorities.

page 269 } The following instructions were given to the jury on motion of the plaintiff:

(A)

The Court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover damages, then in estimating the damages, they shall take into account the bodily injury sustained by the plaintiff, the suffering both mental and physical already undergone and which he is likely to undergo in the future, the effect on his health and nervous system according to its degree and its probable duration as likely to be temporary or permanent, the loss of earning power in the conduct of his business, medical expenses already incurred or likely to be incurred in the fu-

ture by reason of such injury, not to exceed \$5,000.00, the amount laid in the declaration.

(B)

The Court instructs the jury that it was the duty of the defendant railroad company to keep its premises at New Abilene Station in a reasonably safe condition, so that those whom it has invited to lawfully enter upon and use its said premises in approaching said railway station not to be unnecessarily or unreasonably exposed to danger; and if the jury believe from the evidence that the defendant railway company failed to keep said premises in a reasonably safe condition so that those it has invited to lawfully enter upon and use its said premises in approaching said station would not be exposed to danger, and that such failure on page 270 } its part was the proximate cause of the injuries sustained by the plaintiff, then they must find for the plaintiff, unless the plaintiff's own negligence contributed to his injury.

(C)

The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant railway company created, or permitted to remain, on its premises at New Abilene Station an open ditch across which passed a private roadway provided by said railway company as an approach to and from its said railway station, and that this created a situation which under the surrounding circumstances would make it dangerous for travelers using said roadway in the exercise of ordinary care, unless protected, and that the said railway company failed to erect and maintain such guard rails, barriers, readily seen warnings, or other safeguards as were necessary to prevent travelers using said roadway in the exercise of ordinary care from falling into said ditch, and that such failure was the proximate cause of injury complained of, they should find for the plaintiff.

(D)

The Court instructs the jury that the defense of contributory negligence is an affirmative defense set up and claimed

by the defendant in this case and that if the jury believe from a preponderance of the evidence that the negligence of the defendant has been established and that said accident would not have occurred, except for said negligence on the part of the defendant, then in that event the defendant in order to avail itself of the defense of contributory negligence must establish and prove said contributory negligence on the part of the plaintiff by a preponderance of the evidence and that said accident would not have occurred except for the contributory negligence on the part of the plaintiff.

(E)

The Court instructs the jury that even if they believe from the evidence that the plaintiff had arthritis in some form prior to the date of the accident, yet if they further believe from the evidence that the injury complained of added to or aggravated the condition of the left knee and that such injury was due to the negligence of the defendant, the plaintiff is entitled to recover such damages as the jury may find, not to exceed \$5,000.00.

The following instructions were given to the jury on motion of the defendant:

INSTRUCTION NO. 1.

page 272 } The court instructs the jury that the fact that the plaintiff drove into the ditch or drain on the defendant's premises does not raise any presumption of negligence against the defendant and the burden rests upon the plaintiff to show by a preponderance of the evidence every fact necessary to hold the defendant negligent in the performance of a duty which it owed to the plaintiff. It is not sufficient that the evidence is consistent equally with the existence or non-existence of negligence on the part of the defendant, but there must be affirmative preponderating proof of the defendant's negligence in the performance of a duty which it owed to the plaintiff which was the proximate cause of the injury of which the plaintiff complains.

INSTRUCTION NO. 2.

The court instructs the jury that if they believe from the

evidence that the plaintiff came upon the defendant's station grounds at Abilene for the purpose of meeting
 page 273 } his daughter, who was a passenger on defendant's train, then the defendant only owed to the plaintiff the duty of exercising ordinary care to have its premises in a reasonably safe condition to be used by the plaintiff in accomplishing the purpose of his visit to said premises, in the exercise of reasonable care on the part of the plaintiff, and the defendant was not an insurer of the safety of the plaintiff while on said premises, and was only required to use ordinary care not to expose the plaintiff to danger.

INSTRUCTION NO. 3.

The Court instructs the jury that the only duty owing by the defendant to the plaintiff was to construct and maintain the approaches to its stations reasonably safe for travelers exercising ordinary care, and if they believe that the said approaches were so constructed and maintained as that a careful and prudent traveler, exercising ordinary care in using said approaches, would have been reasonably safe, then you must find for the defendant.

INSTRUCTION NO. 5.

The Court instructs the jury that contributory negligence is a bar to recovery in this action, and if the jury shall believe from the evidence that the plaintiff was in any manner negligent and that his negligence contributed to the accident they must find for the defendant.

INSTRUCTION NO. 7.

The court instructs the jury that the burden is on the plaintiff to show, by a preponderance of the evidence,
 page 274 } dence, that the injuries of which he complains resulted from the alleged accident on the defendant's premises.

The jury are further instructed that if, from all of the evidence, it is just as probable that the plaintiff's infirmities resulted from other causes, as it is that they resulted from the alleged accident, the jury must find for the defendant.

INSTRUCTION NO. 8.

The court instructs the jury that, if they shall believe from the evidence that the proximate cause of the plaintiff's accident was negligence of both the plaintiff and defendant co-operating and concurring together, then your verdict shall be for the defendant.

The court refused to give the following instructions offered by the plaintiff:

(F)

The court instructs the jury that an excavation adjoining a private way, or so near thereto that one using the same with ordinary care might fall into it and be injured, is *per se* a nuisance, unless proper means are provided to guard against the occurrence of such accident, and the court further instructs the jury that when the owner makes an excavation, or knowing that an excavation on his premises adjoining a private way exists and fails to provide safeguards against accident to those lawfully using the same, the owner is liable as an insurer and the burden of proof is on the defendant to show by a preponderance of the evidence that the plaintiff's negligence was the proximate cause of the injury.

page 275 }

(G)

The court instructs the jury that what the County authorities may have done, or failed to do, in the construction of roads over culverts has nothing to do with the case now being tried.

(H)

The court instructs the jury that if they believe from the evidence that the defendant railway company created or permitted to remain on its premises at New Abilene Station an excavation adjoining a private roadway provided by said railway company as an approach to and from its said railway station and failed to provide guard rails or other safeguards to prevent travelers lawfully using said roadway from falling in said excavation and being injured thereby, the

railway company has created a nuisance and becomes the insurer of persons lawfully using said roadway while exercising ordinary care, and that if they believe from the evidence that the said excavation was the proximate cause of the injuries complained of, they must find for the plaintiff.

(I)

The court instructs the jury that the owner of premises who makes an excavation or knowingly permits such an excavation to exist on said premises adjoining a driveway or so near to said driveway as to make the driveway unsafe or dangerous to the invitee while using ordinary care in
page 276 } using the same, it becomes the duty of the said owner to provide fencing or other proper safeguards to such driveway so that one rightfully using the same may be protected from falling into such excavation and being injured thereby and if the jury believe from the evidence that the defendant railroad company did create such excavation or permit the same to exist and failed to provide proper fencing or proper guards and as the result of an unintentional deviation or an accidental misstep, the plaintiff sustained the injuries complained of by falling into such excavation, then said defendant is liable to the plaintiff for the injuries sustained by him, if they further believe from the evidence that such act on the part of the defendant company in permitting such excavation to exist and failing to provide proper safeguards was the proximate cause of the injuries to the plaintiff.

The court refused to give the following instructions offered by the defendant:

INSTRUCTION NO. 6.

The court instructs the jury that, if they believe from the evidence that there was on defendant's premises, for the use of its patrons, a well-defined driveway, covered with cinders or slag, and that such driveway could be clearly seen and was obvious to anyone using said premises in the exercise of ordinary care, and that the plaintiff, through failure to turn on the lights of his automobile, or because his vision through the windshield of his automobile was obstructed, or through any other cause for which the defendant was not responsible,

failed to see said driveway, and drove his automobile off the driveway into the ditch or drain, then the plaintiff was guilty of such contributory negligence as will bar a recovery in this case, and the jury must find for the defendant.

INSTRUCTION NO. 9.

The court instructs the jury that the defendant was not required to use a higher degree of care in the construction of the driveway over the ditch on its premises at Abeline than is customarily used in the construction of county and other roads in the locality in which Abeline is located, and if the jury shall believe from the evidence that the roadway over the drain pipe in the ditch on defendant's premises at Abeline was of sufficient width and was constructed and maintained by the defendant in view of this particular situation in as safe condition for travel thereon as for travel over similar drain-pipes constructed and maintained in county and other roads in that locality, then the defendant was not guilty of negligence by reason of the manner in which it constructed and maintained its driveway over the ditch on its premises at Abeline.

I, R. F. Hutcheson, Judge of the Circuit Court of Charlotte County, Virginia, who presided over the foregoing trial, do hereby certify that the foregoing is a true and correct stenographic copy of the report of all the testimony that was introduced and other incidents of the trial therein, including all the instructions, given, refused and amended, all exhibits or other writings introduced in evidence, or presented to the trial Court, all questions raised and all rulings thereon, in the case of W. J. Hillsman vs. Virginian Railway Company, tried in the Circuit Court of Charlotte County, Virginia, on the 4th and 5th days of May, 1932, and it appears in writing that the plaintiff's attorneys have had reasonable notice of the time and place when the report of testimony and other incidents of the trial would be tendered and presented to the undersigned for certification, which is certified within sixty days after final judgment.

Given under my hand this the 25th day of July, 1932.

ROBT. F. HUTCHESON, Judge.

I, H. B. Chermside, Clerk of the Circuit Court of Charlotte County, Virginia, do hereby certify that the foregoing stenographic copy or report of testimony and other incidents in the trial of the case of W. J. Hillsman vs. Virginian Railway Company was filed with me as Clerk of said Court on the 25 day of July, 1932.

H. B. CHERMSIDE, Clerk.

page 279 } And on another day, to-wit, at a Court continued
and held for Charlotte County on the 4th day of
May, 1932, the following order was entered:

W. J. Hillsman
vs.
Virginian Railway Company.

MOTION.

This day came again the paryies, *vy* their attorneys, and then came a jury, to-wit, Roy M. Holt, Melvin E. Crews, F. A. Mason, W. J. Sublett, O. M. Locke, J. D. Morton and J. Thos. Hamlett, who were selected, impanelled and sworn the truth to speak upon the issue joined, and after hearing part of the testimony, the jury was adjourned over until tomorrow morning at ten o'clock.

And on another day, to-wit, at a *Cpirt* continued and held for Charlotte County, the 5th day of May, 1932, the following order was entered:

W. J. Hillsman
vs.
Virginian Railway Company.

MOTION.

This day came again the parties, by their attorneys, and the jury sworn in *tyis* case on yesterday, appeared in Court pursuant to adjournment, and after hearing the testimony and argument of counsel, retired to their room to consult of their verdict and after some time returned into Court with a verdict in these words: We, the jury, find in favor of the plaintiff and fix his damages at \$1,250.00. Whereupon, the defendant, by its attorneys, moved the Court to set aside the verdict of the jury and enter judgment for the defendant on the ground

page 280 } that the verdict was contrary to the law and the evidence and on account of the insufficiency of the evidence to support a verdict, which motion the Court takes time to consider and this case is continued.

And now on this day, to-wit, at a Court continued and held for Charlotte County, on the 6th day of July, 1932, the following was entered:

W. J. Hillsman

vs.

Virginian Railway Company.

MOTION.

This day came the plaintiff and defendant, by counsel, pursuant to agreement, whereby the motion of the defendant to set aside the verdict of the jury in this action was set to be heard on the 16th day of May, 1932, before the Judge of this Court in vacation in chambers, and the Court having heard argument of counsel and counsel having submitted written briefs, and the Court having taken time to consider said motion and after having carefully considered the same, is of opinion and doth so decide and order that the motion of the defendant to set aside the verdict of the jury be overruled.

Therefore, it is considered by the Court that W. J. Hillsman, the plaintiff, do recover of the Virginian Railway Company \$1,250.00 in accordance with the verdict of the jury rendered in this case, together with his cost in this behalf expended.

To which ruling of the Court in overruling the motion to set aside the verdict and entering judgment for the plaintiff, the defendant, by counsel, excepted. Whereupon, on motion of the defendant, by counsel, execution of this judgment is hereby suspended for a period of ninety days upon de-
page 281 } fendant, or someone for it, entering into a suspending bond in the penalty of \$250.00, conditioned according to law, to allow the defendant to apply to the Supreme Court of Appeals for a writ of error and *supersedeas* to said judgment.

In the Clerk's Office of the Circuit Court of Charlotte County.

I, H. B. Chermside, Clerk of the Circuit Court of Charlotte County do hereby certify that the foregoing is a true and cor-

rect copy of the record in the case of W. J. Hillsman vs. Virginian Railway Company, lately pending in said Court, and I do further certify that due notice as required by section 6339 of the Code of Virginia, was duly given by counsel for defendant to counsel for plaintiff before said transcript was made out and delivered to counsel for plaintiff.

Given under my hand this 1 day of August, 1932.

W. B. CHERMSIDE, Clerk.

Clerk's fee \$5.00.

A Copy—Teste:

H. STEWART JONES, C. C.

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