

162-456

# Record No. 1432

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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T. D. KISER

v.

CHANNING M. SUTHARD

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FROM THE CIRCUIT COURT OF THE COUNTY OF FAUQUIER

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"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.

M. B. WATTS, Clerk.

162 Va 456

IN THE  
**Supreme Court of Appeals of Virginia**  
AT RICHMOND.

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**Record No. 1432**

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T. D. KISER  
*versus*  
CHANNING M. SUTHARD.

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PETITION FOR A WRIT OF ERROR.

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

Your petitioner, T. D. Kiser, respectfully represents that he is aggrieved by that certain judgment of the Circuit Court of Fauquier County, entered against him on the 27th day of March, 1933, for Seven Thousand Dollars (\$7,000.00), and interest from the 27th day of January, 1933, in proceedings held pursuant to a notice of motion for judgment for Ten Thousand Dollars (\$10,000.00), by Channing M. Suthard, the plaintiff, in the Court below, your petitioner, T. D. Kiser, being the defendant in the said lower Court.

This notice of motion was filed at Warrenton, Virginia, before the Circuit Court above said, and in said notice of motion claim was asserted for \$10,000.00 damages based upon personal injuries suffered by Mr. Suthard, as the result allegedly of the negligence of the servant and employee of Mr. Kiser, whose truck was being operated on a state highway by the said employee.

There was a verdict and judgment of \$7,000.00 in favor of the said plaintiff, Channing M. Suthard, which the judge of the Circuit Court of Fauquier County, refused to set aside as being contrary to the law and evidence, of which verdict and judgment your petitioner now complains.

## FACTS.

On the 28th day of September, 1932, at about the hour of 8:30 P. M. the truck of T. D. Kiser, engaged in commercial hauling and driven by one William Sweeney, was proceeding in a southerly direction from Washington, D. C., to Remington, Virginia. The truck had passed through the town of Warrenton, Virginia, on its way to its destination point on the State Highway Route #15 and had proceeded for a distance of approximately three to four miles south of said town. The truck was loaded with merchandise and ice which he had taken on in Washington for its return trip having gone to Washington early that day. Sweeney was driving the truck at a lawful rate of speed, the truck having a governor attached to it which prevented it from exceeding the speed of forty-five miles an hour, which is allowed on state highways of this character. At said point of approximately three or four miles south of Warrenton, and practically opposite the residence of Mr. and Mrs. Latham Shumate, the passenger car of Suthard's was approaching the truck. The passenger car was proceeding on its way to Warrenton in a northerly direction. There was but one person in the truck, that being its driver, Sweeney, and there was but one person in the passenger car, that being Suthard, its driver.

The truck and passenger car collided with each other at this point, the result of which Suthard suffered personal injuries and was carried to the local hospital in Warrenton. As to how the collision occurred the statements of Suthard and Sweeney are, of course, at variance one with the other.

The substance of Suthard's statement, beginning on page 79 of the record, is that he left home about eight o'clock and up to the time and scene of the collision had passed several cars and when he was about to pass the truck driven by Sweeney he attempts to state that the heavy truck "jumped right across the road" and struck his car. He naturally stated that he was driving on the right hand side of the road and was not exceeding the speed limit.

The witness, Sweeney, driving the truck, whose evidence is to be found beginning on page 115 of the record, shows in a few words how the collision occurred. His statement is as follows (Page 115):

"A. I was going home from Washington; I was going down the road, and I got just over a hill just before you get to Mr. Shumate's, and I saw this car coming. I dimmed my

lights and he dimmed his and right after he dimmed his lights, he continued coming on my side of the road; at first I thought it was somebody playing with me; got right on me and was clean over on my side of the road; if he had stayed where he was I would not have touched him, and I thought of that ice and I swung hard to the left, and when I swung he did too and the two went in together like that. He was clean over on my side past me; if he had stayed where he was I would not have touched him.

Q. From the way the cars were approaching was the collision imminent? Was it certain a collision would have occurred?

A. Yes, Sir; was not any way in the world I could help from hitting him.

Q. What did you do to try to avoid an accident?

A. Swung hard to the left."

In other words, Sweeney, driving upon his right hand side of the road at the time the Suthard car was approaching him realized that Suthard, driving his car well to his left side of the road would certainly cause a collision. He further realized that there was but one way to avoid a serious accident and that was to turn from the path of Suthard's car to the only side of the road that it was possible for him to do so. He attempted to turn his truck quickly to the left in his attempt to avoid a collision.

The above is the substance of the witness's testimony before the jury as to how the collision came about. There were a number of physical facts in addition to the above. A certain amount of shattered glass was found on the east side of the road at about the scene of the impact, Page 51 of the record. The truck was found on the east side of the road headed into the bank at a 45 degree angle, Record, Page 26; the left front wheel of which was practically against the bank and the right front wheel probably two feet from the bank. The passenger car, driven by Suthard, was completely turned around all four wheels still on the macadam and facing south in the opposite direction to that in which it had been proceeding before the accident. The left front wheel was about  $2\frac{1}{2}$  to 3 feet on the east edge of the road and the left rear wheel approximately  $4\frac{1}{2}$  feet from the east side of the road. The two vehicles after the impact were situated approximately three feet apart. Leading from a point five feet from the west edge of the hard surface in a gradual half moon curve to the left front wheel of the car driven by Suthard was a distinct black skid mark, identified

on page 29 of the record, page 138 and page 140. The circular mark was 15 feet long and led directly to the left front wheel of the Suthard car, which said mark was recognized and identified before either of the vehicles had been moved, immediately following the impact. Photographs of this mark were prepared, identified and introduced in evidence before the jury here in this case.

### THE ASSIGNED ERRORS.

(1) That the Court erred in refusing to declare a mistrial and to discharge the jury because of certain statements made by the witness, T. F. Stafford, on Page 36 of the record, which statement of the said witness is as follows:

“A. It was two fellows, supposed to be representing insurance agent, having it done.”

(2) That the Court erred in refusing to set aside the verdict as being contrary to the law and evidence and grant a new trial in accordance with the motion by counsel for T. D. Kiser, to be found on Page 14 of the transcript of the record.

### ASSIGNMENT OF ERROR #1.

At the beginning of the trial of this cause the plaintiff introduced as his first witness T. F. Stafford, who took the stand and described in detail the position of the car and the truck as he found them very shortly after the accident.

Upon the cross examination of Mr. Stafford, by counsel for Kiser, the witness attempted to describe certain marks found upon the scene of the accident and counsel for Kiser introduced pictures of the mark in their cross examination of the witness. During the progress of such cross examination and while counsel for Kiser were interrogating the witness, Mr. Burnett Miller, Counsel for the plaintiff, Suthard, interrupted defendant's counsel's cross examination, as is shown by the following question and answer:

“Mr. Miller:

Q. Who made that do you know?

A. It was two fellows, supposed to be representing insurance agent, having it done. I do not know who actually took the pictures.”

At this point counsel for the plaintiff in error requested that the jury be taken out of the court room and thereupon a motion was made that the Court declare a mistrial and discharge the jury. The court refused the motion advising counsel that the Court would instruct the jury that they should disregard such statement and that whether either party had insurance or not, should have no bearing upon the issue raised by the facts. The motion was overruled and exception duly and properly taken by counsel for plaintiff in error, Mr. Kiser. Your petitioner assigns this action of the Court in refusing a mistrial and in refusing to discharge the jury and in the failure to instruct the jury to disregard such statement, as error.

As your petitioner understands the law of the State of Virginia, to be found among the decided cases and particularly those with reference to automobile accident cases, it is gross error for such statements to be made in the presence of a jury. Such a statement is wholly collateral to the issue of whether or not the defendant is guilty of negligence. Being thus collateral and irrelevant to the question of the existence or non-existence of negligence, the reception of such evidence is, of course, inadmissible. Further than that an instruction from the Court to the jury for the latter to disregard such statement or evidence is too mild an antidote to obliterate and erase the effect of such evidence from the minds of the average juror. It does not have to be proven that such a statement has actually affected the minds of the jurors and it must only appear that such an inadmissible, improper statement *may* have influenced the verdict. As your petitioner and his counsel understand the law of this state, it is not necessary that such statements need be made intentionally or defiantly. Even though a witness may have thoughtlessly and innocently referred to insurance, the effect upon the minds of the jurors cannot help but be the same.

In this particular case, as counsel will hereinafter present in this petition, the verdict of the jury awarding damages in the amount of \$7,000.00—is one of the largest verdicts ever rendered in the County of Fauquier.

In the light of an award of damages so excessive in their amount and not based upon any evidence of excessive injury or injuries suffered, it is not unreasonable to surmise and to see that the jury in this case was swayed or prejudiced by some untoward influence. We honestly and fairly assume the position that the statement of the witness, Stafford, not only probably, but actually did prejudice and sway the jury in this case. We recognize and realize that great re-

spect is to be accorded to the verdict of any jury of any court in this Commonwealth, but we reiterate that the judgment of the average juror is never infallible and is always subject to the effect of certain subtle influences that impress the average human mind.

The decided cases of this state indicate that in a case where it is *possible* that the jury *may* have been influenced as to their verdict by such extrinsic matters, that justice requires the granting of a new trial to remove and do away with such a doubt. The courts have always said, that where there is a doubt that any citizen of this state has not received a fair trial, that the ends of justice are satisfied by the award of a new trial. The courts have not laid down the rule that it must appear absolutely without doubt that the jury has been influenced by such a statement. Decided cases use the words that the jury "may" have been influenced or that the statement or statements were "likely" to influence the mind of the average juror.

In the case at bar we not only have the statement uttered in the presence of the jury, but the court failed to instruct the jury to disregard it. Is there not the inference from which the jury could have drawn some such conclusion? In other words, the utterance of such a statement and the failure of the court to instruct them to absolutely disregard such a statement, might have led the jury in this case to have felt that they were justified in taking into consideration that the defendant, Kiser, in this case was fully insured and that the insurance company holding his policy, would stand for the loss and damages suffered by the defendant in error, Mr. Suthard.

Briefly we wish to present the following cases to sustain petitioner's contention and assignment of error that the court of Fauquier County should have declared a mistrial in accordance with the motion of counsel to be found on Page 14 of the transcript of the record.

*Rinehart & Dennis Company vs. Brown*, 137 Va. 670.

This case involved an action to recover for damages sustained by plaintiff and in the opening statement of counsel for plaintiff before the lower court, reference was made to the defendant, Rinehart & Dennis, was fully protected by a certain casualty company in the event of any liability for damages. Upon objection by counsel for defendant, the court sustained the objection and instructed the jury not to consider any such remarks or the fact of any insurance being

owned by the defendant. The court refused to discharge the jury and the Supreme Court of Appeals of this state held; the verdict for the plaintiff should have been set aside and a new trial awarded the defendant.

During the course of the opinion we find the following pertinent words:

“All that can be safely laid down is, that whenever in the exercise of a sound discretion, it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however, thoughtlessly or innocently of it, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside.”

“We must consider then whether the amount of the verdict was such as to indicate that the jury were probably influenced improperly by the remarks of counsel. It was not said that the extent of prejudice on the part of the jury could be ascertained *only* by determining whether the verdict *in its amount* disclosed prejudice or disregarded the evidence, in that particular case it did, and that was all that was necessary to investigate, but that was not announced as a universal test. There may be cases in which the evidence may not warrant a recovery by the plaintiff, or the evidence leaves it doubtful if the plaintiff is entitled to recover, where verdict for the plaintiff for any amount may be said to be induced or certainly influenced by the improper remarks of counsel. In such cases the verdict should be set aside.”

*Lanham vs. Bond*, 157 Va. 167.

The issue involved in this case revolved around the statement and testimony of the plaintiff (suing for damages) that the defendant at the time of the accident told him that it was defendant's fault, but that he had insurance and the insurance company would pay the damages. Upon motion of defendant's counsel the Corporation Court of the City of Alexandria refused to declare a mistrial and discharge the jury.

In an opinion by Justice Browning the case was reversed and remanded. It cited and affirmed the case of *Rinehart & Dennis Company vs. Brown* and reiterated the principle that mentioning of insurance constitutes error. We quote the following lines from the opinion:

“The plaintiff here has been allowed to obtain the advan-



tage of having the attention of the jury called to the insurance, a wholly collateral subject, which was likely to influence the mind of the average juror notwithstanding the instructions of the trial court."

\* \* \* \* \*

"The reception of such evidence sometimes has a subtle influence that will act unconsciously upon the mind."

\* \* \* "at least there is a reasonable probability that the jury was influenced by it to the prejudice of defendant."

### ASSIGNMENT OF ERROR #2.

Counsel for the defendant following the verdict moved to set aside the verdict on the following grounds:

(1) That the verdict of the jury was contrary to the law and evidence.

(2) That the verdict of \$7,000.00 was grossly excessive, in view of the fact that there was no evidence before the jury to show damages in the amount of \$7,000.00 to the plaintiff's person and property.

(3) Because the verdict of the jury was the result of the statement concerning insurance, which said statement was highly prejudicial to the defendant and calculated to excite the feelings of the jury and to influence the jury by passion, partiality and/or prejudice and especially in view of the fact that the court failed to instruct the jury before they retired to consider their verdict that they should disregard such reference to insurance of the defendant.

The motion of the defendant to set aside the verdict on the above grounds was refused and your petitioner has now assigned as error the action of the court in refusing said motion to set aside the verdict.

The only two eye witnesses to the collision between the passenger car and the truck were the drivers of each vehicle. The driver of the defendant's truck testified in a very clear fashion that he was complying completely with the law of the road and that the driver of the plaintiff's car approached him on his side of the road (the west side) and that he conscientiously and in the exercise of his best judgment attempted to avoid the accident by cutting to the east side of the road, after he saw that a collision was imminent unless he resorted to some means to prevent it. The driver of the plaintiff's car (the plaintiff himself) testified that he was also complying with the law of the road and was driving

well to his right side of the road, which happened to be the east side of the road. He further testified that the defendant's truck came across the road and struck him at the scene of the accident. These two statements are entirely contradictory and in complete conflict one with the other. It is, of course, the province of every jury to decide such a conflict in the evidence. A jury has the privilege to believe one or the other in such an event, but fortunately juries are not permitted to disbelieve or to refuse to heed evidence consisting of certain uncontradicted and uncontradictable physical facts.

In this case there were presented to the jury several pictures and photographs of a skid mark made by the left front wheel of the plaintiff's car. This skid mark was identified by the defendant immediately after the accident before the plaintiff's car was removed and in addition was further identified by an uninterested witness and third party, who had no interest in the action for damages, pro or con. May we repeat that the plaintiff's car had completely reversed itself and instead of heading north as it originally was proceeding, it was found, immediately after the accident, headed in a southerly direction. The skid mark led from the east side of the road directly from the left front wheel of plaintiff's car in a half moon circular curve to the west side of the road to a point at a distance of four to five feet from the west edge of the macadam road, described as being 16 to 17 feet wide. Let us follow and reverse the movement of plaintiff's car from its position after the accident along the course of the skid mark, let us reverse the car along said skid mark and follow the half moon to its other end, turning the plaintiff's car around and heading it back toward the north. Following thusly the course of the skid mark to that point at the other end of the mark and then the left front wheel of plaintiff's car would have been and could not have been elsewhere than from four to five feet from the west edge of his left side of the road, showing without the slightest doubt and question that plaintiff's car was being driven well to his left and wrong side of the road, as it was approaching and about to pass the defendant's truck.

Your petitioner would further call attention to the fact that the surface of the highway was 16 to 17 feet in width and that the plaintiff's car was a long five passenger car.

We further call attention, therefore, to the further physical fact that plaintiff's five passenger car had completely turned around and was still upon the hard surface road. Is it possible for plaintiff's car to have been proceeding on his right

hand side of the road and to have been hit by an impact on the left side of his car turned completely around and not have been knocked off of the hard surface on to or past the dirt shoulder on the edge of the concrete? Your petitioner earnestly contends, therefore, that these two physical facts governed by the laws of physics could not have been heeded by the jury, that the evidence of such physical facts existing were uncontradicted and uncontroverted and that being thusly undeniable because of their physical character, their existence could not be accorded other than full credence by human intelligence.

The jury may have believed *in toto* the statement of the plaintiff, Suthard, and disbelieved *in toto* the evidence introduced on behalf of the defendant, but the jury has exceeded its province in believing or attempting to believe the unbelievable and incredible. The testimony of Suthard could not have been more in conflict with the actual physical facts.

If it be assumed that it was possible for plaintiff's car to have moved, as it was claimed by the plaintiff himself that it did move, the court is still confronted by this unescapable fact—it did not so move, and that it did not is demonstrated by uncontroverted physical facts. We, therefore, respectfully and sincerely petition the Honorable Court of Appeals of Virginia that the Circuit Court of Fauquier County, erred in refusing to set aside this verdict upon this ground.

The following authorities for this contention are cited below:

*Shoemaker vs. Andrews*, 154 Va. 170.

"In the instant case plaintiff while riding upon a mule was struck by defendant's automobile which was approaching from the opposite direction. The mule was struck on its right side, thus corroborating defendant's testimony that on his approach the mule became frightened and headed directly across the road. The injuries to defendant's car were on the left side. Thus, the physical facts clearly indicated that the car at the time of the accident was being properly driven on the right side of the road. The evidence of plaintiff's son contradicted defendant, but if the son's account of the occurrence had been true, the mule instead of being struck on the right side, would certainly have been struck on his left side. Moreover, statements of the son made to others at the time of the accident were at variance with his testimony at the trial and confirmed defendant's account of the accident. There was a verdict for plaintiff which the trial court set aside and rendered judgment for defendant.

Held: That the trial court's action in setting aside the verdict as unsupported by the evidence must be affirmed."

*White vs. Richmond Greyhound Lines*, 158 Va. 462.

This case involved an accident between a passenger bus and a Hupmobile touring car. The accident occurred during a storm or immediately following a storm and the condition of the road was such that an impression of the wheels of the bus were easily shown in the soft mud to the side of the center concrete hard surface. These impressions showed the path of the defendant's bus, proving absolutely that the bus was well to its right hand side of the road, immediately preceding the accident. The physical facts, uncontroverted also in this particular case, substantiated in detail defendant's testimony. The lower court set aside a verdict of \$10,000.00 and the action of the trial court in setting aside the verdict was affirmed in the following words:

"This case does not come to us as on a demurrer to the evidence, but if it did even that unbending rule does not require us to believe the unbelievable. If we assume that it was possible for this bus to have moved, as it is claimed that it did move, we are still confronted by that unescapable fact—it did not so move, and that it did not is demonstrated by uncontroverted physical facts."

Your petitioner's final contention is based upon the lower Court's refusal to set aside the verdict because the damages of \$7,000.00 were excessive, the amount being based on no evidence introduced and that consequently the amount or *quantum* of damages arrived at could not have been other than the result of passion, partiality or prejudice. An award of damages, of course, must always be based upon some concrete evidence introduced which describes the extent of the plaintiff's injuries. What damages did the plaintiff suffer? It is in evidence that the total amount of plaintiff's hospital bill was but \$127.50, that he was confined to the hospital from the 25th day of September for a period of four weeks; that his doctor's and surgeon's bills were approximately \$100.00; that the damage to his car approximated the sum of \$350.00. Over and above the total of these amounts the balance to the limit of \$7,000.00 is represented by the physical injuries suffered by the plaintiff. There is no evidence that the plaintiff was permanently incapacitated or disabled or that he will not henceforth and always be able to continue his usual occupation, earning his livelihood as he did before. There is evidence, at the time of the trial of this case, on the 27th

of January, 1933, only a few months following the time of the accident, that the plaintiff was unable at that particular time to assume the duties and obligations of an occupation, but there is not one iota of evidence of the plaintiff himself, or his father, J. L. Suthard, or any of the physicians or surgeons attending him, even hinting at or tending to show any permanent disability or any permanent injury, which will prevent him in the future from earning his living and gaining a livelihood as he did before the time of the unfortunate accident.

We maintain, therefore, that the award of thousands of dollars for temporary injury is excessive, particularly in view of the fact that there is no evidence of other than the temporary injury or injuries and that the jury in awarding such a stupendous sum must have been motivated or influenced by extrinsic matter outside of the evidence.

In addition to the above there are further circumstances which must be considered to show the influence that was deliberately attempted and intended to have been exerted upon the minds of the jurors.

On Page 94 of the transcript of the record the witness H. E. Clougherty was called by counsel for plaintiff in a very unusual manner. Counsel for plaintiff, on Page 92 of the record, in certain remarks and conversation with the Judge of the court, referred to the witness Clougherty in the following words: "As the man who perpetrated a fraud upon this person."

On Page 143 in answer to a question propounded by plaintiff's attorney, the witness, Stafford, testified as follows:

"A. This fellow sitting on the edge of the bench back here—Clougherty."

It must be borne in mind that the witness, Stafford, early in the case had referred to the taking of pictures as being taken at the instance of supposed insurance representatives. At the time the pictures were taken a certain chalk mark was traced over the skid marks and the witness, Clougherty, was identified as the party who traced the chalk mark at the time the pictures were taken and it was attempted to be shown by plaintiff's counsel from the testimony of Stafford that Clougherty was present, that he made the chalk mark and by subtle inference that he, Clougherty, by making the chalk mark was supposed to be representing an insurance company, who had insured the defendant. This same witness (Clougherty) was identified by the witness, Dr. George H. Davis, as being the same party who obtained the signed

statements from the plaintiff while the latter was a patient in the hospital. This identification is to be found on Page 89 of the record in the following words:

"A. That gentleman right over there (indicating gentleman in the Court Room); I do not remember his name."

As indicated above, plaintiff's counsel had attempted, in the presence of the jury, to link the witness, Clougherty, with the supposed insurance company and from plaintiff's counsel's statement before the jury, accused such supposed representative of an insurance company as being a party who "perpetrated a fraud" upon the plaintiff while he was in the hospital.

We submit that such statements of counsel, of the witness Davis and of the witness, Stafford, are entirely improper, because there is absolutely no evidence of undue influence or perpetration of fraud. All of these statements were uttered in the presence of the jury in a hostile, defiant and insinuating manner and were calculated to make an impression upon the mind of each of the jurors and it is not only possible but probably that such statements above referred to had a very subtle and psychological effect upon the minds of those in the jury box.

We further call attention to a certain paper found among the papers in this suit after the trial and before motion was made to set aside the verdict. This paper was returned by the foreman of the jury at the time the verdict was returned. This paper is to be found on Page 161 of the transcript of the record and the following figures are given in quotations as follows:

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These figures are to be found on the above mentioned paper and counsel for your petitioner do not refer to them in an attempt to impeach the verdict as being a quotient verdict, but to show that the jury in their verdict had been motivated and influenced by other than the proper inferences to be drawn from the evidence properly submitted to them.

It is to be borne in mind that there were only six members

on the jury in this case, that the above six figures added up and divided by 6 were put down by the jury in an attempt to reach a compromise verdict. We call attention to the first figure of 15000. In this connection we call attention to the fact that suit was originally brought to recover not more than \$10,000.00. Some one member of the jury could not, therefore, have rendered his decision on the basis of a maximum of \$10,000.00.

Your petitioner, therefore, earnestly submits that upon the basis of this paper, the several statements referred to hereinabove in this petition with reference to insurance, and with reference to a perpetration of fraud, would show a verdict not fairly rendered and one that should be set aside. We further submit that the amount of the verdict in conjunction with the above is to be termed excessive.

The following case is cited:

*C. D. Kenny Co. vs. Solomon.*

This case was decided in March, 1932, and involved the question of negligence (and damages) presented as the result of an automobile accident. There was a verdict in favor of the plaintiff for \$2,500.00 damages. The verdict of the jury was approved by the trial court and judgment for said amount was accordingly awarded to the plaintiff. There was no preponderance of evidence in favor of the plaintiff, that the plaintiff had been permanently injured, and no preponderance of the evidence as to the impairment of his earning power and there was no preponderance of the evidence that plaintiff's injuries were more than temporary. It was held that the verdict in favor of the plaintiff of \$2,500.00 was excessive, that the verdict should be set aside and that a new trial be granted the defendant. We find the following in the course of the opinion:

"Sometimes the size of the verdict alone is sufficient to indicate passion or prejudice on the part of the jury. In ascertaining whether a verdict is excessive, each case must be determined on its own facts. Consideration should be given to all the circumstances, such as the nature and extent of the injury; whether temporary or permanent; the amount of suffering endured as a result of the injury; the probability of future suffering; the expense incurred and the extent to which earning power has been impaired."

"The finding of a jury is in no case, under the law of this State, beyond the healthful and salutary control of the courts. Strong as is the function of a jury as to damages, whether

in cases purely sounding in damages for tort, or where the law fixes a standard, its power is not arbitrary and unlimited, and cannot be allowed to work injustice and oppression.

If the verdict is so disproportionate to the injury as to suggest the inference that it is not the result of fair, calm and unbiased judgment of the jury, the verdict ought to be set aside as excessive."

### CONCLUSION.

Your petitioner respectfully contends and submits that the judgment of the lower court in this case should be reversed, that it should be remanded to the Circuit Court of Fauquier County for a new trial for the foregoing reasons assigned and respectfully prays that he be awarded a writ of error pending the review of the record by this Court and that this petition may be read in addition, as your petitioner's opening brief, for which said petitioner intends it.

A copy of this petition has been mailed to Mr. Burnett Miller, at Culpeper, Virginia, who was the attorney appearing for the plaintiff in the trial of this cause before the Circuit Court of Fauquier County, Virginia, and said copy of this petition was mailed to him on the 22nd day of June, 1933.

Counsel for your petitioner desire to state orally the reasons for reviewing the decision and action of the lower court hereinabove complained of.

Respectfully submitted,

T. D. KISER,  
By counsel.

RICHARDS & RICHARDS,  
Warrenton, Virginia,  
Attorneys for Petitioner.

We, the undersigned Attorneys, practicing before the Supreme Court of Appeals of Virginia, do certify that in our opinion the judgment complained of in the foregoing petition is erroneous and should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

Given under our hands, this the 22nd day of June, 1933.

J. DONALD RICHARDS,  
PAUL C. RICHARDS, JR.

August 25, 1933. Writ of error awarded. Bond, \$300.00.

GEORGE L. BROWNING.

Received Aug. 25, 1933.

M. B. WATTS, Clerk.



**RECORD****VIRGINIA:**

In the Circuit Court of Fauquier County.

Among the records and proceedings of said Court are the following:

Be it Remembered that on the 8th day of November 1932, there was filed in the Clerk's Office of the Circuit Court of Fauquier County, a Notice of Motion wherein Channing M. Suthard was plaintiff and T. D. Kiser defendant, in the following words and figures:

To T. D. Kiser:

You are hereby notified that on the 1st day of the November Term 1932 of the Circuit Court of Fauquier County, Virginia, which will be the 4th Monday in November 1932, between the hours of ten A. M. and five P. M. of that day, or as soon thereafter as it may be heard, I, the undersigned, will move the Circuit Court of the County of Fauquier, at the court-house thereof, at Warrenton, Virginia, for a judgment against you for the sum of Ten Thousand Dollars (\$10,000.00) which sum is due and owing by you to me for the damages, wrongs and injuries hereinafter set forth.

**COUNT #1.**

That heretofore on or about the 25th day of September, 1932, I, Channing M. Suthard, a resident of Fauquier County, Virginia, was the lawful owner and possessed of a certain Ford Tudor Sedan car in which I was then riding and driving in a northerly direction towards and headed for Warrenton, Virginia, over and along a certain road and highway in Fauquier County, Virginia, between the towns of Remington and Warrenton, known as Federal Route #15 and State Route #32.

And at the same time W. R. Sweeney, your duly authorized employee, servant and agent, then acting for you as your said employee, servant and agent, within the scope of his employment as such employee, servant and agent, was driving a Stewart truck for you, and in the course of his employment for you, which truck was owned by and belonged to you, over and along the same road and highway as I was driving

my said car, and was coming from the opposite direction, viz: from Warrenton in the direction of Remington.

And thereupon, it became and was the duty of your said employee, servant and agent, while driving your said truck for you and acting within the scope of his employment as your said employee, servant and agent, along said road and highway, in meeting my said car in which I was riding and driving along said road and highway, and far to my right hand side of said road and highway, to drive your said truck seasonably to his right hand side of said road and highway so that your said truck might pass my car without interference and without running into and *injuring* me and my said car.

page 3 } Notwithstanding the duty of your said employee, servant and agent, while acting for you within the scope of his said employment, as he was driving your said truck along the said road and highway towards Remington at a point approximately four and one-half miles south of Warrenton, near the residence of one Latham Shumate, and as he was meeting my said car in which I was riding and driving along said road and highway, on the right hand side thereof, he, your said employee, servant and agent, acting for you and within the scope of his employment as aforesaid, negligently failed to drive your said truck seasonably to the right hand side of said road and highway, but drove said truck to his left hand side thereof, thereby running said truck into and against my said car with great force and violence, throwing me violently against the top, the sides the seat and the front of my said car, thereby partially lacerating my left ear, fracturing my skull, and otherwise bruising and permanently injuring me about the head and about the body and about the eyes.

## COUNT #2.

That heretofore on or about the 25th day of September, 1932, I, Channing M. Suthard, a resident of Fauquier County, Virginia, was the lawful owner and possessed of a certain Ford Tudor Sedan car in which I was then riding and driving in a northerly direction towards and headed for Warrenton, Virginia, over and along a certain road  
page 4 } and highway in Fauquier County, Virginia, between the towns of Remington and Warrenton, known as Federal Route #15 and State Route #32;

And at the same time W. R. Sweeney, your duly authorized employee, servant and agent, then acting for you as your said

employee, servant and agent within the scope of his employment as such employee, servant and agent, was driving a Stewart truck for you and in the course of his employment for you, which truck was owned by and belonged to you, over and along the same road and highway as I was driving my said car, and was coming from the opposite direction, viz: from Warrenton in the direction of Remington.

And thereupon it became and was the duty of your said employee, servant and agent, while driving your said truck for you and acting within the scope of his employment as your said employee, servant and agent along said road and highway in meeting my said car in which I was riding and driving along said road and highway and far to my right hand side of said road and highway, to use reasonable care in the management and operation of your said truck so as to avoid a collision with my said car and with me.

Notwithstanding the duty of your said employee, servant and agent while acting for you within the scope of his said employment, as he was driving your said truck along the said road and highway towards Remington at a point approximately four and one-half miles south of Warrenton near the residence of one Latham Shumate, and as he was  
page 5 } meeting my said car in which I was riding and driving along said road and highway on the right hand side thereof, he, your said employee, servant and agent, acting for you and within the scope of his employment as aforesaid, negligently failed to use such care and so carelessly and negligently drove and managed your said truck along the said road and highway that it ran into and against my said car with great force and violence, throwing me violently against the top, the sides, the seat and the front of my said car, thereby partially lacerating my left ear, fracturing my skull and otherwise bruising and permanently injuring me about the head and about the body, and about the eyes.

### COUNT #3.

That heretofore on or about the 25th day of September, 1932, I, Channing M. Suthard, a resident of Fauquier County, Virginia, was the lawful owner and possessed of a certain Ford Tudor Sedan car in which I was then riding and driving in a northerly direction towards and headed for Warrenton, Virginia, over and along a certain road and highway in Fauquier County, Virginia, between the towns of Remington and Warrenton, known as Federal Route #15 and State Route #32;

And at the same time W. R. Sweeney, your duly authorized employee, servant and agent, then acting for you as your said employee, servant and agent within the scope of his page 6 } employment as such employee, servant and agent, was driving a Stewart truck for you and in the course of his employment for you, which truck was owned by and belonged to you, over and along the same road and highway as I was driving my said car, and was coming from the opposite direction, viz: from Warrenton in the direction of Remington;

And thereupon it became and was the duty of your said employee; servant and agent, while driving your said truck for you and acting within the scope of his employment as your said employee, servant and agent along said road and highway, to drive and manage the said truck with ordinary care at all times having regard to the width, traffic and use of the said road and highway and the protection of life and property, and to drive the said truck at a reasonable and proper rate of speed.

Notwithstanding the said duty of your said employee, servant and agent, he negligently failed to drive and manage your said truck with ordinary care, and failed to maintain a lookout for me as I was approaching in my said car, and as he was driving your said truck along the said road and highway towards Remington at a point approximately four and one-half miles south of Warrenton, near the residence of one Latham Shumate, and as he was meeting my said car in which I was riding and driving along said road and highway on the right hand side thereof, he, your said employee, servant and agent, acting for you and within the scope of his employment as aforesaid, drove your said truck at page 7 } an unreasonable and improper rate of speed, and as the result thereof ran your said truck into and against my said car with great force and violence, throwing me violently against the top, the sides, the seat and the front of my said car, thereby partially lacerating my left ear, fracturing my skull, and otherwise bruising and permanently injuring me about the head and about the body, and about the eyes.

And as a result of the injuries caused by the negligence of your said employee, servant and agent, I have been caused to suffer great mental anguish and physical pain, and will permanently continue to so suffer, and have been obliged to pay and expend divers sums of money for doctor's bills, hospital bills and nurse's hire, aggregating a large sum, to-wit \$236.00, in and about endeavoring to be relieved and cured of my

injuries, and have been forced to lose a great deal of time, forty days, from attending to my business and from engaging in any productive occupation, and have suffered and will continue to suffer great loss from the permanent diminution of my earning capacity by reason of the injuries aforesaid;

And as a further result thereof my said car was broken and rendered unserviceable and worthless;

By reason of which and as the proximate result whereof, I have been damaged to the extent of Ten Thousand Dollars (\$10,000) wherefore judgment therefor will be asked at the hands of the said court at the time and place here-  
page 8 } in above set out.

Given under my hand this 5th day of November, 1932.

CHANNING M. SUTHARD.

And on the 28 November 1932, the following order was entered:

This day came the plaintiff by his attorney and moved the Court for judgment, pursuant to notice returned, then the defendant appeared by counsel and objected to judgment being given and filed his plea of the general issue, to which plaintiff replied generally. And issue having been joined, by consent of parties the cause is continued to the 5 day of the January Term of this Court for trial. And the defendant through counsel will furnish plaintiff's counsel his grounds of defense within fifteen days from this date. And the defendant is allowed thirty days from this date to file any counterclaim he may desire.

page 9 } And on said 28 November 1932 the defendant  
filed his plea in these words:

The said defendant, by his attorney, comes and says that he is not guilty of the premises in this action laid to his charge, in manner and form as the plaintiff hath complained. And of this, the said defendant puts himself upon the country.

And on the 17th December 1932, the defendant filed his grounds of defense in these words:

The defendant, T. D. Kiser, comes and says, pursuant to order of Court entered in this cause and states as his grounds of defense as follows:

The defendant denies each and every allegation in the plaintiff's notice of motion charged against him and particularly states his grounds of defense to be, that about the hour of eight o'clock P. M. on the 25th day of September, 1932, a truck belonging to him and operated by one W. R. Sweeney, his employee, was proceeding south from Washington, D. C. toward Remington, Virginia, in Fauquier County, and that said truck had approached a certain distance, to-wit: approximately four miles south of Warrenton on the State Highway leading south from Warrenton toward Remington and that at that certain point on said highway, the plaintiff's automobile, to-wit: a Ford coach, was approaching his said truck in a northerly direction and the two vehicles were about

to pass each other being driven in opposite directions. At that certain place and time, defendant emphatically states, that the said W. R. Sweeney was operating and driving his said truck in a careful, reasonable, safe and prudent manner with due regard to the safety of all other persons and property, that his said truck was being operated at a reasonable and careful rate of speed and that furthermore his said truck was well to its right side of the road going south and that about that certain time and place when the two vehicles were about to pass as above said, the said Channing Suthard drove and operated his said motor vehicle on his, the said Suthard's, west and wrong side of the road and that a collision seemed imminent and unavoidable should he, the said W. R. Sweeney, continue upon his right side of the road. In order to avoid such a collision, the said W. R. Sweeney attempted to drive the defendant's said truck away from his right side of the road to the east and left side of the road going south. At the same time the plaintiff's car attempted to turn to the same said east side of the road, and thereupon the two cars collided.

The defendant, therefore, denies any and all negligence in the operation of his said truck as charged to him in the above said notice of motion filed on behalf of and by the plaintiff in this action.

T. D. KISER, by Counsel.

page 11 } And on the 28 December 1932, the defendant filed his cross-claim in these words:

The said defendant comes and says, in addition to his plea of general issue heretofore filed, he is entitled to recover his damages of the said plaintiff and he, the said defendant,

*Left hand driving*

for cross-claim against the said plaintiff, as is his right pursuant to the provisions of the Code of Virginia, complains of the said plaintiff as follows, to-wit:

That the plaintiff unlawfully brought his said action to recover damages of the defendant for alleged injury to plaintiff's automobile, claiming damages against the said defendant, but the defendant complains of the said plaintiff of this his cross-claim for this, that, on the 25th day of September, 1932, about the hour of eight o'clock P. M. of that day, said plaintiff's automobile was being operated in a northerly direction on the State Highway leading from Remington to Warrenton, in said County and State aforesaid, and when said plaintiff's automobile had reached a point on the said Highway approximately four miles south of Warrenton where the said defendant's truck was approaching in the opposite or in a southerly direction toward Remington and the two vehicles were about to pass each other proceeding in opposite directions, the said plaintiff's automobile then and there being operated in an illegal, dangerous and negligent manner, did suddenly then and there run into, strike and collide  
page 12 } with the said truck of the said defendant, which was being then and there lawfully operated on said Highway, whereby and by reason of the said negligence and carelessness of the said plaintiff, the said plaintiff's automobile was driven with great violence and force into the said truck of the said defendant, which was badly crushed and damaged thereby. The automobile of the said defendant was so damaged and crushed and demolished that it was necessary to expend divers sums of money, to-wit, \$314.00 in and about endeavoring to repair the damages inflicted, as the natural and proximate result of the aforesaid negligence of the said plaintiff.

The defendant verily believes and here alleges that because of the plaintiff's wrongful, unlawful, and negligent operation of his said automobile, so causing the injury to the property of the defendant as aforesaid, he, the said defendant, has been damaged to the extent, to-wit, the sum of \$600.00, and other wrongs to the said defendant then and there to the damage of the said defendant in a large sum, to-wit, the sum of \$600.00. And, therefore, he, the said defendant, institutes this his counter-action by way of cross-claim against the said defendant in his said action of trespass.

T. D. KISER, by Counsel.

page 13 } And on the 28 January 1933, the following order was entered:

This day came the parties by their attorneys, and thereupon came a jury, by consent of parties composed of six, to-wit: C. W. O'Roark, W. E. Adams, E. R. Peters, C. B. Ashby, R. M. Meetze and W. E. Sudduth, who being elected tried and sworn the truth to say upon the issues joined, having fully heard the evidence and argument of counsel and received the instructions of the Court, were sent out of Court to consult of their verdict; and after some time returned into Court and upon their oaths do say we, the jury, upon the issues joined, find for the plaintiff Channing M. Suthard, and assess his damages at the sum of seven thousand dollars, Charles W. O'Roark, foreman; and they are discharged. And thereupon the defendant moved the Court to set aside the verdict of the jury and grant him a new trial upon the grounds (1) that the same is contrary to the law and evidence (2) that the verdict of the jury of \$7,000.00 in favor of Channing M. Suthard is grossly excessive; (3) by reason of the Court admitting certain evidence over the objection of the defendant as to the insurance of the defendant, which said evidence is improper and was calculated to influence the jury by passion, partiality or prejudice; (4) because the Court failed to grant the motions of the defendant to declare a mis-trial in this case by reason of the evidence of the insurance of the defendant being improperly allowed to go to the jury, which evi-  
page 14 } dence was prejudicial to the defendant to the highest extent and calculated to excite the feelings of the jury and to cause them to award damages in an amount greater than they otherwise would; (5) because there was no evidence before the jury to justify damages in the amount of \$7,000.00 to the plaintiff's person or property; which motion is continued to the 8 day of February 1933.

And on the same day the defendant filed his grounds for appeal in writing, in these words:

The defendant, by counsel, moves the Court to set aside the verdict of the jury of \$7,000.00 in favor of Channing Suthard and to grant a new trial upon the following grounds:

(1) That the verdict of the jury is contrary to the law and the evidence.

(2) That the verdict of the jury of \$7,000.00 in favor of Channing Suthard is grossly excessive.



(3) By reason of the Court admitting certain evidence over the objection of the defendant, as to the insurance of the defendant, which said evidence is improper and was calculated to influence the jury by passion, partiality or prejudice.

(4) Because the Court failed to grant the motion of the defendant to declare a mis-trial in this case by reason of the evidence of the insurance of the defendant being improperly allowed to go to the jury, which evidence was prejudicial to the defendant to the highest extent and calculated to excite the feelings of the jury and to cause them to award damages in an amount greater than they otherwise would.

(5) Because there was no evidence before the jury to justify damages in the amount of \$7,000.00 to the plaintiff's person or property.

And on the 8 February 1933, the following order was entered:

This day came again the parties by their attorneys, and the motion to set aside the verdict of the jury rendered at this term on 27 January 1933, being argued, the Court desiring time to consider the same, it is ordered, by their consent, that any judgment rendered by the Judge of this Court in vacation, shall have the same force and effect as if rendered in term.

page 16 { And on the 27 March the following order was entered:

This day came again the plaintiff and defendant by their respective attorneys, and the Court having maturely considered the motion heretofore submitted to set aside the jury's verdict, is now of opinion that the motion should be overruled; wherefore it is considered by the Court that the motion to set aside the jury's verdict be and the same is hereby overruled, and that the plaintiff Channing M. Suthard recover of the defendant T. D. Kiser the sum of seven thousand dollars (\$7,000.00) in accordance with the jury's verdict, with interest thereon from the 27 day of January, 1933, the date said verdict was rendered, as well as his costs in this behalf expended. To which action of the Court, the defendant by counsel excepted, and on motion of the defendant execution of said judgment is suspended for sixty days from this day, provided the said defendant should within ten days from the

rising of the Court enter into a suspending bond in the penalty of three hundred dollars (\$300.00) with good security to be approved by the Clerk of this Court conditioned according to law.

page 17 } And on the 9 May 1933 the defendant filed his  
Bill of Exceptions and exhibits therewith in these  
words:

Be It Remembered:

That upon the trial of this case on the issue therein joined as to the claim of the plaintiff, Channing M. Suthard, on the action for damages based upon the alleged negligence of the defendant, T. D. Kiser, in a notice of motion for judgment as is fully set forth in the record in this cause, the plaintiff in said issue to sustain the allegations upon his part produced by the court and jury, the oral testimony of T. F. Stafford, to be found on pages 1 to 21 inclusive of the stenographic copy of the evidence included as a part of the record in this said cause, which said witness, Stafford, having been duly sworn testified upon direct and cross-examination and was recalled to give certain evidence to be found on pages 119 to 122 of the stenographic report of the oral testimony reduced to writing and corrected by the court, which is hereto annexed, consisting of 124 pages and index. And the plaintiff further introduced Mrs. Latham Shumate, whose testimony will be found on pages 22 to 25 of the said copy, who was examined in chief, as well as cross-examined. Latham Shumate, who was examined in chief and cross-examined on pages 22 to 28. Dr.

page 18 } M. B. Hiden, who was examined in chief and cross-  
examined on pages 29 to 30 and who was recalled  
respectively as a witness on pages 53, 63-64 and  
page 84. Dr. George H. Davis, who was examined in chief  
and cross-examined on pages 40 to 46 and was recalled on  
pages 52, 65-69, 76-83, 85-86, respectively, and the defendant,  
Channing M. Suthard, who was examined in chief and cross-  
examined on pages 56-62 and who was recalled again, as is  
shown on page 73; and the plaintiff produced the witness,  
H. E. Clougherty, as an adverse witness, as is shown on page  
70 to 76 of the copy of the evidence and W. Edgar Burke,  
whose evidence is to be found on pages 87 and 88 of the above  
said copy of the evidence; and the plaintiff in said issue there-  
upon rested his case after having produced the above *wit-  
ness* in his behalf; and during the cross-examination by the  
defendant's attorney of plaintiff's witness, T. F. Stafford,

Mr. Burnett Miller, counsel for plaintiff, interrupted said cross-examination, as is shown on page 12 of the stenographic copy of the evidence, the result of which interruption was that the following question and answer were produced before the jury in said jury's presence:

"Q. Who made that do you know?

A. It was two fellows, supposed to be representing insurance agents, having it done. I do not know who actually took the pictures."

page 19 } Whereupon counsel for the defendant asked that the jury be withdrawn and moved the court to declare a mistrial and discharge the jury, because such question and answer were prejudicial to the defendant in this cause, and the jury was withdrawn from the court room before the said motion was made and counsel for plaintiff and defendant argued said motion, which said motion the court refused and counsel for defendant excepted to the ruling of the court in overruling the motion, as is found on page 13 of the stenographic copy of the evidence.

And thereupon defendant, T. D. Kiser, to maintain the issue upon his part introduced the witness William Sweeney, whose testimony is to be found on pages 89 to 103 of said copy of the evidence and the said defendant, T. D. Kiser, thereupon took the stand in his own behalf and gave his own evidence included in the said copy of the evidence on pages 104-114, of the same and further on behalf of the defendant, witness Ebert E. Murray took the stand on pages 115-118; and thereupon in rebuttal, the plaintiff called one W. G. Coleman to take the stand, and upon the objection of counsel for the defendant, plaintiffs' counsel withdrew said witness, as is shown on pages 123-124 of the stenographic copy; and thereupon the defendant rested his case, as shown by a stenographic report of all oral testimony introduced in said trial, reduced to typewriting and corrected by the court, which is hereto annexed, consisting of 124 pages and an index, beginning at page 1 of the record and concluding at page 124 of the same, and which evidence together with said corrected record and as a part thereof, is identified by the signature of the Judge of this court on the first page of said index, as well as on the first page of the report itself and on the last page thereof.

The following exhibits, on behalf of the plaintiff and defendant, were introduced in evidence:

Three pictures on behalf of defendant, described in the evidence on page 15 of the stenographic copy as Exhibits 1, 2 and 3, a written statement signed by the plaintiff, Channing M. Suthard, introduced on defendant's behalf, as Exhibit #4 on page 60 of the copy of the evidence, Exhibit #5, written statement of the witness Dr. George H. Davis, and on behalf of the plaintiff Exhibit #6, page 64, the hospital bill of plaintiff at the Fauquier County Hospital, Warrenton, Virginia.

And the plaintiff and defendant having rested, the court having considered the instructions offered in behalf of the said plaintiff and defendant, granted the instructions described as numbers 1, 2, 3, (1) (3) (6) & (7); and accordingly so instructed the jury; and the court certified that the said transcript of evidence corrected as aforesaid, together with the various documents and instruments of writing therein referred to and introduced in evidence, and which are to be copied with and are hereby made a part of this bill page 21 } of exceptions, constitutes all of the evidence introduced in this case. And this being all of the evidence, the jury after having heard the instructions of the court as aforesaid and the argument of counsel, retired to consider their verdict and after a while returned into court with their verdict in the words and figures following: we the jury upon the issue joined find for the plaintiff and award damages to plaintiff in the amount of \$7,000.00. And were discharged. And thereupon the defendant in said cause moved the court to set aside the verdict of the jury on the following grounds:

(1) That the verdict of the jury was contrary to the law and the evidence.

(2) That the verdict of the jury for \$7,000.00 in favor of Channing Suthard, the plaintiff, was grossly excessive.

(3) By reason of the court admitting certain evidence over the objection of the defendant as to the insurance of the defendant, which said evidence defendant's counsel claimed to be improper and calculated to influence the jury by passion, partiality or prejudice.

(4) Because the court failed to grant the motions of defendant for mistrial in this cause by reason of the evidence of the insurance of defendant being improperly allowed to go to the jury, which evidence was claimed to be prejudicial to the defendant to the highest extent and calculated to incite the feelings of the jury and cause them to award damages in the amount greater than they otherwise would have.

(5) Because there was no evidence before the jury to justify damages to the plaintiff, person and/or property in the amount of \$7,000.00. The said motion to set aside the verdict and grant a new trial was continued to the 8th day of Feb. 1933, at ten o'clock and thereafter, the court having heard argument on said motion as aforesaid, did on the 27th day of March, 1933, refuse said motion and entered judgment in favor of the plaintiff in the sum of \$7,000.00 with legal interest thereon from the said 27th day of January, 1933, and his costs in that behalf expended, to which action of the court in refusing said motion, as set out in a paper writing filed among the papers in this cause and as hereinabove set out, the defendant excepted; and thereupon the defendant was given sixty days within which to present this his bill of exceptions to the judge of said court for his signature; all of which will appear as a part of said certified record. And the defendant having so excepted, now tenders this his bill of exceptions, which is signed, sealed and enrolled and made a part of the record in this said cause of Channing M. Suthard vs. T. D. Kiser, this the 8th day of May, 1933.

J. R. H. ALEXANDER, Judge. (Seal)

page 23 } The following evidence on behalf of the plaintiff  
and of the defendant, respectively, as hereinafter  
denoted, is all of the evidence that was introduced in the trial  
of this cause:

J. R. H. ALEXANDER, Judge.

Suthard

vs.

Kiser.

page 25 }

### EVIDENCE.

Transcript of evidence taken before Honorable J. R. H. Alexander, Judge of the Circuit Court of Fauquier County, Virginia, and Jury, the 27th day of January, 1933.

Present Messrs. Burnett Miller and C. W. Carter, Attorneys for the plaintiff; Messrs. J. Donald Richards and Paul C. Richards, Jr., Attorneys for the defendant.

T. F. STAFFORD,  
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Miller:

Q. Mr. Stafford, give the jury your name, please?

A. T. F. Stafford.

Q. How old are you?

A. Twenty-four.

Q. What business are you engaged in at present?

A. State Police.

Q. Where are you located?

A. Warrenton, Virginia.

page 26 } Q. How long have you held that position?

A. Three years.

Q. Do you know anything about a collision between a car and *and* a truck, several miles, three or four miles to the south of Warrenton, as happening on or about the 25th of September, 1932, between the car of Channing Suthard and the truck of T. D. Kiser?

A. Yes, sir.

Q. How long after the accident did you arrive on the scene

A. I judge it was about from thirty to forty-five minutes afterwards, to the best of my knowledge.

Q. State to the jury what the condition of the car and the truck was with reference to locations, when you got here on the highway?

A. About five miles out of town, the scene of the accident, right at a small cut, about a four-foot bank on each side, vary a little bit more or less; at this particular point about a sixteen-foot macadam road, and from point to point is thirty-four feet, and the truck was standing in a position of about a forty-five degree angle, I would say to the left side of the road, with the left wheel practically against the bank, right wheel probably back about two feet in that position—

page 27 } Suthard's car, all four wheels were on the Pike, and was headed back probably southeast; the road runs north and south, but the front wheel being about two and one-half to three feet on the edge of the road and the rear wheel about four and one-half down in the opposite direction.

Q. What was there on the ground, if anything, to indicate where the truck was located and where the car was located at the time of the collision?

There was a black circular mark, I would term, about a half moon, about two feet and a half from point to point, and the points were pointed full on the road, probably four feet from the righthand side of the road, facing north,—and the truck and the car, was sitting in between the two vehicles.

Q. How far into the bank had the truck apparently been driven when you arrived?

A. The track from the left wheel probably showed the truck had rolled up on the bank possibly two feet after hitting the bank.

Q. That was on the righthand side coming towards Warrenton?

A. Yes, sir.

Q. How far then was the car with which the truck had collided, from the bank on the righthand side coming towards Warrenton?

page 28 } A. All four wheels of the car were still on the macadam, the front wheels being about two and one-half feet, and the rear wheel probably four or maybe a little more over, sitting on an angle in the road.

Q. How far from the bank on the righthand side coming towards Warrenton?

A. Possibly seven feet or a little more, seven or eight feet from the front wheel of the car over to the bank or the cut.

Q. Showed that the car had been turned around?

A. Yes, sir.

Q. By the collision?

A. By the collision.

Q. Was there any glass on the ground there?

A. Yes, sir, glass from headlights, headlight glass, glass between the two vehicles, between the truck and about the rear wheel of the car.

Q. Was that on the macadam?

A. On the macadam.

Q. And some on the side?

A. Yes, it was more or less scattered, but the majority was on the macadam.

The Court: How wide is the road there?

A. The macadam side is sixteen feet and from  
page 29 } bank to bank is thirty-four feet.

Mr. Miller:

Q. The macadam at this point you have testified was sixteen feet?

A. Yes, sir.

Q. How far from bank to bank?

A. Thirty-four.

Q. From the point of accident, looking towards Remington north, how far can you see?

A. According to the speedometer on an automobile, it is exactly four-tenths of a mile south towards Remington. It would be south; measured exactly four-tenths of a mile from the point of the accident to the curve beyond, next to Colbert's.

Q. From the point of the accident, looking north towards Warrenton, how far can you see?

A. Exactly two-tenths of a mile from the point of accident to the top of the curve of the hill in this direction, headed south.

Q. Approximately how far from the town of Warrenton to the point of the accident?

A. Five miles.

Q. The cars had not been moved when you got there?

A. Had not.

page 30 } Q. On which side of the road did it show that the accident took place?

A. Driving from Warrenton, going towards Remington it was on the left side of the road, left side of the road to the truck.

Q. Going this way (indicating) it was on the lefthand side from me?

A. Yes.

Q. Then when you got there the truck was in to the bank on the lefthand side from here, on Suthard's side of the road, and Sweeney's truck was over there too?

A. Yes, sir.

Q. Showing that the *collision* took place on Suthard's right-hand side of the road? That's right, isn't it?

Objection by Mr. Richards.

Mr. Miller: All right then.

No answer given to above question.

Q. Who did you find there, Mr. Stafford, when you arrived?

A. It was a number of people there, but Sweeney was there at the time; from information Suthard had been carried to the Fauquier County Hospital.

page 31 } Q. Suthard was not there?

A. No, sir.



Q. Who else you recall there?

A. Mrs. Shumate, young Shumate girl, Orville Shumate.

The Court: If there is any particular person you would save time.

Q. And who else, Mr. Stafford?

A. I do not recall. A number of people there. A lot of people from Warrenton came; a number of Warrenton fellows there. I do not recall all of the people there.

Q. Did you have any conversation with the driver of the Kiser car?

A. Yes, sir, I did.

Q. What, if you can remember?

A. I asked him why was the truck to the left side of the road and he said at the time the automobile was facing him, came over on his side of the road and he knew if he hit him head-on the ice in the back of the truck would kill him; he had to turn to the left side to avoid that.

page 32 }

#### CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Mr. Stafford, how soon after the accident did you say you got there?

A. To the best of my knowledge from thirty to forty-five minutes afterwards.

Q. You do not remember the hour you did get there?

A. I believe it was about nine o'clock; I do not remember the time.

Q. Now, you said something about the width of the road. Will you repeat that?

A. The macadam, the hard surface is sixteen feet; it varies more or less, but approximately sixteen feet.

Q. Did you measure it that night?

A. Not that night, the next morning. From the bank the cut there possibly four feet—from cut to cut is thirty-four feet.

Q. You said something about glass from those cars. Do you mean to tell these gentlemen of the jury that that glass came from either or both of those cars?

A. The headlight glass. I would not say which one it was from. It was glass well known, headlight glass there between the truck and the car.

page 33 }

Q. I understood you to state that glass came from those cars. Do you know that?

A. Well, it was there, is all I know.

Q. All you mean to say it was on the road?

A. Glass out of the car was gone. I could not swear which piece of glass came from either car, no.

Q. I understood you to say that you were a Motor Vehicle Inspector?

A. Yes, sir.

Q. You travel the roads a good deal, or not?

A. Yes, sir.

Q. In your travel over the road do you or not quite frequently see glass on the road?

A. Occasionally you see small pieces, small amount, not as much as was there in that place.

Q. You do find it sometimes on the road?

A. Oh, yes.

Q. How about this statement Mr. Sweeney made to you?

A. The statement he made to me, coming down the road towards home, that is Remington, he saw this car coming and said it was varying on the road, coming to him, and he cut the truck to the left side of the road; said he knew if he hit head-on the ice would come through the cab and crush him in the cab and he cut across to avoid that.

page 34 } Q. Why did he tell you he thought there was going to be a collision?

A. Because he said he saw this car waving on the road.

Q. Which car?

A. The car he had the collision with.

Q. Which direction was the car going?

A. Supposed to be travelling from Remington.

Q. To the right or left side of the road?

A. At the time he cut across, from his statement, told me the statement, was on the left side of the road, travelling, facing him.

Q. The car was on the west side of the road as you explained awhile ago, on Mr. Sweeney's west side?

A. Yes, southwest.

Q. He told you he cut to the left to avoid that accident because the car was coming on his right side of the road against him?

A. Yes, said he knew if he hit head-on the ice would crush him and kill him.

Q. Mr. Stafford, you have testified as to a mark you found in the road there. Which side of the road was that mark on?

A. It was to the right of the center of the road, heading north.

page 35 } Mr. Richards: Let us call the road east and west side.

A. It was on the east side across the center of the east side of the road.

Q. Now facing south, where did that mark begin?

A. Approximately four feet from the east side of the road. It was in a half moon shape circle, possibly two and one-half feet from point to point.

Q. How far towards the center did it go?

A. Its widest proportion from the east side of the road about four feet. It came across nearer to the east side of the road.

Q. Did that mark cross the road and go to the west side?

A. No, it was headed with the road; it pointed sort of south and around north.

Q. You remember any pictures being taken of that mark?

A. Not of that particular one, no.

Q. Were you present at any time that Mr. Delmar Fewell took some pictures of the scene of the accident?  
page 36 } A. I was present at the time some pictures were made. I pulled in at the time they were making them.

Mr. Miller:

Q. Who made that do you know?

A. It was two fellows, supposed to be representing insurance agent, having it done. I do not know who actually took the pictures.

Mr. Richards: If Your Honor please, we would like for the jury to be withdrawn. We want to make a motion.

At this point the jury is taken out of the courtroom.

Mr. Richards: If Your Honor please we wish to make an exception to the statement of Mr. Stafford that representatives of the Insurance Company were there, and to move for a mistrial, and that the jury be discharged in this case. That statement cannot help but be prejudicial to the defendant in this case, as we understand it under the law.

page 37 } The Court: Actual remark of the witness, unsolicited and unresponsive to any question. The Court will instruct the jury that it makes no difference whether either party had insurance or whether they did not,

or that the insurance had anything to do with the accident. He said nothing there to indicate that the party had insurance. I do not think any statement this witness has made could possibly prejudice the jury one way or another. I am going to see what the Court of Appeals will say about it.

Mr. Richards: We except to the ruling of the Court in that.

The Court: I overrule the motion.

Exception noted by Mr. Richards.

The Court: Is it or is it not admitted that this accident occurred on the left-hand side of the road, on the east side of the road?

page 38 } Mr. Miller: Yes, sir, we will admit that.

Mr. Richards: Who said we admitted that.

Mr. Paul C. Richards, Jr.: We admit the position of the cars.

The Court: I understood from statement of counsel, I understood that was the case, but if I am mistaken, go ahead with the examination.

Mr. Miller: I don't think there could be any question about it.

The Court: If counsel do not admit it.

Mr. Miller: You admitted that the collision took place on the east side of the road—

page 39 } Mr. Richards: No, we do not admit that. We do not admit anything.

The jury is returned to the courtroom.

Q. Mr. Stafford, I hand you some pictures. Will you please state whether or not these are the pictures of the mark at the scene of the accident, when you were present?

Mr. Miller: Identify them, please.

(Pictures referred to are introduced in evidence as Exhibits 1, 2, 3 and 4.)

A. Yes, sir, I remember all with the exception of No. 4. I do not recall that. I recall this. (Indicating.)

Mr. Miller: Eliminate No. 4, Mr. Richards, please.

Q. Mr. Stafford, in this No. 4 you state there, do you recog-

nize who that person is in the picture there? Re-  
page 40 } fresh your memory.

A. Yes, sir, I think I recognize the man. I would  
not say for certain.

Q. Is that or not the same person in the other pictures,  
or anybody else in those other pictures?

A. Yes, I know.

Q. Who is that?

A. He is Mr. Kiser; there some time taking the pictures be-  
fore I came in. I happened to be going down the road on  
another trip at the time; I came in there, probably, I am not  
certain, but two of them must have been taken before I got  
there.

Q. Were they pictures of the mark you found in the road  
there?

A. I would say Picture No. 3 and No. 2 are pictures of  
mark that was caused by left front wheel of the truck sink-  
ing when they hooked the truck to it and dragged it from the  
bank. The left front wheel was locked.

Q. Which way was the truck heading?

A. The truck was headed directly east.

Q. Were you there when the truck was taken out?

A. Yes, sir; hooked a Ford truck to it and hooked to the  
back and of it and pulled it across the road; pulled it to its  
original side of the road, headed towards Remington. The  
lefthand front wheel was sinking, was locked, dragging it on  
back.

page 41 } RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. Mr. Stafford, with reference to these two photographs,  
marked respectively 1 and 4, tell the jury in regard to this  
man here (indicating) which way he is looking, towards War-  
renton or Remington?

A. He is facing from these pictures, shows towards War-  
renton.

Q. Where is Mr. Latham Shumate's residence?

A. On the same side of the road with this man, only back  
of him.

Q. Now, then, to this point you see looks the chalk mark  
on the road here, where does that begin with reference to  
that man?

A. It begins on the east side of the road.

Q. And what was your response to a question from Mr.  
Richards as to that mark we see there?

A. At the time of the accident?

Q. Yes, sir.

A. I could see no marks at all, and the lefthand wheel of the truck was off the road and when they hooked the Ford truck to it and pulled it back it was locked and sinking and made a mark upon the road all the way across to the opposite side, back to where they had dragged it or to its original side of the road.

page 42 } Q. That is what caused that white mark?

A. There was a chalk mark, chalk mark there.

Q. Who put that chalk mark there?

A. I do not know who it was. I do not know his name. I have seen the fellow a couple of times.

Q. Now, pass those photographs along to the jury. Now, will you take these two cars here (indicating two miniature cars); here is the road, yonger is Remington over there; there is Warrenton over there. We will say over here is Remington and here is Warrenton. Now state to the jury—(broken off.)

The Court: You have got them backwards. This is Warrenton up at this end. The road goes out that street. (Indicating.)

Mr. Miller: This is the east over here, and this is west here; Remington would certainly be down there. Here is Warrenton.

The Court: Remington goes out that way.

Mr. Miller: I beg your pardon, Remington is out here.

The Court: That is Fauquier Springs out here.  
page 43 } Mr. Miller: No, sir, Fauquier Springs is out that way. (Indicating.) Remington is south of here. It was this morning. We will do it as His Honor says. We will say this is Warrenton out here and this is Remington back here. We will say the red truck or red car here is the Kiser car, the green one is the Suthard car. State to the jury the relative location of the truck and car when you arrived at the scene?

A. This side, the east side. The truck was parked in an angle of this nature, about that angle (indicating). This is the bank; this represents the bank. The truck had the two front wheels over the macadam and against the bank. The automobile was sitting possibly four feet from the rear to the truck, from the side of the truck, and the two front wheels were possibly two and one-half feet from the edge of this road, heading back in this direction. The truck and car were nearly headed in the same direction, only the car was

turned around a little more to the right. The car had all four wheels on the Pike and the truck had two wheels against this bank. This truck would have been on this side—this direction, and the automobile on this side. (Indicating.) This mark was a half moon right in here. (Indicating.) The truck and the car were in that shape. Practically, *ex-* page 44 } actly a half moon.

Q. Where was that

A. Between the two.

Q. Now, then, indicate by the use of the red car, which is the Suthard car, where it appeared to have been struck?

A. The Suthard car was damaged, its right front fender and wheel, and practically as far as I seen, the radiator.

The Court: You mean right of left?

A. On the left side of the car—frame was bent towards the center, also the end of the frame—was sitting in the opposite direction—driven in this direction.

Q. The right side of the truck struck the left side of the car?

A. That is where the injuries were; that is where they were.

Q. Tell the jury if any part of the truck was broken off and thrown against the back?

A. Piece of transmission fly-wheel housing was lying in the road right along about the edge of the macadam. This is the piece (indicating)—fly-wheel housing.

Q. Now, place the two trucks, I mean the truck and car, as found when you got there, and tell the jury where the glass was distributed over the ground with refer-  
page 45 } ence to the cars?

A. The truck was off the center of the road, and the glass was in this position (indicating) was lying in between the two, possibly on the edge of the macadam road, from four feet on the macadam, and over to the east side.

Q. Clear to the bank?

A. Not all the way to the bank.

Q. How close to the bank?

A. Probably half the distance from the macadam, say about four feet.

Q. Much or little glass?

A. Considerable amount; few pieces the size of your hand.

Q. What part of the glass on the car was broken?

A. The headlight, left headlight, and also the truck was mashed up.

Q. How about the windshield?

A. I do not remember what condition the windshield was in.

Q. You call this the bank here?

A. The truck was not really raring up.

Q. Was there any indication there that it had struck the bank a hard blow?

A. I would not say a hard blow—ordinary roll.

Q. That is the left front wheel?

A. Left front wheel, yes, sir.

page 46 } RE-CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Mr. Stafford, you said both front wheels of the truck were off the macadam, or not?

A. Yes, sir.

page 47 } MRS. LATHAM SHUMATE,  
a witness, being first duly sworn, says:

# DIRECT EXAMINATION.

By Mr. Miller:

Q. You are Mrs. Latham Shumate?

A. Yes, sir.

Q. You live in Fauquier County on the road between Warrenton and Remington?

A. Yes, sir.

Q. Your house is right near the highway?

A. Yes, sir.

Q. Will you tell the jury where you were on the 25th of September, Mrs. Shumate, when a collision occurred on the highway between Mr. Suthard's and Mr. Kiser's car and truck.

A. I was home.

Q. About what time of night was it?

A. I guess it was half past eight.

Q. Dark, of course?

A. Yes.

page 48 } Q. Where were you at the time of the collision?

A. I was sitting on the porch.

Q. Could you tell from where you were where the collision occurred, on which side of the road?

A. Well, no, I only heard. I heard it you know, and of course, I did not know until I went out there.

Q. Where did you find the truck and car when you got out there?



Q. They were standing both on the lefthand side of the road.

Q. Going which way?

A. Going towards Remington.

Q. Going south?

A. Going south.

Q. Who were there when you got to the scene of the accident?

A. Well, when I got there, there was not anybody there but just the boy that was in the wreck, you know.

Q. Mr. Suthard?

A. Yes, he was there, lying on the road.

Q. Will you explain to the jury the relative location of the car and the truck which had apparently collided?

A. They were both headed south, and on the left-hand side of the road, and the truck was up the bank and the car was turned around in front of the truck.

page 49 } Q. On the east or west side of the road?

A. On the east side.

Q. Did you visit the scene the next morning?

A. No, I did not *got* out there the next morning.

Q. Have you ever been there since?

A. Oh, yes, I did go out there one time.

Q. You notice any glass on the ground?

A. Yes, there was glass on the road.

Q. The road has been scraped since then?

A. Yes.

Q. Much or little glass?

A. There was just a small amount of glass, shattered from the window in the road, you know.

Q. Did you talk with the driver of either car, the night of the accident?

A. No, I only asked the boy when he came and called me.

Q. Which boy do you mean?

A. The one that was driving the truck.

Q. The Kiser truck?

A. Yes.

Q. What did you ask him?

A. I asked him if anyone was hurt, and he said yes, there was a man hurt. I asked him who it was and he said he did not know who it was, and neither did I until after  
page 50 } we sent the Suthard boy to the Hospital, and Price came along and said it was the Suthard boy.

Q. You never asked the driver of the truck any further questions, did you?

A. No.

CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. You said something about the glass coming from the window. Can you swear it came from either one of those two cars?

A. It must have come from Suthard's car. I noticed the window in the rear was broken out.

Q. As a matter of fact, can you really say whether or not it did come from either car?

A. No, I could not. I just saw some glass lying on the road and noticed the door in his car was broken out.

page 51 }

LATHAM SHUMATE,  
a witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Miller:

Q. You are Mr. Latham Shumate?

A. Yes, sir.

Q. Where were you on the night of September 25th?

A. I had just been down to the old place to feed and had just got back after they had moved the truck and car away from there. A part of the truck was lying there.

Q. What part was lying there?

A. Piece of the body was lying there.

Q. What about the glass on the ground, if anything?

A. I picked the glass up, a lot of it, out of the road, the next morning.

Q. On which side of the road was the glass, on the right-hand side coming to town?

A. On the macadam or left part of it, in the macadamized road, and part on the bank side.

Q. You know about where the two cars were at the time of the collision?

A. Yes, sir.

Q. Have you put anything there to indicate on the ground, to indicate where the collision occurred?

page 52 } A. Yes, sir, I drove a stake on each side of the road.

CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Did you see the collision at all?

A. No, sir, I did not.

Q. How soon afterwards did you get there?

A. I got there within fifteen minutes. They had moved Mr. Suthard.

Q. Was your wife there when you were there?

A. Yes, sir, she had come out of the road and come on to the house.

Q. How did you know where the collision was if you were not there?

A. All I saw was the glass and the blood in the road.

Q. That is all you found?

A. That is all I saw.

Q. How did you know where the collision occurred?  
page 53 }

A. There was the track where the truck run across the road. The track is there now. Right there now.

Q. Did you see that track there that night?

A. Yes, sir, and the next morning. It is there to-day. You can see it right now.

Mr. Miller:

Q. Could you point it out to the jury if you were on the ground there?

A. Yes, sir.

Q. You mean that chalk mark on the road?

A. No, sir, the truck track where it went up the bank.

Q. You mean the truck mark in the bank?

A. Yes, sir.

Mr. Paul C. Richards, Jr.:

Q. You are speaking about the mark on the bank, not on the road?

A. Yes, sir.

page 54 }

DR. M. B. HIDEN,  
a witness, being first duly sworn, says:

### DIRECT EXAMINATION.

By Mr. Miller:

Q. Will you give the jury your name?

A. Martin B. Hiden.

Q. You are a practicing physician?

A. Yes, sir.

Q. Where are you located?

A. Warrenton, Virginia.

Q. Do you specialize or general practice?

A. Specialize.

Q. In what?

A. Surgery.

Q. How long have you been specializing in surgery?

A. About twenty years; been doing nothing but surgery since 1925. Limited practice to surgery, but I began specializing in it in 1912.

Q. You practice and operate at two hospitals, at Fauquier and Leesburg?

A. Yes, sir.

Q. How much of your time do you spend at Fauquier Hospital?

A. I would average five days out of the week.

Q. Where did you study medicine, Doctor?

A. University of Virginia, United States Navy Medical School, some post-graduate work.

Q. When did you graduate at the University of Virginia?

A. 1911.

Q. Well now, Doctor, you have qualified to speak. Where were you on the night of September 25, 1932, when one Mr. Channing M. Suthard was brought to the Hospital at Warrenton?

A. I was at the Hospital.

Q. What was his condition when brought there?

A. He was unconscious and having frequent convulsions; had a cut down the back of the head about six inches, a little to the left side of the center. This cut was down to the skull; the tissues around the cut were undermined for a distance of about three inches; in other words, it was loose from the skull for a distance of about three inches. His left ear was nearly severed; might have been some minor scratches and cuts, I do not remember. Those were the main things.

Q. Was there or not, just tell the jury, a fracture of the skull?

page 56 } A. The skull was undoubtedly fractured. After he recovered he saw double. Still sees double, which is one very trustworthy sign of a fracture of the skull. He was deeply unconscious. He had the signs and symptoms of fracture of the skull. That was the diagnosis agreed on.

Q. Does a fracture of the skull affect a man permanently, and if so, how does it?

A. A fracture of the skull is very often fatal.

The Court: Ask him the question of this particular wound. One fracture of the skull might have a different effect than a fracture on another part.

Mr. Miller:

Q. Doctor, about that ear now. When he came to the Hospital it took some skill to get that ear in the condition it is now, didn't it?

A. Yes, I will admit that.

Q. What is the condition of the ear at the present time?

A. The ear is I think, in very good condition. It is very much thicker and not exactly in place. Or course, it is numb because the nerves were cut off from it. You are  
page 57 } speaking about the external ear, this part (indicating). The ear is thicker; it drops forward a little bit and droops a little, and of course, it has very little feeling in it. Of course, that scar will always be there.

Q. That will follow him to his grave regardless of how long he lives?

A. Yes. The position of the ear will probably be permanent. The scar will get better, I think. The position of the ear, I imagine that has improved all it is going to improve.

Q. How did that affect his ear—on the inside?

A. Why, he still has a ringing in that ear. That ear is not normal yet and has not been normal since the accident.

Q. Will it in your judgment ever be normal?

A. I do not think I am qualified to answer that. I know very little about ears. I am not an ear specialist.

Q. About the scar on the back of the head. How long did you tell the jury that scar was?

A. About six inches.

Q. That cut went all the way through to the skull?

A. Yes.

Q. How has that affected him, if you know, that  
page 58 } is, Mr. Suthard, the plaintiff here?

A. That scar without considering any injury—no, I do not think that causes any.

Q. The result of that injury which caused that scar, how will that affect him?

A. Do you mean by that the fracture in the skull?

Q. Yes, sir, the result of the accident.

A. He has double vision; that is, he sees double. He has to have glasses in order to get his eyes to focus. He has a ringing in this ear (indicating). It is—kind of a cross between the wind blowing through the trees and fine bells, 'twixt and between those two sounds. He tells me that he has not gotten back his nervous balance, tires easily and is not quite sure of himself in driving in traffic.

Mr. Richards: We object to what Doctor Hiden has testi-

fied to about the ringing in the ears. He has stated the man told him. You do not know that of your own knowledge, except from his statement, do you Doctor, about ringing in the ears?

page 59 } A. I do not know what any man hears—nobody but himself.

Mr. Richards: We ask it be stricken out.

The Court: What are the grounds of your motion?

Mr. Richards: That the statement of Dr. Hiden as to Suthard having ringing in the ear is hearsay, and all he knows about it, if I understand him correctly, is what Suthard told him about the ringing in the ear, and he further stated if I understood him correctly, that no one would know about the ringing in the ear except the person himself. That was correct, wasn't it?

A. Nobody can hear that except the man that has got the ear.

The Court: What is your reply, Mr. Miller?

Mr. Miller: As I started to interrogate Dr. Hiden, how injuries of the nature of the ones received by the plaintiff here would affect a man, and followed it up by the Doctor testifying to his intercourse with his patient and what his patient said to him. No doctor can tell anything about the  
page 60 } condition of his patient unless the patient tells him, the patient acquaints him with the symptoms. Suppose Your Honor and I are ill, and our doctor comes and interrogates us. We tell him where the pain is; we tell him where we hurt; we tell him how we suffer, before the doctor reaches his conclusion, and he is then competent to testify as to the condition of a patient from the symptoms—and the symptoms from what he told me, from what he saw and observed, and how injuries of that nature usually affect people. Can *can* testify to it.

The Court: I think it is a different rule. The Doctor is entitled to testify as to what complaints the patient has made, and not entitled to testify as the jury might draw from a statement, where the condition actually existed. The Doctor testified he had a ringing in his ear. He can testify the patient complained of a ringing in his ear. He said the ringing was actually there.

Mr. Miller: The Doctor said he did complain of it, or did tell him about it.

page 61 } The Court: I said a physician is entitled to testify as to symptoms complained of by the patient and not entitled to testify that they actually existed, unless he has some other means. His first testimony on this subject indicated there was ringing in the man's ear.

Mr. Miller: What is the difference in a patient telling his physician where the pain is—

The Court: A whole lot of difference. A patient might come and say he has a pain in his leg. Dr. Hiden's testimony was calculated to convey to the jury that Dr. Hiden himself was testifying that this pain actually existed.

Mr. Miller:

Q. Dr. Hiden, whose patient was Mr. Suthard, the plaintiff here, after he came to the Hospital?

page 62 } A. Dr. Davis, George H. Davis was the first, and I was called in consultation and we handled the case together all the time he was in the Hospital.

Q. Who performed the operation on the ear?

A. I did.

Q. Did he ever complain to you at that time or since that time of his inability to see, that his vision was affected, that he saw double?

A. Yes, sir.

Q. He has complained to you?

A. Yes, sir.

Q. How long, if you recall, Dr. Hiden, did this patient, Mr. Suthard, stay in the Hospital, after he was brought there?

A. Stayed there; came on the 25th of September, and left on the 23rd of October, which was exactly, I think, four weeks.

Q. Were the injuries that he received according to his condition when he was brought to the Hospital, Doctor, such as would cause pain and suffering?

A. Yes, sir.

Q. Do you know, or did he complain to you of suffering while at the Hospital?

A. Yes, sir.

Q. How often would you see him while he was  
page 63 } there?

A. I saw him as a rule, twice a day; some days I would only see him once. Some days I may have missed seeing him entirely, after he got better, but as a rule I saw him twice a day. That is routine, however. I see all of my patients twice a day if I am in town.

Q. Do you know what the expense incurred by him or for his benefit was while at the Hospital?

A. No, sir; could be very easily ascertained.

Q. Is his condition such now, Doctor, or not, that he requires medical advice and medical attention, Mr. Suthard, I mean?

A. Yes.

Q. Do you know at whose hands, that is, at the hands of what physician, he is receiving attention now?

A. I am under the impression that his family physician, and an eye specialist. He told me he had been under the care of Dr. Bailey since leaving the Hospital, getting his glasses from Dr. Bailey.

### CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. I understood you to say you saw him twice a day?

A. Yes; that is routine in the Hospital. I just mean to say I call in twice a day; it is my custom to see all page 64 } of my patients twice a day.

Q. You saw him twice a day or once a day every day for four weeks?

A. No. I saw him twice every day I was in town. I would get back say late at night after the patients are asleep and I do not go in and wake them up if they are doing all right that day, I would not see them twice—one day out of a week I would probably see him once a day, and probably two days out of the four weeks I might have missed and did not see him at all.

Q. That is each week?

A. Yes; I do not keep a record of that. You see it is impossible to answer exactly, but I can give you approximately.

page 65 } DR. GEORGE H. DAVIS,  
another witness, being first duly sworn, says:

### DIRECT EXAMINATION.

By Mr. Miller:

Q. Doctor, you are located at Warrenton, are you not?

A. Yes, sir.

Q. Are you connected or in any way affiliated with the Fauquier Hospital, located at Warrenton?

A. I send my patients to Fauquier Hospital.

Q. You are engaged in the general practice of medicine?

A. Yes, sir.

Q. How long have you been so engaged?



A. About twenty-six years.

Q. Where did you study medicine?

A. Richmond.

Q. University of Richmond?

A. Yes, sir.

Q. Graduate there?

A. Yes, sir.

Q. And began the practice of medicine in Warrenton, afterwards?

A. No, sir.

page 66 } Q. Where were you located before you came to Warrenton?

A. In Spottsylvania County, one year with my father. I came to Bethel in 1908.

Q. What physician looked after Mr. Channing M. Suthard when he came to the Hospital on the 25th of September, 1932, if you know?

A. I was the first one saw him.

Q. What was his condition when you saw him, when he was brought to the Hospital?

A. He was unconscious and having convulsions and a severe cut on the back of his head.

Q. How about the ear?

A. The upper half of the ear was practically severed.

Q. Who, if anyone, operated on that ear?

A. Dr. Hiden.

Q. Who assisted him?

A. I did.

Q. How long then did Mr. Suthard, if you know, remain in the Hospital, as a patient?

A. About four weeks.

Q. How often did you see him while he was there?

A. Twice every day.

Q. How often did you see him while he was page 67 } there?

A. Twice every day.

Q. State to the jury whether or not he complained of suffering while at the Hospital?

A. He suffered quite a good deal with his head, very restless; complained of his ear; tried to get out of bed; pulled off his dressings and suffered with his head.

Q. Did you know this young man before he came to the Hospital?

A. I knew him; I had seen him, yes, sir.

Q. Do you know the condition of his health then before he came to the Hospital?

A. I do not.

Q. Do you know the amount of his expenditures for nurse hire, doctors' bills and Hospital bills while at the Hospital?

A. I could not say.

Q. He was in charge of and under the supervision of the nurses down there, all the time he was an inmate of the Hospital?

A. Oh, yes; he had two private nurses for awhile and continued on with one private nurse longer than he did with the two. I do not know the exact time, but his condition was such that he had to have two private nurses.

page 68 } Q. Do you know, Doctor—that wound on the back of his head, fracture. Do you agree with Dr. Hiden? You heard his statement.

} A. Well, that is where he got his fracture; was the blow on the back of the head.

Q. Describe to the jury how long the wound was?

A. I would say it was four or six inches, about that length; I do not remember exactly.

Q. Who has been in attendance upon this patient since he left the Hospital, if you know? What physician?

A. I have seen him several times. I do not know of any other.

Q. Has he complained to you since that time of his inability to see? Has he complained of his eyesight?

A. Yes, sir.

Q. What was his complaint?

A. He had to have glasses. I sent him to Dr. Bailey, and he had to have glasses, because he would see double. Be one object and he would see two.

page 69 } CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Doctor, you said he had to have glasses after the accident?

A. Yes, sir.

Q. Are you an eye specialist?

A. No, sir.

Q. Did you prescribe the glasses for him?

A. No, sir.

Q. Do you know whether or not he still sees double with the glasses?

A. With the glasses he does not, so he tells me.

Q. As far as you know, that cures the defect, the glasses?

A. It helps it, yes.

Q. Is it not a rather common thing sometimes for people to see double?

A. Well, it depends on circumstances.

The Court: Normal condition.

Q. All I want to know, whether or not since he has gotten the glasses?

A. While he is wearing the glasses I think he can page 70 } see all right; better than without the glasses.

page 71 } J. L. SUTHARD,  
another witness, being first duly sworn, says:

### DIRECT EXAMINATION.

By Mr. Miller:

Q. What is your name?

A. J. L. Suthard.

Q. How old are you?

A. Sixty-nine.

Q. Where do you live?

A. Bealton.

Q. You are the father of the plaintiff in this case, Channing M. Suthard, are you not?

A. Yes, sir.

Q. What was the condition of the health of your son, Channing M. Suthard before September 25, 1932?

A. It was all right; never complained.

Q. Where did he live?

A. Bealton, with me.

Q. How old is he now?

A. Thirty-five in March.

Q. Does he live there with you?

A. Yes.

Q. What business was he engaged in?

page 72 } A. Worked with me as a well driller for several  
years, papering, painting plumbing; working with  
me all the time.

Q. What has been his condition, if you know, since the accident complained of?

A. Been a perfect wreck; he is not himself at all, nervous.

Q. Where has he lived since he left the Hospital?

A. With me, of course.

Q. Do you know how long he stayed at the Hospital?

A. Yes; stayed about four weeks.

- Q. How long after the accident did you see him?  
 A. Seen him on Sunday night, when he was hurt.  
 Q. He was at the Hospital then when you saw him?  
 A. Yes, sir.  
 Q. Whose car was it he was driving?  
 A. His.  
 Q. What kind of car was it?  
 A. Ford.  
 Q. Ford Sedan?  
 A. Yes, sir.

Q. Where is that car now?  
 page 73 } A. Burke's Garage.  
 Q. At what place?

A. At Burke's, Bealeton; never been touched since the wreck.

Q. You did not get a letter from me last night, did you?  
 A. No.

Q. Mr. Suthard, how often did you see your son while he was at the Hospital?

A. I aimed to see him every day. Sometimes I would miss a day.

Q. How much did you pay for him while at the Hospital?

A. Why, now, I just cannot tell. I do not have it with me.

Q. Do you know approximately what you paid for him?

A. No, I do not. I would have to guess at it.

Q. What you paid for him was loaned to him, wasn't it?

A. Undoubtedly.

Q. What complaint has he made to you, if any, since he returned from the Hospital, about his ear?

Mr. Richards: I do not think that that comes within a statement unless a doctor, and we except to it. Question withdrawn by Mr. Miller.

page 74 } CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. I understood you to say that the amount of money that you had to pay for Hospital bills, etc., you were loaning to your son? What evidence have you of that debt?

A. I have none but myself. I loaned it to him.

Q. You ever have any conversation with him about it, the repayment of it?

A. No, sir.

Q. Has he ever promised to repay it?

A. I have never asked him yet; he has nothing to pay with. Has not been able to do anything since and I do not know when he will be.

Q. You have not talked with him about it at all?

A. No, sir.

Q. And yet you still say you loaned him the money?

A. I did.

Q. Have those bills been paid?

A. All the bills have been paid except Dr. Hiden's?

Q. To whom were the cheques given?

A. Given to the Hospital.

Q. On your signature?

page 75 } A. Yes, sir.

Q. Cheques in payment were not made to your son then?

A. I gave the cheques, yes, sir, to the Hospital.

Q. No money went through your son's hands?

A. No, sir.

Q. You say he has not promised to pay it back?

A. Why do you ask that question. He has not promised. I told you awhile ago he has not.

Mr. Miller:

Q. You expect him to pay you, don't you?

A. Why certainly.

page 76 } DR. GEORGE H. DAVIS (recalled),

#### RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. What is your bill for medical services to Mr. Channing M. Suthard?

A. Fifty dollars.

Q. Have you sent it to him yet?

A. No, Sir.

Q. But he owes it?

A. Yes, Sir.

page 77 } DR. M. B. HIDEN (recalled).

#### RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. Your bill for medical services to Mr. Channing M. Suthard is how much, Doctor?

A. I am quite sure it is sixty dollars; it might be seventy.

Q. Has it been paid?

A. No, Sir.

Q. You have not presented it?

A. Yes, Sir.

Q. When did you present it?

A. I do not remember. I mailed it directly to him at Bealeton.

Mr. Miller: It is agreed that the driver of the truck at the time of the accident was Mr. Kiser's driver, driving the truck for him, and as his agent and *chauffeur* at the time.

Mr. Richards: We are not agreeing to anything. You prove your case. We are not agreeing to anything. I never agreed to it. We are not agreeing to that.

Mr. Miller: Just let the record show that that page 78 } is agreed to.

The Court: You do not have to agree to it.

Mr. Miller: I think we are entitled to have it agreed to.

Mr. Richards: We admit everything that is in that answer.

Mr. Miller: It appears of record that we did agree to it; that he was driving the truck for Mr. Kiser and as Mr. Kiser's *chauffeur*.

page 79 } CHANNING M. SUTHARD,  
a witness, being first duly sworn, says:

### DIRECT EXAMINATION.

By Mr. Miller:

Q. You are Mr. Channing M. Suthard, are you not?

A. Yes, Sir.

Q. Where do you live, Mr. Suthard?

A. About a mile from Bealeton.

Q. How old are you now?

A. Thirty-four or thirty-five in March.

Q. You are the plaintiff in this case, are you not?

A. Yes, Sir.

Q. You allege here in the notice of motion for judgment against Mr. Kiser, that on the 25th of September last, you had a collision with a truck owned by Mr. Kiser, driven by his agent. Tell the jury now in your own language about how that accident occurred?

A. I was coming this way towards Warrenton, and I had already passed several busses, cars; I seen this one coming; I dimmed the lights; just about seventy-five or one hundred

feet before it got to me, it kind of came to me, just jumped right across the road right on me.

page 80 } Q. Which side of the road were you on?

A. I was on the right-hand side.

Q. Were you on or off the macadam?

A. Right on the edge of it.

Q. What time of night was that?

A. I left home about eight o'clock; must have been around about eighty-thirty.

Q. Where were you headed for?

A. Warrenton.

Q. What were you coming here for that night?

A. I was coming up here to see a girl; all I know.

Q. But you didn't get here, did you?

A. No, I did not.

Q. How long before you got to where the accident occurred had you been coming on the right-hand side of the road?

A. All the way up.

Q. You had met several trucks?

A. Passed several truck, lots of cars.

Q. How far from where the accident occurred?

A. Between there and where I turn off; I passed several at those filling stations.

Q. Do you remember anything that happened that night after the truck came across and struck you?

A. No, Sir, I was dead, practically dead.

Q. And you were in the Fauquier Hospital, were you not?

A. As well as I remember, about a week afterwards. Do not remember a thing until about a week afterwards.

Q. How now, were you injured after you made the discovery? Tell the jury.

A. My head was all sewed up; one ear had to be sewed back.

Q. Which ear was it that was struck?

A. This ear. (Indicating.)

Q. This ear here? (Indicating.)

A. Yes, Sir.

Q. I am going to ask this witness to turn around and let the jury see the condition of that ear there.

(Witness exhibits ear referred to to the jury.)

Q. What did you complain of? To what extent did you suffer, if at all, while in the Hospital, Mr. Suthard?

A. Suffered with my head.

Q. What was the condition of your health before you went to the Hospital?

A. It was all right; I had good health before.

Q. Did you suffer any with your head before you went there?

A. No, Sir.

Q. To what extent have you suffered with your head since, very much or little?

A. My eyes. I had to get a pair of glasses. I page 82 } never wore a pair in my life. I would look at one thing and see two. Take the glasses off now, look at one thing and see two.

Q. Do the glasses help you or aid you in seeing?

A. They do. They help me.

Q. They help you in seeing?

A. Yes, Sir.

Q. How long have you been wearing those glasses?

A. I guess about a month, I guess; something like that.

Q. Tell the jury if you suffer with your head otherwise than the suffering received from your lack of proper vision, your eyes?

A. Just kind of sore, tender yet, about all now.

Q. What is your condition with reference to nervousness now? Are you able to sleep?

A. Yes.

Q. Do you sleep as well as you did before you were injured?

A. No, I do not.

Q. Whose car was that you were driving that night?

A. Mine.

Q. What was the value of that car?

A. I guess it was worth two hundred or three hundred dollars, something like that.

page 83 } Q. Before the injury?

A. Yes.

Q. What is the value of it now?

A. About fifty cents or a dollar, something like that.

Q. Where has the car been ever since the wreck?

A. Down at Burke's garage at Bealeton.

Q. What did you pay for the car, if you remember?

A. Five hundred and some dollars, whatever they were selling for at that time.

Q. How long had you had it?

A. It was a '29; about three or four years.

Q. What about the mileage; how far had it run?



A. Twenty some thousand.

Q. Did you buy it new when you got it?

A. Bought it new, yes, Sir.

### CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. I understood your father to say before you were injured that you were employed by him. Did you work regularly for your father?

A. Yes.

Q. Work every day in the week?

page 84 } A. Every day, yes. I worked every day.

Q. What was your salary, how much?

A. How much? About four dollars a day, I got.

Q. You say about?

A. Four dollars, yes, Sir.

Q. Mr. Suthard, I hand you a written statement here. Will you acknowledge that as your statement or not? Will you please tell these gentlemen whether that is your signature signed to that paper, or not? The signature is at the bottom of the page?

A. Yes, that is my signature, but I do not know nothing about this. I do not know anything about that.

Q. That is your signature?

A. Yes, Sir.

Q. You know about that being your signature?

A. I know it is my signature but I do not remember anything about it.

Mr. Paul C. Richards, Jr.: If Your Honor please, we offer this statement in evidence.

A. Dr. Hiden can tell you more about that.

### RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. These gentlemen have introduced that writing and asked you about it. Under what conditions did you sign it?

page 85 } A. I do not remember signing it. I do not know anything about it.

Q. Where were you when you signed it, dated October 5th?

A. In Warrenton Hospital.

Q. Do you know who brought it to you?

A. I do not know anything about it. That is my signature on there, but I do not know anything about it; do not remember putting it on there.

Q. You remember who brought it to you and asked you to sign it?

A. I do not remember anything about it.

(Here Mr. Miller reads statement referred to to the jury.)

Q. You did not read that, did you?

A. No, Sir. I know nothing about it.

Q. Except you recognize that is your signature?

A. It is my signature, but I do not know anything about that. I do not remember signing it.

Mr. Paul C. Richards, Jr.:

Q. You just said you were in the Hospital at the time that was signed?

A. I do not know nothing about that.

page 86 } The Court: Mr. Miller asked him where he was  
on October 5th, and he said in the Hospital.

A. I said in the Hospital.

page 87 } DR. M. B. HIDEN (recalled).

#### RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. Do you know anything about the mental condition of Channing M. Suthard on October 5, 1932?

Q. Was he capable of knowing what he was doing in signing that paper at that time?

A. Incapable of giving a valid statement on that date.

#### RE-CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Doctor, this is January. You remember distinctly the 5th of October, Mr. Suthard's condition on that day?

A. Yes, I remember his condition. He was in the Hospital at that time.

Q. How long was he unconscious?

A. He was deeply unconscious for about four days, and then he gradually began to clear up and he became quite

clear at the end of about three weeks. They asked me for an opinion and I gave it. You want to know the reason I base that opinion on?

Q. I want to know if you refreshed your memory page 88 } since the 5th of October, and why you remember particularly he was not able to give a statement on that day?

A. I remember on the 9th day of October, which was four days later.

Q. I am talking about on the 5th.

A. I would know better on the 5th. He was worse on the 5th than he was on the 9th.

Q. You see him in the morning or afternoon that day, or which, or both?

A. I saw him in the morning, and either in the afternoon or at night.

Q. You are not certain whether it was afternoon or night?

A. No, I could not say whether it was before supper or after supper. I understand they asked me for my opinion, which I gave. I do not mean to say that my opinion is the law of the land or is infallable. That is my honest opinion, and if you care to ask on what I base that opinion.

Q. Your opinion is all right. I do not question that.

A. Somebody else's opinion might differ—that is my opinion, what I arrived at, from his symptoms and signs.

Mr. Miller: I want to introduce the Hospital bill paid by Mr. Channing Suthard, \$127.50.

page 89 } DR. GEORGE H. DAVIS (recalled).

#### RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. Dr. Davis, you ever see that paper writing before, introduced as C. M. C. No. 1?

A. Yes, Sir.

Q. Where did you see it?

A. In Mr. Paul Richards's office.

Q. Do you know the conditions or anything about the conditions under which Mr. Channing Suthard signed it?

A. Yes, Sir.

Q. Tell the jury.

The Court: Where did you get your knowledge on the subject?

A. That gentleman right over there (indicating gentleman in the Court Room); I do not remember his name.

The Court: Who did you get your knowledge from? Were you present when it was signed?

A. No, Sir.

page 90 } Mr. Miller:

Q. Do you know who was present?

A. It was a nurse, but I do not know which one.

Q. Did you interrogate or talk with the man who did get him to sign it?

A. Yes, Sir.

Q. What did he say about it?

Objection by Mr. Richards.

The Court: How is that?

Mr. Miller: Because they have introduced a paper writing here that a man signed when he was absolutely unconscious.

The Court: It does not appear from the testimony that the man you are talking about was present.

Mr. Miller: I have not called his name.

The Court: You never have proved anybody was present.

Mr. Miller: Yes, I have; he says a nurse was  
page 91 } present.

The Court: What are you undertaking to prove about that paper?

Mr. Miller: I did not introduce it. They are undertaking to contradict the statement is making.

The Court: Are you undertaking to prove this paper was secured by any undue influence?

Mr. Miller:

Q. Go on Doctor—

The Court: I think you should first prove who secured the statement.

Mr. Miller: The man who secured it told him so.

The Court: Prove who secured the statement first, not by anything he said.

Mr. Miller: That would mean I would have  
page 92 } to go to the Hospital. By the man who perpetrated a fraud upon this person.

The Court: You have first got to prove who perpetrated

the fraud. You cannot prove who did it by the statement of the man you claim did it.

Mr. Miller:

Q. Were you there when that statement was signed, Dr. Davis?

A. No, Sir.

Mr. Richards: We except to the statement of Mr. Miller that this paper was perpetrated by fraud. That statement should not be made to the jury.

The Court: The statement is absolutely unobjectionable.

Mr. Richards: We except to the ruling of the Court.

Mr. Miller:

Q. Is the party here in the Court Room?

A. Yes, Sir.

Q. What is his name?

page 93 } A. I do not recall his name.

Q. You see him here?

A. Yes, Sir.

Q. Point him out?

A. Man over there on the back row. (Indicating gentleman sitting on rear seat in Court Room.)

Mr. Miller: We will ask the Court to call him as an adverse witness.

Mr. Richards: If you want to call him as an adverse witness, you can call him.

Mr. Miller: No, Sir, we ask the Court to call him.

The Court: You can call him and if he proves to be adverse, you can examine him.

page 94 } H. E. CLOUGHERTY,  
a witness, being first duly sworn, says:

### DIRECT EXAMINATION.

By Mr. Miller:

Q. What is your name?

A. H. E. Clougherty.

Q. Where do you live?

A. Timberville, Virginia.

Q. In whose handwriting is that paper I am handing you, marked No. 1 C. M. S.

A. That is my writing.

Q. Who was present when Mr. Suthard signed that writing?

A. I am not certain whether the nurse was in the room or not. I am not positive about that.

Q. You presented this, and handed it to him and he signed it?

A. I asked him how the accident happened and he told me that is the way the accident happened.

Q. I didn't ask you that, Sir.

The Court: I think the answer is responsive to the question you asked him, if he presented that paper to page 95 } him to be signed.

Mr. Miller: And he could have said yes or no.

The Court: He had the right to go a little further.

Q. You presented the paper to Mr. Suthard, you say?

A. After he told me the facts just as they are written there, almost in those words.

Q. In whose presence did he tell you the facts?

A. I think probably while we were talking the nurse was in the room. I think she was out awhile and would come in awhile.

Q. What was his condition then?

A. He seemed just about as normal that day as he did on the witness stand to-day.

Q. What were you doing in there to see him?

A. I asked Dr. Davis; Dr. Davis took me in there to see him; he told me, and I went down there and I went in there really with Dr. Davis; he walked in the room with me, and I asked the man how it happened and he described that statement—said he passed several cars and he said he did not see the truck until that hit him.

Q. At whose instance did you go in there?

A. Mr. Kiser's.

page 96 } Q. Who were you representing?

A. I was representing Mr. Kiser.

Q. You went in there with Dr. Davis, you say? Was Dr. Davis there when this statement was signed?

A. He signed right in the presence of Dr. Davis, and it was shown to Dr. Davis and he said that it was all right, something like that.

The Court: The witness, H. E. Clougherty having testified that when the paper introduced in evidence was shown to

Dr. Davis, he, Davis, remarked that it was all right, the Court will permit the witness to state what was his reply to Clougherty on the occasion testified to by him.

Exception noted by Mr. Miller.

Mr. Miller: We save the point.

page 97 } (At this point Channing M. Suthard was recalled to the stand.)

CHANNING M. SUTHARD (recalled).

Mr. Miller:

Q. You are still under the care of Dr. Bailey, are you?

A. Yes, Sir, I am under the care of him.

page 98 } The testimony of the witness H. E. Clougherty, was then resumed.

Mr. Miller:

Q. Didn't Dr. Davis criticize you afterwards for coming there and getting the patient to sign that statement?

A. Dr. Davis came in Mr. Richards's office and he said Mr. Suthard's father had jumped on him for giving the statement, and he asked to see the statement and I handed him that statement; he said afterwards just about what he said—he read that statement and he said that was all right.

Q. How long had you known Mr. Kiser before that time?

A. Mr. Kiser and I often talked about that, just how long I had known him. We tried to remember where we met and have not been able to do it.

Q. Did you meet before this accident?

A. Yes, indeed. We talked about it as soon as this accident happened. We happened to talk about it that day, about where we had met.

### CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. You say Dr. Davis went in there with you?

A. Yes, Sir, Dr. Davis took me in the room to see page 99 } him.

Q. Did you have permission to go in?

A. Of course; I went down with Dr. Davis. He took me in.

Q. Did you have any conversation with Dr. Davis about his condition, whether or not it was proper to go to see him?

A. We did at the office. I called at his office before I went to the Hospital, and finally he agreed and he went on down in his car, and I followed in my car and we met at the Hospital, and Dr. Davis took me in to see the patient, and we asked him if he knew how the accident happened, and Mr. Suthard just described it just about as he did in that paper and I kept it just as nearly to what he told. I have never in my life tried to make anybody do anything through fraud, and if you want to know my reputation you can consult the Southern Railway Company.

Q. Did Mr. Davis go in to see Mr. Suthard before you went in?

A. Yes, he did.

Q. Why did he go in?

A. I think to see his condition that morning, and see if it would be all right. I waited outside, kind of office, and waited for Dr. Davis to come back.

page 100 } Q. He knew you wanted to find out about the accident?

A. Yes, Sir.

Q. And he let you go in and talk with him?

A. He did.

Q. Why were you interested in Mr. Kiser's case?

Question withdrawn.

page 101 } DR. GEORGE H. DAVIS (recalled).

### RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. You have heard the statement made by that man that just went on the stand?

A. Yes, sir. He came to my office and asked if he could see Mr. Suthard. I told him yes. We went down to the Hospital together. I went in the room. I said, "You can see him if he is awake". I went in there and he was awake. I was not in there when he was questioning him, and I had no idea that he was going to question him. I thought he was just going in to show him the respect and to show him an interest in this accident.

Q. Was Suthard in a mental condition to comprehend what was in that paper?

A. Absolutely not.



## RE-CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. You knew that Mr. Clougherty was going in there to talk to him about the accident?

A. I did not, and I came over to your office page 102 } that day and told you.

Q. Was the accident discussed at all?

A. Not in my presence.

Q. If Mr. Suthard was in no condition to carry on a conversation why did you let Mr. Clougherty go in there and talk to him?

A. I did not know he was going to question him about the case.

Q. You knew he was going to have a conversation?

A. I did not know what he was going to say.

Q. You knew he was going in there to talk to him?

A. I thought he was just going in there to speak to him and see how he was getting along.

Q. If you knew he was going in to have a conversation and talk to him, and you thought he was not responsible, why did you let him go in?

A. I did not know he was going to question him. He had been having a few visitors. I think he was about the first one.

Q. I hand you a statement. Will you say whether that is your signature to that statement or not?

A. Yes, sir.

Q. You remember signing that?

A. Yes, sir.

page 103 } Q. Was that before or after you talked with Mr. Clougherty that day?

A. It was the same day.

(Mr. J. Donald Richards here reads the statement referred to.)

Q. Dr. Davis, do you remember having a conversation with me in my office with reference to that statement?

A. Yes, sir.

Q. When Mr. Clougherty was present?

A. I do not remember whether he was in there or not. He might have been and might not.

## RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. Didn't you have some conversation and criticize this

man afterwards for getting this statement under the conditions he did?

A. Yes, sir.

Q. What did you tell him about it?

Objection by Mr. Richards.

Mr. Miller: They claim Dr. Davis told him he could do it  
—if they had a conversation in which Dr. Davis  
page 104 } criticized him for doing it.

The Court: That is perfectly all right.

Q. Dr. Davis, did you criticize him afterwards and tell him—(broken off).

The Court: You asked that question and he says he did.

Q. I want to know if he criticized him and what it was he said to him in the way of criticism.

Exception by Mr. Richards.

The Court: I do not think what he said would be material. You can state in bill of exceptions what you expect the witness to testify to. I am going to discharge the jury in a few minutes and you can say what you have to say.

Q. Dr. Davis, just tell the jury frankly, what reason he assigned to you, this man, for going in where that patient was?

A. Just going in to see him.

page 105 } Q. Why did he say he wanted to see him?

A. He didn't tell me.

Q. Did you know of have any reason to suspect?

A. Absolutely none.

Mr. Miller: It was stated in addition to the fees due Dr. Hiden the amount was \$127.50, and as a matter of fact, it is \$192.50. Two items have been added since. \$192.50.

Mr. Miller: Now, Your Honor, we want a view of the premises at such time as Your Honor will allow us to go there. We will provide the way to carry the jury, and we also want the jury to view the plaintiff's car, which we will have here in front of the Courthouse.

The Court: I cannot send this jury out there a day like this. There is no conflict in the testimony on the subject.

The Court: I do not see how the jury could be  
 page 106 } helped a bit by going down there. Might get the  
 "flu" out of it.

Mr. Miller: I told the jury in my opening statement that  
 we would take them to view the premises.

(At this point the jury is taken out of the Courtroom.)

The question, "What did you say to him in the way of criticism?" was objected to by Mr. Richards and objection sustained. Thereupon Mr. Miller for the plaintiff stated he would like to have the witness answer the question away from the jury and not in the jury's presence. The Court decided that the answer could be made but not in the presence of the jury.

The following question was asked by Mr. Miller and the answer given, out of the presence of the jury:

Q. What did you say to him in the way of criticism?

A. I told him I had no idea that he was going to question  
 him, and that he was not capable of giving cor-  
 page 107 } rect answers, and I think that was said in Mr.  
 Paul Richard's office, wasn't it, Mr. Richards?

page 108 } DR. M. B. HIDDEN (recalled).

Mr. Miller:

A. In regard to seeing this patient, how often I saw him in the Hospital. When I am in town, it is routine to see the patients twice a day. If I go out of town and get back very late, I do not see them. The question was twice that day to the best of my knowledge. Now, I did not see him twice a day every day that he was in the Hospital, because I was away, out of town for four days of that time, but that did not include the 5th. Once in a while I go to Richmond; if so, I see the patient in the morning before I leave and see him the next day.

Q. You did see him twice on the 5th?

A. Yes, sir.

Q. How do you know that?

A. Because I remember I returned the night of the 4th, and I went down and checked up patients there, and I did not have any work at Leesburg on that day—and I know I was in town all of that day, and therefore, I am confident I saw him twice on that day.

page 109 } DR. GEORGE H. DAVIS (recalled).

The Court: Dr. Davis, the witness, Clougherty testified that when you looked at this paper, which has been introduced in evidence, over in Mr. Richards's office, you made a remark to the effect it was all right. Will you please tell the jury what you did say?

A. Which paper is it? There are two papers.

Mr. Richards: Exhibit 1, C. M. S.

A. If I said it over there, I will say it now.

Mr. Miller:

Q. What is your recollection about what you said to him?

A. I know I questioned him and I told Mr. Richards that that statement he made at that time would not be worth the paper it was written on, he was not capable of making any statement. Didn't I tell you that, Mr. Richards? That is the only way I can answer the question. I did not know that this gentleman had gotten any statement from Mr. Suthard until the nurse told me.

page 110 } Q. Then did you have any conversation with him?

A. I did.

Q. What was it?

A. I told him just what I have just said, that he was not capable of making a statement. That is a fact, gentlemen; that is all there is to it.

Mr. Paul C. Richards, Jr.:

Q. Do you deny that when you left Mr. Clougherty in Mr. Suthard's room that you did not know he was coming there to see him about the automobile wreck?

A. Absolutely not, on my word of honor.

Q. What did you think he was coming in there for?

A. He came up to my office and asked me could he see him, and I said, "We will go down there together," and I went down there. I said, "You can see him if he is awake," and I went in there with him, and I left him in there. I never heard a question that he asked him, and I told you the same thing.

page 111 } W. EDGAR BURKE,  
another witness, being first duly sworn, says:

## DIRECT EXAMINATION.

By Mr. Carter:

Q. State to the Court and gentlemen of the jury your name and place of business?

A. W. Edgar Burke, Bealeton.

Q. What business are you engaged in?

A. Automobile. The business is Burke Motor Company.

Q. You know Mr. Channing Suthard?

A. Yes, sir.

Q. How long have you known him?

A. All my life.

Q. Were you familiar with this Ford car of his that was wrecked on the night of September 25th?

A. Yes, sir.

Q. When did you see it before the wreck?

A. We see him practically every day; I would not say the day the wreck happened.

Q. Wasn't that car brought to your garage on that night?

A. No, sir, that night Hickman & Hutchinson brought it in to their place.

page 112 } Q. How did it get to your garage?

A. We came and got it the next day.

Q. What was its condition then?

A. It was a complete wreck, beyond repair.

Q. How long have you been in the Ford business, Mr. Burke?

A. Been in the Ford business eight years.

Q. What would you say was the value of that car on the 25th day of September, 1932, before it was wrecked?

A. About \$250.00.

Q. What is its value now?

A. No value at all; you could just salvage it.

Q. What is the salvage value?

A. Fifteen dollars.

Q. What parts of it are wrecked?

A. The entire front end is broken in, which means that the frame is bent, and the motor block is cracked, all housings of the transmission, the generator, the starter, the radiator, the front axle, front spring—and bumpers. I would have to name the whole Ford if I was going to tell you all of it.

Q. Where is the car now?

A. In front of the Courthouse.

No cross examination.

page 113 } Mr. Miller: I would like to ask the Sheriff to  
take the jury out to see the car.

The Court: Any objection?

Mr. Richards: I do not know of any valid objection I could  
make.

(The jury is taken out of the Courtroom to view the car referred to.)

Mr. Miller: It is agreed that bill for the *Hospital*, the correctness of it, is one hundred and ninety-two dollars and something.

Mr. Richards: Yes, sir, whatever the Hospital says.

Mr. Miller: If we are allowed to rest. If there should be something we expect to prove we will recall the witness.

Mr. Richards: Better recall them now.

page 114 } Mr. Richards: I renew the motion I made this  
morning.

The Court: The Court will take the same action it did this morning.

page 115 } WILLIAM SWEENEY,  
another witness, being first duly sworn, says:

#### DIRECT EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Will you give us your name and age?

A. William Sweeney, aged twenty.

Q. Where do you live?

A. Warrenton.

Q. Do you know the defendant, Mr. Kiser, T. D. Kiser?

A. Yes, sir.

Q. Did you know him on the 25th of September last?

A. Yes, sir.

Q. Did you have any dealings with him then?

A. No more than just working for him.

Q. Were you driving the truck of Mr. Kiser that night when the accident occurred?

A. Yes, sir.

Q. Will you tell those facts to the gentlemen of the jury, just how it happened?

A. I was going home from Washington; I was going down the road, and I got just over a hill just before you get to Mr. Shumate's, and I saw this car coming. I dimmed my

lights and he dimmed his and right after he  
 page 116 } dimmed his lights, he continued coming on my  
 side of the road; at first I thought it was some-  
 body playing with me; got right on me and was clean over  
 on my side of the road; if he had stayed where he was I  
 would not have touched him, and I thought of that ice and I  
 swung hard to the left, and when I swung he did too and the  
 two went in together like that. He was clean over on my  
 side past me; if he had stayed where he was I would not have  
 touched him.

Q. From the way the cars were approaching was the *col-  
 lission imminent?* Was it certain a collision would have oc-  
 curred?

A. Yes, sir; was not any way in the world I could help  
 from hitting him.

Q. What did you do to try to avoid an accident?

A. Swung hard to the left.

Q. What happened after that?

A. I saw some smoke fly up from his car; thought it was  
 on fire; I jumped out of the truck and went over to his car  
 and reached in for him and he was not in there. The first  
 thing I did was to holler for Mrs. Shumate. I started back  
 around the car and fell over him lying out in the road.

Q. Did you help take him to the Hospital?

A. I helped get him up.

Q. You know who took him to the Hospital?

A. No, sir, I do not.

page 117 } Q. Did any cars come along after that?

A. No, sir, I never noticed any coming along  
 right at that time. It was one there and I got him to carry  
 me down to Mr. Kiser's.

Q. Do you know how Mr. Suthard got to the Hospital?

A. No, sir. He was in the road. I do not know who it  
 was.

Q. You mean someone came along and took him?

A. Yes, sir; a car came along and took him.

Q. After the cars came together what position did they  
 finally settle in and how did they get there?

A. The truck was on the left side of the road headed into  
 the bank, kind of like that, and his car was on the hard sur-  
 face of the road, turned around, I would say about two feet  
 and a half from the truck.

Q. How far from the edge of the hard surface was the  
 Suthard car?

A. To be exact, I do not know; I imagine it was about eight  
 or ten inches.

Q. Is that the front?

A. That is the front.

Q. How about the rear please?

A. I really do not know, sir; I could not tell page 118 } you.

Q. Which part of each car was struck? Tell these gentlemen how the cars were after they were struck?

A. His left side of his car and my right of the truck was the worst *damage*.

Q. I understood you to say his car turned around, turned completely around—or how was it?

A. Yes, sir, it was sitting kind of that angle (indicating).

Q. Turned around and headed in a southerly direction?

A. Yes, sir.

Q. How long have you been driving trucks, Mr. Sweeney?

A. Off and on, trucks and cars together, about eight or ten years.

### CROSS EXAMINATION.

By Mr. Miller:

Q. You started driving when you were very young?

A. Yes, sir.

Q. Start driving for Mr. Kiser?

A. No, sir.

Q. How long have you been driving for Mr. Kiser?

A. I had not been driving for Mr. Kiser,—I had worked for him longer than I had been driving. I had been driving for

Mr. Kiser I would say two weeks when the accident happened. page 119 }

Q. You started from the Kiser Dairy to Washington very early that morning, on the 25th, didn't you?

A. Yes, sir.

Q. What time did you start?

A. I left down there about nine o'clock.

Q. What time did you get to Washington?

A. I got in Washington about twelve.

Q. Then you stayed there for some little time before you left?

A. Yes, sir.

Q. You were on the highway and discovered the presence of this Suthard truck on the highway. How far was it ahead of you before you dimmed your lights?

A. I do not know exactly, sir, but it was a right good distance.

Q. You were going south and on the righthand side of the



road when you discovered his presence on the highway. He was also on your side of the road and his left, wasn't he?

A. Yes, sir.

Q. When you first discovered it?

A. No, right after he dimmed his lights; when he dimmed his lights, he acted as if he went to sleep and continued coming to my side of the road and kept on coming. I thought he was going up the bank.

page 120 } Q. How fast did he appear to be driving, at what rate of speed?

A. I would not like to say; I do not know, but he was going plenty fast.

Q. How fast were you going?

A. I was doing between twenty-five and forty, maybe a little better than forty.

Q. How close had the front of his car gotten to the front of your truck before you decided to go to the left of the road?

A. I do not know exactly, sir, but it was plenty close.

Q. About how close? Indicate to the jury in some way, by pointing at some object in the Courtroom, if you can do it?

A. I would say it was about fifteen feet.

Q. He was about fifteen feet in front of you, coming at a fast rate of speed?

A. When I saw him.

Q. You were clear to your right-hand side of the road?

A. When I started swinging, I was.

Q. Were your right wheels off the hard surface?

A. Yes, sir.

Q. And your left wheels were on?

A. Yes, sir.

page 121 } Q. He was coming towards you at a rapid rate of speed and within fifteen feet of you?

A. I won't say fifteen feet, but plenty close; somewhere in the neighborhood.

Q. When you struck him or when you collided with him, he was then over on the righthand side, coming towards Warrenton, was he not?

A. His front end was.

Q. If you were going south and he was going north, and your right wheels were off the hard surface and he was over on your side of the road about as far as you were, wasn't he?

A. Further.

Q. Then he must have had all of his wheels off the hard surface?

A. Must have been.

Q. And within fifteen feet of you. Do you mean to tell me that he got on the other side of the road by the time you did?

A. My truck carried him on the other side of the road.

Q. Dragged him over there?

A. No, did not exactly drag. He was coming up here and I was going down here (indicating) and his left of his car struck the right of my truck and went around like page 122 } that.

Q. But the uncontradicted evidence appears to be that at the time of the collision both cars were on the right-hand side of the road, that is, the truck and the car, coming in the direction of Warrenton. Is that right?

A. Yes, sir.

Q. Then you account for your being over on that side that you struck him over on your side and carried him around there?

A. He was coming at a good rate of speed and when they struck he knocked my truck over there.

Q. He knocked your truck over there?

A. Yes, sir; I was already headed that way, and naturally if you hit it hard enough it is going on over.

Q. I understood you to tell the jury awhile ago that your right wheels were off the macadam.

A. They were on the edge of it. They could not have been on the hard surface; must have been off.

Q. And then his left wheels were further over off the macadam than your right ones?

A. He was over on my side of the road further than I was.

Q. That was the position of both cars within fifteen feet of each other?

page 123 } A. May have been a little more.

Q. He managed to get on the other side of you, and due to that you struck him?

A. Yes, sir.

Q. How do you explain that? Here is a man within fifteen feet of you, going at a rapid rate of speed, going over on your side of the road, and yet when you collided you were on the other side of the road, east side?

A. When I started swinging to his side of the road, he swung, too; we were both headed for the left side of the road when we struck.

Q. Did you slacken your speed at all?

A. Yes, sir, I did.

Q. You could have stopped your car if you saw a man coming with his lights dimmed? Looked as though he were asleep. That's right?

A. Yes, sir. I thought something was the matter with him.

Q. You could have stopped your car?

A. I could have in time if I had took the time.

Q. If you had done that there would have been no accident?

A. No, sir, would not. Even if I had been standing still I would not let anybody run into me with a load  
page 124 } of ice.

Q. If you had stopped your car he would have had ample room to go around?

A. Not the way he was headed.

Q. But he did start across the road. Which started to the lefthand side first?

A. I did.

Q. And then he started?

A. Yes, sir.

Q. You saw him coming, you saw a man approaching you which looked like he was not in possession of his mental faculties or that had been asleep, you could have stopped your car to have avoided an injury?

A. Could not have done it. If I had known he was boing to stay over there in time I could have gone on his side of the road, before I did. I thought it was somebody playing with me at first.

Q. As a matter of fact, were not you tired and were not you asleep

A. No, sir.

Q. You waked up and ran over there and struck that man?

A. No, sir, I was not.

Q. Had not been asleep since you left Washington?

A. No, sir.

Q. How far did this accident occur from Beal-  
page 125 } ton?

A. I do not know.

Q. It was in Fauquier County, and about four or five miles from Warrenton, wasn't it?

A. Yes, sir.

Q. Tell the jury what was the size of your truck? What horse-power was it or engine-power?

A. It was a two-ton truck.

Q. What length was that truck?

A. I do not know.

Q. You do not know the length of it?

A. No, sir.

Q. You do not know the size of it?

A. No more than just a ton and a half truck.

Q. What kind of frame did it have on it, or body?

A. Had a wooden body on it.

Q. Have a refrigerator?

A. No, sir.

Q. Had a load of ice on, didn't you?

A. Yes, sir.

Q. You brought that ice from Washington?

A. Yes, sir.

Q. And you cannot tell the jury now the size of the car?

A. No, sir.

Q. Would not like to say the length of it?

page 126 } A. No, Sir.

Q. You could not have been going at a right rapid speed when you turned to go to the left, were you?

A. No, Sir; I was stepping along right keen, but I was not going too fast to control it or anything like that.

Q. The evidence is here that even after you struck the other car that did not impede your progress, but that one wheel of your car had reared up on the bank and you had driven the front of your truck into that bank.

A. His car helped me a whole lot going across that road.

Q. You mean his car made your truck go faster after you struck it?

A. It helped it over a lot.

Q. I would imagine that it would stop you to a certain extent when you run against something.

A. But I didn't hit him that way. The way he struck me was pushing me to his side of the road.

Q. It would have shoved your car around and the front of it would not have gone into the bank.

A. It did shove it some.

Q. But the front of it went into the bank on the left-hand side, and the wheel went up on the bank, didn't it?

A. Yes, Sir.

page 127 } Q. And you had certainly collided with the Suthard car before you got to the bank, hadn't you?

A. Yes, Sir.

## RE-DIRECT EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Have you ever had an automobile accident before, as long as you have been driving?

A. No, Sir.

Q. When I talked to you before and asked you questions

before, you told me you were going thirty-five or forty, or perhaps a little bit more. Is that a correct statement?

A. Yes, Sir.

Mr. Miller:

Q. You do not know how fast you were going?

A. I know I was not breaking the speed law. A truck is governed. I could not go but forty-five.

Q. Did you ever exceed forty-five?

A. Not that night.

Q. Any other night?

A. Yes, I have; I won't deny that.

page 128 }

T. D. KISER,

another witness, being first duly sworn, says:

#### DIRECT EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Please state your name, age and place of residence, Mr. Kiser?

A. T. D. Kiser, Opal, Virginia, age 35.

Q. Are you the defendant in this action?

A. Yes, Sir.

Q. Mr. Kiser are you the owner of this truck we have heard so much about to-day?

A. Yes, Sir.

Q. What kind of truck is it?

A. Stewart.

Q. How big is it?

A. Ton and a half.

Q. Did you go up to the scene of this accident that night?

A. Yes, Sir.

Q. Tell the jury what you found there and the position of the cars and conditions?

A. When I got up to where the accident occurred the truck was sitting at about a forty-five degree angle against the bank on the east side. The car was sitting about  
page 129 } two and one-half to three feet away from the truck, turned completely around in the road, facing south, and where the truck had gone up on the bank a little ways and drifted back to the edge of the bank. Then where the mark started from where I could tell, they had struck, was within five feet of the edge of the hard surface of the road on the west side of the road, leading right around to the front wheel of the Suthard car. Of course, the right

corner of the truck and the left side of the Suthard car hit. That is as near as I could tell you.

Q. What time did you get there, Mr. Kiser?

A. Must have been around nine o'clock or a few minutes after.

Q. Who went with you, Mr. Kiser?

A. Ebert Murray.

Q. You remember that mark distinctly, Mr. Kiser?

A. Yes, Sir.

Q. Where did you say the mark began?

A. Began five feet on the west side of the road from the edge of the hard surface.

Q. How long was that mark?

A. I guess that mark was at least eighteen feet long from where it started to where it stopped.

Q. Where did it stop you say?

page 130 } A. At the front wheel of the Suthard car.

Q. What kind of mark was it?

A. It was a dark mark like a tire had scraped, and then there was little cuts along in the hard surface.

Q. There have been some pictures introduced in evidence of a mark on the road. Will you take these pictures and tell the jury what that mark is, your explanation of the pictures? (Hands witness pictures referred to.)

A. That mark leads from here. This picture is facing Warrenton, isn't it?

Q. Yes, Sir.

A. This mark started here, represents where I figure that the truck and car went together. This truck was coming down.

Mr. Miller: I object to that statement, "This mark is where I figure the car and truck went together".

The Court: He can describe the mark, but the conclusion that he reached comes out. That is what the jury is here for.

A. Well, that is the mark there. Here is where it started and here is where it stopped. (Indicating.) The  
page 131 } Suthard car was standing about eighteen inches to two feet on the front, at the front wheel, and about three and a one-half at the rear wheel, from the hard surface, on the east side of the road, where it had been turned completely around. Of course, the ice and cans mashed one side of the truck off the bed when it hit, and the ice and cans were lying all out in the road. That is about all I can tell you about it. I just got there after the accident happened.

Q. Were you present when those pictures were taken?

A. Yes, Sir.

Q. Was that chalk mark put on there at the time you were there and the pictures were taken?

A. Yes, Sir.

Q. Is that right in the picture there?

A. Yes, Sir.

Q. Those chalk marks we speak of, please state exactly, whether they were put over the other mark there?

Objection by Mr. Miller.

The Court: What was that chalk mark put there for, Mr. Kiser?

A. It was put there to bring out the picture much plainer.

page 132 } The Court: Why was it put where it was?

A. Because the mark was there that the car had made.

Q. How long has Mr. Sweeney been driving for you?

A. Mr. Sweeney worked for me, I could not tell you exactly; he had been helping me some along. Was a helper on the truck, and I hurt my back and he drove the truck a few days for me.

Q. Had he ever had any accident before, since he has been driving for you?

A. No, Sir.

Q. Mr. Kiser, you have filed a counter-claim in this suit, asking for judgment yourself to cover your damages. Will you explain what damages you have suffered?

A. It cost me \$134.00 for parts and labor to fix the truck up. I lost five trips to Charlottesville and I paid \$1.50 a day for a truck to gather up with.

Q. How long were you out of the use of the truck?

A. I was out of the use of the truck a little better than a month.

Q. How many days would you say?

A. I guess must have been around thirty-four  
page 133 } or thirty-five days.

Q. You say you had to hire another truck during that time?

A. Yes, Sir.

Q. How much did you pay for that other truck?

A. One dollar and a half a day.

Q. How about these trips to Charlottesville?

- A. I got \$25.00 a trip for those trips.  
 Q. How many did you lose?  
 A. I lost five.  
 Q. What did you have on the truck, what was in the truck?  
 A. Cans and ice.  
 Q. Was any of that ice and those cans damaged or lost?  
 A. No cans damaged, but one block of ice, it was crushed, and several others that was crushed some. I did not lose all the ice.  
 Q. What did you pay for the ice that was crushed up?  
 A. I paid sixty-eight cents a block for it.

CROSS EXAMINATION.

By Mr. Miller:

Q. Who made that chalk mark you have pointed out on that photograph?

A. I could not tell you his name, for I do not know, but it is the man that taken the pictures.

Q. Who asked him to make that mark?

page 134 } A. I didn't hear anybody ask him. He just made it himself.

Q. You mean the photographer?

A. Yes, Sir; he was asked to take the picture of the mark but no one asked him to chalk it.

Q. When did you get there to the scene of the accident, after it happened?

A. Around nine or a few minutes after.

Q. That night?

A. Yes, Sir.

Q. Neither car had been moved when you got there?

A. No, Sir.

Q. Did you examine to see if there were any marks, that night?

A. Yes, Sir.

Q. What was the condition of the road at that time, wet or dry?

A. It was dry.

Q. How long did that mark remain there, if you know?

A. Well, you could see that mark there a couple of weeks afterwards.

Q. When was the picture taken, photograph, how long afterwards?

A. That photograph was taken, I guess, five or  
 page 135 } six days afterwards.

Q. Who were there when the photographs were taken, besides yourself and the photographer?



A. Ebert Murray, and I cannot call his name; the gentleman on the stand awhile ago.

Q. He testified you and he had been friends for a long time. You knew him well?

A. Yes, Sir, I have been knowing him for some time.

Q. You cannot call his name?

A. No, Sir, I have not seen him for quite a while.

Q. You agree with him, what he says, you and he were good friends?

A. Yes, Sir; I met him in Harrisonburg a good many years ago.

Q. How many times since you met him in Harrisonburg have you seen him?

A. I guess it has been twelve or thirteen years.

Q. Now, tell the jury the truth about it. Do you know how that mark got there that you are talking about?

A. That mark was evidently put there by the car when it was turned around in the road.

Q. Why do you say that now?

A. It led right around to the front wheel of the car, where it was mashed.

Q. The mark there on the road, exactly where  
page 136 } you put the chalk mark, if it was there so plain  
          } where any human eye could see it, what was the  
occasion for putting a chalk mark there?

A. I could not tell you. I didn't ask him that question at all.

Q. Didn't ask who?

A. The man that taken the pictures.

Q. Didn't ask him what he was putting that chalk mark there for?

A. No, Sir.

Q. Did you call the attention of any other person to that mark there on the highway?

A. Mr. Murray.

Q. Anybody else?

A. Well, not especially that night.

Q. Was it a dark night?

A. Well, yes, it was dark.

Q. How was it you could detect in dry weather a mark made by an automobile tire as you say, on the highway, after night, in the dark?

A. Mighty easy; I had a light to see it by.

Q. What kind of light?

A. Flashlight.

page 137 } Q. Was Mr. Shumate there?

A. I didn't see Mr. Shumate any there that night.

Q. You see Mr. Stafford, the policeman there?

A. Yes, Sir.

Q. Did you call his attention to that mark?

A. I did not especially that night, but I did say something to him afterwards.

Q. And he agreed then with you, didn't he, that that was made by the truck in dragging it out of there?

A. Well, if it was made by the truck in dragging it out of there, why would it curve towards Remington instead of towards Warrenton. The back of the truck up towards Warrenton, with the wheel dragging, as if this was the road, it would have made this mark in this shape instead of in this. (Indicating.)

Q. According to that you and your driver disagree about how it occurred? You heard his testimony?

A. I heard his testimony.

Q. Do you agree with him about how it happened?

A. I told you how I say it happened.

Q. You do not then agree with your driver?

A. I told you just how I seen it.

Q. If your driver said something to the con-  
page 138 } trary—you and he do not agree, do you?

A. Well, maybe we do not.

Q. You were there, the driver was there, that night, were not you?

A. Yes, Sir.

By Mr. Paul C. Richards, Jr.:

Q. I understood you to say that mark led up to the front wheel of Mr. Suthard's car. Was that the right or left front wheel?

A. Left front wheel.

page 139 } EBERT E. MURRAY,

another witness, being first duly sworn, says:

# DIRECT EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. Please state your name, age and place of residence?

A. Ebert E. Murray; I live down below Opal; thirty-six.

Q. You know the defendant, Mr. T. D. Kiser?

A. I have been knowing Mr. Kiser ever since he came from the Valley over in this country.

Q. Are you the Mr. Murray that Mr. Kiser said went out with him that night to the scene of the accident?

A. Yes, Sir.

Q. What time did you get there?

A. I judge a little after nine o'clock.

Q. Tell these gentlemen of the jury exactly what you found, the position of the cars and just what you saw when you got there with Mr. Kiser?

A. When we got there there was some others there, maybe a dozen or more people, and the truck was sitting cross-ways and went up to the bank a little, and the car was I judge three or four feet away, something like that, turned around, headed back towards Bealeton.

Q. What part of the Suthard car was hurt?

page 140 } A. The left side.

Q. Mr. Kiser said he called your attention and discussed with you certain marks on the road. Did you see this mark?

A. Like something had drug around; he had a big flashlight there.

Q. How long was the mark?

A. Well, I judge it was around fifteen feet, something like that, the way it had made a circle around.

Q. Where did that mark first begin?

A. Began five feet from the left side.

Q. Where did it lead to?

A. It came, I judge, about three feet and a half on the west side, I mean the east side.

Q. You notice where it led up to?

A. Let up to where the car was sitting.

Q. Which car was that?

A. Channing's car.

Q. Who is that, Mr. Channing Suthard?

A. Yes, Sir.

Q. Which wheel of his car did it lead up to?

A. Led up to the left wheel.

Q. Front or back?

page 141 } A. Front.

Q. You remember that distinctly?

A. Yes, Sir.

Q. Did you go back there when any pictures were taken?

A. Yes, Sir.

Q. Mr. Murray, take those four pictures, and state whether or not those pictures correctly state the mark that you found there that night?

A. Well, they look like it, as near as I could tell you.

Q. That is the mark you say was fifteen feet long and started on the west side of the road five feet from the edge of the macadam?

A. Yes, Sir, I would judge about that.

Q. And led up to about tree feet of the east side of the road to the left front wheel of the *Sudduth* car?

A. Yes, Sir.

### CROSS EXAMINATION.

By Mr. Miller:

Q. The five feet you talked about on the west side, you mean five feet from the west edge of the macadam?

A. Yes, Sir, from the hard surface.

page 142 } Mr. Richards: That is the case for the defendant.

Mr. Miller: We want to recall Mr. Stafford.

page 143 } T. F. STAFFORD (recalled).

### RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. Were you present when the chalk mark as shown by the pictures here introduced in evidence was made?

A. I was there when one was made.

Q. Who made that?

A. This fellow sitting on the edge of the bench back here—Clougherty.

Q. He made that mark, did he?

A. Yes, Sir.

Q. Anything there for him to make it on?

A. It was a mark there made by the left front wheel of the truck when it was being pulled back. The wheel was locked.

### RE-CROSS EXAMINATION.

By Mr. Paul C. Richards, Jr.:

Q. You say it was made by which?

A. The left front wheel of the truck.

Q. Were both wheels of the truck on or off the macadam?

A. The rear wheels were on and the front off.

Q. Both?

page 144 } A. Yes.

Q. Take these pictures and tell me if both the

front wheels of that car—Why didn't that mark begin in the dirt, until it came on the macadam—The picture shows the chalk was put over the top?

A. I do not know any reason for that. Well, it certainly was not any mark I could find at the time of the wreck. I examined close to try to find any.

Q. When that truck was dragged which way was it dragged?

A. Hooked a truck to the back end of it and pulled it back, practically the way it was standing to its original right-hand side; that would have been the west side.

Q. Got behind it and pulled it back?

A. Yes.

Q. How far behind the Kiser truck would you say the other truck was putting it back?

A. That is a thing I never noticed so particularly; I would say six or seven feet.

Q. How long was the truck?

A. From a rough guess, I would say around twenty-four or twenty-five feet long; a Stewart Truck.

Q. And the truck you say was six or seven feet page 145 } back of it?

A. Yes, Sir.

Q. And twenty-four feet long?

A. Yes, Sir.

Q. Twenty-four and six makes thirty; this mark goes back over the other side of the road; goes back over to the west side of the road. If this other truck was there and thirty more feet behind it, the truck pulling it would have been over in the field?

A. It was in an angle; pulled back and naturally taken a curve with the road.

Q. You testified the front wheel of this other truck made this mark. If you pulled that back from the end of this mark, five feet from west of the County Road and add thirty feet, you would be over in the field?

Q. Take the truck if it was towed back would swing back in towards the center of the road.

Q. You said that was made by the front wheel?

A. It was. I examined it closely at the time; also put an automobile on each side, looking for a mark. No mark other than the mark of the front wheel that was dragged back, with the exception of the moon there, the half moon.

Q. Except the moon?

page 146 } A. *Excepting* the half moon. That was probably two and one-half feet from point to point.

Q. In other words, two marks there?

A. Yes, Sir. One mark after the wreck and one mark evidently during the wreck.

page 147 } W. G. COLEMAN,  
another witness, being first duly sworn, says:

DIRECT EXAMINATION.

By Mr. Miller:

Mr. Richards: If this is direct evidence, we object to it.

Mr. Miller:

Q. What school are you principal of?

A. School at Marshall.

Q. Fauquier County?

A. Yes, Sir.

Q. When did you arrive at the scene of the accident, the subject of investigation here?

A. It was possibly twenty minutes or half an hour after the accident occurred.

Q. State to the jury the condition of the two cars when you got there?

A. The Ford Car was south of the truck, both headed toward the bank. The truck had the left front wheel partly up on the bank, somewhat elevated.

Mr. Richards: We object to that, if Your Honor please.

page 148 } Mr. Miller: We will withdraw it. They have  
put evidence on the stand about it. All right, Sir,  
I will withdraw it.

Teste: this 8th day of May, 1933.

J. R. H. ALEXANDER, Judge.

page 149 } EXHIBITS NO. 1 AND 2 AND 3.

The following exhibits filed and introduced on behalf of the plaintiff and of the defendant, respectively, as hereinafter denoted, are all of the exhibits introduced in the trial of this cause:

J. R. H. ALEXANDER, Judge.

May 8/33.

A Copy— Teste:

T. E. BARTENSTEIN, Clerk.

page 150 } DEFT'S EXHIBIT NO. 4.

Warrenton, Va., Oct. 5—1932.

To Whom It May Concern:

I hereby certify that I left home about 8 p. m. the evening I was involved in an accident with Mr. T. D. Kiser's truck South of Warrenton, Va. I did not stop after leaving home and recall passing several cars after coming out on the road (on which the accident happened) at the two filling stations but I do not recall seeing the truck with which my car collided. The last thing I remember I was driving along the road in the direction of Warrenton and when I regained consciousness I was in the hospital—I was not drinking.

I have read the above and it is my own true statement of facts.

C. M. SUTHARD.

A Copy—Teste:

T. E. BARTENSTEIN, Clerk.

page 151 } DEFT'S EXHIBIT NO. 5.

FAUQUIER COUNTY HOSPITAL  
WARRENTON, VIRGINIA

Oct 5—1932

To Whom It May Concern:

I hereby certify that Channing Suthard was brought into Fauquier Co. Hospital about 8:30 p. m. Sept. 25—1932, having been injured in an automobile accident. The following is a list of injuries sustained. Left ear practically severed—cut on left side of head just above the ear about four inches in length, to the skull—patient unconscious and remained so for about three days—Diagnosis: Fracture of base of skull & severe concussions—Patient now doing nicely.

GEO. H. DAVIS, M. D.

A Copy—Teste:

T. E. BARTENSTEIN, Clerk.

page 152 } PLAINTIFF'S EXHIBIT NO. 6.

Warrenton, Va.,

193

Mr. Channing Suthard

TO FAUQUIER COUNTY HOSPITAL, DR.

Terms in Advance

Paid Fauquier Co. Hospital

\$127.50

A Copy—Teste:

T. E. BARTENSTEIN, Clerk.

page 153 } The foregoing exhibits filed and introduced on  
behalf of the plaintiff and of the defendant, re-  
spectively, as hereinabove denoted, are all of the exhibits  
introduced in the trial of this cause.

Teste: this the 8 day of May, 1933.

J. R. H. ALEXANDER, Judge.

page 154 } The following instructions granted at the re-  
quest of the plaintiff and of the defendant, respec-  
tively, as hereinafter denoted, are all of the instructions  
that were granted in the trial of this cause:

J. R. H. ALEXANDER, Judge.

I.

*neg. defined*  
The Court instructs the jury that negligence on the part of the plaintiff, Suthard is defined as the failure to use ordinary care or the failure to do what a reasonable and prudent driver would have done under the circumstances at the time. It is defined as the failure to exercise that degree of care in the operation of his car necessary in order to avoid endangering or injuring the limb or property of another person, and the Court further instructs the jury that the motor vehicle law of the State of Virginia provides that upon all highways of the State, the driver of a vehicle shall drive the same upon his right half of the highway. In this connection if the jury believe from the evidence that the plaintiff Suthard was guilty of such negligence and reckless driv-



*Right side driving*

ing or failed to drive his said automobile upon his right half of the highway, then, he, the said Suthard, is guilty of negligence, and if the jury further believe that  
 page 155 } such negligence or such failure to drive upon the right side of the highway, were the proximate cause of the injuries suffered by the defendant Kiser, they shall find a verdict for the said Kiser and not for said Suthard, and award to said Kiser damages not in excess of the sum sued for.

## 2.

The Court instructs the jury that an automobile driver, who by the negligence of another, and not by his own negligence, is suddenly confronted by an emergency, and is compelled to act quickly to avoid a collision or injury, is not guilty of any negligence if he makes such a choice as a person of ordinary prudence placed in such a position and predicament might make, even though he did not make the wisest and best choice. If he acted in the light of all the surrounding circumstances as a prudent man would reasonably under similar circumstances, he did all the law required of him.

*Reckless emergency and driving left*

The jury is therefore further instructed that if they believe from the evidence in this case that at the time of the collision between the two automobiles mentioned, or just before said collision as the two automobiles were approaching each other in opposite directions, the said plaintiff Suthard was negligently driving his car upon the wrong side of the road and that it became apparent to the driver of the Kiser truck that in order to avoid a collision it was  
 page 156 } necessary for him to drive and turn said truck quickly to his left, they shall find the driver of the Kiser truck not guilty of negligence and render a verdict in favor of said defendant Kiser, provided the ordinarily reasonable man would have done as did said truck driver under the same circumstances.

3. *Preponderance of ev.*

The Court instructs the jury that the law imposes upon the plaintiff, Suthard, the burden of proving the defendant guilty of negligence and that the burden is upon the said plaintiff to prove such negligence by a preponderance of the evidence and in this connection the jury is further instructed that they are the sole judges of the weight of the evidence

introduced and the creditability of the witnesses testifying. In other words, the jury can believe or disbelieve the testimony of any witness or any of the evidence introduced. The jury is further instructed that should they believe that the said plaintiff, Suthard, after weighing all the evidence in the case, has not proven negligence as above said by a definite preponderance of the evidence, then they, the jury, shall find for the said defendant.

page 157 }

(1)

*Defendant*  
The court instructs the jury that if they believe from the evidence the driver of defendant's truck immediately before or at the time of the collision with the plaintiff's car was driving said truck for the defendant as his agent and employee and engaged in business for the said defendant, then the defendant is liable for the acts of his said agent and driver while engaged in such business as agent and employee, and if the said driver was guilty of any culpable negligence, and that such negligence caused the injuries to the plaintiff complained of, then the defendant is as liable for such damages as though he himself had been in charge of and driving his said truck and had committed the acts of negligence complained of.

(3)

*Explain*  
The court further instructs the jury that if they believe from the evidence the plaintiff's car was on the right hand side of the highway at the time of the collision, and the defendant's truck, driven by his agent immediately before or at the time of the injury, was driven from the right to the left hand side of the road by said agent and driver, and to the plaintiff's right hand side thereof, and struck  
page 158 } the plaintiff's car injuring it as well as the plaintiff, then the burden is upon the defendant to explain why his said truck was on the wrong side of the road at the time of the collision.

(6)

The court further *instructs* the jury that if they should find from a preponderance of the evidence in this case that the

3  
 plaintiff was lawfully upon the highway at the time and place indicated, and was traveling from the south to the north thereof, without negligence on his part, and that the defendant's agent and employee and driver was then and there driving and operating a truck for the defendant, and engaged in business for the defendant as his agent and representative, meeting the plaintiff from the opposite direction, and was not then and there exercising due and reasonable care under all the circumstances of the case, and carelessly and negligently collided with and struck the plaintiff's car on his, the plaintiff's side of the road with the said truck, and as a direct result thereof the plaintiff was injured and his automobile damaged, and that the proximate cause of the injuries to both plaintiff and his car was the careless and negligent conduct of defendant's agent and employee in the operation of the truck he was driving, then page 159 } the finding should be for the plaintiff in such sum as the jury should find from all the evidence he was entitled to recover, not exceeding the sum sued for.

## (7)

deduced from  
 The Court further instructs the jury that if they find for the plaintiff they may in estimating the damages take into consideration the bodily injury, disability and disfigurement sustained by him if any, and the permanent or temporary character thereof, and the pain and mental anguish caused by said injuries if any, and paid on account of hospital and doctors bills, medical attention and nurse hire if any, as well as damage to his car, if any, and fix the amount of damages at such sum as will be a just, reasonable and proper compensation therefor, provided, however, such damages shall not exceed the amount sued for, to-wit, ten thousand dollars.

*McGovern vs. Faymon*, 144 Va. 365.

page 160 } The foregoing instructions granted at the request of the plaintiff and of the defendant, respectively, as hereinabove denoted, are all of the instructions that were granted in the trial of this case.

Teste: this the 8 day of May, 1933.

J. R. H. ALEXANDER, Judge.

page 161 } Paper found among the papers in suit, not  
marked filed

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J. HARVEY EDWARDS.

April 15, 1847.

Aug. 2, 1930.

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The foregoing is a copy of a paper presented by counsel of defendant on hearing of motion for new trial and by counsel stated to have been found in papers of this action returned in Court with its verdict by jury.

J. R. H. ALEXANDER, Judge.

May 8/33.

page 162 } I, T. E. Bartenstein, Clerk of the Circuit Court  
of Fauquier County, Virginia, do hereby certify  
that the foregoing is a true and correct transcript of the  
record in the case lately pending in said Court, styled Chan-  
ning M. Suthard vs. T. D. Kiser; and I further certify that  
evidence of the notice required by section 6339 of the Code  
of Virginia, has been filed in the papers in said case.

T. E. BARTENSTEIN, Clerk.

Cost of this copy, 18.50.

May 17, 1933.

A Copy—Teste:

M. B. WATTS, C. C.

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