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Record No. 2250

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIS E. DARDEN, ET AL.,

v.

M. J. MURPHY.

FROM THE CIRCUIT COURT OF ELIZABETH CITY COUNTY.

RULE 14.

¶5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶6. SIZE AND TYPE. 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. The record number of the case shall be printed on all briefs.

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

M. B. WATTS, Clerk.

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2250

WILLIS E. DARDEN AND SWIFT AND COMPANY,
Plaintiffs in Error,

versus

M. J. MURPHY, Defendant in Error.

PETITION FOR A WRIT OF ERROR.

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

PRELIMINARY STATEMENT.

Your petitioners, Willis E. Darden and Swift and Company, respectfully represent that they are aggrieved by a final judgment in the sum of Two Thousand Five Hundred (\$2,500.00) Dollars of the Circuit Court of Elizabeth City County, rendered on the 24th day of July, 1939, against your petitioners in favor of the plaintiff, M. J. Murphy, in the above-entitled cause (R., p. 8). The parties will hereinafter be referred to as the plaintiff and defendants, according to their respective positions in the Trial Court. Unless otherwise indicated, all italics are ours, and the page numbers refer to *the transcript of the record. Counsel for the petitioners desire to state orally to the Court the reasons for reviewing the decision complained of and adopt this petition as the original brief, which petition was filed with the

Clerk of this Court, at Richmond, on the 20th day of November, 1939, and a copy of which was mailed to Montague and Holt, Esqs., of counsel for the plaintiff, on the same day.

RULE OF DECISION.

In view of the fact that the plaintiff secured a verdict in his favor, it is conceded by the defendants that for the purposes of this petition the plaintiff is entitled to a statement of the facts as they appear most favorably to him. In *Price v. Burton*, 155 Va. 229, 154 S. E. 499, this Court said at page 234:

“It must be borne in mind, that unless the verdict of the jury is plainly wrong or without evidence to support it, this court will sustain it. Under this rule, in view of the verdict of the jury, we will consider all material conflicts in the testimony as settled by the verdict in favor of the plaintiff.”

3*

*THE FACTS.

The accident occurred on July 18, 1938, a bright, sunny day, between 12:30 and 1:00 P. M. on Mallory Street, near its intersection with County Street, in the Town of Phoebus (R., p. 15). The plaintiff had been in Fuller's Hotel, which was located at the corner of that intersection, having a drink with a friend of his by the name of Michael J. Foley (R., p. 16). He saw a friend of his by the name of Gordon Brown go by and he wanted to see him, so he went out of Fuller's Hotel in order to hail him (R., p. 16). There was a street car in Mallory Street waiting for the stop and go light to change to green right in front of Fuller's Hotel at the intersection (R., p. 16), and there was another street car behind it a little distance down the street at a switch in the street car tracks (R., p. 17). The plaintiff observed Brown trying to get on the street car and (R., p. 17):

“He got on this special car there—they were either the Boy Scouts or the Newsboys that had been to Buckroe I don't know which, and the conductor would not let Gordon get on the car, so I said to Foley: ‘I will have some fun with him. I will give him the laugh.’ I started to walk up the sidewalk close to the curb, and about that time this truck came along and knocked me down on the sidewalk.”

The point of the impact was about fifteen feet from a mail box, which was located on Mallory Street at the property line

of County Street on the sidewalk directly in front of the entrance to Fuller's Hotel (R., p. 45), and all the plaintiff
4* *knew was that the truck hit him as he stood directly on the edge of the curb (R., p. 31):

"Q. You don't know where the truck came from, do you?

"A. No, I don't.

"Q. Is it your contention that this truck hung over the sidewalk, or swung over the sidewalk and struck you?

"A. I have not got any contentions about it any more than the truck hit me.

"Q. Where were you when it hit you?

"A. I was right on the curb."

Although the plaintiff disclaimed of ever having gotten off the sidewalk (R., p. 17), he admitted that his feet were within three or four inches of the edge of the curb (R., p. 18) and that his arm and shoulder might have projected over the curb line (R., p. 17). He testified that "he was right on the curb" (R., p. 31), and on page 33 his testimony was as follows:

"Q. Where were you going after you got to the edge of the sidewalk,—you say you were within three or four inches of the curb, where were you going?

"A. Right straight along.

"Q. Towards where?

"A. Towards Buckroe.

"Q. Were you not going towards the curb?

"A. No, I was only close to the curb.

"Q. Do I understand you to say at the time you were walking straight towards Buckroe?

"A. Yes.

"Q. Then what part of your body was struck by the truck first?

"A. My arm and shoulder.

"Q. Which arm and shoulder?

5* *"A. My left.

"Q. Now, you were walking very close to the curb?

"A. Yes.

"Q. Did you take any particular caution there due to the fact you were close to the curb? Any special caution?

"A. I was on the sidewalk and I didn't think I had to take any special caution.

"Q. In other words, you thought you could walk right up to the curb line and not worry about what happened?

"A. I think you can go to the curb line, and if you are on the sidewalk you still have pedestrian's rights."

Michael Foley, his companion, was following the plaintiff four or five feet behind him (R., p. 42). He likewise did not see the truck and testified that the plaintiff was walking diagonally toward the edge of the sidewalk (R., p. 45) and gave the following account of the accident (R., p. 43):

“Mr. Murphy and I had gotten through the door,—Mr. Murphy was ahead of me, and both of us were on the walk. There were two trolley cars standing there on the tracks and there was someone Mr. Murphy recognized trying to board one of the cars and Mr. Murphy waived to him, trying to attract his attention. He walked right across to the curb, at the same time towards Buckroe Beach. He was about four feet in front of me. Just as he got to the curb, still on the sidewalk, all of a sudden this truck loomed up. (Where it came from I do not know.) The rear end of *the truck 6* hit Murphy; it turned him about one-fourth of the way around; he threw his arms out in front of him and he fell on his face.”

Thomas Allen, the only other eyewitness to the accident who testified for the plaintiff, was almost a block away (R., p. 60) and likewise did not notice anything until the actual impact occurred (R., p. 58). He testified as follows on page 57:

“A. I was going up towards Fuller’s Hotel and I saw a man hit. At that time I did not know who the man was, and it looked to me as if the rear end of the truck hit him, or he was thrown out of the back of it.

“Q. What?

“A. It looked as if he was thrown from the back of the truck.”

.Not only did the plaintiff admit that the truck never got on the sidewalk (R., p. 34) but all the other witnesses testified to the same effect (R., pp. 52, 95, 126). Likewise, it was admitted by everybody that he came in contact with the extreme rear side of the truck (R., pp. 49, 62, 124).

The truck had been coming down Mallory Street for several blocks (R., p. 80) and had stopped for the red light at that intersection (R., pp. 80, 93, 125). Darden, the truck driver, when the light changed, proceeded on across the intersection and knew nothing of the accident until he was told about it a few minutes later (R., pp. 124-125).

7* *Mallory Street is forty feet wide (R., p. 105), and at the point of the collision the travelled portion is eleven

and one-half feet wide, because there is a safety zone that distance from the curb (R., p. 105). The truck was six feet and nine inches wide (R., p. 128) with an overhang of the body from the wheels of not more than two inches (R., pp. 115, 120, 128).

The plaintiff testified that he was not conscious for ten minutes after the accident but that he got a glimpse (R., p. 34) of the truck when it was one hundred and sixty feet away after it had struck him and that it looked like it was going about thirty miles an hour (R., p. 23). Foley, who also saw the truck after the accident, said "it was hitting a pretty good clip. I would say 25 to 30" (R., p. 47). Allen also said it was "moving along pretty fast" when he saw it after the impact. The street car conductor and the truck driver both estimated the speed at eight to ten miles an hour. It is obvious that the truck could not have been going at any appreciable rate of speed, because he had just been stopped for the red light and had only the distance of the intersection in which to pick up speed.

8* *THE TRIAL COURT'S MEMORANDUM.

On pages 144 and 146 of the record is found the Trial Court's memorandum of opinion. This the Court is respectfully referred to, and because it will be quoted from hereinafter we shall not copy it here in full.

ASSIGNMENTS OF ERROR.

Assignment of Error No. 1.

The Court erred in overruling the defendants' motion to set aside the verdict of the jury and to enter final judgment on the ground that there was no evidence of primary negligence on the part of the defendants (R., pp. 7, 8, 143).

Assignment of Error No. 2.

The Court erred in overruling the defendants' motion to set aside the verdict of the jury and to enter final judgment on the ground that the plaintiff was guilty of contributory negligence as a matter of law (R., pp. 7, 8, 143).

9* *Assignment of Error No. 3.

The Court erred in granting Instruction No. 1 over the objection of the defendants (R., p. 136).

Assignment of Error No. 4.

The Court erred in granting Instruction No. 2 over the objection of the defendants (R., pp. 136-137).

Assignment of Error No. 5.

The Court erred in granting Instruction No. 3 over the objection of the defendants (R., pp. 137-138).

Assignment of Error No. 6.

The Court erred in overruling the motion of the defendants to set aside the verdict of the jury and to enter final judgment because the damages awarded by the jury were excessive (R., pp. 7, 8, 143).

ASSIGNMENT OF ERROR NO. 1.

The Defendant Was Guilty of No Negligence.

The Trial Court in overruling the motion of the defendants to set aside the verdict gave a memorandum of opinion, the pertinent portions upon the question of primary negligence being as follows (R., p. 144):

10* **"In the above-styled case three points were raised on the motion to set aside the verdict: (1) that certain instructions granted the plaintiff were not proper; and that certain instructions refused the defendant were improperly refused; (2) that the verdict should be set aside because it was contrary to the evidence; and (3) that the damages were excessive.*

* * * * * *

"Second, I am asked to set aside the verdict because it is contrary to the evidence. The sole question in the case is whether or not when the plaintiff was struck by the automobile he was on the sidewalk and far enough away from the edge to be in a place of safety. I also instructed the jury along this line with reference to his position on the sidewalk. I think there is evidence in the record by which the jury could conclude that in some way the plaintiff was injured by the swinging around of the truck. That being the case I do not feel that I should interfere with the verdict on that ground."

It is apparent from the plaintiff's own evidence and that of his witnesses, as shown before, that he was walking in a diagonal direction toward the edge of the sidewalk and that when he had gotten to the very edge with his shoulders and arms projecting over it he was struck by the rear end of the truck, which admittedly did not come up on the curb but was driving down the street close to the edge of the curb. This was necessary because of the safety zone which, as shown by the map attached to this petition, only allowed a limited space over which a vehicle could drive. It was also made necessary by the presence of the street car on the single track in the middle of the street. The defendants' truck

11* *driver admitted that he was within one and a half to two feet from the curb; and, even if he were a little closer, close enough so that a man moving onto the very edge of the sidewalk, as the plaintiff was, would be hit by the truck or would himself run into the truck in its rear, no negligence would be imputed to the truck driver, because he was doing only what was necessary under the circumstances. The overhang of the body from the wheels was, at the very most, two inches; and with the plaintiff's admission that his shoulders and arms extended over the edge of the curb, there is no evidence whatsoever that the actual impact took place over the sidewalk rather than over the street. The truck driver was driving where he had a right to be, and he could assume unless there was something shown to the contrary that the roadway would continue free from obstruction. *Jones v. Massie*, 158 Va. 121, 128, 163 Va. 63.

In fact, the City Ordinance of the City of Phoebus, introduced into the record (R., p. 133), provided that the defendant should "drive (his vehicle) * * * as closely as possible to the right-hand edge or curb of such highway * * *". The truck driver was following the very provisions of this ordinance, and no negligence can be imputed to him for obeying it.

12* *The Court in its opinion (R., p. 146) said, "I think there is evidence in the record by which the jury could conclude that in some way the plaintiff was injured by the swinging around of the truck". As shown before, none of the plaintiff's witnesses, including himself, ever saw the truck until after the impact. They were in no position to and did not testify that the truck ever did swing around in any fashion. The uncontradicted evidence of the defendants disclosed that the truck had been waiting for the stop signal to turn green and that, when it did, it had proceeded straight down the street somewhat close to the curb, as required by the

City Ordinance, and the plaintiff walked diagonally into the rear of this truck.

There was likewise no probative evidence of excessive speed. The plaintiff said that he was knocked unconscious, under which circumstances he never could have seen the truck. He testified that he did get a glimpse of it some one hundred and sixty feet away after the impact (R., p. 34) and it appeared to be going thirty miles an hour. Whether he was unconscious or whether he did see it, the fact remains that his evidence has no probative value.

The other two plaintiff's witnesses, Foley and Allen, testified that it was moving along pretty fast at a pretty good clip and that they would say twenty-five to thirty miles an hour (R., pp. 47, 59). This evidence as to speed even 13* by *itself is entirely without probative value, as was held in *Shoemaker v. Andrews*, 154 Va. 170, 174, 152 S. E. 370, where it was said:

"There is no testimony that defendant was driving at an unlawful or excessive rate of speed. The plaintiff's witness, Thompson, who was not at the place, but who had been passed by the defendant's automobile a few minutes before the occurrence, when asked what his rate of speed was, answered: 'About thirty or thirty-five miles—probably forty. I don't know exactly. I am pretty sure it was over twenty-five miles as he just walked away from my car like I was standing still.' But the plaintiff's son, who was an eyewitness, testified that at the time and place of the occurrence he was driving his car 'pretty fast—not so awful fast—about twenty-five or thirty miles'. The defendant testified unequivocally that he had not run as much as thirty-five miles an hour after leaving the concrete road near Farmville; that he had plenty of time to get to his home at Charlottesville and took his time. When asked to confine himself to the time of the injury, he answered: 'I did not keep my eyes on the speedometer. I slowed down to about five miles an hour.' 'Q. Did you at any coast and when I saw that I was going to have an accident I slapped the brakes on and the car skidded. I think I had slowed down to about five miles an hour. 'Q. Did you at any time exceed thirty miles an hour? A. No, sir; I know that is true.' This is the substance of all of the testimony as to excessive speed. It clearly fails to establish that allegation of negligence."

In addition to all this, we have the uncontradicted evidence that the truck had been stopped at the corner for *some 14* little time waiting for the stop light to turn green and that it was going only eight to ten miles an hour (R., pp.

95, 126). It is a matter of common knowledge that a truck cannot from a standing position accelerate to any such speed as twenty-five to thirty miles an hour across an intersection of approximately forty feet. Such evidence is incredible, and the Court does not have to lend it credence. *Johnson v. R., F. & P. R. R. Co.*, 160 Va. 766, 169 S. E. 603; *C. & O. v. Barlow*, 155 Va. 863, 149 S. E. 419; *Southern Ry. v. Davis*, 162 Va. 548, 147 S. E. 228; *Saunders v. Temple*, 154 Va. 714, 153 S. E. 691.

ASSIGNMENT OF ERROR NO. 2.

The Plaintiff Was Guilty of Contributory Negligence as a Matter of Law.

The plaintiff admitted (R., p. 33) that he paid no particular caution because he thought he could walk right up to the edge of the curb with part of his body projecting over it and still have pedestrians' rights. There might perhaps be some force in this contention if he had been hit by the front of the truck, but it has been shown that was not the case but rather that the plaintiff came in contact with the extreme rear of the truck, which he admitted he never saw. If there were 15* any opportunity to *avoid the accident, it was the plaintiff's. The truck had nearly passed in its entirety, and the sole cause of the accident was due to the plaintiff's walking into its rear, even though he may not have gotten his feet off the sidewalk.

ASSIGNMENT OF ERROR NO. 3.

Instruction No. 1 Should Not Have Been Given.

Instruction No. 1 (R., p. 136) allowed the jury to consider the question of excessive speed as follows:

"The Court instructs the jury that it is the duty of the operator of every motor vehicle to drive the same at a careful and prudent speed, not greater nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and any other condition then existing, and that under the Ordinances of the Town of Phoebus, Virginia, any person who operates a motor vehicle in a business district (and the place where the injuries to the plaintiff occurred was a business district) at a rate of speed exceeding fifteen miles an hour is *prima facie* guilty of reckless driving."

Timely objection to this instruction was made on the ground that it was entirely unsupported by the evidence, as it, in fact, was. It has been shown that the truck could not have gotten up such a speed from a standstill just going 16* *across the intersection; that the plaintiff's evidence is entirely without probative value; and that the physical facts were corroborated by the defendants' evidence that it was going at a proper and lawful rate of speed.

Submission of an instruction without any evidence to support it has been repeatedly held by this Court to be reversible error. *Gale v. Wilbur*, 163 Va. 211, 175 S. E. 739; *C. & O. v. Crum*, 140 Va. 333, 125 S. E. 301; *Southern Ry. v. Forgey*, 105 Va. 599, 603, 54 S. E. 477. In the last mentioned case, this Court said:

"The reason for this is that the tendency of such instructions is to mislead the jury by withdrawing their attention from the legitimate points involved in the issue. Juries are sufficiently prone to indulge in conjecture without having possible facts not in evidence suggested for their consideration. *Kimball & Fink v. Borden*, *supra*, and cases cited."

This instruction is likewise fatally defective because speed was not and could not have been a proximate cause of the accident. In fact, neither this nor any other instruction submitted the question of proximate cause to the jury as to speed but left the instruction dangling without tying it up to any finding instruction.

ASSIGNMENT OF ERROR NO. 4.

Instruction No. 2 Should Not Have Been Given.

Instruction No. 2 (R., p. 136) was given over the objection of the defendants on the ground that the burden of proof is on the plaintiff and that under the facts no such presumption or burden of proof should be cast upon the defendants. This instruction is as follows:

17* * "The Court instructs the Jury that if you believe from the evidence that M. J. Murphy was injured by the automobile owned by the defendant, Swift & Company, Incorporated, and operated by the defendant, Willis E. Darden, while he was standing on the sidewalk in front of Fuller's Hotel in the Town of Phoebus, Virginia, the burden of proof is upon the defendants to show by a preponderance of the evidence that said injury was unavoidable, and that the de-

defendants did everything that a reasonably prudent person would do under all the facts and circumstances in the case, to prevent injuring him, and unless they did this, they are guilty of negligence, and you must find for the plaintiff."

This instruction is directly contrary to the following portion of the defendants' instruction found on page 141:

"The Court further instructs the jury that the plaintiff had no right to stand so close to the edge of the curb so that any part of his body would project beyond the curb and be struck by a passing motor vehicle driven in the ordinary way, and if you believe from the evidence that he did this, then he is not entitled to recover and your verdict should be in favor of the defendant."

The Trial Court recognized that Instruction No. 2 was contrary to the usual legal requirements that the plaintiff always had the burden of proof. In its memorandum of opinion, it was said:

"Taking these objections up in order, I am of the 18* opinion that there was no error *in the instructions. It is true that Instruction No. 2 given the plaintiff, which to a certain extent placed the burden of the proof upon the defendants to show by a preponderance of the evidence that the injury was unavoidable, seems to be inconsistent with the burden which the plaintiff always has to carry in a suit of this nature,—yet this instruction is based upon an instruction which was given in the suit of *Trauerman v. Oliver's Administrator*, and I followed this case in granting it. I feel, therefore, that the jury was properly instructed."

It is true that in *Trauerman v. Oliver's Administrator*, 125 Va. 458, 93 S. E. 467, this Court used language to that effect in discussing an accident where a vehicle physically left the road and went onto the sidewalk. Of course, no such thing happened here. The accident occurred because both the truck and the plaintiff happened to be close to the edge of the curb at the same time, and it was admitted by all parties that the wheels of the truck never left the street nor came on the sidewalk. The factual situation between this case and the *Trauerman* Case is entirely different, and for that reason the instruction should not have been given.

In addition, this Court has repeatedly held that the burden of proof even in a case of *res ipsa loquitur* always remains with the plaintiff. Certain evidential facts may shift the

burden of evidence, but the burden of proof always
19* *remains with the plaintiff. *C. & O. v. Baker*, 149 Va.
549, 140 S. E. 648, 150 Va. 647, 143 S. E. 299; *C. & O. v. Tanner*, 165 Va. 406, 182 S. E. 239; *V. E. & P. Co. v. Lowry*, 166 Va. 207, 184 S. E. 177. In the *Baker* Case, it was dogmatically stated that, although there may be a presumption of negligence which may dispense with further proof on the plaintiff's part, still "he (the plaintiff) has the burden of proving negligence as in any other action founded on negligence and that the carrier is not bound to account for the accident".

ASSIGNMENT OF ERROR NO. 5.

Instruction No. 3 Should Not Have Been Given.

Instruction No. 3 (R., p. 137) is as follows:

"The Court instructs the Jury that if you believe from the evidence that the defendant, Darden, operated a truck owned by the defendant, Swift & Company, in such a manner in the Town of Phoebus, Virginia, that the body of the said truck extended over and on the sidewalk where it struck and injured the plaintiff, Murphy, who was standing upon said sidewalk, then your verdict should be in favor of the plaintiff."

This instruction is entirely unsupported by the evidence, as has been shown, because the truck body only extended two inches beyond its wheels, and it could not possibly have overlapped the sidewalk as the instruction stated. In addition,
20* *it tells the jury to find for the plaintiff under those facts, irrespective of the question of negligence, assuming that such an action is negligence as a matter of law. This instruction goes even further than Instruction No. 2, because Instruction No. 2 at least submits the question of negligence even though it casts the burden of proof upon the wrong party, but this instruction tells the jury to find for the plaintiff, irrespective of any question of negligence. In addition, it ignores the defense of contributory negligence and is directly contrary to the last part of the defendant's instruction (R., p. 149) which holds that the plaintiff had no right to stand so close to the edge of the curb that he would be struck by a passing vehicle. These two instructions cannot be reconciled, and Instruction No. 3 leaves out a vital defense, namely, contributory negligence, and for that reason is prejudicial error.

ASSIGNMENT OF ERROR NO. 6.

The Damages Awarded Were Excessive.

The evidence in this case clearly shows that the damages were grossly excessive. The plaintiff's bill for medical care was \$38.00 (R., p. 13). Plaintiff testified that his total salary was approximately \$100.00 per month, and this included room and board (R., p. 21). He further testified that he was 21* away from work for approximately eight weeks (R., p. 21) which was a loss of around \$200.00. However, there is no evidence in the record showing that the plaintiff had to give up his room and board when he was unable to work. But, accepting plaintiff's own estimate, his actual damages were at the most \$238.00. Dr. Ward testified that the last time he examined the witness he was all right except for some roughness in his knee (R., p. 14). There is no evidence in the record of extreme suffering or unusual pain.

Here the verdict is so grossly disproportionate to the injury that one cannot escape the conclusion that it is not the result of fair, calm and unbiased judgment and should be set aside as excessive. In the case of *C. D. Kenny Co. v. Solomon*, 158 Va. 25, 163 S. E. 97, where the evidence shows that the plaintiff was away from work thirty-four days and his loss of wages amounted to \$200.00, his medical bill and drugs \$75.00, and no extreme suffering, as in the instant case, this Court said in setting aside a \$2,500.00 verdict on page 30:

"In personal injury actions, which merely sound in damages, where there is no legal rule for measuring them, the amount to be ascertained and awarded rests largely in the discretion of the jury, *but if the amount awarded is greatly out of proportion to the injury suffered it may indicate that the jury were actuated by bias or prejudice*, or that the evidence of the extent of the injury was disregarded. In arriving at the amount of damages it is the duty of the 22* court *to see that the jury approximates a sane estimate. 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."

And so here the size of the verdict alone shows that the jury has not approximated a sane, sensible estimate. There

is no evidence of any permanent injury with the exception of minor scars. There is no evidence of great suffering; and plaintiff's earning power has not been shown to have been impaired other than the time actually lost. Consequently, the facts of this case show the verdict to be plainly excessive, and such verdict should, therefore, be set aside.

CONCLUSION.

Because of the errors assigned, your petitioners pray that a writ of error from and a *supersedeas* to the said judgment of the Circuit Court of Elizabeth City County be
23* awarded; *that if any of the assignments of error be well taken the judgment of the Trial Court be reversed, and that such other relief be awarded as to the Court seems proper.

Respectfully submitted,

SINNOTT AND MAY,
By S. L. SINNOTT,
V. P. RANDOLPH, JR.,
Counsel for Petitioners.

S. L. SINNOTT,
V. P. RANDOLPH, JR.,
222 Richmond Trust Bldg.,
Richmond, Virginia.

We, S. L. Sinnott and V. P. Randolph, Jr., whose addresses are 222 Richmond Trust Building, Richmond, Virginia, attorneys practicing in the Supreme Court of Appeals of Virginia, do certify that, in our opinion, the judgment and decision of the Circuit Court of Elizabeth (*City*) County in an action at law, wherein M. J. Murphy was plaintiff and Willis E. Darden and Swift and Company were defendants, rendered on the 24th day of July, 1939, a transcript of the record of which is attached hereto, should be reviewed by the Supreme Court of Appeals of Virginia.

Given under our hands this 20th day of November, 1939.

S. L. SINNOTT,
V. P. RANDOLPH, JR.

Received November 20, 1939.

M. B. WATTS, Clerk.

January 4, 1940. Writ of error and *supersedeas* awarded by the Court. Bond \$3,300.

M. B. W.

(See MS. for map with petition.)

RECORD

VIRGINIA

Pleas before the Circuit Court of Elizabeth City County, Virginia, August 18th, A. D. 1939.

Be it remembered, that heretofore to-wit: on the 28th day of October, 1938, came M. J. Murphy, plaintiff, by Montague and Holt, his attorneys, and filed his notice of motion for judgment against Willis E. Darden and Swift and Company, Incorporated, defendants, which notice of motion for judgment is in words and figures as follows, to-wit:

In the Circuit Court of Elizabeth City County, Virginia:

M. J. Murphy, Plaintiff,

v.

Willis E. Darden, and Swift & Company, Inc., Defendants.

NOTICE OF MOTION FOR JUDGMENT.

To: Willis E. Darden,
115 Thirty-Fourth Street,
Newport News, Virginia.

and

To: Swift & Company, Inc.

You, and each of you, are hereby notified that on the 5th day of December, 1938, between the hours of 10:00 A. M., and 2:00 P. M., on that date, or as soon thereafter as the same may be heard, the undersigned, M. J. Murphy, will move the Circuit Court of Elizabeth City County, Virginia, at the Court House thereof for a judgment against you in the sum of Ten Thousand Dollars (\$10,000.00) which sum is due and owing by you and each of you to the undersigned for the damages, wrongs and injuries hereinafter set forth, to-wit:

That heretofore, to-wit: on or about the 18th day of July, 1938, you, Willis E. Darden, were driving a certain
page 2 } one and one-half ton Chevrolet truck, of red color,
in the Town of Phoebus, Elizabeth City County,
Virginia, and you were driving said truck which was owned

by the defendant, Swift & Company, Incorporated, in your capacity as agent and employee of the said Swift & Company, Incorporated, and incident to the business of your employer, and it, thereupon, became and was your duty to exercise ordinary care for the safety of the person of the undersigned and it was your further duty to have your automobile under complete control, having due regard for the width, traffic and use of said street and the protection of life and property.

Notwithstanding the duty of you, the said Willis E. Darden, Agent for you, Swift & Company, Incorporated, and acting in the scope of your employment and on behalf of your employer, Swift & Company, Incorporated, you the said Willis E. Darden, did negligently fail to drive and manage your said automobile with ordinary care, and you failed to maintain a proper lookout for pedestrians upon the sidewalk, and you recklessly and negligently drove and operated your said automobile truck at an improper rate of speed, and in such a manner that the body of your said truck left the street and came over upon the sidewalk upon which the undersigned plaintiff was standing, without fault upon his own part, and you, the said Willis E. Darden, acting within the scope of your employment for the defendant, Swift & Company, Incorporated, negligently and recklessly ran your said automobile truck with great force and violence, into, upon and against the undersigned, who was then and there in the exercise of due care

standing upon the sidewalk in front of Fuller's
page 3 } Hotel in the Town of Phoebus, in Elizabeth City
County, Virginia, by reason whereof and as the
proximate result of which the undersigned plaintiff was
knocked down and caused to fall on the hard paved sidewalk
and was thereby lacerated, bruised, torn and crushed, and
suffered bruises, contusions, lacerations and sprains, injuring
the nerves, flesh and bones and crippling the undersigned,
causing great pain and distress, permanent and incurable injuries,
and permanent disfigurement.

And as a further result of the injuries caused by your negligence aforesaid, the undersigned has been caused from hence hitherto to suffer great mental anguish and physical pain and permanent disfigurement; and the undersigned has been obliged to pay divers sums of money for doctor's bills and the repair of his eyeglasses, and has been forced to lose a great deal of time, from attending to business matters, or from engaging in any gainful or productive occupation or calling, which condition still continues, and has suffered and will continue to suffer loss from the permanent diminution

of his earning capacity by reason of the injuries aforesaid.

By reason whereof and as the approximate result of which the undersigned has been damaged to the extent of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, judgment therefor will be asked at the hands of said Court at the time and place hereinabove set forth.

Given under my hand this the 27th day of October, 1938.

Respectfully,

M. J. MURPHY,
By MONTAGUE & HOLT,
Counsel.

page 4 } MONTAGUE & HOLT, p. q.

Upon the back of which is endorsed the following words and figures, to-wit: Executed in the City of Richmond, Va., October 27, 1938, by delivering in duplicate a copy of within Notice of Motion for Judgment to R. L. Jackson the Secretary of the Commonwealth of Virginia and as such Secretary of the Commonwealth the Statutory Agent for Swift and Company Incorporated.

Place of residence and place of business of said R. L. Jackson being in the City of Richmond, Va. Fee of \$2.50 paid the Secretary at time of service.

Sergeant's fee \$.75.

JOHN G. SAUNDERS,
Sergeant of Richmond, Va.
By P. H. BOWIS,
Deputy Sergeant.

Executed October 28, 1938, in the City of Newport News, Virginia by delivering a true copy of the within Notice to Willis E. Darden in person.

P. W. HALL, City Sergeant,
By J. D. SMITH,
Deputy Sergeant.

Notice of Motion returned to Clerk's Office executed October 28th, 1938.

October 29th, 1938.

Writ tax and deposit paid and cause duly docketed for hearing December 5th, 1938, the day to which it is returnable to this Court.

page 5 } And at another day, to-wit:

Circuit Court of the County of Elizabeth City on Thursday the twenty-seventh day of April, in the year of our Lord one thousand nine hundred and thirty-nine.

M. J. Murphy, Plaintiff

v.

Willis E. Darden and Swift & Company, Defendants

ORDER FILING DEPOSITIONS.

THIS DAY came the parties, by counsel, and by stipulation filed the stenographic report of the testimony of Michael J. Foley taken by Mrs. Harriet W. Elam, which report was taken on the 7th day of March, 1939, in this proceeding, and which said report is herewith by stipulation of counsel ordered filed among the papers in this proceeding, and by stipulation of counsel, it is ordered that the said testimony of Michael J. Foley be treated and considered as a deposition in any further proceedings which may be had in this case.

M. J. Murphy

v.

Willis E. Darden and Swift and Company

MOTION FOR JUDGMENT.

This day came the parties by their attorneys, and there-upon came a jury to-wit: D. J. Tranyham, Rubin Wallace, H. C. Hathaway, Phillip Fertitta, J. B. Tyler, F. J. Scott and Jacob Ferguson who were sworn well and truly to try the issue joined and the truth of and upon the premises
page 6 } to speak and having heard the evidence of the plaintiff, the defendants, by counsel, moved the Court to strike the evidence of the said plaintiff, which motion the Court doth overrule, to which ruling of the Court, the defendants by counsel, excepted and asked leave to subsequently file their bills of exceptions, which leave is granted and the jury having heard the evidence of the defendants, the defendants by counsel, renewed their motion to strike the evidence of the plaintiff, which motion the Court overruled, to

which ruling of the Court the defendants, by counsel, excepted and asked leave to subsequently file their bills of exceptions, which leave is granted and having heard the arguments of counsel were adjourned until tomorrow morning at 10:00 o'clock.

And the further hearing of this cause is continued until tomorrow morning at 10:00 o'clock.

And at another day, to-wit:

Circuit Court of the County of Elizabeth City on Friday the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and thirty-nine.

M. J. Murphy

v.

Willis E. Darden and Swift and Company

MOTION FOR JUDGMENT.

This day again came the parties by their attorneys, and the jury adjourned over on yesterday again appeared in Court pursuant to their adjournment and retired page 7 } to their room to consult of a verdict and after some-time returned into Court having found the following verdict to-wit: "We the Jury find in favor of the Plaintiff M. J. Murphy and fix the damages at Twenty-five hundred (\$2,500.00)". (Signed) F. J. Scott, Foreman.

Whereupon, the defendants, by counsel, moved the Court to set aside the verdict of the jury in this cause rendered because the same is contrary to the law and the evidence and without evidence to support the verdict and because the Court granted certain instructions to the plaintiff over the objections of the defendants and because the Court refused to strike the evidence of the plaintiff in accordance with the motions of the defendants, and because of excessive damages, the hearing of which motion is continued until some later day in this term.

And the further hearing of this cause is continued until some later day in this term.

And at another day to-wit:

Circuit Court of the County of Elizabeth City on Monday the twenty-fourth day of July, in the year of our Lord one thousand nine hundred and thirty-nine.

M. J. Murphy

v.

Willis E. Darden and Swift and Company

MOTION FOR JUDGMENT.

This day again came the parties, by their attorneys, and the defendants, by counsel, renewed their motion
page 8 } made at the trial of this cause on the 28th day of April, 1939, on the grounds set forth in the order of said date, and the Court having heard the arguments of counsel and maturely considered the said motion, doth overrule same, to which ruling of the Court, the defendants, by counsel, excepted and asked leave to subsequently file their bills of exceptions, which leave is granted.

It is therefore considered, by the Court, that the plaintiff, M. J. Murphy, recover of the defendants, Willis E. Darden and Swift and Company, the sum of Twenty-five Hundred (\$2,500.00) dollars, the damages by the jurors in their verdict fixed, with interest thereon computed at the rate of Six per centum (6%) per annum from the 28th day of April, 1939, until paid.

Whereas, the defendants, by counsel, notified the Court of their intention to apply to the Supreme Court of Appeals of this State for a writ of error and *supersedeas*, the Court doth suspend the execution of this judgment for the period of ninety (90) days from this day, in order to allow the defendants time in which to perfect their said appeal, conditioned however, that the defendants shall enter into a bond in the penalty of Three Thousand (\$3,000.00) dollars, within fifteen (15) days from this day, with the security to be approved by the Court or the Clerk thereof, to pay all damages and costs that may be adjudged against them.

page 9 } CERTIFICATE OF EXCEPTIONS.

All the evidence, instructions, objections and other incidents of the trial of the case.

Virginia:

In the Circuit Court of the County of Elizabeth City.

M. J. Murphy, Plaintiff,

v.

Willis E. Darden and Swift and Company, Defendants

Dr. O. W. Ward.

Before the Honorable John Weymouth, Judge, Hampton, Virginia, April 27, 1939.

Counsel: Montague & Holt, and Frank A. Kearney, representing the Plaintiff;

S. L. Sinnott and E. Ralph James, representing the Defendants.

page 10. }

DR. O. W. WARD,

a witness, called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kearney:

Q. You are Dr. O. W. Ward?

A. I am.

Q. You are a practicing physician in Phoebus, and have been there twenty-five years, have you not?

A. Yes.

Q. Were you called on to treat and administer to the wounds of Mr. Murphy on the 18th of July last year?

A. Yes, Mr. Murphy was brought into my office and I treated him in my office.

Q. Just what condition did you find him in when he was brought in?

A. He was brought in my office. He was partially unconscious. He had lacerations over each eye, about two or three inches long down to the bone; bleeding profusely. He had a very large contusion on the head; which was right much bruised, with blood under the swelling. He had several other scars about his body, especially one on one of his knees, I forget which one it was. I have that data in my office but forgot to bring it with me. One of his knees was scarred and bruised. He was right lame for some time from that.

Q. Now, you say he had wounds on his face, Doctor?

A. Yes.

page 11 }

Q. Where were they?

A. Right over his eyes.

Q. Would you mind standing up over—(turning to the Plaintiff,—Mr. Murphy, will you stand up over here to show the jury your wounds?) Now, Doctor, will you point out to the jury where are the scars.

A. They run from ear to ear, right here.

Dr. O. W. Ward.

Q. How long—about?

A. Two inches.

Q. How many stitches did it take to close that up?

A. Six or eight stitches on either side.

Q. This is on his left side?

A. That is this one back here and here.

Q. How long is that one?

A. The same length.

Q. About how many stitches did it take to close the one on that side?

A. The same as the other side.

Q. While examining the eyes, did these wounds or cuts affect his eyesight?

A. I would not be able to tell you. I don't think so. At that time the eye was red and swollen, but I don't know following that.

Q. He had those wounds on his face. Do you page 12 } know whether he had any wounds on his arm?

A. Yes.

Q. Will you show to the jury those wounds?

(The Plaintiff stood up and displayed his arms.)

A. Here.

Q. One on each arm around the elbow and below and just above the elbow?

A. Yes, one here and right down on each side.

Q. Doctor, I notice some roughness there on his arm. What is that?

A. I don't know. There was no fracture there.

Q. And the other injury to his knee?

A. Yes.

Q. Did it take any stitches to close the wound, Doctor?

A. No. On his—on one of his knees he had a bruise to the teller ligament, making it stiff for some time.

Q. What?

A. That is the ligament which raises up his knee here. It was bruised and he had several scars on that ligament, and there was a roughness there which continued in there for some time; in fact the roughness was there when I examined him two months ago.

Q. How long did you treat him? Do you remember, Doctor?

A. No, I don't know. Four or five weeks I should say. I

Dr. O. W. Ward.

am sorry I did not bring the data along this time. It was
four or five weeks anyway.

page 13 } Q. You saw him last about two months ago?

A. I examined him some time, I think it was in
February.

Q. Doctor, you say that he was brought into your office—
your office is nearby the scene of this accident, is it not?

A. Yes.

Q. Were you there when he was brought in?

A. Yes, I was there.

Q. Doctor, do you remember what your bill was for your
services?

A. I do not recall exactly.

Q. Your bill that is filed with the papers is \$35.00. Is that
right? \$35.00 up to this last examination?

A. I think that is what it was.

Q. Doctor, has Mr. Murphy recovered from those injuries?

A. There is some roughness in the knee yet, that is about
the only thing,—stiffness, and the scars on his face.

Q. Of course, those are permanent?

A. Yes.

CROSS EXAMINATION.

By Mr. James:

Q. Doctor, I believe your total bill for attending Mr. Murphy
was \$38.00. Is that correct?

A. Yes.

Q. And that as to the exact dates on which you attended
Mr. Murphy your notes would show, if you had them, were
from July 18th to August 20th?

page 14 } A. I had them here last time. I forget just ex-
actly the dates.

Q. He was discharged August 20th. Did you discharge
him as being well at that time?

A. I discharged him to go to work at that time.

Q. I believe you examined him in January or February of
this year?

A. Yes.

Q. But you treated him from July 18th to August 20th?

A. Yes.

Q. And you discharged him on August 20th as well?

A. Of course there was some blood in the knee at that
time.

Mr. M. J. Murphy.

Q. Of course, you examined him in January or February of this year?

A. Yes.

Q. You found him all right at that time, did you not?

A. Except for some roughness in one knee, I forget which knee.

Witness stood aside.

MR. M. J. MURPHY,
called in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kearney:

Q. What is your name?

A. M. J. Murphy.

Q. You live in Phoebus?

A. Yes.

page 15 } Q. How old are you?

A. I will be 63 years old in August.

Q. Mr. Murphy, you were injured in an automobile accident on the 18th of July of last year, I believe.

A. Yes.

Q. What time of day was it?

A. I would say between 12:30 and 1:00.

Q. What kind of a day was it?

A. A day like today.

Q. A bright sunshiny day?

A. Yes.

Q. Between 12:30 and 1:00 in the daytime?

A. Yes.

Q. Whereabouts in Phoebus did the accident occur?

A. Fuller's Corner, at County and Mallory Street.

Q. Tell the jury, if you will, just how the accident occurred.

A. Well, I was in Fuller's. I had just got off about twenty minutes after twelve, and I saw Gordon Brown come by.

Q. Were you talking to anyone in Fuller's?

A. Yes, a fellow by the name of Foley was with me.

Q. Who is Foley?

A. At that time—he is a veteran—in other words, he is getting treatment at the Home.

Mr. M. J. Murphy.

Q. Where was he living at that time?

A. He was living in Phoebus.

page 16 } Q. Where is he now?

A. He is in St. Petersburg, Florida now.

Q. Is he in a hospital?

A. Yes, he is in the Bay Pines Hospital.

Q. That is a Government Hospital in St. Petersburg, Florida?

A. Yes.

Q. You were in Fuller's, talking to Mr. Foley. Now take up from that point how this accident occurred,—tell what happened.

A. I was in there and Mr. Foley asked me to have a drink. I took a drink, and I saw Mr. Gordon Brown go by. I said to Mr. Foley: "There is a friend of mine. I want to see him." So I came out. There happened to be a car just about where you go around the curve in Mallory Street—

Q. When you say "car", do you mean a street car or an automobile?

A. A street car.

Q. Where?

A. On Mallory Street just about to go around the curve.

Q. How close was that street car to County Street?

A. Almost to County Street, waiting for the light to change.

Q. There was a street car right in front of Fullers on Mallory Street waiting for the light to change, going towards Hampton after the light changed?

A. Yes.

Q. Was any other street car there?

page 17 } A. Yes, there was one on the switch.

Q. You saw Mr. Gordon Brown come across the street?

A. Yes.

Q. What did you do?

A. He got on this special car there—they were either the Boy Scouts or the Newsboys that had been to Buckroe I don't know which, and the conductor would not let Gordon get on the car, so I said to Foley: "I will have some fun with him. I will give him the laugh." I started to walk up the sidewalk close to the curb, and about that time this truck came along and knocked me down on the sidewalk.

Q. What direction were you facing when you were hit?

A. I was facing towards Buckroe.

Q. Now you walked out from Fullers on the sidewalk, and when you walked out, did you walk towards Buckroe?

Mr. M. J. Murphy.

A. Yes, I walked out towards Buckroe 20 or 25 feet after I came out of Fullers.

Q. Were you walking down there parallel with the curb line or at an angle towards the curb?

A. I was pretty close to the curb when going down there.

Q. Did you at any time step out into the street? At any time did any part of your body ever project over the curb there?

A. No, unless it was my shoulder or arm.

Q. Did they at any time project?

page 18 { A. I don't think so.

Q. What was the closest your foot got to it?

A. Three or four inches from the edge of the curb.

Q. Where would that throw your shoulders?

A. About even with the curb.

Q. Did you at any time get even with the curb line?

A. No.

Q. What happened, Mr. Murphy when you walked out there?

A. I don't know. I got hit. I don't know what happened after that.

Q. Did you see the truck when it hit you?

A. No.

Q. When you were hit, what occurred then?

A. It knocked me in on the sidewalk. The blood was streaming down my face. I looked down. Foley was with me. I was brushing the blood out of my eyes. I was bleeding pretty fast. I saw a red truck. I did not know whose it was. Foley said it was a Swift and Company truck. It was going on by. Foley was standing one and a half feet from me on the sidewalk.

Q. In front or back of you?

A. Almost at my side. He was probably one yard behind me, pretty close to me.

Q. You were hit and knocked down?

A. Yes.

Q. When you were hit, were you on the sidewalk or street?

A. On the sidewalk.

page 19 { Q. Now, when you were hit, were you knocked straight ahead or knocked inward on the sidewalk?

A. Kinda diagonally.

Q. Towards the building like, or towards the curb line?

A. Towards the building, yes.

Q. When you say you were knocked in, you mean in that direction, is that what you mean?

A. Yes.

Mr. M. J. Murphy.

Q. Where did you fall, with reference to the curb line? How far was it in that you fell?

A. I would say,—about thirty or thirty-six inches.

Q. About three feet?

A. Yes.

Q. Who picked you up, Mr. Murphy?

A. A fellow picked me up. I found out later who it was,—a fellow by the name of Carter, a veteran from the Home, but he has left there.

Q. Did you make an effort to locate Carter?

A. Yes.

Q. Were you able to locate him?

A. No.

Q. What did Carter, this man that picked you up, what did he do?

A. He picked me up. I went into Fuller's. I went behind the counter to get some water. Mr. Fuller said: page 20 } "Don't put that water on you."—

Q. Don't tell any conversation. They took you into Fuller's?

A. I think he took me in there.

Q. Who was that?

A. This Carter.

Q. What happened when you got in there?

A. Phil got hold of Nelson, his boy, and said: "You rush this fellow to Dr. Ward's."

Q. They took you to Dr. Ward's?

A. Yes.

Q. What was your condition at that time, Mr. Murphy?

A. Well, I don't know. I got hit. I was in pretty bad shape.

Q. Where were you injured, and how?

A. I was injured in the head, and my left knee and this arm, and around my muscles and this elbow, and I had a crack in my rib here. I don't know just what—

Q. You were taken down to Dr. Ward's. Do you know how long he treated you?

A. I would say he had me in there a half hour stitching me up.

Q. All right, that was on that day. How long were you under his care, do you know?

A. Well, I was under his care I would say about five or six weeks.

Q. Were you able to go back to work then?

Mr. M. J. Murphy.

A. No. After he got through, with me I still
page 21 } had that bandana on my head from those stitches.

Q. After he got through treating you, in about
five or six weeks, were you able to go in and work?

A. I was on my feet but not able to go to work.

Q. How long before you were able to go to work?

A. I never got ready to go to work until around the 15th
or the 10th of September.

Q. You were away from work for eight weeks?

A. Eight or nine weeks.

Q. At the time you were injured, who were you working
for?

A. Mr. Fuller.

Q. What was your salary with Mr. Fuller?

A. Well, of course, I had a room at the hotel and I could
have what I wanted. I had \$15.00 a week clear.

Q. He gave you \$15.00 a week and your room?

A. Yes.

Q. Did you get your meals there too?

A. Yes, I had them there.

Q. What do you figure your total salary was?

A. I figure my total salary was around \$100 a month.

Q. You were not able to go to work then for about eight
weeks?

A. I was unable to go to work for longer than that. Mr.
Fuller did not want to put me to work behind the bar on ac-
count of the scars showing.

Q. How long were you out from work, about eight weeks?

A. Yes.

page 22 } Q. You incurred a doctor's bill from Dr. Ward
of \$38.00.

A. I don't really know what the bill is.

Q. Did you incur any other expenses?

A. Yes, I had drugs and stuff like that. I don't know how
much.

Q. How about your clothes?

A. I lost a suit of clothes.

Q. How did you lose a suit of clothes?

A. It got all torn up after I was hit.

Q. Did you ever see a young man—did you ever see the
young man who was driving Swift and Company's truck?

A. Not until I came here to the trial.

Q. You never saw him?

A. I never saw him before.

Mr. M. J. Murphy.

Q. Did the truck that hit you stop there after you were hit and knocked down?

A. No.

Q. What became of the truck?

A. The truck went on towards Buckroe.

Q. Do you know where the truck went—you don't know whether the truck stopped, of your own knowledge?

A. No more than what they told me.

Q. The truck that struck you kept on going?

A. Yes.

Q. Did you notice the speed of the truck when it pulled away from where you were knocked down?

page 23. } A. Before it hit me, I could not give the speed,
but after it hit me it looked like it was going thirty miles an hour.

Q. In which direction?

A. Towards Buckroe.

Q. And you saw that?

A. Yes.

Q. Did anybody holloa to the driver there at that time?

A. I don't know.

Q. How did you get those cuts on your head? Do you know?

A. Well, the only way I can figure the thing out, my glasses—

By Mr. James: We object, Your Honor. If he knows he can tell, but he cannot "figure it out".

Q. Were you wearing glasses at that time?

A. Yes.

Q. What became of them?

A. They are gone.

Q. What do you mean by that,—"They are gone."?

A. They were broken up.

Q. Smashed up in the accident?

A. Yes.

Q. How much did the glasses cost you?

A. \$22.00.

CROSS EXAMINATION.

By Mr. James:

Q. I don't believe you saw the truck until you were struck? Is that correct?

Mr. M. J. Murphy.

A. I never saw the truck until after I was struck by it.

Q. When you came out of this door and started
page 24 } walking towards Buckroe, you wanted to attract
the attention of Gordon Brown, did you not?

A. Yes.

Q. Where was he?

A. Gordon Brown when I first saw him was trying to get on the special car for Boy Scouts or newsboys coming from Buckroe, and the conductor put him off.

Q. How many cars were out there?

A. One was getting ready to go around the curve and one was on the switch.

Q. The one that was getting ready to go around the curve then was up close to the corner. Is that right?

A. Yes.

Q. On which side did Gordon Brown try to get on that car?

A. On the other side of the street.

Q. On the side towards Hampton?

A. Yes.

Q. Did he try to get on the front or rear?

A. On the front.

Q. How close was that car standing to the corner?

A. I would say five yards.

Q. About five yards?

A. Yes.

Q. That would be about fifteen feet then, there are three feet to a yard.

page 25 } A. No, he would not have been that far.

Q. How far?

A. He would not be over, at the most, six feet from that line, right on the corner.

Q. He would be six feet from the corner?

A. Yes.

Q. Because the light sways out over the middle, does it not, six feet from the curb line, Mr. Murphy, and he was going to get on the front of that car?

A. I thought he was.

Q. And you were running out—

A. No, sir, I was walking—not running.

Q. You were going out to “holloa” to stop him?

A. I did not “holler” to him until he got off the car, and the conductor, or motorman, I don’t know which it was, put him off.

Mr. M. J. Murphy.

Q. If he was six feet from the curb, why did you go 25 feet up the street in order to speak to him?

A. Because he was going to catch the other car going to Hampton, and I was trying to attract his attention.

Q. How did you know he was going to catch the other car?

A. I surmised he was going to catch the other car.

Q. At that time he was trying to get on the car?

A. When I caught his attention he was already off—the motorman or conductor would not let him on.

Q. He was about six feet from the corner and you were about twenty-five feet from it?

page 26 } A. Yes, about twenty-five feet.

Q. You never did see him run back to the second car, did you?

A. I saw him go back on the sidewalk, going towards the other car.

Q. If he had been going back to the other car, you could not have seen him because the street car would have been between you and Mr. Brown.

A. I don't know. He went on the sidewalk to the car.

Q. I believe you stated you were knocked unconscious.

A. Yes, for a time.

Q. How long?

A. I don't know.

Q. I believe Dr. Ward said when you came to his office you were semi-conscious.

A. I was unconscious for ten minutes.

Q. Then if you were unconscious for ten minutes after the accident, how did you look up and see the truck, and see it going thirty miles an hour?

A. I had my senses all the time. I did not say I was unconscious.

By Mr. Sinnott: What do you mean by unconscious?

A. When I was struggling to my feet and getting up I was not unconscious. I did not know what I was doing but I was on my feet.

Q. What did you mean when you said you were unconscious ten minutes?

page 27 } A. I did not know what happened for ten minutes. For ten minutes I was out.

Q. Did you look at the truck as it went down the street?

A. I was on my knees looking at the truck before I got on my feet.

Mr. M. J. Murphy.

Q. Still you state you were not unconscious and yet you did not know what happened?

A. No, I was not unconscious at no time.

Q. Now, you say you were not unconscious at any time?

A. I may have been unconscious when I was at the Doctor's office. I don't know what happened in the Doctor's office but I was not unconscious at the time of the accident.

Q. You said—

A. I said when I was in the Doctor's office I did not know what happened. I said it took ten or twenty minutes to get the Doctor to fix me up.

Q. When did you get unconscious?

A. When I got on the table, as soon as I laid down.

Q. As soon as you layed down?

A. Yes.

Q. Which is correct, a few minutes ago you said right after the accident you were unconscious for ten minutes; now you say you did not get unconscious until you got to the Doctor's office.

A. I don't know whether you would say I was unconscious or semi-conscious.

page 28 } Q. What do you mean?

A. For the reason I did not feel it when he put the stitches in my eyes.

Q. But you said that immediately after the accident you were unconscious for ten minutes?

A. That was not immediately after the accident. They took me right in Fuller's and then to Dr. Wards. I could walk on crutches for three minutes.

Q. Will you just simply explain to the jury what you mean when you say you were unconscious for ten minutes immediately after the accident?

Mr. Kearney: I think he has explained it just as clear as any witness in the world could explain it.

Mr. Sinnott: Your Honor, we fail to see how he has explained it. He testified that immediately after the accident he was unconscious for ten minutes and Mr. James has simply asked him—

The Court. He can give any further explanation he can as to whether he was conscious or unconscious or semi-conscious. I think I prefer to have him do so, myself.

A. The only time I could figure I was unconscious was when

Mr. M. J. Murphy.

he had me on the slab when he was sewing me up. I don't remember him sewing me up.

Q. The thing I want explained is this. You testified that immediately after the accident you were unconscious page 29 } scious for ten minutes.

A. No, I testified that when I got up I went into Fuller's and walked behind the bar and—

Q. Do you mean to say you have not testified that immediately after the accident you were unconscious for ten minutes?

By Mr. Kearney: Wait a minute, Mr. James. I think this witness has given a very fair statement. An effort is being made to confuse the witness's statement. He testified in detail. He testified in detail that when he was knocked on to the sidewalk he got up, saw the truck moving off and he was assisted up by a man named Carter, and assisted into Fuller's, and when he left Fuller's he went over to Dr. Ward's; and when they asked him whether he was unconscious, he said he was unconscious for ten minutes; and there is no inconsistency in his statement, and an effort is being made on the part of counsel to confuse him.

By Mr. James: He may have testified to that on direct examination but on cross examination he testified that he was unconscious for ten minutes immediately after the accident. If there is any question as to that I will be glad to have the stenographer read the record. Now he testified he did not say that.

By Mr. Kearney: He testified he was unconscious after the accident. He meant in the Doctor's office.

page 30 } The Court: The witness has made several statements in reference to his condition. If you gentlemen are able to clear it up I will let you do so. What is in the record is in the record and you cannot rub it out. If you gentlemen think you can get this matter any clearer I will permit you to do it.

By Mr. Kearney: We object to it. It has been read once and he has explained it.

The Court: I told Mr. James he could go ahead and examine the witness.

Q. Who picked you up after the accident?

A. A man by the name of Carter.

Q. Where was Foley during that time, do you know?

Mr. M. J. Murphy.

A. He was probably about one yard behind me, when it happened.

Q. Now, did you not testify that Foley helped wipe the blood out of your eyes on the street?

A. O', no.

Q. No?

A. No.

Q. Did you not testify that when you were getting up off the street Foley helped you wipe the blood out of your eyes?

A. No.

Q. Who helped you wipe the blood out of your eyes?

A. Myself.

Q. Did anyone else help you wipe the blood out of your eyes?

A. No.

page 31 } Q. You don't know where the truck came from, do you?

A. No, I don't.

Q. Is it your contention that this truck hung over the sidewalk, or swung over the sidewalk and struck you?

A. I have not got any contentions about it any more than the truck hit me.

Q. Where were you when it hit you?

A. I was right on the curb.

Q. How close to the edge of the curb were you?

A. Pretty near the edge.

Q. Just how close to the edge?

A. I cannot say. I did not measure it that day. I was walking along.

Q. Do you mean two feet or three feet or how far?

Mr. Sinnott: He said probably three or four inches.

Q. You stated you were three or four inches from the edge of the curb.

A. That is from the flagging; there is a flagging on the sidewalk.

Q. You mean from the edge of the curb?

A. Yes.

Q. As you approached the edge of the curb, did you look to see if anything might strike you if you stepped off the curb?

A. I did not step off the curb.

page 32 } Q. Did you intend to step off?

A. No.

Mr. M. J. Murphy.

Q. How close were you going to the edge of the curb before you stopped?

A. I did not have time to think about that; they picked me off before I had time to think.

Q. How much further were you going before stopping?

A. I would probably not have gone in the street.

Q. Had you already stopped?

A. I probably had. I would not say I was standing still or moving. I may have been moving but I may not have been going any further.

Q. You don't know whether you were standing still or walking?

A. I could have been walking. I imagine I was walking. I was trying to get to see the other car that was standing on the switch to get Brown's eye.

Q. A moment ago you said you were standing still; now you say you imagine you were walking. Were you walking?

A. I was walking or standing still. I was standing still when I got hit. I could have been walking or standing.

Q. You could have been doing either, but which did you do?

A. I would say I was probably taking a step or two.

Q. Well, you were three or four inches from the sidewalk's edge, you said. Were you taking that step or two to get off the sidewalk?

A. No.

page 33 } Q. Where were you going after you got to the edge of the sidewalk,—you say you were within three or four inches of the curb, where were you going?

A. Right straight along.

Q. Towards where?

A. Towards Buckroe.

Q. Were you not going towards the curb?

A. No, I was only close to the curb.

Q. Do I understand you to say at the time you were walking straight towards Buckroe?

A. Yes.

Q. Then what part of your body was struck by the truck first?

A. My arm and shoulder.

Q. Which arm and shoulder?

A. My left.

Q. Now, you were walking very close to the curb?

A. Yes.

Mr. M. J. Murphy.

Q. Did you take any particular caution there due to the fact you were close to the curb? Any special caution?

A. I was on the sidewalk and I didn't think I had to take any special caution.

Q. In other words, you thought you could walk right up to the curb line and not worry about what happened?

A. I think you can go to the curb line, and if you are on the sidewalk you still have pedestrian's rights.

page 34 } Q. You say that you saw that it was a truck that hit you after it passed?

A. Yes.

Q. What color?

A. A red truck. I say red, it may have been maroon, or something like that.

Q. Then it was some shade of red?

A. Foley saw the truck.

Q. You saw it also?

A. I got a glimpse of it, yes.

Q. How much of a "glimpse"?

A. The back end.

Q. Was the truck on the sidewalk or street when you saw it?

A. It was on the street.

Q. Did the wheels of the truck ever run up on the sidewalk, so far as you know?

A. I don't think so.

Q. As it went away, you saw the rear end of the truck. How far away was it when you saw it?

A. I will say just before it got to the street car that was on the switch, I would say 160 feet—around in there.

Mr. Sinnott: How far was the other car?

Witness: He had already swung out into the other track.

Mr. Kearney: We object to two attorneys questioning the witness.

The Court: Yes, one at a time, gentlemen.

page 35 } Q. Now, when you first saw the truck then it was 100 feet away from you?

A. I will say over 100 feet.

Q. In what part of the street was it traveling?

A. He had set himself right and gotten on the car track; there were some cars parked along Mallory Street and he had to go out there.

Q. How do you know he had righted himself?

Mr. M. J. Murphy.

A. He could not run along the curb.

Q. You had not seen the truck until it got 100 feet away from you?

A. Yes.

Q. Where was it when you first saw it? The first time you saw it?

A. 150 feet away from. I beg pardon, I meant to say 100 feet.

Q. How far from the curb was he at that time?

A. I could not tell you that, the blood got in my eyes at that time, I could not give you the exact distance how far he was from the curb at that time.

Q. You could tell us whether he was 50 feet away from the curb. Could you tell us whether he was in the middle of the street, or how far from the curb he was?

A. No, he was. Let me see; them tracks now. I will say he was about 20 feet from the curb, near the railroad tracks when I seen him, as near as I could judge.

Q. So far as you know, now, that is of your own page 36 } knowledge, not what anyone else may have told you, you don't know of your own knowledge that this truck which you saw 100 feet up the road is what struck you, do you?

A. No, but Foley told me—

Q. From your own knowledge?

A. No, I don't know.

Q. And you had your back towards the truck at the time that you were struck by something?

A. Yes.

Q. You have seen that truck since that time, have you not?

A. If I have I don't know it; I have seen some Swift & Co. trucks passing by but I would not swear that that was the truck.

Q. Do you know how much the fenders of that truck overhang the wheels?

A. No, sir, I do not.

Q. Have you any idea?

A. No, sir, I have not.

Q. Now, Dr. Ward testified that he discharged you on August 20th as being well. What did you do until the time you went back to work?

A. I did not do anything.

Q. Were you able to work?

A. No, sir, not with the scars on my face, the man would not let me go behind the car.

Mr. M. J. Murphy.

Q. Other than the scars themselves, you were
page 37 { well?

A. No, my leg would not let me go to work at that time.

Q. You did not go back to the Doctor's any more at that time, did you?

A. O', yes, I did.

Q. When?

A. I think I went back to him two times after that, if I am not mistaken.

Q. Did you go to Dr. Ward, or some other Doctor?

A. No, I went to Dr. Ward; never went to anybody but Dr. Ward.

Q. You heard him testify he discharged you on August 20th and had seen you only once since that time?

By Mr. Kearney: He heard his testimony; the jury heard it too. The Jury heard Dr. Ward say the bill he gave him was down to September 20, 1935, was \$35.00; and the bill for the total treatment was \$38.00, so the witness's statement that he went back to Dr. Ward two times was correct.

By Mr. Kearney:

Q. When did you go back?

A. You have got the bill there, it shows it down to September 20th was \$35.00, and his total bill for services \$38.00.

Q. He said he examined Mr. Murphy in January or February.

The Court: Dr. Ward is not on the stand. Mr. Murphy is on the stand. Let him testify.

page 38 { Q. When was the last time you saw the Doctor after August 20th?

A. The last time?

Q. The first and last time.

A. July 18th, and I think I went to him for an examination either the latter part of February,—I think it was the latter part of February.

Q. You went to him for that examination just before this case was to be tried. Is that correct?

A. Two or three weeks before.

Q. That was the last time you saw him?

A. (No answer.)

Q. What other times have you seen him since August 20th?

Mr. M. J. Murphy.

A. Not any more than the two times after the 20th except when I was examined.

Q. Do you know when they were?

A. No, I don't. It could not have been over a week.

RE-DIRECT EXAMINATION.

By Mr. Kearney:

Q. I want to ask you, (will you agree, Mr. James, that the bill of \$35.00 up to August 20th which you showed the Doctor, and which you did not introduce in evidence—

By Mr. James: Yes, we can agree that the bill given by Dr. Ward dated September 7, 1938,—the last item is August 20th, which he stated on the stand was when he discharged him as well, and the bill at that time was \$35.00.)

page 39 } RE-DIRECT EXAMINATION.

By Mr. Kearney:

Q. There is one more question I would like to ask you: How far towards Buckroe had you gotten from the corner when you were struck?

A. I will say about twenty feet from that letter-box at the corner.

Q. There is a mail box on the corner and you were about twenty feet north of the mail box when you were hit?

A. Yes.

Q. Well, there has been a little bit of confusion on the cross examination as to what your condition was. Do you remember after you were hit, were you knocked unconscious when you were knocked on the sidewalk?

A. The only time I could figure I was unconscious was when they had me on the slab in the Doctor's office.

Q. You testified that after you were knocked down you looked up and saw this truck moving off and then with the assistance of Carter, you got up and was carried into Fuller's and from Fuller's you were carried to Dr. Ward's place. Do you remember, or are you guessing, or did somebody tell you?

A. I remember that myself.

Q. And then when you got in the Doctor's office you became unconscious for about ten or twenty minutes.

A. I don't remember him even sewing me up.

Mr. M. J. Murphy.

Q. Now, you started to testify on the stand page 40 } about what Mr. Fuller stated, and I stopped you.

Do you remember him talking to you, or saying something to you when you were brought in?

A. I walked in there myself and walked behind the bar and he said—

Q. Don't tell what he said, but do you remember the fact that he did say something to you?

A. He did not say it to me; he said it to his son: He said: "Grab that fellow and—

Mr. James: Don't say that. That is not permissible. He told you not to testify to what Fuller said to you.

Witness stood aside.

Mr. Sinnott: May it please the Court, I think it would be of material aid to the jury and give a great deal of light if they would see the truck.

Mr. Kearney: We are going to ask for that at the proper time.

Mr. Sinnott: The only thing is that truck has been traded in; it has the same body, and the people that own it are using it, and losing a day's time from its operation.

Mr. Kearney: I have a barber here who says when he does not work he does not get paid. I don't want to inconvenience him either, but we have a lot of people we are inconveniencing too, many who are losing time from page 41 } their work and are not getting paid.

By Mr. Sinnott: Swift & Company's truck has perishable products in it.

Mr. Kearney: Swift & Company's truck has all kinds of ice contraptions to "keep meats" and other things "Sweet, wholesome and fresh". It is not going to hurt them to stay out there for ten or fifteen minutes longer.

The Court: You can look at it a little later.

Mr. Sinnott: Of course, if these gentlemen feel that way.

page 42 } Note: Due to the fact that Michael J. Foley, an eyewitness, is in a hospital in Florida, it was agreed that the testimony he gave in the trial of March 7, 1939, in this case might be read and considered as though he were present, inasmuch as he had read over the transcript and signed it.

(Read by Mr. Montague.)

“MICHAEL J. FOLEY,
a witness of lawful age, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Frank A. Kearney:

Q. You are Michael J. Foley?

A. Yes.

Q. How old are you?

A. 51.

Q. Where were you residing in July of last year?

A. Buckroe Beach.

Q. Whereabouts?

A. Second and Herbert.

Q. Mr. Foley, did you see an accident which occurred on Fuller's Corner in Phoebus, Virginia, on the early afternoon of July 18th of last year?

A. I did.

Q. Where were you at the time the accident occurred?

A. I was four or five feet back of Mr. Murphy on Fuller's corner.

page 43 } “Q. Where had you been just previous to the occurrence of this accident?

A. I had been inside of Fuller's talking to Mr. Murphy.

Q. Where had you been just before that; what were you doing in Phoebus?

A. I went over there to see Dr. Ward, and got there a little early for his office hours, about twenty minutes to one. I went into Fuller's to kill time until one o'clock. I met Mr. Murphy and him and I stood there talking until we came out.

Q. As you walked out, did he walk out with you?

A. Mr. Murphy and I walked out the door together. He was a little ahead of me.

Q. What happened on the sidewalk?

A. Mr. Murphy and I had gotten through the door,—Mr. Murphy was ahead of me, and both of us were on the walk. There were two trolley cars standing there on the tracks and there was someone Mr. Murphy recognized trying to board one of the cars and Mr. Murphy waived to him, trying to attract his attention. He walked right across to the curb, at the same time towards Buckroe Beach. He was about four feet in front of me. Just as he got to the curb, still on the sidewalk, all of a sudden this truck loomed up. (Where it came from I do not know.) The rear end of the truck hit Murphy;

Michael J. Foley.

it turned him about one-fourth of the way around;
page 44 } he threw his arms out in front of him and he fell
on his face.

Q. Where was Mr. Murphy when he was hit, on the sidewalk or in the street?

A. He was on the sidewalk.

Q. Where was Mr. Murphy after he fell, when he was hit?

A. Where he was, his head would have been about 30 inches—sort of catercornered, with his face towards Buckroe, on the sidewalk.

Q. 30 inches from what?

A. His head would be over this way and his feet would be on the sidewalk this way.

Q. That is, it knocked him ahead towards Buckroe, and a little from where he was?

A. Yes.

Q. Was he at any time out in the street?

A. At no time.

Q. After he was struck, you say he was knocked there on the sidewalk. How did he get up, do you know?

A. I found out afterwards. A veteran ran and picked him up.

Q. What did he do?

A. He went into Fullers. I was sick at the time and I went in Fullers. The veteran brought him into Fullers.

Q. I believe you suffer from heart trouble?

A. Yes, heart trouble, neuritis, arthritis and laryngitis.

Q. And this upset you some?

A. Yes. I was feeling bad anyway and this made
page 45 } a wreck of me. I went in the store and sat down.

This veteran came in with Mr. Murphy—had his arm over his shoulder helping to carry him in.

Q. Did you see this veteran when he picked him up?

A. Yes, I saw him pick him up.

Q. Where was Mr. Murphy lying at that time?

A. On the pavement,—on the sidewalk.

Q. Do you know who this man was to whom Mr. Murphy waived or *hallowed* to?

A. I believe it was Gordon Brown.

Q. Do you know him personally?

A. No, I do not.

Q. Well, now, when Mr. Murphy walked over to Fuller's Hotel I understood that you were in the confectionery part of Fuller's place?

A. Yes, at the soda fountain.

Michael J. Foley.

Q. You walked out together and he was ahead of you. Now, right at the corner of County and Mallory Streets, I believe there is a mail box. Do you know where it is?

A. Yes, right at the corner.

Q. Where was Mr. Murphy when he was struck? How far down from that?

A. I would say 15 feet from the mail box.

Q. You say Mr. Murphy was walking diagonally toward the edge of the sidewalk and toward Buckroe?

A. Yes.

page 46 } Q. Where was the truck as Mr. Murphy walked out? In front of him, or behind him?

A. From behind. The truck was coming down the street toward Buckroe, but where it came from I don't know.

Q. Did the truck turn the corner or come right out of Mallory Street, or County?

A. I think it came out of Mallory. I don't know.

Q. In which direction were you looking?

A. I was looking at Murphy.

Q. You were looking in the same direction he was?

A. Yes.

Q. How far away were you?

A. I would say 4 or 5 feet. I don't know.

Q. What became of the truck?

A. It went down the road.

Q. Did anybody halloo at it?

A. I turned around when Mr. Murphy hit the pavement, and I saw a fellow help him up, and I walked into the store.

Q. Do you know whose truck it was?

A. Swift's truck. I saw the name on the side of it, a red box truck.

Q. Did you get the license number?

A. No.

Q. But you did see it?

A. I saw the name "Swift & Company" on the side of the truck.

Q. What kind of a truck was it?

page 47 } A. A big box truck, twin like tires.

Q. What kind did you say?

A. A big box truck, closed in body, built out over the fender.

Q. What color was it?

A. Kind of a red. I would call it red.

Q. Now, you say you could not tell the jury whether the

Michael J. Foley.

truck came around County Street, making the curve, or down Mallory?

A. I could not say.

Q. Could you tell whether the truck was going fast or slow?

A. It was hitting a pretty good clip. I would say 25 to 30.

Q. There is a traffic light at that corner, I believe?

A. Yes.

Q. Did you notice whether it was in operation at that time?

A. It was working.

Q. Do you know whether it was on red or green at that time?

A. The traffic was stopped; it was red, as you come out of Fuller's store, you are facing the light.

Q. That is in about the center of the two streets, is it not?

A. Yes.

Q. But at the time Mr. Murphy was hit, your back was to the light, I believe?

page 48 } A. Yes.

Q. You don't know what the light was at that time?

A. No.

CROSS EXAMINATION.

By Mr. James:

Q. Do you live in Buckroe Beach?

A. No.

Q. Where do you live now?

A. I am stopping temporarily at Fuller's Hotel.

Q. The accident happened right in front of Fuller's Hotel, I believe?

A. Yes.

Q. Now, you don't know whether the truck came around the corner or straight through the intersection, do you?

A. No.

Q. Then what do you mean by saying you saw a red light?

A. On Mallory Avenue for traffic going down to Buckroe.

Q. It was red on Mallory Avenue?

A. Yes.

Q. Then if the truck had gone around the corner, it would have been green, wouldn't it?

A. I don't know.

Q. Well, the light is red on Mallory if it is green on County, isn't it?

A. Yes.

Michael J. Foley.

Q. In other words, when it is red on one it is green on the other?

page 49 } A. Yes.

Q. You saw all at once the truck loom up—you did not see it until Mr. Murphy was struck. Is that it?

A. Yes.

Q. The first time you saw the truck was when you saw him fall?

A. I saw the truck flash out behind from somewhere, and some part of the end of the truck hit Murphy.

Q. Which part?

A. Some of the right rear.

Q. Do you drive an automobile?

A. I have driven automobiles.

Q. You did not see it until it hit him?

A. No.

Q. Then how do you *now* how fast the truck was going?

A. I drove a car myself for ten or fifteen years.

Q. You did not see it coming?

A. My back was to the car. I was not looking in that direction.

Q. You did not have any trouble in seeing the truck?

A. I could tell the speed the truck was going after it passed.

Q. After the accident?

A. As the truck was passing?

Q. What part of the rear end of the truck hit him?

A. I don't know whether it was the right rear
page 50 } fender, or a part of the bumper.

Q. What kind of a fender was on the truck?

A. The body is built out over it, only a little part of it extends out.

Q. A curved fender or wheel just like an automobile, it is that down below the body?

A. The body is built right out over it.

Q. How much of the fender?

A. Do you mean, how far does the fender extend over the side?

Q. Yes.

A. Two inches, or two and a half inches, I believe.

Q. Beyond the body?

A. Yes.

Q. What color is the fender, if the truck is red?

A. The fender is black, I believe.

Michael J. Foley.

Q. You don't know what part of the truck hit him, just some part of the end?

A. Yes, the rear end.

Q. Does the fender back there where the wheel is, stick out further than the other portion of the body?

A. Yes.

Q. Back of the rear wheels it has a fender which sticks out wider than the other portions of the body. Is that right?

A. I would say so.

page 51 } Q. And that is painted black?

A. Yes.

Q. How far back from the edge of the curb was Mr. Murphy standing at the time he was struck?

A. He was standing close to the curb. I could not say how far.

Q. How far would you say?

A. I could not say. Three or four inches, I suppose.

Q. Three or four inches from the curb?

A. Yes.

Q. Was anyone else standing on the corner?

A. Yes.

Q. Do you think he was struck by the truck right back at the fender, at the wheels, further back or further forward?

A. He was struck with the right rear end of the truck.

Q. What do you mean by the right rear end? (Illustrating with a pad of paper.) Suppose this is the body,—the box body of the truck, the wheels along here. What part of the truck struck him?

A. Right here.

Q. This corner right back here, the right rear corner?

A. Yes, it could have been the fender or it could have been the bumper.

Q. Has the truck got a fender at the corner?

A. Over the rear wheel.

page 52 } Q. Does the fender stop at the rear wheel or go all the way back to the corner of it?

A. It extends a little beyond.

Q. Which sticks out further, the fender or the body?

A. I cannot say.

Q. How long have you known Mr. Murphy?

A. I have been knowing Mr. Murphy for about three months previous to the accident.

Q. Where was the front end of the truck when he was struck by the rear end.

A. Along the curb.

Michael J. Foley.

Q. Was the front end pulling into the curb or away from the curb?

A. It looked like it swung into the curb and then swung right out again.

Q. You mean it swung around the corner and into the curb?

A. I don't know, because I don't know where the truck came from.

Q. In other words, you did not see it until just as it hit him?

A. No.

Q. Do you know how high the curb is?

A. The curb is six inches high, possibly.

Q. Did the wheels of the truck run up on the curb?

A. No.

Q. Now, suppose this is the body of the truck
page 53 } (illustrating) if the front corner of the body here
missed him, then how could this rear corner have
hit him?

A. The rear end of the truck is really wider than the cab of the truck.

Q. I know, but it has a body and that is the same width all the way back.

A. The cab?

Q. Has the truck not a red body about twelve feet long?

A. Something like that.

Q. All right. It has a red body about twelve feet long. If the front corner of the body missed him, how could this rear portion of the truck hit him?

A. The only way I can account for it is he was swinging out again and the body swayed over.

Q. If it was swinging out, the body would not come over—

A. The fender extended over the curb.

Q. How far did it extend over the curb?

A. I did not measure it. When a body swings out, I don't know how far it would go over.

Q. When it struck him?

A. With the weight of that body, I don't know how far it would go over.

Q. When it struck him, how far did that body extend over the curb?

A. I could not say.

Q. Mr. Foley, here is a rough diagram. This is
page 54 } Fuller's. This is Fuller's Hotel, and I believe you
come out the door right at the corner, something

Michael J. Foley.

like that, the truck was going this way—towards Phoebus—

A. No, towards Buckroe.

Q. That is Mallory Street, I believe I called it "County Street" awhile ago. Now, where was Mr. Murphy standing at the time he was struck? How far from that corner?

A. This is Fuller's Hotel right here. Here is the barber shop.

Q. Put a little line right here. This is not drawn according to scale, of course.

A. Mr. Murphy was standing right here.

Q. Put an X-mark there. (Witness complied.)

Q. About how far from the corner.

A. From this curb or from the door?

Q. From either one.

A. From that door to where Mr. Murphy was standing, 30 feet.

Q. Do you know about how far that would be from the corner?

A. This is the corner of the building here.

Q. I mean from the curb line?

A. I do not know.

Q. I understood that he walked this way and you were walking behind him?

A. Yes.

Q. Why was he going that way?

A. He was trying to attract someone's attention,—a man who was trying to make this car here; one car was standing here; there is a car switch here. There was a special car, so when Mr. Murphy saw his mistake, he was trying to attract his attention; this is the way Mr. Murphy was walking,—this way,—and waiving to his friend. (Illustrating.)

Q. As he went by, the main part of the truck missed him and he was struck by this rear corner as the truck went by?

A. Yes.

Q. I believe you said you were living in Buckroe Beach then?

A. Yes.

Q. When did you leave there?

A. September 1st.

Q. This accident happened when?

A. July 18th.

Q. Where did you move from Buckroe?

A. Washington, Walter Reed Hospital.

Q. How long were you there?

Thomas Allen.

A. Until the last day of November when I went to Miami Beach, Florida.

Q. When did you come back here?

A. Yesterday.

Witness stood aside."

page 56 } THOMAS ALLEN,
 a witness of lawful age, being first duly sworn,
testified as follows:

DIRECT EXAMINATION.

By Mr. Kearney:

Q. Will you state your name, age and residence?

A. Thomas Allen, 57 years old, Fuller's Hotel.

Q. Mr. Allen, do you know Mr. M. J. Murphy?

A. Yes.

Q. How long have you known him?

A. 30 or 35 years, sir.

Q. Mr. Allen, did you see an automobile accident that occurred in front of Fuller's Hotel on the 18th of last July?

A. Yes.

Q. Where were you when the accident occurred?

A. I was right about at Carney's Drug Store, about one-fourth of a block away.

Q. You were on Mallory Street?

A. Yes.

Q. On the south side?

A. On the right-hand side going towards Buckroe.

Q. And you think you were about in front of Worman's Store and Woodward's Drug Store, then?

A. Yes.

Q. You say you were about—between Worman's
page 57 } and the drug store?

A. Yes.

Q. And you were coming towards Buckroe?

A. Yes.

Q. What time of day was it?

A. Around twelve o'clock.

Q. Was it a cloudy day, or a bright, sunshiny day like today?

A. It was bright, sir.

Q. Now, Mr. Allen, were you wearing glasses at that time?

A. Yes.

Thomas Allen.

Q. I understand you have had an eye injury within the last two or three months.

A. A cold in my eyes, sir. (Witness is wearing dark glasses.)

Q. So you were walking down there in the direction of Buckroe at the time and it was a bright, sunshiny day?

A. Yes.

Q. Did you see many people standing on Fuller's Corner?

A. Yes, several people were there that day.

Q. What did you see?

A. I was going up towards Fuller's Hotel and I saw a man hit. At that time I did not know who the man was, and it looked to me as if the rear end of the truck hit him, or he was thrown out of the back of it.

Q. What?

A. It looked as if he was thrown from the back of the truck. I walked up quite fast and about the time I got there Mr. Murphy came out of Fuller's Hotel about that
page 58 } time. I saw it was Murphy. I ran to Dr. Ward's, figuring the Doctor might not be in his office and—

Q. You summoned the Doctor?

A. Yes.

Q. Did they bring Mr. Murphy down to the Doctor's office?

A. Yes.

Q. Did you see the truck as it actually hit him, or see the man as he was knocked down?

A. I seen him just as he was knocked down.

Q. Did you see him when he was lying on the walk?

A. Yes, he was back on the sidewalk.

Q. How far back?

A. Right around thirty inches, sir.

Q. Was that where he was lying?

A. Yes.

Q. Was he at any time that you saw him over the curb line—over in the street?

A. No, sir, not—

Q. Where did the truck come from, do you know, straight down Mallory Street?

A. I think it came straight down Mallory Street.

Q. Did you notice the truck moving off?

A. I did not notice it until the truck hit him.

Q. After it hit him, what happened to it?

A. It went on towards Buckroe.

Thomas Allen.

- Q. Fast or slow?
- page 59 } A. Moving along pretty fast.
- Q. Had you noticed the truck before you saw this man thrown over there?
- A. No, sir. I just saw this impact and the man came back on to it.
- Q. That was what you noticed, the truck?
- A. Yes, I noticed the red truck. I went to the barber shop, after going to the doctor's, and asked Craig to go and get Joe.
- Q. Did the truck stop?
- A. No.
- Q. The truck continued on?
- A. Yes.
- Q. Who reported this to the police?
- A. I got "Shorty" Craig. I went around to get Joe and they all went to the other accident that happened.
- Q. Did you go down to the Doctor's office with Mr. Murphy?
- A. I was there ahead of him. I 'phoned Dr. Ward.
- Q. Was Mr. Murphy cut about the head?
- A. There were two bad gashes up there, and the blood was running pretty bad.
- Q. When you got up there, he had been picked up and carried into Fuller's and they were bringing him out?
- A. Yes.
- Q. Did you notice any blood there?
- page 60 } A. Yes, blood was on the sidewalk, going into Fuller's and all the way down to the doctor's.
- Q. What was the closest to the curb line you saw any blood?
- A. I would say around 25 to 30 inches back from the curb.
- Q. Did you see any blood in the street?
- A. No, I did not.
- Q. Was there a trail of blood there?
- A. Yes, spots like a man would bleed.
- Q. Where did they lead from?
- A. They lead from right—I imagine 20 or 25 feet back from where the mail box is, down towards Buckroe.
- Q. That is where the bloow was, 25 to—20 or 25 feet towards Buckroe?
- A. Yes.
- Q. And about how far back from the curb?
- A. About thirty inches.
- Q. Where did the blood go to?

Thomas Allen.

A. Quite a bit of it was there and then it went into Mr. Fuller's, and as he came on into the Doctor's office,—afterwards when we took him back you could see the trail where he had been bleeding pretty bad.

Q. You could see a trail of blood to the Doctor's office?

A. Yes.

CROSS EXAMINATION.

By Mr. James:

Q. You were almost a block away from where the accident happened, when it occurred?

A. That is correct, sir.

Q. Were many people on the sidewalk?

page 61 } A. I imagine 8, 10 or 12 were standing there,
some standing by the edge of the curb and some
by the building.

Q. Down at Fuller's corner?

A. Yes.

Q. Between you and County Street, how many people were on the sidewalk?

Q. I imagine one or two.

A. You were about three-quarters of a block from County Street, were you not?

A. Yes.

Q. There were only one or two people on the sidewalk?

A. People were walking along.

Q. How many people do you think were standing in front of Fuller's, could you say?

A. Eight or twelve.

Q. Where were they standing?

A. Some were standing on the curb, some standing back by the buildings and some on the sidewalk.

Q. Were any standing by that mail box on the corner?

A. I could not tell you that, just exactly what position they were standing in, but just on the corner.

Q. Were there any standing by the sign post?

A. Some people were just scattered up and down the street, I cannot tell you their exact positions.

Q. Were most of them close to the corner or further away?

A. There were two ladies standing back by the building.

We tried to get them as witnesses but—

page 62 } Q. Were any standing right close to the curb?

A. Close, but not right on the edge of it.

Q. How close to the edge of the curb were they standing?

Thomas Allen.

A. 1½ or 2 feet away from it, maybe.

Q. How could you see past or over these people who were standing on the corner there, and see this man when he was struck?

A. I could see right through the middle of the sidewalk that a man was hit there.

Q. Through them? You were in a direct line with them, but were not all of these people in between you and him?

A. No, some were standing back when the truck hit this man, and he went back on the sidewalk.

Q. You said that a number of people were standing on the corner, some on the curb and some standing back and some all along?

A. Yes, like the public do stand on a corner.

Q. He was 25 feet from the corner back towards Buckroe?

A. 25 feet from the mail boxes.

Q. You could see all these people standing there and see him?

A. I saw a man hit but did not know at the time it was Murphy.

Q. What part of the truck hit him?

A. Some part of the rear of the truck.

Q. I believe the body of the truck was just a
page 63 } square box, something like this, (indicating with a
piece of paper).

A. I don't know.

Q. Is not that true?

A. I don't know. It was a red truck. I could not tell whether it was a Swift truck or somebody else's until the boy came back and told us.

Q. Have you looked at that truck since then?

A. No.

Q. What kind of a body did it have?

A. I don't know; it was a red truck.

Q. Was it a closed-in body or open body?

A. I could not tell you that,—a red truck, I knew that, but I could not say whether a closed-in-body; I don't know whether it was a Swift & Co. truck or whose it was. I did not know whose it was at the time.

Q. You don't remember whether it had a top on it, or whether a part of it was open, or if the back was solid or if it had posts standing up?

A. I don't know. It was a red truck, that is all I could tell you. I did not make an inspection of it, the truck was moving and going towards Buckroe.

Thomas Allen.

Q. Did it have any body above the floor, or a flat floor?

A. I don't know.

Q. So far as you know, it may not have had a body above the floor?

page 64 } A. I cannot tell you its design, or shape or anything like that, sir.

Q. What portion of it struck him?

A. The right rear part of the truck; I cannot tell which part of that; some part must have struck him, he got knocked back a little over the back.

Q. How far towards the rear of the truck?

A. I would say probably four or five or six feet from the rear of the truck—that is, sir, where it appeared to me to hit him.

Q. Then you think the front part missed him?

A. I am quite sure it did.

Q. Now, if you did not notice the truck any more than that, how do you know how fast it was going, if you don't even know what kind of a truck it was?

A. When he was hit, he was almost down to the C. & O. tracks.

Q. Almost to the C. & O. tracks?

A. Yes, when I got there, I was three-fourths of a block away, and that is what I figured.

Q. How far is it from where Mr. Murphy was struck to the C. & O. tracks? How many blocks?

A. A pretty long block in there with intersection of streets.

Q. How many feet is it from where he was struck to the C. & O. tracks down there—from where you were
page 65 } to the point where he was struck?

A. It is a pretty long block in there, from Fuller's corner to the C. & O. track, a long block, there is no intersecting street coming in there; it is longer than other blocks.

Q. Had he gotten twice as far as you had when you reached the scene of the accident?

A. I think so.

Q. Would that be about right?

A. Yes.

Q. In other words, you walked from Woodward's and Worman's down to the scene of the accident?

A. I was not down there.

Q. While you were going that far, he went about twice that distance?

A. He was going well over the tracks down there by then.

Thomas Allen.

Q. How fast were you going when you went down there?

A. I was running or trotting at a pretty good rate.

Q. How fast were you running? Have you any idea?

A. I don't know.

Q. Two miles an hour; four, or five or what?

A. I could walk four miles an hour.

Q. How fast do you think you were going down there?

A. Ten or twelve miles an hour.

Q. You think you were going ten or twelve miles an hour?

A. That is my guess.

page 66 } Q. You think he went about twice that distance?

A. I think he was running down there by the C. & O. track when I got to the corner.

Q. Well, now, where was Mr. Murphy when you got to the scene of the accident?

A. Mr. Murphy was coming out of Fuller's Hotel.

Q. In other words, the accident had happened long enough when you got there for someone to have taken Mr. Murphy into Fuller's Hotel, and they were on their way back out?

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Kearney:

Q. I forget to ask you when you were on the stand,—or when I examined you first, were there any street cars there at the corner?

A. Yes.

Q. Did you see any of them pulling around the corner as you got up there?

A. Yes, there were two cars there.

Q. Where was the first one?

A. One was right there at the light and one was kind of back in the switch.

Q. You saw two cars there?

A. Yes.

Q. When a car makes that turn going from Mallory Street into County Street towards Hampton, does it swing any over towards the curb on Fuller's side of the street?

A. Yes.

page 67 } Q. How far does it swing?

A. Quite a good swing, sir; they have a white line down there to keep automobiles away from the back and pedestrians so the back end of cars won't strike them when they make the turn, sir.

A. Gordon Brown.

Q. Does the car swing any over that line?

A. I think it does, sir. I am quite sure it does.

Q. They have a sign there warning that a car does swing out when it does make the turn?

A. Yes.

Q. What is the condition of the street there? Is it graded from the car track into the curb line?

A. Yes, it is crowned up there, sir, a little higher because they have a sewerage system that takes the water from the whole block down there, I imagine that is what it is for.

RE-CROSS EXAMINATION.

By Mr. James:

Q. There is also a depression right there close to the corner on Mallory Avenue where the water comes under the sidewalk, is there not, and runs off?

A. Yes.

RE-RE-DIRECT EXAMINATION.

By Mr. Kearney:

Q. That probably would be how much, do you think?

A. I don't know.

By Mr. James:

Q. That drop is right at the corner, is it not?
page 68 } A. Right in front of Fuller's, yes.

Witness stood aside.

A. GORDON BROWN,

a witness of lawful age, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Montague:

Q. You are a practicing attorney in this County?

A. Yes.

Q. Did you have occasion to be in Phoebus on the 18th of last July?

A. Yes.

Q. Were you in the vicinity of what is known as "Fuller's

A. Gordon Brown.

Corner'' at the corner of County and Mallory Streets in Phoebus?

A. Yes, I was.

Q. Do you know whether or not you were there about the time that some one, whom you afterwards learned was Mr. Murphy, was injured?

A. I was.

Q. At that time, Mr. Brown, how many street cars were in the vicinity of Fuller's Corner, that you saw?

A. About two or three, I forget which.

Q. Where were you standing there?

A. I was standing over on Ferris' corner, right page 69 } by the telegraph pole.

Q. Did you make any effort to board a street car?

A. Yes.

Q. Where was the car you tried to board?

A. Right on the track by Ferris's corner.

Q. Right where the car swings in towards Hampton?

A. Yes.

Q. Were you about to board that car?

A. No. I was forbidden to board that car.

Q. Why?

A. They had some boys' excursion and the car was loaded—anyway it was a special car which was coming from Buckroe going to Newport News, I think.

Q. What did you do when they refused to admit you to the special car?

A. I stepped back by the telephone pole on the street corner.

Q. What became of the special car?

A. It went around the corner.

Q. In the direction of what?

A. Hampton.

Q. Did you succeed in getting on a street car?

A. I did afterwards.

Q. Where did that street car come from?

A. Right beyond this one, or the second car behind, I don't know which, whether it was another excursion car page 70 } or not—I reckon so.

Q. They came right along together?

A. Yes, they came right along together.

Q. Did you know about a man being hurt across the street?

A. Not until the street car went around the corner.

Q. You knew somebody had been hit?

A. Gordon Brown.

A. I knew somebody had been hit.

Q. You did not know who it was?

A. No.

Q. Then you went over to Fuller's corner?

A. Yes.

Q. Did you make an examination?

A. No,—the other car had come along and I wanted to get it.

Q. You don't remember seeing the truck going through?

A. Yes, I could see the top of a truck going through.

Q. Was it a Swift & Co. truck?

A. There was a Swift & Company truck. I don't know whether it was the same truck or not, but I don't think the truck stopped; it came on over and kept going.

Q. Do you remember what the color of the truck was?

A. A yellow truck, I think, I could not swear as to that.

Q. Are you in a position to say, Mr. Brown, whether or not at the time this person was hit, the street car was or was not moving around the corner?

A. The street car was not—

By Mr. James: He stated he did not know until page 71 { after the car had gone around the corner that anyone had been struck so he is not in a position to say.

By the Court: Unless he knows when he was struck.

A. I did not know it was Murphy.

The Court: Unless he knew at the time that someone was struck.

Mr. James: And the only way he could know that would be to see it.

Q. Did you know it?

A. Yes, the street car was stopped.

Q. The street car was stopped when you tried to board it, of course.

A. Yes. I don't know when the man was struck.

Q. But when you learned that the man was struck, as I understand you, the street car had moved out from in front of you?

A. Yes.

Q. How long was it after the street car turned the corner

A. Gordon Brown.

so your vision was unobstructed, before you learned that somebody had been hurt?

A. I suppose a half minute, probably, not over one minute, anyway.

Q. Were there many people gathered across the street there?

page 72 } A. About fifteen or twenty people, I think.

Q. Were they there when the street car was out of your way?

A. Yes; they came up.

Q. Right while the street car was moving out of your way, or after it got out of your way?

A. I don't know; they were there when I got across the street.

CROSS EXAMINATION.

By Mr. James:

Q. I understand that after this car had pulled away you went across the street to Fuller's corner?

A. Yes

Q. Then what did you do?

A. I walked over to the other street car that was coming up. I asked what was the matter over there. They told me a man had been hurt and taken into Fuller's Hotel. I did not know it was Mr. Murphy. I did not ask who it was, or anything.

Q. Did you go back across the street?

A. Yes, the street car was coming down just at that time.

Q. Did you go back on the sidewalk?

A. No, I don't think so. I went back on the sidewalk on the other side.

Q. When you did get back from trying to board the first car—did you ever go back down Mallory Street to try to get back on to a car?

A. No.

page 73 } Q. You never went any further back than the first car, sir?

A. No.

Witness stood aside.

JAMES S. HASTINGS,

a witness of lawful age, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kearney:

Q. You are Mr. James S. Hastings?

A. Yes.

Q. Where do you live?

A. 2 South Mallory Street, Phoebus, Virginia.

Q. What is your business, Mr. Hastings?

A. Barber.

Q. Where is your shop?

A. 2 North Mallory Street.

Q. Where is that with reference to the confectionery operated by Mr. Fuller?

A. Next door to it; it is in the same building.

Q. Then a part of Mr. Fuller's confectionery store is next to your place of business?

A. Yes.

Q. Do you know of an accident occurring on the 18th day of last July in which Mr. Murphy was injured?

A. Yes, I remember the accident.

page 74 } Q. Did you see the accident?

A. No.

Q. Where were you at the time?

A. I was standing just inside the shop. I judge not over ten feet away from there.

Q. You were inside?

A. Yes. I was inside working with my back toward the street.

Q. With your back toward the street?

A. Yes.

Q. What first attracted your attention there; that there had been an accident there?

A. There was right much commotion outside, and when I turned around I saw people looking toward the street; the only way I knew something had happened outside, an accident.

Q. When you looked, had they gotten Mr. Murphy up or was he still lying there?

A. Mr. Murphy was going by Frank's place. Some gentleman had him by the arm.

Q. Was he going in the direction of Dr. Ward's office?

A. Yes.

John Shaub (Shank).

Q. They had gotten him up from where he was?

A. Yes.

Q. Did you notice blood on the street corner?

A. I did at that time notice some blood there and I asked what had happened. A colored woman standing page 75 } by the side of the walk said a man had been hit there.

Q. You saw the blood?

A. Yes.

Q. There is a mail box there on the corner, is there not?

A. Yes.

Q. How far towards Buckroe from the mail box was the blood?

A. I judge around 20 feet.

Q. How far was it, how close was it to the curb line?

A. Just one step about; a good step from the curb.

Q. Was any blood on the curbing?

A. No, sir, I did not see any there.

Q. Did you look in the street?

A. I looked in the street plenty, because they said a truck hit him.

Q. How far from the curb line was the blood, did you notice?

A. One step from the curb.

Mr. Sinnott: No questions.

Witness stood aside.

JOHN SHAUB (SHANK),

a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Kearney:

Q. State your name, age, and residence.
page 76 } A. John Shaub.

Q. What is your age?

A. 44.

Q. What is your residence?

A. Hampton, Virginia, 218 Hope Street.

Q. Do you know Mr. M. J. Murphy?

A. Yes.

Q. How long have you known him?

A. I would say about three years.

John Shaub (Shank).

Q. Well, now, you were employed there, I believe, in the pool room at Fuller's on the 18th of last July?

A. Yes.

Q. And that pool room is in the same building that is connected with Hastings' Barber Shop; his shop is in the front; there is no partition, and the pool tables are in the back?

A. Yes.

Q. Were you in the same room with him?

A. No; I had gone over to the Soldier's Home to see a friend, and was in Mr. Fuller's about one o'clock.

Q. You had gone over to the Soldier's Home to see a friend?

A. Yes.

Q. What time did you get back?

A. Ten minutes to two. I had to go to the bank and I came out before the bank closed.

Q. Did you learn when you got back that an accident had in which Mr. Murphy was hurt had occurred?

A. Yes.

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

A. Yes.

Q. Did you see any blood on the sidewalk?

A. Yes.

Q. Where was the blood?

A. I seen it 30 inches from the curb on the sidewalk—I would say about 20 feet from the mail box in front of Mr. Hastings' Barber Shop I seen blood.

Q. Did you see any blood out in the street?

A. No.

Q. Did you look out there?

A. There was not any there.

Q. Did you see blood any closer to the curb line than 30 inches?

A. No. It *lead* from the end of the store into Fuller's.

Q. Could you track blood from where he had started out into Fuller's store?

A. Yes.

Q. Could you track it out of the store where he went out?

A. Well, the blood was there. I could not say where he went out.

Q. There was a trail 30 inches back from the curb and about 20 feet North of the mail box leading into Fuller's Hotel?

A. Yes.

Witness stood aside.

page 78 } WILLIS E. DARDEN,
one of the Defendants, being first duly sworn, was
called as an adverse witness by the Plaintiff.

Questions by Mr. Kearney:

Q. What is your name, please?

A. Willis E. Darden.

Q. How old are you, Mr. Darden?

A. 24.

Q. Where do you reside?

A. 4811 Huntington Avenue, Newport News, Va.

Q. By whom were you employed on the 18th of July last year?

A. Swift and Company.

Q. In what capacity were you employed by them?

A. Truck driver.

Q. Were you down in Phoebus around twelve or one o'clock that day with one of Swift and Company's trucks?

A. Yes.

Q. Were you down on business for Swift and Company delivering purchases that had been made from them?

A. Yes.

Mr. Sinnott: Are you trying to prove whether he is an agent of Swift and Company?

Mr. Kearney: Yes, we want to prove whether it is his or their truck.

Mr. Sinnott: We admit he is an agent for Swift
page 79 } and Company and was driving around Phoebus be-
tween twelve and one o'clock on the day of the
accident.

Q. All right. When you got away from Fuller's corner, where was the next stop you made after that, Mr. Darden?

A. At the Quality Grocery.

Q. At Virginia Avenue and North Mallory Street?

A. I think so. I don't know streets down there well.

Q. That is about how far from Fuller's Hotel?

A. Not knowing, I would not like to say.

Q. There is one long block there between Fuller's Hotel and the railroad track, is there not?

A. Yes.

Q. There is another block—first comes Slaughters, Sewell Avenue, then comes Darlington, Cummings, Taylor, Kelly and Virginia. There are about five blocks in there?

Willis E. Darden.

A. I don't know.

Q. You remember coming by Fuller's place, don't you?

A. Yes.

Q. You remember seeing people standing there by Fuller's Corner waiting for a street car, and doing other things?

A. Yes.

Q. How many people did you notice on the corner?

A. I don't know how many, but a bunch of people were standing on the corner.

page 80 } Q. Did you notice a street car there?

A. Yes, I did.

Q. How many?

A. There was one right in front of the hotel.

Q. Was there one back of that?

A. There was one back in the switch.

Q. There were two cars there?

A. Yes.

Q. You came right down Mallory Street. Is that right?

A. Yes.

Q. You had been to Carmel's store and made a delivery there?

A. Yes.

Q. You came down Mallory Avenue, past Howard, past Court Street, past Mellon—did you stop at County Street before going across?

A. I stopped for the light to go on—the red light was on,—I stopped for the light to turn.

Q. When the light came on you were stopped on one side of the street and the street car was stopped on the other side?

A. Yes.

Q. When the light came on, the street car pulled off—the street car to Hampton,—and to go back—

A. The street car was still standing when I went through.

Q. Did not the street car start off just as you
page 81 } started off?

A. No.

Q. Sir?

A. The street car was standing when I went through.

Q. Had it moved up until the time you passed it?

A. No, sir, it had not.

Q. Are you positive of that?

A. Absolutely.

Q. Do you remember testifying last February?

A. Yes.

Willis E. Darden.

Q. Do you remember testifying that when the light changed the street car pulled off to go into Hampton and you pulled off to to into Buckroe?

A. I testified before that it looked like the street car might be getting ready to start as I went through but it was still.

Q. Did you not testify at the last trial of this case that when the street car—when the light changed the street car pulled out, made the turn into Hampton and you came across?

A. The street car was still when I went through.

Q. Did you not testify that *your* car pulled out as you pulled out, at the last trial of this case?

By Mr. Sinnott: We object. You have asked him—

By Mr. Kearney: I am warning him—I am going to contradict him. I am giving him an opportunity to
page 82 } correct that situation.

Mr. Sinnott: I would rather for him to do it than for you to do it.

Mr. Kearney: I am going to do it.

Questions resumed by Mr. Kearney:

Q. Now, Mr. Darden, I give you notice that I am going to later ask to have read to the jury your cross examination at the last trial of this case.

Q. In that examination at the last trial, held in this courtroom on March 7, 1939, did you not testify that the street car moved off when the light changed just as you moved off?

A. No, the street car was standing still as I moved off, and when I got even with the street car, it probably moved off too.

Q. You are positive of that?

A. Yes.

Q. So there was one street car there standing right in front of Fuller's Hotel?

A. Yes.

Q. And another street car behind it. Do you know how many street cars there were there?

Mr. Sinnott: You have asked him that several times.

page 83 } A. Two.

Q. There were not any automobiles parked between the street car and the curb at Fuller's Corner, were there?

Willis E. Darden.

A. No, there were none.

Q. Now, when you came across the street you did not know whether that car was going to move up and make that swing or not, did you?

A. The car was still—not going; it could not have made the swing.

Q. The car had been stopped there for some time waiting for the light, as you were?

A. Yes.

Q. Was the street car there when you came up?

A. Yes.

Q. And you knew when the light changed the street car would move off?

A. Yes.

Q. Did you cut into the curb to give plenty of room for the car to make the swing?

A. No, it has a safety zone there. A white line between the street and safety zone.

Q. Here between the curb and the safety line?

A. Yes.

Q. How close to the curb did you come?

A. About 18 inches to 2 feet.

Q. About 18 inches was as close as you could come to it?

A. Yes.

page 84 } Q. You don't know anything about hitting Mr. Murphy, do you?

A. No. If anybody hit him, I don't know anything about it.

Q. The first knowledge you had of it was when a man came to the Quality Grocery Store and—when you stopped there, five or six blocks away, and told you that you had hit or struck somebody?

A. Yes.

Q. You came back then, after they had notified you?

A. I came back to find out who had been hurt.

Q. You found out that your truck had hit him?

A. No.

Q. What did you find out?

A. I came back and found out that somebody said that a big, red truck had hit a man.

Q. You don't know whether it was yours or not, do you?

A. No.

Q. Do you drive a truck now for Swift and Company?

A. Yes.

Chauncey Franklin. Mrs. Harriet W. Elam.

Q. Do you drive the same body—only with a different chassis, or did they give you a different truck?

A. I drive all three of them—no special truck.

Q. In delivering you have a special truck assigned to you?

A. No.

Q. Do other drivers have special trucks?

page 85 } Q. *Do other drivers have special trucks?*

A. They change around, whichever one they want to send on a route.

Q. This truck the jury went out to see today has not got the same chassis you were driving on July 18th, has it?

A. It has not got the same chassis.

Q. No,—the body is the same but the chassis is changed:

A. Yes.

Witness stood aside.

CHAUNCEY FRANKLIN,

called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Questions by Mr. Montague:

Q. You are Mr. Chauncey Franklin, the Deputy Sheriff of the County of Elizabeth City?

A. I am.

Q. Was a summons issued for Garrett Carter, a veteran mentioned in this case?

A. Yes. He cannot be found. He is out of the "Facility". I made a return on the summons that I could not locate him. He cannot be reached.

Witness stood aside.

page 86 } MRS. HARRIET W. ELAM,

called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Questions by Mr. Kearney:

Q. What is your name, residence and occupation?

A. Harriet W. Elam; Court Reporter, Richmond, Virginia.

Q. Did you report the trial of this case held March 7, 1939?

A. I did.

Q. Will you please read the cross examination of Mr. Willis E. Darden?

A. I will: (Read as follows)

Mrs. Harriet W. Elam.

“CROSS EXAMINATION.

By Mr. Kearney:

Q. Now, Mr. Darden, as you came up to County Street on Mallory Street, was anybody with you?

A. No, sir.

Q. Did you see any street cars at or on Mallory Street?

A. Yes, I saw a street car.

Q. How many did you see?

A. I saw one.

Q. You heard Mr. Coleman testify that there were some behind him. Did you see those?

A. No, I did not see any behind him.

Q. Did you see the street car make a turn in front of you as you came up?

A. No.

Q. How far back from the corner was his street car?

“A. His street car was right at the corner.

page 87 } Q. Did you see any street car back about 120 feet from the corner?

A. Yes.

Q. So you saw two street cars?

A. I saw one there and one back down there, at the corner.

Q. Now, you say there was one standing right at the corner?

A. Yes.

Q. About how far from the corner was it?

A. It was right at the corner; it stopped for the red light; and I stopped on the other side for the red light.

Q. Now, when the light changed, what became of that street car? Did it go around the corner?

A. Yes, it started to go around the corner.

Q. As it started around the corner, you started across the street?

A. Yes.

Q. And as the car goes around the corner, it swings out to the left, does it not?

A. I don't know.

Q. You saw the white mark, or safety guide for the public's protection, to take care of the swing when the car makes the turn off of Mallory Street into County Street, going towards Hampton, does not that back end of the car swing out as the turn is made?

A. I suppose so.

Mrs. Harriet W. Elam.

page 88 } "Q. Did it not do that on this occasion?

A. I did not see it make the turn.

Q. Did you not state that as the light changed it started?

A. Yes, he closed the door.

Q. Then he started around the corner and you started across the street?

A. Yes.

Q. In order to avoid this swing that that car made it made it necessary for you to go close to the curb?

A. No, there is a line for the safety zone between that and the curb.

Q. I know, but you got over that to give the car plenty of room, as you swung that corner.

A. I drove right straight through the safety zone.

Q. Through the street?

A. No, through the driving lane, the safety zone and the street car.

Q. After you got across there, did you see the street car Mr. Coleman was on back some distance?

A. All I saw was a car. I don't know who was on it.

Q. Moving or—

A. Standing still.

Q. As you started across the street, this car, where you make the turn, as the light changed the man closed the door, and you put your car in gear, and he made the turn going into County Street as you were going across?

page 89 } A. He was getting ready to go when I went through.

Q. I asked you, as the light changed, the man closed the door, and you put your car in gear, and he made the turn going into County Street as you were going across. Is that right?

A. Yes.

Q. And when you got in the middle of the street near the light he was moving.

A. He had just started moving.

Q. Now, when you saw this car start to moving, you know, it makes a swing as it goes around, does it not?

A. Yes.

Q. You cannot afford to run too close to it, can you?

A. No.

Q. You were giving him plenty of room to make the swing?

A. Yes, there was plenty of room laid off by a white line.

Q. The street had a track in the center from which that car does not move—the cars go on a stationary rail?

Mrs. Harriet W. Elam.

A. Yes.

Q. When he makes the swing he comes out some distance from the track, does he not?

A. Yes.

Q. When the light changed you saw the man close the door and make the motion to go across it just as you started to cross the street—did you pull over to let him make the turn?

A. No, I pulled right on through.

page 89 } “Q. When you came up from Mallory Street, was a bus in front of Sheehan’s place?

A. No.

Q. Are you sure of that?

A. Yes.

Q. How close did you stop your truck, when you stopped for the light, to the sidewalk?

A. About four feet; three to four feet.

Q. When you got over on Fuller’s side you think you were about two feet from the curb?

A. It was nearer than that because of the street car.

Q. Then you pulled in towards the curb?

A. No, I did not. I went right straight in.

Q. How do you mean, you went right straight in, Mr. Darden?

A. Between the street car and the safety zone there is about twelve feet, and I went right straight through.

(Note: The attorney took a piece of chalk and made a diagram on the floor.)

Q. You see, here is Fuller’s Corner. You say that when you came to a stop over here at this point you were about 4 feet from this point to the right-hand side of the curb?

A. Approximately 3 or 4. I don’t know exactly.

Q. When you got over there, you think you were between 2 and 3 feet?

A. Yes.

Q. So you did come across at some angle, did you not?

A. I went right straight through.

page 90 } A. I understand you did not make any turn to go right or “left, but you saw the car, and saw the man close the door, when the light changed, and saw him making arrangements to go ahead?

A. Yes.

Q. When you got in the center of the street you saw him move?

Mrs. Harriet W. Elam.

A. He just started to move when I went through.

Q. And you knew how the back end of the car swings out—

A. It does not swing over the white line.

Q. I know, but it does swing out?

A. Yes.

Q. And you were giving him plenty of room?

A. No, because the light was what I went by—he had plenty of room.

Q. You gave him plenty of room?

A. He had plenty of room.

Q. You still tell the jury you did not pull over at all?

A. No. I did not pull over at all."

Witness stood aside.

Plaintiff rests:

page 91 } By Mr. Sinnott: May it please the Court, at the conclusion of Plaintiff's evidence, the Defendant, by Counsel, moves to strike the evidence of the Plaintiff, and for these reasons:

First: There is no evidence of primary negligence here. It is here shown that the truck of the Defendant was traveling down the street; traveling on the main portion of the street. There is no evidence that he ever got on the sidewalk; there is no evidence to contradict that he was traveling along on the right-hand side of the street, and there is no evidence of primary negligence because that truck had a perfect right to travel down that street. On the contrary, it is shown by the evidence of the Plaintiff that Plaintiff was guilty of contributory negligence as a matter of law. It is shown that he was standing so close to the edge of the curb, that, according to his own evidence, he was struck by the truck, which was traveling as he had a right to travel, in the portion of the street set aside to him.

There is in effect an ordinance of the City of Phoebus providing that trucks shall drive as near as practicable to the right-hand side of the street. There is no evidence that he was travelling on the sidewalk, but there is evidence that he was travelling as near as practicable to the right-hand side.

We ask the Court to strike the evidence of the Plaintiff.

The Court: Motion overruled.

page 92 } Mr. Sinnott: Exception noted.

TESTIMONY FOR THE DEFENDANT.

WARREN COLEMAN,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sinnott:

Q. Please state your full name?

A. Warren Coleman.

Q. Your age?

A. 27.

Q. What is your occupation?

A. Bus and street car operator.

Q. I will ask you if on the 18th day of July last you witnessed an accident at or near the intersection of County and Mallory Streets in which the Plaintiff was involved?

A. Yes.

Q. What were you doing at that time?

A. Operating a street car.

Q. What street car were you operating?

A. A Virginia Public Service street car.

page 93 } Q. What line was it?

A. The main line that ran to Phoebus at that time.

Q. Were you on the front of that car?

A. Yes.

Q. Was your car moving or standing still at the time of this accident?

A. Standing still.

Q. How far from the corner was it?

A. Approximately 150 feet.

Q. Which way were you headed?

A. Towards Newport News.

Q. On Mallory Street?

A. Yes.

Q. And approaching County Street?

A. That is right.

Q. I will ask you if you witnessed the accident at the corner?

A. Yes.

Q. Did you see this truck of Swift & Company?

A. Yes.

Q. Where was it when you first saw it?

A. On the opposite side of the intersection on Mallory and County Street.

Warren Coleman.

Q. The intersection beyond you?

A. Yes, on the opposite side.

Q. Was it standing still or moving?

Q. Standing still.

page 94 } Q. Do you know in what position in the street
it was, with reference to the right curb, in the direction in which he was traveling?

A. What do you mean?

Q. Was it close to the curb or between it and—

A. I did not pay much attention to that. I would not like to say.

Q. How close to the corner was he?

A. I did not pay any particular attention to that.

Q. You say he was standing still?

A. Yes.

Q. Is there a red light on that corner?

A. Yes.

Q. I mean a signal light?

A. Yes.

Q. At the time you saw him, when he was standing still, was the red light against him, or green light with him?

A. The red light was against him.

Q. And he was standing still?

A. Yes.

Q. Did you see the light change to green?

A. Well, I saw it after it turned. I was not watching it when it turned, but afterwards I saw it.

Q. What did the truck of Swift & Company do?

A. Proceeded on towards Buckroe.

Q. Was the green light with him when you saw him proceeding on?

page 95 } A. Yes.

Q. Did you notice about how fast he was traveling there?

A. 8 or 10 miles an hour.

Q. Your car was facing his truck and you were going towards Buckroe?

A. No, I was going in the other direction.

Q. Oh, he was going towards Buckroe and you were going in the opposite direction—you were facing each other?

A. Yes, we were facing each other.

Q. Did you see him cross the intersection?

A. Yes.

Q. Just describe briefly what you saw after he crossed the intersection.

Warren Coleman.

A. Well, I was noticing the truck, and just after he passed the intersection I saw a pair of feet come off the curb, and after the truck went by I saw a man get up out of the gutter, turn around several times, apparently dazed; a man caught him by the arm and they went in the drug store.

Q. When you saw the man he was lying in the gutter?

A. Yes.

Q. Did you see that man that was lying in the gutter make any movement before this accident?

A. Not any more than I saw his feet under the truck.

Q. Did you see him wave at anybody or anything like that?

A. No.

Q. Did you see him when he was standing on the sidewalk?

page 96 } A. There were several people standing on the walk. I did not pay any particular attention to who they were. I did not know anyone there.

Q. You say you saw a man's feet under the truck?

A. Yes.

Q. After the truck had passed where was the man lying?

A. In the gutter right by the curb.

Q. Did you see the truck come in contact with him?

A. No, sir.

Q. Where was the front of the truck when you saw those feet under the truck?

A. The front of the truck had passed him.

Q. And he was at that time lying in the gutter?

A. Yes, after the truck passed him.

Q. After the front of the truck passed him?

A. When I first saw him his feet were about the midway of the truck.

Q. When the truck passed him, where was he lying?

A. Lying in the street in the gutter.

Q. Have you any interest in this case one way or the other?

A. No, sir.

CROSS EXAMINATION.

By Mr. Montague:

Q. Mr. Coleman, there is no question in your mind about it being Swift and Company's truck there that had this accident when Mr. Murphy was injured, is there?

A. Did I notice it was a Swift and Company truck?

Q. Do you know it was Swift & Company's?

Warren Coleman.

page 97 } A. At the time I did not; I knew it was a big red truck.

Q. Do you recognize this boy as being the driver?

A. No.

Q. You afterwards learned that the truck was a Swift & Co. truck?

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Sinnott:

Q. Did that truck stop when you saw that man out in the street?

A. No.

Q. What did it do?

A. Kept going.

Q. Fast or slow?

A. Same rate of speed.

Q. What was that?

A. A speed of around 10 miles an hour.

RE-CROSS EXAMINATION.

By Mr. Montague:

Q. The point I want to clear up is, the big red truck you saw come in contact with Mr. Murphy was a Swift and Company truck?

A. I did not say that; I said it was a big red truck.

By Mr. Sinnott: He said he later learned it was Swift and Company's truck.

A. Not from seeing the truck; it was just mouth to mouth information.

By Mr. Sinnott: We object to that and ask the
page 98 } Court to direct the Jury to disregard that.

The Court: What he afterwards learned is not evidence.

By Mr. Montague:

Q. You did see a large red truck, regardless of whose red truck it was, come in contact with Mr. Murphy on the 18th day of last July at the corner of County and Mallory Street in front of Fuller's Hotel in Phoebus? Is that right?

Warren Coleman.

A. Well, I don't remember the date; if that is the right date, that was it; I don't remember the exact date. I did not pay attention to that.

Q. Was it between twelve and one o'clock or thereabouts?

A. Yes.

Q. Now, as I understand it, you were back about 150 feet from the corner of County and Mallory Streets?

A. Yes.

Q. Were you sitting or standing in the cab of your street car?

A. Sitting.

Q. Did you notice another street car ahead of you when the light was red at the corner there about opposite Fuller's Hotel?

A. There was no street car there.

Q. I mean at the time the truck was halting or standing still on the red light on Mallory Street—there was
page 99 } no street car ahead of you with either anybody in it or not?

A. It was ahead of me but he had turned the corner. He was out of my sight.

Q. He was out of your sight when the light turned green and the truck came through the intersection?

A. Yes.

Q. Are you sure about that?

A. Positive.

Q. So there was not any street car still standing there at the time, Mr. Coleman, when Murphy and the red truck had this accident?

A. No, sir.

Q. That had been ahead of you but it had turned?

A. He had made a right turn out of my sight.

Q. It had made the turn on the green and before the red light stopped the truck?

A. Yes.

Q. So the only thing then that obstructed your view of such obstacle as the truck itself gave, between you and Mr. Murphy—was the truck itself?

A. That did not obstruct my view in any way.

Q. I mean—let us take this situation—you were on a street car 150 feet down the street and here is a truck 150 feet away and you were standing in your cab—

A. No, I was sitting in the cab.

Warren Coleman.

Q. Sitting in the cab of that car and you testified on direct examination that Mr. Murphy did not get in front of that car but came into the side of it? In fact, you did not see him, you just saw feet. Is that right?

A. Yes.

Q. I say, what you did observe was only obstructed by such obstruction as the truck itself made?

A. The truck's body is three feet—not less than three feet—from the ground. There is a plain view from where I was sitting. You can see it as plain as day underneath there.

Q. The top of the truck was higher.

A. It obstructed the view of Mr. Murphy's body but not his feet.

Q. The truck would have obstructed your view of Mr. Murphy from where you were, except his feet?

A. Right.

Q. The only part you could see of Mr. Murphy was his feet?

A. Yes.

Q. You observed that from a standing position in the street car?

A. No, I was sitting.

Q. You were in a sitting position in the street car and as you looked, you could not see around this way, but you saw his feet under the truck?

A. Yes.

Q. I am going to ask you to place these little toy automobiles in the positions the truck and street car were.

(The witness placed them.)

page 101 } Q. You have placed these (toy cars) almost headon—were not the truck and street car further apart than that.

A. Something like that.

Q. More like this? (Making them slightly further apart).

A. Yes.

Q. You only saw his feet, and from that angle, the only view you had of his feet is such a view as you were able to get by seeing underneath the truck?

A. Yes.

Q. There is no way you can see over or around the truck?

A. Yes.

Q. It was a solid, closed truck was it not?

Warren Coleman.

A. Yes.

Q. We will say this is the curb here,—his body was found—you saw it in the street underneath the car—lying in the street?

A. Yes.

Q. Could you tell he was bleeding then?

A. No, sir. I did not pay any attention.

Q. You don't know whether he was bleeding or not?

A. No.

Q. How long was he down? Did you see him get up or attempt to get up, rub his eyes and attempt to look at the truck?

A. He got up under his own power; turned around two or three times apparently dazed, wiped his face as you have described, then a man grabbed him by the arm and
page 102 } went in the drug store.

Q. How long was he down there?

A. Not longer than he could get up.

Q. He got right up?

A. Yes.

Q. Did he fall down again after he got up?

A. I would not like to say.

Q. Not that you know of?

A. No.

Q. Did you try to attract the truck driver's attention by halloaing to him, or making a signal that he had hit somebody when he came by your car?

A. No, sir.

Q. Did you take a look to try to recognize him?

A. No, sir.

Q. He was not going very fast,—8 or 10 miles an hour?

A. That is right.

Q. You did not try to intercept him?

A. No, sir.

Q. Did you, when he came by, notice the name on the truck?

A. No, sir. I did not pay any attention to the truck; I was looking at the man after he hit him.

RE-DIRECT EXAMINATION.

By Mr. Sinnott:

Q. Did you have a good, clear view of the truck as it came down the street, Mr. Coleman?

A. Well, I would have had, if I had been looking at it, but

Girard Chambers, Jr.

I was not paying any particular attention to the page 104 } front of it.

Q. Did you see that man come in contact with the truck?

A. No more than his feet.

Q. And where were his feet with reference to the truck when you saw him?

A. They were off the curb in the street.

Q. With reference to the front or rear of the truck?

A. In the rear of the truck.

Q. How did anybody contact you in reference to this case? I believe you did not stop, did you?

A. I was already stopped when it happened, but I did not stop to investigate it. I was notified at the car barn.

Q. By whom?

A. A dispatcher, Mr. McAllister.

Q. Do you know how he got the information?

A. It has been almost a year ago. He said a Phoebus officer got the number of my street car and called him.

GIRARD CHAMBERS, JR.,

a witness of lawful age, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sinnott:

Q. You are Mr. Girard Chambers, Jr., are you not?

A. I am.

Q. What is your occupation?

page 105 } A. Civil Engineer.

Q. I will ask you if you, at our request, drew this sketch of the intersection of Mallory and County Street?

A. Yes.

Q. What is the width of Mallory Street from curb to curb?

A. 40 feet.

Q. In front of Fuller's Hotel, what is the width of the curb there?

A. 6 inches.

Q. What is the height of it?

A. 6 inches.

Q. Does that represent the situation there, showing the double car track coming on Mallory Street and turning on County Street?

Girard Chambers, Jr.

A. Yes.

Q. These marks here that I have marked with the figure "1", what do they represent?

A. They are lines or marks placed on the pavement—painted on the pavement to represent where a street car, in turning the corner, would cover the space from the track to that mark.

Q. And what is the width from the edge of this safety zone over to the curb?

A. It is approximately 11½ feet; it varies, because the car track is on a—

Q. It is approximately 11½ feet?

A. Yes.

Q. That is the safety zone?

A. It is more of a clearance zone than a place
page 106 } for passengers.

Q. You mean for street cars to clear?

A. Yes.

Q. The traveling portion of the street for motor vehicles is between there and the curb in front of Fuller's Hotel?

A. Yes.

Q. How is the street there? Practically level?

A. There is a slight rise in the center.

Q. A slight rise?

A. Yes.

Mr. Sinnott: The Defendant introduces this map in evidence marked "Defendant's Exhibit No. 1".

CROSS EXAMINATION:

By Mr. Kearney:

Q. (Looking at the map.) This is the double track back here,—here is Fuller's Hotel in here?

A. Yes.

Q. Then this is what we call the switching track here?

A. Yes.

Q. You say this line is put in here so when a car makes a swing it comes out here?

A. Yes.

Q. What distance is it from that point to the curb?

A. Six feet.

Q. So that car, when it swings on this curb, swings out at least six feet?

Warren Coleman.

page 107 } A. Yes, but I do not know the exact swing.
Q. You don't know whether it comes past that,
or not, do you?

A. No.

Q. Just that line put there to warn all pedestrians and drivers that the car is going to swing around there?

A. Yes.

Q. And it will swing?

A. Yes.

Q. It is not a safety zone but a warning that when the car comes there it will swing out in that direction?

A. Yes.

Q. And whether it comes over that line or not, you don't know?

A. No.

Q. There is a crown on this street; this drains from there, and when it comes down the slant, it comes this way on both sides?

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Sinnott:

Q. What is this little figure in the center?

A. I have put that there to indicate a stop light.

Witness stood aside.

WARREN COLEMAN
recalled to the stand:

RE-DIRECT EXAMINATION.

By Mr. Sinnott:

Q. Mr. Coleman, I show you a map or sketch of Mallory Street and County Street. Here is the intersection—marked, "Exhibit (Defendant) No. 1". Will you use that
page 108 } green toy vehicle as your street car and place it
where it was when you were stopped when you saw this thing?

(Note: Witness placed it on the sketch.)

Q. Now, mark this as a figure "2" where the front of your car was stopped.

Warren Coleman.

A. All right. (Marked with figure 2.)

Q. About how far from the corner was it?

A. Approximately 150 feet.

Q. Now, sir, I am handing you this other toy vehicle and ask that you let it represent the red truck that you saw. What was the position when you first saw it? Do you understand this map?

A. Yes. It was in the intersection apparently straight but I don't know as to any angle or any degree—

Q. Mark it with a figure "3"—the front of that little toy vehicle.

Mr. Montague: We object to that because witness stated he does not know in what position—

Mr. Sinnott: He said it was standing this way.

Q. Mark with a figure 3 where the front of that truck was; that red truck that you saw.

(Note: Witness marked it with a "3".)

Q. Now, when the street car in which you were,
page 109 } was standing (there at figure 2), I believe you said
the red light was on?

A. Yes.

Q. And when the front of this red truck was at figure 3, the red light was on?

A. Yes.

Q. Then, sir, will you illustrate to the Jury what happened? I believe you stood still all the while?

A. Yes.

Q. Illustrate what happened.

A. Well, the truck came across here, proceeding towards Buckroe. When it got approximately along here, (the mail box is not on here, is it, Mr. Sinnott?) Say right here, three feet past the mail box, I saw those feet come from the curb under the red truck.

Q. Mark with a figure "4" where you saw those feet.

(Note: Marked with a "4".)

Q. That is about the center of the truck, I believe you said you saw it?

A. Yes.

Warren Coleman.

Q. Could you tell about how close the truck was to the curb in front of Fuller's Hotel?

A. No, sir.

Q. Was it jammed up against the curb—flush with the curb, or out in the street?

A. It could not be flush with the curb, because page 110 } the feet were off the curb.

Q. Could you give an estimate of how far off the curb it was?

A. 2½ feet.

Q. That was the time you saw the feet out there?

A. Yes.

Q. You saw the man's feet lying in the street?

A. They were walking when I first saw them.

Q. Then did you afterwards see the feet belonging to the same man lying in the street?

A. I cannot say that because I did not see his face.

Q. As I understood you, when you saw them, this truck was 2½ feet from the curb, you saw somebody's feet walk into the street?

A. Yes.

Q. Then the truck passed and you saw the man lying in the street?

A. Yes.

RE-CROSS EXAMINATION.

By Mr. Kearney:

Q. How many steps did you see this man walk down the street?

A. I could not say.

Q. Did you see him take more than one?

A. (No answer.)

Q. You said you saw him walk in the street?

A. I said I saw him walk off the curb.

Q. You saw him when he left the curb?

A. Sure.

page 111 } Q. How many steps did he take.

A. I would say he had approximately taken two.

Q. Was he walking right straight across the street? Could you tell from the man's feet which way he was walking?

A. No, sir.

Warren Coleman.

RE-RE-DIRECT EXAMINATION.

By Mr. Sinnott:

Q. When he left the curb you saw him as the front of the truck passed him?

A. Yes.

Q. I show you this sketch marked by a figure "1"; it has been testified that this mark represents the swinging space of the street car as it goes around here.

A. Yes.

Q. To go around there do they go beyond that?

A. No.

RE-RE-RE-CROSS EXAMINATION.

By Mr. Kearney:

Q. How far do the cars swing?

A. They swing the distance of the line.

Q. About how many feet would you say that would be from the track?

A. I don't know. I would say 2½ to 3 feet.

By Mr. Sinnott:

Q. You see where the figure "1" is marked there?

A. Yes.

Q. See this mark—is there a safety zone on the opposite side?

A. Not this close to the intersection; it is back page 112 } further between this and the double track, there is a safety zone.

Q. So you have a mark, with dotted lines, where the safety zone is—approximately where it is.

A. That is taking up right much territory; I could not say exactly where it is, but there is one over there.

Q. Cannot you tell us approximately where it is, marked with a dotted line?

Note: The witness marked and put a figure 5 where the safety zone is, opposite the figure 1.

A. The safety zone is over there; whether that is exactly right or not, I don't know.

Q. That is the approximate position, is it not?

A. I think so.

Witness stood aside.

W. R. PHELPS,
a witness of lawful age, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sinnott:

Q. What is your name, age, residence and occupation?

A. W. R. Phelps.

By Mr. Kearney: I object to this witness testifying. He has been in the court room ever since we started; or at least has been in a long time.

By Mr. Sinnott: He is a new witness, just come page 113 } in.

The Court: To what is he going to testify?

Mr. Sinnott: He is going to testify as to the over-hang of the wheels.

The Court: If he has blueprints—

Mr. Kearney: They asked to have the witnesses separated this morning. We object to his testifying.

The Court: I did not know he was a witness.

Mr. Kearney: I did not know he was a witness.

The Court: He is not testifying to anything that any other witness has testified to.

Mr. James: It has nothing to do with what happened at the scene of the accident.

The Court: Motion overruled.

Mr. Kearney: We note an exception.

Q. Mr. Phelps, will you please state your full name?

A. W. R. Phelps.

Q. Where do you live?

A. Hilton Village.

Q. What is your business?

A. Manager of the Tire Department, Newport News Automobile Service.

Q. How long have you been in that business?

A. I have been in it since 1919 but I have only been with the Newport News Automobile Service since 1936.

Q. You are Manager of the Tire Department?

A. Yes.

Q. I will ask you if you replaced some tires on a page 114 } Chevrolet truck about three weeks ago for Swift & Company?

A. We replaced the chassis.

W. R. Phelps.

Q. What is that?

A. New tires, new wheels, with the exception of the body, it is an entirely new truck—the body was removed from another Chevrolet truck.

Q. The body that was removed was from the truck involved in this accident last July, is it not?

A. I am reliably informed it is the same truck.

Mr. Kearney: We object to that. He does not know.

The Court: He only knows what he was told—connect it up.

Q. It was about three weeks ago?

A. Yes.

Q. You changed the chassis?

A. Yes, that is right.

Q. You changed the chassis and put the old body on a new chassis?

A. That is correct.

Q. That was three weeks ago?

A. Yes.

Q. On a Chevrolet truck?

A. Yes.

Q. I will ask you if you viewed it today, at our request, at the intersection of Mallory and County Street in front of Fuller's Hotel?

A. Fuller's Hotel, I did.

page 115 } Q. I ask you if that truck, with the chassis that was on there at the time you exchanged it,—I will ask you how far the over-hang of that body was from over those wheels?

By Mr. Kearney: I object. Is this man a tire man? I understood him to say he is.

The Court: I am not going to let him testify to anything he does not know. If he knows what the over-hang of the truck was before its alteration, he can testify to it.

Witness: I have been equipping the old truck with tires for many years.

Mr. Kearney: We don't think putting tires on it has anything to do with that. I thought they were going to put on a man who knew something about the chassis.

Q. Please state, Mr. Phelps, if you saw the chassis on that truck?

W. R. Phelps.

A. I saw the chassis and it was changed in our place of business.

Q. I ask you on that truck, before you changed the tires, wheels, etc., and put the body on it, what the over-hang of that body was over the tires on that truck?

A. About 1½ inches on each side.

Q. I will ask you if the right wheels of that truck were flush with the curb, right straight up against it—how page 116 } far could that truck body overhang on the curb?

A. 1½ inches.

CROSS EXAMINATION.

By Mr. Kearney:

Q. How wide is this chassis?

A. The body of that truck?

Q. I am asking you about the chassis?

A. The over-all of the tires?

Q. Yes.

A. Do you want the old, or the new one first?

Q. I want the width of the chassis of the present truck.

The Court: We have not the old one; we have the new truck here.

Q. We are referring now to the old one.

A. The width of the new one, Mr. Kearney, is 82.81 inches.

Q. We are talking about the old one now.

A. The old one was 78.16 inches. (Referring to records.)

Q. So the chassis on the new truck, or the chassis on the truck now in use is 4½ inches wider than the chassis that was on the old truck. Is that right?

A. Correct.

Q. Where do you get those figures from?

A. We have that data to determine this.

Q. Where are the data books?

A. Over here, sir.

Q. Will you let me see them, please, sir?

A. Yes. The way we determine the length of page 117 } the truck, I measured both of those trucks myself.

Q. Where is the old chassis now?

A. At the Automobile Exchange, in the Used Car lot.

Q. You mean the Newport News Automobile Exchange?

A. Yes.

W. R. Phelps.

Q. When did you measure that last?

A. About 1:30 P. M. today.

Q. When did you measure this other chassis,—the new one?

A. I measured the new one just like the other one, at 1:30 today.

Q. The old body that was taken from the truck involved in this accident, you measured that today at 1:30, and the present chassis on which this body now is, you likewise measured that at 1:30 today?

A. Well, I measured one exactly like it. I did not measure Swift and Company's truck today.

Q. You never have measured Swift & Company's chassis?

A. I measured one exactly like it.

Q. But the one involved in this accident, you did not measure it?

A. I measured that day, the old one.

Q. Did you measure the body of the old truck today?

A. I did not.

Mr. James: You are asking him about the chassis—not the body?

Mr. Kearney: I know what he is trying to do.
page 118 } He is saying he measured one like it.

Q. Did you measure the chassis that was on the truck on July 18, 1938?

A. I measured that today.

Q. Now, did you measure the body that was on the old chassis on July 18, 1938; did you measure that body today?

A. I did not see it today.

Q. Have you ever measured it?

A. Yes.

Q. When?

A. When in our shop being painted and new repairs put on it.

Q. What did you say your position is?

A. Manager of the Tire Department.

Q. What do you have to do with the chassis of automobiles?

A. The service department and my department work together.

Q. You have a department for each of these services?

A. We had to make alteration to this particular job to accommodate larger tires we put on the chassis.

Q. How much larger were the tires on this here present chassis than on the chassis you had on the old one?

W. R. Phelps.

A. The old tires were 32.6 high pressure, 8 ply on a 5 inch rim, and each tire loaded radius 7.16 inches.

Q. How about on the present chassis?

A. On the present chassis 65.16 tire on a 6 inch rim and loaded rim 7.65 inches.

Q. So that would make this tire how much
page 119 } wider than *the* There would be a difference between 65.16 and 32.65.

A. 49/100ths of an inch.

Q. Your new rim is how much wider than the old rim?

A. One inch wider.

Q. The rim of this chassis is one inch wider than the old rim?

A. Yes. I will give you the specifications on that. From center to center of the outside tire on the old truck is 71 inches.

Q. What are,—reading from where?

A. From the measurements I took.

Q. When did you write that statement up?

A. Today.

Q. On the new truck the chassis is 75 inches center to center of the outside tires.

Q. On the new one 75 and the old one is what?

A. 71 center to center on outside tires. Now, the over-all width of the chassis is one-half the width of the tire in addition to that.

Q. This would make that truck 6 inches from end to end of over-all wider than the other?

A. No, not 6 inches.

Q. How much would it make?

A. 4.64 inches.

Q. Are you allowing anything there for the difference in your rim?

A. That is 2.32 for each side of the truck; that
page 120 } includes the rim by actual measurement.

Q. Can you show me?

A. Yes.

Q. Show me the other measurements you have on that. Where did you get them from?

A. I took them from the truck. I measured the truck.

Q. But you did not measure the truck that was in the accident?

A. I did today.

Q. You measured the chassis but not the body.

W. R. Phelps.

A. No, I did not measure the body; I did not see the truck today.

The Court: You testified you measured the truck today.

Witness: I measured it when I was looking over the job in our shop.

Q. What is the furthest part of this present truck the tire is on?

A. The tire is slightly wider than the body, than the bottom.

Q. How much wider?

A. Nearly a half inch.

Q. Then the overhang on it, on the other, must have been two inches.

A. Between one and a half and two inches.

Q. Now, was not the rim that goes around the body there about four inches, was not that the overall?

page 121 } A. That is included in the 81 inches.

Q. Was not that the overhang on the truck, that rim that went around there?

A. That is approximately the overhang.

Q. It is?

A. The overhang of the body is the ridge at the bottom of the body.

RE-DIRECT EXAMINATION.

By Mr. Sinnott:

Q. Let me get this clear: What was the overhang of the body on the old chassis over the wheels?

A. Between 1½ and 2 inches.

By Mr. Kearney: Approximately.

Witness: I would not say it is. There might be a slight variation—it might be a half inch further out.

Q. The widest part is the back?

A. The only difference in width would be the fender and bumper a half inch beyond that little rim.

Q. These wheels are not the front wheels?

A. The front wheels are in from the rim.

Q. What is the difference from the center to the front wheels?

A. The front wheels are approximately the same distance apart as the center of the two rear wheels.

M. J. Murphy.

Q. Can you tell us what it is?

A. Approximately 70 to 71 inches as to the front wheels, and that applies to both trucks.

page 122 } Q. So that back wheels of the truck were out some 10 or 12 inches—some distance from the front?

A. Not that much, no.

Q. You said it was 70 to 71 inches. How far do you say the back wheels are?

A. 82.—or 81 inches.

Q. 10 or 12 inches.

A. 9 or 10 inches.

Q. 70 from 82—

A. 71 from 82 is 11.

Q. 11 or 12 inches.

A. That is right. The front wheels are not that much but the back—

The Court: On each side—

A. The large tires are installed on the rear of the truck, it increases the width of the rear over the front.

Witness stood aside.

M. J. MURPHY recalled.

RE-CROSS EXAMINATION.

By Mr. Sinnott:

Q. Mr. Murphy. Here is a sketch marked "Exhibit—Defendant No. 1", of the scene of the accident. Do you recognize the situation there, sir?

A. This is Fuller's Corner and this is the barber shop?

Q. No, the whole thing is by Fuller's Hotel.

Q. Now mark with an X-mark where you were page 123 } standing when you were struck.

By Mr. Kearney: Let us see if he understands this. Show him how the curb line was.

By Mr. Sinnott: Here is the catch basin here. Here is the mail box here. Here is the barber shop.

Q. How far did you say you were standing from the curb when hit?

Willis E. Darden.

A. Not over five inches—four or five.

Q. That is a guess? As near as you can tell? You might have been closer than that?

A. I might have been closer.

Q. And you had your back turned to the South, up Mallory Street, did you not?

A. Yes.

Q. You did not know what hit you, did you?

A. No, sir.

Witness stood aside.

WILLIS E. DARDEN,

one of the Defendants, called to testify in his own behalf, testified as follows:

DIRECT EXAMINATION.

By Mr. Sinnott:

Q. What is your full name?

A. Willis E. Darden.

Q. You are one of the defendants in this case, I believe?

A. Yes.

page 124 } Q. What is your age?

A. 24.

Q. Are you employed by Swift & Company?

A. Yes.

Q. Were you employed by them last July?

A. Yes.

Q. In what capacity?

A. Truck driver.

Q. How long have you been operating a truck?

A. Do you mean with this Company?

Q. Any company.

A. About 7½ years.

Q. How long have you been with Swift & Company?

A. About 2½ years.

Q. I believe you are one of the gentlemen who were brought here and sued for \$10,000, were you not?

A. Yes.

Q. Mr. Darden, on the 18th of July, did you know you had had an accident until some time after the alleged occurrence?

A. No.

Q. When was the first you heard of having an accident?

A. Some truck driver came down to the Quality Grocery

Willis E. Darden.

where I was delivering merchandise, and told me somebody had stepped into the side of my truck.

Q. How long after this person was supposed page 125 } to have stepped into the side of your truck?

A. 15 or 20 minutes.

Q. Did you know anything about the accident?

A. No, sir.

Q. Did you see anybody in the front part or side of this truck get struck? Did you see the truck strike anybody?

A. No, sir.

Q. You were on Mallory Street, I believe? Were you not?

A. Yes.

Q. Going kind of in a Northerly direction?

A. That is right.

Q. Will you take this little toy automobile and show on the sketch here, marked "Defendant's Exhibit No. 1" how you came down Mallory Street, where you stopped and what occurred?

(Note: Witness marked on the map as requested.)

Q. Now, let's see if you understand this, Mr. Darden. Here is County Street; here is where the street car turns; here is Fuller's Hotel; here is the safety zone; here is the space for cars to turn around the corner. As I understand it, you were coming in this direction, kind of south, just use this little car, and illustrate and tell the jury what occurred.

Mr. Kearney: He was going North.

Mr. Sinnott: Yes, going North.

A. I was coming down here and the light was page 126 } on red.

Q. You were going to continue North down Mallory Street?

A. I came here and stopped for a red light.

Q. Mark with a figure 6 where the front of your truck was when you stopped.

(Note: Witness marked as requested.)

Q. Was the red light facing you?

A. Yes.

Q. About how long did you stand there?

A. I stayed there about a minute, I guess.

Willis E. Darden.

Q. Then what happened?

A. The light changed and I drove on across. I went on through.

Q. Will you take this pencil and start at the figure 6 and follow the course you pursued as you went down the street? Mark this sketch here.

(Note: Witness took the pencil and marked his course.)

Q. Did you make any turn after you left the point (illustrated) here with the figure 6, until you got on down the street?

A. No.

Q. About how close to the curb were you driving?

A. I judge about 18 inches or 2 feet. Something like that.

Q. About how fast were you traveling?

A. Between five and ten miles an hour.

Q. Then you went on down the street to deliver some goods and somebody told you that someone had run into the side of your truck?

A. Right.

page 127 } Q. Then you came on back up here?

A. Yes.

Q. Where was Mr. Murphy when you got back?

A. I don't know. I did not see him.

Q. Did you see any blood up there?

A. Yes.

Q. Where was the blood?

A. I noticed some on the sidewalk and some in the street.

Q. About how far out in the street was it from the curb?

A. 18 inches.

Q. 18 inches?

A. Yes.

Q. I understood you had no notice of the accident until somebody came down the street and told you?

A. No, I had not.

Q. Did you see somebody standing on the corner of Fuller's Hotel?

A. Yes, I saw some people standing there.

Q. Did anybody move out into the street just before you got there?

A. No.

Q. Did you feel the impact—did you feel any impact at all with your truck?

A. No.

Willis E. Darden.

Q. What is the length of the body on that truck?

A. 12 feet.

page 128 } Q. Do you know what the width of the truck is,
over-all?

A. 6 ft. 9 inches.

Q. Is there any over-hang—was there on that body—over the wheels?

A. Approximately $1\frac{1}{2}$ to 2 inches. I don't know exactly.

Q. It has been testified here—you heard Mr. Phelps' testimony—a while ago that the truck has been changed since the accident. Is that true?

A. We have a new chassis but the same body.

Q. Are you still using the same body?

A. Yes.

Q. Is that body you saw back of the courthouse here this morning, is that the body on the truck or chassis that was involved in this accident?

A. Yes.

Q. Did they change the body of the truck?

A. No, sir.

Q. Has it been changed recently?

A. We changed the body to a new chassis.

Q. When did they change that?

A. About three weeks ago.

Q. Is that the body Mr. Phelps, the gentleman who testified just before you, was talking about, that the chassis had been changed?

A. Yes.

page 129 } Q. When your—Mr. Darden, when you drive
along the street do you drive along the curb or
do you drive away from it?

A. I drive away from it.

Q. Were you driving away from it on this occasion?

A. Yes.

Q. Did you have any reason to drive up against the curb?

A. No.

Q. If that right wheel was touching a curb would it be possible to hit a man or any object four feet back on the sidewalk?

A. No, sir.

Q. I mean four inches back on the sidewalk?

A. I don't think so.

Q. You said the overhang of the body from the wheels were about $1\frac{1}{2}$ inches?

Willis E. Darden.

A. Yes.

Q. Did you have any occasion to drive right straight up against the curb that day?

A. No.

Q. And scrape your wheels?

A. No.

CROSS EXAMINATION.

By Mr. Kearney:

Q. How long is that truck, Mr. Darden?

A. Front or body?

Q. The truck.

A. I don't know how long the truck is.

page 130 } Q. From bumper to bumper?

A. I don't know.

Q. How long is the body?

A. 12 feet.

Q. Do you know what the distance is from the front of the body to the front of the truck?

A. No, sir.

Q. Do you think it is as much as 8 feet?

A. I don't know.

Q. Now, Mr. Darden. Will you look here a minute. Take this sketch to illustrate this. I understand that when you came up, you stopped up in front of Frank's place for the light?

A. Yes.

Q. When you stopped in front of Frank's place, you were waiting for the green light, were you not?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. You were stopped there for the light?

A. Yes.

Q. Did you notice whether there was any street car there?

A. I could not say, sir.

Q. After you passed this one, did you notice this one?

A. One back here?

Q. One at the switch?

page 131 } Q. But you are positive there was one back here?

A. Yes.

Willis E. Darden.

Q. Now, you say this man came out and told you that somebody had stepped into your truck. What he really told you was,—he came out and told you you had knocked a man down and had not stopped, did he not?

A. No.

Q. Who was the man who came out there?

A. I don't know.

Q. Was not what he told you that you had knocked a man down and had not stopped?

A. No.

Q. You don't know the man's name, do you?

A. No.

Q. What day of the week was that, Mr. Darden? Do you know?

A. I don't remember what day it was, it was the 18th of July.

Q. It was on a Monday, was it not?

A. I don't know whether it was or not.

Q. What time did you leave Swift & Company's place?

A. About 6:30 or 7:00 that morning.

Q. What time were you due back there?

A. About 2:30 or 3:00.

Q. Where did your route end?

A. Fox Hill.

Q. How many places did you have to visit down at Buck-roe?

A. 5 or 6 places—I don't know exactly how page 132 } many.

Q. How long was it after you passed Fuller's Corner that you came back there?

A. I don't know just how long it was.

Q. But you saw some blood there when you got back?

A. Yes.

Q. You are positive you saw some blood in the street?

A. Yes.

Q. You are positive of that?

A. Yes.

Q. You are also positive there was some blood on the sidewalk?

A. Yes.

Willis E. Darden.

RE-DIRECT EXAMINATION.

By Mr. Sinnott:

Q. Were you supposed to get back to Swift & Company's at any particular time, Mr. Darden, or when you got through your work?

A. When I got through.

Q. You get through usually at what time?

A. Around 2:00, 2:30 or 3:00.

Witness stood aside.

Defendants rest.

By Mr. Sinnott: Will you gentlemen (addressing opposing counsel) agree that we may introduce the *the* ordinance of City of Phoebus about driving on the right-hand side of the street?

page 133 }

STIPULATION.

It is stipulated by and between counsel that at the time of the accident out of which this suit grew there was in force in the City of Phoebus, where the accident occurred, the following ordinances, reading as follows:

"Section 24. Restrictions as to Speed.

"A. Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing. Any person who shall drive any vehicle upon a highway at such speed as to endanger the life, limb, or property of any person, or so as to unnecessarily block, hinder, or retard the orderly and safe use of the highway by those following, shall be prima facie guilty of reckless driving.

“B. Subject to the provisions of sub-division (a) of this section and except in those instances where a lower speed is specified in this Act, it shall be *prima facie* lawful for the driver of any vehicle, save and except only a passenger motor bus, to drive the same at a speed not exceeding the following:

1. Fifteen miles an hour when passing a school during recess or while children are going to or leaving school during its opening and closing hours.
2. Fifteen miles an hour in a business district, as defined herein.
3. Twenty-five miles an hour in a residence district as defined herein.
4. Thirty-five miles an hour under all other conditions.”

“Section 26. *Drive on the right side of highways.*

Upon all highways of sufficient width the driver of a vehicle shall drive the same upon the right half of the highway and as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing set forth in sections twenty-nine and thirty of this Code.”

page 134 } *Section 27: KEEP TO THE RIGHT IN
CROSSING INTERSECTION OR RAIL-
ROADS.* In crossing an intersection of highways or the intersections of a highway by a railroad right of way, the driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable.

page 135 } (Jury excluded.)

By Mr. Sinnott: May it please the Court, the Defendants, by Counsel, move the Court to strike the evidence of the Plaintiff for the reasons heretofore assigned at the conclusion of Plaintiff's evidence, and in addition thereto, and we think this is vital:—

The Plaintiff testified that he was standing four inches from the curb. He testified that positively. It is shown here by undisputed evidence that that truck never went up on that sidewalk; and it is further shown by undisputed evidence that the over-hang of that truck—the over-hang of the body,—the wheels, was not exceeding $1\frac{1}{2}$ or 2 inches. We say by the undisputed evidence in this case, it was physically impossible for it to have happened. It is incredible, and the courts will not accept incredible statements.

One witness, Mr. Phelps, measured the truck, and his evidence is undisputed,—he says the over-hang of the body is $1\frac{1}{2}$ or 2 inches, and the Plaintiff says he was standing 4 inches from the edge of the curb.

For these reasons, we move the Court to strike Plaintiff's evidence.

The Court: Motion overruled.

Mr. Sinnott: We note an exception to the ruling of the Court.

page 136 } The following Instructions from 1 to 5 inclusive,
and "A" were all the instructions offered and
given:

PLAINTIFF'S INSTRUCTION NO. 1.

The Court instructs the Jury that it is the duty of the operator of every motor vehicle to drive the same at a careful and prudent speed, not greater nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and any other condition then existing, and that under the Ordinances of the Town of Phoebus, Virginia, any person who operates a motor vehicle in a business district (and the place where the injuries to the plaintiff occurred was a business district) at a rate of speed exceeding fifteen miles an hour is *prima facie* guilty of reckless driving.

By Mr. Sinnott: Defendants object to the giving of Instruction No. 1 offered by the Plaintiff because there is no evidence that the truck of the Defendant was doing anything other than proceeding at a careful and lawful rate of speed, and at a speed not exceeding 15 miles per hour, as provided by the Ordinance of the City of Phoebus, and there is no evidence that this was a business district.

PLAINTIFF'S INSTRUCTION NO. 2.

The Court instructs the Jury that if you believe from the evidence that M. J. Murphy was injured by the automobile owned by the defendant, Swift & Company, Incorporated, and operated by the defendant, Willis E. Darden, while he was standing on the sidewalk in front of Fuller's Hotel in the Town of Phoebus, Virginia, the burden of proof is upon the Defendants to show by a preponderance of the evidence that said injury was unavoidable, and that the Defendants did everything that a reasonably prudent person would do under all the facts and circumstances in the case, to prevent injuring him, and unless they did this, they are guilty of negligence, and you must find for the plaintiff.

By Mr. Sinnott: Defendants object to the giving of Instruction No. 2 offered by the Plaintiff because it casts the burden upon the Defendant to show by a preponderance of the evidence that the injury was unavoidable, whereas the burden is on the Plaintiff to show by a preponderance of the evidence that the Defendants were guilty of negligence.

PLAINTIFF'S INSTRUCTION NO. 3.

The Court instructs the Jury that if you believe from the evidence that the Defendant, Darden, operated a truck owned by the Defendant, Swift & Company, in such a manner in the Town of Phoebus, Virginia, that the body of the said truck extended over and on the sidewalk where it struck and injured the Plaintiff, Murphy, who was standing upon said sidewalk, then your verdict should be in favor of the Plaintiff.

page 138 } By Mr. Sinnott: Defendants object to the giving of Instruction No. 3 offered by the Plaintiff on the ground that there is no evidence that the truck extended over and on to the sidewalk where it struck and injured the Plaintiff, but if it did, the evidence was without dispute that it could only extend not exceeding two inches, and if the Plaintiff was standing within two inches of the sidewalk, then he is guilty of contributory negligence as a matter of law.

PLAINTIFF'S INSTRUCTION NO. 4.

The Court instructs the Jury, that the Plaintiff, M. J. Murphy, is presumed to have exercised due and proper care at the time he received his injuries, and the burden of proving that he was guilty of contributory negligence is upon the defendant, and it will not avail the defendant, unless it has been established by a preponderance of the evidence.

By Mr. Sinnott: Defendants object to the giving of Instruction No. 4 offered by the Plaintiff because under Plaintiff's own evidence as to the extension of the body of the truck, he was bound to have been guilty of contributory negligence.

PLAINTIFF'S INSTRUCTION NO. 5.

The Court instructs the Jury that if you find in favor of the Plaintiff, that in ascertaining the amount of
page 139 } damages that the Plaintiff is entitled to, you shall take into consideration the bodily injuries and disabilities sustained by the Plaintiff, if any, and the permanent and/or temporary character thereof, the physical pain and mental anguish caused thereby, if any, the inconvenience caused to the Plaintiff by said injuries, the disfigurement, if any, and the impairment resulting from injuries sustained by the Plaintiff as the result of the accident; and you may also take into consideration the amount expended or incurred by the Plaintiff for doctors, if any, in endeavoring to be relieved and cured of the injuries received in said accident, such damages, however, not to exceed the amount asked for in the notice of motion for judgment in this case.

By Mr. Sinnott: Defendants object to the giving of Instruction No. 5 because there is no evidence of any permanent injury.

DEFENDANT'S INSTRUCTION "A".

The Court instructs the jury that the mere fact that the Plaintiff was injured by reason of coming in contact with the Defendant's truck is not sufficient to justify a recovery on the part of the Plaintiff, and before the Plaintiff is entitled to recover, you must believe from a preponderance of the

evidence that the operator of the Defendant's truck was, on the occasion of the accident, guilty of negligence, and even then, the Plaintiff is not entitled to recover if you
page 140 } believe from the evidence that he was guilty of negligence which proximately caused or efficiently contributed to the accident.

You cannot base your verdict on surmise or sympathy, but it must be based on the evidence of the witnesses and the instructions of the Court, and unless you believe from these, that the operator of the Defendant's truck was guilty of negligence which was a proximate cause of the accident, the Plaintiff is not entitled to recover and your verdict should be in favor of the Defendant.

If you are unable to determine whose fault the accident was, then you would not be justified in finding a verdict in favor of the Plaintiff but your verdict under these circumstances must be for the Defendant.

It was the duty of the operator of the Defendant's truck to exercise ordinary care in the operation of said truck, and if you believe from the evidence that he did this, then the Plaintiff is not entitled to recover; or, if you believe that he failed to do this, and that the Plaintiff was guilty of negligence which proximately caused or efficiently contributed to the accident, then he is not entitled to recover, and your verdict must be in favor of the Defendant,—in other words, if you believe from the evidence that both parties were at fault, that is, guilty of negligence which proximately caused or efficiently contributed to the accident, the plaintiff is not entitled to recover and your verdict must be in favor of the Defendant.

The Court instructs the Jury that it was the duty of the Plaintiff to exercise reasonable care,—that is, such care as a
page 141 } person of ordinary prudence would for his own safety, and if you believe from the evidence that the Plaintiff failed to do this, and that such failure on his part proximately caused or efficiently contributed to the accident, then the Plaintiff is not entitled to recover, and your verdict should be in favor of the Defendant.

The Court instructs the Jury that if you believe from the evidence that the Plaintiff stepped from a place of safety into a place of danger, and such action on his part proximately caused or efficiently contributed to the accident, then he is not entitled to recover and your verdict should be in favor of the Defendant.

The Court further instructs the jury that the Plaintiff had no right to stand so close to the edge of the curb so that any part of his body would project beyond the curb and be struck

by a passing motor vehicle driven in the ordinary way, and if you believe from the evidence that he did this, then he is not entitled to recover and your verdict should be in favor of the Defendant.

By Mr. Montague: Plaintiff has no objection to the giving of Instruction "A" offered by Defendant, with the exception of the last paragraph. If Plaintiff was struck by the Defendant's truck off the sidewalk I would see no impropriety in that instruction, but if he was struck by the Defendant's truck while standing on the sidewalk I think that does raise that presumption.

By Mr. Sinnott: The Defendants except to the page 142 } giving of the foregoing instructions for the reasons stated.

In addition the Defendants object and except to the giving of any instructions for the Plaintiff on the ground that the evidence did not disclose any negligence on the part of the Defendant and that it disclosed contributory negligence as a matter of law on the part of the Plaintiff barring any recovery.

page 143 } The Jury awarded a verdict of \$2,500.00 in favor of the Plaintiff, whereupon the Defendants by counsel moved the Court to set aside the verdict of the jury on the following grounds:

1st: The verdict was contrary to the law and the evidence and without evidence to support it;

2nd: There was no evidence of primary negligence;

3rd: The Plaintiff was guilty of contributory negligence as a matter of law;

4th: The Court erred in giving and refusing instructions;

5th: The damages awarded by the Jury were excessive.

page 144 } (COPY).

In the Circuit Court for the County of Elizabeth City, Virginia.

M. J. Murphy

v.

Willis E. Darden and Swift & Company

MEMORANDUM OF OPINION.

In the above styled case three points were raised on the motion to set aside the verdict: (1) that certain instructions granted the plaintiff were not proper; and that certain instructions refused the defendant were improperly refused; (2) that the verdict should be set aside because it was contrary to the evidence; and (3) that the damages were excessive.

Taking these objections up in order, I am of the opinion that there was no error in the instructions. It is true that Instruction No. 2 given the plaintiff, which to a certain extent placed the burden of the proof upon the defendants to show by a preponderance of the evidence that the injury was unavoidable, seems to be inconsistent with the burden which the plaintiff always has to carry in a suit of this nature,—yet this instruction is based upon an instruction which was given in the suit of *Trauerman v. Oliver's Administrator*, and I followed this case in granting it. I feel, therefore, that the jury was properly instructed.

Second, I am asked to set aside the verdict because it is contrary to the evidence. The sole question in the case is whether or not when the plaintiff was struck by the automobile he was on the sidewalk and far enough away
page 146 } from the edge to be in a place of safety. I also instructed the jury along this line with reference to his position on the sidewalk. I think there is evidence in the record by which the jury could conclude that in some way the plaintiff was injured by the swinging around of the truck. That being the case I do not feel that I should interfere with the verdict on that ground.

The third ground set up in the motion to set aside the verdict is that the damages awarded by the jury,—\$2,500.00,—were excessive. It is an exceedingly difficult matter to measure damages in dollars and cents. This case has been tried twice, and while the plaintiff's medical bills were not large and his actual loss of time and salary from work were not great, he was cut above both eyes and is permanently disfigured. He also suffered a leg injury, from which his physician seems to think he has permanently recovered, but he himself still complains of some trouble from that source. It may have been that another jury would have given a smaller amount than that awarded. It is possible that still another jury might have awarded a greater amount. Inasmuch as that question was left to the jury, and inasmuch as there is no indication

that the jury were actuated by improper motives in reaching this verdict, I feel that I must let the verdict stand.

The motion to set aside the verdict is therefore overruled.

(Signed) JOHN WEYMOUTH,
Judge.

page 147 } (COPY)

Virginia:

In the Circuit Court of Elizabeth City County.

M. J. Murphy, Plaintiff,

v.

Willis E. Darden and Swift and Company, Defendants.

STIPULATION.

It is stipulated by and between counsel for the respective parties that it will not be necessary, on appeal, to copy any of the exhibits in the record but that the same may be used in the Supreme Court of Appeals.

(Signed) MONTAGUE AND HOLT,
(Signed) FRANK A. KEARNEY,
Counsel for the Plaintiff;
(Signed) E. RALPH JAMES,
(Signed) SINNOTT & MAY,
Counsel for the Defendants.

This 15th day of August, 1939.

page 148 } Virginia:

In the Circuit Court of the County of Elizabeth City.

M. J. Murphy, Plaintiff

v.

Willis E. Darden and Swift & Company, Defendants

COURT'S CERTIFICATE.

The undersigned, John Weymouth, Judge of the Circuit Court of Elizabeth (City) County, hereby certifies that the foregoing stenographic report of testimony, instructions and other incidents of the trial in the case of M. J. Murphy, Plaintiff, v. Willis E. Darden and Swift & Company, Defendants, embracing as it does all the testimony adduced at the trial, objections to testimony, exceptions to rulings thereon; motions to strike the plaintiff's evidence and exceptions of the Defendants to the action of the Court in overruling said motions; embracing and setting out all the instructions that were offered and given in the case, the objections of counsel to instructions, and exceptions to rulings thereon, and embracing all incidents of the trial; was this day presented to the undersigned Judge for authentication; and it appearing that Plaintiff's counsel had due and timely notice of this application, and that the said transcript appearing to be correct, full and complete in all respects, it is hereby certified and authenticated as the true transcript of all the proceedings had at the trial of said cause and the same is transmitted to the Clerk of said Court to be filed with and made a part of the record in said cause.

Done within sixty days from the date of final judgment
in said cause.
page 149 } This the 18th day of September, 1939.

JOHN WEYMOUTH,
Judge.

Presented September 9, 1939.

JOHN WEYMOUTH,
Judge.

page 150 } And at another day to-wit:

Virginia:

In the Circuit Court of the County of Elizabeth City.

M. J. Murphy, Plaintiff,

v.

Willis E. Darden and Swift & Company, Defendants

ORDER.

This day came the parties by their attorneys and the Defendants tendered to the Court their certificate of exceptions embracing all the evidence, instructions and other incidents of the trial of the case, and on request of the defendants the said certificate is signed and made a part of the record in this case.

JOHN WEYMOUTH,
Judge.

September 18th, 1939.

In the Clerk's Office of the Circuit Court of Elizabeth City County, Virginia, September 18th, A. D. 1939.

The foregoing vacation order was this day received in office and entered of record as the law directs.

Teste:

R. E. WILSON, Clerk.

Notice to E. Sclater Montague, Counsel for plaintiff of the presentation of Exceptions to the Judge and application to the Clerk for the transcript of record, which is in words and figures, as follows, to-wit:

page 151 } Virginia:

In the Circuit Court of Elizabeth City County.

M. J. Murphy, Plaintiff,

v.

Willis E. Darden and Swift and Company, Defendants

NOTICE.

To Mr. E. Sclater Montague, counsel for the plaintiff in the above styled cause:

Please take notice that, on the 9th day of September, 1939, we shall present at 11:00 o'clock A. M. at his office at Hampton, Virginia, to the Honorable John Weymouth, Judge of the Circuit Court of Elizabeth City County, certificates of exception in the above-styled cause for the purpose of applying to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas*.

At the same hour and place we shall apply to the Clerk of said Court for a transcript of the record in said cause for the same purpose.

E. RALPH JAMES, p. d.
SINNOTT & MAY, p. d.

Service of this notice accepted this 15th day of August, 1939.

FRANK KEARNEY,
of counsel for plaintiff.
MONTAGUE & HOLT,
of counsel.

page 152 } In the Clerk's Office of the Circuit Court of
Elizabeth City County, Virginia, September 18th,
A. D. 1939.

I. R. E. Wilson, Clerk of the Circuit Court of Elizabeth City County, Virginia, do certify that the foregoing is a true and perfect transcript of the record of the Notice of Motion for Judgment heretofore pending in this Court between M. J. Murphy, plaintiff and Willis E. Darden and Swift and Company, Incorporated, defendants, as the same now appears from the original papers and records on file in my office.

I further certify that the notice required by law to be given by the appellant to the appellee, upon application made to me for a transcript of the record has been duly given; is filed among the original papers in this office and is copied in this record.

Supreme Court of Appeals of Virginia.

And I further certify that a bond in the penalty of Three Thousand (\$3,000.00) dollars, with approved security, conditioned according to law was entered into as required by this Court.

Given under my hand this 18th day of September A. D. 1939.

R. E. WILSON,
Clerk of Circuit Court of Elizabeth
City County, Virginia.
By L. M. GIDDINGS,
Deputy Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

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