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# Record No. 5896

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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ROY LOUIS GALLAGHER

v.

COMMONWEALTH OF VIRGINIA

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FROM THE CIRCUIT COURT OF CAMPBELL COUNTY

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## RULE 5:12 BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

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Record No. 5896

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 28th day of April, 1964.

ROY LOUIS GALLAGHER,                      Plaintiff in error,  
*against*

COMMONWEALTH OF VIRGINIA      Defendant in error.

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From the Circuit Court of Campbell County  
Charles E. Burks, Judge

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Upon the petition of Roy Louis Gallagher a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Campbell County on the 22nd day of October, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

## RECORD

★      ★      ★      ★      ★

page 20 ]      In the Circuit Court of the County of Campbell  
on Tuesday the 22nd day of October, 1963.

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This day again came the Attorney for the Commonwealth and the attorney for the defendant to be heard on a motion to set aside the jury's verdict which motion is hereby overruled; to which action of the Court in overruling said motion, the defendant, by counsel objected and excepted.

It is therefore ordered by the Court that the said Roy Louis Gallagher pay a fine of \$200.00 the fine by the Court ascertained as aforesaid. And the Commonwealth is to recover of the defendant its costs by it in this behalf expended in the amount of \$103.16.

The defendant by counsel, having indicated his intentions to apply to the Supreme Court for a writ of error and *superseas* stay of execution is granted for a period of thirty (30) days. And this case is continued.

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page 21 ]

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Virginia Circuit Court of Campbell County Received and filed this the 5th day of Nov. 1963.

Teste:

H. E. BENNETT Clerk

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN pursuant to Section 4 of Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia of the appeal of the defendant, Roy Louis Gallagher, to the Supreme Court of Appeals of Virginia from the final judgment entered in this case on October 22, 1963.

ASSIGNMENT OF ERROR

The following assignments of error are made to the said judgment entered on October 22, 1963, to wit:

The said judgment is contrary to the law and evidence of this case, and the Circuit Court of Campbell County erred

1. In admitting into the evidence as the Commonwealth's exhibit No. 1 the Blood Alcohol Report of the Chief Medical Examiner and oral testimony as to the statements contained therein.

2. In failing to find and hold as a matter of law that a reasonable doubt as to the defendant's guilt existed by virtue of the fact that the Commonwealth failed to comply with all the requirements of Section 18.1-55 of the Code of Virginia (1950), as amended, and, in particular, the requirement that where practicable the blood sample shall be withdrawn by a physician of the defendant's choice.

page 22 ] 3. In refusing to give to the Jury Instruction C as offered by the defendant or any other instruction properly defining the words "drive or operate" as applicable to this case.

4. In refusing to find and hold, as a matter of law upon the evidence in this case, that the defendant did not "drive or operate" his automobile as charged.

5. In refusing and failing to set aside the verdict of the Jury and to enter a final judgment of acquittal in favor of the defendant.

EDWARD R. FEINMAN

Attorney for the Defendant

page 1 ]

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A stenographic report of the oral testimony and other incidents of the trial of the case of *Commonwealth of Virginia* versus *Roy Louis Gallagher*, tried on the 18th day of June, 1963 in the Circuit Court of Campbell County at Rustburg, Virginia before Honorable Charles E. Burks, and Jury.

APPEARANCES:

Leonard F. Jones, Commonwealth Attorney.

Mosby G. Perrow, Jr. and Edward R. Feinman, attorneys for the defendant.

*Earl H. Marks*

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page 3 ]

EARL H. MARKS,  
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Jones:

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Q. I believe you are a Deputy Sheriff of Campbell County.  
Is that correct?

A. Yes, sir.

Q. In your official capacity, Mr. Marks, did you receive a  
call to investigate this matter now before the Court?

A. Yes, sir, on November 27th, 1962.

Q. At approximately what time did you receive the call,  
Mr. Marks?

A. Approximately ten minutes after 10:00 at night, P.M.

Q. What time did you arrive at the scene?

A. Probably ten minutes later or 10:20 P.M.

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page 4 ]

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Q. Describe the condition of the highway at that point.

A. It is a dual highway with a median strip between the  
eastbound lanes and the westbound lanes, there are four lanes  
of travel.

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By Mr. Jones:

Q. Now, Mr. Marks, go ahead and tell the Court  
page 5 ] and jury what you found when you arrived at  
the scene.

A. I found a 1961 Cadillac sitting with the back end of it in  
the median strip of the highway with the left front wheel  
sitting on the shoulder, sitting at an angle. The right front  
wheel was sitting on the hard surface or the paved part of

*Earl H. Marks*

the road. When I arrived I could see the right rear wheel on the car was spinning. I noticed Mr. Gallagher sitting under the wheel of the automobile. I immediately got out and walked around him. He was sitting there and the car was in gear and he was giving it the gas at the time. There was a pickup truck sitting in front of him. Mr. Hillsman was sitting in the truck when I arrived. When I got there in my car he got out of the truck.

Q. Was anyone else at the scene besides the defendant, Gallagher, and Mr. Hillsman at the time you arrived?

A. No, sir, that is all that was there.

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page 6 ]

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By the Court:

Q. Did he deny he was driving?

A. Later on that night, yes, sir. Later on he probably told me seventy-five times he wasn't driving. He said, "I wasn't driving, you know I wasn't driving."

Q. You say he was under the wheel at the time and the rear wheel was spinning.

A. The rear wheel was spinning, yes, sir.

page 7 ] By Mr. Jones:

Q. Was any portion of this car on the highway at the time, Mr. Marks?

A. The left front wheel was sitting on the shoulder and the right front wheel was sitting up on the hard surface part of the highway.

By Mr. Feinman:

Q. Will you repeat that? I didn't understand you.

A. The left front wheel was sitting on the shoulder. The right front wheel was sitting on the hard surface part of the highway. The car was sitting at an angle.

By Mr. Jones:

Q. Does the defendant, Gallagher, live in that vicinity?

A. Yes, sir, it was directly in front of his house.

Q. Did he give you an explanation as to how it happened?

*Earl H. Marks*

A. Not that I recall.

Q. At the scene he did not?

A. No, sir.

Q. Mr. Marks, did you advise him of his right to a blood alcohol test?

A. I did.

Q. Was one taken, Mr. Marks?

page 8 ] A. Yes, sir. It was taken by Mrs. F. W. Merryman, Jr., a registered nurse. We have the results from the Chief Medical Examiner's office.

Q. Mr. Marks, I believe you said you informed him of his right to a blood test.

A. Yes, sir.

Q. Now, did you render any assistance to him in having this test obtained?

A. The only thing I did was to call his attention to it when the nurse was putting the blood in it.

Q. In other words, you took him to a registered nurse. It that correct?

A. Yes, sir.

Q. Who did you say took the blood?

A. Mrs. Merryman.

Q. Here at Rustburg?

A. Yes, sir.

Q. Was a sealed container from the Chief Medical Examiner's office provided for the taking of this blood?

A. Yes, sir.

Q. Was more than one sample of blood taken, Mr. Marks?

page 9 ] A. Yes, sir, there were two. The defendant was given one sample by the registered nurse that night.

By The Court:

Q. Were you present when it was taken?

A. Yes, sir.

By Mr. Jones:

Q. Was the container sealed in the presence of the defendant?

A. Yes, sir.

Q. Was that fact called to his attention?

A. It was called to his attention.

Q. Will you check the container there, please, sir? Does that container have a label identifying and showing the

*Earl H. Marks*

person making the test?

A. Yes, sir.

Q. The name of the accused?

A. Yes, sir.

Q. And the date it was taken?

A. Yes, sir.

Q. And the time it was taken?

A. Yes, sir.

Q. And what is the time given?

A. 10:50 P.M.

page 10 ] Q. And was that within two hours of the arrest?

A. Yes, sir.

Q. Now, what was done with the second sample? In other words, you took two samples of blood.

A. It was given to Mr. Gallagher by the nurse.

Q. What was done with this test?

A. It was mailed to the Chief Medical Examiner's office in Richmond.

Q. By whom?

A. By me.

Q. You mailed it personally?

A. Yes, sir.

By Mr. Jones:

Q. Where did you mail it?

A. At the post office here in Rustburg.

Q. You didn't put it in a woodpecker's nest?

A. No, sir.

By Mr. Jones:

Q. Is this the Chief Medical Examiner's report you received from the Chief Medical Examiner's office?

A. Yes, sir.

page 11 ] Q. Does that certificate show the name of the accused?

A. Yes, sir.

Q. The date it was received?

A. Yes, sir.

Q. The time it was received?

A. Yes, sir.

Q. By whom examined?

A. Yes, sir.

Q. Does it contain a statement that the container seal had



*Earl H. Marks*

not been broken and/or otherwise tampered with?

A. Yes, sir.

Q. Does it contain a statement of the alcoholic content of the sample?

A. Yes, sir.

Q. Will you read the alcoholic content?

A. 0.23 per cent.

Mr. Feinman: I object to that, if your Honor please. That isn't in evidence yet, the result of the test.

The Court: Go ahead and read it.

Mr. Jones: I offer it in evidence.

Mr. Feinman: Your Honor, I object and except to the question and answer.

page 12 ] By The Court:

Q. Read it.

A. Blood: 0.23 per cent alcohol by weight.

Mr. Jones: We offer that as Commonwealth's Exhibit No. 1.

The Court: All right, go ahead.

Mr. Feinman: If your Honor please, the defendant, by counsel, objects and excepts to the Court's action in permitting this to be introduced as an exhibit.

The Court: On what ground?

Mr. Feinman: On the ground that a proper foundation has not been laid.

The Court: In what respect?

Mr. Feinman: There has been no showing who drew the blood or what cleanser was used.

Mr. Jones: We have shown who drew the blood and will present the testimony as to the manner in which the blood was drawn.

The Court: All right, you make that objection. I will reconsider the introduction of the certificate when it is connected up. The certificate has not been admitted.

page 13 ] Before you can introduce the certificate you must comply with the conditions of the statute and I take it you will connect that up.

Mr. Jones: Yes, I will connect it up.

The Court: All right, go ahead.

Mr. Jones: Your witness.

*Earl H. Marks*

CROSS EXAMINATION

By Mr. Feinman:

Q. Mr. Marks, when you arrived at the scene you say the car was backed into the median strip?

A. Yes, sir.

Q. What was the general heading of the car? Was it in the direction of travel in that lane? Was the heading of the car in the general direction of travel in the lane in which you were proceeding on the side in which it was facing?

A. In the general direction, yes.

Q. It was over at an angle, I understand that, but the general direction if it could have been pulled out it would have been going in the general direction of traffic in that lane of the highway?

A. Yes, sir.

page 14 ] Q. You stated as you drove up you saw the right rear wheel spinning. Is that correct?

A. That is correct.

Q. Was it the right or left wheel? Is there any question in your mind?

A. No, sir, the right wheel. I drove to the right side of the car.

Q. You drove to the right side of the car and it was the right rear wheel that was spinning, the one closest to the hard surface?

A. The one closest to the hard surface on my side of the highway.

Q. Let's forget the opposite direction lane. Was that wheel off the ground?

A. Not entirely off the ground, no, sir. ✓

Q. It was off the ground sufficient so that it made no traction with the ground whatsoever, isn't that correct?

A. Some slight traction, yes, sir. It was raised where all the weight wasn't on it.

Q. And it was spinning? ✓

A. That is true.

Q. If there was traction it would have been moving. Is that right?

By The Court:

Q. Was it touching the ground or pavement?

A. It was touching the ground.

*Earl H. Marks*

By Mr. Feinman:

Q. It was not touching the ground with sufficient force to keep it from spinning, it was just spinning.

A. Yes, sir.

Q. And you also say that this was directly in front of Mr. Gallagher's home.

A. Yes, sir.

By The Court:

Q. The wheel that was spinning was any part of it on the hard surface?

A. No, sir.

Q. Would it be down in the track?

A. Yes, sir, a slight track.

By Mr. Feinman:

Q. Would you say it is essentially true that the weight of the car was on either the axle or the differential housing or some part of the car and that was holding the wheel up so it wasn't touching the ground?

page 16 ] A. It could have been. I didn't look under it.

Q. You say that Mr. Gallagher was sitting behind the wheel of the car?

A. Yes, sir.

Q. And that the pickup truck that belonged to Mr. Hillsman or that he was driving was sitting in front of this vehicle?

A. Yes, sir.

Q. Did you observe any rope there?

A. Yes, sir.

Q. Was the rope broken or had it been broken?

A. I don't know whether it was broken at that time or not. There was a piece of rope tied to the bumper of the truck and to the car and it could have been broken, I didn't pay that much attention.

Q. Was it obvious to you that Mr. Hillsman was attempting to pull that car out?

A. That is correct.

Q. Did you see the vehicle move?

A. Only the wheel.

✓ Q. You only saw the wheel turning. Did you see the body budging or the automobile itself move?

page 17 ] A. No, sir.

By The Court:

Q. What was Mr. Gallagher doing under the wheel? You

*Earl H. Marks*

say the wheel was turning. Was the gas on?

A. Yes, sir. The engine was running and he was feeding it gas.

Q. The engine was running?

A. Yes, sir.

Q. What was he doing? What was his movements? What did he appear to be doing?

A. He was attempting to get the car out in the highway.

Q. To go forward?

A. Yes, sir.

Q. Was the car in gear at the time?

A. Yes, sir.

Q. It was in gear?

A. Yes, sir.

By Mr. Feinman:

Q. How fast was the rear wheel turning?

A. I couldn't answer that question.

Q. Was it going real fast? If it was really flying you could say that.

page 18 ] A. No, it wasn't flying.

Q. Was it turning over very slowly or can you give us any sort of an idea of how fast the wheel was turning?

A. It would be hard to answer. It wasn't slow and it wasn't fast.

Q. Just turning?

A. That is true.

Q. You are aware of the fact, sir, that an automobile in gear or, in fact, an automobile with some hydromatic transmission is not in gear but in neutral and one wheel is not on the ground it might revolve?

A. Sure.

Q. How long did Mr. Hillsman stay there?

A. I don't remember.

Q. Did they make any further attempt to move that vehicle after you arrived?

A. No, sir.

Q. Didn't try to start it up again or anything like that?

A. No, sir.

By The Court:

Q. Did Mrs. Gallagher ever come out there?

*C. D. Hillsman*

A. She came out after I got Mr. Gallagher in  
page 19 ] my car, she came out and talked to him. He was  
sitting in my car.

By Mr. Feinman:

Q. Did you ever talk to her?

A. No, I did not.

Q. Might you have misunderstood Mr. Gallagher before  
when you stated he said he was on his way to work? Is it  
possible you misunderstood him?

✓ A. He said he was on his way to work.

Q. Couldn't he have said he was on his way to his sister's  
to do some work for her up there?

A. No, sir.

Q. No possibility in that regard?

A. No, sir.

Q. I believe you also said on your direct testimony that  
Mr. Gallagher didn't tell you at the time he was at the scene  
of the accident how the car got into the position it was in.  
That is correct, isn't it?

A. That is right.

Q. He didn't tell you until you got down to Rustburg?

A. Probably on the way to Rustburg.

Q. And when he told you that he also denied, as you said,  
seventy-five times or more that he was driving it  
page 20 ] but his wife had driven it back there?

A. He didn't say that his wife was driving it  
then, he just kept saying, "I wasn't driving, you know I  
wasn't driving."

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page 21 ]

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C. D. HILLSMAN,  
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Jones:

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Mr. Hillsman, in reference to this matter before the Court  
now what first attracted your attention to Mr. Gallagher's

*C. D. Hillsman*

car?

A. Well, I was coming down Timberlake Road headed toward Timberlake and I saw the car sitting there and I just stopped.

page 22 ] Q. Did you talk with Mr. Gallagher?

A. Yes, sir, I did.

Q. Then go ahead and tell the Court what you offered to do.

A. Well, I saw the car sitting in the ditch. I didn't have anything with me to pull a car out of a ditch with. We discussed the situation and he said he might have something.

Q. Did you have a chain in your car?

A. I usually carry a chain in my truck at all times.

Q. You had one that day, didn't you?

A. Yes, I believe I did have one that night but no hooks or nothing on it. I had no way of hooking the chain to the truck.

Q. Was anyone at the scene when you first arrived there?

A. I don't know who the guy was. He said he belonged to the Life Saving Crew and he asked Mr. Gallagher did he want him to call a wrecker or anything to get him out and he said no, he could take care of that.

Q. Did you go up to Mr. Gallagher's house for a rope?

A. Yes, sir, we walked up to his house to see if we could find anything to pull the car with and the only thing we could find was a piece of rope.

page 23 ] Q. Did you all have any success with that piece of rope?

A. No.

Q. Why not?

A. It was a small rope and this was a heavy car and by the time we tightened the rope up it would break. I saw I couldn't pull it.

Q. Could you tell whether or not the defendant had been drinking?

A. Yes, I could smell it on his breath. He had been drinking. ✓

Q. Were you very anxious to get his car out into the highway for him?

A. No, sir, I wasn't. I like to help anybody out if I can.

Q. You just saw his condition?

A. I wouldn't say just by looking at his condition he had had too much that he couldn't drive.

Q. When you offered to pull him out what did he do? Did

*C. D. Hillsman*

you attach the rope to his front bumper?

A. Yes.

Q. Who got into the car?

A. Mr. Gallagher got into the car.

page 24 ] By The Court:

Q. Was he in the car when you arrived there?

A. No, sir, when I first arrived and talked to this other fellow that belonged to the Life Saving Crew he was standing out beside the car. While I was standing there talking to him Mr. Gallagher got in the car.

By Mr. Jones:

Q. Was his wife at the scene?

A. No, I never did see his wife that night.

Q. And you say he got in the car. You know whether he ever started the motor?

A. The motor was already running when I stopped.

Q. The motor was running at the time you got there. Did he get into the driver's seat of the car?

A. Yes, sir.

Q. Did he hold onto the wheel?

A. I was standing in front of his car and I couldn't tell.

Q. Was he in the car at the time you were attempting to pull him?

A. Yes, he was.

Q. You know whether he accelerated the car?

page 25 ] A. Yes, the motor was running.

Q. He accelerated it when you tried to pull

✓ him out.

✓ A. Yes, sir. One wheel was completely off the ground and it would have been impossible for the car to have moved by itself.

Mr. Jones: All right, that is all.

### CROSS EXAMINATION

By Mr. Feinman:

Q. You didn't know Mr. Gallagher before you arrived there that night?

A. No, sir, that was the first time I had seen him in my life.

Q. You stopped to lend him a helping hand as you would

*C. D. Hillsman*

any other stalled motorist?

A. Right.

Q. You say you had a chain in your truck but no hooks.

A. Yes, sir.

Q. And a chain without hooks is a useless tool?

A. No place to hook it to.

Q. And you say Mr. Gallagher was outside  
page 26 ] the car when you arrived?

A. When I first arrived.

Q. Then did the two of you go up his driveway toward his house?

A. Yes, sir.

Q. And what was the purpose in going up there?

A. After a rope, after something to pull with.

Q. Where did you go when you went up there? You walked up to the house with Mr. Gallagher?

A. Yes, sir. I stopped at the garage. He has a garage that joins his house and I stopped at the garage and he went in the house.

Q. Did Mrs. Gallagher know you were up there?

A. I don't know.

Q. Did Mr. Gallagher know what you were going up there for?

A. Yes, sir.

Q. Was he able to keep up with you and walk along with you as you went up that hill?

A. Yes, he walked along with me.

Q. This was before the police officer arrived?

A. Yes, sir.

page 27 ] Q. Did he tell you where to look or point out anything in the garage?

A. No, he said he didn't know where anything was and he would have to hunt for something.

Q. Where did he go?

A. He went into the house.

Q. And then where did you go?

A. I stayed there at the garage.

Q. Did you find anything in the garage while he was gone?

A. Yes, while I was there looking in the garage I seen a piece of rope while I was waiting for him to come up.

Q. After you found the rope did he come back out of the house?

A. Yes, sir.

Q. Did he have a rope with him? Had he found some rope?



*C. D. Hillsman*

A. Yes, sir, he had a piece of rope with him.

Q. Was he able to walk reasonably well? Could he keep up with you when you walked?

A. Yes, sir.

Q. He didn't stumble or fall?

A. I wasn't paying any attention to his walk.

Q. There was nothing about his manner of movement that attracted your attention one way or the other?

A. Nothing. I noticed he had had a drink or two but I don't know how much.

Q. And he went back down to the car?

A. Yes, sir.

Q. Where the car and the truck were and you put your vehicle in front of his. Who tied the two vehicles together with the rope?

A. I did that myself.

Q. You say Mr. Gallagher got in the car to help?

A. When we got back down there he got in the car.

Q. And you got in the pickup truck?

A. Yes, sir.

Q. And you put a strain on the rope and he was spinning his wheels and were you able to move the vehicle?

A. No, sir, we were not.

Q. Did you examine the rear wheels or get down and look?

A. I walked around behind the car and noticed that the right rear wheel was off the ground.

Q. Was it able to give any traction whatsoever?

A. No, it wasn't.

Q. Are you familiar with the fact that a car with one wheel up off the ground and in gear that all the power is going out through the spinning wheel?

A. Yes, sir, unless it has an equal lock rear end and that doesn't have an equal lock rear end.

Q. You know for a fact this car doesn't have that kind of rear end?

A. Yes, sir.

Q. You say it was impossible to move that car by itself?

A. Yes, sir.

Q. Was that fact apparent to you?

A. Yes, sir.

Q. Was that fact apparent to Mr. Gallagher?

A. Apparently so.

*C. D. Hillsman*

Q. Did he indicate that he understood clearly the car couldn't move without help from the outside?

A. Yes, sir.

By The Court:

Q. Did the car touch the ground before it began to spin? Did the wheels touch the ground?

A. No, sir. There is a water drain in between the highway and the way the car was sitting the bumper was up on the side of the bank and the wheel was sitting down in the hole.

page 30 ] Q. Was any part of that right wheel touching the ground?

A. It was in the grass and I didn't examine the ground to see. It was in the grass and it could have.

By Mr. Feinman:

Q. But the car did not move?

A. No, sir.

The Court: You have been over that. Stand aside. Call the next witness.

By Mr. Feinman:

Q. Where were you when the police *office* drove up?

A. I believe I was standing behind the truck unhooking the piece of rope that had broke.

Q. Where was Mr. Gallagher at the time?

A. He was sitting in the car.

The Court: Stand aside.

Mr. Feinman: I am not through.

The Court: You have been over the thing.

Mr. Feinman: There is a conflict in the evidence.

The Court: You have his evidence. Why do you keep on after him?

page 31 ] RE-DIRECT EXAMINATION

By Mr. Jones.

Q. Mr. Hillsman, do you recall telling Mr. Marks that you had a chain in your car but you saw this man's condition and weren't too anxious to get him on the highway?

A. No, sir. I know when anybody is drinking they don't

*Earl H. Marks*

have any business being on the highway.

Q. You did tell him that?

A. I would have gladly made arrangements to get chains and everything else and hook to his car and pulled his car back up to his house for him.

Mr. Jones: That is all.

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page 34 ]

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EARL H. MARKS,  
recalled, testifies as follows:

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page 35 ]

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## CROSS EXAMINATION

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page 36 ]

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By Mr. Feinman:

Q. Did you at any time inform the defendant that where practicable he could have a physician of his choice withdraw the blood?

A. I don't remember.

Q. And if the defendant says you didn't would you deny that?

A. Repeat the question.

Q. I will withdraw the question, but to your knowledge you do not remember telling him where practicable he could have a physician of his choice to withdraw the blood and offered him an opportunity to do so?

A. I don't remember.

*Earl H. Marks*

Q. But you did take him to Mrs. Merryman at Rustburg.

A. Mrs. Merryman was called and came to the office.

Q. And did you make any effort to find out if  
page 37 ] he had a physician he would like to have with-  
draw his blood?

A. I don't remember.

By Mr. Jones:

Q. Did he request anybody else to withdraw it?

A. No, sir, he didn't.

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Mr. Jones: If your Honor please, we offer Commonwealth's  
Exhibit No. 1 in evidence.

page 38 ] The Court: Very well.

Mr. Jones: That is the Commonwealth's case,  
your Honor.

The Court: We will take a little recess, about five minutes.  
Members of the jury, go to your room.

(JURY OUT)

Mr. Feinman: If your Honor please, the statute requires,  
where practicable, the defendant may have a physician of  
his own choice take the blood sample. The officer did not  
inform this defendant of his opportunity to avail himself of  
his right. The officer took him in custody to Rustburg and  
called Mrs. Merryman and we object to the introduction of  
this exhibit on that ground.

The Court: Does the statute make it mandatory he be  
advised?

Mr. Jones: That statute has got so many things in it I  
am not sure what is in it.

The Court: I overrule the objection. Go ahead.

Mr. Feinman: While the jury is out I would like  
page 39 ] to make a motion in their absence.

If your Honor please, the defendant, by counsel,  
moves the Court to strike the Commonwealth's evidence in  
this case as being insufficient to sustain a conviction, first,  
on the ground that this blood test has been improperly ad-  
mitted into evidence and particularly that the accused was  
not informed of and given an opportunity to have the blood  
drawn by a physician of his choice.

*Mrs. R. L. Gallagher*

The Court: I have passed on that.

Mr. Feinman: The second ground is that there has not been any evidence that the defendant is guilty of driving or operating a motor vehicle as contemplated by the statute in that the vehicle itself was never moved. The evidence is clear and distinct that the motor vehicle was not moved in any direction.

The Court: I overrule your motion. Sit down and call the jury in.

Mr. Feinman: We object and except, of course, to the Court's ruling.

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(JURY PRESENT)

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MRS. R. L. GALLAGHER,  
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

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By Mr. Feinman:

Q. Tell us what happened. What happened as you drove away?

A. I backed out into the left-hand lane of traffic, you understand, across the right-hand lane of traffic into the left-hand lane of traffic, which I always do. I do that when I back out from home to go to work or anywhere else and I didn't cut the car short enough to make the turn and it went over into the median strip.

Q. When you say the left-hand lane —

The Court: Go ahead and let her tell what happened. Don't interrupt her.

By Mr. Feinman:

Q. What happened to the car?

A. The car got stuck, of course, and I couldn't move it.

Q. Did you get out to look?

*Mrs. R. L. Gallagher*

A. I got outside and looked and I saw what had happened.

I saw I couldn't get it out.

page 43 ] Q. What was the condition of the car while  
you were there?

A. The back wheels were sitting over in the median strip  
and one wheel was off the ground.

Q. Did you, yourself, try to get it out?

A. Yes, I did.

Q. And did you have any success at all?

A. No.

Q. Then what did you do?

A. I got out of the car.

Q. Then what did you do?

A. I went to the house and cut the lights on so I could see.

Q. Then what happened after that?

A. I left him at the car.

Q. Then what did you do?

A. In the meantime while I was cutting the lights on Mr.  
Hillsman came up and then he and Mr. Hillsman came to-  
gether to the house after a rope.

Q. Did Mr. Hillsman come in the house?

A. No, he didn't come inside the house. He was under  
the garage and on the breezeway. My husband went to the  
basement and got a piece of rope.

page 44 ] Q. Then what happened? Where did your hus-  
band and Mr. Hillsman go?

A. He and Mr. Hillsman went back to the car. I didn't  
go back right then.

Q. When did you learn the policeman had arrived?

A. I was standing in my living room door and I saw Mr.  
Marks when he drove up.

Q. What did you do after he drove up?

A. I just stood there. There wasn't any use for me to go  
back down there. I waited awhile and then I went back to  
the car and Mr. Marks had already put him in the car.

Q. In whose car, in Mr. Marks' car?

A. In the Sheriff's car.

Q. Did you talk with the Sheriff at all?

A. He didn't say one word to me. Didn't either one of  
them ask me any questions or say anything to me.

Q. Did you talk to your husband any?

A. I said a few words to him.

Q. Were you informed where your husband was going  
then?

*Mrs. R. L. Gallagher*

A. Yes.

Q. What did you do then? Did they leave or what?

A. I left and went back to the house.

page 45 ] Q. And did you hear anything more that evening?

A. Nothing more than the State man came to my door after I got back to the house, came up and told me that I would have to move the car.

Q. What did you do then?

The Court: No need going into that. That is a subsequent matter. The question here is whether he was driving the automobile or operating it at the time of his arrest.

By Mr. Feinman:

Q. Did you call a wrecker to come and get the car?

A. Yes, I called John P. Hughes.

Q. Did they come?

A. He didn't come right then. I guess it was a half an hour or more before he came.

Q. And did the wrecker lift the car over and out of the ditch?

A. I was in the car. He told me to start up the motor of the car and he lifted the car back up on the highway.

Mr. Feinman: Your witness.

page 46 ] CROSS EXAMINATION

By Mr. Jones:

Q. Mrs. Gallagher, that is a wide road, a two-lane road on each side?

A. Yes, sir.

Q. You have backed into that road before?

A. Yes, sir, I back out every time and everybody else does on that road.

Q. You have been accustomed to backing out in there?

A. Yes, sir.

Q. And this was about 10:00 o'clock at night?

A. It was 9:30 at night when I backed out.

Q. 9:30?

A. When we started out to his sister's it was 9:30 and it was very dark and cold.

Q. And the car had been there until the Sheriff got there

*Mrs. R. L. Gallagher*

about ten minutes after 10:00, had backed in about forty minutes before?

A. Yes, sir.

Q. You have back up lights on that Cadillac?

A. Yes.

Q. And with the back up lights on it you could  
page 47 ] see all right?

A. No, I couldn't see very well. It was dark.

Q. But you are accustomed to backing out in that highway. Have you ever backed over into that ditch before?

A. Not that far. I have got off onto the shoulder before.

Q. You know how wide that road is there?

A. It is a wide road.

Q. About twenty-four feet wide and then the shoulders on each side are three or four feet?

A. Yes, sir.

Q. And yet you say you backed and backed into the ditch. You had not been drinking, had you?

A. No, sir, I don't drink.

Q. But your husband had been drinking?

A. He had one drink that I know of.

By The Court:

Q. Why did you drive his car?

A. I knew he had a drink. I drive his car occasionally, not very often. ✓

By Mr. Jones:

Q. But on this particular night you didn't tell  
page 48 ] the officer anything about that, did you?

A. He didn't ask me anything.

Q. You knew he had arrested your husband for driving.

A. I presumed he had. He was in the Sheriff's car.

Q. Why didn't you tell him you drove the car?

A. Because he didn't ask me any questions.

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INSTRUCTIONS

The Court: The Court grants instructions No. 1, No. 2 and No. 3 as offered by the attorney for the Commonwealth.

The Court grants instructions lettered A and B as offered by the attorney for the accused.



The Court denies Instruction lettered C as offered by the attorney for the accused.

Mr. Feinman: Will you Honor give us an instruction defining the words "driving" and "operating?"

The Court: I am not going to give you any definition. I will let you argue the case.

Mr. Feinman: If your Honor please, we respectfully object and except to the refusal of the Court to give such an instruction and we except to the Court's refusal to give Instruction C as offered.

The Court: You all argue the evidence.

Gentlemen of the jury, the Court instructs you that the law of this case is as follows:

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*Defendant's Instruction C (Denied):*

"The Court instructs the jury that the 'driving or operating' a motor vehicle to constitute the offense charged, requires the movement of the vehicle which is the result of a positive or affirmative action on the part of the driver or operator thereof to put the vehicle in motion.

page 55 ] Therefore, if either the vehicle is not moved or put in motion, or if it is put in motion but not as a result of positive or affirmative action on the part of the driver or operator, there is no 'driving or operating' as contemplated by this charge."

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Note: The jury having returned its verdict finding the defendant guilty and fixing his punishment at a fine of \$200.00, the following ensued:

Mr. Feinman: Will your Honor entertain a motion?

The Court: All right.

Mr. Feinman: If your Honor please, the defendant moves

that the verdict be aside on the following grounds:

1. That the verdict is contrary to the law and the evidence in this case;

2. That the admission of the report on the blood page 57 ] analysis was improper in that it was mandatory for the Commonwealth to comply with all requirements of the Code as amended and that sub-section (c) of that section makes it mandatory where practicable a physician of the defendant's or accused's choice shall withdraw the blood and the Commonwealth did not comply with that and it was error not to comply;

(3) That the jury was improperly instructed by the Court's refusal to give Instruction C as offered; and

(4) On the ground that the evidence is not sufficient to sustain a conviction of operating a motor vehicle under the statute as contemplated by that statute.

The Court:

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page 61 ]

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The Commonwealth Attorney started out suggesting to the jury that they could find him guilty of driving by inference or that the jury could infer he drove from the house down there; that nobody touched the car but him. Well, there is no evidence in the case upon which the jury would be justified in making that inference because he didn't go on the witness stand and he is not prejudiced by that but page 62 ] his wife did go on the stand and explained why she drove the car from the house down there and there is no contradiction of her and her statement was clear, it was a plausible statement and nobody contradicted it. Now, on that state of facts under the law of Virginia neither a jury nor a court can disregard her statement. That is the only evidence on that point so therefore you have to believe it because it is reasonable and nobody denied it and therefore you couldn't infer that he was the driver. As you recall, the Court interrupted in the middle of the argument and instructed you on that point.

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Mr. Feinman: If your Honor please, I would like to include in my motion that if the Court sees fit to set aside the verdict of the jury it will enter up judgment in favor of the defendant.

The Court: All right,

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A Copy—Teste:

H. G. TURNER, Clerk.

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