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Records Nos. 5138, 5139

In the Supreme Court of Appeals of Virginia at Richmond

MALCOLM A. NEWTON
v.
ARTHUR CARPENTER

FRANK WAYNE NEWTON, AN INFANT, ETC.,
v.
ARTHUR CARPENTER

FROM THE CIRCUIT COURT OF HENRICO COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three 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 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

Record No. 5138

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 13th day of January, 1960.

MALCOLM A. NEWTON, Plaintiff in Error,

against

ARTHUR CARPENTER, Defendant in Error.

From the Circuit Court of Henrico County

Upon the petition of Malcolm A. Newton a writ of error is awarded him to a judgment rendered by the Circuit Court of Henrico County on the 21st day of July, 1959, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Arthur Carpenter was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5139

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 13th day of January, 1960.

FRANK WAYNE NEWTON, AN INFANT, ETC.,
Plaintiff in Error,

against

ARTHUR CARPENTER, Defendant in Error.

From the Circuit Court of Henrico County

Upon the petition of Frank Wayne Newton, an infant who sues by Malcolm A. Newton, his father and next friend, a writ of error is awarded him to a judgment rendered by the Circuit Court of Henrico County on the 21st day of July, 1959, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Arthur Carpenter was defendant; no bond being required.

RECORD NO. 5138

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* * * * *

Malcolm A. Newton, Plaintiff,

v.

Arthur Carpenter, Defendant.

ORDER.

This day came again the parties and their attorneys, and the jury sworn on yesterday to try the issue in this case again appeared in Court in pursuance of their adjournment.

And having heard the evidence of the plaintiff, upon motion of the defendant, by counsel, and over the objection of the plaintiff the Court doth strike out said plaintiff's evidence to which action of the Court said plaintiff duly excepts.

And thereupon the defendant, by counsel, moved the Court to enter summary judgment for the defendant which motion having been fully heard and materially considered by the Court is granted, to which action of the Court the plaintiff objects and excepts.

Whereupon it is considered by the Court that said plaintiff take nothing by his suit herein and that said defendant go hence without day and recover against said plaintiff his costs about his defense in this behalf expended, to all of which said plaintiff duly excepts.

Enter 7/21/59.

EDMUND W. HENING, JR., Judge.

I ask for this:

ERNEST G. GARRETT, JR., p. d.

We object to this order and except to its entry:

ROBERT H. PATTERSON, JR., Clerk.

* * * * *

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* * * * *

Received and filed in office September 17, 1959.

Teste:

MARGARET B. BAKER, Dep. Clerk.

MALCOLM A. NEWTON, Plaintiff,

v.

ARTHUR CARPENTER, Defendant.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Comes now the plaintiff and gives notice of his appeal from the final judgment entered herein on the 21st day of July, 1959.

Further, this plaintiff assigns the following errors committed by the Court:

(1) The Court erred in striking the plaintiff's evidence and entering summary judgment for the defendant, on the ground that the evidence introduced by and on behalf of the plaintiff in the trial of the action required its consideration by the jury.

(2) The Court erred in sustaining the defendant's objection to the filing of the plat offered as plaintiff's Exhibit "S" and showing the distances of visibility in the area where Frank Wayne Newton received his injuries, on the ground that consideration of such plat by the jury was necessary to enable it to determine the defendant's negligence.

(3) The Court erred in sustaining the defendant's objection to the testimony offered by the witness George Hunt, which testimony would have shown to the jury the page 14 } lack or great slowness of movement of Frank Wayne Newton at the time he received his injuries, on the ground that consideration of such testimony by the jury was necessary to enable it to determine the defendant's negligence.

(4) The Court erred in sustaining the plaintiff's objections

to the admission of testimony offered by the plaintiff and showing the habit and frequency of children of tender years playing in the immediate vicinity of the place where Frank Wayne Newton received his injuries, on the ground that consideration of such testimony by the jury was necessary to enable it to determine the defendant's negligence.

MALCOLM A. NEWTON
By WILLIAM H. KING
Of his counsel.

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RECORD NO. 5139

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• • • • •

Frank Wayne Newton, an infant who sues by Malcolm A. Newton, his father and next friend, Plaintiff,

v.

Arthur Carpenter, Defendant.

ORDER.

This day came again the parties and their attorneys, and the jury sworn on yesterday to try the issue in this case again appeared in Court in pursuance of their adjournment.

And having heard the evidence of the plaintiff, upon motion of the defendant, by counsel, and over the objection of the plaintiff the Court doth strike out said plaintiff's evidence to which action of the Court said plaintiff duly excepts.

And thereupon the defendant, by counsel, moved the Court to enter summary judgment for the defendant which motion having been fully heard and materially considered by the Court is granted, to which action of the Court the plaintiff objects and excepts.

Whereupon it is considered by the Court that said plaintiff take nothing by his suit herein and that said defendant go hence without day and recover against said plaintiff his costs about his defense in this behalf expended, to all of which said plaintiff duly excepts.

Enter 7/21/59.

EDMUND W. HENING, JR., Judge.

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We object to this order and except to its entry:

ROBERT H. PATTERSON, JR., p. q.

• • • • •

page 23 }

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Frank Wayne Newton, an infant who sues by Malcolm A. Newton, his father and next friend, Plaintiff,

v.

Arthur Carpenter, Defendant.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Comes now the plaintiff and gives notice of his appeal from the final judgment entered herein on the 21st day of July, 1959.

Further, this plaintiff assigns the following errors committed by the Court:

(1) The Court erred in striking the plaintiff's evidence and entering summary judgment for the defendant, on the ground that the evidence introduced by and on behalf of the plaintiff in the trial of the action required its consideration by the jury.

(2) The Court erred in sustaining the defendant's objection to the filing of the plat offered as plaintiff's Exhibit "S" and showing the distances of visibility in the area where the plaintiff received his injuries, on the ground that consideration of such plat by the jury was necessary to enable it to determine the defendant's negligence.

page 24 } (3) The Court erred in sustaining the defendant's objection to the testimony offered by the witness George Hunt, which testimony would have shown to the jury the lack or great slowness of movement of the plaintiff at the time he received his injuries, on the ground that consideration of such testimony by the jury was necessary to enable it to determine the defendant's negligence.

(4) The Court erred in sustaining the plaintiff's objections to the admission of testimony offered by the plaintiff and showing the habit and frequency of children of tender years playing in the immediate vicinity of the place where the plaintiff received his injuries, on the ground that consideration of such testimony by the jury was necessary to enable it to determine the defendant's negligence.

FRANK WAYNE NEWTON, AN
INFANT WHO SUES BY
MALCOLM A. NEWTON, HIS
FATHER AND NEXT FRIEND
By WILLIAM H. KING
of his counsel,

• • • • •

TRANSCRIPT
RECORDS NOS. 5138 AND 5139

page 3 } Note: The Jury was duly impaneled; witnesses were sworn and excluded; the Reporter was sworn.

The Court: Gentlemen, are you ready for the Court to tell the Jury the matter we took up in chambers?

Mr. King: Yes, sir.

Mr. Garrett: Yes, sir.

The Court: Gentlemen of the Jury, as a result of the conference with the lawyers in my office, first in regard to the opening statement that counsel always make as to what they intend to prove, they will use, each of them, I believe, a plat, a survey made by one of the local surveyors whose reputation is such, I gather, that they joined in having the same man make the survey. Later, that will be placed in evidence.

At their request and with their joint consent, the Court approved their using the survey in making their opening statements, as an outline in the place of this accident.

Now, the other announcement the Court will make at this time, also based on a conference with the attorneys before we start the trial here, is along this line: that the boy, Frank Newton, was something over seven years old when the accident happened. In any event, as sometimes happens in automobile cases, he has no recollection of how the accident happened at all, the facts of the accident, the manner in which it happened, and for that reason and for his own page 4 } benefit counsel has suggested and the Court agrees that he be permitted to absent himself from the courtroom during the great majority of the trial. It is possible he might be called for one or two questions.

The Court wanted to explain to you that that is why that is being done. Is there anything else? Does that cover it?

Are you gentlemen ready to start your opening statements?

(The opening statements of counsel were made; and the taking of evidence was commenced, as follows:)

The Court: Who will be your first witness, Mr. King?

Mr. King: Officer Montgomery.

The Court: Are there any stipulations to be reached beforehand or not?

Mr. King: Mr. Garrett said I might have made a mark on this and what I would like to do at this time, before Officer

Montgomery comes in, is to have this received as Exhibit No. 1.

The Court: Received and filed as Plaintiff's Exhibit No. 1.

(The plat was received and filed as Plaintiff's Exhibit No. 1.)

OFFICER E. T. MONTGOMERY,

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

page 5 } DIRECT EXAMINATION.

By Mr. King:

Q. Now, Mr. Montgomery, will you please state to the jury your full name and your place of residence and your occupation?

A. Edward Turner Montgomery. I live at Laurel, out in Henrico County; with the Henrico County Police Department.

Q. What was your occupation on May 9, 1957?

A. I was at that time a patrolman.

Q. By the pleadings in the case, Officer, the parties to this case agree that at about 2:50 p. m. on the afternoon of Thursday, May 9, 1957, the plaintiff, Frank Wayne Newton, a young boy, was struck by a motor vehicle. We don't agree on what the vehicle was or whose it was. They agree he was struck by a motor vehicle at a point on Penick Road about 750 or 800 feet west of its intersection with Staples Mill Road and I would like to show you this plat which has now been received as Plaintiff's Exhibit No. 1 and ask that you hold that before you in such a manner that the jury might be able to see it, when I ask you a question or two about it.

Now, I think perhaps we can do this—

(Note: The witness showed the plat to the jury.)

Q. Did you investigate that accident?

A. I investigated an accident on the ninth day of
page 6 } May, 1957, approximately 2:50 p. m., yes, sir.

Q. Now, during the course of that investigation, did the Henrico Police Department take any photographs at the scene of the accident?

A. Not at that particular day, that particular time. We took some Sunday, the 12th day of May, three days later.

Officer E. T. Montgomery.

Q. Which would be three days later?
A. Yes, sir.
Q. And I show you these pictures and ask you if they are—The parties agree those are the photographs taken on the Sunday afternoon three days later after the accident, and do you also feel that those are correct?
A. Yes, that's a copy of the pictures that we had taken.

The Court: Are these to be made a part of the record at this time?
Mr. King: Yes, sir. I suggest ,if the Court please, that they be received as Plaintiff's Exhibit 2-A, 2-B, or through the appropriate letter, whichever that would be. I think there are approximately six or seven photographs there.
The Court: I would like to receive these as 2, 3, 4, 5, 6, 7, 8. There are seven of them. Do you want to offer all seven?
Mr. King: Yes, sir.

page 7 } (The photographs were received and filed as Plaintiff's Exhibits No. 2 through No. 8, inclusive.)

The Court: Gentlemen of the jury, you will have an opportunity to see these exhibits once they are identified by the witnesses. Anything that comes in as an exhibit also goes to the jury room with you for consideration at the conclusion of the trial.

Q. Now, Officer, will you tell us this, which I think is a matter that is necessary, what were the weather conditions along Penick Road on the afternoon of Thursday, May 9, 1957?
A. I'll check it. It happened approximately two years ago. According to the notes I have here in my accident investigation book, it was daylight and weather was clear when I arrived on the scene approximately 3:00 p. m.
Q. Was the sun shining, sir?
A. As well as I can recall, it was. I had it marked in my book that the weather was clear.
Q. Was Penick Road dry?
A. Dry, that is correct.
Q. All right, sir. Now, will you just start testifying on what the nature of your investigation was, what your findings were, and what was done in that regard? Now, I would suggest that you start with the time that you arrived on the

Officer E. T. Montgomery.

scene and from that point on deal with the entire
page 8 } matter chronologically, take it day by day through
the end of your investigation, and you might, if you wish, use those photographs or the plat to assist the jury in understanding what the nature of your testimony will be.

A. Well, I arrived on the scene approximately 3:00 p. m. on Thursday afternoon, the 9th of May, and as I arrived at the scene, young Frank Wayne Newton was in the process of being loaded on the ambulance.

Q. At the time you arrived?

A. At the time I arrived. I was not able to talk with him at the scene. I determined that he had been riding a bicycle and had been struck by an automobile or some type motor vehicle.

Q. Speak so the jury can hear you.

A. There was no one at the scene at the time that could give me any information as to who the driver of the motor vehicle was that had struck the bicycle which the boy was riding. As I said, I wasn't able to talk with the boy. He was being loaded on the ambulance. He was hurt rather seriously, wasn't able to talk with him. There were several spectators there and no one made themselves known to me at the time that they were the operator of the motor vehicle. If anyone there was the operator of the motor vehicle, they didn't make themselves known to me. There were several spectators there that offered information as to what type of
vehicle it had been.
page 9 } One was a young boy about twelve years old that
stated he had been in the schoolroom at the Dumbarton School which is in the vicinity and that he had not seen the actual impact but right after it had occurred he had seen a green Chevrolet pickup truck, one which resembled his grandfather's truck, leave the scene.

There were several other spectators there, I didn't get the names or addresses, that gave the information that led me to believe there was a dump truck involved, a green dump truck. However, on the bicycle I saw some red paint on the bicycle.

Q. Let me ask you this, Officer. When you arrived at the scene was Mr. Carpenter there, the defendant in this case?

A. I'm not in position to say. I didn't recognize him as being there. If he was there, he didn't make himself known to me.

Q. Did not make himself known if there?

A. That is right. There were quite a few spectators there and he possibly could have been there, but I didn't recognize

him as being there on that day. This bicycle, as I said, had some red paint on it and the ones that I talked to at the scene—didn't seem to be any eye witnesses other than this young student in the schoolroom at the time who stated it was a green truck. The other information I was
page 10 } able to gather at the scene led me to believe there had been a green truck involved. We put out a broadcast on a green truck to be picked up, that if it should be damaged on the right side, last seen headed in the direction of Staples Mill Road on Penick Road. We weren't able to pick up anything at all that day.

I talked to the five-year-old brother, I don't recall his name, the five-year-old brother of Frank Wayne, and he stated to me he was running along behind his brother. Both boys were headed home. He was not riding a bicycle, running along behind him, and he stated to me it was a gray automobile that had hit his brother's bicycle, but being a five year old boy, everyone else agreeing it was a truck, I didn't take too much stock in what the boy told me, having seen the red paint on the bicycle.

Mr. Garrett: I think the Officer ought to testify as to what these folks told him. His analysis of their ability to observe and all, I think that's for the jury, not for the officer to pass on.

The Court: Objection sustained. I take it that you are objecting to the conclusions he was referring to.

Mr. Garrett: He was saying what weight he gave to the younger brother's statement of what happened. I think that is clearly for the jury to determine and not for the Officer.

The Court: Objection sustained.

page 11 } Mr. King: I think it is very necessary to show his future course of conduct, what did he do.

The Court: I am not ruling on what he did or saw, but as to what weight he attached to it. It seems to the Court to be within the rule. He is getting into speculation or conclusion based on what he did.

A. Anyway, we continued to look for the dump truck, a green truck, possibly with red paint on it. On Thursday night, the night of the accident, we determined, upon information received from the parties coming through Penick Road that afternoon, that two dump trucks had passed them, a red and green dump truck. The party gave his name and address. He talked to Officer Sheppard, County Police Department.

Officer E. T. Montgomery.

Sheppard passed this information on to me the next morning.

Mr. Garrett: I think he should identify the person that made this report.

A. The report that came into Officer Sheppard was that Arthur Carpenter—as a matter of fact, Arthur Carpenter made contact with Officer Sheppard. I don't know whether it was in person or by telephone.

Mr. Garrett: I think it should be clearly stated by the Officer, you mean Mr. Carpenter called your headquarters and reported two trucks had passed him?

A. As I stated, I don't know whether he contacted him in person or whether he called him by phone. He
page 12 } did make contact with Officer Sheppard to tell him two trucks had passed him on Penick Road.

Q. Mr. Carpenter told you that?

A. Not me, Officer Sheppard. On the basis of that, I proceeded to look, still look for a green dump truck with red paint. Late that afternoon, approximately 5:30, I found a green dump truck with red wheels, some of the undercarriage of the truck painted red. This truck had been hauling through Penick Road on that day and had some damage to the right side of it. I took it by Mr. Carpenter's house and asked him to identify the truck. That was the first conversation I had with Mr. Carpenter about the accident. He stated that was not the truck involved. He was reasonably certain. He couldn't give me any other information about the truck other than it was a green truck.

Q. Excuse me there, you are speaking of Friday?

A. That is correct.

Q. Did Mr. Carpenter at that time make any comment about his familiarity with the case other than tell you he did not think that was the truck involved?

A. He didn't offer any information. I didn't question him further because at that time I had no reason to suspect him of it. On Saturday I continued to look for a green dump truck with some red paint on it, and on Saturday morning, or rather Saturday afternoon, I received some infor-
page 13 } mation from two young boys who were actually eyewitnesses to the accident that afternoon. They had been in the vicinity.

Officer E. T. Montgomery.

Q. Do you remember who those young boys were?

A. Wally Walton and Stanley Brock. These boys both attended Dumbarton School, lived in the neighborhood. The reason they stated to me they hadn't given me—

Mr. Garrett: Your Honor, I think any statements made by these boys certainly could not be considered part of the *res gestae* and I would think it was hearsay as to use, particularly if they are available. They seem to be subpoenaed.

Mr. King: They are summoned as witnesses and waiting to testify. Do you object—

Mr. Garrett: I think we ought to have the witness himself and not have the Officer relate what the witness told him happened.

Mr. King: These are questions, sir, not as to whether the facts stated are true or not. It is not hearsay; it is simply a statement of fact, regardless of truth. That is all that it is. He is not speaking in terms of hearsay. Hearsay, as Your Honor well knows, is applicable to prove the truth of something and not whether or not a statement was made.

page 14 } The Court: I don't understand the purpose of the questions that would go to this witness other than the fact that he found two witnesses Walton and Brock. I mean, I don't understand the purpose of any question that would go beyond that if the witnesses are going to be here.

Q. I'll ask this question. Did those two boys make any statement to you that led you to take any further investigative action based on what they had told you?

A. On the basis of what the boys told me, the following afternoon Officer Beck and myself went and talked directly to Arthur Carpenter about his part in the accident. As a matter of fact, that same afternoon, on Saturday afternoon, I went back and talked with Arthur Carpenter.

Mr. Garrett: If Your Honor please, if I may note my exception to the admission of that evidence, we will go from there.

The Court: Which evidence are you talking about?

Mr. Garrett: The statement of what these boys told.

The Court: The Court doesn't understand, on its own recollection of the evidence, he ever made a statement of what the boys told him; on information received from talking to them he went to see somebody.

Officer E. T. Montgomery.

Mr. Garrett: Very well, sir.

Mr. King: I submit, sir, he has a right to say what the boys told him.

page 15 } The Court: I don't go that far at this time.

Mr. King: That is what prompted him to do what he did.

The Court: I don't go that far with you at this time, Mr. King, but I don't see where that is pertinent.

Mr. King: He says as a result of what they did tell him he went to see Carpenter, so I guess that is enough.

Q. All right, sir, go ahead.

A. Well, I got a little bit ahead of myself there.

On the basis of what the boys told me, on Saturday afternoon I went back to talk with Carpenter, under the pretense of talking to him about dump trucks. Actually, I was observing his automobile sitting in his yard, and I observed some damage on the right front fender of his automobile which in my opinion was the same color—

Mr. Garrett: I object to his opinion. I think he can describe it and that is the limit of it.

Q. What was the color of his right front fender?

A. What was the color? His automobile is a two-tone automobile. It was gray on top and I'm unable to describe the color of the bottom other than to say that some form of pink, but it was the same color as the paint found on the front fender of the bicycle that Frank Wayne Newton was riding.

page 16 } Then, on Sunday afternoon I went back with Officer Beck to the home of Arthur Carpenter and we talked to him about his being involved in the accident. At that time he gave us a statement stating that he was traveling east on Penick Road approximately 2:50 p. m. on that day, that he saw something on the side of the road and when he looked back—this was after he passed—when he looked back he swerved on the left and back to the right side and stopped to render what assistance he could. And we asked him at that time if he would mind going back with us to the scene of the accident. He only lived about two blocks from there. We asked him if he would mind going back with us to the scene of the accident so we could take some pictures and compare the damage to the bicycle to the damage on the front fender of his automobile. He stated he would go.

Officer E. T. Montgomery.

He went voluntarily and on the basis of that, we took the photographs we have here.

Q. Would you pull those photographs in any order you think appropriate and show those to the jury and explain each of them. Those photographs, I believe you said, were taken on Sunday afternoon?

The Court: One minute, gentlemen. Do I understand you agree that these are photographs taken by the Police Department after this accident?

Mr. Garrett: Yes, sir, I desire to use them as much as the Plaintiff.

The Witness: If the Court would like, I have the
page 17 } set I used in criminal proceedings, the photographs
that I used before.

Mr. Garrett: Your Honor, there is one matter that has come up in the Officer's testimony that I would like to take up with you before you proceed any further, if we may.

(Note: The Judge and Counsel retired to Chambers.)

Mr. Garrett: If Your Honor please, the Officer in the latter part of his testimony made reference to a criminal proceeding against Mr. Carpenter. The clear implication of that was that the Officer concluded that Mr. Carpenter was guilty of some crime arising out of the accident which is something that is not material to this case.

Now, that is certainly prejudicial to Mr. Carpenter because we are here before this jury asking them to determine the question of liability. If they have evidence before them that this Officer concluded that Mr. Carpenter was guilty of a criminal act in the driving of his automobile, that is the only thing a criminal proceeding could possibly be related to this accident, then they have been somewhat influenced by the Officer's conclusions. I don't know of any way it can be eradicated from the case and under those circumstances I
feel it's my duty to move the Court for a mis-trial
page 18 } by reason of that statement.

I might say this, Counsel has had ample opportunity to talk with this Police Officer and caution him concerning such statements as that.

Mr. King: Number one, I say I haven't heard the word "criminal" or "crime" or "conviction" mentioned yet and I don't think the Officer intended to, so far as I know. All I asked him to do was to relate what he investigated and what

he found. Virtually everything he said I have heard no objection to the answers he has given except from time to time where Mr. Garrett and I disagreed on whether it might or might not be admissible; for example, whether he could say what the boys told him. I think he can but Your Honor overruled me on that and I took no exception. All he is doing at this time is explaining what these various photographs are, what they showed, and it's agreed between the parties they are accurate and correct photographs and are admissible as evidence in the case. They have been so received without objection.

(The statement made by the witness was read as follows: "If the Court would like, I have the set I used in criminal proceedings, the photographs that I used before.")

page 19 } Mr. King: If there is any defect there, I think it can be readily cured by instructions, instructing the jury from the bench that any criminal proceedings that may or may not be conducted should not be considered in this case, have nothing to do with this case. The only matter involved here is what occurred at the time. That's all the Officer is qualified to testify.

Mr. Garrett: My position on that is that nothing you could do now would do anything but emphasize what has happened. The only thing you can do to cure the defect is declare a mistrial. If you feel that motion is not well taken, then I think the jury should be instructed along the lines Mr. King stated and should further be told that ultimately Mr. Carpenter was completely exonerated by your court, Your Honor.

Mr. King: He was found guilty by the lower court, too, so what are you going to do?

Mr. Garrett: That is not a final adjudication.

(The motion was argued at length.)

The Court: I am going to overrule the motion for a mistrial.

Mr. Garrett: We take exception, Your Honor.

The Court: I am not supposed to instruct the jury whether or not it was a criminal proceeding or not and what
page 20 } the outcome was, if there was one, is immaterial in this case.

Mr. Garrett: We take exception to that if that's all the farther you go.

Mr. King: Would you go further and instruct the witness

to make no comment concerning any proceedings other than this one today.

Mr. Garrett: If you are so instructing them for our benefit, it seems to me you are emphasizing the thing.

The Court: I understood you a moment ago to say that if the Court overruled your motion you thought that the Court, as Mr. King suggested, should inform the jury that whether or not there was a criminal proceeding against Mr. Carpenter is immaterial and even if there was one the outcome is immaterial. You went along with the first part but then said you thought I ought to go ahead and instruct the jury he was exonerated from the criminal proceedings.

Mr. Garrett: Yes, sir, I think if you comment at all on it further, otherwise the clear inference to the jury is that he was found guilty.

(The motion was argued further at length.)

The Court: Gentlemen, I am going to overrule the motion for a mistrial as I already have and I am going to
page 21 } instruct the jury that whether or not there was any criminal proceedings was not a matter for their consideration at all and the outcome of it would have no bearing on this case.

Mr. Garrett: If we may now make our exceptions, objection and exception to that, without having to do it when you do it. We object to that because again it is the emphasis there was a criminal proceeding against Mr. Carpenter which indicated that someone concluded that he was criminally at fault and to not tell them the ultimate outcome of that proceeding gives them evidence from which they can infer that he was found guilty. We respectfully except to the Court's ruling.

Mr. King: May I say one further thing. If you have that difficulty, when you put Mr. Carpenter on the stand ask him was he found guilty and he can say, "No, I was completely exonerated." That will cure everything.

Mr. Garrett: Why can't we ask the Officer that?

Mr. King: I don't know if he knows.

The Court: What I am wondering, in view of the fact that Mr. King has just said he has no objection to Mr. Carpenter getting on the stand and stating that he was exone-
page 22 } rated in any criminal proceedings, do you want that to be part of what the Court tells them at this time?

Mr. Garrett: It seems to me it would be as simple for you to go ahead and tell them now. It's a matter of record in this court that you found him not guilty.

Mr. King: I think that that should not be done by the Court.

The Court: But you are willing to have him do it but you don't want it done at this time?

Mr. King: I don't think the Court should do it. I think he could ask Carpenter, and I will go on with my examination and say what happened in the lower court. If you want to get into it, we will go into the whole thing.

Mr. Garrett: I think that would be improper because that is not final adjudication. The thing is, Bill, you have gotten it into the case now. I think you should have cautioned this witness against that sort of thing.

Mr. Patterson: You talked to this witness several times. Did you summon him?

Mr. Garrett: That doesn't make any difference,
page 23 } Bob.

The Court: I am going to rule on the point before me now. You will have to take it from then on.

(Note: The Judge and Counsel returned to the Courtroom.)

The Court: Gentlemen of the Jury, the Court instructs you that whether or not there was a criminal proceeding growing out of this accident is a matter of no concern at all to you and the outcome in any criminal proceeding that may have been is of no concern to you in this case. You have to decide this case on the evidence presented by the witnesses and by the instructions of the Court.

The Court also instructs the witnesses to confine themselves to answering specifically the questions asked and not make any other remarks that are not asked by either Counsel. You confine your answers to the questions asked you.

Q. Mr. Montgomery, I would suggest that you use the photographs that I handed you and not any others you might have in your possession because the parties have agreed that those I have handed you are correct. You go ahead. You are now going to explain each of those photographs. Show them to the jury so that they can understand precisely what you are saying about each of them.

Officer E. T. Montgomery.

page 24 } A. Well, this photograph here is just a photograph of the bicycle.

Q. Can you hold it up so the Court, as well as the jury, can see it?

The Court: In referring to each photograph, look on the back of it first and say, "The photograph marked Exhibit No. So-and-So; photograph Exhibit So-and-So shows—" Then the record will be clear.

A. This is Plaintiff's Exhibit No. 6, a photograph showing the damage to the front fender of the bicycle.

(The photograph was shown to the jury.)

Q. You might wait until they have a chance to see them.

The Court: Gentlemen, you all look over each other's shoulder in the process of this.

Q. Next photograph?

A. This is Plaintiff's Exhibit No. 8, showing the damage to the right front fender of the automobile.

Q. Will you point out to the jury the damage to which you refer?

A. That's this black mark here, very slight damage to the right front fender.

Q. All right.

A. This is Plaintiff's Exhibit No. 7, a photograph showing the bicycle and the automobile, the comparative
page 25 } damage to both and the position we lined them up in.

Q. Officer, I will ask you to look again at Plaintiff's Exhibit No. 7 and point out anything else in that picture that you think is of significance and in addition to showing the position, the matching position of the fender of the bicycle and the right front fender of the automobile.

A. This is Plaintiff's Exhibit No. 7. In this lower right-hand corner, that's barely visible, is some discoloration on the ground. That is the puddle of blood where the boy's head was lying and that's the purpose of the bicycle and car being put in that position, for the purpose of taking pictures. This is Plaintiff's Exhibit No. 3. This is a view of Penick Road looking west, showing the bicycle still sitting in the approximate place where it would have entered Penick Road.

Officer E. T. Montgomery.

Juror: Can you point out where it was taken?

The Witness: (Referring to plat, Exhibit No. 1.) This is the boy's home over here and if you are looking west in this direction, the bicycle sitting approximately here.

A. This is Plaintiff's Exhibit No. 2 and this is a picture of the view looking east on Penick Road with the bicycle still sitting in the same position.

Q. Point out to the jury where that shows on the plat, the direction it was taken from.

A. (Referring to plat.) Well, it was taken from
page 26 } this way, looking east towards Staples Mill Road, showing the bicycle setting approximately here.

This is Plaintiff's Exhibit No. 5 and this is a view taken from the north side of Penick Road in the parking area of the church lot looking south across Penick Road showing the approximate point and roadway which the bicycle came out of, approximate direction in which the boy was traveling.

Plaintiff's Exhibit 4 is a photograph of exactly the same thing just taken from a position a little bit further back than the other.

Q. Would you put your finger on the plat and show where this picture and the one before were taken from?

A. Back in this parking area facing south, somewhere in this parking area. (Referring to plat.)

Q. Now, Officer, will you take, if you will, please, sir, a pencil—I think preferably a fountain pen—and mark on this plat the place where these photographs indicated the collision occurred.

A. Could I see the photographs again? This line here is the hard surface?

Q. That is right.

A. You want me to show this spot? I wouldn't be able to tell them exactly where the point of impact would be. I could point to the spot where the discoloration was found.

Mr. Garrett: I think he should only show what
page 27 } he found there and not some conclusion he reached from those facts.

Mr. King: What he actually found was the puddle of blood and what he wants to mark is where he found the puddle of blood, so mark the puddle of blood.

(The witness so indicated.)

Officer E. T. Montgomery.

Q. All right, sir, so that will be a little more obvious, if I had a red pencil I would ask you to put a circle around that "X" you made. It doesn't show up too well. Make the circle as small as possible.

(The witness so indicated with red pencil.)

Mr. King: If Your Honor please, do you think it necessary to write upon the exhibit which is Plaintiff's Exhibit 1 any further indication of who made the marking upon it just now, whether Officer Montgomery did?

The Court: I suggest he run another arrow off with pen and put his initials therein some place on a higher part of the exhibit.

Mr. King: There is some question about the area down in here. Perhaps if he ran it up in this direction.

The Court: Any direction that wouldn't interfere with the plat.

Q. Make an arrow in here and put your initials.

(The witness initialed the exhibit.)

page 28 } Q. Now, Officer, do you have any further statement of fact resulting from your investigation, and when I say statement of fact, I am not talking about any proceedings of any sort. I am merely talking about facts that you found relating to this accident, the cause of it, where it occurred, and so forth.

A. I don't recall that I do.

Mr. King: I have no further questions, sir.

CROSS EXAMINATION.

By Mr. Garrett:

Q. Now, Officer Montgomery, referring again to Exhibit 4, Plaintiff's Exhibit 4, would you come here a moment, sir? This "X" with the red circle around it and the line leading off with your initials, that doesn't purport to be in scale to the rest of the map? You didn't attempt to do that, did you?

A. No.

Q. Now, this No. 4, this is the blood right here, is that my understanding of it?

A. That is correct.

Officer E. T. Montgomery.

Q. And what would you say—how far was that from this edge of the road?

A. I would estimate it eighteen inches from the edge of the hard surface.

Q. Was it much further than the circumference of this sprocket on that bicycle? This is the end of it, isn't it, Officer, right here? (Referring to plat.)

page 29 } A. Doesn't look like it on the picture, as I recall. As I recall, it was approximately eighteen inches back. It doesn't appear so in the photograph.

Q. Do you mean by that you are not now certain of the exact measurement between the blood and the edge of this gravel portion of the hard surface?

A. In checking back over my notes I don't find anywhere where I have the measurements of that.

Q. When you took this photograph you placed the bicycle with the driver's seat, rider's seat, right at the edge of the road, is that right? Was it back from the edge, or just how is this?

A. Taking this photograph here, we lined the automobile up, assuming it was in the proper traffic lane, giving ample room on the side here. We just put the automobile there and placed the bicycle in that position.

Q. Now, the bicycle, would you mark on the plat where the front of the bicycle is represented on this picture? In other words, I would like to portray this picture. You've got the blood spot, now I would like to portray the front of the bicycle on this plat. Could you do that with a mark?

Mr. King: If Your Honor please, I object to that because he has put on the plat only what he knew was actually there. This picture No. 4 is where he thinks it may have been that the bicycle and the automobile were, but he knows

page 30 } for certain where the blood spot was, and that's where he put it on the plat.

Mr. Garrett: Are you suggesting that the Court should instruct the jury that these pictures are merely the speculation of Officer Montgomery, or—

Mr. King: I'm speaking only of the actual point of collision. We agree that's a picture of the automobile and this is a picture of the bicycle, but precisely where they were at the time of the impact he has said he does not know.

Q. Officer, let me ask you this. What was the reason that you lined the bicycle thus?

Officer E. T. Montgomery.

A. As I stated, when I showed this picture, Plaintiff's Exhibit 7, the purpose of this picture here—

Mr. Garrett: No. 7, I'm sorry, I referred to it as 4.
Mr. King: I said 4 also. Mark it 7.

A. The purpose to show this picture was not to show the point of impact but to show the comparative damage between the right front fender of the vehicle and the damage to the front fender of the bicycle. That was the purpose of this picture here.

Q. Referring now to Exhibit—you can take a seat. Referring now to Exhibits No. 3, 4, and 2, Plaintiff's Exhibits, all of those show the bicycle, but do I understand
page 31 } that none of them purport to show where the bicycle was at the time of the impact?

A. That is correct, yes. We merely put the bicycle in that position to show the approximate direction that the bicycle was traveling.

Q. All right, sir. Now, you say in your testimony, Officer, that the information you received was that the bicycle was traveling out of the driveway. That's what I understood you to say?

A. I received the information from his five year old brother.

Q. You received that from, I believe, the boy's name is Craig, isn't it, the younger brother of Frank Wayne Newton?

A. I don't recall the name.

Q. Anyway, he was two years younger than Frank Wayne?

A. That is correct.

Q. Precisely what did he tell you with reference to where they had been and where they were going and just what he was doing at the time of the impact, his brother?

A. I don't have anything written down on what the boy told me, but as I stated, the boy said he and his brother had been over at this neighbor's house across the road playing and were in the process of going home. His brother was riding the bicycle, he was running along behind him.

page 32 } Q. And did he tell you that his older brother was still moving when he collided with the car?

A. I don't recall that I asked him, don't recall that he told me.

Q. I see. Now, Officer, if we can go back to this plat, would you show us where you found the bicycle when you arrived at the scene of the accident?

Officer E. T. Montgomery.

A. The bicycle was approximately here. There's a big evergreen tree, (referring to plat).

Q. I wonder if you would take your ball point pen and make a "B" on here as to where the bicycle was when you arrived at the scene.

A. I can't say definitely, pinpoint the spot that the bicycle was. I definitely recall it was back off the road a way, somewhere about here. (The witness marked the plat.)

Q. Was the boy still here when you arrived?

A. He was in the process of being loaded in the ambulance when I arrived on the scene.

Q. All right, now, were there any skid marks from any vehicles in this area?

A. My notes don't indicate it.

Q. No skid marks whatever?

A. No.

Q. And you looked at the scene several times
page 33 } after the accident?

A. That is correct.

Q. All right, sir. Now, tell me precisely what Mrs. Newton said when you got there. You can take your seat now.

A. I don't know that I recall word for word what Mrs. Newton said. I can tell you generally what she said.

Q. What did she say with reference to what vehicle had struck her son?

A. Now, I talked with Mrs. Newton twice, once at the scene and again about an hour and a half later at the hospital.

Q. Let's have the first time.

A. At the scene she stated to me that there was a dump truck involved.

Q. She told you that a dump truck was involved?

A. That is correct.

Q. And what did she tell you at the hospital?

A. At the hospital she had calmed down quite a bit and was in much better frame of mind for me to talk to her than she was at the scene of the accident. I asked her if she could tell me what color truck it was. She said no. I asked her if she knew it was a dump truck. She said no. I said then, "How do you know it was a truck involved?" She said she didn't, but dump trucks had been hauling dirt up and down the road all day. She was around on the side of her
page 34 } house and heard it but did not see the accident.

Q. Now, the young Newton boy, the one that was five years old, now, he told you that it was a gray car that was in collision? Is that correct?

Officer E. T. Montgomery.

A. That is correct.

Q. I'm not sure, did you say gray car or gray vehicle? I believe you said before gray vehicle and didn't specify whether it was a car or truck.

A. I don't recall.

Q. Did he say a gray vehicle or do you recall what he said in that respect?

A. No, I don't.

Q. He just mentioned the color gray?

A. Gray.

Q. And he didn't specify car or—you don't recall whether he specified car or what have you? All right, sir, now, Officer, did you observe the bushes and the hemlock and that sort of thing here on the side of the road when you were there?

A. Yes, sir, I did. That's where I found the bicycle, by that evergreen. I don't know the name of it.

Q. I'll take a chance on that, hemlock or some sort of evergreen. Now, did you notice how low the branches went on that tree? Well, let me ask you this. Do these photographs, as far as you know—let's take a look at one that page 35 } catches the tree pretty good. This Plaintiff's Exhibit No. 4, does that accurately portray the branches that were on that tree at the time of the accident?

A. Yes, that is correct. That picture was taken three days after the accident.

Q. Now, you recall going to the scene with me back in February of this year? I believe you and I have been out there a couple of times. I met you out there maybe a year ago?

A. Yes.

Q. Do you recall walking back into this driveway and looking back to the west on Penick Road with me?

A. Yes, I do.

Q. Now, could you tell us, sir, at that time what the effect of this hemlock was?

A. Some of these lower branches—I'm not in position to estimate how high—but some of the lower branches had been removed from the tree.

Q. Yes, sir. But where the branches had not been removed, what was the effect of those? Well, I've got you on cross examination. Did that not block the view, where they were not removed? They are thick and heavy, are they not?

A. You mean prior to having the branches cut off would they have obstructed the view?

Q. Yes.

Officer E. T. Montgomery.

A. Very definitely.

page 36 } Q. Now, Officer, I believe that these bushes here a little bit further along this yard front are crepe myrtle bushes, is that right?

The Court: What exhibit now are you talking about? Is that Exhibit 4?

Mr. Garrett: We are now referring to Plaintiff's Exhibit No. 2.

The Court: Thank you.

Q. They are portrayed on this plat also, are they not?

A. Yes.

Q. Just shrubbery. Referring now to Plaintiff's Exhibit No. 3, this is a hedge down here, is that correct?

A. Yes.

Q. Now, have you noticed whether anything has been done to that hedge since the time of the accident?

A. That's some distance further down the road. I don't recall about the hedge.

Q. I don't think you and I discussed that before. Oh, yes, Officer, was the garbage can as shown in this picture, was that at the scene at the time?

A. I'm not in position to say. I know definitely it was there on Sunday afternoon. I do not recall that it was there at that time.

page 37 } Q. All right, sir. Now, Officer, would you tell us what the speed limit was in that zone at the time of this accident?

A. In 1957, at the time this accident occurred, it was a 55 mile zone.

Q. All right, sir. Now, Officer, was that road that the young fellow was driving out of, or riding his bicycle out of, was that a private road?

A. Private driveway.

Q. Private driveway. Now, when you talked with Mr. Carpenter on the several occasions that you did, what was your impression of his attitude about the matter? Was he co-operative?

A. Now, about the whole thing in general?

Q. Yes.

A. Yes, very definitely.

Q. And did he not, when you asked him to take his car back up to the scene, was he not more than willing to do that?

Officer E. T. Montgomery.

A. He agreed to take his car up there and drove his car up there himself.

Q. He made no protest at all of that?

A. No, sir, none whatever.

Q. And even up to that point he had taken the position that he had not struck the boy, isn't that correct?

A. He had indicated so in his statement.

page 38 } Q. Yes, sir. Do you have that statement with you there?

A. Yes, sir.

Q. You've never shown this statement to me, have you? Do you recall?

A. No.

Q. Now, he told you that as he passed that driveway, he thought he saw something lying on the side of the road?

A. That's what he said.

Q. All right. And then he took a second look and saw the youngster back there and that's when he brought his car to a stop?

A. Yes, sir.

Mr. Garrett: I would like to have this introduced as an exhibit, Your Honor.

The Court: This would be Defendant's Exhibit No. 1.

(The document was marked and filed as Defendant's Exhibit No. 1.)

Q. Now, Mr. Montgomery, you have testified concerning the bicycle and I saw a bicycle back here in the Judge's Chambers. I wonder if we could get that bicycle and see if that's the same one?

(A bicycle was brought before the jury.)

page 39 } Q. Officer, is this the same bicycle that was involved that you found there? It looks like it's a Fox make, Rowlett.

A. My notes show it's a 20-inch barrel Fox bicycle, blue and white.

Mr. King: Mr. Garrett, we are willing to stipulate that is the bicycle, if you wish.

Mr. Garrett: All right, sir. Thank you, Mr. King. I would like that tagged in some manner, Your Honor.

Officer E. T. Montgomery.

The Court: All right, we have a tag sufficient for that exhibit, Defendant's Exhibit No. 2.

(The bicycle was marked and filed as Defendant's Exhibit No. 2.)

Q. Officer, can you point out on this fender now the paint that you found?

(The witness indicated on the bicycle, Defendant's Exhibit No. 2.)

Q. Was that paint on there also?
A. No.
Q. What about this paint?
A. I don't recall.
Q. Now, what about this signal here, or whatever that is?

Mr. King: May I explain that to you?
Mr. Garrett: I want to know where it came page 40 } from.
Mr. King: This has been examined by Froehling and Robertson. That's the Froehling and Robertson seal on there.

Q. Mr. Montgomery, was this mark here or something that Froehling and Robertson—

Mr. King: That was not. That's been put on since the bicycle came in my possession.
Mr. Garrett: What about this red mark?
Mr. King: That's likewise.

Q. Do you know where this red paint—was that on there at the time? Seems to be a dent there with some red paint.
A. I don't recall.
Q. Now, this red paint over here, was that on there at the time?
A. I don't recall.
Q. There seems to be a trace of blue paint up here. Can you tell me whether that was on there at the time, Officer?
A. I really don't recall, Mr. Garrett, but I recall this paint.

Officer E. T. Montgomery.

Mr. Garrett: Let's put it back over here.

Q. Now, there seems to be a trace of red paint back here on it. I believe they call that the fork, don't they? Is that what that is? Anyway, I want to ask you, was that on there at that time?

page 41 } A. I don't recall.

Q. All right, sir. Now, in your examination of Mr. Carpenter's car, did you find any marks on it other than the mark you described that's at the edge of the wheel well, fender well?

A. None whatsoever.

Q. No other marks on it at all?

A. No.

Q. No blood marks or anything of that nature?

A. No.

Q. Did you examine it completely along the side?

A. When I made a thorough examination of the car was on Sunday. I just glanced at the car on Saturday afternoon, made a thorough examination on Sunday which would have been three days later, and I didn't find anything of that nature.

Mr. King: What was your answer? "I didn't find anything of that nature on Sunday afternoon?"

Q. So that the only mark that you felt was significant was this one right here? (Referring to photograph.)

A. That is correct.

Q. Immediately behind the wheel and on the rear leading edge of the fender?

The Court: What exhibit is that?

Mr. Garrett: I'm referring to Plaintiff's Exhibit 8, Your Honor.

page 42 } Q. This could be construed as a dent up here in the side of that door. Is that just a defect in the picture, or possibly just dirt on the side, or do you know anything about that?

A. I'm not in position to say. It could be some dirt on the picture.

Q. At any rate, you made a very thorough examination and found nothing but this mark that you felt had any significance?

Officer E. T. Montgomery.

A. That is correct.

Q. Now, Officer, is Penick Road a heavily traveled road?

A. Yes, sir.

Q. Do you know whether it was at the time a part of the State Highway System?

A. Not that I recall.

Q. You do not know?

A. If it was, it didn't have any highway number or marks.

Q. I believe it's now part of the feeder system to the toll road, is that right?

A. Yes, sir.

Q. Did you determine that there were a number of trucks using it that day?

A. Yes, I did.

page 43 } Q. Now, you speak of this young fellow over in the Dumbarton School that said that he saw some of the facts leading up to the accident. I'm sure in your thorough investigation you took a rather complete statement from him, did you not?

A. I don't have it written down. I just recall the conversation by memory. I don't have it.

Q. Now, that was the little boy named Ronnie Kidd?

A. That is right.

Now, I believe he told you he was in class there at Dummarton School waiting for school to let out, or it was only a few minutes before the 3:00 o'clock termination of the school day?

A. He told me he was in school.

Q. All right, now, and he also told you he was looking out of the window?

A. That is correct.

Q. Now, didn't he tell you that he had seen the boy on the bicycle, the Newton boy, back in the Cox yard? Is that the name of the people who live here, Cox?

A. As well as I recall.

Q. He had seen them back in that yard just a couple of minutes or maybe even a matter of seconds before the accident occurred?

A. All that I can recall of the conversation with page 44 } Ronnie Kidd is that he did not see the impact but he heard it and looked around and saw this green pickup truck, one which resembled his grandfather's truck, drive by.

Q. As a matter of fact, he told you this, didn't he, Officer, that he thought that his grandfather was coming to pick him

up because school was over? Do you recall him telling you that?

A. I don't recall that. It's possible.

Q. Now, do you recall him telling you that after seeing the Newton boy in the Cox yard and some distance back from the road, that his schoolteacher called his attention back to his studies. Did he tell you that, or did you pursue it that far?

A. I didn't question him along that line. He merely stated to me he was in school.

Q. Well, now, then he looked up and he saw that an accident occurred and he saw the green pickup truck leaving? Did he say he saw any other cars in his vision, between him and where the boy was?

A. No, he did not.

Q. And didn't he tell you that he saw the boy lying on the road at that point?

A. I don't recall how he stated to me the facts about the accident. I recall that he said he heard the impact, looked around and saw the green Chevrolet pickup truck.

page 45 } Q. Let me ask you this. This is Dumbarton School. Could you come here a moment, Officer, and we will look at this Exhibit No. 1 again. This is Dumbarton School and I believe that the school building lies somewhere something like that, does it not?

A. That is correct.

Q. Actually, there's been a new section built to it since the accident?

A. There's been an addition added.

Q. Ronnie Kidd said he was on the second story level, did he not?

A. He pointed out to me that his classroom window in which he was looking out of, which would have been on the—

Q. West side?

A. Southwest corner of the school. The school at that time faced Staples Mill Road east and he was in the southwest corner of the school.

Q. Do you know that the place he was sitting, whether it was on the west side or on the south side, or did you go into that detail?

A. No, I did not, but I can tell you from my own knowledge it would have been—it would have to have been on the west side of the building because there are no windows on the south side.

Officer E. T. Montgomery.

Q. Good, that's exactly what I want to know.
page 46 } Officer, if he saw that green truck and it was still in his sight, do you know at what point it would have had to have been on this road before it would have left his sight?

A. No, I'm not in position to say that.

Q. Well, the walkway led up to about the center of the school, doesn't it, or do you know?

A. I don't recall that that walkway was in there at the time.

Q. Do you think the truck could have gotten beyond this drive leading off to the north from Penick Road before he would have lost sight of it? Really, Officer, I may be asking you something that you've never considered before and perhaps if you did not go into that, I wouldn't pursue it any further. I wondered if you took into account where in here the truck, the furtherest it could have been before he would have lost sight of it? He said he saw it and I wanted to try to establish whether it was here or here or here, when he saw it.

A. I did not question him along those lines at all.

Q. I see. Well, from the vantage of this, his position on the second floor, he could see right down to that accident scene, could he not?

A. He should have had clear vision.

Q. And he would have had clear vision of this whole road here, would he not?

page 47 } A. I don't know how far down he would have had clear vision.

Q. Well, of course—I'll qualify that by consequently the side of the building barred his sight?

A. The only thing in here. (Indicating)

Q. I see. Now, Officer, on this Plaintiff's Exhibit No. 2, that is taken from a position not at the center of the road, but more on what would be the left-hand side of the road as Mr. Carpenter would be traveling, assuming he was on his proper side of the highway?

A. That is right.

Q. So that if the picture had been taken more over—Well, at what normally would have been his driving position, the effect would have been to bring these branches out a little bit further to hide any bicycle or pedestrian or what have you coming out of that drive, isn't that correct?

A. Yes, sir, that's true.

Officer E. T. Montgomery.

Q. It's sort of a matter of leverage if you consider that the focal point here, the further you come around here to take the picture, the further you can see back in that driveway?

A. That is correct.

Q. And by the same token, if you get over here these branches would come out further to block the view? You do not have a picture that was taken from the position

page 48 } that a driver would have been in coming along there, do you?

A. No, sir.

Q. Now, referring now to Plaintiff's Exhibit No. 7, the front part of that fender on that car extends out the same distance as the rear part, does it not, oh, maybe half an inch difference one way or the other, but within those tolerances, it's about the same, isn't it?

A. That's true.

Q. Then, possibly, the bumper extends out a little further, isn't that true?

A. That's true.

Q. Now, if I may pose a hypothetical question to you, if a bicycle, if this bicycle had been standing still would not the front have struck it before the area here, particularly if it got back in that position?

A. Assuming that the car was traveling straight as it's setting now, it would very definitely have to be struck by the front of the vehicle, that's true, if the bicycle had been sitting still.

Q. All right, sir. Now, do you recall whether Mr. Carpenter requested you or possibly some of the other officers in your presence to have an analysis made of the scrapings from his fender and from the bicycle at some point there along when you were discussing this matter with him?

A. I don't recall that he requested it. I know

page 49 } that we were going to have it done.

Q. Why was it never done?

Mr. King: Ask the Judge whether he can answer the question.

The Court: He seems to think that would be improper so perhaps we had better take it up before the Court in the absence of the jury.

(Note: The Judge, Counsel, the witness, and the court reporter retired to Chambers.)

Officer E. T. Montgomery.

In Chambers:

The Witness: We took the bicycle—I took the bicycle to headquarters to have it sent to the Medical Examiner's office and I do not know it was sent up there but the information was given back to me that the bicycle was sent. The front fender was taken off the bicycle, taken to the Medical Examiner's office and in view of the circumstances and the evidence that we had preparing the case, they did not feel it necessary to go into a chemical analysis, that he would rather reserve it in view of the civil case which may result from it.

The Court: You all would rather reserve it?

The Witness: No, sir, I believe it was Dr. Sidney Kaye, but, anyway, the man in the State Medical Examiner's office said he felt it wouldn't be necessary. We have
page 50 } it in the other hearings, that he didn't feel it necessary that we have it and because since there was so little paint on the bicycle, to reserve it in view of the fact there may be some civil hearing later on and the chemical analysis was not made.

I didn't take the bicycle up there myself. I took it to Headquarters and the front fender was sent up there by somebody at Headquarters. I don't know.

Mr. Garrett: Your Honor, in view of that response, I guess it's very much hearsay, so I will withdraw the question.

(Note: The Judge, Counsel, the witness, and the court reporter returned to the courtroom.)

Q. Now, Officer, in your testimony you said that spectators told you that a green truck had struck the boy. Now, other than Mrs. Newton and her little son and Ronnie Kidd, who else told you that?

A. I don't have the names of any of them written down.

Q. Do you know how many there were that told you that?

A. I just said several, I don't recall.

Q. Were they material people?

A. None of them were actually witnesses to the accident.

Q. Were they adults or children or what were they, or do you recall?

page 51 } A. Other than Mrs. Newton and the boy I really don't recall who I talked to. It was quite a crowd there. By this time school had let out and all the school children around and all the other spectators at the scene, I don't recall who all was there.

Officer E. T. Montgomery.

Q. You are very definite in your testimony you did not talk to Mr. Carpenter at that time, at the scene?

A. I said if I talked to him, or if he was there, if he was there, I don't recall seeing him.

Q. Isn't it true that Mr. Carpenter has never said that one of the dump trucks hit the boy? He merely said that two dump trucks passed him prior to the happening of the accident?

A. That is right.

Q. He's never taken the position that he saw the dump truck hit the boy?

A. Not to my knowledge.

Q. And I believe you said that Mr. Carperter called your Headquarter to volunteer that information that he had been passed by these two dump trucks?

A. In some way he contacted Officer Sheppard either in person or—

Q. By the time he did that you all were already looking for a dump truck, were you not?

A. That is correct.

page 52 } Q. Now, describe the damage you found on this green dump truck later on?

A. I don't believe I could, Mr. Garrett. I don't recall now just—the damage was to the underportion of the frame of the truck. I distinctly remember that because it was painted red under there, and in view of the red paint I had found on the bicycle, that's why I was noticing. It was a green dump truck with the hubs of the wheels painted red and I guess you would call the frame of the truck—

Q. You had a dump truck that was both red and green?

A. That is correct.

Q. And that point, as I take it, I imagine this speaks for itself, was of sufficient similarity to the paint you found on the bicycle to justify you in asking Mr. Carpenter if that was the truck that passed him?

A. I don't know so much it was the paint that justified my asking Mr. Carpenter as it was the fact this was a green dump truck with red paint that had been hauling dirt through Penick Road on that day.

Q. And had damage on the right-hand side?

A. That is correct.

Q. Did you determine the driver of that truck?

A. I don't have his name written down now. At the time I had it written down on some notes, but the boy was from

Officer E. T. Montgomery.

over in Chesterfield County. The reason I recalled
page 53 } that he gave me some argument about going back
over to Mr. Carpenter's house. It was getting late in the day.

Mr. Garrett: All right, Officer, that's all I have to ask you now. Your Honor, I will desire to call this Officer, possibly, when I get to my case.

Mr. King: How about re-direct, do you want me to do that first?

Mr. Garrett: Excuse me, Mr. King.

RE-DIRECT EXAMINATION.

By Mr. King:

Q. Officer, will you come here, please, sir? I think you testified the only place this boy, Ronnie I think you said the name was, the only place that Ronnie could have been and seen some commotion of some sort up in the area where the collision occurred was in the southwest corner of the school floor of the school building. Is that what you said?

A. I didn't say it that way. The only place it could be, I said that was the point he pointed out to me where he was.

Q. You will notice here at the foot of this map the size scale, one inch and thirty feet. Will you take what you consider to be the approximate location of the southwesterly corner of the Dumbarton School without the new addition that's on it? I'm speaking now of the original building. Take that point and measure the number of inches from that to the point of impact.

page 54 } A. This walk leads to the new addition so it would have to be approximately here. (Indicating)

Q. "Approximately here," you are speaking of the letter "M" in the word "Dumbarton"?

The Court: On Plaintiff's Exhibit No. 1?

Mr. King: Plaintiff's Exhibit No. 1, yes, sir.

Mr. Garrett: I think we can stipulate that.

Mr. King: Let him do it.

The Witness: It would be 22½ inches.

Q. Multiply 22½ by thirty.

A. 675 feet.

Q. And that's the same as 325 yards, is it not?

Officer E. T. Montgomery.

Mr. Garrett: Mr. King, you went to the wrong school.
Mr. King: I beg your pardon.
The Witness: It would be 225 yards.
Mr. King: That is right.

Q. Let me show you this exhibit put in by Mr. Garrett.

The Court: Is that Exhibit No. 2?
Mr. King: That is Exhibit No. 1. I'll read that. It's partly signed by Mr. Carpenter. I assume that's agreed, Mr. Garrett?
Mr. Garrett: Yes.

page 55 } Q. He said, "I thought—" He's saying first he was traveling down Penick Road at approximately 2:50 p. m. and said, "I thought I saw something on the side of the road."

"When I looked back I saw something lying in the road. I swerved to the left side and back to the right and stopped to render what assistance I could. If I hit the boy with my car, I did not hear it, the noise, because I had my radio on in my car. A 1957 Chevrolet sedan, '57, Virginia 44530." And that was witnessed by you and two other officers, is that correct? He says if he hit it, he didn't hear it?

A. That is correct.

Q. Was there any time prior to your receipt of this statement signed by Mr. Carpenter, and I understood you to say that was on a Sunday which was three days after the accident, is that correct?

A. That is right.

Q. Was there any time in your prior conversations with him that he gave any indication that he might have hit the boy?

A. I didn't have any conversation with Mr. Carpenter at all about him being involved in the accident until Sunday.

Q. I think you testified the second time you saw him you showed him a truck, but that was merely to feel him out, or words to that effect?

A. I had in mind observing his automobile which was in his yard. I went to his house and talked with him

page 56 } about the dump truck but at that time I was talking with him I was observing his automobile to see what damage was on it.

Q. He gave you at no time any indication that he might have hit the boy himself?

Officer E. T. Montgomery.

A. None whatsoever. As I say, I didn't have any conversation with him along that line.

Q. I see. I will show you one other thing. This is Plaintiff's Exhibit No. 2 and this is the photograph that runs—that is taken on Penick Road west of the point of impact and it shows on the right what I think Mr. Garrett referred to as an evergreen.

Mr. Garrett: Hemlock, I'm not sure.

Q. And he was commenting on the fact that some of the lower limbs had been cut off that tree. Do any of those lower limbs stick out as far as any of the upper limbs or are they shorter? I'm speaking now of looking down Penick Road.

A. Not according to this photograph.

Q. So the upper limbs which are not contended were cut off were longer out than were the lower limbs?

A. That is right.

Q. And does the difference between the length of the upper limbs and the lower limbs make any difference in the point of view available to someone looking down Penick Road?

A. Say that again?

Q. By that I mean can you see farther down this
page 57 } driveway when you measure by the lower limb
than you can when you measure by the upper limb? In other words, does the lower limb give less of an impediment to the view than does the upper limb in determining how far you can see down that driveway?

A. Well, the higher limbs definitely stick out further. The lower limbs at the time were definitely view obstruction. As to how much more so they were than the higher limbs, I would assume it would depend on how high a vehicle you were in, if you were riding in a truck or automobile, depending on the height up the roadway.

Q. They did not stick out as far as the upper limbs which were not later cut off?

A. That is correct.

Mr. King: I believe that's all.

RE-CROSS EXAMINATION.

By Mr. Garrett:

Q. Do you know the height of the camera these pictures were taken, Exhibit No. 2?

Wally Walton.

A. No, I wouldn't have any idea.

Q. Now, look here carefully. It was just pointed out to the jury, this Exhibit No. 2, does that not show Dumbarton School in it, the school building?

A. Yes, it does.

Q. Can you point to the jury—. Let me ask you
page 58 } this, isn't the corner that Ronnie Kidd said he was in, is that just over the top of this boy sitting on a bicycle, kind of humped over?

A. That is correct.

(The photograph was shown to the jury.)

Mr. Garrett: Officer, that's all.

Mr. King: No other questions.

The Court: What shift are you on?

The Witness: I'm working right now.

The Court: You don't know whether you are going to finish the Plaintiff's evidence today?

Mr. Garrett: Let me ask him this. Officer, can we reach you through your Headquarters most any time we want you?

The Witness: Any time after 6:00 I will be at home.

(Witness excused subject to call.)

The Court: Gentlemen, I believe our clock is running a few minutes late anyway. In view of that, suppose we take a luncheon recess until 2:00 o'clock and, gentlemen of the jury, the same admonition I have given you all along applies to the luncheon recess and every other recess we take in connection with this, and any other case.

(Whereupon, at 12:50 o'clock p. m. a luncheon recess was taken.)

page 59 } After Recess.

July 20, 1959
2:00 o'clock p. m.

WALLY WALTON,

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

Wally Walton.

DIRECT EXAMINATION.

By Mr. King:

Q. Son, will you state your name?

A. Wally Ray Walton.

Q. Say it again.

A. Wally Ray Walton.

Q. What is your age?

A. Sixteen.

Q. And when were you sixteen?

A. October 17th.

Q. Where do you now live?

A. No. 5 North Allen Avenue right now.

Q. In the City of Richmond?

A. Yes, sir.

Q. Where did you live in May of 1957? That is approximately two years ago?

A. 5301 Penick Road.

Q. 5301 Penick Road?

A. Yes, sir.

page 60 } Q. Now, are you familiar with an accident that happened in May of 1957 when a young boy by the name of Wayne Newton was injured on Penick Road when he was on a bicycle which was struck by a motor vehicle?

A. Yes, sir.

Q. Were you in the vicinity of that accident at the time when it occurred?

A. Yes, sir.

Q. Now, will you please explain to the jury and speak loudly so they can hear you, and slowly so they can understand you, and tell them how you happened to be there at that time?

A. I left my house on 5301 Penick Road at twenty minutes after two, May 9, and me and this other boy Brock left the house—

Q. Hold there. You say "Me and this other boy." Who is this other boy?

A. Stanley Brock.

Q. Is he a good friend of yours?

A. Yes, sir, known each other a long time.

Q. Do you go around together all the time?

A. Yes, sir.

Q. All right, you say you and Stanley Brock left your home about 2:20 on that afternoon?

Wally Walton.

A. Yes, sir, and we walked half way—we got half
page 61 } way up Penick Road and got in front of this house
where we knew this lady at and she gave us a ride to Davista Circle. She put us out right there. We got out there and was waiting for a truck going across the road and that's when I heard it.

Q. Wait a minute. Look at this map here; step over here, if you will. This is Staples Mill Road and this is Dumbarton School. Do you know where that is?

A. Yes, sir.

Q. And this says it's Davista Avenue?

A. Yes, sir.

Q. And you said that from your residence you and—

A. I lived much further down.

Q. You lived way down in this direction?

A. Yes, on down that way.

Mr. King: Let the record show I'm pointing at Plaintiff's Exhibit 1 and pointing toward the west.

Q. You lived to the west from this area here, or you did at that time?

A. Yes, sir, I did at that time.

Q. And you recited that you and your friend Stanley Brock wanted to go where?

A. Drug store.

Q. Greendale Drug Store? Where is that?

A. Up here is Staples Mill Road and you turn in here that
way, and it's about a block.
page 62 } Q. And then I think you said you came to some
lady's house and she gave you a ride?

A. Before we got to the drug store we walked on down Penick Road, thumbed and didn't get a ride, about half way down, walking to Glenwood Street, and this lady, Mrs. Cirillo, picked us up and gave us a ride to Davista Circle.

Q. This place here? (Indicating)

A. Yes, sir.

Q. Why didn't she ride you any further?

A. She was turning off here and was going the other way. She was going to her son's house, going into Davista Avenue.

Q. Where did she let you off?

A. Along there, and I walked back.

Q. Excuse me, did Stanley Brock get out of the car at the same time you did?

A. Yes, sir, right with me, yes, sir.

Wally Walton.

Q. And then what happened?

A. We waited for a dump truck to pass and walked over here in the field about three or four feet.

Q. Hold a minute. Where were you standing when you got out of the car?

A. Right along here. (Indicating) She got half way in the road before she let us out.

Q. Then you stood and waited for what?

page 63 } A. A dump truck.

Q. Where was the dump truck?

A. Coming out down this way, headed to Staples Mill Road.

Q. The dump truck was headed east along Penick Road towards Staples Mill Road?

A. Yes, sir.

Q. And when the dump truck got by, what did you do?

A. Went across the road in the field three or four feet.

Q. Straight across the road?

A. Yes.

Q. Were you going to walk from there over to the drug store?

A. I was going around behind the school.

Q. What happened when you got three or four feet over in the field?

A. I heard a crash and looked up the road and saw Mr. Carpenter.

Q. Where did you hear the crash?

A. Right up here to the west.

Q. What did you do?

A. We run back up there. I looked up there and Mr. Carpenter's car was sliding.

Q. You heard a crash?

page 64 } A. Yes, sir.

Q. Did you look?

A. The other boy said it was a flat tire and I said a wreck. Mr. Carpenter's car was sliding over toward this pole right here.

Q. Go slowly because these gentlemen want to know.

A. We were standing right here alongside this pole, three or four feet in the field. We heard the crash and Stanley Brock said it was a flat tire and I said it was a wreck. I saw Mr. Carpenter's car sliding.

Q. Did you look up the minute you heard the noise?

A. Yes, sir, I looked that way and saw Mr. Carpenter's car sliding to this side of the road and he got it under control and parked it along here.

Wally Walton.

Q. Where is that?
A. On this shoulder of the road.
Q. You say he slid over to the north side of the road and then came back to the right?
A. Yes, sir.
Q. How far over to the north side of the road did he go?
A. Clean on the other side of the road.
Q. Did he get off the hard surface?
A. I wouldn't know for sure. I seen the car slide all the way around and come back to this side.

page 65 } Q. What did you do?
A. We was running all the time the car was sliding after we heard the crash.
Q. Where were you running?
A. Up this way, jumped off a bank up there, and where I saw Wayne Newton laying in the road, tangled up in a bicycle.
Q. Where did you see him?
A. Right along there where that "X" is.
Q. Where was Mr. Carpenter all that time?
A. He was coming back, too. We got there, I believe, a little before he did or around the same time. We run faster than he. He got out the car and come back.
Q. Did you all arrive up here about the same time?
A. I reckon about the same time.
Q. Did you say anything to Mr. Carpenter?
A. Yes, sir.
Q. Excuse me, hold on there. How do you know it was Mr. Carpenter?
A. I have known him all the time before, known him two or three years.
Q. Where does he live with reference to this area?
A. You turn into Davista Drive, you can come here on Staples and go down and he lives right along here.

page 66 } Q. Let me ask you this. As you were riding down with the lady—I think you gave her name?
A. Mrs. Cirillo.
Q. As you were driving down with her, riding in the car, did you see any children playing around in this area?
A. Yes, sir, up here, this big white house, been there a long time, old house up there, always playing up there.
Q. Were they always playing up there at that time, during that time?
A. Most every time I came by there I saw some children.

Mr. Garrett: I object. Let's limit it to this particular

time. If the children were there at other times, that has no bearing.

Mr. King: It has a great deal of bearing.

Mr. Garrett: It does not. Your Honor, there is a case that the driver saw children on one corner and they said that didn't put him on notice the children would be on the other corner. It's a recent case; I have it. I will recite it for Your Honor.

The Court: As I understand, he was referring to children near some house off the road?

Mr. Garrett: Yes, sir.

The Court: I am going to sustain the objection insofar as it relates to testifying to children on another occasion.

page 67 } Mr. King: I'm speaking merely was it customary for children to play in that area? I think it's very admissible.

Mr. Patterson: In the area from the house down to the road, this area here. (Indicating plat.)

Mr. King: That is right.

Mr. Garrett: I have a case, Your Honor, if you want to go into it fully.

Mr. King: Do you want to excuse the jury while we are arguing this?

The Court: I think maybe we had better. Counsel and the court reporter and the witness had better join me back here.

(Note: The Judge, Counsel, court reporter, and the witness retired to Chambers.)

In Chambers:

Mr. Patterson: I think it's so well established we don't need the case.

The Court: You are talking about *Dickerson against Ball?*

Mr. Garrett: Yes, sir.

The Court: Before we get into a discussion on the law on this, I want to know, maybe you all are arguing two different points. One may relate to custom and one to the probative value of something. It may be we need more foundation as to what we are doing.

page 68 } (The objection was argued at length.)

The Court: Let's get to one point first. Are you trying to go back into a situation where children play in this vicinity regardless of where it is?

Wally Walton.

Mr. Garrett: I think this witness ought to be excluded.
The Court: Yes, you step outside, son.

(The witness was excused from Chambers.)

The Court: Are you still trying to show what was done on numerous other occasions prior to this accident in the vicinity?

Mr. King: I am trying to show that that was a well known local playing area for small children and that Carpenter knew it, or he should have known it, and I'm prepared to show that he knew it and I say that under this statement of law that's contained in this instruction—I wish I had the case before me. I'm not sure which it is—that that increased the degree of care he owed in driving along in that particular area.

The Court: Well, in effect, then, you are trying to show the knowledge of the defendant through a witness who happens also to have been familiar with the area, is that true?

page 69 } Mr. King: In effect, it comes to that because he's going to say that's a well known playing area for children. He already said he lives over here one block and I have another witness—I don't know if I can tell this—I have two more witnesses who will say his own boy played there all the time and I intend to prove that.

Mr. Garrett: My position is that that does not give him notice a child will come riding out in the road on a bicycle.

Mr. Patterson: You can cover that adequately in your instructions.

Mr. Garrett: A matter of evidence and a matter of instruction is an entirely different thing.

The Court: Let me get one other thing clear. You all had the Exhibit No. 1, the guide to which the witness Walton was testifying. I could not see exactly what area he was pointing to to begin with. Is there anything else you care to say?

Mr. Garrett: No, sir, except that I am relying on this Dickerson case which is apparently the latest thing on it. It postdates all these cases they cite.

page 70 } Mr. King: May I have one thing further? You have undoubtedly decided what you want to do. May I say this, if that had been a public playground there wouldn't be any question on earth about it. I don't think any objection would be made on the evidence. Now, this had the same characterization as a public playground for all the children in the neighborhood and I want to show that Carpenter knew it or let the jury find he should have known

it. I have no doubt they will find he should have known it, particularly when his own child played there all the time.

The Court: Whose own child?

Mr. King: Mr. Carpenter's.

Mr. Garrett: The point is that whether he knew the children were there or not, that didn't put him on notice that one was going to come riding across the road on the bicycle. That's in the Dickerson case. In the Dickerson case the direct evidence was that this man saw the children fifty feet away.

Mr. King: That's no inclination there would be one on the curb. It doesn't say that was a common playground or anything of that sort.

The Court: What is the scale of this map?

Mr. King: One inch to thirty.

The Court: Well, first of all, gentlemen, I'm going to rule this. At this time, insofar as this witness testifying as to what children were there on other occasions, I'm going to sustain the objection to that at this time, see what might come up later.

page 71 } Mr. King: If, by your ruling you mean you will deny the right of the witness to testify to the identification of the children, to me that's quite a different thing than saying he's denied the right to testify that children in considerable groups and with frequency played in that area without undertaking to identify who the children are. I'm not going to ask him that. If that is your ruling, I note my exception, sir. He is not undertaking to identify them.

The Court: In the first place, up to now there is a certain vagueness as far as the Court is concerned as to exactly what area this particular witness is talking about. He may have pointed to something on this Exhibit No. 1 as to which the Court can't tell because there are no marks or anything else on the chart. I don't understand precisely what area he is talking about to being with.

Mr. King: That is correct, sir. You've never given me the opportunity to show.

The Court: It may be, from a preliminary standpoint before I rule on it at all, we may have to make that feature of evidence a little more definite. The only other thought I had in mind at the time was regardless of the witness' knowledge at this time, the witness' knowledge of what goes on

page 72 } around the playground, maybe the Defendant's knowledge ought to be gone into first, but I would like to have the witness come in here now and let's get to more background as to what he's talking about because the

chart was too far from me to be able to tell what he was pointing to, if he pointed at any area at all.

(The witness returned to Chambers.)

Mr. King: Let the record show that the questions I am about to ask the witness Walton are in the absence of the jury and in Chambers.

By Mr. King:

Q. Wally, I asked you the question while you were testifying if an area in this general vicinity which you pointed out as being where that red spot is on Plaintiff's Exhibit No. 1, if it was commonly used by children of the neighborhood as a play area?

A. Yes, sir, these children over here, Newton, crossed back and forth. I lived there for fifteen years and come up there in the road a lot of times every day and I always saw them in there playing.

Q. What?

A. Saw them there playing most every evening.

Q. What do you mean by "them"? Are you identifying any particular children or just a group?

A. Newton children, I don't know the children
page 73 } that lived here. Me and Brock carried the paper
up there.

Q. Did you know children other than the children—

A. Lots of children in there in Davista Avenue and all played up there, too, a little bit older children.

Q. When they played in that area, did they play around in here? (Referring to plat.)

A. All the way in the edge of here and in here, too. (Indicating.)

Q. All the way in that block that adjoins the big white house?

Mr. Patterson: Let the record show what you are talking about.

The Witness: I have seen children wrastle in the edge of the grass here; that's a big grass spot.

The Court: Where is this big white house. I don't see it marked on this map? Behind this driveway?

The Witness: Right over in here. This is the driveway; the big house is in here.

Wally Walton.

The Court: The driveways shown here on the exhibit, leaving Penick Road, do they go to the house?

The Witness: Yes, sir.

The Court: Is the house back beyond where these two driveways come together?

The Witness: Along in here, I'll say. The
page 74 } house is on the side, the driveway comes in here.

The Court: What is your best estimate of the distance this house is from the road, from Penick Road?

The Witness: About fifty yards. I don't know for sure, something around fifty yards. I ain't very good at judging something like that. It's not real far.

Mr. King: Let me ask one further question.

Q. Do you know whether Mr. Carpenter did or did not drive frequently up and down Penick Road?

A. Oh, he came up Penick Road a lot. He gave me a ride from my house.

Mr. King: All right, sir.

The Court: Anything you want to ask?

Mr. Garrett: No, sir.

Mr. King: I will recite this for the record, that the area referred to by the witness in the questioning and answers he has just given to questions embraces Penick Road commencing at a point on the southwest corner of Davista Avenue and Penick Road and extending westwardly along the southern line of Penick Road up to a point where on this plat has been marked a red circle and extending back in a southerly direction from that frontage to the area surrounding the large old white house which the witness has described as
page 75 } being to the east of the two driveways approaching toward that house.

(The witness was excused from chambers.)

(The objection was further argued at length.)

The Court: Well, at this time, gentlemen, I am going to sustain the motion—objection, insofar as ruling out what children did on any previous occasion as of this time. However, I think it is admissible evidence for this witness to testify whether he saw on that occasion any other children playing in this vicinity and let him place where they were, if he saw them.

Mr. King: All right, sir. I note my exception to Your Honor's ruling and wish to save the point because I intend to offer precisely the same evidence by additional witnesses.

This is something entirely different. If Your Honor please, I have been practicing quite a few years but I've never seen it before and I don't mean to accuse anybody of anything. I'm sure there is no ill will on the part of anyone, but I know that during recess some very pleasant conversations were going on between the jury and principally Joe Williams. I'm sure that some of those jurors are very good friends of his, but when you have seven jurors sitting there and three or four or five of them are seen in close, very page 76 } friendly conversations between a lawyer in a case, then certainly the jurors, I think it gives a very bad impression. I don't mean to say I consider it unethical. I haven't. I suggest to the Court that he admonish Counsel to avoid any conversations whatever with jurors during the trial of this case or after the case is concluded.

Mr. Williams: If Your Honor please, along that line, we were all sitting at the Counsel table, Mr. King was sitting at his desk and so was Mr. Patterson and Mr. Garrett and I were sitting at the desk. The jurors were talking about their pay in the case, and one turned to me and said, "Joe, how much do we get paid?" And that started the conversation. That's all the conversation was about. It was purely along that line and was started by the jurymen and all the Counsel were at the table and I did nothing more than answer that question.

The Court: The Court feels that I instructed the jurors about talking to people about the case, gave them admonition several times in connection with the original recess and luncheon recess and told them they weren't to discuss anything in the case or allow anyone to discuss it in front of them. In view of that I don't believe it is up to the Court to, under these circumstances, tell Counsel what to do or not page 77 } to do.

Mr. Williams: I assure Your Honor that nothing was said about the case. It was as far removed from the case as night is from day and Mr. King knows it was.

Mr. King: I'm certain it was not, but I would very much appreciate it if Counsel would avoid such conversations in the future. Incidentally, the Court's statement he feels he should not admonish Counsel, I note my exception to that also.

Wally Walton.

(Note: The Judge, Counsel and Court Reporter returned to the courtroom.)

DIRECT EXAMINATION. (Continued)

By Mr. King:

Q. Now, Wally, let me ask you this. As you came down in the automobile with the lady that was giving you and Stanley Brock the ride that you had thumbed, as you passed the place opposite where those two driveways are, did you notice to your right any children playing in the area?

Mr. Garrett: Now, Your Honor, that's the very thing you just sustained the objection on, as I understand.

Mr. King: No, His Honor said I could ask that question.

A. Yes, sir, I did. I saw three or four—

Mr. Garrett: Just a minute, sir.

The Court: Do you have anything to say, Mr. Garrett?

page 78

Mr. Garrett: Well, I made my position clear on it, I think.

The Court: Do you want the Court to re-state its ruling, or not, sir?

Mr. Garrett: Well, I object to this question, Your Honor.

The Court: All right, objection is overruled.

Q. Now, will you answer the question?

A. Yes, sir, I saw three or four children playing.

The Court: Speak up.

The Witness: Yes, sir, I saw three or four playing in the yard.

Q. Where did you see them playing? Will you point on the map?

A. Right along in here. (Indicating)

Mr. Garrett: I note my exception to that.

Q. Here is the fence line between the places. You say you saw them playing in this area?

The Court: Can't we get this witness to mark this? Later

on I couldn't tell or the Supreme Court couldn't tell.

Mr. King: I would like for the record to show that the witness is pointing to a spot—

The Court: Wait, I suggest you let him just page 79 } mark it.

Mr. King: Would you take this pencil and mark with a circle as large as you think need be, to show where the children were playing.

The Witness: They were playing all around in the yard here.

Mr. King: Will you put your initial "W" in the middle of that?

(The witness so marked the exhibit.)

Mr. King: All right, the witness puts "W" upside down on the plat so it looks as thought it were an "M."

Q. And you've testified that the lady let you out of a car here at the corner of Davista Avenue and Penick Road. I think you testified also that you started across the road but waited for a dump truck to go by you. Is that correct.

A. That is right.

Q. Then you went across the road and said you were about three or four feet off in the field where this pole is?

A. Yes, sir.

Q. When you heard a crash?

A. Yes, sir.

Q. Then what happened?

A. As soon as I heard the crash, I looked up and Mr. Carpenter's car was sliding over toward this pole here and come back to this side of the road.

page 80 } Mr. King: The witness is pointing at a pole that is marked to the north off the hard surface of the road opposite the letter "P" in Penick, in Plaintiff's Exhibit No. 1.

Q. This pole?

A. Yes, sir.

Q. Saw him sliding over there, and then what?

A. As soon as I saw him sliding, I took off running up here. He come to a stop when he come to this shoulder.

Mr. King: The witness is pointing to the word "shoulder"

on the south side of Penick Road approximately half way between Davista Avenue and the easternmost area marked "Drive" which lies to the west of Davista Avenue.

Q. You ran back up to where—

A. Yes, sir, I ran before he come to a stop and I got up here and Wayne Newton was laying there tangled up in a bicycle. The bicycle was on top of him.

Q. Did Mr. Carpenter arrive at the same time or later?

A. About the same time.

Q. Did you have any conversation with Mr. Carpenter? Did you say anything to him?

A. I asked him if he hit him.

Q. What did he say?

A. He was sweating and told me a dump truck hit him.

Q. Did he seem calm?

page 81 } A. No, he was kind of nervous.

Q. What do you mean by kind of nervous?

A. He was shaking, sweating, it was hot. He rubbed his face off like he was sweating, had his hat on.

Q. He said, "No, a dump truck hit him."?

A. Yes, sir.

Q. Was the boy Stanley Brock there at about the same time that you got there?

A. Yes, sir, he was right there with me when I got there.

Q. Do you remember whether Mrs. Newton got there at about that time?

A. I think we was there about two seconds—she got there immediately after we got there. Wasn't no time.

Q. Did you stay there until Officer Montgomery arrived?

A. Yes, sir.

Q. Did Mr. Carpenter stay there until Officer Montgomery arrived?

A. He walked away as soon as the policeman came up there. He went home, I reckon that's where he went. He got in his car.

Q. You say as soon as Officer Montgomery got there, Mr. Carpenter left?

A. Yes, sir.

page 82 } Q. Did you see him have any conversation with Officer Montgomery?

A. No, sir.

Q. He just left as soon as the police got there?

A. Yes, sir.

Q. Wally, will you take that pencil you have in your hand

Wally Walton.

and mark the place in the field that you and Stanley Brock were standing when you heard the crash?

A. Right along there, about two or three feet in the field, beside the pole.

Q. Put a mark on it and put your initial "W" just above it.

A. Right along there. (Witness initialed exhibit.)

Q. Now, at the time that you were over there and heard the crash, where was the dump truck?

A. The dump truck was pulling out of Staples Mill Road and I couldn't tell you which way it headed, but I know it was pulling out of Staples Mill Road.

Q. When you looked up toward where you heard the crash, did you see any more dump trucks coming?

A. No, sir, wasn't anything else in the road.

Q. Did you see any more automobiles or any vehicles of any sort parked along the side of Penick Road, or any—

A. No, sir.

Q. Were there any parked cars in the vicinity at
page 83 } all?

A. No, sir.

Q. Were there any cars approaching there at the time?

A. No, sir. Some came up there two or three minutes later, I believe, stopped all around ,and all. A truck come up there, Wilber Florist truck stopped there.

Q. You say you saw the boy lying there tangled up in the bicycle?

A. Yes, sir.

Q. Did anyone request of you that you move the bicycle?

A. No, sir, I asked Mrs. Newton would it be all right to move it. She was screaming, holding his head. She said, "Move it," so I moved it on this street right here.

Q. Where?

A. On this street right here. (Indicating plat.)

Q. Was the boy lying on the bicycle or under it, or how?

A. He was tangled up there. I don't know for sure. His feet were tangled in the bicycle.

Q. And you pulled the bicycle away from him and stood it up?

A. Laid it down on this street right here.

Mr. Patterson: Let the record show he is pointing to "B."

Mr. King: Where the letter "B" is already on
page 84 } the plat.

Wally Walton.

Q. Wally, let me ask you this. Do you have any interest in the outcome of this case at all?

A. No, sir.

Q. How long have you known Mr. Carpenter?

A. I've known him about two or three years, two and a half years.

Q. At this time or at the time of the accident?

A. I knew him before the accident two or three years. I've known him four or five now. I had known him two or three before the accident.

Q. Has Mr. Carpenter ever given you any rides on Penick Road?

A. Yes, sir.

Q. Have you ever seen Mr. Carpenter traveling up and down Penick Road with any degree of frequency?

A. Yes, sir, I've seen him traveling up Penick Road a lot of times.

Q. Has Mr. Carpenter ever done anything to you to make you dislike him in any way?

A. No, sir.

Q. You are saying only what you recall?

A. Yes, sir, only what I saw is all I'm saying.

Q. Now, will you look at this plat here, or this picture—.

page 85 } Here's a picture in evidence. It's Plaintiff's Exhibit No. 4 and Officer Sheppard has testified that that picture was made on Sunday afternoon three days later. It shows a trash can or a garbage can sitting there on that concrete platform. Do you recall whether that can was there at the time of the accident on Thursday, or do you know?

A. I don't remember. I didn't see it there. I ain't saying it wasn't there; I didn't see it.

Mr. King: All right, no other questions.

CROSS EXAMINATION.

By Mr. Garrett:

Q. Now, you have marked this area with a "W" where you say that these other children were when you came by. Looking at this Plaintiff's Exhibit No. 4, would that be in the vicinity of this little white shed just about in the center of that picture, immediately behind the garbage can?

A. Right there where the cars are.

Q. Up where the cars are?

Wally Walton.

The Court: Can you gentlemen hear this? Speak up.

A. Right up there where the cars are setting, right there. You can see on the picture.

Q. You say it was up here by these cars?

A. Yes, sir.

Q. Now, the lane, this lane here is this lane right here, is it not?

A. I can't see. Yes, this lane here is this one.

page 86 } (Referring to plat and photograph.)

Q. Where the word "Drive" is on it, immediately to the east of the red circle with the "X" in it. Now, the cars, then, you said the cars are where the children were playing. That would be more over in this area, would it not?

A. No, sir, the cars couldn't be parked there. That's where the house is, right along in here.

Q. There are two lanes? Isn't there another lane that comes out this way?

A. This is it over here, comes out over where that pole is setting .

Q. What I want to know, you said the children were up by where the cars are. Aren't those cars parked up in here? They are not in this area?

A. They are between them two driveways right here.

Mr. Garrett: Can you gentlemen see this? Let's take this picture and will you—Let me get another picture. Your Honor, will you mark this as Defendant's Exhibit No. 3.

Mr. King: May I see it? If Your Honor please, that's the same as No. 5.

Mr. Garrett: I have a reason to do it. I want to mark on this one.

(The photograph was marked and filed as Defendant's Exhibit No. 3.)

page 87 } The Court: For the record, it is true that Defendant's Exhibit No. 3, the photograph just identified by the Court, is the same as Plaintiff's Exhibit No. 5.

Q. Now, you say that the children were playing up by—It seems to be a little bit closer than this one, this No. 5. You say the boy was playing up by these cars, is that right?

A. Yes, sir, right along in here.

Wally Walton.

Q. Will you make a hole?
A. I'm not sure. They were playing all around They was all around in there is all I know.
Q. Put a circle on that picture where you saw it.
A. They was all in there. (Indicating.)
Q. Take that and press down and put a "W" in the middle of that. Now, you insist that this area here is over in here on this plat? That's your testimony?
A. I think that's where it was.
Q. And not here? (Indicating)
A. No, sir.
Q. All right. Now, take your seat. How long have you known Mr. Carpenter?
A. A right good while.
Q. You carry papers for him, don't you?
A. I used to help him carry his—he would help me carry mine.
page 88 } Q. You've known him, too?
A. Known him a long time.
Q. This is important to me. I want to know this, I want to get this sequence of events clear in my mind. You said you got out of this lady's car. What was her name?
A. Mrs. Cirillo.
Q. Mrs. Cirillo?
A. Yes, sir.
Q. Where does she live?
A. Down by Glenwood Street. It's right off Penick Road, crosses on Penick about three or four blocks from where the boy was hit.
Q. You got out of her car and she drove off?
A. Yes, sir.
Q. On Davista?
A. Davista.
Q. Davista, that is right. All right, then, you came over to the south side, south edge of Penick Road?
A. Yes, sir, I waited for a dump truck to pass by.
Q. Had you gotten to the edge of the road when you waited?
A. Yes, sir, I was on the edge of the road when I waited. The dump truck went on by.
Q. Then, the dump truck went by?
A. Yes, sir.
page 89 } Q. What was the color of that truck?
A. I don't remember for sure. I just know it was a dump truck.
Q. Do you know whether it was loaded or empty?

Wally Walton.

A. It was empty because it was bouncing, rattling.
Q. Bouncing, rattling, making a lot of noise?
A. Yes, it was making noise.
Q. Was the tailgate swinging?
A. No, sir, I walked way behind it.
Q. Then it went by and you immediately started walking?
A. Yes, sir, as soon as it went by.
Q. And you got across the road and three feet, you say, off of the road?
A. Yes, sir, three feet.
Q. So you walked a distance of about twenty-five feet, twenty-three feet?
A. Something like that, maybe not that far, just across the road.
Q. And then you say that you heard a noise to the west?
A. Yes, sir.
Q. Well, now, you weren't looking in the direction of that noise when you heard it, were you?
A. No, sir, as soon as I heard the noise, I looked.
page 90 } Q. You looked around and you then saw Mr. Carpenter's car?
A. Yes, sir.
Q. Now, did it actually slide its wheels, or could you tell?
A. Yes, it slid over to the side of the road and come back to the other side and stopped.
Q. And did you see any skid marks up there when you went back?
A. No, sir, wasn't no skid marks. Can't put skid marks on that kind of road.
Q. How do you account for that?
A. Some kind of rock road, but you can't put any skid marks on it.
Q. Can't put any skid marks on it?
A. No, sir.
Q. All right, then, you looked up and saw him coming to a stop?
A. Yes, sir, slid on the other side of the road and slid back this side and come to a stop.
Q. Do you recall testifying once before in this matter?
A. Yes, sir.
Q. Do you recall—

Mr. King: Do you care to identify where he
page 91 } testified?
Mr. Garrett: Yes.

Wally Walton.

Q. Did you testify in Judge Power's court at one time in this case?

A. Yes, sir.

Q. You were asked a question, "How far from there was Mr. Carpenter's car?"

A. Yes, sir.

Q. And you said—

A. From where the boy was hit or where Mr. Carpenter stopped at?

Q. You said, "About right there where a little bit past that box, right there past that box—indicating on the photograph." And didn't you indicate—referring to Plaintiff's Exhibit No. 2—didn't you indicate that paper box right there, a combination mail and paper box?

A. Yes, sir, right along there somewhere.

Q. "Right by that paper box, right there, you mean?" And you said, "Right there, right along beside that box." Is that where he stopped?

A. Yes, sir.

The Court: What Exhibit is that?

Mr. Garrett: No. 2.

Q. Now, let's look here a minute, now, Wally. Isn't that mailbox, combination mail and paper box, that's a
page 92 } mailbox and paper box all on the same post?

A. Yes, sir.

Q. And that's at this drive coming out of the other side?

A. There was another one down here.

Q. There was another one down here?

A. Yes, sir.

Q. Well, now, you pointed out this mailbox right here, Wally.

A. You can see where that mailbox is. It's down past this. (Indicating)

Q. Where do you see that mailbox here?

A. Down past this drive. The drive comes in on this side, the drive comes out and the box is on the other side of the tree.

Q. Well, if you put the box over here, it's still a considerable distance from where this word "shoulder" is?

A. That's where I seen he stopped, right in here somewhere.

Q. Somewhere between the word "Drive" and the word "shoulder"?

Wally Walton.

A. No, sir, right along in here is where he stopped. (Indicating.)

Q. Take your pencil and run it between this driveway and the word "shoulder."

page 93 } A. I know it was on the other side of this driveway. The mailbox is on the other side of this driveway.

Mr. Garrett: All right, take your seat.

Q. Do you recall when Mrs. Newton came up there?

A. Yes, sir, she got there no time after we got there; two or three seconds after we got there, she got there screaming.

Q. Did you hear her tell the officer it was a dump truck that struck the boy?

A. No, sir, I wasn't paying no attention. I was watching her hollering. She didn't tell nobody nothing. She was screaming and hollering for help.

Mr. Garrett: All right, thank you very much.

The Court: One minute, I want to ask you this. Wally step down out of the witness chair to the Plaintiff's Exhibit No. 1 there in front of the jury. Now, those two driveways that leave Penick Road go to somebody's house. Whose house is that?

The Witness: Mrs. Cox, I think. I think it's Mrs. Cox's house.

The Court: Where is that house in relation to where the two driveways leaving Penick Road come together?

The Witness: Where is the house at?

The Court: Yes, sir.

The Witness: Right down in here somewhere,

page 94 } along the side.

The Court: Could you draw a little square or something indicating the house?

The Witness: I reckon it's something like that. I wouldn't know for sure. I couldn't tell by this paper, something like that. (Indicating.)

The Court: Put initial "C.H." in there representing "Cox House."

(The witness so initialed the exhibit.)

The Court: Now, these children you referred to, where were they in relation to this Cox house?

The Witness: Right over here where I marked, somewhere around in there.

The Court: Somewhere around the Cox house?

The Witness: Yes, sir, they was on the Cox's land. They was on that land, mostly over here.

The Court: What distance is that where the children were from Penick Road?

The Witness: I reckon it's around 150 feet or 200 feet, maybe more than that.

Mr. Garrett: What was the question, Your Honor?

The Court: The distance that the children he talked about being back up by the Cox house driveway were from Penick Road.

Mr. Garrett: And he says 150 feet?

page 95 } The Court: As I understood it.

The Witness: Something like that.

The Court: Now, between there and where those driveways go in, it makes sort of a diamond shape or triangle shape, doesn't it?

The Witness: You mean where the driveways come in like that from the house? It's a grass spot in there.

The Court: Any trees in it?

The Witness: Yes, sir, there's some trees in there, about five or six, something like that. I'm not sure. It's trees in there.

The Court: That's all I care to ask.

(Witness stood aside.)

The Court: Don't discuss with anyone else the questions you were asked or the answers you gave while you were in the courtroom.

Mr. King: Wally, wait a second. I'm going to ask Stanley Brock be called. As soon as he comes in, you go. Don't stay here while he's here.

STANLEY EUGENE BROCK,

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

DIRECT EXAMINATION.

By Mr. King:

Q. Will you state your name?

page 96 } A. Stanley Eugene Brock.

Q. Incidentally, will you bear in mind that those

Stanley Eugene Brock.

who want to hear you, what you say, are the members of the jury and the Judge, so speak not so rapidly. The lady wants to write it down, she wants to write everything you say. And speak loudly enough so these people can hear you. Say your name again.

A. Stanley Eugene Brock.

Q. What is your age?

A. Seventeen.

Q. When were you seventeen?

A. June 13th.

Q. Where do you live?

A. 6708 West Broad.

Q. Is that near the place where Penick Road runs into Broad Street?

A. Yes, sir.

Q. How far is that from Penick Road which runs into Broad?

A. About a block.

Q. And that place you live, is that down toward Richmond from the entrance to Penick Road along Broad Street?

A. Yes, sir, about a block this side, the other side of Reynolds Metals.

Q. The other side?

A. Yes, sir.

page 97 } Q. Other side of Broad Street from the new Reynolds Metals Building?

A. Yes, sir.

Q. Did you live at that same place in May of 1957?

A. Yes, sir.

Q. Now, are you familiar with an accident that occurred on an afternoon in May, actually May 9, 1957, in which a very small boy, Wayne Newton, was injured when struck by a motor vehicle?

A. Yes, sir.

Q. Were you in that vicinity at the time?

A. Yes, sir.

Q. Will you tell the jury now precisely how you happened to be there?

A. Well, I went up, Wally Walton—that was the other boy sitting in here—I went to his house about 12:00 and we got up and got to playing games—

Q. Excuse me, please don't speak too fast. Is Wally Walton a friend of yours?

A. Yes, sir.

Q. Is he a good friend?

Stanley Eugene Brock.

A. Yes, sir.
Q. Has he been for long?
A. All my life.
Q. You went to his house about 12:00 o'clock
page 98 } and you were playing games?
A. Yes, sir.
Q. How old were you at that time?
A. Fourteen.
Q. In May? When is your birthday?
A. June.
Q. So you are now just seventeen?
A. Yes, sir
Q. And in May of 1957 you were fourteen?
A. Yes, sir.
Q. You went to Wally Walton's house and were playing games with him around 12:00 and then what happened?
A. Somewhere after 2:00 we decided to go up Greendale and we walked down the road, got about half way up there and was thumbing a ride with Mrs. Cirillo and we went up a road not far from where that Newton boy was hit and she was turning off and she let us off there.
Q. Hold a minute. Will you come to the plat in front of the jury and show where these places are?
A. She was turning in this road here.

The Court: What is the name of that road?
Mr. King: Davista Avenue.

Q. She turned into Davista Avenue?
A. Yes, sir, turned in there and we got off.
Q. Where did you get off?
page 99 } A. Right at the corner. She just had got in there.

Mr. King: The witness points at the southwest corner of the intersection of Davista Avenue and Penick Road.

Q. Then what did you do?
A. We got out the car there and had to wait for a dump truck to go by, then we crossed the street, across Penick and got over here about four or five feet in the field over there, the church field, and then we heard—I thought it was a tire blow. I said, "Wally, a tire blowed." He said, "No, that was a wreck." So we looked up the road and saw Mr. Carpenter—

Stanley Eugene Brock.

Q. Excuse me, did you look up the road before you talked to Wally or talk too Wally after you looked up the road?

A. Both of us looked up the road when we heard the noise.

Q. What did you see?

A. I seen Mr. Carpenter's car come over here by the pole in front of the church and swerved by this road and stopped by this shoulder, and Wally and I took off up here and jumped back on the road and went about to where the Newton boy was laying.

Q. Down there where the Newton boy was laying?

A. Yes, sir, right in the middle of this drive, corner, where that "X" is.

page 100 } Q. Well, now, at the time that you ran across or went across the road and heard this noise and started running, where was the dump truck?

A. When we heard the noise, the dump truck was going out of Penick into Staples Mill.

Q. Had you seen it going out of there?

A. Yes, sir, we had watched it.

Q You watched it as you crossed the road?

A. Yes, sir.

Q When you looked up there toward where the accident occurred, did you see any more dump trucks?

A. No, sir.

Q. Did you run fast up here to this place or did you just run?

A. We ran as fast as we could get up there.

Q. You said Mr. Carpenter's car swung over to the left near that pole, which is in front of the Bethlehem Church on the plat and came to rest somewhere down here on the right-hand side of the road. Now, did Mr. Carpenter come up here also?

A. Yes, sir, he got out the car and he sort of trotted up there a little bit.

Q. Who got there first, you or Carpenter?

A. Approximately the same time, a few seconds difference.

Q. All right.

page 101 } A. Wally asked Mr. Carpenter, "Did you hit him?" He said, "No, a dump truck." He was shaking, took his hat off and he mumbled something.

Q. He mumbled? Did Mrs. Newton come then?

A. Yes, sir, it was a few seconds between all of us, Mr. Carpenter and Mrs. Newton, Wally and me.

Q. What was the condition of the boy when you saw him there?

Stanley Eugene Brock.

A. He was laying there, there was blood coming out of his face, on his nose and side of his head was scratched up and his foot was—the end of his foot was tangled up in the bicycle so Wally took the bicycle up by this tree.

Q. Now, as you drove down—what was the lady's name that you went down with?

A. Mrs. Cirillo.

Q. As you drove down with Mrs. Cirillo, did you see any children playing in this vicinity?

Mr. Garrett: Same objection to that.

The Court: Same ruling.

A. There was, you know, a lot of children playing over here by this Cox's house, place, across the road from Mrs. Newton, sort of at an angle, and there was a lot of children playing there. I saw three of them playing on a bicycle. There was a lot of children playing by the Cox's residence, three of them playing around with a bicycle. I couldn't see if it page 102 } was the Newton boy or not because I don't know any of them.

Q. Did you know the Newton boy at that time?

A. No, sir, I seen him in the yard when I was carrying papers up there.

Q. To the Newton's?

A. Yes, sir.

Q. How long have you known the Newtons?

A. I don't know exactly.

Q. Did you first get to know them when you started carrying papers to them?

A. Yes, sir.

Q. How long have you known Mr. Carpenter?

A. About two years or more.

Q. You are speaking two years or more prior to this accident?

A. Before the accident.

Q. Two years or more before the accident?

A. Yes, sir.

Q. Did you ever ride on Penick Road with Mr. Carpenter?

A. Wally and I sometimes thumbed and caught a ride. He traveled pretty fast.

Mr. Garrett: What's that?

The Witness: He traveled pretty fast.

Mr. Garrett: That's entirely inadmissible. It has nothing

Stanley Eugene Brock.

page 103 } to do with this case here, the fact that on a prior occasion this boy may have thought he traveled fast is an entirely remote thing from this accident. It has no probative value whatever. I think that Counsel knows better and should have avoided that, particularly in view of your ruling awhile ago.

Mr. King: I resent that. You know I didn't ask him how fast the man was going.

Mr. Garrett: You turned him aloose.

Mr. King: I resent those remarks.

Mr. Garrett: I make a motion for a mistrial because of that improper evidence.

The Court: Motion overruled. Gentlemen of the jury, the Court instructs you in this manner. The only determination you are making is what happened on the day of this case, day of this accident. What may have happened on some other day has no bearing on it. Therefore, the Court directs you to disregard anything that this boy has to say about some possible speed on some other occasion. Young man, you answer the questions you are asked and don't go talking about some other day that doesn't have any bearing.

Mr. King: That's precisely what I was going to say. I didn't ask anything about his speed and don't answer anything that I don't ask you.

page 104 } Q. I think you just testified that you had known Mr. Carpenter for two or three years prior to this?

A. Yes, sir.

Q. And that you had ridden on Penick Road with him?

A. Yes, sir.

Q. And you added something you weren't asked to say?

A. Yes, sir.

Q. How well had you known Mr. Carpenter?

A. I've seen him up at Greendale. I haven't known him personally, I've known him by name, mention of it.

Q. Have you ever seen him driving up and down Penick Road when you were not with him, you were not along?

A. Yes, sir.

Q. Have you ever seen him driving up and down Penick Road on numerous occasions?

A. Right recently.

Q. I'm speaking around the time of this accident.

A. He goes up that road right much.

Q. Did he at that time go up that road right much?

Stanley Eugene Brock.

A. Yes, sir.

Q. Do you know where, with reference to this immediate area of where the accident occurred, Mr. Carpenter lives?

A. Yes, sir.

Q. Where?

A. It's up here, as you go up to Staples Mill, take a right down—it's about, somewhere around a block.

page 105 } Q. Now, Stanley, you can sit back up there.

(The witness returned to the witness chair.)

Q. Did Mr. Carpenter remain at the scene of the accident?

A. He stayed there until the police arrived, then he left.

Q. Did he have any conversations with the police that you know of?

A. No, sir.

Q. Did you, at the time of the accident, see any motor vehicles parked on Penick Road?

A. No, sir.

Q. Did you see any cars approaching you coming down Penick Road as you ran up to the scene of the accident?

A. No, sir.

Q. Did you see any dump trucks running up and down Penick Road other than the one you testified to?

A. No, sir.

Q. What was the color of that dump truck? Do you remember?

A. I don't remember exactly. It was sort of a dark color, I think. I'm not sure.

Q. Have you gone up and down Penick Road very often?

A. Yes, sir.

Q. Are you familiar with the area around it, page 106 } what has been referred to as the Cox house?

A. Not behind the Cox house, but on Penick, up and down Penick.

Q. Do you know whether children of younger years customarily play in that area in front of the Cox house leading down to Penick Road?

Mr. Garrett: Your Honor, I know that's what you ruled out awhile ago.

Mr. King: I told the Judge I was going to ask the question.

Mr. Garrett: It puts me in position of having to object before the jury. It's prejudicial to our case. I hate to keep

making these objections and I don't think I should be put in that position. I think that if Counsel insists on doing that, that the only alternative, the only cure, is to declare a mistrial and I so move, sir.

Mr. King: Counsel is awfully anxious for a mistrial.

Mr. Garrett: When you keep putting in evidence that is not proper—

Mr. King: Let me finish then you start up. You weren't very polite a few minutes ago in speaking to me. After Your Honor made his ruling in Chambers, I stated to page 107 } Your Honor that I had several witnesses that can testify along that particular line and I would like to save the point with respect to all those witnesses. Therefore, I will raise the question and Your Honor can rule on each instance so it will be in the record, and that's the exact purpose of it and I thought that was understood.

The Court: Well, the Defendant's objection to that question is sustained for the reason previously and the Defendant's motion for a mistrial is denied.

Mr. King: And I note my exception to the Court's ruling. Is it to be understood that I can't ask that question to any succeeding witness? I do want the record to show that I have asked for it.

The Court: Well, I don't know that the Court can prevent anyone from asking any question that may conceivably have some bearing on it, subject to any objection or ruling on the objection.

Mr. King: Well, I'll ask it in the future, then. I have no other questions.

CROSS EXAMINATION.

By Mr. Williams:

Q. Stanley, I believe you said you are seventeen now?

A. Yes, sir.

Q. Where do you go to school?

page 108 } A. I work right now, at Wilbur's Florist, Penick Road.

Q. Where were you going to school? You were fourteen at the time this happened? You weren't quite fourteen, is that right?

A. I was fourteen, yes, sir.

Q. Where were you going to school then?

A. Dumbarton.

Q. And where was Walton going to school?

Stanley Eugene Brock.

A. He was going to school in—I don't know the name of the school.

Q. Why weren't you and Walton at school that day?

A. We had skipped that day.

Q. Both you and Walton had skipped school?

A. Yes, sir.

Q. Had you planned to skip school before or it just happened?

A. Just that particular day, I reckon.

Q. You weren't excused from school at all?

A. No, sir.

Q. Were you in the habit of skipping school?

A. Not too often.

Q. Did you skip school by plan or did you just both happen to skip the same day?

page 109 } A. I was going to school and met him at the bus stop and he said, "Let's skip school today," and we skipped.

Q. What time was that?

A. Around 8:00.

Q. I thought you said you went to his house around 12:00? When Mr. King was asking, didn't you say you met him about 12:00 o'clock that morning?

A. Yes, sir, but in the morning when we were going to school—

Q. You got up with him at 8:00 o'clock?

A. I met him at 8:00 and went home and come back to his house about 12:00.

Q. Where did you meet him?

A. At the bus stop.

Q. Where was that?

A. That was on Penick, about his house.

Q. How far does he live from you?

A. It was a right short distance through the woods.

Q. Don't both of you go to the same school?

A. No, sir, he went to a high school.

Q. He went to high school and you went to grade school?

A. Yes, sir.

Q. You were waiting for your bus and he talked you into playing hooky?

page 110 } A. He didn't talk me into it.

Q. Why did you play hooky?

A. I don't know.

Q. Didn't you stay off with him from that time on?

A. Stay home with him?

Stanley Eugene Brock.

Q. Didn't you stay with him from 8:00 o'clock on?
A. I told him I would meet him at his house after awhile.
Q. What time did you meet him?
A. Come back up there after 12:00.
Q. What did you decide to do at 12:00?
A. Stayed there and played monopoly up to 1:30 and decided to go to Greendale after 2:00.
Q. What were you going to Greendale for?
A. Just going up there.
Q. You don't know why you were going to Greendale?
A. We go there right much.
Q. Why?
A. A little bit of everything, look in the stores.
Q. You had no idea, now, as to what you were going up there for?
A. We always go up there.
Q. What do you do when you get there? There are stores on Broad Street Road, aren't there?
A. Yes, sir, but I like it on Greendale.

page 111 } Q. You have no reason for trying to get to Greendale?
A. There was a girl over there.

Q. You were going there to see her?
A. Both of us. She went to school, but we go there; a bunch of boys up there that work and get off at 12:00 o'clock.
Q. How high did you go in school?
A. Seventh—sixth.
Q. And quit?
A. Yes, sir.
Q. Now, the lady gave you a ride and you got out of the car?
A. Yes, sir.
Q. And you were headed across through the school ground, I believe?
A. Yes, sir.
Q. You walked through the school grounds?
A. Yes, sir.
Q. Would you tell the jury why you kept—paid such particular attention to the truck, looking at it turn down Staples Mill Road?
A. Couldn't miss it, looking at it.
Q. I thought you were looking across to Greendale? You weren't walking the way the truck was going, were you?
A. No, sir.

Stanley Eugene Brock.

Q. Weren't you thinking about the girl you were going to meet?

page 112 } A. I was looking both ways.

Q. I thought you crossed the road? Let's get that straight. You show them, now, come here and mark where you were standing, on this map.

A. Across the road right there (indicating), beside Davista Avenue.

Q. I'm talking about when you heard the crash.

A. It was in the edge of the field then.

Q. Where was the truck when you were at the edge of the field? Where was the truck you all saw?

A. I don't know.

Q. Didn't you testify that the truck was down here making a turn around Staples Mill Road when you heard the crash?

A. That was when we were almost in the middle of the road, when we were looking both ways.

Q. Well, where was the truck when you heard the crash?

A. I don't know then, I just seen it turn out.

Q. You didn't tell the jury when you heard the crash the truck was here making the turn? (Indicating)

A. The truck was just about in the road.

Q. What road?

A. Staples Mill.

Q. Where were you?

page 113 } A. When the crash occurred?

Q. Yes.

A. In the edge of the field.

Q. And the truck was here at Staples Mill Road?

A. Yes, sir.

Q. You were going across over here, weren't you, to Greendale, the Greendale Pharmacy, you make this turn to go a block? (Indicating)

A. I think it's further than that.

Q. You were headed across this way? (Indicating)

A. Yes, sir.

Q. Why were you looking back over behind you on Staples Mill Road?

A. I don't know, just happened to be looking.

Q. So you had your back up here, is that right? (Indicating) You had your back to the place where the boy was hit?

A. Yes, sir, but you could hear the crash.

Q. Could you tell where the crash was?

A. Yes, sir.

Stanley Eugene Brock.

Q. What did you think it was?
A. I thought it was a flat tire, he said it was an accident.
Q. You and Walton sat there and had a discussion as to whether it was a flat tire or an accident, didn't
page 114 } you?
A. No, sir.
Q. Didn't you say you told him it was a flat tire?
A. Yes, sir, and he said it was an accident and we took off running up there.
Q. With your back to it you could tell exactly where it was?
A. It was up here not far. (Indicating)
Q. You couldn't tell what it was, a crash or a tire?
A. I didn't know, there was a hill right there.
Q. How long have you delivered papers, now, for the News?
A. Around a year.
Q. And you knew Mr. and Mrs. Newton very well, didn't you?
A. Yes, sir.
Q. And—
A. Not perfect, but I knew them by carrying papers to them.
Q. Did you see Mr. Carpenter up there at the accident?
A. Yes, sir.
Q. And what did Mr. Carpenter do?
A. When the accident occurred?
Q. After you got back up there, what did Mr.
page 115 } Carpenter do?
A. Both of us got there about the same time.
Q. What did he do?
A. He was a little trembly.
Q. What else?
A. He was sweating a little and took his hat off and mumbled.
Q. He didn't do anything else?
A. No, sir.
Q. Did he touch the boy?
A. He stooped down with Mrs. Newton, and asked if she wanted him to put him in the car and take him to a doctor.
Q. Did he stay there and hold the boy for Mrs. Newton?
A. No, sir.
Q. You didn't see him holding the boy while Mrs. Newton was taking care of him?
A. He was talking to Mrs. Newton.
Q. Standing there talking to Mrs. Newton?
A. Yes, sir, stooping down beside her.

Stanley Eugene Brock.

Q. You heard Mrs. Newton tell the police officer that a dump truck hit him, didn't you? Did you hear him tell Officer Hubbard that?

A. No, sir.

Q. Did you tell Officer Hubbard what you saw?

page 116 } A. No, sir.

Q. That's all. You saw Officer Hubbard up there?

A. Yes, sir.

Q. You saw him investigating the accident, didn't you?

A. Yes, sir.

Q. You didn't tell him anything you saw?

A. He asked Wally and Wally told him, I didn't tell him.

Q. You didn't tell him a thing, did you?

A. No, sir.

RE-DIRECT EXAMINATION.

By Mr. King:

Q. Did you hear Mr. Carpenter make any statement in answer to a question given him by Wally?

A. He told Wally a dump truck hit him. Mr. Carpenter told Wally.

Q. Wally asked him that question, not you?

A. Yes, sir.

Q. You heard him give the answer?

A. Yes, sir.

Q. That was the time when you first arrived there and he was trembling and sweating?

A. Yes, sir.

page 117 } RE-CROSS EXAMINATION.

By Mr. Williams:

Q. You heard the Officer tell Wally a dump truck hit him? What did Wally tell the Officer then?

A. Wally told him the same thing I told you, when we got out of Mrs. Cirillo's car the dump truck passed and we heard the crash and saw Mr. Carpenter swaying—

Q. Did Wally tell him that up there then?

A. I'm not sure he was talking to Wally.

Q. You said you heard the Officer tell Wally that a dump truck hit him? I'm asking you what you heard, and don't tell anything but what you did hear. What did you hear Wally tell the Officer?

Stanley Eugene Brock.

A. I'm saying what Wally told me, I went on there with Mrs. Newton's boy.

Q. You didn't hear the Officer tell Wally the dump truck hit him, did you?

Mr. King: You have it backward.

Q. Did you hear Wally tell the Officer that a dump truck hit him?

A. No, sir.

Q. You don't know what Wally told him?

A. No, sir.

Q. You don't know what the Officer told Wally?

A. I'm going by what Wally told me.

page 118 } Q. What did Wally tell you that he told the Officer right there on the scene? What did Wally tell you he told the Officer?

A. Well, he didn't tell me the exact words he told the Officer.

Q. Tell me in your own words what Wally told you he told the Officer right on the scene?

A. I don't remember all that. All I know is what—

Q. I thought you said you and Wally discussed it a lot?

A. We did.

Q. I want you to tell me what Wally told you he told the Officer on the scene?

A. I don't remember.

Q. Just tell in your own words what he told him.

A. He just—you know what I said just now, the dump truck was going out and Mr. Carpenter—the Officer told Wally a dump truck hit him.

Q. Don't you know that neither you nor Wally told the Officer or anybody else anything about that until Saturday? It happened on Thursday and neither of you told him anything until Saturday, don't you know that?

A. No, sir, I didn't talk to the Officer.

Mr. Williams: That's all.

Mr. King: We have no other questions.

page 119 } (Witness stood aside.)

The Court: Don't discuss the questions you were asked or the answers you gave while you were in the courtroom. We will recess, with the usual admonition.

Stanley Eugene Brock.

(Whereupon, a short recess was taken.)

Mr. Williams: If Your Honor please, I want to recall Stanley Brock.

Mr. King: I want to recall one first.

Mr. Williams: I want to recall him. We were cross examining him.

STANLEY EUGENE BROCK,
being previously sworn, was recalled to the stand and further testified as follows:

RE-CROSS EXAMINATION.

By Mr. Williams:

Q. Now, Stanley, you admitted you were playing hooky that day that you saw this?

A. Yes, sir.

Q. I want to ask you if you have ever been convicted of a felony?

A. Yes, sir. We were with a bunch of boys and took $1,035.00.

Q. So you have been convicted of a felony?

A. Yes, sir, we were with the biggest boys and we wanted to be as big as they were.

page 120 } Q. How many times have you been convicted of a felony?

A. I'm not sure.

Q. You do know you have been convicted of one felony?

A. Yes, sir.

Q. What about Walton, has he ever been convicted of a felony?

A. He was with me on that other thing we was convicted on.

Q. So he's been convicted of a felony, too?

A. Yes, sir.

Mr. King: I object to that. It's very improper to introduce evidence of that sort unless it involves a crime which concerns moral turpitude; merely calling something a felony is not enough and I can hardly think it's a fair way to cross examine a witness. What was the felony?

Mr. Williams: I was asking him.

Mr. King: What felony?

Mr. Williams: He said it involved stealing money. Cer-

tainly it involves moral turpitude, involving a thousand dollars. He said it involved stealing more than a thousand dollars.

Mr. King: You must have known or you
page 121 } wouldn't have asked him the question.

Mr. Williams: I had a pretty good idea.

Mr. King: It's to impeach the witness, I take it?

Mr. Garrett: I would like for Mr. King to make his objection or not.

Mr. King: I do object, most certainly.

Mr. Garrett: I don't want to sit here and argue the thing before the jury. We take the position that goes to the impeachment of that witness and the other one, both. It's a crime involving moral turpitude and I think it meets the rule.

The Court: Anything else?

Mr. King: No, sir. I note my objection.

'The Court: Objection overruled.

RE-DIRECT EXAMINATION.

By Mr. King:

Q. Stanley, I want you to tell the jury and tell me under what circumstances—Well, what was the amount of money that was taken?

A. $1,035.00.

Q. From whom was it taken?

A. Wally's grandfather.

Q. Wally's grandfather?

A. Yes, sir.

Q. Now, why was the money taken?

page 122 } A. Just—We told a bunch of boys where it was. They took it, said they would take us down there and take us and show us and we went and got it—We wanted to be as big as they were.

Q. Were those boys bigger than you?

A. Yes, sir, lots bigger.

Q. You wanted to show them you were just as big as they?

A. Yes, sir.

Q. How old were you?

A. I don't know. It was a while ago.

Q. Have you ever committed any crime since?

A. No, sir, haven't touched nothing. Never going to either.

Mr. Williams: Was it before or after this accident?

Wally Ray Walton.

The Witness: It was before the accident.
Mr. Williams: Before the accident?
The Witness: Yes, sir.

Q. Let me ask you this. Were you any better friend of the Newton's than you were of Mr. Carpenter?
A. No, sir.
Q. Do you have anything whatever to gain for testifying in this case?
A. No, sir.
page 123 } Q. You've made a true effort to tell the truth and nothing but the truth?
A. Yes, sir.
Q. You told it as best you can, is that correct?
A. Yes, sir.

(Witness stood aside.)

Mr. King: I want to ask Wally Walton to come back to the stand.

WALLY RAY WALTON,
being previously sworn, was recalled to the stand and further testified as follows:

Mr. Garrett: Your Honor, I will object to any further leading questions asked by Mr. King as to either one of these witnesses. He led that witness very heavily, I think. We didn't object. I think any leading questions as to this witness will be improper since he is the Plaintiff's witness.
Mr. King: I won't ask any leading questions.

DIRECT EXAMINATION.

By Mr. King:
Q. Wally, some question has been raised on whether or not at the time of this accident you told any of the facts of the case, what you had observed, to either Officer Sheppard, I think was the name mentioned, or to Officer Montgomery? Did you tell them at the time of the accident what had occurred?

page 124 } Mr. Garrett: That's certainly a leading question. He's suggesting exactly what the answer should be.

Wally Ray Walton.

Q. Did you or did you not?
A. No, sir, I didn't. Mr. Carpenter said a dump truck came by and I didn't want to call him no lie.
Q. Is that why you said nothing to the Officer?
A. That's why I said nothing to the Officer.
Q. Did you at any later time talk to the Officers and tell them what had happened?
A. I met him on the road.
Q. Where was that? Do you know?
A. It was Saturday, I think. He stopped me and asked me and I told him what I saw.
Q. That was the first time you told him what you had seen?
A. Yes, sir, first time I talked with him.

Mr. King: No other questions.

CROSS EXAMINATION.

By Mr. Garrett:
Q. Wally, you also were convicted of stealing some thousand dollars from Stanley's grandfather?
A. My grandfather.
Q. Your grandfather? All right.

Mr. Garrett: I think that's all.

The Witness: I don't see where that would
page 125 } have anything to do with what I saw on Penick
Road. I was with other boys.

Mr. Garrett: You address your objections to questions I asked to the Judge. If he thinks they are improper, he will stop them.
Mr. King: Did the jury hear what the witness said? All right, no other questions.
The Court: Is that all the questions of this witness?
Mr. King: Yes, sir.
The Court: Do you want these two boys held for possible further examination or do you want them excused?
Mr. King: It's agreeable to me that they be excused.
Mr. Garrett: We have no objection to their being excused. Just a minute, young fellow. Let me ask you one or two more questions.

Q. Didn't you and this other boy get in the police car with Officer Montgomery or one of the other investigating Officers there at the time of this accident or immediately afterwards?

Alma Pearle Newton.

A. No, sir, I walked over by the police car and looked in it because I had never been around it much.

Q. You apparently took a little ride to the court house in one one time?

page 126 } A. Yes, sir, I rode to the courthouse in one.

Q. Didn't you actually get in the Officer's car?

A. No, sir, not that day.

Q. Did the other boy, Stanley, get in the Officer's car?

A. No, sir, I don't think so, no, sir.

Q. Well, Stanley says that you were talking to the Officer. What were you talking to the Officer about?

A. I wasn't talking to the Officer.

Q. You didn't have any conversation at all with the Officer there?

A. I might have talked to him about a '56 Chevrolet, but about Mr. Carpenter I never talk to him. I might have said something to him but not about Mr. Carpenter or the boy.

Q. You mean to tell the jury now that under all the circumstances there, you having seen Mr. Carpenters' car and the facts that you now relate to this jury, and you had occasion to talk to the Officers, you knew the Officer was investigating this accident, and you didn't say anything at all to him?

A. No, sir, because Mr. Carpenter told me a dump truck hit him. As soon as the police pulled up, he walked away and I didn't say nothing.

Q. And you stayed?

A. No, sir, I said after Mr. Carpenter left and

page 127 } the ambulance got there, I left right then.

Mr. Garrett: Very well, that's all.

The Court: Any objection to this boy and the other one being excused?

Mr. Garrett: No, sir.

The Court: You can tell them they are excused and are free to leave now. Next witness.

MRS. ALMA PEARLE NEWTON,

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

DIRECT EXAMINATION.

By Mr. King:

Q. Will you please state your name?

Alma Pearle Newton.

A. Alma Pearle Newton.

Q. Please bear in mind that what you have to say must be heard by each of the gentlemen in the jury box and also by the Judge, so I think it would be better if you addressed your remarks to the gentleman at the right end of the rear row of the jury box so that if he can hear you, we are certain the rest can also. I'm merely asking the questions; you are giving them the answers. You say your name is Pearle Newton?

A. That is right.

Q. What is your place of residence, Mrs. Newton?

A. 4300 Penick Road.

Q. Are you the mother of the boy, that is, the

page 128 } Plaintiff—

A. I am.

Q. —in this case today?

A. Yes, sir.

Q. And what is his present age?

A. Nine years old.

Q. What is his birthday?

A. April 20th. 1950 was when he was born.

Q. Born April 20, 1950?

A. That is right.

Q. If he was in an accident that happened on May 9, 1957, would he at that time have been seven years and nineteen days of age?

A. That is correct.

Q. Now, will you look at this plat right before you there and show the jury on the plat where your place of residence is?

A. This is where I live right here. I live right here, 4300, brick building.

Q. Was that your place of residence in May of 1957?

A. It was, yes, sir.

Q. Now, your son was injured on that day. Can you tell the jury where you were at the time he was injured?

A. I was standing right here watering shrubbery, right at the end of the front porch.

page 129 } Q. Is this the front porch?

A. Yes, this is the front right here.

Q. And you were standing—

A. Right at the end.

Q. You are pointing to the west end of the porch? This is north.

A. Right here. (Indicating)

Alma Pearle Newton.

Q. All right. Immediately prior to the accident had you seen your children?

A. Oh, yes, I had seen them quite often because they were playing right over in this area here, Mrs. Cox's house.

Q. Were they at that time, immediately prior to the accident, playing over there?

A. Yes, sir.

Q. And when you heard—Well, what was the sound that you heard when the accident occurred?

A. Well, I just heard a crash and I looked up and that's when I saw the bicycle lying right here. Of course, knowing the color of the bike, I knew it was one of my boys' bike and I immediately dropped the hose and ran right to the spot where he was.

Q. Was anyone else there when you arrived?

A. I saw no one, no one at the boy. I went right to my boy then and squatted down beside him.

page 130 } Q. Why did you see no one if no one was there?

A. I didn't look at anything else but my boy. When I saw the bike, that's all I would look at.

Q. What was the boy's condition at that time?

A. He looked like half of his forehead was gone. It was all bloody and his nose was bleeding and, of course, I thought he was dead. He wouldn't answer me, he wouldn't move, and he just laid there.

Q. Where was he with reference to the bike?

A. He was on top of the bike. His legs were sort of tangled up with the bike.

Q. What was the position of his body?

A. It seems to me he was lying on his left side. His face was in the dirt and his right leg was stretched out straight—No, his left leg was stretched out like this, one was brought up. I remember putting my hand on his leg, patting him.

Q. Was he lying on the shoulder of the road or on the hard surface? Now, bear in mind, let me mention to you you will see this Exhibit No. 1 shows Penick Road and it shows your house and it shows the church, and so forth. Where it shows Penick Road it has been agreed that that is the hard surface portion of the road.

A. You mean where these lines are?

Q. Where those heavy solid lines are, that's the page 131 } hard surface part. Now, the part that is not hard surface is usually referred to as the shoulder. It is shown in this particular instance to the south side of Penick Road and it's marked "shoulder."

Alma Pearle Newton.

A. Oh, I see.

Q. Was your son lying in the shoulder or on the hard surface?

A. The biggest part of his body was in the dirt, the shoulder, and I remember his foot and it could have been a little of his leg was on the hard surface, but all of his body was in the dirt.

Q. And he was tangled up in the bike?

A. Yes, sir, he was on the bike. It was a girl's bike, so it was easy for one leg to be underneath and one on top.

Q. This bicycle over here has been received in evidence. Does that appear to you to be the bicycle?

A. That is.

Q. Will you have a seat now, please, ma'am? At that time did you know Mr. Carpenter?

A. No, I did not. I didn't know him.

Q. Did you see anyone there who was later identified to you as Mr. Carpenter?

A. Yes, sir, after I had—

page 132 } Mr. King: Just a minute. If Your Honor please, I would like to issue one word of caution to the witness in connection with an objection made earlier in the trial concerning a statement that was indicated by another witness, and Your Honor feels it should not be mentioned. I don't want her discussing some other function. That's all. I don't know that she would, but it's not material here and I would like to express to her the suggestion that she not mention that other occasion. I think Your Honor knows what I'm talking about, but it's difficult to tell the witness with the jury present. I'm sorry I didn't think of it before. I should have told the witness before this.

The Court: Any objection?

Mr. King: You know what I'm talking about?

Mr. Garrett: I'm not sure, but I should think the thing to do is—

Mr. King: Mr. Garrett thinks it's all right if I take her to one side and explain it to her, if the Court thinks it's all right.

The Court: All right.

(Note: Counsel and the witness stepped aside momentarily.)

Alma Pearle Newton.

(The witness resumed the stand.)

Q. Well, now, to get back to the question. Did you, while you were there beside your son, see this gentle-
page 133 } man who is immediately to your right there, Mr. Carpenter, and who is the Defendant in the case?

A. Yes, sir, I did, after I had gone to my son's body and, of course, I don't know how long it was that I was there with him. I thought I was all alone because I can remember screaming for two of my neighbors and this man came up to my right and asked me where he could find a telephone and that was the first that I saw of him and a neighbor at that time ran up and threw a wet towel to me and she took him to her house.

Q. Took who to her house?

A. Mr. Carpenter, to use the telephone.

Q. What was that neighbor?

A. Mrs. Cox, she was across the street from me and that's where my son was laying.

Q. Did a police officer arrive while you were there?

A. Well, I vaguely remember him driving up but, of course, so many people were gathering I just—I can't tell you who was there. I remember a little boy asking me if he could move—if I wanted him to move the bike from under the child.

Q. Do you know who that boy was?

A. Well, I didn't at the time, but it was one of the boys that was here as a witness.

Q. One of the boys who were here today?

A. Yes.

page 134 } Q. Well, was your son bleeding at the time?

A. Very much. His whole forehead was full of blood and the gashes seemed like they were wide open. His nose, it looked like blood was pumping from his nose and I asked Mr. Carpenter at the time if he knew any of the pressure points to help me stop the bleeding and I don't remember whether he said anything but neither of us knew at the time how to stop it.

Q. Did that bleeding leave any blood spots on the shoulder of the highway?

A. Yes, sir, it left a very large puddle which was there for days even after rain. It still stayed there.

Q. Now, at what stage did you leave the scene of the accident?

Alma Pearle Newton.

A. Well, the ambulance came up. I don't know how long it took to get there, seemed like hours, but then when they got there some of the neighbors took me home to dress so I could ride to the hospital with the child. That's when I left.

Q. Well, did you dress and then go with the child in the ambulance or did you go some other way?

A. I went home and dressed and got in the ambulance and went with the child.

Q. You dressed quickly, I imagine?

A. I had on shorts. All I did was slipped a
page 135 } dress over them.

Q. What hospital was the child taken to?

A. Richmond Memorial Hospital.

Q. Did your husband, Mr. Newton, meet you at the scene of the accident or did he join you at some other place or where did he first appear after the accident happened?

A. After the accident, the first time I saw my husband was at the hospital. He didn't come to the scene while I was there.

Q. Did you undertake to make any arrangements that he be contacted?

A. I remembered when I was there with the child that I called to a neighbor that was way back, she wasn't down at the scene, she was standing in the yard, and I called and asked if one of them would call my husband and tell him, but I don't remember which one did.

Q. Now, had you or had you not, at the time this accident occurred, instructed your son Wayne in any way respecting how he should behave in crossing Penick Road with a bicycle?

A. Well, I have three little boys and I've always told them when they took their bikes across to get off the bike and to look both ways and to push the bike across. They were never allowed to ride a bike across the street and if they did it was unbeknowing to me because I've never seen them ride a bike across the street.

page 136 } Q. But in this particular instance, you do not know whether he was riding or walking?

A. No, I don't know.

Q. Now, I think you testified to the jury that before the accident your children and others were playing over around the Cox house?

A. Yes, that was the regular play area for those children. They all played right there.

Q. Well, now, at that time was that area commonly used as a play area by children in the neighborhood?

Alma Pearle Newton.

A. It was, my children—

Mr. Garrett: Your Honor, that again brings up the question we have gone into several times. It looks like there ought to be some finality to the ruling on that point.

The Court: Do you gentlemen want to be heard on that?

Mr. Garrett: Yes, sir.

Mr. King: May I ask her one further question which I think is the point on that? No, I won't ask her at this time.

(Note: The Judge, Counsel, and Court Reporter retired to Chambers.)

In Chambers:

page 137 } Mr. Garrett: Your Honor, if I understood you awhile ago, you ruled that Mr. King could not go into this thing, this area being on former occasions being on former occasions used by children, and he keeps persisting in asking that question and I have to get up and object. It puts me in position of looking bad before the jury. Now, in this particular instance, while I was objecting, the witness went ahead and answered the question anyhow. I think that that is highly prejudicial, sir, and it seems to be that here again the only way you can cure it is to declare a mistrial and start all over again. We have got this criminal hearing thing that has crept into the case and now this thing about this playground idea on the area across the road. I just don't see how we can get a fair trial now that we have had all that put in against us, and that's the ground for my motion, that you declare a mistrial.

(The previous question and answer were read as follows: "Q. Well, now, at that time was that area commonly used as a play area by children in the neighborhood?" "A. It was, my children—")

The Court: Mr. Garrett, you have endeavored to register an objection to the question and the witness has, in effect, answered a portion of it before the objbection could

page 138 } even be ruled upon. That's correct, isn't it?

Mr. Garrett: The thing is that Counsel knows you ruled that should not be asked and he continues to ask the question. If he wants to make his record complete and ask these witnesses that, I think he should do it in the absence of the jury but to keep on bringing it up in the presence of the

jury, it puts me in a bad light before that jury. It is prejudicial to my case.

The Court: Is there anything you all have to say?

Mr. King: I think we've said it. I think there's no question whatever that it's of probative value. We've shown this, we've shown that Carpenter regularly goes up and down Penick Road. We want to show and have thus far been denied the opportunity of showing that that area around the Cox house all the way down to Penick Road is a commonly used playground by children in the neighborhood. What I next wish to show is that Carpenter's own boy is a common user of that area, all of which leads to this point, that if that is a common play area and Carpenter eventually was up and down the road, he most certainly knew or most certainly should have known, particularly in view of the fact that his own child played there regularly, that that was a dangerous

page 139 } area and he should have had that in his mind when he approached the area and that should have necessarily increased the degree of care he should give while driving in this area.

The Court: Up until now there's been no evidence at all about any signs of caution of school children playing or crossing or anything of that sort, isn't that correct?

Mr. Garrett: There's evidene there's a school zone sign on the plat and the evidence is that that was not there at the time of the accident. It was way down the road.

Mr. King: This, I think, has nothing to do with a school zone.

The Court: I was thinking about the element of the signs because as I read that Dickerson case, in the opinion they went into right much about the speed limit signs relative to a school children crossing.

Mr. Garrett: That's Read versus Daniel. That was a different situation. That was marked as a school zone or playground area, a school zone, I believe.

Mr. King: If Your Honor has any doubt about it, I would like to go and find you the case that says flatly that where it's commonly known as a playground area, that that

page 140 } is something that should be kept in recognition by the Defendant in driving in the area.

The Court: As I remember the other questions, before you tried to get from the boys that there were a lot of other children playing around there and since then your only additional evidence is that they testified they had seen Mr. Carpenter,

the Defendant, riding up and down the road; also, some testimony about where he lived.

Mr. King: And all three witnesses are prepared to testify that the children habitually play there in that area, all the way down alongside Penick Road. My next witness is prepared to say the same. She's also a neighbor.

The Court: What do you say the law is now with respect to that?

Mr. King: I think the law is this, that if an area alongside a traveled highway or street is commonly known to be a play area in which children habitually frequent, that that increases the duty of care of a driver driving along that road.

The Court: What are your cases on that? We had better look at those right now.

page 141 } Mr. Garrett: I'm relying on that Dickerson case where they say he could have seen these children over there and that wasn't sufficient to put him on notice.

Mr. King: I think that's not the point because that doesn't involve a play area at all.

Clark against Hodges, 185 Virginia. (Reading)

(Note: The motion and objection were argued at length.)

Mr. King: May I be permitted to ask Mrs. Newton if the son of Mr. Carpenter—

The Court: My thought would be as of this time, subject to your right to call this witness or any other that you think may have some knowledge on this point, that it might be better to abandon this point, but delay, side-track it until we can look into this thing and get some more authority. After we get as much evidence as we can in today, maybe you can come down earlier tomorrow.

Mr. Williams: If Your Honor please, we contend that Your Honor has ruled on this, but he, on two occasions, has brought it up again and prejudiced us before the jury, number one, from having to object and, secondly, actually answered. And we certainly contend that if he can't produce some law to show he's right, we are highly prejudiced and should have a mistrial in this case.

The Court: That point has been made. Was it made again this time?

page 142 } Mr. Garrett: Yes, sir, I renewed my motion a few minutes ago. I think before we proceed, you will have to rule one way or the other.

Alma Pearle Newton.

The Court: As I recall it, on this exchange she was asked this question and practically answered before we got into it. You have objection to this line of questioning and another motion for a mistrial. Is that correct, Mr. Garrett?

Mr. Garrett: Yes, sir.

The Court: Before I rule on it, it is my understanding that subject to the Court's ruling on this, that it would be agreeable to Counsel for the rest of the day's evidence to go into other matters and try to get prepared on this tonight and come down early tomorrow morning and get into it. Let me see, then, shall we leave it in the the status that the Court does not rule on either the objection at this time nor the motion for mistrial but that we go ahead with other matters and then come back tomorrow morning and the Court having it under advisement and hearing from Counsel will rule on it.

(Note: The Judge, Counsel, and Court Reporter returned to the courtroom.)

(The witness resumed the stand on direct examination.)

Q. Mrs. Newton, will you explain to the Court
page 143 } and to the jury the state of Wayne's health prior
to this accident?

A. Well, he had never had anything wrong. He had had a tonsillectomy and broke his collarbone.

Q. When did he break his collarbone?

A. When he was about seventeen months old. We had a play yard fence and my oldest boy left the gate open and he came out and got on the sliding board we had put on the outside and he got on that and fell off and broke his collarbone.

Q. Did he seem to have any difficulty with the broken collarbone at the time of the accident?

A. No, it didn't bother him one bit.

Q. Did he have any other physical ailments of which you knew at the time of the accident?

A. No, sir, he has never had any sickness.

Q. Now, when Wayne was taken to the Richmond Memorial Hospital immediately after the accident, what treatment was given, as best you know of your own knowledge?

A. Well, when he was taken right in the beginning, they just took him in the emergency room and called Dr. Meredith from the—

Q. Dr. John Meredith?

A. Yes, sir, from the Medical College, a neurosurgeon. Of

course, when he came he took him on away. I didn't see, and as far as I know, all they could do was sew up the page 144 } gashes and try to straighten his nose as much as possible because that had been crushed like an egg.

Q. Do you know of any other doctor that assisted Dr. Meredith?

A. Dr. Meredith called a Dr. Brooks Hunt in and the two of them worked on him.

Q. What portion of the boy did Dr. Hunt work on?

A. Well, he worked on his nose at that time.

Q. Dr. Meredith worked where?

A. Well, the two of them together, I guess, sewed the stitches up. I never knew just which one.

Q. At that time was the boy conscious or unconscious?

A. No, he was unconscious. He was unconscious for about eight days.

Q. This accident happened on a Thursday and your best recollection, I take it, is that he was unconscious for seven or eight days until, roughly, Thursday or Friday of the next week?

A. I believe it was the following Thursday, about 6:00 o'clock that morning that his night nurse called us and told us to get there quick that she thought Wayne was coming to.

Q. Did you go when she called?

A. Oh, yes, we went right straight down.

Q. Had you been with the boy during that week?

page 145 } A. We had been with him almost constantly but it so happened that I did sleep at home that night. I had a cot in his room the whole time he was there. That night, though, I had gone home to sleep.

Q. When you received that call in the morning, what did you do?

A. We just got dressed hurriedly and went down and when we got there Wayne was like a little wild animal. He was screaming, he was afraid of everything and everybody. It took us all to hold him in the bed and the minute you would take him in your arms, he would push you away and scream. He was frightened. Of course, he didn't know what he was doing at the time and that went on for quite a few days and it was a good while, I don't remember how long, before he knew us. I would walk in and talk to him and he would call me Mr. She and Mrs. She, what little he could talk. He talked very slow. He had to learn to talk all over and when he did try to talk he

would have to think the words out. He seemed like he wanted to but he couldn't.

Q. Do you know whether at that time he was given any drugs or medicine or what?

A. Right at the beginning they had to feed him through his veins, intravenous, and it would take about four or five men to hold him to get the needles in, even though he was unconscious at the time. He evidently could feel pain
page 146 } because he fought like a little tiger.

Q. How long was he in the hospital that first time?

A. About twenty-eight days, I believe it was, he was in the hospital the first time.

Q. Then was he permitted to come home?

A. Yes, he was permitted to come home. Of course, we had had to watch him very closely.

Q. Did you have instructions with respect to watching him?

A. Yes, Dr. Meredith said we should have to watch him. He wasn't to play hard. Of course, each time he tried to play, of course, he wanted to play because he had two other brothers, but each time he had such a dreadful headache.

Q. What appeared to give him the headaches?

A. He could shake his head from side to side and it would give him one or he could walk down the steps and he would get a headache and he seemed constantly to have headaches.

Q. Had he ever had a headache before the accident?

A. As far as I know, he has never troubled with headaches until after it.

Q. What was the condition of his facial appearance at that time?

A. Well, he looked horrible to me, but his nose was crooked and the whole left side of his face was paralyzed at the time.

When he would smile, it would be just on one side.
page 147 } This one was no expression whatever, (indicating) and he has dimples. There's none in the left cheek. He still has his right one, of course. His face is just distorted. This side seems to droop, where this side, of course, has the expression.

Q. You say his nose was crooked.

A. That was crooked even, but since then he's had plastic surgery.

Q. When was he first given plastic surgery?

A. That was in September after he was—The accident was in May and this was in September that he was first taken to the hospital for plastic surgery.

Alma Pearle Newton.

Q. Do you remember approximately when in September that was?

A. It was the first week, I believe, first or second week, because he missed school right in the beginning. He was a couple of weeks late going to school.

Q. I think you said—Well, we know the injury occurred on May 9th?

A. Yes, sir.

Q. And, of course, as you testified, he went to the hospital immediately. As I recall, you testified he was there approximately twenty-eight days?

A. That is right.

Q. So twenty-eight days would be, roughly, the 5th or 6th—

page 148 } A. The last of June he came home.

Q. The 5th or 6th of June?

A. When he came home the first time.

Q. Then he went back again?

A. In September.

Q. Early in Septmber for plastic surgery? Who performed the plastic surgery?

A. Dr. Leroy Smith performed the plastic surgery.

Q. What was the nature of that operation?

A. They had to break his nose over and straighten it, took out the splints and, of course, he worked on the scars. I don't know just what he did. I know he took stitches in it because they had to be taken out, but I don't know the terms. When he explains it, I don't understand it, but I do know he was trying to make the scars look better, trying to restore the damage that had been done as much as possible.

Q. How long was he in the hospital on that September visit.

A. Approximately one week, I believe, just about a week.

Q. Were you and Mr. Newton directed by any of the—any attending physician or physicians to give him drugs of any sort during this period of time?

A. Well, after the accident, Dr. Meredith started him on phenobarb which is a nerve medicine.

page 149 } Q. Is that phenobarbital?

A. Phenobarbital, I should say, and that was to prevent any epileptic seizures he might have from the brain injury and he took that for two years. I stopped it around some time in June.

Q. In June of this year?

A. Yes. He took that three times a day for two years.

Q. That was on doctor's advice, was it?

Alma Pearle Newton.

A. Yes, sir.

Q. Well, now, were you instructed by any physicians to restrict his play habits and his physical behavior?

A. Well, it's more or less that way ever since he was hit because it seemed like every little thing he would try to do, he would suffer from it so we just had to watch it carefully. We weren't allowed to let him tussle and do the things little boys would like to do, and, well, just everything he wanted to do seemed to be the thing he couldn't do. He would try them, of course. You know, it's hard to keep children still.

Q. Could you keep a watch on him at all times?

A. No, I couldn't.

Q. You say you have three sons?

A. Yes, sir.

Q. Do you have any daughters?

page 150 } A. No, sir.

Q. What is the difference in age?

A. Now, the baby is seven and Wayne is nine and the other is eleven and a half.

Q. What is the name of the one you call the baby?

A. Craig, he is seven.

Q. He is seven and Wayne is nine?

A. And Chippy is twelve, or will be in November.

Q. Chippy is the oldest?

A. And, of course, all boys like to wrestle and that's where I had trouble. They all want to wrestle and tussle, and the others seemed too young to realize that Wayne couldn't and, of course, Wayne would try.

Q. There's approximately two years difference in age between the two of them?

A. That is right.

Q. Now, has Wayne been back to the hospital since that September, 1957, plastic surgery trip? I'll call it that. Has he been back again for any further treatment?

A. Yes, he was in the hospital just this past June for plastic surgery again.

Q. On whose suggestion was that?

A. Dr. Smith, his last check-up which was in the Spring.

Q. Is Dr. Smith himself a plastic surgeon?

page 151 } A. Yes, sir.

Q. Did he perform plastic surgery this last June?

A. Yes, sir.

Q. What was the nature of that?

A. He just worked on the scars. Of course, as I say, I don't

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know what he did, but it was re-stitched all over, all three of the scars were, but he didn't touch his nose or his cheeks.

Q. If you know, how did he re-stitch the scars?

A. I don't know. All I know, the stitches were there and I took him to his office to have them taken out, but I don't know.

Q. You were not present when the operation was performed?

A. No.

Q. Do you still restrict Wayne in his method of play or behavior?

A. Yes, I beg him not to climb trees because I'm still afraid of a seizure. Whether it will ever come, I don't know, but I always ask him not to climb trees or get in high spots where if he were to have a seizure I feel that would be of more damage to him if he was up high, and if he plays ball I caution him to wear something on his head. We bought him, I guess you would call it a catcher's mask because I have a fear of him getting struck again in his head and we have had

page 152 } tumbling mats for the three boys to play on and they have been put away for two years because each time he would try to stand on his head he would get the headache again. So they have been put away for good.

Q. Let me ask you this. Can you tell the jury what his accomplishments, I suppose is the best word, what his accomplishments were in his school work before the accident and after the accident?

A. Well, in the first grade he got—

Q. First, before you do that, let me ask you this. What grade was he in at the time of the accident? Now, that's May 9, 1957.

A. Well, he was in that first grade. That was the end—it was just a month before school was out and he would have completed.

Q. Had he gone to kindergarten also?

A. Went to kindergarten the years before. This was the first grade at Dumbarton Elementary School.

Q. How did he do in grades?

A. He got good grades. I wouldn't say he was an outstanding student. We were satisfied with his grades, and then in the second grade, of course, he had a hard time keeping up. He had lost his enthusiasm for school.

Q. The second grade would be the grade starting in September, 1957?

page 153 } That is right. He was two weeks starting because of plastic surgery and, of course, the head-

aches were continually with him then and he would get sleepy in school and would cry and wouldn't want to go school but at the time I felt he was better off in school because he was at least quiet.

Q. The first year he cried and didn't want to go to school?

A. No, he loved school the first year and then I feel it was the way he was feeling was the reason he disliked going because he just felt bad.

Q. Has he now completed his third year of school?

A. Yes, sir, he completed that just recently.

Q. How has he done this year?

A. He got average grades this year. It was better than the second grade.

Q. Was there any comparison—what was the degree of difference between the first, second, and third grades?

A. Well, his grades in the first grade were one degree higher as far as report cards. That's all I have to go by.

Q. What do you mean by that?

A. On report cards they grade Excellent, Satisfactory, Help Needed, I believe, and then Poor. I think that's the way.

Q. What were his grades?

page 154 } A. The first grade his grades were all under Excellent. They put a check beside the subjects, and this year it was all under Satisfactory.

Q. What about his second year?

A. That was Satisfactory, but the teacher, she had to wait. She told me at least he had nerve enough if he was behind the class, he would ask them to wait for him and she gave him his grades due to the fact he was trying and doing his best at the time.

Q. Gave him Satisfactory?

A. And she gave him Satisfactory.

Q. How about your other two children? How do they do in school, or have they done?

A. I guess they are average. The oldest, I would say he averaged about a "C" in his elementary. He went to a different school and they graded by "A," "B," "C." His average was a "C" in the first grade but he didn't go to kindergarten and I feel that was a big help to the other two, the younger, and the youngest, who will go in the second grade next year, his grades were all under Excellent, just like the one that got hit.

Q. Like Wayne did the first year?

A. That is right. He goes in the second grade next year. there has been on the part of his other two brothers?

Alma Pearle Newton.

Q. You, of course, necessarily know your children and know their abilities?

page 155 } A. Yes, I feel that I do.

Q. Do you feel that there is any greater degree of responsibility or understanding on the part of Wayne than there has been on the part of his other two brothers?

A. No, I would say they are all about alike. They are just average three little boys. I can't see why—I would like to think they are geniuses, but they are average boys as far as I can tell.

Q. Mrs. Newton, I have here some photographs which I would like to show you and ask you if you will go through these and identify them. After your having done so, I will ask the Court to receive them in evidence. They are pictures of your boy Wayne, in chronological order from the youngest to the more recent. I have handed you four pictures.

Mr. Garrett: We would like to approach the Bench a moment, Your Honor.

(Note: Counsel approached the Bench, after which the Judge, Counsel, and Court Reporter retired to Chambers.)

In Chambers:

Mr. Garrett: This is supposed to be a chonological order of the pictures, one showing him just a plain portrait, one his seventh birthday with "Cowboy" written on the birthday cake, and one with his face all plastered up and the last with scars on his head which I understand was taken

page 156 } since the time of this last operation on June 1st.

Now, the first one we have no objection to. That shows the boy before he was hurt. We think, however, if that's put in there's no point in putting in the one showing him at the birthday party since I think the real purpose of that is to give the jury a folksy attitude toward the boy, that he's had a birthday party.

The Court: Chronologically, picture No. 1 on the left, facial view of the Plaintiff, what stage chronologically is that supposed to be?

Mr. King: His school photograph, taken in November or December, 1956.

Mr. Garrett: That was only six months or four months before the accident.

Alma Pearle Newton.

(The objection was argued at length.)

The Court: The Court rules that picture No. 1 of the boy around six years old is admissible and picture No. 2 of the seventh birthday is admissible; picture No. 3 is rejected and picture No. 4 is admissible.

Mr. Garrett: We would except to your ruling as to No. 4. I think maybe you had better mark these now so that I can properly identify the one I object to for the record.

Mr. King: We except to his ruling with re-
page 157 } spect to picture No. 3.

(The photographs were marked and filed as Plaintiff's Exhibits No. 9, 10, and 11.)

(Plaintiff's Exhibit marked No. "R" was rejected.)

Mr. Garrett: My objection and exception runs to Exhibit No. 11.

Mr. King: And the Plaintiff's objection runs to the Exhibit marked "R".

Mr. Garrett: We would like to call Mrs. Newton in here to ask her a question or two.

Mr. King: That's quite unusual.

The Court: It's not anything you would handle on cross-examination?

Mr. Garrett: We understand she had a conversation with one of the jurors. I would like to ask her the nature of the conversation.

Mr. King: I don't know anything about it.

(The witness was called into Chambers.)

By Mr. Garrett:

Q. Mrs. Newton, when we were in recess a few minutes ago, I went back to the Judge's office. Did one of the jurors approach you?

A. You mean when I was sitting up there?

Q. Yes.

page 158 } A. You mean did he talk?

Q. Yes.

A. Yes, we talked about my corn being flattened out and another one stood there, the grey-haired one, I think, and we were talking about the chair I was sitting in being nailed to the platform. Is that what you mean?

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Q. Did he make any reference to the plat laying there on the rail?

A. Oh, no.

Q. Do you know that juror?

A. No, I don't know a soul in there.

Q. Did he ask you something concerning your corn?

A. No, we were talking about the rain, my corn, my garden. My corn is flattened down.

Q. You made that remark and then he said something?

A. He was standing there looking at the plat but he never said anything to me about the plat.

Q. He was looking at the plat and you said something about your corn?

A. We was talking about the rain and I said something about the rain raining so hard and I said I didn't know whether it's hail and I said I guess my corn is flattened down and then the other one, the gray-haired one, he page 159 } was trying to move the chair I was sitting in and he said something about it would fall off. They never said anything about the drawing, if that's what you are talking about. Did I do something wrong?

Mr. Garrett: We have to travel on her testimony in a way. Mr. King brought up the objection awhile ago about the conversation with the jurors; I can't stand here and say Mrs. Newton is lying about what she talked to the juror about but, on the other hand, it's certainly a suspect.

Mr. King: Call the juror in, if you think she's lying. That's one hell of a statement.

Mr. Garrett: Bill, I told you I wasn't accusing the woman of any lying.

Mr. King: That's the insinuation, then.

Mr. Garrett: I'm saying I don't know, but it was certainly an unusual circumstance. There the juror is looking at the plat and he and she are having a conversation. I don't know what happened.

The Court: Do you have a motion as a result?

Mr. Garrett: Under the circumstances, Your Honor, the only thing we can do is ask for a mistrial.

The Court: Would you state your ground for that?

Mr. Garrett: Because of improper conduct of page 160 } the juror in having conversation with a witness while she was on the stand and while the Court was in recess.

The Court: The Court overrules the motion.

Alma Pearle Newton.

Mr. Garrett: We except.

Mr. King: May I make a suggestion, or I would call it a request, that the Court not direct but request the jury not to engage in any conversations with either parties or Counsel in the case during the balance of the trial.

Mr. Garrett: I think that's a very good suggestion. My only thought is this, that it not be done this moment because it would be obvious that having called Mrs. Newton in here that we brought up that question. I think at the next recess or adjournment we should.

Mr. King: That's perfectly agreeable.

The Court: Now, gentlemen, again it was my recollection that you all had summoned something like seventeen witnesses and have two depositions. You are still on the fourth witness. Before we came in to recess I told the jury that the case was going to run overtime and to talk among themselves and let me know how late they want to go tonight. When I go back in I assume somebody will tell me what they want to do. We are either going to have to go overtime
page 161 } into this night or long into overtime tomorrow night unless we happen to see we can get along with more speed than we have now. I'm asking if you are willing to go ahead into the evening, if the jury is willing to.

(The Judge, Counsel, Court Reporter and Witness returned to the courtroom.)

(The Witness resumed the stand on direct examination.)

By Mr. King:

Q. Mrs. Newton, I show you three photographs and ask you if you will take them in chronological order, identify them for the benefit of the jury and the Court.

A. Do I show them to them?

Q. Yes, identify them first and I'll pass them.

A. This one was taken before the accident, I would say the the summer before the summer he was struck. I don't remember what date.

Q. Who took the picture? Do you know?

A. It was not the summer but the fall when he started to school, in the first grade. It could have been anywhere between September or December. If any of you are familiar with the little school pictures they take—

Q. It's a school picture?

A. Yes.

Alma Pearle Newton.

Q. In the fall of—
page 162 } A. The first year he started, in the first grade.
Q. Of 1956?
A. Yes. This one was taken on his seventh birthday which was April 20th.
Q. Where was that taken?
A. At home.
Q. Who took it?
A. I don't know whether I did or my husband. One of us.
Q. That was a snapshot made?
A. Of his birthday. That's his birthday cake.
Q. That was April 20, 1957?
A. Yes.

Mr. King: I think the record should show that the first picture I referred to was Plaintiff's Exhibit No. 9 and I'm now referring to Plaintiff's Exhibit No. 10.

Q. You now have in your hand, Mrs. Newton, Plaintiff's Exhibit No. 11. Will you identify that?
A. This was taken this last time in June, this past June that he had plastic surgery.
Q. That was taken after his last operation?
A. Yes.

Mr. King: I have no other questions on direct examination of Mrs. Newton.
page 163 } The Court: Gentlemen of the jury, if you are through with those photographs, you can lay them on front where the Sheriff can get to them or give them to Counsel.

CROSS EXAMINATION.

By Mr. Garrett:
Q. Now, Mrs. Newton, do you have any pictures that were taken immediately before this last operation?
A. I can't remember when the last I have at home were taken. I have some taken after the last plastic surgery, I believe.
Q. Yes, but do you have any taken—
A. You mean just immediately before?
Q. In the last several months before last—before the last time this case was scheduled for trial and the operation? Did you have any pictures taken?

Alma Pearle Newton.

A. I didn't have any unless I took some snapshots at home. I haven't had any recent photographs taken.

Q. What was the purpose of taking this picture of the boy right after the operation?

A. My attorneys wanted a picture.

Q. Your attorneys wanted it?

A. And I wanted it, too.

Q. They didn't ask you for any picture before the operation was had?

page 164 } A. I don't know whether they did. I can't remember the pictures I've given them. Most of mine are snapshots. That one with his birthday cake, that is a snapshot that I took at my home.

Q. Mrs. Newton, let me ask you to step here and look at the plat a moment. I understand that you said that before the accident your boy was back in this yard?

A. They played all back in here and he was playing right around in this area. (Referring to plat.)

Q. Is this where the house sits, where that mark is put there?

A. Yes, this is the house, this is the driveway.

Q. They play back in here?

A. All around, all in this area. This is the front of the house. They play here. Then there's a garage and barn they play in. They just love that barn.

Q. Let me ask you where you saw him on that particular day. Was he back in here?

A. He was back in here.

Q. Did I understand that he rode out of this drive here?

A. This one right here?

Q. Yes. I wonder if you would put a pencil arrow along that driveway?

A. When they usually come out, they—(The page 165 } witness marked the plat.)

Q. Now, that points just about directly to your home, doesn't it?

A. Yes.

Q. Now, take your seat. Now, as I understand it, had you seen this green dump truck go by or any dump truck go by that day?

A. I had seen some trucks go up and down the road hauling dirt that day.

Q. Had you seen any truck go by immediately before this accident

A. I didn't see anything go by.

Alma Pearle Newton.

Q. Did you see Mr. Carpenter's car?

A. No.

Q. Did you see Mr. Carpenter's car when you ran out to where the boy was laying?

A. I saw nothing but the bicycle.

Q. And you say that your son was partially on the shoulder and partially on the road, I believe you said a foot?

A. The biggest part of his body was on the dirt, the shoulder.

Q. And, as I understand that, the bicycle was right there where he was lying?

A. He was on top of the bike.

Q. Did you tell the Officer that a green dump
page 166 } truck had struck the boy?

A. No, sir, I remember some discussion there about—someone said, I don't know who, said something about a dump truck; the dump trucks, they had seen them going up and down the road and that called my attention and I heard someone say something about these trailers you carry horses in, but of course, I never saw either one of them at that time.

Q. You say you did not tell the Officer anything about a dump truck?

A. If I did I don't remember because I don't remember talking to the Officer at the time of the accident at the scene.

Q. Didn't he later question you about it at the hospital?

A. He came to the hospital and asked me if I saw anything and I told him I didn't see anything at the time because when I heard the crash I looked up and saw the bike and that's all. I didn't see anything at all.

Q. All right, now. You say that your son had a broken collarbone at seventeen months. He fell off of a sliding board?

A. Yes.

Q. Did it knock him unconscious?

A. No, he fell on all fours. I saw him fall but couldn't get to him in time.

Q. And he broke his collarbone?

page 167 } A. Yes.

Q. Now you say that before this accident that his grades were all Excellent?

A. In the first grade his grades were on his report card checked under Excellent.

Q. And you say further that in the second or third grades they have been checked as Satisfactory?

A. That is right.

Q. Now, you spoke of cautioning him about the riding of his

Alma Pearle Newton.

bicycle. Did he seem to understand what you were talking about when you told him?

A. Well, I just tell children, I don't think you can tell whether they understand. You tell them over and over and over when they go to cross a road to be careful, and that's all I could do.

Q. If you felt he didn't understand it, would you let him go across that road?

A. No, if I hadn't had the confidence in him, I wouldn't let him go across that road.

Q. Had had?

A. If I hadn't had.

Q. You describe him as being a bright youngster?

A. I described him as being a normal youngster like any other normal boy.

Q. Well, Excellent grades and so forth, don't
page 168 } you think he understood the rules you laid down?

A. I think he did.

Q. And that's the reason you allowed him to go across the road?

A. That is right.

Q. How long had he been riding his bicycle?

A. I think he started riding it between four and five years old and we got—

Q. So he had been riding it better than two years when the accident happened?

A. Just about, and we bought them girls' so they could get off and on and not get hurt.

Q. Now, you say that he was aware of this rule you made that he get off and walk his bicycle across the road?

A. Yes.

Q. At the time of this accident, if he were riding his bicycle, he was violating your rule?

A. No, because he was allowed to ride the bike anywhere except in Penick Road.

Q. You say when he crossed the road your rule to him was that he get off and walk the bicycle?

A. He didn't cross the road. He was on the other side and had been playing over there. He never got back across the road.

Q. I'm asking you if he did cross the road or
page 169 } attempt to cross the road?

A. I don't know. We just don't know what happened.

Q. I just want to ask you—

Alma Pearle Newton.

A. He had headed home, as far as I know. I would imagine, if he were there, he was on his way home, where I found him.

Q. Whether he was crossing or had started to cross or what have you, if he crossed that road without dismounting and walking the bicycle across, it would be a violation of the rules you had explained to him?

A. Sure, if he would go across Penick Road and not push his bicycle it was against my wishes and orders.

Q. You say you think he understood that? He was of sufficient intelligence to understand that?

A. I've never seen him ride the bike across.

Q. You also allowed his little brother to go across the road?

A. He didn't have a bike with him. The older one looked out for him, took him *acros* when they went over to play.

Q. The seven year old looked out for the five year old?

A. Yes, across the road if I wasn't there.

Q. Had you told him what to do in the event a car was approaching?

A. I always told him to stop and look both
page 170 } ways and if there was a car anywhere in sight, not to cross the street, didn't matter how far away it was.

Q. Did he seem to understand that?

A. As far as I can tell, he did.

Q. Now, did he seem to be able to handle his bicycle all right when he was riding it?

A. Yes, I think so.

Q. Mrs. Newton, let me ask you this. Is Dr. Meredith, Dr. John Meredith, still the attending physician for your boy as far as you know?

A. If I need him, I'm sure I can go to him.

Q. He is a neurologist, is he not?

A. Yes, sir.

Q. As well as a neurosurgeon?

A. Yes, sir.

Q. I assume he's told you to call him if your son has any difficulty?

A. Well, when I go to see him he says, "Well, you don't need to bring him any more." But I feel I can call him if I need him.

Q. In view of that—

The Court: What was that statement? What did Dr. Meredith say?

The Witness: I said the last time he checked on him he

said, "You wouldn't need to bring him any more."
page 171 } And that was it. He didn't say, "You be sure and call me."

Q. That was back in February of this year, wasn't it, shortly before this case was supposed to be tried?

A. Yes, sir, that was the last time.

Q. Up to that time he hadn't been to see Dr. Meredith for over a year, had he?

A. I couldn't say.

Q. Tell me, ma'am, why was it necessary to bring Dr. Asa Shield into the case?

A. Well, we had been worried about Wayne's future for a long time, ever since the accident, and my husband had been checking around different people, different doctors. The main one he checked with was the doctor of his company, trying to find someone that could give us an idea of what Wayne's future held and Dr. Shield was brought into the picture and we had heard, we checked on him and heard he was a good doctor and that he was somewhat of a psychologist, I guess, as well as a brain doctor.

Q. I thought you had Dr. Weir Tucker as a psychologist?

A. No, Dr. Tucker only studied the EEG's that were taken at Tucker Sanitorium.

Q. Is the fact that Dr. Meredith gave favorable reports, did that have any influence on your switching from
page 172 } one doctor to another?

A. I wanted to give Wayne every advantage and I wanted, if there was any better doctors or any different doctors that may tell me more, I wanted them.

Q. What was there about Dr. Meredith that was unsatisfactory other than the fact he was giving you favorable reports?

A. As far as I know. he wasn't unsatisfactory. He talked very little. You didn't get much out of him as far as talking.

Q. You still contend he was your attending neurosurgeon and neurologist?

A. I was sent to him to have him re-examined. I didn't go on my own accord.

Q. He's the doctor that pulled your little boy through the hospital.

A. He was the one they called and I'm not saying a thing against him because we felt we needed more doctors on the case because the future of our son was still at stake. We still didn't know.

Alma Pearle Newton.

Q. You seem to have gotten eleven doctors into the case at one point or another?

A. Well, if it were your boy, would you get them in? Wouldn't you?

Q. That's a matter that—I'd have to—

page 173 } A. I'll never stop looking for doctors for him.

Q. I wanted to know, you had Dr. Weir Tucker who is also a neurologist?

A. In fact, we went to him because when he was in Memorial Hospital they wanted to have an EEG taken. The machine was broken or not set up. They put his nurse and him in an automobile and we took him to Tucker's to use that EEG. That's the way Dr. Tucker came into the picture.

Q. He also attended your son during one of these plastic surgery operations, or he advised one of the doctors it was all right to go ahead with the operation?

A. Dr. Bundy is the one that told us to go to Smith and have plastic surgery, my pediatrician.

Q. Dr. Asa Shield wasn't brought into the case until just about a week before the last time we were ready to try this case, isn't that true?

A. It was in February.

Q. And it was within a week before the trial of the case, wasn't it?

A. I don't know just what date.

Q. Or two weeks?

A. But he was recommended as a good doctor and that's why we went.

Q. And then just three or four days before the trial he put your young son in his private hospital, is that right?

page 174 } A. That is right, but that had nothing to do with the trial, him being in the hospital. You don't toss youngsters around in hospitals just for a trial.

Q. Well, as a matter of fact, you took off for New York, didn't you?

A. Because Dr. Shield says, "I do not want any of you anywhere near, you cannot see him." I had planned a trip and he told me, said, "You take the trip."

Q. Mrs. Newton, at the time of this accident, was that garbage can sitting out there or do you know? Out on the highway? The one that shows in some of these pictures?

A. I didn't see any garbage can.

Q. I hand you Exhibit No. 3., Defendant's Exhibit No. 3, and ask you if that garbage can was sitting there at the time?

Mrs. Robert A. Hart, Jr.

A. When he was hit?
Q. The afternoon of the accident?
A. I don't know.
Q. All right. At the scene of the accident Mr. Carpenter was there, was he not
A. He came up later, after I got to the body.
Q. Just a matter of seconds, wasn't it,
A. I can't tell you the time because the time didn't mean a thing to me at the time. I thought I was alone for a good while.
page 175 } Q. Didn't he give you every kind of assistance there?
A. He squatted down beside me and we both just squatted beside the child. We didn't do anything.
Q. Didn't he suggest calling the rescue squad?
A. No, he didn't say anything to me.
Q. Did he hold the little boy's head up?
A. I don't know. I had my hand under his face the whole time. I got his face up out of the dirt, but I don't remember. I know Mr. Carpenter was there, but that's all.

Mr. Garrett: Thank you very much.
Mr. King: I have no further questions.

(Witness stood aside.)

Mr. King: Mrs. Hart. I would like for Mrs. Newton to remain in the courtroom.
The Court: That's all right if neither party intends to call her again, if she remains in. As far as the rule for the separation of witnesses, she could not be used again if she remains in the courtroom now.
Mr. King: Unless Counsel consents. Would you have any objection to her staying in, Jack?
Mr. Garrett: It occurs to me that we are getting ourselves into a fix where we might want to call her. I don't know that I will.
The Court: I think it may be safer if she re-
page 176 } mains outside.

MRS. ROBERT A. HART, JR.,
called as a witness on behalf of the Plaintiff. being first duly sworn, was examined and testified as follows:

Mrs. Robert A. Hart, Jr.

DIRECT EXAMINATION.

By Mr. King:

Q. Will you please state your name?

A. Mrs. Robert Hart, Jr.

Q. Will you say your name again?

A. Mrs. Robert Hart, Jr.

Q. And where do you live, Mrs. Hart?

A. 4301 Penick Road.

Q. Will you look at that plat before the jury there and show the jury where your residence is, if you can find it on there?

A. I live right here. This is my yard and my home right here. (Referring to plat.)

Q. Where?

A. This is my yard and my home is right here.

Q. Speak up.

A. This is my yard and my home is about here.

The Court: I can't see the plat from here, gentlemen. Is it marked at all with a house or anything on it?

Mr. King: No, sir.

Q. Would you take a pencil and write the word
page 177 } "Hart" in the area you have been pointing to?

(The witness so marked the plat.)

Q. All right, now, I notice to the east of your property on this plat there's what appears to be, what is labeled as a fence. Does that fence mark the border of your property?

A. Yes, it does.

Q. Who lives beyond the fence?

A. Mrs. Cox.

Q. Where does your line stop, leading to the west?

A. A sidewalk here.

Q. Where this says "concrete walk," is that on your property line?

A. Yes, sir.

Q. Who lives on beyond you to this side, to the west?

A. At present a Mrs. Story.

Q. How long have you lived in your residence?

A. Twenty-six years.

Q. You said you were Mrs. Hart?

A. Yes.

Q. You haven't been married twenty-six years?

Mrs. Robert A. Hart, Jr.

A. No, it's my home place.

Q. And your husband lives with you at your home place?

A. Yes.

Q. Let me show you a picture. I have in my
page 178 } hand here what is marked as Plaintiff's Exhibit
No. 5. Now, can you recognize where that picture
—can you recognize what is shown in that picture. Leave out the bicycle and so on.

A. The fence is ours and our garbage can here at the end of the fence.

Q. Is that a garbage can or a trash can?

A. It's a garbage can.

Q. So when you look at that picture, the fence you are referring to is the one between your property and that of Mrs. Cox, is that right?

A. Yes.

Q. The testimony is that this picture was taken on a Sunday afternoon three days after the accident that's involved in this case. Leave out the time at the moment. Why did you or your husband put your garbage can out on that concrete slab?

A. It was taken out possibly late on Sunday afternoon because Monday is our pickup day, but as a rule it is taken on Monday morning and picked up in the afternoon by my husband. My husband brings it out and then he brings it out to the back of the house on Monday afternoon.

Q. But the garbage collector collects it on Mondays?

A. Mondays.

Q. Did they in 1957 collect in on any day other than Monday, that you recall?

page 179 } A. No, sir.

Q. Had you at any time, other than this particular occasion, had the garbage can taken out there, say on a Sunday afternoon, late afternoon?

A. Very seldom do we ever do that.

Q. But it has been done, or do you know?

A. It has been done, but, as I say, very seldom.

Q. Do you recall any time when you have had that garbage can placed out there in the middle of the week. say on a Wednesday or Thursday?

A. Never.

Q. Do you know of your own knowledge whether on a Thursday which was May 9, 1957 your garbage can was sitting out there on that slab?

A. No, sir, it was not.

Q. Do you know of your own knowledge that it was not?

Mrs. Robert A. Hart, Jr.

A. Well, I use that garbage can every day and it's brought back around the back of my garage.
Q. Where you have ready access to it?
A. Yes, where I'm close to it.

(The witness returned to the stand.)

Q. Now, let me ask you this. The accident involved in this case happened on an afternoon in May of 1957. Are you familiar with the accident to any extent?
A. Yes, sir.
page 180 } Q. Were you at home when the accident happened?
A. No, sir, I was not.
Q. When did you first learn of the accident?
A. Just a few minutes after it happened.
Q. How did you learn?
A. A neighbor called me.
Q. But you were not present at the time it happened?
A. No.
Q. Now, I'll show you another photograph that's been received in evidence and this is marked Plaintiff's Exhibit No. 2. It's this photograph looking to the east on Penick Road. This evergreen tree there, and I can't recall what name it's been called, do you know what type of evergreen that is?
A. I do not. I'm sorry.
Q. It's your tree, isn't it?
A. Yes, sir.
Q. Now, this picture was taken, it's been agreed, was taken on the afternoon of May 12, 1957. Has that tree been trimmed since that time?
A. Yes, it has.
Q. To what extent—will you come and show the jury what trimming has been done on it. Hold it around so they can see.
A. These limbs that come around here to the ground were cut from under that tree, just these below here.
page 181 } (Indicating.)
Q. Are they shorter than the limbs above?
A. The longest limb that's here is still on that tree.
Q. By that you mean the limb that appears to be about three feet or four above the ground?
A. Yes, sir.
Q. But these lower limbs were cut off?
A. We took them out, yes, sir.

Mrs. Robert A. Hart, Jr.

Q. Why were they taken out?

A. We wanted to get under that tree with a mower and we could not with those limbs hanging to the ground.

Q. So you took out the lower limbs?

A. Yes, sir.

Q. Any other trimming done on that tree?

A. No, sir.

Q. Will you look at this plat? I'm speaking now of your property, that portion you described as your property, and down here there's a mark, a little circle, and opposite that mark it says "depression in lawn." Was there ever anything removed at that point?

A. Yes, sir, there was.

Q. What was removed? I'm speaking now of since May 9, 1957.

A. Yes.

page 182 } A. A mock orange.

Q. Mock orange. Was that mock orange any larger than any of these other shrubs shown immediately to the east?

A. No, sir.

Q. Has anything else been removed from the front of your property except these two things that have been mentioned?

A. No.

(The witness returned to the stand.)

Mr. King: If Your Honor please, I have no more questions of this witness, subject to a ruling that Your Honor will make later, as I understand.

CROSS EXAMINATION.

By Mr. Garrett:

Q. Mrs. Hart, referring to Plaintiff's Exhibit No. 4, that's a little different view, could you step over here now and point out to the jury the branches that have been cut out? Is it all the branches below this leaf here?

A. Yes, sir.

Q. All these were cut out?

A. The ones that were touching the ground and that would strike a mower.

Q. These limbs appear to be right much higher than the bicycle, aren't they?

A. Yes, sir.

page 183 } Q. Do you know how high? There's the bicycle over there. I guess that's two and a half or three feet high. Do you know how high these branches are that are there now?

A. No, sir, I do not.

Q. These are the ones that are still there?

A. Yes, sir.

Q. Now, Mrs. Hart, I want to ask you about one other photograph before you sit down. Referring to Plaintiff's Exhibit No. 3, you see this hedge down here that's been boxed?

A. Yes, sir.

Q. Has that been cut down since the accident?

A. Yes, sir.

Q. It's now just a little stubby sort of thing?

A. It's about that high. (Indicating.)

Q. Do you know how high that was at the time of the accident?

A. No, I do not. That's on the Gee's property next to me and I can't tell you how high that is.

Q. Have you had some bushes cleaned off of this fence that shows in Exhibit 5? Have you had some bushes cleaned off of that fence there?

A. No, sir, I haven't done a thing to that fence.

Q. Those bushes are still there?

A. I'm sure they are. I haven't done anything to them.

Q. And you say that the garbage can was not

page 184 } there at the time of this accident?

A. No, sir.

Q. Take a seat. I want to ask you a few more questions. Have you seen Frank Newton since this accident?

A. Yes, sir.

Q. How frequently do you see him?

A. Quite frequently.

Q. Does he come over to your house?

A. Yes, sir.

Q. I wonder if you would describe his activities, what does he do?

A. He plays with all the other children.

Q. What does he do?

A. They are playing with cars, things like that, out in the yard. They have a hut out back they play in.

Q. Have you seen him climb any trees?

A. I have seen him climb my front tree. I have a low tree the boys like to climb.

Arthur Carpenter.

Q. Is that that weeping cherry tree in your front yard?
A. Yes, sir.
Q. That goes up right far before it starts weeping, doesn't it?
A. They like to get in the body where it's
page 185 } grafted and it's low.
Q. Does that tree appear in any of these pictures?
A. I don't know.
Q. I don't believe it does. Have you seen him ride his bicycle?
A. Yes, sir.
Q. How long after the accident did you first see him start riding his bicycle again?
A. I do not know. It was a right good while so I couldn't give you any time on that.
Q. Could it have been as early as September after the accident happening in May?
A. I just don't know.

Mr. Garrett: All right. Thank you, Mrs. Hart.
Mr. King: No other questions.
The Court: Do you want this lady excused?
Mr. King: I think so, yes, sir.
Mr. Garrett: Yes, sir, that's perfectly all right.
The Court: You are excused, Mrs. Hart. You are free to leave.

(Witness Excused.)

Mr. King: I would like to call Mr. Carpenter to the stand.

page 186 } ARTHUR CARPENTER,
called as a witness by the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. King:
Q. Will you please state your name, sir?
A. Arthur Carpenter.
Q. And you are the defendant in this case, or you are the defendant in the case, are you not?
A. Yes, sir.

Arthur Carpenter.

Q. Where do you live, Mr. Carpenter?
A. I live Route 12, Box 307-A, Staples Mill Road.
Q. How far is that from the scene of the accident in which you are involved?
A. Approximately three blocks, two and a half blocks.
Q. You quite often go up and down Penick Road, do you not?
A. Yes, sir, I go to work that way, sometimes as much as four times a day.
Q. How long have you been going up and down there four times a day?
A. Started in '52.
Q. So for a period of seven years you have been going up and down Penick Road on an average of four
page 187 } times a day except Sundays?
A. I would say four or five times; some days I wouldn't go home for lunch.
Q. But you very frequently go up and down the road?
A. Yes, sir.
Q. Do you remember the day this accident occurred?
A. Yes, sir.
Q. Do you know what time occurred?
A. Approximately 2:30.
Q. Were you in the vicinity of the accident at the time it occurred?
A. Yes, sir, I was there.
Q. You still take the position you were not involved in the accident?
A. Yes, sir.
Q. You feel you were not involved in the accident?
A. I feel like I don't see how I could have been, unless even the boy had been riding awful fast because a man with one eye could have seen him if he had been standing there or riding slow. I would have certainly seen him coming out from where she said he was coming out.
Q. Were you driving with your windows down?
A. No, sir, I had the back windows up and the side window. Only window I had down was the one on my side.
page 188 } Q. Did you hear any noise whatever at the time the collision is supposed to have occurred with your car?
A. No, sir.
Q. Heard nothing at all?
A. No, sir. I had my radio playing right loud.
Q. How loud was it playing?

Arthur Carpenter.

A. Well, it was right loud, I would say a little more than average.

Q. If your car hit the bicycle and a boy on the second floor of a school building 675 feet away heard the sound and it caused him to look, why didn't you hear it?

Mr. Garrett: Just a minute, there's no evidence of that, Mr. King.

Mr. King: Of course there is.

Mr. Garrett: No, there isn't. There's evidence a boy some 670 feet away saw the child riding out and that he afterwards saw the boy lying in the street but there is no evidence he heard any noise.

Mr. King: You wish to take the position that he did not hear it? I had understood the Officer testified he said he did.

Mr. Garrett: I don't think he did and I think the questions you ask him ought to be based on the evidence.

Mr. King: I think that is the evidence. but I
page 189 } won't press it further.

Mr. Garrett: Well, we will go back and get the record if you want to make an issue of it.

Mr. King: That's not necessary.

Q. You heard absolutely nothing?

A. No, sir.

Q. Do you admit that your car swerved suddenly to the left at the time that the accident is supposed to have taken place?

A. Well, not right at that time, sir. When I was going right by I sort of seen something on the right just at that big tree kind of overhangs the road and I turned around and looked back for the second time, throwed my elbow on the seat and seen him out the window. I did swerve to the left and turned on back to the right and stopped and got out of the car and run back just as fast as I could, and Mrs. Newton, she was coming across the road just about the same time that I got there, and I believe it was Mr. Foster, I'm not for sure, was coming out of the church just about the same time. In fact, he was looking—I run up there and said, "Lord, have mercy."

Q. Were you asked the question by Wally Walton of whether you had hit the boy?

A. No, sir.

Q. You deny—you heard him testify?

page 190 } A. No, sir.

Q. You deny he asked you such a question?

Arthur Carpenter.

A. Yes, sir.

Q. Did you see Wally Walton there at the time of the accident?

A. Yes, sir, he was there, I would say, approximately, maybe, a minute but it occurred and I stopped, they was over in the school ground over there in the field going on about half way to the school from between there and the road, and that's where they were. I seen them, I remember I seen them when I stopped the car so I jumped out the car and run back as quickly as I possibly could.

Q. Did you look at them first or look back to where you were going?

A. No, sir, I just noticed them, I looked back to where I was going. In fact, I stopped the car and hadn't even cut it off.

Q. You saw them. Did you also notice this boy Stanley Brock?

A. Yes, sir.

Q. How long have you known Stanley Brock?

A. Well, I haven't knowed him by name but I imagine, approximately, I've seen him around up there for approximately, oh, I imagine three and a half or four years.

page 191 } Q. How about the other boy?

A. Yes, sir, I've seen him around, too.

Q. Speak to the Jury.

A. Yes, sir.

Q. You also deny that you left the scene as soon as the Officer arrived?

A. No, sir, I didn't leave as soon as he arrived. When I first arrived there, the officer arrived, I stayed. Before that, to go back a little bit, I helped Mrs. Newton all I could with the boy and some lady asked to go get some towels. Well, before that—it's kind of hard to remember these things, it's been going on three years. The first thing I wanted to do was somebody call the Rescue Squad and I started to call them and some other lady said somebody had done already called them, and I said, "Somebody call the Police," and somebody said, "Yes, somebody has gone over here to call the Police"

Q. Did you talk with the Officer at all after he arrived?

A. No, sir. These two boys, Wayne and Wally—

Q. No, Wayne is the boy that was hurt.

A. I'm getting a little mixed up. I can't think of the names. Anyhow, the two that testified was in the car, they got in the car with the Policeman.

Arthur Carpenter.

Q. They got in the car with the Policeman?

page 192 } A. Yes, sir, I didn't see—I'm almost sure it was, because they went right across the street and then after that I didn't see them around there anywhere and they were sitting in the car with the Policeman.

Q. Did you see them sitting in the car with the Policeman?

A. It was two boys just like them, they disappeared; whether it was them, I didn't see the faces, I couldn't say whether it was or not. They did go over there.

Q. But you had no conversation with the Policeman yourself?

A. No, sir.

Q How many policemen arrived?

A. One.

Q. That was Mr. Montgomery?

A. Yes, sir.

Q. Did you feel that you should have told him that you had some knowledge of what had occurred?

A. Well, I didn't think it was much any use after Mrs. Newton—when there was five or six people around there and Mrs. Newton was said—she was crying and carrying on—said it was a big old green truck that hit him.

Q. Did you say to anyone you thought it was a green truck?

A. No, sir.

page 193 } Q. At no time did you tell anyone you thought it was a green truck?

A. No, sir.

Q. You had no conversation with Mr. Montgomery at all during the time you said you thought it was a green truck?

A. No, sir.

Q. You never told the Officer you thought it was a green truck?

A. No, sir.

Q. So if he says, on his cross examination, that—

A Only green truck coming down, in front of me, immediately after he passed me.

Mr. Garrett: The Officer didn't testify to that. He said the green truck passed him.

Q. Did you talk with the Officer about a green dump truck?

A. Yes, sir.

Q. Did you talk with him about a red dump truck?

A. Yes, sir.

Q. What did you tell him about those?

Arthur Carpenter.

A. I told him there was two of them passed me up there, one was green and one was kind of a red one and, I believe—a green and a red one, and he brought one of them around to the house on a Friday and asked me if that looked page 194 } like it was the truck and I told him I didn't know for sure whether it was or not. I said, "It looks a little too clean to be the truck." It looked like a dirty dump truck, it had kind of a dirty color to it, and had a scratch up at the front fender and also right back of the gas tank where the gas tank had been bent in.

Q. Now, your statement that you signed on Sunday—

The Court: Do you want that?
Mr. King: Yes, sir.

Q. Now, this has been received as a statement signed by you on Sunday. May 12th.

A. Yes, sir.

Q Do you recognize that?

A. Yes, sir.

Q. And this says, "I, Arthur Carpenter, W. M.—" I think that means white male, "34," and gives your address—"do make the following statement without threat or promise from the Police. I was traveling east on Penick Road approximately 2:50 p.m.—" You think that's right or the 2:30 you said awhile ago?

A. I can't remember but it was somewhere between 2:30 and 3:00 o'clock.

Q. (Reading statement) "I thought I saw something on the side of the road. When I looked back I saw page 195 } something laying in the road." When did you first think you saw something on the side of the road?

A. When I first went by, just like you go past something and like you go past a driveway with trees and things in it and something catches you in the eye, like you wave your hand. I saw something then, and I turned around and looked back out of the back seat and put my arm up on there and I seen this child and the bicycle lying back there. I thought it was my boy to start with.

Q. You thought it was your boy?

A. Yes, sir.

Q Why did you think it was your boy?

A. Because my boy played up there right much.

Q. He played in that same area?

Arthur Carpenter.

A. Yes, sir, right on this side of the house, they have a ground up there they play all the time.

Q. He plays there?

A. Not right at that spot but back down this way, yes, sir.

Q. You say, "I thought I saw something on the side of the road." That something you saw, what did you think it was?

A. Well, I didn't know, sir, until I turned around and looked back again.

Q. Was it something standing up or laying flat?

page 196 } A. I think it was laying flat.

Q. If you saw something on the side of the road laying flat and you were driving, how could you see from your right down on the ground?

A. It was something in the corner of my eye and I turned around and looked the second time

Q. You were very interested in it, were you not?

A. Yes, sir.

Q. To swerve from the left of the road and to the right?

A. Yes, sir.

Q. But you still take the position you believe you didn't hit the boy?

A. No, sir, I don't believe I did. I believe—I asked for an analysis for the paint to be made for five times.

Q. Who did you make that request of?

A. John A. Carr, a lawyer.

Q. John A. who?

A. Carr, and finally the policeman came out, the Police Sergeant, and scratched it off the car and never did take it that I know of. I never heard any more from it.

Q. When you were coming down Penick Road and approaching the place where this injury occurred, were you driving with your right wheels on the shoulder?

page 197 } A They was up on the hard surface of the road.

Q. About how far onto the hard surface were they? Your best estimate?

A. Well, I would say fifteen inches, fifteen to eighteen

Q. Eighteen inches is a foot and a half?

A. Yes, sir.

Q. Does that sound approximately right?

A. Yes, sir.

Q. How fast were you going?

A. I was going between 30 and 35.

Q. What's the nearest estimate to the speed you can make? Was it 30 or 35?

A. I would say between 30 and 35. I wasn't driving fast be-

cause I didn't have to slide my brakes to stop.

Q. Were you driving your automobile in your customary manner?

A. Yes, sir.

Q. Were you sitting up right behind the wheel?

A. Do what?

Q. Were you sitting up right behind the steering wheel?

A. You mean straight up and down?

Q Yes.

page 198 } A. Yes, sir.

Q. Was the steering wheel directly in front of you or were you to one side or the other?

A. It was directly in front of me.

Q. So your head was right in line with the steering rod or steering post, is that right?

A. Yes, sir.

Q. How tall are you?

A. I'm 5 foot 11.

Q. Do you have any trouble seeing over the top of the steering wheel?

A. No, sir.

Q. Do you still have the same automobile you had in May of 1957?

A. Yes, sir.

Mr. King: Your Honor, I have no further questions at this time.

Mr. Garrett: We'll put him on when we put our case on.

The Court: Have a seat by your attorney.

(Witness stood aside.)

Mr. King: I would like to ask Mr. Hunt to come in.

GEORGE HUNT,

page 199 } called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. King:

Q. Will you please state your name and your place of residence?

George Hunt.

A. My name is George Hunt and my residence is Midlothian, Virginia.

Q. Mr. Hunt, what is your occupation?

A. Professional engineer.

Q. Is that sometimes referred to as a Consulting Engineer?

A. The term Professional Engineer is the one the State uses.

Q. Are you certified as a Professional Engineer by the State of Virginia?

A. Yes, I am certified in Virginia.

Q. Are you certified elsewhere?

A In North Carolina as well.

Q. With what engineering firms have you been associated?

A. My recent association was with Wiley and Wilson, Consulting Engineers, of Richmond and Lynchburg.

Q. How long were you associated with them?

A. Approximately seven years.

Q. Is Wiley and Wilson a well known concern?

page 200 } A. Yes, it's one of the largest firms in the state, I presume employing about seventy people.

Q. Is it an old firm?

A. Yes, I believe it was founded in 1903.

Q. 1903?

A. Yes, sir.

Q. Since your association with Wiley and Wilson, how have you been engaged in the profession as a Consulting Engineer?

A. I have been in private practice as an individual.

Q. In your functioning as a professional engineer have you performed any work for governmental or state agencies?

A Yes, State of Virginia, North Carolina, and the Federal Government.

Q. Are you engaged in any projects requiring the services of a professional engineer at the time?

A. Yes, I have a number of projects on which I'm working; two I might mention is a new boiler plant for Standard Paper on Hull Street and also for Hi-Grade Food Products Company in the modernization of their plant.

Q. May I ask you this. Have you ever in your specialized services as a professional engineer, been prevailed upon by the law firm of which Mr. Garrett is a partner?

A. Yes, I believe I've done work for them and several other firms in the city.

page 201 } Q. I'll ask you this, Mr. Hunt. Did you obtain from me a copy of the plat which is laying before

George Hunt.

the Jury and which has been marked Plaintiff's Exhibit No. 1?

A. Yes, this is the plat prepared by Mr. Fleet.

Q. You have with you the copy—

A. No, inadvertently I left it at home. I examined them all in your office. I believe you had three and they were all identical, made from the same tracing.

Q. Did you at my request prepare an enlarged plat of the area which is involved in this case?

A. Yes, sir.

Q. Will you show us that, please? May I ask you this, also? Was that plat prepared by you at my request for the purpose of showing the extent of visibility that would be available to a driver driving along Penick Road in an eastwardly direction in the area where this accident occurred?

A. Yes, that is true. This plat was prepared at a larger scale, it's three times the size of this particular area just so that it's a little bit clearer. Mr. Fleet's plat takes in a considerable length of Penick Road.

Q. If that plat is 30 feet to the inch, this is 10 feet to the inch?

Mr. Garrett: There are features of this plat I notice I would like to take up with you in the absence of
page 202 } the Jury.

The Court: Let me ask you gentlemen this. If you take this matter up in Chambers, you don't know what length of time that will take. What is your estimate, Mr. King, of your length of time it will take you to examine Mr. Hunt?

Mr. King: It depends on cross examination. I think I can finish examining directly Mr. Hunt in not over ten or twelve minutes. I have one other witness I think would take not over four or five minutes and that includes all my evidence on the question of liability, short of medical testimony.

Mr. Patterson: We can't complete our case today in any event.

Mr. King: Just that one, three or four minutes, I can call him the very first thing tomorrow morning.

The Court: Off the record.

(Discussion off the record.)

(Note: The Judge and Counsel retired to Chambers.)

In Chambers:

Mr. Garrett: Your Honor, this matter of pretrial conference and stipulating things has taken right much of a one-way street in this case. I have been asked to stipulate at least a dozen different things and one thing I asked to be stipulated and my friends rejected that. They have got to page 203 } have the man here, that's the motion pictures, but now, we have had a complete pre-trial conference. We have been in this case before Your Honor for six or eight months and the day before the trial they come along with a plat and present it to me and ask that I agree with you—

Mr. King: I haven't asked you to agree at all.

Mr. Garrett: Well, you presented it to me and I'm not going to agree to it. You asked that you introduce this plat when I haven't had any opportunity to check these various difference, but be that as it may, Your Honor—Do you have that 200, Virginia?

Mr. Patterson: I will get it, Judge.

Mr. Garrett: It's obvious from this plat they are going to try to show sight distances across here. Mr. Carpenter was approaching the area of this accident. Now, first of all, we know that there's been a substantial change in the physical set-up there.

Mr. King: If you will let me qualify your question, I will show there hasn't. Go ahead.

Mr. Garrett: Well, certainly, we know some limbs have been cut off three feet from the ground to the bottom of the tree. Now, in this case of *Transit Company* v. *Brickhouse* in 200, Virginia 844, here's what he said. (Counsel read citation.)

Mr. Garrett: They cite four or five different page 204 } cases there. We know there have been some physical changes there. The tree has been changed. They show this fence line here, Judge, and I know that bushes have been cut off of that fence and some of these lines go smack across that fence. What other changes there have been I am not prepared to say but we know there have been some changes since the time of this accident. Consequently, I think under the authority of this *Transit Company* v. *Brickhouse* case this would be entirely improper.

Mr. King: May I answer that, sir? Is Your Honor familiar with that case? I followed that in having this prepared. The evidence is going to show— Well, let me say this, I have already asked Carpenter these questions: "How tall are you?" "Where were you sitting when you were driving?" "Do you sit behind the steering post or to the right or left?"

And his answer was "Behind it." One of these points here was they don't know whether the bus driver was leaning over picking up a coin or not. I asked him how far away from the right-hand side of the road his car was going. He said "Anywhere from fifteen to eighteen inches." This has been drawn so the line of vision of the traveler would page 205 } be with his right wheels on the right-hand side of the hard surface, right on the edge of the shoulder, so he has the benefit of doubt there, unquestionably, as the evidence shows. With respect to this tree, these lines have all been drawn on the tree precisely as it's shown on the plat today and I intend to ask him, I will say, "Did I instruct you in drawing this to treat that tree as though it were a stone concrete wall that you couldn't see through any part of it?" And he's going to say that's what he has done. It has been two years since the accident happened. I haven't seen a tree fail to grow in two years. Everything done here is in keeping with the evidence. It's given the Defendant every single benefit of the doubt. It's very material evidence because one of the instructions I feel quite confident Your Honor will give is whether the Defendant knew or should have known, should have kept a careful or proper lookout or observed objects on the side of the road. This will show how far down this driveway one can see. He came up here. (Indicating) How far back, starting at 200 feet, 150, 180, 50. 40, 30 from the point of impact, which is fixed. That's where the Officer put it. How far down this driveway could you see at that time? If he was only 30 feet from the point of impact page 206 } he could see to to infinity. There can't be anything fairer than that. This is an extremely important point in the case and I think it's admissible.

Mr. Garrett: In this Transit case they go on and say—(reading citation)

We know it's bound to have grown. The top has been taken out. I don't know what the effect of all this is, but we know these conditions are not the same as they were at the time of the accident and that's exactly what this Brickhouse case is.

Mr. King: It shows that the limbs cut off the tree were those cut off low to the ground and were shorter than the upper limbs. I know they have grown in the last two years.

Mr. Garrett: This was also based on the hypothesis this was the point of impact. (Indicating) This is not the Officer's testimony. He says that's where the blood was located, so the whole thing is based on an erroneous assumption as to that.

George Hunt.

Mr. King: That was put on the edge of the highway immediately adjoining the shoulder. That's where the measurements are made too. The only thing is how far down the driveway was the boy before the impact or how far was he down the driveway when this man was down 200 page 207 } feet? How far could he see down here? His speed is established. Your Honor will get an instruction to show the reaction time at various speeds and stopping distance at various speeds. All this is extremely pertinent. I think it's very clearly admissible.

Mr. Garrett: I think it's inadmissible. All the facts they have given here could not possibly include the facts that occurred at the time of this accident. We don't know the speed of the car. Even the car's speed is not clearly established.

Mr. King: This is not done with respect to speed. It's done with respect to show how far Carpenter could see down that driveway.

The Court: Gentlemen, what I would like to do this afternoon, short of putting the plat in evidence, is have this witness lay whatever foundations you are going to do as to what hypothesis or what-not he started with and before we admit the plat or get to any opinion, whatever his opinion would be on seeing the distances, I want to stop at that point. I want you to lay the foundation you are going to and I'm going to take the matter under advisement and read that case tonight and then we will adjourn for today.

(Note: The Judge and Counsel returned to the page 208 } courtroom.)

(The witness resumed the stand under direct examination.)

Q. Mr. Hunt, I am going to ask you some questions concerning that plat you have in your right hand. I am not going to ask you any questions involving what you believe that it shows, but merely questions laying the foundation,—

A. I understand.

Q. —for what it may show.

A. I understand.

Q. Now, have you drawn that in scale with Plaintiff's Exhibit No. 1?

A. It is, so far as I am able. It is an exact duplication except to a larger scale.

Q. You converted 30 to 1 to 10 to 1?

A. Yes, sir, three times larger.

George Hunt.

Q. Have you drawn on that plat, running in an eastwest direction on the hard surface portion of Penick Road, a line which is the same distance as that between the outer right side of the wheels of a Chevrolet, 1957 model sedan, and the steering post?

A. That is correct. It was determined that the wheel spread of a Chevrolet was 58 inches and that the steering column was 14½ inches off the middle of the car and this line drawn on the plat assumes the right tire of the automo-
page 209 } bile on the extreme edge of the hard surface and, in effect, duplicates a trace of the steering wheel on that road or the line that a man would follow sitting directly behind a steering wheel of a 1957 Chevrolet.

Q. What is the distance you moved that over?

A. 3.81 feet, approximately three foot and nine and three-quarters inches.

Q. Now, on that plat you have drawn marks around a tree and I will ask you if the tree that you have used is the same as the tree shown on Plaintiff's Exhibit No. 1?

Mr. Garrett: Just a minute. Let's have the plat put over here.

The Witness: All right.

Mr. King: I am not showing it to the Jury.

Q. Is the tree that you have put—used as an object on your plat taken by scale from Plaintiff's Exhibit No. 1 and is it the same tree as that shown here that has the letter "B" beside it?

A. Yes, sir, it's the same tree and the extent of the tree was duplicated as closely as it is possible. Of course, Mr. Fleet did this just off the shoulder of the road and I did likewise so far as it is possible to duplicate anything.

Q. In drawing the lines, the straight lines that go around that tree or that touch the tree, the varying lines,
page 210 } did you treat that tree as being a solid, firm object through which no sight whatever could be obtained?

A. That is true. We assumed it was an obstacle to sight and our lines of sight all pass around it.

Q. Do they pass to the outermost portion of that tree in each instance?

A. Yes, in each instance. We treated it as a stone wall, if you will.

George Hunt.

Mr. King: Your Honor knows what the plat is to portray and I don't think it's necessary that I ask any further questions. I think I've laid the foundation.

Mr. Garrett: May I ask one question?

The Court: At this time I think it would be desirable in view of our discussion in Chambers for Defense Counsel to ask any questions they may desire to.

CROSS EXAMINATION.

By Mr. Garrett:

Q. Do I understand that you have not been to the scene?

A. Yes, I have, on two occasions. I have been to the scene.

Q. Then, you adopted this plat?

A. That is correct, because I did not take any measurements at the site having to do with this plat, and I have full confidence in Mr. Fleet's ability as an exact por-
page 211 } trayor of layout of this kind.

Q. Tell me this. Was the grade of the road above the grade of the shoulder at the edge of the road?

A. The grade of the road?

Q. The top of the grade of the road?

A. It's slightly above the shoulder of the road.

Q. How many inches?

A. I did not measure it. I would assume several, not more than a foot at most.

Q. Do you know how much higher the crown of the road is than the edge of the road?

A. Again, I did not measure it but I would assume it was barely a few inches. There's not a depreciable crown in the road.

Q. Do you know how much difference there is between the grade level of the private driveway there and the crown of the road?

A. Again, the answer is the same. It's substantially flat in that area. Well, within a foot, I would estimate from my visit to the site.

Q. When did you first visit the site?

A. I believe I visited it once prior to January 28th and again on January 28th.

Q. Of this year?

A. Of this year, yes, sir.

page 212 } Q. You did not visit the scene at the time of the happening of the accident?

A. Oh, no, no.

George Hunt.

Q. Or any time shortly after that?

A. No, I did not.

Q. Were you aware of the change of some of the features there, such as the removal of some of the lower limbs of the tree?

A. Yes, that was quite evident in that the lower limbs of this particular tree about which these lines of sight were drawn, some of the lower branches had been removed.

Q. When was that called to your attention?

A. It was obvious. I noticed it as the time I was there on the site and Mr. Patterson was with me and we commented about it at that time.

Q. When was that?

A. As I remember, the 28th of January of this year.

Q. Did you also notice some of the crepe myrtle had been removed, or mock—

A. Honestly, I don't remember specifically which bushes, but there had been some bush trimming in addition to this removal of limbs, as far as I can recall.

Q. Did you take a 1957 Chevrolet—

A. Yes, sir.

Q. Did you take a 1957 Chevrolet to the scene?

page 213 } A. No.

Q. Do your measurements possibly take into account any bouncing or anything of that nature of a car?

A. No, the dimensions which we took are fixed by virtue of the model of the car, the wheel spread is the same.

Q. You took your measurements when the car was sitting still?

A. Oh, yes, and they would be the same whether the car was in motion.

Q. Suppose the car was possibly rocking a little?

A. It would not alter the tread of the wheels nor would it alter the distance from the center of the dashboard to the center of the car, I'm sure.

Q. If the car was not precisely to the edge of the road and you don't know the difference between the edge of the road and the crown of the road, any movement across that crown could change your sight level?

A. Possibly, yes, but you see, we assumed that the car was on the extreme edge of the road so that we feel—or rather, I feel that these sight signs that were plotted were plotted in the most conservative possible manner, consistent with the car being driven up the road in a legal fashion, that is, on the hard surface but barely on it so that there was no attempt to

George Hunt.

amplify these facts or make more of them, or
page 214 } anything of that sort. I would much prefer it be
on a most conservative basis.

Mr. Garrett: I certainly understand that. I think that's all.

Mr. King: I have one or two questions which have been suggested to me by Mr. Garrett's questions.

RE-DIRECT EXAMINATION.

By Mr. King:

Q. Your measurements apparently start at 200 feet down the road, west of the point of impact?

A. They start 200 feet down the road from a point projected from a center line of the driveway where I understand that the accident occurred. We projected the center line of the driveway out to the edge of the pavement and measured from that point on the drawing.

Q. Are you familiar with the nature of Penick Road at that point?

A. Yes, sir.

Q. And you have examined it, have you?

A. Yes, I may not be able to answer Mr. Garretts' questions to a nicety in dimension precisely, but I'm aware of the nature of the road at that point.

Q. What I'm speaking of is this, is there any lumping in the road in that 200 feet that would put you in one place
where you had to look over a hill to see something
page 215 } or is it perfectly level?

A. No, it's not perfectly level. There is a slight rise. You are traveling in an eastwardly direction on Penick Road and this driveway is about the crease of the rise, but the rise is substantially flat althought it increases slightly.

Q. So, from the 200 point to the final point there is a rise, but a constant rise?

A. Exactly, sir.

Q. He also asked if you took into consideration the trimming of any shrubs?

A. This is the plot?

Q. That is right. And compare that with your exhibit here and see whether any of those shrubs that are to the left of the tree would in any way interfere with the drawing you have made here. Just bring the plat over here.

George Hunt.

A. You want me to bring this over here?
Q. Yes.
A. To the west of it, certainly not. It would in no way influence it. When you speak of the west you are referring to these bushes here? (Indicating)
Q. That is correct.
A. No, it would not.
Q. So they would not interfere with the line of vision that you have drawn?
A. Your statement is correct, sir.

page 216 } Mr. King: All right.

RE-CROSS EXAMINATION.

By Mr. Garrett:
Q. Let me ask you this, Mr. Hunt. I notice there is a 24-inch tree there. It is perfectly possible that this bicycle—I don't believe the handlebars are over 24 inches wide, are they?
A. No, I don't think so. I have a rule in my pocket if you would like to measure it.
Q. Well, we might do that.

(The above referred to measurements were taken.)

A. They are eighteen and a quarter, approximately.
Q. Isn't it perfectly possible for this bicycle to be hidden behind a 24-inch object or tree or what have you if it was setting in just the right manner?
A. It would, provided the bicycle was directly behind the tree and you are walking directly toward the tree, but if the tree were off to one side, you would see the bicycle first. Then it would be hidden, but you would see it again.
Q. What I'm asking you is, could that bicycle be hidden by a tree?
A. No, I don't think so.
Q. Why couldn't it?
A. Let us suppose this urn is the tree. Let us put this bicycle directly behind this urn. Certainly, if we
page 217 } are in line with it that urn hides the bicycle, assuming this is the tree, but if we are proceeding at an angle we see it on one side and it's hidden and we see it on the other. It's only if we are approaching the bicycle directly toward the tree.

George Hunt.

Q. That's assuming, Mr. Hunt, that a driver is giving his full attention to looking off into the woods and not straight down the road like he's supposed to be, isn't that right? What I mean is this, if he should take a look off to the side at the precise right moment, he couldn't see the tree, couldn't see the bicycle, could he? If he did it like that and looked back, there's no question the thing could be behind a tree?

A. I don't think I'm qualified to answer that question. That is a case of perception. You direct that to an oculist and somebody qualified to answer.

Q. You are an engineer.

A. I can testify from a physical fact that you can hide that bicycle behind that tree, but you would have to walk directly toward that tree for it to remain hidden.

Q. Well, in making these calculations on this plat, are you prepared to say that you made them under the precise same conditions of looking that Mr. Carpenter did at that time?

A. No.

Q. You have no idea of what Mr. Carpenter did page 218 } in the way of looking over there?

A. I have no idea. There may have been a pretty little girl in the churchyard. He may have been looking at ninety degrees.

Q. He may have been looking in front of him to see what else was on the highway?

A. That is correct. I don't know that Mr. Carpenter went down the road, for that matter.

Q. Your plat is based on the assumption that he was continuously looking off?

A. No, sir, it is not based on any assumption. It is merely a graphical drawing of lines showing what a person might be able to see if he were to look standing at any of the points involved.

Q. And providing there wasn't a tree in the way, including the big hemlock?

A. No, the lines are drawn around the hemlock.

Q. It's not drawn around the 24-inch tree, 18-inch tree, 12-inch tree and at least four or five shrubs.

A. Mr. Garrett, it should be perfectly obvious that someone coming up Penick Road at an angle and in spite of the trees would see anything in there. You can't hide anything behind the trees as you are going by, if you are looking in that direction.

George Hunt.

Mr. Garrett: All right, I have no other questions.

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The Court: Any redirect?

Mr. King: Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. King:

Q. Will you take this, Mr. Hunt? (Handing the plat to the witness.) Now, Mr. Hunt, did you in company with Mr. Patterson, my partner, and with the consent of opposing Counsel, examine the motor vehicle of Mr. Carpenter, and that's the automobile that is involved in this case?

A. Yes, Mr. Patterson took me out to what I believed to be Mr. Carpenter's residence, what he assured me was Mr. Carpenter's residence, and pointed out an automobile to me that I understood belonged to Mr. Carpenter.

Q. When was that done?

A. That was the 28th of February, also.

The Court: February or January?

The Witness: January, I beg your pardon, sir.

Q. Have you had an opportunity to see that vehicle today?

A. No, I have not.

Q. Now, when you examined that motor vehicle, did you remove any paint from the automobile for the purpose of comparing that with the red paint on the front fender of the bicycle?

page 220

A. Yes, I did.

Q. How did you do it?

A. Well, I cleaned off a place on the fender, leading edge of the fender, just below the point where this blemish that was pointed out to me was situated and scraped some quantity of paint from the fender into an envelope and brought that away with me.

Q. What did you do with those scrapings that you put in the envelope?

A. I gave them—turned them over to Froehling and Robertson.

Q. Who are they?

A. An inspection laboratory here in Richmond on Cary Street.

Q. Did you turn them over to any particular individual?

A. Yes, sir, Mr. Weaver.

George Hunt.

Q. Julian M. Weaver?
A. Julian N. Weaver.
Q. Did you also turn over to Mr. Weaver for his examination the front fender of the bicycle?
A. That is right.
Q. And is that the same front fender attached there to the bicycle?
A. Yes, sir, I see my initials on it.
page 221 } Q. For what purpose did you give it to Mr. Weaver?
A. It was given to Mr. Weaver for the purpose he might examine the paint, sample which I had removed from the automobile, compare it with the paint smear that's to be seen on the fender of the bicycle.
Q. Do you know whether he's made such comparison?
A. Yes, I understand he has.

Mr. King: We will call Mr. Weaver to testify, Your Honor, as a result of that examination.

Q. Now, at the time you inspected Mr. Carpenter's automobile, I think you said it was January 28th of this year, did you inspect it to determine whether there were any indications of damage by denting or otherwise, or otherwise on the right side of the car in the area immediately following the rear portion of the right front bumper where the blemish which you refer to occurs?
A. I did, sir.
Q. What did you observe?
A. There was a blemish that existed on the leading edge of the right fender. The extent of it was approximately seven inches, the lower—
Q. Excuse me, will you look at these pictures and see if you can find those in the pictures?

Mr. Garrett: Just a minute, may I see your
page 222 } report?
The Witness: Just notes I made there. (Handing document to counsel.)
Mr. Garrett: Just a minute. Your Honor, I object to any evidence of anything he found on this car at such a remote time as that, almost two years afterwards. I think I can vouch for this. Mr. Carpenter is prepared to testify that at various—I think he said something about in the snow they rubbed against something, the underpart of the car, against

something and various things like that. So this car is not, certainly at the time Mr. Hunt saw it, was not in the same condition at the time the Officers inspected it, and you recall that the Officer testified that he could find nothing on that car other than that mark behind that front wheel. So I object to any further questioning along this line.

The Court: All right, gentlemen. I think this is a good stopping point. We will have to bring Mr. Hunt back tomorrow. I'll take that matter under advisement. However, before doing it there are a couple of questions I would like to ask Mr. Hunt, but I think I can reserve them until tomorrow morning. We have gone a little past the ten or fifteen minutes.

page 223 } Gentlemen of the Jury, in this overnight adjournment, same admonition. Don't discuss the case with anyone or allow anyone to discuss it with you. It is a highly contested case and, as I said before, I believe it would be better if you didn't talk to Counsel or any of the parties or witnesses. I didn't see any reporter in here. If there was anything in the paper, don't read anything in the paper about it. You all are excused, gentlemen, until tomorrow morning at quarter of ten, if you can make it. If you can't, I'm not going to make any point of it.

I believe at this time we can excuse Mr. Hunt. You will be back some time after ten, as I understand it.

(Whereupon the Jury and witness were excused at 6:55 o'clock p. m.)

The Court: One other matter not fresh in my mind that you all might be prepared on, in addition to the point we already have pending—I just can't get it straight in my own mind at this time, but basically, to what extent, if any, the Defendant will be entitled or not entitled to instructions in regard to one of the witnesses having been impeached or a couple of witnesses impeached on the basis of committing a felony, whether that is already included under the credibility of the witnesses. It's been offered as a standard stock instruction.

page 224 } I guess everybody would agree that's a standard stock instruction, but in my recollection, in such cases it's always been a matter of comment or argument by Counsel. If you want to check that out?

Mr. Garrett: I think we can amend one of the instructions by inserting recommendations on that in it.

(Whereupon, Court was recessed at 7:00 o'clock p. m., Monday, July 20, 1959.)

page 225 } (Note: The Judge and Counsel, as heretofore noted, convened in Chambers at 9:30 o'clock a. m., Tuesday, July 21, 1959.)

Mr. Garrett: Judge, I have done considerable more work on both of these points. I don't know who is to proceed first or what the situation is.

The Court: Well, we actually, as I recall it, have two main points that are under advisement. One is in the nature of objection of yours to the Plaintiff putting in evidence in regard, so to speak, to a reputation of this particular Cox house area for being a place where children play, and that was sort of tied in with children having played there on other occasions than this particular occasion. Up until now I had ruled that I didn't think it was admissible to go into whether children had played there on other occasions. In the meanwhile, I think I also ruled, said it preliminarily, as I stated when it first came up, that what the Defendant might know about the place couldn't really be proved through other witnesses, even though one of the witnesses said he was in the car with Mr. Carpenter, the Defendant, several times on some occasions and passed that area. I seem to recall, however, in the meantime when the Defendant Carpenter was being
page 226 } examined by Plaintiff's Counsel under the adverse witness rule, that the Defendant, in answer to one of the questions, indicated he thought it might be his boy that was on the road, the object that he saw, because his son played over there. Now, whether he went further and said that other children played over there or not I don't know.

Mr. King: He said he had driven for seven years up and down there for an average of four or five times a day.

The Court: Then, the next point I think we have relates to the admissibility of this evidence that the expert Hunt, has attempted to go into which, apparently, has to do with sight distances. So, preferably, we get to the first point and discuss that and then reserve the question of the admissibility of this sight distance by the expert Hunt as the second phase.

Mr. Garrett: Well, let me say this, Judge, on this thing about Mr. Carpenter I understood when we were in the conference here yesterday afternoon before Mr. Carpenter came on that we were not going into that evidence. Mr. King, after he mentioned thinking maybe it was his boy, Mr. King made a

very definite point of asking "Why do you think
page 227 } it was your boy?" Be that as it may, I don't
think it makes any difference whether Mr. Carpenter considered it might be his boy or not. The cases I found, there are a whole number of them in addition to that 200 Virginia we have already discussed, and I can go back in chronological order, but the cases I found last night, I took them back about three or four volumes and I think all of them in substance are the same. In *Hoier* v. *Noel,* 199 Va. 151, there was a case where a man was driving along expecting to pick up a couple of children and he was near an athletic field and he ran over one of the children and the Court said that he had to see this particular child, and, apparently, the fact that he was near an athletic field was of no significance whatsoever. There was a long discussion of the whole point in that case, but that is the meat of it.

In the case of *Ward's Administrator* v. *Lewis,* 198 Va. 811, this is particularly in point. This is a case where the Defendant came out of her home to get in her car in the driveway which separated her home from the lot and home of the infant Plaintiff and she actually saw the infant Plaintiff out in the other yard when she came out to her car. Now, the
Court points out, says, "Several children lived in
page 228 } these homes and decedent, a Lewis child, and
other children played together at times in the respective yards." They are speaking of everybody's yard, the Plaintiff's yard and Defendant's yard and all other neighbors. The houses were built in one of these horseshoe deals, Judge. The houses front on each side around that horseshoe. (Counsel read citation.)

Now, Judge, I can't think of a more closely point case than this. In this case the lady knew the children played all in those yards and that's at most what you've got in this situation. Then, there are other cases, *Hall* v. *Miles*, 197 Va. That was another case where a neighborhood child was struck by someone backing out of their lane. Now, that case did not hold, as a matter of law, that the Defendant was negligent. They merely affirmed a jury verdict for the Defendant so they didn't have to pass on that particular question.

Now, the only other case that may have any bearing on the matter is that one of *Read* v. *Daniel* in 197 Va., where as you mentioned yesterday there was a four-three split among the Court, Court of Appeals, and in that case, Judge, if you will note the facts, there was a sign well before the driver got to
this intersection. Bear in mind, too, it was a public
page 229 } intersection, an intersection of two public roads
where the pedestrian has a right-of-way and there

was big sign that said "Caution: School children crossing." In other words, it was brought to his attention that children might be crossing that highway. That's certainly not the situation here, and there are cases we rely on and I think that Ward case is particularly in point since it involves, certainly, a more pointed situation than the one that we have here. Then, of course, the case of 200 Va., that is very much like the case we have. I think in that case the children were some 50 feet from the road, whereas the evidence here is that the children played, one witness said 150 to 200 feet back from the road, and the plat indicates it must have been at least somewhere around 75 or 80 feet back from the road.

The Court: Anything else you want to say?

Mr. Garrett: No, sir, not on that point.

Mr. King: I would like to read this a little more fully, but I will read that in a second. The case he mentioned is *Russell Hoier against Noel,* and he talks about a baseball park, "Noel driving on Fayette Street in Farmville struck and killed David Hoier, a child of three years. The accident happened after dark and Noel's lights were on high beam. He
page 230 } testified that he was driving at ten to fifteen miles an hour, his vision somewhat impaired by lights from an athletic field a few blocks away. He suddenly saw a child in the road just as he struck him but he stopped within four or five feet to pick up the child." The athletic field didn't have anything to do with that case.

Mr. Garrett: It certainly points out they were picking up these children.

Mr. King: *Ward against Lewis,* thus far I haven't seen that any point has been raised. I don't see any point was raised about its being a playground area. It may be in here but I would like to look at this a little more. That was a case where a woman got in the car and started backing up and there happened to be a child under it. It said she was negligent because she was tending to her own child who was in the front seat. I would like to read this. This is 30 A. L. R. 2nd. I am reading from page 21. The title is "Motorist's Duty to Children." (Counsel read citation.)

They cite one case from Alabama, looks like six from California, one from Delaware, one from Florida, one from Georgia, one from Kansas. Looks like there are two from Louisiana, one from Maryland, two from Michi-
page 231 } gan, looks like three or four from Minnesota, three or four or five from Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, and I'll come back to that; Washington, West Virginia, Wisconsin. They

don't cite anything—here it is, Cary decisions, looks like an Indiana case, an Illinois Appeals case, and mention of a Michigan case. That's an earlier Michigan case referred to over here. As far as the Virginia case is concerned, I have on the foot of this instruction—

The Court: What is the Virginia case?

Mr. King: Well, I have added three to what I have given Your Honor. The one I think that is clearest in point is *Messick* v. *Mason,* 156 Va. 193, at page 202. I have two others that I don't believe you have here, those that I put check marks beside.

The Court: The first part of what you read in here, this annotation, I think is the law in Virginia and a great number of states. The only question in my mind is whether the last little phrase of what you read applies in Virginia. Where did you read from? In other words, "* * * required of a driver of a motor vehicle who knows of the presence of a child or children in, near, or adjacent * * *."

Mr. King: Continue on.

page 232 } The Court: I accept that. "* * * or should know that children might reasonably be expected to be in the vicinity."

Mr. King: That means vicinity of the highway.

The Court: That must be in the vicinity of the highway.

Mr. King: The evidence that we offered, Judge, and we have four witnesses that would say it, is that children habitually play in the Cox yard and played down along Penick Road. The evidence also will show that one of the parties that played there frequently in that fashion was the son of the Defendant. The evidence will show the children played in that yard. That was a common playground for those children, that in playing in the yard they also played down along Penick Road, that the Defendant's son was one of them that played, which would certainly lend weight to the belief that he should have known. He testified that for seven years he's gone up and down that road an average of four times a day. Now, I just can't conceive of the law being that the mere fact that he knew or should have known that children played around there and around that road, having gone up and down it repeatedly, that that didn't place upon him a higher degree of care than it would have been if

page 233 } he had been driving down Broad Street or up U. S. Route 250 in Louisa County. It just doesn't make sense. Here's a case, Judge. This is the *Messick* case, 156 Va. at 193. This states it in reverse, unfortunately. I will read it to you. This states it in reverse so you will have to follow very carefully what I say. (Counsel read citation.)

This is a way of saying that if he does not or should have known it, that it is his duty to do so. It says it flatly. If you would like to read that. Then, these other cases mentioned by Mr. Garrett do not deal with this situation.

The Court: "But there are no special facts or circumstances known to the driver which ought to be known, to be in the exercise of a reasonable lookout * * * reasonably expected to be in or near the roadway at a particular place."

Mr. King: That, I think, is it right there.

The Court: I think one of the things you all are in issue about is what is in or near, reasonably in or near a highway to create a lookout and you are trying to put an additional high degree of care on the driver above the reasonable care—

Mr. King: The testimony is that they played all over the lot and alongside the road. That's what I want

page 234 to prove.

The Court: Suppose they do that 364 days, yet a man comes along there and knows they play there or not, and doesn't see anybody on that day, you don't think they can charge you with a high degree of vigilance because on that day he comes along there and there's nobody near the highway?

Mr. King: I think he ought to keep a lookout if he knows that's a place habitually frequented by children. I think that puts on him the duty of exercising a greater degree of vigilance in driving along that area than would anyone, say, from the state of Pennsylvania who happened to drive up and down there for the first time.

The Court: All right, now, specifically what are you trying to get into the evidence? Specifically what questions do you want to ask, what answers are you trying to elicit that you think are within your theory of the law?

Mr. King: I want to ask these witnesses, in effect, where the children habitually played in or near, in the area where the accident occurred, or do they habitually play in that area? If the answer is yes, then I will say, "Well, now, where in that particular area do they play?" "Are they

page 235 restricted to any particular spot or do they play all over the Cox's property as you've mentioned?" Answer, "They play all over." Question, "Well, do they play down adjacent to Penick Road?" Answer, "Yes, they play down there." Question, "How long has that been going on?" Answer, "A long, long time." Question, "Before this accident occurred?" Answer, "Yes." Question, "Before that?" Answer, "Yes, sir." Question, "Since then?" Answer, "Yes, sir."

Well, since then doesn't make any difference. Carpenter

already testified he knew his own son played in there, testified he goes up and down the road four times a day and to me that makes a vast difference, as I mentioned a moment ago. Some man from Pennsylvania who has never been there before in his life, driving down Penick Road, he wouldn't be expected to know that, and I think that 156 Va. case says that.

Mr. Garrett: Judge, all I can say is this, that yesterday afternoon you asked us to produce authority. I haven't heard one case they stated that is as factual on point as to this matter. I have produced not only that 200 Va. which certainly seems to be smack on point and also three other cases, one of which is completely on point because it points out

page 236 } this lady knew the children played in this neighborhood, played in her yard, and adjacent yard, and the child was struck in the driveway between the two yards.

Mr. Patterson: I can distinguish that case very readily. That was a jury verdict for the Defendant.

Mr. Garrett: It was not. They struck the evidence.

Mr. Patterson: *Ward* v. *Lewis,* you gave two. One was a jury verdict for the defendant. This is the infant case—let me be sure we are on the right case—this is the one where the infant was run over when the party backed out of the driveway. The point in that case, Judge, was never raised, certainly not from the decision of the Supreme Court as to whether or not the Plaintiff attempted to establish evidence that there was in that area a common playing area where the children gathered to play. There's no evidence in this case that I know of where the Court didn't comment on the point we are attempting to make here. It doesn't make any comment at all about that.

Mr. Garrett: Let me read the case, "Several children lived in these homes and decedent, a Lewis child, and other children played together at times in the respect-

page 237 } ive yards."

Mr. Patterson: Well, there is no evidence there that the Plaintiff attempted to establish by his evidence and to show and to get an instruction that this placed upon the Defendant a high degree of care.

Mr. Garrett: I haven't seen that happen in any of the cases you cite.

The Court: Let's see, where did we stop this thing? When we took this under advisement, who did you have on the stand?

Mr. Garrett: Mrs. Newton.

Mr. King: I was going to call Mrs. Hart and question Mrs.

Newton further and, if necessary, I was going to recall those two boys that testified, Brock and Walton.

Mr. Patterson: I think it first came up on Walton's testimony.

The Court: I thought Walton testified to it. Was that in Chambers?

Mr. Patterson: Yes.

Mr. Garrett: No, it was open court at that particular stage. He called them back. He said, "That particular day I saw them back here," and that's when he stated it was 150 feet back. You let him testify to that. You al-
page 238 } lowed them to ask him where he saw the children on that particular day, Judge, and he said—he drew a circle, you remember, and put "C. H.", Cox House, and that's way back. And then he said it was 150 feet.

The Court: He said, "150 feet at least."

Mr. Patterson: His testimony at that stage was that he pointed out on the picture where the children were playing on that day. When we went into Chambers, he then designated on the plat the area where they played and I asked Mr. King to describe the area that Walton was describing in his testimony and it ran from Davista Avenue up along what would be the southern line of Penick Road to the two driveways and back.

The Court: Let me ask Mr. Garrett this., Do you see any distinction between witnesses other than the Defendant? In other words, just generally as opposed to the Defendant himself? Is there any distinction between those witnesses testifying and the Defendant being requested to testify, testifying on what knowledge he had, if any, with regard to the nature, that he was passing—

Mr. Garrett: I think that's immaterial because in that case there, the *Dickerson* v. *Ball,* the point that
page 239 } was made was this, that there were children 50 feet away that the Defendant should have seen. Now, there's no difference between that and a situation where they claim that my man should have known the children were there. In other words, in our case here they say the Defendant should have known it and that case there they say the Defendant—they were in such a position that the Defendant should have seen them, see. Either one of them would convey knowledge to him that the children were there.

The Court: You are saying, then, that regardless of whether he knew about the situation or not, prior to this occasion, no higher duty of care was placed on him other than the usual one?

Mr. King: If he sees children near the road, then he has to exercise a higher degree of care. Now, I might say this further, that if he testifies along this line, he will say that the children play over in a field to the east of that Cox home where they played ball and things of that nature.

Mr. Patterson: That would be the area bounded by Davista Road from the Cox's to Davista Road.

Mr. Garrett: It's well away from the highway. I don't think it makes any difference, Judge, whether
page 240 } he knows it or should have known it. The fact is that if he didn't see children there that particular day, there's nothing to put him on notice. After all, he was driving at thirty at the most and the speed limit is fifty-five, so he certainly was taking some precautions.

The Court: All right, the Court is going to adhere to its former ruling. I don't feel that what the other witnesses would testify as to what was done on other occasions, where the children may have played on other occasions, is relevant in this case. I think the evidence ought to be confined to what the situation was on the day of the accident, what this Defendant saw or should have seen on that day.

Mr. King: The Plaintiff excepts to the decision of the Court for the reasons formerly given. Now, on that same point, does the Court consider it—well, I suppose I know the ruling on what I'm about to say. I will put it in the affirmative. I assume the Court would not object to my commenting to the Jury on the testimony of Carpenter himself as to children playing in the area and his own boy playing there?

Mr. Garrett: If he is going to ask for that, I will have to renew my motion for a mistrial, if this evidence
page 241 } has come in.

Mr. King: It hasn't.

Mr. Garrett: It has in some respects. You let it in. Mr. Carpenter said he thought it was maybe his child and the next question you asked was "Why?" You knew exactly what he was going to say. If they are going to go into that, we want to pursue our motion for a mistrial.

The Court: You asked whether or not you could go into that on argument.

Mr. King: That is right, Carpenter's own testimony.

The Court: In view of the Court's ruling all the way through on this matter, reaffirmed as of now, I feel the Court should be consistent on it and rule that you shouldn't comment in argument on it in regard to that feature of it.

Mr. King: With respect to that, Counsel for the Plaintiff also excepts, considering that the Plaintiff is bound by his

own testimony. If he volunteers such information, Counsel for the Plaintiff has a right to bring it up before the Jury.

Mr. Garrett: On the matter of the experiments, I have four cases that all held that these type of experi-
page 242 } ments were not admissible, four, plus the Brick-house case which is in 200 Virginia, which held that they couldn't use it. Now, there's this further comment I would like to make on the evidence. You recall that Hunt said he did not take the measurements of the crown of the road nor the difference in levels between the driveway and the road or the shoulder and the road. He did not take into account the moving vehicle—

The Court: Before we get into this, there's one other matter I wanted to mention. We suspended on the examination of the witness Hunt last evening just before we adjourned for the day around 7:00 o'clock, and as I understood it, most of his foundation had been laid on direct examination and cross examination that Counsel for the parties desired to make. I might mention that there actually were a few questions that the Court may have wanted to ask him but I didn't get to it due to the lateness of the hour. I don't want you gentlemen to not ask him those questions, but I don't want you to think I'm hearing your argument and then going to ask him some questions.

Mr. Garrett: All right, sir. Well, now, I find that in addition to that Mr. Carpenter tells me that he may or may not have had some tools and other equipment in the
page 243 } trunk of his car which would throw it up higher. In other words, it was a load in the trunk and it would throw the front of the car up and the driver somewhat up. Hunt doesn't take into account the blocking of vision by the doorpost and I figured that out, that the doorpost being four inches wide at a distance of four feet, every twelve feet it would block out an area of a foot. In other words, 24 feet, that would be a two-foot block; 48 feet would be a four-foot block. In addition there is a rear view mirror that's six inches wide and that's located approximately two feet from the driver. At every four feet that will block out an area of a foot, so in 40 feet it would block out a ten foot area. He doesn't take that into account. Listen to *Lane* v. *Hampton*, 197 Va. 46, at page 48. (Counsel read citation.)

This experiment and observation were made under the conditions and circumstances quite different from those existent at the time of the accident. The experiment was made during daylight while the accident occurred on a dark night. Hunt made his in February after the accident happened in May.

Mr. King: He didn't make it in February.

Mr. Garrett: At the time of the experiment
page 244 } the witness was on the lookout for an object which
he knew had been placed on the highway for the purpose of being seen while under the circumstances of the accident, the Defendant was unaware of the presence of his friend's body in the road. Plainly under such circumstances the evidence of this test and observation was improper and without probative value on the issue before the Jury. Then, you get to the case of *Doss* v. *Rader* which they cite, and that points out that the tests were made two years later and they said that that had no probative value. Then in *Bell* v. *Kenny*, 181 Va. 24, in similar circumstances they held that such a test was not admissible. *Ferguson* v. *Virginia Tractor Company*, 170 Va. 486—well, what I want to comment, if you have any doubt about it, I would like to have you read the case, Judge. They say this, and this is important, that again the person making the test is looking for the planted object. They call it a planted object which they knew was there. That's the situation here. This man comes in here and says at such a point he could see such and such and at another point something else. That is made by a person who is going out there for the very purpose of seeing something come out of there.

In other words, they are put on notice and in all
page 245 } those cases, there's five cases, Judge, that the
Court has consistently ruled out these tests.

The Court: Let me ask you gentlemen both if you recall the evidence—I don't know that we've gotten to it—but didn't Mr. Hunt say, or what did he say with regard to the speed that he was traveling at as of the time he made the observations?

Mr. King: You mean Mr. Carpenter?

The Court: What would the witness that you offer—what has he said, if anything? I don't recall.

Mr. King: I think he said nothing because it has nothing to do with it. It's simply a question of when a person is in a particular position how far—Judge, here's what happened. He took the plat to which we both agreed and from that plat projected lines to show how far down the driveway a person so many feet from the driveway, proceeding as close to the edge of the pavement as is possible, could see; what his line of vision is. It's not what he saw, it's where he could see, what was the line of vision, and that is measured starting at 200 feet and coming down, as I recall, to 30 feet. That has nothing to do with any planted objects being there.

The Court: The point Im making is, he's
page 246 } making observations, as I understand it, from a
standstill and the evidence of the Defendant is he

was going 30 to 35 miles an hour. And the other thing that bothers me is he projects a line out of the center line of the driveway. There's no evidence as to how wide the driveway is. It's bound to accommodate a car.

Mr. King: That was taken from that plat to which we both agreed.

The Court: There's no evidence at all as to where the child came from. He could have been up against a tree or on the far side of the driveway. The thing that worries me is this man is making an observation from a standing position, and the third thing is why is this around for expert opinion anyway? But assuming that to be true, I'm wondering whether the test is made under the same circumstances when you have got the differential of time and other factors, but particularly when he's making an observation from a standstill and where the Defendant's evidence is he was going 30 or 35 miles an hour, presumably with his attention ahead of him and passing these shrubs and trees. Then, the witness Hunt takes a projected line from the center line of the driveway. With those trees in there it might be highly material as to whether the boy was on the left side of the

page 247 } driveway or the right side. Those are the things that worry me.

Mr. King: It would be from the left side, right side, or center line, anywhere in the driveway. Everybody agrees that the boy came down the driveway. That's the testimony and that has nothing to do with any planted object. It's a moving object. It's merely a line of sight at the fartherest outside point and putting the Defendant, at his best, to the fartherest right he could possibly have been. It's nothing but a line of sight, has nothing to do with any planted object as he mentioned. It's merely a line of vision.

The Court: It seems to me that the planted object would be more persuasive than having nothing in there. In other words, if a person was taking a test, and looking for an object, that's more persuasive he could see. And the Defendant says he doesn't know where the boy came from. He saw something out of the side of his eye.

Mr. King: The evidence is that the boy was coming down the side of the driveway.

Mr. Garrett: No, there's no evidence. The Judge has struck it exactly right. There's no evidence in this case which of those driveways that boy came out.

page 248 } Mr. Patterson: You are wrong on that.

The Court: We have an idea where he ends up as far as the pool of blood. The Officer has not fixed the point

of impact. There's a place where the blood was but nobody saw the boy come out.

Mr. King: He testified that the younger brother, who was then five years old, says he ran down the driveway behind the brother on a bicycle.

Mr. Garrett: Which driveway?

Mr. King: The Officer pointed out the driveway, said the younger brother told him. You didn't object to it.

Mr. Garrett: He didn't say which driveway.

The Court: What do you say the experiment would do, Mr. King?

Mr. King: Merely show how far down the driveway a driver going under such circumstances as the Defendant said he was—he said he was sitting straight upright, he's five feet eleven inches tall, sitting directly behind the steering post, how far to his right he could see. It's not a question of whether he did see or didn't see. It's a question of how far he could see down that driveway that the evidence shows was the driveway down which the boy was coming.

page 249 } Mr. Patterson: I might point out this, too, that the lines of sight cross not only this driveway but they cross the other driveway, for that matter.

Mr. King: Cross other driveways.

The Court: As I understand it, under this Brickhouse case and the others, unless the conditions were substantially similar, the resulting picture could be misleading and the thing that worries me is that here is a man that is going to stay still at various points and he's going to say, "Standing still, I can look in this direction." In effect, "If I'm expecting something to come out there, and I can see that direction," now, as opposed to a man who is going 30 or 35 miles an hour as he rightfully could in a 55 mile an hour zone unless there were something on the highway to cause him to use reasonable speed. I just think it would be misleading to the Jury to let this witness come in here and say, "Standing still at this point, I could look down this driveway on this projected line, coming up to the middle of this driveway." The boy could be on either one driveway or the other, or wherever he could have been. It's still not too clear. I think it would be misleading to the Jury.

page 250 } Mr. King: Before you rule, may I make one comment? If the width of the driveway is involved, that is determined and settled by the plat which was admitted with the consent of both parties. The witness can very easily convert distances from the center of the driveway to the right or left, or all through. Number two, insofar as a silent or still view is concerned, that is not

what the plat shows. What the plat will show is that as the man was driving down the highway, when he reaches a point that's 200, he might be going 90 miles an hour or 180, but when he's driving down the driveway, if he cared to look or wished to look to his right when he hit the 200 mark, he could see that far. It's merely to show the length of vision when he passes at those particular points.

The Court: But you get up to the key point which is where the youngster came out of the driveway on his bicycle and here you've got him standing still concentrating at a direction up the driveway; whereas, under tests substantially similar you would have to have this experiment conducted in such a way that the witness was going by this thing at 30 or 35 miles an hour, whatever the speed would be, at 35 miles an hour, the distance you cover has a lot to do with the view and so forth that you could make.

page 251 } Mr. King: How on earth, if Your Honor please, could a person introduce evidence along that line if he can't do it this way? How can you show the range of vision? There's not one single thing erroneous about this. Is it permissible for Counsel to argue such matters? Can I raise the point of vision? I'm entitled to argue the case to the Jury and how a man can see is a material matter.

The Court: As I recall the evidence, the road is straight and there's a very gradual increase or downgrade.

Mr. King: Up.

The Court: It was straight, and you've got all these photographs, various distances. You've got the plat that shows a perfectly straight road and you've got the witness' description and the photographic description of where these trees and objects were, and it seems to me the Jury, as to whether the fellow could have seen or not, I think it's misleading for one person on an experiment which is not conducted at the same time of the year and a considerable period of time after this thing and on certain assumptions.

Mr. King: All in favor of the Defendant, every single assumption.

page 252 } The Court: Gentlemen, I am going to rule out this experiment.

Mr. King: I will argue it before the Jury. I certainly do except to it for the reasons I have stated and I recite that if this exhibit is denied under the circumstances I have recited, I consider it reversible error. I consider it could not, under any circumstance, be deemed prejudicial to the rights of the Defendant, but rather it leans in his favor. If this is not admissible, no such exhibit by any expert or any surveyor is admissible.

Mr. Patterson: There is one other thing, Judge. Yesterday on cross examination of Mrs. Newton some question was raised as to how Dr. Shield got into the case and it's pretty obvious what Jack was driving at, Mr. Garrett, and I wanted to state now the circumstances. She testified that her husband had been advised by some physician he consulted in his company as to certain eminent physicians in town. This man, Mr. Newton, came to us and said he wanted an additional physician and named several. Mr. Newton suggested to Mr. King Dr. Asa Shield. Mr. King knows Dr. Asa Shield, as you perhaps do, and we discussed it and at that time and in our office, Mr. King called Dr. Shield.

page 253 } I want to state that for the record since some implication has been raised by Mr. Garrett as to how he got in the case. I want it to be shown in case he doesn't already know it. I might add this, that under the rules of our pretrial conference, we exchanged information and reports concerning medical testimony. It's there clearly stated that Mr. King, of course, and I were present, or I was present when Dr. Shield first examined this Newton boy. That's in the record so if there's any implication to be drawn from it by this testimony, Mr. Garrett knows it and there's no attempt to hide the fact that we were there.

Mr. King: May I say this. What Bob says is correct. The difficulty is this, I can't get on the stand and testify. I can't do it. I would have to get out of the case and have to have a new trial, but what Bob Patterson says is correct. Mr. Newton, not Mrs. Newton but Mr. Newton, came to my office. It was not long before this thing was set for trial, I think, for the second time. It's been set three times—the second time, and he said he had talked with his physician at Reynolds Metals and was not satisfied with the way the boy was getting along and wanted to know what to do. The doctor,

page 254 } I think it's McMullan, said, "You ought to have him looked *out* by some fellow who does psychiatric work." He said, "I know several people," and mentioned some. One was Dr. Asa Shield, and Mr. Newton came to see me and said, "These names have been mentioned. I want the boy examined further. I'm worried about him." And he mentioned the names to me. I said, "I know Dr. Asa Shield, he's a good friend of mine. I've known him for years and he is a person of great ability and I'm sure you can rely on what he tells you." He said, "If you know him, why don't you call him?" And I called him and that was done at the request of Mr. Newton. It's very true at the time that was done, I said, "Well, if he can examine the boy, we could use him as a witness in the case." But he was not

called for the reason we wanted him to examine the boy simply so he could testify in this case and that's the inference that was given yesterday in the examination of Mrs. Newton. I don't want to get into things of that sort. If necessary, I'm going to have to get on the stand and testify, but I wanted to explain to you now, Jack, that's the whole thing. We could ask you the same thing. How did it happen that Dr. Kendrick happened to see the boy?

The Court: Well, where do you all want to
page 255 } start now?

Mr. King: I'm not going to say any more about that plat of Mr. Hunt's. Mr. Hunt will go back on the stand and when we adjourned yesterday, we started getting into a quarrel of some sort about this question that I asked Hunt, "Did you examine the motor vehicle of Carpenter to determine whether any dents or bruises or blemishes at a point under the front right bumper where the scar is shown by Exhibit so-and-so occurred?" And he said, "Yes, I did." At that point, Jack objected and said that car, he didn't examine it until almost two years after the accident. Now, the police officer has already testified that he examined it. This is what Jack mentioned in his argument, and that he didn't find anything behind that point. That's exactly what Hunt is going to say. He's not going to disagree and say, "I found a great big smash in the car." He's going to say, "I didn't find anything." Do you object to that? It's not going to be contrary to what the policeman said.

Mr. Garrett: I don't object to it, but if he says that, he's crazy as the devil because there is a bump down there now, the man tells me. I haven't seen the car recently, but he says that in snow or something, backing over a curb at Willow Lawn, he scraped the underside of the right-hand side of the car, the underside toward the rear.

page 256 } Mr. King: Well, he examined it last June, the 26th or something.

The Court: Are you objecting to his asking the question? I haven't ruled on that, have I? I'm going to let him answer that question.

Mr. Garrett: We take exception on the ground that there's no evidence that the car is in the same condition that it was at the time of the accident or shortly thereafter.

Mr. King: At the time of the examination.

Mr. Garrett: I mean that the car at the time of Hunt's examination may or may not have been in the same condition that it was at the time shortly after the accident when the police officer examined it.

The Court: Now, one minute. You haven't said anything about it and I don't know whether it's in the province of the Court, but I feel like I ought to treat Counsel as fairly as I know how. What are you going to do about getting in the record what Hunt would have said or the plat he would have put in? If you don't get it in, it won't be part of the record.

Mr. King: I would ask the Court merely this,
page 257 } I would say—I would now ask that the Court receive that plat and mark it for identification so it can become a part of the record but not be made available to the Jury in view of the Court's ruling.

Mr. Garrett: I think that's proper.

Mr. King: I further say that Hunt, were he permitted to testify, would say that the line of vision of a person sitting upright behind a steering post of a 1957 Chevrolet sedan, driving as near to the hard surface, right-hand side of the hard surface of Penick Road as was possible to do and taking the fartherest most extreme of the sight impairment that would be there and treating that sight impairment as though it were a stone or brick wall incapable of being seen through, would have fixed the line of vision at various points in his province along Penick Road to those places as shown on the plat, to the driveway, which—

The Court: Does the Court understand that such observations that would be shown on that plat would be made at a stopped position? In other words, standing still?

Mr. King: No, sir, that is not what will be shown. It will be shown that as Carpenter progressed eastwardly along Penick Road at those points he could have seen this at a particular angle.

page 258 } The Court: But the witness was still when he made the observations?

Mr. King: No, sir, the witness made the observations entirely in reliance on Plaintiff's Exhibit 1 which has been admitted with the consent of both parties as a correct and true plat. It was not made by going to the scene and looking at it. It is merely a conversion of the plat we both agree is correct. That's all. That's the principal reason I think Your Honor is in error.

(Note: Whereupon, the Judge and Counsel returned to the courtroom where court convened, pursuant to adjournment.)

The Court: Who will you call first?

Mr. King : Mr. Hunt.

GEORGE HUNT,

being previously sworn, resumed the stand and further testified as follows:

RE-DIRECT EXAMINATION.

By Mr. King:

Q. Now, Mr. Hunt, when we adjourned on yesterday I had asked you this question which you had not, given your answer to. You have previously testified that you inspected the car or obtained paint scrapings from the car

page 259 } of Mr. Carpenter in January of this year when you were in company with my partner, Mr. Patterson. I now ask you this. At that same time did you inspect or observe that automobile for the purpose of determining whether on its right side at any point heading toward the rear of the automobile back of the right front fender point where the marks are shown on Plaintiff's Exhibit 8—in other words, what I am speaking of, I am speaking of all portions of the automobile on the same side extending to the rear from that mark. Did you examine that area of the automobile in order to determine whether there were any dents, blemishes, or evidences of damage of any sort to the automobile?

A. Yes, I did.

Q. What was the result of your examination?

A. I found the blemish on the leading edge of the fender. If you would hold up the photograph and point to it, I will identify it. It's the brown streak at that point. There was a considerable dent there, not of any magnitude but a very clearly defined one. There was also a slight scratch on the skirt just below the edge of the door, approximately ten inches above the roadway.

Q. Is this the skirt? (Indicating.)

A. Yes.

Q. Will you pull out the picture, if any, that shows that scratch?

page 260 } A. Yes, I believe it's shown more clearly in this photograph.

The Court: What exhibit is that?

The Witness: This is Plaintiff's Exhibit No. 7.

Mr. Garrett: I understood that the representation in Chambers was that this witness would say he found no other marks, before you ruled on this matter. I would like to refer to the reporter's notes on that, if we may.

Mr. King: If Your Honor please, what this witness' testimony is going to be, that he found nothing in addition to

what's shown on these pictures. He found nothing to the rear of this—in Chambers. I had forgotten about this myself, but that's shown in a picture taken three days after the accident.

Mr. Garrett: That had a material bearing on your ruling, as I understood it.

Mr. King: Your objection was that he didn't look at the car for two years after the accident. All the witness is saying is he found nothing in addition to what was shown at the time the pictures were taken or at the time the officer examined the car.

The Court: Well, the Court rules that the witness can testify to it and then Counsel for the Defendant can cross examine to establish the time and places.

page 261 } Mr. Garrett: Note an exception to this.

Q. Will you recite once more what marks you found on the vehicle in the area of the side of the vehicle to which we are referring?

A. I'm referring to the blemish on the leading edge of the fender which we saw on the other exhibit and this slight scratch below the door panel on the skirt.

Q. Did you find anything else?

A. No, there was no evidence of any other damage to the automobile either uncorrected nor was there evidence of any damage that had occurred and had been corrected, so far as I was able to determine.

Q. In other words, I take it you mean you saw no evidence of any repair of any portion of it?

A. Exactly.

Q. Now, Mr. Hunt, as a result of that inspection and what you found in regard to it, have you reached a conclusion of whether the boy on his bicycle was traveling toward the automobile at any appreciable speed at the time the collision occurred?

Mr. Garrett: I object to this, Your Honor. That's a conclusion based on a limited knowledge of the facts and doesn't take into account all of the various circumstances that could have been present at that time. Well, I think we

page 262 } better argue this in Chambers, too, Your Honor.

Mr. King: If Your Honor please, it's very material whether the boy was moving. The boy, we concede, doesn't remember anything. Carpenter doesn't remember anything. He said he never saw the boy—

George Hunt.

The Court: One minute. Let's go back in Chambers.

(Note: The Judge and Counsel retired to Chambers.)

In Chambers:

Mr. Garrett: Your Honor, if anything, this is worse than the plat. He's asking this witness if he can take that picture and those marks that he saw there and tell whether or not this boy was moving. No evidence of what speed the car was going, where the impact took place. It could have been on the road, could have been anywhere, anywhere on that road.

Mr. Williams: He looked at the car a year and a half later.

The Court: Isn't this the point, the one that was reached and covered by the Supreme Court in 200 on the case of Appeals from Judge Bazile's Court? They had an expert say—

Mr. Garrett: He could reconstruct the accident.

The Court: A year and a half later. How do you distinguish your situation from that?

page 263 } Mr. King: Very materially, sir, because they said that what that witness was testifying to could readily have been determined by the Jury and therefore it was a matter of common knowledge and therefore was not something that was subject to expert testimony. That was what was wrong with this. Now, what this witness will testify to is that if the boy had been moving at an appreciable speed and on the bicycle, which he will show, the seat is virtually as high as the handlebars. If he had been moving at an appreciable speed and going forward, that the collision of the bicycle with the automobile would not have stopped his momentum and he would have gone into the side of the automobile, that if he had gone into the side of the automobile he would have been splattered all over, and also say it doesn't take a rock or piece of steel to put a dent in an automobile. It depends on the speed of the object that hits it, not on the solidity of the object. You take an orange and throw it against the side of an automobile so it moves fast enough, you are going to get a great big dent. You can take a piece of straw, and it's been known to happen, in a very high wind that a piece of straw will run into a board and bury itself in the board. It depends on the speed of the object.

Julian Mason Weaver.

page 264 } It is very important. It necessarily calls for expert testimony and this man is prepared to give it. It's not something the Jury can draw on their own conclusions.

Mr. Garrett: There isn't any evidence whether this boy was riding a bicycle or walking beside it.

The Court: The Supreme Court in earlier cases said the way automobiles end up and the way they look defies all laws of physics. They made such a pronouncement.

Mr. Garrett: They say the courses and distances of an automobile after a collision have no bearing in the case because sometimes they act in a manner completely contrary to all laws of physics, and there must be a hundred times they said that.

The Court: Do you want to say anything else, Mr. King, on this point? I think he made the objection. He has the right to close. Do you want to say anything else before he closes?

Mr. King: I don't have anything that needs to be said.

The Court: The Court sustains the objection.

Mr. King: I vigorously except to the Court's ruling. It's an extremely material fact that the Jury cannot draw from its own conclusion and, therefore, refusal to admit the evidence is error.

page 265 } (Note: The Judge and Counsel returned to the courtroom.)

Mr. King: I have no other questions, Mr. Hunt. That's all.

Mr. Garrett: Thank you, Mr. Hunt. I have no other questions.

(Witness excused.)

JULIAN MASON WEAVER,

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

DIRECT EXAMINATION.

By Mr. King:

Q. Mr. Weaver, will you please state your full name?

A. Julian Mason Weaver.

Q. What is your place of residence?

Julian Mason Weaver.

A. Quarry Road, Chesterfield County, Richmond, Virginia.

Q. What is your occupation?

A. I am Chief Chemist and Director of the Bacteriological Sections for the firm of Froehling and Robertson, Incorporated, Richmond, Virginia.

Q. How long have you been engaged in such activities, professional activities?

A. About thirty-one years.

page 266 } Q. Have your activities and your experiences been such that have familiarized you with the means and methods by which identity of paints correspond?

A. Paint analyses and tests have been one of our specialties.

Q. Have you had extensive experience in such matters?

A. I would say so, sir, over thirty-one years of it.

Q. In or about the month of February of this year, 1959, did Mr. George Hunt leave with you for testing certain paint scrapings in an envelope to be compared with marks shown on the front of a fender of a bicycle?

A. Yes, sir.

Q. Now, behind you is an exhibit in this case. You will have to turn around. It is a bicycle. I will ask you if the fender, the front fender on this bicycle, is the same fender which you used in making your examination and tests?

A. Yes, sir, it is. I placed a company stamp on it to be identified.

Q. This mark ? (Indicating)

A. It's an "F & R."

Q. That was placed there by you?

A. Yes, sir.

Q. Did you test those scrapings on the fender to see the similarity between the paint, in the paint?

A. Yes, sir.

page 267 } Q. What was the result of your findings?

A. Our findings were that one of the marks on the fender was paint which apparently had been deposited from forcible contact with another painted object. The paint scrapings which were delivered to me were checked against the paint from the mark on the mudguard of the bike and the paints were found to be practically identical.

Q. What difference, if any, did you find?

A. Well, the mark on the mudguard of the bike obviously was composed of the exterior paint from the object in which it had been in forcible contact. The paint scrapings delivered

along with the mudgard were, I think, from the appearance under the miscroscopic examination, that it was a complete film. That's possible in taking paint scrapings, particularly from metal objects and objects which are in contact through abrasion, usually forcible abrasion, quite often only the exposed or exterior film of the paint will be deposited. In some instances more than that could be. In this particular instance all we could find in our examination indicated that there was only one type of paint, in other words, from the smear on the bicycle mudguard.

Q. And they were of the same type?

A. Yes, sir, I'm speaking now of the exterior paint.

Q. Yes. Did you reduce your findings to writing?

A. Yes, sir.

page 268 } Q. I have here what appears to be a report bearing the heading of Froehling and Robertson, Incoroporated, dated February 17, 1959 and it bears some initials at the end of it and I will ask you if this is your report?

A. I prepared this report and initialed the report.

Mr. King: We would like to ask, sir, that this be received as Plaintiff's Exhibit—whatever the appropriate number.

Mr. Garrett: Just a minute, we have no objection.

The Court: Received and identified as Plaintiff's Exhibit No. 12.

(The document was marked and filed as Plaintiff's Exhibit No. 12.)

The Court: Mr. King, do you want the Jury to see this at this time?

Mr. King: Yes, sir. There's no need for it if it says what he said I think—it's all right, of course.

CROSS EXAMINATION.

By Mr. Garrett:

Q. Mr. Weaver, may I see your notes there, please, sir?

A. Yes, sir. (Handing notes to Counsel.)

Q. Now, you sav this was a red paint?

A. Well, I would describe it as red. There are

page 269 } various shades, of course, of red.

Q. What shade of red was this?

A. I didn't determine the shade, sir.

Julian Mason Weaver.

Q. Well, I thought you said it was similar in color to the paint that was given you?

A. That's true, it was.

Q. Is this the red you would describe it as, this red on here? (Indicating bicycle)

A. This is the deposit of paint that we were particularly concerned with.

The Court: I don't believe the Jury can see that. (The bicycle was brought to the jury box.)

A. This is the smear of paint that we were particularly concerned with. I took a section, this section was taken in the laboratory in order to obtain a piece of the metal with the paint smear for laboratory examination.

Q. Was it the same red as this red over here?

A. We did not check these points here. This was the point of issue as far as we were concerned.

Q. Well, was this red the same as this red? (Referring to bicycle)

A. I didn't check that, sir.

Q. Well, you can't tell us the shade of red that it was? Was it bright red, dull red, just what kind of red?

page 270 } A. I would just call it ordinary red. I would say as far as the shade is concerned we would consider it a medium red in the range of red colors.

Q. Now, you definitely establish these scrapings as being paint from an automobile?

A. No, sir.

Q. Isn't that paint common to any number of types of automobiles?

A. That is not generally true. I would say of the same model and the same manufacturer, certainly, there would be a number of vehicles with the same—

Q. Would it be unlikely that, say, GMC who makes the Chevrolet would also paint the Chevrolet trucks with the same red paint?

A. I don't think so.

Q. Why?

A. I think that normally they used different paints on trucks.

Q. Do you have any direct knowledge of that?

A. Just simply from experience from the testing standpoint and also from personal experience.

Q. Tell me a specific instance in which you found that.

Julian Mason Weaver.

A. Well, sir, I don't know that I can quote. I would have to go back to my records. Over the years I have tested so many samples of paint that I simply can't go back page 271 } and give you the details of an examination of that type. Most of my opinion is expressed largely on the basis of my own personal observation and my experience in connection with the operation of automobiles and also trucks in connection with a firm of which we have approximately a hundred vehicles and also our experience in the laboratory.

Q. Well, is it impossible that a truck could have been painted with the very same paint that this—

A. No, sir, it's easily possible.

Q. Easily possible?

A. Yes, sir.

Q. And how about a pickup truck?

A. I think the same thing holds true. I don't think it's generally true; it could be.

Q. Are you familiar with photography at all?

A. To some degree. We used photography to some extent in our business.

Q. Can you say whether or not that car is red or not? (Indicating)

A. No, sir.

Q. Do you think it's red?

A. I wouldn't think. There's no color there.

Q. You mean you are not prepared to say one way or the other?

The Court: What exhibit is that?
page 272 } Mr. Garrett: Exhibit No. 7.

Q. Have you seen this particular car?

A. No, sir.

Mr. Garrett: All right, I think that's all.

Mr. King: No other questions.

(Witness excused.)

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page 345 }

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In Chambers:

Mr. Garrett: The Defendant desires to move the Court to strike the evidence, on several grounds. First, that there has been no showing of primary negligence on the part of the Defendant; secondly, that as a matter of law, the page 346 } Plaintiff is guilty of contributory negligence and, thirdly, that because there is a fatal defect between the allegations and the proof. Now, in connection with the first ground, we rely on the case of *Dickerson* v. *Ball,* in 200 Va. 809. Now, we have discussed that case right fully today as to several features of the evidence and things of that nature. You recall there that the lower court struck the evidence of the Plaintiff and the matter on appeal was affirmed. Now, briefly, Judge, that was a case in which a child was standing on a curb and ran between two cars coming out into the traveled portion of the street and struck a passing automobile, or was struck by a passing automobile. The Court reviewed these various rules about the duty in relation to children and they make this statement. First, they say, speaking of Plaintiffs, "The Jury had the right to find that as the Defendant approached the place where the accident occurred, by the exercise of ordinary care he should have seen the child on the curb and should have anticipated that he might run into the street in the path of his car. The burden of proof was on the Plaintiffs to show this and this they have failed to do," as Ball said. "The Hugo car obstructed his view of the child and prevented him seeing him. There page 347 } is no evidence to the contrary and the physical facts support this testimony." And then they go on and speak of those obstructions there, the fact that they blocked the vision of the Defendant. They also discuss this matter of other children playing around and the fact that they did not have any bearing on the question.

Now, Judge, here is the evidence in this case. All that has been proved is that Mr. Carpenter was traveling east on Penick Road at the outside 35 miles an hour which is 20 miles an hour within the speed limit. The evidence is sufficient to sustain a finding that his car and this bicycle were in collision, although that is a factual issue in the case. I think the rule on the motion for judgment is that you have to review the evidence most favorable to the Plaintiff and we concede that the evidence is sufficient for the purposes of this motion, is sufficient to support that finding. His testimony is that as he approached the scene of that accident, he saw no children. The evidence indicates and very clearly shows that his vision

at any point off of the highway was completely blocked by the shrubbery; certainly, until he got very close to the point where the impact occurred. There is no evidence to show page 348 } where the child came from, whether he came from one lane or the other, whether he came off of the, maybe off of the yard. There is no evidence of how fast he was traveling or whether he was, or just what he was doing. The case is absolutely lacking in all essential elements to carry the burden of proof.

Now, the same situation was presented in this *Brown* v. *Boyd,* in 192 Va. 702, and incidentally in that case, as in this case, Judge, the Plaintiff called the Defendant as an adverse witness in order to make out his case and the Court pointed out that having done that he was bound by the Defendant's testimony, there being no evidence to the contrary, and that is a very significant point in this case; because of their lack of evidence they attempted to make out a case by calling Mr. Carpenter. The head notes says: "Defendant, the only eyewitness, was called by Plaintiff as an adverse witness and his testimony as to the happening of the accident was uncontradicted. Plaintiff was therefore bound by such of Defendant's statements as was clear, logical and reasonable and not in conflict with evidence introduced on behalf of the Plaintiff." And they pointed further, "The accident occurred while Plaintiff was on his way home from a school at a place about one quarter of a mile from the page 349 } school. He was crossing a thoroughfare in between intersections where there was no cross walk. There was no evidence that Defendant failed to keep his truck under proper control, failed to keep a proper lookout or drove at an unreasonable rate of speed * * *" (Counsel continues reading citation.)

Judge, if anything, this case is stronger for the Plaintiff than the case you now have before you for consideration. Now, as to one of the other points as to contributory negligence, I just call Your Honor's attention to this. The Court has recognized that a child of the age of this child can be guilty of contributory negligence. The only evidence on the matter is that this boy was of normal intelligence. He had been riding his bicycle about two years; he was alert, so forth; his mother had instructed him not to cross the road riding. If there's any inference at all to be drawn from the evidence, it is that he was riding his bicycle across that road and I would say that's completely lacking, so that you have a situation where if the accident occurred as the Plaintiff has alleged, then the Planitiff was guilty of contributory negligence as a matter of law.

Now, thirdly, the Plaintiff's allegation in their motion for judgment that at the time of the accident the page 350 } Plaintiff was standing astride his bicycle on the shoulder of the road or on the south side of the road. That's the case we were prepared to meet, no other, and there's been no evidence whatever to support that finding. Now, they can't travel on some other case. They've got to travel on the case they have alleged. To do otherwise would be a fatal variance requiring dismissal of the actions. That's all we have to say, sir.

Mr. King: First, they say, "No proof the Defendant was negligent," and he's mentioned two—he mentioned one, he just mentioned a word and never came back to it. I don't know really what he had in mind. He said, "There's no evidence as to the speed of the bicycle." I am not going to touch on that because I don't think it means anything for the purpose of his motion. And he says there was no evidence of where the child came from. Now, let's see about that. Bear in mind, Your Honor, that the testimony is that the mother, immediately before the accident, saw her boy, her children and other children, playing up at the end of that driveway. Bear in mind also that the two other boys, as they drove by with the woman who had given them a ride, saw the children playing up there in the same place. Bear page 351 } in mind that the policeman says that the younger boy, without any objection being made, that the younger brother of this boy saw the boy run down the driveway. The young boy said he ran down the driveway behind the bicycle. The policeman fixed a place of where the collision occurred at the end of that driveway. The mother fixed the place of collision at the end of the driveway. The two boys who got up there immediately fixed the place at the end of that driveway.

Now, the evidence, or the conduct of the Plaintiff—the Defendant, fixed the place there. That was the place where he swerved to the left across the road and came back to the right of the road and came to a rest and went back to that very same place. Well, the evidence is that the boy came down the driveway. How fast he came I don't think we know for certain, although I have a very firm idea that I can argue to the Jury that he was moving forward, if at all, at a very slow rate of speed. That's the evidence Your Honor wouldn't let me put in with an expert, but I can argue it anyway and prove it.

They admit there is sufficient evidence that the Defendant struck the Plaintiff. Necessarily, he struck him at the place

or very near the place where the boy was found.
page 352 } Now, it doesn't make any difference whether the boy came down the driveway, whether he came down the driveway or up alongside Penick Road. No matter where he came from, he was there and it's perfectly obvious that the boy could not have been laying flat on the ground and been hit if, as the other evidence sufficient to the Jury shows, he hit the bicycle in an upright position and the boy was knocked and entangled in it when he came to rest. So the boy was obviously in very plain sight.

If you will look at the plat, there is no credible sense whatever for this Defendant to say that he was coming down Penick Road and never saw anyone in this vicinity and could not have seen them. It's impossible that could have happened. The perfectly obvious thing is he wasn't looking at all because this is the *hearest* obstacle to interfere with his visibility and that's that one tree that we all agree is right there. (Indicating) If the boy was standing still there, he obviously could have seen him. If the boy was coming up the road and the boy riding—a little bicycle like that can't go 30 miles an hour. If the boy was coming up the road, the best he could possibly do, I would think, would be ten miles an hour, at the very best, a little bicycle with a boy seven years
page 353 } old running the thing along. If he was coming up there, he couldn't have been more than one-third of the distance of the road that this man was away and the instruction that I have offered to Your Honor is that the reaction time 30 miles an hour is 33 feet. If you will take a ruler and measure there 33 feet, you will see it's right in the middle of that tree. That's one inch and a touch over from this. (Referring to plat.) So everything was perfectly obvious to the driver. The boy couldn't have sprung up out of the ground. He was there, perfectly obvious, and now this case that he cites, the one where the boy ran between two parked cars, I think the verdict was right because they proved in that case that the engine or the front radiator on that car was taller than the boy was. He said, "I didn't see him and what happened, when I got right by him, that's when he darted in front of me," and the Court said, "There was nothing you could do under those circumstances and we can't find you were negligent because you couldn't have seen him at that time." Now, that's about all there is on that. Of course, I can go further if you have any question in your mind. I don't know what the problem would be from that point on.

page 354 } The Court: Let me ask you this. What evidence is there from a witness or otherwise that

this Defendant ever saw this boy at any time prior or there was any intervening gap between the Defendant's car and the Plaintiff's bicycle?

Mr. King: I don't follow you, Judge.

The Court: What evidence is there, positive evidence is there, of a distance between the bicycle as it approached or was on the road and where the Defendant's car was?

Mr. King: At the time the bicycle approached?

The Court: At any time?

Mr. King: Well, the Defendant hit him and the picture taken by the Officer shows that that bicycle ran straight under the front fender of the car and matches up perfectly and the bicycle is upright and if the Defendant is coming along at 30 or 35 miles an hour it's impossible the boy could have been anywhere at all other than in plain sight when the man approached him and he's bound to have been in plain sight at a greater distance than the statute says is the reaction time for stopping a motor vehicle, far beyond that.

The Court: How do you reach that?

page 355 } Mr. King: Well, the man was going 30 or 35 miles an hour. Now, I would like Your Honor to look at that plat and see where that boy could have come from in the time that man went 33 feet at 35 miles an hour. Could he have possibly come from any place where he was totally out of sight? It's the man never kept a proper lookout, doesn't show anything on that plat to show that the boy could have sprung out of no place and gotten to where the accident occurred and hit the car in the way in which it did hit it at any place which was not obvious to the driver of the car. It's impossible to find it and the evidence is uncontradicted that where the boy came from, right down that road. That's what the evidence is. There is no objection to any of the evidence that's been taken that way and it's all in perfectly obvious sight, clear sight to the driver of the vehicle.

Mr. Garrett: If I can comment on that point?

The Court: Are you through, Mr. King?

Mr. King: Yes, sir.

Mr. Garrett: The reaction time is not the only factor you have to consider. You have to consider the stopping distance, too, which is an additional 60 feet, I think.

page 356 } Mr. King: No.

Mr. Garrett: Let me show you what they say about all that in this *Dickerson* case. "The Plaintiffs contend that the Jury had the right to find from the testimony of Mrs. Griffin that the Defendant was driving at an excessive speed * * *" (Counsel read citation.)

"* * * There's no showing that the accident would not have occurred had the car been driven at a permitting speed of 25 miles an hour." There's where not only your reaction time but your braking distance comes in, Judge. In other words, if he had seen this child, say, at 30 feet, as Mr. King says he should have, he wouldn't have been able to stop. (Counsel continues reading citation.)

They argue there the same thing Mr. King is trying to argue here.

Mr. King: Not at all. Let me show you the plat again. The only evidence of how the boy got there is that he came down the driveway. Carpenter has testified that his right front wheel was off the edge of the road eighteen inches. That's a foot and a half.

The Court: From the edge of the hard surface but on the hard surface.

Mr. King: That is right. Eighteen inches beyond the southern boundary of the hard surface. (Referring to plat.)

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Hunt testified that it's roughly three and a half feet from the edge—from the right outer side of a right wheel of a '57 Chevrolet to the steering post. Your man testified he sat directly behind the steering post, didn't lean to the right or left, so that puts him from the side of the road five feet. You come out here five feet from the side of this road and you draw a line from that, which I have done on another piece of paper I have, but you draw a line from that on back here and put him 60 feet, and you will find that boy coming up the driveway was down at least 20 feet and he was in plain sight. None of these tree groups were in the way. If you want to assume the garbage can was there, that wasn't in the way. That's where the boy was coming from. He was in plain sight and the man had 60 feet to go before he got to the place he hit him. If you say that's running between two parked cars, I've never heard of such a thing.

Mr. Garrett: I disagree with that. The boy could have been behind the tree. There is no evidence of which driveway he came out. There is some indication that at one time he was up in this driveway. (Referring to plat.) That's the mother's testimony. When she drew this line she said, "That's where he was, up in here."

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There is no evidence actually that whether he came from behind this tree or what have you, if he came from behind that tree, obviously this man couldn't have seen him.

Mr. King: There is no evidence he came from behind that tree because there is a fence up here.

The Court: Are you positive where he came out?

Mr. King: There is this, the Officer said that the boy saw him coming down this driveway. That's where he put him, on that driveway.

The Court: I don't know. That spot there, as I remember the Officer's testimony, indicated where the blood spot was.

Mr. King: The mother said she saw them playing up in here. The two boys that moved by said they saw them playing in here, all along this side of the fence. You can't run a bicycle through a fence and come down over here. They said they saw them come down here and he couldn't have come down the other side.

The Court: Who said he was coming down there? Who was it?

Mr. King: No one said he was. It's Mr. Garrett's idea that he might have been coming down this drive-
page 359 } way. (Indicating)

The Court: Who put him coming down that driveway?

Mr. King: The Officer and the mother saw him playing right up here and if he was playing right here immediately before the accident, how is he going all the way across here and get his bicycle through a fence, start here and get to that point by the time Carpenter gets down here going 35 miles an hour. It's impossible.

Mr. Garrett: All the Officer said was that the little boy said they were coming out of a driveway.

Mr. King: He said, "the driveway." The Officer put the bicycle like that (indicating), showing the way from which he came. He's the fellow that put that bike there and took the picture.

The Court: Well, the most he said was that, gathered from the investigations, that's the way he might have come from. There is no positive witness who says he saw him come out of any driveway, is there?

Mr. King: Well, let's suppose he didn't come out of a driveway. He was there and the evidence shows that his bike was standing upright because it fits with the automobile. The evidence shows the automobile hit the bicycle.

page 360 } The Court: What evidence is there that there was any opportunity to avoid an accident?

Mr. King: Then he was in plain sight if he was standing there.

The Court: No evidence he was standing there.

Mr. King: How are you going to get him from this place?

Mr. Garrett: The burden of proof is on the Plaintiff.

The Court: In most of the cases you have witnesses who are able to place these things and in this case the Plaintiff, the young boy, was hurt and for the reason the doctors testified to he did not remember the thing and, naturally, he hasn't testified and placed himself or the car and the Defendant never said he saw these boys on the road at all, riding or walking or anything else, other than lying, and it seems to me we are getting into a realm of speculation. You have got to show some distance somewhere. The Defendant saw or had some opportunity to do this.

Mr. King: Let me give you an example.

The Court: Answer that. That's the thing that's bothering me.

page 361 } Mr. King: Let's suppose that not a soul was around, not a soul was around there, nowhere. Let's suppose that we found a body of a boy here so the boy doesn't know anything, he can't say anything. You find Carpenter's car parked down by his house; you find blood all over the place; you find enough of the boy to know what boy it is; you go down and there's no witness. You go down and find Carpenter's car and you find the boy's blood and hair and so on all over the side of the automobile. Carpenter says he doesn't remember hitting anybody up there and you are expected to show that. The finding on the automobile is part of that, the boy was hit right there.

The Court: For the purpose of this argument I am willing to concede that the bicycle and the Defendant's automobile were in contact and we can go on from there.

Mr. King: All right. That means there's no evidence to go to the Jury whether he did it carelessly. To me that's inconceivable.

Mr. Garrett: Mr. King keeps making that statement about appeal and all that. Let me say this in that connection. This case is terribly important to this man Carpenter.

page 362 } I'm willing to take my chances on any appeal.

The Court: I concede, know full well from the case, the way it has been conducted, that it is important to both of you and it's been well presented and contested, but in most of these cases you have got a Plaintiff that testifies and says, "I was doing so and so and got to this point and there was the Defendant." Or the Defendant is taken on adverse and says, "I came down the road and saw these boys or saw a boy on a bicycle and there he was and I didn't slow down until the last minute and then he came out in front of me and then I tried to veer but it was too late." Or absent either

that from the Plaintiff or Defendant you have some third party, witness, who happened to be across the street and says, "There was the Plaintiff and there was the Defendant at this spot and the Plaintiff was standing still or he was driving or he was coming out there and the Defendant was doing this at the same time," and give the approximate location. I think to hold the Defendant negligent in this case would be the gravest amount of speculation and I see no evidence on which to submit the case to the Jury on the negligence of the Defendant and I am going to sustain the motion to strike.

page 363 } Mr. King: Let me read you what Carpenter testified to. I didn't want to bring this out, but I will do it now.

The Court: I don't know as a general policy that there is anything I don't want to do more than strike the evidence of the Plaintiff because I think everything ought to be submitted that can be submitted and the whole thing go to the Jury and try the case. Let them have it and then, of course, in a child's case who received the injury you have got a lot of sympathy and it's difficult, having children, for me to take that attitude.

Mr. King: Do you want to hear what Mr. Carpenter said? I have his testimony of yesterday. I will read on over on page four. "Do you admit that your car swerved suddenly to the left at the time that the accident is supposed to have taken place?" "A. Well, not right at that time, sir. When I was going right by I sort of seen something on the right just at that big tree kind of overhangs the road and I turned around and looked back for the second time, throwed my elbow on the seat and seen him out the window. I did swerve to the left and turned on back to the right and stopped and got out of the car and run back just as fast as I could, and

page 364 } Mrs. Newton, she was coming across the road just about the same time that I got there, and I believe it was Mr. Foster, I'm not for sure, was coming out of the church just about the same time. In fact, he was looking—I run up there and said, 'Lord, have mercy.' "

Now, if a man is driving an automobile at 30 miles an hour, 30 or 35 miles an hour and says, "I saw something to my right," and if it had been there a man with one eye would have seen him. That's his own statement, and he said, "I saw him to the right and threw my right elbow on the seat." If you are driving an automobile 35 miles an hour and you put your right elbow on the seat of the car, what is your position with respect to the control and behavior of that car? If you swing yourself to the right like that, (indicating) how on

earth can you turn your car to the left? Your hand is completely left off the steering wheel. If you lean over far enough to try to get your head out of the window, I tried it and it can't be done. This man admits he saw the child and and then he looked back. After he saw him he leaned over to look out the window and look at him again and then he says his car went to the left. He admits right there that he saw the boy.

page 365 } The Court: I believe what you said indicated the same thing, he would have seen him if he had been standing on the road.

Mr. King: Or riding slow.

The Court: And he says as he passed he saw something on the right side of the road near the tree.

Mr. Garrett: Bear in mind that this transcript is a cold record. That man made a motion when he testified. He said he looked around like this (indicating) when he made the motion.

The Court: I think it would be a whole lot different if there was somebody testifying that this boy had been out there and on the road or approaching it, walking or just pushing a bike or standing there as of the time this man was back up here somewhere. You dont have a witness or evidence showing that fact, and placing them in relation to each other, and you have got the Defendant saying he would have seen him if he had been standing in or near the road. He said as he passed by that place, something on the right side of the road near the trees, that's what he saw. That's the first time he saw anything, but there's nobody that puts the boy coming up to that spot or how long he had been there before the Defendant arrived or where that bike was

page 366 } in relation to where that car was any time before the accident. The only thing we have got it that two vehicles ran together.

Mr. King: Who put this line on the chart? (Indicating)

Mr. Garrett: I will tell you, Mrs. Newton, she put it on there at the same time she said, "I don't know where he came out." Mrs. Newton said he was back up here (indicating) and "I guess he came up that way."

Mr. King: Judge, the only place on earth he could have come out is down there. (Indicating)

Mr. Garrett: That's not true.

Mr. King: Wait a minute. I'm arguing this thing. Could he come all the way out here and come back there and get there? (Indicating plat) He was here, he had to get out. Could he come over here and go through a solid fence and come down there? He couldn't. The only way he could have

was come down that driveway. The policeman said the younger brother said he ran down the driveway.

The Court: Well, I feel, gentlemen, that I understand your positions. It is just that I frankly don't think, as much as I am reluctant to strike the evidence in this case, there is any evidence to go to the Jury on the negligence
page 367 } of this Defendant in this case, so I grant the motion of the Defendant.

Mr. King: Note my objection and exception.

Mr. Garrett: We rule for a summary judgment.

The Court: Then, the Court grants the Defendant's motion to enter a summary judgment for the Defendant. You all take exception to that?

Mr. King: We certainly do.

The Court: In view of that sequence, as I understand it, all we have to do is dismiss the Jury for further considerations.

Mr. Garrett: That applies to both cases, of course?

Mr. King: Necessarily.

The Court: Necessarily.

(Note: The Judge and Counsel returned to the courtroom.)

The Court: Gentlemen of the Jury, may I have your attention, please. There have been some developments in the case which make it unnecessary for you to further consider the case. Therefore, you are discharged from further consideration of the case. You are now excused for the day.

(Whereupon, at 4:00 o'clock p. m., Tuesday,
page 368 } July 21, 1959, Court was adjourned.)

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A Copy—Teste:

H. G. TURNER, Clerk.

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