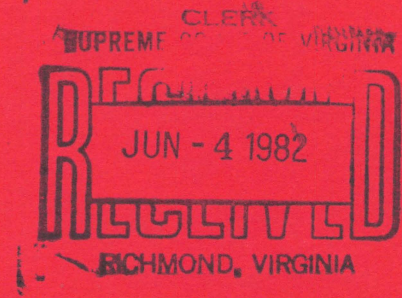


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 811588



MARILYN SUTHERLAND GRIFFIN

Appellant

v.

GARLAND SHIVELY

Appellee

JOINT APPENDIX

F. H. Conway
Attorney at Law
812-13 Masonic Building
Danville, VA 24541

Counsel for Appellant

Frank O. Meade
Meade, Tate & Daniel, P.C.
116 South Ridge Street
Danville, VA 24541

Counsel for Appellee

TABLE OF CONTENTS

Appendix Page

Motion for Judgment filed 10-28-80	1
Defendant's Grounds of Defense filed 12-12-80	3
Judgment Order entered 7-27-81	5
Notice of Appeal and Assignment of Error dated 8-21-81	7
 <u>Transcript of Evidence Heard 6-29-81:</u>	
Testimony of Charles Sutherland	10
Testimony of Vivian Counts	11
Testimony of Hazel Quinn	21
Testimony of John D. Aherron	35
Testimony of M. W. Taylor	42
Testimony of Garland Shively	52
Testimony of Wayne Rogers	72
Testimony of Mrs. Garland Shively	80
Motion to Strike Evidence	83

MOTION FOR JUDGEMENT
FOR
WRONGFUL DEATH

To the Honorable James F. Ingram, Judge

The plaintiff respectfully represents that :

1.

She was heretofore, on October 8, 1980, duly appointed Administratrix of Estate of Albert Clinton Sutherland, deceased in the Clerk's Office of Your Honor's Court.

2.

The deceased left three children as his only heirs at law, namely, Charles Wade Sutherland, aged 21, Dennis Hall Sutherland, aged 12, and Angela Ruth Sutherland, aged 9. He was not married at the time of his death.

3.

The said Albert Clinton Sutherland was wrongfully shot to death by the defendant, Garland Shively, at the Country Diner, on Route 58 East in Pittsylvania County, Virginia.

4.

The deceased was and had been a patron at the said Country Diner at the time of his death and the said defendant Shively was then and there an employee of the defendant, Burns, owner and operator of the said Country Diner.

5.

It was the duty of the said Burns to provide a safe establishment for his customers but he knew or should have known of defendant Shively's unstable propensities and knew or should have known that defendant Shively kept a loaded gun on the said Diner's premises, but the defendant Burns nevertheless permitted the defendant Shively to keep said weapon on his premises knowing or he should have known and realized that defendant Shively kept the same for dangerous use and which weapon did in fact inflict the said Sutherland's mortal wound.

Therefore, the said defendant wholly failed in his duty aforesaid and by said negligence the defendant Burns likewise became liable for the wrongful death of the said Sutherland.

Wherefore, the plaintiff moves for a judgement in the amount of \$150,000.00 against each defendant, both of whom are jointly and severally liable for the wrongful death of Albert Clinton Sutherland.

Respectfully submitted

Marilyn Sutherland Griffin Plaintiff

F. H. Conway Counsel to Plaintiff
812-13 Masonic Building
Danville, Virginia 24541

GROUND OF
DEFENSE

For his grounds of defense to the motion for judgment for wrongful death filed in the above styled action, defendant Garland Shively replies, denying he is liable to plaintiff, and for answer says:

1.

The allegations of Paragraph 1 of the motion for judgment are not denied.

2.

The allegations of Paragraph 2 of the motion for judgment are not denied.

3.

The allegations of Paragraph 3 of the motion for judgment are denied.

4.

The allegations of Paragraph 4 of the motion for judgment are not denied.

5.

The allegations of Paragraph 5 of the motion for judgment are denied.

6.

This defendant alleges that at the time and place complained of in the motion for judgment plaintiff's decedent was guilty of negligence proximately causing or contributing to cause his death and/or plaintiff's decedent assumed the risk of his death, thus barring any recovery herein.

WHEREFORE, defendant Garland Shively denies he is liable to plaintiff in any amount and requests this action be dismissed as to him, with his costs expended.

GARLAND SHIVELY

By Counsel

Counsel

MEADE, TATE & DANIEL, P. C.
116 South Ridge Street
Danville, Virginia 24541

By


Frank O. Meade

CERTIFICATE OF COUNSEL

I, Frank O. Meade, of counsel for defendant Garland Shively in the above styled action, certify that a true copy of the foregoing grounds of defense was served by mailing on the 11th day of December, 1980, to F. H. Conway, counsel for plaintiff, Masonic Building, Danville, Virginia, and to Earle Garrett, III, of counsel for defendant Robert Burns, Masonic Building, Danville, Virginia.



On June 29, 1981, came the plaintiff and defendant in person and by their attorneys, the defendant having filed his grounds of defense to plaintiff's motion for judgment.

Whereupon came a jury, to-wit: Rebecca Browder, Maxine Catron, Lois Harp, Wilson Motley, Nan B. Scruggs, Shirley Stone and Wilbur Williams, who were sworn to well and truly try the issue joined and a true verdict give according to the evidence and the law.

The evidence of the plaintiff was presented and at the conclusion of all the evidence as to the issue of liability, the defendant, by counsel, moved the Court to strike the evidence of the plaintiff on the ground, among others, that the evidence established that Plaintiff's deceased was guilty of misconduct which constituted contributory negligence and such actions by the plaintiff decedent would as a matter of law bar the plaintiff from recovery, which motion, for reasons set forth orally and in a letter opinion of this court dated July 6, 1981, was sustained and to which ruling of the Court the plaintiff, by counsel, objected and excepted.

Whereupon, the jury was discharged.

Thereafter the plaintiff, by counsel, filed her written motion that the Court "set aside" and void its order striking the plaintiff's evidence and grant a new trial. Whereupon the Court, after maturely considering the same, overruled said motion, to which action of the Court, plaintiff, by counsel, duly objected and excepted.

It is, therefore, ADJUDGED and ORDERED that the plaintiff may not recover and shall have naught against the said defendant, and judgment is herewith entered on behalf of the defendant against the plaintiff for his costs in

this behalf expended. To all of which the plaintiff has noted her objections and exceptions.

And the plaintiff having indicated, by counsel, to the Court her desire to apply to the Supreme Court of Virginia for a writ of error to the aforesaid judgment, it is ORDERED that execution on said judgment be suspended until such time as the said appeal procedure is terminated or until plaintiff fails to effect an appeal, provided the plaintiff, or someone on her behalf within 15 days from the date of entry hereof, gives bond before the Clerk of this Court in the amount of \$1,000, as required by §8.01-676, Code of Virginia, with adequate security, approved by the Clerk of this Court.

The Clerk is directed to send a copy teste of this order forthwith to counsel of record.

ENTER: 7/27/81

1371/2/81
JUDGE

70. ALLEN CLERK,
Allen Clerk
Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT OF PITTSYLVANIA COUNTY

MARILYN SUTHERLAND GRIFFIN,	:	
ADM. etc.	:	
Plaintiff	:	
	:	<u>NOTICE</u>
v	:	<u>OF</u>
	:	<u>APPEAL</u>
GARLAND SHIVELY	:	
Defendant	:	

The Plaintiff hereby gives Notice of Appeal to the Supreme Court of Virginia from the final judgement order of this Court of July 27th, 1981, and gives further notice pursuant to Rule 5:6 that a transcript of the testimony is to be filed, as part of the record, and assigns as error the Court's striking plaintiff's evidence.

Respectfully submitted

F. H. Conway Counsel

W. Carlton White Counsel

I certify that a copy of this Notice of Appeal was mailed to Frank O. Meade, Esquire, South Ridge Street, Danville, Va. 24541 on August 12th 1981.

F. H. Conway

1
2
3 VIRGINIA:

4 IN THE CIRCUIT COURT OF PITTSYLVANIA COUNTY

5
6 -----
7 MARILYN SUTHERLAND GRIFFEN :
8 Administratrix of the Estate of :
9 Albert Clinton Sutherland, Deceased :
10 -----

11 VS

: TRANSCRIPT OF EVIDENCE
:
:

12 GARLAND SHIVELY
13 -----

14 A stenographic report of the evidence and other
15 incidents of trial recorded in the Circuit Court of Pittsylvania
16 County, at Chatham, Virginia, on the 29th day of June, 1981,
17 heard before Honorable B. A. Davis, III, Judge, and jury.

18 APPEARANCES: FRENCH H. CONWAY
19 W. CARLTON WHITE
20 Counsel for Plaintiff

21 FRANK O. MEADE
22 Counsel for Defendant
23
24
25

CONTENTS

CHARLES SUTHERLAND

Direct examination by Mr. Conway	2
Cross examination by Mr. Meade	4

VIVIAN COUNTS

Direct examination by Mr. Conway	4
Cross examination by Mr. Meade	10
Redirect examination by Mr. Conway	12
Recross examination by Mr. Meade	13
Redirect examination by Mr. Conway	13

HAZEL QUINN

Direct examination by Mr. Conway	14
Cross examination by Mr. Meade	21
Redirect examination by Mr. Conway	26
Recross examination by Mr. Meade	27
Redirect examination by Mr. Conway	27

JOHN D. AHERRON

Direct examination by Mr. Conway	28
Cross examination by Mr. Meade	30
Redirect examination by Mr. Conway	34

M. W. TAYLOR

Direct examination by Mr. White	35
---------------------------------	----

GARLAND SHIVELY

Direct examination by Mr. Conway	45
Cross examination by Mr. Meade	57
Redirect examination by Mr. Conway	68

WAYNE ROGERS

Direct examination by Mr. Conway	65
Cross examination by Mr. Meade	69
Redirect examination by Mr. Conway	72

MRS. GARLAND SHIVELY

Direct examination by Mr. Conway	73
Cross examination by Mr. Meade	75

Motion in chambers to strike plaintiff's evidence at conclusion of plaintiff's evidence	76
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1 The jury was empaneled and duly sworn. The witnesses
2 were separated and excluded from the courtroom. Opening
3 statements were presented on behalf of plaintiff and defendant,
4 which are omitted.

5 CHARLES SUTHERLAND

6 the first witness, called to testify on behalf of the
7 plaintiff, being first duly sworn, testified and stated as
8 follows:

9 DIRECT EXAMINATION

10 BY MR. CONWAY:

11 Q You are Charles Sutherland?

12 A Yes.

13 Q Are you the son of Mr. Clinton Sutherland?

14 A Yes.

15 Q Mr. Sutherland, you are not full brother to Dennis
16 and Angela, right?

17 A No, sir, I am not.

18 Q You are a child by a previous marriage?

19 A Yes, sir.

20 Q Were you close to your father?

21 A No, sir, I wasn't.

22 Q You were not?

23 A No, sir.

24 Q How old are you now?

25 A Twenty-two.

1 Q Are you asking anything for yourself in this case?

2 A No, sir.

3 MR. CONWAY: Thank you.

4 CROSS EXAMINATION

5 BY MR. MEADE:

6 Q You say you are not asking anything for yourself?

7 A No, sir.

8 Q You don't feel anybody is entitled to anything, do
9 you?

10 A I didn't say that.

11 Q You are making no claim at all?

12 A No, sir.

13 MR. MEADE: That's all.

14 THE WITNESS STOOD ASIDE.

15 * * * * *

16 VIVIAN COUNTS

17 the next witness, being first duly sworn, testified and stated
18 as follows:

19 Q What is your full name?

20 A Vivian Lee Counts.

21 Q Where were you on April 10th of last year?

22 A I was working at the restaurant.

23 Q Why were you working at that restaurant on that day?

24 A Mr. Shively called me and told me he would like for
25 me to work that day because he had some business to attend to.

- 1 Q He had some business to attend to?
- 2 A Yes.
- 3 Q And he wanted you to take his place?
- 4 A Yes, sir.
- 5 Q Can you tell us what time you got to the Country
6 Diner?
- 7 A I expect it was around 9:30 or 10:00, somewhere like
8 that.
- 9 Q Who was there at that time?
- 10 A Mr. Shively was there.
- 11 Q When did you first see Mr. Sutherland?
- 12 A I expect it was around 11:30 or quarter to twelve.
13 Almost lunch time.
- 14 Q Was he with anyone?
- 15 A Uh huh.
- 16 Q Who was he with?
- 17 A Wayne Rogers.
- 18 Q Did they order anything?
- 19 A Yes, sir. They came in and they wanted breakfast.
20 I laughed at them because I told them, "This is lunchtime,
21 boys." They said, "We just got up and we would like breakfast."
22 So I fixed them a ham sandwich. They ate a ham sandwich.
- 23 Q Was the water on at that time?
- 24 A No, sir, it wasn't.
- 25 Q What happened about the water?

1 A I went back there to cut it on and it wasn't on, so
2 I asked Mr. Shively could he go and see why we didn't have
3 any water. So he went to the well house and he was gone for
4 a few minutes. He come back in and he was just as white as
5 a sheet. He couldn't speak. I said, "What's the matter?"
6 He still couldn't speak. I noticed his lips were all white.
7 I said, "Mr. Shively, what is the matter?" I think I asked him
8 about three times. He said, "Let me catch my breath. I just
9 saw some snakes in there." Scared him to death.

10 Q He didn't die?

11 A No, he didn't.

12 Q So what happened about the water?

13 A Well, he said, "I am not going back in the well house.
14 I don't care if you never get any water the rest of the day."

15 Q Did you get water?

16 A No, I didn't.

17 Q Never did turn the water on?

18 A I didn't go back out to turn it on.

19 Q Well, Mr. Rogers and Mr. Sutherland and Mr. Shively
20 were there?

21 A Yes, sir.

22 Q What went on after they ate their sandwich?

23 A They just talked and palled around, you know, just
24 normal procedure between friends.

25 Q Was there anything said about snakes?

1 A Yeah, they were talking about the snakes.

2 Q Was anything done by anybody?

3 A Well, Mr. Shively was sitting at the bar. He was
4 still trying to catch his breath, trying to get over what he
5 had seen. They said, "We will go out there and get the snakes
6 for you." He said, "No, don't go out there and bother the
7 snakes."

8 Q Did they go out?

9 A I think they went outside. I am pretty sure they
10 did.

11 Q When they came back in what did they say?

12 A They didn't have a snake. They were still teasing
13 him about the snakes.

14 Q How were they teasing him?

15 A Saying they were going to get the snakes and put
16 them on him, all that, you know.

17 Q Was there any demonstration of any kind, belt
18 throwing or anything?

19 A No, not at that time. They was just talking and
20 teasing, you know, patting him on the back. Just palling
21 around.

22 Q What time did you leave?

23 A I expect it was around fifteen minutes to four,
24 four o'clock.

25 Q Was there any other employee in the restaurant then

1 at that time?

2 A I believe Hazel Quinn was working. Yeah, Hazel come
3 on at four o'clock.

4 Q What was Mr. Shively doing. You said he indicated
5 to you he wanted to do something else for you to take his
6 place. Was he there at the restaurant all this time?

7 A Well, now I remember. His brother came by, Jimmy
8 Shively. They had to go pick up his daughter. Then they
9 were going in the basement to sort out cans.

10 Q They were going in the basement of the restaurant?

11 A Uh huh.

12 Q Would you explain to the jury a little bit about
13 this restaurant. Where is the counter in relation to the
14 front door?

15 A I would say the counter is about where you are
16 standing. Let's say the door is about over there at that
17 chair. Maybe a little farther.

18 Q The counter runs along one side of the building, is
19 that right?

20 A Yes, sir.

21 Q What is at the end of the counter from the front
22 door?

23 A At the end of the counter? It is two or three
24 machines.

25 Q Was there any other room back there?

1 A You mean where the counter is?

2 Q Behind the counter.

3 A Yes, you can walk there, it is a space.

4 Q To the best of your recollection what did Mr. Sutherland
5 do while he was there and you were there after he had eaten
6 breakfast?

7 A Well, he was talking to Wayne Rogers a pretty good
8 while in the booth. He was palling around with Mr. Shively.
9 Then my husband came in around three o'clock. He wanted
10 my husband to play pool. He said no, it was almost time for
11 me to get off. He reached up and bit my husband on the ear.
12 That's the way he was. He loved to play. We left, you know.

13 Q Was anybody mad?

14 A No, sir, didn't seem to be.

15 Q What kind of trade did this restaurant have?

16 A What kind of trade did it have?

17 Q Yes. Who frequented the place? What type of people?

18 A Mostly regular customers came in and we sold food
19 there and we sold beer there. Mostly in the daytime.

20 Q It had a pool table?

21 A And a pinball machine, things like that.

22 Q What alcoholic beverages did you serve?

23 A Beer. That's about it.

24 Q Mainly beer?

25 A Yes, sir. We had beer in the kegs too.

1 Q Draft beer?

2 A Yes, sir.

3 CROSS EXAMINATION

4 BY MR. MEADE:

5 Q Mrs. Counts, I understood that after you got to work
6 you needed water?

7 A Yes, we did.

8 Q And so you told Mr. Shively this and he went to the
9 well house?

10 A Yes, sir, out back.

11 Q Out back?

12 A Yes, beside the restaurant.

13 Q About how far from the back door?

14 A I am not good on this. I know he went out the front
15 door. He went to the left side. I don't know how many feet
16 back.

17 Q He came back in in a short while?

18 A Yes, sir, he did.

19 Q And I believe you testified when he came back in he
20 was white?

21 A Yes, sir.

22 Q He couldn't speak?

23 A Yes, sir.

24 Q I believe you said he was frightened to death or
25 scared to death?

1 A Yes. I knew something was wrong because he had
2 done turned white all over and he couldn't speak. I asked
3 him three times, I said, "Mr. Shively, what is wrong?" He
4 said, "I just liked to have put my hands on snakes." You know,
5 just took a deep breath like that.

6 Q It took him quite some time to get over this,
7 didn't it?

8 A Yes, sir.

9 Q The fright was obvious to be seen, wasn't it?

10 A Yes, sir.

11 Q This happened before Sutherland and Wayne Rogers came
12 in?

13 A Yes, sir.

14 Q But apparently they were told about it when they came
15 in?

16 A They knew about it because they were talking about the
17 snakes.

18 Q Did they make some statement to the effect they would
19 put some snakes on Mr. Shively?

20 A Yes, sir.

21 Q And that frightened him?

22 A Yes, sir. He said, "Don't go out there and get
23 them snakes."

24 Q The front door to this restaurant apparently latches
25 from the outside at night. Do you lock it with a padlock?

1 A Yes. You have to lock it with a lock, put a padlock
2 on it.

3 Q Sometimes when the front door is closed, the hasp
4 will slip in and the door won't open?

5 A And whoever is inside can't get out, because it will
6 slant back and catch.

7 Q So you can lock yourself in the front door?

8 A Yes. I've done it myself a couple of times.

9 Q I believe you worked first shift that day?

10 A Uh huh.

11 Q And Mr. Shively, he operated the restaurant for the
12 owner, didn't he?

13 A Yes.

14 Q And you were relieved about four o'clock when Hazel
15 Quinn came in?

16 A Yes, sir.

17 Q At the time you left Hazel was there, Mr. Shively
18 was there and Jimmy Shively was there, is that correct?

19 A Yes, sir.

20 REDIRECT EXAMINATION

21 BY MR. CONWAY:

22 Q Mrs. Counts, the front door, does it have any locks
23 on the inside of it, bolts?

24 A Seems like it had a little latch.

25 Q So it could be locked from the inside?

1 A Yes, I believe you could.

2 Q You mentioned that Mr. Shively went to the basement.

3 Do you get to the basement from inside the building?

4 A Yes, sir.

5 Q And is there a back door, outside back door?

6 A Yes. They have a back door, but that was kept
7 barred all the time.

8 Q Is that in the basement?

9 A Yes, sir.

10 MR. CONWAY: Thank you.

11 RECROSS EXAMINATION

12 BY MR. MEADE:

13 Q From the time that -- you say Mr. Sutherland and
14 Wayne Rogers arrived between 11:30 and 12:00 o'clock?

15 A Yes.

16 Q And said they wanted breakfast, they had just gotten
17 up?

18 A Yes, sir.

19 Q Did they leave anytime while you were there?

20 A No, sir, they were still there.

21 Q At four o'clock?

22 A Uh huh. They were still there.

23 Q They didn't leave in between that time?

24 A No.

25 REDIRECT EXAMINATION

1 BY MR. CONWAY:

2 Q Mrs. Counts, did you serve Mr. Sutherland and Mr.
3 Shively any beer while you were there?

4 A Yes, I did.

5 THE WITNESS STOOD ASIDE.

6 * * * * *

7 HAZEL QUINN

8 the next witness called by the plaintiff, being first duly
9 sworn, testified and stated as follows:

10 DIRECT EXAMINATION

11 BY MR. CONWAY:

12 Q What is your full name?

13 A Hazel Quinn.

14 Q Mrs. Quinn, were you working last April 10th?

15 A Yes, sir.

16 Q Where did you work?

17 A Country Diner, 58 East.

18 Q What time did you come to work that day?

19 A Supposed to have been there at four, but I came in at
20 three. I came in early.

21 Q Do you recall particularly who was there at the time
22 you came in?

23 A I can tell you some of them. Clinton Sutherland
24 was there and Garland was in there and Mrs. Counts was working
25 there. It was several in there but I can't remember who all

1 was there.

2 Q Do you recall what Mr. Sutherland was doing when you
3 came in?

4 A At that time he was playing pool.

5 Q Playing pool?

6 A Yeah.

7 Q What happened, to the best of your recollection,
8 from then until Mr. Sutherland's death? Try to recount it
9 as best you can.

10 A I came in and sat at a table and Clinton walked over
11 to the table. Garland said to me -- that's Mr. Shively --
12 said, "Hazel, if you don't never get no water out of that
13 well, if you don't ever have no water, I'm not going back to
14 that well." He said it was snakes out there. Mr. Sutherland
15 heard it all. So I went on my shift and went to work. About
16 five o'clock Mr. Shively got a call and Mr. Sutherland went
17 to the bathroom outside. And the phone was beside the door
18 and he was on the phone and Mr. Sutherland walked in and
19 threw the belt around his neck.

20 Q Around Mr. Shively's neck?

21 A Yes. And he fell over on the juke box and turned
22 white and Clinton, he laughed about it. Mr. Sutherland just
23 laughed.

24 Q Then what occurred?

25 A Later on it was nobody there but me and Mr. Shively

1 and Mr. Sutherland for quite a while. I went over in the
2 booth and sat here and they sat on the other side, Mr.
3 Shively and Mr. Sutherland, talking.

4 Q They were sitting in the booth together?

5 A Yes, they were talking to each other.

6 Q What were they doing?

7 A They were talking. They had a beer. I served them
8 a beer. I don't know really what time it was, it might have
9 been after nine that Robert Goins and Gerald Boaze and J. D.
10 Aherron came in. They walked over there where they was at,
11 and one of them throwed a belt on the table. Mr. Shively
12 jumped up. Robert Goins said, "Let's go get the real snake
13 and put on him." Mr. Shively said, "If you do you won't walk
14 back through that door again." They went outside, stayed
15 maybe ten minutes. Mr. Shively went to the door and tried to
16 get out, but he couldn't get the door open. There was a latch
17 on the outside and if you shut it you can't get out because
18 I've been locked in myself at closing time, had to get the
19 cab driver to come and open the door for me. He said, "Hazel,
20 they have locked me in." He went around behind the counter
21 and I looked there and he had the gun in his hand aimed at
22 the door. Mr. Sutherland walked in and he flung something
23 black -- I couldn't tell whether it was a snake or what it
24 was -- and it went over the side of the counter where I was
25 sitting. About that time the gun went off. When he throwed

1 it the gun went off. I got up and went over there. Mr.
2 Shively went over there and said, "Call the life saving crew,
3 I have shot Mr. Sutherland."

4 Q Do you recall any other incidents throughout the
5 day? You mentioned a couple where Mr. Sutherland put his
6 belt around Mr. Shively's neck when he was on the phone and
7 someone else threw a belt on the table.

8 A Yes.

9 Q Were there any other incidents of throwing a belt
10 around Mr. Shively?

11 A That was all that I saw.

12 Q How did the water get turned back on?

13 A I don't know. I don't know whether somebody else --
14 we still didn't have none.

15 Q You never did get any water?

16 A We got some later but I don't know what day we got
17 any. We didn't have none that afternoon because the well
18 wouldn't run.

19 Q Do you remember Mr. Shively's brother coming down?

20 A I knew he was there.

21 Q Do you recall how many people were in the place
22 when Mr. Shively shot?

23 A Yes, sir.

24 Q How many?

25 A Mr. Aherron, Gerald Boaze and me and Mr. Shively.

1 Robert went out the door with Mr. Sutherland. J. D. Aherron,
2 Gerald Boaze, Mr. Shively and I.

3 Q Would you describe the layout of the place a little
4 bit for the benefit of the Court and jury? You go in the
5 front door which fronts on 58 west?

6 A Yes, sir.

7 Q Going toward South Boston -- I mean east going toward
8 South Boston, right?

9 A Right.

10 Q When you come in the front door what is to your right?

11 A It is two booths and the counter.

12 Q The counter is to your right?

13 A I come in this way.

14 Q The counter is to the right?

15 A Yes.

16 Q Can you get around the counter at the front of the
17 building? Is that where you go around the counter to get
18 behind the counter?

19 A That's the only way you can go, to the right to get
20 behind the counter.

21 Q The counter runs from front to back of the building,
22 is that correct?

23 A It runs halfway, but not all the way.

24 Q Where does it stop?

25 A Right at the kitchen, right where the cook stove is at.

- 1 Q Is the kitchen a separate room?
- 2 A No. It is all together.
- 3 Q What is behind the counter?
- 4 A The cook stove is there, and the cash register.
- 5 Q Any storage rooms there?
- 6 A Down in the basement.
- 7 Q Any storage room behind the counter?
- 8 A No. The beer box is behind the counter all the way
- 9 down the counter.
- 10 Q At the end of the counter is there a room back there?
- 11 A It is a little small kitchen.
- 12 Q But that is not connected to the main room?
- 13 A It has a partition where you can't see in the kitchen.
- 14 Q When you come in the front door, the wall of the
- 15 kitchen is right in front of you?
- 16 A Yes. You see it is panelled there.
- 17 Q And it is a restroom there, isn't it?
- 18 A It goes downstairs.
- 19 Q And down in the basement what is down there?
- 20 A Storage room. We have kept stuff down there but not
- 21 at that time. We didn't have anything down there.
- 22 Q After you get to the basement is there an outside
- 23 entrance?
- 24 A In the basement it is.
- 25 Q When Mr. Sutherland went out with Mr. Goins you say

1 that Mr. Shively didn't go out with him, is that right?

2 A No, he didn't go outside, but he did try to get out.

3 Q After they got out. . .

4 A He tried to get out the door. He did.

5 Q Did he lock the front door from the inside?

6 A Not as I know of. He didn't lock it because he couldn't
7 get it open.

8 Q What did he do?

9 A He walked behind the counter.

10 Q What did he do behind the counter?

11 A I looked around. He had the gun in his hand aimed
12 at the door.

13 Q He had the gun in his hand aimed at the door?

14 A Yes, sir.

15 Q How long before Mr. Sutherland came in?

16 A I would say they had been gone maybe eight or ten
17 minutes. They went toward the well. I could see their heads
18 from the window where I was sitting.

19 Q And Mr. Shively was behind the counter with the gun
20 all that time?

21 A No. He tried to get out the door. He couldn't, so
22 he walked behind the counter.

23 Q He didn't lock the door?

24 A He tried to get out. He couldn't get out.

25 Q He could have locked it from the inside though,

1 couldn't he?

2 A I don't know. There's a lock on there, but I don't
3 think he would have.

4 Q But you say he went behind the counter?

5 A Yes, sir.

6 Q He got the gun out?

7 A I don't know where he got the gun from, but I looked
8 and he had the gun.

9 Q How long was it before Mr. Shively shot?

10 A Clinton came in the door, slung the door open and
11 slung the black object. That's when the gun went off. I
12 really didn't think he would do it because they were friends.

13 Q How long was Mr. Shively at the counter with the gun
14 in his hand before Mr. Sutherland came in with the belt?

15 A I wouldn't know. They were gone, I would say eight
16 or ten minutes. When they went out the door he tried to get
17 out the door. He went back behind the counter. When I looked
18 around he had the gun.

19 Q So he was there with the gun for some six or eight
20 minutes?

21 A He had the gun before they came in.

22 CROSS EXAMINATION

23 BY MR. MEADE:

24 Q Mrs. Quinn, I understand your shift actually was from
25 four o'clock on but you came in at three?

- 1 A Yes. I always come in early.
- 2 Q When you arrived there was Sutherland, Shively and
3 Vivian Counts?
- 4 A Yes. There were some more there but I can't remember
5 who they were.
- 6 Q Did Mr. Shively tell you about having seen snakes in
7 the well house?
- 8 A Yes, he did.
- 9 Q Now, you testified about a phone call about five
10 o'clock?
- 11 A Yes, somewhere along there.
- 12 Q You say Mr. Shively took this phone call?
- 13 A Yes.
- 14 Q And the phone is pretty close to
- 15 A It is beside the door.
- 16 Q The front door?
- 17 A On the right if you were inside going out.
- 18 Q You say while he was on the telephone Mr. Sutherland
19 came in and threw a belt?
- 20 A Yes, around his neck. He had his back turned to the
21 door, and when he came in he threw the belt around his neck.
- 22 Q From behind?
- 23 A Yes, from behind.
- 24 Q I believe you testified Mr. Shively turned white?
- 25 A He did.

- 1 Q And he fell on the juke box?
- 2 A He did.
- 3 Q He dropped the telephone too, didn't he?
- 4 A Yes, sir.
- 5 Q Mrs. Shively was there at that time, wasn't she?
- 6 A Yes, she was. She was in the kitchen.
- 7 Q As a matter of fact, she came from the kitchen and
8 made the comment if it was a real snake he would have a heart
9 attack.
- 10 A Yes.
- 11 Q And Mr. Sutherland was there when that was said,
12 wasn't he?
- 13 A Right.
- 14 Q And I believe you said a second occasion somebody
15 threw a belt on the table?
- 16 A Yes, but I don't know exactly which one did it. They
17 were crowded around the table.
- 18 Q Mr. Shively was in a booth at that time?
- 19 A He was sitting down.
- 20 Q And Mr. Boaze was there?
- 21 A Sitting beside him.
- 22 Q To get out Mr. Shively had to get over Mr. Boaze,
23 didn't he.
- 24 A He tried to get over him.
- 25 Q He tried to?

1 A Yes.

2 Q That frightened him, didn't it?

3 A Yes, it did.

4 Q Still later in the evening Mr. Sutherland or either

5 Mr. Goins said, "Let's go out and get the real snake."

6 A Mr. Sutherland said that.

7 Q And put him on him.

8 A He said, "Let's go get the real snake" is what he said.

9 He said, "I have got a light in my car."

10 Q And they were going to go down and get it.

11 A Before they went out the door.

12 Q Mr. Shively begged him not to do that.

13 A He said, "If you do, you won't walk back in the door."

14 Q Didn't he say something about somebody getting shot

15 or getting hurt?

16 A I don't recall him saying that.

17 Q You say they were gone eight or ten minutes.

18 A I would say.

19 Q And then when they left the door apparently locked.

20 A It had to be because he tried to get out. He tried

21 to leave.

22 Q He tried to get out?

23 A He was. He turned around and said to me, "They have

24 locked me in here."

25 Q And he was frightened, wasn't he?

1 A He was frightened. I knew he couldn't get out
2 because I have been locked in there twice myself.

3 Q Where were you at this time?

4 A I was sitting in a booth.

5 Q And when the door opened, it was thrown open quick,
6 wasn't it?

7 A Right, and he flung a black object. I couldn't tell
8 whether it was a snake or what it went so fast.

9 Q But it was a black, dark object?

10 A Uh huh.

11 Q And it was a long object.

12 A He had it rolled up when he throwed it, whatever it
13 was. It landed on the other side of me on the floor.

14 Q You couldn't tell whether it was a snake or a belt,
15 could you?

16 A I couldn't tell what it was.

17 Q Actually Shively and Sutherland were pretty good
18 friends, weren't they?

19 A They were.

20 Q You knew Mr. Shively was deathly afraid of snakes?

21 A I knew that.

22 Q Everybody there that day knew that?

23 A That's true.

24 Q And the statement that was made by Goins was that they
25 were going out to get a real snake?

1 A That's what he said.

2 Q And Sutherland agreed to do that?

3 A He went out the door with him.

4 Q You could see out the window and could see people out
5 there?

6 A I could see the tops of their heads when they came back,
7 over top of the juke box where I was sitting. You could see
8 them.

9 REDIRECT EXAMINATION

10 BY MR. CONWAY:

11 Q Mrs. Quinn, this was the same belt that Mr. Sutherland
12 had thrown around Mr. Shively's neck earlier, wasn't it?

13 A It was.

14 Q Is there a restroom inside the building?

15 A It is a ladies. The men's is on the outside.

16 Q Can you lock the door from the inside of the restroom?

17 A Are you talking about the ladies restroom? It is
18 not no lock on the door in the ladies restroom but it is one
19 at the top of the stairs, where you go downstairs.

20 Q And you go downstairs to the basement?

21 A To the ladies bathroom, yes.

22 Q In other words, there's a door leading to the basement?

23 A Yes.

24 Q And there's a lock that you can lock it at that point?

25 A At the top of the stairs you can lock the door. It

1 has got a padlock.

2 Q And when you go down to the basement, is there an
3 outside entrance?

4 A In the storage room it is.

5 MR. CONWAY: Thank you.

6 RECROSS EXAMINATION

7 BY MR. MEADE:

8 Q The basement door you referred to was kept locked
9 from the inside, wasn't it?

10 A It was.

11 Q Padlocked?

12 A Padlocks on both of the doors. It is one to go in the
13 storage room and one when you come out.

14 Q You mean it is padlocked on both sides?

15 A It is. I couldn't even get out of it because I didn't
16 have the key.

17 REDIRECT EXAMINATION

18 BY MR. CONWAY:

19 Q Who had the key?

20 A I think it was hung up on the wall but I didn't know
21 which one it was because they kept all the keys up there.
22 I never did have to use the outside door down there.

23 Q Did Mr. Shively keep the key?

24 A They were always hung on the wall. There was a bunch
25 of keys there. I didn't know which one it was. They were

1 always hung on the wall.

2 THE WITNESS STOOD ASIDE.

3 * * * * *

4 JOHN D. AHERRON

5 the next witness, being first duly sworn, testified and stated
6 as follows:

7 DIRECT EXAMINATION

8 BY MR. CONWAY:

9 Q What is your full name?

10 A John D. Aherron.

11 Q Where do you live?

12 A Route 1, Ringgold.

13 Q Did you know Mr. Sutherland?

14 A I did.

15 Q Do you know Mr. Shively?

16 A I do.

17 Q On April 10th last year, did you have occasion to
18 be at the Country Diner?

19 A Yes, sir.

20 Q Can you tell the Court and jury what you recall
21 happened?

22 A Well, we had worked on a tractor up until nine or
23 ten o'clock, whenever we got there. We went in. Mr. Shively
24 and Mr. Sutherland were sitting together in one booth. I
25 believe we ordered a beer.

1 Q You and who?

2 A Me and Robert Goins and Gerald Boaze. They sat --
3 Sutherland and Shively -- in a booth. I sat over in a booth
4 by myself. In the meantime someone came by with a belt and
5 threw on Mr. Shively and he come out of the booth and went
6 backwards and proceeded to go behind the counter. In the
7 meantime they went out, told him they were going to bring a
8 snake in to put on him.

9 Q What time of day was this?

10 A This was in the night. Really I done forgot the
11 exact time. Mr. Shively went to the door to get out. The
12 door was locked. Then he went behind the counter. Me and
13 Gerald Boaze went to the pool table. We had already put a
14 quarter in it. After they had left, Goins and Sutherland had
15 gone outside, we went over and put a quarter in the pool
16 table and was proceeding to shoot pool. The door flew open
17 and the shot was fired and we didn't see anything from where
18 we was at at the location of the pool table.

19 Q You say that when you got there Mr. Shively and Mr.
20 Clement were sitting in a booth together?

21 A Yes, sir.

22 Q Was anybody else with them in the booth?

23 A No, sir.

24 Q Who threw this belt on the table, do you remember?

25 A No, sir, I don't. From where I was sitting, I don't

1 know whether Mr. Sutherland or Gerald Boaze threw the belt.

2 Q Had you heard much conversation about the snake
3 business and the belt business while you were there?

4 A Only when I went in that evening something was talked
5 about it but not a whole lot. I mean it was just talk that
6 they had found some snakes in the well house, I believe.

7 Q Are you afraid of snakes yourself?

8 A Well, I don't catch them. I am not scared of them
9 but I don't go around trying to catch them.

10 Q You say you didn't see what Mr. Shively did when he
11 went behind the counter?

12 A No, sir.

13 Q Did you see him have a gun?

14 A No, sir.

15 MR. CONWAY: Thank you.

16 CROSS EXAMINATION

17 BY MR. MEADE:

18 Q Mr. Aherron, you arrived apparently late afternoon
19 or early night, didn't you?

20 A Yes, sir.

21 Q And when you got there you have already told us who
22 was there, but apparently Mr. Boaze and Mr. Goins sat in the
23 same booth with Mr. Sutherland and Mr. Shively?

24 A That's right.

25 Q And you sat in a separate booth?

- 1 A Yes, sir.
- 2 Q Did Boaze and Goins work for you?
- 3 A No, sir.
- 4 Q In the booth where Mr. Shively was the other men were
5 laughing at Mr. Shively, weren't they?
- 6 A At the time the belt was thrown on him.
- 7 Q They laughed?
- 8 A Yes.
- 9 Q He didn't laugh, did he?
- 10 A No, sir.
- 11 Q In fact, he tried his best to get out of that booth,
12 didn't he?
- 13 A He did get out.
- 14 Q He had to climb over Mr. Boaze to get out, didn't he?
- 15 A It happened so fast, he did come out.
- 16 Q And he then went behind the counter, didn't he?
- 17 A Yes.
- 18 Q Didn't he say something to them about not putting
19 a snake on him, if they did he might shoot somebody?
- 20 A I think so.
- 21 Q He used that word "shoot", didn't he?
- 22 A Yes, sir.
- 23 Q He was in effect warning them that somebody might
24 get shot if they tried to put a snake on him?
- 25 A That's right.

1 Q After that warning, they told him they were going
2 out to get a snake to put on him, didn't they?

3 A Yes, sir.

4 Q And Sutherland and Goins went outside too, didn't
5 they?

6 A Yes.

7 Q And after they got outside, did Mr. Sutherland make
8 some sort of a motion through the window -- there's a window
9 there you could see through, isn't it?

10 A Yes, sir.

11 Q Did Sutherland make some sort of a motion outside that
12 he was going to get a snake or had gotten a snake and were
13 going to put on him?

14 A I am not sure about that.

15 Q When Sutherland and Goins went outside, you and Mr.
16 Boaze went over to shoot pool, didn't you?

17 A Yes, sir.

18 Q And Goins and Sutherland went outside?

19 A That's right.

20 Q To get the snakes they were talking about?

21 A That's right.

22 Q Now, I believe you testified that when Sutherland
23 and Goins went out, Mr. Shively tried to go out the door
24 but found the door was latched?

25 A That's right.

- 1 Q And at this time Mr. Shively was real frightened,
2 wasn't he?
- 3 A Yes, sir.
- 4 Q He was shaking and he was white?
- 5 A That's right.
- 6 Q Isn't that correct?
- 7 A Yes.
- 8 Q It was obvious the man was frightened?
- 9 A I think so.
- 10 Q And I believe you had gotten over to the pool table
11 and had you racked the balls up before this thing happened?
- 12 A I believe we had but in the process the balls
13 hadn't never been broken when it happened.
- 14 Q Then what happened?
- 15 A Then Mr. Sutherland when he come in the door the belt
16 went through the air like that and we thought he was really
17 playing. We didn't know he had been shot.
- 18 Q But the door flew open, didn't it?
- 19 A All of a sudden.
- 20 Q It was a sudden thing?
- 21 A Just that quick.
- 22 Q And I guess you looked up?
- 23 A Yes, sir.
- 24 Q And you saw something come through the air?
- 25 A Yes, sir.

- 1 Q And then you heard the shot?
- 2 A Yes, sir.
- 3 Q And you didn't have any idea that Mr. Sutherland had
- 4 been hit, did you?
- 5 A No, sir.
- 6 Q Then Mr. Sutherland fell to the floor?
- 7 A Yes, sir.
- 8 Q Did you go to him?
- 9 A In a second or two I did, yes.
- 10 Q At first you all thought he was pretending then,
- 11 didn't you?
- 12 A Yes.
- 13 Q Then you realized he had been hit?
- 14 A Yes.
- 15 Q Mr. Shively hadn't indicated any hatred or dislike
- 16 of Mr. Sutherland, he had simply been very frightened?
- 17 A That's right.
- 18 REDIRECT EXAMINATION
- 19 BY MR. CONWAY:
- 20 Q Mr. Aherron, when Mr. Sutherland and Mr. Goins went
- 21 outside, you said he was sitting with Mr. Shively?
- 22 A He had came out of the booth then.
- 23 Q Mr. Shively had come out of the booth?
- 24 A Yes.
- 25 Q Was any reason he couldn't have walked out the door

1 at the same time they did?

2 A I believe he had made his way by the door then.

3 Q What do you mean?

4 A From where the door was located and where the booth was
5 sitting, he had gotten by the door when they went out.

6 Q Was there any reason he couldn't have walked out at
7 the same time they did?

8 A I don't think so.

9 Q You said later, after they went out, he did try the
10 front door and that he couldn't open it?

11 A Yes, sir.

12 Q Do you know whether or not he made any attempt to
13 lock it, secure it so they couldn't get back in?

14 A No, sir, I do not.

15 THE WITNESS STOOD ASIDE.

16 * * * * *

17 (RECESS)

18 M. W. TAYLOR

19 the next witness, being first duly sworn, testified and
20 stated as follows:

21 DIRECT EXAMINATION

22 BY MR. WHITE:

23 Q Mr. Taylor, please state your full name and occupation.

24 A I am Michael W. Taylor. I am an investigator with
25 the Sheriff's Department here in Chatham.

1 Q How long have you been employed by the Sheriff's
2 Department?

3 A Since February of 1975.

4 Q Were you working on the night of April 10, 1980?

5 A No, sir. I was at home. I was called out to the
6 incident.

7 Q Where did you go in response to that call?

8 A I went to the Country Diner, which is on 58 east of
9 Danville.

10 Q Please describe what you found at the scene when you
11 got there.

12 A When I arrived at approximately 10:30 at night there
13 were several other officers there. Mr. Garland Shively was
14 there. Some of the employees that worked at the Country
15 Diner were there, and I believe some of Mr. Shively's
16 relatives.

17 Q How many people were there when you got there?

18 A There were about seven people there when I arrived.

19 Q Was Clinton Sutherland there?

20 A No, sir.

21 Q Did you have an occasion while you were there to make
22 a thorough investigation of what happened?

23 A Yes. I

24 MR. MEADE: The question is already answered. It was a
25 yes or no question he has already answered.

1 Q What did your investigation disclose.

2 MR. MEADE: We are getting into possible hearsay. If he is
3 going to testify to what he saw there when he got there
4 that may be all right but we don't know how soon he got there
5 after the accident.

6 THE COURT: He got there at 10:30. Mr. Taylor knows all
7 about hearsay. Testify as to the results of your investigation
8 and leave out the hearsay.

9 A When I arrived Mr. Sutherland was not there. I
10 observed -- what I did see was a brown leather belt that was
11 lying between two bar stools and this was near a counter
12 that's inside of the Country Diner there. I did see a 25 calibre
13 pistol lying on the table and I did see a spent 25 cartridge
14 lying on the floor behind the counter. That's what I saw at
15 that time. Soon after that we all left the premises there.

16 Q After you left the premises, did you have an occasion
17 to make a diagram of the premises?

18 A Yes, sir.

19 Q Do you have that now?

20 A Yes, sir, I do.

21 THE COURT: Have you seen the diagram, Mr. Meade?

22 MR. MEADE: No.

23 MR. WHITE: I am showing it to Mr. Meade right now, if the
24 Court please.

25 THE COURT: Any objection, Mr. Meade?

1 MR. MEADE: No.

2 MR. WHITE: I would like to enter a photostatic copy of
3 this diagram.

4 Q Prior to making your diagram, did you have an
5 occasion to make pictures?

6 A Yes, sir.

7 THE COURT: Mr. Meade, I believe you have seen the photographs,
8 have you not?

9 MR. MEADE: I have seen the photographs. As I understand,
10 these photographs are intended to show the area when he got
11 there.

12 THE COURT: They will be admitted, Mr. White.

13 Q Will you please identify the pictures handed to you now
14 by Mr. Conway?

15 THE COURT: I believe they are numbered on the back. Refer
16 to them by number.

17 A Picture No. 1 is a picture of the bar stools I
18 referred to and the leather belt lying on the floor.

19 Q Now, before you proceed, will you indicate on the
20 diagram where that particular picture illustrates the
21 interior of that building.

22 A See the diagram. This belt was found between the
23 fourth and fifth bar stools there at the Country Diner, lying
24 on the floor. Exhibit No. 2 is the same belt from a different
25 angle. Exhibit 3 is the counter I am referring to, the

1 counter at the west end of the building of the Country Diner,
2 and these bar stools would be in this area here. Exhibit
3 No. 5 is a photograph showing the pump house, and this was
4 taken from the east corner of the building, somewhere in this
5 area of the east corner. Exhibit No. 7 is another photograph
6 taken inside the building standing at this point here at the
7 counter shooting back toward -- showing the back of the grill
8 area and the chest which contained the beverages there.
9 Exhibit No. 8 is just another photograph of the brown leather
10 belt on the floor.

11 Q With the relationship to the bar stools, counter top
12 and grill area, can you point out or will you point out on
13 your diagram where the front door of this establishment would
14 be?

15 A Yes, sir. The front door is marked as item A, the
16 front door, item A.

17 Q And where did you find the spent shell casing?

18 A The spent shell casing was found behind the counter,
19 marked as item K on the diagram.

20 Q Would you take Exhibit 7. With relationship to that
21 particular installation, where did you find the spent shell
22 casing?

23 A The casing was found right at the bottom of this
24 freezer chest type appliance here. The picture doesn't show it
25 lying on the floor but it was found in this area, right at

1 the bottom of the cabinet.

2 Q Where would that be in relation to the counter top?

3 A The counter top runs the length of the chest. The
4 counter top rests on top of the chest. The spent casing was
5 found at the bottom on the floor.

6 Q I show you a picture indicating a line of bar
7 stools and a counter top. With relation to that, point out
8 to the jury, please, the approximate location where the shell
9 casing might have been lying on the floor.

10 A With reference to the photograph it would be on the
11 other side of the counter, the far counter here, and it was
12 lying on the floor.

13 MR. MEADE: Were you pointing to a corner of the room back
14 behind the counter?

15 A Yes, facing the counter.

16 MR. MEADE: Behind the counter?

17 A Yes.

18 Q Mr. Taylor, here is another photograph of the
19 interior showing both the front door and the left-hand side
20 of the counter facing the counter. There is a pole,
21 apparently, or a support that goes near that corner of the
22 counter. How far away is that support?

23 A From the counter top?

24 Q Yes.

25 A I have no idea, Mr. White. I would be afraid to say.

1 I just don't know.

2 Q Is there a walkway in between those areas or not?

3 A There is room enough to get to this bar stool, but
4 I don't know how far it would be.

5 Q Can you point out what area the shell casing was in
6 there? Maybe you can answer Mr. Meade's question that way.

7 A The counter top runs into this wall, and behind the
8 counter lying on the floor was where the casing was found,
9 behind this counter.

10 Q Can you identify for us the front door on that
11 photograph?

12 A This door here would be the front door.

13 Q And you have measured the distance between the
14 location of the shell casing and the front door?

15 A Yes, sir.

16 Q Can you tell us what it measured?

17 A It is approximately twenty-three feet, five inches
18 from the front door knob to the top corner of the counter.

19 Q Was the measurement made with the door open or closed?

20 A I believe -- well, I don't know. I can't say. I
21 believe it was with the door closed but I wouldn't say.

22 Q From the photographs can you tell us whether or not
23 there was any obstruction to the opening of the door
24 completely wide open?

25 A Nothing but the door itself. The door opens to the

1 inside.

2 Q Do you know how large a door it is?

3 A The front door opening measured six foot six inches
4 by three foot.

5 Q Three by six and a half?

6 A Yes.

7 Q What is to the right of the door as a customer might
8 enter?

9 A To the right? There's some sort -- I am not sure of
10 the name -- but some sort of electronic game.

11 Q Could you identify that for us in this photograph
12 and pass it along to the jury?

13 A This was the front door opening to the right and
14 this would be the machine and this is another shot of it from
15 inside the building. There's the machine.

16 Q Here is a photograph of the exterior of the Country
17 Diner. Please look at that and identify it for us.

18 A This is the Country Diner located on 58 outside of
19 Danville in Pittsylvania County.

20 Q How large a parking area is that?

21 A I am not sure of the exact size. The building
22 itself measures thirty-eight feet nine inches by twenty-eight
23 feet nine inches, and the parking area is somewhat greater
24 than the building itself.

25 Q Could you tell us, if you know, how far off the

1 actual highway right of way it is?

2 A I don't know how far it would be. Just an estimate
3 would be fifty or sixty feet maybe.

4 Q Are you familiar with the general operations of that
5 particular establishments?

6 MR. MEADE: I don't see how he can answer that question.

7 MR. WHITE: He is a deputy sheriff.

8 THE COURT: Some things deputies don't know.

9 A A whole lot of things.

10 THE COURT: Are you familiar with the operation?

11 A Well, I have grown up in that community, yes, sir.
12 It has always had the stigma of being a beer joint if that
13 will help you any.

14 Q Do you know who frequents the place? You are
15 describing the type building and personnel.

16 A Some good and some bad.

17 Q Did you determine ownership of the belt? If so, who
18 might have owned it?

19 A I can't answer truthfully, Mr. White. I don't know.

20 Q With regard to the building itself, could you tell us
21 about any back door exterior entrance besides the front door?

22 A Yes, sir. There is a door inside of the building
23 which leads down a stairwell which leads into a basement area
24 of the building that has exterior doors.

25 Q What has an exterior door?

1 A The basement section of the building.

2 Q Which side of the building is that on?

3 A It would be on the basement, on the east end of the
4 building.

5 Q With relation to the building, where is the well
6 house?

7 A The well house is at a diagonal from the east corner
8 of the building. It sort of sits off to the side of the
9 Country Diner itself, the building itself.

10 Q What is the distance between the well house and the
11 exterior door on the east side, if you know?

12 A I don't know, Mr. White.

13 Q Did you see it?

14 A Yes.

15 Q Could you give us an estimate?

16 A Yes, sir. Well, the front door, which is in the
17 middle of the building upstairs, the entrance, from the front
18 door.

19 Q Excuse me, Mr. Taylor. The question was from the
20 door on the east side to the well house.

21 A I would say it was -- just an estimate -- fifty to
22 sixty feet.

23 MR. MEADE: I have no questions.

24 * * * * *

25

GARLAND SHIVELY

the defendant, called to testify on behalf of the plaintiff as an adverse witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. CONWAY:

Q You are Mr. Grover Garland Shively?

A Yes, sir.

Q Where do you work, Mr. Shively?

A Presently?

Q Yes.

A I am managing a service station on Route 58 east about half a mile outside of Danville.

Q Where were you working April 10th of last year?

A At the Country Diner.

Q How far is that out of Danville?

A I would say approximately one mile.

Q Is the Country Diner on the north side or the south side of the highway?

THE COURT: Right or left going toward South Boston?

A On the right.

Q About how far is it beyond the old Wickes store?

A The land is adjoining.

Q It adjoins it?

A Yes.

1 Q How long had you known Mr. Sutherland?

2 A Well, I have known Mr. Sutherland for practically
3 fifteen years, but I had never been close to him until the
4 last nine or ten months.

5 Q How close were you with him?

6 A We were friends.

7 Q You were friends?

8 A Yes.

9 Q Was he at your place of business, this Country Diner,
10 on April 10th?

11 A Yes, sir, he was at the Country Diner on April 10th.

12 Q What time did he get there?

13 A I would say approximately 10:30 or 11:00. I don't
14 know exactly what time it was.

15 Q Who was with him?

16 A Wayne Rogers.

17 Q What did they do?

18 A They come in and ordered something to eat and got
19 them a beer and then they left and come back again.

20 Q How long was it they were gone?

21 A I would say about an hour, an hour and a half,
22 something like that.

23 Q So they were back by one o'clock?

24 A Around 1:00 or 1:30.

25 Q Was Mr. Sutherland in the Country Diner from that time

1 until the time he died, except when he went outside?

2 A Yes.

3 Q He was at the place?

4 A Yes.

5 Q What time did he die, do you know?

6 A No, sir, I can't say what time it was.

7 Q There has been testimony there was some trouble with
8 the water. Can you tell us about that, what happened?

9 A Yes, sir. They had an underground leak that was found
10 later that was going to the Wickes building. We supplied
11 the water to the Wickes building for their bathroom, and we
12 hadn't been able to find it because it was underground and
13 the well pump kept leaking down and we had to shut it off at
14 night to keep the well from leaking down.

15 Q I believe Mrs. Counts said she asked you to see about
16 the water. What happened?

17 A I went up to the well house and was going to cut the
18 water on. When I opened the door it was a snake standing up
19 looking at me when I opened the door.

20 Q So you didn't cut the water on?

21 A No, sir.

22 Q You went back to the Country Diner and what did you
23 do?

24 A I went back in and I sat down on the bar stool. When
25 I started talking I told Mrs. Counts to give me a glass of

1 water. She asked me what was wrong and I told her.

2 Q So then what did you do about the water?

3 A I let it go until that afternoon. I asked Mr. Rogers
4 and my brother if they were scared of snakes, if he would
5 cut the water on. He said he would go out there and check
6 and cut the water on for me.

7 Q Did they do that?

8 A Yes, sir.

9 Q That's Mr. Wayne Rogers that came in with Mr.
10 Sutherland?

11 A Yes.

12 Q You got the water back on. Were you talking to Mr.
13 Sutherland most of this time?

14 A Yes, sir. I generally talked to most of the customers
15 at the diner.

16 Q Did you sit with him?

17 A Not in the afternoon, no, sir.

18 Q When was the first time that somebody teased you
19 with a belt?

20 A Right after Mr. Sutherland and Mr. Rogers and them
21 went out there to get the snakes out of the well house.

22 Q What happened?

23 A They came back in and they started teasing me
24 then.

25 Q Who threw the belt?

1 A Mr. Sutherland.

2 Q Where were you?

3 A At one time I was on the telephone. At one time I
4 was over at the pool table when he threw it at me.

5 Q So he threw the belt around your neck one time when
6 you were at the telephone?

7 A Yes, sir.

8 Q Then you were over at the pool table a little later?

9 A Well, I was at the pool table was the first time.

10 Q And this was his own belt?

11 A He took it out of his pants. I don't know if it was
12 his own belt or not.

13 Q It was around your neck. I reckon you got a good
14 look at it, didn't you?

15 A No, sir. I didn't see it. I just fell over
16 against the pool table and the belt fell off my neck and
17 somebody picked it up.

18 Q Did he throw the belt onto the booth table at any time?

19 A Before he put it around my neck when he went out to
20 use the bathroom he threw it on the pool table one time.

21 Q No, I am talking about when you all were seated.

22 A In the booth?

23 Q Yes.

24 A I don't know who threw the belt then.

25 Q But that was another time a belt was thrown?

1 A Yes, sir.

2 Q You saw this belt then three or four times?

3 A I saw a belt three or four times.

4 Q Were they teasing you in any other way about being
5 scared of snakes?

6 A Yes, sir.

7 Q How long did this teasing go on?

8 A About four or five hours, I would say.

9 Q Did you call your wife?

10 A Yes, sir.

11 Q What did you call her for?

12 A I called my wife and told her to bring me some moth-
13 balls because I have heard mothballs would get rid of snakes.
14 I had her bring me a five-pound bucket out there.

15 Q Did she do that?

16 A Yes, sir.

17 Q Who put the mothballs in the well house?

18 A My brother.

19 Q Shortly after that did anybody go out to the well
20 house saying they were going to get some snakes?

21 A Yes, sir. We were sitting in the booth there.

22 Q You and who?

23 A Me and Mr. Sutherland and Mr. Goins and Mr. Boaze
24 were sitting in the booth. Either Mr. Sutherland or Mr.
25 Goins one said, 'We are going out to get the real thing and

1 bring it in here and show you it is no fear into it."

2 Q What time of day was that?

3 A It was at night.

4 Q Wasn't that earlier though? Didn't it happen once
5 before earlier?

6 A They didn't say they were going out to get snakes.
7 They said they were going out to get rid of the snakes. That
8 was Mr. Rogers, my brother, and Mr. Sutherland.

9 Q They were going to get rid of the snakes? Wasn't
10 anybody that went out before Mr. Goins and Mr. Sutherland
11 and came back and told you there weren't any snakes out there?

12 A Not that I remember.

13 Q Nobody told you that the snakes were all gone?

14 A They were out there and they said the snakes went
15 down in the floor somewhere or went down into the building,
16 but they didn't say the snakes were gone.

17 Q The first time the belt was thrown around your neck
18 was when you were calling your wife, right?

19 A Yes, sir.

20 Q After your wife got there did somebody call you to
21 the phone and somebody else threw a belt around your neck,
22 didn't they?

23 A No, sir, not that I remember.

24 Q Now, what did you do the summer before that when
25 your wife had a live snake in a jar and showed it to you in

1 the basement of your house?

2 A I had her to get rid of it.

3 Q Who got rid of it?

4 A She got rid of it.

5 Q Had you ever shot at any snakes before?

6 A Yes. I shot at what I thought was a snake before
7 with a 22 rifle.

8 Q You didn't shoot at the snake that was in your house?

9 A Pardon?

10 Q You didn't shoot at the snake in your house?

11 A No. My wife thought she had killed the snake when
12 she put it in the jar.

13 Q But it wasn't dead?

14 A It won't completely dead, no, sir.

15 Q She showed it to you?

16 A She showed me the jar.

17 Q Were you in service?

18 A Yes, sir.

19 Q How long were you in service?

20 A Nine years, sir.

21 Q Did they give you instructions in handling firearms?

22 A I qualified with an M-14 rifle.

23 Q Are you then familiar with the does and don'ts
24 of firearms?

25 A Yes, sir.

1 Q Do you realize that shooting in a building with people
2 in there can likely hurt somebody?

3 A Not at the time I didn't, sir.

4 Q You had been trained to understand a bullet, even
5 if you hit a wall, can ricochet off and hit somebody in an
6 occupied room.

7 A No. The only thing I was trained was how to use the
8 weapon and what it was used for.

9 Q Whose pistol were you using?

10 A It was my wife's pistol, sir.

11 Q How long had you been carrying it?

12 A Well, I had a license to carry it while I was running
13 a service station down there about four years, then I
14 started carrying it again. I carried it in my car in the seat
15 most of the time when I carried my money backward and forward
16 from home.

17 Q Was the pistol in your car that night?

18 A No, sir.

19 Q Where was it.

20 A It was in the diner.

21 Q Well, when you got ready to leave that night what
22 did you do?

23 A Well, at one time I started to leave and Mr.
24 Sutherland asked me to have a beer with him. We went back
25 over there and sat down. When they got up and said they were

1 going out to get a snake, I walked over to the counter and
2 picked up my pistol and my money and went to the door and
3 tried to get out and they had it locked.

4 Q They had it locked?

5 A Well, it was locked. The bolts were closed on it where
6 you couldn't open the door.

7 Q Is there a bolt on the inside?

8 A Yes, sir, it is a little old bolt lock thing.

9 Q Is there a bolt on the door knob?

10 A Not to lock it.

11 Q But there is a lock bolt where you can lock the door
12 from the inside?

13 A Sometimes it worked and sometimes it didn't. It was
14 hanging there by just screws.

15 Q You didn't try to close that door?

16 A No, sir. I didn't think about it at the time.

17 Q Mr. Shively, according to this diagram the door is
18 here, right?

19 A Yes.

20 Q What did you do -- where were you seated with Mr.
21 Sutherland?

22 A We were seated right over here.

23 Q You were seated over here?

24 A Yes, sir.

25 Q And when Mr. Sutherland and Mr. Goins said they were

1 going out to get a snake, did you follow them to the door?

2 A I got up and I come around here and went behind the
3 counter. My money box and things were sitting right here.
4 I picked them up and went right over to the door to leave.

5 Q You went to the door and found you couldn't open
6 it?

7 A Right.

8 Q And you didn't lock it from the inside?

9 A No, sir, because I didn't figure that lock was any
10 good.

11 Q Well, you didn't even try, did you?

12 A No, sir.

13 Q What is this area here?

14 A It is sort of a kitchen, and a little storage room
15 where we keep things in.

16 Q One of the ladies said that you went back here and you
17 got your pistol, held it in your hand up on the counter for
18 six to eight minutes, is that right?

19 A I don't know how long it was.

20 Q You were just waiting for them to come back?

21 A No, sir. I was waiting to get away or protect myself,
22 whatever I had to do.

23 Q But you were there with the gun in your hand for some
24 several minutes at least?

25 A The frame of mind I was in I couldn't say how long it

1 was.

2 Q Was there any reason that you couldn't go back in
3 this area?

4 A Yes, sir.

5 Q What?

6 A I wouldn't go into a burning room. I couldn't see
7 back there.

8 Q Isn't there a doorway here?

9 A No, sir.

10 Q No doorway here?

11 A No, sir. No doorway in that back storage room.

12 Q Is there any reason that you couldn't have gone
13 through this doorway?

14 A Yes, sir, but I would have come out twenty to thirty
15 yards from where they were going to get the snake.

16 Q That's on this end of the building?

17 A Yes.

18 Q And the pump house was some fifty to sixty feet . . .

19 A It is not that far.

20 Q The sheriff just testified it was.

21 A He estimated it. I estimate it at thirty-five feet.

22 Q You say it is thirty-five, he says sixty, but you
23 could have come out here and gone this way, couldn't you?

24 A It was growed up back there. I would have had to run
25 through the bushes and briars and weeds.

1 Q So instead of that you get your pistol out and wait
2 to shoot inside this building. Mr. Shively, you shot. What
3 did you shoot at?

4 A I shot at what I thought was a snake coming through
5 the air.

6 Q You shot at the belt?

7 A Well, I thought it was a snake. It turned out to
8 be a belt.

9 Q The same belt that Mr. Sutherland had played with you
10 before with?

11 A I don't know, sir. I never looked at it that close
12 afterwards.

13 Q I believe that you said that you had gotten your money
14 box, you had put your pistol in your pocket?

15 A Yes.

16 Q And then Mr. Sutherland asked you to have a drink with
17 him?

18 A Yes, sir.

19 Q Were you ready to leave at the time you got your money
20 box and your pistol?

21 A Yes, sir.

22 MR. CONWAY: That's all.

23 CROSS EXAMINATION

24 BY MR. MEADE:

25 Q Mr. Shively, first of all, before Mr. Sutherland and

1 Mr. Goins went out to get -- they said they were going out
2 to get a real snake?

3 A Yes.

4 Q Before they went out, hadn't you warned them that
5 somebody would get hurt or might get shot?

6 A Yes, sir.

7 Q Didn't Mr. Sutherland know you had a gun on you?

8 A Yes, sir.

9 Q When they left you actually tried to leave, didn't
10 you?

11 A Yes, sir.

12 Q And the door was locked?

13 A Yes, sir. It was closed, bolted where I couldn't
14 get it open.

15 Q Then I understood that you got behind the counter?

16 A Yes, sir. I was back as far as I could go and still
17 see what was coming inside.

18 Q Could you see anything out of the window there?

19 A I could see their heads and they come up and made a
20 motion with their lips what I understood as "We got a big one."

21 Q And then the next thing that happened the door opened.
22 Did it come open real gently or did it just bust open?

23 A It busted open.

24 Q Then what happened?

25 A The gun went off. I shot at what I thought was a

1 snake.

2 Q You saw something coming through the air?

3 A Yes.

4 Q And you shot at it?

5 A Yes.

6 Q Did you intend to shoot at Mr. Sutherland?

7 A No, sir.

8 Q Did you think you had hit Mr. Sutherland?

9 A No, sir.

10 Q What, if anything, did Mr. Sutherland do about the
11 time you shot? Did he say anything or do anything?

12 A Well, he sort of laughed when he threw the belt, then
13 it looked like he stood there a second and hollered out, then
14 he just fell over.

15 Q Did you go to him?

16 A Not at the moment.

17 Q Did you think he had been hit at that time?

18 A No, sir.

19 Q Mr. Shively, just a couple of simple questions. Are
20 you afraid of snakes?

21 A Yes, sir.

22 Q I want you to tell the jury what snakes or the thought
23 of snakes mean to you or signify to you.

24 A It is hard to explain. A lot of people have got a
25 fear of fire, a lot of people have got a fear of water. Some

1 of these things I am not scared of, but a snake, I can see
2 one crawling across that window sill out yonder, and I will
3 go shaky.

4 Q Wasn't a belt thrown around your neck by Mr.
5 Sutherland in the late afternoon on April 10th while you were
6 on the telephone?

7 A Yes, sir.

8 Q Did you fall then?

9 A I fell against the juke box, yes, sir.

10 Q Did you drop the telephone?

11 A Yes, sir.

12 Q What sort of feeling do you get when something like
13 this happens? Does your heart stop or what? Pain?

14 A Yes, sir. I get pains at times. I have got a little
15 heart problem and I get pain at times.

16 Q You do have a heart problem?

17 A Yes, sir.

18 Q How long have you had it?

19 A Approximately four years.

20 Q Mr. Sutherland was a good friend of yours?

21 A Yes, sir.

22 Q Did he know you had this heart condition?

23 A No, sir.

24 Q I understood you to say that Wayne Rogers and Mr.
25 Goins, and I thought you said your brother went down and cut

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1 the water on, is that right?

2 A Mr. Rogers went to cut the water on and my brother
3 went to show him how to cut it on, because Mr. Rogers said
4 he was not scared of no snakes and I stood outside the door
5 up on top of the hill there and they hollered up there, "There's
6 three big ones in here." That's when Mr. Sutherland and all
7 of them went outside and said they were going to get rid of
8 them. That's when they started kidding me about not going
9 back down there, really.

10 MR. MEADE: That's all.

11 REDIRECT EXAMINATION

12 BY MR. CONWAY:

13 Q Mr. Shively, you then went back up there after the
14 first time between the building and the pump house to show
15 Mr. Rogers how to cut the water on?

16 A I went outside the door and showed him the pump
17 house and how to get to the water, but I never did go down to
18 the pump house.

19 Q But you went between the building and the pump house.

20 A No. In front of the building, the main building at
21 the door.

22 Q How far were you from the pump house at that time?

23 A I would say seventy-five or eighty yards.

24 Q Seventy-five or eighty yards? How far is the pump
25 house from the building?

1 A It is about thirty or thirty-five feet if you go out
2 the back door on the bottom, but if you go out the front
3 door you have got to go out and go down to it.

4 Q You think it is about seventy-five yards from the
5 front door of the building?

6 A Guessing, estimating.

7 Q And only thirty-five feet from the side door?

8 A I would say from where I was standing in front of
9 the building, in accordance with the side door and everything.

10 Q Mr. Shively, isn't there a lock on the door leading
11 into the ladies restroom?

12 A Yes. It is a lock where we lock at night at the top
13 of the steps leading down to the ladies bathroom. We bar the
14 door and lock it, but it is taken off every morning.

15 Q Was any reason you couldn't have gone down there and
16 put that lock on?

17 A I didn't see no reason to lock the ladies bathroom
18 sir.

19 Q Instead of running behind the counter, you were
20 already on that side of the room, why did you run behind
21 the counter instead of going into the basement and locking
22 the door?

23 A You can't lock the ladies bathroom from the inside.

24 Q You have got a ladies bathroom that you can't lock
25 the door to?

1 A I don't think you can.

2 Q You could have gone down the steps and gone outside.

3 A I would have had to went through two locked doors
4 to get outside and it would have carried me right out at the
5 well house, within thirty or thirty-five feet.

6 Q There are steps leading directly from the door at the
7 basement to the front of the building, weren't there?

8 A I don't follow you, sir.

9 Q When you come out of the basement door -- this is
10 the front door? (Referring to the diagram)

11 A Yes, sir.

12 Q You say you were seated over here with Sutherland and
13 Goins, right?

14 A Yes, sir.

15 Q All right. And after you went over here to try this
16 door -- you didn't go out directly with them. You waited
17 until after they had gotten out and the door was shut. You
18 said you couldn't get it open, so you went this way, right?

19 A Right.

20 Q Was there any reason you couldn't have gone this way
21 down these steps to the basement and out this door?

22 A Well, if I had of went out that door it would have
23 brought me right out at the well house where they were going
24 to get the snakes.

25 Q There's a roadway along here, isn't it?

1 A It was an old roadway but it was grown up, from the
2 back of the store around.

3 Q But there was an old roadway?

4 A It was old.

5 Q According to your testimony, it is thirty-five feet
6 from here to the well house?

7 A Yes.

8 Q Aren't there steps leading from right here out to
9 the . . .

10 A No, sir.

11 Q No steps there?

12 A You come out about ten feet, then you go up the steps.

13 Q As the belt came through the air, instead of shooting
14 couldn't you have stepped right into that storage room?

15 A I don't know, sir. I was too nervous.

16 Q Do you know that it is unlawful to shoot a gun in a
17 public place?

18 MR. MEADE: I will have to object to this line of questioning.

19 THE COURT: Objection sustained. It is unlawful, no question
20 about that.

21 MR. CONWAY: That's all.

22 THE WITNESS STOOD ASIDE.

23 * * * * *

WAYNE ROGERS

the next witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. CONWAY:

Q Mr. Rogers, do you recall April 10th of last year?

A Very vaguely.

Q Do you remember who you were with and so forth?

A Yes.

Q Who were you with?

A Clinton Sutherland.

Q Where did you all go that day?

A From the beginning of the day or . . .

Q Well, did you go anywhere for breakfast?

A No, sir. We went to the diner but that won't breakfast.

Q What time?

A I would say approximately ten o'clock, eleven o'clock, somewhere along there. Just before lunch.

Q Did you get anything to eat?

A I think I ate something, but I don't think Clinton did.

Q Did you see Mr. Shively there?

A Yes, sir.

Q What conversation do you remember having with Mr.

1 Shively?

2 A He mentioned something about it was a leak in the
3 water line and he went out to the pump house to turn the
4 water on and it was a snake in the pump house. He was telling
5 us about it.

6 Q He was telling you about it?

7 A Yes, sir. He was telling me and Clinton and whoever
8 else was in the diner.

9 Q What resulted from that conversation?

10 A Me and Clinton left and we went over on the other
11 side of town. Then we come back and Mr. Shively asked me was
12 I scared of snakes. I said, "No, sir." He asked me would I
13 go out there and run them out of the pump house so he could
14 turn the water on because he needed some. I told him, "Yeah,
15 I'll go out there and run them out." So me and Clinton and
16 Mr. Shively's brother, Jimmy, we went to the pump house. When
17 I opened it up, it was a snake in there. I run him out. I
18 said beings I was out there I would turn the water on for him
19 because he acted like he was scared.

20 Q Where was Mr. Shively at that time?

21 A Standing up on the bank above the pump house.

22 Q How far from the pump house?

23 A I would say as far as here to the wall back yonder,
24 maybe not that far.

25 Q Twenty to thirty feet?

- 1 A Something like that.
- 2 Q Could he see in the pump house?
- 3 A It would have been hard to do. He could have seen it,
4 but it would have been hard to have seen in and seen the
5 snake itself, I would say.
- 6 Q You all got the water turned back on?
- 7 A No, sir. I was going to go in the pump house to
8 turn the water on. When I started to go in something just
9 told me to look up and it was a snake laying up on the ledge
10 on each side of me.
- 11 Q What happened?
- 12 A We run them out and they was going down the side of
13 the wall down under the pump house.
- 14 Q Then what happened?
- 15 A Then we got back up to the diner and everybody
16 started teasing Garland about it.
- 17 Q Did you ever get the water turned on?
- 18 A If they did, I didn't turn it on.
- 19 Q You and Mr. Sutherland and who else? Jimmy Shively?
- 20 A Yes, sir.
- 21 Q All of you went back in the diner?
- 22 A Yes.
- 23 Q And started teasing Mr. Shively about snakes?
- 24 A Yes, sir.
- 25 Q Can you explain a little more in detail what ~~that~~

1 consisted of?

2 A Mr. Shively was telling us about how scared he was
3 of snakes. We kept teasing him about we was going to go
4 out there and get one and bring it back and put it on him.
5 He just kept on telling us not to do it because he was scared
6 of them.

7 Q Did anybody put anything on him?

8 A No, sir, not then.

9 Q When was the first time anybody used a belt to scare
10 him?

11 A It was later on that evening.

12 Q What happened?

13 A Some more of our friends come in. We was all sitting
14 in a booth. They started taking their belts off, dropping
15 them on Mr. Shively, putting them around his neck.

16 Q Did he get mad with anybody?

17 A No, sir. It seemed like he didn't get mad, just
18 seemed like he was frightened.

19 Q He didn't get mad?

20 A No, sir.

21 Q How many times did people play with him with belts?

22 A To be truthful, I don't know, because I was drinking
23 kind of heavy myself. They were continuously playing with
24 him.

25 Q What was he doing?

1 A Every time they would do it he would jump up. One
2 time he almost turned the table over we were sitting in.

3 Q Was he drinking beer too?

4 A Yes, sir. I think he was drinking one then.

5 Q How long were you there?

6 A I would say up until about nine o'clock, about
7 thirty-five or forty minutes before the accident happened.

8 Q What were Mr. Sutherland and Mr. Shively doing when
9 you left at about nine o'clock?

10 A If I ain't mistaken, we were all kind of sitting
11 around in the booth, but we were shooting pool, too.

12 Q Did Mr. Shively say he was leaving or anything before
13 you left?

14 A No, sir.

15 Q He did not? Was he drinking beer with you all?

16 A Yes.

17 CROSS EXAMINATION

18 BY MR. MEADE:

19 Q Mr. Rogers, you went to the Country Diner that day
20 with Mr. Sutherland, of course.

21 A Yes.

22 Q And you knew from Mr. Shively that there had been
23 some snakes seen in the pump house?

24 A Yes, sir.

25 Q On at least one occasion you saw the result of the

1 fright on Mr. Shively; you saw him white and shaky, didn't
2 you?

3 A Yes.

4 Q It was obvious that he was frightened of snakes?

5 A Yes, sir.

6 Q And you were asked by Mr. Shively on one occasion to
7 see if you could cut the water on for him, is that right?

8 A Yes, sir.

9 Q So you went down to the pump house?

10 A Yes, sir.

11 Q Who was with you?

12 A Clinton.

13 Q That's Sutherland?

14 A And his brother, Jimmy.

15 Q And when you got down there you saw one on the floor?

16 A Yes, sir, on the ground, it was coiled up on the
17 ground.

18 Q Did you run him out?

19 A Yes, sir. He went up under the edge of the pump
20 house.

21 Q And then you went on into the pump house a little
22 ways and you thought better and you looked up.

23 A Yes, sir.

24 Q You saw at least two more on the rafters?

25 A Yes, sir, one on each side.

- 1 Q You saw them slither down?
- 2 A Yes, sir. We started in the pump house. They were
- 3 on the rafters outside the pump house.
- 4 Q You backed out too?
- 5 A Yes, sir.
- 6 Q You didn't cut the water on?
- 7 A No, sir.
- 8 Q Too many snakes to suit you?
- 9 A Yes, sir.
- 10 Q Later on when both you and Sutherland were teasing
- 11 Shively and told him you all were going to bring a snake in
- 12 there and throw it on him, he told you all you had better
- 13 not, that he was liable to shoot you or hurt you. Didn't he
- 14 say that?
- 15 A Yes.
- 16 Q He said, "I am liable to shoot you", or something to
- 17 that effect?
- 18 A Yes, sir.
- 19 Q You realized this was getting to Shively?
- 20 A Yes. I quit fooling with him.
- 21 Q You figured he might do something foolish?
- 22 A Yes.
- 23 Q So you stopped?
- 24 A Yes.
- 25 Q Sutherland kept on picking at him?

Wayne
Rogers
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Shively
mistakenly
figured
the
snakes
too

1 A There were some more people that came in that
2 started picking at him. They seen we were picking at him
3 and they started picking at him then.

4 Q You left about what, about 8:30?

5 A About nine o'clock I left.

6 Q You saw at least three snakes down there yourself?

7 A Yes, sir.

8 Q There were enough in there to keep you from going
9 in there and cutting the water on, wasn't it?

10 A Yes, sir.

11 REDIRECT EXAMINATION

12 BY MR. CONWAY:

13 Q Mr. Rogers, who was teasing Mr. Shively about these
14 snakes other than you and Sutherland?

15 A Gerald Boaze and Robert Goins. I think it was all of
16 us.

17 Q Do you recall which one put a belt around his neck
18 when he was at the phone?

19 A At the phone?

20 Q Yes. Were you there?

21 A No, sir. I was shooting pool at the time. When I
22 turned around I seen him running from the phone, but as
23 far as who done it, I didn't see who done it.

24 THE WITNESS STOOD ASIDE.

25 * * * * *

MRS. GARLAND SHEVELY

the next witness called to testify on behalf of the plaintiff as an adverse witness, being first duly sworn, testified and stated as follows:

DIRECT EXAMINATION

BY MR. CONWAY:

Q Mrs. Shively, I believe that you were called by telephone by your husband sometime on the 10th of April of last year to bring him some mothballs, is that right?

A Yes, sir.

Q Do you know what time that was?

A It was around 6:30.

Q In the evening?

A Yes, sir.

Q Did you take the mothballs to him?

A Yes, sir.

Q After you got out there, what did he do with the mothballs?

A He and my brother-in-law and I carried them and put them in the pump house.

Q He went with you all to put them in the pump house?

A Yes.

Q About how far is this pump house from the building? Just look around and see if it is to the street or to the end of the porch or where.

1 A From the building I would say at least as far as the
2 porch.

3 Q As far as the porch? You all put the mothballs in
4 the pump house?

5 A Yes, sir.

6 Q And did you see any snakes?

7 A No, sir, I didn't.

8 Q Did anybody say anything about seeing any snakes when
9 you were out there at the pump house?

10 A They had said they had seen them.

11 Q Before, but did anybody see them at that time?

12 A I don't know.

13 Q Mrs. Shively, your husband had your pistol, is that
14 right?

15 A One that I had bought, yes, sir.

16 Q Had he ever shot at snakes with it?

17 A Yes, sir.

18 Q Where?

19 A When we were living in Charlotte County. We came
20 to Danville one weekend and went back home and he thought it
21 was a snake up there at the well house, but it was a stick
22 out there, and he was shooting at that.

23 Q Had he ever shot at snakes in the garden?

24 A He has shot at them, yes, sir.

25 Q Did you have occasion to put a snake in a bottle?

1 A Yes, sir.

2 Q The summer before? Tell us what happened.

3 A I went down in the basement one night and it was a
4 snake down there, and I got a broom and hit it and I thought
5 I had killed it. I was going to put it in a jar and scare
6 the little girl with it so she wouldn't get close to them.

7 Q Scare your child?

8 A Uh huh. She was asleep so I was going to wait until
9 the next day and show it to her to make sure she understood
10 they would hurt her, not to get close to them. I showed it
11 to him and he just panicked.

12 Q What do you mean? He didn't shoot at it, did he?

13 A No, sir. I killed the snake. It wasn't dead when
14 I put it in the jar and when I took the top off the next day
15 I could tell it wasn't dead and I put it out on the carport
16 and just cut it in two with a hoe.

17 Q You say he panicked?

18 A He turned real white and drew back and said, "That
19 thing will hurt you."

20 Q He didn't run and he didn't shoot at it?

21 A He stepped back.

22 Q That's all.

23 CROSS EXAMINATION

24 BY MR. MEADE:

25 Q Mrs. Shively, your husband is and has been deathly

1 afraid of snakes?

2 A Ever since I have known him.

3 Q He gets sort of hysterical when things are said about
4 snakes and when he sees a snake he gets hysterical, doesn't
5 he?

6 A Yes, sir.

7 THE WITNESS STOOD ASIDE.

8 *****

9 (Court and counsel went into chambers)

10 IN CHAMBERS

11 MR. WHITE: That's all the witnesses we have on liability.

12 MR. MEADE: Judge, that raises at this time -- it would
13 be appropriate under normal circumstances to go into this
14 other matter that I raised this morning, but as I understand
15 it, the plaintiffs have rested their case except with respect
16 to the damage aspect. I think that this would be an appropriate
17 time for me to make a motion on liability because if the
18 Court should sustain it, then we don't have to go into the
19 damage aspect of it. Does the Court want to handle it that
20 way?

21 THE COURT: Yes, sir.

22 MR. MEADE: Then it is my understanding that the plaintiffs
23 have rested their case with respect to the liability feature
24 of it. In view of that, defendant, by counsel, moves the
25 Court to strike the evidence and enter summary judgment for

1 the defendant on the ground that there has been no showing
2 of primary negligence that could be the sole proximate cause
3 of the resulting death of Sutherland, and certainly on the
4 ground that Sutherland was guilty of at least contributory
5 negligence that was at least a contributing proximate cause
6 of the accident and his resulting death.

7 MR. CONWAY: If your Honor please, we feel that any person
8 using a firearm is bound to use extraordinary care, and
9 certainly this was a most wanton type of negligence on Mr.
10 Shively's part shooting in an occupied building, strictly
11 illegal and without a permit and contributory negligence is
12 something that happens contemporaneously with the main act.
13 We don't see how Mr. Sutherland was acting at the same time
14 he got shot. He had thrown a belt in a playful act, but the
15 shot came later that killed him, and he was not required,
16 according to the authorities, to anticipate heedlessness
17 on the part of Mr. Shively, which this was heedless to be
18 shooting a gun under these circumstances. He had a right to
19 assume that he would act with care. There has been no showing
20 by our evidence that Mr. Sutherland knew that Mr. Shively
21 had a gun. He had mentioned a gun, but there was no showing
22 by our evidence that he in fact had one. There was no way
23 that Mr. Sutherland should or ought to have anticipated the
24 wanton act on the part of Mr. Shively. We feel that Mr.
25 Shively was guilty of the grossest, most wanton, wilful act

1 of negligence we have ever heard of and we just don't feel
2 that Mr. Sutherland was required to anticipate that he might
3 get shot after all of this horseplay all afternoon with the
4 belt and he was throwing the same belt and Mr. Shively had
5 every opportunity to step around the corner of that wall there
6 out of the way of the snake that was being thrown, if he had
7 waited for that point. He says that he tried the door to get
8 out after Mr. Sutherland had stepped out and he found he
9 couldn't get out, but there was no reason he couldn't have
10 gone out with them and left at the same time. He apparently
11 waited and went behind the counter. He had every opportunity
12 to go down the steps and out another way. If he was shooting
13 at the snake he certainly was negligent if he thought it
14 was a snake, and I don't think he had reasonable grounds to
15 assume it was a snake after all the horseplay with belts,
16 and he had obviously seen this belt on several different
17 occasions during the horseplay during the afternoon.

18 MR. WHITE: If it please the Court, as I recall the evidence
19 in this case, I have to agree with Mr. Conway that the
20 actual exhibition of a firearm to the decedent has not been
21 proven, that the only evidence with regard to injury has been
22 the general statement by Mr. Shively that "If anybody throws
23 a snake on me, somebody will get hurt" or "I will shoot
24 somebody", I don't know which of those statements he really
25 made. That during this whole afternoon of frivolity, drinking,

1 good palling around, fellowship, this man was teased by lots
2 of his friends. There is no indication in the evidence
3 that when Sutherland went out and came back in, that he
4 could expect to be confronted by a man holding a pistol
5 simply based on the statements that somebody will get shot.
6 To me this is a case of misplaced confidence and that, of
7 course, in the law is not contributory negligence and I have
8 to agree with Mr. Conway that he could reasonably expect as
9 a prudent person to come in and continue horseplay rather than
10 to have this frightful confrontation of a firearm. Of course,
11 there was a momentary pause and halt in which something
12 else might have happened that was not quite so serious, such
13 as shooting up in the air or on the floor, or something like
14 that. To me the element of contributory negligence at this
15 point is not in the case. I think primary negligence has been
16 shown. If the defense counsel can, through his evidence, show
17 a pure case of contributory negligence, of course, that is his
18 duty under the law.

19 THE COURT: Gentlemen, here is where we are. Here is a man
20 in his own place of business with some friends and you
21 gentlemen and your witnesses have tried to make out the fact
22 it is all right to go out and get a snake and run a man out
23 of his place of business. Mr. Sutherland knew that Mr.
24 Shively was paranoid of snakes. Mr. Rogers testified he
25 backed off, he could see what was happening. In fact, from

1 a legal standpoint Mr. Sutherland was guilty of an assault
2 on Mr. Shively. There is no question about that. He could
3 have taken out a warrant for him. You don't have to have the
4 weapon. The Supreme Court has held a rubber gun or a
5 cap pistol is considered a deadly weapon. It is what the
6 victim thinks it is. The fact it was a belt resulting
7 in Mr. Sutherland's death is unfortunate, but I am going to
8 grant the defendant's motion to strike the evidence. I feel
9 Mr. Sutherland put in motion a series of events that led to
10 his death, that he knew or should have known that the
11 defendant was -- the word he used was deathly afraid of snakes
12 and he persisted in an act that made him guilty of negligence
13 that directly contributed to his own death. Mr. Sutherland
14 was guilty of that degree of negligence which showed a
15 disregard for the health and safety of Mr. Shively and it
16 goes to the extent, as I said, Mr. Sutherland's acts went
17 to the point that he was guilty of -- legally guilty of a
18 criminal assault. I am going to sustain Mr. Meade's motion
19 and enter summary judgment for the defendant, over the
20 objection and exception of Mr. Conway and Mr. White, and I
21 will explain what we did to the jury.

22 (Court and counsel returned to the courtroom)

23 * * * * *

24 IN COURT

25 THE COURT: The plaintiff has concluded all its evidence

1 in reference to liability that was the cause of the death
2 of Mr. Sutherland and the law is such, ladies and gentlemen,
3 that in order to recover, whether it be an automobile accident
4 or a fire or whatever, alleged snake throwing incident, the
5 plaintiff, in this case Mr. Sutherland, would have to be free
6 from negligence in order for his estate to recover anything.
7 I am of the opinion that if you ladies and gentlemen brought
8 back a verdict in favor of Mr. Sutherland's estate, I would
9 have to set it aside. I feel that Mr. Sutherland, in his
10 actions with the snake or an alleged snake -- I am satisfied
11 Mr. Shively had a mortal, deathly fear of snakes -- he was
12 paranoid about snakes -- I feel Mr. Sutherland put in motion
13 a series of events that unfortunately led to his death. He
14 knew or should have known Mr. Shively was afraid of snakes
15 to the point he was almost paranoid about them, and with that
16 knowledge Mr. Sutherland persisted in an act that made him
17 guilty of negligence when he confronted Mr. Shively finally
18 with a belt that turned out that Mr. Shively thought was a
19 snake that turned out to be a belt, and Mr. Sutherland
20 was guilty of that degree of negligence that showed a disregard
21 for the health and safety of Mr. Shively, knowing Mr. Shively
22 was deathly afraid of snakes. In fact, as I told Mr. Conway
23 and Mr. White, if the situation had stopped short of Mr.
24 Sutherland's death, Mr. Sutherland was guilty of an assault
25 on Mr. Shively. As I explained, the law of the Commonwealth

1 is if I rob a bank with a cap pistol and the bank teller
 2 thinks I have a real pistol, I am guilty of an assault with
 3 a deadly weapon, even though I don't have a deadly weapon.
 4 It is what the victim thinks it is. I think Mr. Shively had
 5 plenty of reason to think it was a snake. Therefore, I am
 6 going to strike the plaintiff's evidence and enter summary
 7 judgment for the defendant.

8 (Court was adjourned.)

9 * * * * *

10 CERTIFICATES

11 The foregoing transcript of oral testimony and other
 12 incidents of trial recorded on the 29th day of June, 1981,
 13 in the Circuit Court of Pittsylvania County, at Chatham,
 14 Virginia, was stenographically recorded by and transcribed
 15 by the undersigned court reporter, who was first duly sworn
 16 according to law. I hereby certify that this is a true
 17 transcript and that as of this 28th day of July, 1981, I have
 18 filed with the Clerk, Samuel W. Swanson, Clerk of the Circuit
 19 Court of Pittsylvania County, by mailing the original of
 20 this transcript, and have delivered a copy to Mr. French H.
 21 Conway, Counsel for Plaintiff, and have delivered a copy to
 22 Mr. Frank O. Meade, Counsel for Defendant.

23 *Earline F. Gosney*
 24 COURT REPORTER
 25

