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Supreme Court of Appeals
Richmond, Va.

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Record No. 5115

In the Supreme Court of Appeals of Virginia at Richmond

B. G. YOUNG & SONS, INCORPORATED

v.

J. W. KIRK, ET AL.

FROM THE CIRCUIT COURT OF PULASKI COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5115

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 27th day of November, 1959.

B. G. YOUNG & SONS, Incorporated, Plaintiff in Error,

against

J. W. KIRK, ET AL., Defendants in Error.

From the Circuit Court of Pulaski County

Upon the petition of B. G. Young & Sons, Incorporated, a Tennessee corporation, a writ of error is awarded it to a judgment rendered by the Circuit Court of Pulaski County on the 24th day of July, 1959, in a certain motion for judgment then therein depending wherein J. W. Kirk and Velma P. Kirk were plaintiffs and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of five hundred dollars, with condition as the law directs.

RECORD

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page 14 }

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Received and filed, this the 10 day of June, 1959.

MARVIN G. GRAHAM, Clerk.

AMENDED MOTION FOR JUDGMENT.

To the Honorable Jack M. Matthews, Judge of said Court:

The undersigned, J. W. Kirk and Velma P. Kirk, hereby respectfully file this amended motion for judgment and move the Court for judgment in the sum of Four Thousand Four Hundred Thirty-six Dollars and Ninety-three Cents $4,-436.93) against the defendant, B. G. Young & Sons, Incorporated, for the following wrongs:

(1) That on the 6th day of March, 1958, the undersigned were the owners and seized and possessed of certain premises on which was erected a dwelling house and on which was a spring and reservoir, situated on the south side of State Highway No. 100, Newbern Magisterial District, Pulaski County, Virginia, approximately one (1) mile west of the Town of Draper.

(2) That on or about the said 6th day of March, 1958, and numerous dates thereafter, the defendant, B. G. Young and Sons, Incorporated, engaged in blasting stone on lands of the Commonwealth of Virginia in close proximity to the premises of the undersigned, and did carelessly and negligently, and without due care to the rights and property of the undersigned, cause to be made large blasts, commonly known as "shots," by the use of high explosives which resulted in great force, concussion and shaking of the premises of the undersigned and inflicted considerable damage

page 15 } thereto, to-wit: cracking and breaking of every outside and most of the inside walls of said dwelling house and of the floors in said dwelling house; and the cracking and breaking of the walls of the said reservoir.

(3) That on or about the 6th day of March, 1958, and numerous dates thereafter, the defendant, B. G. Young & Sons, Incorporated, engaged in blasting stone on the lands of the Commonwealth of Virginia in close proximity to the premises of the undersigned and in so doing did cause to be made large blasts, commonly known as "shots," by the use

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Received and filed June 10, 1959.

Teste:

MARVIN G. GRAHAM, Clerk.

DEMURRER, MOTION AND ANSWER TO THE AMENDED MOTION FOR JUDGMENT.

DEMURRER.

The Defendant says that the amended motion for judgment is not sufficient in law to entitle the Plaintiffs to relief.

MOTION.

The Defendant moves the Court to require the Plaintiffs to file a bill of particulars of the damage claimed under the amended notice as it has previously filed a motion for a bill of particulars of the damage claimed under the original motion and a bill of particulars as to the acts of negligence as previously requested to the original motion.

ANSWER.

The Defendant for answer to the amended motion, and reserving the right to file a further answer after the filing of the bill of particulars, for answer says:

(1) That the allegations of Paragraph 1 are correct.

(2) That it denies all charges that it carelessly and negligently and without due care caused to be made large blasts in the use of high explosives and denies that as a result of any action on its part there was any damage done

page 20 } to the property of the Plaintiffs.

(3) It denies all charges in the motion for judgment of any negligent or wrongful conduct on its part and denies that any act done by it caused any damage whatever to the Plaintiffs.

(4) It denies that it was guilty of any wrongful, negligent or careless act as set out in Paragraph 4 of the motion.

of high explosives which resulted in great force, concussion and shaking of the premises of the undersigned and inflicted considerable damage thereto, to-wit: cracking and breaking of every outside and most of the inside walls of said dwelling house and of the floors in said dwelling house; and the cracking and breaking of the walls of the said reservoir.

(4) That on or about the aforesaid date or sometime shortly thereafter the said defendant while engaged in the construction of a highway on the property of the Commonwealth of Virginia carelessly and negligently installed a drainage system in close proximity to the premises of the undersigned, and without due care to the rights and property of the undersigned, which caused, and continues to cause, waters to collect and to flow in an artificial channel or volume and to pour upon the premises of the undersigned to the damage of the same- to-wit: carrying mud and excess water upon a large area of the premises preventing the undersigned from any beneficial use thereof; and carrying mud and unsanitary waters into the spring and reservoir of the undersigned preventing the use of said spring and reservoir.

(5) That by reason and as a result of the above, the undersigned have been damaged in the sum of Four Thousand Four Hundred Thirty-six Dollars and Ninety-three Cents ($4,436.93) on the following basis, to-wit: repair
page 16 } of cracks and breaks in walls and floors, $1,436.93; decrease in value of dwelling house as a result of permanent damage thereto, $1,000.00; damage to spring, reservoir and water system, $1,000.00; damage to land upon which mud and water flows, $500.00; and inconvenience and discomfort of being deprived of water for long periods of time, by being deprived of water free of mud, and by being deprived of a weather and air proof dwelling for a considerable period of time, $500.00.

WHEREUPON, the undersigned move the Court for judgment against the defendant for the sum of Four Thousand Four Hundred Thirty-six Dollars and Ninety-three Cents ($4,436.93), interest and cost.

J. W. KIRK and
VELMA P. KIRK
By Counsel.

EUGENE L. NUCKOLS of
CROWELL, DEEDS & NUCKOLS
Attorneys at Law
Pulaski, Virginia
Counsel for Plaintiffs.

page 23 } INSTRUCTION 4.

The Court instructs the jury that to blast to a greater extent or to use explosives in larger quantities than is reasonably necessary or to fail to take proper care with regard to all the facts and circumstances shown, including the place and the surroundings, is failure to use the care required of one using high explosives; and if you believe that the defendant failed in this respect, and this was the proximate cause of the damage to the plaintiffs' dwelling, spring and reservoir, you shall find for the plaintiffs as to the blasting damages in such amount as will compensate them for such damages as you may find from the evidence they have suffered.

page 24 } INSTRUCTION 5.

The Court instructs the jury that if you find for the plaintiffs, Mr. and Mrs. Kirk, in this case you may consider, in fixing an amount which will compensate them for their injury, the cost of repairing the dwelling, reservoir and water system; the difference in value, if any, in the dwelling after repairing the same and its value before the damage was inflicted; the cost of removing the water and mud from the land and the loss, if any, of income from said land; and the inconvenience and discomfort of being deprived of water or water free of mud and of being deprived of a weather and air proof dwelling. However, the amount shall not exceed the sum sued for herein, Four Thousand Four Hundred Thirty-Six Dollars and Ninety-Three Cents ($4,436.93).

G.

J. M. M.

page 25 } INSTRUCTION NO. 6.

The Court instructs the jury that if you believe from the preponderance of the evidence in this case that the defendant, B. G. Young & Sons, Incorporated, through its agents, servants or employees negligently, or by failure to comply with the plans and specifications of the Department of Highways in a reasonable and timely manner, caused water to flow upon the lands of the plaintiffs in a greatly increased or unnatural quantity, and such act of the defendant resulted in injury to the property of the plaintiffs, then you should find for the plaintiffs in such amount as will compensate them for

(5) It denies that the Plaintiffs suffered the damages claimed in Paragraph 5 of the motion.

(6) For further answer this Defendant says that all of the work done by it was done as the agent of the Commonwealth of Virginia and pursuant to authority granted to the Commonwealth of Virginia in a deed executed by J. W. Kirk and Velma Kirk to the Commonwealth of Virginia dated the 26th day of November, 1957, recorded in Deed Book 178 at page 521 and that by the terms of this said deed and for a valuable consideration the said Plaintiffs accepted a cash payment in lieu of and release of all damages by reason of the location, construction and maintenance of the said highway, including such drainage facilities as might be necessary and the right to drain water onto the property of the Plaintiffs, and the said Defendant denies the right of the Plaintiffs to recover any damages whatever from it because of the provisions of the said deed from the Plaintiffs to the Commonwealth of Virginia.

(7) This action cannot be maintained because this Defendant is entitled to the immunity enjoyed by the Commonwealth of Virginia from suits for torts.

Respectfully,

B. G. YOUNG & SONS, INC.
By Counsel.

CAMPBELL & CAMPBELL
By S. B. CAMPBELL
Wytheville, Virginia,
Counsel.

* * * * *

page 22 } INSTRUCTION 1.

The Court instructs the jury that the fact that the plaintiffs were paid by the State Highway Department a certain sum of money for a parcel of land and damages from the construction of the highway does not preclude a recovery by the plaintiffs for any damage to their property proximately caused by improper acts of the defendant in the construction of said highway.

G.

J. M. M.

page 28 } INSTRUCTION NO. C.

The Court further instructs the jury that no burden rests upon the Defendant to introduce any evidence or to prove anything until the Plaintiffs by competent evidence have made out a *prima facie* case of liability, and even if the jury on consideration of all of the evidence in the case and the instructions of the Court believe that it is just as probable that the Defendant is liable as that it is not liable, then they must bring in a verdict for the Defendant.

G.

J. M. M.

page 29 } INSTRUCTION NO. E.

The Court further instructs the jury that there are two claim for damage in this case; the first one is said to have been caused by blasting, and the second one to have been caused by careless or negligent installation of the drainage system. You will now be instructed separately on these two branches of the case.

As to the damages claimed as a result of the explosion of dynamite, the Court instructs you that the Defendant was acting as an agent of the State in the building of a highway and that in so doing it had the right to use explosives in the building of the highway and that the use of explosives creates no presumption of any sort that the Defendant is liable, and unless the Plaintiffs have proven by a preponderance of the evidence that the Defendant was guilty of negligence or the failure to use reasonable care under the circumstances existing, and reasonable care is that degree of care which an ordinarily prudent man in the same line of business and conducting an operation similar to the operation then being conducted by the Defendant would have used, the jury will find for the Defendant on the claim for damages due to blasting.

G.

J. M. M.

page 30 } INSTRUCTION 2.

The Court instructs the jury that if you find from a preponderance of the evidence that the blasting operations of the

such damages as you may find from the evidence they have suffered.

G.

J. M. M.

page 26 }

* * * * *

INSTRUCTION NO. A.

The Court instructs the jury that this is an action brought by Mr. and Mrs. Kirk against B. C. Young & Sons, Inc., seeking to recover money damages for certain alleged injuries claimed to have been sustained to the property of Mr. and Mrs. Kirk; that in this case the fact that damage was sustained to their property is not sufficient to create any liability on the Defendant, but the Plaintiffs must go further and prove by competent evidence three things; first, that there was negligence on the part of the Defendant; second, that this negligence was the proximate cause of the damage claimed to have been sustained by the Plaintiffs; and third, the amount of such damage in dollars and cents with reasonable certainty; and unless this has been done, the jury must find for the Defendant.

G.

J. M. M.

page 27 } INSTRUCTION NO. B.

The Court further instructs the jury that their verdict must not be based on, or influenced, by sympathy or prejudice or anything except the evidence produced on the witness stand and the instructions of the Court, and the jury cannot speculate or guess as to whether the Defendant may or may not have been legally responsible for damages claimed, but on the contrary the Plaintiffs must prove by a preponderance of the evidence the facts necessary under the instructions of the Court to sustain a verdict for the Plaintiffs, and unless the Plaintiffs have done this, it is the duty of the jury to find a verdict for the Defendant.

G.

J. M. M.

pensate them for such damages as you may find from the evidence they have suffered.

Refused.

J. M. M.

page 33 } INSTRUCTION NO. D.

The Court instructs the jury that the Plaintiffs released all damages which might ordinarily have been expected from the construction and building of the highway and that all of these matters were compensated for in the payment made to Plaintiffs by the Commonwealth, and the Plaintiffs also gave the Commonwealth of Virginia the right to construct and use such drainage facilities as might be necessary in the construction of the road, and unless the jury believe from a preponderance of the evidence, and the burden of establishing this is upon the Plaintiffs, that the Defendant in this case stepped aside or departed from the terms of its contract with the State Highway Department and either negligently or wrongfully performed some duty under said contract, then the jury will find a verdict for the Defendant, even though they may believe that the Plaintiffs have suffered damages.

Refused.

J. M. M.

page 34 } INSTRUCTION NO. F.

The Court further instructs the jury that as to the alleged damages caused by water the Defendant had the right to change the flow of the stream and of the surface water and to collect and have the same flow in an artificial channel or volume and to pour over the premises of the Plaintiffs, and unless the jury find from a preponderance of the evidence that the Defendant wantonly or wilfully stepped aside from the proper construction of the road and wantonly or wilfully damaged the Plaintiffs in connection with the water running onto or over their property, they will find a verdict for the Defendant because of the alleged claim of damage from water.

Refused.

J. M. M.

defendant, B. G. Young & Sons, Incorporated, its agents or employees, in the construction of the highway adjoining the plaintiffs' property was the proximate cause of damage to plaintiffs' dwelling, spring and reservoir, you shall find for the plaintiffs as to the blasting damages in such amount as will compensate them for such damages as you may find from the evidence they have suffered.

Refused.

J. M. M.

page 31 } INSTRUCTION 2 "A."

The Court instructs the jury that in using dynamite in the construction of the highway near the property of the plaintiffs, the defendant, its agents or employees, was under the duty of using the highest degree of care to prevent any damage to the plaintiffs' property, and if you believe from a preponderance of the evidence that the defendant failed to use the highest degree of care to prevent damage to the plaintiffs' property in exploding dynamite near the plaintiffs' property and such failure was the proximate cause of the damage to the plaintiffs' dwelling, spring and reservoir, you shall find for the plaintiffs as to the blasting damages in such amount as will compensate them for such damages as you may find from the evidence they have suffered.

Refused.

J. M. M.

page 32 } INSTRUCTION 3.

The Court instructs the jury that if you believe from the preponderance of the evidence in this case that the defendant, B. G. Young & Sons, Incorporated, through its agents, servants or employees, collected surface waters in considerable quantity on the property of the State Highway Department and artificially channeled the said water in greatly increased or unnatural quantity without making reasonable and timely provisions for the handling of said water, and causing it to flow upon the lands of the plaintiffs in a greatly increased or unnatural quantity, and such act of the defendant resulted in injury to the property of the plaintiffs, then you should find for the plaintiffs in such amount as will com-

"We, the jury, on the issue joined, find for the plaintiffs, J. W. Kirk and Velma P. Kirk, against the defendant, B. G. Young & Sons, Incorporated, and fix their damages at $2,-250.00." (Signed—David S. Bill, Foreman)

Whereupon, the Defendant, by counsel, moved the Court to set aside the verdict of the Jury as being contrary to the law and the evidence; for the admission by the Court of improper evidence on behalf of the Plaintiffs and for the exclusion of proper evidence offered on behalf of the Defendant; and for the action of the Court in giving improper instructions on behalf of the Plaintiffs over the objection of the Defendant; and for the refusal of the Court to give proper instructions offered on behalf of the Defendant; and for the failure of the Court to grant the Defendant's motion to strike the Plaintiff's evidence, which motion the Court doth take under advisement.

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page 39 }

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JUDGMENT.

This day came the plaintiffs and the defendant by their respective attorneys and the Court having maturely considered the motion heretofore submitted to enter final judgment for the defendant *non obstante* or in lieu thereof to grant a new trial as to damages claimed on account of water and mud and damages to the spring reservoir and water system, is now of the opinion that the motion should be overruled; whereupon the said motion is hereby overruled, and the plaintiffs, J. W. Kirk and Velma P. Kirk, recover of the defendant, B. G. Young & Sons, Incorporated, the sum of Two Thousand Two Hundred Fifty Dollars ($2,250.00), in accordance with the jury's verdict, with interest thereon from the 9th day of June, 1959, the date said verdict was rendered, as well as their costs in this behalf expended.

To this action of the Court, the defendant, by counsel, excepted, and on motion of the defendant execution of said judgment is suspended for sixty (60) days from this day, provided the said defendant should within ten (10) days hereof enter into a suspending bond in the penalty of Three Thousand Dollars ($3,000.00), with good security to be ap-

page 35 } INSTRUCTION NO. G.

The Court further instructs the jury that as to the alleged damages caused by water the Defendant had the right to change the flow of the stream and of the surface water and to collect and have the same flow in an artificial channel or volume and to pour over the premises of the Plaintiffs, and unless the jury find from a preponderance of the evidence that the Defendant departed from the proper construction of the road and damaged the Plaintiffs in connection with the water running onto or over their property, they will find a verdict for the Defendant because of the alleged claim of damage from water.

Refused.

J. M. M.

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page 37 } Circuit Court, Pulaski County, Wednesday, the 10th day of June, in the year of our Lord Nineteen Hundred Fifty-Nine.

Present: The Honorable Jack M. Matthews, Judge.

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This day came the parties to this action, by their respective counsel of record, and issue being joined upon the pleadings herein, came also a Jury summoned and selected in the manner provided by law, to-wit: Robert D. Carson, Fred L. Carrico, D. S. Bill, James R. Micou, Fred Hodnett, Fred H. Clark and Howard R. Imboden, who were sworn to well and truly try the issue joined between the Plaintiffs and the Defendant and a true verdict render according to the law and the evidence, and having heard the evidence presented on behalf of the Plaintiffs, the Defendant, by counsel, moved the Court to strike the Plaintiff's evidence, which motion the Court doth over-rule, and to the action of the Court in overruling Defendant's motion, the Defendant, by counsel, excepted; and the Jury having heard all of the evidence, received the Court's instructions and heard argument of counsel, retired to their room to consider of their verdict, and after sometime, returned into Court having found the following verdict, to-wit:

proved by the Clerk of this Court, conditioned according to law.

Enter this 24th day of July, 1959:

JACK M. MATTHEWS, Judge.

* * * * *

page 40 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The Defendant, B. G. Young & Sons, Incorporated, hereby gives notice that it will present to the Supreme Court of Appeals of Virginia a petition for writ of error to the judgment entered against it on the 24th day of July, 1959, in favor of J. W. Kirk and Velma P. Kirk and assigns the following errors:

1. The Court erred in overruling the Defendant's motion to strike the evidence of the Plaintiffs.
2. The Court erred in not setting aside the verdict of the jury and entering judgment *non obstante* in favor of the Defendant, or in lieu thereof, awarding the Defendant a new trial.
3. The Court erred in admitting improper evidence offered by the Plaintiffs.
4. The Court erred in excluding proper evidence sought to be elicited on the cross examination of the Plaintiffs' witnesses.
5. The Court erred in giving improper instructions on behalf of the Plaintiffs.
6. The Court erred in refusing proper instructions tendered by the Defendant.

B. G. YOUNG & SONS,
INCORPORATED
By Counsel.

S. B. CAMPBELL
A. A. CAMPBELL
Counsel, Wytheville, Virginia.

Received and filed, this the 14 day of July, 1959.

MARVIN G. GRAHAM, Clerk.

* * * * *

page 2 } J. W. KIRK,
one of the Plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Nuchols:
Q. You are Mr. J. W. Kirk?
A. Yes, sir.
Q. You and your wife, Velma P. Kirk, are the Plaintiffs in this action?
A. Yes, sir.

* * * * *

Q. Mr. Kirk, you and your wife own a parcel of land over in Draper Valley, is that correct?
A. Yes, sir.
Q. What's the size of this parcel of land?
A. Approximately four acres.
Q. How long have you all owned it?
A. Since July of 1956.
Q. And you have a home constructed on it?
page 3 } A. Yes, sir.
Q. When was this home constructed?
A. It was constructed in the Fall of 1956. We completed the masonary work on it in November of '56?

* * * * *

Q. What did you—what is the material used in the construction of the house. What type of material was used?
A. Solite block, concrete and very little lumber. The roof is all the lumber that's used in it.
Q. What are the inside walls of your house?
A. Block, solite block.

* * * * *

page 4 } Q. What about the outside walls of your house?
A. They're block.

* * * * *

Q. How far down was it excavated for you to put in the foundation?
A. At the back it was approximately 5 feet at one point

and it sloped on off. Maybe the footings in the front were 12 or 13 inches at some point and maybe not that deep at other places.

Q. What is your footing and foundation resting on?

A. Some of it is hard clay and then I have some rock in there.

Q. What percentage of the footing would be resting on clay and what percentage of rock, you recall?

A. Well, no, not offhand I couldn't tell you exactly, but there's right much rock in there.

Q. Did you have to fill any there before you put your foundation or footing in?

A. No, sir, I didn't fill any at all.

page 5 } Q. Then the footing is sitting right on the natural earth, you had nothing removed in there at all?

A. That's right.

Q. What is the flooring of your house?

A. Concrete.

Q. Now, under your concrete floors, what is under that?

A. I hauled rock in there and filled it with rock.

Q. Inside your foundation?

A. Inside the foundation.

Q. Is there any dirt in there?

A. No, there's some shale in there that I put in there to go down in between the rocks. If there's any dirt in it it's very little.

Q. What was the cost of this residence, Mr. Kirk?

A. I had between $4,000 and $4,500 worth of material, and the labor that I paid out was probably $350.00.

Q. That does not include your labor, does it?

A. No, sir.

Q. And the material that went into the property was between $4,000 and $4,500?

A. That's right.

Q. Mr. Kirk, where do you get your water for your residence?

A. From a large spring down below the house.

page 6 } Q. You say down below?

A. Down the hill from the house.

Q. Have you used water from this spring ever since you've been there?

A. Yes, sir.

Q. Does anyone else use water from this spring?

A. Mr. Kirby and Mr. Roop.

Q. Are they your next door neighbors on either side?

J. W. Kirk.

A. That's right.

Q. Do you have any system of storing up water at the spring?

A. Yes, sir, we have a large retaining wall around it that stays full.

Q. Now, Mr. Kirk, when the defendant through its agents and employees began constructing near your house, do you recall the first time that you noticed anything unusual because of the construction in close proximity to your property?

A. Yes, sir, around March. Around the middle of March they started blasting over there and we noticed that some cracks had opened up in the house.

Q. You say this was sometime in March?

A. Sometime in March.

Q. Do you recall when Mr. Lyne and Mr. Williams came to your house, or were you at home on that occasion?

A. They had been there.

page 7 } Q. I mean when they first came to inspect your house?

A. No, I wasn't there at the time.

Q. Mr. Campbell stated that it was on the 6th of March. You recall how soon after the 6th of March you noticed anything unusual in your construction?

A. We had had several jars there and we noticed some cracks appearing in the house, in the mortor joints of the house.

Q. Where were these explosions in relation to your house?

A. North of it I'd say five or six hundred feet. I don't know exactly how far.

Q. Looking straight north of your house you would not see this cut that is in the roadway there, would you? Isn't it a little bit to the northeast of your property?

A. I think so.

Q. Was the first explosion you noticed right directly in front of you or northeast of you?

A. Maybe it was a little more to the northeast, it was in an old quarry, around an old quarry that they had there at one time.

Q. You said you noticed vibrations in your house, what sort of movements could you feel or see there during this blast?

A. You could feel the vibration under your feet when they shot the blast, and it would shake the windows and

page 8 } doors.

Q. How are the windows installed in your house?

A. They're built into the block.

J. W. Kirk.

just couldn't tell you just how many there's in it, but it has been opened up a number of times.

page 10 } Q. I believe you stated that you used solite block, is that correct?

A. *Solie* block yes, sir.

Q. Did the blocks crack?

A. No, sir, none cracked whatsoever, just the mortar joints.

Q. Where are the cracks in the house, are they on one set definite wall, or are they on all the walls?

A. They're on all the walls.

Q. Is that the inside and the outside walls?

A. Yes, sir. They're not as visible inside as they are outside, but you can see them inside a number of them.

Q. I believe your house is a rectangular shape and has four sides, doesn't it?

A. Correct, but there's an offset to the back of it.

Q. Do each of those walls contain cracks in them?

A. Yes, sir.

Q. In addition to the walls are there any cracks in your house?

A. Yes, sir, there's a crack in the floor in a bedroom and a crack in the kitchen.

Q. Are these concrete floors covered with anything in the bedroom or kitchen?

A. No, they're not, they're plain cement floors.

page 11 } Q. What about the other rooms in the house?

A. They have tile on part of them.

Q. And you don't know whether there are any cracks there or not, do you?

A. No, sir, I don't.

Q. When did these cracks in the floor first appear?

A. Sometime in April, I think, I won't be sure, but it was during one of the blasts that I noticed they cracked.

Mr. Campbell: I didn't catch that, Mr. Kirk, what did you say?

A. After one of the blasts I found that they had cracked.

Mr. Nuchols: And he said in April.

Mr. Campbell: About April?

A. Sometime in April, I think. I couldn't be too sure about that.

Q. Are they wooden frames?
A. No, they're aluminum frames.
Q. You say these would shake?
A. Yes, sir, they would shake.
Q. Did this continue, Mr. Kirk, for any length of time?
A. Yes, sir, they continued on for two or three months.
Q. Did you complain to the State Highway Department or B. G. Young & Sons?
A. I complained to the inspector over there.
Q. Do you recall when you first complained to him?
A. Around the middle of May, I think.
Q. Did they come back over and look at your house after you made the complaint?
A. I think the inspector came and looked at the water situation, and it was after that Mr. Lyle and the inspector came over there.
Q. After you made this complaint were there any further blasts that you could feel in your property?
A. Yes, sir.
Q. Can you recall any special time that you had a blast which is distinct in your mind that caused any particular unusual damage?
page 9 } A. It was so often that I didn't keep any dates on it, or anything.
Q. You said this lasted two or three months. Did the damage continue during this two or three month period?
A. Since July I haven't seen any damage to the house.
Q. Is that July of 1958?
A. 1958.
Q. And the blasting and first damage you noticed was in March, 1958?
A. Yes, sir.
Q. During this period of March up into July do you recall approximately how many times you were at home when the blasting disturbed your property?
A. Oh, I guess I was there at least fifteen times and every time they put off a blast you could feel it jar. If you were outside you could feel the ground jar and tremble under you.
Q. Mr. Kirk, before March 6th when Mr. Lyle and Mr. Williams came to your property, were there any cracks at all in your property?
A. No, sir.
Q. What cracks are in there now?
A. There's so many; all over the house is cracked, and I

J. W. Kirk.

Q. Had you checked to see if there were any cracks in it before this?
A. I didn't notice any.
Q. You didn't notice any?
A. No, sir.
Q. You say there is a crack in the reservoir now?
A. Yes, in one of the retaining walls.
Q. What effect does this have on the reservoir?
A. Well, we got a leak around the outside of the reservoir now. I don't know whether that could be leaking from that now, we haven't dug it out to see.

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Q. Have you been without water because of this, or what?
A. Yes, our pump has lost prime several times because there wasn't any water up in the part where we get our water from.

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Q. Mr. Kirk, what has been the condition of the water that you received in your house?
A. It has been real muddy, red mud or reddish cast to it.
Q. Has this affected the pressure of the water in your house?
A. Yes, there in the kitchen I don't have very much water at all, a small stream.
Q. Before this, how was the pressure in there?
A. The pressure was good, I had 40 pound pressure on it.
Q. Do you get mud in your water now?
A. Yes, sir.
Q. How often do you get it or is it a constant thing?
A. Well, if we have a rain it takes an awful long time for it to clear up. And just a mild rain will make it muddy.
Q. Did this occur before the construction from a mild rain?
A. No, we had to have an awful downpour for it
page 15 } to get muddy.
Q. I believe there's a branch that runs along the

Mr. Nuchols: Other than the immediate dwelling are there any other cracks in your property, in your walks or steps, or anything?

A. I had some blocks ready to pour some steps, and there's cracks in those blocks—step blocks.

Q. Is that in the blocks or in the mortar?

A. It's in the mortar joints; it's not the blocks.

Q. Mr. Kirk, it's quite apparent in visiting in your home, and Mr. Campbell I'm sure noticed it, that you

page 12 } have not finished your home, or that you haven't completed the construction of your house?

A. No, I have three window sills and maybe a door to hang, and, of course, I want to put tile on the floors.

Q. What's the reason that this has not been completed?

A. I wanted to wait until I had some understanding about the damage that I had.

Q. And this has been since the spring of 1958?

A. Yes, sir.

Q. Mr. Kirk, I believe you completed the masonary in November, 1956, when did you move into the house?

A. February, '57.

Q. From that time up to the Spring of '58, the water supply to your property just tell the Jury what sort of water supply you had and the condition of it?

A. Well, we had plenty of water. I never was out, and it would get dingy maybe if we had an awful lot of rain, but we could still use it, but since they started construction on the highway there's been an awful lot of water running down through the property there into the spring, and it has at least—I measured the mud and it's got 12 inches of mud in it now, red mud.

Q. In your spring?

A. In the spring reservoir.

Q. Has the blasting had any affect on your reservoir at all?

A. It stayed dry a right good of the time last

page 13 } year.

Q. Do you know why it stayed dry?

A. I discovered a crack in the wall of the reservoir that I had never seen there before.

Q. Had you been around this reservoir much before this blasting while you were building up there and in and about your property there?

A. Yes, sir, several times.

J. W. Kirk.

A. Before they cut a drain ditch down there it went straight out through the field right into the spring.

Q. Right into your spring?

A. That is if we had a large amount of rain.

page 17 } Q. You say before they dug a drainage ditch. When did they dig a drainage ditch?

A. I think it was sometime in January of '59. They had a small one there before hand but I don't think it would take care of the water.

Q. Sometime before that had they talked to you about getting some sort of easement from you to take care of the water?

Mr. Campbell: Mr. Nuchols, I wish you would say who; you say "they," and I would like to know who "they" are.

Mr. Nuchols: Alright, sir.

Q. Did representatives of B. G. Young & Sons and the Highway Department talk to you about a possible easement across your property?

A. The inspectors on the job did, Mr. Farris and some other gentlemen.

Q. Do you recall when that was?

A. I believe it was in May.

Q. May, 1958?

A. In May of '58. I'm not sure but I think that's when it was.

Q. And you say this was dug by B. G. Young & Sons in January or February of 1959?

A. They installed the culvert before then I think, maybe in the fall of '58.

Q. They installed this culvert that brought this water right down beside your driveway, is that correct?

page 18 } A. Yes, sir, but I'm pretty sure it was '59 when they cut this ditch.

Q. On any occasions did you complain to the Highway Department or B. G. Young & Sons about this water coming across your property?

A. I talked to the inspectors on the road a number of times.

Q. A number of times?

A. I don't know how many times but I talked to them several times about it, and I also called them down there and showed them the situation.

edge of your property and fairly close to this reservoir, is that correct?

A. Yes, sir.

Q. When you have large rains do you get some water from this branch in the reservior?

A. I never have seen it since I've been there. I've never seen it get over this retaining wall in the years I've been there from the branch.

Q. You say you've got about 12 inches of mud in the reservoir now, have you seen water and mud coming across your land into this reservoir?

A. Yes, sir.

Q. Mr. Kirk, before they began the construction of this new highway the water that came off the hills around you there had to come down by that branch there, is that correct?

A. Yes, sir.

Q. It flowed down the branch?

A. Yes.

Q. How did it come down across your property before?

A. I had a culvert under the driveway.

Q. Did water come down from Mr. Kirby's side or Mr. Roop's side?

A. Mr. Roop's side.

page 16 } Q. And where would it come from there?

A. It would go under the culvert and on down into the creek.

Q. Coming from the north side of the highway where would the water first come on your side of the highway?

A. It came up on Mr. Harper's property down through a lot and into James Roop's property and then under the culvert there and into ours.

Q. Now, when you would have a large rain where would the water go? Would it go down through these culverts satisfactory?

A. Yes. Of course, a lot of that water seeped into the ground. I wouldn't have as much as some of the other people would.

Q. Now, after the construction where does all of that water go; where does it first come across to your side of the highway?

A. There at the driveway.

Q. Whose driveway?

A. My driveway in a large culvert.

Q. Now, after it comes through there where has it been going?

J. W. Kirk.

I don't know how it is now, but before hand it was marshy and last Summer it was marshy.

Q. I believe your driveway going into your house comes through this bottom land also, is that correct?

A. Yes, sir.

Q. Has this had any effect on your driveway at all.

A. A lot of water has been running down through there and it keeps it real soft.

Q. What was the condition before this occurred?

A. I didn't have any trouble getting in and out.

Q. Did it stay soft with moisture?

A. No, it didn't drain through there like it does now.

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Since they started this construction you've not been able to use this field, is that what you stated before?

A. I had it cut part of it last year, but I didn't get it all cut.

Q. Right now can you get in there with machinery?

A. No, I'd be afraid to put machinery in there.

Q. What would be necessary, Mr. Kirk, to restore that property so that it can be used again as you used it before?

A. I suppose you would have to drain it and maybe ditch it.

Q. What about the overlay of mud?

A. You'd probably have to till it and plow it under.

Q. Do you know approximately how much something like that would cost?

A. No, I don't have any idea with equipment to dig drains, but I guess it's pretty expensive.

Q. You don't have any idea yourself, how much it would cost?

A. I'd be afraid to say, maybe a couple of hundred dollars, that is, to drain it and get it back into shape.

Q. Where would you have to drain it? Would you have to drain it toward your spring, or how long ditches would you have to put in?

A. You would have to drain it away from the
page 22 } spring I guess.

Q. Toward the branch?

A. Yes, toward the branch.

Q. You called which one of the gentlemen down?

A. Mr. Farris. I think he was the inspector then, and I'm sure he was when I called him maybe the first part of '59.

Q. Was it subsequent to this that the drainage ditch was dug, after you made your complaint?

A. It was after they dug a larger ditch to take care of the water.

Q. Now, Mr. Kirk, this bottom land you refer to that this water flowed over, what was the condition of this land before this occurred? What was it used for?

A. It had been used for grazing and it was real fertile and we had raised a good bit of hay on it, and had it cut every year.

Q. Did you have hay cut off that section?

page 19 } A. Yes, sir.

Q. And did you yourself graze any animals on it?

A. I did before the highway department came through. I had a milk cow.

Q. What was the condition of the soil there, what type of soil did you have there?

A. It was real rich, black soil.

Q. True bottom land, is that it?

A. Yes, sir.

Q. What's the condition of it right now?

A. There's right much mud in it and part of it's marshy. I tried to have it mowed last year and the tractors couldn't mow it all because it was marshy.

Q. You know how deep the mud is?

A. No, I don't but it was scattered over a large portion of it.

Q. Is it an inch, or less than that or more than that?

A. It's more than an inch.

Q. How large an area would you say this bottom land is in acres?

A. Well, I guess it's approximately a half an acre, maybe more. I don't know for sure. It could be more or less, I just don't know.

Q. You also stated, I believe, that it's marshy?

A. Yes, sir, one side now is marshy and stays

page 20 } real damp.

Q. Does any water stay on it?

A. Yes, sir, but I haven't been in there since Spring and

J. W. Kirk.

Q. The blocks were cracked?
A. Yes, sir.
Q. In your opinion, are the cracks in your house similar to these that you had worked with before?
A. No, sir.
Q. I believe you stated that all of these are just in the mortar?
A. The mortar joints, yes, sir.
Q. Is there a single block in your house cracked?
A. I think there's one in the planter on top that was cracked when I put it in.
Q. The planter?
A. The planter on the outside of the house.
Q. Are any of the blocks in the house itself cracked?
A. Not that I know of. I haven't seen any.
Q. Have you checked your house to see?
A. There was one little crack in one block I used in a partition wall in the back of the house where you enter through the kitchen, but that was there when I put it in.
Q. There's no long line of cracks through any wall through the blocks in your house?
A. Not through the blocks, just the mortar joints.

page 25 } Mr. Nuchols: That is all, Mr. Campbell.

CROSS EXAMINATION.

By Mr. Campbell, Sr.:
Q. Mr. Kirk, coming first to the land that you have there that was overflowed, that all lies on the east side of this branch now?
A. Yes, sir.
Q. That is between the road that goes up to your house and the branch?
A. Yes, sir.
Q. Is there any below the spring?
A. Some of the land is down below the spring.

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Q. And that has been overflowing with this fresh dirt, red clay from the road, hasn't it?

Q. How long would the ditches have to be approximately?
A. Maybe a hundred feet.
Q. Mr. Kirk, you stated that through your water system that you get mud through your system?
A. Yes.

* * * * *

Q. You had Mr. Chumbley over there to make an estimate to clean the mud out of your system?
A. Yes, sir, and the spring.
Q. What about repairing the reservoir walls. You're in the masonary business, approximately how much would that cost?
A. Digging out around the walls and pouring the concrete and the labor would probably cost maybe $50.00.
Q. In the process you would have to drain the water out of it?
A. Yes, sir, you would have to drain it to get the
page 23 } mud out and repair that crack if it's leaking there.
Q. Have you had anyone to examine your residence to give you the cost of repairing your residence—the cracks in your walls?
A. Yes, sir.
Q. Who have you had to do that?
A. Mr. Fred Swinburne over there and Mr. Vanhoy and Mr. Phelps—George Phelps?
A. You've had all three of these gentlemen to inspect it?
A. Yes, sir.
Q. Mr. Kirk, these blasts that you testified to how far away would they be from your property?
A. In some of the culverts they were probably four or five hundred feet, or more, or further away I guess, up on the hills. I don't know exactly how many feet.
Q. Some would be as close as four or five hundred in your opinion?
A. Some of the blasts, yes, sir.

* * * * *

Q. Are you personally familiar with cracks in masonary walls caused by settling?
A. I've seen some that apparently was caused
page 24 } by settling, but the blocks were cracked all the way up, you know, in the center, and some of the mortar joints, but the blocks were cracked all the way up.

J. W. Kirk.

Q. And no wash at all from the land that lay between the old road and the quarry?

A. If it was that water went down the branch.

Q. It went down the branch and so far as you were concerned it was practically nothing?

A. That's right.

Q. It was in grass or some sort of vegetation, except right around the old quarry?

A. They cleaned off the top soil to some of the rock.

Q. I mean before any construction was done?

A. That was done before I went there. I think the state probably did that, I don't know.

page 29 } Q. You think the state did that. Anyhow, the new construction has made a much greater flow of water than use to be?

A. That's right.

Q. Now, Mr. Kirk, I hand you this certified copy of this deed dated the 26th day of November, 1957. I suppose you gentlemen are familiar with it.

Mr. Nuchols: Yes, I am.

Mr. Campbell, Sr.:

Q. And will ask you to look at that and see if that is the deed that you and Mrs. Kirk executed to the Highway Department or to the Commonwealth of Virginia rather?

A. As far as I know this is about the same.

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page 30 } Mr. Campbell: We offer this deed, your Honor, please as Defendant's Exhibit No. 1.

The Court: Let it be so introduced.

Mr. Campbell:

Q. No, the date of that deed seems to be November 26, 1957. As I wrote you down, and I want you to correct me if I'm wrong on that, that your house was build in the fall of 1956?

A. I completed the masonary work in the fall of '56, in November I'm pretty sure it was.

Q. Then when did you move in?

A. February, 1957.

Q. You were living there then when you and Mrs. Kirk executed this deed of November 26, 1957?

J. W. Kirk.

A. Yes.

Q. And all of that came from the road work, didn't it?

A. I never had any dirt to wash in there before.

Q. Before the branch ran on what we call the south side; that's the side your house is on or the old road?

A. The branch ran—I guess the west side.

Q. If you're going toward the truck stop up there it would be on your left side?

A. On the left side.

page 27 } Q. The same side of the road your house is on? Whatever points of the compass that might be.

A. Yes, sir.

Q. You had a pipe under your driveway?

A. Yes.

Q. What size pipe was that?

A. Oh, I don't remember.

Q. Something like an 8 or 10 inch pipe?

A. I don't remember what it is now.

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Q. They made a channel change there in constructing the highway there, didn't they?

A. Yes, sir.

Q. And put the branch on the other side of the road from where it had been before?

A. Well, there wasn't very much water that ran down through there unless we had a lot of rain.

Q. But what you had in there would go down on the other side of the road?

page 28 } A. Yes.

Q. And then they have put a 5 foot culvert there under the new big road, haven't they?

A. Yes, sir.

Q. And water comes from all up where that old quarry used to be, and comes under there, doesn't it?

A. Yes.

Q. And that overflowed onto your bottom there, that half an acre, you think?

A. Yes, sir.

Q. And water came in that way. Before the road was built there was practically no wash from that road, was there?

A. No, sir.

A. Yes, sir.

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Q. Mr. Kirk, coming back to our water situation, I understood you to say that at times the water was dingy
page 31 } before the highway did any work?
A. Yes, sir, with an awful lot of rain it would get dingy.
Q. But you had an abundant water supply?
A. Yes, sir, plenty of water.
Q. Is that fed by a spring?
A. Yes, sir.
Q. Have you noticed whether or not you get as much water from your spring as you did before?
A. It don't run over as much as it did.
Q. The flow of the spring has been lessened?
A. I don't say the flow of the spring has been lessened, but I can notice a large amount of water going around the walls.

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Q. And is there as much water running from the spring now as there was before this highway construction?
A. I guess there would be including this water going around this retaining wall, and of course, there's
page 32 } not very much spilling over.
Q. And you estimate that $50.00 would fix your retaining wall back like it was?
A. As far as I know. You don't know exactly until you tear into it.
Q. And what has happened to that retaining wall?
A. It's a crack in it.

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Q. Have you got an electric pump?
A. Yes, sir.
Q. And that pumps the water up to your house?
A. Yes.
Q. The water in your reservoir, does that have
page 33 } anything to do with the amount of pressure on your electric pump?
A. No, it doesn't have anything to do with the pressure

J. W. Kirk.

on the electric pump. If the water gives out of the reservoir the pump will lose prime. You've got to have plenty of water in there all the time.

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Q. Now, you made a complaint along in May to the inspector there on the job about your water?

A. Yes, sir.

Q. You remember whether that was Mr. Farris or Mr. Williams?

A. No, I don't. I believe it was Mr. Farris.

Q. Turn around and look at these gentlemen and see if you recognize which one it was?

A. This one, Mr. Farris, I believe.

Q. That's Mr. Farris. All you complained of then was your water?

A. I think I told him that the house had been opened up.

Q. You think you had? You won't be certain of that?

page 34 }

A. No, I won't be certain.

Q. But you did complain about the water?

A. Yes, sir.

Q. And didn't they explain to you that if you would give them an easement there to widen that channel they would do it?

A. Yes, sir.

Q. And that was the Highway Department, the inspector, that you made that agreement with, wasn't it?

A. I agreed to let them have an easement at that time.

Q. And that was in connection with the construction of that road, wasn't it?

A. It was on my property.

Q. It was on your property there and you agreed for them to do that, and a 10 foot channel, wasn't it?

A. Yes, sir.

Q. And they constructed it, didn't they?

A. No.

Q. Didn't grade out the channel there?

A. At that time they might have—I don't remember when they did it, but they might have put a little drain down there maybe with a dozer.

Q. They might have had a dozer in there and worked on that 10 foot there that was outside the original—

A. No, not on there because they didn't get the easement.

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page 35 }

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Q. And they did some work there in cleaning out that channel for you, didn't they?

A. They cut a shallow channel down there.

Q. They cut a channel for that water to go in. And also, didn't the inspector tell you that they would fill in there and raise the level so that it would keep all the water from coming on you?

A. They told me they would fill the place in with dirt.

Q. And you didn't agree for them to do that, did you?

A. No, because I didn't think I could use it any more if I did.

Q. And they told you they would put top soil there, didn't they?

A. I don't remember whether they did or not.

page 36 } Q. That they would fill in with the excavated dirt and give you some top soil on top of that?

A. I don't remember about that.

Q. You don't say about that, but you know you refused to let them fill that up to keep the water from flowing over?

A. If they fill it up you would still get water down through it. We'd get muddy water from the red dirt if we had any rain.

Q. So there wasn't anything that could be done to fix that to keep you from getting muddy water?

A. It would have taken some time.

Q. You mean it would have had to grassed over?

A. That's right.

Q. And there was no way until you could have grassed that over to keep the muddy water from coming down there?

A. It would have taken some time to do it.

Q. When you were at home, were you there the day that Mr. Williams and Mr. Lyle came up there in March, 1958?

A. No, sir, I wasn't. I was working then at that time.

Q. Were you at home when any blasting was done?

A. Yes, sir.

Q. When was that, can you tell us?

J. W. Kirk.

A. I was home a number of times between when they started and on up.

page 37 } Q. Until the blasting was all done?

A. Well, they haven't completed it yet, but I was there and I've been there ever since, a part of the time.

Q. That land is right much rock, isn't it?

A. Quite a bit.

Q. Where the road is built?

A. Yes, sir.

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page 55 }

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RE-DIRECT EXAMINATION.

By Mr. Nuchols:

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page 56 }

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Q. This 10 foot easement that they wanted to use, did they want you to give it to them or were you going to give them that valuable consideration?

A. They wanted me to give it to them.

Q. And you didn't give it to them?

A. No, I didn't. I agreed to before but I finally decided not to.

Mr. Nuchols: That's all.

RE-CROSS EXAMINATION.

By Mr. Campbell, Sr.:

Q. You agreed with them when you talked to Mr. Farris or Mr. Williams and then changed your mind?

page 57 } A. That's right, it wasn't done right away.

Mr. Campbell: Alright, that's all.

Witness stands aside.

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page 61 } F. J. SWINBURNE,

another witness called on behalf of the Plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Nuchols:

Q. You're Mr. F. J. Swinburne?

A. That's right.

Q. Mr. Swinburne what is your occupation?

A. General building contractor.

Q. How long have you been in this business?

A. About the last ten years in Virginia.

Q. Right here in Pulaski?

A. Yes.

Q. What type of construction work do you do?

A. General building of industrial and residential.

Q. You do some industrial building also?

A. Yes.

Q. Approximately how much of your would be industrial and how much residential?

A. Oh, I expect it would run about fifty-fifty.

Q. Mr. Swinburne, did you inspect the property of Mr. and Mrs. J. W. Kirk in Draper Valley?

A. Yes, I did.

Q. You recall when you inspected the property?

A. I don't exactly, it was this winter sometime.

page 62 } Or the early part of January.

(Mr. Nuchols hands paper to witness and also copy to opposing counsel).

Q. You say the early part of January of this year?

A. 1959, yes.

Q. What was the purpose of your inspection at this time?

A. To determine the repair costs on the residence.

Q. What repairs did you determine were needed?

A. Well, it was mostly in the cracking in the mortar joints and all around the house, and it was also in the house and the slab itself in the concrete. And, of course, I itemized all of them in this list here, everything that I saw.

Q. How many cracks did you find in the house?

A. I don't know, there was quite a few of them though. They was numerous.

Q. Do you have them in your report there?

A. I have the number here that would have to be repaired, yes, I do.

F. J. Swinburne.

Q. Would you state to the Jury how many that is?
A. The following list designates the number and location of solite blocks in which the mortar joints showed cracking:

On the south side of the house there were 33; on the east side there were 24; on the north side of the house there were 39; and on the west side of the house 96.

Q. That is a total of almost 200, is that correct?
page 63 } A. Yes, sir.
Q. Now, these cracks you state were in the mortar, did you find any cracks in the solite blocks themselves?
A. No.
Q. How were the cracks, were they mostly horizontal or vertical cracks?
A. The majority of them were horizontal.
Q. Did you find any other cracks in the house?
A. In the floor in the northeast bedroom and in the kitchen of the house cracking in there.
Q. Any of the window sills were they cracked?
A. Yes, they were.
Q. Did you make an examination of this property and determine the cost of repairing the cracks in the property?
A. Yes, I did.
Q. And replacing the mortar, putting new mortar in?
A. That's right, what we would ordinarily call tuck pointing those joints. Grinding them out and then tuck pointing them.
Q. That's grinding out in between the solite blocks, grinding out the old mortar and putting new mortar back in?
A. That's right.
Q. What was your estimate of the costs?
A. The total would have been $1,436.93.
Q. That is the total of your estimate of the cost?
A. Yes, that's right.
page 64 } Q. Is this the original of your estimate?
A. Yes, sir, it is.
Q. And it shows $1,436.93?
A. That's right.

Mr. Nuchols: We would like to make this Exhibit A of the Plaintiff's evidence.

Estimate received and filed as Exhibit A of Plaintiff.

Q. Mr. Swinburne, are you familiar with damage of cracks in buildings caused by settling?

A. Yes, I am. I've seen quite a lot of them anyhow.

Q. You've worked on repairing them etc.?

A. Yes, I have.

Q. From what you could see with your own eyes of the cracks in this building, did they appear to be the type of cracks which would have been caused by the settling of the land underneath the foundation?

A. Not in my opinion they wouldn't be.

Q. What sort of cracks do you normally get from settling?

A. Most of the time in settling you'll find they don't settle in a continuous place. One part of the wall will settle and when it does the mortar joints in the masonary wall will open up vertically in a zig zag line and then follow the mortar joints that go down the wall.

Q. Was this true in this house, did it have that

page 65 } type of cracks?

A. No, the majority of the cracking was in the horizontal line on this house.

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page 67 } J. E. WILLIAMS,

another witness called on behalf of the Plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Nuchols:

Q. You are Mr. J. E. Williams?

A. That's right.

Q. What is your position, Mr. Williams?

A. Inspector with the Highway Department.

Q. You work for the State of Virginia?

A. Yes, sir, in the Highway Department.

Q. In March of 1958, March 6th, to be exact, did you have an occasion to inspect the property of Mr. and Mrs. Kirk?

A. Yes, I did make an inspection.

Q. Who accompanied you at that time?

A. *My* Lyle, the Superintendent and representative of the contractor.

Q. That's Mr. Cecil Lyle?

J. E. Williams.

A. That's right.

Q. And he is Superintendent for B. G. Young & Sons?

A. That's right.

Q. At the time you inspected this property did you find any cracks whatsoever in the walls or the flooring of the Kirk property?

page 68 } A. We found no cracks.

Q. Is that the purpose for which you made the inspection?

A. To make a check prior to our dynamiting.

Q. Were there any in the floor?

A. None that I observed.

Q. Again that was your main purpose for going there?

A. Yes.

Q. Now, subsequent to this date of your inspection, were there blasts shot within 1000 feet of the Kirk property by B. G. Young & Sons?

A. No shots prior to this.

Q. Subsequent, after March 6th, after this inspection?

A. I have the record here (witness checks record).

Yes, there were shots pulled within the same area after the 6th of March.

Q. Alright, sir, then after that date, after the 6th of March and after the blasting occurred, did you again inspect this property?

A. Yes.

Q. And who were you with on this occasion?

A. In the presence of Mr. Lyle and with the B. G. Young & Sons contractors, and Mr. Leo Farris who is now the inspector on the project.

Q. He is also with the Department?

A. He is with the Department.

page 69 } Q. What day was this, do you recall?

A. It was around the first of July of '58.

Q. Which was not quite four months after you had first inspected it?

A. That's correct.

Q. And had there been considerable blasting in between this time, this four months period?

A. No, I wouldn't say there had been considerable blasting, but we had done quite a bit in that area. But in the meantime I had been moved from this project to another and I was not present all the time. I have forgotten the exact day I was relieved of the project there, whether it was in April or the first of May.

Q. Oh, I see, when you inspected it in July you had actually been moved from this job?

A. I was not on the project, no, sir.

Q. Oh, I see. At this time what did you find in regard to cracks as far as the Kirk property was concerned?

A. We found several cracks in the structure.

Q. Did you find them in just one wall, or how many walls did you find them in?

A. To my best recollection I found one at the base which was the main crack we inspected that day and then some around the windows. I don't remember seeing the ones in the floors at the time I was with them on the inspection that has been mentioned prior.

page 70 } Q. Did you make any record whatsoever of the number of cracks?

A. No, I did not. I think Mr. Farris made a record of that. I think Mr. Farris did but I'm not sure. He made a written record of it.

Q. At this time he was the actual inspector?

A. He was the actual inspector in charge of the project, yes, sir.

Q. Mr. Williams, were you the inspector of the contract or for the state that contacted Mr. Kirk for the 10 foot easement?

A. No, that was after I had been removed from the project.

Q. You were not there then?

A. No, sir.

Mr. Nuchols: That's all.

CROSS EXAMINATION.

By Mr. Campbell, Sr.:

Q. Mr. Williams, you were the State Highway inspector in the job over there?

A. Yes, sir.

Q. You recall when you left?

A. It was the latter part of April I believe. I can check and see here just a minute.

Q. Alright, sir.

(Witness checks record).

page 71 } A. It was May 20, 1958.

Q. You were up there until May 20, 1958?

J. E. Williams.

A. Yes, sir.

Q. And you were in particular charge of this place where the work was being done there next to Mr. Kirk's, were you?

A. Yes, sir.

Q. What was the general nature of the ground there, Mr. Williams?

A. Well, it was an old quarry and more or less a solid rock formation back of it.

Q. Was it necessary to blast in order to build a road in there?

A. Yes, sir.

Q. Now, while you were there was any blasting done that was not ordinary, customary and usual on like jobs to that?

A. No, sir, I don't think there was any excessive blasting.

Q. And the blasting was a normal and natural procedure on that job?

A. Yes, sir, I think so.

Q. Did your plans also call for a channel change there and a diversion of a small branch?

A. Yes, sir.

Q. And was that done?

A. That drainage part had not been completed page 72 } when I left.

Q. I see.

A. They had only installed a short section of pipe.

Q. Mr. Williams, the affect of the work there on this highway was to uncover a whole lot of red clay and leave that bare and liable to wash in any kind of rain?

A. Yes, sir, I think that's the general practice.

Q. You can't build a road without doing that, can you?

A. That's right.

Q. And was there anything done there while you were there except what was called for in the plans of the Highway Department?

A. No, everything was carried out according to specifications.

Q. And Young & Sons were the contractors who had the job in charge, were they?

A. Yes, sir.

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page 73 }

page 75 } with damaged property, property that has been cracked caused by settling of the earth, or cracks caused by vibration?

A. I've had right much experience with settling. This I would say was different from any settling problem I ever had. I've had problems where occassionally you have some rock sticking up in the footing of the wall, and that will most always cause a vertical crack. Most of the time all the way from the top to the bottom, but it won't cause cracks similar to what we observed over there. It would seem to be more shattered crack or expansion cracks or—

Mr. Campbell, Sr.: We object to that, your Honor.

The Court: I overrule your objection.

Mr. Campbell, Sr.: Unless he is a man of experience, your Honor, as to the causes and affects of explosions, we object to that. And it has not been shown that he has had experience. He said he has had right much experience in settling.

The Court: I think this gentleman is qualified as an expert and I overrule your objection.

Mr. Campbell: Exception.

Mr. Nuchols:

Q. From your examination of the property and the cracks, what was the cause of the cracks?

Mr. Campbell: Same objection to that question.

The Court: I overrule your objection.

Mr. Campbell: Exception.

page 76 } A. To start with, Mr. Kirk explained the construction he used. He explained the fact that the building had been inspected before—

Mr. Campbell: We object to what Mr. Kirk told the witness. Mr. Phelps can tell what he found.

The Court: I overrule your objection. He is stating facts and it's up to the Jury to determine how much weight to give to this. The question is proper.

Mr. Campbell: Exception.

A. He explained there were no cracks previous to any blasting. I was not there before and I was not there when

GEORGE D. PHELPS,
another witness called on behalf of the Plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Nuchols:
Q. You are Mr. George D. Phelps?
A. Yes, sir.
Q. What is your occupation or business?
A. I'm in the general building and contracting.
Q. How long have you been in this work?
A. Well, contracting I'd say about the last ten years. And on construction work for about twenty or twenty-five.
Q. You do your contracting here in this vicinity?
A. Yes, and around the county as a whole.
Q. Mr. Phelps, did you inspect the property of Mr. and Mrs. J. W. Kirk at their request in the last year?
A. I did. I believe it was in October that I
page 74 } made the first inspection.
Q. Mr. Phelps, when you examined this property what did you find that was necessary to repair?
A. I found that numerous cracks, mostly horizontal, some around the lintels and sills of the windows, cracks in the floors and some on the interior walls.
These joints could all be ground out or chisled out and repointed. And you would still have a patched job.
Q. You would still have a what?
A. A patched job.
Q. Would this be true even after you painted the walls?
A. I would say so.
Q. Did you make an estimate as to the cost of repairing this?
A. Roughly. I didn't itemize it for future reference. I was in hopes I wouldn't be called on it. I don't even recall what the total figure was. But if I may I will read the statement I made in this letter.

Mr. Campbell, Sr.: We object to that, your Honor. We do not object to anything but the first paragraph, but the first paragarph gives a conclusion of the witness.
The Court: You may examine that and refer to it but not read from it, but testify from it by refreshing your memory.

Mr. Nuchols:
Q. Mr. Phelps, before we get into that, have you worked

L. G. FARRIS,
another witness called on behalf of the Plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Nuchols:
Q. Your name is L. G. Farris?
A. Yes, sir.
Q. What is your position?
page 78 } A. Inspector with the Virginia Department of Highways.
Q. Were you working on the job of the Kirk property?
A. Yes, sir.
Q. And is it your job to inspect the work as it progresses which Mr. Young's company does?
A. Yes, sir.
Q. How long have you been on this particular job over there?
A. Since January of '58.
Q. I believe Mr. Williams was there as inspector also part of that time?
A. Yes, sir.
Q. On any occasion did you along with Mr. Williams and Mr. Cecil Lyle inspect the Kirk property because of complaints?
A. Yes, sir, we did.
Q. Do you recall when that was?
A. No, sir.

The Court: You may refer to your notes.

A. (Witness inspects notes) On July 1st, is the first inspection I made in the company of Mr. Lyle and Mr. Williams.
Q. What did you find on that occasion as far as cracks in this property is concerned?
A. I will read a transcript from this.

The Court: No. Just refer to it and then testify; if you want to refresh your memory about it you may do so.

A. We found cracks in the wall between the
page 79 } joint of the block running transversly around the house from the front to the rear of the floor elevation. A vertical crack in the rear, which would be the east side of the house; small cracks on the inside around the

the blasting went off, but I can testify that the cracks are in the manner just described, and that is what I had to base my belief on.

Mr. Nuchols:
Q. What was your opinion?

Mr. Campbell: Object for reasons previously assigned.
The Court: I overrule your objection.
Mr. Campbell: Save the point.

Mr. Nuchols:
Q. What did you state to Mr. Kirk in your report to him?

Mr. Campbell: Objection.
The Court: I sustain your objection.

Mr. Nuchols:
Q. What is your opinion as to the cause of these cracks?

Mr. Campbell: Objection.
page 77 } The Court: Overruled.
Mr. Campbell: Exception.

A. We figured—I made one trip there. I also took another man, a brick mason back with me and we estimated the cost of repair would be about $1,500.00, but you would still have a patched job. So then we would figure maybe $1,000.00 for permanent damage to the construction, which might reoccur since it was cracked.

Mr. Nuchols:
Q. That was your two figures, $1,500.00 for repairs, and $1,000.00 for damage?
A. Yes.

Mr. Nuchols: That is all.
Mr. Campbell: That is all, thank you.

Witness stands aside.

At 1:50 a ten minute recess.

windows running from the lintels vertically downward. I believe that was all.

Q. Did you inspect the spring and the reservoir?

A. Yes, sir, I inspected that earlier.

Q. What had you found there.

A. At the time I first inspected it, the reservoir itself was somewhat lower from my previous inspection. I had looked at this spring before, not in the line of duty particularly, but just when we were constructing the culvert in that area, but the reservoir was lower somewhat and was evidentally draining subteraneously or through the wall.

Q. Was this after the blasting had commenced in this area?

A. Yes, sir.

Q. Did you inspect the reservoir as to its condition so far as sediment is concerned?

A. Yes, sir.

Q. What did you find?

A. There was mud in it.

Q. What about the land between the highway and the spring, did you inspect that?

A. Yes, sir.

page 80 } Q. What did you find there?

A. An overflow of mud had washed in upon his land.

Q. Now, Mr. Farris, do you recall the date the culvert was put in that comes from the north side of the highway and comes out right by Mr. Kirk's driveway?

A. No, sir, I do not. It was placed last fall.

Q. That was the Fall of '58?

A. '58.

Q. Before that date had you conferred with Mr. Kirk concerning securing an easement for water?

A. Yes, sir.

Q. When had you conferred with him?

A. May 21, 1958, sir, according to our records.

Q. You keep a diary or something of the activities there on the job?

A. Yes, sir.

Q. And that was in your diary?

A. Yes, sir.

Q. And was that some three or four months before the culvert was actually put in in the fall?

A. Yes, sir.

L. G. Farris.

Q. Then three or four months before you had tried to get an easement to take care of this water?

A. Yes, sir.

Q. Now, when did B. G. Young & Sons Company dig a ditch leading from the culvert to the spring,

page 81 } do you know?

A. I don't quite understand your question, sir.

Q. Coming from the culvert down to the branch on Mr. Kirk's property—the branch is on the west side—it has been testified to that a ditch was dug along there, when was this ditch dug?

A. The ditch was first dug right after Mr. Kirk's first complaint. It was May 20, '58, and shortly thereafter there was a ditch dug from his culvert.

Q. Did Mr. Kirk complain to you up in January or February, 1959, concerning water on his property?

A. Yes, sir, he did.

Q. At that time had there been a ditch sufficient to carry the water coming out of this culvert on down to the branch before he complained to you, was there a ditch there sufficient to carry the water?

A. Yes, sir.

Q. Did it carry the water?

A. Yes, sir, it did.

Q. Did it carry all the water that came through there?

A. Apparently it didn't carry a heavy rainfall that occurred one evening.

Q. When was this?

A. According to the Highway Department records on the 22nd of January in '59.

Q. On that occasion did you go down and look

page 82 } at the water?

A. No, sir, I did not.

Q. On previous occasions did you go down when it was raining to see whether this ditch was carrying it?

A. Yes, sir.

Q. Each time it rained?

A. No, sir.

Q. Then you don't know whether each time it rained the ditch they dug carried the water, is that correct?

A. No, sir.

Q. Was it more than once that Mr. Kirk complained to you about this overflow in January, 1959?

A. I really don't remember, sir. Perhaps he did on occasions.

L. G. Farris.

Q. Does he stay on the job there most of the time?
A. Yes, sir.
Q. Mr. Farris, as the inspector on this job, do you keep a record of the size of the dynamite blast or shot and the dates of these shots on this particular job?
A. Yes, sir.
Q. Do you have a record of the first blast which was made near the Kirk property, which was apparently made on the 7th as has been previously testified to that Mr. Williams and Mr. Lyle went to the Kirk property on the 6th, the day before the first blast? Do you have a record of that?
A. Yes, sir.

The Court: 6th of what?
Mr. Nuchols: I'm sorry, the 6th of March, 1958.

Q. What does your record show what size blast was detonated on that day?
A. According to our record it was 4,000 pounds.
Q. That's approximately two tons?
A. Yes, sir.

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Q. Where was the blast in relation to the Kirk property? Was it north or northeast?
A. It was somewhat northeast of the Kirk property, approximately 550 feet from his dwelling to the very edge of the blast area.
Q. What about the following day, was there a blast fairly close to the Kirk property, within 1,000 feet?
A. Yes, sir.
Q. What was the size of that blast?
A. According to our records it was 3250 pounds.
Q. And what was the distance from the Kirk residence?
A. Approximately 550 feet.
Q. Now, did blasting continue in this vicinity for sometime?
A. Yes, sir, it did.
Q. Do you have the records which will show the next blast which would contain more than 1,000 pounds?
A. Yes, sir.
Q. What day was that on?
A. According to the records on April 2, 1958.

Q. Do you have your diary with you right now that has January, 1959?
A. Yes, sir.
Q. Would you open it to the date of the 22nd of January?
A. Yes, sir.
Q. Do you have it?
A. Yes, sir.
Q. On these dates—does that date show that Mr. Kirk made a complaint to you? Does your records there show that he made a complaint to you?
A. Yes, sir.
Q. Right on the 22nd of January, 1959?
page 83 } A. Yes, sir, it is.
Q. What was his complaint at that time.
A. According to this it was that the surface water had drained into his spring.
Q. Did you determine the cause of this?
A. Yes, sir, we looked at it.
Q. What did you determine was the cause of that?
A. An overflow from the culvert that had been placed at that location that flowed out across his property into his spring.
Q. What had B. G. Young & Sons done about the overflow coming out of that culvert?
A. Prior to this they had done nothing.
Q. Since then have they done something?
A. Yes, sir.
Q. On the 29th of January, would you open your book for that date also?
A. Yes, sir.
Q. Did Mr. Kirk again make a complaint to you on this day?
A. Yes, sir.
Q. What was his complaint on that day?
A. Apparently it was the silt, mud, etc. that had washed into his spring.
Q. Had the contractor by this time done anything from the 22nd to the 29th?
page 84 } A. No, sir.
Q. What did you do about it, Mr. Farris?
A. I brought it to the attention of the Superintendent.
Q. Had you done that previously?
A. I don't remember, sir.
Q. The Superintendent was Mr. Cecil Lyle?
A. Yes, sir.

L. G. Farris.

A. July 5, 1958, was 1150 pounds.
Q. And how far from the house?
A. Approximately 600 feet.
Q. And did you have any more?
A. July 12th, approximately 2,000 pounds at approximately 800 feet.
Q. From the house?
page 88 } A. Yes, sir.
Q. Mr. Farris, did you make a report to Mr. N. B. Harvey, Jr., of the Christiansburg office, on December 16, 1958, concerning the Kirk property?
A. Yes, sir.
Q. Was this the report labeled "Interdepartmental memorandum"?
A. I suppose so, sir.
Q. And you personally made the report to Mr. Harvey? I mean you drew the report itself?
A. Yes, sir.
Q. Report to the contractor, the defendant in this case, the result of your examination—

Mr. Campbell, Sr.: Your Honor, please, we don't think that is a proper matter. The witness is on the stand and certainly has answered every question fairly and frankly that has been asked him.
Mr. Crowell: Your Honor, please, we're asking the witness if he made a report to the contractor the results of these various inspections and what he found.
The Court: He can show that he made that report but he can't read from it.
Mr. Nuchols: Now, we just want to know if he reported to the contractor that?
page 89 } The Court: Yes, sir, that's right, and I don't think Mr. Campbell objected to that.

By Mr. Nuchols:
Q. Did you report to the contractor the result of your investigations that you made?
A. Yes, sir.

Mr. Nuchols: That's all, Mr. Farris, thank you.
The Court: Let me ask Mr. Farris one question.

Q. Mr. Farris, did this blasting that was done, was that

Q. And what was the size of this blast?

A. 3250 pounds.

page 86 } Q. And what was the distance from the residence?

A. Approximately 600 feet.

Q. What was the next blast which would contain more than 1,000 pounds?

A. On April 4, 1958.

Q. What was the size of it?

A. 8,750 pounds.

Q. That's approximately four tons of dynamite?

A. Yes, sir.

Q. And what was the distance from the house?

A. Approximately 750 feet.

Q. Alright, sir, and what's the next one of 1,000 pounds?

A. April 9, 1958.

Q. What was the size of it?

A. 3700 pounds according to our records.

Q. And the approximate distance from the house?

A. 550 feet.

Q. And the next one above a thousand?

A. April 16, 1958, sir.

Q. And what was the size of that?

A. 6700 pounds.

Q. That's a little more than three tons, is that correct?

A. Yes, sir.

Q. And what was the distance from the house?

page 87 } A. 800 feet approximately.

Q. Alright, sir, and the next one?

A. April 23, 1958.

Q. And what was the size of it?

A. 7100 pounds.

Q. And what was the distance from the house?

A. Approximately 750 feet.

Q. Alright, sir, what was the next one above a thousand pounds?

A. April 30, 1958.

Q. What was the size of that?

A. 1350 pounds.

Q. And the distance from the house?

A. Approximately 600 feet.

Q. And I believe it has been testified, Mr. Farris, by Mr. Kirk that the damage to his property went into July, but after that he didn't notice any additional. Did you have any blasts in July which were in excess of 1000 pounds?

L. G. Farris.

22, 1959. And I believe you were kind enough to
page 91 } furnish both Mr. Nuchols and us with a copy of this. Does that show anything about the rainfall on that date?

A. Approximately two inches of rain fell during the evening.

Q. Is that or not a very heavy rain?

Mr. Nuchols: I would object to this witness answering that question. He's not a meteorologist, and I think the Jury can make a determination about that and not Mr. Farris.

The Court: I sustain the objection.

Mr. Campbell: Alright, sir.

Q. Two inches of rain fell that afternoon and it was shortly after that he made his complaint, is that right, sir?

A. No, sir. This entry was made on January 22nd, which means the rain would have fell January 21st.

Q. On the afternoon of the 21st, I catch you. And it was on the 22nd that Mr. Kirk complained of the water across his property?

A. Yes, sir.

Q. Now, in the construction of that road, was it necessary to leave a great deal of bare, take the vegetation off of it and what not?

A. Yes, sir.

Q. Then is there any way to keep the rain water from washing the dirt off under those conditions?

A. No, sir, not immediately.

Q. You have to grass it over?

page 92 } A. Yes, sir.

Q. And that would take at least a year or longer?

A. Perhaps.

Q. Now, during the time that you were on this job—just a minute, how long have you been with the Highway Department sir?

A. Ten years.

Q. Have you been inspector on other jobs besides this?

A. Yes, sir.

Q. You've had experience in the necessity of blasting out limestone rock for the construction of roads?

A. Yes, sir, very little.

Q. State whether or not this blasting was all done in the usual and customary manner?

for the purpose of grading the road, or was it a quarry operation?

A. It was for the purpose of grading the road, your Honor.

Q. All of it was?

A. Yes, sir.

The Court: Alright, sir.

CROSS EXAMINATION.

By Mr. Campbell, Sr.:

Q. Was it necessary for the purpose of grading the road?

A. Yes, sir.

Q. Mr. Farris, I hand you this and ask you to look at sheet number 10 of a total of 27 sheets, and will ask whether or not that shows the highway plan—Highway Department's plan for the road here at Mr. Kirk's place?

page 90 } A. Yes, sir.

Q. Now, is there any channel change shown on that?

A. Yes, sir, there is.

Q. What is that channel change that is shown?

A. The channel change that is shown calls for a 60 inch pipe under the road just west of his entrance.

Q. That's just west of the Kirk entrance?

A. Yes, sir. With a channel on the Highway Department's right-of-way running parallel to the service road left along the right-of-way for about 200 feet, and then dispensing into an old channel.

Q. Now, this widening of the channel that was done there in January, or after January, '59, was that on the highway right-of-way or on Mr. Kirk's property?

A. It was on the highway right-of-way.

Q. Is there any width shown for the channel that is to be dug there in that channel change?

A. No, sir.

Q. It just shows channel change?

A. Yes, sir.

Q. What Young had done up to January was in accordance with the plans that was shown—according to what was shown on these plans, was it not?

A. Yes, sir.

Q. Now, if you will refer to your diary there for January

L. G. Farris.

A. No, I'm not. The culvert hadn't been placed yet.
Q. It hadn't been placed yet. Did you dig it any deeper?
A. Yes, sir, they did after awhile.
Q. Was that after January of 1959?
A. Yes, sir.
Q. That was after the complaints of Mr. Kirk?
A. Yes, sir.
Q. So that from the time it was placed in there in the fall of '58 up until the latter part of January, '59 there was the one foot deep ditch to carry this water, is that correct?
A. Yes, sir.
Q. After that did they take some dirt and pile it up on Mr. Kirk's property right there at the culvert where the water had to turn? Did B. G. Young & Sons place some dirt on his property to kinda make an embankment there?
A. Yes, sir, they placed some material for a small embankment, yes, sir. I don't recollect just at this time whether it's on our property or Mr. Kirk's property.
Q. This easement, did you offer to pay Mr. Kirk for it?
A. No more than to make it legal, sir.
Q. And you folks wanted him to give you an easement to take care of this, is that it?
page 95 } A. To take care of what we might consider his portion also of the drainage problem.
Q. But it was drainage coming out of these culverts?
A. Yes, sir.
Q. Which was on the highway property?
A. Yes, sir.
Q. Mr. Farris, are you the only State of Virginia employee working on this job, or any job such as a contractor as B. G. Young & Sons, are you the only State employee working with them?
A. No, sir.
Q. Who else would be working with them right on the job?
A. I beg your pardon, sir, you mean what other State employee?
Q. State employee, yes, sir.
A. By name, sir, or how many?
Q. No, just by jobs and approximately how many?
A. We have six other inspectors on the project at this time working with myself and, of course, the resident engineer and his assistant in Christiansburg.
Q. Do you exercise any control over the contractor in the size of blasts, these dynamite blasts?

Mr. Crowell: He stated he had had very little experience in that.

The Court: You haven't qualified him.

Mr. Campbell: Alright, sir.

Q. Now, Mr. Farris, did you know anything about the offer to dump the surplus material over on Mr. Kirk's property in order to raise that up so there would be no overflow?

A. Yes, sir.

Q. What about that?

A. I believe perhaps that I initiated that offer along with Mr. N. B. Harvey for the Highway Department, page 93 } and Mr. Kirk was studying the matter and he never did come to a conclusion, therefore, we didn't make an agreement.

Q. And Mr. Kirk never let you?

A. No, sir.

Q. So far as you could see there, Mr. Farris, did Mr. Lyle, Superintendent for Young & Sons, or any of Young & Sons people, do anything except what was called for in the Highway contract?

A. As far as I know that was all.

Mr. Campbell: That is all, thank, you.

RE-DIRECT EXAMINATION.

By Mr. Nuchols:

Q. Mr. Farris, this channel which was dug along your right of way line and the south side of the service road, you say that was dug during the summer of '58?

A. Yes, sir.

Q. How deep was that dug, Mr. Farris?

A. Approximately one foot, sir. It was dug with a grader.

Q. Approximately one foot?

A. Yes, sir.

Q. And what was the size of the culvert that the water was going to come through into that channel? How big is that culvert?

A. I beg your pardon.

Q. How big is that culvert?

page 94 } A. It is a 60 inch culvert, sir.

Q. A five foot culvert and a one foot ditch, is that what you claim?

Q. I see. And before the job is completed that other work will be done?
A. Yes, sir.

Mr. Campbell: That's all, sir.

RE-RE-DIRECT EXAMINATION.

By Mr. Nuchols:
Q. Just to clear up one thing I didn't understand. Under Mr. Kirk's driveway he has a small culvert, is that correct?
A. Yes, sir.
Q. Now, the water before you put the new culvert in, the water from the north of the highway came down on Mr. Frank Harper's land and on down to Phillip's,
page 98 } Roop's and Kirk's property, is that correct?
A. Yes, sir.
Q. The water that came through his culvert you say this ditch would have been large enough to have taken care of it?
A. Yes, sir.
Q. Would the ditch have been large enough to take care of it coming through the five foot culvert?
A. It wasn't in there then.
Q. When the culvert was installed in the fall of 1958 was the one foot ditch, which was not changed until after January, '59, was it large enough to carry all of the water that would come through that 5 foot opening?
A. No, sir.

Mr. Nuchols: That's all, thank you.

Witness stands aside.

page 99 } FRANK HARPER,
another witness called on behalf of the Plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Nuchols:
Q. What is your name?
A. My name is Frank Harper.

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L. G. Farris.

A. No, sir, I do not.

Mr. Nuchols: Thank, you.

page 96 } RE-CROSS EXAMINATION.

By Mr. Campbell, Sr.:

Q. Mr. Farris, Mr. Nuchols asked you if you were trying to run a five foot culvert into a one foot ditch. Just explain about that ditch. It is a foot deep and how wide was it?

A. It was highly variable. It was a "V" ditch and I said approximately one foot deep, it may have been deeper or more shallow, but it was wide at the top and forming a "V" at the bottom.

Q. And did that lead on down to the natural drain of the deep branch down below there?

A. Yes, sir, it did.

Q. And before the channel change all of this water I believe went on Mr. Kirk's property and through a drain pipe there under his driveway?

A. Yes, sir.

Q. And you know about the size of that pipe?

A. Not accurately, sir. I would say it's about 15 to 18 inches.

Q. Some 15 to 18 inches. And this ditch that you dug there, the "V" ditch that you explained, would that carry as much water as that pipe would carry?

A. If properly installed, yes, sir, I think it would.

Q. And this was before the 5 foot culvert was put in?

A. Yes, sir.

Q. And the culvert, was that put in lower down
page 97 } and nearer to the big branch?

A. Yes, sir.

Q. And the situation has been corrected entirely as I understand you, as far as you can?

A. No, sir, not completely.

Q. Not completely? What must be done now?

A. We will shape this channel up even more than it is now, and either concrete the channel or sod it.

Q. That is, the State will do that, or is that part of the contract.

A. No, sir, that may be made a part of the contract.

Q. That is part of the contract and they just haven't gotten around to doing it?

A. No, sir.

Frank Harper.

Q. Is this old quarry and cut that we've been discussing between your house and Mr. Kirk?

A. It's almost directly in front of my house, slightly west and Kirk's house is below that.

* * * * *

page 100 } Q. Do you know who installed that wall around the reservoir?

A. I did.

Q. When was this installed?

A. Well, I'd say 6, 7 or 8 years ago. I just don't recall, about 8 years ago, I imagine, something like that.

Q. At the time you sold the property to Mr. and Mrs. Kirk in '56, what was the condition of the reservoir at that time?

A. It was in good condition when I sold it.

Q. Did it have any cracks in it?

A. No, sir.

Q. Did it hold the water?

A. Yes, sir. It was running over the dam. When I sold it the reservoir was full and the water was spilling over the dam, and it was that way for a good while after I sold it.

Q. Did you ever use water from that spring?

A. Yes, sir, I used water from that spring for about eight years.

Q. What sort of water did you get out of it, was it clear water?

A. It was clear, and sometimes in a real hard rain the water would get a little muddy and clear up in about 24 hours, but the water was good when I was using it.

Q. Did your reservoir ever become empty?

A. No, sir, it stayed full as far as I know after we put the wall in there. That's what we put this retaining
page 101 } wall around for so that we could have a better supply and cover the pipe up. And as far as I know it was never down after that. I haven't seen it for three or four years, but it stayed full all the time after that.

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page 102 } Q. Mr. Harper, you say you live about 250 yards east of the Kirk property?

A. That's right, northeast it would be.

* * * * *

Frank Harper.

Q. In your residence, sometimes when you've been in your home, has anything unusual occurred?

A. That dynamite has been very unusual if that's what you have reference to.

Q. That's what I have reference to.

A. That's been rather unusual.

Q. Do you recall when this unusual event first started?

A. It was sometime in March of '58. And they moved in and the job started somewhere in March, the first part of March. I don't recall, but it was in March of '58. And the first thing they put up—it was muddy—and they brought the drill in there and the air compresser and started drilling and shooting right in front of my house. That was the first part of March, 1958.

Q. What would be the result of the dynamiting
page 103 } near your house?

A. Well, they put off some heavy shots—

Mr. Campbell: We object to what would be the result. He can describe what he saw.

The Court: I sustain the objection. He can state the size of the blasting but not the results, unless he saw it.

Mr. Nuchols: I want the result in his house.

Mr. Campbell: We object to that.

Mr. Nuchols: What was the vibration, if any, in his house from the same dynamite charges that affected the Kirk property.

The Court: He can show that there was, if there was, like or strong vibrations, but not in the sum total of what damaged him.

A. Well, it was a very severe shock in my house from some of these. I was inside in 10 of the shots. I'd say, and approximately outside in 10. I was there in about 20 of these shots and I could feel my house shake just like an earthquake had hit it, and it was very severe shots. And that was from these large shots right across from my house from the quarry. It shook my house up good.

Q. Mr. Harper, during these vibrations would there be any rattling of dishes, or windows or pictures?

A. Yes, sir, it knocked windows out of my house; knocked glasses off the table and dishes off the shelves, and it would shake the whole house like an earthquake had
page 104 } hit it. We got some terrific jars over there from those heavy dynamite charges.

Frank Harper.

Q. Mr. Harper, was this in March and April of the year, or when?

A. Well, those shots started the first of March and they put one off yesterday and one day before yesterday. It's been a continuous series of those shots, but the heavy shots were back in March, April and May of '58. But those shots they put one off yesterday and day before yesterday, and there's been a continuous 200 of those shots I guess.

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page 105 }

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Q. How far is this Kirk house from the rock quarry?

A. It's about 500 feet from here to the rock quarry over to here. It's 250 yards from my house down to his.

Juror: How far is it from your house to the rock quarry?

A. I'd say it's about 400 feet. Just across these roads here, four or five hundred feet from my house across to the rock quarry, and just above this right here is a brick house and my brother lives right here.

Juror: Was all the blasting here?

A. No, there's a big cut right in here. There was a considerable lot of blasting right here to the left of Kirk's house. The heavy blasting was in this old quarry. There's a big solid cut right through there.

Mr. Nuchols: There's one more thing. If we could use Mr. Farris out on this for the Jury what 318 and 319 means, Mr. Farris, so that they can understand it.

The Court: You have your rule scale there. Come around, Mr. Farris.

By Mr. Nuchols:

page 106 } Q. Mr. Farris, the detonation on the 7th of March, 1958, you have the location of it at 318 and 319, north and south.

Mr. Farris: A. They are 100 foot stations. 100 foot

station intervals and 318 would be at this little hatch mark right here on the center line of the road.

Q. Right along in there (point to location on map). And that is where the 4,000 pound detonation was made, and that was approximately 550 feet?
A. Yes, sir.

Juror: The heaviest blast was made in here?

A. No, sir.

Mr. Harper: A. The one that shook my house more than anything was over in here (indicating on map)
Juror: 550 feet from here to here?

A. Yes, sir.

By Mr. Nuchols:
Q. This is where that first one was detonated and that was about 550 feet from the house?

Juror: 550 feet from here to here (indicating)?
Mr. Harper: A. That's right.
The Court: Now, gentlemen, as I understood it he said that was about 550 feet, but the blast was about 700 feet, but you determine that, what the witness said.
page 107 } I say that to clarify the thing because one of the jurors asked if that was the heaviest blast. Remember, Gentlemen, you are the judges of what the witness said.

By Mr. Nuchols:
Q. Mr. Harper, before the construction of this highway where did the water from the north side of the highway, where did this come under the road?
A. It came under the road on the west side of my place, and under the road in a culvert down through this David Phillips lot, down through James Roop lot on to the Kirk property. It came under the road say in about a big 24 inch pipe into my field, and then it drained down through my field to the David Phillips field, on down through the James Roop field onto the Kirk property.
Q. As the water would come down there would it flood the bottom land, now the Kirk property?

Frank Harper.

Mr. Campbell: We object to his statement that they put off a heavy shot, because he wasn't there, and he doesn't know whether it was a heavy one or whether it was a dobbie shot.

The Court: I overrule your objection.

A. I felt the jar of this shot and felt the service station vibrate from the half a mile distance from this rock quarry when they put this shot off. I intended to be
page 110 } back home when they put this shot off, but I had gone out to the service station to get something and they put the shot off while I was out there. And it's about a half a mile from my house and I felt that service station jerk, I felt the vibration from that shot a half a mile from where it was put off, and it must have been heavy to have shook that filling station the way it did.

Mr. Campbell: We object to his statement how heavy it was.

The Court: I think he's in position to answer the question.

Mr. Campbell: Exception.

By Mr. Nuchols:

Q. Had you intended on being at home when this shot was put off? Did you know when it would be put off?

A. Yes, sir, they would always tell us and warn us. One of Young's men would come up and tell us they were going to put a shot off at 10:30 in the morning, and maybe they would come up at nine and say they were going to shoot at eleven and not to get out of the house and be careful because we're going to put off some shot here. With any shot he would say you all be careful. So I knew they was going to put that shot off at 10:30 and I intended being back at nine o'clock, but I happened to be at the service station when that particular shot went off.

Q. Did they on a number of occasions come up
page 111 } to your house and tell you?

A. Always. Every time as far as I know when they would put off a shot a man would be sent from one house to another. I've seen them leave Kirk's house, come on up to Roop's to mine and go to my brother's, and they would say, "We're going to put a shot off over here at 10:30, get your cars and stuff out of the way."

Frank Harper.

A. Just at unusual times in very heavy rain. This land was a little swampy up there, and a lot of the water that would come through my field would settle into my place, and it would lose some strength as it went down through there into this swampy land, and a lot of it settle, and it didn't have the force at the Kirk property that it did coming out of this pipe as it does there now. Of course, a lot of the water in running three or four hundred yards would settle out in that bottom and settle down into the swampy land in there.

Q. Did you use this land when you owned it?

A. Yes, sir, I pastured it.

page 108 } Q. Was it free of mud?

A. Yes, sir, there was no mud in it at that time.

Q. While you owned it was it ever covered with mud?

A. No, sir, there was no mud there until this road work started and then it washed off. It practically removed the top soil and the red dirt washed in there.

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page 109 }

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Q. Have you been down on the Kirk property on any occasions after any unusual rains?

A. I don't remember being down on the property. I've been by there. I drove by there after one of these heavy rains and I saw the water was spreading out in the bottom and I wondered why somebody didn't dig a ditch and take that stuff on down to the branch there. I wondered at the time why something wasn't being done about it. It didn't concern me but I could see what was happening. The red mud was washing all down around the spring and in the spring and I wondered why somebody didn't go in there and do something about that.

Q. You testified about the vibrations in your house. On any occasions when you were away from your house did you notice any vibrations which you know definitely came from blasts?

A. Yes, sir, I was about a half mile out the road at this service station and they put off a heavy shot—

are completing the project according to the specifications of the Highway Department?

A. That's correct.

Q. They do not have supervision over the methods used, do they?

A. In most cases no, we don't specify methods.

Q. In connection with the detonation of dynamite for grading or breaking stone in a quarry or otherwise, it is possible to accomplish the same result, whether page 114 } or not it is more economical or not with several lesser size charges than one single large charge, is that not correct?

A. Yes, if you're not taking your economic factor into consideration.

Q. It it more economical to use large charges than several smaller charges?

A. That's correct.

Q. But by the use of several smaller charges you may reduce the amount of detonation at any one time?

A. That's right.

Mr. Crowell: That's all.

CROSS EXAMINATION.

By Mr. Campbell, Sr.:

Q. Mr. Wilkinson, was the report made to you of all the blasting on this job?

A. I had a report that Mr. Farris had addressed to Mr. Harvey on this matter.

Q. And I believe all work was under your general supervision?

A. That's correct.

Q. And were you on the job several times yourself?

A. Yes, sir.

Q. How often?

A. I would say every other week.

Q. Did Mr. Young do the work there in accordance with the plans and specifications of the Highway Department?

A. That's correct.

page 115 } Mr. Crowell: Your Honor, please, I object to his making him his own witness, in as much as he has testified that the Highway Department has no supervision over the methods the contractor uses. That is within

R. A. Wilkinson.

Q. What would they tell you when they were coming and why?

A. They would warn you that they were going to put a shot off. Almost every shot that I know of, unless it was a little dobbie shot or something like that, they would come to your house and warn you. One of Young's employees would go from house to house and tell them all, "We're going to put off a shot over here in the quarry." So we would always know in advance when they were going to put those shots off.

Q. And when you got those warnings would they usually be—would the shot at that time be a considerable blast?

A. They warned you about all blasts about having any children that might be playing out. I think that was just a precaution they were taking whether it was a small blast or a large one they would always send a man to warn you about any children that might be playing out there that a rock might hit. Rocks did fall on some of the houses over there. They warned you whether it was a small shot or a large on.

Mr. Nuchols: That's all.

page 112 } Mr. Campbell: That's all, thank you.

Witness stands aside.

* * * * *

page 113 } R. A. WILKINSON,

another witness called on behalf of the Plaintiffs, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Crowell:

Q. What is your name?

A. R. A. Wilkinson.

Q. What position do you occupy with the Department of Highways of the Commonwealth of Virginia?

A. Resident Engineer.

Q. In this instance, Mr. Wilkinson, the B. G. Young Company is an independent contractor in the construction of this project we have under consideration here, is that right?

A. Yes, sir.

Q. And your inspectors are there to determine if they

Mr. Crowell: Objection. I will have to call him on that if you permit him to cross examine on that we'll never reach the resting point.

The Court: I sustain the objection.

Mr. Campbell: We save the point.

That's all then, thank, you, Mr. Wilkinson.

Witness stands aside.

page 117 } VELMA P. KIRK,

one of the Plaintiff's after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Nuchols:

Q. You are Mrs. J. W. or Velma P. Kirk?

A. Yes, sir.

Q. And you are one of the plaintiffs in this action?

A. Yes, sir.

Q. You and your husband own the property we've been discussing?

A. Yes, sir.

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page 118 }

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Q. Now, Mrs. Kirk, in the spring of 1958, did you while you were in your home feel any results of any blasting occurring within your vicinity?

A. Yes, sir, I could feel the vibrations under my feet from this blasting while I was in the house.

Q. When did this first occur to your best recollection?

A. Sometime in March, '58.

Q. Could you see from your house where they were doing the blasting?

A. Yes, sir.

Q. Where were they doing this blasting?

A. In front of Frank Harper's residence. I don't know the direction.

Q. This old quarry?

A. Yes, sir.

his discretion how he will accomplish the plans and specifications.

The Court: I understand that.

By Mr. Campbell:

Q. Now, Mr. Wilkinson, I suppose you have had a good deal of experience in road work, have you not, sir?

A. Yes, sir.

Q. Isn't it a fact that when charges are fired with delayed fuses, or it is one, the detonation is not as great as when it's all fired at once?

A. That's correct.

Q. A delay of eight I believe is about the delay that gives the least—

Mr. Crowell: Your Honor, please, we vow that Mr. Wilkinson has been subpoenaed on behalf of the Defendant, and that this is beyond the scope of my direct examination.

Mr. Campbell: You put him on for all purposes.

Mr. Crowell: No, sir, we did not.

Mr. Campbell: We insist you did.

The Court: When you examine him on matters not asked on direct examination you make him your witness.

Mr. Campbell: Judge, may I remind you of page 116 } this. They asked him about whether to fire a lesser charge and I'm coming right at that now in this delayed firing.

The Court: Go ahead.

By Mr. Campbell:

Q. With the delay only a definite amount of the charge is fired at one time?

A. That's correct.

Q. Say you were firing 2,000 pounds with 8 delays. 4,000 pounds with 8 delays, that would only be 500 pounds at a time?

A. It could be shot that way.

Q. If it was loaded, if the holes were loaded each hole equal, and that would give the effect of firing only the amount of the charge that was detonated from that particular fuse or whatever it is?

A. That's correct.

Q. Now, from the reports that came into you on this was there any excessive blasting on this?

are they, are they just a short way in between the block or would it go all the way through the block?

A. A lot of them go all the way through the block.

Mr. Campbell: You say the cracks went all the way through in the mortar, Mrs. Kirk?

A. The mortar yes, not through the block. I mean the mortar.

Q. That's what I thought you said, I just wanted to be certain.

page 121 } By Mr. Nuchols:

Q. Can you see light through them?

A. Yes.

Q. On any occasion since this occurred has any moisture come through those cracks?

A. Yes, sir, rain came through the cracks and I had to mop it up as it rained, and it took a lot of towels and mopping to keep it up.

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page 122 }

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Concerning your water in your house, Mrs. Kirk, do you have the same type of water and pressure in your water system now that you had before this blasting took place and this water and mud drained across the field into the spring and reservoir?

A. No, sir, it is not.

Q. Is it the same type of water, is it as clear and clean as you had before?

A. No, sir, it is not. It's muddy and I don't have as much water. My pressure is down.

Q. When you turn on your faucett now—

A. I don't have much pressure.

Q. And did you have suffiicent pressure before?

A. Yes, sir.

Q. And how often do you have mud in your water?

A. Every time it rains I have mud in there.

page 123 } Q. Before March of 1958 when it rained did you have mud in your water all the time?

A. No, sir.

Velma P. Kirk.

Q. Kinda northeast, you would look out to your right out of your picture window?

A. That's right.

page 119 } Q. When these blasts would take place what would be the result in your house? What sort of vibrations or sensations would you get or see?

A. Of course, under your feet you could feel the vibrations and you could hear the windows rattle and the doors shake.

Q. Did this occur more than once, Mrs. Kirk?

A. Yes, sir.

Q. How often would you say it occurred to your house while you were in it?

A. On a number of occasions and I was there most of the time. There were lots of blasts.

Q. How many times would you say that while you were in your house that you could feel this vibration and that the windows would shake?

A. I could say 20, 25 or 30 and be perfectly safe. I'm sure there were that many.

Q. Did you notice any damage to your property during these vibrations?

A. Yes, sir.

Q. What would you notice?

A. Afterwards in checking you could see cracks in the mortar of the joints in the house, and as time would go by you could see where the mortar would fall out on the floor from the cracks.

page 120 } Q. What about the cracks in the floor, you recall when that occurred?

A. I don't recall when it was, but we have a crack in the floor in the kitchen and one in the bedroom on the front of the house.

Q. Mrs. Kirk, you had lived in that house since February, 1957, is that correct?

A. Yes, sir.

Q. Then you had been in the house thirteen months before these blasts took place?

A. Yes, sir.

Q. And you're a housekeeper?

A. Yes.

Q. Did you notice any of these cracks before then?

A. There were no cracks before then.

Q. Now, Mrs. Kirk, these cracks in the mortar how deep

Q. Mrs. Kirk, you mentioned mortar falling out of the cracks, did you ever see any of it fall yourself while you were standing in the room?

A. Just as soon as we would have a blast and as soon as it was over, of course, you would look and there it was, the mortar out of the joints on the floor.

Q. The mortar fell out of the joints?

A. Yes, I couldn't say I actually saw it fall out of the joints down on the floor, but I know it wasn't there before.

Q. You knew it wasn't there before?

A. I knew it wasn't there before.

Mr. Nuchols: That's all.

Mr. Campbell: No questions, Mrs. Kirk.

Witness stands aside.

page 126 } Mr. Nuchols: That is all.

Mr. Campbell: You gentlemen rest?

Mr. Nuchols: Yes, sir, we rest.

Mr. Campbell: Will you give us just a moment.

The Court: Yes, sir.

L. G. FARRIS,

recalled for further cross examination, testified as follows:

RE-RE-CROSS EXAMINATION.

By Mr. Archie Campbell:

Q. When you testified a few minutes ago did you intend to give the Jury the impression that the defendant—

Mr. Nuchols: Objection.

The Court: I sustain the objection. That's not a proper question what he intended to give the Jury the impression.

By Mr. Campbell:

Q. I'll ask you this, Mr. Farris. As inspector on this project did B. G. Young & Sons install the culvert and the channel on the south side of the highway in accordance with the plans and specifications?

A. Yes, sir, thus far they have.

Q. As I understand the road is still under construction and work is still being done?

A. Yes, sir.

Q. Did you have sufficient pressure?

A. Yes, sir.

Q. On any occasion have you been completely out of water since March of '58?

A. Yes, sir.

Q. How long a period of time would you be without water?

A. I don't remember how long. I know we've had to haul water.

Q. Would it be for 24 hours?

A. Oh, yes, sir, that much, but I don't know how much longer.

Q. It would be at least 24 hours. And you recall how many times you've had this?

A. No, sir, several times.

Q. Mrs. Kirk, had you been in your home before this large culvert was put in beside the driveway when you had a fairly heavy rain and see where the rain went to as far as your bottom land is concerned.

A. You mean before this?

page 124 } Q. Yes, before you had any drainage problem?

A. It would go across our bottom land in front of the house there.

Q. Now this is before, would it bring in mud and large quantities of water from a normal rain?

A. Before they started the highway construction?

Q. Yes.

A. No, sir, not before they started this construction.

Q. Since this culvert was put in beside your driveway have you been at home when you had rains which caused any water to come over into the bottom land?

A. Yes, before they dug the ditch deep enough to take care of it.

Q. Before they dug this ditch deep enough what would happen?

A. It would run over the bottom land and down into the spring and muddy up our water system.

Q. And you saw this yourself?

A. Yes, sir.

Q. Had you had that happen before?

A. No, sir.

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page 125 }

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Q. Who decided that?
A. You mean the original "V" ditch?
Q. Yes, sir, who decided that?
A. You might say that we and the contractor decided that to carry the water temporarily.
Q. To carry it temporarily, but that was not the specifications at that time?
A. No, sir.

Mr. Nuchols: Alright, that's all.

RE-RE-RE-CROSS EXAMINATION.

By Mr. Archie Campbell:
Q. If you hadn't done that additional work page 129 } his land may have been flooded more often?
A. Yes, sir.

Mr. Campbell: That's all.

RE-RE-RE-RE-DIRECT EXAMINATION.

By Mr. Nuchols:
Q. Mr. Farris, did you not have in your notes on the 22nd day—did you not put down your opinion at that time that the cause of this was insufficient depth of the ditch in January, 1959. Were you of that opinion?

Mr. Campbell: Objection.
The Court: I sustain the objection in the manner in which the question is asked. You may ask him the direct question if you want to.

By Mr. Nuchols:
Q. In January of 1959, were you of the opinion that the wash going across Mr. Kirk's land was caused by the contractor not having dug a sufficiently deep drainage ditch?
A. Yes, sir, that may be found in the diary.

Mr. Nuchols: That's all, sir.

RE-RE-RE-RE-CROSS EXAMINATION.

By Mr. Archie Campbell:
Q. Is there something you wish to explain?

Q. We're discussing this culvert, this 60 inch culvert. Did you at some time last May determine that the
page 127 } angle of the culvert was such that it would be difficult to contain the expected amount of water?

A. Yes, sir, it did.

Q. Did you at that time go to Mr. Kirk and ask him if he would give you 10 feet so that you could put a different type in there to carry this water on across this property?

A. Yes, sir, we did. At that time the flows on this fill in this area of the channel on the left side of the service road was staked by a survey party to be a much flatter slope. In other words it was going out horizontal and down one foot vertical.

After having not reached an agreement with Mr. Kirk, and in the meantime we didn't have room to put an adequate channel in there. And since that time we have steepened our slope on the hill which will give us more room.

Q. If he had consented to have let you put this—

Mr. Crowell: Your Honor, please, his deed is produced here and they can have additional land by condemnation or purchase if they need it. Mr. Kirk is not required to furnish any more land than the deed called for.

By Mr. Campbell:

Q. Did the defendant, Mr. Young, do the work in accordance with the plans?

A. Yes, sir.

Mr. Campbell: That's all.

page 128 } RE-RE-RE-DIRECT EXAMINATION.

By Mr. Nuchols:

Q. Mr. Farris, is there any specifications on here for that ditch?

A. On this sheet, no, sir.

Q. Are there specifications in this set for that particular ditch?

A. I am somewhat unfamiliar with the cross section at this particular point. It may be shown in the cross section.

Q. Did the State Highway Department decide at this particular point that there should be a "V" ditch at that particular depth?

A. No, sir.

L. G. Farris.

A. Yes, I did. The ditch that was not dug it was the understanding of Mr. Lyle, the Superintendent, the very words that day that I told him to widen that channel that he thought it had been dug, and I believe it was an oversight on the part of everyone concerned.

page 130 } Q. And it was a foot deep?

A. Yes, temporarily.

Q. And it filled up with wash from the road on the north, and it was dug out again since January, is that right?

A. I don't think it ever filled up. I think it overflowed.

Q. It's still a temporary ditch?

A. Yes, sir.

Mr. Campbell: That's all.

Witness stands aside.

Mr. Campbell, Sr.: Your Honor, we have a motion to submit.

The Court: Gentlemen, you may retire to your room.

Mr. Campbell: Your Honor, please, we move to strike the Plaintiff's evidence in this case as to the entire case and as to each item in the amended complaint. And the grounds of our motion are that this work has been done, and it's undisputed, that it was done by a general contractor for the Highway Department of the Commonwealth. It is a tort action and there's no claim here that he did anything in connection with this except as a contractee or agent of the State.

The items of damage claimed are repair cracks and breaks in wall and floors $1436.96, that is alleged to have been done by the blasting. Decrease in value of dwelling

page 131 } house as a result of permanent damage thereto $1,000.00. That is alleged to have been done as a result of blasting. Damage to spring, reservoir and water system, alleged to have been done by blasting, $1,000.00. Damage to land upon which mud and water flows $500.00. And inconvenience and discomfort for being deprived of water for long periods of time; by being deprived of water free of mud; and being deprived of air tight and I believe he said weather proof dwelling for a considerable period $500.00. Your Honor will see that the gravity of that offense is the blasting.

Now, we have introduced in evidence the deed from Mr. and Mrs. Kirk to the Highway Department in which they

released specifically all claims, compensation and damages by reason of the location, construction and maintenance of said highway, including drainage facilities as may be necessary. That is a complete and full release.

We have a Virginia case, *Pamplin* v. *Norfolk & Western Railway Company,* 124 Virginia, 254, in which our Supreme Court said this:

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page 132 }

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Now, we have a more recent case, which is even more in point than the one that I have just read And that's *Sayers* v. *Bolt,* 180 Virginia, 222, in which the State was constructing a fish hatchery out at Marion. And they blasted and destroyed a man's spring. They realized they can't sue the state as in this case this gentleman realized he can't sue the Commonwealth. The Court said this in there:

page 133 }

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page 134 }

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There's no proof at all of any failure to take proper precautions. In fact, it's just the other way. On cross examination the plaintiff's own witnesses admitted that everything was done there in a usual, proper and customary way, and that there was nothing that was done there that was not in accordance with the plans and specifications.

It is true that Mr. Wilkinson said that smaller charges and more of them could be used, but he also didn't say that that was improper in any way. You might use pick and shovel and might have gotten it out, but it wouldn't have gotten it out in the usual and customary way. And Mr. Wilkinson said this work was done is the usual and customary way.

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Mr. Campbell: Instruction No. 1 is objected to because it does not instruct the Jury in accordance with the facts in the case and the conveyance from the plaintiffs to the state.

It is also objected to because there is no sufficient evidence in this case or any improper acts of the defendant in the construction of the highway, and because the instruction assumes, or the Jury might assume that there were such improper acts.

Instruction No. 1 was given by the Court on behalf of the Plaintiffs.

Thereupon, the Defendant by counsel excepted.

Instruction No. 2 was offered by the Plaintiffs and refused by the Court, and which refusal to give such instruction was excepted to by the Plaintiffs.

Instruction No. 2-A offered by the Plaintiffs and refused by the Court, which was excepted by counsel for Plaintiffs in the Court's refusal to give instruction No. 2-A as offered.

Instruction No. 3 offered by the Plaintiffs and refused by the Court, to which action of the Court the Plaintiffs by counsel excepted.

Instruction No. 4 offered by Plaintiffs and given by the Court over the following objection by counsel for the Defendant:

page 140 } Defendant by counsel objects to Instruction No. 4 because it does not correctly state the law and because there is no evidence of the use of any larger quantities of dynamite than was reasonably necessary. There is no evidence of any failure to take proper care, and there is on the contrary the evidence that all of the work was done in accordance with the plans of the Highway Commissioner and that there was nothing improper in the work that was done.

To which action of the Court in granting said instruction the defendant by counsel excepted.

Instruction No. 5 offered by the Plaintiffs and given by the Court was objected to on the following grounds:

Mr. Campbell: Because there is no sufficient evidence to support it, nor any sufficient evidence upon which a verdict for the Plaintiffs can be sustained. And in addition thereto the instruction from which the Jury defines the difference in value, if any, in the building after repairing the same, and its value before the damage was inflicted, and also allows the jury to find for inconvenience and discomfort alleged to have been suffered because the water was not free from mud, and

We might multiply many authorities. There's a West Virginia case of *Watts* v. *Norfolk & Western Railway* that was a blasting case there. I have the case here if your Honor wants to read it.

They have not proved any negligence in this case at all and therefore, your Honor, we move to strike the plaintiff's evidence.

The Court: I overrule your motion.

Mr. Campbell: We save the point.

The Court: Call the Jury in.

(Jury returns to the Courtroom.)

Defendants rests.

(In Chambers).

Mr. Campbell: At the conclusion of the Plaintiffs' evidence the defendant moved to strike the plaintiff's evidence, which motion was overruled. Thereupon, the defendant elected not to introduce any evidence and renewed its motion to strike the plaintiffs' evidence, which renewed motion the Court overruled, and the defendants excepted.

Profile of the Highway is received and filed as Defendant's Exhibit B.

page 138 } Mr. Campbell: Your Honor, there was one question asked Mr. Wilkinson, and I want to supply the answer.

The Court: What question?

Mr. Campbell: If there had been any excessive blasting, and his answer would have been there was not.

Mr. Crowell: You mean for the purpose of passing on the objection?

Mr. Campbell: We aver that would have been his answer.

Mr. Crowell: We objected on the ground that he was going outside of his scope of direct examination.

Mr. Campbell: We have to have the answer to the question, and we aver that his answer would have been "There was not."

page 139 } INSTRUCTIONS.

Plaintiffs offered instruction No. 1, which was objected to by defendant as follows:

the Court over the objection of the Plaintiffs and excepted to by the counsel for the Plaintiffs.

Instruction No. D offered on behalf of the Defendant and objected to by the Plaintiffs, which was refused by the Court.

Mr. Nuchols: I object to this instruction because it has no application to an independent contractor and because it improperly states the law on the drainage. They didn't grant the right to drain water over and through their property.

To which action of the Court, the plaintiffs by counsel excepted.

Instruction No. D-1 offered by the Defendant was objected to by Plaintiffs and refused by the Court. The defendant, by counsel, excepted to the Court's refusal to grant such instruction.

Mr. Campbell: We except to that because this does not refer to anything except a drainage to the property.

Your Honor, we don't ask for the amendment to the instruction suggested by you because the deed, as we read it, does not refer to plans and specifications, except

page 143 } to the drainage of the property conveyed.

Instruction No. E offered by the Defendant and objected to by Plaintiff on the grounds as set forth with reference to Instruction A. Instruction No. E given by the Court, and excepted to by the Plaintiff.

Instruction No. F offered on behalf of the Defendant was refused by the Court because it does not refer to the plans and specifications in the deed, to which refusal the Defendant excepted.

Instruction No. G offered on behalf of the Defendant was refused by the Court and excepted to by the Defendant.

Returned to Courtroom.

The Jury received their instructions, heard arguments in the case, retired to their room to consider of their verdict, and after a time returned to the courtroom and rendered their verdict, after which the Jury was discharged from further consideration of this case.

page 144 } Mr. Campbell: Your Honor, please, we move to set aside the verdict of the Jury because of lack of evidence to support the verdict; because of the admission by the Court of improper evidence over the objec-

an air proof dwelling, and there is no evidence of this and no facts proven upon which the Jury could reasonably support a verdict.

And further, because the evidence shows that the damage alleged to have been caused by the mud and water over the land was a damage directly attributable to the construction of the highway and inseparable therefrom, and
page 141 } was released in the deed of conveyance.

And because the instruction does not limit the difference in value to any damage caused by negligence of the dedendant, and also because it does not limit this item to a difference in value caused by the acts of the defendant as distinguished from the construction, maintenance and operation of the highway. And also because it permits and invites the Jury to speculate because there's no evidence introduced as to values mentioned above.

To which action of the Court the Defendant by counsel excepted.

Instruction No. 6 offered by the Plaintiffs and given by the Court over the following objection by the Defendant:

Mr. Campbell: We object to Instruction No. 6 because there's no evidence to support it, and there's no evidence as to reasonable and *timliness* in the construction of the ditch, nor of any other violations of the plans and specifications of the Highway Department.

To which action of the Court in granting Instruction No. 6 the defendant excepted.

Instruction No. A was offered by the Defendant and given by the Court with the following objection by the Plaintiffs:

Mr. Crowell: This instruction is objected to on the grounds that it is not necessary to prove negligence in order to create liability upon a person using high explosives, which is the object of Instruction No. 11 offered by the Plaintiffs and refused.
page 142 } And it is further objected to on the grounds that it uses the basis of ordinary negligence only, and if any negligence is required to be shown it is only the failure to use the highest degree of care in the use of the instrumentality of dynamite.

Instruction No. B offered by the Defendant and given by the Court without objection on the part of the Plaintiffs.

Instruction No. C offered by the Defendant was given by

DEFENDANT'S EXHIBIT NO. 1.

THIS DEED, Made this 26th day of November, 1957, by and between J. W. Kirk and Velma P. Kirk, husband and wife—co-tenants of Pulaski County, Virginia, hereinafter designated as grantor (even though more than one), and the COMMONWEALTH OF VIRGINIA, Grantee:

WITNESSETH:

In consideration of the benefits accruing or to accrue to the said grantor, by reason of the location and construction, or other improvement of part of State Highway Route 402, Project 8077-06 (New 0402-077-006) between 0.942 Mi. W. Int. Rt. 99 and 1.117 Mi. E. Int. Rts. 11 & 101 along, through, or over the lands of the grantor, and for further consideration paid by the grantee to the grantor, receipt of which is hereby acknowledged, the said grantor, hereby grants and conveys unto said grantee with general warranty the land of the grantor needed for the location and construction or other improvement of said highway, the said land being as shown on a plan and survey of the said highway, on file in the office of the Department of Highways at Richmond, identified as Sheet No. 10, Project 8077-06, Route 402, all of said land being located in Newbern Magisterial District, in Pulaski County, and described as follows:

Being as shown on plans approved February 28, 1957, and lying on the Southeast (left) side of the northbound lane centerline and adjacent to the Southeast right of way line of present Route 100 from the lands of James C. Rupe opposite approximate Station 322 plus 00 to the lands of D. A. Kirby and Maude A. Kirby opposite approximate Station 324 plus 80 and containing 0.17 acre, more or less, land; and being a part of the same land acquired by the grantor by deed recorded in Deed Book 173, Page 301, in the office of the Clerk of the Circuit Court of said County.

For a more particular description of the land herein conveyed, reference is made to photo copy of said Sheet No. 10, showing outlined in RED the land conveyed in fee simple, which photo copy is hereto attached as a part of this conveyance and recorded simultaneously herewith in the State Highway Plat Book.

AND FURTHER WITNESSETH: THAT WHEREAS, all or part of said highway has been designated as a Limited

tion of the Defendant; because of exclusion of proper evidence offered by the Defendant, and because of the giving of improper instructions offered by the Plaintiffs, and the refusal of proper instructions offered by the Defendant.

Now, your Honor, we are very serious in that motion and we have authorities which we think will support our position. If your Honor wishes it we will be glad to *funish* your Honor with a full brief upon the matter on our position in the case and to have the evidence transcribed.

The Court: I think I understand the evidence, Mr. Campbell, and I don't want you to go to too much bother, but I would like to have a memorandum of your authorities and I will read them and think about them and try to let you know within the next few weeks.

Mr. Campbell: Of course, included in that is the failure of the Court to strike the Plaintiffs' evidence in that motion.

Court adjourned.

* * * * *

location, construction, and maintenance of said highway, including such drainage facilities as may be necessary.

WITNESS the following signatures and seals:

J. W. KIRK (Seal)
VELMA P. KIRK (Seal)

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

Access Highway in accordance with the provisions of Article 3, Chapter 1, Title 33, of the 1950 Code of Virginia, as amended;

NOW, THEREFORE, for the aforesaid considerations the grantor doth also hereby grant and convey unto the grantee with any general warranty any and all easements of access, light or air incidental to the lands of the grantor or abutting upon said Limited Access Highway, and/or upon any of its ramps, loops, or connections at and with intersecting highways, the line or lines along which said easements herein conveyed lie being described as follows:

From a point on the proposed Southeast right of way line opposite approximate Station 322 plus 00 the lands of James C. Rupe, thence along said proposed Southeast right of way line to a point opposite approximate Station 324 plus 80 the lands of D. A. Kirby and Maude A. Kirby and shown in BLUE on said photo copy.

It is covenanted and agreed that this conveyance is made pursuant to the provisions of Article 3, Chapter 1, Title 33, of the 1950 Code of Virginia, as amended, which shall be a covenant running with the abutting lands of the grantor, which abut upon the said Limited Access Highway, and/or upon any of its ramps, loops, or connections at or with intersecting highways, along the said line or lines hereinabove described, as if said Article as amended were herein fully recited. Nothing herein contained shall be construed to convey any easement of access, light or air, incident to any lands of the grantor abutting upon any highway other than said Limited Access Highway, ramps, loops, and connections, nor as denying the grantor the right of ingress to and egress from any of the grantor's lands which abut upon any service road now or hereafter constructed by the grantee to provide access to and from said Limited Access Highway.

The said grantor covenants that he has the right to convey the said land and easements to the grantee; that he has done no act to encumber the same; that the grantee shall have quiet possession of the same, free from all encumbrances, and that he will execute such further assurance of the same as may be requisite.

The said grantor covenants and agrees for himself, his heirs and assigns and successors, that the considerations hereinabove mentioned and paid to him shall be in lieu of any and all claims to compensation and damages by reason of the

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