Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

207 VA 207

# Record No. 6225

## In the
## Supreme Court of Appeals of Virginia
## at Richmond

---

## CAROLINA, CLINCHFIELD AND OHIO RAILROAD COMPANY
## v.
## HAROLD MULLINS

---

FROM THE CIRCUIT COURT OF DICKENSON COUNTY

---

RULE 5:12 BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND.

---

**Record No. 6225**

---

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 6th day of October, 1965.

CAROLINA, CLINCHFIELD AND OHIO RAILROAD COMPANY, Plaintiff in error,

*against*

HAROLD MULLINS, Defendant in error.

---

From the Circuit Court of Dickenson County
Raymond J. Boyd, Judge

---

Upon the petition of Carolina, Clinchfield and Ohio Railroad Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Dickenson County on the 4th day of June, 1965, in a certain motion for judgment then therein depending wherein Harold Mullins was plaintiff 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 two thousand dollars, with condition as the law directs.

RECORD

★ ★ ★ ★ ★

page 1 ]

★ ★ ★ ★ ★

Received and filed, this the 14 day of Nov., 1963

J. C. STANLEY, D. Clerk

MOTION FOR JUDGMENT

Your undersigned plaintiff, Harold Mullins, respectfully moves the court for judgment against Carolina, Clinchfield and Ohio Railroad company in the sum of $3500.00, and for the grounds of his motion states as follows:

(1) That the said plaintiff before and at the time of the committing of the grievances by the said defendant hereinafter mentioned was, as a tenant from month to month, lawfully occupying a dwelling house and lot in Dickenson County, Virginia, on McClure River, at McClure as a lessee from Orbin Dotson, by virtue of his occupancy of same had located upon said property house hold furnishings, clothing and other personal property of a value of at least the sum of $3500.00.

(2) That the said plaintiff by reason of his said occupancy of said land was entitled to the use and enjoyment of same, free from the willful or negligent damage to his said property located thereon from the actions of any persons whatsoever, and was entitled to have and still ought to have, the right, benefit, and enjoyment of the said McClure River upon which said property was located, freely flowing and draining in its natural state, by and through said property.

(3) That the said defendant, well knowing the premises, and that the said plaintiff had the aforesaid rights in said property and in the waters flowing over and through the same, by its own acts, and through its agents, servants and employees, wrongfully and negligently built or caused to be built a certain trestle located a short distance below the land of your plaintiff, approximately 200 yards therefrom, in such a manner as to cause the said McClure River to be blocked, and obstructed, and to cause the said river to flood and overflow its banks, as a

page 2 ]

result of which said McClure River was dammed and overflowed upon the lands so occupied by your plaintiff, backing up into said house, and covering the floor thereof to a depth of approximately 30 inches, damaging all of his personal property located therein and thereon; which said damages proximately resulted from the negligent method of constructing said railroad trestle, and blocking and obstructing the waters of said McClure River; and which said damages had occurred within five years prior to the institution of this suit, to-wit, upon March 12, 1963.

Wherefore, as damages for the said wrongful and negligent actions by the said defendant resulting in said damages to the plaintiff the said plaintiff hereby moves the court for judgment against said Carolina, Clinchfield and Ohio Railroad Company in the sum of $3500.00, together with costs of this proceeding.

HAROLD MULLINS
By Counsel

PHIPPS and BEVERLY
Attorney at Law
Clintwood, Virginia

By FRANK E. BEVERLY
Counsel for Plaintiff

★ ★ ★ ★ ★

page 5 ]

★ ★ ★ ★ ★

Received and filed, this the 29 day of Nov., 1963

Frenchman O'Quinn, Clerk

## ANSWER AND GROUNDS OF DEFENSE

(1). The Defendant, for answer to Plaintiff's motion for judgment, says that it is a corporation duly organized and existing under the laws of the State of Virginia as a common carrier by railroad, and that, in the construction and maintenance of its railroad and trestle, which were permanent structures, on and at the location and place complained of, it was acting under authority of law and in the exercise of the

requirements of its franchise for the accommodation of the public and in the exercise of duties which it owed to the public and not in a private capacity.

(2). Defendant does not know whether the allegations of Paragraph numbered (1) of Plaintiff's motion for judgment are true.

(3). Defendant does not know whether the allegations of Paragraph numbered (2) of Plaintiff's motion for judgment are true, and it denies the materiality of said Paragraph numbered (2).

(4). Defendant alleges and avers that, in the construction and maintenance of its said permanent trestle, which said trestle is an essential part of its railroad and indispensably necessary in order *toperform* its duties required by its franchise and the laws of this Commonwealth and which said trestle and railroad track was indispensably necessary in the exercise of its public right to run its trains for transportation purposes, it exercised due care and was not guilty
page 6 ] of any negligence which proximately resulted in the injury complained of.

(5). Defendant denies each and every allegation of Paragraph numbered (3) of Plaintiff's motion for judgment, and denies that Defendant, or its agents, servants or employees, negligently built or caused to be built a trestle approximately 200 yards below Plaintiff's land, which caused the river to overflow its banks and to overflow upon the lands and building of the Plaintiff, and to cause damage to them, and Defendant denies that it was guilty of any negligence in the construction of or maintenance of its railroad tracks and trestle which was the proximate cause of Plaintiff's alleged damage to his house. Defendant denies that Plaintiff suffered any damage by reason of any negligence or wrongful act of Defendant. Defendant, says that the Plaintiff's claim for damages is barred by the statute of limitations.

(6). Defendant denies that, in the construction of its said trestle and railroad tracks, it was guilty of negligence which obstructed the water or caused the river to be blocked or obstructed or to dam *upand* overflow its banks, and says that it was not guilty of any negligence in the construction of its said trestle which was a proximate cause of Plaintiff's alleged injury. Defendant further alleges and avers that its said trestle was constructed in accordance with the advice and direction of skilled engineers of high qualifications, and that said trestle was erected a considerable distance below Plaintiff's house and property. Defendant avers that no damage could reasonably have been foreseen or anticipated from the

construction of said trestle in the manner and in the location whereof it was built.

(7). Defendant alleges and avers that Plaintiff was the author of his own misfortune, if any, he suffered. This land of Plaintiff, which is claimed to have been overflowed in this case, is only slightly above the low water mark of the river. The house, which is claimed to have been damaged, page 7 ] is only about two feet above the ground. It is located at a place where the waters of the river, in approaching it, runs almost directly toward said house, and then the bed of the stream turns abruptly to the left, the natural and actual effect of which, when the stream is high, is to cause the water to go straight toward the house rather than toward the left and follow the bed of the stream. The said house is located very near, within a few feet, of the bank of the river. McClure River is a mountain stream in a rough and *mountaineous* country and falls rapidly as it proceeds. It is fed by rapidly descending smaller streams which at times of heavy rain fall, which occurs periodically, overflows its shallow banks and inundates to a depth of several feet, in excess of three feet, *thelittle* narrow alluvial bottoms bordering the stream, including the little bottom on which the Plaintiff's house is located. All of which the Plaintiff knew at and before the time he acquired said property. Defendant alleges that Plaintiff was negligent in locating and maintaining his house and building and in acquiring a building subject to said floods and overflow, and that this was the sole proximate cause of said flooding, overflow and damage complained of. Defendant alleges that, by the acquisition and maintenance of said house at the place and under the circumstances above set forth, all of which was known to Plaintiff at the time of and before he acquired said property, he thereby assumed the risk of the overflow and flooding and alleged damage complained of, and Defendant is in no wise liable therefor.

(8). Defendant says that only slight damage, if any, was caused to Plaintiff's house and property by the overflow and flooding alleged to have occurred on March 12, 1963; and Defendant further alleges and avers that such slight damage, if any, as was caused by the high waters of March 12, 1963, could have been greatly reduced and entirely eliminated by the Plaintiff in the exercise of reasonable care to page 8 ] clean up the building and promptly repair any damage done by the alleged flood and overflow. The Defendant further alleges that Plaintiff was negligent in failing to use due and reasonable care to reduce and eliminate the damage caused by said alleged overflow, and that on this

account Plaintiff is not entitled to recover the damage alleged in this cause, or any part thereof.

(9). Defendant denies each and every allegation of Plaintiff's motion for judgment not hereinabove specifically admitted or *specificallydenied.* It denies that it is indebted to or liable to the Plaintiff in the sum of $3500.00, or in any part thereof, or in any amount, and it prays that no judgment be rendered against it, but that said suit be dismissed, and that Defendant recover of the Plaintiff its costs in this behalf expended.

CAROLINA, CLINCHFIELD AND OHIO
RAILROAD COMPANY

By Counsel
A. G. LIVELY,
Lebanon, Virginia

M. M. LONG,
St. Paul, Virginia

I, A. G. Lively, of counsel for Defendant, do hereby certify that I have this day mailed a true copy of the foregoing pleading to Frank E. Beverly, Esq., c/o Phipps & Beverly, Attorneys at Law, Clintwood, Virginia, counsel for Plaintiff.

Given under my hand this the 27 day of November 1963.

A. G. LIVELY
Attorney

page 9 ] Given
RJB

NO. D-1

The Court instructs the jury that, in this case, the Defendant is charged with the negligent damage to Plaintiff's property. The burden is upon the Plaintiff, in order to entitle him to recover in this case, to prove, among other things, by a preponderance of the evidence that Defendant was guilty of negligence, and also that its negligence was the sole proximate cause of Plaintiff's injury; and, if Plaintiff fails to prove this by a preponderance of the evidence, then he can not recover in this case, and your verdict must be for the Defendant.

page 10 ] Given
RJB

No. D-1A

The Court instructs the jury that the Defendant in this case is a public service corporation and is authorized by its charter and the laws of this State to perform a public function. It cannot be held liable for damages to private property in the necessary performance of said public function unless it is shown to have been guilty of negligence which was the proximate cause of said alleged damage.

page 11 ] Given
RJB

No. D-2

The Court instructs the jury that negligence is the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done under the existing circumstances.

Given
RJB

No. D-3

The Court instructs the jury that the proximate cause is the superior or controlling agency as contradistinguished from those causes which are merely incidental or subsidiary to such controlling cause.

page 12 ] Given
RJB

No. D-4

The Court instructs the jury that actionable negligence lies only where there has been a failure to perform some duty which the Defendant owes to the Plaintiff. Negligence lies only for consequences which, in the light of attendant circumstances, could reasonably have been anticipated, to cause injury, by a reasonably prudent person. One is not charged with foreseeing that which could not be expected to happen.

And, unless Plaintiff has proven by a preponderance of the evidence that, from the construction and maintenance of the trestle in question, the Defendant should have anticipated that it would cause injury to others, then Defendant is not liable in damages, and you should find for Defendant.

page 13 ] Given
RJB

INSTRUCTION P-1(A)

The court instructs the jury it was the duty of the defendant railroad company in constructing and building its trestle across McClure River to to build said trestle as to not obstruct such flow of water as the defendant railroad company might reasonably have expected would occasionally flow down McClure River, including the ordinary rise of said branch at periodically recurring freshlets.

And if the jury believe from the evidence that the flow of water in McClure River upon the occasion complained of in the motion for judgment was not greater that the defendant railroad company might reasonably have expected would flow down McClure River on such occasion, then it was the duty of the defendant to have anticipated such flow of water and to have so built said *tressle* that under such circumstances would have not caused the water to back up on the plaintiff's property.

And if the jury believes from a preponderance of the evidence that the defendant railroad company failed to so build said *tressle* and failed to provide other ways sufficient for the passage of water down McClure River on such occasions, and as a proximate result thereof, the plaintiff's personal property was damaged, then the defendant is liable to the plaintiff in such sum as will fully compensate him for any damage sustained as a result of the alleged flooding.

★ ★ ★ ★ ★

page 17 ] Refused
RJB

No. D-5

The Court instructs the jury that, if you believe from the evidence that, at the time Plaintiff acquired and owned the property claimed to have been damaged, and then and there-

after, there was an obvious and inherent danger of it flooding from the natural flow of McClure River at flood tide, on account of its proximity to the river, its altitude and the topography of the country at and around the house of Plaintiff, and that Plaintiff knew and appreciated this danger prior to the flood that is alleged to have caused damage claimed in this suit, and that said damage proximately resulted, in part, from the obstruction of McClure River by Defendant's trestle, and in part from flood tide flow of the waters in McClure River, independent of any affect on said waters by said trestle, then Defendant is not liable to any extent for the alleged damage, and the jury must so find; and this is true even though you should believe that Defendant's trestle was responsible for more of the damage than that resulting independent of it.

page 18 ] Refused
RJB

No. D-6

The Court instructs the jury that it is the duty of one who claims to have been injured by the wrongful or negligent act of another to exercise reasonable care and diligence to avoid loss and to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence to minimize or lessen the damage, he cannot recover.

And, if you believe from the evidence that the Plaintiff, after he was injured, failed to exercise reasonable care and diligence in an attempt to lessen the resulting damage to him, and that such failure enhanced his damages, then he cannot recover for such enhanced or increased damage.

page 19 ] Refused
RJB

No. D-8

The Court instructs the jury that, if you believe from the evidence that the Plaintiff and Defendant were both guilty of negligence, and that the negligence of both caused the alleged damage, then your verdict must be for the Defendant, even though you may believe from the evidence that the de-

gree of negligence of the Defendant was greater than that of the Plaintiff.

page 20 ] Refused
RJB

INSTRUCTION D-9

The Court instructs the jury that even though they may believe that timber, brush, and other rubbish lodged against the bridge, this is not any evidence of the negligent construction or maintenance of said bridge.

page 21 ]

★ ★ ★ ★ ★

We the Jury decide in favor of the plaintiff and fix the damage of $1,250.00

JOE TURNER
Foreman

page 22 ]

★ ★ ★ ★ ★

Received and filed, this the 30 day of April, 1965

FRENCHMAN O'QUINN, Clerk

★ ★ ★ ★ ★

MOTION TO SET ASIDE THE VERDICT

Counsel for the defendant moves the Court to set aside the verdict of the jury in this case and to grant it a new trial upon the following grounds:

1. The Court erred in admitting certain evidence offered by plaintiff over defendant's objection.
2. The Court erred in permitting the plaintiff to introduce in evidence a written list, which he claimed to have made up soon after the alleged damage occurred, showing articles and price or value claimed by plaintiff as evidence of his damage and to read said list to the jury over defend-

ant's objection.

3. The Court erred in refusing to admit certain admissible and material evidence offered by defendant.

4. The Court erred in giving to the jury certain erroneous instructions for the plaintiff over defendant's objections.

5. The Court erred in refusing certain proper, material, pertinent and correct instructions offered by defendant on objections from plaintiff.

6. Because the verdict is excessive.

7. Because the verdict is contrary to the law and the evidence and without evidence to support it.

page 23 ] Respectfully,

CAROLINA, CLINCHFIELD and OHIO RAILROAD COMPANY

BY COUNSEL

M. M. LONG
A. G. LIVELY
Counsel for Defendant

I hereby certify that a true copy of the foregoing Motion has this day been mailed to A. M. Phipps, Attorney at Law, Clintwood, Virginia, and Frank E. Beverly, Attorney at Law, Clintwood, Virginia, counsel for the plaintiff.

This the 28th day of April, 1965.

A. G. LIVELY
M. M. LONG

Filed 4/29/65
RJB

page 24 ]

ORDER

This day came the parties by their attorneys and it appearing to the Court that on the day on which the jury rendered its verdict in this case, that is on the 13th day of April, 1965, the defendant, by counsel, moved the Court, in open court, to

set aside the verdict and requested that it be given twenty (20) days in which to file grounds of its said motion, which motion and request was accordingly granted, and on this day, that is on the —— day of April, 1965, the defendant tendered its grounds of motion to set aside the verdict and asked leave to file same in this cause, which said motion was granted and which said grounds of motion to set aside the verdict was accordingly this day filed.

And the Court not being advised of its judgment took time to consider and it is the desire of the Court that counsel argue said motion to set aside the verdict, and it is adjudged that counsel for each side shall have twenty (20) days from this time in which to file written arguments upon said motion, if they desire to file written arguments, and that the Court will hear oral arguments on said motion on the 10 day of May, 1965, beginning at 10 a.m.; said arguments to be heard at the Court's chambers at the courthouse in Lebanon, Virginia.

We request this Order.

M. M. LONG
A. G. LIVELY

We have seen this Order.

A. M. PHIPPS

page 25 ] TO: Frenchman O'Quinn, Clerk

Enter this Order this 29 day
of April, 1965.

R. J. BOYD
Judge

page 26 ] AT A CIRCUIT COURT CONTINUED AND HELD FOR DICKENSON COUNTY, VIRGINIA, ON THE 4th DAY OF JUNE, IN THE YEAR OF OUR LORD, ONE THOUSAND NINE HUNDRED SIXTY-FIVE.

★ ★ ★ ★ ★

ORDER

This day came the parties again by their attorneys and the court having maturely considered the written motion of the

defendant to set aside the verdict of the jury heretofore returned herein, which motion the court, after carefully considering the same, doth overrule, and to which action of the court in overruling its motion to set aside the verdict and grant a new trial the defendant excepts.

It is therefore considered by the court that the plaintiff, Harold Mullins recover of and from the Carolina, Clinchfield and Ohio Railroad Company, defendant, the sum of $1250.00, the amount of the verdict of the jury, with interest from April 15th 1965, until paid and all costs in his behalf expended, to which the defendant by counsel excepts. Counsel having indicated their intention to apply to the Supreme Court of Appeals for a writ of error, it is ordered that execution of this judgment be suspended for a period of 90 days.

SEEN:
A. M. PHIPPS
Attorney for Plaintiff
M. M. LONG
A. G. LIVELY
Attorney for Defendant

R. J. BOYD, Judge

* * * * *

page 27 ]

* * * * *

Received and filed this the 19 day of July 1965

J. C. STANLEY, D. Clerk

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

*To Frenchman O'Quinn, Clerk of the Circuit Court of Dickenson County, Virginia:*

Notice is hereby given by counsel for Defendant, Carolina, Clinchfield & Ohio Railroad Company, of its appeal from the judgment entered in this cause on the 4th day of June, 1965, and it assigns and sets forth the following errors:

(1). The Defendant Railroad Company is a public service corporation, with the right of eminent domain. The trestle or bridge complained of was located 200 yards below Plaintiff's

property. It was shown to be an essential public improvement. No negligence was shown. No right of recovery was shown. The Court erred in refusing to strike out Plaintiff's evidence and enter judgment for the Defendant;

(2). The verdict is contrary to the law and the evidence and is without evidence to support it. The Court erred in refusing to so hold;

(3). The Court erred in instructing the jury that they could find a verdict for the Plaintiff;

(4). The Court erred in overruling Defendant's motion to set aside the verdict;

(5). The Court erred in permitting Plaintiff to introduce in evidence and to read and testify from a written list which he claimed to have made up soon after the alleged damage, showing the alleged articles damaged and alleged prices and values as evidence of his damage, and to read said list to the jury, over Defendant's objection;

page 28 ] (6). The Court erred in instructing the jury that the measure of damages in this case was the difference in value of the articles or property alleged to have been damaged, before and after the alleged damage. In this case, the damage was easily repaired, and the measure of damages is the cost of repair;

(7). The Court erred in refusing to submit to the jury and in refusing to give Defendant's instructions submitting to the jury the question of assumption of risk by the Plaintiff;

(8). The Court erred in refusing to submit to the jury the question of mitigation of damages by Plaintiff and the question of his duty to mitigate the damages and in refusing Defendant's instructions offered for this purpose;

(9). The verdict of the jury is excessive.

CAROLINA, CLINCHFIELD & OHIO
RAILROAD COMPANY

BY COUNSEL,
M. M. LONG
A. G. LIVELY, Lebanon, Va.
A. K. McINTYRE

I hereby certify that on this 16th day of July, 1965, I have mailed to Phipps & Beverly, Attorneys at Law, Clintwood, Virginia, counsel of record for the Plaintiff, Harold Mullins, a true copy of the foregoing Assignments of Error.

A. G. LIVELY, Lebanon, Virginia
of Counsel for Defendant

★ ★ ★ ★ ★

page 5 ]

★ ★ ★ ★ ★

ELMER ROBINSON,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Phipps:
Q. Your name Elmer Robinson?
A. Yes, sir.
Q. How old are you?
A. Sixty-seven.

Mr. Lively: The rule was asked for, if the court please. This witness has been in here. I don't know why.

Q. (By Mr. Phipps) Where do you live?

The Court: Any other witnesses in the court room?
Mr. Phipps: No, sir, he never has been in here.
The Court: Go ahead.
page 6 ] Mr. Lively: This witness has been in the court room.
The Witness: McClure.

Q. (By Mr. Phipps) How long have you lived at McClure?
A. Well, I have been around close McClure for the last forty years.
Q. Well, you were living over there in March —
A. Yes, sir.
Q. I believe, '63?
A. Yes, sir.
Q. Do you recall the time that they had this flood over there in '63?
A. Yes, sir.
Q. How far did you live from where Mr. Reedy and Mr. Sluss owns the property and Phipps and the other plaintiffs there, Mr. Fields, how far do you live?
A. Well, it would be a couple of hundred yard I guess.
Q. Two hundred yards?

*Elmer Robinson*

A. Something like that.

Q. Did you observe that river there at the time?

A. What?

Q. Did you observe the condition of the river at that time?

A. Well, the night that the high water come, why Mr. Field and his wife and old — and Alex Reedy there come to my house for shelter, and I took them in and we page 7 ] stayed up the rest of the night then watching the water backwards and forth down to the bridge. We couldn't get out through above the houses the way the road was because the water had it blocked out through there.

Q. You mean, is that the road, that little road there in front of Mr. Reedy's and the other homes, that was all blocked?

A. That was all blocked.

Q. Now then, did you observe the trestle or bridge or whatever they call it, you want to call it, down there the next day in the river? If so, just tell the jury over there what the condition of that river was at that time?

A. Well, that river was, that bridge was stopped completely stopped plumb across and that water was pouring over there six to eight feet down to where the water at the bottom —

Q. You mean the water up the river from where this trestle is was falling over and hitting the water over six to eight feet?

A. That's right.

Mr. Lively: Object to that, if the court please.

The Court: Overrule; overrule the objection.

Mr. Lively: I object to the question and any answer because it's leading.

Mr. Phipps: What was that?

Mr. Lively: I want to object to the question.

Q. (By Mr. Phipps) What was in there? Just page 8 ] describe what was in that bridge or trestle, whatever you want to call it.

A. Logs, leaves, and everything else that comes down the river when the water gets up.

Q. Well, did you observe the water there and see whether or not any of it was eddying back up the stream?

Mr. Long: That is leading and suggestive.

Mr. Phipps: You have said it was backing up. It couldn't

*Elmer Robinson*

help but back it up; it couldn't get out.

Q. (By Mr. Phipps) And how long did it stay there, remain in that condition until it was taken out?

A. Well, I don't know just the time now before they come and removed the stuff out, but the water was going down, way up in the day, the next day. The rain stopped and the water went to falling.

Q. Do you know Mr. Rice Fields?

A. Sure do, next door neighbor.

Q. Do you remember a small outhouse there on back of his house?

A. Yes, sir, a little smoke house they call it.

Q. Well, tell what happened to that house in this flood.

A. Well, the house set kindly out here till you got a gate goes out to the river where he comes out of the back door of the house, and the little smoke house set out next to the fence there and the water carried *hit* plumb back up *agin* the upper side of the fence up there. Mr. Alex's smoke

page 9 ] house was washed down *agin* this tree, locust tree there, you know, and *hit* carried that little smoke house right around back up *agin* that fence.

Q. Do you know about how many feet it was carried up there?

A. Well, we measured it, but I don't remember just the distance.

Q. State whether or not it was carried upstream or downstream?

A. Upstream.

Q. Upstream.

The Court: How close was that to the house occupied by Harold Mullins?

The Witness: Well, it was a house, Alex's house between it and Harold Mullins.

The Court: About what distance would that be?

Q. (By Mr. Phipps) What is the distance between the two houses, if you know?

A. Well, I guess it's about I'd just guess at 40 or 50 feet between the houses.

Q. Do you know —

A. I mean the lot.

Q. Do you know the size —

A. The bigness of the lot across.

*Elmer Robinson*

Q. Do you know the size of the lots there that they own, the frontage of them? Do you know that?

A. No, I don't know exactly now the frontage

page 10 ] of them.

Q. Have you ever seen the river since you have lived there as high as it was at that time?

A. Never was — it could have been that high, but it never had nothing down there to back it up. In '57 *in* sloshed up in the road right, rather right straight below my house.

Q. Do you know when this trestle was built?

A. What?

Q. Do you know in what year this trestle was built?

A. No.

Q. Across the river, do you know when it was —

A. No, I don't remember.

Q. Tell the jury if you know about how long it was built before they had this flood over there?

A. Well, I couldn't say. I never kept up with it, just how long it's been in it.

Q. I'll ask you whether or not this flood was bigger than the one in 1957.

A. Well, it just about like that, but the water had an outlet down there in '57 till it could go on out.

Q. Has that trestle been built there since that time?

A. Sure, it's been built since '57.

Q. Built since '57?

A. Since '57, yes, sir.

Mr. Phipps: You may ask him.

The Court: Cross examine.

page 11 ] Mr. Phipps: Wait just a minute.

Q. (By Mr. Phipps) You talked about that road that went around there in front of these houses that belong to Mr. Reedy and Mr. Fields and the other houses, are they about the same level?

Mr. Lively: Object to that, if the court please, those other, leading.

The Witness: Well, they are all on the same level up through there.

Mr. Phipps: You may ask him.

The Court: All right, cross examine. Overrule.

Mr. Lively: Exception.

*Elmer Robinson*

CROSS EXAMINATION

By Mr. Lively:

Q. You have lived there for how long?

A. Well, I have lived right there since '48.

Q. Since '48?

A. Well, they sold the houses, the company sold the houses there.

Q. Well, McClure River rises and has a flood in it pretty often, doesn't it?

A. Well, it generally comes about once a year.

Q. Once a year?

A. A spring.

Q. That is these very high floods come once

page 12 ] a year?

A. Yes, we have a kind of a —

Q. Very high, then at other times other than the very high flood it overflows its bank and gets up where, in the neighborhood of these houses up there, doesn't it?

A. Well, it don't get up in the houses.

Q. Well, it gets up under the houses, doesn't it?

A. No, it don't get up under, gets around.

Q. Around the houses, and it does that every year pretty often, doesn't it?

A. No, sir, it don't get up under there every year.

Q. Under. You spoke about this little house out in front of the residences there. That's a little house that's something like 20 feet wide and maybe 30 or 40 feet long?

A. No, this little house was tore up, tore — Rice Fields tore it up and junked it after it washed up there *agin* his upper side of his lot.

Q. Well, there's a house there now, isn't there?

A. (No response.)

Q. That's Mr. Reedy's right over there?

A. Well, his smoke house —

Q. Regardless of whose it is or whose house it's next to, there is a house there of some size now, isn't it?

A. It's a smoke house, yes.

Q. Well, about what size is it?

A. Well, I wouldn't say, wouldn't know. It's

page 13 ] about 8 or 10 foot wide and maybe 20 foot long.

Q. Twenty feet long, and it's still standing there?

*Elmer Robinson*

A. Well, it's blocked *agin* a big locust tree. It couldn't get away.

Q. Well, it was on above this originally, wasn't it?

A. Yes, it was setting crossways, because the side of the river —

Q. Here is the river, but it was above where it is now wasn't it? It's down the river from where it was originally, isn't it?

A. Oh, yes, it moved it down *agin* that locust.

Q. How far did it move it?

A. Well, it didn't move it much more than the length.

Q. About twenty feet? I believe you said.

A. If it did that. I never did measure it. I don't know.

Q. Well, it moved it, this flood that you're talking about, occurred in '63 I believe you said, that flood moved this house that you're speaking of down the river about 20 feet. Is that right?

A. Well, it moved it down *agin* that locust. I wouldn't know how many feet.

Q. Well, I am asking you about the distance. It moved it about 20 feet, right?

A. Well, to guess at it I wouldn't know without measuring.

Q. Yes, and it stopped only when it drifted up

page 14 ] against a locust?

A. In a big locust.

Q. Yes. That is the only thing that stopped it there, isn't it?

A. Well, I don't know about that now.

Q. Well, you know —

A. I know it stopped.

Q. That it drifted up against this locust, don't you?

A. Well, I know —

Q. A big locust.

A. It's setting there now.

Q. It's setting there now, and that didn't show any backing up of the water, did it, that caused this flood?

A. Well, what caused this trash to go down there and come back then?

Q. Well, you answer my questions. That showed that that flood moved this house downstream, didn't it?

A. Well, yes, it moved that downstream. It moved that down there before that bridge got blocked till it got to carrying that stuff back up.

Q. Well, how do you know it moved it down at any certain time? Did you see it move it?

A. No, I didn't exactly see it moving.

*Elmer Robinson*

Q. Why are you telling us that?

A. Because I know the way the river was rag-
page 15 ] ing though.

Q. You know the fact is that it was moved downstream, don't you, 20 feet up against a locust?

A. Well, we know it's down there, yes.

Q. Yes. All right. Now, how close are these houses there, this house that Mr. Mullins's property was in and the others, how close are they to the stream, to the —

A. McClure River.

Q. McClure River.

A. Well, I wouldn't know that now without measuring.

Q. Well, they are pretty close, aren't they?

A. Well, they're not too close.

Q. You can't give the number of inches but you know they are close to the edge of this river, don't you?

A. Well, they lack a lot of being on the edge of the river.

Q. Well, how much do they lack if they lack a lot?

A. Well, to guess at it, I'd say it was 150 feet to the edge of the river.

Q. You think it was 150 feet to, from the river up to that row of houses?

A. The way the river is right now, yes, sir.

Q. All right. And you say that this water was pouring over the dam down there, over the trestle?

A. Over the trestle, sure was.

Q. What did you call it, a dam or a trestle?

A. What?

page 16 ] Q. What did you call that structure there?

A. What would I call it?

Q. What did you call it in your testimony a while ago?

A. I was a calling it a dam because it dammed up —

Q. A dam.

A. It was dammed up *agin* it and the water pouring over it.

Q. You call it that because the trash drifted against the upper side of it?

A. (No response.)

Q. The water did go over it, didn't it, — through it?

A. It wasn't going through it that night. It was backing it up.

Q. Did you ever construct a bridge of this sort?

A. No, I never did construct a bridge like that, but I believe I could beat that in building one.

Q. You're willing to try to beat that?

*Elmer Robinson*

A. I believe I could.

Q. But you never built a bridge, did you?

A. I worked on them some though.

Q. You never had to do with the construction of a bridge of this kind?

A. No, sir, I never did construct one.

Q. You couldn't go over there and tell anybody how to build a bridge at that place, could you?

A. I believe I could build one that let the water

page 17 ] through.

Q. You wouldn't know how to start to build a bridge there, would you?

A. Sure, I'd know how to start to build a bridge.

Q. What do you find — what's wrong with this bridge?

A. What's wrong with it?

Q. Yes.

A. What's wrong with it. Well, it just built, the beds is just built too close together to let the stuff go through. That's all that's wrong with it.

Q. Do you know what it takes to build a bridge there that will hold up a railroad train?

A. Sure, you can look down at Mouth of Canny you see what it takes to hold up a railroad train.

Q. Well, what does it take to hold up a railroad train that this bridge doesn't have?

A. Well, you'd just have to build an abutment there out of concrete and set them steel structures there like you got down at Mouth of Canny.

Q. That's the way you'd build it?

A. That's the way I'd build it.

Q. And you don't know of any bridge being constructed at a place like this as to what it requires, do you?

A. (No response.)

Q. You don't know what it takes to build a bridge at a place like that to hold the traffic that it has, do you?

page 18 ] A. Well, I couldn't figure it out if, I don't guess.

Q. Don't guess you could. You're not capable of telling whether or not the bridge is built properly or improperly, are you?

A. It looks like a man's eyes wouldn't fool him if you could see anything.

Q. Now, on — how high are the banks of the river along there?

A. What?

Q. How high are the banks of the river along there?

A. Well, I wouldn't know that exactly either.

Q. Along right about where this bridge is, how high are the banks of the river on each side?

A. The banks you mean?

Q. Yes.

A. I guess they're about 30 the way the bridge comes across there.

Q. Well, the bridge has got nothing to do with the height of the bank, has it?

A. Well, the bank would be about off from the bridge out going up above the shop there I guess —

Q. Well, you say the water came over the top of this trestle?

A. Not plumb over the top of the trestle.

Q. Well, how far did you mean? Didn't you say a while ago that it went over the top?

A. No, I didn't say that a while ago.

page 19 ] Q. What did you say?

A. I said it built a dam and was going over the top of the dam.

Q. Going over the dam. Well now how far up on the dam did the water come? How far up on the trestle did the water come?

A. Now you know these braces you have got in the bridge?

Q. I don't know a thing about bridges. I am just asking you how high up on the trestle did the water come?

A. Well, —

Q. At this flood time.

A. It was almost up to the main stringer that holds the railroad up.

Q. And about how close to the top was that?

A. Well, it looked like about four or five feet up at the stringer, the main stringer at the top of your level.

Q. How high was the water — how high was the water up on this?

A. The water was going up and pouring under them stringers there.

Q. And was that height as high as the banks of the river?

A. Yes, it was around as high as the banks.

Q. As high as the banks of the river?

A. Where it goes over on the ground there at the shop.

*Elmer Robinson*

Q. Did the water pour over the banks and onto
page 20 ] the bottom there?
A. Huh?

Q. Onto the bottom where those buildings and supply houses are constructed, how did the water get over — get on that bottom now, if it did?

A. Well, it, why it got up there, it backed up here and run around the end of that shop and down the bottom to the supply house.

Q. So the water was up higher than the bottom. Is that right?

A. Sure it was up higher than the bottom was.

Q. How much?

A. Well, I never measured the water there at the shop, but you couldn't go down through there. I know we made a dozen trips down there that night a looking at it.

Q. You don't know how much higher than the bottom. How deep was the water in the bottom there?

A. Well, I never measured that. I don't know just —

Q. How wide is that bottom about the structure, the bridge structure?

A. Don't know that.

Q. Well, it's — you have some idea about it, don't you?

A. You mean going down toward Ervin Supplies?

Q. I mean, yes, sir, going from the direction of where these houses are downstream by the town of McClure
page 21 ] and by the supply house and so on.
Q. Well, I wouldn't know how wide they are. I worked there for years, but I never did measure the bottom.

Q. And you don't know how high it was up at the bridge, up at the trestle?

A. I told you how high it was. It was a pouring over them braces that runs on —

Q. Well, I am not asking you about that. I am asking you in feet how high it was, how high was the river.

A. Well, I never measured it, measured timber up there, and I don't know how high the timber is. I know it was dammed up and backed up the river. That's all I know.

Q. How high is the river back down at those houses where this Mullins' furniture was?

A. You mean off to the river?

Q. I mean —

A. Straight off down in.

Q. The normal height of the river up to those houses, how

high is it?

A. Well, I couldn't tell you that just a looking at it. I never measured that.

Q. Don't have any idea?

A. Well, not too good an idea because I never did —

Q. As compared with the height of the bridge I believe you said the bridge was four or five feet high, the
page 22 ] trestle was four or five feet higher than the river banks, the bottom. Is that right?

A. You mean the trestle from the bottom of the river up to the top of the bank there?

Q. Yes, is that right?

A. Where you go over on the ground, the track?

Q. Is that right?

A. You know it's higher than that.

Q. It's not a question of what I know. What do you know? What is the height of that river or that trestle there as compared with the banks, the height of the banks of the river?

A. Oh, it's 25 or 30 feet up there from the bottom of the river up there to the top of your rail on your bridge.

Q. Well, how high is it as compared with the river banks along there? Is it higher than the river banks, the trestle? And, if so, how much?

A. It comes right out level on top of the bank and goes, the track goes right down on the ground there at the shop.

Q. Well, how high was it? The trestle comes off on a fill there, doesn't it? It's higher than the bottom?

A. Oh, yes, they made a little fill there when they come off of there.

Q. I say then it's higher than the bottom. Now, have you ever seen the bottom flooded before this trestle was built?

A. No, sir, not since I have been there.

page 23 ] Q. You mean to say that the bottom, that bottom land there where the supply house and so on is has never been flooded —

A. Never been flooded since I worked there.

Q. Wait a minute. Not until after this trestle was built?

A. Not in my knowing ever since I worked there.

Q. You have been there where you could observe it for a good many years, haven't you?

A. I worked for Plain Mill for Ritter for about twenty year.

Q. And you observed this river pretty closely and you can tell this jury that that bottom has never been flooded until after this trestle was built there? Is that what you mean?

*Elmer Robinson*

A. Not like it was this time. Never was up there.
Q. Well, not like it was this time or —
A. It was up agin that shop right there, that kiln, that dry kiln where Ritter had the dry kiln. It never was up agin there what time I worked there.
Q. When did you work there?
A. I worked there when Ritter Lumber Company was running that shop.
Q. And from what time to what time?
A. Well, I couldn't just tell you what year.
Q. Were you there in 1957?
A. 1957.
Q. Yes.
page 24 ] A. I lived — I lived right there.
Q. Right there where you could observe the trestle and there wasn't any overflow in the bottom in 1957?
A. No, sir, the bridge wasn't in there then.
Q. Is that what you're telling the jury? You are certain of that as anything you state?
A. I am certain of that.
Q. No overflow at all in 1957?
A. Not up around that and down through there to Ervin's Supplies.
Q. Well, you know where that bottom is there, don't you, where these buildings are?
A. Where the houses is, yes.
Q. Yes. And they extend right up to the river, don't they?
A. The water got up in that garden in '57, but it — it wasn't like it was this time.
Q. Now, isn't it a fact that the water was in an inch or two or a few inches as high in '57 on those buildings as it was in '63 at the time of this complaint?
A. Oh, no.

The Court: Is that all of this witness, gentlemen?
Mr. Lively: Let me ask him just one more question.

Q. (By Mr. Lively) What time of day was it when you observed this river on this occasion that you are telling about?
A. This last high water?
page 25 ] Q. Well, I don't know whether it was the last or not, but the high water you were telling about when you talked about this bridge and the overflow.
A. Sixty-three.

Q. Well, and what time of day was it when you were down there observing this stream?

A. Well, I stated in the first, beginning, that old man Fields and old man Reedy and Field's wife come to my house two o'clock that night. And we never did go to bed. I stayed up, me and Mr. Fields walked up and down through there and looked at the river right on till —

Q. Well, did you go in the house where this man's furniture was?

A. You couldn't get in there without swimming in there.

Q. Couldn't get in. Did you try to get in?

A. No, wasn't no use to try to get in. We didn't want to get wet.

The Court: All right, he's gone into that.

Mr. Lively: All right, stand aside.

The Court: Call your next witness.

Mr. Phipps: Wait a minute. I want to cross examine the witness.

## REDIRECT EXAMINATION

By Mr. Phipps:

page 26 ] Q. Mr. Robinson, state how that — tell the jury there just how that trestle was built, whether it is straight across or how is that?

A. No, it's not built straight across the river. It's built angling like this and then it's, the piers is set about ten feet centers there, ten feet from one pier to another.

Q. And do you know how many of those piers are there?

A. I have counted them, but I don't remember just how many.

Q. Now, do you know how high the water got up there in the floor of the house that Mr. Mullins lived in that night?

A. No, I wasn't never out in Mullinses' house.

Q. Well, you were down at the Rice Fields'?

A. Rice Fieldses'.

Q. Well, do you know how much was in it?

A. It was 30 inches from the floor up to the water mark.

Q. Well, how did that compare with out there where he lived?

A. Well, according to the level there and the way the water running out this road it was bound to have been standing in his house about the same depth.

*Elmer Robinson*

Q. About the same?

A. The same depth the way it looked running out that road.

The Court: All right, any questions?

Mr. Phipps: That's all.

RECROSS EXAMINATION

By Mr. Lively:

page 27 ] Q. You spoke of this trestle not being straight across the river. That is correct, isn't it?

A. Certainly ain't straight across the river.

Q. Not straight across the river. Would it be practicable to build a trestle at that place to serve these people that live there, be possible to build a trestle of that sort straight across the river at that place?

A. Well, to my ideas now —

The Court: Just answer the question if you can.

The Witness: What?

The Court: Answer the question. Let's get along.

Q. (By Mr. Lively) Would it be practical to build a trestle straight across the river there?

A. Well, you couldn't build it straight across and come in the way you did, but, the way it's over there, but they could have fixed it opening in the river, the bigness of the river and let the water through, not have blocked, completely blocked the river.

Q. But you didn't answer my question. I said would it be practical to build a trestle straight across the river there?

A. Oh, yes, I could build a bridge straight across the river.

Q. But it wouldn't serve the purpose, would it?

A. No, you couldn't get in —

Q. Couldn't get a train across it to save your life.

page 28 ] The Court: I don't see how this is helping a bit, gentlemen. I declare. Go ahead. Get on to something else?

Mr. Lively: Stand aside.

The Court: Stand aside. Call your next witness.

RICE FIELDS,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Phipps:

Q. Your name Rice Fields?

A. That's what they call me, yes, sir.

Q. Where do you live?

A. Live at McClure.

The Court: Were you sworn to testify?

Q. (By Mr. Phipps) Were you sworn this morning? Were you sworn?

A. Yes, yes, I was sworn.

Q. How old are you?

A. Seventy-two.

Q. How long you been living there in the house that you live in now?

A. Well, I imagine, I don't know just exactly, about fifteen year I believe.

Q. Do you recall a flood that they had in March of '63 over there?

page 29 ] A. Yes, sir.

Q. Were you living in your house then?

A. Yes.

Q. And how far is your house from the house where Harold Mullins lives?

A. Well, I don't know just exactly, but there is one house between me and that house.

Q. Well, who lives in that house?

A. Alex Reedy did live in it.

Q. How far is it from Alex Reedy's house over to the house that Harold lived in?

A. Well, I imagine it's about 30 foot probably.

Q. How far from your house over to the Reedy house?

A. About the same thing, about 30 feet or like the length of the house over there. I don't know just exactly the size of the lots there, but something like that, approximately that.

Q. Mr. Fields, did you get out, have to get out of your home on the night this flood came?

Mr. Lively: That is objected to, what he had to do.

Q. (By Mr. Phipps) Well, tell what you did there with reference to the flood.

A. Oh, with reference to the flood?

Q. And tell what you saw about the river, what was in the river and all.

page 30 ] A. Well, along about eleven o'clock one of my neighbors called and asked me if — they used to live next to me — if the water was getting up and I went out and looked and I told him well, it was getting up pretty close.

Mr. Long: Object to what he said.

The Court: Tell what conditions were there. Leave out the conversation with the other people.

The Witness: That was I say going on about eleven o'clock I went out and water was up nearly to my garden gate and at one o'clock then, a little bit after one, why it was up into the house. And so we had to, we put up what things we could and we had to get out. The water got up, before it quit raining, was up to 30 inches in my house. That's what it was up, 30 inches.

Q. Well, did you go out and see Mr. Mullins's house?

A. Yes.

Q. Do you know how much water was standing in his house?

A. Well, I didn't go in the house. I went out the road, that is, after the water went down the next morning, and it had looked like that the water was just about the same. Oh, it might have varied maybe an inch or two on those houses, all five of them out through there.

Q. All right. Now, go ahead. Go ahead and tell what you saw there in the river, what the condition of the river was when this happened.

page 31 ] A. Well, the river was, it was, well, it was going down one side and coming back up the other is the way it looked. It picked up my woodhouse, took it up the river about 15 feet till it hit the fence and stopped, took it back up the river.

Q. Now, that's on your side where you lived?

A. That is on my side, yes, that is right.

Q. All right. Now then, what was — go ahead and tell what the condition of the river was on down below this where this trestle is.

A. Well, the river was backed up from the bridge looked like and down at the bridge it looked like it was flowing over. I went down as far as I could get. Me and Mr. Robinson walked down there that night.

Q. Well, next morning just describe what you saw at the trestle.

A. Well, there was trash and stuff backed up there and it looked like that the water had been about, oh, from three to four feet higher on the upper side than it had on the lower, the best of my estimate. I never measured it.

Mr. Lively: That is objected to, it looked like. If he knows we have no objection to him stating.

The Witness: Well, I never measured. I'd estimate it being about from three to four feet.

The Court: Go ahead.

page 32 ] Q. (By Mr. Phipps) What did all that trash and stuff do to the river there? Tell what happened to that.

A. Well, that trash and stuff, it blocked the bridge. This water backed up like a dam of any kind when it gets stopped up, stopped up till it got up it could flow on down through the bottom.

Q. Did you observe it and see it the next morning to see whether or not any water was going over what you call this dam or whatnot?

A. Sure.

Q. Well, tell the jury about that.

A. Well, it was flowing over just like you have seen a mill dam. It was dropping over about, I couldn't, I didn't measure it. I couldn't be positive. It was four feet, three and a half or something like that, somewhere along there from three to four feet what it looked to me like.

Q. Where was it falling?

A. It was falling on the other side.

Q. From the upper side to the lower side was something like three and a half to four feet?

Mr. Lively: I object, if the court please. All of it is leading. Let the witness testify.

The Court: I think he is doing all right testifying the best he can. You all leave him alone.

The Witness: That is the best I could tell. I
page 33 ] didn't measure. It looked like from three to four
feet higher than the upper side than it was on the
lower side. Somewhere along there.

The Court: All right.

Q. (By Mr. Phipps) Well, you were living there in 1957?

A. Yes.

Q. Well, how did that flood compare with this one?

A. I wouldn't know. I wasn't at home in 1957.

Q. Wasn't at home?

A. I was down in Kentucky. I wasn't — I was working down in Kentucky. My wife was home, but I wasn't home.

Q. Well, you have measured that trestle, have you not? How many sections in it, if you recall, how many pillars?

A. Mr. Phipps, I couldn't — I believe it's about twenty, but I wouldn't be too sure, but somewhere around it. I counted them one time.

Q. Well, did you count at one time?

A. Yes, I counted and I measured the distance twelve feet centers and the timbers is ten inch timbers and again your braces in there leave you something over ten feet between them.

Q. About ten feet between each pillar?

A. Yes, and then you can see it's setting at an angle with the river. If it had been square it would have been different,
but it's setting with, angling with the river.
page 34 ] Q. They are not set square with the river?
A. No, they are not set square with the river.

Q. And they are not set straight across the river either, are they?

A. No, they are setting like this, right here, just as, angling something like that, you see (demonstrating).

The Court: All right, cross examine.

## CROSS EXAMINATION

By Mr. Lively:

Q. When did you get this knowledge, Mr. Fields, that you testified about?

A. Sir.

Q. What time did you see the river and make your observations?

A. I seen it that night and the next morning both.

Q. And that was in 1963?

A. Yes, that's right.

Q. And when had you had a flood of that character before that?

A. The other flood was in '57.

Q. Fifty-seven?

A. Yes.

Q. And how was it as compared to this flood?

A. Well, it didn't, it hadn't — didn't hurt any of my furniture and things at home. I didn't have to buy anything there, but I don't know, I wasn't at home, but it wasn't, page 35 ] it hadn't been as high because they didn't have to move anything out of the house or anything.

Q. But it did get up in your house, didn't it?

A. I think it did. I think it got over the floor just barely over the floor, what my wife said. Now I don't know; I wasn't at home.

Q. You saw signs of it where it had been up in the house?

A. Sure, yes.

Q. And about how high had it been in the house?

A. It, well, it looked like it might have been on the upper side of the house. The house wasn't exactly level, must not have been, because it looked like on the upper side of the house it had been about, oh, the molding that comes around your baseboard. It looked like it had been up to about the top of that.

Q. Four or five inches?

A. I wouldn't be sure whether it's five inches or not, but something like that. But on the other side now in my bathroom it never got into the bathroom in '57.

Q. But it was up in the house on both of these occasions?

A. Yes.

Q. And over the floors?

A. Yes, that's —

Q. Now the other —

A. On one side of the house. Now on the other one it wasn't.

page 36 ] Q. I understand. Now, on other occasions, on many occasions, you have seen McClure River at such flood stage as to come up there under those houses, haven't you?

A. I have seen it up around up to my house one time before this. One time was, is all the times that I ever seen it, and I

have been there ever since those houses was built, that is, worked there at McClure.

Q. Was there any railroad trestle down there such as you are talking about now in 1957?

A. No; no, sir.

Q. Wasn't any trestle down there?

A. No.

Q. But the water was never up in your house without any trestle?

A. No, other than '57, not to my knowing it wasn't.

Q. You say it was then?

A. In '57, yes, that's right.

Q. And no trestle down there?

A. No, wasn't any trestle there.

Q. Now on this occasion — well, strike that out. How high are the river banks there below your house and down towards the town of McClure and on beyond where this trestle was? How high are the river banks?

A. Well, it's pretty high right now. It's been filled in there. When they built that trestle, when those houses page 37 ] were built and when Ritter's Mill used to be there along down there, that bottom, there that was a slope down to the river. When they built this bridge in there and put this railroad in there and Ervin's Supply built those garages there, they filled in there. They filled this, hauled dirt and filled in and so it's different. It's pretty high over there now. But it was —

Q. Excuse me, sir. But it was high enough, the banks were not so high in 1957 but what this flood water ran over that bottom, didn't it?

A. Would you repeat that question?

Q. I say in 1957 although there was no trestle there such as you complain of now, the flood waters covered that bottom and covered, there was some depth was up on —

A. I wouldn't know; I wasn't at home. I didn't see the bottom. I wasn't at home in '57.

Q. You don't undertake to say that it didn't do that?

A. No, I can't say it did or didn't because I was working in Kentucky. I wouldn't know.

Q. You were not a bridge or trestle builder?

A. (No response.)

Q. You are not an engineer?

A. No, I am not an engineer, but I have helped build several trestles.

Q. You have worked at it?

page 38 ] A. Yes, sir, I have worked at it.

Q. You — what company did you build trestles for?

A. I did work for the W. M. Ritter Lumber Company.

Q. The W. M. Ritter Lumber Company?

A. Yes, sir, that's right.

Q. You never had to build a trestle for a railroad that hauled heavy freight over it, did you?

A. Nothing except logs. That's all; that's all.

Q. But there wasn't much comparison in a trestle such as you'd build for logging for Ritter Lumber Company and as would be required —

A. Well now, let me amend that too. We had to build trestles across from where the main line come through to haul the lumber out. Now this was the main line.

Q. I understand, but you wouldn't compare the requirements of a trestle built for the lumber company as equal —

Mr. Phipps: Your Honor, I think that is immaterial and we object.

Mr. Lively: As equal to what would be required for a trestle such as this?

The Witness: Not for a logging road I don't expect it would have to be as heavy, that's right.

Mr. Phipps: Save exception.

Q. (By Mr. Lively) And you saw the flood that night and also the next day?

page 39 ] A. Yes; yes, sir.

Q. And you observed — did you ever move your furniture out on this, during the first flood?

Mr. Phipps: Well, we object to that, your honor. It's immaterial.

The Witness: I wasn't at home. No, my wife was there. They didn't move the furniture out in the first flood.

Q. (By Mr. Lively) Not that you know of?

A. No, I wasn't at home. She said she didn't move the furniture out.

Mr. Lively: I believe that's all.

The Court: All right, stand aside.

*Orbin Dotson*

REDIRECT EXAMINATION

By Mr. Phipps:

Q. Mr. Fields, do you know whether Harold Mullins put his furniture out of there, threw it away, or carried it out, or anything?

Mr. Lively: Well, we object to that, if the court please.

The Witness: No, I don't, Mr. Phipps, I don't know.

The Court: I sustain the objection. Stand aside, Mr. Fields.

Mr. Phipps: Stand aside. Call Orbin Dotson.

page 40 ] ORBIN DOTSON,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Phipps:

Q. Your name Orbin Dotson?

A. Yes, sir.

Q. How old are you?

A. Forty-seven.

Q. Where do you live?

A. McClure.

Q. Do you recall this flood that they had March '63 over there?

A. Yes, sir.

Q. You were the owner of one of those houses that was flooded?

A. Yes, sir.

Q. How long did you own that house?

A. Well, roughly ten years I guess.

Q. I don't believe that is the house that Harold Mullins lived in, is it?

A. Yes, sir.

Q. It is the one that he lived in?

A. Yes, sir.

Q. How long did you own it, say about ten years?

A. I'd say roughly ten years.

page 41 ] Q. And did you see that flood the next morning?

A. Yes, sir.

Q. Or that night?

*Orbin Dotson*

A. I saw it about two-thirty that afternoon and then I saw it the next morning.

Q. Did you go out and see Harold's house, inspect it just after the flood?

A. Well, yes, it's my house; I was in there.

Q. Well, you went in and looked at it?

A. Yes, sir.

Q. How far up from the floor had the water stood in that house?

A. The best I could tell was about three or four inches above the kitchen sink.

Mr. Lively: I couldn't hear you. What?

The Witness: The best I could tell three or four inches above the kitchen sink over top of the kitchen sink.

Q. (By Mr. Phipps) Well, do you recall the flood in '57 over there?

A. Yes, sir.

Q. Did you get up in the house after that?

A. Yes, it looked like it was about an inch of getting to the top of the baseboard.

Q. Lacked a little of getting to the top of the sink?

The Court: The baseboards.

page 42 ] The Witness: The baseboard. I believe the baseboard is six inches high. I am not sure.

Q. (By Mr. Phipps) How high was it up to the top of the sink?

A. It's either thirty or thirty-two inches. I can't say which, but it's thirty or thirty-two.

Q. Well, what do you mean by that? You mean water was thirty or thirty-two inches or you mean the sink was thirty or thirty-two inches?

A. No, thirty or thirty-two inches high.

Q. Water three or four inches above that, take four off from what it was in '57, leave you about twenty-four or twenty-six inches to it at the top. Is that right?

Mr. Lively: Don't answer that. I object to that as leading and suggestive.

The Court: Well, I don't think it's material anyway. The jury can make their own calculations if they want to make any.

*Orbin Dotson*

Q. (By Mr. Phipps) Now, did you observe the river the next morning?

A. Yes, sir.

Q. Just tell the jury over there what you saw in that river and down there where that trestle was and on down the river. Just go ahead and tell what you saw there.

page 43 ] A. Well, it was I'd say most any kind of trash that you could imagine was there. Anyway you saw logs, twigs, all kinds of debris that comes from a flood, all kinds of cans, jugs, I just — it would be hard to mention what all.

The Court: Where was it? Where was this debris you're talking about?

The Witness: Beg your pardon?

The Court: Where was the debris?

The Witness: It was against the bridge.

Q. (By Mr. Phipps) Describe that now, how it was packed in there. Just tell about what you know about how it was constructed and all.

A. Well, actually, you could see more of the debris as the water went down; and, when the water went down, it was, well, it would be hard for me to describe I guess what all was in there.

Q. Well, what was in it? What was in the river there besides cans and big logs.

A. Well, just hog trash. Saw logs, limbs, trees, bushes, and, oh, just about all kinds of stuff.

Q. Well, about how high did that extend up on that trestle?

A. Well, when the water went down it was I'd say twelve or fourteen feet up on the trestle, the debris was.

Q. Well, did you observe the water above the dam or bridge, you call it, in there and below it at that time?

page 44 ] A. I did at two-thirty. I stood there and it was roaring so the main thing that attracted my attention, and looked out over it like this and angled with my eye, and it was plain to see that the water was I'd say between two and two and a half feet. I mean there was roll there like a waterfall at two-thirty in the afternoon, and I came out there at eleven o'clock that night, and it was dark. I couldn't see, but two-thirty in that afternoon that was about I'd say the roll in the water.

*Orbin Dotson*

Q. Is that the afternoon before or the afternoon after that you're talking about?

A. Well, the water, that was when it was getting high. I mean it was higher on later in the night. That's two-thirty in the evening as I went to work.

Q. Well, state whether or not the water below the trestle or dam was about the same height as that above it.

A. No, it was noticeable. You could stand back and see that it was lower behind the trestle than it was.

Q. Do you know the house or building that Rice Fields had there?

A. Yes, I lived right close to it four years.

Q. Well, did you observe whether or not it was moved during this flood?

A. When it was moved?

Q. Well, which direction was it moved?

page 45 ] A. It was moved up the river, and the foundation was setting here, and you could see it setting upstream, oh, I just measured with my eye, I'd say twelve or fourteen feet. I don't know for sure how far.

Q. It did not move it downstream?

A. No, sir, it did not.

The Court: All right.

Mr. Phipps: You may ask him.

The Court: Cross examine.

## CROSS EXAMINATION

By Mr. Lively:

Q. You say this water was how much higher above the trestle than it was below?

A. Above the trestle?

Q. How much higher. You stated it was so much higher above the trestle than it was below.

A. That was two-thirty in the afternoon, and I just measured with my eye. I just estimated I'd say between two and two and a half feet.

Q. Two and two and a half feet?

A. Yes, sir.

Q. And that was at the time it was the highest?

A. Nope.

Q. When did it get the highest?

A. That night about one or two o'clock.

Q. And you don't know how high it was then?

page 46 ] A. No, sir, I don't.

Q. Could you see — was it a dark night?

A. Yes.

Q. One or two o'clock?

A. When I walked over to the edge of it and I couldn't see; I could hear.

Q. You tried your best and you couldn't see at one or two o'clock?

A. No, not one or two o'clock, about eleven o'clock.

Q. Well, I thought you went back then at one or two o'clock.

A. That was before dark, two-thirty in the afternoon.

Q. Two-thirty in the afternoon?

A. Yes, sir.

Q. Well, it was eleven o'clock then at night that you couldn't see?

A. That's right.

Q. And you walked down to a place where it was, you would have had visibility if it could have been seen at all?

A. (No response.)

Q. I say you walked down to a place where you could have seen if it was visible?

A. Yes, yes, I was right on the edge of it.

Q. And you went down there for the purpose of trying to see, so you don't know how much higher the water was on the upper side of the trestle than it was on the

page 47 ] lower.

A. Not at eleven o'clock at night, I didn't.

Q. No, sir. Now, you were asked about a house up there at, where these five houses are along up there.

A. Yes, sir.

Q. And you say you believe the house moved up the river?

A. Yes, sir, it's moved up the river from its foundation. The foundation was here and it was setting up here up the river.

Q. Well, is that the house that's sitting over there now?

A. No, that was a smoke house.

Q. Well, there's a house over there now in front of one of these properties that's probably ten or twelve feet wide and twenty feet long. Have you seen that?

A. Well now, there is two houses over there. You'll have to tell me which house and which piece of property.

Q. Well, do you know of a house over there that is something like ten or twelve feet in width and twenty feet long,

something like that?

A. Well —

Q. A dark colored house. It's sitting there now. Do you know of anything like that?

A. Well, there's five houses and three smoke houses, and I can't get in my mind which one you're talking about.

Q. I am not talking about the five houses. I am talking about a house, a smaller house that's between the river

page 48 ] and one of these five houses. And it was there at the time of this 1963 flood. Do you know of any such house as that?

A. Yes, there is two houses there and I still don't understand which house.

Q. Do you know of a house over there that is twenty feet long and dark colored and about ten or twelve feet wide and that has moved down the river from where it was and lodged against a big locust tree?

A. That's not the house — I understand the house you mean now. That belonged to —

Q. All right, you know about that house then, the one that I mean?

A. Well, I can't swear as to its position for I never did go out there and look at it.

Q. Well, can't you swear that that house was moved down the river during this '63 flood?

A. No, sir, I haven't paid any attention to that old house.

Q. Haven't paid any attention. Was there any reason why you would have paid attention to this house which was moved up the river and not pay any attention to this one?

A. Yes, sir, as I was going to my house it was right there. I couldn't help but see it.

Q. And you couldn't see the other one?

A. If I walked around behind his house I could have.

Q. You do know of this house that I'm asking

page 49 ] about?

A. Yes, I have seen it.

Q. And do you know also that this house was lodged on the lower side of the, down the river lodged against a big locust tree?

A. No, sir, if it was a locust tree over there, I don't remember.

Q. I see. You don't undertake to say there isn't a house of the kind that I have asked you about over there?

A. Yes, sir, there's a house. There's a house there that you

asked me about.

Q. And you can't tell the jury whether that house has drifted down the river or up the river, that house that I am speaking of now that is against the big locust tree?

A. No, sir, I didn't pay any attention.

Q. Just don't know.

A. Is that all?

Q. How long you say you've been living over there?

A. I lived there about four years, but I have been gone about five.

Q. Been away from there for five years?

A. Four.

Q. Four years?

A. Yes, sir.

Q. When did you leave there?

A. Four or five years ago.

page 50 ] Q. Well, what year did you leave?

A. I couldn't swear that. I—

Q. Well, did you leave before '63 or after '63?

A. Yes, sir, I left before '63.

Q. Left before '63?

A. Yes, sir.

Q. And what were you doing there in '63 when this flood came?

A. Well, I come—I worked right near the bridge, too.

Q. Work near the bridge?

A. And I came down the next day to look my property over.

Q. What work do you follow, or what were you?

A. I work for Clinchfield Shop.

Q. Clinchfield Shop?

A. Yes, sir.

Q. Were you there in 1957?

A. Not in that house. I was in McClure.

Q. Well, were you where you could observe the condition of the river in 1957?

A. Yes, sir.

Q. What was its condition then with reference to flood?

A. Well, I told you a while ago it got up to the top of the baseboards, about an inch of the top of my baseboards in '57 and got up over the kitchen sink in the '63 flood.

Q. Now, did it also get up over their bottom—

page 51 ] this bottom down there where the buildings are, the supply shop and the other buildings down there, down the river from where these five houses are?

Did it get over the bottom at that time?

A. Where the five houses are?

Q. No, the bottom that's down the river from where the five houses are. Ervin's Supply and McClure Supply Company and those business buildings there?

A. Well, I have heard it did, but I didn't see it. I wasn't down there.

Q. You didn't happen to see that?

A. I wasn't down there, no, sir.

Q. But you don't know anything except you were in the house of Mr. Mullins' and saw where the water was up in it, didn't you say?

A. I didn't go in it when the water was up. I went in it after the water was up.

Q. Oh, you saw the indications that were in the house?

A. I saw the mark on the wall and I shoveled the mud out of the sink.

Q. You don't know what the condition was as far as the flood was concerned in '57 or '63 either, do you?

A. (No response.)

Q. Did you observe—

A. I don't understand exactly what you mean.

page 52 ] Q. Did you observe the flood itself both times or either time?

A. Yes, sir, I stood there and looked at it all right.

Q. Both times, '57 and '63?

A. Yes, sir.

The Court: All right. Is that all?

Mr. Lively: Stand aside.

Mr. Phipps: Call Rice Fields back for one question.

RICE FIELDS,

was recalled, and further testified as follows:

DIRECT EXAMINATION

By Mr. Phipps:

Q. Mr. Fields—

A. Yes.

Q. You testified a while ago about this building of yours that, in the lower part of your lot, and it moved up the river or upstream about fifteen feet. Will you tell the jury over there about what the size of that building is?

A. I believe it was—
Q. Was the size of it.
A. Eight by ten I think.

Mr. Lively: Mr. Fields, won't you look over this way so I can hear you?
The Witness: Yes, about eight by ten.

page 53 ] Q. (By Mr. Phipps) By how high about?
A. Oh, it was I think about eight feet on the front side and it sloped one way and about six—six and a half on the back.
Q. Did it have a floor in it?
A. Yes, it had a floor in it.
Q. What kind of a floor?
A. Wood floor.
Q. Rough floor?
A. Yes, rough floor.
Q. All right. That is all.
A. And also had a bunch of windows and, you know, just odd junk of one kind and another, iron, and some tools, one thing and another.

The Court: All right. Is that all?
Mr. Phipps: You may ask him.

## CROSS EXAMINATION

By Mr. Lively:
Q. Now, how many buildings were between those houses, those five houses and the river before this '63 flood?
A. Well, I wouldn't know on up through there just exactly how many buildings there were.
Q. Well, you know how many buildings were between those five houses and the river, don't you?
A. No, not none except mine and Mr. Reedy's
page 54 ] there. Now, we had—he had a wood house in his yard there and this one, this one I was talking about washing back up in my yard, that's the only two, and I expect there was outbuildings along up there, but, probably one to each house. I wouldn't be positive about that.
Q. Do you still live over there?
A. Sure, yes.
Q. Well, isn't there a house there now?

A. What?
Q. Isn't there a house there now?
A. Yes, that's Mr. Reedy's.
Q. Between those houses, this row of five houses and the river?
A. Yes, there's a house there.
Q. Yes, and about what size is it?
A. One house there.
Q. And about what size is it?
A. Well, I don't know. It looks to be about twenty feet long and about eight feet wide.
Q. That's not the house you were talking about?
A. No, I had to tear this one down. It knocked it down up *agin* the fence, turned it over, took it up the creek *agin* the fence and it was full of mud and stuff like that, and I just tore it down.

Q. And there is a house over there that washed
page 55 ] down the river, isn't there?
A. It come down a piece and it started to swing around.
Q. Yes.
A. And it come against the fence there and stopped.
Q. But it washed down the river, didn't it?
A. Yes.

The Court: That's what he said.
The Witness: It come down the river.
The Court: We have gone over this a dozen times I know.
Mr. Lively: I don't think I had asked this witness that.
The Court: Well, it has been testified about a half dozen times about that house going down the river.

Mr. Phipps: That's all.
Mr. Lively: I believe that's all.
The Court: Stand aside, Mr. Fields. Call your next witness.

PRINCE COUNTS,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Beverly:
Q. What is your name, sir?
A. Prince Counts.

page 56 ] Mr. Lively: Turn so we can hear. Look at the jury, if you can. What is your name?

The Witness: Prince Counts.

Q. (My Mr. Beverly) How old are you, Mr. Counts?

A. I am forty-five years old.

Q. Where do you live?

A. I live over here off McClure River.

Q. Are you acquainted with Harold Mullins?

A. Yes, sir.

Q. Where do you work?

A. I work at the central shop for the Clinchfield Coal Company.

Q. Is that just below the place where this flood occurred in March 1963?

A. It's on the river, the other side of the river right beside of the flood.

Q. Did you have occasion to go look at it?

A. Well, I seen it.

Q. Did you go over on the bridge itself?

A. No, sir, I didn't.

Q. Were you in a position to see whether the lower side of the dam was lower than the upper end?

A. You mean the water?

Q. Yes.

A. Well, yes, it was.

page 57 ] Q. About how much was it?

A. Well, when I seen it, it wasn't at the highest place whenever I seen it. The flood had been higher.

Q. What time did you see it?

A. Well, it was up in the day sometime the next, the next day after the flood come at night. It was the next day sometime.

Q. Did you look at the houses that were involved in the flood?

A. Yes, sir.

Q. When you saw them the next day, was the water up in them?

A. Yes, sir.

Q. How far?

A. Well, when I seen them it had been higher than it was when I seen them, but it was up close to the—

Mr. Lively: Well, we object to that. Tell what you saw.

The Court: Just tell what you saw.

The Witness: Right up close to the window. Sir?

The Court: Just describe what you saw in the house.

The Witness: I never saw nothing in the house. I seen it outside of the house.

The Court: You didn't go in the house?

The Witness: No, sir.

page 58 ] The Court: Well, what, if anything, could you tell, was there any indication showing how high the water had been on the outside of the house?

The Witness: Yes, sir, I could see where it had been.

The Court: What was it?

The Witness: Well, there was a water mark there around the side of the house.

The Court: Well, how far was that up on the side of the house?

The Witness: It was up near the bottom of the top window. It had been at the bottom pane, near the top of it.

The Court: All right.

Q. (By Mr. Beverly) Would you describe for the jury about what the dam looked like when you saw it, or the water?

A. Sir?

Q. Will you describe to the jury what it looked like right at the bridge when you saw it?

A. Well, right at the bridge there was a lot of trees, limbs, brush, leaves, and it formed a dam against the bridge. And it just looked like a big, almost like a dam, is about as near as I can tell you what it looked like.

Q. I believe you stated that the water above was higher than the water below.

The Court: He stated that.

page 59 ] The Witness: Yes, I stated that statement.

Q. (By Mr. Beverly) Were you there in 1957 when there was a flood?

A. Well, I lived the same place.

Q. Did you see that flood?

A. Yes, sir.

Q. Which one had the most water in it?

A. Well—

Q. Aside from the dam or bridge, the one in 1957 or 1963?

A. Well, above the bridge there was more water in the last one.

Q. In 1963?

A. Yes. Below the bridge I wouldn't say. It might have been as much; it might have been not as much. I don't know. It was about the same I guess. I don't know for sure what was below, but I do know that there was more above. Above the bridge there was considerably more water.

Q. Was the 1957 flood a notably big flood?

A. Yes, sir.

Q. You don't know which one did rise the highest down below the bridge?

A. No, sir, I don't know which one was the highest down below. The transformer was on a post there in '57 I noticed, and I had it marked on them, but they moved the transformer before this next flood come. I kind of estimated at, page 60 ] guessed at it as almost up, you know, it was almost up to those transformers, but before the second flood come they tore them posts down and moved the transformer over agin the shop, so that moved my mark.

The Court: All right, is that all?

Mr. Beverly: Yes, sir.

The Court: Cross examine.

## CROSS EXAMINATION

By Mr. Lively:

Q. How long have you been living over there, you say?

A. About seventeen years I think.

Q. Seventeen years?

A. I think maybe seventeen or eighteen.

Q. And you looked at that flood in '63 and also at the one in '57?

A. I seen them both, yes, seen both floods.

Q. Which one was the highest?

A. Well, I'd say—the last flood was higher above the bridge, but I wouldn't say which one was higher below the bridge. I don't know which one was higher.

Q. You don't know about that?

A. No, sir.

Q. Did you see the bridge, the trestle at that time?

A. At the last one?

Q. Yes.

page 61 ] A. Yes, sir.

Q. How does the height of that trestle or the high water mark on the trestle compare with the top of the bank, river bank there about where this trestle was?

A. I don't know if I know just exactly what you mean or not.

Q. I mean which was the highest, the river banks or the high water mark on the trestle?

A. I still don't know what you mean.

Q. Well, you know what the high water mark on the trestle is, don't you?

A. The high water mark on the trestle?

Q. Yes, you said you saw the trestle.

A. I saw the trestle.

The Court: What do you mean by the high water mark on the *testle*?

Mr. Lively: I want to ask him—

The Witness: I saw the trestle and I saw the dam.

The Court: How high the water was on the trestle?

Mr. Lively: Well, that would be the high water mark, if it left a mark that he could see.

The Witness: I don't know how high it was.

Q. (By Mr. Lively) You don't know?

A. No.

Q. Do you know how high the river banks were?

page 62 ] A. I am not sure I know what you're talking about.

Q. They were as high as they are right now?

A. (No response.)

Q. You know what a river bank is, don't you?

A. Yes, there is one everywhere there is a river, there's a bank.

Q. Yes, that is right. Now, the question I am asking you is which was the higher, the high water mark up on the trestle where you could see the water came up to the highest or the banks of the river?

A. According to how far out on the bank you get. It was up there in the highway; naturally, the highway was higher.

Q. When you get to the top of the bank, that's as high up as you can get, isn't it?

A. I suppose if it was level, I suppose the water line would

be across there, Mr. Lively. I don't know whether I understand what you're talking about or not.

Q. Did you see—were you up where those five houses are?

A. I was up in the road.

Q. Above the houses?

A. Up in the highway above there.

Q. Did you see a building up there that washed down and lodged against a big oak—a big locust tree?

A. I probably seen it, but I don't recall it; I don't recall seeing it.

page 63 ] Q. You don't recall seeing a building of that sort?

A. No.

Q. Have you been over there recently?

A. I have gone over there every day.

Q. Well, did you see one recently over there?

A. I don't recall seeing one recently. I didn't look—I didn't look that day for a building. I was just looking at the water, sightseeing, or seeing what it done, and I didn't really—I really didn't look for no extra building. I seen them outbuildings, I know I did, but I couldn't say whether they were *agin* a tree or not.

Q. How high is the foundation of these buildings, these five buildings over there above the normal water line, normal water line of the river?

A. I don't know how high they are above it. I never measured it.

Q. Well, can't you give me some idea?

A. (No response.)

Q. You don't have any idea?

A. Yes, I guess I have got one.

Q. Well, let's have it.

A. It might not be right, my idea might not.

Q. Well, do the best you can.

A. Well—

The Court: You're speaking with reference to

page 64 ] the bed?

Mr. Lively: The normal flow of the river.

The Witness: The normal flow of the river, it's fifty yards away from the houses.

Q. (By Mr. Lively) But how much higher is it, how much higher are these houses, those five houses, than the normal

flow of the river?

A. I'd say it varies. Some of them is closer.

Q. Well, what is the variation?

A. (No response.)

Q. I believe—

A. That's a hard question. I can't tell you about how high it is.

Q. All right, that's all.

The Court: All right, stand aside, Prince.

Do You want about a five minutes' recess? Take about a ten minutes' recess.

(Thereupon, there was a short recess after which the following proceedings were had in the presence of the jury.)

HAROLD MULLINS,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Beverly:

page 65 ] Q. What is your name, sir?

A. Harold Mullins.

Q. How old are you, Harold?

A. Thirty-seven.

Q. What is your address?

A. I live at McClure, Virginia.

Q. You are plaintiff in this suit, I believe?

A. Yes, sir.

Q. Were you at home on the night of, in March, that this flood occurred?

A. Yes, sir, I was.

Q. Would you describe to the jury in your own words just a short history of that flood?

A. Well, the water started getting up along up in the day and it kept getting higher all the time, and along about two o'clock in the morning it flooded us out, and we had to get our children out and find some place for them to stay.

Q. How many are in your family?

The Court: Just a minute. When did the water start rising, Mr. Mullins?

*Harold Mullins*

The Witness: Well, it, rising slowly, been raining all day, and it was rising slowly all day.

The Court: When did it begin to get up close to your home?

The Witness: Well, along around eleven o'clock

page 66 ] it started raising fast, eleven o'clock at night.

The Court: Eleven o'clock at night?

The Witness: Yes, sir.

The Court: Well, where was the water say at—

The Witness: Well, it raised, it started getting up in the yard at eleven o'clock and by two o'clock then in the morning it was up nearly to the floor. It hadn't got up in the house, it hadn't got up on the front walk, and I left home at twenty minutes after two to bring my family over to Clintwood.

The Court: Hadn't started getting up in the yard until about eleven o'clock. Is that right?

The Witness: Around eleven o'clock at night it started getting up in my yard. And my yard is higher than some of them.

The Court: All right, I just wanted to know.

The Witness: And I was gone, it wasn't over my front walk when I left, and approximately forty-five minutes later it was up to the doorknob, the front doorknob, the front doorknob.

The Court: All right. What did you do when you went back over there?

The Witness: Nothing I could do. I couldn't get in the house.

The Court: You didn't go in?

page 67 ] The Witness: I—no, sir, I couldn't go in till the water went down the next day.

The Court: And could you tell the next day how high the water had been in your house?

The Witness: Yes, sir.

The Court: And how did you determine that?

The Witness: It got up on top of my electric range, up to the top of the electric range.

The Court: And what was the distance of that from the floor?

The Witness: Well, I'd say approximately thirty, thirty-three, thirty-four inches.

The Court: All right. Now, go ahead, Mr. Beverly.

Q. (By Mr. Beverly) Did all of your family stay up all night?

The Court: That is immaterial, Mr. Beverly. Go on now

with what he found in the house when he went back the next day. Let's get down to the issue.

Q. (By Mr. Beverly) How long had you lived there, Mr. Mullins?

A. I moved in the house in January.

Q. You had been there two months?

A. Two months, yes, sir, approximately.

Q. I believe you were not there in 1957?

A. No, sir, I wasn't.

page 68 ] Q. Did you live in that vicinity?

A. No, sir.

Q. In '57?

A. No, sir.

Q. Now, would you describe to the jury, if you can, what the trestle or bridge across the river looked like?

A. Well, the piers under the trestle had just caught all the trash and trees and things like that and just blocked it where the water couldn't get through it; all the water that was coming down it couldn't go through it. It had to go through or over the top of it or somewhere, it had to go somewhere and it started backing up.

Q. I believe you're the second house above Rice Fields.

A. Yes, sir.

Q. How large are those lots?

A. Well, they're approximately I'd say roughly forty feet wide from one side to the other.

Q. Did you observe a little building of Alex Reedy's or Rice Fields' which had been shifted by the water?

A. Yes, sir, I did.

Q. Would you describe what was done to them?

A. Well, the one in Mr. Field's yard had been washed back up against the fence and turned over a little bit, and the one in Mr. Reedy's yard which is still there, it had started to turn around, and the lower end of it had hit the fence

page 69 ] and lodged against the fence.

Q. Did you have occasion to observe whether the water was higher above the bridge or below it?

A. Well, the next morning, I didn't go down that night, the next morning I went down and it was still higher above the bridge than it was below it. I was more interested that night in getting my family out than I was anything.

Q. Was the water still in your house the next morning?

A. The next morning, yes, sir.

Q. How high was it then?
A. You mean the next morning?
Q. Yes, sir.
A. Well, it was maybe six inches by daybreak, still six inches, something like that, in the house.
Q. Did you make a list of your personal property that was in your house?
A. Yes, I did.
Q. When did you make that list?
A. Well, I made it as soon as—the next day I started listing it the next day.
Q. What did that list consist of?
A. Well, I just listed what was damaged.
Q. Did you list the household furnishings and clothing?
A. What was damaged I did, yes, sir.
Q. Do you have that list with you?
page 70 ] A. Yes, sir, I have it right here with me, and you have one that should compare with it.
Q. Have you amended that list to show not only what the property cost but what it was worth in your opinion on the date of the flooding?
A. Yes, sir, because I traded some of this—

Mr. Lively: We object to that.
The Court: Have you shown that list to counsel?
Mr. Beverly: Yes, sir, they have a copy of essentially the same list except for his—
The Court: I am not talking about essentially the same. Show them what you're talking about here now.
Mr. Lively: If the court please, we object to him introducing a list. If he knows it, he can testify to it.
The Court: Use the list to refresh his memory, but—
Mr. Lively: Don't object to him refreshing his memory, but we do object to him attempting to file a list.
The Witness: Well, I figured it compares with the list, the one you have.

Q. (By Mr. Beverly) Did you list every item of your household furnishings and clothing that was damaged on that list?
A. As close as I possibly could, yes, sir.
Q. Would you take this list and item by item state the piece of property that was damaged, what its cost was,
page 71 ] if you knew it, what its reasonable value was at the time of the flood and less any salvage value

that you may have gotten from it?

Mr. Lively: Now that is objected to because it's self-serving and hearsay. If the witness knows what his property was that was damaged and the value of it—

The Court: That is—in the interest of saving time, don't you think he would be able to go ahead and frame his question that way, if he has got a number of items?

Mr. Lively: I say it's contrary to the way the rules of evidence would admit.

The Court: I realize that. I think you're right in that respect. But I think if we go ahead and read such items that you have that you're claiming the damage on because of the flood and the reasonable value immediately after the flood, so state it.

The Witness: Electric radio, new cost, $49.95, and at the time of the flood estimated to be worth $24.95, and it was no salvage value.

Mr. Lively: If the court please, that is simply taking his time and making up a list to suit him. It's a self-serving thing.

The Court: It's all right—it's perfectly all right to be self-serving. That is what his contentions are.

Mr. Lively: We except to it; we don't think it is.

The Court: Read it off slowly so counsel can get

page 72 ] your contentions.

The Witness: Electric iron, new, $17.95. Value at the time of loss was $12.95, and there is no salvage on that. Electric clothes dryer, new, cost $199.95, valued at $100 at the time of the flood. And we got a $30 trade in, and that left a $70 loss.

Mr. Lively: Now, it's understood that we are objecting because it's self-serving and hearsay.

The Court: Yes, sir.

The Witness: Washer, $185 new, $95 at the time of flood, $30 trade in, $65 loss. Refrigerator, $235 new, $134 at the time of loss, and a $30 trade in, $55 loss. Electric range, $239 new, $175 at the time of the flood, salvage value $50. We lost $125. Dinette set, $119.50 new, $65, and that was a loss. Electric fry pan $35.95, and it was damaged at $30.95, valued at $30.95 at the time of the flood, $6 a salvage value, $24.95 loss. Kitchen cabinet, $112 new, $60 at the time of loss, $10 salvage value, and $50 loss. Silverware, $59.95; $29.95 at the time of the flood, and no salvage value. Grocery meats, which we just

had gotten that day, $40, that was a total loss.

The Court: What was that?

The Witness: Grocery, sir, meats and just the grocery order.

The Court: All right.

page 73 ] The Witness: And had a couch $49.50 and that was purchased in November of '62. It was new. It was new, and it was a total loss. Two chairs $36.50, that is, $18.25 each. They were a total loss. And a desk, $40; $20 at the time of the flood, and $20 loss. There is no salvage value. Wardrobe $75; $25 salvage value, $50 loss. And one set of box springs, $59 new, $35 at the time of flood, no salvage value on that. And one mattress $39 new, $25 at the time of flood, and no salvage value on that one. And a crib mattress $16 value at the time of flood and no salvage value. And three bedspreads which were new were purchased at $6.95 each, which would be $20.85, valued then at $4 each, would have been $12 at the time of flood and a $12 loss. And two pillows, $5.50 each, $11; at time of flood, they were valued at $3.50 each, $7. That was no salvage value. And the coffee table $35 new, $18 at time of flood and $18 loss. Three pair of curtains, $6.95 each, new, $20.85; $4.95 each at time of flood was $14.85, and that was a loss. And toys, dolls and dish sets, game sets, and puzzles, and toys, $100 loss. And clothing which consisted of dresses, shoes, underclothes, suits, pants, and shirts, and sweaters, were, for seven people, $700. And school books and supplies including a set of encyclopedias, $85 loss. Pictures, personal and other pictures, $50 loss. And a lawnmower, $105 new; $45 at the time of flood; $10 salvage value; $35 loss. That

page 74 ] made a total of $1866.75.

Q. (By Mr. Beverly) You say—

Mr. Lively: Is that all? We move to strike out the testimony of this witness which is procured by taking a writing which he is supposed to have prepared and reading from it to the jury. It's hearsay, it's self-serving, highly prejudicial to the defendant.

The Court: Objection overruled.

Mr. Lively: Exception.

Q. (By Mr. Beverly) I'll ask you if you have traded in any of these items?

A. Yes, sir, I have.

Q. And what items are those?

Mr. Lively: Without repeating it, may we be understood as objecting for the same reasons above assigned?

The Court: Has he already stated—to those questions?

Mr. Lively: To this examination, on all of them concerning this paper.

Mr. Beverly: No, sir, I don't believe he stated that only three of them he acquired trade in upon them.

The Court: I am not asking what the trade in was. I am asking the fair market value of the property immediately after the date of the damage.

Mr. Beverly: Well, to arrive at the damage, your honor, it is material.

page 75 ] The Court: Go ahead. You're the one doing it.

Q. (By Mr. Beverly) What were those items?

A. Had a clothes dryer, refrigerator, and a washer, that is, wash machine, *ringer* type.

Mr. Lively: I want it to be understood that we are objecting to all of that.

The Court: Yes, sir.

Mr. Lively: And we are excepting to the ruling of the court.

Q. (By Mr. Beverly) To whom did you trade them in?

A. Vanover Appliance, Darwin, Virginia.

Q. Did you purchase new items for each one of those three?

A. Not for each one. I purchased a new wash machine and new refrigerator.

Q. What about the clothes dryer?

A. No, I just traded it in, just let it go on the purchase of what value I had on that.

Q. How much were you allowed trade in upon those things?

The Court: If you object to that, I'll sustain it.

Mr. Lively: Yes, sir.

The Court: I am not going into that. We are going far afield now. It's a matter of contract.

Q. (By Mr. Beverly) What was the total damage you sustained less any salvage value it may have?

A. Less any salvage? You mean taking the salvage value off?

page 76 ] Q. Yes.

A. Eighteen hundred sixty-six dollars and fifteen cents.

Q. Do I understand that you had some items not on this list which were in your house?

A. Yes, sir, but I did not list them because they wasn't damaged to the amount—

Mr. Lively: Object to that as immaterial and prejudicial.

The Court: I sustain the objection. Now, you say your total claim is how much?

The Witness: Eighteen sixty-six fifteen.

The Court: Eighteen sixty-six fifteen?

The Witness: That is less the salvage.

Q. (By Mr. Beverly) Would you introduce this writing you have made?

A. Yes, I will.

Mr. Lively: To the introduction of which counsel for the defendant excepts—objects for all the reasons heretofore assigned to the testimony of the—

The Court: I'll sustain the objection. I permitted him to use the list to refresh his memory is all.

Mr. Phipps: Save exception.

Q. (By Mr. Beverly) Were all the items on this list on the property that were damaged, all the property that were damaged that you can think of?

page 77 ] A. Yes, sir.

Q. Now, you mentioned the item of groceries $40 round figure. How did you achieve that figure?

A. Well, just gone to the grocery store.

Mr. Lively: I object to that because the examination is on the paper, on the paper introduced as objectionable.

The Court: Overrule the objection.

Q. (By Mr. Beverly) You may answer it.

A. I just had gone to the grocery store that day, that evening. That is how I knew how much the groceries were. More than that, but that is the only proof I had on it.

*Harold Mullins*

Q. How many children in your family?
A. At that time?

Mr. Lively: I object to that.
The Court: The court has already sustained one objection to that, Mr. Beverly. That is immaterial.
Mr. Beverly: Not as to the item of clothing, your honor.
The Court: He has already stated he had seven children.
The Witness: Seven people. That included me and my wife.
The Court: Seven people?
The Witness: Yes, sir.

Q. (By Mr. Beverly) Now, your item for school
page 78 ] books and supplies, $85. What did that include?

Mr. Lively: That is objected to for the reasons assigned to the preceding question.
The Court: Overrule the objection.
Mr. Lively: Exception.

Q. (By Mr. Beverly) What did that include?
A. Well, that included the books and school supplies, pencils, and papers, and a set of encyclopedias, damage on the encyclopedias and the dictionaries.
Q. What kind of encyclopedias?

Mr. Lively: Same objection.

The Witness: I can't recall the name right off.

Q. (By Mr. Beverly) Do you recall how many volumes were in the set of encyclopedias?
A. Eighteen or twenty.

Mr. Lively: Same objection; same ruling excepted to.

Q. (By Mr. Beverly) I'll ask you if you got those school books for that year new or used?
A. Most of them were new.

Mr. Lively: Objection.

Q. (By Mr. Beverly) Were all of your children in school?
A. All but one.

Mr. Lively: Same objection.

Q. (By Mr. Beverly) What items were included
page 79 ] in your item of toys?

A. Well, that was dolls for the girls and puzzles, jigsaw puzzles, and guns and holsters and—

Mr. Lively: As I understand it, this examination is continuing on the paper that he testified to.

Mr. Beverly: Well, it's continuing for the question I ask.

Mr. Lively: We reserve—desire to object to the questions.

The Court: Overrule the objection.

Mr. Lively: Except to the ruling.

Q. (By Mr. Beverly) Now, you have an item of silverware, $50 loss, and some comments made on it. What kind of silverware was it and what happened to it?

Mr. Lively: Same objection.

The Court: Overruled.

The Witness: Well, I don't know exactly what brand it was, but we had it stored in a drawer in the cabinet and the water got up in the drawer and just washed the drawers apart and the silverware was washed out into the mud and stuff, couldn't find it out, three or four inches of mud on the floor.

Q. I think that's all.

The Court all right, cross examine.

Mr. Long: We want that paper.
page 80 ] The Court: That hasn't been introduced.

Mr. Beverly: We offered it.

The Court: They offered it and I sustained it.

Mr. Lively: He's been reading from it and asking questions concerning it.

The Court: Let the record show that the counsel for defendant requested the paper which has been referred to and that the paper was handed to counsel for defendant by counsel for plaintiff for the purpose of cross examination.

*Harold Mullins*

CROSS EXAMINATION

By Mr. Long:
Q. Now, Mr. Mullins—

Mr. Lively: Let the record show that the paper that was requested was returned to counsel for the plaintiff.
The Court: Do what?
Mr. Lively: Let the record show that counsel for the defendant examined the paper and returned it to the counsel for the plaintiff at the court's request. No, it wasn't—
Mr. Long: And without asking any questions as to the particular paper.
The Court: Go ahead.

Q. (By Mr. Long) Mr. Mullins, what time did the water start rising there that day?
A. Well, it had been raining all day, and it was gradually raising all during the day a little bit.
page 81 ] Q. Well, hadn't it been raining for two or three days?
A. Well, I know it rained all that day.
Q. And the day before too, hadn't it?
A. (No Response.)
Q. I mean the night before.
A. I don't know whether it rained all day or not, but it had rained the day before.
Q. Well, at two-thirty o'clock that afternoon, wasn't the water way up?
A. I don't know about that. I wasn't there at that time of the afternoon, sir.
Q. What time did you get in?
A. I got in about five-thirty.
Q. Well, wasn't the water at that time high?
A. Well, it wasn't up in the yard at that time.
Q. Wasn't in the yard at five o'clock?
A. No, sir; no, sir, it wasn't.
Q. You didn't know about it being high down there at the bridge at that time?
A. No, I didn't know about it being high at the bridge at that time.
Q. And it wasn't in the yard at five o'clock in the afternoon?
A. Not up in the edge of my yard, no, sir.

*Harold Mullins*

Q. And wasn't in any yard, was it?

A. It could have been some of the other yards
page 82 ] above me. I don't know. But I know it wasn't in
my yard at five o'clock.

Q. You stayed there at the house from five-thirty on to when?

A. Till I had to leave.

Q. What time did you leave?

A. Left at two-twenty.

Q. Left at two-twenty?

A. Yes, sir.

Q. Did you go out any in the meantime from the time you got home?

A. Well, I kept watching the water, going to the back door and watching the water.

Q. Watching the water?

A. Yes, sir.

Q. Did you take anything out of the house?

A. No, sir.

Q. Never moved anything?

A. Well, I laid some stuff up when I seen it was getting high, tried to get up what I could to try to save it.

Q. You laid up your things on shelves?

A. Well, what I could, yes, sir.

Q. Yes, sir. Well, you had a long time there from five o'clock till two o'clock, didn't you?

A. Well, the water never started getting up in the yard till
way up in the night. I didn't have any — the only
page 83 ] time I started putting stuff up was around one-
thirty when I saw there might be danger of it
getting in the house.

Q. Well, it kept raising all the time from the time you got there at five o'clock till the time you left, didn't it?

A. Well, slowly, yes, sir.

Q. Yes, sir, still rising. Did you ask or inquire there from anybody else about the water or anything or what they were doing?

A. No, sir, I never.

Q. You didn't. Did you know that people in the other houses were taking some of the stuff out?

A. No, sir, I did not.

Q. Didn't know that?

A. No, sir.

Q. You just relied on putting some of your stuff up to high places?

A. I didn't have any idea of it getting in the house.

Q. What did you put up in high places?

A. We got the mattresses, all but lost one mattress and one box spring.

Q. Yes, sir.

A. And got my, I have a bed room suite, a cedar bedroom suite, got the beds up and the wardrobe, I didn't get it up to where it would keep the water out of it.

Q. Where did you go then at two-thirty?

page 84 ] A. I brought my wife and my kids over to Clintwood to my father's.

Q. Over here and you went on back?

A. I went back. I was gone approximately forty-five minutes.

Q. You was gone how long?

A. Approximately forty-five minutes from the time I left.

Q. And in that time the water, it had gotten up how high?

A. Yes, sir, it was up to the doorknob of the house when I got back.

Q. How high was it when you left?

A. Well, I stayed around till it started falling the next morning.

Q. I mean that night.

A. Oh, well, it was up nearly to the bottom of the house, it had never gotten into the house.

Q. When you left?

A. Yes, sir.

Q. Did you take anything with you when you left with your family?

A. No, sir, just what clothes they had on is all.

Q. Didn't take any clothing?

A. No, sir.

Q. Didn't make any preparation?

A. No, sir, I did not.

Q. You were getting your family away because

page 85 ] you knew the water was going to get up high?

A. Well, I wasn't going to let my family stay there. I didn't have any idea of the water getting —

Q. But you made no preparations about getting anything out other than your family?

A. If I'd of gotten it out, it would have been damaged anyway.

Q. But you didn't bring anything in your car over there?
A. No, sir, I certainly did not.
Q. Over here. And that is the reason you didn't get it out, you figured it would be damaged anyway if you got it out?
A. No, I didn't figure that. I just had no idea the water would get as high as it did. I certainly didn't expect it to get up in the house.
Q. But you took your family out.
A. I didn't until it was getting up that way.
Q. Well, this must have changed your mind about something.
A. Yes.
Q. That's right, but that didn't have any effect on you about your stuff. Now, you have listed, you said — read off a great long list. When did you make up that list?
A. Made it up the day after the damage.
Q. The day after the damages?
A. Yes, sir.
page 86 ] Q. Now, when you got back that next morning how high was the water then?
A. When I got back the next morning?
Q. From over here.
A. Well, the next morning, it was up to the doorknob when I got back from over here because I only stayed over here about forty-five minutes.
Q. That was as high as it got, to the doorknob?
A. No, it raised a little more.
Q. It went above the doorknob, but you noticed that in particular when you went back though. When did it start falling?
A. The doorknob was on under the water when it stopped raining.
Q. When did it start falling?
A. Well, it was close, it was close daylight when it started falling.
Q. Close to daylight?
A. Yes, sir.
Q. And when did it leave the house? When did it get down to the floor?
A. Well, it was around way up in the morning around ten or eleven o'clock, between ten and eleven o'clock.
Q. It was down to the floor then?
A. Before I could get in the house, yes, sir.
page 87 ] Q. Yes, sir. And it just kept going down rapidly, didn't it?

A. Well, no, it stayed in the yard.

Q. I know, but in the house, it went out of the house?

A. It didn't raise any more; it just kept going down.

Q. Well, it got out of the house, left the house about ten or eleven o'clock the next morning?

A. It took it that long to go down till I could get in the house.

Q. Now then, what did you do with your stuff in there after you got in?

A. Well, I moved out what wasn't damaged and moved up in the other house.

Q. Moved up in which house?

A. The one I am living in *how,* sir.

Q. You moved it up there when, the next day?

A. The next day, yes, sir.

Q. And you took everything from that house, didn't you?

A. Everything that wasn't damaged I could use.

Q. Everything that wasn't — well now, didn't you take everything?

A. I mean damaged to the point to where I couldn't use it.

Q. Well now, didn't you take everything the next morning, the next day?

A. No, I didn't take everything.

page 88 ] Q. What did you leave there now?

A. Well, I left the mattresses and the clothing, all the clothing because I sent some to the cleaner and washed other. And we had to try to get rid of them after that. We kept them for a long time and we had to get rid of them.

Q. All right. You left the mattress and clothing. What else? Anything?

A. Well, the chairs.

Q. The chairs?

A. The couch, had to leave the couch.

Q. The couch?

A. Yes, sir.

Q. Now, you took everything else up there, didn't you?

A. Yes, sir.

Q. I notice you have an item on here of silverware $29.95. Did you take that up there?

A. No, sir; no, sir, I didn't take that up there.

Q. What did you do with that?

A. I couldn't find it.

Q. Couldn't find it?

A. It washed out of the drawers.

*Harold Mullins*

Q. Did it wash out the door?
A. The water come up so far in the drawer it come apart.
Q. Well, it didn't wash anything away there, did it?
A. Washed it out in the mud till we couldn't
page 89 ] find it.
Q. Couldn't find the silverware? Well, did you look for it?
A. Well, not in particular, no, sir.
Q. Not in particular you didn't look for it. Now, your electric radio, did you put that up on something high or not?
A. No, sir, it was just setting on a table or something. Where, I don't know exactly where it was setting.
Q. Didn't bother that. Now, how many rooms in that house that's down there next to the river?
A. There's five rooms and a bathroom.
Q. Five rooms and how many rooms in the house you moved into up there next to the —
A. Well, there is four, four rooms up there and a small pantry.
Q. Now, the stuff you took up there just about filled that house, didn't it?
A. After I got a new refrigerator and new washing machine and new living room suite and what stuff I got back new, sir, yes, sir.
Q. You bought now a new refrigerator?
A. I bought a new refrigerator.
Q. And what else?
A. New washing machine.
Q. How long have you had that washing machine?
A. I bought it the day that I moved up there, the day after the flood.
page 90 ] Q. Did you have one before?
A. Yes, sir.
Q. What did you do with it?
A. Traded it in.
Q. Traded it in?
A. Yes, sir.
Q. Now, the frigidaire — refrigerator and the washing machine and what else?
A. And I traded the clothes dryer in, electric clothes dryer.
Q. Did you get a new clothes dryer?
A. No, sir, I let the salvage value go on the price of the refrigerator.
Q. How long had you had that clothes dryer?

A. Well, I had it since '57, 1957.

Q. Bought it in '57?

A. Yes, sir.

Q. And that was in '63, and you charge here I believe $195.99 for the clothes dryer.

A. Well, the other list I had, sir, the salvage value, I mean the value at the time of the flood I listed $100.

Q. Well, you charge here $199 — I mean $95.

A. Well, that was the price of it new there.

Q. That was the price of it new here. Well, and you had had it a good many years. Now, the washing

page 91 ] machine, how long had you had it?

A. I had it since '57.

Q. Since '57. Well, isn't that just about the life of a washing machine and a clothes dryer?

A. Well, I don't know, sir.

Q. With that many children in your family, six or seven in the family, isn't that about the life of a clothes dryer and a washing machine —

A. I know I can't buy one —

Q. Every seven years?

A. Every seven years, I couldn't.

Q. And they last longer than that you think?

A. Yes, sir.

Q. And they are worth more than half at that time, after seven years?

A. If they are taken care of, yes, sir.

Q. Yes, sir. Now, you had a wardrobe on there I believe.

A. Yes, sir.

Q. Now, did you state down there before we went to look at that house down there this morning that there was nothing taken out of that house up there except the wardrobe and stove. Isn't that what you said down there?

A. I told you that that was what I had listed as damaged.

Q. No, I didn't ask you that.

page 92 ] A. That is the way I answered.

Q. Did you make the other statement, didn't you tell us down there the only thing you took up to that house when we were talking about going up there to look at —

A. If you recall, you asked me what I was using that was damaged, and I told you I had the wardrobe and the stove that were on the damaged list that I was using.

Q. I asked you the direct question what you had taken up

there and I understood you to say you had taken two items, that wardrobe and the stove. Now, as a matter of fact, you had taken the household, about the household full of stuff up there, hadn't you?

A. I don't have it all listed on that damage list either, do I?

Q. Well now, the wardrobe that you talk about that you lost was that cedar wardrobe?

A. I didn't state I lost it; I had damage on it.

Q. How much damage do you have?

A. I figured $50 damage.

Q. How much?

A. Fifty dollars.

Q. Fifty dollars. Now, it's up there and there's no apparent damage to it. It's setting up there looking about as good as it ever did, isn't it?

A. Did you open it and look in it?

page 93 ] *A.* Well, you saw me trying drawers there, didn't you?

A. No, that was the chest of drawers; that wasn't the wardrobe. Now the chest is not on there.

Q. The chest of drawers went through the flood too, didn't it?

A. I didn't have it listed.

Q. I know, but I am asking the question. That chest of drawers went through it too, didn't it?

A. I laid it up to where the water didn't get to it.

Q. How did you have it laid up?

A. Well, I had it up on some beds, iron bedstead.

Q. Well, you could have laid up the other stuff too.

A. No, I couldn't lay the wardrobe up.

Q. Well, the wardrobe didn't show any signs whatever of damage, did it?

A. You didn't open the doors and look at the inside, did you?

Q. Now, the water was only up on it an hour or two, wasn't it?

A. Well, I don't know how long it takes for the water to soak glue loose or —

Q. You say you left at two-thirty and got back in an hour, or forty-five minutes. That's right, isn't it?

A. I said approximately forty-five minutes.

Q. You got back there in forty-five minutes, but

page 94 ] the water was up in the house?

A. I couldn't get in the house.

Q. That's when you got back?
A. That's when I got back.
Q. And about three-fifteen you was over there, three-fifteen the water was in. Now, you said the water was out by ten?
A. The next morning.
Q. Yes, sir, ten o'clock. And so it was in there, the water was in there then, according to that, something over, a little over six hours. That's right, isn't it?
A. Well, yes, sir.
Q. Yes, sir. And now you took an iron bed up there, didn't you?
A. Yes, sir.
Q. You took this hide-away bed up there, didn't you?
A. Yes, sir.
Q. You took the mattress for that hide-away bed up there, didn't you?
A. Yes, sir.
Q. And you took those two single beds up there, didn't you?
A. Yes, sir.
Q. And you took the mattresses that was on those single beds too, didn't you?
A. Yes, sir, but I don't have none of those items listed on that list.
page 95 ] Q. I understand that, but what I am getting at is what you said down there this morning and what you have up there. You had your fishing reels up there, took them up there, didn't you?
A. That wasn't at home at that time.
Q. Wasn't at home at that time?
A. No, sir, my brother had those at that time.
Q. You had just about, took about a house full of stuff up there, didn't you?
A. (No response)
Q. You had about all you could put in there?
A. Yes, sir, after I bought my new stove and put back in —
Q. You bought a parlor, living room suite?
A. Yes, sir.
Q. Refrigerator, electric range —
A. Washing machine.
Q. Washing machine. That is all now you bought?
A. I had to buy new curtains?
Q. Curtains?

A. Yes.

Q. Why couldn't you use the other curtains?

A. Because they were damaged. You couldn't use, couldn't keep something like that if old trash or something gets washed up in there.

Q. The curtains went on the top of the windows,

page 96 ] I guess, didn't they?

A. Water gets half way on them you can't cut them off and use them.

Q. And couldn't clean them?

A. No, sir, you can't clean that out of them, no, sir.

Q. Didn't try to?

A. Yes, sir, I tried to clean them, yes, sir.

Q. What did you do with them?

A. Had to throw them away.

Q. Threw them away and didn't have them up there in the house today?

A. Well, that's been two years ago, sir.

Q. I know it. I know it, but I am asking if you didn't still have them up there today?

A. No, sir, not the ones listed on that list.

Q. Not listed on there. Now, the electric range, what about it?

A. Well, it cost me $239 new and I figured it worth $134 at the time, or $175 I guess I got it listed.

Q. And how long had you had the electric range?

A. I bought it in 1960.

Q. 1960?

A. Yes, sir.

Q. Did you consult anyone with reference to having it worked on? Or did you just go on and trade it in?

page 97 ] A. I haven't traded it in; I still have it.

Q. Oh, you still have it?

A. Yes, sir.

Q. Using it?

A. Using it.

Q. Every day doing cooking on it?

A. Well, there is one element burnt out and one oven element burnt out in it.

Q. Two units. How many units are good?

A. That leaves three on top and one in the bottom.

Q. Four, you have got four units you are using. And when did they burn out?

A. Well, they burnt out since the flood.

Q. Since the flood?
A. Yes, sir.
Q. You used them a while before they burnt out?
A. Short time, yes, sir.
Q. Well, you don't know what caused them to burn out, do you?
A. Well, I don't actually know it.
Q. Well now, those things burn out when you don't have floods too, don't they?
A. Well, yes, sir, they burn out when you don't have floods. I'll agree with you there.
Q. You have had them to burn out before, page 98 ] haven't you?
A. Yes, sir.
Q. And you have had them to burn out in that stove before too, haven't you?
A. No, sir.
Q. Not in that stove?
A. No, sir.
Q. But you have had them burn out in other stoves?
A. Yes, sir.
Q. And they didn't get wet either, did they?
A. No, they didn't.
Q. Now, your electric frying pan, what happened to that?
A. It just quit; can't use it any more.
Q. Well, don't you know those electric frying pans, you can put them in water?
A. Well, how come though this one to burn out then?
Q. Burnt out just recently, right after the flood?
A. Burnt out recently after the flood.
Q. How soon after the flood?
A. Just a very few days after the flood.
Q. You used it a while?
A. Well, used it some, yes, sir.
Q. About how long, a month or two?
A. Well, maybe.
Q. Maybe a month or two. How old was that electric frying pan?
page 99 ] A. Well, I bought it in either — '60, last part, bought it for a Christmas present I believe, in 1960, for my wife.
Q. 1960. Now, what do you say about the kitchen cabinet?
A. What do you mean what I say about it?
Q. Yes.

*Harold Mullins*

A. Well, I figure it was worth $60 before the flood and it's not worth over $10 now.

Q. Well, you're using it every day, aren't you?

A. Well, it's setting there; we're using it, yes.

Q. Yes, sir. How long had you used it? When did you buy that?

A. Bought it in '57.

Q. What's that?

A. Fifty-seven.

Q. Bought it in '57. And had used that six years. Your children—you said you had how many children?

A. I had five at that time.

Q. Five. How old was the oldest one?

A. Well, the oldest one now—

Q. At that time '63?

A. Well, was twelve years old.

Q. Twelve years old. The next one?

A. The next one was eleven; the next one eight and one was seven; and the other one was four, I believe.

Q. That was in '63?

page 100 ] A. That was in '63, yes, sir.

Q. Well, children are kind of rough on that sort of stuff, aren't they?

A. Well, yes, sir, they are rough on it.

Q. And six years, when you get six years' use out of these things, you have just about got the best of it too, when you have that many children?

A. Well, I can't agree with you there.

Q. Yes, sir. And you couldn't find your silverware. And groceries, food, you say is $40?

A. Yes, sir, because I just went to the market that evening, had $40 worth and all of it was lost. That was just what I bought that day.

Q. Well, when you brought your family over here to leave them with somebody, didn't you bring the food along with you and what you had just gotten in groceries?

A. No, sir, certainly did not. I didn't bring anything.

Q. Knowing water was coming up in the house?

A. I didn't know water was going to get up in the house, no, sir.

Q. Well, you moved your family.

Q. Well, my family comes first.

The Court: Well, let's go on to something else.

Q. (By Mr. Long) And the couch, how old was that couch?

A. That was new; that was a new couch. The
page 101 ] couch was new. I had, the couch and two chairs
had been bought in, I bought them in November
of '62.

Q. Now, don't you put the groceries and that food up on something? You put the chest of drawers up on something.

A. Well, I could have if I could have got to everything I guess.

Q. And two chairs, $36 and a half.

A. I could have put a lot of other stuff up also if I had known the water was going to get in the house too.

Q. Didn't move any of it out?

A. No, sir.

Q. Two chairs, what kind?

A. They were new. They were bought when the couch was bought.

Q. What did you pay for the couch?

A. Forty-nine fifty for the couch.

Q. Forty-nine fifty for the couch and two chairs?

A. The chairs were $36.

Q. Well, now, you had several chairs this morning. They were brought from the house.

A. This was other chairs.

Q. But they were in the flood, weren't they?

A. They weren't listed on that list either.

Q. Yes, sir. Well now, the desk, what about the desk?

A. It was damaged. I couldn't use it no more.
page 102 ] Q. What did you do with it?
A. I had to throw it away.

Q. Where did you throw it?

A. I don't know where it went now.

Q. You took it out of that house. You didn't leave it in that house, did you?

A. Well, I don't know for sure where—whether I left it in that house or not. I don't believe I did.

Q. Well now, you must have thought it was some value, you wouldn't have taken it away, would you?

A. (No response.)

Q. Now, one box spring. What was the matter with that?

A. Well, the water got in it and all the cotton and stuff come out of it and I just couldn't use it. I lost one box spring and one mattress. All the other mattresses I saved those. And they

were soaked with water and mud in there. I can't use it no more.

Q. Did you try to clean it?

A. Tried to clean it, but you can't get it out.

Q. One crib mattress.

A. It was the same way.

Q. How old were they?

A. Well, the box springs and mattress, I bought the other mattress, I bought it in '60, no, '59 when I bought the box spring and the mattress. And the crib mattress was

page 103 ] about four years old.

Q. Now, you have three bedspreads.

A. That was new bedspreads.

Q. Well now—

A. Well, they had been used some. We paid $6.95 for them new and I valued them at four something at the time of the flood.

Q. What did you do with them? You have them up at the house now?

A. No, she don't have them. She don't have no bedspreads.

Q. Just because the water got on them you threw them away?

A. You can't wash stuff like that when they were soaked with that mud. Did you ever try it?

Q. You can't wash the bedspread?

A. You can wash the bedspreads, but you can't get that mud and stuff out like that when it washed in them like that.

Q. Two pillows?

A. Same way, they got soaked.

Q. One coffee table.

A. It broke—the water washed it and broke the glass and it come apart.

Q. Now, toys, $100.

A. Well, that consisted of dolls, little girls' dolls and jigsaw puzzles.

Q. One hundred dollars is pretty high for toys

page 104 ] that five or six kids been playing with for sometime.

A. Well, they haven't been playing with these very long, not very long after Christmas, couple of months after Christmas.

Q. I don't know. Mine usually finished them up before New Years. Do you think the toys were worth $100?

A. Yes, sir, when I had to pay for them, yes, sir; when I had to pay for them new, yes, sir.

Q. What did they consist of?

A. Well, dolls and game sets, holster sets for the boy and just regular line of toys and one rocking horse for the baby, things like that.

Q. Well, the rocker, you saved the rocking horse, didn't you?

A. No, sir.

Q. Couldn't do any of that. Now, you have clothing $700.

A. Well, that is for seven people, shoes, dresses, underclothes, pants, shirts.

Q. And you couldn't salvage any of it?

A. No, sir, very few. Just one that was in best shape, the ones that we had on.

Q. And lost it all?

A. Yes, sir, the wardrobe was full and everything and the wash was full of dirty clothes.

Q. Couldn't wear clothes just because the water page 105 ] got in there and got them wet?

A. Most of them was washed away.

Q. Now didn't anything wash out of the house?

A. (No response.)

Q. You don't claim in your bill of suit that anything washed away.

A. No—I am talking about the shoes.

Q. Now the shoes didn't—

A. The mud covered them up.

Q. Where were they?

A. Well, usually where kids leave them setting, under the bed or anything like that.

Q. Well, you didn't try to get them out?

A. Like I said a while ago, I didn't have time to get everything.

Q. I mean you went back in there the next morning.

A. Salvaged what we could.

Q. And school books and supplies, $85.

A. Well, for four kids, and that also included a, damage on a set of encyclopedias and two dictionaries and a big white Bible that was included in books, school books and supplies.

Q. Now at the age of these children what did the books cost?

A. Well, I don't know right off. I couldn't tell you right to the dollar, but we bought the books that year. page 106 ] We're renting them now, but we bought them that year.

Q. Well, you always bought second-hand books?

A. Not all of them second-hand, no, sir.
Q. Well, most of them?
A. Part of them.
Q. Weren't most of them?
A. Part of them?
Q. Part of them. You had $85?
A. I didn't include the books for—
Q. What's that?
A. It only included the school books, like I told you, the set of encyclopedias, and —
Q. You used some of the books and tried them out?
A. When the pages stick together you can't use them.
Q. What did you do with them?
A. Well, I still have some of them there.
Q. Pictures.
A. Well, that consisted of pictures, she had to buy new pictures, you know, like on, hang on the wall, different ones.
Q. Well, were they hanging on the wall?
A. No, they wasn't hanging on the wall. See, we hadn't lived in that house but two months.
Q. Hadn't hung your pictures up?
A. No, she had the pictures stored away in boxes and things that she hadn't put up.

page 107 ] Q. And they were in boxes?
A. The pictures most of them were still boxed away that she hadn't put up.
Q. And lawnmower, $35?
A. Yes, sir.
Q. Well, you still have the mower, don't you?
A. I have it, but I don't use it. I can't use it. It got under, water got in the engine and can't use it.
Q. It's a regular gasoline engine, isn't it?
A. Yes, sir, it's just a gasoline engine.
Q. Did you ever try to have it repaired or anything?
A. Well, no, I haven't tried to have it repaired, no, sir.
Q. And you have these things now you list here running here $1866, those in addition now to the stuff that you have already in your house?
A. What do you mean in addition?
Q. That's this stuff here.
A. That's the loss, the damage to it.
Q. To what?
A. Well, most of this stuff was lost I say.

Q. Yes, I know that, most of it, and that is in addition now to what you have in the house now?

A. Well, that is like I said, I bought a new washing machine and new refrigerator and new living room suite, and I bought a new television set, but that was included in that.

page 108 ] See, the television set is not on that, and I bought a new sewing machine and that's the only thing, and those items are not listed on that list.

Q. And you're using the beds and the chairs, and the dishes and things of that sort, aren't you?

A. Beds and things are not on that list either, are they?

Q. Those things were in the flood, you say, weren't they?

A. That's the things that wasn't damaged, yes, sir. Yes, sir, damaged or lost, yes, sir, I am not claiming any damage for these things that wasn't damaged.

The Court: All right.

Q. (By Mr. Long) Really, this was damaged either, very little damage done to this stuff?

A. No, I was claiming damage for stuff that was damaged or lost. That is the only thing I am asking.

The Court: Is that all? You have about finished? How many questions do you have?

Mr. Beverly: About two.

The Court: Just ask two then.

## REDIRECT EXAMINATION

By Mr. Beverly:

Q. How much, all told, based on your knowledge of your property were you damaged?

Mr. Lively: We object to that now.

The Court: He just testified to that.

page 109 ] Q. (By Mr. Beverly) Well, I ask you what was the difference in fair cash value of your property before the flood and after?

Mr. Lively: That is objected to because he is not qualified.

The Court: Well, he just stated, as I understood, that he was

damaged $1866.15. That is what you claim your damage is, is it not?

The Witness: Actual cost.

Mr. Beverly: I wanted to be certain that he—

The Court: Yes. Gentlemen of the jury, I am going to recess this case until tomorrow morning at nine o'clock. Now don't discuss this case with anyone nor permit anyone to discuss it in your presence, and if they should attempt to discuss it with you over your protest, it is your duty to inform the court immediately upon your return to the court tomorrow morning.

In the meantime, I hope you won't discuss the case even among yourselves. Wait until you have heard all the case and wait until you are ready to retire to the jury room, so I'll see you in the morning at nine o'clock.

(Thereupon, court was adjourned at four-twenty o'clock, p. m.)

page 110 ] SECOND DAY

(Thereupon, court reconvened at nine o'clock, a.m., on the 13th day of April, 1965. All parties were present as heretofore, and the following proceedings were had in the presence of the jury.)

The Court: All right, does the plaintiff rest?

Mr. Phipps: Yes.

The Court: The plaintiff rested, gentlemen. Is the defendant ready?

Let the jury come around.

Mr. Lively: We'd like to see the court in chambers.

(Thereupon, the court, counsel, and the court reporter retired to chambers where the following proceedings were had out of the presence of the jury.)

The Court: All right, gentlemen.

Mr. Lively: If the court please, we desire to move to strike the evidence of the plaintiff and permit the jury to find a verdict for the defendant in this case for the reason that no negligence has been shown on the part of the defendant which was the proximate cause or proximately contributed to the injury alleged in the case, and for the further reason that

the alleged damage is not proven with such particularity and completeness as required by law.

page 111 ] The Court: All right, what do you gentlemen have to say?

Mr. Beverly: We don't think the defendant is entitled to its motion. It is basically that streams must be left in their natural flowing state, and we think the evidence is plainly adequate to show that that was not done in this case.

The Court: Well, I'll —

Mr. Lively: We'll avow that this is, the Clinchfield Railroad Company or C. C. & O. Railroad Company is a public service corporation, and that this construction and maintenance of this track and trestle is essential to its carrying on its work.

The Court: All right, I'll overrule your motion to strike.

Mr. Long: Exception.

The Court: All right.

(Thereupon, the court, counsel, and the court reporter returned to the open court room where the following proceedings were had in the presence of the jury.)

The Court: All right, call your first witness, gentlemen.

Mr. Long: Jack Marshall, please, Sheriff.

Sheriff: This witness has not been sworn, your honor.

page 112 ] (Thereupon, the witness was duly sworn.)

The Court: Have a seat.

JACK MARSHALL,

having been duly sworn, *wss* examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lively:

Q. Your name Jack Marshall?

A. That is right, sir.

Q. Where do you live, Mr. Marshall?

A. I live over at Castlewood.

Q. What do you do? What is your employment?

A. I am superintendent of the shop at Clinchfield Coal Company.

*Jack Marshall*

Q. Located at McClure?
A. McClure.
Q. How long have you been holding that position?
A. Twelve years, located there.
Q. Twelve years. Were you there when what has been referred to here at the time of the 1957 flood?
A. Yes, sir.
Q. And also of the 1963 flood?
A. That is right, sir.
Q. Now, did you observe the high water marks in both of these floods?

page 113 ] A. Yes, sir, I did.

Q. What was the difference in the two floods with reference to the high water marks in each case?
A. Well, in 1963, I guess the water was approximately six inches higher than it was in '57.
Q. And in saying that are you speaking of it below where this trestle was located or—
A. Below the trestle.

Mr. Phipps: We object to leading and suggesting. Just let him tell what he is talking about, what section of it.
The Court: All right, go ahead.
Mr. Lively: Where he was talking about, he told you it was below the trestle.

Q. (By Mr. Lively) You say it was about six inches difference in it?
A. About six inches, yes, sir.
Q. And was that, which time was it higher?
A. Well, in the '63 flood the water was about a foot higher on the upper side of the bridge than it was on the lower side.
Q. The water was about one foot higher on the upper side of the bridge than on the lower side?
A. That's right, sir.

Q. Did this—was the height of the bank there, page 114 ] the bank of the river, was the bank of the river higher than the high water mark or lower? I mean by that did it overflow its banks?
A. It did overflow it right at the corner of the bridge.
Q. How—to what depth did it overflow or what height did it overflow?
A. I imagine it must have been about two foot from the

ground level from the bridge from the road there at the corner of the shop up to the—

Q. Now, did it also overflow its banks in 1957?

A. Yes, it did.

Q. On both occasions?

A. Yes, sir.

Q. But I believe you stated that the '63 overflow was something like four to six inches higher than—

A. I'd say around six inches, yes, sir.

Q. Were the marks put on any objects there showing the high water marks on each of these occasions?

A. Yes, sir, there were.

Q. Were they also put on the trestle?

A. On the trestle?

Q. At the last overflow?

A. Yes, sir.

Q. And those marks that are on there are correct as to the heights?

page 115 ] A. Yes, sir.

Q. On these occasions?

A. Yes, sir.

Q. Now, where are the shops? Just describe to the jury where these shop buildings are of the McClure Company, the supply companies there, where are those shops with reference to the trestle? The Clinchfield shops.

A. The Clinchfield shop is, the bridge comes across the river at about an angle, it's a certain degree, it's angled across there, and the corner where it hits the road, our shop building is right in line with the corner of it. In other words, we are setting about even, straight in line with it where the bridge crosses and comes on across the river onto the bank, just about in line with it.

Q. And now speak as to the distance the building that stands down the river and the size of the building.

A. That building is 145 foot wide and 165 foot long, so we would extend on below the bridge about 165 feet below the bridge there, our building would.

Q. Now, what about the—is there any level land or bottom land there that was overflowed?

A. Yes, sir, there was some.

Q. Is that the character of the land where the buildings are constructed and located?

A. Yes, sir, it's built—

page 116 ] Q. How wide is that bottom?

A. Oh, I'd say about in the neighborhood of 300 feet wide there at the shop, I guess, something like that.

Q. So that when the river reaches the—

Mr. Beverly: We object. He is leading, your honor.

Q. (By Mr. Lively) Bottom, what is the width of the area there that is overflown, including the regular bed of the stream, would you say?

A. Well, when water comes out of the bank it will cover an area there of approximately 200 feet, I guess, from one bank over to the other over into the bottom, probably 200 to 250 feet.

Q. In width?

A. Yes, sir, in width.

Q. Now, what is the length of that bottom?

A. Well, it goes on down below McClure Lumber about the same distance, and I guess it would run, that distance would be twelve, fifteen hundred feet down through there.

Q. Where—what other buildings are there other than the one you have spoken of?

A. Well, McClure, well, first behind us is Erwin Supply Company Hardware.

Q. That is down below?

A. Yes, below the shop. And then they have two

page 117 ] buildings there, one the main building, and then they have a metal building that set side by side.

Q. Did the water get up in these buildings, any of them?

A. Just in the truck pit, where they load their truck.

Q. And on both occasions?

A. Yes, sir, both.

The Court: All right, cross examine.

## CROSS EXAMINATION

By Mr. Beverly:

Q. Mr. Marshall, at what points on your building did you observe the high water mark in the 1963 flood?

A. We got a small loading ramp that is just about, oh, probably *twoo* foot above ground level that we back our trucks in

coming into the shop, and it was up on that about two-thirds of the way.

Q. How high above the ground is the loading ramp?

A. Oh, it might be something, eighteen inches or something like that.

Q. Well, you say the building is 165 feet long. How far down from the corner next to the trestle is your loading ramp?

A. We load in front of the building, not below it, the one I am speaking of in front, which would put it a little bit, kindly on line with the bridge where it comes off on the highway. The loading ramp that I am speaking of is in front of

page 118 ] the building, which would be more or less in line with the end of the bridge where it comes across the river.

Q. Now, what time did you observe that or make that mark?

A. Well, along about seven-thirty in the morning.

Q. At seven-thirty in the morning. That was not at high crest, was it?

A. No, it wasn't.

Q. That is the 1963 flood you are talking about?

A. 1963.

Q. Now, in 1957, in that flood, where did you put your high water mark?

A. Along the same area which was a little bit lower in '57 it was in '63.

Q. And what time of day did you put your mark at that time?

A. Well, that flood, along about that time, the best I can remember the '57 flood, it must have been around eleven o'clock, it reached its highest eleven o'clock, a.m., in the morning.

Q. You say your shop, the end of it is directly across from the trestle. The trestle was not built there in 1957, was it?

A. I don't—I don't think it was, no, sir.

Q. You don't remember if it was?

A. I am pretty sure it wasn't.

page 119 ] Q. You never made any marks on the trestle then in 1957?

A. I can't recall. I made a mark there with paint, and if I ain't mistaken I did mark that trestle, if I ain't mistaken, that trestle was there in '57.

Q. You think the trestle was there in 1957?

A. I am pretty sure it was.

Q. Now, your crew got out and cleaned up the debris the

next day or so, did it not, some of your employees?

A. On which flood are you talking about?

Q. In the 1963 flood.

A. Well, we cleaned up what there was there to clean up.

Q. You took, I believe, dredges and mechanical devices and pulled that debris back from the trestle?

A. Uh huh.

Q. Now, isn't it true that the reason you pulled that back was because it was damming the water up?

A. No, it wasn't.

Q. Why did you remove it?

A. We removed it for the simple reason if it come another flood we needed it open. We keep it that way, dredge it down all the time.

Q. The purpose in removing it was to permit water to pass on through?

A. In case it come another flood. If it came another rain and washed more debris in there you'd just be making

page 120 ] yourself more of a dam, so we keep it clean.

Q. Now, if it hadn't been for that trestle which backed the water up and caused it to overflow the bottom, where your car pit or truck pit is, why you wouldn't have had water in there, would you?

Mr. Lively: That is objected to. That is counsel's testimony.

The Court: I sustain the objection.

Mr. Beverly: We except.

Q. (By Mr. Beverly) In fact, it was the overflow from the trestle itself that was coming down the road beside your building, wasn't it?

A. Yes, any water running down the road there, it done that on both occasions, the same way.

Q. And if that channel had been clear underneath the trestle, why much of that water would have gone down the channel, wouldn't it?

A. Well, actually the bridge is higher than the road itself, so it wouldn't, it could clear it under there all right, but the lower part of the bank was there and the, just natural flow of the water to come that way.

Q. The water was lower below your trestle than it was above, wasn't it?

A. Yes, some, yes.

Q. Did you observe how much?

page 121 ] A. About, oh, ten to twelve inches.

Q. What time did you get there that morning?

A. About seven-thirty.

Q. Seven-thirty in the morning?

A. Yes, sir.

Q. That was, as you say, after high crest?

A. No, I didn't.

Q. How many days did it take you to remove that debris?

A. Oh, I guess we worked a couple of days, something like that. I don't have any record of it, don't remember.

Q. What kind of machinery did you use?

A. We used a hyster, just pulled it out and let the rest of it flow on through.

Q. Were there logs?

A. Yes, there was some logs in there.

Q. Was there brush in it?

A. Brush.

Q. And had mud accumulated back of the logs and brush?

A. Not much mud that you notice in the river, no.

Q. How high up on the trestle did the debris reach?

A. From the water level up I, just guessing, the best I can remember, it would be about six feet or something like that.

Q. You never measured how high it was up on the trestle?

A. Not the debris, no.

page 122 ] Q. And its your opinion that the trestle was there in 1957?

A. I was there when the trestle was built and before, and I just don't recall right off what year we had that trestle put in. That is my opinion that it was there.

The Court: All right.

Mr. Beverly: That's all.

The Court: All right, stand aside.

## REDIRECT EXAMINATION

By Mr. Lively:

Q. Mr. Marshall, you were there is 1957?

A. Yes, sir.

Q. You have been there about twelve years, I believe?

A. Yes, sir.

Q. Are you positive that the trestle was there in '57?

*Jack Marshall*

The Court: He said he's not positive.

The Witness: No, I am not positive it was there. I don't recall right off.

The Court: He said he doesn't remember.

Q. (By Mr. Lively) Now, in 1957 you spoke of the flood being about a few inches lower than in '63. Do you know whether or not the people that lived in these six—five houses, I believe, up there along the river bank moved their furniture out of their houses?

A. In 1957 you're talking about?

Q. Yes, sir.

page 123 ] A. Yes, sir, they did. Water was up in those houses in 1957 and they, some of our men helped them get the material out.

Q. State whether or not you know of the people that lived in these houses there; these same houses, moving their furniture and fixtures out at any other time than '57.

A. Not that I recall, no, sir.

The Court: All right, is that all?

Mr. Lively: I believe that is all.

## RECROSS EXAMINATION

By Mr. Beverly:

Q. They moved their furniture out for fear it would flood in 1957. Is that correct?

A. In 1957 the men was wading water up there to get the material out. They had already flooded.

Q. That's all.

The Court: All right, stand aside.

## REDIRECT EXAMINATION

By Mr. Lively:

Q. You say it didn't flood the buildings in '57?

A. Sir?

Q. I understood you, wasn't sure what you said about it flooding the buildings in '57.

A. Those houses up above there were flooded in '57; when a lot of them got their furniture out, the water was already in them.

page 124 ] The Court: All right, sir.
Mr. Lively: That's all.
The Court: Stand aside, Mr. Marshall. You can be excused.
Mr. Lively: May be excused, your honor?
The Court: Yes, sir, call your next witness.

(Witness excused.)

Mr. Lively: Mr. Hillman.
Sheriff: This witness has not been sworn, your honor.

(Thereupon, the witness was duly sworn.)

EUGENE L. HILLMAN,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Long:
Q. What is *yourname,* please?
A. Eugene L. Hillman.
Q. Where do you live, Mr. Hillman?
A. On Meadow Street in Coeburn.
Q. What is your occupation?
A. Vice president of Erwin Supply Company.

Mr. Phipps: Mr. Hillman, would you please look toward the jurors so we can hear you instead of talking
page 125 ] over there to Senator Long?

Q. (By Mr. Long) What business is Erwin Supply Company engaged in?
A. The wholesale distribution of mine, mill, electrical and mining supplies primarily.
Q. Where is its place of business?
A. Just in the corporate limits of McClure, just below Clinchfield's central supply or central shop building.
Q. What size building do you have there?
A. It's 110 or 12 feet in width, approximately 400 feet in length.
Q. And you have supplies and merchandise stored in these buildings?
A. Yes, sir.

*Eugene L. Hillman*

Q. And were you working for the Erwin Supply Company in 1957?

A. Yes, sir.

Q. And in 1963?

A. Yes, sir.

Q. Do you know about the water there, the height of water, high water, in 1957 and 1963 around and in your buildings there of the Erwin Supply?

A. In 1957 I was present during that high water, and I am aware of the markings that are there in our truck pit. In fact, we were in the warehouse and could not get out

page 126 ] readily that particular day.

Q. What was the difference, if any, between the levels of the high water in '57 and in 1963?

A. From the water markings I would estimate maybe, that is, in the truck pit, maybe three to four inches higher water in 19—I beg your pardon—in 1963 *that* in 1957.

Q. Yes, sir. And how—where is your building, rather the building of the Erwin Supply Company with reference to this railroad bridge?

A. May 400 feet, that would be north of the bridge.

Q. Would that be upstream or downstream?

A. That would be downstream.

Q. And about how close is your building to the river?

A. The brick building, I would say, is 120 feet, something of that nature.

Q. And do you own, does the Erwin Supply Company also have another building there?

A. We have a metal, steel building across from our brick building that is between the brick building and the river.

Q. What size is that building?

A. I believe that is 60 by 288 feet in length.

Q. Now, where does the railroad tracks run there with reference to the two buildings?

A. The railroad tracks are approximately six feet from our brick building. It gives us access to the railroad

page 127 ] cars coming into the brick building.

Q. Now, when water in '57, did the banks overflow there and water come over on your property?

A. It rose to the degree that it did get up on the present road, rose into our truck pits and along the loading platform on the outside of the building.

Q. Was the trestle built in '57, or was it built later on?

A. If I am not mistaken, I believe the trestle was built in

'58 or '59. I have forgotten the year; I would say '59 probably.

Q. Fifty-nine?

A. Yes, sir.

Q. Now, this water mark you speak of, now, that was made by high water in '57 and '63, was that the mark of the height of the water at the crest?

A. In '63 I think it's just by the mud and the debris. The markings in our truck pit in the '57 flood, it was distinguished between the '63 flood by a red paint mark inside the truck pit.

Q. Did the water in either year get in your metal building and in the other building too there?

A. Of course in '57 the metal building did not exist. In '63 it did exist and it covered most everything in the metal building that was up to, say, four feet or forty-eight inches, something of that nature.

page 128 ] You mean the water was something like four feet in the metal building?

A. Yes, sir.

Q. In '63?

A. That is correct.

Q. As I understand, the metal building was not there in '57?

A. That is correct.

Q. And this metal building is closer to the river, I believe, than the brick building?

A. That's right.

Q. And how far down the river from the bridge is the metal building?

A. It's approximately the same distance as the brick building. They are almost directly opposite each other. I would say maybe 400 feet.

Q. Four hundred feet down the river from the bridge?

A. That is correct.

Q. And the water was four feet up in the metal building there?

A. That is an estimate. I would say close that.

Q. Yes, sir. Was water over the railroad tracks down through there?

A. Yes, sir, it was over just about all the track except just a small part up at the bridge just as the trucks came off the bridge, that is, in 1963.

page 129 ] Q. Now how was the road, there is a road down through there I believe you all use, maybe a private road, down between the buildings on down to McClure Lumber and Supply, isn't there?

*Eugene L. Hillman*

A. Yes, sir.

Q. Now, was it passable in '63 when the water was up?

A. In '63 I could not testify, sir, because of the fact that I was unable to get there till the waters had receded.

Q. From the marks it left, could you tell?

A. From the marks it left, I would say not.

Q. Yes, sir. Did the water also get up in McClure Lumber and Builders' Supply building below yours?

A. From the markings of the water and debris I would say that it did get up into their buildings also.

Q. Do you know whether or not the people up there in these five houses moved their furniture out of their houses in 1957?

A. In 1957 I am sure that they did because of the fact that one of our employees came to me and asked permission to loan some of our tarpaulins to those people to cover their furniture that they had carried out. We also loaded some furniture on our truck, that is, some of our men did. I authorized them to use our tarpaulins to cover their furniture as they moved it from their homes I assume.

Q. Yes, sir. What would you say is the width of page 130 ] the bottom land down below the bridge there where these buildings are located? What would you say the width of it is there that the water can spread out when the river is up?

A. You mean between the buildings?

Q. Yes, sir.

A. I would—I wouldn't think—I can't remember the dimensions exactly, but maybe 80 feet between the brick building and the metal building.

Q. Yes, sir. And how far over to the bank from the brick building?

A. Close 100 feet.

Q. Yes, sir. And water all down through there and in the metal building in '63?

A. As far as I can say, I would think that from the bank of the river to the building, the brick building would probably be 100 feet or, more or less.

Q. Did you go up to the bridge there in 1963?

A. No, sir, I did not.

Mr. Long: All right, you may ask him.

The Court: Cross examine.

CROSS EXAMINATION

By Mr. Phipps:
Q. Mr. Hillman—
A. Yes, sir.
Q. Did you see a dam put across there just
page 131 ] above it in March '63?
A. Repeat the question, please.
Q. I say did you see where a dam had been constructed there by the debris, logs and trash and stuff right above that trestle in 1963?
A. No, 1963 I did not go up there.
Q. You don't know what the condition was about the trestle?
A. I only knew what it was below because I didn't have a chance to go up there in 1963.
Q. But it was only about three or four inches higher in '63 than it was in '57?
A. That's below the bridge in our truck pit.
Q. In '57 didn't have that trestle, did you?
A. That is true, we did not have the trestle.
Q. Well now, did you see the water running, be on the left side going upstream, did you see the water running off the left side where that trestle was and down on the railroad?
A. Not in 1963 because I didn't arrive at work until probably eleven o'clock that morning.
A. That is all.

The Court: All right, stand aside.
The Witness: Can I be excused, sir?
The Court: You can be excused.

(Witness excused.)

Mr. Lively: Mr. Yates.
page 132 ] The Court: Have you been sworn?
The Witness: Yes, sir.

J. M. YATES,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lively:
Q. What is your name, Mr.—J. M. Yates?

*J. M. Yates*

A. J. M. Yates.
Q. Where do you live, sir?
A. I live right above McClure, just above it.
Q. How long have you lived there?
A. Past eight years.
Q. What work, what kind of work do you? What is your business?
A. I am warehouse foreman at Erwin Supply Company.
Q. And have you held that position for the last eight years?
A. Last ten years.
Q. Ten years?
A. Yes, uh huh.
Q. Were you there during the, what's been referred to as the flood of 1957?
A. Yes, sir, I was.
Q. Was this trestle built at that time or not?
page 133 ] A. It was not, no, sir.
Q. Built after that?
A. Yes, sir.
Q. And you were also there during the flood of '63?
A. Yes, sir, I was.
Q. If you observed and know, state the difference in the height of the water, high water during the flood of '63 and the flood of '57.
A. Well, the flood of '63 was approximately four to six inches higher than it was in '57. That was on our building.
Q. And your building was located where with reference to this trestle?
A. It's approximately 400 feet below the trestle, the end of the building.
Q. Now, describe how the river comes into this trestle? Does it come straight or does it come at an angle to the trestle?
A. (No response.)
Q. I mean how does the river run through the trestle? Run straight through the trestle or does it run at an angle?
A. Well, I haven't looked at it too much, but it seems like it runs at a slight angle through the trestle, I believe. I am not sure of that. I really never paid too much attention to it.
Q. Tell us what the character of the land is, the
page 134 ] topography of the land, the lay of the land from a point above the trestle on down the river.
A. You mean below the trestle?
Q. Yes, sir, is it level?
A. Well, it's level below the trestle. I'd say there is 300

feet probably level on the side that we are on.

Q. And how wide is that level piece of land?

A. Oh, it's approximately 300 feet I would say.

Q. Three hundred feet wide?

A. Yes.

Q. And how high is the bank of the river there with reference to the high water marks? I mean was the high water mark above the banks of the river?

A. The high water mark, I would say, was about forty inches, three feet or forty inches above the river bank itself.

Q. So this level land there then was overflown during each of these flood—

A. Yes, sir, it did.

Q. Periods. And you say, I believe you said, that is 300 feet wide?

A. It's approximately 300 feet.

Q. Something like that?

A. In there.

Q. Did this, either of these floods get up in the building that you—

page 135 ] A. No, sir, it did not.

Q. Were marks put on the buildings there at the time or about the time of these respective floods?

A. Yes, sir.

Q. Showing the maximum high water on each of them?

A. Yes, sir, it was.

Q. And it was about, I believe—what did you say?—how many inches difference?

A. I would say four to six inches. I am not sure of that.

Q. Something like that. Do you know whether or not the buildings that are involved in this controversy, that is, the five houses up above the trestle were flooded in the '57 flood?

A. I know there were some houses flooded. Which ones, I do not know.

Q. You mean someone's—someone's or all of these five houses?

A. I wasn't up there. I don't know that.

Q. I understand you don't know. How do you say you know that some of them were?

A. Well, I know I loaned some of the people tarpaulins and trucks to get their furniture out.

Q. That was during the flood of '57?

A. That was in '57, yes, sir.

Q. All right.

page 136 ] Mr. Lively: I believe you may ask him.

CROSS EXAMINATION

By Mr. Beverly:

Q. Mr. Yates, did you go up to the point where the trestle was at each of these two floods, in '57 and '63?

A. No, sir, I did not.

Q. What time did you arrive at work on the morning after the flood?

A. That's in '63?

Q. Yes, sir.

A. It was seven o'clock, but I had been there before that when the high water was there, and I went home and came back.

Q. Did you go up and look over the trestle at the debris piled behind it?

A. I did not, no, sir.

Q. Did any of the workmen from your shop go up there and help remove it?

A. No, sir, I don't remember anyone going up.

Q. You were there, you say, for about ten years?

A. Uh huh.

Q. From 1957 until 1963, between the floods, what changes were made or what buildings were built on that, on the banks about level with your building?

A. Well, there was—we had a metal building built, I believe it was 500 feet long and 40 feet wide.

page 137 ] Q. Pretty long building?

A. Yes, it was 500 feet long.

Q. How far across from your building, your brick building was it?

A. The metal building?

Q. Yes, sir.

A. Oh, it must be 30 feet roadway between the two buildings.

Q. It occupied a space then of approximately 40 feet by 500 feet on the river bank between you and the river?

A. Yes, it did.

Q. Was it closed off at the upper end?

A. Yes, sir.

Q. Both ends were closed?

A. Yes.

Q. Did the flood water in 1963 appear to be coming from

an overflow up above the trestle and down the road between your buildings?

A. I didn't—would you repeat that, please?

Q. Did the flood waters in 1963 appear to be coming from above the trestle *an* overflow down the streets between your buildings?

A. Honestly, it was dark. I don't know where the water was coming from.

Q. Well, it's seven o'clock.

A. It wasn't seven when the high water was
page 138 ] there. It was about three in the morning when
the highest water—

Q. What about at seven o'clock?

A. Well, seven o'clock the water had already gone down and we could travel through in the road.

Q. The effect of your metal building was partly to block the flow of the water?

A. No, sir, it was to store materials.

Q. I mean the result of it was to partially block the flow of the water, was it not?

A. Well, I honestly don't know.

The Court: All right, is that all for this witness? Stand aside, Mr. Yates.

Call your next witness. You may be excused, Mr. Yates.

(Witness excused.)

Mr. Lively: Will the court give us a few minutes while we talk to a witness?

Mr. Long: One witness wasn't here before we convened.

The Court: Any other witnesses?

Mr. Long: No, sir.

The Court: Well, take a ten minutes' recess. Try and be back in ten minutes.

Mr. Long: Well.

The Court: Well, let's get along.

Mr. Long: It's another witness we wanted to
page 139 ] use right along this line.

(Thereupon, there was a short recess after which the following proceedings were had in the presence of the jury in open court.)

*K. V. Herndon*

The next witness was duly sworn.

K. V. HERNDON,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Long:
Q. Is your name K. V. Herndon?
A. Yes, sir.
Q. Where do you live, Mr. Herndon?
A. McClure, Virginia.
Q. How long have you lived there?
A. Oh, twenty, twenty-five years.
Q. What is your occupation?
A. Building material business.
Q. You're president, I believe, of McClure Lumber and Builders' Supply, are you?
A. Yes, sir.
Q. Where is the place of business of McClure Lumber and Builders' Supply with reference to this railroad bridge that is involved in this case?
A. I'd say it's approximately 300 yards below
page 140 ] the railroad bridge.
Q. Three hundred yards or twelve hundred feet—I mean—three hundred—now, were you there in 1957 when they had a high water?
A. Yes, sir.
Q. And you were there in 1963?
A. Yes, sir.
Q. Did the water get into your place of business there in either of those years?
A. Yes, in both years.
Q. Both years?
A. The year '57 and '63.
Q. What part of your property did it get into or over?
A. Oh, it came into my basement in my home and the basement in the apartment building and the basement in the store building.
Q. How was the water in '57 as compared to in '63, the height of it, which time was the highest?
A. The water mark in '63 was, oh, eight to ten inches higher than in '57.

Q. And how much lower are you down below the Erwin Supply?

A. Well, I'd say we're about, Erwin Supply is about half way between our place and the bridge.

Q. And the bridge. And the Clinchfield shops are on above Erwin Supply, I believe?

page 141 ] A. Yes.

Q. Now, the water that came down through there, where was it with reference to the track there in '63 and the road?

A. Are you speaking about the road going up by Erwin Supply?

Q. Yes, sir.

A. Water was coming down in the road there between the Erwin Supply and the, well, in the roadway between Erwin Supply and the river.

Q. Well, how did it come down in '57? Any difference?

A. Well, I believe there was more in '63 than in '57.

Q. I understand that, but I mean did it come the same way?

A. Practically the same path, yes.

Q. Yes, sir.

Mr. Long: I believe you may ask him.

## CROSS EXAMINATION

By Mr. Phipps:

Q. Mr. Herndon, since '57 up where the shop was they had filled in towards the river, had they not? They had excavated and filled the river bank?

A. Just whereabouts up there?

Q. Well, from the—all along from the trestle down.

A. Had filled in?

Q. They had filled in over next to the river, the river bank?

A. Since '57 I'd say possibly they could have

page 142 ] filled in. There has been some building in there.

Q. Now did you see this dam that was put across that river up there in '63?

A. See the dam?

Q. Yes, see that trestle and dam there.

A. Oh, I have seen it, yes.

Q. No, did you see it at the time?

A. At the time?

Q. Before it was taken out, before the railroad company

took it out, before they removed the dam?

The Court: Are you talking about the debris?
Mr. Phipps: The debris and all that out.
The Witness: Oh, did I see it?

Q. (By Mr. Phipps) Yes.
A. Not at the time of the flood. I have been up there a few times, but I didn't go up there. I was too busy down at my place.
Q. And that trestle was not built when they had the flood in '57?
A. No, I believe it was built after that.
Q. That's all.

Mr. Long: Stand aside.
The Court: All right, you may be excused, Mr. Herndon.

(Thereupon, the next witness was sworn.)

page 143 ] Mr. Phipps: If the court please, we object to him testifying. He has been in here all the time.
Mr. Lively: We are entitled to one representative.
The Court: They are entitled to one representative in here I think. Are you counting lawyers? Go ahead.

T. J. BRITTON,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lively:
Q. What is your name?
A. T. J. Britton.
Q. What do you do, Mr. Britton?
A. I am claim agent with the Clinchfield Railroad Company.
Q. And how long have you held that position?
A. Since the first of the year in 1957.
Q. Do you know anything about these two floods that they are speaking of, one of which is referred to as the '57 flood and the other as to the '63 flood?
A. Well, the only thing I know about the '57 flood is just

seeing it and passing through the territory.

Q. Well, from the appearance in passing, what was the character of the 1957 flood as compared with the 1963 flood?

A. Just seeing the water up around buildings and around these particular houses involved here is all I

page 144 ] could say. I didn't go down to it. I had no reason to go down, just seeing as I passed on the highway.

Q. Well, was the 1957 flood, were these houses that are involved here, were they flooded in 1957?

A. Yes, sir, there was water around the houses when I passed, and other houses too.

Q. In '57?

A. Yes, sir.

Q. Was that before or after this trestle was built?

A. I believe the trestle was built in 1960, or '59, so it would have been before the trestle was built.

Q. Then these houses flooded in '57?

A. Yes, sir.

Q. Were you present yesterday when a view was taken of the place involved in this?

A. Yes, sir, I was.

Q. Did you hear a conversation between Senator Long and the plaintiff, Mr. Mullins, in regard to the certain, certain lists of property that Mr. Mullins had there, or Senator Long had, one of them?

A. Yes, sir.

Q. Which one of them had this list?

A. Well, it was handed to Senator Long, and I was standing there at the time it was handed to him.

Q. Now, did Mr.—did Senator Long ask Mr.

page 145 ] Mullins any questions about what the list represented?

A. Yes, sir, he did.

Q. Well, what was his question and what answer did Mullins make?

A. He asked him where the property was that was in the houses, and Mr. Mullins said that everything was lost except two items, two pieces, a chifforobe, and there was one other item. There was two items that he said, and everything was lost.

Q. What, if I refresh your memory, what about a stove?

A. Stove, that's it, yes, sir.

Q. And the chifforobe, you say, and a stove?

A. That's what I understood him to say.

Q. And all of his other furniture was lost, his property?

A. Yes, sir.

Q. Now, did you, after this flood of '63, did you come to the town of McClure?

A. Yes, I visited this particular property April 2nd, of '63.

Q. How did you happen to come there at that time?

A. I came to see Mr. Phipps and we went up there.

Q. You mean Mr. Phipps here?

A. Mr. Phipps, and Mr. Beverly, and I went up to this property April 2nd, of '63.

Q. Did you, at that time was any question being raised about this flood?

page 146 ] A. Yes, sir.

Q. Did you go into the houses for the purpose of seeing the furniture or property that was claimed to be damaged?

A. Yes, sir, Mr. Phipps, Mr. Beverly, and I went in all the houses and looked at them.

Q. Did you go into the house where the plaintiff, Mr. Mullins, had lived?

A. Well, I didn't know Mr. Mullins at that time, but we went in all the houses, and I know the house that Mr. Mullins occupied prior—

Q. Well, did you find any furniture or any property in that house at that time?

A. No, sir, the only thing in the house that I visited was a built-in kitchen sink and I believe was a hot water heater that was there. That was the only furnishings in the house that I saw.

Q. Did you see Mr. Mullins at that time?

A. No, sir, I didn't.

The Court: All right, is that all, gentlemen? Cross examine.

## CROSS EXAMINATION

By Mr. Beverly:

Q. Is it correct that what Mr. Mullins said was that everything that he lost was on his list except for the stove and chifforobe or wardrobe? Isn't that the way he

page 147 ] made the statement?

A. Mr. Beverly, all I know is what I heard; and the statement, the list was handed to Senator Long and the

comment was made about it, and he just said everything was lost except the chifforobe and the stove. That is the way I understood him.

Q. Everything that was on the list was lost?

A. Well, I don't know what he was referring to. He just said everything was lost except those two items, was what he said.

Q. Now, on the occasion, April 2, 1963, when you and I and Mr. Phipps went up there, did you see the marks around the top of his lower window pane?

A. Yes, sir.

Q. Did you confirm our estimate that the water had been up in the floor thirty or thirty-two inches?

A. I remember it was up on a pane of the, bottom pane of the window. I don't recall that I actually measured it.

Q. Were the marks very evident at that time?

A. Yes, sir, there was evidence that marks were there.

Q. All around the walls?

A. Yes, sir.

Q. I believe there was two or three inches of mud on all the floors?

Mr. Lively: That is objected to because there is
page 148 ] no claim in the pleadings of any damage being caused by mud.

The Court: Go ahead, describe the premises and let's get along.

Mr. Long: Exception.

Mr. Lively: We want to except to that.

The Witness: There was mud on the floor.

Mr. Lively: And I want to give the court some authority on it.

The Court: That is all right. The court has already ruled.

The Witness: I don't recall there being two or three inches there. There was mud on the floor of this particular house.

Q. (By Mr. Beverly) It had not been cleaned up at the time you were there?

A. Not to my knowledge. I don't know.

Q. I believe when we were there on April 2nd, they were still moving the debris from around the trestle, were they not?

Mr. Lively: Well, I object to that. That is counsel testifying,

"I believe so and so."

The Court: Ask him the questions, Mr.—

Q. (By Mr. Beverly) Is it true that they were still removing debris from down at the trestle when we were over there?

A. No, sir. No, sir, it's not true.

page 149 ] Q. Do you know the date the flood occurred?

A. No, sir, I don't. It was in March, the latter part of March.

Q. Was it March 12th or 13th, the night of the 12th?

A. I don't recall the exact date, sir. It was in March. That's all I know, because it was—

Q. Don't you have a record of that in investigating this claim?

The Court: Well, Mr.—it's pretty evident when the flood was. The trial has gone on this long.

Mr. Beverly: I want to establish that it was about two weeks or longer after the flood.

The Court: He has been stating here he was here on April 2nd. Let's get along now with cross examination in response to examination-in-chief.

Mr. Beverly: Save an exception to that.

The Court: All right.

Q. (By Mr. Beverly) You never saw his furniture at all then?

A. The only time I saw it was yesterday.

Q. And the time you were down by, when you passed by in '57 you never went into any of the buildings?

A. No, sir. No, sir, just passed the main—

Q. You don't know how far, if it ever got up into the buildings or not?

page 150 ] A. Well, it was up around all the houses. You could, of course, the highway there, you can look down on these particular houses, and you could see the water between the houses and all around them, in front of them, and it was pretty obvious there as well as every place along there.

Q. But it was not in the buildings?

A. Well, I couldn't say; it was up around them. Now whether it was in the buildings or not I wouldn't know.

Q. That's all.

The Court: All right, call your next witness.

A. K. McINTYRE,
having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lively:

Q. Your name A. K. McIntyre?

A. Yes, sir.

Q. Where do you live, Mr. McIntyre?

A. Erwin, Tennessee.

Q. What is your profession?

A. I am general counsel for the Clinchfield Railroad Company.

Q. How long have you held that position?

A. Since 1952.

Q. I'll get you to state whether or not the Clinchfield Railroad Company is a public service corporation.

page 151 ] A. It is a public service corporation operating a railroad, common carrier railroad.

Q. Are you familiar with this trestle that is in controversy in this case?

A. Yes, sir, I have seen it.

Q. I'll get you to state whether or not that trestle is essential to the operation of the railroad at that point for the service of its patrons.

A. It is. There are some three or four commercial and industrial patrons of the railroad who require the railroad service and must be reached by this bridge.

Q. What is the size and character of these businesses that you speak of?

A. I am not too familiar with their actual businesses except that they are substantial shippers and receivers of freight by rail.

Q. And do they do that regularly? I mean is it—

A. Oh, yes, yes.

Q. How long has that been—that condition existed?

A. Oh, for a number of years, I don't know how many, for a number of years.

Q. And it's in evidence, I believe, that this trestle was built in 1959.

A. It was built, I believe, in 1958 or nine.

Q. Fifty-eight?

page 152 ] A. Somewhere in there.

Q. Why was it built at that time?

A. To serve—

Mr. Phipps: We object to that, your honor. We don't think it's material, why it was built. We admit it's built; it's there.

The Court: Let him go on and state.

The Witness: It was built to serve those business establishments across the river from where the railroad was at the time.

Mr. Phipps: Save exception.

Mr. Lively: I believe that is all.

The Court: All right, any cross?

## CROSS EXAMINATION

By Mr. Phipps:

Q. Mr. McIntyre, before you built that trestle across there you still were serving part of that business on this side, weren't you?

A. I can't say, sir.

Mr. Lively: I didn't hear what your answer was.

Q. (By Mr. Phipps) Did you know of the 1957 flood at the time that your company constructed this trestle across there?

A. I knew there was a flood. I don't recall particuarly when it was. There have been several.

Q. Well, it's not necessary for the trestle to be

page 153 ] there for the operation of the Clinchfield Railroad Company, is it?

A. Yes, sir.

Q. You mean it's only necessary for that locality, not for the operation of the railroad as a whole?

A. Well, Mr. Phipps, when commercial—

The Court: I don't think we need to go into that, gentlemen. We know it's a public common carrier of freight.

Mr. Phipps: That's all, your honor.

The Court: The State Corporation Commission can order it to provide service to firms along its route. I don't think that will add anything at all to this case here.

Mr. Phipps: That is all.

The Court: Stand aside, Mr. McIntyre. Is that all for the defendant?

Mr. Lively: We want Mr. Kerns.

The Court: Have you been sworn?

The Witness: Yes, I have been, yesterday.

LOUIS C. KERNS,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lively:

Q. What are your initials and name, Mr. Kerns?

A. L. C. Kerns.

Q. Where do you live?

page 154 ] A. Erwin, Tennessee.

Q. And what do you do?

A. I am a civil engineer with the Clinchfield Railroad.

Q. How long have you been with the Clinchfield Railroad?

A. Nineteen years.

Q. What preparation have you had to qualify you to do engineering work?

A. I attended East Tennessee State University as a graduate—as a mathematics major. I worked with the Tennessee State Highway Department and with the T. V. A. for three years before I went with the railroad as a civil engineer.

Q. And how long have you been with the railroad as a civil engineer?

A. Nineteen years.

Q. Nineteen years. During that time have you engaged in construction of essential track or bridges and so on of the railroad? Just what has been your—

A. My duties have consisted of laying out and supervision of construction of railroad tracks and bridges and buildings.

Q. Are you familiar with this trestle that was involved in this?

A. I have seen the plans for it, and I have seen the bridge. I didn't actually take part in the construction of this particular structure, but I am familiar with it.

Q. What would you say about this trestle as to

page 155 ] its suitableness for the purpose for which it was constructed as used?

A. This bridge is of a standard design that is in common use on the railroad. In fact, we have several places that this type structure is used on our main line, and in practically all

cases on our sidetracks we use timber frame trestles of this same general construction.

Q. What about its character as being a standard—

A. It is a standard trestle design. In fact, we don't always draw a particular plan for that. We have got a standard plan for twelve foot timber trestles, and we can adapt it to almost any construction.

Q. What would you say about this being suitable for the location in which it is built?

A. Yes, sir, to me it's as good a structure and as safe a structure as could be put over this stream at that place for the purpose that it was to be used.

Q. Do you know anything about the flood? I mean did you see or observe anything about the flood conditions in the years 1957 and the year '63?

A. No, sir, I wasn't in this part of the state at all during the floods. I have come back later and run some levels of high water marks in the floods.

Q. Now it's been testified to by some witnesses here that the trestle dammed up the water in such a way as to cause or contribute to the flooding of these houses, the house page 156 ] there where Mr. Mullins had his furniture. What would you say about that? And tell what you have done in the way of determining that, if you can. And explain—

Mr. Beverly: We—

Mr. Lively: And why you reached the conclusion that you have.

Mr. Beverly: We object to that. It's asking for the opinion of this witness. He is not qualified from personal knowledge by his own evidence.

Mr. Lively: He is qualified.

The Court: Overrule your objection. Go ahead with your answer and let's see what it is.

Mr. Beverly: Exception.

Mr. Lively: Go ahead.

The Witness: I ran levels over high water marks taken at the houses that were visible at the time and the Army engineering came through apparently about the first of April after the flood in March.

Mr. Beverly: We object to hearsay now.

The Court: Well now, Judge Lively, ask him a question so you could—so it would be admissible there if you have something.

Mr. Lively: I thought I did do that, but I'll try to amend it.

Q. (By Mr. Lively) What work did you—strike
page 157 ] that out, please. What would you say—strike that
out. Did you do some work there with a view to determining the cause of the flood and the high water and the results of the high water? Did you do some work there to determine, to undertake to determine those things?

A. Yes, sir.

Q. Now what did you do?

A. I took a surveying instrument and ran the level over all of the visible high water marks that I could locate in the area to determine where the water was at various locations in 1963.

Q. Now, in determining these high water marks, did you examine the water marks on the buildings as well as on the trestle there?

A. Yes, sir.

Q. Did you examine the high water mark that had been made by the individuals and property owners there as well as by the Army engineers?

A. Yes, sir.

Q. Now, from your work there and from your work in connection with this information that you had, tell what you—what conclusions you reached with reference to the damming up of water from this trestle.

Mr. Phipps: We object to that question for the same reason
stated before.
page 158 ] The Court: Well, just let him state.
Mr. Lively: I didn't hear what the court said.

The Court: Let him state.

Mr. Lively: Go ahead.

Mr. Phipps: Save exception.

The Witness: I checked the water elevation at the bridge, high water elevation, and at the houses which are from 550 to 700 feet upstream.

The Court: Does that include the house occupied by Harold Mullins?

The Witness: Yes, sir.

The Court: All right.

The Witness: And I found that the water was about two and a half foot higher at the houses than it was at the bridge, which shows, of course, that the water was flowing from the houses towards the bridge because when water is dammed up, of

course, it will go back level. And if the water had been only at the height of the high water at the bridge, it would not have damaged the houses. It wouldn't have been high enough to have damaged the houses if the water had been completely dammed at the bridge.

Q. (By Mr. Lively) In other words, as I understand you, Mr. Kerns, the water, the high water mark of the water at the bridge was not high enough to have caused any damming at the point of the building that was occupied by Mr. Mullins?

page 159 ] Mr. Beverly: We object to that as leading, your honor.

The Court: Answer the question.

Mr. Beverly: Save exception.

The Witness: Yes, sir, the water was not high enough at the bridge to have caused the damage at the houses if the water had been level from the bridge back to the houses.

Q. (By Mr. Lively) How far below the house where Mr. Mullins' furniture was to the point in the stream where the, where any damming that occurred from the bridge, if any, gave out? You say it didn't reach up to the house?

A. The water, if the water had backed up level from the bridge—

Q. You mean from the high water mark?

A. From the high water mark on the bridge, it would have run out at approximately the floor level of the houses.

Q. Now, speaking of the type of bridge, you mentioned something about it a while ago, explain the construction of the bridge, whether or not there's room for water to go through this trestle.

A. Yes, sir, the bridge is constructed of timber piling or posts set on concrete footings, and there is twelve foot openings in there and eight, if I am not mistaken, there's eight twelve-foot openings that are about fourteen foot

page 160 ] high to allow the water to pass through.

Q. Now, along about this bridge and immediately above the bridge, speak of the height of the river banks. Are they, as compared to this high water mark upon the bridge, are the river banks lower than that high water mark or higher?

A. The banks are lower than the high water marks.

Q. So the—now what is the nature of the land where you

spoke of these river banks being lower than the high water marks? I mean is it level land or is it hills?

A. Well, it's hills when you get out of the river banks in most places. There is a few flat areas.

Q. Well now, right opposite and just above the point where this bridge is located, isn't there a bottom there or—

A. Narrow flat place.

Q. Level bottom?

A. Not near the bridge, there isn't. Well, there's a parking area right opposite the building, but it's at the top of the bank of the river.

Q. Well, the bank being lower than the high water mark there, did they have any—did the water have any room to spread out on either side?

A. Not much. It had some room but not much; when it got out of its banks, why it was right against the mountain before it went very far.

page 161 ] Q. Well, about what distance was it, about what was the distance you say?

A. There at the bridge?

Q. Yes, and below the bridge.

A. Well, below the bridge it spreads out 400 feet.

Q. Four hundred feet.

A. And above the bridge it will go out about 125 or 30 feet, just above the bridge.

Q. And now, at the upper end just before the river reaches a point opposite these—this house which Mr. Mullins' furniture was located in, how does it approach? Is it a straight line or does, is there a curve in the river there? What is the character of that?

A. Just upstream from the house in question, the stream comes down and makes a curve; and, actually, it has a tendency for the water to come around and swirl in towards the houses.

Q. Towards the houses?

A. Yes, sir.

Q. Now, before it makes the curve, about what is the direction that the stream is coming toward these houses?

A. It's coming relatively straight until it comes into the curve.

Q. You mean it's coming straight toward the houses?

A. Yes, sir.

Q. And then makes a curve in which direction?

page 162 ] A. To the left.

Q. To your left as you're facing down the river?

*Louis C. Kerns*

A. Yes, sir.

Q. And that, I believe you say, would have a tendency to throw the water—

Mr. Beverly: We object to his suggestion and leading.

Mr. Lively: All right. I misplaced a paper here, if the court please.

The Court: All right.

Q. (By Mr. Lively) In connection with your work there at the place where this flooding is alleged to have taken place, did you make any maps?

A. Yes, sir.

Q. Showing the approach of the river to it and the location of the river and the location of the bridge?

A. Yes, sir, we made a general plan map of the area.

Q. I hand you here a paper which appears to be a map and get you to look at that and tell us what it is.

A. This is a map made showing the situation at the, at and around, the timber trestle at McClure.

Q. I'll get you to point out to the jury what you mean by saying that the river as it approached these houses approached them direct and then turned to one side.

Mr. Beverly: If your honor please, we'll object
page 163 ] to the introduction of this map unless it's to be, shown to be his own work, his own drawing and resulting from his own individual efforts.

The Court: Overrule the objection. I think he already stated he prepared this map.

The Witness: The map was prepared under my supervision. I didn't actually draw it, but I did go out in the field and take all the information, and I supervised the drawing.

Q. (By Mr. Lively) Is it a correct representation of your work there that was done?

A. Yes, it is.

Mr. Beverly: We'd like an opportunity to see it.

Mr. Lively: We offer this map in evidence.

The Court: Let it be filed, marked and filed number, whatever it is.

Mr. Lively: No. 1.

(EXHIBIT NO. 1 was marked for identification and filed.)

Q. (By Mr. Lively) And point out to the jury how this river comes in and what you meant by the curve and the approach there and—

Mr. Beverly: Save an exception.

Q. (By Mr. Lively) And the approach toward these houses.

A. This is the general area. This is a timber page 164 ] trestle here, the river coming up through here, and the house in this area. Water comes down, flows generally the same way the railroad does. It comes down to here and makes a turn and comes back and turns and comes back relatively parallel with the houses, and then it comes on down through the trestle and the fact that the water at flood stages, when it has a tendency to get out of its banks—

The Court: You don't need to testify to that. You can state what you found.

Mr. Lively: I don't believe some of the jurors saw this very well. Let me have it.

The Court: All right, do you have any further questions of Mr. Kerns?

Mr. Lively: I have just a question or two.

The Court: All right, go ahead and ask him.

Q. (By Mr. Lively) What is the, speak of the elevation of these houses above the river, the houses that are involved in this controversy.

A. The floor level of the houses are ten and a half foot above the river bed.

Q. Ten and a half feet?

A. Yes, sir.

Q. That's in elevation?

A. Yes, sir.

Q. And did you notice a house there on the page 165 ] property between, I mean a small house, between the river and the resident houses?

A. Yes, sir.

Q. Was there anything there to show where that house had been originally located?

A. Yes, sir, there was timbers in the ground where it had

been where the old foundation was or where the building had been sitting before the flood.

Q. And is that house still there on the property?

A. It wasn't in the same location. It had been moved down about, well, from one property line to another, about fifty feet.

Q. About fifty feet?

A. Yes, sir.

Q. You mean that house has been moved down the river something like fifty feet?

A. Yes, sir.

Mr. Lively: Cross examine.

## CROSS EXAMINATION

By Mr. Phipps:

Q. Mr. Kerns, when did you make your survey?

A. I made the first trip up there about a year ago, the best I remember. I don't remember exactly when it was now. And I have been back about three times since then to get additional information.

page 166 ] Q. But at the time that you made the first survey it was about a year after this flood?

A. Approximately, yes, sir.

Q. And the only information that you could get was what you inquired from people around there?

A. No, sir.

Q. Well, what else did you get?

A. Well, I could see the high water mark on some of the houses up there, on the windows of the house and on the walls of the house, and I could see the high water mark where it had left silt on McClure Lumber and Supply Company warehouse walls down there. The silt was still there where the water had got up, and you could see it.

Q. Did you go in Mr. Mullins' house and see how high water had been in it?

A. I don't know which house was Mullins' but it was five houses up there, and I went in two or three of them and found high water marks in two or three of them.

Q. You just run a survey in to determine how high the water had been on the Mullins' house at the time you made that, did you?

A. I am not sure.

Q. Well, you didn't make—you didn't go in the house; therefore, you didn't know how it was, did you?

A. I might have been in the house. Like I say, page 167 ] there were five houses there, and I went in two or three of them and found what water marks I could find.

Q. And if it was thirty inches inside of the house from the floor up, why your surveys wouldn't have taken that in at all, would it?

A. Yes, sir.

Q. Would it have been up as high as that thirty inches?

A. Just about exactly thirty inches from the floor level up to the high water marks that I found.

Q. And the high water mark at the bridge and the one at the house, in the house, would that be thirty inches?

A. No, sir; no, sir.

Q. Well, how do you figure that, that it was only—only four to six inches higher below the bridge and it was thirty inches above the bridge in those houses, the '57 and the '63, how do you figure that?

A. I didn't testify about '57.

Q. I know you didn't but I said the witnesses, they have testified here.

The Court: Well now, he doesn't know anything about the '57; he hasn't said anything about that, Mr. Phipps.

Mr. Lively: He wasn't in the court room. Witnesses have testified in this case.

The Court: This man has testified about marks which he identified only, not some other marks that some page 168 ] other witness may have testified about.

Mr. Phipps: That's all.

The Court: All right, stand aside, Mr. Kerns.

Mr. Lively: I want to ask Mr. Britton one question. Come around, Mr. Britton. Omitted question.

T. J. BRITTON,

was recalled, and further testified as follows:

## DIRECT EXAMINATION

By Mr. Lively:

Q. Mr. Britton, were you with Mr. Kerns when he did some

of his work up on this?

A. Yes, sir, on two occasions and he went back after that.

Q. He spoke of a house that was there on the property in between the resident houses and the river. Do you know about that house?

A. Yes, sir.

Q. Is that house now located at the same place it was before the flood and before the flood of '63 and, if not, where—how was it moved?

A. The house was located on one of the property lines, and it had moved downstream up against a tree, so—I don't know what kind of tree it is.

Q. Is that a locust tree?

A. It could be a locust. I don't know, but it page 169 ] moved from one property to the other.

Q. Was Mr. Kerns around all of these houses there doing his work up there?

A. Yes, sir, we were around all five of those houses, between them and taking water marks on all the houses.

Q. And made your observations?

A. Yes, sir.

Q. Now—oh, yes—now in making his calculations there do you know whether Mr. Kerns used the same high water mark that you had observed when you were there in April of '63?

A. Yes, sir, he used those marks.

Q. That's all.

The Court: All right, any questions? All right, stand aside. Is that all the evidence, gentlemen? The defendant close?

Mr. Long: No, sir, we have another witness that is on the way. We have some instructions. I think we could be going over those and indicate to the court what the witness would testify to.

The Court: Well, I'll see, gentleman, but I don't think—

(Thereupon, the court, counsel, and the court reporter retired from the open court room where the following proceedings were had in chambers out of the presence of the jury.

There was an off-the-record discussion before any page 170 ] instructions were offered.)

Thereupon. Instruction No. P-1 was offered.

Q. Then what is the lay of the land from that bank to the houses?

A. Well, it's generally sloping towards the highway and the mountain on the side that the highway lays along. In other words, the river's flood channel is from the railroad embankment on the one side of the river to the page 174 ] highway embankment on the other side of the river.

Q. Do you know of your own knowledge whether or not the waters of McClure River have overflowed these banks prior to 1963?

A. Well, in the period of the time of which I am familiar from 1950 on, there have been at least two other times that I remember.

Q. Do you know if one of those was in 1957?

A. Yes, sir.

Q. And was one of those after—prior to or after 1957?

A. The other was prior to 1957.

Q. Did you make up the plans and specifications for the railroad trestle across the river at McClure?

A. They were built under my supervision and direction.

Q. The plans were made and the bridge was built under your supervision?

A. Yes, sir.

Q. Is that bridge built according to the best standards of the railroad industry?

Mr. Beverly: We object to that. It calls for a conclusion and is not the—

The Court: Overrule the objection.

Mr. Beverly: Save exception.

The Witness: This structure is built in accordance with the generally accepted practice of the American page 175 ] Railway Engineering Association, which is composed of practically all the railroads in the United States. It is typical of hundreds of thousands of structures under railroads and under highways. It is typical of a large number of such structures which we have supporting our main track at other locations. Some four or five are located between Dante and St. Paul.

Q. I show you a drawing marked Exhibit 1 in this case and ask you if it fairly represents the situation at McClure, Virginia.

A. It does, yes, sir.
Q. Including the railroad bridge?
A. Yes, sir.
Q. And including the houses along the edge of the river?
A. Yes, sir.
Q. Do you happen to know who lives in these houses?
A. No, sir, I do not.
Q. On that map do you see a bend in the river?
A. Yes, sir, the river, McClure fork generally meanders in a same general plan that it does through this location. Very little of it is truly straight.
Q. In speaking above the houses, I mean in the direction from which the water is flowing. Now, above those houses, do you see a bend in the river on that map?
A. There is a bend in the river which is, the
page 176 ] river leaves its normal channel and reaches a flood stage and would throw it towards the state highway and towards the houses.
Q. Now, in the direction of the bridge, was adequate provision made for the flow of McClure River?

Mr. Beverly: We object to that, your honor. It calls for a conclusion again.
The Court: You can state what you did in the way of construction of the bridge there and what factors are concerned.

Q. (By Mr. McIntyre) What did you do in the construction of the bridge to provide for the flow of the water of McClure River?
A. We took into consideration the previous flood planes and the portions of the structure which would materially restrict the flow of the river at what was then known as maximum flood and was raised above that flood.
Q. In the construction of the bridge, was consideration given to the flow of the water and its possible restricting of the water?
A. Certainly. We would not design any structure and put our money into the structure with the idea that high water would turn that structure over and wash it away or seriously damage it.
Q. You spoke of turning it over. If debris or any other substance absolutely dammed that water as high
page 177 ] as four to six or eight feet, what would be the effect upon that bridge?

*J. M. Salmon, Jr.*

A. It would turn this structure over or wash it off of its foundation. The structure is only sitting on its foundation with small pins in the bottom of the piles to keep it from moving under vibration and normal loading. It's not fastened down in any way to the concrete sills that sit in the river vertically, and this structure was not designed to take loading of that nature, and it would not stand under such loading. And none of the high water that has occurred since this structure has been built has this ever occurred, or could it ever have occurred, because this structure has never been moved out of line on the top or the center line of the track at all. The structure is standing today just as it was when it was constructed.

Mr. Beverly: If the court please, we would like to object to that question and ask the court that it be stricken from the record. It's an opinion and a conclusion.

The Court: Overrule the objection.

Mr. Beverly: Save exception.

Q. (By Mr. McIntyre) Did you consider in the construction of this bridge whether or not any back water which would possibly be caught by the bridge backing water up in such a manner as to damage any person?

A. Certainly. When we built the structure with the track at the elevation at which we built it, it was built page 178 ] so that the stringers and the ties and the rail, the deck of the bridge would be above the highest known flood plane that we were aware of and it was above the 1963 flood.

Q. Now, where would the water go if it were restricted in any manner by debris and other substance lodging against the bridge?

A. Well, part of the water before this, the McClure fork reaches its maximum known floods, it breaks towards the northeast and flows through the property of the Clinchfield Coal Corporation and the Erwin Supply Company, which has a tendency to considerably widen the channel of the stream just above the structure. But had at any time drift lodged on this structure in which it would have dammed up the stream and caused a differential of water between the high and low side of any amount, it's very simple design *calcuation* to prove that the structure would turn over. It would be washed away in flood.

The Court: And whereupon, counsel for the plaintiff offered Instruction P-1A, to which defendant by counsel, the granting of which the defendant by counsel lodged the following objections.

INSTRUCTION NO. P-1A (Given)

"The court instructs the jury it was the duty of the defendant railroad company in constructing and building its trestle across McClure River to build said trestle as to not obstruct such flow of water as the defendant railroad company might reasonably have expected would occasionally flow down McClure River, including the ordinary rise of said branch at periodically recurring freshlets.

"And if the jury believe from the evidence that the flow of water in McClure River upon the occasion complained of in the motion for judgment was not greater that (*sic*) the defendant railroad company might reasonably have expected would flow down McClure River on such occasion, then it was the duty of the defendant to have anticipated such flow of water and to have so built said trestle that under such circumstances would have not caused the water to back up on the plaintiff's property.

"And if the jury believes from a preponder-
page 183 ] ance of the evidence that the defendant railroad company failed to so build said trestle and failed to provide other ways sufficient for the passage of water down McClure River on such occasions, and as a proximate result thereof, the plaintiff's personal property was damaged, then the defendant is liable to the plaintiff in such sum as will fully compensate him for any damage sustained as a result of the alleged flooding."

Mr. Lively: In Instruction P-1A after the word, after the word "to" in the third line from the top, we think the words "reasonable care"—in other words, duty is not absolute, but use "reasonable care to build said trestle so as not to"—we think the word "materially" ought to be before the word "obstruct."

The Court: All right.

Mr. Lively: And we object to it for those reasons.

Now then, is another instruction offered?

The Court: No.

Mr. Lively: Not P-2, P-1?

Mr. Long: He has refused them.

The Court: That's all one instruction.

Mr. Lively: Oh, I see. And in the line next to the bottom "such sum as will fully and reasonably compensate him," we think "fully and" should be stricken out, "such sum as will reasonably compensate him."

page 184 ] Mr. Beverly: We want it "fully."

Mr. Lively: I think you can put "fully" if you want to rather than "reasonably," but I don't believe you are entitled to both of them.

(Thereupon, there was a discussion off the record.)

The Court: I'll give P-1A as amended by striking out the words, quote, "and reasonably," end quote, in the next to the —in the line next to the last line.

(Before the amendment the last two lines of Instruction P-1A read: "such sum as will fully and reasonably compensate him for any damage sustained as a result of the alleged flooding.")

Mr. Long: What about the amendment up there at the top about "materially obstruct?"

The Court: I decline to amend it any further.

Mr. Lively: Now our objection is that you make the duty absolute here when it should be reasonable care.

The Court: And materially. I think the thing is, you have just got to reasonably anticipate the flow of the water down there is all you have got to do, and—

Mr. Beverly: If we may, your honor, we'd like a little time to discuss these?

Mr. Lively: If the court please, before we offer the instructions, we want to move to strike out the plaintiff's evidence for the reasons set forth in our motion at

page 185 ] the close of plaintiff's testimony.

The Court: All right, motion overruled.

Mr. Lively: And in the light of the testimony of the defendant introduced since that time.

The Court: Overrule the motion.

Mr. Lively: Exception.

Mr. Long: And on that instruction there given, we want another objection want the record to carry another objection as follows: this is a finding instruction and does not take into consideration the defendant's defenses. It leaves out the question of the duty of the plaintiff to minimize his damage and leaves out the question of the contributory negligence of the plaintiff in that he moved into a place where he knew the

high water was *accumstomed* to get into the house. And we think that he assumed the risk.

The Court: All right, I'll adhere to my ruling on it.

Mr. Long: Save exception.

(Thereupon, defendant by counsel offered Instruction No. D-1.)

INSTRUCTION NO. D-1 (Given)

"The Court instructs the jury that, in this case, the Defendant is charged with the negligent damage to Plaintiff's property. The burden is upon the Plaintiff, in
page 186 ] order to entitle him to recover in this case, to prove, among other things, by a preponderance of the evidence that Defendant was guilty of negligence, and also that its negligence was the sole proximate cause of Plaintiff's injury; and, if Plaintiff fails to prove this by a preponderance of the evidence, then he can not recover in this case, and your verdict must be for the Defendant."

Mr. Beverly: The plaintiff by counsel objects to the giving of Instruction D-1 on the ground it's contrary to the law and in particular that portion on the fourth from the last line stating that the negligence must be the sole proximate cause. I don't think the word "sole" belongs in it.

The Court: All right, go on to No. 2.

INSTRUCTION NO. D-1A (Given)

"The Court instructs the jury that the Defendant in this case is a public service corporation and is authorized by its charter and the laws of this State to perform a public function. It cannot be held liable for damages to private property in the necessary performance of said public function unless it is shown to have been guilty of negligence which was the proximate cause of said alleged damage."

Mr. Beverly: The plaintiff objects to the giving of Instruction D-1A as immaterial to this case and that liability imposed is the same as for any other defendant.

INSTRUCTION NO. D-2 (Given)

page 187 ] "The Court instructs the jury that negligence is the failure to do what a reasonable and prudent

man would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done under the existing circumstances."

Mr. Beverly: The plaintiff objects to the giving of Instruction D-2 because included in Instruction D-4 and therefore repetitious.

INSTRUCTION NO. D-3 (Given)

"The Court instructs the jury that the proximate cause is the superior or controlling agency as contradistinguished from those causes which are merely incidental or subsidiary to such controlling cause."

Mr. Beverly: The plaintiff objects to the giving of Instruction D-3 as a misleading statement and as contrary to the law. Plaintiff objects—

The Court: It's all right if the jury can understand what it means, but go ahead.

Mr. Beverly: Objects to the giving of Instruction D-4 on the ground simply that is repetitious of what was included in D-2.

INSTRUCTION NO. D-4 (Given)

"The Court instructs the jury that actionable negligence lies only where there has been a failure to perform some duty which the Defendant owes to the Plaintiff. Negli-
page 188 ] gence lies only for consequences which, in the light of attendant circumstances, could reasonably have been anticipated, to cause injury, by a reasonably prudent person. One is not charged with foreseeing that which could not be expected to happen. And, unless Plaintiff has proven by a preponderance of the evidence that, from the construction and maintenance of the trestle in question, the Defendant should have anticipated that it would cause injury to others, then Defendant is not liable in damages, and you should find for Defendant."

INSTRUCTION NO. D-5 (Refused)

"The Court instructs the jury that, if you believe from the evidence that, at the time Plaintiff acquired and owned the property claimed to have been damaged, and then and thereafter, there was an obvious and *inherant* (*sic*) danger

of it flooding from the natural flow of McClure River at flood tide, on account of its proximity to the river, its altitude and the topography of the country at and around the house of Plaintiff, and that Plaintiff knew and appreciated this danger prior to the flood that is alleged to have caused damage claimed in this suit, and that said damage proximately resulted, in part, from the obstruction of McClure River by Defendant's trestle, and in part from flood tide flow of the waters in McClure River, independent of any affect (*sic*) on said waters by said trestle, then Defendant is

page 189 ] not liable to any extent for the alleged damage, and the jury must so find; and this is true even though you should believe that Defendant's trestle was responsible for more of the damage than that resulting independent of it."

Mr. Beverly: The plaintiff objects to the giving of Instruction D-5 as contrary to the law and as not applicable in this case. We submit that the law in fact holds the defendant liable if it's a contributing cause to an act of God or any other negligence.

INSTRUCTION NO. D-6 (Refused)

"The Court instructs the jury that it is the duty of one who claims to have been injured by the wrongful or negligent act of another to exercise reasonable care and diligence to avoid loss and to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence to minimize or lessen the damage, he cannot recover.

"And, if you believe from the evidence that the Plaintiff, after he was injured, failed to exercise reasonable care and diligence in an attempt to lessen the resulting damage to him, and that such failure enhanced his damages, then he cannot recover for such enhanced or increased damage."

Mr. Beverly: Plaintiff objects to the giving of Instruction D-6 as not applicable to this case.

The same objection to Instruction D-8, that it's

page 190 ] not applicable because there is no evidence of any negligence whatsoever on the part of the plaintiff.

INSTRUCTION NO. D-8 (Refused)

"The Court instructs the jury that, if you believe from

the evidence that the Plaintiff and Defendant were both guilty of negligence, and that the negligence of both caused the alleged damage, then your verdict must be for the Defendant, even though you may believe from the evidence that the degree of negligence of the Defendant was greater than that of the Plaintiff."

Mr. Long: We had one, D-9, I believe you have seen it.

INSTRUCTION NO. D-9 (Refused)

"The Court instructs the jury that even though they may believe that timber, brush, and other rubbish lodged against the bridge, this is not any evidence of the negligent construction or maintenance of said bridge."

Mr. Lively: Are you through with your objections?

Mr. Beverly: Plaintiff objects to the giving of Instruction D-9 as clearly contrary to the law. It ignores the fact that the defendant was liable to anticipate the effect of its trestle.

Mr. Lively: You asked me a question now, what I think is the reason they should be given. This man didn't, as we understand it, do what he should have done to page 191 ] minimize the damages. In other words, we think the measure of damages in this case is what it would have cost to repair and clean these articles, and he, so far as the list goes and the evidence is, he did nothing to clean up this damage so far as the price is concerned. He cleaned it up and put it in his house afterwards and it's in about as good a shape as it ever was, and we think that the proper measure of damage is what it would have cost to have cleaned it and put it back in the shape that it was.

The Court: Well, of course, I can't go with you on that.

Mr. Lively: And it only alleges, he don't allege, the pleadings don't allege any damage from anything but water, and he was permitted to, over defendant's objection, to tell about mud stains on it, which we think is improper.

Mr. Beverly: May I say something at that point?

The Court: Yes.

Mr. Lively: On the minimizing of damage, the plaintiff himself says that he moved his wife and family out to keep them from danger and didn't take one stitch of clothing with them which, as I recall was the highest item on his list of damage, highest single item. He includes his silverware which he says himself he did not even look for. He has a lawnmower

included which is still at his house and two chairs
page 192 ] later. He has never had any attempt made to
repair it and on down the line. He has never attempted to repair or to minimize his damage in any way, according to his own testimony. And he could have carried that stuff out of there that night.

Mr. Long: The water level was just up to the floor, it wasn't in the house, when he left. And I never heard of a mother taking a flock of children and not taking something along with them, some clothes along. Food either, when you go visiting kin people. At least that's the kind I like to see coming, with a little something to eat. He just had $40 of fresh groceries carried in.

Mr. Beverly: We stick by our objection on that. We think he did all that he, that could reasonably be expected of any man at two or three o'clock in the morning, in that he removed his furnishings about the next day or the next day or two.

Mr. Long: Bottled goods, canned goods are not hurt by water.

The Court: I am going to give Instructions No. D-1, D-1A, D-2, D-3, and D-4. I am going to refuse D-5.

Mr. Lively: Now in that connection I'd like to cite the court one case, the case of *Berry* vs. *Hammond,* 203 Virginia, 596, 599.

The Court: Wait just a second.

Mr. Lively: I have got a number of authorities,
page 193 ] but that's the latest case. That is where the policeman shot another one—

The Court: Well, I am going to refuse that instruction.

Mr. Lively: All right.

The Court: What is that now? No. 5. I am going to refuse No. D-6. That is on minimizing the damage. And I am going to refuse D-8 and D-9.

Mr. Lively: And D-8, we had *Adams* vs. *Norfolk,* and so forth, *Company,* 111 Virginia, 556, 560. And D-9, you say?

The Court: Yes.

Now, you gentlemen want to address the jury? And, if so, how long?

Mr. Phipps: It's all right for me to let the court read the instructions and let it go to the jury.

Mr. Lively: We except to the action of the court in refusing each and every instruction offered by the defendant which were refused by the court.

★ ★ ★ ★ ★

page 194 ]

★ ★ ★ ★ ★

(Thereupon, the court read Instructions P-1A, D-1, D-1A, D-2, D-3, and D-4 to the jury.)

The Court: Now, I am going to give you these instructions. Go back to your room and write your verdict that you think would be proper on this piece of paper.

page 195 ] Hand these to the gentlemen here. And come back as soon as you can.

(Thereupon, the jury retired from the open court room at two-thirty-three o'clock, p. m., to consider its verdict and returned to the open court room at three-twelve o'clock, p. m.)

The Court: Do you have a verdict?
Foreman: Yes, sir.
The Court: All right, just come around and have a seat.

"We the Jury decide in favor of the plaintiff and fix the damage of $1,250.00. Joe Turner, Foreman."

Is that your verdict, so say ye all?

★ ★ ★ ★ ★

page 196 ]

★ ★ ★ ★ ★

Mr. Lively: If the court please, we desire to move to ask the court to set aside the verdict and ask the court to give us twenty days in which to file a written ground?
The Court: Did you say twenty days? All right, put that down—all right, that motion will be granted then. Thank you all very much.

THESE WERE ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THIS CASE.

★ ★ ★ ★ ★

A Copy—Teste:

H. G. TURNER, Clerk

# INDEX TO RECORD


page

Writ of Error and Supersedeas Awarded ..... 1
Record ..... 2
Motion for Judgment ..... 2
Answer and Grounds of Defense ..... 3
Instructions ..... 6, 115, 120
Verdict of Jury ..... 10, 129
Motion to Set Aside the Verdict ..... 10
Order — April 29, 1965 ..... 11
Judgment — June 4, 1965 ..... 12
Notice of Appeal and Assignments of Error ..... 13
Witnesses:
- Elmer Robinson ..... 15
- Rice Fields ..... 29, 43
- Orbin Dotson ..... 36
- Prince Counts ..... 45
- Harold Mullins ..... 51
- Jack Marshall ..... 79
- Eugene L. Hillman ..... 87
- J. M. Yates ..... 91
- K. V. Herndon ..... 96
- T. J. Britton ..... 98, 113
- A. K. McIntyre ..... 103
- Louis C. Kerns ..... 105
- J. M. Salmon, Jr. ..... 116

Proceedings ..... 78, 95, 114, 115, 120, 129