

# Record No. 5456

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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WILBUR T. SMITH,  
ADMINISTRATOR, ETC.

v.

HERMAN GRENADIER, ET AL.

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FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

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## RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

**Supreme Court of Appeals of Virginia**

AT RICHMOND

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**Record No. 5456**

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 11th day of January, 1962.

WILBUR T. SMITH, ADMINISTRATOR, ETC.,  
Plaintiff in Error,

*against*

HERMAN GRENADIER, ET AL., Defendants in Error.

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From the Circuit Court of Fairfax County

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Upon the petition of Wilbur T. Smith, Administrator of the estate of Donald B. Smith, deceased, a writ of error is awarded him to a judgment rendered by the Circuit Court of Fairfax County on the 26th day of July, 1961, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Ray Rainwater and others were defendants; no bond being required.

**RECORD**

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This came on to be on the 6th day of July, 1961 upon the motion for judgment and answers thereto filed by the Defendants, interrogatories and the answers thereto the same being matured and duly set for trial with a jury.

Thereupon a jury was properly empaneled and sworn and evidence presented on behalf of the Plaintiff, at the conclusion of which counsel for all Defendants moved the Court to strike the evidence. Whereupon on the 7th day of July 1961, the matter having been continued over the Court struck the evidence and entered summary judgment for the Defendants, Wayne Construction Co. Inc., and Herman Grenadier, to which ruling and judgment of the Court counsel for the Plaintiff and the Defendant, Ray Rainwater duly excepted, the motion to strike the evidence of the Plaintiff by counsel for Rainwater being denied and counsel for said Defendant duly excepted to such ruling. Thereupon the Court and jury proceeded to hear evidence in behalf of the Defendant, Ray

Rainwater and upon the commencement of such  
page 41 } counsel for the Plaintiff moved the Court to re-  
consider this ruling in striking the evidence  
against said Defendants, which motion was joined in by  
counsel for the Defendant, Ray Rainwater, and said motion  
was denied, to which ruling counsel for the Plaintiff and  
Defendant, Ray Rainwater duly excepted.

Thereupon on July 7, 1961, at the conclusion of all evidence presented, instructions having been given by the Court the matter was argued by counsel and after due deliberation the jury returned its unanimous verdict in favor of the Plaintiff in the sum of \$20,000.00, said sum to be divided equally between the parents of the deceased.

Whereupon counsel for the Defendant, Ray Rainwater moved the Court to set aside the verdict of the jury on the grounds that it was contrary to the law and the evidence which said motion was denied, therefore,

IT IS ADJUDGED and ORDERED that judgment be and the same is hereby entered upon the verdict of the jury in

favor of the plaintiff, Wilbur T. Smith, Administrator of the Estate of Donald B. Smith, deceased against the Defendant, Ray Rainwater in the sum of \$20,000.00, with interest on same at 6% per annum from July 7, 1961, until paid and costs.

Enter July 26, 1961.

CALVIN VAN DYCK  
Judge of said Court.

Seen and excepted:

ROBERT C. FITZGERALD  
Counsel for Plaintiff.

page 42 } HENRY M. deBUTTS  
Counsel for Defendant,  
Ray Rainwater.

Seen.

E. WALLER DUDLEY  
Counsel for Wayne Construction Co. Inc.

CHARLES H. DUFF  
Counsel for Defendant,  
Herman Grenadier.

\* \* \* \* \*

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\* \* \* \* \*

Filed Sep. 8, 1961.

THOMAS P. CHAPMAN, JR.  
Clerk of the Circuit Court of  
Fairfax County, Va.

#### ASSIGNMENT OF ERROR.

Now comes Wilbur T. Smith, Administrator of the Estate of Donald B. Smith, deceased, by counsel, and states as his Assignments of Error as follows:

1. That the Circuit Court Judge erred when he struck the evidence of the Plaintiff as to Wayne Construction Co., Inc. and Herman Grenadier and then entered summary judgment for the said Defendants, Wayne Construction Co., Inc. and Herman Grenadier.

2. That the Circuit Court Judge erred when he refused to reconsider the said motion striking the Plaintiff's evidence as to the Defendants, Wayne Construction Co., Inc. and Herman Grenadier and granting summary judgment, the said motion to reconsider being made by Plaintiff and Defendant, Ray Rainwater, at the commencement of the taking of evidence in behalf of the Defendant, Ray Rainwater.

It is submitted that the rulings of the Circuit Court Judge in granting the motion to strike, summary judgment and refusing to reconsider the said rulings were contrary to the law and the evidence.

ROBERT C. FITZGERALD  
Counsel for Wilbur T. Smith  
Administrator of the Estate of  
Donald B. Smith, deceased.

\* \* \* \* \*

In open court.

The Court: Are you gentlemen ready?

Mr. Fitzgerald: Call Mr. Ray Rainwater, please.

Mr. de Butts: Mr. Rainwater is not here.

Mr. Fitzgerald: If it please the Court, I had a subpoena issued for Mr. Rainwater this morning. It may not have been served yet, but if he gets served and we find him and bring him here, I will put him on at that time.

I would like to call the gentleman at the end page 9 } of the table, Mr. Keener.

While he is taking the stand, all counsel, I believe, have stipulated to the cause of death: that the death of Donald Smith was caused by some motion of this machinery, as will be testified to. Is that correct?

Mr. Dudley: That's correct.

Mr. Slenker: That's correct.

Mr. Duff: That's correct.

Thereupon

CLAUDE E. KEENER,  
was called as a witness by and on behalf of the plaintiff and,  
having been first duly sworn, was examined and testified on  
his oath as follows:

DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Will you state your name, sir?

A. Claude E. Keener.

Q. What position do you occupy with Wayne Construction Company?

A. I am secretary and treasurer.

Mr. Fitzgerald: If it please the Court, I am calling this witness as an adverse witness.

The Court: Any objection?

Mr. Dudley: No, sir. I think he is a party.  
page 10 } He would be presumed adverse.

By Mr. Fitzgerald:

Q. Let me have your last name again?

A. Keener, K-e-e-n-e-r.

Q. Mr. Keener, how long have you been an officer of Wayne Construction Company?

A. Since its inception in 1952.

Q. What are your duties?

A. I keep the books, bookkeeper, and also help supervise the jobs—in other words, check on the jobs as they progress, with the superintendents.

Q. With the superintendents.

A. Primarily, I am in the office as bookkeeper and office manager.

Q. Mr. Keener, are you familiar with the Mantua school contract that the Wayne Construction Company had?

A. Yes, I am.

Q. Would you tell the jury whether or not, on a contract of that sort, Wayne Construction Company keeps a superintendent or foreman on the job?

A. We do. Most of the time there is a superintendent on the job, yes.

Q. Is it not true that part of his duties are to see that the job site is maintained in a safe condition for those  
page 11 } who might be on the site?

A. He would, in a case of this kind—in other words, we would maintain our own equipment, yes.

*Claude E. Keener.*

Q. No, sir. I just want you to answer this question. Then we can go to that one. Is it true that the man that Wayne Construction Company has in charge of the job would do what he could to see that the premises where you were working were maintained in reasonably safe condition? If he saw something dangerous there, he would have it corrected, wouldn't he?

A. Yes, I suppose he would, yes.

Q. Now, do you know who the superintendent of this Mantua school site was?

A. Mr. Stringer.

Q. Mr. Who?

A. Stringer.

Q. What is his experience in this work?

A. Mr. Stringer has been in the construction business, I suppose, most of his life, since he has been big enough to work—25, 30, 40 years.

Q. Does he have experience enough to be familiar with all the phases of the job?

A. Sure.

Q. That would include the operations done by page 12 } the carpenters and the metal workers and such?

A. Yes.

Q. Would it also include the operation of site clearing and grading? He would be familiar with that?

A. He would be familiar with that, yes.

Q. Before he became a superintendent in your company, do you know what actual trade he was in?

A. No, I do not.

Q. You say it is the policy of the company to keep the superintendent or somebody in charge on the job at all times; is that correct?

Mr. Dudley: Excuse me, if Your Honor please. May I inquire of counsel the purpose of this line of questioning? This has nothing to do with the case as far as it is pleaded, that I know anything about.

Mr. Fitzgerald: It certainly does have something to do with the case. It is alleged that the defendants, and one of them is Wayne Construction Company, allowed a hazardous condition to exist on this site, public property.

The Court: I think it is pertinent that they had supervision on the site, but what they do generally is not related. I will sustain the objection.

*Claude E. Keener.*

Mr. Dudley: Before we go any farther, I would like to get one thing straight, sir:

page 13 } As I understand this case, as Your Honor outlined it to the jury, as Mr. Fitzgerald told the jury in his opening statement; as I told the jury in my opening statement, Wayne Construction Company is in this case on one theory, and that is that Mr. Rainwater was its agent or employee.

Now, as I apprehend from Mr. Fitzgerald's line of questioning, he is attempting to show primary negligence on the part of Wayne Construction Company.

Mr. Fitzgerald: If it please the Court, maybe counsel hasn't read the motion for judgment, but it is alleged in that motion for judgment that, and I said it before this jury in my opening statement, that defendants allowed this piece of machinery to remain on this property in a dangerous and hazardous condition.

The Court: That is alleged in paragraph 3 of the motion for judgment, Mr. Dudley.

I am going to sustain the objection as far as general practice of the Wayne Construction Company is concerned. I am going to allow the question with regard to the activities on this particular project.

Mr. Dudley: Would you note my exception to any line of inquiry along this point for the reasons I have just indicated?

page 14 } By Mr. Fitzgerald:

Q. Mr. Keener, what was the superintendent's name? Mr. Stringer?

A. Mr. Stringer, S-t-r-i-n-g-e-r.

Q. He was superintendent on the Mantua school site when this accident happened?

A. He was superintendent, yes.

Q. As superintendent, did he have over-all supervision of the site?

A. That's right.

Q. All right, sir.

Now, I show you a copy of a letter dated, or paper writing date, October 29, 1960.

Do you recognize that?

A. Yes, sir; it is on our letterhead, paper; yes, I recognize it.

Q. Do you keep the records of this company?



*Claude E. Keener.*

Mr. Slenker: I am having a difficult time hearing the witness.

The Court: Would you speak a little louder, Mr. Keener?

The Witness: Yes.

I recognize this. It is on the letterhead paper from Wayne Construction Company.

page 15 } The Court: I don't believe they can hear you.

Mr. Slenker: There are automobiles and trucks out there.

By Mr. Fitzgerald:

Q. Do you recognize it?

A. Yes, sir.

Q. Do you have the original of that here with you today, or does your counsel?

A. I think counsel does, yes.

Mr. Dudley: I don't have it.

By Mr. Fitzgerald:

Q. Mr. Keener, will you tell the Court whether or not this is some sort of a duplicated copy of the paper writing dated August 29, 1960, signed by Mr. Herman Grenadier?

Mr. Slenker: If Your Honor please, I make objection to the question in the form it is asked, and for the answer that it obviously is designed to elicit from the witness.

I think if counsel wants to present this document, if it is a legally binding document, it is incumbent upon him to produce the original of the document or at least to lay the proper foundation for any substitute. The question is objectionable. I don't believe that this document is admissible or proper.

Mr. Fitzgerald: May it please the Court, I of course don't have possession of the original document. As has been pointed out in the question, it is a letter written by Wayne Construction Corporation to Mr. Grenadier, and signed by Mr. Grenadier. This is only a copy that was furnished me on interrogatories. That type of reproduction does not produce an ink signature, so it is not produced on that copy. I request that counsel—

The Court: Can't you all stipulate it was given to him on interrogatories?

Mr. Fitzgerald: They have said so in their opening statement, that such a document existed. It seems a little late to deny it now or to object to it.

*Claude E. Keener.*

I ask that this be produced here today, had a *subpoena duces tecum* ready for it, and was assured by counsel for the Wayne Construction Company that it would be here.

I did not talk to Mr. Dudley. I talked to his associate, Mr. Alexander. He said all the paper involved—

Mr. Dudley: May I say that Wayne Construction Company does not doubt that is a true copy of the contract. Mr. Fitzgerald apparently talked to my associate about bringing a signed copy of it in, and was led to believe we have a signed copy. We do not have a signed copy, but I do not doubt the validity of the contract, and am not objecting to it.

I am sorry to misinform you, but we do not page 17 } have it. But, at any rate, we do not object to it.

Mr. Fitzgerald: I did not have the *subpoena duces tecum* served because of what I was led to believe.

The Court: Mr. Keener, do you have the original of that?

The Witness: It is possible, in the office. I don't have it with me.

Mr. Dudley: Do you have a signed copy in your office?

The Witness: It is possible there is a copy of it in the office. I was under the impression that counsel had it.

The Court: Do you recognize that as a photostatic copy or duplicated copy?

The Witness: I recognize it as a copy of the contract that was written to Mr. Grenadier, yes.

The Court: I will permit it to be introduced into evidence.

Mr. Fitzgerald: I want to know whether counsel for Mr. Grenadier are either admitting or denying that Mr. Grenadier signed this?

Mr. Slenker: I have not seen the original of this contract. That is why I make objection to this document going in.

If counsel can produce the original document something that we have never seen, then I will be glad to page 18 } stipulate that that is what it is, or allow the question to be asked of the witness.

But I have not seen the document.

Mr. Fitzgerald: May it please the Court, Mr. Duff, who also represents Mr. Grenadier, stood before this jury and told them about the document. I don't think they can come now and—

Mr. Duff: I haven't said a word to this jury. I have yet to open my mouth to them.

Mr. Fitzgerald: I apologize, Mr. Duff.

He stood before the jury, and told them that this docu-

*Claude E. Keener.*

ment was in existence and explained to them that Mr. Grenadier signed it.

Now, I think it is a little late to object to the entry of a copy of it.

Mr. Duff: May I say something?

The Court: I am going to allow it to be introduced as a copy and then you can examine him as to whose signature was on the original.

Mr. Slenker: May we note an exception to the Court's ruling, on the basis of the grounds previously stated?

By Mr. Fitzgerald:

Q. Mr. Keener, was this signed by somebody for Wayne Construction Company and accepted by Mr. Grepage 19 } nadier; is that correct?

A. There was such a contract.

Mr. Fitzgerald: I offer it into evidence.

The Court: Plaintiff's 1.

(The document referred to was marked Plaintiff's Exhibit 1 and received in evidence.)

By Mr. Fitzgerald:

Q. Has that school been completed yet?

A. No, it has not. We are still working. The building is primarily complete, the building itself. The outside work has not been completed—that is, the paving and sodding and seeding, and things of that nature.

Q. Who is doing the grading and site work now, the site improvement work?

A. What site work has been done has been done by Mr. Rainwater.

Q. He is the one that actually operated the machine?

A. He operated some himself, and had employees who worked for him that operated other pieces of equipment for him.

Q. Has he completed the job yet?

Mr. de Butts: I object. That has nothing to do with the events that took place in this case, as I see it.

The Court: What is the purpose of the question, page 20 } Mr. Fitzgerald?

Mr. Fitzgerald: Well, the purpose of the ques-

*Claude E. Keener.*

tion is to show that whatever relationship existed is still going on.

I will withdraw the question; I don't think it adds anything to it.

The Court: I think I would have to sustain the objection to it.

Mr. Fitzgerald: That's all the questions I have of this witness.

Mr. de Butts: Your Honor, I have no questions of this witness.

### CROSS EXAMINATION.

By Mr. Slenker:

Q. Mr. Keener, when did construction start on the Mantua school job?

A. In August, I'd say some time after the 15th of August.

Q. After the 15th of August of what year?

A. 1960. I couldn't be exactly on the date. I don't have the records to show it; but I would say some time between the 15th and latter part of August.

Q. At that time, were all the contracts with the subcontractor signed?

A. I would say most of them had been signed; I page 21 } don't know that all of them had been signed, but most of them had been signed at that time.

Q. Did you usually, on this job, have one subcontractor at each specialty, one carpenter, one mason, one plumber?

Mr. Fitzgerald: I object to the question as to what was usually done. The Court has ruled that what is usually done is not material.

The Court: Objection sustained.

Mr. Slenker: I have reference to this particular job, Your Honor.

By Mr. Slenker:

Q. On this particular job, did you normally have one subcontractor in each of the specialties?

A. That's right. We do our own carpentry and concrete work. The masonry work and steel, and things of that nature, we sublet to subcontractors.

Q. Do you normally have one masonry contractor?

A. That's right, one.

Q. Did you on this job?

*Claude E. Keener.*

A. We had one masonry contractor, yes.

Mr. Fitzgerald: If it please the Court, I don't think it is material how many masonry contractors they had. I would like to know the materiality of this question.

page 22 } By Mr. Slenker:

Q. Let me ask you this, Mr. Keener: You had but one excavating subcontractor, did you not, in August of 1960?

A. That's right.

Q. That was Mr. Rainwater, wasn't it?

A. That's right.

Q. And in August of 1960, you had a signed contract with Mr. Rainwater, did you not?

A. That's right.

Q. I ask you, Mr. Keener, if you recognize this document?

A. That is a copy of the contract we had with Mr. Rainwater.

Q. That's a copy of the contract that you had with Mr. Rainwater?

A. That's right.

Q. Do you have the original of that document?

A. I suppose so.

Q. Is it signed by Mr. Rainwater?

A. I would think so, yes. Yes.

Mr. Slenker: I tender this into evidence, if Your Honor please.

The Court: Show it to Mr. Fitzgerald.

page 23 } Mr. Dudley: Your Honor, counsel has in his hand, which I have given him, a signed copy of this same contract.

Here again, I have no objection to admitting that this was a valid copy. This copy, unfortunately, has some immaterial matter on it which I think renders it as inadmissible.

Mr. de Butts: I have a statement that I was going to require that this be entered. This is a copy. I have seen Mr. Rainwater's signature.

The Court: Any objection?

Mr. de Butts: No, sir.

Mr. Fitzgerald: May I see the one you are introducing?

Mr. Slenker: The one you saw.

May the record reflect that on the signed copy, Mr.

*Claude E. Keener.*

Rainwater's signature appears in the lower left-hand corner with the date of August 29, 1960, on it.

The Court: Can that be stipulated among counsel, that that was on there?

Mr. de Butts: Yes, sir.

The Court: Do you want to examine that, Mr. Fitzgerald, the signed copy?

Mr. Fitzgerald: Signed in the same place Mr. Grenadier signed it.

Mr. Dudley: No secret about it.  
page 24 } Would you like to see this?

Mr. Fitzgerald: I will stipulate it is signed in the same place the other contract is signed.

The Court: The statement just made by Mr. Slenker regarding this exhibit is stipulated to by all counsel.

This will be received in evidence as Defendant Grenadier's Exhibit No. 1.

(The document referred to was marked Defendant Grenadier Exhibit No. 1, and received in evidence.)

By Mr. Slenker:

Q. Mr. Keener, in connection with the excavating work, did contractors bid on this job?

A. I'm sorry?

Q. In connection with the excavating subcontract, the one that was awarded to Mr. Rainwater in August of 1960, did he have to bid on the job?

A. He did, yes.

Q. Were there other contractors that bid?

A. Yes.

Q. Was Mr. Grenadier one that bid?

A. No.

Q. As a matter of fact, Mr. Keener, did you or  
page 25 } anyone in your organization, in August of 1960,  
even know Mr. Herman Grenadier?

A. We did not.

Q. Had you ever seen him on the job site?

A. No, sir.

Q. Mr. Rainwater started work in late August, did he not?

A. That's right.

Q. Just about the time this contract was signed?

A. Yes.

Q. At that time, he was the only excavating subcontractor that you had, is that correct?

*Claude E. Keener.*

A. You are right.

Q. Was there a schedule of work set up for this particular job covering the excavating work, so that a certain amount of the work was to be done at a set time?

A. I don't know that there was a set time. It is stipulated in the contract.

Q. I do not have reference to the contract. I am asking you if your organization had a time schedule for certain types of excavating work to be completed?

A. Yes, we make a progress schedule on all jobs, setting out at certain times what portion of the job is supposed to be done, and the excavating would be a part of that.

page 26 } Q. Did Mr. Rainwater perform in accordance with that schedule, as you required him to do?

A. Yes.

Q. The first item that is listed on this contract with Mr. Rainwater is the clearing of the site. Can you tell this jury when Mr. Rainwater did that?

A. The clearing was done, or begun, about the same time the excavating was done. The whole site was not a wooded area, only a portion of it. So he was probably excavating at one portion, and doing the clearing at the other side at the same time.

Q. At the same time?

A. That's right.

Q. Would he be doing the excavating for the building at that same time, as well?

A. Yes.

Q. When would he be required to have that finished, or when was he required to have that finished, according to your progress schedules?

A. Without the progress schedule, I wouldn't know, exactly.

Q. All right. Would the building excavation, the general site fill, the general site excavation, stripping and storing of topsoil and the clearing of site, would that all  
page 27 } have been done in August of '60 or early September of 1960?

A. It would have all been done in August or the early part of September, yes.

Q. How about the interior building fill and backfill of walls?

A. In this particular site, the interior fill was put in before we put our foundations, a good portion of the building was on the fill, so that the building fill was put in before we dug footings or put any of our foundations in.

*Claude E. Keener.*

Q. So that would have been done in August or early September?

A. August or early September.

Q. Would it have been done before the 15th of September, if you know?

A. I couldn't answer exactly, but somewhere around that time.

Q. The eighth item here is the disposal of excess dirt, if required. Can you tell when that was done?

A. In this case, there was no excess dirt. It was all used on the site.

Q. So we are not concerned with that.

No. 9, furnishing of additional fill dirt from job site if required.

A. In other words, it was an even—you borrowed page 28 } and out. As I recall, there was no fill brought in or no excess dirt removed.

Q. All of these items that I have mentioned, Mr. Keener, they were done by Mr. Rainwater, were they not?

A. That is true.

Q. They were completed in August of 1960, or the early part of September of 1960? As a matter of fact, they would have been concluded, would they not, before the 23rd of September 1960?

A. No, I don't think all the excavation was done prior to that time.

Q. How about these items that are here? I am not asking you about all the excavation. I am asking you about Items 1 through 9 here, if that was not all completed by the 23rd of September?

A. I don't believe all of these items would have been done prior to that.

Q. Which ones would not have?

A. Clearing of the site would have probably been done; stripping and storing topsoil—I would think that would be the first thing that would have to be done. The general site excavation and general site fill. I don't think all of that would have been done. But I think your building excavation,

your interior building fill, backfill, exterior walls, page 29 } I am not sure that that would have been complete; and 8 and 9, I don't believe would apply in this case.

Q. So, everything that is listed on here except for two items, general site excavation, and general site—wait a minute—and the backfill of exterior walls?



*Claude E. Keener.*

A. And general site fill.

Q. Those three things were not done?

A. I would say that that would be true.

Q. As of the 23rd of September?

A. That's right.

Q. The rest of it had been?

A. I'd say primarily the rest of it would have been completed by that time.

Q. Fine.

It is true, is it not, that Mr. Rainwater did all of these things that had been done according to your testimony as of the 23rd of September?

A. Yes.

Q. As a matter of fact, did you ever see Mr. Grenadier on the job in September of 1960?

A. No, sir.

Q. Were there a schedule of payments set up under this contract with Mr. Rainwater, whereby he was to get periodical payments for his work?

page 30 } A. He was paid periodically as the work progressed.

Q. As the work progressed. Were those payments geared to the nine items that are on this contract?

A. They were in payment of those nine items, yes.

Q. In other words, when he completed the first two or three of them, then he received a draw; is that correct?

A. Yes. As the work progressed, he received payments. We didn't specifically pay him for the clearing or building the fill or stuff like that.

Q. I understand.

A. As the work progressed, he was paid.

Q. Could you tell this jury when he was paid?

A. Payments were normally made around the tenth of each month.

Q. Was he paid in accordance with the normal schedule?

A. Yes.

Q. Then he would have received how many pays or how many draws between the time that he started and the 23rd of September?

A. Normally they were paid monthly. He would probably have not received over two.

Q. But he probably would have received two payments?

A. I wouldn't swear that he received just two, or received

*Claude E. Keener.*

one; but I say he had received some payments  
page 31 } prior to or up until September 23, yes.

Q. Now, up to that point, had Mr. Grenadier ever been paid anything by your company?

A. No, sir.

Q. As a matter of fact, Mr. Keener, as you said on the stand today, Mr. Grenadier had never been paid one penny by the Wayne Construction Company, is that not correct?

A. That's right.

Q. Now, Mr. Keener, at the time Mr. Rainwater was awarded this contract, you required of him, or your company required, did they not, a completion bond?

A. A payment bond, 50 per cent payment bond.

Q. A payment bond?

A. Yes, sir.

Q. In August of 1960, did Mr. Rainwater post such a bond?

A. No.

Q. Did he ever post such a bond on this job?

A. No, sir.

Q. He never did?

A. No, sir.

Q. Did he have some trouble, so far as you know?

A. He had trouble in securing the bond, I believe. In other words, he himself *were* not financially able, I suppose, to get the bond. However, he indicated to us  
page 32 } that he would get it, but a bond was never issued.

Q. In August of 1960, did you require any kind of a completion bond of Herman Grenadier?

A. No.

Q. You had no reason to?

A. No bond was furnished by Mr. Grenadier.

Q. You had no need to, did you, because Mr. Grenadier was not a contractor on that job; isn't that correct?

A. That's right.

Q. Did there come a time when you wanted to help Mr. Rainwater to get a completion bond if you could?

A. We talked to Mr. Rainwater about getting a bond. I don't know what help we could give him, but we kept after him to get a bond.

As far as giving him help, I don't know that we helped him get it, or tried to help him get it.

Q. Mr. Keener, is it not a fact that in October of 1960, you sent a document to Herman Grenadier, or your company

*Claude E. Keener.*

did, for signature, in order to help Mr. Rainwater to get a bond?

A. Yes, it was sent to Mr. Grenadier. Mr. Meyers of our company wrote the contract and, I think on the instructions of Mr. Rainwater, this document was sent to Mr. Grenadier.

Q. At that time, Mr. Kenner, the document page 33 } was sent to Mr. Grenadier, not for purposes of establishing him as a subcontractor but for purposes of helping Rainwater get a bond; was that not correct?

A. To help get a bond for the job, yes.

Q. The document that was sent to Mr. Grenadier, is that the document that has been marked as Plaintiff's Exhibit No. 1?

A. Yes.

Q. It was not the intent, was it, sir, of Wayne Construction Company to enter into a contract with Herman Grenadier for excavating work?

Mr. Fitzgerald: If it please the Court, I object to the question. The document speaks for itself.

Mr. Slenker: If Your Honor please, in view of the conflict in the testimony at this point concerning the contracts here, and the purpose of them, and in view of Mr. Keener's statements concerning these two documents, I think that the question is perfectly proper.

Mr. Fitzgerald: I don't see how there could be any conflict in the testimony. There has only been one witness on the stand.

The Court: I am going to permit the question, to show the relationship between the parties at this time. I think that is what the main issue is.

Mr. Fitzgerald: All right, sir.

page 34 } By Mr. Slenker:

Q. Mr. Keener, I ask you if it was not the intention—or let me strike that, and let me phrase it this way:

At the time this document went to Mr. Grenadier, there was no intention on the part of Wayne Construction Company to enter into a contract with Herman Grenadier for the doing of excavating work at the Mantua job site?

A. The purpose of this was primarily to get a bond.

Q. For who to get a bond?

A. For Rainwater to get a bond, or somebody to give us a bond to cover the contract written on that job.

*Claude E. Keener.*

Q. As a matter of fact, you had no intention of requiring Mr. Grenadier to do anything, of these nine things or ten things on here, did you?

A. Not Mr. Grenadier, because Rainwater had already done them.

Q. Rainwater had already done them under this contract here; is that not correct?

A. Yes.

The Court: Mr. Dudley, what was stipulated was that it was sent to Mr. Grenadier.

Mr. Slenker: I don't believe there has been a stipulation on the date. Down at the bottom—but on the other it is August.

page 35 } Mr. Dudley: August 29, 1960.

Mr. Slenker: August 29, 1960.

The Court: On Rainwater.

Mr. Slenker: Yes.

The Court: This he testified was October.

Mr. Slenker: Yes.

Mr. Fitzgerald: I don't believe there is any stipulation to the date.

The Court: None as to the date on Plaintiff's Exhibit No. 1.

Mr. Fitzgerald: Just that the witness testified it was signed by Mr. Grenadier.

Mr. Duff: Which is that you refer to?

Mr. Slenker: The Grenadier document.

By Mr. Slenker:

Q. Mr. Keener, I show you this document and ask if you can identify it, sir?

A. It is one of our envelopes, letter envelopes, Wayne Construction Company.

Q. Is there a postmark on that envelope, sir?

A. Yes, sir; there is.

Q. Can you read the date?

A. October 13, 8:30 p.m., 1960, Arlington, Virginia.

page 36 } Q. To whom is the envelope addressed, sir?  
A. Herman Grenadier.

Q. Do you recognize that, sir, as the envelope in which the document dated October 29, 1960, was sent to Mr. Herman Grenadier?

*Claude E. Keener.*

Mr. Fitzgerald: You asked him if he recognized that envelope.

Mr. Slenker: Yes, indeed.

The Witness: I recognize this envelope as being one of our own envelopes, company envelopes, I would assume.

Mr. Fitzgerald: I object to anything he assumes. If he cannot say that is the envelope, I object to it.

Mr. Slenker: If Your Honor please, I ask that this be marked for identification only at this point.

The Court: This will be marked for identification as Defendant Grenadier's Exhibit No. 2.

(The envelope referred to was marked Defendant Grenadier Exhibit No. 2 for identification.)

By Mr. Slenker:

Q. It is your testimony, is it not, Mr. Keener, that the document that was sent to Mr. Grenadier was sent to him in October of 1960, is that not true, sir?

A. That's right.

Q. Now, in October of 1960, had you ever seen page 37 } Mr. Grenadier on the job up at Mantua?

A. No, sir.

Q. Had you ever had any conversation with him yourself in October of 1960?

A. I am not sure of the date, but we were in Mr. Grenadier's office—when I say "we": Mr. Rainwater and Mr. Meyers and myself; but I am not sure of the date.

Q. Would that have been in October of 1960?

A. I am not sure. I couldn't swear that it would have been October.

Q. Was it not, sir, at that time that Mr. Grenadier asked you for that document back?

A. That's right.

Mr. Slenker: Thank you, sir.

By Mr. Dudley:

Q. Mr. Keener, contract with Rainwater Construction Company was for the overall sum of \$13,000, as indicated in here; is that not so?

A. That's right.

Q. Did Mr. Rainwater have employees of his own?

A. He did, yes.

Q. Who paid them?

*Claude E. Keener.*

A. He paid them.

Q. Who gave them their orders?

page 38 } A. He gave them their orders.

Q. The only payments that were paid to Rain-water, the payments that were made pursuant to this written contract here?

A. That's right.

Q. Now, in the contract it says that all engineering and grades are to be provided by this office. Would you indicate to the jury what is meant by that?

A. That means that we would set grade stakes at certain locations on the site, whereby he could follow those stakes and either cut or fill, as would be indicated on those stakes.

Q. Was it up to him to go ahead and do the work?

A. It was up to him to go ahead and do the work in accordance with the grades put on those stakes.

Q. Did he determine when this work was to be done, give orders to his own people to carry it out?

A. That's right.

Q. Did he fire and hire his own people?

A. He did.

Mr. Dudley: That's all.

Mr. de Butts: May I have the privilege of cross-examining this witness? I would like the privilege of cross-examining this witness.

The Court: All right.

page 39 } Mr. Fitzgerald: I understood him to say he had no questions; but that's all right with me.

By Mr. de Butts:

Q. Mr. Keener, did you sign or attest the contract with the Fairfax County School Board?

A. Yes, I did.

Q. Of course, you read that contract, did you not?

A. I am sorry, I didn't hear you?

Q. Did you read that contract? You are the secretary-treasurer.

A. Secretary-treasurer, yes.

Q. Didn't I ask you if you read the contract?

A. I read most of it, I would say, yes.

Q. Was there any part of the work at the Mantua school to be performed, so far as the School Board is concerned, by anyone other than Wayne Construction Company?

*Claude E. Keener.*

A. Was there any work to be done by anyone other than us?

Q. Yes, sir. What I mean, was there any statement in that contract about specific work not being done by Wayne Construction Company?

A. I don't recall any work that was not to be done by us.

Q. That contract encompassed or included grad-  
page 40 } ing and excavation, did it not?

A. That's right, it did.

Q. What was the total price for that contract?

A. \$382,800-and-some-odd, I believe—\$382,000 in round figures.

Q. Mr. Keener, Wayne Construction Company, under that contract, was solely responsible for the completion, was it not?

A. We were responsible for completing it, yes.

Q. It so happens that a portion of the work you did not complete yourself, and that was work to be done by Mr. Rainwater?

A. Yes. There was work to be done as an excavator.

Q. His work was satisfactory, was it not?

A. I am sorry, I cannot hear you.

Q. His work was satisfactory?

A. Yes.

Q. Now, if any employee of Mr. Rainwater or Mr. Rainwater himself had not been satisfactory, would that have been your responsibility to the School Board now?

A. Yes it would have been our responsibility to the School Board. We were responsible for the whole thing.

Q. Did you, in your contract, sir, with Mr. Rainwater reserve the right—at least it was understood that  
page 41 } you had the right to control the operation of the construction?

Mr. Dudley: What do you mean by "control"?

The Witness: What do you mean by "control"?

By Mr. de Butts:

Q. I understand that he completed the contract satisfactorily, at least his work was satisfactory?

A. Yes.

Q. In the event that it were not, did Wayne Construction Company have the right to see that it was done properly?

A. Yes, I would say we had the right to require the work to be done in accordance with the contract.

*Claude E. Keener.*

Q. In that sense, sir, you had some control over his actions, did you not?

Mr. Dudley: That is a conclusion.

The Court: Objection sustained.

By Mr. de Butts:

Q. No part of Mr. Rainwater's work, no part of it, sir, was outside the contract which you held with the Fairfax County School Board, is that correct?

A. Would you ask it again?

Q. No part of Mr. Rainwater's work was outside the terms of your contract, Wayne Construction Company's contract, with the Fairfax County School Board?

A. We may have rented from him, at different page 42 } times, a piece of equipment—I am sure we did last winter—to move some snow, maybe do a little excavating that was not strictly in accordance with this contract. But, other than that, I have no knowledge of anything.

Mr. de Butts: All right, sir.

Mr. Fitzgerald: Will the Court indulge me just a minute please?

### REDIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Mr. Keener, do you handle the letting of contracts when you advertise for bids?

A. No, sir; Mr. Meyers writes the contract.

Q. Are you familiar with the procedures used, like you testified to?

A. Yes.

Q. The bond is required?

A. Yes.

Q. When do you require a performance bond or a completion bond?

A. What do you mean, when? In time?

Q. Yes. In the time of the advertising for bids, letting of the contract, or completion of the contract, where in the procedure is the completion bond required?

A. There is no completion bond. I say, payment bond.

Q. Payment bond. All right. Payment that he page 43 } is going to make the payments required, is that right?



*Claude E. Keener.*

A. There is supposed to be required prior to their beginning work.

Q. Prior to their beginning work.

As a matter of fact, prior to you through the awarding of the contract, isn't that correct?

A. I am not sure about that.

Q. Is it not a fact that the contract is awarded contingent on them putting up all bonds that they have to put up?

A. That's right.

Q. Isn't that true?

A. Yes.

Q. And certainly before they get in there and start to work, you require that bond, don't you?

A. I am not sure that we always do.

Q. In this case you say you didn't?

A. We didn't, that's right.

Q. But in the ordinary course of business you do?

A. It is not always furnished prior to their beginning work, no.

Q. That is the time that you should require them, though, isn't it?

page 44 } A. Yes.

Q. You say in this case you never did get one?

A. No, sir.

Q. Never did?

A. No.

Q. Now, you told this jury that you got Mr. Grenadier to sign this contract to help Mr. Rainwater get a completion bond, to help Mr. Rainwater, who—not the completion bond; the payment bond—who does the payment bond protect?

A. The general contractor.

Q. Who is that?

A. Wayne Construction Company.

Q. So, you were trying to help Wayne Construction Company, too, weren't you?

A. It is a requirement of the law that bond be required. In other words, on private work it is not required.

Q. Part of your contract with the public body of the School Board of Fairfax County was that that bond be required?

A. It was a requirement of the specifications, yes.

Q. A requirement of the specifications?

A. Yes.

Q. Under the contract bid, and you still don't have that, do you?

*Claude E. Keener.*

A. That's right.  
 page 45 } Q. Now, you were trying to get it, weren't you?  
 A. Yes.

Q. Now, you tell this jury how you are going to use that letter or that contract, whatever you call it, that Mr. Grenadier signed. How were you going to use it to try to help whoever you were going to help to get that payment bond?

A. How?

Q. Yes. How was it going to help?

A. Well, the reason Rainwater couldn't get it was for financial reasons. The only reason we would have written it, or he would have wanted it written to Mr. Grenadier was financial reasons, in order to be able to secure the bond.

Q. Mr. Keener, tell this jury what you were going to do with that agreement in order to get a payment bond? What were you going to do with it?

A. With the agreement with Mr. Grenadier?

Q. Yes, sir.

A. In other words, we wrote it to Mr. Grenadier in order to get the payment bond.

Q. I understand that. All I am asking you is to tell this jury what was going to be done with that agreement that Mr. Grenadier signed?

A. I don't follow you: what was going to be done.

Q. Were you going to take it and hang it on  
 page 46 } the wall, or were you going to take it and do something with it?

A. It was written to get a bond.

Q. I think I am being clear, Mr. Keener. It was written to get a bond?

A. That's right.

Q. So, in order to use it to get a bond, you had to do something with it, did you not? Can't you tell this jury what you were going to do with that agreement?

A. I still don't know what you mean by what was I going to do with this to get the bond.

Q. Let me make a few suggestions to you. Maybe it will refresh your memory.

A. All right.

Q. Weren't you going to take that agreement and submit it to a bonding company as the agreement by which the work was being done, and the man responsible for the work, in order that the bond could be written for Mr. Grenadier?

A. We had no responsibility in securing the bond. I do

*Claude E. Keener.*

not give this to any bonding company in order to help get a bond.

Q. Tell the jury what Mr. Rainwater was going to do with it, then. How was it going to help get the bond?

A. Mr. Rainwater may have taken it to a bonding company and got a bond, yes.

page 47 } Q. You helped him get it, didn't you?

A. Yes.

Q. Get this letter.

A. We wrote the letter, yes, at his request.

Q. You have told the jury it was to help him get a performance bond?

A. That's right, payment bond.

Q. Payment bond, I am sorry. You have told the jury the payment bond was to protect Wayne Construction Company, haven't you?

A. That's right.

Q. And you do know that that agreement was to be taken to buy Mr. Rainwater, taken to a bonding company to show them, to convince them that Mr. Grenadier was the subcontractor, or the man that had the contract on this job, so that they would write the performance bond for Mr. Grenadier, is that not correct?

A. That's right.

Q. All right. We got to it.

Now, you have mentioned a meeting you had in Mr. Grenadier's office. Tell the jury whether it was before or after the accident happened, that you went there with Mr. Grenadier, and he then tried to get an agreement back.

A. After the accident.

page 48 } Q. After the accident?

A. Yes, sir.

Q. Can you tell this jury what Mr. Rainwater did with the money, from your own knowledge, after Wayne Construction Company gave it to him?

A. I have no idea.

Mr. Fitzgerald: No further questions.

Mr. Slenker: I have a few questions of Mr. Keener.

#### RECROSS EXAMINATION.

By Mr. Slenker:

Q. Mr. Keener, did I understand you to say that during the time that Mr. Rainwater was the subcontractor on this

*Claude E. Keener.*

job, that Wayne Construction may have rented some equipment from him?

A. We may have. I am not sure that we did during the snow last winter, to move the snow out so we could work.

The Court: What year was that?

The Witness: That would have been this year.

By Mr. Slenker:

Q. 1961?

A. During the winter of this year, which would have been 1961.

Q. On those occasions—or let me ask you this: Did you ever rent any equipment from Mr. Rainwater in page 49 } 1960 out on the Mantua job?

A. To my knowledge, we did not.

Q. Now, I believe you said that the bond, the payment bond had not been secured?

A. That's right, it has not.

Mr. Slenker: Will the Court indulge us just one second?

The Court: All right.

By Mr. Slenker:

Q. Mr. Keener, you made some reference to a conference in Mr. Grenadier's office, and that Mr. Fitzgerald asked you if that wasn't several weeks after the accident had happened. As a matter of fact, the document that went from Wayne Construction Company to Mr. Grenadier was also several weeks after the accident, was it not sir?

A. That's right.

Mr. Slenker: That's all I have. Thank you, sir.

By Mr. Dudley:

Q. Mr. Keener, at the time of this accident, which I believe was September 1960, was all of the excavating equipment, heavy equipment on the job, equipment that Rainwater brought there?

A. Yes, that's right.

Q. Did Wayne have any heavy equipment of its page 50 } own on that job?

A. We did not.

Q. The equipment that was involved on the job at that

*Edward Mills.*

time, were you renting that equipment or did you own it in any way?

A. The excavating equipment?

Q. Yes.

A. No, sir. We did not own or did not rent any equipment prior to that time from anyone.

Mr. Dudley: Thank you.

FURTHER REDIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Would you recognize a photograph of this equipment that Mr. Rainwater, you say, had there?

A. I think I would.

Q. Let me show it to you.

A. I wouldn't swear it was that machine, because they have a lot that looked just alike, but it is similiar to this.

Q. Let me have it a minute.

A. All right.

Q. Will you all stipulate?—I have no further questions of this witness.

Mr. Dudley: No further questions.

Mr. Slenker: No questions.

\* \* \* \* \*

page 53 } I will withdraw the witness and call another witness.

The Court: Step down.

(Witness temporarily excused.)

Mr. Fitzgerald: Call the ambulance operator.

Thereupon

EDWARD MILLS,

was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified on his oath as follows:

*Russell Gray.*

DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. State your name.

A. Edward Mills.

Q. Where do you live, Mr. Mills?

A. Dunn Loring Fire House.

Q. What is your job with the Fire Department?

A. I am employed by the county as a paid fireman.

Q. On September 23 last year, 1960, did you receive a dispatch to go to the Mantua school site for an accident?

A. Yes, I did.

Q. Upon arriving there, do you remember about what time it was?

A. No, not right offhand.

Q. Morning or afternoon?

page 54 } A. Late in the evening. I imagine somewhere after five o'clock.

\* \* \* \* \*

page 70 } Mr. Fitzgerald: Excuse him, please.

The Court: All right; you may be excused.

(Witness excused.)

Mr. Fitzgerald: I would like to call a man from D. A. Foster. He has a green uniform on there.

Thereupon.

RUSSELL GRAY,

was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Just take a seat and face around this way. Tell the jury your name.

A. Russell Gray.

Q. Where do you live?

A. 1716 Memphis Street, Alexandria.

*Russell Gray.*

The Court: What is your name again?

The Witness: Russell Gray.

By Mr. Fitzgerald:

Q. Mr. Gray, tell the jury and the Court where you live.

A. 1716 Memphis Street, Alexandria, Virginia.

Q. Tell the jury where you work.

A. For D. A. Foster Trenching Company, Merri-  
page 71 } field, Virginia.

Q. Tell the jury what your occupation is.

A. Right now I am a master mechanic, and I used to be,  
for eighteen years, an operator.

Q. Operate on what?

A. All types of heavy equipment.

Q. All types of heavy equipment?

A. Bulldozers, pans, Tournabuls.

Q. How long were you that?

A. About eighteen years; since '42.

Q. Have you ever attended any schools or courses for  
the operation of heavy equipment?

A. I belong to the Operating Engineers union in Wash-  
ington, Local 77B. They put you through a course.

Q. Did you go through it?

A. Yes, sir; I did.

Q. Now, will you tell the jury what kind of a piece of  
machinery is depicted by Plaintiff's Exhibit No. 3? Hold it  
up there.

A. That is a Caterpillar pan. What capacity, by the  
picture, I can't tell whether it is twelve yards, seventeen yards  
or thirty yards. I can't tell you this.

Q. It is a Caterpillar pan?

A. It is made by Caterpillar equipment people.  
page 72 } Q. I am sure we have all probably watched these  
things operate; but tell the jury how this piece of  
machinery is used.

Mr. de Butts: Your Honor, one thing, I would like to ask  
the witness two or three questions for the purpose of laying  
a foundation for an objection.

The Court: All right.

Mr. Fitzgerald: As to his qualifications?

Mr. de Butts: I said, I would like to ask him a few ques-  
tions for the purpose of laying a foundation for an objec-  
tion.

Mr. Fitzgerald: I think he can ask him anything about

*Russell Gray.*

his qualifications, but I think he has a right to cross-examine this witness or make any objection to any question I ask, but I don't think he has a right to start questioning in our—

The Court: What's the nature of your objection?

Mr. de Butts: I would first like to ask the question.

Mr. Fitzgerald: I think we have a right to know what the purpose of the question is.

Mr. de Butts: All right, I will state my objection. I will ask this one question: Have you examined this specific piece of machinery?

page 73 } The Witness: No, I haven't.

Mr. de Butts: There is my objection.

Mr. Fitzgerald: He can cross-examine, but he has testified as to what this is.

Mr. de Butts: I object to him testifying about the specific piece of machinery.

Mr. Fitzgerald: If it please the Court, this picture has been identified as the piece of machinery that caused this accident. This witness has identified the piece of machinery as what it is, and says he is familiar with the operation of it. If that isn't sufficient, then I don't know what is.

Mr. de Butts: I can go further and ask him serial numbers, model numbers, but I think the fact that he has not examined this specific piece of machinery, which is readily available for him to examine, if it is an odd model or serial number on that piece of machinery, and it had anything to do with this accident, then I am not in this courtroom.

It may very well have, because counsel doesn't know how the accident happened, and so stated. The operation of this piece of machinery is extremely important. This witness does not know how this specific piece of machinery works; he has never examined it.

Mr. Fitzgerald: Counsel does not even know what questions I am going to ask this man. He has testified as to what this piece of machinery is; it has been identified as the machine. It has been stipulated as the machine. I think I have the right to ask him how that machine, what the machine is used for.

The Court: I am going to let you go ahead with your questioning, but if a question is asked, which counsel thinks is objectionable, he has a right to object to it and I will rule on it at that time.

Mr. de Butts: I note an exception respectfully to the continuation of this witness for the purposes of testifying as an expert as to what happened.



*Russell Gray.*

The Court: I have heard no questions yet, Mr. de Butts. The question was asked that is objectionable. You will have a right to object to it when it is asked.

By Mr. Fitzgerald:

Q. Mr. Gray, will you just tell the jury what that piece of machinery is used for?

A. That is used to move dirt from one point to another. It is pulled by a tractor which has a power unit on the back of it, which operates these cables. It has two levers. One raises and lowers the pan and one pushes this gate forward, lifts this gate, pushes this gate forward and dumps the dirt.

Q. Will you turn it around, so counsel, if they want to see it, can see it?

page 75 } Mr. Slenker: I think it might be better if I might sit over here during the examination of this witness.

By Mr. Fitzgerald:

Q. Would you tell the jury what the position, the parts of the machinery are there, of that particular type of machine, to scopp up dirt?

A. Well, he lowers this part, which we call the bowl, to the ground. In turn, he raises this front, which is called the apron, up, whatever width he wants; and then the tractor pulls it ahead, and the dirt goes in the pan.

When he has completed his load, he releases his cable. This apron closes, and he takes it where he is going with it; that keeps the dirt in there.

Q. Would you look at Plaintiff's Exhibit No. 5 and tell the jury whether or not, or what part of the machine is that?

A. That is the front apron, the part that keeps the dirt in the bowl.

Q. Would you tell the jury how that is moved to let the dirt in and how it is—

A. It is moved by a cable connected to the power unit on the tractor.

Q. Tell the jury what position it is in, to let the dirt in, which way?

A. It is open, as it is right now.

page 76 } Q. That is in an open position?

A. That is in an open position now.

Q. Can it be opened wider than that?

*Russell Gray.*

A. Oh, yes; it comes all the way up and sits about like this (indicating) when everything is being dumped.

Q. All right. When the dirt is being hauled or moved, would you tell the jury what position the—what do you call it?

A. The apron.

Q. No. Well, first the apron; what position is that in?

A. That closes down and almost comes shut, providing the dirt is not too hard, it will completely close itself. If it is hard dirt, it will set up a ways.

Q. If it is empty, will it go all the way together?

A. Yes.

Q. When it is released?

A. That's right.

Q. Now, would you tell the jury what position the—I call it the pan,—

A. The bowl.

Q. The bowl?

A. The bowl, yes.

Q. What position that is in when dirt is being hauled?

A. Well, depending on how the operator wants  
page 77 } to carry his pan. Some carry a low pan; some  
carry a high pan.

Q. Would you tell the jury how high the pan can be raised?

A. Well, I would say fourteen to sixteen inches, average.

Q. Off the ground?

A. Off the ground.

Q. Now, would you tell the jury whether or not, in the operation of a piece of machinery of this sort, in the trade there are any safety regulations taught?

A. Most certainly is.

Q. Is there one that you might call the cardinal rule of safety in the operation of a piece of machinery like this?

A. I have always been taught never to leave your apron up, never leave the pan off the ground, for safety's sake, and never sit close to a piece of equipment when it is running, to eat your lunch or anything like that.

Q. Getting to the position of the machinery, you say that for safety reasons you never leave the bowl off the ground or the apron open; is that correct?

A. No, sir. Lots of contractors terminate you for that.

Q. Lots of what?

A. Contractors will terminate you for that.

*Russell Gray.*

page 78 } Q. For doing that?  
A. Yes.

Q. When you say "terminate", what do you mean?

A. Fire you.

Q. You said for safety reasons. Would you tell the jury what has to be—first of all, I show you Plaintiff's Exhibit No. 4. State whether you recognize that piece of machinery?

A. That is a D-7 Caterpillar tractor with a Caterpillar winch or power unit, whichever one you want to call it, on the back of the blade, the bulldozer blade.

Q. Would you tell the jury, and point out, if you can see it on that photograph, first of all what has to be done to let the pan or the bowl go down to the ground?

A. You have to operate these levers here, right opposite the seat where the operator sits.

Q. Can you hold that around so the jury can see it?

A. Two levers. One is to raise and lower the pan, and one is to dump.

Q. Am I correct, from that photograph, that those levers are about an arm's length, or about as long as an arm?

A. Most operators use them about arm's length. You can adjust them to suit the length of your arm.

Q. Now, will you state whether or not that bowl is a heavy piece of machinery?

page 79 } A. The bowl is the pan part of it, the apron part, which we call, which raises to let the dirt out. It is tremendously heavy.

Q. Could you just approximate the weight of that apron part?

A. That would vary on the size of your pan.

Q. Just tell the jury what the lightest one would be.

A. I would say—

Mr. Slenker: I am going to make an objection to any speculative evidence in this case.

The Court: If he knows, on the various models of Caterpillar pans, I think he can testify to that. If he knows about this particular machine, I think he can testify to that; but I don't think he can speculate.

The Witness: On the lightest machine,—

Mr. Fitzgerald: Just a minute. The Court is ruling he cannot testify as to what the lightest possible apron would be?

*Russell Gray.*

The Court: If he knows what the weight of the apron on this particular pan we are concerned with is, I think he can testify to that. If he doesn't know what that is, he can testify whether they are generally a heavy piece; but I don't think he can guess at the weight of it.

By Mr. Fitzgerald:

Q. Just tell the jury whether it is a heavy piece.  
page 80 } A. It is a heavy piece.

Q. Now, tell the jury how far that lever you pointed to has to be moved to drop the bowl down, first of all.

A. Just a very short distance, just more or less to touch it.

Q. Now point out to the jury what has to be done to drop the front apron down.

A. Same procedure.

Q. Is that the other lever you see there?

A. That is the other lever.

Q. Would you tell the jury just how far that lever has to be moved to drop the pan?

A. You can adjust this thing to where it is very easy to work and you don't have to move it very far.

Q. In any event, will you tell the jury just how far the arm would have to move?

A. To move it all the way over to where it knuckles out, I would say something like that, indicating maybe a foot.

Q. Indicating about a foot?

A. Yes.

Q. Would you tell the jury whether or not, if you move it less than that, what, would the apron fall?

O. It would start lowering your apron; your apron would fall.

page 81 } Q. And would you tell the jury, if that is just moved slightly—

Mr. de Butts: Your Honor, I hesitate to object and take the time of the Court, but I know that there are many models of this particular machine, and this witness has testified that they are various capacities. He hasn't identified this particular machine as any model. He hasn't identified that there is a difference between models, that they are operated differently, that this particular machine was in excellent condition, poor condition—he hasn't seen the machine.

My objection goes to any of his testimony in regard to the operation of this specific machine.

*Russell Gray.*

And counsel is leading him, in addition to that; and if he has seen this machine, I would like to see him testify. If not, I don't think he can speak in generalities about Caterpillars. There are all kinds of Caterpillars. That is the reason for my intention to question him.

Mr. Fitzgerald: This witness has identified this bulldozer by model number and says he is familiar with the operation of it. He has identified the other part of the machine, the earth mover. He said he didn't know what its capacity was.

Now, if there is something peculiar about these page 82 } machines, particular machines, Mr. Rainwater, the defendant, can come here and tell the jury about it. This operator is telling the jury what has to be done to drop these things on this particular piece of machinery with the model number he has given, he has identified it. I could ask him the one other question:

Regardless of the capacity of the loader behind, or the machinery behind the bulldozer, is there any difference in raising and lowering the bowl?

The Witness: No, not in that particular pan, no.

Mr. Fitzgerald: I think that would certainly cover any objection that was made.

The Court: All these controls are handled from the bulldozer?

The Witness: The operator is sitting in the seat, as I am sitting here, and the operating controls are all on his right.

The Court: They are controlled from the bulldozer itself?

The Witness: From the tractor itself.

The Court: The pan just responds to the control from the tractor?

The Witness: Control from the tractor.

The Court: And the controls which you have page 83 } been speaking of today are the ones that, according to your experience, are part of this particular tractor?

The Witness: That's right.

These tractors, you order them, they come through with or without the power unit, or whichever way you desire.

The Court: Has it been your experience that all the tractors of this particular make operate the same way?

*Russell Gray.*

The Witness: Yes, of this particular type Caterpillar, Caterpillar power unit—they all operate on the same principle.

The Court: Since he has identified the tractor, I am going to overrule the objection, Mr. de Butts, and allow the question.

Mr. de Butts: I would like to note an exception.

By Mr. Fitzgerald:

Q. Mr. Gray, tell the jury how the bulldozer power mechanism is connected to the bowl, as you call it, and the apron.

A. Do you mean from the power unit to the bowl? That is controlled by cables. One cable lowers and raises the bowl. One dumps the bowl, raises the front apron and dumps the bowl.

Q. Tell the jury whether or not, in order to raise the apron and the pan, the bulldozer has to be in operating position? page 84 }

A. That's right; certainly does. The motor has to be running, the clutch engaged, and you have a shaft that goes back to your power unit.

In turn, the power unit, the cable is wound on the spool.

Q. Tell the jury whether or not, to let the bowl fall and the apron fall, the bulldozer has to have the engine running.

A. No, sir; it does not; it will fall of its own free will.

Q. Will you tell the jury whether or not, if the lever, as you have shown, the controls that control the bowl, lets the bowl and the apron down, whether or not, if it were pushed over, it would gradually come together, or whether it would fall down abruptly?

The Court: I believe you are leading the witness a little bit too much.

By Mr. Fitzgerald:

Q. Just tell the jury if the arm were pushed over, how the blade or the apron would come down.

A. It would just come down with a bang, that's it.

Mr. Fitzgerald: No further questions.

page 85 }

CROSS EXAMINATION.

By Mr. de Butts:

*Charles Norfolk.*

\* \* \* \* \*

page 89 }

\* \* \* \* \*

Q. Is there any way the apron can be actuated to fall or to come down except by operation of one of those levers?

A. Not unless the cable would break.

\* \* \* \* \*

page 101 }

\* \* \* \* \*

CHARLES NORFOLK,  
was called as a witness by and on behalf of the plaintiff  
and, having been first duly sworn, was examined and testified  
on his oath as follows:

#### DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. State your name, sir.

page 102 } A. Charles Norfolk.

Q. What is your rank with the Fairfax police?

A. Rank of lieutenant, patrol division.

Q. Were you so employed on the 23rd of September 1960?

A. I was.

Q. Did you respond to a call, dispatch, to the Mantua school site on that afternoon?

A. Yes, sir, I did.

Q. Will you state whether or not you were the first, second, or third police to arrive at the scene?

A. I was the second officer on the scene.

Q. Was Officer Downey there at the time?

A. Yes, sir; I met him there.

Q. What did you find when you got there?

A. When I got there I talked to Officer Downey, ascertained what had happened. He told me what had happened, and we began to inspect the piece of equipment that was on the scene, the earth moving machine hooked behind a Caterpillar tractor, the jaws, or the working part of the earth moving machine, was some distance apart.

*Charles Norfolk.*

The bottom of this appartus, as you know, has what they call bull tongues, I believe, that digs the dirt, pushes it back in this machine.

Q. I am not interested in the operation. I just  
page 103 } want you to tell what you saw when you got there.

A. This is an apron that comes over it. These were so far apart (indicating). In the bottom of the machine, or the earth moving machine, was several pieces of board. One of them was a 4x4. Some eight or ten feet long. There were a couple of short pieces of 4x4, I believe, and a 2x4.

There was a bunch of people around. We tried to get it to go all the way down, to keep this thing from happening again.

I worked the lever several times myself. I couldn't get it to go together. I think Officer Downey worked on it another while. Some passer-by came along and he knew just what to do and he released it and it dropped. That secured the machine.

\* \* \* \* \*

page 104 } CROSS EXAMINATION.

\* \* \* \* \*

By Mr. Dudley:

Q. Lieutenant Norfolk, did I understand you to say, sir, that you found this wood jammed between the apron and the pan, so to speak, or whatever you call these pieces of equipment, in the jaws of it?

A. It was not jammed. It was laying loose.

Q. It was laying loose?

A. Yes, sir.

Q. So that the pieces of wood were not holding the jaws apart?

A. No, sir.

Q. They were free to move or to lower if somebody knew how to work it; right?

page 105 } A. Yes, I moved one of the logs myself, one of the 4x4s. I pulled it back.

Q. Pulled it back out of the way?

A. Back in the pan.

Q. Then did I understand you to say you tried unsuccessfully for some time after that to get the jaws to close?

A. Yes, sir.

Q. You couldn't do it?



*Ray Rainwater.*

A. No, sir.

Q. It took somebody who came by there who knew something about working with these bulldozers to get the jaws to close, is that right?

A. There was someone—I don't know whether he worked with the machine or not—someone came by and it dropped.

Mr. Dudley: That's all.

Mr. Fitzgerald: That's all.

The Court: You may be excused.

(Witness excused.)

Mr. Fitzgerald: Mr. Rainwater. I would like to call him as an adverse witness. I don't believe he has been sworn.

Thereupon

RAY RAINWATER,  
having been first duly sworn, was examined and  
page 106 } testified upon his oath as follows:

## DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Will you face around this way, please? Tell the jury your name.

A. Ray Rainwater.

Q. Where do you live, Mr. Rainwater?

A. 5430 Kirby Road, Falls Church, Virginia.

Q. What is your occupation?

A. I am an operator, contractor.

Q. What kind of operator?

A. Operate heavy equipment, earth-moving equipment.

Q. How long—

The Court: Mr. Rainwater, would you speak a little more loudly so that counsel can hear you?

Mr. Slenker: We cannot hear you, sir.

By Mr. Fitzgerald:

Q. How long have you been operating?

A. Since 1947.

Q. Since 1947?

A. Yes, sir.

*Ray Rainwater.*

Q. On September 23, 1960, had your machinery or had a piece of machinery on the Mantua school site, where you had been working—  
page 107 }

A. Yes, I was working there.

Q. These photographs have been stipulated to as being the machine, pictures of the machinery you had there. What do they call that?

A. Scraper.

Q. This is identified as Plaintiff's Exhibit No. 3. This is called a scraper?

A. That's right.

Q. How long had you been operating at that time, had you been operating that type of machinery?

A. I first operated a piece of equipment of this nature about 1950.

Q. About 1950?

A. Yes, sir.

Q. Did you ever go to school or apprentice school, or anything like that?

A. To learn that? No, sir.

Q. Are you a member of, I guess you call it the Heavy Equipment Operators Union?

A. Yes, sir.

Q. You are not a member?

A. No, sir. I thought you said do I remember.

Q. You are not a member?

A. No, sir.

page 108 }

Q. Sort of self-taught, is that correct?

A. Well, I was instructed by other operators.

Q. By another operator.

This particular piece of machinery, when had you first come to operate that machine?

A. About June of 1960.

Q. About June of 1960?

A. Yes, sir.

Q. In other words, the June before this happened?

A. That's correct.

Q. Was this the first job you had operated it on?

A. No.

Q. How many other jobs?

A. One other job.

Q. One other job?

A. Yes, sir.

Q. On this particular day of September 23, 1960, had you actually been operating that day?

*Ray Rainwater.*

A. Yes, I had. I operated from seven-thirty in the morning until about nine o'clock in the morning.

Q. What kind of work were you doing?

A. We were grading this building site for the Mantua school.

Q. Did something occur during that day to page 109 } cause you to stop operating?

A. Yes, the machine broke down. The tractor part of the machine became disabled.

Q. The Caterpillar tractor part?

A. Yes, sir.

Q. Just tell the jury what happened, how did it break, what happened? What broke?

A. The master clutch in the tractor, of this nature that activates the tractor; it looks like a foot clutch.

The Court: Will you talk louder?

The Witness: There *us* a master clutch on a tractor of this type. It works the same as a foot clutch on a truck or pickup truck. It enables you to shift gears and re-engage the clutch.

This master clutch became damaged at about nine o'clock in the morning.

By Mr. Fitzgerald:

Q. Nine o'clock in the morning?

A. Damaged to the point it wouldn't continue to work all day.

Q. But you were operating it yourself?

A. Yes, sir.

Q. Was it at this particular point where the accident happened that the clutch went out, or did you move it page 110 } to that point after?

A. No, sir; I moved it to that point afterwards.

Q. You could operate it somewhat?

A. It could run, yes.

Q. Then did you proceed to repair it?

A. That's correct.

Q. Do you know how to repair these things?

A. Yes, sir.

Q. That was about nine o'clock that morning?

A. That's right.

Q. Now, from the time you cut the engine off, when you moved to this location, did you ever start the engine up again?

A. No, sir.

*Ray Rainwater.*

Q. Then, when you moved to that location and cut the engine, the bowl was in an up position, wasn't it?

A. I cannot say.

Q. You cannot say?

A. No, sir. When I moved—

Q. To move it over there and not pick up any dirt, it was in an open position?

A. The bowl was in a traveling position.

Q. That is up?

A. That is up.

Q. Eighteen inches up above the ground?

page 111 } A. Anywhere from twelve to sixteen, twelve to fourteen.

Q. Well, that would depend on the contour of the ground beneath it?

A. That's right.

Q. If there was a depression there, it could be as much as two or three feet?

A. It could be.

Q. And we speak of twelve, fourteen, sixteen inches—we are talking about from a perfectly flat piece of ground?

A. Yes, sir.

Q. In order to lift that bowl, and lift what has been called the apron, the engine of the tractor has to be running?

A. Yes, sir.

Q. You say that you didn't cut it back on after you stopped there?

A. That's right.

Q. Now, this learning to be an operator of this machinery, and in your experience, when you say in working with this particular type since 1950, I believe, ten years or more—

A. That's right.

Q. —there are certain safety rules everybody learns in a trade; isn't that right?

A. That's right.

page 112 } Q. One of those is that when you stop, and you go to leave your machine, you lower that bowl and the apron?

A. That's right, true.

Q. As a matter of fact, that is the most important safety rule they can teach you about this particular type of machinery?

A. I agree.

Q. No question about that?

A. No question about it.

*Ray Rainwater.*

Q. Now, the engine of the tractor does not have to be running to lower it, does it?

A. That's right.

Q. And am I right, I describe it as an arm or lever, about arm's length, that comes from in behind the operator, the seat, and to the right of where the operator sits, and there are two of them, are there not?

A. That's right.

Q. One of those levers you push to drop the bowl?

A. Right.

Q. Push it the other way, it raises it?

A. You pull it to raise it.

Q. Pull it to raise it?

A. Push it to lower it.

Q. The other one you pull it to raise the apron?

page 113 } A. Yes.

Q. Push it to drop the apron closed.

Even if the Caterpillar tractor is broken down, not running, to put that bowl down on the ground, and close the apron, all you have to do is just hit those levers; is that right?

A. That's right.

Q. How long had you been working on this site, Mr. Rainwater?

A. Since the first part of September.

Q. Would you tell the jury whether or not homes were built all around there?

A. Yes, there were many homes around there.

Q. In the middle of a residential neighborhood?

A. It was a residential neighborhood.

Q. And when you worked on this site, you saw the ball diamond that was there, didn't you?

A. Yes, sir.

Q. And you had seen, while you were working on this site, kids around the site, at the school, playing ball there?

A. I had been children around. I hadn't seen them playing ball.

Q. They were around the site?

A. They were around the site.

page 114 } Q. When you started to repair this, did there come a time before this accident that you left?

A. Before the accident, yes.

Q. Before the accident happened, did you leave the machine?

A. Yes, I left the site.

Q. And you left it on the school site?

*Ray Rainwater.*

A. That's right.

Q. And you operated it yourself that day?

A. That's right.

Q. You left nobody there in your employ?

A. Well, it was four o'clock when I left.

Q. Four o'clock?

A. Yes.

Q. You left nobody there with the machine?

A. No, sir.

Q. Where did you go when you left?

A. I went to the Caterpillar dealer, to get repair parts.

Q. To get parts to repair it with?

A. Yes, sir.

Q. Did you get those parts?

A. I did.

Q. Did you return back to the site?

page 115 } A. Yes, sir.

Q. What time?

A. Six o'clock.

Q. Too late?

A. Right.

Q. The accident had happened?

A. That's correct.

Q. Did you inquire—the body had been removed when you got there?

A. That's correct.

Q. Did you inquire as to what had happened?

A. I did.

Q. Did you in fact talk to Mr. Smith here?

A. Very briefly.

Q. You did talk to him soon after you got there, or when you got there, as a matter of fact?

A. No, he wasn't there. I was there alone when I came back. He arrived later.

Q. You talked to him briefly then?

A. Yes, sir.

Q. Did you talk to Detective McNab?

A. Yes, sir.

Q. Had a conversation with him?

A. Yes, sir.

page 116 } Q. You understood he was investigating the cause of this accident when he talked to you?

A. I suppose I did.

Q. You knew he was a member of the Fairfax County Police Department?

*Ray Rainwater.*

A. Yes, sir.

Q. He identified himself?

A. Yes, sir.

Q. When did you get this tractor fixed?

A. About noon the following day, on the 24th.

Q. How much, if you know—how much did it cost to repair it?

A. Better than a hundred dollars.

Q. About a hundred dollars?

A. About a hundred and seventeen, I think.

Q. Had you ever had to repair it before, since you had it in operation?

A. To repair the machine, any part of it, or this particular part?

Q. Any part.

A. Nothing major.

Q. Up to that point?

A. That's right.

Q. Have you since had to repair any parts of it?

page 117 } Mr. Duff: I don't see what is material about having repaired it since the accident at all. It is what occurred at that time or prior thereto that is important.

The Court: Just address yourself to that. What is the purpose of the question?

Mr. Fitzgerald: The purpose of the question is to show the connection between this witness and Mr. Grenadier. I think the relationship all the way through this is material.

The Court: The question about the subsequent repairs? I will permit the question at this time, but I may strike it unless it is connected up.

Mr. Duff: May I note my objection on the ground that anything subsequent to this accident has no relevancy whatsoever to this case.

By Mr. Fitzgerald:

Q. Have you had to make repairs on this machine, either before the accident or subsequent to it, other than the one you were talking about?

A. Nothing of a major nature. Minor things, such as broken cable, broken grease fitting, the like.

Q. This breaking of the clutch, you consider that a major repair?

*Ray Rainwater.*

Mr. Duff: Objection. I think the witness can say what he did, what he saw, what he overheard from page 118 } another party; but to call for his conclusion of whether it is major or minor invades, in my view, the province of the jury.

Mr. Fitzgerald: If it please the Court, this witness has said he is familiar with repairs and has made repairs.

The Court: I think the witness is qualified to tell whether it is major or minor repair.

Mr. Duff: Exception.

By Mr. Fitzgerald:

Q. Tell the jury whether it was a major or minor repair.

A. I would consider it a major repair.

Q. Would you also tell the jury who owned this piece of machinery?

A. Mr. Grenadier, Herman Grenadier.

Q. Do you know when it was purchased by him?

A. It was in June of 1960, I believe.

Q. June of 1960. Would you tell the jury here what your arrangement was with Mr. Grenadier in the purchase and operation and paying for this piece of machinery?

A. Yes, I used the equipment as an independent contractor.

The Court: Just a minute. Do either of you people want to move over here so you can hear better?

Mr. Duff: If you don't mind.

By Mr. Fitzgerald:

Q. State what your arrangement was with Mr. Grenadier. page 119 }

A. I agreed to make the payments on the equipment.

Q. Who made the down payment on it?

A. Mr. Grenadier did.

Q. How much did he put down, do you know?

A. I don't really know.

Q. You made the payments on it?

A. That's correct.

Q. Who was to retain ownership of it?

A. Mr. Grenadier.

Q. Do you know what the machine cost?

A. In the neighborhood of \$14,000.

Q. Around \$14,000?



*Ray Rainwater.*

A. Fourteen-fifteen thousand dollars.

Q. At the time you completed the payments on it, Mr. Grenadier was supposed to still keep title to it?

A. Well, the value of the machine, the payments on the machine were around \$1,100 a month and the earning capacity of the machine was considerably more than that, more than I could make operating as an operator for a salary.

Q. Just tell the jury whether or not Mr. Grenadier was supposed to keep title to the machinery after you had made all the payments on it.

A. That was the understanding.

Q. Tell the jury, first of all, who paid for the page 120 } repairs you made on it when this clutch broke down on September 23.

A. Mr. Grenadier reimbursed me for it.

Q. Mr. Grenadier reimbursed you for it?

A. Yes, sir.

Q. Was it your agreement, or wasn't it, that Mr. Grenadier was to pay for the major repairs?

A. That's correct.

Q. How much did Mr. Grenadier pay you to repair that?

A. I gave him an accounting of the parts and the time I spent.

Q. He actually paid you for your time in repairing it?

A. Yes, sir.

Q. Do you remember how much it came to?

A. No, sir.

Q. Was it something over the hundred dollars you said that you paid for the parts?

A. Yes, sir.

Q. At the time this accident happened, you had gone to get the parts; is that correct?

A. Yes, sir.

Q. Tell the jury whether or not you told Mr. Smith or Detective McNab anything about leaving the bowl up?

Mr. Dudley: I am sorry; I can't hear you.

page 121 } By Mr. Fitzgerald:

Q. Tell the jury whether or not you told Mr. Smith or Detective McNab anything about leaving the apron up, in an up position.

A. I didn't say anything about leaving it up. I didn't state that I recalled leaving it up.

Q. You don't recall stating that?

*Ray Rainwater.*

A. I didn't state that I recalled leaving it up.

Q. What did you tell him?

A. Well, I couldn't remember word for word.

Q. You don't remember.

There has been some testimony about your inability to get a payment bond.

A. Yes, sir.

Q. And that Mr. Grenadier was helping you out in getting that payment bond?

A. Yes, sir.

Q. And signed the contract; is that right? That has been testified to.

A. That's right.

Q. What were you going to do with that contract?

A. What was I going to do with the contract?

Q. Yes, sir.

A. Which contract, sir?

page 122 } Q. The one that Mr. Grenadier signed.

A. You see, I agreed with Wayne Construction Company, for a given price, to do the excavating.

Q. I just want you to tell this jury what you were going to do with that contract Mr. Grenadier signed.

A. Well, as soon as I could obtain a bond, a payment bond for the job—

Q. I want you to tell the jury how you were going to use that contract for obtaining the payment bond.

A. Well, the equipment wasn't in my ownership. I didn't have enough financial ability to guarantee an insurance or a bonding company that I would meet all the payments on the job, so I discussed it with Mr. Grenadier, that if he were, in effect, the subcontractor and he had the equipment for collateral, then they would issue a payment bond.

Q. If he were in fact the subcontractor?

A. That's correct.

Q. Tell the jury now what you were going to do with that agreement.

A. I wanted the completion bond.

Q. I would like to ask you one more time. I know you wanted the payment bond or completion bond; but tell this jury how you were going to use that contract signed by Mr. Grenadier to get it. What were you going to do?

page 123 } A. Write the bond in Mr. Grenadier's name.

Q. Were you not going to submit that contract to a bonding company, too, to show them who had the contract, in order for them to write the bond?

*Ray Rainwater.*

A. I would have to.

Q. You would have to, wouldn't you.

That's all.

Mr. de Butts: No questions.

## CROSS EXAMINATION.

By Mr. Duff:

Q. Mr. Rainwater, you were operating, at the time of your contract with Wayne Construction Company, as the Rainwater Excavation Company?

A. Yes; Rainwater Contracting Company.

Q. Rainwater Contracting Company. I see.

How many employees did you have working for you at that time, sir?

A. Only one.

Q. Sir?

A. One.

Q. Who was that?

A. Cliff Sisk.

Q. You signed a contract with Wayne Construction Company for the excavating work?

page 124 } A. Yes, sir.

Q. I believe that was August 29, 1960?

A. That's right.

Q. How did you learn, may I inquire, that this contract was available? How did you learn about it?

A. I had done previous work for Wayne Construction Company, and they advised me that this job was coming up.

Q. Did you bid on the job?

A. Yes, sir.

Q. Other contractors bid on the job also?

A. Yes, sir.

Q. Do you know, of your own knowledge, whether or not this gentleman, Mr. Grenadier, bid on the job?

A. He did not.

Q. All right, sir.

At the time that you signed the contract with Wayne, back in August of 1960, did you come to Mr. Grenadier and tell him that you were going to sign this contract?

A. No, sir.

Q. Were you under any obligation to come to him and tell him that?

*Ray Rainwater.*

A. No, sir.

Q. Had you ever come to him and told him that you were going to sign a contract on any job?

page 125 } A. No.

Q. Prior to the date of this young lad's death, had you ever told Mr. Grenadier that you were working on the Mantua job?

A. I don't recall. It was immaterial.

Q. You never felt any obligation to do that, did you?

A. No, sir.

Q. I ask you, Mr. Rainwater, Mr. Grenadier did none of the work on this job at all, did he?

A. No, sir.

Q. You did all of the work in that contract yourself?

A. That's right.

Q. Or with your employees?

A. That's correct.

Q. Did you pay the man that worked for yourself?

A. Yes, sir.

Q. Mr. Grenadier paid him nothing?

A. Nothing.

Q. I believe you described—or, let me ask you—correct me if I misquote you. Did you describe your relationship with Mr. Grenadier as an independent contractor?

A. That's right.

Q. You leased the equipment from him, did you not?

A. In effect, that's right.

page 126 } Q. Let me ask you this: Did I understand you to testify that you understood your arrangement with him to be that he would reimburse you for major repairs?

A. That's right.

Q. You do the repair and he would simply see that you were reimbursed financially?

A. That's right.

Q. Nothing unusual about that?

A. Nothing at all.

Q. Now, Mr. Rainwater, this accident happened on September 23, 1960, and you had been working on the job about three weeks at that time, or a little more?

A. That's right.

Q. Had you experienced, had you made an effort in those three weeks to get a bond?

A. Yes, I had.

Q. And you had been turned down?

*Ray Rainwater.*

A. That's correct.

Q. What was your first approach to this gentleman, to Mr. Grenadier, about getting him to sign some type of a document that would enable you to get a bond? Do you remember when that was?

A. I think it was sometime in October.

Q. As a matter of fact, you discussed this page 127 } rather thoroughly with the Wayne people first, did you not?

A. That's right.

Q. And as a further matter of fact, was it not the Wayne people that suggested that you go to Mr. Grenadier?

A. Yes, sir.

Q. There was never any intent in your mind that Mr. Grenadier would be a contractor on this job, was there?

A. No, sir; not at all.

Q. Now, may I ask you—and think carefully on this—At the time that you first spoke with Mr. Grenadier about signing the contract, he had already received it in the mail from Wayne, had he not?

A. I am not sure of that.

Q. You don't have any recollection of that?

A. It is possible that he had. I wouldn't have any way of knowing.

Q. I'm sorry?

A. I wouldn't have any way of knowing that for sure.

Q. Do you recall whether you went to see him first about it, or did he call you about it, telling you that he had received something in the mail?

A. I believe he did call me.

Q. Telling you that he had received this in the mail and wanting to know what this was all about; isn't page 128 } that it, sir?

A. That's right.

Q. That was around the middle of October?

A. Yes, sir.

Q. That was three weeks after this lad was killed; isn't that right?

A. That's right.

Q. It is at that time, then, that you went to his house and told him you just needed his signature in order to get a bond, isn't that right?

A. That's right. The contract that I had with Wayne Construction was for \$13,000, to complete the job. At the time that I bid the job and figured the price, I didn't know

*Ray Rainwater.*

a completion bond was required, which cost one per cent of the total contract price.

So I approached them after I went to work—they approached me and said, “We are going to have to have a bond.”

I said I wasn’t aware of that; I didn’t know anything about it, to begin with.

And then I tried to get one, unsuccessfully.

And then it was suggested that perhaps Mr. Grenadier would be willing to take the contract and get the bond in his name.

Q. Let me interrupt you a minute. That suggestion that you mentioned came from Wayne Construction page 129 } Company?

A. Yes, sir.

Q. Go ahead, sir.

A. So then they sent Mr. Grenadier a duplicate contract of mine, dated the same date, but they agreed that they would give me, in addition to my \$13,000 for the contract, the one per cent cost for the bond, which would be \$130; so that contract read \$13,130.

Q. That was simply a duplicate of the one that you had already signed back in August?

A. Yes, sir.

Q. Now, as a matter of fact, in the middle of October, when this situation that you have just described developed, most of the items on your contract had already been completed, had they not?

A. Practically.

Q. Finally, sir, let me ask you this:

Mr. Grenadier exercised no control over the way you did your work, did he?

A. No, sir.

Q. Did he ever come out on the job and tell you how to work?

A. No, sir.

Q. Or how to do it?

A. No, sir.

page 130 } Q. Did he ever pay you any money for doing the job?

A. No, sir.

Q. Do you know, of your own knowledge, whether Mr. Grenadier was ever paid anything by Wayne for this job?

A. Not to my knowledge.

Q. Whenever any repairs were needed on the tractor, you,

*Ray Rainwater.*

having it in your control, just went right ahead and did it?

A. I did.

Q. As a matter of fact, the thing that was wrong with the tractor on this particular day, or the bulldozer—am I correct in suggesting to you that the yoke in the master clutch had lost its pin?

A. That's the term; that is a way of saying it.

Q. What kind of a pin is this?

A. It is the pin that holds the yoke. There is a pin from the top and a pin from the bottom that controls the yoke. The yoke engages and disengages the clutch. With one pin missing, the yoke was useless.

Q. So what was done, then, was to replace the pin?

A. That's correct.

Q. He simply reimbursed you for that?

A. That's right.

Mr. Duff: No further questions. Thank you,  
page 131 } sir.

Mr. Dudley: No questions, Your Honor.

## RE-DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Mr. Rainwater, from the time Mr. Grenadier purchased this piece of machinery, or these pieces of machinery—

A. Yes, sir.

Q. —you were the only one who operated it?

A. That's correct.

Q. You had this arrangement with him before he purchased the machine, did you not?

A. Yes, sir.

Q. You got together with Mr. Grenadier, is that correct?

A. Yes.

Q. Before he purchased the machine. And you came to an agreement whereby he would make the down payment on the machine?

A. That's right.

Q. Take it in his name. You would then, as an operator, operate the machinery and make the payments on it?

A. Yes, sir. And anything I made in addition to payments would be mine.

Q. Over and above the payments was yours. You paid for the machine and he kept the title to the machine?

*Ray Rainwater.*

- A. Yes, sir.
- page 132 } Q. Now, at some time or other you had finished the payments on the machine?
- A. Yes.
- Q. He would still own it?
- A. That's correct.
- Q. If you didn't operate it, you didn't make any money off of it?
- A. That's right.
- Q. If you didn't make any money off of it, you couldn't meet the \$1,100 a month payment, could you?
- A. That's right.
- Q. So the money you got from Wayne Construction Company, \$1,100 a month of it went to pay on Mr. Grenadier's machine, didn't it?
- A. That's right.
- Q. Now, did Mr. Grenadier make any objection at all in making this payment for the repairs you made on it?
- A. No, sir.
- Q. You charged him by the hour for your labor, didn't you?
- A. I charged him less than it would cost, otherwise.
- Q. You computed the time it took to make the repair?
- A. Yes, sir.
- Q. And charged him so much for that time?
- page 133 } A. Yes, sir.
- Q. Plus what you paid for the parts?
- A. That's right.
- Q. You say that was your original understanding?
- A. Yes, sir.
- Q. That he was going to be responsible for major repairs?
- A. Yes, sir.
- Q. You submitted the bill to him and he paid it?
- A. That's right.
- Q. Insofar as the bonding company was concerned, it was your intention to try to convince that bonding company that Mr. Grenadier was the man who contracted for the job, wasn't it?
- A. It was my intention to convince the bonding company that Mr. Grenadier was an able man financially, to see that the job was paid, the bills were paid on the job.
- Q. In order to do that, you had to convince them, with this contract you got him to sign, that he was the contractor?
- A. That's right.



*Ray Rainwater.*

Q. That's right?

A. That's right.

Q. He was responsible for the work being completed and the bills paid?

A. That's right.

page 134 } Q. Mr. Grenadier was responsible for major repairs, you considered it your duty to operate the machinery in a safe way, so as not to injure it, didn't you?

A. Of course.

Q. You also considered it your duty to leave it in a safe condition?

A. Of course.

Mr. Fitzgerald: No further questions.

## RE-CROSS EXAMINATION.

By Mr. Duff:

Q. May I ask just a few more; I don't want to prolong this, but this is rather vital, I think.

Where did you get the parts for the repair of the machine, sir?

A. Alban Tractor and Equipment Company.

Q. Alban Tractor. Is it not a fact that Mr. Grenadier made the payment directly to them? Think carefully, sir. Didn't you just give him the bills and he paid the payment directly to them?

A. Not in this particular case, I don't think, in this instance.

Q. Are you sure?

A. He has paid directly for parts in some cases, and he has paid me in others. I don't know for sure.

page 135 } Q. You really, to be completely frank, you are not sure about it in this case, isn't that right?

A. No, I couldn't say for sure.

Q. Mr. Rainwater, do I understand that at the time you entered into the contract with Wayne, you did not know that there was a completion bond required?

A. That's right.

Q. I hand you what has been introduced in evidence as Defendant's Exhibit No. 1, Defendant Grenadier's Exhibit No. 1, and ask you if this is the contract that you signed with Wayne Construction Company?

A. Yes, sir.

*Ray Rainwater.*

Q. You did sign that, sir?

A. Yes, sir.

Q. Would you kindly read the next to the last paragraph to the jury?

A. "The above contract includes the cost of the payment bond in accordance with the law passed by the Assembly of Virginia, House Bill 193."

Q. You don't dispute that that was in there when you signed it?

A. I didn't know it was in there when I signed it, if this is the one that I signed.

Q. Well, I want to be sure. Do you recognize page 136 } this as the one that you signed?

A. There is a copy with my signature on it? I could identify that one.

Q. I wish we had, it, sir.

Do you have any question about this being the one that you signed, or about the one that you signed not having this language in there; or don't you know?

A. I wasn't aware of the language in the contract.

Q. All right, sir.

A. If that is the one that I signed.

Q. Whatever you signed, whether it is that one or another one, let me ask you: Did you actually take it to a bonding company and attempt to get a bond?

A. Yes, sir.

Q. Prior to this accident?

A. Yes, sir.

Mr. Duff: No further questions. Thank you, sir.

Mr. Fitzgerald: Just one more.

FURTHER RE-DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Mr. Duff, in response to one of his questions, you said that Mr. Grenadier had made these payments direct a number of times on the repairs and sometimes to you. Had there been other occasions when Mr. Grenadier paid page 137 } for the repairs?

A. Yes, sir. Not on this equipment; on other pieces of equipment.

Q. Not on this piece of equipment. It was your arrangement on other pieces of equipment, too?

A. Yes, sir.

*Ray Rainwater.*

Q. Would you tell the jury whether there was a piece of equipment that you had at the same time as—

A. It was a front-end loader.

Q. Using it at the same time?

A. Yes, sir.

Q. Had the same arrangement on that piece of equipment as you did on this?

A. That's correct.

Q. He had purchased it in his name, made the down payment; you were making the payments on it?

A. That's right.

Q. Title was in his name?

A. Yes, sir.

Q. He was responsible for major repairs?

A. Yes, sir.

Q. You for maintenance?

A. Right.

Q. Could you tell the jury on the piece of equipment, since you entered into this arrangement with Mr.  
page 138 } Grenadier, approximately how much money he has paid on repairs?

A. I couldn't, offhand.

Q. You don't know?

A. No, I couldn't tell you exactly.

Q. Do you know of any other specific repair he has made to this machinery?

A. Yes, sir; there was some welding necessary. Some welding that was necessary.

Q. Welding. He paid for that?

A. Yes, sir.

Mr. Duff: You didn't consider yourself working for Mr. Grenadier, did you?

The Witness: No, sir.

By Mr. Fitzgerald:

Q. When you made the repairs on the machinery and he paid for them, you were working for him then?

A. It was an arrangement for getting the machinery repaired and running again at the least possible cost.

Q. It was his obligation to get it repaired?

A. Yes, sir.

Q. When you were doing it, you were doing it for him because he paid you for it; right?

A. I suppose so.

*Ray Rainwater.*

The Court: Mr. Rainwater, were you free to  
page 139 } get any employment you wanted to on any jobs  
with this equipment?

The Witness: Yes, sir.

The Court: Did you have any arrangement with Mr.  
Grenadier about this before you took it over?

The Witness: No, sir.

The Court: Did you pay him any part of your proceeds  
for these jobs?

The Witness: No, sir; only what I agreed to pay him.

The Court: Just this monthly payment for the machine?

The Witness: Yes, sir.

The Court: All right.

By Mr. Fitzgerald:

Q. Were you going to continue those monthly payments  
after the machine was paid for?

A. We didn't go that far with this.

Q. You don't know what was going to happen at that  
point? Had you discussed it?

A. I could make \$600, approximately, a month, working  
for a salary; approximately. This way, with good luck and  
working steady, I could make two or three thousand a month.  
It wasn't a bad deal for me.

Q. I understand that.

You were making the payments on the ma-  
page 140 } chinery?

A. Yes, sir.

Q. When you had completed making those payments were  
you going to pay anybody then?

A. Well, I would continue to pay him for the use of the  
equipment.

Q. How much?

A. That wasn't stipulated.

Q. No agreement at that time?

A. No, sir.

Q. Didn't know how much you were going to pay him?

A. No, sir.

Mr. Fitzgerald: No further questions.

FURTHER RE-CROSS EXAMINATION.

By Mr. Duff:

Q. May I ask another question:

*G. T. McNab.*

The amount that you were paying him, regardless of what it was, was for your use of the machine, wasn't it?

A. That's correct.

Q. It was rent?

A. That's correct.

Mr. Duff: No further questions.

Mr. Fitzgerald: No further questions of this witness.

(Witness steps down.)

page 141 }

\* \* \* \* \*

G. T. McNAB,  
having been first duly sworn, was examined and testified upon  
his oath as follows:

DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. State your name.

A. Detective G. T. McNab.

Q. Are you a detective with the Fairfax County Police Force?

A. That's correct, sir.

Q. Were you so employed on September 23, 1960?

A. Yes, sir.

Q. Were you called to investigate an accident where Donald Smith, a nine-year-old boy, was killed?

A. Yes, sir.

Q. In your investigation of that accident, did you have occasion to talk to the defendant, Mr. Rainwater?

A. Yes, sir, I did.

Q. Do you know whether or not you talked to him on the day of the accident?

A. Yes, I did.

Q. Would you just tell the jury what your  
page 142 } conversation and what Mr. Rainwater's conver-  
                  sation was with you in regard to the happening  
of the accident?

A. I was called by Lieutenant Norfolk and Officer Downey. They had been over there shortly after the accident occurred. I met them at Merrifield and, because a juvenile was in-

*G. T. McNab.*

volved, and I am a Juvenile Detective, they requested I go in and make an investigation.

I went over there to the site where the accident occurred. At the site was the D-7 Caterpillar tractor and this scraper, or pan, as they call it. At the tractor was Mr. Rainwater.

Q Would you tell the jury approximately what time this was?

A. I would say when I got there, it was possibly quarter to six—five-thirty, or something.

Q. Go ahead; tell the jury what happened.

A. Mr. Rainwater was the only one at the scene. He was, as I recall, working on the tractor. I asked him what happened. He told me that a boy had been crushed there in the scraper or the pan behind the tractor. He said that he had left the pan in the air, in an operating position; that he should have left it lay on the ground where no one could have gotten hurt.

He said he always did it in the past; but he  
page 143 } said he went to get some parts at the store, to  
work on the tractor, and when he came back this  
accident had already occurred.

I got the width of the tractor and the approximate height and so on from him. He told me how the machine operated.

I asked him if the pan could have accidentally closed on this youngster and he said it was impossible for that pan to come shut unless somebody hit the lever which operates the pan that is on the tractor.

Q. Detective McNab, at that point did you conduct an investigation to try to find out who, if anybody, or who did, if anybody, touched the lever?

A. Yes, sir; I did.

Q. Were you able to locate such a person?

A. I talked to several of the children in the neighborhood, I would say six-seven-eight-year-olds. I got conflicting stories as to what happened, which is natural with children that age.

Q. Just tell the jury whether or not, from that investigation, in talking to those children, whether you were able to determine who, if anybody, touched one of those levers?

A. I was not able to determine.

Mr. Fitzgerald: No further questions.

page 144 }

\* \* \* \* \*

*G. T. McNab.*

CROSS EXAMINATION.

\* \* \* \* \*

page 150 } By Mr. Slenker:

\* \* \* \* \*

page 151 } Q. Officer, is it not a fact, in your discussions with Mr. Rainwater, he said that he was the excavating contractor, did he not, on this job?

A. He said he was working there doing subcontract work.

Q. Did he say he was working under a contract with the Wayne Construction Company?

A. Yes, sir.

Q. He did not say he was working for Mr. Grenadier or Herman Grenadier, did he?

A. As I recall, those names were not mentioned to me. I have in the report who he said he was working for and what job and so on.

As I recall—

Q. Mr. Grenadier's name never came into the conversation?

A. Not that I recall. I don't remember his name at all. I asked him who owned the equipment, or who the equipment was from. He gave me that information.

Mr. Slenker: Thank you, sir.

RE-DIRECT EXAMINATION.

By Mr. Fitzgerald:

Q. Who did he say owned the equipment? Do you want to refer to your report?

A. If I can refer to my report.

I have in my notes here—

page 152 } Q. What do you have?

A. Leased equipment from Mr. Herman Grenadier, 2702 King Street, Alexandria, King 9-7722; and was doing the excavating work under contract for Wayne Construction Company.

\* \* \* \* \*

page 171 }

\* \* \* \* \*

WILBUR SMITH,

having been previously duly sworn, was recalled and, upon examination, testified further upon his oath as follows:

DIRECT EXAMINATION. (Continued)

By Mr. Fitzgerald:

\* \* \* \* \*

page 174 }

\* \* \* \* \*

Q. What did Mr. Rainwater have to say to you?

A. Well, I guess he was about as broken up about it as I was, and he said that the machine had broken  
page 175 } down and that he had left it to go get some parts to repair it; and he said, ordinarily he would leave it resting on the ground, but at that particular time, for some reason he didn't know why, he guessed he was just anxious to get the parts, he left it in a, instead of leaving it rest on the ground, he left it in an upright position. That's about all the conversation I had.

He said something about, I believe he said he had a boy of his own and he knew how I felt, or something like that. I am not positive.

\* \* \* \* \*

page 179 }

CROSS EXAMINATION.

By Mr. de Butts:

\* \* \* \* \*

page 180 }

\* \* \* \* \*

Q. Are you sure in your own mind somebody  
page 181 } was there with Donald?

A. From what I have been able to find out since, and the way the machine operates, I believe there was somebody there. But when I talked to people, they just wouldn't even talk to me about it, so I figure somebody probably knows, but I don't.



\* \* \* \* \*

page 230 } In Chambers.

\* \* \* \* \*

page 233 }

\* \* \* \* \*

The Court: Next is the motion on behalf of the defendant, Mr. Grenadier, argued by Mr. Duff yesterday.

With regard to Mr. Grenadier, there is no contention that he was guilty of primary negligence. The contention about Mr. Grenadier was, that Mr. Rainwater was an agent and acting as an agent of Mr. Grenadier in his work, and that any negligence of Mr. Rainwater would be imputed to Mr. Grenadier—I have reviewed the arguments and the evidence from the standpoint of a joint venture, and it seems there is no evidence to back up the situation of a joint venture, inasmuch as there was no sharing of profits.

The entire evidence was everything that Rainwater got from his subcontract with Wayne went to Rainwater, who was liable only to make payments on the machine which he was using, which belonged to Mr. Grenadier.

With regard to any other ground of agency, I also do not feel that an agency has been established as far as Mr. Grenadier is concerned. The evidence is clear that he had no control over Mr. Rainwater on this particular job, or no right to control it; that in fact Mr. Rainwater bid on the job without telling him, or feeling that he had to tell him anything about the bid. He was free to accept any work he wanted to.

Mr. Grenadier received no money that Mr. Rainwater made. Mr. Rainwater's only obligation was to pay so much a month toward the cost of the machine while he was working.

There are two aspects of the Grenadier situation. One is the contract which he signed, according to the evidence, in October. This was after the accident had occurred, and the work, most of the work, had already been done by Rainwater; and the only evidence I have is that the contract was signed for the sole purpose of enabling Mr. Rainwater to get a bond to do his work.

Mr. Grenadier was not intended to be the contractor. In fact, he did not do any of the work and was not on the job at the time of the accident.

I don't believe that the contract by itself shows that

Mr. Grenadier, even though it occurred after the accident, shows Mr. Grenadier was either a joint venturer, or that Mr. Rainwater was acting as his agent at the time of the accident, because there again we get back to the question of whether he had the right to control Mr. Rainwater's actions or whether Mr. Rainwater was an independent contractor for someone else; and I think there is no agency shown on that.

The other aspect of the Grenadier party is the page 235 } question of the repair contract. Apparently there was oral agreement that Mr. Grenadier would pay for major repairs and also for the time of Mr. Rainwater while it was repaired. To my mind, that was an agreement between the parties and binding on them as far as the ownership and use and repair of the machine was concerned, but I still do not believe that that establishes agency relation or makes Mr. Rainwater the agent of Grenadier at the time Mr. Rainwater did the work, because, again, there was no control by Mr. Grenadier over the work. He did it for a price for somebody else.

For those reasons, the Court will sustain the motion to strike out the defendant, Grenadier, and motion, if made, to grant summary judgment.

Mr. Duff: Motion is so made.

\* \* \* \* \*

PLAINTIFF'S EXH. NO. 1.

WAYNE CONSTRUCTION COMPANY, INC.

General Contractors

P. O. Box 9855, Rosslyn Station  
Arlington, Virginia

JAckson 7-8804

August 29, 1960.

Herman Grenadier  
2702 King Street  
Alexandria, Virginia

Re: Mantua Elementary School

Gentlemen:

We hereby accept your proposal in the amount of \$13,130.00 for furnishing all labor, plant and materials necessary for and incidental to the completion of the excavating and grading for

the above reference project in strict accordance with plans, specifications and Addenda 1 thru 4 as prepared by Dwight G. Chase, Architect. It is understood that this contract is to include the following:

1. Clearing of site
2. Stripping and storing of top soil
3. General site excavation
4. General site fill
5. Building excavation
6. Interior building fill and backfill of walls
7. Backfill of exterior walls
8. Disposal of excess dirt if required
9. Furnishing of additional fill dirt from job site if required
10. Void

It is also understood that this contract is to provide sufficient grades for all curb and gutter, macadam walks and sidewalks. Also fine grading of entire project in accordance with specifications. All engineering and grades are to be provided by this office.

We are requesting that you forward two copies of Insurance Certificates for our files.

The above contract includes the cost of a payment bond in accordance with a law passed by the Assembly of Virginia, House Bill 193.

Kindly sign and return one copy for our records.

Yours very truly,

WAYNE CONSTRUCTION  
COMPANY, INC.,  
ARTHUR R. MYERS, JR.

Accepted:

By .....  
Date .....

.....

DEF. GREN. EXH. NO. 1.

C. V. D.

WAYNE CONSTRUCTION COMPANY, INC.

General Contractors

P. O. Box 9855, Rosslyn Station  
Arlington, Virginia

JAckson 7-8804

August 29, 1960.

Rainwater Excavating Company  
433 Vista Drive  
Falls Church, Virginia

*Re:* Mantua Elementary School

Gentlemen:

We hereby accept your proposal in the amount of \$13,000.00 for furnishing all labor, plant and materials necessary for and incidental to the completion of the excavating and grading for the above reference project in strict accordance with plans, specifications and Addenda 1 thru 4 as prepared by Dwight G. Chase, architect. It is understood that this contract is to include the following:

1. Clearing of site
2. Stripping and storing of top soil
3. General site excavation
4. General site fill
5. Building excavation
6. Interior building fill and backfill of walls
7. Backfill of exterior walls
8. Disposal of excess dirt if required
9. Furnishing of additional fill dirt from job site if required

It is also understood that this contract is to provide sufficient grades for all curb and gutter, macadam walks and sidewalks. Also fine grading of entire project in accordance with specifications. All engineering and grades are to be provided by this office.

We are requesting that you forward two copies of Insurance Certificates for our files.

The above contract includes the cost of a payment bond in

accordance with law passed by the Assembly of Virginia,  
House Bill 193.

Kindly sign and return one copy for our records.

Yours very truly,

WAYNE CONSTRUCTION  
COMPANY, INC.,  
ARTHUR R. MYERS, JR.

Accepted:

.....  
.....

A Copy—Teste:

H. G. TURNER, Clerk.

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