

Record No. 5882

In the
Supreme Court of Appeals of Virginia
at Richmond

V. N. GREEN & COMPANY, INC.

v.

DOUGLAS M. THOMAS, ET AL.

FROM THE CIRCUIT COURT OF SMYTH COUNTY

RULE 5:12 BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

NOTICE TO COUNSEL

This case probably will be called at the session of court
to be held NOV 1964

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5882

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 24th day of April, 1964.

V. N. GREEN & COMPANY, INC. Plaintiff in error,
against

DOUGLAS M. THOMAS AND LAIRE T. THOMAS,
 Defendants in error.

From the Circuit Court of Smyth County
Thomas L. Hutton, Judge

Upon the petition of V. N. Green & Company, Inc., a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Smyth County on the 21st day of November, 1963, in a certain motion for judgment then therein depending wherein Douglas M. Thomas and another were plaintiffs and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of two thousand dollars, with condition as the law directs.

RECORD

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page 1]

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MOTION FOR JUDGMENT

*To: Registered Agent: A. C. Eppsm Mutual Building
Richmond 19, Virginia*

I.

THAT the plaintiffs are the owners of a certain tract or parcel of land with a dwelling house thereon, lying and being in the Town of Marion, on the North side of Interstate Highway No. 81 in Smyth County, Virginia and were the owners of said property during the times mentioned herein.

II.

THAT in and about December, 1961 defendant, while engaged in excavation on land in the vicinity of the plaintiffs' land and dwelling house, exploded large quantities of explosives; that defendant thereby produced violent concussions and vibrations of the earth which shook the said land and dwelling house of the plaintiffs and caused great injury and damage to the property of the plaintiffs and particularly the dwelling house located on said land and occupied by the plaintiffs; that the plaintiffs on numerous occasions cautioned agents of the defendant concerning said blasting operations.

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III.

That the defendant knew the area in which they set off the large quantities of explosives was thickly settled and that the quantities of explosives so used would likely cause damage to the plaintiffs who were residing in the immediate area of the blasting operations carried on by the defendant. Yet notwithstanding this knowledge, the defendant or his agents set off the large quantities of explosives without first properly ascertaining the effect of the explosions on the property of the plaintiffs.

IV.

That by reason of the foregoing claim plaintiffs have been damaged in the sum of FOUR THOUSAND (\$4,000.00) DOLLARS.

WHEREFORE, for the reasons aforesaid, judgment for the sum of FOUR THOUSAND (\$4,000.00) DOLLARS together with costs, is asked at the hands of said Court against the defendant.

DOUGLAS M. THOMAS
AND
LAIRE T. THOMAS
By Counsel

J. AUBREY MATTHEWS
MARION, VIRGINIA
Counsel for Plaintiffs

Filed this 1 day of February 1963

LLOYD E. CURRIN, Clerk

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DEMURRER

Comes now the Defendant, V. N. Green & Company, Inc., and says that the motion for judgment in this case is not sufficient in law upon which to base a recovery against this Defendant, and demurs to the same.

V. N. GREEN & COMPANY, INC.
By Counsel

G. P. Young, P.D.

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Filed this 23 day of February 1963

LLOYD E. CURRIN, Clerk

page 4]

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ORDER

This proceeding came on this day to be heard upon the Demurrer filed by V. N. Green Company, Inc., by Counsel; the Court having heard the argument of Counsel indicated that the Court would order plaintiffs to file a Bill of Particulars in this proceeding; thereupon defendant, by Counsel stated that he did not move for a Bill of Particulars.

Upon consideration of which the Court doth overrule the Demurrer and it is ordered that the defendant shall file his Answer or Grounds of Defense within Fifteen Days from this date; to which action of the Court in overruling said Demurrer, defendant by Counsel excepts.

Enter this the 27th day of February, 1963.

T. L. H., Judge

SEEN :

J. AUBREY MATTHEWS
Counsel for Plaintiffs

SEEN AND EXCEPTED TO :

G. P. YOUNG
Counsel for Defendant

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RESPONSIVE PLEADING OF THE DEFENDANT

The Defendant, for its responsive pleading to the motion for judgment in this action, says:

(1)

That it neither admits nor denies the allegations of Paragraph 1 for lack of knowledge about the ownership of the property in question.

(2)

The allegations of Paragraph 2 of the motion are denied.

(3)

The allegations of Paragraph 3 of the motion are denied.

(4)

The allegations of Paragraph 4 of the motion are denied; the Defendant denies that the Plaintiff received damages in the amount of Four Thousand Dollars (\$4,000.00) or any other amount.

(5)

The Defendant denies that it caused damage to the Plaintiff's property as the result of blasting or from any other cause.

(6)

The Defendant alleges that this action cannot be
page 6] maintained because at all times alleged in the
motion for judgment this Defendant was acting
in execution of a contract it made with the Commonwealth
of Virginia for the construction of Interstate Highway No. 81;
that the blasting complained of was done in the lawful, neces-
sary and usual execution of its contract with the Common-
wealth at all times and in accordance with its contract with
the Commonwealth and that it is entitled to the immunity
of the Commonwealth of Virginia from actions for torts.

V. N. GREEN & COMPANY, INC.
By Counsel

G. P. Young, P.D.

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Filed this 12th day of March, 1963

Teste: NANCY S. CROUSE, Deputy Clerk

page 7]

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BILL OF PARTICULARS

This day came the plaintiffs, by counsel and as their particulars state that they intend to rely upon the allegations contained in their original Motion For Judgment and in addition thereto files this Bill of Particulars:

1.

That from January, 1961 through March, 1962 the defendant in blasting a rock ledge located a short distance in front of the plaintiffs' residence in the Town of Marion, Smyth County, Virginia, on lands owned by the Commonwealth of Virginia and in the construction of Interstate 81, said blasting taking place at a location to the South of the plaintiffs' residence damaging the plaintiffs' residence in the amount of Four Thousand (\$4000.00) Dollars. The main damage done to the plaintiffs' residence was done between January, 1961 and March, 1962 although there was blasting after that date. The damage consisted of cracking and buckling of the foundation to plaintiffs' residence, cost of repairing amounting to \$1,197.75; cracking and breaking the plaster throughout the plaintiffs' residence, cost of repairing amounting to \$200.00; damage to the roof of the plaintiffs' residence causing the same to leak and replacing said roof, cost amounting to \$500.00; seven window panes being shaken from their sashes and broken, cost of replacing and repairing amounting to \$7.35; that in addition to the cost of repairing and patching, the plaintiffs' residence received permanent damage and decreased in value as a result of said damage in
page 8] amount of \$2,194.95; that in addition thereto plaintiffs were unable to complete construction of plaintiffs' home because defendant requested plaintiffs to delay in completing brick work to minimize said damages, which plaintiffs agreed to delay and did delay.

2.

Plaintiffs on numerous times and occasions contacted V. N. Green Company, Inc. through its agents and employees concerning the blasting in front of their residence and requested defendant to cease and desist said *plasting* operation in the manner and method performed by defendant.

3.

The plaintiffs claim that V. N. Green Company, Inc. is liable for the aforesaid damages because blasting is intrinsically dangerous and extraordinarily hazardous and that the same was carried on a short distance from the plaintiff's residence, which fact the said V. N. Green Company, Inc. knew and the said V. N. Green Company, Inc. is liable for damages to the plaintiffs' residence whether or not it was negligent in performing said blasting operation within a short distance of the plaintiffs' residence and plaintiffs claim that they are entitled to recover from the defendant for said damages.

4.

Plaintiffs further claim that V. N. Green Company, Inc. in said blasting operations aforesaid, threw rocks and stones on their premises, said rocks and stones striking the roof of plaintiffs' residence causing damage and one stone being hurled through the window of the plaintiffs' residence breaking said window.

5.

Plaintiffs further allege that the blasting operation was in the entire control of the defendant, V. N. Green Company, Inc. and the damage was of such nature and character that said damage would not have occurred if the blasting operation had been carried on in a proper manner and that
page 9] the negligence and carelessness of the defendant, particularly the negligent and careless way in which the blasting operation was carried on caused the damage to the plaintiffs' residence through concussion, vibrations and hurling of stones *on to* and into plaintiffs' residence and plaintiffs are entitled to recover as a result of the negligence of the said defendant for all of the damages sustained in amount of Four Thousand (\$4,000.00) Dollars.

6.

Plaintiffs further allege that the blasting operations were on lands owned by the Commonwealth of Virginia and in the exclusive control of the defendant and that the plaintiffs are further entitled to recover their damages under the doctrine of *res ipsa loquitur*.

THE PLAINTIFFS, THEREFORE, For the foregoing

reasons claim damage of the defendant in the amount of
FOUR THOUSAND (\$4,000.00) DOLLARS.

DOUGLAS M. THOMAS
AND
LAIRE T. THOMAS
By Counsel

J. AUBREY MATTHEWS
Counsel for Plaintiffs

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Filed this 12 day of November 1963

LLOYD E. CURRIN, Clerk

page 10]

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AMENDED BILL OF PARTICULARS

This day came the plaintiffs, by counsel, and asked leave
to amend their Bill of Particulars heretofore filed, as follows:

1.

That paragraph 1 of the Bill of Particulars heretofore filed
be amended and changed to read as follows: "That from
November, 1960 through March, 1962" as the dates said
blasting took place.

DOUGLAS M. THOMAS
AND
LAIRE T. THOMAS
By Counsel

J. AUBREY MATTHEWS
Counsel for Plaintiffs

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Filed this 12 day of November 1963

LLOYD E. CURRIN, Clerk

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GROUNDS OF DEFENSE

For its Grounds of Defense in this action the Defendant, by Counsel, alleges that it intends to rely upon the allegations of its responsive pleading to the motion for judgment, and in addition thereto, the following:

(1)

The Defendant denies the allegations of Paragraph 1 of the Bill of Particulars except that it admits that blasting about which the Plaintiffs complain was done in the performance of a contract made between the Defendant and the Commonwealth of Virginia for the construction of a portion of Interstate 81 and denies that it caused damage to the Plaintiffs' property.

(2)

The allegations of Paragraph 2 of the Bill of Particulars are denied.

(3)

The Defendant denies that blasting is intrinsically dangerous and extraordinarily hazardous if conducted in a proper manner and alleges that all of the blasting done by the Defendant in the performance of its contract with the Commonwealth was conducted in a proper and customary manner. This Defendant denies that it is liable to the Plaintiffs for damages whether or not it was negligent in the performance of its said contract, but alleges that it is not liable to the Plaintiffs unless it was guilty of negligence in the performance of said contract.

page 12]

(4)

For response to the allegations of Paragraph 4 of the Bill of Particulars, this Defendant says that if any rocks or stones were thrown on the Plaintiffs' premises this Defendant did not know it and calls for strict proof of the same.

(5)

This Defendant denies the allegations of Paragraph 5 and alleges that it was not guilty of negligence in blasting in the performance of its contract and denies that there was damage caused to the Plaintiffs' property by reason of concussion, vibration or otherwise because of anything it did or did not do. This Defendant denies that by reason of negligence on its part the Plaintiffs were caused damage in the amount of Four Thousand Dollars (\$4,000.00) and alleges that if any damage was caused to the Plaintiffs by reason of rocks being thrown on the Plaintiffs' property, strict proof of the same is required.

(6)

This Defendant admits that the blasting it did in performance of its contract with the Commonwealth was on lands owned by the Commonwealth, but it denies that the Plaintiffs are entitled to recover under the doctrine of *res ipsa loquitur*.

(7)

This Defendant alleges that all work done by it under its contract with the Commonwealth for the construction of a portion of Interstate 81, including blasting, was done in the usual and customary manner; that it was not negligent in any respect and that only such blasting was done as was necessary to grade the road as required by its contract.

(8)

This Defendant alleges that all work done by it
page 13] on this portion of Interstate Highway 81 was
done under a contract with the Commonwealth
of Virginia; that the work was done in accordance with the
plans and specifications of the Commonwealth; that only such
blasting was done as was required to be done by said plans
and specifications in order to grade the highway and com-
plete the road; that it used the customary, usual and proper
means and methods of performing the contract and that it
was guilty of no negligence and is entitled to the immunity
of the Commonwealth of Virginia.

V. N. GREEN & COMPANY, INC.
By Counsel

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G. P. Young, P.D.

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Filed this 12 day of November 1963

LLOYD E. CURRIN, Clerk

page 14]

Granted T. L. H.

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INSTRUCTION NO. 1

The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant through its agents, servants or employees, carried on blasting operations in the vicinity of the plaintiffs' property and if you further believe from a preponderance of the evidence that the damage complained of was the direct and proximate result of the blasting by the defendant through its agents, servants, or employees, then you shall find your verdict for the plaintiffs, Douglas M. Thomas and Laire T. Thomas.

page 15]

Granted T. L. H.

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INSTRUCTION NO. 2A

The Court instructs the jury that if you believe from the evidence in this case that the plaintiffs are entitled to recover for the damage to their property, the measure of damage to their property would be the difference between the fair market value of the property immediately before the damage thereto and the fair market value of the property immediately after the damage. In ascertaining the damages if any you may take into consideration the cost of the necessary material and labor to repair the property. The burden is on the plaintiffs, Douglas M. Thomas and Laire T. Thomas to prove such damages to the satisfaction of the jury by a preponderance of the evidence.

page 16]

Granted T. L. H.

INSTRUCTION F.

The Court instructs the jury that no burden rests upon the defendant to introduce any evidence or to prove anything

unless the Plaintiffs, by competent evidence, have made a *prima facie* case of liability, and if the jury, on consideration of all the evidence in the case and the instructions of the Court, believe it is just as probable that the Defendant is not liable as that it is, your verdict must be for the Defendant.

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page 18]

Refused T. L. H.

C.

The Court instructs the jury that your verdict must not be based on or influenced by sympathy or prejudice or anything except the evidence from the witness stand, and the instructions, and the jury cannot guess or speculate as to whether the Defendant may or may not have been negligent or may or may not have been responsible for the damages claimed but on the contrary the Plaintiffs must prove by a preponderance of the evidence that the Defendant was negligent and that such negligence was the proximate cause of the alleged injury claimed by the Plaintiffs and unless the Plaintiffs have done this it is the duty of the jury to find a verdict for the Defendant.

page 19]

Refused T. L. H.

A.

The Court instructs the jury that in this case they can award the plaintiffs damages only for the injuries sustained by them due to rocks being thrown on or into their house.

page 20]

Refused T. L. H.

B.

The Court instructs the jury that this is an action brought by the Plaintiffs against the Defendant in which the Plaintiffs seek to recover money damages for alleged injuries to their property; that in this case the fact that there was injury to the Plaintiffs' property is not sufficient to create any liability on the defendant, but the Plaintiffs must go further and prove by a preponderance of evidence three things: first, that there was negligence on the part of the Defendant;

second, that such negligence was the proximate cause of the damage claimed to have been sustained by the Plaintiffs; and third, the amount of such damage with reasonable certainty; and unless these three things have been proven by a preponderance of evidence the jury must find a verdict for the Defendant.

page 21] Refused T. L. H.

D.

The Court instructs the jury that the Defendant was acting under a contract with the Commonwealth of Virginia in the building of the highway; that in so doing it had the right to use explosives and that the use of explosives creates no presumption that the Defendant is liable, and unless the Plaintiffs have proven by a preponderance of the evidence that the Defendant was guilty of negligence in the performance of its contract, that is, that the Defendant failed to use reasonable care in the circumstances existing, the jury will find for the Defendant.

page 22] Refused

E.

The Court instructs the jury that reasonable care is that degree of care which an ordinarily prudent person in the same kind of business and conducting an operation similar to the road-building work then being conducted by the Defendant, would have used.

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In the Circuit Court of the County of Smyth on Thursday, the 14th day of November in the Year of our Lord, Nineteen Hundred and Sixty-Three.

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This day came the plaintiffs in person and by their attorney, J. Aubrey Matthews, came also the defendant by its

attorneys, George P. Young, S. B. Campbell, Francis M. Hoge; came also Mrs. Eunice Sprinkle, Court Reporter, who was duly sworn to take down and transcribe the proceedings of this issue.

Thereupon a panel of thirteen persons was made up and completed, who were selected by lot from the panel summoned for the trial of cases at this term of Court, who were duly examined and found free from legal exceptions and qualified in all respects to serve as jurors in the trial of this case. Thereupon the plaintiffs, by counsel, and the defendant, by counsel, having alternately each stricken from the said panel three of said jurors, the remaining seven to-wit: Edward Bullins, James T. Moore, Fred D. Conner, David C. Buchanan, Albert Worley, Roy L. Johnson, and Fred A. St. John constituted the Jury for the trial of this issue, who were sworn to well and truly try the issue joined between Douglas M. Thomas et al, plaintiff, and V. N. Green Company, defendant. Thereupon evidence was introduced on behalf of the plaintiffs and when the plaintiffs had announced through

page 26] with their evidence in chief, the defendant, by its counsel, out of the presence of the jury, tendered the Plaintiffs Thirteen Dollars and Seventy-five Cents (\$13.75) and costs in full for damages alleged to have been caused to Plaintiffs by a stone or stones cast on their property, which tender the Plaintiffs declined. Whereupon the Defendant moved the Court to strike the Plaintiffs' evidence except as to the damage of Thirteen Dollars and Seventy-five Cents (\$13.75) which motion the Court overruled and the Defendant excepted. Whereupon evidence was introduced on behalf of the Defendant, upon the conclusion of which the Defendant renewed its motion to strike the Plaintiffs' evidence except as to the damage of Thirteen Dollars and Seventy-five Cents (\$13.75), which motion the Court again overruled and the Defendant excepted. And the jury, having received instructions of the Court and heard argument of counsel, retired to their room and after a time returned the following verdict:

"We the jury have reached a verdict in favor of the Plaintiffs, Douglas M. Thomas and Laire T. Thomas, and fix the amount of damages at \$1500.00, Fred D. Conner, Foreman."

Whereupon the Defendant moved the Court to set aside the verdict and enter judgment *non obstante* for the Defendant except as to the Thirteen Dollars and Seventy-five Cents (\$13.75), for reasons assigned in writing; and the Court

ordered the Defendant to assign its reasons for the motion in writing forthwith. And the Court not now being advised of its opinion doth take time to consider.

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MOTION

The Defendant, by Counsel, moves the Court to set aside the verdict and enter judgment for the Defendant *non obstante* on the following grounds:

(1) The Court erred in overruling the Defendant's motion to strike the evidence of the Plaintiffs.

(2) The Court erred in ruling that the Defendant while constructing a portion of Interstate 81 for the Commonwealth of Virginia in accordance with the plans and specifications, was liable to the Plaintiffs irrespective of negligence on the part of the Defendant.

(3) The Court erred in giving improper Instructions 1 and 2-A on behalf of the Plaintiffs, being all of the instructions given for the Plaintiffs.

(4) The Court erred in refusing proper instructions offered by the Defendant, being Instructions A, B, C, D, E.

V. N. GREEN & COMPANY, INC.
By Counsel

G. P. Young, P.D.

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Filed this 16 day of November 1963

LLOYD E. CURRIN, Clerk

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ORDER

This case came on this day to be heard upon the motion of the defendant V. N. Green Company, Inc. to set aside the

verdict of the jury heretofore rendered in favor of the plaintiffs, Douglas M. Thomas and Laire T. Thomas and enter judgment on behalf of the defendant, V. N. Green Company, Inc. *non obstante*.

It appearing to the Court that the grounds assigned in writing in said motion constitute the same assignments as made during the trial of this issue as will be shown by the Reporter's transcript, and the Court having now maturely considered said motion doth overrule the same.

Whereupon it is ordered that Douglas M. Thomas and Laire T. Thomas do have and recover the sum of Fifteen Hundred (\$1500.00) Dollars, together with their costs in their behalf expended, together with interest from the 13th day of November, 1963 from the defendant, V. N. Green Company, Inc. to which action of the Court in overruling said motion and rendering judgment for plaintiffs, the defendant, by counsel excepts.

The defendant, V. N. Green Company, Inc. having indicated its intention to apply for a writ of error, it is further ordered that execution on the judgment herein rendered be stayed for a period of 90 days and thereafter until such petition is acted on by the Supreme Court of Appeals provided the defendant, or some other person, page 30] within 30 days, execute bond with surety approved by the Clerk of this Court in the penalty of \$2000.00, conditioned according to law to satisfy the judgment, or such part as may be affirmed, and also to pay all damages, costs and fees which may be awarded against or incurred by petitioner in the Supreme Court of Appeals and all actual damages incurred in consequence of the *superseas*.

Enter this 21st day of Nov. 1963.

T. L. H., Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

The Defendant, V. N. Green & Company, Inc., hereby gives notice that it will present to the Supreme Court of Appeals of Virginia a petition for a writ of error and *supersedeas* to

V. N. Green & Company, Inc. v. Douglas M. Thomas, et al. 17

the judgment entered against it on the 21st day of November, 1963, in favor of Douglas M. Thomas and Laire T. Thomas, and assigns the following error:

(1) The Court erred in overruling the Defendant's motion to strike the evidence of the Plaintiffs.

(2) The Court erred in overruling the Defendant's motion to set aside the verdict and enter judgment for the Defendant *non obstante*.

(3) The Court erred in holding that the Defendant was an insurer and was liable to the Plaintiffs irrespective of negligence.

(4) The Court erred in giving improper instructions for the Plaintiffs.

(5) The Court erred in refusing proper instructions for the Defendant.

V. N. GREEN & COMPANY, INC.
By Counsel

G. P. Young, Counsel

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Filed this 23 day of December 1963

LLOYD E. CURRIN, Clerk

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STENOGRAPHIC REPORT of all the testimony, together with the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and other incidents of the trial of the case of *Douglas M. Thomas and Laire T. Thomas, Plaintiffs*, vs. *V. N. Green Company, Inc., Defendants*, tried at Marion, Virginia, on November 13, 1963, before the Honorable T. L. Hutton, in the Circuit Court of the County of Smyth, Virginia.

APPEARANCES: J. Aubrey Matthews, Esq.,
Marion, Virginia,
Counsel for Plaintiffs;

Douglas M. Thomas:

page 2] Stuart B. Campbell, Sr., Esq.

George P. Young, Esq.
 of
Campbell & Campbell
Wytheville, Virginia; and

Francis M. Hoge, Esq.
Marion, Virginia,
Counsel for Defendant.

Marion, Virginia
November 13, 1963
9:00 a. m.

The Plaintiffs and Defendant announced ready for trial.

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page 7] DOUGLAS M. THOMAS,
 one of the Plaintiffs, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

By Mr. Matthews:

Q. State your name please?

A. Douglas M. Thomas.

Q. Mr. Thomas, are you the owner of a house and lot in Marion together with your wife?

A. Yes, sir.

Q. Where is that property located?

A. 941 Sebert Street.

Q. Could you tell the Court and jury where Sebert Street is in Marion?

A. Well, you go out Church Street like you're going up to the Roundhill Cemetery, and on the right of the road it is at the top of the hill.

Q. You and your wife are the owner of this property?

A. Yes, sir.

Q. Mr. Thomas, did you own this property in November of 1960?

A. Yes, sir.

Douglas M. Thomas.

page 8] Q. When did you build your home over there?
A. I started it in 1960 and I finished it in 1961.

Q. When did you begin it in 1960?

A. About this time of year in 1960.

Q. Now, would you describe your house to the jury?

A. It is 44 feet long and 33 feet wide, three bedrooms, livingroom, diningroom and kitchen, and a full sized basement, and a car port on the end.

Q. What type of construction is it?

(Witness hesitates.)

Q. What is it constructed of?

A. The foundation is concrete block, and the footing is Ellis' Ready Mix.

Mr. Young: The foundation is what, sir?

A. Ellis' Ready Mix. Ellis' Quarry Ready Mix, the footing. And the foundation of it, the blocks is Ellis' concrete block. And I bought the framing material and the roofing from Mr. Dodson Dye.

Mr. Matthews:

Q. What are the inside walls made of?

page 9] A. The three bedrooms are plastered. The livingroom is this block celotex overhead and the outside wall is plastered, and the inside wall is knotty pine.

Q. These three bedrooms, livingroom, dining room and kitchen are they all on one floor?

A. Yes, sir.

Q. What is the size of your basement?

A. It is 44 x 33.

Q. The basement is under the entire portion of your home?

A. Yes, sir.

Q. When did you have your foundation, footings, your frame work complete?

A. Just like I stated a minute ago I started it in 1960 and finished it in '61. As far as the dates and stuff I put that down but it has been so long I misplaced it.

Q. Did you have that portion of it completed before the blasting operation began?

A. The best of my knowledge I did.

Douglas M. Thomas.

Q. Now, who constructed this house for you?

A. Mr. Vance Overby and Jess Wymer.

Q. Did you yourself work on this house?

page 10] A. Some of it. I worked at Brunswick part time, and I worked on the house when I wasn't working at Brunswick.

Q. Did you look at it and oversee it yourself?

A. Yes, sir.

Q. What was the first damage that you noticed to your house, Mr. Thomas?

A. It was the basement cracked.

Q. Where was your basement cracked?

A. Where you go in the garage door. On the right side as you go in the garage door.

Q. What end of your house would that be on?

A. It would be on the east — I don't know which side it would be on.

Q. Would you describe that to the Court and the jury?

A. It starts where the garage door framing goes up the side, and it busted the block plumb *in two* and went around the side about approximately four feet; and then in another place six feet near the basement window.

Q. Does that go from the footing or to the sill?

page 11] A. It goes from the footing to the bottom of the window on one of 'em, and from the basement floor to the top on the other.

Q. Do you have any other breaks in the foundation of the basement?

A. It is cracked and all open.

Q. How long had that foundation been there before this happened?

A. Well, I'd say probably a month.

Q. When did you discover this, Mr. Thomas?

A. Well, we went home one day for lunch where we lived on Henry Street, and we kept a fire in the basement; and I come out of the basement about ten minutes 'til twelve and went to Henry Street to lunch. When I come back they had set off a blast and I walked back in the basement door and seen it.

Q. And what time did you walk back in the basement door on that day?

A. It was approximately ten or fifteen after one.

Mr. Young: Ten minutes after one?

Douglas M. Thomas

A. Yes, sir.

Mr. Matthews:

Q. Did V. N. Green & Company set off a
page 12] blast during that period of time?

A. About ten minutes 'til twelve.

Q. How do you know?

A. Well, I went home on Henry Street, and it shook the house on Henry Street.

Q. How many of your basement foundation walls are cracked, how many sides?

A. Four.

Q. All four of your basement walls are cracked?

A. Yes, sir.

Q. When you learned this what did you do?

A. The first step I took I called Mr. Roger Copenhaver, that is in Mr. Green's trailer in front of Shanklin Dairy, where they had it parked. And he said he would send some men up there. So there was three men come up there; I never asked them their names, or nothing about them, and they told me not to worry that their insurance would take care of it.

Mr. Hoge: Your Honor, please, we object to the testimony and move for a mistrial.

The Court: The motion is denied.

Mr. Hoge: We except, sir.

page 13] Mr. Hoge: We would like to supplement that with a motion to discharge the jury, and declare a mistrial.

The Court: Motion is denied.

Mr. Hoge: Exception.

Mr. Matthews:

Q. Who made that statement to you?

A. Mr. Roger Copenhaver told me that he would send some men up there.

Q. And they came?

A. Yes, sir.

Q. Did you point this out to 'em?

A. Yes, sir.

Q. After that were there any other blasts and did they do any additional damage.

A. Yes, sir.

Douglas M. Thomas

Q. How many blasts occurred that damaged your house, if you know, Mr. Thomas?

A. I'd say about six.

The Court: Gentlemen, a little bit louder and sit up straight in your chair.

Mr. Matthews: Speak to the Judge so he can hear you.

A. Six.

page 14] Mr. Hoge: I *Didn't* understand that last question and answer, six what?

A. He asked me how many blasts occurred after that and I said six.

Mr. Matthews:

Q. Did you keep a record of the dates and times of these blasts?

A. I did, but it's been so long that I've misplaced them.

Q. Over what period of time did they occur, Mr. Thomas, what months?

A. I wouldn't know that.

Q. Did they result from the blasting that took place in the cut in front of your house?

A. Yes, sir.

Q. Now, you have described the foundation damage to your house, what other damage transpired to your house?

A. The plastering is cracked all over in the living room, in the bedroom and the roof leaked.

Q. Describe the cracks in the plastering in the house to the jury?

A. I have one right under the picture window in
page 15] the livingroom on one corner, and one on the other corner, and one straight up over the door; two cracks in the diningroom under the diningroom window; and two cracks in the livingroom up over the livingroom door; and two cracks in the bedroom up over the bedroom door.

Q. You indicated that your roof leaked. Describe what happened to your roof?

A. When they would set their dynamite off the rafters would crack and pop and that would pull the nails loose and cause the roof to leak.

Q. Were there any stones cast upon your property?

Douglas M. Thomas

A. Yes, sir. One fell by Mr. Wymer's pick-up truck, one went through the picture window in the livingroom, and there were several occasions that they were on the roof.

Q. What damage did the stones do that were thrown, if any?

A. Seven window lights I had to replace.

Q. Were those seven window lights the result of stones being thrown?

A. Two of them was and the rest of them was from a jar or concussion.

Q. How did it break the window lights from page 16] the jars or concussions?

A. It just shook the house.

Q. Did the windows crack or what happened?

A. They fell out.

Q. Completely out of the sash?

A. On the ground.

Q. Did they break?

A. Yes, sir.

Q. Who put those windows in?

A. I did.

Q. What type of windows do you have, Mr. Thomas?

A. I think they're 12 x 13, and they have four clips that you clip in there with wire, and then you glaze them with putty, the only way you can put them in.

Q. Had they been clipped and glazed properly?

A. Yes, sir.

Q. How do you know?

A. Because I put them in there, and I know that's the way they go.

page 17] Q. And five of them were shaken or vibrated completely out?

A. Yes, sir.

Q. This stone or rock that came through, where did it come into your house?

A. In the livingroom.

Q. How big was that rock?

A. I'd say about two inches.

Q. What do you mean when you say two inches?

A. About two inches around, square or oblong.

Q. Big as your fist?

A. About as big as your fist.

Mr. Young: What was your answer to that?

Douglas M. Thomas

A. About as big as your fist.

The Court: I didn't get it, I'm sorry, sir. That is was or was not as big as your fist?

A. It was.

Q. As big as your fist?

A. Yes, sir.

Q. Hold it up there and let the jury see.

(Witness holds his fist up for the inspection of the jury.)

Mr. Matthews:

page 18] Q. Did you keep that stone?

A. No, sir.

Q. What damage was done to your roof?

Mr. Campbell: Was that by a stone, Mr. Matthews?

Mr. Matthews:

Q. By stones, if any — I'll put it that way.

What damage was done to your roof by stones, if any?

A. On two different occasions I went up there where the stones had knocked holes in the roof and it leaked, and I got on there and removed it and replaced it.

Q. What did you remove and replace?

A. The shingles.

Q. Were the shingles that you removed damaged?

A. They had a hole in it.

Q. All the way through the shingle?

A. Yes, sir.

Q. Did it go through any other portion of the roof?

A. No, sir.

Q. How many shingles did you have to replace?
page 19]

A. I had to replace two, but you have to take off more than two to fix it. You have to take off about six to get one down.

Q. Was there any other damage to your roof in addition to the shingles the rocks knocked holes in?

A. Not as I could find.

Q. Now, on this nailing of your rafters that you spoke of, what was that, Mr. Thomas?

A. The vibration of the blasts pulled them apart, and I

Douglas M. Thomas.

had to get back up there and nail it again.

Q. Did that twist your roof in any manner?

A. I would say it twisted it a little.

Q. How much leaking have you had from your roof?

A. I had to set buckets up in the roof to catch it to keep it from coming through the celetex.

Q. Did the water do any damage to your rooms and ceiling?

A. Yes, sir.

Q. What?

A. I would say that about a square of the celetex had turned brown and will have to be replaced.

page 20] Q. What is a square?

A. That would be about twelve pieces.

Q. Any other damage to your ceiling at any place?

A. No, sir.

Q. On how many occasions did you contact employees of V. N. Green & Company concerning this, Mr. Thomas?

Mr. Hoge: Your Honor, we would like to know what the purpose of that testimony is, because it can't be based on complaints.

The Court: Gentlemen of the jury, step in the other room.

(The jury retired to their room.)

The Court: Gentlemen, I think the evidence is admissible because I think it was invited if for no other reason. Mr. Hoge in his opening statement to the jury said in substance that if they had known about them they would have made the repairs on the spot, or words to that effect. Now, in answer to that certainly Mr. Thomas can tell what he did. You said he didn't make any complaints and knew nothing about them; that you were unaware of it, and I
page 21] think that the complaints and to whom they were made are admissible to show just what happened there at the time and to show whether or not any degree of care was used attempting to prevent the injuries, unless you can show me, sir, that I am in error.

Mr. Hoge: My statement in the opening statement was very limited to the actual physical damages —

The Court: You said that the complaints came the next day or too late, or something to that effect.

Mr. Hoge: As to the stone, the physical damage of the stone. This is not limited in any way, this goes to all of it.

Douglas M. Thomas.

The Court: I'm overruling your objection, sir.

Mr. Hoge: We except.

The Court: All right. Call the jury back.

(The jury returns to the courtroom.)

The Court: Repeat the question now.

(Reporter reads as follows:)

"On how many occasions did you contact employees of V. N. Green & Company concerning this, Mr. Thomas?"

page 22] A. Two that I know of, and my wife made some.

Q. On each occasion did they come to inspect or send someone, Mr. Thomas?

Mr. Hoge: It is improper for counsel to lead his witness.

The Court: Please do not lead, Mr. Matthews.

Mr. Matthews: All right, sir.

A. I know two times that they come up there. Howard Joslin, he come one time and Mr. Hessler come one time, that's the insurance adjuster.

Mr. Young: Your Honor, we make the same motion we made awhile ago in reference to this.

Mr. Campbell: Your Honor, it is not shown, and we want to add that to the grounds of objection, that these people to who these complaints were made, or who came up there were employees of Green & Company.

The Court: He said they were.

Mr. Campbell: No, sir, I beg your pardon.

The Court: He asked him what employees came.

page 23] A. I said two or three.

The Court: Just a minute, please.

Of course, you will have to show that they were employees of the company, otherwise it is not admissible. With that understanding you may proceed.

Mr. Matthews:

Q. How many times did you or a member of your family contact Mr. Roger Copenhaver, the office manager of V. N.

Douglas M. Thomas

Green & Company, Mr. Thomas?

A. Two that I know of. Two times.

Q. Do you know how many times you contacted the foreman or superintendent on the project there in front of your house?

A. No, I never did talk to them in front of the house. The man that I would assume that he was the foreman over the dynamiting come over there one time and stood on the porch and said he wanted to see how bad it jarred the porch, and I wouldn't be betting about it but I believe he's sitting behind me.

The Court: Look around and see.

(Witness turns around and looks back into courtroom.)

A. The big red-faced fellow, right there he sits.

page 24] The Court: Is that the gentleman?

A. I would say that was him. He had his helmet on and his kaki britches on and it's hard to recognize him, but I would say that is him.

Mr. Matthews:

Q. Mr. Thomas, how many houses or homes have you constructed for yourself?

A. Five.

The Court: Why is that material, sir? Do you want to qualify him as an expert?

Mr. Matthews: I want to show what he has done so that he can speak of the damage or estimate the damage to his property.

The Court: All right, proceed.

A. I've built five.

Mr. Matthews:

Q. Mr. Thomas, now in monetary amounts, will you tell the Court and jury how much damage you have sustained from this blasting operation?

A. I'd say it's damaged \$6,000.00.

Q. Do you tell the Court and the Jury that it would take that much to repair —

Douglas M. Thomas

Mr. Hoge: We think that is leading.

The Court: I think that is leading.

page 25] Mr. Matthews:

Q. What do you base that figure on?

A. I base it on the value of selling.

Q. Tell the Court and jury how you do base it?

A. The property has been appraised at \$20,000.00.

Mr. Hoge: Not an appraisal, sir.

The Court: Let him state the fair market value before and after.

Mr. Hoge: Not an appraisal, sir.

The Court: You can cross examine him on that. He is the owner of this property and I will let him state what he believes to be the fair market value before and after.

Mr. Hoge: We except.

A. And the market value of it now is \$14,000.00.

The Court: Wait just a minute. Not what somebody else appraises it, but what he himself fixes on it. Let's proceed in an orderly manner, please.

Mr. Matthews: I'm trying to, your Honor.

page 26] The Court: Wait a minute now. That's the trouble. Just let the gentleman speaking get through before you interrupt him, and then everybody will get along much better.

I'm going to sustain the objection made by Mr. Hoge about the appraisal. You may state your own values, if you know values. So proceed.

Mr. Matthews:

Q. Mr. Thomas, before the damage from the blasting what would, in your opinion, be a fair market value of your house and lot?

A. \$20,000.00.

Q. After the damage to it what would you say is a fair market value?

A. \$14,000.00.

The Court: He may, if he cares to, give his reasons in detail for arriving at that figure.

Douglas M. Thomas

Mr. Matthews:

Q. Could you tell the Court and jury how you arrived at that figure, Mr. Thomas?

A. Well, that's what I've been offered for it right now, \$14,000.00.

Q. Have you had construction people to look
page 27] at it and estimate the actual damage and what it
would cost to repair it?

A. Yes, sir.

Mr. Matthews: All right, I believe that is all. You may cross examine.

CROSS EXAMINATION

By Mr. Young:

Q. Mr. Thomas, you said you began your house along in November, 1960 and finished it sometime in 1961?

A. Yes, sir.

Q. And I believe you said you had several people working on it and you worked on it yourself some?

A. Yes, sir.

Q. Did you start building your house before they started work out here on the bypass?

A. Before they started in the cut I started my house. I had my basement in before they even started the cut.

Q. And you finished it before they got through the road out there, sometime in '61?

A. Yes, sir.

Q. What depth of footings did you have there?

page 28] The Court: I'm sorry, Mr. Young, I can't hear you.

Mr. Young:

Q. What was the depth of the footings you had there?

A. A foot deep and sixteen inches wide.

Q. And I believe the back end of your house came out to a place on the side of a hill, a slight grade?

A. Yes, sir.

Q. And the front end of it went up under a bank, didn't it?

A. Yes, sir.

Q. And that portion of it there, the corner that you say was cracked was back on the northwest corner, which would

Douglas M. Thomas.

be the left rear corner as you face the house, is that right?

A. Yes, sir.

Q. And you say you had cracks. How many cracks did you say you have in the foundation?

A. I had two on each wall and there are four walls in the house.

Q. Yes, sir. Two on each of the four walls?

page 29] A. Yes, sir.

Q. Now, could you tell the jury what your damage was as a result of this rock hitting your house, or rocks hitting your house?

A. Well, as I stated that the rocks damaged the roof, and went through one window glass — two glass come out when the rock went through it in the livingroom.

Q. Two window glasses?

A. Yes, sir.

Q. What did they cost?

A. Fifty cents apiece is what the glass cost, and if you get someone to put them in it would cost you \$1.50.

Q. For each one of the two?

A. Yes, sir.

Q. For the two?

A. Yes, sir.

Q. That would be \$2.00 for replacing the two window glasses that were broken by the stone or stones?

A. Yes, sir.

Q. I believe you said you had some damage to your roof that was caused by a stone or stones hitting
page 30] your roof?

A. Yes, sir.

Q. Would you tell the jury now what the amount of that damage was?

A. A square of roofing cost you \$6.75 or \$8.75. There's different prices.

Q. What did you pay for the one that you put on there?

A. I'm not sure. I think it was \$6.75.

Q. Was that just for the roofing?

A. That was just for the roofing.

Q. How much did it cost to have that put on there?

A. I'd say it would cost about \$5.00.

Q. Did you have any other damage from a stone or stones?

A. Not as I can recall.

Q. Did you have a picture window broken, or did that include one of these up here?

Douglas M. Thomas.

A. That was one of them. When we started the house we was going to put a picture window in, but we didn't put a picture window in it, we put the small glass in it.

Q. I see. So this damage you have given us page 31] is all damage from the stone or stones?

A. All but excepting five more glasses that was shook out of the house.

Q. I was talking about confined to the stone or stones?

A. That is all with the stones.

Q. You've listed that?

A. Yes, sir.

Q. Could you tell us what the date was that you first noticed any damage to your house from when you say the house was jarred?

A. I ain't much hand to tell you the date, but I can tell you it was in 1960. They shut down the road on Thursday at twelve o'clock and went home for Christmas.

Q. That was in the year 1960?

A. Yes, sir.

Q. You said they went home for Christmas, they went home for Christmas, 1960, was it December, 1960?

A. I believe it was. Couldn't say definitely. I had all these dates down and I misplaced them. That's been almost three years ago. That would be hard to keep up with.

page 32] Q. Was that the date you said you came home at 1:10 p.m. and you first noticed the damage?

A. That's the date that I said I went home for dinner on Henry Street and went back and noticed it after lunch.

Q. That's the day you said you noticed it at ten minutes after one?

A. Yes, sir.

Q. The first time you noticed it?

A. Yes, sir.

Q. And that was in December, 1960?

A. The best I can tell you it was 1960 or '61. I couldn't tell you definitely.

Q. You're not positive whether that was '60 or '61, is that correct?

A. That would be correct.

Q. Could you tell us any other day that you noticed the damage there, or noticed any cracking?

A. No, sir, I couldn't. I'm just as honest as the day is long. I wouldn't want to tell you a story.

Q. Could you tell us the year that it was in?

Douglas M. Thomas.

- A. It was in '60 or '61.
- page 33] Q. Is that as near as you can come to it?
- A. Yes, sir.
- Q. You cannot tell us what month it was in or what day?
- A. No, sir.
- Q. You said, I believe, that there were six blastings that damage was from?
- A. Yes, sir.
- Q. But you just said you can't tell us any more about when those occurred?
- A. No, sir.
- Q. Could you tell us, sir, where these blasts were that you think damaged your house from jarring?
- A. They were in the cut that they put through in front of my house on 81.
- Q. That cut is about 900 feet long?
- A. Yes, sir, as best as I can remember.
- Q. Could you give the jury any idea as to what location in that cut that this first blast occurred that you said you noticed about 1:10 p. m. that day?
- A. Right in the biggest — middle ways there.
- Q. About middle ways of that cut. Where
- page 34] were you at the time this blasting occurred?
- A. I was at home on Henry Street eating lunch.
- Q. Is that near your property on Sebert Street?
- A. I'd say it was a mile and a half.
- Q. Henry Street is about a mile and a half away?
- A. Yes, sir.
- Q. When this occurred when you went on to your home?
- A. Yes, sir.
- Q. Now, you have testified, Mr. Thomas, about six blasts damaging your property and that you couldn't give any more specific testimony about the dates, could you tell the jury the times of day on these?
- A. No, I can't do that.
- Q. Could you tell the jury, or give the jury any more information of what damage was done to your house on each one of these blasts? In other words, on the one that occurred that you think was the first one in December, 1960, or December of 1961, could you tell the jury what damage
- page 35] you think that caused to your house on that occasion?
- A. No, I couldn't do that because I had a man come up

Laire T. Thomas

there and take an estimate on it, and he put it down on a piece of paper altogether.

Q. But you yourself don't know that?

A. No, sir.

Q. Do you have any information that you can give to the jury on what damage was done on any of these six blasts that you have referred to?

A. No, I couldn't do that.

Q. Were you at home when these stones hit your house; were you there at the time?

A. Yes, sir.

Q. Was it all at one time, or was it on different occasions?

A. It was different occasions that they come over there. It wasn't all at one time, because they would put off some blasts that would really jar the whole town, and at other times they would put it off and it wasn't quite as bad.

Q. I'm speaking about the stones.

A. I was there when the first stones come over.

Q. You said your property was damaged six
page 36] times, were you there each time when these blasts occurred?

A. Yes, sir.

Q. Were you there each time when stones were thrown on your house?

A. Yes, sir.

Q. Could you tell the jury what time of day those were?

A. They would put their blast off sometimes at ten minutes 'til five and ten minutes after five, and sometimes ten minutes 'til twelve o'clock. That's the way they done their blasting.

Q. Did you testify, Mr. Thomas, that rocks were thrown on your house twice?

A. I think I did.

Q. Was it more than twice, or just two times?

A. Just two times that I know of.

Q. Were you there both times?

A. Yes, sir.

Mr. Young: That is all.

Witness stands aside.

page 37]

LAIRE T. THOMAS,
another Plaintiff, being first duly sworn, testified
as follows:

Laire T. Thomas

DIRECT EXAMINATION

By Mr. Matthews:

Q. What is your name, please ma'am?

A. Laire T. Thomas.

Q. Mrs. Thomas, talk right to the Judge and then everyone can hear you, please ma'am.

Are you the wife of Mr. Douglas Thomas, who has just testified?

A. Yes, sir.

Q. And are you co-owner of the property that he has described?

A. Yes, sir.

Q. Mrs. Thomas, were you over there on the premises while your house was under construction there?

A. Most of the time.

Q. Were you there on any occasions when blasting was done in the cut?

A. Yes, sir, but I wasn't there when the most damage was done. We went home for lunch and we went home after work.

page 38] Q. Were you there on any occasions when any stone or stones were thrown on your property or on your house?

A. Yes, sir.

Q. Where was it thrown?

A. I know two times it went on the roof, and one time that Mr. Wymer was there working one went close to his truck. I was out in the front picking up lumber and stacking it.

Q. Were you there when any went through a window?

A. Yes, sir.

Q. What window did it go through?

A. I was there one time when it went through the window, but I wasn't there the other time in the livingroom.

Q. Was that a stone there or not the time you were there, was it a stone in your house?

A. Yes, sir.

Q. Were windows shaken out or knocked out of your house, Mrs. Thomas?

A. Yes, sir, I was there when that happened, when it jarred.

Laire T. Thomas

Q. Mrs. Thomas, I wonder if you would just
page 39] describe to the Court and jury what damage your
home has sustained from this blasting?

A. Well, at least \$6,000.00.

Q. Describe it, what is it?

A. Oh, you mean the construction?

Q. Just tell them what it is, where it is and how it is?

A. The footing, and the basement floor and the walls,
and the plastering and the roofing, and the ceiling. We
painted the bedroom but we can't do nothing about the
celetex, and it pulled the two rafter joists and twisted them.
We nailed them back but they're not square.

Q. You know when that 2 x 8 joist as you say was twisted,
when did it happen?

A. March 1, 1961. But December 28, 1960, is when it
cracked all the walls. I put these dates down. That is when
it done the big cracking.

Q. And that's when it did the big cracking to your base-
ment walls?

A. Yes, sir.

Q. And March 1st is when it twisted the —

A. That's when it done the jarring. I was in the hall
painting the closets, you know. I wanted to get
page 40] them painted before we cased them in, and it
jarred me off the floor. *In ever* stayed there any
more by myself for I was scared.

Q. Did you yourself contact any employees of V. N. Green
& Company concerning this, Mrs. Thomas?

A. I called Mr. Copenhaver and then me and my son drove
down to the office. He goes in and talks to him but I didn't.
I called him on the 'phone I don't know how many times and
talked with him. But I don't know how come the men to
come over there, whether he sent them or not, but I know
they were there two times. One of them was this guy back
here. And I don't know how come them to come, whether he
sent them, but I do know they was there twice.

Q. Did anybody from V. N. Green & Company tell you any-
thing about the breaking of your house?

A. Well, you know I'd go home — me and my son would
go home to cook dinner, and I don't know how come it
happened but I do know they said for us to wait and not
lay the brick until they got the most of it.

Laire T. Thomas

page 41] Mr. Hoge: We want to know who said that.
 The Court: I think they're entitled to that.

 Mr. Hoge: Who said that?

A. I'm not going to say which one.

The Court: Wait just a minute. You can make your objection.

Mr. Hoge: I'm sorry, sir.

The Court: You can be more specific; he's entitled to know.

Mr. Matthews:

Q. Mrs. Thomas, is there anyone in the courtroom that you have seen here today, who made any statements to you or your husband about breaking your walls of your home?

Mr. Campbell: We object unless she was present when the statement was made to her husband.

The Court: I didn't hear the question.

Mr. Matthews:

Q. Did anyone make any statements to you, Mrs. Thomas, or in your presence, concerning the breaking of the walls of your home?

A. Well, there was somebody else —

The Court: Not what somebody else told you, your husband or somebody else told you.

A. I'm going to tell what I know.

page 42] The Court: If some of the employees came there with authority to act, and the circumstances, I'll let you show that.

Mr. Matthews: Yes, sir.

The Court: And gave them certain instructions I will let you show that and identify them, but don't tell what some third person told her. Be a little more definite in your questions, Mr. Matthews.

Mr. Matthews: If I could get an answer "yes" or "no" to that.

Q. Mrs. Thomas, did anyone make any statements to you, or in your presence, concerning the breaking of the walls to your home?

Laire T. Thomas

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

The Court: I'm going to let her answer that.

Mr. Matthews:

Q. Did they?

A. Mr. Joslin was up there —

The Court: Just answer "yes" or "no" to that,

A. Yes, sir.

Mr. Matthews:

page 43] Q. Do you know who that was that made that statement to you?

A. Well, if he's not going to let me tell about Mr. Joslin there's nothing I can say.

Q. Do you know who it was that told you that, or said that in your presence?

The Court: You can answer that "yes" or "no," if you know it.

A. Yes, sir.

The Court: All right.

Mr. Matthews:

Q. Who was it?

A. It has been so long, like I say I have forgotten so many of them.

Mr. Hoge: I didn't hear her.

Mr. Matthews: She says it's been so long she's forgotten.

The Court: Unless she can identify them as connected with the defendant company that goes out, Mr. Matthews.

Mr. Matthews: Yes, sir, I agree with the Court.

The Court: Members of the jury you cannot bind the defendant by the statement of some third party.
page 44] She must identify him and show that the party speaking had some authority to speak for the defendant company, otherwise it is not binding on the defendant.

Mr. Matthews:

Q. Mrs. Thomas, did you have to replace shingles on your roof as the result of stones being thrown on it?

Laire T. Thomas

A. Yes, sir.

Q. Do you know how many shingles were replaced?

A. I don't know. There was right many one time. You had to take off so many to get to it, they didn't know where the leak was.

Q. How many rooms in your house was the plaster damaged in?

A. The walls?

Q. Yes, ma'am.

A. Four.

Q. Mrs. Thomas, were you there on *anumber* of occasions when these blasts occurred?

A. I was there part of them. I was not there all of them. When the most was when we would go home for lunch, and that's when the most of them went off.

page 45] Q. Describe to the Court and jury what happened when they went off?

A. The time it shook me off the floor I heard the cracking and I looked; that's when I found it. I was standing in the hall and I saw it, and then I went down in the basement I saw all the cracks.

Q. What did you see?

The Court: I'm sorry, have her repeat that. Don't let people slam the doors.

A. Well, the bursting like that in the hall I heard all the timbers, you know, the studding cracking, and I started looking, you know, to see what it did and I saw it. There was one big place. I didn't go up in there. I started out and when my husband come in I showed him and he went up there and tried to put it back together.

The Court: Just tell the jury what the big place was. They don't know. Window, wall, frame work, or what was it?

A. And I went down in the basement and saw all this. I heard it — I could hear it and tell it was doing some big damage, you know.

Mr. Mathews:

page 46] Q. Were you there on any occasions —

The Court: Mr. Matthews, see if you can get her to tell more definite about it. See if she can tell the jury just what

Laire T. Thomas

she means by that big damage; what part of the house, if any, was damaged. Give her all the leeway necessary to explain to the jury in her own way just what she thinks is wrong, and what she saw.

Mr. Matthews:

Q. This big damage, you say you saw this big damage, what do you mean by that?

A. Well, it pulled the house out of line, out of plumb, and I thought the basement was going to fall out from under it, and the cracks that was in it I thought it was going to fall out from under it.

The Court: Not what you thought, lady just what physical damage, if any, did it do. Cracks in the wall, if any, cracks in the wood, if any. Describe that in your own way to the jury?

A. I think when the foundation is damaged that's the worst part of the house.

The Court: What I want you to do is to just tell what actually was done, if anything, to those parts of your house.

page 47] A. It just cracked the wall all the way across one end, and one corner, and then it cracked straight up and down through the sides, and it cracked the floor. We had the footing poured real deep and it cracked the floor in the biggest part of it. Two big rooms that I know of.

Mr. Matthews:

Q. Is that in your basement or your upstairs?

A. In the basement.

Mr. Matthews: All right, I believe that is all. Wait a minute, they will want to ask you some questions.

The Court: Before she leaves she said she had some dates written down. She gave us two dates, one in March and one in December. Do you have those dates written down there somewhere?

A. Yes, sir.

Q. Any other dates besides those two dates?

A. I had them on the wall, but since he finished the house I didn't keep them.

The Court: All right, you may cross examine.

Laire T. Thomas

page 48] CROSS EXAMINATION

By Mr. Hoge:

Q. Mrs. Thomas, you say you did not keep that memorandum of the dates?

A. Just them three.

Q. What three?

A. That I have down there.

Q. What three are those, you gave us March 1st?

A. December 28, 1960, and February 13th in '61, and March 1, '61.

Q. You gave two dates before, December 28th, and I think I understand what you related that happened on that date. What happened on February 13th, just tell us what time of day?

A. What time of day?

Q. Yes, what time of day.

A. February 13th I don't know exactly what time it was.

Q. Approximately what time?

A. It was somewhere in the afternoon.

Q. About what time in the afternoon?

A. I didn't put it down. I'm not going to say.

page 49] Q. Well was it early in the afternoon, one o'clock, or five or six o'clock?

A. It was between noon and quitting time.

Q. Between noon and quitting time?

A. About two or three o'clock.

Q. Two or three p. m. Now, on March 1st, what time of day was that?

A. Well, that was after lunch sometime, I don't know what time it was. I was there by myself and there was a man in the front with the bulldozer working.

Q. You know about what time it was?

A. It was between noon and quitting time. I do not know.

Q. That's quite a spread of time. Now, Mrs. Thomas, can't you be more specific?

Mr. Matthews: If the Court please, she has answered and said that she didn't know the time.

The Court: Objection overruled. He wants you to be more definite, if you can, lady, as to the hour.

A. I would say it was between two and three o'clock for the way the sun looked to me outside. I never looked at the

Laire T. Thomas

clock.

page 50]

Mr. Young: What date was that?

Mr. Hoge: That was March 1st.

Q. What happened on the 28th of December, do I understand that was at noontime?

A. That must have been before twelve. We had been home to lunch and came back.

Q. Prior to twelve noon. All right. And you came back and you observed damage when you came back from lunch?

A. Yes, sir.

Q. Now, Mrs. Thomas, I will ask you if you didn't know as a matter of fact that at that very time, or approximate time, that Oman Construction Company had a job just east of this job under way —

Mr. Matthews: If the Court please —

Mr. Hoge: V. N. Green & Company, and also Ellis Quarry was blasting in the town of Marion; Oman was blasting in the town of Marion, and other contractors doing work and blasting at that time?

The Court: State your objection please.

Mr. Matthews: If the Court please, I object to that. I don't know where all these people were doing these specific jobs that he is talking about, and it is immaterial and irrelevant so far as —

page 51]

The Court: If somebody else was blasting, and not this defendant, he has a right to show that.

Objection overruled.

Mr. Hoge:

Q. Mrs. Thomas, you want to answer that question that there were other people blasting?

The Court: Repeat the question, Mr. Hoge.

Mr. Hoge:

Q. I will ask you again if you did not know that Oman Construction Company had a job under way immediately east of this particular contract of V. N. Green, just east of your property, where blasting was involved; and Ellis Quarry was blasting in its quarry; and likewise the Holston River Quarry here in the town of Marion; and other work going on in town involving blasting during this period of

Laire T. Thomas

time around December 28, 1960?

A. Yes, sir, but we lived on Fair Ground Hill twenty years and when Ellis' Quarry blasted they never done us no harm; and Oman didn't put off their blasts heavy.

Q. Oman didn't put off heavy blasts?

A. No, sir.

Q. How do you know that?

page 52] A. Mr. Green blasted first, and we was pretty aware of it because we knew who done us the damage, and we kept up with it to be sure that they didn't do it. If they had we would have got them too.

Q. If it had been Oman you would have gotten them too?

A. Yes, we would have went and asked and told him about it.

Q. What I'm really trying to get at, Mrs. Thomas, is when you're a mile and a half away —

Mr. Matthews: Your Honor, I think she has answered the question.

The Court: I overrule your objection.

Mr. Hoge:

Q. When you were a mile and a half away from this blast how could you identify it as being the specific blast of V. N. Green & Company in the cut east of your home, clear across town?

A. We had a neighbor, Mrs. Weinbarger and she kept —

Q. Oh, did she —

The Court: Let her answer.

A. They done damage to her basement too, and she would always tell us what time, and I don't know
page 53] whether she's got all the dates down or not, but she has got one down when it done the —

Q. Then you don't know that V. N. Green blasted at 12:00 noon on December 28th at all, do you, of your own knowledge? Somebody else told you.

A. Yes, sir. It shook the windows in our house.

Q. Did you know that V. N. Green did that?

A. Yes, sir.

Q. Of your own knowledge?

A. Yes, sir, Mrs. Weinbarger could look right over there.

Laire T. Thomas

Q. But Mrs. Weinbarger told you, didn't she? You don't know that, do you?

A. Well, in town I've lived there all my life and I never knowed them to put off one like that.

Q. But you don't know who put off this blast of your own knowledge, do you, Mrs. Thomas?

A. No, sir.

Q. Now, Mrs. Thomas, about these other dates about the rocks, did you save those rocks?

A. I looked at them a long time but they told us they was going to pay us when they got through, so I didn't
page 54] think we would have to go into anything like this.

Q. I didn't ask you that. Did you save those rocks?

A. No, sir.

Q. Now please confine your answers to my questions. Why didn't you save the rock?

A. I just told you I didn't think we would ever need them.

Q. And you brought suit and this suit has been pending for quite a long period of time and you didn't save the rocks?

A. I didn't save the ones there, and I sure wasn't going to get any more.

Q. And you didn't save the dates that the damage occurred?

A. I have three of 'em.

Q. Three dates. You didn't save the dates as to the rest of them, and your husband didn't save the dates he made?

A. We put them up on the wall there but we didn't get them off.

Q. The three most important items in this case you didn't save, why didn't you?

A. We saved the three important ones we
page 55] knew about.

Q. Why didn't you give them to your attorney in this case?

Mr. Matthews: If the Court please, I object to that question.
The Court: Objection overruled.

Mr. Hoge:

Q. Mrs. Thomas, as I understand it, this house faced south, faced 81, is that right?

A. Yes, sir.

Q. And you were on the north side of Sebert Street, and

Laire T. Thomas

the ground, the territory, the terrain there runs northward downhill away from Sebert Street, so that the front of your house was in the ground at the front end of the basement, and the rear end of the basement extended out to ground level, is that right?

A. It was all level until we graded down.

Q. But you graded it?

A. We graded it down, but it was level.

Q. A level lot?

A. Yes, sir.

Q. You did some excavation?

A. Yes, sir.

page 56] Q. What with, backhoe, bulldozer, or what?

A. We had both of them there, but Mr. McIntire knows.

Q. Mr. McIntire did your grading?

A. Yes, sir.

Q. And he took dirt out of that basement, is that correct?

A. And filled up, you know, around the house.

Q. When did he do that back filling around the house?

A. In 1960.

Q. In 1960?

A. In '61 as soon as we got the bricks laid, he leveled it all up then.

Q. When did he do the back filling around the basement wall?

A. It must have been '61.

Q. Did he do that immediately, put the dirt back against the basement wall there towards the back immediately afterwards?

A. No, sir, we waited until we got the brick laid.

page 57] Q. Until it was completed?

A. Yes, sir.

Q. Was there a great deal of noise with any one of these blasts, Mrs. Thomas?

A. Yes, sir, it affected one of my ear drums. I couldn't hear for several days. It was when that one went off March 1st.

Q. You couldn't hear for several days?

A. Out of one of my ears.

Q. As I understood your testimony you were standing in the hall and heard the cracking upstairs and big damage immediately following the blast. With all that noise of the blast how did you hear this noise upstairs then?

Laire T. Thomas

A. I wasn't out there. I was in the hall upstairs and I looked and found all that pulled apart, you know, the 2 by 8s, and then I goes downstairs to see.

Q. How were those 2 x 8s pulled apart?

A. Well they couldn't be square now. It's just like you would tack them together like this, and they were pulled out like that (indicating with hands.)

Q. What 2 x 8s were those?

A. Overhead joists I guess you call it.

page 58] Q. The roof rafter?

A. No, it's what you put the ceiling to. The rafters, you know, goes up.

Q. Were they nailed together this way, side by side?

A. No, sir.

Q. How were they nailed?

A. You know how it goes together at the corner and then across the top of it like that. I looked, you know, when I heard it first.

Q. When you heard what?

A. When I heard it pulling, you can tell, you know, when you pull timber apart.

Q. You mean to tell me you could hear that over the sound of the blast, and you deaf for several days afterwards?

A. I wasn't deaf but, you know, I could tell my ear was feeling funny.

Q. I understood you to say a moment ago that you couldn't hear for several days?

A. I couldn't hear like I could out of both ears. I could hear good out of one of my ears, but it hurt my ear drum.

Q. I can't quite identify this corner, what
page 59] corner was it?

A. I can show you in the livingroom.

Q. Can you tell us here?

A. Anybody that knows anything knows that you've got a square there where it comes together and it just pulled it back like that and twisted it enough to pull it out.

Q. Is that in the corner of the house?

A. That is in the corner of the room. I never looked at the corner of the house. I just looked close where I was standing.

Q. And the room was not plastered at that time?

A. No, sir. That's the first big damage.

Q. How long had those timbers been in place?

A. We started about the last of October or the first of

Charles E. Wymer

November. I think it was November when we got the framing up.

Q. The framing was up did you say the last of November?

A. We got the roof on by cold weather.

Q. About what date did you get the roof on?

page 60] A. It must have been the last of November because it wasn't cold weather. It wasn't cold enough that you couldn't work out.

Mr. Hoge: That is all.

Witness stands aside.

The Court: Next witness, please.

I guess you may take a five minute break, gentlemen. You may go to your room. (11:12 a. m.)

(After a short recess and at 11:30 a. m. proceedings resumed.)

The Court: Let the record show that all parties are back in the courtroom, counsel, jury and all parties interested, after a short recess.

You may call your next witness.

CHARLES E. WYMER,
another witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Matthews:

Q. State your name, please?

A. Charles E. Wymer.

Q. What is the last name, please?

A. Wymer, W-Y-M-E-R.

page 61] Q. Speak to the Judge, Mr. Wymer, and we all can hear you.

What is your occupation, Mr. Wymer?

A. Brick mason.

Q. Where do you live?

A. 1046 Madison Drive.

Q. How long have you been a brick mason?

Charles E. Wymer

A. About fourteen years.

Q. Mr. Wymer, did you do some of the work on Mr. Douglas Thomas' home?

A. Yes.

Q. What did you do up there, sir?

A. I laid up his chimney and put the stone on the front of his house.

The Court: Was that the initial construction, or after this alleged damage? What are you talking about, Mr. Matthews?

Mr. Matthews:

Q. Was that in the construction of the house itself?

A. Yes.

Q. Did you help on the roof any?

A. Yes.

Q. When did you work up there, Mr. Wymer?
page 62] A. It was in late '60.

Q. Do you know what month in late '60?

A. The best I can remember it was in November and the early part of December, I believe.

Q. At any time while you were there was any blast set off in the cut in front of the Thomas home?

A. One that I can remember.

Q. Where were you at that time?

A. I was standing in the livingroom.

Q. Could you describe to the Court and jury what effect it had?

A. Well, it shook the house is about all I can say.

Q. How badly did it shake it?

A. Pretty badly. It scared me and I jumped.

Q. At any occasion did you see any stones from the blast that came over there?

A. Nothing but one.

Q. Was that on that same occasion?

A. No — yes, I believe it was. It almost hit my truck, and Mr. Thomas told me, said, "That —

Mr. Young: We object to that, your Honor.
page 63] The Court: Objection sustained.

Mr. Matthews:

Q. Where was your truck at this time?

A. It was setting out in front of the house.

Charles E. Wymer

Q. And you saw this stone?

A. Yes, after it landed.

Q. What was the size of it?

A. Oh, it was between an orange and a grapefruit I'd say.

Q. Did it strike your truck?

A. No.

Q. Did you examine the damage to Mr. Thomas' property there, Mr. Wymer?

A. I looked at the damage that was done to the block.

Q. Did you lay those block yourself?

A. No, sir.

Q. Did you see the foundations and the footings before they were damaged?

A. No, sir, not to my knowledge I didn't.

Q. Could you describe to the Court and jury what you saw there on the foundation and footing?

A. Well, the damage was started at the garage
page 64] door and went back, busted back to the window,
to the basement window. It was approximately
not quite half way.

The Court: How many feet or inches?

A. Oh, approximately about 9, maybe 10 feet.

Mr. Matthews:

Q. Did it go from the footing to the —

The Court: Just let him tell where it went.

Mr. Matthews:

Q. Where did it go then?

The Court: Describe the size and all the details about it, please.

A. It went from the door to the window, and it busted up and then out, and then back up to the window, and then down.

Q. What size crack was it?

A. You could run a pencil in part of it, and then it come on back and you could tell where it was busted at the window.

Mr. Matthews:

Q. What was the length and the height of that crack?

Charles E. Wymer

A. Well the length was from the door to the window, it was approximately 9 or 10 feet.

page 65] Q. When you say from the door, what door?

A. The garage door.

Q. In reference to the basement floor where did it begin?

A. It started busting down next to the floor and went up and busted the block, and then went out the wall and then back to the window, up to the window.

Q. Did you examine the damage to any other portion of the house other than that?

A. No, sir.

Q. Did you look at any of the other sides of the foundation?

A. If I did I don't remember.

Q. In your opinion, what would it cost to replace that particular portion of damage that you have described, Mr. Wymer?

Mr. Campbell: Your Honor, please, replacement cost is not the measure.

The Court: I will let him show the cost to repair and the jury can consider it for whatever it is worth. The true measure of damage is the difference in value before and after, as I understand, gentlemen, is that correct?

Mr. Matthews: I think so.

page 66] The Court: I will let him show the costs of repairs. And the measure of damages, gentlemen, is the difference in the value before and after, and I will let him show the cost of the repairs to this particular crack, and you can consider that in allowing total damages, if any you find. You may proceed.

A. At the time I estimated it a little over \$1100.00, I believe. Because you have to shore up your house, you would have to jack it up, and then you would have to tear out your block, you would have to scrape out your dirt, and put all your block back, and it would cost for an individual like me to buy his timbers to jack it up and shore with.

The Court: Do you have an estimate there? Did you go out there and make a detailed estimate of how many block?

A. Yes, sir, I gave one to Mr. Thomas, but I can't remember what was on it.

Charles E. Wymer

Mr. Matthews:

Q. Mr. Wymer, I show you *and* estimate of \$1197.75, and it is in your writing. Is that the estimate that you made?

A. I believe so.

The Court: Show it to the gentlemen over page 67] there.

(Estimate is shown to opposing counsel.)

Mr. Matthews:

Q. Would you read that out to them?

A. Footing \$125.00; \$65 for block; \$35 for mortar; \$22.75 for sand; \$300.00 labor on blocks; \$190.00 shoring down the wall, and \$200.00 for jacking it up.

The Court: The total is what?

Mr. Matthews:

Q. The total is what?

A. It was a little over \$1100.00.

Q. \$1197.75?

A. \$1197.75.

The Court: You passing that out, what do you want to do with it.

Mr. Matthews: We introduce that as Exhibit No. 1 for the Plaintiff.

The Court: Any objection from you gentlemen? If not, let it be marked as Exhibit No. 1.

(Estimate is received and marked as Plaintiff's Exhibit No. 1.)

Anything further?

Mr. Matthews: That's all.

page 68] CROSS EXAMINATION

By Mr. Young:

Q. This statement here, Mr. Wymer, is what you estimated the cost to fix this crack?

A. Yes, sir.

Charles E. Wymer

Q. You set out the items there \$125 for footing; \$65 for blocks; \$35 for mortar; \$22.75 for sand; \$300 for labor on blocks; \$190 for tearing down wall, and \$200 for jacking it up. You made that, did you?

A. Yes, sir.

Q. And you testified that amounted to \$1197.75?

A. Yes, sir.

Q. I'll ask you if that doesn't amount to \$937.75?

(Witness hesitates in answering.)

The Court: What is the correct amount?

A. I don't know, sir, it was around \$1100.00 the one I gave him.

Mr. Young:

Q. But this one here which you have introduced into evidence amounts to \$937.75, doesn't it?

A. I couldn't say. I haven't figured it, but
page 69] I'll figure it up if you will give me a little time,
and I get over being excited.

The Court: Give him some time, and go ahead with something else.

Mr. Young:

Q. You say you were up there at the house one time when this blast occurred?

A. Yes, sir.

Q. And that you think was in late November?

A. November or early December.

Q. Early December?

A. Yes, sir.

Q. You don't know which month it was in?

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

Q. You know it was in 1960, you sure about that?

A. Yes, I'm pretty sure.

Q. Do you know what day of the month it was?

A. No, sir, I don't.

Q. Do you know what time of day it was?

A. I believe it was right around twelve. I don't know whether I had eaten my dinner yet or not.

Charles E. Wymer

Q. You know what day of the week it was?
page 70] A. No, sir, I don't.

Q. But you're positive it was in late November
or early December?

A. Yes, sir.

Q. And you saw this crack you have described to the jury,
but you didn't see the house before this was supposed to have
happened?

A. No, sir.

Q. You don't know how it came there?

A. No, sir.

Q. And you say you were in the inside of the house there
when you heard this blast?

A. Yes, sir, the one.

Q. In the livingroom?

A. Yes, sir.

Q. And you say you saw this stone up there and you had a
truck near by, and it nearly hit the truck, is that right?

A. Yes, sir.

Q. But did not hit the house?

A. No, the stone fell right beside my truck, and if there
was a stone hit the house I didn't hear it or see it.

Q. Was it in the street?

page 71] A. No, sir, it was on Mr. Thomas' lot. It was
kinda in front of the house down from the car port.

Q. This crack that you saw, was it a zig zag crack? Like
this? (Indicating with hand.)

A. Yes, sir.

Q. In steps?

A. Yes, sir. It come up from the door and busted, and
straight out the wall, and then back to the window.

Q. You said a portion of it there you thought you could
get a pencil in it?

A. Yes, sir, a part of it.

Q. And I take it that was the portion in there where you
started down next to the ground?

A. Yes, sir, it was up the side of the door. Right up in the
corner.

Q. That was the biggest part of the crack?

A. Yes, sir.

Q. And it followed the seams between these blocks?

A. Yes, sir.

Q. The little strips?

Z. V. Overby

A. It went up and out and then back to the
page 72] window.

Q. But did not crack the block itself?

A. Yes, sir, it busted one block that I can recall.

Q. One block?

A. Yes, sir.

Q. And the rest of it was in between the blocks?

A. Yes, sir. That is as well as I can remember.

Q. The *the* cracks started, the biggest part of it, down at the footing, the bottom, and then went away up to a hairline at the top?

A. Yes, sir, it went out and then up I would say four feet up.

Q. And at the end could you just barely see it?

A. Yes, sir, at the window.

Q. And altogether it was about 9 or 10 feet?

A. Yes, sir, from the door to the window.

Q. That's all the damage you saw?

A. Yes, sir.

Q. The rock didn't do any damage there?

A. No, sir, not at that day I was there it
page 73] didn't.

Q. That's the day we're talking about, isn't it?

A. Yes, sir.

Mr. Young: That's all.

Witness stands aside.

Z. V. OVERBY,
another witness called on behalf of the Plaintiff, being first
duly sworn, testified as follows:

DIRECT EXAMINATION

The Court: What are your initials?

A. Z. V.

By Mr. Matthews:

Q. You are known as Vance Overby?

A. Correct.

Q. What is your occupation?

A. Brick mason.

Z. V. Overby

Q. How long have you been laying brick?

A. About twenty-five years.

Q. Mr. Overby, did you help on the *construct-* of the Douglas Thomas house here in Marion?

A. I did.

Q. Did you pour the footing and lay the
page 74] foundation?

A. I did.

Q. Tell the Court and jury what was the type of the footing and foundation?

A. About 16 inch wide footing. It was good footing. I've been building a long time, and I put four yards and a half of concrete for the footing, and used concrete block and laid the basement up out of it.

Q. Did you do that work yourself?

A. I did.

Q. And did you continue to aid in the construction of the property, or the home?

A. I did.

Q. When you laid the foundation — poured the footing and laid the foundation, had the work started, or had any blasting started on 81 at that time?

A. I can't remember. It's been so long I just don't remember.

Q. All right, now, did you help with the framing, roofing and the rest of it, Mr. Overby?

A. Yes, sir.

Q. Were you there on any occasion when a
page 75] blast was put off?

A. Not as I can remember. I always went home. The blasting was always about twelve and after five, and I would always go home for dinner, and I was always at home when they was doing the blasting. And that way I was always gone of evenings when they done the blasting.

Q. You say they always did the blasting around dinner time or late in the afternoon?

A. Yes, sir. And I had done gone home.

Q. Were you there on the occasion that Mr. Wymer was when that one went off, do you recall?

A. No, sir, I wasn't there. I guess I was at home at dinner.

Q. Do you know, Vance, how long after that foundation was put in until these cracks showed up?

A. I believe it was right close to a month.

Q. In the period of a month had the footing and foundation

Z. V. Overby

settled enough to cause those cracks?

A. I don't think so.

Q. You have been doing that type of work for twenty-five years, in your experience would it have settled in that period of time to have caused it?

page 76] A. No, I don't think so.

Mr. Matthews: All right, cross examine.

CROSS EXAMINATION

By Mr. Hoge:

Q. Mr. Overby, as I understand it, part of that house was built on ground level, and part excavated back into the front of the house, is that right?

A. The front was under the ground a right smart, but the back what was graded had been graded down about three or four feet.

Q. The back was graded down what, about three or four feet down in the ground?

A. Yes, cut down in about three or four feet.

Q. And would that be clear across the back or just on one corner, or where?

A. All the way across the back.

Q. All the way across. Then the house was set three or four feet down in the ground?

A. The basement was.

Q. The basement. Well, how did you get into the basement?

A. Around and in the garage door. It was cut out for the garage and you come around and come up
page 77] in the garage.

Q. That area had to be excavated right there too, didn't it?

A. It had to be graded.

Q. Graded, and excavated and dug out?

A. Yeah.

Q. Dug out where the garage door was and the footing was set right there?

A. It was just graded down on the solid.

Q. Graded down on solid what, solid ground?

A. Ground.

Q. Was it set on rock?

A. No rock.

Q. No rock there?

Z. V. Overby

A. There was no rock there at the garage door where it was broke.

Q. None whatever in that particular area?

A. None that I could see.

Q. Was there any rock any place else where it broke?

A. There might have been a few loose rock where we got out.

page 78 } Q. Loose rock that you got out of that particular corner now?

A. No, no. No rocks at all at that particular corner.

Q. No rocks at all. Anywhere else where the wall was cracked, was any rock anywhere else?

A. No, not where the wall cracked.

Q. None whatever?

A. None that I could see.

Q. Now, Mr. Overby, you've been in building for quite a long time. You've seen buildings and walls settle many, many times, haven't you?

A. I've seen a good many of them.

Q. And when they settle they break, don't they?

A. If they settle they do, if you don't put the right kind of foundation under them.

Q. And everytime they settle they're going to break?

A. If they settle they will. If you put them on a solid foundation they ain't going to settle.

Q. Now, tell me about this crack you're talking about, what does it look like?

A. It just looked like it had been picked up at that corner.

page 79 } Q. Looked like it had been picked up?

A. It looked like it just picked it up off of the other block and broke it.

Q. Tell me about the crack all the way, what size was it?

A. I'd say you could have got your finger in it.

Q. Where?

A. In that crack where it run out and up to the window.

Q. Now, the whole distance?

A. No, not the whole distance.

Q. Where?

A. Where it lifted it up off the block there was a wide open crack there.

Q. Where it lifted it up off the block?

A. Just like this block it just picked it up off of this one, and come up like this, and out like this and up.

Z. V. Overby

Q. What held it up there if it lifted it up?

A. It just stayed up there and left a crack in there.

Q. Now, Mr. Overby, you are a building man, and you know a building just don't stand up a corner
page 80] of it?

A. It shows the crack inside.

Q. The building wouldn't stand up there on nothing?

A. The mortar is going to hold it slightly open after it breaks it loose.

Q. Water?

A. Mortar will slight hold it up.

Q. Would it hold the whole corner of that house up, the weight of that house up?

A. I have seen a little piece of mortar not as big as your hand hold up a half a side of a house.

Q. Actually that crack was larger at one point and extended on down to just a bare hairline crack?

A. It extended down until it got littler.

Q. So it separated this way, somewhat in a V shape?

A. No.

Q. Nonewhatever? You just said it was wider down here and a hairline crack up here?

A. It went up like this, and out like this, and up to the window (indicating with hand).

Q. It was wider up here than it was down
page 81] at the corner, wasn't it?

A. Right here was where it was.

Q. Wider in there. So part of it settled away from it and part stayed in place where the hairline crack is? It was standing there in place.

A. It was standing there in place, but you could see the crack in the wall.

Q. Over here was another crack coming this way, wasn't it?

A. Yes, sir.

Q. So the whole wall settled there, didn't it?

A. No, it didn't settle. It just jarred it loose is all it was.

Q. There was a settlement in there, wasn't it Mr. Vance?

A. No, I don't think it was.

Q. Isn't it true that almost in any house, regardless of any house built, there is a certain amount of settling?

A. There's some settling.

Q. All settle don't they?

A. If you put it all on dirt it is all going to settle to-

J. B. Dye

gether.
page 82] Q. And part of it on rock it's not going to
settle quite as fast?

A. True.

Q. Now, where you have a deep end and a shallow end it's
going to settle more on that shallow end than it is on the deep
end too, isn't it?

A. No, sir.

Q. Not a bit?

A. Not if you've got your grade in here you're solid all
the way.

Q. You've got more weight on that deep end, haven't you?
The weight of dirt against that wall.

A. If you've got no back fill it ain't no more weight.

Q. When you've got back fill you've got more weight,
haven't you?

A. Oh, yes, but this was broke before it was backfilled.

Q. You're adding that weight all the time on that shallow
end, you're adding the same weight that you are on the deep
end?

A. I don't think so.

Q. I believe the house is the same, isn't it?
page 83] A. Oh, the house is the same coming down on
it.

Q. Where you've got it shallow running out of the ground,
and deep at one end, you've got the same weight going on
at those two points?

A. The same weight all over the whole house.

Mr. Hoge: All right.

RE-DIRECT EXAMINATION

By Mr. Matthews:

Q. Mr. Overby, did I understand you to say that this was
cracked before any back-fill was done?

A. Yes, sir.

Mr. Matthews: All right, sir.

Witness stands aside.

page 84] J. B. DYE,
another witness called on behalf of the Plaintiff,
being first duly sworn, testified as follows:

J. B. Dye

DIRECT EXAMINATION

By Mr. Matthews:

Q. State your name?

A. J. B. Dye.

Q. What is your occupation?

A. Building material dealer.

Q. Are you also in the construction business?

A. Yes, sir.

Q. Mr. Dye, I ask you if Mr. Douglas Thomas contacted you to make an estimate of damages to his house?

A. He did.

Q. Did you do that, sir?

A. Yes, sir.

Q. Would you tell the Court and jury what you estimate the damage to be, sir?

A. You want a total figure or you want it broken down.

Q. Both.

A. I estimate to replace the footing in the entire page 85] west foundation wall, shore up floors, repair broken block on the east wall of house at \$750.00. Replace window lights \$3.00. Repair roof and roof framing \$200.00. Repair cracked plaster and paint livingroom \$45.00. Makes a total of \$998.00.

Q. Mr. Dye were you ever on the premises over there when the blasts occurred?

A. No, sir. No, this house was practically completed when I was over there.

Mr. Matthews: That is all.

CROSS EXAMINATION

By Mr. Young:

Q. Mr. Dye, when were you over there?

A. When?

Q. Yes, sir.

A. April 18, 1961.

Q. April 18, 1961. I believe you said you were not over there when any blasting was done?

A. No, sir.

Q. You just there the one time?

A. Yes, sir, that is all I recall.

Roger D. Copenhaver

Mr. Young: That is all.

Mr. Matthews: We would like to introduce this estimate.

page 86] The Court: Any objection, gentlemen?

Mr. Young: No objection.

The Court: That will be Plaintiff's Exhibit No. 2.

(Estimate is received and filed as Plaintiff's Exhibit No. 2.)

Witness stands aside.

ROGER D. COPENHAVER,
another witness called on behalf of the Plaintiff, being first
duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Matthews:

Q. Would you state your name?

A. Roger D. Copenhaver.

Q. What is your occupation, Mr. Copenhaver?

A. I'm not working right now, sir.

Q. Where do you live?

A. 420 Louise Avenue.

Q. Were you formerly working for V. N. Green & Company?

A. Yes, sir, I was.

Q. When were you employed by them and for what period?

page 87] A. Approximately two years. I went to work
on September 7, 1960, and the job finished up in
about November of '62.

Q. What was your capacity with Green & Company?

A. My title was field office manager.

Q. Mr. Copenhaver, I ask you if during December of 1960,
and January, February and March of 1961, if Mr. and Mrs.
Thomas contacted you on a number of occasions?

A. Well, sir, I couldn't be positive on that. I have known
Mr. and Mrs. Thomas for quite *sometime*, and to my knowledge
there original complaint was not made to me direct. Either
the superintendent of the project told me about it, or the drill
foreman. Now, it could be that they made their first complaint
to me direct, sir.

Q. I'm not talking about the first complaint. I asked you

Howard Joslin

if they contacted you and made complaints to you?

A. I couldn't say.

Mr. Hoge: Your Honor, please, we would like to renew our objection to these so-called complaints as such. There's no basis for recovery.

The Court: Objection overruled.

page 88] Mr. Hoge: Exception.

A. However, I was aware that Mr. Thomas supposedly had damage to his foundation walls, which he alleged was due to blasting.

Mr. Matthews:

Q. In your system of records do you recall making notations on a number of occasions concerning the Thomas damage?

A. Well, very definitely one occasion, sir.

Q. Do you recall talking with Mrs. Thomas over the telephone?

A. I couldn't say, sir. I do not remember talking with Mrs. Thomas.

Q. Do you recall talking to the *Thomases'* son in person?

A. I know I saw him on the project on more than one occasion. I believe he drove a truck delivering CBR material on the job. And I do recall one occasion where he came to the field office and he wanted to see the superintendent, but what he wanted, sir, I couldn't say.

Q. Do you have your records that you made the notations of these from the *Thomases* with you?

A. I personally do not have them, no, sir.

page 89] Q. Do you know whether they are here or not, that you made?

A. I imagine that the firm I worked for has those records.

Q. Have you seen them?

A. No, sir, not since the project was completed.

Mr. Matthews: All right.

Mr. Young: No questions.

Witness stands aside.

HOWARD JOSLIN,
another witness called by the Plaintiffs, being first duly sworn,
testified as follows:

Howard Joslin

DIRECT EXAMINATION

By Mr. Matthews:

Q. What is your name?

A. Howard Joslin. J-O-S-L-I-N.

Q. Where do you live, sir?

A. *Whytheville*, Virginia.

Q. What is your occupation, sir?

A. Insurance adjuster.

Q. Mr. Joslin, I ask you if you have been on the property
of Douglas M. Thomas and his wife during Decem-
page 90] ber, 1960, January, '61, and February of '61?

A. Yes, sir.

Q. I ask you if you were there on any occasion when a
blast was set off in the cut in front of their house?

A. I was there when the blast was set off, but it was not in
front of the cut directly in front of their house.

Q. Where was that blast?

A. It would be to the east of a point immediately in front of
their house.

Q. It was somewhere in the cut then that begins in front of
their house and extends eastward?

A. Yes, sir.

Q. Was that blast set off in the project of V. N. Green &
Company?

A. To the best of my knowledge, yes, sir.

Q. I wonder if you would describe to the Court and jury the
effect of that blast on the property?

A. I heard a small noise and one small window pane just
barely did rattle in front of me, because we were standing
right at this window looking out to the front of this property.

Q. So this was a small noise and you heard
page 91] the window shake?

A. Yes, sir, very lightly.

Q. Could you feel the vibration of the house?

A. No, sir.

Q. Did you examine the damage to the property, was the
foundation of this house damaged?

A. I observed cracks in the cinder block wall as pointed by
Mr. and Mrs. Thomas to me.

Mr. Matthews: All right, that's all.

The Court: Tell the jury just the nature of those cracks?

A. Sir.

Howard Joslin

Q. Tell the jury the nature of those cracks?

A. The best of my knowledge there were two cracks and they run, as you face this house from the rear it would be on the right hand side of the garage wall, and these cracks followed the mortar joints in the block wall, and they ziz zagged up to this window that has been referred to, and they diminished as they became higher in the wall toward the floor level. They run from the top of the footing almost to the window.

Q. For what distance, five feet, an inch, or ten
page 92] feet?

A. A straight line distance I'd say six to eight feet. If you followed the measurements in the joists — I mean, in the mortar joints, of course, you would get a *somewhat* longer length.

Q. Can you give the jury some idea of the width or the extent of the crack, the size of it?

A. They were hairline at the top, and they were somewhat larger toward the bottom. They were not open, you could not see in them, you could not put your finger in them, they were not near that large.

The Court: All right, you may cross examine.

CROSS EXAMINATION

By Mr. Young:

Q. What date you there, Mr. Joslin?

A. The best of my knowledge it was January 12, 1961.

The Court: Who was present at that time, you and —

A. Mr. and Mrs. Thomas.

Mr. Young: That's all.

Witness stands aside.

The Court: You have this compilation there?
page 93] What does it show.

Mr. Matthews: Mr. Wymer, come around.

Mr. Young: Just a minute, we would like to recall Mr. Thomas.

The Court: All right, what does this compilation show?

Mr. Matthews: It shows \$937.75.

The Court: Is that correct?

Mr. Wymer: Yes, sir.

Douglas M. Thomas

DOUGLAS M. THOMAS,
recalled for further cross examination, testified as follows:

CROSS EXAMINATION

By Mr. Young:

Q. Mr. Thomas, was all the blasting that you claim damaged your house out there in connection with construction of Interstate Route 81?

A. Yes, sir.

The Court: I can't hear you, Mr. Young.

Mr. Young: I asked him if all the blasting he claimed damaged his house was in connection with the construction of Interstate Route 81, and he said it was.

page 94] That is all.

Witness stands aside.

Mr. Matthews: We rest at this time, your Honor.

The Court: You gentlemen may proceed as you may be advised.

Mr. Young: Your Honor, please, we would like to make a motion to the Court.

The Court: All right, the jury may just take their recess now (12:05 p. m.) and come back at 1:30.

(The jury retires for lunch.)

Mr. Young: The Plaintiff's testimony is that a rock thrown onto the property, or stones, and the damage amounted to \$13.75. We want to tender to the plaintiff that amount at this point, and here is the \$13.75.

The Court: You have laid the \$13.75 on the table, I don't know what you want to do.

Mr. Young: I don't know who I'm supposed to give it to unless it is Mr. Matthews, or offer it to him.

Mr. Matthews: If the Court please, I have
page 95] never been one to refuse to take money, however, if this tender is for all damages done, we respectfully submit that we refuse to accept it.

The Court: What is it tendered for?

Mr. Young: All of the Plaintiffs' damages.

The Court: And you refused it. And it's up to the Court

to pass on it. Now, are there any further motions.

Mr. Campbell: Give the tender of \$13.75 to the Clerk.

Mr. Young: We move the Court, please, sir, to strike the evidence on the ground that there's no negligence been shown on the part of the defendant in the case. The evidence is that blasting done down there, and the plaintiffs have testified that the blasting damaged their property, but there's no evidence here of any negligence, or any improper conduct on the part of the defendants who were performing a contract made with the commonwealth in connection with the construction of the highway. There's no evidence that they did any excessive blasting, or did any improper blasting, or used any method that is not usual or customary in the performance of such work. And in fact, there's no evidence
page 96] here at all of negligence on the part of the defendant, and we move the Court to strike the plaintiffs' testimony on that ground.

We have tendered the amount there which the evidence shows is the amount which the plaintiffs received for the damages that was done to his property by reason of a stone or stones being thrown onto his property.

Now if there is any vibration there as a result of the blasting it was in the performance of a contract, which the evidence shows was made by the defendant with the commonwealth for the construction of a highway, a public improvement, and we think that under the decision of the Court in this case, *Tidewater Construction Company vs. Manley*, 194 Va. at 836, which was a case when the tunnel was put under the river down on the coast, and they dug out a trench there to put the tube in, and as a result undermined a building which was on the water front. And action was instituted against the contractor for damage as a result of that work done for the commonwealth, or in the construction of this tunnel. And the Court in very positive language stated in that case
page 97] that the contractor was in no wise responsible for anything in the absence of negligence.

The Court at page 840 said:

"A contractor or agent lawfully acting on behalf of the principals, for whom the right of eminent domain has been accorded in making a proposed public improvement, cannot be held personally liable for damages if such improvement is made without negligence on his part."

The Court went on and said that, at page 841, attention is called to Article 16, etc. of the Constitution.

“The rule is that where a city is acting within its general powers, contracted for improvement upon a street, and work is done by a contractor in accordance with plans and specifications furnished by the city, he is the agent of the city and is not liable for damages in the absence of negligence in the performance of the work. Under the rule stated the respondent is not liable for any damage that may have occurred to the building.”

Now, I submit to the Court that we have a similar situation here. We have a situation here where the defendant has entered into a contract with the commonwealth,
page 98] which the commonwealth itself would have had to do by its own employees had it not made this contract.

The contractor has done the work, and in so far as the plaintiffs' testimony is concerned there is no breach of the contract, no breach of duty whatsoever negligently performed. In the absence of negligence, we submit to the Court that under this decision that the plaintiffs have not made out a case.

As I said a moment ago — it's *really* a repetition, but I listened to the evidence as carefully as I could and I am unable to see any evidence in the case of anything that was done by the defendant that it ought not to have done, or that it failed to do something that it ought to have done. And Virginia has never held in a case of this type — in fact, I think the effect of the case just cited to your Honor is to the contrary. Virginia has never held that in a similar situation as this, that the defendant is liable in the absence of negligence. And in the old *McConnell* case, I think it is in 86 Va. and decided 73 years ago, is an entirely different case. An entirely different case.

In that case we have a blasting on the part of a man which resulted in the death of his neighbor. A private
page 99] individual. Here we have a contractor acting under — who is really vice-principal for the commonwealth itself in the performance of a contract for a public improvement paid for by the taxpayers.

There's not any evidence here that he did anything under that contract that he ought not to have done, or that he failed to do something that he ought to have done. There's no evidence here that he did any more blasting down there than was necessary to grade the road to comply with the contract according to the plans and specifications, or that the dynamite was exploded in a way that is not customary and usual in that type of work. And in the absence of testimony to that effect I'm unable to see any negligence in the case, and I do not

believe that the law of Virginia under this case, in the *Kirk vs Young* case, which is — they did not decide that point, but it is certainly obvious that in this situation there was no liability in the absence of negligence.

The Court: All right, Mr. Matthews, let's hear what you have to say in reply, please.

Mr. Matthews: If the Court please, to begin with, I would like to say that in my opinion the defendant has
page 100] admitted negligence in this case when he tendered \$13.75, or whatever the amount is.

Mr. Campbell: We admit, Mr. Matthews, that we're liable for physical damage, for physical invasion of your property by throwing the rocks thereon, and that's what the tender is for.

The Court: All right, proceed.

Mr. Matthews: That amount was tendered in open court for damages occasioned by the defendant. I recognize that that damage resulted from the throwing of an actual stone on the property. No individual of the defendant, his servant or employee came upon the property and did the damage. But their act in blasting and dynamiting in Interstate 81, they negligently did it, or they wouldn't have cast a stone over on us.

In think that is what the Court held in *Simmons and Lynch vs. McConnell*, that when that stone came over there it was a negligent act, and as Mr. Young said, his neighbor was killed. Here the neighboring property was damaged to some extent by that stone.

We think that we have perhaps shown negligence, but we further rely upon the fact that we don't feel that it is necessary in dynamiting or in explosive cases to prove
page 101] negligence. We feel that if the Court had desired to have decided that point, which it did not in the *Polk* case, 196 Va., I believe it is, 288, which our Supreme Court recently decided, the Honorable trial judge instructed the jury on the theory of strict liability. The jury did not see fit to bring in a verdict for the plaintiff because they did not feel that the damage had been proven as a result of the blasting, and that's a question for the jury. But the Court did not criticise or say that it was erroneous to instruct the jury on strict liability. The majority of jurisdictions in this country uses that theory, and we submit that in effect that Virginia does as a result of the *McConnell* case and as a result of the *Polk* case. The question is not considered in the last case of *Young vs. Kirk* because it was decided on a question of contract, which said that negligence had to be shown.

We say that this work of dynamiting is intrinsically dangerous in nature; that the defendants have the sole control; they have complete control; and if they damage us as a result of it then we are entitled to recover on that theory.

I might point out to the Court that even in those jurisdictions who follow that negligence must be shown, page 102] that many of them follow further that the continuation of blasting in the same manner as before, after warning or notice of damage to property, has been held or recognized to constitute negligence. So that under either theory I think it is a jury question, and we respectfully submit that the Court should instruct on strict liability.

Mr. Young: May I have a moment to answer that, sir.

The Court: I don't think so. You gentlemen were kind enough to furnish me the briefs in this. Mr. Young was a little late with his, he gave it to me this morning. I am familiar with the cases cited here down to the last case here in 204 Virginia, 414, and also Mr. Matthews relies on this West Virginia case 118 S. E. 2nd, etc. and so on. I have considered the *Young vs. Kirk* case. I am going to deny your motion, and I am doubtful that your tender is good at this stage. I also have before me Michie's Jurisprudence on tender, Vol. 18, and I'm doubtful that the tender is timely made, and it doesn't tender any interest or costs, or anything like that. It is just \$13.75. I'm going to deny your motion, and if it goes up let it go up on the whole works. page 103] I will see you back here at 1:30.

The motion is respectfully denied. I thank you gentlemen for furnishing the court the authorities. And I might add further that one day last week Mr. Young and Mr. Matthews was present in chambers and we discussed the law in some detail, and there are a number of other similar cases pending in this court, and I'm going to deny your motion.

Mr. Young: We except to the ruling of the Court.

The Court: We are recessed until 1:30 p. m.

(Court recessed at 12:30 p. m. until 1:35 p. m. at which time proceedings were resumed with the Court, jury, counsel and all interested parties present.)

The Court: Now let the record show that all the parties are present after the noon recess, and you gentlemen may proceed.

Mr. Young: There's another question I want to ask Mr. Thomas.

The Court: All right.

Douglas M. Thomas

page 104] DOUGLAS M. THOMAS,
recalled for further cross examination, testified
as follows:

CROSS EXAMINATION

By Mr. Young:

Q. Mr. Thomas, what is the distance from the west end of that cut up there to your home?

The Court: Which is the west end, that Bristol end?

Mr. Young: Yes, sir.

A. It would be about I'd say 450 feet to 425.

Q. What would you say would be the distance from the mid point in that cut to your home?

A. 475, or 474.

Q. What would you say would be the distance from the east end of the cut to your home?

A. That would be towards Church Street?

Q. Yes, east.

A. I'd say that would be about 550 feet.

Mr. Young: That is all:

The Court: Anything further, gentlemen. All right.

Witness stands aside.

Joe T. Gollehon

page 105] JOE T. GOLLEHON,
a witness called on behalf of the Defendant, being
first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hoge:

Q. What is your name, Mr. Gollehon?

A. Joe T. Gollehon.

Q. What is your occupation?

A. Certified land surveyor.

Q. And you live here at Marion, I believe?

A. I live in the Marion District.

Q. I believe you're Smyth County Surveyor too, aren't you?

A. Yes, sir.

E. V. Crenshaw

Q. Mr. Gollehon, I ask you if you made the measurements from the residence of Douglas Thomas to the cut opposite this house on Interstate 81?

A. Yes, sir.

Q. Would you give us those measurements, please?

A. From the most western point to the house was 474 feet; from the mid point was 650 feet; and from the eastern most point from the cut was 900 feet.

page 106] Q. Was that to the face of the cut, as I understand it?

A. Yes, sir.

Mr. Hoge: You may cross examine.

CROSS EXAMINATION

By Mr. Matthews:

Q. Who was with you when you made these measurements, Mr. Gollehon?

A. One of my employees.

Q. Where did you measure from?

A. From the top of the cliff to the residence.

Q. Was anyone at the residence?

A. When I first got there and started to make my measurements I saw a lady over at the house, and as we went on over she apparently went in the house and I didn't see her any more.

Q. Who pointed out the residence to you?

A. I knew where the residence was at, and was taken out there by Mr. Hoge, out on the Interstate.

Q. The lady was in the house and you didn't make any inquiry and check if that was Mrs. Thomas, or who it was there at the home?

A. No, sir, I did not.

page 107] Mr. Matthews: That's all.

Witness is excused.

E. V. CRENSHAW,

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

E. V. Crenshaw

DIRECT EXAMINATION

By Mr. Campbell:

Q. What are your initials, Mr. Crenshaw?

A. E. V., Ernest V.

Q. And where do you live?

A. At Wytheville.

Q. Where are you from originally?

A. Abingdon.

Q. What is your business or occupation?

A. I am a construction inspector for the Virginia Department of Highways.

Q. How long have you had that position?

A. Ten years.

Q. Were you the construction inspector on this section of 81 constructed by V. N. Green & Company that we've been talking about?

A. Yes, sir.

Q. Were you on there all the time?

page 108] A. Yes, sir.

Q. Please state to the jury whether or not that work was done in accordance with the plans and specifications of the Highway Department?

Mr. Matthews: May it please the Court, I object to that question because defendants specifications have not been introduced.

The Court: Oh, I don't know, gentlemen, where we're getting. What plans and what specifications, and they were changed from time to time, I take it. I guess the plans and specifications is the best evidence. And they have called for them.

Mr. Hoge: Do we understand that he may answer the question?

The Court: I think the plans and specifications — I don't know whether he can testify without them or not, unless the plans and specifications are before him.

Mr. Campbell: All right.

Q. Are you familiar with the plans and specifications?

A. Yes, sir.

E. V. Crenshaw

Q. And you were the resident inspector on the job, as I understand it?

page 109] A. Yes, sir.

Q. Was it part of your duties to see that things were done in accordance with the plans and specifications?

A. Yes, sir.

Q. Please state whether the road was built in accordance with the plans and specifications?

Mr. Matthews: If the Court please, I have no doubt that the road was built in accordance with the plans and specifications. I'm not contending that they weren't. But until they show something as to plans and specifications concerning dynamiting, we object to this whole line of questioning.

The Court: It looks to me like we're going far afield. We're trying issues we need not try, and it was conceded here by counsel the other day that the road was built under contract let by the Department of Highways, and this defendant was the successful bidder and he was awarded the contract and built the road.

Mr. Campbell: If that is conceded, Judge, we don't care to go any further with this evidence.

The Court: I'm not going to try that issue at all. And if it was he wouldn't have any control over it
page 110] out there on the ground as to how the work was done from day to day. Were you present all the time?

A. Yes, sir.

Q. Each hour of each day?

A. Yes, sir, except for vacation and sick leave.

The Court: All right, go ahead, Mr. Campbell.

Mr. Campbell:

Q. Was the work done in accordance with the plans and specifications?

A. Yes, sir.

Q. And the road built in accordance therewith?

A. Built and accepted by the State of Virginia when it's completed.

Mr. Campbell: You may cross examine.

Mr. Matthews: No questions.

E. V. Crenshaw

The Court:

Q. Were you out there when this alleged blasting was done?

A. I was on the project.

Q. I didn't ask you that. The project can
page 111] be five or ten miles long. Do you know anything of
your own knowledge about the amount of powder,
etc. used in the blasts?

A. No, sir.

Q. When the blasting was done you have any supervision
or control over the blasting?

A. All I have supervision over is to see that they have a
certified blaster.

Q. And that's all you know about it?

A. Yes, sir.

The Court: Any questions?

Mr. Matthews: No, sir.

Mr. Campbell: What was the answer to that last question?

The Court: They have a certified blaster, I don't know
what that means.

Mr. Campbell:

Q. Is that not an approved and proper method of doing
the work?

Mr. Matthews: If the Court please, I object to that. That
is a conclusion.

The Court: I don't know whether he knows or not. If he
knows he may state it, if he was present there and
page 112] saw the powder placed in the hole, and if he can
testify of his own knowledge.

A. I was not present at every blast put off, but in some
instances I was when they loaded the holes.

Mr. Campbell:

Q. Were you present when the holes were loaded in this
cut that we've been talking about?

A. Some instances, yes, sir.

Mr. Campbell: That's all.

CROSS EXAMINATION

Mr. Matthews:

Q. Mr. Crenshaw, you had supervision and inspected this

E. V. Crenshaw

whole entire project that Green has, is that right?

A. Yes, sir.

Q. And you had to be from one end of that to the other inspecting, did you not?

A. Yes, sir.

Q. And it wasn't possible for you to be at this cut in front of the Thomas residence at all occasions, was it?

A. No, sir.

Q. And you don't know how the blasting was done, do you?

page 113] A. Not all of it, no, sir.

Mr. Matthews: That's all.

Mr. Campbell: That's all.

Witness stands aside.

Mr. Young: Your Honor, please, the defendant rests at this point, and we would like to renew our motion.

The Court: You make the same motion as heretofore, and I make the same ruling.

Mr. Young: Exception.

The Court: Any further evidence.

Mr. Matthews: No, sir.

Mr. Young: You want us to make this motion in the presence of the jury, your Honor.

The Court: All right, let the jury retire to your room. Both sides are now through with your evidence?

Mr. Matthews: Yes, sir.

Mr. Young: Yes, sir.

(Jury retires to their room.)

The Court: Now, that we are out of the presence of the jury you may state your grounds for your motion
page 114] if they are any different than heretofore assigned.

Is it the same motion and the same reasons?

Mr. Young: Same motion, yes, sir. And we would like to renew our tender and include the costs, which I thought followed as a matter of law, and that the costs would be added to it.

The Court: I'm very doubtful about that.

On your motion that is the same grounds, same ruling and same exceptions.

Now let's see your instructions, gentlemen.

(The Court and counsel retire to Chambers to consider the instructions.)

Mr. Campbell: The defendant, by counsel, objects to the giving of any instructions for the Plaintiffs, except as to damage done by stones cast upon their premises, for the reason that the motion for judgment does not allege negligence, nor does it allege any acts from which negligence can be inferred; because the bill of particulars alleges no negligence; and because the evidence has failed to show any negligence; and the evidence has shown that this work was done by the defendant and as contractor for the Commonwealth of Virginia, and that there was no departure from the plans.

The Court: If you have any objections to page 115] Plaintiffs' Instructions Nos. 1 and two, please state it in the record.

Mr. Young: The defendant, by counsel, objects to Instruction No. 1 on the ground that this instruction would permit the jury to return a verdict for plaintiffs without proof of any negligence on the part of the defendant, and it is contrary to the law, we submit. And for the additional reason that the evidence shows that the defendant was performing a contract for the construction of Interstate Highway #81 and complied with the plans and specifications, and if it did so, it is not liable to Plaintiffs for anything except negligence or departure from the terms of the specifications, and except for the casting of stones on the plaintiffs' residence, and that damage amounted to \$13.75.

The Court: All right, No. 2.

Mr. Young: Defendant, by counsel, objects to Instruction No. 2 because this instruction fails to differentiate between the damage to the property caused by the rock or rocks hitting the property, and the damage from any other cause. And it fails to require the jury to return a verdict for the plaintiffs only for damages negligently caused.

page 116] The Court: What about the last paragraph?

It would seem to me that on that instruction you ought to have one yardstick and not two. You have any authorities for it?

Mr. Matthews: No, sir. I have an instruction that it was based on in Michie's Instructions, your Honor.

The Court: Let me see that. The true value is the difference before and after. You can take into consideration any costs of repairs to the building.

Mr. Matthews: The evidence shows that there is damage of twisting.

Mr. Young: May I state further my objection to it?

The Court: I think it's full enough.

It seems to me that you are taking two measures of damages there. The true measure is the difference before and after, and you may consider the cost of repairs ascertained as that one measure of damages. Make your instruction to conform to that and I will grant it.

Mr. Young: The difference in value of the property before and after should be arrived at by pointing
page 117] out damage caused by the defendant's negligence.

The Court: Of course, you have to confine it to that. It has to be the direct cause.

I am not going to confine this case to the negligence theory. I'm going to put the other in and let the Supreme Court say I am in error about it.

I will grant Instruction No. 1.

Mr. Young: We except.

The Court: Instruction No. 2 — I don't think you have that stated correctly. The true measure is the value before and after, and in ascertaining that you may take into consideration the cost of repairs and placing the property in as good a condition as before.

Mr. Young: We object to Instruction No. 2. I think the instruction should set forth the difference between the damages negligently caused and those not negligently caused.

The Court: No. 2 is refused as offered.

Instruction No. 2-a was offered by the Plaintiffs.

The Court: Are there any new and additional objections to Instruction No. 2-a?

Mr. Campbell: No additional objections.

page 118] The Court: I will grant No. 2-a.

Mr. Young: We except to the granting of Instruction No. 2-a.

Instruction A was offered by the defendant, and refused by the Court as offered.

Mr. Campbell: We save the point. It correctly states the law as shown in this case that this work was done pursuant to plans and specifications of the Highway Department in the building of a public road. There is no evidence of any negligence or any departure from the terms of the plans and specifications and contract. Neither the motion for judgment nor the bill of particulars claim any negligent act.

Instruction B was offered by the defendant.

Mr. Matthews: I object to B.

The Court: I will refuse Instruction B.

Mr. Campbell: We save the point.

Instruction C was offered by the defendant.

The Court: I refuse C. I am not going to confine it to negligence.

Mr. Young: We except.

INstruction D was offered by the defendant.

The Court: I refuse D. also, to which refusal page 119] to grant Instruction D, counsel for defendant, excepted.

Defendant, by counsel, offered Instruction E.

Mr. Matthews: I object to Instruction E because there is no evidence to substantiate this instruction.

The Court: You concur in their statement that there is no evidence of negligence?

Mr. Matthews: No, sir.

The Court: You are not basing your recovery on 1 and 2 on negligence?

Mr. Matthews: That's right.

The Court: If he's not relying on negligence you don't want E. I refuse E.

Mr. Young: We except.

Instruction F was offered by counsel for the defendant.

Mr. Matthews: No objection.

The Court: *Given* without objection.

I overruled the gentlemen there for the defendant this morning on your question because of the opening statement made by Mr. Hoge, but you never did identify those two page 120] parties you said came up there, and it looks like that evidence should be stricken at this stage, because you didn't identify those two people, and the defendant cannot be bound by some third party, and I will tell the jury why I let it in, and that the parties were not identified, and that, therefore, they are not to consider it. I will instruct the jury to disregard that statement.

Mr. Campbell: Are you striking the question and answer?

The Court: About the two people coming there and reporting that the insurance man would pay for it.

Mr. Campbell: We renew our motion to discharge the jury.

The Court: Motion denied.

Mr. Campbell: We except.

(The Court, jury, counsel and all interested parties returned to the courtroom and proceedings were resumed.)

The Court: There was one bit of testimony this morning,

during the testimony of the witness, Mrs. Thomas, which was objected to by the defendant, to the effect that three men appeared and told me that the insurance company page 121] would pay for it, or words to that effect. At that time I overruled the objection, but those three parties were never identified, as far as I recall in the evidence, and the Court now tells you at this stage, they not having been identified — I don't know whether they were representatives of the defendant or not — to disregard that testimony in arriving at your verdict. The defendant is not bound by the statement of outsiders and strangers, and those three parties were not identified in the record, so the Court tells you to disregard that statement.

I want to make this further statement that objections were made and it is the duty of the Court to pass upon questions of law and rule. That doesn't mean that the Court is favoring one side or the other. I stand indifferent. It is immaterial to me who wins or loses. The only thing I am concerned with is that they get a fair trial and I'm not interested on one side over and above the other, and neither are you gentlemen. You are wholly unbiased and unprejudiced, so you weigh the evidence; you are the sole judges of the facts, so you weigh the evidence and decide the issue submitted to you. Neither the Court or anybody else can tell you who to believe. You will give credit where you think credit is due. page 122] The Court instructs the jury.

(Mr. Mathews opened the summation before the Jury.)

(Mr. Young and Mr. Hoge summed up for the defendant before the jury.)

(Mr. Matthews closed for the plaintiffs before the jury.)

The jury retired to their room at 3.16 p. m. to consider of their verdict.

After a time, the jury returned to the courtroom at 4:07 p. m., and rendered the following verdict:

(The Court, counsel, jury and all interested parties returned to courtroom.)

The Court: Gentlemen, have you arrived at a verdict.

Jury: We have, sir.

The Court: Pass it up to the Clerk, please. Mr. Clerk, will you read the verdict.

Mr. Clerk:

"We, the jury, have reached a verdict in favor of the

plaintiffs, Douglas M. Thomas and Laire T. Thomas, and fix the amount of damage at \$1500.00.

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“FRED T. CONNER, Foreman.”

The Court: Any objection to the form of the verdict?

Mr. Matthews: None by the plaintiffs.

Mr. Young: No objection to the form.

The Court: All right, gentlemen, let the verdict be received, and you gentlemen are excused.

Whereupon the jury retired from the courtroom.

Mr. Young: If the Court please, we would like to move to set the verdict aside.

The Court: Suppose you assign your grounds and let me have them in the next few days, and I will pass on it as soon as possible. Assign your grounds in writing, and give copies and authorities to opposing counsel, and leave the original with the Clerk here, and then you answer within a reasonable time. Now, don't delay it because all of these things pass out of my mind, and I would like to pass on it as soon as possible.

Gentlemen, Court is recessed until tomorrow morning at 9:00 o'clock.

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CERTIFICATE

I, T. L. Hutton, Judge of the Circuit Court of Smyth County, Virginia, do hereby certify that the foregoing is a true and correct stenographic copy and report of the evidence and other incidents of the trial therein, all questions raised, and all rulings thereon and exceptions noted in the case of *Douglas M. Thomas and Laire T. Thomas, Plaintiffs*, vs. *V. N. Green & Company, Inc., Defendant*, in said Court at Marion, Virginia, on November 13, 1963; and it appears in writing that the Plaintiffs had reasonable notice when this report of the testimony and other incidents of the trial would be presented for certification, and which was presented to me within sixty days after final judgment and signed by me within seventy days.

I also certify that the Court Reporter reporting said case was sworn to take down and transcribe said testimony and other incidents faithfully and accurately to the best of her ability.

Given under my hand this 13th of January, 1964.

T. L. HUTTON
Judge

page 125] I, Lloyd E. Currin Clerk of the Circuit Court of
Smyth County, Virginia, do hereby certify that
the foregoing stenographic copy or report of the testimony
and other incidents of the trial in the case of *Douglas M.
Thomas and Laire T. Thomas, Plaintiffs*, vs. *V. N. Green &
Company, Inc., Defendant*, was filed with me as Clerk of said
Court on the 13 day of January, 1964.

LLOYD E. CURRIN
Clerk of the Circuit Court
of Smyth County, Virginia.

A Copy—Teste:

H. G. TURNER, Clerk.

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