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Record No. 4952

In the Supreme Court of Appeals of Virginia at Richmond

FANNIE TILLER, ET AL.

v.

NORFOLK AND WESTERN RAILWAY COMPANY

FROM THE CIRCUIT COURT OF DICKENSON COUNTY

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4952

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 13th day of October, 1958.

FANNIE TILLER, ET AL., Appellants,

against

NORFOLK AND WESTERN RAILWAY COMPANY, Appellee.

From the Circuit Court of Dickenson County

Upon the petition of Fannie Tiller, Maxie T. Mullins, Tollie E. Mullins, Rachel Barton, Ira Barton, Hattie Ashworth, Eugene Ashworth, Graham A. Tiller, Janie Ruth Tiller, J. Bernard Tiller, Mona Tiller, Elaine T. Duty and Dewey Duty an appeal is awarded them from a decree entered by the Circuit Court of Dickenson County on the 22nd day of April, 1958, in a certain chancery cause then therein depending wherein Norfolk and Western Railway Company was plaintiff and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said Circuit Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Filed in the Clerk's Office the 2 day of Jan., 1958.

Teste:

C. P. MULLINS, Clerk
..... RASNICK, D. C.

PETITION.

To the Honorable Frank W. Smith, Judge of said Court:

I.

Your petitioner, Norfolk & Western Railway Company, respectfully represents that it is a public service corporation of this State organized to conduct a railroad business with its principal office in Roanoke, Virginia, and it is authorized by its Charter and the laws of Virginia to condemn land, other property and any interest or estate therein for railroad purposes for public use.

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II.

Your petitioner represents that in furtherance of its purpose it is necessary for it to locate and construct for public service a spur line off of its Wilder Spur Extension—Dumps Creek Branch—Clinch Valley District, Pocahontas Division of its railroad to be located in Dickenson County, Virginia, connecting with its said Wilder Spur extension near the mouth of Tiller Fork of Cane Creek; thence running in a general Southwesterly direction up Tiller Fork, a distance of approximately 1.8 miles in said Dickenson County.

III.

That the spur line off of the Wilder Spur extension is to be known as the Tiller Fork spur which petitioner is to construct and operate, passes through and over the lands located in Dickenson County, Virginia, owned by Fannie Tiller, Maxie T. Mullins and Tollie E. Mullins, Rachel Barton and Ira Barton, Hattie Ashworth and Eugene Ashworth, Graham A. Tiller and Janie Ruth Tiller, J. Bernard Tiller and Mona

Tiller, and Elaine T. Duty and Dewey E. Duty, being all the heirs at law of Eivens Tiller, deceased; that a *bona fide* effort has been made by petitioner to purchase from the said Fannie Tiller, Maxie T. Mullins and Tollie E. Mullins, Rachel Barton and Ira Barton, Hattie Ashworth and Eugene Ashworth, Graham A. Tiller and Janie Ruth Tiller, J. Bernard Tiller and Mona Tiller, and Elaine T. Duty and Dewey E. Duty the lands and properties necessary for the location, construction, and operation of said spur line of railroad, but petitioner has been unable to purchase said land and to secure title to same by reason of its inability to agree on the purchase price of the land which is wanted to be taken and used in the location, construction, maintenance, and operation for public use of its Tiller Fork spur. In this connection Hattie Ashworth, Eugene Ashworth and Mona Tiller and Janie Ruth Tiller were not contacted directly due to the fact that Hattie Ashworth and Eugene Ashworth are non-residents page 3 } of Virginia, and Mona Tiller and Janie Ruth Tiller have only contingent rights of dower, also petitioner has been informed that these heirs have agreed among themselves that no one or more of them would sell to petitioner unless all sold, and, therefore, those contacted were acting as agent for those not contacted. That there is filed herewith as Exhibit "A" and as a part of this petition a memorandum setting forth the names and residences of the present owners of the land and also showing the quantity and description of the land and other property which is sought to be condemned; that there is also filed herewith as Exhibit "B" and as a part of this petition a plat of the survey with a profile showing the cuts and fills, trestles and bridges, and description of the land and other property which is sought to be condemned; also filed herewith as Exhibit "C" a certified copy of a resolution of the Board of Directors of petitioner authorizing the condemnation of said land and said exhibits are prayed to be read as a part of this petition.

IV.

The interests or estate taken in said land described as aforesaid is a fee simple title subject to the mineral and mining rights and other interest therein outstanding in The Pittston Company.

V.

That a part of the defendants, owners of undivided interests in said land, to-wit: Maxie T. Mullins and Tollie E.

Mullins, her husband, whose address is 146 East Grand Avenue, Johnson City, Tennessee, and Hattie Ashworth and Eugene Ashworth, her husband, whose address is 8 Chamberlain Court, Charleston, West Virginia, are non-residents of the State of Virginia.

VI.

That the said strip or parcel of land is wanted for the location, construction and operation for public service of the Tiller Fork Spur of petitioner's line of railroad.

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VII.

That the material facts upon which this application for appointment of Commissioners is based are as follows: That a *bona fide,* but ineffectual effort has been made to purchase the said land from the said Fannie Tiller, Maxie T. Mullins and Tollie E. Mullins, Rachel Barton and Ira Barton, Hattie Ashworth and Eugene Ashworth, Graham A. Tiller and Janie Ruth Tiller, J. Bernard Tiller and Mona Tiller, Elaine T. Duty and Dewey E. Duty, but petitioner has been unable to agree with the owners on the purchase price of said land. Hattie Ashworth, Eugene Ashworth and Mona Tiller and Janie Ruth Tiller were not contacted directly for the reasons and under the circumstances set forth above.

VIII.

WHEREFORE, your petitioner prays for the appointment of Commissioners as provided by law, to ascertain what will be a just compensation for the fee simple title to the strip or parcel of land to be taken for the purpose aforesaid, subject to the mineral and mining rights, and other interest therein outstanding in The Pittston Company, and to award damages, if any, resulting to the adjacent or other property of the owners or to the property of any other person, beyond the peculiar benefits, if any, that will accrue to such properties, respectively, from the location, construction and operation of said spur line of railroad.

NORFOLK & WESTERN RAILWAY COMPANY

By .....

Vice President and General Manager.

* * * * *

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* * * * *

EXHIBIT "A."

MEMORANDUM of the names and residences of the owners of the property to be condemned, the description of the land and the acreage thereof, and the interest to be taken therein.

Land to be acquired from the heirs at law of Eivens Tiller, Deceased:

All those certain pieces or parcels of land situate in the County of Dickenson, State of Virginia. bounded and described as follows:

PARCEL NO. 1.

Beginning at the point of intersection of the dividing line between lands of Heirs of Eivens Tiller et al. and Elaine T. Duty et al. with the center line of location of Tiller Fork Spur—Wilder Spur Extension—Dumps Creek Branch—Clinch Valley District—Pocahontas Division of the Norfolk and Western Railway Company at station 39 plus 63.3 as measured from the connection of Tiller Fork Spur with Wilder Spur Extension; thence with said dividing line as follows: S 55° 16.5′ E about 148 feet to a point; thence about S 45° 52′ W 400 feet to a point; thence about S 58° 38′ E 13 feet, more or less, to a point; thence through said land of Heirs of Eivens Tiller et al. as follows: Parallel with said center line 110 feet distant southeastwardly therefrom S 43° 28.5′ W about 332 feet to a point radial to said center line at P. C. Station 46 plus 66.31; thence radial to said center line, southeastwardly 20 feet to a point; thence parallel with said center line and 130 feet distant southeastwardly therefrom by a line curving to the right with a radius of 1562.69 feet, southwestwardly 309.43 feet to a point radial to said center line at station 49 plus 50; thence by a line radial to said center line, northwestwardly 20 feet to a point; thence parallel with said center line and 110 feet distant southeastwardly therefrom as follows: by a line curving to the right with a radius of 1542.69 feet, southwestwardly 79.02

feet to a point at right angles to said center line at P. T. Station 50 plus 23.39; thence S 57° 45.5′ W about 160 feet to a point in the dividing line between lands of said Heirs of Eivens Tiller et al. and J. B. Tiller et al.; thence with said dividing line about N 39° 10.5′ W, crossing Virginia State Highway Route No. 601, 111 feet, more or less, to a point in the west line of right of way of said highway; thence with said line of right of way southwestwardly about 370 feet to a point corner to said lands; thence with the dividing line between said lands N 81° 55′ W crossing said center

page 7 } line at 90 feet at station 56 plus 14.75, a total distance of 172.5 feet to a point; thence through said land of Heirs of Eivens Tiller et al. parallel with said center line and 80 feet distant northwestwardly therefrom as follows: by a line curving to the right with a radius of 754.69 feet northeastwardly about 471 feet to a point radial to said center line at P. C. Station 52 plus 13.02; thence N 57° 45.5′ E 189.63 feet to a point at right angles to said center line at P. T. Station 50 plus 23.39; thence by a line curving to the left with a radius of 1352.69 feet northeastwardly about 127 feet to a point in the line of a fence bounding Tiller Grave Yard; thence with said line of fence as follows: S 65° 27.5′ E about 43 feet to a point; thence N 31° 58′ E 61.5 feet to a point, said point benig radial to and 60.6 feet distant northwestwardly from said centerline at station 48 plus 10; thence continuing with said line of fence northwestwardly about 4.5 feet to a point; thence through said land of Heirs of Eivens Tiller et al. parallel with said center line and 65 feet distant northwestwardly therefrom as follows: by a line curving to the left with a radius of 1367.69 feet northeastwardly about 131 feet to a point radial to said center line at P. C. Station 46 plus 66.31 thence N 43° 28.5′ E 116.31 feet to a point at right angles to said center line at station 45 plus 50; thence by a straight line northeastwardly about 570 feet to a point in aforesaid dividing line between lands of Heirs of Eivens Tiller et al. and Elaine T. Duty et al.; thence with said dividing line S 55° 16.5′ E 100 feet to the point of Beginning and containing 6.93 acres, more or less, together with all buildings and appurtenances thereto pertaining, excepting however all coal rights owned by The Pittston Company and 1.2 acres, more or less, the right of way for Virginia State Highway Route No. 601, leaving a balance of 5.73 acres, more or less, to be acquired by this conveyance.

PARCEL NO. 2.

Beginning at the point of intersection of the dividing line between lands of Heirs of Eivens Tiller et al. and J. B. Tiller et al. with the center line of location of Tiller Fork Spur of Wilder Spur Extension—Dumps Creek Branch—Clinch Valley District—Pocahontas Division of the Norfolk and Western Railway Company at station 63 plus 07 as measured from the connection of Tiller Fork Spur with Wilder Spur Extension; thence with said dividing line as follows: S 88° 13.5′ E 26 feet to a stake on the bank of Tiller Fork, corner to said lands; thence with the dividing line between said lands of Heirs of Eivens Tiller et al. and J. B. Tiller et al. as follows: S 13° 44.5′ W 278 feet to a hub with white walnut marker; thence S 7° 47.5′ E 438 feet to a beech stump; thence S 20° 12.5′ E 353 feet to a stake corner to said land of Heirs of Eivens Tiller et al. and land of The Pittston Company; thence with the dividing line between said lands S 76° 40.5′ W crossing aforesaid center line at 54.4 feet at station 73 plus 76, a total distance of 104.4 feet to a point; thence through said land of Heirs of Eivens Tiller et al. as follows: by a straight line northwestwardly about 364 feet to a point at right angles to and 140 feet distant southwestwardly from said center line at station 70 plus 25; thence by a straight line northwardly about 360 feet to a point radial to and 100 feet distant westwardly from said center line at station 67 plus 00; thence by a straight line northeastwardly about 390 feet to a point in aforesaid dividing line between said lands of Heirs of Eivens Tiller et al. and J. B. Tiller et al.; thence with said dividing line S 88° 13.5′ E 115 feet to the point of Beginning and containing 3.26 acres, more or ess, excepting therefrom all coal rights owned by The Pittston Company.

page 8 } PARCEL NO. 3.

Beginning at stake near a willow on the bank of Tiller Fork corner to lands of Heirs of Eivens Tiller et al., Maxie T. Mullins et al., and J. B. Tiller et al., said point being N 18° 46.5′ E 25 feet distant from the center line of location of Tiller Fork Spur of Wilder Spur Extension—Dumps Creek Branch—Clinch Valley District—Pocahontas Division of the Norfolk and Western Railway Company at station 90 plus 70.33 as measured from the connection of Tiller Fork Spur with Wilder Spur Extension; thence with the dividing line between said lands of Heirs of Eivens Tiller et al. and J. B.

Tiller et al. N 69° 46.5′ E 31.95 feet to a point; thence through said lands of Heirs of Eivens Tiller et al. as follows: parallel with and 50 feet distant northeastwardly from said center line and said center line produced, S 56° 31.5′ E 267.07 feet to a point at right angles to said center line as produced at station 93 plus 50; thence S 26° 31.5′ E crossing said center line as produced at 100 feet, at station 94 plus 36.6, a total distance of 196.3 feet to a point at right angles to and 48.15 feet distant southwestwardly from said center line as produced, at station 95 plus 20; thence at right angles to said center line as produced southwestwardly 21.85 feet to a point; thence N 51° 20′ W 220.9 feet to a point at right angles to and 50 feet distant southwestwardly from said center line as produced, at station 93 plus 00; thence N 53° 34.5′ W 219.82 feet to a point in the dividing line between aforesaid lands of Heirs of Eivens Tiller et al. and Maxie T. Mullins et al.; thence with said dividing line N 18° 46.5′ E, crossing said center line at 40 feet, at aforesaid Station 90 plus 70.33, a total distance of 65 feet to the place of Beginning and containing 0.85 of an acre, more or less, excepting therefrom all coal rights owned by The Pittston Company.

The above described parcels of land are designated parcels Nos. 1, 2 and 3 on Norfolk and Western Railway Company's plat N-26903, dated September 16, 1957, and revised December 10, 1957, copy of which is filed herewith as Exhibit "B."

* * * * *

page 13 } "EXHIBIT C."

IT IS CERTIFIED, That the following is a true and correct copy of a preamble and resolution adopted at a stated meeting of the Board of Directors of NORFOLK AND WESTERN RAILWAY COMPANY duly called and held in the City of Philadelphia, Pa., on the 25th day of June, 1957, at which meeting more than a quorum of the Board was in attendance, nine votes being cast for the resolution and none against it:

WHEREAS, in order to accommodate the public using the railroad of this Company and to develop its traffic, it is necessary for this Company under its franchises to locate, construct and operate for public service certain spur tracks from its Wilder Spur Extension, now in process of construction

or from spurs from said Wilder Spur Extension, such spurs to be located in Dickenson, Buchanan and Russell Counties, Virginia, as hereinafter more particularly described;

THEREFORE, BE IT RESOLVED THAT:

1. This Company does hereby locate spurs of railroad as follows:

* * * * *

(c) In Dickenson County, Virginia—

Beginning at a point on the east side of Cane Creek and the south side of Tiller Fork in Dickenson County, Virginia, and on Wilder Spur Extension of the Norfol kand Western Railway Company about 0.27 of a mile southwardly from the end of said Wilder Spur Extension near the mouth of Tiller Fork; thence extending in a general easterly and southerly direction up the southerly or westerly side of Tiller Fork a total distance of about 1.8 miles from the beginning.

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MOTION TO QUASH.

The defendants come and move the court to quash the notice, petition and proceedings in this case, because:

1. The petition is insufficient, and does not show facts constituting any necessity for the condemnation prayed, but only the conclusion of the pleaders.
2. The petition does not show the interest proposed to be taken, nor what mineral rights are not to be condemned; nor what are "the other interest therein outstanding in The Pittston Company."
3. The map filed does not show cuts, fills, trestles nor bridges.
4. The petition does not state facts showing a *bona fide* effort to purchase the land described or any excuse therefor.

5. No authority by the Interstate Commerce Commission for the construction of the proposed line is alleged.

S. H. & GEO. C. SUTHERLAND,
Attys. Clintwood, Virginia
By S. H. SUTHERLAND.

Received and filed, this the 21 day of Jan., 1958.

..... RASNICK, Dep. Clerk.

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GROUNDS OF DEFENSE.

These defendants come and for grounds of defense to the above entitled proceedings, say:

1. They admit the corporate entity and authority as set forth in paragraph I.
2. They deny that the proposed strip of land is to be taken for a spur line or that it is necessary for petitioner's use or will be for public use.
3. They again deny that the proposed strip of land is a spur track but admit it is an extension; they deny any *bona fide* effort has been made to purchase said tract of land; and they deny that Exhibit B is a plat showing the profile, cuts, fills, trestles and bridges in compliance with the statutes in such cases made and provided.
4. They deny that the strip of land is intended for public use.

S. H. & GEO. C. SUTHERLAND,
Attys. p. d.
By S. H. SUTHERLAND.

Received and filed, this the 21 day of Jan., 1958.

..... RASNICK, Dep. Clerk.

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DECREE.

On the 1st day of February, 1958, came the Petitioner and the defendants Fannie Tiller, Maxie T. Mullins and Tollie E. Mullins, Rachel Barton and Ira Barton, Hattie Ashworth and Eugene Ashworth, Graham A. Tiller and Janie Ruth Tiller, J. Bernard Tiller and Mona Tiller, and Elaine T. Duty and Dewey E. Duty, by their respective counsel. And the defendants filed their motion to quash the notice, petition and proceedings in this case. Whereupon both the petitioner and the defendants presented evidence by witnesses heard in open court at the conclusion of which both the petitioner and the defendants announced that they had closed the presentation of their evidence in the case.

And it appearing to the Court that ten days notice of the Norfolk and Western Railway Company's intention to apply to this court for the appointment of Commissioners to ascertain what would be a just compensation for the land and other property proposed to be condemned in these pleadings for its uses, and to award the damages, if any, resulting to the adjacent or other property of said owners or any other person, beyond the peculiar benefits that will

page 26 } accrue to such properties, respectively, from the construction and operation of the said Company's line of railroad, has been given to Marie T. Mullins, T. E. Mullins, Hattie Ashworth and Eugene Ashworth by Order of Publication duly posted and published for two weeks in the Dickensonian, a newspaper published in Dickenson County, Virginia; the first publication appearing in the issue of January 10, 1958, and the second publication appearing in the issue of January 17, 1958; certificate of the Editor and Publisher showing due and legal publication being filed with the papers in this cause; that Fannie Tiller, Elaine T. Duty, Dewey E. Duty, Rachel Barton and Ira Barton have been given notice by personal service of notices by the Sheriff of Dickenson County, Virginia; and to J. Bernard Tiller and Mona Tiller by personal service of notices by the Sheriff of Russell County, Virginia, and to Graham A. Tiller and Janie Ruth Tiller by personal service of notices by the Sheriff of Washington County, Virginia; that on the 2nd day of January, 1958, the Norfolk and Western Railway Company filed in the Clerk's office of this County, a plat,

memorandum, and Petition in compliance with the provisions of law for such cases made and provided, and that the land and other property sought to be condemned in these proceedings is wanted for the uses and purposes of the said Norfolk and Western Railway Company; that the said land and other property lies within the County of Dickenson; the Court doth adjudge, order and decree that this cause be docketed; and it appearing to the court that all parties owning an interest in the land to be condemned have been given notice as required by law; and the Court being of opinion that Petitioner has complied with all requirements of the law as to filing of pleadings, exhibits and notices to the owners; the court doth overrule the motion to quash and doth further hold that the grounds of defense are insufficient, and no sufficient reason appearing why commissioners should not be appointed at this time, the Court doth appoint W. B. Trivett, J. C. Mullins, William Skeens, Garfield Baker, and Claude F. Beverly, five disinterested free-holders page 27 } residing in said County of Dickenson, any three or more of whom may act for the purpose of ascertaining a just compensation for such lands and other property and awarding the damages, if any, resulting to the adjacent or other property of the owners or to the property of any other person, beyond the peculiar benefits that will accrue to such property respectively, from the construction and operation of the said Company's line of railroad; and the Court doth designate the 17 day of February, 1958, at 9:00 A. M. for said Commissioners to meet at the Clerk's office of this Court to be sworn and then to proceed to the land involved in this suit and after viewing said land the said Commissioners are to return to the Court house where they shall hear any pertinent evidence offered by either side and they shall report their action thereunder.

To which action of the Court in overruling the motion to quash and in not sustaining the grounds of defense filed by the defendants the defendants Fannie Tiller, Maxie T. Mullins and Tollie E. Mullins, Rachel Barton and Ira Barton, Hattie Ashworth and Eugene Ashworth. Graham A. Tiller and Janie Ruth Tiller, J. Bernard Tiller and Mona Tiller, and Elaine T. Duty and Dewey E. Duty duly and properly excepted.

To C. P. Mullins, Clerk, please enter this decree this the 1st day of February, 1958.

F. W. SMITH, Judge.

* * * * *

page 32 } INSTRUCTION NO. 1.

The Court instructs the commissioners that the compensation to be fixed by you is the value as of the date of the making of your report. The value of the property taken is the market value and the market value of property is the price which it will bring when offered for sale by one who desires, but is not obligated to sell, and is bought by one who is desirous, but is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered.

It is not a question of the value of the property to the company or to the owner, nor can the value be enhanced by an unwillingness to sell it or because the company needs the particular property. It is the actual present value of the land with all its adaptations to general and special uses, and not its prospective or speculative or possible value based upon future expenditures and improvements, that is to be considered.

Given.

F. W. S.

page 33 } INSTRUCTION NO. 2.

The court instructs the commissioners that they are to hear and determine three separate cases together. The commissioners should make three reports and they are to determine two questions in each case. First, the compensation to each land owner for the land taken by the railroad company, and; Second, such damages, if any, as may be done to the remainder of the land of the respective land owners by reason of the construction and operation of the company's works on such right of way, and to the property of other persons, beyond the peculiar benefits that will accrue to such properties respectively.

Given.

F. W. S.

page 34 } INSTRUCTION NO. 4.

The Court instructs the commissioners that it is not necessary that all of the commissioners shall agree upon the re-

port to be made in each of the cases now being heard, but a majority of you have the right to reach a conclusion and file your report setting forth that conclusion. If the minority desires to do so, they may file a minority report.

Given.

F. W. S.

page 35 } INSTRUCTION NO. 6.

The Court further instructs the commissioners that you cannot take into consideration in arriving at your awards any future apprehended damages which may possibly result from any negligent construction or operation of the works and lines of the Norfolk and Western Railway Company since the company would then be liable in damages for such negligence in a separate action.

Given.

F. W. S.

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II.

Now as to what is a "peculiar benefit" that will accrue to the property, and as used in the above instruction, the words "peculiar benefit" should be given the ordinary, every day meaning, in contrast to "general benefits" which accrues to all or practically all the property in the community where the improvement is to be made. They
page 39 } must, be the direct, certain and proximate, as to the defendants and their land, and not indirect, contingent or remote and such as is received in common by the whole community or public. In this case, if the construction of this railroad, in your opinion, will enhance the value of the property in the vicinity, as I believe it will, this is a *general benefit,* shared by all, and cannot be offset against damages, which may be caused. It is hard to so phrase a sentence as to make this distinction clear. From my knowledge of this country, a *peculiar benefit* of the kind you are allowed

to offset is rare here. I will give you a couple of illustrations which, I think, will enable you to determine what the term peculiar benefits in cases of this sort mean. If a man owns a farm that is swampy, and the improvement contemplated would dry it up or drain it, as it would if the improvement proposed would require a ditch to be cut through it; that would be a direct and peculiar benefit to that property not shared by the rest of the community, as the other property would not be thus enhanced in value thereby, in that way. Again, where a man owns a tract of land through which a large deep river flows, and the improvements would place a bridge across this stream so as to enable him to have easy access to his land on both sides of the stream, that would be a peculiar benefit to this man, in which the general public would not share or profit. From those illustrations you can readily determine whether or not there are any "peculiar benefits" for you to consider in this case.

Refused as offered.

F. W. S.

INSTRUCTION NO. III.

The defendants are entitled to a fair and just compensation for the lands taken, i. e., they are to have the equivalent in money for the land taken. The words "just compensate" presents the idea of jointly balancing the money page 40 } they are to receive against the land taken. To compensate is to give or render money which is equal in value to the land which they are to lose, and when we add to or modify this by the adjective "just" we intensify the meaning of the word "compensation," so it means the compensation allowed by you should be placed upon a broad and equitable basis, so this equivalent you are to give should be real, substantial, full and ample.

Refused.

F. W. S.

INSTRUCTION NO. IV.

With reference to arriving at the value of the property taken, just compensation includes the damages, if any, to the remainder of the defendants' property. In other words, if there is any diminution in value of the defendants' land

not taken, compensation for this should be included in your estimate of the land taken; because the defendants are entitled to have their entire tract considered in fixing the value of what is actually taken. In such case your inquiry should be "how much less is the entire property worth to the owners with this railroad constructed thereon, the day after the construction of the railroad than it would have been if none of their property had been taken, and your answer to this inquiry would be the value of the land taken. But suppose there is no damage to the remainder of the property of the defendants, and it is worth as much as it would have been had no portion of the entire tract been taken, then your task is the much easier one of fixing the value of the property taken.

Refused as offered.

F. W. S.

INSTRUCTION NO. V.

Now as to your duty to appraise the value of the property taken, your good judgment as men is of more value than any rule of law; but these rules of law are important and should be most carefully observed. Your inquiry is, what is the property worth in the market, viewed not
page 41 } merely with reference to its present condition, but to what it plainly is adapted, or what is it worth for the most advantageous uses to which it is now adapted or may in the near future be applied—its capability of being available for other uses is to be by you considered, having regard to the business wants of the community, or such as may be reasonably expected in the immediate or near future. If the property has any special adaptability for railroad purposes, its capabilities of being so made available, are to be by you considered.

Refused as offered.

F. W. S.

INSTRUCTION NO. VI.

As to damages, it is difficult, if not impossible, to enumerate all of the elements to be taken into consideration; if for no other reason than there are rarely any two cases alike, and what will influence one man in one direction may influence

another in a contrary direction. When part of a tract is taken the shape and size of the entire tract before, as well as the shape and size of the parcel or parcels that remain, the difficulty of access, and communication between the parts left, if there are such, inconveniences and disfigurement, interference with the drainage or access to the water supply, when present, are elements and items which should receive careful consideration. Without undertaking to enumerate a list of all the proper items which should be considered, or to intimate that all, or any of them, are present in this case, the court will instruct you that if you find the following or any one or more of them exist, you should consider, and the defendants are entitled, in addition to the value of the land actually taken, to compensation, (1) to deterioration in value by reason both of the construction and operation of petitioner's railroad; (2) annoyance and inconvenience from noise, vibration, settling of smoke, dust, cinders, blowing of whistles and ringing of bells, etc., (3) for damages page 42 } and inconveniences which directly result from the use of the land for railroad purposes; (4) for adaptability for railroad purposes; (5) blasting and other construction, maintenance, and operative work, so far as they may affect the market value of the land; (6) interference with easements or access to *to* her property owned by the defendants; (7) increased inconveniences of access and other inconveniences of like kind; (8) increased danger of fire; (9) increased inconvenience in the use of the remainder of their property; (10) damages to any spring or other water, and (11) any and all things which would affect the price or sale of the remaining property.

Refused.

F. W. S.

INSTRUCTION NO. VII.

You gentlemen of the Commission are instructed that in arriving at the damages to the residue of the land not taken that you must take into consideration the whole of the residue and the following elements of damage to said whole of the residue may be considered:

1. The shape and size of the parcel or parcels that remain.
2. Inconvenience of passing from one part to another and disfigurement caused by the taking.

3. Interference with the drainage, or the flow of the surface water, or the water supply.
4. Danger to which the occupants or stock is exposed.
5. Injury to grass and crops by the dirt washed from the embankments, or other materials.
6. The depreciation and deterioration in value of the land left.
7. Reduction in the value of the buildings not taken.
8. Change or destruction of roads.
9. The width of the right of way, and the road as
page 43 } constructed, and the manner of use by the rail-
railroad.
10. The height and depth of cuts and fills.
11. The depth and number of ditches and under drains and where the water will be left after passing under the road.
12. Pollution of the streams and springs.
13. Increased cost of the use of the property.

Refused.

F. W. S.

page 44 }

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Received and filed, this the 26 day of Feb., 1958.

..... RASNICK, Dep. Clerk.

REPORT OF COMMISSIONERS.

We, W. B. Trivett, J. C. Mullins, Garfield Baker, B. S. Powers, and William L. Skeen, five Commissioners appointed by the Circuit Court of Dickenson County to ascertain what will be a just compensation for the fee simple title to the tract or parcel of land owned by the said Fannie Tiller, et al., subject to the mineral and mining rights and interest therein outstanding in The Pittston Company, and for such other property as is proposed to be taken by the Norfolk and Western Railway Company, and to assess the damages, if any, resulting to the adjacent or other property of said owners or to the property of any other person beyond the peculiar benefits that will accrue to such property, respectively, from the construction and operation of the Company's line of railroad, do hereby certify that on the 24 day of February, 1958, the day designated in the said Order, we

met together at the Clerk's office of Dickenson County and after being sworn by the Clerk, we proceeded to the land involved in this proceeding and met together on said land, the limits of which were then and there shown and described to us as follows:

All those certain pieces or parcels of land situate in the County of Dickenson, State of Virginia, bounded and described as follows:

page 45 } PARCEL NO. 1.

Beginning at the point of intersection of the dividing line between lands of Heirs of Eivens Tiller et al. and Elaine T. Duty et al. with the center line of location of Tiller Fork Spur—Wilder Spur Extension—Dumps Creek Branch—Clinch Valley District—Pocahontas Division of the Norfolk and Western Railway Company at station 39 plus 63.3 as measured from the connection of Tiller Fork Spur with Wilder Spur Extension; thence with said dividing line as follows: S 55° 16.5′ E about 148 feet to a point; thence about S 45° 52′ W 400 feet to a point; thence about S 58° 38′ E 13 feet, more or less, to a point; thence through said land of Heirs of Eivens Tiller et al. as follows: parallel with said center line and 110 feet distant southeastwardly therefrom S 43° 28.5′ W about 332 feet to a point radial to said center line at P. C. Station 46 plus 66.31; thence radial to said center line, southeastwardly 20 feet to a point; thence parallel with said center line and 130 feet distant southeastwardly therefrom by a line curving to the right with a radius of 1562.69 feet, southwestwardly 309.43 feet to a point radial to said center line at station 49 plus 50; thence by a line radial to said center line, northwestwardly 20 feet to a point; thence parallel with said center line and 110 feet distant southeastwardly therefrom as follows: by a line curving to the right with a radius of 1542.69 feet, southwestwardly 79.02 feet to a point at right angles to said center line at P. T. station 50 plus 23.39; thence S 57° 45.5′ W about 160 feet to a point in the dividing line between lands of said Heirs of Eivens Tiller et al. and J. B. Tiller et al.; thence with said dividing line about N 39° 10.5′ W, crossing Virginia State Highway Route No. 601, 111 feet, more or less, to a point in the west line of right of way of said highway; thence with said line of right of way southwestwardly about 370 feet to a point corner to said lands; thence with the dividing line between said lands N 81° 55′ W crossing said center line at 90 feet at station 56 plus 14.75, a total

distance of 172.5 feet to a point; thence through said land of Heirs of Eivens Tiller et al. parallel with said center line and 80 feet distant northwestwardly therefrom as follows: by a line curving to the right with a radius of 754.69 feet northeastwardly about 471 feet to a point radial to said center line at P. C. Station 52 plus 13.02; thence N 57° 45.5′ E 189.63 feet to a point at right angles to said center line at P. T. station 50 plus 23.39; thence by a line curving to the left with a radius of 1352.69 feet northeastwardly about 127 feet to a point in the line of a fence bounding Tiller Grave Yard; thence with said line of fence as follows: S 65° 27.5′ E about 43 feet to a point; thence N 31° 58′ E 61.5 feet to a point, said point being radial to and 60.6 feet distant northwestwardly from said center line at station 48 plus 10; thence continuing with said line of fence northwestwardly about 4.5 feet to a point; thence through said land of Heirs of Eivens Tiller et al. parallel with said center line and 65 feet distant northwestwardly therefrom as follows: by a line curving to the left with a radius of 1367.69 feet northeastwardly about 131 feet to a point radial to said center line at P. C. station 46 plus 66.31; thence N 43° 28.5′ E 116.31 feet to a point at right angles to said center line at station 45 plus 50; thence by a straight line northeastwardly about 570 feet to a point in aforesaid dividing line between lands of Heirs of Eivens Tiller et al. and Elaine T. Duty et al.; thence with said dividing line S 55° 16.5′ E 100 feet to the point of Beginning and containing 6.93 acres, more or less, together with all buildings and appurtenances thereto pertaining, excepting however all coal rights owned by The Pittston Company and 1.2 acres, more or less, the right of way for Virginia State Highway Route No. 601, leaving a balance of 5.73 acres, more or less, to be acquired by this conveyance.

PARCEL NO. 2.

Beginning at the point of intersection of the dividing line between lands of Heirs of Eivens Tiller et al. and J. B. Tiller et al. with the center line of location of Tiller Fork Spur of Wilder Spur Extension—Dumps Creek page 46 } Branch—Clinch Valley District—Pocahontas Division of the Norfolk and Western Railway Company at station 63 plus 07 as measured from the connection of Tiller Fork Spur with Wilder Spur Extension; thence with said dividing line as follows: S 88° 13.5′ E 26 feet to a stake on the bank of Tiller Fork, corner to said lands; thence with the dividing line between said lands of Heirs of Eivens Tiller et al. and J. B. Tiller et al. as follows: S 13° 44.5′ W

278 feet to a hub with white walnut marker; thence S 7° 47.5′ E 438 feet to a beech stump; thence S 20° 12.5′ E 353 feet to a stake corner to said land of Heirs of Eivens Tiller et al. and land of The Pittston Company; thence with the dividing line between said lands S 76° 40.5′ W crossing aforesaid center line at 54.4 feet at station 73 plus 76, a total distance of 104.4 feet to a point; thence through said land of Heirs of Eivens Tiller et al. as follows: by a straight line northwestwardly about 364 feet to a point at right angles to and 140 feet distant southwestwardly from said center line at station 70 plus 25; thence by a straight line northwardly about 360 feet to a point radial to and 100 feet distant *westwardt frin saud* center line at station 67 plus 00; thence by a straight line northeastwardly about 390 feet to a point in aforesaid dividing line between said lands of Heirs of Eivens Tiller et al. and J. B. Tiller et al.; thence with said dividing line S 88° 13.5′ E 115 feet to the point of Beginning and containing 3.26 acres, more or less, excepting therefrom all coal rights owned by The Pittston Company.

PARCEL NO. 3.

Beginning at a stake near a willow on the bank of Tiller Fork corner to lands of Heirs of Eivens Tiller et al., Maxie T. Mullins et al., and J. B. Tiller et al., said point being N 18° 46.5′ E 25 feet distant from the center line of location of Tiller Fork Spur of Wilder Spur Extension—Dumps Creek Branch—Clinch Valley District—Pocahontas Division of the Norfolk and Western Railway Company at station 90 plus 70.33 as measured from the connection of Tiller Fork Spur with Wilder Spur Extension; thence with the dividing line between said lands of Heirs of Eivens Tiller et al. and J. B. Tiller et al. N 69° 46.5′ E 31.95 feet to a point; thence through said lands of Heirs of Eivens Tiller et al. as follows; parallel with and 50 feet distant northeastwardly from said center line and said center line produced, S 56° 31.5′ E 267.07 feet to a point at right angles to said center line as produced at station 93 plus 50; thence S 26° 31.5′ E crossing said center line as produced at 100 feet, at station 94 plus 36.6, a total distance of 196.3 feet to a point at right angles to and 48.15 feet distant southwestwardly from said center line as produced, at station 95 plus 20; thence at right angles to said center line as produced southwestwardly 21.85 feet to a point; thence N 51° 20′ W 220.9 feet to a point at right angles to and 50 feet distant southwestwardly from said center line as produced, at station 93 plus 00; thence N 53° 34.5′ W 219.82 feet to a point in the dividing line between

aforesaid lands of Heirs of Eivens Tiller et al. and Maxie T. Mullins et al.; thence with said dividing line N 18° 46.5′ E, crossing said center line at 40 feet, at aforesaid station 90 plus 70.33, a total distance of 65 feet to the place of Beginning and containing 0.85 of an acre, more or less, excepting therefrom all coal rights owned by The Pittston Company.

The above described Parcels of land are designated Parcels No. 1, 2, 3 and are on Plan N-26903 of the Norfolk and Western Railway Company, dated September 16, 1957, and revised December 10, 1957.

page 47 } After going upon said land and viewing it and of the adjacent or other property of said owners, no one appearing to claim damages to property other than those set forth in the Petition, we returned to the Courthouse at Clintwood, Virginia, and heard evidence that was offered by the Petitioner and the land owners; after hearing such evidence as was offered by the land owners and Petitioner, no other persons appearing to claim damages to their property by reason of the construction and operation of said line of railroad, we are of opinion and do ascertain that for the fee simple title to said tract or parcel of land subject to the mineral and mining rights and interest therein outstanding in the Pittston Company, and for all other property of said owners so taken, $10,000.00 will be a just compensation and the damages to the adjacent and other property of such owners and to the property of other persons who are damaged in their property by reason of the construction and operation of the line of railroad, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of such line of railroad, will be:

Fannie Tiller et al., $2,500.00.
Other parties, $ None.

Given under our hands this 26th day of February, 1958.

W. B. TRIVITT
J. C. MULLINS
GARFIELD BAKER
B. S. POWERS
WILLIAM L. SKEEN
Commissioners.

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* * * * *

Received and filed, this the 24 day of March, 1958.

..... RASNICK, Dep. Clerk.

EXCEPTION TO REPORT OF COMMISSIONERS.

The defendants in the above styled proceeding, except to the report of W. B. Trivett, J. C. Mullins, William Skeen, Garfield Baker and B. S. Powers, Commissioners, filed in the clerks office on the 26th day of February 1958, and move the court to set same aside and to refuse to confirm same, for the following and other reasons appearing on the face of the proceedings.

1. The court should have sustained the motion to quash the proceeding because the map filed showed a space within less than sixty feet of a dwelling is to be invaded, and no reason or excuse therefore was alleged.
2. The petition alleges that the land proposed to be taken is for a spur line.
3. The allegation in the petitions does not state facts showing a *bona fide* effort to purchase the lands had been made; nor other material facts sufficient for the court to appoint commissioners.
4. The map filed does not show cuts, fills, trestles, and bridges as provided by statute.
5. The petition does not show what mineral and mining rights and other interests are outstanding in the Pittston Company, nor make said company a defendant, or allege any excuse therefor.
6. The map filed shows the lands proposed to be condemned includes a longitudal section of a public state highway.
7. Map filed and description show a strip of land more than one hundred feet wide is to be taken, and no reason therefor is alleged.

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8. The map filed shows part of the land sought to be taken is not for the public use of the applicant railroad company, but is in part for a state highway.
9. The description is not certain enough for these defendants to understand just what property is to be taken, or for commissioners to fix a price therefor: for instance, the first

call in Parcel No. 1, leaving the point of beginnings is "8.55° 16.5 E. *about* 148 feet to a point"; the second call is, "thence *about* S. 45° 52′ W. 400 feet to a point"; the third call is, "thence about S. 58° 38′ E. 13 feet, more or less, to a point," etc.

10. The evidence introduced by applicant on February 1st, 1958 was not sufficient to entitle the applicant to have commissioners appointed.

11. The court erred in overruling the objections of these defendants to the court presiding over the commissioners while hearing of evidence, and in refusing to allow the defendants to introduce certain evidence before the commissioners, and for them to consider same, which was material to the inquiry for which they were appointed.

12. The court erred in waiting to give the commissioners instructions until after a view was had and the evidence was heard.

13. The report shows at least 1651.45 feet of a public state highway is being longitudally taken and therefore contains land that cannot be condemned by the applicant for its purposes; and the amount of the land included in this old highway is not to be included in the amount of land to be compensated for as taken.

14. The award of the Commissioners is wholly inadequate and was not arrived at in the manner provided by law, and was caused in part by the fact that the court over these defendants objections, sat with and presided over the proceedings, while the testimony of witnesses was being introduced and directed what testimony should be heard and what evidence the Commissioners should consider.

page 50 } 15. The award of the commissioners is wholly inadequate, and this was caused, in part, by the failure of the commissioners, under the direction of the court, to hear admissable, important and material evidence concerning value of the lands taken and damages to residues, for example:

(a) To allow Ted Bise to testify what lands owned by The Pittston Company, which is to furnish applicant this right of way, was worth or what said company would take for similiar lands (except improvements) near by, (Tr., pp. 33-4).

(b) To allow Graham Tiller one of defendants, who was familiar with the lands sought to be condemned and the surroundings to give his valuation of the lands sought to be condemned, and the damages to the residue and to show his reasons therefore (Tr., pp. 91-99, 109-10).

(c) To allow Arlie Davis and John D. Nicewonder to testify what amount had recently been paid to the surface owner for the right to strip coal owned by The Pittston Company (Tr., pp. 99-104), in this county.

16. The award of the Commissioners is wholly inadequate, and this was caused, in part at least, by the Commissioners receiving and considering under the instructions of the court, inadmissible evidence, concerning value of the lands taken and the damages to the residue, e. g.

(a) In allowing E. L. Rardin who could not qualify, to testify as to the lands taken and the value, (Tr., pp. 39-47).

17. The award of the commissioners is wholly inadequate, and this was caused, in part at least, by certain instructions given them over the defendants objections, and in refusing instructions requested by these defendants.

page 51 } This 24th day of March, 1958.

S. H. SUTHERLAND
Attorneys for Defendants
Clintwood, Virginia.

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DECREE.

This cause came on again this the 22nd day of April, 1958, to be heard upon the papers formerly read, former orders and decrees, and the report of W. B. Trivett, J. C. Mullins, William Skeen, Garfield Baker, and B. S. Powers, commissioners appointed for the purpose of ascertaining a just compensation for the strip or parcel of land condemned in these proceedings and awarding the damages, if any, resulting to the adjacent property or other property of the owners, or to the property of any other person beyond the enhancement in value that will accrue to such properties from the construction, operation, and maintenance of said line of railroad was duly returned and filed in the Clerk's office of this Court on the 26th day of February, 1958, together with the certificate of the officer administering the oath at-

tached thereto, and the exceptions taken and filed to said report on the 24th day of March, 1958, by Fannie Tiller et als.; and it further appearing to the Court that the Petitioner, Norfolk and Western Railway Company, paid to the Clerk of this Court on the 27th day of March, 1958, the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, being the amount in full for compensation awarded the defendants for their entire interest in said land by said commissioners, and for the damages to the residue, as shown by their report; and Petitioner asked leave to be permitted to introduce evidence to show the necessity of taking a strip of land through the defendant's property, at certain places, more than one hundred feet in width, and the Court being of the opinion that the Petitioner should be permitted to introduce its evidence on this point, thereupon Petitioner introduced evidence to show that it was necessary to take a strip of more than one hundred feet in width at certain places through the lands of the defendants for slopes, ditches, cuts, embankments, drainage and for the deposit of waste materials, and the court

page 55 } being of the opinion that said exceptions to said report are not well taken, it is therefore adjudged, ordered and decreed that said exceptions be and the same are hereby overruled; and it appearing to the Court that it is necessary at certain places to take in excess of one hundred (100) feet for said right of way for slopes, ditches, cuts, embankments, drainage, and for the deposit of waste materials, the same is hereby authorized; it is therefore adjudged, ordered and decreed that said report be and the same is hereby approved, ratified, and confirmed, and the court doth confirm unto the Petitioner, the Norfolk and Western Railway Company, as provided by Statute, the fee simple title to said strip or parcel of land belonging to the defendants which is fully described in said report and the said Petitioner, the Norfolk and Western Railway Company, shall take and forever hold said strip or parcel of land described in the pleadings and commissioners' report in this cause, subject to the mineral and mining rights and other interest therein outstanding in The Pittston Company; it is further adjudged, ordered and decreed that the decree appointing said commissioners, their report and this decree confirming same, be recorded in the current Deed Book in the Clerk's office of this court and indexed in the name of the Norfolk and Western Railway Company, as well as in the name of all of the defendants, to-wit:

Fannie Tiller,
Maxie T. Mullins,
Tollie E. Mullins,
Rachel Barton,
Ira Barton,
Hattie Ashworth,
Eugene Ashworth,
Graham A. Tiller,
Janie Ruth Tiller,
J. Bernard Tiller,
Mona Tiller,
Elaine T. Duty and Dewey Duty.

To the action of the court in overruling said exceptions, counsel for defendants excepts.

To C. P. Mullins, Clerk, enter this decree this the 22nd day of April, 1958.

F. W. SMITH, Judge.

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Received and filed, this the 20 daly of May, 1958.

..... RASNICK, Dep. Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: Norfolk and Western Railway Company.

You are hereby notified that we, the above named defendants, in the above entitled cause, lately pending in the Circuit Court of Dickenson County, Virginia, intend to appeal, and do hereby appeal to the Supreme Court of Appeals of Virginia from the interlocutory decree entered in said cause on the 1st day of February 1958, and also from the final decree entered on the 22nd day of April, 1958; and, further, we will present to the said Supreme Court of Appeals a petition praying for an appeal from said decrees and each of them so rendered by said Circuit Court of Dickenson County to the said Supreme Court of Appeals of Virginia, as by law and the rules of said Supreme Court of Appeals

prescribed; and, that in our said petition we will assign as errors, committed by said Circuit Court during the pendency of said suit in said court, and at the *ore tenus* hearings of said cause, and in the final decree upon which we will rely for a reversal of said decrees, the following:

ASSIGNMENTS OF ERROR.

1. The court erred at the hearing on February 1st, 1958, in refusing to quash the notice and proceedings, because:

(a) The map filed showed a space within less than sixty feet of a dwelling was to be invaded, and no reason therefor was alleged;

page 57 } (b) The petition alleges that the land proposed to be taken was for a spur line;

(c) There is no profile showing cuts and fills, trestles and bridges filed as required by the statute.

(d) The map filed shows the lands proposed to be condemned includes a longitudinal section of a public highway.

(e) The map and description filed shows a strip of land more than one hundred feet wide is to be taken, and no reason therefor is shown;

(f) The map and description filed shows part of the land sought to be condemned is not for the public use of the applicant, but is in part for a state highway;

(g) The description is not certain enough for the defendants to understand what property was to be taken, nor for the commissioners to fix a price therefor nor damages to the residue;

(h) The petition does not show what mineral and mining rights and other interest are outstanding in The Pittston Company, nor make said company a party, or allege any excuse therefor;

(i) The petition does not state material facts sufficient for the court to appoint commissioners.

2. The court erred in appointing commissioners because the evidence introduced at the hearing on February 1st, 1958, was insufficient to show a *bona fide* effort to purchase the lands proposed to be condemned, nor other facts sufficient to entitle commissioners to be appointed.

3. The court erred in presiding over defendants' objection, while the commissioners were hearing evidence and in directing them not to consider certain admissible evidence.

4. The court erred in waiting till after the commissioners

had viewed the premises and heard the evidence
page 58 } to instruct them.

5. The petition, map filed, and evidence introduced shows that the applicant proposes to condemn and take 1651.44 feet of a longitudinal section of a public highway (State Highway 601), and the amount of land included in the old highway, although it would belong to defendants is not to be included as lands to be compensated for as taken, and the court erred in the final decree entered April 22nd, 1958, in permitting this to be done.

6. The court erred in its final decree of April 22, 1958, in overruling the defendants' exceptions to the award of the commissioners as it is wholly inadequate both as to the value of the land taken as well as damages to the residue, and was arrived at in a manner not prescribed by law.

7. The court erred in confirming the report of the commissioners filed herein on the 26th day of February 1958, instead of sustaining defendants exceptions thereto and setting the same aside; because it was wholy inadequate, both as to the value of the lands taken and the damages to the residue, and was in part caused by the court, over the defendants' objection, presiding over the commissioners while they were hearing evidence, and by the court refusing to allow the commissioners to hear, or consider admissible evidence concerning the value of the land and damages to the residue.

8. The court erred in confirming the report of the commissioners filed on the 26th day of February 1958, instead of sustaining these defendants' exceptions thereto and setting the same aside; because the same is wholly inadequate both as to the lands taken and the damages to the residue, and it was caused in part at least by the action of the court, over these defendants' objection, sitting with and presiding over the commissioners while hearing evidence, and especially in refusing to allow them to hear or consider certain admissible evidence.

9. The court erred in giving, over the objections of the defendants, Instructions Nos. 1, 2, 4 and 6 at the
page 59 } request of the applicant as shown by the stenographic transcript of the hearing, and introduced at the hearing on these defendants' exceptions.

10. The court erred in refusing to give to the commissioners, Instructions II, III, IV, V, VI, VII, requested by these defendants.

11. The Court erred in refusing to allow certain witnesses to testify to, and the commissioners to consider certain admissible evidence, during their hearing of testimony before

they made their report, as shown by the Stenographic Transcript of said hearing, as set out in exception 15 (a), (b) and (c) of defendants' exceptions thereto; and also in the commissioners receiving and considering certain inadmissible evidence at the direction of the court as shown by Exception 16 (a) by these defendants.

12. The court erred in overruling the various exceptions, and each of them, made by these defendants, to the report of the commissioners filed herein on the 26th day of February, 1958, for, the reasons in said exceptions stated, and shown to the court at the hearing by the record and evidence then produced; because, the same is wholly inadequate, both as to the value of the land taken and the damages to the residue.

Yours respectfully,

FANNIE TILLER
MAXIE T. MULLINS
TOLLIE MULLINS
RACHEL T. BARTON
IRA BARTON
HATTIE ASHWORTH
EUGENE ASHWORTH
GRAHAM A. TILLER
JANIE RUTH TILLER
BERNARD TILLER
MONA TILLER
ELAINE T. DUTY
DEWEY E. DUTY

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S. H. SUTHERLAND
Clintwood, Virginia
of S. H. & Geo. C. Sutherland, Attys.

GLYN R. PHILLIPS.

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A transcript of the proceedings and evidence had in a hearing before Judge Frank W. Smith, Judge of the above Court, in Grundy, Virginia, on February 1, 1958, taken before Evelyn D. Slemp, a Notary Public for the State of Virginia.

APPEARANCES: Fred B. Greear and M. M. Long, Jr., of counsel for Plaintiff.

S. H. Sutherland and Glyn Phillips, counsel for Defendants.

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Feb. 1, '58
page 3 } Mr. Greear: In this case the process does not show it has been executed on Graham Tiller, and Mr. Sutherland says he will enter his appearance; and his wife also, Janie Ruth.

Mr. Sutherland: We will enter his appearance; I don't think she is necessary, a necessary party; we will make her that way.

Mr. Greear: We also have under consideration *Norfolk & Western Railway* v. *J. B. Tiller* and *Mona Tiller,* and the same against Maxie Mullins and Tollie Mullins. In the case of *N & W* v. *J. B. Tiller and Mona Tiller,* the original petition was filed against Milton D. Williams as Lessee, but at the time process was issued he had moved out of the house and the property was occupied by B. V. Webster, Robert Fellows, Dillard Dockery and Owen Dockery. We have had process issued and served on the four lessees of J. B. Tiller. We desire to substitute those four as defendants in the place of Milton D. Williams, who was named in the petition. Do you have any objections, Mr. Sutherland?

Mr. Sutherland: I don't represent them.

Mr. Greear: Do you have any objections to substituting them as defendants?

By Mr. Sutherland:

A. As far as we are concerned, we are not interested in them being noticed at all. They don't have any freehold interest.

Graham Tiller: They never did live over there in the property in question.

Mr. Sutherland: It is not necessary to notify them.

Feb. 1, '58
page 4 } Mr. Greear: There is a Motion to Quash and Grounds of Defense, which are the same in all three cases.

The Court: You have got a lot of things listed here; it will take a little while to read this. Are all of them just the same?

Mr. Greear: Yes, sir. We wanted to put on some evidence. Swear Mr. Rardin and Mr. Durham.

The Court: I should pass on these motions first.

E. L. Rardin.

Mr. Sutherland: The Petition is substantially the same as the Duty one was.

Mr. Greear: The motions are the same too.

Mr. Sutherland: Substantially, yes.

The Court: Mr. Sutherland, on this question here on your Motion to Quash, I notice your grounds No. 2, what mineral rights are not to be condemned?

Mr. Sutherland: It states that they will condemn it subject to the mineral rights which are owned by the Pittston Company.

Mr. Greear: We are asking for fee simple title subject to the mineral rights.

Mr. Sutherland: They want fee simple title subject to their rights.

The Court: Mr. Sutherland, do your clients claim any interest in the minerals?

Mr. Sutherland: Yes. They own the gas and oil.

The Court: They don't own the coal?

Feb. 1, '58 page 5 } Mr. Sutherland: No, they don't own the coal. We have other kinds of minerals that are enumerated, but it don't enumerate gas and oil. I don't have it before me, but that is the substance of it in all three cases.

The Court: I overrule the Motion to Quash, and Grounds of Defense.

Mr. Sutherland: We save exceptions.

E. L. RARDIN,
after being duly sworn, testified as follows.

By Mr. Greear:

Q. Your name is E. L. Rardin?

A. Yes, sir.

Q. Where do you live?

A. Roanoke, Virginia.

Q. Are you employed by the Norfolk & Western Railway?

A. Yes, sir, I am.

Q. In what capacity?

A. Right-of-way Agent.

Q. Do you know J. B. Tiller?

A. Yes, sir.

Q. And his wife, Mrs. Tiller?

A. Yes, sir.

Q. Have you been in contact with them with reference to

purchasing right-of-way across their land in Dickinson County?

A. Yes, I have.

Q. Did you make them an offer to purchase land?

A. Yes, sir, I did.

Q. What price did you offer them for the land

Feb. 1, '58 needed for the railroad company?

page 6 } A. $14,000.00.

Q. What property did you need from them?

A. We need a strip of land containing approximately 4.8 acres.

Q. Are there any improvements on it?

A. Yes, sir, there is.

Q. What improvements are on it?

A. There is a dwelling house, barn, I believe four outbuildings, small outbuildings.

Q. Was that a bona fide offer? Were you authorized to make this offer for the property?

A. Yes, I was.

Q. Did they accept it?

A. No, sir, they did not.

CROSS EXAMINATION.

By Mr. Sutherland:

Q. Mr. Rardin, did you have any writing that you wanted him to sign when you went there?

A. Yes, sir, I did.

Q. What was the nature of that? Was it an offer to purchase or only an option?

A. As is our custom, Mr. Sutherland, I had an option. However, I am sure that if the parties insisted on a purchase contract I could have provided that.

Q. But you didn't do it?

Feb. 1, '58 A. I didn't have it at the time. In fact, I

page 7 } didn't need it because the offer was refused.

Q. If you offered to buy, how do you know they would refuse? You understand there is a difference in an option and an offer to purchase?

A. Yes.

Q. You only asked them for an option?

A. That is correct, because that is our customary method of procedure. However, this was unusual, in that I had been authorized to make an offer by my superiors. That is not

E. L. Rardin.

usually the case. In this particular instance, if these parties had accepted, I am sure I could have produced a purchase contract.

Q. The thing you asked for was an option?

A. That is correct.

Q. And they refused that?

A. Yes, sir.

Q. How much is that property worth, Mr. Rardin?

A. In my opinion it is worth $14,000.00.

Q. Don't you think it is worth considerably more?

A. No, I do not.

Q. Are you well acquainted with real estate values in that neighborhood?

A. I think so; I think I am.

Q. How did you get acquainted with real estate values there?

Feb. 1, '58 page 8 } A. Sometime ago I investigated purchases that the Clinchfield Coal Company have made.

Q. The Clinchfield Coal Company, the owner of the surface, except these Tillers, is furnishing a right-of-way to the Norfolk & Western free, isn't it?

A. That is not my understanding, no, sir.

The Court: Did these defendants ever make any offer or make any price?

A. No, they didn't. They have not made an offer for the individual parts of the land.

The Court: I understand you went and tried to see if you could agree on something.

A. Yes, sir, that's right.

The Court: They refused your offer and didn't make you any counter-offer?

A. That's correct.

RE-DIRECT EXAMINATION.

By Mr. Greear:

Q. Do you know Maxie Mullins and Tollie Mullins, her husband?

A. Yes, sir.

E. L. Rardin.

Q. Has the Norfolk & Western desired to acquire a right-of-way across their property also?
A. Yes, sir.
Q. Have you been to see them for that purpose?
A. Yes, sir, I have.
Feb. 1, '58 page 9 } Q. Did you make an offer to purchase their property for a right-of-way?
A. Yes, sir, I did.
Q. What offer did you make Maxie Mullins and husband?
A. I offered them $750.00.
Q. What property is needed by the railroad company for right-of-way purposes belonging to Maxie Mullins?
A. Approximately 1.08 acres.
Q. Are there any improvements on that?
A. There is a very dilapidated barn or shed on it.
Q. Is that all that is on it?
A. That is all, yes, sir.
Q. Did they take the $700.00 you offered them?
A. No, they didn't.
Q. Did they make any counter-proposal as to what they would take?
A. No, sir, they didn't.
Q. Were you authorized to make that offer by your superiors with the railroad company?
A. Yes, sir, I was.
Q. Was that a bona fide offer which would have been paid if they had accepted?
A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Sutherland:
Q. Was this an offer to purchase or an option as you had in the other cases?
Feb. 1, '58 page 10 } A. I think the same principle will also apply to this.
Q. You had an option, form of an option, you wanted them to sign?
A. Yes, sir, and as I have said, that is our customary procedure.
Q. I am not interested in what your custom is. I am asking did you offer to buy or just ask them to give you an option?
A. I was authorized to make an offer which I am sure would have been accepted.

E. L. Rardin.

Q. You knew they would have accepted an option, that's what your offer was, to take an option?

A. At that particular time, however, if they had accepted the figure and insisted on a signed contract, I am sure that it could be provided.

Q. I am not interested in your argument and what you think would happen; I want to know what you did. You understood me, didn't you, that all you asked for was for them to give you an option on that for $700.00 odd dollars, giving your company an option?

A. Yes, sir.

The Court: Did any of the defendants in this case make any counter-offer?

A. No, sir, they didn't.

Feb. 1, '58 page 11 } The Court: Have they at any time said what they would take?

A. The only offer I have heard, sir, and I believe it was Mr. Mullins who mentioned this figure in one of the suits, mentioned the figure $170,000.00 to $200,000.00. That is the only figure I have ever heard. That amount of money was for all the rights-of-way, is my understanding.

The Court: All the right-of-way on the various Tiller tracts together?

A. Yes, sir.

Mr. Sutherland: He didn't make that at the time you were speaking you approached him for this option, did he?

A. No, when I approached him, I was discussing the 1.08 acres.

RE-DIRECT EXAMINATION.

By Mr. Greear:

Q. Do you know Fannie Tiller?

A. Yes, sir, I do.

Q. Have you contacted her with reference to lands needed

by the railroad company belonging to the Eivens Tiller estate?

A. Yes, sir.

Q. Have you contacted any of the other heirs?

A. Yes.

Q. Name who all you contacted on that.

A. I discussed it with Elaine Duty and her husband; J. B. Tiller and his wife; Mr. and Mrs. Mullins; Mr.

Feb. 1, '58 and Mrs. Barton and Mr. Graham Tiller.

page 12 } Q. In other words, you have talked to all of them except Mrs. Ashworth and her husband?

A. And I have not talked to Mrs. Graham Tiller.

Q. I believe Mrs. Ashworth lives in Charleston, West Virginia?

A. That is my understanding.

Q. You have never seen her?

A. No, I haven't.

Q. What lands does the railroad company desire to obtain right-of-way property across the Tiller estate?

A. 9.84 acres.

Q. Are there any improvements on that property?

A. Yes, sir, a barn and two small buildings. I believe one is a corn crib and the other one a sheep shed or sheep pen or something.

Q. Have you made an offer to purchase that property?

A. Yes, sir, I have.

Q. Did you make it to each one of these you talked to?

A. Yes, I did.

Q. What did you offer them for their property?

A. $5,300.00.

Q. Was that a bona fide offer?

A. Yes, sir, it was.

Q. Were you authorized by your superiors to make the offer for the railroad company?

Feb. 1, '58 A. I was.

page 13 } Q. Did they understand that?

A. I am sure they did.

Q. Did they accept that?

A. No, sir, they did not.

Q. Did they make any counter-proposals what they would accept?

A. No, sir, they did not.

E. L. Rardin.

RE-CROSS EXAMINATION.

By Mr. Sutherland:

Q. Did you ask them for an option or to sign an agreement for an outright sale?

A. I would have preferred to take an option because that is the customary way we handle real estate matters.

Q. What did you say to them when you contacted the parties? Did you say you wanted an option?

A. I don't recall that I mentioned it. I did say I would like to purchase the land for that price for the railroad company.

Q. Didn't you say you wanted an option?

A. I don't recall that, Mr. Sutherland, that I used those words. It is conceivable that I did.

Q. You have been so much on your custom, isn't that your custom to come and ask for an option?

A. Yes, it is.

Feb. 1, '58 page 14 } Q. You don't know anything different from what was your custom on this occasion? You didn't offer them anything other than the customary way of approaching them?

A. I had no occasion to offer them anything; they refused my offer.

Q. Did you do anything other than take an option?

A. Frankly, the occasion didn't arise to make that because my offer for the land was refused.

Q. You didn't offer to purchase, you offered to take an option, didn't you?

A. It is conceivable I could have mentioned the word "option." I don't recall right now. I may have.

Q. Don't you think that is what you did by reason of it being your custom?

A. Possibly.

Q. Don't you think it more than possible? Isn't it your best opinion that is what you did do?

A. Mr. Sutherland, I offered the parties an amount of money for the land and they refused it. It is possible, as I say, I don't deny that at all, that I said I would like to take an option on this property for that amount.

Q. I see from your methods, you say because you wanted to take an option you are under the impression you are offering to buy. I want to know in this case if you offered to do anything more than take an option for that price?

A. No, sir, I did not.

L. A. Durham.

RE-DIRECT EXAMINATION.

Feb. 1, '58
page 15 } By Mr. Greear:

Q. Could you have done more if they had accepted your proposition?

A. Yes, I could have.

Q. Were you asked to do any more?

A. No, sir, I wasn't.

The Court: Did they ever make you a proposition what they would be willing to take?

A. No, sir, they did not.

The Court: In all three of these cases which the Court is hearing evidence on at this time, did you go to see all these parties as you have stated, in good faith, trying to deal with them and settling this matter?

A. Yes, sir, I did.

The Court: I understand none of them ever agreed to any offer you made and never made any offer of their own?

A. That is correct.

Witness stood aside.

L. A. DURHAM,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:

Q. You are L. A. Durham?

A. Yes, sir.

Q. Where do you live?

A. Bluefield, West Virginia.

Q. You are employed by the Norfolk & West-
Feb. 1, '58 ern Railway?
page 17 } A. Yes, sir.

Q. In what capacity?

A. Division Engineer, Pocahontas Division.

L. A. Durham.

Q. In the case of *N & W* v. *J. B. Tiller et al,* Grounds of Defense have been filed in which it is denied that the land desired across the Tiller property is to be used for a spur track. What is a spur track?

A. A spur track is a deviation from the main line or branch, branch line, over which there is no regularly scheduled train service.

Q. What type of railroad does the railroad company plan to build on Tiller Fork?

A. We plan to build a spur line to serve a loading operation of Clinchfield Coal Company.

Q. Will you have what we call a team track on that spur line also?

A. We can put a team track on that spur line, yes, sir.

Q. What will that be for?

A. To accept shipments of freight for anyone that desires to ship over our railroad.

Q. Is that spur line on the Tiller Fork in the area to be served according to the designations of the Interstate Commerce authorities?

A. Yes, sir, it is within the limitations.

Feb. 1, '58
page 17 } CROSS EXAMINATION.

By Mr. Sutherland:

Q. How did you define a spur?

A. A spur track is a deviation from the main line or branch line over which there is no regularly scheduled train service.

Q. That answer would apply to the entire railway from Carbo over in this section, would it not, the deviation from the main line, and this entire seventeen miles is a deviation from the main line, and there isn't to be any scheduled train, is there?

A. That would not be correct, sir. The branch line that turns out of our Clinch Valley at Carbo is known as Dumps Creek Branch.

Q. That's what you call it, but it deviates from the main line at Carbo?

A. Yes, sir.

Q. There isn't to be any scheduled trains on it?

A. No scheduled trains, no.

Q. No depots, no public telephone station at all on it; you come to the mines and get what they have there and that is

L. A. Durham.

all it is intended for? No telephone office that is regular for trains, is there?

A. Yes, we have communications on that line. We have railroad telephones, tram cars you check for safety.

Feb. 1, '58
page 18 } Q. That is true on all your lines, is it not?

A. No, sir.

Q. You don't have any stations, depots or agents over there anywhere, do you?

A. No, sir.

Q. Not on the entire seventeen miles?

A. No.

Q. The Interstate Commerce Commission authorized you to extend down through Sandy Ridge, down Caney Creek to a point near the mouth of Tiller Fork. What is there at that place? The point near the mouth of Tiller Fork, what do you propose there at that point near the mouth of Tiller Fork at the terminus?

A. We plan to build a track up to Clinchfield Coal Company's operation.

Q. You plan to put a side track parallel back up Caney Creek about a mile to an operation for the coal company, don't you?

A. Yes, sir.

Q. And from this where this leaves down there near the mouth of Tiller Fork, it goes up through new territory where no other railroad is, doesn't it?

A. No other railroad service is there.

Q. There is no other business up there for several miles around that would be served by the railroad, is there, except this Clinchfield Coal Company operation?

Feb. 1, '58
page 19 } A. I believe it has been brought out in previous testimony at other trials, I believe they testified they need its service for loading timber or coal or—.

Q. These fellows all testified to a leading question, would your railroad like for a station to build up there—and on cross-examination they said that where they would need it would be three miles further down at Duty, which is the terminus of one of your authorized extensions down there, isn't it? They said they would never come up there to load if the railroad was at the other place.

A. Also testified we couldn't put in a team track down there.

L. A. Durham.

Q. But they now have broken ground, you can see that is the most logical place, isn't it?

A. Absolutely not.

Q. And also the same fellow testified that land you go back up Cane Creek, that spur or side track, that it couldn't be built there, and yet you are building one and getting ready to load coal right at that place.

A. Which place is that?

Q. Sheckler place.

A. Yes, we are building a line up there.

Mr. Greear: Do you consider his testimony applies in all three cases?

Mr. Sutherland: Yes.

Feb. 1, '58 page 20 } The Court: Let me ask him a question; this line you propose to build, as stated in your petition in all these cases, I believe that it is a spur line off the Wilder Spur extension to be known as Tiller Fork Spur. That is the same spur that has been before this Court and the same contention made by the same attorneys that it isn't a spur line, it that right?

A. Yes, sir.

By The Court:

Q. Did you previously testify in other cases—I don't remember whether it was you or someone else.

A. I testified here regarding the Tiller Fork Spur.

The Court: This line you refer to as Tiller Fork Spur is a line which will go through and take a part of the lands and property of these defendants in all three of these cases?

A. Yes, sir.

The Court: On that Tiller Fork Spur it is brought out in other proceedings more in detail, particularly in regard to the injunction case of *Tiller* v. *N & W* recently decided; but on this Tiller Fork Spur line which is proposed, will there be a loading place or station; I don't know just what the proper term is, but will there be such a place on this Tiller Fork Spur to be used by the public?

A. There will be, sir, if it is so requested, providing team track facilities; that is a public loading track.

L. A. Durham.

The Court: In other words, Tiller Fork Spur will be for the use of the public?

A. Yes, sir.

Feb. 1, '58
page 21 } Mr. Sutherland: I notice you say if the public requested that it be put in there. You don't have any idea anybody will request it, do you?

A. We have every reason to believe they will, based on previous testimony.

Q. On what grounds would you think?

A. It is quite possible someone would want to ship logs.

Q. As a matter of fact, don't you know there is no logs to be shipped from that country, that Clinchfield has a mill below to cut such timber as it wants, and the Tillers sell to boys who take it out on trucks?

A. We had testimony that others would request the service, and they were testifying under oath.

The Court: Mr. Sutherland, I will ask you if it isn't a fact that all of these Tillers who are defendants in these three cases now being considered by the Court here today, were parties to the injunction suit of Fannie Tillers *et al* v. *N & W Railway,* in which the injunction was refused by this Court a very short time ago.

Mr. Sutherland: They are the same parties that were complainants in a suit in Dickenson County against N & W and The Pittston Company for an injunction, but the maps will show that it was a different line from what they have now, and there is no plea in these cases as you can
Feb. 1, '58 see of *res judicata.*
page 22 } Mr. Greear: We can agree it is the same parties, same people, and same boundaries of land?

Mr. Sutherland: No. It is the same parties that were complainants and N & W is the same defendant as one of the defendants in that, and they are now seeking to condemn a narrow strip through a large tract on which that involved it all.

Mr. Greear: I mean the large boundary is the same boundary.

Mr. Sutherland: This is a part of the large boundary.

The Court: What I am particularly interested to know if this is the same line of Tiller Fork that was in Tiller Fork in that suit as far as the railroad line is concerned.

S. S. Ward.

Mr. Sutherland: It is the same Tiller Fork, but on a different grade to what the maps filed in that showed.

Mr. Greear: It is the same Tiller Fork Spur.

Mr. Sutherland: It is the same line of railroad on Tiller Fork.

The Court: It is the same line of railroad of Tiller Fork that was involved in the injunction suit, and the question was raised in that case whether or not it was a spur or whether it wasn't a spur line?

Mr. Sutherland: As I tried to make it clear, this is the same spur, but it isn't on the same grade, as the stakes up there will show.

The Court: The grade wouldn't affect it as to whether or not it is a spur line.

Mr. Sutherland: No, sir, I wouldn't think so—in this case—let me not make it that broad.

Witness stood aside.

Feb. 1, '58
page 23 } S. S. WARD, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:

Q. Your name is S. S. Ward?

A. Yes, sir.

Q. Where do you live?

A. Bluefield, West Virginia.

Q. Are you connected with Norfolk & Western Railway?

A. Yes, sir.

Q. In what capacity?

A. Resident Engineer on Pocahontas Division.

Q. Are you familiar with the surveying and layout for the Tiller Fork Spur in Dickenson County?

A. Yes, sir.

Q. Are you familiar with the maps that have been filed in the cases, the condemnation cases of *N & W* v. *Fannie Tiller et al, N & W* v. *Maxie Mullins* and *N & W* v. *J. B. Tiller et al?*

A. Yes, sir.

Q. Do those maps show the profile, the cuts and fills of the proposed railroad?

A. They do.

Mr. Sutherland: We object to that if it is shown his testimony would be irrelevant and immaterial, and if it is, it would be irrelevant and immaterial.

Feb. 1, '58 page 24 } Q. Is there any change contemplated in the construction of the railroad from what is shown on the maps?

A. No. sir.

Mr. Greear: You may ask.

Mr. Sutherland: I don't care to ask him anything.

Witness stood aside.

Mr. Greear: Petitioner closes.

J. B. TILLER.

after being duly sworn. testified as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Are you the J. B. Tiller mentioned in two of these cases?

A. Yes. sir.

Q. Do you know E. L. Rardin who testified?

A. Yes, sir.

Q. When he came to you on either occasion, did he offer to buy or to take an option?

A. An option is what he mentioned.

CROSS EXAMINATION.

By Mr. Greear:

Q. Did you agree to accept the price he offered?

A. No, sir, I didn't.

Q. Did you make him any counter-proposals for what you would take for the right-of-way needed?

A. No, sir, I didn't.

Witness stood aside.

Feb. 1, 58 page 25 } GRAHAM TILLER, after being duly sworn, testified as follows:

Graham Tiller.

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Are you the Graham Tiller mentioned in one of these proceedings?

A. Yes.

Q. Do you know E. L. Rardin who testified here?

A. Yes, sir.

Q. When he came to you did he offer to buy or want an option?

A. I don't know that the word "option" was ever used when he come there and saw me. He just mentioned what he would give the estate. I don't have any individual part. My interest is in the undivided estate, and that is the price he mentioned.

Q. Did he say he would give you that or give you an option?

A. Just said, "We will give you so much." I don't remember the exact words.

The Court: You didn't refuse the offer because it was an option, you just wouldn't take that amount?

A. That's right.

Mr. Greear: No cross examination.

Witness stood aside.

To J. B. Tiller By The Court: You didn't refuse that because the offer was made in the form of an option or request for an option at that price, did you?

Feb. 1, '58 page 26 } A. No, sir.

The Court: You wouldn't have taken it if he had offered you the cold cash right then and there?

A. No, not at that price.

Mr. Sutherland: Do you think any reasonable man would think your property was worth more than that?

A. I think most anybody would.

Mr. Sutherland: We are through.

Mr. Greear: We are through.

The Court: The Court will appoint Commissioners. To the decision of the Court the defendants except.

Mr. Greear: I suppose you will appoint the same Commissioners in all three cases.

Mr. Sutherland: I see no reason for having different ones, but there is so much over there I do think we ought to see part of it one day and part another. I think a good division would be Bernard Tiller and Maxie Mullins one day and the estate another. I think it would be fair to the parties and Commissioners and everybody to have two days.

Mr. Greear: You mean make two trips up there?

Mr. Sutherland: Yes, go and make that mile and a half. It is hard to get in your mind everything there. I do think we ought to have two trips.

Mr. Greear: I thought we might do it this way; go and examine it one day and set the next day to hear evidence.

Mr. Sutherland: I believe it would be better the other way, because you can go up and start around here

Feb. 1, '58 page 27 } and they have got a lot of different things to look at. It is so difficult to point out to the Commissioners all the things you will have in this mile and a half.

Mr. Greear: You won't let them forget a thing.

The Court: All this property is in the same neighborhood.

Mr. Sutherland: On the same fork. I would say they will have to go about a mile and a half.

Mr. Greear: What is the distance from across the three? Are they all three together?

Mr. Sutherland: No, there is a place between them, then the Mullins property lies 1800 feet further upstream, but going up there you will have to go farther than the railroad to get a view of the damages that will be done to their property.

The Court: The engineer stated a moment ago off the record that all this property was within a mile. The properties are within a mile of each other?

Mr. Sutherland: It isn't much more than a mile from the lower side where the railroad reaches their property to the upper end as far as it will extend, but when we get up there I want the Commissioners to look at some land they can't see, they will have to go farther up—that will come down and be affected by that railroad up there.

Mr. Greear: I want to do it any way to suit

Feb. 1, '58 page 28 } everybody. I don't think the Commissioners want to go back twice on two days just to look at it. I think we can see it all one day. I believe

we should go and examine the property one day and not try to do anything else that day except examine the property and the next day take the evidence. What do you think, Glyn?

Mr. Phillips: We will need two days to look and take the evidence.

The Court: Why not go one day and look at it and have the evidence next day?

Mr. Sutherland: I thought it would be fair for the Commissioners to go and look at part of the property, say two of them, you could divide it up here, the J. B. Tiller—and then you will bring out something the Commissioners didn't think to examine carefully, then when you go back they will look for those things. That is the reason I thought it would be best to have two views. But of course, that is a matter for the Court.

The Court: I think it would not be necessary to set different days for each of these tracts, that is, for the Commissioners to view the property on two different days. That, of course, does not limit the Commissioners in time. I don't see any reason why the three properties that close together could not all be viewed the same day; certainly save time and expense too if that could be done. However, as already stated, if the Commissioners didn't get through that day, they would have authority to continue over until the next day until they get through, and the same thing is true with reference to hearing testimony. So I will fix the same day in each of these cases.

Feb. 1, '58 page 29 } It was agreed the property would be viewed on February 17, 1958, but due to the weather on February 17, 1958, the property was viewed on February 25, 1958.)

Mr. Greear: We request the Court to be present at the taking of the testimony.

The Court: What is the reason for the Court to come over there?

Mr. Greear: Just with reference to admissibility of evidence.

The Court: What about on the other case, did you have a scuffle?

Mr. Greear: Yes, sir, we had a good many objections back and forth.

Mr. Sutherland: The Court doesn't have any right to control, and his opinion might be the grounds for exceptions.

Mr. Greear: I think he does have the right when we have

exceptions, that is what he passes on; just save getting into exceptions.

Mr. Sutherland: He can only pass on the Commissioners' report.

The Court: The statute gives the Court the right to give instructions to the Commissioners. If the Court is there, the Court can give instructions and rule what they are to consider and what not to consider.

Mr. Sutherland: If the Court gives instructions, I want them prepared before the Commissioners meet so we will have time to consider them. I thought about having some prepared, but I have been pressed. It frequently happens, and I always thought it was better practice for the Court to give instructions how the Commissioners were to conduct themselves and what they are to do.

Feb. 1, '58 page 30 } The Court: It would be impossible for the Court to instruct without being present on questions of evidence. The Court wouldn't know what questions of evidence would come up.

Mr. Sutherland: I think it would be reversible error to mention how the Commissioners should proceed.

Mr. Greear: He mentions items they should consider in arriving at their award; if he doesn't comment that this witness said this or said that.

The Court: Any Court knows how these things are. If the Court were present when the evidence is heard, there is a lot less chance of there being error in the admission of evidence in a Commissioners' hearing, the evidence they should not hear.

Mr. Greear: That's what I had in mind.

Mr. Sutherland: Under our statutes now, that isn't grounds for exceptions; you can't ask the Commissioners how they arrived at their award.

Mr. Greear: You can't put the Commissioners on as a witness, but the Court can call a Commissioner and consult with him. Used to you could bring them on as witnesses, but now you don't do that any more. The Court can call him in.

Mr. Phillips: I read the thing the other day.

Mr. Sutherland: Only tell about how they proceed.

Mr. Greear: We formally move for the Court to be present if he can.

Feb. 1, '58 page 31 } Mr. Sutherland: We object to anything except the regular procedure authorized by law.

Mr. Greear: We think that is authorized by law.

The Court: Mr. Sutherland, I would like to

have a statement of your position. Do you oppose the Court being present or do you not?

Mr. Sutherland: I have no objection to you being present, but I don't think the Court has any authority while the Commissioners are hearing the evidence or viewing the premises.

The Court: Well, do you have any objection to the Court being present and presiding and ruling upon the admissibility of the evidence?

Mr. Sutherland: Yes, I don't think the law authorizes that, and that is the point I am making. I want to go according to law. I want it fixed so other parties will be bound when we get in there.

The Court: You say you don't think the law authorizes the Court to be present and preside. Will you please furnish the Court between now and February 17th with any authorities you expect to rely on? That applies to both sides. I would like to have authority before that time, sooner if possible, but certainly not later than that date.

The above was all the evidence presented and proceedings had in the foregoing cases on February 1, 1958.

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A transcript of the evidence taken before the Commissioners in the above styled cases on February 25 and 26, 1958, in Clintwood, Virginia, before Evelyn D. Slemp, a Notary Public for the State of Virginia at Large. the witnesses and Court Reporter being sworn by Judge Frank W. Smith, Judge of the Circuit Court for Dickenson County, Virginia.

Appearances: Fred B. Greear and M. M. Long, Jr., of counsel for Plaintiff.

S. H. Sutherland and Glyn Phillips, counsel for Defendants.

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Feb. 25, '58
page 3 } Mr. Greear: We have three cases we are proceeding in. We have agreed between counsel that the evidence would be common to all three of them in most instances. If there is any that differentiates, that will be called to the attention of the Commissioners.

The Court: The Commissioners will come around and take a seat here and hear the evidence that either side wants to

offer. The Commissioners have already viewed the property. I understand they did that yesterday.

Mr. Greear: Yes, sir.

WALTER LEE RUSH,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:

Q. Your name is Walter Lee Rush?

A. Yes, sir.

Q. Where do you live?

A. Clintwood.

Q. What is your occupation?

A. Land Agent for Clinchfield Coal Company.

Q. How long have you worked for Clinchfield?

A. Since 1944.

Q. Are you also a practicing lawyer, I mean, are you a licensed lawyer?

A. Yes, sir.

Q. I show you a deed from S. J. Tiller and others to Jacob Yost recorded in Deed Book 15, page 4 } at Page 570 in the Clerk's Office of this Court and will ask you to give to the Commissioners the names of the parties of the first part and the party of the second part and the date of the deed.

Feb. 25, '58

A. The date of the deed is February 9, 1900. The parties of the first part are Samuel J. Tiller, Rachel Irene Tiller and Frances Tiller. The party of the second part is Jacob Yost, Staunton, Virginia.

Q. Who owns the rights conveyed to Jacob Yost in that deed? Who owns it today?

A. The Pittston Company as the successor in title to the Clinchfield Coal Corporation and Jacob Yost.

Q. Does that deed convey land in fee or not?

A. This deed conveys the coal with certain rights and privileges on a tract of land described as containing 682 acres.

Q. Are you familiar with that tract of land?

A. Yes, sir, I am.

Q. Are you familiar with the land which Norfolk & Western Railway Company seeks to condemn for use of its right-of-way on Tiller Fork?

Walter Lee Rush.

A. Yes, sir, I am familiar with the location of the land which they are condemning in this suit.

Q. Are you familiar with it in all three of these cases, that is, the heirs of Fannie Tiller and others and against J. B. Tiller and Maxie Mullins?

Feb. 25, '58 page 5 } A. Yes, sir, I am familiar with all of it.

Q. I will ask you to state whether the land which is sought in these three cases by the railroad is all covered by the 682 acres described in this deed to Jacob Yost.

A. Yes, sir, it is.

Q. Will you read from that deed the rights which were conveyed and which the Pittston Company now owns in that 682 acres.

A. This deed conveys the coal on this land and also the following rights: "The parties of the first part convey unto the party of the second part the right to enter upon said land to excavate the coal and prepare the same for market, granting and conveying unto the party of the second part, his heirs and assigns, the right of ingress and egress to said land for the purpose of mining, storing or removing said coal to market, granting to the party of the second part, his heirs and assigns, the right to build railroads, tram roads and wagon roads in, on and under said land, the right to erect coal sheds, tipples, houses and accessory buildings necessary for the successful mining of said coal and preparing the same for market, also granting unto the party of the second part, his heirs and assigns all the timber on said land twelve inches and under in diameter which may be on said land at the commencement of mining operations except on that part about 125 acres which the said Samuel J. Tiller and wife have heretofore sold the surface and timber unto Eivens Tiller, but it is expressly understood and agreed that the parties of the first part shall have the right to clear any or all of said land for agricultural purposes, and further it is expressly agreed and understood that the parties of the first part shall not cut or destroy any timber under twelve inches in diameter unless it becomes necessary to clear said land for agricultural purposes. The parties of the first part also grant and convey unto the party of the second part the right to use said roads, tipples, houses, entries and improvements on, under and through said land for the purpose of mining, preparing and removing to market any other coal, oil, gases or minerals adjoining or contiguous

Feb. 25, '58 page 6 }

to said land or leased by the party of the second part or his assigns."

Q. Does the Pittston Company at this time intend to open that coal?

A. Yes, sir, it does.

Q. Are they engaged in the beginning of those operations now?

A. Yes, sir.

Q. Have you been on Tiller Fork recently?

A. I haven't been over there since the first of the year.

Q. Were there any excavations made on this land at that time by the coal company?

A. Yes, sir.

Q. Were those excavations that are made there at this time made in pursuance of that deed?

A. Yes, sir.

Feb. 25, '58
page 7 } CROSS EXAMINATION.

By Mr. Sutherland:

Q. The tract except concerning which the timber is excepted there as 125 acres to except the timber, that is now owned by Maxie Mullins, one of the defendants, is it not?

A. Yes, sir, that is correct.

RE-DIRECT EXAMINATION.

By Mr. Greear:

Q. In other words, the coal company now owns all the timber twelve inches and under on the land except the land that belongs to Maxie Mullins?

A. Yes, sir, that's the way I interpret the deed.

RE-CROSS EXAMINATION.

By Mr. Sutherland:

Q. That deed, your company don't claim the right to strip the coal, what we call stripping in this county?

A. No, sir, we do not.

Witness stood aside.

S. S. WARD,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:
Q. Your name is S. S. Ward?
A. Yes, sir.
Q. Where do you live?
A. Bluefield, West Virginia.
Q. What is your occupation?
Feb. 25, '58 A. Civil Engineer for Norfolk & Western
page 8 } Railway.
Q. How long have you worked as an engineer for the Norfolk and Western Railway Company?
A. Since June 1912.
Q. Were you in charge of making the survey for what is referred to as the Tiller Fork Spur of Norfolk & Western Railway?
A. Yes, sir.
Q. Have you prepared maps and plats that show the land that is needed for right-of-way purposes?
A. We have, yes, sir.
Q. As you go up Tiller Fork, which part of that land in these three cases do you come to first?
A. The heirship tract of land.
Q. Have you prepared a map of that?
A. Yes, sir.
Q. Is that Drawing N-26903?
A. Yes, sir.
Q. Will you explain to the Commissioners and the Court what is needed there for the construction of the railroad. You might refer to where we were yesterday at different points.
A. This is low and this is hillside. Right here is the beginning point where we started yesterday morning and the land follows up this branch as I pointed out yesterday. This offset right here comes out there 13 feet on that
Feb. 25, '58 line between Elaine Duty property and Tiller
page 9 } heirs on this side over here. Then we followed that on the outside of the branch to another offset just below the cemetery located right there. Then we come just below this barn and there is another offset. We come back in and on up to the line. This offset is the line between the heirs and J. B. Tiller on this side. Here is land continues to the large hollow below J. B. Tiller's house. On this upper side at the beginning we go up on the hillside 100

S. S. Ward.

feet at that point, then it comes down on a slant as you see Station 45-plus fifty to 65 feet up until we join the fence at the cemetery, then we follow the cemetery fence around.

Q. How far up on that cemetery fence do you hit there?

A. 4½ feet.

Q. 4½ feet above the corner of the fence?

A. Yes.

Q. Then you drop down 4½ feet and follow the fence as it is in there?

A. Yes, sir. Then as we come up above the cemetery we go 80 feet on the hillside and that distance continues on around to the J. B. Tiller tract.

Q. That is along in this hollow?

A. Yes, sir.

Q. Along the cemetery there, will there be any elevations in the present roadway?

A. You mean the railroad?

Feb. 25, '58 Q. Yes.

page 10 } A. There will be an average fill 16 feet in front of the cemetery from the elevation of the present highway.

Q. Will there be a way available to get to the cemetery from this side of the property over here?

A. Yes, sir.

Q. How will that be handled?

A. At this point right here (Witness Indicating On The Map Throughout Testimony) the Tiller Fork channel and highway will be changed and put over here, pushes over further this way. Then as the fill is made for this railroad, there will be a road can be ramped up across right in here to go up on this corner, which is the most logical place to go up to the cemetery.

One of the Commissioners: At the same place where the gate opens?

A. Yes, the same place.

Q. He is talking about the gate in the fence now, it is on up above?

A. There is one there too. Then the gate that enters into the cemetery fence is located right here, which would make the logical place.

Q. Will the cemetery be disturbed in any way?

A. No, none whatever.

S. S. Ward.

Q. Do you take some more land from the Tiller heirs in addition to that strip?

A. Yes, sir.

Feb. 25, '58 page 11 } Q. Where is it located?

A. That is located farther on up Tiller Fork.

Q. I show you now Map No.—

Mr. Sutherland: If you expect to use all this, I think it will be well to identify it as you go along; otherwise it will be confusing.

Mr. Greear: I will introduce this one as Exhibit 1. I was referring to the number on the map. Each one has a different number.

Q. I show you a map marked N-26901 and ask you if that is the next tract of the heirs' land.

A. No, that is J. B. Tiller. No. N-26903.

Q. Will you explain to the Commissioners where the next tract of land lies, the J. B. Tiller.

A. I showed you on this first map the property line of J. B. Tiller. The upper land is this offset right here. The line comes down here where that is above the barn. The dividing line goes on up the branch you see there and all on this side just opposite this part right in here. Here is the heirship land. Fold that under there and it fits right in this section.

Q. Is this property shown on this Map No. N-26903 all hillside land?

A. Yes, sir.

Q. Are there any improvements on it at all?

A. No, sir.

Feb. 25, '58 page 12 } Q. Can you give the acreage in the first tract or this second that comes from the heirs' land?

A. In the first tract is 6.93 acres, and in this tract is 3.26 acres.

Q. Is there another piece that comes from the heirs' land?

A. Yes, that is on farther up the branch. That is also shown on that same No. N-26903. This tract of land lies above the dividing line between the Maxie Mullins property and J. B. Tiller property on up the branch farther.

Q. That is at the extreme end of the spur?

A. Yes, that's at the extreme end of the spur.

Q. That is where we walked in that hollow at that log?

A. Yes.

Q. Are there any improvements on that tract of land?

S. S. Ward.

A. No, sir.
Q. How much acreage is in it?
A. .85 of an acre.
Q. What is the total acreage that we need from the heirs of the Tillers?
A. 11.04 acres.
Q. Do you know the size of the boundaries from which that comes, what is remaining there as heirship land?
A. I don't know whether I got that exactly or not. No, sir, I don't have that.

Q. You don't have the acreage in those
Feb. 25, '58 boundaries?
page 13 } A. No.
Q. Is this 11.04 acres from substantial boundaries?
A. Yes, sir.
Q. Do you take any improvements from the heirs?
A. No, sir, no improvements.
Q. What about this barn, is that on the heirs' land, the lower barn and crib?
A. Yes, the lower barn and crib, that's right.
Q. On that middle piece of the heirs' land above J. B. Tiller's when we passed the hollow at the end of the first piece and going on up, I noticed what looked like a road cut around the side of the hill, you say they knocked over some of your markers—who built that away around there?
A. The Pittston Coal Company.
Q. Does N & W Railway have anything to do with that?
A. No, sir.
Q. Is Norfolk and Western responsible in any way for that?
A. No, sir.
Q. Do you know what, if any, provisions have been made with references to the owners of the land to get across that and get on up to their land above?
A. No.
Q. Does the same roadway that leads to the mines go to the land above there?
Feb. 25, '58 A. It is right there back of his house.
page 14 } Q. What land is needed from the J. B. Tiller property?
A. This is N-26901. Just above the large barn, the first barn, come to right above the cemetery from on the creek side of the highway is this little spot of land, from J. B. Tiller,

S. S. Ward.

and this is his lower line comes down the hollow and goes up the spur and on around the hill to this upper line which joins heirship land in here. Then that follows the same division line up the branch to the upper end of the heirship property where it joins the Pittston property. We take this strip of J. B. Tiller, which contains 4.6 acres, Parcel No. 2, and in Parcel No. 1 which is below the road 0.15 of an acre.

Q. This is a piece of a little bottom?

A. Yes.

Q. You take the Tiller dwelling house and barn also?

A. Take the barn and dwelling houses and outhouses.

Q. How many tracks will be built on that land?

A. There will be four tracks.

Q. Is that above the proposed loading points for the coal?

A. Yes, sir.

Q. What part of the J. B. Tiller land is located on this? Would that be south?

A. Yes, south.

Q. On the southern side of the right-of-way land, what part of the land is on that side or northern, what part is on the northern side?

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A. His main boundary is on the southern side.

Q. Will he be interfered with using his main boundary at all?

A. No.

Q. How much does he have on the northern side?

A. Just a small tract on the northern side. I understand it runs right up that spur on around to the top of the hill.

Q. It would just be a few acres?

A. Yes, sir.

Q. That is up in the side of that spur?

A. Yes.

Q. Is there anything up there at all besides a little timber growing?

A. That is all.

Q. That little part he has on the side of the spur above the road, that has been cut by the coal company?

A. Yes, sir.

Q. Where will the grade of the railroad be with reference to that coal company road?

A. It will be below that towards the creek.

Q. Are there any plans or provisions with reference to getting across this right-of-way up there for J. B. Tiller to get to the other side of that little spur?

S. S. Ward.

A. No, sir.

Q. Where will the State Road be located along the J. B. Tiller tract of land after the railroad is built?

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A. It will be in the same place.

Q. Same location?

A. Yes, the same location as it is today in front of his house.

Q. I show you another map No. 26901 which has a triangular piece of land marked on it and ask you where that is located and who it belongs to.

A. That is located near the upper end of the line, spur line, at the upper boundary line between the Maxie Mullins line and the heirs and J. B. Tiller and the heirs consisting of that little triangle.

Q. That is up where the old sawmill was?

A. Yes.

Q. What amount of land is needed there?

A. 0.05 acres.

Q. 5/100 of an acre?

A. Yes.

Q. How much land is needed altogether from the J. B. Tiller property?

A. 4.8 acres.

Q. Then you take his barn and his dwelling house?

A. Barn and dwelling house and outhouses.

Q. In the other case of Maxie Mullins, I show you Map No. 26905 and ask you if that shows the land belonging to Maxie Mullins which is needed for right-of-way purposes?

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A. Yes, sir.

Q. Where is that located, Mr. Ward?

A. This tract of land is located joining Pittston property on this end, the lower end, and extends on up through a little bottom to the upper land between the Maxie Mullins property and the heirs which is up there right opposite the sawmill.

Q. How much land is needed there?

A. 1.08 acre.

Q. Is there any kind of building on that?

A. There is an old barn right there about middle ways.

Q. How much of a fill will be there where you cross going up to the house on that property?

A. That will run between three and four feet of fill.

Q. Is there any proposal with reference to constructing a road and crossing there for the use of this tract of land?

S. S. Ward.

A. Not yet, no, sir.
Q. But will that be done?
A. Yes, sir.

Mr. Sutherland: I object to Mr. Greear asking "What will be done?"

Q. How do you handle these private crossings, Mr. Ward?
A. In cases like that where we have about
Feb. 25, '58 the same amount of fill all the way through the
page 18 } property, we generally put them where they are most suitable to the owners.
Q. Is it a policy to construct those wherever they are needed?
A. Yes, sir.
Q. How many tracks will be on that?
A. Just one track.
Q. How much of this bottom will be left below the right-of-way line?
A. I don't know in acreage the number of feet, but a narrow strip.
Q. Do you think perhaps about the same size as would be left below or not quite as much?
A. Not quite as much.
Q. Less than an acre then?
A. Yes, it will be less than an acre.

CROSS EXAMINATION.

By Mr. Sutherland:
Q. When the Commissioners were there yesterday you had stakes up which showed the exterior lines through all the property until you got up past the Maxie Mullins property, didn't you?
A. Yes, sir.
Q. The Commissioners could see; you had
Feb. 25, '58 white flags on the stakes several feet high and it
page 19 } was easy for them to visualize the boundaries where you were taking?
A. That's right.
Q. Let's get down to that first map you had, the Tiller heirs. I notice that the exterior or white lines on that map show the southeastern side, and the other will include the present State Highway, is that correct?

S. S. Ward.

A. Yes, sir. That's correct.

Q. How far will that extend longitudinally through that tract of land, approximately?

A. I can get it right here in a second. 1250 feet.

Q. Now, Mr. Ward, will you give me the J. B. Tiller one, the one at the lower end. The map, I notice at the western side of the small map—what shade do you call this, reddish looking?

A. Kindly red.

Q. Which is in a pale red at the east part, a parcel No. 1, read it for me.

A. .15 acres.

Q. That would be on the left of the highway going up?

A. Yes, sir.

Q. In your measurements you started as the beginning point on the side of the highway at the left, do you not?

A. Yes, sir.

Q. That will be on the left of the highway going up?

A. That's correct.

Feb. 25, '58 page 20 } Q. On the other one concerning which I asked you there, the Fannie Tiller, I notice you run up to a point which would be on the right side of the highway going up.

A. Yes, sir, that's correct.

Q. And then in your calculations of the amount taken, you have not included that highway, have you?

A. No, I notice this highway is marked "Virginia State Highway Route 601."

Q. You didn't include that much of the highway in your calculations of the amount of land taken from J. B. Tiller and Fannie Tiller or the heirs' tract?

A. No, sir.

Q. Did I understand you to say in your examination in chief that the highway will not be disturbed anywhere adjoining the J. B. Tiller tract of land?

A. Not in front of his house, but it will be down at the point you were talking about.

Q. What do you propose to do with the little triangle I mentioned down there between the J. B. Tiller and Fannie Tiller tract? What do you propose to do with the highway there that is taken that you didn't include in your calculations?

A. That highway will move towards the creek.

Q. In other words, you will change the location over there?

S. S. Ward.

A. Yes, that is correct. The highway does
Feb. 25, '58 change down there.
page 21 } Q. I expect the Commissioners will understand me better if I will frame my questions this way rather than with reference to the map; I will frame them with reference to the ground. Commencing at the lower end of the tract of land going up, I notice the highway is wholly within the tract of land to be taken. In your calculation of 1250 feet would that include the portion from the Elaine Duty portion down or from the beginning of the Elaine Duty up to where you left Elaine Duty's land, was it 1200 the entire distance or just from the Elaine Duty where you leave the Elaine Duty land up to where you come to the J. B. Tiller tract of land?

A. Are you talking about this line (indicating)?

Q. Yes.

A. No, the 1200 was from here (indicating).

Q. To the beginning of the Elaine Duty land?

A. Yes.

Q. All right, I just wanted to get that clear. What is the distance that the railroad will pass over the lower tract of the Tiller heirs which is shown on the map from the Elaine Duty up to the lower side of the J. B. Tiller before you get to his house?

A. It is 1651.45 feet.

Q. What is the distance across the next tract above the J. B. Tiller and the Pittston Company tract?

A. 1069 feet.

Feb. 25, '58 Q. What is the distance down over the other,
page 22 } the upper one, the one above Maxie Mullins?

A. That is 449.67 feet.

Q. Yesterday I believe when the Commissioners were on the ground you took these various maps and showed how they stand to each other on the ground, did you not?

A. Yes, sir.

Q. How many railroad tracks will there be by the cemetery?

A. Well, there will be two switch tracks right by the cemetery. On the back track on this plan this switch comes in, there is two tracks going on through. A switcher comes through.

Q. That is the place where you commence to enlarge the railway bed going up and going down?

A. Yes, sir.

S. S. Ward.

Q. Would you give the distance from the railroad right-of-way over to the home of Eivans Tiller?
A. The old home place?
Q. Yes, if you have it.
A. No, sir, I don't have it.

RE-DIRECT EXAMINATION.

By Mr. Greear:
Q. Come up here again, please. On that first piece of land that comes from the heirs where you start the beginning at Elaine Duty's house, have you included in the calculations of 11.04 acres the right-of-way of the highway that comes through that land?
A. Yes, this is all included in it.

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Q. The right-of-way of the highway is included in that calculation?
A. Yes, sir.
Q. Now, when you leave that up here, did you include the right-of-way on J. B. Tiller's land?
A. No, I don't think I included that.
Q. Why did you include the right-of-way on the other one and not include the right-of-way on J. B. Tiller's?

Mr. Sutherland: I object to why he did it.
Mr. Greear: He is the one that made the calculations.

A. This is included because we had to buy additional right-of-way to take care of the change. We were taking the present road and had to build another, so we had to furnish the right-of-way.
Q. Up above here you are going to leave the road where it is on the J. B. Tiller tract of land?
A. It just takes a small portion right there across that, one little corner.
Q. When you calculated this area did you include that in your calculation?
A. Yes.
Q. When you calculated this over here where the present highway is, you did not count the right-of-way?
A. No.

Ted Bise.

Feb. 25, '58
page 24 } RE-CROSS EXAMINATION.

By Mr. Sutherland:
Q. You did below but not above?
A. Yes.
Q. From the beginning up to where you reach the J. B. Tiller land?
A. Yes, that's right.

RE-DIRECT EXAMINATION.

By Mr. Greear:
Q. The land you are going to move the highway to is also included in your calculations on the heirs' land?
A. That is correct, yes, sir.

Witness stood aside.

TED BISE,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Long:
Q. Please state your name.
A. Ted Bise.
Q. Mr. Bise, what is your occupation?
A. Assistant Land Agent for Clinchfield Coal Company.
Q. How long have you been employed by the Clinchfield Coal Company?
A. Assistant Land Agent since 1940.
Q. What is the nature of your duties as Assistant Land Agent?
A. Buying property and buying rights-of-way.
Q. Have you had considerable experience in
Feb. 25, '58 Dickenson County purchasing real estate?
page 25 } A. Yes, sir.
Q. Are you familiar with the property over on Cane Creek and Tiller Fork?
A. Yes, sir.
Q. Have you purchased property in that section?
A. In all them forks, yes.

Ted Bise.

Q. You have purchased property on Tiller Fork of Cane Creek?

A. Yes.

Q. Are you familiar with the value of property in that section?

A. Yes, sir.

Q. Are you familiar with the property that the railway company seeks to condemn from Maxie Mullins, J. B. Tiller and the heirs of Eivens Tiller?

A. Yes, sir.

Q. You are familiar with all that property?

A. Yes.

Q. How does that land lay over there?

A. Most of it is very steep and rocky. There is some small bottom land on this property.

Q. What is that land primarily used for over there?

A. Most of it is in woodland, the biggest portion of it. Of course they farm a little bit of it.

Q. Is much of it suitable for farming?

Feb. 25, '58 A. No, sir.

page 26 } Q. From your experience in purchasing property in the area and also your experience as Land Agent in buying real estate in other sections of the county, what is your opinion as to the fair market value of the property in that section, particularly the Maxie Mullins, J. B. Tiller and heirs of Eivens Tiller property? I am speaking of the land.

A. Well, the hillside land is not very valuable. I would say taking the whole thing as a whole in that section of all the property I have bought in that section, the average, taking bottom land, hillside land and all, the average was about $85.00 per acre.

Q. Have you purchased property over in that section recently at that rate?

A. In 1957, yes, sir, I purchased some property in that section at that figure.

Q. Mr. Bise, the property you have purchased in this area you say averaged $80.00 or $85.00 per acre, did that include mineral rights, or was it for surface only?

A. Surface only and timber.

Q. Were there improvements on the property?

A. Yes, some of them, and some of them wasn't.

Q. Was this property similar to the property owned by Maxie Mullins, J. B. Tiller, and the Eivens Tiller heirs?

Ted Bise.

A. I bought property adjoining them, the Tiller heirs, and also the two spots of the Tiller heirs, I believe
Feb. 25, '58 the two spots of it I bought property adjoin-
page 27 } ing.

Q. The property lays the same as Tiller's?

A. There is one little bottom there at this barn where it has a little bottom and that is maybe as good land as I bought adjoining, didn't have as much bottom land as that one.

CROSS EXAMINATION.

By Mr. Phillips:

Q. I believe you bought the property of Lonnie Kiser over there?

A. Yes.

Q. And Lonnie Kiser owns property just across the hill on the opposite side of the hill from the Tiller property?

A. Yes, adjoining Tiller property.

Q. Do you recall how many acres Mr. Kiser had which you purchased?

A. He had 32 acres over there and he had three houses and he owned the land in fee. He owned the coal, minerals and everything.

Q. He had mined the coal?

A. He had mined some of the coal. He had mined all the Jaw Bone and Tiller Seam on the left-hand side. We do have some Jaw Bone and Tiller coal on the right side in the Jaw Bone and also below it.

Q. You paid Mr. Kiser $20,000.00?

A. Yes.

Q. Dividing 32 acres into $20,000.00 to get
Feb. 25, '58 the price per acre which you paid him, that is
page 28 } about $625.00 an acre?

A. Yes. We had the houses and improvements. He had three dwelling houses and he had this coal. He owned the land in fee.

Q. I believe your first offer to Mr. Kiser was $1,200.00 and you ended up paying him $20,000.00?

Mr. Greear: We object to that. It would be immaterial.

A. I don't recall whether I did or not.

Ted Bise.

Q. Is the railroad going through the property of Lonnie Kiser?

A. Yes.

Q. You mentioned some of this property you bought for $85.00 an acre. Can you name a single tract over there you bought for $85.00 an acre that the railroad passes over?

A. Most of it the railroad is not going over.

Q. You are taking in the Tiller estate, Tiller heirs and also J. B. Tiller and Maxie T. Mullins, practically all of the land is bottom land which the railroad is taking?

A. No, there is no bottom land on part of the Tiller heirs. There is no bottom land on it. As I recall, the first thing above J. B. Tiller's property there is no bottom land. It is hillside.

Q. Isn't it a fact that the land you purchased in that area and paid $85.00 an acre for is higher up on the mountain and is away from where the proposed railroad is going to be?

Feb. 25, '58 page 29 } A. Yes, where I bought some of it. I bought land adjoining the tipple and everything else for $100.00 an acre.

Q. You said you bought the Honaker tract of land, which is a tract of land between J. B. Tiller and Maxie T. Mullins.

A. No, it is between the Tiller heirs and Maxie Mullins. I paid $17,000.00 for 102 acres which had a nice house, barn, shock, crib and tobacco lot and had the timber uncut on it, 1,000 feet of saw timber; quite a difference in the value of the property.

Q. How much did you pay per acre for that?

A. $17,000.00, you can figure it, for 102 acres.

Q. About $175.00 per acre?

A. Yes.

Q. To let the Commissioners understand where that land is located, the Honaker tract, that is where the mine is opened up above J. B. Tiller's on up the hollow above J. B. Tiller?

A. Yes, sir.

Q. You purchased other land in the area; you purchased land from Ada Kiser?

A. Ada and Rufus.

Q. How many acres?

A. Six acres.

Q. What did you pay for that?

A. $6,000.00. The value we put on that land was the road

Ted Bise.

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and the improvements and the orchard and also all land is not as valuable to my company as certain land. We have certain haul-through rights, and this land happened to be—this property, our mine was projecting haul-throughs to haul under that land. That is the reason we paid that price for it.

Q. Your company didn't buy the Rosa Tiller property?

A. No.

Q. Do you know whether or not that was sold to Norfolk and Western?

A. I have heard it is all.

Q. You don't know at what price?

A. No, sir.

Q. Have you ever been on the Maxie T. Mullins property?

A. Yes.

Q. Have you been over all this property?

A. Yes.

Q. You said what the company paid for the Walker Honaker tract. Do you know what they would want for it if they should sell it?

A. No.

Q. Would they sell it?

Mr. Long: We object. It is immaterial what the company wants for it.

A. No, I don't know.

Mr. Long: That is not a proper criteria of value.

RE-DIRECT.

By Mr. Long:

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Q. Mr. Phillips asked you about the Lonnie Kiser tract and the Ada Kiser tract and Walker Honaker tract. All those had improvements on them, didn't they?

A. Yes.

Q. And you were buying things other than the surface of the land in those instances?

A. Yes, sir.

Q. And the value he placed on the acres per acre included in that the improvements?

Ted Bise.

A. That's right.

Q. Minerals in the case of Lonnie Kiser?

A. Yes, sir.

Q. Do you have a list of all property you have purchased of surface properties you have purchased in this area?

A. I have a list of some of it. I don't have it all.

Q. Give us the name of some of the surface property you have purchased in that area, the date and price paid per acre.

A. I don't have the dates on this, but it was sometime in 1957; Harman Kiser, I bought that for $75.00 an acre; May Edwards 163 acres, $16,000.00, I haven't figured that out. I don't know what is was per acre. Sarah Edna Kiser tract, $75.00 an acre; Breeding heirs $75.00; I bought the Rebecca Deel property adjoining the Tiller heirs' property at $100.00 an acre. We bought the Radford Powers property adjoining Elaine Duty at $100 an acre and of course I have got lots more. I bought the McKinley Breeding property 64.66 acres for $7,000.00, and Joe and Nettie Rasnick at $80.00. It had a house and improvements on it. Edgar Stephens property $75.00 an acre; it had improvements on it. Oliver Salyer property at $80.00 per acre. I bought Alfred Salyer improvements and houses on it at $80.00 per acre. I got one here on the creek there, 44 acres at $150.00 per acre. Then I got one at John C. Owens' heirs for $85.00 an acre, didn't have a house on it.

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Q. I believe Radford Powers' property adjoins Tiller property?

A. Yes, it adjoins the Elaine Duty property.

Q. I believe the railroad crosses the Radford Powers property?

A. Yes, sir.

Q. You purchased that property last year?

A. I purchased that I believe the first day of January, 1957.

RE-CROSS.

By Mr. Phillips:

Q. Most of this land you named, including Harman Kiser, May Edwards, Sarah Kiser and several others was located up on top of the ridge or more on top or up above the Tiller property?

A. Some of it was. Some of it wasn't.

Q. How about the Harman Kiser?

Ted Bise.

A. Yes.
Q. May Edwards, how about that?
A. It is on Frying Pan side.
Feb. 25, '58 Q. How about Sarah Kiser?
page 33 } A. Yes.
Q. The Salyer property?
A. Yes.
Q. Isn't it a fact that the land you mentioned paying $75.00 or $80.00 an acre for, your company just purchased that to avoid any suits in the future because of surface damage or sinking of water and it hasn't been purchased for any investment?
A. No, it is strictly for mining use and privileges.
Q. On the Radford Powers tract do you know what your company would take per acre for that land?
A. No, sir, I do not.
Q. Will it take any price?

Mr. Long: We object to that. I think that is immaterial. The proposition is, what is the market value of the property.
Mr. Phillips: You can't make a market by going out and saying—
Mr. Long: The market value is what it has been sold at in recent years.
The Court: I didn't understand.
Mr. Long: He wants to know what the coal company would take for some of the land they bought.
Mr. Phillips: We are not selling ours and the coal company is not selling theirs.
Mr. Long: That is not the proposition of market value.
The Court: Objection sustained. That is not
Feb. 25, '58 proper evidence, what somebody would take for
page 34 } their property.
Mr. Sutherland: We save exceptions on that. Clearly we would be entitled—we are not selling ours and they are going around buying bargains.
The Court: It is the market value. Some people might not want to sell at all.

RE-DIRECT.

By Mr. Long:
Q. Some of those tracts you listed there are along down on the creek?

Ted Bise.

A. Yes, sir.

Q. Several of the tracts you had listed are not on the ridge, but down on the creek?

A. Yes.

Q. And right in the same vicinity of the property we are talking about?

A. Yes.

Q. Will you go through your list, Mr. Bise, and give us the number of the ones you have named before that actually come down to the creek or on the creek.

A. Well, of course, this Breeding property comes off this Tiller Fork Creek, but it is above where the railroad comes; and of course the Honaker property, Radford Powers property, Rebecca Deel property and Rufus Kiser is on a different fork. McKinley Breeding is on a different fork from this Tiller Fork, and Douglas Rasnake and Bertha Johnson and Elzene Kiser and the Lun Kiser.

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Q. Actually more of the names on your list of people from whom you have purchased property, more people are down on the creek than on the ridge?

A. Yes.

RE-CROSS.

By Mr. Phillips:

Q. Does the proposed railroad cross the Rebecca Deel property?

A. No.

Q. Is there a single piece of land you have purchased on Tiller Fork—does the railroad go over a single tract of land you named other than Walker Honaker and Radford Powers on Tiller Fork?

A. No.

Q. Douglas Rasnake is on another fork?

A. Yes.

Q. Do you know how much per acre you paid for that?

A. 48.50 acres. It had a house and improvements; 48.50 acres, we paid $8,000.00. It had a tobacco allotment.

Q. What is the tobacco allotment and house worth?

A. Of course, the tobacco allotment is something you can't guess at; they aggravate you to death wanting to lease the tobacco allotment and houses. I have the house rented at $10.00 a month.

S. S. Ward.

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page 36 } RE-DIRECT.

By Mr. Long:

Q. Is there any other property on Tiller Fork through which the railroad passes except Tiller property and Walker Honaker property and Radford Powers property?

A. Yes, it went over the—

Q. On Tiller Fork?

A. Well, getting on Tiller Fork, it went over Pittston Company and Julia Fletcher and Elaine Duty.

Q. Elaine Duty's property was originally Tiller property, wasn't it?

A. Yes.

Q. And Julia Fletcher's, that property was original Tiller property too, wasn't it?

A. Yes.

Witness stood aside.

(Recessed one hour for lunch).

recalled.

S. S. WARD

RE-DIRECT.

By Mr. Greear:

Q. This morning I asked you if you included the highway right-of-way in the first tract that comes from the Tiller heirs. Have you reviewed that since then?

A. Yes, sir, that highway right-of-way is deducted, 1.2 acres.

Q. I believe that is shown on the map we were looking at?

Feb. 25, '58
page 37 } A. That's correct, yes, sir.

Q. Take it up and show the Commissioners how it is figured.

A. Parcel No. 1 is 6.93 acres except 1.2 acres highway right-of-way, net 5.73 acres.

Q. How much difference does that make to the heirs' figure of 11.04 acres? How much is it actually now?

A. 9.84 acres.

Q. 9.84 acres it takes from the heirs?
A. That's right.

Witness stood aside.

E. L. RARDIN,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:
Q. Your name is E. L. Rardin?
A. Yes, sir.
Q. Where do you live?
A. Roanoke, Virginia.
Q. What is your occupation?
A. Right-of-way Agent for Norfolk & Western Railway Company.
Q. How long have you worked in the Right-of-Way Land Department of Norfolk & Western?
A. Approximately three years.
Q. How long have you been with the railway company altogether?
Feb. 25, '58 A. Around seventeen years.
page 38 } Q. What did you do formerly?
A. I worked as a draftsman and was field engineer on survey parties.
Q. Have you worked with reference to the necessary right-of-way lands of N & W in building this spur into Dickenson County?
A. Yes, sir, I have.
Q. Have you made any study of the lands and land values in that area?
A. Yes, sir.
Q. Are you familiar with the lands required for the Norfolk & Western uses from the Tiller heirs, from J. B. Tiller and Maxie Mullins?
A. Yes, sir.
Q. From the studies which you have made, Mr. Rardin, what is the average market value of that same type land as needed for the railroad from those three parties in that area?

Mr. Sutherland: We object to that, Mr. Greear. He has

E. L. Rardin.

been buying for a specific purpose and consequently doesn't get the proper view of values.

Mr. Greear: I agree with Mr. Sutherland; as to the purchases he has made for specific purposes he wouldn't have. But I asked him from his study of sales made between buyers and sellers in that area, what the value was. Not from his specific purchases.

Feb. 25, '58 page 39 } Mr. Sutherland: I object. That would be hearsay.

Mr. Greear: No, it is his opinion as an expert.

The Court: He may give his opinion.

A. I find the records show that acreage tracts in that general area will sell from around $75.00 to $100.00 per acre. Now, that is an average.

Q. Are you speaking of surface lands where they don't own the coal?

A. Yes, sir.

Q. That is the average on the sales that have been made, which is free purchase sales?

A. Yes, sir.

Q. From your experience as a real estate agent for Norfolk & Western Railway Company and dealing in real estate, what values would you fix on the lands that are to be taken from the Tiller heirs? Do you make that any different from the average, and if so, why?

Mr. Sutherland: I object to that because he doesn't qualify under the rules at all.

Mr. Greear: He certainly is an expert, and how well qualified he is is a question for the Commissioners.

Mr. Sutherland: I think he is just the reverse of an expert.

The Court: I think what you gentlemen are arguing may be true in the way of testimony, but I think it is admissible, and he may answer with his opinion.

Mr. Sutherland: We save exceptions.

Feb. 25, '58
page 40 } A. In my opinion, of course, each separate parcel of land will stand on its own merits, but I think in this particular case where we are taking smaller

areas, possibly the hillside land would be worth $200.00 an acre and the bottom land possibly $400.00 an acre.

Q. Do you fix that value for the land from the Tiller heirs?

A. Yes, sir, I think that would apply to the Tiller heirs.

Q. Why is it you make an increase from what the average sales have been in the territory?

A. It has been my experience that always larger acreage tracts when sold by the entire tract will sell for smaller value per acre than when a small tract was taken, in other words, a part of a larger tract.

Q. What about the land to be acquired from J. B. Tiller?

A. I believe the same values would apply to that.

Q. How about the Maxie Mullins 1.08 acres?

A. Possibly due to its relative isolation from the road there, the values would be somewhat less on the Maxie Mullins.

Q. Have you made any calculations with reference to the damage that might be done to the balance of the land which these parties would have?

Feb. 25, '58 page 41 } A. Yes, sir, I have considered it.

Q. Taking them in reverse order, what damage do you figure would be done to the balance of the Maxie Mullins tract by taking this 1.08 acres across that bottom?

A. I believe that would have to be in the neighborhood of $400.00.

Q. How do you fix that?

A. Well, there is approximately an acre; my estimation around half an acre of bottom land which would still be there for their use, but it would be isolated from the rest. I think that has some value.

Q. You are referring to the parcel cut off between the right-of-way and creek?

A. Yes.

Q. I believe the creek is the boundary?

A. Yes, sir.

Q. What else?

A. I also feel under the present circumstances they are free to cross at any place they desire. With the railroad there, they will have to pass at a particular place and stick to it. I think possibly that will be some inconvenience to them.

Q. In other words, there will be one crossing instead of

E. L. Rardin.

crossing anywhere in the bottom, they will have to cross at one place?

A. That's right. That substantially is the reason I have for this figure for damages.

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Q. Would it affect the main boundary of timber back in the hollow above the house in any way?

A. Not in my opinion it would not, sir.

Q. What about the little piece there of J. B. Tiller, the rectangle taken right next to the Maxie Mullins tract? Would there be any damage to the residue of his land up there?

A. I wouldn't think so, no, sir.

Q. How about down at his home?

A. I think there would be some damage there.

Q. How do you fix the damage there?

A. I have set there in my opinion the damage would be around $1,300.00.

Q. How do you figure that?

A. Mr. Tiller has a frame garage across from his house.

Q. That is the garage across the road?

A. Yes, sir. The railway company is not taking that, but on the other hand, when he loses his house he will have very little use for the garage. Therefore, I think that they should consider the value of the garage, and I think $500.00 for that would be fair. The remaining $800.00 I believe would be justified due to the inconvenience that he will have in getting to his hillside land, although he will be able to get to it.

Q. What hillside land will J. B. Tiller have that will be above the railroad that he would have to cross the railroad to get to?

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A. I will have to approximate that, Mr. Greear.

Q. Just where is it located on the ground?

A. It will be up the hill from his house.

Q. In back of his house?

A. That's right. I would guess he would have from four to six acres of land up on the hillside.

Q. That four to six acres he has on the side of that point, is he already barred in some way from getting to that?

A. Yes, I believe the coal company constructed a road through it.

Q. Did the railway company have anything to do with the road of the coal company being up there?

E. L. Rardin.

A. Not to my knowledge, they did not, sir.

Q. Have you figured as to the value of his dwelling house?

A. I have, yes, sir.

Q. When you were talking awhile ago as to the value per acre, you did not include any improvements?

A. No, I did not.

Q .What value do you put on the dwelling house and why?

A. It would be my opinion that his dwelling house is worth approximately $9,000.00.

Q. Can you give a description of it and tell the Commissioners how you base that?

Feb. 25, '58 page 44 } A. I don't have my calculations. It is a one and a half story frame dwelling. I believe it has five rooms and bath down and three bedrooms up, four small outhouses behind it which are in the yard and which I would include in it. I believe the size of it is approximately 27 by 38 feet.

Q. What size basement does it have under it?

A. The basement as I recall does not extend under all the house. There is a furnace room and coal bin, according to my recollection.

Q. What kind of heat?

A. Coal heat, I believe hot air heat.

Q. You value the house at $9,000.00?

A. Yes, sir.

Q. What about the barn above there?

A. In my opinion the barn is probably worth $2,000.00.

Q. Do you have the size of it?

A. I think I may have it here somewhere. That barn is 37 feet by 42.

Q. While we are on that barn, there was an old log barn partly dilapidated on the Maxie Mullins right-of-way land, did you consider any value for it?

A. No, sir, I would consider very little value for it, possibly firewood.

Q. What about the improvements on the heirs' property?

Feb. 25, '58 page 45 } A. There is a frame barn on the heirs' property, also a corn crib, and on the right-hand side of the road going upstream there is a little small barn of some kind, I believe they call it a sheep barn.

E. L. Rardin.

Q. Did you place values on those?

A. Yes, sir, I think the barn would also be worth around $2,000.00 and the corn crib and this little barn maybe $200.00.

Q. Are those all the improvements that are on these three tracts of land to be acquired, all the land from the three parties?

A. Yes, sir.

Q. Did you figure anything as to the damage of the residue of the heirs' property in the construction of the railroad?

A. Yes, sir, I feel that that probably would be in the vicinity of $900.00.

Q. How did you base that damage?

A. I feel the damage to the heirs' property probably comes from two sources: one, they are moving the road and the creek will be moved closer to their house. I think that is a damage. And also it will be a little inconvenient for them to reach their remaining hillside property. I think that is a damage.

Q. Have you broken that down, Mr. Rardin? You have given me your estimated value of the bottom land taken at $400.00 per acre. What does that amount to with reference to the heirs? How much of it is bottom and how much hillside, the 9.84 acres to be taken from the heirs?

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A. The heirs have according to my calculation around 2.14 acres of bottom land and 7.7 acres of hillside land.

Q. Can you give us a figure in dollars and cents as to the values you have put on the heirs' land to be taken and the improvements located on it?

A. It will be about $5,300.00.

Q. Then you added to that, I believe, $900.00?

A. No, I had added to that the $900.00 damage. Without the damage on that it would be $4,400.00.

Q. $4,400.00 is for the land and the barn, then $900 is damage to the residue, making a total of $5,300.00?

A. Yes, sir.

Q. What about the J. B. Tiller property, how much of it is bottom and how much is hillside?

A. According to my calculations it would be about 3.75 acres of hillside and 1.05 acres of bottom land. According to my figures here, the J. B. Tiller land and buildings minus the damage would be $12,370.00.

Q. Then you add $1,300.00 damage to the residue?

E. L. Rardin.

A. That is correct.
Q. That makes a total of $13,670.00?
A. That's right, yes, sir.
Q. What about the Maxie Mullins tract?
Feb. 25, '58 A. Approximately half an acre of hillside in
page 47 } Maxie Mullins' and about 58/100 of an acre of bottom land. That incidentally would be $332.00 value for the land and $400.00 damage, which would be $732.00.

CROSS EXAMINATION.

By Mr. Sutherland:
Q. You live in Roanoke?
A. Yes, sir.
Q. You don't have a barn there, do you?
A. No, sir.
Q. Nor a tobacco house?
A. No, sir.
Q. Mr. Rardin, did you negotiate a trade for your company for the Rosa Tiller property?
A. I worked on that. I didn't make the final negotiations.
Q. You didn't?
A. No. I did take the option, but I did not have any part in accepting the terms of it.
Q. How many acres were in that?
A. I believe the company actually purchased 119 acres.
Q. About how far did it extend along next to the creek, what distance?
A. I would hesitate to guess at that, Mr. Sutherland.
Q. Give your estimate.
A. I would say approximately 1,500 feet, but
Feb. 25, '58 I could be wrong on that.
page 48 } Q. How far back up the mountain did it extend?
A. That property went to the top of the mountain, I understand it went over in some places.
Q. More than half a mile away?
A. Yes.
Q. What did you pay for that?
A. Total purchase price for that was $33,915.00.
Q. How long ago has that been?
A. I don't know the date of the deed. The property was optioned in September 1957.

E. L. Rardin.

Q. About how far downstream in this Tiller property that you mentioned from where the Tiller property under consideration is?

A. I would estimate from a mile to a mile and a half.

Q. Did you know the man down there, which is just below the property you have been talking of, by the name of Robert Smith?

A. Yes, I did.

Q. Your company recently purchased his property?

A. They did.

Q. How far did it extend along the creek or highway?

A. Mr. Sutherland, I hesitate to guess at this. Again I say approximately 1,200 or 1,500 feet.

Q. How far up on the hill did you go?

A. We would go I would say probably from

Feb. 25, '58 the road 300 to 400 feet.

page 49 } Q. How much did you pay per acre for that?

A. We paid $10,000.00.

Q. There was 5.7 acres?

A. That is correct.

RE-DIRECT.

By Mr. Greear:

Q. What were the circumstances under which you bought the Robert Smith property for $10,000.00?

A. At that time, sir, I understand we had equipment, heavy grading equipment there on the job waiting to get in on this property to begin working. It was my understanding that it was better from a financial standpoint of the railroad to acquiesce to these unreasonable prices than it would be to wait. Therefore, I think it was the time element entirely.

Q. Did you take Mr. Smith's house too?

A. Yes.

Q. Did you take his cultivating land?

A. Yes.

Q. His tobacco allotment?

A. Yes.

Q. Was there any agreement about how long it would be from the time you signed up until you could go through to work?

A. We asked Mr. Smith to allow us to come on the land within thirty days after the option was accepted.

W. R. Hamner.

Q. How long was it from the time you took
Feb. 25, '58 the option until he started tearing his house
page 50 down?

A. I understand he started tearing his house down next day. I wasn't there.

Q. Did you all move in with the machinery and start grading?

A. Yes.

RE-CROSS.

By Mr. Sutherland:

Q. Mr. Smith was allowed to move the dwelling house that was on the property you got?

A. Yes.

Q. He was allowed to move it off?

A. Yes.

Q. Your company in addition drilled him a well?

A. We did that because of the spring he had formerly had which served his house, which was on the hillside in the vicinity of the railroad. It was our understanding we would pipe the spring down to the toe of the fill. In other words, the spring would be protectced. I understand the spring was destroyed in this construction and for that reason we drilled him a well.

Witness stood aside.

W. R. HAMNER,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:

Q. You are W. R. Hamner?
page 51 } A. Yes, sir.
Feb. 25, '58 Q. Where do you live?
A. Norton.

Q. What is your occupation?

A. Building contractor.

Q. How long have you been engaged as a building contractor?

A. Twenty years.

W. R. Hamner.

Q. As a building contractor have you worked all over this area of Southwest Virginia?

A. I worked in over half the counties in the state.

Q. Do you build dwelling houses?

A. Yes, sir.

Q. How many dwelling houses have you built in Norton?

A. I have completed seventy houses in the last five years.

Q. Have you made an inspection of J. B. Tiller's house on Tiller Fork?

A. Yes, sir.

Q. You made an inspection of this house from the standpoint of what that house was worth?

A. What it could be replaced for.

Q. Describe the house to the Commissioners as you found it there.

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A. The J. B. Tiller house is 32 feet and 4 inches by thirty-three feet; five rooms downstairs and two rooms upstairs. The chimney is leaning and it has a half basement. The floor sills are 2 by 6's on 24 inch centers. It has hot air heat in it, and they have some logs there or poles for joists in some places in the house. The studs are 2 by 4's on 2 foot centers, weather board, composition roof; there were old brick used in both chimneys. It has a chimney and a flue. When it was built, the brick had been used before.

Q. What would it cost to reproduce that house today?

A. I put a valuation on that house at $6,000.00.

Q. Is that what it would cost to build it?

A. Yes, sir, if anybody came and wanted me to build one and use 2 by 6's for floor joists and putting them on two foot centers. The floor vibrates like this (indicating) if you walk on it like this. You couldn't get a G. I. or FHA loan on it under any condition.

Q. Using that kind of construction?

A. Yes, sir.

Q. Did you go over the barn?

A. Yes, sir.

Q. What size of barn and what type barn was it?

A. 40 by 36 feet. It has a tin roof, 10½ foot boxing up to the eaves of the building. And it is pole-constructed. It is put up on poles, and I suppose as long as it is down in that hollow—but if it was up on a hill it wouldn't have

stood one winter because it isn't property built.
Feb. 25, '58 If you are going to build a pole barn and ex-
page 53 } pect it to stand up, you are supposed to bury
the poles in the ground and concrete them.
These are pole trimmed and upright pieces nailed into that piece of timber.

Q. What value do you put on that barn?

A. $1,800.00.

Q. Did you also examine the barn belonging to the Tiller heirs?

A. That barn is very similar to this one.

Q. Is it built on a similar plan?

A. The same man drew the plans for both of them.

Q. What value do you place on the one of the Tiller heirs?

A. It was built just about the same time. I believe that one was just a little bit larger. I believe that one is 42½ feet by 37 feet and 8 inches. But the poles in that barn were small poplar poles is what the barn was constructed of. I have $1,800.00 on that.

CROSS EXAMINATION.

By Mr. Phillips:

Q. Mr. Hamner, you say the J. B. Tiller house has five rooms?

A. I think five down and two upstairs.

Q. Hardwood boors, aren't they? Did you notice the flooring?

A. I don't have a note on that, but I think it
Feb. 25, '58 was.
page 54 } Q. Did you notice the condition of the floors
on the inside? The walls, did you notice their condition on the inside?

A. The walls were in fair shape. Sheet rock.

Q. Do you know how they were constructed, the construction of the walls, what was in them?

A. I think they were sheet rock.

Q. Do you know how many square feet of floor space they had in the house?

A. No.

Q. Isn't it customary in the building business to figure up the value of a house by the number of square feet or cubic feet?

Gereal Mullins.

A. There is a chart on that, yes.

Q. In fact, you talked about FHA and G. I., that is the way they estimate it and you build it on that basis?

A. Yes, sir.

Q. You didn't figure that?

A. 32 feet and four inches by 32 feet.

Q. You didn't figure it out?

A. No.

Q. In other words, you just made a rough guess?

A. I would have been glad to have sold it for the price I had on it if it was mine.

Q. The last houses you built in Norton, are they two, three or four bedroom houses?

A. Three to five.

Feb. 25, '58 page 55 } Q. What do you get out of a three bedroom-house?

A. $12,000.00 to $15,000.00.

Q. How many bedrooms are in this J. B. Tiller house?

A. Well, the construction of the house I examined, I think that you would have had four or five bedrooms.

Q. All the rooms you visited downstairs especially were fairly large rooms?

A. They were good little rooms, yes, sir.

Q. There was a coal bin downstairs in the basement with a half basement?

A. Coal bin, half basement and hot air heat.

Q. And a furnace?

A. Yes.

Q. Running water in the house?

A. It had its own water system, yes, sir.

Q. The roof was in good condition, you didn't notice any leaks?

A. No, I didn't notice any leaks.

Witness stood aside.

Mr. Greear: We close.

GEREAL MULLINS,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Phillips:

Q. What is your occupation, Mr. Mullins?

Gereal Mullins.

A. Building.

Q. Where do you live?

Feb. 25, '58 page 56 } A. Haysi.

Q. How long have you been building houses?

A. I have been building houses 25 years.

Q. I will ask you if you have inspected J. B. Tiller's house, Bernard Tiller?

A. Yes, sir.

Q. With the assistance of someone, did you measure the house?

A. Yes, we measured the house.

Q. How many square feet of floor space are in the house?

A. In the floor space, let's see—it's all right to look at this (indicating paper in hand)?

Q. Yes.

A. In the house there is 1,000 feet. That is not counting porches. In other words, the body of this house is 1,000 feet floor space.

Q. Briefly tell the Commissioners how that house is constructed.

A. Well, under the bottom it has got a basement to the best of my knowledge, 12 by 24 feet I think to the best of my knowledge, made out of blocks and it has got a hot air furnace, looked like about a 24-inch furnace to me; and it has got—the foundation part of it, what I could see, has got log beams, 2 by 6, subfloor, finished floor over that, framed with poplar, and inside of walls sealed with

Feb. 25, '58 page 57 } poplar, paper, sheet rock, papered bathroom, linoleum on the floor, Congo Wall on the Wall, kitchen also the same; Venetian blinds go with it, built-in cabinets stay there unless you take a wrecking bar and tear them out.

Q. Go ahead and tell the Commissioners what would be the fair market value of the house and approximately what it would take to replace that house.

A. Market value, I don't know nothing about market value; all I do is build. I can't tell you. All I could tell you is what I could build the house for now.

Q. Go ahead.

A. As far as market price, I don't keep up with that.

Q. Tell what it would cost to replace it.

A. The house has got 1,000 square feet of floor space, that is upstairs and down, and with the equipment in it I figure $10,890, the basement is 12 by 24 feet, would be $1,-

Gereal Mullins.

296.00 and the porches 300 feet of floor space, $1,008.00. That makes a total of $13,194.00.

Q. Did you also check the barn on Bernard Tiller's property?

A. Yes.

Q. Tell the Commissioners what it would cost to build the barn.

A. Well, the barn, according to my measurements, the best of my knowledge, is 36 by 40, and the crib 1440 square feet, and the material and labor to build a barn like that, I would have to have $2,600.00.

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Q. How about any other out buildings on J. B. Tiller's property? Did he have any other buildings?

A. Yes, the wash house; 112 feet of floor space in that; $336.00. Do you want me to explain how I get these?

Q. Yes.

A. When I contract, you can't do no good just walking around and guessing what a man has got to build a house. I figure it by the square feet of floor space. That way I figure this at $3.00 a square foot, material and labor, $336.00. The coal house, 104 square feet, $2.50 a square foot, $260.00. Then he has a little old house, shed of a thing, pretty good outbuilding, $200.00, and another one there $60.00, and his hog pen $35.00; so that is all I figured on Mr. Tiller's.

Q. Have you totaled that?

A. $18,234.00 complete on all of it. Did I give you the can house? I don't believe I did. I think we skipped that.

Q. What is your total?

A. The total of all of it; now here is something when you asked about this we skipped over. I have got a can house on there built of brick and it has got a pump and tank in it, $630.00, and then there is a concrete wall and walk built on the back of the house that would cost $487.00, then he has a front retaining wall and walk and two sets of concrete steps, that would be $632.00. The total of all combined with this was $18,234.00.

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Q. That includes all of his outbuildings and everything?

A. Yes.

Q. How about garages?

A. Yes, I have got those in there.

Q. Did you also check the barn down on the Tiller heirs' property, the old home place?

A. Yes.

Q. Go ahead and tell the Commissioners your estimate on that. Is there a water pump in this can house you were talking about?

A. Yes, and a tank. Now, the barn on the estate, that is the one you were wanting, wasn't it?

Q. Yes.

A. I figure that 1413 square feet by $2.50, which would be $3,532.50.

Q. Any other improvements?

A. Yes, another little barn about 352 square feet at $2.50 per foot, that is material and labor is what I am figuring on, all combined $880.00; and there is another building 5 by 12, 60 square feet, $180.00; and a little shed there they call a tool shed, 5 by 7, 35 square feet, $140.00; a crib 12 by 12, 144 square feet, double crib, the best of my knowledge with a partition in the center, $576.00; that would be a total of $5,308.50 for the barn and buildings around there, what I gave you there, not including the house.

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Q. How many square feet, going back to the J. B. Tiller house, how many square feet in his house?

A. I said a thousand, I think. That is in the body of the house; that is not counting porches, I added them separate. The porches I figured a different price to what you do the house.

Q. What about the upstairs, is that included in the 1,000 feet?

Mr. Sutherland: He said it was.

CROSS EXAMINATION.

By Mr. Greear:

Q. Mr. Mullins, have you ever built a barn shed like those sheds they have over there?

A. Yes, I have built some barns. I would say to the best of my knowledge I never built but two just like that, and that has been some time back.

Q. Really then you don't have much to base that on, the square foot basis?

A. Yes, you could, the size of it and everything. I haven't built one for fifteen years. You count the size and know your labor and what materials cost.

Q. What do you figure poplar poles cost?

Gereal Mullins.

A. I figured it by the foot.

Q. I know, but you have to have some basis
Feb. 25, '58 to figure by the foot. Nobody builds a barn by
page 61 } the square foot that I ever knew of.

A. I built one.

Q. You never built one by the square foot though, did you? I built them, but I never built one by the square foot.

A. Did you ever build a house by the square foot?

Q. Yes, you can figure on that because you figure by standard construction. Do you know how many poplar poles are in that barn?

A. No, nor nobody knows how many pieces he nailed in another house. I am talking about what I would built it for.

Q. You can count how many poplar poles?

A. I don't build like that. There is 1440 square feet, I figure it $2,600.00 less than $2.00 a foot, furnish the material and build it.

Q All you did was say, "I will guess it $2.00 a foot"?

A. I have built enough until I know what it costs.

Q. You even put down "pig pen, so much a foot"?

A. That is the only way to do.

Q. It don't cost like it does a house? Did you ever built a pig pen by the square foot? You know you never did, don't you? If you are going to build a pig pen, you take how big you are going to make it, how much lumber, so much a thousand foot?

A. I have been in this building 25 years here,
Feb. 25, '58 and 35, and I never heard tell of counting
page 62 } poles and nails.

Q. In the 25 years you never built a house and put it on 2 by 6's, two-foot centers and sold it for $18,000.00?

Mr. Sutherland: I object to that. He didn't say the house was worth $18,000.00.

Q. He counted it up about $13,000.00. Did you ever build a house, a six or eight room house and put it on 2 by 6's with two foot centers?

A. Sure.

Q. Is that the way you build them now? Do you count that good construction?

A. Not now.

Gereal Mullins.

Q. We are talking about building now.
A. That's what I'm talking about.
Q. The house is on 2 by 6's with two foot centers, isn't that right?
A. Bottom, yes. I made this price what I could build and replace the house, build it today for.
Q. That is on standard construction. You want to build skimpy out of secondhand materials like J. B. Tiller's house, the brick used, and the chimney and flue old secondhand brick?
A. I couldn't swear that.
Q. Did you look at them?
A. Yes.
Q. You saw they were old bricks, didn't you?
Feb. 25, '58 A. I ain't valuating that. I valued what I
page 63 } can replace it for.
Q. I knew you weren't valuating that. It has 2 by 4's on two foot centers?
A. I guess they are.
Q. And the inside of it is the cheapest grade of wallboard?
A. What do you call cheap grade?
Q. On that costs less money.
A. You call sheet rock the cheapest grade of wallboard?
Q. I am talking about wall board. You can take your finger and ram it through it if you hit hard enough.
A. That's right, some of it.
Q. The wallboard that breaks the easiest is the cheapest?
A. There is different kinds of wallboard.
Q. Sure, there is. And this was Congo Wall on the inside.
A. And sheet rock.
Q. And it wasn't put up very well; you can see every crack between every piece put up, can't you?
A. Well, I ain't figured that.
Q. That is what affects the value of the house when you say so much a square foot, you are talking about standard construction?
Feb. 25, '58 A. Yes.
page 64 } Q. You were talking about good construction and you were applying good construction to a house that is not constructed very well. All right, you can stand aside.

Witness stood aside.

A. A. BREEDING,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Phillips:

Q. Your name is A. A. Breeding?

A. Yes.

Q. Where do you live?

A. Lebanon.

Q. What kind of business are you in?

A. Building construction.

Q. How long have you been in the business of building construction?

A. Well, about twelve to fourteen years.

Q. You are a native of this part of the country and live in this county?

A. I live in Russell County, yes, sir.

Q. I will ask you if you have been over and inspected J. B. Tiller's house and the improvements on the Tiller property?

A. Yes, sir.

Q. Have you inspected it very thoroughly or closely and made an estimate?

Feb. 25, '58 page 65 } A. Yes, sir, I inspected pretty good, the best I could.

Q. Tell these gentlemen how the house is constructed and the manner in which it has been constructed and what your price would be, the estimate you would give of the cost of replacing the house.

A. Well, it looks like a pretty good constructed house. It is framed and part of it looks to be on two-foot centers and part of it sixteen-inch centers. It has got either 3/4 or one inch poplar silling in the inside, weather board on the outsde; it is about half an inch or 5/8 inch or something, the weather board. Looks like poplar, and it has got sheet rock on the inside on top of this sill that it has inside, which I figure the amount of lumber that is in the inside for silling would be more than overrun the framing that was left off the two-foot centers which ought to be sixteen.

Q. How many rooms were there in the house?

A. Five rooms and bath downstairs and three rooms upstairs, four closets.

Q. Go ahead and tell the Commissioners your estimate of the cost of replacing it and on what you base it.

A. My figures are 32 by 34, 1088 square feet of space on

the first floor and three rooms and four closets 384 square feet, front porch 7½ by 27 feet, back porch 7 by 23 feet, and it is screened in.

Q. That is the back porch?

Feb. 25, '58 page 66 } A. Yes. The basement is 12 by 24 by 7 feet high. With the 24-inch coal hot air furnace; two chimneys and three fire places, the house is weatherboarded outside, silled and sheetrock inside, hardwood floors; and that house in the kitchen has got cabinets built inside the kitchen, Venetian blinds, and got a 40-gallon electric water heater. Of course, the bath outfit is all in the bathroom, nothing been bothered. And this house I priced what I would take the way I figure this house, what I would take today to build the house and place it back, but I could take lumber similar to that, but there is lumber I wouldn't be able to get of that kind without you have a special order in for it. The only way I could figure the building is what I could put them back today for. I figured the dwelling house, all the fixtures, cabinet work and all $14,234.00. We got a brick fruit house on the back that is 10 by 12 feet concrete floor, electric pump in there to put water in the house, and this is wired for electricity, inside wall switches. I figure all that stuff. I figure that one building built of brick, I would have to have $1,200.00 to build it. Then there is a bunch of outbuildings. I can name over what they are. I have got the size of them.

Mr. Sutherland: Name them over with the size.

A. There is a brick can house, I gave you that. I have got a 9 by 10 by 8 building outside building,—all these buildings I am going to call over is for material

Feb. 25, '58 page 67 } and work, a 9 by 10 by 8, $144.00; 9 by 12 by 8, $160.00; another building 10 by 10 by 8, $150.00; another small building 4 by 6 by 8, $75.00; eight inch block walls, 4 x 165 feet $289.00; concrete walk and steps $220.00; tobacco and stock barn, metal roof 36 by 40 by 14, $2,370.00; hog house 8 by 8 $85.00; one of these hog houses is fixed up and got—in other words, it was a brooder house for hogs, $85.00; hog house 6 by 8, $75.00; garage 16 by 20, that is the garage across the road, $1,280.00. That is my figures on that.

Q. Have you totaled that?

A. Yes, sir.

A. A. Breeding.

Q. Of all the improvements on the J. B. Tiller property?
A. That is just on the construction of the buildings, not anything on the excavating or any shubbery or shade trees or anything like that.
Q. Just improvements. Go ahead.
A. $20,282.00.
Q. Did you look at the barn down at the Tiller estate and make estimates?
A. Yes.
Q. Tell the Commissioners about that.
A. Well, I looked at all this down there. Of course, I looked at the house and all of it, the barn; the barn is 38 by 49, tobacco and stock barn, of course, I don't figure building these barns by the square foot. I figure them by labor and materials. I figure this barn at $3,386.00.

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Q. How about any other outbuildings?
A. Log barn 16 by 22, $250.00; a tool house 5 by 7 at $80.00; a chicken house 6 by 12, $110.00; 12 by 12 foot crib with floors and partitions in it, $350.00; I have got some other buildings here over at the other house.

Mr. Sutherland: Get those at the barn first and then we will break them down separately.

A. That is all I have. I didn't total that up.

Mr. Sutherland: I would like to hear his estimate of the dwelling.

Q. Did you notice the house on the Tiller estate? Did you inspect that?

Mr. Greear: We object to that because there is no damage to the dwelling on the Tiller estate; nobody comes close to it.
Mr. Sutherland: No physical damage, but they will have to move away and leave it.
Mr. Greear: You don't have to move away and leave it; it will just be right there where it is.
Mr. Sutherland: But your access to it.
Mr. Greear: The highway is close to it.
The Court: I think that is a matter for the Commissioners. You can't limit the evidence to—he may describe the house.

A. A. Breeding.

If it is not taken out, it is left there; I think that would be admissible. All surrounding facts and circumstances are admissible.

Feb. 25, '58
page 69 } A. It is a six room house, two story, one bath, two porches and two chimneys, five fireplaces and mantels. I have the figures on that, but I don't believe I have the floor space here with me.

Q. What is the figure of the value?

A. I figured the out and out value of it. Part of this house has built-in mantels, five mantels, and I figured what it would cost me to build it; one of them is black walnut and has black walnut up one side of it.

The Court: I think you are going into details. As I said, the general proposition, all the surrounding facts and circumstances—I would like for you not to take too much time on details.

Q. What is the approximate value of that house?

The Court: I assume the Commissioners have seen it?

Mr. Sutherland: I don't think they were in the house. They didn't go in this house, they looked at it from the outside.

Mr. Greear: It is some distance away from the right-of-way and not bothered at all.

A. This house has outbuildings, a 12 by 15 foot smoke house, $700.00 to build it; another outbuilding 10 by 11 feet smoke house, $150.00; an 8 by 14 foot outbuilding, $650.00; a 4 by 6 building, $75.00. I figure to replace that house back now would cost $18,840.00.

Q. The house and all the outbuildings?

A. Yes.

Feb. 25, '58
page 70 } Mr. Greear: We object.

Q. That is the house—?

Mr. Greear: We object to the estimate for replacing it. It isn't going to be destroyed; it is going to stay there just as it is.

A. A. Breeding.

Mr. Sutherland: Is it in good state of repair?

A. Yes, most of them were in good state of repair.

The Court: Of course, the Commissioners will understand and the Court will instruct them that that house he is talking about now is not being taken. It is only evidence as to whether or not there is any damage to the remaining real estate over and above the peculiar benefits derived from the building of the railroad.

CROSS EXAMINATION.

By Mr. Greear:

Q. How long have you lived in Lebanon?

A. Well, about all my life, ever since I was a small kid. I moved from St. Paul up there.

Q. You moved from St. Paul to Lebanon when you were very young?

A. Yes, sir.

Q. Are you in business with J. B. Tiller?

A. No, sir.

Q. What business is he in in Lebanon?

Feb. 25, '58 page 71 } A. He is in the building material business.

Q. You do do business with him?

A. I do a little, yes, sir.

Q. You have been doing business with him ever since he has been living there?

A. I have done business at that place.

Q. He is interested in the business?

A. I suppose he is.

Q. One of the partners?

A. No.

Q. There has been quite an increase in real estate values in Lebanon recently?

A. Well, I would say so, yes, sir.

Q. And yet—could you take this J. B. Tiller house over there and sell it today—you couldn't get $10,000.00 for it?

A. Yes, sir, I could beat that all to pieces.

Q. Haven't they tried to sell new houses as big as that for less money and couldn't sell them?

A. I don't know of any. I am hunting men houses right now.

A. A. Breeding.

Q. Do you know those builders in Lebanon that rebuilt the motel at Lone Star?

A. Yes, sir, I know of them, plenty enough about them.

Q. Do you know what they got for rebuilding nineteen rooms with hot water heat?

Feb. 25, '58 page 72 } A. I don't know exactly, but I do know what happened to them.

Q. They built it and paid for it, didn't they?

A. No, sir, they haven't yet.

Q. Haven't they built new houses out there in the edge of Lebanon?

A. No, sir.

Q. You don't know of that?

A. No, sir.

Q. Weren't they trying to trade them to Mr. Tiller's company there?

A. They never did build them.

Q. They were having a hard time trading them, weren't they, those new houses?

A. They can't trade them.

Q. Did you know the contract price on the motel of nineteen units was $13,000.00?

A. No, I don't know contract prices. I do know a few contract prices they made to people in Lebanon trying to knock other people in business like myself.

Q. They were bidding lower than you were?

A. They bid them so low they couldn't build them, had to quit them.

Q. What price do you figure per square foot?

Feb. 25, '58 page 73} A. It depends on what you mean, the materials, etc.

Q. Standard construction No. 1.

A. I charge you from $10.00 to $12.50 per square foot.

Q. As you cut down on the material and skimp on material it gets cheaper?

A. If you use secondhand stuff it cuts the price; if you use secondhand stuff it gets cheaper, but the labor is the same. I don't use secondhand stuff because labor would eat me up.

Q. But if a man wants to use secondhand material?

A. It's all right if he can stand the labor price. I can't do that.

Q. Under Mr. Tiller's house he got old used logs and used

them as sills; they are good and stout, but it is hard to put a level house on it?

A. No. Of course, it's hard, but it takes more labor to do it; but if I put it in now—

Q. You didn't put levels on his house to see if it was level?

A. No, but I can tell.

Q. Did you notice the chimney was leaning?

A. Yes, sir.

Q. You didn't say anything about that. You do put up houses in Dickenson County?

A. No.

Q. Yet you put a price on this as if you were putting it up standard construction.

Feb. 25, '58 page 74 } A. I am talking about putting a house up.

Q. You don't put up a good sized house with 2 by 6's and two foot centers?

A. No.

Q. You don't do that; and when you do that that cheapens the house, and that makes you get less for the house?

A. Of course, it cuts it down.

Q. Lots of times it puts it where you couldn't sell it at all; actually you can't borrow money on a house built like J. B. Tiller's house?

A. I can buy a 2 by 10 cheaper than buying logs.

Q. They won't pass it if you try to borrow money?

A. No, I don't think they will.

Q. They won't pass it even for inspection. I believe that's all.

Witness stood aside.

BERT MULLINS,

after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Phillips:

Q. Mr. Mullins, where do you live?

A. Johnson City.

Q. How old are you?

A. Thirty-two.

Q. Are you the son of Tollie Mullins?

A. Yes, I am.

Bert Mullins.

Q. What kind of business have you been in
Feb. 25, '58 during the past few years?
page 75 } A. The last nine years I have been building and constructing new homes.

Q. What education have you had prior to going into the building business?

A. Bachelor of Science Degree.

Q. About how many houses have you helped build or been connected with your father in building in Johnson City during the past few years?

A. I am going on the 69th house right now.

Q. Have you looked at these houses, J. B. Tiller's house and also the other houses located on this property?

A. Yes, I have.

Q. Have you made sketches of the houses and do you have them there?

A. I do have.

Q. Starting with the barn on the Tiller estate, I will ask you if you will present the sketch of that to the Commissioners and mark it Exhibit 1. Did you actually participate in taking the measurements of this?

A. I actually read the tape myself.

(Mr. Greear looks at sketch).

Q. Go ahead and tell the Commissioners while Mr. Greear is looking at it, what your estimates will be.

A. This is Bernard's house and this is the
Feb. 25, '58 estate.
page 76 } Q. Tell the Commissioners your estimated cost to replace this barn.

A. This barn is 16 foot high on the side walls, 49 feet one inch across the front including extra shed, 37 feet 7 inches deep. In the gables it is 26 foot high practically solid, fitted with one one oak boards. It has a roof through the four stalls, one shed room plus an extra shed on the right-hand side facing the wall with seven outside doors in the barn. There is a tobacco barn and has 26 foot 6 inch poles on the average 20 foot high for the tobacco tiers to be placed on the average 20 foot high for the tobacco tiers to be placed on the five tiers of nine rows for tobacco. In the center of it it has four tiers of nine rows on the shed side, 9 by 9 sills around it; the side walls are on 10 or 12 inch full length 16 foot No. 1 oak boards, and outside corners run poles, they are about 6

by 6 sawed logs. On the inside where the tobacco tiers go, there are poles on that. On the estate barn; and I didn't figure it by the square foot. I figured it by actual listing of material the best I could calculate and I got Clinchfield Supply down there next to Frying Pan, got their prices on their No. 1 oak boards, they have random lengths and widths, and in this barn the entire cost of labor and materials is $3,897.20. That is from an actual computed list of materials.

Q. How about the other outbuildings or improvements on the estate?

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A. It is on that same plan; there is an estate crib; I don't have the measurements here. It is on that plant. The estimated cost to build that is $393.75. Then there is one additional building that is affected joining the barn, a tool shed. It is not in the best of shape, but serves the purpose, and to rebuild the tool shed is $100.37. Then on the right side of the road there is a log barn that is in excellent shape. That barn would cost to rebuild $384.65. That is also, I believe, shown on that same plan.

Q. Are there any other improvements on the estate?

A. Nothing that is affected directly. There is one log hog pen and chicken house that is adjoining within thirty feet of the right-of-way. I estimate one at $16.75 and the other a little more.

Q. What is your estimate for the barns and buildings on the estate?

A. On the estate $4,774.00 to replace it.

Q. I will ask you on the J. B. Tiller property if you have estimates?

A. Yes.

Q. This is the barn and outbuildings—you mentioned something about—going back to the Tiller estate—about the log barn when you were up there.

A. I was up there approximately two weeks ago.

Q. You don't know whether anything happened to this barn by way of being damaged since you were there?

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A. Not that I know of.

Q. But it could have been damaged?

A. Yes.

Q. I will ask you on the Bernard Tiller house, describe that, going back to Exhibit 2, tell us about the barn and

outbuildings. Go ahead and describe the barn and outbuildings.

A. The barn, the main building of the barn is 36 by 40 feet and has 14 foot side walls all the way around and three stalls on the left, feed room on the right as you go through; rafters, 2 by 6's, 24 inch centers. Gables eight foot high, which makes 22 feet; in the gables ten rows, three tiers high for tobacco; 32 feet 6 inch posts, average 18 foot length, and it has a crib on the side of it attached to it. That is used as a farrowing pen, 7 by 9 foot or 8 foot high. On the back of this barn, the back of it drops down until actually the back of it is 8 foot higher than the front. The actual cost figured from a list of materials on that barn is $2,808.15, material and labor to replace the barn. He has several outbuildings. He has what I listed as "wash house, 10 feet 7 inches by 10 feet 6 inches, oak and metal roof, value $245.28. The coal house, $239.28; then he has another shed that is 10 feet 2 inches by 10 feet 3 inches, and that also $245.00. Then he has an outdoor privy that is 5 by 4 feet; that would cost to replace $104.55. He has a hog pen 5 by 8 feet. That would cost $85.29 to replace. Then he has a garage beside the road that is 16 feet 4 inches by 20 feet three inches, in excellent shape, and that garage figured out $575.67. Then he has a dairy affected listed with the house, a dairy building that includes; it has concrete floors, built of fireproof brick, shelving around one wall and adjacent to the other walls, two windows and door, built back into the bank, concrete floor, composition roof, 33 foot concrete floors; and the front of it running full length of the house is an 8-inch retainer wall on each side. That dairy building is 10 feet 8 inches by 12 feet, and the cost of that building, it also includes a pump in it, and I believe I have got that included in this price—no, I haven't either—the excavating machinery, concrete, furnishing labor is $430.75. Then he has a retainer wall along the front of his house, that is 114 foot long, eight inch block wall, four blocks high. The cost of that one is $222.50. Then he has a rock wall along the upper side of the house about 55 feet long. The estimate for labor approximately $100.00 for building that rock wall.

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Q. Do you have that total except with the house?

A. No.

Q. Go ahead with the house; tell about the construction and cost to replace it.

Bert Mullins.

A. This house is 33 feet deep, 33 feet wide, excluding porches, starting from the floor up. I would like to mention the floor joists. They have been speaking of 2 by 6's for floor joists. 2 by 6's are acceptable to FHA for this reason; there is a log sill running underneath the middle of the floor joists, and since the span is 6½ to 7 feet, then it is acceptable for FHA. But they base their findings entirely on the length of span.

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Q. Let me interrupt. Have you built houses to be financed by the FHA and G. I.?

A. Practically FHA; very seldom anything else.

Q. Go ahead.

A. The house has yellow poplar siding on it on the outside, which is impossible to buy today. That siding will be there when we are dead and gone. The inside of it is sheeted with yellow poplar sheet, and sheet rock placed over that, and in this manner whenever it is so constructed you can't push or kick a hole through that sheet rock; you would have to kick through the one-inch boards as well. However sheet rock itself without anything behind it is acceptable to FHA the same as plaster. About half the houses I have built are sheet rock. He has better construction on that house than the houses today. Venetian blinds. Rooms good size, five rooms and bath downstairs, three rooms upstairs. The downstairs has 1025 square feet exclusive of the porches. Upstairs approximately 500 square feet including the closets. There are three rooms, all large enough for bedrooms. It has three fireplaces in the house. One chimney is used brick, but many, many folks today are using used brick. The FHA accept it as decorative effect. The largest manufacturer in Johnson City is now manufacturing used brick; you get it for the effect. It has a complete bath in the bathroom; the kitchen has real nice wall cabinets, base cabinet 42 in. and water heater. fireplace or flue for coal range and wired for electric range. Linoleum on the floor, Congo Wall on the wall. The back porch is screened about half the way up, could be easily completed. And it has a nice front porch, it has extra large concrete steps in front, 64 inches wide, a three foot walkway into the road, concrete steps down to the front of the house. The basement inside measurements 11 feet 6 inches by 22 feet 3 inches with 8 inch partition separating the furnace from the coal bin, and the furnace is labeled

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"D-27 Sunbeam," concrete floor and steps entering into the basement itself.

Q. Go ahead and give your estimate of the cost of building a house similar to the one you just described.

A. Building a house similar to this couldn't be done for less than $10.00 a square foot. You have your upstairs and then exclusive of porches and basement has 1,525 square feet, and porches and if you come on to that, I wouldn't contract a house this size, just the house alone, for less than $16,000.00, and I have never sold a house for less than about $11.00 a square foot.

Q. You have estimated that at $10.00 a square foot?

A. Yes, I have estimated it at $10.00 a square foot. And the total of all Bernard Tiller's outbuildings and home is $21,554.00.

Q. I believe there was a house which is located up on what they referred to in this case as Maxie T. Mullins.

Feb. 25, '58 Have you made an estimate on that?

page 82 } A. Yes, I have, Glyn. That house has 1402 square feet in the house, and to replace it today would run in the neighborhood of $10,000.00 to $11,000.00 as is.

Q. Briefly what is the square footage in the home located on the Tiller estate?

A. 2,002 square feet.

Q. Without going into detail, what would be your estimate of the cost of replacing that home?

A. That house would run in the neighborhood of $18,000.00, the beautiful paneling and material it has in it.

Q. Of course, that is the house that isn't taken by the right-of-way, but is near the right-of-way?

A. That's right.

CROSS EXAMINATION.

By Mr. Long:

Q. I believe you stated you build homes in Johnson City?

A. That is correct.

Q. You are self-employed?

A. Yes, I am self-employed. I contract and build for sale specific buildings.

Q. Are you in partnership with your father?

A. No, I'm not.

Bert Mullins.

Q. All these homes you talked about building, you contracted them yourself, have you?

Feb. 25, '58 page 83 } A. Not all of them, no. I have been up until about a year and a half ago I was partners with my father and my brother.

Q. For the last year and a half you have been by yourself?

A. Yes, I have been by myself entirely.

Q. You have built houses since then by yourself?

A. I certainly have.

Q. You figured these estimates?

A. I figured the estimates. I do my pricing and all blueprint work.

Q. Have you built any barns?

A. I have not built any barns, no, sir.

Q. You are not familiar with the construction at all?

A. I am familiar with the construction, yes, sir. The construction in a barn is very simple; it is much simpler than any house. I can figure material on a barn a lot easier than I can on a house.

Q. On these barns did you figure up the cost of the materials?

A. I figured the cost of materials. I have a list of the materials.

Q. How much did you figure on labor?

A. On the estate barn $1,200.00; on the Bernard Tiller barn $1,000.00 labor. I figured it on the basis

Feb. 25, '58 page 84 } of $2.00 an hour, which is what we pay carpenters.

Q. $2.00 an hour labor on the estate barn figures $1,200.00?

A. Yes.

Q. Materials would run $2,400.00?

A. Materials $2,697.20.

Q. The poplar poles, how much did you figure them?

A. I figured on the poles, 26 poles, 1560 square feet, $195.00.

Q. Where did you get the price from?

A. That price was not available because you cannot buy poles. You would have to get squared material at a sawmill if you went to buy it unless you went out and cut it yourself.

Q. Can't you go out and buy it from anybody?

A. No, Clinchfield has everything up to twelve inches over there; this is six-inch.

Q. On some of these houses you obtained FHA approval?

A. All my houses with the exception of two or three I have used FHA approval.

Bert Mullins.

Q. It is possible to get approval when building on two foot centers?

A. Very definitely so.

Q. Have you ever had one approved?

A. I have submitted on 2 by 4's; they will take 2 by 8's up to 12-foot span, and they definitely will take 2 by 6's on seven-foot span.

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Q. How about 2 by 6 rough lumber on two-foot centers?

A. They will take rough lumber the same.

Q. Have you ever had one approved like this?

A. I have never had occasion to do so. They permit 2 by 6's in the specification book.

Q. But you don't know from your own experience whether or not they will approve that?

A. I know it says so in their book. That's what I go by. Have never had any turned down.

Q. On the lists you made you didn't put in the price of rough lumber, you said good lumber?

A. The list I made on the barns I used random lengths and widths, and this (indicating) was two widths and one width.

Q. The house?

A. I based it on the square foot.

Q. Did you figure it on rough lumber?

A. There is some rough lumber, but rough lumber, you can get it $5.00 to $10.00 cheaper than you can finished.

Q. You furnished on the prices all new, good lumber?

A. Very definitely, because what is in there is as good as new.

Q. You furnished prices on new brick?

A. Yes, I furnished prices on new brick.

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Q. The chimney is constructed with old brick?

A. Yes, the chimney is of old brick, but old brick only costs $10.00 less on the thousand than new.

Q. You are replacing it with better material than it is built of?

A. I am figuring to replace the house with either better—or the only difference would be about $15.00 difference if you use secondhand brick.

Q. How about the flue linings, would that be approved?

A. I would have to have a ladder to get up there. I didn't do that. I wouldn't commit myself.

Q. You are replacing a better house here, aren't you?

Graham Tiller.

A. No, sir, it would be what we would term a new house, but it is what I am basing it on, is what the total cost would be to replace or rebuild the house.

Q. The way you have figured it, you wouldn't rebuild it with leaning chimneys?

A. No, but it costs as much that way as it would to put it up straight.

Q. Then it won't sell?

A. He wasn't trying to sell it.

Q. The market value wouldn't be as great with leaning chimneys, used bricks and built on two-foot centers?

A. If I built a house with crooked chimneys it would cost as much to build it crooked as straight.

Feb. 25, '58 page 87 } Q. The resale value wouldn't be the same?

A. I am talking about what it would cost to replace it.

Q. They don't build houses like that in Johnson City, do they?

A. Once in a while you find one with leaning chimneys.

Q. And built of similar construction?

A. I don't suppose you can find similar construction because no one today puts wood behind the sheet rock. They just put sheet rock up, which is highly acceptable to FHA.

Witness stood aside.

Mr. Greear: We move to strike this witness' testimony because the question here is market value and not replacement value. He says he doesn't know anything about market value and dodges that. We move to strike out his testimony.

The Court: I overrule the motion because I think the jury may take that into consideration—I mean the Commissioners may take that into consideration as testimony. It would be admissible. However, the Court will instruct the Commissioners as to the method of determining value, which is the fair market value of the property as it stands, not the cost of reproducing the house out of new materials, that is replacing it; but they may hear and consider the evidence in determining the value of the house as it stands and the other buildings.

Mr. Greear: We except to the Court's ruling.

Feb. 25, '58 page 88 } GRAHAM TILLER,

after being duly sworn, testified as follows:

Graham Tiller.

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Are you one of the defendants in one of these suits, the one styled Fannie Tiller and others?

A. Yes.

Q. I believe you are a brother of J. B. Tiller and Maxie Mullins, also defendants?

A. Yes, sir.

Q. How old are you?

A. Fifty.

Q. Where were you born with reference to the property in question?

A. I was born on the Maxie Mullins parcel.

Q. How long have you lived there?

A. Until I was eighteen years old.

Q. Where have you been since that?

A. We moved to Clintwood for a period of about five years, then moved back to where the home of Fannie Tiller is, my mother, where she lives.

Q. When you would be away would you go back frequently?

A. Yes, sir.

Q. When can you first remember that highway there? Had the state taken it over when you first remember?

A. No, I don't think so. When I can first remember, the County paid people that lived through the community for working on the highway, working on the road.

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Q. The fill comes down there where your mother lives. How many acres are there in that tract of land? I better get it this way. Approximately how many acres would there be on the right side of the creek as you go up the highway?

A. There would be approximately 154 acres on the right side.

Q. The Commissioners, I believe, yesterday weren't up to the top of that hill. Can you see as far back as that land goes?

A. No, you could not.

Q. What is the nature of the timber up there above the cleared fields?

A. It is as good as you will find in the county anywhere.

Q. How long has it been since it was cut over?

A. Forty years.

Graham Tiller.

Q. Who cut over it forty years ago?

A. Honaker Lumber Company.

Q. Honaker Lumber Company cut over it except the oak and large poplars?

A. That is the principal thing they got.

Q. Do you remember down to what size they took it.

A. No, I don't.

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Q. How about that stream beside the high-way, does it run the entire year or does it go dry at certain seasons?

A. Between the property of J. B. Tiller and estate?

Q. Yes.

A. It stays there the entire season. It is a brook or spring.

Q. Where is it from J. B. Tiller's home, where was the spring?

A. It is south and to the left coming downstream. It is the dividing line between the J. B. Tiller property and the estate, on the west bank or the right bank going upstream.

Q. Have you made an estimate of what in your opinion that property is worth there without the railroad, that home, and we will get on the J. B. Tiller and Maxie Mullins separate—from the Honaker property down, how it is affected?

A. I have.

Q. What is that and how did you arrive at it?

A. Total numbers of acres taken of the estate 11.04 acres. I have approximated the amount of level land taken by the railroad as being four acres taken by the railroad. I value this at $2,500.00 per acre, total $10,000.00. And I estimate the hillside land taken by the railroad, I have 7.05 acres; I value that at $500.00 per acre, which is $3,525.00. The barn on the estate, the big barn, I estimate at $3,500.00, and the small barn $350.00 on these buildings was my estimates without consulting any building contractors or anybody else.

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Q. Had you in your lifetime, especially during your father's lifetime, had experience in constructing similar buildings?

A. Yes, I have, and been connected with selling building materials quite awhile. The small barn on the right of the road going upstream I value at $350.00, the crib $300.00, 300 posts in the fencing at 50¢, $150.00; 200 rods of wire $250.00, five large gates $100.00, labor of fencing $200.00, damage to the home as a home I estimate at $15,000.00 from the standpoint of the traffic, the railroad, the bumping and

banging of cars; the right-of-way will be thrown over practically in front of the front door, it would be absolutely worthless as a home. Damage to the cemetery from the standpoint of inaccessibility, dust, noise, smoke $5,500.00; destruction of water between the estate and J. B. Tiller's property on the west side going upstream $5,000.00. What we have been calling the lower tract below J. B. Tiller's tract and the second tract above J. B. Tiller's, really isn't two tracts, those two tracts join in a hollow or runs above the J. B. Tiller property.

Q. In other words, where his house is is eight acres carved out on that side?

A. That's right, and that complete acreage approximately 174.5 acres including where the home is. Approximately 125 acres in the side where the home is, on the east side of the stream there is approximately 20 acres in there around the home. On the west side there is approximately 29 acres that is cleared, leaving approximately 125 acres in timber. I value the timber at $150.00 an acre. I estimated that timber to be worth—it is 10,000 feet per acre worth $15.00 per thousand on the stump. Damage to the timber I am figuring $75.00 per acre. On the lower end of the property where the railroad starts, it is so close up to the timber that it will be impossible to get out a lot of it, too close to the railroad to cut. On up abve J. B. Tiller's, the same proposition, he has a house there; there is quite a bit of it you won't be able to get to it all, and then cutting timber and getting through all four railroad tracks in places, two railroad tracks in places and three in places, it is an impossibility, the expense and all, I figure damaged this timber $75.00 per acre, which at 125 acres would total $9,375.00. And on 125 acres on the west bank of the lower tract or the upper tract—

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Q. Up to the Honaker tract?

A. Yes. It completely cuts it off. I am figuring damage to the land $125.00 per acre, making a total of $15,625.00 damage to the land, the inaccessibility of it, you can't get a cow or horse or hog or sheep or anything else to and from, and no place to put a barn, and it is absolutely worthless the way I see it. At the southern end of the tract where the tract ends there is a boundary of 80.2 acres that is all in timber. Approximately 3 acres on the west bank a distance of about 450 some feet and then it runs on both railroad tracks, that is

Feb. 25, '58 page 93 } hemmed in and be absolutely cut off. Pittston Company land comes down to it on the upper side and you can't get to it from the creek; approximately three acres in there cut off at $400.00 per acre, total $1,200.00. 80.2 acres of timber valued at $150.00 per acre, and figuring the damage to this per acre as $50.00, fifty times 80.2 is $4,010.00. The way the railroad goes up in the creek it takes the creek on both sides and to the hillside the full distance, which is around 450 feet on both sides and would necessitate quite a bit of building of roads before we can get any timber up. That total of damage to the buildings, to the timber and to the land I am estimating at $80,100.00. This is not mentioning the damages to the gas and oil rights. It is my understanding that in drilling a well that within 300 feet of other property, if a producing well is drilled that the other land owner will share in the royalties. This would mean that in 300 feet on either side of the tract plumb through the entire property we would not drill a well on an average of 300 feet on each side, and taking as an average the tract of 200 feet would be 800 feet clean through our property that we could not drill a well and it would put us if we drilled and there was room enough to drill to the next man's property that we would have to go to the top of the mountains,—no other place.

Mr. Greear: We object to that line of testimony and move to strike it out because it is purely speculative, highly imagin-

Feb. 25, '58 page 94 } ative and nobody knows there is any gas there, it has no present prospects or future prospects of drilling a well, no place to sell gas if he had a dozen wells.

Mr. Sutherland: They want it down here at Middlesboro.

The Court: Objection sustained unless you show more than speculation.

Mr. Sutherland: We will save exceptions on that.

The Court: Go ahead.

A. That is a figure that is hard to estimate, but I am putting that damage at $20,000.00.

Q. What is the next item?

Mr. Greear: We object to that.

The Court: Sustained.

Graham Tiller.

A. We have been approached by a man who is in the coal stripping business for a lease on our coal stripping rights and we have told him we would consider it and we have been offered 50¢ a ton royalty.

Q. Is he a reliable, reputable man?

A. As far as I know he is. He is a man in the business now and been in it for some time and I have never heard anything else other than he is reliable.

Mr. Greear: Does he own the coal?

A. He doesn't own the coal.

Mr. Greear: We move to strike it out. A man can't strip if he doesn't own the coal. It is impossible for anybody to strip coal if he doesn't own the coal. I could offer you $10.00 a ton to strip, but if I don't own the coal it don't amount to anything.

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A. He says—

The Court: How could you get an offer from somebody that does not own the coal unless he had a right to mine it?

A. He says he is confident that he can get a contract from Clinchfield to strip it.

The Court: Objection sustained.

A. He intimated he had already been informed he could get it.

The Court: Objection sustained; the Commissioners have no right to consider that; it is based on hearsay and speculation.

Mr. Sutherland: We save exceptions. We can follow it up. We can show—

The Court: I am not interested in what you can show. It isn't admissible unless you show something to make it admissible. You have got no right to introduce evidence of that kind; it is speculative.

Mr. Sutherland: I am confident I can show the Court authority for it.

The Court: Go ahead; I have already ruled.

Graham Tiller.

A. Where they are entering our property and for practically all the way through it, the railroad grade will go up very near to the outcropping of the coal, therefore making it impossible to strip it.

Mr. Greear: We object to that argument.

Feb. 25, '58 page 96 } Mr. Sutherland: Mr. Rush said you didn't have the right and we all know it is being done all over this country.

Mr. Greear: It isn't being done up there.

The Court: Objection sustained. Mr. Sutherland, that is highly prejudicial to keep on that sort of evidence in a Commissioners' hearing. I have already ruled it inadmissible.

Mr. Sutherland: We save exceptions.

The Court: You have a right to save exceptions. Go ahead; observe the ruling of the Court.

Mr. Sutherland: Your Honor remembers what I said when he was asked whether he would sit and I am relying on that.

The Court: I will hear you in the absence of the Commissioners if you want to argue a legal point, but it isn't proper before the Commissioners.

Mr. Sutherland: We save exceptions. Go ahead.

The Court: The Commissioners are laymen just like a jury. These legal questions are not for the Commissioners to pass on. It is for the Court under proper instructions, proper rulings of the Court.

Mr. Sutherland: We save exceptions to that.

Q. What did you have there?

A. 1977 feet around the hill that could be stripped if it was not for the railroad.

Mr. Greear: We still object; he has nothing to strip. He says 1977 feet could be stripped.

The Court: Sustained.

Feb. 25, '58 page 97 } Q. What is the next item there?

A. Coal will average in that country 1800 tons—

The Court: Mr. Sutherland, you know this Court ruled on a similar proposition not long ago. I don't want you to argue that question or persist over the Court's ruling. If

you want to be heard right now or any other time I will be glad to hear you.

Mr. Sutherland: I save exceptions. That is what I was trying to get; if the Court wants the Commissioners to go out until you hear what he says, I would like to have it.

The Court: When the Court sustains the objection there is no way he can answer except in the absence of the Commissioners. You want it for the record?

Mr. Sutherland: Yes, I want it for the record.

The Court: Let the Commissioners go out.

COMMISSIONERS OUT:

Q. Go ahead.

A. The coal will average 1800 tons per acre per foot high. The gentleman who offered to lease our stripping rights would contract to strip back to 100 feet highwall, which on an average would uncover 160 feet horizontal of coal. Every 280 lineal feet around the hill would equal approximately one acre of coal uncovered. 1977 feet is the number of lineal feet of stripping around the hill, divided by 280 equals 7 acres of coal that could be stripped. This coal will average 10 foot high and at 1800 tons per acre per foot high times ten equals 18,000 tons per acre; 18,000 times 50¢—

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Q. Is that what he offered?

A. Royalty which we were offered. which would equal $9,000.00 per acre. Nine thousand times seven equals $63,000.00 of royalty that could be derived from stripping the seven acres, making a grand total of $163,100.00.

Q. Deducting the $63,000.00 would be what?

A. $100,100.00.

Mr. Sutherland: When the Commissioners come back in I want to ask you that so you can give me those figures, omitting the $63,000.00. That is all, Your Honor.

The Court: You don't claim you own the coal on it, do you, Mr. Tiller?

A. No, sir, I do not. But we own the stripping rights.

Mr. Greear: Not a word of evidence in the case it can be stripped. We tried it one time and there is 15 to 18 feet of sandstone over it and it makes it unprofitable.

Arlie Davis.

Mr. Sutherland: That's your guess. We have got 50¢ a ton for it; I am going to call a witness while the Commissioners are out. I might call him before you cross-examine.

Mr. Greear: You see how foolish this kind of evidence is?

Feb. 25, '58 page 99 } If there is going to be a 100 foot highwall, he himself would cut off everything above the timber.

Mr. Sutherland: Everything is to be measured. It is a mathematical proposition when you come to prices of real estate.

Mr. Greear: Cut the boundary either way.

Mr. Sutherland: If agreeable I want to offer the evidence.

Mr. Greear: I suggest you let Graham stand aside and call the other witness while the Commissioners are out. (Graham Tiller stood aside).

ARLIE DAVIS,

after being duly sworn, testified in the absence of the Commissioners as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Where do you live?

A. Georges Fork.

Q. Do you own any real estate up there?

A. Yes, sir.

Q. Within the last year or two has there been any coal what we call stripping, facing the coal, out beyond the outcrop on your land?

A. Yes, sir.

Q. Who owned the coal?

A. Clinchfield Coal Corporation.

Q. What did you get to allow the company to strip the coal on your land?

A. What do you mean? By the ton?

Q. Yes.

Feb. 25, '58 page 100 } A. We got 55¢ a ton.

Q. How long ago has that been?

A. That was in 1956.

Mr. Greear: We move to strike it out because it is entirely immaterial as to this case. The conditions of stripping vary from one hill to another and one place on the same hill to an-

other on the same land; and it is according to whether it is solid rock, the steepness of the hill and all that and the availability of the railroad has a good deal to do with it to haul.

Q. I might ask you how for is your property from the railroad? How far do you have to haul the coal?
A. I believe around eleven miles; I am not for sure.

CROSS EXAMINATION.

By Mr. Greear:
Q. How far is Georges Fork from Tiller Fork in this county?
A. I don't know where Tiller Fork is.
Q. Tiller Fork is thirty-odd miles from Clintwood.
A. It would be approximately thirty-five miles, I guess.

Witness stood aside.

J. D. NICEWONDER,
after being duly sworn, testified in the absence of the Commissioners as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:
Feb. 25, '58 page 101 } Q. Where do you live?
A. McClure.
Q. What business are you in?
A. Coal stripping.
Q. Have you been stripping any coal on Georges Fork the last few years?
A. Yes, sir.
Q. Did you strip the coal on the Arlie Davis tract up there?
A. Yes.
Q. Who were you doing the stripping for?
A. Clinchfield Coal Company.
Q. That is the predecessor of Pittston Company, as you understand?
A. Yes, sir.
Q. How much did you give Mr. Davis per ton for stripping?
A. 55¢ a ton.
Q. Have you stripped any other coal that belongs to Clinchfield from any other person?

J. D. Nicewonder.

A. Yes, sir.

Q. How many places, how many persons have you stripped for?

A. I believe just one other—no, about three others.

Q. How far did you have to haul the coal?

A. Eight to eleven miles on the three jobs;

Feb. 25, '58 it varied.

page 102 } Q. Are you familiar—were you raised in this country—familiar with the terrain and topography and coal business?

A. Yes, sir.

Q. Are you experienced especially with the stripping end of it?

A. I think I am, yes, sir.

Q. What is the principal factor in stripping coal?

A. Well, the room you have to put your overburden or spoil, we call it; how steep the hill is on top of it and what the formation is over it, is the big factor. If it's sandstone you can't do it—in other words, a piece of land with slate or shale over it, you can get four times as much coal as if you are in sandstone, because you can handle it easier. Sandstone is so hard to drill and remove it.

CROSS EXAMINATION.

By Mr. Greear:

Q. On one of these steep hillsides have you got back anywhere and cut coal horizontally 160 feet under sandstone?

A. No, sir, not with sandstone.

Q. That is not practical, is it?

A. No, sir.

Q. As a matter of fact when you hit sandstone, you skip that place and go on to another one?

A. I have, and I have stripped some of it. It works both ways.

Feb. 25, '58 Q. This Mr. Davis and others you were strip-

page 103 } ping for Clinchfield had a lease over a certain place?

A. Yes.

Q. When you got to their property and when it was an individual's surface, you would make a deal with him to go on across him?

A. Yes, sir.

Q. You want to do that in order to keep your road coming to the highway?

A. Yes, sir.

Q. But you have never come out and made an individual stripping lease with somebody where you didn't touch Clinchfield property at all?

A. Yes, sir.

Q. Just a strip on the individual's property?

A. Yes.

Q. Does Clinchfield tell you where to strip?

A. Yes.

Q. You can't go anywhere else?

A. No.

Q. Are there any other strippers in the country besides you who work on Clinchfield property?

A. Clinchfield Coal?

Q. Yes.

A. Yes.

Feb. 25, '58 page 104 } Q. How many are there?

A. There is two more in this Lick Fork Section.

Witness stood aside.

Mr. Greear: I have a witness I would like to put on who tried to strip at Tiller Fork and couldn't because of the sandstone. I want to put it on in rebuttal.

Mr. Sutherland: Why, you can't—

The Court: I think that is a matter for the Court. What you want to put on is evidence to show the inadmissibility of this evidence?

Mr. Greear: I was going to call one man that tried to strip at Tiller Fork and couldn't because of the sandstone.

The Court: You can put it in the record. It would be more logical to put it in now.

TERRY MULLINS,

after being duly sworn, testified in the absence of the Commissioners as follows:

DIRECT EXAMINATION.

By Mr. Greear:

Q. Your name is Terry Mullins?

A. Yes.

Q. Where do you live?

Terry Mullins.

A. Dwale, five miles of Clintwood.

Q. Have you been engaged in the coal business in Dickenson County in the past?

A. Yes, sir.

Q. In what manner have you been engaged in the coal business?

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page 105 }

A. Deep mining and had some stripping done.

Q. Did you formerly have a mine on Tiller Fork in this county?

A. Yes.

Q. How long ago was that?

A. Almost ten years ago.

Q. Where was the mine located with reference to the Fannie Tiller home up there?

A. I was near the forks of the creek down there; as well as I remember, about a mile and a half.

Q. You mean where Tiller Fork comes in Cane Creek?

A. It is two creeks coming in there; I don't know what you call it.

Q. At that point on Tiller Fork, did you attempt to strip coal there?

A. I had an opening; I went about so far around the hill, was going to put in another opening; I had the coal stripped between where the opening was going to be.

Q. Who were you leasing from?

A. Clinchfield Coal Corporation.

Q. What were the results of your attempt to strip around the hill?

A. It had a deep cover over it and we ran into sandstone and we quit.

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Q. How thick was the sandstone you ran into?

A. Well, as I remember—it has been a long time—but approximately around 15 feet; it wouldn't vary much.

Q. You had to give up the idea of stripping?

A. Yes; we didn't go back any further; we quit.

CROSS EXAMINATION.

By Mr. Sutherland:

Q. You have seen places around here they have stripped and had to go in it 15 feet through sandstone, haven't you?

A. I guess there are, Mr. Sutherland. I don't know; I never did check the other mines to find out.

Terry Mullins.

Q. And did you quit deep mining at the same time there?
A. No, I mined on just a short time.
Q. How long?
A. Not very long. I had some labor disunities and I had to quit.
Q. Do you think you went as much as a month?
A. Yes, I went a month, maybe two months; I don't remember.

RE-DIRECT EXAMINATION.

By Mr. Greear:
Q. Why did you shut down deep mining?
A. Labor trouble.
Q. I believe you later had a suit against the United Mine Workers?
A Yes.
Q. And recovered substantial damages for it?
A. Yes, I recovered some damages.

Feb. 25, '58
page 107 } RE-CROSS EXAMINATION.

By Mr. Sutherland:
Q. Did Clinchfield cancel your lease?
A. No. In fact, I didn't have any lease. I was just over there as a miner for them. I understood they were going to give me a lease, but I never did come to Clintwood to get the lease and I don't know whether it was required or not. I was getting out some coal they wanted me to ship to different areas of the United States to see how people liked the coal. I never did get a lease, never did come up to the office and ask for it.
The Court: You didn't find the stripmining satisfactory? What you are talking about is deep mining?

A. Yes.

The Court: Did you try stripmining?

A. I tried to strip some, but the rock got so big and so much cover over the coal I had to quit.

Witness stood aside.

Jake Elkins.

Mr. Sutherland: I would like to put Mr. Elkins on; he is an old gentleman; I would like to put him on between Graham Tiller and the next witness. (Commissioners returned to court room).

JAKE ELKINS,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Phillips:

Q. Did you sell some land to the Clinchfield Coal Company recently?

A. I did, yes, sir.

Feb. 25, '58 page 108 } Q. How much land did you sell to them, about how much?

A. A little better than fifty acres.

Q. I will ask you the last time you sold them some, how much did you sell them the last time?

A. About 1¼ acres.

Q. One and a fourth acres?

A. Yes, one acre and 21/100.

Q. Where do you live?

A. I live five miles west of here on Georges Fork.

Q. How much were you paid for that 1¼ acre?

Mr. Greear: We object to that. I think we might agree on the facts. Mr. Elkins lives on Georges Fork. He had a damage claim against the coal company about the settlement of a stripping operation they had in here and covered up his bottom. They traded with him and settled all damage claims and I can't see where that has anything to do with it.

Mr. Sutherland: I don't understand it that way. I have been told by reliable people the other way.

Mr. Greear: I happen to know something about it.

The Court: I would have to know the circumstances.

Mr. Greear: It is also 35 miles from the place on Tiller Fork we are talking about and is on the main highway.

Mr. Sutherland: It is on top of one of the hills.

Mr. Greear: It isn't; it is a little bottom at Georges Fork.

Mr. Sutherland: It is up there on top of the hill.

Mr. Greear: One acre of that 1.20 acre is down on the

creek?

Feb. 25, '58 Witness: Yes, sir.

page 109 } Mr. Sutherland: I thought—

Mr. Greear: No, it is covered up with stuff from stripping operations.

The Court: You are again arguing the question as to the admissibility of evidence, which is for the Court to decide. Before the Court can determine the admissibility of this evidence, it is necessary for the Court to know the circumstances of the sale, that is, certain things about the conditions under which the sale was made, before I can determine whether it is admissible or not. I can hear it in the absnce of the Commissioners or you can go ahead. I just want to know the facts before you get to the prices.

Mr. Sutherland: If it isn't on the hill, we won't press it. It isn't necessary.

The Court: I think the law in Virginia is well settled; it is not too difficult to determine the admissibility of the evidence.

Mr. Greear: He says he will withdraw this witness.

Witness stood aside.

GRAHAM TILLER,

returned to the witness stand for further examination.

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Have you totaled up what you mentioned there? Don't mention what you started to say about stripping or anything like that. How much have you got?

Feb. 25, '58 A. Damage to the residue and the home, land

page 110 } taken and damage to gas and oil rights—we say the damage to the home, the residue and land taken was $80,100.00, damage to the gas and oil $20,000.00, total $100,100.00 for the estate.

Mr. Greear: I understood the Court sustained the objection as to gas and oil; highly speculative.

Mr. Sutherland: I think he did.

The Court: That's right, the Commissioners will not consider that.

Graham Tiller.

A. $80,100.00 total to the home, buildings and residue.

CROSS EXAMINATION.

By Mr. Greear:

Q. Mr. Tiller, you say you didn't consult anybody in fixing up these figures?

A. I did not.

Q. That is rather apparent from the figures themselves, isn't it? Isn't it true you all offered to sell the entire property over there a short time ago for $10,000.00 and couldn't get a buyer for it?

A. Absolutely ridiculous.

Q. Didn't offer it to a man named Duty?

A. Ridiculous; that's the first I ever heard of that.

Q. That is this heirship property?

A. No, sir.

Q. In valuing it you said you had four acres

Feb. 25, '58 of level land at $2,500.00 an acre. What is the

page 111 } highest price you have sold any of the land for?

A. We haven't sold any land. We haven't been trying to sell land.

Q. You sold Radford Powers his land?

A. I did.

Q. Hiw much did you get for it?

A. I don't remember that. That was back in 1940 or 1943.

Q. A few years ago you got $10.00 an acre?

Mr. Sutherland: Eighteen years ago.

A. I don't remember.

Q. Don't you remember at the beginning of World War II you got $10.00 an acre for the land you sold Radford Powers?

A. Probably so.

Q. Part of it was bottom land?

A. Fairly, you couldn't call it bottom land.

Q. The little creek joins the highway?

A. Sure, it does.

Q. On this level land you figured it 11.04 acres, which includes 1.02 acres of the state road, doesn't it?

A. On that, the way it was first given to us. it was corrected here, the total was 11.04 acres taken; that is my understanding, and was corrected here today by you.

Q. Your figure does include the state road?

Graham Tiller.

A. My figures include the land that was first given us that was taken on your railroad maps.

Feb. 25, '58
page 112 } Q. Then you put that steep land on the hillside at $500.00 an acre?

A. 7.05 acres of it, yes.

Q. Where did you get any such value, Mr. Tiller? Did you ever hear of any hillside land in this county selling for $500.00 an acre?

A. I think you have been paying it. I think N & W have been paying it.

Q. I am not talking about what N & W has been paying. I am talking about whether you ever heard of any hillside land in this county selling for $500.00 an acre.

A. That's who I'm talking about. That's who is taking our land.

Q. No, this is a proposition of market value.

A. We are not trying to sell it. We are not trying to put it on the market.

Q. What is it worth on the market to a man desirous of selling but doesn't have to sell?

A. Only one I know desirous is N & W.

Q. A man desirous of selling but doesn't have to sell, and to a buyer that doesn't have to buy but wants to buy?

A. The only market I know is what Norfolk and Western has said.

Q. What about Clinchfield Coal Company, they have been buying a lot of land?

Feb. 25, '58
page 113 } A. Not in our neighborhood through which the railroad goes.

Q. Beyond on both sides of you and Powers' land?

A. Yes.

Q. They bought it for $100.00 an acre?

A. I understand when he sold he didn't know there was a railroad going through it. They bought that over a year ago.

Q. Everybody in that country knew they were talking of the railroad in January, 1957?

A. I didn't live there.

Q. They knew it was coming down Big Cane? They knew it was coming up Tiller Fork?

A. No.

Q. There had been a survey made?

A. Not at that time.

Q. There hadn't been a survey made?

Graham Tiller.

A. I don't think so. Walter Honaker didn't know it was coming in there when he sold.

Q. He didn't know?

A. No.

Q. Then you put the timber up there at $150.00 an acre and the other half the value is gone?

A. Yes, sir.

Q. Why is it gone? What hurt the timber?

Feb. 25, '58 page 114 } A. A bunch of it you won't be able to recover at all.

Q. Why?

A. On account of the railroad being too close to it. How are you going to cut timber on a railroad? If you cut it it will fall on the railroad.

Q. The railroad is not going to be built to the edge of the right-of-way.

A. The right-of-way sticks up.

Q. You can cut timber and let it fall on the right-of-way. It is done all the time.

A. Cut it over the railroad?

Q. It doesn't go on the railroad.

A. Part of the right-of-way is not over 15 feet to the edge of the timber line.

Q. Starting at Elaine Duty's line?

A. Absolutely.

Q. That is an open field around there.

A. There is awful good timber in the upper side of it all around up the mountain.

Q. You mean coming from Elaine Duty's up to the graveyard there is timber all along there?

A. All along the fringe of that field and on the lower end of this railroad, goes in 15 feet of the fringe of the timber line.

Q. The lower end?

Feb. 25, '58 page 115 } A. Yes, sir, you just said Elaine Duty's. That is where we start. That's is what I am talking about.

Q. The railroad there comes through Elaine Duty's house? And at that point you say it is 15 or 20 feet from the timber?

A. No, sir.

Mr. Sutherland: He said the right-of-way. He is talking about the right-of-way.

Graham Tiller.

Q. Do you think the railroad right-of-way will be up there where you can't get the timber? Is that what you are telling?

A. I stated it is too close to the timber to cut without falling on the railroad right-of-way.

Q. Did you count the trees to see how many would fall on the right-of-way?

A. No, I didn't.

Q. Yet you estimate everything from there up at $75.00 an acre. You know that is foolishness, don't you?

A. No.

Mr. Sutherland: We object to that.

Q. You don't think that is silly?

A. When you commence paying $18.00 to $20.00 an hour to a bulldozer to build roads into your timber to haul timber out, then you say it don't damage your timber?

Q. Do you say every man in the timber busi-
Feb. 25, '58 ness builds a road with a bulldozer?
page 116 } A. Without the railroad you wouldn't have to build it.

Q. How many trees?

A. Several acres.

Q. I am talking about above the land, this old field.

A. I say ten acres.

Q. Ten acres of timber?

A. Yes, sir.

Q. You think it would be damaged half?

A. Yes, sir.

Q. Because it has to come off one side?

A. Yes, sir. Then it starts again above the graveyard.

Q. $150.00 an acre?

A. That's right.

Q. Have you sold any timber like that?

A. We haven't been trying to sell timber.

Q. And you won't. Now your damage to the cemetery $5,500.00, what is that for?

A. As I stated awhile ago, it takes in front of it, it builds up a fill of 15 to 17 feet high in front of it, puts two railroad tracks in front of it, and inaccessibility of it, the smoke, smog, dust and so forth.

Graham Tiller.

Q. That doesn't damage the cemetery, does
Feb. 25, '58 it?
page 117 } A. It damages it from our standpoint.
Q. You mean it damages it from a sentimental standpoint?
A. Yes, sir.
Q. There is no actual damage at all?
A. Absolutely a necessity.
Q. Didn't you hear Mr. Ward testify they planned to have a road across there and build it up in order that the cemetery will be on a bank, but pretty well level?
A. I didn't hear him say he was going to keep the cars from cutting on each side of the ramp at all times.
Q. You didn't ask him what they were—didn't you look at the map? Look at it and see here. That is the switching point; no cars standing on this switching point. That is what he said, a switching point. Isn't that what he testified?
A. He didn't say that.
Q. You didn't hear him say that was the switch board and the tracks operated above and below that? Did you hear that? And this other track, the main line coming up the track? If it's that way, your proposition of $5,500.00 doesn't have any basis?

Mr. Sutherland: I object to that argument.
Mr. Greear: He didn't understand the situation. He said he didn't understand the testimony, didn't hear him tell it.
The Court: I think that is argument; objection sustained.

Q. Where is the land damaged $125.00 an acre
Feb. 25, '58 because you couldn't get to it?
page 118 } A. All on the right side of the stream going up.
Q. That is the same land you already charged $75.00 an acre damage to the timber?
A. That's right.
Q. So you first charged $75.00 damage to the timber on the land, then you say, "Well, I can't get to it, so it damaged $125.00 an acre to the whole land"?
A. That's right.
Q. The land is not fit for anything except timber?

J. B. Tiller.

A. I valued the timber damage at $75.00 an acre and the land at $125.00.

Q. The land has no use except as timber land?

A. Grazing land; we have had cattle, sheep and horses there.

Q. They just grazed through the woods; it has never been cleared, has it?

A. Part of it has.

Q. Up in those hills?

A. Yes.

Q. Where the timber is now, that has been cleared?

A. No, not where the timber is now.

Q. This is damage to the land and the timber too, is that right?

A. We will just put it at $200.00 an acre for the land and timber if you want it that way.

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Q. Clinchfield has already got you cut off with their mining operations, haven't they?

A. There won't be any railroad crossing setting along our roads. I think we could haul logs across our road.

Q. You could haul across a road, but couldn't haul them across a crossing on the railroad?

A. I don't know whether there is going to be a crossing.

Q. Still it would be damaged $200.00 an acre?

A. Yes, sir.

Q. All the land above that is mountainous and there is timber on it and nothing else?

A. Yes, sir.

Q. As a matter of fact, you don't own the timber except the big timber?

A. We own it twelve inches and up.

Q. And Clinchfield Coal Company owns it twelve inches and down?

A. I don't think they own it including twelve inches.

Q. Below twelve inches?

A. Yes, that's right.

Witness stood aside.

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J. B. TILLER,
after being duly sworn, testified as follows:

J. B. Tiller.

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. I believe you are one of the defendants in one of the cases we are trying and also joint defendant with your brothers and sisters in another?

A. Yes, sir.

Q. And you are the J. B. Tiller that has one of these blueprints that have been introduced in evidence that shows you own some property there?

A. Yes.

Q. About how many acres are in that tract on which your house is?

A. About 8.8 acres the best I recall.

Q. The Commissoiners were over there yesterday, but give the Commissioners an outline as to where your boundary goes on each side. Does it go up the creek all the way? Do you own anything on the left going up until after you pass the highway crossing?

A. Yes, sir, I do.

Q. Does any of the 8 acres cross there?

A. Yes, on the lower end in the bottom and up to the culvert or bridge across the highway almost in front of the house.

Q. If I understand you, your line was a creek there and went straight up the hill to the left?

Feb. 25, '58 page 121 } A. No, what is in the 8 acres started at the lower end, follows the creek to just below the house and angles across the road and goes about through the small barn and to the upper end, where it turns up right-handed.

Q. Is the garage on the eight acres?

A. No, it is on the other.

Q. The Commissioners were up there yesterday and went up a strip from above your barn, come down to the creek to the upper end of the Maxie Mullins property; how many acres are in that?

A. There is about 94 or 95 acres.

Q. You showed them yesterday up there at the upper end where the line went up to the left from the creek, but if you showed them where the line went to the left near your house, I didn't hear it. I am sure they can understand.

A. Where the line crosses the bottom down there just

above my mule barn, the line between me and the estate also crosses and goes up the hill and corners there at the same corner.

Q. I will commence on your property or on your mother's down there and will ask you about what do you consider the land there—you were along with the Commissioners yesterday and it was pointed out where the flags were on stakes, you could see the portion of land being taken?

A. Yes, sir.

Q. What in your opinion is that piece of land worth considering it as part of the farm?

Feb. 25, '58 page 122 } A. In the lower end of the bottom there, for 100 feet front on the road and 110 feet back, we were offered $1,000.00 about two years ago.

Q. That was on yours?

A. Yes, sir.

Q. I am talking now below on the heirs' at the lower end of it, I believe nearly 7 acres there. Considering it as part of the farm, what was it worth?

A. $500.00 an acre.

Q. Considering the damage to the residue, how much do you think it will be damaged, the damage to the residue of that tract?

A. $500.00 per acre.

Q. Does building that railroad as Mr. Ward pointed out to the Commissioners yesterday, does that in your estimation depreciate the remainder of the land any?

A. Yes, it certainly does.

Q. For what reason would it depreciate the land there on the left as you go up? Give your reasons why it would not be worth so much, left going up the creek.

A. Well, it is going to cut us off there from all the other land, cut the home off there to itself and without climbing up a high embankment and across the railroad, scrambling through cars to get to the other side.

Q. The side next to the house, is it worth as much as it was without taking the railroad?

Feb. 25, '58 page 123 } A. No, it wouldn't be.

Q. Why wouldn't it be?

A. It cuts it down to such a small amount, and the dust and noise, it would ruin it as a home.

Q. How much would you say it depreciated that from the railroad up to the top of the hill on that side?

J. B. Tiller.

Mr. Greear: Which side are you talking about?

Q. From the railroad to the top of the hill on the right-hand side.

A. Just about ruined the full value of the land.

Q. How much in dollars and cents has it been damaged? About how many acres? Your brother Graham gave an estimate awhile ago, but what would be your estimate?

A. Taking in the whole tract 170 acres in the estate, I would say it damaged it around $250.00 or $300.00 an acre.

Q. Let's go up to your own property and get out minds on that. What is your property worth there if the railroad wasn't there? The damage first on the eight acres where the home is.

A. Taking in the home and all the buildings?

Q. Yes, including the buildings and everything that makes a home.

A. I would say around $35,000.00 or $40,000.00.

Q. You heard especially this young gentle-
Feb. 25, '58 man, Bert Mullins, describe it. Did he describe
page 124 } the house very well?

A. Yes, sir.

Q How long has the house been built?

A. I built it in 1931.

Q. The barns up there, the outbuildings, did you build them about the same time?

A. No, the barn was only built about five or six years ago. The other buildings, a number of them, have been there as long as the house.

Q. With the railroad taking what Mr. Ward pointed out yesterday, what is the portion left worth?

A. Well, there isn't a place big enough to set one of the smallest buildings in the way of level land.

Q. I believe the map shows it takes practically all between the upper side of the railroad and the creek. Would the portion between the creek and what the railroad don't take be of any value?

A. Very little.

Q. Does building the railroad affect the value of the garage?

A. Yes, sir, it will be of no value to me because I have no use for the garage there by itself.

Q. Starting there up from the eight acres, you were along with the Commissioners yesterday when they showed where

they took a strip on the left side of the stream. What would that be worth as a part of your 90 acre tract or the rest of your land?

Feb. 25, '58
page 125 } A. Well, there was part of it I used for pasture, part of it I used for farming land. It would cut me off from all of it, as far as that is concerned; takes it away up on the hill, the highway above it, it would be inaccessible for me to angle over a steep bank into it.

Q. Is there anything between the highway to the right until you get up to the Honaker tract or Pittston tract? Would that be worth anything to you?

A. Very little.

Q. What do you consider that 90 acre tract of land worth if the railroad wasn't there? If the railroad wasn't taking that portion?

A. Well, considering timber and all, between $400.00 and $500.00 an acre.

Q. What is it worth after you have taken off the access down there to the creek and anything below the road?

A. It takes every building site I have. I have no place left remaining to put a building without grading out a way on the hillside somewhere.

Q. Then they are taking a small fraction of an acre up there at the upper place where your sawmill was. What was that piece worth as a part of your land there?

A. Well, if it wasn't for that it could probably be used for a building site, but with the railroad taking across the front of it, it couldn't be thought of as a building site. I have used it in the past as farm truck patches and for a mill site. That was destroyed for either of those.

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Q. The sawmill site?

A. Yes.

Q. I would like to get an estimate of this land in which you are interested in above any of yours, a small tract there, what is that worth, being a part of that land, the upper end of the estate, that is being taken above Maxie Mullins' and above your mill site.

A. Well, the way it lays in there, being taken off the other, it is very valuable because that is the only outlet for that land up in there, especially all that lies below or under the highway without a lot of expensive road drilling.

Q. What do you consider that land worth an acre?

A. Well, timber and all, I say $500.00 an acre.

J. B. Tiller.

CROSS EXAMINATION.

By Mr. Long:

Q. I believe you testified that in your opinion the value of the land the railroad is taking from the heirs of the estate is worth about $500.00 an acre, is that right?

A. No, sir, I didn't say that.

Q. What value do you place on that, on what the railroad is taking?

A. I don't think I put a value on that. He asked me about the value of what was on the hill.

Feb. 25, '58 page 127 } Q. The value you placed, $500.00 an acre, you meant was the land the railroad was not taking?

A. Yes, sir.

Q. That is the value you place on the land, is it?

A. That is the value I put on the hillside up through there, yes, sir.

Q. That is on the right going up?

A. Yes.

Q. I believe you also figured $500.00 an acre damage to it, is that right?

A. Yes, sir, that is practically considering all the loss.

Q. You are considering all that property above the railroad on the right as a total loss?

A. Practically so.

Q. What use has that land been put to? What have you been using that land for?

A. We have used it for pasture and there is some fields back in the head of the hollow orchard and quite a bit of farming done in there in the past.

Q. In other words, just farming land and some timber land?

A. Yes, sir.

Q. And not much of it is suitable for farming?

A. No, not too much.

Q. Do you know of any farming land selling

Feb. 25, '58 page 128 } for $500 an acre in that section?

A. No, I haven't known of any farms selling for farming purposes.

Q. You still have timber on it; the timber is not going to be disturbed.

A. No, but it would be almost worth the timber to build roads to it now if the railroad goes in.

Q. You will still have the timber; in other words, it will be a question of getting it out?

A. Yes, sir.

Q. You say the trouble getting in and out makes the land worthless to you?

A. Practically so.

Q. Doesn't Clinchfield practically have you blocked off there now?

A. Not as yet.

Q. Do you know they have built a road around the side of the hill?

A. Yes, part of it.

Q. Would that make your timber worthless when they made a road around the hill?

A. Eight or ten foot embankment is not going to be like 15 to 40 feet at the back of my house. We won't be able to even get to the Clinchfield road.

Q. The Clinchfield road is going to be on the

Feb. 25, '58 other side of the road though.

page 129 } A. It's according to which side you mean by "on the other side."

Q. The railroad is between your house and the Clinchfield road, isn't it?

A. It will be right through where the house is now setting.

Q. As it is standing now you have to go across the Clinchfield road, wouldn't you, to get timber?

A. Yes.

Q. And that is not practical is it?

A. As I say, from six to ten foot embankment won't be like twenty to forty.

Q. Do you know there would be a 40-foot embankment there?

A. Well, from where their stake is to where they said the road bed was going to be, it will be something like that.

Q. Their stake is outside the exterior line of the right-of-way.

A. That is going to be theirs.

Q. That isn't the bank, is it? You don't know how much bank is going to be there, do you?

A. I have a pretty fair estimation.

Q. Up at your house you figure you have been damaged on your property and improvements $35,000.00 to $40,000.00 you say?

Feb. 25, '58 A. Yes, sir. I have it down as around—in

page 130 } fact, I have it around $48,000.00.

Q. What value do you place on your house?

J. B. Tiller.

A. $16,000.00.
Q. You built the house in 1931?
A. Yes, sir.
Q. It cost you about $2,500.00 to build it?
A. I didn't keep any estimate on it at the time.
Q. Did it cost you that much?
A. I don't have any idea.
Q. You know it didn't cost anything like $16,000.00?
A. No, but when I am living in that house, that is serving the purpose. I am not wanting to sell it. If I rebuilt that—what I am talking about is what it is going to cost me.
Q. You left the house some time ago?
A. Yes.
Q. It wasn't because of any railroad?
A. No.
Q. You moved over to Lebanon and live over there?
A. Yes, I bought a trailer over there temporarily, it was a temporary move; I left my house furnished.
Q. $16,000.00 for your house, and what was the other damage there to make up the $48,000.00?
A. I have all the outbuildings there along about the same, right close to it, other extensions that have been made on it.

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Q. What value do you place on the garage?
A. On the garage $600.00.
Q. That isn't going to be damaged?
A. What good is a garage to me setting there and no place to live?
Q. It is still going to be there?
A. Yes.
Q. You are not using it now?
A. Yes, I am.
Q. What are you using it for?
A. I have it full of machinery of one kind and another.
Q. Of course, you can still store the machinery.
A. I have no place to use it.
Q. You can rent it for storage to people, can't you? It isn't going to be a complete loss to you, is it?
A. As far as I am concerned it will be a complete loss.
Q. What value do you place on your other land there that the railroad has taken, how much an acre?
A. I don't believe I have that figured out.
Q. You included that in the $48,000.00?
A. Yes.

J. B. Tiller.

Q. But you don't have any figure for that?

Feb. 25, '58 page 132 } A. That's right. Yes, I do have it: 8.8 acres $8,000.00.

Q. $1,000.00 an acre?

A. Yes.

Q. Is that just the land that is taken?

A. Yes, that is that 8.8 acres the right-of-way goes through.

Q. Three parcels the railroad is taking from you total to 4.8 acres. The amount of acreage the railroad is taking from you amounts to 4.8 acres, doesn't it?

A. I believe they estimated something like that.

Q. How do you figure eight acres?

A. That is destroying the rest of it.

Q. You place the same value on the property that is left in damage to that property as a total loss to you?

A. Yes.

Q. And it would be absolutely worthless to you, in your opinion?

A. Practically so.

Q. Why do you figure that? How do you figure it?

A. I wouldn't be able to get to it and use it for anything.

Q. You could get to it as well as you can now.

A. Cut off from water and everything.

Q. What difficulty will you have in getting to it?

Feb. 25, '58 page 133 } A. Well, there will only be about four railroad tracks, somewhere around twenty to forty foot embankment to climb.

Q. If you crossed down at the railroad crossing and come up the road, you can get through it.

A. Come up the road—what road?

Q. You wanted to come along the side of the hill?

A. Where is that road?

Q. The Clinchfield road.

A. That is the Clinchfield road.

Q. It is on your property, isn't it?

A. Yes.

Q. You can come around there to get to your property.

A How do you get to that road?

Q Come across there at the cemetery Can't you cross there?

A. I don't know any road going across there.

Q. You heard Mr. Ward testify this morning they were going to have a crossing there, didn't you?

Tollie Mullins.

A. I heard something said about a crossing going to the cemetery, but from the cemetery there is no road going on.

Q. Couldn't you cross there and go on Clinchfield road going around?

A. It is quite a distance from the cemetery to where Clinchfield made their road.

Q. How far is it from where the cemetery is to where Clinchfield goes in there to their road?

Feb. 25, '58 page 134 } A. I would say around 700 to 800 feet.

Q. Do you have any occasion to go up on that land now? How often do you go up there?

A. Well, it has been quite a little bit since I have been up there.

Q. It is very rare occasions you have any reason to go up there on that other land?

A. I don't know what occasions might arise.

Q. If the railroad puts you a crossing where you can cross from the upper land to come on down, you are not inconvenienced, are you?

A. Very much so.

Q. If you have a crossing there, you will be inconvenienced?

A. Yes, sir.

Q. Enough to make the land a total loss to you?

A. Practically so.

Witness stood aside.

TOLLIE MULLINS,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Where do you live, Mr. Mullins?

A. Johnson City.

Q. Where were you raised?

A. Dickenson County.

Feb. 25, '58 page 135 } Q. What business have you been in in the last thirty or forty years?

A. Mercantile business.

Q. What places have you been in business?

A. I started in business at Duty, Virginia, in 1932.

Tollie Mullins.

Q. That is about three miles below this property in question?

A. Yes; and Tarpon, Virginia, in 1935; moved to Clinchco in 1938 and started in the hardware business down there. still have a business down there, moved to Johnson City in 1944.

Q. Are you the husband of Maxie Mullins?

A. I am.

Q. Did you ever live on this tract of land up there that belongs to your wife where the railroad is taking nearly two acres?

A. We did.

Q. How long did you live there?

A. We lived there I believe from 1924 to 1932.

Q. While you lived there, what did you do?

A. We farmed.

Q. Mr. Mullins, if the railroad didn't go through that piece of land belonging to your wife, what is it worth?

A. I have it listed here. I wrote it down in figures. I figure the damage to the house and the lot surrounding the house that the railroad is not taking at $5,000.00; that is just living at the home and the lots making up the home; and the barn $600.00.

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I realize the barn is old and the roof is bad on it, but the logs are good; that could be replaced with a roof on it for a minimum fee and could be used. In fact, it was dry on the inside of the barn now. I took into consideration there was 540 feet on the lower side and 602 on the upper land that the railroad right-of-way was taking. I divided it into lots 60 by 150 feet and considered that at $9,000.00. Then the damage to the spring and water above there. The spring outlet runs down the bottom all during the summer, the wet season. I don't know what effect it is going to have on the back up there. I estimate that at $1,000.00. Then I had three apple trees there. I estimate that $200.00; fence and posts and labor to put it up, $200.00; and there is 119½ acres of land and all of it lies from the creek within that 602 frontage. We have accessibility to get to it. There is approximately from 90 to 95 acres of timber land and we have a good orchard. We had an orchard of about 150 trees up in the hollow plus there at the home, and damage to the timber we estimated it at approximately $150.00 per acre of timber, which they base it—I got prices from different fellows who are sawmilling, and cut timber of

that material in that vicinity—they told me it would run around 15,000 feet of timber per acre, and base it on $10.00 per thousand would run $150.00 per acre. And the loss, I took one-third loss, which is $50.00 an acre, which would run $4,500.00. That is the timber damage. And

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page 137 } still left at $11,500.00 damage, which makes a total of $32,000.00. That doesn't include gas and oil and stripping rights. And all of it is in behind this railroad.

Q. You mentioned that frontage they are taking in lots. Have you had any experience in fixing or selling or buying lots near a large coal operation?

A. Yes, sir, I have.

Q. Do you consider that a fair value?

A. Yes, I do. I do.

Q. I believe you stated there was 119½ acres of timber and cleared land and all the cleared land is down at the lower side where the Commissioners could see yesterday, is that correct?

A. No, there is cleared land on up in the hollow. There is possibly around twenty-some acres up there.

Q. What is the nature of that timber up there, is it on good, rich soil?

A. It is good, rich soil with some of the finest poplars, real good timber on the whole tract that isn't cleared, which will run 90 to 95 acres that is in timber.

Q. Where did you say that spring was?

A. The spring is around from where the railroad right-of-way is, down below the house at one side of the house, and it is in the neighborhood of 100 feet from the right-if-way to where the spring is. And the drainage comes

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page 138 } right down through the bottom there.

Q. That spring still runs all the time?

A. All the time.

Q. That estimate you gave, that was the value of the land taken and the damage to the residue?

A. That is the damage to the land and the timber and everything combined, the estimate of $32,000.00.

Q. Do you in your business sell building materials?

A. We sell certain portions of building materials. I did sell lumber, but I don't sell much lumber now. We sell roofing, nails, paint, electric and bathroom equipment and so on.

Tollie Mullins.

CROSS EXAMINATION.

By Mr. Greear:

Q. Where is this business of yours located in Johnson City?

A. It is on 11-E just on the road just out—it isn't out of Johnson City, it is in the corporation of Johnson City.

Q. When you get down to Johnson City you are right on the railroad?

A. There is a railroad that runs through there, yes.

Q. There are four or five tracks there below John Sevier Hotel?

A. Only one that I know of.

Q. Right below John Sevier Hotel on U. S. Route 23?

A. That is not in the main business district. There isn't a yard there. There is a track there.

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Q. There are four tracks you cross?

A. After you pass the hotel; the hotel is away up, 1½ blocks from the railroad.

Q. That hasn't damaged the hotel much having the railroad there?

A. The railroad goes through as I understand it, and it is about a block and a half of the hotel.

Q. Your most expensive property is right down by the railroad?

A. No, I wouldn't say that. The business right on the railroad end is the cheapest property I know of, from a business standpoint. I own some property on the railroad. I own a big brick building and if it had been somewhere else I would have gotten four times what I sold it for.

Q. You say up in this home where you used to live you want to cut that into lots and sell it, where the railroad is going to be built?

A. Mr. Greear, I might state it this way: of course, I looked at it in the light of the possibilities.

Q. You are going to get rich having the railroad?

A. The possibility is there for those many lots.

Q. That possibility has been there since 1932?

A. If I had the same lots I am talking about here in Johnson City, I would get two or three times that much.

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Q. But there has been the same possibility since 1932 to cut that up in lots?

Tollie Mullins.

A. No, sir, since 1932 things have changed considerably in that vicinity and in this county.

Q. You could have cut it up into lots any time?

A. I could have, yes.

Q. There wasn't any sale for them?

A. We weren't trying to sell them. I didn't anticipate cutting them up to sell. We are not proposing to sell it to take it away from the other property at this time.

Q. Now you say, "I could cut it up and sell it, but I want big damages to keep the railroad coming"?

A. I didn't say that. I said the possibility was there to cut it up in lots, railroad or no.

Q. How much rent do you get for the property?

A. We haven't tried to rent it.

Q. You have got no income from 1932 to 1958?

A. I haven't had any income that I know of.

Q. How much taxes do you pay?

A. I don't recall how much taxes we pay. We have always paid them. We look at it as an asset.

Q. As much as $20.00 a year?

A. I don't know that; I couldn't tell you.

Q. You think the whole thing is damaged $32,000.00?

A. Basing it on other property that has been

Feb. 25, '58 sold in that territory, yes.

page 141 } Q. What has it sold for?

A. I understood they testified today, I believe they sold it for $17,000.00.

Q. $17,000.00, how much was it?

A. I talked to the man if you want me to give the details.

Q. How much land?

A. 102 acres.

Q. That had a whole lot more cleared land than yours, didn't it?

A. I don't know that it has.

Q. More shows up there than does on yours?

A. Possibly it does, yes, but not much difference, I would say, in the cleared land.

Q. You estimate and ask damages for one acre here nearly twice what they got for 102 acres adjoining. How do you justify such a statement?

A. State that again.

Q. You asked damages twice as much for 1.8 acres as what was sold, those 102 acres adjoining.

A. What one man sells his for, he sees one way and another sees it another way. Everybody doesn't sell on the same basis, same price, doesn't see it alike. He saw it one way and I see another thing.

Feb. 25, '58 page 142 } Q. All you see is dollar marks?

A. I don't know whether you call it dollar marks.

Q. You are selling 1.08 acres and an old log barn?

A. If you want to consider it that way and don't consider the other property. The railroad is going up through the entire place with box cars 4½ or 5 feet away in one place. He stated six feet, and to be caught in between all those, and you being in your home with your family in behind there trying to farm, your cattle and cows and everything, if you have it right on the railroad with shifting cars—that's the way I see it.

Q. Where did you get all that stuff about box cars?

A. That is exactly what they stated they were going to use it for was a tipple and a track to shift cars.

Q. Only one track.

A. That's shifting cars.

Q. You can't shift cars on one track.

A. They take them back up in there and let them drift or pull them down.

Q. They use it to pull up in there in order to keep on the tracks below there.

A. They say it is for a railroad crossing there. It doesn't go anywhere else.

Q. They are going to build you a crossing.

A. They didn't say that. He said they was going to operate, but I didn't know where they were going to build all this.

Feb. 25, '58 page 143 } Q. You know they will put in a crossing.

A. No, I don't know that.

Q. Would you cut down on the damage, assuming they did?

A. No, the damage is just the same.

Witness stood aside.

ASA TILLER,

after being duly sworn, testified as follows:

Asa Tiller.

DIRECT EXAMINATION.

By Mr. Phillips:

Q. What relation are you to Rosa Tiller?

A. I am her son.

Q. Where do you live?

A. Scott County, Virginia.

Q. I will ask you if your mother sold some land up in this vicinity recently to Norfolk & Western Railway?

A. She did.

Q. How many acres did she sell?

A. Approximately 119 acres.

Q. I believe Mr. Rardin, the N & W right-of-way Agent, testified earlier about that?

A. Yes.

Q. He testified as to the total price per acre, but what did they pay per acre?

A. That equals $285.00.

Feb. 25, '58 page 144 } Q. Describe to the Commissioners what kind of land it was there, how much bottom land, how much hillside; give a general description of it.

A. 601 runs through the property. They bought all the porperty that was on the upper side of the State Highway, and she kept the property on the other side of the road. Approximately three acres or near that.

Q. Are there any bottoms on the side of the State Highway where you sold your property to the railway?

A. No, there is nothing except a garden, small garden.

Q. Did she sell any level land?

A. I would say not level.

Q. How many acres was it?

A. 119 acres, approximately, near that. I don't know the exact tenths. 119 acres and some.

CROSS EXAMINATION.

By Mr. Long:

Q. 119 acres?

A I don't know the tenths

Q You figured it amounted to $285.00 an acre?

A. Yes.

Q. I believe your mother also had a home on the place or a house?

A. Yes, there was a house on the place.

Q. That was included in this figure?

Feb. 25, '58 A. It was.

page 145 } Q. I believe she also had a spring there the railroad took?

A. Yes, sir.

Q. I believe you all let the railroad come on your property there and do some work right away, right after you agreed to settle with them?

A. Yes.

Q. Actually before you got the check from the railroad?

A. Yes, they did some work before we got the check.

Q. In other words, you co-operated with the railroad and let them do their work at the time they wanted to do it?

A. Yes, as quick as they took an option, they got a letter of acceptance, and they went on the property as soon as they got the letter of acceptance.

Q. Your mother's property came to the road?

A. Yes.

Q. It is very similar property to the other property?

A. Yes.

Q. Not much difference in that property and this?

A. Not much difference in all the property in that vicinity of the general area.

Witness stood aside.

Feb. 25, '58
page 146 } LUNDY DUTY,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Where do you live? How far do you live from this property in controversy?

A. About three miles.

Q. Do you own any land over there?

A. Yes.

Q. Has Norfolk & Western come down there to buy a right-of-way from you?

A. Yes, sir.

Q. Have you agreed on that?

A. Yes.

Q. How much land do they want to take?

A. My part I think is six and a fraction acres. I don't remember; 6.6 acres maybe it was to start with.

Q. Does it go along the bottom land or go around the hillside?

A. It goes around the hillside.

Q. Is it steep or smooth?

A. Well, some of it is steep and some of it not so bad.

Q. What did they pay you for that?

A. Well, I just sold six and a fraction acres for $8,000.00 with a house on it.

Q. What did they say about the house?

Feb. 25, '58 page 147 } A. Well, of course, the house was old; a price on the house too naturally.

Q. I don't understand you. You say you want a price for the house?

A. The house is considered in it.

Q. What did they say you could do with it or did they say anything?

A. They said if I would move it off in time I could move it off in ten days. I don't know now. It has been occupied all the time.

Q. What did they say as to whether you could move it or not?

A. Mr. Rardin said I could move it if I moved it immediately after they had notified me they would take the property.

CROSS EXAMINATION.

By Mr. Greear:

Q. I believe you have some other houses up there too, don't you?

A. Well, the boys built some houses there.

Q. In the trade they made with you the whole thing was settled up, any damage to the other porperty or such as that was all covered?

A. Yes, it was all covered except the heirs own an interest.

Q. That is the other houses: the toe of the fill

Feb. 25, '58 page 148 } is coming right down to the houses or against them, is it not?

A. Yes, it comes pretty close.

Q. That was all included with the trade they made with you?

A. That's right.

Witness stood aside.

Mr. Sutherland: Your Honor, please, when Graham Tiller was on the witness stand—I would like to recall him.

GRAHAM TILLER,

recalled.

Questions by Mr. Sutherland:

Q. Mr. Tiller, have you drawn a map which will indicate in a fair way where the various tracts of land involved in this are?

A. I have.

Q. Is this the map?

A. That's it.

Q. Explain what the various colors in that mean.

A. The red shows the property of the estate on both sides of the tract; this is J. B. Tiller's farm right here, and the estate property runs in behind this property and on up to what was once the Honaker place, which is now Pittston. J. B. Tiller is the blue, which is here; and this is his on up plumb up the creek, plumb past the Honaker place and here. This is Maxie Mullins' place.

Q. What color?

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A. Brown is Maxie Mullins, and again up here the red where the tract hits the estate.

Q. Is that a fair representation of the way the various tracts of land lie?

A. It is.

Q. I notice some dark lines.

A. That is for the railroad.

Q. Is that a fair representation of the way the land looks up there?

A. It is, and where it hits the various tracts.

Mr. Sutherland: We desire to introduce this as Graham Tiller's Exhibit 1.

CROSS EXAMINATION.

By Mr. Greear:

Q. You don't claim that is drawn to scale or anything like that?

S. S. Ward.

A. No, I will admit—the only thing is to show the Commissioners where and when it hits various different properties owned by the ones involved.

Witness stood aside.

(The defendants close).

S. S. WARD,

recalled.

RE-DIRECT.

By Mr. Greear:

Q. Mr. Ward, there have been questions asked with reference to the value of the Fannie Tiller home. Do you know where that is located?

A. Yes, sir.

Feb. 25, '58 page 150 } Q. Does the construction of the proposed railroad on Tiller Fork bother that home or change it in any particular whatever?

A. No, sir.

Q. How far will it be from the Fannie Tiller home to the railroad, just a straight line?

A. To the railroad, I would have to guess at part of it. The center line of our railroad will be in the neighborhood of 250 to 260 feet away.

Q. How far will it be from the new highway that will be built there by the railroad?

A. It will be at least 200 feet, 210 feet or 200 feet.

Q. If there is any dirt or dust made by coal cars, does the railway company have anything to do with that?

A. No, they don't.

RE-CROSS.

By Mr. Phillips:

Q. I believe you are going to relocate the creek adjacent to the Tiller home, is that right?

A. Yes.

Q. About how far will the home be from the creek in its new location?

A. I am guessing—from the outside of our right-of-way to the house will be I say around 130 feet, and the center of the creek will be about 40 feet from the right-of-way line.

S. S. Ward.

Feb. 25, '58
page 151 } RE-DIRECT.

By Mr. Greear:

Q. The new creek will be inside the right-of-way a little, about 40 feet?

A. Yes, that's right. The center of the creek will be about forty feet from the right-of-way line.

Witness stood aside.

Mr. Greear: That's all.

Mr. Sutherland: Do you want to on and work out the instructions? It would suit me better to go and come back in the morning. It is a great big question. I don't think it could be settled in a few minutes' time.

Mr. Greear: I suggest—Mr. Baker said it would suit him better, and I suppose it would the other Commissioners—we could adjourn and take up the instructions and work them out.

The Court: I want to get away. I can see you gentlemen about the instructions. It isn't necessary for me to be here in the morning. The Clerk can read the instructions, or I can let the Commissioners read them or they can be read to them.

(Commissioners excused until 10:00 tomorrow morning).

IN CHAMBERS:

Mr. Sutherland: We oppose the giving of any instructions at this stage. We think they should have been given when the Commissioners were *apointed.* We think the instructions when given should have been given before the Commissioners went and looked or viewed the
Feb. 25. '58 premises.
page 152 } The Court: Counsel for the defendants have handed the Court seven instructions, really eight, seven numbered and an introductory one, which would make eight. Do you want the Court not to consider these?

Mr. Sutherland: Not to consider any. We think the oath of the Commissioners at this stage is all that is admissible, but if instructions should be given, we will want to submit what has been handed to the Court.

The Court: I don't think it is too late for the Court to give instructions. As a matter of fact, this is the first time any instructions have been requested.

Instructions 1, 2, 3, 4, 5 and 6 were offered to the Court by petitioners.

Mr. Sutherland: No. 1 is objected to because the definition of market value is erroneous as applied to condemnation cases. The second sentence is erroneous, but I see no objection to the remainder of that instruction.

Mr. Greear: I took it verbatim from the power company case in 195 Va. and Michie's gives that.

Mr. Sutherland: You are putting in that an element that doesn't arise in cases where men are free to bargain. In a condemnation case, men are not free to bargain.

The Court: They held in 195 Va. that that is the measure of damages. I will give Instruction No. 1.

Feb. 25, '58 page 153 } Mr. Sutherland: Defendants by counsel except to the action of the Court in giving No. 1.

Mr. Sutherland: No. 2 is correct as far as it goes, but omits that they might find some damage to somebody else's property. You see where they start by Elaine Duty's property, they may think it will damage Elaine Duty's property, although none of hers is taken.

The Court: I don't understand what you mean.

Mr. Sutherland: If the Commissioners find there might be damage to her property, they should find that also, or if there is damage to anyone else.

The Court: She owns a separate tract?

Mr. Sutherland: Yes, sir. She is one of the heirs and owns this commencing here (indicating) and this is her separate tract. They are taking it right to her boundary and building a road which may throw dirt over on her land.

Mr. Greear: If they do that, the railroad is responsible; that is a future action. They might run over one of Mrs. Duty's children and cut its leg off.

The Court amended No. 2 and gave the instruction as amended, with no objections on the part of counsel for defendants.

Mr. Greear: We except to the action of the Court in amending Instruction No. 2 and will offer it as amended by the Court.

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Mr. Sutherland: We object to Instruction No. 3 because there is no established business there.

The Court: I will refuse Instruction 3.

Mr. Greear: We except to the action of the Court in reusing Instruction 3.

Mr. Sutherland: I don't think a minority has a right to file a report. (Referring to Instruction No. 4).

Mr. Greear: You said any three in your instructions.

Mr. Sutherland: The three make the report, and only the three that agree, sign it. The others don't sign anything.

Mr. Greear: They can if they want to.

Mr. Sutherland: I don't think so.

The Court: I think it is all right, although I don't see any use in a minority report. I will give No. 4, but it isn't necessary to do so. Also Instruction No. 3 is refused because it is covered by Instruction No. 1, and also because it would not be proper if the loss of future profits affect the present value of the land.

Mr. Sutherland: Defendants except to the action of the Court in giving Instruction No. 4.

Mr. Sutherland: Instruction No. 5 is erroneous in that it passes on the weight of the evidence.

The Court: I will refuse No. 5; it is a correct statement of the law, but it has only to do with the admissibility of evidence, which is for the Court; and to give the instruction to the Commissioners would be to single out

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part of the evidence for comment by the Court. The Commissioners have heard the evidence of other sales from both sides, and of course they would have the right to and may consider it, but the instruction, I think, would not be proper, since the Commissioners may make their award on their own judgment of what they saw in viewing the premises.

Mr. Greear: To the action of the Court in refusing Instruction No. 5, the petitioner duly and properly excepts.

Mr. Sutherland: Instruction No. 6 is correct, but I don't see why it should be given. It states the law, but I think it is rather misleading to give it.

The Court: I will give Instruction 6.

Mr. Sutherland: We except to the action of the Court in giving No. 6.

The defendants offered their instructions to the court.

Mr. Greear: (The preamble marked A): We object to the preamble, the first one, which is not a proper statement to the Commissioners.

The Court: I will give this and mark it "A."

Mr. Greear: We except to the action of the Court in giving the preamble marked "A." We have no objection to No. I.

The Court: I will give Instruction I.

Feb. 25, '58 page 156 } Mr. Greear: Plaintiff objects to Instruction II so offered by the defendant because it is argumentative. It would be a better instruction if you stop up there at the top of the second page.

The Court: I refuse Instruction II as offered because it contains some objectionable statements, and the first part of the instruction down to and including the word "public" is all right and will be given. I mean the first two complete sentences. The other part is not necessary and I think it would be better not to give it.

Mr. Sutherland: To the action of the Court in refusing Instruction II as offered, defendants except, and offer it as amended by the Court.

Mr. Greear: Plaintiffs object to Instruction III as offered by defendants because it is argumentative and is not a proper statement of the law. The value to be awarded by the Commissioners is the fair market value of the property taken plus the damages to any residue, and this instruction as worded would be misleading and confusing to the Commissioners and prejudicial to the plaintiff.

The Court: I will refuse the instruction as offered and will give it as amended, which is the first two sentences.

Mr. Sutherland: Defendants by counsel except to the action of the Court in refusing Instruction III as offered, and will offer the instruction as amended by the Court.

Feb. 25, '58 page 157 } Mr. Greear: Plaintiff by counsel objects to Instruction IV, especially the latter part of it because argumentative, and it has the Court telling the Commissioners that the remainder of the property will be worth less if the railroad is constructed than it was before and doesn't leave it to the discretion of the Commissioners.

The Court: I will refuse Instruction IV. The second sentence is very misleading. Other instructions given will properly instruct the Commissioners.

Mr. Sutherland: Defendants except to the action of the Court in refusing Instruction IV.

Mr. Greear: We object to Instruction V in its present wording. We think that with a few changes it might be all right. What is that about "adaptability", Mr. Sutherland?

Mr. Sutherland: Its location; you don't have to come through the mountain to it. That's the language in the State Female Farm case. That was what they reversed that case for, because they didn't inform the Commissioners that.

Mr. Greear: There is nothing in this case that shows this property has special adaptability for railroad purposes.

Mr. Sutherland: I would think there is. You don't have to make a tunnel through this property.

The Court: The instruction is refused as offered and will be given as amended by omitting the first and last sentence.

Feb. 25, '58 page 158 } Mr. Sutherland: Defendants except to the action of the Court in refusing Instruction V as offered, and will offer it as amended.

Mr. Greear: Plaintiff objects to Instruction VI as offered by the defendants because it is argumentative completely and is largely inapplicable to the facts in the case under consideration.

The Court: Instruction VI is refused. I think what is stated in the first sentence is sufficient reason for not giving the instruction. The instruction is also argumentative, for I think the instruction in accordance with the statute should be sufficient. In other words, too many instructions wouldn't be helpful, going into too much detail. The Commissioners will understand from the evidence what they should do and what their duties are without the necessity of the Court attempting to comment on every possible element or item of damage.

Mr. Sutherland: Defendants except to the action of the Court in refusing Instruction VI.

Mr. Greear: Plaintiff by counsel objects to Instruction VII because it also is argumentative and because it sets forth many "elements of damage" which might be applicable in some cases, but it is not applicable to this case, and it is misleading and confusing and would be prejudicial to the plaintiff.

The Court: Instruction VII is refused because I think the Commissioners have been fully instructed and for the reasons stated in refusing Instruction VI.

Mr. Sutherland: To the action of the Court in modifying the aforesaid instructions and each of them, the defendants except because the modifications leave the instructions misleading to the Commissioners.

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FEBRUARY 26, 1958:

Mr. Greear: Commissioners, please, we have two sets of instructions which are all the instructions of the Court. They have been approved by Judge Smith, but he couldn't be here this morning, so the lawyers will read the instructions to you, and you will take them and be guided by them in your decision in this case as pointed out in the instructions. We will give you the Orders and you have to fill the Orders in, one figure for the value of the land taken in each case; the other figure is for damage to the residue. I mean the rest of the land each party has left; you have to separate that and put it in. Those figures, we got confused on that in the last one we had here. Some of you were on that Commission then and know how that was. There is another angle in the situation with reference to finding damage, if any, done to any adjoining owners not parties to this suit. The only person affected by that would be Elaine Duty. You remember when we first started up there, the first tract; that comes down to the creek and the right-of-way joins Elaine Duty's property. Of course, I don't think there is any damage done, but it is up to you to decide if any damage was done to her because it joins her boundary line with the right-of-way line. That is a question for you to decide. The statute says "damage to any other adjacent property owner." She is the only adjoining property owner we would have in this case that is interested.

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(Mr. Greear read Plaintiff's set of instructions).

Mr. Phillips: Gentlemen of the Commission, I will read you the remainder of the instructions. The first one I will read you was prepared before, with the expectation of it being read to you before you were sworn. You understand that. (Reads the remainder of the instructions). Now, gentlemen, you may take these instructions along with the petitions there and all the exhibits back to your room. I believe you have the Order, Mr. Greear?

Mr. Greear: Yes.

Mr. Phillips: Take these and report back to the Clerk. Three of you must sign the report.

Mr. Greear: There are three orders to be filled out.

* * * * *

A transcript of the evidence and other proceedings had in the above styled cases heard *ore tenus* before Honorable Frank W. Smith, Judge of the Circuit Court of Dickenson County, Virginia, on April 22, 1958, at Clintwood, Virginia, taken and transcribed by Evelyn D. Slemp, a Notary Public for the State of Virginia at Large.

* * * * *

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The Court: Are you ready in the cases in which exceptions have been filed, three cases of Norfolk & Western Railway Company *v.* the Tiller heirs, J. B. Tiller et al., and Maxie Mullins et al.?

Mr. Sutherland: Defendants are ready on their exceptions.

Mr. Greear: Petitioner is ready.

The Court: How much time do you want?

Mr. Sutherland: As far as we are concerned, we wouldn't want but a short while. And if Your Honor will give me those files, I had Mr. Rasnake to secure a transcript for us.

The Court: If there is no objection to them, it will expedite the hearing.

Mr. Long: You don't desire to offer any evidence?

Mr. Sutherland: Just that and the agent of Norfolk & Western Railway Company's testimony in a case between these parties; and Graham Tiller, just one little thing, which we will expect to offer.

The Court: You mean the evidence already taken and transcribed, and Graham Tiller, is all the de-

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fendants desire to put on?

Mr. Sutherland: Yes. I want to put Graham Tiller on. It is already in writing except Graham's. (Offers paper containing evidence of J. Frank Newsom). I am going to offer this in evidence to show the relationship between Ted Bise and the applicant. That is the object of it.

The Court: That is not necessarily evidence; there has been no evidence like that offered in these cases.

Mr. Sutherland: In a similar case J. Frank Newsom made that testimony in the case of Fannie Tiller *et als* v. *The Pittston Company et al.* Mr. Newsom testified to that and I am offering this.

The Court: That is in a different proposition altogether; it wasn't in the condemnation suit.

Mr. Sutherland: No.

The Court: You have got the certificate there, the Clerk certifying that is a transcript of the evidence in the case of *Fannie Tiller et al* v. *The Pittston Company et al.* Is that evidence in the condemnation suit?

Mr. Sutherland: No.

Mr. Greear: What is that you have there, Holiday?

The Court: That is something that is not true at all.

Mr. Long: We haven't seen it.

Mr. Sutherland: The Clerk says "I, Herbert J. Rasnick, Deputy Clerk, do hereby certify that the foregoing is a true and correct copy of the transcript of the evidence in the case of *Fannie Tiller et al* v. *The Pittston Company et al*" and shows when it was and how it was.

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The Court: That is not all of the evidence.

Mr. Sutherland: That is all of his testimony.

(Counsel for Petitioner examined the paper offered as an exhibit by the defendants' counsel).

The Court: That is not correct. The Clerk certified that is the evidence in that case. That might be the evidence of that witness, but that is misleading.

Mr. Sutherland: It should be "of Mr. Newsom only."

The Court: Anybody seeing that would think that is all the evidence there was in that case.

Mr. Long: This would not involve Norfolk & Western Railway Company. This would involve the Pittston Company and would have to go to the other counsel.

Mr. Greear: We weren't present. We don't know anything about this.

The Court: It is really not in the evidence of the condemnation suit. That is only a part of the evidence, and the Clerk certified it is the evidence in that case. It is only evidence of one witness and there were several witnesses who testified in the case concerning the same thing. All right, I am ready to hear you.

Mr. Sutherland: I have sent for the Clerk. I want him to make it "evidence of J. Frank Newsom." While he is com-

ing, Your Honor, we desire to offer the evidence
Apr. 1, '58 introduced before the Court at the hearing when
page 5 } the Commissioners were appointed, which was
taken in shorthand and has been transcribed and has been agreed by counsel as tendered to Your Honor this morning, and later that same day signed by the Judge and we desire to introduce the evidence taken at the hearing before the Commissioners that made this report, which was taken down in shorthand and transcribed and has been signed by counsel; and later that same day signed by the Judge. I desire to introduce the certified copy of the evidence of J. Frank Newsom in a case heard October 2nd between the same parties except The Pittston Company is included in this evidence. I offer this to show the relationship of the witness Mr. Ted Bise introduced before the Commissioners in this case.

Mr. Long: Your Honor, please, we haven't seen it. We don't know what it is. It is sorta like the other excerpt of the evidence of J. Frank Newsom. We were not present, and that was a part of the evidence in the case between The Pittston Company and the Tiller heirs. Norfolk & Western was not present and was not represented at the time. And we don't know anything about it. It was taken in another proceeding, not the one against Norfolk and Western.

The Court: That is the evidence, Mr. Sutherland, that was taken *ore tenus* before the Court in the chancery cause which has already been decided?

Mr. Sutherland: Yes, sir.

The Court: And taken in the chancery cause of *Fannie Tiller et al* v. *The Pittston Company and Norfolk*
Apr. 1, '58 *& Western Railway Company?*
page 6 } Mr. Sutherland: This was taken at the hearing between the Norfolk and Western Railway Company and The Pittston Company. This was the testimony at the hearing of The Pittston Company phase of the case.

The Court: That is true. That was heard in that part of the case, in which Norfolk & Western Railway Company was not concerned at all. The case originally was brought against both the Norfolk and Western Railway Company and The Pittston Company. That particular testimony was heard after the part of the case concerning Norfolk & Western Railway Company had already been heard and decided. Norfolk & Western had no further interest in that part of the case concerning The Pittston Company. It seems to me, Mr. Sutherland, you are too late in offering it now on exceptions. I don't see why you didn't offer it if you wanted it in, if it

was admissible in this proceeding, it should have been offered at the proper time. Aren't you too late now in offering it on exceptions?

Mr. Sutherland: This is the first time I have had an opportunity to present evidence on the exceptions to the Commissioners' Report in this case.

Mr. Greear: We wouldn't raise any point on the lateness it was offered, but we thought it was something not connected with this case, and we were not present when the witness testified.

The Court: What point are you offering it on, Mr. Sutherland?

Apr. 1, '58 page 7 } Mr. Sutherland: I am offering it to show the relationship between Norfolk & Western Railway Company and Ted Bise, a witness who was heard before the Commissioners in this case.

The Court: Why wasn't that relationship shown at the time he testified? You had an opportunity to do that. That is what I am talking about.

Mr. Long: I believe it is shown in the case that Ted Bise was Land Agent for the Clinchfield or The Pittston Company.

Mr. Sutherland: That is what he is, and that is the reason.

The Court: Is that the only reason you are offering it?

Mr. Sutherland: That's it.

The Court: I don't think there is any question about that. I think all of us knew who he was.

Mr. Sutherland: In lieu of that, if it will be stipulated—here is this statement to show the extent of the relationship—"there was no agreement between me and Clinchfield. They said they would give us a right over the lands for a right-of-way for the railroad."

Mr. Greear: I don't see how we could stipulate that. In fact, we don't know about it. My understanding individually was different. It was that the railroad company would go ahead and build the railroad over the coal company's land and when they got through, they would pay for it at the rate of $100.00 an acre.

Mr. Long: We would probably want to cross-examine him.

The Court: You said you were offering it only to show the relationship of Ted Bise to The Pittston Company?

Apr. 1, '58 page 8 } Mr. Sutherland: Yes, sir, and the relationship between The Pittston Company and Norfolk & Western Railway Company.

The Court: The relationship of Ted Bise, who testified, a question was asked him on Page 24 of the transcript: "Q. Mr. Bise, what is your occupation?" "A. Assistant Land Agent for Clinchfield Coal Corporation."

What is the purpose of putting on the evidence of this other witness? That is shown already.

Mr. Sutherland: I want to show the extent of his principal's interest.

The Court: You state more now than you stated in the beginning. You may offer it for the record, but I don't see any merit in it because it is already shown. The record shows it.

Mr. Sutherland: By that do I understand Your Honor is sustaining the objection to the introduction of it? If so, I shall want to save exceptions.

The Court: For the purpose you stated it is not necessary.

Mr. Sutherland: We save exceptions.

The Court: What is the use of the Court hearing evidence that is not contradicted, no question made about it; it shows plainly it is Clinchfield Coal Corporation and is conceded by counsel for defendant and never any question raised about it throughout the proceedings that Clinchfield Coal Corporation is owned by The Pittston Company. It goes in for the record, but I sustain the objection, because it isn't necessary for the Court to consider.

Mr. Sutherland: We save exceptions.

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GRAHAM TILLER,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Sutherland:

Q. Are you one of the defendants in one of these cases under consideration, *Norfolk & Western Railway Company* v. *Fannie Tiller* and others?

A. Yes.

Q. How old are you?

A. Fifty-one.

Q. Where were you raised? Where were you raised with reference to what is shown on the map filed in this case as the home of Fannie Tiller and the Tiller heirs?

A. I was born and raised in about 200 yards of the track, the one they are building on.

Q. Are you familiar with the country there?

A. Yes.

Q. Describe what is called the spur they are condemning

Graham Tiller.

up Tiller Fork? Will you describe the land or fix the main line? Where does it run?

A. The main line tunnels through Sandy Ridge and hits the head of Cane Creek, down Cane Creek to the mouth of Tiller Fork, turns around the butt of the spur or ridge up Tiller Fork approximately two miles. Tiller Fork or Tiller Creek runs practically parallel with Cane Creek, dividing it in two tracts, and Cane Creek and Tiller Creek or Tiller Fork is a spur or a ridge which will average

Apr. 1, '58 from 250 to 300 feet high approximately.

page 10 } Q. Is there anything between this spur and the main line except the one ridge or spur you mentioned?

A. No, sir.

Q. Mr. Phillips called my attention—were you present here last October when Mr. J. Frank Newsom testified?

A. I suppose I was. I have been here every hearing.

Q. Do you remember a man testifying that he was the Land Agent for Norfolk & Western Railway Company?

A. Yes, sir.

Q. Do you remember him testifying in that what was the understanding or agreement between the Norfolk & Western Railway Company and Clinchfield concerning a right-of-way over there?

Mr. Long: We object to the question and any answer because it seeks to elicit hearsay, irrelevant and incompetent evidence.

The Court: What is the purpose of that, Mr. Sutherland?

Mr. Sutherland: In view of the objection made to the other, if I should be wrong, I want to get this statement of what was testified in the record to show the relationship between Ted Bise's principal and the applicant, Norfolk & Western Railway Company, in this case.

The Court: That is not the purpose you were offering it for awhile ago. I thought you were offering it to show the relationship of Ted Bise to Clinchfield Coal Corporation.

Mr. Sutherland: No. Ted Bise was the agent

Apr. 1, '58 of Clinchfield Coal Corporation, and his princi-

page 11 } pal was the one that was to give the right-of-way, is what I am saying, or what I have tried to say.

Mr. Phillips: It is not only to show the relationship of Ted Bise with Clinchfield Coal Company, which is a subsidiary of The Pittston Company, but also to show the relationship of Clinchfield Coal Company, a subsidiary of The Pittston Company, to the Norfolk & Western Railway.

The Court: Why didn't you offer this evidence at the proper time?

Mr. Sutherland: I think I am offering it at the proper time. This is the first time I have had an opportunity to present evidence on the exceptions.

The Court: The proper time to offer it was when Ted Bise testified if it has to do with the weight of his testimony.

Mr. Phillips: Counsel for Petitioners waived any objections as to the time of introducing the evidence and are not objecting, so they stated a few minutes ago, to the introduction of it at this particular time, but object to it for other reasons.

The Court: I understand now they are objecting. They state they are objecting, if they mean what they say, if the reporter would read it back.

Mr. Greear: We would object to it. We think it is immaterial, irrelevant and incompetent in this hearing, but we do not object to it with reference to the time it is being offered, at a late time.

Apr. 1, '58 page 12 } The Court: All right, if you don't object, let him offer it for what it is worth. Objection overruled, or do you want to withdraw your objection? I don't get what you mean. I understand these proceedings are just like any other legal proceedings; you can't go and re-hash all the evidence brought before the Commissioners. There is a proper time for all that evidence, and the Court doesn't have to sit and hear all the evidence again. There has to be some good reason for not having offered it at the proper time.

Mr. Greear: Our idea was that we didn't want to appear to be technical with them because it hadn't been offered at the proper time. We are willing to waive that angle. We didn't think it was admissible anyway.

Mr. Long: We do not waive its admissibility.

The Court: Apparently what you are trying to get in the record is a statemen by this witness, this question and answer on the second page: "Q. Did you and the Clinchfield Coal Corporation, or the Pittston Company, agree on the terms and the prices for your rights-of-way where you were going through their land?

A. No, sir, there was no agreement made on that except it was—they said they would give us a right over their lands for a right-of-way for the railroad."

Graham Tiller.

Mr. Long: Now they seek to prove that statement by this witness; we object to that because in any event, regardless of the lateness of the evidence being offered, it would be inadmissible, simply reciting what some other witness

Apr. 1, '58 in a case testified. It would be hearsay.

page 13 } The Court: Anyway, I will let it in. I think it should have been offered at the proper time, but since you don't object to it on that ground, I will let it in. I don't think it makes any difference in these exceptions.

Mr. Sutherland: Mr. Tiller, if you recall in substance, what did he say with reference to the agreement between the Norfolk and Western Railway Company and the Pittston Company or Clinchfield Coal Corporation?

Mr. Long: Same objection.

A. I don't recall his statement more than what he told me personally, that they were giving them the right-of-way.

Mr. Sutherland: You may cross examine.

Mr. Long: We move to strike out the answer of the witness for the reasons heretofore assigned.

The Court: I sustain the objection to what this witness said. What I meant was that the testimony of the Norfolk & Western agent was admitted if it hadn't been waived, the admissibility of it at the proper time hadn't been waived. But here on the hearing that relationship of the witness to The Pittston Company or even if it shows relationship, which I think it does not, between Norfolk & Western and The Pittston Company, there was no evidence offered at the time. It is too late to offer it now, affecting the validity of the findings of the Commissioners, because this deposition

Apr. 1, '58 was known about at the time, the same counsel

page 14 } was representing the Tillers in the chancery cause that is representing them here. They knew about it and could have offered it at the right time. I don't think the Court ought to consider it now. I will let it in evidence, but I will not give it any consideration.

Mr. Sutherland: We save exceptions.

The Court: That is to the point of sustaining the exceptions.

CROSS EXAMINATION.

By Mr. Long:

Q. Mr. Tiller, a right-of-way hasn't been graded through the property of the Eivens Tiller heirs, has it?

A. It is in the process of cutting the right-of-way, cutting the timber.

Q. But no grading has been done?

A. I don't think they have started bulldozer work yet. They have been a creek channel through the property re-channeled, houses and barns being torn down.

Q. You spoke about the line coming down Cane Creek and turning up Tiller Fork. Doesn't it go on down below Tiller Fork? Doesn't it extend on down the creek below the mouth of Tiller Fork?

A. The main line does.

Q. It goes on down a considerable distance below the mouth of Tiller Fork, doesn't it?

A. Yes.

Q. Then the side track goes, spur track goes up Tiller Fork, starting the grade for it?

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A. Yes, sir.

Q. Now Cane Creek comes down, I believe, a narrow hollow, doesn't it; the sides are rather steep, the hills?

A. The hills are pretty steep all through this section.

Q. The same way Tiller Fork, the hills on each side are pretty steep?

A. Where there is a hill, yes, sir.

Q. And the hollow is very narrow too, isn't it?

A. In places. In places it widens out quite a bit.

Mr. Long: That's all.

Mr. Sutherland: That's all. Defendants rest.

Witness stood aside.

B. E. CRUMPLER,

after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Long:

Q. What is your position with Norfolk & Western Railway Company?

A. Assistant to the Chief Engineer, Norfolk & Western Railway Company, Roanoke, Virginia.

Q. How long have you been working for the Norfolk and Western Railway Company?

A. For thirty-two years.

B. E. Crumpler.

Q. Are you familiar with the layout of this line of railroad referred to in this case?

Apr. 1, '58 A. I am.

page 16 } Q. Did you have anything to do with the laying out of it, selecting a location and such as that?

A. It was done under my general supervision.

Q. Are you familiar with the Fannie Tiller land, I believe referred to as the Eivens Tiller heirs' tract? Are you familiar with that?

A. To a certain extent; I am familiar with the general widths of the right-of-way. As to individual ownership, I am not too familiar, but fairly so.

Q. Do you know where the J. B. Tiller residence is?

A. Yes, sir.

Q. Do you know where Fannie Tiller lives?

A. I think I do. I am not sure. I believe she lives in the house across the creek from the highway at the proposed railway location.

Q. Is that the narrow hollow there on Tiller Fork? How is it laid out there, the hills?

A. Most of Tiller Fork hollow is narrow.

Q. How are the sides of the hills, steep or sloping?

A. The hillsides are quite steep.

Q. What is the width of the right-of-way through the Elaine Duty land, Mr. Crumpler?

A. It varies in width. If I could see a plat submitted as evidence, I could be more specific.

Apr. 1, '58 Q. Here is a copy of the plans filed with the

page 17 petition and ask you to state with reference to the width of the right-of-way through her land.

Mr. Sutherland: Mr. Long, is that—couldn't you get the original?

Mr. Long: It is the same thing.

Mr. Sutherland: Instead of having so many.

Mr. Long: We can get the original. Do you have the original file?

Mr. Sutherland: I expect I have.

Mr. Long: Let me have that and I will show you the one that is in the file.

The Court: On these objections being made and which have been made, I am letting it all in and I will consider what I think ought to be considered, but you can get it in the record anyway.

Mr. Long: I think that is proper.

Mr. Sutherland: I didn't get that.

The Court: I say on the objections I am letting it all in and I will consider what I think proper.

Q. I hand you herewith blueprints filed with the papers in this case and ask you to examine that and state with reference to the width of the right-of-way through that land.

A. The narrowest width is approximately 80 feet; the widest width is about 248 feet. Much of it is in the neighborhood of 200 feet wide.

Q. Was it necessary to take more than 100 feet in width?

Mr. Sutherland: I object to that as his conclusion, the witness' opinion.

Apr. 1, '58
page 18 } Mr. Long: The Court says to go ahead and answer. He is not ruling on it.

A. Yes, sir, it was necessary.

Q. Why was it necessary?

A. Because of the area to be occupied by deep cuts and high fills. We needed a sufficient width to contain our grading slopes, the top of the cut and toe of the fill.

Q. Some exception has been made to the description, I believe, of the right-of-way where it is described by metes and bounds, two calls. I believe the distance referred to as "about 148 feet" and again as to the degree. Can you explain why that—what that refers to or why it is described in that manner?

Mr. Sutherland: We object to that because that would be supplementing and adding to what must be in writing. You go ahead.

Q. I hand you the exceptions. Explain why it reads "about 148 feet."

A. That is a scaled distance, an office distance not measured in the field. The distance in this particular case was from the center line of location to a property corner. It was our intent to tie all the land between our location and the adjacent property line. So we made that; engineers call it "plus or minus." It means "about or approximately." But the reason the slight indefiniteness is indicated is because it is a scaled distance. Actually you pretty well

Apr. 1, '58
page 19 } guarantee it is within a foot or two of the true distance.

Q. Was the right-of-way staked out at the time the Commissioners were there?

B. E. Crumpler.

A. I can't answer that question, Mr. Long. I understand it was, but I didn't see it. I wasn't on the ground.

Mr. Sutherland: Objected to insofar as the witness' understanding.

Q. There is another call in the description "thence about S 45 degrees 52 west 400 feet" coming along outside line of the right-of-way. What would you say about that?

Mr. Sutherland: That is objected to because it would be adding to and putting something into the description that is not in writing.

A. Well, from this plan my interpretation is that the "about" applies to the bearing and not the distance.

Q. The second call does, but the first—

A. Yes, the first applies to the distance. I don't know, I am not familiar with the details, but I assume that the original deed bearing and our bearings didn't agree, so they put the "plus and minus" on the bearing.

Q. Would that amount to anything?

A. No, nothing whatever. It was the intent to follow the original deed call wherever it might be.

Mr. Sutherland: We object to the last part of the answer because it is a variation and the witness' interpretation of something that is not in writing.

Apr. 1, '58 page 20 } Q. Does the right-of-way include any part of the secondary highway?

A. Yes, the proposed right-of-way includes sufficient land to reconstruct the highway.

Q. Is it necessary to make a change in the highway?

Mr. Sutherland: We object to that. It is his conclusion.

A. It was necessary. The proposed railroad location for a short distance is right on top of the present highway. It would have been infeasible to move the railroad into the hillside because of the prohibitive cost of moving into a steep hillside. The most economical thing to do was move the highway towards the creek, which this plan calls for. And we obtained sufficient land to relocate the highway. We have received permission from the Virginia State Highway Department to do that work.

Mr. Sutherland: We object to that. The State Highway Commission can't give permission to change the road over our land. And the State Highway Department is not a part of this proceeding.

Mr. Long: Mr. Sutherland, I don't know whether you were just offering in your evidence and exceptions evidence on the Eivens Tiller heirs case. Do you mean you had no other evidence in J. B. Tiller and Elaine Duty and Maxie Mullins? Did you want to offer anything else?

Mr. Sutherland: Nothing except the stenographic report.

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Q. While he is on I wanted to ask him a question about the others too. I will ask him a question or two about the others also. Mr. Crumpler, I hand you herewith a blueprint of the right-of-way in the J. B. Tiller case. I will ask you to state the width of the right-of-way in the case, please, whether or not it exceeds 100 feet at any place and if so, the distance or the width.

A. The minimum width is at the upstream end. It is 15.61 feet wide. The maximum width is near the lower end and it is about 235 feet wide. Or some one-third of it is in the neighborhood of about 200 feet wide.

Q. Was it necessary to take more than 100 feet in width in that case?

A. It was.

Q. Why?

A. To enable us to contain our grading slopes on the right-of-way width. That is the top of cut on toe of fill.

Q. Was it necessary to take the residence of J. B. Tiller?

A. Yes.

Q. Was it occupied by J. B. Tiller at the time or not or by renters?

A. It was occupied by renters recently. I don't know when Mr. Tiller moved out of the place.

Q. Why was it necessary to take the residence property?

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A. It would have meant exorbitant grading costs to have to move so far into the steep hillside to avoid taking the house. In any case, the grading would have been quite close to the house and would have made it undesirable to live in.

Q. How is that hollow along up there—pretty narrow or not?

A. It is quite narrow above the J. B. Tiller house.

Q. We wanted to ask him a question in the Elaine Duty

case too, Mr. Sutherland. Do you want us to do that now or let you ask him and re-offer him?

Mr. Sutherland: That is not under consideration. It has been passed on, the Elaine Duty case.

Mr. Long: All right, you may ask him.

CROSS EXAMINATION.

By Mr. Sutherland:

Q. Mr. Crumpler, what is the percentage of grade that that kind of material there will stand up?

A. That is expressed in slopes.

Q. Yes. What should be your slope?

A. In that type of territory we normally figure on one to one; one out and one up.

Q. For every foot horizontal you go one up on the sides vertically?

A. That is in cuts. On fill slopes the usual angle of repose is 1½ to one. That means 1½ horizontal, one vertical, which makes it lighter than a 45 degree slope. To illustrate, on a 30 foot high fill a lateral distance of 45 feet would be required for the slope. That is from the top of the slope to the toe of the slope.

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Q. What is the height of your slope along there where it is over 200 feet wide or 200 feet or more; what is the height of that slope?

A. Of course, the height of cuts and fills varies every foot of the way. Along well near the loading point the subgrade is approximately 30 feet above the creek.

Q. That would be 45 feet then you would settle in to the toe of the fill?

A. From the top of the fill to the toe of the fill, that is correct.

Q. Then how much is the cut at that place?

A. Well, it varies considerably. If you just want an illustration you might say a 30 foot cut—I am sure it would be more than that in places and almost nothing in places.

Q. Do you think there is a 30 foot cut on the Fannie Tiller place?

A. I am not sure. It varies every foot of the way.

Q. I ask you to look at the map and look at what you call the profile and see if that isn't true, that there was not a place on the Fannie Tiller portion that is more than ten or twelve feet.

B. E. Crumpler.

A. The profile doesn't describe but two conditions. That is, on the center line; that is along one line which is on the center line of your right-of-way. Where a slope intercepts a place the ground might be out 100 feet and it doesn't represent the elevation on the center line at all.

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Q. You understand you can only add to your 100 feet where it is necessary by a cut or fill that which you speak of as a slope, of course, fill and the cut. Now, where is that cut in the hillside on the Fannie Tiller tract that is more than ten or twelve feet high?

A. The profile doesn't tell you. The profile only tells you the elevation of the ground line on center line of the track and continues to the height of this cut and fill. You have to consider your road bed width.

Q. You are assuming you are entitled to more than 100 feet.

A. That is what I am trying to get at. You also have to consider where you have multiple tracks. It isn't a matter of adding those heights of the cuts and fills together.

Q. You go from the toe of the fill to the top of the cut and add 100 feet to that?

A. No, sir, I haven't added 100 feet.

Q. You understand you are only entitled to add to 100 feet where necessary by reason of this fill and your cut in slope?

A. Yes.

Q. Tell me anywhere your slope on the Fannie Tiller tract and your fill will amount to 50 feet.

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A. It amounts to more than 50 feet everywhere on the Fannie Tiller tract.

Q. It does?

A. Yes, sir.

Q. How much more?

A. Well, I stated that your slopes, the distances from the center line, both cut and fill slopes vary every foot of the way from one end of the railroad to the other.

Q. Yes, but what I am trying to get is how much beyond 100 feet is necessary for a slope in the cut through the Fannie Tiller tract?

A. If I can see this map; it will be simpler if I express it this way: we worked it out on cross-section; we have a picture of the original ground, and maybe on the high side there will be a cut and on the low side a fill. We lay our track centers on 10 foot scale. We lay our road bed and cut slopes with the original ground on one side to its interception with the original ground on the other side. If there is no roadway,

we go slightly beyond it to grade slopes, intersections, and that is the right-of-way we require. You cannot propose a right-of-way line exactly at the top of the slope because according to human nature, there is going to be erosion a little bit. We don't want to go back six months later and buy a little more. Once we establish the top of the

Apr. 1, '58 slope we will go ten or fifteen feet, sometimes,
page 26 } beyond.

Q. You said it would extend up one to one?

A. I said we based our calculations on one to one, and generally it will as a whole, but you have overburden and most of this part of the country has ten or fifteen feet of overburden that is subject to erosion, as you know.

Q. The Highway Department all along here through that kind of material, don't make it one to one?

A. The Highway Department generally ignores slopes. They will buy a definite strip. What we have been able to claim we would have been glad to make it 25 feet from each side center line with the right to let our slopes go off the right-of-way.

Q. I understand your argument and what you are arguing for. I am asking a specific question about facts. Now, the land all through that section, all through this, the highway don't make the slope in earth as much as one to one, do they?

A. You mean they make it steeper?

Q. Yes

A. They make slopes lighter than I am talking about; in modern highway construction they make it lighter than one to one in earth. In other words, the modern highway construction goes 1½ to one or possibly two.

Q. You are talking about modern highways where?

A. Anywhere highway work is done.

Q. Can you find a place like that in Dickenson County? Look right over there in front of the courthouse

Apr. 1, '58 and see if it isn't ¼ to one.
page 27 } A. Not in earth, Mr. Sutherland.

Q. Right over there (indicating).

Mr. Long: We object.

A. ¼ to one, that is a steep slope on good rock. This combination shale and slate and sand rock, ½ to one is as steep as you should go for highway or railway construction.

Q. Now then, you can't say how high the slopes will be

along on the right going up in the hill, the cut will be, can you?

A. The slope stakes as far as I know are on the ground. I could measure them, but it varies so greatly that if I gave an average it wouldn't mean anything.

Q. I am contending you are taking more land than necessary. That is what I am getting at. Your distance is more. What I want to know is how much is the cut on the right going up through the Fannie Tiller tract?

A. It varies so much I couldn't answer the question for any specific place, and it would have to be asked on that basis.

Q. You took elevations when you made the cross sections, didn't you?

A. Yes, but as I explained, it doesn't represent where the top of your slope is going to be. We take ground line on center line. I could draw you a picture and explain.

Apr. 1, '58 page 28 } Q. I have been over it a thousand times. You need not draw a picture for me. I am trying to get you to fix these, the heights of that cut.

A. I can say it this way. Except to give repose from erosion at the top of the cut or scotching of the fill, we have not taken any exorbitant width anywhere. We make it a specific point in case we can't negotiate to be careful about that particular point. And we know we stand wide open for criticism if we take more than we need, and we are careful not to.

Q. You can't say how much the cut—how high the cut is above the bed of the road through the Fannie Tiller tract?

A. I could with a proper plan. The profile doesn't tell you.

Q. You cannot show that and you would not—then the fill would not be more than 45 feet, the toe of the fill of the thirty feet would make 45?

A. We are not talking about necessary widths. You have to consider the road bed width from the top of the slope to the center.

Q. The thing you are trying to keep saying is you have got four tracks through there.

A. I mentioned all four tracks. We are not trying to hide that.

Q. You want your slopes and fills plus multiple tracks?

Apr. 1, '58 page 29 } A. We have to have them, yes, sir, to build.

Q. Let's see a little further. What you have said with reference to the Fannie Tiller tract will apply to the J. B. Tiller tract from—or up to the upper end of the first there; there are four tracts in

B. E. Crumpler.

the J. B. Tiller tract, but that will apply up to the tract which includes his dwelling, won't it?

A. The distance from our proposed subgrade to the creek elevation gets smaller as we go up the creek. We come off the main line at the mouth of Tiller Fork at a high elevation and drop down to near the creek level and climb with Tiller Fork the distance from the proposed railroad to the water level, gradually declines.

Q. That is shown on the map?

A. Yes, sir, that is shown on the profile.

Q. Until you get up, let me see, so it will make it understandable to you; the J. B. Tiller one; (refers to map). I will show you the J. B. Tiller tract of land, Mr. Crumpler and I will ask you with reference to the large portion in the middle, and if I understand where the offset near the middle of that, is the line where his land comes up to a tract owned by the heirs; isn't that correct, Mr. Crumpler?

A. Yes.

Q. Now then, how much of the State Highway have you taken on that map up to the place I mentioned, the heavy offset?

A. How much of the State right-of-way?

Q. Yes.

Apr. 1, '58 page 30 } A. None. This comes to the highway right-of-way line.

Q. Look at the little portion down at the right. Isn't that on the east side of the northern end of the map?

A. Yes.

Q. Don't the highway run between them? If you were to move that up there, wouldn't the highway be between the two portions?

A. I don't understand the question.

Q. Let's push that up there, the small one—I don't remember—is on the east side of the highway will leave a place on the western—?

A. This strip up here, we wouldn't even buy it. We wouldn't need it.

Q. Don't your description of that come right up at that place?

Mr. Long: You mean they connect?

Mr. Sutherland: Yes.

A. Not as I know of. This is to scale.

Q. Why are you taking the small portion?

B. E. Crumpler.

A. In order to move the highway over toward the creek.

Q. You are wanting to condemn for a highway?

A. Yes, sir, condemn to build the railroad. The railroad cannot be built unless the highway is relocated.

Q. While I am on that, let's go up to the south-
Apr. 1, '58 ern portion of the J. B. Tiller tract, and by that
page 31 } I mean the narrow strip to the left of Cane Creek
going up from the offset where the heirs own.
Now you said that was from fifteen to how many feet wide?

A. The narrow part of it is right here, 15.61 feet.

Q. That is at the southern end?

A. At the southern end, that is correct.

Q. In the heirs' tract you seek to condemn a strip west of that how wide?

A. I don't have the plan before me. That also varies from place to place.

Q. Let's look at that (referring to map).

A. This fits like this (indicating). See this part right here, it comes right up in the corner.

Q. This offset represents the same as that one?

A. This is Sheet One of three. You want Sheet 2, I expect, Mr. Sutherland. You want the plan up here.

Q. Yes.

A. I believe you want Sheet 2 of this plan.

Q. I think you are correct on that. Take the two plans together, Mr Crumpler What is the width of the two?

A. Do you mind if I use the scale?

Q. That is what I want you to do.

A. Now for an average this would be about 130 feet, and
for an average here (indicating) it would be
Apr. 1, '58 about 50 feet. That would make an average of
page 32 } 180 feet.

Q. How high is the bed of the road? Is your elevation above the creek bed there?

A. Neither one of these plans will tell me, but up here I will say approximately 20 feet.

Q. I assume that you will change the channel to the east of the J. B. Tiller tract and the road will be west, will it not?

A. The road bed?

Q. Yes.

A. Yes, that is correct.

Q. Now then, you say that is about 12 feet; that would make 18 feet for your slope out to the creek, wouldn't it?

A. One and a half would be thirty. I said about 20.

Q. Then that would be thirty feet for the slope?

B. E. Crumpler.

A. Yes.

Q. Now then, how deep is your hillside cut on the heirs' property?

A. Well, there again the height of the cut varies every foot of the way, and this plan doesn't tell you. This only shows the ground line on the center line of location. It doesn't give you the height or elevation of the ground where the slope is.

Q. When you put your pencil on a place and call it "this," what does it designate on the map?

A. "Ground line on center line location."

Apr. 1, '58 page 33 } Q. Is that what you intend as a profile of cuts, fills and slopes?

A. That is what is required by law.

Q. Is that what you intend that as—a compliance with that phase of the law?

A. Yes.

Q. Yet you can't tell how much cut there is or how much fill?

A. I can tell you how much is on the center line, but that has nothing to do with the location of it because of the cut.

Q. That don't show then how much cut there will be?

A. Not anywhere except on the center line. It shows how much cut there is on the center line, but that's all.

Q. It don't show how much fill you have got except on the center, does it?

A. That's correct, yes, sir. Now—

Q. Go ahead.

A. Now, if the country side were level, no contours and followed this (indicating), then that would show the cuts and fills for the entire width of the road bed as well as your ground; on this job for slopes you take a certain elevation or center line and everywhere else it is a different elevation.

Q. It is all hillside cut, isn't it?

Apr. 1, '58 page 34 } A. I believe so, Mr. Sutherland. I don't believe there is a thorough cut—I am sure there is one started at the end of Tiller Fork. It is all cut on the hillside.

Q. Making a little thorough cut at the lower end of the point?

A. Yes.

Q. After you get to the Tillers, there is nothing but side cut anv at all?

A. That's right.

Witness stood aside.

L. A. DURHAM, JR.,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Greear:

Q. State your name, please.

A. L. A. Durham, Jr.

Q. What is your occupation?

A. Division Engineer, Pocahontas Division, Norfolk and Western Railway Company, Bluefield, West Virginia..

Q. Did you testify in these cases before?

A. Yes, sir.

Q. Were you present when the Commissioners were present on the ground with reference to the Tiller heirs' property and the J. B. Tiller tract and the Maxie Mullins property?

A. Yes, sir.

Q. Are you familiar with the right-of-way that is desired for the railroad company there?

Apr. 1, '58 A. Yes, sir.

page 35 } Q. At the point of beginning in the description of the heirs' property, the word "about" is used as to the distance on the first one, and the word "about" is used as to the degrees on the second one. Explain why that was done.

Mr. Sutherland: I object to that, as that would be adding something that wouldn't be identified by adding and making an addition to what is already in writing.

A. As stated previously, these distances are scale distances made by draftsmen in the office, using the plus or minus or the term "about" to signify it was our intentions not to leave a narrow strip six inches or a foot wide. It was our intentions to go to the property line.

Q. When the Commissioners were on the ground, was that pointed out to them and that fact made known to the Commissioners?

A. Yes, sir, we had set high sticks with colored pieces of cloth attached to signify the corners of the property.

Q. Were the Commissioners informed that at this location—I am talking about the line desired—would run with the Elaine Duty boundary line?

L. A. Durham, Jr.

Mr. Sutherland: That is objected to as it wouldn't be identifying what is in writing, but is adding to it and making something that is not in writing.

A. Yes, we did.

Apr. 1, '58 page 36 } Q. When you speak with reference to the width desired at some places, I noticed the right-of-way desired is more than 100 feet wide, and you also asked to take the J. B. Tiller residence. Why was that done?

A. We only take what land is absolutely needed in these cases.

Mr. Sutherland: I object to that as his opinion and desire.

A. The sloping land opposite J. B. Tiller's house would be so close, there would be the possibility of damage to the residence or it would not be a particularly good place to live with the slope up close to it.

Q. Could you build it on any other location and come up the hollow and avoid the dwelling?

A. We could have gone back in the hillside with exorbitant grading.

Q. Would that have been prohibitive?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Sutherland:

Q. Mr. Durham, you take the J. B. Tiller house, don't you?

A. Yes, sir.

Q. You heard Mr. Crumpler testify a few moments ago?

A. Yes, sir.

Apr. 1, '58 page 37 } Q. With reference to what I asked him concerning the slopes and the cuts, would you have any different statement to make to what his answers were?

A. No, sir.

The Court: I believe you already testified as to that previously before the Commissioners were appointed?

A. Yes, sir.

The Court: You testified about what the map showed, etc.?

L. A. Durham, Jr.

A. Yes, sir.

Witness stood aside.

Mr. Greear: We have no further evidence.
Mr. Sutherland: That is all we have, Your Honor.
The Court: Is there anything further?
Mr. Sutherland: We are through.
Mr. Greear: We are through.
The Court: Is there any argument on the matter of these exceptions?
Mr. Greear: We don't care to argue.
Mr. Sutherland: We have none unless the Court has something he wants to hear us on.
The Court: I overrule the exceptions. Most of them are matters the Court has already ruled on and has given due consideration to heretofore.
Mr. Sutherland: We save exceptions to the ruling of the Court in overruling our exceptions.

• • • • •

DEF. EX. I.—April 22, 1958.

Evelyn D. Slemp

F. W. S.

Clintwood, Virginia
October 2, 1957
9:00 o'clock, a. m.

This case came on to be heard *ore tenus* before the Honorable Frank W. Smith, Judge.
Mrs. Ruth M. Lewis, Court Reporter, was sworn to report the case.

Appearances: Messrs. S. H. Sutherland and George C. Sutherland, of Clintwood and Grundy, Virginia, Counsel for Complainants.
Messrs. William A. Stuart and G. R. C. Stuart, of Penn, Stuart and Phillips, Abingdon, Virginia, Counsel for Defendant The Pittston Company.

J. FRANK NEWSOM

the first witness, called by and on behalf of the Complainants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. S. H. Sutherland:

Q. Please state your full name.

A. J. Frank Newsom.

Q. Mr. Newsom, where do you live?

A. Roanoke, Virginia.

Q. What is your occupation?

A. Real Estate Agent for the Norfolk and Western Railway Company.

Q. How long have you held that position?

A. I came into the position of Real Estate Agent in 1954.

Q. Have you continuously held that position since 1954?

A. Yes, sir.

Q. And your title is what?

A. Real Estate Agent.

Q. You mean by that you are the chief real estate agent for the N & W? Some of them divide it up in so many different ways, is why I ask that.

A. That is the only Real Estate Agent the Norfolk and Western Railway has.

Q. I believe you said you have been Real Estate Agent for the N & W from 1954 to the present time?

A. Yes, sir.

Q. As such did you negotiate the rights for your company for this Sandy Ridge tunnel from Dumps Creek to Cane Creek?

Mr. Wm. A. Stuart: We object to the Sandy Ridge tunnel, if your Honor please. That is not on the tract with which we are here concerned.

The Court: When they object go right ahead with your answer unless the Court stops you.

A. Yes, I negotiated for a good bit of the property, Mr. Sutherland, through there for the right-of-way.

Q. Did you and the Clinchfield Coal Corporation, or the Pittston Company, agree on the terms and the prices for your rights-of-way where you were going through their land?

A. No, sir, there was no agreement made on that except

it was—they said they would give us a right over their lands for a right-of-way for the railroad.

Mr. Sutherland: That is all. Cross examine.

Mr. Wm. A. Stuart: No questions. You may stand *stand* aside, Mr. Newsom.

It is agreed the foregoing, pages 1 to 349, inclusive, is a correct transcript of the evidence and other proceedings had in this case on October 2, 3 and 4, 1957, before the Honorable Frank W. Smith, Circuit Judge, as taken by Mrs. Ruth M. Lewis, Court Reporter, Bristol, Virginia.

S. H. SUTHERLAND
Of Counsel for Complainants.

WM. A. STUART
Of Counsel for Defendant.

RECEIVED on the 7th day of November, 1957, within 60 of final judgment.

SIGNED on the 7th day of November, 1957.

F. W. SMITH
Judge.

RECEIVED and FILED on the 7 day of Nov. 1957.

HERBERT J. RASNICK, Deputy Clerk.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

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

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

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
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RICHMOND, VIRGINIA