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Record No. 5059

In the Supreme Court of Appeals of Virginia at Richmond

C. A. CLYBORNE, ET AL.

v.

MARY R. McNEIL, ET AL.

FROM THE CIRCUIT COURT OF BUCHANAN 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. 5059

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 13th day of August, 1959.

C. A. CLYBORNE, ET AL., Appellants,

against

MARY R. McNEIL, ET AL., Appellees.

From the Circuit Court of Buchanan County

Upon the petition of C. A. Clyborne and Paragon Jewell Coal Company, Incorporated, an appeal was awarded them by one of the Justices of the Supreme Court of Appeals on the 11th day of August, 1959, from a decree entered by the Circuit Court of Buchanan County on the 6th day of March, 1959, in a certain proceeding then therein depending wherein Mary R. McNeil and others were plaintiffs 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 five hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 11 } THIS DEED OF LEASE, made and entered into this the 1st day of August, 1948, by and between Mary McNeil, widow of J. W. McNeil, deceased, Virgie Clifton and Norman Clifton, her husband, Stella McNeil, single, Macie Salyers and Edd Salyers, her husband, all of Buchanan County, Virginia, hereinafter called "Lessors," parties of the first part, and James H. Franks, W. M. Culbertson, Jr., and C. A. Clyborne, hereinafter called "Lessees," parties of the second part;

WITNESSETH: WHEREAS, the parties hereto have heretofore entered into a certain deed and contract of lease dated the 1st day of August, 1946, whereby the said Lessors did demise and lease to the said Lessees, for the purpose of mining and shipping coal therefrom, all of the coal in, under and upon the real estate hereinafter mentioned;

WHEREAS, under the said lease, the said Lessees have heretofore paid minimum royalties in the sum of Six Thousand Dollars ($6,000.00);

WHEREAS, the parties hereto have agreed that this contract shall entirely supercede the said contract dated August 1, 1946, and that the said contract dated August 1, 1946, is hereby rescinded.

WITNESSETH: That for and in consideration of the premises, the said Lessors do hereby demise and lease unto the said Lessees, their heirs, successors and assigns, for the period or periods hereinafter mentioned, the sole and exclusive right and privilege of mining and removing, by deep mining or strip mining methods, or both, all of the merchantable and minable coal upon the following tracts or parcels of land, which are situated in Buchanan County, in the State of Virginia, and which are more particularly described as follows:

page 12 } All of those tracts or boundaries of land which were owned by J. G. McNeil, deceased, and which lands are now owned by the parties of the first part, as heirs at law of J. G. McNeil, situate on the waters of Dismal River, a tributary of the Levisa Fork of Big Sandy River, and extending from Laurel Fork of Dismal River in an easternly

direction across Sugar Grove Branch, and adjoining the lands of James A. McGuire on the South, the P. J. Brown heirs on the West, the lands of Carrie White, Monie Cole and Cassie Cox on the East, and Dismal River on the North, and containing approximately seven hundred fifty (750) acres.

It is further covenanted and agreed between the parties hereto as follows:

I.

The Lessees agree to pay to the Lessors a tonnage rent or royalty at the rate of fifteen cents (15¢) per ton for each and every ton of coal of two thousand (2000) pounds mined from the leased premises. The amount of tonnage royalty to be so paid for coal mined shall be determined by actual weight.

It is further agreed between the parties hereto that a minimum royalty of Four Thousand Dollars ($4,000.00) per year shall be payable to the Lessors hereunder by the Lessees on the 1st day of August, 1948, and on the 1st day of each succeeding August thereafter during the life of this contract, and that the sum *o* Four Thousand Dollars ($4,000.00) covering the minimum royalty for the year commencing August 1, 1948, has been paid by the Lessees to the Lessors, and receipt of which is hereby acknowledged, and such minimum rentals or royalties shall be payable whether sufficient coal to yield such minimum royalty shall be mined at the rate of fifteen cents (15¢) per ton or not. However, if the coal mined in any one year shall not, at the rate of fifteen cents page 13 } (15¢) per ton, yield the said minimum royalty, and the Lessees shall have paid the said minimum royalty for such year, then the Lessees shall have the right to mine, within a period of six (6) months in the following year, free of royalty, sufficient coal to yield the said minimum royalty paid in excess of the coal mined in such year, and that the Lessees shall have the privilege, within the next twelve (12) months from this date, of mining, free from royalty, a sufficient amount of coal which will, at the rate of fifteen cents (15¢) per ton, yield the sum of Six Thousand Dollars ($6,000.00), being the sum of money heretofore paid as minimum royalties, as hereinbefore shown. However, it is further agreed that in case the market conditions are such that the Lessees are unable to market or sell their coal, the Lessors will grant to the Lessees the privilege of relief from minimum royalty, and exclude the payment of such minimum royalty, but for market conditions only.

II.

The tonnage royalties shall be payable on the 25th day of each month for all coal mined during the preceding calendar month, and the Lessees agree that on the 25th day of each month, they will give to the Lessors or mail to them, at their last known postoffice addresses, a statement showing the amount of coal mined from the leased premises during the preceding calendar month.

III.

The Lessees shall keep books of account, showing the number of tons of coal mined from the leased premises, and said books shall, at all times, during business hours, be open for inspection by the Lessors, their agents or attorneys, for the purpose of comparing and verifying the accounts rendered.

page 14 } IV.

It is further agreed that the Lessees shall have the right to use all of the surface of said land as is now owned in fee simple by the said Lessors for the purpose of mining said coal, the construction of any and all other buildings necessary for the carrying on of said mining operation. There is, however, excepted from this right or privilege granted to the Lessees the following:

1. All the cleared land under fence on the portion of land now used and occupied by Macy Salyers, with the exception that the said Lessees may have the right to construct a tipple on the east end of said tract.

2. All the cleared land running with the lower end of the said tract hereby leased on the portion now used and occupied by Virgie Clifton, with the exception that the said Lessees may have the right to construct a tipple on the west end or portion of said land. It is, however, agreed between the parties hereto that the said Lessees may have a right of way for railroads, or truckroads, or other means of transportation on the lands of the said Macy Salyers and Virgie Clifton.

3. There is also excepted all the land under fence on the home place of the said Mary McNeil, with the exception that the said Lessees may have the right and privilege of using the truckroad that is already constructed and in use over and through said property, which said road is to be improved

and maintained by the said Lessees at their own expense, leading to and from the State Highway. It is agreed between the parties hereto that the said Lessees in making use of said road will indemnify and save harmless the said Mary McNeil, her heirs or assigns, from any damages which she or they may sustain by reason of said road being so used by the said Lessees.

page 15 } V.

It is further agreed between the parties hereto that the said Lessees, their heirs or assigns, will pay all land and property taxes assessed against the property herein covered by this lease, beginning with the year 1948, and to continue during the term of this lease or for such period of time as such lease remains in full force and effect. It is agreed between the parties hereto that the said Lessees, their heirs or assigns, are hereby released from damages for injury, if any, which may result to the surface of said land by reason of the mining and removal of the said coal, with the exception of the three (3) tracts above described, which are (1) the Mary McNeil home tract, (2) the Macy Salyers tract, and (3) the Virgie Clifton tract.

VI.

The said Lessees, their heirs or assigns, shall also pay all taxes that may be assessed against the improvements, fixtures and machinery and upon all of the coal mined during the continuance of this lease from the said leased premises.

VII.

The Lessees shall work and mine the coal in the most effectual, modern, workmanlike and proper manner and in conformity with the laws now existing or hereafter passed by the State of Virginia, or by the United States of America, regulating the working of mines, drifts, gangways, and other necessary and appropriate openings to and in the beds or veins of coal hereby leased, with openings for airways and ventilating passages for keeping the mines in good working order, to the satisfaction of the engineer of the Lessors: but in case the Lessees shall claim that the requirements of the Lessors' engineer in this regard are unreasonable, then and in that event, the disagreement thus arising shall be settled by arbitration, as hereinafter provided.

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VIII.

Whenever reasonable, the Lessees shall drive the regular size of gangways and airways through such portion of said veins or seams of coal as may prove faulty, or may not yield minable and merchantable coal, and shall leave no more coal in the mine opening or workings than in the opinion of the engineer of the Lessors may be necessary and proper for the full security of the mines, and shall leave pillars and supports along the sides of the entries, gangways and elsewhere as the engineer of the Lessors shall consider necessary for such security, and shall mine and recover all of the minable and merchantable coal in said seams or veins of coal which, by the exercise of care and modern mining methods, it is practicable to recover. And any disagreement arising under this clause shall be settled by arbitration, in the manner hereinafter provided for.

IX.

The Lessees shall have the right to rob out and mine the pillars in or along any room or other working place it abandons, which, in the opinion of the engineer or other proper officer or appointee of the Lessors, are not necessary to be left for the proper protection and support of the mines, and the said Lessees shall recover all of the minable and merchantable coal that, by the exercise of skill and modern mining methods, can reasonably be recovered.

X.

The said Lessees shall have the right to use the entries, haulways, or other excavations in said mine for the purpose of hauling through said land the coal leased or purchased from any other person than Lessors, but the said Lessees shall pay to the said Lessors two and one-half (2½¢) cents for each and every ton of coal acquired or purchased from any other persons than Lessors and hauled through

page 17 } any of said entries, gangways, excavations, or haulways through the leased premises, and shall keep a book of accounts showing every ton of coal mined from other lands and hauled through any of the excavations, entried, or haulways on the leased premises, and pay therefor at the rate of two and one-half (2½¢) cents per ton for each ton so hauled, each month at the same time the royalties herein provided to be paid shall be due and payable. However,

the Lessors do hereby grant the Lessees the right and privilege to haul Lessee's own coal purchased, owned, or leased over lands leased by Lessees from Lessors on the truckroads, or roads now on the leased premises free of charge. Provided, however, the said Lessees agree to maintain and upkeep the truckroads, or other roads at their own expense.

XI.

The Lessors, their agents, engineers, or other officers, or some other person on their behalf, with their assistants, shall have the right to enter at all reasonable time the mines and all other works on the said leased premises, whether below or on the surface of the ground, in order to inspect, examine, survey or measure the same, or any part thereof, or for any other lawful purpose, and, for those means, to use freely the means of access to the said mines and works without hindrance or molestation.

XII.

It is hereby expressly understood and agreed that all royalties which at any time may be owing to the said Lessors under this contract, shall constitute and are hereby constituted and declared a first and paramount lien upon the premises embraced in this lease, and upon all steel rails, fixtures, appliances and improvements now or hereafter placed thereon.

XIII.

It is further understood and agreed that if at
page 18 } any time during the continuance of this lease the
Lessees should be prevented from operating the mines on the leased premises on account or by reason of general labor strikes prevailing through the Buchanan County Coal Fields, or by reason of failure on the part of the Railroad Companies, after ten (10) days notice by the Lessees, to furnish, without fault on the part of the Lessees, sufficient transportation, then, and in either of those events, the minimum royalty provided for in this contract shall be abated until such time as the two causes aforesaid shall have been removed, provided, however, that in no event shall anything be construed as meaning to give relief to the Lessees as to any amount, except as to the difference between the coal actually mined and the amount of said minimum royalty, and provided, further, that there shall in no event be any abatement from said minimum royalty for either or both of the causes men-

tioned in this clause for a greater length of time than three (3) months in the aggregate in any one year.

XIV.

It is agreed between the parties hereto that should the operation of the mines on the leased premises be stopped by fire, and it becomes incapacitated for work by reason thereof, or solely from other providential cause, the payment of the minimum royalty hereunder shall be suspended until such time as the necessary repairs or rebuilding can reasonably be done.

XV.

If at any time, during the continuance of this lease, a dispute shall arise between the said Lessors and the said Lessees as to whether or not said mines are being worked in a skillful, suitable and proper manner, as herein provided for, or as to any other question involving the construction and effect of this lease, or any part thereof, the dispute or disputes so arising shall be referred to a board of arbitrators consisting of three competent and expert men, one of whom shall be selected by the Lessees, one by the Lessors and one to be agreed upon by the two thus selected, and should they fail to agree within twenty-four (24) hours upon such an one, then it shall be referred to the Judge of the Circuit Court of Buchanan County, Virginia, who shall select the third as arbitrator, and the decision of said board of arbitrators shall be final.

page 19

XVI.

It is agreed and covenanted by all the parties hereto that this lease shall take effect on the 1st day of August, 1948, and continue for the period of twenty (20) years from the said 1st day of August, 1948, and that the said Lessees, their heirs or assigns, shall have the right to renew this lease upon the same terms and provisions as those stated herein, for a further or additional period of twenty (20) years, and in the event of any such renewal, the minimum royalty for said renewal period shall be Four Thousand Dollars ($4,000.00) per year; provided the said Lessees, their heirs or assigns, shall give to the said Lessors, their heirs or assigns, at least thirty (30) days notice in writing of their intention and desire to renew said lease for said additional period of twenty (20) years, prior to the expiration of said twenty (20) year period.

XVII.

The Lessees shall deliver to the Lessors, their heirs or assigns, or one of them, within ten (10) days after the end of each six (6) months period, a blueprint of a map of the mines by a competent engineer, which shall show all coal mined by the Lessees during the last six (6) months period. Said blueprint shall show all the coal mined from the date of this lease up to the said last six (6) months period and shall also show the property lines of the leased premises.

page 20 } XVIII.

It is understood and agreed between the parties hereto that in mining said coal or making any test holes or drilling any wells upon said premises for the purpose of investigating said land or mining said coal, the Lessees shall not be liable for any damages incurred by any cave-ins or the sinking of wells or springs or any other damage that might be incurred in or by the said operations of the Lessees unless said damages be to the properties excepted as hereinbefore stipulated.

XIX.

It is further understood and agreed between the parties hereto that the said Lessees, their successors or assigns, shall have the right to construct railroads, tramroads, haulroads, or tipples or other necessary structures upon said leased premises for the purpose of mining said coal and are also permitted to use any stone, dirt, water, trees or timber situate upon said premises for the purpose of mining said coal, except on those lands heretofore excepted, and shall make no payment therefor except the minimum royalties on the coal mined, hereinbefore provided for. It is further agreed between the parties hereto that the said Lessees, their heirs or assigns, may also have the same rights and privileges to the use of mining timber and other exceptions as were excepted on those tracts of surface sold and conveyed by the said John McNeil, now deceased, during his lifetime.

XX.

All of the aforesaid rights and privileges purported to be vested in the said Lessees are hereby granted under the terms hereof to the said Lessees, their heirs, successors and assigns, and all of the aforesaid immunities in favor of the said

Lessees are and shall be in favor of the said Lessees, their heirs, successors and assigns.

page 21 } This lease is executed in duplicate, one copy thereof being delivered to the said Mary McNeil, and the other copy thereof being delivered to the said James H. Franks.

(21) The Lessors covenant that they will warrant generally the title to the coal, rights and privileges hereby leased and demised, and that they are free from encumbrances.

Witness the following signatures and seals.

Sign 11/17/52

MACIE SALYERS
EDD SALYERS

MARY R. McNEIL	(Seal)
VIRGIE CLIFTON	(Seal)
NORMAN CLIFTON	(Seal)
STELLA McNEIL	(Seal)
MACIE SALYERS	(Seal)
EDD SALYERS	(Seal)
JAMES H. FRANKS	(Seal)
W. M. CULBERTSON, JR.	(Seal)
C. A. CLYBORNE	(Seal)

* * * * *

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* * * * *

OPINION OF THE COURT—July 3, 1958
F. W. SMITH, JUDGE.

John G. McNeil was formerly the owner of a tract of land situate just above Whitewood, in Buchanan County, Virginia, containing approximately 750 acres. He died in 1936, leaving a will dated March 20, 1936; probated September 8, 1936, and recorded in the Office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Will Book 2, page 20. By this will he divided his land into three parts, devising his home place containing about 30 acres, and including home, outbuildings, orchards and gardens, to his widow, Mary R. McNeil, for life, with remaining to his daughter Stella McNeil; devised to his daughters, Macy Salyers and Virgie Clifton,

jointly "the fields and flats" in front of Whitewood post-office. Macy Salyers and Virgie Clifton later divided the land so devised to them, and each has a home constructed on her tract. After the above devises, John G. McNeil devised the residue of his land to his wife and three daughters as tenants in common.

By deed of lease dated August 1, 1948, Mary McNeil Stella McNeil, Macie Salyers and Virgie Clifton leased to James H. Franks, William Culbertson, Jr. and C. A. Clyborne the coal on the 750 acres. This 750 acres at the time of the execution of the lease consisted of four tracts, the home tract of about 30 acres owned by Mary McNeil for her lifetime with remainder to her daughter, Stella McNeil, one tract owned by Macie Salyers, one tract by Virgie Clifton and the fourth tract owned jointly by Mary McNeil, Stella
page 67 } McNeil, Macie Salyers and Virgie Clifton as tenants in common. These tracts will be hereinafter referred to as the Mary McNeil tract, the Salyers tract, the Clifton tract and the undivided tract.

The lease conveyed to the Lessees, their heirs, successors and assigns, the sole and exclusive right and privilege of mining and removing by deep mining, or strip mining methods, or both, all of the merchantable and minable coal upon the 750 acres.

ARTICLE IV of the lease provides as follows:

"It is further agreed that the Lessees shall have the right to use all of the surface of said land as is now owned in fee simple by the said Lessors for the purpose of mining said coal, the construction of any and all other buildings necessary for the carrying on of said mining operation. There is, however, excepted from this right or privilege granted to the Lessees the following:

1. All the cleared land under fence on the portion of land now used and occupied by Macy Salyers, with the exception that the said Lessees may have the right to construct a tipple on the east end of said tract.

2. All the cleared land running with the lower end of the said tract hereby leased on the portion now used and occupied by Virgie Clifton, with the exception that the said Lessees may have the right to construct a tipple on the west end or portion of said land. It is, however, agreed between the parties hereto that the said Lessees may have a right of way

for railroads, or truckroads, or other means of transportation on the lands of the said Macy Salyers and Virgie Clifton.

3. There is also excepted all the land under fence on the home place of the said Mary McNeil, with the exception that the said Lessees may have the right and privilege of using the truckroad that is already constructed and in page 68 } use over and through said property, which said road is to be improved and maintained by the said Lessees at their own expense, leading to and from the State Highway. It is agreed between the parties hereto that the said Lessees in making use of said road will indemnify and save harmless the said Mary McNeil, her heirs or assigns, from any damages which she or they may sustain by reason of said road being so used by the said Lessees."

ARTICLE X provides:

"The said Lessees shall have the right to use the entries, haulways, or other excavations in said mine for the purpose of hauling through said land the coal leased or purchased from any other person than Lessors, but the said Lessees shall pay to the said Lessors two and one-half (2½) cents for each and every ton of coal acquired or purchased from any other persons than Lessors and hauled through any of said entries, gangways, excavations, or haulways through the leased premises, and shall keep a book of accounts showing every ton of coal mined from other lands and hauled through any of the excavations, entries, or haulways on the leased premises, and pay therefor at the rate of two and one-half (2½) cents per ton for each ton so hauled, each month at the same time the royalties herein provided to be paid shall be due and payable. However, the Lessors do hereby grant the Lessees the right and privilege to haul Lessee's own coal purchased, owned, or leased over lands leased by Lessees from Lessors on the truckroads, or roads now on the leased premises free of charge. Provided however, the said Lessees agree to maintain and upkeep the truckroads, or other roads at their own expense."

ARTICLE XIX provides:

"It is further understood and agreed between the parties hereto that the said Lessees, their successors or assigns, shall have the right to construct railroads, tramroads, haulroads, or tipples or other necessary structures upon said leased premises for the purpose of mining said coal—"

page 69 } ARTICLE XX is as follows:

"All of the aforesaid rights and privileges purported to be vested in the said Lessees are hereby granted under the terms hereof to the said Lessees, their heirs, successors and assigns, and all of the aforesaid immunities in favor of the said Lessees are and shall be in favor of the said Lessees, their heirs, successors and assigns."

By deed of assignment, dated January 12, 1951, James H. Franks and William Culbertson, Jr. assigned their interest in the lease to C. A. Clyborne, and thereafter C. A. Clyborne assigned the lease to Paragon Jewell Coal Company, Inc.

Paragon Jewell Coal Company, Inc., after receiving said assignment of the lease constructed a tipple and coal processing plant upon the east end of the Macie Salyers tract and has proceeded to mine the coal from the leased premises and has leased and purchased from persons other than the lessors coal from other tracts of land and have hauled the same over all of the tracts except the McNeil tract, and have contracted with other persons who had coal to sell to bring the same to its tipple which was paid for upon delivery at said tipple.

It also further appears that the defendant, Paragon Jewell Coal Company, Inc. has constructed certain new truck roads on the surface of all the tracts except the Mary McNeil tract which new roads were not on these tracts at the time the lease was executed and have hauled over these new roads the coal mined from the leased premises and also coal which was leased and purchased from persons other than the lessors, and have contracted with other persons who had coal to sell to bring the same to its tipple which was paid for upon delivery at said tipple.

It is a well established rule that in construing the lease the intention of the parties must be ascertained by reference to the entire instrument and the language used in any part thereof must not be construed as standing alone, page 70 } but must be interpreted in the light of the instrument as a whole. *Stonegap Colliery Company* v. *Kelly,* 15 Va. 390, 79 S. E. 341.

There appears to be no question presented for decision as to the Mary McNeil tract. The question has been raised with respect to the other three tracts as to whether or not the Paragon Jewell Coal Company, Inc., hereinafter referred to as Paragon Jewell, stands in the position of successor and assign of the original lessees. The easement rights granted in

the lease are appurtenant to the coal leased thereunder. No question is raised as to the right of the lessees to make the assignment to Paragon Jewell. The easement rights, therefore, acquired by the lessees and which were appurtenant to the coal under the lease went with the assignment thereof to Paragon Jewell in accordance with the provision of Article XIX, that all the rights and privileges vested in the lessees should go to their heirs, successors and assigns. Such rights and privileges as were granted to the lessees therefore, by reason of the assignment, passed to Paragon Jewell.

The next question raised is as to the right of Paragon Jewell to construct and use new truck roads or other new roads on all tracts, except the Mary McNeil tract, which were not thereon at the time of the execution of the lease. Under Article IV the lessees were expressly granted the right to use all of the surface of the land covered by the lease for the purpose of mining the coal thereon, subject to the exceptions contained in paragraph 1, 2 and 3. Paragraph 2 of these exceptions specifically grants to the lessees a right of way for railroads or truck roads, or other means of transportation on the lands of Macy Salyers and Virgie Clifton. Article XIX also specifically grants to the lessees, their sucessors or assigns, "the right to construct railroads, tramroads, haulroads or tipples or other necessary structures upon said leased premises for the purpose of mining said said coal. It is apparent that the right of way for railroads, truck page 71 } roads or other means of transportation over the Salyers and Clifton tracts granted under Paragraph 2 of Article IV was for the purpose of mining and removing the coal from the leased premises as was expressly stated with reference to the similar rights granted under Article XIX. It is clear therefore that Paragon Jewell, as assignee of the lessees, has the right to construct new truck roads or other new roads upon the three tracts for the purpose of mining the coal from the demised premises.

Another question raised is whether or not the right granted the lessees in Article X to use the entries, haulways or other excavations for hauling through said premises coal leased or purchased from any other person than lessor for which the lessees should pay 2 1/2¢ per ton should apply to roads or haulways on the surface. The lease grants to the lessees their successors or assigns the exclusive right and privilege of removing by deep mining or strip mining methods, or both, all the merchantable coal on the land covered by the lease. It is common knowledge in coal mining areas that mining coal by the strip mining method means that method by which the surface or strata overlying the coal is removed in order that

the coal may be taken out without any underground operation and the haulways are necessarily upon the surface. The use of the entries, haulways or exacavations referred to would, therefore, include not only those used in mining the leased coal by the deep mining method but also those used in mining by the strip mining method, and the roads or haulways contemplated by the parties were not limited to those underground but also included the use of such roads or haulways upon the surface as would be reasonably necessary to construct and use in mining the leased coal.

It is also apparent, from a consideration of the lease as a whole and giving effect to all parts thereof, that it was the intention of the parties that the 2 1/2¢ per ton to be paid for

page 72 } "coal acquired or purchased from any other persons than lessors and hauled through any of said entries, gangways, excavations, or haulways through the lease premises," was not to be paid for the privilege of hauling lessees' coal, so acquired or purchased, over the truck roads or roads which were already on the leased premises. In other words, the lease provides that the lessees' own coal purchased, owned or leased should be hauled "free of charge" over the truck roads or other roads existing on the leased premises at the time of the execution of the lease. The use of the words "entries, gangways, excavations or haulways" as used in Article X of the lease for the use of which the lessees are required thereby to pay the 2 1/2¢ per ton are such entries, gangways, excavations or haulways as the lessees, their successors or assigns had the right to construct and use on the leased premises and did not apply to the use of truckroads or other roads already on the lease premises.

It is contended by the petitioners that the rights granted to the lessees under Article X are applicable only to the undivided tract and do not apply to the use of the Salyers and Clifton tracts.

The petitioners further contend that the lease granted to the lessees no right to construct or use any roads or haulways on the Salyers or Clifton tracts which were not already on these tracts at the time the lease was executed for hauling any coal except the coal acquired by lessees from the lessors under the lease.

After excepting the Salyers and Clifton tracts from the general right granted the lessees to use the surface of the lands owned in fee simple by the lessors for the purpose of mining the coal under lease as provided in Article IV of the lease the lessees are specifically granted "a right of way for railroads, or truckroads, or other means of transportation on

the lands of said Macy Salyers and Virgie Clifton." It is conceded that the right of way here granted is only for the purpose of mining the coal on the demised premises page 73 } and does not apply to coal from any other lands except insofar as it may be looked to in determining the rights conveyed under Article X. While not conceded, it is apparent that the same construction is applicable to the rights and easements granted by Article XIX. It is clear that the lessees, their successors or assigns were granted the right of way to construct and to use such railroads, truckroads, haulroads or other means of transportation over the Salyers and Clifton tracts as were necessary for the mining and removal of the coal from the entire leased premises including all four of the tracts covered by the lease. This, of course, included the right to construct and use new truck roads or other new roads over the Salyers and Clifton tracts for such purpose when and where necessary.

If the lessees, their successors and assigns had not been granted any right to construct and use new truckroads or other roads over the Salyers and Clifton tracts for the purpose of mining and removing any coal, then the argument, that the rights conferred by Article X, do not apply to the Salyers and Clifton tracts would have merit because the right to use the haulways referred to in Article X would mean such haulways as the lessees, their successors or assigns had a right to use in mining the leased coal, but since the leases were under Article IV granted the right to construct and use haulways or other means of transportation over these two tracts for mining and removing the coal conveyed by the lease, the reference to the use of haulways will be taken to mean the haulways which the lease gave the lessees, their successors and assigns the right to construct and use over the Salyers and Clifton tracts as well as the undivided tract.

It therefore follows that the defendant, Paragon Jewell as a successor and assign of the lessees has such rights of way as were granted the lessees under the lease, and thereby had the right to construct and use new truckroads or other new roads, which were necessary for mining and re- page 74 } moving the coal mined from the demised premises, not only over the undivided tract but over the Salyers and Clifton tracts also.

Paragon Jewell has the further right to use such new truckroads or other new roads so constructed and used over the surface of the Salyers and Clifton tracts as well as the undivided tract for hauling "the coal leased or purchased

from any other person than Lessors" for which it is required to pay 2 1/2¢ per ton for such hauling of all coal leased or purchased by it from any persons other than the lessors.

Paragon Jewell as such assignee has the further right, conferred under Article X, to haul its own coal purchased, owned, or leased over the leased premises, including the Salyers and Clifton tracts as well as the other tracts, on the truckroads or other roads, which were on any of said tracts at the time of the execution of the lease, free of charge.

Paragon Jewell, therefore, is not liable for any reasonable use of truckroads or other roads, which were on any of the tracts covered by the lease at the time the lease was executed, for hauling any coal mined from the leased premises nor for the use of such roads for hauling its own coal, purchased or leased from parties other than the lessors, if it maintains and keeps in reasonably good condition such roads so used, and it is not liable for construction and use of any new roads including new truckroads reasonably necessary for mining and removing the coal mined from the leased premises; but it is liable at the rate of 2 1/2¢ per ton, if not already paid, for all coal acquired or purchased from persons other than the lessors and hauled over any such new roads including new truckroads so constructed or used over any of the tracts contained in the lease.

New roads, including new truckroads, as herein used, shall be taken to mean roads which were not on any of the four tracts included in the lease at the time it was executed.

page 75 } If any roads have been constructed or used by Paragon Jewell on any part of the leased premises which were not reasonably necessary for the mining or removal of the coal from the leased premises Paragon Jewell had no right to do so and is liable to such of the petitioners as may have been damaged thereby and it will be restrained by this Court from any further construction or use of such roads if such be the case.

The Court is further of the opinion that a special commissioner of this Court should be appointed to ascertain and report in this cause the following:

(1) Whether Paragon Jewell or anyone for it has constructed or used any roads on any of the four tracts of land included in the leased boundary which were not reasonably necessary for the successful mining and removal of the coal on the leased premises.

(2) If any such unnecessary roads have been constructed or used, then said commissioner shall determine the location

of same with respect to the four tracts involved in this controversy and the extent of the use thereof and other facts necessary for the determination of the proper amount of damages for such unnecessary construction or use, or both, the amount of damages recoverable therefor and by whom recoverable in this proceeding.

(3) The number of tons of coal acquired or purchased by Paragon Jewell from persons other than the lessors and hauled over new truckroads or other new roads which were not on the leased premises at the time of the execution of the lease but which were reasonably necessary to construct and use in order to successfully mine and remove the coal from the leased premises.

Paragon Jewell claims the right to deduct 2 1/2¢ per ton from the weight of the coal as loaded on trucks and weighed at its tipple for what is called tare weights, consisting of slate, ash and other impurities in the coal. The lease provides for the payment of royalty on the coal mined from the leased premises and royalty for hauling coal not leased nor *puchased* from lessors, but is silent as to any such
page 76 } deduction or any other deduction for tare weight.

The evidence does not show what amount of slate, ash or other impurities actually existed in the lessors coal mined by Paragon Jewell for which it agreed to pay 15 cents per ton nor in the other coal not purchased or leased from lessors and hauled over the leased premises for which it agreed to pay 2 1/2¢ per ton. There is no evidence of tests being made of this particular coal to show the amount or percentage of such impurities. The evidence of the amount of impurities in other coal mined in the general neighborhood is not enough to overcome the burden placed upon Paragon Jewell who weighed and accepted the coal at its tipple to prove the amount of impurities removed from the coal in question. In view of the evidence for the petitioners that the coal in question was clean coal and the fact that the evidence produced by Paragon Jewell that certain of the impurities in the coal were removed at its processing plant without showing the amount or percentage of such impurities so removed the evidence falls short of that which is necessary to sustain Paragon Jewell's contention.

It is not necessary that the Court rule upon the question of whether under different evidence and circumstances it would be proper to deduct so called "tare weight."

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* * * *

DECREE.

This cause came on this the 6th day of March, 1959, to be again heard on the proceedings heretofore had herein and the papers heretofore filed herein; upon the answer of Defendants to the Amended Petition of the Complainants filed in this cause on August 8, 1955; upon depositions taken on behalf of the Complainants and filed in this cause on March 27, 1956, and on December 15, 1956; upon depositions taken on behalf of the Defendants and filed in this cause on November 2, 1956, and on December 15, 1956, respectively; upon the written briefs filed on behalf of the Complainants and on behalf of the Defendants, respectively; and upon oral argument by Counsel.

Upon consideration whereof the Court is of the opinion and doth adjudge, order and decree as follows:

(1) That the defendant, Paragon Jewell Coal Company, Incorporated, is assignee of the lessees in the deed of lease of August 1, 1948, from Mary McNeil, Stella McNeil, Macie Salyers and Virgie Clifton to James H. Franks, William Culbertson, Jr. and C. A. Clyborne, and as such assignee is the successor to all the rights and privileges granted to said lessees by said lease.

(2) That the words "demised premises" as used in said lease and as hereinafter used in this decree, mean page 78 } all those tracts of land which were owned by John G. McNeil at the time of his death, containing approximately 750 acres, as described in the granting clause of said lease, on which the lessees were granted the right and privilege of mining and removing the merchantable and minable coal.

(3) That the right of way granted lessees for railroads or truck roads or other means of transportation on the lands of Macie Salyers and Virgie Clifton by the language used in paragraph 2 of Article IV of said lease was granted for the purpose of mining and removing the coal on the leased premises, and was not intended to apply to coal mined and removed from any other lands, but this limitation upon the use of such railroads or truck roads shall not be construed as a limitation upon the use of such roads for the mining and removal of lessees' own coal purchased or leased from parties other than the lessors as conferred upon the lessees by Article X of said lease as hereinafter set forth in this decree.

(4) That the Paragon Jewell Coal Company, Incorporated, under Article IV of said lease was entitled to construct, maintain and use, free of charge, such new truck roads or other

roads on the Virgie Clifton land, on the Macie Salyers lands, and on the lands owned jointly by the heirs at law of John G. McNeil, deceased, as were reasonably necessary for the mining and removing of the coal from the demised premises.

(5) That the Paragon Jewell Coal Company, Incorporated, has the right under Article X of said lease to use said new truck roads or other new roads so constructed and used over the surface of the Virgie Clifton land, the Macie Salyers land and the lands owned jointly by the heirs at law of John G. McNeil, deceased, for the purpose of hauling any coal leased or purchased by it from parties other than the

page 79 } lessors, for which use the said Paragon Jewell Coal Company, Incorporated, shall pay to the lessors two and a half (2½) cents per ton. The words "new roads" as used in this decree shall mean roads which were not on any of the four tracts included in the lease at the time it was executed.

(6) That Paragon Jewell Coal Company, Incorporated, also has the right to use the truck roads or other roads which were already on said tracts of land at the time the lease was executed, free of charge, for the hauling of its own coal purchased or leased from parties other than the lessors, if it maintains and keeps said roads in reasonably good condition.

(7) That the language used in Article X of the lease with reference to the use of entries, excavations and haulways was intended to mean and by said terms therein used, includes entries, excavations and haulways on the surface of the lands therein mentioned as well as the entries, excavations and haulways underground, or below the surface of said lands.

(8) That the use and construction of haulways and roads shall mean the reasonable use and construction thereof for the purposes mentioned and granted in said lease.

(9) That the payment of the 2½¢ per ton, as herein stated, shall apply to the use of the 750 acres or any part thereof and shall be payable by the said Paragon Jewell Coal Company, Incorporated, to the lessors jointly, and shall be so payable so far as the lessees or their assigns are concerned even if less than all of the tracts are used, the court being of the opinion that the obligation so incurred was a joint one insofar as the lessees were concerned.

(10) That it is agreed by Counsel representing the respective parties that the only roads on the demised premises at the time of the execution of the lease, insofar as

page 80 } as the issues in this case are concerned, were the roads shown in red on the map of C. B. Belcher, dated February 5, 1955, and filed as a part of his depositions in this cause.

(11) That the testimony is insufficient to establish the weight of the refuse, if any contained in the coal heretofore mined on the leased premises; and that the complainants are entitled to recover the amounts heretofore deducted by the defendants from the royalty payments on this account. But this shall not preclude the defendants from making deductions on account of such refuse as they shall hereafter be able to establish does not constitute coal within the ordinary and usual meaning of coal when loaded for shipment to the consumer.

(12) That all of the payments heretofore provided for shall bear interest from the end of the calendar year for which they became due and payable.

(13) The Court being further of the opinion that a Special Commissioner should be appointed for the purposes set forth in the written Opinion of the Court filed in this cause, it is ordered that such appointment shall be made at some later date herein.

The Complainants, by Counsel, objected and excepted to the rulings of the Court for the reasons set out in writing and filed with the papers in this cause.

The Defendants, by Counsel, also objected and excepted to the rulings of the Court for the reasons set out in writing and filed with the papers in this cause.

The Defendants indicating an intention to apply to the Supreme Court of Appeals for an appeal herein, on their motion, execution of this decree is hereby suspended for ninety (90) days from the date hereof, and thereafter until

page 81 } their petition is acted upon by the Supreme Court of Appeals if such petition is actually filed within said ninety (90) days, upon the defendants or someone for them entering into bond in the Clerk's Office of this Court in the amount of Five Hundred Dollars, with surety approved by said Clerk, conditioned according to law, within fifteen (15) days from the date of the entry of this decree.

Enter this Decree this 6th day of March, 1959.

F. W. SMITH, Judge.

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Received and filed 6th day of March 1959.

J. L. LOONEY, Clerk.

OBJECTIONS AND EXCEPTIONS OF DEFENDANTS TO THE RULINGS OF THE COURT.

The defendants, by counsel, object and except to the following rulings of the Court in the decree entered in this cause on the 6th day of March, 1959:

1. To the holding in paragraph numbered (3) of said decree that the easement of right of way granted lessees in paragraph 2 of Article IV of the lease is restricted to use in connection with coal mined on the demised premises only and cannot be used for coal mined on other lands without payment of the wheelage charge, upon the ground that the lease provides no such restriction and the lease, correctly construed, permits such use free of charge for coal leased or purchased by the lessees from parties other than the lessors;

2. To the holding in paragraph numbered (4) of said decree that the use of the new truckroads and other roads there mentioned is restricted to use in connection with coal
page 83 } mined on the demised premises, upon the same ground stated in paragraph numbered 1. above;

3. To the holding in paragraph numbered (5) of said decree, that the lessees are to pay the lessors a wheelage charge of 2½¢ per ton for the use of roads on the surface of the leased premises, constructed after the lease was executed, for coal leased or purchased by the lessees from others than the lessors, upon the ground that the lease, correctly construed, provides no such charge but permits the lessees to use such new truck roads free of charge for coal leased or purchased from others;

4. To the holding of paragraph numbered (7) in said decree construing the terms "entries, excavations and haulways" as referring to roads upon the surface as well as to the underground passages used in coal mining, upon the ground that said terms apply only to underground passages used in coal mining and do not apply to surface roads;

5. To the apparent holding in paragraph numbered (10) of said decree that the road used by the lessees from the State Highway to the tipple is subject to a 2½¢ wheelage charge for such use, upon the ground that the lease, correctly construed, grants lessees the use of said road free of charge;

6. To the holding in paragraph (11) of said decree that the testimony is insufficient to establish the weight of the refuse in the coal which the lessees claimed the right to de-

duct, in determining the amount of the tonnage
page 84 } royalties payable to the lessors, upon the ground that the testimony sufficiently established that the lessees were entitled to deduct 2½% from the weight of the coal on account of slate and other foreign matter removed therefrom in and during the cleaning process;

7. To the reference to a Special Commission in paragraph numbered (13) of said decree of the issue whether the lessees constructed or used any roads not reasonably necessary for use in mining and removing the coal on the demised premises, and the damages therefor if any, upon the ground that no such issue arises upon the record and upon the further ground that the lessees had the right to use the roads not only in mining and removing the coal upon the demised premises but also in hauling coal leased or purchased from others;

8. To the reference to a Special Commissioner, in paragraph numbered (13) of said decree, for a report of the coal tonnage leased or purchased from others by the lessees and hauled over new roads on the leased premises, upon the ground that the lessees had the right under the lease to haul such coal over such new roads on the surface without payment of a wheelage charge.

WM. A. STUART
CARL C. GILLESPIE
Counsel for Defendants.

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Received and filed 6th day of April 1959.

J. L. LOONEY, Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The defendants, C. A. Clyborne and Paragon Jewel Coal Company, Incorporated, hereby give notice of appeal from the decree entered in this cause on the 6th day of March, 1959, and set forth the following assignments of error:

The Court erred:

1. In decreeing that the grant of rights of way for railroads, or truckroads, or other means of transportation to the de-

fendants as lessees in Paragraph 2 of Article IV of the lease between the complainants as lessors and the defendant, C. A. Clyborne as lessee, dated August 1, 1948, restricted the free use of such rights of way to coal mined from the demised premises, and that such rights of way could not be used for coal mined from other lands without the payment of a wheelage charge of 2½¢ per ton.

2. In decreeing that the defendants in exercising their rights granted by the said lease for surface haulage of coal upon the leased premises without payment of wheelage, were restricted to coal mined upon the leased premises, except in the case of haulage over roads which were upon said lands before said lease was executed.

page 90 } 3. In decreeing that the defendants as lessees are required to pay to the complainants as lessors a wheelage charge of 2½¢ per ton for the use of any roads upon the surface of the leased *premised* which were constructed after the lease was executed, for the haulage of coal leased or purchased by the defendants from others than the complainants.

4. In holding that the haulage of coal by the defendants over the road leading from the State Highway to the defendants' tipple is subject to the 2½¢ wheelage charge for such use of said road, except as to coal mined from the leased premises.

5. In holding that the terms "entries, excavations and haulways" used in said lease referred to roads upon the surface of the leased premises, as well as to the underground passages used in coal mining.

6. In holding that the testimony is insufficient to establish the weight of the refuse in the coal for which the lessees claim the right to make deductions in determining the amount of the tonnage royalties payable to the complainants.

7. In ordering a reference to a Special Commissioner upon the issue of whether the defendants had constructed or used any roads upon the demised premises which were not reasonably necessary for use in mining and removing the coal therefrom, and to determine the damages therefor, if any.

8. In ordering a reference to a Special Commissioner to determine the coal tonnage leased or purchased from others by the defendants and hauled over new roads upon the leased premises.

C. A. CLYBORNE AND PARAGON JEWEL COAL COMPANY, INCORPORATED
By Counsel.

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* * * * *

Received and filed 16th day of April 1959.

LOIS McCLANNHAN, D. Clerk.

ASSIGNMENTS OF CROSS-ERROR.

The Complainants in the above styled chancery suit, they being Mary R. McNeil, Virgie Clifton, Norman Clifton, Stella McNeil, Macie Salyers, and Edd Salyers, hereby make the following assignments of cross-error, it being contended by Complainants that the Court erred in his Decree dated March 6, 1959, as follows:

(1) In holding in Paragraph Two (2) of said Decree that all the coal on the tracts of land owned by John G. McNeil at the time of his death was included in the lease to Culbertson et als., when the holding should have been that the coal was not leased on the tracts owned individually by Virgie Clifton, Macie Salyers and by Mary McNeil and Stella McNeil.

(2) In holding in Paragraph Three (3) of said Decree that the limitation upon the use of railroads or truckroads on the lands of Macie Salyers and Virgie Clifton shall not be construed as a limitation upon the use of such roads for the mining and removal of lessees' own coal purchased or leased from parties other than the lessors as conferred upon the lessees by Article X of said lease.

(3) In holding in Paragraph Five (5) of said Decree that Paragon Jewell had the right to haul and transport
page 93 } coal mined from lands other than the demised premises over new roads constructed by it on the lands of Virgie Clifton, Macie Salyers, and on the lands owned jointly by the Heirs at law of John G. McNeil, deceased.

(4) In holding that for the right to so haul and transport coal mined from lands other than the demised premises over new roads constructed by defendants, or either of them, on lands of Virgie Clifton, Macie Salyers and on lands owned jointly by the heirs at law of John G. McNeil, deceased, defendants were only liable for 2½¢ per ton, when the Court should have held that defendants were liable for a reasonable

amount per ton, which was at least the sum of 5¢ per ton.

(5) In holding in Paragraph Seven (7) of said Decree that the language used in Article X of the lease with reference to the use of entries, excavations and haulways was intended to mean or include entries, excavations and haulways on the surface of the land as well as in the mines, the contention of the Complainants being that for the use of the entries, excavations and haulways in the mines for the purpose of hauling coal from lands other than the demised premises the Complainants are entitled to 2½¢ per ton, while Complainants are entitled to a reasonable amount for the transportation of coal over the new roads, entries, excavations and haulways on the surface land, which, under the evidence, should be at least 5¢ per ton.

(6) In holding in Paragraph Nine (9) of said Decree that the payment of 2½¢ per ton shall be paid to the lessors jointly, the contention of the Complainants being that for all coal, other than the demised coal, which is transported over new roads on the surface of the Macie Salyers page 94 } tract, she should be paid a reasonable amount; that for all coal, other than the demised coal, which is transported over new roads on the surface of the Virgie Clifton land, she should be paid a reasonable amount; and that for all coal, other than the demised coal, hauled over new roads on the surface land owned jointly by the Complainants, they should be paid jointly therefor.

This April 16, 1959.

MARY R. McNEIL,
VIRGIE CLIFTON,
NORMAN CLIFTON,
STELLA McNEIL,
MACIE SALYERS,
EDD SALYERS.
By Counsel.

POBST & COLEMAN, p. q.
Grundy, Virginia.

• • • • •

1C—page 2 } H. A. COMPTON,

the first witness, called for and on behalf of the Complainants, being first duly sworn, deposes and says:

H. A. Compton.

DIRECT EXAMINATION.

Mr. Pobst:

* * * * *

1C—page 5 }

* * * * *

Q. I here hand you seven pictures, approximately 4 x 5, or prints of pictures and will ask you to examine them and see if you took those pictures?

A. Yes, I made these exposures.

Q. I here hand you a picture, which is marked on the back thereof in pencil "5," and will ask you to state what that picture represents, and whether you remember about where it was taken from?

A. Yes, it was over there close to the railroad, between the railroad and the river and it is looking down stream, or rather down that way kinder.

Q. When you refer to the river, what river do you refer to?

A. Dismal.

Q. And the railroad, what railroad is that?

A. Norfolk and Western.

Q. Where does that railroad run to going up Dismal?

A. Jewell Valley.

Q. And that is some miles above this land, is that right?

A. Yes.

Q. Then where does that railroad run to down the river?

A. Well, it goes right on to Devon, that division of the railroad does.

1C—page 6 } Q. Is that the Buchanan division of the Norfolk & Western Railroad that runs through Buchanan County down by Grundy?

A. Yes.

Q. Now, as you face down Dismal, and going from right to left of the three things, which I will mention, the state highway going down Dismal, then Dismal creek, and then the railroad that you have spoken of, as you face down, which is on the right?

A. The county or state highway is on the right.

Q. And then which is next to it?

A. The river.

H. A. Compton.

Q. And then on the left is what?

A. The railroad.

Q. You say this picture was taken near the railroad, and looking down?

A. Yes, looking down.

Q. Is that below or above the Norman Clifton house?

A. Below.

Q. Is the Clifton house below or above the Salyers house?

A. It is below, it is on the same side of the hill but it is down the river a little bit.

Q. And you say you have known this land for a good many years?

A. Ever since I can remember.

Q. Please state whether this picture shows the land as it has been for a number of years or not.

A. Well, it's the same thing, only the railroad has been built through there and these roads.

1C—page 7 } Q. I mean that view?

A. Oh, yes, same thing.

Q. I will ask you to file this print as Compton "Exhibit No. 5."

A. I here file same as requested.

Q. I will ask you these—first, Mr. Compton, this print is called No. 5, and the others which I will ask you to file are from 6 to 11, both included, why are those numbered that way?

A. Well, these packages of films, they come a dozen to the pack, and they are numbered and they have a tab that corresponds with the negative, it has a number on it, and I tear that off and keep it so that proper identification can be made.

Q. The negative is numbered by the *manufactor?*

A. Yes.

Q. And these correspond with the number of the negatives you took?

A. Yes, I had used four up and had to begin on 5 and that is the reason they start with number 5.

Q. I next hand you another print, which is marked on the back thereof in pencil "6," I will ask you if you made that exposure?

A. Yes.

Q. Can you say about where that was taken from?

A. Well, that was made in the opposite direction, or almost, it was looking up the railroad or rather little to the right, and looking up stream in a general way.

H. A. Compton.

1C—page 8 } Q. Do you know where a bridge crosses the Dismal river, leading from the highway across Dismal River and across Norfolk & Western Railroad up to the tipple where you have stated, do you know where that bridge is?

A. Yes.

Q. The place where the road crosses the railroad?

A. Yes.

Q. Were you standing above or below it?

A. Below it.

Q. I will ask you to file that photograph, marking it Exhibit No. 6.

A. I here file same as requested.

Q. I here hand you another print, marked on the back in pencil "7," and will ask you where that picture was taken from, and what it shows, was it taken above or below the place you were in the last picture introduced?

A. It was taken a little above the last one.

Q. What does it show?

A. It shows the road, as it comes off the mountain, and it shows the other one that goes around to the right, you can't see the road much for the view is blocked, but you can see the grade, that goes around to Norman Clifton's.

Q. The road where you see two automobiles across the bridge, does that turn to the left or right?

A. The one the cars on turns to the left.

Q. I will ask you to file that print with your deposition, marking it as Exhibit No. 7?

A. All right.

1C—page 9 } Q. I now hand you another photograph, which in pencil is marked "8," and I will ask you about where that was taken from, and which way you were looking?

A. That is a view that shows the intersection of these two roads, and it is about straight opposite Norman's house.

Q. I see a little to the right of the center of this picture and towards the top thereof, above the cut, the top of what looks to be a house in white, where is Norman Clifton's house from that?

A. Well, that seems to be his house. I think it is, you can't see it all. I had to point up the hill, it was so far.

Q. I will ask you to file that with your deposition, marking it as Exhibit No. 8.

A. I will.

Q. I here hand you another photograph, print of which

H. A. Compton.

is marked in pencil "9," and will ask you where that was taken from, was it taken from below or above or where from the last taking?

A. I was standing above where I was in the last one, and it was another view looking down the river, the sun was shining in the lense of the camera and make it look a little bit foggy.

Q. I will ask you to file that photograph as Exhibit No. 9 with your deposition.

A. I will file same as requested.

Q. I now hand you another photographic print, which, on the back thereof, is marked in pencil "10," and will ask you whether that was taken from above or below the point where you took the last one.

1C—page 10 } A. Well, I must have been standing pretty well at the same place but I had the camera ranged the other way, and it shows part of the tipple up there up the river.

Q. Which way did you have the camera pointed, up or down the river?

A. Well, in this one, I was looking up the river.

Q. This structure that you see at the upper extreme left-hand side of the picture, what is that?

A. Part of the tipple.

Q. I will ask you to file that picture as a part of your evidence, marking same Exhibit No. 10.

A. All right.

Q. I here show you another photographic print, which in pencil is marked on the back thereof "11" and will ask you whether that was taken above or below the point where you took the last picture?

A. This was made from above, it was closer up to the tipple, it shows same thing only closer to it.

Q. Is it looking up or down the river?

A. Up the river.

Q. And what is that main building you can see plainly?

A. That is the coal tipple.

Q. I will ask you to file that as a part of your deposition, marking the same Exhibit No. 11.

A. I here file same as requested.

Q. Now, each one of those you file them as requested, do you?

A. Yes.

1C—page 11 }

* * * * *

C. A. CLYBORNE,
the next witness, being first duly sworn, deposes and says:

DIRECT EXAMINATION.

Mr. Pobst:

. . . . . .

1C—page 12 }

. . . . .

Q. What relation do you have to Paragon Jewell Coal Company, Incorporated?
A. President.
Q. Are you also a member of the Board of Directors?
A. Yes.
Q. And general manager?
A. Yes.
Q. And own the principal part of the stock or all of it?
A. Principal part of it.
Q. More than a majority?
A. Yes.
Q. You have heard H. A. Compton testify as to a coal tipple erected some four or five years ago, located on Dismal River close to Macie and Edd Salyers' home?
A. Yes.
Q. And he testified as to a tipple built there four or five years ago, whose tipple is that?
A. Paragon Jewell Coal Company, Inc.
Q. That is the same tipple shown in these photographs, is it?
A. Yes.
Q. Can you tell me when this tipple was completed and began to operate?
A. October, 1951.
Q. 1951?
A. Yes.
Q. The lease filed as an exhibit with the bill
1C—page 13 } is dated August 1, 1948, the tipple was not completed then and began to ship coal for something over three years, is that right?
A. That is right, three years.
Q. As I am informed, you did not begin to construct this tipple for oh maybe a year or two after the lease, is that right?

C. A. Clyborne.

A. We began erection as near, as I recall, in January or February, 1951.

Q. And it took you some nine or ten months to erect it?

A. Approximately, I can check that if that is essential.

Q. And you began to actually ship coal over it in October, 1951?

A. October 22, 1951, as near as I recall.

Q. And since then, your company has constantly shipped coal over this tipple, is that right?

A. We run steadily approximately 48 months.

Q. And did you run most of that time five days a week?

A. The majority time 5 days, three or four months six days.

Q. And at very few times that you wouldn't run five days each week?

A. We run always five days a week, with the exception of when car supply short.

Q. This is a very expensive tipple and well equipped?

A. Yes.

Q. I don't desire to pry into your business that has no particular bearing, but as I am informed, the tipple will cost a quarter million dollars or more, is that approximately correct?

A. I didn't bring the figures with me. Clyborne, Inc. and Paragon Jewell Coal Company had approximately $561,000.00 on the roads, the tipple, side-track, excavations for the sidetrack, I think the road account run approximately $140,000.00, we have these small mines that bring coal from other tipples.

1C—page 14

Q. You don't mean that that much was spent on the Salyers and Clifton lands, do you?

A. Spent on the roads, I would have to break that down by checking the figures thoroughly, if that is important I can get it.

Q. You had some roads which you constructed other than those on the Clifton and Salyers land, is that right?

A. That is right.

Q. And would those other roads be approximately half or one-third or two-thirds of this cost?

A. I couldn't tell you.

Q. This road building on the John G. McNeil estate generally would run into many thousands dollars?

A. Oh, yes.

Q. That is outside the railroad?

A. Yes, we gave the railroad approximately $27,000.00 and

C. A. Clyborne.

excavations, as I recall, run approximately $34,000.00 for the side track.

Q. The side track would have cost you over $50,000.00 then?

A. Well, whatever the figures total.

Q. What character of coal or what seam or seams of coal do you ship from that tipple?

1C—page 15 } A. The Jewell or Red Ash seam.

Q. Is that the same seam that is mined by the Jewell Ridge Coal Corporation?

A. I am told it is.

Q. Generally speaking, what character of coal is that?

A. It is splendid quality.

Q. What is it used for principally?

A. Steam, domestic and metallurgic.

Q. It is a high quality of coal and known as a premium coal, is that correct?

A. That is correct.

Q. About what, on the average, since October, 1951, has been your output, that which you have shipped over that tipple?

Mr. Crockett: This question is objected to as being immaterial and irrelevant and incompetent for any issue in this case.

A. I would say—of course, I didn't check the figures before I came down, I would imagine between 750,000 and 1,000,000.

Mr. Pobst:

Q. You mean dollars?

A. Yes.

Q. What I was expecting to obtain from my question was the approximate number railroad cars which you ship per day?

Mr. Crockett: Same objection.

A. We are running around from 28 to 38 cars a day, sometimes we get two shifts, with the exception of when we were operating Saturdays there I would say that

1C—page 16 } was on the light side, I would say 16 to 18 cars.

Q. Those are standard railroad cars?

A. That is right.

C. A. Clyborne.

Q. They will average around 60 to 65 tons of 2,000 pounds to each railroad car?

A. It will vary, some of that coal is little heavy and averages over 70 tons, and some less, down to 50's, I would say they will average around 63 tons, might run little more, but taking the average run, we have to predetermine what our average runs—we take 100 cars and average various grades—on the prepared coal by reason of the way the coal lays in the car there is lot vacant space and those cars usually run around 54 to 58 tons, that is for the egg and stove size.

Q. That is the larger size?

A. Yes, I have a lot of dealers don't like to take the 70 ton cars.

Q. Do you ship any run-a-mine coal?

A. Not equipped to ship it, because we have to clean it.

Q. How many grades or sizes do you ship?

A. Three since we started, egg, stove, and inch and quarter, nut, and zero to slack.

Q. Now, what is nut and slack?

A. That is the size that falls through an inch and quarter screen, running from that size down to zero.

Q. That is down to absolutely slack?

A. It embraces the slack, pea and nut.

1C—page 17 } Q. And your next size is stove, what size does that take?

A. Inch and quarter to three and one-half inches.

Q. Everything over an inch and quarter but under three and one-half inches is put in stove size?

A. Over an inch and quarter screen and through three and one-half inch screen is properly designated stove or junior egg, sell it better under junior egg.

Q. And all coal that will not go through three and one-half inch screen you call it lump?

A. No, egg. All coal that goes through the 3½ to 11 inch screen is egg.

Q. Then the largest size you have is 3½ by 11?

A. Yes.

Q. And that size is what you called egg?

A. That is right.

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1C—page 19 }

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C. A. Clyborne.

Q. Mr. Clyborne, some of the coal, which the Paragon Jewell Company, Incorporated, and hereafter instead of calling the full name Paragon Jewell Coal Company, Incorporated, I may call it Paragon Jewell, shipped is mined from the lands of the widow and heirs at law of John G. McNeil, deceased, which was leased to J. H. Franks and others in 1948, is that right?

1C—page 20 } A. Yes.

Q. Then other coal which you ship is brought up or down the state highway, leading up or down the Dismal River, and across Dismal River near the Whitewood post office, and near the Clifton and Salyers houses, and then across the railroad and then proceed on to the Paragon Jewell tipple, is that correct, some of it comes up or down the Dismal River, which is shipped over this tipple?

A. Yes.

Q. Now all that coal so delivered by way of the highway, and then crossing the Dismal River and the railroad as aforesaid delivered to your tipple, that comes from a number of mines up and down Dismal River, is that correct?

Mr. Crockett: Counsel for Defendants object to this question and all questions of a like nature, if any, which may be asked, for the reason they are incompetent, immaterial and irrelevant to any issue in this case, and for the further reason that under the contract of lease the defendants, I mean Paragon Jewell Coal Company, Inc. has been and is authorized to haul such coal over the lands of the plaintiffs and to the tipple.

A. Do you want that broken down?

Mr. Pobst:

Q. Yes, if you can.

A. Well some of the independent contractors operate on the property which is owned by J. H. Franks and Clyborne, Inc., producing from the Jewell seam and some comes from the Brown heirs off Laurel Fork, some comes from

1C—page 21 } the Brown heirs that adjoins the McNeil tract. Some comes from independent contractors on what we designated as John Jewell tract down below Whitewood school house, that is owned by the Tazewell Coal and Iron Company; some comes from the Clyde Dennis tract, who bought some of the Coles—I have forgotten—it was part of the Cole heirs on Laurel Fork. And some coal comes from

C. A. Clyborne.

—in recent weeks—from the Buck Jewell and his brother tract up above the McNeils.

Q. Could you tell roughly or approximately what proportion shipped over your tipple—the tipple of Paragon Jewell tipple—is mined from the John G. McNeil tract?

A. I don't think I could classify it unless I could check the records. The plaintiffs could tell you exactly because we pay royalty on it.

Q. Now, as I understand you, the coal mined from the lands of the Brown heirs, which is contiguous to the John G. McNeil heirs' coal, comes over the lands of the John G. McNeil heirs, is that right? Some of the Brown heirs coal?

A. Yes, that comes from the Brown heirs 889 acre tract joining the McNeil tract.

Q. Do you also haul some from lands of C. L. Ritter Lumber Company over the McNeil lands to the tipple?

A. I believe C. B. Belcher, or Caudle Belcher, and his son leased less than 100 acres from Woodrow Cole, and the Woodrow Cole seam led into the C. L.—W. M. Ritter, I believe it shows on the map, I was not aware of that until someone talking to our superintendent, Frank H. Woods—

1C—page 22 } Caudle Belcher can tell you if that is material.

Q. And that Ritter coal, and whether it is C. L. or W. M. Ritter coal is immaterial, and some of the Brown heirs coal does not go down the highway or up the highway and across the bridge to the tipple, is that correct, some of it?

A. I will answer your question this way, the Brown heirs 889 acres joins the McNeils, and coal is hauled over some part of the McNeil tract from that tract. All other coal from Laurel Fork and from the Buck Jewell tract and from Tazewell Coal and Iron is brought up the state highway, across the bridge and delivered to the tipple.

Q. You have a road, that is a truck road, not a railroad, tramroad, built from the tipple in general direction down Dismal around the hill and above the Norman Clifton house, do you?

A. It is a road built around the back of Norman Clifton's primarily to serve in the outset Tom Heneger's mine. He mined on the McNeil tract at the very edge before you reach the Brown heirs tract.

Q. And you later extended it into the Brown heirs tract?

A. Yes, we go on into the Brown tract.

Q. And you then haul that coal from the Brown heirs tract over that road?

C. A. Clyborne.

A. Back of the Norman Clifton house.

Mr. Crockett: We want to insert the same objection.

Mr. Pobst:

1C—page 23 } Q. Then you also haul over that road back of Norman Clifton's house the Ritter coal, whether it is C. L. Ritter or W. M. Ritter?

A. No, that comes off Laurel Fork.

Q. Laurel Fork empties into Dismal about a half mile below Norman Clifton's house, is that right?

A. Somewhere around quarter to half mile, I imagine.

Q. And as you proceed down Dismal it comes in from the left, does it?

A. That is right.

Q. Then as you proceed up Laurel Fork from its mouth to your left would be the Brown heirs tract?

A. That is right, one Brown heirs tract 889 acres.

Q. And that is the coal that is hauled over this road back of Norman Clifton's house?

A. Yes.

Q. But no Ritter coal?

A. No Ritter coal. You see the Ritter coal is underground back of Woodrow Cole's tract leased by Caudle Belcher, and that is on the right of Laurel Fork, approximately across from Mrs. Cole's store.

Q. Now who is doing all of the mining of the coal which your company ships over its tipple—I don't mean to name all of them, but generally?

A. At the present the 32 independent contractors.

Q. And do those independent contractors have any connection with Paragon Jewell Coal Company, and if so, what?

1C—page 24 }

A. No connection except they are to deliver the coal to the Paragon Jewell tipple.

Q. You have contracts with them to deliver that coal to the Paragon Jewell tipple?

A. We don't have any written contract, but the independent contractors bring the coal to the tipple as they mine it, we will weigh it, process it and pay them on the 14th and 28th of each month, and if they need money in the meantime we will advance them in advance of those dates for their payrolls or other specific need. The coal is weighed at the scales on the Paragon Jewell lease from the McNeils, and we deduct on all

C. A. Clyborne.

of our statements 50 pounds per ton or 2½% of the net weight and all that is shown on the statements to the contractors. We have brought everything out in the open and the purpose of the 2½%, which we consider fair and equitable, was to take care of scale tolerance and at times we have very clean coal and at times we don't have such clean coal and it has been regarded more or less a custom that 50 pounds is very reasonable as net tolerance and to take care of scale tolerance and rejects. That is substantially the contract with all the 32 contractors, and the engineer, Caudle Belcher, lays off a certain area and submits maps to the independent contractor for the area allotted to any particular contractor.

Q. Now does your company pay for hauling that coal?

A. No.

Q. It pays a certain price for hauling, mining and everything, is that right?

1C—page 25

A. We pay a price f. o. b. scale and they dump it in the tipple.

Q. You furnish the road?

A. We furnish and maintain the road.

Q. Over which they haul, is that correct?

A. That is right.

Q. Who leases those lands—I am speaking now of the men who haul coal up or down the state highway and across Dismal River and up to your tipple, the lands from which they mine, who leases those lands?

Mr. Crockett: This is objected to for the reasons heretofore given and for the further reason that under the contract Paragon Jewell Coal Company and its contractors have the right to haul the coal up the river, across the river, across the bridge and to the tipple.

A. Paragon Jewell Coal Company leases all the lands, with the exception of the Woodrow Cole tract, which is combined with the Ritter tract, and that was leased by Caudle Belcher and Grogan but Grogan dropped out of it when Belcher approached the Ritter line, when he was close to the line underground on the Woodrow Cole tract and as I understand it Belcher leased that himself, but that is a matter of hearsay. Another lease was Albert Keen leased from Buck Jewell and his brother, some acreage above the McNeil tract. As I recall, those are the only two exceptions. Paragon Jewell has all the other tracts.

C. A. Clyborne.

1C—page 26 } Mr. Pobst:

Q. Paragon Jewell Coal Company pays the royalty on all those lands, does it?

A. No, Keen pays his royalty to Buck Jewell and his brother and Caudle Belcher pays his royalty to Ritters.

Q. I mean who pays the royalty of the lands Paragon Jewell leases?

A. Paragon Jewell—we get the coal from the Paragon Jewell tracts royalty free.

Q. Whom do you mean by we?

A. Paragon Jewell.

Q. Well, Paragon Jewell either owns all the coal that comes across the bridge, except Buck Jewell coal and Clyde Dennis and maybe Ritter coal, either owns it or leases it from others, is that right?

A. I have answered that question. All the tracts that Paragon Jewell has under lease they pay the royalty to the land owners.

Q. And you contract with the miners that you are to furnish the road, the coal, royalty paid, and you pay them so much per ton to dig it, mine it, and haul it to the tipple, is that right?

A. That is right, the price varies from time to time according to market conditions.

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1C—page 27 }

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Mr. Pobst:

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1C—page 28 }

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Q. Mr. Clyborne, you have seen the roads, that is the truck roads shown on the photographs introduced, have you, you know where they are located, do you?

A. Yes.

Q. There is one road that crosses Dismal River on a bridge and one road turns right and the other left and both go to the

tipple, but they use the left handed one exclusively to go to the tipple, is that right?

A. Yes.

Q. Then they have another road back of the house we have talked about?

A. Yes.

Q. And then one or two other roads on the McNeil property, is that right?

A. Well, the pictures are scanty and I couldn't tell—

Q. Well, those roads have been constructed on the McNeil property?

A. Yes.

Q. Who had that engineering done and roads laid off?

1C—page 29 } Mr. Crockett: This is objected to, certain of those roads were in existence at the time the leases were made and no doubt for many years prior to the time.

Mr. Pobst: Replying to the above, counsel for the complainants state that some of those roads were not in existence.

A. Paragon Jewell had the roads constructed and paid for them.

Q. And that company employed the engineer to lay those roads out and paid him, did you?

A. That is my assumption, although Mr. Grogan had some practical experience at that time, he may have laid out some of them himself.

Q. Was he an engineer?

A. Just practical experience, I couldn't say whether Belcher actually laid out some of them or all of them. Grogan may have laid out some himself.

Q. And Mr. Grogan worked for Paragon Jewell, and Paragon Jewell paid him, is that right?

A. Yes, he was superintendent.

Q. Mr. Clyborne, the lease which has been filed with the petition and which is dated August 1, 1948, and is between Mary R. McNeil, widow, Virgie Clifton and Norman Clifton, her husband, Stella McNeil, single, Macie Salyers and Edd Salyers, her husband, lessors, to James H. Franks, W. M. Culbertson, Jr. and C. A. Clyborne, that C. A. Clyborne is you, is it not?

A. That is right.

1C—page 30 } Q. And how did Paragan Jewell Company, by what right did Paragon Jewell construct

the tipple on the Salyers land and use those roads? How did the Paragon Jewell Coal Company have that right?

A. Well, Franks and Culbertson passed the lease to C. A. Clyborne and C. A. Clyborne passed it to Paragon Jewell, Inc.

Q. This lease was recorded on August 12, 1952, in the office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 119, page 184, and shows no such assignment, was it by separate paper or papers that it was assigned to you, and then by you to the Paragon Jewell Company?

A. Yes.

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1C—page 37 }

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NORMAN CLIFTON,

the next witness, called for and on behalf of the Complainants, being first duly sworn, deposes and says:

DIRECT EXAMINATION.

Mr. Pobst:

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1C—page 38 }

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Q. Whom did you marry?
A. Virgie Mae McNeil.
Q. Who were her parents?
A. John G. McNeil and Mary R. Cole McNeil.
Q. Is Mary R. McNeil one of the petitioners in this case?
A. Yes, sir.
Q. Then she is the widow of John G. McNeil?
A. Yes.
Q. He is dead, I believe?
A. Yes.
Q. Do you remember when he died?
A. He died in '36, I don't remember the exact day.

Norman Clifton.

Stipulation: It is stipulated and agreed between counsel and parties now here present that a copy of the will of John G. McNeil, deceased, certified by the Clerk of the Circuit Court of Buchanan County, Virginia, may be produced and marked filed and placed with the papers in this cause and used for any purpose desired by the parties hereto.

Mr. Pobst:

Q. Do you know Edd Salyers?

A. I do.

Q. Whom did he marry?

A. He married Macie Salyers.

Q. And who were her father and mother?

1C—page 39 } A. John G. McNeil and Mary R. McNeil.

Q. How long ago were you married?

A. We were married in August, 1935.

Q. How long has Edd Salyers and his wife been married?

A. I can't recall.

Q. Did he marry before or after you?

A. After.

Q. Then John G. McNeil was living when you married your wife?

A. That is right.

Q. What other children did John G. McNeil have?

A. Macie Salyers and Stella McNeil.

Q. And Stella McNeil has she never married?

A. No.

Q. And Mary R. McNeil, one of the complainants, is his widow?

A. Yes.

Q. And Virgie Clifton and Norman Clifton, that is you?

A. Yes.

Q. So Mary R. McNeil and Stella McNeil, Virgie Clifton and Norman Clifton and Macie Salyers and Edd Salyers, her husband, are the petitioners here, is that right?

A. Yes.

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1C—page 40 }

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Mr. Pobst:

Q. In the first clause of the will, he gives to his wife, Mary

Norman Clifton.

R. McNeil, his home place during her life time, then it is "to be my daughter, Stella's property thereafter," what land was that, Mr. Clifton?

A. That was the original home place where they were living at the time of his death.

Q. How much was in that, how big a place is that, and what did it consist of?

A. It consisted of all the land under fence around the home place.

Q. Is that land around the home place, or was it a part of the John G. McNeil home place?

A. It was.

Q. Did it adjoin the other property?

A. It did.

Q. It was all one boundary then?

A. Yes.

Q. About how much was under fence, he referred to as his home place?

1C—page 41 } A. Approximately 10 acres.

Q. Were there any buildings on that of any kind?

A. There were.

Q. What?

A. There were five rent houses.

Q. You mean houses that he rented to others?

A. That is right.

Q. All right.

A. A barn, crib, coal house and dwelling house.

Q. Who lived in the dwelling house when John G. McNeil died?

A. John G. McNeil himself.

Q. Who is living there now?

A. Mary R. McNeil and Stella McNeil.

Q. He says, "containing 30 acres and including orchard and out-buildings," you said containing about 10 acres.

A. That included it all, I was just roughly guessing, I didn't know.

Q. How far is that from the tipple that you have spoken of?

A. Oh, near 1,000 feet.

Q. Then next John G. McNeil gives and devises to his daughters, Virgie and Macie, the field and flat in front of Whitewood post office, who are they?

A. Virgie is my wife, and Macie is Edd Salyer's wife.

Norman Clifton.

Q. Describe the fields and flat, describe those how they were at the time of John G. McNeil's death.

A. Well, they were pasture land and corn land.

Q. You mean he raised corn there?

1C—page 42 } A. Yes.

Q. Was it fenced off?

A. That is right.

Q. How much was in that?

A. Approximately 15 acres.

Q. In the whole thing?

A. In the whole thing.

Q. Was there any woodland in that, I mean grown up, timber of any kind?

A. No, sir.

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1C—page 43 }

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Q. Was there any trading or division in any way of that field and flat that Virgie and Macie got under their father's will?

A. There was.

Q. What was done?

A. We built on the lower end or the west end of the flats of the field and Macie and Edd Salyers built on the upper or east end.

1C—page 44 } Q. Well do Virgie Clifton and Macie Salyers still own all of that field and flats jointly now?

A. They made a divide, made each other deeds to their tracts. In other words, they deeded each other their rights to each end of the place.

Q. You mean they divided the property in kind, that they had gotten jointly?

A. That is right.

Q. And Macie got the upper part and Virgie the lower?

A. That is right.

Q. Did you make one deed or two?

A. Two.

Q. Are those deeds of record in the Clerk's Office?

A. Yes.

Norman Clifton.

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1C—page 50 }

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Q. Was there a truck road built already to the Mary McNeil home place?
A. Yes.
Q. Then where did that truck road go?
A. Well, it came in from the highway across
1C—page 51 } and to Mary R. McNeil home.
Q. Did it go on further up towards her back line or where did it stop?
A. No, it went around in front of her house to a rent house.
Q. Was that rent house above, that is up Dismal, from the Mary McNeil home or below?
A. Below.
Q. Was it above or below the Mary McNeil home?
A. It was above.
Q. Was that road on the Mary McNeil home place, which was there when the lease was made, ever used by the Paragon Jewell Company or any of them for hauling coal over it?
A. Not for coal, but for gravel and other supplies, not knowing just exactly what.

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1C—page 54 }

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Q. At the time the lease was made, was there a bridge across Dismal River?
A. There was.
Q. Is there a bridge now?
A. Yes, there is a new bridge.
Q. Is the location of the new bridge on the same location of the old bridge?
1C—page 55 } A. It is not, it is 32 feet below where the old bridge was—near or about that distance.
Q. Did you measure that to the best of your ability?
A. I did to the best of my ability.

Norman Clifton.

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1C—page 57 }

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Q. Now, Mr. Clifton, there is the state highway, Dismal River, and Norfolk & Western Railroad shown on this map, with arrows pointing to the right as you hold this plat before you, is that the relative position of these things?

A. That is right.

Q. There is the location of the old bridge placed thereon and between that and the new bridge there is the figure 32 feet, does that figure 32′ indicate that it is 32 feet between the location of the old bridge and the location of the new bridge?

A. Approximately.

-C—page 58 } Q. From the location of the old bridge, there is a line going first to the right and then turning back to the left, which is designated "old road," now what is that?

A. That is the road that was there at the time that this lease was drawn up.

* * * * *

Q. Now, there is another line or lines shown from the upper part of the bridge designated "new bridge" leading first to the right and then to the left to the point designated "tipple," this is designated "New Road No. 1," what is that road?

A. That is the first road that Paragon Jewell Coal Company built to haul coal over.

Q. And was that there at the time the lease was made?

A. It was not.

Q. Now, the road designated as "New Road No. 2," which leads off left handed from "New Road No. 1" and goes to the point designated "tipple," what is that road?

A. That is the second road that Paragon Jewell built.

Q. Now, there is a road designated, over to the left of the plat, "New Road No. 3," what is that road?

A. Well, that is the road leaving the tipple going up above the Edd Salyers house and on to our coal, that

1C—page 59 } is, the McNeil coal, left handed. The left-hand fork goes to the McNeil coal alone.

Q. Now, you mean left-handed as you would cross the new bridge looking up towards your house?

Norman Clifton.

A. That is right, that is above the tipple.

Q. I mean left-handed as you look at this plat, it is the left handed side of the plat?

A. That is right, looking from the highway or the railroad.

Q. Now, by the McNeil coal, what do you mean?

A. I mean the coal that Macy Salyers, Virgie Clifton, Mary McNeil and Stella McNeil received from John G. McNeil, deceased.

Q. Is that the coal leased in this lease we are talking about?

A. That is right.

Q. You said some time ago that "I built," whom do you mean built?

A. I mean me, Norman Clifton, and Virgie Clifton.

Q. Now, there is another road designated "New Road No. 4," what is that road?

A. That is the road going around near the west end or lower end looking from the railroad, at the McNeil estate.

Q. And over what land does it go?

A. It goes over the land of John G. McNeil, deceased, undivided, of Macy Salyers, Virgie Clifton, Mary McNeil and Stella McNeil.

Q. And to what land does it go?

A. It extends onto the Brown heirs 889 acre tract of land that Mr. Clyborne testified about.

1C—page 60 } Q. Now, the old road and the new road, as it turns back to the left as shown on the plat, where do they both run with reference to the Clifton house and Clifton garage, below or above?

A. It runs below.

Q. After it turns and goes back to the left, was the old road above or below the present location of the new road?

A. The old road was above the No. 1 road that the Paragon Jewell built.

Q. Was the old road above or below the No. 2 road that Paragon Jewell built?

A. It crossed it in a different direction.

Q. Does the plat show the approximate place where it crossed?

A. It does.

Q. Who constructed and built new roads No. 1, 2, 3, and 4?

A. Well, I think Paragon Jewell.

Mr. Crockett: We object to what he thinks.

Norman Clifton.

Mr. Pobst:

Q. Did you pay for it?

A. No, Paragon Jewell built them.

Q. You mean built or had them built?

A. Had 'em built.

Q. Who bossed it?

A. Number 1 road, Mr. Grogan was superintendent at that time, and I take it was the boss.

Q. In the deposition of C. A. Clyborne just given, he was asked about and mentioned the bridge across

1C—page 61 } which much of the coal shipped in the tipple was hauled from the state highway and across Dismal River and on up to the tipple, what is that bridge, as now located on the map, what is the bridge there?

A. The new bridge.

Q. Is there any other bridge there?

A. No.

Q. Was any coal ever hauled over the old road?

A. There was not to the tipple.

Q. Why?

A. Well, it was narrow and steep.

Q. Tell about any conversation you may have had in reference to building of new road No. 1, I mean any conversation with Mr. Grogan, Paragon Jewell's superintendent?

A. Well, at the time they came in there and was working on the bridge, Mr. Grogan asked me how about changing this road up the hill.

Q. Changing which road?

A. The old road and building a new road up the hill, he said that they could not get the tipple supplies and things in to build a tipple over the road that was there with any success, that the road was narrow and steep and he said he would build a road below the house and he would go out in the field and build the road around above the house—that is the Virgie Clifton house.

Q. And did he mention anything at that time about hauling coal over the new road No. 1?

A. He said it was too steep to even haul coal

1C—page 62 } over and he said, "We want to build a new road."

Q. At that time was the tipple under construction?

A. I can't remember exactly.

Q. What did you tell him?

A. I told him to go ahead and build the road any place that

was suitable to him, but I was expecting a royalty and he said, "We expect to pay royalty."

Q. Was any amount mentioned?

A. There was not.

Q. Did you talk to him about that more than once?

Mr. Crockett: Counsel for the defendants object to the last above mentioned answer purporting to detail statements of Mr. Grogan, for the reason that unfortunately Mr. Grogan is now *non compos mentis* or mentally incapacitated and cannot testify, and submit that the evidence of this witness on the subject is incompetent and should be stricken out.

A. I met Mr. Grogan after they started running coal, hauling coal over this new road, and asked him if they had ever decided how much royalty per ton that they were going to allow me for building this new road.

Mr. Crockett: Same objection.

Mr. Pobst:

Q. Continue with your answer.

A. And he said, "I haven't had a chance" or "We haven't had time to work out any royalty."

1C—page 63 } Q. How long was that after (interrupted)

Mr. Crockett: Motion is made to strike out the answer for reasons heretofore given.

Mr. Pobst:

Q. How long was that after he first asked you for permission to build a new road, new road No. 1?

A. I don't know exactly, this was after they started running coal.

Q. Do you remember how long it was from the time they began building the tipple until they were running coal?

A. It was a matter of months, I would say.

Q. Did you talk with him more than once about this?

A. I did, I went to him the second time and asked him if they had figured out how much they were going to pay royalty for this new road or disturbing the front of my property, and he said at the time, he said, "We have decided not to give you anything."

Q. Whom did he mean by "we"?

A. I don't know.

Norman Clifton.

Q. Did he say he had talked to anybody?

A. He said he had met with Mr. Clyborne or the officers of the company and that they decided they were not going to give me anything.

Q. Did you take it up with anyone connected with Paragon Jewell?

A. I did, I went to see Mr. C. A. Clyborne.

Q. Did you take this up with him?

A. I did.

1C—page 64 } Q. What did he say?

A. He never would give me satisfaction about what he was going to do.

Q. What did he say?

A. He made mention that if he had to work strictly to the letter of the contract he would cut the mining down until we would only get the $4,000.00 a year royalty out of it.

Q. How many times did you see him?

A. I don't remember, three or four times.

Q. Did he at first make any objection or what did he say?

A. He said they would figure it out or somthing, he wanted to put me off, he said, "At times, I think I will pull the damn thing out."

Q. The whole tipple and all?

A. I told him it was all right, I said it is your money and it is all right if you want to.

Q. What did he finally tell you?

A. He finally referred me to Mr. Bob Crockett, at Tazewell, that he was his lawyer.

Q. Is that Mr. R. O. Crockett, who is attorney for the defendants and who is now representing Mr. Clyborne here?

A. It is.

Q. Did you go see him then?

A. I did.

Q. What did he say?

A. He said they wouldn't have to pay us any royalty. I made mention of the clause in the contract that

1C—page 65 } they were supposed to pay us royalty. He made mention several times, did I think I was smart enough to be a lawyer, or was I a lawyer, or looked like I was smarter than him, very sarcastic about it.

Q. What did he finally tell you?

A. He finally said they would not pay.

Q. Then what did you do?

A. I came to see you, Mr. Pobst.

Norman Clifton.

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1C—page 66 }

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Q. Now, let's go now to New Road No. 2, when and why was that road built?

A. For no reason without it was because of a break on the road near the tipple.

Q. What do you mean by break?

A. The hill kept slipping off out near the
1C—page 67 } tipple, that was in above the railroad and if that is not the reason I don't know why.

Q. Is the new road shorter than the No. 1?

A. It is shorter.

Q. Is it a better way to haul the coal up to the tipple?

A. Well, it is steeper.

Q. When was new road No. 2 built?

A. I just don't remember.

Q. I mean before or after New Road No. 1?

A. No. 2 was built after New Road No. 1, I would say approximately a year and half.

Q. Was New Road No. 2 built before this suit was instituted?

A. I don't remember whether it was or wasn't.

Q. To refresh your memory I will ask you if you didn't tell me this morning that after they built new road No. 2, that that is when you came to us lawyers to talk to us?

A. I think that is right.

Q. When New Road No. 2 was built, who was superintendent of Paragon Jewell Coal Company?

A. I don't know.

Q. Was Grogan still there?

A. I believe he was.

Q. Well, did anybody connected with Paragon Jewell Coal Company say anything to you about constructing New Road No. 2 before they began working on it?

A. They did not.

Q. Did you talk to anybody about that?
1C—page 68 } A. No, I did not.
Q. Then did you talk to the lawyers?

A. I did.

Q. When was new road No. 3 built?

Norman Clifton.

A. That road was built before there was any coal run over the tipple.

Q. Was it built before new road No. 2?

A. No. 3 and No. 4 roads were built before the tipple started operating, that is where the first coal came over.

Q. Was anything said to you about those roads?

A. There was not.

Q. Did they ask your permission or your wife's permission to built those roads?

A. They did not.

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1C—page 72 }

* * * * *

Q. Mr. Clifton, have you ever mined coal?

A. I have.

Q. What are you doing now?

A. I am mining, I have mines of my own.

Q. Do you ever go in those mines and examine your coal seam?

A. I do.

Q. How often?

A. Quite often.

Q. How long have you been mining coal?

A. Around 22 years.

Q. For whom have you worked?

A. I worked for Jewell Ridge Coal Company, Red Jacket and at Page.

Q. Are they all in Buchanan County?

1C—page 73 } A. They are.

Q. Can you tell whether they are seams of coal, when you examine it, that has any partings, rock or impurities in it?

A. I can.

Q. Have you examined the same seal of coal which is being shipped from the Paragon Jewell tipple?

A. I have.

Q. At different places?

A. I have.

Q. Does it have any impurities or partings anywhere on that land, McNeil land?

A. It does not, it doesn't show in the coal seam.

Norman Clifton.

Q. What about the roof or top?
A. Most of the roof is sandstone.
Q. What about the bottom?
A. Sandstone bottom.
Q. That being the case, sandstone roof and sandstone bottoms, are there any rejects, etc. if properly mined?
A. I don't think so.
Q. Where would they get partings, rock or impurities, would they get it out of the seam of coal?
A. They would not.
Q. Explain rejects or tare weights, what is it?
A. Well, it is slate, rock, or middleman, which some coal has.
Q. What is middleman?
A. Well it is a rock, in some coal it is soft and in some coal it is hard streak of rock, bone or slate.
1C—page 74 } Q. Is a middle man or parting all the same thing in a seam of coal?
A. It is.
Q. You have heard Mr. Clyborne say that in all the coal which the Paragon Jewell bought and shipped, when they paid for it they took off 2½% for tare weight or rejects, did you know that they were taking that off your royalties when the royalties were paid to Mrs. McNeil and her daughters?
A. I did.
Q. Did you complain to the company about it?
A. I did.
Q. More than once?
A. I did.
Q. What did they say?
A. Mr. Clyborne told me they had put their cards on the table, they weren't trying to hide anything, that they hadn't tried to hid anything, that they thought 2½% was reasonable tolerance or tare weight.
Q. What is tolerance?
A. I don't know.
Q. Well, he said scale tolerance, I believe, what is scale tolerance, do you know?
A. I do not.
Q. Well, are scales absolutely accurate at all times?
A. They are supposed to be.
Q. Well, are they at all times, do they sometimes get out of order?
1C—page 75 } A. They have, I guess, got out of order.
Q. Well, when they get out of order, do they

always show too much weight or are they just as liable to shop too little weight?

A. It would vary either way, scales could show over or under either one.

Q. Did you at any time, refuse or fail to cash your royalty checks, I mean, Mrs. McNeil and her daughters?

A. We did the first check.

Q. Why?

A. For the reason 2½% tare weight, or whatever he meant by taking it off of our tonnage.

Q. Did you finally cash that check?

A. We did.

Q. Did you talk to the company more than once?

A. We did.

Q. Did they ever do anything about it?

A. They did not.

* * * * *

CROSS EXAMINATION.

Mr. Crockett:

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1C—page 77 }

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Q. Did you see any slate or rock in there?

A. I saw slate or sandstone that had been shot, I don't remember whether they have all sandstone or all slate, I just don't remember.

Q. I believe you say that you saw slate there that had been shot down?

A. Slate or sandstone, I just remember it was rock.

* * * * *

2C—page 54 }

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H. A. COMPTON,

another witness of lawful age, having heretofore deposed on behalf of the complainants, being recalled on further direct examination, deposed as follows:

H. A. Compton.

DIRECT EXAMINATION.

By Mr. Pobst:

* * * * *

Q. 3. You hold five prints—pictures—in
2C—page 55 } your hand. The first one which is "Compton Exhibit No. 1-B," did you take that picture?

A. Yes, sir.

Q. 4. Now, where were you standing, with the camera, when you took that picture?

A. I was about in the neighborhood of the post office. I think just about opposite the post office.

Q. 5. Do you remember the bridge that crosses up there?

A. Yes, sir.

Q. 6. On the one called No. 1-B?

A. This is the second series.

Q. 7. The one that you took the second time?

A. Yes, sir.

Q. 8. The one that is marked No. 1-B, you said you took that picture and you were standing near or in front of the post office. Where were you standing in reference to Dismal River when you took that picture? Were you standing on the side next to the highway or next to the river?

A. The side next to the highway.

Q. 9. Which way was your camera pointing?

A. Pointed up the river.

Q. 10. Was the bridge that you cross over, where they haul coal to the tipple, above or below where you were standing?

A. Above.

Q. 11. Does the bridge show in that picture?

A. No, 1, this one. It don't hardly show it, nearly did.

Q. 12. There is a house in the upper right-hand corner. Whose house is that?

2C—page 56 } A. That is Norman Clifton's.

Q. 13. And Virgie Clifton's, his wife?

A. Yes, sir.

Q. 14. And this looks like a level part, going straight across,—what is that?

A. That is the railroad.

Q. 15. Is there another elevation above that?

A. Another elevation?

Q. 16. I mean another—it looks like something else—excavation up there,—what is that?

H. A. Compton.

A. That right in there seems to be an old road.

Q. 17. Where is the present road leading around to the Norman Clifton house?

A. Well, it is right around this way, and then switches back here.

Q. 18. When you said "right around this way" you put your finger over toward the right of the picture and switched it back up toward Norman Clifton's house.

A. Comes up this way and then switches back.

Q. 19. Now, take Compton Exhibit No. 3-B.

A. The reason there was not no No. 2, the film was spoiled.

Q. 20. What does that picture No. 3-B show?

A. This is a little bridge that goes across Dismal Creek or River.

Q. 21. Who uses that bridge?

A. I reckon every body is, up there. I imagine Norman uses it.

2C—page 57 } Q. 22. Where does the coal go over, what bridge, that goes up to the Paragon Jewell tipple? What bridge does it go over?

A. This is the bridge that comes down. I don't know whether they haul any coal up there above the tipple or not. This is the bridge across Dismal River.

Q. 23. Is that the only bridge on the Clifton land?

A. That is all the one I know. There is a steel bridge down below Norman. This is a wood bridge.

Q. 24. Were you above or below that bridge?

A. I was above it.

Q. 25. Toward the left center of that picture I see the top gable end of a house. Whose house is that?

A. Norman's, Norman Clifton's house.

Q. 26. And there in the picture it looks like a deep cut or bank, what is that, near the center?

A. Right here?

Q. 27. Yes.

A. This is where you go across the bridge, then the railroad is right here, you can see the tracks, and there is a road goes right around this way.

Q. 28. To the right?

A. It goes around to the right and then cuts back to the left. Then, there is another one that goes up to the left.

Q. 29. Which one goes direct to the tipple?

A. I imagine it is this one right here.

Q. 30. You mean the one to the left?

A. Yes, sir.

H. A. Compton.

Q. 31. Now, the next picture is No. 4-B. You
2C—page 58 } took that picture, did you?
A. Yes, sir.
Q. 32. Did you take this picture No. 4-B?
A. Yes, sir.
Q. 33. Did you take that picture?
A. Yes, sir.
Q. 34. Where were you standing when you took that picture?
A. I was down about half way between this bridge, the one that is shown in the last one and the first one I made.
Q. 35. Which side of Dismal were you on?
A. On the road side.
Q. 36. There is a house up there near the upper center that you can see the top of. Whose house is that?
A. Norman Clifton's.
Q. 37. Did you take this picture No. 5-B?
A. Yes, sir.
Q. 38. Where were you when you took that picture?
A. I was on the hill above the tipple.
Q. 39. Looking which way? Looking down the River?
A. It was not either one, it was looking against the hill. I was up to the right of the tipple.
Q. 40. Did you take that picture?
A. Yes, sir.
Q. 41. That something is a bank down toward the highway, is that right?
A. No, it is up on the hill above the tipple where, they told me, this is the McNeil-Brown road.
Q. 42. That dirt road?
2C—page 59 } A. Yes, and this is the McNeil side.
Q. 43. The one where the truck is sitting is the McNeil road?
A. That is what they told me. This is below the forks—the intersection,—I was below that.
Q. 44. At the right?
A. This is the Brown and this is the McNeil.
Q. 45. You took that picture?
A. Yes, sir.
Q. 46. Now, there is another picture called No. 7-B, and it shows a house. What is that picture?
A. I was up there very near where I made this other one, at the intersection of the road, but it was turned down the other way. This picture shows a view down the road, down next to Dismal River and the tipple. That shows the bridge.

Edward Salyers.

Q. 47. Is that the little bridge down there?

A. That crosses the river. This is just a view down the road there. I was up on the hill when I made that.

Q. 48. You stood not far from the tipple, is that right?

A. Just up above the tipple.

Q. 49. That looks sort of down Dismal—sidling down.

A. Here is Dismal. It runs right down through there, and this is a view nearly cross ways.

Q. 50. The main hill or mountain in the upper part of that picture is across Dismal River, is that right?

A. Yes, that back ground is.

Q. 51. I will ask you if you will file all those pictures as a part of your deposition, marking them respectively Compton Exhibits No. 1-B, No. 3-B, No. 4-B, No. 5-B and No. 7-B.

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2C—page 61 }

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EDWARD SALYERS,

one of the complainants, a witness of lawful age, introduced on behalf of the complainants, being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Pobst:

* * * * *

Q. 2. Did you marry into the family of—the daughter of John G. McNeil, now deceased?

A. Yes, I did. I married Macie McNeil.

Q. 3. Is she one of the complainants in this suit?

A. Yes, sir.

Q. 4. Where do you live?

A. I live at Wise, Virginia now.

Q. 5. Does your wife own any property involved in this suit?

A. Yes, sir.

Q. 6. It is stated that Macie Salyers owns a residence house above the—up on the bank and above the Virgie Clifton house. Is that the property she owns?

Edward Salyers.

A. Out to the left of the Virginia Clifton property if you are facing it from the highway.

Q. 7. Going up Dismal River, it would be up from the Virgie Clifton property?

2C—page 62 } A. Yes, sir.

Q. 8. Your wife's property is above the Clifton Property?

A. Going up the river, yes, sir.

. . . . .

2C—page 65 }

. . . . .

Q. 36. Now, proceeding from the point where that seventy foot right-of-way extended,—that is the Norfolk and Western's outside line, on the left side of Dismal River, going down, whose land would that be in front of the Salyers house and in front of the Clifton house? From that line, on up toward the mountain and toward the houses, whose land would that be?

A. It belongs to my wife and Norman's wife to the woodland.

Q. 37. You mean Macie Salyers and Virgie Clifton?

A. Yes, sir.

Q. 38. When did you marry Macie Salyers?

A. In 1926. No, pardon me, 1936.

Q. 39. And was John G. McNeil living then?

A. He was.

Q. 40. How long did he live?

A. We was married in April, the 15th I believe, and he died some time in July.

Q. 41. Of the same year?

2C—page 66 } A. Of the same year.

Q. 42. There was certain land called "fields" and "flats" near Whitewood that appears in the will of John G. McNeil, given to your wife, Macie Salyers, and to Virgie Clifton. Is that your wife, Macie Salyers, and Norman Clifton's wife?

A. It certainly is.

Q. 43. What did he mean by the "fields" and "flats"?

A. The way I got the property, around the home place, was in one boundary, fenced in, of cleared land with some orchard on it, and the field next to the post office, it was in one bound-

Edward Salyers.

ary, under fence, and he gave them that, what he called the lower flats.

Q. 44. Was that in woods, or what was it in?

A. It was pasture land.

Q. 45. It was pasture land?

A. Yes, sir.

Q. 46. How did it lay in reference to pasture and cultivation?

A. There was some, right smart, little flat where my house is built, and had a pretty nice garden at the back of the house; on the top of the next flat I had a nice little garden there, and had a little strip of farming land to the right that they are hauling coal over now,—I used it for kind of a trucking garden.

Q. 47. Were you there when the contract of lease, that is the subject of this suit, was written up?

* * * * *

2C—page 78

* * * * *

Q. 51. Now, Mr. Salyers, you say down there, that day, that the Brown heirs coal was mentioned. That is the time when the first contract was drawn?

A. I would not say that they mentioned the name Brown at all. The coal in back of us was mentioned.

Q. 52. They mentioned that coal?

A. The coal that was there in the back of us.

Q. 53. Now, what rights were given in that contract, according to your recollection? What haulage rights were given in it?

A. All that I can recall of that, this was where it was stated they would have the right to haul the coal over the roads, free of royalty, if they hauled through the entries of the mines, was all that I have any knowledge of.

Q. 54. You remember Clause Four, Paragraph Two of the contract, don't you, where it said: "It is, however, agreed between the parties hereto that the said Lessees may have a right of way for railroads, or truck roads, or other means of transportation on the lands of the said Macie Salyers and Virgie Clifton." Do you remember that?

A. Seems like I do remember something like that.

* * * * *

2C—page 90 } A. B. JEWELL,
a witness of lawful age, being first duly sworn, deposes and says:

* * * * *

2C—page 105 }

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CROSS EXAMINATION.

By Mr. Gillespie:

* * * * *

2C—page 106

* * * * *

Q. 5. Is that present road closer or farther away from the Clifton home than it formerly was?
A. I believe it is farther away.
Q. 6. Do you know whether it is entirely on the right-of-way of the Norfolk and Western Railway or any of the McNeil lands?
A. I believe it starts off the right-of-way of the Norfolk and Western and gets on the McNeil land.
Q. 7. Do you know to what extent?
A. No, sir. I didn't survey it or anything like that.
Q. 8. Then, since the relocated road is *father* away from the Clifton home there would be less annoyance from dirt and noise by the haulage than if it were hauled over the old location, is that true?
A. Naturally it would be less noise if it was farther away.
Q. 9. And less dirt?
A. Yes, sir.
Q. And less annoyance generally?
2C—page 107 } A. Yes, sir.

* * * * *

1D—page 2 } CAUDLE BELCHER,
a witness of lawful age, being first duly sworn, deposed as follows:

Caudle Belcher.

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Please state your name, residence and occupation?

A. Caudle Belcher, I live at Grundy, Virginia, or three miles South of Grundy, I am fifty-two years old and a land surveyor and a mining engineer.

Q. 2. How long have you been engaged in land surveying and mining engineering?

A. Thirty years.

Q. 3. Where have you practiced your profession of land surveyor and mining engineer principally, Mr. Belcher?

A. Eleven years in Kentucky and nineteen years in Virginia.

By Mr. Pobst: We admit Mr. Belcher's qualification as a land surveyor and mining engineer.

Q. 4. Mr. Belcher, are you familiar with the land situate on Dismal River in Buchanan County, Virginia owned by John G. McNeil in his life time and which has been leased by his widow and heirs to C. A. Clyborne and J. H. Franks?

A. Yes, sir.

Q. 5. Did you make a map of some roadways situate upon those lands, Mr. Belcher?

A. Yes, sir.

Q. 6. I hand you herewith what purports to be a map showing a railroad, Dismal River, truck roads and
1D—page 3 } property lines near Paragon Jewell Coal Company's coal tipple, Whitewood, Buchanan County Virginia, and ask you if that is a map showing the railroad, river, truck roads, etc. on what is known as the John G. McNeil lands?

A. Yes, sir.

Q. 7. Did you make that map?

A. Yes, sir.

Q. 8. I notice there are certain roadways shown on that map in different colors. Would you explain what those colors represent?

A. Well, the Red coloring on the road is an original road that was in there before they begun mining.

Q. 9. Were you on the land and do you know what roads were there before any mining operations were begun by the defendants?

A. Yes, sir.

Caudle Belcher.

Q. 10. What type of road was that road which you have in Red and which is described as "Old Original Road"?

A. That was a narrow road similar to a wagon road and was very rough until it got on top of the hill below Clifton's residence.

Q. 11. Is that map drawn to scale?

A. Yes, sir.

Q. 12. Could that road have been used for the purpose of hauling coal over it by trucks?

A. No, sir.

Counsel for the complainants object to the foregoing question as immaterial and as eliciting evidence which would vary the terms of the contract. Defendants were given the right to haul over the road then made, and the contract is silent on any other right,—whether or not Mr. Belcher thinks it was too steep and narrow and rough.

1D—page 4

Q. 13. Did it have any base on it that would support a coal truck?

Counsel for the Complainants objected for the same reasons as heretofore assigned.

A. No, it would have been impossible to have hauled coal over it, it was too steep.

Q. 14. Was any attempt ever made to haul any coal over that same road?

Counsel for the Complainants objected for the reasons heretofore assigned.

A. No, sir.

Q. 15. Now, is that road which you have shown in red, does it include a bridge which went across Dismal River from the state highway going up Dismal at one time?

A. Yes, sir.

Q. 16. What kind of bridge was that?

A. It was a wooden bridge with log stringers.

Q. 17. Would it have supported a coal truck?

A. No, sir.

Counsel for the Complainants objected to the foregoing question and answer.

Caudle Belcher.

It is stipulated and agreed by and between counsel for both parties that objections are made by counsel for the complainants to all similar questions without repeating the objection specifically to each question asked, and for the same reasons given above.

Q. 18. Now, do you know what this road which you have in red on the map was used for prior to the time that Paragon Jewell Coal Company started developing this
1D—page 5 } property?
A. There had been some logs hauled out, and they had built a road to a well where they drilled a gas well.

Q. 19. What other purpose, if any, was it serving at the time this property was leased, Mr. Belcher?

A. That particular road was also used as ordinary family purposes.

Q. 20. Did anybody live on that side of the river, Mr. Belcher?

A. At that time there was three dwelling houses on that side?

Q. 21. Who lived there?

A. Norman Clifton and Salyers did live there, he was not living there at the time I went there, and a tenant house of Clifton.

Q. 22. How did they get back and forth from their dwelling houses to the main highway?

A. They used the road I have colored in red.

Q. 23. And used the bridge that went across at the point where you have shown the bridge in red?

A. Yes, sir.

Q. 24. Did they have any other way of getting across the river with vehicles?

A. No, not that I ever saw of.

Q. 25. Now, what is the roadway shown in yellow?

A. That was the first road constructed there when they started to mine.

Q. 26. And was a new bridge put across the river near where the old bridge was located?
A. Yes, sir.
1D—page 6 } Q. 27. Is that also shown in yellow crossing the river at that point?

A. Yes, sir.

Q. 28. About how far was the bridge, the new bridge, from the old bridge?

A. Around thirty-five feet.

Caudle Belcher.

Q. 29. Do you know why the old bridge was not torn out and a new bridge constructed in the exact location the old bridge was in?

A. They had no way crossing the river if they had torn out the old bridge before the new one was constructed.

Q. 30. Who would have no way of crossing the river?

A. In constructing the tipple and the people living over there.

Q. 31. The people living over there. Who do you have reference to?

A. Norman Clifton and his tenant.

Q. 32. By dropping the new bridge down the river slightly they would still have a means of access to the Clifton residence, is that right?

A. Yes, sir.

Q. 33. Now, what particular effect, if any, did this change in the location of the bridge have upon the Clifton or the Salyers properties?

A. Well, I would say it would improve it.

The foregoing questions and answers are objected to by counsel for the complainants as being immaterial to any issue in this case, and it is stipulated and agreed by 1D—page 7 } counsel for all parties that the same objection, for the same reasons, is made to all similar questions as to alleged improvements to the Clifton property without making these objections to each specific question.

Q. 34. In what respects was the properties of the complainants, Clifton and Salyers, improved by this change in location of the bridge, Mr. Belcher?

A. In raising the bridge up around four feet higher than the other one and made a better entrance to get up on the railroad.

Q. 35. Did it also eliminate some danger of the bridge washing out?

A. Yes, sir.

Q. 36. What type of structure is the new bridge?

A. It had steel girders and a wood floor.

Q. 37. Does this road shown in yellow follow the location of the old road, or original road there, or was there some slight change made in the location?

A. Well, the most of it was a new road altogether.

Q. 38. I believe you stated that the map was drawn to scale, and according to your map there was some slight change made

in the location of parts of the road shown in yellow as distinguished from that shown in red, is that correct?

A. Yes, sir.

Q. 39. Why was that slight change made in the location?

A. Well, in order to haul coal over it.

Q. 40. I believe you already stated that the old road could not possibly carry the traffic of hauling coal?

A. That is right.

1D—page 8 } By Mr. Pobst: All questions whether heretofore asked and answered or whether hereafter asked as to the change in location objected to as being immaterial and of no probative value as a matter of defense. And it is agreed that the same objection and reasons shall apply to all similar questions without specifically objecting to each question and answer.

Counsel for the defendants, in reply to the foregoing objection, here state that the lease provides in clear and unequivocal terms that the lessees were to have the right to haul over the roads on the leased premises coal acquired by the lessees from other parties free of charge, provided the lessees maintain and keep up the roads, or other roads, at their own expense. It is respectfully submitted, under that provision of the lease, the lessors intended to give the lessees the right to haul this coal over the leased premises to the tipple, and described the way in general terms. If the precise location of the roads then on the leased premises were wholly unfit for the agreed purposes, the lessees were given the necessary right to place them in some condition to make them of practical use for the express purpose set out in the lease.

Counsel for the complainants contend that nothing in the lease gives the defendants, or any of them, the right to change the location of any of these roads or the grade thereof, and the lease nowhere gives the defendants any right to haul coal from other lands over premises not leased, and the lands of the McNeil widow and heirs reserved were not to be so used as they were not leased premises.

Counsel for the defendants assumes it is the contention of counsel for the complainants that the lessors intended to give the lessees a right which it was impossible to exercise.

Replying to this counsel for the complainants contend that they gave them no right to haul over any of the reserved and excepted lands except coal from their own properties, and that over the roads already constructed.

Caudle Belcher.

1D—page 9 } Q. 41. Now, do you know approximately how long the road shown in yellow was used by the defendants for the purpose of hauling coal to its tipple located on the McNeil lands?

A. No, sir, I don't know exactly the time.

Q. 42. Is it now hauling its coal over that road?

A. No, sir.

Q. 43. Do you know approximately how long it has been since it has hauled over the road shown in yellow?

A. I say something over two years.

Q. 44. Is Paragon Jewell Coal Company still maintaining the road shown in yellow?

A. Well, all they do they keep the lower end of the road cleared where it joins the new constructed road.

Q. 45. Who is, and for the past two years, been using the road shown in yellow?

Counsel for the complainants objected to the foregoing question as immaterial.

A. Clifton and his tenant.

Q. 46. How does the defendant, Paragon Jewell Coal Company, get its coal to its tipple from its mines located on the opposite side of Dismal River at this time?

A. It is over a new constructed road.

Q. 47. Is that the road shown on the map in green?

A. Yes, sir.

Q. 48. Now, what part, if any, of the road shown in green, and which you say has been used by Paragon Jewell Coal Company for approximately two years, is on the property of the lessors or any of them?

A. Well, the road is on them after it passes
1D—page 10 } the Norfolk and Western right-of-way line.

Q. 49. Does the map accurately show where that is, Mr. Belcher?

A. Yes, sir.

Q. 50. Now, what effect, if any, has the relocation of this road had upon the Clifton property?

Counsel for the complainants objected to the foregoing question as immaterial except as to the character of construction. Counsel for complainants took that to mean the use or effect of it. We think that would be immaterial. We think it is material to show that it has made higher cuts and caused the land to slip.

Caudle Belcher.

A. I would say it would improve the land so far as—the new cut was made approximately one hundred feet from the old road—and keeping the dust from the property.

Q. 51. That is further away from the Clifton residence?

A. Yes, sir.

Q. 52. Now, has there been any slide of any nature, or cave-in, as a result of this new road being located there?

A. Not to my knowledge outside of the mountain moving.

Q. 53. Has the mountain moved there where this road is located?

A. I figure it has moved all along, because the tipple has moved about six inches since the tipple was constructed. There was a well drilled at the Salyers house that had to be discontinued because the casing was approximately two feet out of line.

Q. 54. That took place on around this road in the vicinity of the tipple, did it, Mr. Belcher?

A. Yes, sir.

1D—page 11 } Q. 55. There has been no slippage or cave-in or slide there in the cut where the new road was built in order to get to the tipple, has there?

A. No, sir, not since it has been constructed.

Q. 56. Any relocation of that road approximately one hundred feet further away from the Clifton home has had nothing to do with the slippage you referred to?

A. No, sir.

Counsel for the complainants insist that the questions are quite leading.

Q. 57. And was there a cut below the Clifton house before any change was made in the location of any roadway?

A. Yes, sir. There was a railroad constructed below his house.

Q. 58. Is that the road that is presently being used by Paragon Jewell Coal Company and cut into that cut, or had it made an entirely new cut?

A. It made a new cut something like one hundred feet on the upper end.

Q. 59. Where do you mean "the upper end"?

A. Outside of the Norfolk and Western right-of-way.

Q. 60. That is where it leaves the railroad right-of-way?

A. Yes, sir.

Q. 61. And is that cut also further away from the Clifton house?

Caudle Belcher.

A. Yes, sir.

Q. 62. Now, there are also some other roads shown on the map in red and blue. Will you explain what those are, Mr. Belcher?

1D—page 12 } A. The Red road was the original road which was a narrow road similar to a wagon road; the road shown in Blue was a road constructed by Paragon Jewell Coal Company.

Q. 67. And where did those roads lead to?

A. Led to the mines.

Q. 68. Did you do the engineering work for Paragon Jewell Coal Company in its mining operation?

A. Yes, sir.

Q. 69. Are you still doing its work?

A. Yes, sir.

Q. 70. Now, those roads, shown in Blue, were constructed there for the purpose of mining and removing what coal?

A. The McNeil coal and the Brown coal.

Q. 71. Were they built there to the outcrop of what is known as the Jewell or Red Ash seam of coal?

A. Yes, sir.

Q. 72. Mr. Belcher, please state whether or not it would have been possible as a practical proposition to have mined the coal from the McNeil lands if these slight changes in the location of the bridge and the roads, which you have testified about and which are shown on the map which you have been testifying from, had not been made.

Counsel for the complainants objected to the foregoing question for the following reasons:

1. Because the question is suggestive and leading, inasmuch as it suggests to the witness that the changes made were slight.

2. Because it is immaterial whether, as a practical proposition, the coal could have been mined from the McNeil lands or not. If it could not have, this does not vitiate the requirements. The defendants are bound by their

1D—page 13 } contract, and can only make such use of the land as the contract provides.

A. No, sir, it would not have been. All their coal could not have been mined from that side of the river. They own two

hundred forty three acres on another branch that would have to come up over this road.

Q. 73. Could the lessees have mined the coal on that side of the river without the road shown in Blue on the map, which you have been testifying from, being built?

The complainants, by counsel, object for the same reasons heretofore assigned.

A. No, sir.

Q. 74. Then, those changes and improvements in the roadway and bridge were necessary in order to mine the McNeil coal?

The complainants, by counsel, object for the same reasons heretofore assigned.

A. Yes, sir.

The complainants, by counsel, object for the reasons heretofore assigned, including the first reason as leading and suggestive.

Q. 75. Have you prepared all the mine maps of the Paragon Jewell Coal Company since it has been operating there on the McNeil lands and adjacent lands, Mr. Belcher?

A. Yes, sir.

Q. 76. Has any coal been hauled underground through any haulway from the Brown heirs' land over the McNeil land?

A. Yes, sir.

Q. 77. Do you know when that started, approximately?

A. Something like eighteen months ago.

Q. 78. Will you file, as a part of your deposition, the map from which you have been testifying, which is described "Map showing railroad, Dismal River, truck roads and property lines near Paragon Jewel Coal Company's Coal tipple, Whitewood, Buchanan County, Va." as defendants' exhibit No. 1?

1D—page 14

A. Yes, sir.

Thereupon the map was filed, marked for identification as Defendants' Exhibit No. 1 and the same is attached to and returned with the original hereof.

* * * * *

Caudle Belcher.

1D—page 15 } CROSS EXAMINATION.

By Mr. Pobst:

Q. 1. Mr. Belcher, when did you do the surveying shown on this map? It is labeled 2-5-55. Does this mean about February, 1955, when you did this surveying?

A. No, I did it—the surveying there—some time before that, except the new road,—the one that is on the new location.

Q. 2. You mean the greenroad?

A. Yes, sir.

Q. 3. You didn't survey the old road shown in red until after the new road shown in yellow had been done, is that right?

A. I run the crop and run a tie line around this old road shown in red before they ever made any change there. We were doing that for a loading dock and they decided not to put it in.

Q. 4. You didn't take any topography or widths or anything at that time of the road shown in red?

A. No, sir, except on a curve, it was some wider than on the straight road. On a straight road would run around ten or twelve feet wide and on the curve it would have been eighteen feet wide.

Q. 5. Is it not a fact that the cuts on the upper side of the road shown in yellow are higher than they were on the old road shown in red?

A. Yes, sir, they are some higher.

Q. 6. Did you measure to show any difference as to those?

A. No, sir.

1D—page 16 } Q. 7. You spoke of a well on the Salyer's land, near the Salyer's house having pushed or gotten out of plumb. About how far did you say?

A. Approximately two feet.

Q. 8. About two feet. Do you know anything about the well near the Clifton house and used by the Clifton family also being out of plumb?

A. No, sir.

Q. 9. Did you know they had to drill a new well up there?

A. No, sir. I knew they drilled one at Paragon Jewell.

Q. 10. At this time is most of the coal from the Brown—Is any of the coal from the Brown heirs' land being brought through the inside of the mines shown on this map?

A. No, not on that map.

Caudle Belcher.

Q. 11. Is any of the Brown heirs' coal being brought through the inside of the mines of the complainants?

A. Yes, sir.

Q. 12. Then, why, if they are bringing it through the inside of the mines from the Brown heirs did they make any outside road, shown in Blue and brown?

A. Because of number of mines and the size of the tract.

Q. 13. Is a record kept, do you know, of how much of the coal is hauled through the mines and how much is hauled over the Blue road?

A. Yes, sir.

Q. 14. They keep a record of that?

A. Yes, sir.

Q. 15. Do you know whether the Paragon Jewell Coal Company is paying anything for the coal from the
1D—page 17 } Brown land that is hauled over this blue and brown outside road?

A. No, sir.

Q. 16. You mean you don't know or they are not paying anything?

A. Not paying anything.

Q. 17. About what portion is hauled over the brown and blue road from the Brown heirs coal, and what portion through the inside of the defendants' mines?

A. I don't know. I never made any comparison.

Q. 18. Where does most of the coal come over?

A. Over the surface.

Q. 19. You mean over the blue and brown roads?

A. Yes, sir.

Q. 20. You were on the ground, you say, when the old road, that was the road shown in red, is that right?

A. Yes, sir.

Q. 21. And that supplied the needs and wants of the Clifton and Salyers families, did it not?

A. Yes, sir, I imagine it did, it was all the road there was.

Q. 22. Could you see any reason for them having more road than they had?

A. Well, I could tell it took a road to be used for heavy traffic as you are trucking on it, and it would be impossible for them to use it.

Q. 23. I believe you did not understand my question. My question is this: For the use that the Cliftons and Salyers and

1D—page 18 } the McNeil heirs for their houses and farms and going in and out, was not that road shown in red ample for their needs?

A. Up until the time I went there it was ample for their needs.

Q. 24. The needs for hauling heavy machinery and coal in over that road is not the needs of the complainants in this suit, is it?

A. Well, Norman Clifton could not have used his low boy on the old road, that he has, and his big heavy trucks he has. He has mines and takes his truck and low boy up to his house.

Q. 25. You mean mines away from the Clifton land?

A. Yes, sir.

Q. 26. He could have stored them along on adjacent land?

Counsel for the defendants objected to counsel arguing with the witness.

Q. 27. He could have stored them along the Dismal River or along the main highway, or along the edge of the Norfolk and Western right-of-way as he started up the hill, could he not? He didn't have to take them up to his house, did he?

Counsel for the defendants objected to counsel for the complainants arguing with the witness.

A. I don't know anything about that. That would have been left up to Norman Clifton.

Q. 28. Were you there, or do you know anything about the use of this road shown in red that was made by the people that dug the gas well?

A. No, sir.

Q. 29. They used that old road in hauling their well equipment and supplies up to dig that well, did they?

1D—page 19 } A. I imagine they did. That was the only road there.

Q. 30. And all the timber they used in drilling the well they hauled that over the old road shown in red, didn't they?

A. Yes, sir. I imagine they did. I didn't see them.

Q. 31. Well, did you know that the complainants sold the timber off that land to George Horn?

A. Yes, sir.

Caudle Belcher.

Q. 32. And he had hauled all his timber down over that old road?

A. He was going down hill with his loaded trucks.

Q. 33. Well, the bridge—the old bridge was sufficient for those purposes for the trucks to cross?

A. That is right. The bridge gradually deterioated so it would have to be repaired, and while they repaired it they built a new bridge.

Q. 34. What deterioated it? Was it not the trucks of the defendants over it that did most of it?

A. It was practically gone when they came there. It was an old bridge when they first started using it.

Q. 35. The defendants hauled all their equipment and materials for their tipple and buildings and whatever else they had was hauled over this old road, in red, was it not?

A. Not all of it, no, sir.

Q. 36. Where did the rest come from?

A. The heavy machinery that went in, part of it was loaded off of railroad cars and part was hauled over this bridge.

Q. 37. It took them how long to install that plant?

A. I say ten months, something like that.

1D—page 20 } Q. 38. The bridge shown in yellow, crossing Dismal River, was on the lands of complainants from the edge of the state highway and then on across Dismal River and then on some feet further to the right-of-way of the Norfolk and Western nearest Dismal Creek, is that not true?

A. Yes, sir.

Q. 39. Then the yellow road crosses the Norfolk and Western right-of-way in one hundred or so feet,—from then on is all on the lands of the complainants, is that right?

A. Yes, sir.

Q. 40. Now, Mr. Belcher, do you remember how long the defendants used the yellow road?

A. No, sir, I don't.

Q. 41. You could not estimate that time, could you, whether it might be six months or a year, or two or something?

A. I say, roughly, they used it—Well, it would be hard to answer, because it was some time before they hauled much coal that way, but from the time they started constructing the tipple up until they quit using it was possibly two years and a half.

Q. 42. This green road that turns to your left, from the point where it leaves the location of the road shown in yellow runs approximately one hundred seventy-five feet or two

hundred feet on the Norfolk and Western right-of-way, is that right?

A. Yes, sir.

Q. 43. And then it enters the lands of the complainants, is that right?

A. Yes, sir.

1D—page 21 } Q. 44. And runs some three hundred fifty or four hundred feet out to the coal tipple of the defendants, is that right?

A. About three hundred feet, yes, sir.

Q. 45. Then that road is broadened out so, at one place, it is something like one hundred feet wide where it goes out to the coal bin to the left?

A. Yes, sir.

Q. 46. Then, it continues on and passes into the office—the office building and passes somewhere in six feet to the location of the red road, is that right?

A. Yes, sir.

* * * * *

1D—page 23 } FRANK H. WOODS, another witness of lawful age, being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. You are Frank H. Woods?

A. Yes, sir.

Q. 2. Where do you live?

A. Bluefield, West Virginia.

Q. 3. What is your occupation?

A. Treasurer and superintendent Paragon Jewell Coal Company.

Q. 4. Does the Paragon Jewell Coal Company have any operation other than the one on Dismal River in Buchanan County, Virginia?

A. No, sir.

Q. 5. I believe its tipple is located on what is known as the McNeil lands?

A. That is right.

Q. 6. How long have you been superintendent of the Paragon Jewell Coal Company?

A. Since May of 1954.

Frank H. Woods.

Q. 7. You say you are also treasurer of that company?
A. Yes, sir.
Q. 8. Do you have charge of the records of that company?
A. Yes, sir.
Q. 9. Did you have prepared, under your supervision, a statement which has been asked for by counsel for the complainants showing all of the coal mined from
1D—page 24 } the various tracts of land which has been transported to the Paragon Jewell Coal Company's tipple and processed in that company's tipple?
A. Yes, sir, that was prepared under my supervision and I checked it.
Q. 10. It has been checked from the official records of the company?
A. Yes, sir.
Q. 11. I hand you herewith what purports to be a statement of the tonnage mined from the various tracts of land and processed by the Paragon Jewell tipple, and ask you if that is the statement which you say was prepared under your supervision?
A. Yes, sir.
Q. 12. Will you file that statement with your deposition, marked Defendants' Exhibit No. 2?
A. Yes, sir.

Thereupon the statement above referred to was filed and marked for identification as Defendants' Exhibit No. 2, and the same is attached hereto and returned as a part hereof.

* * * * *

1D—page 25 } Q. 13. Now, Mr. Woods, has any coal been transported underground from the Brown heirs' tract of land through the McNeil lands?
A. It has been transported underground by one of our contractors, Bear (Bare) Ridge Coal Company.
Q. 14. Have you kept accurate records of the number of tons of coal that have been hauled underground from the Brown heirs' tract through the McNeil lands?
A. Yes, sir. We have kept those records from the measurements given us by Caudle Belcher.
Q. 15. Have you paid to the complainants, who are the lessors under the terms of their lease with C. A. Clyborne and J. H. Franks, two and one-half cents for each and every ton of coal hauled underground through the McNeil lands?

Frank H. Woods.

A. Yes, sir. We paid them each month.

Q. 16. That has been fully paid at the rate agreed upon in the lease for each and every ton of coal hauled through their lands from the Brown heirs, underground, is that correct?

A. Yes, sir.

Q. 17. Mr. Woods, I hand you a map which has been introduced in evidence as Defendants' Exhibit No. 1, and will ask you to look at it and state if you are familiar with the lands and roadways, rivers, etc. as shown on that map?

A. Yes, sir, I am.

Q. 18. Do you understand the legend of the map?

A. Yes, sir.

Q. 19. The roadway that is shown in yellow is used now for what purpose?

1D—page 26 } A. The roadway shown in yellow?

Q. 20. Yes.

A. The part from the highway to the Norfolk and Western right-of-way is used by us for transporting coal.

Q. 21. Is it used by any other persons?

A. Yes, sir. It is also used by Mr. Clifton in getting to and from his house.

Q. 22. After the road shown in yellow crosses the railroad right-of-way and continues upward, who uses the road?

A. That road now is used by Mr. Clifton in getting to and from his house.

Q. 23. Used by any body else?

A. Not that I know of.

By Mr. Pobst: The last two questions as to who is using the yellow road is objected to as being immaterial.

Q. 24. How long has that road in yellow been used exclusively by Mr. Clifton in getting to and from his home?

Counsel for the complainants objected to the foregoing question.

A. Approximately thirty months—the past thirty months.

Q. 25. During the past thirty months, approximately thirty months, how has your company been getting its coal to the tipple?

A. We have been getting our coal to the tipple by the road shown here in green.

Q. 26. And that extends across to the Norfolk and Western

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right-of-way until it reaches a point near where the yellow road intersects with it?

A. Yes, sir.

Q. 27. Now, why was the road shown in
1D—page 27 } green located where it was, Mr. Woods?

A. The whole bottom fell out of the road shown on the map in Yellow. If we had not put the road shown in Green here we would have to go up and take off approximately the whole of Mr. Clifton's yard there to still transport coal in this direction.

Counsel for the complainants object to the foregoing as being immaterial.

Q. 28. Could it have been replaced at its same location, or in the location of the road shown in Red?

A. No, sir. We had to go in further toward Mr. Clifton's house or get on the Norfolk and Western right-of-way.

Q. 29. You say the road was constructed principally on the Norfolk and Western right-of-way in order to get further away from his house?

A. Yes, sir.

Q. 30. Now, when this Green road leaves the Norfolk and Western Right-of-way, state to what extent there is any cut as compared with the cut that existed in the old road?

Counsel for the complainants object for the reason, even if there was no cut, the defendants had no right to use it to make a new road.

A. I could not tell you. I know in height and feet a very slight cut was made there in intersecting with the Yellow road.

Q. 31. From a point near the edge of the Norfolk and Western right-of-way on that side toward the Clifton residence, back down to the railroad track itself, is that cut within the railroad cut?

1D—page 28 } A. The road is within the railroad right-of-way.

Q. 32. Was it not necessary for the railroad to make a cut in order to construct its tracks there at that point?

A. They had to make a cut when the railroad was originally put in there, yes, sir.

Q. 33. And this road shown in green was cut into the railroad cut?

A. That was cut into the cut the railroad company made.

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Q. 34. Is the bridge now being used by your company and also by Mr. Clifton the same bridge that was there at the time this operation was started?

A. Yes, sir. It is the same bridge we built.

Q. 35. It is not the same bridge that was there when the operation started?

A. When the operation started? No, sir.

Q. 36. Do you know where the old bridge was located?

A. Yes, sir.

Q. 37. Approximately how far was that from the location of the present bridge?

A. Approximately thirty feet.

Q. 38. What type of construction is the new bridge?

A. Concrete and steel with a wood floor.

Q. 39. What about the level of the bridge with reference to the highway and railroad which has to be crossed in order to reach the Clifton home?

A. The bridge we built is approximately six feet higher than the bridge that was in there at the time the construction begun on the Paragon Jewell plant.

1D—page 29 } Q. 40. Was that above, below or about on a level with the railroad?

A. It is below the railroad slightly.

Q. 41. But still six feet higher than the old bridge, approximately?

A. Yes, sir.

Q. 42. What affect, if any, has the new bridge had on the Clifton property and its accessibility to the highway?

A. It has made it much more accessible. You can take much more over it than you could the bridge that was in there.

Counsel for the complainants objected to the foregoing as being immaterial to the issue in this case.

Counsel for the defendants would like to ask counsel for the complainants if they have abandoned any claim they have made for any damages to the Clifton property.

By Mr. Pobst: We have not; we have abandoned nothing.

By Mr. Gillespie: I was wondering, in the light of your objections, if that was not your present position. If not, I think this question is material.

Q. 43. Mr. Woods, would it have been possible for the Paragon Jewell Coal Company, or any other operating company, to mine and remove the McNeil coal without having

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made these changes and improvements in the roadway there?

Counsel for the complainants object to the question and any answer, because immaterial.

It is agreed by counsel for the complainants and defendants the same objection shall apply without specifically objecting to each question.

Counsel for the defendants has been laboring under the impression that the leasing of coal carried with it the necessary rights incident to mining and removing the coal, and, therefore, it is respectfully submitted this question is vitally material to the issues in this case.

1D—page 30

Counsel for the complainants again call the attention of the Court to the fact that the Clifton and Salyers land were not leased. Only specific rights were given them and they were set out in the deed of lease.

Q. 44. Would it be possible to mine and remove the McNeil coal without the improvements and change in the roadways?

A. No, sir.

Q. 45. Now, you say that the roadway now being used to get to the tipple is further away from the Clifton house than the old road?

A. Yes, sir, it is approximately one hundred feet further away from his residence than the old road was.

Q. 46. What effect, if any, has that had on the Clifton home and its enjoyment?

Counsel for the complainants objected for the reason it is immaterial.

A. It has eliminated much dust and traffic which Mr. and Mrs. Clifton both complained to us before when we were using the old road. We have not had these complaints since we have been using the new road.

Q. 47. Has there been any slippage or cave-ins any ways near the Clifton residence as a result of this road being relocated there?

A. Not that I know of.

Q. 48. Are you there every day?

A. I am there three and four days every week.

Q. 49. Have you ever seen or heard of any such occurrence taking place?

1D—page 31

A. No, sir.

Frank H. Woods.

Q. 50. Mr. Woods, how is this coal mined that goes through the Paragon Jewell Coal Company's tipple?
A. The coal is all deep mined.
Q. 51. What method of mining is used?
A. The coal is all hand loaded.
Q. 52. Now, is that the truck method of mining?
A. Yes, truck mining.
Q. 53. And that coal is hauled into the tipple in trucks of various independent contractors, is that correct?
A. Yes, sir.
Q. 54. Have you had any experience in comparing the weights of the coal as it is weighed on the trucks as brought in on the company scales as against the railroad weights of coal after it is sold?
A. Yes, sir.
Q. 55. What has been the result of the comparisons in that respect?
A. The result is we buy from two and one-fourth to some times as high as three per cent more coal than we sell.

This question and answer is objected to by complainants as being immeaterial.

By Mr. Gillespie: If this is immaterial then complainants must be abandoning their claim that they are entitled to payment for the two and one-half per cent recovery for impurities that the defendants have been making.
By Mr. Pobst: That is not correct. We will argue that at the proper time.

Q. 56. Now, what do you attribute this
1D—page 32 } difference to, Mr. Woods?

Counsel for the complainants object for the same reason.

A. Impurities in the coal which are removed by processing through our tipple.
Q. 57. What do those impurities consist of?
A. Rock, scrap iron, timbers,—various items that are removed during the processing of the coal through our tipple.
Q. 58. Is this waste meterial that one sees dumped out in the vicinity of coal tipples? Is that what you have reference to?
A. Yes, sir, refuse.

Frank H. Woods.

Q. 59. Is that refuse weighed on the trucks when it is brought to your scale?
A. Yes, sir.
Q. 60. And those impurities and refuse are cleaned out in processing the coal and only clean coal is loaded into the coal cars, is that correct?
A. Yes, sir.

By Mr. Pobst: This question and several previous questions are objected to as being grossly leading and suggestive, and further because immaterial. It is agreed that the same objection shall apply to all similar questions even though no specific objection is propounded to each question.

Q. 61. It is alleged in the Bill and Amended Bill that a deduction of two and one-half per cent has been made in royalty payments to the McNeil heirs by your company. Is that correct?
A. Yes, sir.
Q. 62. Was that deduction made because of these impurities and refuse in the coal?

1D—page 33 } By Mr. Pobst: Objected to as grossly leading.

Q. 63. Have you, by actual tests and experience, determined what percentage of the coal that is brought in to your scales, on trucks, is lost because of these impurities?
A. Yes, sir. We have run tests at various times, and it has run from two and one-fourth to some times as high as three and one-half per cent.
Q. 64. Is the two and one-half per cent deduction which you say your company makes for these impurities fair and proper?
A. Yes, sir.

By Mr. Pobst: This answer is objected to because it is the impression of counsel for the complainants that what is fair and proper is a question for the Court.

Q. 65. Have all of the statements showing the tonnage mined from the McNeil heirs land clearly and plainly shown this deduction?
A. Every statement we have given the McNeil heirs show these two and one-half per cent rejects.
Q. 66. You have been mining there since October, 1951?

Frank H. Woods.

A. Yes, sir.
Q. 67. I believe you stated that the coal is mined by these individual contractors—truck mines—and hauled in to your tipple?
A. Yes, that is right.
Q. 68. How are they paid?
A. They are paid on the same basis.

By Mr. Pobst: Question and answer objected to as immaterial.

1D—page 34 } Q. 69. On a tonnage basis?
A. On a tonnage basis, yes, sir.

Counsel for the complainants objected to the foregoing question and answer as being immaterial.

Q. 70. Is this same deduction made for impurities and foreign matter against them also?
A. Yes, sir. The two and one-half per cent deduction is made from all our contractors.

Counsel for the complainants objected for the same reasons heretofore assigned.
Q. 71. Does your company have any way of being compensated for this waste material that is thrown out on the side of the mountain?
A. No, sir, it is of no value.

Counsel for the complainants objected for the reasons heretofore assigned.

Q. 72. Is it coal?
A. No, sir, it is rock, bone, scrap iron and lots of wood.

Counsel for the complainants objected for the reasons heretofore assigned.

Q. 73. I believe your company now holds the McNeil lease as assignee of Mr. Clyborne and Mr. Franks?
A. Yes, sir.

Counsel for the complainants objected to the foregoing question and answer because the writing is the best evidence.

Frank H. Woods.

Q. 74. Does your company owe the complainants any amount of money on account of royalties for any coal mined from the demised premises?

A. No, sir.

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CROSS EXAMINATION.

By Mr. Pobst:

Q. 1. Mr. Woods, at the place lying immediately to the right of the Green road, ascending some seventy-five or one hundred feet where it turns to the left, there is
1D—page 37 } shown the Yellow road to the right, ascending off of the railroad right-of-way and outside of that right-of-way. I refer to a place just above and to the left, ascending, of the corner marked "R R Mon," meaning Railroad Monument. Right from about half way from that point to where the Red and Green roads come together, is it not a fact that the Yellow road and the Red road have been entirely discontinued and a high cut made on the right side of the Green road, ascending, and that the Yellow and Red, from that point, are all cut off and gone? From right about here to here.

A. The road from Mr. Clifton's house, approximately fifty feet from Mr. Clifton's house out this way, is gone. That is the section of the road that fell in. We had no road there.

Q. 2. A part of the Red road is also gone, is it not? Fell in, out toward the line marked "Established Partition Line"? From there out to the Green road, approximately—from the "Partition Line" out to the Green road the Red road is all gone?

A. The Yellow road is still there.

Q. 3. Is not the Red road gone, though? I will ask it in another way. I will mark the letter "A," with pen, and put a ring around it. Now, from there — approximately there — to the "Partition Line," shown on the map, is it not a fact all the Yellow road and Red road is gone? It has fallen in and there is a high bank on the right-hand side as you proceed toward the tipple?

Frank H. Woods.

A. No, sir. Mr. Clifton uses what is the Red road there now to get into his residence.

1D—page 38 } Q. 4. From the line there, is the road gone? From the Partition Line there, is not the red road gone?—Right close to that partition line?

A. I could not tell you the exact location. The road is probably from here to here.

Q. 5. That does not mean anything "from here to here,"—the Court don't know. From the Partition Line to about where the red road connects with the green road there is no red road, is there? It is gone, fallen in.

A. I don't understand you.

Q. 6. If it has fallen in, it is not there. Has it fallen in or not? From about the Partition Line out to where it connects with the green road has the red road fallen in?

A. No, the red road is not fallen in.

Q. 7. Can you use that red road from point "A" to the tipple?

A. We don't use the red road at all.

Q. 8. Can it be used?

A. No.

Q. 9. Has it not been cut out by the green road, and fell in?

A. The yellow road is the one that fell in.

Q. 10. The red did not?

A. The red road is the road used by Mr. Clifton to get to his house.

Q. 11. From the point "A," or the Partition Line, he can't use, can he?

A. It could be used. He don't use it.

1D—page 39 } Q. 12. Then, it is not fallen in from the Partition Line to where it connects with the Green line is not fallen in?

A. No, sir.

Q. 12. Has the Yellow road fallen in from that point?

A. You mark the Yellow one like you marked the Red?

Q. 13. From a point near point "A," is not the Yellow road all gone to where it connects with the Green?

A. Yes, sir, with the exception of right here there is still some of the Yellow road across the "Partition Line."

Q. 14. On the other side of the "Partition Line," from the Clifton residence?

A. Yes, sir, on the Salyers side.

Q. 15. Now, didn't you state there is no giving away of the bank at the Clifton residence?

Frank H. Woods.

A. At his residence?

Q. 16. Near the Clifton residence, or anywhere up there?

A. How near to the Clifton residence do you mean?

Q. 17. For instance the well. Did you know his well is about—is out of plumb and he had to drill a new one?

A. I was told that. I never did see it.

Q. 18. You said there was not any change up about the Clifton house, you were there three or four times a week. You just don't know what occurred up there, you have not been up there?

A. I am not at the Clifton house three or four times a week, I am at the Paragon Jewell tipple three or four times a week.

Q. 19. You don't know what has happened to the well?

A. I never did see it. I was told.

Q. 20. You were told they had to drill a new well.

A. I was told.

1D—page 40 } Q. 21. Why, you know, they had to drill a new well if the old one is pushed out?

A. We had to drill a new well at the house we rent from Salyers. It was being pushed over by the mountain pushing down behind it.

Q. 22. And the reason is those high cuts in front?

A. I could not say what the reason was.

Q. 23. Now, Mr. Woods, you stated that the Bear (Bare) Ridge Coal Company's coal was hauled over the McNeil surface out of the Brown heirs land, is that right?

A. It is hauled underground from the Brown tract and the McNeil tract.

Q. 24. You mean it is the Brown coal and it is hauled out over the McNeils, or some underground and some on the surface?

A. It is all underground.

Q. 25. The Bear (Bare) Ridge Coal is all hauled underground. It is hauled underground a part of the way and then hauled over this Blue road?

A. It is hauled underground from the entry of the Bear (Bare) Ridge mine.

Q. 26. Where is the entry of the Bear (Bare) Ridge Mine on this map?

A. It is not shown on that map.

Q. 27. Do you see an entry to a mine, with the pillars left in, about the top center of this map, and right under it is written the word "Mine"? Do you see that?

A. Yes, sir.

Frank H. Woods.

Q. 28. What entry was that?
1D—page 41 } A. That was Bluff Coal Company.
Q. 29. From that point, facing that entry, would the Brown heirs' entry be to the right or to the left?
A. It would be behind it.
Q. 30. Where did it go, outcrop? Did it go to the left or out here to the right?
A. The Brown property?
Q. 31. The place where the Brown heirs' coal come out to the surface?
A. You don't have the right mine. If you had the Bare Ridge Mine I could show you.
Q. 32. I understand that. This was another mine. You said it was not on there. I am asking you whether it is—as you face that entry, is it to the left, around this way to the outcrop, or to the right, along the word "Outcrop"?
A. It would be in front of it.
Q. 33. Where does the Bare Ridge coal, mined from the Brown heirs' land, come out? Does it come out this entry?
A. No.
Q. 34. As you face that entry, is it to the left or to the right outcrop?
A. It is about fifteen hundred feet below the outcrop as you face the entry,—the above mentioned entry shown on the map.
Q. 35. That is where the coal mined from the Brown heirs comes out to the surface?
A. Yes, sir.
Q. 36. What road was used in bringing it
1D—page 42 } down, in transporting it?

Counsel for the defendants fails to see where this is material to any issue in this case. The witness has already testified that coal mined from the Brown heirs' land and hauled underground, or the wheelage has been paid the lessors on every ton of coal.

Q. 37. Now, when it comes out into the open, does it come down to the tipple over any Blue road shown on the map? How does it get in there?
A. It comes over this section of Blue road right there.
Q. 38. You mean there in the left-hand upper corner of the map designated "Stake Orig. Cor. Fence"? Comes out over that Blue stretch of road, is that correct?
A. Yes, sir.

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Q. 39. Now, does the Bear (Bare) Ridge Coal Company have a lease on the McNeil lands and on the Brown lands?

A. They mine coal from the McNeil and Brown lands.

Q. 40. And from the Brown heirs they bring it through the mines and out as you stated?

A. Yes, sir.

Q. 41. Now, I have looked on the Brown heirs' lease, where you say you have shown all the lessors, and do not see the Bear (Bare) Ridge Coal Company on there, and wondered if that is included in the McNeil or under another name?

A. You asked, Mr. Pobst, for this up to September, 1955.

Q. 42. Well, we asked for it up to September 1, 1955 because that was when we were taking depositions and we have just now got it. We will eventually want it. We might go along without any more information, but if the de-
1D—page 43 } cision of the Court is adverse to you, then we will ask that it be brought down to date, naturally.

A. Without my office records here I could not tell you the month Bear (Bare) Ridge started mining Brown coal and hauling it through McNeil underground.

Q. 43. It has been a recent thing that the Bear (Bare) Ridge Company got back to the Brown land and commenced mining off of that?

A. Yes, sir.

Q. 44. Now then, for all coal from the McNeil lands they have hauled over any of this Blue road—Has all of the McNeil coal, after it comes out of the mines, I mean coal mined from the McNeil lands, been hauled over this Blue road?

A. No, sir.

Q. 45. Where did the rest come from?

A. The rest come from the same road at the point you showed a while ago.

Q. 46. From that "Stake Corner"?

A. Yes, sir.

Q. 47. What coal come over the Blue road?

A. The coal that was mined by Bluff and two or three companies operating at that same drift mouth.

Q. 48. Is this the Bluff here?

A. Yes, sir.

Q. 49. I am going to write on this map "Original Bluff C. Co. Entry." Is that correct?

A. Bluff was the original entry there. There has been three or four others since Bluff.

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Q. 5. The Original Bluff Coal Company
1D—page 44 } entry, is that right?
A. Yes, sir.

Q. 51. And what about this "Opened for Mine" up on the left hand end of the Brown road? What is that?

A. That is an opening we made for a mine to go in. The stakes and timbers are still sitting there for the mine.

Q. 52. You have not hauled anything out there?

A. No, sir.

Q. 53. Most of the coal then from the McNeil land was from beyond this "Stake Corner"?

A. It was both ways.

Q. 54. You mean all of it that does not come out of this Bluff opening comes from that left-hand "Stake Corner," is that correct?

A. Yes, sir.

Q. 55. You said all of the coal could not be brought to the tipple without these new roads, the yellow road or the green road?

A. I said could not be mined.

Q. 56. Could not be mined with your coal mine?

Counsel for the defendants object to the foregoing question because he is misquoting the witness.

Q. 57. Why could it not be mined? It could be mined where the coal is. And why could it not all be brought down the Blue road up near the "Stake Corner"?

Counsel for the defendants state their further objection to this question for the reason that the Blue road was put there by the defendants in order to get the McNeil coal to the tipple. And under the complainants assumption, or apparent assumption they had no right to go anywhere except on the Red road.

1D—page 45 } Q. 58. Let me ask you this: You stated that you could not mine and take to the defendant's tipple all of the coal from the McNeil lands without using the Yellow Bridge crossing Dismal River.

A. Yes, sir.

Q. 59. What part of the McNeil coal have you been bringing in that way?

A. In mining coal you have to have some way to get the supplies in, you have to take your equipment in and you have

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to get your men in. We have to use this road to get to the McNeil land.

Q. 60. None if the McNeil coal is hauled across the Yellow bridge?

A. This road is necessary to mine the coal on the McNeil tract.

Q. 61. I again ask you! Is any of the coal mined from the McNeil land hauled over the Yellow bridge? Is it, or not?

A. No, sir.

Q. 62. All right. Did you say the *complainants* constructed all this Blue road? Who constructed all the Blue road?

A. The Paragon Jewell Coal Company.

Q. 63. Was it necessary to construct any of that Blue road from the point designated "B" on the map, and then to the right toward the Brown land? Was it necessary to construct that road to get the McNeil coal out?

A. It was necessary to construct all of it in order to get to the McNeil coal.

Q. 64. I have designated point "C" on the
1D—page 46 } map. Tell me what McNeil coal is brought over the Blue road from that point?

A. None.

Q. 65. Why was it necessary?

A. We have an opening here. We planned to put a mine right here.

Q. 66. But you didn't?

A. No, sir.

By Mr. Gillespie: Designate that "Proposed Mine."

By Mr. Woods: It is already shown on the map here "Proposed Mine."

Q. 67. You have not used any of the Blue road from point "C" out to the Brown heirs' land for the purpose of hauling any coal from the McNeils, is that right?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Mr. Woods, I believe your company's lease also includes some coal on the Mary McNeil portion of the John G. McNeil land. How would you get that coal to your tipple?

A. We will have to haul that coal across this road right

here. The same location Mr. Pobst asked me about a while ago.

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1D—page 47 } WILLARD H. GREEN,
another witness of lawful age, being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Please state your name, residence and occupation?

A. Willard H. Green, Royal City, Virginia, private engineer.

Q. 2. What type of engineering do you do?

A. Mining engineering.

Q. 3. Where have you been engaged in your profession as mining engineer, Mr. Green?

A. Mostly around Whitewood in Buchanan County, and in the last three or four months I have been doing some engineering out around Grundy.

Q. 4. And how many years have you been engaged in mining engineering?

A. Off and on since 1931, but in this State I guess about eight years.

Q. 5. What training have you had?

A. I completed half of a correspondence course with the International Correspondence School and experience with competent engineers.

Q. 6. You have worked under and with graduate engineers?

A. Yes, sir.

Q. 7. How long have you worked under and with graduate engineers, Mr. Green?

A. Well, it was practically all, prior to coming here. When I come here I come here as engineer for the
1D—page 49 } Laurel Fork Coal Company.

Q. 8. How long have you been in this section of Virginia?

A. About eight years.

Q. 9. And you say you have been engaged chiefly in and around Whitewood?

A. Yes, sir.

Q. 10. How far is that from what is known as the McNeil

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lands where the Paragon Jewell Coal Company has its operation?

A. Where the Laurel Fork tipple is would join the McNeil property.

Q. 11. Are you familiar, in a general way, with the Paragon Jewell Coal Company's operation?

A. I know where it is.

Q. 12. In your work is it necessary for you to familiarize yourself with terms of leases under which you are working?

A. Yes, sir. When I was with Laurel Fork there was some I was familiar with, and others in Cumberland, Maryland. I formed a corporation of my own, and, of course, in that way I knew right off hand.

Q. 13. What corporation.

A. It was a coal mining corporation.

Q. 14. Did you engage in the mining of coal?

A. Yes, sir.

Q. 15. Now, what type of operation did you engage in?

A. Strip mining.

Q. 16. Are you familiar with what is known as the truck mining method of coal mining?

A. Yes, sir.

1D—page 50 } Q. 17. Now, when coal is mined by what is known as the truck mining method, just state what the proceedure is as to mining, removing and transporting the coal and getting it loaded into the railroad cars.

A. You have to go in and mine it, load it into cars, bring it out and dump it in a chute and from the chute into trucks and then the trucks haul it to a processing plant where it is prepared.

Q. 18. When it is prepared, what takes place?

A. Well, it is graded as to size, and all different sizes are put into separate cars, and the impurities are taken from it.

Q. 19. At the time a truck is driven upon the scales at the preparation plant, are these impurities weighed along with the coal?

A. Yes, sir.

Q. 20. Have you had any experience in determining approximately what proportion or part of the load that is placed upon the scales, in the truck, is impurities?

A. Yes, sir. I can cite the instance of Laurel Fork. When they first started dumping coal into the coal cars they didn't weight it. And then later on we put the tipple in and we put in a set of scales and we started weighing in the coal. At first

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we had taken three hundred pounds tare weight per truck. Now, that three hundred pounds was to take up the difference in the weight. When you have anything empty, an empty gas tank and a full gas tank,—maybe when he had his empty truck he didn't have a set of chains in it and

1D—page 51 } later on he might have put a set of chains on it and that truck would pick up mud, and that would make the truck weight heavier. And that tare weight was mainly to take care of that, together with any impurities taken from it. With that three hundred pounds per truck we found out that we were buying more coal than we were selling by the railroad weight, so, we called all the contractors or truck miners together to work out a solution, and the solution which we worked out was, we decided to take fifty pounds per ton. In other words, if the truck coming over the scales—we know what trucks weight, we know he hauls six tons and he sets his tare for fifty pounds per ton. In other words, they will take fifty pounds per ton.

Counsel for the complainants object for the reason it is immaterial.

Q. 21. Did you find that by deducting fifty pounds per ton tare weight, as you refer to it, for the impurities and other things, that that adjusts the difference between the scale weights at the processing plant and the railroad cars of coal?

A. Yes, sir.

Counsel for the *complaiants* object for the reason it is immaterial.

Q. 22. Then, only coal was loaded into the railroad cars, after the coal was cleaned and processed?

A. That is right.

Q. 23. Then, your experience showed you that there was approximately fifty pounds to each ton of coal being weighed on the trucks at your scales that was not coal?

A. That is right.

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J. H. Franks.

CROSS EXAMINATION.

By Mr Pobst:

Q. 1. Mr. Green, in your work with and for the Laurel Fork Coal Company, on property you say adjoins or lying near to the McNeil land on Dismal River, I believe you were working in the Cary seam of coal?

A. Yes, sir.

Q. 2. That is about the dirtiest coal seam you know of?

A. Other than Jaw Bone.

Q. 3. Then, you are now working below Grundy I believe?

A. I am working around those little truck mines there on Little Prater.

Q. 4. Near Grundy?

A. Yes, sir.

Q. 5. In the vicinity of Grundy generally?

A. Yes, sir.

Q. 6. About twenty-five miles from the Paragon Jewell operation?

A. Yes, sir.

Q. 7. What seam are you working in down
1D—page 54 } there, do you know?

A. They have three or four names,—they call it the Grundy seam, the Widow Kennedy seam and Red Ash. What is right I don't know.

Q. 8. You have never worked in any coal in the Red Ash seam near the McNeil lands?

A. No, sir.

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J. H. FRANKS,

another witness of lawful age, being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. You are Mister J. H. Franks?

A. Yes, sir.

Q. 2. Where do you live?

J. H. Franks.

A. On Swords Creek about three miles out of Raven.

Q. 3. In Russell County, Virginia?

A. Yes, sir.

Q. 4. I believe you are one of the original lessees in the lease from Mrs. Mary R. McNeil and others on certain lands which are mentioned in this suit and known as the John G. McNeil lands, is that correct?

A. Yes, sir.

Q. 5. Have you and the other lessee, Mr. C. A. Clyborne, assigned this lease to the Paragon Jewell Coal Company?

A. Yes, sir.

Counsel for the complainants object because the lease must be assigned in writing and the writing is the best evidence.

Counsel for the defendants here submit the assignee ought to be able to know whether or not this lease has been assigned, and all of the parties involved have stated or

1D—page 56 } will state that the lease has been duly assigned and is now held by the Paragon Jewell Coal Company.

Q. 6. Mr. Franks, were you active in procuring the lease which was originally given to you and Mr. Culbertson from the McNeil heirs?

A. Yes, sir.

Q. 7. Did you personally negotiate this lease and discuss its terms with the lessors?

A. Yes, sir.

Q. 8. Was there any one with you on the occasions or occasions when the terms of this lease were discussed with the lessors?

A. Yes, sir.

Q. 9. Who was it?

A. W. M. Culbertson, Jr.

Q. 10. Now, will you please state whether or not you had any conversation or discussion with the Lessors concerning your right to haul other coal over these lands?

A. Yes, sir.

The question and answer is objected to by counsel for the complainants if a beginning or start is made that might tend to introduce evidence to vary, change or alter or contradict the written lease.

Q. 11. Was Mr. Norman Clifton present when these discussions took place?

J. H. Franks.

A. Yes, sir.

Q. 12. Counsel for the complainants have asked Mr. Clifton why the clause "It is, however, agreed between the parties hereto that the said Lessees may have a right 1D—page 57 } of way for railroads, or truck roads, or other means of transportation on the lands of the said Macie Salyers and Virgie Clifton." Will you please state why that provision was put in the lease as you recall the conversation?

A. Well, we had coal on other boundaries and we owned other coal on other boundaries and we had leased other coal and had to have those rights in order to take care of the output we was expecting to have, and we had to get coal from other properties in order to reach our tonnage.

Q. 12. Do you remember how much acreage there was in the McNeil lands?

A. I am not positive, I believe it was seven hundred fifty acres.

By Mr. Pobst: Next to the last answer—the answer next to the last question is objected to as tending to vary, alter or contradict the lease.

Q. 13. Now, did you explain to the lessors what your and Mr. Clyborne's plan was for mining this coal?

A. Yes, sir.

Q. 14. What explanation did you make to them?

A. Well, we talked all the things over and it was satisfactory with all that was concerned.

Q. 15. What did you tell the lessors about how you planned to mine, process and prepare the coal for market?

By Mr. Pobst: Same objection as last above given.

A. Well, mining the coal by truck and hauling it to the tipple *prepatory* to processing the coal.

Q. 16. Did you and Mr. Clyborne then con- 1D—page 58 } template building this tipple?

A. Mr. Clyborne did.

Q. 17. And that was provided for in the lease?

A. Yes, sir.

Q. 18. Now, could Mr. Clyborne or any one else have built a tipple there for seven hundred fifty acres of coal?

A. I didn't understand the question, please.

Q. 19. Could Mr. Clyborne afford to build a tipple and processing plant there for seven hundred fifty acres of coal?

A. No, he could not.

Counsel for the complainants objected.

Q. 20. Did you explain that to the lessors?

By Mr. Pobst: Same objection.

A. I don't remember whether we talked—We talked about the amount of coal we wanted to run, and I don't know whether we talked that over with the lessors or not.

Q. 21. Well, there is a provision in the lease—Paragraph X of the lease, which provides that the lessors herein grant the lessees the right and privilege to haul lessees own coal purchased or leased over lands leased by lessors to lessees on the truck roads, or roads now on the leased premises free of charge. Why was that provision put in the lease, Mr. Franks?

A. That was to take care of our output of coal from other properties.

Q. 22. Did you discuss this with the lessors?

A. Yes, sir.

Q. 23. Were they fully and clearly informed of your intention to haul other coal over their lands?

A. Yes, sir.

1D—page 59 } Q. 24. And was it the agreement of the parties that you were to be given that right?

A. Yes, sir.

The last question and answer objected to by counsel for the complainants for the reason it is grossly leading and complainants move to strike the answer; and further because the evidence tends to alter or contradict the written instrument.

Q. 25. Did you look this property over prior to or at the time or shortly after the lease was executed, Mr. Franks?

A. Yes, sir, and before too. I was over the property before the lease was made.

Q. 26. Was there a road that led from the main Dismal River highway across the river and railroad tracks up to the Clifton and Salyers homes there at the time this lease was executed?

A. Yes, sir, there was a roadway, but they had to get up to their home, where Norman Clifton lived up on the hill.

J. H. Franks.

Q. 27. Was there a bridge that went across the Creek in order for them to get to their houses?

A. Yes, sir.

Q. 28. What type of bridge was it?

A. It was just a wood, log stringer wood bridge.

Q. 29. Was this bridge and road of such type that it could be used to haul coal to the tipple site which was granted in the lease?

A. No, sir.

Counsel for the complainants object for the reason it is immaterial.

Q. 30. Now, were you there on the job from time to time while the tipple was being constructed?

1D—page 60 } A. Yes, sir.

Q. 31. How did the contractor who erected that tipple get the equipment and materials up there to the tipple site?

A. Well, I don't know how they got their first equipment on that hill, whether they pulled it up there with the help of bull dozers, or whether they remodeled the road before they started getting it up. I know the road was too bad to get up there with trucks.

Q. 32. Were there some improvements made to the road?

A. Yes, sir.

Q. 33. What did those improvements consist of?

A. They changed the grade of the road and put it on a better grade and widened it out and graveled it until they could get in and out with the coal and equipment.

Q. 34. What about the bridge? Did they make any changes there?

A. Yes, sir.

Q. 35. What changed did they make?

A. They rebuilt the bridge.

Q. 36. Where did they rebuild this bridge with reference to the location of the old bridge?

A. They built it just a little below the old bridge.

Q. 37. What type of construction was the new bridge?

A. Well, it is steele beams but I could not tell you, I don't know whether it is concrete under those beams or what.

Q. 38. Is it strong enough and suitable to carry truck traffic with coal?

A. Yes, sir, it is.

1D—page 61 } Q. 39. Do you know what happened to the road that they changed the grade on and

graveled there at first in order to get the material in there to build the tipple?

A. Just abandoned it.

Q. 40. Do you know why they abandoned it?

A. They put it on a better grade, and they put it where they could get in and out to the tipple.

Q. 41. Now, is that closer or further away from the Norman Clifton home?

A. It was a little bit further away, down further I know, I don't know the distance—how far. I do know they built him some steps, coming in below, in order to get him up.

Q. 42. Would the noise and dust from the new location be more or less than it would be from the old location?

Counsel for the complainants object because it is immaterial.

A. Well, I would think it would be less noise further away, a little further away from his residence, and better road to haul over.

Q. 43. What effect, if any, has the new bridge and the relocation of the road had on the Clifton and Salyers property?

A. Well, it has been an improvement.

Q. 44. Been an improvement?

A. Yes, sir.

By Mr. Pobst: This question and answer objected to because it is a conclusion of the witness, and further because Salyers and Clifton did not ask for the new road and did not need the new road.

Q. 45. Was it necessary that this bridge and relocated road be built in order to mine the McNeil coal, Mr. Franks?

1D—page 62

A. Yes, sir. Yes, sir, it was.

Q. 46. Are you a practical miner yourself?

A. Well, I have done a lot of mining.

Q. 47. How long have you been engaged in mining coal?

A. Fifty-nine years.

Q. 48. And where have you worked in mines and in producing coal?

A. In Virginia. I spent the biggest part of my life at Toms Creek, Virginia. I went there when I was nine and I left there twenty-three years ago, and I will be sixty-nine years old the 26th of June.

J. H. Franks.

Q. 49. Have you done extensive coal mining in Tazewell, Russell and Buchanan Counties, Virginia during that period of time?

A. Yes, sir, I have.

Q. 50. And in what different seams have you engaged in in the production of coal?

A. Well, in practically all of them. The Kennady, the Cary, Red Ash and the Allen Springs and the Jaw Bone.

Q. 51. Have you operated mines in all those seams of coal in this section of Virginia?

A. Yes, sir.

Q. 52. Have you ever operated any coal mines in the Red Ash or Jewell seam by what is known as the truck mining method?

A. Yes, sir.

Q. 53. Now, in that method of mining, Mr. Franks, when the trucks loaded with coal drive on the scales, at the tipple, is all of the load on the truck coal or not?

1D—page 63 } A. No, sir.

Counsel for the complainants object as being immaterial.

Q. 54. What is weighed on the tipple scales, on the trucks, other than coal?

Counsel for the complainants object for the same reason.

A. Well, it is impurities, slate and the bone,—that is where you get that Jaw bone.

Q. 55. I am speaking of the Red Ash seam.

A. The Red Ash is a pretty clean seam of coal. You get all the impurities near the bottom and not the roof. You find the shale in the roof that will run two or three inches thick and in places it will be soft and you shovel it up.

Q. 56. Are those materials coal or foreign substances referred to as impurities?

A. Yes, sir, they are impurities.

Q. 57. Are they loaded on the trucks along with the coal?

A. Yes, sir.

Counsel for the complainants object because it is immaterial.

Q. 58. Have you ever had any experience in determining about what per cent of the Red Ash seam that is brought in on the truck scales constitute impurities or refuse?

J. H. Franks.

A. Well, at one mine I worked, at Doran, we took three hundred *founds*. That was the best estimation we could get, that there was three hundred pounds of impurities to the ton.

Q. 59. To the ton or to the truck?

A. To the ton.

1D—page 64 } By Mr. Pobst: This question and answer is objected to as being of no probative value to the question at issue. And it is agreed by all counsel present that the same objection shall apply to each specific question on the same without being specifically propounded.

Q. 60. It is alleged in the pleadings in this case and has been established as a fact that the Paragon Jewell Coal Company, your assignee, has been deducting fifty pounds per ton or two and one-half per cent from the truck weights as tolerance for these impurities and foreign matter hauled in on the trucks in order to compensate therefor. Now, from your experience as a practical miner of the Red Ash seam of coal, is this a reasonably accurate way of determining the net amount of coal that is brought in on those trucks?

A. Yes, sir.

Q. 61. Do you think that is fair and just?

A. That is the best system I ever saw set up, that absolutely gets the impurities. The other system we used—dumped in the car and shipped—and we kept our market messed up all the time.

Q. 62. From your experience does the railroad cars of cleaned coal bear out your statement that this deduction of two and one-half per cent for tolerance for impurities is an accurate way in determining the amount of impurities in those truck loads of coal brought in there?

A. Yes, sir.

Q. 63. Will that method assure the lessor of getting paid for all the coal mined from his property?

A. That is right.

1D—page 65 } Counsel for complainants object as calling for a conclusion and other reasons stated above.

Q. 64. Have you been to the Paragon Jewell Company's tipple recently, Mr. Franks?

J. H. Franks.

A. Yes, sir.

Q. 65. Have you been just above there and seen the slate dump?

A. Yes, sir.

Q. 66. Where did all that stuff come from that is dumped over the side of the mountain?

A. It comes from the washer and the tipple.

Q. 67. Was that hauled in there on those trucks?

A. It was hauled in there on the trucks, yes, sir.

Q. 68. Was it on those trucks at the time they were driven on the scales and weighed?

A. Yes, sir.

Q. 69. Is that, at least, a part of the impurities you are talking about?

A. Yes, sir.

Q. 70. Is it worth anything to anybody?

A. No, sir.

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CROSS EXAMINATION.

By Mr. Pobst:

Q. 1. Mr. Franks, you say you negotiated this lease from the McNeil heirs?

A. Yes, sir.

Q. 2. You and Mr. Culbertson. Did you do it mostly or Mr. Culbertson, or both of you?

A. Well, we—I guess you would say—I did, maybe, the most of the talking. Mr. Culbertson was there in the plans, with me, all the time.

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Q. 3. You obtained the lease yourself, and you, Mr. Culbertson and Mr. Clyborne took the lease first, is that right?

A. No, sir.

Q. 4. Who did?

A. Me and Culbertson. We talked and planned the lease and got everything lined out like we wanted it, and then Mr. Clyborne stepped in.

Q. 5. His name is written here in the lease as one of the

lessees, along with your name and Culbertson's name?

A. Yes, sir.

Q. 6. Then, all three of you took it when it come to have the lease written up?

A. Well, the first written lease Mr. Clyborne was not present.

Q. 7. This is the only written lease that was gone through with, was it not?

A. Well, it might have been Mr. Clyborne. He was not with us at the time the lease was negotiated.

Q. 8. The Paragon Jewell Coal Company is operating under this lease, it is dated August 1st, 1948, is that right?

A. Yes, sir.

Q. 9. Was it your idea, or Culbertson's idea, to mine this yourselves?

A. No, sir.

Q. 10. You took it so you could transfer it
1D—page 68 } to somebody else, is that right?

A. Now, Mr. Clyborne is my partner over there in other properties that we purchased.

Q. 11. You are getting an over-riding royalty on this lease?

A. Yes, sir, a little over-riding royalty.

Q. 12. You get so many cents per ton?

A. Yes, sir.

Q. 13. Therefore, you are interested in this proposition the same as Mr. Clyborne is, is that right?

A. I don't think I could be interested as much as the man that would have—I am interested in the lease, I want to see everybody get along good.

Q. 14. You get some money out of every ton of coal that is mined?

A. Yes, sir, with the exceptions of the impurities,—that is not coal.

Q. 15. You don't get anything for the impurities?

A. No, sir.

Q. 16. Don't you think you ought to?

A. No, sir.

Q. 17. Didn't you tell Mr. Clifton, since this thing has been going on, you would like to see him get somewhere with that, it is not right for Mr. Clyborne and the Paragon Jewell to deduct for those impurities?

A. No, sir.

Q. 18. You didn't tell him that?

A. No, sir.

J. H. Franks.

Q. 19. You think that is right?
1D—page 69 } A. I think it is, one hundred per cent right.
Q. 20. It is not in the lease contract?

Counsel for the defendants object to counsel for the complainants arguing with the witness.

Q. 21. Why do you think it is right?
A. We didn't have the set up, the planning of the mining, and I actually didn't have anything to do with the setting up of this ruling on it. In fact I didn't know that there could be—Mr. Clyborne, he and his organization worked that out.
Q. 22. Mr. Franks, do you remember meeting Mr. Norman Clifton on the street there at Raven, below the drug store,—both of you were walking, and met up?
A. No, sir.
Q. 23. And at that time you mentioned that you wished he could do something with that tare weight percentage being taken out, you didn't think it was right?
A. No, sir.
Q. 24. You don't remember that?
A. No, sir.
Q. 25. Mr. Franks, why was not that put in the contract, if that was what you were going to claim?

Counsel for the defendants object to this question for the reasons heretofore assigned, and for the further reason it is purely repetitious of previous questions.

Q. 26. I asked him. Read him the question.

Thereupon the preceding question was read by the reporter as reported.

A. I didn't know myself as to what the plans would be on these impurities in the coal at the tipple, be-
1D—page 70 } cause it had not been erected at that time, and that was the other man's plans altogether, I had nothing to do with that.
Q. 27. When you discussed this with Norman Clifton, at that time, and before the lease was written up was that discussed at all?
A. No, sir, I don't know it was.
Q. 28. Did you ever tell them that you, or the people you

assigned the lease to, was going to take off something for impurities—certain per cent—did you ever tell them that?

A. I don't remember of it.

Q. 29. You don't remember ever telling them that?

A. No, sir, I don't.

Q. 30. Do you recall, recall fully, just how there was anything come to be put in about hauling coal from other lands? Do you remember why that was done? How it come up?

A. Yes, sir. We had purchased the G. W. Cole property and we didn't want to build but one tipple.

Q. 31. You mean the lessees, you and Clyborne?

A. We had some property leased and we had purchased some property and we were negotiating with some other people, and we wanted it all to come over this tipple.

Q. 32. Don't you remember when you first got to talking to the McNeils, Macie Salyers and Virgie Clifton and Mary McNeil and maybe Stella McNeil—all the women folk—do you remember their objecting to the lessees having any rights over the Clifton land and the Salyers land at the front land there where John G. McNeil and his wife lived?

1D—page 71 } A. The lease agreement plainly tells that, I think that I can quote it. We had a right to go over in front of Mrs. McNeil and out between the railroad right-of-way. We were preparing for a road back into the mountain, and we were not to do any more damage than we could possibly do, to take care of her orchard, to get into the mountain. In investigating this route we found she didn't own it, that it belonged to the Whites. We had a right to come in under the upper end, that is on Salyers. We had a right to put a tipple on the lower end, that was on Mr. Clifton. And when it was settled and decided this place where we put the tipple, on the upper end, was the one Mr. Clyborne's engineers decided was the proper place for the tipple.

Q. 33. You had not answered my question. Now, pay attention to it, and if you don't understand it ask me over. When you were talking about going over these front lands and near the residences of these three complainants, didn't all the women folk say they didn't want any hauling or any rights on their lands? Don't you remember that?

A. No, sir. You could not get in and out without going over their lands.

Q. 34. Don't you remember there were two or three meetings and you said: "They were not to have any rights over their front lands"?

Harry J. Johnson.

A. No, sir. We could not get in there without going over it.

Q. 35. Don't you remember furthermore you saying: We will have to have some rgihts to haul the coal out, to haul the McNeil coal, and they gave you that. And then you saying: "I have got a little coal and you won't mind me hauling it out over it"? Do you remember that?

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A. It was perfectly all right, with all that was concerned, with all these sites and rights coming over their property.

Q. 36. Just like it is stated in the lease?

A. Just like it is stated in the lease agreement.

Q. 37. That was the way it was discussed too? It was put down just as it was discussed?

A. Just the way that we were going in down there and the way the properties are. There are three different tracts in front, and we had to go in over one or the other, and where we went in was agreed to by everybody.

Q. 38. Don't you remember having the matter up with the women about the rights on those front lands? Do you remember it or not?

A. I don't remember it.

Q. 39. They were perfectly agreeable to everything you asked?

A. I don't remember. When we got down to business and made our deal everybody was perfectly satisfied. We was all right together when the agreements were made.

Q. 40. You say you and Mr. Culbertson executed a written assignment, in writing, assigning all your interest in this lease to Mr. Clyborne or the Paragon Jewell Coal Company?

A. Yes, sir, we did.

* * * * *

1D—page 100

HARRY J. JOHNSON,

a witness of lawful age, introduced on behalf of the defendants, being first duly sworn deposed as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Will you please state your name, your residence and occupation?

A. Harry J. Johnson, Grundy, Virginia and my occupation is mining and buying and producing coal.

Harry J. Johnson.

Q. 2. How long have you been engaged in mining and producing coal in Buchanan County, Virginia?

A. About eight years.

Q. 3. In what particular part of Buchanan County are you so engaged, Mr. Johnson?

A. I operate in both the Thacker and Buchanan.

Q. 4. Do you know where the operation of the Paragon-Jewell Coal Company is?

A. Yes, sir.

Q. 5 Have you ever engaged in mining and producing what is known as the Jewell or Red Ash seam of coal in that vicinity of Buchanan County?

A. Yes, sir,—approximately one mile below where they are located—Jewell Smokeless—

Q. 6. Is that company engaged in the mining and production of coal?

A. Yes, sir. We call it Cornett-Jewell.

Q. 7. Mr. Johnson, have you had any experience in mining this seam of coal by what is known as the truck mining method?

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A. Yes, sir, our mining is done exclusively that way.

Q. 8. When coal is mined by that method, how is it transported from the mine to the tipple?

A. In the majority of cases it is transported by truck.

Q. 9. How is the coal weighed when it reaches the tipple?

A. How? By truck scales.

Q. 10. Are they usually located right at or near the tipple?

A. Yes, at the railroad tipple.

Q. 11. Now, is all of the substance hauled in on the truck scales at the tipple, on those trucks, coal or not?

A. No, sir, it is raw coal and slate and pieces of headers and cap wedges.

Q. 12. You mean there is impurities and other foreign substance hauled in in the coal on the trucks and weighed on the truck scales other than coal itself?

A. Yes, sir.

Q. 13. Now, are those foreign substances and impurities removed from the coal when it passes through the tipple and is loaded into railway cars?

A. In the majority of cases it is. Some goes straight into cars.

Q. 14. Do you know whether Paragon-Jewell Coal Company, in processing the coal through its tipple, removes these impurities?

A. Yes, sir, they wash their coal.

Q. 15. And these foreign substances are removed?

A. They try to get them out.

Q. 16. Now, is it true that after the coal is processed at the tipple and loaded into railroad cars, the coal is shipped and later weighed by the railroad company?

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A. Yes, sir.

Q. 17. Then the railroad companies do not include these impurities and foreign substances that have been weighed on the truck scaled?

A. There is some left in it, not much.

Q. 18. In your experience in producing and processing the Red Ash or Raven seam of coal there in this particular area, what is a fair and just allowance for tolerance on account of these foreign substances and impurities in the coal that are removed during the processing of the coal, Mr. Johnson?

A. We take from three to four hundred pounds, and some instances five hundred pounds, per truck load. The trucks average ten ton.

Q. 19. It is in evidence in this case that two and one-half per cent, or fifty pounds to each two thousand pounds has been deducted because of foreign substances and impurities by the defendants in its operation? Do you think this fair and just?

A. Well, I want to give you my opinion, and certain mines are more dirty than others, and I think there would be a fluctuation. That would be a good average for the impurities over the whole tract.

Q. 20. By that you mean there would be some coal that would be too little and some that perhaps would be too much?

A. That would be an average.

Q. 21. That would be a fair and proper average?

A. Yes, sir

* * * * *

1D—page 104

W. M. CULBERTSON, JR., a witness of lawful age introduced on behalf of the defendants, being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

By Mr. Gillespie:

Q. 1. Your name is W. M. Culbertson, Jr.?

A. Yes, sir.

Q. 2. Where do you live, Mr. Culbertson?

A. Raven, Virginia.

Q. 3. What is your business?

A. I am a truck mine operator.

Q. 4. Are you one of the original lessees under the lease from the widow and heirs of John G. McNeil, deceased?

A. Yes, sir.

Q. 5. Mr. Culbertson, were you present at any time or times during the preliminary and final negotiations with the lessors of the lands set forth and described in the lease dated August 1, 1948, and which lease is the subject in issue in this case?

A. Yes, sir.

Q. 6. Were you also present at the time that the lease was prepared by the attorney, and when its terms were being finally discussed and related to the attorney in order for him to prepare the final draft of the lease?

A. Yes, sir.

Q. 7. Now, who else was present at that time, Mr. Culbertson?

A. Norman Clifton and Virgie Clifton.

Q. 8. Is that his wife?

1D—page 105 } A. Yes, his wife. Ed Salyers and Macie Salyers, his wife, and Mary McNeil and Stella McNeil, her daughter and Mr. Franks and myself.

Q. 9. When you and Mr. Franks were negotiating with the lessors for this property, please state whether or not you made any statement to the lessors that you had other coals in that vicinity?

A. Yes, sir.

Q. 10. Was any discussion had about hauling this other coal over the lessors lands?

A. Yes, sir.

Q. 11. Or the lands of the McNeil heirs?

A. Yes, sir.

Q. 12. Was any agreement reached in that respect?

A. Yes. Under the lease agreement we had a right to haul these other coals over the property of the lessors, Mary McNeil and the other heirs of John G. McNeil.

Q. 13. Were you to pay anything to the lessors for hauling this other coal over the property of the lessors?

'A. No, sir.

W. M. Culbertson, Jr.

By Mr. Pobst: This line of examination is objected to by counsel for the complainants, especially as to whether there was anything to be paid and the other terms of the lease, because the terms are in writing and the lease speaks for itself, without elaboration.

Q. 14. The lease provides in Clause X that the lessees were to have the right to use the entires and haulways and other excavations for the purpose of hauling other coal through such excavations or haulways or underground, for which the lessees were to pay haulage of two and one-half cents. Was that provision put in there pursuant to the previous understanding between the parties?

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A. Yes, sir.

Q. 15. Was there any wheelage or any payments to be made for hauling coals over the surface of that lease?

A. No. Our understanding before the lease was prepared—

Q. 16. Was the lease prepared in accordance with your understanding, do you think?

A. Yes, sir, it seems that all parties were satisfied with the preparation of the lease.

Q. 17. On page 7 of the lease, also in Clause X, it was provided further that the Lessors do hereby grant the Lessees the right and privilege to haul Lessee's own coal purchased, owned, or leased over lands leased by Lessees from Lessors on the truckroads, or roads now on the lease premises free of charge. Was that provision in the lease in order to put in writing the agreement between the parties that you were to have the right to haul over the surface without any wheelage charge?

Counsel for the complainants object to the foregoing question as being grossly leading.

A. Yes, sir.

Q. 18. Now, Mr. Culbertson, I believe that you and the other lessees under this lease, since that time, assigned this lease to Paragon-Jewell Coal Company, which is now the holder of the rights and privileges under the terms of the lease, is that true?

1D—page 107

A. Yes, sir.

Q. 19. You say that you are engaged in mining and producing coal by the truck mining method?

A. Yes, sir.

Q. 20. Where are you so engaged, Mr. Culbertson?

A. On Little Hurricane Creek near Whitewood, Virginia and on Contrary Creek about eight miles from Whitewood.

Q. 21. Have you had any experience in mining and producing coal in the area where the McNeil lands are situate?

A. Yes, sir.

A. 22. Have you had any experience in mining coal by the truck mining method of what is known as the Red Ash or Jewell seam of coal?

A. Yes, sir.

Q. 23. How is the coal which is mined by that method transported from the mines to the tipple?

A. Transported by trucks.

Q. 24. And is the content of each truck of coal weighed, in any manner, upon reaching the tipple?

A. Yes, sir.

Q. 25. How?

A. The truck pulls on the scale and the load that is on the truck is weighed and the truck.

Q. 25. Now, after that the coal is dumped into a bin, which goes through the tipple, and the coal is processed?

A. Yes, sir.

Q. 26. And them emptied into railroad cars, is that correct?

A. Yes, sir.

1D—page 108 } Q. 27. Do the weights of the truck scales there at the tipple show any difference from the railroad weights of the coal as the cars pass over the railroad scales in Roanoke?

A. Yes, they do.

Q. 28. What is this attributable to?

A. You have slate, rock and other impurities that comes in with the coal from the mines.

Q. 29. Are those impurities and foreign substances weighed on the truck scale there at the tipple?

A. Yes, sir, along with the coal.

Q. 30. Are most of those impurities and foreign substances eliminated in processing the coal and before it is loaded into the railroad cars?

A. Yes, sir.

Q. 31. Is that what accounts for the difference in the weights?

A. Yes, sir, that is right.

Q. 32. Now, under this lease was it contemplated by the

parties, as stated in the lease, that the lessees were to pay for anything other than coal?

A. No, sir.

Counsel for the complainants object because the lease is the best evidence.

Q. 33. Is the producer or operator compensated in any way for these impurities and foreign substances that are taken out of the loads that are brought in on the truck scales and dumped out on the side of the mountain?

Counsel for the complainants object because the lease is the best evidence, and because immaterial.

A. No, sir.

1D—page 109 } Q. 34. Have you, in your occupation as a miner and operator of truck mines, had any experience in determining what percentage or what part or what ratio of the coal that is brought into the tipple on these trucks is coal and what percentage is impurities and foreign substance?

A. Yes, sir.

Q. 35. What has been your experience in this respect?

Counsel for the complainants object because it is immaterial.

A. Well, this tipple that I operate down here at Doran—all of them are pretty small trucks, about seven and one-half to eight tons per load, and we take a tare weight of four hundred pounds for each truck that is weighed, and we find that it about equalizes our weights between the truck weights and the railroad weights.

Q. 36. It has been testified here that the deduction of fifty pounds for each two thousand pounds of coal is made by the defendant, Paragon-Jewell Coal Company, on account of these impurities and foreign substance. From your experience in mining the Red Ash or Jewell seam of coal in your operations is this a fair and equitable and just deduction for these foreign substances?

A. I think that is fair.

Counsel for the complainants object because it is immaterial.

Q. 37. Do you think, by applying this method of determining the impurities and the *foregin* substances, that the lessors would be paid for all of the coal actually mined and removed from the leased premises.

1D—page 110 } A. Yes, sir.

Q. 38. Do you produce any of this Red Ash or Jewell seam of coal to the Paragon-Jewell Coal Company tipple at the present time?

A. Yes, sir.

Q. 39. Is this same deduction for impurities and foreign substance deducted from the coal that you deliver there to the tipple?

A. Yes, sir, it is.

Q. 40. Do you feel that you are being fully paid for all the actual coal that you deliver to the tipple with the deduction made on that basis?

A. Yes, sir, I think that is fair.

Q. 41. Do you know, approximately, how much coal you deliver to the defendants' tipple each day, on an average?

A. About four hundred ton a day.

CROSS EXAMINATION.

By Mr. Pobst:

Q. 1. And you deliver most all of your coal to the defendants' tipple, is that right, the Paragon-Jewell Coal Company?

A. Some of it.

Q. 2. The most of your coal you will deliver to their tipple?

A. I deliver approximately four hundred ton there.

Q. 3. How much do you mine every day?

A. I have eight mines on Contrary Creek and the coal goes to Doran, Virginia.

Q. 4. You mean all the coal you mine on Contrary Creek goes to Doran?

A. Yes, sir.

Q. 5. How much coal do you take from

1D—page 111 } those mines?

A. About five to six hundred ton a day.

Q. 6. Outside of Contrary Creek how much coal do you mine in Buchanan County from other mines than on Contrary Creek?

A. I have two mines—interest in two mines on the Levisa River, and that coal goes to the Universal Coal Company.

Q. 7. And the balance goes to the Paragon-Jewell mines?

W. M. Culbertson, Jr.

A. Yes, sir.

Q. 8. Now, you say that you took four hundred pounds of coal off of each truck load over at Raven, and those were eight or nine ton trucks?

A. Seven and one-half to eight and one-half ton.

Q. 9. What seams of coal do you mine?

A. That is what they call the Jaw Bone seam.

Q. 10. That is about the dirtiest coal known. Do you know of any dirtier coal in Buchanan County, that is mined, or close to Buchanan County than the Jaw Bone?

A. It is pretty high in ash.

Q. 11. Ash means stuff that is not coal?

A. I guess so.

Q. 12. That is what makes ash,—rock and dirt and everything but coal. Any substance not coal, when you analyze it, will increase the ash, is that right?

A. That is right.

Q. 13. Do you know of any coal in that whole section, Buchanan, Tazewell, Dickerson or Wise Counties, that has any greater percentage of ash than the Jaw Bone seam?

A. I know the coal in Wise and Dickerson is a lot higher in ash than the Jaw Bone.

1D—page 112 } Q. 14. I am talking about the Jaw Bone seam. What is the ash content of the Jaw Bone?

A. It runs seven and one-half to twelve.

Q. 15. Some of it goes fifteen to eighteen?

A. It could be that it would run that high.

Q. 16. You also mine that seam, if that is the Cary seam at Raven?

A. No, sir.

Q. 17. None of them the Cary seam?

A. No, sir.

Q. 18. Anything in the contract about this tare weight, as you call it?

A. I don't think so.

Q. 19. They did not put it in the contract at all?

A. No, sir.

Q. 20. You told Mr. Gillespie that you considered that about right and fair for them to take fifty pounds off of each ton, is that right?

A. Yes, I do. And when that mine was put in over there in 1952 the coal business was on a down grade. You could hardly sell any coal, and the preparation that was put in over there—the facilities that were put in, that tipple and the

washer to wash the slate and dirt out of the coal, made it possible to keep it on the market.

Q. 21. The amount of the impurities in a coal seam changes with each coal seam and each vicinity?

A. That is right.

1D—page 113 } Q. 22. And the same coal seam at one place will have partings, rock, slate and impurities in it, and a mile or two or four or five, it will be greater or less, is that right?

A. That is true.

Q. 23. Have you ever been in the mines there where they are mining this McNeil coal, the coal belonging to the plaintiffs?

A. No, not the McNeil property. No, sir.

Q. 24. You have never been in those mines?

A. No, sir.

Q. 25. You have not gone in them to observe, or to take any analysis?

A. No, sir.

Q. 26. What you are speaking of is the general average of all the seams and all the mines being operated.

Counsel for the defendants object to the foregoing question for the reason that he has misquoted the evidence. This witness has stated that this was a fair deduction for tolerance for this particular seam of coal which is under lease from the McNeil heirs, known as the Jewell or Red Ash seam of coal and none other.

A. No, sir.

Q. 27. You also stated what was being taken in other seams, didn't you? Jaw Bone seam. You were trying to get an average of the different seams?

A. No, sir.

Q. 28. You took two seams, the Jaw Bone and Raven?

A. The Red Ash. Well, I am mining less than two and one-half miles from the McNeil property, and I know some of that coal has a slate top over it and some of it does not.

1D—page 114 } Q. 29. And you are basing your figures on an average of the Red Ash seam all through that section, is that right?

A. Around the vicinity of Whitewood,—I would say so, yes, sir. Some of my coal on Little Hurricane Creek and the Red Ash you will have found to five inches of draw rock and some of it there is not any. It has a fairly good top.

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1D—page 115 }

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RE-DIRECT EXAMINATION

By Mr. Gillespie:

Q. 1. One further omitted question. I believe you, in assigning this lease, or your interest in the lease, to the Paragon-Jewell Coal Company reserved an overriding royalty, is that true?

A. Yes, sir.

Q. 2. Is that overriding royalty determined upon the basis of coal after this fifty pounds per ton for impurities and foreign substances has been deducted for tolerance?

Counsel for the complainants object to the foregoing question because it is immaterial.

A. Yes, sir.

Q. 3. And is that deduction shown on your statements covering the overriding royalty which you receive?

A. Yes, sir.

Q. 4. And do you consider that fair, just and equitable?

A. Yes, I think it is fair.

1D—page 116 }

* * * * *

RE-CROSS EXAMINATION.

By Mr. Pobst:

Q. 1. Mr. Culbertson, you were speaking from the original lease, heretofore introduced in this case, from the McNeil heirs to J. H. Franks and others, dated August 1, 1948, is that right? You were speaking from that lease?

A. Yes, sir.

Q. 2. Do I understand you to say that under this lease the lessees or their assigns have the right to haul coal from other lands over the McNeil lands?

A. That is true.

Q. 2. And are they to pay—

A. No, sir.

Q. 3. Anything for that privilege?

A. No, sir.

Q. 4. It says here, in Article X, "the said Lessees shall have the right to use the entries, haulways, or other excavations in the mines for the purpose of hauling through said land the coal leased or purchased from any other person than Lessors, but are to pay two and one-half cents for that."

1D—page 117

A. That is right, that is what the lease agreement says.

Q. 5. You said they were not to pay anything.

A. That is through the portals under the ground, all the coal moved underground.

Q. 6. Your statement is: If they made excavations underground they had to pay two and one-half cents?

A. All of the coal hauled over the leased land underground.

Q. 7. That is where the coal was not mined from the leased land?

A. That is right.

Q. 8. If they hauled it over the top of the ground and made roads to do that hauling they were to pay nothing at all?

A. That is right. There is a paragraph in the lease agreement permitting us the right to haul the coal that we had owned and leased on other properties. Mr. Franks and Mr. Clyborne owned about one thousand acres of coal on Laurel.

Q. 9. That is what you were trying to get hauled over the McNeil land free of charge?

A. All the coal they owned, leased or could get. They had to have so many acres of coal before they could get a right to build a railroad track.

Q. 10. This says you have a right to haul Lessees own coal purchased, owned or leased over lands leased by Lessees from Lessors on truck roads, or roads now on leased premises free of charge. What does he mean by roads now on the leased premises? What was meant by that?

1D—page 118

A. There was not much of a road there when we leased the property.

Q. 11. You know that soon after the Paragon-Jewell Coal Company, the defendants, began to mine and ship coal they cut another road, leading to the right after you cross the railroad, up in front of the house. You know that, don't you?

A. I understand that.

Q. 12. You saw that road that they made?

Norman Clifton.

A. The mountain, the mountain was slipping there and they had to do something or the whole job would have been shut down.

* * * * *

NORMAN CLIFTON,
a witness of lawful age, after being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

* * * * *

3C—page 2 }

* * * * *

Q. Mr. Clyborne has just now stated that when you talked to him about this wheelage question, which he states was about July, 1953, he told you to go to his attorney, Mr. R. O. Crockett, then of Tazewell, Virginia. Is this correct?
A. He did.
Q. Did you go?
A. I did.

* * * * *

NORMAN CLIFTON,
a witness of lawful age, after being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

Questions by Carl Gillespie:
2D—page 2 } Q. You are Norman Clifton and you have heretofore testified?
A. I have.
Q. It's in evidence that Paragon Jewell Coal Company started operating there near your Home in October, 1951, is that correct?
A. I just don't remember the correct date, the day or—
Q. As far as you know that is the correct date, isn't it?
A. As far as I know it might be—I just don't know the correct date.

Norman Clifton.

Q. And you were living there within sight of the tipple at the time the operation started?
A. I was.
Q. And you continued to live there for sometime after that?
A. I still live there.
Q. Now, you have testified that sometime after that operation began you went to see Mr. Clyborne and talked to him?
A. I did.
Q. Do you remember when that was?
A. No, I don't remember the exact date.
Q. That was nearly two years after the operation began?

Mr. Pobst: Objected to as immaterial.

A. No, it was right after they started operating running coal.
Q. Don't you recall that it was in July, 1953?
A. No, I don't.
Q. Or the summer of 1953?
A. I do not.
2D—page 3 } Q. Was that the first time you, or any other person whose name is set out in the lease as lessor, ever talked to any of the lessees in the lease? Concerning the question of wheelage?
A. That's the first time I ever talked to Mr. Clyborne.
Q. Well had you ever talked to Mr. Culbertson or Mr. Franks before that concerning any wheelage?
A. Well, sir, I just don't remember.
Q. If you had, you have no recollection of it?
A. I don't remember.
Q. Yet, you knew and all the other lessors knew that these lessees. or their assignee, Paragon Jewell Coal Company, had been hauling coal from up Dismal or down Dismal to the tipple ever since they had started operating?

Mr. Pobst: This question and all similar questions are objected to because the witness has stated in all detail heretofore, as part of his deposition in this case, the whole circumstances; he stated that when the new roads were beginning to be excavated that he went to the then superintendent and protested, and he assured him he would be paid for that. This evidence will be mere repetition.

A. We did know about it, but we went to see Mr. Clyborne immediately after they started hauling coal, or shipping coal

Norman Clifton.

from the tipple. I don't remember the exact date, or what time, but it was sometime after they started within after the time that we received the first statement—royalty statement—after they started operating.

Q. Now, how are your royalties payable?

A. It's payable by the month. We generally get it anywhere from about the 20th to the 25th of each

2D—page 4 } month.

Q. Now, you were the only person who ever went to see Mr. Clyborne weren't you?

A. No, sir, I think that my brother-in-law went, Edd Salyers.

Q. He went with you sometime after you went—

Mr. Clifton interrupted here: I think after I first went.

Q. —in the summer of 1953, didn"t he?

A. I don't remember the date.

Q. But you had been there before by yourself?

A. I went a couple or three times by myself.

Q. And your wife, your wife's sister and mother had received a great many royalty checks prior to that time?

A. No, sir, I don't think so. There was a minimum royalty paid and I don't think we received any checks for sometime—I just don't remember. Anyhow, I went to see Mr. Clyborne immediately after they started operating, or after we received the first check, because it was understood between Mr. Grogan and myself that we would get royalty over this new road they put in there.

Q. You knew Mr. Grogan wasn't one of the lessees under this contract, didn't you?

Mr. Pobst: Objected to as immaterial. Certainly it needs the citation of no authorities to convince the Court that the Superintendent of the lessees can bind the company.

Mr. Gillespie: It is respectfully submitted that if Grogan was in fact the Superintendent of the company, he had no right to change the express terms of the contract, or to alter the terms of the lease between the lessors and the lessees in this case.

2D—page 5 } Reply by Mr. Pobst: Counsel for complainants call the attention of the Court to the fact that Mr. Grogan's promise was not changing or altering the terms of the contract, but was carrying them out as written.

Norman Clifton.

Q. You knew who the lessees were in the contract, didn't you?

Mr. Pobst: Objected to as immaterial.

A. I knew that Culbertson and Franks did lease the coal from us, but at the time Mr. Grogan came there and started working, or started putting in the job, we were under the impression that he was one of the company, because he claimed he was—in other words he made it appear that he was one of the company, talked as one of the company.

Q. Why did you go to see Mr. Clyborne if you already had this agreement out of Mr. Grogan to pay you the wheelage?

A. Well, at the time the job started there, before they built any road or anything, Mr. Grogan asked me which that I would rather—(pause)—he said this, he said 'you know that we can't haul over this road that's here, we've got to haul coal into the tipple,' and he said 'we would like to have a right to put a road, or we want to put a road in till we can haul over it,' and he asked me, he said 'which would you rather have the road to go on in front of your house here or go around and go in back of your house.'

Q. Now, Mr. Clifton, that isn't what I asked you—the question I asked you was that if Mr. Grogan had made a promise to pay you wheelage for coal hauled over this land from other lands, why did you go to see Mr. Clyborne?

2D—page 6 } A. Well, for the simple reason Mr. Clyborne—he said—he told me afterwards when I asked him about it and had he worked out anything, Grogan flatly said I would have to see Mr. Clyborne, that he'd talked to them and they didn't think I was due any royalty.

Mr. Pobst: This and all similar questions objected to because they have all been asked and answered. They are mere repetition and can serve no good.

Q. And you did go to see Mr. Clyborne and at that time you told him that you had been re-reading the contract, and that after restudying it, you felt that it provided for wheelage payments?

A. No, sir, I don't remember it?

Q. Well, do you deny that you made that statement to him, or words to that effect?

A. I just don't remember. I told him that I thought we was

due a royalty. In other words, that I didn't think they had a right to haul over us.

Q. And that you had come to that conclusion after recently re-reading the lease and restudying it?

A. I don't remember saying that, I just don't remember.

Q. Do you remember who was present on that first day that you went to Mr. Clyborne's office?

A. I don't think there was anyone present.

Q. Do you know Mr. Frank Woods?

A. I do.

Q. Was he present?

2D—page 7 } A. I don't think so.

Q. Are you positive he was not present?

A. I don't remember, but I don't believe so.

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C. A. CLYBORNE,

another witness of lawful age, after being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

Questions by Mr. Gillespie:

Q. You are C. A. Clyborne, one of the parties to this suit, and you have heretofore testified?

A. Yes.

Q. Mr. Clyborne, it is in evidence in this case that the operation of Paragon Jewell Coal Company on what is known as the "McNeil land," started in October of 1951. Is that correct?

A. Yes.

Q. Now, do you recall when it was that any of the lessors, or any of the consorts of the lessors, first came to you and mentioned anything about wheelage to you?

A. Three or four months later Mr. Clifton came up and raised the question about wheelage—not wheelage, but scale tolerance and rejects.

Q. At that time did he say anything about wheelage?

A. Not at all.

Q. Had you been hauling this coal from other lands over the McNeil lands to your tipple at that time?

A. Yes.

Q. When was it that he, for the first time, mentioned any-

C. A. Clyborne.

thing to you about wheelage?

2D—page 8 } A. Around July, 1953.

Q. And was that when he came to your office in Bluefield?

A. Yes.

Q. On that occasion did he state to you that he had been re-reading or restudying the contract or lease and had decided, as a result of his restudy, that the lease did not authorize you to haul coal from other lands over their lands without a wheelage payment?

Mr. Pobst: Objected to because grossly leading.

Mr. Gillespie: Well, I have just laid the foundation for this.

Mr. Pobst: Counsel for complainants state that in the trial or argument of the case they will move to exclude this testimony because grossly leading.

A. Yes.

Q. And that was in July, 1953?

A. Around July, 1953, as near as I could determine from the files.

Q. And you all had been hauling this other coal, which had been either leased or purchased by you or your assignee, Paragon Jewell Coal Company, from these other lands during that year and a half to nearly two years?

A. Yes, sir.

Q. And had also been mining some of the coal from the McNeil lands and paying them royalties on it?

Mr. Pobst: Counsel for complainants object to the last two or three questions because grossly leading, and advise that they will move the Court to exclude the answers to such questions.

2D—page 9 } A. Yes.

Q. How long had you been hauling coal from these other lands over the McNeil lands at the time Mr. Clifton came to you and made that statement?

A. When he raised the question of wheelage, we had been hauling about a year and a half or two years—almost two years.

Q. How long had you been mining on the McNeil lands when he came to see you and mentioned this restudy of the lease and his conclusion that wheelage was due?

C. A. Clyborne.

A. A year and a half or almost two years.

Q. Do you have any idea how many royalty payments had been made to Mrs. McNeil, and Mrs. Clifton and Mrs. Salyers at that time?

A. We had the right of recoupment on some previous royalties. We did send a statement each month, but how much cash in the form of checks we made them prior to his visit I am unable to say, but my guess is that it would be five to seven payments. The records will determine that.

Q. Have either Mrs. McNeil, Mrs. Clifton or Mrs. Salyers ever made any claim to you or to the other lessees that this wheelage was due?

A. No.

CROSS EXAMINATION.

Questions by Mr. Pobst:

Q. Mr. Clyborne, what incident reminds you or convinces you that it was in July, 1953 when Norman Clifton first mentioned these wheelage royalties to you? How do you fix that most definite date after about forty months expiration?

2D—page 10

A. We have a yellow pad that we keep a record of all the visitors and notations that we often refer to. That's the basis of my estimate of the time of his arrival. It may have been in June, but I tied it in with certain notations on the file and other notations that I keep in my drawer—I just throw them in there, and sometimes I have, frequently have, occasion to refer back to what transpired by a caller, either by telephone or by visit to my office.

Q. And when did you look at those notations?

A. I looked back sometime ago, I don't recall just when it was.

Q. Before you heretofore testified?

A. Yes, and then I refreshed my memory on them.

Q. Why didn't you state that when you testified before?

A. The question has never been asked before.

Q. It's part of the general scheme of your defense, wasn't it?

A. No, I never had occasion to—the question has never been asked as to the first visit on the scale tolerance and rejects, the 2½% question, and the question of wheelage was not raised until almost a year and a half to two years later.

Q. What did that notation say?

A. I don't recall specifically.

C. A. Clyborne.

Q. Does it specifically state that that was the first time he had ever mentioned it to you? He states in his evidence in chief, I mean Norman Clifton states, that he mentioned it to you more than once. Did you say in that notation that 'this is the first time he's mentioned it to me'?

2D—page 11

A. On the subject of wheelage-yes.

Q. Did the memorandum so state that 'he first mentioned the wheelage proposition to me on this day,' which you say is about July, 1953? Does it so state or does it not?

A. I had a record of calls, and I have a *phenominal* memory when a matter of unusual concern is involved.

Q. You probably have anywhere from five to twenty or thirty, or may be more, callers every day or conversations over the phone, right? Is that right? Or maybe fifty?

A. We have anywhere from seven to ten calls a day, and fifty to seventy-five telephone conversations.

Q. You have two or three separate and distinct phones in your office, don't you?

A. Yes.

Q. I have understood that sometimes you will be talking to two people at once, one phone on your right ear and one on your left, is that right?

A. No, I haven't been able to talk to two at once, I am not ambidextrous mentally you know.

Q. I know, but I have heard it said that you have had two connections and you will say something to one man in your right hand receiver, and then turn around say something in the other. Is that correct?

A. That once in awhile occurs.

Q. That does occur?

A. But that's our daily routine affairs, but when a question like this is raised, it's somewhat momentous where a contract is involved.

2D—page 12

Q. Now, as I understand your defense in this case, you treat the claims of the complainants as to wheelage very lightly don't you? You don't think there's anything in it? Is that right?

A. While I'm only a layman, I knew what the intentions were in connection with this lease—what the intentions of the parties was. We had additional acreage up in that region and we expected to get additional acreage, and it is set out in the lease—while I'm not a lawyer—it is set out in the lease that we had a right to haul over these roads owned coal, pur-

chased coal or leased coal, and I told Norman that I was not a lawyer, but merely a layman, but I knew about the phrasology in a general way, but I would have to get the lease out of the safe and re-read it to see whether or not there was any merits in his—ah! in his objectives. Norman said that he was a bit of a lawyer and he had read and re-read that lease and he did not understand that we had the right. Then I stated that "now if you're going to get into the question of law, you go to see our attorney, Mr. R. O. Crockett, in Tazewell and you gentlemen kick it around." If the wording of that lease is such that we've slipped a cog somewhere along the line and we'd have to pay the wheelage on any part of the tonnage, why we'd have to do it, but I didn't understand that we didn't, (pause) I understood that we did have the right to haul that coal from any and all areas in order to make up sufficient tonnage to build a tipple and in order to get a railroad siding from the Norfolk & Western Railroad.

2D—page 13 } Q. Now, at that time you say he talked to you around July, 1953, nor afterwards have you ever considered that there was any merit in the contentions of the complainants, isn't that right?

A. I never did think there was any merit in his contentions.

Q. And don't think so yet?

A. No.

Q. You did not then, nor do you yet, consider the matter of much moment or seriousness to the defendants, is that right?

A. Well, Norman Clifton, and he's been the motivating factor, alleges that we are due him wheelage, but we don't think so because of the background of the negotiations, what transpired and the terms and conditions of the lease.

Q. Therefore, when he came to see you, about July, 1953, you did not take him very seriously did you?

A. I didn't treat him lightly, I was courteous, he'll admit that, but I did think and still think that he has nothing meritorious to his claim or his allegation that we owe him wheelage.

Q. Now, you make possibly fifty or seventy-five or more notations every day, telephone calls and visits, is that correct?

A. At times they're endless.

Q. And do you mean to say that you examined all prior notations in your office of calls etc. and visits prior to July, 1953? Did you do that?

A. I stated that we keep those notations available there in

my desk drawer, and sometimes we keep them for two, three, four or five years.

2D—page 14 } Q. Well, have you examined all of your notations of all visits from the time you began to ship coal on Dismal and prior to July, 1953? Have you made an examination of all those notations?

A. We made notations at various times and I didn't tabulate them, but it's my memory that Clifton, very shortly after we began operating, claimed that the 2½% deduction for scale tolerance and rejects was out of harmony with the principals of equity, and I disagreed with him. Then he came back later and reasserted his point of view. One time he came up with Salyers, his brother-in-law, and as I recall from the notes that I made on my files at different times and from these other notes, he made four visits to my office, and I distinctly remember the one, even when I ran across the notes, the one about his visit when he raised the question about wheelage, which was a year and a half or two years later. I think it was about a year and a half, would be closer to it.

Q. But you never examined all of your notes from the time you began to ship coal up to about July, 1953, did you?

A. I examined the notes in the files and from these other notes when this case came up.

Q. Well, I asked you whether you examined every note when this case first came up?

A. There wouldn't be many notes involved in his visits, which was only four.

Q. Was those other three after or before July, 1953?

A. The other three were before that.

2D—page 15 } Q. And have you recently examined your notations on what transpired at those other three visits?

A. Well, I looked at those notes. I didn't bring them all with me. I don't know whether they were still there in the office or not, but I know the question of wheelage did not arise until the middle of 1953.

Q. How do you know?

A. If anybody makes a claim against you for thousands, and thousands, and thousands of dollars, if you have an unusually good memory you can't forget it.

Q. But you never thought there was anything in it; you never thought there was any reason for exercising that good memory; you rather laughed at his claim.

A. No, I didn't laugh. I treated him courteously, and he will admit that.

C. A. Clyborne.

Q. Well, as a matter of fact, when Mr. Clifton and I, H. Claude Pobst, conferred with you and the late Mr. R. O. Crockett, your then attorney, at his office at Tazewell, Virginia, both of you laughed at both of us, stating our claim was ridiculous. Isn't that true?

A. We may have laughed mentally, but we didn't outright laugh and try to make a clown out of you, or anything like that, but we didn't think that your claim had any merit.

Q. Well, didn't Mr. Crockett make some deprecating remark about my ability or rating as a lawyer, stating that I was a sea lawyer. I don't know what he meant by sea lawyer. Was this true or not?

Mr. Gillespie: Counsel for the defendants objects to this line of questioning for the reasons that any
2D—page 16 } conversation or statements made between counsel while they were at least endeavoring to discuss potential litigation, or perhaps settle potential litigation, is not admissible in evidence and has no materiality or relevancy to any issue in this case and it is highly improper for the distinquished counsel for the petitioners to attempt to insert any such conversations into this case.

A. I recall some bantering between you two, but you followed that up with an invitation to, at a subsequent time, visit your cabin at Wrightsville Beach, so I just figured it was banter between you two. I didn't regard it as detrimental to you or your character, or anything like that, because R. O. was somewhat amusing from that standpoint anyhow.

Q. It was banter, I did not get mad, but I'm again asking you if your demeanor at that time and the demeanor of your attorney did not indicate that the claim which we were making on behalf of the McNeil heirs was utterly ridiculous?

Mr. Gillespie: Same objection.

A. I thought so then and I think so now, and I've always thought so.

Q. Therefore, you are now trying to testify positively about a conversation—four conversations—that happened in your office between you and Norman Clifton during and prior to July, 1953, or from three and a half to some five or six years ago on a matter that you then thought and think now is

ridiculous and has no merit, and you're still trying to testify positively, is that true?

A. That's right.

2D—page 17 } Q. Is it not also a fact that in all the conversations between you and Mr. Clifton in your office in Bluefield, West Virginia, that he was at first only trying to make you pay the 2½% per ton—asking you to pay it—where you hauled other coal over roads constructed by you and your company. That was his first claim?

A. His first claim was a question of the 2½% deduction for scale tolerance and reject impurities.

Q. Alright, then his first claim as to wheelage was—

Mr. Clyborne interrupted here, stating: It came up a year and a half or two years later.

Mr. Pobst: Yes, you stated that.

Mr. Pobst: That's all.

RE-DIRECT EXAMINATION.

Questions by Mr. Gillespie:

Q. I believe at the time Mr. Clifton came to see you and for the first time mentioned this wheelage payment, you referred him to Mr. Crockett?

A. That's right, after some discussion with him.

Q. And I believe that Mr. Clifton has heretofore testified that he went to see Mr. Crockett?

A. That's right.

Q. And Mr. Clifton further testified that Mr. Crockett advised him that under the lease no wheelage was due for hauling over the surface of the land?

A. That's right.

2D—page 18 } Q. And he further testified that he then came to see Mr. Pobst?

A. Yes.

Q. And employed him to prosecute this case?

A. Yes.

Q. And according to the file, this suit was instituted in May of 1954?

A. That's right.

Q. Do you recall whether or not you had any correspondence with Mr. Crockett shortly after Mr. Clifton's visit to you and to Mr. Crockett?

A. Well, I probably have a note on the file or any old papers

that I have been keeping. I've been cleaning up some of that old stuff here lately.

* * * * *

FRANK H. WOODS,
another witness of lawful age, after being first duly sworn, deposed as follows:

DIRECT EXAMINATION.

Questions by Mr. Gillespie:

Q. You are Mr. Frank H. Woods and I believe you have heretofore testified in this case?

A. Yes, sir.

Q. Mr. Woods, were you present in the Office of Mr. C. A. Clyborne in Bluefield, West Virginia, on an occasion when Mr. Norman Clifton came into his office and they had some discussion about some wheelage payments payable under the McNeil lease?

2D—page 19 } A. Yes, sir.

Q. Do you recall about when that happened?

A. That was sometime during the summer of 1953, I'd say around June or July.

Q. On that occasion did Mr. Clifton make the statement to this effect—that he had been re-reading or restudying the lease and after his restudy felt the lease did not give Mr. Clyborne and the other lessees, or their assignee, Paragon Jewell Coal Company, the right to haul over the surface of the lands without wheelage payments?

Mr. Pobst: This question objected to as being grossly leading.

A. Yes, he discussed that when he was there that day.

Q. Did he say that he had come to that conclusion after re-reading and restudying the lease?

A. That's right.

Mr. Gillespie: That's all.

CROSS EXAMINATION.

Questions by Mr. Pobst:

Q. You were there that one time?

Frank H. Woods.

A. I was there that one time, that's all, yes, sir—no I was there another time when Norman Clifton and Edd Salyers were there.

Q. When?

A. That was prior to this.

Q. What year?

2D—page 20 } A. I couldn't tell you the exact year.

Q. What month?

A. I couldn't tell you that.

Q. Was it fall, winter, spring or summer?

A. I couldn't tell you that.

Q. Then how and why is it that at this particular time you cannot only tell the year, but you can tell the month, what's the difference?

A. Well, I remember it very distinctly because Mr. Clyborne called me over in his office when Norman came up, and I went to get the contract—the lease with the McNeils out of Mr. Clyborne's safe.

Q. What makes you recall absolutely that it was in the month of July? Do you remember that you had your coat off?

A. I said June or July.

Q. Alright, June or July. What makes you remember that? Did you have your coat off and your sleeves rolled up? Do you remember it being hot as you drove up and back? Or what recalls it to your mind that it was positively and absolutely June or July, and positively a month of the year 1953.

A. For the same reason that Mr. Clyborne remembers, because we have notes up there and keep notes of all of his calls.

Q. Oh! then your definite evidence on that as to that time and that month, or the month of June or July, is based on his notes and not on your own recollection, is that right?

A. On my own recollection too, yes, sir.

2D—page 21 } Q. What pinpointed that recollection? Why was it so inevitably impressed on your mind that that was the month and that was the year, when you do not remember anything about the other visits—season, year, month or nothing? What was the difference? From those notes and Mr. Clyborne's testimony, is that it?

A. Not from Mr. Clyborne's testimony, but from the notes Mr. Clyborne had.

Q. You read those notes?

A. Not word for word, A to Z, no, sir.

Q. Did he show them to you?

Frank H. Woods.

A. Yes, sir.
Q. When?
A. Oh, I'd say maybe two years ago.
Q. You haven't seen them recently?
A. No, sir, I haven't.

• • • • •

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.

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