215 Va. 914

SUPREME COURT OF VIRGINIA
RECEIVED
NOV 26 1973
RICHMOND, VIRGINIA

IN THE SUPREME COURT OF VIRGINIA

HENNO C. LACKS, Appellant

vs.

BOTTLED GAS CORPORATION OF VIRGINIA, Appellee

Record No. 730626

APPENDIX TO BRIEF

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VIRGINIA: IN THE CIRCUIT COURT OF CHARLOTTE COUNTY

BOTTLED GAS CORPORATION OF VIRGINIA, A Virginia Corporation,	Plaintiff	)
vs.		)
HENNO C. LACKS Route 1 Drakes Branch, Virginia,	Defendant	)

MOTION FOR JUDGMENT
(Filed February 20, 1970)

You are hereby notified that acting by and through our attorney, E. Falcon Hodges, we will move the Circuit Court of Charlotte County for a judgment against you in the principal amount of $4770.02, plus interest on $4614.66 from August 27, 1969, and interest on $156.26 from November 18, 1969, and the costs of this proceeding, all of which sum is owing and due by defendant to plaintiff by virtue of the following:

(a) Balance due on contract of conditional sales for barn gas burner system, including rack loader and thermostat in the total amount of $4614.66, said contract entered into by the plaintiff and defendant on August 14, 1969.

(b) Balance due on gas account for six transactions of gas sales and purchases between August and November, 1969, in the total amount of $156.26.

Said amounts are still due and paid, therefore, the plaintiff, Bottled Gas Corporation of Virginia, a

Virginia corporation, moves this court for the entry of a judgment against the defendant in the amount of $4770.92, with interest on $4614.66 from August 27, 1969, and interest on $156.26 from November 18, 1969, thus this motion for judgment.

GROUNDS OF DEFENSE AND COUNTER-CLAIM
(Filed March 10, 1970)

Defendant, for his grounds of defense, says:

(a) That the barn gas burner system sold by plaintiff to defendant has been completely inoperative contrary to the representations made by plaintiff to the defendant and that defendant does not owe plaintiff any sum because of a complete failure of consideration.

(b) The defendant demands strict proof of the balance due, if any, on gas sales between August and November, 1969.

Defendant, for his counter-claim, alleges and pleads as follows:

(a) This defendant claims damages from the plaintiff for the damages done to his tobacco crop caused by attempting to cure it in the barn gas burner system, the basis for the said claim and plea of counter-claim being that the plaintiff carelessly and negligently set up and/or constructed the barn gas burner system and thereafter caused defendant to use said system in its defective condition and as a direct and proximate result thereof, plaintiff did wrongfully cause three and one-half barns of tobacco to be ruined so that defendant has suffered loss to the extent of $7,350.00, and this defendant moves the Court for a judgment in the sum of $7,350.00, and costs in this action.

(b) The defendant revokes acceptance of the barn gas burner system installed by the plaintiff on the ground that it has failed to cure tobacco as represented by the plaintiff.

RESPONSE AND GROUNDS OF DEFENSE TO THE COUNTERCLAIM OF THE DEFENDANT, HENNO C. LACKS
(Filed March 26, 1970)

The Plaintiff, in response to Defendant's Counterclaim and for its grounds of defense to said Counterclaim, says:

1. It denies that it was guilty of any negligence or the breach of any duty it may have owed to the Defendant as alleged in Paragraph (a) of Defendant's Counterclaim.

2. It denies that it was responsible in any manner for any loss occurring to Defendant's tobacco as alleged in Paragraph (a) of Defendant's Counterclaim.

3. It says that any defect in installation of the barn and other items in question was not the responsibility of the plaintiff, but was the responsibility of the Defendant who had control and supervision over the installation.

4. It has no knowledge of the allegations of Paragraph (a) of Defendant's Counterclaim dealing with the losses and damages alleged to have been sustained by the Defendant and therefore denies the same.

5. It says that Defendant failed to mitigate his damages and losses and is barred from recovery for such damages and losses.

6. (a) It says that the contract dated August 14, 1969, wherein Plaintiff agreed to sell and Defendant agreed

to buy the gas barn and other items in question, said contract included the following provision:

> "Debtor's remedies appearing in the manufacturer's standard warranty, if any, for the Collateral shall be exclusive, and there are no other warranties, express or implied, of merchantability or otherwise, which extent beyond the above description of the property. Without limiting the scope of the foregoing, secured party's obligation specifically excludes any liability for consequential damages, such as loss of profits, delays, expense, damage to goods or property used in connection with, or processed in or by, the product sold, or damage to the product sold from whatever cause, whether or not such loss is due to the negligence of the secured party or the manufacturer of the product sold."

(b) It says that the aforesaid provision in said contract wherein the Plaintiff was referred to as "Secured Party" and the Defendant as "Debtor," bars Defendant from recovery of Plaintiff on the counterclaim.

7. It says that Defendant is estopped from asserting that the barn and other items were defective or negligently installed by virtue of Defendant's written acceptance as they were installed.

8. It says that the Defendant assumed the risk of the hazard resulting in the damages to his property and is barred from recovery against the Plaintiff.

9. It says that even if it be deemed guilty of negligence, which is herein specifically denied, Defendant was likewise guilty of negligence contributing to the

losses and damages alleged in his counterclaim and is therefore barred from recovery against the Plaintiff.

10. It says that Defendant is estopped to revoke acceptance of the barn gas burner as stated in Paragraph (b) of Defendant's Counterclaim.

11. It denies each and every allegation contained in Defendant's counterclaim except those specifically admitted herein.

12. It says that Defendant's Counterclaim fails to state a cause of action upon which relief may be granted.

SPECIAL PLEA OF CONTRACTUAL DEFENSE TO DEFENDANT'S COUNTERCLAIM
(Filed March 26, 1970)

The Plaintiff, by counsel, for its special plea to the Defendant's Counterclaim, says as follows:

1. (a) The Defendant and the Plaintiff entered into a contract on August 14, 1969, wherein Plaintiff agreed to sell to Defendant a gas barn, a rack loader and a wet dry bulk thermometer for a certain monetary consideration to be paid by Defendant and further for Defendant's agreement to be bound by the terms of said contract which provided in part:

> "Debtor's remedies appearing in the manufacturer's standard warranty, if any, for the Collateral shall be exclusive, and there are no other warranties, express or implied, of merchantability or otherwise, which extend beyond the above description of the property. Without limiting the scope of the foregoing, secured party's obligation specifically excludes any liability for consequential damages, such as loss of profits, delays, expense, damage to goods or property used in connection with, or processed in or by, the product sold, or damage to the product sold from whatever cause, whether or not such loss is due to the negligence of the secured party or the manufacturer of the product sold."

(b) In said contract, Plaintiff was designated as "Secured Party" and Defendant as "Debtor."

(c) Under the terms and conditions of said contract, Defendant is barred from recovery of the Plaintiff for the losses and damages alleged in his counterclaim.

2. Plaintiff specifically requests a reply to this special plea.

(6)

GEORGE F. ABBITT, JR., JUDGE
FIFTH JUDICIAL CIRCUIT
APPOMATTOX, VIRGINIA

October 21, 1970

COUNTIES
APPOMATTOX
BUCKINGHAM
CHARLOTTE
CUMBERLAND
PRINCE EDWARD

Frank M. Slayton, Esquire
Attorney at Law
South Boston, Virginia

Norman Moon, Esquire
Attorney at Law
Lynchburg, Virginia

Re: Bottled Gas Co. vs. Lacks

Gentlemen:

I have now had an opportunity to review the memorandum submitted to me by each of you relative to the point of law raised in the special plea filed by the defendant in this case. The point involved is an important question of law and it also is one that has not been settled clearly in Virginia.

Although there are several cases in Virginia in which the point now before me has been present, however, the only case in which the precise point has been actually passed upon by our appellate court is the case of Johnson's Administratrix vs. R. & D. R. R. Co., 86 Va. 975 (1890). Although the other cases to which I referred are not controlling on the point now before me, it appears from a careful reading of these cases that our court has avoided passing upon the question of a contract limiting liability for negligence. See the two cases of Revenue Aero Club vs. Alexandria Airport 192 Va. 231 and Kitchen vs. Gary Steel Corp., 196 Va. 259.

I feel constrained to hold, at the present time, that the plea should not be sustained but that the entire case and evidence should be developed so that, if it becomes necessary for either party to pursue their appellate rights the entire case will be available to the Court of Appeals.

Therefore, an Order will be prepared and endorsed and presented to me overruling the plea at this time. After the evidence is fully developed we then may be in position to dispose of this question.

GEORGE F. ABBITT, JR., JUDGE
FIFTH JUDICIAL CIRCUIT
APPOMATTOX, VIRGINIA

COUNTIES
APPOMATTOX
BUCKINGHAM
CHARLOTTE
CUMBERLAND
PRINCE EDWARD

Frank S. Slayton
Norman K. Moon (2) October 21, 1970

With personal regards to each of you, I am

Sincerely yours,

George Abbitt, Jr.

George Abbitt, Jr., Judge

GAjr/b

cc: W. Byron Keeling, Esquire
W. Falcon Hodges, Esquire

NOTICE
(Filed August 10, 1971)

TO: Franklin M. Slayton, Esq.
P. O. Box 446
South Boston, Virginia 24592

W. Byron Keeling, Esq.
Church Street
Keysville, Virginia

TAKE NOTICE: That pursuant to Rule 4:11 the defendant Henno C. Lacks is required within ten (10) days after service hereof to admit the following facts that appear of record at the Department of Agriculture Office at Charlotte Court House in Charlotte County, Virginia, in the record books pertaining to acreage allotments and sales of tobacco for Charlotte County:

1. For the year 1968, Henno C. Lacks had an acreage allotment of 6.64 acres and a poundage allotment of 8,795 pounds. That in 1968, Henno C. Lacks marketed 9,656 pounds under provisions of a law allowing the sale of 10% more than the allotment but to be subtracted from the following year's sales.

2. That in 1969, Henno C. Lacks was allotted 2.81 acres and had a poundage allotment of 3,723 pounds that he leased from others the right to sell 7,122 pounds for a total poundage of 10,845 pounds. That in 1969, he actually marketed 8,934 pounds.

3. In 1970, Henno C. Lacks marketed 9,108 pounds and he had a total allotment of 11,052 pounds.

NOTICE
(Filed September 2, 1971)

TO: E. Falcon Hodges
118 West Atlantic Street
P. O. Box 566
South Hill, Virginia

TAKE NOTICE that pursuant to Rule 4:11 the plaintiff, Bottled Gas Corporation of Virginia, is required within ten (10) days after service hereof to admit the following facts:

1. That on or about August 14, 1969, Henno C. Lacks of Drakes Branch, Virginia, entered into a contract to purchase from Bottled Gas Corporation of Virginia, South Hill, Virginia, a gas barn, Serial No. 36573, Model G-5, Style 132, for $4,541.60.

2. That on or about June 23, 1971, the plaintiff, its agents or assigns, without notice to the defendant, Henno C. Lacks, came upon the property of the defendant and removed the said gas barn.

3. That the plaintiff, Bottled Gas Corporation of Virginia, has since sold the aforesaid barn to a third party at a private sale, without giving notice to the defendant, Henno C. Lacks.

ANSWER TO REQUEST FOR ADMISSION
(Filed September 21, 1971)

STATE OF VIRGINIA,

COUNTY OF MECKLENBURG, to-wit:

This day personally appeared before me, Jene G. Radcliffe, a Notary Public in and for the county and state aforesaid, one E. Falcon Hodges, who, being first duly sworn, made oath as follows:

1. That he is counsel for Bottled Gas Corporation of Virginia in a certain civil suit now pending before the Circuit Court of Charlotte County, Virginia, under the above captioned style.

2. That on or about August 14, 1969, the aforesaid plaintiff entered into a contract of sale of one gas barn, Serial No. 36573, Model G5, Style 132, for $4541.60, to Henno C. Lacks, of RFD, Drakes Branch, Virginia.

3. That on or about June 23, 1971, the plaintiff, by its agents, and pursuant to an agreement with the defendant's counsel, repossessed said gas barn in order to dispose of the same, all with the knowledge and consent of the defendant.

4. That the plaintiff, Bottled Gas Corporation of Virginia, has disposed of the said gas barn by private sale, pursuant to the aforesaid notice and all with the expressed knowledge of the defendant.

(11)

GEORGE F. ABBITT, JR., JUDGE
FIFTH JUDICIAL CIRCUIT
APPOMATTOX, VIRGINIA 24522

January 17, 1973

COUNTIES
PRINCE EDWARD
APPOMATTOX
BUCKINGHAM
CHARLOTTE
CUMBERLAND

Norman K. Moon, Esquire
Attorney at Law
Lynchburg, Virginia

W. Byron Keeling, Esquire
Attorney at Law
Charlotte Court House, Virginia

Frank M. Slayton, Esquire
Attorney at Law
South Boston, Virginia

Re: Bottled Gas Corp. vs. Henno C. Lacks

Gentlemen:

I have now finally had an opportunity to review fully the questions pending before me in the above styled case.

I have reviewed carefully the memorandum of authorities and statement of the respective positions of you gentlemen in support of your client's case and have also read the authorities that have been cited by each of you and that have been relied upon in support of your respective positions.

The record in this case discloses that Bottled Gas Corporation of Virginia sued Lacks for the unpaid purchase price of a curing ~~bond~~ barn that had been purchased by Lacks from the said Corporation. Lacks filed grounds of defense and a counterclaim against Bottled Gas Corporation of Virginia and the manufacturer of this curing ~~bond~~ barn to recover the alleged loss sustained by Lacks when two curings of tobacco were distroyed due to an alleged failure of the barn to perform as represented. A special plea was filed by Bottled Gas Corp. asserting the benefits and protection of a clause in the sale contract exempting the said seller from liability for consequential damages to goods or property used in connection with the product sold whether such loss was due to the negligence of the said seller or the manufacturer of the product sold, namely the barn.

I overruled the plea so that the matter could be heard fully. The matter now confronts the Court on a motion to set aside the jury verdict which awardad Lacks damages for the loss of his two curings of tobacco.

The first question that arises is whether or not the fact that only Lacks actually signed the said sale contract bars the

GEORGE F. ABBITT, JR., JUDGE
FIFTH JUDICIAL CIRCUIT
APPOMATTOX, VIRGINIA 24522

COUNTIES
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CUMBERLAND

seller from the protection of the "no liability" clause in the sale contract.

The answer to this question is found in the case of Crowder vs. Com. 202 Va. 871 where this language is used at p. 875: "Furthermore, we have frequently held that although a contract may be unilateral, when suit is brought for its enforcement, he who has not theretofore been bound will be deemed to have consented to it in writing, thus making the obligations mutual." (The Crowder case was a civil proceeding in equity and cites other civil cases in support of its holding.)

Therefore when Bottled Gas instituted action vs. Lacks, that act converted the contract into a bilateral instrument.

The next question with which I am confronted is raised by the special plea.

I have consulted the available authorities dealing with the question of contracts exempting parties thereto from responsibility or liability for negligence including the annotation found in Vol. 175 of A. L. R. which is a lengthy treatment of the question now before me. Of course I have read a number of the decisions reported in the supplemental service to A. L. R.

Although the question before me has been presented in the pleadings in several cases that reached the Court of Appeals, so far, the Court has avoided the question due to the posture of the pleadings. See Revenue Aero Club, Inc. vs. Alexandria Airport, 192 Va. 231 and Kitchin vs. Gary Steel Products Corp. 196 Va. 259, and Haynes vs. Bekins Van & Storage 211 Va. 231.

I have carefully reviewed the uniform commercial code. The clause involved in the pending litigation appears to be sufficiently conspicious to meet the requirements of this code. It is on the face of the contract, it is in the body of the contract wherein the terms involved are set forth. It is not comparable to a small ticket with an inconspicious clause of limitation of liability printed in small print on the back of the ticket.

GEORGE F. ABBITT, JR., JUDGE
FIFTH JUDICIAL CIRCUIT
APPOMATTOX, VIRGINIA 24522

COUNTIES
PRINCE EDWARD
APPOMATTOX
BUCKINGHAM
CHARLOTTE
CUMBERLAND

In other words it does not come within one of the exceptions to the general rule that parties are free to and may contract so long as the terms and subject of the contract do not violate or infringe upon public policy. Here no monopoly was involved. Here no public services were involved. Here the parties were free to contract on their own terms and conditions. Here no master-servant relationship existed. In fact the product involved could have been purchased from any other dealer. There was no emergency involved. No rush was involved.

I am of the opinion that the parties, in this case, were free to contract as to their respective rights. It does not fall within the prohibited field of contracting against one's own negligence.

I therefore feel constrained to hold that the motion to set aside the verdict should be sustained and I do therefore, for the reasons herein set forth, suggest that an Order be prepared carrying out the holding as herein expressed. The Order should be endorsed by Counsel of Record and submitted for entry.

I do indeed appreciate the extensive amount of work and time that you gentlemen devoted to this case.

With personal regards to each of you, I am

Sincerely yours,

George Abbitt, Jr.

George Abbitt, Jr., Judge

GAjr/n

cc: E. Falcon Hodges, Esquire
S. J. Thompson, Jr., Esquire

GEORGE F. ABBITT, JR., JUDGE
FIFTH JUDICIAL CIRCUIT
APPOMATTOX, VIRGINIA 24522

COUNTIES
PRINCE EDWARD
APPOMATTOX
BUCKINGHAM
CHARLOTTE
CUMBERLAND

For further authorities see:

Williams vs Chrysler, 137 S. E.(2) 225

Stamp vs Windsor. 177 S. E. (2) 146

Brown vs Five Points Parking Center, 175 S. E. (2) 901

Miller's Mut Fire Ins. Assn., etc vs Parker, 65 S. E. (2) 341

Pride vs Southern Bell Tel & Tl Co., 138 S. E. (2) 155

57 Am. Juris. (2) p. 362 sec. 20 Negli et seq.

13 Michies Juris. 1970 Supp p. 127 Sec. 14 Negli

4 Michies Supp. (1970 issue) Sec. 115 p. 183 note 7

ORDER
(Entered May 29, 1973)

This day came again the parties, by their attorneys, and the Court having taken under advisement the motion of the plaintiff to set aside the jury's verdict for the defendant, and now being advised of its judgment as is set forth in the Court's opinion of January 17, 1973, to be filed with the Clerk and considered a part of this order, the Court doth sustain said motion and it is, therefore considered by the Court that the defendant take nothing by his counter-claim against the plaintiff and that the plaintiff recover of and against the defendant its costs by it about this suit in this behalf expended and the defendant, by his attorney, duly objected and excepted to the action of the Court.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
(Filed June 20, 1973)

Comes now the defendant, Henno C. Lacks, by W. Byron Keeling, and Frank M. Slayton of Vaughan, Slayton and Bennett, his attorneys, and pursuant to Rule 5:6 of the Rules of Court of the Supreme Court of Virginia hereby files his notice of appeal from the judgment order entered in this case on the 29th day of May, 1973, and as a basis for the appeal he states the following assignments of error:

1. The Court erred in sustaining the motion of counsel for the plaintiff, Bottled Gas Corporation of Virginia, to set aside the jury verdict rendered in the defendant's behalf on his counter-claim against the plaintiff in the amount of $6750.00 and in ordering that the defendant, Henno C. Lacks, recover nothing on his counter-claim.

2. The order entered on May 29, 1973, in the Circuit Court of Charlotte County, Virginia, is contrary to the law and the evidence and is not supported in law.

3. A transcript of the testimony and other incidents of the trial heard in the Circuit Court of Charlotte County, Virginia, on June 16, 1972, shall be filed in the Office of the Clerk of the Circuit Court of Charlotte

County, Virginia, pursuant to the requirements of Rule 5:9 (b).

No. 67-40

CONDITIONAL SALE CONTRACT
(Purchase Money Security Agreement

EXHIBIT A

August 24, 1969

PURCHASER
("Debtor"): Lenno C. Lacks, Rt. #1, Dacks Branch, Charlotte, Virginia
(Print full name) (No. St., or RFD) (City) (County) (State)

SELLER
("Secured Party"): Bottled Gas Corp. of Va. South Hill, Mecklenburg, Virginia
(Dealer's name) (Correct Legal Address) (City) (County) (State)

Secured Party agrees to sell, retaining title, and Debtor agrees to buy the property described below (the "Collateral"):

No. Unit	Description	Unit Price	Total Price
1	300-432-3 Gas Barn 8½ Racks	451.60	451.60
1	453A-221 Rack Loader	55.12	55.12
1	Wet Dry Bulb Thermometer	17.94	17.94

Debtor's remedies appearing in the manufacturer's standard warranty, if any, for the Collateral shall be exclusive, and there are no other warranties, express or implied, of merchantability or otherwise, which extend beyond the above description of the property. Without limiting the scope of the foregoing, secured party's obligation specifically excludes any liability for consequential damages, such as loss of profits, delays, expense, damage to goods or property used in connection with, or processed in or by, the product sold, or damage to the product sold from whatever cause, whether or not such loss is due to the negligence of the secured party or the manufacturer of the product sold. Debtor grants and conveys to Secured Party a security interest in the Collateral to secure all sums due hereunder, and DEBTOR AND SECURED PARTY AGREE AS FOLLOWS:

1. PAYMENT: DEBTOR SHALL PAY SECURED PARTY AT ABOVE DESCRIBED ADDRESS THE SUM OF _____

($_____) DOLLARS ON OR BEFORE THE EXPIRATION OF FIFTEEN DAYS DUE DATE FROM THE DATE THE COLLATERAL IS DELIVERED TO THE PREMISES OF DEBTOR.

2. USE: UNLESS SECURED PARTY CONSENTS IN WRITING TO ANOTHER USE, THE COLLATERAL WILL BE USED ON DEBTOR'S FARM IN THE COUNTY OF _____ STATE OF _____ MORE PARTICULARLY DESCRIBED AS FOLLOWS:

1,47
4433.19
Trade 1,16
30.00
3.5

Debtor will maintain the Collateral in reasonably good and safe condition, will comply with all applicable laws and regulations, and shall not make any use of the Collateral for the curing, drying, or storing of tobacco or other farm products until the purchase price has been fully paid. Debtor warrants and covenants that Debtor is the owner of the real estate upon which the Collateral is being placed.

3. Title: Until Debtor has fully performed all agreements, covenants and obligations hereunder, title shall remain in Secured Party and Collateral shall be severable from any realty to which it may have been affixed.

4. Assignment: Secured Party may assign this security agreement without notice to Debtor, and the assignee shall be entitled, upon notifying the Debtor, to performance of all Debtor's obligations hereunder and to all rights and remedies of Secured Party. Debtor will not assert against the assignee any claims or defenses he may have against Secured Party named above.

5. Entire Agreement: This Security Agreement, including the additional terms on the reverse side hereof, constitutes the entire agreement. No waiver or modification shall be valid unless written upon or attached hereto.

IN TESTIMONY WHEREOF, Debtor and Secured Party have executed and sealed this instrument, on the day and year first above written.

_____ (SEAL)

Lenno C. Lacks (SEAL)
Debtor

By_____
(Title if not individual)
Secured Party

_____ (SEAL)
Debtor

(OVER)

ADDITIONAL TERMS

6. Delivery: Secured Party agrees to cause the Collateral to be delivered to Debtor, but assumes no liability for late delivery, loss or damage arising from any cause beyond the control of Secured Party. Debtor further agrees that, in the event the Collateral is not in good order and condition at the time of delivery to him, he will notify Secured Party at the first opportunity, or in any event within three days before due date, which period of time shall be the essence of this Agreement.

7. Liens: Debtor warrants and covenants that no adverse liens, security interests or encumbrances affect the Collateral and that Debtor will keep the Collateral free from all other security interests, taxes, liens, encumbrances, charges and adverse claims until the purchase price is fully paid.

8. Insurance: Debtor will maintain at Debtor's own expense insurance against loss or damage by fire or windstorm or other casualty in an amount not less than the purchase price and furnish proof thereof to Secured Party upon request.

9. Default: Misrepresentation or misstatement in connection with, noncompliance with or nonperformance of any of Debtor's covenants and agreements under this Security Agreement, or nonpayment of any sum or sums due under this Security Agreement or any note hereby secured, or bankruptcy, or insolvency proceedings by or against Debtor, shall constitute default under this Security Agreement.

10. Remedies on Default: Upon Debtor's default, Debtor shall pay immediately to Secured Party, if Secured Party so elects, the entire amount remaining unpaid under this Security Agreement or any note hereby secured, and Secured Party shall have all the remedies of a secured party under the Uniform Commercial Code enacted in said state where Collateral will be located, and without limitation thereof, Secured Party shall have in addition the following cumulative specific rights: (a) to take immediate possession of the Collateral or render it unusable on Debtor's premises without notice or resort to legal process; (b) to require Debtor to assemble the Collateral and make it available to Secured Party at a place to then be designated by Secured Party which is reasonably convenient to both parties; (c) to dispose of the Collateral in any county or place elected by Secured Party at either a public or private sale (at which sale Secured Party may be the purchaser) with or without having the Collateral physically present at the sale, and in the event of public sale, written notice thereof mailed to Debtor and posted on a suitable bulletin board maintained for such purpose in the court house in the county or place in which the sale is to be held at least five (5) days immediately preceding the sale, is stipulated to be sufficient notice and advertising, in the event of private sale, written notice mailed by Secured Party to Debtor at least five (5) days prior to the time after which private sale is to be made, is stipulated as sufficient and reasonable notice; (d) to sell the Collateral at private sale as used goods or equipment in the ordinary course of Secured Party's business and such sale is stipulated to be a commercially reasonable sale in a recognized market; (e) to retain from the proceed of disposal, or to recover in any action, the reasonable attorneys' fees, legal expenses and other expenses of enforcement of this Agreement, incurred by Secured Party in addition to all other costs, expenses and deficiencies permitted by the Uniform Commercial Code in said state at the date of this Agreement; (f) to give any notice to Debtor by mailing a copy, postage prepaid, to Debtor's address set out herein.

1. Miscellaneous: "Debtor" and "Secured Party" as used in this Security Agreement include the heirs, executors, administrators, successors, or assigns, of those parties; if more than one debtor, their obligations are joint and several; this Security Agreement shall secure all renewals or extensions of the debt or any note which shall not be deemed a payment or discharge; the exercise or waiver of any right or remedy by Secured Party shall not be a waiver of any other right or remedy; Debtor will pay all filing and recording fees in connection with this Agreement.

POWELL ORDER AND SHIPPING INSTRUCTIONS

Ship via: _____ Delivery Desired: _____

Ship To: _____

Remarks: _____

_____

_____

Date Shipped: _____ Invoice Number: _____

_____

ASSIGNMENT

To induce Powell Manufacturing Company, Inc., to extend credit to the undersigned for the purchase money of the Collateral described in the within Purchase Money Security Agreement, and as additional security therefor, and subject to the terms of existing written agreement with Powell Manufacturing Company, Inc., the undersigned hereby assigns and transfers to Powell Manufacturing Company, Inc., all its right, title and interest in and to said Purchase Money Security Agreement and Collateral described therein, and all undersigned's rights and remedies thereunder, including without limitation the right to collect any installment due thereon and to take any action thereunder which undersigned might otherwise take. The undersigned warrants the genuiness of the said Purchase Money Security Agreement and the truth of the facts therein stated, and that it is free from any and all other liens and encumbrances whatsoever. In connection with this assignment, Powell Manufacturing Company, Inc., shall have all the rights and remedies of a secured party under the Uniform Commercial Code, which shall be cumulative.

Dealer _____ (SEAL)

Date: _____

By _____
(Signed) (Title)

VIRGINIA: IN THE CIRCUIT COURT OF CHARLOTTE COUNTY

BOTTLED GAS CORPORATION OF VIRGINIA, Plaintiff, v. HENO C LACKS, Defendant. and HENO C. LACKS, Plaintiff, v. POWELL MANUFACTURING COMPANY, Defendant.	TRANSCRIPT OF EVIDENCE

A stenographic report of the oral testimony and other incidents of the trial of Bottled Gas Corporation of Virginia v. Heno C. Lacks, and Heno C. Lacks v. Powell Manufacturing Company tried on the 16th day of June, 1972 in the Circuit Court of Charlotte County, Virginia before Honorable George F. Abbitt and Jury.

APPEARANCES:

FRANKLIN M. SLAYTON and BYRON M. KEELING, attorneys for Heno C. Lacks.
NORMAN K. MOON and FALCON HODGES, attorneys for Bottled Gas Corporation of Virginia.
S. J. THOMPSON, JR., attorney for Powell Manufacturing Company.

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WITNESSES	DIRECT	CROSS	RE-DIRECT
Bobby Lafoon	3	-	-
Heno C. Lacks, Jr.	10	49 52	51
J. I. Gregory	53	61	63
Earl Tudor	65	70	72
George Russell Smith	75	77	-
W. G. Edwards	78	85	-

After the jury was selected and sworn, the witnesses sworn and separated and opening statements were made, the following ensued:

The witness, BOBBY LAFOON, having first been duly sworn, on examination, testified as follows:

DIRECT EXAMINATION

BY MR. HODGES:

Q Would you tell us your name, please.

A Bobby Lafoon of Bottled Gas Company of Virginia.

Q How old are you, Mr. Lafoon?

A Thirty-seven.

Q Where do you live?

A Kenbridge, Virginia.

Q By whom are you employed?

A Bottled Gas Corporation of Virginia.

Q What is your position?

A Assistant Manager, South Hill.

Q Were you employed by Bottled Gas Corporation during the latter part of 1969?

A Yes, sir.

1 Q In what capacity did you serve Bottled Gas
2 Corporation in 1969?
3 A I was employed as office manager in Kenbridge,
4 and I was transferred to South Hill in the fall of 1969.
5 Q Mr. Lafoon, in your position with Bottled Gas,
6 did you have occasion to keep records and books with Bottled
7 Gas Corporation?
8 A Yes, sir. I am in charge of record keeping in
9 South Hill.
10 Q Do you recall whether you had any dealings
11 with Mr. Lacks in 1969?
12 A When I came to South Hill in the fall of 1969,
13 we were in the process of trying to get an account straightened
14 out. The account had not been paid.
15 Q What dealings did you have with Mr. Lacks?
16 A I believe I wrote Mr. Lacks several letters
17 and had our man go by to see him.
18 Q What transactions, if any, did you have with
19 Mr. Lacks?
20 A We sold Mr. Lacks a barn.
21 Q Did you sell it on a contract?
22 A On contract.
23 Q Do you recall what day that was?
24
25

A I'm not sure. It was sold before I came to South Hill.

Q Do you have a copy?

MR. SLAYTON: There are two statements there. One is an open account which we do not object to and the other is the contract. We do object to the contract.

THE COURT: There is a matter we will have to determine out of the presence of the jury. Members of the jury, go to your jury room for a few minutes.

NOTE: The following ensued out of the presence of the jury:

THE COURT: All right.

MR. MOON: I think Mr. Hodges offered the contract in evidence. I don't object to it. We have filed pleadings which alleged that there is a contract, and I asked for a specific reply to the existence of the contract. There was no denial and no pleadings were filed under that. It is bound to exist, and I think Mr. Lacks' attorney filed a request for admission of the contract. I don't see, at this point, that they can deny that that is the contract.

THE COURT: At the moment, what is the purpose of the contract? I assume it's going to be admissible.

MR. MOON: I think it's actually already in the record as far as that's concerned. As I say, they have admitted it. I think it should be in the record but the Court should pass on the motion to dismiss the basic claim of Bottled Gas Company as to the purchase price.

MR. SLAYTON: Your Honor, please, as counsel is well aware, Mr. Hodges is counsel for Bottled Gas. The case made here to the Court, in pretrial conferences, that Bottled Gas by virtue of the fact that they got this, sold at a private sale and repossession was effective without giving any notice to Mr. Lacks. He was given no notice to sell the barn. Counsel also stipulated or expressed a willingness to stipulate that the only claim Bottled Gas had was for the $88.00, approximately, the account. We object to the introduction of the contract because it was not signed by Bottled Gas; it was signed by Mr. Lacks. The pleadings relied upon were the pleadings that destroyed any claim Bottled Gas might have for deficiency judgment. We feel it's prejudicial to Mr. Lacks' position.

THE COURT: Under no developments in the case it would be admissible?

MR. SLAYTON: I can't say that. I don't have the benefit of the other witnesses. I do object to it at this time.

MR. MOON: I think what we decided is that the Court would, at this time, rule whether or not he could proceed with this particular claim. We know that Mr. Lacks entered into a contract with Bottled Gas Company for a barn, Serial Number 36573, for $4,541.60. I say under this, the contract, it is my understanding the Court would rule upon the basis that he was not taking a nonsuit because the Court was going to rule based upon the status of things at the time of trial as to the main claim as to the barn. I say the contract is admissible for the purpose of that. The pleading doesn't have to be shown to the jury. I think the Court would rule on the basic claim. I think it is admissible in the case insofar as the law to be applied.

MR. SLAYTON: We don't object on that basis. We want to keep it from the jury.

MR. MOON: For the purpose of the pleadings, to show what the pleadings are talking about, they allege such contract, I think it's admissible.

THE COURT: With that background, I'll admit it as

1 you gentlemen stipulated. If it becomes necessary later, the
2 Court will determine whether to submit it to the jury. At
3 some stage we could get into the trial that we had pretrial
4 conferences in Appomattox day before yesterday. We will stip-
5 ulate to the facts as such. That will be the ruling of the
6 Court, assuming none of the conditions existed and the primary
7 claim would be dismissed.
8
9 NOTE: The jury returned to the courtroom, and Mr.
10 Hodges continued the direct examination of Mr. Bobby Lafoon.
11
12 Q Just to go back a minute, I believe you said
13 you were working for Bottled Gas and the keeper of the records
14 in South Hill?
15
16 A Yes, sir.
17 Q You entered into a contract with Mr. Lacks?
18 A Yes, sir.
19 Q I hand you a paper. Is that it?
20 A Yes, sir, that is the contract for the barn of
21 Mr. Lacks.
22 Q What is the date?
23 A August 14, 1969.
24 Q What subject did it cover?
25

A A Powell bulk barn.

Q That's Mr. Heno C. Lacks?

A Yes, sir.

Q I ask to offer this in evidence.

THE COURT: It will be received in evidence.

HENNO C. LACKS, JR. 15.

* * *

Q Did you receive or your father receive instructions as to how to prepare the footings upon which this curer was to be placed?

A Yes, sir, we did.

Q Were they in the nature of written instructions?

A Yes, sir.

Q Did you and your father put down this footing or did you seek assistance?

A We helped. Wade Newcomb come and put the footings down, and we also helped.

Q Was it put down in accordance with these specifications?

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

Q When the barn was brought there, explain to the jury how it was placed on the footings.

A When we put the foundation down, there was supposed to be plastic in the barn and it wasn't there. I

went to Keysville and picked up the plastic and went by Williams Lumber Company in Drakes Branch and got sand and cement and brought it back. They put the plastic down, the sand down, and the cement on top.

BY THE COURT:

Q Who is "they"?

16.

A Bottled Gas Company. They put the barn on top of the foundation and sat down and told me to wet it down good, which I did. So the next day, they came back and took the current to the barn and it was supposed to be ready to go as far as I know.

MR. KEELING: We wish to introduce this specification as our "Exhibit No. 1".

THE COURT: Make it "No. A".

BY MR. KEELING:

Q Mr. Lacks, I hand you this paper and ask you if you can identify it.

A This is the blueprint of putting the barn down.

Q Is this the type of structure that was placed on the footing?

A Yes, sir.

Q Does this give the diagram of the footing?

A Yes, sir, this is the footing here.

Q My understanding is that they bring it in and set it on top of that footing?

A Yes, sir.

Q Did you receive any other instructions as to the preparation of the foundation?

A No, sir.

17.

Q This provides "select a well-drained sight". Was that done?

A Yes, sir.

Q It provides that all exposed ground within the footing was to be covered with plastic, is that right?

A Yes, sir.

Q It provides that the plastic is to be covered with two inches of dirt. Was that done?

A To the best of my knowledge.

Q Was that done by the representative or agent of Bottled Gas Company?

A Yes, sir.

BY MR. KEELING:

Q Mr. Lacks, who placed this barn on the footings?

A Well, the representative of Bottled Gas Company.

Q Did they bring the barn to your father's farm?

A Yes, sir.

Q Were you there when it arrived?

A Yes, sir.

Q How was it transported?

A By truck and tractor.

Q Explain to the jury how it was brought out and placed over the footings.

A They brought it in on a tractor and then they took it loose, and we hooked it to our farm tractor and pulled it across the foundation.

Q Was it necessary that it be lowered on this footing?

A Yes, sir, it had to be jacked up and the wheels taken out and then lowered.

Q Who furnished the jacks?

A The Gas Company.

Q Who operated the jacks?

A The same men who brought the barn.

Q After it was placed on the footings, was any mention made by the representative or the people working for Bottled Gas Company as to whether or not the footing was defective in anyway?

A Not to my knowledge.

Q Were you there all the time?

A Yes, sir.

Q Were you in a position to hear?

A Yes.

Q Now, who instructed you to get the sand to put on top of the plastic?

A We had to have the material there. They got there quicker than I thought, and I had to get the cement and the sand. The plastic was supposed to come with the barn.

Q Did you testify previously that the plastic did not come with the barn?

A Yes, sir.

Q Who instructed you to go get the plastic?

A I don't remember, but I weant and got it.

Q After the plastic was secured, who put it in place on the foundation?

A They did, the Bottled Gas Company.

Q When you got the sand and brought it back, was any mention made that that was not what you were supposed to use?

A No, sir.

Q Who put the sand on top of the plastic?

A They did.

BY MR. THOMPSON:

Q Who is "they"?

A Bottled Gas Company.

MR. MOON: I don't think it is proper for him to say "they". There were people there from different organizations. I object to "they" being Bottled Gas Company. I think he has to say who did something.

THE COURT: That is possibly so.

BY MR. KEELING:

Q With reference to these questions I have asked dealing with placing this curer on the foundation and your reference to "they", who were you speaking of?

A Bottled Gas. I don't know their names. The only one I knew was Mr. Gregory.

Q Was Mr. Gregory there during any of that?

A I believe so.

1 MR. MOON: I move to strike that. He can't answer
2 that way. He has testified that Powell Manufacturing put it
3 down.
4 MR. THOMPSON: I don't believe he testified that
5 Powell Manufacturing put it down.
6 THE COURT: We will excuse the jury for a minute.
7
8 NOTE: The jury retired to the jury room, and the
9 following ensued out of the presence of the jury:
10
11 THE COURT: See if you can develop who was there
12 out of the presence of the jury, how many and who they were.
13 MR. SLAYTON: Your Honor, it is the plaintiff's
14 position in these suits that Mr. Lacks bought this barn; it
15 was brought there as a result of an agreement he reached with
16 Bottled Gas Company; that the barn was manufactured by Powell
17 Manufacturing Company, and what we're trying to show is that
18 these people had the complete control and supervision for
19 installing this barn and that Mr. Lacks nor his son had nothing
20 to do with it except that they operated at the direction of
21 these other people and did what they were asked to do and no
22 more. For the Court to take the position at this time that
23 our witness has to know by whom these various individuals were
24
25

employed, we feel places an undue burden on him.

THE COURT: I agree he will have to say who was there at the request of Bottled Gas.

MR. SLAYTON: From that point on, should we elect to go the route, we could call these people as adverse witnesses and develop various roles they played in the installation of the barn. This man was there. He knows who was there by appearance but he doesn't know the names. We have been over this with him, and he has told us the various roles Mr. Gregory played. I think to simply cut him off because of the people working there as they were will be restrictive.

THE COURT: I'm inclined to think that is so. He was buying this from Bottled Gas. I believe Bottled Gas will be bound by that. It doesn't necessarily mean Powell will be responsible. I think we will have to go further to show that. I believe he can show they came for the purpose of installing it. Powell could have given advice, assuming it is tied in later when they call these witnesses as adverse witnesses.

MR. MOON: Object on the basis that this testimony of this witness is basically hearsay. He is not the plaintiff in the case and counsel for Lacks continues to ask questions about what happened and what was said, and it's not shown that

1 this man knows. He may be repeating things his father told him.
2 That is the foundation of what he has given here, which is
3 contrary to the depositions. He said his father took care of
4 most of the dealings with the Bottled Gas Company. That is one
5 of my objections to his testifying.
6 THE COURT: I told him to say what he heard. The
7 statements from them are not hearsay.
8 MR. THOMPSON: My objection is that Powell only had
9 one man and that was the driver, and he had nothing to do with
10 installing the barn. He brought it up there, but he didn't
11 have anything to do with it.
12 BY MR. THOMPSON:
13 Q Isn't it true that there was just one Powell
14 man there?
15 A That is correct; the driver.
16 Q He had nothing to do with the installation?
17 A That is correct.
18 BY THE COURT:
19 Q How many other men were there?
20 A I'd say five from the gas company.
21 THE COURT: Does that clear it up; that there was
22 one man from Powell that took no part in the installation?
23 * * *
24
25

1 Q Mr. Lacks, how many days prior to the time the
2 curer was brought to your farm was this footing constructed?
3 A I'd say two or three days.
4 Q When the trailer was brought on your father's
5 property, was that contractor there, the contractor who put
6 the footing down?
7 A I beg your pardon.
8 Q Mr. Newcomb, was he present?
9 A No, he wasn't.
10 Q Were there any people from Bottled Gas Corpo-
11 ration there on the day the curer was brought and placed?
12 A Yes, sir.
13 Q Do you recall approximately how many?
14 A Five, I think.
15 Q After the barn was placed and after the plastic
16 and sand was put down, how long was it before you put any
17 tobacco in the barn?
18 A I'd say two or three days; I don't know
19 exactly.
20 Q Did anyone from Bottled Gas Corporation check
21 the plant out before you put the tobacco in it to indicate
22 that it was ready for operation?
23
24
25

A No,sir, I don't think so.

Q Did any representative of Bottled Gas Company instruct you or your father not to use it?

A No, sir. After they hooked the current and gas and what not, it was supposed to be ready to go. When we filled it up, we were supposed to call and tell them it was full.

Q Did you do that?

A I did.

Q What happened?

A In a couple of days, the guy from the factory was back.

Q Was this Powell or Bottled Gas?

A No, sir, the factory man. We didn't have the barn blocked off like it should be, and he showed me how to block it off with fertilizer bags and rocks. He told me to go ahead.

Q Did you proceed?

A I did.

Q Did they give you any instructions as to how many days to keep it in and the temperature?

A Yes, we had a chart to go by.

Q Were you in charge of the operation of the heating unit and so forth?

A Yes, sir.

Q Did you comply with the instructions that came with the curer?

A Yes, sir, I did.

Q Tell the jury what happened to this first curing.

A The first curing, the heat didn't get to the tobacco, and it rotted in the barn. The plastic came up from the ground and sealed the heat off so I called the company, Mr. Gregory, and he was supposed to get a man up there from Bottled Gas Company to come and fix it. So they came up and they tore the floor under the furnace room up and put a patch in it and put it down and said it was ready to go.

Q Were you present at the time they came up there?

A To fix the furnace?

Q Yes.

A We took the tobacco out and took it down across the hill there and saved some of it. So we filled it up again and they came back and worked on it again. The same thing happened again. We lost the tobacco. So the third time they came and took the barn up. Before that, this guy asked me--the same one that just walked out awhile ago--did we want the barn, and we said yes. They left and were going to call back to South Hill and they came back and said, "Don't worry about the tobacco", that we would be covered, so they took the barn up from the foundation again. That was on a Sunday afternoon. What we had in the barn, they took that out and throwed it down across the hill. They said we could put in another barn on Monday.

* * *

Q Mr. Lacks, I believe you testified that the first curing was ruined?

A Yes, sir.

Q How did you find out it was ruined?

A When we went to take it out.

Q As soon as you saw it had been ruined, who did you notify?

A Mr. Gregory.

Q Did anyone come to the farm to look at the curer and look at the tobacco?

A Mr. Gregory did.

* * *

Q Did your father refill this barn with the tobacco after they made these adjustments?

A We did.

Q Will you state to the jury what happened to that curing.

A We still couldn't get any heat in the barn.

Q Did you follow the prescribed procedure?

A I did.

Q What happened to that curing?

A It messed up too.

Q You say "messed up", were you able to sell any of it?

A No, sir. We threw it away.

Q What did you do then, after that loss?

A We called the company again.

Q Which company is that?

A Bottled Gas Company in South Hill.

Q What happened after you called them?

A They come and done some more work on it.

Q Who came that time?

A The same people as the first time. I don't

know whether the same guys or different guys but some from the company was there to adjust it.

Q Have you seen any of those men here today?

A I saw one sitting on the bench awhile ago, but the guy sitting behind you was present. He told me the last time when they took the barn up that we would get paid for the tobacco. He was there.

Q This man?

A Yes, sir. He was present when this boy told me. They called the company.

Q Was that after the second time?

A That was the third time.

Q Mr. Lacks, do you know approximately how much poundage you can cure in this barn per curing?

A No, sir, I wouldn't know. I could guess but I really wouldn't know.

MR. MOON: I don't think it's proper. If he doesn't know, he shouldn't guess.

BY MR. KEELING:

Q Mr. Lacks, with reference to your poundage, starting in 1968, that you marketed, what was your total allotment for 1968?

1 A 1968 was 9,656 pounds.

2 Q Was that the amount you sold or your allotment?

3 A That was the allotment.

4 BY THE COURT:

5 Q Nine thousand and what?

6 A 9,656 pounds.

7 BY MR. KEELING:

8 Q Was that the pounds you sold, the number of

9 pounds you sold?

10 A That's right, yes, sir.

11 Q And the allotment was how much?

12 A It was 8,795 pounds. That's with ten percent.

13 Q Was your father allowed a ten percent addi-

14 tional amount that year?

15 A Yes, sir.

16 Q Does the A.S.C. Office require that the ten

17 percent that was allowed in '68 to be deducted from the '69

18 allotment?

19 A No, sir, you can have ten percent. If you go

20 over that, you deduct it.

21 Q Since you used it in 1968, the requirement is

22 that it be deducted from the following year?

23

24

25

1 A Yes, sir.

2 Q And the total amount to be deducted from the

3 1969 allotment was how much?

4 A 861 pounds.

5 Q After the A.S.C. Office deducted the 861

6 pounds from 1969, what was the total poundage allowed for '69?

7 A 10,845 pounds.

8 Q How many pounds did you actually sell, total

9 pounds sold?

10 A 8,934 pounds.

11 Q How many pounds were you short for 1969?

12 A 1,911 pounds.

13 Q What did the tobacco that you all put on the

14 market, that is your 1969 tobacco, what did it average that

15 year?

16 A Around sixty-five cents.

17 Q I am speaking of the tobacco that you raised

18 in 1969. That was how much?

19 A Read that again.

20 Q What I'm asking is, the crop that you raised

21 in 1969 and you put on the market, how much did that average

22 a pound?

23

24

25

A Sixty-five cents, I believe.

Q Do you have your sales tickets?

A Yes, sir, right here.

MR. KEELING: We will let counsel on the other side look at these.

MR. MOON: I'm sure these are authentic insofar for whatever purpose--I think you can go ahead.

THE COURT: You don't have any objections, Mr. Thompson?

MR. THOMPSON: For what purpose are they offered?

MR. SLAYTON: They are offered to show the loss sustain. He lost two and a half acres of tobacco, and that loss is reflected in the sales tickets.

THE COURT: Are they sales tickets for the year?

MR. SLAYTON: Yes, sir.

MR. MOON: I will agree to admitting them for the purpose that they are what they say they are.

THE COURT: All right.

BY MR. KEELING:

Q I hand you these tickets and ask if you can identify them?

A Yes, sir, I can.

Q What do they represent?

A They represent old tobacco sales.

Q When you refer to "old tobacco", what year was that raised on your farm?

A I'd say '67 or '68.

Q Now, have you totaled up the total poundage of old tobacco that was put on the market in 1969?

A Yes, sir.

Q How many pounds?

A 5,036 pounds.

Q And what did this old tobacco bring based on these tickets?

A $3,256.50.

Q In other words, you testified previously that in the sale of your 1969 crop that you were short 1,911 pounds and you are testifying now that you had to use tobacco that you raised in '67 and '68 to make up the shortage caused by the tobacco that was ruined in the curers?

A Yes, sir.

Q Did the old tobacco that you sold, did that bring as much as the 1969 crop?

A No, sir.

1 Q That old tobacco, how much did that average?
2 A I think it was sixty-five cents, but I'm not
3 sure.
4 Q What was the average on the 1969 crop? You
5 said the old tobacco brought an average of sixty-five cents.
6 A I believe seventy cents.
7 Q Going to your 1970 tobacco production, how
8 many pounds were you allowed? Can you state to the jury how
9 many pounds you were allowed for 1970?
10 A 11,052 pounds.
11 Q How many pounds were you able to put on the
12 market?
13 A 9,108 pounds.
14 Q How many pounds was that short of your total
15 allowance?
16 A 1,944 pounds.
17 Q How much did your father average on that
18 crop?
19 A I believe it was seventy cents.
20 Q Did you say the A.S.C. Office also allowed
21 your father an additional ten percent poundage in the year
22 of 1970?
23
24
25

1 A Yes, sir.

The witness, J. I. GREGORY, having first been sworn, on examination, testified as follows:

DIRECT EXAMINATION

BY MR. SLAYTON:

Q Would you please tell the Court and members of the jury your name, sir.

A J. I. Gregory.

Q Where do you live?

A Chase City or near Chase City, R.F.D.

Q What kind of work do you do, sir?

A I'm a salesman for Bottled Gas Corporation.

Q Where is your operation located?

A South Hill. I have a sub-office in Chase City, 54
a sales office, not the accounting office. The sub-office is under the South Hill office.

Q How long have you been in this business?

A I think from in 1969, I believe it was '68, October of '68.

Q Are you still in that same business, Mr. Gregory?

A Part-time.

Q Mr. Gregory, were you in Chatham in 1969 when they had a demonstration of various barns that were being offered for sale there?

A No, I was not there.

Q When did you first become acquainted with Mr. Lacks?

A Shortly after the demonstration you mentioned in Chatham. The Powell representative informed me that he had interviewed Mr. Lacks at this demonstration and he would probably be interested in a purchase of a barn. Our company was the distributor for this general area. I went to see Mr. Lacks.

Q What was the name of the representative of Powell that gave you that information?

55

A Mr. Edwards.

Q Is he here today?

A Yes, sir.

Q Is that gentleman sitting back behind me?

A That is right.

Q Were you present at Mr. Lacks' farm when the barn was delivered?

A Yes, I was there.

Q Was any other representative of your company there on that day?

A Yes, sir, I think it was five, four or five. I believe it was five.

Q Do you recall their names?

A I can't say that I do all of them. Charles Wright, in our Service Department, and he was kind of in

18 charge of placing the barn. In fact, he took the lead. I had
19 done some of this work before, and his assistant, I think. He
20 had either three or four other men with him from our Service
21 Department, from Bottled Gas Corporation.
22 Q Does Mr. Wright still work for the company in
23 that field?
24 A That's right.
25 56
1 Q When you sell a barn like this, Mr. Gregory,
2 do they come equipped with the polyethylene that you put down
3 on the floor before you put the barn on the foundation?
4 A Customarily they do. This was supposed to be
5 in the barn when they got there.
6 Q Who furnishes the polyethylene that you use in
7 preparing the foundation before you set the barn down? Is it
8 the manufacturer?
9 A The manufacturer.
10 Q Do you know anything about the type of poly-
11 ethylene they furnish?
12 A No, I'm not familiar with the different types.
13 Q Did you stay at this site from the time they
14 got there with the barn until they finally placed it on the
15 foundation?
16 A Yes, I was around. I didn't assist in the
17 mechanics of it, but I was around.
18
19

Q Did you look at this foundation before the barn was put on it?

A Yes, sir.

Q Did it appear, from your observations of others you have seen, to be a satisfactorily prepared foundation?

A At that time, I hadn't seen many prepared. As near as I could tell, this was being done properly at the time.

Q Before this barn was actually placed on the foundation, was Mr. Wright in charge of getting everything in order for placing the barn?

A He assisted. He and the men with him took charge, you might say, of getting the barn set on the footing or foundation. He was more familiar with it, apparently, than the other men helping him so he more or less took the lead.

Q Now, Mr. Gregory, this polyethylene that the manufacturer supplies and is put down before you set the barn down, is what color?

A Clear approximately. It may be a cloudy clear but it's not a colored material.

Q Tell the members of the jury, if you will, what you do to the plastic and all that sort of thing before you set the barn down on it.

A The plastic is placed between the runners or fottings and then dirt is put on top of that and then some sand and cement and it's watered down to make it congeal or set.

Q Now, was that done before this barn was put down?

58.

A Yes, sir.

Q Did you have occasion to go back to this farm after that barn had been placed on the foundation?

A Yes, I think--as well as I recall now, the first time I went back was after they had started curing with it and they were having difficulty, and Mr. Lacks, his son, came down to my home.

Q Is that this man here?

A Yes, sir. He came at night to tell me that one side of the barn was curing, and the other room was not, and I immediately called that night, the manager of our Service Department, and he sent somebody out there.

Q Did you go out there at a later time?

A Later, not when the service man went. I did go on several occasions, probably during the next few weeks. I didn't follow that service man that went out there, following my telephone call or following his visit that night.

Q When you sent out to where this barn was, from your observations, could you determine whether or not it was being operated according to the instructions?

A I don't say that I can be positive whether it was. After our service man had been out there, after his first

visit to me, telling me he was having trouble with one side of the barn, one of the rooms, I went out there to observe, more than anything else and as near as I could tell Mr. Lacks was out there and he had the book of instructions, the book to go by and he said he was following it. That's all I can say about that.

Q Did you talk to this young man about any loss of tobacco they had suffered?

A No.

Q Did you ever talk to him about throwing any of the tobacco away as a result of the failure of the barn?

A No, I have never said anything about--Mr. Lacks on one occasion when he was telling me about the loss he had had--he wanted to know, he said, "I guess you are covered by insurance", and I said, "That's not my department. I don't know", and I didn't know.

Q How many pounds of tobacco would this barn cure under normal operating conditions?

A I'd say around 1700 to 2,000 pounds. I'd say about 2,000 pounds would be a full load for it, it averages between 1700 and 2,000.

Q Aside from that first call you testified to

that you made to this service man, were you contacted about any other difficulty that Mr. Lacks experienced in the operation of the barn at later dates?

A Yes, sir. I don't recall whether they finished curing that barn or whether it was the next curing or not. He was having difficulty again. He came down there, he didn't have a telephone at that time. He knew where I lived, and he came to my house and said the other side, the other room was not curing properly.

Q Did you go out to see what was wrong?

A No, I had the service man go out.

Q Were you there on the Sunday that they lifted the barn up from the foundation to do some work under it?

A No, I wasn't there.

Q Now, when this barn was put on its foundation, right after it was delivered, was the direction and control of placing the barn on the foundation under the supervision of Bottled Gas Company?

A Yes, sir, I think so. That is where they give instructions how to operate it after it was placed.

Q Well, I was talking about placing it on the foundation, setting it up to get it ready to start operation.

A I would think our men did it in this instance.

MR. SLAYTON: I have no further questions.

CROSS-EXAMINATION

BY MR. MOON:

Q Mr. Gregory, you furnished Mr. Lacks or someone in your company furnished Mr. Lacks the instructions for preparing the foundation?

A Yes, sir.

Q Did your men have anything to do with the preparation of the foundation?

A None whatever.

Q You actually were the person that went to see Mr. Lacks when you heard he wanted the barn, is that correct?

A That's right.

MR. MOON: I offer it into evidence. I think it's admissible.

THE COURT: Accepted.

BY MR. MOON:

Q Mr. Gregory, you all worked on the barn. Did

1 you ever have a conversation with Mr. Lacks as to whether or
2 not the barn had cured any tobacco?
3 A One of our service men, I believe probably--
4 the last barn of tobacco--he was instructed by our manager to
5 check that barn everyday during that curing to see that the
6 instructions were properly carried out which he did. After
7 that date, Mr. Tudor and myself called on this Mr. Lacks at
8 Charlotte Court House where he worked, the place he worked,
9 and he told us that they had cured a first curing of tobacco,
10 that was the last one I think, and he thought that turned out
11 nicely.
12 Q Mr. Gregory, was anything found that was wrong
13 with the barn when it was checked out when the trouble devel-
14 oped?
15 MR. SLAYTON: Objection. Mr. Gregory previously
16 testified that he was not actually there when these repairs
17 were being made.
18 BY MR. MOON:
19 Q Did you ever go there when they were checking
20 on why it wasn't curing?
21 A No, I went by there two or three times while
22 it was in the process of curing but not at the time it was
23
24
25

giving trouble. The time it was giving trouble, Mr. Lacks got in touch with me, and I had the service man go out there. I didn't go out there at the time the trouble was taking place. I was there between times to see if things were going all right, just to inquire.

Q When the barn was delivered and the polyethylene was not with the barn, what did you do about the polyethylene?

A Well, they wanted to get the barn down that night. The driver brought it up there, and he had to leave and he didn't want to leave until the barn was placed. He went one way and Mr. Lacks, Jr., here, the other way. It was late and most places had closed. They were trying to find somewhere that they could buy some polyethylene. He was successful in finding somebody that would open up and let him have it.

Q Mr. Lacks bought the polyethylene?

A Yes, that is right.

* * *

EARL TUDOR

MR. SLAYTON: I would like to call Mr. Earl Tudor as an adverse witness.

The witness, EARL TUDOR, having first been duly sworn, on examination, testified as follows:

1 DIRECT EXAMINATION

2 BY MR. SLAYTON:

3 Q Would you tell the Court and members of the
4 jury your name, please.

5 A My name is Earl Tudor.

6 Q How old are you, sir?

7 A Thirty-nine.

8 Q By whom are you employed?

9 A Bottled Gas Corporation of Virginia.

10 Q How long have you worked for them?

11 A Nine years.

12 Q What is your job?

13 A Service man and tank truck driver.

14 Q What duties do you perform as a service man
15 and driver?

16 A I deliver gas on the bulk truck and service
17 work, installing these barns and anything that comes to hand.

18 Q Have you had any training that qualifies you
19 to do this service work?

20 A No, sir, nothing but what I learned through
21 the years. On the barn, I went to school for the Powell barns.

22 Q How long did you go to this school for Powell?

23

24

25

A Two days.

Q And what year was that?

A I went to school in 1970.

Q Who is Mr. Wright who is with your company?

A He is an employee with the company.

Q What is his job?

A He is a service man.

Q Who is your supervisor?

A Randolph Jones is our manager.

Q Is he here today?

A No, sir.

Q Were you present on the farm of Mr. Heno Lacks when the barn was delivered there in 1969?

A No, sir.

Q Did you ever go to that farm while this barn was there?

A Yes, sir.

Q When did you go there?

A You mean what date?

Q What was the occasion for your going there?

A They were having problems with the foundation.

Q Just tell us what you did when you went there.

A It was on a Sunday, my boss man told me he wanted me to get ready to go up there to see what the problem was. When we got up there, we had to jack it up and get to the foundation and the polyethylene and sand had to be redone. One side had blew up.

Q Who brought the polyethylene to do the job?

A I can't answer that.

Q Was it furnished by your company?

A I don't remember about the polyethylene.

Q How many people from your company were up there doing the work?

A I said it was five of us, maybe six.

Q Is that the day on which you jacked the barn up and moved it off the foundation?

A Yes, sir.

Q How many times did you go up there to do this work?

A Just that Sunday.

Q That's the only time you went?

A Not the only time I went, but to do that job to get the foundation right.

Q What other occasions did you go up there?

A Well, our manager sent me back each day for three or four days while the curing was going on to help Mr. Lacks to see if I could give him any points on it.

Q Which Mr. Lacks were you dealing with?

A His son here.

Q This man?

A Yes, sir.

Q Were you there when they had thrown some of the tobacco away?

A Yes, sir.

Q How many times did you see that they had thrown tobacco away because it had been ruined?

A Sunday, that was thrown away and a few racks under the shed there on another curing. That's all I seen.

Q When you got there to do the work on that Sunday, was the tobacco in the barn?

A Yes, sir.

Q Who took it out?

A Employees of Bottled Gas of Virginia took out some. They taken it out and laid it out in piles.

Q Who took it out exactly? I'm a little confused.

A Myself, for one.

Q And, who else?

A The other employees that were there.

Q Did you put it back?

A No, sir.

Q Why?

A I did what my boss told me to do.

Q That's what we're trying to have you tell the jury. You took it out and didn't put it back because your boss told you not to?

A He told us to take it out of the barn, and that's what we did and night had come on and that's where we left it.

Q Was it as much as a half a barn of tobacco?

A It was a barn of tobacco.

Q A full barn?

A Yes, sir.

Q Was your boss there, the man that told you to take it out?

A He was there at the time he told us.

Q Did he leave or do you remember?

A He was there part of the time. I don't know whether he stayed until we finished or not.

Q When he left, who was in charge?

A I don't know. He just told us what to do, the procedure, and we went along with it. Nobody was appointed in charge.

Q Do you know anything about curing tobacco and farming and that sort of thing?

A I have been on one all of my life. I know a little something.

Q Well, what I'm trying to find out is if your boss said anything about saving this barn of tobacco that he told you all to take out?

A He said they could rearrange it and put it in a conventional barn the next day, but I don't think they did.

Q He didn't tell you all to go back and do it?

A No, sir.

MR. SLAYTON: That's all.

CROSS-EXAMINATION

BY MR. MOON:

Q Was Mr. Lacks present when you were working on that barn?

A Mr. Lacks?

Q This one or the father?

A Yes, sir, Mr. Lacks was out there and Junior was there also.

Q They were there when the tobacco was taken out of the barn?

A Yes, sir. I don't know whether both were there, but one or the other was there.

Q Was it necessary to take the tobacco out of the barn to fix it? You had to jack it up?

A That's right.

Q You said someone said something about hanging it in another barn. Did Mr. Lacks know that?

A He was told that.

Q Mr. Lacks was told to hang it in another barn?

A Yes, he was told that.

Q After you put the barn back down on the foundation that time, did you have to come back and check on the barn again?

A After we put it on the foundation that Sunday?

Q Yes.

A I come back the next week when they had a curing in there.

Q How many days did you come?

1 A I'd say from three or four.

2 Q What did you observe about the curing of

3 tobacco in the barn at that time?

4 A It looked like a normal curing of tobacco.

5 Q Did you have any conversation with this Mr.

6 Lacks about how the barn cured after you fixed it?

7 A Yes, sir, up at the school bus shop, I asked

8 him--I asked how it turned out, and he told me it cured all

9 right.

10 Q Mr. Lacks has denied ever making any statement

11 to you such as that. Are you sure?

12 A Yes, sir, he told me standing in the school

13 bus shop.

14 Q Who was present when he told you?

15 A Mr. Gregory.

16 MR. MOON: That's all.

17 * * *

W. G. EDWARDS

The witness, W. G. EDWARDS, having first been duly sworn, on examination, testified as follows:

DIRECT EXAMINATION

BY MR. SLAYTON:

Q Would you tell the Court and the members of the jury your name, please.

A W. G. Edwards.

Q Where do you live, Mr. Edwards?

A Wilson, North Carolina.

Q What is your business or occupation?

A I am employed by Powell Manufacturing Company as a Territory Manager.

Q What do your duties consist of?

A Assisting in sales or representative of the company in every way.

Q How large a territory do you represent?

A In '69, all of Virginia and Northeastern North Carolina.

* * *

Q Whose duty and responsibility is it to see that the barn is set up on the site properly?

A The dealer's.

* * *

BY MR. SLAYTON:

Q Are you familiar with the transaction between Mr. Heno C. Lacks and the Bottled Gas Company?

A No, sir.

Q Did you see Mr. Lacks or his son at the demonstration that your company participated in in Chatham?

A Yes, sir.

Q Do you remember talking to them there?

A Yes, sir.

Q Did you represent to them there that the barn would cure tobacco in the customary manner and do it in a proper way?

A The barn will, yes, sir.

Q Will the barn do that if it's improperly placed on the site?

A There are specifications for it to be installed.

Q Who prepares the specifications for the installation of the barn?

A We prepare the specifications.

Q Does your company play any role in the actual

installation of the barn?

A No, sir, other than delivering it.

82.

Q At the point of delivery to the farm, does your company have any other role in this transaction at all?

A No, sir.

Q Did you ever visit the farm of Mr. Lacks after this barn was delivered?

A Yes, sir.

Q Was the barn in operation when you arrived there?

A No, sir.

Q Did anyone go with you to visit this particular barn?

A I was there on a Saturday, I believe it was, and there was someone from Bottled Gas there that met me there.

Q What was the purpose of your visit?

A They asked for help, that the barn was not properly curing.

Q Did you inspect the barn?

A Yes, sir.

Q Were you able to determine what was causing the barn to function improperly?

A What I thought it was, yes, sir.

Q How long have you been engaged in this business?

A Six years.

Q Did you inspect the barn?

A Yes, sir.

Q Had any work been done on it before you began your inspection?

A I couldn't answer that. I got there after the barn was installed, and I went there only on a call for assistance.

Q What did you determine to be the cause of the malfunction in this particular barn?

A In my opinion, the vapor barrier had created a problem of its own in there by reason of the foundation that was not properly fixed. To the naked eye, it may have looked all right at that time. I did find long jagged pieces of rock that are not supposed to have been in there that could easily have torn that.

Q Did you observe any of the tobacco that had been thrown out?

A I don't believe I did.

Q Were you there more than once?

A Yes, sir.

Q What was the occasion for your next visit?

A The first day I was just told what was wrong, and the second day I came back to help alleviate the problem. That was my second visit.

Q What did you do on your second visit?

A We jacked the barn up, and I got under it and cleared out everything under there. It was obvious that the vapor barrier had been punctured. With Mr. Lacks' permission, we jacked the barn up and cleaned out everything and redid it completely and getting all the old two-inch layer off, that's where I found the jagged rocks. To my knowledge, it was re-done and should have performed all right.

Q Who furnished the material to do this work on your second visit there?

A Bottled Gas. You mean the new vapor barriers?

Q Yes. When you company sells one of these barns, do they customarily have the vapor barriers in them?

A Yes, sir.

Q That's part of the package?

A Yes, sir.

Q Did you talk to Mr. Lacks about the losses suffered as a result of this?

A I don't recall talking to him about it. He did bring it up to me, but there was no way I could talk to him about any losses.

Q Were the other people there, who were doing the work to try to correct the difficulty that Mr. Lacks had been having with this barn, employees of Bottled Gas Company?

A Yes, sir.

Q I believe you said earlier that the dealer has the responsibility for properly placing the barn on the foundation when he delivers it to the farm and not your company?

A Yes, sir.

MR. SLAYTON: Thank you, Mr. Edwards.

CROSS-EXAMINATION

BY MR. MOON:

Q Who had the responsibility of preparing the foundation.

A That would be up to the dealer and the customer.

Q It is in testimony here that the customer prepared the foundation. Is that contrary to your usual experience?

A No, sir.

CROSS-EXAMINATION

BY MR. THOMPSON:

Q You sell the barn to the distributor and the distributor sells it to whoever he wants?

A We sell it to the dealer.

Q You don't have anything to do with what arrangements the dealer makes with the customers?

A No, sir.

Q There was nothing wrong with this barn, was there?

A No, sir.

* * *

MR. SLAYTON 93.

This barn will hold 2,000 pounds on each curing. There is no dispute that these people lost three curings, no dispute here, Your Honor, of the testimony of Bottled Gas employees who said he went down Sunday and, under the direction of his boss, he and the other members of the crew took the tobacco out of the barn and laid it on the ground. He said they took out a full barn. We have proven that the tobacco grown by this particular farmer in 1969 on that farm sold for seventy-cents a pound, and the old tobacco that he had grown the year before, that he had put in there to complete his allotment, sold for sixty-five cents. That

1 jury is not going to go out, if they give us an award and give
2 us exactly what we ask for and in matters of this kind, it's
3 up to them, if they find for Mr. Lacks, to fully and fairly
4 compensate him for what they think is reasonable under evi-
5 dence. It doesn't have to be proven to a mathematical cer-
6 tainty. There is an abundance of evidence to allow them to go
7 in the jury room properly instructed by the Court and make the
8 determination. They know how much tobacco he lost and know
9 what his tobacco sold for. We would hope the Court would
10 overrule the motion made by Mr. Moon and Mr. Thompson on
11 behalf of their clients.
12 THE COURT: First, I direct a verdict for the
13 amount of the bill claimed by Bottled Gas Company for the
14 amount owed by Mr. Lacks. Of course, as to the motion of Mr.
15 Thompson, that should be sustained. I am more concerned about
16 the other motion. I am disposed to let that go to the jury
17 and maybe they'll resolve it. I wrote you letters on three
18 Federal decisions, Fairfax against 151 Fed. 2nd. 939
19 of the Fourth Circuit Court of Appeals of Virginia. They
20 said there was a local monopoly; that he could only get it in
21 that area from one dealer and that was a monopoly. That was
22 151 Fed. 2nd. 939. The second case is Fralin v. American
23 Cyanide. That's 239 Fed. Supplement 178. They hold that
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where there is generally a quality of bargaining power between the parties, the agreement is valid. They recognize it as to be public utilities in public services. The other case is Motels, Incorporated v. Howard Johnson, 373 Fed. 2nd. 375. That's the Fourth Circuit Court of Appeals. They enforced it and refused to enforse the contract against liability. There is much more authority, Mickie's Juris Prudence 13, Page 127 of the 1970 supplements. There is nothing in the main volume. The parties in that limits his liability except as to common carrier, I will overrule the motions, and I'll take a new look at it if the jury sustains the motion.

MR. MOON: I except to the ruling of the Court.

MR. SLAYTON: I'm sure you will hear us again. In American Juris Prudence, Section B, this has been before a Virginia Court four times and only one passed on the old railroad case, 172 Virginia and it went around and 192 Virginia; the same points were raised in 196 and then in 209.

MR. MOON: We rest now, and I'll renew my motion without restating it.

THE COURT: I'll overrule the motion. We can now take up the instructions.

MR. MOON: Object and except.

(IN COURTROOM)

17 NOTE: At this point the Court reads the instructions
18 to the jury and this, including the arguments of counsel, is
19 hereby omitted.
20
21 THE COURT: You are now ready to retire to your
22 jury room to consider your verdict.
23 JUROR: I want to ask a question. I am confused
24 on the damages of the two curing. Did the barn do good after
25 it was fixed that second time? 97
1 THE COURT: I can't comment upon the evidence.
2 JUROR: I feel like we should know if the foundation
3 was damaged and if a good curing was put out of the barn. I
4 think we should know.
5 NOTE: At this point counsel approaches the bench
6 and a discussion takes place off the record.
7 THE COURT: I can see you are confused. You are
8 proper in asking the question. All I can say is that you have
9 to resolve the testimony as best you can as to what evidence
10 was introduced and come up with a verdict that you think is
11 proper based upon the evidence and instruction. Now, you
12 may retire to your room and take the instructions with you.
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15 NOTE: After the jury retired to consider their
16 verdict the following ensued:
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18 MR. MOON: What I would like to state for the
19 record--Your Honor said I could after the juror asked the
20 question--I moved the Court to instruct the jury that they
21 could only award damages to Mr. Lacks based on the loss that
22 actually was sustained in the curing of tobacco that spoiled
23 because of the negligence of Bottled Gas Company; that Lacks
24 could not be awarded any sum in this case for losses due to
25 failure to raise crops in future years, but that he can only
1 recover for such damages as he sustained through the failure 98
2 of this tobacco barn to cure his tobacco properly.
3 THE COURT: Didn't the instructions cover that?
4 MR. MOON: What I am saying is this: The jury was
5 confused. I believe there was improper argument that led the
6 jury to believe that Mr. Lacks could recover for things not
7 related to the actual losses at the barn.
8 THE COURT: I understood the question to be that
9 they they wanted to know if some of the repair work was
10 effective and if a successful curing was gotten from the barn.
11 I don't think he was confused as to the question you raised.
12 I didn't hear what Mr. Slayton said. Do you wish to reply
13 to that, Mr. Slayton?
14 MR. SLAYTON: My position on the statement made by
15 counsel for Bottled Gas Company is that my argument was based
16 on the testimony which was offered without objection when Mr.
17 Heno C. Lacks, Jr. testified concerning the production and
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20 crop allotment for his father's farm in 1968, 1969 and 1970,
21 and these figures were before the jury, as well as the averages
22 that the tobacco sold for in these respective years.
23 During the course of Mr. Lacks' testimony, some
24 controversy arose concerning whether or not these figures
25 were hearsay and the Court allowed us to proceed when we
1 represented to the Court that at the proper time we would 99
2 bring a representative from the A.S.C. office here to verify
3 the figures for the Court and jury. We again went through
4 the entire list that we had and had previously offered and
5 they were again accepted without objection, and we had this
6 proof prepared in a type written paper that we were using and
7 carefully presenting this to the jury in an orderly way.
8 There was no objection to it. I assumed, in argument, that I
9 could argue these losses as a part of the damages that Mr.
10 Lacks had sustained. All we said was that Mr. Lacks, in 1968
11 and 1969, had produced more tobacco than he was able to sell
12 under the law and as a consequence of that labor and effort
13 expended on his part, he had this tobacco stored on his farm--
14 sort of like money in the bank--and when he sustained the
15 loss occasioned by the negligence of Bottled Gas Company he
16 was able to sell up to the limit allowed by the law because
17 of his previous efforts. He was able to sell what he was
18 allowed to sell then. In the following year, 1970, he was
19 not able, through his efforts, to sell what he was allowed
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22 under the law to sell and since Bottled Gas had forced him to
23 use up the reserve that he had accumulated, he was to be
24 paid for that too because they couldn't come in and take the
25 benefit of the labor he had expended because he was foresighted
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1 enough by the fact that he over produced and saved it for this
2 eventuality and the objection being raised that we should be
3 limited to only what the barn destroyed.
4 The other side of that argument is that if the barn
5 had destroyed two and one-half curings and he had marketed
6 everything the law would allow him to sell and suffered no
7 loss, that is not fair either. I say again that I said
8 nothing to the jury that had not previously been presented
9 to the Court and jury.
10 MR. MOON: If your Honor please, first of all, my
11 point is still, do you, Mr. Slayton, feel that they can recover
12 for more tobacco poundage than was lost in the barn?
13 THE COURT: It is too late to correct it now.
14 MR. MOON: May I make my objections and exceptions
15 now?
16 THE COURT: Yes.
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* * *

1 MR. MOON: If your Honor please, Bottled Gas
2 Corporation, by counsel, moves the Court to set aside the
3 verdict of the jury in favor of Heno C. Lacks and enter up
4 final judgment for Bottled Gas Corporation upon the grounds
5 that the verdict is contrary to the law and evidence and for
6 the reason that the evidence failed, as a matter of law, to
7 disclose negligence on the part of Bottled Gas Corporation;
8 for the further reason that the contract of sale excluded
9 and negated any liability for negligence on the part of
10 Bottled Gas Corporation to Lacks. It specifically states that
11 they would not be responsible for damages such as loss of
12 profits, delays, expense, and made reference to products used
13 in the barn itself. The contract is very specific, and the
14 verdict cannot stand for that reason; and for the further
15 reason that they have failed to sufficiently prove damages
16 and failed to prove all elements necessary for the jury to
17 arrive at damages. Bottled Gas Corporation, by counsel,
18 moves the Court to set aside the verdict for the reasons
19 stated; the verdict is contrary to the law and evidence, and
20 give the plaintiff a new trial for the error of the Court in
21 refusing to grant the instructions offered by Bottled Gas
22 Corporation which counsel objected to at the time for the
23 omission of certain evidence offered; for the error of the
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1 Court in not instructing the jury that they could not award
2 damages that included damages for anything that was not
3 destroyed in the barn or in the curing of the tobacco in
4 question; and for the further reason that the verdict is
5 excessive. I might add that the most possible tobacco that
6 could have been lost is five thousand pounds and his own
7 testimony was that seventy cents was the highest they ever
8 sold a pound of tobacco for and it couldn't have been over
9 $3,500.00. I make that motion at this time and ask the
10 Court to consider it.
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12 THE COURT: I will take your motion under advisement
13 and wait until I hear from you gentlemen.
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