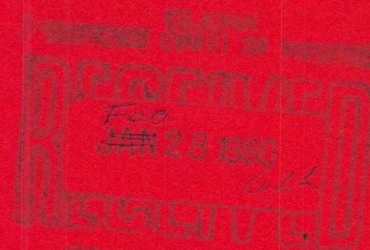


223 VA 14



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IN THE  
**Supreme Court of Virginia**

AT RICHMOND

RECORD NO. 791330

ROBERT M. KESLER,

*Appellant*

v.

EMLET FLEETWOOD FENTRESS,

*Appellee*

JOINT APPENDIX

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Norfolk, Virginia 23514

*Counsel for Appellant*

Russell R. Stallard  
219 Military Circle East Building  
Norfolk, Virginia 23502

*Counsel for Appellee*

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VIRGINIA: 1. THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS  
EMLET FLEETWOOD FENTRESS,

Plaintiffs

v.

ROBERT M. KESLER  
7606 Maury Arch  
Norfolk, Virginia,

Defendant

At Law  
No. 14664-M

MOTION FOR JUDGMENT

The plaintiffs, SHERMAN A. FENTRESS and EMLET FLEETWOOD FENTRESS, respectfully represent unto the Court the following:

1. That they are seised and possessed in fee simple of two certain tracts of land, situate in Pleasant Grove Borough of the City of Chesapeake, Virginia as shown on the plat entitled: Survey Of Sherman And Emlet F. Fentress, Pleasant Grove Borough, Chesapeake, Virginia, dated May 23, 1970 and made by Freeman and Johnson, Engineers and Surveyors. A true copy of said plat is herewith filed, marked Exhibit "A" and made part of this pleading; and
2. That it is the same property which was conveyed to the plaintiff<sup>s</sup> by Nellie G. Murphy et vir by deed bearing date on the 31st day of July, 1948 and duly recorded in the Clerk's Office of this Court in Deed Book 920, page 154; and

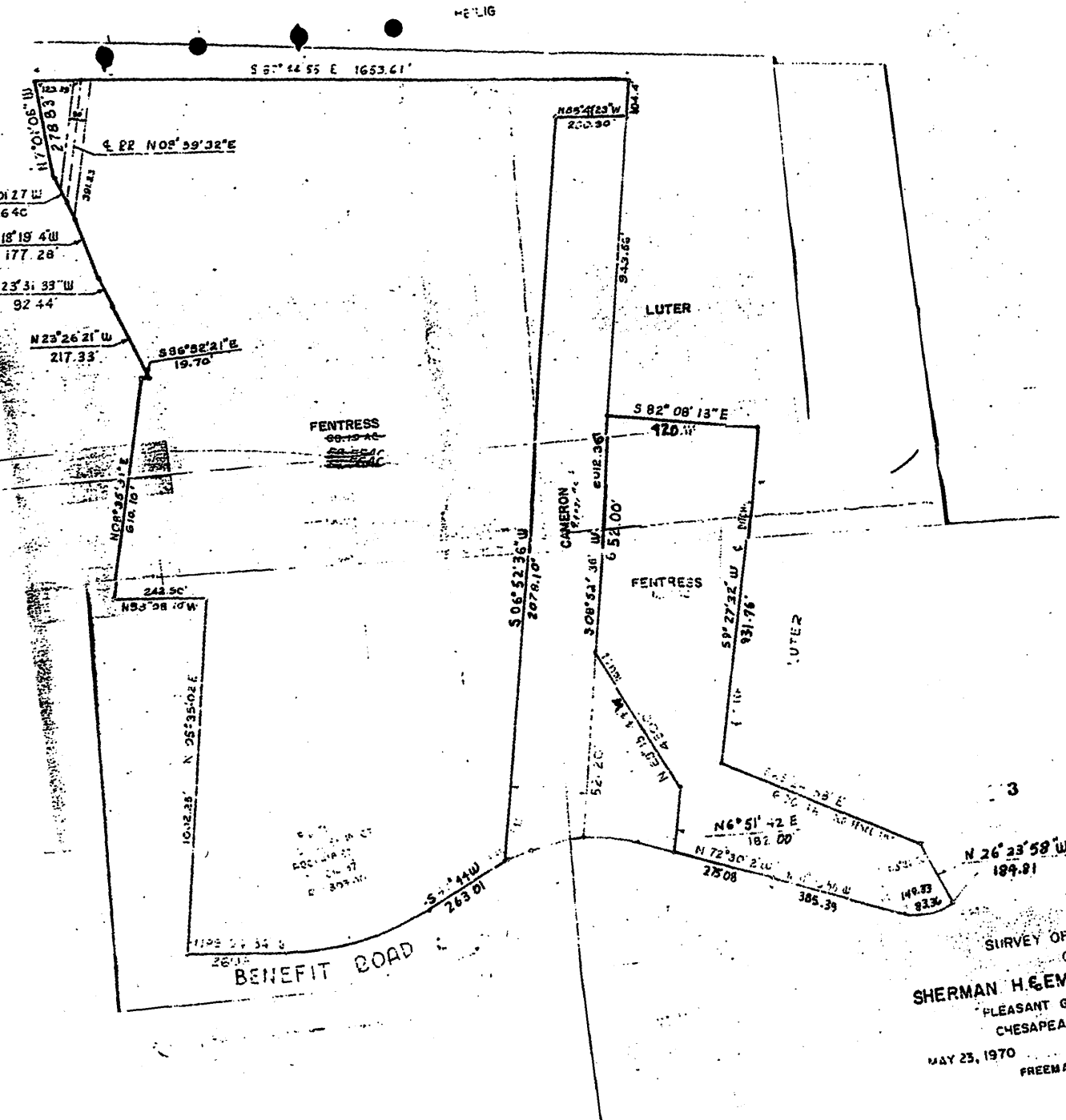
3. That the defendant is seised and possessed in fee simple of a certain tract of land adjoining that of the plaintiff's and is described with reference to the plat entitled: Physical Survey Of Property Belonging To E. Frank Luter & Loretta B. Luter, Chesapeake, Virginia, dated April 3, 1970 and made by Old Dominion Surveyors. A true copy of said plat is herewith filed, marked Exhibit "B" and made part of this pleading; and

4. That it is the same property which was conveyed to the defendant from E. Frank Luter et ux by deed bearing date on the 10th day of March, 1970 and duly recorded in the Clerk's Office of this Court in Deed Book 1565, page 571; and

5. That the boundaries between the plaintiff's property and the defendant's property have become confused and uncertain, through the lapse of time, carelessness of the occupants and the absence of natural monuments; and

6. That the parties are equally interested in having said boundaries determined.

WHEREFORE, the plaintiffs move the Court for ascertainment and designation of the true boundaries between the parties as provided by Section 8-836 of the Code of Virginia.



3

SURVEY OF PRO  
OF  
SHERMAN H. EMLET  
PLEASANT GROVE I  
CHESAPEAKE VI  
MAY 23, 1970  
FREEMAN B. COVA

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

On the 20th day of June, 1979

EMLET FLEETWOOD FENTRESS,

Plaintiff .

v. .

At Law

No. 14664-M

ROBERT M. KESLER,

Defendant .

JUDGMENT ORDER

This day came the parties, by counsel; and

It appearing to the Court that on the 8th day of May, 1979, the jury rendered a verdict, finding the plaintiff to be the owner of the boot-shaped parcel as shown upon the survey admitted as an exhibit herein and establishing the common boundary line between the parties with reference thereto; and

It further appearing that there is pending before the Court the defendant's motion to set aside the verdict of the jury as contrary to the law and the evidence of the case and enter judgment for the defendant.

Therefore, upon due consideration thereof, the Court is of the opinion that said motion should be and the same is hereby denied, and that judgment should be entered for the plaintiff on the verdict.

I ask for this:

Enter: 6/20/79



### ASSIGNMENTS OF ERROR

I. The trial court erred in overruling and disallowing Kesler's plea of res adjudicata, thus permitting the Fentresses again to litigate a determination of boundary lines which they could have litigated and failed to litigate in the prior action for determination of boundary lines.

II. The trial court erred in overruling and disallowing Kesler's plea of collateral estoppel, thus permitting the Fentresses again to litigate the issue of ownership of the same property which was the same issue presented to the jury and determined by its verdict and the court's judgment in the prior trespass action.

III. The trial court erred in overruling Kesler's Motion to strike Fentress' evidence at the end of Fentress' case in chief in the second trial.

IV. The trial court erred in overruling Kesler's motion to set aside the verdict and judgment in the second trial as contrary to law and the evidence and to enter judgment for Kesler.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

ROBERT M. KESLER,

Plaintiff

v.

SHERMAN A. FENTRESS  
1708 Benefit Road  
City of Chesapeake, Virginia,

Defendant

and

EMLET FLEETWOOD FENTRESS  
1708 Benefit Road  
City of Chesapeake, Virginia,

Defendant

AT LAW

NO. 13651-M

MOTION FOR JUDGMENT

To the Honorable Judges of said Court:

Plaintiff, Robert M. Kesler, moves said Court for judgment against Sherman A. Fentress and Emlet Fleetwood Fentress, defendants, in the sum of Five Thousand Dollars (\$5,000.00) and costs, for this, to-wit:

1. Plaintiff owns in fee simple absolute and is possessed of certain real property at or near the Northwest corner of the intersection of Benefit Road and Johnstown Road in the City of Chesapeake, Virginia, in all containing 105.56 acres, more or less, it being the land conveyed to Plaintiff by deed of E. Frank Luter and Lorelle B. Luter, husband and wife, dated March 10, 1970, and recorded by the Clerk of this Court in Deed Book 1565, at page 571.

2. Defendants are husband and wife who reside on property near to, but not immediately adjacent or contiguous to, or coterminous with, said land belonging to the Plaintiff.

3. On many occasions during the period of Plaintiff's ownership and possession of said land, Defendants, their agents, invitees and servants have trespassed willfully and wantonly upon Plaintiff's land, to-wit:

a. During the late Spring and early Summer of 1970, Defendants caused surveyors to trespass upon a portion of Plaintiff's said land comprising about 12 acres, more or less, near the Southwest corner thereof.

b. During the Spring of 1971, and during the Summer and Fall of 1972, and then again in the Winter of 1973, Defendants strung and installed a barbed wire fence on Plaintiff's land, setting off and enclosing about 12 acres, more or less, of the Southwest corner of Plaintiff's said land.

c. On or about the first week of November, 1973, Defendants and their servants or agents wrongfully hunted upon Plaintiff's land, destroying game and breaking trees and shrubbery.

d. From time to time during the years 1972 and 1973, Defendants have placed many signs on Plaintiff's land, clearly labeled "No Trespassing - Fentress".

4. Plaintiff and his agents have many times asked Defendants not to trespass further on Plaintiff's land, but Defendants continue, willfully and wrongfully, to enter

upon Plaintiff's said land without Plaintiff's authority,  
and contrary to law.

WHEREFORE, Plaintiff demands judgment against Defendants  
in the sum of \$5,000.00, including compensatory damages in the  
sum of \$1,000.00 and punitive damages in the sum of \$4,000.00,  
plus the costs of these proceedings.

ROBERT M. KESLER

By 

Of Counsel

HOFHEIMER, NUSBAUM & McPHAUL, P.C.  
1010 Plaza One  
Norfolk, Virginia 23510

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE**

**ROBERT M. KESLER,**

**Plaintiff,**

**v.**

**SHERMAN A. FENTRESS et al,**

**Defendants.**

**:**

**:**

**:**

**AT LAW**

**:**

**NO. 13651-M**

**:**

**DEMURRER**

**The Demurrer of SHERMAN A. FENTRESS and EMLT FLEETWOOD FENTRESS to the Motion for Judgment filed against them in this action at law by ROBERT M. KESLER.**

**These defendants say that the plaintiff's Motion for Judgment is not sufficient in law in that the plaintiff may not try title to real property by an action of Trespass as a substitute for an action of Ejectment.**

**SHERMAN A. FENTRESS**

**EMLT FLEETWOOD FENTRESS**



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE  
On the \_\_\_\_\_ day of \_\_\_\_\_, 1974

ROBERT M. KESLER,

Plaintiff

v.

SHERMAN A. FENTRESS, ET AL,

Defendants

AT LAW  
NO. 13651-M

ORDER

This matter came to be heard upon the Defendants  
Demurrer and the same was argued by counsel;

And it appearing that the Plaintiff's Motion For Judgment  
is sufficient in law, now therefore, it is

ORDERED and ADJUDGED that Defendants' Demurrer be, and  
it is hereby, overruled; and this case is continued for trial  
on its merits.

*Enter: 10-28-74*  
*131 W. J. J.*

We ask for this:

HOFHEIMER, NUSBAUM & McPAUL, p.q.

By

*Robert S. Dorsey*  
Robert S. Dorsey

Seen:

*Russell R. Stallard*  
Russell R. Stallard, p.d.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

ROBERT M. KESLER,

Plaintiff,

v.

SHERMAN A. FENTRESS et al,

Defendants.

IN LAW

NO. 13651-M

ANSWER AND GROUNDS OF DEFENSE

The defendant, SHERMAN A. FENTRESS, as and for his  
Answer and Grounds of Defense, says:

1. That he denies the allegations contained in paragraphs  
~~one, two, three and four~~ of the plaintiff's Motion for Judgment  
and calls for strict proof thereof.

2. That he denies that the plaintiff is entitled to re-  
cover the sum of Five Thousand Dollars (\$5,000.00) or any other  
sum from this defendant.

SHERMAN A. FENTRESS

By

Russell R. Stallard  
Of Counsel

Russell R. Stallard, p.d.  
219 Circle East Building  
Military Circle  
Norfolk, Virginia 23502

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

ROBERT M. KESLER,

Plaintiff,

v.

SHERMAN A. FENTRESS et al,

Defendants.

:

:

:

:

:

IN LAW

NO. 13651-M

ANSWER AND GROUNDS OF DEFENSE

The defendant, EMLY FLEETWOOD FENTRESS, for her Answer and Grounds of Defense, says:

1. That she denies the allegations contained in paragraphs one, two, three and four of the plaintiff's Motion for Judgment and calls for strict proof thereof.
2. That she denies that the plaintiff is entitled to recover the sum of Five Thousand Dollars (\$5,000.00) or any other sum from this defendant.

EMILY FLEETWOOD FENTRESS

By

Russell R. Stallard  
Of Counsel

Russell R. Stallard, p.d.  
219 Circle East Building  
Military Circle  
Norfolk, Virginia 23502

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(Whereupon, the jury resumed the jury box; Jury admonished by the Court; a recess was taken for the luncheon hour, after which the Jury was instructed by the Court, at the close of which the following statement was made:)

1 THE COURT: I might say the Court failed to  
2 advise you, Ladies and Gentlemen, that this suit was  
3 brought against both Mr. and Mrs. Fentress. The Court  
4 having considered the evidence found no evidence which  
5 would show Mrs. Fentress would have trespassed on the  
6 land that is in question, so the Court has stricken the  
7 evidence as to her, and the matter goes to you between  
8 only the two parties, Dr. Kesler and Mr. Fentress.

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The Court instructs the jury that every unauthorized entry on land of another is a trespass from which it will be presumed that an injury resulted, even if it was no more than the trampling of the herbage, and if you believe from the evidence in this case that the defendant, Sherman A. Fentress, entered on land in the possession of the plaintiff without any authority and without title, you shall find for the plaintiff.

*Smith*  
*1-15-75*  
*WHS*

The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff, Robert M. Kesler, by reason of a deed recorded according to law, is the owner of the land in question, then he has the right to possession of that land; and if you further find that the defendant, Sherman A. Fentress, set foot upon the plaintiff's land without his permission, or let or caused anyone else to do so, then that defendant is guilty of trespass, unless he proves by a preponderance of the evidence that he was the owner.

HTI  
1-15-75  
WHT

The Court instructs the jury that the statement of quantity of land, or the estimated number of acres of land, is only one of several methods of describing land and must not be allowed to control other means of determining the boundaries fixed by the deed.

*Handwritten:*  
1-15-75  
W/HZ

The court instructs the jury that Robert M. Kessler can recover in this action only on the strength of his own title; that it does not matter whether the Fentress' title is defective or not; that the question is not whether the Fentresses have title to the land in controversy but whether Robert M. Kessler has title thereto; that the burden is upon Robert M. Kessler to show by a preponderance of the evidence that he has the legal title to the land in dispute; that Robert M. Kessler has the additional burden to identify and to locate the land which he claims and to show that it is embraced within the designated boundaries of his title papers.

And if the jury is uncertain as to whether Robert M. Kessler has legal title to the land in controversy or whether he can identify and locate the land which he claims, or, if the jury believes that it is just as probable that Robert M. Kessler does not have such legal title as that he does, then, you cannot find for Robert M. Kessler.

*Granted*  
*1-15-75*  
*WHT*

The Court instructs the jury that if you find from a preponderance of the evidence that the defendant, Sherman A. Fentress, trespassed on the plaintiff's land, then you shall award the plaintiff damages against the said defendant in a sum sufficient to compensate him for any damages he may have sustained, but in a sum not to exceed \$1,000.00; and if you find that he has sustained no damage, then you shall award him a nominal sum against the defendant.

*Griff*  
*1-15-75*  
*WHT*



The court instructs the jury that if you should find the defendant/ guilty of trespass and if you should further find that the defendant/ trespassed upon the land by mistake under a bona fide claim of title, then, you shall fix Robert M. Kessler's damages at such sum as will compensate him for only such loss, as he has shown by a preponderance of the evidence to have sustained by reason of the trespass.

*Granted*  
*1-15-75*  
*WHP*

VIRGINIA:

In the Circuit Court of the City of Chesapeake on the  
15th day of January, 1975.

Robert M. Kesler,

Plaintiff,

vs.

13651-M

Sherman A. Fentress and  
Emlet Fleetwood Fentress,

Defendants.

O R D E R

This day came again the above named parties, in person and by counsel, as well as the Jury heretofore selected, this case having been continued from the 14th day of January, 1975, and after having fully heard the evidence, the defendant Emlet Fleetwood Fentress /by counsel moved the Court to strike the evidence of the plaintiff as to her as being contrary to the law and the evidence, which motion the Court sustained, and after having heard the argument of counsel, the Jury retired to their room to consult of a verdict, and after sometime returned into Court having found the following verdict, and after sometime returned into court having found the following verdict: "We the Jury find for the plaintiff and fix damages at \$25.00, M. D. Hobbs, Foreman".

Thereupon the defendant, by counsel, moved the Court to set aside the verdict of the Jury aside as being contrary to the law and the evidence, which motion the Court doth take under advisement, and this case is continued generally.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE  
On the \_\_\_\_\_ day of \_\_\_\_\_, 1975

ROBERT M. KESLER,

:

Plaintiff

:

v.

:

AT LAW NO. 13651-M

SHERMAN A. FENTRESS and  
EMLET FLEETWOOD FENTRESS,

:

:

Defendants

:

JUDGMENT

THIS day came again the plaintiff and defendants, by counsel,  
upon the defendants' motion to set aside the verdict of the jury  
as being contrary to the law and the evidence;

And the Court, having maturely considered the motion and  
argument by counsel, is of the opinion that the motion should  
be overruled; now, therefore, it is

ADJUDGED, ORDERED and DECREED that the plaintiff, Robert M.  
Kesler, recover damages of the defendant, Sherman A. Fentress,  
in the sum of Twenty-Five Dollars (\$25.00), in accordance with  
the jury's verdict, and costs;

And the defendants' objection and exception to this action  
of the Court are noted;

And this judgment is entered this date, nunc pro tunc as  
of January 15, 1975, the date of the jury's verdict.

Enter: 7-24-75  
131 W. H. H 22

Exh. P-1

920/154

DB 920/154

THIS DEED, Made this the 31st day of July, 1948,  
between NELLIE G. MURPHY and FRANK G. MURPHY, sometimes  
known as F. G. Murphy, her husband, parties of the first  
part, and SHERMAN A. FENTRESS and EMLET FLEETWOOD FENTRESS,  
husband and wife, parties of the second part.

WITNESSETH, That for and in consideration of the sum  
of TEN (\$10.00) DOLLARS and other good and valuable con-  
sideration, the receipt of which is hereby acknowledged, the  
said parties of the first part do hereby grant and convey,  
with general warranty, unto the said Sherman A. Fentress  
and Emlet Fleetwood Fentress, husband and wife, for and  
during the term of their natural lives and at the death of  
either, then to the survivor, the following property, to-wit:

1. All that certain piece or parcel of land, with the  
buildings and improvements thereon, situate, lying and being  
in Pleasant Grove Magisterial District, County of Norfolk,  
and State of Virginia, bounded and described as follows:  
One certain lot of land containing ~~about nineteen (19)~~  
~~acres~~, with the improvements thereon, bounded on the North  
by the lands formerly owned by Thomas M. Hall, ~~South by the~~  
~~main road~~, ~~East by the land of D. O. Dozier~~, and West by  
the lands of Leban Hall. ~~Also~~ all that certain other lot  
of land situate in said Magisterial District, County and State  
of Virginia, ~~containing about forty acres~~, with the improve-  
ments thereon, and bounded and described as follows: On

~~the East by the land of L. G. Dozier~~, on the North by the land of John West, on the West by the land of J. C. Weston, and on the South by the lands formerly owned by Thomas M. Hall.

2. All that certain tract of land situate in Pleasant Grove Magisterial District of Norfolk County, Virginia, and bounded and described as follows: to-wit: On the North by the lands of John Miller, ~~East by the lands of L. G. Dozier~~, South by the lands of P. E. Nichols, and West by the lands of John F. McCoy, containing by ~~actual survey~~ twenty-eight (28) acres and three (3) rods, as shown by survey made by J. A. Grimes, October 2, 1886.

3. All that certain tract, piece or parcel of land situate, lying and being in Pleasant Grove Magisterial District of the County of Norfolk, State of Virginia, near Benefit, as shown on a certain plat made by G. I. Stephens, November 18, 1924, and duly of record, ~~containing 4.02 acres~~, being situated on the western side of the property conveyed to F. G. Murphy by E. A. Brickhouse by deed recorded in the Clerk's Office of the Circuit Court of Norfolk County, Virginia. Said lot or tract of land fronting 358 feet on the North; running thence southwardly 629 feet; thence in a northwestwardly direction 318.7 feet; and thence in the northerly direction 494.7 feet.

The said tracts of land above designated and described contain together 87 acres more or less and being part of the



same property which was conveyed to the said Nellie G. Murphy, party of the first part by deed of Frank G. Murphy, party of the first part, bearing date on the 14th day of September, 1932, and duly of record in the Clerk's Office of the County aforesaid in D. B. 608, page 178.

~~There is specifically excepted~~ from this conveyance and deed, a tract of land containing ~~10 acres more or less~~, with the buildings and improvements thereon, on the southeastern portion of said land hereby conveyed and is more particularly described as follows: Beginning at a point on the North side of the main road and the eastern boundary line of the property herein described; thence running northerly along the eastern line of said property, 2100 feet to a point; thence westerly and parallel with the County Road first mentioned, 210 feet; thence southerly and parallel with the eastern line of said property, 2100 feet, more or less, to the North side of said road; thence easterly along the northern side of said road, 210 feet to the point of beginning.

~~It is the intention of the parties of the first part to~~ convey ~~77 acres more or less~~ to the said parties of the second part. It is understood that the crops grown for 1948 on said property are hereby reserved and same are to be removed by the 1st of January, 1949.

The said parties of the first part covenant that they

have the right to convey the said lands to the grantees;  
that the grantees shall have quiet possession of the said  
land, free from all encumbrances; that they, the said parties  
of the first part, will execute such further assurances of  
the said land as may be requisite, and that they have done  
no act to encumber the said land.

WITNESS the following signatures and seals.

/s/ Nellie G. Murphy (SEAL)

/s/ Frank G. Murphy (SEAL)

STATE OF VIRGINIA,  
COUNTY OF NORFOLK, TO-WIT:

I, J. James Davis, a Notary Public of and for the  
County and State aforesaid, do hereby certify that Nellie  
G. Murphy and Frank G. Murphy, sometimes known as F. G.  
Murphy, her husband, whose names are signed to the writing  
above, bearing date on the 31st day of July, 1948, have  
acknowledged the same before me in my County aforesaid. My  
commission expires on the 6th day of March, 1951.

Given under my hand this 2nd day of August, 1948.

/s/ J. James Davis  
Notary Public

VIRGINIA: In the Clerk's Office of the Circuit Court of Norfolk County, August 9, 1948, at 11:14 A.M. This Deed was presented in Office with the certificate annexed and admitted to record.

TESTE: E. T. White, Clerk

By/s/ N. M. Sykes, Jr.

## EXHIBITS

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3	Photographs	24
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1	Map	15
2	Blown-up copy of parts of map	15
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4	Suit File	90
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6	Deed from West to Dozier	95
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BOOK 1565 PAGE 571

E. Frank Luter, et ux  
To B & S  
Robert M. Kesler

//1894

Tax \$64.05 L. Tax \$21.35

THIS DEED, Made this 10th day of March, 1970, by and between E. FRANK LUTER and LORELLE B. LUTER, husband and wife, parties of the first part; and ROBERT M. KESLER, party of the second part.

WITNESSETH: That for and in consideration of the sum of Ten Dollars (\$10.00) cash in hand paid, and other good and valuable considerations, the receipt of which is hereby acknowledged, the said parties of the first part do hereby grant and convey, with General Warranty, unto the said party of the second part, the following described property, to-wit:

PARCEL ONE: All that part of the certain farm or tract of land, of which Lemuel C. Dozier died seized and possessed, near Benefit in Pleasant Grove Borough in the City of Chesapeake, Virginia, containing 61.48 acres, more or less, by a survey made by J. R. Kirk, County Surveyor, filed in said suit and which was assigned to C. S. Dozier and other in a certain chancery suit recently pending in the Circuit Court of Norfolk County (now the City of Chesapeake), Virginia, in which W. H. Breeden was plaintiff and S. C. Dozier and other were defendants, bounded and described generally as follows: On the North by Roscoe Wilson and the land of W. H. Breeden; on the East by the land of W. C. Ansell; on the South by the land of S.J. Nichols; and on the West by the land of Henry Brickhouse. For a more particular description of said land see Chancery suit of W.H. Breeden vs. S. C. Dozier, et als, recently pending in the aforesaid Circuit Court of Chesapeake and the plat filed therewith.

**PARCEL TWO:** The tract which is known as the Home Tract, as shown on the said plat, and described as follows: All that certain piece or parcel of land, with the buildings and improvements thereon, situate in the City of Chesapeake, Virginia and on the Horn Quarter Road, and bounded and described as follows: On the North by Lemuel Dozier's land; on the East by the land of Columbus Ansell; on the South by the land of Samuel Nichols and Thomas N. Hall; on the West by the Mill Road; as described by the deed from Thomas N. Hall to Lemuel Dozier, recorded in Deed Book 105, page 423, in the aforesaid Clerk's Office of the Circuit Court of the City of Chesapeake, Virginia, containing 44.08 acres. There is excluded from the said area the cemetery and church yard lot; and also the school house consisting of about 3 acres, as shown on the said plat. And also save and except the following:

1. That property from Thomas E. Bell, et ux to Lee Wilson and Rudolph Nixon, by deed dated May 21, 1943 and recorded in the aforesaid Clerk's Office in Deed Book 738, page 491.
2. That property from T. E. Bell, et ux to C. G. McPherson, et als, Trustees of Good Hope Methodist Church, dated November 27, 1953 and recorded in said Clerk's Office in Deed Book 1139, at page 52.
3. That property from Clarise M. Nuckols, et vir to Jack F. Churn, et ux, dated February 2, 1965 and recorded in said Clerk's Office in Deed Book 1424, at page 204.
4. That property from Clarise M. Nuckols, et vir to Ernest C. Nuckols, et ux, dated February 1, 1965 and recorded in said Clerk's Office in Deed Book 1424, at page 208.

IT BEING the same property conveyed to the said parties of the first part by deed of Clarice M. Nuckols, et vir, dated March 25, 1968 and duly recorded in the aforesaid Clerk's Office in Deed Book 1509, at page 512.

BOOK 1505 PAGE 572

This conveyance is made expressly subject to conditions, easements, reservations and restriction of record; if any, affecting the aforesaid property and constituting constructive notice.

This conveyance is made expressly subject to the lien of a deed of trust from E. Frank Luter, et ux to James N. Garrett, Jr., Trustee, dated March 25, 1968 and recorded in the aforesaid Clerk's Office in Deed Book 1509, at page 515, securing the original principal sum of \$22,000.00, the unpaid balance of which the said party of the second part hereby assumes and agrees to pay.

This conveyance is also made expressly subject to the lien of a deed of trust from E. Frank Luter, et ux to Frederick H. Creekmore, Trustee, dated February 5, 1970 and recorded in the aforesaid Clerk's Office in Deed Book 1559 and at page 634, securing the original principal sum of \$11,088.00, the unpaid balance of which the said party of the second part hereby assumes and agrees to pay.

The parties of the first part covenant that they are seized in fee simple of said property, that they have the right to convey the said property to the grantee herein named; that the said grantee shall have quiet and peaceful possession of said property, free from all encumbrances; that the parties of the first part have done no act to encumber the said property; that they, the said parties of the first part will execute such further assurances of said property as may be requisite.

WITNESS the following signatures and seals:

E. Frank Luter (SEAL)  
E. Frank Luter

Lorelle B. Luter (SEAL)  
Lorelle B. Luter

STATE OF FLORIDA: AT LARGE

CITY/COUNTY OF Orange, to-wit:

I, May James Miller, a Notary Public in and for the City/County and State aforesaid, do hereby certify that E. Frank Luter and Lorelle B. Luter, husband and wife, whose names are signed to the foregoing

th day of March, 1970, have acknowledged the same  
ty and State.

12 day of March, 1970

May James Miller  
Notary Public

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE  
MY COMMISSION EXPIRES JAN. 17, 1972  
BONDED THROUGH FRED W. DIESTELHORST

By Mildred U. Lee D.C.

"

Tax Imposed by Sec. 58-54 (b),  
Code of Virginia

PAID

ES, CONSOLVO &  
PICKETT  
LITTLE CREEK RD.  
NORFOLK, VA.

INIA: In the Clerk's Office of Circuit Court of the City  
Desapeake May 12 1970 at 3:40 P.M.  
Deed was presented in Office with the certificate an-  
d admitted to record.  
Teste: Charles B. Cross, Jr., Clerk

4, 199

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS

and

EMLET FLEETWOOD FENTRESS,

Complainants, :

v. :

IN CHANCERY

ROBERT M. KESLER

7606 Maury Arch

Norfolk, Virginia,

Defendant. :

NO. 15385

### BILL OF COMPLAINT

The complainants, SHERMAN A. FENTRESS and EMLET FLEETWOOD FENTRESS, respectfully represent unto the Court the following:

1. That they are seised and possessed of a certain tract of real property situate in Pleasant Grove Borough of the City of Chesapeake, Virginia, and containing approximately seventy-seven (77) acres; and
2. That it is in all respects the same property which was conveyed to the complainants by Nellie G. Murphy et vir by deed bearing date on the 31st day of July, 1948, and duly recorded in the Clerk's Office of this Court in Deed Book 920, page 154; and



3. That the defendant did cause to be recorded in said Clerk's Office in Deed Book 1565, page 571, a certain instrument from E. Frank Luter et ux bearing date on the 10th day of March, 1970, and purporting to convey, subject to certain exceptions, a certain forty-four and eight hundredth (44.08) acre tract of real property adjoining complainants' property and described with reference to a certain survey entitled: PLAT OF LAND SURVEYED FOR HEIRS OF L. C. DOZIER, dated February, 1913, and made by J. R. Kirk, county surveyor, and filed in this Court in the chancery cause styled W. H. Breeden v. Samuel Dozier et al and having been assigned Ended Chancery File Number 3247; and

4. That said survey and defendant's said deed description purports to convey a portion of the complainants' said property; and

5. That the defendant now sets up and claims title to said portion of the complainants' property but refuses to commence an action at law against these complainants to try title to the said premises; and

6. That said instrument which the defendant has caused to be recorded in the Clerk's Office of this Court in Deed Book 1565 page 571, is a cloud upon the title of the complainants in said premises and tends to depreciate the value and sale thereof.

IN CONSIDERATION WHEREOF: and forasmuch as the complainants are remediless in the premises save in a court of equity where such matters are alone and properly cognizable, the complainants pray that so much of the defendant's deed from E. Frank Luter et ux bearing date on the 10th day of March, 1970, and caused to be recorded in the Clerk's Office of this Court in Deed Book 1565, page 571, and conveying the complainants' property as aforementioned, be set aside and declared void as against these complainants, as a cloud upon their title , and to that extent, said deed be cancelled and the complainants' title to said property be quieted; and that the complainants may have such other, further and general relief in the premises as equity may require and as to the Court may seem meet.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS, ET AL.,	:	
	:	
Complainants	:	
v.	:	IN CHANCERY
	:	NO. 15385
ROBERT M. KESLER,	:	
	:	
Defendant	:	

REQUEST FOR ADMISSIONS

Defendant, Robert M. Kesler, pursuant to Rule 4:11 of the Rules Of The Supreme Court Of Virginia, requests Complainants, Sherman A. Fentress and Emlet Fleetwood Fentress, to admit within 21 days hereof the truth of the following matters:

1. At the trial on January 14 and 15, 1975, of the action at law in said Court, numbered 13651-M, the parties therein were the same Robert M. Kesler, Plaintiff, who is Defendant herein, and the same Sherman A. Fentress and Emlet Fleetwood Fentress, Defendants, who are Complainants herein.

2. A certified copy of all the contents of the case file from the records of the Clerk of this Court that is attached to the Plea Of Collateral Estoppel heretofore filed in the instant Chancery cause, and each page thereof, are true and complete copies of and from said case file.

3. At the trial of the said action at law numbered 13651-M, proceedings were reported faithfully and accurately according to

law; and a transcript of the record of these proceedings will show the following to be true:

(a) The plaintiff therein claimed damages from the defendants therein for trespass upon a portion of his land; and the defendants therein defended upon their allegations that they, the defendants, owned the land upon which they were accused of trespassing.

(b) The land upon which the defendants therein were accused of trespassing was described as a "boot-shaped" portion of land containing 12.111 acres as shown on a survey dated April 3, 1970, entitled "Physical Survey of Property Belonging to E. Frank Luter and Loretta B. Luter," made by Old Dominion Surveyors, a copy of which survey was submitted in evidence at said trial.

(c) Said "boot shaped" portion of land was claimed by defendants to be owned by them pursuant to the deed of Nellie G. Murphy, et vir, dated July 31, 1948, and recorded in the records of the Clerk of this Court in Deed Book 920, at page 154.

4. The said "boot-shaped" portion of land discussed above, the ownership of which was at issue in said action at law numbered 13651-M, is included in and is a portion of the tract of land containing 44.08 acres described in the deed from E. Frank Luter, et ux, dated March 10, 1970, and recorded in Deed Book 1565, page 571, which deed and tract are referred to in paragraph 3 of the Bill of Complaint filed in this cause.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS et al, :  
Complainants, :  
v. : IN CHANCERY  
ROBERT M. KESLER, : NO. 15385  
Defendant. :

ANSWER TO REQUEST FOR ADMISSIONS

The complainants for answer to request for admissions filed in this cause, say:

1. That they admit the matter contained in paragraph one of the request; and
2. That they can neither admit nor deny the matter contained in paragraph two of the request as complainants nor their counsel received a certified copy of said records; and
3. That they admit the matter contained in paragraph three (a) to the extent that evidence of title was offered but that title was placed in issue by the defendants' pleadings; and
4. That they admit the matter contained in paragraph three (b); and
5. That they admit the matter contained in paragraph three (c); and
6. That they admit that the evidence placed ownership in issue but deny that ownership was placed in issue by the pleadings; that they admit the other matters contained in paragraph four.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS et al,

:

Complainant,

:

v.

:

IN CHANCERY

ROBERT M. KESLER,

:

NO. 15385

Defendant.

:

SUPPLEMENTAL ANSWER TO REQUEST FOR ADMISSIONS

The complainants for their supplemental answer to request for admissions filed in this cause, say:

1. That they have received a certified copy of the contents of the law action styled Robert M. Kesler v. Sherman A. Fentress et al and that said copy is a true and complete copy of said case file.

SHERMAN A. FENTRESS

EMLET FLEETWOOD FENTRESS

By



Of Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS, ET AL.,

Complainants

v.

ROBERT M. KESLER,

Defendant

IN CHANCERY  
NO. 15385

PLEA OF COLLATERAL ESTOPPEL

Now comes Defendant, Robert M. Kesler, by counsel, and respectfully states that Complainants may not maintain this cause and are precluded from asserting their title to, or ownership of, any part of the land conveyed to Defendant and described in the deed dated March 10, 1970, and recorded in the Office of the Clerk of this Court, in Deed Book 1565, page 571, for this, to-wit:

1. In an action at law in this Court, numbered 13651-M, Defendant, on July 11, 1974, filed his Motion For Judgment in trespass against the Complainants herein, alleging his ownership and possession of all the land conveyed to him by the deed aforesaid. A certified copy of the case file from the records of the Clerk of this Court is attached hereto as Exhibit "A", and each page thereof is numbered consecutively in pencil in the lower right corner. References herein are to pages so numbered, e.g., "Case File, page 1."

2. In his said action at law, Defendant herein (who was then Plaintiff) alleged acts of trespass upon his land by the

Complainants (who were then Defendants) specifically upon that portion of his said land comprising the 44.08 acre tract which Complainants have alleged in their Bill of Complaint herein to be owned in part by them. (Bill of Complaint, paragraph 4; Case File, page 2.)

3. Complainants, as Defendants in said action of trespass, defended by claiming that approximately 12 acres of said 44.08 acre tract belonged to them and that therefore they could not be guilty of trespassing upon their own land.

4. This issue of ownership of the land, which was raised as a defense to the alleged trespass, by the same Defendants who are herein Complainants, was tried in this Court before a jury on January 14 and 15, 1975. Before the Court submitted the case to the jury, the Court struck the evidence as to the Defendant Emlet Fleetwood Fentress (one of the Complainants herein), there being no evidence that she actually trespassed on the land in question. In submitting the case to the jury as to the other Defendant, Sherman A. Fentress (a Complainant herein), the Court instructed the jury as follows:

"The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff, Robert M. Kesler, by reason of a deed recorded according to law, is the owner of the land in question, then he has the right to possession of that land; and if you further find that the defendant, Sherman A. Fentress, set foot upon the plaintiff's land without his permission, or let or caused anyone else to do so, then that defendant is guilty of trespass, unless he proves by a preponderance of the evidence that he was the owner."  
Case File, page 38.

and the Court further instructed the jury as follows:



"This Court instructs the jury that Robert M. Kesler can recover in this action only on the strength of his own title; that it does not matter whether the Fentress' title is defective or not; that the question is not whether the Fentresses have title to the land in controversy, but whether Robert M. Kesler has title thereto; that the burden is upon Robert M. Kesler to show by a preponderance of the evidence that he has the legal title to the land in dispute; that Robert M. Kesler has the additional burden to identify and to locate the land which he claims and to show that it is embraced within the designated boundaries of his title papers.

And if the jury is uncertain as to whether Robert M. Kesler has legal title to the land in controversy or whether he can identify and locate the land which he claims, or, if the jury believes that it is just as probable that Robert M. Kesler does not have such legal title as that he does, then, you cannot find for Robert M. Kesler." Case File, page 41.

5. On January 15, 1975, pursuant to the instructions set forth above, inter alia, the jury returned the verdict, "We the jury find for the plaintiff and fix damages at \$25.00 (signed) W. D. Hobbs, Jury Foreman." Case File, page 43.

Judgment was entered by the Court nunc pro tunc, as of January 15, 1975, in accordance with the jury's verdict in favor of Robert M. Kesler, the Plaintiff therein, who is in this cause the Defendant.

WHEREFORE, the Defendant says that the sole matter in issue in this suit, to-wit, the ownership of his land as described in the Bill of Complaint, has already been adjudicated and that the Complainants are precluded and estopped to cause the matter again to be litigated; and Defendant prays the Court to dismiss this cause with prejudice to Complainants and award Defendant his costs, a reasonable fee for his attorney, and such other and general relief as in equity may seem meet.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS, ET AL.,

Complainants

v.

ROBERT M. KESLER,

Defendant

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IN CHANCERY  
NO. 15385

DE M U R R E R

Now Comes Defendant, Robert M. Kesler, by counsel, and respectfully states that the Bill of Complaint herein filed against him is insufficient in law.

ROBERT M. KESLER

By

  
Of Counsel

HOFHEIMER, NUSBAUM & McPHAUL, p.d.  
1010 Plaza One  
Norfolk, Virginia 23510

I certify that on the 5th day of August, 1975, I mailed a true copy of the foregoing to Russell R. Stallard, Esquire, 219 Circle East Building, Military Circle, Norfolk, Virginia 23502, counsel for the Complainants.

  
Counsel

FIRST JUDICIAL CIRCUIT  
OF VIRGINIA

WILLIAM H. HODGES, JUDGE  
CHESAPEAKE, VIRGINIA 23320



CIRCUIT COURT OF THE  
CITY OF CHESAPEAKE

April 2, 1976

Robert S. Dorsey, Esquire  
1010 Plaza One  
Norfolk, Virginia, 23510

Russell R. Stallard, Esquire  
219 Circle East Building  
Military Circle  
Norfolk, Virginia, 23502

Re: Fentress v. Kesler  
Chancery No. 15385

Gentlemen:

The Court has reviewed the memoranda submitted by you in the above matter plus other authorities and is of the opinion that defendant's motion of collateral estoppel should be denied. Among the considerations of the Court is the fact that the parties involved in final judgment of the trespass case are not the same as in this instance. As you will recall in the latter case, the evidence was struck as to Emlet Fleetwood Fentress. Inasmuch as Mr. Stallard has prevailed, I will request that he draft appropriate decree in accordance herewith noting defendant's exceptions.

Unless there are other motions, this matter should now be referred to a Commissioner in Chancery.

With kindest regards, I am

Very truly yours,

William H. Hodges  
Judge

WHH/mlc

FIRST JUDICIAL CIRCUIT  
OF VIRGINIA

WILLIAM H. HODGES, JUDGE  
CHESAPEAKE, VIRGINIA 23320



CIRCUIT COURT OF THE  
CITY OF CHESAPEAKE

June 1, 1976

*Reed  
June 8, 1976  
[Signature]*

Russell R. Stallard, Esquire  
219 Circle East Building, Military Circle  
Norfolk, Virginia, 23502

Robert S. Dorsey, Esquire  
1010 Plaza One Building  
Norfolk, Virginia, 23510

Re: Fentress, et al v. Kesler  
Chancery No. 15385

Gentlemen:

In the above matter, you will recall that on April 2, 1976, I wrote you rejecting the defendant's plea of collateral estoppel. I failed at that time to rule on the defendant's demurrer. Since then, this has been called to my attention and after researching the issues, the Court is of the opinion that the demurrer should be sustained. It would appear that Article 3, Chapter 35, Title 8, Code of Virginia, 1950, as amended, makes provision for the establishment of boundary lines which is the subject matter of this Chancery cause. Inasmuch as a remedy in law is available, the Court is of the opinion that the proper procedure for the complainants in this cause is by motion for judgment. Therefore, as indicated, I will request that counsel for the defendant draft an appropriate decree sustaining the defendant's demurrer and granting complainants leave to transfer this cause to the law side of the docket and file their motion for judgment. I will request that the complainants' exceptions be embodied in such a decree.

Very truly yours,

*William H. Hodges*  
William H. Hodges  
Judge

WHH/mlc

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

On the 24th day of June, 1976

SHERMAN A. FENTRESS, ET AL.,

Complainants

v.

ROBERT M. KESLER,

Defendant

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IN CHANCERY  
NO. 15385

D E C R E E

This cause came to be heard upon the Bill of Complaint, the Defendant's Plea of Collateral Estoppel, Defendant's Demurrer, Defendant's Plea of The Statute of Limitations, Defendant's Answer, and upon the memoranda of authority submitted by both parties on the Plea of Collateral Estoppel and on the Demurrer, and was argued by counsel; and

Upon mature consideration thereof, the Court is of the opinion that, since the identity of the parties subjected to final judgment in the prior trespass case is not the same as in this cause, Defendant's Plea of Collateral Estoppel should be disallowed; and the Court being of the opinion that Complainants have an adequate remedy at law by filing a Motion For Judgment for the establishment of boundary lines under the provisions of Article 3, Chapter 36, Title 8, Code of Virginia of 1950, as amended, now therefore, it is

DECREED that the Defendant's Plea of Collateral Estoppel be, and it is hereby, disallowed; and it is further DECREED that Defendant's Demurrer be, and it is hereby, sustained; and

this cause is directed to be, and the same hereby is, transferred to the Law side of this Court; and the Clerk is directed to transfer all the papers, pleadings, and exhibits thereof with the cause to the Law side of the Court; and upon their motion, Complainants are granted leave to file their Motion For Judgment as aforesaid within 21 days hereafter, and after the same is filed, Defendant shall have 21 days within which to file his responsive pleadings;

And to the ruling of the Court that the Plea of Collateral Estoppel be disallowed, Defendant has duly objected and excepted; and to the ruling of the Court sustaining said Demurrer, Complainants have duly objected and excepted.

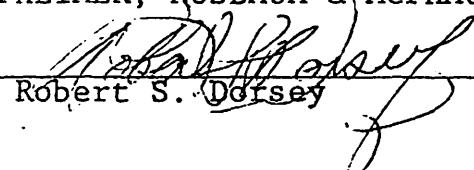
Enter: 6-24-76

s/ WHH

Seen:

  
Russell R. Stallard, p.q.

HOFHEIMER, NUSBAUM & McPHAUL, p.d.

By   
Robert S. Dorsey

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS,  
EMLET FLEETWOOD FENTRESS,

Plaintiffs

v.

ROBERT M. KESLER,

Defendant

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AT LAW  
NO. 14664-M

PLEA OF RES ADJUDICATA

To the Honorable Judges of said Court:

The Defendant, Robert M. Kesler, by counsel, hereby pleads res adjudicata and moves the Court to dismiss, with prejudice to the Plaintiffs, the Motion For Judgment heretofore served upon him on Wednesday, February 16, 1977, for this, to-wit:

1. In the Chancery cause, numbered 15385, in which the parties herein were the same, on June 24, 1976, this Court entered a Decree sustaining Defendant's demurrer, transferring said cause to the Law side of the Court, as Docket No. 14410-M; and upon the Plaintiffs' motion, this Court granted the Plaintiffs leave to file their Motion For Judgment for establishment of boundary lines within 21 days thereafter. An attested copy of said Decree is attached hereto and made a part hereof.

2. According to the terms of said Decree, Plaintiffs should have filed their Motion For Judgment on or before July 15, 1976. They did not do so, and neither did they move the Court for an extension of time within which to file. Said

Decree, therefore, became final on July 15, 1976, and the Court has no further power over it.

3. The final Decree in the prior proceeding is conclusive in this case, not only as to every matter which was decided in the prior cause, but as to every question which the parties might have litigated and had the Court decide, which included a determination of boundary lines under the provisions of Section 8-836, Code of Virginia.

WHEREFORE, Defendant moves the Court to dismiss Plaintiffs' said Motion For Judgment as a matter heretofore adjudicated, with prejudice to Plaintiffs.

ROBERT M. KESLER

By

  
Of Counsel

HOFHEIMER, NUSBAUM & McPHAUL, p.d.  
1010 Plaza One  
Norfolk, Virginia 23510



FIRST JUDICIAL CIRCUIT  
OF VIRGINIA

WILLIAM H. HODGES, JUDGE  
CHESAPEAKE, VIRGINIA 23320



CIRCUIT COURT OF THE  
CITY OF CHESAPEAKE

February 1, 1978

Russell R. Stallard, Esquire  
219 Military Circle East Building  
Norfolk, Virginia, 23502

Robert S. Dorsey, Esquire  
1010 Plaza One Building  
P. O. Box 3508  
Norfolk, Virginia, 23514

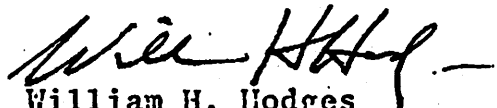
Re: Fentress, et ux v. Kesler  
14664-M

Gentlemen:

I have reviewed the memoranda and other authorities in the above matter and feel that the defendant's plea of res adjudicata should be overruled. While the authorities cited by the defendant are persuasive, the Court feels that the subject matter of this suit differs substantially from that of the cases cited and that public policy would encourage the determination of boundary lines to assure the alienation of real property. As defendant will recall, this Court encouraged the defendant, Kesler, to amend its suit for trespass so that the boundary could be determined once and for all. Inasmuch as Mr. Stallard has prevailed, I will request that he draft the appropriate order in accordance herewith noting the defendant's exception.

Thanking you, I am

Very truly yours,

  
William H. Hodges  
Judge

WHH/mlc

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE  
On the 6<sup>th</sup> day of March, 1978

SHERMAN A. FENTRESS  
and  
EMLET FLEETWOOD FENTRESS,

Plaintiffs

v.

ROBERT M. KESLER,

Defendant

AT LAW  
NO. 14664-M

O R D E R

On this day came the parties by counsel, to be heard upon the Defendant's Plea of Res Adjudicata and Defendant's Plea of Collateral Estoppel, and were argued by counsel; and

Having considered the Defendant's Plea of Res Adjudicata, in which the Defendant moves the Court to dismiss the Motion For Judgment herein because he says that this action is between the same parties and on the same cause of action which could have been litigated after Chancery cause Number 15385 was transferred to the Law side and became At Law Number 14410-M, the Court does hereby overrule and disallow said Plea of Res Adjudicata; and

Having considered once again Defendant's Plea of Collateral Estoppel, which Defendant has again filed in this action, having heretofore filed the same in said Chancery cause Number 15385 and the Court having heretofore on June 24, 1976, disallowed the same over Defendant's objections and exceptions, and in which plea Defendant states that Plaintiffs may not maintain this action because ownership of the land at issue was determined by verdict of a jury and judgment of this Court on January 15, 1975, in the action between the same parties which was designated At Law No. 13651-M, the Court does hereby overrule and disallow said Plea of Collateral Estoppel;

And to the said ruling of the Court that the Plea of Res Adjudicata be overruled and disallowed and to the said ruling of the Court that the Plea of Collateral Estoppel be overruled and disallowed, Defendant has duly objected and excepted to both rulings;

And upon the Defendant's Motion, the Court hereby takes judicial notice of those three case files and of the records therein of the prior related litigation in this Court between the same parties to this action: namely, At Law Number 13651-M, in Chancery Number 15385, and At Law Number 14410-M; and the Court ORDERS and directs that those three case files and all the record of each of them be, and they are hereby, made a part of and incorporated in, the record of this action at law;

And the Court hereby directs that the transcript of the trial of the case styled Kesler v. Fentress, et al., and numbered At Law No. 13651-M be, and it is hereby made a part of the said record in that action.

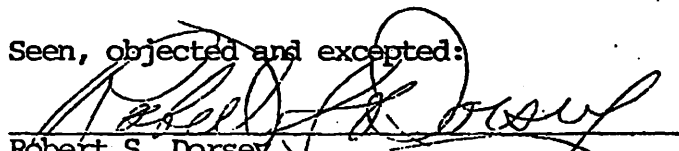
And the Defendant shall file his Grounds of Defense herein within twenty-one days after entry of this Order.

I ask for this:

  
Russell R. Stallard  
Counsel for Plaintiffs

Enter: 3-6-78  
151 W.H.H.

Seen, objected and excepted:

  
Robert S. Dorsey  
Counsel for Defendant

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

SHERMAN A. FENTRESS  
and  
EMLET FLEETWOOD FENTRESS,

Plaintiffs

v.

ROBERT M. KESLER,

Defendant

AT LAW  
NO. 14664-M

GROUND OF DEFENSE

To the Honorable Judges of said Court:

The Defendant, Robert M. Kesler, as and for his Grounds of Defense to the Motion For Judgment filed herein against him, states as follows:

1. As to the matters alleged in Paragraphs numbered 1 and 2 of said Motion For Judgment, Defendant has no independent knowledge thereof and calls for strict proof thereof; and insofar as any of those matters alleged shows or tends to show a claim by Plaintiffs to land to which he has title, Defendant denies the same.

2. As to the matters alleged in Paragraphs numbered 3 and 4 of said Motion For Judgment, Defendant agrees that he is seized and possessed in fee simple of all the land described in said deed dated March 10, 1970, recorded by the Clerk of this Court in Deed Book 1565, page 571, and further bounded and described in said plat dated April 3, 1970, made by Old Dominion Surveyors; and Defendant states that all the land bounded and described in said plat consisting of 93.434 acres, including that parcel of 12.111 acres shown as "Property Claimed By S. A. Fentress," belongs in fee simple to him, the Defendant, by reason of said deed dated March 10, 1970, recorded as above.

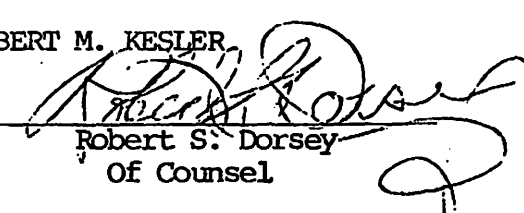
3. As to all the allegations in Paragraphs numbered 5 and 6 of said Motion For Judgment, Defendant denies the same.

4. Defendant states that in addition to his right and title in fee simple to the said land bounded and described in said deed dated March 10, 1970, and in said plat dated April 3, 1970, he is seized and possessed in fee simple of all said land consisting of 93.434 acres by reason that he and his predecessors in title, continuously for more than fifteen (15) years next preceeding the filing of Plaintiff's Motion For Judgment in this case, have had adverse possession of said described land consisting of 93.434 acres, and said adverse possession has been actual, exclusive, hostile, open and notorious under a bona fide claim of title against all other persons; and Plaintiffs' motion for ascertainment of boundary lines therefore is barred by the statute of limitations.

WHEREFORE, Defendant moves that the Motion For Judgment filed herein against him be dismissed with prejudice to said Plaintiffs.

ROBERT M. KESLER

By

  
Robert S. Dorsey  
Of Counsel

Robert S. Dorsey, p.d.  
Hofheimer, Nusbaum & McPhaul  
1010 Plaza One  
Norfolk, VA 23510

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MR. DORSEY: I call to the Court's attention 8.01-179 of the Code which gives a person the right to bring this suit if he has a subsisting interest in the real estate and a right to its possession.

Now, that prior adjudication by this Court, the judgment, in accord with the verdict of that jury in January of 1975 adjudicated that Sherman Fentress did not have a right to the possession of this same boot-shaped parcel of land now before the Court.

1 judgment as we saw from the testimony of Mrs. Moyer  
2 when she relayed that she had accompanied him on this  
3 disputed piece of real estate more than a year after  
4 that judgment was entered.

5 We claim that in the light of that judgment,  
6 that Mr. Fentress, and because she claims under the  
7 same deed with him, do not have a right to the possession  
8 of that real estate and we, therefore, ask that the  
9 evidence be stricken.

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE  
On the 8th day of May, 1979

SILVERMAN A. FENTRESS	)	
and	)	
LESLIE FLEETWOOD FENTRESS,	)	
Plaintiffs	)	
	)	
vs	)	AT LAW NO. 14664-M
	)	
ROBERT M. KESLER,	)	
Defendant	)	

O R D E R

This day came again the above named parties, and also the jury who were sworn to well and truly try the issue joined on May 7, 1979.

After having heard all the evidence and receiving the instructions from the court and hearing arguments of counsel, the jury retired to their room to consult of their verdict, and after some time returned into court with the following verdict: "We the jury find that the "Boot" shaped parcel of land shown on Exhibits P-11 and P-12 is the property of the plaintiff, Leslie Fleetwood Fentress, Elwood B. Gibson, Jr., Foreman."

Whereupon, defendant by counsel moved to set aside the verdict of the jury as being contrary to the law and the evidence and to grant the defendant a new trial, which motion the court took under advisement and the case is continued on the docket of this court.



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2 A There is no question in my mind that the Mill  
3 Road was very clearly located by the previous deed to Mr. Dozier.

4 Q You are saying when he looked at the sixty  
5 acres, the road was somewhere along this line here?

6 A I believe the fact that that deed stated that  
7 the beginning point for the back tract was eleven hundred  
8 seventy-six feet running due north from the Mill Road, from the  
9 Benefit Road in 1872 and the fact that eleven hundred  
10 seventy-six remained constant right on through the Kesler plat  
11 in 1970 clearly located it.

12 Q Well --

13 THE COURT: Let him finish.

14 THE WITNESS: Those factors clearly located the  
15 Mill Road for me as the title examiner.

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12 Q Now, as the result of your examination of both  
13 th Fentress and the Kesler properties, can you tell us whether  
14 you have run across in any deeds any of the lines, the course  
15 lines or the distances that outline that boot-shaped parcel?

16 A No, sir, I do not.

17 Q You were unable to find them?

18 A I find no boot-shaped parcel evidenced in the  
19 public records in any way, shape or form.

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9 Q Before you bought it, did you have a survey run  
10 on that land?

11 A No, sir.

12 Q As a matter of fact, this survey that you did  
13 order for the land is dated 1970 or some twenty-two years after  
14 your purchase of the property?

15 A That's right.  
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14           A           In examining the deed which is now in question,  
15 Deed Book 96, page 345 by which this acreage was conveyed or  
16 said to be conveyed, if this boundary line is correct, we have  
17 no way of knowing that the Mill Road would have to lie east,  
18 this way, from this ditch somewhere in this area here.

19           Q           Well, then, that would mean that this line up  
20 here in the northern part of the Dozier property, then, would have  
21 to lie to the east?

22           A           No, it does not because the deed says parallel  
23 with a road or lane.

24           Q           That runs from the said Main Road to and by  
25 Thomas Hall's mill?

1 A Which means that the road lies somewhere east  
2 of this line and runs parallel with this ditch.

3 Q But it's parallel, right, but it says running  
4 along side and parallel with the road or lane that runs from  
5 said Main Road to and by Thomas Hall's mill --

6 A Along side-- it would have to be east of this  
7 ditch.

8 Q You are putting it way over there. Why would  
9 it have to be there? What is your reasoning on that?

10 A Because when Thomas Hall conveyed this piece  
11 right here which is in question, he conveyed twenty acres.  
12 He did not mention this ditch as being the western boundary line  
13 of this property. He mentioned the Mill Road as being the  
14 boundary line of that property. A ditch is a much better  
15 monument than the road.

16 Q But he did say that this lane and ditch that  
17 run along side and parallel --

18 A It could run along side, but it would have to  
19 be east of that ditch.

20 Q Along side means close by?

21 A I have no way of knowing. It would mean to me  
22 somewhere east of the ditch there is a Mill Road. There was  
23 in 1872.

24 Q And which way does the Mill Road run?

25 A It would have to run north and south.

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Q Well, the surveyor had no problem apparently fixing the corner of the sixty-acre tract, he was tied into Benefit Road here so many yards and some how or another he got through the chopped trees at this point and tied it in. That's not in question, but when he was faced with the second instrument calling for twenty acres and it did not give courses and distances--

A I think he probably took advantage of the fact in preparing his survey to the front or home tract that the deed to the back tract located that southwesterly corner of the back tract as being due north along a ditch seven hundred and seventy-six feet from the Horn Quarter Road, so I think that, realistically speaking, the deed to the back tract locates the westerly boundary to the home tract, the front tract.

Q Lacking any courses and distances in that

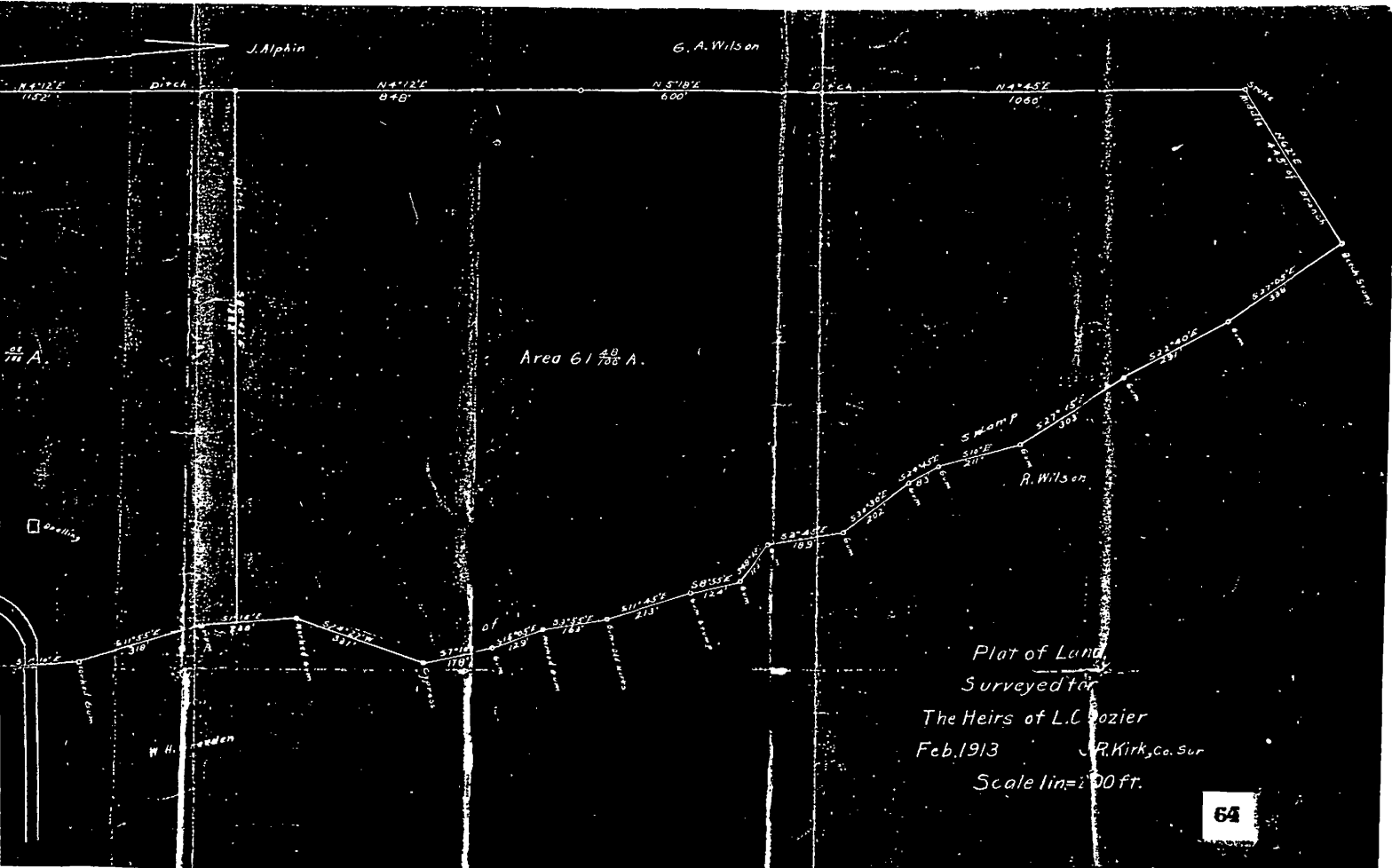
1 description in the twenty acres to Dozier, he would look for  
2 fixed monuments?

3 A I believe he found them.

4 Q And if he found the Mill Road, he would have  
5 indicated it on his survey that he filed in that suit?

6 A Well, we have this. We have a deed that located  
7 the Mill Road as running along and parallel to the three-foot  
8 ditch. He did find the ditch and the ditch shows on Mr. Kirk's  
9 plat and running from what is now Benefit Road north.

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Plaintiff's Exhibits

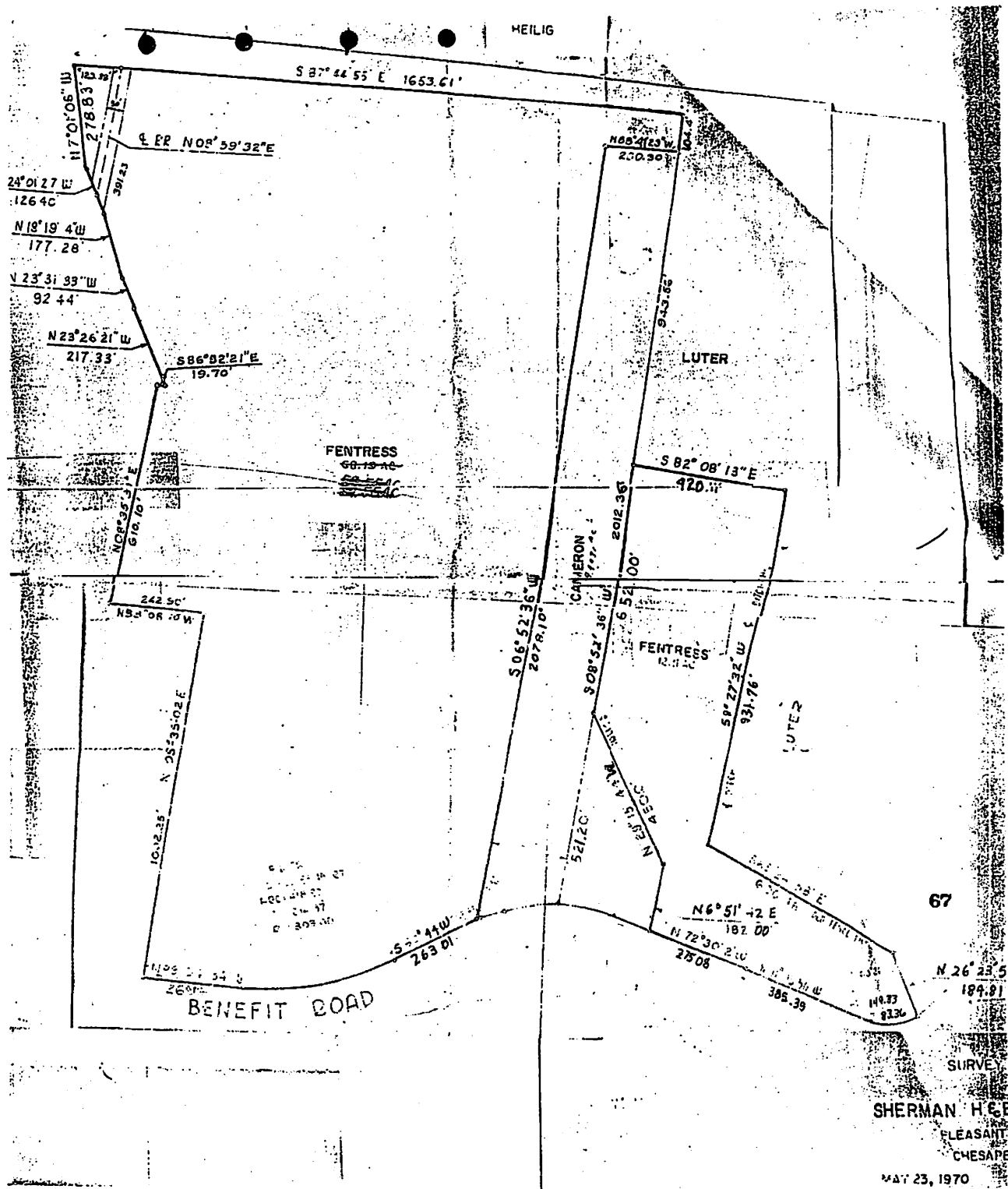
Description

Page

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1	<u>Plaintiff's Exhibits</u>	<u>Description</u>	<u>Page</u>
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7	<u>Defendant's Exhibits</u>	<u>Description</u>	<u>Page</u>
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THIS IS TO CERTIFY THAT ON APRIL 2, 1970, I SURVEYED THE PROPERTY SHOWN ON THIS PLAT AND THE TITLE LINES AND THE WALLS OF THE BUILDINGS ARE SHOWN ON THIS PLAT. THE BUILDINGS STAND STRICTLY WITHIN THE TITLE LINES AND THERE ARE NO ENCROACHMENTS OF OTHER BUILDINGS EXCEPT AS SHOWN.

*George F. Hoggard*  
 GEORGE F. HOGGARD C. L. S. NO. 798

NOW OR FORMERLY  
 J. D. HEILIG  
 DB. 808, P. 13

NOW OR FORMERLY  
 G. W. CAMERON  
 DB. 1526, P. 484

SURVEY BY OLD DOMINION SURVEYORS

TOTAL	93.434 AC.
CLAIMED BY S.A. FENTRESS	12.111 AC.
NET	81.323 AC.

NOW OR FORMERLY  
 M. WILSON  
 DB. 1468, P. 631

PHYSICAL SURVEY  
 OF  
 PROPERTY BELONGING TO

E. FRANK LUTER & LORETTE B. LUTER

DEEP CREEK BOROUGH  
 CHESAPEAKE, VIRGINIA

FOR  
 ROBERT M. KESLER

SCALE: 1" = 200' APRIL 3, 1970

OLD DOMINION SURVEYORS  
 VIRGINIA BEACH, VIRGINIA



SURVEY BY J. R. KIRK, CO. SURVEYOR

TOTAL	105.56 AC.
SOLD	12.126 AC.
NET	93.434 AC.

