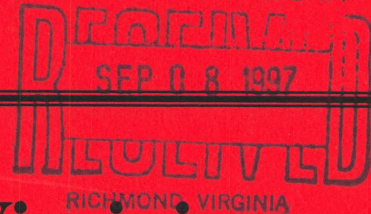


255 VA 440

CLERK  
SUPREME COURT OF VIRGINIA



---

IN THE

# Supreme Court of Virginia

RECORD NO. 970922

CAROLYN HOLLANDER,

*Appellant,*

v.

WORLD MISSION CHURCH OF  
WASHINGTON, D.C.,

*Appellee.*

JOINT APPENDIX

William M. Stanley, Esq.  
COHEN, GETTINGS,  
DUNHAM & DAVIS, P.C.  
2200 Wilson Boulevard, Suite 800  
Arlington, Virginia 22201  
(703) 525-2260

*Counsel for Appellant*

Ilryong Moon, Esq.  
Attorney at Law  
7617 Little River Turnpike  
Suite 930  
Annandale, Virginia 22003  
(703) 941-7395

*Counsel for Appellee*



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## **EXHIBITS**

### **Plaintiff's No.:**

1 - Deed .....	189
2 - Letter dated 9/19/95 .....	190
3 - Letter dated 10/16/95 .....	191
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2 - Deed dated 7/2/81 .....	194
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4 - Plat .....	198
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V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY,,

THE WORLD MISSION CHURCH  
OF WASHINGTON, D.C.,

Plaintiff

v.

CAROLYN HOLLANDER,  
8043 Idylwood Road  
Dunn Loring, Virginia 22027

Defendant

At Law No. 147562

MOTION FOR JUDGMENT

COMES NOW, the Plaintiff, The World Mission Church of Washington, D.C., by and through her counsels, Moon, Park & Associates, and moves for a judgment against the Defendant, Carolyn Hollander, and in support thereof, states as follows that:

1. Since on or about December 23, 1980, the Plaintiff has been possessed of an estate in fee simple absolute of a certain tract or parcel of land lying in Fairfax County, Virginia and containing 2 acres more or less, bounded and described in the attached "Exhibit A".

2. The Defendant, sometime after October 25, 1993, entered into a part of said tract and now unlawfully withholds from the Plaintiff the possession thereof. A letter from the counsel representing the Defendant is attached hereto as "Exhibit B".

3. Despite a letter from the Plaintiff's counsel (Exhibit C) demanding the Defendant to remove from said part of the tract any of her belongings, including fence or other enclosures, the

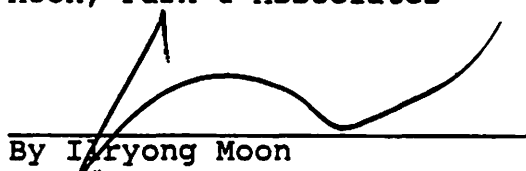


Defendant has refused to do so. A copy of the letter from the Defendant's counsel refusing such demand is attached hereto as "Exhibit D".

WHEREFORE, the Plaintiff hereby respectfully prays for this Court to enter a judgment that she recover rightful possession of said premises from the Defendant together and her costs in this behalf expended.

The World Mission Church  
of Washington, D.C.  
By Counsels

Moon, Park & Associates



By Iryong Moon  
VSB # : 24086  
7611 Little River Turnpike  
Suite 404  
Annandale, Virginia 22003  
(703)941-7395  
Counsels for Plaintiff

actions\missionc.mfj

EXHIBIT A

Beginning at a point in the easterly right-of-way line of Gallows Road (State Route 650), point of beginning being a point on former centerline of Beech Street (now vacated); thence departing the easterly right-of-way line of Gallows Road and running with the former centerline of Beech Street S. 71 degrees 19 minutes 00 second E. 334.25 feet to a point; thence departing the former centerline of Beech Street with a line common in part to the remaining portion of Beech Street and in part to the land of Frank R. Taylor et al. S. 18 degrees 41 minutes 00 seconds W. 350.00 feet to a point in the northerly right-of-way line of North Parkl Stree N. 71 degrees 19 minutes 00 seconds W. 175.49 feet to a point in the easterly right-of-way line of Gallows Road; thence with the easterly right-of-way line of Gallows Road N. 05 degrees 34 minutes 00 seconds W. 350.97 feet to a point N. 71 degrees 19 minutes 00 seconds W. 1.10 feet to a point and N. 05 degrees 34 minutes 00 seconds W. 32.90 feet to the point and place of beginning containing 89,046 square feet or 2.0442 acres of land.

BEING the same property as shown on the plat by Alexandria Surveys, Inc. dated December 11, 1980 attached to Deed recorded in Deed Book 5511 at page 1377.

LESS AND EXCEPT that portion of the above described parcel containing approximately 2,614 square feet conveyed to the Commonwealth of Virginia by Deed dated September 21, 1979 and recorded April 23, 1980 in Deed Book 5424 at page 1060, among the aforesaid land records.

EXHIBIT B

LAW OFFICES

**HERBERT AND METZ, PLC**

ERIC METZ  
SHANNA A. HERBERT

10521 JUDICIAL DRIVE  
SUITE 100  
FAIRFAX, VIRGINIA 22030  
(703) 691-0609  
FACSIMILE (703) 691-3203

ANNA K. M. MUELLER MARK  
of counsel  
ADMITTED IN MD & VA

September 19, 1995

**VIA CERTIFIED AND REGULAR MAIL**

Trustees of the Church World  
Mission of Washington, D.C.  
7628 Leesburg Pike  
Falls Church, Virginia 22043

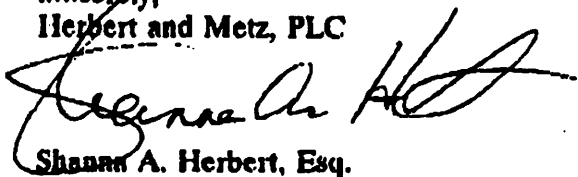
RE: 2401 Gallows Road, Dunn Loring

Dear Trustees:

I represent Carolyn Hollander, the owner of the lot located at 8043 Idylwood Road in Dunn Loring. This lot abuts the above-referenced property, for which you are identified as the record owner. This letter serves as notice to you that Carolyn Hollander is the owner of that area of the above-referenced property which is enclosed by her fence. She claims ownership of this area of the property by adverse possession, under a claim of right established by both Ms. Hollander and her predecessors in title. The occupation and possession of this area of the property for well over 30 years has been under claim of right sufficient to meet the requirements for adverse possession under Virginia law. Under Virginia law, Ms. Hollander is the owner of this property and as such is afforded all the benefits accruing to a property owner.

Attached is a survey which delineates the area owned by Ms. Hollander. Any attempt by you, or one claiming through you, to enter onto this property will be treated as a trespass. Please call should you have any further questions.

Sincerely,  
Herbert and Metz, PLC



Shanna A. Herbert, Esq.

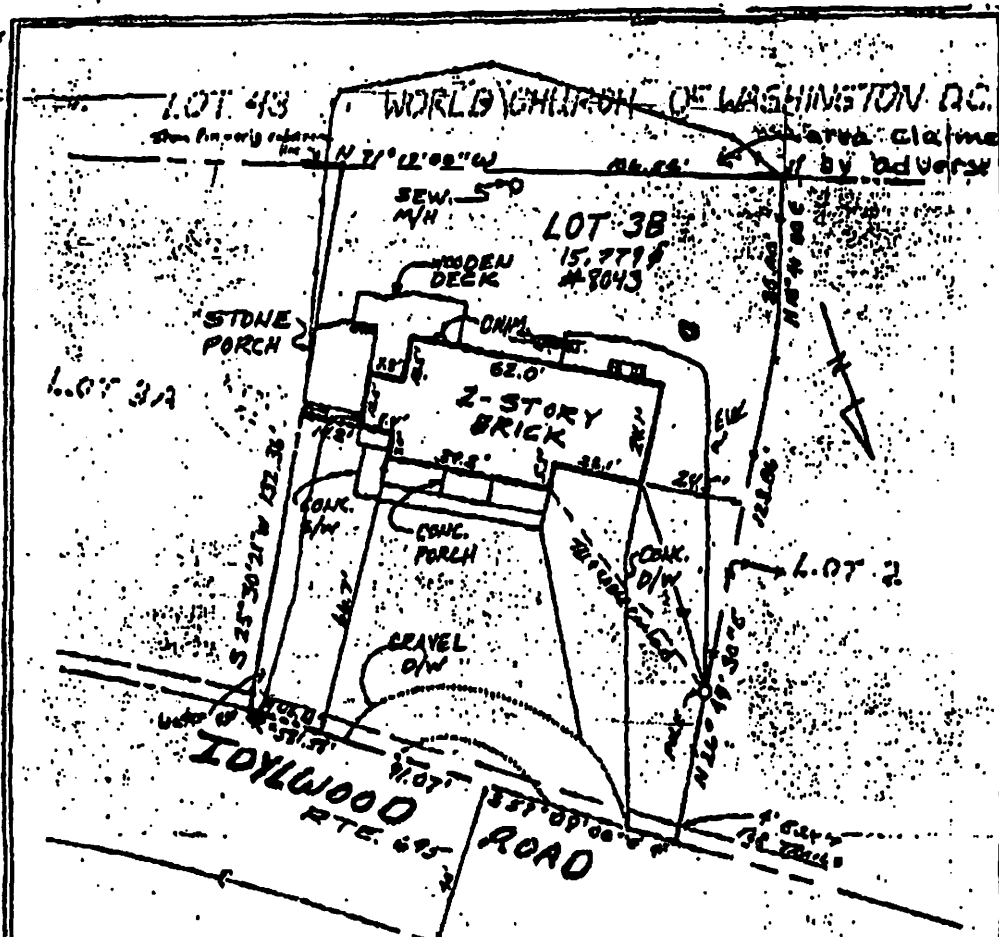
SH/em

Enclosure (1)

cc: Mr. Ben Pyon, ERA Premier Properties



# SITE PLAN



## NOTES:

1. THE PROPERTY DELINEATED HEREON IS LOCATED ON ASSESSMENT MAP SP-4(113) LOT 3B.
2. THE PROPERTY SHOWN HEREON DOES NOT LIE WITHIN A DESIGNATED M.O.D. SPECIAL FLOOD HAZARD AREA.
3. NO FIRE REPORT FURNISHED.

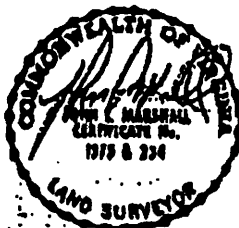
HOUSE LOCATION SURVEY  
LOT 3B

PAGE ACRES  
DB 5490 PG 438

8013 JOYWOOD ROAD  
PROVIDENCE DISTRICT  
FAIRFAX COUNTY, VIRGINIA

Scale: 1"=30' / Date: MAY 22, 1987

LAND DESIGN CONSULTANTS, INC.  
10700 N. Andrews Blvd. • Silver Spring, Virginia 22152 • (703) 744-1111 • 301-466-1111



BUYER: CARON

Outstanding Results™

EXHIBIT C  
**MOON, PARK & ASSOCIATES**  
ATTORNEYS AT LAW

ILRYONG MOON \*  
SANG KUEN PARK \*  
STEVE Y. YUN \*

7611 LITTLE RIVER TURNPIKE  
SUITE 404  
ANNANDALE, VIRGINIA 22003

TELEPHONE (703) 941-7396  
FACSIMILE (703) 941-6262

\* VA, DC & MD BARS  
\* VA & DC BARS

October 16, 1995

Shanna A. Herbert, Esquire  
HERBERT AND METZ, PLC  
19521 Judicial Drive  
Suite 100  
Fairfax, Virginia 22030

Re: 2401 Gallows Road  
Dunn Loring, Virginia

Dear Ms. Herbert:

Please note that this office represents The World Mission Church of Washington, D.C. (hereinafter the "Church"), the owner of the above-referenced property and this letter is in response to your letter of September 19, 1995.

A demand is hereby duly made for your client, Carolyn Hollander, to remove, within 10 days from the date of this letter, any and all of her properties or belongings, including any fence or other enclosures, located, placed, or encroaching upon the Church's above-referenced property. In the event that your client fails to so remove, the Church will seek a legal recourse against and hold your client responsible for all the damages suffered and expenses incurred.

Thank you for your close attention this regard. Please contact me immediately, if you have any questions.

Sincerely yours,



Ilryong Moon

IM: im

cc: The World Mission Church

EXHIBIT D

LAW OFFICES

**HERBERT AND METZ, PLC**

ERIC METZ  
SHANNA A. HERBERT

10521 JUDICIAL DRIVE  
SUITE 100  
FAIRFAX, VIRGINIA 22030  
(703) 691-0699  
FACSIMILE (703) 691-3203

ANNA K. M. MUELLER MARK  
*of counsel*  
\*ADMITTED IN MD & VA

November 2, 1995

Ilryong Moon, Esquire  
Moon, Park & Associates  
7611 Little River Turnpike  
Suite 404  
Annandale, Virginia 22003

**VIA FACSIMILE AND REGULAR MAIL**

RE: 2401 Gallows Road, Dunn Loring

Dear Mr. Moon:

This letter is to inform you that I have advised my client not to comply with the demand contained in your October 16, 1995 letter. As indicated in my September 19th letter to your client, the statutory period for adverse possession has long since passed and your client is without right to make any demands on my client concerning that portion of the above-referenced property which is enclosed by her fence. Your client has long been aware of my client's occupation of the property. When your client purchased the property in 1983 the current fence existed. This fence provided ample notice to your client that an investigation of ownership was warranted prior to purchasing the property. Any complaint he has should be directed towards his predecessor in title, not my client.

Accordingly, any attempt by your client to remove the fence will be considered a trespass. In response, any and all appropriate legal action will be taken and your client will be held responsible for any resultant damage. In addition, any legal action brought to recover possession of the relevant portion will be met with a memorandum of lis pendens and a plea that the statute of limitation bars such action.

I respect your vigorous representation of what you believe to be your client's interest in the property. However, I am sure if you investigate the facts of this matter you will become convinced that any attempt by your client to claim ownership of the parcel will be rendered moot by the provisions of §8.01-236 of the Code of Virginia, 1950, as amended, and other applicable Virginia law. Therefore I will be happy to assist you in your consideration of the relevant facts in an effort to minimize the cost and expense of civil litigation. If you should require evidence of the continuity of occupation, I will be happy

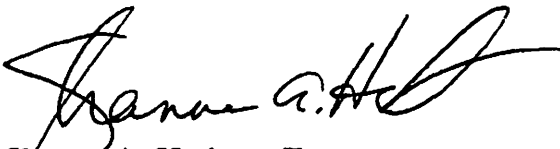


Page Two  
Letter to Moon  
November 2, 1995

to provide you with the names of my client's predecessors in title. I have investigated each of these occupations and with each the requisite elements of adverse possession were met.

Please contact me should you have any further questions.

Sincerely,  
Herbert and Metz, PLC



Shanna A. Herbert, Esq.

SH/em

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FAIRFAX, VA

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

**THE WORLD MISSION CHURCH OF )  
WASHINGTON, D.C., )**

**Plaintiff )**

**v. )**

**CAROLYN HOLLANDER, )**

**Defendant. )**

**At Law No.: 147562**

**ANSWER AND GROUNDS OF DEFENSE**

COMES NOW the Defendant, Carolyn Hollander, by counsel, and for her answer and grounds of defense to the Motion for Judgment filed herein states as follows:

1. Defendant denies that plaintiff is the owner of the land described in paragraph 1 of the Motion for Judgement to the extent of that area of the land which abuts the defendant's property and which is enclosed by a fence erected by the defendant's predecessor in title (the "Enclosed Area"). Defendant further denies that the plaintiff is entitled to possession thereof.
2. Defendant denies the allegations contained in paragraph 2 of the Motion for Judgement, except that the Defendant admits to that part of paragraph 2 which alleges that the defendant entered into the Enclosed Area of the land and withholds possession thereof from the plaintiff.
3. Defendant admits the allegations contained in paragraph 3 of the Motion for Judgement.

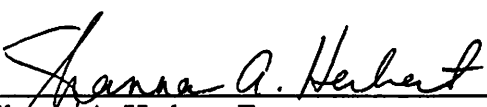
LAW OFFICES  
ROSENFELD AND SHEARER, P.C.  
10381 JUDICIAL DRIVE  
SUITE 100  
FAIRFAX, VIRGINIA 22030  
(703) 591-9225

4. Neither plaintiff nor any person under whom plaintiff claims was seized or possessed of the Enclosed Area within 15 years before commencement of this action.
5. Defendant, and those under whom she claims, entered into and have been in actual, continuous, open, notorious, hostile, exclusive, and adverse occupation and possession of the Enclosed Area adversely to the title claimed by the plaintiff for more than 15 years, under a claim of title in fee simple absolute.
6. That at all times for a period in excess of 15 years the Enclosed Area has been openly occupied and maintained by the defendant and those under whom she claims.
7. That no action was commenced by the plaintiff or anyone under whom he claims within 15 years from the time the right to commence such action accrued.

WHEREFORE your defendant asks this court to enter judgment in her favor together with all her costs expended in this action.

Respectfully submitted,

CAROLYN HOLLANDER  
By Counsel

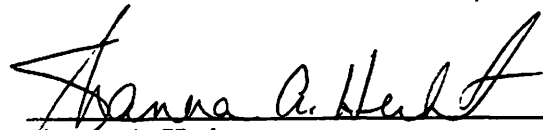
  
Shanna A. Herbert, Esq.  
Rosenfeld and Shearer, P.C.  
10521 Judicial Drive, Suite 100  
Fairfax, Virginia 22030  
(703) 591-2225  
VSB No.: 37233



**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Answer and Grounds of Defense was mailed first class mail, postage prepaid, to the following persons this 23rd day of December, 1995.

Ilryong Moon  
Counsel for Plaintiff  
Moon, Park & Associates  
7611 Little River Turnpike  
Suite 404  
Annandale, Virginia 22003

  
Shanna A. Herbert

970922

ORIGINAL

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CLERK OF CIRCUIT COURT  
FAIRFAX, VA

1

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - -X

WORLD MISSION CHURCH OF:

WASHINGTON, D.C., :

Plaintiff, :

-vs- : AT LAW NO. 147562

CAROLYN HOLLANDER, :

Defendant. :

- - - - -X

Monday, December 30, 1996

Circuit Courtroom No. 5A  
Fairfax County Courthouse  
Fairfax, Virginia

The above-entitled matter came on to  
be heard before THE HONORABLE LESLIE M. ALDEN,  
JUDGE, in and for the Circuit Court of Fairfax  
County, beginning at approximately 10:03  
o'clock, a.m.

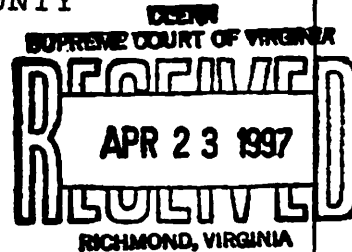
APPEARANCES:

On behalf of the Plaintiff:

ILRYONG MOON, ESQUIRE

On behalf of the Defendant:

SHANNON HERBERT-KELLER, ATTORNEY AT LAW



A.L. & F. Reporting Service, Inc.

8606 Ordinary Way  
Annandale, Virginia 22003  
(703) 978-2557  
FAX (703) 978-4723

11403 Farmland Drive  
Rockville, MD 20852  
(301) 231-8799

1700 K Street, N.W., #505  
Washington, D.C. 20006  
(202) 783-0116

C O N T E N T S

WITNESS                      DIRECT CROSS REDIRECT RECROSS

Hyosung Chae	5	10	--	--
William Stephens	16	26	37	--
Guy Caron	40	47	54	--
Carolyn Hollander	61	68	74	--
Marvin Hicks	77	--	--	--
Carolyn Hollander	91	--	--	--

E X H I B I T S

FOR ID    IN EVIDENCE

Plaintiff's Exhibit 1	4	4
Plaintiff's Exhibit 2	8	15
Plaintiff's Exhibit 3	9	15
Plaintiff's Exhibit 4-A	71	72
Plaintiff's Exhibit 4-B	71	72
Plaintiff's Exhibit 4-C	71	72
Plaintiff's Exhibit 4-D	71	72
Defendant's Exhibit 1	(Premarked)	--
Defendant's Exhibit 2	(Premarked)	18
Defendant's Exhibit 3	(Premarked)	9
Defendant's Exhibit 4	(Premarked)	60
Defendant's Exhibit 5	(Premarked)	42
Defendant's Exhibit 6	(Premarked)	63

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(202) 783-0116



P R O C E E D I N G S

(Whereupon, the Court Reporter was sworn by the Clerk of the Court.)

THE COURT: Good morning, ladies and gentlemen. This is the case of World Mission Church of Washington, D.C. against Carolyn Hollander, Law Number 147562. Are the parties ready this morning?

MS. HERBERT-KELLER: Yes, Your Honor.

MR. MOON: Yes, Your Honor.

THE COURT: All right. Are there any preliminary matters that we need to take up?

MR. MOON: I believe that the Defendant's counsel is willing to stipulate that the Plaintiff is the record owner --

THE COURT: All right.

MR. MOON: -- of the disputed property.

THE COURT: Is that correct?

MS. HERBERT-KELLER: Yes, Your Honor.

MR. MOON: This is a copy of the recorded deed.

THE COURT: All right. That will be received as Plaintiff's Exhibit 1. All right.

*A.L. & F. Reporting Service, Inc.*

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Washington, D.C. 20006  
(202) 783-0116

(The item referred to above was marked for identification as Plaintiff's Exhibit No. 1 and was received in evidence.)

MR. MOON: And, also, one more stipulation I believe Defendant's counsel will agree to is that, if you take a look at the deed, the name of the church is Full Gospel Washington Korean Church. However, that name was subsequently changed to the World Mission Church of Washington, D.C. in '82.

THE COURT: All right. So the stipulation is that the -- it's a proper party -

MS. HERBERT-KELLER: Yes, Your Honor.

THE COURT: -- and a successor in interest, essentially? All right. All right. I'll ask the Clerk to swear the witness.

MR. MOON: And we have an interpreter.

THE COURT: All right. And I'll ask the Clerk to swear the interpreter, as well.

(Whereupon, the interpreter was sworn by the Clerk of the Court.)

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1700 K Street, N.W., #505  
Washington, D.C. 20006  
(202) 783-0116

Whereupon,

SONI KIM

an Interpreter, was called by counsel on behalf of the Plaintiff to translate the testimony of the witness Hyosung Chae, and, after having been first duly sworn by the Clerk of the Court, translated the examination and testimony as follows:

(Whereupon, the witness was sworn by the Clerk of the Court.)

Whereupon,

HYOSUNG CHAE

a witness, was called for examination by counsel on behalf of the Plaintiff, and, after having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOON:

Q State your full name, please

A My name is Hyosung Chae, C H A E, Chae.

Q And could you spell your name?

A H Y O S U N G, last name C H A E.

Q Mr. Chae, what's your home address?

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1700 K Street, N.W., #505  
Washington, D.C. 20006  
(202) 783-0116

1           A     5518 Whitfield Court, W H I T F I E L D  
2     Court, Fairfax, Virginia, zip code 22032.

3           Q     Mr. Chae, are you a member of the World  
4     Mission Church of Washington, D.C.?

5           A     Yes.

6           Q     Do you hold any particular position in  
7     that church?

8           A     I'm an elder and also I'm a trustee of  
9     the financial committee.

10          Q     Mr. Chae, does the church own a  
11     property near Gallows Road, in the Dunn Loring  
12     area?

13          A     Yes, I own the land.

14          Q     Is it I or the church owns? Mr. Chae,  
15     did you say you owned the land or the church  
16     owns the land?

17          A     Church is.

18          Q     The church owns the land. What's the  
19     approximate size of the land the church owns?

20          A     Just a little over two acres.

21          Q     Is that the only land the church owns?

22          A     Yes, correct; do not have any other  
23     building or other --

*A.L. & F. Reporting Service, Inc.*

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Rockville, MD 20852  
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*1700 K Street, N.W., #505  
Washington, D.C. 20006  
(202) 783-0116*

1 Q Okay. My question was whether the  
2 church owns any other land other than the land  
3 at Gallows Road?

4 A No.

5 Q Could you describe to the Judge the  
6 condition of the church's land on Gallows Road?

7 A I believe that, with my knowledge, that  
8 land was purchased in December 1980. But there  
9 is nothing on other than the just the land  
10 itself. What I mean is that there is no  
11 building built on other than just the natures of  
12 the trees and grass. And that's all that's on  
13 it. Not only that, we didn't even put any  
14 fences or anything like that. Just the way we  
15 purchased it is just as it is.

16 Q Has the church ever developed that  
17 piece of land?

18 A No, nothing.

19 Q Mr. Chae, do you know the Defendant in  
20 this case, Ms. Carolyn Hollander?

21 A Well, I saw her this morning. I  
22 haven't seen her before.

23 Q But you know that Ms. Hollander is a

*A.L. & F. Reporting Service, Inc.*

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Rockville, MD 20852  
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8606 Ordinary Way  
Annandale, Virginia 22003  
(703) 978-2557  
FAX (703) 978-4723

1700 K Street, N.W., #505  
Washington, D.C. 20006  
(202) 783-0116



1 Defendant in this case?

2 -- A Yes, through the letters; yes.

3 Q Okay. Let me show you a letter dated  
4 September 19, 1995; do you recognize that  
5 letter, Mr. Chae?

6 A Yes, I remember receiving a letter.

7 Q And did you understand what the  
8 contents was?

9 A Well, I did not understand fully, so I  
10 brought it to you, the attorney Moon.

11 Q Okay. Was that the first time you ever  
12 received any letter from either Ms. Hollander or  
13 her lawyer?

14 A Yes.

15 MR. MOON: Thank you. Could I have  
16 that marked as Plaintiff's Exhibit 2?

17 (The item referred to above was  
18 marked for identification as  
19 Plaintiff's Exhibit No. 2.)

20 BY MR. MOON:

21 Q Let me show you another letter dated  
22 October 16, 1995.

23 A Yes.

*A.L. & F. Reporting Service, Inc.*

*11403 Farmland Drive  
Rockville, MD 20852  
(301) 231-8799*

*8606 Ordinary Way  
Annandale, Virginia 22003  
(703) 978-2557  
FAX (703) 978-4723*

*1700 K Street, N.W., #505  
Washington, D.C. 20006  
(202) 783-0116*

1 Q Okay. Do you recognize that letter,  
2 sir?

3 A Yes.

4 Q What's that letter?

5 A Since I did consult with you about the  
6 contents of the letter, all the other things  
7 under the land that has to be -- We requested  
8 all the buildings demolished from the land.

9 MR. MOON: Could I have this marked as  
10 Exhibit 3?

11 (The item referred to above was  
12 marked for identification as  
13 Plaintiff's Exhibit No. 3.)

14 BY MR. MOON:

15 Q Ever since the church purchased the  
16 property, the land, back in 1980, the church had  
17 made any plan to use the property for whatever  
18 purposes?

19 A At the time of the purchase, in 1980, I  
20 wasn't there. But I do believe that when the  
21 land was purchased, it was planned to build a  
22 church on there.

23 Q Is that land under any contract to be

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1 sold at the present time?

2       A     Yes, we do have a contract to sell the  
3 land.

4             MR. MOON: That's all I have.

5             THE COURT: All right. Cross examine.

6             MS. HERBERT-KELLER: Thank you, Your  
7 Honor.

8             CROSS EXAMINATION

9             BY MS. HERBERT-KELLER:

10            Q     Good morning, Mr. Chae. You have  
11 testified that you are the trustee for the World  
12 Mission Church?

13            A     Yes.

14            Q     And, as trustee for the church, what  
15 are your responsibilities?

16            A     I am responsible for all the spending  
17 and earning and also taking care of properties.

18            Q     So you're responsible for the  
19 maintenance and any work or anything that  
20 involves the property that the church owns?

21            A     Well, since then we are really renting  
22 the church from the American church. So we do  
23 not really directly have maintenance of the

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1 church itself. But I do take care of financial  
2 situations for the Korean church part with the  
3 reverend.

4 Q Well, is he responsible -- are you  
5 responsible for the maintenance of the property  
6 at Dunn Loring which is owned by the church?

7 A Yes, that is part of my responsibility.

8 Q How long has the church owned the  
9 property in Dunn Loring?

10 A That I remember, we purchased December  
11 1980. I told you that I was not there. The  
12 pastor was there at the time. He is in Moscow,  
13 Russia for missionary purposes. And, since we  
14 purchased the land in December 1980, the pastor  
15 and I were very close friends. We were planning  
16 to build a church. And I guess that is sixteen  
17 years ago.

18 Q Okay. How long have you been  
19 responsible for the maintenance of the property?  
20 I'll rephrase it. How long have you been a  
21 trustee?

22 A I can't really exactly remember this  
23 morning. But I think it's 1982 or 1983. I

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1 can't really remember. I know it's in 1983,  
2 1983.

3 Q And, during -- since 1982 or 1983, you  
4 have been responsible for the maintenance of  
5 church property?

6 A Well, there is the time in between.  
7 They would change the members time to time.  
8 But, yes, pretty much so.

9 Q During your time from 1982 or 1983 to  
10 today while you have been the trustee, how many  
11 times have you visited the Dunn Loring property?

12 A Well, physically that I really went in  
13 the land, perhaps four or five times. But I  
14 drive there every day on the way to church. So  
15 every Sunday I drive through there. I have to  
16 go to church that way.

17 Q But, during the last thirteen years or  
18 fourteen years that you have been trustee, you  
19 have actually physically been on the property  
20 four to five times?

21 A Yes, and there is other times that  
22 there is trees and other things that we have to  
23 clean. Our neighbors complain about the trees

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1 and tree falls and things like this. So I went  
2 there a few more times.

3 Q So more than four or five times?

4 A Yes.

5 Q Ten times?

6 A I can't remember. I don't know. I  
7 can't remember the exact amount.

8 Q Okay. What is the nature of the  
9 terrain of the property? By that I mean, is it  
10 wooded, grassy?

11 A It's trees and I'm sure there is a lot  
12 of weeds, also.

13 Q Okay. Are you familiar with the area  
14 that is in dispute in this case?

15 INTERPRETER: I'm sorry, excuse me?

16 BY MS. HERBERT-KELLER:

17 Q Familiar with the area of the church  
18 property which is property that's in dispute in  
19 this case, that's the subject of this  
20 litigation?

21 A I don't understand. Can you say that  
22 again?

23 Q Of the church property, there is a

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1 particular portion that is in dispute in this  
2 litigation. Are you familiar -- have you seen  
3 that portion of the property?

4 A About this case, yes.

5 Q You have seen the property?

6 A Yes, I went there.

7 Q Can you tell me what the terrain is on  
8 that area of the property?

9 A There was stacked up firewood and then  
10 there's some part there the same thing, some  
11 space in between the firewood stacked up. The  
12 land that the church owns, and then there is  
13 dividing between -- distinguished from property,  
14 there is grass that distinguishes between two  
15 different properties.

16 Q Is there grass in the disputed portion?

17 A Yes.

18 Q Are there trees?

19 A No trees.

20 MS. HERBERT-KELLER: Thank you.

21 Nothing further, Your Honor.

22 THE COURT: Any redirect?

23 MR. MOON: No.

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1 THE COURT: All right, sir, you may  
2 step down and have a seat with your attorney.

3 MR. MOON: That's the Plaintiff's case.

4 THE COURT: All right. Do you want  
5 Exhibits 2 and 3 admitted?

6 MR. MOON: Yes, Your Honor.

7 THE COURT: Is there any objection?

8 MS. HERBERT-KELLER: No, Your Honor.

9 THE COURT: All right. They'll be  
10 received.

11 (The items previously marked for  
12 identification as Plaintiff's  
13 Exhibit Nos. 2 and 3 were received  
14 in evidence.)

15 MS. HERBERT-KELLER: I'd like to call  
16 William Stephens, please.

17 THE COURT: All right.

18 MR. MOON: I'm going to ask for a rule  
19 on the witnesses? I don't know how many we  
20 have.

21 THE COURT: All right. Anyone who's in  
22 the courtroom who's going to testify in this  
23 case, I'll ask you to stand at this time. All

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right. If the witnesses will remain outside the courtroom. And please don't discuss your testimony until you're called. All right. Who is your first witness?

MS. HERBERT-KELLER: William Stephens.

THE COURT: All right. William Stephens.

Whereupon,

WILLIAM M. STEPHENS

a witness, was called for examination by counsel on behalf of the Defendant, and, after having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. HERBERT-KELLER:

Q Good morning, Mr. Stephens. Could you state and spell your last name?

A William M. Stephens, Stephens is spelled, S T E P H E N S.

Q Can you give your full address, please?

A 5843 Aspen Wood Court, and that's in McLean, 22101.

Q Prior to moving to Aspen Wood Court,

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1 did you live at 8043 Idyllwood, in Dunn Loring?

2 A Yes, I did.

3 Q Approximately when did you purchase  
4 that house?

5 A We purchased the property in early July  
6 1981.

7 Q Okay. I'm going to show you a copy of  
8 a deed which has been marked Defendant's Exhibit  
9 2. Take a look at that, please. Does that look  
10 familiar to you?

11 A Yes.

12 Q Is that the deed that transferred title  
13 to the property to you?

14 A Yes.

15 MS. HERBERT-KELLER: I move Defendant's  
16 Exhibit 2.

17 THE COURT: All right. Is there any  
18 objection to the exhibit?

19 MR. MOON: No objection.

20 THE COURT: All right. It will be  
21 received.

22 (The item previously marked for  
23 identification as Defendant's

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Exhibit No. 2 was received in  
evidence.)

BY MS. HERBERT-KELLER:

Q Approximately how long did you live at  
8043 Idyllwood?

A We owned the property from July of '91  
until mid-June of -- I'm sorry, '81, until mid-  
June of '87.

Q Okay. And you purchased -- who did you  
purchase the property from?

A We purchased it from a trustee.  
Philadelphia Management was the name of the  
owner. We purchased it from a Court-appointed  
trustee. I think the IRS or someone claimed the  
property.

Q Okay. When did you begin looking at  
the property to purchase it?

A We first expressed an interest  
Christmas week of 1980. I can't remember the  
exact date. But that was when we first  
attempted to purchase the property and  
discovered that there was, I guess, difficulties  
with title or something.

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1 Q But you had been out --

2 A Yes.

3 Q -- and looked at the property prior to  
4 that?

5 A Yes, right, prior to that.

6 Q So during the month of December?

7 A Yes, it was in late December of 1980.

8 Q Before you made an offer and while you  
9 were looking at the property, did you have  
10 occasion to go to the back yard of the property?

11 A Yes, we looked at -- The house was  
12 open.. And we looked over the house. And we  
13 looked over the property around it.

14 Q Okay. How many times do you think you  
15 went out there during that month?

16 A Oh, maybe five, six times.

17 Q Okay. I'm going to show you a copy of  
18 a survey of the property. It's marked as  
19 Plaintiff's Exhibit 1. I'd like you to go ahead  
20 and hold onto this while I ask you some  
21 questions.

22 THE COURT: Is that Defendant's Exhibit  
23 1?

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1 MS. HERBERT-KELLER: I'm sorry,  
2 Defendant's Exhibit 1.

3 THE COURT: All right.

4 BY MS. HERBERT-KELLER:

5 Q Does this fairly and accurately  
6 represent the location of the house on the  
7 property --

8 A Yes.

9 Q -- at the time that you began looking  
10 at it?

11 A Well, yes. The dimensions have changed  
12 slightly. We added to the house. But this is  
13 the location of it.

14 Q About three-quarters of the way back on  
15 this plat, you'll see a circle with an M.H.  
16 beside it.

17 (Discussion held off the record.)

18 BY MS. HERBERT-KELLER:

19 Q Are you familiar with a manhole in the  
20 middle of the property?

21 A Yes.

22 Q Behind the manhole is a portion of  
23 property up to where it shows the wood pile.

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1 Are you familiar with that area of the property,  
2 as well?

3 A Yes.

4 Q When you began looking at the property,  
5 in December, do you recollect viewing that  
6 portion of the property from the manhole back as  
7 shown on this plat --

8 A Yes.

9 Q -- back to what's shown on this plat,  
10 now, as a wood pile?

11 A Right.

12 Q What was the nature of that area when  
13 you began looking at the property?

14 A Well, the lot itself was, I'll use the  
15 word, "landscaped," back to the woods. The  
16 woods were just behind where it's marked, "wood  
17 pile."

18 Q Okay. Was it grass in that area?

19 A Grass and weeds.

20 Q Grass and weeds. Was it being mowed?

21 A It was being mowed regularly. It was  
22 not in great shape. But it was being mowed  
23 regularly. There was a clear delineation

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1 between what had been -- what was being cared  
2 for on the property and the woods behind it.

3 Q Okay. When you purchased -- when you  
4 made an offer on the property, in December, was  
5 it your understanding that the area from the  
6 manhole back, as shown on this plat today, was  
7 part of the back yard?

8 A That was our assumption, yes.

9 Q Okay. Did you have any reason to  
10 believe that?

11 A Well, it was maintained. And the  
12 neighbors -- If you looked out behind the  
13 houses, you kind of followed a straight line  
14 across where the woods were. And our assumption  
15 was that that was our property back to the edge  
16 of the woods, because it was for the property on  
17 either side of us.

18 Q Did you, in your negotiations with  
19 Philadelphia Management, have any other reason  
20 to believe that that was part of the property?

21 A They made the representation that it  
22 was.

23 Q So based on their representation that

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1 was part of the property --

2 -- A Yes.

3 Q -- you believed it to be part of the  
4 property? You owned this property for  
5 approximately seven years; correct?

6 A Six years.

7 Q Six years, from 1981 to 1987?

8 A Correct.

9 Q During that time, did you maintain the  
10 property from, as shown on this plat, the  
11 manhole cover back to the wood pile?

12 A Yes, we did.

13 Q How did you maintain it?

14 A Very nicely, if I say so myself.  
15 Actually, we had new topsoil brought in and put  
16 down sod and put up a fence at the back side of  
17 it and some shrubs and flowers and even tried to  
18 grow vegetables out there.

19 Q Okay. Did you consider it part of your  
20 property?

21 A Yes.

22 Q Continuously during that time you owned  
23 it?

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1           A     Right, that was an important part of  
2     it. That was one of the things that made the  
3     property attractive.

4           Q     Did anyone ever give you -- Did you  
5     ever have any conversations with someone from  
6     the World Mission Church prior to that?

7           A     No, I didn't know who they were; never  
8     heard of them.

9           Q     Were you being open in your claim of  
10    ownership to this portion of the property?

11          A     I don't understand.

12          Q     Were you trying to hide?

13          A     Oh, no; no, we just were doing  
14    business. I mean, we owned the house and used  
15    the property and never gave a second thought to  
16    it.

17          Q     During 1981, did you have occasion to  
18    erect a fence on the property?

19          A     Yes, right after we moved in, we  
20    cleaned up the -- There had been a lot of  
21    reconstruction and a lot of renovation work. We  
22    cleaned everything up. In the meantime, between  
23    when we had put in our bid to buy the house and

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1 when we bought it, there was a house built next  
2 door. And they had a dog run. So we put up the  
3 fence that's on -- between Lot 3-A and 3-B. And  
4 then we put up a split rail fence at the back of  
5 our property.

6 Q That was in 1981?

7 A That was in the fall of '81.

8 Q Does the location of the wood pile,  
9 going across the back of the property, does that  
10 fairly represent where you erected that fence --

11 A Yes.

12 Q -- in 1981? Did you maintain that  
13 fence there for the entire time of your  
14 ownership?

15 A Yes, we did.

16 Q When you sold the property, in 1987,  
17 did you represent to the then purchasers that  
18 this was a part of their property?

19 A What I told them was that we had  
20 thought that was our property when we bought it  
21 and we had later discovered through a survey  
22 that, in fact, it may be disputed. But our  
23 understanding -- I had called back the lawyer

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1 that we bought it from. And he told us that if  
2 we continued to use it -- Mr. Page, who had been  
3 the builder of the house, had always used it.  
4 And Philadelphia Management had used it -- and  
5 said, if you continue to use it, it will be  
6 yours, so don't worry about it. I just passed  
7 that information on.

8 MS. HERBERT-KELLER: Okay. Nothing  
9 further, Your Honor.

10 THE COURT: All right. Cross examine.

11 CROSS EXAMINATION

12 BY MR. MOON:

13 Q Mr. Stephens, just a few questions.  
14 When you purchased that particular property back  
15 in 1981, did you receive -- did you have any  
16 survey done on that property?

17 A Yes.

18 Q Do you remember what your survey showed  
19 as the boundary of your property, especially in  
20 relation to the disputed area in this  
21 litigation?

22 A It was approximately the same as this  
23 drawing here. It was by a different firm. But

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1 it was approximately the same.

2       Q     Did your survey show that the so-called  
3 back yard of your property was encroaching upon  
4 somebody else's property?

5       A     I don't recall that being noted. There  
6 were no fences. At the time there were no  
7 fences around any of the property in the  
8 neighborhood. So there were no landmarks, per  
9 se, to point to in the yards. I don't remember  
10 any reference to other ownership. The survey  
11 that we bought from had been done by  
12 Philadelphia Management when they bought the  
13 property.

14       Q     So, when you bought the property, you  
15 did have a chance to look at your survey?

16       A     Yes.

17       Q     And do you understand the area in  
18 dispute in this case?

19       A     Yes, I do.

20       Q     Do you remember seeing a line below the  
21 area in dispute in this case on your survey when  
22 you purchased the property?

23       A     I'm confused about what line. You'll

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1 have to --

2       Q     Something like this, something like  
3 this.

4             THE COURT: All right. Let the record  
5 reflect that counsel is pointing to the rear lot  
6 line of Lot 3-B on Plaintiff's Exhibit 1.

7             THE WITNESS: There was a rear lot line  
8 on the plot. But there was no -- We didn't know  
9 exactly where that was, because there was no --  
10 you know, no reference on the ground. We didn't  
11 have it staked or anything.

12            BY MR. MOON:

13            Q     Did your survey show any wood piles  
14 beyond that line?

15            A     No, there weren't any wood piles there.

16            Q     Not on your survey?

17            A     They weren't there at all.

18            Q     Were there any wood piles beyond the  
19 line?

20            A     No, just the part that -- There was an  
21 obvious area where the landscaping stopped,  
22 where the grass stopped and where the woods  
23 started. And that was the only thing that was

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1 obvious. And that was not noted on the plat.

2 Q So, in '81, when you purchased the  
3 property, there were no so-called firewood  
4 stacked up in your back yard?

5 A I don't know anything about firewood  
6 being stacked up in any case.. I didn't stack  
7 firewood there. And I don't remember any wood  
8 being there when I bought it.

9 Q And you owned the property up until  
10 1987?

11 A Yes.

12 Q And, during the period of your  
13 ownership of the property, you never stored any  
14 firewood in your back yard; did you?

15 A We stored the firewood under the deck,  
16 is where we stored the firewood. We had a fence  
17 at the back of it. And it was landscaped. So  
18 we didn't use that for firewood.

19 Q Okay. Let's talk about the fence.

20 A Okay.

21 Q You said there was a fence between your  
22 house and the house next door?

23 THE COURT: Lot 3-A.

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1 BY MR. MOON:

2 Q Lot 3-A.

3 A We built that fence.

4 Q You built that fence?

5 A We built that fence.

6 Q Did you build any fence between your  
7 back yard and the property owned by the church,  
8 beyond where you see --

9 A Yes, we put up a split rail fence.

10 Q Does that show on that survey?

11 A No.

12 Q Okay. Could you describe to us one  
13 more time what kind of fence was it?

14 A Split rail.

15 Q Was it all the way around the back  
16 yard?

17 A It was across the back of the property,  
18 connected between -- There's a chain link fence  
19 between Lot 2 and 3-B. And it connected from  
20 the corner of that chain link fence to the board  
21 fence between 3-A and 3-B.

22 Q In relation to the property you owned  
23 back in '81, do you know where the property of

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1 the World Mission Church of Washington, D.C. is  
2 located?

3 A It's behind the property.

4 Q It's behind?

5 A Yes.

6 Q And have you ever built any fence  
7 between your back yard and the property owned --

8 A Yes.

9 Q -- by the church?

10 A Yes.

11 Q And what kind of fence was it?

12 A It was a split rail fence.

13 Q And that was built when?

14 A That was in the fall of '81.

15 Q Now, you had that fence up until 1987?

16 A The fence was still standing when we  
17 sold the property, yes.

18 Q Was it beyond where the location of the  
19 wood piles might be?

20 A It was approximately that line. It was  
21 about the same line where those wood piles are.

22 Q Was your fence fully enclosed, fully  
23 enclosing your back yard?

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1           A     It fully enclosed it in the extent that  
2     the fence ran from the fences on either side.  
3     It was a complete fence. But a split rail fence  
4     is not a security fence. It's just more -- you  
5     know, it's defines a boundary and it's  
6     decorative. But it doesn't -- it wasn't there  
7     for security purposes.

8           Q     I'm still confused as to the nature of  
9     the fence between your back yard and the  
10    church's property and whether -- How tall was  
11    the fence?

12          A     The posts were probably -- well, they  
13    were eight-foot tall posts. And I set them in  
14    the ground three feet. So that left five feet  
15    exposed. And then I had three rails running  
16    across it. And the top rail was probably around  
17    forty-eight inches, about four feet up, and  
18    there was a mid-rail at around three feet and a  
19    lower rail at around eighteen inches.

20          Q     And, Mr. Stephens, you testified that  
21    you thought you owned the area which is in  
22    dispute in this case when you purchased the  
23    property?

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1           A     When we purchased the property, that  
2     was our assumption, that we owned all the way  
3     back to where the obvious lot line was.

4           Q     If somebody had told you where the  
5     legal boundary of the lot was, would you have  
6     been surprised that that did not include the  
7     portion of the property in dispute?

8           A     I would have been very surprised. I  
9     would have been very surprised.

10          Q     You testified that some time later on  
11     you had another survey done on the property?

12          A     There was a survey done when -- Well,  
13     we had a couple of surveys done. We refinanced  
14     the property at one point. There was a survey  
15     done for that. And then I think the first  
16     survey that -- this one, this particular survey  
17     was done when we sold the property. And this  
18     was done by a different company.

19          Q     And when was the survey done for  
20     refinancing; do you remember which year?

21          A     It would have been late '81 and then  
22     again about a year later.

23          Q     Late '81 --

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1           A     Right.

2           -- Q    -- is the refinancing?

3           A     Those were in the nature -- they were  
4 just a reissue of the same plan. We hadn't  
5 changed their -- Well, in '83 we built the  
6 garage area. So we had to have a survey done to  
7 take that into account.

8           Q     Did your subsequent surveys, such as  
9 the one done in the latter part of 1981 and  
10 1983, show any boundaries of your property?

11          A     I'm sure they did, yes.

12          Q     Do you recall where the boundary --

13          A     You know, this was a -- the survey was  
14 a technical item. All we were doing was  
15 refinancing. So I don't recall precisely what  
16 they did. It was ordered up by the lawyer and  
17 was part of the package; that's the only thing I  
18 remember.

19          Q     And I remember earlier you testified  
20 that you had one survey done and there was some  
21 problem with your survey and you had to consult  
22 with your lawyer. And the lawyer described to  
23 you -- the lawyer told you not to worry about

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1 it, et cetera, et cetera; do you remember that?  
2 I guess probably it was the time you were  
3 selling the property to the next owner you had a  
4 survey done?

5 A That would have been this survey. He  
6 had this survey done. We didn't have that  
7 survey done. This was done by his people.

8 Q Okay. During the period of your  
9 ownership of the property, had you ever realized  
10 that there was going to be a problem with  
11 ownership of the disputed area?

12 A Not a problem. We became aware that  
13 there was a disputed area somewhere during our  
14 ownership. I don't remember when, but somewhere  
15 in there we became aware that the area we  
16 thought was our back yard in fact was in  
17 dispute.

18 Q And when was that?

19 A I don't recall.

20 Q How did you come to know that there was  
21 a dispute?

22 A It has been a long time ago. My  
23 recollection is that it came up through -- a

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1 neighbor brought it to my attention. But I  
2 don't recall precisely when that would have been  
3 or even what he said. But I do remember that  
4 somewhere in there we became aware that, in  
5 fact, what we were landscaping and mowing and  
6 taking care of in fact was in dispute, it was  
7 not clearly ours.

8 Q But did you still believe that this  
9 disputed area still belonged to you?

10 A There were a lot of -- there were a lot  
11 of other things being said at the time. And, on  
12 balance, we thought that it was our property.  
13 It had been part of this lot for the previous  
14 two owners and for many, many years. So we  
15 assumed that it was our property regardless.

16 Q You didn't have any new survey done  
17 to --

18 A I didn't have anything done in response  
19 to that, no. There were lots of other stories  
20 going on. And on balance we felt that it was  
21 our property. So we used it as such.

22 Q Have you built anything other than the  
23 fence you described on the disputed portion of

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1 the property?

2 A No, there were no other structures.

3 Q Thank you, Mr. Stephens.

4 THE COURT: Mr. Stephens, is the garage  
5 that you built shown on Plaintiff's Exhibit 1?

6 THE WITNESS: Yes, it is.

7 THE COURT: Whereabouts is that  
8 located?

9 THE WITNESS: That's on the right side  
10 of the property at the bottom of the driveway.  
11 It's identified by -- it says, 22.2 feet.

12 THE COURT: All right.

13 THE WITNESS: That portion is the  
14 garage.

15 THE COURT: All right. Thank you. Any  
16 redirect?

17 MS. HERBERT-KELLER: Yes.

18 REDIRECT EXAMINATION

19 BY MS. HERBERT-KELLER:

20 Q You testified that you put the fence up  
21 in the fall of 1981?

22 A Yes.

23 Q You bought the property in July of

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1 1981?

2 A Right.

3 Q At the time you purchased the property,  
4 there was grass in the area between the manhole  
5 and the fence as shown on the plat -- or between  
6 the manhole and the wood piles which are now  
7 shown on that plat?

8 A Yes.

9 Q You mowed that yard?

10 A Right.

11 Q In 1981 you put the fence up?

12 A Yes.

13 Q And the area where you built the fence  
14 you believe is fairly represented by the lines  
15 that now show a wood pile?

16 A Yes.

17 Q During your entire ownership of the  
18 property, did you always intend to possess and  
19 use that portion of the property, the disputed  
20 portion of the property as your property?

21 A Yes.

22 Q Did anyone from the World Mission  
23 Church or anyone who owned that property,

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1 claiming to own that property, ever come to you  
2 and tell you not to use the property?

3 A No, we had no contact from anyone.

4 Q Did anyone at all ever -- You used the  
5 word, "dispute." Did anyone ever come to you  
6 and say, don't use this property?

7 A No.

8 Q Did you ever try to hide the fact that  
9 you were using this property?

10 A No.

11 Q Did you use it continuously --

12 A Yes.

13 Q -- during your entire ownership?

14 A Yes.

15 Q Were you aware of Philadelphia  
16 Management using the property?

17 A Yes.

18 MS. HERBERT-KELLER: Nothing further,  
19 Your Honor.

20 THE COURT: All right. May this  
21 witness be excused?

22 MS. HERBERT-KELLER: Yes.

23 THE COURT: All right.

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1 MR. MOON: That's fine, Your Honor.

2 THE COURT: Sir, you may step down.  
3 You're free to go or stay as you wish. Call  
4 your next witness.

5 MS. HERBERT-KELLER: Guy Caron.

6 (Whereupon, the witness was sworn by  
7 the Clerk of the Court.)

8 Whereupon,

9 GUY CARON

10 a witness, was called for examination by counsel  
11 on behalf of the Defendant, and, after having  
12 been first duly sworn by the Clerk of the Court,  
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MS. HERBERT-KELLER:

16 Q Good morning, Mr. Caron.

17 A Good morning.

18 Q Can you state your full name and  
19 address for the record, please?

20 A My name is Guy Caron. I live at 9200  
21 Hidden Creek Drive, in Great Falls, Virginia.  
22 The zip code is 22066.

23 Q Mr. Caron, where did you live previous?

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1           A     I lived previously at 8043 Idyllwood  
2 Road, in Falls Church.

3           Q     And approximately when did you purchase  
4 that property?

5           A     I purchased it in June or July 1987.

6           Q     And do you remember when you sold the  
7 property?

8           A     In June or July 1993.

9           Q     So you lived there approximately six  
10 years?

11          A     That's correct.

12          Q     Did you purchase the property from  
13 William and Barbara Stephens?

14          A     That is correct.

15          Q     I'm going to show you a deed. And I  
16 want you to take a look at it and see if you  
17 recognize it. This deed is marked as  
18 Defendant's Exhibit 5. Can you take a look at  
19 that and see if you --

20          A     Yes, I recognize it. It's the deed  
21 that we had made when we purchased the property.

22               MS. HERBERT-KELLER: Your Honor, I'd  
23 like to move to admit that exhibit.

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1 THE COURT: Any objection?

2 MR. MOON: No objection, Your Honor.

3 THE COURT: All right. It will be  
4 received.

5 (The item previously marked for  
6 identification as Defendant's  
7 Exhibit No. 5 was received in  
8 evidence.)

9 BY MS. HERBERT-KELLER:

10 Q Mr. Caron, when you purchased the  
11 property from the Stephens, was there a wood  
12 fence --

13 A Yes, there was.

14 Q -- along the back? If I show you a  
15 plat --

16 MS. HERBERT-KELLER: It's a plat that  
17 we used before, Defendant's Exhibit 1 --

18 BY MS. HERBERT-KELLER:

19 Q Hold on to this. And I'm going to ask  
20 you some questions about it, as well. Do you  
21 see on here, about three-quarters of the way  
22 back, there's a circle with M.H., a manhole,  
23 shown on the plat?

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1           A     Yes.

2           Q     Do you see further back behind that  
3 something depicted as a wood pile --

4           A     That's correct.

5           Q     -- and lines with Xs on it?

6           A     That is correct.

7           Q     Can you tell me whether that's  
8 approximately the location where the fence was  
9 located when you purchased the property?

10          A     That's exactly the location. I took a  
11 ninety-year-old oak tree down during my stay  
12 there. And there was so much wood in there that  
13 I replaced the wood fence with the wood pile.  
14 So the wooden fence was replaced by the wood  
15 pile by myself, by moving all that wood back  
16 there.

17          Q     Was that over a period of time or was  
18 that over -- was that on one discrete occasion?

19          A     It certainly was not in one day. The  
20 tree was too large for that. But it certainly  
21 was a couple of weeks, I would say a couple of  
22 months, maybe. I moved the wood back there and  
23 replaced the wooden fence with the wood pile.

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1 Q Why did you replace the fence?

2 A The fence was starting to be -- rotting  
3 away. I inherited the fence from the previous  
4 owner. And I also needed a spot to put all that  
5 wood there. So I thought it would be a good way  
6 to delineate the property and leave it there.

7 Q Okay. Do you see where the line runs  
8 through, about three-quarters of the way back on  
9 this survey, with the M.H. on it?

10 A Yes.

11 Q Do you see where the wood fence is --  
12 or where the area depicted by the wood piles is?

13 A Yes.

14 Q The area of land in between those two  
15 points, during your ownership, what was the  
16 nature of the terrain of that area?

17 A It was a grassy area. And I maintained  
18 it.

19 Q How did you maintain it?

20 A I mowed the lawn and raked the leaves  
21 and maintained it properly and clean, as the  
22 rest of the property.

23 Q So you think you maintained it at least

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1 once a week?

2 A Certainly.

3 Q Did you consider it part of your yard?

4 A We certainly played there -- the kids  
5 played there and had games there and everything.  
6 So, yes, it was certainly part of the property.

7 Q Did you consider it --

8 A Absolutely.

9 Q -- your yard?

10 A Uh-huh.

11 Q Did you claim ownership to that piece  
12 of property?

13 A I considered it -- You know, that's  
14 where we played, that's what we used. We always  
15 used it. That's why we used the fence. And  
16 that's why we used the wood pile there.

17 Q Did you ever try to hide the fact that  
18 you were using the yard during that time?

19 A I don't think so.

20 Q You were open about it?

21 A We were back there all the time. So it  
22 was --

23 Q Anyone that walked by would have

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1 noticed? You consider that your use of it would  
2 giye anyone notice of the fact that you were  
3 using that area?

4 A I certainly did not try to hide  
5 anything.

6 Q Okay. Was there a delineation between  
7 the area behind the wood pile and this area  
8 here; could you tell a difference between those  
9 two areas?

10 A Behind the wood pile were basically  
11 leaves and the way the rest of the property is  
12 back there, which is wooded, weeds, not  
13 maintained. It doesn't need to be maintained.  
14 It was a wooded area, not maintained. My area  
15 was totally maintained as a normally maintained  
16 yard would be. And that's the difference.

17 Q Okay. Did anyone from the church or  
18 claiming ownership of that property ever come to  
19 you, during your ownership, and request that you  
20 stop using that portion of the property?

21 A No, they did not.

22 Q Did anyone ever come and notify you  
23 that you were not supposed to be using that

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1 property?

2       A     No, I have never had anybody come to  
3 me.

4       Q     Okay. During your entire ownership,  
5 did you intend to use that?

6       A     Absolutely.

7       Q     Did you use it continuously?

8       A     Absolutely.

9             MS. HERBERT-KELLER: Nothing further,  
10 Your Honor.

11            THE COURT: All right. Cross examine.

12            CROSS EXAMINATION

13            BY MR. MOON:

14       Q     Mr. Caron, when you purchased the  
15 property in 1987, did you have a survey done?

16       A     Yes, we did.

17       Q     And did your survey show the boundaries  
18 of your property?

19       A     Similar to this plat, yes.

20       Q     Did you notice from the survey that the  
21 wooden fence was beyond the property boundary in  
22 your back yard?

23       A     All I can tell you is that this was my

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1 second house we purchased. I did really not pay  
2 much attention. I can tell you on my plat, when  
3 we purchased the house, rather than what we have  
4 here, now, there were actually -- the wooden  
5 fence was actually there, as well. I did not  
6 concern myself at all with the fact that it was  
7 either over or beyond or within.

8 Q Before you purchased the property, has  
9 it ever come to your attention that there might  
10 be a dispute as to that particular portion of  
11 the property in your back yard which is beyond  
12 the boundary of your property?

13 A Are you asking me if I was worried  
14 about that or --

15 Q If you were aware?

16 A No, I was not aware that there would be  
17 a dispute of any kind.

18 Q The people who owned the property right  
19 before you, Mr. and Ms. Stephens, I think --

20 A Uh-huh.

21 Q -- did any of them inform you as to a  
22 possible dispute as to ownership of that  
23 particular piece of property?

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1           A     All I knew is there was a vacated  
2 street behind my property; okay? It was not  
3 clear to me if the vacated property was included  
4 or not included in the plan. I really, as I  
5 said before, was not aware to a great detail of  
6 what the end of that property was. It was not  
7 much of a concern to me. You have to understand  
8 that, when I bought the property, I just bought  
9 the property. I enjoyed it, I played with it.  
10 I have kids. You know, I don't look in great  
11 detail to the plat. So that's certainly what it  
12 was.

13           Q     So you thought that that portion of the  
14 property which is in dispute in this case  
15 belonged to you all along?

16           A     It was my understanding that it's ours  
17 and that we can use it, that it was our property  
18 back there. The fact -- I don't know of any  
19 reason. Now, on my plat it showed the picket  
20 fence back there. That there was a dispute I  
21 didn't know.

22           Q     If someone had told you, by looking at  
23 the survey, that the portion of the property was

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1 beyond the legal boundary of your back yard,  
2 would you have been surprised?

3 A I don't know. If somebody would have  
4 shown me that the property was different?

5 THE COURT: Well, you have answered the  
6 question. You said you don't know. Next  
7 question.

8 BY MR. MOON:

9 Q Let's go to the wood piles --

10 A Uh-huh.

11 Q -- you put up after taking down wooden  
12 fence --

13 A Uh-huh.

14 Q -- in your back yard. Were you using  
15 those woods from time to time?

16 A Yes, I was using the wood partially to  
17 heat, my firewood. And that's what it was used  
18 for partially. There was so much back there  
19 that I only need very few. I don't know. You  
20 saw how big these oak trees are back there. I'm  
21 sure you have seen them. It was a similar tree  
22 that came down. I needed a place to store them.  
23 And I thought it would be a very good place to

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1 put it. And that's where I put it. And, yes, I  
2 used some of it as firewood. And that's about  
3 it.

4 Q Have you ever restacked that firewood  
5 because you used so much and you felt that --

6 A By the time I left, I believe there was  
7 still plenty of firewood left. And there  
8 probably is still firewood left. So I would  
9 have no reason to buy any further wood.

10 Q Were the wood piles totally enclosing  
11 your back yard or were there spaces between the  
12 piles?

13 A I believe that the way it is delineated  
14 here is probably correct as of now. At one  
15 point it was probably continuous. The reason  
16 there is an opening on the righthand side is  
17 there used to be a gate there. I don't know if  
18 it's still there. On the righthand side of the  
19 property there used to be a gate. And that's  
20 where that gate was left to gain access to the  
21 other side. And the middle of the pile might  
22 have been closer or touching at one point or  
23 another. I believe they were completely closed

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1 at the time.

2 Q And you sold this property to Ms.  
3 Hollander in 1993?

4 A 1993, I believe it was in June, if I  
5 recall it correctly.

6 Q Was any survey done at the time?

7 A I don't think I ordered one. If one  
8 was done, it was probably on their end.

9 Q Has anyone -- When you sold the  
10 property in 1993, had anyone brought to your  
11 attention a possible dispute with the ownership  
12 of the particular portion of the property in  
13 your back yard?

14 A As I said, I was concerned -- I had a  
15 contract on another house. I was little  
16 concerned with the other side of this property.  
17 My concern was getting it sold at that time.

18 Q So is your answer, no, nobody had  
19 brought to your attention a possible dispute?

20 A Well, at that point, there was some  
21 discussion. But we did not deny or neglect any  
22 of that. I don't know. I didn't know at the  
23 time. And it is only recently that I have been

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1 brought to attention there is a dispute. So I  
2 did not know.

3 Q You said there were discussions  
4 concerning --

5 A I did not know what was done on the  
6 plat or what was not done on the plat. The only  
7 thing I know is that I had a plat done. And the  
8 plat was very clearly what I showed. And I sold  
9 the property as-is. And, if there was anything,  
10 I was not made aware of it.

11 Q So you didn't make any representation  
12 as to ownership of that particular portion of  
13 the property?

14 A No, I said that we have been using it  
15 all along. For the six years we had been there  
16 we always used that part. It was a playground  
17 for our children. And the manhole is a typical  
18 example. You know, we had to be careful when we  
19 played football back there not to trip over it.  
20 So we used it as our property. We always had.  
21 We always thought it was ours.

22 Q Other than replacing the wood piles --  
23 other than replacing the wooden fence with the

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1 wood piles, did you build any other physical  
2 improvement?

3 A No, we didn't build anything back  
4 there. The only thing I did is, I maintained it  
5 somewhat at the overhangs. There was a lot of  
6 leaves and tree limbs that became very long and  
7 then came over on my side of the property. So I  
8 just trimmed a number of trees back; that's all  
9 I did.

10 Q But there was no physical structure  
11 built on the --

12 A Absolutely not.

13 MR. MOON: Thank you, Your Honor.

14 THE COURT: Any redirect?

15 MS. HERBERT-KELLER: Yes, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. HERBERT-KELLER:

18 Q Mr. Caron, I'm going to show you  
19 another plat. This is Defendant's Exhibit 4;  
20 can you tell me what the date is on that?

21 THE COURT: Well, could he identify  
22 this document?

23 BY MS. HERBERT-KELLER:

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1 Q Does that plat seem familiar to you,  
2 look familiar to you?

3 A I recognize the property where I lived.  
4 I don't know if it was any different.

5 Q What year did you sell the property to  
6 Ms. Hollander?

7 A 1993.

8 Q I'm sorry. What year did you purchase  
9 the property from the Stephens?

10 A 1987.

11 Q And what is the date on this plat?

12 A November 28th, 1987 -- I'm sorry, May  
13 28th.

14 Q Which is the date that you purchased --  
15 shortly before the date that you purchased it?

16 A It probably is, yes.

17 Q Can you identify this plat as a plat  
18 that you received at settlement?

19 A I would certainly think it would be.

20 THE COURT: Well, can you identify it  
21 or not? I mean, don't guess.

22 THE WITNESS: Okay. Let me see if I  
23 can see. Yes, it is mine, because it says on

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1 the bottom lefthand corner, by Caron. And so  
2 that is me. Certainly it was done upon our  
3 request at the time of purchase from the  
4 Stephens.

5 MS. HERBERT-KELLER: Your Honor, I'd  
6 like to admit that as Defendant's Exhibit 4.

7 MR. MOON: Your Honor, this is  
8 basically a report from a surveyor as to the  
9 location of fences, et cetera, et cetera.  
10 Without testimony directly from the surveyor as  
11 an expert witness, if it is being admitted to  
12 show the location of the gates and other items,  
13 it's not --

14 MS. HERBERT-KELLER: Your Honor, I seek  
15 to admit this for two reasons, one, so that Mr.  
16 Caron can testify whether that was -- that  
17 accurately depicts the location of the fence at  
18 the time he purchased the property, and, two, to  
19 testify as to whether he received this at  
20 settlement.

21 THE COURT: Well, why don't you ask him  
22 those questions. Then maybe you can establish a  
23 foundation for the admission of the document.

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MS. HERBERT-KELLER: Okay, Your Honor.

BY MS. HERBERT-KELLER:

Q Mr. Caron, if you take a look at that plat, do you see an area three-quarters of the way back with the line drawn across?

A That's correct.

Q And then do you see an area past that which is in an arch, the line drawn --

A Uh-huh.

Q -- at the very back?

A Uh-huh.

Q Would you say that line fairly and accurately represents the location of the split rail fence at the time that you purchased the property?

A Absolutely, yes.

Q Would you say that the area in between that line and the line that goes across three-quarters of the way back, that fairly and accurately represents the area of the lawn that you testified to you played in?

A Absolutely.

Q Can you testify that you received this

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1 at settlement?

2 -- A Yes, I did.

3 Q During your ownership --

4 MS. HERBERT-KELLER: Your Honor, I  
5 would like to move for admission of this  
6 document.

7 MR. MOON: Your Honor, based upon the  
8 same ground I stated before I object to  
9 admission of this, because as Mr. Caron stated,  
10 this survey that I have has, you know, a lot of  
11 numbers and distances and words, et cetera,  
12 which have to be testified by the expert  
13 witness, the surveyor, rather than the lay  
14 witness who is only guesstimating where the  
15 location of the gates and boundaries might be.

16 THE COURT: Well, now, this Exhibit 4  
17 also has a notation, a handwritten notation at  
18 the top that says, "Area claimed by adverse  
19 possession"; was that there, Mr. Caron, when you  
20 received this?

21 THE WITNESS: Your Honor, I could not  
22 recall. You're asking me -- you know, it's '87.  
23 It's nine years ago. I would really not know.

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1 And, if it had been there, I probably would not  
2 have noticed it personally. I'd be very honest  
3 in saying, I was so excited in buying the house  
4 I really wanted. That's not really what we  
5 focused on.

6 MS. HERBERT-KELLER: Your Honor, I'll  
7 stipulate that we're not putting this into  
8 evidence to prove the truth of those words that  
9 are written there, that that's the area of  
10 adverse possession.

11 THE COURT: Well, my concern is that  
12 the witness is identifying a document that has  
13 been altered since the time that he saw it, if  
14 he can even remember that he saw it. But I'm  
15 going to receive the exhibit for the sole  
16 purpose of the witness' testimony that the  
17 rearmost line there looks like where the fence  
18 was when he bought it, though I'm not sure what  
19 significance that has if he can't remember  
20 whether he saw this or not. Go ahead. It will  
21 be received for that limited purpose.

22 MR. MOON: Could you note my objection,  
23 Your Honor?

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1 THE COURT: So noted.

2 (The item previously marked for  
3 identification as Defendant's  
4 Exhibit No. 4 was received in  
5 evidence.)

6 BY MS. HERBERT-KELLER:

7 Q Just one final question, Mr. Caron.  
8 During your six years of ownership, did you  
9 intend to possess that area between that line --  
10 between the manhole and the back, the wood  
11 piles, as your property?

12 A Yes, I did.

13 MS. HERBERT-KELLER: Thank you.  
14 Nothing further, Your Honor.

15 THE COURT: Anything further, Mr. Moon?

16 MR. MOON: No, Your Honor.

17 THE COURT: All right. May this  
18 witness be excused?

19 MS. HERBERT-KELLER: Yes; yes, Your  
20 Honor.

21 THE COURT: All right. Sir, you may  
22 step down. You're free to go or stay as you  
23 wish.

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1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: All right. Please call  
3 your next witness.

4 MS. HERBERT-KELLER: I call Carolyn  
5 Hollander, Your Honor.

6 (Whereupon, the witness was sworn by  
7 the Clerk of the Court.)

8 Whereupon,

9 CAROLYN HOLLANDER

10 the Defendant, was called for examination by  
11 counsel in her own behalf, and, after having  
12 been first duly sworn by the Clerk of the Court,  
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MS. HERBERT-KELLER:

16 Q Would you please state your full name  
17 and address?

18 A I am Carolyn Hollander. I'm live at  
19 8043 Idyllwood Road, in Dunn Loring.

20 Q Approximately when did you purchase the  
21 property at Idyllwood Road?

22 A October, end of October 1993.

23 Q Did you purchase that from Guy and

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1 Patsy Caron?

2 A I purchased it, yes.

3 Q I'm going to show you a copy of a deed.  
4 If you can take a look at it and see whether it  
5 looks familiar to you?

6 MS. HERBERT-KELLER: I believe it's  
7 marked Defendant's Exhibit 6, Your Honor.

8 BY MS. HERBERT-KELLER:

9 Q Does that look familiar to you?

10 A Yes, this is the one I signed for the  
11 deed.

12 Q Is this a deed that you received at  
13 settlement?

14 A That I received, yes.

15 Q This is the deed that gave you  
16 ownership of the property?

17 A Yes, it was.

18 Q And October 25th, 1993 is the date you  
19 purchased the property?

20 A Correct.

21 Q And the Grantors are correct on here,  
22 Guy and Patsy Caron?

23 A Guy and Patsy Caron.

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1 Q Your Honor, I move to admit this as  
2 Defendant's Exhibit 6.

3 THE COURT: All right. Any objection?

4 MR. MOON: No objection, Your Honor.

5 THE COURT: All right. It will be  
6 received.

7 (The item previously marked for  
8 identification as Defendant's  
9 Exhibit No. 6 was received in  
10 evidence.)

11 BY MS. HERBERT-KELLER:

12 Q Here's a copy of a survey, a plat here.  
13 This is Defendant's Exhibit 1, the original  
14 plat. Take a look at that. And I want to ask  
15 you some questions about it. Do you see the line  
16 that is drawn through the property approximately  
17 three-quarters of the way back where the circle  
18 is drawn, M.H., the manhole is located?

19 A Yes, I do.

20 Q And do you see where it is depicted  
21 wood piles?

22 A Yes.

23 Q Are those wood piles still there?

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1           A     They're still there.

2           Q     Do you maintain those wood piles?

3           A     I haven't touched the wood piles. The  
4 wood piles are -- Save for a couple that may  
5 have fallen off, they're exactly as they were  
6 when I bought the house.

7           Q     The area in between that line three-  
8 quarters of the way back and the wood piles,  
9 what's the nature of that area right now, the  
10 terrain?

11          A     It's grass.

12          Q     It's grass?

13          A     Maintained, it has got a couple of  
14 weeds. But it has been reseeded three or four  
15 times.

16          Q     Do you maintain that weekly?

17          A     Probably biweekly, and rake leaves in  
18 the fall every day it seems like.

19          Q     Do you consider that a part of your  
20 property?

21          A     I do.

22          Q     Do you openly use that property?

23          A     Yes, I have played volleyball back

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1 there. I have had the property. It's just  
2 mowed every time. I have a maintenance person  
3 that I have hired that continues to mow it. And  
4 I mow it myself.

5 Q Would you say that the wood pile fairly  
6 depicts where you consider the edge of your  
7 property to be --

8 A Yes.

9 Q -- the wood pile as shown on this  
10 survey that you're looking at?

11 A Yes, it's in the same place.

12 Q Okay. Have you been open in your use  
13 of that area between the manhole and the wood  
14 pile?

15 A Yes, I have.

16 Q Have you ever tried to hide the fact  
17 that you're using it?

18 A No, I use it all the time.

19 Q Have you continuously used that as part  
20 of your yard since October of 1993?

21 A Yes, I have.

22 Q Has anyone from the World Church or  
23 purporting to act on behalf of the World Church

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1 or anyone else ever come back and asked you not  
2 to use that property?

3 A Nobody came to me, no.

4 Q Okay. But you did receive a letter in  
5 October from --

6 A After I sent a letter to them.

7 Q Did you continue to use the property?

8 A I have continued to use it the same as  
9 I had before.

10 Q So you're continuing to use it today?

11 A Yes, I am.

12 Q Was there ever a period when you didn't  
13 use that property?

14 A No.

15 Q The area behind the wood piles as shown  
16 on this, it says, N/F Church of World Mission on  
17 this plat --

18 A Uh-huh.

19 Q -- can you tell me what that area looks  
20 like right now?

21 A It's mushed up leaves, it's trees,  
22 bramble, mud, just debris.

23 Q If the wood pile wasn't there -- Would

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1 you say you can tell a difference between --

2 A Absolutely.

3 Q -- the area -- Wait until I'm finished  
4 asking, please -- between the area of the lot  
5 and the wood pile?

6 A Right.

7 Q If those wood piles weren't there, that  
8 area and the area that's now behind the wood  
9 piles, you could tell a difference between them?

10 A Yes.

11 Q What's the difference?

12 A Well, one is grass and kept low and  
13 maintained. And behind it is just wild, debris,  
14 trees.

15 Q Has anybody ever given you permission  
16 to use that from the World Church?

17 A Nobody gave me permission, no.

18 Q Did you intend, during your entire  
19 ownership, to claim that area of disputed  
20 property as yours?

21 A Yes.

22 MS. HERBERT-KELLER: Nothing further,  
23 Your Honor.

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1 THE COURT: All right. Cross examine.

2 CROSS EXAMINATION

3 BY MR. MOON:

4 Q Ms. Hollander, when you purchased the  
5 property in 1993, was a survey done?

6 A Yes, a survey was done. I believe it's  
7 this one, Exhibit 1.

8 Q Did your survey show the boundary of  
9 your property?

10 A Yes.

11 Q Was -- Did you study that survey?

12 A Not when I bought it. It was my very  
13 first house. I was scraping the money to buy  
14 it. I barely could afford the survey, to have  
15 it done.

16 Q And did you take a look at the survey?

17 A I took a look at the survey and saw  
18 that the wood pile was along the back.

19 Q Along the back, which was beyond where  
20 the manhole is?

21 A Which is beyond where the manhole is,  
22 that is correct.

23 Q Did your survey you had back in 1993

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1 have a line going across going through that  
2 manhole?

3 A It's a dotted line, yes, dashed line.

4 Q Did you understand what the line was?

5 A Not at that time explicitly, no. I  
6 understood that there was the church behind it,  
7 where it says, N.F. Church of World Mission.  
8 But, as I could tell when I looked at the  
9 property and purchased the property, the fence  
10 in the back area was what they had been using  
11 and the people before them had been using and,  
12 for all intents and purposes, was what I  
13 considered to be my property.

14 Q So you considered that particular  
15 portion of property above the dotted line going  
16 through manhole was your property when you  
17 purchased it?

18 A I thought it was mine. I used it as  
19 mine. And I was told that it had been used for  
20 years and years.

21 Q And you see the wood piles on the  
22 survey. That disputed portion of property  
23 between the dotted line going through the

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1 manhole and the wood pile belonged to you; that  
2 was your understanding?

3 A It was. I saw it that way. It was  
4 shown to me. Again, you know, there were the  
5 wood piles in the back that delineated where the  
6 wood started and the grass started.

7 Q So the boundary of your property in  
8 your back yard reached up as far as where the  
9 wood piles were; was that your understanding?

10 A That was my understanding.

11 Q And that has been your understanding  
12 throughout until you received the letter from  
13 the church; is that right?

14 A No, I believe I sent the letter  
15 originally claiming adverse possession.

16 Q That was in September 1995?

17 A Yes.

18 Q And you did receive a letter back from  
19 church's attorney in October 1995?

20 A Right.

21 Q Let me show you one, two, three, four  
22 pictures. Take a look at those and tell me  
23 whether any of those pictures does not fairly

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1 represent your wood piles in your back yard?

2     A     The question is whether it does not  
3 represent it?

4     Q     Whether it does not?

5     A     It fairly represents it, yes.

6     Q     All four pictures?

7     A     This one here --

8     Q     Which one?

9     A     -- represents it, but there's a --

10     MS. HERBERT-KELLER: Your Honor --

11     THE COURT: Mr. Moon, let's mark those  
12 as 4-A, B, C and D, if you haven't already done  
13 that.

14     MR. MOON: I have not, Your Honor.

15     THE COURT: All right. I'll ask the  
16 Clerk to do that. And then, Ms. Hollander, when  
17 you testify, please indicate for the record  
18 which photograph you're referring to.

19     (The items referred to above were  
20 marked for identification as  
21 Plaintiff's Exhibit Nos. 4-A  
22 through 4-D.)

23     THE WITNESS: It fairly represents it,

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1 except on 4-B there might be a couple of more  
2 pieces of wood and broken down trees there.

3 BY MR. MOON:

4 Q Could I take a look at that?

5 A Yes.

6 Q 4-B?

7 A It's very close. I mean, if you're  
8 going to itemize each piece of wood and each  
9 tree, there might be an area there's a little  
10 bit more debris behind what is the wood pile.

11 MR. MOON: Could I have those exhibits  
12 admitted into evidence as Plaintiff's Exhibits  
13 4-A, B, C, D?

14 THE COURT: Is there any objection?

15 MS. HERBERT-KELLER: (Nods head,  
16 indicating a negative response.)

17 THE COURT: All right. They'll be  
18 received.

19 (The items previously marked for  
20 identification as Plaintiff's  
21 Exhibit Nos. 4-A through 4-D  
22 were received in evidence.)

23 BY MR. MOON:

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1 Q Ms. Hollander, have you ever built any  
2 structure on that particular portion of property  
3 which is in dispute in this case?

4 A I've built no structures.

5 Q Have you ever built any fence in your  
6 back yard since you owned the property?

7 A No, I have not.

8 Q Have you ever restacked your firewood  
9 in your back yard?

10 A Not restacked it, no. If anything, I  
11 just had one or two pieces myself. They didn't  
12 burn. They were too old and rotted. So, no, I  
13 didn't put any new wood on it.

14 Q Are those wood piles in your back yard  
15 totally enclosing your back yard?

16 A No, they do not totally enclose it.  
17 There is a piece of the wood fence, the split  
18 rail fence, in the gap in that one place that I  
19 talked to you about that shows where the old  
20 fence was, which is a continuous wooden rail  
21 across. But the wood pile does not stack up in  
22 that area. So there is a continuous  
23 delineation. But there is not a wood pile the

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1 entire back.

2 - Q Are there gaps between your wood piles  
3 in your back yard?

4 A There are wood piles that stretch  
5 across except where the gates are. There's a  
6 gate on the left and a gate on the right. And  
7 then there's the original lower rail that's  
8 actually physically on the ground, at the one  
9 point, where the two wood piles, as they  
10 describe, in the middle have been depleted.

11 MR. MOON: That's all I have.

12 THE COURT: All right. Any redirect?

13 MS. HERBERT-KELLER: One question, Your  
14 Honor, please.

15 REDIRECT EXAMINATION

16 BY MS. HERBERT-KELLER:

17 Q On the survey, the Rice and Associates  
18 survey, which is Defendant's Exhibit 1, can you  
19 see where the wood piles are shown?

20 A Yes.

21 Q Can you see where there is gaps shown  
22 on it?

23 A Yes.

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1 Q Even in the area where there is gaps --

2 A Yes.

3 Q -- is there clear delineation between  
4 the property inside the wood piles and the  
5 property outside?

6 A Yes.

7 Q How is it clearly delineated?

8 A Well, there's the gate on the righthand  
9 side which is open, because the hinge is rusted.  
10 But there's a gate there on the righthand side.  
11 And the middle part has the original fence split  
12 rail on the ground there that you have to step  
13 over to even get past the wood pile. It's about  
14 six inches tall.

15 Q Is there grass in that area, that  
16 disputed portion, all the way up to the wood  
17 pile?

18 A There's grass all the way up to the  
19 wood pile clear across the back.

20 Q Is there the same type of grass on the  
21 other side of the wood pile?

22 A Behind the wood pile is all debris and  
23 woods.

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1           Q     So if you were to stand facing the wood  
2     piles and there was any kind of gap there, where  
3     there was no wood or no gate, would you be able  
4     to tell the difference, because of the grass and  
5     the debris, where --

6           A     Yes, there's grass up to that point.  
7     And then, if you stepped across it, you're in  
8     debris and mush and bramble.

9           Q     Okay. For what purpose did you leave  
10    the wood piles there?

11          A     Well, it delineated the property as I  
12    understood it. And I saw it as a way to keep  
13    some people out. It's not a high security  
14    thing, but it's some security.

15               MS. HERBERT-KELLER: Nothing further.  
16    Thank you.

17               THE COURT: Any further cross examine?

18               MR. MOON: No, Your Honor.

19               THE COURT: All right. Ma'am, you may  
20    step down. All right. Please call your next  
21    witness.

22               MS. HERBERT-KELLER: I call my last  
23    witness, Your Honor, Mr. Marvin Hicks.

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1 (Whereupon, the witness was sworn by  
2 the Clerk of the Court.)

3 Whereupon,

4 MARVIN PAUL HICKS, JR.

5 a witness, was called for examination by counsel  
6 on behalf of the Defendant, and, after having  
7 been first duly sworn by the Clerk of the Court,  
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. HERBERT-KELLER:

11 Q Can you state your name and address?

12 A Marvin Paul Hicks, Jr., 8153 Woodland  
13 Court, Dunn Loring, Virginia, 22027.

14 Q Mr. Hicks, are you familiar with the  
15 property at 8043 Idyllwood --

16 A Yes, ma'am.

17 Q -- in Dunn Loring? How did you become  
18 familiar with that property?

19 A Through Mr. Page, who was a previous  
20 owner. We were friends of sorts, if you will.

21 Q How did you meet Mr. Page?

22 A Through a mutual friend and the church.

23 Q Approximately what year did you meet

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1 Mr. Page?

2 A '72, '73.

3 Q 1972?

4 A 1972, 1973.

5 Q From 1972, during the time that Mr.  
6 Page owned the property, did you have occasion  
7 to go to the property at 8043 Idyllwood?

8 A Quite often.

9 Q Were you ever in the back yard?

10 A Quite often.

11 Q Okay. How often do you think you were  
12 there?

13 A It may have varied from year to year  
14 over several years as a consequence of several  
15 factors. One, Mr. Page --

16 Q If you can just give me the estimation  
17 of an average over the years?

18 A I'd say maybe two to three times a  
19 week.

20 Q Over -- from 1972 --

21 A From '72 to '75, yes, in that time  
22 frame.

23 Q From 1972 to '75?

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1 A Yes, ma'am.

2 -- Q Did you continue going to the property  
3 after 1975?

4 A Yes, but far less frequently.

5 Q Okay. But you went to the back yard of  
6 Mr. --

7 A Yes, ma'am.

8 Q Okay. Did you have an occasion to have  
9 a garden in Mr. Page's back yard?

10 A Yes, ma'am, that's what I was earlier  
11 attempting to explain. I was there quite  
12 frequently as a consequence of having a garden  
13 in that back yard. Two to three times a week I  
14 was there. I only had that garden for several  
15 years, however.

16 Q I'm sorry?

17 A I only had the garden for several  
18 years, '72 to '75, I believe, in that time  
19 frame.

20 Q Did you have permission from Mr. Page  
21 to plant the garden there?

22 A Yes, I did.

23 Q I'm going to show you a plat,

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1 Defendant's Exhibit 1. I want you to take a  
2 look at it just to give you some benchmarks.  
3 I'm going to ask you some questions about it, so  
4 you can hold it there in front of you. Does --  
5 This is a plat at 8043 Idyllwood; does it fairly  
6 represent your remembrance of the lot at that  
7 time?

8 A Yes, ma'am, it does.

9 Q Were the wood piles there then?

10 A Yes, ma'am, they were.

11 Q The wood piles along the back property  
12 line?

13 A Yes, ma'am.

14 THE COURT: Now, what period of time  
15 are you referring to, Mr. Hicks?

16 THE WITNESS: '72 to '75 is when I had  
17 the garden.

18 THE COURT: All right.

19 THE WITNESS: From '72, which is when -  
20 - '71, '72 time frame, when I moved in the  
21 neighborhood, I have frequented that area.  
22 There's a wooded lot behind there that I  
23 frequent and still do to this day. But to go to

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1 the actual home site, when Mr. Page moved, I  
2 didn't have occasion to go on that particular  
3 property or in the home at all.

4 BY MS. HERBERT-KELLER:

5 Q You see a line on the right side of the  
6 plat near where it says, "Vacated Beech Street,"  
7 the line along the side of what looks like the  
8 property line that has got Xs on it?

9 A Yes, ma'am.

10 Q Do you remember a chain link fence  
11 being located there during your visit?

12 A Yes, ma'am.

13 Q During your visits to the property, do  
14 you remember the grass going past the chain link  
15 fence?

16 A Yes, ma'am.

17 Q So there's an area, there's a line  
18 about three-quarters of the way back on that  
19 survey, do you see that, where there's a circle  
20 with an M.H. on it, a line going straight  
21 through the plat?

22 A Oh, yes, ma'am, I'm sorry; yes, I do.

23 Q And then there's a little circle in the

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1 middle and it says "M.H." on it?

2 A Yes, I do.

3 Q Okay. You see the area behind that?

4 A I certainly do.

5 Q Okay. Would you say that the line goes  
6 right to where the fence on the right side of  
7 the property ended, the chain link fence?

8 THE COURT: Well, this witness cannot  
9 interpret this exhibit.

10 MS. HERBERT-KELLER: Your Honor, what  
11 I'm trying to do is give him a benchmark to try  
12 to establish that past the chain link fence what  
13 was there --

14 THE COURT: Well, you can ask him about  
15 what he observed. But I don't really think you  
16 can ask him to interpret this exhibit.

17 MS. HERBERT-KELLER: Okay.

18 BY MS. HERBERT-KELLER:

19 Q Mr. Hicks, there was a chain link fence  
20 to the right, on the neighbor's property to the  
21 right --

22 A Yes, ma'am.

23 Q -- correct, at the time that you were

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1 there?

2 A Yes, ma'am.

3 Q And you were familiar with Mr. Page's  
4 back yard at that time?

5 A Certainly.

6 Q Okay. Do you remember there being  
7 grass in a portion of Mr. Page's back yard past  
8 the end of that fence, that chain link fence?

9 A Yes, ma'am.

10 Q Was it maintained as a part of Mr.  
11 Page's yard?

12 A As a lawn, yes.

13 Q Okay. Was there a difference between -  
14 - was there any delineating markers at the end -  
15 - at the back lot line of the fence -- of the  
16 grass in Mr. Page's yard?

17 A The lot line as depicted by this --

18 THE COURT: Well --

19 BY MS. HERBERT-KELLER:

20 Q Don't worry about the survey, just from  
21 your own recollection, when you were looking at  
22 the back yard and you saw the grass, what was  
23 behind the grass?

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1 A The wood line.

2 Q I'm sorry?

3 A The wood line.

4 Q When you say, "wood line," do you  
5 mean --

6 A The line of trees where the --

7 Q Lines of trees. When you say, "woods,"  
8 you mean trees --

9 A Yes --

10 Q -- woods, as in trees?

11 A -- unimproved property.

12 Q Okay. Did you have occasion -- you  
13 said you had occasion to have a garden?

14 A Yes.

15 Q And how long did you maintain that  
16 garden there?

17 A Several years.

18 Q Approximately what years?

19 A '72 --

20 THE COURT: I think he said '72 to '75.

21 MS. HERBERT-KELLER: Okay.

22 BY MS. HERBERT-KELLER:

23 Q You did that with Mr. Page's

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1 permission?

2 A Yes.

3 Q Okay. Now, recalling the property as  
4 you're doing for me, you have got the chain link  
5 fence that ends on the next door neighbor's lawn  
6 to the right?

7 A Yes.

8 Q And you're saying that Mr. Page had  
9 grass beyond that?

10 A Yes, ma'am.

11 Q Where in relation to that was your  
12 garden located?

13 A The garden started approximately even  
14 with the side of the house and extended all the  
15 way to the wood line.

16 Q To the woods?

17 A Yes, ma'am.

18 Q Okay. So it was back in the area at  
19 the end of Mr. Page's yard where the grass was  
20 before you got to the woods --

21 A Yes.

22 Q -- is that correct?

23 A Correct.

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1 Q Okay. Did you use that with -- Did Mr.  
2 Page represent that that was his property to you  
3 when you used that?

4 A He certainly did.

5 Q And have you had occasion to walk  
6 through the woods since you had the garden  
7 there?

8 A Yes, I did.

9 Q And, by that, I mean the woods that are  
10 behind Mr. Page's property?

11 A Yes, I do.

12 Q How often do you walk through there?

13 A Probably once every two to three weeks.

14 Q For how long, how many years?

15 A Since '71.

16 Q Consistently since 1971 --

17 A Yes.

18 Q -- you have walked through those woods?.

19 A Yes.

20 Q Have you noticed 8043 Idyllwood, Mr.  
21 Page's old home, now Ms. Hollander's home,  
22 during your walks?

23 A Have I noticed it?

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1 Q Yes.

2 A Certainly.

3 Q Have you ever noticed any change in the  
4 grassy area and where the grass ended in the  
5 back of Mr. Page's lawn?

6 A No, there has not been, to my  
7 knowledge, any.

8 Q Never a change?

9 A Never a change.

10 MS. HERBERT-KELLER: Nothing further,  
11 your Honor.

12 THE COURT: All right. Cross examine.

13 MR. MOON: Nothing, Your Honor.

14 THE COURT: All right. May this  
15 witness be excused?

16 MS. HERBERT-KELLER: Yes, Your Honor.

17 THE COURT: All right. Sir, you may  
18 step down. You're free to go or stay as you  
19 wish.

20 MS. HERBERT-KELLER: Your Honor, I have  
21 no further witnesses. I would like to move the  
22 deed into -- an exhibit, I'm sorry, for the  
23 admission of a deed. It's a deed in 1980. It's

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1 a copy from the Fairfax County land records.  
2 It's shown, I believe you have it as Exhibit 3.

3 THE COURT: All right. Is there any  
4 objection?

5 MR. MOON: No, Your Honor.

6 THE COURT: All right. It will be  
7 received.

8 (The item previously marked for  
9 identification as Defendant's  
10 Exhibit No. 3 was received  
11 in evidence.)

12 MS. HERBERT-KELLER: Your Honor, there  
13 is nothing further.

14 THE COURT: All right. You did not  
15 move the admission of Exhibit 1?

16 MS. HERBERT-KELLER: Your Honor, I  
17 believe I moved the admission of Exhibit 1.

18 THE COURT: No, you didn't. But would  
19 you like to do that now?

20 MS. HERBERT-KELLER: I would like to do  
21 that.

22 THE COURT: All right. Is there any  
23 objection?

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1 MS. HERBERT-KELLER: Exhibit 1 is the  
2 plat.

3 MR. MOON: I guess I'm repeating my  
4 same argument previously, that, in order for  
5 this exhibit to be admitted into evidence, the  
6 surveyor would have to testify.

7 THE COURT: All right. Ms. Herbert-  
8 Keller, what are you offering it to show?

9 MS. HERBERT-KELLER: Your Honor, we're  
10 offering it to show representation of where the  
11 wood piles are located on the property and to  
12 show this was a deed that she received at  
13 settlement which shows what she was informed at  
14 settlement of where the wood piles were located  
15 on the property.

16 THE COURT: Well, except the exhibit on  
17 its face says that it was revised 10-3-96 to add  
18 the wood pile. So I don't see how it could be  
19 the one that she received at the time of  
20 settlement.

21 MS. HERBERT-KELLER: That it has been  
22 revised?

23 THE COURT: Well, I don't think there

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1 has been a foundation laid for the exhibit. I  
2 sustain the objection.

3 MS. HERBERT-KELLER: Your Honor, can I  
4 recall Ms. Hollander then, please?

5 THE COURT: Any objection?

6 MR. MOON: I don't know how --

7 MS. HERBERT-KELLER: I'll have Ms.  
8 Hollander testify that this deed is an accurate  
9 depiction of the one she received at settlement.

10 THE COURT: Well, even if she were to  
11 say that, I'm not sure what the significance of  
12 the testimony would be given the fact that it  
13 has already been indicated this wasn't the one  
14 she received at settlement and she said that it  
15 was. But the wood piles apparently weren't  
16 indicated on the survey that she received at  
17 settlement. At least that's what this document  
18 would suggest. So what is it that you want her  
19 to say?

20 MS. HERBERT-KELLER: I would want her  
21 to now testify that the wood piles were shown on  
22 the deed, the plat that she received, that this  
23 barrier represents the area that was shown on

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1 the plat she received at settlement, either as a  
2 fence or as wood piles.

3 THE COURT: Well, over objection I'll  
4 allow you to recall her. I'm still not clear as  
5 to what it is you're going to have her  
6 establish. But I'll give you the opportunity to  
7 do that.

8 Whereupon,

9 CAROLYN HOLLANDER

10 the Defendant, was recalled for examination by  
11 counsel in her own behalf, and, after having  
12 been first previously duly sworn by the Clerk of  
13 the Court, was examined and testified as  
14 follows:

15 DIRECT EXAMINATION

16 BY MS. HERBERT-KELLER:

17 Q You're still under oath. Would you  
18 take a look at this. When you settled what  
19 title company did you use to settle?

20 A Rice Associates.

21 Q No, what title company?

22 A Oh, RGB; RGB I believe is the title of  
23 the company.

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1 Q Did you receive a survey at the time of  
2 settlement?

3 A Yes, I did.

4 Q Do you remember whether that survey was  
5 prepared by Rice Associates?

6 A It was.

7 Q It was?

8 A Yes, it was.

9 Q Okay. Looking at this plat, you see a  
10 location on the back which shows a wood pile?

11 A Yes.

12 Q Do you remember at the time of  
13 settlement, when you received a plat, that there  
14 was an area shown behind that line three-  
15 quarters of the way out? Do you see this line -  
16 -

17 A Yes.

18 Q -- three-quarters of the way out drawn  
19 through the little circle that shows M.H. on it?

20 A Yes.

21 Q Do you remember at the time of  
22 settlement, for the plat that you received, that  
23 there was another line above that area marked?

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1           A     There was, yes. It was a line with Xs.  
2 It didn't have the words "wood pile" on it.

3           Q     But it was located here approximately  
4 where these wood piles are?

5           A     It was on the exact same dimension,  
6 yes.

7           Q     Okay. Nothing further, Your Honor.

8           THE COURT: Cross examine.

9           MR. MOON: No, Your Honor.

10          THE COURT: All right. You may step  
11 down. Well, the witness has testified about  
12 what she looked at at the settlement. And I  
13 think that's sufficient. I don't think her  
14 testimony is a proper foundation for Exhibit 1.  
15 So I sustain the objection. Does the Defendant  
16 have any further evidence?

17          MS. HERBERT-KELLER: No, Your Honor, we  
18 rest.

19          THE COURT: All right. Any rebuttal?

20          MR. MOON: No, Your Honor.

21          THE COURT: All right. Why don't we  
22 take a ten-minute recess and then have closing  
23 arguments.

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1 MS. HERBERT-KELLER: Thank you, Your  
2 Honor.

3 (Brief recess.)

4 THE COURT: All right. Mr. Moon, go  
5 ahead.

6 MR. MOON: Thank you, Your Honor. I  
7 remember learning adverse possession in my first  
8 year at law school. And I didn't know that I  
9 was ever going to actually have a case dealing  
10 with adverse possession, especially up in the  
11 Northern Virginia area. But that's what we have  
12 this morning, Your Honor.

13 I did some research on adverse  
14 possession. And there are several elements  
15 which the Defendant in this case has to prove.  
16 Among them are actual, hostile, exclusive,  
17 visible, continuous possession under a claim of  
18 right or title for a statutory period. The  
19 statutory period in this case is fifteen years,  
20 Your Honor.

21 Defendant admits that the Plaintiff's  
22 counsel sent a letter on October 16, 1995, which  
23 is in evidence, admitted into evidence in this

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1 case, that church demanded Defendant to remove  
2 everything in the disputed area. So Defendant  
3 has to prove, at least for a fifteen-year period  
4 going back from October 16, 1995, at least for  
5 fifteen years going back from that date, that  
6 she has met all those elements by clear and  
7 convincing evidence.

8 The requirement of the proof to be  
9 clear and convincing evidence is from many  
10 different cases. But I want to give one  
11 citation, Your Honor. It's Calhoun versus  
12 Woods, C A L H O U N, versus Woods, 246 VA 41.  
13 That's a 1993 case, Your Honor. And the record  
14 owner of the property, in this case the  
15 Plaintiff, enjoys all the presumptions in their  
16 favor as a record owner of legal title. And  
17 I'll give you another citation, Your Honor.  
18 It's Matthews versus W.T. Freeman Company. It's  
19 191 VA 385. That's a 1950 case which states  
20 that all the presumptions were in favor of the  
21 holder of the legal title.

22 The Defendant's first witness, Mr.  
23 Stephens, became the owner of the property in

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1 July of 1981. With Mr. Stephens, Mr. Caron and  
2 Ms. Hollander, Defendant tried to prove all  
3 those elements from July 1981 up until this  
4 point. But they need to go back -- at least  
5 back to October 16th, 1980, Your Honor. There  
6 was no proof, no evidence whatsoever that, from  
7 October 1980 up until July 1981, that someone  
8 claimed adverse possession of that disputed  
9 area. There is no evidence whatsoever, Your  
10 Honor, not even talking about by clear and  
11 convincing evidence, not a single piece of  
12 evidence came in.

13 And then Defendant produced Mr. Hicks,  
14 maybe trying to prove even before October 1980  
15 someone tried to claim adverse possession of  
16 that particular piece of property. But his  
17 testimony indicated that he didn't visit at the  
18 property since 1975.

19 THE COURT: No, I think he said he had  
20 been there even recently.

21 MR. MOON: But not to the property,  
22 Your Honor. He was walking back in the woods.  
23 And he said, between 1972 and 1975 -- I'm sorry,

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1 I take that back, Your Honor -- between 1972 and  
2 '75 he made a visit to the property about two or  
3 three times a week, but never after Mr. Page  
4 sold the property. And the deed, one of the  
5 deeds you have shows that Mr. Page sold the  
6 property to Philadelphia Management in April of  
7 1980. But, during the period of Philadelphia  
8 Management's ownership of the property, there is  
9 no evidence whatsoever, Your Honor, showing any  
10 intent on the part of Philadelphia Management,  
11 Inc. to hold the disputed property under adverse  
12 possession, Your Honor.

13           Going back to Mr. Hicks' testimony,  
14 Your Honor, I'm sure you realize that there was  
15 obvious conflict between what he said and what  
16 the other witness said, which was the very first  
17 witness. Mr. Stephens stated that, when he  
18 purchased the property in '81, there were no  
19 wood piles in the back yard. And he built -- he  
20 set up a wooden fence. Somehow Mr. Hicks stated  
21 that back in 1971, even back in 1971 there were  
22 wood piles. It's, you know, an obvious  
23 conflict. And that sheds on the credibility of

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1 this witness' testimony, Your Honor.

2 In an area like up in Northern  
3 Virginia, especially when you own a house right  
4 next to a property which is basically  
5 undeveloped, which is full of trees, the only --  
6 only because you have some wood piles in your  
7 back yard beyond your property boundary does not  
8 mean -- does not give enough notice to the  
9 property owner that you are, in fact, claiming  
10 the ownership of that property beyond your  
11 boundary.

12 And this Plaintiff testified that  
13 Plaintiff thought of using, thought of building  
14 a church on this property, but that plan never  
15 materialized for some reason. And it was  
16 undeveloped with just trees, with no physical  
17 improvements ever made on the piece of property.  
18 And it's a common thing to see the people just  
19 leaving other people to enjoy for the time being  
20 their extended back yard. That happens every  
21 day up in Northern Virginia.

22 And I submit that, as I stated, first  
23 of all, the Defendant simply failed to prove all

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1 the requisite elements of adverse possession for  
2 a fifteen-year-period. There is no evidence  
3 whatsoever going back to October 1980, the  
4 period between October 1980 and July 1981, Your  
5 Honor. And the evidence they have presented  
6 thus far is not clear and convincing enough to  
7 meet all the requisite requirements.

8 THE COURT: All right. Thank you, Mr.  
9 Moon. Ms. Herbert-Keller.

10 MS. HERBERT-KELLER: Your Honor,  
11 adverse possession is a complete and total  
12 defense to an action for ejectment. The only  
13 issue is whether or not Ms. Hollander and her  
14 predecessors chronologically possessed the  
15 property for the requisite fifteen years prior  
16 to the time that the Plaintiff brought his  
17 action for a ejectment. So the correct time  
18 period that we have got to prove that this  
19 property was adversely possessed -- And I have  
20 no problem agreeing that I have the burden to  
21 prove that -- is from December, when he filed  
22 this action, to December in 1980. And I think  
23 there is more than clear and convincing evidence

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1 that this property has met -- the possession of  
2 this property has met the elements for a claim  
3 of adverse possession.

4 We have to prove that the possession  
5 was open and notorious, that the acts were of  
6 such notoriety that the true owner would be on  
7 notice that his property is being used or at  
8 least be presumed to know of the adverse claim  
9 to have actual possession. And that can be  
10 evidenced by cultivation, by mowing, by  
11 maintenance, by an enclosure such as a fence,  
12 something that is plainly visible, so that  
13 they're on that notice. It has got to be  
14 hostile. They have got to intend to use the  
15 property and claim the property as their own.  
16 And it has got to be continuous for the period  
17 of fifteen years.

18 THE COURT: But doesn't that hostility  
19 mean they have to intend to dis-ease the true  
20 owner?

21 MS. HERBERT-KELLER: Your Honor, I  
22 believe it means they have to intend to use the  
23 property, not to -- it has to be hostile to the

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1 other person's interest and to intend to use it.  
2 But I don't think it's a specific intent that  
3 they intend to dis-ease another owner from the  
4 property. We have brought in four witnesses to  
5 testify. Three of those witnesses have  
6 testified to the possession of the property, to  
7 the use of the property during their ownership,  
8 which was from 1981 until the present time.

9 Now, I agree that we have got to prove  
10 possession and use of the property before 1981,  
11 from December of 1980, to complete the requisite  
12 time period. And that was a period when  
13 Philadelphia Management owned the property. And  
14 I believe that we have clearly done that, as  
15 well. Not only has Mr. Hicks testified that  
16 prior to Philadelphia Management taking  
17 possession of the property and owning it Mr.  
18 Page used that and maintained that as a yard,  
19 but Mr. Stephens testified that, prior to  
20 purchasing the property in July, they began  
21 looking at the property in December, they  
22 actually made an offer in December of 1980, and  
23 that while he was viewing the property it was

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1 clearly delineated back past the property line  
2 and into the woods. Not only did he see it and  
3 testify to that, but he testified his  
4 understanding that it was his property came from  
5 a representative of Philadelphia Management  
6 telling him that he needed to use that property,  
7 that that was a part of the property. I believe  
8 he testified to that.

9 Mr. Stephens also testified that he  
10 occupied it continuously, that he did it under a  
11 claim of right, that every day that he owned  
12 that property he intended to use it and intended  
13 it to be his property. It was clearly  
14 notorious. There was clear delineation not only  
15 by the fence that was eventually built, in 1981,  
16 but by the difference in the yard.

17 Every one of the witnesses has  
18 testified that there was grass up into the areas  
19 shown by the wood piles. On the other side of  
20 the wood piles there was nothing but woods. Mr.  
21 Stephens clearly testified to that. Mr. Caron  
22 bought the property in 1987. The fence was  
23 still standing at that time. He testified that,

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1 as the fence deteriorated, he put wood piles  
2 there, consistently maintained the grass. There  
3 was always a clear delineation. And I think  
4 Carolyn represented that, as well.

5 Now, Mr. Hicks, Mr. Moon assailed his  
6 credibility because of the issue of the wood. I  
7 think Mr. Hicks clarified that later, by  
8 stating, when I helped him, that he meant woods  
9 as in the woods, as opposed to wood piles,  
10 because we will stipulate the wood piles were  
11 not there at that time. But I think Mr. Hicks  
12 clearly clarified that for us that he did not  
13 mean wood piles. And I have got to disagree.  
14 Mr. Hicks testified that he walks in those woods  
15 two to three times a week up until today, that  
16 he has consistently done that, that he didn't  
17 just go over there during 1972 to 1975. He  
18 planted a garden there between 1972 and 1975.  
19 But he has consistently weekly walked through  
20 those woods. And he further testified that he  
21 has noticed, he has looked at Ms. Hollander's  
22 back yard, or Mr. Caron's back yard or Mr.  
23 Stephens' back yard, throughout all this time

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1 and has never once seen any change.

2 And so when you look at the fact that  
3 this was used and occupied prior to the fifteen-  
4 year statutory period, it's a natural conclusion  
5 that during the seven or eight months that  
6 Philadelphia Management owned the property they  
7 continued to use it. And Mr. Stephens has  
8 testified to that as well, by saying that from  
9 the time he started looking at the property it  
10 was always maintained, during the period of  
11 December, and also that they intended to use it,  
12 because they told him, at the time he was  
13 purchasing the property, that he needed to use  
14 that because it had been used as the property  
15 and that it was a part of the property.

16 Now, everyone has testified that the  
17 church has taken no steps to claim any ownership  
18 up until the October letter. They have never  
19 once come out there and asked them to remove the  
20 fence or the wood piles from the property. They  
21 have never once come out there and even  
22 discussed it. And I think that the church  
23 trustee himself bolsters that, because he says

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1 he has only been out there four, five, maybe ten  
2 times in the last twelve years that he has been  
3 responsible for the maintenance of the property.  
4 And he clearly has been negligent -- the church  
5 has been negligent in trying to do anything  
6 about maintaining their property and possessing  
7 this property.

8 And that's really what the law of  
9 adverse possession goes to. I mean, it's there  
10 to protect the true owner. And by that I mean  
11 the one that has been in the property for more  
12 than fifteen years. And it creates a  
13 presumption, the statutory period creates a  
14 presumption that the owner was negligent in the  
15 enforcement of his rights. And he hasn't gone  
16 out there and done anything prior to the fifteen  
17 years. And he should not be allowed to now come  
18 in and oust the true owner, the one who has been  
19 possessing it and maintaining it and valuing the  
20 property for fifteen years, he should not oust  
21 him, rather, the law should protect that true  
22 owner and his quiet enjoyment of the property.

23 I believe we clearly have all the

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1 elements for adverse possession. Every one of  
2 these witnesses has testified that they have  
3 held it with the intent to use it, openly,  
4 hostilely, continuously. They all considered it  
5 their yard. They have all used it. And they  
6 have done that continuously.

7 THE COURT: Are there any particular  
8 authorities that you're relying on, case  
9 citations that you're relying on or that you  
10 want to direct my attention to?

11 MS. HERBERT-KELLER: Your Honor, the  
12 only one that I would like to draw your  
13 attention to -- It will take me a minute to find  
14 it -- is the one on intent. And I do have some  
15 of those.

16 THE COURT: All right. Well, while  
17 you're looking for that, Mr. Moon, do you have  
18 any rebuttal?

19 MR. MOON: Yes, just one point, Your  
20 Honor. My understanding of the law is that you  
21 are correct, that you need to show intent to  
22 dis-ease. It's not just an intent to use. It's  
23 intent to dis-ease, deprive the ownership of the

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1 true owner of a particular piece of property  
2 before you can claim of adverse possession. At  
3 least there was no showing whatsoever from  
4 Philadelphia Management that Philadelphia  
5 Management intended to dis-ease the true owner  
6 of the ownership, Your Honor.

7 THE COURT: All right.

8 MR. MOON: If I may, Your Honor, I have  
9 many citations which I can give to you.  
10 However, I have not been able to find any case  
11 exactly right on point, exactly the same  
12 situation. Other cases involve much larger lots  
13 under dispute and et cetera.

14 THE COURT: All right.

15 MS. HERBERT-KELLER: Your Honor, I  
16 believe 171 VA 170, which is Marion Investment  
17 Company v. Virginia Lincoln Furniture Company,  
18 goes to the issue of intent of claiming a right  
19 to the ownership and that your intention is to  
20 use it exclusively irrespective of whether or  
21 not you know that you own that property. I  
22 still have an issue of -- I believe they all  
23 clearly knew that there was a dispute or a

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1 problem, but --

2 THE COURT: That's not really what the  
3 testimony was. They all testified that they  
4 believed that was part of their property. In  
5 fact, Ms. Hollander very explicitly said that  
6 she considered that portion was hers, she was  
7 told that it was hers, she understood that all  
8 along it belonged to her.

9 MS. HERBERT-KELLER: Another one is 108  
10 VA 86.

11 THE COURT: 108 VA 86?

12 MS. HERBERT-KELLER: Right.

13 THE COURT: All right. All right. I'm  
14 going to take a recess. It will probably be  
15 about thirty minutes if you all want to go to  
16 the cafeteria or something; all right?

17 (A recess was taken at this time.)

18 THE COURT: All right. Counsel, I have  
19 considered all of the exhibits which were  
20 admitted during the trial of this case as well  
21 as your arguments and the authorities that were  
22 cited to me. And I have had a chance to review  
23 those authorities. Now, in a case for adverse

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1 possession, as this one is, the burden is on the  
2 claimant to show by clear and convincing  
3 evidence that the holding is actual, hostile,  
4 visible, exclusive and that the claimant is in  
5 continuous possession under a claim of right for  
6 the statutory period of fifteen years. And the  
7 presumptions in a case of this sort are in favor  
8 of the holder of the legal title.

9         While the evidence in this case clearly  
10 showed that the owners of the property on  
11 Idylwood, for a period of at least fifteen years  
12 and perhaps longer, mowed and maintained, I  
13 guess, a piece of property that actually belongs  
14 to the World Mission Church of Washington, D.C.,  
15 I think there's an essential element of adverse  
16 possession missing from this case. The crux of  
17 an adverse possession case is the intent of the  
18 claimant to oust the true owner of the title of  
19 the property. That's what adverse is all about.  
20 And in this case the evidence was uniformly that  
21 each of the owners of the property, the claimant  
22 property, believed that the property which is  
23 the subject of this lawsuit was owned by them.

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1           For instance, Mr. Stephens said that he  
2           and his wife, or whoever he bought the property  
3           with -- he said, we assumed this area was part  
4           of our lot. He equivocated a little bit about  
5           whether he heard any rumors about whether it  
6           really was owned by someone else. But he said,  
7           no, he believed that the property was owned by  
8           them. Later, Mr. Coron was even more emphatic.  
9           He testified that he understood the property was  
10          his; he was not aware of any dispute over it.

11           But, most significantly, Ms. Hollander  
12          testified unequivocally that she considered that  
13          portion of land to be hers. She said she was  
14          told it was hers. And she testified that she  
15          understood all along that it belonged to her.  
16          And I think that evidence is overwhelming that  
17          there was no intent of the claimant in this case  
18          to oust the true owner of the title of the  
19          property.

20           The law in Virginia has been well-  
21          settled for many years, as far as I can tell,  
22          that when the occupation of a piece of land is  
23          by mistake or misapprehension as to the

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1 boundaries, with no intention of a claimant to  
2 claim as his own that which does not belong to  
3 him, then the possession is not adverse. And  
4 such an intention is an indispensable element of  
5 an adverse possession claim. And I find that  
6 authority in Clinchfield Cole versus Veers at  
7 111 VA 261 and in the case of Stewart versus  
8 Meade, 119 VA 753. So, for those reasons, I  
9 conclude that the claimant in this case has  
10 failed to show by clear and convincing evidence  
11 the necessary elements for a claim of adverse  
12 possession. So my finding in this case is in  
13 favor of the Plaintiff.

14 Mr. Moon, do you have an order today?

15 MR. MOON: Yes, I have the order.

16 MS. HERBERT-KELLER: Your Honor, I  
17 would ask that you stay execution of that order  
18 for twenty-one days for post --

19 THE COURT: All right. I think we have  
20 a suspending order here if that isn't included  
21 in your order, Mr. Moon. I'll suspend it for  
22 twenty-one days. That will be a total of thirty  
23 -- excuse me, for fourteen days. So that will

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Washington, D.C. 20006  
(202) 783-0116

1 be a total of thirty-five days. And if there  
2 are any post-trial motions filed in this case,  
3 you need to be sure that you set them on my  
4 docket. And it would be helpful if you could  
5 send copies of any briefs that you file to my  
6 chambers, so that I can have a chance to take a  
7 look at them.

8 (Discussion held off the record.)

9 THE COURT: All right. Well, I guess  
10 we don't have any suspending orders here. But I  
11 tell you, what I'll do is enter one today; all  
12 right? So we'll suspend the finality of this  
13 order for a period -- an additional period of  
14 fourteen days; all right?

15 MR. MOON: Thank you, Your Honor

16 MS. HERBERT-KELLER: Thank you, Your  
17 Honor.

18 THE COURT: Thank you all for appearing  
19 today. All right. Court's in recess.

20 (Whereupon, at approximately 12:45  
21 o'clock, p.m., the hearing in the above matter  
22 was concluded.)  
23

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WORLD MISSION CHURCH OF  
WASHINGTON, D.C.,

Plaintiff

v.

CAROLYN HOLLANDER,

Defendant

LAW NO. 147562

ORDER

THIS CAUSE CAME UPON TO BE HEARD by Plaintiff's Motion to Exclude Witnesses and Documents, Defendant's Brief in Opposition of Plaintiff's Motion, and upon consideration of argument of counsel, and it appearing proper to do so, it is hereby

ORDERED that the Plaintiff's Motion to Exclude Witnesses and Documents, is hereby denied.

ENTERED this 30 day of December, 1996.

  
JUDGE

WE ASK FOR THIS:

ROSENFELD AND SHEARER, P.C.

BY:

  
Shanna A. Herbert-Keller

Counsel for Defendant

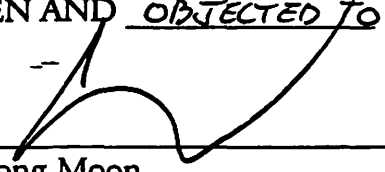
10521 Judicial Drive, Suite 100

Fairfax, Virginia 22030

(703) 591-2225

VSF No. 37233

SEEN AND OBJECTED TO:

  
Ilryong Moon  
MOON PARK AND ASSOCIATES  
Counsel for the Plaintiff  
7611 Little River Turnpike, Suite 404  
Annandale, Virginia 22003  
(703) 941-7395  
VSB No. 24086

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

The World Mission Church of )  
-Washington, D.C., )

Plaintiff )

v. )

At Law No. 147~~52~~  
56

Carolyn Hollander, )

Defendant )

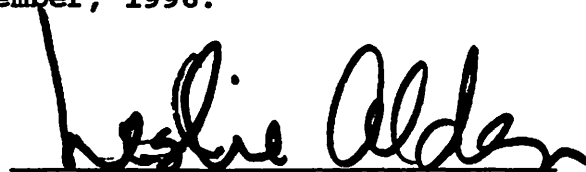
FINAL ORDER

This case came upon the Plaintiff's Motion for Ejectment to eject the Defendant from the Plaintiff's property, the legal description of which is attached hereto as "Exhibit A", hereinafter referred to as the "Property". The Defendant has claimed, as her defense, that she has acquired a part of the Plaintiff's Property by adverse possession.

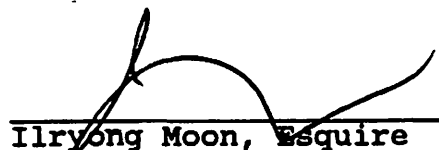
Having considered all of evidence presented and arguments advanced by the parties, it is the judgment of this Court that the Plaintiff is the owner of the Property and the Defendant's claim of adverse possession of a part of the Property lacks merits.

IT IS, THEREFORE, ADJUDGED, ORDERED AND DECREED that the Defendant be, and she hereby is, ejected from the Plaintiff's Property.

Entered this 30th day of December, 1996.

  
Judge

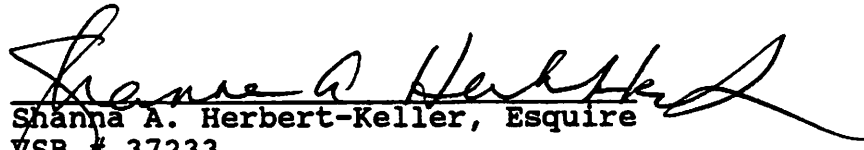
I ASK FOR THIS:



---

Ilryong Moon, Esquire  
VSB # 24086  
7611 Little River Turnpike  
Suite 404  
Annandale, Virginia 22003  
(703)941-7395  
Counsel for Plaintiff

SEEN AND OBJECTED TO:



---

Shanna A. Herbert-Keller, Esquire  
VSB # 37233  
10521 Judicial Drive  
Suite 100  
Fairfax, Virginia 22030  
(703)591-2225  
Counsel for Defendant

actions\mission\12-30-96.od1

EXHIBIT A

Beginning at a point in the easterly right-of-way line of Gallows Road (State Route 650), point of beginning being a point on former centerline of Beech Street (now vacated); thence departing the easterly right-of-way line of Gallows Road and running with the former centerline of Beech Street S. 71 degrees 19 minutes 00 second E. 334.25 feet to a point; thence departing the former centerline of Beech Street with a line common in part to the remaining portion of Beech Street and in part to the land of Frank R. Taylor et al. S. 18 degrees 41 minutes 00 seconds W. 350.00 feet to a point in the northerly right-of-way line of North Parkl Street N. 71 degrees 19 minutes 00 seconds W. 175.49 feet to a point in the easterly right-of-way line of Gallows Road; thence with the easterly right-of-way line of Gallows Road N. 05 degrees 34 minutes 00 seconds W. 350.97 feet to a point N. 71 degrees 19 minutes 00 seconds W. 1.10 feet to a point and N. 05 degrees 34 minutes 00 seconds W. 32.90 feet to the point and place of beginning containing 89,046 square feet or 2.0442 acres of land.

BEING the same property as shown on the plat by Alexandria Surveys, Inc. dated December 11, 1980 attached to Deed recorded in Deed Book 5511 at page 1377.

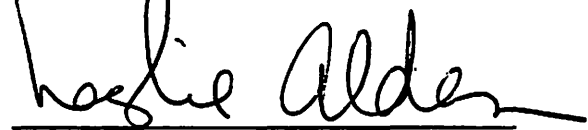
LESS AND EXCEPT that portion of the above described parcel containing approximately 2,614 square feet conveyed to the Commonwealth of Virginia by Deed dated September 21, 1979 and recorded April 23, 1980 in Deed Book 5424 at page 1060, among the aforesaid land records.



SUSPENDING ORDER

It is ORDERED that the Final Order be suspended for fourteen (14) days from this date so that the parties may submit an agreed Amended Final Order, if they should desire. This tolls the running of the twenty-one (21) day provision in Rule 1:1, thus allowing a total of thirty-five (35) days for entry of an Amended Final Order.

Entered this 30<sup>th</sup> day of December, 1996.



JUDGE LESLIE M. ALDEN

Rule 1:13  
Counsel for Plaintiff(s)

RULE 1:13  
Counsel for Defendant(s)

1-21-97

**FILED**

**JAN 21 1997**

**JOHN P. FREY**  
Clerk of the Circuit Court  
of Fairfax County, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WORLD MISSION CHURCH OF  
WASHINGTON, D.C.,

Plaintiff,

v.

CAROLYN HOLLANDER,

Defendant.

At Law Number 147562

**DEFENDANT'S MOTION TO VACATE JUDGMENT**  
**AND ENTER JUDGMENT IN FAVOR OF DEFENDANT,**  
**OR IN THE ALTERNATIVE, TO VACATE THE**  
**JUDGMENT AND ORDER A NEW TRIAL**

COMES NOW, the Defendant, Carolyn Hollander, by counsel, and moves this honorable court to vacate its judgment in this cause dated December 30, 1996 and enter judgment in favor of the defendant, or in the alternative, to set-aside the verdict and to grant a new trial on the grounds that the Court committed a mistake of law in its ruling, and that when considering the evidence in the light most favorable to plaintiff, the judgment rendered by the Court is plainly wrong and without evidence to support it. And in support of her motion, plaintiff hereby states:

1. The plaintiff initiated a lawsuit against the defendant in an attempt to eject defendant from a disputed portion of land that she possessed, but for which the plaintiff claimed title. A bench trial on this matter was heard before this Court on December 30, 1996. The Defendant claimed adverse possession to a small portion of her backyard that extended into the plaintiff's property; this extension of land had been held as part and parcel of the property, by its successive owners, in excess of the statutorily required fifteen year period. The original transcript of the December 30, 1996

hearing has been filed with the Court simultaneously with the filing of this Motion, and is incorporated fully herein.

2. After receiving and hearing evidence, the Court rendered its decision in favor of the plaintiff in its claim for ejectment, and against the defendant in her claim of adverse possession. Specifically, while the Court found that the defendant had shown actual, hostile, visible, exclusive and continuous possession of the disputed property for fifteen years, it appears from the record that this Court found that the defendant had not proven claim of right to the disputed property; that is, that the defendant failed to show, through the testimony of the successive owners, an "intent of the claimant to oust the true owner of the title of the property." (Tr. Trans., Pg. 109). This Court ruled that since each successive owner "believed that the property which is the subject of this lawsuit was owned by them," their respective possession of the disputed property was not adverse. (Tr. Trans., Pg. 109).

3. Furthermore, this Court cited two cases that formed the basis of the Court's understanding of the requirements of adverse possession. Specifically, the Court stated:

"The law in Virginia has been well settled for many years, as far as I can tell, that when the occupation of a piece of land is by mistake or misapprehension as to the boundaries, with no intention of a claimant to claim as his own that which does not belong to him, then the possession is not adverse. And such an intention is an indispensable element of an adverse possession claim. And I find that authority in Clinchfield Co[al] versus V[iers] at 111 VA 261, and in the case of Stewart versus Meade, 119 VA 753." (Tr. Trans., P. 110-111).

4. The defendant respectfully submits that the Court committed reversible error when it applied the holdings of Clinchfield Coal v. Viers, 111 Va. 261 (1910), and Stewart v. Meade, 119 Va. 753 (1916) to the case at bar. Moreover, cases that have followed these cases have clearly limited the applicability and effect of the doctrine invoked by this Court in its December 30, 1996

ruling. When considering the evidence presented at trial under the proper requirements of Virginia's adverse possession doctrine, the evidence clearly shows that the defendant had proven her claim of adverse possession, and that judgment must be therefore entered in her favor.

### **ARGUMENT**

#### **A. The law of Adverse Possession is well settled in Virginia.**

5. Virginia's doctrine of adverse possession is not only established in the Virginia Code, but also has been well developed and refined through the years by her Courts. Adverse possession must be actual, hostile, open and notorious, accompanied by a bona fide claim of title against all other claimants, and it must continue for the statutory period. Creekmur v. Creekmur, 75 Va. 430 (1881); Radford Veneer v. Jones, 143 Va. 124 (1925); Walton v. Rosson, 216 Va. 732 (1976); and Grappo v. Blanks, 241 Va. 58 (1991). Use and occupation of property, evidenced by fencing the property, constitutes proof of actual possession. LaDue v. Currell, 201 Va. 200, 207, 110 S.E.2d 217, 222 (1959). One is in "hostile" possession if his possession is under a claim of right and adverse to the right of the true owner. Virginia Midland R. Co. v. Barbour, 97 Va. 118, 123 (1899). One's possession is "exclusive" when it is not in common with others. Providence F. Club v. Miller Co., 117 Va. 129, 132-33 (1915). Possession is "visible and notorious" when it is so obvious that the true owner may be presumed to know about it. Turpin v. Saunders, 73 Va. (32 Gratt.) 27, 34 (1879). Possession is "continuous" only if it exists without interruption for the statutory period. Hollingsworth v. Sherman, 81 Va. 668, 674 (1885). Finally, the person making the claim of adverse possession has the burden of proving all elements by clear and convincing evidence. Matthews v. W.T. Freeman Co., 191 Va. 385, 395 (1950).

6. In adverse possession, a party need not enter into possession under a deed or some other

form of writing. Marion Inv. Co v. Virginia Lincoln Furniture Corp., 171 Va. 170, 183 (1938). A party that assumes possession of property by a claim of right, takes that which he occupies, cultivates, encloses, or from which he otherwise excludes the owner. Hollingsworth v. Sherman, 81 Va. 668, 673 (1885). Claim of title is a mere assertion of ownership or right, without paper title. The possessor intends to appropriate and use the land as his own, to the exclusion of all others, irrespective of any semblance of title or legal right Marion Inv. Co. v. Virginia Lincoln Furniture Corp., at 182. A claim of right need not be expressed. It is sufficient that the acts of the party in possession indicate a claim of ownership. "The actual occupation, use and improvement of the premises, without payment of rent, recognition of another's title or disavowal on one's own title, raises a presumption that the possessor entered and is holding as the absolute owner." Id. at 182.

**B. The Clinchfield Coal and Stewart cases are not controlling when applied to the case at bar.**

7. It was plain error for this Court to apply the holdings of the Clinchfield Coal and the Stewart cases to the case at bar. Not only is the instant case easily distinguishable from both cases cited by the Court, but more importantly, the holdings of these cases have been severely limited by their progeny. In addition, more recent cases have held an opposing view of the Clinchfield Coal Court as it interprets the intent of the possessor in matters of adverse possession.

8. In Clinchfield Coal, the dispute arose over two parties' interpretation of their deeds, as their properties related to two boundary lines, named the "Fugae" and "Thornbury" lines, respectively. The Court determined these lines to be the same lines, and that since the party seeking possession of the disputed property only claimed his boundary to the Fugae line, he "had not

intention of claiming land that did not belong to him," and that because the disputed land was not "within the calls" of the deed of Viers, his claim of adverse possession failed. Id. at 264. The Clinchfield Coal court then held that when "the occupation of the land is by mere mistake, and with no intention on the part of the occupant to claim as his own land that which does not belong to him, but intends to claim only the true line, wherever it may be, the holding is not adverse, the intention to hold adversely being an indispensable element of adverse possession." Id. at 264. (Quoting Schaulbuch v. Dillemath, 60 S.E. 745).

9. The facts of the case at bar are dissimilar to those found in Clinchfield Coal. In Clinchfield Coal, the issue concerned the interpretation of two deeds as they related to the determination of the proper boundary lines; such is not the case here. The case at bar concerns a claimant's physical possession of land in excess of the true boundary line marked and delineated by survey and recited in the deed. It does not concern the establishing of proper survey lines, but rather falls into the more general requirements of adverse possession. As the Virginia Supreme Court stated when it distinguished its Clinchfield Coal holding in a subsequent case: "It [Clinchfield Coal] was not a case...in which the fact was that there was a specific intention proved to exist on the part of the possessor to claim title to **a definite line on the ground** in fact beyond the true line." Christian v. Bulbeck, 120 Va. 74, 107 (1916). The testimony elicited throughout the trial of the case at bar proved that each successive owner had a specific intent to claim title to a definite line on the ground (i.e., the log/fence line) that extended beyond the true line. Therefore, the evidence elicited at trial should have been interpreted by the Court under more recent adverse possession cases, and not under the limited rulings of Clinchfield Coal and Stuart. These more recent cases are discussed in more detail as they relate to the instant case in argument set out below.

10. The Court also cited Stuart v. Meade, 119 Va. 753 (1916) in support of its ruling against the defendant. However, upon closer inspection, it is clear that the facts of this case do not apply to the case at bar. Specifically, in Stuart, two owners of adjacent parcels of land entered into a written agreement to put up a fence in the vicinity of the boundary line separating the properties. The parties agreed that the fence was put up irrespective of the true boundary line, and that such a fence did not give one owner additional land belonging to the other if the fence line did not match the boundary line. The parties in Stuart further agreed that "when the fence is reset, it shall be put on the true line between the parties, unless otherwise agreed." Id. at 754. The Stuart court correctly found that because there was privity by an agreement between the owners regarding the fence and the true line, there could be no adverse possession; the court held that "[t]he reason why such an occupancy and possession could not be adverse with us is because in this State intention to hold adversely is an indispensable element of adversary possession (citations omitted), and it is wanting where the occupant does not intend to claim the fence as his line unless it be his true line." Id. at 761. In the case at bar, there was no agreement (and therefore no privity) between the plaintiff and any successive land owner and the World Mission Church to permit the encroachment of the Idyllwood property line on the World Mission Church property. Moreover, it was the intent of the successive land owners to possess the property that was not theirs, to a definite line on the ground, and not only that which was limited to the true property line. Repeatedly, each owner, including the defendant, claimed the disputed property as their property, and also that they had continuously claimed the fence/log line as being their true property line. Defendant's letter to plaintiff by itself clearly shows such an intent by defendant to possess the disputed property in contravention to the plaintiff's property interest. (Plaintiff's Exhibit 2). Again, there exists cases decided after Stuart that

completely distinguish and limit its holding as it applies to other factual situations, and that are discussed more fully below. Stuart, therefore, does not apply to the case at bar, and should not have been considered by this Court in its determination of the defendant's adverse possession claim.

**B. The doctrine of Mistake/Misapprehension as it applies to adverse possession has been distinguished and limited by more recent cases.**

11. In the case of Christian v. Bulbeck, 120 Va. 74 (1916), the Virginia Supreme Court has previously commented on this Court's position regarding the intent of the possessor. The rule: "when the occupation of a piece of land is by mistake or misapprehension as to the boundaries, with no intention of the claimant to claim as his own that which does not belong to him, then the possession is not adverse," is not by any means an absolute rule. As the Christian Court stated, this doctrine: "assumes that there is no proof of intention to claim title beyond the boundary line as designated in the claim of title of the possessor--the extrinsic matter of the calls in the deed or other evidence of claim of title being the **controlling factor** of the intention of the possessor;" the Court reasoned that this was contrary to the intention of adverse possession, and failed to consider proof of intention to claim title beyond the set boundary line. Id. at 108. If a possessor takes a step "further in his mental process and to have decided for himself, then and there, without waiting for any future more definite ascertainment thereof, that the lines called for his chain of title have in fact a definite locus on the ground, which he then and there fixes upon definitely and claims title thereto," a claim for adverse possession may arise. Id. And, even when it is found that the possessor "in taking such definite action he may be mistaken in his location as compared with the true [lines]," he may, "nevertheless take and hold possession by **pedis positio** or actual possession beyond his true boundary line, and with such **bona fide**, though mistaken, claim of title to the extent of such **pedis**



position or actual possession, he will have adverse possession, which if continued unbroken for the statutory period will ripen into a perfect title under the statute of limitations." Id., at 108-109. It is not the intent of the claimant to oust the true owner of the title to the property that controls, but rather that a proper claim of adverse possession:

"must be presented in which the preponderance of the evidence as to the character of the possession, how held, how evidenced on the ground, how regarded by the adjoining land owner, etc., etc., supplies the proof that the definite and positive intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line on the ground existed, coupled with the requisite possession, for the statutory period, in order to ripen title under the statute. Whether the positive and definite intention to claim as one's own the land up to a particular and definite line on the ground existed is the practical test in such cases. at 110-111 (emphasis added).

12. Perhaps most telling is the Christian Court's view of the erroneous argument that there must be a specific intent to oust the true owner of title:

"The collateral question whether the possessor would have claimed title, claimed the land as his own, had he believed the land involved did not belong to him, but to another, that is, had he not been mistaken as to the true boundary line called for in his chain of title, is not the proximate but an antecedent question, which is irrelevant and serves only to confuse ideas." at 111.

This Court clearly interpreted the facts presented by the defendant in her adverse possession claim in accordance with its stringent interpretation of Clinchfield Coal and Stuart, without the benefit of the more proper and less restrictive interpretation of the intention of the possessor, as is found in the Christian case. This Court mistakenly interpreted the previous and current owner's testimony, that they had claimed the disputed property as their own from date of purchase, as meaning that they mistakenly thought that the extension to the fence/log pile was their true lot line; yet, their belief to the true boundary of the property was irrelevant to the determination of adverse possession, and was unnecessary for the defendant to assert in her case in chief. Rather, their statements more plainly

show the definite and positive intention on the part of each successive owner of the property to occupy, use and claim as his own the land up to a particular and definite line on the ground (ie., the fence/log pile); also, this testimony clearly showed that this intent to possess was for the statutorily mandated period of time. Therefore, the use of the Clinchfield Coal and Stuart standard by this Court in the instant case was a mistake of law, thereby constituting plain error; such error is cause for vacating the judgment entered against the defendant, and entering judgment in favor of the defendant's adverse possession claim.

**C. The defendant proved by the preponderance of the evidence that she had become the rightful owner of the disputed property through adverse possession.**

13. Under proper analysis, the evidence and the testimony adduced at the December 30, 1996 trial clearly showed that each successive owner: a.) used and occupied the property (by building a fence and later a log pile), thereby showing actual possession; b.) possessed under a claim of right that was adverse to right of the true owner (by the owners' intent to appropriate and use the land as their own to the exclusion of all others), thereby showing "hostile" possession; c.) held the land not in common with others and to the exclusion of others, thereby showing "exclusive" possession; d.) held and occupied the land in such an obvious manner that the true owner may be presumed to know about it (the fence, wood-pile, tree removal, land use and maintenance), thereby showing "visible and notorious" possession; and finally, e.) that each successive owner possessed the disputed property without interruption during the statutory period, showing "continuous" possession. The evidence presented at trial clearly proved each and every element required in a successful claim of adverse possession. The defendant was not required to show that she, along with the other previous owners of the Idyllwood property, intended to oust the true owner, but was only

required to show that they claimed the property as their own. To require otherwise would be contrary to the law of adverse possession in the Commonwealth of Virginia.

14. The facts of the instant case are more analogous to the case of Via v. Windsor, 16 Va. Cir. 443 (1976). In this Alleghany Circuit Court case, Judge R.B. Stephenson, Jr. presiding, the Court considered a claim of adverse possession arising out of the placement of a fence that extended on to the property of another. The property containing the picket fence was sold numerous times, and in each instance, it was the intent of each successive owner to possess that property that included the fence line; one owner testified that "I bought what was under fence, and I claimed what was under fence." at 444. Moreover, when the dispute arose, the party dispossessed of the property asserted, like this Court erroneously found in the instant matter, that since the location of the fence was a mistake as to the true property line, the claim of adverse possession failed because they mistakenly thought the property was indeed theirs. Id. at 445: The Via Court correctly held that the Clinchfield Coal proposition does not apply "where the evidence establishes that a specific intention exists on the part of the possessor to claim title to a definite line on the ground...if a person takes and holds actual possession beyond the true boundary line, and with good faith, though mistaken, claims title to and occupies the land, his possession is adverse to the extent of his actual possession." Via, at 445. By citing 3 Am. Jur 2d, Adverse Possession, section 40, the Via Court incorporated the following reasoning into its holding that the fence became the true boundary line in a successful claim of adverse possession, and that possession by mistake was irrelevant:

"Where a claimant takes possession of land by mistake and holds adversely, claiming title, for the statutory period, the law is not concerned with what might have been his intention if he had known he had no title to the land before his possession ripened into title; the question is what was his intention during the period of his holding. The true question is whether, when he acquired possession, he intended to hold it as his own and against all persons; the

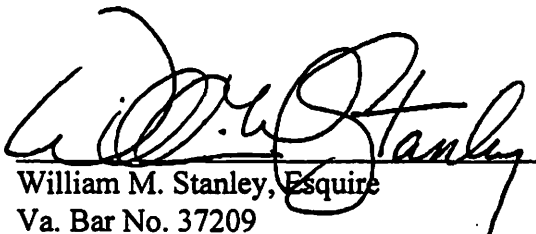
intention is the test, and not the mistake. It is said that the intent with which possession is held rather than an intention to hold in accordance with a claimant's deed is controlling. The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is held not to be a controlling factor. If one occupies land intending to occupy it as his own his occupancy is adverse, and he may have such interest even though he is mistaken as to the facts of legal ownership." See also 80 A.L.R. 2d 1177-1181.

15. The evidence at trial in the case at bar was undisputed and consistent. The boundary line of the Idyllwood property extended over its surveyed property line into the property of the World Mission Church continuously, for well in excess of fifteen years up to the time of defendant's possession. Such extension over the original property line was noted in every property survey drafted for each sale of the property, and those introduced into evidence by the defendant. Every witness presented in the defendant's case in chief, Mr. Stephens, Mr. Coron and even the defendant herself, all previous or current owner of the Idyllwood property establishing the statutory chain of title for the proscribed limitations period, testified that they claimed the disputed property as being their own property. They each thought the strip of land that extended to the fence/wood pile was their property when they purchased the home; two owners testified that even when they were told of the possible dispute as to the ownership of the strip of land, they still continued to possess, occupy, maintain and use the land and claim it as their own, which was adverse to the interests of the World Mission Church. Their testimony regarding their actions in the use, occupancy and maintenance of the property in excess of fifteen years was direct evidence of their intent to possess the property. While the evidence was not clear as to whether or not each successive owner had actual notice of the property dispute arising from the placement of the fence/log piles past the original property line (or actual knowledge that the strip of land in fact belonged to the World Mission Church), such notice was nonetheless irrelevant to determine the issue of whether the

defendant had proven her claim of adverse possession to the land in dispute. The fact that it was the intent of each successive owner when they acquired possession of the property to hold it as his or her own against all others, (regardless of whether or not each owner mistakenly believed that they actually owned the property in dispute), is what is controlling in the determination of the issue of whether or not the defendant had proven her claim of adverse possession. Under this proper analysis, the judgment of this Court would have been in favor of the defendant's claim of title. Because of this Court's erroneous analysis of the Clinchfield Coal and Stuart rule to the facts at hand, the defendant was improperly denied the relief that she sought. As was found in Via v. Windsor, judgment should have been entered in favor of the defendant's claim of adverse possession, and this Court should have by Order recognized the new rightful boundary line of the Idyllwood property, to the detriment of the ownership interests of the World mission church. The defendant respectfully submits that this Court committed reversible error by finding otherwise.

WHEREFORE, for the aforementioned reasons, the defendant respectfully prays that this Court vacate its judgment in favor of plaintiff in the above-styled case, rendered on December 30, 1996, and enter judgment in favor of the defendant; or, in the alternative, vacate the judgment and order a new trial.

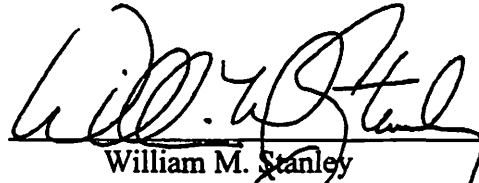
Respectfully Submitted,  
Carolyn Hollander  
By Counsel



William M. Stanley, Esquire  
Va. Bar No. 37209  
COHEN, GETTINGS, DUNHAM & DAVIS, P.C.  
2200 Wilson Blvd., Suite 800  
Arlington, Virginia 22201  
(703) 525-2260

Certificate of Service

I hereby certify that a true copy of the foregoing was mailed first-class, postage prepaid, to Ilryong Moon, Esquire, Attorney for Plaintiff, at MOON, PARK & ASSOCIATES, 7611 Little River Turnpike, Suite 404, Annandale, Virginia 22003, this 21<sup>st</sup> day of January, 1997.

  
William M. Stanley

the Court intends to grant leave to the plaintiffs to file an Amended Motion for Judgment.

With respect to the ground of misjoinder, the Court does also sustain the demurrer on the basis that the liability of the defendant, Cavalier Concrete Products, Inc., is not alleged to be joint with that of the other defendants.

With respect to the ground of duplicity, the plaintiffs in their memorandum deny any intent to seek damages for negligence and express the intent to proceed only upon the theory of breach of warranty. If an Amended Motion for Judgment should be filed, presumably this intent will be made manifest.

The Court overrules the demurrers and special pleas with respect to the ground of lack of implied warranty insofar as Count II of the Motion for Judgment is concerned. The Court has been cited to and has found no authority for the proposition that the implied warranty provided by statute with respect to goods (in this instance, bricks) ceases when such goods become incorporated into real property. Such a proposition would seem to defy logic, and it would seem clear that if such had been the legislative intent, it would have so provided.

The demurrer as to Count II is sustained, however, insofar as it purports to claim damages upon a breach of express warranty (paragraph 5) as there is no allegation of any express warranty by Cavalier Concrete Products, Inc. Likewise, and as set forth above, in light of plaintiff's expressed intention to proceed only upon the theory of breach of warranty, it is assumed that any amended motion for judgment will make such intent manifest.

For the reasons stated above, the Demurrers as to both counts of the Motion for Judgment are sustained, with leave to the plaintiffs to file an Amended Motion for Judgment within twenty-one days from the entry of an order in conformity herewith.

# CIRCUIT COURT OF ALLEGHANY COUNTY

Howard L. Via and  
Clara L. Via

v.

Earl L. Windsor and  
Esther R. Windsor

January 20, 1976

Case No. 1402

*HEADNOTE: If a person takes and holds actual possession beyond the true boundary line, and with good faith, though mistaken, claims title to and occupies the land, his possession is adverse and may ripen into a perfect title.*

By JUDGE ROSCOE B. STEPHENSON, JR.

This is a suit brought by Howard L. Via and Clara L. Via (Via), against Earl L. Windsor and Esther R. Windsor (Windsor), pursuant to Code § 8-836, to establish the boundary line between their respective properties.

The evidence, which is without material conflict, was heard without a jury and established these facts. Via is the fee simple owner of land identified as Lot 1 and 2, Block 17, Section 4, as shown on the map of the Clifton Forge Company. Windsor is the fee simple owner of Lot 3 in said block. All three lots were originally owned by Mary E. Johnson and J. G. Johnson, her husband. While the Johnsons owned these lots they constructed a picket fence around what was purported to be Lot 3 and they constructed a wire fence around three sides of Lots 1 and 2, tying the wire fence to the picket fence. That is to say, the picket fence ostensibly divided Lots 1 and 2 from Lot 3. In 1946 the Johnsons conveyed Lots 1 and 2, which were enclosed by the fence as aforesaid, to S. W. Sharp and Josephine A. Sharp, his wife. According to the Sharps, the Johnsons intended to sell and convey and the Sharps intended to purchase all the land lying within

the wire fence (on three sides) and the picket fence (which separated the land sold by the Johnsons and the land retained by them). The Sharps continued to own these two lots as fenced until they sold and conveyed them to Via in 1963. While they owned them, the Sharps permitted others to use it as a garden for two or three years. Both Mr. and Mrs. Sharp testified that they always claimed and possessed everything that was under fence. Mr. Sharp continued to reiterate, "I bought what was under fence, and I claimed what was under fence." He further testified that Mr. Johnson represented the picket fence to be the division line between their properties.

Since 1963 Via was in possession of the land enclosed by the fence purporting to be Lots 1 and 2. In 1968 Via built a house on these lots. Mr. Sharp told Mr. Via, before delivery of the deed, that he was selling him all land which was under fence. Mr. and Mrs. Via testified that they claimed all land within the fence, i.e., to the picket fence between the two properties.

Windsor acquired title to Lot 3 in 1957. Mrs. Windsor testified that she and her husband owned the picket fence. She further testified that "up until last Summer I never claimed beyond the picket fence."

The matter became controversial, for the first time, when Windsor tore down the picket fence in March, 1975. Mrs. Windsor testified that she and her husband planned to put a new fence along the same line as the old and therefore left the corner posts which are still in place. Thereafter, Via had R. Riner, a Certified Land Surveyor, make a survey which indicated that the picket fence was 18 inches within the Via property at the front, and on the survey line at the rear. Windsor had E. L. Huffman, also a Certified Land Surveyor, make a survey which indicated the picket fence was on Windsor by 18 inches at the front and by 2.13 feet at the rear.

At the conclusion of all the evidence, the Court took a view of the property.

Via claims title to all land to the picket fence line by adverse possession, relying upon the possession of the Sharps and themselves which covered a period of about thirty years. Windsor relies upon the paper title and the Huffman survey, and further contends that since

the location of the fence was a mistake, Via's claim of adverse possession fails.

Where a person occupies and possesses the land of another, through a misapprehension or mistake as to the boundaries of his land, with no intention to claim as his own that which does not belong to him, but only intends to claim to the true line, wherever it may be, he does not hold adversely. *Schaubuck v. Dilleuth*, 108 Va. 86, 60 S.E. 745 (1908); *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 68 S.E. 976 (1910); *Stuart v. Meade*, 119 Va. 753, 89 S.E. 866 (1916); *Clatterbuck v. Clore*, 130 Va. 113, 107 S.E. 669 (1921).

This proposition does not apply, however, where the evidence establishes that a specific intention exists on the part of the possessor to claim title to a definite line on the ground. Therefore, if a person takes and holds actual possession beyond the true boundary line, and with good faith, though mistaken, claims title to and occupies the land, his possession is adverse to the extent of his actual possession, and such possession if continued unbroken for the statutory period, will ripen into a perfect title. *Christian v. Bulbeck*, 120 Va. 74, 90 S.E. 661 (1916).

Where a claimant takes possession of land by mistake and holds adversely, claiming title, for the statutory period, the law is not concerned with what might have been his intention if he had known he had no title to the land before his possession ripened into title; the question is what was his intention during the period of his holding. The true question is whether, when he acquired possession, he intended to hold it as his own and against all persons; the intention is the test, and not the mistake. It is said that the intent with which possession is held rather than an intention to hold in accordance with a claimant's deed is controlling. The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is held not to be a controlling factor. If one occupies land intending to occupy it as his own his occupancy is adverse, and he may have such intent even



though he is mistaken as to the facts of legal ownership. 3 Am. Jur. 2d, *Adverse Possession*, sect. 40. See, 80 A.L.R.2d 1177-1181.

In the case at bar the uncontradicted evidence established that both Sharp and Via intended to claim title to the picket fence, that they occupied all the land to that fence, that their possession was adverse to the extent of their actual possession, and that such possession continued unbroken for a period of more than fifteen years.

Since this evidence is undisputed and is consistent with the long existing physical evidence, the Court is constrained to hold that the lawful boundary line between the two properties is the line designated on the exhibits as "old fence" and referred to herein as the picket fence. This line shall be marked at each end by permanent monuments and the Court order which establishes this line shall be recorded in the current Deed Book and indexed in the names of the parties (each as both grantors and grantees).

# CIRCUIT COURT OF THE CITY OF RICHMOND

S. L. Messina  
and Tech-Mod Corp.

v.

Fidelity National Bank

v.

Joseph T. Norris

April 20, 1976

Case No. 8009

145

**HEADNOTE:** *An irrevocable letter of credit can be cancelled where the account party requests it and the letter of credit was never established as to the beneficiary.*

By JUDGE ALEX H. SANDS, JR.

This is an action instituted by plaintiffs, the beneficiaries under an irrevocable letter of credit allegedly issued by defendant (Fidelity) which was allegedly wrongfully cancelled by defendant to the detriment of the plaintiffs. Fidelity has brought in the account party (customer, Norris) as a third-party defendant who in turn has filed a counterclaim against the third-party plaintiff Fidelity. A demurrer filed by Fidelity challenging the sufficiency of the counterclaim is now before the Court for ruling.

Norris alleges in his counterclaim (1) that upon receiving the subject letter of credit, he, Norris, has returned the letter requesting that it be cancelled, and (2) that the letter of credit was never delivered to plaintiffs by him, nor had it ever been "established" as to the plaintiffs.

If these two allegations were true, there would obviously be no liability of Fidelity to anyone for F

## Syllabus.

## Richmond.

## CHRISTIAN AND OTHERS V. BULBECK.

November 16, 1916.

1. **BOUNDARIES—Ascertainment—Acts 1912, p. 133—Scope of Act.**—The act of March 4, 1912 (Acts 1912, p. 133) allowing a petition to be filed to ascertain the true boundaries of land, confers upon the court jurisdiction to pass upon the title to the land included in the boundary line or lines fixed by the judgment of the court, and the defense of adverse possession for the statutory period may be set up as a defense to such petition.
2. **BOUNDARIES—Location—Acts 1912, p. 133—Ejectment.**—The title of the plaintiff in the case at bar being a fee, and the controversy being with the owners of "coterminous real estate" as to the true location of boundary lines between the plaintiff and the defendants, the plaintiff had the right to proceed under the statute and was not driven to an action of ejectment.
3. **BOUNDARIES—Preference of Corners Over Courses.**—In ascertaining the boundary lines of land, distance or length of lines called for in deeds and plats, and acreage, must give way to fixed and ascertained corners and reputed boundaries established by ancient but distinct land marks.
4. **BOUNDARIES—Acts 1912, p. 133—Plaintiff's Title.**—In a proceeding under Acts 1912, p. 133, to fix boundaries and to recover the land lying between the true boundary and the boundary claimed by the defendants, the plaintiff must recover upon the strength of his own title.
5. **EVIDENCE—Boundaries—Plats.**—A plat not referred to in or made a part of the chain of title of either plaintiff or defendants, on the trial of a petition under Acts 1912, p. 133, is not admissible as evidence of the extent or location of the metes and bounds covered by the true title, or of that covered by the color of title of the defendants.
6. **ADVERSE POSSESSION—Taking Possession—Harmless Error.**—In fixing the duration of adverse possession, a party has the right to tack to his possession the possession of those under whom he claims, but the omission to make any reference to this right in an instruction is harmless where the testimony

## Syllabus.

is to the effect that the only possession claimed was that of the party himself.

7. **INSTRUCTIONS—Application to Evidence.**—Instructions should be read with reference to the evidence in the case in which they are given. Although correct with reference to a case to which they are applicable, they may be erroneous when applied to a different state of facts.
8. **ADVERSE POSSESSION—Mistake as to Boundary—Claim to Line on the Ground.**—The proposition that adverse possession does not exist where the party occupied and possessed the land in controversy through a misapprehension or mistake as to his boundary, with no intention to claim what did not belong to him, but only intending to claim to the true line, is sound in principle only where in fact there was no intention to hold adversely up to the boundary line on the ground unless that were the true boundary. It does not apply where it is shown that a specific intention exists on the part of the possessor to claim title to a definite line on the ground in fact beyond the true title. If a party takes and holds actual possession beyond his true boundary line, and with good faith, though mistaken, claims title to and occupies the land, his possession is adverse to the extent of his actual possession, and such possession, if continued unbroken for the statutory period, will ripen into a perfect title under the statute of limitations.
9. **ADVERSE POSSESSION—Mistake as to Boundary—Presumption as to Extent of Claim—Claim with Reference to Line on the Ground.**—Where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line of the ground. That is to say, on the whole proof a case must be presented in which the preponderance of evidence as to the character of the possession, how held, how evidenced on the ground, how regarded by the adjoining land owner, etc., etc., supplies the proof that the definite and positive intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line on the ground existed, coupled with the requisite possession, for the statutory period, in order to ripen title under the statute. Whether the positive and definite intention to claim as one's own the land up to a particular and definite line on the ground existed, is the practical test in such cases.

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10. **BOUNDARIES—Acts 1912, p. 133—Monuments and Corners Preferred to Lines and Acreage—Instructions.**—In a proceeding under the statute to ascertain the true boundary of land an instruction that "a correspondence in quantity given by a line in question with the quantity mentioned in the deed, or in the approximation thereto, may be considered as going to establish such line as the true one," gives too great prominence to the mere acreage. While it is a circumstance bearing on the establishment of such line, it is of less weight than natural monuments, corners or reputed boundaries and the jury should have been so instructed.
11. **INSTRUCTIONS—Jury Fully Instructed.**—Where a case has been fairly submitted to the jury on proper instructions it is not error to refuse other instructions tendered.

Error to a judgment of the Circuit Court of Amherst county in a statutory proceeding to ascertain the boundary of land. Judgment for the petitioner. Defendants assign error.

*Reversed.*

The opinion states the case.

*Caskie & Caskie*, for the plaintiffs in error.

*Scott & Meeks and O. L. Evans*, for the defendant in error.

SIMS, J., delivered the opinion of the court.

"This case is a proceeding at law under Acts of Assembly 1912, p. 133, by the appellee, plaintiff in the court below, against the appellants, defendants in the court below, by the following petition:

"Your undersigned petitioner, Marion Bulbeck, respectfully shows unto the court that in accordance with an act of the General Assembly of Virginia, approved March 4, 1912, contained in chapter 74 of the Acts of 1912, page 133, she is filing this, her petition, in your honor's court for the

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purpose of having determined the true boundary line or lines to certain real estate, situated in the county of Amherst, of which your petitioner and C. Burks Christian and Sallie B. Christian, jointly, are the coterminous owners in fee simple, and as to which a dispute has arisen as to what is the true boundary line or lines between your said petitioner and said Christians.

"Your petitioner shows unto the court that by deed dated June 28, 1893, recorded in Deed Book VV, page 57, of Amherst county clerk's office, one John H. Lewis and wife conveyed to your petitioner a tract of 48 acres of land on James river, in Amherst county, it being the same land conveyed to said Lewis by John C. Mundy, trustee, in deed dated October 20, 1891, recorded in Deed Book TT, page 521, of Amherst county, and the same land conveyed to John C. Munday, trustee, by Drewry J. Christian and wife, by deed dated August 20, 1873, and recorded in Deed Book JJ, page 222, of Amherst county, and the same land of which Stephen W. Christian, the father of said D. J. Christian, conveyed his life estate in deed of September 2, 1868, recorded in Deed Book GG, page 194, of Amherst county, and being a part of the same land allotted to Moaning Christian, the grandmother of the said D. J. Christian, and at her death partitioned among her children, a copy of which partition is herewith filed marked 'Exhibit X' (See Will Book No. 9, pp. 416 and 422).

"Your petitioner further shows unto the court that the true location of the lines between her and said Christians has never been fixed and determined and that recently there has been litigation and disputes between them as to what is the proper location of said boundary lines.

"Your petitioner further shows unto the court that one J. C. Fulcher, as tenant of said C. B. Christian and said S. B. Christian, is cultivating, for the present year, a portion of the land, which, as your petitioner alleges and charges, is a

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part of said boundary purchased by her and part of said land which is now in dispute.

"Your petitioner further shows unto the court that said C. B. Christian and S. B. Christian own said adjoining real estate in fee simple as two of the heirs of their father and as grantees of the remaining heirs; that originally the land of your petitioner and said Christians belonging to one Drewry Christian and allotted to his heirs and as dower to his wife Mourning Christian, of whom said C. B. Christian and S. B. Christian are descendants, and at the death of whom the said Mourning Christian was allotted the said tract of land contained in said plot filed herewith as 'Exhibit X', the other lands held by said Christians, adjoining your petitioner's said . . . . . acres, being part of what was allotted to the heirs of said decedent.

"Your petitioner alleges and charges that the confusion in the location of this line is largely due to the fact that the parties owning the same were related and no action was taken to determine what were the proper lines, and it has only been within the last two or three years that your petitioner was made aware of the fact that the true line had never been located.

"Your petitioner still further alleges and charges that she has made every possible effort to get the said Christians to agree upon the establishment of a line between the properties aforesaid; that she has even gone to the expense and trouble of purchasing the necessary material to build a proper fence so as to secure her own cattle and stock from trespassing and to prevent other people's stock from trespassing upon her, but the said Christians have refused to agree upon a line or to permit her to put up a fence upon any line that has been run by surveyors employed by petitioner, going so far as to threaten violence toward any and all she employed to build such fence.

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"Your petitioner, therefore, asks and prays that this, her petition, shall be considered of by this honorable court at its next civil term, and in the meantime your petitioner asks that a competent surveyor, or surveyors, be ordered and directed to enter upon the premises in question and establish by such survey as may be deemed necessary the true boundary lines between the said several plots of land, the same to be used as evidence at the trial of this case, and that the true line between her and C. B. and S. B. Christian may be determined, and she may be given possession of such land as she is entitled to by the proper location of said line, with such damages for its repletion as may be proper in accordance with the statute in such cases made and provided, and that all other proper relief may be granted her."

There was a demurrer to the petition by defendants on several grounds, only one of which, however, is relied on here, which ground is as follows:

"The remedy, if any, of the plaintiff is one in ejectment."

Counsel for defendants, in their petition, in amplifying this ground of demurrer, take the following positions:

"The act approved March 4, 1912 (Acts 1912, page 133), gives the right to any person having an interest in real estate, to file a petition, and 'have ascertained the true boundary line or lines to such real estate as one or more of the coterminous land owners.'

"It is submitted that this act does not substitute the petition therein provided for, for an action of ejectment. A party can not come into court alleging that she has had a survey made of the land, and knows where the true boundary is, and ask the court to confirm her opinion, because, forsooth, some adjoining land owner is unwilling to admit that she is entitled to a piece of land of which he and his predecessors have been in possession for seventy-five years.

"To illustrate: If A owns and occupies a lot which is fenced in and B claims and occupies an adjoining lot, like-

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wise fenced in, A will not be heard by this sort of summary proceeding to have the court determine that his lines embrace B's lot, and dispossess him thereof. If a party does not know where his lines are, he may, by this proceeding, have them ascertained and then institute his proceeding to recover what he does not have in possession if he so determine.

"This view is strongly fortified by the fact that the act contains no provision for possession, or for damages for the unlawful possession. It is impossible to believe that if the intention of the legislature had been to settle all questions of title that it would have failed to provide for a judgment for the possession and for damages.

"Again, the court is restricted by the act to ascertain and designate 'the true boundary line or lines.' What is the 'true boundary line'? The word 'true' is defined to mean 'real,' 'exact,' 'accurate,' 'correct,' 'right,' and in this sense it is used in the statute referred to. The jurisdiction of the court is to find 'the real line,' 'the exact line,' 'the accurate line,' hence it could not consider any question of estoppel, act of limitations, or any other matter, which, under the law, would allow the party to claim what was not his 'real,' 'correct,' or 'accurate' boundary, and hence the defendant could not avail himself of the admissions of the plaintiff of his claim of title, or color of title, adverse possession or other defenses which the law says avail him, no matter how defective his real, accurate, true title is.

"Where each party claims to know the real, true boundary, and a definite piece of land is in dispute, *the question at issue is not one of boundary, but one of title.*

"This view seems to have been held by the draftsmen of the petition in this cause, who felt called upon to aver therein that the true boundary lines had 'never been fixed and determined' (Rec., p. 3), although he filed with his

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petition a plat which fixes and determines every one of them, and rests the whole case upon the correctness thereof.

"The demurrer should have been sustained, and the plaintiff remanded to the proper action to assert title to the eight acres of land which she claims, but of which the defendants had possession and to which they claimed title."

The court below overruled the demurrer, and such action is assigned here as the first ground of error.

In considering such assignment we are called upon to decide the following questions:

1. Did the act of Assembly, 1912, p. 133, give the court jurisdiction to pass upon the title to the land included in the boundary line or lines fixed by the judgment of the court in a proceeding under that act?

We think it did.

The act is as follows:

"Chap. 74.—An Act to authorize the ascertainment and designation of the boundary line of real estate.

"Approved March 4, 1912.

"1. Be it enacted by the General Assembly of Virginia, That any person having an interest in real estate upon petition filed in the court which would have jurisdiction in an action of ejectment concerning such real estate, shall have the right to have ascertained and designated by the said court, the true boundary line or lines to such real estate as to one or more of the coterminous landowners. All parties interested in the coterminous real estate shall be made parties to the said petition which shall be matured for hearing as provided for maturing an action of ejectment, except that it shall not be necessary to serve a copy of the petition.

"The trial shall be conducted as other trials at law and the same rules of evidence shall apply and the same defenses

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may be made as in other actions at law; the trial by jury may be waived by consent of parties, the judgment of the court shall be recorded in the common law order book and in the current deed book of the court, and indexed in the name of the parties to the petition. The court may upon application of either party to the petition, by order in term time or in vacation, direct such survey or surveys to be made as may be deemed necessary. The judgment of the court shall, unless reversed, forever settle and determine and designate the true boundary line or lines in question, and be binding upon the parties to such petition, their heirs, devisees and assigns. The judgment of the court shall be subject to the review by the Supreme Court of Appeals of the State upon writ of error."

The concluding provisions of the act, that "The judgment of the court shall, unless reversed, forever settle and determine and designate the true boundary line or lines in question, and be binding upon the parties to such petition, their heirs, devisees and assigns," seem to us to be conclusive of this question and to decide it in the affirmative.

The act also provides that, "The trial shall be conducted as other trials at law and the same rules of evidence shall apply and *the same defenses may be made as in other actions at law* \* \* \*" (Italics ours.) Hence, adverse possession, whether with or without color of title, under a plea of the statute of limitations, is a defense which may be made under such act.

2. As to what "interest in real estate" in the plaintiff is necessary to enable him to institute an action under the statute, or as to what cases of controversy over boundary line or lines of land involving dispute as to the title of the land included therein, the act applies, or as to what other defenses may be made in such a proceeding, we do not at this time decide, because not necessary for the decision of the case before us; except that we are of opinion and do

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decide that the plaintiff in this case appears from the allegations of said petition to have had such an "interest in real estate," being a fee simple interest, as was sufficient to enable her to institute this action under said statute and that as this case, per said petition, involves a controversy between "coterminous real estate" owners as to the true location of boundary lines, which in effect involves a controversy as to the title or ownership of the land included in such boundary lines, it is such a case that the act in question applies thereto.

We are, therefore, of opinion that the court below committed no error in overruling the demurrer.

There was a trial by jury in the case, and a verdict and judgment in favor of the plaintiff, fixing the boundary lines as claimed by the latter as the true boundary lines between her land and that of the defendants; thus, in effect, determining that the land between the lines as claimed by the plaintiff and those claimed by the defendants, consisting of about eight acres, belonged to the plaintiff.

There are the following other grounds of error assigned in said petition:

a. The refusal of the court below to set aside the said verdict and grant a new trial;

b. The refusal of such court to admit in evidence a certain plat found spread on the official surveyor's book of Amherst county of 1803 to . . . . ., p. 116, in what defendants claim was the handwriting of H. L. Brown, who was at one time assistant surveyor of Amherst county, but now deceased, bearing no date or signature of any surveyor, or statement thereon with respect to the identity of the land it included, except the lines of the plat and courses and distances thereon and natural landmarks noted thereon, such as James river, Christian's island, the acreage of the latter as 13½ acres, "up the branch", "Gate at the Dwelling House" &c., "Pointers Dogwood, Gum & White Oak," "White

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Oak," &c., designating lines and courses, the general outline and shape of the land covered by such plat being similar to the outline and shape of the outside lines of a plat introduced in evidence by plaintiff, made in 1837, September 15th, by H. L. Brown, assistant surveyor of Amherst county, as Exhibit X with her petition, the latter plat being signed by him and showing the division of the Mourning Christian dower land into lots—the former plat being claimed by defendants to be a plat of the said dower land made when it was assigned to said widow, but no report of such assignment or order of court, or deed or other writing was introduced in evidence, either by defendants or plaintiff, which refers to such former plat or authenticates it as binding on any of such parties to this suit. It should be said also that the length of one important boundary line of said dower land as given on the plat not admitted in evidence is different from the length of such line as given on said plat introduced in evidence by the plaintiff.

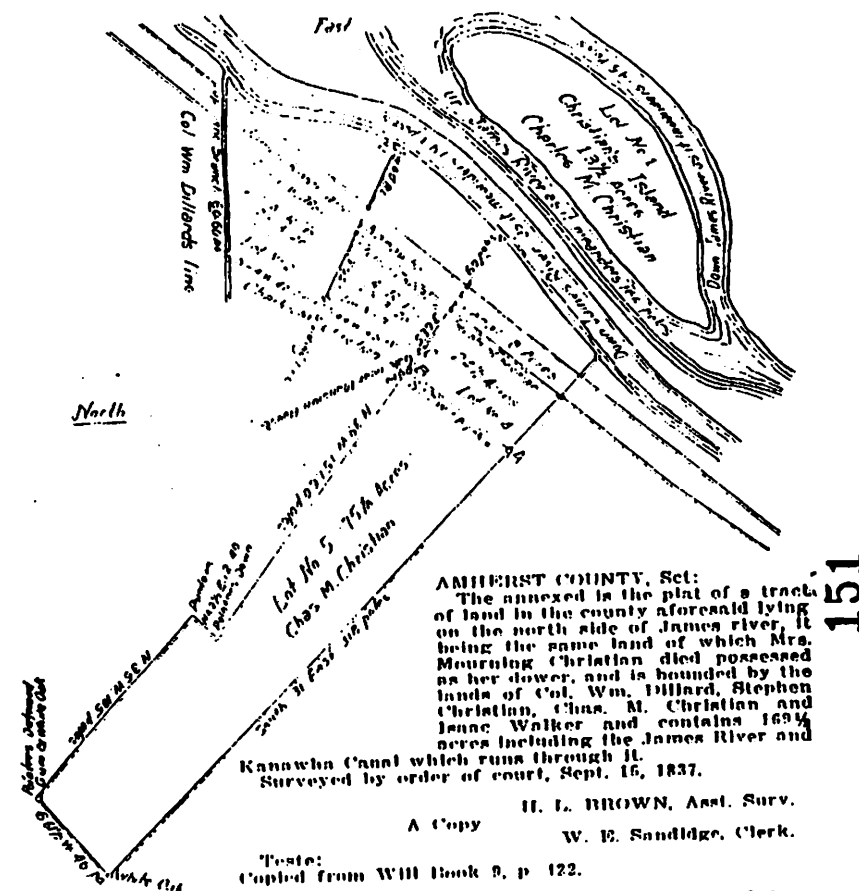
c. The giving of certain instructions, A, B, C and D, for plaintiff.

d. The refusing of certain instructions numbered 1 to 7 inclusive, offered by defendants.

Before considering the questions arising upon these assignments of error, we will state briefly the salient facts in the case bearing upon such issues.

The plaintiff and defendants derive title from a common source, Drewry Christian, who died in 1818. The following plat shows the dividing boundary lines, which we have indicated by the letters A, B, C, D, E, which are in controversy in this proceeding.

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Plaintiff derived title as alleged in her petition to lots No. 3 and No. 4 shown on such plat, and there is no conflict in the evidence that for about sixty-seven years prior to this suit, that is, up to about three years before such suit, neither the plaintiff nor any of those under whom she claims title, exercised any acts of ownership with claim of title beyond the location on the ground of the lines A, B, C, D, E, as marked by an old rail fence, from a very early time, not definitely fixed by the evidence, and later by a well defined hedgerow of trees and other growth, such as plainly

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indicated a very old fence location. That the old mansion house of Drewry Christian was located on said lot No. 4 near the corner C, which was occupied by subsequent owners of lots No. 3 and No. 4 until it was destroyed by fire soon after the plaintiff acquired these lots, after which she or members of her family lived in another house on same premises. That these old fences and hedgerows marked lines were therefore very near this old Christian family residence and constantly in sight from thereabout and in passing to and from it. That the owners on both sides of these lines back to within a few years after the division of land shown by said plat "Exhibit X," including the plaintiff, up until 1910, recognized this old fence and hedgerow as the outside boundary lines of their land on both sides of it, respectively, both sides claiming title up to and only up to such old fence and hedgerow location of such lines. That about 1893 there were remains of such old fence apparent along such location, or on parts of it, and the said hedgerow, or growth of bushes and trees, plainly indicating an old fence location all along these lines, and such hedgerow remained along the most part of said lines A, B, C, D, E, down to the institution of this suit, except that on the line from D to E most of the growth was cut down in recent years; but a wire fence was built and maintained by the plaintiff from about the year 1893 on or along the line A, B, C, D, E, on said lots No. 3 and No. 4 partly inside but practically along and on the site of said old fence and hedgerow location, until the institution of this suit. Plaintiff located this wire fence in ignorance of the true location of said boundary lines A, B, C, D, E, in accordance with her title as claimed by her since 1910. If such boundary lines were located on the ground, as the plaintiff claims they should be, which she claims is the true location thereof according to said plat, "Exhibit X," they would extend some one hundred and fifty feet to the northwest, north and north-

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east of said old fence and hedgerow and of said wire fence location and include the land in controversy, above referred to, of about eight acres. Plaintiff furnishes no proof that there was any mistake made in the original location of the old fence except the testimony of Garland and DeMott, surveyors, as to the conclusions reached by them from their recent surveys in regard to the true location of such lines per said plat "Exhibit X." It appears that she did not discover the alleged mistake in the location of her wire fence until 1910, when she was having some surveying done, and then undertook to extend her fence out to such boundary lines—as thereafter claimed by her, and was prevented from so doing by the threat of Col. C. B. Christian, one of defendants, to prevent by force this being done.

The defendants derived title by descent and conveyances to lots No. 2 and No. 5, and the land adjacent and to the northwest and north of these lots, known as the "Burks tract," tracing their title back also to said plat "Exhibit X" as to the portions of said lines A, B, C, D, E, which lay from A to B and from D to E, and tracing their title back of such plat to the portion of said lines which lay from B to C; and the uncontradicted proof is that they claim and have claimed, for at least seventy years prior to the institution of this suit, title up to the said old fence and hedgerow location of said boundary lines, and they claim also that such is the true location of such lines according to said plat "Exhibit X."

In the chain of title of defendants, prior to the said division of said dower tract and plat, "Exhibit X," there is a deed from Mary Burks and husband of date January 9, 1818, which conveyed to C. M. Christian, the father of defendants, the said "Burks tract." The Burkses derived this land from Drewry Christian in the division of his land in 1818, when the Mourning Christian dower tract was also assigned.



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The testimony for defendants of C. G. Massie, surveyor, which is uncontradicted, is to the effect that he surveyed the Burks tract, and that by such actual survey its boundary line next to land of plaintiff extends on the ground to the points B, C, D, of the said line A, B, C, D, E, as their location is claimed by defendants, being the same location as said old rail fence and hedgerow on such portion of such line.

The Burks deed, therefore, gave the defendants color of title, if not title, to that portion of the strip of land in controversy which lies from B to C to D, along the said line A, B, C, D, E. If the true location of the line A, B, C, D, E, as designated on said plat "Exhibit X" was as claimed by defendants and as shown by said old rail fence and hedgerow, the Burks deed gave to the father of defendant and also to those claiming title under him by descent as aforesaid, title to such line. If the true location of such line was as claimed by plaintiff, still, as the metes and bounds called for in the Burks deed extended beyond and over the line as claimed by plaintiff to the line as claimed by defendants, it gave the latter color of title to such location on the ground of the line B to C to D, as claimed by them.

As to the possession of defendants, it is deemed sufficient to say that regarding this case as upon demurrer to evidence by defendants, the evidence for defendants as to possession is not of that specific and definite character which is essential to prove the *pedis positio*, or actual possession, of the strip of land in controversy, or any part of it, for the statutory period, necessary for the application of the bar of the statute of limitations where the defendants have no title or color of title. That is to say, such testimony goes to the extent of proving open, notorious, actual, hostile and uninterrupted or continuous possession by defendants for at least seventy years only of some portion of the Burks tract, which, under said title or color of title, gave them construc-

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tive possession up to the said line B to C and C to D, portions of line A, B, C, D, E, as claimed by defendants, and also only of some portion of lots 2 and 5, which if the true title lines thereof are as defendants claim, would give them constructive possession up to A to B and D to E, portions of the line A, B, C, D, E; but the testimony does go to that extent. On this subject, and as to the Burks tract and also lots 5 and 2, Col. C. B. Christian, one of defendants, who was in his eightieth year when he was on the witness stand, testified as follows:

"Q. Colonel, how long have you and your sister held this land of yours, I mean especially the strip of land" (in controversy) "and how have you held it, if you did hold it? A. We have held it adversely for seventy years to my knowledge and I believe for many years before that by my forefathers, certainly back to the Drewry Christian division of 1815 or 1818, had uninterrupted possession, notorious, open and actual against Miss Bulbeck and the world \* \* \*

\* \* \*

"Q. Do I understand you to say that you and your sister have had adverse possession of all the land on your side of Miss Bulbeck's fence (when I say adverse you as a lawyer know what I mean) for the last seventy years? A. I do."

It is true that this was a statement of a conclusion of the witness and not of the specific facts on which the conclusion was based, but it was not excepted to and the other testimony in the case does not contradict its accuracy in so far as it refers to possession of parts of lots 5 and 2 and the Burks tract not included in the strip of land in controversy.

Col. C. B. Christian's testimony therefore shows the possession above indicated by him and his sister with the definite and unconditional claim of title and ownership on their part, and the intention to so claim title to the line A.

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B, C, D, E, as located on the ground per the old rail fence and hedgerow.

Miss Sallie B. Christian's testimony shows the same, only she adds: "Of course, we did not want any land but that which belonged to us; we would not have any land other than that that belongs to us, we intended only to hold to the true line wherever it was."

Now as to the location on the ground of the "Gate near the Mansion House," called for as a corner on said plat, "Exhibit X," and the actual location on the ground of the line A, B, C, D, E, in accordance with such plat. Col. C. B. Christian is not contradicted in his testimony that he remembers this line as far back as "seventy years at least since I can first remember," which would place his personal recollection back to 1843, six years after said plat "Exhibit X" was made; and he says: "These lines are as near as can well be where Miss Bulbeck's present fence is, \* \* \*"

"Q. How do you know this? A. I know it by surveys properly located, and also by what \* \* \* Uncle Stephen Christian, who owned Miss Bulbeck's lands, as well as what Drewry J. Christian, his son, all of them told me. They all said the rock or gate referred to in H. L. Brown's plat of Mourning Christian's dower \* \* \* shows the true corner and starting point, and the only known or well established corner between these lands. These old people all recognize this as the corner, and this rock is not a movable rock, but is one called a tight rock, and juts out on top of the land, and the lines between our lands and Miss Bulbeck's land take this rock as a corner, and run approximately with Miss Bulbeck's present fences, and were so recognized as the true lines by our family, and Uncle Stephen Christian, who owned lots No. 3 and No. 4, and at his death fell to his son, D. J. Christian, my first cousin. At or within a few feet of this rock was a gate, and I remember that there one of my aunts, who was riding horseback through this gate,

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going over to Uncle Stephen's house (which was later burned, after Miss Bulbeck bought it) was thrown from her horse and broke her hip, and she was an invalid the balance of her days."

Mr. Garland, a civil engineer, was appointed by the court below to survey and report upon the lines in controversy. He reported in favor of the lines as claimed by plaintiff, and testified that in his opinion such location is the true location on the ground of such lines. He filed a plat showing thereon in yellow lines the location on the ground of such lines as claimed by defendants and in red line the location on the ground of such lines as claimed by plaintiff.

Mr. Garland's testimony pertinent to the issues in this case was as follows:

"I am surveyor and engineer by profession, live in Lynchburg, and have had several years' experience as such, and am a graduate of Virginia Military Institute. \* \* \* At the request of Col. C. B. Christian I started at what is known as the rock corner, near Miss Bulbeck's residence, claimed by the defendants as the corner, and ran the lines first northeast, and thence to the river, which lines approximately in shape and location fitted the present fences between Miss Bulbeck and the Christians, that is I mean the line between the Burks tract of north 48 poles or the old line north 44 east, 48 poles to corner of lot No. 2; thence S. 46 east 78 poles, or the old line south 50 east 78 poles, the difference being in bearing to corrected change on account of the variation in needle of instrument in time of two surveys, and I found these two lines approximately fitted the present fence on the ground. I then ran from the rock corner north 35 west 9 poles, and thence south 61 west or the old bearing, south 57 west, 58 poles towards S. B. Walker's line, which distance ran over the fence between Walker, Bulbeck and Christian at the northwest corner of Marion Bulbeck's ——— poles. I then started at the end

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of north 44 east 48 poles, between lots No. 2 and No. 3, supposed corner of Christian and Bulbeck, and extended the line north 44 east 48 poles, and I did not reach the branch in plat, corner called for on branch being Col. William Dillard's line on the northeast, which should be the corner of lot No. 2 and the Burks tract in Dillard's line. Then I began on James river, where there was no corner named, except on river, and ran the line between S. B. Walker's estate and Miss Bulbeck. The distance of Miss Bulbeck not being given I obtained it by my scale on the plat of the partition of Mourning Christian's dower, and by old trees supposed to be the line trees and somewhat with the present fence, and the distance obtained by the scale on the Mourning Christian's dower division I ran the distance shown by this plat I filed with my report, which ran over, on the defendants' lands, as claimed by them. I then ran as indicated on the plat the red lines parallel to the three lines I ran from the supposed rock corner claimed by the Christians over to the branch on the Dillard line on the northeast, the measurements of these three red lines about took me to the branch on the Dillard line. I came back and extended the line from James river on between Walker and the Christians north 27 west distance given by the plat claimed to have been made for the Walker tract from the river, and this distance stopped at an old tree or near it, but I could not discover well defined marks on same. Some claimed it as the corner in the line of lot No. 5, belonging to the Christians, and the corner of the Walker tract. I did not run any of the other lines of the Christians' lands, or the lands of the defendants, notably on the Burks tract and lot No. 5. My conclusion was the red dotted lines are the true boundary lines between the lands of the plaintiff and the lands of the defendants."

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## CROSS-EXAMINATION.

By Counsel for Defendants:

"Q. Mr. Garland, your survey and conclusion, as I understand, are the result of starting at James river, at the supposed corner of Walker and Miss Bulbeck? A. Yes, sir.

"Q. If the bank edge of James river has changed since 1815 or 1818, the date of the division of the old Drewry Christian estate and the present bank, or where you started, is not the true or correct starting point, then are your conclusions and survey correct? A. Of course if the river has changed, and my starting point wrong, the location of the red lines on my plot would also be wrong.

"Q. In locating the lines from the supposed rock corner northeast, claimed by the Christians as the true corner, did Col. Christian not point out to you what he claimed to have been the location of an old barn on the northwest side and about half way of the line north 44 east 48 poles, which barn he claimed to have been there from the time he could remember up to several years ago, and which he claimed was a few feet on his side of the true line, between him and Miss Bulbeck. If this barn was on his side of the true line, as claimed by him, then the line as located by you was through the barn site or location on Miss Bulbeck's side was it not? Would not this show that your conclusion is wrong? A. Well, it might."

"Q. On your map the yellow lines about correspond, as I understand, with the present fences of Miss Bulbeck, do they not? A. Yes, they do.

"Q. Where you located the red lines on your map, did you find any landmarks whatever fitting the bearings and distances? A. No, I did not.

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"Q. I mean between the defendants and Miss Bulbeck, the plaintiff? A. No."

Mr. DeMott, a surveyor, also testified for plaintiff as follows:

"I surveyed the Bulbeck two lots \* \* \* I ran from the rock as pointed out by Col. Christian, both ways, and my lines practically fitted Miss Bulbeck's fence, as at present. Then I ran the Walker line from the river and came to the conclusion that Miss Bulbeck's line should be located from the river and go out on the Christian side as indicated on Mr. Garland's plat by the red lines; my measurements agreed with Garland's as far as I made them. I made no measurement on the river; I think Mr. Garland's are correct in his survey, and conclusions. I should say that the trees on the river on the Bulbeck side are seventy-five years old.

"You can get lots No. 2, 3 and 4 on the ground; the land is there; Mr. Garland's survey is correct. If rock is right all else is wrong and acreage to Miss Bulbeck is too small and Colonel's too much. My survey and conclusions check with those of Mr. Garland, in every respect. Garland's estimate is correct; a discrepancy of one-fourth of an acre does not mean that the lines are wrong in making such survey. In my judgment Massie is not right and Garland is right. There are indications that James river has not changed from the trees, etc., from 75 to 100 years old. In surveys on rivers like the James the line starts at the low water level and not out in the water. My experience is that in surveying on James river there is very little change in it as evidenced at Peach and other places. At Miss Bulbeck's land there is an inland that extends up beyond the starting point of her survey which Garland established by the red line, and that island serves to protect her land from washes by the river. I found the Walker line marked, but I found no hedgerows or fences to indicate any ancient line.

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I consider the survey of Mr. Garland made from the records to be better and more accurate than the memory of any man. The white rock basis which C. G. Massie took is unquestionably wrong; Brown never took the rock as a basis and Brown is correct and made a good survey and with him Garland checks. The barn referred to possibly existed in 1818 and Brown ran the line in 1837. Charles M. Christian owned the whole land before the survey. I regard the barn as questionable and it does not stand to prove anything; memory fails and is made to change."

## CROSS-EXAMINATION.

"If the river has changed in the last seventy-five years of course the starting point on the Walker line is wrong, and then the conclusions arrived at by Mr. Garland and myself are also wrong."

## RE-CROSS-EXAMINATION.

"No one showed me the barn claimed by Col. Christian, or its side. The plat calls for gate but no rock on the H. L. Brown survey of Mourning Christian's dower."

C. G. Massie, a surveyor and witness for defendants, filed a plat locating the lines in controversy A, B, C, D, E, as claimed by defendants. His testimony pertinent to the said issues was as follows:

"I am county surveyor of Amherst county \* \* \* I began the survey at rock or stone claimed by Col. Christian to be the corner near the corn house, supposed to be where the gate is called for near mansion house on H. L. Brown's plat. I ran the lines from that point both ways, and taking that as a corner I found the bearings and distances fitted pretty well the present fence of Miss Marion Bulbeck, thus indicating that whoever put up the fence hit the lines pretty well. I also surveyed the Burks tract, and found evidence

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of an old line in the way of a hedgerow on the northwest side of this tract. Along lines from pointers south 51 W., 31 poles south 38 west 72 1-2 poles, south 52 1-2 east 12 2-5 poles pointers which aided me in my conclusion, in fitting up this tract with the Mourning Christian's dower; that the rock claimed by Col. Christian was a true corner, near the corn house. Then I took into consideration the barn, as claimed by Col. Christian \* \* \* In running the line from the rock near the corn house north 44 east, 48 poles to corner of Christian and Miss Bulbeck; thence south 50 east 78 poles I practically hit the present fence, and the bridge on the canal, and continuing the line north 44 east, 48 poles to the branch on the Dillard line the true distance was 52 poles on the latter line a little short, and running from the rock north 39 west 9 poles, and thence 57 north 58 poles towards the Walker line I ran over what is supposed to be the Walker line several poles, but this happens frequently in old lines. I also ran the line beginning at the corner of Walker and Bulbeck's line on James river between Walker and Bulbeck, but there is no distance given on any plat I have ever seen on this line along with the Bulbeck line. Col. Christian showed me the rock. In making these surveys I did not consider the area of any of these tracts. The question was to locate the lines accurately between the parties. I did not put much faith in beginning at the river bank on the Walker line, as water streams are changeable, especially have I found James river so. I cannot agree with surveyor Garland in his conclusions. \* \* \*

Examined by Counsel:

"I have had little experience in surveying on James river. The lines in controversy are short when run from the river to Colonel's proposed line on the rock basis. I don't know anything about whether James river has changed or not. There are no marked trees or otherwise, that indicate the Burks line extending from the mansion house. There are

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hedgerows that do not indicate lines. Never ran line from the river near Walker's or the full length of the Walker line. I did not pay any attention to the surrounding lots. \* \* \* I could not see any material change in the branch. I ran around the 23-acre lot, called lot No. 2, but did not calculate the acreage. I did not estimate any acreage, nor did I run the line from the river. The lines are short when run from James river or else you would have to go into James river to get the acreage about 150 feet if the white rock basis is true."

We come now to consider the several assignments of error, which we will take up in their order above stated.

a. The refusal of the court below to set aside said verdict and grant a new trial.

1. We are of opinion that the verdict was contrary to the evidence in this, that the jury found and fixed the true boundary lines in question in accordance with the said survey and plat made by H. G. Garland, and such survey and plat entirely ignored the uncontradicted testimony of Col. Christian as to the location on the ground of the "Gate near Mansion House," and fixed that corner altogether by the length of the lines thereto from the Dillard branch on the one side and the Walker boundary line as this surveyor found it marked on the ground on the other side, giving undue weight to mere length of lines called for on said plat, "Exhibit X," as compared with the monument of the location of the "Gate near Mansion House," evidenced by the "tight rock" in practically the same place, as per Col. Christian's uncontradicted testimony; also in ignoring the existence of the reputed boundary line called for on said plat as marked by the old rail fence and hedgerow along the line in controversy, and making the existence of the present location of the reputed boundary of the Walker line outweigh and set at naught the existence of the old rail fence and hedgerow; also in making the length of the lines

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ending on the river as called for on or ascertained by scale from said plat, "Exhibit X," outweigh the existence of said old rail fence and hedgerow and the facts aforesaid, showing it as the reputed boundary from such an ancient time, namely, for some seventy years, between the adjoining lands and the recognition by owners of lots 3 and 4 prior to the plaintiff of the correctness of the claim of title of defendants up to such line as so located on the ground, and indeed by plaintiff until 1910. It is true that the plaintiff explains why she treated this as her boundary until 1910, namely, because she was ignorant of what recent surveys she had made disclosed, and she also denies that she knew that defendants claimed title up to this old fence and hedgerow location until about the year 1900; but prior to the holding of the plaintiff, which as we have said began in 1893, back to a period of time seventy years before this suit, we have the uncontradicted testimony of said living witness as to the location of the old rail fence and hedgerow lines being recognized and treated by the land owners on both sides of it as the true boundary and delineation on the ground of the extent of their respective titles, as called for in said plat, "Exhibit X." This is proof of even more than a reputed boundary.

As was said by Judge Pendleton in *Shaw v. Clements*, 1 Call. (5 Va.) 438, "our juries generally and wisely establish reputed boundaries, disregarding mistaken descriptions."

And in *Herbert v. Wise*, 3 Call (7 Va.) 242, it is said: "To pursue the proper description of our land boundaries would render men's titles very precarious, not only from the variations of the compass, but that old surveys are often inaccurate."

As held in *Summerfield v. White*, 54 W. Va. 311, 315, 46 S. E. 154, 156, "If a monument called for by the deed is

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established by uncontradicted evidence, it becomes binding upon the parties."

Applying the rule announced in the West Virginia case last cited to the monument, the "Gate near Mansion House," in the case at bar, its location, as testified to by Col. Christian, became established. This corner called for in the plat, "Exhibit X," being thus fixed, that corner became a marked monument; James river was a natural landmark; the reputed boundary of the lands in controversy was marked by the old rail fence or hedgerow. The dividing line in question, when located according to said plat, "Exhibit X," if the corner last mentioned is fixed as next above stated, corresponds on the ground with the line A, B, C, D, E, as claimed by defendants, and the only discrepancies that would then exist between such location and such plat would be the length of the lines of the plaintiff's land, those running from the river northwest being too short by about 150 feet, and the length of the lines running on the one side of such "Gate near Mansion" corner to Dillard's branch being too long by about 99 feet, and on the other side of such corner to Walker's line, as now marked on the ground, too short by about . . . . feet; and the acreage of the plaintiff's land being about 40 instead of about 48 acres, as called for in said plat. However, the rule on the subject is too well settled in Virginia to need a citation here of the authorities, that in such case distance or length of lines called for on the plat must give way to the fixed corner of the "Gate near Mansion," and the reputed A, B, C, D, E, boundary; that acreage called for must also give way to this data; and the correct location of the boundary line in dispute, according to the well settled rule in Virginia referred to, is the A, B, C, D, E line as claimed by defendants. The verdict of the jury was plainly in conflict with this rule, even regarding the evidence under the rule applicable to demurrer to evidence by defendants.

2. We are of opinion that the verdict of the jury was contrary to the evidence for the further reason that it ignored the following facts shown by uncontradicted testimony in the case, namely: Even if the true location of the disputed lines, according to the plat, "Exhibit X," under which the plaintiff derived title, was as claimed by the latter, the defendants claimed and derived title to the Burks tract adjoining that portion of such line A, B, C, D, E, from B to C to D under deed to their father in 1818. The metes and bounds of the Burks deed designated lines which by actual survey of Massie, as appears from his testimony above quoted, extended from B to C to D of the line A, B, C, D, E, as located on the ground along the line of said old rail fence or hedgerow. Therefore, the defendants had title, or at least color of title (with possession such as above noted according to uncontradicted testimony for defendants), older than the plaintiff's title to that portion of the strip of land in controversy lying to the west, north and northeast of said portion of said line from B to C to D. Hence, as to so much of the boundary line, and such portion of the strip of land included therein, the verdict of the jury was in the face of the uncontroverted evidence for defendants and absolutely without evidence for the plaintiff to support it, since the plaintiff must recover upon the strength of her own title—as indeed the court below correctly instructed the jury in an instruction not excepted to and hence not herein quoted.

This view of the case results in our having to reverse the action of the court below on the assignment of error under consideration, and the granting of a new trial. Ordinarily such holding would call for no further opinion from us upon the other assignments of error in the case, but as upon a new trial it seems that the following questions raised by such assignments of error will again arise and have to be passed upon by the court below, we feel constrained to deal

with them here. They will be considered in their order as they arise under the remaining assignments of error above noted.

As to—

b. The refusal of the court to admit in evidence the plat referred to above under this heading.

The court below was right in refusing to admit this plat in evidence. This plat was not referred to in or made a part of any part of the chain of title of defendants or of the plaintiff, and hence was not admissible as evidence of the extent or location of the metes and bounds covered by the true title.

For the same reasons it was not admissible on the question of the extent or location of the metes and bounds covered by the color of title of defendants. *Sulphur Mining Co. v. Thompson*, 93 Va. 293, 25 S. E. 232.

c. The giving of certain instructions, "A," "B," and "C," for plaintiff.

Such instruction "A" was as follows: "The court instructs the jury that where one person relies upon the acquirement of land, rightfully belonging to another, by adverse possession, such adverse possession must possess the following elements as shown by a preponderance of testimony; (1) The possession must last during the period of the statute (that is, for fifteen years prior to the institution of suit, concerning lands situated in Amherst county); (2) That such possession should meanwhile have been continuous and uninterrupted; (3) That it must be free from fraud; (4) That it should have been visible and notorious; (5) That it should have been exclusive; (6) That it should have been hostile; and (7) That it should have been actual. And, therefore, as applying to the case at bar, unless the jury believe by a preponderance of evidence that the defendants have held the land in controversy in accordance with said elements or requirements, each and every one,

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then they must find for the plaintiff, so far as the acquirement of title thereto by adversary possession is concerned.

"See Minor or Real Property, Vol. II, page 1103."

1. This instruction disregarded the right of defendants to tack their possession to the possession of those under whom they claimed and derived title. However, in view of the testimony for defendants on the trial of the case, to the effect that such possession as they proved was by themselves, the omission in the instruction of the reference to possession of those under whom they claimed title was not error.

Such instruction "B" was as follows: "The court instructs the jury that where a person occupies and possesses the land of another through a misapprehension or mistake, as to the boundaries of the land, with no intention to claim as his own that which does not belong to him, but only intending to claim to the true boundary line, wherever that may be, he does not hold adversely, and the reason why this is so is because in this State *intention to hold adversely* is an indispensable requisite to adverse possession, and such intention is then wanting; and, therefore, if they believe from the evidence that the defendants occupied and possessed the land in controversy through a misapprehension or mistake as to the boundaries of their lands, with no intention to claim as their own that which did not belong to them, but only intending to claim to the true line wherever that may be, they must find for the plaintiff.

"See *Schaubach v. Dillmuth*, 108 Va. 86, 60 S. E. 745, 15 Ann. Cas. 825."

2. This instruction correctly expounds the law when stated in reference to a case to which it is applicable; indeed, the precise language employed in this instruction may be found used by this court in its discussion of the cases in which the rule that intention to hold adversely is an essential element of adverse possession. The error in this

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instruction, as applicable to a case such as that at bar, is contained most distinctly in the concluding paragraph of it, namely: " \* \* \* and, therefore, if they believe from the evidence that the defendants occupied and possessed the land in controversy through a misapprehension or mistake as to the boundaries of their lands, with no intention to claim as their own that which did not belong to them, but only intending to claim to the true line wherever this may be, then they must find for the plaintiff.

The proposition of law embodied in this paragraph is good and sound in principle only where the case is one where the fact is that no intention to hold adversely up to the boundary line *on the ground* in question exists or is proved. In a case of absence of proof of such intention, possession taken through a misapprehension or mistake as to the boundary of land, with proof only of a general intention to claim only what belongs to one, as may be determined by the true boundary, wherever it may be, the mistake explains the possession and there is an absence of proof of the fact that the intention to claim adversely exists. Similarly, if the possession up to a given boundary is taken under a parol agreement between adjoining land owners that the line is not the true boundary line, there is an absence of an intention to claim adversely on the part of one taking possession under such an agreement. And the cases in which there may be an absence of the intention to claim adversely, *i. e.*, where the possession may be explained as consistent with the absence of such intention, are as various and as innumerable as are the mutations of human affairs. No especial significance, therefore, is to be given to the taking of possession under a mistake as to the true boundary, nor any especial or conclusive presumption is to be inferred as resulting from it. It is merely an explanation of the character of the possession taken under such circumstances, which in the absence of proof of spe-



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cific intention to claim title to a definite line *on the ground*, then or subsequently existing, negatives the idea of the existence of such intention.

On principle this is necessarily true. And to give to the fact that possession once taken, under a mistake as to the true boundary, may not in some cases, at the very time of taking possession under such mistake, be accompanied by the intention to claim title adversely, or if not at such time so accompanied, may not afterwards change its character, on the part of the original possessor, or subsequent possessor claiming under him, would be a confusion of ideas and would be to lose sight of the fact that the inquiry always, in a case of alleged adverse possession, is, with what intent is it in fact held? In other words, was it with claim of title? It is true that if originally taken under a mistake, and with the conditional intention only, above referred to, in the absence of proof of a specific intention as to the extent of the claim of title, or of a later or changed and specific intention, it will be assumed that there has been no change in the intent. What is not proved cannot be assumed to exist. It is also true that as between parties and privies a possession originally taken in subservience to another's title cannot be changed into an adverse possession without proof, not only of a subsequent specific intention to claim adversely, but such proof must go to the extent of bringing home notice of such intention to claim adversely to the owner of the dominant estate, or be of such a character that such notice will be presumed (*Creeknur v. Creeknur*, 75 Va. 430, and other cases on this subject). Still, the fact remains that, if in a given case there is proof of such specific intention to claim adversely, and there is no complication arising from the possession having been taken originally by agreement or in subservience to a dominant estate, (or, if there is such complication, the facts are such that notice of the intention to claim adversely is

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brought home to the owner of such estate, or the proof as to it is of such character that such notice will be presumed), from that moment, the possession will be adverse, and the statute of limitations will begin to run, regardless of the prior absence of intent to claim adversely.

On principle no other position can be in accordance with the spirit and intent of the statute of limitations, or indeed with the strict letter of the statute. On authority we find the same to be true.

The leading case in Virginia on the subject of possession taken by mistake is that of *Davis v. Owen*, 107 Va. 283, 58 S. E. 581, 13 L. R. A. (N. S.) 728. In that case there was an express disclaimer, on the part of the school trustees who took the possession relied on by the defendants as adverse, of any intention to claim title beyond the true boundary. The defendants had had only eight or nine years' possession themselves, not sufficient to apply the bar of the statute of limitations. Hence, there was in that case an absence of proof of an intention to claim adversely existing, coupled with possession, for the statutory period, and what is said by this court in that case must be read as applicable only to the case before the court.

This subject of possession taken by mistake is referred to in the case of *Haney v. Breeden*, 100 Va. at pp. 783-4, 42 S. E. 916, 917, and it is there made plain that in such cases the real inquiry always is whether the possession was with or without the *intention of claiming title*, this court saying: "It is true adverse possession depends upon the intention with which the possession is taken and held; and while the intention to claim title must be manifest, it need not be expressed. But whether or not the plaintiffs took possession by mistake or without the intention of claiming title is a question for the jury \* \* \*"

In the case of *Schaubach v. Dilleuth*, 108 Va. at pp. 91-2, 60 S. E. 747, 15 Ann. Cas. 825, this court said: "The evidence, considered upon the demurrer to it, mani-

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festly does not sustain the defendant's claim of adversary possession. It does appear that he had exclusive possession of the land in controversy for more than fifteen years, perhaps for twenty-five or thirty years; but it does not appear that he held it under color of title or claim of right. If he held it as the grantor of his father, he held, not adversely, but in subserviency to the grantee, as there is no evidence that he ever disclaimed that relation, and asserted an adverse right, which was brought to the knowledge of his grantee or those claiming under him. If he was holding the land under the mistaken belief that the fence between the thirty-three acres and the land in controversy was the line, the evidence not only fails to show that he intended to *claim and hold all the land east of the fence*, whether or not it was upon the true line between his land and that which he had conveyed to his father, but it tends strongly to show that he did not occupy the land with the intention of claiming or holding to the fence unless that was upon the true line. When his attention was called to the fact, by his father's vendee, Mr. Epes (after the latter's agreement to sell his farm, which included the fifty-acre parcel, to the plaintiff, but before the purchase price had been paid and the conveyance made), that the boundary west of the fence only contained thirty-three acres, he did *not claim* that he was the *owner of the land immediately east of the fence*. On the contrary, he stated that he had sold fifty acres to his father and that Mr. Epes was entitled to that much land. He by agreement went upon the land with Mr. Epes, a surveyor named Rives, and the son of the plaintiff who represented her, to establish the line and mark the corners of the fifty-acre parcel. The surveyor, in accordance with the directions of the defendant, ran the line far enough west of the fence to make up the fifty acres called for by the defendant's deed to his father, and marked the corners and line trees

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thereof. The defendant, not being entirely satisfied with the accuracy of that survey, went upon the land again with Mr. Epes and another surveyor, and at that time admitted that the survey made by Mr. Rives was practically correct." (Italics ours.)

In the case of *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 68 S. E. 976, the plaintiff, relying on adverse possession, recognized the location of the line in controversy as claimed by the defendant as the true line "by deed of July 23, 1904, in which he unites with others in conveying to the grantee all the coal on a certain tract of land, the boundary lines called for in the deed going exactly to and no further than the" line as claimed by defendant. This was within the statutory period before the institution of the suit. It was not a case, therefore, in which the fact was that there was a specific intention proved to exist on the part of the possessor to claim title to *a definite line on the ground* in fact beyond the true line. What is said by this court, therefore, in that case must be read in the light of the case before the court. (See also *Stuart v. Meade*, 119 Va. 753, 89 S. E. 866.)

The cases elsewhere are not in harmony on this subject, but the conflict is more seeming than real. It is believed that the considerations on principle above suggested, and the further consideration that much of the conflict on the subject arises from the different presumptions which the courts entertain at the beginning of their reasoning as arising from the proof only of possession, without express proof of intention to claim title to a definite boundary as *located on the ground*, will go far to harmonize them.

In Virginia, proof of an expressed intention to claim title is not necessary. *Haney v. Breeden*, *supra*.

It is said in *Ross v. Gould*, 5 Mc. (5 Greenl.) 121: " \* \* \* a disseisin cannot be committed by mistake, because intention \* \* \* is an essential ingredient in a disseisin."

## Opinion.

But this assumes that there is no proof of intention to claim title beyond the boundary line as *designated in the claim of title* of the possessor—the *extrinsic* matter of the calls in the deed or other evidence of claim of title being the *controlling factor* of the intention of the possessor. Coupled with this proof there may or may not be further proof of an actual intention to claim title to *the land itself up to a specific boundary line on the ground*, as the *controlling factor* of the intention of the possessor. In the former case the intention to claim title would be contingent and ambulatory, dependent for definiteness of location on the ground upon the more definite ascertainment of precisely where the lines called for in the chain or claim of title should be located on the ground. In the latter case, if such further proof be present, the possessor is shown by such further proof itself to have taken a step further in his mental process and to have decided for himself, then and there, without waiting for any future more definite ascertainment thereof, that the lines called for in his chain of title have in fact a definite *locus* on the ground, which he then and there fixes upon definitely and claims title up thereto. It is true that in taking such definite action he may be mistaken in his location as compared with the true location of the lines called for in his chain or claim of title. It may be true that but for such mistake he would never have taken the further step of forming the definite intention to claim title up to the definite location of the line in question on the ground; but the fact exists that he did form such definite intention. In such case, if he has no other claim of title than his true title, he has no color of title to give him constructive possession beyond the true boundary line. But he may, nevertheless, take and hold possession by *pedis positio* or actual possession beyond his true boundary line, and with such *bona fide*, though mistaken, claim of title to the extent of such *pedis positio* or

## Opinion.

actual possession, he will have adverse possession, which continued unbroken for the statutory period will ripen into a perfect title under the statute of limitations. (See *Creckmur v. Creckmur*, *supra*; *Kincheloe v. Tracwell*, 11 Gratt. (52 Va.) 587, 685; *Reusens v. Lawson*, 91 Va. 236, 21 S. E. 347; *Shanks v. Lancaster*, 5 Gratt. (46 Va.) 110, 50 Am. Dec. 108; *Drumright v. Hite*, 2 Va. Dec. 465, 26 S. E. 583—as to general subject of the character of claim of title which may support adverse possession in Virginia.) Otherwise the statute of limitations would not run in favor of possession under a *bona fide* claim of title when possession is taken beyond the bounds of the true title, and no honest man could acquire title under such statute. His very honesty and *bona fides* would rob him of the benefit of the statute. As is said in *Cole v. Parker*, 70 Mo. 372: "Honest men always inclose land not their own by mistake, or with the consent of the owner, and if the law on this subject were not as this court has held, the statute of limitations would never run in favor of an honest man, because he would never avow his purpose to have been to take the land of another."

As is said in *French v. Pearce*, 8 Conn. 439, 445, 21 Am. Dec. 680, "the intention of the possessor to claim adversely is an essential ingredient \* \* \* yet \* \* \* the person who enters on land believing and claiming it to be his own \* \* \* though under a mistake, \* \* \* does thus enter and possess. The very nature of his act is an assertion of his own title and the denial of the title of others. \* \* \* it is certain that a disseisin may be committed by mistake as that a man may, by mistake, take possession of land, claiming title and believing it to be his own. \* \* \* Adopt the rule that an entry and possession under claim of right, if through a mistake, does not constitute an adverse possession and a new principle is substituted. The inquiry no longer is whether visible possession, with the intent to possess

## Opinion.

under a claim of right, and to use and enjoy as one's own is a disseisin; but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explained \* \* \*."

In *Seymour v. Carli*, 31 Minn. 81, 84, 16 N. W. 495, 496, after conceding that the parties, when possession was taken, made a mistake as to their boundaries, the court said: "The object of the statute is to quiet titles and end disputes. If the plaintiffs have a cause of action in ejectment, there would seem to be no good reason why the statute should not run against it, as in other cases where the possession of land is withheld. It is the policy of the law that parties should assert their claims to the possession of land and rectify their boundaries within the statutory term."

A collection of many recent cases on this subject will be found in the note of the learned annotator to 33 L. R. A. (N. S.) 923, *et seq.*, where the varying views of the different courts in recent cases will be found. The conclusion of the annotator is that, "the old idea that there could be no disseisin by mistake is now abandoned," and that "the trend of opinion is against disturbing him whose visible boundaries have existed for the period of the statute of limitations."

On the whole, the correct rule, and the rule in Virginia, may be taken to be that, where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line on the ground. That is to say, on the whole proof a case must be presented in which the preponderance of evidence as to the character of the possession, how held, how evidenced on the ground,

## Opinion.

how regarded by the adjoining land owner, etc., etc., supplies the proof that the definite and positive intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line *on the ground* existed, coupled with the requisite possession, for the statutory period, in order to ripen title under the statute. Whether the positive and definite intention to claim *as one's own* the land up to a particular and definite line *on the ground* existed, is the practical test in such cases.

The collateral question whether the possessor would have claimed title, claimed the land as his own, had he believed the land involved did not belong to him, but to another, that is, had he not been mistaken as to the true boundary line called for in his chain of title, is not the proximate but an antecedent question, which is irrelevant and serves only to confuse ideas.

The verdict of the jury in the case at bar is an illustration of the effect that results from a confusion of the circumstance that there was a mistake in the original location of the lines in controversy (if there was in fact such a mistake, which would be but a single circumstance after all, which should have been considered by the jury in determining whether the fact of an intention to claim title up to such boundary lines existed in the possessor for the requisite statutory period) with the broader consideration of whether on the whole case the evidence shows that such intention to so claim title existed. That is to say, it seems clear that the jury, under the instruction under consideration, drew from the presumption that arises from such a single circumstance, a conclusive inference that in such a case no intention to claim title to the boundary as located on the ground could at any time exist. This was to base an inference upon a presumption, which this court has held in another line of cases cannot be done. (*C. & O. Ry. Co. v. Heath*, 103 Va. 64, 48 S. E. 508.) And under such

## Opinion.

instruction the verdict of the jury ignored the uncontradicted testimony in the case referred to above, which was in effect that defendants had for the greater part of seventy years in fact claimed title, claimed as their own the land, up to the old rail fence and hedgerow location *on the ground* of the lines in controversy with the knowledge thereof on the part of, and hence brought home to, the adjoining owners, under which plaintiff claims, at least up to the time of her acquisition of the title, a claim of title which would have sufficed to apply the bar of the statute of limitations as against such adjoining owners even had the defendants' possession been originally taken in subservience to the title of such owners (*Creekmur v. Creekmur*, *supra*, and kindred cases too numerous to cite). If such could be the law in this State, few titles would be secure from experimental surveys based upon the calls for courses and distances of ancient plats, in disregard of long established boundaries in accordance with actual possession taken and held for the prescriptive period, or longer, without objection on the part of adjoining land owners. It is true that courts have no policies, but they know that the policy of the statutes of limitations is one of repose, and this court would feel that a construction of this statute which would nullify its policy would not be a correct construction of it.

Our conclusion, therefore, is, on the instruction "B" under consideration, that the court below erred in giving it in this case; and that while its language is abstractly correct as applicable to a proper case therefor, it would be a better phrase in any case for any instruction or instructions on this subject to be in a different form, so as to present for the consideration of the jury, in dealing with this subject, the main and broad question, whether the intention to claim title—to claim as his own the land—up to the line or lines in controversy *on the ground* in fact existed, along with the acts of possession relied on by the

## Opinion.

possessor, and direct their attention to the consideration of mistakes in original location of boundary, if such was made, as but one of the circumstances, if there are others, which bear upon such question of fact as to intention to claim title.

Instruction "C" was as follows: "The court instructs the jury that while the quantity of land mentioned in the deed will not control the boundary when estimated by the description, nevertheless a correspondence of quantity given by a line in question with the quantity mentioned in the deed or in the approximation thereto, may be considered as going to establish such line as the true one."

3. We think that this instruction gave too great prominence and weight to the mere acreage. Instead of instructing the jury that the quantity of land may be considered "as going to establish such line," it would have been better for the court to have said it may be considered "as a circumstance bearing upon the establishment of such line, but one of less weight than natural monuments or corners or reputed boundaries called for in the plat, 'Exhibit X' filed with the plaintiff's petition in this case."

Instruction "D" was as follows: "The court instructs the jury that if they believe, in the light of all of the evidence, that the boundary lines between the parties hereto have been properly determined and laid off by Mr. H. G. Garland, the surveyor appointed by the court to make the survey herein filed, in accordance with the plots and metes and bounds attached to or referred to in deeds and other muniments of title under which said parties claim their respective rights and title to the lands in question as introduced in this case, then the court further instructs the jury that if they believe from the evidence that these lines have by mistake of the parties hereto or their grantors or predecessors in title become confused so that the defendants have in consequence taken possession of a part of the land

## Opinion.

shown by said survey as properly belonging to the plaintiff, then unless the jury believe from the evidence that the defendants or their predecessors in title have intentionally dispossessed the plaintiff or her grantors for the purpose of acquiring title by adversary possession to all or a part of the land in question, then they, the jury, should find for the plaintiff in accordance with the report and survey of Mr. H. G. Garland filed in this suit."

It is deemed sufficient in this case to say—

4. We think that this instruction is erroneous because of its adoption of a wrong view of the effect of a mistake in the original location of boundary lines, as above set forth.

We come now to consider—

d. The refusing of certain instructions numbered 1 to 7 offered by defendants.

1. As this opinion has been sufficiently prolonged, it is deemed sufficient to say on this subject that all of these instructions were properly refused, it appearing from the record that the other instructions given for the defendants fairly submitted their theory of the case to the jury.

We have not reviewed the cases of *Hamman v. Miller*, 116 Va. 873, 83 S. E. 382, and *Wright v. Rabey*, 117 Va. 884, 86 S. E. 71, because they are not directly in point upon any of the questions involved herein; but the manner in which the statute in question was dealt with in those cases tends to support the conclusions reached in the present case.

For the reasons stated above, we are of opinion to reverse the judgment complained of, set aside the verdict of the jury, and grant a new trial, to be had not in conflict with the views above expressed.

*Reversed.*

## Statement.

Richmond.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED V. MURRAY.

November 16, 1916.

Absent, Sims, J.\*

1. ACCIDENT—*Proof Required—Circumstantial Evidence—Demurr to Evidence.*—While the proof of an accident may be circumstantial, the circumstances proved must point directly to the main fact in issue and not be such as to lead merely into labyrinth of surmises and conjectures. Even upon a denial to evidence the finding cannot be based upon conjecture, or random judgment, but must be founded upon facts and evidence.
2. NEGLIGENCE—*Burden of Proof—One of Two Causes of Accident.*—In an action to recover damages for a negligent injury, burden of showing negligence by a preponderance of the evidence is upon the plaintiff, and if the injury might have resulted from one of two causes for only one of which the defendant was responsible there can be no recovery; neither can the plaintiff recover if it is just as probable that the damage was caused by the one as by the other.
3. ACCIDENT INSURANCE—*Accidental Death—Burden of Proof—Presumption—Case at Bar.*—In order to recover on an accident policy, the burden is on the plaintiff to bring himself within the provisions of the contract of insurance by proving an accidental injury to the assured. There is no presumption to the contrary, as death is presumed to be the result of natural dissolution rather than of accidental injury. In the case at bar, the accidental death of the assured is not established by the evidence introduced in the cause.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action on an accident insurance policy. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

\*Submitted before Judge Sims took his seat.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY.

The World Mission Church of  
Washington, D.C.,

Plaintiff

v.

Carolyn Hollander,

Defendant

At Law No. 147652

PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO VACATE JUDGMENT  
AND ENTER JUDGMENT IN FAVOR OF DEFENDANT,  
OR IN THE ALTERNATIVE,  
TO VACATE THE JUDGMENT AND ORDER A NEW TRIAL

COMES NOW the Plaintiff, The World Mission Church of Washington, D.C., by counsels, and states that it opposes the Defendant's Motion to Vacate Judgment and Enter Judgment in Favor of Defendant, Or in the Alternative, to Vacate the Judgment and Order a New Trial. As its grounds of opposition, it states as follows:

1. First of all, the Plaintiff concedes that Christian v. Bulbeck, 120 Va. 74 (1916) seems to stand for a proposition that the Court should determine whether there is a proof of an actual intention to claim title to the land itself up to a specific boundary line on the ground even where a mistake as to the true boundary exists. However, the Christian Court also indicated the Court should also direct its attention to the consideration of mistakes as one of the circumstances which bear upon the question of fact as to intention to claim title. Id. at 113. The

predecessors in title to the Defendant's property had all been mistaken as to the actual location of the boundary throughout the entire periods of their ownership of the property. This Court could have certainly concluded from the evidence presented that the Defendant had failed to prove by clear and convincing evidence a bona fide intention to claim title to the disputed portion of the property.

2. More importantly, a very recent Supreme Court case of Chaney v. Haynes, 250 Va. 155 (1995) rebuts the seeming downplaying by the Christian Court of significance of the mistake in determining the intent to hold adversely. The Plaintiff admits that Chaney case is a prescriptive easement case and not an adverse possession one. However, the elements of prescriptive easement and proofs thereof are basically the same as those of adverse possession. The only difference is that, under prescriptive easement, one acquires a use to property rather than a title to it.

A claimant of prescriptive easement has to prove an adverse use which is in essence an intentional assertion of claim hostile to the ownership right of another. The character of use required for prescriptive easement--adverse--is the same character of possession required for adverse possession. The Court in Chaney stated that "use of property, under the mistaken belief of a recorded right, cannot be adverse as long as such mistake continues." (Bold and Italics added for emphasis.) (Citing Clatterbuck v. Clore, 130 Va. 113 (1921); Clinchfield Coal Co. v.



Viers, 111 Va. 261 (1910); Schaubach v. Dilleuth, 108 Va. 86 (1908)) Id. at 158.

In Chaney the claimants of prescriptive easement all mistakenly believed that they had a right to use property they had been using for more than 20 years under the recorded right. The recorded right of easement, however, was for the property located at another location. Despite that the claimants had been using the property with definite boundaries on ground (between cedar trees and bushes), the Chaney Court held that such use could not have been adverse as long as the mistake continued. Id. at 159. Whereas the Christian Court did not address the issue of continuing mistake, the Chaney Court seemed to have a clear rule that, so long as the mistake continues, the mistaken use does not become an adverse use.

Just like the claimants in Chaney, the predecessors in title to the Defendant's case at bar, had been all along under mistaken belief as to the location of the boundary and had never realized such mistake at anytime during the periods of their ownership of the property. Therefore, their use and possession of the disputed portion of the property could not have been adverse. And, this is the only conclusion we can draw under the analysis of the Chaney Court.


3. Lastly, as argued by the Plaintiff at its closing argument, the Defendant had failed to prove all the necessary elements of the adverse possession by clear and convincing evidence. Specifically, the Defendant had failed to prove any

hostile intent to use and possess on the part of Philadelphia Management from November 29, 1980 until its sale of the property on July 2, 1981. The only evidence presented before this Court was that someone with Philadelphia Management represented in December, 1980 to the purchaser of the property that the disputed portion of property belonged to the backyard. There was no evidence as to how and with what intent Philadelphia Management had used and possessed the disputed portion of the property.

WHEREFORE, the Plaintiff respectfully prays that this Court denies the Defendant's Motion to Vacate Judgment and Enter Judgment in Favor of Defendant, Or in the Alternative, to Vacate the Judgment and Order a New Trial.

The World Mission Church of  
Washington, D.C.  
By counsels

Moon, Park & Associates



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Certificate of Service

The undersigned hereby duly certifies that a true copy of the foregoing Plaintiff's Opposition was mailed and faxed (525-2489) on this 4th day of February, 1997 to William M. Stanley, Esquire, counsel for Defendant, at 2200 Wilson Boulevard, Suite 800, Arlington, Virginia 22201.

  
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Ilryong Moon

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d and remanded.

each Food Lion's assign-  
support the jury's verdict

Chaney v. Haynes  
250 Va. 155 (1995)

155

RACHEL P. CHANEY

v.

CASPER B. HAYNES, JR., ET AL.

Record No. 941562

June 9, 1995

Present: All the Justices

*The evidence was not sufficient to support the trial court's ruling that a prescriptive easement had been established for a right of way over subdivided lots providing access to a river, and the plaintiffs failed to prove an adverse use; therefore, the trial court's ruling approving a commissioner's report was plainly wrong and it is reversed.*

**Real Property — Prescriptive Easements — Adverse Use — Injunctive Relief — Rights of Way**

The former owner of a tract of land subdivided it and granted each lot purchaser the right to use a 10-foot wide strip of land along the northern boundary of the lots to the low water mark of the river. The easement runs across a lot owned by one of the plaintiffs. Despite the fact that the express easement runs across her own property, the plaintiff and the other successors in interest to the original purchasers of the lots have used land adjacent to her property to gain access to the river. The adjacent lot is now owned by the defendant, who placed a fence across a portion of the lot, thus preventing access to the river. The plaintiffs filed a petition for a temporary injunction to enjoin the defendant from interfering with their use of the alleged right-of-way and they also filed a petition for declaratory judgment, asserting that they had established a prescriptive easement over the defendant's land. A commissioner concluded that the plaintiffs had acquired a prescriptive easement over the defendant's property and the trial court entered an order confirming the report. The defendant appeals.

1. On appeal, the Court must determine whether the conclusions of the commissioner, as approved by the trial court, are supported by credible evidence.
2. To establish a private right of way by prescription over lands of another, the claimant must prove, by clear and convincing evidence, use under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owners of the land over which it passes, and that the use has continued for at least 20 years.
3. When the user clearly demonstrates that his use has been open, visible, continuous, and exclusive for more than twenty years, his use is presumed to be under a claim of right. This presumption of a grant or adverse right is in Virginia *prima facie* only and may be rebutted by evidence.

4. The essence of an adverse use is the intentional assertion of a claim hostile to the ownership right of another, but use of property under the mistaken belief of a recorded right cannot be adverse as long as such mistake continues.
5. Here the plaintiffs based their use of the defendant's land solely on their mistaken belief that it was land described in their express easements and, thus, they have failed to prove that a prescriptive easement was established.
6. Since the plaintiffs failed to prove their right to an adverse use, the trial court's ruling approving the commissioner's report is plainly wrong.

Appeal from a judgment of the Circuit Court of King and Queen County. Hon. Samuel Taylor Powell, III, judge presiding.

*Reversed and final judgment.*

*Jonathan A. Smith-George (Patten, Wornom & Watkins, on brief), for appellant.*

*C. Flipppo Hicks (J. Flipppo Hicks; Robert H. Smallenberg; Ayers & Stolte, on brief), for appellee.*

JUSTICE KEENAN delivered the opinion of the Court.

In this appeal, we consider whether the evidence is sufficient to support the trial court's ruling that a prescriptive easement had been established. The dispositive issue is whether the plaintiffs proved an adverse use.

The property involved in this dispute is located in King and Queen County. In 1944, J.M. Garnett purchased a five-acre tract which he later subdivided. By deed, the Garnetts granted each lot purchaser

the right to use the strip of land 10-ft. wide over and along the northern boundary of this lot and over and along the northern boundary of all other lots in the Re-Subdivision and over and along the remaining property of J.M. Garnett extending from the public highway on the east to low water mark of York River on the west for purposes of access to the York River and to the public highway. This right shall be in common with a similar right of use by the [grantors] and the owners of all the land now owned by J.M. Garnett and by the owners of all the lots in the Re-Subdivision herein recited.

The described easement over the land of Erwin.

Casper B. Haynes and his heirs and assigns are all successors in title to the Garnett lots. Deed of J.M. Garnett across Erwin's property to the plaintiffs used land adjacent to the York River. This adjacent land is now owned by F. Haynes. At the time Chaney died, the plaintiffs owned across a portion of the land.

The plaintiffs appealed the trial court's ruling that an alleged ten-foot wide easement between Route 66 and the plaintiffs' land was a prescriptive easement. The trial court's ruling on the petition for declaratory judgment was affirmed.

At the commission's hearing, the commission stated that, under the deed, an easement ran across the land to the north of the plaintiffs' land approximately 10 feet wide.

These plaintiffs claimed that the river became the boundary there. One plaintiff testified that the way with known width was known. Duvall stated that the easement was straight down the river, over shrubs, apparent easement. The area between the river and the plaintiffs' land included in the deed.

The commission's ruling on the plaintiffs' use of the land and with the plaintiffs' continued for the plaintiffs' use included that the plaintiffs' use over Chaney's land.

The described easement runs across a lot now owned by Josephine Erwin.

Casper B. Haynes, Jr., Josephine Erwin, and the other plaintiffs are all successors in interest to the original purchasers of the Garnett lots. Despite the fact that their express easement runs across Erwin's property, the plaintiffs and their predecessors have used land adjacent to Erwin's property to gain access to the York River. This adjacent lot, formerly owned by Frances Sutton, is now owned by Rachel P. Chaney. The plaintiffs alleged that, at the time Chaney purchased the lot in 1991, she placed a fence across a portion of the lot, thus preventing access to the river.

The plaintiffs filed a petition for temporary injunction, asking the trial court to enjoin Chaney from interfering with their use of an alleged ten-foot wide right-of-way across Chaney's land between Route 667 and the York River. The plaintiffs also filed a petition for declaratory judgment asserting that they had established a prescriptive easement, ten feet wide, over Chaney's land. The trial court denied the request for injunctive relief and referred the petition for declaratory judgment to a commissioner in chancery.

At the commissioner's hearing, all the plaintiffs who testified stated that, until the present suit was filed, they believed their easement ran over Chaney's property between a group of cedar trees to the north and a stand of bushes to the south. That area is approximately 40 to 50 feet wide.

These plaintiffs further stated that they used this way to get to the river because they understood that their easement was located there. One plaintiff, Michael S. Duvall, testified that he used the way with knowledge that his easement was only ten feet wide. Duvall stated that, when he used the way, he drove his vehicle straight down the middle of the area between the trees and the shrubs, apparently in an attempt to comply with the terms of his easement. The other plaintiffs testified that they used the whole area between the trees and the shrubs because they thought it was included in their easement.

The commissioner received other evidence indicating that the plaintiffs' use of the way was exclusive, continuous, uninterrupted, and with the acquiescence of the Suttons, and that such use had continued for a period of over 20 years. The commissioner concluded that the plaintiffs had acquired a prescriptive easement over Chaney's property, and stated that they had established an

adverse use by their use of the entire area between the trees and the shrubs.

After overruling Chaney's exceptions to the commissioner's report, the trial court entered an order confirming the report. This appeal followed.

Chaney argues that the plaintiffs did not establish a prescriptive easement because they did not prove the element of adverse use. Chaney asserts that, if the users of a way are under the mistaken belief they have an express easement granting them the right to use the way, and they do not intend to use land over which they have no right-of-way, then such use of the property is not adverse. See *Clatterbuck v. Clore*, 130 Va. 113, 121-22, 107 S.E. 669, 672 (1921).

In response, the plaintiffs argue that the element of adverse use is satisfied by their use of the entire area between the cedar trees and the shrubs, instead of only a ten-foot wide strip across the property corresponding to the width of the easement they believed they were entitled to use. Citing *Pettus v. Keeling*, 232 Va. 483, 489-90, 352 S.E.2d 321, 326 (1987), the plaintiffs contend that the location and size of their right-of-way should be measured by their actual use of the property. We disagree with the plaintiffs.

[1] Our standard of review in a case like this is well established. Since the trial court fully approved the report of a commissioner in chancery who heard evidence ore tenus, the trial court's decree will not be reversed on appeal unless it is plainly wrong. *Ward v. Harper*, 234 Va. 68, 70, 360 S.E.2d 179, 181 (1987); *Pavlock v. Gallop*, 207 Va. 989, 994, 154 S.E.2d 153, 157 (1967). Thus, we must determine whether the conclusions of the commissioner, as approved by the trial court, are supported by credible evidence. *Ward*, 234 Va. at 70, 360 S.E.2d at 181; *Surf Realty Corp. v. Standing*, 195 Va. 431, 436, 78 S.E.2d 901, 904 (1953).

[2-3] In determining whether the plaintiffs established a prescriptive easement over Chaney's land, we apply the settled rule that

[t]o establish a private right of way by prescription over lands of another, the claimant must prove, by clear and convincing evidence, that his use of the roadway was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owners of

the land over which  
for at least 20 years

*Ward*, 234 Va. at 485, 352 S.E.2d 321, 326 (1987), another's land clearly visible, continuous use is presumed. *Phillips*, 240 Va. 125, 126 (1985). *Pettus*, 232 Va. at 489, 352 S.E.2d 321, 326 (1987), a grant or adverse use can be rebutted by evidence. *Pettus*, 232 Va. at 489, 352 S.E.2d 321, 326 (1987).

Chaney argues that the element of adverse use is rebutted, that all the plaintiffs' claims that their express easement was not intended to use

[4-5] The essence of a claim hostile to the plaintiff's property, under the principle of adverse use as long as it is not rebutted, at 121-22, 107 S.E.2d 321, 326 (1987), 261, 264, 68 S.E.2d 321, 326 (1987), Va. 86, 89, 60 S.E.2d 321, 326 (1987), that the plaintiff's mistaken belief in an express easement. Thus, the element of adverse use is not rebutted.

We find no error in the trial court's finding that the "whole area" was used by the plaintiffs with the intent to use the property. With the finding stated that the area in question was used by the plaintiffs from the center of the area, the trial court's finding that the plaintiffs intended an interference with the defendant's property is not rebutted by their evidence.

We also disagree with the trial court's finding in *Pettus* at 430 (1989), that the

the land over which it passes, and that the use has continued for at least 20 years.

*Ward*, 234 Va. at 70, 360 S.E.2d at 181. *Accord Pettus*, 232 Va. at 485, 352 S.E.2d at 323. However, "when the user of a way over another's land clearly demonstrates that his use has been open, visible, continuous, and exclusive for more than twenty years, his use is presumed to be under a claim of right." *Umbarger v. Phillips*, 240 Va. 120, 124, 393 S.E.2d 198, 200 (1990). *Accord Pettus*, 232 Va. at 485, 352 S.E.2d at 323. "[T]his presumption of a grant or adverse right is in Virginia *prima facie* only and may be rebutted by evidence." *Davis v. Wilkinson*, 140 Va. 672, 677, 125 S.E. 700, 702 (1924).

Chaney argues that any such presumption in the plaintiffs' favor is rebutted, as a matter of law, by the undisputed evidence that all the plaintiffs used the way under the mistaken belief that their express easement designated that location, and that they did not intend to use any land not included in the grant. We agree.

[4-5] The essence of an adverse use is the intentional assertion of a claim hostile to the ownership right of another. Use of property, under the mistaken belief of a recorded right, cannot be adverse as long as such mistake continues. *See Clatterbuck*, 130 Va. at 121-22, 107 S.E. at 672; *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 264, 68 S.E. 976, 977 (1910); *Schaubach v. Dillemath*, 108 Va. 86, 89, 60 S.E. 745, 746 (1908). The present record shows that the plaintiffs based their use of Chaney's land solely on their mistaken belief that it was the land described in their express easement. Thus, the plaintiffs have failed to prove that a prescriptive easement was established.

We find no merit in the plaintiffs' contention that their use of the "whole area" between the cedar trees and the bushes proved an intent to use adversely all but a ten-foot-wide strip across the property. With the exception of Duvall, all the plaintiffs who testified stated that they believed their easement covered the entire area in question. Duvall testified that he used only a strip down the center of the way. Thus, none of the plaintiffs' testimony evidenced an intent to use any property other than what they believed their express easement allowed.

We also disagree with the plaintiffs' contention that our holdings in *Pettus* and in *McNeil v. Kingrey*, 237 Va. 400, 377 S.E.2d 430 (1989), require a different result here. In those cases, we up-



held findings that prescriptive easements had been established when the evidence showed, among other things, that both of the easement claimants held a general belief they had the right to use the ways at issue. *Pettus*, 232 Va. at 488, 352 S.E.2d at 325; *McNeil*, 237 Va. at 402, 377 S.E.2d at 431.

[6] Neither of those claimants, however, asserted that his right derived from an express easement. Thus, the claimants' intended use of the respective properties was hostile to the interests of the property owners and satisfied the requirement of an adverse use. Here, in contrast, the plaintiffs intended to use only the land described in their express easement. Since the plaintiffs failed to prove an adverse use, we conclude that the trial court's ruling approving the commissioner's report is plainly wrong.

For these reasons, we will reverse the trial court's judgment and enter final judgment in favor of Chaney.

*Reversed and final judgment.*

TARM

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*The trial court testimony on the motion and grant of the evidence motion. The plaintiff for a new trial the opinion.*

**Contracts — Breach  
Expert Testimony —  
Motions to Strike**

A materials supplier filed a motion to dismiss the defendant corporation's claim for breach of contract. The defendant corporation is a concrete masonry contractor. The supplier and filed a motion to dismiss the claim for breach of contract. The supplier did not use in the manufacture known as "pop-outs." also its sole evidence. The court concluded that the evidence on the motion for judgment, jury's determination.

1. The admission of expert testimony at the trial judge and was in the discretion.
2. As a general rule, a trial judge should admit all relevant evidence unless the evidence is irrelevant.
3. Expert testimony is admissible if the testimony is relevant to the issues that have no bearing on the outcome of the case.
4. The trial court should not exclude evidence of a similarity of conditions at the time relevant to the case.

## Opinion.

marked by a fence sixty-five feet south of its northern line, and upon which the ten acres of land sold by appellant to the appellee fronts, and the southern line of the ten acres being fixed at the low water mark of the Roanoke river, there can be no difficulty in ascertaining by survey the proper metes and bounds of the ten acres to be conveyed by the appellant to the appellee.

For these reasons the decrees appealed from must be reversed, and the cause remanded to the circuit court for further proceedings not in conflict with this opinion.

*Reversed.*

## Opinion.

**Staunton.**

CLINCHFIELD COAL CO. AND OTHERS v. VIERS.

September 15, 1910.

Absent, Cardwell, J.

1. **BOUNDARIES—Location—Case in Judgment.**—Upon the evidence touching the boundary line in controversy, it is held that the true location of the line is that claimed by the appellants.
2. **ADVERSE POSSESSION—Possession by Mistake.**—When the occupation of land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but intending to claim only to the true line, wherever it may be, the holding is not adverse.

Appeal from a decree of the Circuit Court of Dickenson county. Decree for complainant. Defendants appeal.

*Reversed.*

The opinion states the case.

*Phlegar & Powell, Ayers & Fulton, W. H. Rouse, Vicars & Peery* and *A. A. Skeen*, for the appellants.

*Roland E. Chase* and *S. H. Sutherland*, for the appellee.

HARRISON, J., delivered the opinion of the court.

The bill in this case was filed by the appellee, H. H. Viers, asserting title to and possession of a strip of land contained 81.99 acres in the county of Dickenson, and alleging that by reason of divers conveyances, the appellant, Clinchfield Coal Company, claimed to be the owner of the coal and

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minerals on said strip of land, and the appellants, T. K. Colley and wife, the owners of the surface thereof, and seeking to have the conveyances under which the appellants claimed set aside as alleged clouds upon his title.

The title of the appellee to the strip of land was put in issue by the pleadings, and upon that issue a final decree was rendered by the circuit court, sustaining the contention of the appellee and ordering the deeds mentioned in the bill to be cancelled and annulled. This decree is brought under review by the present appeal.

It appears that about the year 1858 Robert Fugate, a surveyor, ran a line through the section of country where the lands here involved are situated. The true location of this line is the vital question upon which this controversy turns.

At the time this Fugate line was run, James Colley owned a large body of land in its neighborhood, and it is through him that both parties to this controversy claim title. In the year 1884, James Colley, who had been selling off portions of his land, had the line run which is known in the record as the Thornbury line. This line is four and one-half miles in length, is well marked and identified, and the appellants contend that it is the alleged Fugate line re-established by Thornbury.

A careful examination of the record leads us to the conclusion that this contention is sustained by the weight of evidence, both oral and documentary. It satisfactorily appears that throughout the entire length of this Thornbury line, and as far back as the records shed any light upon the subject, the citizens on both sides thereof have recognized it as the true line by which their titles were determined. In numerous deeds passing title from one to the other, on both sides of this line, it is referred to, sometimes as the Thornbury line and sometimes as the Fugate line, the metes and bounds in the respective deeds showing that the several tracts of land conveyed ran to this well established line, thus recog-

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nizing the Fugate line and the Thornbury line as one and the same. The appellee, in effect, recognized this as the true line by deed of July 23, 1904, in which he unites with others in conveying to the grantee all the coal on a certain tract of land, the boundary lines called for in the deed going exactly to and no further than the Thornbury line.

The line contended for by the appellee as the true Fugate line is located by him on an average of about fifty-five poles north of the Thornbury line, thus leaving the disputed strip between the two contending lines. In support of the contention that the true Fugate line is that insisted upon by him, appellee mainly relies upon certain marked timber in the neighborhood of the disputed land. Some of these marked trees were blocked and the blocks exhibited with the record, and considerable evidence given concerning them. The few blocks adduced were from trees embraced within a very short distance. They were all located in the neighborhood of and within the length of the boundary line to one side of appellee's tract of 185 acres. The evidence shows that these marks vary in age as much as twelve years, and one of them does not appear to have been made by an axe or hatchet, but to have been the result of a bruise on the tree. The evidence with respect to these marks wholly fails to show their value as tending to establish the true Fugate line. It very clearly appears that they were not made by Robert Fugate. One of the surveyors called by the appellee states positively that the marks in question were made by a surveyor by the name of Looney. These marks, so far as made by a surveyor, were evidently never made as indicating the Fugate line, but were made in running some other much shorter line. Outside of these marks, there is not an object shown having the slightest tendency to establish the true Fugate line as being upon the location contended for by the appellee, which location, if established,

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would unsettle numerous titles and almost certainly precipitate much litigation.

It is not necessary, and we will not attempt in this opinion, to review all of the voluminous evidence adduced by both the appellants and the appellee in support of their respective contentions as to the true location of the Fugate line. It must suffice to say that, in our judgment, the appellee falls far short of sustaining his claim, and that the great preponderance of evidence establishes the Thornbury line to be, as claimed by the appellants, the true Fugate line. It follows from this conclusion that the disputed strip of land is not within the calls of the deeds of the appellee, but is covered by the deed of the appellants.

It is further claimed by the appellee that he has held adverse possession of the disputed strip of land for a sufficient length of time to acquire the legal title thereto as against the true owner.

It is only necessary to say, in answer to this contention, that the record clearly shows that the appellee never claimed title further north than the true Fugate line, and had no intention of claiming land that did not belong to him. The great weight of authority is in favor of the view, that when the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but intends to claim only to the true title wherever it may be, the holding is not adverse; the intention to hold adversely being an indispensable element of adverse possession. *Schaubach v. Dillemath*, 108 Va. 86, 60 S. E. 745.

For these reasons the decree appealed from must be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the appellee's bill with costs.

*Reversed.*

## Statement.

## Staunton.

CLINCHFIELD COAL CO. v. WHEELER.

September 15, 1910.

Absent, Cardwell, J.

1. APPEAL AND ERROR—*Maturing Case—Sufficiency of Bond.*—There is no error to the prejudice of the defendant in error in this case in the proceedings by which this writ of error has been matured for hearing, nor is the bond taken open to the objections alleged against it.
2. MASTER AND SERVANT—*Assumption of Risk.*—A servant, when he enters the service of the master, assumes all of the ordinary risks of such service, and also, as a general rule, all risks from causes which are known to him, or should be readily discernable by a person of his age and capacity, in the exercise of ordinary care.
3. MASTER AND SERVANT—*Obvious Dangers—Assumption of Risk.*—When an employee is not placed by his employer in a position of undisclosed danger, but is a mature man, doing the ordinary work which he has engaged to do and the risks of which are obvious to any one, he assumes the risk of the employment, and no negligence can be imputed to the employer for an accident to him therefrom.
4. INSTRUCTIONS—*Evidence to Support—Assumed Risk.*—An instruction which correctly states the law of "assumed risk" and is applicable to the case, should be given where the evidence tends to establish the facts stated therein.

Error to a judgment of the Circuit Court of Russell county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

J., quotes from the opinion in *Bass v. Norfolk Ry. Co.*, 100 Va. 1, 8, 40 S. E. 100, 102, the following as the settled rule in this court, viz.: "Whether or not the plaintiff's intestate, under all the facts and circumstances of the case, was guilty of contributory negligence is a question about which reasonably fair-minded men might differ. The inferences to be drawn from the evidence must be certain and incontrovertible, or they cannot be decided by the court. It will therefore, a question for the jury . . . And since the jury might have found for the plaintiff on the question of contributory negligence of the plaintiff's intestate, on the defendant's demurrer to the evidence the court must so find."

Viewed in the light of the authorities cited, we are of opinion that the judgment of the circuit court for the plaintiff, upon the defendant's demurrer to the evidence, is right and has to be affirmed.

*Affirmed.*

### Stanton.

#### STUART AND OTHERS V. MEADE AND OTHERS.

September 11, 1916.

1. ADVERSE POSSESSION—*Line Fence—Agreement—Transfer of Title—Notice—Case at Bar.*—Where adjacent land owners build a line fence "on or near the line between them" and by written agreement stipulate that "neither party shall have any advantage of the other by the fence not being on the line, and that when the fence is reset, it shall be put on the true line between the parties, unless otherwise agreed," the alienees of the parties are bound by the agreement whether they have notice of it or not.
2. ADVERSE POSSESSION—*Privity—Presumption—Notice—Transfer of Title.*—Where possession has been taken in privity with another, the true owner has the right to presume that the original character and intent of the possession remain unchanged until something has been done which will bring home to him notice of a disloyal severance of the privity, and a mere transfer of a record title, with no material change in the character of the possession is not alone sufficient for this purpose. A possession which, in its beginning, was consistent with the possession of the true owner will not be rendered adverse by the lapse of any length of time unless there be such a change in the character of the original possession as will charge the true owner with notice thereof.
3. ADVERSE POSSESSION—*Mistake—Intention.*—Where a person occupies and possesses the land of another, through a misapprehension or mistake as to the boundaries of his land, with no intention to claim as his own that which does not belong to him, but only intends to claim to the true line, wherever it may be, he does not hold adversely, for, in this State, the intention to hold adversely is an indispensable element of adverse possession.

Error to judgments of the Circuit Court of Russell county, in two actions of ejectment. Judgments for the defendant. Plaintiffs severally assign error.

*Reversed.*

## Statement.

On the 2nd day of October, 1871, Elizabeth T. Johnson and Louisa M. Johnson, of the one part, and W. A. Stuart, of the other part, owning adjoining tracts of land, entered into a written agreement, which, literally quoted, was that, "the said parties have lately made a fence on or near the line between them running from Gilbert's line to the corner between said Johnsons and Stuart, a distance of eight or nine hundred panels of fence, now it is agreed that the said fence between the parties is to be treated as a line fence, and that neither party shall have any advantage of the other by the fence not being on the line, and that when the fence is reset, it shall be put on the true line between the parties, unless otherwise agreed."

In the year 1897, Louisa M. Webb, who was formerly Louisa M. Johnson and who had become the sole owner of the tract of land which was affected by the above-recited agreement, conveyed the same to "Emily J. Meade and her three children, Gertrude, Charlie and Tom," these grantees being the daughter and grandchildren, respectively, of the said Louisa M. Webb. This conveyance, after reciting a consideration of love and affection and certain small sums of money to be paid to specified beneficiaries and certain collateral directions to be complied with by the grantees, described the land generally as "the Isaac Johnson land, being the same land on which the said party of the first part now lives, and includes all the land which she now owns." The grantees took possession accordingly, and have held it ever since.

In 1884 W. A. Stuart conveyed to the Stuart Land and Cattle Company the other and adjoining tract which was the subject of the line fence agreement aforesaid; and, by contracts made, respectively, in

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August, 1906, and February, 1907, the said company sold a part of the same to D. C. Stuart and the residue to J. T. Puckett. Subsequently, in the year 1913, the Stuart Land and Cattle Company and heirs of W. A. Stuart assigned to D. C. Stuart and J. T. Puckett all rights and benefits arising under the said line fence agreement. Stuart and Puckett were placed in possession shortly after the contracts of sale were made, but no deeds were executed to them until several years later. In about the year 1909, when the lands sold to Stuart and Puckett were being surveyed to enable the parties properly to describe the premises, it developed that according to the true line the fence which had all along been the visible and physical division was so located as to include within the Johnson boundary something over seven acres of the original Stuart land. A part of this seven acres falls within the lines of the D. C. Stuart purchase and the residue in the Puckett boundary.

The attention of the grantees in the deed from Mrs. Webb was called to this disclosure, but they refused to agree to any change in the location of the fence, and, thereupon, Stuart and Puckett brought their separate actions of ejectment. These two actions were, by agreement, tried together, and there was a verdict and judgment for the defendants. The defense relied upon was their possession.

It is conceded that the true line is as claimed by Stuart and Puckett, and that, until the survey was made in 1909, the location of that line was in fact unknown to the plaintiffs and to the defendants. The plaintiffs appear to have known from about the time of their purchase that the previous owners of the adjoining tracts had not regarded the fence as the true line, and they did not know whether they, or the de-

## Statement.

fendants, would lose land by the survey. The defendants claim, and there is evidence tending to support the claim, notwithstanding the close family relationship between them and their mother and grandmother, Mrs. Webb, that she had never informed them of the line fence agreement, and that they did not know of it. Mrs. Webb's son-in-law, J. H. Meade, the husband of the defendant, Emily J. Meade, looked after and managed the land for Mrs. Webb from the time her husband died in 1879 until she conveyed it to Meade's wife and children in 1897, a period of about 18 years. When she made this conveyance, the defendants simply stepped into the possession of Mrs. Webb, and continued to hold, use and occupy the land substantially as she had done, without anything to indicate any change of attitude with reference to the division line. The defendants, according to what we think a fair interpretation and summary of their testimony, thought the fence was on the line, and for that reason and in that sense claimed the entire enclosure. During the ownership of the Stuart Land and Cattle Company and of these defendants, this fence being in bad repair was practically rebuilt by representatives of the adjoining owners. The sole reason for this was the bad condition of the fence, and there was no purpose or suggestion to reset it, or to define the true line thereby.

The principal assignments of error are, first, that the court erred in instructing the jury, as it did in effect, that the original agreement as to the location of the fence would not influence the rights of the defendants, unless they had actual notice of it; and, second, that the evidence was not sufficient to support the verdicts.

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W. W. Bird and J. J. Stuart, for the plaintiffs in error.

H. A. Routh, for the defendants in error.

KELLY, J., after making the foregoing statement, delivered the opinion of the court.

It must be, and as we understand it is, conceded as a legal conclusion from the foregoing facts that, from 1871, the date of the line fence agreement, down to 1897, the date of the conveyance from Louisa M. Webb to Emily J. Meade and her children, including the eighteen years during which Mrs. Meade's husband looked after the farm for Mrs. Webb, her possession of the land now in controversy was consistent with, and not adverse to, the true title. In our opinion the defendants are in no better position in this respect than was their grantor.

Mr. Raleigh Minor, in his work on Real Property, says: "Finally it is to be observed that if the occupant's possession was *begun in privity* with the rightful claimant; a higher degree of notoriety must attach to the possession than would be demanded if there were no such relation between the parties, for the privity is itself an explanation of the possession, and the rightful owner is not bound to seek another, unless notice of the fact of the disloyal *severance of the privity* be brought home to him. Hence, in such case, there must be a clear, positive and continuous disclaimer and disavowal of the title, of the rightful owner, and the assertion of an adverse right brought home to the adverse claimant. The possession must have become tortious and unlawful by the disloyal acts of the party in possession, so open, notorious and continued as to show

fully and clearly the *changed character of his possession and notice thereof to the rightful claimant.*" 2 Min. Real Prop., sec. 1033. *Hulvey v. Hulvey*, 92 Va. 182, 186, 23 S. E. 233; *Thompson v. Camper*, 106 Va. 315, 317, 55 S. E. 674.

It is contended by counsel for the defendants, and that contention was sustained by the trial court in its instructions to the jury, that their rights could not be affected in any way by the line fence agreement, unless they had actual notice of it. This view ignores the right of the true owner to presume that the original character and intent of a possession begun in privity remains unchanged until something has been done which will bring home to him notice "of the disloyal severance of privity." A mere transfer of a record title, with no material change in the character of the possession is not alone sufficient to do this, and certainly not where, as in this case, the conveyance is made to a daughter whose husband has for 18 years been the active representative of a possession which began and continued up to the date of the conveyance in privity with the true title. The theory contended for by the defendants and accepted by the circuit court, places the burden on the wrong shoulders and requires the true owner to presume that a naked possession, assumed under the circumstances existing in this case, is adverse and wrongful. The presumption of law is just the reverse. The great weight of authority is to the effect that mere possession will be presumed to be in subordination to the title of the true owner, that every presumption should be made in favor of such title, and that a possession which in its beginning was consistent with the possession of the true owner will not be rendered adverse by the lapse of any length of time unless there be such a change in

the character of the original possession as will charge the true owner with notice. 1 Cyc. 1145; 1 C. J. 264.

"The presumption to which we refer is one incorporated in many of the statutes of limitation, and which we think is generally implied, whether stated in direct terms or not, and is to the effect that possession is always presumed to be held in subordination to the legal title. By reason of this presumption, the mere holding of the lands of another, however long continued, is not sufficient evidence of title by prescription, but must be aided by other testimony, from which the inference may reasonably be drawn that such possession was maintained in hostility to the title of the true owner. The presumption ought to apply with special force when it appears probable that possession of lands adjacent to a boundary line was taken through ignorance or inadvertence, and maintained without thought of disseising the owner." *Finch v. Ullman*, 24 Am. St. Rep., note pp. 389-390.

The only case to which counsel on either side have cited us, and the only one which we have found, specifically deciding the question of notice arising here is the case of *Irvine v. Adler*, 44 Cal. 559. In that case O'Connor and Wainright bought adjoining lots which they subsequently sold. Before making sale, they "entered upon their respective tracts, and agreed to measure off with a tape line their respective lots, put up temporary fences, and that, when the true lines should be ascertained, each should have his land according to the true lines; and they accordingly measured the lots with a tape line, and each entered upon, and they and their grantees have since occupied the parcels of land according to the measurements thus made. The grantees of O'Connor had no knowledge of the agreement in respect to the measurement



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of the lots. The true measurement shows that a narrow strip of the land conveyed to Wainright is included within the lines of the O'Connor lot as run by the 'tape line measurements.' The court in that case, after stating the facts here pertinent as set out above, said further: "In respect to the defense of adverse possession, it is sufficient to say that a possession commenced as in this case is not adverse and does not become so until there is a distinct repudiation of the agreement under which the possession was taken. The grantees of O'Connor having simply succeeded him in the possession of that to which they acquired no title by their deeds, occupy no better position than he did."

There is another aspect of this case which, by reason of the facts as recited, is more or less related to and blended with the one already discussed, and which seems to us fatal to the defendants. The principle underlying the view to which we now advert is established as the law in this State, and is supported by the apparent weight of authority elsewhere.

It is stated by Judge Buchanan in *Schaubuch v. Dilleuth*, 108 Va. at p. 89, 60 S. E. 746, 15 Ann. Cas. 825, as follows: "If the fence was placed where it is by the defendant, upon the belief that the boundary west of the fence, in the possession of his grantee and those who claim under him, contained fifty acres, when in fact it only contained thirty-three acres, it was a mistake, and the defendant's possession of the seventeen acres on the east side of the fence would not be adverse, unless he intended to claim as his own the land east of the fence, even though the fence was not upon the true line."

"Upon this question the cases are not in harmony, but the great weight of authority is in favor of the

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view, that where a person occupies and possesses the land of another, through a misapprehension or mistake as to the boundaries of his land, with no intention to claim as his own that which does not belong to him, but only intends to claim to the true line, wherever it may be, he does not hold adversely. See 1 Cyc. 1036-1038 and cases cited in note 96; Warville on Ejectment, secs. 440, 441; Newell on Ejectment.

"The reason why such an occupancy and possession could not be adverse with us is because in this State intention to hold adversely is an indispensable element of adverse possession (see *Clarke v. McClure*, 10 Gratt. (51 Va.) 305, 310; *Early v. Garland*, *supra*, [13 Gratt. (54 Va.) 1]; *Haney v. Breeden*, 100 Va. 781, 784, 42 S. E. 916), and it is wanting where the occupant does not intend to claim the fence as his line unless it be the true line."

In that case, which was an action of ejectment, the plaintiff, Dilleuth, claimed title under a deed which the defendant had made to his father, Henry Schaubuch, and under which the plaintiff showed a good paper title to the land in controversy. It appeared from the evidence that the defendant, Schaubuch, had been in possession of the disputed land for more than the statutory period, but it did not appear (as it does in the instant case) when or how his possession commenced. Schaubuch's deed to his father, under which Dilleuth claimed, conveyed fifty acres of a larger tract owned by Schaubuch, but the dividing fence, for some reason not explained in the evidence, was not placed on the true line and only included in the father's boundary thirty-three acres. After discussing the abstract principles of law applicable to the case, Judge Buchanan, in sustaining the judgment of the lower court in favor of the plaintiff, on a demurrer

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to the evidence by defendant, said further: "The evidence, considered upon the demurrer to it, manifestly does not sustain the defendant's claim of adversary possession. It does appear that he had exclusive possession of the land in controversy for more than fifteen years, perhaps for twenty-five or thirty years; but it does not appear that he held it under color of title or claim of right. If he held it as the grantee of his father, he held, not adversely, but in subserviency to the grantee, as there is no evidence that he ever disclaimed that relation, and asserted an adverse right, which was brought to the knowledge of his grantee or those claiming under him. If he was holding the land under the mistaken belief that the fence between the thirty-three acres and the land in controversy was the line, the evidence not only fails to show that he intended to claim and hold all the land east of the fence, whether or not it was upon the true line between his land and that he had conveyed to his father, but it tends strongly to show that he did not occupy the land with the intention of claiming or holding to the fence unless that was upon the true line." See also 2 Min. Real Prop., sec. 1036, p. 1114; Graves' Notes on Real Prop., sec. 139, and note; *Davis v. Owen*, 107 Va. 283, 289, 58 S. E. 581, 13 L. R. A. (N. S.) 728; *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 68 S. E. 976; Note to *Schaubach v. Dillemath*, 15 Ann. Cases 827, and subsequent note in Ann. Cases 1912-A, p. 450, classing the Virginia decisions with the majority rule.

For the reasons stated, we are of opinion that the judgments complained of must be reversed, the verdicts of the jury set aside, and the causes remanded for new trials to be had not in conflict with the views herein expressed.

Reversed.

## Syllabus.

## Stamton.

BOARD OF SUPERVISORS OF TAZEWELL COUNTY v.  
NORFOLK AND WESTERN RAILWAY COMPANY.

September 11, 1916.

1. HIGHWAYS—*Tazewell County—Statutes—Width of Roads.*—The several acts of Assembly, relating to the construction of certain public roads in Tazewell county, referred to in the opinion of the court, did not of themselves establish or locate the turnpike or public roads contemplated thereby, nor did they fix the width of such roads. They directed them to be constructed as State roads, and the act of March 2, 1847, merely controlled the wide discretion of the board of public works when it came to take land for the location and construction of the road.
2. EVIDENCE—*Records—Loss or Destruction—Presumption.*—The existence of facts will not be presumed merely because records have been lost or destroyed. Such loss or destruction gives rise to no presumption and has the effect merely of changing the mode of proof of such records, admitting secondary evidence in the place of an exemplification of the record.
3. HIGHWAYS—*Acceptance—Dedication.*—Where the record shows that a road was not the result of condemnation proceedings, acts of acceptance do not supply its place so as to give title to a right of way. Acceptance is merely one element in obtaining title to a right of way for a public road. Dedication is the accompanying element.
4. HIGHWAYS—*Prescription—Width and Extent of Use.*—When dedication of a highway is implied from continuous use by the public for the statutory period, and there has been acceptance by competent authority, title to a right of way may be acquired by prescription. But the right cannot extend beyond the use. If the right to the way depends solely upon the use, then the width of the way and the extent of the servitude is measured by the character of the use, for the easement cannot be broader than the use.
5. RAILROADS—*Change of County Road—Consent—New Road.*—At the time the county road in controversy was changed by the railroad company, the company was not required to obtain the consent or approval of the county court to such alteration, but could act *ex parte*. The only limitation upon this right of the railroad company

V I R G I N I A : IN THE CIRCUIT COURT OF FAIRFAX COUNTY

The World Mission Church of  
Washington, D.C.,

Plaintiff

v.

Carolyn Hollander,

Defendant

At Law No. 147652

ORDER

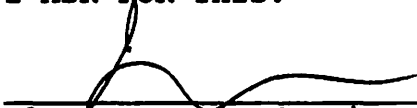
UPON CONSIDERATION OF the Defendant's Motion to Vacate Judgment and Enter Judgment in Favor of Defendant, or in the Alternative, to Vacate the Judgment and Order a New Trial and the Plaintiff's opposition filed thereto and the parties' memoranda filed in support of or opposition to said motion; and, UPON CONSIDERATION of the arguments from the parties through their respective counsels; it is,

ADJUDGED, ORDERED AND DECREED that the Defendant's said motion be, and it hereby is, denied.

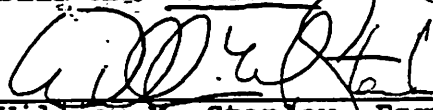
Entered this 7th day of February, 1997.

  
Judge

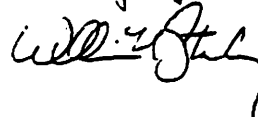
I ASK FOR THIS:

  
Ilryong Moon, Esquire  
VSB # 24086  
7611 Little River Turnpike  
Suite 404  
Annandale, Virginia 22003  
(703)941-7395  
Counsel for Plaintiff

SEEN AND OBJECTED TO: (for reasons cited below)

  
William M. Stanley, Esquire  
VSB #37209  
2200 Wilson Boulevard  
Suite 800  
Arlington, Virginia 22201  
(703) 525-2260  
Counsel for Defendant

Counsel objects to this Court ruling as it committed a mistake of law when it applied Christie v. Viers & STUART v. MEADE to the case at bar. The Court should have more properly applied Christie v. Bullock & U.S. v. Warden and its holdings to the facts of the case in its determination of defendant's claim of Adverse Possession. The defendant had otherwise proven her claim of Adverse Possession, and judgment should have therefore been entered in her favor.



actions\mission\02-07-97.od1

THIS DEED, made this 25<sup>th</sup> day of December, 1980, by and between AFCO INTERNATIONAL CORPORATION, a Virginia Corporation, party of the first part; and PAUL O. KIM, KI HWANG KIM and JA KI KIM, Trustees for the FULL GOSPEL WASHINGTON KOREAN CHURCH, a District of Columbia Corporation, party of the second part.

WITNESSETH, that for and in consideration of the sum of Ten Dollars, the said party of the first part does hereby grant and convey, with general warranty, unto the said party of the second part, all that certain land situate in Fairfax County, Virginia, and particularly, described as follows:

Beginning at a point in the easterly right-of-way line of Gallows Road (State Route #650), point of beginning being a point on the former centerline of Beech Street (now vacated); thence departing the easterly right-of-way line of Gallows Road and running with the former centerline of Beech Street S 71° 19' 00" E 334.25 feet to a point; thence departing the former centerline of Beech Street with a line common in part to the remaining portion of Beech Street and in part to the land of Frank R. Taylor et al S 18° 41' 00" W 350.00 feet to a point in the northerly right-of-way line of North Park Street; thence with the northerly right-of-way line of North Park Street N 71° 19' 00" W 175.49 feet to a point in the easterly right-of-way line of Gallows Road; thence with the easterly right-of-way line of Gallows Road N 05° 34' 00" W 350.97 feet to a point, N 71° 19' 00" W 1.10 feet to a point and N 05° 34' 00" W 32.90 feet to the point and place of beginning containing 89,046 square feet or 2.0442 acres of land.

BEING the same property as shown on plat by Alexandria Surveys, Inc. dated December 11, 1980 attached hereto and made part hereof.

LESS AND EXCEPT that portion of the above described parcel containing approximately 2,614 square feet conveyed to the Commonwealth of Virginia by deed dated September 21, 1979 and recorded April 23, 1980 in Deed Book 5424, Page 1060, among the aforesaid County land records.

AND BEING a part of the same property conveyed to AFCO International Corporation by Deed recorded in Deed Book 4912 page 723 among the land records of Fairfax County, Virginia.

SUBJECT, HOWEVER, to restrictions and easements of record.

IN WITNESS WHEREOF, AFCO INTERNATIONAL CORPORATION has caused this deed to be signed by its President, and its corporate seal to be hereto affixed duly attested by its Secretary.

AFCO INTERNATIONAL CORPORATION

By: *As Kim*  
President

ATTEST:

*[Signature]*  
Secretary

The said  
Sec 58-1  
Sec 58-2  
Sec 58-3  
Consideration 15.000

PLF-BK-EX-#

DATE 12/30/94

JUDGE 19

CASE # 2,147,562

TAX MAP NO.  
039-4-01-0043

GRANTEE'S ADDRESS:  
Full Gospel Washington Korean Church  
3855 Massachusetts Avenue, N.W.  
Washington, D. C. 20016

RETURN TO:

JAMES H. POK  
ATTORNEY AT LAW  
1000 RICHMOND ROAD  
ALEXANDRIA, VA  
22304

ERIC METZ  
SHANNA A. HERBERT

LAW OFFICES  
**HERBERT AND METZ, PLC**

10521 JUDICIAL DRIVE  
SUITE 100  
FAIRFAX, VIRGINIA 22030  
(703) 691-0699  
FACSIMILE (703) 691-5203

ANNA K. MUELIHER MARK  
of counsel  
ADMITTED IN MD & VA

September 19, 1995

**VIA CERTIFIED AND REGULAR MAIL**

Trustees of the Church World  
Mission of Washington, D.C.  
7628 Leesburg Pike  
Falls Church, Virginia 22043

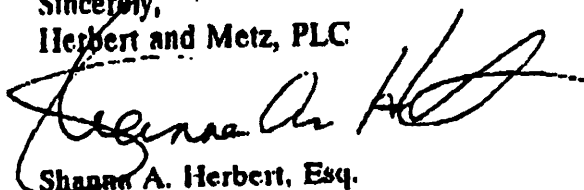
RE: 2401 Gallows Road, Dunn Loring

Dear Trustees:

I represent Carolyn Hollander, the owner of the lot located at 8043 Idylwood Road in Dunn Loring. This lot abuts the above-referenced property, for which you are identified as the record owner. This letter serves as notice to you that Carolyn Hollander is the owner of that area of the above-referenced property which is enclosed by her fence. She claims ownership of this area of the property by adverse possession, under a claim of right established by both Ms. Hollander and her predecessors in title. The occupation and possession of this area of the property for well over 30 years has been under claim of right sufficient to meet the requirements for adverse possession under Virginia law. Under Virginia law, Ms. Hollander is the owner of this property and as such is afforded all the benefits accruing to a property owner.

Attached is a survey which delineates the area owned by Ms. Hollander. Any attempt by you, or one claiming through you, to enter onto this property will be treated as a trespass. Please call should you have any further questions.

Sincerely,  
Herbert and Metz, PLC

  
Shanna A. Herbert, Esq.

SH/em

Enclosure (1)  
cc: Mr. Ben Pyon, ERA Premier Properties

PLF-EX.# 2  
DATE 12/30/96  
JUDGE  
CASE # 2147562

**MOON, PARK & ASSOCIATES**

**ATTORNEYS AT LAW**

ILRYONG MOON \*  
SANG KUEN PARK \*  
STEVE Y. YUN \*

7611 LITTLE RIVER TURNPIKE  
SUITE 404  
ANNANDALE, VIRGINIA 22003

TELEPHONE (703) 941-7395  
FACSIMILE (703) 941-6262

\* VA, DC & MD BARS  
\* VA & DC BARS

October 16, 1995

Shanna A. Herbert, Esquire  
HERBERT AND METZ, PLC  
19521 Judicial Drive  
Suite 100  
Fairfax, Virginia 22030

Re: 2401 Gallows Road  
Dunn Loring, Virginia

Dear Ms. Herbert:

Please note that this office represents The World Mission Church of Washington, D.C. (hereinafter the "Church"), the owner of the above-referenced property and this letter is in response to your letter of September 19, 1995.

A demand is hereby duly made for your client, Carolyn Hollander, to remove, within 10 days from the date of this letter, any and all of her properties or belongings, including any fence or other enclosures, located, placed, or encroaching upon the Church's above-referenced property. In the event that your client fails to so remove, the Church will seek a legal recourse against and hold your client responsible for all the damages suffered and expenses incurred.

Thank you for your close attention this regard. Please contact me immediately, if you have any questions.

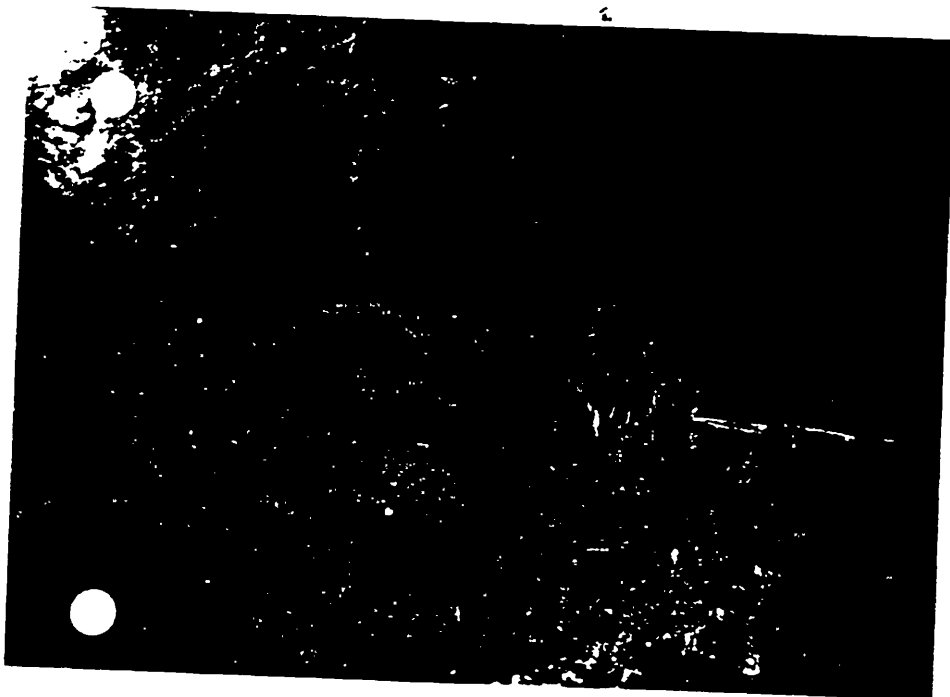
Sincerely yours,

  
Ilryong Moon

IM: im

cc: The World Mission Church

PLF-EX # 3  
DATE 12/30/96  
JUDGE LC  
CASE # 214756

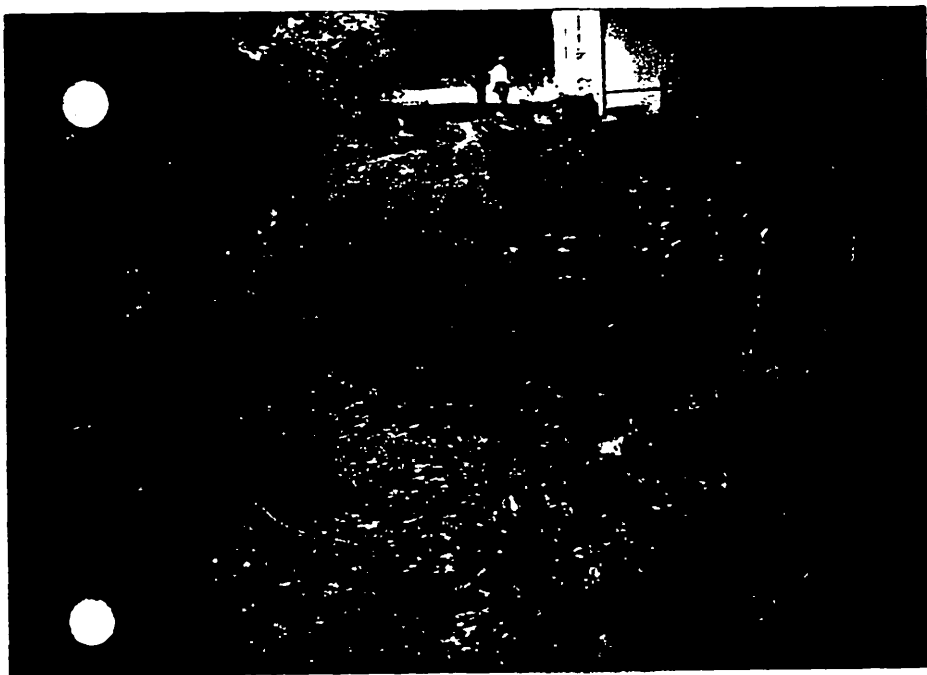


4A



4B





4C



4D

043748

BK557

20810

**DEFENDANT'S  
EXHIBIT**  
#2 - L147562  
ALL-STATE LEGAL SUPPLY CO.

THIS DEED, made this 2nd day of July, 1981, by and between PHILADELPHIA

MANAGEMENT, INC., a Virginia Corporation, by its Attorney in Fact, ALAN S. TOPPELBERG, by virtue of Power of Attorney recorded prior hereto in Deed Book 5510, at Page 860, Instrument # 20-08992, among the land records of Fairfax County, Virginia, party of the first part, Grantor, and, WILLIAM M. STEPHENS and BARBARA S. KRAUS, parties of the second part, Grantees.

\*\*\* WITNESS BETH \*\*\*

That for and in consideration of the sum of Ten Dollars (\$10.00) cash, in hand paid, and other good and valuable consideration, the receipt of which is hereby acknowledged, the said party of the first part does hereby grant, bargain, sell and convey, with GENERAL WARRANTY OF TITLE unto the said parties of the second part as JOINT TENANTS WITH THE COMMON LAW RIGHT OF SURVIVORSHIP, all of that certain lot of land together with improvements thereon, situate, lying and being in the County of Fairfax, Virginia, and more particularly described as follows:

Lot 3-B, of a Resubdivision of Lot 3, Page Acres and a portion of Vacated Beech Street, as per Resubdivision recorded in Deed Book 5490, at Page 438, among the land records of Fairfax County, Virginia.

And being the same property conveyed to the party of the first part by Deed recorded in Deed Book 5428, at Page 1210, among the aforesaid County land records.

This conveyance is made subject to a certain Deed of Trust dated October 25, 1980, and recorded in Deed Book 5510, at Page 881, among the aforesaid County land records, in the original principal sum of \$82,500.00, of which there remains a present principal outstanding balance of \$82,500.00, which Deed of Trust the parties of the second part hereby agree to assume and pay as is evidenced by their acceptance hereof and signatures hereto.

This conveyance is made subject to the restrictions, rights of way and conditions, if any, contained in the deeds forming the chain of title to this property.

The party of the first part covenants that it has the right to convey the aforesaid property unto the parties of the second part; that the parties of the second part shall have quiet possession thereof; that the party of the first part has done no act to encumber said land, except as hereinabove set forth; and that it will execute such further assurances of the land as may be requisite and necessary.

WITNESS the following signatures and seals:

*William M. Stephens* (SEAL)  
WILLIAM M. STEPHENS

*Barbara S. Kraus* (SEAL)  
BARBARA S. KRAUS

PHILADELPHIA MANAGEMENT, INC., a Virginia Corporation

BY: *Alan S. Toppelberg*  
ALAN S. TOPPELBERG, Attorney in Fact

LAW OFFICES  
OF  
RICHARD C. SCALISE  
8800 ELM STREET  
MCLEAN, VIRGINIA 22101  
(703) 893-6700

Tax Paid  
Sec 58-54 168-  
Sec 58-65.1 36-  
Sec 58-54.1 29.50  
Consideration 172,000-

STATE OF VIRGINIA )

) to-wit:

COUNTY OF FAIRFAX )

The foregoing instrument was acknowledged before me this 2nd day of July, 1981, by WILLIAM M. STEPHENS and BARBARA S. KRAUS and PHILADELPHIA MANAGEMENT, INC., by its Attorney in Fact, ALAN S. TOPPELBERG.

My commission expires: 5/7/82

*Richard C. Scaline*  
NOTARY PUBLIC

LAW OFFICES  
OF  
RICHARD C. SCALINE  
4000 ELM STREET  
MCLEAN, VIRGINIA 22101  
(703) 882-6700

RECORDED W/CERTIFICATE ANNEXED

1981 JUL 13 PM 2:46

FAIRFAX COUNTY, VA.

TESTE:

*James J. Hoffmeyer*  
CLERK

195

ALAN S. Toppe/Beers  
1928 L St NW.  
WASHINGTON, DC 20034

Return to

Charles Address: 7550 Potomac Falls Road  
McLean, Virginia

THIS DEED, do and entered into this 24th day of April, 1980, by and between FRANK COLIN/PAGE, and ANNA MARIE/PAGE, his wife, parties of the first part, and PHILADELPHIA MANAGEMENT, INC, party of the second part.

DEFENDANT'S  
EXHIBIT  
#3 - L147562  
ALL-STATE LEGAL SUPPLY CO.

W-I-T-N-E-S-S-E-T-H

That for and in consideration of the sum of \$5.00 cash in hand paid, and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties of the first part do hereby grant, bargain, sell and convey, with GENERAL WARRANTY OF TITLE, unto the party of the second part all of that certain tract or parcel of land located in Fairfax County, Virginia, with all rights, ways, easements, improvements and appurtenances thereunto:

BEGINNING at an iron pipe, northeast corner of Lot 2, Page Acres in the south right of way line of Idylwood Road, Route 732, 221.43 feet, S 57° 09' E, from the point of curvature of Gallows Road; thence continuing with the south right of way line of Idylwood Road, S 57° 09' E, 91.07 feet to an iron pipe marking a point of curvature of a curve; thence continuing 131.87 feet with the arc of a curve bearing to the left: (radius - 581.58 feet; delta - 12° 59' 20"; tangent length - 66.22 feet; chord length - 131.58 feet; chord bearing - S 63° 38' 40" E) to an iron pipe, northernmost corner of now or formerly Jackson; thence departing said south line of Idylwood Road and continuing with the west line of Jackson, S 18° 41' W, 82.69 feet to an iron pipe, north line of Beech Street; thence continuing with the north line of Beech Street, N 71° 19' W, 42.71 feet to an iron pipe; thence departing said north line of Beech Street and continuing through that portion of Beech Street vacated by Deed Book 5035 at Page 651, S 18° 41' W, 35.00 feet to an iron pipe; thence N 71° 19' W, 193.54 feet to an iron pipe; thence N 18° 41' E, 35.00 feet to an iron pipe, southeasternmost corner of aforesaid Lot 2, Page Acres; thence continuing with the east line of Lot 2, N 26° 49' 36" E, 123.86 feet to the BEGINNING and containing 29.297 square feet.

AND BEING a part of the same property as conveyed in Deed Book D-13 at Page 562 from Paul Kaiser, unmarried,

AND ALSO including a part of the same property conveyed to FRANK COLIN PAGE and ANNA MARIE PAGE by virtue of a deed from the Board of Supervisors of Fairfax County dated 30 October, 1978 and recorded November 9, 1978 in Deed Book 5035 at page 651, among the aforesaid County land records.

Tax Paid  
Sec 58-54 730.30  
Sec 58-65.1 43.50  
Sec 58-54.1 17.00  
Consideration 790.80 00

REFERENCE is hereby made to the said Deeds for a further and more particular description of the land hereby conveyed.

This conveyance is made subject to any rights of way, easements or restrictive covenants of record.

The parties of the first part covenant that they have the right to convey the said land; that the party of the second part shall have quiet possession of the same, free from all encumbrances; and that they, the parties of the first part, will execute such further assurances as may be deemed requisite.

WITNESS the following signatures and seals:

Frank Colin Page (SEAL)

FRANK COLIN PAGE

Anna Marie Page (SEAL)

ANNA MARIE PAGE

Frank Colin Page, Jr. (SEAL)

FRANK COLIN PAGE, Jr.  
Attorney-in-fact

STATE OF VIRGINIA )  
COUNTY OF FAIRFAX ) ss:

I, Alan S. Toppelberg, a Notary Public in and for the State and County aforesaid, do hereby certify that FRANK COLIN PAGE, Jr., as the attorney in fact of the aforesaid FRANK COLIN PAGE and ANNA MARIE PAGE acknowledged that he signed their names to this deed dated 24 April 1980, and further acknowledged his signature to this instrument as the attorney in fact of said parties.

GIVEN under my hand and seal this 24<sup>th</sup> day of April, 1980.



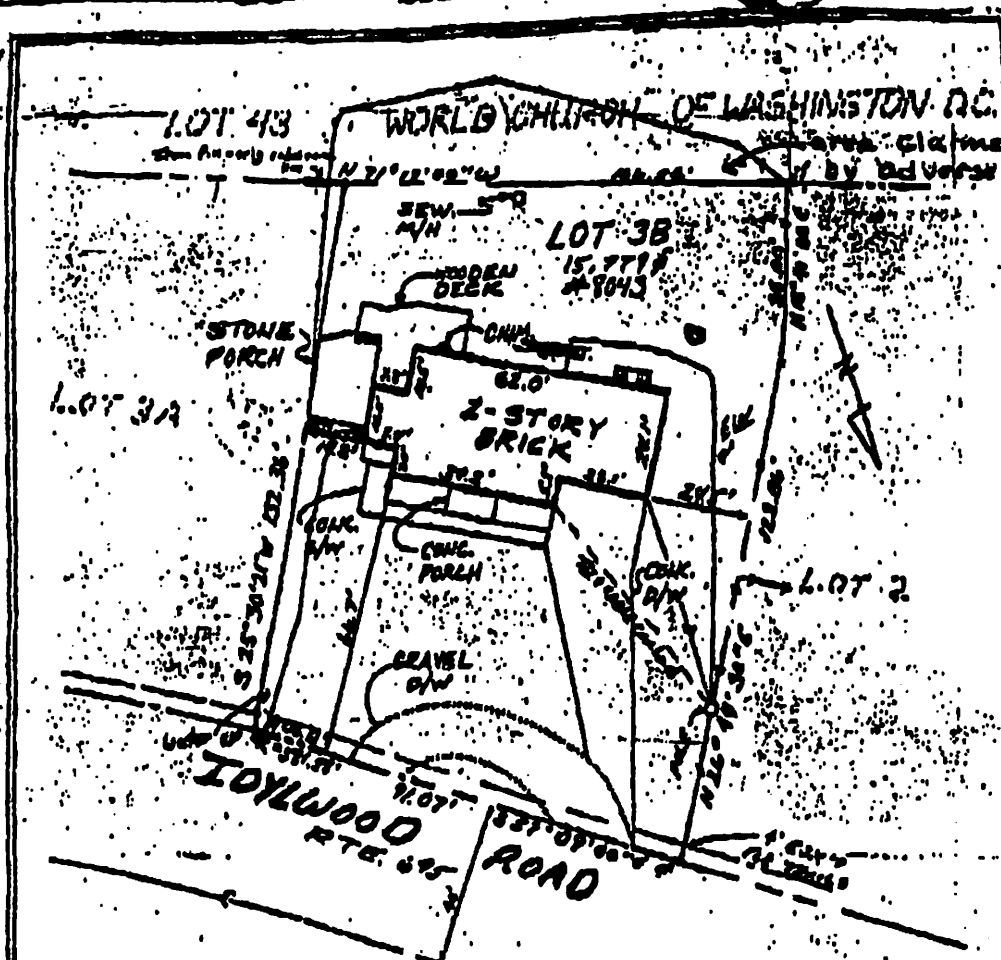
Alan S. Toppelberg

Alan S. Toppelberg, Notary  
Public in and for the County  
of Fairfax, State of Virginia

My Commission expires 9 January, 1982

Recorded with certificate annexed, 11:28  
Fairfax Co. Va. MAY 5 1980  
Teste: Anna S. Toppelberg Clerk

# SITE PLAN



## NOTES:

1. THE PROPERTY DELINEATED HEREON IS LOCATED ON ASSESSMENT MAP SP-4 (K13) LOT 3B.
2. THE PROPERTY SHOWN HEREON DOES NOT LIE WITHIN A DESIGNATED H.O.D. SPECIAL FLOOD HAZARD AREA.
3. NO TREE REPORT FURNISHED.

HOUSE LOCATION SURVEY  
LOT 3B

PAGE ACRES  
0.8 5490 PG 138

5015 TOYWOOD ROAD  
PROVIDENCE DISTRICT  
ARMY COUNTY, VIRGINIA

Scale: 1"=30' / Date: MAY 20, 1987

LAND DESIGN CONSULTANTS, INC.  
DESIGNERS • PLANNERS • ENGINEERS  
10705 Antebellum (Bldg. 4) Manassas, Virginia 22110 • (703) 747-0000 • Telex 551425



BUYER: CARON

Outstanding Results™

DEFENDANT'S  
EXHIBIT

87115618

EX67-8 1848

THIS DEED, made this 15 day of June, 1987, by and between William M. STEPHENS and Barbara K. STEPHENS, husband and wife, parties of the first part; and Guy CARON and Patricia CARON, husband & wife, Parties, tenants by the entirety with the common law right of survivorship, parties of the second part:

WITNESSETH, that for and in consideration of the sum of Ten Dollars, the said party of the first part does hereby grant and convey, with general warranty, unto the said parties of the second part, as tenants by the entirety, with the common law right of survivorship, it being intended that the fee simple title to said property shall be vested in said parties of the second part during their joint lives and thereafter fee simple title shall be vested in the survivor of them, all that certain land situate in Fairfax County, Virginia, and particularly described as follows:

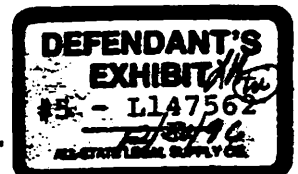
Lot 3B of a resubdivision of Lot 3, PAGES ACRES, and a portion of vacated Beech Street as per resubdivision recorded in Deed Book 5490 at page 438, among the land records of Fairfax County, Virginia.

AND BEING part of the same property conveyed to the Borrowers herein by Deed recorded in Deed Book 5725 at page 691, among the said land records.

SUBJECT, HOWEVER, to restrictions and easements of record.

8043 DRYLAND ROAD  
12-22-87 10:10 AM

STATE TAX	330.75	672.50
	110.25	673.00
	1.00	
	220.50	50/315
	220,500.00	



6758-130

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

WITNESS the following signatures and seals:

BY: William M. Stephens (SEAL)  
William M. Stephens

BY: Barbara K. Stephens  
Barbara K. Stephens

STATE OF VIRGINIA

COUNTY OF FAIRFAX, to-wit:

The foregoing instrument was acknowledged before me this 15 day of June, 1987, by William M. Stephens and Barbara K. Stephens.

My commission expires on the 10 day of SEPTEMBER, 19 88.

[Signature]  
NOTARY PUBLIC

File No: 59231-F

RECORDED W/CERTIFICATE ANNEXED

1987 JUN 16 9:56

FAIRFAX COUNTY  
TESTE: [Signature]  
CLERK



D E E D

THIS DEED made, this 25th day of October, 1993, by and between GUY CARON and PATRICIA CARON, husband and wife, GRANTORS; and CAROLYN HOLLANDER, unmarried, GRANTEE;

W I T N E S S E T H

THAT, for and in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration, receipt of which is hereby acknowledged, the GRANTORS do hereby grant, bargain, sell and convey, in fee simple and with General Warranty of Title, unto the GRANTEE, as and for her sole and separate equitable estate, the following described property, situate, lying and being in Fairfax County, Virginia, to wit:

Lot 3B, of a resubdivision of Lot 3, PAGES ACRES, and a portion of vacated Beech Street as per resubdivision recorded in Deed Book 5490, at Page 438 among the land records of Fairfax County, Virginia.

AND BEING the same property conveyed to GUY CARON and PATRICIA CARON, Husband and Wife, by virtue of Deed dated June 15, 1987, recorded June 16, 1987 in Deed Book 6758 at Page 1848 among the aforesaid land records.

This property is conveyed to the GRANTEE as her sole and separate equitable estate, free from the control and marital rights of the present or any future spouse and free from any curtesy or dower rights or inchoate rights of the present or any future spouse of the GRANTEE, all of which are hereby expressly excluded and with full rights and complete authority in the GRANTEE to alien, convey, encumber and otherwise deal with and dispose of the same without the necessity of joinder by or with her spouse.

This conveyance is made subject to the covenants, conditions, restrictions, easements and rights of way of record.

The GRANTORS covenant that said GRANTORS have the right to convey the aforesaid property; that the GRANTORS have done no act to encumber said property; that the GRANTEE shall have quiet possession of said property; and that the GRANTORS will execute such further assurances as may be requisite.

Witness the following signatures and seals:

GUY CARON

(seal)

PATRICIA CARON

(seal)

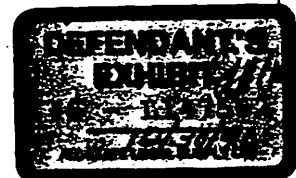
LIGHT PRINT

RENNALS COMPANY & SONS  
100115  
SUITE 100  
1255 BEVERLY ROAD  
MCLEAN VIRGINIA 22101  
(703) 903 9400  
FAX NO (703) 903 9400

Tax Map No.: 039-4-13-0001-B  
Grantee's Address: 8041 IDYLWOOD ROAD  
DURN LORING, VIRGINIA 22027  
Consideration: \$268,000.00

M9702589

BK 8813-0639



Page 2  
CARON/HOLLANDER  
Deed dated October 25, 1993

State of Virginia  
Fairfax County

I, the undersigned, a Notary Public for the jurisdiction aforesaid,  
do certify that GUY CARON and PATRICIA CARON whose names are signed to  
the foregoing document acknowledged the same before me in my  
jurisdiction aforesaid, this 25<sup>th</sup> day of October, 1993  
My commission expires on the 30<sup>th</sup> day of May, 1996.

Theresa R. Rupp  
Notary Public

EX 813 0640

LIGHT PRINT

RECORDED & INDEXED  
FAX  
1993 OCT 26 10:00  
1235 N. VA HWY 2210  
FAIRFAX, VA 22031  
FAX 703 271 0000

OCT 26 93  
RECORDED FAIRFAX CO VA  
TESTED  
Theresa R. Rupp



